M153

CYCLOPEDIA

OF

LAW AND PROCEDURE

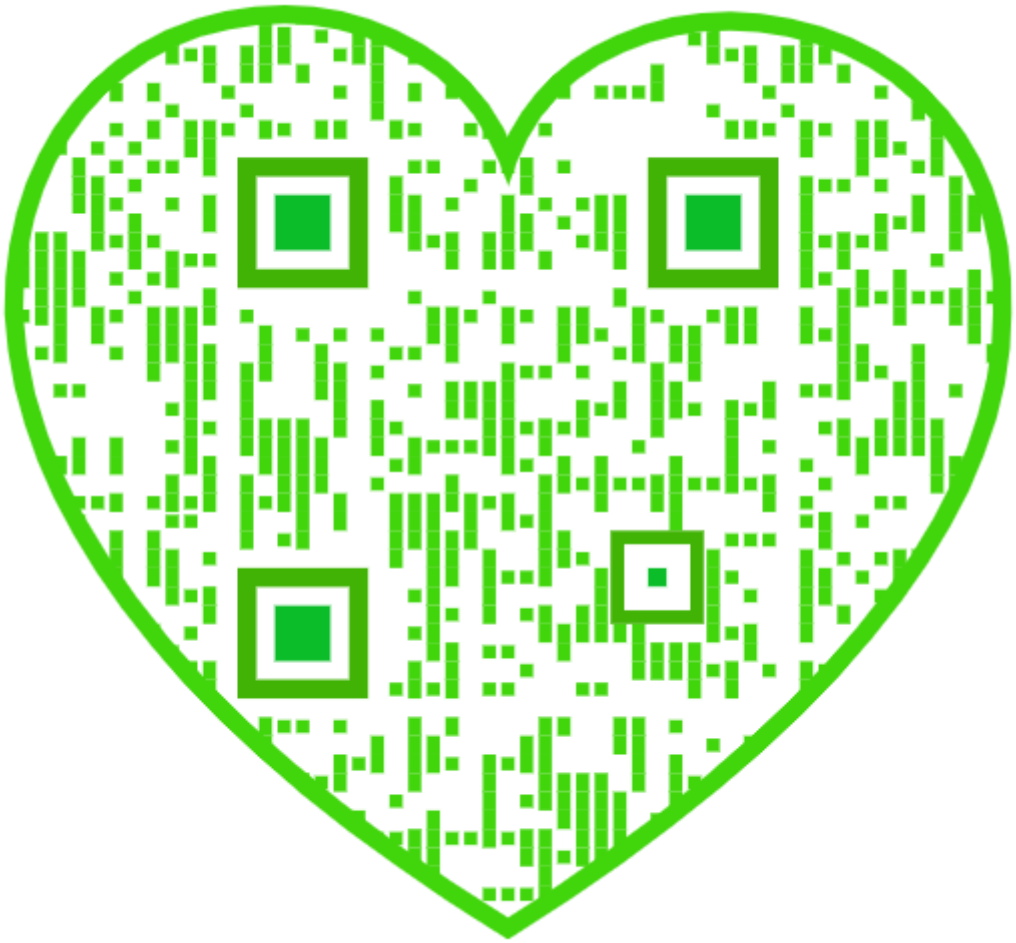
WILLIAM MACK

EDITOR-IN-CHIEF

VOLUME XX

80619
12/10/06

NEW YORK
THE AMERICAN LAW BOOK COMPANY
LONDON: BUTTERWORTH & CO., 12 BELL YARD
1906



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J. B. LYON COMPANY
PRINTERS AND BINDERS
ALBANY, N. Y.

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I. SCOPE OF TITLE.

This article is designed to discuss fraud as an actionable wrong, that is, a tort which gives rise to an action for damages, the remedy commonly known as the action of deceit. Fraud as affecting in its various aspects contractual rights and remedies is treated under specific titles in this work.[1]

II. DEFINITION AND BASIS OF LIABILITY.

A. Introductory Statement. Much confusion has arisen from the use of the word "fraud" by courts and text writers as a term of wide and general application. This inaccurate use of the word has given rise to such phrases as "constructive fraud," conduct "amounting to fraud in the contemplation of a court of equity," "legal fraud," "fraud in law," and the like; the meanings of which are not apparent and need considerable explanation.[2]

B. Classification and Definition of Fraud[3]**— 1. IN GENERAL.** Fraud as a generic term, especially as the word is used in courts of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another.[4] The classification of fraud most frequently used by courts and text writers is: (1) Actual or positive fraud;[5] (2) legal fraud or fraud in law;[6] (3) constructive fraud.[7]

2. ACTUAL OR POSITIVE FRAUD. Actual or positive fraud has been said to consist in circumventing, cheating, or deceiving a person to his injury, by any cunning, deception, or artifice. This definition was adopted by Story from the civil law,[8] but similar definitions are to be found in the judicial opinions of the courts of this country.[9] It will be seen that fraud of this kind is included within the definition of fraud which will support an action of deceit.[10]

3. LEGAL FRAUD OR FRAUD IN LAW. The terms "legal fraud" and "fraud in

1. See CONTRACTS, 9 Cyc. 408 *et seq.*, 411 *et seq.*, and cross-references there given.

Other species of fraud than that involved in the action of deceit will be mentioned here only for the purpose of definition and to distinguish them from the subject under discussion. See *infra*, II, B, 4; II, B, 5.

2. See comments in Pollock Contr. 461, 462; Crislip *v.* Cain, 19 W. Va. 438; Derry *v.* Peek, 14 App. Cas. 337, 54 J. P. 148, 58 L. J. Ch. 864, 61 L. T. Rep. N. S. 265, 1 Meg. 292, 38 Wkly. Rep. 33, opinions of Lords Bramwell and Herschell.

3. The codes of several states contain exhaustive classifications and definitions of fraud substantially in harmony with those in this article. See Hurtwig *v.* Clark, 138 Cal. 668, 671, 72 Pac. 149; Benson *v.* Bunting, 127 Cal. 532, 535, 59 Pac. 991, 78 Am. St. Rep. 81; Daley *v.* Quick, 99 Cal. 179, 185, 33 Pac. 859; Mayer *v.* Salazar, 84 Cal. 646, 649, 24 Pac. 597; Hanscom *v.* Drullard, 79 Cal. 234, 236, 21 Pac. 736; Gordon *v.* Irvine, 105 Ga. 144, 147, 31 S. E. 151; Conyers *v.* Graham, 81 Ga. 615, 619, 8 S. E. 521; Whitbeck *v.* Lees, 10 S. D. 417, 73 N. W. 915.

4. 1 Story Eq. § 187. See Conyers *v.* Graham, 81 Ga. 615, 8 S. E. 521; Crislip *v.* Cain, 19 W. Va. 438.

See also EQUITY, 16 Cyc. 87.

5. See *infra*, II, B, 2.

6. See *infra*, II, B, 3.

7. See *infra*, II, B, 4.

8. 1 Story Eq. §§ 186, 187. See also 1 Bigelow Fraud 4, 5 and notes.

9. "Actual or positive fraud consists in deception, intentionally practiced to induce another to part with property or to surrender some legal right, and which accomplishes the end designed." Judd *v.* Weber, 55 Conn. 267, 277, 4 Atl. 40; Lodge *v.* Rose Valley Mills, 1 Pa. Dist. 811, 812. See also Cooley Torts 474.

"It may safely be averred, that all deceitful practices in depriving or endeavoring to deprive another of his known right by means of some artful device or plan contrary to the plain rules of common honesty, is fraud." Mitchell *v.* Kintzer, 5 Pa. St. 216, 219, 47 Am. Dec. 408, per Coulter, J. See also Brownlee *v.* Hewitt, 1 Mo. App. 360, 366.

10. See *infra*, II, B, 6.

law" were formerly used by the courts to describe a species of actionable fraud in which a corrupt motive, such as a desire to obtain a benefit or to cause an injury, was lacking, but the other elements were present.[11] The term "legal fraud" has also been used to characterize false representations more or less innocent which will be sufficient ground for the rescission of a contract.[12] But even when the expression "fraud in law" was employed there was always present and regarded as an essential element the circumstance that the deception was wilful either because the untrue statement was known to be untrue or because belief in it was asserted without such belief existing;[13] and since neither a corrupt motive of gain nor a wicked motive of injury is necessary to maintain the action of deceit,[14] and since in the cases where the terms "legal fraud" or "fraud in law" were used the intent that the representation should be acted upon was always deemed an essential element,[15] these terms fall directly within the definition of fraud as discussed in this article.[16] The term "legal fraud" has therefore been characterized as meaningless.[17] At all events the phrase is anomalous and unnecessary, and so far as the modern law is concerned the use of the term as a technical expression has become nearly if not entirely obsolete and should be abandoned.[18]

4. CONSTRUCTIVE FRAUD. A constructive fraud has been said to be "an act which the law declares to be fraudulent, without inquiring into its motive; not because arbitrary rules on this subject have been laid down but because certain acts carry in themselves an irresistible evidence of fraud."[19] Constructive fraud,

11. See Lobdell *v.* Baker, 3 Metc. (Mass.) 469; Fostor *v.* Charles, 6 Bing. 396, 19 E. C. L. 183, 7 Bing. 105, 20 E. C. L. 55, 8 L. J. C. P. O. S. 118, 4 M. & P. 61, 31 Rev. Rep. 446; Haycraft *v.* Creasy, 2 East 92, 6 Rev. Rep. 380 (dissenting opinion of Lord Kenyon); Crawshay *v.* Thompson, 11 L. J. C. P. 301, 4 M. & G. 357, 5 Scott N. R. 562, 43 E. C. L. 189; Moens *v.* Heyworth, 10 L. J. Exch. 177, 10 M. & W. 147.

Thus it was said that "fraud in law consists in knowingly asserting that which is false in fact, to the injury of another." Crawshay *v.* Thompson, 11 L. J. C. P. 301, 4 M. & G. 357, 387, 5 Scott N. R. 562, 43 E. C. L. 189, per Cresswell, J.

12. See Hart *v.* Swaine, 7 Ch. D. 42, 47 L. J. Ch. 5, 37 L. T. Rep. N. S. 376, 26 Wkly. Rep. 30. And see CONTRACTS, 9 Cyc. 408, 421 *et seq.*

The term "fraud in fact" is sometimes used in contradistinction to "legal fraud" or "fraud in law," to denote the fraud which is the basis for the recovery of exemplary damages, viz., fraud involving moral turpitude. Lobdell *v.* Baker, 3 Metc. (Mass.) 469, 472, per Shaw, J.

As to the right to exemplary damages see *infra*, VII, O, 3.

13. See the cases cited in the foregoing notes. And see the opinion of Lord Herschell in Derry *v.* Peak, 14 App. Cas. 337, 54 J. P. 148, 58 L. J. Ch. 864, 61 L. T. Rep. N. S. 265, 1 Meg. 292, 38 Wkly. Rep. 33.

14. See *infra*, III, B, 6.

15. See the cases cited in the preceding notes.

16. See *infra*, II, B, 6.

17. 1 Bigelow Fraud 8, 9. In Weir *v.* Bell, 3 Ex. D. 238, 243, 47 L. J. Exch. 704, 38 L. T. Rep. N. S. 929, 26 Wkly. Rep. 746, Lord Bramwell said: "I do not understand legal fraud. To my mind it has no more meaning than legal heat or legal cold, legal light or legal shade. There never can be a well-founded complaint of legal fraud, or of anything else, except where some duty is shewn and correlative right and some violation of that duty and right. And when these exist it is much better that they should be stated and acted on, than that recourse should be had to a phrase illogical and unmeaning with the consequent uncertainty." And again in Derry *v.* Peek, 14 App. Cas. 337, 346, 54 J. P. 148, 58 L. J. Ch. 864, 61 L. T. Rep. N. S. 265, 1 Meg. 292, 38 Wkly. Rep. 33: "As I understand, there is never any occasion to use the phrase 'legal fraud' except when actual fraud cannot be established. 'Legal fraud' is only used when some vague ground of action is to be resorted to, or, generally speaking, when the person using it will not take the trouble to find, or cannot find, what duty has been violated or right infringed, but thinks a claim is somehow made out. With the most sincere respect for Sir J. Hannen I cannot think the expression 'convenient.' I do not think it is 'an explanation which very clearly conveys an idea;' at least, I am certain it does not to my mind. I think it a mischievous phrase, and one which has contributed to what I must consider the erroneous decision in this case." See also Kountze *v.* Kennedy, 147 N. Y. 124, 41 N. E. 414, 49 Am. St. Rep. 651, 29 L. R. A. 360 [*affirming* 72 Hun 311, 25 N. Y. Suppl. 682].

18. 1 Bigelow Fraud 8, 9. But in connection with conveyances to defraud creditors the term is still used. See Delaney *v.* Valentine, 154 N. Y. 692, 49 N. E. 65 [*reversing* 11 N. Y. App. Div. 631, 42 N. Y. Suppl. 1123]. See, generally, FRAUDULENT CONVEYANCES.

19. McBroom *v.* Rives, 1 Stew. (Ala.) 72, 79 (in which Taylor J., added: "The instances given in the books are few, and I

however, is a subject belonging primarily to the domain of equity jurisprudence and will not be further discussed in this title.[20]

5. Fraud Upon the Law. A term sometimes used is "fraud upon the law." It is said that this term does not designate any independent kind of offense not embraced within the other definitions of fraud but is merely a term of convenience by which a striking aspect of certain frauds is designated. Since every fraud must be committed against a being capable of rights, "fraud upon the law" is a fraud upon an individual, a corporation, or the sovereign; generally in evasion of some statute such as the Bankruptcy Act, where the offense is nothing but a fraud upon creditors, or the liquor laws, where the offense is a fraud on the sovereign.[21]

6. Fraud as the Basis of the Action of Deceit. It is sometimes asserted that the common law gives no definition of this species of tort.[22] Approximately accurate definitions, however, are frequently found, the most comprehensive of which is as follows: The fraud which gives rise to an action of deceit exists where a person makes a false representation of a material fact susceptible of knowledge, knowing it to be false, or as of his own knowledge when he does not know whether it is true or false, with intention to induce the person to whom it is made, in reliance upon it, to do or refrain from doing something to his pecuniary hurt; when such person, acting with reasonable prudence, is thereby deceived and induced to so do or refrain, to his damage.[23] This definition is well supported

feel no disposition to enlarge the number"). See also Conyers *v.* Graham, 81 Ga. 615, 8 S. E. 521.

Story's definition.— The same idea has been elaborated by Story who says: "By constructive frauds are meant such acts or contracts as, although not originating in any actual evil design or contrivance to perpetuate a positive fraud or injury upon other persons, are yet, by their tendency to deceive or mislead other persons, or to violate private or public confidence, or to impair or injure the public interests, deemed equally reprehensible with positive fraud, and therefore are prohibited by law as within the same reason and mischief as acts and contracts done *malo animo*." 1 Story Eq. § 258. Story's description of constructive fraud has been criticized as being on the one hand merely a convenient *nomen collectivum* for a variety of contracts obnoxious to public policy, or on the other only a synonym for actual fraud. 1 Bigelow Fraud 9.

Indeed the more usual and proper application of the term "constructive fraud" is in the law of fiduciary and confidential relations, where there is only a legal suspicion or assumption of fraud and no fraud may actually have existed. 1 Bigelow Fraud 10. As an example of this use of the term see Lampman *v.* Lampman, 118 Iowa 140, 91 N. W. 1042. See Equity, 16 Cyc. 85 *et seq.*, and cross-references there given.

20. See Equity, 16 Cyc. 87, and cross-references there given.

21. 1 Bigelow Fraud 7, 8. See Rogers *v.* Palmer, 102 U. S. 263, 26 L. ed. 164, fraud on the Bankrupty Act. See also Bankruptcy, 5 Cyc. 363 *et seq.*; Fraudulent Conveyances; Intoxicating Liquors.

22. "The common law not only gives no definition of fraud, but perhaps wisely asserts as a principle that there shall be no definition of it, for, as it is the very nature and essence of fraud to elude all laws in fact, without appearing to break them in form, a technical definition of fraud, making everything come within the scope of its words before the law could deal with it as such, would be in effect telling to the crafty precisely how to avoid the grasp of the law." McAleer *v.* Horsey, 35 Md. 439, 452, per Miller, J. See also Winter *v.* Bandel, 30 Ark. 362 [*citing* 2 Parsons Contr. 769]. "Fraud is so various that it escapes exact definition." Brownlee *v.* Hewitt, 1 Mo. App. 360, 366. "What will constitute fraud by any kind of deceit, whether by means of concealment, reticence concerning matters of which the party should speak, false representations, or artifices of any kind, must always be determined by the particular circumstances. The criterion is the good sense of the jury, estimating the character of the transaction by applying to the evidence their general knowledge of human motives, and their sense of dealing. Fraud is manifold in its devices, and its ingredients cannot be so defined as to include all cases, save by such general statements as must, after all, refer the question to the judgment of the jury upon the facts." Hanger *v.* Evins, 38 Ark. 334, 346.

23. Busterud *v.* Farrington, 36 Minn. 320, 321, 31 N. W. 360, per Berry, J. To the same effect see Eamos *v.* Morgan, 37 Ill. 260, 271; Ley *v.* Metropolitan L. Ins. Co., 120 Iowa 203, 210, 94 N. W. 568; Page *v.* Bent, 2 Metc. (Mass.) 371, 374 (opinion of Shaw, C. J.); Polhill *v.* Walter, 3 B. & Ad. 114, 123, 23 E. C. L. 59; Murray *v.* Mann, 2 Exch. 538, 541, 12 Jur. 634, 17 L. J. Exch. 256; Watson *v.* Poulson, 15 Jur. 1111, 1112, 7 Eng. L. & Eq. 585. It will be observed that the definition given in the text includes actual or

by the decisions and it may be stated as a general rule that wherever the facts bring a case within this definition an action for damages will lie.[24] Although the fraud which will support an action of deceit will generally furnish ground for rescinding a contract the formation of which has been induced by it, or under the same circumstances will be a sufficient defense to a suit for specific perform-

positive fraud as defined above (see *supra*, II, B, 2); but it is not inconsistent with the statement frequently made that actual fraud is essential to maintain an action of deceit (see *infra*, III, B, 6).

Other definitions are: "A false representation of fact, made with a knowledge of its falsehood, or recklessly, without belief in its truth, with the intention that it should be acted upon by the complaining party, and actually inducing him to act upon it." Anson Contr. (8th ed.) 203.

"Fraudulent representations or contrivances by which one man deceives another who has a right to rely upon representations, and has no means of detecting the fraud." Reynolds *v.* Palmer, 21 Fed. 433, 434. See also Spencer *v.* King, 5 Ohio S. & C. Pl. Dec. 113, 3 Ohio N. P. 270.

Fraud of this kind is sometimes called deceit. See Reynolds *v.* Palmer, 21 Fed. 433; Pollock Torts 273.

"The wrong called Slander of Title is in truth a special variety of deceit, which differs from the ordinary type in that third persons, not the plaintiff himself, are induced by the defendant's falsehood to act in a manner causing damage to the plaintiff." Pollock Torts 301. See, generally, LIBEL AND SLANDER.

The infringement of trade-marks and trade-names is a species of actionable fraud, and the liability of the guilty party may be enforced in an action similar to the action of deceit. See, generally, TRADE-MARKS AND TRADE-NAMES.

24. See the following cases:

Alabama.— Henry *v.* Allen, 93 Ala. 197, 9 So. 579; Einstein *v.* Marshall, 58 Ala. 153, 25 Am. Rep. 729; Harris *v.* Powers, 57 Ala. 139; Munroe *v.* Pritchell, 16 Ala. 785, 50 Am. Dec. 203.

California.— Perkins *v.* Fish, 121 Cal. 317, 53 Pac. 901.

Colorado.— American Nat. Bank *v.* Hammond, 25 Colo. 367, 55 Pac. 1090; Lahay *v.* City Nat. Bank, 15 Colo. 339, 25 Pac. 704, 22 Am. St. Rep. 407; Sellar *v.* Clelland, 2 Colo. 532; Oakes *v.* Miller, 11 Colo. App. 374, 55 Pac. 193.

Connecticut.— Sherwood *v.* Salmon, 2 Day 128; Strong *v.* Peters, 2 Root 93.

Delaware.— Grier *v.* Dehan, 5 Houst. 401.

Georgia.— Barnett *v.* Central Line of Boats, 51 Ga. 439.

Illinois.— Leonard *v.* Springer, 197 Ill. 532, 64 N. E. 299; Hicks *v.* Deemer, 187 Ill. 164, 58 N. E. 252; Bunn *v.* Schnellbacher, 163 Ill. 328, 45 N. E. 227; Nolte *v.* Reichelm, 96 Ill. 425; Eames *v.* Morgan, 37 Ill. 260; Jackson *v.* Wilcox, 2 Ill. 344.

Iowa.— Riley *v.* Bell, 120 Iowa 618, 95 N. W. 170.

Kansas.— Burnham *v.* Lutz, 8 Kan. App. 361, 55 Pac. 519; Schee *v.* Shore, 6 Kan. App. 136, 50 Pac. 903.

Kentucky.—Jones *v.* Middlesborough Town-Lands Co., 106 Ky. 194, 50 S. W. 28, 20 Ky. L. Rep. 1744; Livermore *v.* Middlesborough Town-Lands Co., 106 Ky. 140, 50 S. W. 6, 20 Ky. L. Rep. 1704; Trimble *v.* Reid, 97 Ky. 713, 31 S. W. 861, 17 Ky. L. Rep. 494; Dinwiddie *v.* Stone, 52 S. W. 814, 21 Ky. L. Rep. 584.

Maine.— Braley *v.* Powers, 92 Me. 203, 42 Atl. 362; Hobbs *v.* Parker, 31 Me. 143.

Maryland.— Price *v.* Read, 2 Harr. & G. 291; Adams *v.* Anderson, 4 Harr. & J. 558.

Massachusetts.— Lee *v.* Tarplin, 183 Mass. 52, 66 N. E. 431; Whiting *v.* Price, 172 Mass. 240, 51 N. E. 1084, 70 Am. St. Rep. 262; Windram *v.* French, 151 Mass. 547, 24 N. E. 914, 8 L. R. A. 750; Bowen *v.* Carter, 124 Mass. 426; David *v.* Park, 103 Mass. 501; Page *v.* Bent, 2 Metc. 371, per Shaw, C. J.

Michigan.— Wasey *v.* Mahoney, 55 Mich. 194, 20 N. W. 901; Whitman *v.* Johnston, 35 Mich. 406.

Minnesota.— Minazek *v.* Libera, 83 Minn. 288, 86 N. W. 100; Busterud *v.* Farrington, 36 Minn. 320, 31 N. W. 360.

Missouri.—Atchison County Bank *v.* Byers, 139 Mo. 627, 41 S. W. 325; Anderson *v.* McPike, 86 Mo. 293; Rhodes *v.* Dickerson, 95 Mo. App. 395, 69 S. W. 47; Chase *v.* Rusk, 90 Mo. App. 25; McBeth *v.* Craddock, 28 Mo. App. 380.

New Hampshire.— Cain *v.* Dickenson, 60 N. H. 371.

New York.— Kujek *v.* Goldman, 150 N. Y. 176, 44 N. E. 773, 55 Am. St. Rep. 670, 34 L. R. A. 156 [*affirming* 9 Misc. 34, 29 N. Y. Suppl. 294]; Hickey *v.* Morrell, 102 N. Y. 454, 7 N. E. 321, 55 Am. Rep. 824; Rice *v.* Manley, 66 N. Y. 82, 23 Am. Rep. 30 [*reversing* 2 Hun 492]; Blumenfeld *v.* Stine, 96 N. Y. App. Div. 160, 89 N. Y. Suppl. 85; Ettlinger *v.* Weil, 94 N. Y. App. Div. 291, 87 N. Y. Suppl. 1049; Hill *v.* Chamberlain, 64 N. Y. App. Div. 609, 71 N. Y. Suppl. 639 [*affirmed* in 170 N. Y. 595, 63 N. E. 1117]; Wessles *v.* Carr, 15 N. Y. App. Div. 360, 44 N. Y. Suppl. 114; Von Bruck *v.* Peyser, 4 Rob. 514; Van Benscoten *v.* Seaman, 25 Misc. 234, 55 N. Y. Suppl. 79; Benton *v.* Pratt, 2 Wend. 385, 20 Am. Dec. 623.

Ohio.— Bartholomew *v.* Bentley, 15 Ohio 659, 45 Am. Dec. 596.

Pennsylvania.— Boyd *v.* Browne, 6 Pa. St. 310.

South Dakota.— Whitbeck *v.* Sees, 10 S. D. 417, 73 N. W. 915.

Tennessee.— Allison *v.* Tyson, 5 Humphr. 449.

Texas.— Danner *v.* Ft. Worth Implement Co., 18 Tex. Civ. App. 621, 45 S. W. 856.

ance,[25] the converse of the proposition is not true as a general rule; the misrepresentation which will be sufficient to avoid a contract will not always constitute actionable fraud. An innocent misrepresentation may be sufficient to sustain a suit to rescind the contract or to defend a suit for specific performance, but according to the weight of authority it will not support an action of deceit.[26] On the other hand a suit in equity to recover damages for fraud must be decided on the same principles as the action of deceit at common law.[27]

III. ESSENTIAL ELEMENTS.

A. In General. While the rules governing the essential elements of actionable fraud are in the main well settled, the distinctions drawn in particular cases

Utah.— Whitney *v.* Richards, 17 Utah 226, 53 Pac. 1122.

Vermont.— Somers *v.* Richards, 46 Vt. 170; Cabot *v.* Christie, 42 Vt. 121, 1 Am. Rep. 313.

Virginia.— Owens *v.* Boyd Land Co., 95 Va. 560, 28 S. E. 950.

Washington.— Pronger *v.* Old Nat. Bank, 20 Wash. 618, 56 Pac. 391; Gates *v.* Moldstad, 14 Wash. 419, 44 Pac. 881.

United States.— Nevada Bank *v.* Portland Nat. Bank, 59 Fed. 338.

England.—Clydesdale Bank *v.* Paton, [1896] A. C. 381, 65 L. J. P. C. 73, 74 L. T. Rep. N. S. 738; Venezuela Cent. R. Co. *v.* Kisch, L. R. 2 H. L. 99, 36 L. J. Ch. 849, 16 L. T. Rep. N. S. 300, 15 Wkly. Rep. 321; Edgington *v.* Fitzmaurice, 29 Ch. D. 459, 50 J. P. 52, 55 L. J. Ch. 650, 53 L. T. Rep. N. S. 369, 33 Wkly. Rep. 911; Redgrave *v.* Hurd, 20 Ch. D. 1, 51 L. J. Ch. 113, 45 L. T. Rep. N. S. 485, 30 Wkly. Rep. 251; Ramshire *v.* Bolton, L. R. 8 Eq. 294, 38 L. J. Ch. 594, 21 L. T. Rep. N. S. 51, 17 Wkly. Rep. 986; Polhill *v.* Walter, 3 B. & Ad. 114, 23 E. C. L. 59; Dobell *v.* Stevens, 3 B. & C. 623, 5 D. & R. 490, 3 L. J. K. B. O. S. 89, 10 E. C. L. 283; Hunter *v.* Sheppard, 4 Bro. P. C. 210, 2 Eng. Reprint 143; Butler *v.* Prendergast, 4 Bro. P. C. 174, 2 Eng. Reprint 119; Attwood *v.* Small, 6 Cl. & F. 232, 7 Eng. Reprint 684; Bowring *v.* Stevens, 2 C. & P. 337, 12 E. C. L. 604; Barry *v.* Croskey, 2 Johns. & H. 1; Watson *v.* Poulson, 15 Jur. 1111, 7 Eng. L. & Eq. 585; Hill *v.* Perrott, 3 Taunt. 274; Pasley *v.* Freeman, 3 T. R. 51, 1 Rev. Rep. 634.

Canada.—Hossock *v.* Neilly, 13 Nova Scotia 388.

See 23 Cent. Dig. tit. "Fraud," § 1.

"The principle is well settled, that if a person make a representation of a fact, as of his own knowledge, in relation to a subject-matter susceptible of knowledge, and such representation is not true; if the party to whom it is made relies and acts upon it, as true, and sustains damage by it, it is a fraud and deceit, for which the party making it is responsible." Page *v.* Bent, 2 Metc. (Mass.) 371, 374, per Shaw, C. J.

25. See CONTRACTS, 9 Cyc. 408, 411, and cross-references there given.

26. Bondurant *v.* Crawford, 22 Iowa 40; Holmes *v.* Clark, 10 Iowa 423; Trimble *v.* Reid, 97 Ky. 713, 31 S. W. 861, 17 Ky. L. Rep. 494 [*distinguishing* Prewitt *v.* Trimble, 92 Ky. 176, 17 S. W. 356, 13 Ky. L. Rep. 581, 36 Am. St. Rep. 586]; Lovelace *v.* Suter, 93 Mo. App. 429, 67 S. W. 737; Derry *v.* Peek, 14 App. Cas. 337, 54 J. P. 148, 58 L. J. Ch. 864, 61 L. T. Rep. N. S. 265, 1 Meg. 292, 38 Wkly. Rep. 33 [*reversing* 37 Ch. D. 541, 57 L. J. Ch. 347, 59 L. T. Rep. N. S. 78, 36 Wkly. Rep. 899] (opinion of Lord Herschell); Arkwright *v.* Newbold, 17 Ch. D. 301, 320, 50 L. J. Ch. 372, 44 L. T. Rep. N. S. 393, 29 Wkly. Rep. 455 (opinion of Cotton, L. J.); Anson Contr. 203; Pollock Torts 274. But see Brownlee *v.* Hewitt, 1 Mo. App. 360. See CONTRACTS, 9 Cyc. 408, 410, 411; EQUITY, 16 Cyc. 87.

That knowledge of the falsity is necessary in this action see *infra*, III, B, 4.

That a fraudulent intent is necessary see *infra*, III, B, 6.

As to equity jurisdiction in cases of fraud see EQUITY, 16 Cyc. 81 *et seq.* See also such specific titles as INJUNCTIONS; SPECIFIC PERFORMANCE.

Ground for asserting vendor's lien.— An innocent misrepresentation inducing an exchange of real property may be sufficient to entitle the injured party to establish in equity a vendor's lien on the parcel conveyed by him. Bishop *v.* Seal, 87 Mo. App. 256. See also EXCHANGE OF PROPERTY, 17 Cyc. 847 note 67.

27. Clement *v.* Swanson, 110 Iowa 106, 81 N. W. 233; Hubbard *v.* Weare, 79 Iowa 678, 44 N. W. 915; Smith *v.* Chadwick, 9 App. Cas. 187, 42 J. P. 644, 53 L. J. Ch. 873, 50 L. T. Rep. N. S. 697, 32 Wkly. Rep. 687 [*affirming* 20 Ch. D. 27, 51 L. J. Ch. 597, 46 L. T. Rep. N. S. 702, 30 Wkly. Rep. 661]; Peek *v.* Gurney, L. R. 6 H. L. 377, 43 L. J. Ch. 19, 22 Wkly. Rep. 29; Arkwright *v.* Newbold, 17 Ch. D. 301, 50 L. J. Ch. 372, 44 L. T. Rep. N. S. 393, 29 Wkly. Rep. 455. See also the opinion of Lord Esher, M. R., in Le Lievre *v.* Gould, [1893] 1 Q. B. 491, 498, 57 J. P. 484, 62 L. J. Q. B. 353, 68 L. T. Rep. N. S. 626, 4 Reports 274, 41 Wkly. Rep. 468. There is no such thing recognized as an "equitable" action of deceit. Opinion of Cotton, C. J., in Arkwright *v.* Newbold, 17 Ch. D. 301, 320, 50 L. J. Ch. 372, 44 L. T. Rep. N. S. 393, 29 Wkly. Rep. 455 [*approved* in Derry *v.* Peek, 14 App. Cas. 337, 54 J. P. 148, 58 L. J. Ch. 864, 61 L. T. Rep. N. S. 265, 1 Meg. 292, 38 Wkly. Rep. 33 (per Lord Herschell); Smith

are, however, often very fine, in many instances it being practically impossible to reconcile or distinguish decisions based on very similar states of fact; and this difficulty has been frankly conceded by the courts.[28] The general rule is that to constitute actionable fraud it must appear: (1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury.[29] Each of these facts must be proved with a reasonable degree of certainty,[30] and all of them must be found to exist; the absence of any one of them is fatal to a recovery.[31] A maxim announced in an early English case[32] and ever since recognized as correct[33] is that fraud without

v. Chadwick, 9 App. Cas. 187, 42 J. P. 644, 53 L. J. Ch. 873, 50 L. T. Rep. N. S. 697, 32 Wkly. Rep. 687 (per Lord Blackburn)].

28. See Boddy *v.* Henry, 113 Iowa 462, 85 N. W. 771, 53 L. R. A. 769; Lovelace *v.* Suter, 93 Mo. App. 429, 67 S. W. 737; Cabot *v.* Christie, 42 Vt. 121, 1 Am. Rep. 313.

29. *Arkansas.*— Hutchinson *v.* Gorman, 71 Ark. 305, 73 S. W. 793.

Colorado.— Sellar *v.* Clelland, 2 Colo. 532; Dingle *v.* Trask, 7 Colo. App. 16, 42 Pac. 186.

Delaware.— See Grier *v.* Dehan, 5 Houst. 401.

Florida.— Mizell *v.* Upchurch, (1903) 35 So. 9.

Georgia.— Morris *v.* Morris, 95 Ga. 535, 20 S. E. 506.

Illinois.— Merwin *v.* Arbuckle, 81 Ill. 501; Hiner *v.* Richter, 51 Ill. 299; Wheeler *v.* Randall, 48 Ill. 182; Miller *v.* John, 111 Ill. App. 56; Dickinson *v.* Atkins, 100 Ill. App. 401; John V. Farwell Co. *v.* Nathanson, 99 Ill. App. 185; Sherburne *v.* Tobey Furniture Co., 19 Ill. App. 615; Johnson *v.* Beeney, 9 Ill. App. 64; McBean *v.* Fox, 1 Ill. App. 177.

Iowa.— Riley *v.* Bell, 120 Iowa 618, 95 N. W. 170; Boddy *v.* Henry, 113 Iowa 462, 85 N. W. 771, 53 L. R. A. 769; Hubbard *v.* Weare, 79 Iowa 678, 44 N. W. 915.

Kentucky.— O'Day *v.* Bennett, 82 S. W. 442, 26 Ky. L. Rep. 702.

Maine.— Hammatt *v.* Emerson, 27 Me. 308, 46 Am. Dec. 598.

Missouri.—Atchison County Bank *v.* Byers, 139 Mo. 627, 41 S. W. 325; Live Stock Remedy Co. *v.* White, 90 Mo. App. 498; Edwards *v.* Noel, 88 Mo. App. 434.

New Jersey.— Byard *v.* Holmes, 34 N. J. L. 296.

New York.— Kountze *v.* Kennedy, 147 N. Y. 124, 41 N. E. 414, 49 Am. St. Rep. 651, 29 L. R. A. 360 [*affirming* 72 Hun 311, 25 N. Y. Suppl. 682]; Brackett *v.* Griswold, 112 N. Y. 454, 20 N. E. 376; Arthur *v.* Griswold, 55 N. Y. 400; Oberlander *v.* Speiss, 45 N. Y. 175; Grosjean *v.* Galloway, 82 N. Y. App. Div. 380, 81 N. Y. Suppl. 871; Powell *v.* F. C. Linde Co., 58 N. Y. App. Div. 261, 60 N. Y. Suppl. 1070 [*affirmed* in 171 N. Y. 675, 64 N. E. 1125]; Masterton *v.* Beers, 1 Sweeny 406; Kelly *v.* Gould, 19 N. Y. Suppl. 349 [*affirmed* in 141 N. Y. 596, 36 N. E. 320]; Bigler *v.* Atkins, 7 N. Y. St. 235; Doctor *v.* Gilmartin, 5 N. Y. St. 894; Babcock *v.* Libbey, 53 How. Pr. 255. See also Chester *v.* Comstock, 40 N. Y. 575 note; Ansbacher *v.* Pfeiffer, 13 N. Y. Suppl. 418.

Ohio.— Spencer *v.* King, 5 Ohio S. & C. Pl. Dec. 113, 3 Ohio N. P. 270.

Oregon.— Martin *v.* Eagle Development Co., 41 Oreg. 448, 69 Pac. 216.

Pennsylvania.— McAleer *v.* McMurray, 58 Pa. St. 126.

Virginia.— Dudley *v.* Minor, 100 Va. 728, 42 S. E. 870.

United States.— Marshall *v.* Hubbard, 117 U. S. 415, 6 S. Ct. 589, 29 L. ed. 919; Ming *v.* Woolfolk, 116 U. S. 599, 6 S. Ct. 489, 29 L. ed. 311.

England.— Derry *v.* Peek, 14 App. Cas. 337, 54 J. P. 148, 58 L. J. Ch. 864, 61 L. T. Rep. N. S. 265, 1 Meg. 292, 38 Wkly. Rep. 33; Smith *v.* Chadwick, 9 App. Cas. 187, 42 J. P. 644, 53 L. J. Ch. 873, 50 L. T. Rep. N. S. 697, 32 Wkly. Rep. 687; Arkwright *v.* Newbold, 17 Ch. D. 301, 50 L. J. Ch. 372, 44 L. T. Rep. N. S. 393, 29 Wkly. Rep. 455; Polhill *v.* Walter, 3 B. & Ad. 114, 23 E. C. L. 59; Corbett *v.* Brown, 8 Bing. 33, 21 E. C. L. 433, 5 C. & P. 363, 24 E. C. L. 607, 1 L. J. C. P. 13, 1 M. & Rob. 108, 1 Moore & S. 85; Foster *v.* Charles, 6 Bing. 396, 19 E. C. L. 183, 7 Bing. 105, 20 E. C. L. 55, 8 L. J. C. P. O. S. 118, 4 M. & P. 61, 31 Rev. Rep. 446; Pollock Torts 276.

See 23 Cent. Dig. tit. "Fraud," §§ 1–24. See also *infra*, III, B.

These elements have been tersely described as "representations," falsity, scienter, deception and injury." Arthur *v.* Griswold, 55 N. Y. 400, 410 [*approved* in Ley *v.* Metropolitan L. Ins. Co., 120 Iowa 203, 94 N. W. 568; Brackett *v.* Griswold, 112 N. Y. 454, 20 N. E. 376], per Church, C. J.

30. Arthur *v.* Griswold, 55 N. Y. 400.

31. Brackett *v.* Griswold, 112 N. Y. 454, 20 N. E. 376.

32. Baily *v.* Merrell, 3 Bulstr. 94, 95, opinion of Croke, J.

33. *Alabama.*— Einstein *v.* Marshall, 58 Ala. 153, 25 Am. Rep. 729.

Missouri.—Atchison County Bank *v.* Byers, 139 Mo. 627, 41 S. W. 325.

New York.—Kountze *v.* Kennedy, 147 N. Y. 124, 41 N. E. 414, 49 Am. St. Rep. 651, 29 L. R. A. 360 [*affirming* 72 Hun 311, 25 N. Y. Suppl. 682]; Marsh *v.* Falker, 40 N. Y. 562;

damage or damage without fraud is not actionable, but that where both concur an action of deceit will lie.

B. Particular Elements Considered — 1. The Representation — a. In General. To maintain an action of deceit there must be a false affirmation of fact or something equivalent thereto,[34] although no specific rule can be laid down as to what false representations will constitute fraud, as this depends upon the particular facts in each case, the relative situation of the parties, and their means of information.[35] Ordinarily, however, there must have been a specific representation brought to plaintiff's knowledge. Mere vague, general, or ambiguous statements are ordinarily insufficient.[36] But a representation within the meaning of the law of fraud appears to be anything short of a warranty, which proceeds from the action or conduct of the party charged, and which is sufficient to create upon the mind a distinct impression of fact conducive to action.[37]

b. Form and Character — (I) *In General.* The gist of a fraudulent misrepresentation is the producing of a false impression upon the mind of the other party, and if this result is actually accomplished the means of accomplishing it are immaterial.[38]

(II) *Wilful Misstatements.* The simplest and perhaps the most frequent case of fraud is that consisting of telling a deliberate and intentional falsehood as to a material fact. Where a person makes such a misrepresentation, intending that another shall act upon it, and the latter does act upon it to his injury, it is perfectly clear that an action of deceit will lie.[39]

Upton *v.* Vail, 6 Johns. 181, 5 Am. Dec. 210 note.

Tennessee.— Allison *v.* Tyson, 5 Humphr. 449.

Vermont.— Childs *v.* Merrill, 63 Vt. 463, 22 Atl. 626, 14 L. R. A. 264.

England.— Derry *v.* Peek, 14 App. Cas. 337, 54 J. P. 148, 58 L. J. Ch. 864, 61 L. T. Rep. N. S. 265, 1 Meg. 292, 38 Wkly. Rep. 33 [*reversing* 37 Ch. D. 541, 57 L. J. Ch. 347, 59 L. T. Rep. N. S. 78, 36 Wkly. Rep. 899]; Pasley *v.* Freeman, 3 T. R. 51, 1 Rev. Rep. 634.

34. *Colorado.*— Connell *v.* El Paso Gold Min., etc., Co., (Sup. 1904) 78 Pac. 677.

Georgia.— Brooke *v.* Cole, 108 Ga. 251, 33 S. E. 849; Morris *v.* Morris, 95 Ga. 535, 20 S. E. 506.

Massachusetts.— Emerson *v.* Brigham, 10 Mass. 197.

Missouri.— Hume *v.* Brelsford, 51 Mo. App. 651.

New Hampshire.— Cloutman *v.* Bailey, 62 N. H. 44.

New York.— Fleming *v.* Slocum, 18 Johns. 403, 9 Am. Dec. 224. See also Brewster *v.* Hatch, 13 Abb. N. Cas. 460.

South Carolina.— Campbell *v.* Kinlock, 9 Rich. 300.

Wisconsin.— Miles *v.* Pike Min. Co., (1905) 102 N. W. 555.

United States.— Fenwick *v.* Grimes, 8 Fed. Cas. No. 4,733, 5 Cranch C. C. 439.

England.— Ward *v.* Hobbs, 4 App. Cas. 13, 48 L. J. Q. B. 281, 40 L. T. Rep. N. S. 73, 27 Wkly. Rep. 114 [*affirming* 3 Q. B. D. 150, 47 L. J. Q. B. 90, 37 L. T. Rep. N. S. 654, 26 Wkly. Rep. 151]; Watson *v.* Poulson, 15 Jur. 1111, 7 Eng. L. & Eq. 585; Adamson *v.* Evitt, 9 L. J. Ch. O. S. 1, 2 Russ. & M. 66, 11 Eng. Ch. 66, 39 Eng. Reprint 319; Pickering *v.* Dowson, 4 Taunt. 779.

See 23 Cent. Dig. tit. "Fraud," § 8.

35. Walsh *v.* Hall, 66 N. C. 233.

36. *Florida.*— Williams *v.* McFadden, 23 Fla. 143, 1 So. 618, 11 Am. St. Rep. 345.

Illinois.— Wightman *v.* Tucker, 50 Ill. App. 75.

Maine.— Palmer *v.* Bell, 85 Me. 352, 27 Atl. 250.

Missouri.— See Hume *v.* Brelsford, 51 Mo. App. 651.

New York.— Brackett *v.* Griswold, 112 N. Y. 454, 20 N. E. 376; Williams *v.* Hay, 21 Misc. (N. Y.) 73, 46 N. Y. Suppl. 895.

England.— Smith *v.* Chadwick, 20 Ch. D. 27, 51 L. J. Ch. 597, 46 L. T. Rep. N. S. 702, 30 Wkly. Rep. 661 [*affirmed* in 9 App. Cas. 187, 48 J. P. 644, 53 L. J. Ch. 873, 50 L. T. Rep. N. S. 697, 32 Wkly. Rep. 687].

See 23 Cent. Dig. tit. "Fraud," § 8.

A mere recommendation by a person interested in the construction of a railroad that a proposition for construction be accepted is not a representation on which an action for deceit can be maintained by a bank which cashes a draft for contractors, drawn by them on the construction company which made a contract with them. Kelly *v.* Gould, 19 N. Y. Suppl. 349 [*affirmed* in 141 N. Y. 596, 36 N. E. 320].

37. 1 Bigelow Fraud 466, 467; Leonard *v.* Springer, 197 Ill. 532, 64 N. E. 299 [*reversing* 98 Ill. App. 530]. See *infra*, III, B, 1, b.

38. Lomerson *v.* Johnston, 47 N. J. Eq. 312, 20 Atl. 675, 24 Am. St. Rep. 410; Stewart *v.* Wyoming Cattle Ranche Co., 128 U. S. 383, 9 S. Ct. 101, 32 L. ed. 439. See also Rice *v.* Manley, 66 N. Y. 82, 23 Am. Rep. 30 [*reversing* 2 Hun 492]; Chisolm *v.* Gadsden, 1 Strobh. (S. C.) 220, 47 Am. Dec. 550; Howard *v.* Gould, 28 Vt. 523, 67 Am. Dec. 728.

39. *Connecticut.*— Scholfield Gear, etc., Co. *v.* Scholfield, 71 Conn. 1, 40 Atl. 1046.

(III) *ACTS OR CONDUCT.* Fraud may be as effectually perpetrated by acts as by words, and it is settled law that acts or conduct calculated and intended to produce a false impression in the mind of another party are equivalent to actual misrepresentations.[40]

(IV) *SILENCE OR CONCEALMENT.* Mere silence as to a material fact is not necessarily, as a matter of law, equivalent to a false representation,[41] and therefore, in the absence of any duty to speak, it is not of itself ground for an action of deceit.[42] On the other hand mere silence is different from concealment,[43] and it is commonly stated that a suppression of the truth may amount to a suggestion of falsehood, and thus that the concealment of material facts with the intent to

Illinois.—Dickinson *v.* Atkins, 100 Ill. App. 401.

Iowa.— Hubbard *v.* Weare, 79 Iowa 687, 44 N. W. 915.

Massachusetts.— Nash *v.* Minnesota Title Ins., etc., Co., 159 Mass. 437, 34 N. E. 625.

Missouri.—Atchison County Bank *v.* Byers, 139 Mo. 627, 41 S. W. 325.

New York.— Kujek *v.* Goldman, 150 N. Y. 176, 44 N. E. 773, 55 Am. St. Rep. 670, 34 L. R. A. 176; Benton *v.* Pratt, 2 Wend. 385, 20 Am. Dec. 623.

England.— Stevens *v.* Lee, 2 C. L. R. 251, 2 Wkly. Rep. 16; Gerhard *v.* Bates, 1 C. L. R. 868, 2 E. & B. 476, 17 Jur. 1097, 22 L. J. Q. B. 364, 1 Wkly. Rep. 383, 75 E. C. L. 476; Denton *v.* Great Northern R. Co., 5 E. & B. 860, 2 Jur. N. S. 185, 25 L. J. Q. B. 129, 4 Wkly. Rep. 240, 85 E. C. L. 860; Murray *v.* Mann, 2 Exch. 538, 12 Jur. 634, 17 L. J. Exch. 256; Watson *v.* Poulson, 15 Jur. 1111, 7 Eng. L. & Eq. 585; Pasley *v.* Freeman, 3 T. R. 51, 1 Rev. Rep. 634.

See 23 Cent. Dig. tit. "Fraud," § 8.

40. New York City Second Nat. Bank *v.* Curtis, 2 N. Y. App. Div. 508, 37 N. Y. Suppl. 1028 (signing as a witness a forged assignment of a stock certificate, knowing that it was to be used in obtaining a loan); March *v.* Mobile First Nat. Bank, 4 Hun (N. Y.) 466 [*affirmed* in 64 N. Y. 645]; Sieling *v.* Clark, 18 Misc. (N. Y.) 464, 41 N. Y. Suppl. 982 (where defendant, knowing that he had insufficient funds in the bank, induced plaintiff to cash his checks); Stout *v.* Harper, 51 N. C. 347 (putting sand in bales of cotton); Croyle *v.* Moses, 90 Pa. St. 250, 35 Am. Rep. 654; Anderson *v.* Snyder, 14 Pa. Super. Ct. 424 (where defendant attested as a witness a declaration of no set-off against a judgment note, without having seen the maker thereof sign the same); Chisolm *v.* Gadsden, 1 Strobh. (S. C.) 220, 47 Am. Dec. 550; 1 Bigelow Fraud 467. See also Beardsley *v.* Duntley, 69 N. Y. 577; Howard *v.* Gould, 28 Vt. 523, 67 Am. Dec. 728; Stewart *v.* Wyoming Cattle Ranche Co., 128 U. S. 383, 9 S. Ct. 101, 32 L. ed. 439.

"Any conduct capable of being turned into a statement of fact is a representation. There is no distinction between misrepresentations effected by words and misrepresentations effected by other acts." 1 Bigelow Fraud 467 [*approved* in Leonard *v.* Springer, 197 Ill. 532, 64 N. E. 299 (*reversing* 98 Ill. App. 530)].

Sending a person to obtain information from a source whence only false or misleading information can be derived amounts to a fraudulent misrepresentation where the person obtains such information and acts upon it. Chisolm *v.* Gadsden, 1 Strobh. (S. C.) 220, 47 Am. Dec. 550. See also Boddy *v.* Henry, 126 Iowa 31, 101 N. W. 447.

41. Stewart *v.* Wyoming Cattle Ranche Co., 128 U. S. 383, 9 S. Ct. 101, 32 L. ed. 439.

42. *Connecticut.*— Otis *v.* Raymond, 3 Conn. 413.

Georgia.— Littlejohn *v.* Drennon, 95 Ga. 743, 22 S. E. 657.

Illinois.— See Roper *v.* Sangamon Lodge No. 6, I. O. O. F., 91 Ill. 518, 33 Am. Rep. 60.

Nebraska.— Jones *v.* Stewart, 62 Nebr. 207, 87 N. W. 12.

New Jersey.— Crowell *v.* Jackson, 53 N. J. L. 656, 23 Atl. 426.

New York.— Fleming *v.* Slocum, 18 Johns. 403, 9 Am. Dec. 224.

Pennsylvania.— Iron City Nat. Bank *v.* Du Puy, 194 Pa. St. 205, 44 Atl. 1066; Bokee *v.* Walker, 14 Pa. St. 139.

South Carolina.— Campbell *v.* Kinlock, 9 Rich. 300.

United States.—Stewart *v.* Wyoming Cattle Ranche Co., 128 U. S. 383, 9 S. Ct. 101, 32 L. ed. 439, per Gray, J. See also Laidlaw *v.* Organ, 2 Wheat. 178, 4 L. ed. 214.

England.— See Pickering *v.* Dowson, 4 Taunt. 779.

See 23 Cent. Dig. tit. "Fraud," § 15.

43. Stewart *v.* Wyoming Cattle Ranche Co., 128 U. S. 383, 9 S. Ct. 101, 32 L. ed. 439. But the distinction is sometimes very close. See McDonald *v.* Christie, 42 Barb. (N. Y.) 36. "While it may be more difficult to define, with clearness and precision, the distinction between suppression and falsehood, as constituting actual fraud, it may be said, generally, that silence, in order to be an actionable fraud, must relate to a material matter known to the party, and which it is his legal duty to communicate to the other contracting party, whether the duty arises from a relation of trust, from confidence, inequality of condition and knowledge, or other attendant circumstances. Though a concealment may be tantamount to a misrepresentation, and equally effective to deceive or mislead, every omission to disclose facts, though material, is not necessarily fraudulent." Jordan *v.* Pickett, 78 Ala. 331, 338, per Clopton, J.

mislead may be equivalent to positive misrepresentation.[44] This is undoubtedly true where the concealment is of a material fact which under the circumstances the party is in good faith bound to disclose, or where the concealment is accompanied by some representation or disclosure so that both together amount to a representation that what is disclosed is the whole truth, and thus a false impression is made upon the mind of the other party;[45] but whether a duty to make full disclosure exists in a given case is a question depending upon the peculiar facts involved, such as the nature of the transaction, the mutual relation of the parties, and their respective knowledge and means of knowledge.[46] Where, however, one person seeks information from another and expressly states that he will place reliance on the latter's statements, or the circumstances are such that the person approached must know that what he says will be relied on, a duty arises either to refuse to give any information or to make a full and truthful disclosure which shall have no tendency to deceive or mislead;[47] and if a party conceals a fact that

44. See the opinions in the following cases:
Illinois.— Aortson *v.* Ridgway, 18 Ill. 23; Jackson *v.* Wilcox, 2 Ill. 344.
Nebraska.— Faulkner *v.* Klamp, 16 Nebr. 174, 20 N. W. 220.
New York.— Beardsley *v.* Duntley, 69 N. Y. 577; Viele *v.* Goss, 49 Barb. 96; Addington *v.* Allen, 11 Wend. 374 [*reversing* on other grounds 7 Wend. 9].
North Carolina.— Lunn *v.* Shermer, 93 N. C. 164.
United States.—Stewart *v.* Wyoming Cattle Ranche Co., 128 U. S. 383, 9 S. Ct. 101, 32 L. ed. 439.
England.— Foster *v.* Charles, 6 Bing. 396, 19 E. C. L. 183, 7 Bing. 105, 20 E. C. L. 55, 8 L. J. C. P. O. S. 118, 4 M. & P. 61, 31 Rev. Rep. 446; Tapp *v.* Lee, 3 B. & P. 367.
See 23 Cent. Dig. tit. "Fraud," § 15.

45. *Alabama.*—King *v.* White, 119 Ala. 429, 24 So. 710.
Georgia.— James *v.* Crosthwaite, 97 Ga. 673, 25 S. E. 754, 36 L. R. A. 631.
Maine.— Atwood *v.* Chapman, 68 Me. 38, 38 Am. Rep. 5.
Massachusetts.— Burns *v.* Dockray, 156 Mass. 135, 30 N. E. 551; French *v.* Vining, 102 Mass. 132, 3 Am. Rep. 440; Kidney *v.* Stoddard, 7 Metc. 252; Tryon *v.* Whitmarsh, 1 Metc. 1, 35 Am. Dec. 339.
Michigan.— See Busch *v.* Wilcox, 82 Mich. 315, 49 N. W. 940.
New Hampshire.—Stevens *v.* Fuller, 8 N. H. 463.
New York.— March *v.* Mobile First Nat. Bank, 4 Hun 466 [*affirmed* in 64 N. Y. 645] (where defendant attached a worthless bill of lading to a bill of exchange whereby plaintiffs were induced to believe that the bill of exchange was secured by certain cotton mentioned in the bill of lading, defendant knowing that the cotton had not been paid for and concealing the fact from plaintiffs); Viele *v.* Goss, 49 Barb. 96; Addington *v.* Allen, 11 Wend. 374 [*reversing* 7 Wend. 9]; Upton *v.* Vail, 6 Johns. 181, 5 Am. Dec. 210. See also Beardsley *v.* Duntley, 69 N. Y. 577.
North Carolina.— Lunn *v.* Shermer, 93 N. C. 164.
Pennsylvania.— Cornelius *v.* Molloy, 7 Pa. St. 293. *Compare* Bokee *v.* Walker, 14 Pa. St. 139.
South Carolina.— Chisolm *v.* Gadsden, 1 Strobh. 220, 47 Am. Dec. 550.
Tennessee.— Baker *v.* Seahorn, 1 Swan 54, 55 Am. Dec. 724; Allison *v.* Tyson, 5 Humphr. 449.
United States.— Stewart *v.* Wyoming Cattle Ranche Co., 128 U. S. 383, 9 S. Ct. 101, 32 L. ed. 439; Loewer *v.* Harris, 57 Fed. 368, 6 C. C. A. 394.
England.— Peek *v.* Gurney, L. R. 6 H. L. 377, 43 L. J. Ch. 19, 22 Wkly. Rep. 29; Fostor *v.* Charles, 6 Bing. 396, 19 E. C. L. 183, 7 Bing. 105, 20 E. C. L. 55, 8 L. J. C. P. O. S. 118, 4 M. & P. 61, 31 Rev. Rep. 446; Tapp *v.* Lee, 3 B. & P. 367; Eyre *v.* Dunsford, 1 East 318.
See 23 Cent. Dig. tit. "Fraud," § 15.
As to "half truths" see *infra*, III, B, 3, b.
Representations subsequently becoming false see *infra*, III, B, 3, c.

46. *Connecticut.*— Edward Malley Co. *v.* Button, 77 Conn. 571, 60 Atl. 125.
Maine.— Atwood *v.* Chapman, 68 Me. 38, 23 Am. Rep. 5.
Pennsylvania.— Cornelius *v.* Molloy, 7 Pa. St. 293.
Vermont.— Paddock *v.* Strobridge, 29 Vt. 470.
United States.— Britton *v.* Brewster, 2 Fed. 160.
See 23 Cent. Dig. tit. "Fraud," § 15.

47. *Georgia.*—James *v.* Crosthwaite, 97 Ga. 673, 25 S. E. 754, 36 L. R. A. 631.
Massachusetts.— Kidney *v.* Stoddard, 7 Metc. 252.
Minnesota.— Hedin *v.* Minneapolis Medical, etc., Inst., 62 Minn. 146, 64 N. W. 158, 54 Am. St. Rep. 628, 35 L. R. A. 417; Busterud *v.* Farrington, 36 Minn. 320, 31 N. W. 360.
New York.— Schumaker *v.* Mather, 133 N. Y. 590, 30 N. E. 755 [*criticizing* Long *v.* Warren, 68 N. Y. 426]; Viele *v.* Goss, 49 Barb. 96; Addington *v.* Allen, 11 Wend. 374 [*reversing* 7 Wend. 9].
Pennsylvania.— Cornelius *v.* Molloy, 7 Pa. St. 293; *Compare* Bokee *v.* Walker, 14 Pa. St. 139.
Tennessee.— Baker *v.* Seahorn, 1 Swan 54, 55 Am. Dec. 724.
Vermont.— Mallory *v.* Leach, 35 Vt. 156, 82 Am. Dec. 625.

is material to the transaction, knowing that the other party is acting on the assumption that no such fact exists, the concealment is as much a fraud as if the existence of the fact were expressly denied or the reverse of it expressly stated;[48] that is, the concealment amounts to an indirect representation that the fact does not exist.[49] The foregoing principles as to silence and concealment have in some jurisdictions been substantially affirmed by express statutory provisions.[50]

(v) *Statements of Fact or of Opinion*—(a) *In General.* To furnish grounds for an action of deceit the representation must be of a matter susceptible of approximately accurate knowledge and must be in form or substance an assertion importing knowledge on the part of the speaker. A statement which by reason either of its form or subject-matter amounts merely to an expression of opinion is not actionable, for it is one upon which reliance cannot safely be placed.[51] It is not always easy, however, to determine whether a given statement is one of opinion or of fact; the subject-matter, the respective knowledge of the parties, and the form of the statement all being important circumstances in

England.— Eyre *v.* Dunsford, 1 East 318; Pasley *v.* Freeman, 3 T. R. 51, 1 Rev. Rep. 634.

See 23 Cent. Dig. tit. "Fraud," § 15.

48. *Georgia.*— Gordon *v.* Irvine, 105 Ga. 144, 31 S. E. 151.

Kentucky.— Singleton *v.* Kennedy, 9 B. Mon. 222; Faris *v.* Lewis, 2 B. Mon. 375.

Minnesota.— Thomas *v.* Murphy, 87 Minn. 358, 91 N. W. 1097.

Missouri.— McAdams *v.* Cates, 24 Mo. 223; Manter *v.* Truesdale, 57 Mo. App. 435.

New York.— March *v.* Mobile First Nat. Bank, 4 Hun 466 [*affirmed* in 64 N. Y. 645]; Boston Nat. Bank *v.* Armour, 1 Silv. Sup. 444, 6 N. Y. Suppl. 714.

North Carolina.—Biggs *v.* Perkins, 75 N. C. 397.

Pennsylvania.— Cornelius *v.* Molloy, 7 Pa. St. 293.

South Carolina.— Chisolm *v.* Gadsden, 1 Strobh. 220, 47 Am. Dec. 550.

Vermont.— McKindly *v.* Drew, 71 Vt. 138, 41 Atl. 1039; Maynard *v.* Maynard, 49 Vt. 297; Paddock *v.* Strobridge, 29 Vt. 470.

See 23 Cent. Dig. tit. "Fraud," § 15; and Kerr Fr. & M. 94.

Actionable fraud may be perpetrated by encouraging and taking advantage of a delusion known to exist in the mind of the other party. Busch *v.* Wilcox, 82 Mich. 315, 46 N. W. 940; Maynard *v.* Maynard, 49 Vt. 297; Paddock *v.* Strobridge, 29 Vt. 470.

49. Thomas *v.* Murphy, 87 Minn. 358, 91 N. W. 1097; McAdams *v.* Cates, 24 Mo. 223; Maynard *v.* Maynard, 49 Vt. 297; Paddock *v.* Strobridge, 29 Vt. 470.

50. See Daley *v.* Quick, 99 Cal. 179, 33 Pac. 859; Gordon *v.* Irvine, 105 Ga. 144, 31 S. E. 151.

51. *Alabama.*— Stevens *v.* Alabama State Land Co., 121 Ala. 450, 25 So. 995; East *v.* Worthington, 88 Ala. 537, 7 So. 189 (cubic contents of a piece of grading); Saltonstall *v.* Gordon, 33 Ala. 149.

California.— Holton *v.* Noble, 83 Cal. 7, 23 Pac. 58; Nounnan *v.* Sutter County Land Co., 81 Cal. 1, 22 Pac. 515, 6 L. R. A. 219 (amount of earth necessary to construct a levee, and the quality of the earth to be excavated); Rendell *v.* Scott, 70 Cal. 514, 11 Pac. 779.

Colorado.— Dingle *v.* Trask, 7 Colo. App. 16, 42 Pac. 186.

Georgia.— Wrenn *v.* Truitt, 116 Ga. 708, 43 S. E. 52.

Illinois.— Mumford *v.* Tolman, 157 Ill. 258, 41 N. E. 617; Williams *v.* Wilson, 101 Ill. App. 541; Coolidge *v.* Rhodes, 96 Ill. App. 17; Emmerson *v.* Hutchinson, 63 Ill. App. 203; Casselberry *v.* Warren, 40 Ill. App. 626; Rockford Ins. Co. *v.* Warne, 22 Ill. App. 19.

Indiana.— Neidefer *v.* Chastain, 71 Ind. 363, 36 Am. Rep. 198; Curry *v.* Keyser, 30 Ind. 214.

Iowa.— Bossingham *v.* Syck, 118 Iowa 192, 91 N. W. 1047; Warfield *v.* Clark, 118 Iowa 69, 91 N. W. 833; Bankson *v.* Lagerlof, (1898) 75 N. W. 661; Clark *v.* Ralls, 50 Iowa 275; Bondurant *v.* Crawford, 22 Iowa 40.

Maine.— Bishop *v.* Small, 63 Me. 12; Holbrook *v.* Connor, 60 Me. 578, 11 Am. Rep. 212.

Massachusetts.— People's Sav. Bank *v.* James, 178 Mass. 322, 59 N. E. 807; Lynch *v.* Murphy, 171 Mass. 307, 50 N. E. 623; Nash *v.* Minnesota Title Ins., etc., Co., 159 Mass. 437, 34 N. E. 625; Kimball *v.* Bangs, 144 Mass. 321, 11 N. E. 113; Tucker *v.* White, 125 Mass. 344; Belcher *v.* Costello, 122 Mass. 189; Mooney *v.* Miller, 102 Mass. 217; Veasey *v.* Doton, 3 Allen 380; Page *v.* Bent, 2 Metc. 371, 374, per Shaw, C. J.

Michigan.— Myers *v.* Alpena Loan, etc., Assoc., 117 Mich. 389, 75 N. W. 944; Nowlin *v.* Snow, 40 Mich. 699.

Missouri.— Dalrymple *v.* Craig, 149 Mo. 345, 50 S. W. 884; Smith *v.* Dye, 88 Mo. 581 [*affirming* 15 Mo. App. 585]; Lovelace *v.* Suter, 93 Mo. App. 429, 67 S. W. 737; Reel *v.* Ewing, 4 Mo. App. 570 [*affirmed* in 71 Mo. 17].

Nebraska.— Albion Milling Co. *v.* Weeping Water First Nat. Bank, 64 Nebr. 116, 89 N. W. 638.

Nevada.— Banta *v.* Savage, 12 Nev. 151.

New Jersey.— Cummings *v.* Cass, 52 N. J. L. 77, 18 Atl. 972.

New York.— Oberlander *v.* Spiess, 45 N. Y. 175; Simons *v.* New York L. Ins. Co., 38 Hun 309; Leszynsky *v.* Ross, 35 Misc. 652, 72 N. Y. Suppl. 352; McGlynn *v.* Seymour, 14 N. Y. St. 707.

deciding the question,[52] which is ordinarily one for the jury.[53] An expression of opinion may be so blended with statements of fact as to become itself a statement of fact.[54] Where one of the parties has superior knowledge on the subject, his expression of an opinion which he knows he does not entertain because it is contrary to the facts may be actionable if made for the purpose of inducing another to act upon it, which he does to his injury;[55] or it may amount to an implied assertion that he knows facts which justify his opinion, and thus his statement may become actionable as a false statement of fact.[56] Upon the same principle actionable fraud may be predicated upon a knowingly false expression of opinion by an expert who has special knowledge on the subject of which he

Oregon.— Martin *v.* Eagle Development Co., 41 Oreg. 448, 69 Pac. 216.

Pennsylvania.— Watts *v.* Cummins, 59 Pa. St. 84; Peck, etc., Co. *v.* Stevenson, 6 Pa. Super. Ct. 536, 42 Wkly. Notes. Cas. 119.

Tennessee.— Horrigan *v.* First Nat. Bank, 9 Baxt. 137.

Texas.— Hunter *v.* International Bldg., etc., Assoc., 24 Tex. Civ. App. 453, 59 S. W. 596.

Vermont.— Randall *v.* Farnum, 52 Vt. 539; Crown *v.* Brown, 30 Vt. 707; Jude *v.* Woodburn, 27 Vt. 415.

West Virginia.— Wamsley *v.* Currence, 25 W. Va. 543; Crislip *v.* Cain, 19 W. Va. 438.

Wisconsin.— Spence *v.* Geilfuss, 89 Wis. 499, 62 N. W. 529; Warner *v.* Benjamin, 89 Wis. 290, 62 N. W. 179; Montreal River Lumber Co. *v.* Mihills, 80 Wis. 540, 50 N. W. 507.

United States.— Gordon *v.* Butler, 105 U. S. 553, 26 L. ed. 1166; Sawyer *v.* Prickett, 19 Wall. 146, 22 L. ed. 105.

England.— Haycraft *v.* Creasy, 2 East 92, 6 Rev. Rep. 380.

See 23 Cent. Dig. tit. "Fraud," § 12.

An estimate based upon matters of opinion is within the rule of the text. Warfield *v.* Clark, 118 Iowa 69, 91 N. W. 833. See also Emmerson *v.* Hutchinson, 63 Ill. App. 203. *Compare* Chase *v.* Boughton, 93 Mich. 285, 54 N. W. 44.

A statement as to what a house would cost is merely expression of an opinion. Sweney *v.* Davidson, 68 Iowa 386, 27 N. W. 278. See also Emmerson *v.* Hutchinson, 63 Ill. App. 203.

52. For discussions of this difficulty see the following cases:

Maine.— Braley *v.* Powers, 92 Me. 203, 42 Atl. 362.

Massachusetts.— Andrews *v.* Jackson, 168 Mass. 266, 47 N. E. 412, 60 Am. St. Rep. 390, 37 L. R. A. 402; Burns *v.* Dockray, 156 Mass. 135, 30 N. E. 551; Stubbs *v.* Johnson, 127 Mass. 219.

Michigan.— McDonald *v.* Smith, (1905) 102 N. W. 668.

Missouri.— Lovelace *v.* Suter, 93 Mo. App. 429, 67 S. W. 737.

Nebraska.— Gerner *v.* Mosher, 58 Nebr. 135, 78 N. W. 384, 46 L. R. A. 244.

New York.— Marshall *v.* Seelig, 49 N. Y. App. Div. 433, 63 N. Y. Suppl. 355.

England.— Haycraft *v.* Creasy, 2 East 92, 6 Rev. Rep. 380.

See 23 Cent. Dig. tit "Fraud," § 12.

The rule that an expression of an opinion is not actionable, it has been said, applies only "when the opinion stands by itself and is intended to be taken as distinct from anything else." Hickey *v.* Morrell, 102 N. Y. 454, 463, 7 N. E. 321, 55 Am. Rep. 824. See also McDonald *v.* Smith, (Mich. 1905) 102 N. W. 668; People *v.* Peckens, 153 N. Y. 576, 47 N. E. 883 [*affirming* 12 N. Y. App. Div. 626, 43 N. Y. Suppl. 1160].

A positive assertion made concerning a subject which is susceptible of definite knowledge and upon which the speaker has actual knowledge based upon his own experience, while the other party is ignorant, cannot be said to be merely an expression of opinion. Wilson *v.* Nichols, 72 Conn. 173, 43 Atl. 1052; Braley *v.* Powers, 92 Me. 203, 42 Atl. 362; Burns *v.* Dockray, 156 Mass. 135, 30 N. E. 551; Milliken *v.* Thorndike, 103 Mass. 382. See also Reynolds *v.* Franklin, 39 Minn. 24, 38 N. W. 636.

That exterior of a building is fireproof.— Thus the statement by the owner of a building that the exterior of the building is fireproof has been held to be a statement of an existing fact and not an expression of opinion. Hickey *v.* Morrell, 102 N. Y. 454, 7 N. E. 321, 55 Am. Rep. 824 [*distinguishing* Walker *v.* Milner, 4 F. & F. 745].

Efficacy of a medicine.— A false representation that a worthless medicine is a sure cure for cholera is not a statement of opinion, but is a misrepresentation of fact, and actionable. McDonald *v.* Smith, (Mich. 1905) 102 N. W. 668.

53. See *infra*, VII, M, 2, a, (II).

54. Scholfield Gear, etc., Co. *v.* Scholfield, 71 Conn. 1, 40 Atl. 1046; Marshall *v.* Seelig, 49 N. Y. App. Div. 433, 63 N. Y. Suppl. 355.

55. Robbins *v.* Barton, 50 Kan. 120, 31 Pac. 686; McDonald *v.* Smith, (Mich. 1905) 102 N. W. 668; Vilett *v.* Moler, 82 Minn. 12, 84 N. W. 452; Hickey *v.* Morrell, 102 N. Y. 454, 7 N. E. 321, 55 Am. Rep. 824. See also Tryon *v.* Whitmarsh, 1 Metc. (Mass.) 1, 35 Am. Dec. 339; Haight *v.* Hayt, 19 N. Y. 464; Marshall *v.* Seelig, 49 N. Y. App. Div. 433, 63 N. Y. Suppl. 355; Baker *v.* Seahorn, 1 Swan (Tenn.) 54, 55 Am. Dec. 724; Howard *v.* Gould, 28 Vt. 523, 67 Am. Dec. 728.

56. McDonald *v.* Smith, (Mich. 1905) 102 N. W. 668; Marshall *v.* Seelig, 49 N. Y. App. Div. 433, 63 N. Y. Suppl. 355; Smith *v.* Land, etc., Corp., 28 Ch. D. 15, 49 J. P. 182, 51 L. T. Rep. N. S. 718, per Lord Bowen.

speaks, if the subject is one on which an opinion may approximate to the truth.[57] And as will be shown, a person may commit a fraud by asserting as a fact that which he merely believes.[58]

(B) *Statements of Law* — (1) In General. It is presumed that the law is equally within the knowledge of all persons, and assertions of law, although false,[59] such as misrepresentations as to the legal effect of a particular written instrument[60]

57. Kost *v.* Bender, 25 Mich. 515; Picard *v.* McCormick, 11 Mich. 68; Hedin *v.* Minneapolis Medical, etc., Institute, 62 Minn. 146, 64 N. W. 158, 54 Am. St. Rep. 628, 35 L. R. A. 417 (where a physician was held liable for falsely representing that he could cure a patient); Conlan *v.* Roemer, 52 N. J. L. 53, 18 Atl. 858; Gordon *v.* Butler, 105 U. S. 553, 558, 26 L. ed. 1166 (per Field, J.). See also Kinney *v.* Dodge, 101 Ind. 573. *Compare* Spead *v.* Tomlinson, (N. H. 1904). 59 Atl. 376.

One who contracts with a workman for services within his art or calling has a right to rely upon his representations as to his skill; and although the law will not seek to compel a man to perform that which is impossible, yet it will not allow the workman, after he has obtained by fraudulent misrepresentations as to his skill, payments for services which he cannot perform, to defeat a recovery for the deceit and consequent injury by setting up the impracticability of those services. McGar *v.* Williams, 26 Ala. 469, 62 Am. Dec. 739, where a tinner represented that he would put on plaintiff's house a roof that would not leak for twenty years.

58. See *infra*, III, B, 4, b.

59. *Alabama.*— Lehman *v.* Shackleford, 50 Ala. 437; Martin *v.* Wharton, 38 Ala. 637.

Colorado.— Cooper *v.* Hunter, 8 Colo. App. 101, 44 Pac. 944, statement that one has a claim on public land.

Illinois.— Rogan *v.* Illinois Trust, etc., Bank, 93 Ill. App. 39, statement as to whether certain stock in an incorporated company is or is not liable to assessment.

Indiana.— Kinney *v.* Dodge, 101 Ind. 573. See Platt *v.* Scott, 6 Blackf. 389, 39 Am. Dec. 436.

Maine.— Thompson *v.* Phœnix Ins. Co., 75 Me. 55, 46 Am. Rep. 357, holding that the representation of an insurance company's agent that the non-occupancy of the building insured rendered the policy void if regarded as a statement of the law of insurance is not actionable, although false; and that if such representation is regarded as one of fact, still it is only the expression of an opinion and does not sustain an action.

Nebraska.— See Wood *v.* Roeder, 50 Nebr. 476, 70 N. W. 21.

New York.— Duffany *v.* Ferguson, 66 N. Y. 482 [*reversing* 5 Hun 106] (that a certain legacy was good); Starr *v.* Bennett, 5 Hill 303 (false representation by a deputy sheriff that his return on a fieri facias was in due form of law).

Wisconsin.— Gormely *v.* South Side Gymnastic Assoc., 55 Wis. 350, 13 N. W. 242, false representations that a lessee would have the right to sell intoxicating liquors on the premises.

England.— Beattie *v.* Ebury, L. R. 7 Ch. 777, 41 L. J. Ch. 804, 27 L. T. Rep. N. S. 398, 20 Wkly. Rep. 994.

See 23 Cent. Dig. tit. "Fraud," § 11.

Rule stated.— Fraud cannot be predicated upon representations of the law however false they may be and whether they are suppressions of truth or representations of falsehood. Every person is bound to know the law and not to be deceived by its suppression or false representation. Burt *v.* Bowles, 69 Ind. 1.

60. *Alabama.*—Townsend *v.* Cowles, 31 Ala. 428, guaranty.

Colorado.— Dingle *v.* Trask, 7 Colo. App. 16, 42 Pac. 186.

Indiana.— Fry *v.* Day, 97 Ind. 348; Clodfelter *v.* Hulett, 72 Ind. 137; Smither *v.* Calvert, 44 Ind. 242 (misrepresentation of the legal effect of the language of a deed); Hartsville University *v.* Hamilton, 34 Ind. 506; Clem *v.* Newcastle, etc., R. Co., 9 Ind. 488, 68 Am. Dec. 653; Russell *v.* Branham, 8 Blackf. 277; Elkhart First Nat. Bank *v.* Osborne, 18 Ind. App. 442, 48 N. E. 256.

Missouri.— Dalrymple *v.* Craig, 149 Mo. 345, 50 S. W. 884.

New York.— Rose *v.* Saunders, 38 Hun 575; Leszynsky *v.* Ross, 35 Misc. 652, 72 N. Y. Suppl. 352; Brady *v.* Edwards, 35 Misc. 435, 71 N. Y. Suppl. 972 (misstatement as to legal rights in a play); Unckles *v.* Hentz, 18 Misc. 644, 43 N. Y. Suppl. 749 (representation by the trustees of a trust company that the trust was a legal organization and authorized to issue certificates of shares).

United States.— New York Mut. L. Ins. Co. *v.* Phinney, 178 U. S. 327, 20 S. Ct. 906, 44 L. ed. 1088 [*reversing* 76 Fed. 617, 22 C. C. A. 425].

See 23 Cent. Dig. tit. "Fraud," § 11.

Every person is presumed to know the contents of an agreement which he signs, and has therefore no right to rely on the statements of the other party as to its legal effect. Clem *v.* Newcastle, etc., R. Co., 9 Ind. 488, 68 Am. Dec. 653; Russell *v.* Branham, 8 Blackf. (Ind.) 277. *Compare* Wells *v.* Adams, 88 Mo. App. 215.

On the other hand, fraud may be predicated on false statements as to the meaning of technical language in a writing where the other party is ignorant of its true meaning and relies upon the representations to his injury. McKindly *v.* Drew, 71 Vt. 138, 41 Atl. 1039. See also Calkins *v.* State, 13 Wis. 389; 1 Bigelow Fraud 507. And in such a case the fact that the guilty party actually read the document to the party deceived is immaterial if he saw and realized that the

or obligation,[61] are as a general rule regarded as mere expressions of opinion and cannot be made the basis of an action for deceit. Where, however, a confidential relation exists between the parties of which one knowingly avails himself to mislead the other by a misrepresentation of the law,[62] or where, as has been said, one knowingly takes advantage of the other's actual ignorance of the law, to mislead him by misstatements thereof,[63] an action may be maintained. The line of demarcation between representations of law and of fact is sometimes very obscure,[64] the assertions of law sometimes being so mingled or associated with statements of fact as really to become a part thereof.[65] For example, it is held that a statement that a deed of trust is "not a good and subsisting lien" is an expression of a mere legal opinion,[66] but that a statement that such a deed is a first lien[67] or that a deed does not cover certain land[68] constitutes a false representation of fact, and is therefore actionable. And according to the principle previously stated[69] a statement of a legal conclusion may amount to a representation that facts exist which justify the conclusion and thus be actionable as a representation of fact.[70]

(2) Of Foreign Law. A representation as to a foreign law is not within the above rule, but is regarded as a representation of fact and may be actionable if false and fraudulent.[71]

(vi) *Promissory Statements* — (a) *In General.* As a general rule false representations upon which fraud may be predicated must be of existing facts, or facts which previously existed, and cannot consist of mere promises or conjectures as to future acts or events, although such promises are subsequently broken,[72]

latter was still under the false impression previously created. McKindly *v.* Drew, *supra.*

Representations as to the purpose for which certain writings are wanted, and that such purpose cannot be accomplished without them, are representations of fact, and if false and fraudulent may be actionable. Rose *v.* Saunders, 38 Hun (N. Y.) 575.

61. Lexow *v.* Julian, 21 Hun (N. Y.) 577 [*affirmed* in 86 N. Y. 638], that a certain debt is a lien on a specific thing.

62. See *infra*, III, B, 5, b, (III).

63. Townsend *v.* Cowles, 31 Ala. 428. A misrepresentation by the holder of a tenant's notes for the rent of land as to his legal right in respect to the crop grown on the land, made to a subtenant who was ignorant of the terms of the contract between the tenant and his landlord, and by which he was induced to surrender a legal right, would be a misrepresentation as to a matter of fact, and would constitute fraud. Lehman *v.* Shackleford, 50 Ala. 437.

64. In West London Commercial Bank *v.* Kitson, 13 Q. B. D. 360, 53 L. J. Q. B. 345, 50 L. T. Rep. N. S. 656, 32 Wkly. Rep. 757, it was held that an acceptance of a bill of exchange by directors of a company was a representation that the company had power under private acts of parliament to accept a bill, and was a representation of fact and not of law.

Statement of one that he has a landlord's lien on property is not necessarily a mere conclusion of law, which may not be the basis of an action for false representations. Texas Cotton Products Co. *v.* Denny, (Tex. Civ. App. 1903) 78 S. W. 557.

A false representation as to the expiration of the time of redemption from a foreclosure sale is a representation of fact and not of law, and if false and fraudulently made is actionable. Kelly *v.* Rogers, 21 Minn. 146.

A representation by an insurance agent as to the kind of company he represents is a representation of fact and not of law. Harris-Emery Co. *v.* Pitcairn, 122 Iowa 595, 98 N. W. 476.

65. See Dashiel *v.* Harshman, 113 Iowa 283, 85 N. W. 85.

66. Dalrymple *v.* Craig, 149 Mo. 345, 50 S. W. 884.

67. Kehl *v.* Abram, 210 Ill. 218, 71 N. E. 347, 102 Am. St. Rep. 158 [*affirming* 112 Ill. App. 77]; Bristol *v.* Braidwood, 28 Mich. 191.

68. Dashiel *v.* Harshman, 113 Iowa 283, 85 N. W. 85.

69. See *supra*, III, B, 1, b, (v), (a).

70. Windram *v.* French, 151 Mass. 547, 24 N. E. 914, 8 L. R. A. 750 (statement that stock is non-assessable); Burns *v.* Lane, 138 Mass. 350 (statement that goods are attached).

71. Bethell *v.* Bethell, 92 Ind. 318; Schneider *v.* Schneider, 125 Iowa 1, 98 N. W. 159; Windram *v.* French, 151 Mass. 547, 24 N. E. 914, 8 L. R. A. 750; Wood *v.* Roeder, 50 Nebr. 476, 70 N. W. 21.

72. *Colorado.*— Adams *v.* Schiffer, 11 Colo. 15, 17 Pac. 21, 7 Am. St. Rep. 202; Beard *v.* Bliley, 3 Colo. App. 479, 34 Pac. 271.

Delaware.— See Frantz *v.* Girard L. Ins., etc., Co., 2 Pennew. 447, 47 Atl. 1000.

Illinois.— Kitson *v.* Farwell, 132 Ill. 327, 23 N. E. 1024; Gage *v.* Lewis, 68 Ill. 604; Dickinson *v.* Atkins, 100 Ill. App. 401 (representations, by means of which a note was obtained, as to what defendant would do with the proceeds of the note); Murray *v.* Smith,

unless the promise includes a misrepresentation of existing facts,[73] or the statement is as to some matter peculiarly within the speaker's knowledge, and he makes the statement as a fact.[74] Whether a false statement of intention may be actionable appears not to be definitely settled. On the one hand it is held that, although it is

42 Ill. App. 548; Knight *v.* Gaultney, 23 Ill. App. 376.

Indiana.— Smith *v.* Parker, 148 Ind. 127, 45 N. E. 770; Balue *v.* Taylor, 136 Ind. 368, 36 N. E. 269; Bennett *v.* McIntire, 121 Ind. 231, 23 N. E. 78, 6 L. R. A. 736; Burt *v.* Bowles, 69 Ind. 1; Welshbillig *v.* Dienhart, 65 Ind. 94; Reagan *v.* Hadley, 57 Ind. 509; Adkins *v.* Adkins, 48 Ind. 12; State *v.* Prather, 44 Ind. 287; Hartsville University *v.* Hamilton, 34 Ind. 506; Fouty *v.* Fouty, 34 Ind. 433; Richter *v.* Irvine, 28 Ind. 26; McAllister *v.* Indianapolis, etc., R. Co., 15 Ind. 11. See Caylor *v.* Roe, 99 Ind. 1.

Maine.— Palmer *v.* Bell, 85 Me. 352, 27 Atl. 250; Long *v.* Woodman, 58 Me. 49.

Massachusetts.— Dawe *v.* Morris, 149 Mass. 188, 21 N. E. 313, 14 Am. St. Rep. 404, 4 L. R. A. 158; Knowlton *v.* Keenan, 146 Mass. 86, 15 N. E. 127, 4 Am. St. Rep. 282. See Pedrick *v.* Porter, 5 Allen 324. *Compare* Garry *v.* Garry, 187 Mass. 62, 72 N. E. 325.

Michigan.— Hubbard *v.* Long, 105 Mich. 442, 63 N. W. 644; Black *v.* Miller, 75 Mich. 323, 42 N. W. 837.

Missouri.— Saunders *v.* McClintock, 46 Mo. App. 216; Bullock *v.* Wooldridge, 42 Mo. App. 356.

Nebraska.— Pollard *v.* McKenney, (1903) 96 N. W. 679; Esterly Harvesting Mach. Co. *v.* Berg, 52 Nebr. 147, 71 N. W. 952. See Markel *v.* Moudy, 11 Nebr. 213, 7 N. W. 853.

New Hampshire.— Goodwin *v.* Horne, 60 N. H. 485.

New Jersey.— See Norfolk, etc., Hosiery Co. *v.* Arnold, 49 N. J. Eq. 390, 23 Atl. 514.

New Mexico.— See Ellis *v.* Newbrough, 6 N. M. 181, 27 Pac. 490.

New York.— Closius *v.* Reiners, 13 N. Y. App. Div. 163, 43 N. Y. Suppl. 297; Lexow *v.* Julian, 21 Hun 577; Farrington *v.* Bullard, 40 Barb. 512; Gray *v.* Palmer, 2 Rob. 500; Hackett *v.* Equitable L. Assur. Soc., 30 Misc. 523, 60 N. Y. Suppl. 847 [*affirmed* as to other matters in 50 N. Y. App. Div. 266, 63 N. Y. Suppl. 1092]. See Kley *v.* Healy, 149 N. Y. 346, 44 N. E. 150.

Pennsylvania.— Grove *v.* Hodgers, 55 Pa. St. 504; Wilkinson *v.* Starr, 14 Wkly. Notes Cas. 359.

South Carolina.— Holmes *v.* Caldwell, 10 Rich. 311.

Texas.— Chicago, etc., R. Co. *v.* Titterington, 84 Tex. 218, 19 S. W. 472, 31 Am. St. Rep. 39; New York L. Ins. Co. *v.* Miller, 11 Tex. Civ. App. 536, 32 S. W. 550; Jones Lumber Co. *v.* Villegas, 8 Tex. Civ. App. 669, 28 S. W. 558.

Vermont.— Alletson *v.* Powers, 72 Vt. 417, 48 Atl. 647, holding that the failure of a grantor of mortgaged property to keep an agreement to pay interest on the mortgage is a breach of contract only, for which no recovery can be had in an action for fraud.

Virginia.— Watkins *v.* West Wytheville Land, etc., Co., 92 Va. 1, 22 S. E. 554. See Orr *v.* Goodloe, 93 Va. 263, 24 S. E. 1014.

Wisconsin.— Milwaukee Brick, etc., Co. *v.* Schoknecht, 108 Wis. 457, 84 N. W. 838; Field *v.* Siegel, 99 Wis. 605, 75 N. W. 397, 47 L. R. A. 433; Spence *v.* Geilfuss, 89 Wis. 499, 62 N. W. 529; Warner *v.* Benjamin, 89 Wis. 290, 62 N. W. 179; Sheldon *v.* Davidson, 85 Wis. 138, 55 N. W. 161; Patterson *v.* Wright, 64 Wis. 289, 25 N. W. 10.

United States.— Fenwick *v.* Grimes, 8 Fed. Cas. No. 4,734, 5 Cranch C. C. 603.

See 23 Cent. Dig. tit. "Fraud," § 14.

Such promissory statements properly constitute a contract for a violation of which the remedy is by action thereon. Dawe *v.* Morris, 149 Mass. 188, 21 N. E. 313, 14 Am. St. Rep. 504, 4 L. R. A. 158.

A representation by a lessor that he had contracted for improvements on the leased premises is in the nature of a promise and is not a sufficient basis for an action of fraud. Welshbillig *v.* Dienhart, 65 Ind. 94.

73. Wilkinson *v.* Starr, 14 Wkly. Notes Cas. (Pa.) 359. Where a fraud has been accomplished in part by false representations and in part by false promises, evidence of the promises and their non-performance is admissible, although the promises in and of themselves are nullities and not grounds of action. McDonald *v.* Smith, (Mich. 1905) 102 N. W. 668.

Statements of contemporaneous facts as to what the speaker is actually doing at the time of the negotiations cannot be considered as promissory. Kilgore *v.* Bruce, 166 Mass. 136, 44 N. E. 108.

74. Tanner *v.* Clark, 13 Ky. L. Rep. 922, holding that a statement of a matter in the future if affirmed as a fact may, as well as a statement of a fact as existing at present, amount to a fraudulent representation. A representation by a well-borer that he had certain appliances by which he could remedy the evils resulting from an influx of quicksand, coupled with the assurance that he would put them into the wells if the contract was made, when he had no such appliances, are representations as to a fact and not mere promises to do something in the future. Davis *v.* Driscoll, 22 Tex. Civ. App. 14, 54 S. W. 43.

False representations as to the future earnings of a proposed corporation are fraudulent if made with intent to deceive by a person having superior knowledge as to such matters. French *v.* Ryan, 104 Mich. 625, 62 N. W. 1016.

Representations to a married woman that her husband was to receive one half of the proceeds of the sale of property, made to induce her to release her dower, were not merely promissory representations, but con-

difficult to prove what the state of a man's mind is at a particular time, yet if it can be ascertained it is as much a fact as anything else; and thus that a statement of intention is a statement of fact, and if it is false and accompanied by the necessary elements of actionable fraud, it may constitute grounds for an action of deceit.[75] On the other hand it is held that a statement of intention is merely a promissory statement and therefore is not actionable, although false.[76]

(B) *Promise With Intent Not to Perform.* The general rule above stated is held to apply, in some jurisdictions, although the promise is accompanied with an intention not to perform it, the proper remedy in such case being upon the promise, if valid.[77] In most jurisdictions, however, the contrary is held to be the rule; that if the promise is made merely as a means of deceiving and with no intention to perform, it will support an action of deceit.[78]

(VII) *STATEMENTS REQUIRED BY LAW.* One who makes a false representa-

stituted statements as to existing conditions and arrangements. Garry *v.* Garry, 187 Mass. 62, 72 N. E. 335.

75. Edgington *v.* Fitzmaurice, 29 Ch. D. 459, 483, 50 J. P. 52, 55 L. J. Ch. 650, 53 L. T. Rep. N. S. 369, 33 Wkly. Rep. 911, in which Bowen, L. J., said: "The state of a man's mind is as much a fact as the state of his digestion."

76. McAllister *v.* Indianapolis, etc., R. Co., 15 Ind. 11; Tanner *v.* Clarke, 13 Ky. L. Rep. 922. And see cases cited in preceding notes. As distinguished from the false representation of a fact the false representation as to a matter of intention not amounting to a matter of fact, although it may have influenced a transaction, is not a fraud at law. Gage *v.* Lewis, 68 Ill. 604 [*quoting* Kerr Fr. & M. 88].

No statement as to what would be done or was intended to be done in the future constitutes fraud. Milwaukee Brick, etc., Co. *v.* Schoknecht, 108 Wis. 457, 84 N. W. 838.

77. Kitson *v.* Farwell, 132 Ill. 327, 23 N. E. 1024; People *v.* Healy, 128 Ill. 9, 20 N. E. 692, 15 Am. St. Rep. 90; Gage *v.* Lewis, 68 Ill. 604; Murray *v.* Smith, 42 Ill. App. 548; Farrington *v.* Bullard, 40 Barb. (N. Y.) 512; Gray *v.* Palmer, 2 Rob. (N. Y.) 500; Gallager *v.* Brunel, 6 Cow. (N. Y.) 346. *Compare* Miller *v.* Howell, 2 Ill. 499, 32 Am. Dec. 36; Hill *v.* Chamberlain, 64 N. Y. App. Div. 609, 71 N. Y. Suppl. 639 [*affirmed* in 170 N. Y. 595, 63 N. E. 1117] (holding that fraudulently procuring a mortgagor to allow his property to be sold at an inadequate price at foreclosure sale by an agreement that the purchaser will act on behalf of the mortgagor and bid in the property for him, thus inducing the mortgagor not to bid, the party purchasing for himself and refusing to comply with his agreement, constitutes actionable fraud, although the agreement is not sufficient to constitute a valid contract); Bernstein *v.* Lester, 84 N. Y. Suppl. 496 (holding that one who obtains money on a promise made with fraudulent intent, to deliver certain goods in his stock, and then sells his entire stock to another, is liable for the fraud). In Gage *v.* Lewis, *supra*, (at page 615) Mr. Justice Schofield says: "It cannot be said that these representations and promises were false when made, for, until the proper time arrived, and plaintiff refused to comply with them, it could not be positively known that they would not be performed. Even if, at the time they were made, it was not intended to comply with them, it was but an unexecuted intention, which has never been held, of itself, to constitute fraud. If they legally amount to anything, they constitute a contract."

78. *California.*— Brison *v.* Brison, 75 Cal. 525, 17 Pac. 689, 7 Am. St. Rep. 189; Cockrill *v.* Hall, 65 Cal. 326, 4 Pac. 33.

Connecticut.— Ayres *v.* French, 41 Conn. 142.

Indiana.— Smith *v.* Parker, 148 Ind. 127, 45 N. E. 770, holding complaint in action for fraud defective, for not alleging that when defendant made the promises he did not intend to fulfil them, or to state facts from which such intention can be inferred. But see Balue *v.* Taylor, 136 Ind. 368, 36 N. E. 269; Burt *v.* Bowles, 69 Ind. 1.

Iowa.— *In re* Harker, 113 Iowa 584, 85 N. W. 786, holding that an allegation that a party to a contract did not intend to carry it out without the statement of any facts whatever establishing such an intent, except the ultimate failure to perform the agreement, is not a sufficient charge of fraud since such failure is not evidence of fraud in the inception of the contract.

Kentucky.— Oldham *v.* Bentley, 6 B. Mon. 428.

Maryland.— Price *v.* Read, 2 Harr. & G. 291.

Massachusetts.— See Sweet *v.* Kimball, 166 Mass. 332, 44 N. E. 243, 55 Am. St. Rep. 406, holding that the use by a creditor of promises of assistance to his debtor in his affairs as a device to lure him into the state, with intent to cause his arrest and compel him to pay for his release, is a sufficient fraud upon which to found an action.

Nebraska.— Pollard *v.* McKenney, (1903) 96 N. W. 679.

New Hampshire.— Goodwin *v.* Horne, 60 N. H. 485.

Rhode Island.— Swift *v.* Rounds, 19 R. I. 527, 35 Atl. 45, 61 Am. St. Rep. 791, 33 L. R. A. 561.

South Carolina.— See Holmes *v.* Caldwell, 10 Rich. 311.

Texas.— McFarland *v.* McGill, 16 Tex. Civ. App. 298, 41 S. W. 402; Jones Lumber Co. *v.*

tion under circumstances which would render him liable if it were made voluntarily is not excused by the fact that the law requires him to make a true statement of the same subject-matter.[79]

2. Materiality of Representation — a. In General. The representation must be material; that is, it must relate to some matter so substantial and important as to influence the action of the party to whom the representation is made.[80] The question whether a particular misrepresentation is material ordinarily presents a question of fact which, under proper instructions, is to be determined by the jury in the light of the circumstances attending the transaction.[81]

b. Of Concealment. Concealment in order to be actionable must be the concealment of a material fact — one which if known would be likely to influence the party's action.[82]

3. Falsity of Representation — a. In General. As a general rule a representation in order to be actionable must be actually false.[83] But there are circum-

Villegas, 8 Tex. Civ. App. 669, 28 S. W. 558. See Chicago, etc., R. Co. *v.* Titterington, 84 Tex. 218, 19 S. W. 472, 31 Am. St. Rep. 39.

United States.— Fenwick *v.* Grimes, 8 Fed. Cas. No. 4,734, 5 Cranch C. C. 603.

See 23 Cent. Dig. tit. "Fraud," § 14.

79. Gerner *v.* Mosher, 58 Nebr. 135, 78 N. W. 384, 46 L. R. A. 244.

This principle frequently appears in cases where the officers of corporations are required by law to make certain published statements concerning the affairs of the corporation. See Gerner *v.* Mosher, 58 Nebr. 135, 78 N. W. 384, 46 L. R. A. 244, statement required to be made by directors of national bank. And see Banks and Banking, 5 Cyc. 481; Corporations, 10 Cyc. 842 *et seq.*; and, generally, Insurance.

80. *Arkansas.*— Winter *v.* Bandel, 30 Ark. 362.

California.— Nounnan *v.* Sutter County Land Co., 81 Cal. 1, 22 Pac. 515, 6 L. R. A. 219.

Colorado.— Dingle *v.* Trask, 7 Colo. App. 16, 42 Pac. 186.

Illinois.— Schwabacker *v.* Riddle, 99 Ill. 343.

Iowa.— Hale *v.* Philbrick, 47 Iowa 217; Sheriff *v.* Hull, 37 Iowa 174.

Maine.— Palmer *v.* Bell, 85 Me. 352, 27 Atl. 250.

Maryland.— McAleer *v.* Horsey, 35 Md. 439.

Massachusetts.— Dawe *v.* Morris, 149 Mass. 188, 21 N. E. 315, 14 Am. Rep. 404, 4 L. R. A. 158; Moore *v.* Cains, 116 Mass. 396.

Michigan.— Collins *v.* Jackson, 54 Mich. 186, 19 N. W. 947; Hall *v.* Johnson, 41 Mich. 286, 2 N. W. 55.

Missouri.— Franklin *v.* Holle, 7 Mo. App. 241.

New Jersey.— Byard *v.* Holmes, 34 N. J. L. 296.

North Carolina.—Gilmer *v.* Hands, 84 N. C. 317.

Texas.— Furneaux *v.* Webb, (Civ. App. 1903) 77 S. W. 828; McCall *v.* Sullivan, 1 Tex. App. Civ. Cas. § 1.

West Virginia.— Crislip *v.* Cain, 19 W. Va. 438.

England.— Smith *v.* Chadwick, 20 Ch. D. 27, 51 L. J. Ch. 597, 46 L. T. Rep. N. S. 702, 30 Wkly. Rep. 661 [*affirmed* in 9 App. Cas. 187, 48 J. P. 644, 53 L. J. Ch. 873, 50 L. T. Rep. N. S. 697, 32 Wkly. Rep. 687].

See 23 Cent. Dig. tit. "Fraud," § 16.

81. See McAleer *v.* Horsey, 35 Md. 439. And see *infra*, VII, M, 2, b.

While there is no definite standard by which to determine whether a fraudulent misrepresentation is material, a working rule has been laid down as follows: If the misrepresentation be such that had it not been made the transaction would not have been entered into or completed, then it is material; but if it be shown or made probable that the same thing would have been done in the same way if the misrepresentation had not been made, it cannot be deemed material. McAleer *v.* Horsey, 35 Md. 439; Gilmer *v.* Hands, 84 N. C. 317. See also Hale *v.* Philbrick, 47 Iowa 217; Farmers' Stock Breeding Assoc. *v.* Scott, 53 Kan. 534, 36 Pac. 978. *Compare* Cabot *v.* Christie, 42 Vt. 120, 1 Am. Rep. 313, where it is considered that such an inquiry would be too speculative. It has been held that an instruction that the misrepresentation must be intended to deceive, calculated to deceive, and must actually deceive, sufficiently informs the jury that the statement must be material. McDonald *v.* Smith, (Mich. 1905) 102 N. W. 668.

82. Jordan *v.* Pickett, 78 Ala. 331; Otis *v.* Raymond, 3 Conn. 413.

83. *Colorado.*— Cole *v.* Smith, 26 Colo. 506, 58 Pac. 1086.

Georgia.— Hart *v.* Waldo, 117 Ga. 590, 43 S. E. 998.

Illinois.— Sherburne *v.* Tobey Furniture Co., 19 Ill. App. 615.

Iowa.—Allison *v.* Jack, 76 Iowa 205, 40 N. W. 811; Hallam *v.* Todhunter, 24 Iowa 166.

Massachusetts.— Putney *v.* Hardy, 99 Mass. 5.

New York.— Catlin *v.* Vietor, 52 N. Y. Super. Ct. 169; Ide *v.* Graham, 3 Misc. 151, 22 N. Y. Suppl. 709; Peterson *v.* Humphrey, 4 Abb. Pr. 394.

North Carolina.— Ramsey *v.* Wallace, 100 N. C. 75, 6 S. E. 638.

Pennsylvania.— Huber *v.* Wilson, 23 Pa. St. 178.

United States.— Hindman *v.* Louisville First Nat. Bank, 112 Fed. 931, 50 C. C. A.

stances under which an actionable fraud may be perpetrated, although the verbal representations themselves are literally true, as where they are intended to convey and do convey a false impression.[84]

b. "Half-Truths." If by false representations one actually misleads another to his injury, he commits an actionable fraud even though some of his representations are true;[85] and the same result follows where representations are made which are in fact true but are accompanied by a concealment of material facts, so that considering the representations and the concealment together a false impression is produced.[86]

c. Representation Subsequently Becoming False.[87] Where representations true when made subsequently become false by reason of changes in their subject-matter, and the party to whom they were made is ignorant of the changed conditions, it is the duty of the speaker to inform him thereof, and if he fails to do so and allows him to act in the belief that the original condition of affairs still exists, he is guilty of fraud.[88]

4. Knowledge and Belief of Party Charged — a. In General. It is well settled that to support an action of deceit based on a false representation a scienter must be proved;[89] that is, the representation must either (1) be false to the knowledge of the party who makes it, or (2) must be made as a positive assertion calculated

623, 57 L. R. A. 108; Tappan *v.* Darling, 23 Fed. Cas. No. 13,746, 3 Mason 101.

See 23 Cent. Dig. tit. "Fraud," § 3.

The misrepresentation must be materially and substantially false. Sheriff *v.* Hull, 37 Iowa 174.

84. Mulligan *v.* Bailey, 28 Ga. 507, 510 (where Lumpkin, J., said: "A fraud may be as effectually perpetrated by telling the truth as a falsehood; by calling things by their right names as by their wrong names"); Denny *v.* Gilman, 26 Me. 149; Lomerson *v.* Johnston, 47 N. J. Eq. 312, 20 Atl. 675, 24 Am. St. Rep. 410; Moens *v.* Heyworth, 10 L. J. Exch. 177, 182, 10 M. & W. 147 (where Baron Alderson said: "I consider that if a person makes a representation, or takes an oath of that which is true, intending that the party to whom the representation is made should not believe it to be true, that is a false representation").

85. Mulligan *v.* Bailey, 28 Ga. 507.

86. *Massachusetts.*— Tryon *v.* Whitmarsh, 1 Metc. 1, 35 Am. Dec. 359.

New York.— Nickley *v.* Thomas, 22 Barb. 652; Addington *v.* Allen, 11 Wend. 374 [*reversing* on other grounds 7 Wend. 9].

Tennessee.— See Allison *v.* Tyson, 5 Humphr. 449.

Vermont.— Mallory *v.* Leach, 35 Vt. 156, 8 Am. Dec. 625. See also Graham *v.* Stiles, 38 Vt. 578.

England.— Tapp *v.* Lee, 3 B. & P. 367.

See 23 Cent. Dig. tit. "Fraud," §§ 3, 15.

87. As affecting the validity of contracts see Contracts, 9 Cyc. 424.

88. Loewer *v.* Harris, 57 Fed. 368, 6 C. C. A. 394.

89. *Arkansas.*— May *v.* Dyer, 57 Ark. 441, 21 S. W. 1064; Righter *v.* Roller, 31 Ark. 170; Morton *v.* Scull, 23 Ark. 289.

California.— Toner *v.* Meussdorffer, 123 Cal. 462, 56 Pac. 39; Perkins *v.* Fish, 121 Cal. 317, 53 Pac. 901; Davidson *v.* Jordan, 47 Cal. 351.

Colorado.— Connell *v.* El Paso Gold Min., etc., Co., (Sup. 1904) 78 Pac. 677.

Connecticut.— Elwell *v.* Russell, 71 Conn. 462, 42 Atl. 862; Hall *v.* Bradbury, 40 Conn. 32; Bartholomew *v.* Bushnell, 20 Conn. 271, 52 Am. Dec. 338.

Delaware.— Grier *v.* Dehan, 5 Houst. 401; Herring *v.* Draper, 2 Houst. 158; Fooks *v.* Waples, 1 Harr. 131, 25 Am. Dec. 64.

Florida.— Williams *v.* McFadden, 23 Fla 143, 1 So. 618, 11 Am. St. Rep. 345.

Georgia.— Cooley *v.* King, 113 Ga. 1163, 39 S. E. 486; Slade *v.* Little, 20 Ga. 371; Manes *v.* Kenyon, 18 Ga. 291.

Illinois.— Holdom *v.* Ayer, 110 Ill. 448; Schwabacker *v.* Riddle, 99 Ill. 343; Wharf *v.* Roberts, 88 Ill. 426; St. Louis, etc., R. Co. *v.* Rice, 85 Ill. 406; Tone *v.* Wilson, 81 Ill. 529; Wheeler *v.* Randall, 48 Ill. 182; Wightman *v.* Tucker, 50 Ill. App. 75; Knight *v.* Gaultney, 23 Ill. App. 376; Rice *v.* Van Ackere, 22 Ill. App. 588; Sherburne *v.* Tobey Furniture Co., 19 Ill. App. 615; Johnson *v.* Beeney, 9 Ill. App. 64; Clement *v.* Boone, 5 Ill. App. 109; Dwight *v.* Chase, 3 Ill. App. 67.

Indiana.— Gatling *v.* Newell, 9 Ind. 572; State Bank *v.* Hamilton, 2 Ind. 457; Hopper *v.* Sisk, 1 Ind. 176; Humphreys *v.* Comline, 8 Blackf. 516.

Iowa.— Riley *v.* Bell, 120 Iowa 618, 95 N. W. 170; McKown *v.* Furgason, 47 Iowa 636. See also Hubbard *v.* Weare, 79 Iowa 678, 44 N. W. 915. There are a number of cases, however, which are more strict in their requirements and which assert without qualification that actual knowledge of the falsity is essential. Warfield *v.* Clark, 118 Iowa 69, 91 N. W. 833; Mentzer *v.* Sargeant, 115 Iowa 527, 88 N. W. 1068; Boddy *v.* Henry, 113 Iowa 462, 85 N. W. 771, 53 L. R. A. 769; Scroggin *v.* Wood, 87 Iowa 497, 54 N. W. 437; Phelps *v.* James, 79 Iowa 262, 44 N. W. 543; Allison *v.* Jack, 76 Iowa 205, 40 N. W. 811; Watson Coal, etc., Co. *v.* James, 72 Iowa

to convey the impression that he has actual knowledge of its truth when in fact he is conscious that he has no such knowledge. It is generally held too that if

184, 33 N. W. 622; Avery *v.* Chapman, 62 Iowa 144, 17 N. W. 454; Hallam *v.* Todhunter, 24 Iowa 166; Gates *v.* Reynolds, 13 Iowa 1; Courtney *v.* Carr, 11 Iowa 295; Holmes *v.* Clark, 10 Iowa 423.

Kansas.— Farmers' Stock Breeding Assoc. *v.* Scott, 53 Kan. 534, 36 Pac. 978; Stevens *v.* Allen, 51 Kan. 144, 32 Pac. 922; Da Lee *v.* Blackburn, 11 Kan. 190; Kansas Refrigerator Co. *v.* Pert, 3 Kan. App. 364, 42 Pac. 943.

Kentucky.— Trimble *v.* Reid, 97 Ky. 713, 31 S. W. 861; Warren *v.* Barker, 2 Duv. 155; Campbell *v.* Hillman, 15 B. Mon. 508, 61 Am. Dec. 195; Ball *v.* Lively, 4 Dana 369; Kirtley *v.* Shinkle, 69 S. W. 723, 24 Ky. L. Rep. 608; Pieratt *v.* Young, 49 S. W. 964, 20 Ky. L. Rep. 1815.

Massachusetts.— Sibley *v.* Hulbert, 15 Gray 509; Thaxter *v.* Bugbee, 5 Cush. 221; Stone *v.* Denny, 4 Metc. 151; Page *v.* Bent, 2 Metc. 371 (per Shaw, C. J.); Tryon *v.* Whitmarsh, 1 Metc. 1, 35 Am. Dec. 339; Emerson *v.* Brigham, 10 Mass. 197, 6 Am. Dec. 109. See also Holst *v.* Stewart, 154 Mass. 445, 28 N. E. 574.

Minnesota.— Brooks *v.* Hamilton, 15 Minn. 26; Faribault *v.* Sater, 13 Minn. 223.

Mississippi.— Sims *v.* Eiland, 57 Miss. 83; Taylor *v.* Frost, 39 Miss. 328.

Missouri.— People's Nat. Bank *v.* Central Trust Co., 179 Mo. 648, 78 S. W. 618; Anderson *v.* McPike, 86 Mo. 293; Lovelace *v.* Suter, 93 Mo. App. 429, 67 S. W. 737; Live Stock Remedy Co. *v.* White, 90 Mo. App. 498; Paretti *v.* Rebenack, 81 Mo. App. 494; Felix *v.* Shirley, 60 Mo. App. 621; Redpath *v.* Lawrence, 42 Mo. App. 101; Koontz *v.* Kaufman, 31 Mo. App. 397; Arthur *v.* Wheeler, etc., Mfg. Co., 12 Mo. App. 335; Merchants' Nat. Bank *v.* Sells, 3 Mo. App. 85; Brownlee *v.* Hewitt, 1 Mo. App. 360. See also Hume *v.* Brelsford, 51 Mo. App. 651.

New Hampshire.— Pettigrew *v.* Chellis, 41 N. H. 95; Mahurin *v.* Harding, 28 N. H. 128, 59 Am. Dec. 401; Crooker *v.* Willard, 28 N. H. 134 note.

New Jersey.— Allen *v.* Wanamaker, 31 N. J. L. 370; Searing *v.* Lum, 5 N. J. L. 683.

New York.— Powell *v.* F. C. Linde Co., 171 N. Y. 675, 64 N. E. 1125; Kountze *v.* Kennedy, 147 N. Y. 124, 41 N. E. 414, 49 Am. St. Rep. 651, 29 L. R. A. 360 [*affirming* 72 Hun 311, 25 N. Y. Suppl. 682]; Daly *v.* Wise, 132 N. Y. 306, 30 N. E. 837, 16 L. R. A. 236; Lamb *v.* Kelsey, 54 N. Y. 645; Wakeman *v.* Dailey, 51 N. Y. 27, 10 Am. Rep. 551 [*affirming* 44 Barb. 498]; Hubbell *v.* Meigs, 50 N. Y. 480; Oberlander *v.* Spiess, 45 N. Y. 175; Meyer *v.* Amidon, 45 N. Y. 169; Chester *v.* Comstock, 40 N. Y. 575 note [*affirming* 6 Rob. 1]; Marsh *v.* Falker, 40 N. Y. 562; National L. Ins. Co. *v.* Minch, 6 Lans. 100; Clark *v.* Bamer, 2 Lans. 67; Powell *v.* F. C. Linde Co., 58 N. Y. App. Div. 261, 68 N. Y. Suppl. 1070 [*affirmed* in 171 N. Y. 675, 64 N. E. 1125]; Hemenway *v.* Keeler, 88 Hun 405, 34 N. Y. Suppl. 808; Marshall *v.* Fowler, 7 Hun 237; Robinson *v.* Flint, 58 Barb. 100; Marshall *v.* Gray, 57 Barb. 414, 39 How. Pr. 172; Moore *v.* Noble, 53 Barb. 425; Binnard *v.* Spring, 42 Barb. 470; Lawton *v.* Goodrich, 4 Silv. Sup. 24, 7 N. Y. Suppl. 76; Ide *v.* Graham, 3 Misc. 151, 22 N.Y. Suppl. 709; Wilmerdings *v.* Fowler, 15 Abb. Pr. N. S. 86; Peterson *v.* Humphrey, 4 Abb. Pr. 394; Mead *v.* Mali, 15 How. Pr. 347; Williams *v.* Wood, 14 Wend. 126. See also Indianapolis, etc., R. Co. *v.* Tyng, 2 Hun 311, 48 How. Pr. 193 [*affirmed* in 63 N. Y. 653]; Bigler *v.* Atkins, 7 N. Y. St. 235. It must be shown not only that the representation was false and material, "but that the defendant when he made it knew that it was false, or not knowing whether it was true or false and not caring what the fact might be, made it recklessly, paying no heed to the injury which might ensue." Kountze *v.* Kennedy, 147 N. Y. 124, 129, 41 N. E. 414, 49 Am. St. Rep. 651, 29 L. R. A. 360 [*affirming* 72 Hun 311, 25 N. Y. Suppl. 682], per Andrews, C. J.

North Carolina.— McEntire *v.* McEntire, 43 N. C. 297; Cobb *v.* Fogalman, 23 N. C. 440; Hamrick *v.* Hogg, 12 N. C. 350.

Ohio.— Foreman *v.* Compton, 4 Ohio Dec. (Reprint) 479, 2 Clev. L. Rep. 218.

Oregon.— Martin *v.* Eagle Development Co., 41 Oreg. 448, 69 Pac. 216.

Pennsylvania.— Lamberton *v.* Dunham, 165 Pa. St. 129, 30 Atl. 716; Griswold *v.* Gebbie, 126 Pa. St. 353, 17 Atl. 673, 12 Am. St. Rep. 878; Erie City Iron Works *v.* Barber, 106 Pa. St. 125, 51 Am. Rep. 508; Cox *v.* Highley, 100 Pa. St. 249; Pennsylvania R. Co. *v.* Zug, 47 Pa. St. 480; Huber *v.* Wilson, 23 Pa. St. 178; Staines *v.* Shore, 16 Pa. St. 200, 55 Am. Dec. 492; Dutton *v.* Pyle, 7 Pa. Super. Ct. 126, 42 Wkly. Notes Cas. 65; Jalass *v.* Young, 3 Pa. Super. Ct. 422, 40 Wkly. Notes Cas. 40.

South Carolina.— Poag *v.* Charlotte Oil, etc., Co., 61 S. C. 190, 39 S. E. 345.

Tennessee.— Gibbs *v.* Odell, 2 Coldw. 132.

Vermont.— Bond *v.* Clark, 35 Vt. 577; Weeks *v.* Burton, 7 Vt. 67.

Washington.— Northwestern Steamship Co. *v.* Dexter, 29 Wash. 565.

United States.— Hindeman *v.* Louisville First Nat. Bank, 112 Fed. 931, 50 C. C. A. 623, 57 L. R. A. 108; Union Pac. R. Co. *v.* Barnes, 64 Fed. 80, 12 C. C. A. 48; Farrel *v.* National Shoe, etc., Bank, 43 Fed. 123; Jacques *v.* Collins, 13 Fed. Cas. No. 7,168.

England.— Derry *v.* Peek, 14 App. Cas. 337, 54 J. P. 148, 58 L. J. Ch. 864, 61 L. T. Rep. N. S. 265, 1 Meg. 292, 38 Wkly. Rep. 33 [*reversing* 37 Ch. D. 541, 57 L. J. Ch. 347, 59 L. T. Rep. N. S. 78, 36 Wkly. Rep. 899]; Le Lievre *v.* Gould, [1893] 1 Q. B. 491, 57 J. P. 484, 62 L. J. Q. B. 353, 68 L. T. Rep. N. S. 626, 4 Reports 274, 41 Wkly. Rep. 468; Evans *v.* Collins, 5 Q. B. 804, D. & M. 72, 7 Jur. 743, 12 L. J. Q. B. 339, 48 E. C. L.

the speaker honestly believes his representation to be true he is not liable, an honest mistake or error in judgment being regarded as insufficient grounds on which to base a charge of fraud.[90] But the speaker's belief will not in all cases

804, D. & M. 669, 8 Jur. 345, 13 L. J. Q. B. 180 (*distinguishing* Humphrys *v.* Pratt, 5 Bligh N. S. 154, 5 Eng. Reprint 269)]; Wilson *v.* Fuller, 3 Q. B. 68, 3 G. & D. 570, 43 E. C. L. 634; Freeman *v.* Baker, 5 B. & Ad. 797, 27 E. C. L. 336, 5 C. & P. 475, 24 E. C. L. 663, 3 L. J. K. B. 17, 2 N. & M. 446; Neeley *v.* Lock, 8 C. & P. 527, 34 E. C. L. 873; Collins *v.* Gripper, 1 F. & F. 332; Ashlin *v.* White, Holt N. P. 387, 3 E. C. L. 155; Ormrod *v.* Huth, 14 L. J. Exch. 366, 14 M. & W. 651; Burtsal *v.* Bianchi, 65 L. T. Rep. N. S. 678; Schroeder *v.* Mendl, 37 L. T. Rep. N. S. 452.

Canada.— Hill *v.* McLeod, 17 Nova Scotia 280; Cann *v.* Imperial F. Ins. Co., 10 Nova Scotia 240.

See 23 Cent. Dig. tit. "Fraud," § 4.

Contra.— Totten *v.* Burhaus, 91 Mich. 495, 51 N. W. 1119; Holcomb *v.* Noble, 69 Mich. 396, 37 N. W. 497 [*followed* in Busch *v.* Wilcox, 82 Mich. 315, 46 N. W. 940]; Baughman *v.* Gould, 45 Mich. 481, 8 N. W. 73; Watson *v.* Baker, 71 Tex. 739, 9 S. W. 867; Hoper *v.* Robinson, 54 Tex. 510, 514; Marsalis *v.* Crawford, 8 Tex. Civ. App. 485, 28 S. W. 371; Davis *v.* Nuzum, 72 Wis. 439, 40 N. W. 497, 1 L. R. A. 774; Bird *v.* Kleiner, 41 Wis. 134.

In Alabama a distinction is drawn between cases where the person making the representation is a party to the contract or transaction to which the representation relates, and cases where the representation is made by a stranger to the transaction. Where the representation was made by a party, as in case of a sale, it is not necessary to prove that he knew that it was false. Einstein *v.* Marshall, 58 Ala. 153, 25 Am. Rep. 729; Munroe *v.* Pritchett, 16 Ala. 785, 50 Am. Dec. 203. But where the representation was made by a stranger the general rule applies, and it must accordingly be shown that defendant when he made the statement knew that it was false, or made it as of his own knowledge when in fact he was conscious that he had no such knowledge. Baker *v.* Trotter, 73 Ala. 277; Einstein *v.* Marshall, *supra*. The reason of this distinction is that in the first class of cases the author of the injury ordinarily is the gainer by reason of his fraud, whereas in the second class of cases the stranger ordinarily cannot derive any profit from the transaction induced by his representation. Einstein *v.* Marshall, *supra*. There are to be found, however, expressions of judicial opinion to the effect that knowledge of the falsity of the statement is no part of actionable fraud, and that defendant may be held liable for misrepresentations made through mistake, inadvertence, or ignorance. See Foster *v.* Kennedy, 38 Ala. 359, 81 Am. Dec. 56; Munroe *v.* Pritchett, 16 Ala. 785, 50 Am. Dec. 203.

In Nebraska it has frequently been said to be the settled law of the state that if the representation is false and is relied upon by plaintiff to his injury, defendant's knowledge of the falsity is immaterial and need not be proved, the courts apparently considering that the rule requiring a scienter to be shown was not in force there. And this statement of the law was deemed applicable of course whether the fraud was made the basis of an action or was set up by way of recoupment or counter-claim in an action to enforce a contract. Bauer *v.* Taylor, (1904) 98 N. W. 29 [*modifying* (1903) 96 N. W. 268]; Hitchcock *v.* Gothenburg Water Power, etc., Co., (1903) 95 N. W. 638; Gerner *v.* Mosher, 58 Nebr. 135, 78 N. W. 384, 46 L. R. A. 244; Johnson *v.* Gulick, 46 Nebr. 817, 65 N. W. 883, 50 Am. St. Rep. 629. It is doubtful, however, whether the courts intended entirely to abrogate or disregard the rule requiring a scienter; the decisions themselves are not inconsistent with the theory that the courts, when asserting that knowledge of the falsity is not essential, merely meant that where a person makes a positive assertion as of his own knowledge, when in fact he is conscious that he has no knowledge on the subject, his liability is the same as though he knew his statement to be false. See the opinion in Gerner *v.* Mosher, *supra* (per Irvine, C.); Moore *v.* Scott, 47 Nebr. 346, 350, 66 N. W. 441; Foley *v.* Holtry, 43 Nebr. 133, 137, 61 N. W. 120. For a discussion of this rule see *infra*, III, B, 4, b. Indeed the case of Phillips *v.* Jones, 12 Nebr. 213, 10 N. W. 708, which the courts cite as authority for the proposition that a scienter is unnecessary is nothing more than an application of the rule just mentioned. If this explanation is correct the Nebraska decisions are not inconsistent with the rule of the text. See opinion of Irvine, C., in Foley *v.* Holtry, *supra*.

Concealment.— Knowledge of the fact alleged to have been concealed is essential to liability for fraudulent concealment. May *v.* Dyer, 57 Ark. 441, 21 S. W. 1064; Kirtley *v.* Shinkle, 69 S. W. 723, 24 Ky. L. Rep. 608.

Warranty.— The necessity for a scienter is a feature which distinguishes a fraudulent misrepresentation from a false warranty. See Clark *v.* Bamer, 2 Lans. (N. Y.) 67; Binnard *v.* Spring, 42 Barb. (N. Y.) 470; Schuchardt *v.* Allens, 1 Wall. (U. S.) 359, 17 L. ed. 642; Louisiana Molasses Co. *v.* Ft. Smith Grocery Co., (Ark. 1905) 84 S. W. 1047; Moore *v.* Noble, 53 Barb. (N. Y.) 425; Northwestern Steamship Co. *v.* Dexter, 29 Wash. 565. See, generally, SALES.

90. *Arkansas.*— Hanger *v.* Evins, 38 Ark. 334.

Florida.— Williams *v.* McFadden, 23 Fla. 143, 1 So. 618, 11 Am. St. Rep. 345.

Illinois.— Johnson *v.* Beeney, 9 Ill. App. 64.

Iowa.— Boddy *v.* Henry, 113 Iowa 462, 85 N. W. 771, 53 L. R. A. 769; Scroggin *v.* Wood, 87 Iowa 497, 54 N. W. 437; Bondurant *v.* Crawford, 22 Iowa 40.

protect him from liability in an action for deceit, as where he makes the statement recklessly.[91]

b. Reckless Statements. It is not always necessary that the speaker should actually know that his representation is false. If the statement is of a matter susceptible of accurate knowledge and he makes it recklessly, without any knowledge of its truth or falsity, and in the form of a positive assertion calculated to convey the impression that he knows it to be true, the representation is equally fraudulent.[92] The rule just stated applies, although the speaker honestly believes that the fact which he represents as existing actually does exist. In such

Massachusetts.— Tucker *v.* White, 125 Mass. 344; Tryon *v.* Whitmarsh, 1 Metc. 1, 35 Am. Dec. 339.

Missouri.— Lovelace *v.* Suter, 93 Mo. App. 429, 67 S. W. 737.

New York.—Kountze *v.* Kennedy, 147 N. Y. 124, 41 N. E. 414, 49 Am. St. Rep. 651, 29 L. R. A. 360 [*affirming* 72 Hun 311, 25 N. Y. Suppl. 682]; Marsh *v.* Falker, 40 N. Y. 562; Chester *v.* Comstock, 40 N. Y. 575 note; Binnard *v.* Spring, 42 Barb. 470.

Pennsylvania.— Lamberton *v.* Dunham, 165 Pa. St. 129, 30 Atl. 716; Bokee *v.* Walker, 14 Pa. St. 139.

England.— Derry *v.* Peek, 14 App. Cas. 337, 54 J. P. 148, 58 L. J. Ch. 864, 61 L. T. Rep. N. S. 265, 1 Meg. 292, 38 Wkly. Rep. 33 [*reversing* 37 Ch. D. 541, 57 L. J. Ch. 347, 59 L. T. Rep. N. S. 78, 36 Wkly. Rep. 899]; Evans *v.* Collins, 5 Q. B. 804, D. & M. 72, 7 Jur. 743, 12 L. J. Q. B. 339, 48 E. C. L. 804, D. & M. 669, 8 Jur. 345, 13 L. J. Q. B. 180 (*distinguishing* Humphrys *v.* Pratt, 5 Bligh N. S. 154, 5 Eng. Reprint 269)]; Haycraft *v.* Creasy, 2 East 92, 6 Rev. Rep. 380; Ormrod *v.* Huth, 14 L. J. Exch. 366, 14 M. & W. 651.

See 23 Cent. Dig. tit. "Fraud," § 4.

Contra.— Totten *v.* Burhaus, 91 Mich. 495, 51 N. W. 1119; Baughman *v.* Gould, 45 Mich. 481, 8 N. W. 73 [*followed* in Holcomb *v.* Noble, 69 Mich. 396, 37 N. W. 497]; Watson *v.* Baker, 71 Tex. 739, 9 S. W. 867; Loper *v.* Robinson, 54 Tex. 510; Marsalis *v.* Crawford, 8 Tex. Civ. App. 485, 28 S. W. 371; Davis *v.* Nuzum, 72 Wis. 439, 40 N. W. 497, 1 L. R. A. 774; Bird *v.* Kleiner, 41 Wis. 134.

Inadvertence, erroneous judgment, etc.— "The man who intentionally deceives another to his injury should be legally responsible for the consequences. But if through inattention, want of judgment, reliance upon information which a wiser man might not credit, misconception of the facts or of his moral obligation to inquire, he makes a representation designed to influence the conduct of another, and upon which the other acts to his prejudice, yet, if the misrepresentation was honestly made, believing it to be true, whatever other liability he may incur he cannot be made liable in an action for deceit." Kountze *v.* Kennedy, 147 N. Y. 124, 129, 41 N. E. 414, 49 Am. St. Rep. 651, 29 L. R. A. 360 [*affirming* 72 Hun 311, 25 N. Y. Suppl. 682], per Andrews, C. J.

Concealment.— A person cannot be held liable for fraudulent concealment of a material fact if he believes that the fact does not exist. Johnson *v.* Pickett, 78 Ala. 331; Gerkins *v.* Williams, 48 N. C. 11; McEntire *v.* McEntire, 43 N. C. 297; Hamrick *v.* Hogg, 12 N. C. 350.

91. See *infra*, III, B, 4, b.

92. This rule is based upon the principle that the speaker is conscious either that he knows or that he does not know the truth of what he states, and that when, conscious of his ignorance, he assumes to have knowledge, he acts in bad faith and must be held to warrant the truth of his assertion, and so is liable in an action for deceit.

Alabama.— Henry *v.* Allen, 93 Ala. 197, 9 So. 579; Einstein *v.* Marshall, 58 Ala. 153, 25 Am. Rep. 729; Munroe *v.* Pritchett, 16 Ala. 785, 50 Am. Dec. 203. See also Jordan *v.* Pickett, 78 Ala. 331.

Arkansas.— See Hanger *v.* Evins, 38 Ark. 334.

California.— Mayer *v.* Salazar, 84 Cal. 646, 24 Pac. 597.

Colorado.— Lahay *v.* City Nat. Bank, 15 Colo. 339, 25 Pac. 704, 22 Am. St. Rep. 407; Stimson *v.* Helps, 9 Colo. 33, 10 Pac. 290; Sellar *v.* Clelland, 2 Colo. 532; Goodale *v.* Middaugh, 8 Colo. App. 223, 46 Pac. 11.

Connecticut.— Scholfield Gear, etc., Co. *v.* Scholfield, 71 Conn. 1, 40 Atl. 1046.

Georgia.— Smith *v.* Newton, 59 Ga. 113; Corbett *v.* Gilbert, 24 Ga. 454.

Illinois.— Miller *v.* John, 208 Ill. 173, 70 N. E. 27; Snively *v.* Meixsell, 97 Ill. App. 365; Johnson *v.* Beeney, 9 Ill. App. 64.

Indiana.— Kirkpatrick *v.* Reeves, 121 Ind. 280, 22 N. E. 139; West *v.* Wright, 98 Ind. 335; Bethell *v.* Bethell, 92 Ind. 218; Jones *v.* Hathaway, 77 Ind. 14; Freugel *v.* Miller, 37 Ind. 1, 10 Am. Rep. 62. See also Ingalls *v.* Miller, 121 Ind. 188, 22 N. E. 995.

Kansas.— Kansas Refrigerator Co. *v.* Pert, 3 Kan. App. 364, 42 Pac. 943.

Kentucky.— Trimble *v.* Reid, 97 Ky. 713, 31 S. W. 861, 17 Ky. L. Rep. 494, 41 S. W. 319, 19 Ky. L. Rep. 604; Graves *v.* Lebanon Nat. Bank, 10 Bush 23, 19 Am. Rep. 50.

Maine.— Hammatt *v.* Emerson, 27 Me. 308, 46 Am. Dec. 598.

Maryland.— Cahill *v.* Applegarth, 98 Md. 493, 56 Atl. 794.

Massachusetts.—Arnold *v.* Teel, 182 Mass. 1, 64 N. E. 413; Fottler *v.* Moseley, 179 Mass. 295, 60 N. E. 788; Nash *v.* Minnesota Title Ins., etc., Co., 159 Mass. 437, 34 N. E. 625; Chatham Furnace Co. *v.* Moffatt, 147 Mass. 403, 18 N. E. 168, 9 Am. St. Rep. 727; Savage *v.* Stevens, 126 Mass. 207; Litchfield

a case it is apparent that he cannot believe in the truth of the statement he makes — that he knows the fact to exist — and the fraud consists in passing off

v. Hutchinson, 117 Mass. 195; Fisher *v.* Mellen, 103 Mass. 503; Stone *v.* Denny, 4 Metc. 151.

Michigan.— Stone *v.* Covell, 29 Mich. 359; Beebe *v.* Knapp, 28 Mich. 53.

Minnesota.— Hedin *v.* Minneapolis Medical, etc., Inst., 62 Minn. 146, 64 N. W. 158, 54 Am. St. Rep. 628, 35 L. R. A. 417; Bullitt *v.* Farrar, 42 Minn. 8, 43 N. W. 566, 18 Am. St. Rep. 485, 6 L. R. A. 149; Busterud *v.* Farrington, 36 Minn. 320, 31 N. W. 360; Humphrey *v.* Merriam, 32 Minn. 197, 20 N. W. 138; Wilder *v.* De Cou, 18 Minn. 470.

Mississippi.—Sims *v.* Eiland, 57 Miss. 607; Clopton *v.* Cozart, 13 Sm. & M. 363.

Missouri.— People's Nat. Bank *v.* Cent. Trust Co., 179 Mo. 648, 78 S. W. 618; Hamlin *v.* Abell, 120 Mo. 188, 25 S. W. 516; Walsh *v.* Morse, 80 Mo. 568; Caldwell *v.* Henry, 76 Mo. 254; Dulaney *v.* Rogers, 64 Mo. 201; Buford *v.* Caldwell, 3 Mo. 477; Chase *v.* Rusk, 90 Mo. App. 25; McBeth *v.* Craddock, 28 Mo. App. 380. See also Dunn *v.* White, 63 Mo. 181.

Nebraska.— Leavitt *v.* Sizer, 35 Nebr. 80, 85, 52 N. W. 832; Phillips *v.* Jones, 12 Nebr. 213, 10 N. W. 708. See also the comments on the Nebraska decisions *supra*, note 89.

New Hampshire.— Rowell *v.* Chase, 61 N. H. 135.

New York.— Hadcock *v.* Osmer, 153 N. Y. 604, 47 N. E. 923 [*affirming* 4 N. Y. App. Div. 435, 38 N. Y. Suppl. 618]; Daly *v.* Wise, 132 N. Y. 306, 30 N. E. 837, 16 L. R. A. 230; Rothschild *v.* Mack, 115 N. Y. 1, 21 N. E. 726; Bennett *v.* Judson, 21 N. Y. 238; Zabriskie *v.* Smith, 13 N. Y. 322, 64 Am. Dec. 551; Taylor *v.* Commercial Bank, 68 N. Y. App. Div. 458, 73 N. Y. Suppl. 924; Frank *v.* Bradley, etc., Co., 42 N. Y. App. Div. 178, 58 N. Y. Suppl. 1032; Indianapolis, etc., R. Co., *v.* Tyng, 2 Hun 311, 4 Thomps. & C. 524, 48 How. Pr. 193 [*affirmed* in 63 N. Y. 653]; Sharp *v.* New York, 40 Barb. 256; Morehouse *v.* Yeager, 41 N. Y. Super. Ct. 135; Ryder *v.* Wall, 29 Misc. 377, 60 N. Y. Suppl. 535; Myers *v.* Rosenback, 13 Misc. 145, 34 N. Y. Suppl. 63; Kelly *v.* Gould, 19 N. Y. Suppl. 349 [*affirmed* in 141 N. Y. 596, 36 N. E. 320]; Rabinowitz *v.* Cohen, 17 N. Y. Suppl. 502; Dawson *v.* Chisholm, 1 N. Y. Suppl. 171; Du Flon *v.* Powers, 14 Abb. Pr. N. S. 391. See also Kountze *v.* Kennedy, 147 N. Y. 124, 41 N. E. 414, 49 Am. St. Rep. 651, 29 L. R. A. 360. *Compare* Marsh *v.* Falker, 40 N. Y. 562; Craig *v.* Ward, 1 Abb. Dec. 454, 3 Keyes 387, 2 Transcr. App. 281, 3 Abb. Pr. N. S. 235 [*affirming* 36 Barb. 377], opinion of Hunt, J.

North Carolina.— Ramsey *v.* Wallace, 100 N. C. 75, 6 S. E. 638; Ferebee *v.* Gordon, 35 N. C. 350. See also Solomon *v.* Bates, 118 N. C. 311, 24 S. E. 478, 54 Am. St. Rep. 725.

Ohio.— Nugent *v.* Cincinnati, etc., Straight Line R. Co., 2 Disn. 302.

Oregon.— Cawston *v.* Sturgis, 29 Oreg. 331, 43 Pac. 656 [*distinguishing* Rolfes *v.* Russel, 5 Oreg. 400].

Pennsylvania.— Lamberton *v.* Dunham, 165 Pa. St. 129, 30 Atl. 716; Griswold *v.* Gebbie, 126 Pa. St. 353, 17 Atl. 673, 12 Am. St. Rep. 878 [*affirming* 6 Pa. Co. Ct. 212]; Thompson *v.* Chambers, 13 Pa. Super. Ct. 213.

Texas.— Loper *v.* Robinson, 54 Tex. 510; Mitchell *v.* Zimmerman, 4 Tex. 75, 51 Am. Dec. 717; Commercial Nat. Bank *v.* Cuero First Nat. Bank, (Civ. App. 1903) 77 S. W. 239 [*reversed* on other grounds in 97 Tex. 536, 80 S. W. 601, 104 Am. St. Rep. 879]; Beatty *v.* Bulger, 28 Tex. Civ. App. 117, 66 S. W. 893; Davis *v.* Driscoll, 22 Tex. Civ. App. 14, 54 S. W. 43. See also McCord-Collins Commerce Co., 21 Tex. Civ. App. 109, 50 S. W. 606; Wright *v.* U. S. Mortg. Co., (Civ. App. 1897) 42 S. W. 789; McCall *v.* Sullivan, 1 Tex. App. Civ. Cas. § 1.

Vermont.— Darling *v.* Stuart, 63 Vt. 570, 22 Atl. 634; Cabot *v.* Christie, 42 Vt. 121, 1 Am. Rep. 313; Wheeler *v.* Wheelock, 34 Vt. 533.

Wisconsin.— Krause *v.* Busacker, 105 Wis. 350, 81 N. W. 406; Cameron *v.* Mount, 86 Wis. 477, 56 N. W. 1094, 22 L. R. A. 512; Montreal River Lumber Co. *v.* Mihills, 80 Wis. 540, 50 N. W. 507; Cotzhausen *v.* Simon, 47 Wis. 103, 1 N. W. 473.

United States.— Lehigh Zinc, etc., Co. *v.* Bamford, 150 U. S. 665, 14 S. Ct. 219, 37 L. ed. 1215; Cooper *v.* Schlesinger, 111 U. S. 148, 4 S. Ct. 360, 28 L. ed. 382; Hindeman *v.* Louisville First Nat. Bank, 112 Fed. 931, 50 C. C. A. 623, 57 L. R. A. 108; Nevada Bank *v.* Portland Nat. Bank, 59 Fed. 338; Barnes *v.* Union Pac. R. Co., 54 Fed. 87, 4 C. C. A. 199; Lynch *v.* Mercantile Trust Co., 18 Fed. 486, 5 McCrary 623.

England.— Joliffe *v.* Baker, 11 Q. B. D. 255, 47 J. P. 687, 52 L. J. Q. B. 609, 48 L. T. Rep. N. S. 966, 32 Wkly. Rep. 59; Edgington *v.* Fitzmaurice, 29 Ch. D. 459, 50 J. P. 52, 55 L. J. Ch. 650, 53 L. T. Rep. N. S. 369, 33 Wkly. Rep. 911; George *v.* Skivington, L. R. 5 Exch. 1, 21 L. T. Rep. N. S. 495, 18 Wkly. Rep. 118; Schneider *v.* Heath, 3 Campb. 506, 14 Rev. Rep. 506 (per Mansfield, C. J.); Taylor *v.* Ashton, 7 Jur. 978, 12 L. J. Exch. 363, 11 M. & W. 401 (per Parke, B.); Leddell *v.* McDougal, 29 Wkly. Rep. 403. See also Derry *v.* Peek, 14 App. Cas. 337, 54 J. P. 148, 58 L. J. Ch. 864, 61 L. T. Rep. N. S. 265, 1 Meg. 292, 38 Wkly. Rep. 33 [*reversing* 37 Ch. D. 541, 57 L. J. Ch. 347, 59 L. T. Rep. N. S. 78, 36 Wkly. Rep. 899] (opinion of Lord Herschell); Le Lievre *v.* Gould, [1893] 1 Q. B. 491, 57 J. P. 484, 62 L. J. Q. B. 353, 68 L. T. Rep. N. S. 626, 4 Reports 274, 41 Wkly. Rep. 468 (opinion of Lord Esher, M. R.).

See 23 Cent. Dig. tit. "Frauds," § 5.

In Iowa until very recently the decisions on this question were not uniform. In a long line of decisions the rule of the text was

his opinion or belief in the guise of positive knowledge.[93] Consequently the speaker is not relieved from liability, although in making the assertion he relies

either disregarded or expressly repudiated, actual knowledge of the falsity being held essential. Warfield *v.* Clark, 118 Iowa 69, 91 N. W. 833; Mentzer *v.* Sargeant, 115 Iowa 527, 88 N. W. 1068; Boddy *v.* Henry, 113 Iowa 462, 85 N. W. 771, 53 L. R. A. 769; Scroggin *v.* Wood, 87 Iowa 497, 54 N. W. 437; Phelps *v.* James, 79 Iowa 262, 44 N. W. 543; Allison *v.* Jack, 76 Iowa 205, 40 N. W. 811; Watson Coal, etc., Co. *v.* James, 72 Iowa 184, 33 N. W. 622; Avery *v.* Chapman, 62 Iowa 144, 17 N. W. 454; Hallam *v.* Todhunter, 24 Iowa 166; Kimmaus *v.* Chandler, 13 Iowa 327; Gates *v.* Reynolds, 13 Iowa 1; Courtney *v.* Carr, 11 Iowa 295; Holmes *v.* Clark, 10 Iowa 423. The rule of the text had, however, been recognized (McKown *v.* Fergason, 47 Iowa 636), and had been applied (Hubbard *v.* Weare, 79 Iowa 678, 44 N. W. 915), but it was later definitely adopted as the law of this state (Riley *v.* Bell, 120 Iowa 618, 95 N. W. 170, reviewing a number of the earlier decisions).

"An unqualified statement that a fact exists, made for the purpose of inducing another to act upon it, implies that the person who makes it knows it to exist, and speaks from his own knowledge." Kirkpatrick *v.* Reeves, 121 Ind. 280, 282, 22 N. E. 139.

"It is a fraud to affirm positive knowledge of that which one does not positively know." Hadcock *v.* Osmer, 153 N. Y. 604, 608, 47 N. E. 923, per Vann, J. See also Reese River Silver Min. Co. *v.* Smith, L. R. 4 H. L. 64, 79, 39 L. J. Ch. 849, 17 Wkly. Rep. 1024, (per Lord Cairns); Hart *v.* Swaine, 7 Ch. D. 42, 47 L. J. Ch. 5, 37 L. T. Rep. N. S. 376, 26 Wkly. Rep. 30 (where the foregoing principle is adopted as a rule of equity); Evans *v.* Edmonds, 13 C. B. 777, 786, 1 C. L. R. 653, 17 Jur. 883, 22 L. J. C. P. 211, 1 Wkly. Rep. 412, 76 E. C. L. 777 (per Maule, J.). "There can be no variance in the principle upon which one is held liable for damage who asserts the existence of a fact, knowing that in truth it does not exist, and that upon which a like responsibility is visited upon one who, conscious that he is ignorant concerning the subject-matter of which he speaks, still falsely asserts that, within his own personal knowledge, a fact stated by him does in truth exist. In each instance an intentional fraud is manifest, and it is of this that the law takes note, and for this it affords a remedy." Riley *v.* Bell, 120 Iowa 618, 626, 95 N. W. 170, per Bishop, C. J.

This rule is not an exception to, but an application of, the principle (see *infra*, III, B, 6), that actual fraud must be shown to sustain an action of deceit; and is not in conflict with the rule requiring a scienter. Riley *v.* Bell, 120 Iowa 618, 95 N. W. 170; Lovelace *v.* Suter, 93 Mo. App. 429, 67 S. W. 737; Hadcock *v.* Osmer, 153 N. Y. 604, 47 N. E. 923 [*affirming* 4 N. Y. App. Div. 435, 38 N. Y. Suppl. 618]; Kountze *v.* Kennedy, 147 N. Y. 124, 41 N. E. 414, 49 Am. St. Rep. 651, 29 L. R. A. 360 [*affirming* 72 Hun 311, 25 N. Y. Suppl. 682]. But the distinctions drawn in the reported cases on the subject are "often fine and sometimes impalpable." Lovelace *v.* Suter, *supra*.

Defendant's want of recollection.— It has been held that one who makes false assertions as to a matter within his knowledge is not excused by averring a want of recollection at the time the statement is made. Chatham Furnace Co. *v.* Moffatt, 147 Mass. 403, 18 N. E. 168, 9 Am. St. Rep. 727; Bacon *v.* Bronson, 7 Johns. Ch. (N. Y.) 194, 11 Am. Dec. 449; Burrowes *v.* Lock, 10 Ves. Jr. 470, 8 Rev. Rep. 33, 856, 32 Eng. Reprint 927. But in England since the decision in Derry *v.* Peek, 14 App. Cas. 337, 54 J. P. 148, 58 L. J. Ch. 864, 61 L. T. Rep. N. S. 265, 1 Meg. 292, 38 Wkly. Rep. 33 [*reversing* 37 Ch. D. 541, 57 L. J. Ch. 347, 59 L. T. Rep. N. S. 78, 36 Wkly. Rep. 899], the case of Burrowes *v.* Lock, *supra*, can be supported only on the ground of estoppel. Low *v.* Bouverie, [1891] 3 Ch. 82, 60 L. J. Ch. 594, 65 L. T. Rep. N. S. 533, 40 Wkly. Rep. 50. See also Pollock Torts 287, 288.

93. *California.*— Mayer *v.* Salazar, 84 Cal. 646, 24 Pac. 597.

Indiana.— Kirkpatrick *v.* Reeves, 121 Ind. 280, 22 N. E. 129.

Maine.— Braley *v.* Powers, 92 Me. 203, 42 Atl. 362.

Maryland.— McAleer *v.* Horsey, 35 Md. 439.

Massachusetts.— Chatham Furnace Co. *v.* Moffatt, 147 Mass. 403, 18 N. E. 168, 9 Am. St. Rep. 727; Litchfield *v.* Hutchinson, 117 Mass. 195.

New York.— Hadcock *v.* Osmer, 153 N. Y. 604, 47 N. E. 923; Haight *v.* Hayt, 19 N. Y. 464; Ryder *v.* Wall, 29 Misc. 377, 60 N. Y. Suppl. 535. *Compare* Marsh *v.* Falker, 40 N. Y. 562.

Texas.— Loper *v.* Robinson, 54 Tex. 510; McCall *v.* Sullivan, 1 Tex. App. Civ. Cas. § 1.

Vermont.— Johnson *v.* Cate, 75 Vt. 100, 53 Atl. 329; Cabot *v.* Christie, 42 Vt. 121, 1 Am. Rep. 313.

See 23 Cent. Dig. tit. "Fraud," § 5.

"It is often said that a representation is not fraudulent if the party who makes it believes it to be true. But a party who is aware that he has only an opinion . . . and represents that opinion as knowledge, does not believe his representation to be true. As is well said in a note to the report of the case of Taylor *v.* Ashton, 7 Jur. 978, 12 L. J. Exch. 363, 11 M. & W. 401, 418 (Phila. ed.), the belief of a party to be an excuse for a false representation must be 'a belief in the representation as made.'" Cabot *v.* Christie, 42 Vt. 120, 126, 1 Am. Rep. 313.

upon trustworthy information.[94] But the application of the principle imposing liability for false statements made in reckless ignorance is confined to cases where a man states as of his own knowledge facts that are susceptible of approximately accurate knowledge on his part.[95] In England the doctrine of liability arising from false statements recklessly made has received a very material modification by a decision rendered in a leading case[96] which involved the liability of directors of a corporation for false statements in a prospectus issued by them.[97] This decision established the rule that unless the relation of the parties, contractual or otherwise, gives rise to a duty to use care in ascertaining and stating the truth, recklessness or carelessness, however gross, in stating material facts, does not amount to fraud; but that to render the misrepresentation actionable the statement must be made either with knowledge of its falsity, or without knowing or caring whether it is true or false and without any belief in its truth.[98] The effect of this rule is that the honest belief of the speaker in the truth of his statement absolves him from liability regardless of the sufficiency of the grounds on which his belief is based; the fact that he has no reasonable grounds for his belief being regarded as nothing more than inconclusive evidence of fraud.[99] This decision has given rise to much adverse criticism,[1] and its effect, so far as concerns the class of corporation cases to which it applies has, in England, been nullified by statute;[2] but the principle which it established appears to be still the law of England[3] and has met with some approval in this country.[4] In a few cases the courts have invoked by analogy the law of constructive notice[5] to charge the speaker with liability, it being held that, although he does not know his statements to be untrue, yet if he is cognizant of facts which, in the exercise of common sense and ordinary prudence, ought to put him on inquiry, and would lead him to a knowledge of the facts in question, he will be liable the same as if he had

94. Kilpatrick *v.* Reeves, 121 Ind. 280, 22 N. E. 139. See also Fisher *v.* Mellen, 103 Mass. 503; Haight *v.* Hayt, 19 N. Y. 464.

95. Tucker *v.* White, 125 Mass. 344; Page *v.* Bent, 2 Metc. (Mass.) 371; Spead *v.* Tomlinson, (N. H. 1904) 59 Atl. 376. See also Marsh *v.* Falker, 40 N. Y. 562; Haycraft *v.* Creasy, 2 East 92, 6 Rev. Rep. 380.

96. Derry *v.* Peek, 14 App. Cas. 337, 54 J. P. 148, 58 L. J. Ch. 864, 61 L. T. Rep. N. S. 265, 1 Meg. 292, 38 Wkly. Rep. 33 [*reversing* 37 Ch. D. 541, 57 L. J. Ch. 347, 59 L. T. Rep. N. S. 78, 36 Wkly. Rep. 899]. This decision was rendered in 1889.

97. See Corporations, 10 Cyc. 844. See also Contracts, 9 Cyc. 423.

98. Derry *v.* Peek, 14 App. Cas. 337, 54 J. P. 148, 58 L. J. Ch. 864, 61 L. T. Rep. N. S. 265, 1 Meg. 292, 38 Wkly. Rep. 33 [*reversing* 37 Ch. D. 541, 57 L. J. Ch. 347, 59 L. T. Rep. N. S. 78, 36 Wkly. Rep. 899]. See Le Lievre *v.* Gould, [1893] 1 Q. B. 491, 57 J. P. 484, 62 L. J. Q. B. 353, 68 L. T. Rep. N. S. 626, 4 Reports 274, 41 Wkly. Rep. 468 [*overruling* Cann *v.* Willson, 39 Ch. D. 39, 57 L. J. Ch. 1034, 37 Wkly. Rep. 23]; Low *v.* Bouverie, [1891] 3 Ch. 82, 60 L. J. Ch. 594, 65 L. T. Rep. N. S. 533, 40 Wkly. Rep. 50; Angus *v.* Clifford, [1891] 2 Ch. 449, 60 L. J. Ch. 443, 65 L. T. Rep. N. S. 274, 39 Wkly. Rep. 498, all of which follow and explain Derry *v.* Peek, *supra*.

99. Derry *v.* Peek, 14 App. Cas. 337, 54 J. P. 148, 58 L. J. Ch. 864, 61 L. T. Rep. N. S. 265, 1 Meg. 292, 38 Wkly. Rep. 33 [*reversing* 37 Ch. D. 541, 57 L. J. Ch. 347, 59 L. T. Rep. N. S. 78, 36 Wkly. Rep. 899]; Angus *v.* Clifford, [1891] 2 Ch. 449, 60 L. J. Ch. 443, 65 L. T. Rep. N. S. 274, 39 Wkly. Rep. 498.

1. See Corporations, 10 Cyc. 844 note 71.

2. St. 53 & 54 Vict. c. 64 (the Directors' Liability Act of 1890). See Pollock Torts 288; and Corporations, 10 Cyc. 844 note 71.

3. Le Lievre *v.* Gould, [1893] 1 Q. B. 491, 57 J. P. 484, 62 L. J. Q. B. 353, 68 L. T. Rep. N. S. 626, 4 Reports 274, 41 Wkly. Rep. 468 [*overruling* Cann *v.* Willson, 39 Ch. D. 39, 57 L. J. Ch. 1034, 37 Wkly. Rep. 23]; Low *v.* Bouverie, [1891] 3 Ch. 82, 60 L. J. Ch. 594, 65 L. T. Rep. N. S. 533, 40 Wkly. Rep. 50; Angus *v.* Clifford, [1891] 2 Ch. 449, 60 L. J. Ch. 443, 65 L. T. Rep. N. S. 274, 39 Wkly. Rep. 498; Pollock Torts 287, 288.

4. See Nash *v.* Minnesota Title Ins. Co., 163 Mass. 574, 40 N. E. 1039, 47 Am. St. Rep. 489, 28 L. R. A. 753; Kountze *v.* Kennedy, 147 N. Y. 124, 41 N. E. 414, 49 Am. St. Rep. 651, 29 L. R. A. 360 [*affirming* 72 Hun 311, 25 N. Y. Suppl. 682]. *Compare* Hadcock *v.* Osmer, 153 N. Y. 604, 47 N. E. 923.

In Iowa a doctrine substantially the same has long been settled. Warfield *v.* Clark, 118 Iowa 69, 91 N. W. 833; Mentzer *v.* Sargeant, 115 Iowa 527, 88 N. W. 1068; Boddy *v.* Henry, 113 Iowa 462, 85 N. W. 771, 53 L. R. A. 769; Allison *v.* Jack, 76 Iowa 205, 40 N. W. 811; Holmes *v.* Clark, 10 Iowa 423. *Compare* Riley *v.* Bell, 120 Iowa 618, 95 N. W. 170; Hubbard *v.* Weare, 79 Iowa 678, 44 N. W. 915.

5. See Notice; Sales; Vendor and Purchaser.

actual knowledge; and it has been held proper to instruct the jury to this effect.[6] This principle applies where a purchaser of property is induced by misrepresentations of the vendor made positively and as of his own knowledge,[7] or where the person making the representation may from his peculiar situation be presumed actually to have some special knowledge on the subject involved,[8] or where confidential relations exist imposing a special duty upon the speaker.[9] But aside from these instances the principle is not one of general application, and the weight of authority absolves defendant from liability where he acted, not in reckless ignorance but in perfect good faith, honestly believing that his view of the facts was correct; and recognizes that one may have full belief in a matter notwithstanding that he has means for ascertaining the truth or that he may have some reason for doubt.[10]

c. Statements Made as Upon Information and Belief. It is clear, however, that if the misrepresentation is made, not in the form of an unqualified assertion implying personal knowledge, but as upon information and belief, and the speaker really believes the statement to be true, he cannot be held liable, although the person to whom it is made suffers injury from acting in reliance thereon.[11]

6. Gordon *v.* Irvine, 105 Ga. 144, 31 S. E. 151; Craig *v.* Ward, 1 Abb. Dec. (N. Y.) 454, 3 Keyes 387, 2 Transcr. App. 281, 3 Abb. Pr. N. S. 235 [*affirming* 36 Barb. 377]. See also Atkins *v.* Elwell, 45 N. Y. 753; Bigler *v.* Atkins, 7 N. Y. St. 235; Pulsford *v.* Richards, 17 Beav. 87, 17 Jur. 865, 22 L. J. Ch. 559, 1 Wkly. Rep. 295, 51 Eng. Reprint 965, per Romilly, M. R.

This rule seems to be justified by Cal. Civ. Code, § 1710. See Hanscom *v.* Drullard, 79 Cal. 234, 21 Pac. 736.

7. See *infra*, IV, B, 1, a, (I).

8. See Watson *v.* Jones, (Fla. 1899) 25 So. 678; Hoe *v.* Sanborn, 21 N. Y. 552, 78 Am. Dec. 163. As where the party is an officer of a bank or other corporation. See Houston *v.* Thornton, 122 N. C. 365, 29 N. E. 827, 65 Am. St. Rep. 699; Nevada Bank *v.* Portland Nat. Bank, 59 Fed. 338. See BANKS AND BANKING, 5 Cyc. 419; CORPORATIONS, 10 Cyc. 1.

9. See *infra*, III, B, 5, b, (III).

The test of liability in an action for deceit is whether defendant has by act or omission violated his duty; and in applying this test it is always necessary to inquire what defendant's duty was. There can never be a well founded complaint of fraud except where some duty is shown and a correlative right, and some violation of that duty and right. Nash *v.* Minnesota Title Ins., etc., Co., 163 Mass. 574, 40 N. E. 1039, 47 Am. St. Rep. 489, 28 L. R. A. 753; Sprigg *v.* Commonwealth Title Ins., etc., Co., 119 Fed. 434; Weir *v.* Bell, 3 Ex. D. 238, 248, 47 L. J. Exch. 704, 38 L. T. Rep. N. S. 929, 26 Wkly. Rep. 746, per Lord Bramwell.

10. See the following cases:

Iowa.— Warfield *v.* Clark, 118 Iowa 69, 91 N. W. 883; Boddy *v.* Henry, 113 Iowa 462, 85 N. W. 771, 53 L. R. A. 769; McKown *v.* Furgason, 47 Iowa 636.

Massachusetts.— Tucker *v.* White, 125 Mass. 344; Pearson *v.* Howe, 1 Allen 207.

Missouri.— Lovelace *v.* Suter, 93 Mo. App. 429, 67 S. W. 737.

New York.—Kountze *v.* Kennedy, 147 N. Y. 124, 41 N. E. 414, 49 Am. St. Rep. 651, 29 L. R. A. 360 [*affirming* 72 Hun 311, 25 N. Y. Suppl. 682]; Salisbury *v.* Howe, 87 N. Y. 128; Wakeman *v.* Dalley, 51 N. Y. 27, 10 Am. Rep. 551; Marsh *v.* Falker, 40 N. Y. 562; Chester *v.* Comstock, 40 N. Y. 575 note.

North Carolina.— Gerkins *v.* Williams, 48 N. C. 11; McEntire *v.* McEntire, 43 N. C. 297; Hamrick *v.* Hogg, 12 N. C. 350.

Pennsylvania.— Lamberton *v.* Dunham, 165 Pa. St. 129, 30 Atl. 716; Dilworth *v.* Bradner, 85 Pa. St. 238.

England.— Derry *v.* Peek, 14 App. Cas. 337, 54 J. P. 148, 58 L. J. Ch. 864, 61 L. T. Rep. N. S. 265, 1 Meg. 292, 38 Wkly. Rep. 33 [*reversing* 37 Ch. D. 541, 57 L. J. Ch. 347, 59 L. T. Rep. N. S. 78, 36 Wkly. Rep. 899]; Evans *v.* Collins, 5 Q. B. 804, D. & M. 72, 7 Jur. 743, 12 L. J. Q. B. 339, 48 E. C. L. 804.

See 23 Cent. Dig. tit. "Fraud," § 5.

The reasonableness of defendant's belief is not the question to be determined, but whether he really did believe his statement. Lamberton *v.* Dunham, 165 Pa. St. 129, 30 Atl. 716; Dilworth *v.* Bradner, 85 Pa. St. 238; Wilson *v.* Talheimer, 20 Pa. Co. Ct. 203.

"Infallible knowledge of facts is never attainable, and it is, or ought to be, enough that one has carefully endeavored to learn the truth from appropriate sources and believes he has learned it. Such conduct is very different morally and we think legally, from recklessly asserting something to be true from a vague belief of its truth which the speaker has taken no pains to verify." Lovelace *v.* Suter, 93 Mo. App. 429, 440, 67 S. W. 737 [*citing* Scotland Western Bank *v.* Addie, L. R. 1 H. L. Sc. 145].

11. *California.*— Davidson *v.* Jordan, 47 Cal. 351.

Massachusetts.— Cooper *v.* Lovering, 106 Mass. 77.

Minnesota.— Humphrey *v.* Merriam, 32 Minn. 197, 20 N. W. 138.

Missouri.— Lovelace *v.* Suter, 93 Mo. App. 429, 67 S. W. 737.

On the other hand, if he knows that his statement is false, the fact that it is not made as of his own knowledge will not exonerate him.[12]

5. IGNORANCE OF PARTY COMPLAINING — a. In General. It is essential of course that the party to whom the representation is made should be ignorant of the matter represented. If before he acts he has knowledge of the truth and thus knows that the statement is false it cannot be said that he is deceived.[13]

b. Duty to Investigate — (i) *In General.* It is difficult to state accurately any general rule as to the right of one person to rely upon representations made by another, since the question always depends upon the facts of the particular case and the circumstances under which the representation was made.[14] The courts do not declare as a matter of law what representations as to existing facts may or may not be relied on,[15] but the determination of the question is generally for the jury.[16] It is clear that ordinarily the representations must have been of such a character, and must have been made under such circumstances, as would justify their belief by a man of ordinary intelligence and prudence;[17] but the respective character, intelligence, experience, age, and mental and physical condition of the parties are considerations which may vary this rule or render it of small importance.[18] It is a general principle, however, that if no confidential relations exist between the parties and if the facts misrepresented[19] or con-

Nebraska.— Moore *v.* Scott, 47 Nebr. 346, 66 N. W. 441.

New York.— Catlin *v.* Vietor, 52 N. Y. Super. Ct. 169.

West Virginia.— Crislip *v.* Cain, 19 W. Va. 438.

See 23 Cent. Dig. tit. "Fraud," § 22.

12. Savage *v.* Stevens, 126 Mass. 207.

13. *Alabama.*— Hooper *v.* Whitaker, 130 Ala. 324, 30 So. 355; Gilmer *v.* Ware, 19 Ala. 252.

Iowa.— Simpson *v.* Kane, 98 Iowa 271, 67 N. W. 247.

Kentucky.— New York L. Ins. Co. *v.* Hord, 78 S. W. 207, 25 Ky. L. Rep. 1531.

Mississippi.— Clapton *v.* Cozart, 13 Sm. & M. 363.

New Hampshire.— Cloutman *v.* Bailey, 62 N. H. 44.

North Carolina.— Stafford *v.* Newson, 31 N. C. 507; Cobb *v.* Fogalman, 23 N. C. 440; Fagan *v.* Newson, 12 N. C. 20.

Ohio.— Spencer *v.* King, 5 Ohio S. & C. Pl. Dec. 113.

Oregon.— Martin *v.* Eagle Development Co., 41 Oreg. 448, 69 Pac. 216.

Texas.— Loper *v.* Robinson, 54 Tex. 510; McCall *v.* Sullivan, 1 Tex. App. Civ. Cas. § 1. See also Furneaux *v.* Webb, (Civ. App. 1903) 77 S. W. 828.

See 23 Cent. Dig. tit. "Fraud," § 20.

Loss of good bargain.— And it has been held that in such a case plaintiff cannot maintain an action of deceit merely for the loss of a good bargain, as where a vendor misrepresents the boundaries of the land and the purchaser on discovering that the vendor has no title to a part of the land within the boundaries as represented, refuses to accept the deed; the remedy being an action to recover back the purchase-money. Fagan *v.* Newson, 12 N. C. 20. See also Flureau *v.* Thornhill, 2 W. Bl. 1078.

14. See Watson *v.* Molden, (Ida. 1905) 79 Pac. 503; Ingalls *v.* Miller, 121 Ind. 188, 22 N. E. 995.

15. Ingalls *v.* Miller, 121 Ind. 188, 22 N. E. 995.

16. See *infra*, VII, M, 2, d, (I).

17. Hall *v.* Johnson, 41 Mich. 286, 2 N. W. 55; Runge *v.* Brown, 23 Nebr. 817, 37 N. W. 660; Ellis *v.* Newbrough, 6 N. M. 181, 27 Pac. 490, where plaintiff claimed to have been deceived by being induced to join a community of "Faithists" by representations which were obviously extravagant and absurd.

Statements of opinion see *supra*, III, B, 1, b, (V).

Promissory statements see *supra*, III, B, 1, b, (VI).

Statements made as upon information and belief see *supra*, III, B, 4, c.

18. Ingalls *v.* Miller, 121 Ind. 188, 22 N. E. 995; Stones *v.* Richmond, 21 Mo. App. 17. "It is difficult to draw a line beyond which human credulity cannot go, especially in speculations in mining stocks. If the representations were so extravagant that sensible, cautious people would not have believed them, that is a proper consideration for the jury in determining whether plaintiff believed and relied upon them; but it does not preclude a finding that plaintiff did so, nor relieve defendant from liability for his fraud if he committed fraud. It is as much an actionable fraud wilfully to deceive a credulous person with an improbable falsehood as it is to deceive a cautious, sagacious person with a plausible one. The law draws no line between the two falsehoods. It only asks, in either case, Was the lie spoken with intent to deceive and defraud, and was the false statement believed and money paid on the faith that it was true? These questions are for the jury." Barndt *v.* Frederick, 78 Wis. 1, 11, 47 N. W. 6, 11 L. R. A. 199.

19. *Georgia.*— Hart *v.* Waldo, 117 Ga. 590, 43 S. E. 998.

Massachusetts.— Silver *v.* Frazier, 3 Allen 382, 81 Am. Dec. 662, holding that the owner of land, who had directed an agent to erect

cealed [20] are not peculiarly within the knowledge of the party charged, and the other party has available means of knowing the truth by the exercise of ordinary prudence and intelligence, and nothing is said or done to prevent inquiry by him, he must make use of his means of knowledge or he cannot complain that he was misled. This principle is especially applicable where the transaction is entered into upon the express understanding of both parties that a material fact may exist of which one of them is ignorant,[21] or where the party making the misrepresentations is obviously hostile to the other and interested in misleading him.[22] On the other hand, if the fact represented is one which is susceptible of accurate knowledge and the speaker is or may well be presumed to be cognizant thereof while the other party is ignorant, and the statement is a positive assertion containing nothing so improbable or unreasonable as to put the other party upon further inquiry or give him cause to suspect that it is false, and an investigation would be necessary for him to discover the truth, the statement may be relied on.[23] And if in such a case plaintiff has been defrauded through acting in reliance on defendant's false statements, defendant will not be heard to say that he is a person unworthy

a house at a particular place thereon, cannot maintain an action against a third person, who, by false representations as to the true boundary line, has induced the agent, in the owner's absence, to erect the house at a different place.

Missouri.— Anderson *v.* McPike, 86 Mo. 293; Franklin *v.* Holle, 7 Mo. App. 241.

New York.— Schumaker *v.* Mather, 133 N. Y. 590, 30 N. E. 755; Chrysler *v.* Canaday, 90 N. Y. 272, 43 Am. Rep. 166.

North Carolina.— Fields *v.* Rouse, 48 N. C. 72; Saunders *v.* Hatterman, 24 N. C. 32, 37 Am. Dec. 404; Farrar *v.* Alston, 12 N. C. 69.

England.— Baily *v.* Merrell, 3 Bulstr. 94, Cro. Jac. 386.

See 23 Cent. Dig. tit. "Fraud," § 19.

20. Where persons are dealing with each other upon equal terms, and no confidential relations exist between them, neither is bound to disclose to the other superior information which he may possess respecting the transaction.

Georgia.— Littlejohn *v.* Drennon, 95 Ga. 743, 22 S. E. 657.

Illinois.— Roper *v.* Sangamon Lodge No. 6, I. O. O. F., 91 Ill. 518, 33 Am. Rep. 60.

Maine.— Hobbs *v.* Parker, 31 Me. 143.

Nebraska.— Jones *v.* Stewart, 62 Nebr. 207, 87 N. W. 12.

New York.— Dambmann *v.* Schulting, 75 N. Y. 55 [*reversing* 12 Hun 1]; McMillan *v.* Arthur, 48 N. Y. Super. Ct. 424 [*affirmed* in 98 N. Y. 167]; Williams *v.* Hay, 21 Misc. 73, 46 N. Y. Suppl. 895.

Pennsylvania.— Iron City Nat. Bank *v.* Du Puy, 194 Pa. St. 205, 44 Atl. 1066.

England.— Keates *v.* Cadogan, 10 C. B. 591, 15 Jur. 428, 20 L. J. C. P. 76, 70 E. C. L. 591.

See 23 Cent. Dig. tit. "Fraud," § 19. And see *supra*, III, B, 1, b, (IV).

The grantor of an annuity is not bound to disclose to the intended grantee all the circumstances of his situation. He is only bound to give honest answers to questions put to him by the intended grantee. The agents of the grantor stand in his situation, and are not bound to do more. Adamson *v.* Evitt, 9 L. J. Ch. O. S. 1, 2 Russ. & M. 66, 11 Eng. Ch. 66, 39 Eng. Reprint 319.

21. Jones *v.* Stewart, 62 Nebr. 207, 87 N. W. 12.

22. Morrill *v.* Madden, 35 Minn. 493, 29 N. W. 193 [*followed* in 37 Minn. 282, 34 N. W. 25]. See also Thompson *v.* Phœnix Ins. Co., 75 Me. 55, 46 Am. Rep. 357; Ætna Ins. Co. *v.* Reed, 33 Ohio St. 283. *Compare* Marshall *v.* Buchanan, 35 Cal. 264, 95 Am. Dec. 95.

23. *Alabama.*— McGar *v.* Williams, 26 Ala. 469, 62 Am. Dec. 739. See also Henry *v.* Allen, 93 Ala. 197, 9 So. 579.

Colorado.— American Nat. Bank *v.* Hammond, 25 Colo. 367, 55 Pac. 1090.

Illinois.— Endsley *v.* Johns, 120 Ill. 469, 12 N. E. 247, 60 Am. Rep. 572 [*affirming* 17 Ill. App. 466.]

Iowa.— Riley *v.* Bell, 120 Iowa 618, 95 N. W. 170.

Maine.— Braley *v.* Powers, 92 Me. 203, 42 Atl. 362.

Massachusetts.— Andrews *v.* Jackson, 168 Mass. 266, 47 N. E. 412, 60 Am. St. Rep. 390, 37 L. R. A. 402; Brown *v.* Castles, 11 Cush. 348.

Michigan.— Starkweather *v.* Benjamin, 32 Mich. 305; Eaton *v.* Winnie, 20 Mich. 156, 4 Am. Rep. 377.

Missouri.— Cottrill *v.* Krum, 100 Mo. 397, 13 S. W. 753, 18 Am. St. Rep. 549; Wells *v.* Adams, 88 Mo. App. 215.

Nebraska.— Perry *v.* Rogers, 62 Nebr. 898, 87 N. W. 1063; Foley *v.* Holtry, 43 Nebr. 133, 61 N. W. 120.

Oregon.— David *v.* Moore, (1905) 79 Pac. 415.

Pennsylvania.— Cornelius *v.* Molloy, 7 Pa. St. 293.

Rhode Island.— Bank of North America *v.* Sturdy, 7 R. I. 109.

Washington.— Tacoma *v.* Tacoma Light, etc., Co., 17 Wash. 458, 50 Pac. 55.

United States.— Strand *v.* Griffith, 97 Fed. 854, 38 C. C. A. 444; Wilson *v.* Higbee, 62 Fed. 723.

See 23 Cent. Dig. tit. "Fraud," § 19.

of belief and that plaintiff ought not to have trusted him, or that plaintiff was negligent and was cheated through his own credulity.[24] And this is true *a fortiori* where the facts are difficult of ascertainment.[25] Likewise the party complaining is not deprived of his right of action through failure to investigate if by any trick or artifice the other party prevented him from making investigation.[26] Moreover where the relations between the parties are not contractual,[27] but are involuntary on the part of the one to whom the statement is made, the duty to ascertain the truth is still less strict, and if the representation is positive and the party to whom it is made believes it, he may rely thereon without taking any steps to verify its accuracy.[28]

(II) *Where Sources of Information Are Given.*[29] Ordinarily the speaker cannot be held liable if in good faith he gives the sources of his information so that the other party may readily investigate for himself.[30] But referring the party to other sources of information does not as a matter of law excuse the speaker from liability; whether it will or not in a given case depends upon the circumstances;[31] and it will not excuse him if he has reason to know that the information which the party might obtain there would be untrue.[32]

(III) *Where Confidential Relations Exist.*[33] The rule requiring investigation by the person to whom a misrepresentation is made does not apply if any relation of trust or confidence exists between the parties, so that one of them places peculiar reliance in the trustworthiness of the other; but in such cases the latter is under a duty to make full and truthful disclosure of all material facts, and is liable either for fraudulent misrepresentation or concealment.[34] Nor is this principle confined to the typical cases of attorney and client, trustee and

24. Eaton *v.* Winnie, 20 Mich. 156, 4 Am. Rep. 377; Foley *v.* Holtry, 43 Nebr. 133, 61 N. W. 120; Runge *v.* Brown, 23 Nebr. 817, 37 N. W. 660; David *v.* Moore, (Oreg. 1905) 79 Pac. 415; Strand *v.* Griffith, 97 Fed. 854, 38 C. C. A. 444. See also Cottrill *v.* Krum, 100 Mo. 397, 13 S. W. 753, 18 Am. St. Rep. 549; Wells *v.* Adams, 88 Mo. App. 215; Anderson *v.* Snyder, 14 Pa. Super. Ct. 424; Wilson *v.* Higbee, 62 Fed. 723.

25. Marshall *v.* Seelig, 49 N. Y. App. Div. 433, 63 N. Y. Suppl. 355; David *v.* Moore, (Oreg. 1905) 79 Pac. 415; Benolkin *v.* Guthrie, 111 Wis. 554, 87 N. W. 466. And see *infra*, IV, B, 1, a, (III), (B), (3).

26. Wells *v.* Adams, 88 Mo. App. 215; Jenkinson *v.* Stoneman, 4 Ohio Dec. (Reprint) 289, 1 Clev. L. Rep. 218. See also Scott *v.* Haynes, 12 Mo. App. 597. This principle finds most frequent application in cases of sales of property. See *infra*, IV, B, 1, a, (III), (C).

Failure to read instrument.— While it is true that where one signs an instrument he must read it, if he can read, or have it read if he cannot, yet this rule does not operate where a trick or artifice is resorted to for the purpose of preventing him from reading or having it read to him. And where one of the contracting parties can read and does not read a contract before signing it, but relies on the other party for a knowledge of its contents, and is deceived by him, he can maintain an action. Dashiel *v.* Harshman, 113 Iowa 283, 85 N. W. 85; Wells *v.* Adams, 88 Mo. App. 215, where defendant designedly omitted certain stipulations from written instruments and by representing that the documents contained the entire contract between the parties induced plaintiff not to read them. See also Christensen *v.* Jessen, (Cal. 1895) 40 Pac. 747, 749; Phelan *v.* Kuhn, 51 Ill. App. 644.

27. For instances of this class of cases see *infra*, IV, E.

28. Burns *v.* Lane, 138 Mass. 350. See also Eaton *v.* Winnie, 20 Mich. 156, 4 Am. Rep. 377; David *v.* Moore, (Oreg. 1905) 79 Pac. 415.

29. **Statements made upon information and belief** see *supra*, III, B, 4, c.

30. Davidson *v.* Jordan, 47 Cal. 351; Cooper *v.* Lovering, 106 Mass. 77; Albion Milling Co. *v.* Weeping Water First Nat. Bank, 64 Nebr. 116, 89 N. W. 638; Griffing *v.* Diller, 21 N. Y. Suppl. 407.

31. Arnold *v.* Teel, 182 Mass. 1, 64 N. E. 413; Whiting *v.* Price, 172 Mass. 240, 51 N. E. 1084, 70 Am. St. Rep. 262; Savage *v.* Stevens, 126 Mass. 207; Handy *v.* Waldron, 19 R. I. 618, 35 Atl. 884. See also Hicks *v.* Stevens, 121 Ill. 186, 11 N. E. 241.

32. Hanscom *v.* Drullard, 79 Cal. 234, 21 Pac. 736; Chisolm *v.* Gadsden, 1 Strobh. (S. C.) 220, 47 Am. Dec. 550.

33. See, generally, such specific titles as Attorney and Client; Executors and Administrators; Guardian and Ward; Husband and Wife; Principal and Agent; Trusts.

34. *Alabama.*— King *v.* White, 119 Ala. 429, 24 So. 710.

Arkansas.— Hanger *v.* Evins, 38 Ark. 334.

Idaho.—Watson *v.* Molden, (1905) 79 Pac. 503.

Indiana.— Manley *v.* Felty, 146 Ind. 194, 45 N. E. 74; Ingalls *v.* Miller, 121 Ind. 188, 22 N. E. 995; Kinney *v.* Dodge, 101 Ind. 573.

cestui que trust, partners, tenants in common, and the like; but it applies wherever the circumstances require or induce one person to repose trust and confidence in another,[35] and it will sustain a right of action for false statements fraudulently made even though they are expressions of opinion,[36] such as representations of law.[37]

6. Fraudulent Intent. The false statement must have been made for the purpose of being acted upon either by the person to whom it was made or by some third person who it can be reasonably said was within the contemplation of defendant and to whom the statement was intended to be communicated. Representations made for a different purpose,[38] or intended for persons other than plaintiff,[39] cannot be made the basis of an action of deceit. Moreover the rule is well settled in most jurisdictions that an intent to deceive — or, as commonly expressed, a fraudulent intent — is an essential element of every actionable fraud, and that to support an action of deceit the existence of this intent must in some way be made manifest.[40] It is sometimes stated that proof of "actual fraud" is essen-

Iowa.— Faust *v.* Hosford, 119 Iowa 97, 93 N. W. 58.

Michigan.— Trumbull *v.* January, 123 Mich. 66, 81 N. W. 970; Picard *v.* McCormick, 11 Mich. 68.

Wisconsin.— Bergeron *v.* Miles, 88 Wis. 397, 60 N. W. 783, 43 Am. St. Rep. 911; Grant *v.* Hardy, 33 Wis. 668.

See 23 Cent. Dig. tit. "Fraud," § 23.

35. Hanger *v.* Evins, 38 Ark. 334; Picard *v.* McCormick, 11 Mich. 68; Smith *v.* Patterson, 33 Ohio St. 70; Bergeron *v.* Miles, 88 Wis. 397, 60 N. W. 783, 43 Am. St. Rep. 911. See also King *v.* White, 119 Ala. 429, 24 So. 710; Grant *v.* Hardy, 33 Wis. 668. *Compare* Hart *v.* Waldo, 117 Ga. 590, 43 S. E. 998.

"It is not always easy to define when this relation of trust and confidence exists; and no general rule can be formulated by which its existence can be known." Dambmann *v.* Schulting, 75 N. Y. 55, 62, per Earl, J.

36. Watson *v.* Molden, (Ida. 1905) 79 Pac. 503; Picard *v.* McCormick, 11 Mich. 68.

37. Lehman *v.* Shackleford, 50 Ala. 437; Townsend *v.* Cowles, 31 Ala. 428. See also Cooke *v.* Nathan, 16 Barb. (N. Y.) 342.

Misstatements of the law by an attorney to his client to secure an advantage to himself, with knowledge of the falsity and intent to defraud on one side, and ignorance and reliance on the other, constitute actionable fraud. Kinney *v.* Dodd, 101 Ind. 573; Hubbard *v.* McLean, 115 Wis. 9, 90 N. W. 1077; Allen *v.* Frawley, 106 Wis. 638, 82 N. W. 593. See Attorney and Client, 4 Cyc. 889.

38. *Maine.*— Henry *v.* Dennis, 95 Me. 24, 49 Atl. 58, 85 Am. St. Rep. 365.

Massachusetts.— Nash *v.* Minnesota Title Ins., etc., Co., 159 Mass. 437, 34 N. E. 625; Hunnewell *v.* Duxbury, 154 Mass. 286, 28 N. E. 267, 13 L. R. A. 733; Fogg *v.* Pew, 10 Gray 409, 71 Am. Dec. 662.

Missouri.— McClure *v.* Campbell, 148 Mo. 96, 49 S. W. 881.

New York.— Brackett *v.* Griswold, 112 N. Y. 454, 20 N. E. 376. See also Babcock *v.* Libby, 82 N. Y. 144.

Pennsylvania.— McAleer *v.* McMurray, 58 Pa. St. 126.

Rhode Island.— Butterfield *v.* Barber, 20 R. I. 99, 37 Atl. 532.

39. See *infra*, V.

40. *Arkansas.*— Hutchinson *v.* Gorman, 71 Ark. 305, 73 S. W. 793.

Connecticut.— Morrill *v.* Blackman, 42 Conn. 324.

Delaware.— Grier *v.* Dehan, 5 Houst. 401.

Georgia.— Hunt *v.* Hardwick, 68 Ga. 100; Bennett *v.* Terrill, 20 Ga. 83; Terrell *v.* Bennett, 18 Ga. 404.

Illinois.— Linington *v.* Strong, 111 Ill. 152; Schwabacker *v.* Riddle, 99 Ill. 343; Miller *v.* Howell, 2 Ill. 499, 2 Am. Dec. 36; Wachsmuth *v.* Martini, 45 Ill. App. 244; Gray *v.* Lindauer, 33 Ill. App. 371; Flower *v.* Farwell, 18 Ill. App. 254.

Iowa.— Warfield *v.* Clark, 118 Iowa 69, 91 N. W. 833; Boddy *v.* Henry, 113 Iowa 462, 85 N. W. 771, 53 L. R. A. 769; Clement, etc., Co. *v.* Swanson, 110 Iowa 106, 81 N. W. 233; Kimmans *v.* Chandler, 13 Iowa 327.

Kentucky.—Warren *v.* Barker, 2 Duv. 155; Ball *v.* Lively, 4 Dana 369; Foster *v.* Gibson, 38 S. W. 144, 18 Ky. L. Rep. 716.

Maine.— Kingsbury *v.* Taylor, 29 Me. 508, 50 Am. Dec. 607; Denny *v.* Gilman, 26 Me. 149.

Maryland.— Lamm *v.* Cecil County Port Deposit Homestead Assoc., 49 Md. 233, 33 Am. Rep. 246.

Massachusetts.— Tucker *v.* White, 125 Mass. 344.

Michigan.— Black *v.* Miller, 75 Mich. 323, 42 N. W. 837; Collins *v.* Jackson, 54 Mich. 186, 19 N. W. 947.

Minnesota.— Humphrey *v.* Merriam, 32 Minn. 197, 20 N. W. 138; Merriam *v.* Pine City Lumber Co., 23 Minn. 314; Johnson *v.* Wallower, 18 Minn. 288.

Missouri.— Dunn *v.* White, 63 Mo. 181; Summers *v.* Metropolitan L. Ins. Co., 90 Mo. App. 691; Tootle *v.* Lysaght, 65 Mo. App. 139; Brooking *v.* Shinn, 25 Mo. App. 277. See also Lovelace *v.* Suter, 93 Mo. App. 429, 67 S. W. 737. But see Brownlee *v.* Hewitt, 1 Mo. App. 360, holding that where the representations relate to land a fraudulent intent is wholly unnecessary to found an action for deceit.

New Hampshire.— Spead *v.* Tomlinson,

tial to maintain the action,[41] or that there can be no actionable fraud without a

(1904) 59 Atl. 376; Hanson *v.* Edgerly, 29 N. H. 343; Lord *v.* Colley, 6 N. H. 99, 25 Am. Dec. 445.

New Jersey.— Crowell *v.* Jackson, 53 N. J. L. 656, 23 Atl. 426; Cowley *v.* Smyth, 46 N. J. L. 380, 50 Am. Rep. 432.

New York.— Kountze *v.* Kennedy, 147 N. Y. 124, 41 N. E. 414, 49 Am. St. Rep. 651, 29 L. R. A. 360; Macullar *v.* McKinley, 99 N. Y. 353, 2 N. E. 9 [*affirming* 49 N. Y. Super. Ct. 5]; Duffany *v.* Ferguson, 66 N. Y. 482 [*reversing* 5 Hun 106]; Stitt *v.* Little, 63 N. Y. 427; Wakeman *v.* Dalley, 51 N. Y. 27, 10 Am. Rep. 551; Chester *v.* Comstock, 40 N. Y. 575 note; Inderlied *v.* Honeywell, 88 N. Y. App. Div. 144, 84 N. Y. Suppl. 333; Bloomingdale *v.* Southern Nat. Bank, 63 N. Y. App. Div. 72, 71 N. Y. Suppl. 306; Kingsland *v.* Haines, 62 N. Y. App. Div. 146, 70 N. Y. Suppl. 873; Carson *v.* Eisner, 42 N. Y. App. Div. 614, 58 N. Y. Suppl. 826; Hemenway *v.* Keeler, 88 Hun 405, 34 N. Y. Suppl. 808; Van Vliet *v.* McLean, 23 Hun 206; Frisbee *v.* Fitzsimons, 3 Hun 674; Thompson *v.* Gray, 11 Daly 183; Rothschild *v.* Porter, 19 N. Y. Suppl. 177; Cullen *v.* Hernz, 13 N. Y. St. 333; Peterson *v.* Humphrey, 4 Abb. Pr. 394; Nelson *v.* Luling, 46 How. Pr. 355; Mead *v.* Mali, 15 How. Pr. 347; Young *v.* Covell, 8 Johns. 23, 5 Am. Dec. 316.

North Carolina.— Stafford *v.* Newsom, 31 N. C. 507.

Pennsylvania.— McAleer *v.* McMurray, 58 Pa. St. 126; Rheem *v.* Naugatuck Wheel Co., 33 Pa. St. 358; Bokee *v.* Walker, 14 Pa. St. 139; Dutton *v.* Pyle, 7 Pa. Super. Ct. 126, 42 Wkly. Notes Cas. 65; Jalass *v.* Young, 3 Pa. Super. Ct. 422, 40 Wkly. Notes Cas. 40; Wilson *v.* Talheimer, 20 Pa. Co. Ct. 203; Williams *v.* Beninger, 11 Pa. Co. Ct. 150.

South Carolina.— Munro *v.* Gairdner, 3 Brev. 31, 5 Am. Dec. 531.

Washington.— Thorp *v.* Smith, 18 Wash. 277, 51 Pac. 381.

West Virginia.—Crislip *v.* Cain, 19 W. Va. 438.

United States.— Russell *v.* Clark, 7 Cranch 69, 3 L. ed. 271; Sprigg *v.* Commonwealth Title Ins., etc., Co., 119 Fed. 434.

England.— Derry *v.* Peek, 14 App. Cas. 337, 54 J. P. 148, 58 L. J. Ch. 864, 61 L. T. Rep. N. S. 265, 1 Meg. 292, 38 Wkly. Rep. 33 [*reversing* 37 Ch. D. 541, 57 L. J. Ch. 347, 59 L. T. Rep. N. S. 78, 36 Wkly. Rep. 899]; Joliffe *v.* Baker, 11 Q. B. D. 255, 47 J. P. 678, 52 L. J. Q. B. 609, 48 L. T. Rep. N. S. 966, 32 Wkly. Rep. 59; Kennedy *v.* Panama, etc., Royal Mail Co., L. R. 2 Q. B. 580, 8 B. & S. 571, 36 L. J. Q. B. 260, 17 L. T. Rep. N. S. 62, 15 Wkly. Rep. 1039; Milne *v.* Marwood, 15 C. B. 778, 3 C. L. R. 228, 24 L. J. C. P. 36, 80 E. C. L. 778; Behn *v.* Kemble, 7 C. B. N. S. 260, 97 E. C. L. 260; Stevens *v.* Webb, 7 C. & P. 60, 32 E. C. L. 499; Haycraft *v.* Creasy, 2 East 92, 6 Rev. Rep. 380; Thom *v.* Bigland, 8 Exch. 725, 22 L. J. Exch. 243, 1 Wkly. Rep. 290; Taylor *v.* Ashton, 7 Jur. 978, 12 L. J. Exch. 363, 11 M. & W. 401.

See 23 Cent. Dig. tit. "Fraud," § 2.

"Every deceit comprehends a lie; but a deceit is more than a lie on account of the view with which it is practised, it being coupled with some dealing, and the injury which it is calculated to occasion, and does occasion, to another person." Pasley *v.* Freeman, 3 T. R. 51, 56, 1 Rev. Rep. 634, per Buller, J.

If the motive and design of an act may be traced to an honest and legitimate source, equally as to a corrupt one, the former ought to be preferred and the charge of fraud will fail. Jackson *v.* Wilcox, 2 Ill. 344; Ley *v.* Metropolitan L. Ins. Co., 120 Iowa 203, 94 N. W. 568; Kenosha Stove Co. *v.* Shedd, 82 Iowa 540, 48 N. W. 933.

But in Michigan the rule prevailing in courts of equity, that innocent misrepresentations may constitute fraud (see CONTRACTS, 9 Cyc. 408), has been applied in actions of deceit, it being well settled that "if there was in fact a misrepresentation, though made innocently, and its deceptive influence was effective, the consequences to the plaintiff being as serious as though it had proceeded from a vicious purpose, he would have a right of action for the damages caused thereby." Holcomb *v.* Noble, 69 Mich. 396, 399, 37 N. W. 497 [*followed* in Busch *v.* Wilcox, 82 Mich. 315, 46 N. W. 940]; Baughman *v.* Gould, 45 Mich. 481, 8 N. W. 73. See also Totten *v.* Burhaus, 91 Mich. 495, 51 N. W. 1119.

And in Nebraska, Texas, and Wisconsin a similar doctrine has been announced. Bauer *v.* Taylor, (1904) 98 N. W. 29 [*modifying* (1903) 96 N. W. 268]; Gerner *v.* Mosher, 58 Nebr. 135, 78 N. W. 384, 46 L. R. A. 244; Watson *v.* Baker, 71 Tex. 739, 9 S. W. 867; Loper *v.* Robinson, 54 Tex. 510; Marselis *v.* Crawford, 8 Tex. Civ. App. 485, 28 S. W. 371; Krause *v.* Busacker, 105 Wis. 350, 81 N. W. 406; Davis *v.* Nuzum, 72 Wis. 439, 40 N. W. 497, 1 L. R. A. 774; Bird *v.* Kleiner, 41 Wis. 134.

Concealment.— A fraudulent intent is an essential element of fraudulent concealment. Jordan *v.* Pickett, 78 Ala. 331; Hanson *v.* Edgerly, 29 N. H. 343; Clark *v.* Bamer, 2 Lans. (N. Y.) 67; Fleming *v.* Slocum, 18 Johns. (N. Y.) 403, 9 Am. Dec. 224.

41. Kountze *v.* Kennedy, 147 N. Y. 124, 41 N. E. 414, 49 Am. St. Rep. 651, 29 L. R. A. 360 [*affirming* 72 Hun 311, 25 N. Y. Suppl. 682]; Bokee *v.* Walker, 14 Pa. St. 139; Derry *v.* Peek, 14 App. Cas. 337, 54 J. P. 148, 58 L. J. Ch. 864, 61 L. T. Rep. N. S. 265, 1 Meg. 292, 38 Wkly. Rep. 33 [*reversing* 37 Ch. D. 541, 57 L. J. Ch. 347, 59 L. T. Rep. N. S. 78, 36 Wkly. Rep. 899]. See also Boddy *v.* Henry, 113 Iowa 462, 85 S. W. 771, 53 L. R. A. 769.

"While the common-law action of deceit furnishes a remedy for fraud which ought to be preserved, we think it should be kept within its ancient limits, and should not

dishonest intent indicative of moral turpitude.[42] But except in cases where the intent to deprive plaintiff of money or property is the gist of the action, and thus there must necessarily be a dishonest intent,[43] the proposition that a fraudulent or dishonest intent is necessary means nothing more than that the misrepresentation must be made with knowledge of its falsity or with what the law regards as the equivalent of such knowledge, and with the intent that it shall be acted upon or in such a manner as naturally to induce the other person to act upon it. If these circumstances exist the misrepresentation is fraudulent both in morals and in law and is made with all the fraudulent intent which the law requires; a motive to obtain benefit or cause injury is not an essential element.[44] So where the representation relates to a material fact and (1) is made with knowledge of its falsity, or (2) recklessly, without any knowledge of its truth or falsity and as a positive assertion calculated to convey the impression that the speaker knows it to be true, a fraudulent intent will always be inferred;[45] and independent evi-

by construction be extended to embrace dealings which, however unfortunate they may have proved to one of the parties, were not induced by actual intentional fraud on the part of the other." Kountze *v.* Kennedy, 147 N. Y. 124, 129, 41 N. E. 414, 49 Am. St. Rep. 651, 29 L. R. A. 360, per Andrews, C. J.

42. See the following cases:

Illinois.— Flower *v.* Farwell, 18 Ill. App. 254.

Missouri.— Lovelace *v.* Suter, 93 Mo. App. 429, 67 S. W. 737.

New Jersey.— Crowell *v.* Jackson, 53 N. J. L. 656, 23 Atl. 426.

North Carolina.— Gerkins *v.* Williams, 48 N. C. 11; McEntire *v.* McEntire, 43 N. C. 297; Hamrick *v.* Hogg, 12 N. C. 350.

England.— Taylor *v.* Ashton, 7 Jur. 978, 12 L. J. Exch. 363, 11 M. & W. 401.

43. Such for instance as a purchase of goods with intent not to pay for them. See *infra*, IV, B, 2, b.

44. *Connecticut.*— Judd *v.* Weber, 55 Conn. 267, 11 Atl. 40.

Illinois.— See McBean *v.* Fox, 1 Ill. App. 177.

Iowa.— Boddy *v.* Henry, 126 Iowa 31, 101 N. W. 447; Riley *v.* Bell, 120 Iowa 618, 95 N. W. 170.

Maine.— Braley *v.* Powers, 92 Me. 203, 42 Atl. 362.

Massachusetts.— Whiting *v.* Price, 169 Mass. 576, 48 N. E. 772, 61 Am. St. Rep. 307; Nash *v.* Minnesota Title Ins., etc., Co., 163 Mass. 574, 40 N. E. 1039, 47 Am. St. Rep. 489, 28 L. R. A. 753; Chatham Furnace Co. *v.* Moffatt, 147 Mass. 403, 18 N. E. 168, 9 Am. St. Rep. 727; Stone *v.* Denny, 4 Metc. 151; Page *v.* Bent, 2 Metc. 371, per Shaw, C. J.

Missouri.— Edwards *v.* Noel, 88 Mo. App. 434; Brownlee *v.* Hewitt, 1 Mo. App. 360. See also Scott *v.* Haynes, 12 Mo. App. 597.

New Hampshire.— See Hanson *v.* Edgerly, 29 N. H. 343.

New York.— Hadcock *v.* Osmer, 153 N. Y. 604, 47 N. E. 923 [*affirming* 4 N. Y. App. Div. 435, 38 N. Y. Suppl. 618]. See also Wakeman *v.* Dalley, 51 N. Y. 27, 10 Am. Rep. 551.

Pennsylvania.— Lamberton *v.* Dunham, 165 Pa. St. 129, 30 Atl. 716; Bokee *v.* Walker, 14 Pa. St. 139, (per Gibson, C. J.); Anderson *v.* Snyder, 14 Pa. Super. Ct. 424.

South Carolina.— See Campbell *v.* Kinlock, 9 Rich. 300.

Texas.— Texas Cotton Products Co. *v.* Denny, (Civ. App. 1903) 78 S. W. 557.

Wisconsin.— See Montreal River Lumber Co. *v.* Mihills, 80 Wis. 540, 50 N. W. 507.

England.— Derry *v.* Peek, 14 App. Cas. 337, 54 J. P. 148, 58 L. J. Ch. 864, 61 L. T. Rep. N. S. 265, 1 Meg. 292, 38 Wkly. Rep. 33 (per Lord Herschell); Polhill *v.* Walter, 3 B. & Ad. 114, 23 E. C. L. 59; Foster *v.* Charles, 6 Bing. 396, 19 E. C. L. 183, 7 Bing. 105, 20 E. C. L. 55, 8 L. J. C. P. 118, 4 M. & P. 61, 741, 31 Rev. Rep. 446; Eddington *v.* Fitzmaurice, 29 Ch. D. 459, 50 J. P. 52, 55 L. J. Ch. 650, 53 L. T. Rep. N. S. 369, 33 Wkly. Rep. 911; Haycraft *v.* Creasy, 2 East 92, 6 Rev. Rep. 380 (per Le Blanc, J.); Watson *v.* Poulson, 15 Jur. 1111, 7 Eng. L. & Eq. 585 (per Parke, J.); Pasley *v.* Freeman, 3 T. R. 51, 1 Rev. Rep. 634 (per Buller, J.).

See 23 Cent. Dig. tit. "Fraud," §§ 2, 4, 5.

45. *Colorado.*— Lahay *v.* City Nat. Bank, 15 Colo. 339, 25 Pac. 704, 22 Am. St. Rep. 407; Sellar *v.* Clelland, 2 Colo. 532; Goodale *v.* Middaugh, 8 Colo. App. 223, 46 Pac. 11.

Connecticut.— See Scholfield Gear, etc., Co. *v.* Scholfield, 71 Conn. 1, 40 Atl. 1046.

Illinois.— Case *v.* Ayers, 65 Ill. 142; John V. Farwell Co. *v.* Nathanson, 99 Ill. App. 185; Johnson *v.* Beeney, 9 Ill. App. 64; McBean *v.* Fox, 1 Ill. App. 177.

Indiana.— Kirkpatrick *v.* Reeves, 121 Ind. 280, 22 N. E. 139.

Iowa.— Boddy *v.* Henry, 126 Iowa 31, 101 N. W. 447; Riley *v.* Bell, 120 Iowa 618, 95 N. W. 170; Hubbard *v.* Weare, 79 Iowa 678, 44 N. W. 915.

Maine.— Braley *v.* Powers, 92 Me. 203, 42 Atl. 362; Hammatt *v.* Emerson, 27 Me. 308, 46 Am. Dec. 598.

Massachusetts.— Nash *v.* Minnesota Title Ins., etc., Co., 163 Mass. 574, 40 N. E. 1039, 47 Am. St. Rep. 489, 28 L. R. A. 753; Chatham Furnace Co. *v.* Moffatt, 147 Mass. 403, 18 N. E. 168, 9 Am. St. Rep. 727; Collins *v.* Denison, 12 Metc. 549; Stone *v.*

dence to establish it is not required;[46] although this intent cannot be inferred from the mere falsity of the representation even where coupled with injury to plaintiff,[47] and cannot be held to be conclusively established by the fact that the speaker has reason to believe that his statement is false.[48] Likewise in this connection the courts sometimes apply the principle that a man must be presumed to have foreseen and intended the necessary consequences of his own voluntary acts, and will not be heard to assert the contrary, the voluntary doing of an act which necessarily results in defrauding another being held conclusive evidence of a fraudulent intent.[49] Thus it appears that the rule requiring a fraudulent intent

Denny, 4 Metc. 151 (per Dewey, J.); Page *v.* Bent, 2 Metc. 371 (per Shaw, C. J.).

Minnesota.— Hedin *v.* Minneapolis Medical, etc., Institute, 62 Minn. 146, 64 N. W. 158, 54 Am. St. Rep. 628, 35 L. R. A. 417; Johnson *v.* Wallower, 15 Minn. 472, 18 Minn. 288.

Missouri.— Atchison County Bank *v.* Byers, 139 Mo. 627, 41 S. W. 325; Dulaney *v.* Rogers, 64 Mo. 201. See also Dunn *v.* White, 63 Mo. 181.

New Hampshire. — Spead *v.* Tomlinson, (1904) 49 Atl. 376.

New York.— Hadcock *v.* Osmer, 153 N. Y. 604, 47 N. E. 923; Meyer *v.* Amidon, 23 Hun 553; Frisbee *v.* Fitzsimmons, 3 Hun 674; Williams *v.* Wood, 14 Wend. 126. See also Frank *v.* Bradley, etc., Co., 42 N. Y. App. Div. 178, 58 N. Y. Suppl. 1032; Meyers *v.* Rosenback, 5 Misc. 337, 25 N. Y. Suppl. 521. *Compare* Cullen *v.* Hernz, 47 Hun 635, 13 N. Y. St. 333. "The purpose of the party asserting his personal knowledge is to induce belief in the fact represented, and if he has no knowledge, and the fact is one upon which special knowledge can be predicated, the inference of fraudulent intent in the absence of explanation naturally results." Kountze *v.* Kennedy, 147 N. Y. 124, 130, 41 N. E. 414, 49 Am. St. Rep. 651, 29 L. R. A. 360, per Andrews, C. J.

Pennsylvania.— Griswold *v.* Gebbie, 126 Pa. St. 353, 17 Atl. 673, 12 Am. St. Rep. 878 [*affirming* 6 Pa. Co. Ct. 212]; Wolfe *v.* Arrott, 109 Pa. St. 473, 1 Atl. 333.

Vermont.— Cabot *v.* Christie, 42 Vt. 121, 1 Am. Rep. 313.

Wisconsin.— See Montreal River Lumber Co. *v.* Mihills, 80 Wis. 540, 50 N. W. 507.

United States.— Cooper *v.* Schlesinger, 111 U. S. 148, 4 S. Ct. 360, 28 L. ed. 382; Nevada Bank *v.* Portland Nat. Bank, 59 Fed. 338.

England.— Polhill *v.* Walter, 3 B. & Ad. 114, 23 E. C. L. 59; Corbett *v.* Brown, 8 Bing. 33, 21 E. C. L. 433, 5 C. & P. 363, 24 E. C. L. 607, 1 L. J. C. P. 3, 1 M. & Rob. 108, 1 Moore & S. 85. See also Foster *v.* Charles, 6 Bing. 396, 19 E. C. L. 183, 7 Bing. 105, 20 E. C. L. 55, 8 L. J. C. P. O. S. 118, 4 M. & P. 61, 741, 31 Rev. Rep. 446.

See 23 Cent. Dig. tit. "Fraud," §§ 2, 4, 5.

46. Boddy *v.* Henry, 126 Iowa 31, 101 N. W. 447; Weeks *v.* Currier, 172 Mass. 53, 51 N. E. 416; Cole *v.* Cassidy, 138 Mass. 437, 52 Am. Rep. 284; Collins *v.* Denison, 12 Metc. (Mass.) 549.

47. Ley *v.* Metropolitan L. Ins. Co., 120 Iowa 203, 94 N. W. 568; Meyer *v.* Amidon, 45 N. Y. 169. See also Wakeman *v.* Dalley, 51 N. Y. 27, 10 Am. Rep. 551.

48. Salisbury *v.* Howe, 87 N. Y. 128; Lamberton *v.* Dunham, 165 Pa. St. 129, 30 Atl. 716. See also Derry *v.* Peek, 14 App. Cas. 337, 54 J. P. 148, 58 L. J. Ch. 864, 61 L. T. Rep. N. S. 265, 1 Meg. 292, 38 Wkly. Rep. 33 [*reversing* 37 Ch. D. 541, 57 L. J. Ch. 347, 59 L. T. Rep. N. S. 78, 36 Wkly. Rep. 899]; Angus *v.* Clifford, [1891] 2 Ch. 449, 60 L. J. Ch. 443, 65 L. T. Rep. N. S. 274, 39 Wkly. Rep. 498. *Compare* Mayer *v.* Salazar, 84 Cal. 646, 24 Pac. 597 [*citing* Cal. Civ. Code, § 1572]; Hanscom *v.* Drullard, 79 Cal. 224, 21 Pac. 736 [*citing* Cal. Civ. Code, § 1710].

The reason for the proposition above stated is that while the speaker may have reason to believe that his statement is untrue, yet he may honestly believe in its truth, and therefore the court will not substitute for the fraudulent intent a fact which might or might not in the minds of the jury establish that intent. The fact that the speaker has reason to believe his statement to be false is merely evidence tending to prove the fraudulent intent, but not conclusive as a matter of law. Salisbury *v.* Howe, 87 N. Y. 128. And see *supra*, III, B, 4, b.

49. *Connecticut.*— Judd *v.* Weber, 55 Conn. 267, 11 Atl. 40.

Iowa.— See Boddy *v.* Henry, 126 Iowa 31, 101 N. W. 447.

Massachusetts.— Lobdell *v.* Baker, 1 Metc. 193, 35 Am. Dec. 358, 3 Metc. 469, where defendant procured a minor to indorse a note and then sold it thus indorsed.

Minnesota.— Johnson *v.* Wallower, 18 Minn. 288.

Missouri.— Atchison County Bank *v.* Byers, 139 Mo. 627, 41 S. W. 325, issue of corporate bonds falsely marked "first mortgage bonds."

New York.— Sieling *v.* Clark, 18 Misc. 464, 41 N. Y. Suppl. 982, where defendant, knowing that he had insufficient funds in the bank, induced plaintiff to cash his checks.

Texas.— Texas Cotton Products Co. *v.* Denny, (Civ. App. 1903) 78 S. W. 557.

England.— Foster *v.* Charles, 6 Bing. 396, 19 E. C. L. 183, 7 Bing. 105, 20 E. C. L. 55, 8 L. J. C. P. O. S. 118, 4 M. & P. 61, 741, 31 Rev. Rep. 446.

See 23 Cent. Dig. tit. "Fraud," §§ 2, 5.

"Intent or intention is an emotion or operation of the mind, and can usually be shown

is in part simply another form of the general rule[50] requiring a scienter to be shown;[51] and it can safely be asserted that while there may be moral fraud which is not actionable,[52] there is no actionable fraud which is not to some extent moral fraud.[53]

7. Acting in Reliance on Representation — a. In General. It must appear that plaintiff relied on defendant's false statements as being true and that they constituted a material inducement for him to do the acts that are alleged to have resulted in his injury.[54] If his conduct was not influenced by the false repre-

only by acts or declarations, and as acts speak louder than words, if a party does an act which must defraud another, his declaring that he did not by the act intend to defraud, is weighed down by the evidence of his own act. But in such a case it is not proper to say that there is a presumption or conclusion of law that the transaction is fraudulent; but it is proper to say that the circumstances of the transaction, or the transaction itself, is conclusive evidence of fraud; and if in such a case, against such evidence, a jury or referee should find that there was no fraud, a new trial would be granted, not because any legal presumption or conclusion had been violated, but because the finding was against the weight of evidence; against conclusive evidence." Babcock *v.* Eckler, 24 N. Y. 623, 632, per Sutherland, J.

50. See *supra*, III, B, 4, a.

51. See the following cases:

Connecticut.— Judd *v.* Weber, 55 Conn. 267, 11 Atl. 40.

Indiana.— Kirkpatrick *v.* Reeves, 121 Ind. 280, 22 N. E. 139.

Iowa.— Boddy *v.* Henry, 126 Iowa 31, 101 N. W. 447.

Massachusetts.— Lobdell *v.* Baker, 1 Metc. 193, 35 Am. Dec. 358, 3 Metc. 469.

New York.— Hadcock *v.* Osmer, 153 N. Y. 604, 47 N. E. 923; Kountze *v.* Kennedy, 147 N. Y. 124, 41 N. E. 414, 49 Am. St. Rep. 651, 29 L. R. A. 360; Wakeman *v.* Dalley, 51 N. Y. 27, 10 Am. Rep. 551.

See 23 Cent. Dig. tit. "Fraud," §§ 2, 4.

52. See McAleer *v.* Horsey, 35 Md. 439; Fagan *v.* Newson, 12 N. C. 20. As where plaintiff has suffered no injury. See *infra*, III, B, 8, a.

53. See the following cases:

Iowa.— Riley *v.* Bell, 120 Iowa, 618, 95 N. W. 170.

Massachusetts.— Chatham Furnace Co. *v.* Moffatt, 147 Mass. 403, 18 N. E. 168, 9 Am. St. Rep. 727.

Missouri.— See Lovelace *v.* Suter, 93 Mo. App. 429, 67 S. W. 737.

New Jersey.— Crowell *v.* Jackson, 53 N. J. L. 656, 23 Atl. 426.

New York.— Hadcock *v.* Osmer, 153 N. Y. 604, 47 N. E. 923.

Pennsylvania.— Bokee *v.* Walker, 14 Pa. St. 139.

Vermont.— Cabot *v.* Christie, 42 Vt. 121, 1 Am. Rep. 313.

England.— Derry *v.* Peek, 14 App. Cas. 337, 54 J. P. 148, 58 L. J. Ch. 864, 61 L. T. Rep. N. S. 265, 1 Meg. 292, 38 Wkly. Rep. 33 [*reversing* 37 Ch. D. 541, 57 L. J. Ch. 347, 59 L. T. Rep. N. S. 78, 36 Wkly. Rep. 899].

See 23 Cent. Dig. tit. "Fraud," §§ 2, 4, 5.

54. *Alabama.*— Hooper *v.* Whitaker, 130 Ala. 324, 30 So. 355; Moses *v.* Katzenberger, 84 Ala. 95, 4 So. 237; Gilmer *v.* Ware, 19 Ala. 252.

Arizona.— Stewart *v.* Albuquerque Nat. Bank, (1891) 30 Pac. 303.

Arkansas.— Hill *v.* Bush, 19 Ark. 522.

California.— Nounnan *v.* Sutter County Land Co., 81 Cal. 1, 22 Pac. 515, 6 L. R. A. 219; Snow *v.* Halstead, 1 Cal. 359.

Colorado.— Cole *v.* Smith, 26 Colo. 506, 58 Pac. 1086; American Nat. Bank *v.* Hammond, 25 Colo. 367, 55 Pac. 1090.

Delaware.— Herring *v.* Draper, 2 Houst. 158.

Georgia.— Morris *v.* Morris, 95 Ga. 535, 20 S. E. 506; Slade *v.* Little, 20 Ga. 371; Harrison *v.* Savage, 19 Ga. 310.

Illinois.— Holdom *v.* Ayer, 110 Ill. 448.

Indiana.— Craig *v.* Hamilton, 118 Ind. 565, 21 N. E. 315; Bowman *v.* Carithers, 40 Ind. 90; Hagee *v.* Grossman, 31 Ind. 223; Port *v.* Williams, 6 Ind. 219.

Iowa.— Hale *v.* Philbrick, 47 Iowa 217; Hallam *v.* Todhunter, 24 Iowa 166; Courtney *v.* Carr, 11 Iowa 295. See also Burnett *v.* Hensley, 118 Iowa 575, 92 N. W. 678.

Kansas.— Provident Loan Trust Co. *v.* McIntosh, 68 Kan. 452, 75 Pac. 498; Farmers' Stock Breeding Assoc. *v.* Scott, 53 Kan. 534, 36 Pac. 978; White *v.* Smith, 39 Kan. 752, 18 Pac. 931.

Kentucky.— New York L. Ins. Co. *v.* Hord, 78 S. W. 207, 25 Ky. L. Rep. 1531.

Massachusetts.— Harrington *v.* Smith, 138 Mass. 92; Hedden *v.* Griffin, 136 Mass. 229, 49 Am. Rep. 25.

Michigan.— Lewis *v.* Weidenfield, 114 Mich. 604, 72 N. W. 604.

Minnesota.— Humphrey *v.* Merriam, 32 Minn. 197, 20 N. W. 138.

Missouri.— Priest *v.* White, 89 Mo. 609, 1 S. W. 361; Anderson *v.* McPike, 86 Mo. 293; Felix *v.* Shirey, 60 Mo. App. 621.

Nebraska.— McCready *v.* Phillips, 44 Nebr. 790, 63 N. W. 7; Lorenzen *v.* Kansas City Inv. Co., 44 Nebr. 99, 62 N. W. 231; Upton *v.* Levy, 39 Nebr. 331, 58 N. W. 95; Stetson *v.* Riggs, 37 Nebr. 797, 56 N. W. 628; Runge *v.* Brown, 23 Nebr. 817, 37 N. W. 660. See also Hitchcock *v.* Gothenburg Water Power, etc., Co., (1903) 95 N. W. 638.

New Jersey.— Byard *v.* Holmes, 34 N. J. L. 296.

New York.— Brackett *v.* Griswold, 112

sentations,[55] as where they were not previously brought to his knowledge,[56] or he was informed of the real facts,[57] or acted solely upon his own judgment based upon independent inquiry and investigation,[58] the action cannot be maintained; for in such cases it cannot be said that he was deceived by defendant. And false representations made after plaintiff entered into the transaction in question are obviously immaterial.[59] Likewise where concealment is the ground of the action it must appear that plaintiff relied on defendant to make disclosure of the fact concealed, and that the concealment was a moving inducement to the plaintiff's change of position.[60] It is not necessary, however, that the fraudulent misrepresentations should have induced plaintiff to do some positive act, but if they induced him to refrain from doing something which he otherwise would have done and he thus has suffered a loss, there is a sufficient "acting" to sustain a recovery in an action for deceit;[61] as where plaintiff was induced by the fraud

N. Y. 454, 20 N. E. 376; Taylor *v.* Guest, 58 N. Y. 262; Arthur *v.* Griswold, 55 N. Y. 400; Atkins *v.* Elwell, 45 N. Y. 753; Oberlander *v.* Spiess, 45 N. Y. 175; Powell *v.* F. C. Linde Co., 58 N. Y. App. Div. 261, 68 N. Y. Suppl. 1070 [*affirmed* in 171 N. Y. 675, 64 N. E. 1125]; Tindle *v.* Birkett, 57 N. Y. App. Div. 450, 67 N. Y. Suppl. 1017; Hemenway *v.* Keeler, 88 Hun 405, 34 N. Y. Suppl. 808; Masterson *v.* Beers, 1 Sweeny 406; Elwell *v.* Chamberlain, 4 Bosw. 320; McGlynn *v.* Seymour, 14 Daly 420, 14 N. Y. St. 707; Mead *v.* Mali, 15 How. Pr. 347.

North Carolina.— Ramsey *v.* Wallace, 100 N. C. 75, 6 S. E. 638; Gilmer *v.* Hanks, 84 N. C. 317.

Pennsylvania.— Grauel *v.* Wolfe, 185 Pa. St. 83, 39 Atl. 819; McAleer *v.* McMurray, 58 Pa. St. 126.

South Dakota.— Sioux Banking Co. *v.* Kendall, 6 S. D. 543, 62 N. W. 377; First Nat. Bank *v.* North, 2 S. D. 480, 51 N. W. 96.

Texas.— Cresap *v.* Manor, 63 Tex. 485; Wooters *v.* International, etc., R. Co., 54 Tex. 294; McCall *v.* Sullivan, 1 Tex. App. Civ. Cas. § 1.

Vermont.— Weeks *v.* Burton, 7 Vt. 67.

Wisconsin.— Fowler *v.* McCann, 86 Wis. 427, 56 N. W. 1085; Sheldon *v.* Davidson, 85 Wis. 138, 55 N. W. 161; McNaughton *v.* Conkling, 9 Wis. 316.

United States.— Ming *v.* Woolfolk, 116 U. S. 599, 6 S. Ct. 489, 29 L. ed. 740; Hindman *v.* Louisville First Nat. Bank, 112 Fed. 931, 50 C. C. A. 623, 57 L. R. A. 108.

England.— Smith *v.* Chadwick, 20 Ch. D. 27, 51 L. J. Ch. 597, 46 L. T. Rep. N. S. 702, 30 Wkly. Rep. 661 [*affirmed* in 9 App. Cas. 187, 58 J. P. 644, 53 L. J. Ch. 873, 50 L. T. Rep. N. S. 697, 32 Wkly. Rep. 687]; Adamson *v.* Evitt, 9 L. J. Ch. O. S. 1, 2 Russ. & M. 66, 11 Eng. Ch. 66.

See 23 Cent. Dig. tit. "Fraud," § 17.

That plaintiff believed defendant's statements is not of itself sufficient, for this fact may mean nothing more than that his belief was based on the sole ground that it was consistent with information derived from other sources. Sioux Banking Co. *v.* Kendall, 6 S. D. 543, 62 N. W. 377.

On the other hand an actual reliance upon a representation of fact necessarily implies a belief in the truth of the representation, for in the absence of this belief there can be no reliance. David *v.* Moore, (Oreg. 1905) 79 Pac. 415.

55. Ming *v.* Woolfolk, 116 U. S. 599, 6 S. Ct. 489, 29 L. ed. 740.

56. Brackett *v.* Griswold, 112 N. Y. 454, 20 N. E. 376.

57. See *supra*, III, B, 5, a.

58. *Georgia.*— Morris *v.* Morris, 95 Ga. 535, 20 S. E. 506.

Idaho.— Brown *v.* Bledsoe, 1 Ida. 746.

Illinois.— Fisher *v.* Dillon, 62 Ill. 379.

Indiana.— Craig *v.* Hamilton, 118 Ind. 565, 21 N. E. 315.

Iowa.— Bankson *v.* Lagerlof, (1898) 75 N. W. 661.

Missouri.— Anderson *v.* McPike, 86 Mo. 293; Becraft *v.* Grist, 52 Mo. App. 586.

New York.— Binnard *v.* Spring, 42 Barb. 470.

Pennsylvania.— Grauel *v.* Wolfe, 185 Pa. St. 83, 39 Atl. 819.

Washington.— Zilke *v.* Woodley, 36 Wash. 84, 78 Pac. 299.

United States.— Stratton's Independence *v.* Dines, 126 Fed. 968.

England.— Adamson *v.* Evitt, 9 L. J. Ch. O. S. 1, 2 Russ. & M. 66, 11 Eng. Ch. 66.

See 23 Cent. Dig. tit. "Fraud," § 17.

59. *Delaware.*—Herring *v.* Draper, 2 Houst. 158.

Kansas.— Farmers' Stock Breeding Assoc. *v.* Scott, 53 Kan. 534, 36 Pac. 978.

Minnesota.— Faribault *v.* Sater, 13 Minn. 223.

Ohio.— Merchants' Nat. Bank *v.* Thoms, 31 Cinc. L. Bul. 137.

Pennsylvania.—Craft *v.* Phillips, 4 Pennyp. 45.

Tennessee.— Spring City Bank *v.* Rhea County, (Ch. App. 1900) 59 S. W. 442.

England.— Smith *v.* Chadwick, 20 Ch. D. 27, 51 L. J. Ch. 597, 46 L. T. Rep. N. S. 702, 30 Wkly. Rep. 661 [*affirmed* in 9 App. Cas. 187, 58 J. P. 644, 53 L. J. Ch. 873, 50 L. T. Rep. N. S. 697, 32 Wkly. Rep. 687].

See 23 Cent. Dig. tit. "Fraud," § 17.

60. Jordan *v.* Pickett, 78 Ala. 331.

61. Fottler *v.* Moseley, 179 Mass. 295, 60 N. E. 788.

Preventing prompt payment of a note.— Where defendant by fraudulent misrepresentations prevented prompt payment of a

not to make a sale of his property or not to put his goods on the market whereby he has sustained damage.[62]

b. Partial Reliance. It is not necessary that plaintiff should have relied exclusively upon defendant's statements — that they should have been the sole, or even principal, inducement to plaintiff's change of situation — but if they exerted a material influence upon his mind, although they constituted only one of several motives which, acting together, produced the result, it is sufficient;[63] as where plaintiff to some extent relied upon the statements of third persons.[64] And the same principle applies to a concealment.[65]

c. Time of Acting — Continuing Effect of Representation. It is not always necessary that the representation should be acted upon immediately. If a false statement was intended to be relied upon as an inducement to a given transaction which takes place within a reasonable time afterward it may well have had a continuing operation upon plaintiff's mind, and in the absence of proof to the contrary it cannot be said as a matter of law that he did not continue to rely on the statement.[66] But the nearness or remoteness of the misrepresentations to the acts

note by plaintiff who was thereby damaged in that he was obliged to pay additional interest, it was held that an action could be maintained. Rhodes *v.* Dickerson, 95 Mo. App. 395, 69 S. W. 47.

62. Fottler *v.* Moseley, 179 Mass. 295, 60 N. E. 788 (where plaintiff was induced to countermand an order to sell stock through fraudulent misrepresentations that sales which had been made of such stock in the market had been actual sales; the market price subsequently decreasing and plaintiff thus being subjected to a loss); Rice *v.* Manley, 66 N. Y. 82, 23 Am. Rep. 30 [*reversing* 2 Hun 492]; Butler *v.* Watkins, 13 Wall. (U. S.) 456, 20 L. ed. 629; Barley *v.* Walford, 9 Q. B. 197, 58 E. C. L. 197 (where plaintiff was prevented from putting certain goods on the market by false representations that the goods were an infringement of a design registered under a statute). "A manufacturer may by superior energy, or enterprise, supply all the buyers of a particular article, and thus leave no market for similar articles manufactured by others. But he may not fraudulently or by deceitful representations induce another to withhold from sale his products without being answerable for the injury occasioned by the fraud." Butler *v.* Watkins, 13 Wall. (U. S.) 456, 463, 20 L. ed. 629, per Strong, J.

For fraud inducing breach of contract see ACTIONS, 1 Cyc. 662 *et seq.* See also TORTS.

63. *Alabama.*— Jordan *v.* Pickett, 78 Ala. 331.

Arkansas.— Winter *v.* Bandel, 30 Ark. 362.

Connecticut.— Scholfield Gear, etc., Co. *v.* Scholfield, 71 Conn. 1, 40 Atl. 1046.

Georgia.— James *v.* Crosthwait, 97 Ga. 673, 25 S. E. 754, 36 L. R. A. 631; Savage *v.* Jackson, 19 Ga. 305; Young *v.* Hall, 4 Ga. 95.

Iowa.—Dashiel *v.* Harshman, 113 Iowa 283, 85 N. W. 85.

Maine.— Braley *v.* Powers, 92 Me. 203, 42 Atl. 362.

Maryland.— Cook *v.* Gill, 83 Md. 177, 34 Atl. 248; McAleer *v.* Horsey, 35 Md. 439.

Massachusetts.— Safford *v.* Grout, 120 Mass. 20; Matthews *v.* Bliss, 22 Pick. 48.

Minnesota.—Burr *v.* Willson, 22 Minn. 206.

Missouri.— Saunders *v.* McClintock, 46 Mo. App. 216; Scott *v.* Haynes, 12 Mo. App. 597.

Nebraska.— Foley *v.* Holtry, 43 Nebr. 133, 61 N. W. 120.

New York.— Strong *v.* Strong, 102 N. Y. 69, 5 N. E. 799; Morgan *v.* Skiddy, 62 N. Y. 319; Hubbard *v.* Briggs, 31 N. Y. 518; Barrett *v.* Western, 66 Barb. 205; Shaw *v.* Stine, 8 Bosw. 157; Powell *v.* Flechter, 18 N. Y. Suppl. 451; Addington *v.* Allen, 11 Wend. 374 [*reversing* on other grounds 7 Wend. 9].

Rhode Island.— Handy *v.* Waldron, 19 R. I. 618, 35 Atl. 884.

South Carolina.— Lebby *v.* Ahrens, 26 S. C. 275, 2 S. E. 387.

Washington.— Gates *v.* Moldstad, 14 Wash. 419, 44 Pac. 881.

Wisconsin.— Shaw *v.* Gilbert, 111 Wis. 165, 86 N. W. 188 (partial reliance on statements that were not actionable); Gormely *v.* South Side Gymnastic Assoc., 55 Wis. 350, 13 N. W. 242.

United States.— Hindman *v.* Louisville First Nat. Bank, 112 Fed. 931, 50 C. C. A. 623, 57 L. R. A. 108; Sioux Nat. Bank *v.* Norfolk State Bank, 56 Fed. 139, 5 C. C. A. 448.

England.— Edgington *v.* Fitzmaurice, 29 Ch. D. 459, 50 J. P. 52, 55 L. J. Ch. 650, 53 L. T. Rep. N. S. 369, 33 Wkly. Rep. 911; Wade *v.* Tatton, 18 C. B. 371, 2 Jur. N. S. 491, 25 L. J. C. P. 240, 4 Wkly. Rep. 548, 86 E. C. L. 371.

See 23 Cent. Dig. tit. "Fraud," § 18.

64. Burr *v.* Wilson, 22 Minn. 206; Foley *v.* Holtry, 43 Nebr. 133, 61 N. W. 120. See also Addington *v.* Allen, 11 Wend. (N. Y.) 374 [*reversing* on other grounds 7 Wend. 9].

65. Jordan *v.* Pickett, 78 Ala. 331.

66. Judd *v.* Weber, 55 Conn. 267, 11 Atl. 40; Harris *v.* Mullins, 32 Ga. 704, 79 Am. Dec. 320 [*distinguishing* Hopkins *v.* Tanqueray, 15 C. B. 130, 2 C. L. R. 842, 18 Jur. 608, 23 L. J. C. P. 162, 2 Wkly. Rep. 475, 80 E. C. L. 130, 26 Eng. L. & Eq. 254]; Reeve *v.* Dennett, 145 Mass. 23, 11 N. E. 938; Chilson *v.* Houston, 9 N. D. 498, 84 N. W. 354.

alleged to have been induced thereby are facts to be considered by the jury in determining whether the misrepresentations were relied on as an inducement to such acts.[67]

8. Damage or Injury[68] — a. In General. The fraud must have resulted in injury to plaintiff, else he has no cause of action.[69] On the other hand the fact that the transaction into which plaintiff was led was a good bargain notwithstanding the fraud is not always conclusive evidence that plaintiff has sustained no injury. The correct principle is that plaintiff is entitled to be placed in the situation he would have occupied had there been no fraud, and that his right of recovery must be determined on this basis.[70] Thus in jurisdictions where the

See also Allen *v.* Truesdell, 135 Mass. 75; Blacknall *v.* Rowland, 116 N. C. 389, 21 S. E. 296.

Continuing effect of representations as to credit and financial responsibility see *infra*, IV, D, 1, d, e; IV, D, 2, d.

67. Chilson *v.* Houston, 9 N. D. 498, 84 N. W. 354.

68. **For the measure of damages** see *infra*, VII, O, 1, a.

69. *Alabama.*— Ball *v.* Farley, 81 Ala. 288, 1 So. 253.

Arkansas.— Irons *v.* Reyburn, 11 Ark. 378. See also May *v.* Dyer, 57 Ark. 441, 21 S. W. 1064.

Connecticut.— Gilfillen *v.* Moorhead, 73 Conn. 710, 49 Atl. 196; Hine *v.* Robbins, 8 Conn. 342; Otis *v.* Raymond, 3 Conn. 413.

District of Columbia.— Jackson *v.* Fay, 20 App. Cas. 105.

Georgia.— Freeman *v.* McDaniel, 23 Ga. 354; Bennett *v.* Terrill, 20 Ga. 83; Skrine *v.* Simmons, 11 Ga. 401.

Illinois.— Wharf *v.* Roberts, 88 Ill. 426; Bartlett *v.* Blaine, 83 Ill. 25, 25 Am. Rep. 346.

Indiana.— Neidefer *v.* Chastain, 71 Ind. 363, 36 Am. Rep. 198.

Iowa.— Hale *v.* Philbrick, 47 Iowa 217; Kimmans *v.* Chandler, 13 Iowa 327.

Kentucky.— Snyder *v.* Hegan, 40 S. W. 693, 19 Ky. L. Rep. 517.

Maine.— Danforth *v.* Cushing, 77 Me. 182; Brown *v.* Blunt, 72 Me. 415; Fuller *v.* Hodgdon, 25 Me. 243.

Massachusetts.— Morgan *v.* Bliss, 2 Mass. 111.

Minnesota.—Alden *v.* Wright, 47 Minn. 225, 49 N. W. 767.

Missouri.— Traber *v.* Hicks, 131 Mo. 180, 32 S. W. 1145; Lomax *v.* Southwest Missouri Electric R. Co., 106 Mo. App. 551, 81 S. W. 225 (holding that a person who has been fraudulently induced to execute a release of a cause of action for personal injuries cannot recover in an action of deceit, because the release is void by reason of the fraud and thus plaintiff has not been damaged); Rhodes *v.* Dickerson, 95 Mo. App. 395, 69 S. W. 47.

Nebraska.— Carrington *v.* Omaha Life Assoc., 59 Nebr. 116, 80 N. W. 491; Lorenzen *v.* Kansas City Invest. Co., 44 Nebr. 99, 62 N. W. 231.

New Jersey.— Byard *v.* Holmes, 34 N. J. L. 296; Weaver *v.* Wallace, 9 N. J. L. 251.

New York.— Townsend *v.* Felthousen, 156 N. Y. 618, 51 N. E. 279; Dung *v.* Parker, 52 N. Y. 494; Hubbard *v.* Briggs, 31 N. Y. 518; Wheadon *v.* Huntington, 83 Hun 371, 31 N. Y. Suppl. 912; Newell *v.* Chapman, 74 Hun 111, 26 N. Y. Suppl. 361; Wemple *v.* Hildreth, 10 Daly 481; Ansbacher *v.* Pfeiffer, 13 N. Y. Suppl. 418; Mead *v.* Mali, 15 How. Pr. 347. See also Brackett *v.* Griswold, 112 N. Y. 454, 20 N. E. 376.

North Carolina.—Farrar *v.* Alston, 12 N. C. 69; Fagan *v.* Newson, 12 N. C. 20.

Tennessee.— Whitson *v.* Gray, 3 Head 441.

Texas.— McCall *v.* Sullivan, 1 Tex. App. Civ. Cas. § 1.

Vermont.— Alletson *v.* Powers, 72 Vt. 417, 48 Atl. 647; Nye *v.* Merriam, 35 Vt. 438.

West Virginia.— Crislip *v.* Cain, 19 W. Va. 438.

Wisconsin.—Potter *v.* Necedah Lumber Co., 105 Wis. 25, 80 N. W. 88, 81 N. W. 118; Castleman *v.* Griffin, 13 Wis. 535.

United States.— Ming *v.* Woolfolk, 116 U. S. 599, 6 S. Ct. 489, 29 L. ed. 740; Stratton's Independence *v.* Dines, 126 Fed. 968.

See 23 Cent. Dig. tit. "Fraud," § 24.

Fraudulently inducing a person to pay or secure his own debt does not constitute an injury for which an action of deceit can be maintained. Skowhegan First Nat. Bank *v.* Mansfield, 83 Me. 576, 22 Atl. 479; Brown *v.* Blunt, 72 Me. 415.

An inchoate right of dower is such a valuable interest in property that if the owner thereof is induced by fraud to release it he can maintain an action of deceit against the person guilty of the fraud. Garry *v.* Garry, 187 Mass. 62, 72 N. E. 335. See also Simar *v.* Canaday, 53 N. Y. 298, 13 Am. Rep. 523.

Making representation good.— It has been considered doubtful whether a person guilty of a fraudulent misrepresentation is wholly relieved from liability by making his representation good before it is acted upon by the other party. Reeve *v.* Dennett, 145 Mass. 23, 11 N. E. 938. However this may be, defendant cannot escape liability on this ground unless he makes good his representation "in the most complete and indisputable way." Reeve *v.* Dennett, 145 Mass. 23, 11 N. E. 938.

70. King *v.* White, 119 Ala. 429, 24 So. 710; Hicks *v.* Deemer, 187 Ill. 164, 58 N. E. 252; Drake *v.* Holbrook, 78 S. W. 158, 25 Ky. L. Rep. 1489, 66 S. W. 512, 23 Ky. L. Rep. 1941; Bergeron *v.* Miles, 88 Wis. 397, 60 N. W. 783, 43 Am. St. Rep. 911; Grant *v.* Hardy, 33 Wis. 668. *Compare* Marsalis *v.* Crawford, 8 Tex. Civ. App. 485, 28 S. W. 371, holding that where one has been induced

measure of damages for fraud inducing a sale is the difference between the actual value of the property and its value as represented,[71] it is held that since plaintiff is entitled to the benefit of his bargain he may maintain his action even though the property is worth what he paid for it,[72] or though he has subsequently disposed of it at the same price that he gave or even at a profit,[73] although in jurisdictions where the measure of damages in such cases is the difference between the actual value of the property and the price paid,[74] it is held that if the property is worth what plaintiff gave for it he has suffered no damage and therefore cannot recover.[75]

b. Injury Contingent or Uncertain. Where the injury is merely contingent, as where plaintiff may or may not suffer any loss or damage, no action lies.[76]

c. Duty to Avoid Injury. Although the party upon whom the fraud has been practised is under some duty to avoid injury therefrom,[77] at least to the extent that he must refrain from voluntarily bringing damage upon himself,[78] he is under no duty to make active efforts to avoid injury and is not chargeable with negligence for failure to do so.[79]

9. Benefit to Guilty Party. While in the majority of cases defendant has been a gainer by reason of his fraud, it is not essential to his liability that he should obtain any benefit or advantage from the transaction into which he has led plaintiff.[80]

by fraudulent misrepresentations as to certain land to purchase notes secured by a vendor's lien on the property, and after discovering the truth bids in the land at a sale under a trust deed, and takes a conveyance, his claim for damages for the fraud is satisfied and discharged.

71. See *infra*, VII, O, 1, a, (III), (A).

72. Estes *v.* Odom, 91 Ga. 600, 18 S. E. 355; Antle *v.* Sexton, 137 Ill. 410, 27 N. E. 691 [*affirming* 32 Ill. App. 437]; Drake *v.* Holbrook, 78 S. W. 158, 25 Ky. L. Rep. 1489, 66 S. W. 512, 23 Ky. L. Rep. 1941. *Compare* Snyder *v.* Hegan, 40 S. W. 693, 19 Ky. L. Rep. 517; Jackson *v.* Collins, 39 Mich. 557.

73. Hinton *v.* Ring, 111 Ill. App. 369; Johnson *v.* Gavitt, 114 Iowa 183, 86 N. W. 256; Medbury *v.* Watson, 6 Metc. (Mass.) 246, 39 Am. Dec. 726; Lunn *v.* Shermer, 93 N. C. 164. But see Jackson *v.* Collins, 39 Mich. 557; Shaw *v.* Gilbert, 111 Wis. 165, 86 N. W. 188.

Whether the measure of damages is affected see *infra*, VII, O, 1, a, (III), (E).

74. See *infra*, VII, O, 1, a, (III), (B).

75. Alden *v.* Wright, 47 Minn. 225, 49 N. W. 767.

76. Kimmans *v.* Chandler, 13 Iowa 327; Freeman *v.* Venner, 120 Mass. 424, *In re* Pennewell, 119 Fed. 139, 55 C. C. A. 571.

On the other hand, where defendant falsely represented that he was the owner of a judgment against plaintiff and thereby induced him to secure it by a promissory note which plaintiff afterward paid, it was held that plaintiff could recover notwithstanding that he had not paid the judgment to the rightful owner. Goring *v.* Fitzgerald, 105 Iowa 507, 75 N. W. 358. A person induced by fraud to lend money on inadequate security is damaged as soon as the loan is made, and may bring an action at once. Briggs *v.* Brushaber, 43 Mich. 330, 5 N. W. 383, 38 Am. Rep. 187 [*distinguishing* Freeman *v.* Venner, 120 Mass. 424]. Thus where one has been induced by fraud to purchase corporate bonds that have no substantial or adequate property security behind them, he may have redress for the fraud without waiting for default in the payment of interest. Currier *v.* Poor, 155 N. Y. 344, 49 N. E. 937 [*reversing* 84 Hun 45, 32 N. Y. Suppl. 74].

77. Brown *v.* Blunt, 72 Me. 415; Maynard *v.* Maynard, 49 Vt. 297. See also French *v.* Vining, 102 Mass. 132, 3 Am. Rep. 440.

78. Gilmer *v.* Ware, 19 Ala. 252; New York L. Ins. Co. *v.* Hord, 78 S. W. 207, 25 Ky. L. Rep. 1531; Thompson *v.* Libby, 36 Minn. 287, 31 N. W. 52; Marsalis *v.* Crawford, 8 Tex. Civ. App. 485, 28 S. W. 371. And see *supra*, III, B, 5, a.

79. Oakes *v.* Miller, 11 Colo. App. 374, 55 Pac. 193 (holding that a vendee who relied upon the false representations of the vendor that a creek bordering the land sold had no tendency to overflow its banks is not chargeable with contributory negligence in failing to take precautions to prevent loss from a flood); Knight *v.* Linzey, 80 Mich. 396, 45 N. W. 337, 8 L. R. A. 476. And see Hubbel *v.* Meigs, 50 N. Y. 480, holding that a purchaser of worthless property is under no duty to sell it to some innocent third person. But *compare* Maynard *v.* Maynard, 49 Vt. 297, holding that the exercise of ordinary care is necessary.

80. The gravamen of the charge of fraud is that plaintiff has been deceived to his injury, not that defendant has gained an advantage.

Alabama.— Einstein *v.* Marshall, 58 Ala. 153, 25 Am. Rep. 729.

California.— Wilder *v.* Beede, 119 Cal. 646, 51 Pac. 1083.

Connecticut.— Hart *v.* Tallmadge, 2 Day 381, 2 Am. Dec. 105.

Georgia.— James *v.* Crosthwait, 97 Ga. 673, 25 S. E. 754, 36 L. R. A. 631; Young *v.* Hall, 4 Ga. 95.

Illinois.— Leonard *v.* Springer, 197 Ill. 532,

IV. FRAUD IN PARTICULAR TRANSACTIONS.[81]

A. In Contracts Generally.[82] Where a person, knowingly or recklessly, without knowledge of its truth or falsity, makes fraudulent misrepresentations of material[83] facts[84] for the purpose of inducing another to enter into a contract, and the other person, in reliance on the misrepresentations,[85] enters into

64 N. E. 299 [*reversing* 98 Ill. App. 530]; Endsley *v.* Johns, 120 Ill. 469, 12 N. E. 247, 60 Am. Rep. 572; Eames *v.* Morgan, 37 Ill. 260.

Iowa.— See McGibbons *v.* Wilder, 78 Iowa 531, 43 N. W. 520.

Kansas.— Carpenter *v.* Wright, 52 Kan. 221, 34 Pac. 798.

Maryland.—McAleer *v.* Horsey, 35 Md. 439.

Massachusetts.—Fisher *v.* Mellen, 103 Mass. 503; Springer *v.* Crowell, 103 Mass. 65; White *v.* Sawyer, 16 Gray 586.

Michigan.— Stoney Creek Woolen Co. *v.* Smalley, 111 Mich. 321, 69 N. W. 722; Weber *v.* Weber, 47 Mich. 569, 11 N. W. 389.

Minnesota.— Busterud *v.* Farrington, 36 Minn. 320, 31 N. W. 360.

Missouri.— See Dean *v.* Chandler, 44 Mo. App. 338.

New York.— New York Land Imp. Co. *v.* Chapman, 118 N. Y. 288, 23 N. E. 187 [*reversing* 54 N. Y. Super. Ct. 297]; Hubbell *v.* Meigs, 50 N. Y. 480; Hubbard *v.* Briggs, 31 N. Y. 518; Haight *v.* Hoyt, 19 N. Y. 464; White *v.* Merritt, 7 N. Y. 352, 57 Am. Dec. 527; Weed *v.* Case, 55 Barb. 534; Culver *v.* Avery, 7 Wend. 380, 22 Am. Dec. 586. See also Schwenck *v.* Naylor, 102 N. Y. 683, 7 N. E. 788 [*reversing* 50 N. Y. Super. Ct. 57].

North Carolina.— Irwin *v.* Sherril, 1 N. C. 1, 1 Am. Dec. 574.

South Carolina.— Chisholm *v.* Gadsden, 1 Strobh. 220, 47 Am. Dec. 550.

Tennessee.— Carpenter *v.* Lee, 5 Yerg. 265.

Vermont.— Paddock *v.* Fletcher, 42 Vt. 389.

United States.— Hindeman *v.* Louisville First Nat. Bank, 112 Fed. 931, 50 C. C. A. 623, 57 L. R. A. 108.

England.— Eyre *v.* Dunsford, 1 East 318; Pasley *v.* Freeman, 3 T. R. 51, 1 Rev. Rep. 634.

See 23 Cent. Dig. tit. "Fraud," § 6.

81. **Scope of section.**— The elements essential to all actionable frauds are fully treated in the preceding sections. This section is designed to show the application of the rules above stated to specific transactions, and the rules themselves will not be repeated in detail further than may be necessary to a proper understanding of the particular subject in hand.

82. **For false representations inducing a breach of contract** see, generally, ACTIONS, 1 Cyc. 662 *et seq.* See also TORTS. And for decisions involving "slander of title" which induces the breach of a contract of purchase see, generally, LIBEL AND SLANDER.

For false representations as affecting the validity of a contract see CONTRACTS, 9 Cyc. 408 *et seq.*, and cross-references there given.

Fraud not involving contractual relations see *infra*, IV, F.

83. The representation, in order to constitute an inducement to plaintiff in making the contract, and thus to be actionable, must relate to some matter material to the contract.

Arkansas.— Matlock *v.* Reppy, 47 Ark. 148, 14 S. W. 546.

California.— Nounnan *v.* Sutter County Land Co., 81 Cal. 1, 22 Pac. 515, 6 L. R. A. 219.

Colorado.— Dingle *v.* Trask, 7 Colo. App. 16, 42 Pac. 186.

Iowa.— Sheriff *v.* Hull, 37 Iowa 174.

Kansas.— Acker *v.* Warden, 47 Kan. 51, 27 Pac. 102.

Maine.— Palmer *v.* Bell, 85 Me. 352, 27 Atl. 250.

Maryland.—The misrepresentation must relate distinctly and directly to the contract and affect its very essence and substance. McAleer *v.* Horsey, 35 Md. 439.

Massachusetts.— Dawe *v.* Morris, 149 Mass. 188, 21 N. E. 315, 14 Am. St. Rep. 404, 4 L. R. A. 158; Hedden *v.* Griffin, 136 Mass. 229, 49 Am. Rep. 25, both holding that the false statement must relate to some subject material to the contract itself, that if it merely affects the probability that the contract will be kept, it is collateral to it, and that representations as to matters which are merely collateral and do not constitute essential elements of the contract into which plaintiff is induced to enter are not sufficient.

Michigan.— Hall *v.* Johnson, 41 Mich. 286, 2 N. W. 55.

See 23 Cent. Dig. tit. "Fraud," § 16; and *supra*, III, B, 2.

Omission from written contract.— Where the contract is in writing the fact that the subject-matter of the representations is not mentioned in the contract when it might well have been made a term thereof has been deemed some indication that plaintiff did not regard the matter as material and did not rely on the representations. Nounnan *v.* Sutter County Land Co., 81 Cal. 1, 22 Pac. 515, 6 L. R. A. 219; Palmer *v.* Bell, 85 Me. 352, 27 Atl. 250. See also Wightman *v.* Tucker, 50 Ill. App. 75; Reynolds *v.* Palmer, 21 Fed. 433. *Compare* Nowlan *v.* Cain, 3 Allen (Mass.) 261.

84. That the representation must be one of fact see *supra*, III, B, 1, b, (v); III, B, 1, b, (vi).

85. The representation must have been relied on as a material inducement for plaintiff to contract.

California.— Nounnan *v.* Sutter County Land Co., 81 Cal. 1, 22 Pac. 515, 6 L. R. A. 219.

Indiana.— Craig *v.* Hamilton, 118 Ind. 565, 21 N. E. 315.

the contract and thereby sustains loss. The person making the misrepresentations is liable to the person relying thereon in an action of deceit.[86]

B. In Sales, Conveyances, and Assignments[87] — **1. By Vendor — a. Misrepresentations** — (I) *In General.* Where a vendor in a sale or exchange of real or personal property[88] makes false[89] representations[90] as to material facts

Michigan.— Lewis *v.* Weidenfeld, 114 Mich. 581, 72 N. W. 604.

New York.— Taylor *v.* Guest, 58 N. Y. 262.

Pennsylvania.— Grauel *v.* Wolfe, 185 Pa. St. 83, 39 Atl. 819.

United States.— Ming *v.* Woolfolk, 116 U. S. 599, 6 S. Ct. 489, 29 L. ed. 740.

England.— Smith *v.* Chadwick, 20 Ch. D. 27, 51 L. J. Ch. 597, 46 L. T. Rep. N. S. 702, 30 Wkly. Rep. 661 [*affirmed* in 9 App. Cas. 187, 58 J. P. 644, 53 L. J. Ch. 873, 50 L. T. Rep. N. S. 697, 32 Wkly. Rep. 687].

See 23 Cent. Dig. tit. "Fraud," § 17; and *supra*, III, B, 7, a.

But it need not have been the sole inducement for him to contract if it had a material influence on his mind. McAleer *v.* Horsey, 35 Md. 439; Handy *v.* Waldron, 19 R. I. 618, 35 Atl. 884. See *supra*, III, B, 7, b.

86. *Colorado.*— Sellar *v.* Clelland, 2 Colo. 532, where a contract to transport freight was induced by false representations respecting the condition of the road or trail over which the freight was to be transported.

Indiana.— Kirkpatrick *v.* Reeves, 121 Ind. 280, 22 N. E. 139.

Iowa.— Riley *v.* Bell, 120 Iowa 618, 95 N. W. 170; Hubbard *v.* Weare, 79 Iowa 678, 44 N. W. 915; Porter *v.* Stone, 62 Iowa 442, 17 N. W. 654, holding that a false representation that certain articles were manufactured in more than one place, in order to induce a person to accept an agency for their sale, is material in an action for false representations, as tending to show that there was a demand for the article.

Kentucky.— Trimble *v.* Reid, 97 Ky. 713, 31 S. W. 861, 17 Ky. L. Rep. 494, 41 S. W. 319, 19 Ky. L. Rep. 604.

Maine.— Hammatt *v.* Emerson, 27 Me. 308, 46 Am. Dec. 598.

Maryland.—McAleer *v.* Horsey, 35 Md. 439.

Massachusetts.— Chatham Furnace Co. *v.* Moffatt, 147 Mass. 403, 18 N. E. 168, 9 Am. St. Rep. 727.

Michigan.— McDonald *v.* Smith, (1905) 102 N. W. 668; Holcomb *v.* Noble, 69 Mich. 369, 37 N. W. 497; Baughman *v.* Gould, 45 Mich. 481, 8 N. W. 73.

Minnesota.— Hedin *v.* Minneapolis Medical, etc., Inst., 62 Minn. 146, 64 N. W. 158, 54 Am. St. Rep. 628, 35 L. R. A. 417.

New York.— Hickey *v.* Morrell, 102 N. Y. 454, 7 N. E. 321, 55 Am. Rep. 824 [*reversing* 12 Daly 482]; Marshall *v.* Seelig, 49 N. Y. App. Div. 433, 63 N. Y. Suppl. 355; Culver *v.* Avery, 7 Wend. 380, 22 Am. Dec. 586.

South Carolina.— Lebby *v.* Ahrens, 26 S. C. 275, 2 S. E. 387 (where it was shown that defendant induced plaintiff to contribute four hundred dollars to a newspaper enterprise, by representing that there was a joint-stock company with a capital stock of two thousand dollars, and that a certain man of means and character was a member of the company, all of which was known to defendant to be untrue, and it was held that these false representations were of material facts, and sufficient to entitle plaintiff to recover); Chisolm *v.* Gadskin, 1 Strobh. 220, 47 Am. Dec. 550.

Vermont.— Cabot *v.* Christie, 42 Vt. 121, 1 Am. Rep. 313.

Wisconsin.— Benolkin *v.* Guthrie, 111 Wis. 554, 87 N. W. 466; Bergeron *v.* Miles, 88 Wis. 397, 60 N. W. 783, 43 Am. St. Rep. 911.

United States.—Stewart *v.* Wyoming Ranche Co., 128 U. S. 383, 9 S. Ct. 101, 32 L. ed. 439.

See 23 Cent. Dig. tit. "Fraud," §§ 8–14.

87. **For fraud as invalidating contracts to sell, sales, deeds, and conveyances** see Deeds, 13 Cyc. 505; and, generally, Sales; Vendor and Purchaser. See also Cancellation of Instruments, 6 Cyc. 282; Exchange of Property, 17 Cyc. 829; and, generally, Reformation of Instruments.

Sale induced by misrepresentations as to solvency see *infra*, IV, D.

88. If the essential elements of actionable fraud exist it can make no difference whether the contract induced by the fraud is one for the sale of real or personal property, or whether the false representations relate to the title of the property or to some other material fact. Culver *v.* Avery, 7 Wend. (N. Y.) 380, 22 Am. Dec. 586. See also Krumm *v.* Beach, 96 N. Y. 398 [*affirming* 25 Hun 293]; Gwinther *v.* Gerding, 3 Head (Tenn.) 197; Mitchell *v.* Zimmerman, 4 Tex. 75, 51 Am. Dec. 717; Harlow *v.* Green, 34 Vt. 379. These transactions are therefore discussed together, features peculiar to each being pointed out when necessary to a proper presentation of the law involved.

Both realty and personalty included in sale. — The right to recover damages for a fraud inducing a sale of both real and personal property is not affected by the fact that the misrepresentation referred to only one class of property, if the transaction was an entirety, and the consideration was not apportioned. Baughman *v.* Gould, 45 Mich. 481, 8 N. W. 73.

89. The representations must be false when the sale is made. A recovery cannot be had on proof which establishes only that after the sale was consummated the facts or conditions represented did not exist. Totten *v.* Burhans, 91 Mich. 495, 51 N. W. 1119; Eaves *v.* Twitty, 35 N. C. 468.

90. Something amounting to a misrepresentation must be shown. See *supra*, III, B, 1, a.

relating to the property, having at the time knowledge that his statements are false or what the law regards as equivalent to such knowledge,[91] and intending that the purchaser shall rely upon them as an inducement to the purchase, he becomes liable to an action of deceit in case the purchaser, acting in reliance upon the representations, consummates the purchase and suffers loss thereby.[92] Aside from the doctrine of *caveat emptor*, which is discussed in another connection,[93] the rule just stated applies to misrepresentations as to the title of the property,[94]

91. See *supra*, III, B, 4, b.

92. *Alabama.*— Moncrief *v.* Wilkinson, 93 Ala. 373, 9 So. 159; Foster *v.* Kennedy, 38 Ala. 359, 81 Am. Dec. 56; Munroe *v.* Pritchett, 16 Ala. 785, 50 Am. Dec. 203.

Arkansas.— Matlock *v.* Reppy, 47 Ark. 148, 14 S. W. 546.

California.— Merguire *v.* O'Donnell, 103 Cal. 50, 36 Pac. 1033.

Connecticut.— Scholfield Gear, etc., Co. *v.* Schofield, 71 Conn. 1, 40 Atl. 1046; Bull *v.* Pratt, 1 Conn. 342, purchase of patent right induced by seller's false statement that he had a valid patent right.

Florida.— West Florida Land Co. *v.* Studebaker, 37 Fla. 28, 18 So. 176; Williams *v.* McFadden, 23 Fla. 143, 1 So. 618, 11 Am. St. Rep. 345.

Georgia.— Green *v.* Bryant, 2 Ga. 66.

Illinois.— Antle *v.* Sexton, 137 Ill. 410, 27 N. E. 691.

Indiana.— Craig *v.* Hamilton, 118 Ind. 565, 21 N. E. 315; Peffley *v.* Noland, 80 Ind. 164, sale of patent right.

Iowa.— Riley *v.* Bell, 120 Iowa 618, 95 N. W. 170; Boddy *v.* Henry, 113 Iowa 462, 85 N. W. 771, 53 L. R. A. 769, 126 Iowa 31, 101 N. W. 447.

Maine.— Braley *v.* Powers, 92 Me. 203, 42 Atl. 362, sale of patent right.

Maryland.— McAleer *v.* Horsey, 35 Md. 439.

Massachusetts.—Kilgore *v.* Bruce, 166 Mass. 136, 44 N. E. 108; Chatham Furnace Co. *v.* Moffatt, 147 Mass. 403, 18 N. E. 168, 9 Am. St. Rep. 727 (sale of a lease of a mine); Allen *v.* Truesdell, 135 Mass. 75; Litchfield *v.* Hutchinson, 117 Mass. 195; David *v.* Park, 103 Mass. 501 (sale of patent right).

Michigan.—McDonald *v.* Smith, (1905) 102 N. W. 668; Merrill *v.* Newton, 109 Mich. 249, 67 N. W. 120; Weber *v.* Weber, 47 Mich. 569, 13 N. W. 389; Starkweather *v.* Benjamin, 32 Mich. 305.

Missouri.— Chase *v.* Rusk, 90 Mo. App. 25; Brownlee *v.* Hewitt, 1 Mo. App. 360.

Nebraska.—Hitchcock *v.* Gothenburg Water Power, etc., Co., (1903) 95 N. W. 638.

New Hampshire.— Coon *v.* Atwell, 46 N. H. 510.

New York.—Currier *v.* Poor, 155 N. Y. 344, 49 N. E. 934 [*reversing* 84 Hun 45, 32 N. Y. Suppl. 74] (sale of worthless corporate bonds); Schumaker *v.* Mather, 133 N. Y. 590, 30 N. E. 755; Schwenck *v.* Naylor, 102 N. Y. 683, 7 N. E. 788 [*reversing* 50 N. Y. Super. Ct. 57]; Simar *v.* Canaday, 53 N. Y. 298, 13 Am. St. Rep. 523; Haight *v.* Hayt, 19 N. Y. 464. See also Robinson *v.* Flint, 16 How. Pr. 240.

North Carolina.— Walsh *v.* Hall, 66 N. C. 233.

Pennsylvania.— Cornelius *v.* Molloy, 7 Pa. St. 293.

South Dakota.—Parker *v.* Ausland, 13 S. D. 169, 82 N. W. 402 [*citing* S. D. Code Civ. Proc. §§ 3598, 3599], sale of void county warrant.

Vermont.— Cabot *v.* Christie, 42 Vt. 121, 1 Am. Rep. 313; Harlow *v.* Green, 34 Vt. 397, holding that a defrauded purchaser of land may maintain his action, although he has not received his deed.

Wisconsin.— Krause *v.* Busacker, 105 Wis. 350, 81 N. W. 406.

United States.—Stewart *v.* Wyoming Cattle Ranche Co., 128 U. S. 383, 9 S. Ct. 101, 32 L. ed. 439; Wilson *v.* Higbee, 62 Fed. 723.

See 23 Cent. Dig. tit. "Fraud," §§ 8–24.

Although a person has previously invested in the stock of a corporation, a false and fraudulent statement inducing him to invest in more stock is actionable. McDonald *v.* Smith, (Mich. 1905) 102 N. W. 668.

Misrepresentation as to inventory.— Where an inventory of goods to be sold is made by the seller who falsely represents to the buyer that through mistake part of the goods have been left out of the inventory, or that the goods have by mistake been undervalued, there is such a material misrepresentation as will support an action. Wilder *v.* De Cou, 18 Minn. 470.

93. See *infra*, IV, B, 1, a, (III).

94. *Florida.*— Grady *v.* Jeffares, 25 Fla. 743, 6 So. 828.

Indiana.— Craig *v.* Hamilton, 118 Ind. 565, 21 N. E. 315.

Iowa.— Riley *v.* Bell, 120 Iowa 618, 95 N. W. 170; Hale *v.* Philbrick, 42 Iowa 81. See also Kimball *v.* Sanguin, (1892) 53 N. W. 116; Ballou *v.* Lucas, 59 Iowa 22, 12 N. W. 745.

Kentucky.—Campbell *v.* Hillman, 15 B. Mon. 508, 61 Am. Dec. 195; Young *v.* Hopkins, 6 T. B. Mon. 18.

Maine.— Atwood *v.* Chapman, 68 Me. 38, 28 Am. Rep. 5.

Massachusetts.— Burns *v.* Dockray, 156 Mass. 135, 30 N. E. 551; Fisher *v.* Mellen, 103 Mass. 503.

Michigan.— Wasey *v.* Mahoney, 55 Mich. 194, 20 N. W. 901.

Minnesota.— Thomas *v.* Murphy, 87 Minn. 358, 91 N. W. 1097; Reynolds *v.* Franklin, 39 Minn. 24, 38 N. W. 636.

Mississippi.— Brown *v.* Lyon, 81 Miss. 438, 33 So. 284.

Missouri.— Brownlee *v.* Hewitt, 1 Mo. App. 360.

New York.— Schwenck *v.* Naylor, 102 N. Y. 683, 7 N. E. 788 [*reversing* 50 N. Y. Super. Ct. 57]; Clark *v.* Baird, 9 N. Y. 183; Ryder

the quality and condition of the land that forms the subject-matter of the sale,[95] the quantity of land in the tract to be sold,[96] the boundaries [97] or the location of the

v. Wall, 29 Misc. 377, 60 N. Y. Suppl. 535; Ward *v.* Wiman, 17 Wend. 193; Wardell *v.* Fosdick, 13 Johns. 325, 7 Am. Dec. 383.

North Carolina.— Walsh *v.* Hall, 66 N. C. 233.

Oklahoma.— See Newell *v.* Long-Bell Lumber Co., 14 Okla. 185, 78 Pac. 104.

Tennessee.— Gwinther *v.* Gerding, 3 Head. 197.

Wisconsin.— Hurlbert *v.* T. D. Kellogg Lumber, etc., Co., 115 Wis. 225, 91 N. W. 673. See also McConnell *v.* Hughes, 83 Wis. 25, 53 N. W. 149.

United States.— Andrus *v.* St. Louis Smelting, etc., Co., 130 U. S. 643, 648, 9 S. Ct. 645, 32 L. ed. 1054 (per Field, J.); Barnes *v.* Union Pac. R. Co., 57 Fed. 87, 4 C. C. A. 199.

See 23 Cent. Dig. tit. "Fraud," §§ 8–24.

Where the vendor represents that he has a valid legal title when he has only a doubtful equitable title founded on estoppel, the purchaser may maintain an action, for it cannot be said in such a case that the purchaser has sustained no damage. Schwenck *v.* Naylor, 102 N. Y. 683, 7 N. E. 788 [*reversing* 50 N. Y. Super. Ct. 57].

When representation not made good.— A false representation by defendant that he owned certain land is not made good by his purchase of the land where the greater part of the purchase-price is secured by mortgage on the property, although the purchase is made before plaintiff acted upon the representation. Reeve *v.* Dennett, 145 Mass. 23, 11 N. E. 938.

A positive statement that a title is good may be in a sense an expression of opinion, but it also imports that there are no facts that affect the validity of the title. Burns *v.* Dockray, 156 Mass. 135, 30 N. E. 551. See also Reynolds *v.* Franklin, 39 Minn. 24, 38 N. W. 636; Hurlbert *v.* T. D. Kellogg Lumber, etc., Co., 115 Wis. 225, 91 N. W. 673. *Compare* Andrus *v.* St. Louis Smelting Co., 130 U. S. 643, 648, 9 S. Ct. 645, 32 L. ed. 1054, per Field, J.

The mere fact that the record title is incomplete is insufficient to sustain a recovery on the ground that the vendor misrepresented that he had the full title. Hampton *v.* Webster, 56 Nebr. 628, 77 N. W. 50.

95. Baker *v.* Ezzard, Ga. Dec. 112, Pt. II; Armstrong *v.* White, 9 Ind. App. 588, 37 N. E. 28; Davis *v.* Jenkins, 46 Kan. 19, 26 Pac. 459.

96. *Iowa.*— Boddy *v.* Henry, 113 Iowa 462, 85 N. W. 771, 53 L. R. A. 769, 126 Iowa 31, 101 N. W. 447.

Maine.— See Ladd *v.* Putnam, 79 Me. 568, 12 Atl. 628.

Michigan.— Starkweather *v.* Benjamin, 32 Mich. 305.

Minnesota.— Porter *v.* Fletcher, 25 Minn. 493.

Missouri.— Leicher *v.* Keeney, 98 Mo. App. 394, 72 S. W. 145.

New Hampshire.— Coon *v.* Atwell, 46 N. H. 510.

New York.—Schwenck *v.* Naylor, 102 N. Y. 683, 7 N. E. 788 [*reversing* 50 N. Y. Super. Ct. 577]; Clark *v.* Baird, 9 N. Y. 183; Whitney *v.* Allaire, 1 N. Y. 305 [*affirming* 4 Den. 554]; Allaire *v.* Whitney, 1 Hill 484; Wardell *v.* Fosdick, 13 Johns. 325, 7 Am. Dec. 383.

Oregon.— Cawston *v.* Sturgis, 29 Oreg. 331, 43 Pac. 656, irregularly shaped tract.

Pennsylvania.— Griswold *v.* Gebbie, 126 Pa. St. 353, 17 Atl. 673, 12 Am. St. Rep. 878 [*affirming* 6 Pa. Co. Ct. 212].

Vermont.— Cabot *v.* Christie, 42 Vt. 121, 1 Am. Rep. 313; Harlow *v.* Green, 34 Vt. 379.

See 23 Cent. Dig. tit. "Fraud," §§ 8–24.

Compare Mooney *v.* Miller, 102 Mass. 217.

The quantity of land in a farm is a matter upon which accurate or approximately accurate knowledge is possible, and a representation made as of the vendor's own knowledge that a farm contains a certain number of acres is not an expression of opinion but an assertion of fact. Cabot *v.* Christie, 42 Vt. 121, 1 Am. Rep. 313. See also Speed *v.* Hollingsworth, 54 Kan. 436, 38 Pac. 496; Starkweather *v.* Benjamin, 32 Mich. 305; Coon *v.* Atwell, 46 N. H. 510. "It cannot be generally true that persons can judge of the contents of a parcel of land by the eye. When any approach to accuracy is needed, there must be measurement. When a positive assurance of an area of a parcel of land is made by the vendor to the vendee, with the design of making the vendee believe it, that assurance is very material, and equivalent to an assurance of measurement." Starkweather *v.* Benjamin, 32 Mich. 305, 306.

The fact that the expression "about" or "more or less" is used by the vendor with reference to the number of acres in the tract sold will not preclude a recovery by the purchaser for fraudulent misrepresentations as to the quantity of the land where there is a large discrepancy between the actual and represented number of acres. Boddy *v.* Henry, 126 Iowa 31, 101 N. W. 447. *Compare* Perkins Mfg. Co. *v.* Williams, 98 Ga. 388, 25 S. E. 556. See also VENDOR AND PURCHASER.

97. *Alabama.*— Foster *v.* Kennedy, 38 Ala. 359, 81 Am. Dec. 56.

Georgia.— Smith *v.* Kirkpatrick, 79 Ga. 410, 7 S. E. 258.

Maine.— See Ladd *v.* Putnam, 79 Me. 568, 12 Atl. 628.

Massachusetts.— Chatham Furnace Co. *v.* Moffatt, 147 Mass. 403, 18 N. E. 168, 9 Am. St. Rep. 727, where the lessee of a mine, to induce another to purchase the lease, falsely stated that the mine contained a large quantity of ore, the statement being accompanied by an exhibition of a plan of a survey which the lessee knew to be erroneous.

Michigan.— Baughman *v.* Gould, 45 Mich. 481, 8 N. W. 73.

New York.— Schwenck *v.* Naylor, 102 N. Y. 683, 7 N. E. 788 [*reversing* 50 N. Y. Super.

land,[98] the identity of particular property,[99] the quantity of chattels or goods in a lot sold,[1] the quality and soundness,[2] kind, or nature[3] of personal property, the character, habits, and usefulness of animals sold,[4] as to extrinsic facts materially affecting the value of the property,[5] and as to the amount or extent of a business

Ct. 57]; Beardsley *v.* Duntley, 69 N. Y. 577; Clark *v.* Baird, 9 N. Y. 183.

North Carolina.— Walsh *v.* Hall, 66 N. C. 233.

Vermont.— Harlow *v.* Green, 34 Vt. 379.

Wisconsin.— Castenholz *v.* Heller, 82 Wis. 30, 51 N. W. 432; Davis *v.* Nuzum, 72 Wis. 439, 40 N. W. 497, 1 L. R. A. 774; Bird *v.* Kleiner, 41 Wis. 134.

See 23 Cent. Dig. tit. "Fraud," §§ 8–24.

98. *Arkansas.*— Matlock *v.* Reppy, 47 Ark. 148, 14 S. W. 546, representation that the land was "above overflow."

Kentucky.— Dinwiddie *v.* Stone, 52 S. W. 814, 21 Ky. L. Rep. 584, representation that a lot and improvements thereon were located above the grade established for the street.

Massachusetts.— See Powers *v.* Fowler, 157 Mass. 318, 32 N. E. 166.

Minnesota.— Griffin *v.* Farrier, 32 Minn. 474, 21 N. W. 553; Porter *v.* Fletcher, 25 Minn. 493.

Nebraska.—Hoock *v.* Bowman, 42 Nebr. 80, 60 N. W. 389, 47 Am. St. Rep. 691, representation that a certain city lot — the streets not yet having been opened — was a corner lot.

New York.— Sandford *v.* Handy, 23 Wend. 260.

South Dakota.— Roberts *v.* Holliday, 10 S. D. 576, 74 N. W. 1034.

See 23 Cent. Dig. tit. "Fraud," §§ 8–24.

99. Mulligan *v.* Bailey, 28 Ga. 507 (a horse); Lee *v.* Tarplin, 183 Mass. 52, 66 N. E. 431 (where plaintiff was induced to take a mortgage on a certain house by being shown another and better house as the one to be mortgaged).

1. Stones *v.* Richmond, 21 Mo. App. 17 (stock of goods in a grocery store); Stewart *v.* Wyoming Cattle Ranche Co., 128 U. S. 383, 9 S. Ct. 101, 32 L. ed. 439 (the number of cattle in a large herd ranging over an extensive territory). *Compare* Cole *v.* Smith, 26 Colo. 506, 58 Pac. 1086.

2. *Alabama.*— Moncrief *v.* Wilkinson, 93 Ala. 373, 9 So. 159, sale of mule with defective eyesight.

Arkansas.— Hanger *v.* Evins, 38 Ark. 334.

California.—Merguire *v.* O'Donnell, 103 Cal. 50, 36 Pac. 1033 (sale of glandered horse); Mayer *v.* Salazar, 84 Cal. 646, 24 Pac. 597.

Georgia.— Harris *v.* Mullins, 32 Ga. 704, 79 Am. Dec. 320 [*distinguishing* Hopkins *v.* Tanqueray, 15 C. B. 130, 2 C. L. R. 842, 18 Jur. 608, 23 L. J. C. P. 162, 2 Wkly. Rep. 475, 26 Eng. L. & Eq. 254, 80 E. C. L. 130], sale of diseased mule.

Illinois.— Thorne *v.* Prentiss, 83 Ill. 99, sale of a lot of unsound hams.

Indiana.—Baker *v.* McGinniss, 22 Ind. 257, sale of diseased hogs.

Kansas.— Schee *v.* Shore, 6 Kan. App. 136, 50 Pac. 903, sale of glandered horse.

Kentucky.— Faris *v.* Lewis, 2 B. Mon. 375, sale of diseased animals.

Massachusetts.— Litchfield *v.* Hutchinson, 117 Mass. 195, sale of unsound horse.

Nebraska.—Hitchcock *v.* Gothenburg Water Power, etc., Co., (1903) 95 N. W. 638, false statements as to age, health, and condition of cattle sold.

New York.— Jeffrey *v.* Bigelow, 13 Wend. 518, 28 Am. Dec. 476, sale of diseased animals.

North Carolina.— Erwin *v.* Greenlee, 18 N. C. 39.

Tennessee.— Smith *v.* Cozart, 2 Head 526; Conner *v.* Crunk, 2 Head 246; Baker *v.* Seahorn, 1 Swan 54, 55 Am. Dec. 724.

Texas.— Wintz *v.* Morrison, 17 Tex. 372, 67 Am. Dec. 658, sale of diseased animals.

Vermont.— Maynard *v.* Maynard, 49 Vt. 297.

See 23 Cent. Dig. tit. "Fraud," §§ 8–24.

"But a habit is not, in itself, unsoundness, though it unquestionably may produce it." Eaves *v.* Twitty, 35 N. C. 468, per Nash, J.

Seller's knowledge of intended use of thing sold.—This rule is especially applicable where the seller knows that the article is to be put to some particular use for which it is unfit. See Hanger *v.* Evins, 38 Ark. 334; Maynard *v.* Maynard, 49 Vt. 297.

3. Cornelius *v.* Molloy, 7 Pa. St. 293, where one sold a quantity of metal as copper, knowing it to be not copper but a composition, and not disclosing the fact to the buyer.

The particular make of a bicycle.— In an action to recover for deceit in the sale of bicycles, the evidence tended to prove that the K bicycle was a well-known, standard, high-grade bicycle, and that no other bicycle was known by that name; that defendant knew that plaintiffs were bargaining for this well-known wheel, but fraudulently delivered to them a spurious wheel of a different manufacture, and of inferior grade; and that plaintiffs did not have reasonable opportunity to discover the fraud, and did not discover it, until after they had accepted the bicycles, and disposed of the greater portion of them. It was held that the evidence sustained a verdict for plaintiffs. Smith *v.* Kingman, 70 Minn. 453, 73 N. W. 253.

4. Allen *v.* Truesdell, 135 Mass. 75 (representation that a horse was "not afraid of the cars"); Nowlan *v.* Cain, 3 Allen (Mass.) 261; Allison *v.* Tyson, 5 Humphr. (Tenn.) 449; Maynard *v.* Maynard, 49 Vt. 297.

5. *Iowa.*— Boddy *v.* Henry, 113 Iowa 462, 85 N. W. 771, 53 L. R. A. 769, 126 Iowa 31, 101 N. W. 447.

Maine.— Braley *v.* Powers, 92 Me. 203, 42 Atl. 362.

Massachusetts.— Holst *v.* Stewart, 161 Mass. 516, 37 N. E. 755, 42 Am. St. Rep. 442, the frequency of the arrival and departure of trains at a station near the property.

or trade the good-will of which is the subject of sale.[6] Although the vendor has no actual knowledge of the fact in question, yet if it is one susceptible of accurate personal knowledge on his part, and by reasonable inquiry and examination might be ascertained by him, his positive false representations made as of his own knowledge and for the purpose of inducing the sale are actionable if relied on by the purchaser to his injury.[7]

(II) *Representation as to Collateral Securities.* In the sale of a bond, negotiable instrument, or mortgage, false and fraudulent representations that the instrument is secured by collateral[8] or by collateral of a particular kind, character, or value,[9] the representations inducing the sale and causing loss to the buyer, are actionable.

(III) *Duty of Purchaser to Investigate* — (A) *Equal Means of Knowledge* — (1) In General. According to the weight of authority, however, the rule of *caveat emptor* applies, and under ordinary circumstances the purchaser is required to use reasonable prudence to avoid deception. Thus where the subject-matter of the representation is a fact not peculiarly within the vendor's knowledge, but is one as to which the purchaser has equal and available means and opportunity for information, and there are no confidential relations existing between

New York.— Schumaker *v.* Mather, 133 N. Y. 590, 30 N. E. 755; Simar *v.* Canaday, 53 N. Y. 298, 13 Am. Rep. 523.

Vermont.— Shanks *v.* Whitney, 66 Vt. 405, 29 Atl. 367.

United States.—Andrus *v.* St. Louis Smelting, etc., Co., 130 U. S. 643, 9 S. Ct. 645, 32 L. ed. 1054.

See 23 Cent. Dig. tit. "Fraud," §§ 8–24. See also *infra*, IV, B, 1, a, (III), (B), (4).

False statement that note is unpaid.— An action may be maintained against the payee of a promissory note for false representations at the time of selling it that it has not been paid. Sibley *v.* Hulbert, 15 Gray (Mass.) 509.

6. Nowlan *v.* Cain, 3 Allen (Mass.) 261; Thornton *v.* Harris, 4 N. Y. St. Rep. 859.

Thus in the sale of a newspaper business, together with its good-will, patronage, and subscription list, false and fraudulent representations as to the number of subscribers and the amount of business and profits constitute grounds for an action. Harvey *v.* Smith, 17 Ind. 272.

7. Savage *v.* Stevens, 126 Mass. 207; Litchfield *v.* Hutchinson, 117 Mass. 195; Atkins *v.* Elwell, 45 N. Y. 753; Craig *v.* Ward, 1 Abb. Dec. (N. Y.) 454, 3 Keyes 387, 2 Transcr. App. 281, 3 Abb. Pr. 235 [*affirming* 36 Barb. 377]; Bigler *v.* Atkins, 7 N. Y. St. 235; Cabot *v.* Christie, 42 Vt. 121, 1 Am. Rep. 313. See also Hanscom *v.* Drullard, 79 Cal. 234, 21 Pac. 736; Gordon *v.* Irvine, 105 Ga. 144, 31 S. E. 151; Johnson *v.* Wallower, 18 Minn. 288; Phillips *v.* Jones, 12 Nebr. 213, 10 N. W. 708. *Compare* Clover Farms Co. *v.* Schubert, 92 N. Y. Suppl. 260.

On the other hand fraud cannot be imputed to one who makes representations as to the title to real estate in an honest reliance upon the certificate of the town clerk and the advice of counsel. Elwell *v.* Russell, 71 Conn. 462, 42 Atl. 862.

8. Hamlin *v.* Abell, 120 Mo. 188, 25 S. W. 516 (sale of note); March *v.* Mobile First Nat. Bank, 4 Hun (N. Y.) 466 [*affirmed* in 64 N. Y. 645] (procuring acceptance of bill of exchange).

Transfer of note to illiterate person.— Where a note is transferred by delivery to a person who cannot read writing, with the representation that the indorser is liable, whereas the indorsement is without recourse, an action of deceit will lie for the fraud. Decker *v.* Hardin, 5 N. J. L. 579.

9. *Illinois.*— Kehl *v.* Abram, 210 Ill. 218, 71 N. E. 347 [*affirming* 112 Ill. App. 77]; Leonard *v.* Springer, 197 Ill. 532, 64 N. E. 299 [*reversing* 98 Ill. App. 530] (where plaintiff was induced to purchase notes secured by a worthless trust deed, through false recitals in the deed to the grantor and in trust deed as to the consideration for the same; both deeds being recorded); Nolte *v.* Reichelm, 96 Ill. 425.

Massachusetts.—Whiting *v.* Price, 169 Mass. 576, 48 N. E. 772, 61 Am. St. Rep. 307, 172 Mass. 240, 51 N. E. 1084, 70 Am. St. Rep. 262, sale of bond. See also Nash *v.* Minnesota Title Ins., etc., Co., 159 Mass. 437, 34 N. E. 625; Powers *v.* Fowler, 157 Mass. 318, 32 N. E. 166; Belcher *v.* Costello, 122 Mass. 189; Manning *v.* Albee, 11 Allen 520. *Compare* Veasey *v.* Soton, 3 Allen 380.

Michigan.— See Briggs *v.* Brushaber, 43 Mich. 330, 5 N. W. 383, 38 Am. Rep. 187.

Minnesota.— Bradford *v.* Neill, 46 Minn. 347, 49 N. W. 193, representations as to location of mortgaged property, the character of the buildings thereon, and its adequacy as security.

Missouri.— Atchison County Bank *v.* Byers, (Sup. 1897) 41 S. W. 325 (sale of a bond which recited that it was a first-mortgage bond); Edwards *v.* Noel, 88 Mo. App. 434 (where the representation in substance was that the bond was secured by a deed of trust conveying a perpetual lease at an annual rental of twenty-seven thousand and five hundred dollars, while the actual fact was that the deed of trust conveyed a lease for that rental, but for a term of ninety-nine years only).

the two, and no fraud or artifice is used to prevent inquiry or investigation, it is a general rule that the purchaser must make use of his means of knowledge and that, failing to do so, he cannot recover on the ground that he was misled by the vendor.[10] The rule of *caveat emptor* does not, however, call for more than

New Hampshire.— Bradbury *v.* Haines, 60 N. H. 123.

New York.—Currier *v.* Poor, 155 N. Y. 344, 49 N. E. 937 [*reversing* 84 Hun 45]; Simar *v.* Canaday, 53 N. Y. 298, 13 Am. Rep. 523 [*explained* in Chrysler *v.* Canaday, 90 N. Y. 272, 43 Am. Rep. 166], sale of mortgage. See also Cullen *v.* Hernz, 13 N. Y. St. Rep. 333.

10. *Alabama.*— Hooper *v.* Whitaker, 130 Ala. 324, 30 So. 355; Jordan *v.* Pickett, 78 Ala. 331.

Arizona.— Bianconi *v.* Smith, 3 Ariz. 320, 28 Pac. 880.

Connecticut.— Sherwood *v.* Salmon, 2 Day 128; Strong *v.* Peters, 2 Root 93.

Florida.— Williams *v.* McFadden, 23 Fla. 143, 1 So. 618, 11 Am. St. Rep. 345.

Georgia.— Littlejohn *v.* Drennon, 95 Ga. 743, 22 S. E. 657. See also McDaniel *v.* Strohecker, 19 Ga. 432.

Idaho.— Brown *v.* Bledsoe, 1 Ida. 746.

Illinois.— Schwabacker *v.* Riddle, 99 Ill. 343; Noetling *v.* Wright, 72 Ill. 390; Van Velsor *v.* Seeberger, 35 Ill. App. 598.

Indiana.— Cagney *v.* Cuson, 77 Ind. 494; Foley *v.* Cowgill, 5 Blackf. 18, 32 Am. Dec. 49; Anderson Foundry, etc., Works *v.* Myers, 15 Ind. App. 385, 44 N. E. 193; Armstrong *v.* White, (App. 1893) 34 N. E. 847. But see Armstrong *v.* White, 9 Ind. App. 588, 37 N. E. 28.

Iowa.— See Boddy *v.* Henry, 113 Iowa 462, 85 N. W. 771, 53 L. R. A. 769.

Kentucky.— Moore *v.* Turbeville, 2 Bibb 602, 5 Am. Dec. 642.

Maine.— See Bourn *v.* Davis, 76 Me. 223.

Maryland.— Weaver *v.* Shriver, 79 Md. 530, 30 Atl. 189, sale of corporate stock.

Massachusetts.— Poland *v.* Brownell, 131 Mass. 138, 41 Am. Rep. 215; Veasey *v.* Doton, 3 Allen 380; Salem India-Rubber Co. *v.* Adams, 23 Pick. 256, sale of goods.

Michigan.— Black *v.* Miller, 75 Mich. 323, 42 N. W. 837, where the purchaser of a note took no steps to ascertain whether it was barred by the statute of limitations. See also Lewis *v.* Weidenfeld, 114 Mich. 581, 72 N. W. 604.

New Hampshire.— Leavitt *v.* Fletcher, 60 N. H. 182.

New York.— Schumaker *v.* Mather, 133 N. Y. 590, 30 N. E. 755 (sale of land); Chrysler *v.* Canaday, 90 N. Y. 272, 43 Am. Rep. 166; Grosjean *v.* Galloway, 82 N. Y. App. Div. 380, 81 N. Y. Suppl. 871 (misrepresentation as to title); Clarke *v.* Baird, 7 Barb. 64 (misrepresentation as to boundaries of land). See also Binnard *v.* Spring, 42 Barb. 470.

North Carolina.—See Smith *v.* Andrews, 30 N. C. 3.

Ohio.— Spencer *v.* King, 5 Ohio S. & C. Pl. Dec. 113, 3 Ohio N. P. 270; Warner Elevator Co. *v.* Guthrie, 1 Ohio S. & C. Pl. Dec. 190, 7 Ohio N. P. 200.

Virginia.— Lake *v.* Tyree, 90 Va. 719, 19 S. E. 787.

West Virginia.— Crislip *v.* Cain, 19 W. Va. 438.

Wisconsin.— Kaiser *v.* Nummerdor, 120 Wis. 234, 97 N. W. 932; Farr *v.* Peterson, 91 Wis. 182, 64 N. W. 863.

United States.— Andrus *v.* St. Louis Smelting, etc., Co., 130 U. S. 643, 9 S. Ct. 645, 32 L. ed. 1054 (where a stranger was in possession of the land sold); Reynolds *v.* Palmer, 21 Fed. 433.

See 23 Cent. Dig. tit. "Fraud," §§ 19–20.

Inquiry as to encumbrances.—Thus it is the duty of a purchaser of real estate to inquire whether the property is encumbered. Littlejohn *v.* Drennon, 95 Ga. 743, 22 S. E. 657.

Where the purchase is made at a judicial sale the rule of the text is especially applicable, for it is a well-settled principle that a purchaser at a judicial sale buys at his peril. Estes *v.* Alexander, 90 Mo. 453, 2 S. W. 414. See, generally, JUDICIAL SALES.

Where the purchaser who had always lived near the land bought two hundred acres of it, going over it at the time he purchased it, it was held that he was not entitled to any damages because of the vendor's statement that there were thirty acres of bottom land, when in fact there were some six acres less. Wamsley *v.* Currence, 25 W. Va. 543.

Existence of noxious weeds on farm.— In Long *v.* Warren, 68 N. Y. 426, which was an action for deceit in the sale of a farm, it appeared that defendant represented that there was no "quack grass" on the farm except in a certain small lot, whereas that kind of grass was growing in many places on the farm and the value of the premises was seriously affected thereby. Defendant knew that his statement was false and made it with the intention to deceive, and plaintiff relied thereon and was thereby induced to make the purchase, although it did not appear that defendant used any artifice to prevent plaintiff from making an inspection. Plaintiff went about the farm where the grass was growing and had every opportunity for inspection. The grass was easily distinguishable by any one acquainted with it, and although plaintiff was a farmer and cognizant of the nature and harmful qualities of the grass it did not appear that he endeavored to discover its existence. It was held by a divided court that plaintiff could not recover. In Vandewalker *v.* Cosmer, 1 Thomps. & C. (N. Y.) 50, a similar result was reached on almost identical facts, the representation relating to the existence of daisies on the farm. But the decision in Long *v.* Warren, *supra*, has been severely criticized and it has been said that its authority should be confined to cases falling clearly within the principle there laid down. Schumaker *v.* Mather, 133 N. Y.

reasonable diligence on the part of the purchaser,[11] and what is reasonable diligence depends upon the facts and the circumstances attending the transaction,[12] and ordinarily is a question for the jury.[13]

(2) Statements of Opinion — (a) In General. According to the principles before stated[14] if the vendor's statement either by reason of its form or its subject-matter is merely the expression of an opinion, it is one on which the purchaser is not justified in relying, and therefore is not actionable.[15]

(b) Of Value. In accordance with the rule of *caveat emptor*,[16] if the purchaser has equal means of knowledge with the vendor and deals with him "at arm's length," the latter's representations as to the value of the property are usually deemed mere expressions of opinion and are not actionable, although false and fraudulent.[17] But it cannot be said as a matter of law that the value of

590, 30 N. E. 755; Albany City Sav. Inst. *v.* Burdick, 87 N. Y. 40.

Full disclosure of facts.— Where an attorney sold to another attorney an allowed claim against a receiver and stated at the time all the material facts bearing on the claim, his statement that the claim would be collected cannot be made the basis of an action by the purchaser. Smith *v.* Dye, 88 Mo. 581 [*affirming* 15 Mo. App. 585].

But the fact that a bystander stated the truth does not as a matter of law excuse a vendor who makes fraudulent misrepresentations to induce another to purchase. Haight *v.* Hayt, 19 N. Y. 464. See also Moncrief *v.* Wilkinson, 93 Ala. 373, 9 So. 159. *Compare* Grosjean *v.* Galloway, 82 N. Y. App. Div. 380, 81 N. Y. Suppl. 871.

As to the rules of a stock or produce exchange respecting sales between members see Exchanges, 17 Cyc. 365, 366 note.

11. Whiting *v.* Price, 172 Mass. 240, 51 N. E. 1084, 70 Am. St. Rep. 262; Jackson *v.* Collins, 39 Mich. 557; Messer *v.* Smyth, 59 N. H. 41; Kaiser *v.* Nummerdor, (Wis. 1904) 97 N. W. 932 [*explaining* and *limiting* Shaw *v.* Gilbert, 111 Wis. 165, 86 N. W. 188]; Northern Supply Co. *v.* Wangard, 117 Wis. 624, 94 N. W. 785. See also Watson *v.* Atwood, 25 Conn. 313; Arnold *v.* Teel, 182 Mass. 1, 64 N. E. 413. "The law does not require a prudent man to deal with every one as a rascal, and demand covenants to guard against the falsehood of every representation, which may be made, as to facts which constitute material inducements to a contract. There must be reasonable reliance upon the integrity of men, or the transactions of business, trade and commerce could not be conducted with that facility and confidence which are essential to successful enterprise, and the advancement of individual and national wealth and prosperity." Walsh *v.* Hall, 66 N. C. 233, 238.

The doctrine of contributory negligence does not apply in the law of fraud. Kaiser *v.* Nummerdor, (Wis. 1904) 97 N. W. 932.

12. Sharp *v.* Ponce, 74 Me. 470; Brady *v.* Finn, 162 Mass. 260, 38 N. E. 506; Holst *v.* Stewart, 161 Mass. 516, 37 N. E. 755, 42 Am. St. Rep. 442; Jackson *v.* Collins, 39 Mich. 557. "It is difficult to establish a fixed rule for the government of cases of this character. It is seldom that two cases are found with the same state of facts existing, and the rule seems to be that each case is dependent upon its own particular facts, bearing in mind at all times that the law does not countenance fraudulent statements or misrepresentations made for the purpose of deceiving an intending purchaser." Watson *v.* Molden, (Ida. 1905) 79 Pac. 503, 507.

13. See *infra*, VII, M, 2, d.

14. See *supra*, III, B, 1, b, (v).

15. *Alabama.*— Stow *v.* Bozeman, 29 Ala. 397, opinion as to boundary.

Florida.— Williams *v.* McFadden, 23 Fla. 143, 1 So. 618, 11 Am. St. Rep. 345.

Illinois.— Williams *v.* Wilson, 101 Ill. App. 541.

Iowa.— Bankson *v.* Lagerlof, (1898) 75 N. W. 661; Scroggin *v.* Wood, 87 Iowa 497, 54 N. W. 437; Longshore *v.* Jack, 30 Iowa 298 (quantity of wood on land); Bondurant *v.* Crawford, 22 Iowa 40 (the amount of water which a well will afford).

Maine.— Bishop *v.* Small, 63 Me. 12.

Massachusetts.— Mooney *v.* Miller, 102 Mass. 217.

Michigan.— Collins *v.* Jackson, 54 Mich. 186, 19 N. W. 947.

Nebraska.— Esterly Harvesting Mach. Co. *v.* Berg, 52 Nebr. 147, 71 N. W. 952; Markel *v.* Moudy, 11 Nebr. 213, 7 N. W. 853.

New Jersey.—Cummings *v.* Cass, 52 N. J. L. 77, 18 Atl. 972.

New York.— See McCall *v.* Proal, 48 N. Y. Super. Ct. 403.

Ohio.— Belmont Min. Co. *v.* Rogers, 10 Ohio Cir. Ct. 305, 6 Ohio Cir. Dec. 619.

Vermont.— Shanks *v.* Whitney, 66 Vt. 405, 29 Atl. 367.

See 23 Cent. Dig. tit. "Fraud," § 12.

A statement that the cellar of a house is "as dry as a nut" and that there never has been any trouble with it is a statement of fact and not an expression of opinion and belief. Frank *v.* Bradley, etc., Co., 42 N. Y. App. Div. 178, 58 N. Y. Suppl. 1032.

16. See *supra*, IV, B, 1, a, (III), (A), (1).

17. *Alabama.*— Lake *v.* Security Loan Assoc., 72 Ala. 207, value of stock.

Colorado.— Cole *v.* Smith, 26 Colo. 506, 56 Pac. 1086; Zang *v.* Adams, 23 Colo. 408, 48 Pac. 509, 58 Am. St. Rep. 249; Mayo *v.* Wahlgreen, 9 Colo. App. 506, 50 Pac. 40.

Connecticut.— Gustafson *v.* Rustemeyer, 70

property to be sold is never a material fact. It is only because statements of value can rarely be supposed to have induced a purchase without negligence on the part of the purchaser that the courts have laid down the foregoing principle; and in a plain and aggravated case of cheating the vendor may be held liable notwithstanding that his misrepresentation was one as to the value of the property.[18] Representations as to the market value of property of the kind to be sold have been held to be statements of fact, not of opinion, and to be actionable

Conn. 125, 39 Atl. 104, 66 Am. St. Rep. 92, 39 L. R. A. 644.

Florida.— Williams *v.* McFadden, 23 Fla. 143, 1 So. 618, 11 Am. St. Rep. 345.

Illinois.— Evans *v.* Gerry, 174 Ill. 595, 51 N. E. 615; Brady *v.* Cole, 164 Ill. 116, 45 N. E. 438; Mumford *v.* Tolman, 157 Ill. 258, 41 N. E. 617 (value of stock and the profits it will yield); Hauk *v.* Brownell, 120 Ill. 161, 11 N. E. 410; Dillman *v.* Nadelhoffer, 119 Ill. 567, 7 N. E. 88; Noetling *v.* Wright, 72 Ill. 390; Miller *v.* Craig, 36 Ill. 109; Coolidge *v.* Rhodes, 96 Ill. App. 17; Struhar *v.* Shorthose, 78 Ill. App. 394; Wightman *v.* Tucker, 50 Ill. App. 75.

Indiana.— Shade *v.* Creviston, 93 Ind. 591; Hartman *v.* Flaherty, 80 Ind. 472; Cagney *v.* Cuson, 77 Ind. 494; Kennedy *v.* Richardson, 70 Ind. 524; Cronk *v.* Cole, 10 Ind. 485; Foley *v.* Cowgill, 5 Blackf. 18, 32 Am. Dec. 49; Elkhart First Nat. Bank *v.* Osborne, 18 Ind. App. 442, 48 N. E. 256.

Iowa.— Bossingham *v.* Syck, 118 Iowa 192, 91 N. W. 1047; Hoffman *v.* Wilhelm, 68 Iowa 510, 27 N. W. 483.

Maine.— Bourn *v.* Davis, 76 Me. 223; Bishop *v.* Small, 63 Me. 12; Holbrook *v.* Connor, 60 Me. 578, 11 Am. Rep. 212.

Massachusetts.— Lynch *v.* Murphy, 171 Mass. 307, 50 N. E. 623; Nash *v.* Minnesota Title Ins., etc., Co., 159 Mass. 437, 34 N. E. 625; Poland *v.* Brownell, 131 Mass. 138, 41 Am. Rep. 215; Parker *v.* Moulton, 114 Mass. 99, 19 Am. Rep. 315; Veasey *v.* Soton, 3 Allen 380. See also Cooper *v.* Lovering, 106 Mass. 77.

Michigan.—Buxton *v.* Jones, 120 Mich. 522, 79 N. W. 980; Collins *v.* Jackson, 54 Mich. 186, 19 N. W. 947; Bristol *v.* Braidwood, 28 Mich. 191, representations as to value of a mortgage.

Minnesota.— Doran *v.* Eaton, 40 Minn. 35, 41 N. W. 244.

Missouri.— Anderson *v.* McPike, 86 Mo. 293; Union Nat. Bank *v.* Hunt, 76 Mo. 439 [*affirming* 7 Mo. App. 42]; Brownlow *v.* Wollard, 61 Mo. App. 124. See also Dalrymple *v.* Craig, 149 Mo. 345, 50 S. W. 884.

New Jersey.—See French *v.* Griffin, 18 N. J. Eq. 279.

New York.— Ellis *v.* Andrews, 56 N. Y. 83, 16 Am. Rep. 379; McMillan *v.* Arthur, 48 N. Y. Super. Ct. 424 [*affirmed* in 98 N. Y. 167]; Furman *v.* Titus, 40 N. Y. Super. Ct. 284; McGlynn *v.* Seymour, 14 Daly 420, 14 N. Y. St. 707; Dupont *v.* Payton, 2 E. D. Smith 424; Sandford *v.* Handy, 23 Wend. 260; Davis *v.* Meeker, 5 Johns. 354. See also Van Epps *v.* Harrison, 5 Hill 63, 40 Am. Dec. 314.

North Carolina.— Saunders *v.* Hatterman, 24 N. C. 32, 37 Am. Dec. 404.

Ohio.— Belmont Min. Co. *v.* Rogers, 10 Ohio Cir. Ct. 305, 6 Ohio Cir. Dec. 619; Spencer *v.* King, 5 Ohio S. & C. Pl. Dec. 113, 3 Ohio N. P. 270.

Oregon.— Martin *v.* Eagle Development Co., 41 Oreg. 448, 69 Pac. 216.

Pennsylvania.— Cote *v.* Christy, 10 Pa. Super. Ct. 318, 44 Wkly. Notes Cas. 438.

Tennessee.— Long *v.* Gilbert, (Ch. App. 1900) 59 S. W. 414.

Virginia.— Lake *v.* Tyree, 90 Va. 719, 19 S. E. 787.

Wisconsin.— Farr *v.* Peterson, 91 Wis. 182, 64 N. W. 863; Mosher *v.* Post, 89 Wis. 602, 62 N. W. 516. See also Wood *v.* Boynton, 64 Wis. 265, 25 N. W. 42, 54 Am. Rep. 610.

United States.— Lehigh Zinc, etc., Co. *v.* Bamford, 150 U. S. 665, 14 S. Ct. 219, 37 L. ed. 1215.

England.— Harvey *v.* Young, Yelv. 21*a*.

See 23 Cent. Dig. tit. "Fraud," § 13.

Rule stated.—"The rule is well settled that a naked assertion by a vendor of the value of property offered for sale, even although untrue of itself, and known to be such by him, unless there is a want of knowledge by the vendee, and the sale is made in entire reliance upon the representations made, or unless some artifice is employed to prevent inquiry or the obtaining of knowledge by the vendee, will not render the vendor responsible to the vendee for damages sustained by him." Chrysler *v.* Canaday, 90 N. Y. 272, 279, 43 Am. Rep. 166.

"Wash-sales" of stock are mere false affirmations of an opinion as to value. McGlynn *v.* Seymour, 14 Daly (N. Y.) 420, 14 N. Y. St. 707.

Representations as to the value of stock as an investment, made by the promoter or soliciting agent of a corporation, will not sustain an action of deceit. Vawter *v.* Ohio, etc., R. Co., 14 Ind. 174; Lynch *v.* Murphy, 171 Mass. 307, 50 N. E. 623. See also Nash *v.* Minnesota Title Ins., etc., Co., 148 Mass. 437, 34 N. E. 625.

18. Leonard *v.* Springer, 197 Ill. 532, 64 N. E. 299 [*reversing* 98 Ill. App. 530]; Picard *v.* McCormick, 11 Mich. 68. See also Murray *v.* Tolman, 162 Ill. 417, 44 N. E. 748 [*reversing* 54 Ill. App. 420]; Coulter *v.* Minion, (Mich. 1905) 102 N. W. 660. See also Cullen *v.* Hernz, 13 N. Y. St. Rep. 333. And see *infra*, IV, B, 1, a, (III), (2).

For other qualifications of the rule see *infra*, IV, B, 1, a, (III), (B), (3), (b); IV, B, 1, a, (III), (B), (4); IV, B, 1, a. (III), (B), (6).

where the purchaser is ignorant of the true market value,[19] or where the parties expressly make the truth of the seller's statements an essential element of the bargain.[20] On the other hand it has been held that if the purchaser is an experienced dealer in the property and the means of information are equally open to both parties, representations as to the market value may be regarded as "dealers' talk" which is not actionable.[21]

(c) "Dealers' Talk"[22] — aa. *In General.* General assertions or expressions of a vendor in commendation of his land or wares — commonly called "dealers' talk" — are generally held to fall within the rule under discussion, and thus to constitute no grounds for an action of deceit.[23] Statements merely descriptive of the operation and utility of an invention or patented article are generally regarded as mere expressions of opinion or "dealers' talk," upon which a purchaser cannot safely rely;[24] and even a misrepresentation that experiments have been made with the invention and have proved successful has been held to be merely an expression of opinion and so not actionable, although put in the form of a statement of a past fact.[25] But the decisions in cases of this character are not wholly consistent, and representations very similar to those just indicated

19. Picard *v.* McCormick, 11 Mich. 68; Stoll *v.* Wellborn, (N. J. Ch. 1903) 56 Atl. 894; Bacon *v.* Frisbie, 15 Hun (N. Y.) 26 [*reversed* on other grounds in 80 N. Y. 394, 36 Am. Rep. 627]; Sandford *v.* Handy, 23 Wend. (N. Y.) 260. *Compare* Cronk *v.* Cole, 10 Ind. 485.

20. Kilgore *v.* Bruce, 166 Mass. 136, 44 N. E. 108, where the purchaser of corporate stock told the seller that he relied on the fact represented that stock of the same corporation was selling for a certain price and refused to purchase unless assured that the statement was true.

21. Lilienthal *v.* Suffolk Brewing Co., 154 Mass. 185, 28 N. E. 151, 26 Am. St. Rep. 234, 12 L. R. A. 821. See also Cronk *v.* Cole, 10 Ind. 485.

Dealer's talk see *infra*, IV, B, 1, a, (III), (A), (2), (c).

22. See also 13 Cyc. 287.

23. *Alabama.*— Stevens *v.* Alabama State Land Co., 121 Ala. 450, 25 So. 995.

Florida.— Williams *v.* McFadden, 23 Fla. 143, 1 So. 618, 11 Am. St. Rep. 345.

Idaho.— Brown *v.* Bledsoe, 1 Ida. 746.

Illinois.— Dillman *v.* Nadlehoffer, 119 Ill. 567, 7 N. E. 88; Strubhar *v.* Shorthose, 78 Ill. App. 394; Wightman *v.* Tucker, 50 Ill. App. 75; Van Velsor *v.* Seeberger, 35 Ill. App. 598. When parties are negotiating for the purchase and sale of property, real or personal, each has a right to exalt the value of his own property to the highest point his antagonist's credulity may bear, and depreciate that of his deponent; and, if there is opportunity to examine the property, such boastful assertions or exaggerated descriptions cannot be considered as amounting to fraudulent representation or deceit. Miller *v.* Craig, 36 Ill. 109.

Indiana.— Gatling *v.* Newell, 9 Ind. 572.

Iowa.— See Dawson *v.* Graham, 48 Iowa 378.

Maine.— Bishop *v.* Small, 63 Me. 12; Holbrook *v.* Connor, 60 Me. 578, 11 Am. Rep. 212, affirmance as to deposits of oil in land.

Massachusetts.— Deming *v.* Darling, 148 Mass. 504, 20 N. E. 107, 2 L. R. A. 743 (sale of railroad bond); Kimball *v.* Bangs, 144 Mass. 321, 11 N. E. 113; Poland *v.* Brownell, 131 Mass. 138, 41 Am. Rep. 215; Parker *v.* Moulton, 114 Mass. 99, 19 Am. Rep. 315; Mooney *v.* Miller, 102 Mass. 217 (quantity of wood and hay that could be cut from certain land); Gordon *v.* Parmelee, 2 Allen 312. See also Brown *v.* Castles, 11 Cush. 348.

Michigan.— Collins *v.* Jackson, 54 Mich. 186, 19 N. W. 947.

Ohio.— Spencer *v.* King, 5 Ohio S. & C. Pl. Dec. 113, 3 Ohio N. P. 270.

Virginia.— Lake *v.* Tyree, 90 Va. 719, 19 S. E. 787.

Wisconsin.— Mosher *v.* Post, 89 Wis. 602, 62 N. W. 516.

United States.— Reynolds *v.* Palmer, 21 Fed. 433.

See 23 Cent. Dig. tit. "Fraud," § 12.

Compare Davis *v.* Jenkins, 46 Kan. 19, 26 Pac. 459.

"It is settled that the law does not exact good faith from a seller in those vague commendations of his wares which manifestly are open to a difference of opinion, which do not imply untrue assertions concerning matters of direct observation, and as to which it always has been 'understood the world over that such statements are to be distrusted.'" Deming *v.* Darling, 148 Mass. 504, 505, 20 N. E. 107, 2 L. R. A. 743.

But the rule of the text does not apply when the representations are as to facts, as where old and shopworn goods are represented as new, and a false invoice is shown the purchaser, which is represented as truthfully showing the wholesale value of the goods in the market. Strand *v.* Griffith, 97 Fed. 854, 38 C. C. A. 444.

24. Neidefer *v.* Chastian, 71 Ind. 363, 36 Am. Rep. 198; Hunter *v.* McLaughlin, 43 Ind. 38; Bishop *v.* Small, 63 Me. 12; Kimball *v.* Bangs, 144 Mass. 321, 11 N. E. 113. See also Gatling *v.* Newell, 9 Ind. 572.

25. Kimball *v.* Bangs, 144 Mass. 321, 11 N. E. 113.

have been held to be sufficient to ground an action for deceit as false statements of fact.[26]

bb. *Statements of Cost of Property.* On the question whether false representations by a vendor as to the price paid by him for the property are actionable, there is a direct conflict in the authorities. In some jurisdictions if the vendor and purchaser are dealing "at arm's length" the representation of the former as to the cost of his property, even though false and made with intent to deceive, will furnish no ground of action; but such statements are looked upon merely as representations in regard to value, uttered for the purpose of enhancing the price, and any purchaser who relies upon them is considered as too careless of his own interests to be entitled to relief.[27] But in other jurisdictions statements by the vendor as to the price he gave for the property are held to be statements of fact, such as may be actionable if false and fraudulent.[28] Regardless of the conflict just indicated if, in a contract for the sale of goods, the price to be paid is estimated according to the cost, actionable fraud is committed by the seller if with intent to deceive the buyer he uses false cost marks[29] or misrepresents the meaning of lettered cost marks where the buyer is ignorant of their signification.[30]

(d) Of Law. In accordance with the principles above stated,[31] a misrepresentation as to a matter of law made by a vendor as an inducement to the sale is regarded as an expression of opinion which ordinarily does not constitute actionable fraud;[32] otherwise where his misrepresentation is of the law of a foreign jurisdiction and thus is a misrepresentation of fact.[33]

(3) Reliance Expressly Placed on Vendor. Where the buyer of goods declines to examine them because of his want of experience, expressly declaring that he confides in the judgment of the seller, the latter is under a duty either to make no representations or to make a full disclosure not calculated to deceive the

26. Scholfield Gear, etc., Co. *v.* Scholfield, 71 Conn. 1, 40 Atl. 1046; Merrillat *v.* Plummer, 111 Iowa 643, 82 N. W. 1020; Iowa Economic Heater Co. *v.* American Economic Heater Co., 32 Fed. 735. See also Coulter *v.* Clark, 160 Ind. 311, 66 N. E. 739.

27. *Colorado.*— Cole *v.* Smith, 26 Colo. 506, 58 Pac. 1086.

Illinois.— Hauk *v.* Brownell, 120 Ill. 161, 11 N. E. 416; Noetling *v.* Wright, 72 Ill. 390. See also Tuck *v.* Downing, 76 Ill. 71; Banta *v.* Palmer, 47 Ill. 99.

Kansas.— See Elerick *v.* Reid, 54 Kan. 579, 38 Pac. 814.

Maine.— Bishop *v.* Small, 63 Me. 12 (sale of a patent right); Holbrook *v.* Connor, 60 Me. 578, 11 Am. Rep. 212.

Massachusetts.— Cooper *v.* Lovering, 106 Mass. 77; Hemmer *v.* Cooper, 8 Allen 334.

For limitations of this rule see *infra,* IV, B, 1, a, (III), (B), (4), (6).

Price paid by third person.— The rule of the text does not apply to a statement by the vendor as to the price paid by a third person for the property; such a statement if false and fraudulent may be actionable. Belcher *v.* Costello, 122 Mass. 189.

Offers by third person see *infra,* IV, B, 1, a, (III), (B), (4).

Statement by third person.— Neither does the rule of the text apply where a false statement of the cost is made by an apparently disinterested third person, since in such a case there is no foundation for the doctrine of *caveat emptor.* Medbury *v.* Watson, 6 Metc. (Mass.) 246, 39 Am. Dec. 726. See *infra,* VI, A.

28. See Johnson *v.* Gavitt, 114 Iowa 183, 86 N. W. 256; Dorr *v.* Corey, 108 Iowa 725, 78 N. W. 682; Teachout *v.* Van Hoesen, 76 Iowa 113, 40 N. W. 96, 14 Am. St. Rep. 206, 1 L. R. A. 664; Page *v.* Parker, 43 N. H. 363, 80 Am. Dec. 172; Fairchild *v.* McMahon, 139 N. Y. 290, 34 N. E. 779, 36 Am. St. Rep. 701; Smith *v.* Countryman, 30 N. Y. 655; Van Epps *v.* Harrison, 5 Hill (N. Y.) 63, 40 Am. Dec. 314; Sandford *v.* Handy, 23 Wend. (N. Y.) 260; Clarke *v.* Dickson, 6 C. B. N. S. 453, 5 Jur. N. S. 1027, 28 L. J. C. P. 225, 7 Wkly. Rep. 443, 95 E. C. L. 453.

29. Mason *v.* Thornton, (Ark. 1905) 84 S. W. 1048.

30. Elerick *v.* Reid, 54 Kan. 579, 38 Pac. 814.

31. See *supra,* III, B, 1, b, (V), (B).

32. Martin *v.* Wharton, 38 Ala. 637, 638, holding that a statement by vendor that "his wife would, in no event, be entitled to dower in the land sold by him in his life-time, but would only be entitled to dower in the lands owned and possessed by him at the time of his death," is a misrepresentation of a matter of law and does not constitute fraud. And see cases cited *supra,* III, B, 1, b, (V), (B).

33. Windram *v.* French, 151 Mass. 547, 24 N. E. 914, 8 L. R. A. 750.

A purchaser of a warrant of another state, relying upon a misrepresentation by the vendor as to the statute of limitations of that state, has a right of action against the seller.

buyer; and this, although the fact to be disclosed is one which might be easily discovered by a person familiar with property of the kind sold.[34]

(B) *Matters Peculiarly Within Vendor's Knowledge* — (1) IN GENERAL. As a general rule if a vendor of property, in order to induce a sale, makes positive assertions as to any material fact which is peculiarly within his own knowledge and of which the purchaser is ignorant,[35] such as the title,[36] area,[37] boundaries,[38]

Wood *v.* Roeder, 50 Nebr. 476, 70 N. W. 21.

34. Hanger *v.* Evins, 38 Ark. 334.

35. *Illinois.*— Van Velsor *v.* Seeberger, 59 Ill. App. 322.

Indiana.— Rose *v.* Hurley, 39 Ind. 77 (what is covered by a patent); Shaeffer *v.* Sleade, 7 Blackf. 178; Loucks *v.* Taylor, 23 Ind. App. 245, 55 N. E. 238; Bloomer *v.* Gray, 10 Ind. App. 326, 37 N. E. 819.

Iowa.— Clark *v.* Ralls, (1885) 24 N. W. 567.

Massachusetts.— David *v.* Park, 103 Mass. 501 (sale of patent right); Nowlan *v.* Cain, 3 Allen 261.

Minnesota.— Redding *v.* Wright, 49 Minn. 322, 51 N. W. 1056; Faribault *v.* Sater, 13 Minn. 223, capacity of mill.

Missouri.— Cottrill *v.* Krum, 100 Mo. 397, 13 S. W. 753, 18 Am. St. Rep. 549; Wannell *v.* Kem, 57 Mo. 478.

New York.— Townsend *v.* Felthousen, 156 N. Y. 618, 51 N. E. 279 [*affirming* 90 Hun 89, 35 N. Y. Suppl. 538]; Schwenk *v.* Naylor, 102 N. Y. 683, 7 N. E. 788 [*reversing* 50 N. Y. Super. Ct. 57].

Texas.— Wright *v.* U. S. Mortgage Co., (Civ. App. 1897) 42 S. W. 789, amount of taxes due.

Washington.— Tacoma *v.* Tacoma Light, etc., Co., 17 Wash. 458, 50 Pac. 555.

United States.— Wilson *v.* Higbee, 62 Fed. 723.

See 23 Cent. Dig. tit. "Fraud," §§ 19–21; and cases cited in the following notes.

36. *Iowa.*— Riley *v.* Bell, 120 Iowa 618, 95 N. W. 170; Hale *v.* Philbrick, 42 Iowa 81.

Kansas.— Claggett *v.* Crall, 12 Kan. 393.

Maine.— Atwood *v.* Chapman, 68 Me. 38, 28 Am. Rep. 5.

Minnesota.— Reynolds *v.* Franklin, 39 Minn. 24, 38 N. W. 636.

New York.— Clark *v.* Baird, 9 N. Y. 183, Seld. 187.

United States.— Barnes *v.* Union Pac. R. Co., 57 Fed. 87, 4 C. C. A. 199.

See 23 Cent. Dig. tit. "Fraud," §§ 19–21.

See also Cheney *v.* Powell, 88 Ga. 629, 15 S. E. 750; Hunt *v.* Barker, 22 R. I. 118, 46 Atl. 46, 84 Am. St. Rep. 812. *Compare* Bianconi *v.* Smith, 3 Ariz. 320, 28 Pac. 880; Andrus *v.* St. Louis Smelting, etc., Co., 130 U. S. 643, 9 S. Ct. 645, 32 L. ed. 1054.

37. *Connecticut.*— Lovejoy *v.* Isbell, 73 Conn. 368, 47 Atl. 682.

Illinois.— Antle *v.* Sexton, 137 Ill. 410, 27 N. E. 691 [*affirming* 32 Ill. App. 437].

Indiana.— Ledbetter *v.* Davis, 121 Ind. 119, 22 N. E. 744.

Kansas.— See Speed *v.* Hollingsworth, 54 Kan. 436, 38 Pac. 496.

Michigan.— Starkweather *v.* Benjamin, 32 Mich. 305.

Minnesota.— Porter *v.* Fletcher, 25 Minn. 493.

New York.— See Clark *v.* Baird, 9 N. Y. 183, Seld. 187.

Oregon.— Cawston *v.* Sturgis, 29 Oreg. 331, 43 Pac. 656.

Vermont.— Cabot *v.* Christie, 42 Vt. 121, 1 Am. Rep. 313.

See 23 Cent. Dig. tit. "Fraud," §§ 19–21.

Where the vendor correctly pointed out the boundaries to the purchaser, it was held that his false representations as to the number of acres in the lot were not actionable. Mooney *v.* Miller, 102 Mass. 217. A purchaser of land cannot recover of the vendor on the ground of fraudulent representations, in that he said he was selling him all his land, and did not include in the deed a certain tract owned by him; the vendor, at the time of the sale, having pointed out the lands which he claimed to be selling, as described in the deed, and the omitted tract not having been pointed out, or claimed by him to be his land. Gilbert *v.* Ledford, 32 S. W. 223, 17 Ky. L. Rep. 608. But the purchaser has been held entitled to recover where he was actually deceived by the vendor's false representations, although he had some previous knowledge of the boundaries. Estes *v.* Odom, 91 Ga. 600, 18 S. E. 355; Antle *v.* Sexton, 137 Ill. 410, 27 N. E. 691.

The purchaser's knowledge of the boundaries of an irregularly shaped tract does not charge him with knowledge of its area so as to relieve the vendor from responsibility for his false and fraudulent representations. Cawston *v.* Sturgis, 29 Oreg. 331, 43 Pac. 656.

38. *Alabama.*— Foster *v.* Kennedy, 38 Ala. 359, 81 Am. Dec. 56.

Maine.— Roberts *v.* Plaisted, 63 Me. 335.

Minnesota.— Ohlson *v.* Orton, 28 Minn. 36, 8 N. W. 878.

New York.— Schwenk *v.* Naylor, 102 N. Y. 683, 7 N. E. 788 [*reversing* 50 N. Y. Super. Ct. 57]; Clark *v.* Baird, 9 N. Y. 183, Seld. 187.

North Carolina.— Ramsey *v.* Wallace, 100 N. C. 75, 6 S. E. 638; Walsh *v.* Hall, 66 N. C. 233, 243 [*overruling* Credle *v.* Swindell, 63 N. C. 305; Lytle *v.* Bird, 48 N. C. 222, which held that the rule of *caveat emptor* required a survey by the purchaser]. "A purchaser of land is not required, in order to guard against the fraudulent representations of a vendor, to have a survey made, unless some third person is in possession claiming title; or there is some dispute about boundary, or as to the true location, or he has received some information which would reasonably induce him to suspect fraud. The

location,[39] rents, profits, or income,[40] or encumbrances,[41] may be relied on by the purchaser without further investigation; and if the statements are false and fraudulent and cause damage to the purchaser he may hold the vendor liable in

general customs of conveying land according to old deeds and without a survey, is sufficiently established to be reasonably relied on by a purchaser, as to description of location and boundary." Walsh *v.* Hall, *supra*.

See 23 Cent. Dig. tit. "Fraud," §§ 19–21.

A purchaser is not bound to know what land is contained in the description in his contract or deed, and fraud may be predicated upon representations that the description covers lands not actually included therein. Beardsley *v.* Duntley, 69 N. Y. 577.

39. *Indiana.*— Campbell *v.* Frankem, 65 Ind. 591.

Iowa.— McGibbons *v.* Wilder, 78 Iowa 531, 43 N. W. 520.

Minnesota.— Griffin *v.* Farrier, 32 Minn. 474, 21 N. W. 553; Porter *v.* Fletcher, 25 Minn. 493.

Nebraska.— Hoock *v.* Bowman, 42 Nebr. 80, 60 N. W. 389, 47 Am. St. Rep. 691, location of certain lots in a city where the adjacent streets had not been laid out.

New York.— Sandford *v.* Handy, 23 Wend. 260.

Utah.— Hecht *v.* Metzler, 14 Utah 408, 48 Pac. 37, 60 Am. St. Rep. 906.

See 23 Cent. Dig. tit. "Fraud," §§ 19–21.

40. *Illinois.*— Dwight *v.* Chase, 3 Ill. App. 67 [*distinguishing* Noetling *v.* Wright, 72 Ill. 390], sale of a brokerage business induced by false statements that the broker's income therefrom was a certain sum per annum.

Kansas.— See Speed *v.* Hollingsworth, 54 Kan. 436, 38 Pac. 496.

Kentucky.— See Ward *v.* Crutcher, 2 Bush 87.

Maine.— Irving *v.* Thomas, 18 Me. 418.

Massachusetts.— Lee *v.* Tarplin, 183 Mass. 52, 66 N. E. 431.

New Jersey.— Wise *v.* Fuller, 29 N. J. Eq. 257.

New York.— Griffing *v.* Diller, 21 N. Y. Suppl. 407.

Utah.— Hecht *v.* Metzler, 14 Utah 408, 48 Pac. 37, 60 Am. St. Rep. 906.

England.— Dobell *v.* Stevens, 3 B. & C. 623, 10 E. C. L. 283; Lynsey *v.* Selby, 2 Ld. Raym. 1118; Risney *v.* Selby, 1 Salk. 211. See also Bowring *v.* Stevens, 2 C. & P. 337, 12 E. C. L. 604; 1 Comyns Dig. 351.

See 23 Cent. Dig. tit. "Fraud," §§ 19–21.

In the sale of a newspaper, the number of subscribers and the amount of business and profits are facts so peculiarly within the knowledge of the vendor that the vendee has a right to rely on his representation concerning them. Harvey *v.* Smith, 17 Ind. 272.

The vendee of a stock of goods may maintain deceit against the vendor for a false representation of the amount of current sales, if such representation formed one of the inducements for purchase, and the vendor had no opportunity to examine the books, although he cannot maintain the action if he had an opportunity to make the examination. Mosher *v.* Post, 89 Wis. 602, 62 N. W. 516. See also Stones *v.* Richmond, 21 Mo. App. 17.

41. False and fraudulent statements that the property is not encumbered, or as to the amount of existing encumbrances, are actionable within the rule of the text.

Arkansas.— Hutchinson *v.* Gorman, 71 Ark. 305, 73 S. W. 793, misrepresentation as to amount of encumbrance.

Illinois.— Hahl *v.* Brooks, 213 Ill. 134, 72 N. E. 727 (holding also that the purchaser can recover, although he has not removed the encumbrance or his title has not been swept away by it); Eames *v.* Morgan, 37 Ill. 260.

Indiana.— Backer *v.* Pyne, 130 Ind. 288, 30 N. E. 21, 30 Am. St. Rep. 231; Dodge *v.* Pope, 93 Ind. 480; Loucks *v.* Taylor, 23 Ind. App. 245, 55 N. E. 238, where defendant, when selling certain land encumbered by a mortgage held by a building association, falsely represented to plaintiff that the association had informed him at the time of making the loan that it would be fully paid in seventy-two monthly instalments, of which only thirty-six still remain to be paid, while as a matter of fact the association had informed defendant that it would require eighty-four monthly instalments to pay the loan, and more than thirty-six remained to be paid.

Iowa.— Riley *v.* Bell, 120 Iowa 618, 95 N. W. 170.

Kansas.— Carpenter *v.* Wright, 52 Kan. 221, 34 Pac. 798.

Massachusetts.— See Nash *v.* Minnesota Title Ins., etc., Co., 159 Mass. 437, 34 N. E. 625; Powers *v.* Fowler, 157 Mass. 318, 32 N. E. 166.

Michigan.— Short *v.* Cure, 100 Mich. 418, 59 N. W. 173 (misrepresentations as to amount of mortgage); Weber *v.* Weber, 47 Mich. 569, 11 N. W. 389.

New York.— Haight *v.* Hayt, 19 N. Y. 464 (holding also that, although the vendor, in falsely representing that the premises were not subject to mortgage, supposed that the mortgage could be avoided at law, he was nevertheless liable inasmuch as he wilfully misrepresented a material fact); Blumenfeld *v.* Stine, 42 Misc. 411, 87 N. Y. Suppl. 81 [*affirmed* in 96 N. Y. App. Div. 160, 89 N. Y. Suppl. 85]; Ward *v.* Wiman, 17 Wend. 193; Bacon *v.* Bronson, 7 Johns. Ch. 194, 11 Am. Dec. 449.

South Carolina.—See Chisholm *v.* Gadsden, 1 Strobh. 220, 47 Am. Dec. 550.

Tennessee.— Gwinther *v.* Gerding, 3 Head. 197.

See 23 Cent. Dig. tit. "Fraud," §§ 19–21.

Notice to purchaser.— If the purchaser relied on the vendor's positive statements he may recover, although he had such notice *in pais* as might have put him on inquiry and precluded him from claiming as a *bona*

damages. Nor need the fact be one exclusively within the vendor's knowledge.[42] Upon this principle positive misrepresentations by a vendor of territorial rights under patents, as to the merits and value of the patents and of the rights to be sold, are held not to fall within the rule of *caveat emptor*.[43]

(2) Facts Appearing of Record. Where the fact represented is one which is peculiarly within the vendor's knowledge and of which the purchaser is ignorant, it is generally held that, although the real fact appears on the public records, the purchaser is under no obligation to examine the records, and his failure to do so does not affect his right of action.[44]

(3) Facts Difficult of Ascertainment — (a) In General. The rule of *caveat emptor* does not apply where the fact in question is difficult of ascertainment by the purchaser and is or may well be presumed to be peculiarly within the knowledge of the vendor.[45] This is true where the fact to be ascertained is

fide purchaser as against the prior lienholder. Haight *v.* Hayt, 19 N. Y. 464, where a bystander at the sale mentioned the existence of the encumbrance but its existence was expressly denied by the vendor.

The fact that the vendor is personally liable to pay a mortgage not assumed by the purchaser does not relieve him from damages for a misrepresentation of the amount of the mortgage. Short *v.* Cure, 100 Mich. 418, 59 N. W. 173.

42. Nowlan *v.* Cain, 3 Allen (Mass.) 261.

43. Coulter *v.* Clark, 160 Ind. 311, 66 N. E. 739; Iowa Economic Heater Co. *v.* American Economic Heater Co., 32 Fed. 735. See also Hicks *v.* Stevens, 121 Ill. 186, 11 N. E. 241; Rose *v.* Hurley, 39 Ind. 77. *Compare* Bishop *v.* Small, 63 Me. 12.

44. *Connecticut.*— Watson *v.* Atwood, 25 Conn. 313.

Florida.— Wheeler *v.* Baars, 33 Fla. 696, 15 So. 584.

Illinois.— Kehl *v.* Abram, 210 Ill. 218, 71 N. W. 347 [*affirming* 112 Ill. App. 77]; Eames *v.* Morgan, 37 Ill. 260.

Indiana.— Backer *v.* Pyne, 130 Ind. 288, 30 N. E. 21, 30 Am. St. Rep. 231; Dodge *v.* Pope, 93 Ind. 480.

Iowa.— Riley *v.* Bell, 120 Iowa 618, 95 N. W. 170. See also Faust *v.* Hosford, 119 Iowa 97, 93 N. W. 58.

Kansas.— Carpenter *v.* Wright, 52 Kan. 221, 34 Pac. 798; McKee *v.* Eaton, 26 Kan. 226; Claggett *v.* Crall, 12 Kan. 393.

Kentucky.— Young *v.* Hopkins, 6 T. B. Mon. 18.

Massachusetts.— David *v.* Park, 103 Mass. 501, sale of patent right.

Michigan.— Weber *v.* Weber, 47 Mich. 569, 11 N. W. 389.

Minnesota.— Thomas *v.* Murphy, 87 Minn. 358, 91 N. W. 1097; Ohlson *v.* Orton, 28 Minn. 36, 8 N. W. 878; Porter *v.* Fletcher, 25 Minn. 493; Kiefer *v.* Rogers, 19 Minn. 32.

Nebraska.— Hoock *v.* Bowman, 42 Nebr. 80, 60 N. W. 389, 47 Am. St. Rep. 691 [*citing* Lynch *v.* Mercantile Trust Co., 5 McCrary 623, 18 Fed. 486].

New York.— Blumenfeld *v.* Stine, 42 Misc. 411, 87 N. Y. Suppl. 81 [*affirmed* in 96 N. Y. App. Div. 160, 89 N. Y. Suppl. 85].

Rhode Island.— See Hunt *v.* Barker, 22 R. I. 18, 46 Atl. 46, 84 Am. St. Rep. 812.

United States.— Wilson *v.* Higbee, 62 Fed. 723.

See 23 Cent. Dig. tit. "Fraud," §§ 19–21.

But see Bourn *v.* Davis, 76 Me. 223.

Concealment as to title.—The same rule applies where the vendor conceals the fact that he has parted with his title and allows the purchaser to proceed upon the assumption that the vendor still has title. Thomas *v.* Murphy, 87 Minn. 358, 91 N. W. 1097. Otherwise where the alleged fraud is a mere failure to disclose that the property is mortgaged, no inquiry having been made by the purchaser. Littlejohn *v.* Drennon, 95 Ga. 743, 22 S. E. 657.

45. *Alabama.*— Moncrief *v.* Wilkinson, 93 Ala. 373, 9 So. 159.

Georgia.— Fenley *v.* Moody, 104 Ga. 790, 30 S. E. 1002, representations as to easements or appurtenances.

Indiana.— Coulter *v.* Clark, 160 Ind. 311, 66 N. E. 739.

Kansas.— Speed *v.* Hollingsworth, 54 Kan. 436, 38 Pac. 496.

Kentucky.—Morehead *v.* Eades, 3 Bush 121.

Maine.— Rhoda *v.* Annis, 75 Me. 17, 46 Am. Rep. 354; Martin *v.* Jordan, 60 Me. 531, the condition of farming land when the ground is covered by snow.

Massachusetts.— Lewis *v.* Jewell, 151 Mass. 345, 24 N. E. 52, 21 Am. St. Rep. 454 (the number of yards of carpet in a large dwelling-house); Savage *v.* Stevens, 126 Mass. 207.

Michigan.—Jackson *v.* Armstrong, 50 Mich. 65, 14 N. W. 702; Picard *v.* McCormick, 11 Mich. 68.

Minnesota.— Faribault *v.* Sater, 13 Minn. 223.

New York.— White *v.* Seaver, 25 Barb. 235.

Washington.— Tacoma *v.* Tacoma Light, etc., Co., 17 Wash. 458, 50 Pac. 55.

Wisconsin.— Krause *v.* Busacker, 105 Wis. 350, 81 N. W. 406.

England.— Vernon *v.* Keys, 12 East 632.

See 23 Cent. Dig. tit. "Fraud," §§ 19–21.

Time of running of trains.— It cannot be said that the times of the running of railroad trains is a matter so easily ascertainable by all persons under all circumstances that it can never be the subject of a fraudulent misrepresentation. Holst *v.* Stewart, 161 Mass. 516, 37 N. E. 755, 42 Am. St. Rep. 442.

the existence of a latent defect or unsoundness in personal property,[46] or is the number of acres in a tract of land, especially where the tract is a large one,[47] or of an irregular shape,[48] or where the thing actually sold was different in its character from that contracted to be sold and its true character could not be ascertained by a mere inspection.[49] In such cases, although the purchaser does make some investigation or inspection of the property, he is entitled to rely on the representations of the vendor.[50]

(b) Property at a Distance. Upon the principle just stated as to facts difficult of ascertainment by the purchaser, it is generally held that where the property involved is situated at a distant place and thus an inspection cannot be made without expense and inconvenience, and the prospective purchaser is ignorant of the facts, he may rely on the vendor's positive statements regarding the property and may hold him liable if they are false and fraudulent,[51] even though they are representations of the value, quality, and condition of the property;[52] and the fact that the vendor himself had never seen the property and so informs the purchaser is not a conclusive answer to the action.[53] But where the property,

In an action for deceit in the sale of wool, it appeared that defendant represented the wool to be ordinary fleece wool, when in fact there was a large quantity of pulled wool, tag locks, and other foreign matter rolled inside of the fleeces. Defendant sought to introduce evidence of the custom of buyers to examine wool when buying it, which was excluded. It was held that plaintiff had a right to rely on defendant's representations, whatever the custom of buyers was, and hence the exclusion was proper. Chamberlain *v.* Rankin, 49 Vt. 133. See also Stout *v.* Harper, 51 N. C. 347.

46. See *infra*, IV, B, 1, b, (II).

47. Boddy *v.* Henry, 126 Iowa 31, 101 N. W. 447. See also Speed *v.* Hollingsworth, 54 Kan. 436, 38 Pac. 496; Starkweather *v.* Benjamin, 32 Mich. 305.

48. Cawston *v.* Sturgis, 29 Oreg. 331, 43 Pac. 656. See also Antle *v.* Sexton, 137 Ill. 410, 27 N. E. 691.

49. Cornelius *v.* Molloy, 7 Pa. St. 293, where a sale was made of a quantity of metal as copper but which was only a composition, and which could only be distinguished from copper by some analytical experiment. See also Biggs *v.* Perkins, 75 N. C. 397.

Sale of cotton packed with sand.— The purchaser of cotton put up in bales is not bound to suppose that they are fraudulently packed with sand and other weighty substances, and no degree of diligence is required of him in inquiring into such a thing. The rule *caveat emptor* does not apply where a fraud of this kind has been practised. Stout *v.* Harper, 51 N. C. 347.

50. *Alabama.*— Moncrief *v.* Wilkinson, 93 Ala. 373, 9 So. 159.

Iowa.— Boddy *v.* Henry, 126 Iowa 31, 101 N. W. 447.

Maine.— Rhoda *v.* Annis, 75 Me. 17, 46 Am. Rep. 354.

Michigan.— Starkweather *v.* Benjamin, 32 Mich. 305.

Pennsylvania.— Cornelius *v.* Molloy, 7 Pa. St. 293.

Washington.— Tacoma *v.* Tacoma Light, etc., Co., 17 Wash. 458, 50 Pac. 55.

See 23 Cent. Dig. tit. "Fraud," §§ 19–21.

51. *Illinois.*— Ladd *v.* Pigott, 114 Ill. 647, 2 N. E. 503.

Indiana.— Bolds *v.* Woods, 9 Ind. App. 657, 36 N. E. 933.

Kansas.— Stevens *v.* Allen, 51 Kan. 144, 32 Pac. 922.

Kentucky.— Hanks *v.* McKee, 2 Litt. 227, 13 Am. Dec. 265.

Massachusetts.—See Savage *v.* Stevens, 126 Mass. 207.

Minnesota.— Mountain *v.* Day, 91 Minn. 249, 97 N. W. 883; Griffin *v.* Farrier, 32 Minn. 474, 21 N. W. 553. See also Busterud *v.* Farrington, 36 Minn. 320, 31 N. W. 360.

Missouri.— Bishop *v.* Seal, 87 Mo. App. 256 [*citing* Dunn *v.* White, 63 Mo. 181; Cahn *v.* Reid, 18 Mo. App. 115]; Brownlee *v.* Hewitt, 1 Mo. App. 360.

Nebraska.— See Phillips *v.* Jones, 12 Nebr. 213, 10 N. W. 708.

United States.— Henderson *v.* Henshall, 54 Fed. 320, 4 C. C. A. 357.

See 23 Cent. Dig. tit. "Fraud," §§ 19–21.

52. *Illinois.*— Ladd *v.* Pigott, 114 Ill. 647, 2 N. E. 503.

Indiana.— Bolds *v.* Woods, 9 Ind. App. 657, 36 N. E. 933. See also Armstrong *v.* White, 9 Ind. App. 588, 37 N. E. 28. *Compare* Armstrong *v.* White, (App. 1893) 34 N. E. 847.

Kansas.— Stevens *v.* Allen, 51 Kan. 144, 32 Pac. 922. See also Davis *v.* Jenkins, 46 Kan. 19, 26 Pac. 459.

Minnesota.— Mountain *v.* Day, 91 Minn. 249, 97 N. W. 883; Griffin *v.* Farrier, 32 Minn. 474, 21 N. W. 553.

Missouri.— Brownlee *v.* Hewitt, 1 Mo. App. 360.

Nebraska.— Smith *v.* Myers, 56 Nebr. 503, 76 N. W. 1084. See also Phillips *v.* Jones, 12 Nebr. 213, 10 N. W. 708.

United States.— Henderson *v.* Henshall, 54 Fed. 320, 4 C. C. A. 357.

See 23 Cent. Dig. tit. "Fraud," §§ 19–21.

Contra.— Williams *v.* McFadden, 23 Fla. 143, 1 So. 618, 11 Am. St. Rep. 345.

53. Savage *v.* Stevens, 126 Mass. 207. See also Phillips *v.* Jones, 12 Nebr. 213, 10 N. W. 708. *Compare* Johnson *v.* Beeney, 9 Ill. App. 64.

although at some distance, may be conveniently reached and examined by the purchaser, the general rule of *caveat emptor* applies.[54]

(4) Extrinsic Facts Affecting Value. Although statements of the value of the property are ordinarily considered as mere expressions of opinion and are therefore not actionable,[55] the rule is otherwise where the misrepresentation relates to some specific, extrinsic fact which materially affects the value, and in such cases if the fact is one peculiarly within the vendor's knowledge and the statement is made with knowledge of its falsity or what the law regards as the equivalent thereto,[56] and with the intent that the purchaser should act in reliance thereon, which he does to his injury, the representation is actionable.[57] Thus in the sale of farming property, false statements of fact as to the productiveness of the land, such as the amount of hay which it produces, the amount of pasturage it furnishes, the number of horses and cattle it maintains, etc., are actionable within the rule just stated.[58] Statements by a vendor that a third person has offered him a certain sum for the property is a statement of a material fact affecting the value and may form the basis for an action of deceit.[59] The purchase of a chose in action induced by misrepresentations as to the kind, condition, or value of property by which the debt is secured,[60] and the purchase of a patent right induced by the vendor's misrepresentations as to the cost of manufacturing

54. Wightman *v.* Tucker, 50 Ill. App. 75.

55. See *supra*, IV, B, 1, a, (III), (A), (2), (b).

56. See *supra*, III, B, 4, b.

57. *Colorado.*— Oakes *v.* Miller, 11 Colo. App. 374, 55 Pac. 193, that a creek bordering the land sold had no tendency to overflow.

Connecticut.— Scholfield Gear, etc., Co. *v.* Scholfield, 71 Conn. 1, 40 Atl. 1046.

Idaho.— Watson *v.* Molden, (1905) 79 Pac. 503, amount of water needed for irrigation.

Illinois.— Dwight *v.* Chase, 3 Ill. App. 67 [*distinguishing* Noetling *v.* Wright, 72 Ill. 390].

Indiana.— Peffley *v.* Noland, 80 Ind. 164 (sale of patent right); Loucks *v.* Taylor, 23 Ind. App. 245, 55 N. E. 238.

Iowa.— Boddy *v.* Henry, 113 Iowa 462, 85 N. W. 771, 53 L. R. A. 769, 126 Iowa 31, 101 N. W. 447; Merrillat *v.* Plummer, 111 Iowa 643, 82 N. W. 1020; Wilson *v.* Yocum, 77 Iowa 569, 42 N. W. 446.

Kentucky.— Tanner *v.* Clark, 13 Ky. L. Rep. 922.

Maine.— Hoxie *v.* Small, 86 Me. 23, 29 Atl. 920; Coolidge *v.* Goddard, 77 Me. 578, 1 Atl. 831.

Maryland.—McAleer *v.* Horsey, 35 Md. 439.

Massachusetts.— Whiting *v.* Price, 169 Mass. 576, 48 N. E. 772, 61 Am. St. Rep. 307; Teague *v.* Irwin, 127 Mass. 217; Savage *v.* Stevens, 126 Mass. 207; Belcher *v.* Costello, 122 Mass. 189; Nowlan *v.* Cain, 3 Allen 261, sale of personal property and good-will of a business. *Compare* Kimball *v.* Bangs, 144 Mass. 321, 11 N. E. 113; Mooney *v.* Miller, 102 Mass. 217.

Missouri.—See Wannell *v.* Kem, 57 Mo. 478.

New Hampshire.— Bradbury *v.* Haines, 60 N. H. 123; Messer *v.* Smyth, 59 N. H. 41.

New York.— Schwenk *v.* Naylor, 102 N. Y. 683, 7 N. E. 788 [*reversing* 50 N. Y. Super. Ct. 57]; Miller *v.* Barber, 66 N. Y. 558; Ellis *v.* Andrews, 56 N. Y. 83, 15 Am. Rep. 379; Stark *v.* Soule, 9 N. Y. St. 555; Monell *v.* Colden, 13 Johns. 295, 7 Am. Dec. 390, representation that the purchaser of land on a navigable river would as proprietor be entitled to a grant from the commissioners of the land-office, of adjacent land under water, whereas such land had already been granted to another.

Ohio.— Spencer *v.* King, 5 Ohio S. & C. Pl. Dec. 113, 3 Ohio N. P. 270.

Rhode Island.— Handy *v.* Waldron, 18 R. I. 567, 29 Atl. 143, 49 Am. St. Rep. 794, statement that certain stock had always paid a certain rate in dividends.

Vermont.— Shanks *v.* Whitney, 66 Vt. 405, 29 Atl. 367.

United States.— Henderson *v.* Henshall, 54 Fed. 320, 4 C. C. A. 357.

See 23 Cent. Dig. tit. "Fraud," § 13.

58. Rhoda *v.* Annis, 75 Me. 17, 46 Am. Rep. 354; Martin *v.* Jordan, 60 Me. 531; Messer *v.* Smyth, 59 N. H. 41; Coon *v.* Atwell, 46 N. H. 510; Schumaker *v.* Mather, 133 N. Y. 590, 30 N. E. 755, the number of horses and cattle being maintained on the farm. See also Ladd *v.* Putnam, 79 Me. 568, 12 Atl. 628.

59. Ives *v.* Carter, 24 Conn. 392 (statement that third person had offered and stood ready to give the amount demanded of the buyer); Seaman *v.* Becar, 15 Misc. (N. Y.) 616, 38 N. Y. Suppl. 69; Strickland *v.* Graybill, 97 Va. 602, 34 S. E. 475. See also Peffley *v.* Noland, 80 Ind. 164, representation that the vendor of a patent right had a certain contract with a third person. *Compare* Cooper *v.* Lovering, 106 Mass. 77.

60. Leonard *v.* Springer, 197 Ill. 532, 64 N. E. 299 [*reversing* 98 Ill. App. 530]; Whiting *v.* Price, 169 Mass. 576, 48 N. E. 772, 61 Am. St. Rep. 307 (sale of a bond); Belcher *v.* Costello, 122 Mass. 189; Bradbury *v.* Haines, 60 N. H. 123 (assignment of notes and mortgage); Simar *v.* Canaday, 53 N. Y. 298, 13 Am. Rep. 523 [*explained* in Chrysler *v.* Canaday, 90 N. Y. 272, 43 Am. Rep. 166] (sale of a mortgage). See also Murray *v.* Tolman, 162 Ill. 417, 44 N. E. 748 [*reversing* 54 Ill. App. 420].

the patented article,[61] or by his false statements that other purchasers of territorial rights are selling the article with success and are making money at the business,[62] are further illustrations of this rule. A false and fraudulent representation of material facts which relate to the property of a corporation and which necessarily affect the value of the corporate stock constitutes a cause of action against the party who, by means of such misrepresentations, induces another to purchase stock in the corporation; and the situation is exactly the same as if the purchase were of the corporate property with regard to which the representation is made.[63]

(5) Vendor's Refusal to Warrant — (a) In General. Where the vendor positively misrepresents a material fact which is peculiarly within his own knowledge and of which the purchaser is ignorant, the fact that he refuses to give a warranty is not inconsistent with his liability for fraud,[64] although it is proper to be considered by the jury in determining whether the purchaser relied on the misrepresentations and was deceived thereby.[65]

(b) Conveyance by Quitclaim Deed. And in such a case the vendor may be held liable for his fraudulent misrepresentations, although the conveyance is by quitclaim deed.[66]

(6) Where Confidential Relations Exist.[67] Where there exists between the parties some relation whereby the purchaser, being ignorant of the facts, is justified in placing trust and confidence in the honesty and superior knowledge of the vendor,[68] or where, in the absence of any particular relation, special confidence is placed in the vendor on account of his peculiar knowledge and the purchaser's ignorance,[69] the rule of *caveat emptor* does not apply; and in such cases

61. Braley *v.* Powers, 92 Me. 203, 42 Atl. 362.

62. Allin *v.* Millison, 72 Ill. 201. See also Potter *v.* Potter, 65 Ill. App. 74; Somers *v.* Richards, 46 Vt. 170. *Compare* Bishop *v.* Small, 63 Me. 12.

63. Boddy *v.* Henry, 113 Iowa 462, 85 N. W. 771, 53 L. R. A. 769, 126 Iowa 31, 101 N. W. 447 (where the sale was of corporate stock and the misrepresentation related to the quantity of land owned by the corporation; the land being the principal corporate asset and its quantity thus materially affecting the value of the stock); Schwenk *v.* Naylor, 102 N. Y. 683, 7 N. E. 788 [*reversing* 50 N. Y. Super. Ct. 57]; Miller *v.* Barber, 66 N. Y. 558. See also Coolidge *v.* Goddard, 77 Me. 578, 1 Atl. 831; McAleer *v.* Horsey, 35 Md. 439, where defendant, to induce plaintiff to purchase certain shares in a mine, falsely asserted that he himself had invested a large amount of money in the shares and working capital of the mine. See, generally, Corporations, 10 Cyc. 842 *et seq.*

A representation that a silver mining company had one million five hundred thousand dollars worth of ore on the surface ready for crushing is not so extravagant as to justify the court in holding, as a matter of law, that a purchaser of the stock of the company could not have relied upon it as being true. Barndt *v.* Frederick, 78 Wis. 1, 47 N. W. 6, 11 L. R. A. 199.

64. *Georgia.*— Harris *v.* Mullins, 32 Ga. 704, 79 Am. Dec. 320 [*distinguishing* Hopkins *v.* Tanqueray, 15 C. B. 130, 2 C. L. R. 842, 18 Jur. 608, 23 L. J. C. P. 162, 2 Wkly. Rep. 475, 26 Eng. L. & Eq. 254, 80 E. C. L. 130], sale of a mule.

Iowa.— Boddy *v.* Henry, 126 Iowa 31, 101 N. W. 447.

Nebraska.— Jones *v.* Edwards, 1 Nebr. 170.

New York.— Haight *v.* Hayt, 19 N. Y. 464, sale of land.

Tennessee.— Smith *v.* Cozart, 2 Head 526, sale of a slave.

United States.— Barnes *v.* Union Pac. R. Co., 54 Fed. 87, 4 C. C. A. 199, sale of land.

65. Haight *v.* Hayt, 19 N. Y. 464.

66. Craig *v.* Hamilton, 118 Ind. 565, 21 N. E. 315; Haight *v.* Hayt, 19 N. Y. 464; Wilson *v.* Higbee, 62 Fed. 723; Barnes *v.* Union Pac. R. Co., 54 Fed. 87, 4 C. C. A. 199. See also Kimball *v.* Sanguin, (Iowa 1892) 53 N. W. 116; Ballou *v.* Lucas, 59 Iowa 22, 12 N. W. 745. *Compare* Davis *v.* Bowland, 2 J. J. Marsh. (Ky.) 27.

67. As to such relations in general see *supra*, III, B, 5, b, (III).

68. Green *v.* Bryant, 2 Ga. 66; Hauk *v.* Brownell, 120 Ill. 161, 11 N. E. 416; Nolte *v.* Reichhelm, 96 Ill. 425; Tolman *v.* Smith, 43 Ill. App. 562.

69. *Arkansas.*— Hanger *v.* Evins, 38 Ark. 334.

Connecticut.— Shelton *v.* Healy, 74 Conn. 265, 50 Atl. 742.

Georgia.— Baker *v.* Ezzard, Ga. Dec. 112, Pt. II.

Idaho.— Watson *v.* Molden, (1905) 79 Pac. 503.

Indiana.— Loucks *v.* Taylor, 23 Ind. App. 245, 55 Atl. 238. See also Armstrong *v.* White, 9 Ind. App. 588, 37 N. E. 28. But see Armstrong *v.* White, (App. 1893) 34 N. E. 847.

Maryland.— McAleer *v.* Horsey, 35 Md. 439.

Michigan.— Picard *v.* McCormick, 11 Mich. 68.

New York.— See Drake *v.* Grant, 4 N. Y. Suppl. 899.

See 23 Cent. Dig. tit. "Fraud," § 23.

Compare Grauel *v.* Wolfe, 185 Pa. St. 83, 39 Atl. 819.

the purchaser may without further investigation rely on the vendor's statements even where they might otherwise be deemed mere expressions of opinon or "dealers' talk,"[70] such as statements of the price the vendor gave for the property,[71] or assertions of quality or value,[72] as where the vendor is an expert with respect to property of the character sold and the purchaser is not.[73] The foregoing principle applies *a fortiori* where the truth of the vendor's statement is expressly made the basis of the contract.[74] On the other hand, to bring a case within the rule applicable to relations of trust and confidence, it must be shown not only that trust and confidence existed but that its existence was justified by the situation of the parties;[75] and hence it has been held that a relation of trust and confidence cannot be predicated on the mere fact that the vendor is a minister of the gospel and the purchaser a woman,[76] or that the vendor is a teacher and the purchaser his adult pupil.[77]

(o) *Vendor Preventing Investigation.* Although the purchaser may have available means of ascertaining the truth, yet if the vendor by any misrepresentation or by any trick or artifice induces him to forbear inquiry or investigation which he would otherwise make, and thus to rely solely on the vendor's false statement, the rule of *caveat emptor* does not apply and the purchaser may hold the vendor liable.[78] And since such practices are obviously calculated only to mis-

Whether inquiry by purchaser necessary.— It seems to be necessary that the misrepresentation should be preceded by inquiry by the purchaser. Lawton *v.* Kittredge, 30 N. H. 500.

70. Shelton *v.* Healy, 74 Conn. 265, 50 Atl. 742; Watson *v.* Molden, (Ida. 1905) 79 Pac. 503.

71. Green *v.* Bryant, 2 Ga. 66 (where the parties were brothers-in-law and it was agreed between them that defendant should buy a plantation and that plaintiff should pay him whatever sum he gave for it, plaintiff paying him three thousand dollars on defendant's false representation that he paid that sum); Hauk *v.* Brownell, 120 Ill. 161, 11 N. E. 416; Morehead *v.* Eades, 3 Bush (Ky.) 121; Stoney Creek Woolen Co. *v.* Smalley, 111 Mich. 321, 69 N. W. 722.

72. *Colorado.*— Baum *v.* Holton, 4 Colo. App. 406, 36 Pac. 154.

Connecticut.— Shelton *v.* Healy, 74 Conn. 365, 50 Atl. 742; Bacon *v.* Sanford, 1 Root 164, sale of an order drawn by selectmen on a town treasurer.

Illinois.— Nolte *v.* Reichelm, 96 Ill. 425.

Michigan.—Pickard *v.* McCormick, 11 Mich. 68.

Missouri.— Stones *v.* Richmond, 21 Mo. App. 17.

Nebraska.— See Phillips *v.* Jones, 12 Nebr. 213, 10 N. W. 708.

New York.— Drake *v.* Grant, 4 N. Y. Suppl. 899.

But see Armstrong *v.* White, (Ind. App. 1893) 34 N. E. 847.

73. Kost *v.* Bender, 25 Mich. 515 (representation as to oil deposits in land by one professing to have special scientific knowledge on the subject); Pickard *v.* McCormick, 11 Mich. 68 (sale of jewelry); Powell *v.* Fletcher, 18 N. Y. Suppl. 451, 19 N. Y. Suppl. 911 (sale of violin).

74. Kilfore *v.* Bruce, 166 Mass. 136, 44 N. E. 108; Blacknall *v.* Rowland, 108 N. C. 554, 13 S. E. 191, 116 N. C. 389, 21 S. E. 296.

75. Clodfelter *v.* Hulett, 72 Ind. 137.

76. Spencer *v.* King, 5 Ohio S. & C. Pl. Dec. 113, 3 Ohio N. P. 270.

77. Mayo *v.* Wahlgreen, 9 Colo. App. 506, 50 Pac. 40.

78. *Arkansas.*— See Hanger *v.* Evins, 38 Ark. 334.

California.— Merguire *v.* O'Donnell, 103 Cal. 50, 36 Pac. 1033; Hanscom *v.* Drullard, 79 Cal. 234, 21 Pac. 736.

Illinois.— Antle *v.* Sexton, 137 Ill. 410, 27 N. E. 691; Miller *v.* John, 111 Ill. App. 56.

Kentucky.— Ward *v.* Crutcher, 2 Bush 87; Singleton *v.* Kennedy, 9 B. Mon. 222, holding this to be true both under the law of Kentucky and that of Louisiana.

Michigan.— Starkweather *v.* Benjamin, 32 Mich. 305.

Minnesota.— Griffin *v.* Farrier, 32 Minn. 474, 21 N. W. 553; Burr *v.* Willson, 22 Minn. 206; Wilder *v.* De Cou, 18 Minn. 470.

Missouri.— McBeth *v.* Craddock, 28 Mo. App. 380; Stones *v.* Richmond, 21 Mo. App. 17.

New Hampshire.— Stewart *v.* Stearns, 63 N. H. 99, 56 Am. Rep. 496.

New York.— Schumaker *v.* Mather, 133 N. Y. 590, 30 N. E. 755; Simar *v.* Canaday, 53 N. Y. 298, 13 Am. Rep. 523 [*explained* in Chrysler *v.* Canaday, 90 N. Y. 272, 43 Am. Rep. 166]; Frank *v.* Bradley, etc., Co., 42 N. Y. App. Div. 178, 58 N. Y. Suppl. 1032; Clark *v.* Rankin, 46 Barb. 570; Gage *v.* Peetsch, 16 Misc. 291, 38 N. Y. Suppl. 124; White *v.* Mowbray, 3 N. Y. Suppl. 225. See also People *v.* Peckens, 153 N. Y. 576, 47 N. E. 883 [*affirming* 12 N. Y. App. Div. 626, 43 N. Y. Suppl. 1160].

North Carolina.—Biggs *v.* Perkins, 75 N. C. 397; Stout *v.* Harper, 51 N. C. 347.

Ohio.— Jenkinson *v.* Stoneman, 4 Ohio Dec. (Reprint) 289, 1 Clev. L. Rep. 218.

South Carolina.— Chisholm *v.* Gadsden, 1 Strobh. 220, 47 Am. Dec. 550.

Wisconsin.— Castenholz *v.* Heller, 82 Wis. 30, 51 N. W. 432.

lead the purchaser by producing an erroneous impression on his mind and thus lulling him into a false security, they may of themselves well be deemed to amount to actionable fraud where they succeed in producing the desired result.[79] The very representations relied upon may have caused the purchaser to forbear making inquiry, and in such a case the vendor will not be heard to say that the falsity of his statement might have been ascertained.[80] Thus if the seller of personal property misrepresents the cause or nature of a patent defect or unsoundness in the article, and thus throws the purchaser off his guard and induces him to buy without further inquiry, he becomes liable;[81] and if the defect or unsoundness is latent a similar misrepresentation by the seller,[82] as that the article is "all right"[83] or sound "so far as he knows,"[84] renders him liable if he knows his statement to be false and omits to disclose the defect or unsoundness to the buyer.

(D) *Tendency of Modern Decisions.* In cases where positive fraudulent misrepresentations have been made by the vendor the modern cases show a strong tendency either to relax the doctrine of *caveat emptor* or to refuse to extend it further than it has been carried by previous decisions even with respect to "dealers' talk"; the courts taking the view that a vendor guilty of a falsehood made with intent to deceive should not be heard to say that the purchaser ought not to have believed him.[85]

United States.— Stewart *v.* Wyoming Ranche Co., 128 U. S. 383, 9 S. Ct. 101, 32 L. ed. 439; Strand *v.* Griffith, 97 Fed. 854, 856, 38 C. C. A. 444 (in which the court said: "There is no rule of law which requires men in their business transactions to act upon the presumption that all men are knaves and liars, and which declares them guilty of negligence, and refuses them redress, whenever they fail to act on that presumption. The fraudulent vendor cannot escape from liability by asking the law to applaud his fraud and condemn his victim for his credulity"); Henderson *v.* Henshall, 54 Fed. 320, 4 C. C. A. 357.

England.— Vernon *v.* Keys, 12 East 633, per Lord Ellenborough.

See 23 Cent. Dig. tit. "Fraud," § 21.

Where a vendor suggests that the purchaser make inquiry or examination, but makes the proposal in such a way as to indicate that the act would be wholly unnecessary, the rule of the text applies. Singleton *v.* Kennedy, 9 B. Mon. (Ky.) 222; Stones *v.* Richmond, 21 Mo. App. 17; 1 Bigelow Fraud 532. See also Boddy *v.* Henry, 126 Iowa 31, 101 N. W. 447; McBeth *v.* Craddock, 28 Mo. App. 380.

Where the title to property is misrepresented the fact that the purchaser is told that the vendor's title is under a will does not preclude a recovery if the misrepresentations are such as are calculated to induce the purchaser to believe that the title is valid and to refrain from instituting any further inquiry. Campbell *v.* Hillman, 15 B. Mon. (Ky.) 508, 61 Am. Dec. 165.

79. *Arkansas.*— Mason *v.* Thornton, (1905) 84 S. W. 1048.

California.— Hanscom *v.* Drullard, 79 Cal. 234, 21 Pac. 736.

Missouri.— Stones *v.* Richmond, 21 Mo. App. 17.

South Carolina.— Chisolm *v.* Gadsden, 1 Strobh. 220, 47 Am. Dec. 550.

United States.— Stewart *v.* Wyoming Ranche Co., 128 U. S. 383, 9 S. Ct. 101, 32 L. ed. 439.

See 23 Cent. Dig. tit. "Fraud," § 21.

80. Mason *v.* Thornton, (Ark. 1905) 84 S. W. 1045.

Giving an express warranty may have the effect of putting the buyer off his guard and preventing an examination by him, and in such a case the rule of the text may apply. Salem India Rubber Co. *v.* Adams, 23 Pick. (Mass.) 256; Williamson *v.* Allison, 2 East 446.

81. Robertson *v.* Clarkson, 9 B. Mon. (Ky.) 506; Hanks *v.* McKee, 2 Litt. (Ky.) 227, 13 Am. Dec. 265; White *v.* Mowbray, 3 N. Y. Suppl. 225; Smith *v.* Cozart, 2 Head (Tenn.) 526; Baker *v.* Seahorn, 1 Swan (Tenn.) 54, 55 Am. Dec. 724; Howard *v.* Gould, 28 Vt. 523, 67 Am. Dec. 728. See also Graham *v.* Stiles, 38 Vt. 578; Paddock *v.* Strobridge, 29 Vt. 470.

Mere suggestion of doubt.— Where the vendor of a horse, with actual knowledge that the eye of the horse is positively defective, merely suggests a doubt respecting its soundness, it is as much a false representation or concealment as if no such doubt had been intimated, and even tends to aggravate the fraud. Baker *v.* Seahorn, 1 Swan (Tenn.) 54, 55 Am. Dec. 724.

82. Hanks *v.* McKee, 2 Litt. (Ky.) 227, 13 Am. Dec. 265.

83. Moncrief *v.* Wilkinson, 93 Ala. 373, 9 So. 159.

84. Jones *v.* Edwards, 1 Nebr. 170; Lunn *v.* Shermer, 93 N. C. 164; Ferebee *v.* Gordon, 35 N. C. 350.

85. *Idaho.*— Watson *v.* Molden, (1905) 79 Pac. 503.

Iowa.— Riley *v.* Bell, 120 Iowa 618, 95 N. W. 170.

Kansas.— Speed *v.* Hollingsworth, 54 Kan. 436, 38 Pac. 496.

Massachusetts.— Arnold *v.* Teel, 182 Mass.

b. Silence or Concealment[86]—(i) *As to Title.* Where a vendor knowing that he has no title to the property, as where he has conveyed it to another,[87] or that by reason of some fact peculiarly within his knowledge the title is defective,[88] conceals the fact from the purchaser and allows him to buy in the belief that he is acquiring a valid title, the concealment amounts to actionable fraud.

(ii) *As to Defects in Property*—(a) *In General.* In some cases it has been broadly held that if the buyer makes no inquiry the seller is under no obligation to disclose even secret or hidden defects known to himself and unknown to the buyer, but may remain silent and let the latter examine the property or insist upon a warranty, and is not guilty of fraud unless by words or acts he misleads the buyer,[89] especially where the sale is public or made in open market.[90] The better doctrine, however, and the one sustained by the weight of authority, makes a distinction between patent and latent defects,[91] it being held that if the defect is patent the rule of *caveat emptor* applies, and the seller cannot be held liable for failure to disclose the defect, although he knows its existence, unless he does something to prevent investigation;[92] but that if the defect is latent and known to him his intentional omission to disclose it constitutes actionable fraud, his mere silence with knowledge that the buyer is acting upon the assumption

1, 64 N. E. 413; Whiting *v.* Price, 172 Mass. 240, 51 N. E. 1084, 70 Am. St. Rep. 262; Andrews *v.* Jackson, 168 Mass. 266, 47 N. E. 412, 60 Am. St. Rep. 390, 37 L. R. A. 402; Kilgore *v.* Bruce, 166 Mass. 136, 44 N. E. 108; Way *v.* Ryther, 165 Mass. 226, 42 N. E. 1128.

Missouri.— Cottrill *v.* Krum, 100 Mo. 397, 13 S. W. 753, 18 Am. St. Rep. 549.

Nebraska.— Hoock *v.* Bowman, 42 Nebr. 80, 60 N. W. 389, 47 Am. St. Rep. 691.

New York.— Schumaker *v.* Mather, 133 N. Y. 590, 30 N. E. 755; Albany City Sav. Inst. *v.* Burdick, 87 N. Y. 40 [*criticizing* Long *v.* Warren, 68 N. Y. 426].

South Dakota.— Roberts *v.* Holliday, 10 S. D. 576, 74 S. W. 1034.

Texas.—Wright *v.* U. S. Mortgage Co., (Civ. App. 1897) 42 S. W. 789.

Washington.— Tacoma *v.* Tacoma Light, etc., Co., 17 Wash. 458, 50 Pac. 55.

Wisconsin.—Kaiser *v.* Nummerdor, (1904) 97 N. W. 932 [*explaining* and *limiting* Shaw *v.* Gilbert, 111 Wis. 165, 86 N. W. 188].

United States.— Strand *v.* Griffith, 97 Fed. 854, 856, 38 C. C. A. 444, in which the court said: "The rule of *caveat emptor* is not founded on the highest standard of morals, but it is no longer a shield and protection to the deliberate frauds and cheats of sharpers."

86. See *supra*, III, B, 1, b, (iv).

"Concealment implies design, or purpose. That it may furnish a sufficient cause of action, the fact suppressed must not be only material, but the materiality must either be known to the seller, or the facts must so constitute an element of the value of the contract, as to authorize the inference of knowledge of its materiality." Jordan *v.* Pickett, 78 Ala. 331, 339, which contains an extended discussion of concealment by vendors.

Fraudulent concealment in a sale is defined to be "the failure to disclose a material fact, which the vendor knows himself, which he has a right to presume the person with whom he is dealing is ignorant of, and of the existence of which the other can not, by ordinary diligence, become acquainted." Jordan *v.* Pickett, 78 Ala. 331, 339; Steele *v.* Kinkle, 3 Ala. 352.

87. Thomas *v.* Murphy, 87 Minn. 358, 91 N. W. 1097.

88. Craig *v.* Hamilton, 118 Ind. 565, 21 N. E. 315; Atwood *v.* Chapman, 68 Me. 38, 28 Am. Dec. 5; Burns *v.* Dockray, 156 Mass. 135, 30 N. E. 551, insanity of former grantor. *Compare* Baker *v.* Sherman, 71 Vt. 439, 46 Atl. 57.

Vendor reading deed to purchaser.— Where plaintiff, at the time of purchasing of defendant certain real estate encumbered by a mortgage, could not read, by reason of defective eyesight, was inexperienced in business, and had confidence in defendant, and defendant, on reading the deed to him, failed to read a clause therein whereby plaintiff assumed the payment of the balance of the mortgage, which was an obligation greater than it was his purpose, as known to defendant, to assume, such failure was a fraud on plaintiff. Loucks *v.* Taylor, 23 Ind. App. 245, 55 N. E. 238.

89. Frenzel *v.* Miller, 37 Ind. 1, 10 Am. Rep. 62; Campbell *v.* Kinlock, 9 Rich. (S. C.) 300, sale of unsound slave.

90. Morris *v.* Thompson, 85 Ill. 16. See also Dayton *v.* Kidder, 105 Ill. App. 107.

91. See Lunn *v.* Shermer, 93 N. C. 164; Brown *v.* Gray, 51 N. C. 103, 72 Am. Dec. 563.

A patent defect is one that may be discovered by the exercise of ordinary diligence. A latent defect is one that cannot be thus discovered. Lunn *v.* Shermer, 93 N. C. 164; Lawson *v.* Baer, 52 N. C. 461; Brown *v.* Gray, 51 N. C. 103, 72 Am. Dec. 563. See also, generally, Sales.

92. Lunn *v.* Shermer, 93 N. C. 164; Lawson *v.* Baer, 52 N. C. 461 (sale of spavined horse); Brown *v.* Gray, 51 N. C. 103, 72 Am. Dec. 563; Thompson *v.* Morris, 50 N. C. 151. See also Carondelet Iron Works *v.* Moore, 78 Ill. 65.

that no defect exists being sufficient to fix him with liability[93] unless something is said or done to put the buyer on inquiry.[94] And where the defect is latent the purchaser may recover notwithstanding that he examined the article and failed to discover the defect.[95] On the other hand it is well settled that if the defect is not easily ascertainable by the purchaser, and the latter makes inquiry, the vendor is bound either to make no representation or to disclose the whole truth in such a manner as not to mislead the purchaser, and that an intentional omission to disclose any material fact will render him liable.[96] And where the seller actively conceals the defect so that it cannot be readily discovered and allows the buyer to act in the belief that no defect exists, he is guilty of fraud[97] under the rule previously stated.[98]

(B) *Sale of Animals Having Contagious Disease.* Where the sale is of animals having a contagious or infectious disease known to the seller but unknown and not easily ascertainable by the buyer, the rule appears to be settled that the seller is bound to communicate the fact and that his failure to do so renders him guilty of actionable fraud,[99] unless he expressly sells the animals "with all their faults" so that the buyer is thus put on inquiry.[1]

(C) *Sale of Chattel "With All Its Faults."* As a general rule where the

Preventing investigation see *supra*, IV, B, 1, a, (III), (C).

93. *Kentucky.*— Hughes *v.* Robertson, 1 T. B. Mon. 215, 15 Am. Dec. 104. See also Singleton *v.* Kennedy, 9 B. Mon. 222; Faris *v.* Lewis, 2 B. Mon. 375.

Louisiana.— See Faulk *v.* Hough, 14 La. Ann. 659.

Minnesota.— Marsh *v.* Webber, 13 Minn. 109, sale of diseased animals.

Missouri.— McAdams *v.* Cates, 24 Mo. 223, sale of unsound horse.

Nebraska.— Jones *v.* Edwards, 1 Nebr. 170, sale of unsound horse.

New Hampshire.— Hanson *v.* Edgerly, 29 N. H. 343. See also Stevens *v.* Fuller, 8 N. H. 463.

New York.— Hoe *v.* Sanborn, 21 N. Y. 552, 78 Am. Dec. 163; Nickley *v.* Thomas, 22 Barb. 652. *Contra*, McDonald *v.* Christie, 42 Barb. 36, sale of diseased horse.

North Carolina.— Lunn *v.* Shermer, 93 N. C. 164; Brown *v.* Gray 51 N. C. 103, 72 Am. Dec. 563 (sale of unsound slave); Case *v.* Edney, 26 N. C. 93. See also Biggs *v.* Perkins, 75 N. C. 397; Stout *v.* Harper, 51 N. C. 347, sale of cotton packed with sand.

Tennessee.— Cardwell *v.* McClelland, 3 Sneed 150.

Vermont.— Maynard *v.* Maynard, 49 Vt. 297; Paddock *v.* Strobridge, 29 Vt. 470.

England.— Jones *v.* Bowden, 4 Taunt. 847, 14 Rev. Rep. 683.

See 23 Cent. Dig. tit. "Fraud," § 15.

Seller's knowledge of intended use of article.— Especially is this true where the seller knows that the buyer intends to use the article for some purpose for which on account of its defects it is unfit. French *v.* Vining, 102 Mass. 132, 3 Am. Rep. 440 (sale of poisoned hay to be fed to a cow); Maynard *v.* Maynard, 49 Vt. 297 (sale of an impotent bull for breeding purposes).

Knowledge and intent.— According to the general rules above stated (see *supra*, III, B, 4, a; III, B, 6) knowledge of the defect and intentional suppression of the truth must be shown in order to make out a case of fraudulent concealment. Hanson *v.* Edgerly, 29 N. H. 343; Clark *v.* Bamer, 2 Lans. (N. Y.) 67; Fleming *v.* Slocum, 18 Johns. (N. Y.) 403, 9 Am. Dec. 224; Gerkins *v.* Williams, 48 N. C. 11; McEntire *v.* McEntire, 43 N. C. 297; Hamrick *v.* Hogg, 12 N. C. 350; Poag *v.* Charlotte Oil, etc., Co., 61 S. C. 190, 39 S. E. 345.

Information not believed.— And although the seller has been informed of the defect or unsoundness, if he does not believe that it exists, he is not bound to disclose his information to the buyer. Gerkins *v.* Williams, 48 N. C. 11; McEntire *v.* McEntire, 43 N. C. 297; Hamrick *v.* Hogg, 12 N. C. 350.

94. See *infra*, IV, B, 1, b, (II), (C).

95. Moncrief *v.* Wilkinson, 93 Ala. 373, 9 So. 159 (sale of "moon-eyed" mule); Hughes *v.* Robertson, 1 T. B. Mon. (Ky.) 215, 15 Am. Dec. 104 (sale of blind horse).

96. *Kentucky.*— Hanks *v.* McKee, 2 Litt. 227, 13 Am. Dec. 265.

New York.— Nickley *v.* Thomas, 22 Barb. 652, sale of balky horse.

North Carolina.— Ferebee *v.* Gordon, 35 N. C. 350.

Tennessee.— Baker *v.* Seahorn, 1 Swan 54, 55 Am. Dec. 724.

Vermont.— Graham *v.* Stiles, 38 Vt. 578; Howard *v.* Gould, 28 Vt. 523, 67 Am. Dec. 728, sale of diseased horse.

See 23 Cent. Dig. tit. "Fraud," § 15.

97. Singleton *v.* Kennedy, 9 B. Mon. (Ky.) 222 (holding this to be true both under the law of Kentucky and that of Louisiana); Biggs *v.* Perkins, 75 N. C. 397; Stout *v.* Harper, 51 N. C. 347.

98. See *supra*, III, B, 1, b, (IV).

99. Faris *v.* Lewis, 2 B. Mon. (Ky.) 375; Marsh *v.* Webber, 13 Minn. 109; Jeffrey *v.* Bigelow, 13 Wend. (N. Y.) 518, 28 Am. Dec. 476; Wintz *v.* Morrison, 17 Tex. 372, 67 Am. Dec. 658. See also Howard *v.* Gould, 28 Vt. 523, 67 Am. Dec. 728.

1. Ward *v.* Hobbs, 4 App. Cas. 13, 48 L. J. Q. B. 281, 40 L. T. Rep. N. S. 73, 27 Wkly.

sale of a chattel is made "with all its faults," no warranty or representation being made, and there is full opportunity for an inspection by the buyer, the rule of *caveat emptor* applies, and an action for deceit cannot be based upon the seller's failure to disclose defects in the article sold;[2] and in such case the mere offer of the chattel for sale cannot be construed as an implied representation by conduct.[3] But this rule has no application where the seller makes knowingly false representations or expressions of opinion to the effect that no defects actually exist or that those existing are of a trivial character, since the only purpose and result of such statements is to put the buyer off his guard by a show of apparent candor and fair dealing, and thus to prevent a careful inspection and inquiry;[4] and such statements even tend to aggravate the fraud.[5]

(III) *As to Extrinsic Facts Affecting Value.* Actionable fraud may be predicated on the seller's fraudulent concealment of extrinsic facts which materially affect the value of the property,[6] according to principles previously stated.[7] But selling mortgaged property without disclosing the existence of the mortgage is not fraudulent *per se*.[8]

2. By Purchaser[9] — a. In General. Although a prospective purchaser has special knowledge of facts which enhance the value of the property, and the vendor is ignorant of these facts, the purchaser is ordinarily under no duty to disclose them to the vendor, and is not liable in an action of deceit for failure to do so.[10] But if in such a case he volunteers to convey information which may influence the vendor's conduct in making the sale, he is bound to tell the whole

Rep. 114 [*affirming* 3 Q. B. D. 150, 47 L. J. Q. B. 90, 37 L. T. Rep. N. S. 654, 26 Wkly. Rep. 151]. See *infra*, IV, B, 1, b, (II), (C).

2. Ferebee *v.* Gordon, 35 N. C. 350, 351 (per Nash, J.); Ward *v.* Hobbs, 4 App. Cas. 13, 48 L. J. Q. B. 281, 40 L. T. Rep. N. S. 73, 27 Wkly. Rep. 114 [*affirming* 3 Q. B. D. 150, 47 L. J. Q. B. 90, 37 L. T. Rep. N. S. 654, 26 Wkly. Rep. 151]; Pickering *v.* Dowson, 4 Taunt. 779.

3. Ward *v.* Hobbs, 4 App. Cas. 13, 48 L. J. Q. B. 281, 40 L. T. Rep. N. S. 73, 27 Wkly. Rep. 114 [*affirming* 3 Q. B. D. 150, 47 L. J. Q. B. 90, 37 L. T. Rep. N. S. 654, 26 Wkly. Rep. 151, and *criticizing* Bodger *v.* Nicholls, 28 L. T. Rep. N. S. 441].

Sale in violation of statute.— This is true, although the conduct of the sale is in violation of a penal statute prohibiting persons from sending diseased animals to market. Ward *v.* Hobbs, 2 App. Cas. 13, 48 L. J. Q. B. 281, 40 L. T. Rep. N. S. 73, 27 Wkly. Rep. 114 [*affirming* 3 Q. B. D. 150, 47 L. J. Q. B. 90, 37 L. T. Rep. N. S. 654, 26 Wkly. Rep. 151].

4. Ferebee *v.* Gordon, 35 N. C. 350; Smith *v.* Cozart, 2 Head (Tenn.) 526 (where the sale of a consumptive slave "as unsound property" and without warranty was induced by false statements that her illness was temporary and not serious); Baker *v.* Seahorn, 1 Swan (Tenn.) 54, 55 Am. Dec. 724. See the opinion of Earle Cairns, L. C., in Ward *v.* Hobbs, 4 App. Cas. 13, 48 L. J. Q. B. 281, 40 L. T. Rep. N. S. 73, 27 Wkly. Rep. 114 [*affirming* 3 Q. B. D. 150, 47 L. J. Q. B. 90, 37 L. T. Rep. N. S. 654, 26 Wkly. Rep. 151]. See also *supra*, IV, B, 1, a, (III), (C).

5. Baker *v.* Seahorn, 1 Swan (Tenn.) 54, 55 Am. Dec. 724.

6. See Jordan *v.* Pickett, 78 Ala. 331; Loewer *v.* Harris, 57 Fed. 368, 6 C. C. A. 394.

Representations subsequently becoming false.— Thus where negotiations are made for the sale of a business enterprise upon the basis of the seller's representations, true at the time, as to the rate of profit of the business, but pending the execution of the contract there is a decline in the rate of profit, known to the seller but unknown to the buyer, it is the seller's duty to disclose the fact and his failure to do so renders him liable if the buyer proceeds in the belief that the original rate of profit still continues. Loewer *v.* Harris, 57 Fed. 368, 6 C. C. A. 394.

7. See *supra*, III, B, 1, b, (IV).

8. Littlejohn *v.* Drennon, 95 Ga. 743, 22 S. E. 657.

9. For purchaser's fraud in misrepresenting his financial condition see *infra*, IV, D, 1.

For purchaser's fraud inducing vendor to accept note of insolvent person see *infra*, IV, D, 2, a.

10. Tippecanoe County *v.* Reynolds, 44 Ind. 509, 15 Am. Rep. 245; Matthews *v.* Bliss, 22 Pick. (Mass.) 48 (holding that the purchaser was not bound to disclose that he had contracted to sell the property to another at a higher price); Crowell *v.* Jackson, 53 N. J. L. 656, 23 Atl. 426. See also Saltonstall *v.* Gordon, 33 Ala. 149; Bench *v.* Sheldon, 14 Barb. (N. Y.) 66, per Johnson, J.

Purchase of stock by director.— This rule has been applied where a director of a corporation, having knowledge of facts which enhanced the value of the corporate stock, bought shares of such stock from a shareholder without disclosing those facts to him. Tippecanoe County *v.* Reynolds, 44 Ind. 509, 15 Am. Rep. 245; Crowell *v.* Jackson, 53

truth, and a fraudulent misrepresentation of a material fact will render him liable.[11] Indeed it has been held that there is no difference in legal effect between fraudulent misrepresentations by a vendor and by a purchaser.[12] Thus where the vendor is ignorant of the facts, the purchaser's fraudulent misrepresentations as to the quantity of land in the tract,[13] or as to extrinsic facts materially affecting the value of the property,[14] or his false assertions as to its value and condition where the property is distant from the place of contract,[15] are actionable. Where the parties deal on equal footing and the facts in question are equally open to the knowledge of the vendor, the general principles requiring reasonable investigation or inquiry[16] are applicable.[17] But where any relation of trust or confidence exists between the parties, so that the vendor is induced to rely in the honesty and superior knowledge of the purchaser,[18] or where the purchaser has special knowledge of the facts while the vendor is ignorant thereof,[19] and the purchaser's representations are positive assertions made as of his own knowledge, the vendor is justified in relying on the statements and cannot be deemed negligent in not making further investigation.

b. Purchase With Intent Not to Pay. Where a sale of property is induced by false representations of the purchaser, accompanied by a preconceived design not to pay, and by the accomplishment of the fraud the seller is deprived of the property and its price, the purchaser is liable in an action for deceit;[20] as

N. J. L. 656, 23 Atl. 426. *Compare* Hume *v.* Steele, (Tex. Civ. App. 1900) 59 S. W. 812. See CORPORATIONS, 10 Cyc. 796.

But confidential relations existing between the parties, especially where such relations have been encouraged by the purchaser, may impose upon the latter the duty of making a full and truthful disclosure. Mallory *v.* Leach, 35 Vt. 156, 82 Am. Dec. 625. See also Potter *v.* Necedah Lumber Co., 105 Wis. 25, 80 N. W. 88, 81 N. W. 118.

11. *Illinois.*— Hicks *v.* Deemer, 187 Ill. 164, 58 N. E. 252.

Iowa.— Dashiel *v.* Harshman, 113 Iowa 283, 85 N. W. 85.

Kentucky.— Akers *v.* Martin, 110 Ky. 335, 61 S. W. 465.

Minnesota.— Mountain *v.* Day, 91 Minn. 249, 97 N. W. 883.

Missouri.— Meier *v.* Jackson, 78 Mo. App. 396.

New York.— Bench *v.* Sheldon, 14 Barb. 66.

Texas.— Hume *v.* Steele, (Civ. App. 1900) 59 S. W. 812.

Vermont.— Mallory *v.* Leach, 35 Vt. 156, 82 Am. Dec. 625.

Wisconsin.— See Potter *v.* Necedah Lumber Co., 105 Wis. 25, 80 N. W. 88, 81 N. W. 118.

12. Mountain *v.* Day, 91 Minn. 249, 97 N. W. 883.

13. Wilson *v.* Sykes, 84 N. C. 215, false report as to the result of a survey.

14. Meier *v.* Jackson, 78 Mo. App. 396; Mallory *v.* Leach, 35 Vt. 156, 82 Am. Dec. 625.

15. Mountain *v.* Day, 91 Minn. 249, 97 N. W. 883. *Compare* Marshall *v.* Lewis, 4 Litt. (Ky.) 140.

16. See *supra*, III, B, 5, b, (I); IV, B, 1, a, (III), (A), (1).

17. Robins *v.* Hope, 57 Cal. 493; Cobb *v.* Wright, 43 Minn. 83, 44 N. W. 662.

18. Hulett *v.* Kennedy, 4 Ind. App. 33, 30 N. E. 310 (holding that where an heir, who has undertaken to settle up the estate, induces a coheir to sell his interest in the real estate to him at less than its value by falsely representing that there is a claim against the estate to pay which the real estate must be sold, and that it cannot be sold for more than a certain amount, the coheir may recover against him); Edelman *v.* Latshaw, 180 Pa. St. 419, 36 Atl. 926 [*reversing* 13 Montg. Co. Rep. 27]; Fisher *v.* Budlong, 10 R. I. 525.

19. Wilson *v.* Nichols, 72 Conn. 173, 43 Atl. 1052, representations as to the amount of an estate which plaintiffs inherited, whereby plaintiffs were induced to assign their interest therein for much less than its value.

20. Dowd *v.* Tucker, 41 Conn. 197; McCready *v.* Phillips, 56 Nebr. 446, 76 N. W. 885; Pilcher *v.* Levino, 80 Hun (N. Y.) 399, 30 N. Y. Suppl. 314; Welch *v.* Seligman, 72 Hun (N. Y.) 138, 25 N. Y. Suppl. 363; Swift *v.* Rounds, 19 R. I. 527, 35 Atl. 45, 61 Am. St. Rep. 791, 33 L. R. A. 561. See also Adams *v.* Schiffer, 11 Colo. 15, 17 Pac. 21, 7 Am. St. Rep. 202. *Contra*, Kitson *v.* Farwell, 132 Ill. 327, 23 N. E. 1024; People *v.* Healy, 128 Ill. 9, 20 N. E. 692, 15 Am. St. Rep. 90. But see Flower *v.* Farwell, 18 Ill. App. 254. See also *infra*, IV, D, 1, c.

The fraud does not consist in the unfulfilled promise to pay. That is only the false token whereby the fraud is accomplished. The gist of the fraud is in the expressed or implied false representation of the intent to pay. McCready *v.* Phillips, 56 Nebr. 446, 76 N. W. 885.

As to the right to rescind a contract under such circumstances see CONTRACTS, 9 Cyc. 420 note 97; and, generally, SALES.

Intent not to pay.— There must of course be a preconceived intent not to pay. The fact that payment of checks for the goods was stopped has been held not sufficient to show

where the false statements relate to the buyer's solvency and general financial condition.[21]

3. Between Joint Purchasers. The principle applicable to dealings between persons occupying a relation of trust and confidence[22] applies to joint purchasers of property, one of whom makes the negotiations and consummates the purchase on behalf of the other. In such a case if the joint purchaser conducting the negotiations fraudulently misrepresents to the other the purchase-price which is to be paid, so that the other pays more than his share, an action lies.[23] And upon the same principle his false representation as to the original cost of the property may be actionable.[24]

C. In Leases.[25] Fraud inducing a lease of property is actionable on the same general principles as fraud inducing a sale or conveyance.[26] A lessee who was induced to take the lease by the lessor's fraudulent misrepresentations as to his title to the demised premises,[27] as to the quantity of land or the extent of the rights embraced in the lease,[28] as to the condition of the premises,[29] or as to other material facts[30] may maintain against a lessor an action of deceit, or when sued for the rent may recoup the damage he has suffered by reason of the fraud. On the other hand it has been held that the owner of a house which is in a ruinous and unsafe condition is under no implied duty to inform a proposed tenant that the building is unfit for habitation, and that in the absence of express

fraud. Theusen *v.* Bryan, 113 Iowa 496, 85 N. W. 802.

21. See Welch *v.* Seligman, 72 Hun (N. Y.) 138, 25 N. Y. Suppl. 363. See also *infra*, IV, D, 1.

22. See *supra*, III, B, 5, b, (III).

23. *Alabama.*— King *v.* White, 119 Ala. 429, 24 So. 710.

Colorado.— See Mayo *v.* Wahlgreen, 9 Colo. App. 506, 50 Pac. 40.

Illinois.— Hinton *v.* Ring, 111 Ill. App. 369.

Iowa.— Johnson *v.* Gavitt, 114 Iowa 183, 86 N. W. 256.

South Dakota.— Davenport *v.* Buchanan, 6 S. D. 376, 61 N. W. 47.

Washington.— Kennah *v.* Huston, 15 Wash. 275, 46 Pac. 236.

Wisconsin.— Bergeron *v.* Miles, 88 Wis. 397, 60 N. W. 783, 43 Am. St. Rep. 911; Grant *v.* Hardy, 33 Wis. 668.

24. See Mayo *v.* Wahlgreen, 9 Colo. App. 506, 50 Pac. 40; Teachout *v.* Van Hoesen, 76 Iowa 113, 40 N. W. 96, 14 Am. St. Rep. 206, 1 L. R. A. 664.

25. For fraud of the lessor as affecting the validity of the lease and giving the tenant the right of rescission and abandonment see, generally, Landlord and Tenant.

26. See Whitney *v.* Allaire, 1 N. Y. 305 [*affirming* 4 Den. 554]; Allaire *v.* Whitney, 1 Hill (N. Y.) 484; Lehigh Zinc, etc., Co. *v.* Bamford, 150 U. S. 665, 14 S. Ct. 219, 37 L. ed. 1215.

27. Cheney *v.* Powell, 88 Ga. 629, 15 S. E. 750; Whitney *v.* Allaire, 1 N. Y. 305 [*affirming* 4 Den. 554]; Allaire *v.* Whitney, 1 Hill (N. Y.) 484.

28. Chatham Furnace Co. *v.* Moffatt, 147 Mass. 403, 18 N. E. 168, 9 Am. St. Rep. 727; Whitney *v.* Allaire, 1 N. Y. 305 [*affirming* 4 Den. 554]; Allaire *v.* Whitney, 1 Hill (N. Y.) 484, where a lease of a certain water lot and the right to a wharf was induced by misrepresentations of the lessor that he owned three hundred and fifty feet of wharf, whereas he owned one hundred and fifty feet only. See also Holton *v.* Noble, 83 Cal. 7, 23 Pac. 58.

29. *Indiana.*— Arbuckle *v.* Biederman, 94 Ind. 168, holding that fraudulent representations as to the condition of a mine, its drainage, quantity of coal near the shaft, amount worked, etc., whereby plaintiff, who could not examine it, was induced to take a lease thereof, are actionable.

Massachusetts.— Clogston *v.* Martin, 182 Mass. 469, 65 N. E. 839.

Nebraska.— Bauer *v.* Taylor, (1903) 96 N. W. 268 [*modified* on another point in (1904) 98 N. W. 29]; Barr *v.* Kimball, 43 Nebr. 766, 62 N. W. 196.

New York.— Pryor *v.* Foster, 130 N. Y. 171, 29 N. E. 123 (false representation as to heating capacity of a furnace); Meyers *v.* Rosenback, 5 Misc. 337, 25 N. Y. Suppl. 521.

Pennsylvania.— Wolfe *v.* Arrott, 109 Pa. St. 473, 1 Atl. 333.

United States.— Lehigh Zinc, etc., Co. *v.* Bamford, 150 U. S. 665, 14 S. Ct. 219, 37 L. ed. 1215.

See also, generally, Landlord and Tenant; Recoupment, Set-Off, and Counter-Claim.

Statement of fact or opinion.— A representation by a lessor that the premises are in suitable condition for the known purposes for which they are to be used is a statement of fact, not of opinion. Meyers *v.* Rosenback, 5 Misc. (N. Y.) 337, 25 N. Y. Suppl. 521. See also Clogston *v.* Martin, 182 Mass. 469, 65 N. E. 839. But representations as to the amount that harvest land sown in certain crops will produce are mere matters of opinion. Holton *v.* Noble, 83 Cal. 7, 23 Pac. 58.

30. As that the demised lands are not subject to overflow and never have been overflowed (Jones *v.* Hathaway, 77 Ind. 14, holding also that the lessee in such a case may rely on the lessor's statements without fur-

warranty or active fraud no action will lie against him for his omission to communicate the fact.[31]

D. Representations as to Credit and Financial Responsibility[32] — **1. Of the Speaker — a. In General.** An action for deceit may be founded on a person's false and fraudulent representations concerning his own solvency and financial responsibility whereby another is induced to extend credit to him in a sale or other commercial transaction and suffers loss through his solvency,[33] provided that the representations consist of definite statements of fact as distinguished from mere expressions of opinion[34] or statements of a promissory character relating to the future.[35] A well grounded distinction exists with respect to the positive quality with which statements must be invested, between representations as to the credit of a third person and statements as to the credit of the speaker. Mere general statements which may be actionable when made with regard to the credit of a third person[36] are not actionable when made for the purpose of inducing the giving of credit to the speaker, as in such cases they are regarded as mere "trade talk" and not calculated to deceive a person of ordinary prudence.[37] And this distinction goes far to explain some apparent conflict in the cases. False representations that the speaker owns certain described property, made for the purpose of procuring credit, will sustain the action,[38] while mere general statements that one is worthy of credit will not.[39] And ordinary evasions and excuses made by a debtor when called upon for payment, as that he has no change in his possession or that money is owing to him and has not been collected, are not such statements as may be relied upon by the person to whom they are made.[40] Simple representations that one has abundant means with which to pay any judgment that may be rendered against him have, however, been held actionable.[41]

ther investigation or inquiry); or that stables leased were largely used by patrons of a near-by hotel (Fonda *v.* Lape, 8 N. Y. Suppl. 792). See also Phelan *v.* Kuhn, 51 Ill. App. 644.

31. Keates *v.* Cadogan, 10 C. B. 591, 15 Jur. 428, 20 L. J. C. P. 76, 70 E. C. L. 591.

32. Solvency and insolvency.— In this connection it has been held that solvency is ability to pay all debts and just claims, and that insolvency is inability to pay them (McKown *v.* Furgason, 47 Iowa 636, 637); but this fact is not to be determined by the amount of the party's property subject to execution (McKown *v.* Furgason, *supra*, where the court said: "A party may have this ability whose property is not subject to execution. Such person cannot in any proper sense be said to be insolvent." See also Einstein *v.* Marshall, 58 Ala. 153, 29 Am. Rep. 729). See Bankruptcy, 5 Cyc. 227; and, generally, Insolvency. Solvency on part of a merchant, or merchant corporation, is not an ultimate ability to pay debts or an excess of assets over liabilities, but rather an excess of assets available for the discharge of liabilities in the usual course of trade. Ring *v.* Vogel, 44 Mo. App. 111.

33. *Connecticut.*— Judd *v.* Weber, 55 Conn. 267, 11 Atl. 40.

Illinois.— Dickinson *v.* Atkins, 100 Ill. App. 401.

New Hampshire.— Cain *v.* Dickenson, 60 N. H. 371.

New York.— Rothschild *v.* Mack, 115 N. Y. 1, 21 N. E. 726; Eaton, etc., Co. *v.* Avery, 83 N. Y. 31, 38 Am. Rep. 389.

Vermont.— Childs *v.* Merrill, 63 Vt. 463, 22 Atl. 626, 14 L. R. A. 264.

See also *infra*, IV, D, 1, e.

Right to rescind the contract under such circumstances see, generally, Sales.

34. Lyons *v.* Briggs, 14 R. I. 222, 51 Am. Rep. 372; Jude *v.* Woodburn, 27 Vt. 415. See on this point *supra*, III, B, 1, b, (v).

35. The fact that at the time a person obtains credit by promising the avails of a certain contract when carried out, he has already pledged such avails to a third person, does not lay the foundation of an action of deceit. In such case defendant's obligation rests in promise. Best *v.* Smith, 54 Vt. 617.

Promissory statements see *supra*, III, B, 1, b, (vi).

36. See *infra*, IV, D, 2.

37. Lyons *v.* Briggs, 14 R. I. 222, 51 Am. Rep. 372.

38. Cain *v.* Dickenson, 60 N. H. 371; Childs *v.* Merrill, 63 Vt. 463, 22 Atl. 626, 14 L. R. A. 264, that speaker owned certain specified property and that it was unencumbered.

But it was held in an early case that the fact that defendant falsely specified the particulars of his pretended estate had no more effect in conferring a right of action than general statements as to his solvency. Fisher *v.* Brown, 1 Tyler (Vt.) 387, 4 Am. Dec. 726.

39. Lyons *v.* Briggs, 14 R. I. 222, 51 Am. Rep. 372; Jude *v.* Woodburn, 27 Vt. 415.

40. Dyer *v.* Tilton, 23 Vt. 313.

41. Dickinson *v.* Atkins, 100 Ill. App. 401.

b. Intent and Belief of Defendant. A person cannot be held liable for fraudulent misrepresentations as to his solvency whereby another is induced to extend credit to him, unless he intended to deceive.[42] But if he did induce the giving of credit to himself by a false representation as to his solvency, it is immaterial that he expected to be able to meet his obligations when they should mature and had no intention of subjecting the other party to loss, especially if his expectations were without any reasonable foundation.[43] On the other hand if the party honestly believes his statement of his own financial condition is true, he is not liable,[44] and the fact of his belief is the question to be determined, not whether he had reasonable grounds for his belief.[45]

c. Omission to Disclose Insolvency.[46] The mere omission to disclose insolvency is not equivalent, as a matter of law, to a direct affirmation of solvency.[47] It is only where the insolvency of the one seeking to obtain credit is of such a character as to plainly show that he will not be able to meet the obligations sought to be incurred that a positive duty arises to disclose such insolvency.[48]

d. Continuing Effect of Representations. Misrepresentations made for the purpose of obtaining credit may, if not subsequently altered or qualified, properly be held to have a continuing operation.[49] Thus where fraudulent misrepresentations are made to obtain a general credit covering a series of purchases or other transactions, the representations may be considered as continuing, and although the goods first sold on the faith of the representations may have been

42. Macullar *v.* McKinley, 99 N. Y. 353, 2 N. E. 9 [*affirming* 49 N. Y. Super. Ct. 5], where it appeared that defendant did not seek to obtain credit from plaintiff but rather that plaintiff thrust the credit upon him.

It must be proved: (1) That plaintiff in making the sale acted under a mistake or misapprehension; and (2) that defendant designedly caused the mistake or misapprehension for the purpose of inducing the sale. Macullar *v.* McKinley, 99 N. Y. 353, 2 N. E. 9 [*affirming* 49 N. Y. Super. Ct. 5].

For the general principles relating to fraudulent intent see *supra*, III, B, 6.

43. Judd *v.* Weber, 55 Conn. 267, 11 Atl. 40.

Motive and intent.—"It is a mistake to suppose that it is essential to a fraudulent intent that it should reach forward and actually contemplate the resulting damage to the other party. There is a fraudulent intent if one with a view of benefiting himself by intentional falsehood misleads another in a course of action which may be injurious to him. The ulterior hopes and expectations of the defendant, so much relied upon, were utterly immaterial. It is true that the motive to pay at some future time was innocent, but the motive to obtain present possession and title to another's property by the use of falsehood and false pretenses, throwing all the risk of loss on another, was corrupt." Judd *v.* Weber, 55 Conn. 267, 277, 11 Atl. 40, per Loomis, J.

44. Dilworth *v.* Bradner, 85 Pa. St. 238.

45. Dilworth *v.* Bradner, 85 Pa. St. 238.

46. As grounds for rescission of sale see, generally, SALES.

47. Cochrane *v.* Halsey, 25 Minn. 52; Williams *v.* Hay, 21 Misc. (N. Y.) 73, 46 N. Y. Suppl. 895; Weckherlin *v.* White, 4 N. Y. St. 80.

"It is well settled in this State that an intent to defraud cannot be imputed to a party who contracts a debt knowing that he is insolvent, merely from the fact of his insolvency, and his omission upon a purchase of property upon credit to disclose such condition to his vendor." Morris *v.* Talcott, 96 N. Y. 100, 107. And see Phœnix Iron Co. *v.* The Hopatcong, 127 N. Y. 206, 27 N. E. 841.

But a purchase with intent not to pay coupled with known insolvency not disclosed to the seller, whereby the seller is deprived of his goods and their price, constitutes actionable fraud. Wright *v.* Brown, 67 N. Y. 1; Monroe *v.* O'Shea, 4 Silv. Sup. (N. Y.) 292, 7 N. Y. Suppl. 540. See also *supra*, IV, B, 2, b. And where it appears from the facts in evidence that when the purchase was made the buyer must have known that he could not pay, he may be held chargeable with an intent not to pay. Wright *v.* Brown, 67 N. Y. 1 [*approved* in Phœnix Iron Co. *v.* The Hopatcong, 127 N. Y. 206, 27 N. E. 841]. See also Judd *v.* Weber, 55 Conn. 267, 11 Atl. 40.

48. Noyes *v.* Wilson, 7 N. Y. St. 439.

49. Brown *v.* Lobdell, 51 Ill. App. 574 (holding that in an action for deceit whereby plaintiff was induced to discount defendant's notes, it is not necessary that the false statements should have been repeated each time a note was discounted); Levy *v.* Abramsohn, 39 Misc. (N. Y.) 781, 81 N. Y. Suppl. 344 (holding that the fact that some of the goods obtained on credit by false representations were obtained six months after the credit was induced is no defense to an action for the fraud); Lewisohn *v.* Apple, 12 N. Y. Civ. Proc. 274 (holding that where one, to induce a sale of goods to him, made a false representation as to the amount of capital he had put into his business in June and he obtained other goods from the same parties in July without qualifying the statement

paid for, the liability for fraud attaches upon sales subsequently made;[50] and a subsequent false representation of the same character which refers to and reaffirms the truth of the first is admissible in evidence.[51] But there must be some legitimate connection between the representations made and the credit extended. The representations must be acted upon within a reasonable time and cannot be relied upon for a wholly indefinite period.[52]

e. Statements Made to Mercantile Agency.[53] Where a false representation is made by an individual to a mercantile agency concerning his solvency and financial condition, for the purpose of being communicated to persons who may be interested in the matter, and the mercantile agency issues a report or statement based thereon, third persons who in reliance on such report or statement extend credit to the person making the representation and suffer loss through his insolvency may maintain an action of deceit against him. In such cases the legal situation is the same as if the false statements were made directly to the party injured.[54] And a client of a mercantile agency, before acting upon a rating given by the agency based upon a detailed statement made by a merchant, need not himself examine such detailed statement.[55] But the evidence must connect defendant with the making of the report upon which credit was given,[56] and where the rating of the agency is based partly upon information derived from other sources as well as upon the false statements of defendant, and it does not appear that plaintiff knew of the false statements before taking action in reliance upon the rating, an action for deceit will not lie.[57] Since there must be a legitimate connection in point of time between the representations made and the credit extended,[58] one who has acted in reliance upon a report from a mercantile agency is not necessarily entitled, after a considerable lapse of time, to act again upon such report without attempting to obtain additional information,[59] especially in view of the custom of such agency to call for periodical statements.[60] Fraud

previously made, the representation was continuing).

50. Judd *v.* Weber, 55 Conn. 267, 11 Atl. 40.

But where the statement is made through a mercantile agency, a different rule applies. See *infra*, IV, D, 1, e.

51. Judd *v.* Weber, 55 Conn. 267, 11 Atl. 40.

52. Macullar *v.* McKinley, 99 N. Y. 353, 2 N. E. 9 [*affirming* 49 N. Y. Super. Ct. 5]; Weckherlin *v.* White, 4 N. Y. St. 80.

Rule stated.— Representations made with a view to procuring credit with another can be held to apply to and effect future credit only where they are made in the course of such dealings, and under such circumstances that it may be inferred that they were made with an intent to induce a continued credit. Morris *v.* Talcott, 96 N. Y. 100.

53. Statements made to the public see, generally, *infra*, V, A.

54. *Illinois.*— Moyer *v.* Lederer, 50 Ill. App. 94.

Michigan.— Hinchman *v.* Weeks, 85 Mich. 535, 48 N. W. 790; Cortland Mfg. Co. *v.* Platt, 83 Mich. 419, 47 N. W. 330; Genesee County Sav. Bank *v.* Michigan Barge Co., 52 Mich. 164, 438, 17 N. W. 790, 18 N. W. 206.

Minnesota.— Stevens *v.* Ludlum, 46 Minn. 160, 48 N. W. 771, 24 Am. St. Rep. 210, 13 L. R. A. 270.

Missouri.— Holmes *v.* Harrington, 20 Mo. App. 661.

New York.— Eaton, etc., Co. *v.* Avery, 83 N. Y. 31, 34, 38 Am. Rep. 389 [*affirming* 18 Hun 44] (where the court said: "A person furnishing information to such an agency in relation to his own circumstances, means and pecuniary responsibility, can have no other motive in so doing than to enable the agency to communicate such information to persons who may be interested in obtaining it, for their guidance in giving credit to the party"); Converse *v.* Sickles, 16 N. Y. App. Div. 49, 44 N. Y. Suppl. 1080 [*affirmed* in 161 N. Y. 666, 57 N. E. 1107]; Goodwin *v.* Goldsmith, 49 N. Y. Super. Ct. 101.

Ohio.— Wilmot *v.* Lyon, 7 Ohio Cir. Dec. 394.

Texas.— Gainesville Nat. Bank *v.* Bamberger, 77 Tex. 48, 13 S. W. 959, 19 Am. St. Rep. 738.

See 23 Cent. Dig. tit. "Fraud," § 9.

55. Aultman *v.* Carr, 16 Tex. Civ. App. 430, 42 S. W. 614.

56. Cream City Hat Co. *v.* Tollinger, 62 Nebr. 98, 86 N. W. 921.

57. Tindle *v.* Birkett, 57 N. Y. App. Div. 450, 67 N. Y. Suppl. 1017.

58. See *supra*, IV, D, 1, d.

59. Macullar *v.* McKinley, 99 N. Y. 353, 2 N. E. 9 [*affirming* 49 N. Y. Super. Ct. 5].

60. Statements made to mercantile agencies can be relied upon only during the time which would elapse before calling for another statement according to the custom of the agency. Macullar *v.* McKinley, 49 N. Y. Super. Ct. 5 [*affirmed* in 99 N. Y. 353, 2 N. E. 9].

cannot be inferred from technical inaccuracies in a statement to an agency,[61] from the fact that a valuation of property is excessive if judged by subsequent sales at panic prices,[62] or from a mere failure to disclose a conditional liability.[63] And defendant cannot be held liable if the statement issued by the agency is materially different from the one he furnished.[64]

2. Of Third Person[65] — a. In General. It is now well settled law that where one makes false representations as to the solvency and financial condition of a third person, knowing the statements to be false and intending that the person to whom they are made shall act upon them, which he does to his injury, the speaker commits actionable fraud.[66] This rule is most frequently applied where one person, for the purpose of inducing another to lend money or sell goods on credit to a third, falsely represents that the latter is financially responsible and of good credit; the money being lent or the goods sold accordingly, and the lender or seller losing his money through the third person's insolvency.[67] But upon the same principle an action can be maintained where a purchaser of property induces the vendor to accept in payment the notes of an insolvent third person, by false

61. Bradley *v.* Seaboard Nat. Bank, 46 N. Y. App. Div. 550, 62 N. Y. Suppl. 51.

62. Bradley *v.* Seaboard Nat. Bank, 46 N. Y. App. Div. 550, 62 N. Y. Suppl. 51.

63. Bradley *v.* Seaboard Nat. Bank, 46 N. Y. App. Div. 550, 62 N. Y. Suppl. 51.

64. Wachsmuth *v.* Martini, 154 Ill. 515, 39 N. E. 129 [*affirming* 45 Ill. App. 244].

65. Statute of frauds in connection with this class of cases see Frauds, Statute of.

That a stranger to a transaction may be liable for fraud inducing the transaction see *infra*, VI, A.

66. *Alabama.*—Henry *v.* Allen, 93 Ala. 197, 9 So. 579; Einstein *v.* Marshall, 58 Ala. 153, 29 Am. Rep. 729.

Colorado.— Goodale *v.* Middaugh, 8 Colo. App. 223, 46 Pac. 11.

District of Columbia.— Browning *v.* National Capital Bank, 13 App. Cas. 1.

Georgia.— Cheney *v.* Powell, 88 Ga. 629, 15 S. E. 750; Young *v.* Hall, 4 Ga. 95.

Illinois.— Endsley *v.* Johns, 120 Ill. 469, 12 N. E. 247, 60 Am. Rep. 572 [*affirming* 17 Ill. App. 466].

Kansas.— Brown *v.* Case Plow Works, (1900) 59 Pac. 601.

Massachusetts.— Bowen *v.* Carter, 124 Mass. 426; Patten *v.* Gurney, 17 Mass. 182, 9 Am. Dec. 141; Tryon *v.* Whitmarsh, 1 Metc. 1, 35 Am. Dec. 339, per Wilde, J.

Michigan.— Beebe *v.* Knapp, 28 Mich. 53.

Minnesota.—Burr *v.* Willson, 22 Minn. 206. See also Sollund *v.* Johnson, 27 Minn. 455, 8 N. W. 271.

Missouri.— Hamlin *v.* Abell, 120 Mo. 188, 25 S. W. 516; Anderson *v.* McPike, 86 Mo. 293.

New York.— Hadcock *v.* Osmer, 153 N. Y. 604, 47 N. E. 923 [*affirming* 4 N. Y. App. Div. 435, 38 N. Y. Suppl. 618]; Rothschild *v.* Mack, 115 N. Y. 1, 21 N. E. 726; Hubbard *v.* Briggs, 31 N. Y. 518; Zabriskie *v.* Smith, 13 N. Y. 322, 64 Am. Dec. 551; Pilcher *v.* Levino, 80 Hun 399, 30 N. Y. Suppl. 314; Addington *v.* Allen, 11 Wend. 374 [*reversing* on other grounds 7 Wend. 9].

North Carolina.— Thomas *v.* Wright, 98 N. C. 272, 3 S. E. 487.

North Dakota.—Chilson *v.* Houston, 9 N. D. 498, 84 N. W. 354.

Pennsylvania.—Rheem *v.* Naugatuck Wheel Co., 33 Pa. St. 358; Boyd *v.* Browne, 6 Pa. St. 310.

Tennessee.— See Lowry *v.* Stapp, (Ch. App. 1899) 53 S. W. 194.

Vermont.— Weeks *v.* Burton, 7 Vt. 67.

Wisconsin.— Shaw *v.* Gilbert, 111 Wis. 165, 86 N. W. 188.

United States.— Nevada Bank *v.* Portland Nat. Bank, 59 Fed. 338.

England.— Foster *v.* Charles, 6 Bing. 396, 19 E. C. L. 183, 7 Bing. 105, 20 E. C. L. 55, 8 L. J. C. P. O. S. 118, 4 M. & P. 61, 741, 31 Rev. Rep. 446; Eyre *v.* Dunsford, 1 East 318; Pasley *v.* Freeman, 3 T. R. 51, 1 Rev. Rep. 634, the leading case on this point. *Compare* Tapp *v.* Lee, 3 B. & P. 367.

67. *Alabama.*— Einstein *v.* Marshall, 58 Ala. 153, 29 Am. Rep. 729.

Colorado.— Goodale *v.* Middaugh, 8 Colo. App. 223, 46 Pac. 11.

District of Columbia.— Browning *v.* National Capital Bank, 13 App. Cas. 1.

Georgia.— Young *v.* Hall, 4 Ga. 95.

Kansas.— Robbins *v.* Barton, 50 Kan. 120, 31 Pac. 686.

Massachusetts.—Patten *v.* Gurney, 17 Mass. 182, 9 Am. Dec. 141.

Mississippi.— Clopton *v.* Cozart, 13 Sm. & M. 363.

Missouri.— Dulaney *v.* Rogers, 64 Mo. 201; Felix *v.* Shirey, 60 Mo. App. 621.

New York.— Hadcock *v.* Osmer, 153 N. Y. 604, 47 N. E. 923 [*affirming* 4 N. Y. App. Div. 435, 38 N. Y. Suppl. 618]; Viele *v.* Goss, 49 Barb. 96; Bean *v.* Wells, 28 Barb. 466; Addington *v.* Allen, 11 Wend. 374 [*reversing* on other grounds 7 Wend. 9]; Upton *v.* Vail, 6 Johns. 181, 5 Am. Dec. 210.

North Carolina.— Thomas *v.* Wright, 98 N. C. 272, 3 S. E. 487.

Pennsylvania.—Rheem *v.* Naugatuck Wheel Co., 33 Pa. St. 358; Huber *v.* Wilson, 23 Pa. St. 178; Boyd *v.* Browne, 6 Pa. St. 310.

United States.— Nevada Bank *v.* Portland Nat. Bank, 59 Fed. 338.

England.— Corbett *v.* Brown, 8 Bing. 33,

representations that such person is solvent,[68] or by concealment of his insolvency,[69] or where the holder of negotiable paper falsely represents that the makers and indorsers are solvent and of good credit,[70] or conceals the fact of their

21 E. C. L. 433, 5 C. & P. 363, 24 E. C. L. 607, 1 L. J. C. P. 13, 1 M. & Rob. 108, 1 Moore & S. 85; Tatton *v.* Wade, 18 C. B. 370, 86 E. C. L. 370; Eyre *v.* Dunsford, 1 East 318; Burton *v.* Lord, 3 Esp. 207; Pasley *v.* Freeman, 3 T. R. 51, 1 Rev. Rep. 634.

Sale of article in violation of patent.— In such a case the fact that the article procured by the third person was a machine made in violation of a patent, the machine having been retained without any offer to return it, constitutes no defense to the action. Rheem *v.* Naugatuck Wheel Co., 33 Pa. St. 358.

A representation that a man is "good for all he buys" cannot be restricted to a willingness to pay when having funds, or to the promptness with which he has previously met his obligations; but means that he has at the time property or money with which to meet the amount for which he is recommended, or that he is in such a condition that he can command the amount when the term of credit expires. Einstein *v.* Marshall, 58 Ala. 153, 29 Am. Rep. 729.

A representation that a third person is "perfectly safe" means in this connection that he is in such a solvent condition that the debt in contemplation can be satisfied if necessary by process of law. Felix *v.* Shirey, 60 Mo. App. 621.

A statement that a man is "good" for all the goods he wants means merely that he is able to pay and not that he is honest and trustworthy. Weil *v.* Schwartz, 21 Mo. App. 372.

Person doing business as agent.— In an action to recover damages sustained by reason of the fraudulent representations of defendant concerning the credit and good standing of another who was doing business under the designation of agent, it is wholly immaterial whether or not it is the understanding in mercantile circles that a person doing business under such designation is not responsible. Ballard *v.* Lockwood, 1 Daly (N. Y.) 158.

The present ability to pay the particular debt contracted on the faith of the representations does not preclude recovery for the fraud where it does not appear that the party was then able to pay all his other debts. Daniels *v.* Dayton, 49 Mich. 137, 141, 13 N. W. 392, in which the court said: "When a transaction is had for the very purpose of preventing a vendor from getting pay for his goods, and in consequence of that purpose he fails to obtain it, we are not prepared to say that an intermediate possibility of collection will prevent him from treating the scheme as fraudulent."

Attempt to collect debt.— The fact that when plaintiff ascertained that he had been defrauded he attempted to collect his debt from the third person does not constitute a ratification of defendant's acts and does not estop plaintiff from maintaining his action. Goodale *v.* Middaugh, 8 Colo. App. 223, 46 Pac. 11.

68. *Alabama.*— Henry *v.* Allen, 93 Ala. 197, 9 So. 579.

Georgia.— Corbett *v.* Gilbert, 24 Ga. 454.

Indiana.— Bish *v.* Beatty, 111 Ind. 403, 12 N. E. 523, representation that notes were as good as government bonds.

Massachusetts.— Andrews *v.* Jackson, 168 Mass. 266, 47 N. E. 412, 60 Am. St. Rep. 390, 37 L. R. A. 402; Safford *v.* Grout, 120 Mass. 20.

Michigan.— Daniels *v.* Dayton, 49 Mich. 137, 13 N. W. 392; Beebe *v.* Knapp, 28 Mich. 53.

New York.— See Hawkins *v.* Appleby, 2 Sandf. 421.

North Dakota.—Chilson *v.* Houston, 9 N. D. 498, 84 N. W. 354.

Texas.— McCall *v.* Sullivan, 1 Tex. App. Civ. Cas. § 1.

Vermont.— Weeks *v.* Burton, 7 Vt. 67.

Washington.— Gates *v.* Moldstad, 14 Wash. 419, 44 Pac. 881, holding this to be true notwithstanding that according to the allegations defendant falsely represented that they would indorse the notes and become responsible for their payment, but instead of doing so they indorsed them without recourse.

The sale need not have immediately followed the false representation alleged to have induced it. Chilson *v.* Houston, 9 N. D. 498, 84 N. W. 354. See *supra*, III, B, 7, c.

Where the buyer assigned a judgment to the seller in payment for the goods, falsely representing that the judgment was good and collectable, that the judgment debtor was solvent and responsible and had just made a large payment on the debt, and that there was no prior judgment against him, it was held that the action could be maintained. Burr *v.* Wilson, 22 Minn. 206.

Third person inducing acceptance of buyer's check.— Where defendant acting as the agent of K in the purchase of cattle for the latter from plaintiff, induced plaintiff to accept in payment the worthless check of K by false representations that the check was good and would be honored by the bank, a recovery was sustained. Endsley *v.* Johns, 120 Ill. 469, 12 N. E. 247, 60 Am. Rep. 572 [*affirming* 17 Ill. App. 466].

69. Gordon *v.* Irvine, 105 Ga. 144, 31 S. E. 151, holding that there is an absolute duty to make disclosure in such cases.

70. *Arkansas.*— Binghampton Trust Co. *v.* Auten, 68 Ark. 299, 57 S. W. 1105, 82 Am. St. Rep. 295. *Compare* May *v.* Dyer, 57 Ark. 441, 21 S. W. 1064, where the insolvency of the maker was not proved.

Kansas.— Crane *v.* Elder, 48 Kan. 259, 29 Pac. 151, 15 L. R. A. 795, statement that the notes were perfectly good.

Massachusetts.— See Lobdell *v.* Baker, 1 Metc. 193, 35 Am. Dec. 358.

insolvency,[71] thereby inducing another to purchase the notes or indorse them for discount; or where one by false statements of recommendation induces another to employ a worthless and dishonest third person as agent, and the employer suffers loss through the agent's dishonesty.[72]

b. Essential Elements of the Fraud — (i) *General Principles.* In this class of cases as in others all the essential elements of actionable fraud[73] must be present in order to maintain the action.[74] A representation of a third person's solvency must, in order to be actionable, be untrue when made.[75] The speaker must know that his representation is false or must in making it assume to have knowledge of what he says when he is conscious that he has no such knowledge; and as a general rule he cannot be held liable if he honestly believes his statement to be true.[76] But according to the well settled rules on this subject[77] it is not necessary that defendant should actually know that his statement is false, but that it is sufficient if he makes it recklessly, without any knowledge of its truth or falsity, and in the form of a positive assertion calculated to convey the impression that he has actual knowledge of its truth;[78] and in such a case he is liable, although he actually believes in the existence of the facts on which he bases his assertion.[79]

Missouri.— Hamlin *v.* Abell, 120 Mo. 188, 25 S. W. 516.

New York.— Rothschild *v.* Mack, 115 N. Y. 1, 21 N. E. 726; Van Benscoten *v.* Seaman, 25 Misc. 234, 55 N. Y. Suppl. 79.

Washington.— Pronger *v.* Old Nat. Bank, 20 Wash. 618, 56 Pac. 391.

71. Boston Nat. Bank *v.* Armour, 1 Silv. Sup. (N. Y.) 444, 6 N. Y. Suppl. 714 [*distinguishing* People's Bank *v.* Bogart, 81 N. Y. 101, 37 Am. Rep. 481], holding that there is an absolute duty to make disclosure in such cases.

72. Foster *v.* Charles, 6 Bing. 396, 19 E. C. L. 183, 7 Bing. 105, 20 E. C. L. 55, 8 L. J. C. P. O. S. 118, 4 M. & P. 61, 741, 31 Rev. Rep. 446.

73. See *supra*, III.

74. *Georgia.*— Slade *v.* Little, 20 Ga. 371.

Iowa.— Avery *v.* Chapman, 62 Iowa 144, 17 N. W. 454.

Massachusetts.— Tryon *v.* Whitmarsh, 1 Metc. 1, 35 Am. Dec. 339.

New York.— Meyer *v.* Amidon, 45 N. Y. 169; Chester *v.* Comstock, 40 N. Y. 575 note; Marsh *v.* Falker, 40 N. Y. 562; Young *v.* Covell, 8 Johns. 23, 5 Am. Dec. 316.

Pennsylvania.— Huber *v.* Wilson, 23 Pa. St. 178.

75. Corbett *v.* Gilbert, 24 Ga. 454.

76. *Alabama.*— Baker *v.* Trotter, 73 Ala. 277; Einstein *v.* Marshall, 58 Ala. 153, 29 Am. Rep. 729.

Iowa.— Avery *v.* Chapman, 62 Iowa 144, 17 N. W. 454; McKown *v.* Furgason, 47 Iowa 636.

Massachusetts.— Tryon *v.* Whitmarsh, 1 Metc. 1, 35 Am. Dec. 339.

Michigan.— Beebe *v.* Knapp, 28 Mich. 53.

Missouri.— Felix *v.* Shirey, 60 Mo. App. 621.

New York.— Meyer *v.* Amidon, 45 N. Y. 169; Chester *v.* Comstock, 40 N. Y. 575 note; Marsh *v.* Falker, 40 N. Y. 562. See also Young *v.* Covell, 8 Johns. 23, 5 Am. Dec. 316.

Pennsylvania.— See Graham *v.* Hollinger, 46 Pa. St. 55.

United States.— Lord *v.* Goddard, 13 How. 198, 14 L. ed. 111.

England.— Haycraft *v.* Creasy, 2 East 92, 6 Rev. Rep. 380.

See 23 Cent. Dig. tit. "Fraud," § 4; and *supra*, III, B, 4, a.

77. See *supra*, III, B, 4, b.

78. *Alabama.*—Henry *v.* Allen, 93 Ala. 197, 9 So. 579; Einstein *v.* Marshall, 58 Ala. 153, 29 Am. Rep. 729.

Colorado.— Goodale *v.* Middaugh, 8 Colo. App. 223, 46 Pac. 11.

District of Columbia.— Browning *v.* National Capital Bank, 13 App. Cas. 1.

Indiana.— Mendenhall *v.* Stewart, 18 Ind. App. 262, 47 N. E. 943.

Michigan.— Beebe *v.* Knapp, 28 Mich. 53.

Mississippi.— Sims *v.* Eiland, 57 Miss. 607.

Missouri.— Hamlin *v.* Abell, 120 Mo. 188, 25 S. W. 516; Dulaney *v.* Rogers, 64 Mo. 201; Felix *v.* Shirey, 60 Mo. App. 621.

New York.— Hadcock *v.* Osmer, 153 N. Y. 604, 47 N. E. 923 [*affirming* 4 N. Y. App. Div. 435, 38 N. Y. Suppl. 618]; Meyer *v.* Amidon, 23 Hun 553. *Compare* Young *v.* Covell, 8 Johns. 23, 5 Am. Dec. 316.

See 23 Cent. Dig. tit. "Fraud," § 5.

Contra.— Avery *v.* Chapman, 62 Iowa 144, 17 N. W. 454.

79. Browning *v.* National Capital Bank, 13 App. Cas. (D. C.) 1; Mendenhall *v.* Stewart, 18 Ind. App. 262, 47 N. E. 943; Hadcock *v.* Osmer, 153 N. Y. 604, 47 N. E. 923 [*affirming* 4 N. Y. App. Div. 435, 38 N. Y. Suppl. 618]. But in Haycraft *v.* Creasy, 2 East 92, 6 Rev. Rep. 380, where defendant himself had at previous times extended credit to the person whom he recommended, and fully believed that she was possessed of a large estate and of abundant means, it was held that under the circumstances he was not liable, although his statements were made as positive assertions as of his own knowledge, it being considered that his statements could be construed only as a strong expression of opinion. It is somewhat doubtful whether this decision can be considered good law at the present day. See the cases cited *supra*

An intent to deceive plaintiff is essential as in other cases,[80] but it is not necessary that defendant obtain or intends to obtain any benefit from the extension of credit to the third person,[81] should be in collusion with him,[82] or should be prompted by any intent to cause injury to plaintiff other than the intent that the latter should act upon the representation;[83] and if, knowing that the inquirer intends to rely on the information given, he speaks with actual knowledge of the falsity of his statement, or without any knowledge on the subject makes his statement recklessly and in the form of a positive assertion calculated to convey the impression that he has knowledge of its truth, a fraudulent intent may be inferred[84] according to the rule previously stated.[85] On the other hand fraud cannot be inferred from the mere fact that the statement turns out to be false.[86] As in other cases[87] it must appear that in extending credit to the third person plaintiff relied upon defendant's representations as being true and that they were a material inducement to the transaction.[88] But the rule that the false representation of defendant need not have been the sole inducement to the transaction[89] applies to the classes of cases now under discussion.[90]

this note. And see *infra*, IV, D, 2, b, (II), (A).

80. *Iowa.*— Clement *v.* Swanson, 110 Iowa 106, 81 N. W. 233.

Massachusetts.— Tryon *v.* Whitmarsh, 1 Metc. 1, 35 Am. Dec. 339.

Missouri.— Felix *v.* Shirey, 60 Mo. App. 621.

New Hampshire.— Lord *v.* Colley, 6 N. H. 99, 25 Am. Dec. 445.

New York.— Babcock *v.* Libbey, 82 N. Y. 144; Meyer *v.* Amidon, 45 N. Y. 169; Frisbee *v.* Fitzsimons, 3 Hun 674; Young *v.* Covell, 8 Johns. 23, 5 Am. Dec. 316.

Pennsylvania.— Bokee *v.* Walker, 14 Pa. St. 139.

United States.— Iasigi *v.* Brown, 17 How. 183, 15 L. ed. 208 [*reversing* 12 Fed. Cas. No. 6,994]; Lord *v.* Goddard, 13 How. 198, 14 L. ed. 111.

England.— Scott *v.* Lara, 1 Peake N. P. 296.

See 23 Cent. Dig. tit. "Fraud," § 2.

But where a general recommendation of credit is given the rule is different. See *supra*, IV, D, 2, b, (II), (D).

81. Einstein *v.* Marshall, 58 Ala. 153, 29 Am. Rep. 729; James *v.* Crosthwaite, 97 Ga. 673, 25 S. E. 754, 36 L. R. A. 631; Young *v.* Hall, 4 Ga. 95; Endsley *v.* Jones, 120 Ill. 469, 12 N. E. 247, 60 Am. Rep. 572; Eyre *v.* Dunsford, 1 East 318; Pasley *v.* Freeman, 3 T. R. 51, 1 Rev. Rep. 634. See also *supra*, III, B, 6; III, B, 9.

82. Einstein *v.* Marshall, 58 Ala. 153, 29 Am. Rep. 729; Endsley *v.* Johns, 120 Ill. 469, 12 N. E. 247, 60 Am. Rep. 572; Boyd *v.* Browne, 6 Pa. St. 310; Pasley *v.* Freeman, 3 T. R. 51, 1 Rev. Rep. 634.

83. *Alabama.*— Einstein *v.* Marshall, 58 Ala. 153, 29 Am. Rep. 729.

District of Columbia.— Browning *v.* National Capital Bank, 13 App. Cas. 1.

New York.— Hadcock *v.* Osmer, 153 N. Y. 604, 47 N. E. 923 [*affirming* 4 N. Y. App. Div. 435, 38 N. Y. Suppl. 618]. *Compare* Young *v.* Covell, 8 Johns. 23, 5 Am. Dec. 316.

Pennsylvania.— Boyd *v.* Browne, 6 Pa. St. 310.

England.— Foster *v.* Charles, 6 Bing. 396, 19 E. C. L. 183, 7 Bing. 105, 20 E. C. L. 55, 8 L. J. C. P. O. S. 118, 4 M. & P. 61, 741, 31 Rev. Rep. 446.

See 23 Cent. Dig. tit. "Fraud," § 2; and *supra*, III, B, 6.

Motive immaterial.—"No motive for a representation which is false and may be injurious, can be good; and a lie to help a friend, is not the less a lie because it is not designed to injure the person to whom it is told; it is enough to stamp it with the character of actual fraud, that it may lead him to a risk, which he would otherwise shun." Bokee *v.* Walker, 14 Pa. St. 139, 142, per Gibson, C. J. And upon this principle one who recommends a third person to credit and suppresses the fact of the latter's indebtedness may be liable even though his purpose in suppressing the truth is to benefit the person recommended. Rheen *v.* Naugatuck Wheel Co., 33 Pa. St. 358.

84. *District of Columbia.*— Browning *v.* National Capital Bank, 13 App. Cas. 1.

Illinois.— Keith *v.* Goldston, 22 Ill. App. 457.

Indiana.— Mendenhall *v.* Stewart, 18 Ind. App. 262, 47 N. E. 943.

Missouri.— See Felix *v.* Shirey, 60 Mo. App. 621.

New York.—Meyer *v.* Amidon, 23 Hun 553.

Pennsylvania.— Boyd *v.* Browne, 6 Pa. St. 310.

United States.— Nevada Bank *v.* Portland Nat. Bank, 59 Fed. 338.

See 23 Cent. Dig. tit. "Fraud," § 2.

85. See *supra*, III, B, 6.

86. Lord *v.* Colley, 6 N. H. 99, 25 Am. Dec. 445.

87. See *supra*, III, B, 7, a.

88. Savage *v.* Jackson, 19 Ga. 305; Runge *v.* Brown, 23 Nebr. 817, 37 N. W. 660; Scott *v.* Lara, 1 Peake N. P. 296.

89. See *supra*, III, B, 7, b.

90. *Georgia.*— Young *v.* Hall, 4 Ga. 95. *Compare* Savage *v.* Jackson, 19 Ga. 305.

Massachusetts.— Safford *v.* Grout, 120 Mass. 20.

Minnesota.—Burr *v.* Willson, 22 Minn. 206,

(II) *Form and Character of Representation*[91] — (A) *Statement of Fact or Opinion.* A representation as to a third person's solvency and credit must be an assertion implying knowledge, not a mere expression of opinion,[92] although an intentionally false opinion may be actionable.[93] But the question whether a representation as to a third person's financial ability is a statement of fact or an expression of opinion is recognized as being one of peculiar difficulty,[94] and as its solution depends upon the circumstances as well as upon the nature of the statement and the meaning of the language used, it is in the first instance to be determined by the jury.[95] In the earlier cases[96] the courts construed as mere expressions of opinion statements which the courts now would doubtless regard as representations of fact.[97]

(B) *Concealment of Indebtedness.* It has been held that a false representation that the third person is financially responsible, accompanied by a concealment of

partial reliance on statements of third persons.

New York.— Addington *v.* Allen, 11 Wend. 374 [*reversing* on other grounds 7 Wend. 9].

Wisconsin.— Shaw *v.* Gilbert, 111 Wis. 165, 86 N. W. 188, partial reliance on statements that were not actionable.

England.— Tatton *v.* Wade, 18 C. B. 370, 86 E. C. L. 370, partial reliance on statements not actionable.

See 23 Cent. Dig. tit. "Fraud," § 18.

91. Witnessing false signature on letter of credit.— Signing one's name as a witness to a false signature on a letter of credit on the faith of which goods are sold on credit to the person recommended is actionable where the seller loses the price through the buyer's insolvency. Mendenhall *v.* Stewart, 18 Ind. App. 262, 47 N. E. 943.

Lending money to give appearance of solvency.— Where one advances money to a bankrupt for the purpose of enabling him, through the appearance of solvency, to obtain goods on credit and to cheat the seller out of the purchase-price, which purpose is accomplished, he becomes liable to the seller in an action of deceit, although he takes no active part in the sale and his existence is unknown to the seller. Windover *v.* Robbins, 2 Tyler (Vt.) 1.

92. *Georgia.*— Wrenn *v.* Truitt, 116 Ga. 708, 43 S. E. 52; Slade *v.* Little, 20 Ga. 371.

Iowa.— Avery *v.* Chapman, 62 Iowa 144, 17 N. W. 454.

Massachusetts.— Belcher *v.* Costello, 122 Mass. 189.

Nebraska.— Albion Milling Co. *v.* Weeping Water First Nat. Bank, 64 Nebr. 116, 89 N. W. 638.

New Hampshire.— Lord *v.* Colley, 6 N. H. 99, 25 Am. Dec. 445.

New York.— See Catlin *v.* Vietor, 52 N. Y. Super. Ct. 169.

Vermont.— Crown *v.* Brown, 30 Vt. 707.

England.— Haycraft *v.* Creasy, 2 East 92, 6 Rev. Rep. 380.

See 23 Cent. Dig. tit. "Fraud," § 12.

Imparting sources of information.— Where one gives an honest opinion based on information as to the financial worth, standing, and credit of a third person, which information he imparts to the person making the inquiry at the time the opinion is given, the mere fact that he was mistaken in his opinion will not make him liable. Albion Milling Co. *v.* Weeping Water First Nat. Bank, 64 Nebr. 116, 89 N. W. 638. See also Russell *v.* Clark, 7 Cranch (U. S.) 69, 3 L. ed. 271.

93. Robbins *v.* Barton, 50 Kan. 120, 31 Pac. 686. See also Tryon *v.* Whitmarsh, 1 Metc. (Mass.) 1, 35 Am. Dec. 339; Russell *v.* Clark, 7 Cranch (U. S.) 69, 3 L. ed. 271, per Marshall, C. J.

94. Andrews *v.* Jackson, 168 Mass. 266, 47 N. E. 412, 60 Am. St. Rep. 390, 37 L. R. A. 402; Stubbs *v.* Johnson, 127 Mass. 219; Tryon *v.* Whitmarsh, 1 Metc. (Mass.) 1, 35 Am. Dec. 339.

A representation that a note is "good" means that the maker is financially responsible. Weeks *v.* Burton, 7 Vt. 67. It cannot be said as a matter of law that a representation that the note of a third person is as "good as gold" is an expression of opinion rather than a statement of a fact. Andrews *v.* Jackson, 168 Mass. 266, 47 N. E. 412, 60 Am. St. Rep. 390, 37 L. R. A. 402 [*distinguishing* Stubbs *v.* Johnson, 127 Mass. 219]. See also Bish *v.* Beatty, 111 Ind. 403, 12 N. E. 523; Crane *v.* Elder, 48 Kan. 259, 29 Pac. 151, 15 L. R. A. 795. *Compare* Belcher *v.* Costello, 122 Mass. 189.

Representations as to corporation.— Representations by one bank to another that a corporation "is prosperous," "well organized," "doing a large business," and "are valued customers of ours"; that an investigation of its business and responsibility had been made by the vice-president and cashier of the bank, coupled with the transmission of an annual statement, which (as alleged) is known to be false, are representations of fact, and not of opinion, and are actionable if fraudulently made. Nevada Bank *v.* Portland Nat. Bank, 59 Fed. 338.

95. See *infra*, VII, M, 2, a.

96. See Lord *v.* Colley, 6 N. H. 99, 25 Am. Dec. 445; Haycraft *v.* Creasy, 2 East 92, 6 Rev. Rep. 380.

97. See the following cases:

Alabama.— Einstein *v.* Marshall, 58 Ala. 153, 29 Am. Rep. 729.

District of Columbia.— Browning *v.* National Capital Bank, 13 App. Cas. 1.

the fact that he is deeply indebted, are not alone sufficient to constitute actionable fraud, although the representation is acted upon to plaintiff's injury; it being considered that the suppression of the fact of indebtedness, while certainly evidence of fraud, is not conclusive.[98] But if in such a case it be found as a fact that the concealment was made with the intent to deceive plaintiff, fraud is sufficiently established.[99] Thus according to principles before stated [1] the person of whom the inquiry is made is not obliged to make any representation, but if he undertakes to do so, realizing that the other is likely to extend credit on the faith of the information, he is bound to make a full and truthful disclosure of all material facts within his knowledge relating to the third person's financial means, condition, and business integrity; and if he makes statements calculated to inspire confidence as to these matters, but does not mention the fact that the third person is largely indebted, he commits actionable fraud.[2]

(c) *Concealment of Minority.* Since the contractual capacity of the person to be dealt with is a material fact, one who recommends another as worthy of credit but conceals the fact that the person is a minor commits actionable fraud if the person extending credit on the faith of the recommendation sustains loss through the minor's failure to pay;[3] and in such a case the person need not bring an action against the minor before suing the person guilty of the fraud.[4]

(d) *General Recommendation of Credit.* A general recommendation of credit (one addressed to no particular person but intended for the public in general) given to an insolvent, worthless, or dishonest person by one who knows the truth concerning him, will support an action of deceit in favor of any one who acts on the recommendation and thereby suffers loss; and this, although defendant had no intent to defraud any particular individual.[5] But the rule is otherwise

Illinois.— Endsley *v.* Johns, 120 Ill. 469, 12 N. E. 247, 60 Am. Rep. 572 [*affirming* 17 Ill. App. 466].

Kansas.— Crane *v.* Elder, 48 Kan. 259, 29 Pac. 151, 15 L. R. A. 795.

Massachusetts.— Andrews *v.* Jackson, 168 Mass. 266, 47 N. E. 412, 60 Am. St. Rep. 390, 37 L. R. A. 402.

Missouri.— Hamlin *v.* Abell, 120 Mo. 188, 25 S. W. 516; Felix *v.* Shirey, 60 Mo. App. 621.

New York.— Hadcock *v.* Osmer, 153 N. Y. 604, 47 N. E. 923 [*affirming* 4 N. Y. App. Div. 435, 38 N. Y. Suppl. 618]; Rothschild *v.* Mack, 115 N. Y. 1, 21 N. E. 726.

98. Bokee *v.* Walker, 14 Pa. St. 139. To the same effect see Ball *v.* Farley, 81 Ala. 288, 1 So. 253; Clement *v.* Swanson, 110 Iowa 106, 81 N. W. 233; Young *v.* Covell, 8 Johns. (N. Y.) 23, 5 Am. Dec. 316; Graham *v.* Hollinger, 46 Pa. St. 55.

99. Tryon *v.* Whitmarsh, 1 Metc. (Mass.) 1, 35 Am. Dec. 339; Upton *v.* Vail, 6 Johns. (N. Y.) 181, 5 Am. Dec. 210.

1. See *supra*, III, B, 1, b, (IV).

2. Browning *v.* National Capital Bank, 13 App. Cas. (D. C.) 1; Viele *v.* Goss, 49 Barb. (N. Y.) 96; Addington *v.* Allen, 11 Wend. (N. Y.) 374 [*reversing* on other grounds 7 Wend. 9]; Upton *v.* Vail, 6 Johns. (N. Y.) 181, 5 Am. Dec. 210; Rheam *v.* Naugatuck Wheel Co., 33 Pa. St. 358; Boyd *v.* Browne, 6 Pa. St. 310; Foster *v.* Charles, 6 Bing. 396, 19 E. C. L. 183, 7 Bing. 105, 20 E. C. L. 55, 8 L. J. C. P. O. S. 118, 4 M. & P. 61, 741, 31 Rev. Rep. 446; Burton *v.* Loyd, 3 Esp. 207. See also James *v.* Crosthwaite, 97 Ga. 673, 25 S. E. 754, 36 L. R. A. 631; Brown *v.* Case Plow Works, (Kan. 1900) 59 Pac. 601; Eyre *v.* Dunsford, 1 East 318; Pasley *v.* Freeman, 3 T. R. 51, 1 Rev. Rep. 634. *Compare* Potts *v.* Chapin, 133 Mass. 276; Babcock *v.* Libbey, 82 N. Y. 144.

Rule stated.— "Fraud may consist as well in the suppression of what is true as in the representation of what is false. If a man, professing to answer a question, select those facts only which are likely to give a credit to the person of whom he speaks, and keep back the rest, he is a more artful knave than he who tells a direct falsehood." Tapp *v.* Lee, 3 B. & P. 367, 371.

And the amount of the indebtedness should be disclosed. Statements calculated to produce the impression that the indebtedness is inconsiderable or trifling when in truth it is large are fraudulent. Viele *v.* Goss, 46 Barb. (N. Y.) 96.

3. Kidney *v.* Stoddard, 7 Metc. (Mass.) 252.

4. Kidney *v.* Stoddard, 7 Metc. (Mass.) 252.

5. Young *v.* Hall, 4 Ga. 95; Clopton *v.* Cozart, 13 Sm. & M. (Miss.) 363; Hadcock *v.* Osmer, 153 N. Y. 604, 47 N. E. 923 [*affirming* 4 N. Y. App. Div. 435, 38 N. Y. Suppl. 618]; Williams *v.* Wood, 14 Wend. (N. Y.) 126; Addington *v.* Allen, 11 Wend. (N. Y.) 374 [*reversing* on other grounds 7 Wend. 9]. See also Henry *v.* Dennis, 95 Me. 24, 49 Atl. 58, 85 Am. St. Rep. 365.

Letter delivered to two persons of same name.— Defendant wrote and delivered to two persons by the name of Brown the following letter: "Mr. Hadcock: The Browns are good for what money you let them have.

of course where it appears that the letter of recommendation was not intended for the public but for some particular individual or class of persons other than plaintiff.[6]

c. Duty to Investigate. The rule imposing upon a purchaser the duty to investigate as to the truth of his vendor's statements concerning the property to be sold[7] has no application to representations made by a third person as to the credit, solvency, etc., of another. In cases of this character the position of the parties is not antagonistic but somewhat confidential.[8] Therefore if defendant's representation was of such a character, and was made under such circumstances as to justify its belief by a reasonably prudent man, plaintiff being ignorant of the truth and acting upon the representation to his injury, a recovery may be had, although plaintiff might, by the exercise of diligence, have ascertained the insolvency of the person recommended;[9] and defendant will not be heard to say that he is a person on whose word plaintiff had no right to rely.[10]

d. Continuing Effect of Representations. Where defendant's false representations as to a third person's credit, means, and ability to pay were general in their nature, he is presumed to have intended to produce thereby a permanent effect upon the mind and belief of the party to whom they were made, with the design of affecting all future dealings between the latter and the person recommended, and in such case he is liable not only for the first act of deception but for all subsequent credits expended by reason of the false representations.[11] On the other hand where defendant's representation as to a third person's responsibility and ability to pay was made only in connection with a particular transaction, as to which it has proved true, defendant is not liable for plaintiff's loss through subsequently extending credit to such person in connection with other transactions.[12] As, however, no favor is to be shown to a falsehood in the construction

L. Osmer." There were two brothers by the name of Hadcock who lived together as members of the same family, and on the faith of this letter one of them lent money to the Browns. It was held that there being no direction from the writer of the letter as to which one of the Hadcocks it should be given, the jury properly found that it was the intention of defendant that the paper should be delivered to the one of the brothers who would make the loan. Hadcock *v.* Osmer, 153 N. Y. 604, 47 N. E. 923 [*affirming* 4 N. Y. App. Div. 435, 38 N. Y. Suppl. 618].

6. McCracken *v.* West, 17 Ohio 16, holding that where a person writes a letter to another, desiring him to introduce the bearer to such merchants as he may desire, and describing the bearer as a man of property, and bearer does not deliver it to the person to whom it is directed but uses it to obtain credit elsewhere, the persons so giving the credit cannot maintain an action of deceit against the writer, although the representations in the letter are untrue.

7. See *supra*, IV, B, 1, a, (III), (A).

8. Endsley *v.* Jones, 120 Ill. 469, 12 N. E. 247, 60 Am. Rep. 572 [*affirming* 17 Ill. App. 466].

9. Henry *v.* Allen, 93 Ala. 197, 9 So. 579; Endsley *v.* Johns, 120 Ill. 469, 12 N. E. 247, 60 Am. Rep. 572 [*affirming* 17 Ill. App. 466]; Runge *v.* Brown, 23 Nebr. 817, 37 N. W. 660; Addington *v.* Allen, 11 Wend. (N. Y.) 374 [*reversing* on other grounds 7 Wend. 9]. See also Bowen *v.* Carter, 124 Mass. 426. *Compare* Shaw *v.* Gilbert, 111 Wis. 165, 86 N. W. 188 [as *explained* and *limited* in Kaiser *v.* Nummerdor, (Wis. 1904) 97 N. W. 932].

And the fact that plaintiff had an opportunity of ascertaining the financial condition of the person recommended is immaterial. Henry *v.* Allen, 93 Ala. 197, 9 So. 579.

10. Runge *v.* Brown, 23 Nebr. 817, 37 N. W. 660; Addington *v.* Allen, 11 Wend. (N. Y.) 374 [*reversing* on other grounds 7 Wend. 9].

11. Von Bruck *v.* Peyser, 4 Rob. (N. Y.) 514, 531, where defendant, after selling out his business, wrote to plaintiffs that he had made over his "business, with debits and credits, to" the vendee, who would "continue the same, with undiminished means," under the title of his own name, as successor to defendant, and after thanking plaintiffs "for the confidence reposed" in him hitherto, requested them "to extend the same to his successor"; and the court said: "To limit the influence of such a general statement, and confine the liability of its maker to a single dealing, would allow the instrument of fraud to prey at will upon the sufferer, after paying for the first purchase, and enable the originator of it to escape liability and secure certain advantages for the future, at the risk of only a small sum."

12. Lesem *v.* Miller, (Kan. App. 1900) 62 Pac. 538; Thaxter *v.* Bugbee, 5 Cush. (Mass.) 221, holding that where defendant wrote plaintiff: "The bearer, M., is in want of some lumber to finish up a house at Canton. He is a responsible man and will pay you

of its terms, it would seem that a representation as to another's credit should not be held to be confined to a single transaction, unless the language used shows clearly that such was the intention of the maker of the representation.[13]

e. Limitation of Extent of Credit. Fraudulent misrepresentations as to the financial responsibility of another person for the purpose of procuring credit for him are actionable, although no statement is made as to the amount or extent of credit which it is safe to extend.[14] But in Georgia the law is to the contrary.[15] On the other hand, if the representation indicates either generally or specifically a limit of safe credit, the person making the same is liable up to that amount only and not beyond it.[16]

f. Extension of Existing Credit. It has been held that an action of deceit cannot be maintained for false and fraudulent representations as to the credit and solvency of a third person, whereby plaintiff is induced merely to extend a term of credit previously granted and still existing.[17] On the other hand if, in addition to the extension of the original credit, plaintiff is induced to forego some legal right[18] or to allow the third person to contract further liability to him,[19] the action can be maintained.

E. Fraud Inducing Marriage.[20] Fraudulent misrepresentations inducing a marriage is a wrong which may be remedied by an action, the amount of damages recoverable depending on the circumstances of the particular case.[21] Thus where a man incapable by law of contracting a valid marriage, as where he has a wife living from whom he has not been divorced,[22] or where he has previously been married and divorced without the right to remarry,[23] induces by fraudulent misrepresentations and concealment a woman to marry him and thereafter to cohabit with him in the belief that their marriage is legal and their cohabitation lawful, she may recover damages from him in an action of deceit. And the action may be maintained without first obtaining a formal annulment of their marriage, the marriage being absolutely void.[24] Likewise a man who by false representations that a woman is virtuous, whereas she is pregnant by him, induces another man to marry her, is liable to the husband in an action of deceit based

according to agreement," the representation was merely that M was responsible at the date of the letter, and would pay according to agreement, to the amount of the lumber sufficient to finish the house; and hence plaintiff could not recover for lumber furnished M subsequently and for other purposes.

13. See Von Bruck *v.* Peyser, 4 Rob. (N. Y.) 514.

14. Nevada Bank *v.* Portland Nat. Bank, 59 Fed. 338 [*citing* Kimball *v.* Comstock, 14 Gray (Mass.) 508; Addington *v.* Allen, 11 Wend. (N. Y.) 374; Boyd *v.* Browne, 6 Pa. St. 310; Tatton *v.* Wade, 18 C. B. 370, 86 E. C. L. 370, and *disapproving* Glover *v.* Townsend, 30 Ga. 90; Hopkins *v.* Cooper, 28 Ga. 392].

15. Glover *v.* Townsend, 30 Ga. 90; Hopkins *v.* Cooper, 28 Ga. 392; Newsom *v.* Jackson, 26 Ga. 241, 71 Am. Dec. 206; Slade *v.* Little, 20 Ga. 371.

16. See Einstein *v.* Marshall, 58 Ala. 153, 29 Am. Rep. 729.

"Several hundred dollars."—Where the representation was that a certain person might safely be trusted to the extent of several hundred dollars, the term "several hundred" was construed to mean more than two but not very many hundred dollars, and held to include seven hundred. Einstein *v.* Marshall, 58 Ala. 153, 29 Am. Rep. 729.

17. Wemple *v.* Hildreth, 10 Daly (N. Y.) 481.

18. Bowen *v.* Carter, 124 Mass. 426 (the right to rescind a contract between plaintiff and the third person); New York Land Imp. Co. *v.* Chapman, 118 N. Y. 288, 23 N. E. 187 [*reversing* 54 N. Y. Super. Ct. 297] (the right of a landlord to terminate tenancy and rent the premises to other persons).

Fraud inducing forbearance of legal rights see *infra*, IV, G.

19. New York Land Imp. Co. *v.* Chapman, 118 N. Y. 288, 23 N. E. 187 [*reversing* 54 N. Y. Super. Ct. 297].

20. Fraud as affecting the validity of a marriage see, generally, MARRIAGE.

21. Kujek *v.* Goldman, 150 N. Y. 176, 44 N. E. 773, 55 Am. St. Rep. 670, 34 L. R. A. 156 [*affirming* 5 Misc. 360, 25 N. Y. Suppl. 753 (*affirmed* in 9 Misc. 34, 29 N. Y. Suppl. 294, 31 Abb. N. Cas. 314)].

22. Morrill *v.* Palmer, 68 Vt. 1, 33 Atl. 829, 33 L. R. A. 411. *Compare* Wright *v.* Skinner, 17 U. C. C. P. 317.

23. Blossom *v.* Barrett, 37 N. Y. 434, 97 Am. Dec. 747, holding also that plaintiff had a right to rely on defendant's statements, although she might have learned the truth by consulting judicial records in a distant city.

24. Blossom *v.* Barrett, 37 N. Y. 434, 97 Am. Dec. 747.

on the broad ground of loss of *consortium*.[25] It has been said that on principle fraudulent misrepresentations made by a third person to a party to a proposed marriage regarding the pecuniary condition of the other party, in order to induce or promote the marriage, are actionable and authorize a recovery of such damages as may be proved;[26] and instances where the guilty person has been in some way compelled to make good his representations are frequent.[27] But it has been held that fraudulent misrepresentations by members of a man's family regarding his character, habits, and financial condition, whereby a woman is induced to marry him, give no cause of action to the wife.[28]

F. Transactions Not Involving Contractual Relations — 1. In General. To maintain an action of deceit it is not necessary that the false representations should have been an inducement to a contract afterward consummated; but if the essential elements of actionable fraud are present plaintiff can recover damages he has sustained through relying on the misrepresentations of defendant.[29]

2. Enticing Person Into Another State. It is actionable to induce a person by fraudulent misrepresentations to leave his home and business and come into another state, with the intent to cause his arrest there;[30] plaintiff's loss of time, neglect of business, and expenditure of money being sufficient elements of injury.[31] In such a case the cause of action is not founded on the subsequent arrest of plaintiff but upon the fraud of defendant prior thereto;[32] and the fact that after the arrest plaintiff submitted himself to the jurisdiction of the court without pleading in abatement the illegality of his arrest is not bar to the action.[33]

25. Kujek *v.* Goldman, 150 N. Y. 176, 44 N. E. 773, 55 Am. St. Rep. 670, 34 L. R. A. 156 [*affirming* 5 Misc. 360, 25 N. Y. Suppl. 753 (*affirmed* in 9 Misc. 34, 29 N. Y. Suppl. 294, 31 Abb. N. Cas. 314)].

26. Kujek *v.* Goldman, 150 N. Y. 176, 182, 44 N. E. 773, 55 Am. St. Rep. 670, 34 L. R. A. 156 [*affirming* 5 Misc. 360, 25 N. Y. Suppl. 753 (*affirmed* in 9 Misc. 34, 29 N. Y. Suppl. 294, 31 Abb. N. Cas. 314)], per Vann, J.

27. See Piper *v.* Hoard, 107 N. Y. 73, 13 N. E. 626, 1 Am. St. Rep. 789; Neville *v.* Wilkinson, 1 Bro. Ch. 543, 28 Eng. Reprint 1289; Scott *v.* Scott, 1 Cox Ch. 366, 29 Eng. Reprint 1206; Montefiori *v.* Montefiori, 1 W. Bl. 363. See, generally, Husband and Wife.

28. Brennen *v.* Brennen, 19 Ont. 327, 338, holding that such an action would be contrary to public policy, and moreover that such representations as those indicated ought not to be relied on without some inquiry or investigation. In this case the court said: "The maxim '*caveat emptor*' seems as brutally and necessarily applicable to the case of marrying and taking in marriage as it is to the purchase of a rood of land or of a horse. . . . She took her chances and must now, as far as this Court is concerned, read into her contract the words 'for better, for worse, for richer, for poorer.' The praise of the father, the brother, and particularly of the mother, are *simplex commendation quæ non obligat*."

29. Burns *v.* Lane, 138 Mass. 350 (where defendant who was a sheriff falsely represented to plaintiffs that he had attached certain goods belonging to them and had the same in his possession, and plaintiffs relying on the statements did not take any care of the goods which were finally destroyed by the action of the weather); Eaton *v.* Winnie, 20 Mich. 156, 4 Am. Rep. 377 (where defendant by false statements as to the health of his sheep, which had an infectious disease, induced plaintiff to allow them to be pastured with his own sheep to which the disease was communicated); Cameron *v.* Mount, 86 Wis. 477, 56 N. W. 1094, 22 L. R. A. 512. In this case plaintiff's husband wished to buy a kind and gentle road horse for her; defendant offered him a horse and warranted to plaintiff that the horse was kind, gentle, and free from any tricks and bad habits and was perfectly safe for a lady to drive, and he invited her to get into his buggy and drive the horse; plaintiff, relying on these representations, drove the horse a short distance when the animal became unmanageable, upset the buggy, and injured plaintiff. It appeared that in fact the horse was an ugly and vicious animal. It was held that plaintiff could recover notwithstanding that there was no contract of sale. See also Barney *v.* Dewey, 12 Johns. (N. Y.) 224, 7 Am. Dec. 372, where it is said that in case of a gift of a chattel, if the donor falsely and fraudulently states that he is the owner and the donee is afterward sued by the rightful owner and subjected to costs and damages, the donee can maintain an action of deceit against the donor.

30. Wanzer *v.* Bright, 52 Ill. 35; Sweet *v.* Kimball, 166 Mass. 332, 44 N. E. 243, 55 Am. St. Rep. 406; Cook *v.* Brown, 125 Mass. 503, 28 Am. Rep. 259.

31. Cook *v.* Brown, 125 Mass. 503, 28 Am. Rep. 259.

32. Cook *v.* Brown, 125 Mass. 503, 28 Am. Rep. 259.

33. Cook *v.* Brown, 125 Mass. 503, 28 Am. Rep. 259.

G. Fraud Inducing Forbearance of Legal Rights.[34] An action of deceit may be maintained upon fraudulent misrepresentations whereby plaintiff has been induced to forbear the enforcement of some legal right and has thereby suffered loss, as well as where he has been induced to do some positive act.[35] Thus a debtor who by fraudulent misrepresentations and deceitful practices induces his creditor to forbear efforts to collect the debt until after it has become barred by the statute of limitations is liable to an action of deceit.[36]

H. Fraud Inducing Violation of Criminal Statute. A party who has been fraudulently misled cannot recover where he must found his claim in his own violation of a criminal statute.[37] But where the fraudulent misrepresentations are intended to create and actually do create in his mind a belief that under the circumstances represented the act which he is induced to do is neither illegal nor immoral, he may recover the damages he has sustained notwithstanding a statute makes the act a criminal offense.[38]

V. PERSONS ENTITLED TO SUE.[39]

A. In General. From the principles already stated[40] it is apparent that as a general rule the only person entitled to bring an action of deceit against the author of a fraudulent misrepresentation is the one to whom the representation was made with the intent that he should act upon it, or the one to whom it was intended to be communicated for that purpose.[41] It is not always necessary, how-

34. See also *supra*, III, B, 7, a.

35. Alexander *v.* Church, 53 Conn. 561, 4 Atl. 103 (where plaintiff was fraudulently induced not to perfect an inchoate mechanic's lien); Bowen *v.* Carter, 124 Mass. 426 (forbearance of right to rescind contract); Brown *v.* Castles, 11 Cush. (Mass.) 348 (abandonment of attachment); New York Land Imp. Co. *v.* Chapman, 118 N. Y. 288, 23 N. E. 187 [*reversing* 54 N. Y. Super. Ct. 297, and *distinguishing* Wemple *v.* Hildreth, 10 Daly (N. Y.) 481]. See also David *v.* Moore, (Oreg. 1905) 79 Pac. 415. *Compare* Austin *v.* Barrows, 41 Conn. 287.

Mere intention to exercise right.— The rule of the text has been held to apply, although the exercise of the legal right rested wholly in intention. New York Land Imp. Co. *v.* Chapman, 118 N. Y. 288, 23 N. E. 187 [*reversing* 54 N. Y. Super. Ct. 297, and *distinguishing* Wemple *v.* Hildreth, 10 Daly (N. Y.) 481]. See also Bowen *v.* Carter, 124 Mass. 426. But see Austin *v.* Barrows, 41 Conn. 287; Bradley *v.* Fuller, 118 Mass. 239.

36. Marshall *v.* Buchanan, 35 Cal. 264, 95 Am. Dec. 95, where the creditor had levied on certain property of the debtor which the latter fraudulently conveyed to a third person, and by representing that he did not own the property induced the creditor to release his levy; the creditor being unable to find any other property of the debtor and not discovering the fraud until shortly before the commencement of the action. *Compare* Morrill *v.* Madden, 35 Minn. 493, 29 N. W. 193 [*followed* in 37 Minn. 282, 34 N. W. 25], where it was held in a similar case that the creditor was guilty of such negligence as to preclude a recovery.

37. Martachowski *v.* Orawitz, 14 Pa. Super. Ct. 175, where the vendee of bar-room fixtures, liquors, etc., to whom the vendor had represented that he had a liquor license which would be transferred to the vendee, sought to recover damages for his imprisonment for the sale of liquor without a license.

38. Burrows *v.* Rhodes, [1899] 1 Q. B. 816, 68 J. P. 532, 68 L. J. Q. B. 545, 80 L. T. Rep. N. S. 591, 48 Wkly. Rep. 13. See also Prescott *v.* Norris, 32 N. H. 101; Morrill *v.* Palmer, 68 Vt. 1, 33 Atl. 829, 33 L. R. A. 411.

See also GUARDIAN AND WARD; INFANTS.

39. Abatement of action on death of party see ABATEMENT AND REVIVAL, 1 Cyc. 66.

As to parties plaintiff see *infra*, VII, G, 1.

40. See *supra*, III, B, 5, a; III, B, 6.

41. *Georgia.*— James *v.* Crosthwait, 97 Ga. 673, 25 S. E. 754, 36 L. R. A. 631 [*citing* Cheney *v.* Powell, 88 Ga. 629, 15 S. E. 750]; Slade *v.* Little, 20 Ga. 371; Harrison *v.* Savage, 19 Ga. 310.

Maine.— Henry *v.* Dennis, 95 Me. 24, 49 Atl. 58, 85 Am. St. Rep. 365; Carter *v.* Harden, 78 Me. 528, 7 Atl. 392.

Massachusetts.— Hunnewell *v.* Duxbury, 154 Mass. 286, 28 N. E. 267, 13 L. R. A. 733.

Missouri.— Rawlings *v.* Bean, 80 Mo. 614; Baker *v.* Crandall, 78 Mo. 584, 47 Am. Rep. 126; Watson *v.* Crandall, 7 Mo. App. 233 [*affirmed* in 78 Mo. 583].

New York.— Kelly *v.* Gould, 19 N. Y. Suppl. 349 [*affirmed* in 141 N. Y. 596, 36 N. E. 320].

Ohio.— Wells *v.* Cook, 16 Ohio St. 67, 88 Am. Dec. 436; McCracken *v.* West, 17 Ohio 16.

Rhode Island.— Butterfield *v.* Barber, 20 R. I. 99, 37 Atl. 532, holding that where defendant had made certain representations to plaintiff to be communicated to defendant's creditor, to obtain extension of time on a claim which was subsequently transferred to

ever, that the false representation should have been made directly to the person who was injured by acting upon it, but it is sufficient if the speaker intended that it should be communicated to and be acted upon by such person, or knew that this result would follow. In such cases the person injured may recover from the person guilty of the fraud, although the representation was originally made to another.[42] It is well settled also that where a false statement is made to the public at large for the purpose of influencing the action of any individual to whom it may be communicated, any person acting in reliance upon it and thereby sustaining injury may maintain an action against the person who made it,[43] and

plaintiff, and defendant did not know that a note given in payment of the claim was to be taken by plaintiff, plaintiff could not recover for deceit, as the representations were not made with intention of inducing his action.

United States.— Merchants' Nat. Bank *v.* Armstrong, 65 Fed. 932; Montreal Bank *v.* Thayer, 7 Fed. 622, 2 McCrary 1. See also Iasigi *v.* Brown, 17 How. 183, 15 L. ed. 208 [*reversing* 12 Fed Cas. No. 6,994], confidential letter written to an agent.

England.— Peek *v.* Gurney, L. R. 6 H. L. 377, 43 L. J. Ch. 19, 22 Wkly. Rep. 29 [*affirming* L. R. 13 Eq. 79]. See also George *v.* Skivington, L. R. 5 Exch. 1, 39 L. J. Exch. 8, 21 L. T. Rep. N. S. 495, 18 Wkly. Rep. 118; Langridge *v.* Levi, 7 Dowl. P. C. 27, 1 H. & H. 325, 4 M. & W. 337 [*affirming* 6 L. J. Exch. 137, 2 M. & W. 519].

See 22 Cent. Dig. tit. "Fraud," § 9.

But see Merchants' Nat. Bank *v.* Robison, 8 Utah 256, 30 Pac. 985; Wilson *v.* Green, 25 Vt. 450, 60 Am. Dec. 279, in both of which cases it was held that the author of fraudulent misrepresentations can be held liable to a person who has acted thereon, although the statements were intended not for him but for another.

42. Hubbard *v.* Weare, 79 Iowa 678, 44 N. W. 915; Stony Creek Woolen Co. *v.* Smalley, 111 Mich. 321, 69 N. W. 722; Allison *v.* Tyson, 5 Humphr. (Tenn.) 449; Pilmore *v.* Hood, 1 Arn. 390, 5 Bing. N. Cas. 97, 7 Dowl. P. C. 136, 8 L. J. C. P. 11, 6 Scott 827, 35 E. C. L. 62; Langridge *v.* Levy, 6 L. J. Exch. 137, 2 M. & W. 519 [*affirmed* in 7 Dowl. P. C. 27, 1 H. & H. 325, 4 M. & W. 337].

Thus where false representations are made to an agent with the intent to induce him to act upon them in behalf of his principal, which he does to the latter's injury, the principal has a right of action against the person guilty of the fraud. Hubbard *v.* Weare, 79 Iowa 678, 44 N. W. 915; Culliford *v.* Gadd, 60 N. Y. Super. Ct. 343, 17 N. Y. Suppl. 457 [*affirmed* in 139 N. Y. 618, 35 N. E. 205]; Raymond *v.* Howland, 12 Wend. (N. Y.) 176. See also Allen *v.* Addington, 7 Wend. (N. Y.) 9 [*reversed* on other grounds in 11 Wend. 374]; Ward *v.* Clark, 3 Johns. (N. Y.) 272. See, generally, PRINCIPAL AND AGENT. See also FACTORS AND BROKERS.

Third person for whose use purchase is made.—Where a person sells an unsound or unsafe chattel, fraudulently representing it to the buyer to be sound, safe, and suitable for the purpose to which it is to be put, knowing that the buyer intends it for the use of a third person, the latter, upon sustaining injury through the unsoundness or unfitness of the article, can recover against the seller in an action of deceit. Allison *v.* Tyson, 5 Humphr. (Tenn.) 448 (where defendant sold a vicious horse, knowing that it was intended for the use of the buyer's mother, and the latter was injured by the animal); Langridge *v.* Levy, 6 L. J. Exch. 137, 2 M. & W. 519 [*affirmed* in 7 Dowl. P. C. 27, 1 H. & H. 325, 4 M. & W. 337] (where defendant sold a gun, knowing that the buyer intended it for the use of plaintiff, and the gun exploded and injured plaintiff). See also George *v.* Skivington, L. R. 5 Exch. 1, 39 L. J. Exch. 8, 21 L. T. Rep. N. S. 495, 18 Wkly. Rep. 118. But *compare* Carter *v.* Harden, 78 Me. 528, 7 Atl. 392 (holding that false representations as to the gentleness of a horse sold to plaintiff's husband do not form a basis of recovery for injury sustained by plaintiff on account of the vicious character of the horse, it not being shown that any representations were made to her, or to any agent of hers, or with any expectation or intent that she would act on them); Wells *v.* Cook, 16 Ohio St. 67, 88 Am. Dec. 436 (holding that where representations of the soundness of diseased sheep were made to one purchasing them as agent, the agent could not maintain an action for deceit, although he had subsequently purchased the sheep from his principal without knowledge of their unsoundness, and had been injured by turning them among sound sheep owned by him, thereby infecting them). A scienter must be proved in this class of cases as in others. Longmeid *v.* Holliday, 6 Exch. 761, 20 L. J. Exch. 430. See *supra*, III, B, 4, a.

One who deliberately gives another a false statement in writing, knowing that it is to be used to deceive a third person, is responsible for the damage occasioned by such use. Stony Creek Woolen Co. *v.* Smalley, 111 Mich. 321, 69 N. W. 722.

Repetition to assignee of contract.— Where a vendor makes false representations to induce a contract of purchase, and the purchaser with the vendor's knowledge repeats the statements to a third person who, relying thereon, takes an assignment of the contract and himself becomes the purchaser, the latter may maintain an action of deceit against the vendor. Pilmore *v.* Hood, 1 Arn. 390, 5 Bing N. Cas. 97, 7 Dowl. P. C. 136, 8 L. J. C. P. 11, 6 Scott 827, 35 E. C. L. 62.

43. *Iowa.*— Warfield *v.* Clark, 118 Iowa 69, 91 N. W. 833.

Massachusetts.— Windram *v.* French, 151

that in such a case it is not necessary that there should be an intent to defraud any particular person;[44] but in such cases the representation must of course have been intended for the public.[45] Since fraud alone gives no right of action unless injury is suffered,[46] the only person entitled to maintain an action of deceit is the

Mass. 547, 24 N. E. 914, 8 L. R. A. 750, signature of invalid stock certificates. See also Nash *v.* Title Ins. etc., Co., 159 Mass. 437, 34 N. E. 625.

Missouri.—Atchison County Bank *v.* Byers, 139 Mo. 627, 41 S. W. 325.

New York.— Brackett *v.* Griswold, 112 N. Y. 454, 20 N. E. 376; Eaton, etc., Co. *v.* Avery, 83 N. Y. 31, 38 Am. Rep. 389; Cazeaux *v.* Mali, 25 Barb. 578; Kelly *v.* Gould, 19 N. Y. Suppl. 349 [*affirmed* in 141 N. Y. 596, 36 N. E. 320]; Morse *v.* Swits, 19 How. Pr. 275; Addington *v.* Allen, 11 Wend. 374 [*reversing* on other grounds 7 Wend. 9]. See also Hadcock *v.* Osmer, 153 N. Y. 604, 47 N. E. 923 [*affirming* 4 N. Y. App. Div. 435, 38 N. Y. Suppl. 618].

Ohio.— Bartholomew *v.* Bentley, 15 Ohio 659, 45 Am. Dec. 596.

United States.— Hindman *v.* Louisville First Nat. Bank, 98 Fed. 562, 39 C. C. A. 1, 48 L. R. A. 210 [*reversing* 86 Fed. 1013]; Montreal Bank *v.* Thayer, 7 Fed. 622, 2 McCrary 1. See also Iasigi *v.* Brown, 58 U. S. 183, 15 L. ed. 208.

See 22 Cent. Dig. tit. "Fraud," § 9.

By the application of this principle promoters or directors of corporations are liable for false representations in a prospectus or report, or other papers by which individuals have been induced to purchase the stock or become creditors of the corporation, and the fact that the false report or prospectus purports to be the act of the corporation and not of the promoters or directors does not relieve them from personal responsibility. See Warfield *v.* Clark, 118 Iowa 69, 91 N. W. 833; Atchison County Bank *v.* Dyers, 139 Mo. 627, 41 S. W. 325; Brackett *v.* Griswold, 112 N. Y. 454, 20 N. E. 376. See, generally, CORPORATIONS, 10 Cyc. 842 *et seq.* So where the holder of a note fraudulently procures a minor to indorse it and then sells it thus indorsed, he in effect makes a representation to all subsequent holders that the indorsement is a valid, binding contract and he is liable to them for his fraud. Lobdell *v.* Baker, 1 Metc. (Mass.) 193, 35 Am. Dec. 358, 3 Metc. 469. And see COMMERCIAL PAPER, 7 Cyc. 830 *et seq.* And where an unauthorized person, falsely representing that he has due authority, accepts a bill of exchange on behalf of the drawee, he becomes liable on the same principle to subsequent holders of the bill. Polhill *v.* Walter, 3 B. & Ad. 114, 23 E. C. L. 59. And see COMMERCIAL PAPER, 7 Cyc. 761, 762. Liability in cases like the last two is now generally enforced on the theory of express or implied warranty rather than that of fraud. See the cross-references just given; also PRINCIPAL AND AGENT.

Issuing deed in blank with false abstract.— Where a grantor gives to his grantee a deed with a blank for the grantee's name and accompanies it with a verified copy of a spurious abstract showing title in himself, he in effect represents to any subsequent purchaser that he believes the abstract to be correct and he authorizes such purchaser to fill the blank in the deed with his own name. In such case he becomes liable for the fraud to any person who becomes a purchaser, and it is immaterial that the document accompanying the deed is a verified copy and not the original abstract. Baker *v.* Hallam, 103 Iowa 43, 72 N. W. 419.

Representations to mercantile agency see *supra*, IV, D, 1, e.

General recommendations of credit see *supra*, IV, D, 2, b, (II), (D).

The injury must be the immediate and not the remote consequence of the representation thus made. Barry *v.* Croskey, 2 Johns. & H. 1. See *infra*, VII, O, 1, b, (II).

44. *Arkansas.*— Carvill *v.* Jacks, 43 Ark. 454.

Georgia.— Young *v.* Hall, 4 Ga. 95.

Maine.— Henry *v.* Dennis, 95 Me. 24, 49 Atl. 58, 85 Am. St. Rep. 365.

Missouri.— See Atchison County Bank *v.* Byers, 139 Mo. 627, 41 S. W. 325.

New York.— Eaton, etc., Co. *v.* Avery, 83 N. Y. 31, 38 Am. Rep. 389; Fenn *v.* Curtis, 23 Hun 384; Newbery *v.* Garland, 31 Barb. 121 (advertisement as to condition of corporation by director); Morse *v.* Swits, 19 How. Pr. 275; Mead *v.* Mali, 15 How. Pr. 347; Williams *v.* Wood, 14 Wend. 126; Allen *v.* Adington, 7 Wend. 9 [*reversed* on other grounds in 11 Wend. 374].

Ohio.— Bartholomew *v.* Bentley, 15 Ohio 659, 45 Am. Dec. 596, issue of bank-notes without complying with law.

United States.— Montreal Bank *v.* Thayer, 7 Fed. 622, 2 McCrary 1.

See 23 Cent. Dig. tit. "Fraud," § 9.

45. Nash *v.* Minnesota Title Ins., etc., Co., 159 Mass. 437, 34 N. E. 625 (holding that a letter containing certain false representations and intended to be used to promote the sale of bonds was not intended to be used by purchasers of the bonds to enable them to sell the bonds to others); Hunnewell *v.* Duxbury, 154 Mass. 286, 28 N. E. 267, 13 L. R. A. 733; McCracken *v.* West, 17 Ohio 16; Hindman *v.* Louisville First Nat. Bank, 112 Fed. 931, 50 C. C. A. 623, 57 L. R. A. 108, holding that a false certificate made by a bank to an insurance commissioner to enable an insurance company to obtain a license to do business within the state did not give a right of action to one purchasing stock in the insurance company in reliance upon such certificate, unless a connection was shown between defendant bank and the communication of the statement in the certificate to plaintiff or the general public.

46. See *supra*, III, B, 8, a.

one who has been injured by the fraud.[47] But the fact that a defrauded purchaser transfers to another the property purchased will not prevent him from recovering damages for the fraud.[48] Plaintiff must have acted on representations that were directly or indirectly made to him;[49] so where a defrauded purchaser gives the property to another, the donee cannot recover for the fraud practised upon his donor.[50] A stranger to the transaction who does not claim under the party defrauded has no right of action.[51] But the fact that plaintiff did not

47. Brock *v.* Rogers, 184 Mass. 545, 69 N. E. 334; Atchison County Bank *v.* Byers, 139 Mo. 627, 41 S. W. 325; Simar *v.* Canaday, 53 N. Y. 298, 13 Am. Rep. 523; Potter *v.* Necedah Lumber Co., 105 Wis. 25, 81 N. W. 118. See also Shaw *v.* Gilbert, 111 Wis. 165, 86 N. W. 188, holding that where a partnership had been defrauded and one partner afterward purchased, for full value, the interest of the other, he could recover only that portion of the damage which represented his original interest in the partnership.

Where the validity of a transfer induced by deceit is denied, as where it is asserted that a certificate of stock issued to two persons was transferred by one of the record owners without authority, and the operative effect of the transfer denied, it is held that there can be no recovery for deceit. Monyhan *v.* Prentiss, 10 Colo. App. 295, 51 Pac. 94.

Injury to dower.— Where a husband and wife join in a conveyance of lands of the former, the sale being induced by fraud on the part of the grantee, the wife has a cause of action against the grantee for damages sustained in the loss of her inchoate right of dower. Simar *v.* Canaday, 53 N. Y. 298, 13 Am. Rep. 523. See also Garry *v.* Garry, 187 Mass. 62, 72 N. E. 335.

Loss of contract.— Damages may be recovered for the false and fraudulent representations of a third person preventing the fulfilment of a contract, although the contract could not have been enforced by action. Rice *v.* Manley, 66 N. Y. 82, 23 Am. Rep. 30 [*reversing* 2 Hun 492, and *distinguishing* Dung *v.* Parker, 52 N. Y. 494]; Benton *v.* Pratt, 2 Wend. (N. Y.) 385, 20 Am. Dec. 623. And *compare* Snow *v.* Judson, 38 Barb. (N. Y.) 210. See ACTIONS, 1 Cyc. 662 *et seq.* See also TORTS.

48. Medbury *v.* Watson, 6 Metc. (Mass.) 246, 39 Am. Dec. 726; Simar *v.* Canaday, 53 N. Y. 298, 13 Am. Rep. 523 (gift to purchaser's wife); Lunn *v.* Shermer, 93 N. C. 164. See also Spikes *v.* English, 4 Strobh. (S. C.) 34, holding that an action for selling and representing as unpaid a single bill which had been paid was properly brought by the party to whom the bill was sold, and who was at the time of suit in possession thereof, although he had transferred it to another by written assignment without recourse, for valuable consideration. And see *supra*, III, B, 8, a.

Transfer of corporate stock.— The fact that corporate stock, the purchase of which is induced by fraud, has been placed in part in the names of members of his family, will not prevent the person defrauded from recovering damages as to the entire number of shares. Boddy *v.* Henry, 113 Iowa 462, 85 N. W. 771, 53 L. R. A. 769. See also Teachout *v.* Van Hoesen, 76 Iowa 113, 40 N. W. 96, 14 Am. St. Rep. 206, 1 L. R. A. 664, holding that one who enters into an agreement to organize a corporation may recover from his associates damages resulting from their false representation as to the value of property which they put into the enterprise, and by means of which they secured an interest in the corporation at a less cost than plaintiff, although plaintiff has disposed of his stock and the corporation has proved profitable; and holding also that the action need not be brought by the corporation or in its behalf.

49. McGlynn *v.* Seymour, 14 Daly (N. Y.) 420, 14 N. Y. St. 707; McAleer *v.* McMurray, 58 Pa. St. 126; Haines *v.* Franklin, 87 Fed. 139, holding that the assignee of a judgment against a Pennsylvania corporation does not acquire the judgment creditor's right of action against the incorporators for false representations in the sworn application for a charter, and he has no such cause of action unless his acquisition of the judgment was induced by his belief, and in reliance on such representations. *Compare* Town *v.* King, 2 N. Y. St. 254, holding that where representations were made to a husband and wife that a dog belonging to the husband had killed certain sheep, and the wife was thereby induced to allow the husband to make a payment of the damages suffered from money belonging to her, she might maintain an action for deceit.

Necessity for reliance on representations see *supra*, III, B, 7.

50. Simar *v.* Canaday, 53 N. Y. 298, 13 Am. Rep. 523.

51. Lawrence *v.* Montgomery, 37 Cal. 183 (holding that injury caused by fraud in the sale of land is personal and does not run with the land, and hence a subsequent grantee has no right of action therefor); Seeberger *v.* Weinberg, 151 Ill. 369, 37 N. E. 1033 (holding that where, pending the completion of a contract of purchase of realty, the vendee buys in an outstanding title, the person with whom he is contracting for the purchase cannot claim damages for the fraud of the vendee perpetrated on the holders of the outstanding title); Comstock *v.* Ames, 1 Abb. Dec. (N. Y.) 411, 3 Keyes 357 (holding that a grantee of one who had acquired title by fraud could not assert such fraud as the basis of an action for damage where no objection or attack upon his title had

appear in the transaction induced by the fraud will not prevent his recovery when he was in fact the real party in interest.[52]

B. Creditors of Party Defrauded. Where a person, by the practice of fraud, unjustly deprives another of his property, and the defrauded party does not attack the transaction, it seems by analogy of law[53] that his creditors cannot maintain an action of deceit against the party guilty of the fraud on the ground that the latter has diminished their debtor's means of making payment, the remedy of the defrauded debtor being personal to him and not inuring to his creditors.[54] But in some jurisdictions the statutes provide that a defrauded creditor may maintain an action against a person aiding the fraudulent debtor in the conveyance or concealment of his property.[55]

VI. PERSONS LIABLE.[56]

A. In General. A person cannot of course be held liable for a fraudulent misrepresentation unless he made it himself or authorized another to make it for him or in some way participated therein.[57] On the other hand all persons who are engaged in the perpetration of a fraud are liable for the damages occasioned thereby.[58] Moreover it is not necessary that there be any privity of contract

been made by the person on whom the fraud was committed); Tyson *v.* Ranney, 89 Wis. 518, 61 N. W. 563, 62 N. W. 931 (holding that where a husband contracts to exchange his own property for land, and afterward informs his wife of the contract and directs that the land be conveyed to her, she cannot, without other transfer of the right of action, maintain an action against the grantor for false representations as to the character of the land). And see Raymond *v.* Spring Grove, etc., R. Co., 10 Ohio Dec. (Reprint) 416, 21 Cinc. L. Bul. 103, holding that one holding bonds in trust could not recover damages for misrepresentation to the original purchasers of the bonds.

Assignment of cause of action for deceit see ASSIGNMENTS, 4 Cyc. 25.

52. McDonald *v.* Smith, (Mich. 1905) 102 N. W. 738 (so holding where property conveyed stood in the name of, and was conveyed by, another than plaintiff, although on plaintiff's behalf); Subworth *v.* Morton, (Mich. 1904) 100 N. W. 769 (holding that a declaration stating that representations were made to plaintiff, who paid his money, is sufficient, although the parties in fact dealt through an agent).

Thus a principal who has suffered injury through fraud practised upon his agent may recover from the guilty party, although in the transaction induced by the fraud the principal was not disclosed (Culliford *v.* Gadd, 60 N. Y. Super. Ct. 343, 17 N. Y. Suppl. 457 [*affirmed* in 139 N. Y. 618, 35 N. E. 205]; Raymond *v.* Howland, 12 Wend. (N. Y.) 176), although it is not competent for the principal to deny the agency and his responsibility to the agent for the loss, and at the same time sue the person who perpetrated the fraud on the agent (U. S. Mortgage, etc., Co. *v.* Crutcher, 169 Mo. 444, 69 S. W. 380, holding that an action could not be maintained by a trust company induced to make a loan by fraudulent representations made to a special agent, until the liability for an ultimate loss was finally settled, it being insufficient that there be an agreement that the trust company should sue and the question of loss left to be arbitrated at some future date). See, generally, PRINCIPAL AND AGENT.

53. See FRAUDULENT CONVEYANCES.

54. Smith *v.* Blake, 1 Day (Conn.) 258; Parker *v.* Roberts, 116 Mo. 657, 22 S. W. 914; Garretson *v.* Kane, 27 N. J. L. 208.

55. See FRAUDULENT CONVEYANCES.

56. As to parties defendant see *infra*, VII, G, 2.

57. Hoeft *v.* Kock, 119 Mich. 458, 78 N. W. 556; Brackett *v.* Griswold, 112 N. Y. 454, 20 N. E. 376; Chamberlin *v.* Prior, 1 Abb. Dec. (N. Y.) 338, 2 Keyes 539; Oehihof *v.* Solomon, 33 Misc. (N. Y.) 771, 67 N. Y. Suppl. 935 [*reversing* 32 Misc. 773, 66 N. Y. Suppl. 484] (holding that in an action against husband and wife for fraud in the sale of a business, a judgment against the wife was erroneous, although she was interested in the business, where she was not shown to have made any representations); Kelly *v.* Gould, 19 N. Y. Suppl. 349 [*affirmed* in 141 N. Y. 596, 36 N. E. 320]; Munro *v.* Gardner, 1 Mill (S. C.) 328 (holding that where a bill of exchange was drawn in this country and refused acceptance in England, and a list of bills in the handwriting of defendant was shown to plaintiff by the drawer (defendant's brother), and the bill belonging to plaintiff was marked as "paid," defendant not knowing who owned the bill, there was not such a privity between plaintiff and defendant as entitled plaintiff to an action). See also Slade *v.* Little, 20 Ga. 371; Bones *v.* Peters, 61 Iowa 751, 16 N. W. 294; Rawlings *v.* Bean, 80 Mo. 614.

58. Lee *v.* Lemert, 26 Kan. 111 (holding that where a father and son agreed that the father should apply for a loan upon property, and the son, who was without property and financially irresponsible, should borrow money and assure the lender that it was to be re-

between the person guilty and the person defrauded,[59] and it is not necessary to show that defendant had any interest in the transaction induced by the fraud, or that he received any benefit therefrom.[60] Thus a third person, as well as a vendor, may be held liable for fraudulent misrepresentations inducing a sale of property.[61] Indeed, where the misrepresentations are made by an apparently disinterested third person, he is held to even a stricter liability than the vendor, and is not excused for commendatory and exaggerated false statements as to the value and quality of the property.[62]

B. Authorization or Adoption of Another's Fraud — 1. In General. If a person authorizes or causes a fraudulent misrepresentation to be made by another, he becomes liable for its consequences as though he made it himself.[63] So upon the general principles of the law of agency, a principal may be held liable in an action of deceit for fraud committed by his agent when the latter is acting within the scope of his authority;[64] and an agent[65] or a factor or broker[66] is of course liable for his own frauds.

paid from the loan to be obtained by the father, and the father should then refuse to complete the transaction, the father, as well as the son, was liable for the money obtained); Burnham *v.* Lutz, 8 Kan. App. 361, 55 Pac. 519; Patten *v.* Gurney, 17 Mass. 182, 9 Am. Dec. 141. See also *infra*, VII, G, 2. And see Conspiracy, 8 Cyc. 648.

59. *Illinois.*— Bauman *v.* Bowles, 51 Ill. 380; Weatherford *v.* Fishback, 4 Ill. 170.

Massachusetts.— See Brown *v.* Castles, 11 Cush. 348.

Michigan.— Ovid First Nat. Bank *v.* Steele, (1904) 99 N. W. 786, holding that under a statute giving an action in assumpsit in cases in which an action of trespass on the case for deceit may have been formerly brought, it was sufficient that it be shown that the false representations of defendant were made for the purpose of inducing a contract, and did induce it, although defendant took no part in the actual making thereof.

New York.— Chester *v.* Dickerson, 52 Barb. 349, holding that a person guilty of producing deceptive appearances in lands by pouring petroleum thereon is liable to whosoever suffers by the fraud, no matter whether there is any privity between the person perpetrating the fraud and the person receiving the damage by reason of it.

England.— Gerhard *v.* Bates, 1 C. L. R. 868, 2 E. & B. 476, 17 Jur. 1097, 22 L. J. Q. B. 364, 1 Wkly. Rep. 383, 75 E. C. L. 476; Langridge *v.* Levy, 6 L. J. Exch. 137, 2 M. & W. 519; Pasley *v.* Freeman, 3 T. R. 51, 1 Rev. Rep. 634.

See 22 Cent. Dig. tit. "Fraud," § 9.

This principle is illustrated in cases involving representations as to the credit or financial responsibility of a third person. See *supra*, IV, D, 2.

60. Leonard *v.* Springer, 197 Ill. 532, 64 N. E. 299 [*reversing* 98 Ill. App. 530]; Hubbard *v.* Briggs, 31 N. Y. 518; Haight *v.* Hayt, 19 N. Y. 464. See *supra*, III, B, 9.

61. Baum *v.* Holton, 4 Colo. App. 406, 36 Pac. 154; McGibbons *v.* Wilder, 78 Iowa 531, 43 N. W. 520; Medbury *v.* Watson, 6 Metc. (Mass.) 246, 39 Am. Dec. 726. See Springer *v.* Crowell, 103 Mass. 65. See also *supra*, IV, D, 2.

As to liability of an agent see Principal and Agent. See also Factors and Brokers.

62. *Illinois.*— Kenner *v.* Harding, 85 Ill. 264, 28 Am. Rep. 615.

Massachusetts.— Medbury *v.* Watson, 6 Metc. 246, 39 Am. Dec. 726.

Minnesota.— Busterud *v.* Farrington, 36 Minn. 320, 31 N. W. 360.

Missouri.—See Brownlee *v.* Hewitt, 1 Mo. App. 360.

Vermont.— See Adams *v.* Saule, 33 Vt. 538.

United States.— Sigafus *v.* Porter, 84 Fed. 430, 28 C. C. A. 443 [*reversed* on other grounds in 179 U. S. 116, 21 S. Ct. 34, 45 L. ed. 113], holding that one making false representations to induce the purchase of property is equally liable therefor whether he owns the property or not, and whether the representations are made directly to the purchaser or to one acting in his interest, and who reports them to him.

63. Maggart *v.* Freeman, 27 Ind. 531; Ludworth *v.* Morton, (Mich. 1904) 100 N. W. 769; Brackett *v.* Griswold, 112 N. Y. 454, 20 N. E. 376; Ashner *v.* Abenheim, 19 Misc. (N. Y.) 282, 43 N. Y. Suppl. 69 (holding that a party to a contract, who refers the other party to a third person for information about a matter which is inserted in the contract, is liable for such person's fraud in giving false information); Chisolm *v.* Gadsden, 1 Strobh. (S. C.) 220, 47 Am. Dec. 550. See also Stony Creek Woolen Co. *v.* Smalley, 111 Mich. 321, 69 N. W. 722.

64. Indianapolis, etc., R. Co. *v.* Tyng, 63 N. Y. 653 [*affirming* 3 Hun 311]; Griswold *v.* Gebbie, 126 Pa. St. 353, 17 Atl. 673, 12 Am. St. Rep. 878 [*affirming* 6 Pa. Co. Ct. 212]. See Principal and Agent.

Ratification by receiving fruits of the fraud. — And where the principal has received the fruits of the transaction which was brought about by the agent's fraud, he is liable, although he did not authorize the statement or know that it was made. Craig *v.* Ward, 1 Abb. Dec. (N. Y.) 454, 2 Keyes 287, 2 Transcr. App. 281, 3 Abb. Pr. N. S. 235 [*affirming* 36 Barb. 377]. See Principal and Agent.

65. See Principal and Agent.

66. See Factors and Brokers.

2. By Silence and Acquiescence. The mere silence of a party in interest may constitute such acquiescence in another's fraudulent misrepresentation [67] or concealment [68] as to render him liable as though he himself were the author of the fraud.

C. Public Officers.[69] Where a public officer enters into a fraudulent scheme, he will not be protected by his official character from liability for the resulting damages.[70] An action of deceit will lie against a public officer for fraudulent misrepresentations made by him as of his personal knowledge concerning the title of another's property which is being sold by him;[71] but his liability is confined to misrepresentations of matters which are clearly susceptible of personal knowledge on his part.[72]

VII. The Remedy and Its Incidents.

A. Nature and Origin of Action. The cause of action arising from deceit is a part of the common law.[73] The remedy is in its nature an action on the case [74] and is founded on the ancient writ of deceit.[75]

B. Theory and Scope of Action. An action of deceit to recover damages for fraud inducing the making of a contract is not based upon the contract but upon the tort.[76] The action proceeds upon the theory of an affirmance of the

67. Foster *v.* Frenary, 65 Iowa 620, 22 N. W. 898; Case *v.* Edney, 26 N. C. 93.

Sale by auctioneer.— Where the owner of property employs an auctioneer to sell it and stands by and hears the auctioneer make false statements concerning the property without correcting him, he thereby adopts and ratifies the auctioneer's statement and becomes liable as for a positive misrepresentation. Dayton *v.* Kidder, 105 Ill. App. 107; Case *v.* Edney, 26 N. C. 93.

Sale by partners or joint owners.— Where one of two partners or joint owners of personal property stands by and remains silent while the other sells the property belonging to them and makes false representations concerning it, which induces the sale, he becomes as much a party to the representations as if he himself made them and is equally liable. Johnson *v.* Wallower, 15 Minn. 472; O'Leary *v.* Tillinghast, 22 R. I. 161, 46 Atl. 754.

68. Case *v.* Edney, 26 N. C. 93.

Sale by trustee for benefit of creditors.— Where one has conveyed property to a trustee to be sold for the benefit of creditors, who have neither released their claim on him nor assented to the deed, he has such an interest in the sale of the property that if, at the trustee's sale, he stands by and sees property sold in which he knows there is a latent defect, and does not disclose it, he makes himself liable to the purchaser in an action for deceit. Case *v.* Edney, 26 N. C. 93.

As to fraudulent concealment in sales see *supra*, IV, B, 1, b; IV, B, 2, a.

69. See also Officers.

70. Culver *v.* Avery, 7 Wend. (N. Y.) 380, 22 Am. Dec. 586; Whitbeck *v.* Sees, 10 S. D. 417, 73 N. W. 915, holding that a treasurer of a school-district who indorsed an illegal school warrant with a statement that it had been presented and refused because of lack of funds, and officially certified that it would be paid as soon as funds were at hand, was liable to an innocent purchaser induced by such certification to pay a valuable consideration for the warrant.

71. Culver *v.* Avery, 7 Wend. (N. Y.) 380, 22 Am. Dec. 586.

72. Tucker *v.* White, 125 Mass. 344, holding that even positive representations by an officer at an execution sale that there were no encumbrances on the property must be considered merely as a strong expression of belief, and not as a statement of fact to be relied on.

73. Pollock Torts 273.

74. See Kujek *v.* Goldman, 150 N. Y. 176, 44 N. E. 773, 55 Am. St. Rep. 670, 34 L. R. A. 156; Bartholomew *v.* Beatley, 15 Ohio 659, 45 Am. Dec. 596; Cole *v.* High, 173 Pa. St. 590, 34 Atl. 292; Euer System Pl. 44; Pollock Torts 273. See also Case, Action on, 6 Cyc. 689.

In the "code states" the action is regarded as being of the same nature as at common law. See Benjamin *v.* Mattler, 3 Colo. App. 227, 39 Pac. 837; Kujek *v.* Goldman, 150 N. Y. 176, 44 N. E. 773, 55 Am. St. Rep. 670, 34 L. R. A. 156; Ross *v.* Mather, 51 N. Y. 108, 10 Am. Rep. 562 [*reversing* 47 Barb. 582]; Coyle *v.* Nies, 6 N. Y. St. 194.

Mich. Comp. Laws, § 10421, provides that in all cases where an action on the case for fraud and deceit may be brought a recovery may be had in an action of assumpsit upon an implied promise to pay the damages resulting from the fraud. This statute does not, however, create any new right and does not give a cause of action before damage has resulted. *In re* Pennewell, 119 Fed. 139, 55 C. C. A. 571.

75. Pollock Torts 273. See also Euer System Pl. 44.

History of the action see Bigelow Lead. Cas. Torts 16–20 notes.

76. *Arkansas.*— Hutchinson *v.* Gorman, 71 Ark. 305, 73 S. W. 793.

Florida.— Grady *v.* Jeffares, 25 Fla. 743, 6 So. 828.

Indiana.— Union Cent. L. Ins. Co. *v.* Schidler, 130 Ind. 214, 29 N. E. 1071, 15 L. R. A. 89.

contract alleged to have been fraudulently procured.[77] While the ancient writ of deceit had a narrower scope than the action on the case[78] the latter gained in practice a wider scope than it now has, and was used to enforce liabilities which are now enforceable on different theories and in different forms of action.[79] A person fraudulently misrepresenting that he has authority to act for another may be held liable in an action of deceit by the person dealing with him on the faith of his representation;[80] but according to the modern authorities the liability in such a case may be founded upon a warranty.[81]

C. Election of Remedies.[82] A person who has been fraudulently induced to enter into a contract has the choice of several remedies. He may repudiate the contract and tendering back what he has received under it may recover what he has parted with or its value; or he may affirm the contract, keeping whatever property or advantage he has derived under it and may recover in an action of deceit the damages caused by the fraud. While his affirmance may preclude him from rescinding the contract it does not prevent his maintaining an action of deceit.[83] Moreover if sued upon the contract he may set up the fraud as a

Maryland.— Weaver *v.* Schriver, 79 Md. 530, 30 Atl. 189.

Michigan.— Carter *v.* Glass, 44 Mich. 154, 6 N. W. 200, 38 Am. Rep. 240.

New Hampshire.— Mahurin *v.* Harding, 28 N. H. 128, 59 Am. Dec. 401.

New York.— Barney *v.* Dewey, 13 Johns. 224, 7 Am. Dec. 372.

Pennsylvania.— Hastings *v.* McGee, 66 Pa. St. 384.

77. *Arkansas.*— Hutchinson *v.* Gorman, 71 Ark. 305, 73 S. W. 793.

Massachusetts.— Andrews *v.* Jackson, 168 Mass. 266, 47 N. E. 412, 60 Am. St. Rep. 390, 37 L. R. A. 402.

Missouri.— Leicher *v.* Keeney, 98 Mo. App. 394, 72 S. W. 145.

New York.— Gould *v.* Cayuga County Nat. Bank, 99 N. Y. 333, 2 N. E. 16.

North Dakota.— Chilson *v.* Houston, 9 N. D. 498, 84 N. W. 354.

Pennsylvania.— Hastings *v.* McGee, 66 Pa. St. 384.

Virginia.— Wilson *v.* Hundley, 96 Va. 96, 30 S. E. 492, 70 Am. St. Rep. 837. And see University of Va. *v.* Snyder, 100 Va. 567, 42 S. E. 337.

Wisconsin.— Blewitt *v.* McRae, 100 Wis. 153, 75 N. W. 1003.

An action of deceit affirms and ratifies the contract alleged to have been fraudulently procured. McCready *v.* Phillips, 56 Nebr. 446, 76 N. W. 885; Gould *v.* Cayuga County Nat. Bank, 99 N. Y. 333, 2 N. E. 16; Heastings *v.* McGee, 66 Pa. St. 384.

And defendant may set off against the damages awarded plaintiff any sums that are due defendant under the contract. McCready *v.* Phillips, 56 Nebr. 446, 76 N. W. 885. See RECOUPMENT, SET-OFF, AND COUNTER-CLAIM.

78. Pollock Torts 273.

79. Thus before a warranty was recognized as being contractual in its nature, the action of deceit was the proper and indeed the only remedy to recover damages for a false warranty in a sale, which are now recoverable in an action of assumpsit.

Kentucky.— Massie *v.* Crawford, 3 T. B. Mon. 218.

New Hampshire.— Crooker *v.* Willard, 28 N. H. 134 note; Mahurin *v.* Harding, 28 N. H. 128, 59 Am. Dec. 401.

New York.— Fowler *v.* Abrams, 3 E. D. Smith 1, reviewing early decisions.

United States.— Schuchardt *v.* Allens, 1 Wall. 359, 368, 17 L. ed. 642, per Swayne, J.

England.— Williamson *v.* Allison, 2 East 446; 1 Comyn Dig. 345, 350 *et seq.*; Pollock Torts 283, 284.

See also the remarks of Holmes, J., in Nash *v.* Minnesota Title Ins., etc., Co., 163 Mass. 574, 40 N. E. 1039, 47 Am. St. Rep. 489, 28 L. R. A. 753. And see, generally, SALES.

80. Teele *v.* Otis, 66 Me. 329; Polhill *v.* Walter, 3 B. & Ad. 114, 23 E. C. L. 59. See PRINCIPAL AND AGENT.

81. The theory being that a person assuming to act on behalf of another thereby warrants his authority. See PRINCIPAL AND AGENT.

82. **Election of remedies** generally see ELECTION OF REMEDIES, 15 Cyc. 251 *et seq.*

83. *Arkansas.*— Matlock *v.* Reppy, 47 Ark. 148, 14 S. W. 546.

California.— Westerfield *v.* New York L. Ins. Co., 129 Cal. 68, 58 Pac. 92, 61 Pac. 667.

Colorado.— Vivian *v.* Allen, 9 Colo. App. 147, 47 Pac. 844.

Connecticut.— Wilson *v.* Nichols, 72 Conn. 173, 43 Atl. 1052.

Illinois.— Peck *v.* Brewer, 48 Ill. 54.

Indiana.— Dorsey Mach. Co. *v.* McCaffrey, 139 Ind. 545, 38 N. E. 208, 47 Am. St. Rep. 290; Union Cent. L. Ins. Co. *v.* Schidler, 130 Ind. 214, 29 N. E. 1071, 45 L. R. A. 89; Wabash Valley Protective Union *v.* James, 8 Ind. App. 449, 35 N. E. 919.

Iowa.— Teachout *v.* Van Hoesen, 76 Iowa 113, 40 N. W. 96, 14 Am. St. Rep. 206, 1 L. R. A. 664.

Kansas.— Hargadine-McKittrick Dry-Goods Co. *v.* Swofford Bros. Dry-Goods Co., 10 Kan. App. 198, 63 Pac. 281.

Kentucky.— Bacon *v.* Brown, 4 Bibb 91.

Maryland.— Weaver *v.* Schriver, 79 Md. 530, 30 Atl. 189; Applegarth *v.* Robertson, 65 Md. 493, 4 Atl. 896; Groff *v.* Hansel, 33 Md. 161.

defense,[84] or as a basis of a claim for damages by way of recoupment or counterclaim.[85] And in a proper case the defrauded party may be entitled to the equitable remedies of rescission and cancellation[86] or reformation.[87] As a general rule, however, the defrauded party cannot both rescind and maintain an action of deceit. If he elects to rescind the contract he may recover what he has parted with under it but cannot recover damages for the fraud.[88] The latter rule as applied to a perfected rescission of the contract is based not alone upon the principle that the party has elected his remedy, but also on the fact that he has

Michigan.— Hinchman *v.* Weeks, 85 Mich. 535, 48 N. W. 790; Gilchrist *v.* Manning, 54 Mich. 210, 19 N. W. 959; Jewett *v.* Petit, 4 Mich. 508.

Minnesota.— Mlnazek *v.* Libera, 82 Minn. 288, 86 N. W. 100; Haven *v.* Neal, 43 Minn. 315, 45 N. W. 612.

Missouri.— Nauman *v.* Oberle, 90 Mo. 666, 3 S. W. 380; Parker *v.* Marquis, 64 Mo. 38. But see Estes *v.* Reynolds, 75 Mo. 563, in which the court applied the principles applicable to an action based on rescission.

Nebraska.— Barr *v.* Kimball, 43 Nebr. 766, 62 N. W. 196. See also Edney *v.* Baum, (Nebr. 1903) 97 N. W. 252.

New York.— Pryor *v.* Foster, 130 N. Y. 171, 29 N. E. 123; Gould *v.* Cayuga County Nat. Bank, 99 N. Y. 333, 2 N. E. 16; Miller *v.* Barber, 66 N. Y. 558; Thorne *v.* Helmer, 4 Abb. Dec. 408, 2 Keyes 27; Ely *v.* Mumford, 47 Barb. 629; Griffing *v.* Diller, 21 N. Y. Suppl. 407; Whitney *v.* Allaire, 4 Den. 554 [*affirmed* in 1 N. Y. 305]; Allaire *v.* Whitney, 1 Hill 484. *Compare* Zinn *v.* Ritterman, 2 Abb. Pr. N. S. 261. But see Quintard *v.* Newton, 5 Rob. 72.

North Carolina.— Peebles *v.* Patapsco Guano Co., 7 N. C. 233, 24 Am. Rep. 447.

Pennsylvania.— Hastings *v.* McGee, 66 Pa. St. 384.

Texas.— Guinn *v.* Ames, (Civ. App. 1904) 83 S. W. 232.

Vermont.— Mallory *v.* Leach, 35 Vt. 156, 82 Am. Dec. 625.

Virginia.— Wilson *v.* Hundley, 96 Va. 96, 30 S. E. 492, 70 Am. St. Rep. 837.

United States.— Simon *v.* Goodyear Metallic Rubber Shoe Co., 105 Fed. 573, 44 C. C. A. 612, 52 L. R. A. 745; Kingman *v.* Stoddard, 85 Fed. 740, 29 C. C. A. 413; Wilson *v.* New U. S. Cattle-Ranch Co., 73 Fed. 994, 20 C. C. A. 241; South Covington, etc., R. Co. *v.* Gest, 34 Fed. 628.

England.— Houldsworth *v.* Glasgow Bank, 5 App. Cas. 317, 42 L. T. Rep. N. S. 194, 28 Wkly. Rep. 677 (per Cairns, L. C.); Clarke *v.* Dickson, E. B. & E. 148, 27 L. J. Q. B. 223, 96 E. C. L. 148.

See 23 Cent. Dig. tit. "Fraud," §§ 27–31.

See also *infra*, VII, D, 2. And see CONTRACTS, 9 Cyc. 433 *et seq.*

Compare Dean *v.* Yates, 22 Ohio St. 388.

Thus where the defrauded party cannot rescind, and so cannot sue to recover back what he has parted with, he still has his remedy in an action of deceit. Hord *v.* Chandler, 13 B. Mon. (Ky.) 403; Gould *v.* Cayuga County Nat. Bank, 99 N. Y. 333, 2 N. E. 16; Clarke *v.* Dickson, E. B. & E. 148, 27 L. J. Q. B. 223, 96 E. C. L. 148.

Action by shareholder against corporation or joint stock company.— A distinction between contracts relating to goods and chattels and contracts of subscription to shares of stock has been pointed out; and it has been held that one who has been induced to subscribe for or purchase shares of stock by the fraud of the company's agent cannot maintain an action of deceit against the company as long as he remains a shareholder or member, and that if he does not or cannot rescind his contract his remedy is confined to an action against the agent who perpetrated the fraud. Wilson *v.* Hundley, 96 Va. 96, 30 S. E. 492, 70 Am. St. Rep. 837; Houldsworth *v.* Glasgow Bank, 5 App. Cas. 317, 42 L. T. Rep. N. S. 194, 28 Wkly. Rep. 677. See also *In re* Addlestone Linoleum Co., 37 Ch. D. 191, 57 L. J. Ch. 249, 58 L. T. Rep. N. S. 428, 36 Wkly. Rep. 227. See CORPORATIONS, 10 Cyc. 437 *et seq.*, 1218 *et seq.*

84. See CONTRACTS, 9 Cyc. 433; SPECIFIC PERFORMANCE.

85. Peck *v.* Brewer, 48 Ill. 54. See RECOUPMENT, SET-OFF, and COUNTER-CLAIM.

86. See CANCELLATION OF INSTRUMENTS, 6 Cyc. 286; CONTRACTS, 9 Cyc. 433.

87. See REFORMATION OF INSTRUMENTS.

88. *California.*— Westerfeld *v.* New York L. Ins. Co., 129 Cal. 68, 58 Pac. 92, 61 Pac. 667.

Colorado.— Moynahan *v.* Prentiss, 10 Colo. App. 295, 51 Pac. 94.

New York.— Roome *v.* Jennings, 2 Misc. 257, 21 N. Y. Suppl. 938.

North Carolina.— Fagan *v.* Newson, 12 N. C. 20.

United States.— Wilson *v.* New U. S. Cattle-Ranch Co., 73 Fed. 994, 20 C. C. A. 241.

See 23 Cent. Dig. tit. "Fraud," §§ 27–31.

Compare Dean *v.* Yates, 22 Ohio St. 388.

One who has been induced by fraud to purchase property may affirm the contract and sue for its breach by the vendor, and at the same time recover the damages resulting fram the fraud, but he cannot recover for the breach and for the fraud and at the same time recover back the consideration which he paid. Wilson *v.* New U. S. Cattle-Ranch Co., 73 Fed. 994, 20 C. C. A. 241.

On the other hand the fact that one who has been induced to sell land by false representations asks that a note given in part payment be canceled as a part of the recovery of damages does not amount to an attempt to rescind. Barbour *v.* Flick, 126 Cal. 628, 59 Pac. 122.

And the mere filing of a complaint for rescission does not preclude a subsequent action

sustained no damage.[89] Where the contract induced by the fraud contains provisions covering the subject-matter of the false representations, the defrauded party has an election to sue on the contract or to sue for the tort; the fact that he has a remedy on the contract being no impediment to his maintaining an action of deceit, as the tort is not merged in the contract.[90] Thus as a general rule an action of deceit may be maintained by a purchaser of real or personal property against his vendor for fraudulent misrepresentations as to title or as to other material facts relating to the property, notwithstanding that the conveyance is by deed or bill of sale containing covenants or warranties which cover the subject-matter of the representations.[91] Conversely, an action of deceit lies, although

for deceit. Nysewander *v.* Lowman, 124 Ind. 584, 24 N. E. 355.

89. Whiteside *v.* Brawley, 152 Mass. 133, 24 N. E. 1088; Roome *v.* Jennings, 2 Misc. (N. Y.) 257, 21 N. Y. Suppl. 938; Fagan *v.* Newson, 12 N. C. 20. See also Faris *v.* Lewis, 2 B. Mon. (Ky.) 375.

If, however, a perfected rescission does not place the injured party in statu quo, as where he has suffered damage which the rescission and the remedies based thereon cannot repair, there is no principle of law which prevents him from thereafter maintaining an action of deceit, and in such cases a recovery has uniformly been allowed. Faris *v.* Lewis, 2 B. Mon. (Ky.) 375; Lenox *v.* Fuller, 39 Mich. 268; Warren *v.* Cole, 15 Mich. 265; 1 Bigelow Fraud 67.

Replevin for goods sold.— An action for deceit in the making of false representations inducing plaintiff to sell goods to defendant has been held not necessarily inconsistent with a previous action of replevin to recover the goods. Lenox *v.* Fuller, 39 Mich. 268; Welch *v.* Seligman, 72 Hun (N. Y.) 138, 25 N. Y. Suppl. 363. See also Dean *v.* Yates, 22 Ohio St. 388.

90. *Colorado.*—Benjamin *v.* Mattler, 3 Colo. App. 227, 32 Pac. 837.

Connecticut.— Ives *v.* Carter, 24 Conn. 392; Bull *v.* Pratt, 1 Conn. 342.

Delaware.— Tyre *v.* Causey, 4 Harr. 425.

Georgia.— Corbett *v.* Gilbert, 24 Ga. 454; Manes *v.* Kenyon, 18 Ga. 291.

Illinois.— Williams *v.* Wilson, 101 Ill. App. 541.

Iowa.— Mentzer *v.* Sargeant, 115 Iowa 527, 88 N. W. 1068; Bondurant *v.* Crawford, 22 Iowa 40.

Kentucky.— Cravins *v.* Gant, 4 T. B. Mon. 126; Cravens *v.* Gant, 2 T. B. Mon. 117, both holding that an action of deceit will lie for false representations inducing a purchase of chattels, although the subject-matter of the representations is covered by a warranty.

Minnesota.— Hedin *v.* Minneapolis Medical, etc., Inst., 62 Minn. 146, 64 N. W. 158, 54 Am. St. Rep. 628, 35 L. R. A. 417.

Nebraska.— Hitchcock *v.* Gothenburg Water Power, etc., Co., (1903) 95 N. W. 638.

New Mexico.— Daly *v.* Bernstein, 6 N. M. 380, 28 Pac. 764.

New York.— Salisbury *v.* Howe, 87 N. Y. 128; Culver *v.* Avery, 7 Wend. 380, 22 Am. Dec. 586.

Pennsylvania.— Cole *v.* High, 173 Pa. St. 590, 34 Atl. 292.

Vermont.— Childs *v.* Merrill, 63 Vt. 463, 22 Atl. 626, 14 L. R. A. 264.

United States.— Wilson *v.* New U. S. Cattle-Ranch Co., 73 Fed. 994, 20 C. C. A. 241.

England.— Wallace *v.* Jarman, 2 Stark. 162, 3 E. C. L. 360. But *compare* Pickering *v.* Dowson, 4 Taunt. 779.

See 23 Cent. Dig. tit. "Fraud," § 28.

Stipulation to make good the loss.— A stipulation made by defendant in connection with the contract that if the facts do not turn out as represented he will make good the loss does not preclude plaintiff from maintaining his action of deceit. Ives *v.* Carter, 24 Conn. 392; Wallace *v.* Jarman, 2 Stark. 162, 3 E. C. L. 360.

Fraud inducing discharge of note.— A special action on the case may be sustained against a debtor for fraudulently representing himself insolvent, and thereby inducing his creditor to discharge a promissory note for less than its value, notwithstanding that assumpsit on the note might also lie. Edwards *v.* Owen, 15 Ohio 500.

91. *Connecticut.*—Bostwick *v.* Lewis, 1 Day 250, 2 Am. Dec. 73, sale of land — misrepresentations as to title.

Florida.— Grady *v.* Jeffares, 25 Fla. 743, 6 So. 828 [*distinguishing* Sanford *v.* Cloud, 17 Fla. 532], purchase of land induced by misrepresentations as to title.

Georgia.— Manes *v.* Kenyon, 18 Ga. 291, sale of a slave with warranty of soundness.

Kentucky.— Cravins *v.* Gant, 4 T. B. Mon. 126; Cravens *v.* Gant, 2 T. B. Mon. 117, both of which involved sales of personal property with warranty.

Massachusetts.— Burns *v.* Dockray, 156 Mass. 135, 30 N. E. 551, misrepresentations as to title.

Michigan.— See Merrill *v.* Newton, 109 Mich. 249, 67 N. W. 120.

New York.— Ward *v.* Wiman, 17 Wend. 193 (misrepresentations as to encumbrances); Wardell *v.* Fosdick, 13 Johns. 325, 7 Am. Dec. 383 (sale of land having no real existence). See also Culver *v.* Avery, 7 Wend. 380, 22 Am. Dec. 586.

Tennessee.— Gwinther *v.* Gerding, 3 Head 197, misrepresentations as to title and encumbrances in sale of land.

United States.— Wilson *v.* New U. S. Cattle-Ranch Co., 73 Fed. 994, 20 C. C. A. 241.

See 23 Cent. Dig. tit. "Fraud," § 28.

Contra.— Peabody *v.* Phelps, 9 Cal. 213, which holds that an action for a false and

the false representations were not embodied in, or their subject-matter covered by, the writing containing all the terms of the contract.[92] Since the defrauded party to the contract has the right to affirm it, retain its benefits, and also recover damages for the fraud,[93] he may sue to enforce his rights under the contract and at the same time maintain an action of deceit.[94] Where a person by the practice of fraud obtains money from another under such circumstances that he has no right to retain it, the defrauded party may waive the tort and recover the money in an action for money had and received, upon the theory of an implied promise to repay it.[95]

D. When Right of Action Accrues — Conditions Precedent[96] **— 1. In General.** Aside from matters involving the statute of limitations,[97] a cause of action in deceit accrues immediately upon the successful consummation of the fraud,[98] provided that the fraud results in injury to plaintiff.[99] Thus a person

fraudulent representation as to the naked facts of title in the vendor of real estate cannot be maintained by the purchaser who has taken possession of the premises sold under a conveyance with express covenants. Peabody *v.* Phelps, *supra*, was questioned in Wright *v.* Carillo, 22 Cal. 595, where it was considered to be in conflict with Alvarez *v.* Brannan, 7 Cal. 503, 68 Am. Dec. 274.

Doctrine of U. S. supreme court.— In Andrus *v.* St. Louis Smelting, etc., Co., 130 U. S. 643, 9 S. Ct. 645, 32 L. ed. 1054, it was held that while false representations inducing the sale of real property is a ground for an action for deceit when the representations relate to some matter collateral to the title and the right of possession, such as the location, quantity, quality, etc., of the land, and while such representations by the vendor as to his having title may also be a ground of action for deceit if the vendor is not in possession and has neither title nor color of title under any instrument purporting to convey the premises; yet if the vendor holding in good faith and under color of title executes a conveyance to a purchaser with a warranty of title and a covenant for peaceable possession, his previous representations as to the validity of the title or the right of possession conferred by it are merged in the covenants and do not constitute a cause of action in deceit. It is to be observed that the opinions in Peabody *v.* Phelps, 9 Cal. 213 (set out above in this note), and in Andrus *v.* St. Louis Smelting, etc., Co., *supra*, were written by Mr. Justice Field. A distinction similar to that taken in Andrus *v.* St. Louis Smelting, etc., Co., *supra*, was suggested in Gwinther *v.* Gerding, 3 Head (Tenn.) 197, but was expressly repudiated.

92. *Illinois.*— Phelan *v.* Kuhn, 51 Ill. App. 644.

Iowa.— Stanhope *v.* Swafford, 80 Iowa 45, 45 N. W. 403.

Massachusetts.— Nowlan *v.* Cain, 3 Allen 261.

New Hampshire.— Coon *v.* Atwell, 46 N. H. 510, sale of land subject of the representations not covered by the deed.

New York.— Monell *v.* Colden, 13 Johns. 395, 7 Am. Dec. 390, sale of land — subject of the reperesentations not covered by the deed.

Virginia.— See Waddill *v.* Chamberlayne, Jeff. 10, sale of slave without warranty.

England.— Dobell *v.* Stevens, 3 B. & C. 623, 5 D. & R. 490, 3 L. J. K. B. O. S. 89, 10 E. C. L. 283. But *compare* Pickering *v.* Dowson, 4 Taunt. 779.

See 23 Cent. Dig. tit. "Fraud," § 31.

Omission as affecting materiality.— But the omission of the subject-matter of the representation from the written contract is sometimes considered as an indication that the representation was not deemed material. See *supra*, IV, A.

93. See *supra*, page 87.

94. Union Cent. L. Ins. Co. *v.* Schidler, 130 Ind. 214, 29 N. E. 1071, 15 L. R. A. 89 (holding that one who has been fraudulently induced to lend money on a mortgage may foreclose the mortgage and sue for damages for the fraud); Wilson *v.* New U. S. Cattle-Ranch Co., 73 Fed. 994, 20 C. C. A. 241. See also Brumbach *v.* Fowler, 20 Ill. App. 219; Cullen *v.* Hernz, 13 N. Y. St. 333.

Whether a recovery in one action will bar a recovery in the other see Judgments.

95. Ingalls *v.* Miller, 121 Ind. 188, 22 N. E. 995; People *v.* Wood, 121 N. Y. 522, 24 N. E. 952; Rothschild *v.* Mack, 115 N. Y. 1, 21 N. E. 726. See also National Shoe, etc., Bank *v.* Baker, 148 N. Y. 581, 42 N. E. 1077; and, generally, Money Received; Payment.

96. See also Actions, 1 Cyc. 739 *et seq.*

97. See Limitations of Actions.

98. Union Cent. L. Ins. Co. *v.* Schidler, 130 Ind. 214, 29 N. E. 1071, 15 L. R. A. 89; Briggs *v.* Baushaber, 43 Mich. 330, 5 N. W. 383, 38 Am. St. Rep. 187; Lallund *v.* Johnson, 27 Minn. 455, 8 N. W. 271; Thomas *v.* Dickinson, 67 Hun (N. Y.) 350, 22 N. Y. Suppl. 260.

Not required to wait until eviction.—Where plaintiff was induced to purchase defendant's business by false representations that defendant's landlord would consent to an assignment of the lease to plaintiff, which the landlord refused to do, plaintiff thus being obliged to vacate the premises, it was held that plaintiff was not required to wait until evicted by legal proceedings before suing defendant for fraud, plaintiff having no defense to such proceedings. Oehlof *v.* Solomon, 76 N. Y. Suppl. 716.

99. See *supra*, III, B, 8.

who has been induced by fraud to lend money on inadequate security, the fraud consisting of misrepresentations relating to the value of the security offered, is damaged as soon as the loan is made and may bring his action at once without waiting to foreclose.[1] Likewise one who is induced to sell goods on credit to another by the latter's false representations as to his solvency sustains at least nominal damages by parting with his property, and therefore may maintain an action of deceit without waiting for the maturity of the note for the purchase-money;[2] and while he must tender back the note or surrender it into court,[3] he is entitled to judgment upon doing so.[4] A demand before action has been held unnecessary, the cause of action being complete when the fraud results in damage.[5]

2. Restitution Unnecessary. As indicated above,[6] a return or an offer to return what plaintiff has received under the contract induced by the fraud is not a condition precedent to his maintaining an action of deceit, since he is entitled to the benefit of his contract plus the damages caused by the fraud.[7]

1. Briggs *v.* Brushaber, 43 Mich. 330, 5 N. W. 383, 38 Am. Rep. 187. See also Union Cent. Ins. Co. *v.* Schidler, 130 Ind. 214, 29 N. E. 1071, 15 L. R. A. 89.

2. Thomas *v.* Dickinson, 67 Hun (N. Y.) 350, 22 N. Y. Suppl. 260 [*explaining* decision on former appeal in 65 Hun 5, 19 N. Y. Suppl. 600]. See also Cain *v.* Dickenson, 60 N. H. 371.

3. The reason is that if the note should be transferred to a third person for value, plaintiff would not be damaged and defendant might be subjected to a double liability. Cain *v.* Dickenson, 60 N. H. 371; Thomas *v.* Dickinson, 65 Hun (N. Y.) 5, 19 N. Y. Suppl. 600. See also Kimmans *v.* Chandler, 13 Iowa 327. *Contra*, Dayton *v.* Monroe, 47 Mich. 193, 10 N. W. 196, the decision being based partly on the ground that it was necessary for plaintiff to retain the note as evidence.

4. Cain *v.* Dickinson, 60 N. H. 371; Thomas *v.* Dickinson, 67 Hun (N. Y.) 350, 22 N. Y. Suppl. 260. See also Hawkins *v.* Appleby, 2 Sandf. (N. Y.) 421.

5. Tollund *v.* Johnson, 27 Minn. 455, 8 N. W. 271, where plaintiff had been induced to purchase a worthless obligation of a third person whom defendant had falsely represented to be solvent, and it was held that no demand either of defendant or the third person was necessary.

6. See *supra*, VII, C.

7. *Arkansas.*— Binghamton Trust Co. *v.* Auten, 68 Ark. 299, 57 S. W. 1105, 82 Am. St. Rep. 295.

Connecticut.— Wilson *v.* Nichols, 72 Conn. 173, 43 Atl. 1052.

Florida.— See Williams *v.* McFadden, 23 Fla. 143, 1 So. 618, 11 Am. St. Rep. 345.

Georgia.— Cheney *v.* Powell, 88 Ga. 629, 15 S. E. 750.

Illinois.— Allin *v.* Millison, 72 Ill. 201; Brumbach *v.* Flower, 20 Ill. App. 219.

Indiana.— Union Cent. L. Ins. Co. *v.* Schidler, 130 Ind. 214, 29 N. E. 1071, 15 L. R. A. 89; Nysewander *v.* Lowman, 124 Ind. 584, 24 N. E. 355; Wabash Valley Protective Union *v.* James, 8 Ind. App. 449, 35 N. E. 919.

Iowa.— Campbell *v.* Park, (1904) 101 N. W. 861; Goring *v.* Fitzgerald, 105 Iowa 507, 75 N. W. 358; Clews *v.* Traer, 57 Iowa 459, 10 N. W. 838.

Kentucky.— Higgs *v.* Smith, 3 A. K. Marsh. 338; Bacon *v.* Brown, 4 Bibb 91.

Maine.— Sharp *v.* Ponce, 74 Me. 470.

Massachusetts.— Whiting *v.* Price, 172 Mass. 240, 51 N. E. 1084, 70 Am. St. Rep. 262.

Minnesota.— Mlnazek *v.* Libera, 83 Minn. 288, 86 N. W. 100; Haven *v.* Neal, 43 Minn. 315, 45 N. W. 612.

Mississippi.— Myers *v.* Estell, 47 Miss. 4.

Missouri.— Robinson *v.* Siple, 129 Mo. 208, 31 S. W. 788; Nauman *v.* Oberle, 90 Mo. 666, 3 S. W. 380; Edwards *v.* Noel, 88 Mo. App. 434; Miller *v.* Crigler, 83 Mo. App. 395; Shinnabarger *v.* Shelton, 41 Mo. App. 147. But see Estes *v.* Reynolds, 75 Mo. 563, in which the court applied the principles applicable to an action based on rescission.

New York.— Pryor *v.* Foster, 130 N. Y. 171, 29 N. E. 123; Gould *v.* Cayuga County Nat. Bank, 99 N. Y. 333, 2 N. E. 16; Krumm *v.* Beach, 96 N. Y. 398 [*affirming* 25 Hun 293]; Miller *v.* Barber, 66 N. Y. 558; Wessels *v.* Carr, 15 N. Y. App. Div. 360, 44 N. Y. Suppl. 114, 4 N. Y. Annot. Cas. 223 (principle applied to case of compromise which a creditor had been fraudulently induced to accept by his debtor); Albany Hardware, etc., Co. *v.* Day, 11 N. Y. App. Div. 230, 42 N. Y. Suppl. 971, 4 N. Y. Annot. Cas. 90; Ely *v.* Mumford, 47 Barb. 629; Willard *v.* Merritt, 45 Barb. 295; Newbery *v.* Garland, 31 Barb. 121; Mahoney *v.* O'Neill, 28 Misc. 437, 59 N. Y. Suppl. 378; Merrill *v.* Brunner, 4 N. Y. Suppl. 58; Whitney *v.* Allaire, 4 Den. 554 [*affirmed* in 1 N. Y. 305]. But see Quintard *v.* Newton, 5 Rob. 72.

Pennsylvania.— Hastings *v.* McGee, 66 Pa. St. 384.

Tennessee.— Conner *v.* Crunk, 2 Head 246.

Texas.— Guinn *v.* Ames, (Civ. App. 1904) 83 S. W. 232.

Vermont.— Childs *v.* Merrill, 63 Vt. 463, 22 Atl. 626, 14 L. R. A. 264; Kelly *v.* Pember, 35 Vt. 182; Mallory *v.* Leach, 35 Vt. 156, 82 Am. Dec. 625.

3. Performance of Contract Unnecessary. A party who has been induced by fraud to enter into a contract is not obliged to complete the performance of the contract in order to bring his action of deceit;[8] indeed by doing so he may waive his right of action.[9]

E. Waiver of Right of Action — 1. In General. Although an action of deceit based upon fraud in the procurement of a contract proceeds upon the theory of affirmance of the contract by the defrauded party,[10] an important distinction exists with respect to acts done in affirmance of the contract after discovery of the fraud. If the defrauded party acquires knowledge of the fraud while the contract remains executory, and thereafter does any acts in performance or affirmance of the contract, or exacts performance from the other party, he thereby condones the fraud and waives his right of action.[11] Under such circumstances a recovery would be largely if not entirely for self-inflicted injuries and the maxim, *Volenti non fit injuria*, applies.[12] Thus where a contract of sale has been induced by the fraud of the vendor, if the purchaser consummates the purchase after discovering the fraud he cannot thereafter maintain an action of deceit.[13] These principles are not in conflict with the doctrine that the party

Washington.— Pronger *v.* Old Nat. Bank, 20 Wash. 618, 56 Pac. 391.

Wisconsin.— Hurlbert *v.* T. D. Kellogg Lumber, etc., Co., 115 Wis. 225, 91 N. W. 673; Sell *v.* Mississippi River Logging Co., 88 Wis. 581, 60 N. W. 1065.

Canada.— Star Kidney Pad Co. *v.* Greenwood, 5 Ont. 28.

See 23 Cent. Dig. tit. "Fraud," § 29.

Recoupment in action to enforce contract.— The rule of the text applies where the fraud is to be set up by way of recoupment or reduction of damages. So where a purchaser of property, when sued for the purchase-price, sets up by way of recoupment or reduction of damages the fact that he was induced to make the purchase by plaintiff's fraudulent misrepresentations, it is not necessary that he should first tender back the articles purchased as in case of an action in pursuance of an attempted rescission. Sharp *v.* Ponce, 74 Me. 470.

8. Eames *v.* Morgan, 37 Ill. 260.

Payment need not be completed by a defrauded purchaser in order to entitle him to sue his vendor for fraud inducing the purchase. Grady *v.* Jeffares, 25 Fla. 743, 6 So. 828; Weaver *v.* Shriver, 79 Md. 530, 30 Atl. 189. But see Morrill *v.* Hovey, 59 N. H. 107, which held that in an action by a purchaser of land for deceit inducing the purchase, he could not have judgment upon his verdict for actual damages until he had fulfilled his agreement to pay off a mortgage on the land conveyed, he having agreed to assume and pay the mortgage as part of the purchase-money.

9. See *infra*, VII, E, 1.

10. See *supra*, VII, B.

11. *Alabama.*— Thweatt *v.* McLeod, 56 Ala. 375; Gilmer *v.* Ware, 19 Ala. 252. But *compare* McGar *v.* Williams, 26 Ala. 469, 62 Am. Dec. 739; Huckabee *v.* Albritton, 10 Ala. 657, both holding that such acts are merely circumstances to be considered by the jury in determining whether any fraud was committed, and cannot operate as an estoppel or as a waiver of an existing cause of action.

California.— Schmidt *v.* Mesmer, 116 Cal. 267, 48 Pac. 54; Nounnan *v.* Sutter County Land Co., 81 Cal. 1, 22 Pac. 515, 6 L. R. A. 219.

Indiana.— St. John *v.* Hendrickson, 84 Ind. 350; Doherty *v.* Bell, 55 Ind. 205.

Minnesota.— Thompson *v.* Libby, 36 Minn. 287, 31 N. W. 52.

New York.— People *v.* Stephens, 71 N. Y. 527 [*affirming* 51 How. Pr. 235]; Saratoga, etc., R. Co. *v.* Row, 24 Wend. 74, 35 Am. Dec. 598. *Compare* New York Land Imp. Co. *v.* Chapman, 118 N. Y. 288, 23 N. E. 187 [*reversing* 54 N. Y. Super. Ct. 297].

Texas.— Barber *v.* Morgan, (Civ. App. 1900) 76 S. W. 319.

United States.— Fitzpatrick *v.* Flannagan, 106 U. S. 648, 1 S. Ct. 369, 27 L. ed. 211; Simon *v.* Goodyear Metallic Rubber Shoe Co., 195 Fed. 573, 44 C. C. A. 612, 52 L. R. A. 745; Kingman *v.* Stoddard, 85 Fed. 740, 29 C. C. A. 413, which contains an exhaustive discussion on this point.

England.— Selway *v.* Fogg, 8 L. J. Exch. 199, 5 M. & W. 83.

See 23 Cent. Dig. tit. "Fraud," § 30.

But see Peck *v.* Brewer, 48 Ill. 54.

Expressions of opinion to the contrary are to be found in some of the cases (see Parker *v.* Marquis, 64 Mo. 38; Thorn *v.* Helmer, 4 Abb. Dec. (N. Y.) 408, 2 Keyes 27; Whitney *v.* Allaire, 4 Den. (N. Y.) 554 [*affirmed* in 1 N. Y. 305]; Mallory *v.* Leach, 35 Vt. 156, 82 Am. Dec. 625); but these cases are all distinguishable and the expressions of opinion mentioned may be considered *obiter dicta* (see Pryor *v.* Foster, 130 N. Y. 171, 29 N. E. 123; People *v.* Stephens, 71 N. Y. 527 [*affirming* 51 How. Pr. 235]; Kingman *v.* Stoddard, 85 Fed. 740, 29 C. C. A. 413.

12. Gilmer *v.* Ware, 19 Ala. 252; Thompson *v.* Libby, 36 Minn. 287, 31 N. W. 52; People *v.* Stephens, 71 N. Y. 527 [*affirming* 51 How. Pr. 235]; Fitzpatrick *v.* Flannagan, 106 U. S. 648, 1 S. Ct. 369, 27 L. ed. 211; Kingman *v.* Stoddard, 85 Fed. 740, 29 C. C. A. 413.

13. *Alabama.*— Gilmer *v.* Ware, 19 Ala. 252.

defrauded has his election to repudiate the contract or to affirm it and sue in deceit.[14] The question of waiver, however, is largely one of intent.[15] Hence acts done in affirmance of the contract can amount to a waiver of the fraud only where they are done with full knowledge of the fraud and of all material facts, and with the intention clearly manifested of abiding by the contract and waiving all right to recover for the deception.[16] Acts which, although in affirmance of the contract, do not indicate any intention to waive the fraud, cannot be held to operate as a waiver.[17] And the fact that plaintiff notifies defendant that the latter must make good his representations or be held responsible therefor is inconsistent with any such intent,[18] although it has been held that the party going on with the performance after knowledge of the fraud cannot save his right to sue for the fraud by giving notice that he will do so.[19] Payments made before discovery of the fraud cannot of course operate as a waiver,[20] but voluntary performance after discovery of the fraud precludes recovery for the loss caused by partial performance prior to such discovery,[21] unless the past performance is such that the party cannot safely discontinue or recede,[22] or further performance is necessary to determine positively whether fraud has been practised.[23] Where plaintiff has fully executed his part of the contract, acts thereafter done by him

Kansas.— Minnesota Thresher Mfg. Co. *v.* Gruben, 6 Kan. App. 665, 50 Pac. 67.

Minnesota.— Thompson *v.* Libby, 36 Minn. 287, 31 N. W. 52.

New York.— Vernal *v.* Vernal, 63 N. Y. 45.

United States.— Kingman *v.* Stoddard, 85 Fed. 740, 29 C. C. A. 413.

But where acceptance of the goods is induced by fraud of the seller, there is of course no waiver. Willard *v.* Merritt, 45 Barb. (N. Y.) 295.

14. St. John *v.* Hendrickson, 81 Ind. 350; Thompson *v.* Libby, 36 Minn. 287, 31 N. W. 52; Barber *v.* Morgan, (Tex. Civ. App. 1900) 76 S. W. 319.

15. Pryor *v.* Foster, 130 N. Y. 171, 29 N. E. 123. See also St. John *v.* Hendrickson, 81 Ind. 350.

16. Coulter *v.* Clark, 160 Ind. 311, 66 N. E. 739; St. John *v.* Hendrickson, 81 Ind. 350; Pryor *v.* Foster, 130 N. Y. 171, 29 N. E. 123 [*distinguishing* People *v.* Stephens, 71 N. Y. 527]; Rohrschneider *v.* Knickerbocker L. Ins. Co., 76 N. Y. 216, 32 Am. Rep. 290; Thorn *v.* Helmer, 4 Abb. Dec. (N. Y.) 408, 2 Keyes 27; Charbonnel *v.* Seabury, 23 R. I. 543, 51 Atl. 208; Cooley Torts 505.

Assuming a mortgage of a prior owner as part of the purchase-price does not estop a defrauded purchaser from suing the vendor for fraudulently misrepresenting the amount of the mortgage debt remaining unpaid. Hutchinson *v.* Gorman, 71 Ark. 305, 73 S. W. 793.

17. Wilder *v.* Beede, 119 Cal. 646, 51 Pac. 1083; Pryor *v.* Foster, 130 N. Y. 171, 29 N. E. 123 [*distinguishing* People *v.* Stephens, 71 N. Y. 527]; Thorn *v.* Helmer, 4 Abb. Dec. (N. Y.) 408, 2 Keyes 27 (where a contract of partnership between plaintiff and defendant was induced by defendant's fraud, the contract providing that plaintiff might withdraw at the end of the first year, which he did); Cullen *v.* Hernz, 13 N. Y. St. 333.

Where one is induced to take a lease of premises by false and fraudulent representations, his continued possession of the premises and payment of rent after discovery of the fraud does not show a waiver of the tort. Pryor *v.* Foster, 130 N. Y. 171, 29 N. E. 123. Where a lessor falsely and fraudulently represents that the premises described in the lease embrace lands which they do not in fact embrace, the lessee, by taking possession of the premises actually embraced in the lease, does not, although he has knowledge of the falsity of the representation, preclude himself from recovering from the landlord compensation for the other lands or what he reasonably pays to hire them. Whitney *v.* Allaire, 4 Den. (N. Y.) 554 [*affirmed* in 1 N. Y. 305, and *explained* in People *v.* Stephens, 71 N. Y. 527].

18. Pryor *v.* Foster, 130 N. Y. 171, 29 N. E. 123.

Payments made under protest and upon defendant's promise to make good.— If a contract of purchase fraudulently induced has been partially executed by the purchaser, and further payments after the discovery of the fraud are made under protest and upon a promise by the seller that he will make good any loss sustained by the failure of the article to comply with the seller's agreement, the purchaser may still maintain an action for the fraud. Haven *v.* Neal, 43 Minn. 315, 45 N. W. 612.

19. Simon *v.* Goodyear Metallic Rubber Shoe Co., 105 Fed. 573, 44 C. C. A. 612, 52 L. R. A. 745. *Compare* Cain *v.* Dickenson, 60 N. H. 371.

20. Coulter *v.* Clark, 160 Ind. 311, 66 N. E. 739.

21. Simon *v.* Goodyear Metallic Rubber Shoe Co., 105 Fed. 573, 44 C. C. A. 612, 52 L. R. A. 745. But *compare* New York Land Imp. Co. *v.* Chapman, 118 N. Y. 288, 23 N. E. 187 [*reversing* 54 N. Y. Super. Ct. 297].

22. Sell *v.* Mississippi River Logging Co., 88 Wis. 581, 60 N. W. 1065.

23. Charbonnel *v.* Seabury, 23 R. I. 543, 51 Atl. 208. See also Mallory *v.* Leach, 35 Vt. 156, 82 Am. Dec. 625.

in affirmance of the contract and with knowledge of the fraud do not ordinarily amount to a waiver, for he is entitled to realize whatever he can make out of the contract and his right to affirm it and retain its benefits is absolute[24] according to the rule giving him his election of remedies.[25] But even in case of an executed contract the fraud practised in procuring it may be waived by the defrauded party where his acts and conduct clearly indicate an intention to ratify the contract and to abandon his right of action in deceit.[26]

2. Delay in Bringing Suit. Laches or delay which might preclude the defrauded party from rescinding the contract induced by the fraud does not affect his right of action for damages, but he may bring his action of deceit at any time within the period fixed by the statute of limitations.[27]

F. Jurisdiction. As a general rule courts of equity have concurrent jurisdiction with courts of law to give damages for fraud, and may entertain jurisdiction, although plaintiff may have an adequate remedy by an action of deceit;[28] but where plaintiff has a plain and adequate remedy at law and seeks no relief peculiarly within the jurisdiction of a court of equity, the court will ordinarily decline to entertain jurisdiction for the mere purpose of giving damages;[29] and although the bill prays for equitable relief, if the facts constitute no ground therefor the court will not give damages under the prayer for general relief.[30]

G. Parties[31] **— 1. Parties Plaintiff.** Where two or more persons have by the practice of fraud been induced to join in the execution of a contract,[32] or where by reason of false representations made to two persons they both suffer

24. Thorn *v.* Helmer, 4 Abb. Dec. (N. Y.) 408, 2 Keyes 27; Cullen *v.* Hernz, 13 N. Y. St. 333 (defrauded mortgagee appropriating the mortgaged property to the debt); Mallory *v.* Leach, 35 Vt. 156, 82 Am. Dec. 625 (defrauded purchaser selling the property to a third person and receiving payment). See also Pryor *v.* Foster, 130 N. Y. 171, 29 N. E. 123; People *v.* Stephens, 71 N. Y. 527 [*affirming* 51 How. Pr. 235, and *explaining* Thorn *v.* Helmer, *supra*, and Mallory *v.* Leach, *supra*]. But see De Wulf *v.* Dix, 110 Iowa 553, 81 N. W. 779.

Offer to sell.— The fact that a defrauded purchaser offered to sell the property at the price falsely represented by the vendor to be its value constitutes no waiver of his right of action. Cottrill *v.* Krum, 100 Mo. 397, 13 S. W. 753, 18 Am. St. Rep. 549.

Receiving payment of the purchase-price where a sale of property is induced by the purchaser's false representations as to his ability to pay does not condone the fraud but only mitigates the damages to the extent of the payment. Kane *v.* Dickenson, 60 N. H. 371.

25. See *supra*, VII, C.

26. St. John *v.* Hendrickson, 81 Ind. 350.

Filing claim with assignee.— The filing of a claim by the seller of goods with the assignee of the insolvent buyer, and the receipt of the dividend thereon, does not waive a right of action for fraudulent representations made by the buyer if the claim states that the goods were obtained by fraud. Hinchman *v.* Weeks, 85 Mich. 535, 48 N. W. 790.

27. Wilson *v.* Nichols, 72 Conn. 173, 43 Atl. 1052; Dayton *v.* Monroe, 47 Mich. 193, 10 N. W. 196; Cottrill *v.* Krum, 100 Mo. 397, 13 S. W. 753, 18 Am. St. Rep. 549; Griffing *v.* Diller, 21 N. Y. Suppl. 407. See also Wilder *v.* Beede, 119 Cal. 646, 51 Pac. 1083; Guinn *v.* Ames, (Tex. Civ. App. 1904) 83 S. W. 232; Sanborn *v.* Stetson, 21 Fed. Cas. No. 12,291, 2 Story 481.

28. Swayze *v.* Burke, 12 Pet. (U. S.) 11, 9 L. ed. 980; Adamson *v.* Evitt, 9 L. J. Ch. O. S. 1, 2 Russ. & M. 66, 11 Eng. Ch. 66, 39 Eng. Reprint 319; Evans *v.* Bicknell, 6 Ves. Jr. 174, 5 Rev. Rep. 245, 31 Eng. Reprint 998. See Equity, 16 Cyc. 81 *et seq.*

29. Dillon *v.* McAlister, 40 Ark. 189; Denny *v.* Gilman, 26 Me. 149. See Equity, 16 Cyc. 82.

30. Dillon *v.* McAlister, 40 Ark. 189. See Equity, 16 Cyc. 82.

31. Parties generally see Parties.

Persons entitled to sue see *supra*, V.

Persons liable see *supra*, VI.

32. Medbury *v.* Watson, 6 Metc. (Mass.) 246, 39 Am. Dec. 726 [*distinguishing* Baker *v.* Jewell, 6 Mass. 460, 4 Am. Dec. 162]; Patten *v.* Gurney, 17 Mass. 182, 9 Am. Dec. 141 (sale of goods on credit by copartners to a person whom defendants falsely represented as being solvent and worthy of credit); Porter *v.* Fletcher, 25 Minn. 493 (joint purchase).

Where husband and wife join in a conveyance of land of the former, the sale being induced by fraud of the grantee, although the injury to husband and wife is separate, yet there is such a common interest as to authorize them to join in one action for the deceit. Simar *v.* Canaday, 53 N. Y. 298, 13 Am. Rep. 523. But see Read *v.* Sang, 21 Wis. 678, in which fraud was alleged inducing the husband and wife to convey their homestead and in which case the court held that as it did not appear that the title of the homestead was not fully in the husband the wife was improperly joined as plaintiff.

loss, although the contract is formally executed by but one,[33] they may join in an action of deceit. And where the contract is entered into jointly by the persons on whom the fraud has been practised, the right of action in deceit is joint, and the defrauded parties must join as plaintiffs.[34] A joint right of action for fraud cannot be divided because of the subsequent separation of the interests of the aggrieved parties.[35]

2. Parties Defendant. A joint action lies against two or more persons participating in a fraud whereby another is injured,[36] although there was no previous conspiracy.[37] But it is not necessary to join the persons so participating.[38]

H. Pleading[39]— 1. Declaration or Complaint — a. Form of Pleading as Determining Nature of Action. It is often difficult, especially under the code system of pleading, to determine the real cause of action set out in a pleading alleging fraud,[40] and this fact goes to explain apparent inconsistencies in the decisions. But since an action of deceit based on fraud in the procurement of a contract proceeds upon the theory of affirmance of the contract,[41] the fact that the contract is set out as a matter of inducement does not stamp the action as one *ex contractu*;[42] neither does the fact that plaintiff partly attributes his injuries to the failure of defendant to comply with the contract;[43] and an averment indicating that the action is based on contract may be disregarded if there are substantial averments of fraud.[44] Likewise the fact that a prayer for alternative

33. Sacks *v.* Schimmel, 3 Pa. Super. Ct. 426, 39 Wkly. Notes Cas. 452.

Purchasers intending to form a company.— Purchasers of property acting for themselves and others in a plan afterward carried out to form a company to which the property should be transferred may, under N. Y. Code Civ. Proc. § 449, sue in behalf of themselves and all others in interest to recover damages for false representations inducing the purchase. Sigafus *v.* Porter, 84 Fed. 430, 28 C. C. A. 443 [*reversed* on other grounds in 179 U. S. 116, 21 S. Ct. 34, 45 L. ed. 113].

34. See cases cited *infra*, this note.

Where several persons have been induced to make a joint purchase through the fraudulent misrepresentations of their vendor, their right of action for the fraud is joint and they all must join in an action of deceit. Lawrence *v.* Montgomery, 37 Cal. 183; Porter *v.* Fletcher, 25 Minn. 493. But see Baker *v.* Jewell, 6 Mass. 460, 4 Am. Dec. 162.

35. Porter *v.* Fletcher, 25 Minn. 493, where a joint purchase was induced by fraud, and the local statute annexed to the estate purchased the incidents of a tenancy in common, and the purchasers made partition, it being held that the right of action must be determined as of the time when the contract was consummated by payment of the consideration. But see Duncan *v.* Willis, 51 Ohio St. 433, 38 N. E. 13, holding that where one sold property to two persons with the understanding that each was to have one half thereof, and the division took place immediately upon delivery, either could sue without joining the other.

Assignment of purchaser's interest.—Where a joint purchase has been induced by the vendor's fraud, a conveyance by one of the purchasers to the others of his interest in the land does not operate to assign his right of action for the fraud so as to enable the assignees to sue thereon in their names, especially where the original vendor had no title and thus none passed to the purchasers. Lawrence *v.* Montgomery, 37 Cal. 183. And see Assignments, 4 Cyc. 25.

36. Patten *v.* Gurney, 17 Mass. 182, 9 Am. Dec. 141 (which was an action for falsely recommending a third person as worthy of credit); Du Flon *v.* Powers, 14 Abb. Pr. N. S. (N. Y.) 391.

37. Stiles *v.* White, 11 Metc. (Mass.) 356, 45 Am. Dec. 214; Koontz *v.* Kaufman, 31 Mo. App. 397.

38. Montreal Bank *v.* Thayer, 7 Fed. 622, 2 McCrary 1.

39. See, generally, Pleading.

40. See for example Lawrence *v.* Montgomery, 37 Cal. 183; Tolbert *v.* Caledonian Ins. Co., 101 Ga. 741, 28 S. E. 991; Carter *v.* Glass, 44 Mich. 154, 6 N. W. 200, 38 Am. Rep. 240; Quintard *v.* Newton, 5 Rob. (N. Y.) 72.

41. See *supra*, VII, B.

42. Dixon *v.* Barclay, 22 Ala. 370.

Illustrations.— A count alleging that "defendant, by fraudulently warranting his horse to be sound, knowing him to be unsound, defrauded the plaintiff," is a count in tort for deceit. Crooker *v.* Willard, 28 N. H. 134 note. A complaint setting out an original contract, and alleging the making of a new contract, and its procurement by fraud, should be treated as based on the fraud, not as one for damages for breach of the original contract. Marriner *v.* Dennison, 78 Cal. 202, 20 Pac. 386.

For false representations inducing a purchase of land the form of the declaration may be substantially the same as that used in actions based on fraudulent representations inducing a purchase of personal property. Harlow *v.* Green, 34 Vt. 379.

43. Watts *v.* McAllister, 33 Ind. 264.

44. Corder *v.* O'Neill, 176 Mo. 401, 75 S. W. 764.

relief asks to have the parties placed *in statu quo* will not make the action one for rescission if the facts stated in the complaint make out a cause of action in deceit.[45] The use of the word "negligently" will not necessarily militate against treating the action as one based on fraud, if the other allegations are sufficient.[46] In a complaint to recover back money paid to defendant as money had and received to the use of plaintiff allegations that defendant obtained the money by fraud do not necessarily show that the action is founded on tort. If the complaint shows that the action is based upon the implied contract, allegations of fraud are not to be regarded as constituting any part of the statement of the cause of action.[47]

b. General Rules of Pleading. Such general rules of pleading[48] as are consistent with the nature of the action apply in actions of deceit. Among these may be mentioned the rule that plaintiff need not anticipate defenses which may be set up by his antagonist and plead matters in avoidance thereof;[49] that where the declaration or complaint states a good cause of action in deceit, the fact that it contains other allegations bearing upon another cause of action is immaterial;[50] that where an objection that a declaration does not state a cause of action is made for the first time at the trial or after verdict, the pleading must be liberally construed and sustained if possible;[51] and that defects in pleading may be waived by failure to make seasonable objection in the proper manner.[52]

c. Necessity For Alleging Facts. In pleading fraud either at law or in equity, it is a well-settled rule that the facts[53] must be stated in the declaration or petition,

Illustration.—A complaint alleging that by reason of representations of defendant that certain animals were sound and merchantable plaintiff was induced to purchase them, and that the animals were diseased and unfit for market to the knowledge of defendant, and that defendant fraudulently concealed the fact from plaintiff, states a cause of action in tort. Hardwick *v.* Wilson, 40 Ind. 321.

45. *In re* Harker, 113 Iowa 584, 85 N. W. 786. See also Barbour *v.* Flick, 126 Cal. 628, 59 Pac. 122.

Prayer for rescission and cancellation.—But where a petition avers the conveyance of land to defendant under a contract the execution of which was procured by fraud, and prays that the contract be rescinded, that the deeds be canceled, etc., neither such allegations nor the prayer are sufficient to characterize the action as one for deceit. Allred *v.* Tate, 113 Ga. 441, 39 S. E. 101.

46. Corey *v.* Eastman, 166 Mass. 279, 44 N. E. 217, 55 Am. St. Rep. 401.

47. People *v.* Wood, 121 N. Y. 522, 24 N. E. 952. See MONEY RECEIVED; PAYMENT.

48. See PLEADING.

49. Kehl *v.* Abram, 112 Ill. App. 77 [*affirmed* in 210 Ill. 218, 71 N. E. 347, 102 Am. St. Rep. 158]; Gandy *v.* Cummins, 64 Nebr. 312, 89 N. W. 777, holding that where a plaintiff alleges that he was induced to pay over money to defendant for the purchase of land by the false representations of defendant that he was the owner of the land, and that defendant fraudulently converted the money to his own use, the complaint need not deny that the owner of the land ratified the sale.

50. Sprague *v.* Taylor, 58 Conn. 542, 20 Atl. 612. See also *supra*, VII, H, 1, a.

51. Johnston *v.* Spencer, 51 Nebr. 198, 70 N. W. 982.

52. See Du Souchet *v.* Dutcher, 113 Ind. 249, 15 N. E. 459. See also APPEAL AND ERROR, 3 Cyc. 253 *et seq.*; 2 Cyc. 660, 672.

Waiver of allegation of scienter.—Where a petition charging fraud by false statements failed to allege that defendant knew the statements to be false when he made them, it was held that the defect was waived by a failure to attack it in the proper manner, and that the court was not required to instruct the jury that plaintiff could not recover without proving the omitted allegation. Mann *v.* Taylor, 78 Iowa 355, 43 N. W. 220.

53. The facts relied upon as constituting the alleged fraud must be set out.

California.— Fox *v.* Hale, etc., Silver-Min. Co., (1898) 53 Pac. 32; Snow *v.* Halstead, 1 Cal. 359.

Georgia.— Tolbert *v.* Caledonian Ins. Co., 101 Ga. 741, 28 S. E. 991.

Illinois.— Anderson Transfer Co. *v.* Fuller, 73 Ill. App. 48; Ward *v.* Luneen, 25 Ill. App. 160.

Iowa.— Kerr *v.* Steman, 72 Iowa 241, 33 N. W. 654.

Maryland.— Pearce *v.* Watkins, 68 Md. 534, 13 Atl. 376.

Michigan.— Pforzheimer *v.* Selkirk, 71 Mich. 600, 40 N. W. 12.

Nebraska.— Sutton First Nat. Bank *v.* Grosshans, 61 Nebr. 575, 85 N. W. 542.

New Jersey.— Connor *v.* Dundee Chemical Works, 50 N. J. L. 257, 12 Atl. 713; Byard *v.* Holmes, 34 N. J. L. 296. See also Hager *v.* Stillwell, 3 N. J. L. 901.

New York.— Cohn *v.* Goldman, 76 N. Y. 284 [*reversing* 43 N. Y. Super. Ct. 436]; Evertson *v.* Miles, 6 Johns. 138.

North Dakota.— Van Dyke *v.* Doherty, 6 N. D. 263, 69 N. W. 200.

Vermont.— Ide *v.* Gray, 11 Vt. 615.

not conclusions.[54] But this rule does not require that merely probative or evidentiary facts be set out; it is sufficient if ultimate facts are alleged which substantiate the charge.[55] And a complaint which alleges facts with greater particularity and detail than is actually necessary will be upheld.[56]

d. Certainty. The declaration in an action for deceit must clearly and distinctly allege all the essential elements of actionable fraud.[57] But while the requirements as to certainty are at least as strict as in other actions sounding in tort,[58] no express form of words is necessary to set out the various elements con-

Washington.— Cade *v.* Head Camp W. of W., 27 Wash. 218, 67 Pac. 603.

Wisconsin.— Eau Claire New Bank *v.* Kleiner, 112 Wis. 287, 87 N. W. 1090.

Canada.— Armstrong *v.* Lewin, 34 U. C. Q. B. 629.

See 23 Cent. Dig. tit. "Fraud," §§ 36, 37.

Illustrations.—In an action to recover damages because of the sale of notes secured by a mortgage which is falsely represented to be a first mortgage, the complaint must fully describe the mortgage, in what it is worthless, and especially the value of the security. Hawke *v.* Fletcher, 4 Dak. 42, 22 N. W. 593. *Compare* Union Cent. L. Ins. Co. *v.* Schidler, 130 Ind. 214, 29 N. E. 1071, 15 L. R. A. 89. In an action for fraudulent representations as to his financial condition, by which it is alleged defendant secured merchandise from plaintiffs on credit, a declaration alleging that defendant made certain specified false statements of his financial condition to a mercantile agency of which plaintiffs were members, that the sale was made in reliance on this report, and that it was false, is sufficient on demurrer for that it did not show that defendant knew that plaintiffs belonged to the mercantile agency. Hinchman *v.* Weeks, 85 Mich. 535, 48 N. W. 790.

Pleading fraud in equity see EQUITY, 16 Cyc. 231 *et seq.*

The facts showing the manner of the commission of the fraud must be clearly pleaded so that the court may determine whether the charge of fraud is well founded. Cosgrove *v.* Fisk, 90 Cal. 75, 27 Pac. 56; Estep *v.* Armstrong, 69 Cal. 536, 11 Pac. 132; McBean *v.* Fox, 1 Ill. App. 177; Furnas *v.* Friday, 102 Ind. 129, 1 N. E. 296. See also Lummis *v.* Strattan, 2 N. J. L. 245.

54. Robinson *v.* Syracuse Rapid Transit R. Co., 100 N. Y. App. Div. 214, 91 N. Y. Suppl. 909; Woolsey *v.* Sunderland, 47 N. Y. App. Div. 86, 62 N. Y. Suppl. 104; McGlynn *v.* Seymour, 14 Daly (N. Y.) 420, 14 N. Y. St. 707; Crowley *v.* Hicks, 98 Wis. 566, 74 N. W. 348.

Illustration.— An averment that plaintiff was induced to make a contract with defendant because he was led to believe by the latter that he had no other legal means to compel defendant to perform certain obligations is an averment of a legal conclusion. State *v.* Minnesota, etc., Land, etc., Co., 20 Mont. 198, 50 Pac. 420.

55. Picard *v.* McCormick, 11 Mich. 68; Johnston *v.* Spencer, 51 Nebr. 198, 70 N. W. 982; Corwin *v.* Davison, 9 Cow. (N. Y.) 22.

Sale of unsound chattel.— In a declaration for fraud in the sale or exchange of an unsound chattel it is not necessary to give a particular description of the alleged unsoundness; a general charge of unsoundness is sufficient. Reed *v.* Rogers, 3 T. B. Mon. (Ky.) 173.

56. Ohio Cultivator Co. *v.* People's Nat. Bank, 22 Tex. Civ. App. 643, 55 S. W. 765.

57. *Florida.*— Williams *v.* McFadden, 23 Fla. 143, 1 So. 618, 11 Am. St. Rep. 345.

Georgia.— Tolbert *v.* Caledonian Ins. Co., 101 Ga. 741, 28 S. E. 991.

Indiana.—Smith *v.* Roseboom, 13 Ind. App. 284, 41 N. E. 552.

Massachusetts.— Gassett *v.* Glazier, 165 Mass. 473, 43 N. E. 193.

Michigan.— Pforzheimer *v.* Selkirk, 71 Mich. 600, 40 N. W. 12; Parker *v.* Armstrong, 55 Mich. 176, 20 N. W. 892.

Missouri.— Edwards *v.* Noel, 88 Mo. App. 434.

Nebraska.— Stetson *v.* Riggs, 37 Nebr. 797, 56 N. W. 628.

New Jersey.— Byard *v.* Holmes, 34 N. J. L. 296. See also Lummis *v.* Stratton, 2 N. J. L. 229.

New York.— Barber *v.* Morgan, 51 Barb. 116; Brown *v.* Brockett, 55 How. Pr. 32.

Texas.— Carson *v.* Houssels, (Civ. App. 1899) 51 S. W. 290.

Vermont.— Ide *v.* Gray, 11 Vt. 615.

See 23 Cent. Dig. tit. "Fraud," §§ 36, 37.

What are the essential elements see *supra*, III.

Declarations held sufficient see Brown *v.* Lobdell, 50 Ill. App. 559. A complaint alleging that defendant fraudulently represented to plaintiff that his mining location was valid, that its discovery shaft was within its exterior boundaries, and that the representations were false and made with intent to mislead plaintiff, who relied thereon, and purchased the mine, which it would not have done had it known that the discovery shaft was on a previously patented lode, states a cause of action based on fraudulent representations. Connell *v.* El Paso Gold Min., etc., Co., (Colo. 1904) 78 Pac. 677.

58. Byard *v.* Holmes, 34 N. J. L. 296.

Illustrations.— A mere general allegation that the matter stated was a pretense, and that plaintiff was falsely and fraudulently deceived by it, is not sufficient to fasten upon such matter the character of a false pretense; this can be done in no other way than by a distinct and specific averment of the falsehood of each separate matter of fact stated by defendant and intended to be denied by plaintiff. Byard *v.* Holmes, 34 N. J. L. 296. A declaration that defendant falsely,

stituting the cause of action;[59] it is sufficient if the substantive facts are alleged with substantial accuracy,[60] and it is not necessary to aver expressly that defendant was guilty of fraud if the facts set out in the complaint constitute fraud.[61] On the other hand a characterization of acts as fraudulent which are not fraudulent *per se* is not sufficient.[62] It must be made to appear by the facts alleged, independent of mere conclusions, that if the allegations are true a fraud has been committed.[63]

e. Pleading the Particular Elements of Fraud — (I) *The Representations* — (A) *In General.* The declaration or complaint must show what representations were made,[64] and how they came to plaintiff's knowledge.[65] It need not, however, attempt a literal recital of the representations;[66] it is sufficient if it states them in substance.[67]

(B) *Form and Character.* The declaration or complaint must show that the representations on which plaintiff relied related to past or existing facts, not matters *in futuro* [68] or mere matters of opinion.[69]

deceitfully, fraudulently, and wilfully represented the maker and indorser of a note to be good, without naming such maker and indorser, will be held bad, on demurrer, for uncertainty. Newman *v.* Kissock, 8 U. C. C. P. 41.

59. Hay *v.* Landis, 17 Ind. App. 91, 44 N. E. 1013, 46 N. E. 154; Quinby *v.* Ayers, 1 Nebr. (Unoff.) 70, 95 N. W. 464, holding that the petition need not adopt the language used by the court in former cases.

60. Hopkins *v.* O'Neil, 46 Mich. 403, 9 N. W. 448; Quinby *v.* Ayers, 1 Nebr. (Unoff.) 70, 95 N. W. 464. See also Hinchman *v.* Weeks, 85 Mich. 535, 48 N. W. 790.

Illustrations.— A complaint alleging that plaintiff was induced to purchase a certain tract of land by the false representation of defendant that he owned it, and that defendant knew his representation to be false and made it with intent to deceive, is sufficient. Hoffman *v.* Kirby, 136 Cal. 26, 68 Pac. 321. So is a complaint that defendants induced plaintiff to purchase land by falsely and fraudulently representing that he was the owner in fee simple thereof, and that it was unencumbered, and that plaintiff relying on such representations paid the purchase-price, and that defendant had knowledge at the time of making the representations of an outstanding tax title. Koepke *v.* Winterfield, 116 Wis. 44, 92 N. W. 437.

61. State *v.* Stewart, 122 N. C. 263, 29 S. E. 413; Poillon *v.* Poillon, 37 Misc. (N. Y.) 729, 76 N. Y. Suppl. 488.

Formal averments, such as that defendant "falsely" and "fraudulently" deceived plaintiff, may be dispensed with in such cases. Hopkins *v.* O'Neil, 46 Mich. 403, 9 N. W. 448.

It is only necessary that the declaration should set forth the substantial facts constituting the fraud. Hopkins *v.* O'Neil, 46 Mich. 403, 9 N. W. 448.

62. *Georgia.*— Tolbert *v.* Caledonian Ins. Co., 101 Ga. 741, 28 S. E. 991.

North Dakota.— Dowagiac Mfg. Co. *v.* Mahon, (1904) 101 N. W. 903.

Texas.— Weekes *v.* Sunset Brick, etc., Co., 22 Tex. Civ. App. 556, 56 S. W. 243.

Vermont.— Ide *v.* Gray, 11 Vt. 615.

Wisconsin.— Eau Claire New Bank *v.* Kleiner, 112 Wis. 287, 87 N. W. 1090.

See 23 Cent. Dig. tit. "Fraud," §§ 36, 37.

The mere use of the words "falsely" and "fraudulently" accomplishes nothing unless they fit the facts to which they are applied. Darling *v.* Hines, 5 Ind. App. 319, 32 N. E. 109.

63. Eau Claire New Bank *v.* Kleiner, 112 Wis. 287, 87 N. W. 1090.

64. Parker *v.* Armstrong, 55 Mich. 176, 20 N. W. 892; Duffy *v.* Byrne, 7 Mo. App. 417; Brown *v.* Brockett, 55 How. Pr. (N. Y.) 32; Mead *v.* Mali, 15 How. Pr. (N. Y.) 347; Wells *v.* Jewett, 11 How. Pr. (N. Y.) 242.

65. Mead *v.* Mali, 15 How. Pr. (N. Y.) 347.

But an allegation that plaintiff was induced to do certain things by reason of the representations set out is a sufficient allegation that they came to his knowledge. Newbery *v.* Garland, 31 Barb. (N. Y.) 121.

66. Marsh *v.* Steele, Kirby (Conn.) 454; Cutter *v.* Adams, 15 Vt. 237.

67. Barber *v.* Morgan, 51 Barb. (N. Y.) 116.

In an action of deceit by a purchaser of land against his vendor, an allegation that defendant falsely warranted the boundary line and that this warranty was false, and known to be by defendant, and done to deceive and defraud plaintiff, is equivalent to saying that he so represented or affirmed. Harlow *v.* Green, 34 Vt. 379.

68. Meier *v.* Jackson, 78 Mo. App. 396; Dowagiac Mfg. Co. *v.* Mahon, (N. D. 1904) 101 N. W. 903.

Mere averments of a promise to do something in the future are not fatal if there are also averments of representations as to existing facts. Martachowski *v.* Orawitz, 14 Pa. Super. Ct. 175.

69. Jones *v.* St. Louis, etc., R. Co., 79 Mo. 92; Dowagiac Mfg. Co. *v.* Mahon, (N. D. 1904) 101 N. W. 903.

On the other hand, if the representations alleged relate to a matter concerning which positive statements can be made, although of which plaintiff can judge as well as defendant if he has an opportunity of examination, the averment in the complaint that

(II) *Materiality of Representations.* The declaration or complaint must allege and show that the representations related to a material fact,[70] not to some merely collateral matter.[71]

(III) *Falsity of Representations.* The complaint must aver in a direct manner,[72] or at least substantially, that the representations set out were false;[73] and except where it is sought to base liability on representations true when made but false when acted upon,[74] it must be averred that the representations were false when made.[75]

(IV) *Scienter.*[76] Except in those jurisdictions where a scienter is not an essential element of actionable fraud,[77] it is necessary that a scienter be alleged.[78] It is not always necessary, however, that knowledge of the falsity of the repre-

plaintiff relied upon the representations must be deemed conclusive that they do not relate merely to matters of opinion. Whitton *v.* Goddard, 36 Vt. 730. See also Max Meadows Land, etc., Co. *v.* Mendenhall, 4 Pa. Super. Ct. 398, 40 Wkly. Notes Cas. 348.

While a representation as to the validity of title to land may be a matter of opinion, if the complaint sets out circumstances showing that such a representation was relied upon as relating to a matter of fact, the complaint is sufficient. Hurlbert *v.* T. D. Kellogg Lumber, etc., Co., 115 Wis. 225, 91 N. W. 673.

70. Byard *v.* Holmes, 34 N. J. L. 296.

71. Whitton *v.* Goddard, 36 Vt. 730.

72. Bell *v.* Mali, 11 How. Pr. (N. Y.) 254. *Compare* Ballard *v.* Lockwood, 1 Daly (N. Y.) 158, holding sufficient an averment that defendants made certain statements when they well knew the truth to be the converse of what they said.

Representations as to financial condition.— In an action for fraudulent representations as to his financial condition, where it is alleged defendant secured merchandise from plaintiffs on credit, a declaration alleging that defendant made certain specified false statements of his financial condition to a mercantile agency of which plaintiffs were members, that the sale was made in reliance on this report, and that it was false, is sufficient on demurrer that it does not show that the representations were untrue in fact. Hinchman *v.* Weeks, 85 Mich. 535, 48 N. W. 790. In an action for false representation of the credit of a firm, the statement complained of was that the partners were worth from £4,000 to £5,000 between them, out of which they owed defendant and others £1,000 and plaintiff, as a denial of this statement, alleged that they were not worth from £4,000 to £5,000 (not adding between them); and that they were not then indebted to defendant and the other persons named in £1,000, but in a much larger sum, namely, £3,000. It was held that the denial of the worth of the parties referred to was not more extensive than the statement, and that it was sufficiently alleged that they were indebted in more than £1,000. Fowler *v.* Benjamin, 16 U. C. Q. B. 174.

73. *Indiana.*— Warner *v.* Warner, 30 Ind. App. 578, 66 N. E. 760.

Michigan.— Hinchman *v.* Weeks, 85 Mich. 535, 48 N. W. 790; Parker *v.* Armstrong, 55 Mich. 176, 20 N. W. 892; Stoflet *v.* Marker, 34 Mich. 313.

New York.— Caylus *v.* New York, etc., R. Co., 49 How. Pr. 100.

Texas.— Gooch *v.* Parker, 16 Tex. Civ. App. 256, 41 S. W. 662.

Virginia.— Brown *v.* Shields, 6 Leigh 440.

United States.—Andrus *v.* St. Louis Smelting, etc., Co., 130 U. S. 643, 9 S. Ct. 645, 32 L. ed. 1054.

See 23 Cent. Dig. tit. "Fraud," § 40.

If there is no allegation of falsity as to part of the representations mentioned in the complaint, plaintiff will not be allowed to prove that those representations caused the injury of which he complains. Johnson *v.* Beeney, 9 Ill. App. 64.

But merely probative or evidentiary facts need not be stated in order to negative the truth of the representations. It is sufficient if ultimate facts are alleged which show the falsity. Johnston *v.* Spencer, 51 Nebr. 198, 70 N. W. 982. And see *supra*, VII, H, 1, c.

74. See *supra*, III, B, 3, c.

75. Bell *v.* Mali, 11 How. Pr. (N. Y.) 254.

76. **What constitutes scienter** see *supra*, III, B, 4.

77. See *supra*, III, B, 4, a.

78. *Alabama.*— Clark *v.* Dunham Lumber Co., 86 Ala. 220, 5 So. 560.

Florida.— Watson *v.* Jones, 41 Fla. 241, 25 So. 678.

New Hampshire.— Crooker *v.* Willard, 28 N. H. 134 note; Bedell *v.* Stevens, 28 N. H. 118.

New York.— Inderlied *v.* Honeywell, 88 N. Y. App. Div. 144, 84 N. Y. Suppl. 333; Van Pub. Co. *v.* Westinghouse, 72 N. Y. App. Div. 121, 76 N. Y. Suppl. 340; Bloomingdale *v.* Southern Nat. Bank, 63 N. Y. App. Div. 72, 71 N. Y. Suppl. 306; Kingsland *v* Haines, 62 N. Y. App. Div. 146, 70 N. Y. Suppl. 873; Unckles *v.* Hentz, 19 N. Y. App. Div. 165, 45 N. Y. Suppl. 894 [*affirming* 18 Misc. 644, 43 N. Y. Suppl. 749].

Oregon.— Rolfes *v.* Russell, 5 Oreg. 400.

Pennsylvania.— Wilson *v.* Talheimer, 20 Pa. Co. Ct. 203.

South Carolina.— Gem Chemical Co. *v.* Youngblood, 58 S. C. 56, 36 S. E. 437, 58 S. C. 582, 37 S. E. 226.

Washington.— Northwestern Steamship Co. *v.* Horton, 29 Wash. 565, 70 Pac. 59.

See 23 Cent. Dig. tit. "Fraud," § 40.

sentations be alleged in so many words.[79] Thus allegations that the representations were fraudulently or deceitfully made sufficiently aver a scienter, as the word "fraudulently" or "deceitfully" excludes the idea of mistake and imports that the representations were made with knowledge of their falsity.[80]

(v) *Intent.* Except in those jurisdictions where an innocent misrepresentation may be actionable,[81] the declaration or complaint must allege that the representations were made fraudulently; that is, it must aver that they were made with intent to deceive, or must allege facts from which such intent can be legitimately inferred.[82] But it has been held that no particular form of words is

Compare Mann *v.* Taylor, 78 Iowa 355, 43 N. W. 220.

79. Pryor *v.* McNairy, 1 Stew. (Ala.) 150; De Silver *v.* Holden, 50 N. Y. Super. Ct. 236. See also Commercial Bank *v.* Cuero First Nat. Bank, (Tex. Civ. App. 1903) 77 S. W. 239 [*reversed* on other grounds in (1904) 80 S. W. 601].

Reckless statements.— In setting out a cause of action based on false statements made in reckless ignorance (see *supra*, III, B, 4, b), a direct averment of a scienter appears to be unnecessary if facts are alleged from which its equivalent may be legitimately inferred. Furnas *v.* Friday, 102 Ind. 129, 1 N. E. 296; American Nat. Bank *v.* Grace, 67 Hun (N. Y.) 432, 22 N. Y. Suppl. 121; Cameron *v.* Mount, 86 Wis. 477, 56 N. W. 1094, 22 L. R. A. 512; Barnes *v.* Union Pac. R. Co., 54 Fed. 87, 4 C. C. A. 199. But allegations of such facts are necessary. Toner *v.* Meussdorffer, 123 Cal. 462, 56 Pac. 39; Furnas *v.* Friday, 102 Ind. 129, 1 N. E. 296; Coyle *v.* Nies, 6 N. Y. St. 194; Northwestern Steamship Co. *v.* Horton, 29 Wash. 565, 70 Pac. 59. See also Wilson *v.* Talheimer, 20 Pa. Co. Ct. 203.

Illustrations.— An allegation that defendant "was then informed and knew of facts and circumstances sufficient to charge him with knowledge of the falsity" of the statements set out in the complaint was held good on motion to make more definite. American Nat. Bank *v.* Grace, 67 Hun (N. Y.) 432, 22 N. Y. Suppl. 121. An averment that defendant knowingly made false representations that certain property offered for sale to plaintiff was of value sufficiently avers that defendant knew that it was not valuable. Carr *v.* Schermerhorn, 3 Lans. (N. Y.) 189.

80. *Illinois.*— Forsyth *v.* Vehmeyer, 176 Ill. 359, 52 N. E. 55 [*affirming* 75 Ill. App. 308]; Farwell *v.* Metcalf, 61 Ill. 372; Johnson *v.* Beeney, 9 Ill. App. 64.

Indiana.— See West *v.* Wright, 98 Ind. 335.

Michigan.— See Beebe *v.* Knapp, 28 Mich. 53.

Missouri.— Hoffman *v.* Gill, 102 Mo. App. 320, 77 S. W. 146, allegation that defendant made the representations corruptly and fraudulently and with intent to cheat and defraud plaintiff.

New Jersey.— Steip *v.* Seguine, 66 N. J. L. 370, 49 Atl. 715; Eibel *v.* Von Fell, 64 N. J. L. 364, 48 Atl. 1117 [*affirming* 63 N. J. L. 3, 42 Atl. 754]. As a matter of pleading *fraudulenter* without *sciens* or *sciens* without *fraudulenter* is sufficient. Steip *v.* Seguine, *supra*.

New York.— Dudley *v.* Scranton, 57 N. Y. 424; Thomas *v.* Beebe, 25 N. Y. 244; Moore *v.* Noble, 53 Barb. 425; Bayard *v.* Malcolm, 2 Johns. 550, 3 Am. Dec. 450 [*reversing* 1 Johns. 453].

See 23 Cent. Dig. tit. "Fraud," § 40.

Declaration held sufficient after verdict.— A declaration which set out the representation and alleged its falsity and then alleged that "so the plaintiff was falsely and fraudulently deceived," was held sufficient after verdict, as against the objection that the words "false" and "fraudulent" should have been prefixed to the verb "affirmed" or "represented." Bayard *v.* Malcolm, 2 Johns. (N. Y.) 550, 3 Am. Dec. 450 [*reversing* 1 Johns. 453].

81. See *supra*, III, B, 6. And see Gerner *v.* Mosher, 58 Nebr. 135, 78 N. W. 384, 46 L. R. A. 244; Johnson *v.* Gulick, 46 Nebr. 817, 65 N. W. 833, 50 Am. St. Rep. 629; Bauer *v.* Taylor, 4 Nebr. (Unoff.) 710, 98 N. W. 29 [*modifying* 4 Nebr. (Unoff.) 701, 96 N. W. 268].

82. *Indiana.*— Furnas *v.* Friday, 102 Ind. 129, 1 N. E. 296; Langsdale *v.* Girton, 51 Ind. 99; Oliver *v.* Hubbard, 29 Ind. App. 639, 64 N. E. 927; Equitable Trust Co. *v.* Milligan, (App. 1902) 64 N. E. 673

Massachusetts.— The declaration must allege in some form that the representation was fraudulently made; it is not enough to allege its falsity. Holst *v.* Stewart, 154 Mass. 445, 28 N. E. 574.

Missouri.— Jones *v.* St. Louis, etc., R. Co., 79 Mo. 92.

New York.— Kushes *v.* Ginsburg, 99 N. Y. App. Div. 417, 91 N. Y. Suppl. 216; Inderlied *v.* Honeywell, 88 N. Y. App. Div. 144, 84 N. Y. Suppl. 333; Bloomingdale *v.* Southern Nat. Bank, 63 N. Y. App. Div. 72, 71 N. Y. Suppl. 306; Kingsland *v.* Haines, 62 N. Y. App. Div. 146, 70 N. Y. Suppl. 873; Barber *v.* Morgan, 51 Barb. 116; Addington *v.* Allen, 11 Wend. 374 [*reversing* 7 Wend. 9].

Washington.— Northwestern Steamship Co. *v.* Horton, 29 Wash. 565, 70 Pac. 59.

United States.— Montreal Bank *v.* Thayer, 7 Fed. 622, 2 McCrary 1.

See 23 Cent. Dig. tit. "Fraud," § 39.

A complaint which simply alleges that plaintiff was induced to take certain action by the statements set out which were untrue does not sufficiently aver a fraudulent intent. Coyle *v.* Nies, 6 N. Y. St. 194.

necessary.[83] An express averment of the intent is not required, but it is sufficient if the existence of the intent can be clearly inferred from the allegations.[84] Thus if the declaration or complaint sufficiently avers a scienter and that defendant intended the representations to be acted upon by plaintiff, so that the intent to deceive can be legitimately inferred according to rules previously stated,[85] it is sufficient.[86]

(VI) *IGNORANCE AND BELIEF OF PLAINTIFF*—(A) *In General.* It is necessary to aver that plaintiff was ignorant of the falsity of the representations set out,[87] and that he believed them to be true.[88] But it is sufficient if plaintiff's lack of knowledge can be implied from the averments of the complaint;[89] an express averment of his belief is not always necessary.[90]

Fraudulent promise.— If the fraud alleged consists in failing to carry out a promise made, the complaint must show that when defendant made the promise he did not intend to fulfil it (Smith *v.* Parker, 148 Ind. 127, 45 N. E. 770); the mere allegation that he ultimately failed to perform the agreement is not sufficient (Graves *v.* Spier, 58 Barb. (N. Y.) 349. See also *In re* Harker, 113 Iowa 584, 85 N. W. 786); and the mere averment of a fraudulent design by defendant in the breach of the contract alleged to have been fraudulently procured is not sufficient from which to imply a fraudulent intent in the making of the contract (Lakin *v.* Tibbitts, 1 Wis. 500).

Fraudulent concealment.— In an action based upon fraudulent concealment of facts, the declaration or complaint must show that defendant at least had reason to know that plaintiff was ignorant of the facts. Sheldon *v.* Davidson, 85 Wis. 138, 55 N. W. 161.

83. Montreal Bank *v.* Thayer, 7 Fed. 622, 2 McCrary 1.

An allegation that defendant fraudulently made the representations set out sufficiently alleges the fraudulent intent. Montreal Bank *v.* Thayer, 7 Fed. 622, 2 McCrary 1. See also Langsdale *v.* Girton, 51 Ind. 99.

84. Scott *v.* Haynes, 12 Mo. App. 597; Barber *v.* Morgan, 51 Barb. (N. Y.) 116; Morrison *v.* Lewis, 49 N. Y. Super. Ct. 178; Schoellhamer *v.* Rometsch, 26 Oreg. 394, 38 Pac. 344; McMahan *v.* Rice, 16 Tex. 335. See also Johnson *v.* Parrotte, 23 Nebr. 232, 36 N. W. 497. *Compare* Bartholomew *v.* Bentley, 15 Ohio 659, 45 Am. Dec. 596.

Averment of intent to defraud public.— An averment in positive terms that defendant intended to defraud the public generally by the representations set out, by which representations plaintiff was induced to take certain action, is sufficient averment of fraudulent intent. Cross *v.* Sackett, 2 Bosw. (N. Y.) 617. And see Warner *v.* James, 88 N. Y. App. Div. 567, 85 N. Y. Suppl. 153; Bartholomew *v.* Bentley, 15 Ohio 659, 45 Am. Dec. 596.

85. See *supra*, III, B, 6.

86. *California.*— Benson *v.* Bunting, 127 Cal. 532, 59 Pac. 991, 78 Am. St. Rep. 81.

Illinois.— Jacobs *v.* Marks, 83 Ill. App. 156 [*affirmed* in 183 Ill. 533, 56 N. E. 154].

Massachusetts.— Brady *v.* Finn, 162 Mass. 260, 38 N. E. 506; Holst *v.* Stewart, 154 Mass. 445, 28 N. E. 574.

New York.—Robinson *v.* Flint, 16 How. Pr. 240.

Oregon.— Schoellhamer *v.* Rometsch, 26 Oreg. 394, 38 Pac. 344.

Wisconsin.— Shaw *v.* Gilbert, 111 Wis. 165, 86 N. W. 188.

Canada.— Fowler *v.* Benjamin, 16 U. C. Q. B. 174.

See 23 Cent. Dig. tit. "Fraud," § 39.

Compare Equitable Trust Co. *v.* Milligan, (Ind. App. 1902) 64 N. E. 673, action by purchaser of land against vendor for false representations as to the boundaries.

An averment that defendant "wrongfully and falsely" made certain representations which he well knew at the time to be false is sufficient without adding the word "fraudulently." Fowler *v.* Benjamin, 16 U. C. Q. B. 174.

Representation as to third person's financial condition.— Where the representations set out relate to the financial standing of a third person and are alleged to have induced plaintiff to sell to such third person, an averment that defendant knew at the time he made the representation that the buyer was unable to pay for the goods will be construed as a sufficient averment of fraudulent intent after issue has been joined. Robbins *v.* Barton, 50 Kan. 120, 31 Pac. 686. See also Fowler *v.* Benjamin, 16 U. C. Q. B. 174.

87. Lincoln *v.* Ragsdale, 9 Ind. App. 555, 37 N. E. 25; Pforzheimer *v.* Selkirk, 71 Mich. 600, 40 N. W. 12; Spencer *v.* Johnston, 58 Nebr. 44, 78 N. W. 482; Carson *v.* Houssels, (Tex. Civ. App. 1899) 51 S. W. 290.

88. Pforzheimer *v.* Selkirk, 71 Mich. 600, 40 N. W. 12; Byard *v.* Holmes, 34 N. J. L. 296; Douglas *v.* McDermott, 21 N. Y. App. Div. 8, 47 N. Y. Suppl. 336.

89. Cheney *v.* Powell, 88 Ga. 629, 15 S. E. 750; Carr *v.* Schermerhorn, 3 Lans. (N. Y.) 189. But see Carson *v.* Houssels, (Tex. Civ. App. 1899) 51 S. W. 290.

90. Douglas *v.* McDermott, 21 N. Y. App. Div. 8, 47 N. Y. Suppl. 336.

An averment that plaintiff relied and acted upon the representations set out sufficiently avers belief. Quinby *v.* Ayers, 1 Nebr. (Unoff.) 70, 95 N. W. 464; Douglas *v.* McDermott, 21 N. Y. App. Div. 8, 47 N. Y. Suppl. 336. See also Benolkin *v.* Guthrie, 111 Wis. 554, 87 N. W. 466. But see Carson *v.* Houssels, (Tex. Civ. App. 1899) 51 S. W. 290.

(B) *Investigation or Excuse For Failure.* According to the general rule that ordinary prudence must be used to avoid deception,[91] the declaration or complaint should show with some particularity that plaintiff used the ordinary means of information at his command to ascertain the truth of the representations made by defendant.[92] But where a case is stated falling within the exceptions to the rule requiring investigation,[93] plaintiff need not allege an excuse for failure to investigate.[94] Any means used by defendant to prevent inquiry by plaintiff should, however, be specifically stated.[95]

(VII) *Acting in Reliance on Representations.* The complaint must aver that plaintiff relied upon the representations set out,[96] that he was deceived thereby,[97] and in such reliance took certain action to his prejudice.[98] And of course this rule is all the more imperative where the representations were originally made to a third person.[99] But such allegations need not always be made in express terms,[1] and it is not necessary to allege expressly that plaintiff would not have taken the action which he did but for the false representations.[2]

(VIII) *Damage or Injury.* The declaration or complaint must allege that plaintiff sustained damage by reason of the fraud,[3] and should show that

91. See *supra*, III, B, 5, b; IV, B, 1, a, (III).

92. Andrus *v.* St. Louis Smelting, etc., Co., 130 U. S. 643, 9 S. Ct. 645, 32 L. ed. 1054.

93. See *supra*, III, B, 5, b; IV, B, 1, a, (III), (B).

94. Kehl *v.* Abram, 112 Ill. App. 77 [*affirmed* in 210 Ill. 218, 71 N. E. 347, 102 Am. St. Rep. 154].

95. Brown *v.* Bledsoe, 1 Ida. 746; Parker *v.* Moulton, 114 Mass. 99, 19 Am. Rep. 315, holding a general allegation to be insufficient.

96. *District of Columbia.*— Jackson, etc., Co. *v.* Fay, 20 App. Cas. 105.

Georgia.— Dickey *v.* Leonard, 77 Ga. 151.

Indiana.— Oliver *v.* Hubbard, 29 Ind. App. 639, 64 N. E. 927.

Nebraska.— Spencer *v.* Johnston, 58 Nebr. 44, 78 N. W. 482; Stetson *v.* Riggs, 37 Nebr. 797, 56 N. W. 628.

New York.— Kingsland *v.* Haines, 62 N. Y. App. Div. 146, 70 N. Y. Suppl. 873.

See 23 Cent. Dig. tit. "Fraud," § 41.

97. Pforzheimer *v.* Selkirk, 71 Mich. 600, 40 N. W. 12; Carson *v.* Houssels, (Tex. Civ. App. 1899) 51 S. W. 290.

98. Jackson, etc., Co. *v.* Fay, 20 App. Cas. (D. C.) 105; Dickey *v.* Leonard, 77 Ga. 151; Smith *v.* Roseboom, 13 Ind. App. 284, 41 N. E. 552; Mead *v.* Mali, 15 How. Pr. (N. Y.) 347.

In an action based on fraudulent concealment, the declaration or complaint must show that plaintiff was actually induced by such concealment to take action to his prejudice. Sheldon *v.* Davidson, 85 Wis. 138, 55 N. W. 161. A statement that a fraudulent concealment of facts by defendant was for the purpose of inducing plaintiff to do certain things does not sufficiently state that plaintiff was misled by such concealment. Eagle River *v.* Brown, 85 Wis. 76, 55 N. W. 163.

99. McGlynn *v.* Seymour, 14 Daly (N. Y.) 420, 14 N. Y. St. 707.

1. Cheney *v.* Powell, 88 Ga. 629, 15 S. E. 750; Robbins *v.* Barton, 50 Kan. 120, 31 Pac. 686; Windram *v.* French, 151 Mass. 547, 24 N. E. 914, 8 L. R. A. 750.

Illustrations.— An averment that plaintiff took certain action relying upon representations of defendant without knowing whether the representations were true or false, not having an opportunity for discovering their truth, sufficiently alleges that plaintiff was misled. Benolkin *v.* Guthrie, 111 Wis. 554, 87 N. W. 466. *Compare* Smith *v.* Roseboom, 13 Ind. App. 284, 41 N. E. 552; Carson *v.* Houssels, (Tex. Civ. App. 1899) 51 S. W. 290. Where the action is based upon an alleged conspiracy between three defendants to defraud plaintiff in the sale of certain property, an allegation that one of defendants, the owner of the property, called on plaintiff and told him that the other defendants were selling the property for him, sufficiently shows that plaintiff relied on the representations made by the other two defendants as the representations of the owner. Pearl *v.* Walter, 80 Mich. 317, 45 N. W. 181.

On the other hand the want of an express averment of reliance cannot be supplied by a recital of evidence in the complaint which might justify a presumption of such reliance, unless such evidence be conclusive of that fact. Goings *v.* White, 33 Ind. 125. Nor is it sufficient to aver that "by the fraudulent means aforesaid, defendant perpetrated a great fraud upon" plaintiff. Bish *v.* Van Cannon, 94 Ind. 263.

2. Drake *v.* Holbrook, 66 S. W. 512, 23 Ky. L. Rep. 1941; Benolkin *v.* Guthrie, 111 Wis. 554, 87 N. W. 466. But see Carson *v.* Houssels, (Tex. Civ. App. 1899) 51 S. W. 290.

3. *California.*— London, etc., F. Ins. Co. *v.* Liebes, 105 Cal. 203, 38 Pac. 691.

District of Columbia.— Jackson, etc., Co. *v.* Fay, 20 App. Cas. 105.

Indiana.— Smith *v.* Roseboom, 13 Ind. App. 284, 41 N. E. 552.

New York.— Wilson *v.* Ryder, 10 N. Y. Suppl. 233.

Texas.— Bremond *v.* McLean, 45 Tex. 10.

the relation of cause and effect exists between the fraud and the damage alleged.[4]

f. Setting Out Contract Fraudulently Procured.[5] Where the cause of action is that plaintiff was fraudulently induced to enter into a contract to his damage, the contract, not being the gist of the action, need not be precisely set out.[6] Indeed it is not necessary to set forth the contract at all,[7] except so far as it is necessary to describe the wrong set out in the declaration [8] and to render the statement of the case intelligible.[9] Since a rescission of the contract fraudulently procured is ordinarily inconsistent with the action of deceit,[10] a count for damages for the fraud and one for a rescission of the contract are repugnant,[11] and an averment that plaintiff has repudiated the contract will ordinarily be fatal.[12]

2. Demurrer. As allegations not material to the cause of action are not demurrable,[13] and as an action of deceit is not based upon the contract alleged to have been fraudulently procured, a demurrer upon the ground that defendants were not liable upon the contract will of course not lie.[14]

3. Plea or Answer. Defendant can litigate the question of fraud under a general denial.[15] With respect to the sufficiency of the denial of the fraud alleged, the general rule of pleading applies that the denial must be by express

Vermont.— See Fisher *v.* Brown, 1 Tyler 387, 4 Am. Dec. 726.

See 23 Cent. Dig. tit. "Fraud," § 42.

Where the false representations relate to the value of property upon security of which plaintiff was induced to make a loan, an averment that property was not of the value represented is not sufficient to show damage. Seaman *v.* Becar, 15 Misc. (N. Y.) 616, 38 N. Y. Suppl. 69.

Averment of eviction unnecessary.— In an action for fraudulently inducing plaintiff to take an assignment of a lease executed by one who has no title to the land, an eviction need not be alleged. Cheney *v.* Powell, 88 Ga. 629, 15 S. E. 750.

Averments held sufficient.— A count which, after setting out false and fraudulent representations, concludes: "And the plaintiff says that by means of said false and fraudulent representations, the defendant obtained from the plaintiff the sum of $2,000, and the plaintiff is entitled to recover the same from the defendant," is a sufficient averment of damage. McAleer *v.* Horsey, 35 Md. 439. Where plaintiff alleges that he was induced to transfer certain property by the false representations of defendant that the contract for the transfer provided for a certain consideration, it is not necessary that plaintiff should allege that he could have obtained for the property the amount of the specified consideration. If the property was not actually worth more than the consideration named in the contract, this is a matter of defense. Christensen *v.* Jessen, (Cal. 1895) 40 Pac. 747. In an action for deceit in inducing plaintiff to purchase a stock of goods, damage is sufficiently shown by an averment that if it had not been for the false representations, plaintiff would not have purchased the goods and that by reason of such representations he suffered a certain loss by depreciation. Benolkin *v.* Guthrie, 111 Wis. 554, 87 N. W. 466.

4. Dickey *v.* Leonard, 77 Ga. 151; Northwestern Mut. L. Ins. Co. *v.* Breautigam, 69 N. J. L. 89, 54 Atl. 228; Byard *v.* Holmes, 34 N. J. L. 296; Ide *v.* Gray, 11 Vt. 615. And see Jackson, etc., Co. *v.* Fay, 20 App. Cas. (D. C.) 105; Mauger *v.* Shedaker, (N. J. Sup. 1904) 58 Atl. 1091; Robinson *v.* Syracuse Rapid Transit R. Co., 100 N. Y. App. Div. 214, 91 N. Y. Suppl. 909.

5. See also *supra*, VII, H, 1, a.

6. Cunningham *v.* Kimball, 7 Mass. 65.

7. Waterman *v.* Mattair, 5 Fla. 211; Corwin *v.* Davison, 9 Cow. (N. Y.) 22; Barney *v.* Dewey, 13 Johns. (N. Y.) 224, 7 Am. Dec. 372.

8. Newell *v.* Horn, 47 N. H. 379; Mahurin *v.* Harding, 28 N. H. 128, 59 Am. Dec. 401.

Illustration.— Where the damage alleged is the procuring from plaintiff of a loan on the security of the note of a third person, indorsed by defendant, the complaint need not show that defendant was legally bound as an indorser. Genin *v.* Schwenk, 16 N. Y. Suppl. 432.

9. Webster *v.* Hodgkins, 25 N. H. 128, which holds that in declaring for a fraud in the sale of a chattel, although the sale must be stated, it is not necessary to set out either the contract of sale or the consideration. See also Barrey *v.* Dewey, 13 Johns. (N. Y.) 224, 7 Am. Dec. 372.

Illustration.— In a suit to recover for fraudulent representations in the sale of the right to sell a certain invention, an allegation that defendant failed to deliver to plaintiff a certain number of the patented articles as agreed is pertinent to the claim for damages for the tort. Iowa Economic Heater Co. *v.* American Economic Heater Co., 32 Fed. 735.

10. See *supra*, VII, C.

11. Heastings *v.* McGee, 66 Pa. St. 384. See also Wilson *v.* New U. S. Cattle-Ranch Co., 73 Fed. 994, 20 C. C. A. 241.

12. Westerfield *v.* New York L. Ins. Co., 129 Cal. 68, 58 Pac. 92, 61 Pac. 667.

13. See Pleading.

14. Harris-Emery Co. *v.* Pitcairn, 122 Iowa 595, 98 N. W. 476.

15. West Florida Land Co. *v.* Studebaker,

contradiction in terms of the allegation traversed.[16] An answer is insufficient which does not attempt to meet or avoid the effect of the allegations as to the false and fraudulent representations imputed to defendant,[17] or which merely sets up that defendant made the representations in good faith.[18] Allegations as to matters which are fixed by the written contract between the parties are properly stricken out.[19] An answer setting up a waiver of the fraud must allege that the acts relied upon to constitute the waiver were done by plaintiff with knowledge of the fraud.[20]

I. Issues, Proof, and Variance — 1. Admissibility of Evidence Under the Pleadings — a. In General. The general rule is that fraud must be alleged in order to be proved, and that evidence of fraud not alleged in the declaration is not admissible to establish a cause of action.[21] But this rule does not mean that specific acts of misconduct relevant to an issue of fraud may not be given in evidence, although not averred in the declaration.[22] Evidence which not only shows the falsity of the representations set out but goes further and negatives the truth of implications which might have misled plaintiff to his prejudice is of course admissible.[23]

b. Representations Other Than Those Alleged.[24] While evidence that defendant made to plaintiff other false statements than those charged in the declaration is not of course admissible if such other representations are relied upon as a part of the cause of action,[25] it may frequently be admissible because relevant to the issue of fraud. Representations differing from but tending to prove the representations set out,[26] or to show that the representations set out may have influenced plaintiff,[27] are admissible. Evidence of other representations contemporaneous

37 Fla. 28, 19 So. 176; Crough *v.* Deremore, 59 Iowa 43, 12 N. W. 759; Bennett *v.* Church, (Kan. 1901) 65 Pac. 642.

16. Dwight *v.* Chase, 3 Ill. App. 67.

Denial held sufficient see Rothschild *v.* Porter, 19 N. Y. Suppl. 177.

17. Porter *v.* Wilson, 35 Ind. 348, where it was held that an averment that certain facts were known to plaintiff, which is perfectly consistent with his ignorance of the material facts, is insufficient.

18. Brown *v.* J. I. Case Plow Works, 9 Kan. App. 685, 59 Pac. 601.

19. **Value of property exchanged.** — In an action for false representations in an exchange of lands, allegations in the answer as to the value of the land traded by plaintiff are properly stricken out where its value was fixed by the written contract between the parties. Stanhope *v.* Swafford, 80 Iowa 45, 45 N. W. 403.

20. Blumenfeld *v.* Stine, 42 Misc. (N. Y.) 411, 87 N. Y. Suppl. 81 [*affirmed* in 96 N. Y. App. Div. 160, 89 N. Y. Suppl. 85], holding that an answer in an action for false representations inducing plaintiff to purchase lands, setting up a waiver of the fraud in that a deed was executed and delivered to plaintiff subsequent to the alleged fraudulent representations, must allege that the deed was accepted with knowledge of the fraud.

21. *Illinois.* — Johnson *v.* Beeney, 9 Ill. App. 64.

Indiana. — Fankboner *v.* Fankboner, 20 Ind. 62.

Massachusetts. — McComb *v.* C. R. Brewer Lumber Co., 184 Mass. 276, 68 N. E. 222.

Michigan. — Jones *v.* Kemp, 49 Mich. 9, 12 N. W. 890.

Missouri. — Chase *v.* Rusk, 90 Mo. App. 25.

New Hampshire. — Brewer *v.* Hyndman, 18 N. H. 9.

Tennessee. — Duffield *v.* Spence, (Ch. App. 1897) 51 S. W. 492.

Utah. — Houser *v.* Smith, 19 Utah 150, 56 Pac. 683.

See 23 Cent. Dig. tit. "Fraud," § 45.

Evidence of representations of third persons, if not alleged, is not admissible, no conspiracy or agency being averred. Jackson *v.* Collins, 39 Mich. 557.

If the deceit consists in false representations and failure to perform a promise, the complaint must allege that defendant did not intend to perform his promise, else evidence that the performance did not conform to the promise is not admissible. McComb *v.* C. R. Brewer Lumber Co., 184 Mass. 276, 68 N. E. 222.

22. McDonald *v.* Smith, (Mich. 1905) 102 N. W. 668.

23. Framington Nat. Bank *v.* Buzzell, 61 N. H. 618, holding that an allegation that defendant falsely represented that a certain person was principal upon a note presented for discount when in fact he was merely surety is sustained by proof that said person never signed the note in any capacity.

24. **Transactions with third persons** see *infra*, VII, K, 3.

25. Sills Stove Works *v.* Brown, 71 Vt. 478, 45 Atl. 1040. And see Jackson *v.* Collins, 39 Mich. 557; McCracken *v.* Robison, 57 Fed. 375, 6 C. C. A. 400.

26. Shelton *v.* Healy, 74 Conn. 265, 50 Atl. 742.

27. Haven *v.* Neal, 43 Minn. 315, 45 N. W. 612.

with those set out in the declaration may be admissible to show the meaning[28] or the falsity[29] of those alleged, or to show scienter;[30] or they may be admissible as evidentiary details of the main misrepresentation charged.[31] And words used by defendant in connection with the statements alleged may be proved for the purpose of showing the *animus* with which the representations were made,[32] as where the words taken in connection with their subject-matter were such as were calculated to allay plaintiff's suspicions and lull him into a false security.[33] A false statement made a considerable time before the representations alleged is admissible if it had some influence on plaintiff's conduct,[34] or was repeated at the time of the one in question.[35] Similar false representations made subsequently to those declared on, while not admissible as a basis of recovery,[36] are admissible as tending to show intent;[37] and a repetition of the original false representations after the consummation of the fraud is admissible to show defendant's bad faith from the beginning.[38] But evidence of statements other than those alleged, which are not shown to be false or do not import fraud upon their face, is irrelevant.[39]

c. Conspiracy.[40] Since a mere conspiracy to commit a fraud is not of itself a cause of action, a conspiracy need not be alleged, although it is necessary to prove one in order to connect defendant with the fraud,[41] and it has been held unnecessary to set out in detail the various facts and circumstances upon which plaintiff relies to establish the complicity of defendants.[42]

d. Waiver or Estoppel. The question whether the conduct of plaintiff amounted to a ratification of the transaction or to a waiver or an estoppel cannot be submitted to the jury unless the matter is pleaded.[43]

2. Conformity of Proof to Allegations — a. In General. Plaintiff must support all the material allegations of the declaration by satisfactory evidence, direct or circumstantial.[44] The representations must be proved substantially as

28. Shelton *v.* Healy, 74 Conn. 265, 50 Atl. 742; Pedrick *v.* Porter, 5 Allen (Mass.) 324.

29. Stewart *v.* Wyoming Cattle Ranche Co., 128 U. S. 383, 9 S. Ct. 101, 32 L. ed. 439.

30. Morehouse *v.* Northrop, 33 Conn. 380, 89 Am. Dec. 211, representations relating to the same subject-matter, a sale of hogs.

31. Picard *v.* McCormick, 11 Mich. 68.

32. Updyke *v.* Abel, 60 Barb. (N. Y.) 15. See also Morehouse *v.* Northrop, 33 Conn. 380, 89 Am. Dec. 211.

33. Morehouse *v.* Northrop, 33 Conn. 380, 89 Am. Dec. 211.

34. Townsend *v.* Felthousen, 90 Hun (N. Y.) 89, 35 N. Y. Suppl. 538 [*affirmed* in 156 N. Y. 618, 51 N. E. 279].

35. Kost *v.* Bender, 25 Mich. 515.

36. Sills Stove Works *v.* Brown, 71 Vt. 478, 45 Atl. 1040.

37. Von Bruck *v.* Peyser, 4 Rob. (N. Y.) 514.

38. Cummings *v.* Cummings, 5 Watts & S. (Pa.) 553. See also Brewster *v.* Crossland, 2 Colo. App. 446, 31 Pac. 236.

Subsequent statement by joint defendant. — In an action on the case against husband and wife, to recover damages sustained by plaintiff upon the exchange of a farm belonging to him for one owned by the wife, on account of the fraudulent representations of defendants, representations made by the wife several months after the exchange was completed cannot be given in evidence on the ground of their being similar to representations made by the husband previous to the exchange, and for the purpose of supporting an averment of a joint fraud by husband and wife. Nor are such representations legitimate evidence by way of admission to prove that the wife had made similar representations previous to the exchange, or that she authorized her husband to make any, or that she had any knowledge of his having made them. Birdseye *v.* Flint, 3 Barb. (N. Y.) 500.

39. West Florida Land Co. *v.* Studebaker, 37 Fla. 28, 18 So. 176.

40. **As to pleading conspiracy** see, generally, Conspiracy.

41. Patten *v.* Gurney, 17 Mass. 182, 9 Am. Dec. 141; Stubly *v.* Beachboard, 68 Mich. 401, 422, 36 N. W. 192; Brackett *v.* Griswold, 112 N. Y. 454, 20 N. E. 376; Butler *v.* Duke, 39 Misc. (N. Y.) 235, 79 N. Y. Suppl. 419. *Compare* Pforzheimer *v.* Selkirk, 71 Mich. 600, 40 N. W. 12; Jackson *v.* Collins, 39 Mich. 577.

42. Ynguanzo *v.* Salomon, 3 Daly (N. Y.) 153. But in Cohn *v.* Goldman, 76 N. Y. 284, the court, though the case went off on another point, criticized a complaint as being too meager which alleged that defendants "in concert did, by connivance, conspiracy and combination, cheat and defraud the plaintiffs out of certain goods."

43. Stones *v.* Richmond, 21 Mo. App. 17; Guinn *v.* Ames, (Tex. Civ. App. 1904) 83 S. W. 232.

44. Corbett *v.* Gilbert, 24 Ga. 454; Taylor

alleged.[45] Thus where plaintiff alleges that false representations were made in respect to the existence of material facts, he cannot recover upon proof of fraudulent concealment of other facts which ought to have been disclosed.[46] But it is not necessary to prove the exact language of the misrepresentations as they are set out in the complaint,[47] if the variance does not mislead defendant to his prejudice.[48] Since it is a general rule of pleading that facts may be stated according to their legal effect,[49] an allegation that false representations were made to plaintiff is supported by proof that the parties dealt through plaintiff's authorized agent to whom the representations were made,[50] or by proof that the representations were contained in circulars signed by defendant and distributed generally to the public.[51] An express allegation of scienter[52] (that defendant knew that his representations were false) is not supported by proof that defendant made positive false statements without knowledge of the facts,[53] or without reasonable grounds for believing the statements to be true, or with reasonable

v. Guest, 58 N. Y. 262 [*reversing* 45 How. Pr. 276]; Moore *v.* Noble, 53 Barb. (N. Y.) 425.

45. *Georgia.*— Brooke *v.* Cole, 108 Ga. 251, 33 S. E. 849.

Michigan.— Collins *v.* Jackson, 54 Mich. 186, 19 N. W. 947.

Nebraska.— Runge *v.* Brown, 23 Nebr. 817, 37 N. W. 660.

New Hampshire.— Cloutman *v.* Bailey, 62 N. H. 44.

West Virginia.— Oberlin College *v.* Blair, 45 W. Va. 203, 32 S. E. 203.

Evidence of false representations made to third persons cannot of itself support a declaration counting on false representations made directly to plaintiff. Edwards *v.* Owen, 15 Ohio 500.

Where the representations are alleged to have been contained in certain papers, the complaint should be dismissed on the failure of the proof to show that the representations were contained in the papers. Goldstein *v.* Parker, 58 N. Y. Super. Ct. 580, 8 N. Y. Suppl. 865.

Representations as to financial condition of third person.— An averment of positive misrepresentations by defendant of the financial condition of a third person is not sustained by a proof of a statement that defendant has found such third person reliable in business transactions, that defendant has sufficient confidence in him to fill his orders, and that defendant has been led to understand that he is having a fair trade. Redpath *v.* Lawrence, 42 Mo. App. 101. And an averment that defendant represented that goods might be safely sold to a third person on credit is not supported by proof that defendant said that he was doing a fair business. Cutter *v.* Adams, 15 Vt. 237.

46. Cochrane *v.* Halsey, 25 Minn. 52.

47. Shelton *v.* Healy, 74 Conn. 265, 50 Atl. 742; Endsley *v.* Johns, 120 Ill. 469, 12 N. E. 247, 60 Am. Rep. 572; Ladd *v.* Piggot, 114 Ill. 647, 2 N. E. 503; Cahill *v.* Applegarth, 98 Md. 493, 56 Atl. 794; Averill *v.* Wood, 78 Mich. 342, 44 N. W. 381.

Illustrations.— Where plaintiff owned a part of the east half of a quarter section and alleged in his complaint that he was induced to execute a deed including his interest in such quarter section by the representations of defendant that the deed did not affect his land, the allegation was supported by evidence that defendant stated that the deed covered only the west half of the quarter section to which plaintiff claimed no title as defendant knew. Dashiel *v.* Harshman, 113 Iowa 283, 85 N. W. 85. An averment in a declaration, in an action for misrepresentation as to the value of land, that it was represented as of a certain value, is proved by proof that it was said to be of that value for any purpose. Holcomb *v.* Noble, 69 Mich. 396, 37 N. W. 497. Where a defendant is charged with falsely representing a note to be good, an averment that he said "it would pass" in a certain locality is supported by proof that there were people in that locality who would take it. Hawkins *v.* Appleby, 2 Sandf. (N. Y.) 421. Where it is averred that defendant absolutely represented a horse sold to be sound, knowing the falsity of his representation, it is no variance to show that the representation made was that the horse was sound so far as defendant knew, and that he knew the horse to be unsound. Wheeler *v.* Wheelock, 33 Vt. 144, 78 Am. Dec. 617; West *v.* Emery, 17 Vt. 583, 44 Am. Dec. 356.

48. Craig *v.* Ward, 1 Abb. Dec. (N. Y.) 454, 3 Keyes 387, 2 Transcr. App. 281, 3 Abb. Pr. N. S. 235 [*affirming* 36 Barb. 377], holding that in an action based on fraud in the sale of a mortgage, under an allegation in the complaint that the mortgage was represented to be a good and valid security, proof of a representation that the mortgage was *bona fide* and well secured, and that the mortgagor had clear title is admissible, in the absence of anything to show that defendant was misled to his prejudice by the variance.

49. See PLEADING.

50. Sudworth *v.* Morton, (Mich. 1904) 100 N. W. 769; Barwick *v.* English Joint Stock Bank, L. R. 2 Exch. 259, 36 L. J. Exch. 147, 16 L. T. Rep. N. S. 461, 15 Wkly. Rep. 877.

51. Fenn *v.* Curtis, 23 Hun (N. Y.) 384.

52. **What constitutes scienter** see *supra*, III, B, 4.

53. Marshall *v.* Fowler, 7 Hun (N. Y.) 237. But see Watson *v.* Jones, (Fla. 1899) 25 So. 678.

cause for believing them to be untrue;[54] but if such facts are to be relied upon they must be pleaded. On the other hand it has been held that such allegation is supported by proof that defendant's means of knowledge were such as to make it his duty to know whether his statements were true or false, on the theory that from such facts the law will conclusively infer the existence of actual knowledge.[55] An averment that plaintiff relied altogether and exclusively on the representations made by defendant, is supported by evidence that he relied mainly and substantially upon such allegations;[56] and the manner of performing the acts done in reliance upon the alleged representations need not be shown precisely as alleged.[57]

b. Unnecessary or Immaterial Allegations — (I) *In General.* It is not necessary, however, for plaintiff to prove all the fraudulent misrepresentations alleged,[58] but only such allegations as to the means used to deceive him as are necessary and sufficient to support his cause of action.[59] Thus where a fraudulent concealment is the gravamen of the action, failure to prove a wilfully false affirmance also alleged will not defeat a recovery.[60] Averments of matters not material to the cause of action,[61] such as an averment of an offer to return the consideration of the contract fraudulently procured,[62] or that defendant has derived some advantage from the fraud,[63] need not be proved as alleged.

(II) *Of Conspiracy.* Likewise although a conspiracy to defraud is alleged it is not necessary to prove it further than to connect an individual defendant with the perpetration of the fraud; for conspiracy is no part of the cause of action of deceit.[64]

54. Allison *v.* Jack, 76 Iowa 205, 40 N. W. 811; McKown *v.* Furgason, 47 Iowa 636; St. John *v.* Berry, 63 Kan. 775, 66 Pac. 1031; Pearson *v.* Howe, 1 Allen (Mass.) 207.

Illustration.— An allegation in a petition that certain representations which defendant is charged with having made were false and known by him to be false is not sustained by proof that, while he had no knowledge or belief on the subject, he made such representations supposing them to be true, without reason therefor, but nevertheless made them as positively known facts. St. John *v.* Berry, 63 Kan. 775, 66 Pac. 1031.

55. Watson *v.* Jones, 41 Fla. 241, 254, 25 So. 678, in which the court said: "In other words, an averment that defendant's situation or means of knowledge were such as made it his duty to know whether his statement was true or false, and an averment that defendant well knew his statements to be untrue, are but different methods of stating the same ultimate fact, viz: knowledge."

56. Cook *v.* Gill, 83 Md. 177, 34 Atl. 248. See also *supra*, III, B, 7, b.

57. Packard *v.* Pratt, 115 Mass. 405, where the representations set out were alleged to have induced plaintiff to purchase the good-will of defendant's business, and it was held proper to prove the execution of a lease of the business to plaintiff which provided that upon payment of the stipulated rent the business should become plaintiff's property.

58. Scholfield Gear, etc., Co. *v.* Scholfield, 71 Conn. 1, 40 Atl. 1046; Kehl *v.* Abram, 112 Ill. App. 77 [*affirmed* in 210 Ill. 218, 71 N. E. 347, 102 Am. St. Rep. 158]; Lare *v.* Westmoreland Specialty Co., 155 Pa. St. 33, 25 Atl. 812.

59. Kehl *v.* Abram, 112 Ill. App. 77 [*affirmed* in 210 Ill. 218, 71 N. E. 347, 102 Am. St. Rep. 158]; Somers *v.* Richards, 46 Vt. 170.

Repetition of false statements.— Notwithstanding that the declaration may allege the repetition of the alleged false representations, yet such repetition need not be established by proof where the original false representations have been sufficiently shown. Kehl *v.* Abram, 112 Ill. App. 77 [*affirmed* in 210 Ill. 218, 71 N. E. 347, 102 Am. St. Rep. 158].

60. Inge *v.* Bond, 10 N. C. 101.

61. Holcomb *v.* Noble, 69 Mich. 396, 37 N. W. 497; Hengen *v.* Lewis, 91 N. Y. Suppl. 77; Pettijohn *v.* Williams, 47 N. C. 33; Curtis *v.* Burdick, 48 Vt. 166.

62. Miller *v.* Barber, 66 N. Y. 558.

63. Fisher *v.* Mellen, 103 Mass. 503.

64. Hayward *v.* Draper, 3 Allen (Mass.) 551; Livermore *v.* Herschell, 3 Pick. (Mass.) 33; Brackett *v.* Griswold, 112 N. Y. 454, 466, 20 N. E. 376 (in which the court said: "The allegation that there was a conspiracy to commit the fraud does not affect the substantial ground of action. The gravamen is fraud and damage, and not the conspiracy. The means by which a fraud is accomplished are immaterial except so far as they tend, in connection with the damage suffered, to show an actionable injury. The allegation and proof of a conspiracy in an action of this character is only important to connect a defendant with the transaction and to charge him with the acts and declarations of his co-conspirators, where otherwise he could not have been implicated. But a mere conspiracy to commit a fraud is never of itself a cause of action, and an allegation of conspiracy may be wholly disregarded and a recovery had, irrespective of such allegation,

c. Allegations as to Contract Fraudulently Procured. Although the contract which was fraudulently induced is not the gist of the action of deceit, if proof of the contract is necessary to show the fraud alleged it must be proved as set out in the complaint.[65] Allegations descriptive of the contract and material to the question of damages must be proved as stated;[66] and if the contract proved is less beneficial to plaintiff than that alleged, in a particular which may materially affect the amount of damages recoverable, the variance is fatal.[67] But averments which, although relating to the contract, are not material to the charge of deceit and merely go to show that defendant derived an advantage from the contract need not be proved.[68] On the other hand if plaintiff omits to state such particulars of the contract as are immaterial to his right of action,[69] or to the measure of damages,[70] it is no material variance to prove them.

d. Recovery on Different Cause of Action.[71] Plaintiff having declared in deceit, cannot recover by showing a mere breach of contract,[72] or by proving negligence[73] or a mutual mistake.[74] The law will not permit a recovery by proof of a right of action of some other character, although facts are alleged or proved upon which in an appropriate form of action a recovery might be sustained.[75]

J. Presumptions and Burden of Proof. Fraud is never presumed but must be affirmatively proved.[76] On the contrary, the presumption, if any, is in

in case the plaintiff is able otherwise, to show the guilty participation of the defendant. In other words, the principles which govern an action for fraud and deceit are the same, whether the fraud is alleged to have originated in a conspiracy, or to have been solely committed by a defendant without aid or co-operation") ; Lefler *v.* Fox, 92 N. Y. Suppl. 227; Griffing *v.* Diller, 21 N. Y. Suppl. 407; East Missouri Tp. *v.* Horseman, 16 U. C. Q. B. 556. *Compare* Emmerson *v.* Hutchinson, 63 Ill. App. 203.

65. Maine *v.* Bailey, 15 Conn. 298, action for fraud in the sale of chattels. See also Webster *v.* Hodgkins, 25 N. H. 128.

66. Collins *v.* Jackson, 54 Mich. 186, 19 N. W. 947, holding that in an action for fraud inducing the purchase of a business, where the complaint alleges that the consideration was paid for a stock of goods, proof that the consideration was for the goods and goodwill of the business is a fatal variance, as this affects the measure of damages.

67. Gotleib *v.* Leach, 40 Vt. 278.

68. Fisher *v.* Mellen, 103 Mass. 503.

69. Cunningham *v.* Kimball, 7 Mass. 65; Webster *v.* Hodgkins, 25 N. H. 128, action for fraud in the sale of a chattel.

The failure of the declaration to set out all the incidents connected with the contract alleged to have been fraudulently procured does not prevent proof of such incidents. Averill *v.* Wood, 78 Mich. 342, 44 N. W. 381.

Illustration.— Where the false representations are alleged to have induced plaintiff to purchase certain property, the ownership of which is not averred, and it is alleged that plaintiff paid defendants a certain sum, it is not a variance that the proof shows that the property was owned by a third person and that the payments made to defendant were received by him for such person. Hasse *v.* Freud, 119 Mich. 358, 78 N. W. 131.

70. Dano *v.* Sessions, 65 Vt. 79, 26 Atl. 585.

71. As to waiving the tort and suing in assumpsit see *supra*, VII, C, and cross-references there given.

72. *Connecticut.*— Moore *v.* Giddings, 77 Conn. 291, 59 Atl. 36.

Georgia.— Brooke *v.* Cole, 108 Ga. 251, 33 S. E. 849.

New Hampshire.— Mahurin *v.* Harding, 28 N. H. 128, 59 Am. Dec. 401.

New York.— Truesdell *v.* Bourke, 145 N. Y. 612, 40 N. E. 83; Barnes *v.* Quigley, 59 N. Y. 265; Ross *v.* Mather, 51 N. Y. 108, 10 Am. Rep. 562 [*reversing* 47 Barb. 582]; Postal *v.* Cohn, 83 N. Y. App. Div. 27, 81 N. Y. Suppl. 1089; Kress *v.* Woehrle, 23 Misc. 472, 52 N. Y. Suppl. 628.

Pennsylvania.— Dutton *v.* Pyle, 7 Pa. Super. Ct. 353, 42 Wkly. Notes Cas. 199.

Pleading and proof of false warranty in sale of personal property see SALES.

73. Kirwin *v.* Malone, 45 N. Y. App. Div. 93, 61 N. Y. Suppl. 844; Derry *v.* Peek, 14 App. Cas. 337, 54 J. P. 148, 58 L. J. Ch. 864, 61 L. T. Rep. N. S. 265, 1 Meg. 292, 38 Wkly. Rep. 33 [*reversing* 37 Ch. D. 541, 57 L. J. Ch. 347, 59 L. T. Rep. N .S. 78, 36 Wkly. Rep. 899]. See also *supra*, III, B, 4, b.

74. Connell *v.* El Paso Gold Min., etc., Co., (Colo. (1904) 78 Pac. 677; Dudley *v.* Scranton, 57 N. Y. 424 [*distinguishing* Lefler *v.* Field, 52 N. Y. 621; Marsh *v.* Falker, 40 N. Y. 562].

Under an answer of counter-claim averring actual fraud a mistake cannot be proved in lieu of the fraud. Leighton *v.* Grant, 20 Minn. 345; Dudley *v.* Scranton, 57 N. Y. 424.

75. Truesdell *v.* Bourke, 145 N. Y. 612, 40 N. E. 83; Barnes *v.* Quigley, 59 N. Y. 265; Postal *v.* Cohn, 83 N. Y. App. Div. 27, 81 N. Y. Suppl. 1089. See, generally, PLEADING.

76. *Colorado.*— Marsh *v.* Cramer, 16 Colo. 331, 27 Pac. 169.

Delaware.— Thomas *v.* Grise, 1 Pennew. 381, 41 Atl. 883.

Illinois.— Jackson *v.* Wilcox, 2 Ill. 344.

favor of innocence;[77] and according to general principles elsewhere discussed[78] the burden falls on him who asserts fraud, whether he be plaintiff or defendant, to establish it by proving every material element of the cause of action[79] by a preponderance of evidence.[80] Thus the burden rests on him to prove the falsity of the representations,[81] the scienter,[82] the intent to deceive,[83] and his reliance on the representations to his damage.[84] But where defendant admits the making of

Missouri.— Redpath *v.* Lawrence, 48 Mo. App. 427.

Nebraska.— Davidson *v.* Crosby, 49 Nebr. 60, 68 N. W. 338.

New York.— Pryor *v.* Foster, 130 N. Y. 171, 29 N. E. 123; Morris *v.* Talcott, 96 N. Y. 100; Wakeman *v.* Dalley, 51 N. Y. 27, 10 Am. Rep. 551; Marsh *v.* Falker, 40 N. Y. 562; Fleming *v.* Slocum, 18 Johns. 403, 9 Am. Dec. 224.

North Carolina.— Tomlinson *v.* Payne, 53 N. C. 108.

Pennsylvania.— Messinger *v.* Hagenbuch, 2 Whart. 410.

United States.— Sanborn *v.* Stetson, 21 Fed. Cas. No. 12,291, 2 Story 481. See also EVIDENCE, 16 Cyc. 1082.

See 23 Cent. Dig. tit. "Fraud," § 46.

Fraud proved for one purpose does not raise a presumption of fraud for another purpose. Fox *v.* Hale, etc., Silver-Min. Co., (Cal. 1898) 53 Pac. 32.

77. Redpath *v.* Lawrence, 48 Mo. App. 427; Morris *v.* Talcott, 96 N. Y. 100; Wakeman *v.* Dalley, 51 N. Y. 27, 10 Am. Rep. 551; Marsh *v.* Falker, 40 N. Y. 562; Tomlinson *v.* Payne, 53 N. C. 108; Stauffer *v.* Young, 39 Pa. St. 455; Messinger *v.* Hagenbuch, 2 Whart. (Pa.) 410.

An instruction that good faith is presumed in business transactions, and fraud, if alleged, must be shown, is correct as applied to matters where the parties do not have any family relationship. Crockett *v.* Miller, 2 Nebr. (Unoff.) 292, 96 N. W. 491.

78. See EVIDENCE, 16 Cyc. 928 *et seq.* See also CONTRACTS, 9 Cyc. 762.

79. *Alabama.*— Moses *v.* Katzenberger, 84 Ala. 95, 4 So. 237.

Illinois.— Barrie *v.* Frost, 105 Ill. App. 187; Faulkner *v.* I. L. Elwood Mfg. Co., 79 Ill. App. 544.

Iowa.— Ley *v.* Metropolitan L. Ins. Co., 120 Iowa 203, 94 N. W. 568; Grimmell *v.* Warner, 21 Iowa 11.

Massachusetts.— Wood *v.* Massachusetts Mut. Acc. Assoc., 174 Mass. 217, 54 N. E. 541.

Michigan.— Bly *v.* Brady, 113 Mich. 176, 71 N. W. 521.

Missouri.— Redpath *v.* Lawrence, 48 Mo. App. 427.

Nebraska.— Upton *v.* Levy, 39 Nebr. 331, 58 N. W. 95; Stetson *v.* Riggs, 37 Nebr. 797, 56 N. W. 628; Bauer *v.* Taylor, 4 Nebr. (Unoff.) 710, 98 N. W. 29 [*modifying* 4 Nebr. (Unoff.) 701, 96 N. W. 268].

New York.— Morris *v.* Talcott, 96 N. Y. 100; Hemenway *v.* Keeler, 88 Hun 405, 34 N. Y. Suppl. 808. See also Grosjean *v.* Galloway, 82 N. Y. App. Div. 380, 81 N. Y. Suppl. 871.

North Carolina.— Tomlinson *v.* Payne, 53 N. C. 108.

Pennsylvania.— Messinger *v.* Hagenbuch, 2 Whart. 410.

Texas.— Carson *v.* Houssels, (Civ. App. 1899) 51 S. W. 290.

Wisconsin.— Miles *v.* Pike Min. Co., (1905) 102 N. W. 555.

United States.— Sanborn *v.* Stetson, 21 Fed. Cas. No. 12,291, 2 Story 481.

See 23 Cent. Dig. tit. "Frauds," § 47.

80. Allen *v.* Elrick, 29 Colo. 118, 66 Pac. 891; Morris *v.* Talcott, 96 N. Y. 100; Carson *v.* Houssels, (Tex. Civ. App. 1899) 51 S. W. 290. See also *infra*, VII, L.

If the evidence is equally balanced the charge is not established. Alter *v.* Stockham Bank, 53 Nebr. 223, 73 N. W. 667.

81. Mosher *v.* Post, 89 Wis. 602, 62 N. W. 516.

Burden of proving foreign law.— If the truth or falsity of the statements set out depends upon the laws of a foreign state, plaintiff has the burden of showing what such laws are. Willoughby *v.* Fredonia Nat. Bank, 68 Hun (N. Y.) 275, 23 N. Y. Suppl. 46.

82. Bennett *v.* Gibbons, 55 Conn. 450, 12 Atl. 99; Hiner *v.* Richter, 51 Ill. 299; Wakeman *v.* Dalley, 51 N. Y. 27, 10 Am. Rep. 551; Postal *v.* Cohn, 83 N. Y. App. Div. 27, 81 N. Y. Suppl. 1089.

Claim for damages in equity suit.— The fact that a claim for damages resulting from misrepresentations as to the credit of a firm is injected by a petition of intervention into a suit in equity does not change the rule requiring proof of scienter. Clement *v.* Swanson, 110 Iowa 106, 81 N. W. 233.

83. Morris *v.* Talcott, 96 N. Y. 100; Wakeman *v.* Dalley, 51 N. Y. 27, 10 Am. Rep. 551; Marsh *v.* Falker, 40 N. Y. 562; Dwyer *v.* Bassett, 1 Tex. Civ. App. 513, 21 S. W. 621.

84. Taylor *v.* Guest, 58 N. Y. 262 [*reversing* 45 How. Pr. 276]; Mahoney *v.* O'Neill, 36 Misc. (N. Y.) 795, 74 N. Y. Suppl. 917 [*reversing* 36 Misc. 843, 74 N. Y. Suppl. 918]; Hard *v.* Ashley, 18 N. Y. Suppl. 413 [*affirmed* in 136 N. Y. 645, 32 N. E. 1015]. See also *infra*, VII, O, 8, a.

Plaintiff need not prove his ignorance.— It has been held, however, that plaintiff need not prove that he was ignorant of the falsity of defendant's statements, as this would require him to prove a negative; but that if defendant seeks to defeat a recovery on the ground that plaintiff was cognizant of the real facts, he must adduce evidence to substantiate his contention. Hiner *v.* Richter, 51 Ill. 299. But see, generally, EVIDENCE, 16 Cyc. 927, 928, 936.

the false representations, and sets up facts in justification and avoidance, it is incumbent upon him to prove those facts.[85]

K. Admissibility of Evidence[86] — **1. Relevancy in General.** In determining the existence of fraud any evidence, direct or circumstantial, which is competent by other rules of law and which in the opinion of the court has a legitimate tendency to prove or disprove the allegations in issue is admissible.[87] Great latitude is allowed in the introduction of evidence,[88] the extent of the investigation being largely in the discretion of the trial court,[89] and objections to circumstantial evidence on the ground of irrelevancy are not favored.[90] Circumstantial evidence to show fraud may well be admissible when taken as a whole, although some of the circumstances considered separately would be incompetent.[91] The whole transaction involving the alleged fraud may be given in evidence.[92]

Where plaintiff testifies that he relied upon defendant's representations, the burden is upon defendant to rebut this evidence by showing that they were not relied upon. Sprague *v.* Taylor, 58 Conn. 542, 20 Atl. 612.

And if defendant attempts to prove plaintiff's knowledge of the real state of affairs before the consummation of the fraud, he can establish his contention only by proof of facts inconsistent with plaintiff's ignorance of the particular facts misrepresented. Charbonnel *v.* Seabury, 23 R. I. 543, 51 Atl. 208.

85. Winans *v.* Winans, 19 N. J. Eq. 220.

86. See, generally, Evidence, 16 Cyc. 821; 17 Cyc. 1.

87. *Colorado.*— Marsh *v.* Cramer, 16 Colo. 331, 27 Pac. 169.

Connecticut.— Bradbury *v.* Bardin, 35 Conn. 577.

Iowa.— High *v.* Kistner, 44 Iowa 79.

Kansas.— Smith *v.* Smidt, 5 Kan. 30.

Pennsylvania.— Stauffer *v.* Young, 39 Pa. St. 455.

United States.— Castle *v.* Bullard, 23 How. 172, 16 L. ed. 424; Carr *v.* Gale, 5 Fed. Cas. No. 2,434, 2 Ware 330.

See 23 Cent. Dig. tit. "Fraud," § 48.

Circumstantial evidence to prove fraud is admissible *ex necessitate*, for fraud is seldom susceptible of proof by direct evidence. "Experience shows that positive proof of fraudulent acts is not generally to be expected, and for that reason, among others, the law allows a resort to circumstances, as the means of ascertaining the truth." Castle *v.* Bullard, 23 How. (U. S.) 172, 187, 16 L. ed. 424. "It is very seldom that frauds are so bunglingly executed as to admit of direct proof. Unless exposed by circumstantial evidence they cannot generally be exposed at all. And no rigid rule of evidence can be applied to measure the admissibility of circumstances, for they arise out of the condition, relation, conduct, and declarations of the parties, and those are infinitely diversified." Stauffer *v.* Young, 39 Pa. St. 455, 459.

88. *Illinois.*— Vigus *v.* O'Bannon, 118 Ill. 334, 8 N. E. 778 [*affirming* 19 Ill. App. 241].

Michigan.— Cook *v.* Perry, 43 Mich. 623, 5 N. W. 1054.

New York.— Townsend *v.* Felthousen, 156 N. Y. 618, 51 N. E. 279 [*affirming* 90 Hun 89, 35 N. Y. Suppl. 538].

Pennsylvania.— Stauffer *v.* Young, 39 Pa. St. 455.

South Carolina.—Gist *v.* McJunkin, 2 Rich. 154.

Washington.— Tacoma *v.* Tacoma Light, etc., Co., 17 Wash. 458, 50 Pac. 55.

United States.— Castle *v.* Bullard, 23 How. 172, 16 L. ed. 424.

Canada.— Colter *v.* McPherson, 12 Ont. Pr. 630.

See 23 Cent. Dig. tit. "Fraud," § 48.

89. Townsend *v.* Felthousen, 156 N. Y. 618, 51 N. E. 279 [*affirming* 90 Hun 89, 35 N. Y. Suppl. 538].

90. **The reason** is that the effect of circumstantial facts usually depend upon their connection with each other. Castle *v.* Bullard, 23 How. (U. S.) 172, 16 L. ed. 424.

91. Castle *v.* Bullard, 23 How. (U. S.) 172, 16 L. ed. 424. See, generally, Evidence, 16 Cyc. 1116.

92. *Colorado.*— Lewis *v.* Dodge, 3 Colo. App. 59, 31 Pac. 1022, an agreement constituting part of the transaction held admissible.

Missouri.— Carder *v.* O'Neill, 176 Mo. 401, 75 N. W. 764.

Pennsylvania.— McLene *v.* Fullerton, 4 Yeates 522.

Texas.— Gilliam *v.* Alford, 69 Tex. 267, 6 S. W. 757.

Vermont.— McKindley *v.* Drew, 69 Vt. 210, 37 Atl. 285.

Illustrations.—The circumstances surrounding the making of an alleged false report to a mercantile agency are proper subjects of inquiry. Hinchman *v.* Weeks, 85 Mich. 535, 48 N. W. 790. Where the alleged false representations relate to a sale of land by plaintiff, evidence is admissible that plaintiff opened the negotiations. Perkin *v.* Embry, 72 S. W. 788, 24 Ky. L. Rep. 1990. In an action by an assignee of a mortgage against his assignor for falsely representing that certain payments had not been made prior to the assignment, the assignee may show that the assignment was made in consideration of a release by him of claims he had made by suit brought by him against the assignor. Hexter *v.* Bast, 125 Pa. St. 52, 17 Atl. 252, 11 Am. St. Rep. 874. In an action based on defendant's false representa-

Every relevant circumstance in the condition and relation of the parties,[93] and every act and declaration of the party charged with fraud, is competent evidence, if in the opinion of the court it bears such a relation to the transaction under investigation as to persuade the jury that the allegation of fraud is or is not well founded.[94] But evidence of a character not likely "to beget mental conviction upon the point under inquiry," [95] or tending merely to create in the minds of the jury a personal prejudice against the party charged,[96] should be excluded. The circumstances adduced by plaintiff must tend to establish the probability of defendant's guilt.[97] Evidence inconsistent with the nature of the action is inadmissible,[98] unless such evidence is to be considered by the jury only in con-

tions in procuring goods from plaintiff, where the latter's credit man testified to the representations made to him at the time of the purchase, it was competent for plaintiff to state what those representations were, as reported to him by such employee, not in corr boration of the latter's testimony, but to show that plaintiff knew what the false representations were, and relied upon them in selling the goods. Banner *v.* Schlessinger, 109 Mich. 262, 67 N. W. 116.

93. *Colorado.*—Kenney *v.* Jefferson County Bank, 12 Colo. App. 24, 54 Pac. 404.

Kansas.— Elerick *v.* Reid, 54 Kan. 579, 38 Pac. 814.

New York.— James *v.* Work, 70 Hun 296, 24 N. Y. Suppl. 149.

Pennsylvania.— Stauffer *v.* Young, 39 Pa. St. 455; Swazey *v.* Herr, 11 Pa. St. 278.

Vermont.— McKindly *v.* Drew, 71 Vt. 138, 41 Atl. 1039.

Illustrations.— Where a patient sued his doctor for cheating him in an exchange of land, it was competent to ask plaintiff, on direct examination, what the state of his health was previous to the bargain, it being claimed that defendant had represented the land as a healthier location than that where plaintiff then resided. Dibble *v.* Nash, 47 Mich. 589, 11 N. W. 399. In an action against defendant for making fraudulent representations as to his financial condition, thereby obtaining merchandise on credit, plaintiffs may show that they sent their salesman to call on defendant, and that they refused to sell him goods, prior to receiving the report. Hinchman *v.* Weeks, 85 Mich. 535, 48 N. W. 790. See also Scheptel *v.* Hatch, 25 N. Y. Suppl. 240. In an action against a partner, by the purchaser of his interest, for falsely representing as collectable certain firm accounts assigned to the purchaser, evidence that the other partner's interest was merely nominal is admissible. Totten *v.* Burhans, 103 Mich. 6, 61 N. W. 58.

Evidence as to the status of the parties is always pertinent. Tacoma *v.* Tacoma Light, etc., Co., 17 Wash. 458, 50 Pac. 55.

Evidence of previous transactions between the parties is admissible to show the relation of the parties (James *v.* Work, 70 Hun (N. Y.) 296, 24 N. Y. Suppl. 149), or to show how defendant may have learned of the possibility of committing the fraud alleged (Monroe *v.* O'Shea, 4 Silv. Sup. (N. Y.) 292, 7 N. Y. Suppl. 540).

94. Stauffer *v.* Young, 39 Pa. St. 455. See also Smith *v.* Smidt, 5 Kan. 30; U. S. Home, etc., Assoc. *v.* Reams, 8 Ohio Dec. (Reprint) 272, 7 Cinc. L. Bul. 8; Carr *v.* Gale, 5 Fed. Cas. No. 2,434, 2 Ware 330.

Illustrations.— In a suit for fraud in substituting one parcel of land for another in an exchange of real property, it is competent to show that, before the exchange, defendant had offered to the witness the land which he afterward agreed to let plaintiff have. Dibble *v.* Nash, 47 Mich. 589, 11 N. W. 399. In an action for falsely representing that a mortgage sold was a first mortgage, when in fact it was a second mortgage, the statement of the mortgagee who sold the mortgage, made at the time of its execution, that he did not want it to contain an exception in the covenant against encumbrances, as that would affect the sale of it, is relevant evidence. Cronkhite *v.* Dickerson, 51 Mich. 177, 16 N. W. 371. Where the fraud alleged is the organization of a fraudulent insurance company, it is proper to admit evidence of statements published in a newspaper of which the president of the company was editor and which was used to advance the interests of such company. Timmerman *v.* Bidwell, 62 Mich. 205, 28 N. W. 866. In an action for fraudulent representations by a deputy sheriff, against whom damages have been recovered by the true owner of property seized by the deputy, at the request of one falsely claiming to be the owner thereof, and delivered to another asserted by him to have a valid chattel mortgage on the property, evidence that, shortly after its removal, the pretended mortgagee stated to plaintiff that it had been stolen from him, and he thought it was on its way to another state, when in fact it was shortly afterward in public use at the village where defendants both resided, is admissible, as having some tendency to show a concert of action between defendants in running off and concealing the property. Kenyon *v.* Woodruff, 33 Mich. 310.

95. Stauffer *v.* Young, 39 Pa. St. 455.

96. Carr *v.* Gale, 5 Fed. Cas. No. 2,434, 2 Ware 330.

97. Doctor *v.* Gilmartin, 5 N. Y. St. 894.

98. Clark *v.* Ralls, 58 Iowa 201, 12 N. W. 260, evidence that defendant entered into a contract of guaranty.

Offer to return consideration.— The nature of the action renders immaterial the question as to whether plaintiff offered to return

nection with the allegations of fraud, and is not made the basis of the right of recovery.[99] Evidence tending to show a breach by defendant of the contract alleged to have been fraudulently procured is ordinarily irrelevant to the question of fraud,[1] but may in some cases be admissible as tending to show the manner and means of committing the fraud and of causing the injury,[2] as where the fraud has been accomplished in part by false promises which have not been performed;[3] but evidence of a breach of a promise not connected with the alleged fraudulent transaction is clearly inadmissible.[4]

2. Parol Evidence. An action of deceit based on fraud in the procurement of a contract not being an action to enforce the contract,[5] parol evidence of the fraud is admissible notwithstanding that the contract is in writing, and this is true whether the fraud is made the basis of an action or is set up by the defrauded party by way of recoupment or counter-claim when he is sued upon the contract.[6]

3. Evidence of Particular[7] Elements of Fraud — a. The Representations. Evidence tending to show what representations were actually made, and the manner of making them, is of course admissible on behalf either of plaintiff or defendant;[8] and if plaintiff claims to have been deceived by statements made to a third

the consideration for the contract alleged to have been fraudulently secured. Arnold *v.* Teel, 182 Mass. 1, 64 N. E. 413. And see *supra*, VII, D, 2.

99. Averill *v.* Wood, 78 Mich. 342, 44 N. W. 381.

1. Taylor *v.* Saurman, 110 Pa. St. 3, 1 Atl. 40.

2. Corder *v.* O'Neill, 176 Mo. 401, 75 S. W. 764.

3. McDonald *v.* Smith, (Mich. 1905) 102 N. W. 668. And see Salem India-Rubber Co. *v.* Adams, 23 Pick. (Mass.) 256, holding that in an action of deceit for fraud inducing a purchase of goods, parol evidence of a warranty not contained in the written contract of sale is admissible as evidence of a representation but not for any other purpose.

4. Hubbard *v.* Long, 105 Mich. 442, 63 N. W. 644.

5. See *supra*, VII, B.

6. *Alabama.*— See Nelson *v.* Wood, 62 Ala. 175.

Iowa.— Scroggin *v.* Wood, 87 Iowa 497, 54 N. W. 437; Stanhope *v.* Swafford, 80 Iowa 45, 45 N. W. 403; Porter *v.* Stone, 62 Iowa 442, 17 N. W. 654; Nixon *v.* Carson, 38 Iowa 338; Rohrabacker *v.* Ware, 37 Iowa 85.

Massachusetts.— Burns *v.* Dockray, 156 Mass. 135, 30 N. E. 551. *Compare* Salem India-Rubber Co. *v.* Adams, 23 Pick. 256.

Michigan.— Picard *v.* McCormick, 11 Mich. 68.

Nebraska.— Bauer *v.* Taylor, 4 Nebr. (Unoff.) 701, 96 N. W. 268 [*modified* on another point in 4 Nebr. (Unoff.) 710, 98 N. W. 29].

New Hampshire.—Coon *v.* Atwell, 46 N. H. 510.

Pennsylvania.— Wolfe *v.* Arrott, 109 Pa. St. 473, 1 Atl. 333. See also Cole *v.* High, 173 Pa. St. 590, 34 Atl. 292.

Tennessee.— Smith *v.* Cozart, 2 Head 526, holding that where a purchase of chattels is induced by a false parol warranty made for the purpose of throwing the buyer off his guard and fraudulently procuring his consent to the bargain, parol evidence is admissible to prove the warranty.

United States.— See Iasigi *v.* Brown, 17 How. 183, 15 L. ed. 208.

See 23 Cent. Dig. tit. "Fraud," § 48.

But *compare* Pickering *v.* Dowson, 4 Taunt. 779.

This proposition is an illustration of a well settled limitation to the "parol evidence rule." See Evidence, 17 Cyc. 695 *et seq.*

7. See also *infra*, VII, K, 3, b.

Necessity for writing see Frauds, Statute of.

8. Smith *v.* Smidt, 5 Kan. 30.

A written description of land, made by the vendor and placed in the hands of his agent, and to which he refers the vendee before sale, is properly admitted in evidence as a representation concerning the land. Williams *v.* McFadden, 23 Fla. 143, 1 So. 618, 11 Am. St. Rep. 345.

Newspaper advertisement.— In an action based on fraudulent misrepresentations by a physician whereby plaintiff was induced to purchase the former's practice, the representations relating to the character and value of the practice, a newspaper advertisement published by defendant in which the representations are set forth is admissible. Bradbury *v.* Bardin, 35 Conn. 577.

Statements of third person in defendant's presence.— Where a third person accompanying a vendor at a sale makes in the vendor's presence and uncontradicted by him statements to the prospective purchaser regarding the property to be sold, such statements are binding on the vendor and admissible against him in an action of deceit brought by the purchaser. Foster *v.* Trenary, 65 Iowa 620, 22 N. W. 898.

Evidence of custom.— Where the alleged misrepresentations relate to the meaning of private marks on goods sold to plaintiff, testimony as to the general custom of merchants marking their goods with private marks is competent. Elerick *v.* Reid, 54 Kan.

person acting on his behalf he may show how the statements were communicated to him.[9]

b. Falsity of Representations — (I) *On Behalf of Plaintiff* — (A) *In General.* Any evidence, otherwise competent, tending to prove that the representations were untrue is admissible.[10] Circumstantial as well as direct evidence is admissible[11] if relevant,[12] and this although the particular circumstances considered separately are also consistent with the truth of the representations.[13] Evidence of defendant's pecuniary interest in the transaction may be admissible as tending to show a motive to falsify.[14] Where the misrepresentations alleged relate to the value of property, evidence of the actual value of the property is admissible;[15] and where they consisted in statements concerning the quality and condition of property sold, the falsity may be established by showing the actual quality and condition immediately after the representations were made,[16] although it is not proper to show what the parties considered the property to be worth a considerable time thereafter.[17]

(B) *Representations Inducing Purchase of Business.* In an action by the buyer of a business for false representations as to the amount and profits of the business sold,[18] evidence is admissible to show that, although the business con-

579, 38 Pac. 814. *Compare* Cable *v.* Bowlus, 21 Ohio Cir. Ct. 53, 11 Ohio Cir. Dec. 526, evidence of custom as to manner of putting certain stock on the market held not admissible.

9. Sigafus *v.* Porter, 84 Fed. 430, 28 C. C. A. 443 [*reversed* on other grounds in 179 U. S. 116, 21 S. Ct. 34, 45 L. ed. 113].

10. Bradbury *v.* Bardin, 35 Conn. 577. See also Stewart *v.* Wyoming Cattle Ranche Co., 128 U. S. 383, 9 S. Ct. 101, 32 L. ed. 439.

Previous written statement.— In an action against an officer of a corporation for false representations concerning the condition and business of the company, a written statement of the company's condition signed by defendant and filed for record is admissible to show the falsity of the representations, although it described the condition of the company at a somewhat earlier date than that on which the representations were made and although plaintiff had not seen the statement. Shelton *v.* Healy, 74 Conn. 265, 50 Atl. 742.

11. Thorn *v.* Helmer, 4 Abb. Dec. (N. Y.) 408, 2 Keyes 27. And see Bradbury *v.* Bardin, 35 Conn. 577.

Representations as to corporate stock.— Upon the question whether defendant, who was the manager of a corporation from the time of its organization, knowingly misrepresented the value of the corporate stock, it was held proper to admit testimony that when the company was organized stock was issued in return for property largely in excess of the value thereof, and that on a subsequent increase considerable stock was issued without being paid for. Shelton *v.* Healy, 74 Conn. 265, 50 Atl. 742.

12. Vines *v.* Chisolm, 1 N. Y. Suppl. 102, holding that where defendant is charged with having falsely represented that a corporation refused to sell its stock at less than a certain sum per share, evidence that some of the stock had sold at the rate named is not relevant to the issue.

Representation as to assets of firm.— In an action against a member of a firm for giving a false statement of the firm's assets evidence of personal debts owed by defendant at the time the statement was given is inadmissible. Sills Stove Works *v.* Brown, 71 Vt. 478, 45 Atl. 1040.

Evidence as to ownership of other property. — Where the alleged representations are asserted to have induced plaintiff to purchase certain bonds issued by a third person, and it is alleged that defendant falsely represented that they had a certain priority and were secured by mortgage, evidence as to the knowledge of defendant as to what property the third person had is not admissible to show falsity in the representations. Bauernschmidt *v.* Maryland Trust Co., 89 Md. 507, 43 Atl. 790.

13. Stubly *v.* Roachboard, 68 Mich. 401, 36 N. W. 192. See, generally, Evidence, 16 Cyc. 1116, 1117.

14. Defendant's pecuniary interest.—Where defendant is a witness in his own behalf it is proper to admit evidence in behalf of plaintiff to show that defendant had a direct pecuniary interest in procuring the contract alleged to have been fraudulently induced. McKindley *v.* Drew, 69 Vt. 210, 37 Atl. 285, an action against an insurance agent for fraudulently inducing plaintiff to take a policy, plaintiff being allowed to show that defendant was entitled to receive a part of the first premium and that he was working for a prize offered by the company. And see Insurance.

15. Darner *v.* Daggett, 55 Nebr. 198, 75 N. W. 548; Townsend *v.* Felthousen, 156 N. Y. 618, 51 N. E. 279 [*affirming* 90 Hun 89, 35 N. Y. Suppl. 538].

16. Merrillat *v.* Plumer, 111 Iowa 643, 82 N. W. 1020; Faulkner *v.* Klamp, 16 Nebr. 174, 20 N. W. 220.

17. Castenholz *v.* Heller, 82 Wis. 30, 51 N. W. 432.

18. Sale of a physician's practice.— For numerous facts and circumstances held admissible to prove the falsity of representations made by a physician to induce another

tinues to be conducted under substantially the same conditions as before, its volume and profits are much less than were represented.[19] But it has been held that the mere fact that plaintiff does not realize the profits represented by defendant is not evidence of falsity if the business is one requiring personal skill, judgment, and tact.[20] Nor is defendant's bank-book admissible for the purpose of showing that his profits were not as represented, unless there is independent evidence that the bank-book shows all the profits.[21] And a comparison of the manner in which the business was conducted by plaintiff and that in which it was subsequently conducted by a third person is immaterial and inadmissible.[22]

(c) *Representations as to Financial Condition.* To show the falsity of a representation that a third person is solvent, a judgment rendered against him by plaintiff and a return of execution thereon *nulla bona* may be admitted;[23] and testimony of a sheriff as to facts tending to show insolvency may likewise be competent.[24] Where the representations relate to the financial condition or solvency of a person at a certain time, evidence of facts occurring subsequently is not admissible,[25] except in so far as it tends to show the condition previously existing.[26]

(ii) *On Behalf of Defendant*—(a) *In General.* While defendant may introduce any relevant evidence to show that he made no false statements,[27] evidence of an independent fact which is entirely consistent with the falsity of the statement charged is not admissible either to contradict plaintiff's testimony on this point or to corroborate defendant's.[28]

(b) *Lack of Benefit From Transaction.* Although benefit to the guilty party is not an essential element of actionable fraud,[29] the fact that defendant obtained no benefit from the transaction alleged to have been induced by his fraud may be material as tending to show the improbability of his having made the misrepresentations charged, and evidence of this fact may be given in his behalf,[30] as where he conducted the transaction for a third person who was the real party in interest.[31] And for like reasons evidence is admissible to show that defendant obtained no undue or excessive profit from the transaction.[32] Thus where plaintiff claims that he was induced to make an exchange with defendant through the latter's fraudulent misrepresentations relating to his property and

to purchase his practice see Bradbury *v.* Bardin, 35 Conn. 577; Thorn *v.* Helmer, 4 Abb. Dec. (N. Y.) 408, 2 Keyes 27.

19. Potter *v.* Mellen, 41 Minn. 487, 43 N. W. 375 (sale of a laundry); Markel *v.* Moudy, 11 Nebr. 213, 7 N. W. 853 (sale of an eating-house); Thorn *v.* Helmer, 4 Abb. Dec. (N. Y.) 408, 2 Keyes 27 (sale of an interest in a physician's practice).

20. Taylor *v.* Saurman, 110 Pa. St. 3, 1 Atl. 40, sale of a photographer's business. This distinction was not noticed in the cases cited in the preceding note.

21. Taylor *v.* Saurman, 110 Pa. St. 3, 1 Atl. 40.

22. Markel *v.* Moudy, 11 Nebr. 213, 7 N. W. 853.

23. Hadcock *v.* Osmer, 4 N. Y. App. Div. 435, 38 N. Y. Suppl. 618 [*affirmed* in 153 N. Y. 604, 47 N. E. 923].

24. Testimony by a sheriff that he had frequently had executions against a party resident in his county, that he knew his pecuniary condition, that he had no property out of which any portion of such executions could be made, and that his general reputation in the community where he resided was that of an insolvent is competent evidence to establish insolvency. Burr *v.* Willson, 22 Minn. 206.

25. Redding *v.* Wright, 49 Minn. 322, 51 N. W. 1056.

26. Warfield *v.* Clark, 118 Iowa 69, 91 N. W. 833. See also Cahill *v.* Applegarth, 98 Md. 493, 56 Atl. 794.

27. Smith *v.* Smidt, 5 Kan. 30.

28. Sprague *v.* Taylor, 58 Conn. 542, 20 Atl. 612. And see Bull *v.* Pratt, 1 Conn. 342.

29. See *supra*, III, B, 9.

30. Hidden *v.* Hooker, 70 Vt. 280, 40 Atl. 748.

31. Hidden *v.* Hooker, 70 Vt. 280, 40 Atl. 748.

32. To show whether plaintiff was induced to sell stock for less than its value by the fraudulent representations of defendant, evidence is admissible to show that defendant could have obtained part of the shares for much less than he paid plaintiff. McNicol *v.* Collins, 30 Wash. 318, 70 Pac. 753.

On the other hand evidence as to what land cost defendant who was sued for deceit in selling it has been held immaterial where the deceit consisted in falsely representing the

tending to show a fictitious value, defendant may give evidence of the actual value of what he received in the exchange, as tending to show that he had no reason to misrepresent his own property.[33]

c. Scienter — (i) *On Behalf of Plaintiff.* Circumstantial evidence is admissible to prove that defendant knew that his statements were false,[34] and scienter may be imputed to him by proving his agent's knowledge of the fact misrepresented,[35] although such knowledge was acquired in another transaction.[36] Evidence tending to show an excess of zeal in defendant in realizing something from the contract fraudulently procured, even at an apparent sacrifice,[37] or to show extreme anxiety to enforce the contract against plaintiff but to avoid the ordinary course of litigation in so doing[38] has been held admissible. Evidence of transactions between defendant and third persons concerning the subject-matter of the representations is admissible to show scienter.[39] Where defendant is charged with having acquiesced in and given authenticity to statements made by a third person, evidence of declarations made by him to such third person is admissible to show knowledge that such statements were being circulated.[40] Evidence of false statements with reference to an immaterial fact may be admissible to show that defendant had knowledge of a material fact which he concealed.[41]

(ii) *On Behalf of Defendant.* Defendant is of course entitled to introduce evidence tending to show his lack of knowledge of the falsity of the alleged misrepresentations.[42] Thus evidence showing that defendant believed and had good reason to believe that his statements were true,[43] or showing circumstances consistent with his good faith at the time of making the representations, is admis-

situation of the land. Baker *v.* Sherman, 71 Vt. 439, 46 Atl. 57.

33. Likes *v.* Baer, 10 Iowa 89; Farmers' State Bank *v.* Tenney, (Nebr. 1905) 102 N. W. 617; Weidner *v.* Phillips, 114 N. Y. 458, 21 N. E. 1011. See also High *v.* Kistner, 44 Iowa 79.

34. Boddy *v.* Henry, 126 Iowa 31, 101 N. W. 447, holding also that tax receipts reciting the number of acres in a certain tract of land were admissible to show knowledge by the vendor that his statements as to the area were untrue, the tax receipts having been delivered by the vendor to the purchaser. See, generally, Evidence, 16 Cyc. 1131.

Illustrations.— Where false representations are alleged inducing plaintiff to purchase mining stock, evidence tending to show that defendant had no faith in the mining property is admissible. Darling *v.* Klock, 165 N. Y. 623, 59 N. E. 1121. If the fraud alleged consists in inducing plaintiff to believe that goods sold by him were for a third person of responsibility, whereas in fact they were obtained by defendant, bills of lading and transcripts of invoices containing the name of such third person are admissible to show knowledge by defendant that plaintiff supposed the goods were intended for such third person. Packer *v.* Lockman, 115 Mass. 72.

Representations as to financial condition.— Where the alleged false representations concern the financial responsibility of a third person, evidence showing that such third person had applied to defendant for financial aid before the making of the representations is admissible. Endsley *v.* Johns, 120 Ill. 469, 12 N. E. 247, 60 Am. Rep. 572. And evidence that defendant held claims against the third person at the time of making the representations, and subsequently proved them in bankruptcy, is also admissible. Safford *v.* Grout, 120 Mass. 20.

Evidence of fraudulent transactions with third persons see *infra*, VII, K, 4.

35. Oehlhof *v.* Solomon, 73 N. Y. App. Div. 329, 76 N. Y. Suppl. 716. See Principal and Agent.

36. Oehlhof *v.* Solomon, 73 N. Y. App. Div. 329, 76 N. Y. Suppl. 716.

37. **Selling goods at very low price.**—Where plaintiff alleges that by the fraud of defendant he was induced to trade a stock of goods for land, and defendant has introduced evidence that the goods were greatly overvalued, plaintiff may show that defendant resold the goods at very low prices, as showing a desire to speedily dispose of them. Connors *v.* Chingren, 111 Iowa 437, 82 N. W. 934.

38. Pearson *v.* Dover Beef Co., 69 N. H. 584, 44 Atl. 113, evidence that defendant who had sold goods to plaintiff followed him into another state where he had gone for a day, and there caused his arrest in an action for the purchase-price.

39. Allin *v.* Millison, 72 Ill. 201. And see *infra*, VII, K, 4.

40. Salmon *v.* Richardson, 30 Conn. 360, 79 Am. Dec. 255.

41. Zimmerman *v.* Brannon, 103 Iowa 144, 72 N. W. 439.

42. Boddy *v.* Henry, 113 Iowa 462, 85 N. W. 771, 53 L. R. A. 769.

43. Baker *v.* Trotter, 73 Ala. 277; Mentzer *v.* Sargeant, 115 Iowa 527, 88 N. W. 1068; Bowker *v.* Delong, 141 Mass. 315, 4 N. E. 834.

Character of third person recommended to credit.— In an action based upon false representations as to the credit of a third person, evidence of the good character of the

sible on his behalf.[44] And where a presumption or inference of knowledge on his part arises from facts in evidence he may introduce evidence of other facts to rebut it.[45]

d. Intent — (I) *On Behalf of Plaintiff* — (A) *In General.* As previously indicated,[46] circumstantial evidence is admissible to prove fraudulent intent,[47] such as that the false representations were made with knowledge of their falsity and with the intent that plaintiff should act upon them,[48] and great latitude is allowed in the introduction of evidence for this purpose.[49]

(B) *Subsequent Conduct of Defendant.* Evidence of defendant's subsequent conduct may be admissible to show fraudulent intent,[50] or motive for making the alleged fraudulent representations.[51]

(II) *On Behalf of Defendant.* Defendant may testify as to his own intent,[52] unless his representations were made in writing,[53] and while his testimony may or may not have weight with the jury it cannot be excluded on the ground that it has no probative value.[54] But where facts are proved from which a fraudulent intent is necessarily to be inferred,[55] defendant will not be allowed to testify that he had no such intent.[56] On the question of intent evidence is admissible that defendant acted under the advice of counsel[57] or of public officers whose advice it was proper to seek under the circumstances;[58] and he may show that he has always acted as if he believed his representations to be true.[59] He may prove any circumstances tending to show that he himself was misled.[60] He may show what information he derived from third persons,[61] the means of information of such persons,[62] and what he did in reliance upon the knowledge thus acquired,[63] unless his representations purported to be based solely upon personal knowledge.[64] Defendant may prove statements similar to those alleged, made at a time when he had no motive to falsify.[65] And evidence is admissible on his behalf to show that the alleged fraud was a mere mistake.[66] But a fraudu-

third person is admissible on behalf of defendant as tending to show that defendant had a well-founded belief in the truth of the representation. Baker *v.* Trotter, 73 Ala. 277.

44. Cole *v.* High, 173 Pa. St. 590, 34 Atl. 292.

45. Cole *v.* Cassidy, 138 Mass. 437, 52 Am. Rep. 284. See also Boddy *v.* Henry, 113 Iowa 462, 85 N. W. 771, 53 L. R. A. 769.

46. See *supra*, VII, K, 1.

47. White *v.* Leszynsky, 14 Cal. 165; Brewster *v.* Crossland, 2 Colo. App. 446, 31 Pac. 236; Castle *v.* Bullard, 23 How. (U. S.) 172, 16 L. ed. 424. See, generally, EVIDENCE, 16 Cyc. 1131.

Fraudulent transactions with third persons see *infra*, VII, K, 4.

48. Williams *v.* Wood, 14 Wend. (N. Y.) 126. And see *supra*, III, B, 6.

49. See *supra*, VII, K, 1.

50. Elwell *v.* Russell, 71 Conn. 462, 42 Atl. 862. See also Simmons *v.* Fay, 1 E. D. Smith (N. Y.) 107.

51. Minx *v.* Mitchell, 42 Kan. 688, 22 Pac. 709.

52. Warfield *v.* Clark, 118 Iowa 69, 91 N. W. 833; Pope *v.* Hart, 35 Barb. (N. Y.) 630. See also Boddy *v.* Henry, 113 Iowa 462, 85 N. W. 771, 53 L. R. A. 769. *Contra*, Ballard *v.* Lockwood, 1 Daly (N. Y.) 158.

53. Where the false representations are contained in a letter written by defendant, he cannot testify as to the meaning of language used in the letter; for as to this the letter itself is conclusive and its construction is for the jury. Flower *v.* Brumbach, 131 Ill. 646, 23 N. E. 335 [*affirming* 30 Ill. App. 294].

54. Pope *v.* Hart, 35 Barb. (N. Y.) 630.

55. See *supra*, III, B, 6.

56. Dulaney *v.* Rogers, 64 Mo. 201.

57. Warfield *v.* Clark, 118 Iowa 69, 91 N. W. 833; Cole *v.* High, 173 Pa. St. 590, 34 Atl. 292. See also Kountze *v.* Kennedy, 147 N. Y. 124, 41 N. E. 414, 49 Am. St. Rep. 651, 29 L. R. A. 360 [*affirming* 72 Hun 311, 25 N. Y. Suppl. 682].

58. Warfield *v.* Clark, 118 Iowa 69, 91 N. W. 833.

59. Clausen *v.* Tjernagel, 91 Iowa 285, 59 N. W. 277; Baker *v.* Sherman, 71 Vt. 439, 46 Atl. 57.

60. Messinger *v.* Hagenbuch, 2 Whart. (Pa.) 410.

61. Merwin *v.* Arbuckle, 81 Ill. 501; Beach *v.* Bemis, 107 Mass. 498; Hinson *v.* King, 50 N. C. 393.

62. Holmes *v.* Moffat, 9 N. Y. St. 41.

63. Holmes *v.* Moffat, 9 N. Y. St. 41.

64. Browning *v.* National Capital Bank, 13 App. Cas. (D. C.) 1.

In an action for misrepresenting a third person's financial condition, evidence as to the reputed wealth of such person and as to his integrity and truthfulness has been held inadmissible. Browning *v.* National Capital Bank, 13 App. Cas. (D. C.) 1.

65. McCracken *v.* West, 17 Ohio 16.

66. Taylor *v.* Leith, 26 Ohio St. 428 (mistake in a deed); Juniata Bank *v.* Brown, 5 Serg. & R. (Pa.) 226.

lent intent proved cannot be rebutted by evidence of defendant's general business integrity.[67]

e. Reliance on Representations — (I) *The Right to Rely.* Evidence is admissible of any facts tending to show reasons for reliance upon defendant's representation — as that the discovery of the true condition of things was difficult,[68] that the relations of the parties were of a confidential nature,[69] that plaintiff was ignorant of the matters to which the representations related while defendant was familiar with them,[70] or that plaintiff was of weak intellect and easily imposed upon.[71] By the weight of authority, testimony of plaintiff that he would not have entered into the transaction had he known the truth or had not the misrepresentations been made is competent as being the statement of a fact peculiarly within the knowledge of the witness and hardly susceptible of proof in any other way, and this notwithstanding the objection that the testimony is a mere conclusion.[72] But it has been held that plaintiff cannot testify as to his uncommunicated motives or intentions to show why he did not make inquiry.[73]

(II) *The Fact of Reliance* — (A) *On Behalf of Plaintiff.* Any evidence otherwise competent, tending to show that plaintiff relied upon defendant's representations is admissible,[74] as that plaintiff sacrificed valuable interests in order to enter into the contract alleged to have been fraudulently procured.[75] Evidence as to what plaintiff relied on in making the transaction is admissible.[76] It is proper to allow plaintiff to testify that he relied upon defendant's representations and believed them to be true,[77] or in case of a purchase that he relied on receiving what he had bargained for.[78] But for the purpose of showing reliance on the representations declared on, evidence of acts or representations of defendant subsequent to the commission of the fraud alleged is manifestly irrelevant and incompetent.[79]

(B) *On Behalf of Defendant.* In an action based on fraudulent misrepresentations as to property sold to plaintiff, defendant may introduce evidence that before the sale plaintiff examined the property and said that he was satisfied with it;[80] and he may show by competent evidence that plaintiff would have bought

67. McBean *v.* Fox, 1 Ill. App. 177 [*disapproving* 1 Greenleaf Ev. § 54].

As to character in evidence in civil cases see Evidence, 16 Cyc. 1263 *et seq.*

68. Rhoda *v.* Annis, 75 Me. 17, 46 Am. Rep. 354.

69. Glaspie *v.* Keator, 56 Fed. 203, 5 C. C. A. 474.

70. McKindley *v.* Drew, 69 Vt. 210, 37 Atl. 285, action for fraudulent misrepresentations inducing plaintiff to take a policy of life insurance.

71. Bloomer *v.* Gray, 10 Ind. App. 326, 37 N. E. 819.

72. Browning *v.* National Capital Bank, 13 App. Cas. (D. C.) 1 (testimony of president and directors of a bank which was plaintiff); Mann *v.* Taylor, 78 Iowa 355, 43 N. W. 220; Stubly *v.* Beachboard, 68 Mich. 401, 36 N. W. 192; Pridham *v.* Weddington, 74 Tex. 354, 12 S. W. 49. *Contra*, Baker *v.* Trotter, 73 Ala. 277, excluding the evidence on the ground that it is a conclusion or inference of fact to be drawn by the jury.

73. Ball *v.* Farley, 81 Ala. 288, 1 So. 253.

74. Thorn *v.* Helmer, 4 Abb. Dec. (N. Y.) 408, 2 Keyes 271; Cummings *v.* Cummings, 5 Watts & S. (Pa.) 553.

Declarations of broker.—In an action against a person who had procured a note to be indorsed by a minor and had through a broker sold the note thus indorsed, declarations made by the broker at the time of the sale, concerning the character of the note and the parties thereto, are competent evidence on the question whether the purchaser of the note placed any reliance on the minor's indorsement. Lobdell *v.* Baker, 1 Metc. (Mass.) 193, 35 Am. Dec. 358.

75. Thorn *v.* Helmer, 4 Abb. Dec. (N. Y.) 408, 2 Keyes 27.

76. Avery Planter Co. *v.* Murphy, 6 Kan. App. 29, 40 Pac. 626; Smith *v.* Kingman, 70 Minn. 453, 73 N. W. 253.

77. Beebe *v.* Knapp, 28 Mich. 53; Thorn *v.* Helmer, 4 Abb. Dec. (N. Y.) 408, 2 Keyes 27; Von Bruck *v.* Peyser, 4 Rob. (N. Y.) 514. See also Charbonnel *v.* Seabury, 23 R. I. 543, 51 Atl. 208.

Plaintiff may testify as to his understanding of a letter written to him and containing the alleged false representations to show his reliance upon the representations. Von Bruck *v.* Peyser, 4 Rob. (N. Y.) 514.

78. Smith *v.* Kingman, 70 Minn. 453, 73 N. W. 253.

79. Faribault *v.* Sater, 13 Minn. 223; Mahoney *v.* O'Neill, 36 Misc. (N. Y.) 795, 74 N. Y. Suppl. 917 [*reversing* 36 Misc. 843, 74 N. Y. Suppl. 918]. And see *supra*, III, B, 7.

80. Bowker *v.* Delong, 142 Mass. 315, 4 N. E. 834.

the property at the same price had no representations been made.[81] That plaintiff had knowledge of the facts from other sources than defendant may be shown.[82] But evidence to show remote or independent collateral facts, offered on the theory that they rather than defendant's statements might possibly have influenced the action of plaintiff, is not admissible if there is no evidence that plaintiff was influenced by them.[83] And evidence that the real facts were generally known and were the subject of common talk in the community has been held inadmissible to show that plaintiff knew the truth and therefore was not misled by defendant.[84] To rebut plaintiff's evidence that he was not given a fair opportunity to examine property sold, evidence that a third person had been given by defendant ample opportunity for inspection at about the same time and under circumstances similar to those which surrounded the transaction with plaintiff is admissible, although plaintiff was not then present.[85] It may be shown that after plaintiff had an opportunity of discovering the alleged fraud, he had personal and business relations with defendant, implying the giving of confidence and credit.[86]

f. Damage or Injury.[87] Any evidence otherwise competent tending to show that plaintiff suffered damage from the alleged fraud is admissible.[88] But evidence that in the estimation of third persons plaintiff was not injured is not admissible, since plaintiff is entitled to the benefit of the bargain which he supposed he was making.[89]

4. Transactions With Third Persons. Independent fraudulent misrepresentations made to, or transactions had with, a third person, if similar to those alleged as a cause of action and if occurring at or about the same time as the transaction in issue, when the same motive for committing a fraud may reasonably be supposed to exist, are admissible in evidence, not to prove the fraudulent representations or acts in issue, for this would violate the rule as to *res inter alios acta*,[90] but

81. Carson *v.* Houssels, (Tex. Civ. App. 1899) 51 S. W. 290, holding also that it is proper to draw this admission from plaintiff on cross-examination.

82. High *v.* Kistner, 44 Iowa 79; Sigafus *v.* Porter, 84 Fed. 430, 28 C. C. A. 443 [*reversed* on other grounds in 179 U. S. 116, 21 S. Ct. 34, 45 L. ed. 113].

Admissions of plaintiff.— Where the cause of action is fraud by a vendor inducing a purchase of land, admissions of the purchaser to the effect that he had knowledge of the facts misrepresented are competent evidence against him regardless of the time when the admissions were made. High *v.* Kistner, 44 Iowa 79.

83. Sprague *v.* Taylor, 58 Conn. 542, 20 Atl. 612; Lee *v.* Tarplin, 183 Mass. 52, 66 N. E. 431.

84. Starkweather *v.* Benjamin, 32 Mich. 305, holding that in an action based on fraudulent representations of a vendor as to the quantity of land in the parcel sold, common rumors and "street talk" concerning the size of the parcel are not admissible to rebut the conclusions of fraud arising from the positive misrepresentations of the vendor; and that this is true even if such rumors had been brought home to the purchaser, for he would be justified in believing the vendor's statements as being based on better knowledge.

85. Salem India-Rubber Co. *v.* Adams, 23 Pick. (Mass.) 256, an action for deceit in the sale of a quantity of shoes, where plaintiff had introduced evidence that the boxes containing the shoes were so piled and arranged as to prevent a full and fair examination of their contents.

86. Jenne *v.* Gilbert, 26 Nebr. 457, 42 N. W. 415.

87. As to amount of damages see *infra*, VII, O, 8, b.

88. See Anderson *v.* Snyder, 14 Pa. Super. Ct. 424; Hindman *v.* Louisville First Nat. Bank, 112 Fed. 931, 50 C. C. A. 623, 57 L. R. A. 108.

Illustration.— In an action by one physician against another for fraudulent misrepresentations as to the amount and value of defendant's practice whereby plaintiff was induced to give up his own practice and enter into partnership with defendant, and as a part of the contract to purchase from him a house for more than its value, evidence as to the real value of the house is admissible as affecting the question of damages. Thorn *v.* Helmer, 4 Abb. Dec. (N. Y.) 408, 2 Keyes 27.

89. Matlock *v.* Reppy, 47 Ark. 148, 14 S. W. 546.

90. *Florida.*— West Florida Land Co. *v.* Lewis, 40 Fla. 404, 25 So. 274.

Illinois.— Johnston *v.* Beeney, 5 Ill. App. 601.

Michigan.— Cook *v.* Perry, 43 Mich. 623, 5 N. W. 1054.

New York.— Murfey *v.* Brace, 23 Barb. 561.

Ohio.— Edwards *v.* Owens, 15 Ohio 500.

Wisconsin.— See Huganir *v.* Cotter, 92 Wis. 1, 65 N. W. 364.

as tending to show scienter[91] or a fraudulent intent or purpose[92] in defendant's transactions with plaintiff; and where they relate to the same subject-matter as those in issue they may be admissible in corroboration of plaintiff's testimony regarding the statements made to him.[93] This rule is a well recognized exception to the principle excluding *res inter alios acta*.[94] But in order that similar representations to third persons may be admissible they must be of a fraudulent character,[95] and must in point of time and otherwise bear such a relation to the representations declared upon as to have a legitimate tendency to establish defendant's mental condition at the time of his transaction with plaintiff, else they are not admissible to prove scienter or intent[96] or to corroborate plaintiff's testimony.[97] Hence evidence of similar independent representations[98] or fraudulent transactions[99] occurring at a considerable time subsequent to those in issue is ordinarily not admissible as it can have no relevancy to the mental condition of defendant at the time of the alleged fraud. But a similar

Compare Porter *v.* Leyhe, 67 Mo. App. 540, where similar false statements regarding the same subject-matter, made to one who was plaintiff's adviser (plaintiff being a person of weak mind), were held admissible.

91. Foster *v.* Trenary, 65 Iowa 620, 22 N. W. 898; Rowley *v.* Bigelow, 12 Pick. (Mass.) 307, 23 Am. Dec. 607 [*followed* in Wiggin *v.* Day, 9 Gray (Mass.) 97]. See also U. S. Life Ins. Co. *v.* Wright, 33 Ohio St. 533.

92. *California.*— Kelley *v.* Owens, (1892) 30 Pac. 596, 31 Pac. 14.

Florida.— See West Florida Land Co. *v.* Studebaker, 37 Fla. 28, 19 So. 176.

Iowa.— Foster *v.* Trenary, 65 Iowa 620, 22 N. W. 893.

Kansas.— Elerick *v.* Reid, 54 Kan. 579, 38 Pac. 814.

Maine.— Craigin *v.* Tarr, 32 Me. 55.

Massachusetts.— Wiggin *v.* Day, 9 Gray 97; Rowley *v.* Bigelow, 12 Pick. 307, 23 Am. Dec. 607.

Michigan.— Stubly *v.* Beachboard, 68 Mich. 401, 36 N. W. 192; Beebe *v.* Knapp, 28 Mich. 53.

New Hampshire.— Jacobs *v.* Shorey, 48 N. H. 100, 97 Am. Dec. 586.

New York.— Boyd *v.* Boyd, 164 N. Y. 234, 58 N. E. 118 [*reversing* 21 N. Y. App. Div. 361, 47 N. Y. Suppl. 522]; Miller *v.* Barber, 66 N. Y. 558 [*affirming* 4 Hun 802]; Simmons *v.* Fay, 1 E. D. Smith 107; Olmsted *v.* Hotailing, 1 Hill 317; Cary *v.* Hotailing, 1 Hill 311, 37 Am. Dec. 323; Rumsey *v.* Lowell, Anth. N. P. 27. The representations made to third persons must be similar to the one in issue and of a like fraudulent character, but if the representations themselves have been proved, fraud in making them may be inferred by the jury from other facts proved in the cases. Simmonds *v.* Fay, 1 E. D. Smith 107.

Ohio.— Edwards *v.* Owens, 15 Ohio 500.

Vermont.— McCasker *v.* Enright, 64 Vt. 488, 24 Atl. 249, 33 Am. St. Rep. 938; Eastman *v.* Premo, 49 Vt. 355, 24 Am. Rep. 142.

United States.— Lincoln *v.* Claflin, 7 Wall. 132, 19 L. ed. 106; Castle *v.* Bullard, 23 How. 172, 16 L. ed. 424.

Canada.— See Waterloo Mut. Ins. Co. *v.* Robinson, 4 Ont. 295.

See 23 Cent. Dig. tit. "Fraud," §§ 50, 52. And see, generally, EVIDENCE, 17 Cyc. 281.

A fortiori fraudulent misrepresentations made to third persons are admissible where they relate to the same subject-matter as those alleged and constitute parts of a continuous transaction. Oudin *v.* Crossman, 15 Wash. 519, 46 Pac. 1047, misrepresentations made in repeated attempts to dispose of certain property. And see Foster *v.* Trenary, 65 Iowa 620, 22 N. W. 898.

But in Connecticut the admissibility of such evidence is confined to cases of alleged conspiracy. Edward Malley Co. *v.* Button, 77 Conn. 571, 60 Atl. 125; Edwards *v.* Warner, 35 Conn. 517 [*explaining* Hoxie *v.* Home Ins. Co., 32 Conn. 21, 85 Am. Dec. 240]. See also Knotwell *v.* Blanchard, 41 Conn. 614.

93. Porter *v.* Stone, 62 Iowa 442, 17 N. W. 654; Cook *v.* Perry, 43 Mich. 623, 5 N. W. 1054. But *compare* West Florida Land Co. *v.* Lewis, 40 Fla. 404, 25 So. 274.

94. Castle *v.* Bullard, 23 How. (U. S.) 172, 16 L. ed. 424. And see cases cited *supra*, note 90 *et seq.* See, generally, as to *res inter alios acta*, EVIDENCE, 17 Cyc. 274, 279 *et seq.*

95. West Florida Land Co., *v.* Lewis, 40 Fla. 404, 25 So. 274; Murfey *v.* Brace. 23 Barb. (N. Y.) 561; U. S. Life Ins. Co. *v.* Wright, 33 Ohio St. 533.

96. West Florida Land Co. *v.* Lewis, 40 Fla. 404, 25 So. 274; Burroughs *v.* Comegys, 17 Ill. App. 653; Parker *v.* Armstrong, 55 Mich. 176, 20 N. W. 892; Huganir *v.* Cotter, 92 Wis. 1, 65 N. W. 364. Such representations must have been made at or about the time of the transaction in question, and must appear to have been part of a general scheme to defraud. Johnston *v.* Beeney, 5 Ill. App. 601.

97. Johnston *v.* Beeney, 5 Ill. App. 601.

98. West Florida Land Co. *v.* Lewis, 40 Fla. 404, 25 So. 274.

99. Burroughs *v.* Comegys, 17 Ill. App. 653.

But whether occurring shortly before or shortly after they may be admissible if they tend to show defendant's mental attitude at the time of the transaction in issue. Stubly *v.* Beachboard, 68 Mich. 401, 36 N. W. 192; Simmons *v.* Fay, 1 E. D. Smith (N. Y.) 107.

representation subsequently made to a third person regarding the same subject-matter may be relevant and admissible to corroborate plaintiff's testimony as to the representations alleged or to show that plaintiff was not mistaken in his understanding of them.[1]

L. Weight and Sufficiency of Evidence[2] — **1. In General.** The charge of fraud must be proved by clear and satisfactory evidence;[3] and this rule governs the establishment of all the elements of the cause of action.[4] The degree of

1. Cook *v.* Perry, 43 Mich. 623, 5 N. W. 1054. But *compare* West Florida Land Co. *v.* Lewis, 40 Fla. 404, 25 So. 274.

2. See, generally, EVIDENCE, 17 Cyc. 753, 760.

3. *California.*— Hanscom *v.* Drullard, 79 Cal. 234, 21 Pac. 736.

Colorado.— American Nat. Bank *v.* Hammond, 25 Colo. 367, 55 Pac. 1090.

Iowa.— Ley *v.* Metropolitan L. Ins. Co., 120 Iowa 203, 94 N. W. 568; Clement *v.* Swanson, 110 Iowa 106, 81 N. W. 233; Des Moines Sav. Bank *v.* Goode, 106 Iowa 568, 76 N. W. 825; Bigelow *v.* Wilson, 99 Iowa 456, 68 N. W. 798; Bixby *v.* Carskaddon, 55 Iowa 533, 8 N. W. 354.

Kentucky.— O'Day *v.* Bennett, 82 S. W. 442, 26 Ky. L. Rep. 702.

Maine.— Flanders *v.* Cobb, 88 Me. 488, 34 Atl. 277, 51 Am. St. Rep. 410.

Maryland.— Melville *v.* Gary, 76 Md. 221, 24 Atl. 604.

Massachusetts.— Cocke *v.* Greene, 180 Mass. 525, 62 N. E. 1053.

Michigan.— Johnson *v.* Fisher, etc., Co., 80 Mich. 431, 45 N. W. 371.

Minnesota.— Hopkins *v.* Stuart, 39 Minn. 90, 38 N. W. 801.

Nebraska.— Van Etten *v.* Flannagan, 2 Nebr. (Unoff.) 59, 95 N. W. 1064.

New York.— Morris *v.* Talcott, 96 N. Y. 100; Postal *v.* Cohn, 83 N. Y. App. Div. 27, 81 N. Y. Suppl. 1089; Carson *v.* Eisner, 42 N. Y. App. Div. 614, 58 N. Y. Suppl. 826; Doctor *v.* Gilmartin, 14 Daly 206, 6 N. Y. St. 296; Mosler Safe Co *v.* Hartog, 26 Misc. 14, 55 N. Y. Suppl. 624; Robinson *v.* Heimbecker, 4 Misc. 606, 24 N. Y. Suppl. 701; Mutual Alliance Trust Co. *v.* Greenberger, 86 N. Y. Suppl. 729.

Pennsylvania.— Nelson *v.* Steen, 192 Pa. St. 581, 44 Atl. 247; Schmitz *v.* Roberts, 26 Pa. Super. Ct. 472.

Rhode Island.— Davidson *v.* Wheeler, 17 R. I. 433, 22 Atl. 1022.

Tennessee.— Continental Nat. Bank *v.* Nashville First Nat. Bank, 108 Tenn. 374, 68 S. W. 497.

Texas.— Edloff *v.* Mason, 79 Tex. 215, 14 S. W. 1036; Security Mortg., etc., Co. *v.* Haney, (Civ. App. 1894) 27 S. W. 215.

West Virginia.— Vanbibber *v.* Beirne, 6 W. Va. 168.

Wisconsin.— Dickson *v.* Pritchard, 111 Wis. 310, 87 N. W. 292.

United States.— Walker *v.* Collins, 59 Fed. 70, 8 C. C. A. 1; Sanborn *v.* Stetson, 21 Fed. Cas. No. 12,291, 2 Story 481.

Canada.— Beatty *v.* Neelon, 12 Ont. App. 50.

See 23 Cent. Dig. tit. "Fraud," §§ 55–58.

"Convincing" proof.— In many cases it is said that the proof must be "convincing," but the use of this word has been criticized, especially in instructions to juries, as misleading and as implying that the proof required is more than a preponderance of evidence. Hitchcock *v.* Baughan, 36 Mo. App. 216. See, however, *infra*, page 130, note 85.

The uncorroborated testimony of a person who has perpetrated a fraud is insufficient to support a decree that such fraud was advised by another party, who absolutely denies it. Fidler *v.* John, 178 Pa. St. 112, 35 Atl. 976.

Representations as to financial condition, etc.— Where the report of a mercantile agency stated that a certain merchant was thought to be worth a certain amount and would be sold his wants, and the merchant denied having made any statement as to his condition, or assented to any estimate, as testified to by the agency reporter, and he had not solicited the purchase, a finding of the jury exonerating him from fraud was warranted. Harton *v.* Carrick, 6 N. Y. St. 647. In the face of a positive refusal of a banking firm to sign a bond guaranteeing the performance, by one of their customers, of a contract with a third person, it should not readily be inferred that they made such representations in respect to the character and financial responsibility of their customer as would impose upon them the same responsibility they would have incurred by signing the bond. Randolph *v.* Allen, 73 Fed. 23, 19 C. C. A. 353.

Representations inducing lease.— Where an action is brought to recover damages for a deceitful representation whereby plaintiff was induced to take a written lease and suffered damage in consequence, the parol evidence of the fraud, in order to sustain the action, must be of the same character as if it were relied on to reform the written contract. Sacks *v.* Schimmel, 3 Pa. Super. Ct. 426, 39 Wkly. Notes Cas. 452.

4. Hoeft *v.* Kock, 119 Mich. 458, 78 N. W. 556; Leland *v.* Goodfellow, 84 Mich. 357, 47 N. W. 591; Morris *v.* Talcott, 96 N. Y. 100; Postal *v.* Cohn, 83 N. Y. App. Div. 27, 81 N. Y. Suppl. 1089.

False representations to induce a promise by defendant to divide the cost of fixing plaintiff's sewer, into which defendant's sewer emptied, are not proved by defendant's testimony that plaintiff said that defendant's neglect had caused defendant's sewer to burst, which defendant admitted at the time, although other testimony shows that both were probably mistaken. Sperling *v.* Boll, 10 N. Y. App. Div. 290, 41 N. Y. Suppl.

proof required is enhanced by reason of the latitude allowed in admitting evidence to prove fraud.[5] A charge of fraud cannot be sustained by mere insinuation and suspicion,[6] strained inference,[7] doubtful or suspicious circumstances,[8] or mere conjecture;[9] and evidence which produces a vague misgiving is not enough.[10] Where the evidence is capable of an interpretation which makes it equally as consistent with defendant's innocence as with his guilt, that meaning must be ascribed to it which accords with his innocence.[11] Although delay in beginning suit does not affect the right of action if suit is brought within the time allowed by the statute of limitations,[12] it may materially affect the credibility of the witnesses' testimony and the consequent weight to be given to the evidence.[13] While a preponderance of evidence is required to sustain the burden of proof,[14] a preponderance is sufficient,[15] and proof beyond a reasonable doubt is not neces-

889. Where plaintiff alleged that he was induced to buy a house upon a lot by false representations of defendant that the lot was not encumbered when there was a mortgage upon it, and the mortgagee testified that it was a lien upon the property subject to the right of defendant to sell the house, a judgment for plaintiff was not sustained by the evidence. Thompson *v.* Howd, 21 Misc. (N. Y.) 429, 47 N. Y. Suppl. 1071.

Sale of a business.— Where it is alleged that false representations as to the amount of business done has induced the purchase of a business, the fact that subsequent sales made by the vendee are less than the amount of sales represented by the seller is not sufficient evidence of falsity. Mosher *v.* Post, 89 Wis. 602, 62 N. W. 516. And see Markel *v.* Moudy, 11 Nebr. 213, 7 N. W. 853.

That plaintiff relied on defendant's statements as a material inducement to his change of position need not be established by very strong evidence. Taylor *v.* Guest, 58 N. Y. 262, 266, per Andrews, J.

The evidence that plaintiff suffered damage by reason of reliance upon the representations of defendant must be clear and satisfactory. Bradley *v.* Carter, 13 N. Y. Suppl. 945. And see *infra*, VII, O, 8. In an action for misrepresentations as to the value of land, evidence must be given as to the value of the land conveyed by plaintiff as consideration for the conveyance by defendant. Newhouse *v.* Clark, 60 Ind. 172.

5. Freeman *v.* Topkis, 1 Marv. (Del.) 174, 40 Atl. 948.

As to the latitude allowed in introducing evidence see *supra*, VII, K, 1.

6. Nelson *v.* Steen, 192 Pa. St. 581, 44 Atl. 247.

"Insinuations and suspicions are not evidence, and strictly speaking they have no place in it. They certainly do not constitute a proper basis for a verdict in accordance with them." Nelson *v.* Steen, 192 Pa. St. 581, 584, 44 Atl. 247.

7. Tacoma *v.* Tacoma Light, etc., Co., 16 Wash. 288, 47 Pac. 738.

8. Sanborn *v.* Stetson, 21 Fed. Cas. No. 12,291, 2 Story 481.

9. Martin *v.* Clark, 19 N. Y. App. Div. 496, 46 N. Y. Suppl. 616.

If it can only be conjectured that plaintiff was damaged because of his reliance upon the alleged false representations, the proof is insufficient to justify submission to the jury. Columbia Sav. Bank *v.* Kingsburry, 84 Mo. App. 82.

10. Braddock *v.* Louchheim, 87 Fed. 287.

11. Morris *v.* Talcott, 96 N. Y. 100; Postal *v.* Cohn, 83 N. Y. App. Div. 27, 81 N. Y. Suppl. 1089. See also Shinnabarger *v.* Shelton, 41 Mo. App. 147.

12. See *supra*, VII, E, 2.

13. Sanborn *v.* Stetson, 21 Fed. Cas. No. 12,291, 2 Story 481.

14. See *supra*, VII, J.

15. *California.*— Hanscom *v.* Drullard, 79 Cal. 234, 21 Pac. 736.

Illinois.— Skeen *v.* Patterson, 180 Ill. 289, 54 N. E. 196; Smith *v.* Edelstein, 92 Ill. App. 38; Means *v.* Flanagan, 79 Ill. App. 296; Lindauer *v.* Gray, 18 Ill. App. 209.

Indiana.— Timmis *v.* Wade, 5 Ind. App. 139, 31 N. E. 827.

Iowa.— Boddy *v.* Henry, 126 Iowa 31, 101 N. W. 447; Ley *v.* Metropolitan L. Ins. Co., 120 Iowa 203, 94 N. W. 568; Connors *v.* Chingren, 111 Iowa 437, 82 N. W. 934; Bixby *v.* Carskaddon, 55 Iowa 533, 8 N. W. 354.

Maine.— Henry *v.* Dennis, 93 Me. 106, 44 Atl. 369.

Maryland.— Cook *v.* Gill, 83 Md. 177, 34 Atl. 248.

Michigan.— McDonald *v.* Smith, (1905) 102 N. W. 668; Turnbull *v.* Boggs, 78 Mich. 158, 43 N. W. 1050; Kryger *v.* Andrews, 65 Mich. 405, 35 N. W. 245.

Missouri.— Hitchcock *v.* Baughan, 36 Mo. App. 216, "preponderance of the evidence and to the reasonable satisfaction of the jury."

Nebraska.— Patrick *v.* Leach, 8 Nebr. 530, 1 N. W. 853; Hitchcock *v.* Gothenburg Water Power, etc., Co., 4 Nebr. (Unoff.) 620, 95 N. W. 638.

New York.— Schumaker *v.* Mather, 133 N. Y. 590, 30 N. E. 755 [*affirming* 60 Hun 576, 14 N. Y. Suppl. 411]; Grosjean *v.* Galloway, 64 N. Y. App. Div. 547, 72 N. Y. Suppl. 331; Muller *v.* Wilcox, 88 Hun 621, 34 N. Y. Suppl. 865.

Oregon.— Benson *v.* Keller, 37 Oreg. 120, 60 Pac. 918.

Pennsylvania.— Sacks *v.* Schimmel, 3 Pa. Super. Ct. 426, 39 Wkly. Notes Cas. 452.

Vermont.— Cutter *v.* Adams, 15 Vt. 237.

sary,[16] although the preponderance established by the fact of the greater number of witnesses testifying on one side than on the other may be overthrown by inference from the facts.[17]

2. CIRCUMSTANTIAL EVIDENCE. It is well settled that direct evidence is not necessary to prove fraud, but that circumstantial evidence is sufficient[18] if fraud is the only reasonable conclusion that can be drawn therefrom.[19] Defendant's knowledge of the falsity of his statement may be established by inference from other facts in evidence,[20] provided that the facts proved are such that the

See 23 Cent. Dig. tit. "Fraud," §§ 55–59. See also EVIDENCE, 17 Cyc. 760.

16. *Michigan.*—Sweeney *v.* Devens, 72 Mich. 301, 40 N. W. 454.

Minnesota.—Burr *v.* Willson, 22 Minn. 206.

Missouri.—Shinnabarger *v.* Shelton, 41 Mo. App. 147.

New York.— Sommer *v.* Oppenheim, 19 Misc. 605, 44 N. Y. Suppl. 396.

Ohio.— Strader *v.* Mullane, 17 Ohio St. 624; U. S. Home, etc., Assoc. *v.* Reams, 8 Ohio Dec. (Reprint) 272, 7 Cinc. L. Bul. 8.

See 23 Cent. Dig. tit. "Fraud," §§ 55–59. See also EVIDENCE, 17 Cyc. 760 note 44.

Fraudulently obtaining goods on credit.— In an action for false and fraudulent representations whereby credit was given for goods sold, the same amount of evidence is not required as in a criminal prosecution; and a charge that plaintiffs would be entitled to recover if a fair balance of evidence should be found in their favor is not erroneous. Cutter *v.* Adams, 15 Vt. 237.

17. Dalrymple *v.* Craig, 149 Mo. 345, 50 S. W. 884.

18. *California.*— White *v.* Leszynsky, 14 Cal. 165.

Delaware.— Terry *v.* Platt, 1 Pennew. 185, 40 Atl. 243; Grier *v.* Dehan, 5 Houst. 401.

Kentucky.— Trimble *v.* Reid, 97 Ky. 713, 31 S. W. 861, 17 Ky. L. Rep. 494.

Michigan.— Woolenslagle *v.* Runals, 76 Mich. 545, 43 N. W. 454.

Missouri.— Gordon *v.* Ismay, 55 Mo. App. 323.

New York.—Beardsley *v.* Duntley, 69 N. Y. 577; Marsh *v.* Falker, 40 N. Y. 562; Clark *v.* Baird, 9 N. Y. 183; Clark *v.* Exchange Printing Co., 74 Hun 71, 26 N. Y. Suppl. 401; Weidner *v.* Phillips, 39 Hun 1; Hopkins *v.* Riggs, 5 Silv. Sup. 485, 8 N. Y. Suppl. 713; Bigler *v.* Atkins, 7 N. Y. St. 235.

North Carolina.— Lunn *v.* Shermer, 93 N. C. 164.

Pennsylvania.—Frazer *v.* Hill, 2 Phila. 299.

Rhode Island.— Bank of North America *v.* Sturdy, 7 R. I. 109.

Texas.— Granrud *v.* Rea, 24 Tex. Civ. App. 299, 59 S. W. 841; Graham *v.* Roder, 5 Tex. 141.

West Virginia.— Bronson *v.* Vaughan, 44 W. Va. 406, 29 S. E. 1022.

Wisconsin.— Montreal River Lumber Co. *v.* Mihills, 80 Wis. 540, 50 N. W. 507; Barndt *v.* Frederick, 78 Wis. 1, 47 N. W. 6, 11 L. R. A. 199.

United States.— Glaspie *v.* Keator, 56 Fed. 203, 5 C. C. A. 474.

"Circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof." Castle *v.* Bullard, 23 How. (U. S.) 172, 187, 16 L. ed. 424. "A deduction of fraud may be made not only from deceptive assertions and false representations directly made, but from facts, incidents, and circumstances which may be trivial in themselves, but decisive evidence of a fraudulent design." Beardsley *v.* Duntley, 69 N. Y. 577, 581 [*citing* 2 Kent Comm. 484; 1 Pars. Contr. 460 *et seq.*], per Miller, J. Although fraud cannot be predicated on mere conjecture, still very slight circumstances will warrant the submission of an issue involving it to the jury. Mosby *v.* McKee, etc., Commission Co., 91 Mo. App. 500.

A prima facie case of fraud is made out by proof that a party induced another to cash his checks when he had not enough funds in the bank to meet them. Sieling *v.* Clark, 18 Misc. (N. Y.) 464, 41 N. Y. Suppl. 982.

19. Paxton *v.* Boyce, 1 Tex. 317.

Payment of full price.— A fraudulent suppression of material facts cannot be inferred from the mere circumstances that a full price was paid as though the property had no defects or bad qualities. Fleming *v.* Slocum, 18 Johns. (N. Y.) 403, 9 Am. Dec. 224.

Fact of large investments.— It cannot be inferred that because a man has investments in excess of that which would seem to be authorized by his earnings or income, such excess has been derived in illegitimate or criminal ways. Linn *v.* Gilman, 46 Mich. 628, 10 N. W. 46.

The fact that a corporation paid no dividends raises no presumption of falsity in a representation, made on a sale of stock that the company was making a profit of ten per cent. Hatch *v.* Spooner, 1 N. Y. App. Div. 408, 37 N. Y. Suppl. 295.

20. *California.*— Maxson *v.* Llewelyn, 122 Cal. 195, 54 Pac. 732.

Illinois.— Hiner *v.* Richter, 51 Ill. 299; Jacobs *v.* Marks, 83 Ill. App. 156 [*affirmed* in 183 Ill. 533, 56 N. E. 154].

Iowa.— Boddy *v.* Henry, 126 Iowa 31, 101 N. W. 447; Goring *v.* Fitzgerald, 105 Iowa 507, 75 N. W. 358; Baker *v.* Hallam, 103 Iowa 43, 72 N. W. 419.

Massachusetts.— See Arnold *v.* Teel, 182 Mass. 1, 64 N. E. 413.

New York.— Redfern *v.* Cornell, 6 N. Y. App. Div. 436, 39 N. Y. Suppl. 656; Slingerland *v.* Bennett, 4 Hun 277, 6 Thomps. & C. 446; Stern *v.* Kareski, 12 Misc. 144, 32 N. Y. Suppl. 1128.

North Carolina.— Mann *v.* Parker, 6 N. C. 262.

inference may legitimately be drawn from them, and are not equally consistent with defendant's innocence.[21] As a general rule, however, scienter cannot be inferred from the mere fact that the statement was false,[22] although it may be so inferred where the subject-matter of the representation was so peculiarly within defendant's personal knowledge that he must have known his statement to be untrue.[23] Testimony of defendant that he did not intend to commit a fraud may be overcome by inference from other facts in evidence.[24] While plaintiff must show that the false representations set out induced him to act to his prejudice,[25] the fact of reliance may be inferred from other facts proved.[26]

M. Province of Court and Jury[27] — **1. In General.** Where the facts are not disputed or have been found by the jury, the question whether they constitute actionable fraud is for the court.[28] The sufficiency of circumstantial evidence to establish fraud is for the jury,[29] under proper instructions from the court as to what constitutes fraud.[30] It has been held that the fact that the evidence may not be sufficient to support a verdict in favor of the party charging fraud does not authorize taking the question from the jury;[31] but as a rule if upon the uncontradicted evidence reasonable men can reach but one conclusion, the court may direct a verdict;[32] and it is also a well-settled rule of law that if there is no evidence to prove one or more of the essential elements of the cause of action it is proper for the court to grant a dismissal or compulsory nonsuit[33] or to direct a

West Virginia.— See Crislip *v.* Cain, 19 W. Va. 438.

See 23 Cent. Dig. tit. "Fraud," § 57.

21. Morris *v.* Talcott, 96 N. Y. 100; Postal *v.* Cohn, 83 N. Y. App. Div. 27, 81 N. Y. Suppl. 1089.

Recommendation of credit. — The mere fact that when defendant recommended a third person as worthy of credit, such person was insolvent and had overdrawn his account with defendant does not show scienter. Sylvester *v.* Henrich, 93 Iowa 489, 61 N. W. 942.

22. Warfield *v.* Clark, 118 Iowa 69, 91 N. W. 833; Anderson *v.* McPike, 86 Mo. 293; Lord *v.* Colley, 6 N. H. 99, 25 Am. Dec. 445. To the same effect see Kirkpatrick *v.* Reeves, 121 Ind. 280, 22 N. E. 139; Ley *v.* Metropolitan Ins. Co., 120 Iowa 203, 94 N. W. 568; Salisbury *v.* Howe, 87 N. Y. 128; Wakeman *v.* Dalley, 51 N. Y. 27, 10 Am. Rep. 551; Meyer *v.* Amidon, 45 N. Y. 169; Lamberton *v.* Dunham, 165 Pa. St. 129, 30 Atl. 716.

23. Watson *v.* Jones, (Fla. 1899) 25 So. 678; Goring *v.* Fitzgerald, 105 Iowa 507, 75 N. W. 358. See also Crislip *v.* Cain, 19 W. Va. 438.

Illustrations.— Where a man falsely states that he is an experienced well-digger, an inference arises that he knows the statement to be false. Davis *v.* Driscoll, 22 Tex. Civ. App. 14, 54 S. W. 48. Where it is proved that defendant (a lawyer) said that he owned a judgment and it is shown that he had no title to it whatever, no other evidence of his guilty knowledge need be given in the first instance. Goring *v.* Fitzgerald, 105 Iowa 507, 75 N. W. 358.

24. American Exch. Nat. Bank *v.* Sedgwick, 54 N. Y. Super. Ct. 55; Anderson *v.* Wehe, 62 Wis. 401, 22 N. W. 584.

25. See *supra*, VII, J.

26. Crouch *v.* Chamness, 21 Ind. App. 492, 51 N. E. 941; Baker *v.* Hallam, 103 Iowa 43, 72 N. W. 419; Taylor *v.* Guest, 58 N. Y. 262 [*reversing* 45 How. Pr. 276]; Schumaker *v.* Mather, 60 Hun (N. Y.) 576, 14 N. Y. Suppl. 411 [*affirmed* in 133 N. Y. 590, 30 N. E. 755].

27. See, generally, Trial.

As to the amount of damages see *infra*, VII, O, 7.

28. Warner Glove Co. *v.* Jennings, 58 Conn. 74, 19 Atl. 239; Macullar *v.* McKinley, 99 N. Y. 353, 2 N. E. 9 [*affirming* 49 N. Y. Super. Ct. 5]; Erwin *v.* Voorhees, 26 Barb. (N. Y.) 127; Gage *v.* Parker, 25 Barb. (N. Y.) 141; Sturtevant *v.* Ballard, 9 Johns. (N. Y.) 337, 6 Am. Dec. 281; McCall *v.* Sullivan, 1 Tex. App. Civ. Cas. § 1.

29. Marsh *v.* Cramer, 16 Colo. 331, 27 Pac. 169; Pocock *v.* Hendricks, 8 Gill & J. (Md.) 121; Brown *v.* Bayer, 91 Minn. 140, 97 N. W. 736; Brin *v.* McGregor, (Tex. Civ. App. 1901) 64 S. W. 78.

30. Marsh *v.* Cramer, 16 Colo. 331, 27 Pac. 169; Hardy *v.* Simpson, 35 N. C. 132.

31. Cole *v.* Taylor, 22 N. J. L. 59.

32. *Kentucky.*— Perkins *v.* Embry, 72 S. W. 788, 24 Ky. L. Rep. 1990.

Michigan.— Fruit Dispatch Co. *v.* Russo, 125 Mich. 306, 84 N. W. 308.

Minnesota.— Reynolds *v.* Munch, 91 Minn. 380, 98 N. W. 187.

Nebraska.— Wilcox *v.* Perkins County, (1903) 97 N. W. 236.

Pennsylvania.— Schmitz *v.* Roberts, 26 Pa. Super. Ct. 472.

Although a statute declares that fraudulent intent is a question of fact, the rule of the text applies. Wilcox *v.* Perkins County, (Nebr. 1903) 97 N. W. 236; Bender *v.* Kingman, 62 Nebr. 469, 87 N. W. 142, 64 Nebr. 766, 90 N. W. 886; Sieling *v.* Clark, 18 Misc. (N. Y.) 464, 41 N. Y. Suppl. 982.

33. Macullar *v.* McKinley, 99 N. Y. 353, 2 N. E. 9 [*affirming* 49 N. Y. Super. Ct. 5]; Miner *v.* Daly, 69 Hun (N. Y.) 337, 23 N. Y. Suppl. 475 [*affirmed* in 144 N. Y. 658, 39

verdict for defendant,[34] according to the practice prevailing in the particular jurisdiction.

2. As to Particular Elements of Fraud — a. The Representations — (i) *In General.* It is for the jury to determine whether the representations were made as alleged.[35] And the meaning of defendant's words, having regard to the circumstances under which they were spoken, is a question for the jury.[36] Thus where the meaning of the statements and representations relied upon as a cause of action is not entirely clear,[37] or where they are capable of two interpretations,[38] it is proper that the question should be submitted to the jury with suitable instructions.

(ii) *Form and Character.* Whether the representation was merely an expression of opinion or belief, or was an affirmation of a fact to be relied upon, is usually a question for the jury.[39] So ordinarily it is for the jury to say whether representations as to value,[40] solvency,[41] or a third person's financial ability[42] are statements of fact or of opinion.

b. Materiality of Representations. Whether the misrepresentation made was material is ordinarily a question of fact for the jury;[43] and it is to be observed

N. E. 858]; Kern *v.* Simpson, 126 Pa. St. 42, 17 Atl. 523.

34. Putney *v.* Hardy, 99 Mass. 5; Reynolds *v.* Munch, 91 Minn. 380, 98 N. W. 187.

35. Meriden First Nat. Bank *v.* Gallaudet, 122 N. Y. 655, 25 N. E. 909; Grockie *v.* Hirshfield, 50 N. Y. App. Div. 87, 63 N. Y. Suppl. 365; Armstrong *v.* Tuffts, 6 Barb. (N. Y.) 432.

Conflicting evidence.— Where, in an action for falsely stating that a corporation of which defendant was president was solvent for the purpose of procuring credit, plaintiff's managing agent testified to the conversations, and defendant testified as positively that no such conversation occurred, the question was for the jury, although there was extrinsic evidence tending to corroborate defendant in some particulars. Shaw *v.* Gilbert, 111 Wis. 165, 86 N. W. 188.

36. Mayo *v.* Wahlgreen, 9 Colo. App. 506, 50 Pac. 40; Schumaker *v.* Mather, 133 N. Y. 590, 594, 30 N. E. 755, in which the court said: "Words are uttered to convey thought and though, possibly enough, we should have to say that when standing alone their utterance, if equally susceptible of an innocent and of a guilty meaning or intention, should be given the more favorable interpretation to the speaker; yet when spoken under circumstances which disclose a motive for their utterance and in the presence of facts which, in the judgment of mankind, lend them a certain color and substance, then the correct rule which should govern in the jury trial requires that the judgment upon their meaning and the intention of the speaker must be pronounced by the jury and not by the judge."

For whom communication intended.— Where plaintiffs wrote defendants' agent to find out the credit of a third person, and the agent after writing to his principals received their reply, which was marked "Confidential," it was for the jury to say whether such word was intended to confine the communication in the letter to the agent. Iasigi *v.* Brown, 17 How. (U. S.) 183, 15 L. ed. 208.

37. Powers *v.* Fowler, 157 Mass. 318, 32 N. E. 166.

38. Simon *v.* Goodyear Metallic Rubber Shoe Co., 105 Fed. 573, 44 C. C. A. 612, 52 L. R. A. 745.

39. Teague *v.* Irwin, 127 Mass. 217; Simar *v.* Canaday, 53 N. Y. 298, 13 Am. Rep. 523; Meyers *v.* Rosenback, 5 Misc. (N. Y.) 337, 25 N. Y. Suppl. 521; Warner *v.* Benjamin, 89 Wis. 290, 62 N. W. 179. See also Sharp *v.* Ponce, 74 Me. 470.

A representation by a vendor as to the location of the boundary lines of the land, or as to the capacity and qualities of a mill situated thereon, cannot be declared as matter of law the statement of an opinion; but it is for the jury to decide whether it is the statement of an opinion or a fact. Foster *v.* Kennedy, 38 Ala. 359, 81 Am. Dec. 56.

Whether the statement was made as of defendant's own knowledge or upon information and belief is properly a question for the jury. Meyer *v.* Amidon, 23 Hun (N. Y.) 553.

40. *Alabama.*— Foster *v.* Kennedy, 38 Ala. 359, 81 Am. Dec. 56.

Colorado.— American Nat. Bank *v.* Hammond, 25 Colo. 367, 55 Pac. 1090.

Michigan.— Moon *v.* McKinstry, 107 Mich. 668, 65 N. W. 546.

New York.— Simar *v.* Canaday, 53 N. Y. 298, 13 Am. Rep. 523.

Ohio.— Floyd *v.* Paul, 9 Ohio Dec. (Reprint) 7, 10, Cinc. L. Bul. 14.

See 23 Cent. Dig. tit. "Fraud," §§ 67–71.

41. Stubbs *v.* Johnson, 127 Mass. 219.

42. Stubbs *v.* Johnson, 127 Mass. 219.

That notes were "as good as gold."— Whether a representation by a vendee that notes of a third person given in part payment of the price were "as good as gold" was a mere expression of opinion or a statement of facts on which the vendor was entitled to rely is a question for the jury. Andrews *v.* Jackson, 168 Mass. 266, 47 N. E. 412, 60 Am. St. Rep. 390, 37 L. R. A. 402.

43. Kehl *v.* Abram, 210 Ill. 218, 71 N. E. 347, 102 Am. St. Rep. 158 [*affirming* 112 Ill.

that the question to be submitted is not whether the representations were deemed by the party to be material but whether they were material in fact.[44] But materiality may be so plain that the court should decide it as a matter of law.[45]

c. Falsity, Scienter, and Intent. The falsity of the representations,[46] and the existence of a scienter[47] and of a fraudulent intent,[48] are questions to be deter-

App. 77]; Fottler *v.* Moseley, 179 Mass. 295, 60 N. E. 788; Moore *v.* Cains, 116 Mass. 396; Davis *v.* Davis, 97 Mich. 419, 56 N. W. 774. See also Sheriff *v.* Hull, 37 Iowa 174.

Conflicting decisions.— In Sharpe *v.* Ponce, 74 Me. 470, the rule of the text was applied. But in Caswell *v.* Hunton, 87 Me. 277, 32 Atl. 899, it was held that while most of the questions involved in an action for deceit are questions of fact for the jury, the materiality of the representation, assuming that all the other elements of the cause of action have been proved, is a question of law for the court. The last decision was based upon an erroneous construction of Penn. Mut. L. Ins. Co. *v.* Crane, 134 Mass. 56, 45 Am. Rep. 282, contained in 1 Bigelow Fraud 139. The decision in the Massachusetts case involved the effect of fraud upon the validity of a contract and it was properly held that this was a question for the court. But since an action of deceit does not involve the validity of any contract, that decision is manifestly inapplicable to the subject in hand. The doctrine of Penn Mut. L. Ins. Co. *v.* Crane, *supra*, was mentioned with approval in a later Massachusetts case (Dawe *v.* Morris, 149 Mass. 188, 21 N. E. 313, 14 Am. St. Rep. 404, 4 L. R. A. 158), which, however, is distinguishable in that the question arose on demurrer.

44. Davis *v.* Davis, 97 Mich. 419, 56 N. W. 774.

45. Shaw *v.* Gilbert, 111 Wis. 165, 86 N. W. 188.

46. Phelps *v.* James, 79 Iowa 262, 44 N. W. 543; Yates *v.* Alden, 41 Barb. (N. Y.) 172 (statements as to solvency); Armstrong *v.* Tuffts, 6 Barb. (N. Y.) 432.

But where the evidence has no tendency to prove falsity it is proper to direct a verdict for defendant. Putney *v.* Hardy, 99 Mass. 5.

47. *Connecticut.*—Colvin *v.* Peck, 62 Conn. 155, 25 Atl. 355.

Florida.— Williams *v.* McFadden, 23 Fla. 143, 1 So. 618, 11 Am. St. Rep. 345.

Kentucky.—Trimble *v.* Reid, 97 Ky. 713, 31 S. W. 861, 17 Ky. L. Rep. 494.

Maine.— Sherwood *v.* Marwick, 5 Me. 295.

Massachusetts.— Tryon *v.* Whitmarsh, 1 Metc. 1, 35 Am. Dec. 339.

New York.— Second Nat. Bank *v.* Dix, 101 N. Y. 684, 5 N. E. 563; Salisbury *v.* Howe, 87 N. Y. 128; Meyer *v.* Amidon, 23 Hun 553; Yates *v.* Alden, 41 Barb. 172; Meyers *v.* Rosenback, 5 Misc. 337, 25 N. Y. Suppl. 521.

North Carolina.— Lunn *v.* Shermer, 93 N. C. 164; Quinn *v.* Pinson, 25 N. C. 47.

Pennsylvania.— Griswold *v.* Gebbie, 126 Pa. St. 353, 17 Atl. 673, 12 Am. St. Rep. 878; Bokee *v.* Walker, 14 Pa. St. 139; Cornelius *v.* Molloy, 7 Pa. St. 293.

South Carolina.— Chisolm *v.* Gadsden, 1 Strobh. 220, 47 Am. Dec. 550; Vance *v.* Word, 1 Nott & M. 197, 9 Am. Dec. 683.

See 23 Cent. Dig. tit. "Fraud," § 69.

48. *Alabama.*— Watson *v.* Reed, 129 Ala. 388, 29 So. 837.

Colorado.— Marsh *v.* Cramer, 16 Colo. 331, 27 Pac. 169.

Connecticut.— Peck *v.* Bacon, 18 Conn. 377.

Delaware.— Clayton *v.* Cavender, 1 Marv. 191, 40 Atl. 956.

Iowa.— King *v.* Sioux City Loan, etc., Co., 76 Iowa 11, 39 N. W. 919.

Massachusetts.— Stone *v.* Denny, 4 Metc. 151.

Michigan.— Christmas *v.* Frei, 78 Mich. 386, 44 N. W. 329; Adams *v.* Bowman, 51 Mich. 189, 16 N. W. 373.

Minnesota.— Haven *v.* Neal, 43 Minn. 315, 45 N. W. 612.

Missouri.— Sumner *v.* Rogers, 90 Mo. 324, 2 S. W. 476.

Nebraska.— Davis *v.* Scott, 22 Nebr. 154, 34 N. W. 353; Hedman *v.* Anderson, 6 Nebr. 392.

New Hampshire.— Lord *v.* Colley, 6 N. H. 99, 25 Am. Dec. 445, false statement as to solvency of third person.

New York.— Salisbury *v.* Howe, 87 N. Y. 128; Grockie *v.* Hirshfield, 50 N. Y. App. Div. 87, 63 N. Y. Suppl. 365; Wakeman *v.* Dalley, 44 Barb. 498 [*affirmed* in 51 N. Y. 27, 10 Am. Rep. 551]; Yates *v.* Alden, 41 Barb. 172; Armstrong *v.* Tuffts, 6 Barb. 432; Hines *v.* John Hancock Mut. L. Ins. Co., 31 Misc. 809, 63 N. Y. Suppl. 973; Drake *v.* Grant, 4 N. Y. Suppl. 899 (false statement as to solvency of third person); Cullen *v.* Hernz, 13 N. Y. St. 333.

North Carolina.— Southern Commission Co. *v.* Porter, 122 N. C. 692, 30 S. E. 119.

Pennsylvania.— Graham *v.* Hollinger, 46 Pa. St. 55 (false statement as to solvency of third person); Landis *v.* Neff, 7 Pa. Cas. 127, 9 Atl. 926; Myers *v.* Hart, 10 Watts 104; Schrenkeiser *v.* Kishbaugh, 8 Kulp 350.

Texas.— McCall *v.* Sullivan, 1 Tex. App. Civ. Cas. § 5.

Vermont.— Carey *v.* Hart, 63 Vt. 424, 21 Atl. 537.

United States.— Ball *v.* Warrington, 108 Fed. 472, 47 C. C. A. 447.

See 23 Cent. Dig. tit. "Fraud," § 69.

Whether the false statement was made from accident or design is a conclusion of fact to be drawn from all the evidence in the case. Stone *v.* Denny, 4 Metc. (Mass.) 151.

Whether defendant had no intention to perform a promise made by him is a question for the jury (Crowley *v.* Langdon, 127 Mich. 51, 86 N. W. 391); as where it is alleged that he purchased property with the

mined by the jury from the facts in evidence. But while fraudulent intent is ordinarily a question of fact, it may be so indisputably established by the evidence as to warrant its being treated as a question of law.[49]

d. Reliance on Representations — (i) *The Right to Rely.* Whether the representations were of such a character and were made under such circumstances that they were likely to deceive plaintiff;[50] whether plaintiff could by ordinary diligence have discovered their falsity;[51] and in general whether upon all the facts in evidence plaintiff was justified in relying on defendant's statements,[52] are questions for the jury. So if there is evidence that defendant did or said anything tending to prevent plaintiff from ascertaining the truth, or to divert his attention from the pursuit of inquiry, it is for the jury to determine the effect thereof as bearing upon plaintiff's right to rely on defendant's representations.[53] But where the facts are established by undisputed evidence, the question whether plaintiff was guilty of such want of care and prudence as to defeat a recovery is a question of law for the court.[54]

(ii) *The Fact of Reliance.* Whether plaintiff relied upon defendant's representations,[55] or whether he acted in whole or in part upon his own knowledge,[56] is a question for the jury.

intent not to pay for it and to cheat the vendor out of the purchase-price (Monroe *v.* O'Shea, 4 Silv. Sup. 292, 7 N. Y. Suppl. 540, holding that a purchase by an insolvent of property on the understanding that he is to make cash payment and the fact that his check given for the price is dishonored, and that he immediately disposed of the property purchased and made an assignment, makes a case of fraud for the jury).

Where there is no evidence from which a fraudulent intent can be inferred the question should not be left to the jury. Cobb *v.* Fogalman, 23 N. C. 440.

49. Wilcox *v.* Perkins County, (Nebr. 1903) 97 N. W. 236; Binder *v.* Kingman, 62 Nebr. 469, 87 N. W. 142, 64 Nebr. 766, 90 N. W. 886. And see *supra*, III, B, 6.

Where the effect of an act understandingly done is necessarily injurious to another's rights, the question of fraudulent intent need not be submitted to the jury, being an inference of law. Coleman *v.* Wolcott, 1 Conn. 285.

50. Ingalls *v.* Miller, 121 Ind. 188, 22 N. E. 995; Kaiser *v.* Nummerdor, 120 Wis. 234, 97 N. W. 932; Iasigi *v.* Brown, 17 How. (U. S.) 183, 15 L. ed. 208.

51. Summerour *v.* Pappa, 119 Ga. 1, 45 S. E. 713.

52. *Illinois.*— Kehl *v.* Abram, 210 Ill. 218, 71 N. E. 347, 102 Am. St. Rep. 158 [*affirming* 112 Ill. App. 77].

Indiana.— Ingalls *v.* Miller, 121 Ind. 188, 22 N. E. 993.

Iowa.— Gee *v.* Moss, 68 Iowa 318, 27 N. W. 268.

Maine.— See Sharp *v.* Ponce, 74 Me. 470.

Massachusetts.— Lee *v.* Tarplin, 183 Mass. 52, 66 N. E. 431; Savage *v.* Stevens, 126 Mass. 207.

Missouri.— Chase *v.* Rusk, 90 Mo. App. 25; Scott *v.* Haynes, 12 Mo. App. 597.

New York.— Eaton *v.* Avery, 83 N. Y. 31, 38 Am. Rep. 389.

Wisconsin.— Kaiser *v.* Nummerdor, 120 Wis. 234, 97 N. W. 932 [*explaining* and *limiting* Shaw *v.* Gilbert, 111 Wis. 165, 86 N. W. 188].

United States.— Stewart *v.* Wyoming Cattle Ranche Co., 128 U. S. 383, 9 S. Ct. 101, 32 L. ed. 439.

See 23 Cent. Dig. tit. "Fraud," § 70.

Failure to inquire of third persons.— The failure of a buyer to make inquiries of persons to whom the seller referred him is not negligence, as a matter of law, but whether it constituted negligence in the particular case is a question for the jury. Handy *v.* Waldron, 19 R. I. 618, 35 Atl. 884.

Whether plaintiff was informed of the facts before taking any action is a question for the jury. Warner *v.* Benjamin, 89 Wis. 290, 62 N. W. 179.

53. Brady *v.* Finn, 162 Mass. 260, 38 N. E. 506; Schumaker *v.* Mather, 14 N. Y. Suppl. 411 [*affirmed* in 133 N. Y. 590, 30 N. E. 755]. See also Simmons *v.* Horton, 51 N. C. 278; Stewart *v.* Wyoming Cattle Ranche Co., 128 U. S. 383, 9 S. Ct. 101, 32 L. ed. 439.

54. Clark *v.* Rankin, 46 Barb. (N. Y.) 570.

55. Warfield *v.* Clark, 118 Iowa 69, 91 N. W. 833; Bondurant *v.* Crawford, 22 Iowa 40; Nash *v.* Minnesota Title Ins., etc., Co., 159 Mass. 437, 34 N. E. 625; Moorehead *v.* Holden, 7 N. Y. Civ. Proc. 188; Chilson *v.* Houston, 9 N. D. 498, 84 N. W. 354.

Whether the representations had a continuing operation on plaintiff's mind is a question for the jury. Fottler *v.* Moseley, 179 Mass. 295, 60 N. E. 788; Zabriskie *v.* Smith, 13 N. Y. 322, 64 Am. Dec. 551.

Disclosure subsequent to misrepresentation. — If a vendor makes a false representation during the negotiation, it is a question for the determination of the jury whether the effect of it on the mind of the purchaser is done away by the vendor's subsequent disclosure of all that he knows in relation to the subject of the contract. Pritchett *v.* Munroe, 22 Ala. 501.

56. Yates *v.* Alden, 41 Barb. (N. Y.) 172.

N. Instructions to Jury — 1. In General. While it is perhaps the best practice to avoid the attempt to cover by a single instruction all the elements of the cause of action of deceit,[57] if an instruction is requested predicating the conditions upon which plaintiff may recover, or the court gives such instruction of its own motion, all the elements of the cause of action concerning the existence of which there is any controversy should be correctly stated.[58] But it is not necessary in order to comply with this rule that all the elements shall be expressly stated; it is sufficient if the necessity of finding their existence can be fairly implied from the charge as given;[59] and if there is no dispute that certain elements exist if others do, the court need not set out the former.[60] The general rules governing instructions in other actions apply, as that the instructions should be so framed as not to be misleading,[61] that they must not assume facts not shown by the evidence,[62] and must not be predicated upon a theory not borne out by the pleadings or evidence.[63] An instruction inconsistent with the theory of the action

57. Runge *v.* Brown, 23 Nebr. 817, 37 N. W. 660.

58. *Alabama.*— Moses *v.* Katzenberger, 84 Ala. 95, 3 So. 237.

Arkansas.— Mason *v.* Thornton, (1905) 84 S. W. 1048.

Illinois.— Alexander *v.* Emmett, 169 Ill. 523, 48 N. E. 427 [*affirming* 68 Ill. App. 261].

Iowa.— Allison *v.* Jack, 76 Iowa 205, 40 N. W. 811; Bondurant *v.* Crawford, 22 Iowa 40.

Massachusetts.— Cowley *v.* Dobbins, 136 Mass. 401.

Nebraska.— Runge *v.* Brown, 23 Nebr. 817, 37 N. W. 660.

See 23 Cent. Dig. tit. "Fraud," § 72.

Where representations relate to value.— In an action for fraudulent representations alleged to have been made as to the value of a stock of goods sold to plaintiff, the court should instruct as to the difference between representations of actual value and mere expressions of opinion. Jenne *v.* Gilbert, 26 Nebr. 457, 42 N. W. 415.

Ownership.— Where plaintiff averred that he was the owner in fee of certain land under a will, and that defendant had falsely represented to him that his interest was only a life-estate, and thus induced plaintiff to sell for an inadequate price, it was error to refuse an instruction that the jury must find that plaintiff was the owner of the land in order to justify a verdict in his favor. Hicks *v.* Deemer, 187 Ill. 164, 58 N. E. 252 [*reversing* 87 Ill. App. 384].

Correct instruction.— Where the complaint alleges fraudulent representations, an instruction that if defendant made the representations as alleged in the complaint, and plaintiff relied on them as true, and paid his money on the faith of them, and if they were false, and defendant knew of their falsity at the time, plaintiff is entitled to recover, is not erroneous. Richardson *v.* Gilson, 55 N. H. 623.

Instructions criticized as not complying with the above rule see David *v.* Moore, (Oreg. 1905) 79 Pac. 415; Von Boeckmann *v.* Loepp, (Tex. Civ. App. 1903) 73 S. W. 849; Glaspie *v.* Keator, 56 Fed. 203, 5 C. C. A. 474.

59. Scholfield Gear, etc., Co. *v.* Scholfield, 71 Conn. 1, 40 Atl. 1046; McDonald *v.* Smith, (Mich. 1905) 102 N. W. 668; Black *v.* Black, 110 N. C. 398, 14 S. E. 971; David *v.* Moore, (Oreg. 1905) 79 Pac. 415.

60. Endsley *v.* Johns, 17 Ill. App. 466 [*affirmed* in 120 Ill. 469, 12 N. E. 247, 60 Am. Rep. 572]; Hudnutt *v.* Gardner, 59 Mich. 341, 26 N. W. 502.

61. *Alabama.*— Watson *v.* Reed, 129 Ala. 388, 29 So. 837.

Illinois.—Covert *v.* Nolan, 10 Ill. App. 629.

Indiana.— Wallace *v.* Mattice, 118 Ind. 59, 20 N. E. 497.

Iowa.— Faust *v.* Hosford, 119 Iowa 97, 93 N. W. 58.

Michigan.— Sweeney *v.* Devens, 72 Mich. 301, 40 N. W. 454.

Nebraska.— Woolman *v.* Wirtsbaugh, 22 Nebr. 490, 35 N. W. 216.

See 23 Cent. Dig. tit. "Fraud," § 72.

Illustration.— A charge that "while a mere promise to pay or do something in the future does not constitute a representation, yet a statement made by a purchaser, as to his future intention respecting a material fact, would be a false representation if at the time the purchaser had no such intention" is confused and misleading, for it would be difficult to understand how a statement would become a false representation because the purchaser had no present intention as to his future intention respecting a material fact. American Hosiery Co. *v.* Baker, 18 Ohio Cir. Ct. 604, 10 Ohio Cir. Dec. 219.

62. *Alabama.*— Watson *v.* Reed, 129 Ala. 388, 29 So. 837.

Illinois.— Budlong *v.* Cunningham, 11 Ill. App. 28.

Iowa.— Theusen *v.* Bryan, 113 Iowa 496, 85 N. W. 802; Clark *v.* Ralls, 58 Iowa 201, 12 N. W. 260.

Missouri.— Hoffman *v.* Gill, 102 Mo. App. 320, 77 S. W. 146.

Nebraska.— Markel *v.* Moudy, 13 Nebr. 322, 14 N. W. 409.

See 23 Cent. Dig. tit. "Fraud," § 74.

63. Markham *v.* Emerson, 69 Mo. App. 292; Thorwegan *v.* King, 111 U. S. 549, 4 S. Ct. 529, 28 L. ed. 514.

Instruction as to concealment.— But a knowingly false statement that a certain fact

is properly refused,[64] and if given may constitute fatal error.[65] Thus the court should not single out the contract alleged to have been fraudulently procured and treat it as the sole basis of recovery.[66]

2. As to Particular Elements of Fraud — a. The Representations. The jury is entitled to pass upon all the misrepresentations in the case, and the court should not restrict the inquiry to particular statements separated from the others[67] unless the others are not actionable.[68]

b. Scienter. An instruction which defines the condition under which plaintiff may recover must include the element of scienter.[69] Since fraud may be predicated on misrepresentations made without knowledge of their falsity, if made recklessly and positively and without any knowledge of the facts,[70] an unqualified instruction that the representation must have been false to the knowledge of defendant is erroneous.[71] Likewise an instruction concerning scienter must be so framed as not to conflict with the rule[72] that a person may be guilty of fraud by stating as of his own knowledge that which he merely believes;[73] and the jury should be permitted to consider the question whether the statements, although made without assertion of knowledge in express terms, were impliedly made as of defendant's knowledge.[74] It will even be proper to

does not exist is equivalent to a concealment of the existence of the fact, and an allegation of such a statement justifies an instruction on fraudulent concealment. Gee *v.* Moss, 68 Iowa 318, 27 N. W. 268. But *compare* Markham *v.* Emerson, 69 Mo. App. 292, where there was nothing in the pleadings or evidence upon which to predicate such an instruction.

64. Andrews *v.* Jackson, 168 Mass. 266, 47 N. E. 412, 60 Am. St. Rep. 390, 37 L. R. A. 402.

65. Beetle *v.* Anderson, 98 Wis. 5, 73 N. W. 560.

66. Corder *v.* O'Neill, 176 Mo. 401, 75 S. W. 764. And see Louisiana Molasses Co. *v.* Ft. Smith Grocery Co., (Ark. 1905) 84 S. W. 1047. *Compare* McDonald *v.* Smith, (Mich. 1905) 102 N. W. 668.

Effect of collateral contract.—It may, however, be the duty of the court, at defendant's request, to instruct as to the effect of a collateral contract entered into by defendant at the time of the alleged fraudulent transactions, as this may be pertinent to the question as to whether plaintiff relied upon the statements. Newell *v.* Chapman, 74 Hun (N. Y.) 111, 26 N. Y. Suppl. 361.

67. Busch *v.* Wilcox, 82 Mich. 315, 46 N. W. 940.

Illustration.— An instruction that if defendant made the representations complained of (and the representations were false, etc.), plaintiff is entitled to recover, is not erroneous on the ground that it should be limited to the statements testified to by plaintiff; but the instruction is properly made applicable to any representations covered by the allegations. Phelps *v.* James, 79 Iowa 262, 44 N. W. 543.

68. Where some representations not actionable.— Where the declaration for deceit in a sale of property sets forth some representations which are and some which are not actionable, a new trial will not be granted, after verdict for plaintiff, on account of an instruction that "the plaintiff could maintain his action only by proof that he was induced to purchase the property by one or more of the representations alleged in the declaration to be false and fraudulent, and proved to be such;" if the judge did not instruct the jury that plaintiff might recover on proof of those representations which were not actionable. Pedrick *v.* Porter, 5 Allen (Mass.) 324.

69. Trimble *v.* Reid, 97 Ky. 713, 31 S. W. 861, 17 Ky. L. Rep. 494; Cowley *v.* Dobbins, 136 Mass. 401. See also Sibley *v.* Hulbert, 15 Gray (Mass.) 509.

Knowledge of the falsity as an essential element see *supra*, III, B, 4.

For correct instructions on this point see Stone *v.* Denny, 4 Metc. (Mass.) 151; Beebe *v.* Knapp, 28 Mich. 53. A charge that the false representations must have been fraudulently made is equivalent to charging that they must have been knowingly made. Nolte *v.* Reichelm, 96 Ill. 425.

70. See *supra*, III, B, 4, b.

71. Leavitt *v.* Sizer, 35 Nebr. 80, 52 N. W. 832; Beatty *v.* Bulger, 28 Tex. Civ. App. 117, 66 S. W. 893.

For a correct instruction on this point see Cole *v.* Cassidy, 138 Mass. 437, 52 Am. Rep. 284.

72. See *supra*, III, B, 4, b.

73. Watson *v.* Reed, 129 Ala. 388, 29 So. 837; Cabot *v.* Christie, 42 Vt. 121, 1 Am. Rep. 313, which involved false representations by a vendor as to the quantity of land embraced in a farm, and in which it was held erroneous to instruct the jury that plaintiff could recover only in case the jury found "that the defendant represented the quantity of land different from what he knew or believed to be true." *Compare* Brewster *v.* Crossland, 2 Colo. App. 446, 31 Pac. 236.

For a correct instruction under this rule see Cole *v.* Cassidy, 138 Mass. 437, 52 Am. Rep. 284.

74. Bullitt *v.* Farrar, 42 Minn. 8, 43 N. W. 566, 18 Am. St. Rep. 485, 6 L. R. A. 149.

submit to the jury only the question whether defendant made the statements recklessly, without having reasonable ground to believe his statements to be true, if that is the only issue made by the pleadings and evidence.[75]

c. Intent. An instruction as to the necessity of showing fraudulent intent should state that such intent may be inferred from the knowledge of the falsity of the representations made.[76] But an instruction should not assume that the mere suppression of a fact is fraudulent.[77]

d. Reliance on Representations — (i) *The Right to Rely.* It is the duty of the court to instruct on defendant's request as to the duty of plaintiff to make efforts to ascertain the truth.[78] Such instructions should include directions as to the effect of any artifice used by defendant to throw plaintiff off his guard.[79] Instructions as to the degree of care essential need not require that plaintiff should have given more than ordinary attention to the subject-matter;[80] and unless the facts justify it an instruction that plaintiff cannot recover unless the statement relied upon was such as was calculated to deceive a person of reasonable prudence may be misleading.[81]

(ii) *The Fact of Reliance.* An instruction predicating the conditions upon which plaintiff may recover should require the jury to find that plaintiff relied upon the representations to his injury.[82]

3. As to Evidence and Burden of Proof. It is proper for the court to repeat in its instructions as often as may be deemed necessary the rule as to the burden of proof.[83] On defendant's request, the court should charge as to the degree of proof required to establish fraud;[84] but the instructions should be so framed as not to exact too high a degree of certainty in the evidence.[85] On the other hand

75. Griswold *v.* Gebbie, 126 Pa. St. 353, 17 Atl. 673, 12 Am. St. Rep. 878.

76. Boddy *v.* Henry, 126 Iowa 31, 101 N. W. 447.

For an instruction held correct because it necessarily implied the qualification indicated see Cole *v.* Cassidy, 138 Mass. 437, 52 Am. Rep. 284. See also Middleton *v.* Jerdee, 73 Wis. 39, 40 N. W. 629.

77. Moses *v.* Katzenberger, 84 Ala. 95, 4 So. 237.

78. Hitchcock *v.* Baughan, 36 Mo. App. 216.

79. Hanscom *v.* Drullard, 79 Cal. 234, 21 Pac. 736; Castenholz *v.* Heller, 82 Wis. 30, 51 N. W. 432.

80. Watson *v.* Atwood, 25 Conn. 313; Kaiser *v.* Nummerdor, 120 Wis. 234, 97 N. W. 932 [*explaining* and *limiting* Shaw *v.* Gilbert, 111 Wis. 165, 86 N. W. 188]; Northern Supply Co. *v.* Wangard, 117 Wis. 624, 94 N. W. 785, 98 Am. St. Rep. 963. See also Honsucle *v.* Ruffin, 172 Mass. 420, 52 N. E. 538 (holding that a request that if plaintiff by reasonable diligence could have ascertained the falsity of declarations in a sale of stock, and did not do so, he could not recover, was sufficiently covered by a charge that if plaintiff ought to have discovered the truth before he put in his money, the jury should find for defendant); Schumaker *v.* Mather, 133 N. Y. 590, 30 N. E. 755 [*affirming* 14 N. Y. Suppl. 411].

81. John V. Farwell Co. *v.* Nathanson, 99 Ill. App. 185; Kaiser *v.* Nummerdor, 120 Wis. 234, 97 N. W. 932, per Dodge, J.

But such an instruction is harmless when it conclusively appears from the evidence that plaintiff was a man of at least ordinary prudence. Kaiser *v.* Nummerdor, 120 Wis. 234, 97 N. W. 932, an instruction that plaintiff must have exercised such care and prudence "as ordinarily careful and prudent persons exercise under like circumstances."

82. Alexander *v.* Emmett, 169 Ill. 523, 48 N. E. 427; Read *v.* Chambers, (Tex. Civ. App. 1898) 45 S. W. 742.

Instruction construed. — In an action for misrepresenting the condition of a horse purchased from defendant, an instruction that if he was not in fact misled by defendant but acted on his own judgment, then the jury should find that plaintiff was not thereby induced to take any action to his prejudice, was held to imply that plaintiff could not recover if he relied on his own judgment. Black *v.* Black, 110 N. C. 398, 14 S. E. 971.

Instruction approved see Schumaker *v.* Mather, 133 N. Y. 590, 30 N. E. 755 [*affirming* 14 N. Y. Suppl. 411].

Although there is evidence of a promise made by defendant as well as representations, the court should charge, at the request of plaintiff, that if the representations had any influence upon plaintiff's action, he may recover. Shaw *v.* Stine, 8 Bosw. (N. Y.) 157.

83. Von Boeckmann *v.* Loepp, (Tex. Civ. App. 1903) 73 S. W. 849, holding that this practice is not objectionable as the repetition of an issue so as to give it undue prominence.

As to the burden of proof see *supra*, VII, J.

84. Shaw *v.* Gilbert, 111 Wis. 165, 86 N. W. 188.

85. Edward Malley Co. *v.* Button, 77 Conn. 571, 60 Atl. 125; Morley *v.* Liverpool, etc., Ins. Co., 85 Mich. 210, 48 N. W. 502; Sweeney

the charge should protect the rights of defendant so as not to enable plaintiff to recover except by a preponderance of proof,[86] and defendant is entitled to an instruction that inconclusive facts do not of themselves establish the various elements of the cause of action.[87] While the court should not charge as to the effect of evidence,[88] the jury in certain cases may and should be instructed that if certain facts are found other facts will necessarily follow.[89]

O. Damages[90] — **1. Actual or General Damages — a. Measure** — (i) *In General.* The general rule of damages in cases of fraud is that the party defrauded is entitled to recover the amount of the loss caused by the fraud of the other party,[91] or, as it has been expressed, plaintiff is entitled to recover damages ade-

v. Devens, 72 Mich. 301, 40 N. W. 454; Hitchcock *v.* Baughan, 36 Mo. App. 216; Granrud *v.* Rea, 24 Tex. Civ. App. 299, 59 S. W. 841. See also *supra*, VII, J; VII, L.

Instructions approved. — A charge that "fraud is never presumed, but the burden rests upon one claiming fraud to make it out by clear and convincing" proof, has been held not misleading, as conveying the impression that fraud must be proved beyond a reasonable doubt. Wallace *v.* Mattice, 118 Ind. 59, 20 N. E. 497. In Ley *v.* Metropolitan L. Ins. Co., 120 Iowa 203, 94 N. W. 568; Kenosha Stove Co. *v.* Shedd, 82 Iowa 540, 48 N. W. 933, charges substantially the same as the above were held proper. An instruction that the charge of fraud must be supported by "satisfactory proof, i. e. proof to the satisfaction of the jury," is not erroneous. Walker *v.* Collins, 59 Fed. 70, 8 C. C. A. 1. But *compare* Hitchcock *v.* Baughan, 36 Mo. App. 216; Granrud *v.* Rea, 24 Tex. Civ. App. 299, 59 S. W. 841.

86. Carson *v.* Houssels, (Tex. Civ. App. 1899) 51 S. W. 290.

87. Markel *v.* Moudy, 11 Nebr. 213, 7 N. W. 853.

88. Scholfield Gear, etc., Co. *v.* Scholfield, 71 Conn. 1, 40 Atl. 1046; Woolenslagle *v.* Runals, 76 Mich. 545, 43 N. W. 454, holding that it was proper for the court to refuse to charge that if defendant desired plaintiff to ascertain the facts for himself and told plaintiff that he knew nothing about the subject of the transaction, a strong presumption that no fraud was intended would be raised. But see Likes *v.* Baer, 8 Iowa 368, holding that it is not error to charge that certain evidence is important, in connection with other instructions that the jury must scrutinize the evidence carefully.

89. Hudnut *v.* Gardner, 59 Mich. 341, 26 N. W. 502.

Thus the attention of the jury may be properly called to the circumstances which in law raise a presumption of fraud, and if such circumstances appear to be uncontroverted by the evidence, they may and should be told that plaintiff's cause is thereby *prima facie* established. Small *v.* Chameny, 102 Wis. 61, 78 N. W. 407.

90. See, generally, Damages, 9 Cyc. 1.

Considerable conflict exists between the decisions in various jurisdictions as to the proper measure of damages for fraud. This sometimes arises from the difficulty of framing any definite rule which will give proper compensation to the injured party under varying states of fact. But at least one marked conflict arises from an irreconcilable difference of judicial opinion as to what is the proper measure of compensation to be given to one who has been induced by fraud to purchase property. See *infra*, VII, O, 1, a, (III).

91. *Alabama.*— Hogan *v.* Thorington, 8 Port. 428.

Arkansas.— Emmerson *v.* Dardanelle Bank, 66 Ark. 646, 52 S. W. 274; Carvill *v.* Jacks, 43 Ark. 439.

California.— American F. Ins. Co. *v.* Hart, 141 Cal. 678, 75 Pac. 334; Hanscom *v.* Drullard, 79 Cal. 234, 21 Pac. 736.

Illinois.— Johnson *v.* Beeney, 9 Ill. App. 64.

Kansas.— Davis *v.* Jenkins, 46 Kan. 19, 26 Pac. 459.

Kentucky.—Singleton *v.* Kennedy, 9 B. Mon. 222; Jackson *v.* Holliday, 3 T. B. Mon. 363.

Maryland.—McAleer *v.* Horsey, 35 Md. 439.

Massachusetts.— Springer *v.* Crowell, 103 Mass. 65; Jones *v.* Wolcott, 2 Allen 247; White *v.* Sawyer, 16 Gray 586; Tuckwell *v.* Lambert, 5 Cush. 23.

Minnesota.— Vilett *v.* Moler, 82 Minn. 12, 84 N. W. 452.

Nebraska.— Forbes *v.* Thomas, 22 Nebr. 541, 35 N. W. 411.

New Jersey.— Crater *v.* Binninger, 33 N. J. L. 513, 97 Am. Dec. 737.

New York.— Rothmiller *v.* Stein, 143 N. Y. 581, 38 N. E. 718, 26 L. R. A. 148 [*affirming* 9 Misc. 167, 29 N. Y. Suppl. 707]; McMillan *v.* Arthur, 98 N. Y. 167 [*affirming* 48 N. Y. Super. Ct. 424]; Saunders *v.* Chamberlain, 13 Hun 568; Whiteside *v.* Connolly, 21 Misc. 19, 46 N. Y. Suppl. 940.

Pennsylvania.— High *v.* Berret, 148 Pa. St. 261, 23 Atl. 1004; Weaver *v.* Cone, 12 Pa. Super. Ct. 143.

Vermont.— Brunnell *v.* Carr, 76 Vt. 174, 56 Atl. 660.

Wisconsin.—Shaw *v.* Gilbert, 111 Wis. 165, 86 N. W. 188; Beetle *v.* Anderson, 98 Wis. 5, 73 N. W. 560 (holding that the measure of damages on the sale of a mortgage by fraudulent representations that the securities are worth the amount of the mortgage is a sum equal to that portion of the mortgage debt which the securities properly applied will fail to pay); Bergeron *v.* Miles, 88 Wis. 397, 60 N. W. 783, 43 Am. St. Rep. 911.

United States.— Sigafus *v.* Porter, 179 U. S. 116, 21 S. Ct. 34, 45 L. ed. 113 [*revers-*

quate to the injury which he has sustained.[92] Plaintiff can recover the entire amount of his loss occasioned by the fraud,[93] but the recovery must be limited to the actual loss[94] sustained by reason of the fraud.[95] The expense incurred by

ing 84 Fed. 430, 28 C. C. A. 443]; Smith *v.* Bolles, 132 U. S. 125, 10 S. Ct. 39, 33 L. ed. 279; Nashua Sav. Bank *v.* Burlington Electric Lighting Co., 100 Fed. 673; Rockefeller *v.* Merritt, 76 Fed. 909, 22 C. C. A. 608, 35 L. R. A. 633; McHose *v.* Earnshaw, 55 Fed. 584, 5 C. C. A. 210; Glaspell *v.* Northern Pac. R. Co., 43 Fed. 900.

England.— Peek *v.* Derry, 37 Ch. D. 541, 57 L. J. Ch. 347, 59 L. T. Rep. N. S. 78, 36 Wkly. Rep. 899 [*reversed* on other grounds in 14 App. Cas. 337, 54 J. P. 148, 58 L. J. Ch. 864, 61 L. T. Rep. N. S. 265, 1 Meg. 292, 38 Wkly. Rep. 33].

See 23 Cent. Dig. tit. "Fraud," § 60.

Fraudulent representations inducing acceptance of deed.— One who by fraudulent representations is induced to take a warranty deed of land and who is evicted by the holder of a better title is not confined to the damages given for a breach of covenant, but may recover all the damages which have necessarily resulted from the fraud, the action being based upon the fraud and not upon the covenants in the deed. Carvill *v.* Jacks, 43 Ark. 439.

Fraud in sale of insurance policy.— The measure of damages recoverable by one who was induced by fraudulent representations to purchase a policy of life insurance, where, on discovering the fraud, he repudiated the contract and refused to pay further premiums on the policy, is the amount of the premiums paid, less the value of the insurance he has had. McKindley *v.* Drew, 69 Vt. 210, 37 Atl. 285.

Conveyance procured by fraud.— An illiterate man about to purchase a farm was induced by his uncle, by false representations as to the institution of suits against him, to have the deed made out to the uncle. The cash payment was made with money furnished by the nephew, and the deferred payment secured by a note executed by both parties. The uncle sold the land to one who had no knowledge of the fraud. It was held that the nephew was entitled to a judgment against the uncle for the amount for which he had sold the land, with interest and costs, and that the notes given by the purchaser should be surrendered to the nephew, and the amount thereof, when paid, credited on the judgment rendered against the uncle. Williams *v.* Collins, 67 Iowa 413, 25 N. W. 682.

92. Campbell *v.* Hillman, 15 B. Mon. (Ky.) 508, 61 Am. Dec. 195.

93. Krumm *v.* Beach, 96 N. Y. 398 [*affirming* 25 Hun 293].

Damages are not limited to the profit derived by defendant from the fraud. White *v.* Sawyer, 16 Gray (Mass.) 586.

94. *Kentucky.*— Crews *v.* Dabney, 1 Litt. 278, holding that in an action by the assignee against the assignor of a note for fraudulently misrepresenting the situation of the maker, the amount of the note was not the measure of damages, but the assignee could recover the amount paid for the note, with interest thereon.

Michigan.— Jackson *v.* Collins, 39 Mich. 557. See also Lewis *v.* Weidenfeld, 114 Mich. 581, 72 N. W. 604.

Minnesota.— Fixen *v.* Blake, 47 Minn. 540, 50 N. W. 612.

New York.— Von Bruck *v.* Peyser, 4 Rob. 514 (holding that in an action to recover the value of goods sold to a third person on the false representations of defendant as to such third person's solvency, the damages must be estimated by the value of the goods when sold, and where the damage was estimated in francs at a period when gold was the only legal tender, the value of the franc in gold at that time was the value of the damages); May *v.* New York Safety Reserve Fund Soc., 14 Daly 389, 13 N. Y. St. 66; Rabinowitz *v.* Cohen, 17 N. Y. Suppl. 502 (holding that in an action for fraud and deceit in procuring plaintiffs to manufacture certain goods, the measure of damage is the actual cost of their manufacture, to which cannot be added the prospective profit on the goods). See also Whiteside *v.* Connolly, 21 Misc. 19, 46 N. Y. Suppl. 940 [*affirming* 20 Misc. 711, 44 N. Y. Suppl. 1134].

Pennsylvania.— Cole *v.* High, 173 Pa. St. 590, 34 Atl. 292; High *v.* Berret, 148 Pa. St. 261, 23 Atl. 1004; Erie City Iron Works *v.* Barber, 102 Pa. St. 156, where the court said that for loss caused by defects in a boiler, the true measure of damages was the amount of money required to put the mill and machinery, including the boiler, in as good condition as they were before the explosion resulting from the defects in the boiler, and that for all incidental damages, such as the loss of profits and the like, the interest on the money thus expended must be regarded as a full equivalent.

Wisconsin.— Shaw *v.* Gilbert, 111 Wis. 165, 86 N. W. 188; Potter *v.* Necedah Lumber Co., 105 Wis. 25, 80 N. W. 88, 81 N. W. 118.

United States.— Sigafus *v.* Porter, 179 U. S. 116, 21 S. Ct. 34, 45 L. ed. 113 [*reversing* 84 Fed. 430, 28 C. C. A. 443]; Smith *v.* Bolles, 132 U. S. 125, 10 S. Ct. 39, 33 L. ed. 279; Nashua Sav. Bank *v.* Burlington Electric Lighting Co., 100 Fed. 673; Rockefeller *v.* Merritt, 76 Fed. 909, 22 C. C. A. 608, 35 L. R. A. 633.

See 23 Cent. Dig. tit. "Fraud," § 60.

Injuries to buyer's feelings.— One who has been fraudulently induced to buy worthless mining stock cannot recover for injuries to his feelings or for disapointment or his disgrace in the community. Cable *v.* Bowlus, 21 Ohio Cir. Ct. 53, 11 Ohio Cir. Dec. 526.

95. See *infra*, VII, O, 1, b, (II).

The inquiry is confined to the injury resulting from the falsity. Foster *v.* Kennedy, 38 Ala. 359, 81 Am. Dec. 56.

plaintiff on account of the false representations may be the proper measure of damages to be recovered.[96]

(II) *Fraud on Vendor.* It has been held that in case of actionable fraud in inducing plaintiff to sell his property, where there is no claim for rescission or recovery of the specific property, the measure of damages is the difference between the value of the property and the price paid,[97] with interest from the date of the fraud.[98] But it has also been held that in such case the measure of damages is the difference between the real value of the property and its value if it had been as represented by the purchaser.[99] It has been held that where the fraud practised consisted, not in inducing the vendor to part with property for less than he was willing to take, uninfluenced by the fraud, but in inducing him to sell at an acceptable price, the purchaser intending to evade payment, the measure of damages is the price agreed upon,[1] less what the vendor may have received ;[2] but there is also authority to the effect that in such case the measure of damages is the value of the property at the place where, and the time when, it was obtained from plaintiff.[3]

(III) *Fraud on Purchaser*—(A) *Difference Between Actual and Represented Value.* It has been frequently laid down that in an action based on fraud in the sale or exchange of property, if plaintiff retains the title and does not offer to rescind, the measure of damages is the difference between the actual value of

Losses due to plaintiff's fault cannot be recovered. Scholfield Gear, etc., Co. *v.* Scholfield, 71 Conn. 1, 40 Atl. 1046, holding that where, in an action for fraud in regard to a patented machine, whereby plaintiff was induced to buy the right to manufacture and sell it, defendant introduced evidence that plaintiff's failure to manufacture it successfully was due to defective workmanship and improper construction and application, and that a considerable number of the other patented appliances concerned in the same transaction had been sold by plaintiff, the jury, in determining the damages, should consider whether plaintiff used proper care and skill in the manufacture, proper endeavors to market the goods, and economy in management, and whether he had made any profits, although no request for such instructions were made by defendant. And see Maynard *v.* Maynard, 49 Vt. 297.

96. James *v.* Elliott, 44 Ga. 237; Dinwiddie *v.* Stone, 52 S. W. 814, 21 Ky. L. Rep. 584, holding that the measure of damages for inducing the purchase of a city lot by falsely representing it to be above the grade established for the street is the amount necessarily expended in making the lot and buildings thereon conform to the grade. And see *infra*, VII, O, 1, b, (III).

97. *Indiana.*— Johnson *v.* Culver, 116 Ind. 278, 19 N. E. 129.

Michigan.— McMillan *v.* Reaume, (1904) 100 N. W. 166.

Minnesota.— Mountain *v.* Day, 91 Minn. 249, 97 N. W. 883.

Mississippi.— Brown *v.* Lyon, 81 Miss. 438, 33 So. 284.

Texas.— Ellis *v.* Barlow, (Civ. App. 1894) 26 S. W. 908.

Wisconsin.—Potter *v.* Necedah Lumber Co., 105 Wis. 25, 80 N. W. 88, 81 N. W. 118.

Where nothing is obtained for the property conveyed, there being an entire failure of consideration, the measure of damages is the value of the property. Woolenslagle *v.* Runals, 76 Mich. 545, 43 N. W. 454; Reynolds *v.* Franklin, 44 Minn. 30, 46 N. W. 139, 20 Am. St. Rep. 540.

Value of chance to make more profitable sale.— Where plaintiff was induced by the fraud of defendant to sell certain stock at a certain price to a person who had already secured the majority of the stock of the company in question, and was determined to buy all the rest of the stock, and actually did buy the same at prices higher than plaintiff got, plaintiff was entitled to recover the value of his chance to make a more profitable sale, and the market value of the stock as evidenced by public sales did not furnish the criterion by which to measure plaintiff's loss. Weaver *v.* Cone, 12 Pa. Super. Ct. 143.

98. Ellis *v.* Barlow, (Tex. Civ. App. 1894) 26 S. W. 908.

99. Hicks *v.* Deemer, 187 Ill. 164, 58 N. E. 252 [*reversing* 87 Ill. App. 384].

1. McCready *v.* Phillips, 56 Nebr. 446, 76 N. W. 885.

2. McCready *v.* Phillips, 56 Nebr. 446, 76 N. W. 885.

3. American Nat. Bank *v.* Hammond, 25 Colo. 367, 55 Pac. 1090 (less amount paid and value of security taken); John V. Farwell Co. *v.* Wolf, 96 Wis. 10, 70 N. W. 289, 71 N. W. 109, 65 Am. St. Rep. 22, 37 L. R. A. 138 (holding, however, that where the evidence showed that the goods were worth the contract price, an instruction that the measure of damages was the contract price, with interest, was error without prejudice). See also Shaw *v.* Gilbert, 111 Wis. 165, 86 N. W. 188.

The value is to be estimated in legal tender of the period. Von Bruck *v.* Peyser, 4 Rob. (N. Y.) 514, where the only currency which was then legal tender was gold.

the property at the time of the sale or exchange and what it would have been worth had it been as represented, or what its value was represented to be,[4] and

4. *Alabama.*— Foster *v.* Kennedy, 38 Ala. 359, 81 Am. Dec. 56; Thompson *v.* Bell, 37 Ala. 438; Kelly *v.* Allen, 34 Ala. 663; Gibson *v.* Marquis, 29 Ala. 668; Stow *v.* Bozeman, 29 Ala. 397. See also Moncrief *v.* Wilkinson, 93 Ala. 373, 9 So. 159.

Arkansas.—Emmerson *v.* Dardanelle Bank, 66 Ark. 646, 52 S. W. 274; Carvill *v.* Jacks, 43 Ark. 454; Morton *v.* Scull, 23 Ark. 289. See also Matlock *v.* Reppy, 47 Ark. 148, 14 S. W. 546.

Colorado.— Herfort *v.* Cramer, 7 Colo. 483, 4 Pac. 896. But see Vivian *v.* Allen, 9 Colo. App. 147, 47 Pac. 844.

Connecticut.— Gustafson *v.* Rustemeyer, 70 Conn. 125, 39 Atl. 104, 66 Am. St. Rep. 92, 39 L. R. A. 644; Murray *v.* Jennings, 42 Conn. 9, 19 Am. Rep. 527.

Florida.— Williams *v.* McFadden, 23 Fla. 143, 1 So. 618, 11 Am. St. Rep. 345.

Georgia.— McCrary *v.* Pritchard, 119 Ga. 876, 47 S. E. 341.

Illinois.— Hicks *v.* Deemer, 187 Ill. 164, 58 N. E. 252; Bunn *v.* Schnellbacher, 163 Ill. 328, 45 N. E. 227; Antle *v.* Sexton, 137 Ill. 410, 27 N. E. 691 [*affirming* 32 Ill. App. 437]; Horne *v.* Walton, 117 Ill. 130, 141, 7 N. E. 100, 103; Drew *v.* Beall, 62 Ill. 164; Haldeman *v.* Schuh, 109 Ill. App. 259; Love *v.* McElroy, 106 Ill. App. 294; Van Velsor *v.* Seeberger, 59 Ill. App. 322; Tate *v.* Watts, 42 Ill. App. 103; Cox *v.* Gerkin, 38 Ill. App. 340; Wynn *v.* Longley, 31 Ill. App. 616; Johnston *v.* Beeney, 5 Ill. App. 601, 9 Ill. App. 64. See also Winslow *v.* Newlan, 45 Ill. 145.

Indiana.— Williamson *v.* Brandenberg, 133 Ind. 594, 32 N. E. 834; Nysewander *v.* Lowman, 124 Ind. 584, 24 N. E. 355; Rawson *v.* Pratt, 91 Ind. 9; Sangster *v.* Prather, 34 Ind. 504 (holding that where, in a sale of an undivided one half of a tract of land, the vendor falsely and fraudulently represented to the purchaser that there was then on the land a house of a particular size and description, the measure of damages for the lack of such house, in a suit by the purchaser against the vendor for such fraudulent representation, was one half the amount of the increase there would have been in the value of the land if there had been such a house on it at the time of the sale, and not merely one half the amount of money it would then have taken to put such a house on the land); Gatling *v.* Newell, 12 Ind. 118.

Iowa.— Warfield *v.* Clark, 118 Iowa 69, 91 N. W. 933; Johnson *v.* Gavitt, 114 Iowa 183, 86 N. W. 256; Boddy *v.* Henry, 113 Iowa 462, 85 N. W. 771, 53 L. R. A. 769; Howes *v.* Axtell, 74 Iowa 400, 37 N. W. 974; Williams *v.* Collins, 67 Iowa 413, 25 N. W. 682; White *v.* Smith, 54 Iowa 233, 6 N. W. 284; Moberly *v.* Alexander, 19 Iowa 162; Gates *v.* Reynolds, 13 Iowa 1; Likes *v.* Baer, 8 Iowa 368; Hahn *v.* Cummings, 3 Iowa 583.

Kansas.— Speed *v.* Hollingsworth, 54 Kan. 436, 38 Pac. 496.

Kentucky.— Campbell *v.* Hillman, 15 B. Mon. 508, 61 Am. Dec. 195; Jackson *v.* Holliday, 3 T. B. Mon. 363; Crews *v.* Dabney, 1 Litt. 278; Drake *v.* Holbrook, 66 S. W. 512, 23 Ky. L. Rep. 1941; Exchange Bank *v.* Gaitskill, 37 S. W. 160, 18 Ky. L. Rep. 532. But see Singleton *v.* Kennedy, 9 B. Mon. 222.

Maine.— Wright *v.* Roach, 57 Me. 600.

Maryland.— Weaver *v.* Shriver, 79 Md. 530, 30 Atl. 189; Pendergast *v.* Reed, 29 Md. 398, 96 Am. Dec. 539.

Massachusetts.— Lee *v.* Tarplin, 183 Mass. 52, 66 N. E. 431 (mortgage); Whiting *v.* Price, 172 Mass. 240, 51 N. E. 1084, 70 Am. St. Rep. 262; Kilgore *v.* Bruce, 166 Mass. 136, 44 N. E. 108; Nash *v.* Minnesota Title Ins., etc., Co., 163 Mass. 574, 40 N. E. 1039, 47 Am. St. Rep. 489, 28 L. R. A. 753; Hedden *v.* Griffin, 136 Mass. 229, 49 Am. Rep. 25; Morse *v.* Hutchins, 102 Mass. 439; Jones *v.* Wolcott, 2 Allen 247; Sibley *v.* Hulbert, 15 Gray 509; Stiles *v.* White, 11 Metc. 356, 45 Am. Dec. 214.

Michigan.— Jackson *v.* Armstrong, 50 Mich. 65, 14 N. W. 702; Jackson *v.* Collins, 39 Mich. 557; Page *v.* Wells, 37 Mich. 415; Hamilton *v.* Billingsley, 37 Mich. 107. See also Woolenslagle *v.* Runals, 76 Mich. 545, 43 N. W. 454.

Missouri.—Atchison County Bank *v.* Byers, (1897) 41 S. W. 325; Rutledge *v.* Tarr, 95 Mo. App. 265, 69 S. W. 22; Shinnabarger *v.* Shelton, 41 Mo. App. 147; Anslyn *v.* Frank, 8 Mo. App. 242; Shultz *v.* Christman, 6 Mo. App. 338; Brownlee *v.* Hewitt, 1 Mo. App. 360 [*citing* Langdon *v.* Green, 49 Mo. 363].

Nebraska.— Hankins *v.* Majors, 56 Nebr. 299, 76 N. W. 544; Woolman *v.* Wirtsbaugh, 22 Nebr. 490, 35 N. W. 216; Young *v.* Filley, 19 Nebr. 543, 26 N. W. 256; Markel *v.* Moudy, 13 Nebr. 322, 14 N. W. 409.

New Hampshire.— Noyes *v.* Blodgett, 58 N. H. 502; Page *v.* Parker, 43 N. H. 363, 80 Am. Dec. 172; Carr *v.* Moore, 41 N. H. 131; Page *v.* Parker, 40 N. H. 47; Fisk *v.* Hicks, 31 N. H. 535.

New Jersey.— Crater *v.* Binninger, 33 N. J. L. 513, 97 Am. Dec. 737.

New York.— Krumm *v.* Beach, 96 N. Y. 398 [*affirming* 25 Hun 293]; Miller *v.* Barber, 66 N. Y. 558; Hubbell *v.* Meigs, 50 N. Y. 480; Haight *v.* Hayt, 19 N. Y. 464; Ettlinger *v.* Weil, 94 N. Y. App. Div. 291, 87 N. Y. Suppl. 1049; Benedict *v.* Guardian Trust Co., 91 N. Y. App. Div. 103, 86 N. Y. Suppl. 370; Grosjean *v.* Galloway, 64 N. Y. App. Div. 547, 72 N. Y. Suppl. 331; King *v.* Mott, 37 N. Y. App. Div. 124, 56 N. Y. Suppl. 213; Newell *v.* Chapman, 74 Hun 111, 26 N. Y. Suppl. 361; Thomas *v.* Dickinson, 67 Hun 350, 22 N. Y. Suppl. 260; Cross *v.* Devine, 46 Hun 421; Wyeth *v.* Morris, 13 Hun 338; Rawley *v.* Woodruff, 2 Lans. 419; Durst *v.* Burton, 2 Lans. 137 [*affirmed* in 47 N. Y. 167, 7 Am. Rep. 428]; Mason *v.* Raplee, 66 Barb. 180; McDonald *v.* Christie, 42 Barb. 36; Sharon *v.* Mosher, 17 Barb. 518; Rothmiller *v.* Stein, 8

that this measure of damages applies without regard to the price paid [5] or the value of the property given in exchange by the party defrauded,[6] for it cannot always be said that plaintiff has suffered no injury because the bargain induced by the fraud was not a bad one and he has received the worth of his money. Plaintiff's right of recovery is determined by the position which he would have occupied had there been no fraud, and he is entitled to the benefit of his bargain on this basis.[7] Ordinarily it is the value at the time the fraud was committed

Misc. 137, 29 N. Y. Suppl. 707 [*affirmed* in 9 Misc. 167, 29 N. Y. Suppl. 707 (*affirmed* in 143 N. Y. 581, 38 N. E. 718, 26 L. R. A. 148)]. *Compare* Zieley *v.* Palliser, 30 N. Y. Suppl. 287.

North Carolina.— Lunn *v.* Shermer, 93 N. C. 164.

Ohio.— Linerode *v.* Rassmussen, 63 Ohio St. 545, 59 N. E. 220; Wilkinson *v.* Root, Wright 686; Norton *v.* Parker, 17 Ohio Cir. Ct. 715, 8 Ohio Cir. Dec. 572.

Oregon.— Cawston *v.* Sturgis, 29 Oreg. 331, 43 Pac. 656.

Pennsylvania.— Lukens *v.* Aiken, 174 Pa. St. 152, 34 Atl. 575; Stetson *v.* Croskey, 52 Pa. St. 230. See also Martachowski *v.* Orawitz, 14 Pa. Super. Ct. 175. But see Pennsylvania cases *infra*, notes 13, 15.

South Carolina.— Beasley *v.* Swinton, 46 S. C. 426, 24 S. E. 313; Parker *v.* Walker, 12 Rich. 138; Spikes *v.* English, 4 Strobh. 34.

Tennessee.— Smith *v.* Cozart, 2 Head 526; Hogg *v.* Cardwell, 4 Sneed 151.

Texas.— Carson *v.* Houssels, (Civ. App. 1899) 51 S. W. 290; Ford *v.* Oliphant, (Civ. App. 1895) 32 S. W. 437; Davenport *v.* Anderson, (Civ. App. 1893) 28 S. W. 922; Farmer *v.* Randel, (Civ. App. 1894) 28 S. W. 384; Traylor *v.* Evertson, (Civ. App. 1894) 26 S. W. 637. But see Texas cases cited *infra*, note 13.

Utah.— Hecht *v.* Metzler, 14 Utah 408, 48 Pac. 37, 60 Am. St. Rep. 906.

Vermont.— McKindley *v.* Drew, 69 Vt. 210, 37 Atl. 285; Shanks *v.* Whitney, 66 Vt. 405, 29 Atl. 367; Bowman *v.* Parker, 40 Vt. 410.

Wisconsin.— Potter *v.* Necedah Lumber Co., 105 Wis. 25, 80 N. W. 88, 81 N. W. 118; Warner *v.* Benjamin, 89 Wis. 290, 62 N. W. 179; Simmons *v.* Aldrich, 41 Wis. 241, holding that the liability of a defendant for fraudulent misrepresentation in the sale of national bank-stock, in respect to the state tax thereon having been paid, is the amount of such tax.

United States.— Lynch *v.* Mercantile Trust Co., 18 Fed. 486, 5 McCrary 623; Sherwood *v.* Sutton, 21 Fed. Cas. No. 12,781, 5 Mason 1. But see United States cases cited *infra*, notes 13–15.

See 23 Cent. Dig. tit. "Fraud," § 61.

Option of vendee.— In Matlock *v.* Reppy, 47 Ark. 148, 166, 14 S. W. 546, the court said: "In actions of deceit, the injured party may insist on having his damages measured by the difference in the value of the property purchased as it really was, and what it would have been had the representations made concerning it been true; or, if he prefer, he may content himself with the difference between the real value of the property in its true condition and the price paid; or, the value placed upon the property in the transaction." See also Goodwin *v.* Robinson, 30 Ark. 530.

Sale of good-will.— In a case where a stock of goods and the good-will of a business were sold, and the vendor represented that the annual sales were twice as much as they actually were, it was held that the measure of damages to which the vendee was entitled was the difference between the rental value of a store such as would be required for the volume of business actually transacted and the rental value of a store such as would be required for the volume of business represented to have been transacted. Rawson *v.* Pratt, 91 Ind. 9.

Cost of obtaining land falsely represented to be included in deed.— It has been held that the measure of damages for misrepresenting the location of a mill and privileges and land described in a deed, the purchaser electing to keep what did pass, is what it would cost to obtain under a writ *ad quod damnum*, or by some equally cheap and expeditious way, the land falsely represented to be covered by the deed. Reynolds *v.* Cox, 11 Ind. 262.

For falsely representing the existence of a claim for damages in favor of a lot sold, the measure of damages is the value of the claim. Shanks *v.* Whitney, 66 Vt. 405, 29 Atl. 367.

When rule not applicable.— The rule stated in the text is not applicable where there has been no misrepresentation as to the character or probable productive value of the thing sold, but the purchaser was led by fraud to give more than the vendor would have been willing to accept rather than lose the sale. In such case the purchaser should be allowed to recover whatever additional sum he was obliged to pay by means of such fraud above that for which he could or would otherwise have got the property. Kilgore *v.* Bruce, 166 Mass. 136, 44 N. E. 108.

5. Cox *v.* Gerkin, 38 Ill. App. 340; Nysewander *v.* Lowman, 124 Ind. 584, 24 N. E. 355; Greenewald *v.* Rathfon, 81 Ind. 547; Pendergast *v.* Reed, 29 Md. 398, 96 Am. Dec. 539.

The price paid may be properly submitted to the jury as a fact which may aid them in assessing the damages. Lunn *v.* Shermer, 93 N. C. 164 [*citing* Houston *v.* Starnes, 34 N. C. 313]; Smith *v.* Cozart, 2 Head (Tenn.) 526.

6. Murray *v.* Jennings, 42 Conn. 9, 19 Am. Rep. 527.

7. King *v.* White, 119 Ala. 429, 24 So. 710; Drake *v.* Holbrook, 78 S. W. 158, 25 Ky. L. Rep. 1489, 66 S. W. 512, 23 Ky. L.

which measures the liability of the person who committed the fraud.[8] Where mortgaged or encumbered real estate is falsely represented by the vendor to be unencumbered, the measure of damages is the amount of the encumbrance,[9] with interest[10] and costs.[11] In an action for deceit in the sale of corporate stock, where the misrepresentations related to the property or condition of the corporation, the measure of damages is the difference between the actual value of the stock and the value it would have had if the corporation had been in the condition or owned the amount of property represented by defendant.[12]

(B) *Difference Between Value and Price.* On the other hand there are a great number of cases in which the rule is stated to be that the measure of damages is the difference between the value of the thing purchased and the price paid,[13] or in case of an exchange, the difference between the value of what the

Rep. 1941; Krumm *v.* Beach, 96 N. Y. 398 [*affirming* 25 Hun 293]; Bergeron *v.* Miles, 88 Wis. 397, 60 N. W. 783, 43 Am. St. Rep. 911. *Compare* Snyder *v.* Hegan, 40 S. W. 693, 19 Ky. L. Rep. 517; Alden *v.* Wright, 47 Minn. 225, 49 N. W. 767. And see *infra*, III, B, 8, a.

8. Haight *v.* Hayt, 19 N. Y. 464; Mahoney *v.* O'Neill, 29 Misc. (N. Y.) 619, 61 N. Y. Suppl. 69, 36 Misc. 843, 74 N. Y. Suppl. 918 [*reversed* on other grounds in 36 Misc. 795, 74 N. Y. Suppl. 917].

9. Hahl *v.* Brooks, 213 Ill. 134, 72 N. E. 727 [*affirming* 114 Ill. App. 644]; Haight *v.* Hayt, 19 N. Y. 464; Cross *v.* Devine, 46 Hun (N. Y.) 421, if less than the value of the land.

10. Haight *v.* Hayt, 19 N. Y. 464; Cross *v.* Devine, 46 Hun (N. Y.) 421.

11. Haight *v.* Hayt, 19 N. Y. 464.

12. Warfield *v.* Clark, 118 Iowa 69, 91 N. W. 833; Boddy *v.* Henry, 113 Iowa 462, 85 N. W. 771, 53 L. R. A. 769; Drake *v.* Holbrook, 66 S. W. 512, 23 Ky. L. Rep. 1941, 78 S. W. 158, 25 Ky. L. Rep. 1489; Kentucky Exch. Bank *v.* Gaitskill, 37 S. W. 160, 18 Ky. L. Rep. 532; Hubbell *v.* Meigs, 50 N. Y. 480; Mahoney *v.* O'Neill, 29 Misc. (N. Y.) 619, 61 N. Y. Suppl. 69, 36 Misc. 843, 74 N. Y. Suppl. 918 [*reversed* on other grounds in 36 Misc. 795, 74 N. Y. Suppl. 917]. See also Miller *v.* Barber, 66 N. Y. 558. *Compare* Zieley *v.* Palliser, 30 N. Y. Suppl. 287.

The market price of the stock about the time or soon after the purchase is strong evidence of its value, and in the absence of other proof will control. But where the real pecuniary condition of the company is shown, from which it appears the stocks were worthless, the market price is entitled to no weight upon the question of value. Hubbell *v.* Meigs, 50 N. Y. 480.

13. *Colorado.*— Vivian *v.* Allen, 9 Colo. App. 147, 47 Pac. 844. But see Hereford *v.* Cramer, 7 Colo. 483, 4 Pac. 896.

Minnesota.— Stickney *v.* Jordan, 47 Minn. 262, 49 N. W. 980; Redding *v.* Godwin, 44 Minn. 355, 46 N. W. 563.

Pennsylvania.— High *v.* Berret, 148 Pa. St. 261, 23 Atl. 1004; Rice *v.* Olin, 79 Pa. St. 391. See also Weaver *v.* Cone, 12 Pa. Super. Ct. 143. But see Pennsylvania cases cited *supra*, note 4.

Texas.— Greenwood *v.* Pierce, 58 Tex. 130; McCord-Collins Commerce Co. *v.* Levi, (Civ. App. 1899) 50 S. W. 606. But see Texas cases cited *supra*, note 4.

Washington.— Tacoma *v.* Tacoma Light, etc., Co., 17 Wash. 458, 50 Pac. 55. *Compare* Phinney *v.* Hubbard, 2 Wash. Terr. 369, 8 Pac. 533.

United States.— Sigafus *v.* Porter, 179 U. S. 116, 21 S. Ct. 34, 45 L. ed. 113 [*reversing* 84 Fed. 430, 28 C. C. A. 443, and *following* Smith *v.* Bolles, 132 U. S. 125, 10 S. Ct. 39, 33 L. ed. 279]; Cooper *v.* Schlesinger, 111 U. S. 148, 4 S. Ct. 360, 28 L. ed. 382 (difference between agreed price procured by fraudulent representations and market price); Hindman *v.* Louisville First Nat. Bank, 112 Fed. 931, 50 C. C. A. 623, 57 L. R. A. 108; McHose *v.* Earnshaw, 55 Fed. 584, 5 C. C. A. 210; Atwater *v.* Whiteman, 41 Fed. 427 (with interest at the discretion of the jury). See also Nashua Sav. Bank *v.* Burlington Electric Lighting Co., 100 Fed. 673. But see United States cases cited *supra*, note 4.

England.— Peek *v.* Derry, 37 Ch. D. 541, 57 L. J. Ch. 347, 59 L. T. Rep. N. S. 78, 36 Wkly. Rep. 899 [*reversed* on other grounds in 14 App. Cas. 337, 54 J. P. 148, 58 L. J. Ch. 864, 61 L. T. Rep. N. S. 265, 1 Meg. 292, 38 Wkly. Rep. 33]. See also Twycross *v.* Grant, 2 C. P. D. 469, 46 L. J. C. P. 636, 36 L. T. Rep. N. S. 812, 25 Wkly. Rep. 701; Simons *v.* Patchett, 7 E. & B. 568, 3 Jur. N. S. 742, 26 L. J. Q. B. 195, 5 Wkly. Rep. 500, 90 E. C. L. 568.

See 23 Cent. Dig. tit. "Fraud," § 62.

Misrepresentations as to profits of business.— Where the purchase of an eating-house with its fixtures and furniture was induced by the vendor's false statements as to the amount of the profits of the business, the measure of damages is the difference between the price paid for the property and its actual value at the time of the purchase. Markel *v.* Moudy, 11 Nebr. 213, 7 N. W. 853.

Fraud in sale of shares of stock.— While the market value of corporate stock sold is ordinarily to be taken as the value for the assessment of damages for fraud in the sale, yet if it be shown that the corporation was insolvent it is not to be presumed that the stock had a market value different from its intrinsic worth, and the latter may be shown

injured party was fraudulently induced to part with and the value of what he got.[14] The principle upon which these cases proceed is that to consider as an element of recovery the value the property would have had if the representations had been true, would enable plaintiff to recover anticipated profits and not merely the actual loss, which is the true measure of damages.[15] The value of the property at the date of the sale furnishes the proper basis of computation.[16]

(c) *Proportionate Recovery.* It has been held that the measure of damages for false representations as to the quality of land, in reliance on which one was induced to purchase it, is the difference between the price and a sum which bears the same proportion to the price as the actual value of the land bears to the value thereof if it had been as represented.[17]

(d) *Where Sale Rescinded.* In an action of deceit in regard to a sale to plaintiff which he had repudiated, it has been held that he was damnified, if at all, by not getting the property he expected to get, and that he was entitled to the same damages as though defendant had wantonly broken his agreement to sell.[18]

(e) *Subsequent Disposition of Property by Purchaser.*[19] The rule established by the weight of authority appears to be that if a purchaser, through fraud practised upon him, has paid a higher price than the property was worth, and the fraud is actionable in its character, then he is entitled to recover for the injury occasioned by such fraud, notwithstanding any subsequent disposition he may make of the property,[20] and hence a recovery cannot be defeated, or the amount of damages reduced, by showing that plaintiff has sold the property for the same amount that he paid for it, or for a larger amount than he claims its real value to have been.[21] But on the other hand it has been held that in a suit

as a basis for the assessment of damages. Redding *v.* Godwin, 44 Minn. 355, 46 N. W. 563. The measure of the damages recoverable in an action for deceit in inducing the purchase of shares of stock in a corporation is the difference between the price paid and the real intrinsic value of such shares at the time of their purchase, and such value is to be ascertained in the light of previous and subsequent events in the history of the company, and not by their market value, although plaintiff is not entitled to recover for depreciation by reason of subsequent acts which were entirely independent of the causes existing at the time of his purchase. Hindman *v.* Louisville First Nat. Bank, 112 Fed. 931, 50 C. C. A. 623, 57 L. R. A. 108. See also Peek *v.* Derry, 37 Ch. D. 541, 57 L. J. Ch. 347, 59 L. T. Rep. N. S. 78, 36 Wkly. Rep. 899 [*reversed* on other grounds in 14 App. Cas. 337, 54 J. P. 148, 58 L. J. Ch. 864, 61 L. T. Rep. N. S. 265, 1 Meg. 292, 38 Wkly. Rep. 33]. A distinction is drawn between tangible property and shares of stock, it being considered that market sales of stock may not give any true indication of its intrinsic value. Hindman *v.* Louisville First Nat. Bank, 112 Fed. 931, 50 C. C. A. 623, 57 L. R. A. 108.

Sale for future delivery.— Where a sale of goods for future delivery is induced by the seller's false representations as to the existence of facts which affect the market value of the goods, and by reason of the non-existence of these facts the market value falls below the contract price, the measure of damages is the diminution of the market value at the time of delivery. Cooper *v.* Schlesinger, 111 U. S. 148, 4 S. Ct. 360, 28 L. ed. 382.

14. Barbour *v.* Flick, 126 Cal. 628, 59 Pac. 122; Wallace *v.* Hallowell, 56 Minn. 501, 58 N. W. 292; Fixen *v.* Blake, 47 Minn. 540, 50 N. W. 612; Alden *v.* Wright, 47 Minn. 225, 49 N. W. 767; Rockefeller *v.* Merritt, 76 Fed. 909, 22 C. C. A. 608, 35 L. R. A. 633.

15. High *v.* Berret, 148 Pa. St. 261, 23 Atl. 1004; Sigafus *v.* Porter, 179 U. S. 116, 21 S. Ct. 34, 45 L. ed. 113 [*reversing* 84 Fed. 430, 28 C. C. A. 443]; Smith *v.* Bolles, 132 U. S. 125, 10 S. Ct. 39, 33 L. ed. 279; Rockefeller *v.* Merritt, 76 Fed. 909, 22 C. C. A. 608, 35 L. R. A. 633.

16. Tacoma *v.* Tacoma Light, etc., Co., 17 Wash. 458, 50 Pac. 55.

17. Pruitt *v.* Jones, 14 Tex. Civ. App. 84, 36 S. W. 502. See also Merritt *v.* Taylor, 72 Tex. 293, 10 S. W. 532.

18. Warren *v.* Cole, 15 Mich. 265.

19. See also *supra*, III, B, 8, a.

20. Medbury *v.* Watson, 6 Metc. (Mass.) 246, 39 Am. Dec. 726; Lunn *v.* Shermer, 93 N. C. 164.

21. Medbury *v.* Watson, 6 Metc. (Mass.) 246, 39 Am. Dec. 726; Lunn *v.* Shermer, 93 N. C. 164. See also Small *v.* Pool, 30 N. C. 47.

Reason of the rule.— The reason of this is that to make what the purchaser afterward sold the property for the rule by which to measure the damages might make the question of fraud depend upon the rise or fall of the property in the market, or upon fluctuations in value arising from causes in no way connected with the fraud complained

for fraudulent representations inducing a sale of goods, defendant may show that the damages have been reduced or made good by an advantageous disposal of the goods by plaintiff, the theory being that if by such disposition plaintiff has reduced his loss, the actual loss is all that he can claim.[22]

(iv) *Failure of Title.* Where a person is induced by fraudulent representations to purchase realty the title to which fails, the measure of damages is the amount of the purchase-money or the consideration paid or given;[23] or in case the title fails as to part only, such proportion of the purchase-money or consideration as the value of such part bears to the value of the whole.[24] If title is finally perfected in the purchaser, he may recover the expense incurred in perfecting title.[25]

b. Elements of Damages — (i) *In General.* The general rule, in cases of fraud or deceit, is that defendant is responsible for those results, injurious to plaintiff, which must be presumed to have been within his contemplation at the time of the commission of the fraud,[26] and plaintiff may recover damages for any injury which is the direct and natural consequence of his acting on the faith of defendant's representations.[27]

(ii) *Proximate Results.* The damage must have been a direct consequence of the fraud; that is, it must appear that the fraud and damage sustain to each other the relation of cause and effect, or at least that the damage might have resulted directly from the fraud; the fraud must have been the proximate, not the remote, cause of the damage.[28]

of. Medbury *v.* Watson, 6 Metc. (Mass.) 246, 39 Am. Dec. 726.

When price realized may be shown.— There are cases where evidence of the price obtained by the purchaser has been admitted, not to establish the value of the property, but as a fact proper to be laid before the jury to aid them in assessing the damages. Lunn *v.* Shermer, 93 N. C. 164; Small *v.* Pool, 30 N. C. 47.

22. Jackson *v.* Collins, 39 Mich. 557.

23. Woolenslagle *v.* Runals, 76 Mich. 545, 43 N. W. 454, actual value of land conveyed in exchange.

Procuring void partition sale.— Where a person fraudulently gets up a proceeding for a sale of real estate for partition, which is void, the measure of damages against him is the purchase-money, with interest. Key *v.* Key, 3 Head (Tenn.) 448.

When rule not applicable.— In case for deceit in the sale of a slave as a slave for life, whereas he was entitled to freedom at a certain time, the purchase-money, with interest, is not the proper measure of damages, the amount of damage depending on the peculiar circumstances of the case. Brown *v.* Shields, 6 Leigh (Va.) 440.

24. Reynolds *v.* Franklin, 44 Minn. 30, 46 N. W. 139, 20 Am. St. Rep. 540; Parker *v.* Walker, 12 Rich. (S. C.) 138.

25. Parker *v.* Walker, 12 Rich. (S. C.) 138. And see *infra*, VII, O, 1, b, (III).

26. Webster *v.* Woolford, 81 Md. 329, 32 Atl. 319; Smith *v.* Duffy, 57 N. J. L. 679, 32 Atl. 371 (holding that one who by fraudulent representations induces another to purchase stock as an investment is liable for the loss which the purchaser suffers by retaining the stock in reliance on the representations); Crater *v.* Binninger, 33 N. J. L. 513, 97 Am. Dec. 737 (holding that where plaintiff was enticed by the deceit of defendant to enter into an oil speculation, defendant was responsible for moneys put into the scheme by plaintiff in the ordinary course of the business, and lost, less the value of the interest which plaintiff retained in the property held by those associated in the speculation); Langridge *v.* Levy, 6 L. J. Exch. 137, 2 M. & W. 519 [*affirmed* in 1 H. & H. 325, 7 L. J. Exch. 387, 4 M. & W. 338, 46 Rev. Rep. 689].

27. Carvill *v.* Jacks, 43 Ark. 439; Oakes *v.* Miller, 11 Colo. App. 374, 55 Pac. 193 (holding that damages consisting in the loss of personal property from the overflow of a creek, which the vendor of land bordering thereon falsely represented had no tendency to rise, are not too remote, in an action by the vendee for the false representations); Charbonnel *v.* Seabury, 23 R. I. 543, 51 Atl. 208. See also Dung *v.* Parker, 3 Daly (N. Y.) 89 [*reversed* on other grounds in 52 N. Y. 494].

28. *Dakota.*— Nelson County *v.* Northcote, 6 Dak. 378, 43 N. W. 897, 6 L. R. A. 230.

Georgia.— Clegg *v.* Whitley, 114 Ga. 569, 40 S. E. 763.

Iowa.— Jamison *v.* Ellsworth, 115 Iowa 90, 87 N. W. 723, holding that where a landlord induces a party to lease his premises by falsely representing that they are well watered for stock purposes, the lease containing no stipulation and there being no implied warranty with respect to the same, damages resulting from injury to cattle and the expense incurred in creating a water-supply are too remote to be recoverable.

Kentucky.—Singleton *v.* Kennedy, 9 B. Mon. 222.

Maine.— Brown *v.* Blunt, 72 Me. 415.

Maryland.— Webster *v.* Woolford, 81 Md.

(III) *Expenses Incurred.*[29] Expenses incurred by the party deceived in reliance upon the false and fraudulent representations of the other party may be recovered,[30] as may also expenses made necessary by reason of the fraud or deceit.[31] But expenditures which, although made by plaintiff in consequence of

329, 2 Atl. 319; Weaver *v.* Shriver, 79 Md. 530, 30 Atl. 189; McAleer *v.* Horsey, 35 Md. 439.

Massachusetts.—Dawe *v.* Morris, 149 Mass. 188, 21 N. E. 313, 14 Am. St. Rep. 404, 4 L. R. A. 158; Silver *v.* Frazier, 3 Allen 382, 81 Am. Dec. 662. See also Jones *v.* Wolcott, 2 Allen 247.

Michigan.— Davis *v.* Davis, 84 Mich. 324, 47 N. W. 555; Fitzsimmons *v.* Chapman, 37 Mich. 139, 26 Am. Rep. 508.

Minnesota.— Mountain *v.* Day, 91 Minn. 249, 97 N. W. 883; Vilett *v.* Moler, 82 Minn. 12, 84 N. W. 452.

Nebraska.— Forbes *v.* Thomas, 22 Nebr. 541, 35 N. W. 411.

New Jersey.— Byard *v.* Holmes, 34 N. J. L. 296.

New York.— Brackett *v.* Griswold, 112 N. Y. 454, 20 N. E. 376; Slingerland *v.* Bennett, 66 N. Y. 611; Arthur *v.* Griswold, 55 N. Y. 400 (the false representations must have been the "inducing cause"); Ettlinger *v.* Weil, 94 N. Y. App. Div. 291, 87 N. Y. Suppl. 1049; Sharon *v.* Mosher, 17 Barb. 518; Tockerson *v.* Chapin, 52 N. Y. Super. Ct. 16.

Pennsylvania.— Martachowski *v.* Orawitz, 14 Pa. Super Ct. 175, holding that in an action to recover for fraudulent representations inducing plaintiff to part with money to defendant for the purchase of a liquor license which defendant falsely represented that he owned, plaintiff could not recover damages for his imprisonment, resulting from his own violation of the law in selling liquor without a license.

Texas.— Greenwood *v.* Pierce, 58 Tex. 130 (where a recovery for improvements erected on a lot sold was denied); Sherrick *v.* Wyland, 14 Tex. Civ. App. 299, 37 S. W. 345.

Vermont.— Alletson *v.* Powers, 72 Vt. 417, 48 Atl. 647.

Wisconsin.— Krause *v.* Busacker, 105 Wis. 350, 81 N. W. 406; Potter *v.* Necedah Lumber Co., 105 Wis. 25, 80 N. W. 88, 81 N. W. 118.

United States.— Smith *v.* Bolles, 132 U. S. 125, 10 S. Ct. 39, 33 L. ed. 279; Cooper *v.* Schlesinger, 111 U. S. 148, 4 S. Ct. 360, 28 L. ed. 382; McHose *v.* Earnshaw, 55 Fed. 584, 5 C. C. A. 210 [*distinguishing* Peek *v.* Derry, 37 Ch. D. 591, 57 L. J. Ch. 347, 59 L. T. Rep. N. S. 78, 36 Wkly. Rep. 899]; Glaspell *v.* Northern Pac. R. Co., 43 Fed. 900.

England.— Richardson *v.* Dunn, 8 C. B. N. S. 655, 30 L. J. C. P. 44, 2 L. T. Rep. N. S. 430, 8 Wkly. Rep. 582, 98 E. C. L. 655; Barry *v.* Croskey, 2 Johns. & H. 1; Hyde *v.* Bulmer, 18 L. T. Rep. N. S. 293.

The test is that those results are proximate which the wrong-doer from his position must have contemplated as the probable consequence of his fraud. Crater *v.* Binniger, 33 N. J. L. 513, 97 Am. Dec. 737; Smith *v.* Bolles, 132 U. S. 125, 10 S. Ct. 39, 33 L. ed. 279.

Illustrations.— A purchaser cannot recover from his vendor, as actual damages resulting from the existence of a lien on property sold as free of encumbrance, a fee paid an attorney for procuring a release of the lien, which the holder willingly executed, nor the amount of rents which might have been realized from the property had the purchaser not been deterred from making improvements by fear of the lien. Sherrick *v.* Wyland, 14 Tex. Civ. App. 299, 37 S. W. 345. In a suit for fraudulent representations as to the future location of a railroad depot, made to induce a sale of land, plaintiff cannot recover the value of improvements made on the land. Greenwood *v.* Pierce, 58 Tex. 130. But *compare* Carvill *v.* Jacks, 43 Ark. 454.

29. As to attorney's fees and expenses of the litigation see *infra*, VII, O, 2, b.

Expenses of perfecting title see *supra*, VII, O, 1, a, (IV).

Expenses resulting from purchase of diseased animals see *infra*, VII, O, 1, c, (I).

30. *California.*— American F. Ins. Co. *v.* Hart, 141 Cal. 678, 75 Pac. 334.

Delaware.— Grier *v.* Dehan, 5 Houst. 401.

Missouri.— Madison *v.* Danville Min. Co., 65 Mo. App. 564.

Pennsylvania.— Drenning *v.* Wesley, 189 Pa. St. 160, 42 Atl. 13.

Texas.—Chatham Mach. Co. *v.* Smith, (Civ. App. 1898) 44 S. W. 592, holding that in an action for false representation in the sale of machinery so defective that it could not be used, the cost of putting it in place is a proper element of damage.

United States.— Sigafus *v.* Porter, 179 U. S. 116, 21 S. Ct. 34, 45 L. ed. 113 [*reversing* 84 Fed. 430, 28 C. C. A. 443]; Smith *v.* Bolles, 132 U. S. 125, 10 S. Ct. 39, 33 L. ed. 279; Nashua Sav. Bank *v.* Burlington Electric Lighting Co., 100 Fed. 673.

31. Barr *v.* Kimball, 43 Nebr. 766, 62 N. W. 196, holding that where a person has been induced to take a lease by the fraudulent misrepresentations of a lessor that the premises are in good condition for the purposes of the business which the lessee wishes to conduct therein, and by reason of the bad condition of the premises the lessee is compelled to remove his business to another place, he may recover the actual and necessary expenses of the removal. See also *supra*, VII, O, 1, a, (I).

But only necessary expenses can be recovered. Wilson *v.* Raybould, 56 Ill. 417.

Expenses held not proximate result see Singleton *v.* Kennedy, 9 B. Mon. (Ky.) 222 (expenses of returning property purchased); Sherrick *v.* Wyland, 14 Tex. Civ. App. 299, 37 S. W. 345 (fees paid attorney to obtain

defendant's false representation, do not necessarily involve a loss are not a proper element of damages.[32]

(iv) *INTEREST.*[33] In a proper case interest may be allowed upon the loss or damages occasioned by the fraud or deceit,[34] but there is no positive rule of law requiring interest to be added to the recovery.[35]

c. Particular Instances of Fraud — (i) *SALE OF DISEASED OR UNSOUND ANIMALS.* Where diseased or unsound animals are sold under a fraudulent representation that they are sound, the buyer is entitled to recover such damages as necessarily or naturally result from the fraud.[36] The recovery is not limited to deterioration or loss in value of the animals sold, but includes the value of the care, attention, and expense of the buyer in preserving the animals,[37] the loss occasioned by the communication of the disease to other animals owned by him,[38]

release of lien which the lien-holders were willing to release).

32. See Chatham Mach. Co. *v.* Smith, (Tex. Civ. App. 1898) 44 S. W. 592, holding that in an action for false representations in the sale of a gin which would not operate, the cost of other machinery bought from defendant for use in connection therewith but adapted for use with various other standard makes of gins was not a proper element of damage.

33. See also, generally, DAMAGES, 13 Cyc. 86 *et seq.*; INTEREST.

Particular instances where interest may be allowed are mentioned in connection with their subject-matter throughout this subdivision.

34. *Georgia.*— Estes *v.* Odom, 91 Ga. 600, 18 S. E. 355.

Illinois.— Horne *v.* Walton, 117 Ill. 130, 141, 7 N. E. 100, 103; Hiner *v.* Richter, 51 Ill. 299; Haldeman *v.* Schuh, 109 Ill. App. 259; Love *v.* McElroy, 106 Ill. App. 294; Johnston *v.* Beeney, 5 Ill. App. 601, 9 Ill. App. 64.

Iowa.— Hallam *v.* Todhunter, 24 Iowa 166.

Massachusetts.— Jones *v.* Wolcott, 2 Allen 247.

Michigan.— Snow *v.* Nowlin, 43 Mich. 383, 5 N. W. 443.

Missouri.— Lack *v.* Brecht, 166 Mo. 242, 65 S. W. 976; Heed *v.* Pierce, 8 Mo. App. 569.

Nebraska.— McCready *v.* Phillips, 56 Nebr. 446, 76 N. W. 885.

New York.— Haight *v.* Hayt, 19 N. Y. 464; Saunders *v.* Chamberlain, 13 Hun 568.

Pennsylvania.— Erie City Iron Works *v.* Barber, 102 Pa. St. 156.

Texas.— Wintz *v.* Morrison, 17 Tex. 372, 67 Am. Dec. 658; Ellis *v.* Barlow, (Civ. App. 1894) 26 S. W. 908.

Vermont.— Brunnell *v.* Carr, 76 Vt. 174, 56 Atl. 660.

Wisconsin.— John V. Farwell Co. *v.* Wolf, 96 Wis. 10, 70 N. W. 289, 71 N. W. 109, 65 Am. St. Rep. 22, 37 L. R. A. 138.

United States.— Smith *v.* Bolles, 132 U. S. 125, 10 S. Ct. 39, 33 L. ed. 279; South Covington, etc., R. Co. *v.* Gest, 34 Fed. 628.

Time from which interest runs.— Interest usually runs from the date of payment (Hallam *v.* Todhunter, 24 Iowa 166; Saunders *v.* Chamberlain, 13 Hun (N. Y.) 568), but where a husband and wife joined in a deed containing false statements as to the amount of an encumbrance on property assumed by the grantee, but it did not appear that the property was that of the wife, the husband was held liable for the amount the grantee was compelled to pay by reason of the deceit, with interest from the date of the commencement of the suit, the date the payment was made not being shown (Brunnell *v.* Carr, 76 Vt. 174, 56 Atl. 660).

35. Johnson *v.* Beeney, 9 Ill. App. 64; Jackson *v.* Holliday, 3 T. B. Mon. (Ky.) 363. And see Corder *v.* O'Neill, 176 Mo. 401, 75 S. W. 764, holding that where the action is for unliquidated damages and plaintiff claims no interest in his petition, it is error to instruct the jury to award interest.

36. Johnson *v.* Wallower, 18 Minn. 288 (holding that if the animals are worthless the measure of damages is not less than the value they would have had if sound); Wintz *v.* Morrison, 17 Tex. 372, 67 Am. Dec. 658 (holding that as to the living animals the measure of damages is the difference between their present value and the price paid for them, with interest from the date of sale).

The value of such animals as have died of the disease may be recovered, with interest from the date of sale. Wintz *v.* Morrison, 17 Tex. 372, 67 Am. Dec. 658.

37. Merguire *v.* O'Donnell, 103 Cal. 50, 36 Pac. 1033 (medical treatment of diseased horses sold); Parker *v.* Marquis, 64 Mo. 38 (contract of agistment); Wintz *v.* Morrison, 17 Tex. 372, 67 Am. Dec. 658.

38. *Kentucky.*— Faris *v.* Lewis, 2 B. Mon. 375.

Minnesota.—Johnson *v.* Wallower, 18 Minn. 288.

New York.— Jeffrey *v.* Bigelow, 13 Wend. 518, 28 Am. Dec. 476.

Texas.— Wintz *v.* Morrison, 17 Tex. 372, 67 Am. Dec. 658, disease communicated to other animals in the herd sold.

England.— Mullett *v.* Mason, L. R. 1 C. P. 559, 1 Harr. & R. 779, 12 Jur. N. S. 547, 35 L. J. C. P. 299, 14 L. T. Rep. N. S. 558, 14 Wkly. Rep. 898.

Seller's ignorance of nature of disease.— This has been held to apply even though the seller did not know the dangerous or infectious character of the disease with which

and the value of property which it became necessary for him to destroy to prevent contagion.[39]

(II) *Representations as to Title.* It has been held that in case of a misrepresentation as to the title of property sold, the measure of damages is the difference between the value of the estate actually acquired and the value of the estate purchased.[40]

(III) *Representations as to Quantity.* A purchaser who, relying upon the false and fraudulent representations of his vendor as to the quantity of land purchased, pays for land which he does not receive is entitled to recover in an action for damages the amount of money paid on account of such fraud; that is to say, such a proportion of the purchase-price as the deficiency bears to the represented area.[41]

(IV) *Representations as to Fitness For Use.* Where a person sells property to be used for a particular purpose and is guilty of defrauding the purchaser in respect to the fitness of the thing sold for that purpose, he is liable to the purchaser for all the damages which result directly from prudently using the property for the purpose contemplated, prior to the discovery of the fraud.[42]

(V) *Inducing Loan.* Where a loan is induced by fraudulent representations as to the value of the security, the measure of damages is the difference between the amount of the loan and the real value of the security, with interest thereon.[43]

(VI) *Inducing Compromise.* Where a creditor is induced by the fraudulent representations of his debtor to compromise, and sues to recover damages for fraud, retaining what he has received in the compromise, he is entitled to recover

the animals sold were afflicted. Johnson *v.* Wallower, 18 Minn. 288.

39. Merguire *v.* O'Donnell, 103 Cal. 50, 36 Pac. 1033, stable burned.

40. Campbell *v.* Hillman, 15 B. Mon. (Ky.) 508, 61 Am. Dec. 195 (where the court said, however, that subsequent events and circumstances which from their very nature were calculated to aid in estimating this difference, and which rendered certain some important element in the estimate upon which it was predicated and without which it would be uncertain and merely conjectural, might be resorted to and proved for that purpose); Grosjean *v.* Galloway, 64 N. Y. App. Div. 547, 72 N. Y. Suppl. 331.

Misrepresentation as to liquor license.— Where defendant sold to plaintiff certain bar fixtures and liquors, etc., and the lease of a house in which the chattels were, and falsely represented that he had, and would transfer to plaintiff, a license to sell liquors during the unexpired period of the license year, the measure of damages was the difference between the value of both chattels and lease with the privilege to sell liquors during the unexpired portion of the year, and their value without such privilege. Martachowski *v.* Orawitz, 14 Pa. Super. Ct. 175.

41. *Alabama.*— Thompson *v.* Bell, 37 Ala. 438; Kelly *v.* Allen, 34 Ala. 663; Williams *v.* Mitchell, 30 Ala. 299; Stow *v.* Bozeman, 29 Ala. 397.

Georgia.— Estes *v.* Odom, 91 Ga. 600, 18 S. E. 355.

Illinois.— Hiner *v.* Richter, 51 Ill. 299, with interest.

Iowa.— Hallam *v.* Todhunter, 24 Iowa 166, where the measure of damages was held to be the contract price per acre, with interest from the date of payment, for the amount of the deficit.

Oregon.—Cawston *v.* Sturges, 29 Oreg. 331, 43 Pac. 656, so holding notwithstanding a contention that the land as it actually existed was worth the purchase-price.

Misrepresentation as to particular tract.— Where the misrepresentation is not as to the quantity in the aggregate of the land sold, but as to the quantity in a distinguishable parcel of such land, the average value per acre of the particular parcel, and not of the entire tract, must furnish the basis of computing damages. Thompson *v.* Bell, 37 Ala. 438.

42. French *v.* Vining, 102 Mass. 132, 3 Am. Rep. 440 (sale of poisoned hay to be fed to a cow, plaintiff being allowed to recover the value of the cow, the animal having died from eating the hay); Tuckwell *v.* Lambert, 5 Cush. (Mass.) 23 (holding that where the purchaser of a vessel falsely and fraudulently represented by the seller as eighteen years old, whereas it was in fact twenty-eight years old, sent it to sea before he had knowledge that such representation was false, and the vessel was afterward condemned in a foreign port, the purchaser was entitled to recover his actual damages occasioned by sending the vessel to sea, not exceeding the value of the vessel); Maynard *v.* Maynard, 49 Vt. 297 (sale of an impotent bull for breeding purposes, plaintiff being a dairyman).

43. Briggs *v.* Brushaber, 43 Mich. 330, 5 N. W. 383, 38 Am. Rep. 187. See also Horne *v.* Walton, 117 Ill. 130, 141, 7 N. E. 100, 103; Slim *v.* Croucher, 2 Giff. 37 [*affirmed* in 6 Jur. N. S. 437, 29 L. J. Ch. 273, 2 L. T. Rep. N. S. 103, 8 Wkly. Rep. 347].

the balance of the amount he would have received had no fraud been committed, notwithstanding that by bringing the action he affirms the compromise.[44]

(VII) *SALE OF PAID NOTE AS UNPAID.* In an action against the seller of a promissory note which has been paid, for knowingly misrepresenting at the time of the sale that it was still due and unpaid, the measure of damages is the full amount of the note.[45]

(VIII) *FRAUD OF JOINT PURCHASER.* Where one of two joint purchasers defrauds the other by representing that the price to be paid for the property is greater than that actually to be paid, the measure of damages for the defrauded party is the difference between what he actually paid and what he should have paid for his proportionate share at the true purchase-price,[46] and this notwithstanding the property might have been a good bargain at the price represented to have been paid.[47]

2. SPECIAL DAMAGES — a. In General.[48] Special damages are often allowed to be recovered in actions of deceit.[49]

44. Buck *v.* Leach, 69 Me. 484; Grabenheimer *v.* Blum, 63 Tex. 369.

45. Sibley *v.* Hulbert, 15 Gray (Mass.) 509, 511 (where the court said: "If he sold a note which had been paid, knowingly making the false representation that it was still due and unpaid, the jury ought not to make an estimate of the market value of the note. The fact that the maker has paid it in full is conclusive evidence that he could pay it. To assess any less sum than the full amount of the note would be to allow the defendant to retain a part of it as the profit upon his own fraud and falsehood"); Spikes *v.* English, 4 Strobh. (S. C.) 34 (with interest).

46. *Alabama.*— King *v.* White, 119 Ala. 429, 24 So. 710.

Colorado.— Mayo *v.* Wahlgreen, 9 Colo. App. 506, 50 Pac. 40.

Iowa.— Johnson *v.* Gavitt, 114 Iowa 183, 86 N. W. 256.

Missouri.— Rutledge *v.* Tarr, 95 Mo. App. 265, 69 S. W. 22.

Wisconsin.— Bergeron *v.* Miles, 88 Wis. 397, 60 N. W. 783, 43 Am. St. Rep. 911.

Concealment of defendant's interest in the property.— In an action to recover damages for fraudulently inducing plaintiff to enter into a joint purchase of land with defendants, where the only fraud charged is that defendants were part owners of the land and concealed such fact from plaintiff, the measure of plaintiff's recovery is the difference between the price paid and the fair market value of the property at the time of the purchase. Constant *v.* Lehman, 52 Kan. 227, 34 Pac. 745.

47. King *v.* White, 119 Ala. 429, 24 So. 710; Bergeron *v.* Miles, 88 Wis. 397, 60 N. W. 783, 43 Am. St. Rep. 911.

48. See also, generally, DAMAGES, 13 Cyc. 13.

49. *California.*— Merguire *v.* O'Donnell, 103 Cal. 50, 36 Pac. 1033.

Iowa.— See White *v.* Smith, 54 Iowa 233, 6 N. W. 284.

Missouri.— Madison *v.* Danville Min. Co., 65 Mo. App. 564.

New York.— See Sharon *v.* Mosher, 17 Barb. 518.

Vermont.— Maynard *v.* Maynard, 49 Vt. 297.

United States.— The Normandia, 62 Fed. 469.

England.— Barley *v.* Walford, 9 Q. B. 197, 10 Jur. 917, 15 L. J. Q. B. 369, 58 E. C. L. 197.

Illustrative cases.— Plaintiff has been allowed to recover the cost of making a lot conform to a grade asserted to exist (Dinwiddie *v.* Stone, 52 S. W. 814, 21 Ky. L. Rep. 584), expenses in moving and loss of wages (Grier *v.* Dehan, 5 Houst. (Del.) 401), the cost of an action which resulted in discovering the fraud (Randell *v.* Trimen, 18 C. B. 786, 25 L. J. C. P. 307, 86 E. C. L. 786; Collen *v.* Wright, 8 E. & B. 647, 4 Jur. N. S. 357, 27 L. J. Q. B. 215, 6 Wkly. Rep. 123, 92 E. C. L. 647; Hughes *v.* Graeme, 33 L. J. Q. B. 335, 12 Wkly. Rep. 857. See also Pow *v.* Davis, 1 B. & S. 220, 7 Jur. N. S. 1018, 30 L. J. Q. B. 257, 4 L. T. Rep. N. S. 399, 9 Wkly. Rep. 611, 101 E C. L. 220), the cost of putting useless machinery into place (Chatham Mach. Co. *v.* Smith, (Tex. Civ. App. 1898) 44 S. W. 592), the expense of delivering a policy (American F. Ins. Co. *v.* Hart, 141 Cal. 678, 75 Pac. 334), the cost of fixtures prepared for premises (Dung *v.* Parker, 3 Daly (N. Y.) 89), and the expense of condemnation of land where title failed (Reynolds *v.* Cox, 11 Ind. 262). In an action for fraud in the sale of a horse, plaintiff may recover for injuries to his person resulting from the vicious character of the horse, if they are the natural consequences of the fraud. Sharon *v.* Mosher, 17 Barb. (N. Y.) 518. Where defendant sold plaintiff a lot, knowing that he intended to build a residence thereon, and falsely represented that there was a street upon the north side of the lot, and plaintiff purchased, and erected a valuable residence on the lot in reliance upon such representation, it was held, the public records disclosing nothing with respect to such street, that plaintiff was entitled to recover as special damages, in addition to the difference in value of the lot, the difference between the market value of the house as a residence with a street as represented, and without such a street. White *v.* Smith, 54 Iowa 233, 6 N. W. 284.

b. Attorney's Fees and Expenses of Litigation.[50] It has been held that attorney's fees and the expenses of prosecuting the action may be recovered as special damages or may be considered by the jury in estimating the damages to be awarded;[51] but there is authority to the contrary.[52]

3. Exemplary or Vindictive Damages. In ordinary cases a recovery of exemplary, punitive, or vindictive damages will not be allowed in an action of deceit;[53] but such damages may be allowed where the wrong involves some violation of duty springing from a relation of trust or confidence,[54] or where the fraud is gross or the case presents other extraordinary or exceptional circumstances clearly indicating malice and wilfulness and calling for an extension of the doctrine.[55]

4. Nominal Damages. As actual injury is necessary in order to sustain the action of deceit,[56] plaintiff cannot recover even nominal damages without proof of loss or injury;[57] but where actual injury is shown, at least nominal damages should be assessed.[58] It has been held, however, that if nominal damages have been sustained at the commencement of the action a recovery may be had[59]

One who by fraudulent representations is induced to take a warranty deed of land, and who is evicted by the holder of a better title, is not confined to the damages given for a breach of covenant, being the purchase-money and interest, but may also recover the value of improvements. Carvill *v.* Jacks, 43 Ark. 454. But *compare* Greenwood *v.* Pierce, 58 Tex. 130.

50. See, generally, Damages, 13 Cyc. 79–81.

51. Ives *v.* Carter, 24 Conn. 392 (such expenses may be taken into consideration in estimating damages); Linsley *v.* Bushnell, 15 Conn. 225, 38 Am. Dec. 79; Bracken *v.* Neill, 15 Tex. 109. See also *infra*, note 55.

Limitation of rule.— But the right of a party to recover reasonable attorney's fees as special damages is confined to cases where he is obliged to take the initiative in order to redress a wrong perpetrated through fraud or malice. Where plaintiff has an apparently good cause of action arising *ex contractu*, and defendant sets up fraud as a defense, he cannot recover special damages. Flack *v.* Neill, 22 Tex. 253. Where, in an action for deceit, there was no evidence introduced on the subject of counsel fees and none as to the fact that defendant had been either stubbornly litigious or had caused plaintiff unnecessary trouble and expense, and the facts were not such as to warrant a verdict for plaintiff, it was held that it was error to charge the jury that they might allow damages to plaintiff on the ground of counsel fees. Smith *v.* Dudley, 69 Ga. 78.

52. Warren *v.* Cole, 15 Mich. 265 (expenses of litigation cannot be considered in estimating damages); Hyde *v.* Bulmer, 18 L. T. Rep. N. S. 293.

53. Singleton *v.* Kennedy, 9 B. Mon. (Ky.) 222 (stating this to be the rule under the law of both Kentucky and Louisiana); Hoffman *v.* Gill, 102 Mo. App. 320, 77 S. W. 146; Oehlof *v.* Solomon, 73 N. Y. App. Div. 329, 76 N. Y. Suppl. 716 [*affirming* 33 Misc. 771, 67 N. Y. Suppl. 935 (*reversing* 32 Misc. 773, 66 N. Y. Suppl. 484)]; Lane *v.* Wilcox. 55 Barb. (N. Y.) 615 (which was an action for fraudulently adulterating milk); Cable *v.* Bowlus, 21 Ohio Cir. Ct. 53, 11 Ohio Cir. Dec. 526 [*explaining* Roberts *v.* Mason, 10 Ohio St. 277].

54. Oehlof *v.* Solomon, 73 N. Y. App. Div. 329, 76 N. Y. Suppl. 716 [*affirming* 33 Misc. 771, 67 N. Y. Suppl. 935 (*reversing* 32 Misc. 773, 66 N. Y. Suppl. 484)]; Peckham Iron Co. *v.* Harper, 41 Ohio St. 100. See also Oliver *v.* Chapman, 15 Tex. 400.

55. *Connecticut.*—Platt *v.* Brown, 30 Conn. 336.

Illinois.—Kelly *v.* Valentine, 17 Ill. App. 87.

Indiana.— McAvoy *v.* Wright, 25 Ind. 22; Millison *v.* Hoch, 17 Ind. 277.

New York.— Kujek *v.* Goldman, 150 N. Y. 176, 44 N. E. 773, 55 Am. St. Rep. 670, 34 L. R. A. 156 [*affirming* 9 Misc. 34, 29 N. Y. Suppl. 294]; Oehlof *v.* Solomon, 73 N. Y. App. Div. 329, 76 N. Y. Suppl. 716 [*affirming* 33 Misc. 771, 67 N. Y. Suppl. 935 (*reversing* 32 Misc. 773, 66 N. Y. Suppl. 484)].

Ohio.— Cable *v.* Bowlus, 21 Ohio Cir. Ct. 53, 11 Ohio Cir. Dec. 526.

Tennessee.— Byram *v.* McGuire, 3 Head 529.

Texas.— Oliver *v.* Chapman, 15 Tex. 400; Graham *v.* Roder, 5 Tex. 141.

Vermont.— Nye *v.* Merriam, 35 Vt. 438.

See 23 Cent. Dig. tit. "Fraud," § 63.

The expenses of the litigation may properly be considered by the jury as coming within this description of damages. Platt *v.* Brown, 30 Conn. 336.

56. See *supra*, III, B, 8.

57. Alden *v.* Wright, 47 Minn. 225, 49 N. W. 767 [*distinguishing* Potter *v.* Mellen, 36 Minn. 122, 30 N. W. 438].

58. Van Velsor *v.* Seeberger, 35 Ill. App. 598; Pryor *v.* Foster, 130 N. Y. 171, 29 N. E. 123 [*followed* in Blumenfeld *v.* Stein, 42 Misc. 411, 87 N. Y. Suppl. 81]; Ledbetter *v.* Morris, 48 N. C. 543. See also Hankins *v.* Majors, 56 Nebr. 299, 76 N. W. 544, holding that a verdict for nominal damages may be proper where, although a sale was induced by false representations of the vendor, the vendee nevertheless received substantially what he expected and bargained for.

59. Thomas *v.* Dickinson, 67 Hun (N. Y.) 350, 22 N. Y. Suppl. 260.

which may include all actual damages suffered by plaintiff after suit brought and up to the day of the verdict.[60]

5. Speculative Damages. In an action of deceit plaintiff cannot recover speculative damages.[61] Thus he is not entitled to recover the prospective but uncertain profits which he might have made had the representations which induced him to enter into the transaction been true, but only his actual loss;[61] nor is he entitled to recover profits which he might have made had he not been deceived by and acted upon defendant's false representations.[63]

6. Mitigation or Reduction of Damages. In an action of deceit, matters which tend to show that the loss or damage suffered by plaintiff was not as great as is claimed, or as might be supposed, may be shown and considered in mitigation or reduction of the damages.[64]

7. Question For Jury. The amount of the loss which plaintiff has suffered by reason of the fraud of defendant is a question which is properly submitted to the jury,[65] as is also the question whether consequential damages asked for in an action for deceit are the natural consequences of the fraud.[66] Where the amount of damages allowed by the jury is clearly contrary to the evidence, the verdict should be set aside.[67]

60. Thomas *v.* Dickinson, 67 Hun (N. Y.) 350, 22 N. Y. Suppl. 260 [*citing* Everson *v.* Powers, 89 N. Y. 527, 42 Am. Rep. 319; Wilcox *v.* Plummer, 4 Pet. (U. S.) 172, 7 L. ed. 821; Sedgw. Dam. § 85].

61. Fitzsimmons *v.* Chapman, 37 Mich. 139, 26 Am. Rep. 508; Myers *v.* Turner, (Tenn. Ch. App. 1898) 52 S. W. 332; Sherrick *v.* Wyland, 14 Tex. Civ. App. 299, 37 S. W. 345. See also Nelson County *v.* Northcote, 6 Dak. 378, 43 N. W. 897, 6 L. R. A. 230.

62. Hiner *v.* Richter, 51 Ill. 299; May *v.* New York Safety Reserve Fund Soc., 14 Daly (N. Y.) 389, 13 N. Y. St. 66; High *v.* Berret, 148 Pa. St. 261, 23 Atl. 1004; Sigafus *v.* Porter, 179 U. S. 116, 21 S. Ct. 34, 45 L. ed. 113 [*reversing* 84 Fed. 430, 28 C. C. A. 443]; Smith *v.* Bolles, 132 U. S. 125, 10 S. Ct. 39, 33 L. ed. 279; Rockefeller *v.* Merritt, 76 Fed. 909, 22 C. C. A. 608, 35 L. R. A. 633. *Compare* Griffith *v.* Bergeson, 115 Iowa 279, 88 N. W. 451.

63. Clegg *v.* Whitley, 114 Ga. 569, 40 S. E. 763.

On the other hand where a manufacturer was induced to sell his goods on credit to an insolvent corporation, relying upon the false statements of defendant that it was solvent, it was held that in computing the damages the goods should be figured at the market price, although that included the usual manufacturer's profits. Shaw *v.* Gilbert, 111 Wis. 165, 86 N. W. 188. But see Rabinowitz *v.* Cohen, 17 N. Y. Suppl. 502.

64. *Colorado.*— American Nat. Bank *v.* Hammond, 25 Colo. 367, 55 Pac. 1090.

Iowa.— Clews *v.* Traer, 57 Iowa 459, 10 N. W. 838.

Michigan.— Briggs *v.* Brushaber, 43 Mich. 330, 5 N. W. 383, 38 Am. Rep. 187.

New Jersey.— Crater *v.* Binninger, 33 N. J. L. 513, 97 Am. Dec. 737, holding that in an action for deceit in enticing plaintiff to enter into an oil speculation, whereby he lost a considerable sum, the value of the interest which plaintiff still retains in the property which was the subject of the speculation should be deducted from the amount of the recovery.

New York.— Mahoney *v.* O'Neill, 28 Misc. 437, 59 N. Y. Suppl. 378.

Ohio.— Taylor *v.* Leith, 26 Ohio St. 428.

Rhode Island.— Whittier *v.* Collins, 15 R. I. 90, 23 Atl. 47, 2 Am. St. Rep. 879, holding that where plaintiff has previously obtained a judgment in assumpsit against defendant arising out of the same transaction, the jury, in assessing the damages in an action for deceit, may consider the value of the former judgment, and if it be thought to have any value, reduce the assessment of damages accordingly.

Texas.— See Carson *v.* Houssels, (Civ. App. 1899) 51 S. W. 290; McCord-Collins Commerce Co. *v.* Levi, (Civ. App. 1899) 50 S. W. 606.

Vermont.— McKindley *v.* Drew, 69 Vt. 210, 37 Atl. 285.

65. *Illinois.*— Johnson *v.* Beeney, 9 Ill. App. 64.

Kentucky.— Jackson *v.* Holliday, 3 T. B. Mon. 363.

Minnesota.— Vilett *v.* Moler, 82 Minn. 12, 84 N. W. 452.

Missouri.— Corder *v.* O'Neill, 176 Mo. 401, 75 S. W. 764.

Pennsylvania.—Weaver *v.* Cone, 174 Pa. St. 104, 34 Atl. 551.

Proper considerations in determining value. — In an action to recover damages for fraud practised upon a purchaser of land by the vendor, who claimed to possess the right to a timber-culture claim, the non-taxable character of land so entered is a proper matter for the jury to consider in determining the value of such a claim and right of entry. Davis *v.* Jenkins, 46 Kan. 19, 26 Pac. 459.

66. Sharon *v.* Mosher, 17 Barb. (N. Y.) 518.

67. Traylor *v.* Evertson, (Tex. Civ. App. 1894) 26 S. W. 637, holding that where, in an action for deceit in the sale of a horse, the evidence showed that defendant was guilty of deceit, in that the horse was of no value, but was represented by defendant to

8. Evidence — a. Burden of Proof.[68] It is incumbent upon plaintiff to show that he has suffered loss through the fraud or deceit of defendant,[69] and to show the facts necessary for the proper and correct computation of the damages.[70]

b. Admissibility.[71] As a general rule any evidence which is otherwise competent and which tends to show the injury which plaintiff has received or to aid the jury in assessing the damages is proper and admissible,[72] but evidence which is

be in a condition which would have made it worth two hundred dollars, a verdict for one cent damages should be set aside as contrary to the evidence.

68. Burden of proof generally see *supra*, VII, J.

69. See Sweet *v.* Owens, 9 Kan. App. 48, 57 Pac. 254; Stetson *v.* Crocksey, 52 Pa. St. 230.

70. West Florida Land Co. *v.* Studebaker, 37 Fla. 28, 19 So. 176; Clegg *v.* Whitley, 114 Ga. 569, 40 S. E. 783; Equitable Trust Co. *v.* Milligan, (Ind. App. 1902) 64 N. E. 673; Whiteside *v.* Connolly, 21 Misc. (N. Y.) 19, 46 N. Y. Suppl. 940 [*affirming* 44 N. Y. Suppl. 1134], holding that the assignee of a lease is not entitled to recover the amount paid for the assignment, for false representations of the assignor, where it is not proved that he has been injured to that extent.

Evidence must be definite. Clegg *v.* Whitney, 114 Ga. 569, 40 S. E. 763.

What showing sufficient.— Defendant sold corporate stock to plaintiff, fraudulently representing that the company owned a patent right of great value. The patent right was actually worthless, and the company had no other property. The court charged that the measure of damages was the difference between the actual and represented value of the stock. It was held that a refusal to charge that plaintiff could not recover because he had not shown the difference in value was proper, since the jury could find from the evidence that the stock was actually worthless, and that had the representations been true the stock would have been worth what plaintiff paid. Miller *v.* Barber, 66 N. Y. 558.

71. See, generally, *supra*, VII, K.

72. *Alabama.*— Hoge *v.* Herzberg, (1904) 37 So. 591, holding that where plaintiff alleged that defendant, claiming as his own certain property belonging to another, and subject to a mortgage, had sold the same to plaintiff, and that plaintiff was sued in conversion by the mortgagee, and a judgment obtained against him, wherefore he sought damages from defendant, there being evidence of said mortgage, the judgment obtained by the mortgagee was relevant on the subject of damages.

Connecticut.— Lovejoy *v.* Isbell, 73 Conn. 368, 47 Atl. 682, holding that plaintiff, in an action for deceit in the sale of a farm, might testify that defendant pointed out to her a certain tract as within the farm he proposed to sell, but which was not embraced in the deed he gave, and might also show the value of such tract, on the question of damages.

Massachusetts.— Stannard *v.* Kingsbury, 179 Mass. 174, 60 N. E. 552.

New York.— Thorn *v.* Helmer, 4 Abb. Dec. 408, 2 Keyes 27.

Ohio.— Taylor *v.* Leith, 26 Ohio St. 428, holding that, in an action by a purchaser of land against his vendor for fraudulent representations, defendant could show that one of the tracts actually sold was by mistake omitted from the deed, and another inserted in its stead, as the evidence tended, if fraud was established, to diminish damages.

Pennsylvania.— Huber *v.* Wilson, 23 Pa. St. 178, holding that where plaintiff furnished brick to a person on defendant's representations as to such person's financial standing, and before the buildings for which the brick was furnished were completed, the property was sold under a judgment in favor of defendant, the record of the judgment was admissible to show that plaintiff realized but little from the property.

Rhode Island.— Charbonnel *v.* Seabury, 23 R. I. 543, 51 Atl. 208.

See 23 Cent. Dig. tit. "Fraud," § 54.

Lease of property.— In an action for deceit in inducing plaintiff to purchase a defective title to realty, plaintiff offered in evidence, as bearing on the measure of damages, a lease under which he had been paying rent. No objection was made that no evidence had been introduced to show that the lessor was the real owner of the premises. It was held that it was error to exclude the lease, the court on appeal assuming that plaintiff would have followed up the offer of the lease by proof of the lessor's title. Grosjean *v.* Galloway, 64 N. Y. App. Div. 547, 72 N. Y. Suppl. 331.

Evidence of the fraudulent representations by means of which a sale of stock was effected is admissible to show the damage, where they related to the market value of the stock in New York, where stocks have such market value. Mason *v.* Raplee, 66 Barb. (N. Y.) 180.

Tender back of property.— In an action for damages for a fraudulent sale of valueless stocks, evidence of a tender of the stock by plaintiff to defendant was properly admitted, as the tender, if fraud was proved, would entitle plaintiff to a return of the money paid, in addition to the damages otherwise sustained. Vines *v.* Chisolm, 1 N. Y. Suppl. 102.

Value of time.— In an action for damages for fraudulent representations inducing the making of a partnership contract, evidence of plaintiff's income prior to the contract is admissible, for he is entitled to the damages naturally and necessarily resulting from the fraud, which include the value of the time

not of this character should be excluded.[73] Under a general allegation of damages plaintiff cannot show injuries not the necessary consequence of the fraud complained of.[74] Evidence tending to show the value of the property in the sale of which fraud is alleged is admissible,[75] but such evidence should be confined to the time at which the sale took place.[76]

put into the business. Charbonnel *v.* Seabury, 23 R. I. 543, 51 Atl. 208. But *compare* Dokes *v.* Soards, 8 Ohio Dec. (Reprint) 621, 9 Cinc. L. Bul. 76, holding that in an action for deceit in the sale of a business, evidence as to plaintiff's loss of time and labor in the business is immaterial, because, by reason of the purchase, the business became his own and the time and labor was thus expended in his own business.

73. Foster *v.* Kennedy, 38 Ala. 359, 81 Am. Dec. 56 (holding that in an action by a purchaser against a vendor for falsely representing that a mill and mill pond were included in the land sold, a witness will not be allowed to make comparisons between the actual value of the land and the value on the supposition of the pond being on a piece of land different from that on which the representation made it); De Wulf *v.* Dix, 110 Iowa 553, 81 N. W. 779 (holding that in an action for damages for fraud in inducing plaintiff to exchange his lands for a stock of goods, it was error to admit evidence adduced merely to show plaintiff's poverty); Dokes *v.* Soards, 8 Ohio Dec. (Reprint) 621, 9 Cinc. L. Bul. 76 (holding that in an action for deceit in a sale evidence of the price at which plaintiff offered to resell to defendant was immaterial, except as bearing upon the value, and in that respect it was simply plaintiff's own declaration, and hence was properly excluded).

Evidence of the intrinsic value of stock is not admissible in an action for false representations as to value thereof, it having a well known and fixed market value, and the inquiry having been as to this. Price *v.* Spencer, (Cal. 1898) 53 Pac. 1073.

When evidence of market value immaterial.— In an action by one who was induced by fraudulent representations to purchase stock of a corporation which subsequently failed to recover the loss resulting from his holding the stock in reliance on the representations, it was proper not to permit defendant to show the market value of the stock at the time of sale, or at any time thereafter up to the company's failure, it appearing that owing to the deceit plaintiff retained the stock until the failure. Smith *v.* Duffy, 57 N. J. L. 679, 32 Atl. 371.

74. Martachowski *v.* Orawitz, 14 Pa. Super. Ct. 175, holding that in an action for false representations in the sale of a liquor license, the transfer of which was the inducing consideration to the purchase of certain bar-room fixtures, liquors, etc,. as alleged by the statement, when in fact the vendor had no such license, it was error to permit plaintiff to show, under a general allegation of damages, that he sold liquor without a license, and had been convicted and sentenced therefor, as such conviction was not a necessary consequence of the wrongful act sued for.

75. *Iowa.*— Warfield *v.* Clark, 118 Iowa 69, 91 N. W. 833, market value of stock sold.

Massachusetts.— Cheney *v.* Gleason, 125 Mass. 166.

Minnesota.— Potter *v.* Mellen, 41 Minn. 487, 43 N. W. 375, plaintiff may prove actual and represented value of property sold to him through fraud.

Wisconsin.— Warner *v.* Benjamin, 89 Wis. 290, 62 N. W. 179, holding that the market value of stock at or about the time of the sale is evidence on the question of its real value, although not necessarily conclusive.

United States.— Hindman *v.* Louisville First Nat. Bank, 112 Fed. 931, 50 C. A. 623, 57 L. R. A. 108.

See 23 Cent. Dig. tit. "Fraud," § 54.

Sale of encumbered land as unencumbered. — In an action of deceit based upon a sale of land falsely represented to be unencumbered, evidence of the value of the land is proper. Hahl *v.* Brooks, 213 Ill. 134, 72 N. E. 727.

The regular payment of interest on corporate bonds is a circumstance bearing on the question of value. Currier *v.* Poor, 155 N. Y. 344, 49 N. E. 937 [*reversing* 84 Hun 45, 32 N. Y. Suppl. 74].

Value of property given in exchange.— In a case for deceit in an exchange of horses, the value of the horse given by plaintiff in exchange may be shown as tending to fix the value of the horse taken in exchange if the false warranty or representation had been true. Fisk *v.* Hicks, 31 N. H. 535.

That the property was a house of ill fame may be shown. Cheney *v.* Gleason, 125 Mass. 166.

Value of part.— In an action for deceit, where the damages depended on the difference between the value of certain property as represented and its real value, there was no error in permitting a witness to testify as to the value of a part of the property at the time of the sale by defendant to plaintiff, as, by ascertaining the value of part, the jury might be enabled to determine whether the estimated value of the other property was correct. Winslow *v.* Newlan, 45 Ill. 145.

The price given by the purchaser and that for which he sold the property is competent as some evidence of the value of the property at the respective times of the purchase and the sale, although it does not exclusively fix the amount of damages. Small *v.* Pool, 30 N. C. 47.

76. Gaulden *v.* Shehee, 24 Ga. 438. But see Hanscom *v.* Drullard, 79 Cal. 234, 21 Pac. 736, holding that testimony as to the value of the property sold is not wholly irrelevant because the estimate was made, not at the

c. Price as Evidence of Value. The price at which the purchase or sale was made is evidence of value,[77] but it is not conclusive upon that question.[78]

P. Verdict and Findings. The verdict or finding must show the existence of the essential elements of a cause of action in deceit;[79] and a failure to find as to one of such elements invalidates the findings as to the others if the issues upon which findings are made are dependent upon the remaining issue.[80] But it is not necessary that there should be findings upon an issue which is so plain that the court can pass upon it as a matter of law.[81] Where the general verdict finds that fraudulent misrepresentations were made by defendant and acted upon by plaintiff, the verdict and judgment thereon must stand, unless taken as a whole the answers to the interrogatories show that there was no fraud.[82] But if special findings of fact show facts inconsistent with the general verdict for plaintiff, as that plaintiff did not rely on the false representations, judgment should be rendered for defendant on the special findings.[83] Where the findings disclose the essential elements of a cause of action in deceit, a legal conclusion contained therein inconsistent with the findings of fact can be disregarded.[84]

FRAUDIS INTERPRETATIO SEMPER IN JURE CIVILII, NON EX EVENTU DUNTAXAT, SED EX CONCILIO QUOQUE DESIDERATUR. A maxim meaning "The civil law regards the intention, rather than the event, as material in inferring fraud."[1]

FRAUDULENT CONCEALMENT OF PROPERTY. See ATTACHMENT.

exact time of the sale, but at a time not remote therefrom.

77. Thompson *v.* Bell, 37 Ala. 438; Hicks *v.* Deemer, 187 Ill. 164, 58 N. E. 252 [*reversing* 87 Ill. App. 384]; Jackson *v.* Holliday, 3 T. B. Mon. (Ky.) 363; Small *v.* Pool, 30 N. C. 47.

78. Thompson *v.* Bell, 37 Ala. 438, 442 (where the court said: "To make the price paid, or agreed to be paid, the unbending test of the value upon the supposition of the truth of the representation, would deprive the purchaser of the benefit of his bargain"); Hicks *v.* Deemer, 187 Ill. 164, 58 N. E. 252; Small *v.* Pool, 30 N. C. 47. See also Jackson *v.* Holliday, 3 T. B. Mon. (Ky.) 363.

79. Hoffman *v.* Kirby, 136 Cal. 26, 68 Pac. 321; Hawkins *v.* New York Fourth Nat. Bank, 150 Ind. 117, 49 N. E. 957; Crouch *v.* Deremore, 59 Iowa 43, 12 N. W. 759.

80. Continental Nat. Bank *v.* Nashville First Nat. Bank, 108 Tenn. 374, 68 S. W. 497.

81. Shaw *v.* Gilbert, 111 Wis. 165, 86 N. W. 188.

82. Kirkpatrick *v.* Reeves, 121 Ind. 280, 22 N. E. 139.

83. Denny *v.* Woods, 2 Ind. App. 301, 28 N. E. 443.

84. Krause *v.* Busacker, 105 Wis. 350, 81 N. W. 406.

1. Morgan Leg. Max.

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By Charles N. Harris*

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CROSS-REFERENCES

For Matters Relating to:
Damages in General, see Damages.
Fraudulent Conveyance, see Fraudulent Conveyances.
Necessity of Writing:
For Acceptance of Bill of Exchange, see Commercial Paper.
For Assignment:
In General, see Assignments.
Of Copyright, see Copyright.
Of Patent, see Patents.
For Gift, see Gifts.
For Insurance Contract, see Insurance, and the Particular Insurance Titles.
For Marriage Contract, see Breach of Promise to Marry; Marriage.
For Mortgage, see Chattel Mortgages; Mortgages.
For Negotiable Instrument, see Commercial Paper.
For Promise to Pay Debt Contracted in Infancy, see Infants.
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For Submission to Arbitration and Award, see Arbitration and Award.
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To Create Authority:
To Bind as Surety, see Principal and Surety.
To Sell Land, see Factors and Brokers.
To Create Trust, see Trusts.
To Establish Boundary, see Boundaries.
Parol Evidence in General, see Evidence.
Part Performance as Ground For Specific Performance, see Specific Performance.

I. Definition, Object, and Authorship.

"Statute of frauds" is a term which is commonly applied to a statute entitled, "An Act for Prevention of Frauds and Perjuries," enacted in England in 1676,[1] and the American statutes modeled thereon.[2] The chief object of these statutes is to prevent the facility to frauds and the temptation to perjury offered by the enforcement of obligations depending for their evidence upon the unassisted memory of witnesses. Hence their leading feature is to render certain contracts and conveyances inoperative unless evidenced by a writing signed by the party to be charged thereby.[3] The authorship of the original statute is somewhat in doubt. It has been ascribed to various persons,[4] but the most plausible conclusion seems to be that it was originally proposed in parliament by Lord Nottingham, then revised by Lord Hale and Sir Lionel Jenkins, and finally passed, as it was left by them, in an informal condition.[5]

II. Agreements in Consideration of Marriage.

A. In General. The English statute of frauds[6] provided that no action should be brought to charge any person upon any agreement made in consideration of marriage, unless the agreement or some memorandum or note thereof should be in writing and signed by the party to be charged therewith or by some person thereunto by him duly authorized. Similar provisions are in force in nearly all the United States.[7] The statute applies to all oral agreements, except

1. St. 29 Car. II, c. 3.

Statutes of fraudulent conveyances distinguished.— St. 13 Eliz. c. 5, made perpetual by 29 Eliz. c. 5, and the American statutes founded thereon, are sometimes, although loosely, individually referred to as the "statute of frauds," apparently because their object was to abolish and avoid conveyances made by debtors for the purpose of delaying, hindering, or defrauding their creditors. See Anderson *v.* Anderson, 64 Ala. 403; Cook *v.* Ligon, 54 Miss. 652; McClellan *v.* Pyeatt, 66 Fed. 843, 14 C. C. A. 140. The statute of Charles II and that of Elizabeth have nothing in common, however, save the broad object to discourage fraud, and the usage of applying a common term to the two has not been generally adopted. In Meaux *v.* Caldwell, 2 Bibb (Ky.) 244, the court in using the term "statute of frauds and perjuries" refers to the statute which renders fraudulent and void as to creditors and purchasers any loan of goods and chattels in which the possession shall have remained with the borrower for the space of five years without demand made and pursued by due process of law on the part of the lender, unless the loan be by will or deed in writing, approved and recorded. See Fraudulent Conveyances.

2. See the statutes of the different states.

3. Burrill L. Dict.

The provisions of the original statute are multifarious. They fall generally under the following heads, viz.: (1) The creation and transfer of estates such as at common law could be effected without a deed; (2) the enforcement of certain contracts which were enforceable at common law, although not in writing; (3) the imposition of additional solemnities in the making of wills; (4) the imposition of new liabilities in respect of real estate held in trust; (5) the disposition of estates *pur autre vie*; (6) the entry and effect of judgments and executions. The modern professional use of the term "statute of frauds," however, refers only to those provisions embraced in the first and second heads, *supra*. Bouvier L. Dict. (Rawle Rev.); Browne St. Fr. (5th ed.) v. For a fuller summary of the provisions of the statute see 2 Kent Comm. 494.

4. Lord Ellenborough (Wain *v.* Warlters, 5 East 10, 17) ascribed the drawing of the statute to Lord Hale. Lord Mansfield (Wyndham *v.* Chetwynd, 1 Burr. 414, 418) thought this scarcely probable, as the statute was not passed until after Hale's death, and "was brought in, in the common way; and not upon any reference to the judges." Lord Chief Baron Gilbert (Whitchurch *v.* Whitchurch, Gilb. Eq. 168, 171, 25 Eng. Reprint 118, 9 Mod. 124, 2 P. Wms. 236, 24 Eng. Reprint 712, 1 Str. 619) said that the statute was prepared by Lord Hale and Sir Lionel Jenkins.

5. Browne St. Fr. (5th ed.) ix. See also Burrill L. Dict.; 1 North Life of Guilford 209. At any rate it is generally conceded that the statute is the work of different hands. Bird *v.* Munroe, 66 Me. 337, 344, 22 Am. Rep. 571.

Lord Nottingham himself said (Ash *v.* Abdy, 3 Swanst. 664): "I had some reason to know the meaning of this law; for it had its first rise from me, who brought in the bill into the lords' house, though it afterwards received some additions and improvements from the Judges and the civilians."

6. St. 29 Car. II, c. 3, § 4.

7. See the statutes of the different states, and *infra*, II–VIII.

mutual promises to marry, which are founded upon a consideration of marriage either with the promisor or with a third person, and such agreements are unenforceable either at law or in equity.[8]

B. Marriage as Consideration. It is important to distinguish between verbal promises made in consideration of marriage, and those which are made in contemplation or expectation merely of marriage. The former are within the statute, while the latter are not.[9]

C. Mutual Promises to Marry.[10] Although mutual promises to marry, if resting in parol, were formerly held in England to be within the statute,[11] later English cases took the opposite view, and in the United States such promises are regarded as valid, although not in writing, even though they are not in terms excluded from the operation of the statute.[12] However, a promise to marry may

8. *Alabama.*— Carter *v.* Worthington, 82 Ala. 334, 2 So. 516, 60 Am. Rep. 738; Andrews *v.* Jones, 10 Ala. 400.

Arkansas.— Galbreath *v.* Cook, 30 Ark. 417.

Georgia.— Bradley *v.* Saddler, 54 Ga. 681.

Illinois.— Richardson *v.* Richardson, 148 Ill. 563, 36 N. E. 608, 26 L. R. A. 305; Austin *v.* Kuehn, 111 Ill. App. 506 [*affirmed* in 211 Ill. 113, 71 N. E. 841].

Indiana.—Brenner *v.* Brenner, 48 Ind. 262; Flenner *v.* Flenner, 29 Ind. 564.

Kentucky.— Mallory *v.* Mallory, 92 Ky. 316, 17 S. W. 737, 13 Ky. L. Rep. 579; Potts *v.* Merrit, 14 B. Mon. 406; Jones *v.* Henry, 3 Litt. 427; Powell *v.* Meyers, 64 S. W. 428, 23 Ky. L. Rep. 795.

Louisiana.— Morgan *v.* Yarborough, 5 La. Ann. 316; Harlin *v.* Leglise, 3 Rob. 194.

Maryland.— Crane *v.* Gough, 4 Md. 316; Bowie *v.* Bowie, 1 Md. 87; Ogden *v.* Ogden, 1 Bland 284; Stoddert *v.* Tuck, 4 Md. Ch. 475.

Massachusetts.— White *v.* Bigelow, 154 Mass. 593, 28 N. E. 904; Deshon *v.* Wood, 148 Mass. 132, 19 N. E. 1, 1 L. R. A. 518; Chase *v.* Fitz, 132 Mass. 359.

Michigan.— Wood *v.* Savage, 2 Dougl. 316.

Missouri.— Mowser *v.* Mowser, 87 Mo. 437.

New Jersey.— Manning *v.* Riley, 52 N. J. Eq. 39, 28 Atl. 810.

New York.— Ennis *v.* Ennis, 48 Hun 11; Brown *v.* Conger, 8 Hun 625; Borst *v.* Corey, 16 Barb. 136; Carpenter *v.* Commings, 4 N. Y. Suppl. 947; Matter of Willoughby, 11 Paige 257; Reade *v.* Livingston, 3 Johns. Ch. 481, 8 Am. Dec. 520; Cushman *v.* Burritt, 14 Wkly. Dig. 59.

North Carolina.— Montgomery *v.* Henderson, 56 N. C. 113; Dunn *v.* Tharp, 39 N. C. 7.

Ohio.— Henry *v.* Henry, 2 Ohio St. 121; Finch *v.* Finch, 10 Ohio St. 501.

Oklahoma.— Stanley *v.* Madison, 11 Okla. 288, 66 Pac. 280.

Oregon.— Adams *v.* Adams, 17 Oreg. 247, 20 Pac. 633.

Tennessee.— Hackney *v.* Hackney, 8 Humphr. 452; Smith *v.* Greer, 3 Humphr. 118; Caines *v.* Marley, 2 Yerg. 582.

Wyoming.— North Platte Milling, etc., Co. *v.* Price, 4 Wyo. 293, 33 Pac. 664.

United States.— Lloyd *v.* Fulton, 91 U. S. 479, 23 L. ed. 363; Jenkins *v.* Eldredge, 13 Fed. Cas. No. 7,266, 3 Story 181.

England.— Harrison *v.* Cage, 1 Ld. Raym. 386; Montacute *v.* Maxwell, 1 P. Wms. 618, 1 Str. 236, 24 Eng. Reprint 541.

See 23 Cent. Dig. tit. "Frauds, Statute of," §§ 1, 2.

To the contrary see Gackenbach *v.* Brouse, 4 Watts & S. (Pa.) 546, 39 Am. Dec. 104 (which was decided in a state in which there is no statutory prohibition against oral agreements in consideration of marriage); Foster *v.* Foster, 4 Call (Va.) 231 (in which there was a decree for specific performance of an oral agreement to give plaintiff certain slaves if he would marry a certain person. The statute had been in force in Virginia for five years but it was not referred to by counsel or the court).

9. *Connecticut.*— Riley *v.* Riley, 25 Conn. 154, in which plaintiff, who before the marriage had loaned money to the man who afterward became her husband, was allowed after his death to recover the amount thereof on the faith of his antenuptial oral promise that if she would not enforce payment of the loan it should remain good and collectable against his estate.

Indiana.— Rainbolt *v.* East, 56 Ind. 538, 26 Am. Rep. 40; Houghton *v.* Houghton, 14 Ind. 505, 77 Am. Dec. 69.

Mississippi.— Steen *v.* Kirkpatrick, 84 Miss. 63, 36 So. 140.

New York.— Dygert *v.* Remerschneider, 39 Barb. 417.

Wisconsin.— Larsen *v.* Johnson, 78 Wis. 300, 47 N. W. 615, 23 Am. St. Rep. 404.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 5.

10. Necessity of performance within a year see *infra*, VI, B, 3.

11. Philpot *v.* Wallett, Freem. 541, 3 Lev. 65, Skin. 24.

12. *Connecticut.*— Clark *v.* Pendleton, 20 Conn. 495.

Illinois.— Blackburn *v.* Mann, 85 Ill. 222.

Indiana.— Short *v.* Stotts, 58 Ind. 29.

Kentucky.— Withers *v.* Richardson, 5 T. B. Mon. 94, 17 Am. Dec. 44.

Louisiana.— Morgan *v.* Yarborough, 5 La. Ann. 316.

Maryland.— Ogden *v.* Ogden, 1 Bland 284.

Massachusetts.— Chase *v.* Fitz, 132 Mass. 359.

be only a part of an entire contract which includes promises in relation to property and settlements, in which case the contract is held to be indivisible, so that no action can be brought on any part of it unless it is in writing.[13]

D. Marriage Settlements. The rule is well established in the United States that a post-nuptial settlement which is made in pursuance of an oral antenuptial agreement is invalid and unenforceable as against intervening creditors,[14] although there are intimations in some earlier English cases to the effect that such a post-nuptial settlement was good as against creditors.[15] The later view in England is in harmony with the principle established in the American cases.[16] Such a settlement is good, however, as between the parties thereto and those claiming under them as volunteers;[17] and the same has been held of a promise in writing after marriage to execute a settlement.[18]

III. PROMISES BY EXECUTORS AND ADMINISTRATORS.

A. Statutory Provisions. In the majority of jurisdictions[19] the statutes provide that no action shall be brought to charge an executor or administrator upon any special promise to answer damages out of his own estate unless the agreement or some memorandum thereof is in writing and signed by the party to be charged or by his agent.[20]

Missouri.— Wilbur *v.* Johnson, 58 Mo. 600.
New Hampshire.— Derby *v.* Phelps, 2 N. H. 515.
England.— Harrison *v.* Cage, 1 Ld. Raym. 386; Cork *v.* Baker, 1 Str. 34.
See 23 Cent. Dig. tit. "Frauds, Statute of," § 3.

Statutes.—Mutual promises to marry are expressly excluded from the operation of the statute in many states.

Validity of parol contract to marry see also BREACH OF PROMISE TO MARRY, 5 Cyc. 999.

13. Caylor *v.* Roe, 99 Ind. 1; Chase *v.* Fitz, 132 Mass. 359; Cushman *v.* Burritt, 14 N. Y. Wkly. Dig. 59. In many instances, the distinction may be very fine between agreements which are held to be in contemplation of marriage only and so not within the statute (see *supra*, II, B) and those which are held to be so far connected with an agreement to marry as not only to be unenforceable themselves but also to defeat the right to recover on the promise of marriage.

14. *Alabama.*— Carter *v.* Worthington, 82 Ala. 334, 2 So. 516, 60 Am. Rep. 738; Andrews *v.* Jones, 10 Ala. 400.
Arkansas.— Galbreath *v.* Cook, 30 Ark. 417.
Kentucky.— Jones *v.* Henry, 3 Litt. 427.
Maryland.— Albert *v.* Winn, 5 Md. 66.
Massachusetts.— Deshon *v.* Wood, 148 Mass. 132, 19 N. E. 1, 1 L. R. A. 518.
Michigan.— Wood *v.* Savage, 2 Dougl. 316.
New Jersey.— Manning *v.* Riley, 52 N. J. Eq. 39, 27 Atl. 810; Neilson *v.* Williams, 42 N. J. Eq. 291, 11 Atl. 257; Satterthwaite *v.* Emley, 4 N. J. Eq. 489, 43 Am. Dec. 618.
New York.— Ennis *v.* Ennis, 48 Hun 11; Borst *v.* Corey, 16 Barb. 136; Reade *v.* Livingstone, 3 Johns. Ch. 481, 8 Am. Dec. 520.
North Carolina.— Saunders *v.* Ferrill, 23 N. C. 97.
South Carolina.— Davidson *v.* Graves, Riley Eq. 219; Izard *v.* Middleton, Bailey Eq. 228.
Tennessee.— Smith *v.* Greer, 3 Humphr. 118; Caines *v.* Marley, 2 Yerg. 582.

15. Dundas *v.* Dutens, 2 Cox Ch. 235, 30 Eng. Reprint 109, 1 Ves. Jr. 196, 30 Eng. Reprint 298; Shaw *v.* Jakeman, 4 East 201, 1 Smith K. B. 14.

16. Warden *v.* Jones, 2 De G. & J. 76, 4 Jur. N. S. 269, 27 L. J. Ch. 190, 6 Wkly. Rep. 180, 59 Eng. Ch. 61, 44 Eng. Reprint 916 [*affirming* 23 Beav. 487, 53 Eng. Reprint 191]; Battersbee *v.* Farrington, 1 Swanst. 106, 1 Wils. Ch. 88, 18 Rev. Rep. 32, 37 Eng. Reprint 40. See Spicer *v.* Spicer, 24 Beav. 365, 53 Eng. Reprint 398.

17. Andrews *v.* Jones, 10 Ala. 400; Argenbright *v.* Campbell, 3 Hen. & M. (Va.) 144; Montacute *v.* Maxwell, 1 P. Wms. 618, 1 Str. 236, 24 Eng. Reprint 541.

18. Montacute *v.* Maxwell, 1 P. Wms. 618, 1 Str. 236, 24 Eng. Reprint 541.

19. See the statutes of the different states.

20. *Alabama.*— Martin *v.* Black, 20 Ala. 309; Greening *v.* Brown, Minor 353.
California.— McKeany *v.* Black, 117 Cal. 587, 49 Pac. 710.
Kentucky.— Crews *v.* Williams, 2 Bibb 262, 4 Am. Dec. 701.
Maine.— Piper *v.* Goodwin, 23 Me. 251; Davis *v.* French, 20 Me. 21, 37 Am. Dec. 36.
Massachusetts.— Hay *v.* Green, 12 Cush. 282; Silsbee *v.* Ingalls, 10 Pick. 526. It is not, however, incumbent upon an administrator to plead the defense of the statute for the benefit of others. Ames *v.* Jackson, 115 Mass. 508.
Mississippi.— Robinson *v.* Lane, 14 Sm. & M. 161.
Missouri.— Bambrick *v.* Bambrick, 157 Mo. 423, 58 S. W. 8.
New Jersey.— Cochrane *v.* McEntee, (Ch. 1896) 51 Atl. 279.
North Carolina.— Smithwick *v.* Shepherd, 49 N. C. 196.

B. Promise to Answer in General — 1. Assets or No Assets of Decedent. The question whether an executor or administrator who promises orally to pay a debt of the decedent intends to pay it out of his own estate or out of that of the decedent seems to be dependent on the question whether he has or has not assets of the decedent in his possession at the time of making such promise. If he has not, he must be considered as having intended to answer out of his own estate, and in such case the promise is within the statute and unenforceable. If, however, he has assets, he is presumed to have promised in behalf of the estate and with the intention of rendering it liable.[21] Accordingly a plea in bar which fails to state that the administrator has not in his possession assets of the decedent is insufficient.[22]

2. Debt of Decedent. In order to come within the prohibition of the statute the promise must be to pay a debt of the decedent.[23]

C. Promises Before Issue of Letters. An oral promise to pay the debt of a decedent out of the promisor's own estate, made by one who is subsequently appointed administrator, has been held not to be within the statute.[24]

D. Effect of Discharge of Decedent's Estate. The fact that a lien or other advantage against the decedent's estate is lost by an agreement in which the executor or administrator promises to pay out of his own estate a debt of the decedent does not take an oral promise out of the statute.[25]

Pennsylvania.— Burt *v.* Herron, 66 Pa. St. 400; Okeson's Appeal, 59 Pa. St. 99; Sidle *v.* Anderson, 45 Pa. St. 464.

South Carolina.— Ciples *v.* Alexander, 3 Brev. 558, 2 Treadw. 757.

Texas.— Flannery *v.* Chidgey, (Civ. App. 1903) 77 S. W. 1034.

Vermont.— Cummings *v.* Brock, 56 Vt. 308; Harrington *v.* Rich, 6 Vt. 666.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 7.

21. *Alabama.*— Read *v.* Rowan, 107 Ala. 366, 18 So. 211.

Connecticut.—Pratt *v.* Humphrey, 22 Conn. 317.

Kentucky.— Guishaber *v.* Hairman, 2 Bush 320; Crews *v.* Williams, 2 Bibb 262, 4 Am. Dec. 701.

Massachusetts.— Stebbins *v.* Smith, 4 Pick. 97.

Pennsylvania.—Okeson's Appeal, 59 Pa. St. 99.

Virginia.— Collins *v.* Row, 10 Leigh 114; Patton *v.* Williams, 3 Munf. 59.

England.— Barry *v.* Rush, 1 T. R. 691, 1 Rev. Rep. 360.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 9.

22. Pratt *v.* Humphrey, 22 Conn. 317.

23. *Connecticut.*— Chambers *v.* Robbins, 28 Conn. 544.

Indiana.— Bott *v.* Barr, 95 Ind. 243; Long *v.* Rodman, 58 Ind. 58; Heckleman *v.* Miller, 4 Blackf. 322.

Maine.— Baker *v.* Fuller, 69 Me. 152.

Michigan.— Meade *v.* Bowles, 123 Mich. 696, 82 N. W. 658.

New York.— Wales *v.* Stout, 115 N. Y. 638, 21 N. E. 1027; Willcox *v.* Smith, 26 Barb. 316; Bowman *v.* Tallman, 2 Rob. 385.

North Carolina.— Norton *v.* Edwards, 66 N. C. 367.

Pennsylvania.— Fehlinger *v.* Wood, 134 Pa. St. 517, 19 Atl. 746.

South Carolina.— Harrell *v.* Witherspoon, 3 McCord 486.

Vermont.— Bellows *v.* Sowles, 57 Vt. 164, 52 Am. Rep. 118.

Obligations contracted in course of administration.— The language of the statute, "promise to answer damages out of his own estate," implies the qualification "for a debt of the decedent," and has been so construed by the courts. The personal obligations, other than promises to pay debts of the decedent, of an administrator or executor, contracted in the course of his administration, although proper charges against the estate, are his private debts for which he is personally liable. See cases cited *supra*, this note.

A submission to arbitration is not within the statute (Alling *v.* Munson, 2 Conn. 691; Holderbaugh *v.* Turpin, 75 Ind. 84, 39 Am. Rep. 124), unless it contains a promise to pay the debt if the arbitrator decides it to be due (Harrington *v.* Rich, 6 Vt. 666).

24. Tomlinson *v.* Gill, Ambl. 330, 27 Eng. Reprint 221. But in Alabama such a promise is held to be within the statute and unenforceable. Martin *v.* Black, 20 Ala. 309.

25. McKeany *v.* Black, 117 Cal. 587, 49 Pac. 710 (where a release of the claim against the decedent's estate was given); Harrington *v.* Rich, 6 Vt. 666.

However, if a lien or other advantage against the decedent's estate is lost, the courts go far to construe the agreement to be an original undertaking and not within the statute. Hackleman *v.* Miller, 4 Blackf. (Ind.) 322. So in Kershaw *v.* Whitaker, 1 Brev. (S. C.) 9, a distress for rent having been released, it was held that the agreement was not within the statute, the case being treated as though it came under the clause of the statute of frauds governing promises to answer for the debt, default, or miscarriage of another. Under that clause

IV. PROMISES TO ANSWER FOR THE DEBT, DEFAULT, OR MISCARRIAGE OF ANOTHER.[26]

A. General Rules — 1. GENERAL PROVISIONS OF STATUTE. The fourth section of the English statute of frauds declares that no action shall be brought whereby to charge defendant upon any special promise to answer for the debt, default, or miscarriages of another person unless the agreement upon which the action is brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized. Most of the states and territories of the United States have adopted these or similar provisions.[27]

2. NATURE OF DEBT, DEFAULT, OR MISCARRIAGE — a. Necessity of Debt of Third Person. In order to hold an oral promise to be within the prohibition of the statute, it is essential that there should be a binding and subsisting liability or obligation on the part of a third person to the promisee to which such oral promise is collateral; the party for whom the promise is made must be liable to the party to whom it is made. If there is no debt, or if no other person is liable for the debt for which the promise is made, although another person may be liable

the discharge of the original debtor is held to take the case out of the statute. See *infra*, IV, F.

26. Guaranty in general see GUARANTY.

27. See the statutes of the different states.

Statute applied see the following cases:

Arizona.— Wulff *v.* Lindsay, (1903) 71 Pac. 963.

California.— Harris *v.* Frank, 81 Cal. 280, 22 Pac. 856; Luce *v.* Zeile, 53 Cal. 54; Gordon *v.* Ross, 2 Cal. 156.

Georgia.— Johnson *v.* Morris, 21 Ga. 238; Connerat *v.* Goldsmith, 6 Ga. 14.

Illinois.— Denton *v.* Jackson, 106 Ill. 433; Chicago First Baptist Church *v.* Hyde, 40 Ill. 150; Netterstrom *v.* Gallistel, 110 Ill. App. 352; Haines *v.* Cox, 109 Ill. App. 15; Tanquary *v.* Walker, 47 Ill. App. 451, holding that the fact that plaintiff has a mechanic's lien on defendant's house for his claim against the contractor, which defendant orally promised to pay, does not take the case out of the statute, for the law does not operate to make the debt of the contractor the debt of the owner of the premises.

Indiana.— Catlett *v.* Sweetser Station M. E. Church, 62 Ind. 365, 30 Am. Rep. 197; Miller *v.* Neihaus, 51 Ind. 401; Smith *v.* Stevens, 3 Ind. 332; Murphy *v.* Merry, 8 Blackf. 295.

Iowa.— Smith *v.* Tramel, 68 Iowa 488, 27 N. W. 471 (holding that an oral promise to pay a note to which the promisor's name has been forged is void); Beerkle *v.* Edwards, 55 Iowa 750, 8 N. W. 341; Wetheimer *v.* Peacock, 2 Iowa 528.

Kentucky.— Smith *v.* Fah, 15 B. Mon. 443; Adams *v.* Wathen, 50 S. W. 962, 21 Ky. L. Rep. 101; Givens *v.* Jordan, 13 Ky. L. Rep. 258.

Louisiana.— Piffet's Succession, 37 La. Ann. 871 (holding that the parol promise of a person since deceased to pay the debt of another is equally within the statute); Hogan *v.* Mississippi Valley Bank, 28 La. Ann. 550; Baker *v.* Pagaud, 26 La. Ann. 220.

Maryland.— White *v.* Solomonsky, 30 Md. 585; Glenn *v.* Rogers, 3 Md. 312; Elder *v.* Warfield, 7 Harr. & J. 391.

Michigan.— Goodman *v.* Felcher, 116 Mich. 348, 74 N. W. 511; Schoch *v.* McLane, 62 Mich. 454, 29 N. W. 76.

Mississippi.— Lombard *v.* Martin, 39 Miss. 147.

Missouri.— Nunn *v.* Carroll, 83 Mo. App. 135.

New Jersey.— Dilts *v.* Parke, 4 N. J. L. 219; Hoppock *v.* Wilson, 4 N. J. L. 149; Ayres *v.* Herbert, 3 N. J. L. 662; Smith *v.* Toomey, 2 N. J. L. 98; Rose *v.* Johnson, 2 N. J. L. 5.

New York.— Higley *v.* Bergholz, 44 N. Y. App. Div. 638, 60 N. Y. Suppl. 625; Brown *v.* Bradshaw, 1 Duer 199; Smyth *v.* Mack, 19 N. Y. Suppl. 347; Walsh *v.* McCloskey, 12 N. Y. St. 173; Stewart *v.* Hubbell, 10 N. Y. St. 280; Anson *v.* Schultze, 9 N. Y. St. 308; Pease *v.* Alexander, 7 Johns. 25; Simpson *v.* Patten, 4 Johns. 422.

Ohio.— Russell *v.* Fenner, 21 Ohio Cir. Ct. 527, 11 Ohio Cir. Dec. 754.

Pennsylvania.— Butz's Estate, 9 Kulp 118; Dutton *v.* Pyle, 42 Wkly. Notes Cas. 65; Hearing *v.* Dittman, 8 Phila. 307. Before the act of April 26, 1855, a promise to pay the debt of another was not required to be in writing. Cobb *v.* Page, 17 Pa. St. 469; Petriken *v.* Baldy, 7 Watts & S. 429.

South Carolina.— Willoughby *v.* Florence, 51 S. C. 462, 29 S. E. 242; Richardson *v.* Richardson, 1 McMull. 280.

Texas.— Flannery *v.* Chidgey, (Civ. App. 1903) 77 S. W. 1034; Clendenning *v.* Mathews, 1 Tex. App. Civ. Cas. § 904; Sandford *v.* Wilson, 2 Tex. App. Civ. Cas. § 247.

Washington.— Pullman First Nat. Bank *v.* Gaddis, 31 Wash. 596, 72 Pac. 460.

Wisconsin.— Hooker *v.* Russell, 67 Wis. 257, 30 N. W. 358.

Canada.— Rounds *v.* May, 35 U. C. Q. B. 367.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 13.

for a distinct debt which is the measure of that in question, the undertaking is not collateral but original and is capable of enforcement although oral.[28]

b. Recognizances. It has been remarked that the statute of frauds has never been held to apply to recognizances, because the recognizors acknowledge a preëxisting debt which they owe the state, not as sureties for the accused, but for themselves.[29]

c. Promise to Answer For Third Person's Liability in Tort. The opinion has been expressed that the words "miscarriage" and "default" apply to a promise to answer for another with respect to the non-performance of a duty not founded

28. *Alabama.*— Sanford *v.* Howard, 29 Ala. 684, 68 Am. Dec. 101.

California.— Kilbride *v.* Moss, 113 Cal. 432, 45 Pac. 812, 54 Am. St. Rep. 361.

Connecticut.— Buchanan *v.* Moran, 62 Conn. 83, 25 Atl. 396.

Illinois.— Resseter *v.* Waterman, 151 Ill. 169, 37 N. E. 875; McKinney *v.* Armstrong, 97 Ill. App. 208; Schotte *v.* Puscheck, 79 Ill. App. 31; Ingraham *v.* Strong, 41 Ill. App. 46, in which, however, the promise was in writing.

Indiana.— Boos *v.* Hinkle, 18 Ind. App. 509, 48 N. E. 383.

Iowa.— Groeltz *v.* Armstrong, 125 Iowa 39, 99 N. W. 128 (holding that an officer of a corporation who, in orally promising to repay money which has been paid to the corporation, acts in excess of his authority is individually liable in damages to the promisee); Townsend *v.* White, 102 Iowa 477, 71 N. W. 337.

Maine.— Griffin *v.* Derby, 5 Me. 476.

Massachusetts.— Jepherson *v.* Hunt, 2 Allen 417.

Michigan.— Ruppe *v.* Peterson, 67 Mich. 437, 35 N. W. 82.

Missouri.— Stewart *v.* Patton, 65 Mo. App. 21.

New York.— Crook *v.* Scott, 65 N. Y. App. Div. 139, 72 N. Y. Suppl. 516 [*affirmed* in 174 N. Y. 520, 66 N. E. 1106]; Hardt *v.* Recknagel, 62 N. Y. App. Div. 106, 70 N. Y. Suppl. 782; Griffin *v.* Condon, 18 Misc. 236, 41 N. Y. Suppl. 380; Lurtig *v.* Brown, 11 N. Y. St. 280; McNamee *v.* McNamee, 9 N. Y. St. 720; Prentice *v.* Wilkinson, 5 Abb. Pr. N. S. 49; Morgan *v.* Woodruff, 1 N. Y. City Ct. Suppl. 14. In Kelly *v.* Smith, 20 Misc. 639, 46 N. Y. Suppl. 679, plaintiff, finding a person to whom he had sold goods to be in doubtful credit, refused to deliver them, whereupon defendant said he would buy the goods, and the court held that this was an entirely new contract between plaintiff and defendant to which the statute of frauds had no application.

South Carolina.— Mease *v.* Wagner, 1 McCord 395.

Wisconsin.— James *v.* Carson, 94 Wis. 632, 69 N. W. 1004; Johnson *v.* Noonan, 16 Wis. 687.

England.—Lakeman *v.* Mountstephen, L. R. 7 H. L. 17, 24, 43 L. J. Q. B. 188, 30 L. T. Rep. N. S. 437, 22 Wkly. Rep. 617 (where Lord Selborne said: "There can be no suretyship unless there be a principal debtor, who of course may be constituted in the course of the transaction by matters *ex post facto*, and need not be so at the time, but until there is a principal debtor there can be no suretyship. Nor can a man guarantee anybody else's debt unless there is a debt of some other person to be guaranteed"); Bushell *v.* Beaven, 1 Bing. N. Cas. 103, 27 E. C. L. 562.

See 23 Cent. Dig. tit. "Frauds, Statute of," §§ 14, 15.

Illustrations.— In Read *v.* Nash, 1 Wils. K. B. 305, defendant orally agreed to pay plaintiff 50 pounds and costs of suit if he would withdraw his action against a third person for assault and battery and not proceed to trial, and the action was withdrawn, and suit having afterward been brought on defendant's oral promise, he was held liable as on an original promise. So in Ledlow *v.* Becton, 36 Ala. 596, a widow who, before the grant of administration on the estate of her deceased husband, requested a third person to furnish goods to an employee of the estate and promised that the estate would pay therefor, was held personally liable therefor as an unauthorized agent on the ground that the estate was not liable for the goods sold; and in Downey *v.* Hinchman, 25 Ind. 453, defendant was held personally liable on his oral promise to pay a stipulated sum to plaintiff for procuring a substitute for defendant's minor son, who had been drafted into the military service of the United States, because, the substitute having been procured without the request of defendant's son, he was himself in no way liable to plaintiff. So in Moorehouse *v.* Crangle, 36 Ohio St. 130, 38 Am. Rep. 564, defendant was held liable as on an original undertaking upon his oral agreement that, if plaintiff would subscribe five hundred dollars to the capital stock of a corporation in which defendant was an officer and stockholder, plaintiff within a year should receive fifteen per cent on the amount thus invested, because there was no corporate debt or obligation, express or implied, to pay to plaintiff any amount on his investment to which defendant's debt could be collateral. So a subscription for the erection of a church is not a contract within the statute of frauds. Barnes *v.* Perine, 15 Barb. (N. Y.) 249 [*affirming* 9 Barb. 202, and *affirmed* in 12 N. Y. 18].

29. Gay *v.* State, 7 Kan. 394. To the same effect see McNutt *v.* Johnson, 7 Johns. (N. Y.) 18. An early case in Connecticut, however, held that an oral agreement by which the promisor undertook, if the constable would suspend the levy of a rate warrant against a third person, to see that such person was

on contract, and that they are more appropriate to a ground of action founded on tort.[30]

3. Liability of Original or Principal Debtor — a. Original Debt Must Be Capable of Enforcement. In order to bring an oral promise within the operation of the statute, the liability of the person for whom the promise is made must be capable of being enforced at law against him, for if there is no liability on his part to the promisee, the promisor would have no debt of another to answer for, and his promise therefore would necessarily be an original and independent, and not a collateral, undertaking.[31]

b. Oral Guaranty of Minor's Debt. An oral undertaking to answer for the debt of a minor, although it may not have been incurred for necessaries, is by the weight of authority held to be within the statute, for a debt due from a minor, being voidable only and not void, is valid until avoided by him; and the disability of infancy being a personal defense, a third person cannot avail himself of it; and in an action against an oral guarantor of such debt it cannot be assumed that the minor will avoid it.[32]

4. Promise to Answer in General[33] — a. Oral Guaranty Before Incurrence of Original Debt. Although Lord Mansfield held that a promise made before delivery of the goods to a third person is not within the statute "because at the time of the promise there was no debt at all," [34] it is now well settled, both in this country and in England, that an oral promise to answer for the debt of another is within the statute, although when made the debt to which it is collateral may not have been incurred.[35]

forthcoming the next day, to be void as a promise to answer for the debt or duty of another. Thomas *v.* Welles, 1 Root (Conn.) 57.

30. *Connecticut.*— Turner *v.* Hubbell, 2 Day 457, 2 Am. Dec. 115.

Indiana.— Hayes *v.* Burkham, 51 Ind. 130.

Kansas.— Baker *v.* Morris, 33 Kan. 580, 7 Pac. 267.

New York.— See Richardson *v.* Crandall, 48 N. Y. 348 [*affirming* 47 Barb. 335], holding that an oral undertaking that men whom plaintiff has procured to enlist in the military service will not desert is within the statute, and bonds deposited by him to secure the performance of such undertaking may be recovered.

North Carolina.— Combs *v.* Harshaw, 63 N. C. 198.

England.— Kirkham *v.* Marter, 5 B. & Ald. 613, 1 Chit. 382, 21 Rev. Rep. 416, 18 E. C. L. 212, where defendant, whose son by wrongfully riding plaintiff's horse had caused its death, orally promised that if plaintiff would forbear to sue his son he would pay the damages. An intimation to the contrary in the earlier English case of Buckmyr *v.* Darnall, Holt 606, 2 Ld. Raym. 1085, 6 Mod. 184, 1 Salk. 27, 3 Salk. 15, has not, it is believed, ever been followed in England, and in this country an oral promise to answer for the tort of another is held to be within the statute.

Canada.— Hamm *v.* McAfee, 10 N. Brunsw. 386.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 14.

31. Resseter *v.* Waterman, 151 Ill. 169, 37 N. E. 875; Utah First Nat. Bank *v.* Kinner, 1 Utah 100; Hooker *v.* Russell, 67 Wis. 257, 30 N. W. 358; Buckmyr *v.* Darnall, Holt 606, 2 Ld. Raym. 1085, 6 Mod. 248, 1 Salk. 27, 3 Salk. 15. Thus, if the original debtor is a *feme covert*, or is under any other legal disability as to forming binding contracts, it is manifest that an oral undertaking by a third person to answer for such debtor cannot be affected by the statute of frauds. King *v.* Summitt, 73 Ind. 312, 38 Am. Rep. 145. See also Voris *v.* Star City Bldg., etc., Assoc., 20 Ind. App. 630, 50 N. E. 779. But it has been held that an oral promise to pay the amount of a bill of exchange if it should be dishonored by the drawer, who was a married woman, is collateral and within the statute. Maggs *v.* Ames, 4 Bing. 470, 6 L. J. C. P. O. S. 75, 1 M. & P. 294, 13 E. C. L. 593. See also Kimball *v.* Newell, 7 Hill (N. Y.) 116.

32. Dexter *v.* Blanchard, 11 Allen 365; Clark *v.* Levi, 10 N. Y. Leg. Obs. 184; Brown *v.* Farmers', etc., Nat. Bank, 88 Tex. 265, 31 S. W. 285, 33 L. R. A. 359. See Merner *v.* Klein, 17 U. C. C. P. 287. The statement in King *v.* Summitt, 73 Ind. 312, 38 Am. Rep. 145, that such a promise is not within the statute was unnecessary to the decision of the cause, and no authorities were cited in support of it, and in Brown *v.* Farmers', etc., Nat. Bank, *supra*, the court says it does not regard King *v.* Summitt, *supra*, "as supported by reason or authority of decided cases."

33. Promises implied in law see *infra*, X, A, 10, b.

34. Mawbrey *v.* Cunningham [*cited* in Jones *v.* Cooper, 1 Cowp. 227, 228, Lofft 769, 2 T. R. 80, 1 Rev. Rep. 429].

35. *Massachusetts.*— Cahill *v.* Bigelow, 18 Pick. 369 [*overruling* Perley *v.* Spring, 12

b. Oral Acknowledgment of Preëxisting Debt. An oral promise that the promisor will allow credit to the promisee for a debt due to the latter from a third person will be enforced, not as a promise to pay, but as an acknowledgment of a preëxisting debt.[36]

c. False Representations as to Third Person. The statute does not apply to a verbal representation with reference to a third person or to such a representation made for the purpose of securing an advantage for such person which if false would subject the person making it to liability in damages for deceit.[37]

d. Necessity of Request of Payment by Debtor or Creditor. It is not necessary to make a written promise to pay the debt of a third person binding that it should be made at the request of the original debtor or of the creditor.[38]

5. Original or Collateral Promise in General — a. Scope of Terms "Original" and "Collateral." Although the words "original" and "collateral" as applied to promises do not occur in the statute of frauds, they were used at an early day, and their use has been sanctioned and approved by the courts and text writers as convenient and accurate expressions to distinguish respectively between the cases in which the direct and leading object of the promisor is to further or promote some purpose or interest of his own, although the incidental effect thereof may be the payment of the debt of another, and those cases in which such object is to become the surety or guarantor of the subsisting debt of another for which the promisor was not previously liable. The former are designated as "original," the latter as "collateral" promises. A collateral promise therefore whether made before, or after, or contemporaneously with the promise of the primary or original debtor is void unless in writing, while an oral original promise, if made on a valuable consideration, is not within the statute, because, although its effect may be to extinguish the debt of another, that is not the controlling motive of the promisor.[39]

Mass. 297, which held the statute applicable only to preëxisting debts of third persons].

Minnesota.— Cole *v.* Hutchinson, 34 Minn. 410, 26 N. W. 319.

New York.— Goodman *v.* Cohen, 132 N. Y. 205, 30 N. E. 399 [*affirming* 16 Daly 47, 8 N. Y. Suppl. 859]; Mallory *v.* Gillett, 21 N. Y. 412.

Vermont.— Mead *v.* Watson, 57 Vt. 426.

England.— Jones *v.* Cooper, 1 Cowp. 227, Lofft 769, 2 T. R. 80, 1 Rev. Rep. 429; Peckham *v.* Faria, 3 Dougl. 13, 26 E. C. L. 21; Matson *v.* Wharam, 2 T. R. 80, 1 Rev. Rep. 429. In Matson *v.* Wharam, 2 T. R. 80, 81, 1 Rev. Rep. 429, the court were of opinion that the distinction taken in Mawbrey *v.* Cunningham [*cited* in Jones *v.* Cooper, *supra*] had been overruled, although Buller, J., added that "if this were a new question, the leaning of my mind would be the other way; for Lord Mansfield's reasoning in the case of Mawbrey and Cunningham struck me very forcibly," but he conceded at the same time that the authorities against it could not then be shaken.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 16.

36. Hoover *v.* Morris, 3 Ohio 56.

37. Lahay *v.* City Nat. Bank, 15 Colo. 339, 25 Pac. 704, 22 Am. St. Rep. 407; Adams *v.* Anderson, 4 Harr. & J. (Md.) 558; Eyre *v.* Dunsford, 1 East 318, 327. See also *infra*, V, A, B, 6.

38. Colgin *v.* Henley, 6 Leigh (Va.) 85.

39. *Connecticut.*— Pratt's Appeal, 41 Conn. 191; Packer *v.* Benton, 35 Conn. 343, 95 Am. Dec. 246.

Georgia.— English *v.* State Bank, 76 Ga. 537; Baldwin *v.* Hiers, 73 Ga. 739.

Maine.— Blake *v.* Parlin, 22 Me. 395.

Massachusetts.— Nelson *v.* Boynton, 3 Metc. 396, 37 Am. Dec. 148. The distinction between original and collateral promises, although not defined, is illustrated by Chief Justice Shaw in the following language: "If the promise is made by one in his own name to pay for goods or money delivered to, or services done for, another, that is original; it is his own contract on good consideration, and is called original, and is binding on him without writing. But if the language is, 'Let him have money or goods, or do service for him, and I will see you paid,' or 'I promise you that he will pay,' or 'If he do not pay, I will,' this is collateral, and, though made on good consideration, it is void by the statute of frauds." Stone *v.* Walker, 13 Gray 613, 615.

Michigan.— Gibbs *v.* Blanchard, 15 Mich. 292, 300, where the court says: "The plain, ordinary meaning of the language used in this clause of the statute would seem sufficiently to indicate that the class of special promises required to be in writing includes only such as are secondary or collateral to, or in aid of the undertaking or liability of some other party whose obligation, as between the promisor and promisee, is original or primary. If there be no such original or primary undertaking or liability of another

b. Method of Determining Character of Promise. It is often difficult to determine from the mere words in which a promise is made whether an undertaking is collateral to the engagement or liability of a third person or an entirely independent and original undertaking. In such cases courts must rely on the circumstances of each particular case and its general features in order to ascertain the intent of the parties, and how they viewed it when it is doubtful whether it was a contract of suretyship or guaranty or an original undertaking.[40] Generally speaking an oral undertaking by a person not previously liable for the purpose of securing the debt or performing the same duty for which the person for whom the undertaking is made remains liable is within the statute of frauds and must be in writing.[41]

party, there is nothing to which the promise in question can be secondary or collateral, and the promise is, therefore, original in its nature, and not within the statute. In other words, the statute applies only to promises which are in the nature of guaranties for some original or primary obligations to be performed by another."

Nebraska.— Fitzgerald *v.* Morrissey, 14 Nebr. 198, 15 N. W. 233; Clopper *v.* Poland, 12 Nebr. 69, 10 N. W. 538.

New York.— Mallory *v.* Gillett, 21 N. Y. 412; Bausinger *v.* Guenthner, 66 Barb. 186; Underhill *v.* Crawford, 29 Barb. 664; Perkins *v.* Goodman, 21 Barb. 218; Fowler *v.* Moller, 4 Bosw. 149.

Oregon.— Bixby *v.* Church, 28 Oreg. 242, 42 Pac. 613.

Tennessee.— Look Out Mountain R. Co. *v.* Houston, 85 Tenn. 224, 2 S. W. 36.

Virginia.— Noyes *v.* Humphreys, 11 Gratt. 636.

Wisconsin.— West *v.* O'Hara, 55 Wis. 645, 13 N. W. 894.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 18.

If the guarantor makes himself primarily liable his promise is original. Baldwin *v.* Hiers, 73 Ga. 739; Morris *v.* Osterhout, 55 Mich. 262, 21 N. W. 339.

40. Reed *v.* Holcomb, 31 Conn. 360; Norris *v.* Spencer, 18 Me. 324; Brooks Waterfield Co. *v.* I. N. Walker Co., 6 Ohio S. & C. Pl. Dec. 301, 4 Ohio N. P. 147; Forbes *v.* Temple, 22 N. Brunsw. 511.

41. *California.*— Clay *v.* Walton, 9 Cal. 328, in which an oral promise made by defendant with plaintiff, a material man, to induce him to furnish brick to defendant's contractor that "he would become responsible for all the brick furnished his building, and whatever contract or agreement was made, that he [defendant] would see carried out" was held to be within the statute.

Illinois.— Spear *v.* Farmers', etc., Bank, 156 Ill. 555, 41 N. E. 164 [*affirming* 49 Ill. App. 509] (which held an oral agreement between two creditors of a common debtor that each would share the loss, if any, which the other sustained on his claim to be within the statute); Eddy *v.* Roberts, 17 Ill. 505.

Maine.— Blake *v.* Parlin, 22 Me. 395, which held void an oral promise to pay rent collateral to a prior promise by the tenant to pay the same rent.

Minnesota.— Walker *v.* McDonald, 5 Minn. 455, which held void an oral promise that if a landlord would permit his tenant to remain in possession the promisor would be responsible for the rent.

New York.— McRoberts *v.* Mathews, 18 N. Y. App. Div. 624, 45 N. Y. Suppl. 431; Pike *v.* Irwin, 1 Sandf. 14.

Pennsylvania.— Haverly *v.* Mercur, 78 Pa. St. 257.

Tennessee.— Caperton *v.* Gray, 4 Yerg. 563.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 18 *et seq.*

Oral undertaking held to be a collateral guaranty and hence unenforceable see the following cases:

California.— Tevis *v.* Savage, 130 Cal. 411, 62 Pac. 611.

Colorado.— Wagner *v.* Hallack, 3 Colo. 176, an undertaking that "we will see the articles paid for," in the absence of evidence that credit was not given to the purchaser thereof.

Florida.— West *v.* Grainger, (1903) 35 So. 91.

Georgia.— Bluthenthal *v.* Moore, 111 Ga. 297, 36 S. E. 689.

Illinois.— Blank *v.* Dreher, 25 Ill. 331 (an agreement that the promisor would be good for the things sold if A did not pay in thirty days); Heggie *v.* Smith, 87 Ill. App. 141.

Indiana.— Indiana Trust Co. *v.* Finitzer, 160 Ind. 647, 67 N. E. 520; Pettit *v.* Braden, 55 Ind. 201.

Kansas.—Newman *v.* Newman, 7 Kan. App. 77, 52 Pac. 908.

Kentucky.— Thwaits *v.* Curl, 6 B. Mon. 472.

Maine.— Rollins *v.* Crocker, 62 Me. 244.

Maryland.— Conolly *v.* Kettlewell, 1 Gill 260.

Michigan.— Butters Salt, etc., Co. *v.* Vogel, 130 Mich. 33, 89 N. W. 560; Fuller, etc., Lumber, etc., Co. *v.* Houseman, 114 Mich. 275, 72 N. W. 187; Studley *v.* Barth, 54 Mich. 6, 19 N. W. 568; Hall *v.* Woodin, 35 Mich. 67.

Minnesota.— Dufolt *v.* Gorman, 1 Minn. 301, 66 Am. Dec. 543.

Missouri.— Koenig *v.* Miller Bros. Brewery Co., 38 Mo. App. 182; Rottmann *v.* Pohlmann, 28 Mo. App. 399.

Nebraska.— Williams *v.* Auten, 62 Nebr. 832, 87 N. W. 1061; Morrissey *v.* Kinsey, 16 Nebr. 17, 19 N. W. 454; Rose *v.* O'Linn, 10 Nebr. 364, 6 N. W. 430.

c. Effect of Giving Credit to Original Debtor. As bearing on the question whether an oral promise to pay the debt of another is original or collateral, it has

New Hampshire.— Walker *v.* Richards, 41 N. H. 388.

New York.— Brown *v.* Weber, 38 N. Y. 187 [*affirming* 24 How. Pr. 306]; Payne *v.* Baldwin, 14 Barb. 570; Rawson *v.* Springsteen, 2 Thomps. & C. 416; Allen *v.* Scarff, 1 Hilt. 209 (a request by the surety that the vendor would not disclose his suretyship to the vendee, and a promise to pay if, after endeavoring to obtain payment from the vendee, the vendor failed to obtain it); Dixon *v.* Frazee, 1 E. D. Smith 32; Timm *v.* J. G. Rose Co., 21 Misc. 337, 47 N. Y. Suppl. 150; Turenne *v.* Washburn, 19 N. Y. Suppl. 753; Dirringer *v.* Moynihan, 10 N. Y. Suppl. 540; Larson *v.* Wyman, 14 Wend. 246; Wilt *v.* Platt, 3 City Hall Rec. 71.

Pennsylvania.— Dougherty *v.* Bash, 167 Pa. St. 429, 31 Atl. 729; Lewis *v.* Lewis Lumber Mfg. Co., 156 Pa. St. 217, 27 Atl. 20; Gable *v.* Graybill, 1 Pa. Super. Ct. 29, 37 Wkly. Notes Cas. 313.

South Carolina.— Robertson *v.* Hunter, 29 S. C. 9, 6 S. E. 850; Kinloch *v.* Brown, 1 Rich. 223, 2 Speers 284.

Texas.— Loftus *v.* Ivy, 14 Tex. Civ. App. 701, 37 S. W. 766.

Vermont.— Mead *v.* Watson, 57 Vt. 426; Steele *v.* Towne, 28 Vt. 771 (in which to induce plaintiff to make advances to S defendant stated orally that S was good, and, if not, that he [defendant] was and the agreement was held void); Aldrich *v.* Jewell, 12 Vt. 125, 36 Am. Dec. 330; Skinner *v.* Conant, 2 Vt. 453, 21 Am. Dec. 554 (in which an oral promise to plaintiff that "if B employs you I will see you paid" was held to be collateral and void).

Virginia.— Engleby *v.* Harvey, 93 Va. 440, 25 S. E. 225; Cutler *v.* Hinton, 6 Rand. 509.

Wisconsin.— Andresen *v.* Upham Mfg. Co., 120 Wis. 561, 98 N. W. 518.

England.— Jones *v.* Cooper, 1 Cowp. 227, Lofft. 769, 2 T. R. 80, 1 Rev. Rep. 429; Anderson *v.* Hayman, 1 H. Bl. 120, 2 Rev. Rep. 734; Matson *v.* Wharam, 2 T. R. 80, 1 Rev. Rep. 429.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 19.

Oral undertaking held to be original and hence valid see the following cases:

Alabama.— Linam *v.* Jones, 134 Ala. 570, 33 So. 343; Bates *v.* Starr, 6 Ala. 697.

California.—Kilbride *v.* Moss, 113 Cal. 432, 45 Pac. 812, 54 Am. St. Rep. 361 (in which defendant, who was an officer and creditor of a corporation, having induced plaintiff to buy its stock on his verbal assurance that if the stock turned out to be worthless he would repay plaintiff the amount he had paid for it, was held liable as on an original agreement); Smith *v.* Mott, 76 Cal. 171, 18 Pac. 260.

Colorado.— Shafer *v.* Cherry, 5 Colo. App. 513, 39 Pac. 345, holding that the fact that a person who rents a house rents it for the use of another does not bring his promise to pay the rent within the operation of the statute.

Connecticut.— Marion *v.* Faxon, 20 Conn. 486, holding that a promise by the receiptor for attached property to deliver it to plaintiff on demand is not within the statute, because it is simply a promise to pay over to the creditor property of the debtor in possession of the promisor.

Delaware.— Ball *v.* Eastburn, 3 Houst. 401.

Idaho.— Sears *v.* Flodstrom, 5 Ida. 314, 49 Pac. 11, oral request to sell to A any goods he wanted and charge them to defendant.

Illinois.— Clark *v.* Smith, 87 Ill. App. 409; Berkowsky *v.* Viall, 66 Ill. App. 349.

Indiana.— Week *v.* Widgeon, 23 Ind. App. 405, 55 N. E. 487.

Kentucky.— Williams *v.* Farmers', etc., Bank, 49 S. W. 183, 20 Ky. L. Rep. 1273.

Maine.— Adams *v.* Hill, 16 Me. 215.

Massachusetts.— Towne *v.* Grover, 9 Pick. 306, in which defendant was held liable on his oral promise not to pay over money to his creditor without giving notice to plaintiff, who was about to sue the creditor, so that he might attach the debt by trustee process.

Michigan.— Wenzel *v.* Johnston, 112 Mich. 243, 70 N. W. 549.

Minnesota.— Laramee *v.* Tanner, 69 Minn. 156, 71 N. W. 1028; Amort *v.* Christofferson, 57 Minn. 234, 59 N. W. 304, where an oral statement by the mortgagee of A, upon the refusal of credit to A for wheat, "You let [A] have the wheat and I will see you paid for it," was held to amount to an agreement by the promisor to pay for it himself.

Missouri.— Schell *v.* Stephens, 50 Mo. 375 (holding that a verbal warranty of an auctioneer, where he alone was trusted and expressly agreed for himself to warrant the title, is an original undertaking and not within the statute); Hill *v.* Seneca Bank, 100 Mo. App. 230, 73 S. W. 307; Beeler *v.* Finnel, 85 Mo. App. 438.

Montana.— Hefferlin *v.* Karlman, 29 Mont. 139, 74 Pac. 201.

Nebraska.— Wellage *v.* Abbott, 3 Nebr. (Unoff.) 157, 90 N. W. 1128; Learn *v.* Upstill, 52 Nebr. 271, 72 N. W. 213, where defendants, acting as a committee appointed by a public meeting of citizens, employed plaintiff to do work on a public road and individually guaranteed payment therefor, and the contract was held to be an original, individual undertaking.

New Jersey.— Herendeen Mfg. Co. *v.* Moore, 66 N. J. L. 74, 48 Atl. 525; Price *v.* Combs, 12 N. J. L. 188.

New York.— Hegeman *v.* Moon, 131 N. Y. 462, 30 N. E. 487 [*affirming* 60 Hun 412, 15 N. Y. Suppl. 596]; Wells *v.* Monihan, 129 N. Y. 161, 29 N. E. 232 [*affirming* 13 N. Y. Suppl. 156]; Hardt *v.* Recknagel, 62 N. Y. App. Div. 106, 70 N. Y. Suppl. 782 (holding that where a firm advances money to a corporation on

been held that if any credit at all is given to the person for whose benefit the promise is made and is not given wholly to the promisor the undertaking is collateral and must be in writing.[42]

d. Oral Contingent Promise. A promise on condition, such as to pay the debt of another upon the receipt of money from him for that purpose, or to pay a given sum for him if he should be found indebted to that amount, is held to be collateral and void if not in writing.[43]

e. Guaranty of Payment of Note.[44] If before delivery of a promissory note a third person indorses thereon a contract in form one of guaranty or suretyship, his promise is regarded in many cases, not as a collateral undertaking which falls within the statute of frauds, but as an original undertaking,[45] so that the indorsement need not conform to the requirements of the memorandum prescribed by the statute;[46] but an indorsement after the making and delivery of the principal obligation is within the statute and must conform to its requirements.[47]

f. Promise to Make, Indorse, or Pay Promissory Note. A verbal agreement by one person to make or indorse a promissory note given in payment of the debt of another or to execute it as his surety is as clearly a collateral promise as a direct promise to pay such debt, and is within the statute;[48] and so is an oral

the promise of its treasurer to become personally liable therefor, the treasurer's promise is an original one and not within the statute); Goodman *v.* Cohen, 16 Daly 47, 8 N. Y. Suppl. 859; Post *v.* Geoghegan, 5 Daly 216 (oral request to plaintiff "to sell to A any goods he wanted and he [defendant] would be responsible"); Cruse *v.* Findlay, 16 Misc. 576, 38 N. Y. Suppl. 741; Mather *v.* Perry, 2 Den. 162.

North Dakota.— Grand Forks Lumber, etc., Co. *v.* Tourtelot, 7 N. D. 587, 75 N. W. 901.

Pennsylvania.— Boston *v.* Farr, 148 Pa. St. 220, 23 Atl. 901; Greenough *v.* Eicholtz, (1888) 15 Atl. 712; Booth *v.* Heist, 94 Pa. St. 177; Kelly *v.* Baun, 6 Pa. Super. Ct. 327; Speers *v.* Knarr, 4 Pa. Super. Ct. 80, 40 Wkly. Notes Cas. 85 (if plaintiff would deliver goods to A defendant would pay for them); Carey *v.* Sheldon, 2 Pennyp. 330; Owen *v.* Jeter, 4 Northam. Co. Rep. 111 (oral promise to be surety for goods of a certain amount furnished to a third person).

Tennessee.— Dillon *v.* Smith, 10 Heisk. 595.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 19.

Nature of undertaking as question for jury see *infra*, XI, C, 2.

42. Schoenfeld *v.* Brown, 78 Ill. 487; Jenkins, etc., Co. *v.* Lundgren, 85 Ill. App. 494; Frissell *v.* Williams, 87 Mo. App. 518. See *infra*, IV, E.

43. Walker *v.* Irwin, 94 Iowa 448, 62 N. W. 785; Barry *v.* Law, 89 Fed. 582, 1 Cranch C. C. 77.

44. **Parol contract of guaranty or suretyship** as to commercial paper see COMMERCIAL PAPER, 8 Cyc. 117 note 60, 7 Cyc. 661, 670 note 72, 678. See also *infra*, IV, E, 8.

45. *Alabama.*— Carter *v.* Odom, 121 Ala. 162, 25 So. 774. See also Singleton *v.* Thomas, 73 Ala. 205, holding that if a debtor gives his note, indorsed by a third person as security, for part of a debt, and it is accepted by the creditor in full satisfaction, it is a valid discharge of the whole debt, the statute of frauds not applying to a transaction of this character.

California.— Ford *v.* Hendricks, 34 Cal. 673; Otis *v.* Haseltine, 27 Cal. 80.

New York.— Etz *v.* Place, 81 Hun 203, 30 N. Y. Suppl. 765; Manrow *v.* Durham, 3 Hill 584; Luqueer *v.* Prosser, 1 Hill 256. And see Casey *v.* Brabason, 10 Abb. Pr. 368. *Contra*, Hall *v.* Farmer, 2 N. Y. 553 [*affirming* 5 Den. 484]. And see Rogers *v.* Kneeland, 13 Wend. 114 [*affirming* 10 Wend. 218].

South Carolina.— See Sloan *v.* Gibbes, 56 S. C. 480, 35 S. E. 408, 76 Am. St. Rep. 551.

United States.— Fowler *v.* McDonald, 9 Fed. Cas. No. 5,002, 4 Cranch C. C. 297.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 18.

Contra.— Commercial Nat. Bank *v.* Smith, 107 Wis. 574, 83 N. W. 766 [*following* Parry *v.* Spikes, 49 Wis. 384, 5 N. W. 794, 35 Am. Rep. 782; Taylor *v.* Pratt, 3 Wis. 674]; Lock *v.* Reid, 6 U. C. Q. B. O. S. 295. And see New York cases cited *supra*, this note.

If the guaranty is expressed in a separate instrument it is a collateral undertaking and so falls within the statute. Brewster *v.* Silence, 8 N. Y. 207; Weed *v.* Clark, 4 Sandf. (N. Y.) 31.

In an action by the second against the first indorser of a note, the latter cannot show by parol that the former was surety of the maker, and that he had placed his name on the back of the note by mistake. Hauer *v.* Patterson, 84 Pa. St. 274.

46. See *infra*, IX, C, 3, g, (II), (B).

47. Rigby *v.* Norwood, 34 Ala. 129. *Contra*, French *v.* Yawger, 47 N. J. L. 157, 54 Am. Rep. 123.

If on transferring the note of a third person the holder guarantees its payment, the promise is original and not within the statute. Johnson *v.* Gilbert, 4 Hill (N. Y.) 178. *Contra*, Wood *v.* Wheelock, 25 Barb. (N. Y.) 625; Wambold *v.* Foote, 2 Ont. App. 579. See *infra*, IX, C, 3, g, (II), (B).

48. *Iowa.*— Dee *v.* Downs, 57 Iowa 589, 11 N. W. 2.

promise by one whose name has been forged to a note to pay it, and it does not estop the promisor from denying the genuineness of his signature.[49] It is otherwise in the case of a verbal promise by one to join with another in giving a note for money loaned to them both,[50] or where, by his indorsement of a note with knowledge of the facts, the indorser ratifies an unauthorized oral promise by another that he would indorse.[51]

6. Obligation of Promisor Independent of Liability of Principal. Although an oral promise to pay the debt of another is within the statute, yet it is not requisite that every agreement, the performance of which incidentally effects the extinguishment of the debt of a third person, should be in writing. Even though when the oral promise is made the primary debt is still subsisting and may have been antecedently contracted, such promise is original and valid if it is supported by a new consideration moving to the promisor and beneficial to him and is such that the promisor thereby comes under an independent duty of payment irrespective of the liability of the principal debtor.[52]

B. Preëxisting Liability of Promisor — 1. Promise to Pay One's Own Debt in General — a. General Rules. It is of importance to determine in each case of an undertaking which in form purports to be a promise to pay the debt of another whether it is such in fact; for it is well settled that if an oral agreement is in effect a promise to pay the debt of the promisor himself, it is not within the

Kentucky.— Mendel *v.* Kinnimouth, 13 Ky. L. Rep. 139.

New Jersey.— Wills *v.* Shinn, 42 N. J. L. 138.

New York.— Carville *v.* Crane, 5 Hill 483, 40 Am. Dec. 364.

South Carolina.—Taylor *v.* Drake, 4 Strobh. 431, 53 Am. Dec. 680; Bronson *v.* Stroud, 2 McMull. 372.

England.— Harburg India Rubber Comb Co. *v.* Martin, [1902] 1 K. B. 778, 71 L. J. K. B. 529, 86 L. T. Rep. N. S. 505, 50 Wkly. Rep. 449.

Canada.— Waterman *v.* Will, Russell's Eq. Dec. (Nova Scotia) 197.

49. Smith *v.* Tramel, 68 Iowa 488, 27 N. W. 471; Mallet *v.* Bateman, L. R. 1 C. P. 163, 1 H. & R. 109, 12 Jur. N. S. 122, 35 L. J. C. P. 40, 13 L. T. Rep. N. S. 410, 14 Wkly. Rep. 225.

50. Dee *v.* Downs, 50 Iowa 310; Van Riper *v.* Baker, 44 Iowa 450.

51. Berryhill *v.* Jones, 35 Iowa 335.

52. *Alabama.*— Cole *v.* Justice, 8 Ala. 793.

Illinois.— Rothermel *v.* Bell, etc., Coal Co., 79 Ill. App. 667.

Indiana.— Gibson County *v.* Cincinnati Steam-Heating Co., 128 Ind. 240, 27 N. E. 612, 12 L. R. A. 502.

Kentucky.— Leisman *v.* Otto, 1 Bush 225; Hudson *v.* Wilkins, 5 Litt. 196.

Massachusetts.— Allen *v.* Leonard, 16 Gray 202.

Michigan.— Mitchell *v.* Beck, 88 Mich. 342, 50 N. W. 305.

Nebraska.— Palmer *v.* Witcherly, 15 Nebr. 98, 17 N. W. 364.

New York.— White *v.* Rintoul, 108 N. Y. 222, 15 N. E. 318; Inman *v.* Johnston, 6 Misc. 26, 25 N. Y. Suppl. 1114; Lurtig *v.* Brown, 11 N. Y. St. 280.

Pennsylvania.— Pizzi *v.* Nardello, 209 Pa. St. 1, 57 Atl. 1100; Potter *v.* Greenberg, 24 Pa. Super. Ct. 505; Roland *v.* Eckman, 12 Pa. Super. Ct. 75; Weber *v.* Bishop, 12 Pa. Super. Ct. 51.

West Virginia.— Sayre *v.* Edwards, 19 W. Va. 352.

Wisconsin.— Dyer *v.* Gibson, 16 Wis. 557 [*approved* in Commercial Nat. Bank *v.* Smith, 107 Wis. 574, 83 N. W. 766], holding that the promise of one person, although in form to answer for the debt of another, if founded on a new and sufficient consideration moving from the creditor and promisee to the promisor, and beneficial to the latter, is an original undertaking and need not be in writing.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 21.

Illustrations.— A verbal promise was held to be original and enforceable where the promisor agreed with assignees for the benefit of creditors, in consideration of the transfer to him of all the assigned property, to pay the charges of counsel for the assignees for drawing the assignment (Stilwell *v.* Otis, 2 Hilt. (N. Y.) 148, 7 Abb. Pr. 431); where, in consideration of the settlement of certain actions involving the title to his wife's realty, he agreed to pay a sum certain (Shaffer *v.* Ryan, 84 Ind. 140); and where, being a partner in a firm by which the promisee was employed, he guaranteed that such employee's salary should amount to a certain sum per week (Barrett *v.* Johnson, 77 Hun (N. Y.) 527, 28 N. Y. Suppl. 892; Douglass *v.* Jones, 3 E. D. Smith (N. Y.) 551). So a partnership debt being the debt of each of its members, a new promise by one of the partners, made after the dissolution of the firm, to pay a partnership debt is not within the statute. Reid *v.* Wilson, 109 Ga. 424, 34 S. E. 608. A director of a bank on which a run was being made, having represented to a depositor that he was indebted to the bank to an amount in excess of the depositor's balance, his oral promise that he would pay the depositor the amount of such balance if he would suffer his deposit

statute of frauds, although the incidental result of its performance may be the discharge of the indebtedness of another person.[53] Thus if the promisor orally agrees to repay money which at his request the promisee has paid out or advanced to a third person in payment of the debt of a fourth person, it is clearly an original and not a collateral promise, as being a promise to pay a debt of his own contracting,[54] and the same is true where the promisor, being the grantor of land, agrees with the grantee to pay the taxes accrued thereon at the time of the conveyance,[55] or where the promisor, being the purchaser of mortgaged land, assumes the payment of the mortgage debt,[56] or where, upon the withdrawal of one partner from a firm, the remaining partners agree with him to pay the old firm debts,[57] or where the promisor, being the owner of land which is subject to a lien for materials supplied to his contractor, promises to pay the lienor,[58] or where the promisor orally guarantees a debt for which he is already liable,[59] or where the promisor, being a debtor, agrees to pay for goods which were sold to his creditor on account of his indebtedness,[60] or where the promisor, being the vendee of property, orally agrees to pay a debt of the vendor in payment of the price of the property bought.[61] But the principle will not be construed to extend to an

to remain for the use of the bank was held to be original and not within the statute. Creel *v.* Bell, 2 J. J. Marsh. (Ky.) 309. *Contra*, Walther *v.* Merrell, 6 Mo. App. 370.

53. See cases cited *passim*, III, B.

Verbal agreement by putative father to support bastard child see BASTARDS, 5 Cyc. 639.

Verbal certification of check by bank see BANKS AND BANKING, 5 Cyc. 540.

54. Perkins *v.* Littlefield, 5 Allen (Mass.) 370.

55. Headrick *v.* Wisehart, 57 Ind. 129; Burr *v.* Wilcox, 13 Allen 269; Gill *v.* Ferrin, 71 N. H. 421, 52 Atl. 558.

56. *Indiana.*—McDill *v.* Gunn, 43 Ind. 315; Helms *v.* Kearns, 40 Ind. 124.

Iowa.— Lamb *v.* Tucker, 42 Iowa 118.

Maine.— Flint *v.* Winter Harbor Land Co., 89 Me. 420, 36 Atl. 634.

Texas.— Beitel *v.* Dobbin, (Civ. App. 1898) 44 S. W. 299; Pickett *v.* Jackson, (Civ. App. 1897) 42 S. W. 568.

Utah.— Thompson *v.* Cheeseman, 15 Utah 43, 48 Pac. 477.

Wisconsin.— Morgan *v.* South Milwaukee Lake View Co., 97 Wis. 275, 72 N. W. 872.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 22.

57. Schindler *v.* Euell, 45 How. Pr. (N. Y.) 33.

58. Landis *v.* Royer, 59 Pa. St. 95.

59. Ellenwood *v.* Fults, 63 Barb. (N. Y.) 321.

60. Phillips *v.* Gray, 3 E. D. Smith (N. Y.) 69.

61. *Alabama.*— See Merrell *v.* Witherby, 120 Ala. 418, 23 So. 994, 26 So. 974, 74 Am. St. Rep. 39; Locke *v.* Humphries, 60 Ala. 117; Merrill *v.* Smith, 12 Ala. 569.

California.— See Tevis *v.* Savage, 130 Cal. 411, 62 Pac. 611.

Colorado.— De Walt *v.* Hartzell, 7 Colo. 601, 4 Pac. 1201; Cerrusite Min. Co. *v.* Steele, 18 Colo. App. 216, 70 Pac. 1091; Baldwin Coal Co. *v.* Davis, 15 Colo. App. 371, 62 Pac. 1041.

Georgia.— See Reid *v.* Wilson, 109 Ga. 424, 34 S. E. 608.

Illinois.— See Darst *v.* Bates, 95 Ill. 493.

Indiana.— Bateman *v.* Butler, 124 Ind. 223, 21 N. E. 989. And see Crim *v.* Fitch, 53 Ind. 214.

Kentucky.— See Fain *v.* Turner, 96 Ky. 634, 29 S. W. 628, 16 Ky. L. Rep. 719.

Maine.— See Rowe *v.* Whittier, 21 Me. 545.

Massachusetts.— See Fish *v.* Thomas, 5 Gray 45, 66 Am. Dec. 348; Alger *v.* Scoville, 1 Gray 391; Call *v.* Calef, 4 Cush. 388.

Michigan.— Calkins *v.* Chandler, 36 Mich. 320, 24 Am. Rep. 593. And see Comstock *v.* Norton, 36 Mich. 277.

Minnesota.— See Crane *v.* Wheeler, 48 Minn. 207, 50 N. W. 1033.

Mississippi.— See Sproule *v.* Hopper, (1894) 16 So. 901.

Missouri.— Schufeldt *v.* Smith, 139 Mo. 367, 40 S. W. 887; Holt *v.* Dollarhide, 61 Mo. 433; Flanagan *v.* Hutchinson, 47 Mo. 237; Besshears *v.* Rowe, 46 Mo. 501; Robbins *v.* Ayres, 10 Mo. 538, 47 Am. Dec. 125; Beardslee *v.* Morgner, 4 Mo. App. 139. And see Sinclair *v.* Bradley, 52 Mo. 180; Moore *v.* Kansas City, etc., R. Co., 31 Mo. App. 145.

New York.—See Dodge *v.* Zimmer, 110 N. Y. 43, 17 N. E. 399; Fitch *v.* Gardenier, 2 Abb. Dec. 153, 2 Keyes 516; Therasson *v.* McSpedon, 2 Hilt. 1; Scherzer *v.* Muirhead, 84 N. Y. Suppl. 159; Rexford *v.* Brunell, 1 N. Y. Leg. Obs. 396.

Ohio.— See Teeters *v.* Lamborn, 43 Ohio St. 144, 1 N. E. 513; Jarmusch *v.* Otis Iron, etc., Co., 23 Ohio Cir. Ct. 122; Conner *v.* Bramble, 9 Ohio S. & C. Pl. Dec. 516, 6 Ohio N. P. 195.

Pennsylvania.— See Crawford *v.* Pyle, 190 Pa. St. 263, 42 Atl. 687; Oliphant *v.* Patterson, 56 Pa. St. 368; Whitcomb *v.* Kephart, 50 Pa. St. 85; Malone *v.* Keener, 44 Pa. St. 107; Van Leuven *v.* Holmes, 13 Pa. Super. Ct. 77; Hearing *v.* Dittman, 8 Phila. 307.

Tennessee.— See Mt. Olivet Cemetery Co. *v.* Shubert, 2 Head 116.

Texas.— See Milburn Mfg. Co. *v.* Tucker, 3 Tex. App. Civ. Cas. § 454.

Vermont.— See Bates *v.* Sabin, 64 Vt. 511,

oral promise to pay an amount in excess of that for which the promisor is legally liable.[62]

b. Parol Acceptance of Bill of Exchange. In the absence of statute to the contrary,[63] a verbal acceptance of a bill of exchange or of an order for money which is equivalent thereto by a drawee who holds funds of the drawer in his hands is not within the statute. His acceptance is regarded as an original undertaking, for, being to the extent of such funds, the debtor of the drawer, he in effect merely agrees to pay his own debt by agreeing to apply the funds as the drawer directs. And the rule is the same if the acceptance is conditional upon having funds of the drawer on hand.[64]

c. Parol Promise to Accept Bill of Exchange. In some jurisdictions a verbal promise to accept a bill of exchange is regarded as an original undertaking and not within the statute.[65] Elsewhere, however, it is regarded as within the statute as to an existing or future bill of exchange, although supported by the consideration of money to be advanced by the promisee.[66]

d. Parol Accommodation Acceptance. A parol promise to accept a bill of exchange or an order which is equivalent thereto for the mere accommodation of the drawer is generally held to be within the statute.[67]

24 Atl. 1013; Dorwin *v.* Smith, 35 Vt. 69; Walker *v.* Norton, 29 Vt. 226.

Wisconsin.— See Lessel *v.* Zillmer, 105 Wis. 334, 81 N. W. 403.

United States.— See Champlain Constr. Co. *v.* O'Brien, 117 Fed. 271, 788.

England.— See Butcher *v.* Andrews, Comb. 473, 1 Salk 23.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 22.

62. Hill *v.* Dougherty, 33 N. C. 195.

63. See for example the Pennsylvania act of May 10, 1881; 1 & 2 Geo. IV, c. 78.

64. *Alabama.*— Espalla *v.* Wilson, 86 Ala. 487, 5 So. 867.

Arkansas.— Chapline *v.* Atkinson, 45 Ark. 67, 55 Am. Rep. 531.

Colorado.— Hughes *v.* Fisher, 10 Colo. 383, 15 Pac. 702; Durkee *v.* Conklin, 13 Colo. App. 313, 57 Pac. 486.

Connecticut.— Jarvis *v.* Wilson, 46 Conn. 90, 33 Am. Rep. 18.

Illinois.— Sturges *v.* Chicago Fourth Nat. Bank, 75 Ill. 595; Nelson *v.* Chicago First Nat. Bank, 48 Ill. 36, 95 Am. Dec. 510.

Iowa.— Winburn *v.* Fidelity Loan, etc., Assoc., 110 Iowa 374, 81 N. W. 682.

Kansas.— Kohn *v.* Ft. Scott First Nat. Bank, 15 Kan. 428; Light *v.* Powers, 13 Kan. 96.

Massachusetts.— O'Connell *v.* Mt. Holyoke College, 174 Mass. 511, 55 N. E. 460; Cook *v.* Baldwin, 120 Mass. 317, 21 Am. Rep. 517; Dunavan *v.* Flynn, 118 Mass. 537; Pierce *v.* Kittredge, 115 Mass. 374; Eastern R. Co. *v.* Benedict, 10 Gray 212.

Michigan.— Upham *v.* Clute, 105 Mich. 350, 63 N. W. 317; Mitts *v.* McMorran, 64 Mich. 664, 31 N. W. 521; Comstock *v.* Norton, 36 Mich. 277.

Missouri.— Curle *v.* St. Louis Perpetual Ins. Co., 12 Mo. 578.

Montana.— Lavell *v.* Frost, 16 Mont. 93, 40 Pac. 146.

Nebraska.— Barras *v.* Pomeroy Coal Co., 38 Nebr. 311, 56 N. W. 890.

New York.— Gallagher *v.* Nichols, 60 N. Y. 438; O'Donnell *v.* Smith, 2 E. D. Smith 124; Carville *v.* Crane, 5 Hill 483, 40 Am. Dec. 364.

Pennsylvania.— Dull *v.* Bricker, 76 Pa. St. 255; Spaulding *v.* Andrews, 48 Pa. St. 411.

Tennessee.— Montague *v.* Myers, 11 Heisk. 539.

Texas.— Neumann *v.* Schroeder, 71 Tex. 81, 8 S. W. 632; Lemmon *v.* Box, 20 Tex. 329.

Vermont.— Fisher *v.* Beckwith, 19 Vt. 31, 46 Am. Rep. 174.

Wisconsin.— West *v.* O'Hara, 55 Wis. 645, 13 N. W. 894.

United States.—Raborg *v.* Peyton, 2 Wheat. 385, 4 L. ed. 268; Shields *v.* Middleton, 21 Fed. Cas. No. 12,786, 2 Cranch C. C. 205.

England.— Pillans *v.* Van Mierop, 3 Burr. 1663.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 44.

65. Kennedy *v.* Geddes, 3 Ala. 581, 37 Am. Dec. 714; Sturges *v.* Chicago Fourth Nat. Bank, 75 Ill. 595; Nelson *v.* Chicago First Nat. Bank, 48 Ill. 36, 95 Am. Dec. 510; Mason *v.* Dousay, 35 Ill. 424, 85 Am. Dec. 368; Jones *v.* Council Bluffs Branch State Bank, 34 Ill. 313, 85 Am. Dec. 306; Nelson *v.* Ravens, 3 Ill. App. 565; Louisville, etc., R. Co. *v.* Caldwell, 98 Ind. 245; Miller *v.* Neihaus, 51 Ind. 401; Stockwell *v.* Bramble, 3 Ind. 428; Morse *v.* Massachusetts Nat. Bank, 17 Fed. Cas. No. 9,857, Holmes 209.

66. *California.*—Wakefield *v.* Greenhood, 29 Cal. 597.

Delaware.— Benson *v.* Walker, 5 Harr. 110.

Missouri.— Rulo First Nat. Bank *v.* Gordon, 45 Mo. App. 293.

New York.— Loonie *v.* Hogan, 9 N. Y. 435, 12 N. Y. Leg. Obs. 225, 61 Am. Dec. 683 [*affirming* 2 E. D. Smith 681].

South Carolina.— Williams *v.* Caldwell, 4 S. C. 100; Strohecker *v.* Cohen, 1 Speers 349.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 44.

67. *California.*—Wakefield *v.* Greenhood, 29 Cal. 597.

2. PROMISE TO PAY TO CREDITOR'S NOMINEE. An express undertaking to be answerable for the debt of another may be enforced, although not in writing, in cases in which the promisor, being a debtor, agrees with his creditor to satisfy his debt by paying the amount thereof to some third person designated by the creditor. By his promise to pay to his creditor's nominee he engages to do no more than to pay his own debt in a particular manner indicated by his own creditor, and in the fulfilment of his engagement he acts as agent to apply funds of his creditor held by himself rather than as guarantor of his creditor's debt to a third person.[68]

3. PERSONAL RELATIONSHIP OF PROMISOR AND PRINCIPAL. It is obvious that the mere fact that the promisor and the person for whose benefit a promise is made are related to each other by ties of blood or affection or stand toward each other in any legal or business relation cannot of itself affect the question of the application of the statute of frauds to the promise. That question must be determined by the application of the same tests as those that govern the validity of oral contracts between strangers. If the person for whose benefit a promise is made, being *sui juris* and capable of entering into a contractual relation, incurs a debt for which, after an oral promise of a third person to pay it, he remains liable, the promise, unless it operates to extinguish the debt or has the effect of making it the debt of the promisor, is a collateral promise and is void if resting in parol. If, however, the promise is made in behalf of one who is legally incapable of contracting a debt or of one for whose debts the law makes the promisor primarily liable, it is good without a writing, the statute not being applicable.[69] These questions arise most frequently in the case of promises made by a husband or a wife[70]

Illinois.— Hite *v.* Wells, 17 Ill. 88.

Iowa.— Walton *v.* Mandeville, 56 Iowa 597, 9 N. W. 913, 41 Am. Rep. 123.

Maine.— Plummer *v.* Lyman, 49 Me. 229.

Massachusetts.— Manley *v.* Geagan, 105 Mass. 445; Sears *v.* Lawrence, 15 Gray 267.

Michigan.— Upham *v.* Clute, 105 Mich. 350, 63 N. W. 317; Pfeff *v.* Cummings, 67 Mich. 143, 34 N. W. 281; Preston *v.* Young, 46 Mich. 103, 8 N. W. 706, 41 Am. Rep. 148; Halsted *v.* Francis, 31 Mich. 113.

Missouri.— Haeberle *v.* O'Day, 61 Mo. App. 390; Nichols *v.* Commercial Bank, 55 Mo. App. 81.

New York.— Loonie *v.* Hogan, 9 N. Y. 435, 12 N. Y. Leg. Obs. 225, 61 Am. Dec. 683 [*affirming* 2 E. D. Smith 681]; Pike *v.* Irwin, 1 Sandf. 14; Quin *v.* Hanford, 1 Hill 82.

Pennsylvania.— Farmers', etc., Bank *v.* Lefever, 74 Pa. St. 49.

United States.— Morse *v.* Massachusetts Nat. Bank, 17 Fed. Cas. No. 9,857, Holmes 209. *Contra,* Townsley *v.* Sumrall, 2 Pet. 170, 7 L. ed. 386.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 44.

68. *Alabama.*— Aultman *v.* Fletcher, 110 Ala. 452, 18 So. 215; Woodruff *v.* Scaife, 83 Ala. 152, 3 So. 311.

Idaho.— Casey *v.* Miller, 3 Ida. 567, 32 Pac. 195.

Indiana.— Indiana Mfg. Co. *v.* Porter, 75 Ind. 428.

Kansas.— Plano Mfg. Co. *v.* Burrows, 40 Kan. 361, 19 Pac. 809.

Kentucky.— Colvin *v.* Newell, 8 Ky. L. Rep. 959.

Maine.— Coffin *v.* Bradbury, 89 Me. 476, 36 Atl. 988.

Maryland.— Rider *v.* Riely, 2 Md. Ch. 16 [*affirmed* in 22 Md. 540].

Massachusetts.— Colt *v.* Root, 17 Mass. 229.

Mississippi.— Lee *v.* Newman, 55 Miss. 365.

Missouri.— Wright *v.* McCully, 67 Mo. 134; Holt *v.* Dollarhide, 61 Mo. 433.

Texas.— Woods *v.* Davis, 1 Tex. App. Civ. Cas. § 952.

Vermont.— Williams *v.* Little, 35 Vt. 323.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 23.

Contra.— Benson *v.* Walker, 5 Harr. (Del.) 110, where the court refused to enforce an oral agreement by an employer to accept an order from his employee to pay a part of his wages to a third person.

69. See cases cited *infra,* notes 70, 71.

70. See cases cited *infra,* this note.

Promises by husband.— An oral promise by a husband to pay a note given by his wife for goods sold to her and on her credit and for which she is primarily liable (Connerat *v.* Goldsmith, 6 Ga. 14), or to pay for the keep of his wife's horses (Brennan *v.* Chapin, 19 N. Y. Suppl. 237), or to pay for land settled by third persons on his wife and children (Bagley *v.* Sasser, 55 N. C. 350), is unenforceable. However, a husband has been held liable on his oral promise to pay for goods purchased by his wife for use in her business on the ground that she could incur no personal liability by contract (Jones *v.* Wocher, 90 Ky. 230, 13 S. W. 911, 12 Ky. L. Rep. 105); and a promise by a husband to pay the fees of his wife's solicitors for services rendered in a suit pending against him for separate maintenance when the agreement was made may be enforced against him, al-

or by a parent or guardian or a child[71] for the debt, default, or miscarriage of the other.

4. Promises by Partners and Partnerships. Since partners are jointly and severally liable for the debts of the partnership, it may be stated in general that an oral promise by one partner to pay the debt of the firm of which he is a member is in effect a promise to pay his own debt, and so not within the statute of frauds;[72] but if neither the partnership nor the promisor is originally liable on the debt, the promise to answer for it is within the statute.[73] So a partnership is liable on an oral promise to pay for goods purchased by one of its members for its benefit, or for labor employed by a member thereof in carrying on its business,[74] but not on an oral engagement to answer for a debt contracted by a previous partnership to which it has succeeded, nor for a debt contracted by a member thereof prior to its formation.[75]

though not in writing (Stein *v.* Blake, 56 Ill. App. 525).

Promises by wife.— An oral promise by a married woman to pay her father for her support is within the statute, since the payment of that debt is imposed by law upon her husband. Perkins *v.* Westcoat, 3 Colo. App. 338, 33 Pac. 139. So also is an oral promise by a married woman to apply her wages in payment for property previously sold to her husband (Strickland *v.* Hamlin, 87 Me. 81, 32 Atl. 732), to see the promisee paid for a building which he erected on her land under a contract with her husband (Rollins *v.* Crocker, 62 Me. 244), to pay the promissory note of her husband, on which she was an indorser, if he did not (Beasten *v.* Henrickson, 44 Md. 609), or to pay the debts of her husband out of the proceeds of insurance on his life (Fisher *v.* Donovan, 57 Nebr. 361, 77 N. W. 778, 44 L. R. A. 383). It is immaterial whether such a promise be made in the lifetime of the husband or after his death. Thwaits *v.* Curl, 6 B. Mon. (Ky.) 472; Travis *v.* Scriba, 12 Hun (N. Y.) 391; Lennox *v.* Eldred, 65 Barb. (N. Y.) 410. If, however, being her husband's sole heir, she promises, in consideration that the holder of his note will not present it for allowance against his estate, that she will pay it, and thereafter pays interest on it, it is held that a new and original promise may be inferred. *In re* Hummel, 55 Minn. 315, 56 N. W. 1064.

An oral promise by a husband, acting as his wife's agent, to pay his own debt out of her property is not binding on her. Felder *v.* Walker, 24 S. C. 596.

71. See cases cited *infra*, this note.

Promises by parent or guardian.— Oral promises of a father to pay for the education and maintenance of his minor children and of a guardian to pay a debt contracted by his ward are held to be original. Elson *v.* Spraker, 100 Ind. 374; McNabb *v.* Clipp, 5 Ind. App. 204, 31 N. E. 858; Thompson *v.* Dorsey, 4 Md. Ch. 149; Roche *v.* Chaplin, 1 Bailey (S. C.) 419. See Coquard *v.* Union Depot Co., 10 Mo. App. 261. In North Carolina, however, an oral promise by a guardian to pay for goods bought by his ward without the guardian's consent is held to be void. Scott *v.* Bryan, 73 N. C. 582.

Promise by child.— It being the duty of a husband to pay for a coffin for his deceased wife which has been delivered to him under his contract to pay therefor, an oral promise of the son of the decedent to pay therefor is void. Youngs *v.* Shough, 15 N. J. L. 27.

72. *Alabama.*— Files *v.* McLeod, 14 Ala. 611.

Arkansas.— McGill *v.* Dowdle, 33 Ark. 311.

Georgia.— Weatherly *v.* Hardman, 68 Ga. 592, so holding, although the promise is made after the firm has received its discharge in bankruptcy for a debt which was contracted before the bankruptcy.

Indiana.— Hopkins *v.* Carr, 31 Ind. 260.

Wisconsin.— Gauger *v.* Pautz, 45 Wis. 449, holding that an oral promise by one member of a partnership which has been dissolved to pay an equal part of such judgment as may be recovered in an action brought against his copartner personally on a firm debt will be enforced.

United States.— Rice *v.* Barry, 20 Fed. Cas. No. 11,751, 2 Cranch C. C. 447, so holding, although judgment for the same debt has been recovered against the other partner.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 25.

See, however, Smith *v.* Bowler, 2 Disn. (Ohio) 153.

73. Taylor *v.* Hillyer, 3 Blackf. (Ind.) 433, 26 Am. Dec. 430; Wagnon *v.* Clay, 1 A. K. Marsh. (Ky.) 257 (both holding that an oral promise of one member of a firm to pay a note signed in the firm-name by another partner and given by him for his individual debt is within the statute); Greenleaf *v.* Burbank, 13 N. H. 454 (holding that a verbal promise to pay an individual note of another partner given for a partnership debt whereby the debt of the firm was extinguished is within the statute); Davis *v.* Evans, 39 Vt. 182 (holding that the verbal promise of a partner after the dissolution of a partnership to pay for goods sold to another partner before the partnership was formed is not enforceable).

74. Arick's Succession, 22 La. Ann. 501; Dumanoise *v.* Townsend, 80 Mich. 302, 45 N. W. 179; Hotchkiss *v.* Ladd, 36 Vt. 593, 86 Am. Dec. 679. See also Van Reimsdyk *v.* Kane, 28 Fed. Cas. No. 16,872, 1 Gall. 630 [*reversed* on other grounds in 9 Cranch 153, 3 L. ed. 688].

75. Paradise *v.* Gerson, 32 La. Ann. 532.

5. Promises by Principals, Agents, Indorsers, Sureties, and Corporate Officers and Stock-Holders. The underlying principle in all cases involving the liabilities of principals, agents, sureties, indorsers, or corporate officers or shareholders is that, although their engagements are in form a guaranty of the debt of a third person, yet if they are already personally liable for the debt, or if the nature of the transaction is such as to make the debt their own, the statute of frauds affords them no protection.[76] However, the members or officers of a corporation cannot be held liable on their verbal engagement to become personally responsible for the debts of the corporation.[77]

6. Promise to Pay or Apply From Property of Debtor. The defense of the

See further Rhodes *v.* McKean, 55 Iowa 547, 8 N. W. 359; Davis *v.* Dodge, 30 Mich. 267.

76. Apperson *v.* Exchange Bank, 10 S. W. 801, 10 Ky. L. Rep. 943 (where the president of a bank borrowed money from the bank and loaned it to his debtor, who was also a debtor of the bank, on the promise that out of the proceeds of the security which he took therefor he would repay the loan to the bank); Thompson *v.* San Antonio, etc., R. Co., 11 Tex. Civ. App. 145, 32 S. W. 427 (holding a carrier liable on a contract for shipment over its own and connecting lines, since, in the case of a default by the connecting lines, they are to be deemed the agents of the contracting line); Georgetown Union Bank *v.* Corcoran, 24 Fed. Cas. No. 14,353, 5 Cranch C. C. 513 (holding that the maker of a note which is expressed to be held as collateral security for his obligation upon an earlier note of a third person is liable, although no consideration is expressed therein).

Promise by agent.— Where an agent loans money of his principal on a note without security, contrary to instructions, and on learning that he will be held responsible guarantees payment of the note, he is liable as upon an original undertaking. Crane *v.* Wheeler, 48 Minn. 207, 50 N. W. 1033. See Hale *v.* Stuart, 76 Mo. 20. But the oral undertaking of an agent of a purchaser of the business of a certain firm that he will become personally responsible for the debts of the firm is void as an undertaking to answer for the debt of another. Berry *v.* Brown, 107 N. Y. 659, 14 N. E. 289.

Promise by indorser.— If the indorser of a promissory note, after the note has been dishonored, and after knowledge of his discharge by the laches of the holder in demanding payment or by an insufficient protest, promises to pay the note, his promise will be enforced, although not in writing. U. S. Bank *v.* Southard, 17 N. J. L. 473, 35 Am. Dec. 521; Uhler *v.* Farmers' Nat. Bank, 64 Pa. St. 406; Fell *v.* Dial, 14 S. C. 247, 251, where the court says: "The new promise does not constitute the cause of action; it only operates as a waiver of the necessity of proving facts — demand and notice — which, but for such promise, would be necessary to sustain an action on the original note, which is the real cause of action, and the contract evidenced by the note cannot be said to be *nudum pactum*, nor is it within the statute of frauds." *Contra*, Huntington *v.* Harvey, 4 Conn. 124; Peabody *v.* Harvey, 4 Conn. 119, 10 Am. Dec. 103.

Promise by principal.— The oral engagement of a principal to be responsible for the payment of drafts to be drawn by his agent and cashed by a bank (Kohn *v.* Ft. Scott First Nat. Bank, 15 Kan. 428), or to repay to his broker money which he has ordered his broker to pay on reclamations for defects in goods sold for him by the broker (Dewey *v.* Massingale, 14 Mo. App. 579), is enforceable.

Promise by surety.— A surety on a defendant's bail-bond who agrees by parol to pay plaintiff's costs if he will discontinue his action, or to pay defendant's counsel for prosecuting an appeal from an order overruling a motion to vacate defendant's arrest is liable. Morgan *v.* Woodruff, 12 Daly (N. Y.) 207; Murphy *v.* Gates, 81 Wis. 370, 51 N. W. 573.

77. *Maryland.*— Wyman *v.* Gray, 7 Harr. & J. 409.

Massachusetts.— Andover Free Schools *v.* Flint, 13 Metc. 539. And see Flint *v.* Pierce, 99 Mass. 68, 96 Am. Dec. 691, holding that the promise of a shareholder to become personally liable for the debts of the corporation beyond the extent to which he stands liable under the law is within the statute.

Pennsylvania.— Putnam Mach. Co. *v.* Cann, 173 Pa. St. 392, 34 Atl. 67.

Tennessee.— Searight *v.* Payne, 2 Tenn. Ch. 175.

Wisconsin.— See Hooker *v.* Russell, 67 Wis. 257, 30 N. W. 358, holding that the oral engagement of the president of a village which has been enjoined from paying its attorneys for services rendered in prosecutions for selling liquor to pay them if they are unable to collect from the village is unenforceable.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 26.

Personal liability of stock-holders on their promise to pay their shares of money advanced by their committee prior to the organization to carry out the purposes of the incorporation see Grant *v.* Pearce, 16 Ky. L. Rep. 204; Smith *v.* Caldwell, 6 Ida. 436, 55 Pac. 1065; Walden *v.* Karr, 88 Ill. 49; Prather *v.* Vineyard, 9 Ill. 40; Stoelker *v.* Chicago Bldg. Supply Co., 22 Ill. App. 625; Watkins *v.* Sands, 4 Ill. App. 207. See, however, Laidlou *v.* Hatch, 75 Ill. 11, holding such agreements to be within the statute.

statute of frauds is not available in the case of one who, having money or property of the original debtor deposited with or intrusted to him for the purpose of paying a debt, orally engages to pay it. As between him and the original debtor, it is his duty to pay the debt, so that when he promises the creditor so to do he in reality engages to answer for his own debt; and although the original debtor still remains liable, he stands rather in the relation of surety for the promisor, while the latter really holds the fund in trust to apply it according to his engagement.[78] Although the promise may be conditional, as upon receiving funds of the debtor to the amount of the debt, still the statute does not apply.[79] However, the mere possession by the promisor of funds belonging to the original debtor which were not deposited with him for the purpose of paying the debt will not suffice to withdraw an oral promise to pay the debt from the operation of the statute;[80] and if the goods of a person who is indebted to the original

78. *Alabama.*— Clark *v.* Jones, 85 Ala. 127, 4 So. 771; Wright *v.* State, 79 Ala. 262; Hughes *v.* Stringfellow, 15 Ala. 324; Cameron *v.* Clarke, 11 Ala. 259; McKenzie *v.* Jackson, 4 Ala. 230.

California.— Lucas *v.* Payne, 7 Cal. 92.

Colorado.— Hughes *v.* Fisher, 10 Colo. 383, 15 Pac. 702; Baldwin Coal Co. *v.* Davis, 15 Colo. App. 371, 62 Pac. 1041; Hamill *v.* Hall, 4 Colo. App. 290, 35 Pac. 927.

Connecticut.— Milliken *v.* Warner, 62 Conn. 51, 25 Atl. 450; Tuttle *v.* Armstead, 53 Conn. 175, 22 Atl. 677; Drakeley *v.* Deforest, 3 Conn. 272.

Georgia.— Ledbetter *v.* McGhees, 84 Ga. 227, 10 S. E. 727; Davis *v.* Banks, 45 Ga. 138.

Indiana.— Woodward *v.* Wilcox, 27 Ind. 207; Nelson *v.* Hardy, 7 Ind. 364.

Iowa.— French *v.* French, 84 Iowa 655, 51 N. W. 145, 15 L. R. A. 300.

Kansas.— Harrison *v.* Simpson, 17 Kan. 508.

Maine.— Goodwin *v.* Bowden, 54 Me. 424; McKeenan *v.* Thissel, 33 Me. 368; Hilton *v.* Dinsmore, 21 Me. 410.

Maryland.— Raymner *v.* Sim, 3 Harr. & M. 451, 1 Am. Dec. 379.

Massachusetts.— Towne *v.* Grover, 9 Pick. 306.

Michigan.— Gleason *v.* Fitzgerald, 105 Mich. 516, 63 N. W. 512; Bice *v.* Marquette Opera-House Bldg. Co., 96 Mich. 24, 55 N. W. 382; Mitts *v.* McMorran, 85 Mich. 94, 48 N. W. 288, 64 Mich. 664, 31 N. W. 521; Calkins *v.* Chandler, 36 Mich. 320, 24 Am. Rep. 593.

Missouri.— Deal *v.* Mississippi County Bank, 79 Mo. App. 262.

Nebraska.— Rogers *v.* Empkie Hardware Co., 24 Nebr. 653, 39 N. W. 844.

Nevada.— Wills *v.* State Bank, 23 Nev. 59, 42 Pac. 490.

New Hampshire.— Rounsevel *v.* Osgood, 68 N. H. 418, 44 Atl. 535.

New York.—Roussel *v.* Mathews, 171 N. Y. 634, 63 N. E. 1122 [*affirming* 62 N. Y. App. Div. 1, 70 N. Y. Suppl. 886]; Sing Sing First Nat. Bank *v.* Chalmers, 144 N. Y. 432, 39 N. E. 331; Phelps *v.* Rowe, 75 Hun 414, 27 N. Y. Suppl. 89; Cock *v.* Moore, 18 Hun 31; May *v.* Malone Nat. Bank, 9 Hun 108; Huber *v.* Ely, 45 Barb. 169; Lippincott *v.* Ashfield, 4 Sandf. 611; Wyman *v.* Smith, 2 Sandf. 331; Ridgway *v.* Grace, 2 Misc. 293, 21 N. Y. Suppl. 934; Colwell *v.* Harison, Liv. Jud. Op. 40. *Contra,* Jackson *v.* Rayner, 12 Johns. 291. See also Weyer *v.* Beach, 79 N. Y. 409 [*affirming* 14 Hun 231].

North Carolina.— Mason *v.* Wilson, 84 N. C. 51, 37 Am. Rep. 612; Threadgill *v.* McLendon, 76 N. C. 24.

Ohio.— Estabrook *v.* Gebhart, 32 Ohio St. 415; Hiltz *v.* Scully, 1 Cinc. Super. Ct. 555.

Pennsylvania.— Fehlinger *v.* Wood, 134 Pa. St. 517, 19 Atl. 746; Smith *v.* Exchange Bank, 110 Pa. St. 508, 1 Atl. 760; Dock *v.* Boyd, 93 Pa. St. 92; Stoudt *v.* Hine, 45 Pa. St. 30; Howes *v.* McCrea, 21 Pa. Super. Ct. 592. See, however, Shaaber *v.* Bushong, 105 Pa. St. 514; Borkey's Estate, 2 Woodw. 163.

Rhode Island.— Peck *v.* Goff, 18 R. I. 94, 25 Atl. 690.

South Carolina.— Cohen *v.* Hart, 2 Hill 304; Madden *v.* McCray, 1 McCord 486. *Contra,* Simpson *v.* Nancy, 1 Speers 4.

Texas.— Moore *v.* Alston, 4 Tex. App. Civ. Cas. § 279, 17 S. W. 1117.

Vermont.— Bailey *v.* Bailey, 56 Vt. 398; Fullam *v.* Adams, 37 Vt. 391; Wait *v.* Wait, 28 Vt. 350; Merrill *v.* Englesby, 28 Vt. 150.

Washington.— Silsby *v.* Frost, 3 Wash. Terr. 388, 17 Pac. 887.

England.— Williams *v.* Leper, 3 Burr. 1886, 2 Wils. C. P. 302.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 54.

Contra.— Laidlou *v.* Hatch, 75 Ill. 11; Emerick *v.* Sanders, 1 Wis. 77. And see New York and South Carolina cases cited *supra,* this note.

79. McKeenan *v.* Thissel, 33 Me. 368. If, however, the promisor receives property from the debtor for the purpose of paying the debt from the proceeds, his liability on an oral promise is held not to be enforceable until such proceeds have been realized, and then only to the extent of such proceeds. Ackley *v.* Parmenter, 98 N. Y. 425, 50 Am. Rep. 693; Belknap *v.* Bender, 75 N. Y. 446, 31 Am. Rep. 476. And see Williams *v.* Leper, 3 Burr. 1886, 2 Wils. C. P. 302.

80. Hughes *v.* Lawson, 31 Ark. 613; Hoppock *v.* Wilson, 4 N. J. L. 149; Murphy *v.* Renkert, 12 Heisk. (Tenn.) 397.

debtor are in charge of a depositary, a promise by the latter to the creditor to pay the debt is within the statute.[81]

C. Promise to Debtor to Discharge Debt — 1. In General. An oral promise to discharge the debt of another, if made to the debtor himself, is not within the statute of frauds. The statute applies only to oral promises made to a person to whom another is answerable.[82]

2. Assumption of Debt in Consideration of Transfer of Property[83] — a. General Rule. The promise of a transferee of property, made in consideration of the transfer, to assume and discharge an indebtedness of the transferrer to a third person is obligatory on him, although resting in parol. By adopting this particular mode of discharging his own debt to the transferrer the transferee in effect makes the debt of the latter his own; and the fact that by thus paying his own debt he incidentally discharges the debt of another does not bring his promise within the

81. Ridgeway *v.* Grace, 2 Misc. (N. Y.) 293, 21 N. Y. Suppl. 934; Quin *v.* Hanford, 1 Hill (N. Y.) 82.

82. *Alabama.*— Moore *v.* Florence First Nat. Bank, 139 Ala. 595, 36 So. 777; Clark *v.* Jones, 85 Ala. 127, 4 So. 771.

Connecticut.— Reed *v.* Holcomb, 31 Conn. 360; Pratt *v.* Humphrey, 22 Conn. 317.

Indiana.—Windell *v.* Hudson, 102 Ind. 521, 2 N. E. 303; Louisville, etc., R. Co. *v.* Caldwell, 98 Ind. 245; Fisher *v.* Wilmoth, 68 Ind. 449; Whitesell *v.* Heiney, 58 Ind. 108; Palmer *v.* Blain, 55 Ind. 11; Brake *v.* King, 54 Ind. 294; Crim *v.* Fitch, 53 Ind. 214; Helms *v.* Kearns, 40 Ind. 124. In Decker *v.* Shaffer, 3 Ind. 187, the fact that defendant, having purchased a chattel from plaintiff's debtor, orally agreed with the vendor to pay his debt to plaintiff therefor seems to have escaped the attention of the court, which held that, the original debtor continuing liable, plaintiff could not recover on defendant's oral agreement.

Iowa.— Morrison *v.* Hogue, 49 Iowa 574.

Kansas.— Patton *v.* Mills, 21 Kan. 163; Center *v.* McQuesten, 18 Kan. 476.

Kentucky.— Williams *v.* Rogers, 14 Bush 776; North *v.* Robinson, 1 Duv. 71; Davis *v.* Wiley, 3 Ky. L. Rep. 755.

Maine.— Tarr *v.* Northey, 17 Me. 113, 35 Am. Dec. 232.

Maryland.— Harwood *v.* Jones, 10 Gill & J. 404, 32 Am. Dec. 180.

Massachusetts.— Hubon *v.* Park, 116 Mass. 541; Aldrich *v.* Ames, 9 Gray 76; Alger *v.* Scoville, 1 Gray 391; Pike *v.* Brown, 7 Cush. 133; Preble *v.* Baldwin, 6 Cush. 549; Weld *v.* Nichols, 17 Pick. 538; Colt *v.* Root, 17 Mass. 229.

Michigan.— Comstock *v.* Norton, 36 Mich. 277; Green *v.* Brookins, 23 Mich. 48, 9 Am. Rep. 74.

Minnesota.— Stariha *v.* Greenwood, 28 Minn. 521, 11 N. W. 76; Sullivan *v.* Murphy, 23 Minn. 6; Goetz *v.* Foos, 14 Minn. 265, 100 Am. Dec. 218.

Mississippi.— Ware *v.* Allen, 64 Miss. 545, 1 So. 738, 60 Am. Rep. 67; Brantley *v.* Carter, 26 Miss. 282, holding an oral promise that if the promisee will prosecute a certain action and it terminates unfavorably to him the promisor will pay the costs and expenses of the suit to be an original undertaking and not within the statute.

Missouri.— Brown *v.* Brown, 47 Mo. 130, 4 Am. Rep. 320; Howard *v.* Cashow, 33 Mo. 118; Flemm *v.* Whitmore, 23 Mo. 430; Duerre *v.* Ruediger, 65 Mo. App. 407.

Nebraska.— Clopper *v.* Poland, 12 Nebr. 69, 10 N. W. 538.

New Hampshire.— Gill *v.* Ferrin, 71 N. H. 421, 52 Atl. 558; Fiske *v.* McGregory, 34 N. H. 414; Tibbetts *v.* Flanders, 18 N. H. 284.

New York.— Barker *v.* Bucklin, 2 Den. 45, 43 Am. Dec. 726; Mersereau *v.* Lewis, 25 Wend. 243; Harrison *v.* Sawtel, 10 Johns. 242, 6 Am. Dec. 337.

Ohio.— Teeters *v.* Lamborn, 43 Ohio St. 144, 1 N. E. 513.

Pennsylvania.— Oliphant *v.* Patterson, 56 Pa. St. 368. In this state, however, the question does not appear to be definitely settled. See Fehlinger *v.* Wood, 134 Pa. St. 517, 19 Atl. 746; Miller *v.* Long, 45 Pa. St. 350.

Rhode Island.— Wood *v.* Moriarty, 15 R. I. 518, 9 Atl. 427.

Texas.— Bexar Bldg., etc., Assoc. *v.* Newman, (Civ. App. 1893) 25 S. W. 461.

Vermont.— Randall *v.* Kelsey, 46 Vt. 158; Beaman *v.* Russell, 20 Vt. 205, 49 Am. Dec. 775.

Washington.— McGraw *v.* Franklin, 2 Wash. 17, 25 Pac. 911, 26 Pac. 810.

Wisconsin.— Fosha *v.* O'Donnell, 120 Wis. 336, 97 N. W. 924; Vogel *v.* Melms, 31 Wis. 306, 11 Am. Rep. 608.

England.— Eastwood *v.* Kenyon, 11 A. & E. 438, 9 L. J. Q. B. 409, 3 P. & D. 276, 39 E. C. L. 245 (a leading case); Reader *v.* Kingham, 13 C. B. N. S. 344, 9 Jur. N. S. 797, 32 L. J. C. P. 108, 7 L. T. Rep. N. S. 789, 11 Wkly. Rep. 366, 106 E. C. L. 344; Hargreaves *v.* Parsons, 14 L. J. Exch. 250, 13 M. & W. 561.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 27.

Contra.— Martin *v.* McNeely, 101 N. C. 634, 8 S. E. 231; Erwin *v.* Waggoman, Cooke (Tenn.) 401.

Consideration for promise to pay another's debt see Contracts, 9 Cyc. 319.

83. Assumption defined see Assumption, 4 Cyc. 361.

statute of frauds.[84] This principle applies to an oral promise by a grantee of land to pay a debt of the grantor to a third person as part of the consideration,[85] an oral promise by the purchaser of lands or chattels which are subject to a mortgage or other encumbrance to assume and pay off the encumbrance as part of the

Right of original creditor to enforce promise see CONTRACTS, 9 Cyc. 374 *et seq.*

84. *California.*— Meyer *v.* Parsons, 129 Cal. 653, 62 Pac. 216.

Colorado.— McIntire *v.* Schiffer, 31 Colo. 246, 72 Pac. 1056.

Florida.— American Lead Pencil Co. *v.* Wolfe, 30 Fla. 360, 11 So. 488.

Illinois.— Meyer *v.* Hartman, 72 Ill. 442; Wilson *v.* Bevans, 58 Ill. 232; Knisely *v.* Brown, 95 Ill. App. 516; Kee *v.* Cahill, 86 Ill. App. 561 [*affirmed* in 187 Ill. 218, 58 N. E. 351]; Scudder *v.* Carter, 43 Ill. App. 252.

Indiana.— Tibbet *v.* Zurbuch, 22 Ind. App. 354, 52 N. E. 815; Deering *v.* Armstrong, 14 Ind. App. 44, 42 N. E. 372.

Iowa.— Clinton Nat. Bank *v.* Studemann, 74 Iowa 104, 37 N. W. 112; Chamberlin *v.* Ingalls, 38 Iowa 300; Johnson *v.* Knapp, 36 Iowa 616.

Maine.— Perkins *v.* Hitchcock, 49 Me. 468; Todd *v.* Tobey, 29 Me. 219; Brown *v.* Attwood, 7 Me. 356.

Minnesota.— Sullivan *v.* Murphy, 23 Minn. 6.

Mississippi.— Wear-Boogher Dry Goods Co. *v.* Kelly, 84 Miss. 236, 36 So. 258.

Missouri.— Schufeldt *v.* Smith, 139 Mo. 367, 40 S. W. 887; Flanagan *v.* Hutchinson, 47 Mo. 237; Robbins *v.* Ayres, 10 Mo. 538, 47 Am. Dec. 125; Price *v.* Reed, 38 Mo. App. 489. In Filley *v.* McHenry, 84 Mo. 277 [*affirming* 12 Mo. App. 582], an oral agreement by the purchaser of a newspaper, as part of the price, to pay its debts appears to have been regarded as within the statute, but the question whether defendant made such an agreement was decided in the negative by the verdict.

Nevada.— Alcalda *v.* Morales, 3 Nev. 132.

New York.— Becker *v.* Krank, 176 N. Y. 545, 68 N. E. 1114 [*affirming* 75 N. Y. App. Div. 191, 77 N. Y. Suppl. 665]; Sing Sing First Nat. Bank *v.* Chalmers, 144 N. Y. 432, 39 N. E. 331; Berg *v.* Spitz, 87 N. Y. App. Div. 602, 84 N. Y. Suppl. 532; Huber *v.* Ely, 45 Barb. 169; Westfall *v.* Parsons, 16 Barb. 645; Cox *v.* Weller, 6 Thomps. & C. 309; Connor *v.* Williams, 2 Rob. 46; Stilwell *v.* Otis, 2 Hilt. 148, 7 Abb. Pr. 431; Cailleux *v.* Hall, 1 E. D. Smith 5; Lyon *v.* Clochessy, 43 Misc. 67, 86 N. Y. Suppl. 245; Metzger *v.* Edson, 25 Misc. 236, 55 N. Y. Suppl. 61; New York Small Stock Co. *v.* Klosset, 13 Misc. 234, 34 N. Y. Suppl. 60; Sternwald *v.* Siegel, 7 Misc. 70, 27 N. Y. Suppl. 375; Barker *v.* Bucklin, 2 Den. 45, 43 Am. Dec. 726 (a leading case); Jennings *v.* Webster, 7 Cow. 256; Farley *v.* Cleveland, 4 Cow. 432, 15 Am. Dec. 387; Skelton *v.* Brewster, 8 Johns. 376.

North Carolina.— Stanly *v.* Hendricks, 35 N. C. 86.

Ohio.— Laws *v.* Scales, 7 Ohio Dec. (Reprint) 220, 1 Cinc. L. Bul. 314.

Pennsylvania.— Sargent *v.* Johns, 206 Pa. St. 386, 55 Atl. 1051; Delp *v.* Bartholomay Brewing Co., 123 Pa. St. 42, 15 Atl. 871; Wynn *v.* Wood, 97 Pa. St. 216; Clymer *v.* De Young, 54 Pa. St. 118; Baily *v.* Shroyer, 1 Pa. Cas. 128, 1 Atl. 717; Dunlevy's Estate, 10 Pa. Co. Ct. 454; Pittsburgh, etc., R. Co. *v.* Stokes, 4 Wkly. Notes Cas. 550.

Tennessee.— Moore *v.* Stovall, 2 Lea 543 [*overruling* Campbell *v.* Findley, 3 Humphr. 330].

Texas.— Spann *v.* Cochran, 63 Tex. 240; Monroe *v.* Buchanan, 27 Tex. 241; Bennett *v.* Rosenthal, 3 Tex. App. Civ. Cas. § 156.

Vermont.— Keyes *v.* Allen, 65 Vt. 667, 27 Atl. 319; Gleason *v.* Briggs, 28 Vt. 135.

Virginia.— Skinker *v.* Armstrong, 86 Va. 1011, 11 S. E. 977.

Washington.— Dimmick *v.* Collins, 24 Wash. 78, 63 Pac. 1101; Don Yook *v.* Washington Mill Co., 16 Wash. 459, 47 Pac. 964; Silsby *v.* Frost, 3 Wash. Terr. 388, 17 Pac. 887.

West Virginia.— Hooper *v.* Hooper, 32 W. Va. 526, 9 S. E. 937.

Wisconsin.— Green *v.* Hadfield, 89 Wis. 138, 61 N. W. 310.

Canada.— Clark *v.* Waddell, 16 U. C. Q. B. 352; McDonell *v.* Cook, 1 U. C. Q. B. 542.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 29.

85. *Georgia.*— Ford *v.* Finney, 35 Ga. 258.

Indiana.— Lowe *v.* Turpie, 147 Ind. 652, 44 N. E. 25, 47 N. E. 150, 37 L. R. A. 233.

Iowa.— Morrison *v.* Hogue, 49 Iowa 574.

Kentucky.— Mudd *v.* Carrico, 104 Ky. 719, 47 S. W. 1080, 20 Ky. L. Rep. 898; Hodgkins *v.* Jackson, 7 Bush 342; Jennings *v.* Crider, 2 Bush 322, 92 Am. Dec. 487; Daniels *v.* Gibson, 47 S. W. 621, 20 Ky. L. Rep. 847.

Minnesota.— Stariha *v.* Greenwood, 28 Minn. 521, 11 N. W. 76.

Nebraska.— Clopper *v.* Poland, 12 Nebr. 69, 10 N. W. 538.

New Jersey.— Berry *v.* Doremus, 30 N. J. L. 399.

New York.— Seaman *v.* Hasbrouck, 35 Barb. 151.

North Carolina.— Rice *v.* Carter, 33 N. C. 298.

Ohio.— Swihart *v.* Shaum, 24 Ohio St. 432.

Oregon.— Feldman *v.* McGuire, 34 Oreg. 309, 55 Pac. 872.

Pennsylvania.— Taylor *v.* Preston, 79 Pa. St. 436.

Texas.— Morris *v.* Gaines, 82 Tex. 255, 17 S. W. 538; Traders' Nat. Bank *v.* Clare, 76 Tex. 47, 13 S. W. 183.

Wisconsin.— Hoile *v.* Bailey, 58 Wis. 434, 17 N. W. 322.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 29.

price,[86] and an oral promise by a subtenant to pay the rent reserved in a lease, or by an assignee of an interest of a joint lessee to pay the arrears of rent.[87] If, however, the oral promise is made after the purchase and is not connected with the consideration to be paid therefor it is a collateral undertaking and cannot be enforced.[88]

b. Transfer of Partnership Property. The rule stated in the preceding section[89] applies also to verbal agreements by the purchaser of a partner's interest in partnership property to pay, as part of the consideration therefor, the debts of the old firm. By such agreement the debts become the debts of the promisor, and the statute affords him no defense.[90] And the rule is the same where, upon the withdrawal of one partner, the remaining partners orally assume the payment of the indebtedness of the firm as formerly constituted.[91]

D. Promise to Indemnify — 1. In General. An important class of cases in connection with the fourth section of the statute is that which involves the question of the validity of an oral promise of indemnity. Such a promise, which in effect is merely an engagement to answer for the debt or default of another, is not withdrawn from the operation of the statute merely because it is in form a promise to indemnify; but in general it may be said that a promise by parol to indemnify another against loss or damage by reason of his act or undertaking is not within the statute of frauds if the effect of such undertaking on the part of the promisee is not such as to render any third person also liable to indemnify him. In such case the statute does not apply because, there being no existing liability of a third person to the promisee, there is nothing to which the promise can be collateral, and because further the statute, as has already been seen,[92]

Contra.—Furbish *v.* Goodnow, 98 Mass. 296.

86. *Colorado.*— Mulvaney *v.* Gross, 1 Colo. App. 112, 27 Pac. 878.

Connecticut.— Tuttle *v.* Armstead, 53 Conn. 175, 22 Atl. 677; Foster *v.* Atwater, 42 Conn. 244; Elting *v.* Clinton Mills Co., 36 Conn. 296; Randall *v.* Latham, 36 Conn. 48; Townsend *v.* Ward, 27 Conn. 610; Hinsdale *v.* Humphrey, 15 Conn. 431.

Illinois.— Frame *v.* August, 88 Ill. 424; Meyer *v.* Hartman, 72 Ill. 442; Albretch *v.* Wolf, 58 Ill. 186; Rabbermann *v.* Wiskamp, 54 Ill. 179; McCasland *v.* Doorley, 47 Ill. App. 513.

Indiana.— Lowe *v.* Hamilton, 132 Ind. 406, 31 N. E. 1117; McDill *v.* Gunn, 43 Ind. 315; Helms *v.* Kearns, 40 Ind. 124.

Kansas.— Neiswanger *v.* McClellan, 45 Kan. 599, 26 Pac. 18.

Massachusetts.— Pike *v.* Brown, 7 Cush. 133.

Missouri.— Dobyns *v.* Rice, 22 Mo. App. 448.

New Hampshire.— Provenchee *v.* Piper, 68 N. H. 31, 36 Atl. 552; Fiske *v.* McGregory, 34 N. H. 414.

New Jersey.— Huyler *v.* Atwood, 26 N. J. Eq. 504 [*affirmed* in 28 N. J. Eq. 275].

New York.— Murray *v.* Smith, 1 Duer 412; Ely *v.* McNight, 30 How. Pr. 97.

Ohio.— Cushman *v.* Garrison, 2 Cinc. Super. Ct. 145.

Pennsylvania.— Elkins *v.* Timlin, 151 Pa. St. 491, 25 Atl. 139; Weber *v.* Bishop, 12 Pa. Super. Ct. 51.

Rhode Island.— Urquhart *v.* Brayton, 12 R. I. 169.

Tennessee.— Moore *v.* Stovall, 2 Lea 543 [*overruling* Campbell *v.* Findley, 3 Humphr. 330].

See 23 Cent. Dig. tit. "Frauds, Statute of," § 29.

This rule applies, although the promise is to pay the mortgage debt on other land conveyed to a third person by the grantor of the promisor at the same time as the conveyance to him (McDowell *v.* Miller, 1 Kan. App. 666, 42 Pac. 402), and although the promise is to pay the taxes thereafter to be assessed on the land conveyed as of the preceding first day of May (Preble *v.* Baldwin, 6 Cush. (Mass.) 549).

87. Neagle *v.* Kelly, 146 Ill. 460, 34 N. E. 947 [*affirming* 44 Ill. App. 234]; Burrell *v.* Bull, 3 Sandf. Ch. (N. Y.) 15.

88. Berkshire *v.* Young, 45 Ind. 461.

89. See *supra*, IV, C, 2, a.

90. *Alabama.*— Lee *v.* Fontaine, 10 Ala. 755, 44 Am. Dec. 505.

Indiana.— Dickson *v.* Conde, 148 Ind. 279, 46 N. E. 998; Haggerty *v.* Johnston, 48 Ind. 41.

Iowa.— Poole *v.* Hintrager, 60 Iowa 180, 14 N. W. 223.

Nebraska.— Bartlett *v.* Smith, (1904) 98 N. W. 687.

New York.— Smart *v.* Smart, 97 N. Y. 559; Wright *v.* Carman, 19 N. Y. Suppl. 696; Schindler *v.* Euell, 45 How. Pr. 33.

Pennsylvania.— Townsend *v.* Long, 77 Pa. St. 143, 18 Am. Rep. 438; Rupp *v.* Teihl, 29 Leg. Int. 245; Allentown First Nat. Bank *v.* Eichelberger, 1 Woodw. 397.

Texas.— Brazee *v.* Woods, 35 Tex. 302; Gay *v.* Pemberton, (Civ. App. 1898) 44 S. W. 400.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 30.

91. Vanness *v.* Dubois, 64 Ind. 338; Bonebright *v.* Pease, 3 Mich. 318.

92. See *supra*, IV, C.

applies only to promises made to one to whom another is answerable and not to promises made to one who himself is or may become the original debtor.[93] Thus an oral promise that if another person will sign a note the promisor will pay it, made before the note is signed, is not within the statute, because aside from the consideration that it is made directly to the person who is to become the primary debtor, there is no liability of any third person, express or implied, to which it can be collateral;[94] and where, to procure plaintiff's accommodation indorsement of the note of a third person to enable defendant to get it discounted, defendant orally promises to see plaintiff paid or to indemnify him if he is compelled to pay it, the statute does not apply, it being the same as if plaintiff had indorsed defendant's own note to enable him to raise money on it.[95] So an oral agreement by a judgment creditor to indemnify an officer against liability for the seizure of the property of a judgment debtor on execution is enforceable as an original engagement, because there is no element of a debt, default, or miscarriage of a third person in the engagement, and because the officer acts not for himself but as the agent of the judgment creditor, and the promisor undertakes to be responsible for the consequences of the acts of the officer in that capacity.[96] So an action will lie on an oral promise to indemnify against the consequences of a trespass committed by the promisee at the instance of the promisor in order to lay a foundation for trying a question of right of fishery or of title,[97] and on an oral promise to indemnify the promisee if allowed to institute an action against a third person in his name,[98] to indemnify the promisee for prosecuting or defending an action at law, if unsuccessful,[99] or to indemnify a person who sues as next

93. *Connecticut.*— Marcy *v.* Crawford, 16 Conn. 549, 41 Am. Dec. 158.

Indiana.— Cheesman *v.* Wiggins, 122 Ind. 352, 23 N. E. 945; Horn *v.* Bray, 51 Ind. 555, 19 Am. Rep. 742; Dickinson *v.* Colter, 45 Ind. 445.

Kentucky.— Floyd *v.* Harrison, 4 Bibb 76.

Louisiana.— Hoggatt *v.* Thomas, 35 La. Ann. 298.

Missouri.— Garner *v.* Hudgins, 46 Mo. 399, 2 Am. Rep. 520.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 32.

94. Godden *v.* Pierson, 42 Ala. 370; Green *v.* Brookins, 23 Mich. 48, 9 Am. Rep. 74; Faulkner *v.* Thomas, 48 W. Va. 148, 35 S. E. 915; Hull *v.* Brown, 35 Wis. 652.

95. Reed *v.* Holcomb, 31 Conn. 360; Warren *v.* Abbett, 65 N. J. L. 99, 46 Atl. 575; Cortelyou *v.* Hoagland, 40 N. J. Eq. 1; Thompson-Houston Electric Co. *v.* Berg, 10 Tex. Civ. App. 200, 30 S. W. 454; Vogel *v.* Melms, 31 Wis. 306, 11 Am. Rep. 608.

The rule is the same if the promisee is already an indorser of a third person's note, and the promisor orally agrees to indemnify him if he will pay it at maturity. Sanders *v.* Gillespie, 59 N. Y. 250.

96. Lerch *v.* Gallup, 67 Cal. 595, 8 Pac. 322; Stark *v.* Raney, 18 Cal. 622; McCartney *v.* Shepard, 21 Mo. 573, 64 Am. Dec. 250; Mays *v.* Joseph, 34 Ohio St. 22; Heidenheimer *v.* Johnston, 1 Tex. App. Civ. Cas. § 645.

Promise by others than creditor.— An agreement similar to that stated in the text, made by a third person or stranger to an execution before the seizure on execution, and therefore before any liability of the judgment debtor to the officer has accrued, is original and enforceable, although not in writing (Tarr *v.* Northey, 17 Me. 113, 35 Am. Dec. 232); and so is such an agreement by a claimant of goods seized on execution to indemnify the officer against all demands of the execution creditor if the goods are returned to him (Smith *v.* Robinson, 3 Ohio Cir. Ct. 257, 2 Ohio Cir. Dec. 146); and so is a promise by a defendant in an action commenced by trustee process that if the trustee will pay over to him the amount of the debt he will hold him harmless as to any judgment rendered against him as trustee (Soule *v.* Albee, 31 Vt. 142), as well as an oral agreement to indemnify an officer, in consideration of the release of an attachment, for any damages which may accrue in the action in which the attachment is made (Lightle *v.* Berning, 15 Nev. 389).

97. Marcy *v.* Crawford, 16 Conn. 549, 41 Am. Dec. 158; Allaire *v.* Ouland, 2 Johns. Cas. (N. Y.) 52; Adams *v.* Dansey, 6 Bing. 506, 8 L. J. C. P. 165, 4 M. & P. 245, 31 Rev. Rep. 480, 19 E. C. L. 231.

98. Goodspeed *v.* Fuller, 46 Me. 141, 71 Am. Dec. 572; Knight *v.* Sawin, 6 Me. 361; Weld *v.* Nichols, 17 Pick. (Mass.) 538.

99. Windell *v.* Hudson, 102 Ind. 521, 2 N. E. 303; Wells *v.* Mann, 45 N. Y. 327, 6 Am. Rep. 93 [*reversing* 52 Barb. 263]; Peck *v.* Thompson, 15 Vt. 637; Bullock *v.* Lloyd, 2 C. & P. 119, 12 E. C. L. 482. See Howes *v.* Martin, 1 Esp. 162. *Contra*, Mundy *v.* Ross, 15 N. J. L. 466 (where the court held a writing necessary to the validity of a promise by one plaintiff in an action to pay the costs and expenses incurred by a co-plaintiff. But it seems to have been overlooked that there was no existing debt of a third person to which such promise was collateral, and that the promise was made directly to the

friend to an infant.[1] An agreement by parol to procure a person to take plaintiff's place as stock-holder in a corporation and to indemnify him from expense or damage in consequence of becoming a stock-holder and of giving his note in payment for the stock is not within the statute, since there is no default of a third person to which such agreement can be collateral.[2]

2. Warranty of Title. As to an oral warranty of title by a third person who is a stranger to a contract of sale, it may be open to some question whether an undertaking of that nature comes properly within the purview of the statute of frauds, but it has been treated in the cases as if it were, and if it appears that it is collateral to an express or implied warranty of title by the vendor himself it is held to be within the statute and void.[3]

3. Reinsurance. An agreement to reinsure is not an undertaking to answer for the debt or default of the first insurer, but is an original undertaking entered into with him to indemnify the owner of the insured property in case a loss occurs, and the statute of frauds has no application to a contract of that nature.[4]

4. Coexisting Liability of Third Person. In a preceding section[5] reference was made to cases which hold that an oral promise to indemnify is not within the statute if the effect of the act or undertaking on the part of the promisee is not such as to render a third person also liable to indemnify him. There are many instances, however, in which the effect of the promisee's act or undertaking is to create an implied coexisting obligation of indemnity on the part of a third person. Upon the question whether, under such circumstances, an oral promise to indemnify is within the statute there has been much difference of opinion both in this country and in England; and while, in the latter country, the question may be considered as settled by authority, there is still much conflict of authority in the United States, not only among the different states, but among the different decisions in the same state, which has been produced in no inconsiderable degree by the vacillation of the English courts themselves.[6] In England it is practically

person who would be liable as the original debtor); Winckworth *v.* Mills, 2 Esp. 484 (a case of doubtful authority). See also Nixon *v.* Vanhise, 5 N. J. L. 491, 8 Am. Dec. 618.

1. Evans *v.* Mason, 1 Lea (Tenn.) 26.

2. Merchant *v.* O'Rourke, 111 Iowa 351, 82 N. W. 759; Green *v.* Brookins, 23 Mich. 48, 9 Am. Rep. 74. *Contra*, Kauffman *v.* Harstock, 31 Iowa 472; Conkey *v.* Hopkins, 17 Johns. (N. Y.) 113.

3. Stratton *v.* Hill, 134 Mass. 27; *In re* Tozer, 46 Mich. 299, 9 N. W. 424; Farnham *v.* Chapman, 61 Vt. 395, 18 Atl. 152; Cross *v.* Richardson, 30 Vt. 641. See, however, King *v.* Summitt, 73 Ind. 312, 38 Am. Rep. 145; Schell *v.* Stephens, 50 Mo. 375, holding that if an auctioneer in selling a chattel expressly agrees for himself to warrant the title, the promise is original and not collateral, and is good although not in writing.

4. Bartlett *v.* Fireman's Fund Ins. Co., 77 Iowa 155, 41 N. W. 601. *Contra*, Egan *v.* Fireman's Ins. Co., 27 La. Ann. 368.

5. See *supra*, IV, D, 1.

6. A brief review of the English cases will aid to an understanding of the diverse views which prevail in the courts of the United States. One of the earliest leading cases is Thomas *v.* Cook, 8 B. & C. 728, 7 L. J. K. B. O. S. 49, 3 M. & R. 444, 15 E. C. L. 358, which was decided in the queen's bench in 1828. There plaintiff, at the instance of defendant and on his oral promise to indemnify him, joined defendant as cosurety on the bond of a third person for the payment of his debt to a fourth. Plaintiff having been compelled to pay the debt, and it appearing that there was no liability on the part of the principal in the bond to plaintiff except that arising by operation of law to reimburse him for money expended in payment of the debt, defendant was held liable on his oral promise. A few years later, in 1839, the question again came before the same court in Green *v.* Creswell, 10 A. & E. 453, 4 Jur. 169, 9 L. J. Q. B. 63, 2 P. & D. 430, 37 E. C. L. 250, in which it appeared that, on defendant's oral promise of indemnity and at his request, plaintiff became bail for a third person who had been arrested on civil process. The court held that in view of the coexistent implied obligation of the third person, the promise was within the statute. As there was really nothing in principle to distinguish the foregoing cases, their conclusions are irreconcilable. The correctness of the later decision, however, was much doubted, and, although it was followed by the decision of the queen's bench in the case of Cripps *v.* Hartnoll, 2 B. & S. 697, 110 E. C. L. 697, in which an oral promise by defendant to indemnify plaintiff for becoming surety on the bail-bond of a third person who had been arrested in criminal proceedings was held to be collateral to the implied obligation of the accused to indemnify plaintiff, the judgment was reversed in the exchequer chamber (10

settled that if one person, at the request of another and on his oral guaranty of indemnity against loss, assumes a responsibility for the discharge of a third person's obligation to a fourth, he may recover against the guarantor, although there is on the part of the third person a coexistent implied obligation to indemnify the promisee; and the weight of authority in this country is in accordance with the English view.[7] In many states, however, a contrary view has been adopted,

Jur. N. S. 200, 32 L. J. Q. B. 381, 8 L. T. Rep. N. S. 768, 11 Wkly. Rep. 953) on the ground that, the bond having been given in a criminal proceeding, there was no implied obligation on the part of the principal to indemnify his surety. But in 1874 in a case in which an executor was permitted to charge the estate of his testator with the amount of an accommodation note which, at the request of his testator and on his oral promise of indemnity, he had made jointly with a third person and had been compelled to pay, the doctrine of Green *v.* Creswell was repudiated and the doctrine of Thomas *v.* Cook was preferred. Wildes *v.* Dudlow, L. R. 19 Eq. 198, 44 L. J. Ch. 341, 23 Wkly. Rep. 435. See also Guild *v.* Conrad, [1894] 2 Q. B. 885, 63 L. J. Q. B. 721, 71 L. T. Rep. N. S. 140, 9 Reports 746; Reader *v.* Kingham, 13 C. B. N. S. 344, 9 Jur. N. S. 797, 32 L. J. C. P. 108, 7 L. T. Rep. N. S. 789, 11 Wkly. Rep. 366, 106 E. C. L. 344; Browne St. Frauds (5th ed.) § 161*ff*.

7. *Connecticut.*— Smith *v.* Delaney, 64 Conn. 264, 29 Atl. 496, 42 Am. St. Rep. 181; Reed *v.* Holcomb, 31 Conn. 360; Stocking *v.* Sage, 1 Conn. 519. *Contra,* Clement's Appeal, 52 Conn. 464.

Georgia.— Jones *v.* Shorter, 1 Ga. 294, 44 Am. Dec. 649.

Illinois.— Resseter *v.* Waterman, 151 Ill. 169, 37 N. E. 875 [*reversing* 45 Ill. App. 155]. *Contra,* Brand *v.* Whelan, 18 Ill. App. 186.

Indiana.—Keesling *v.* Frazier, 119 Ind. 185, 21 N. E. 552; Anderson *v.* Spence, 72 Ind. 315, 37 Am. Rep. 162 [*overruling* Brush *v.* Carpenter, 6 Ind. 78]; Horn *v.* Bray, 51 Ind. 555, 19 Am. Rep. 742. See also Hassinger *v.* Newman, 83 Ind. 124, 43 Am. Rep. 64.

Iowa.— Mills *v.* Brown, 11 Iowa 314.

Kentucky.— Jones *v.* Letcher, 13 B. Mon. 363; Lucas *v.* Chamberlain, 8 B. Mon. 276; Dunn *v.* West, 5 B. Mon. 376; George *v.* Hoskins, 30 S. W. 406, 17 Ky. L. Rep. 63.

Louisiana.— Hoggatt *v.* Thomas, 35 La. Ann. 298.

Maine.— Smith *v.* Sayward, 5 Me. 504.

Massachusetts.— Aldrich *v.* Ames, 9 Gray 76; Chapin *v.* Lapham, 20 Pick. 467; Perley *v.* Spring, 12 Mass. 297.

Michigan.— Boyer *v.* Soules, 105 Mich. 31, 62 N. W. 1000; Potter *v.* Brown, 35 Mich. 274. *Contra,* Sturges First Nat. Bank *v.* Bennett, 33 Mich. 520.

Minnesota.— Esch *v.* White, 76 Minn. 220, 78 N. W. 1114; New York Fidelity, etc., Co. *v.* Lawler, 64 Minn. 144, 66 N. W. 143; Goetz *v.* Foos, 14 Minn. 265, 100 Am. Dec. 218.

Nebraska.— Minick *v.* Huff, 41 Nebr. 516, 59 N. W. 795.

New Hampshire.— Demeritt *v.* Bickford, 58 N. H. 523; Holmes *v.* Knight, 10 N. H. 175.

New York.— Jones *v.* Bacon, 145 N. Y. 446, 40 N. E. 216 [*affirming* 72 Hun 506, 25 N. Y. Suppl. 212]; Tighe *v.* Morrison, 116 N. Y. 263, 22 N. E. 164, 5 L. R. A. 617; Sanders *v.* Gillespie, 59 N. Y. 250; Barry *v.* Ransom, 12 N. Y. 462; Hanna *v.* Laurence, 9 N. Y. St. 619; Chapin *v.* Merrill, 4 Wend. 657; Harrison *v.* Sawtel, 10 Johns. 242, 6 Am. Dec. 337. See also Milks *v.* Rich, 80 N. Y. 269, 36 Am. Rep. 615. *Contra,* Barnett *v.* Wing, 62 Hun 125, 16 N. Y. Suppl. 567; Kingsley *v.* Balcome, 4 Barb. 131; Baker *v.* Dillman, 12 Abb. Pr. 313, 21 How. Pr. 444.

Ohio.— Ferrell *v.* Maxwell, 28 Ohio St. 383, 22 Am. Rep. 393 [*distinguishing* Kelsey *v.* Hibbs, 13 Ohio St. 340; Easter *v.* White, 12 Ohio St. 219, on the ground that in the case at bar the promisor was jointly bound by the same instrument while in the earlier cases he was not].

Oregon.— Rose *v.* Wollenberg, 31 Oreg. 269, 44 Pac. 382, 65 Am. St. Rep. 826, 39 L. R. A. 378.

Texas.— Campbell *v.* Pucket, 1 Tex. Unrep. Cas. 465.

Wisconsin.— Barth *v.* Graf, 101 Wis. 27, 76 N. W. 1100.

United States.— De Wolf *v.* Rabaud, 1 Pet. 476, 7 L. ed. 227.

England.— Wildes *v.* Dudlow, L. R. 19 Eq. 198, 44 L. J. Ch. 341, 23 Wkly. Rep. 435.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 33.

Reason of rule.—The difficulty realized both by the courts and by text-writers in finding the principle which logically leads to the conclusion that such a promise to indemnify is not within the statute is exemplified by the remark of the chancellor in Macey *v.* Childress, 2 Tenn. Ch. 438, that "no two of the decisions to that effect assign the same reason;" and the remarks in May *v.* Williams, 61 Miss. 125, 48 Am. Rep. 80, are to the same effect. Mr. Browne in his treatise on the statute of frauds says that "most of the decisions which reject the doctrine of Green *v.* Creswell, waive altogether the question of principle, and put it as a matter settled by authority that the 'promise to indemnify' is not within the statute." After an examination of the grounds of some of the decisions to the effect that plaintiff makes his engagement relying on defendant's special promise rather than upon the third party's liability, so that the decisive question is to whom was credit given by plaintiff, and stating his objections thereto, he submits as a ground upon which the doctrine may rest that the obligation of the third party exists only by force of and as incidental to the special contract between plaintiff and defendant, and that as the statute contemplates only obligations which exist independently of any oral contract of guaranty, it is not intended to

and a promise of indemnity given under such circumstances is held to be within the statute.[8]

E. Credit Given to Promisor[9] **— 1. General Rules.** In many cases in which goods have been sold or money has been advanced to one person on the oral promise of another to be answerable therefor, a decisive test as to the applicability of the statute of frauds to the promise is afforded by the determination of the question on whose credit the goods were sold or the money advanced. If it appears that the sale or loan was made in reliance solely on the credit of the promisor, and on his unconditional agreement to be answerable therefor, the statute does not apply;[10] and the rule is the same in the case of an oral promise

apply to an obligation which comes into existence only as an incident of the oral guaranty of indemnity. Browne St. Frauds (5th ed.) § 162. See for a further discussion of this subject Rose *v.* Wollenberg, 31 Oreg. 269, 44 Pac. 382, 65 Am. St. Rep. 826, 39 L. R. A. 378.

8. *Alabama.*— Brown *v.* Adams, 1 Stew. 51, 18 Am. Dec. 36.

Mississippi.— May *v.* Williams, 61 Miss. 125, 48 Am. Rep. 80.

Missouri.— Gansey *v.* Orr, 173 Mo. 532, 73 S. W. 477; Hurt *v.* Ford, 142 Mo. 283, 44 S. W. 228, 41 L. R. A. 823; Bissig *v.* Britton, 59 Mo. 204, 21 Am. Rep. 379.

New Jersey.— Hartley *v.* Sandford, 66 N. J. L. 627, 50 Atl. 454, 55 L. R. A. 206 [*reversing* 66 N. J. L. 40, 48 Atl. 1009]. *Contra,* Apgar *v.* Hiler, 24 N. J. L. 812.

North Carolina.— Draughan *v.* Bunting, 31 N. C. 10.

Pennsylvania.— Nugent *v.* Wolfe, 111 Pa. St. 471, 4 Atl. 15, 56 Am. Rep. 291.

South Carolina.— Simpson *v.* Nance, 1 Speers 4.

Tennessee.— Macey *v.* Childress, 2 Tenn. Ch. 438.

Virginia.— Wolverton *v.* Davis, 85 Va. 64, 6 S. E. 619, 17 Am. St. Rep. 56.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 33.

These cases follow Green v. Creswell, 10 A. & E. 453, 4 Jur. 169, 9 L. J. Q. B. 63, 2 P. & D. 430, 37 E. C. L. 250 [*overruled* in Wildes *v.* Dudlow, L. R. 19 Eq. 198, 44 L. J. Ch. 341, 23 Wkly. Rep. 435].

9. Admissibility of evidence to rebut presumption of credit to promisor see *infra,* XI, B, 2.

Question of credit as one for jury see *infra,* X, C, 2.

10. *Alabama.*— Clark *v.* Jones, 87 Ala. 474, 6 So. 362; Boykin *v.* Dohlonde, 37 Ala. 577; Rhodes *v.* Leeds, 3 Stew. & P. 212, 24 Am. Dec. 744.

Arkansas.— McTighe *v.* Herman, 42 Ark. 285.

Georgia.— Rushing Produce Co. *v.* Hilliard, 92 Ga. 555, 17 S. E. 848; Ellis *v.* Murray, 77 Ga. 542; Cruse *v.* Foster, 76 Ga. 723; Davis *v.* Tift, 70 Ga. 52; McLendon *v.* Frost, 57 Ga. 448.

Illinois.— Lusk *v.* Throop, 189 Ill. 127, 59 N. E. 529; Hartley *v.* Varner, 88 Ill. 561; Owen *v.* Stevens, 78 Ill. 462; Geary *v.* O'Neil, 73 Ill. 593; Hughes *v.* Atkins, 41 Ill. 213; Williams *v.* Corbet, 28 Ill. 262; Jenkins, etc., Co. *v.* Lundgren, 85 Ill. App. 494; Struble *v.* Hake, 14 Ill. App. 546.

Indiana.— Cox *v.* Peltier, 159 Ind. 355, 65 N. E. 6; Wills *v.* Ross, 77 Ind. 1, 40 Am. Rep. 279; Johnson *v.* Hoover, 72 Ind. 395.

Iowa.— Lessenich *v.* Pettit, 91 Iowa 609, 60 N. W. 192.

Kentucky.—Stepp *v.* Bacon, 1 A. K. Marsh. 535; Porter *v.* Langhorn, 2 Bibb 63; Guenther *v.* Sanders, 16 Ky. L. Rep. 447; Lexington City Nat. Bank *v.* Rutherford, 12 Ky. L. Rep. 632.

Massachusetts.— Phelps *v.* Stone, 172 Mass. 355, 52 N. E. 517; Barrett *v.* McHugh, 128 Mass. 165.

Michigan.— Foster, etc., Co. *v.* Felcher, 119 Mich. 353, 78 N. W. 120; Franks *v.* Stevens, 82 Mich. 192, 46 N. W. 369; Hake *v.* Solomon, 62 Mich. 377, 28 N. W. 908; Morris *v.* Osterhout, 55 Mich. 262, 21 N. W. 339; Larson *v.* Jensen, 53 Mich. 427, 19 N. W. 130.

Minnesota.— King *v.* Franklin Lumber Co., 80 Minn. 274, 83 N. W. 170; Maurin *v.* Fogelberg, 37 Minn. 23, 32 N. W. 858, 5 Am. St. Rep. 814; Grant *v.* Wolf, 34 Minn. 32, 24 N. W. 289.

Mississippi.—Wallace *v.* Wortham, 25 Miss. 119, 57 Am. Dec. 197.

Missouri.— Newton Grain Co. *v.* Pierce, 106 Mo. App. 200, 80 S. W. 268; Kansas City Sewer Pipe Co. *v.* Smith, 36 Mo. App. 608; Jackson *v.* Dodge, 4 Mo. App. 567.

Nebraska.— Williams *v.* Auten, 62 Nebr. 832, 87 N. W. 1061; Lindsey *v.* Heaton, 27 Nebr. 662, 43 N. W. 420.

New Jersey.— Gallagher *v.* McBride, 66 N. J. L. 360, 49 Atl. 582; Scudder *v.* Wade, 4 N. J. L. 249.

New York.— Jessup *v.* McGarry, 5 Silv. Supreme 274, 7 N. Y. Suppl. 751; McCaffil *v.* Radcliff, 3 Rob. 445; Flanders *v.* Crolius, 1 Duer 206; Graham *v.* O'Niel, 2 Hall 474; Griffin *v.* Keith, 1 Hilt. 58; Pennell *v.* Pentz, 4 E. D. Smith 639; Phillips *v.* Gray, 3 E. D. Smith 69; Fitzgerald *v.* Tiffany, 9 Misc. 408, 30 N. Y. Suppl. 195; Chase *v.* Day, 17 Johns. 114.

North Carolina.— Garrett-Williams Co. *v.* Hamill, 131 N. C. 57, 42 S. E. 448; White *v.* Tripp, 125 N. C. 523, 34 S. E. 686; Morrison *v.* Baker, 81 N. C. 76.

Oklahoma.— Kesler *v.* Cheadle, 12 Okla. 489, 72 Pac. 367; Trulock *v.* Balir, 8 Okla. 345, 58 Pac. 1097.

Pennsylvania.— McCully *v.* Porzel, 158 Pa. St. 513, 27 Atl. 866; Aldrich *v.* McConnell,

to pay for services rendered to a third person at the request of the promisor.[11] But in all such cases it is requisite that credit should be given exclusively to the promisor; if any credit be given to him for whose benefit the promise is made the promisor is not liable unless his promise is in writing,[12] and this is so, although the collateral undertaking may have been the principal inducement to the delivery of the goods or the performance of the services.[13] In determining to

81* Pa. St. 171; Van Horn *v.* A. Lewis Lumber Mfg. Co., 8 Kulp 508; Lefevre *v.* Farmers, etc., Bank, 2 Wkly. Notes Cas. 174.

Texas.— Muller *v.* Riviere, 59 Tex. 640, 46 Am. Rep. 291; Greenville First Nat. Bank *v.* Greenville Oil, etc., Co., 24 Tex. Civ. App. 645, 60 S. W. 828; Sledge *v.* Rayborn, 3 Tex. App. Civ. Cas. § 303.

Wisconsin.— Hopkins *v.* Stefan, 77 Wis. 45, 45 N. W. 676; Champion *v.* Doty, 31 Wis. 190; Hall *v.* Wood, 3 Pinn. 308, 4 Chandl. 36.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 35 *et seq.*

11. *Illinois.*— Pomeroy *v.* Patterson, 40 Ill. App. 275.

Kansas.— Backus *v.* Clark, 1 Kan. 303, 83 Am. Dec. 437.

Missouri.— Sinclair *v.* Bradley, 52 Mo. 180.

New Hampshire.— Brown *v.* George, 17 N. H. 128; Proprietors Upper Locks *v.* Abbott, 14 N. H. 157, 40 Am. Dec. 184.

New Jersey.— Hazeltine *v.* Wilson, 55 N. J. L. 250, 26 Atl. 79; Hetfield *v.* Dow, 27 N. J. L. 440.

New York.— Allen *v.* Scarff, 1 Hilt. 209; Dixon *v.* Frazee, 1 E. D. Smith 32.

North Carolina.—Neal *v.* Bellamy, 73 N. C. 384.

Pennsylvania.— Hibbs *v.* Woodward, 15 Wkly. Notes Cas. 338.

Rhode Island.— Thurston *v.* James, 6 R. I. 103.

South Carolina.— Black *v.* White, 13 S. C. 37.

South Dakota.— Meldrum *v.* Kenefick, 15 S. D. 370, 89 N. W. 863.

Texas.— Lyons *v.* Daugherty, (Civ. App. 1894) 26 S. W. 146.

Vermont.—Bushee *v.* Allen, 31 Vt. 631; Arbuckle *v.* Hawks, 20 Vt. 538.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 35 *et seq.*

12. *Alabama.*— Pake *v.* Wilson, 127 Ala. 240, 28 So. 665; Webb *v.* Hawkins Lumber Co., 101 Ala. 630, 14 So. 407.

Georgia.— Reynolds *v.* Simpson, 74 Ga. 454.

Illinois.— Everett *v.* Morrison, 1 Ill. 79; Schotte *v.* Puscheck, 79 Ill. App. 31.

Indiana.— Smock *v.* Brush, 62 Ind. 156, 176; Miller *v.* Neihaus, 51 Ind. 401; Billingsley *v.* Dempewolf, 11 Ind. 414.

Louisiana.— Graves *v.* Scott, 23 La. Ann. 690.

Maine.— Moses *v.* Norton, 36 Me. 113, 58 Am. Dec. 738.

Maryland.— Cropper *v.* Pittman, 13 Md. 190.

Massachusetts.— Swift *v.* Pierce, 13 Allen 136; Hill *v.* Raymond, 3 Allen 540; Cahill *v.* Bigelow, 18 Pick. 369.

Michigan.— Baumann *v.* Manistee Salt, etc., Co., 94 Mich. 363, 53 N. W. 113; Dupuis *v.* Interior Constr., etc., Co., 88 Mich. 103, 50 N. W. 103; Bates *v.* Donnelly, 57 Mich. 521, 24 N. W. 788; Barden *v.* Briscoe, 36 Mich. 254; Bresler *v.* Pendell, 12 Mich. 224.

Minnesota.— Cole *v.* Hutchinson, 34 Minn. 410, 26 N. W. 319.

Missouri.— Chick *v.* Frey Coal Co., 78 Mo. App. 234; Price *v.* Chicago, etc., R. Co., 40 Mo. App. 189.

New Jersey.— Hetfield *v.* Dow, 27 N. J. L. 440.

New York.— Allen *v.* Scarff, 1 Hilt. 209; Brady *v.* Sackrider, 1 Sandf. 514; Pennell *v.* Pentz, 4 E. D. Smith, 639.

Pennsylvania.— Eshleman *v.* Harnish, 76 Pa. St. 97.

Rhode Island.— Matteson *v.* Moone, 25 R. I. 129, 54 Atl. 1058; Wood *v.* Patch, 11 R. I. 445.

Vermont.— Newell *v.* Ingraham, 15 Vt. 422.

Virginia.— Ware *v.* Stephenson, 10 Leigh 155.

West Virginia.— Radcliff *v.* Roundstone, 23 W. Va. 724.

Wisconsin.— Rietzloff *v.* Glover, 91 Wis. 65, 64 N. W. 298; McDonell *v.* Dodge, 10 Wis. 106.

England.— Buckmyr *v.* Darnall, Holt 606, 2 Ld. Raym. 1085, 6 Mod. 248, 1 Salk. 27, 3 Salk. 15; Barber *v.* Fox, 1 Stark. 270, 2 E. C. L. 109; Matson *v.* Wharam, 2 T. R. 80, 1 Rev. Rep. 429.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 35 *et seq.*

If the promisee has the right of election as to whether he will hold the promisor or the person for whose benefit the promise was made, the promise is within the statute. Welch *v.* Marvin, 36 Mich. 59.

If credit is given a person to whom goods are sold or moneys advanced or for whom services are rendered, a subsequent oral promise by another person to pay the debt is unquestionably within the statute. Waggener *v.* Bells, 4 T. B. Mon. (Ky.) 7; Stidham *v.* Sanford, 36 N. Y. Super. Ct. 341.

13. *Maryland.*— Norris *v.* Graham, 33 Md. 56.

Massachusetts.—Bugbee *v.* Kendricken, 130 Mass. 437.

Mississippi.— Bloom *v.* McGrath, 53 Miss. 249; Lombard *v.* Martin, 39 Miss. 147.

New Hampshire.— Walker *v.* Richards, 39 N. H. 259.

New Jersey.— Hetfield *v.* Dow, 27 N. J. L. 440.

New York.— Read *v.* Ladd, 1 Edm. Sel. Cas. 100.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 35 *et seq.*

Expectation of payment by third person.— The fact that a seller of goods expects that

whom credit was given the jury are to take into consideration the extent of the undertaking, the expressions used, the situation of the parties, and all the circumstances of the case.[14]

2. Promise to Secure Performance of Work by Subcontractors. If a building is in course of erection under a contract, and subcontractors are apprehensive of the financial ability of the general contractor, and the owner, in order to induce them to continue to furnish materials or perform labor on the building, orally agrees to pay them himself, and they, relying on his credit, proceed with the work, his oral agreement will be enforced.[15]

3. Delivery on Request of Promisor After Refusal of Credit to Principal. The question whether goods were sold or services performed solely on defendant's credit is decisive of his liability in those cases also in which, upon the refusal of plaintiff to give credit to a third person, defendant requests the delivery of the goods to, or the performance of the services for, such third person and orally engages to pay for them or see them paid for. If in such cases the sole credit is given to defendant he is liable; otherwise not.[16]

4. Promises in Behalf of Persons Ill or Injured. Where medical services have been rendered to one person at the request of another and on the oral

a third person will pay for them does not render the third person liable in the absence of a promise to pay. Tileston *v.* Nettleton, 6 Pick. (Mass.) 509. See Farwell *v.* Dewey, 12 Mich. 436.

14. Boykin *v.* Dohlonde, 37 Ala. 577; Elder *v.* Warfield, 7 Harr. & J. (Md.) 391; Lakeman *v.* Mountstephen, L. R. 7 H. L. 17, 43 L. J. Q. B. 188, 30 L. T. Rep. N. S. 437, 22 Wkly. Rep. 617 [*affirming* L. R. 7 Q. B. 196 (*reversing* L. R. 5 Q. B. 613)]; Keate *v.* Temple, 1 B. & P. 158.

15. *Georgia.*— Sext *v.* Geise, 80 Ga. 698, 6 S. E. 174.

Illinois.— Schoenfeld *v.* Brown, 78 Ill. 487; Clifford *v.* Luhring, 69 Ill. 401.

Indiana.— Gibson County *v.* Cincinnati Steam-Heating Co., 128 Ind. 240, 27 N. E. 612, 12 L. R. A. 502.

Iowa.— Cedar Valley Mfg. Co. *v.* Starbard, (1902) 89 N. W. 14; Benbow *v.* Soothsmith, 76 Iowa 151, 40 N. W. 693.

Massachusetts.— Barrett *v.* McHugh, 128 Mass. 165; Walker *v.* Hill, 119 Mass. 249; Dean *v.* Tallman, 105 Mass. 443.

Michigan.—Wilhelm *v.* Voss, 118 Mich. 106, 76 N. W. 308; McLaughlin *v.* Austin, 104 Mich. 489, 62 N. W. 719; Hagadorn *v.* Stronach Lumber Co., 81 Mich. 56, 45 N. W. 650.

Minnesota.— Abbott *v.* Nash, 35 Minn. 451, 29 N. W. 65; Grant *v.* Wolf, 34 Minn. 32, 24 N. W. 289.

Missouri.—Yeoman *v.* Mueller, 33 Mo. App. 343.

Nebraska.— Fitzgerald *v.* Morrissey, 14 Nebr. 198, 15 N. W. 233.

Nevada.— Nesbitt *v.* Pioche Consol. Min., etc., Co., 22 Nev. 260, 38 Pac. 670.

New Jersey.— Kutzmeyer *v.* Ennis, 27 N. J. L. 371.

New York.— Raabe *v.* Squier, 148 N. Y. 81, 42 N. E. 516; Cox *v.* Halloran, 82 N. Y. App. Div. 639, 81 N. Y. Suppl. 803; Mannetti *v.* Doege, 48 N. Y. App. Div. 567, 62 N. Y. Suppl. 918; Almond *v.* Hart, 46 N. Y. App. Div. 431, 61 N. Y. Suppl. 849; Desmond *v.* Schenck, 36 N. Y. App. Div. 317, 55 N. Y. Suppl. 251; Alley *v.* Turck, 8 N. Y. App. Div. 50, 40 N. Y. Suppl. 433; W. T. Mersereau Co. *v.* Washburn, 6 N. Y. App. Div. 404, 30 N. Y. Suppl. 664; Snell *v.* Rogers, 70 Hun 462, 24 N. Y. Suppl. 379; Bayles *v.* Wallace, 56 Hun 428, 10 N. Y. Suppl. 191; Schultz *v.* Cohen, 13 Misc. 638, 34 N. Y. Suppl. 927; Boeff *v.* Rosenthal, 76 N. Y. Suppl. 988 [*affirmed* in 38 Misc. 760, 78 N. Y. Suppl. 1108]; Parkes *v.* Stafford, 16 N. Y. Suppl. 756.

Ohio.— Crawford *v.* Edison, 45 Ohio St. 239, 13 N. E. 80; Hiltz *v.* Scully, 1 Cinc. Super. Ct. 555; Fritz *v.* Lamping, 8 Ohio Dec. (Reprint) 520, 8 Cinc. L. Bul. 270.

Pennsylvania.—Merriman *v.* McManus, 102 Pa. St. 102; Jefferson County *v.* Slagle, 66 Pa. St. 202; Carey *v.* Albert, 2 Pearson 300; Vandegrift *v.* Cassidy, 1 Wkly. Notes Cas. 319; Wilson *v.* Munro, 3 Walk. 451; Warnick *v.* Grosholz, 3 Grant 234.

Texas.— Green *v.* Dallahan, 54 Tex 281; Pool *v.* Sanford, 52 Tex. 621.

Wisconsin.— Young *v.* French, 35 Wis. 111.

Canada.— Boorstein *v.* Moffatt, 36 Nova Scotia 81; Petrie *v.* Hunter, 2 Ont. 233 [*distinguishing* Bond *v.* Treahey, 37 U. C. Q. B. 360].

See 23 Cent. Dig. tit. "Frauds, Statute of," § 38.

16. *Arkansas.*— Brown *v.* Harrell, 40 Ark. 429.

Georgia.— Maddox *v.* Pierce, 74 Ga. 838.

Illinois.— Everett *v.* Morrison, 1 Ill. 79, holding that if, upon the refusal of credit to a third person, defendant promises merely that he will go security if the goods are furnished, and the goods are furnished accordingly, but are charged not to defendant but to the third person, defendant's promise is collateral and within the statute.

Maine.— Doyle *v.* White, 26 Me. 341, 45 Am. Dec. 110.

Nebraska.—Waters *v.* Shafer, 25 Nebr. 225, 41 N. W. 181.

New York.— Alger *v.* Johnson, 4 Hun 412, 6 Thomps. & C. 632; Tallman *v.* Bresler, 65

promise of the latter to pay therefor, it is generally held that if they are rendered on the sole credit of the promisor, and before any debt or liability therefor has been incurred by the person for whose benefit they were performed, the promise is original and not within the statute;[17] but if, after the services have been partially rendered, defendant requests that they be continued and orally promises to pay therefor, this does not constitute an original undertaking to pay for future services unless it is shown that they were rendered solely upon his credit and not upon that of the patient.[18]

5. Charges on Creditor's Books. In determining to whom, as between the promisor and the person for whose benefit the promise is made, the credit was actually given, an important consideration is the manner in which the creditor entered the transaction on his books. Evidence that the goods sold were charged to the person to whom they were delivered strongly tends to show that the vendor gave credit to him and relied upon him for payment, and therefore that the promise of another to be answerable for the debt was at most a collateral undertaking.[19] However, this evidence is not conclusive, but is open to explanation, and the weight of it is for the jury.[20] It may be explained for instance by

Barb. 369; Dunning *v.* Roberts, 35 Barb. 463; Devlin *v.* Woodgate, 34 Barb. 252; Quintard *v.* De Wolf, 34 Barb. 97; Darlington *v.* McCunn, 2 E. D. Smith 411; Briggs *v.* Evans, 1 E. D. Smith 192; King *v.* Despard, 5 Wend. 277.

Pennsylvania.— Weyand *v.* Crichfield, 3 Grant 113.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 39.

17. *Alabama.*— Wellman *v.* Jones, 124 Ala. 580, 27 So. 416.

Connecticut.— Langdon *v.* Strong, 42 Conn. 356.

Georgia.— Crowder *v.* Keys, 91 Ga. 180, 16 S. E. 986.

Illinois.— Brandner *v.* Krebbs, 54 Ill. App. 652; Geelan *v.* Reid, 22 Ill. App. 165.

Kansas.— Hentig *v.* Kernke, 25 Kan. 559.

Mississippi.— Biglane *v.* Hicks, (1903) 33 So. 413.

Nebraska.— Peyson *v.* Conniff, 32 Nebr. 269, 49 N. W. 340; De Witt *v.* Root, 18 Nebr. 567, 26 N. W. 360.

New York.— Hanford *v.* Higgins, 1 Bosw. 441.

Pennsylvania.— Patton *v.* Hassinger, 69 Pa. St. 311.

South Carolina.— Speer *v.* Meschine, 46 S. C. 505, 24 S. E. 329.

Vermont.— Bagley *v.* Moulton, 42 Vt. 184; Eddy *v.* Davidson, 42 Vt. 56; Blodgett *v.* Lowell, 33 Vt. 174; Clark *v.* Watermann, 7 Vt. 76, 29 Am. Dec. 150.

England.— Watkins *v.* Perkins, 1 Ld. Raym. 224, where Holt, C. J., says: "If A. promise B. being a surgeon, that if B. cure D. of a wound, he will see him paid; this is only a promise to pay if D. does not, and therefore it ought to be in writing by the statute of frauds. But if A. promise in such case, that he will be B.'s paymaster, whatever he shall deserve; it is immediately the debt of A. and he is liable without writing."

See 23 Cent. Dig. tit. "Frauds, Statute of," § 40.

18. Hardman *v.* Bradley, 85 Ill. 162; Northern Cent. R. Co. *v.* Prentiss, 11 Md. 119; Swigart *v.* Gentert, 63 Nebr. 157, 88 N. W. 159; Kessler *v.* Sonneborn, 10 Daly (N. Y.) 383.

19. *Alabama.*— Webb *v.* Hawkins Lumber Co., 101 Ala. 630, 14 So. 407; Clark *v.* Jones, 87 Ala. 474, 6 So. 362.

Arkansas.— Kurtz *v.* Adams, 12 Ark. 174.

California.— Harris *v.* Frank, 81 Cal. 280, 22 Pac. 856.

Illinois.— Hardman *v.* Bradley, 85 Ill. 162. See also Calverley *v.* Wirth, 59 Ill. App. 553, holding that no action will lie by Wirth against Calverley on an oral promise to pay for goods sold to Mitchell, if the only evidence of the character of the promise is Wirth's account-book with an entry "Mr. H. H. Mitchell (Chas. Calverley security) in account with W. E. Wirth, grocer."

Indiana.— Lomax *v.* McKinney, 61 Ind. 374.

Iowa.— Langdon *v.* Richardson, 58 Iowa 610, 12 N. W. 622.

Massachusetts.—Cahill *v.* Bigelow, 18 Pick. 369.

New York.— Knox *v.* Nutt, 1 Daly 213; Bussel *v.* Sagor, 27 Misc. 810, 57 N. Y. Suppl. 221; McRoberts *v.* Mathews, 45 N. Y. Suppl. 431.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 41.

20. *Alabama.*— Clark *v.* Jones, 87 Ala. 474, 6 So. 362; Boykin *v.* Dohlonde, 37 Ala. 577.

Illinois.— Lusk *v.* Throop, 189 Ill. 127, 59 N. E. 529; Ruggles *v.* Gatton, 50 Ill. 412.

Kentucky.— Leisman *v.* Otto, 1 Bush 225; Kennon *v.* Tolle, 9 Ky. L. Rep. 811.

Maryland.— Myer *v.* Grafflin, 31 Md. 350, 100 Am. Dec. 66; Elder *v.* Warfield, 7 Harr. & J. 391.

Massachusetts.— Dean *v.* Tallman, 105 Mass. 443; Swift *v.* Pierce, 13 Allen 136.

Michigan.—Hake *v.* Solomon, 62 Mich. 377, 28 N. W. 908; Larsen *v.* Jensen, 53 Mich. 427, 19 N. W. 130.

Missouri.— Rottmann *v.* Pohlmann, 28 Mo. App. 399.

evidence that the goods were so charged at the request of the promisor to enable him to identify such third person's items and distinguish them from his own.[21] If goods are delivered to a third person in sole reliance on the credit of defendant, the subsequent presentation of the bill to such third person and demand on him for payment will not impair plaintiff's rights, although defendant would have been released had the application been successful.[22] If at the request of the buyer the seller charges the goods to a third person, it does not render the buyer's promise to pay for them a promise to pay the debt of another.[23] If a person permits goods sold by another to a third person to be charged to him at the time, or if the buyer causes them to be charged to him without authority and he ratifies the transaction on learning of it, he is liable as upon an original promise to pay for them.[24]

6. Relationship of Parties. In determining whether an oral promise to pay the debt of another is original or collateral, the question of the relationship, natural or legal, between the promisor and the person for whose benefit the promise is made is generally speaking immaterial. If the latter is under legal disability so that contracts made by him are absolutely void, or if no credit whatever is given to him, or if the transaction is entirely between the creditor and the promisor, giving rise to no liability or duty except on the part of the promisor and in reliance solely on his credit, his oral undertaking is manifestly original and not within the statute.[25]

7. Joint Liability. If two persons enter into an arrangement for the purchase of goods whereby, although the purchase is made for the benefit of one of them only, they become liable jointly as codebtors for the purchase-price, and credit is given to both jointly, they will each be held liable as on an original promise.[26]

New Hampshire.— Walker *v.* Richards, 41 N. H. 388.

New York.— Foster *v.* Persch, 68 N. Y. 400; Allen *v.* Scarff, 1 Hilt. 209; Larson *v.* Wyman, 14 Wend. 246.

North Carolina.— White *v.* Tripp, 125 N. C. 523, 34 S. E. 686.

Oklahoma.— Kesler *v.* Cheadle, 12 Okla. 489, 72 Pac. 367; Trulock *v.* Blair, 8 Okla. 345, 58 Pac. 1097.

Oregon.— Mackey *v.* Smith, 21 Oreg. 598, 28 Pac. 974.

Pennsylvania.— Merriman *v.* Liggett, 1 Wkly. Notes Cas. 379.

South Carolina.—Kinloch *v.* Brown, 1 Rich. 223, 2 Speers 284.

Tennessee.— Hazen *v.* Bearden, 4 Sneed 48.

Texas.— Nixon *v.* Jacobs, 22 Tex. Civ. App. 97, 53 S. W. 595; Missouri Pac. R. Co. *v.* Turner, 2 Tex. App. Civ. Cas. § 815.

Virginia.— Cutler *v.* Hinton, 6 Rand. 509.

Wisconsin.— Champion *v.* Doty, 31 Wis. 190.

England.— Keate *v.* Temple, 1 B. & P. 158; Anderson *v.* Hayman, 1 H. Bl. 120, 2 Rev. Rep. 734.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 41.

21. Sanford *v.* Howard, 29 Ala. 684, 68 Am. Dec. 101; Lusk *v.* Throop, 189 Ill. 127, 59 N. E. 529; Burkhalter *v.* Farmer, 5 Kan. 477; Maurin *v.* Fogelberg, 37 Minn. 23, 32 N. W. 858, 5 Am. St. Rep. 814.

22. Homans *v.* Lambard, 21 Me. 308.

23. Lance *v.* Pearce, 101 Ind. 595, 1 N. E. 184.

24. McTighe *v.* Herman, 42 Ark. 285.

25. See cases cited *infra*, this note.

Illustrations.— Therefore the promisor is liable on his verbal agreement to pay for goods thereafter to be sold or for services thereafter to be performed for his son, or to pay for goods already sold to his son, who had no credit, and charged to him (Baldwin *v.* Hiers, 73 Ga. 739; Booker *v.* Tally, 2 Humphr. (Tenn.) 308; Hodges *v.* Hall, 29 Vt. 209), to pay for board furnished to his adult daughter, if provided at his request (Kernodle *v.* Caldwell, 46 Ind. 153), to pay for the support and education of his grandchildren (Ellicott *v.* Turner, 4 Md. 476), being an executor, to pay for board provided for the infant children of his testator (Higgings *v.* Hallock, 60 Hun (N. Y.) 125, 14 N. Y. Suppl. 550 [*affirmed* in 138 N. Y. 606, 33 N. E. 1082), and, being a *prochein ami*, to pay counsel for services afterward to be rendered for a minor and to indemnify the indorser of the writ (Sanborn *v.* Merrill, 41 Me 467).

26. *Indiana.*— Boyce *v.* Murphy, 91 Ind. 1, 46 Am. Rep. 567.

Kentucky.— Munnell *v.* Barnes, 12 Ky. L. Rep. 467; Kentucky Nat. Bank *v.* O'Neal, 11 Ky. L. Rep. 763; Kennon *v.* Toole, 9 Ky. L. Rep. 811.

Maine.— Strickland *v.* Hamlin, 87 Me. 81, 32 Atl. 732.

Michigan.— Gibbs *v.* Blanchard, 15 Mich. 292.

Missouri.— Rottmann *v.* Fix, 25 Mo. App. 571.

Vermont.—Whitman *v.* Bryant, 49 Vt. 512; Wainwright *v.* Straw, 15 Vt. 215, 40 Am. Dec. 675.

England.— Howes *v.* Martin, 1 Esp. 162.

So an oral ratification by one of a debt which has been jointly contracted by another without authority is not within the statute.[27] The mere fact, however, that the creditor charged a debt jointly to two will not of itself render them jointly liable so as to charge one of them on an oral promise to pay the debt of the other;[28] nor will an oral engagement to answer for a joint debt which is void as to the promisor, such for instance as the promise of a married woman to pay a joint bond of herself and her husband, be enforced.[29]

8. Promise on Transfer of Bill, Note, or Bond. In many cases it is held that if a note, bill, or other security of a third person held or owned by a debtor is given by him in satisfaction of his debt with an oral guaranty of its validity or genuineness or of the liability of the maker or drawer thereof, the transaction is not within the statute of frauds.[30]

See 23 Cent. Dig. tit. "Frauds, Statute of," § 42½.

27. Bundy *v.* Bruce, 61 Vt. 619, 17 Atl. 796.

28. Matthews *v.* Milton, 4 Yerg. (Tenn.) 576, 26 Am. Dec. 247.

29. Guishaber *v.* Hairman, 2 Bush (Ky.) 320.

30. *Colorado.*— Waid *v.* Hobson, 17 Colo. App. 54, 67 Pac. 176.

Georgia.— Mobile, etc., R. Co. *v.* Jones, 57 Ga. 198.

Illinois.— Power *v.* Rankin, 114 Ill. 52, 29 N. E. 185; Smith *v.* Finch, 3 Ill. 321; Graham *v.* Muson, 17 Ill. App. 399.

Indiana.— Hassinger *v.* Newman, 83 Ind. 124, 43 Am. Rep. 64; King *v.* Summitt, 73 Ind. 312, 38 Am. Rep. 145; White *v.* Webster, 58 Ind. 233; Beaty *v.* Grim, 18 Ind. 131. But an oral guaranty of a receiver's certificate of indebtedness, or an oral guaranty by one person of the payment of the note of another person, given by a debtor in satisfaction of his debt, is within the statute. McCurdy *v.* Bowes, 88 Ind. 583; Crosby *v.* Jeroloman, 37 Ind. 264.

Iowa.— Tarbell *v.* Stevens, 7 Iowa 163.

Maryland.— Little *v.* Edwards, 69 Md. 499, 16 Atl. 134. But an oral promise by the indorser of a bill that he will pay the bill if the drawer does not, coupled with the statement that his indorsement made it as good as gold, is void under the statute. Talbott *v.* Suit, 68 Md. 443, 13 Atl. 356.

Massachusetts.— Gill *v.* Herrick, 111 Mass. 501; Brightman *v.* Hicks, 108 Mass. 246; Ames *v.* Foster, 106 Mass. 400, 13 Am. Rep. 343; Nelson *v.* Boynton, 3 Metc. 396, 37 Am. Dec. 148. See, however, Dows *v.* Swett, 120 Mass. 322, 127 Mass. 364, 134 Mass. 140, 45 Am. Rep. 310, in which the oral guaranty by a debtor of the payment of a promissory note made by a third person payable to the order of the creditor and transferred to him by the debtor was held to be within the statute, because on the facts it could not be regarded as a promise in effect to pay his own preëxisting debt.

Michigan.— Bryant *v.* Rich, 104 Mich. 124, 62 N. W. 146; Huntington *v.* Wellington, 12 Mich. 10; Thomas *v.* Dodge, 8 Mich. 51; Jones *v.* Palmer, 1 Dougl. 379.

Minnesota.— Osborne *v.* Barker, 34 Minn. 307, 25 N. W. 606, 57 Am. Rep. 55; Wilson *v.* Hentges, 29 Minn. 102, 12 N. W. 151; Sheldon *v.* Butler, 24 Minn. 513; Nichols *v.* Allen, 22 Minn. 283. The case of Nichols *v.* Allen, 23 Minn. 542, seems to be opposed to the earlier decisions in Minnesota.

Missouri.— Barker *v.* Scudder, 56 Mo. 272.

New Hampshire.— Knight *v.* Knight, 16 N. H. 107.

New York.— Bruce *v.* Burr, 67 N. Y. 237; Mead *v.* Merchants' Bank, 25 N. Y. 143, 82 Am. Dec. 331; Cardell *v.* McNiel, 21 N. Y. 336; Durham *v.* Manrow, 2 N. Y. 533; Brown *v.* Curtiss, 2 N. Y. 225; Brookline Nat. Bank *v.* Moers, 19 N. Y. App. Div. 155, 45 N. Y. Suppl. 997; Milk *v.* Rich, 15 Hun 178 [*affirmed* in 80 N. Y. 269, 36 Am. Rep. 615]; Allen *v.* Eighmie, 14 Hun 559 [*affirmed* in 79 N. Y. 632]; Lossee *v.* Williams, 6 Lans. 228; Dauber *v.* Blackney, 38 Barb. 432; Fowler *v.* Clearwater, 35 Barb. 143; Allen *v.* Bantel, 2 Thomps. & C. 342; Johnson *v.* Gilbert, 4 Hill 178. See Ellenwood *v.* Fults, 63 Barb. 321. The decisions in Wood *v.* Wheelock, 25 Barb. 625, and Spicer *v.* Norton, 13 Barb. 542, are at variance with the foregoing authorities.

North Carolina.— Rowland *v.* Rorke, 49 N. C. 337; Ashford *v.* Robinson, 30 N. C. 114; Adcock *v.* Fleming, 19 N. C. 225.

Ohio.— Rarey *v.* Cornell, 2 Ohio Dec. (Reprint) 315, 2 West. L. Month. 415.

Oregon.— Kiernan *v.* Kratz, 42 Oreg. 474, 69 Pac. 1027, 70 Pac. 506.

Pennsylvania.— Townsend *v.* Long, 77 Pa. St. 143, 18 Am. Rep. 438; Malone *v.* Keener, 44 Pa. St. 107; Stewart *v.* Malone, 5 Phila. 440. But if the indorser of a promissory note before maturity verbally promises the indorsee to pay the note absolutely, his promise is within the statute. Reiff *v.* McMiller, 45 Leg. Int. 26.

Rhode Island.— Thurston *v.* James, 6 R. I. 103.

South Carolina.— Aiken *v.* Cheeseborough, 1 Hill 172.

Tennessee.— Mills *v.* Mills, 3 Head 705; Hall *v.* Rodgers, 7 Humphr. 536.

Virginia.— Hopkins *v.* Richardson, 9 Gratt. 485.

Wisconsin.— Cribb *v.* Houghton, 64 Wis. 333, 25 N. W. 222; Eagle Mowing, etc., Mach. Co. *v.* Shattuck, 53 Wis. 455, 10 N. W. 690, 40 Am. Rep. 780; Wyman *v.* Goodrich, 26 Wis. 21.

United States.— Emerson *v.* Slater, 22 How. 28, 16 L. ed. 360.

9. Guaranty of Factor or Agent Del Credere. In accordance with the principle that an oral undertaking to be answerable for the debt of another is not within the statute of frauds if it is in reality an obligation of the promisor to discharge his own debt, the oral guaranty of a factor who has received goods under a *del credere* commission is now regarded in this country and apparently in England as an original undertaking which is valid, although not in writing.[31]

F. Discharge of Original Debtor — 1. Necessity of Discharge. It is a general rule that an oral promise to pay the preëxisting debt of another in consideration that the original debtor shall be discharged from liability thereon is not within the statute. In such a case, it being agreed that the debt of the original debtor shall be extinguished, there remains no obligation to which the undertaking of the promisor can be collateral, and the promise being founded on a sufficient consideration, viz., detriment to the promisee in the loss of his debt or claim against the original debtor, the promisor becomes an original debtor to an amount equal to the original debt.[32] But if the debtor is not discharged and

England.— Hargreaves *v.* Parson, 14 L. J. Exch. 250, 13 M. & W. 561.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 45. See also *supra*, IV, A, 5, e.

Reason of rule.— In some cases the decision is put on the ground that the transaction is merely a particular method of paying the guarantor's own debt with the incidental result of contemporaneously discharging the debt of a third person. In other cases such a guaranty is not regarded as a promise but rather as an assurance that a certain condition of things exists, so that the breach thereof does not depend upon the failure of the guarantor to do something in the future; and that therefore if the condition exists the obligation is fulfilled without any payment at all, and if it does not exist the undertaking is broken as soon as made.

31. *Massachusetts.*— Swan *v.* Nesmith, 7 Pick. 220, 19 Am. Dec. 282.

Missouri.— Schell *v.* Stephens, 50 Mo. 375; Suman *v.* Inman, 6 Mo. App. 384.

New Jersey.— Bullowa *v.* Orgo, 57 N. J. Eq. 428, 41 Atl. 494.

New York.— Sherwood *v.* Stone, 14 N. Y. 267; Schwab *v.* Elias, 2 N. Y. Civ. Proc. 340; Wolff *v.* Koppel, 2 Den. 368, 43 Am. Dec. 751.

Tennessee.— Guggenheim *v.* Rosenfeld, 9 Baxt. 533.

United States.— Bradley *v.* Richardson, 3 Fed. Cas. No. 1,786, 2 Blatchf. 343, 23 Vt. 720. See, however, Thompson *v.* Perkins, 23 Fed. Cas. No. 13,972, 3 Mason 232.

In England there has been some fluctuation of judicial opinion on this point. Prior to the decision in Morris *v.* Cleasby, 4 M. & S. 566, the view above stated prevailed. But in that case the effect of acting under a *del credere* commission was said to be that the factor becomes a guarantor of the debts that are created and that his engagement is secondary and collateral, depending on the default of the debtors, who must first be sought out and called upon by the principal. In a later case, however (Couturier *v.* Hastie, 8 Exch. 40, 55, 22 L. J. Exch. 97), Parke, B., adopting the reasoning of the court in Wolff *v.* Koppel, 2 Den. (N. Y.) 368, 43 Am. Dec. 751, said: "The . . . point is, whether the defendants are responsible by reason of their charging a *del credere* commission, though they have not guarantied by writing signed by themselves. We think they are. Doubtless, if they had for a percentage guarantied the debt owing, or performance of the contract by the vendee, being totally unconnected with the sale, they would not be liable without a note in writing signed by them; but being the agents to negotiate the sale, the commission is paid in respect of that employment; a higher reward is paid in consideration of their taking greater care in sales to their customers, and precluding all question whether the loss arose from negligence or not, and also for assuming a greater share of responsibility than ordinary agents, namely, responsibility for the solvency and performance of their contracts by their vendees. This is the main object of the reward being given to them; and though it may terminate in a liability to pay the debt of another, that is not the immediate object for which the contract is given; and the case resembles in this respect those of Williams *v.* Leper, 3 Burr. 1886, 2 Wils. C. P. 302, and Castling *v.* Aubert, 2 East 325." Following this decision see Sutton *v.* Grey, [1894] 1 Q. B. 285, 63 L. J. Q. B. 633, 69 L. T. Rep. N. S. 354, 9 Reports 106, 42 Wkly. Rep. 195.

32. *Alabama.*— Carlisle *v.* Campbell, 76 Ala. 247; Thornton *v.* Guice, 73 Ala. 321; Lehman *v.* Levy, 69 Ala. 48; Jolley *v.* Walker, 26 Ala. 690.

California.— McLaren *v.* Hutchinson, 22 Cal. 187, 83 Am. Dec. 59.

Connecticut.—Buchanan *v.* Moran, 62 Conn. 83, 25 Atl. 396; Packer *v.* Benton, 35 Conn. 343, 95 Am. Dec. 246.

Georgia.— Ferstor *v.* Waycross Bank, 111 Ga. 229, 36 S. E. 773; Edenfield *v.* Canady, 60 Ga. 456; Harris *v.* Young, 40 Ga. 65.

Illinois.— Bunting *v.* Darbyshire, 75 Ill. 408; Runde *v.* Runde, 59 Ill. 98; Knoebel *v.* Kircher, 33 Ill. 308; Eddy *v.* Roberts, 17 Ill. 505; Graham *v.* Mason, 17 Ill. App. 399. *Contra*, Evans *v.* Lohr, 3 Ill. 511; Wickham *v.* Hyde Park Bldg., etc., Assoc., 80 Ill. App. 523.

Indiana.— Palmer *v.* Blain, 55 Ind. 11.

the original debt still subsists concurrently with the oral agreement to assume it, the latter is within the statute of frauds and is void as a collateral agreement to answer for the debt of another.[33] However, such an arrangement in order to be

Kentucky.— Day *v.* Cloe, 4 Bush 563; Creel *v.* Bell, 2 J. J. Marsh. 309; Fessler *v.* Dresman, 15 Ky. L. Rep. 239.

Maine.— Whittemore *v.* Wentworth, 76 Me. 20.

Maryland.— Andre *v.* Bodman, 13 Md. 241, 71 Am. Dec. 628.

Massachusetts.— Walker *v.* Hill, 119 Mass. 249; Langdon *v.* Hughes, 107 Mass. 272; Lord *v.* Davison, 3 Allen 131; Wood *v.* Corcoran, 1 Allen 405; Walker *v.* Penniman, 8 Gray 233; Curtis *v.* Brown, 5 Cush. 488.

Michigan.— Martin *v.* Curtis, 119 Mich. 169, 77 N. W. 690; Gleason *v.* Fitzgerald, 105 Mich. 516, 63 N. W. 512; Green *v.* Solomon, 80 Mich. 234, 45 N. W. 87; Pfaff *v.* Cummings, 67 Mich. 143, 34 N. W. 281; Mulcrone *v.* American Lumber Co., 55 Mich. 622, 22 N. W. 67; Gower *v.* Stuart, 40 Mich. 747; Baker *v.* Ingersoll, 39 Mich. 158; Welch *v.* Marvin, 36 Mich. 59.

Minnesota.— Holm *v.* Sandberg, 32 Minn. 427, 21 N. W. 416; Yale *v.* Edgerton, 14 Minn. 194.

New Hampshire.— Winslow *v.* Locke, 60 N. H. 580.

New York.— Booth *v.* Eighmie, 60 N. Y. 238, 19 Am. Rep. 171 [*affirming* 3 Thomps. & C. 378]; Meriden Britannia Co. *v.* Zingsen, 48 N. Y. 247, 8 Am. Rep. 549; Mallory *v.* Gillett, 21 N. Y. 412; Berg *v.* Spitz, 87 N. Y. App. Div. 602, 84 N. Y. Suppl. 532; Beach *v.* Hungerford, 19 Barb. 258; American Wire, etc., Bed Co. *v.* Schultz, 43 Misc. 637, 88 N. Y. Suppl. 396; Boeff *v.* Rosenthal, 37 Misc. 852, 76 N. Y. Suppl. 988; Flagler *v.* Lipman, 1 Misc. 204, 20 N. Y. Suppl. 878 [*affirmed* in 2 Misc. 417, 21 N. Y. Suppl. 946]; Compton *v.* Mellis, 19 N. Y. Suppl. 691 [*affirmed* in 2 Misc. 301 21 N. Y. Suppl. 940].

North Carolina.— Haun *v.* Burrell, 119 N. C. 544, 26 S. E. 111; Combs *v.* Harshaw, 63 N. C. 198; Rogers *v.* Rogers, 51 N. C. 300; Britton *v.* Thraikill, 50 N. C. 329; Stanly *v.* Hendricks, 35 N. C. 86; Shaver *v.* Adams, 32 N. C. 13; Cooper *v.* Chambers, 15 N. C. 261, 25 Am. Dec. 710.

Ohio.— Teeters *v.* Lamborn, 43 Ohio St. 144, 1 N. E. 513.

Oregon.— Miller *v.* Lynch, 17 Oreg. 61, 19 Pac. 845.

Pennsylvania.— Shoemaker *v.* King, 40 Pa. St. 107.

South Carolina.— Corbett *v.* Cochran, 3 Hill 41, Riley 44, 30 Am. Dec. 348.

Texas.— Hill *v.* Frost, 59 Tex. 25; Warren *v.* Smith, 24 Tex. 484, 76 Am. Dec. 115; Bason *v.* Hughart, 2 Tex. 476; Wallace *v.* Freeman, 25 Tex. Suppl. 91; Marble Falls First Nat. Bank *v.* Border, 9 Tex. Civ. App. 670, 29 S. W. 659; Galveston, etc., R. Co. *v.* Ehrenworth, 1 Tex. App. Civ. Cas. § 786.

Vermont.— Watson *v.* Jacobs, 29 Vt. 169; Anderson *v.* Davis, 9 Vt. 136, 31 Am. Dec. 612.

Wisconsin.— Willard *v.* Bosshard, 68 Wis. 454, 32 N. W. 538.

England.— Goodman *v.* Chase, 1 B. & Ald. 297, 19 Rev. Rep. 322; Butcher *v.* Stuart, 1 D. & L. 308, 7 Jur. 774, 12 L. J. Exch. 391, 11 M. & W. 857; Fish *v.* Hutchinson, 2 Ld. Ken. 537, 2 Wils. K. B. 94.

Canada.— James *v.* Balfour, 7 Ont. App. 461; Hoener *v.* Merner, 7 Ont. 629; Poucher *v.* Treahey, 37 U. C. Q. B. 367; Bond *v.* Treahey, 37 U. C. Q. B. 360; McDonald *v.* Glass, 8 U. C. Q. B. 245; Kissock *v.* Woodward, 1 U. C. Q. B. 344.

See 23 Cent. Dig. tit. "Frauds, Statute of," §§ 47, 48.

33. *Alabama.*— Lehman *v.* Levy, 69 Ala. 48; Puckett *v.* Bates, 4 Ala. 390; Tompkins *v.* Smith, 3 Stew. & P. 54.

California.— Diamond Coal Co. *v.* Cook, (1900) 61 Pac. 578.

Colorado.— Burson *v.* Bogart, 18 Colo. App. 449, 72 Pac. 605; Greene *v.* Latcham, 2 Colo. App. 416, 31 Pac. 233.

Connecticut.— Packer *v.* Benton, 35 Conn. 343, 95 Am. Dec. 246; Turner *v.* Hubbell, 2 Day 475, 2 Am. Dec. 115.

Georgia.— Strauss *v.* Garrett, 101 Ga. 307, 28 S. E. 850.

Illinois.— Farmers', etc., Bank *v.* Spear, 49 Ill. App. 509 [*affirmed* in 156 Ill. 555, 41 N. E. 164]; Murto *v.* McKnight, 28 Ill. App. 238.

Indiana.— Langford *v.* Freeman, 60 Ind. 46.

Iowa.— Griffin *v.* Hoag, 105 Iowa 499, 75 N. W. 372; Sternburg *v.* Callanan, 14 Iowa 251.

Kansas.— Brant *v.* Johnson, 46 Kan. 389, 26 Pac. 735.

Maine.— Farnham *v.* Davis, 79 Me. 282, 9 Atl. 725.

Massachusetts.— Gill *v.* Herrick, 111 Mass. 501; Brightman *v.* Hicks, 108 Mass. 246; Childs *v.* Walker, 2 Allen 259; Stone *v.* Symmes, 18 Pick. 467.

Michigan.— Perkins *v.* Hershey, 77 Mich. 504, 43 N. W. 1021; Ruppe *v.* Peterson, 67 Mich. 437, 35 N. W. 82; Baker *v.* Ingersoll, 39 Mich. 158; Calkins *v.* Chandler, 36 Mich. 320, 24 Am. Rep. 593; Hogsett *v.* Ellis, 17 Mich. 351; Brown *v.* Hazen, 11 Mich. 219.

Mississippi.— Hendricks *v.* Robinson, 56 Miss. 694, 31 Am. Rep. 382.

Missouri.— Deegan *v.* Conzelman, 31 Mo. 424.

New York.— Van Epps *v.* McGill, Lalor 109.

Ohio.— Birchell *v.* Neaster, 36 Ohio St. 331.

Oregon.— Bixby *v.* Church, 28 Oreg. 242, 42 Pac. 613.

Pennsylvania.— Stone *v.* Justice, 9 Phila. 22; Gheen's Estate, 7 Wkly. Notes Cas. 66.

South Carolina.— Jones *v.* Ballard, 2 Mill 113.

Texas.— Starr *v.* Taylor, (Civ. App. 1900)

valid must be entered into with the consent of all concerned, and if made in the absence of the original debtor or without his knowledge it will not be enforced.[34] A verbal agreement to assume the debt and costs of the debtor if the creditor will forbear to prosecute his claim against him will not be enforced, since the debtor is not discharged but remains liable to the creditor in a new action if he sees fit to bring it.[35] The discharge of the debtor must be complete and full in order to sustain a verbal promise to assume his debt, and therefore a mere statement by the creditor that he had discharged the debtor from his liability on a note will not suffice if he continues to hold the note.[36]

2. NOVATION. The provision of the statute which requires a promise to pay the debt of another to be in writing has no application to an arrangement between the debtor, the creditor, and a third person whereby the debtor agrees to pay directly to the third person the money which he owes rather than to his creditor.[37]

G. New Consideration Beneficial to Promisor — 1. IN GENERAL. A promise to pay the debt of another is within the statute unless it is founded on a new and independent consideration passing between the newly contracting parties and independent of the original contract. In the absence of such a consideration the promise is collateral.[38] The question whether the presence of such a consideration takes the case out of the statute is one that has given rise to much discussion and to conflicting decisions. That it is not was asserted in a leading case by Chief Justice Kent, who, in the third clause of his classification of guaranties

56 S. W. 543; Roller *v.* Sandifer, (Civ. App. 1895) 32 S. W. 824; Cobb *v.* Ward, 4 Tex. App. Civ. Cas. § 307, 19 S. W. 250.

Vermont.— Cole *v.* Shurtleff, 41 Vt. 311, 98 Am. Dec. 587.

Virginia.— Noyes *v.* Humphreys, 11 Gratt. 636; Waggoner *v.* Gray, 2 Hen. & M. 603.

Wisconsin.— Malone *v.* Knickerbocker Ice Co., 88 Wis. 542, 60 N. W. 999; Willard *v.* Bosshard, 68 Wis. 454, 32 N. W. 538; Eagle Mowing, etc., Mach. Co. *v.* Shattuck, 53 Wis. 455, 10 N. W. 690, 40 Am. Rep. 780; Wyman *v.* Goodrich, 26 Wis. 21; Dyer *v.* Gibson, 16 Wis. 557.

See 23 Cent. Dig. tit. "Frauds, Statute of," §§ 47, 48.

34. Ellison *v.* Wisehart, 29 Ind. 32; Decker *v.* Shaffer, 3 Ind. 187; Richardson *v.* Williams, 49 Me. 558.

35. Duffy *v.* Wunsch, 42 N. Y. 243, 8 Abb. Pr. N. S. 113, 1 Am. Rep. 514; Hearing *v.* Dittman, 8 Phila. (Pa.) 307.

36. Gunnels *v.* Stewart, 3 Brev. (S. C.) 52.

37. *Alabama.*— Carpenter *v.* Murphree, 49 Ala. 84.

California.— Welch *v.* Kenny, 49 Cal. 49; Barringer *v.* Warden, 12 Cal. 311.

Connecticut.— Green's Farms Consociated Presb. Soc. *v.* Staples, 23 Conn. 544.

Georgia.— Sapps *v.* Faircloth, 70 Ga. 690; Howell *v.* Field, 70 Ga. 592; Anderson *v.* Whitehead, 55 Ga. 277.

Illinois.— Runde *v.* Runde, 59 Ill. 98; Brown *v.* Strait, 19 Ill. 88; Netterstrom *v.* Gallistel, 110 Ill. App. 352; Lindley *v.* Simpson, 45 Ill. App. 648.

Indiana.— Hyatt *v.* Bonham, 19 Ind. App. 256, 49 N. E. 361.

Iowa.— Lester *v.* Bowman, 39 Iowa 611; Bowen *v.* Kurtz, 37 Iowa 239; Sternburg *v.* Callanan, 14 Iowa 251.

Kansas.— Grant *v.* Pendery, 15 Kan. 236.

Kentucky.— Hall *v.* Alford, 105 Ky. 664, 49 S. W. 444, 20 Ky. L. Rep. 1482; Melvin *v.* Hawk, 6 Ky. L. Rep. 592.

Maine.—Hamlin *v.* Drummond, 91 Me. 175, 39 Atl. 551; Maxwell *v.* Haynes, 41 Me. 559.

Massachusetts.— Stowell *v.* Gram, 184 Mass. 562, 69 N. E. 342; Griffin *v.* Cunningham, 183 Mass. 505, 67 N. E. 660; Plummer *v.* Greenwood, 169 Mass. 584, 48 N. E. 782; Trudeau *v.* Poutre, 165 Mass. 81, 42 N. E. 508; Eden *v.* Chaffee, 160 Mass. 225, 35 N. E. 675; Caswell *v.* Fellows, 110 Mass. 52.

Minnesota.— Hanson *v.* Nelson, 82 Minn. 220, 84 N. W. 742.

Mississippi.— Olive *v.* Lewis, 45 Miss. 203.

Missouri.— Wilson *v.* Vass, 54 Mo. App. 221; Lee *v.* Porter, 18 Mo. App. 377.

New York.— Brand *v.* Brand, 48 N. Y. 675 [*reversing* 49 Barb. 346, 33 How. Pr. 167]; Blunt *v.* Boyd, 3 Barb. 209; Compton *v.* Mellis, 2 Misc. 301, 21 N. Y. Suppl. 940.

Pennsylvania.— Maule *v.* Bucknell, 50 Pa. St. 39.

South Carolina.— Antonio *v.* Clissey, 3 Rich. 201.

Texas.— Blankenship, etc., Co. *v.* Tillman, (App. 1892) 18 S. W. 646.

Vermont.— Buchanan *v.* Paddleford, 43 Vt. 64; Gleason *v.* Briggs, 28 Vt. 135.

Wisconsin.— Balliet *v.* Scott, 32 Wis. 174; Putney *v.* Farnham, 27 Wis. 187, 9 Am. Rep. 459; Cook *v.* Barrett, 15 Wis. 596; Cotterill *v.* Stevens, 10 Wis. 422; Story *v.* Menzies, 3 Pinn. 329, 4 Chandl. 61.

England.— Bird *v.* Gammon, 3 Bing. N. Cas. 883, 3 Hodges 224, 6 L. J. C. P. 258, 5 Scott 213, 32 E. C. L. 405.

See 23 Cent. Dig. tit. "Frauds, Statute of." § 49.

38. Clapp *v.* Webb, 52 Wis. 638, 9 N. W. 796 [*approved* in Commercial Nat. Bank *v.* Smith, 107 Wis. 574, 83 N. W. 766].

under the statute of frauds, placed the cases in which "the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the newly contracting parties." Such cases, he observes, are not within the statute of frauds.[39] This construction has been adopted and followed by a considerable number of American decisions,[40] but the rule as laid down by Kent was later regarded, both by the courts and by eminent text writers, as restricting somewhat too narrowly the operation of the statute if not in effect virtually repealing it and sanctioning any oral promise between the newly contracting parties which was good at common law;[41] and in a subsequent case in the same state[42] the verbal promise of defendant to pay the debt of a third person in consideration of plaintiff's release of a lien on the property of the third person was held to be void, although the consideration which supported it was new and moved between the newly contracting parties and consisted in detriment to the promisee by the surrender of his lien, Kent's definition being so modified as to require that the new consideration should not only move to the promisor but be beneficial to him as well. This modification eliminated from the class of original promises those which were supported merely by a consideration of detriment to the promisee or of benefit to the debtor but which were not beneficial to the promisor. The rule as thus modified was in accordance with the doctrine in Massachusetts, as it had been announced by Chief Justice Shaw, who declared an original promise to be one in which the leading object of the promisor is not to

39. Leonard *v.* Vredenburgh, 8 Johns. (N. Y.) 29, 39, 5 Am. Dec. 317. The rule was stated in substantially the same terms by Chief Justice Savage, who said that in those cases falling within the third class which are "founded on a new and original consideration of benefit to the defendant, or harm to the plaintiff, moving to the party making the promise, either from the plaintiff or original debtor, the subsisting liability of the original debtor is no objection to the recovery." Farley *v.* Cleveland, 4 Cow. (N. Y.) 432, 439, 15 Am. Dec. 387. So Roberts Frauds 232, states the doctrine to be that the statute does not apply if the consideration "spring out of any new transaction, or move to the party promising upon some fresh and substantive ground of a personal concern to himself."

40. *Alabama.*— Westmoreland *v.* Porter, 75 Ala. 452; Hollingsworth *v.* Martin, 23 Ala. 591; Travis *v.* Allen, 1 Stew. & P. 192; Brown *v.* Adams, 1 Stew. 51, 18 Am. Dec. 36.

Illinois.— Power *v.* Rankin, 114 Ill. 52, 29 N. E. 185; Eddy *v.* Roberts, 17 Ill. 505; Scott *v.* Thomas, 2 Ill. 58; Dueholm *v.* Stern, 86 Ill. App. 649; Bacharach *v.* McCurrach, 43 Ill. App. 584.

Iowa.— Pratt *v.* Fishwild, 121 Iowa 642, 96 N. W. 1089; Marr *v.* Burlington, etc., R. Co., 121 Iowa 117, 96 N. W. 716; Carraher *v.* Allen, 112 Iowa 168, 83 N. W. 902; Harlan *v.* Harlan, 102 Iowa 701, 72 N. W. 286; Lamb *v.* Tucker, 42 Iowa 118; Johnson *v.* Knapp, 36 Iowa 616.

Kentucky.— Botkin *v.* Middlesborough Town, etc., Co., 66 S. W. 747, 23 Ky. L. Rep. 1964; Garvey *v.* Crouch, 35 S. W. 273, 18 Ky. L. Rep. 84; Livers *v.* Nicholls, 11 Ky. L. Rep. 1000.

Maine.— Todd *v.* Tobey, 29 Me. 219.

Missouri.— Doane *v.* Newman, 10 Mo. 69; Winn *v.* Hillyer, 43 Mo. App. 139.

New Hampshire.— Allen *v.* Thompson, 10 N. H. 32.

New Jersey.— Kurtzmeyer *v.* Ennis, 27 N. J. L. 371.

New York.— Oakley *v.* Boorman, 21 Wend. 588 (holding that where a person, for a consideration moving from the holder of a note to himself, guarantees the note by indorsing it, his promise is not within the statute); Rogers *v.* Kneeland, 13 Wend. 114 [*affirming* 10 Wend. 218] (holding that where a third person, for a new and sufficient consideration moving between him and the debtor, promises to pay moneys owing by the debtor, the promise is not within the statute, although the debtor remains liable to the creditor); Meech *v.* Smith, 7 Wend. 315; Myers *v.* Morse, 15 Johns. 425.

North Carolina.— Haun *v.* Burrell, 119 N. C. 544, 26 S. E. 111; Whitehurst *v.* Hyman, 90 N. C. 487; Cooper *v.* Chambers, 15 N. C. 261, 25 Am. Dec. 710.

South Carolina.— Boyce *v.* Owens, 2 McCord 208, 13 Am. Dec. 711; Hindman *v.* Langford, 3 Strobh. 207.

Virginia.— Colgin *v.* Henley, 6 Leigh 85.

Wisconsin.— Dyer *v.* Gibson, 16 Wis. 557.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 50.

However, the mere fact that a person who promised orally to pay the debt of a corporation owned nearly all the stock in the corporation does not constitute a new consideration which will take his promise out of the statute. Turner *v.* Lyles, 68 S. C. 392, 48 S. E. 301.

41. Maule *v.* Bucknell, 50 Pa. St. 39 (where it was said that Chief Justice Kent's third rule was almost universally admitted to be inaccurate and that it practically denied all effect to the statute); Fullam *v.* Adams, 37 Vt. 391.

42. Mallory *v.* Gillett, 21 N. Y. 412.

become the surety or guarantor of another's debt but to subserve or promote some interest of his own, although its effect may be to pay the debt of another ;[43] and it has been followed and applied in other states.[44] In New York the rule underwent still further discussion and modification. It was pointed out that, although a new consideration moved to the promisor and was beneficial to him, his promise might still be collateral, and that the further inquiry whether his promise was independent of the liability of the original debtor or was contingent upon his default was necessary to determine whether the promise was original or collateral ; and it was said that the cases ended in establishing a doctrine that where the primary debt subsists and was antecedently contracted, the promise to pay it is original when it is founded on a new consideration moving to the promisor and beneficial to him, and such that the promisor thereby comes under an independ-

43. Nelson *v.* Boynton, 3 Metc. (Mass.) 396, 37 Am. Dec. 148, where the creditor attached the property of his debtor, whereupon defendant, in consideration of the discontinuance of the action, promised to pay the debt. The action was discontinued and the lien against the debtor was lost, but the debt remained against the original debtor. The court, however, regarded the leading object and purpose of the promise to be rather the relief of the debtor than the benefit of defendant, and held it to be void because not in writing. To the same effect see Holbrook *v.* Dow, 12 Gray (Mass.) 357; Alger *v.* Scoville, 1 Gray (Mass.) 391.

44. *Alabama.*— Graves *v.* Shulman, 59 Ala. 406; Ragland *v.* Wynn, 37 Ala. 32; Mason *v.* Hall, 30 Ala. 599; Martin *v.* Black, 20 Ala. 309, 21 Ala. 721.

Arkansas.— Gale *v.* Harp, 64 Ark. 462, 43 S. W. 144.

California.— Sacramento Lumber Co. *v.* Wagner, 67 Cal. 293, 7 Pac. 705; Clay *v.* Walton, 9 Cal. 328.

Colorado.— Fisk *v.* Reser, 19 Colo. 88, 34 Pac. 572; Thatcher *v.* Rockwell, 4 Colo. 375.

Florida.— West *v.* Grainger, (1903) 35 So. 91 [*distinguishing* Craft *v.* Kendrick, 39 Fla. 90, 21 So. 803].

Georgia.— Crane *v.* Bulloch, R. M. Charlt. 318.

Illinois.— Waterman *v.* Resseter, 45 Ill. App. 155.

Indiana.— Rhodes *v.* Matthews, 67 Ind. 131; Chandler *v.* Davidson, 6 Blackf. 367.

Iowa.— Schaafs *v.* Wentz, 100 Iowa 708, 69 N. W. 1022; Helt *v.* Smith, 74 Iowa 667, 39 N. W. 81; Wilson *v.* Smith, 73 Iowa 429, 35 N. W. 506.

Kansas.— Patton *v.* Mills, 21 Kan. 163.

Maryland.— Small *v.* Schaefer, 24 Md. 143.

Michigan.— Durgin *v.* Smith, 115 Mich. 239, 73 N. W. 361; Studley *v.* Barth, 54 Mich. 6, 19 N. W. 568. See Calkins *v.* Chandler, 36 Mich. 320, 24 Am. Rep. 593.

Minnesota.— Sheldon *v.* Butler, 24 Minn. 513.

Nebraska.— Swayne *v.* Hill, 59 Nebr. 652, 81 N. W. 855; Clay *v.* Tyson, 19 Nebr. 530, 26 N. W. 240; Clopper *v.* Poland, 12 Nebr. 69, 10 N. W. 538.

New York.—McCraith *v.* National Mohawk Valley Bank, 104 N. Y. 414, 10 N. E. 862; Mallory *v.* Gillett, 21 N. Y. 412; Mead *v.* Parker, 41 Hun 577 [*affirmed* in 111 N. Y. 259, 18 N. E. 727]; Winfield *v.* Potter, 10 Bosw. 226; Benedict *v.* Dunning, 1 Daly 241; Reynolds *v.* Lawton, 8 N. Y. Suppl. 403; Barker *v.* Bucklin, 2 Den. 45, 43 Am. Dec. 726; Gold *v.* Phillips, 10 Johns. 412.

Ohio.— Birchell *v.* Neaster, 36 Ohio St. 331. See Crawford *v.* Edison, 45 Ohio St. 239, 13 N. E. 80.

Oregon.— Miller *v.* Lynch, 17 Oreg. 61, 19 Pac. 845.

Pennsylvania.— Crawford *v.* Pyle, 190 Pa. St. 263, 42 Atl. 687; Bailey *v.* Marshall, 174 Pa. St. 602, 34 Atl. 326; Elkins *v.* Timlin, 151 Pa. St. 491, 25 Atl. 139; Nugent *v.* Wolfe, 111 Pa. St. 471, 4 Atl. 15, 56 Am. Rep. 291; Pizzi *v.* Nardello, 23 Pa. Super. Ct. 535; May *v.* Walker, 20 Pa. Super. Ct. 581; Duncan *v.* Shaw, 17 Pa. Super. Ct. 225; Baxter *v.* Hurlburt, 15 Pa. Super. Ct. 541; Beard *v.* Heck, 13 Pa. Super. Ct. 390; Weber *v.* Bishop, 12 Pa. Super. Ct. 51; Marshall *v.* Brick, 5 Pa. Dist. 84.

Tennessee.— Lookout Mountain R. Co. *v.* Houston, 85 Tenn. 224, 2 S. W. 36; Hall *v.* Rodgers, 7 Humphr. 536.

Texas.— McCreary *v.* Van Hook, 35 Tex. 631; Lemmon *v.* Box, 20 Tex. 329; Hilliard *v.* White, (Civ. App. 1895) 31 S. W. 553.

Vermont.— Greene *v.* Burton, 59 Vt. 423, 10 Atl. 575; Cross *v.* Richardson, 30 Vt. 641; French *v.* Thompson, 6 Vt. 54.

Wisconsin.— Weisel *v.* Spence, 59 Wis. 301, 18 N. W. 165; Hoile *v.* Bailey, 58 Wis. 434, 17 N. W. 322; Clapp *v.* Webb, 52 Wis. 638, 9 N. W. 796; Reynolds *v.* Carpenter, 3 Pinn. 34.

Wyoming.— Ivenson *v.* Caldwell, 3 Wyo. 465, 27 Pac. 563.

United States.— Davis *v.* Patrick, 141 U. S. 479, 12 S. Ct. 58, 35 L. ed. 826; Emerson *v.* Slater, 22 How. 28, 43, 16 L. ed. 360 (where the court says: "Whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself, or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability"); Choate *v.* Hoogstraat, 105 Fed. 713, 46 C. C. A. 174.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 50.

ent duty of payment irrespective of the liability of the principal debtor.[45] The true test then appears to be not what the motive of the promisor may be, nor the nature of the consideration so long as it be sufficient in law, nor whence it proceeds, but what is the nature of the promise. If it is an undertaking which, although in form a guaranty of the debt of another, is in substance such as to subject the promisor to a liability independent of the liability of the original debtor, it is not within the operation of the statute.[46]

2. What Is Sufficient Consideration. Where a person, upon a new and distinct consideration, undertakes verbally to answer for the antecedent debt of another, the consideration must not only move to him and be beneficial to him and such as brings him under an independent liability irrespective of the liability of the original debtor, but it must be such as at common law is legally sufficient to support a contract. Such a promise will not be enforced therefore if the only consideration is the debt of the original debtor or the performance by the creditor of his antecedent contract with the original debtor,[47] or the request of the original debtor that the promisor will pay his debt,[48] or the mere statement of the account by the creditor and his certification to its correctness,[49] or a promise by the creditor thereafter to sell goods to the promisor at their full value and on the usual terms,[50] or on credit, giving him a reasonable time,[51] or the payment by the promisee of an undisputed debt which he is already legally bound to pay,[52] or a promise by the debtor that he will work for the promisor.[53] Nor is a verbal promise by the president of a bank to a depositor that if he will allow his deposit to remain in the bank the promisor will pay the deposit in full if the bank should close, supported by a sufficient consideration.[54] But in the case of a promise to indemnify one person for becoming a guarantor for another, the assumption of the liability by the promisee is a sufficient consideration for the promise;[55] and an oral promise by a stranger to a pending suit to pay plaintiff's attorney's fee if he or plaintiff will discontinue the proceedings is original and not collateral, and the discontinuance is a sufficient consideration;[56] and so is the privilege of paying in depreciated bank-bills a sufficient consideration for

45. White *v.* Rintoul, 108 N. Y. 222, 227, 15 N. E. 318; Ackley *v.* Parmenter, 98 N. Y. 425, 50 Am. Rep. 693; Brown *v.* Weber, 38 N. Y. 187; Kingsley *v.* Balcome, 4 Barb. (N. Y.) 131, 138 (where Sill, J., stated the true rule to be that "the new 'original consideration' spoken of must be such as to shift the actual indebtedness to the new promiser. So that as between him and the original debtor he must be bound to pay the debt as his own, the latter standing to him in the relation of surety"); Hess *v.* Rothschild, 34 Misc. (N. Y.) 800, 69 N. Y. Suppl. 957; Oldham *v.* Pinkus, 32 Misc. (N. Y.) 199, 65 N. Y. Suppl. 691; Lippmann *v.* Blumenthal, 29 Misc. (N. Y.) 335, 60 N. Y. Suppl. 510; Perry *v.* Erb, 23 Misc. (N. Y.) 105, 50 N. Y. Suppl. 714. See also Waterman *v.* Resseter, 45 Ill. App. 155; Chandler *v.* Davidson, 6 Blackf. (Ind.) 367 (where the court says that there are cases in which a verbal promise to pay the debt of another is valid if the new consideration of the newly contracting parties is "of such a character that it would support a promise to the plaintiff for the payment of the same sum of money, without reference to any debt from another"); Sweatman *v.* Parker, 49 Miss. 19; Olive *v.* Lewis, 45 Miss. 203; Garfield *v.* Rutland Ins. Co., 69 Vt. 549, 38 Atl. 235; Fullam *v.* Adams, 37 Vt. 391; Cross *v.* Richardson, 30 Vt. 641; Commercial Nat. Bank *v.* Smith, 107 Wis. 574, 83 N. W. 766; Clapp *v.* Webb, 52 Wis. 638, 9 N. W. 796.

46. Maule *v.* Bucknell, 50 Pa. St. 39.

47. Hughes *v.* Lawson, 31 Ark. 613; Ellison *v.* Jackson Water Co., 12 Cal. 542; Millard *v.* Steers, 9 N. Y. App. Div. 419, 41 N. Y. Suppl. 321 [*affirmed* in 158 N. Y. 741, 53 N. E. 1128]; Lachman *v.* Irish, 72 Hun (N. Y.) 491, 25 N. Y. Suppl. 193; Meech *v.* Smith, 7 Wend. (N. Y.) 315; Barnett *v.* Boone Lumber Co., 43 W. Va. 441, 27 S. E. 209.

48. Osborne *v.* Farmers' L. & T. Co., 16 Wis. 35.

49. Brown *v.* Barnes, 6 Ala. 694.

50. Ruppe *v.* Peterson, 67 Mich. 437, 35 N. W. 82; Pfeiffer *v.* Adler, 37 N. Y. 164.

51. Cardeza *v.* Bishop, 54 N. Y. App. Div. 116, 66 N. Y. Suppl. 408.

52. Killough *v.* Payne, 52 Ark. 174, 12 S. W. 327.

53. Wills *v.* Cutler, 61 N. H. 405; Reynolds *v.* Carpenter, 3 Pinn. (Wis.) 34.

54. Walther *v.* Merrell, 6 Mo. App. 370. *Contra*, Creel *v.* Bell, 2 J. J. Marsh. (Ky.) 309.

55. Chapin *v.* Merrill, 4 Wend. (N. Y.) 657.

56. Prentice *v.* Wilkinson, 5 Abb. Pr. N. S. (N. Y.) 49.

the promise of an indorsee of a promissory note to pay the same absolutely at maturity.[57]

3. Forbearance by Creditor. It is well settled that a promise to pay the debt of another in consideration merely of forbearance by the creditor to sue the original debtor or to make an attachment or levy an execution, without any new or original consideration moving to the promisor and beneficial to him, is within the statute of frauds, and must be in writing;[58] and so is such an agreement merely in consideration of the discontinuance of the action against the original debtor,[59] or of forbearance to take out administration on the estate of the original debtor,[60] or of forbearance to eject a tenant.[61] It seems, however, that if the result of forbearance to prosecute a claim or to present it for allowance is that, by reason of the expiration of the time within which it is required to be prosecuted or presented, the promisee loses his claim, the promise will not be held to be within the statute.[62]

4. Release or Transfer of Lien or Security. A class of cases in which the obligation of the promisor is not within the statute, although the original debtor continues concurrently liable with the promisor, is that in which, in consideration of the transfer or surrender to himself of a lien, attachment, or other security which the creditor holds for his debt, the promisor orally engages to be answerable therefor. But, in order to withdraw such promise from the operation of the statute, it is essential that the interest, benefit, or advantage which the

57. Spann *v.* Baltzell, 1 Fla. 338, 46 Am. Dec. 346.

58. *Alabama.*— Clark *v.* Jones, 85 Ala. 127, 4 So. 771; Westmoreland *v.* Porter, 75 Ala. 452.

Colorado.— Maxwell *v.* Dell, 11 Colo. 415, 18 Pac. 561.

Connecticut.— Dillaby *v.* Wilcox, 60 Conn. 71, 22 Atl. 491, 25 Am. St. Rep. 299, 13 L. R. A. 643; Huntington *v.* Harvey, 4 Conn. 124; Peabody *v.* Harvey, 4 Conn. 119, 10 Am. Dec. 103; Turner *v.* Hubbell, 2 Day 457, 2 Am. Dec. 115.

Illinois.— Evans *v.* Lohr, 3 Ill. 511.

Indiana.— Blumenthal *v.* Tibbits, 160 Ind. 70, 66 N. E. 159; Krutz *v.* Stewart, 54 Ind. 178; Gillfillan *v.* Snow, 51 Ind. 305.

Iowa.— Westheimer *v.* Peacock, 2 Iowa 528.

Kentucky.— Jones *v.* Walker, 13 B. Mon. 356; Sharpe *v.* Mulholland, 13 Ky. L. Rep. 877.

Maryland.— Thomas *v.* Delphy, 33 Md. 373.

Massachusetts.— Dexter *v.* Blanchard, 11 Allen 365; Nelson *v.* Boynton, 3 Metc. 396, 37 Am. Dec. 148; Tileston *v.* Nettleton, 6 Pick. 509.

Michigan.— Stewart *v.* Jerome, 71 Mich. 201, 38 N. W. 895, 15 Am. St. Rep. 252; Waldo *v.* Simonson, 18 Mich. 345.

Minnesota.— Gilles *v.* Mahony, 79 Minn. 309, 82 N. W. 583.

Missouri.— Musick *v.* Musick, 7 Mo. 495.

New Jersey.— Saxton *v.* Landis, 16 N. J. L. 302.

New York.— White *v.* Rintoul, 108 N. Y. 222, 15 N. E. 318; Brumm *v.* Gilbert, 27 Misc. 421, 59 N. Y. Suppl. 237; Berlescu *v.* Stearns, 26 Misc. 841, 57 N. Y. Suppl. 1; Mitchell *v.* Miller, 25 Misc. 179, 54 N. Y. Suppl. 180; Van Slyck *v.* Pulver, Lalor 47; Smith *v.* Ives, 15 Wend. 182.

Oregon.— Gump *v.* Halberstadt, 15 Oreg. 356, 15 Pac. 467.

South Carolina.— Durham *v.* Arledge, 1 Strobh. 5, 47 Am. Dec. 544; Caston *v.* Moss, 1 Bailey 14; McKinney *v.* Quilter, 4 McCord 409.

Tennessee.— Caperton *v.* Gray, 4 Yerg. 563.

Vermont.— Durant *v.* Allen, 48 Vt. 58.

Washington.— McKenzie *v.* Puget Sound Nat. Bank, 9 Wash. 442, 37 Pac. 668, 43 Am. St. Rep. 844.

England.— Harburg India Rubber Comb Co. *v.* Martin, [1902] 1 K. B. 778, 71 L. J. K. B. 529, 86 L. T. Rep. N. S. 505, 50 Wkly. Rep. 449.

Canada.— Beattie *v.* Dinnick, 27 Ont. 285; Lee *v.* Mitchell, 23 U. C. Q. B. 314.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 52.

On the contrary some early cases which do not appear to have been followed later seem to countenance the doctrine that forbearance to sue the original debtor is a good consideration for an oral promise of a third person to pay his debt. Russell *v.* Babcock, 14 Me. 138 (the correctness of this decision as reported was doubted in Hilton *v.* Dinsmore, 21 Me. 410); Kershaw *v.* Whitaker, 1 Brev. (S. C.) 9 (but this case was not followed or alluded to in McKinney *v.* Quilter, 4 McCord (S. C.) 409); Smith *v.* Rogers, 35 Vt. 140 (this case was not followed or cited in Durant *v.* Allen, 48 Vt. 58); Stewart *v.* Hinkle, 23 Fed. Cas. No. 13,430, 1 Bond 506.

59. Becker *v.* Krank, 62 N. Y. App. Div. 514, 71 N. Y. Suppl. 78; Duffy *v.* Wunsch, 42 N. Y. 243, 2 Abb. Pr. N. S. 113, 1 Am. Rep. 514.

60. Keadle *v.* Siddens, 5 Ind. App. 8, 31 N. E. 539.

61. Riegelman *v.* Focht, 141 Pa. St. 380, 21 Atl. 601, 23 Am. St. Rep. 293.

62. Mitchell *v.* Griffin, 58 Ind. 559; Crawford *v.* King, 54 Ind. 6; Templeton *v.* Bascom, 33 Vt. 132.

creditor has relinquished by the surrender of his lien or other security should inure to the benefit of the defendant or promisor.[63] It is true that in Houlditch *v.* Milne[64] Lord Eldon held that the mere release of a lien by the creditor too an oral promise to pay the debt of another out of the statute, and in some of the United States the courts, relying to a certain extent upon this authority, have decided that if a specific lien or a substantial benefit is surrendered upon the express promise of a third person to pay the creditor, it is an original undertaking and not within the statute.[65] The decision in Houlditch *v.* Milne does not appear to have been followed in England, and both in that country and in the United States the doctrine is generally established that the release or transfer of an advantage by the creditor in consequence of the oral promise of a third person is not withdrawn from the operation of the statute of frauds unless that advantage also directly inures to the benefit of the promisor so as in effect to make it a purchase by him of the creditor at a price measured by the amount of the debt.[66]

63. Jepherson *v.* Hunt, 2 Allen (Mass.) 417; Curtis *v.* Brown, 5 Cush (Mass.) 488; Nelson *v.* Boynton, 3 Metc. (Mass.) 396, 37 Am. Dec. 148; Castling *v.* Aubert, 2 East 325, 331, a leading case in which plaintiff, who was the insurance broker of G, had possession of policies of insurance belonging to G on which he had a lien for the balance of his account; and on the faith of these he agreed to accept bills for G's accommodation. A loss having occurred, plaintiff was requested to give up the policies to defendant, to whom G had intrusted the management of his insurance matters, to enable him to receive the money from the underwriters; and, one of the bills having matured on which G as drawer and plaintiff as accepter had been sued, defendant verbally engaged, if the policies were surrendered to him, to settle the acceptance due, and to deposit money with a banker to meet subsequently maturing acceptances. Upon the faith of this engagement, defendant procured the securities from plaintiff, but did not pay the acceptance. Lord Ellenborough said that in entering into this engagement defendant "had not the discharge of Grayson principally in his contemplation, but the discharge of himself. This was his moving consideration, though the discharge of Grayson would eventually follow. It is rather therefore a purchase of the securities which the plaintiff held in his hands." See also Fitzgerald *v.* Dressler, 5 C. B. N. S. 885, 94 E. C. L. 885; Walker *v.* Taylor, 6 C. & P. 752, 25 E. C. L. 671; Fish *v.* Hutchinson, 2 Ld. Ken. 537, 2 Wils. K. B. 94.

64. Houlditch *v.* Milne, 3 Esp. 86.

65. *Alabama.*— Dunbar *v.* Smith, 66 Ala. 490.

Georgia.— Bluthenthal *v.* Moore, 106 Ga. 424, 32 S. E. 344.

Illinois.— Power *v.* Rankin, 114 Ill. 52, 29 N. E. 185.

Indiana.— Spooner *v.* Dunn, 7 Ind. 81, 63 Am. Dec. 414.

Minnesota.— Walsh *v.* Kattenburgh, 8 Minn. 127.

New York.— Fay *v.* Bell, Lalor 251; Mercein *v.* Andrus, 10 Wend. 461.

South Carolina.—Dunlap *v.* Thorne, 1 Rich. 213; Tindal *v.* Touchberry, 3 Strobh. 177, 49 Am. Dec. 637; Rogers *v.* Collier, 2 Bailey 581, 23 Am. Dec. 153; Atkinson *v.* Barfield, 1 McCord 575; Pigott *v.* Siau, 1 Nott & M. 124.

Wisconsin.— Shook *v.* Vanmater, 22 Wis. 532. *Contra*, Gray *v.* Herman, 75 Wis. 453, 44 N. W. 248, 6 L. R. A. 691.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 55.

66. *Alabama.*— Prout *v.* Webb, 87 Ala. 593, 6 So. 190; Westmoreland *v.* Porter, 75 Ala. 452; Blount *v.* Hawkins, 19 Ala. 100.

Georgia.— Wooten *v.* Wilcox, 87 Ga. 474, 13 S. E. 595; Burruss *v.* Smith, 75 Ga. 710; Bohannon *v.* Jones, 30 Ga. 488.

Illinois.— Borchsenius *v.* Canutson, 100 Ill. 82; Scott *v.* White, 71 Ill. 287; Williamson *v.* Rexroat, 55 Ill. App. 116.

Indiana.— Leake *v.* Ball, 116 Ind. 214, 17 N. E. 918; Fleming *v.* Easter, 60 Ind. 399; Conradt *v.* Sullivan, 45 Ind. 180, 15 Am. Rep. 261; Luark *v.* Malone, 34 Ind. 444.

Iowa.— Morrison *v.* Hogue, 49 Iowa 574.

Kentucky.— Lieber *v.* Levy, 3 Metc. 292; Haydon *v.* Christopher, 1 J. J. Marsh. 382; Simpson *v.* Carr, 76 S. W. 346, 25 Ky. L. Rep. 849; Adams *v.* Brown, 32 S. W. 282, 17 Ky. L. Rep. 634.

Maine.— Plummer *v.* Lyman, 49 Me. 229.

Massachusetts.— Aldrich *v.* Carpenter, 160 Mass. 166, 35 N. E. 456; Richardson *v.* Robbins, 124 Mass. 105; Wills *v.* Brown, 118 Mass. 137; Ames *v.* Foster, 106 Mass. 400, 8 Am. Rep. 343; Curtis *v.* Brown, 5 Cush. 488; Nelson *v.* Boynton, 3 Metc. 396, 37 Am. Dec. 148.

Michigan.— Corkins *v.* Collins, 16 Mich. 478.

Minnesota.— Hodgins *v.* Heaney, 15 Minn. 185.

Missouri.— Hursh *v.* Byers, 29 Mo. 469.

Nebraska.— Joseph *v.* Smith, 39 Nebr. 259, 57 N. W. 1012, 42 Am. St. Rep. 571.

Nevada.— Simpson *v.* Harris, 21 Nev. 353, 31 Pac. 1009.

New Hampshire.— Allen *v.* Thompson, 10 N. H. 32.

New Jersey.— Blackford *v.* Plainfield Gas Light Co., 43 N. J. L. 438; Cowenhoven *v.* Howell, 36 N. J. L. 323.

5. Forbearance to Enforce Lien. In those cases in which the owner or intending purchaser of property which is subject to a mortgage or other lien to secure a debt owing by a third person promises, in consideration of the mortgagee's or other creditor's forbearance to enforce his lien, to pay such debt, his oral promise will be regarded as original and not within the statute, even though the incidental effect of its performance may be the extinguishment of such third person's debt, because in such cases the promisor has himself a direct personal interest in discharging the encumbrance, and the payment thereof is simply the price he undertakes to pay to accomplish his end.[67] But a parol promise to pay the debt of another merely in consideration of forbearance by the creditor to enforce a lien against the original debtor will not be enforced if such forbearance does not inure to the benefit of the promisor and the original debtor remains liable,[68] although during the period for which plaintiff agreed to forbear the time for filing a lien expired.[69] It is obvious that if the oral promise to a subcontractor is not absolute in consideration of forbearance, but only conditional upon the failure of the contractor to pay, it cannot be enforced;[70] and it is ineffective if

New York.— Prime *v.* Koehler, 77 N. Y. 91; Mallory *v.* Gillett, 21 N. Y. 412; Tolhurst *v.* Powers, 61 Hun 105, 15 N. Y. Suppl. 420; Barney *v.* Forbes, 44 Hun 446 [*affirmed* in 118 N. Y. 580, 23 N. E. 890]; Stern *v.* Drinker, 2 E. D. Smith 401; Hutton *v.* Gordon, 2 Misc. 267, 23 N. Y. Suppl. 770; Flagler *v.* Lipman, 1 Misc. 204, 20 N. Y. Suppl. 878 [*affirmed* in 2 Misc. 417, 21 N. Y. Suppl. 946]; Budd *v.* Thurber, 61 How. Pr. 206; New York, etc., R. Co. *v.* Gilchrist, 16 How. Pr. 564; Slingerland *v.* Morse, 7 Johns. 463; Gardiner *v.* Hopkins, 5 Wend. 23.

North Carolina.— Whitehurst *v.* Hyman, 90 N. C. 487.

Oregon.— Bunneman *v.* Wagner, 16 Oreg. 433, 18 Pac. 841, 8 Am. St. Rep. 306; Ludwick *v.* Watson, 3 Oreg. 256; Hedges *v.* Strong, 3 Oreg. 18.

Pennsylvania.— Hearing *v.* Dittman, 8 Phila. 307.

South Carolina.— Hindman *v.* Langford, 3 Strobh. 207.

Tennessee.— Randle *v.* Harris, 6 Yerg. 508.

Texas.— Ridgell *v.* Reeves, 2 Tex. App. Civ. Cas. § 436.

Vermont.—Cross *v.* Richardson, 30 Vt. 641; French *v.* Thompson, 6 Vt. 54.

Wisconsin.— Bray *v.* Parcher, 80 Wis. 16, 49 N. W. 111, 27 Am. St. Rep. 17; Weisel *v.* Spence, 59 Wis. 301, 18 N. W. 165.

Canada.— Gerow *v.* Clark, 9 U. C. Q. B. 219.

See 23 Cent. Dig. tit. "Frauds, Statute of," §§ 55, 57.

67. *District of Columbia.*— Williamson *v.* Hill, 3 Mackey 100.

Iowa.— Barker *v.* Guilliam, 5 Iowa 510.

Massachusetts.— See Fears *v.* Story, 131 Mass. 47, where plaintiff, who had a lien on defendant's schooner for the amount due to him for construction materials furnished to a former owner, refused to permit the schooner to go to sea unless the lien was paid, and defendant then orally promised to pay the lien, and plaintiff permitted the vessel to go to sea and forbore to prosecute his lien, and defendant was held liable on his promise, on the ground that when plaintiff, in consideration of defendant's promise, relinquished his lien, whereby a benefit inured to defendant, the transaction constituted a new and independent contract.

Michigan.— Stephen *v.* Yeomans, 112 Mich. 624, 71 N. W. 159.

Montana.— Carothers *v.* Connolly, 1 Mont. 433.

New York.— Alley *v.* Turck, 8 N. Y. App. Div. 50, 40 N. Y. Suppl. 433; Myers *v.* Dorman, 34 Hun 115; Prime *v.* Koehler, 7 Daly 345 [*affirmed* in 77 N. Y. 91, 19 Alb. L. J. 421]; Blumberg *v.* Bezozi, 20 Misc. 286, 45 N. Y. Suppl. 672.

Pennsylvania.— Arnold *v.* Stedman, 45 Pa. St. 186; Burr *v.* Mazer, 2 Pa. Super. Ct. 436, 39 Wkly. Notes Cas. 157.

Texas.— Muller *v.* Riviere, 59 Tex. 640, 46 Am. Rep. 291.

Wisconsin.— Kelley *v.* Schupp, 60 Wis. 76, 18 N. W. 725; Young *v.* French, 35 Wis. 111.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 56.

68. *Alabama.*— Clark *v.* Jones, 85 Ala. 127, 4 So. 771; Sharman *v.* Jackson, 47 Ala. 329.

Illinois.— Hahn *v.* Maxwell, 33 Ill. App. 261. *Contra,* Cornell *v.* Central Electric Light Co., 61 Ill. App. 325.

Indiana.— Parker *v.* Dillingham, 129 Ind. 542, 29 N. E. 23.

Maine.— Stewart *v.* Campbell, 58 Me. 439, 4 Am. Rep. 296.

Massachusetts.— Ames *v.* Foster, 106 Mass. 400, 8 Am. Rep. 343.

Michigan.— Fuller, etc., Lumber, etc., Co. *v.* Houseman, 117 Mich. 553, 76 N. W. 77.

New York.— Ackley *v.* Parmenter, 31 Hun 476 [*affirmed* in 98 N. Y. 425, 50 Am. Rep. 693].

In South Carolina the opposite view prevails, viz., that an oral promise to pay the debt of a third person upon the promisee's forbearance to enforce a lien against him is not within the statute, although the consideration is not beneficial to the promisor. Ellis *v.* Carroll, 68 S. C. 376, 47 S. E. 679, 102 Am. St. Rep. 679; Adkinson *v.* Barfield, 1 McCord 575.

69. Hahn *v.* Maxwell, 33 Ill. App. 261.

70. Warner *v.* Willoughby, 60 Conn. 468, 22 Atl. 1014, 25 Am. St. Rep. 343.

plaintiff, although agreeing to delay the enforcement of his lien, does not waive it, and in fact files it within the statutory period,[71] or if he has not complied with the statute so as to be in a situation to enforce his lien.[72]

6. Purchase of Debt. Somewhat different in principle from those cases sustaining the validity of an oral promise to answer for the debt of another in consideration of the creditor's release of a lien or security which inures to the benefit of the promisor is a class of cases in which defendant, instead of agreeing to pay or discharge the debt of the original debtor, contracts to purchase it from the creditor. This undertaking is held not to be within the statute of frauds.[73]

V. Representations.[74]

A. In General. The English statute[75] commonly called Lord Tenterden's Act, which was enacted May 9, 1828, apparently for the purpose of extending the fourth section of the statute of frauds, provided by section six "that no action shall be brought to charge any person, upon or by reason of any representation or assurance made or given concerning or relating to the conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon, [*sic*][76] unless such representation or assurance be made in writing, signed by the party to be charged therewith." Similar statutes have been enacted in many of the states and territories of the United States.[77] Prior to the enactment of the English statute it was held in England that a false statement made by defendant with respect to the credit, ability, or solvency of a third person with intent to defraud plaintiff will, if plaintiff suffers damage, found an action on the case in the nature of deceit;[78] and this rule has been generally followed in this country in

71. Vaughn *v.* Smith, 65 Iowa 579, 22 N. W. 684.

72. Parker *v.* Dillingham, 129 Ind. 542, 29 N. E. 23.

73. *Arkansas.*— Gist *v.* Harkrider, (1891) 15 S. W. 187; Conger *v.* Cotton, 37 Ark. 286.

Illinois.— Hayward *v.* Gunn, 82 Ill. 385.

Indiana.—Collins *v.* Stanfield, 139 Ind. 184, 38 N. E. 1091.

New York.— Mead *v.* Keyes, 4 E. D. Smith 510.

Pennsylvania.— Hearing *v.* Dittman, 8 Phila. 307.

Rhode Island.—Stillman *v.* Dresser, 22 R. I. 389, 48 Atl. 1.

Vermont.— Lampson *v.* Hobart, 28 Vt. 697.

Wisconsin.— Hoeflinger *v.* Stafford, 38 Wis. 391.

United States.— Humphreys *v.* St. Louis, etc., R. Co., 37 Fed. 307.

England.— Anstey *v.* Marden, 1 B. & P. N. R. 124, 2 Smith K. B. 426, 8 Rev. Rep. 713. See also Tomlinson *v.* Gill, Ambl. 330, 27 Eng. Reprint 221; Chater *v.* Becket, 7 T. R. 201, 4 Rev. Rep. 418; Case *v.* Barber, T. Raym. 450.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 58.

74. Misrepresentation in general see Fraud.

75. St. 9 Geo. IV, c. 14.

76. "Which I have no doubt may be read 'money or goods upon credit.'" Lyde *v.* Barnard, 1 Gale 388, 5 L. J. Exch. 117, 1 M. & W. 101, Tyrw. & G. 250, 256, per Gurney, B.

77. See the statutes of the different states. Statute applied see the following cases:

Alabama.— Ball *v.* Farley, 81 Ala. 288, 1 So. 253.

Indiana.— Heintz *v.* Mueller, 19 Ind. App. 240, 49 N. E. 293; Mendenhall *v.* Stewart, 18 Ind. App. 262, 47 N. E. 943.

Maine.— Brown *v.* Kimball, 84 Me. 280, 24 Atl. 847; Hunter *v.* Randall, 62 Me. 423, 16 Am. Rep. 490; Hearn *v.* Waterhouse, 39 Me. 96.

Massachusetts.— Bates *v.* Youngerman, 142 Mass. 120, 7 N. E. 549.

Michigan.— St. Johns Nat. Bank *v.* Steel, 135 Mich. 165, 97 N. W. 704.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 59 *et seq.*

78. Foster *v.* Charles, 6 Bing. 396, 19 E. C. L. 183, 7 Bing. 105, 20 E. C. L. 55, 8 L. J. C. P. O. S. 118, 4 M. & P. 741, 31 Rev. Rep. 446; Tapp *v.* Lee, 3 B. & P. 367; Haycraft *v.* Creasy, 2 East 92, 6 Rev. Rep. 380; Eyre *v.* Dunsford, 1 East 318; Pasley *v.* Freeman, 3 T. R. 51, 1 Rev. Rep. 634, 2 Smith Lead. Cas. (8th Am. ed.) 66, the leading case. In Trapp *v.* Lee, *supra*, which was an action on the case to recover damages caused by an oral fraudulent representation by defendant as to the credit of a third person, whereby plaintiff was induced to sell him goods, Chambre, J., observed that "cases of this sort are within all the mischief intended to be prevented by the statute of frauds; but I think that statute does not extend to them," and Lord Alvanley remarked, "After the determinations which have taken place, I am bound to hold that such an action lies, though I much wish that the legislature would interfere in restraining these actions, unless the representation on which

those states in which no statute similar to Lord Tenterden's Act has been enacted.[79] The courts limit the operation of the statute strictly to the evil it was intended to cure.[80] It is unnecessary, however, in order to make the defense of the statute available, that plaintiff should in terms declare on the representation. The true test whether the cause of action in whatever form alleged comes within the statute is whether the action can be sustained without proof of the representations made for the purpose of establishing the credit or pecuniary ability of another. If such proof is essential to the action, the statute applies.[81] Nor does the fact that the declaration or complaint charges a conspiracy affect the question; the purpose of the statute cannot be evaded by the form of the complaint; the necessity that the representations should have been made in writing is the same where conspiracy is set up as where it is not.[82]

B. Scope and Effect of Statute — 1. Limitation to Representations as to Third Person and to Obtain Credit For Him. It is well settled that the statute is limited in its application to cases in which the representation is made for the purpose of obtaining credit for a third person.[83]

they are made be given in writing." The decision in Pasley *v.* Freeman, *supra*, was strongly criticized by Lord Chancellor Eldon in Evans *v.* Bicknell, 6 Ves. Jr. 174, 5 Rev. Rep. 245, 31 Eng. Reprint 998.

79. *Connecticut.*— Hart *v.* Tallmadge, 2 Day 381, 2 Am. Dec. 105; Wise *v.* Wilcox, 1 Day 22.

Kentucky.— Warren *v.* Barker, 2 Duv. 155.

Louisiana.— Parrish *v.* Cirode, 8 Rob. 117.

Massachusetts.— Patten *v.* Gurney, 17 Mass. 182, 9 Am. Dec. 141. See also Sibley *v.* Hulbert, 15 Gray 509, 511.

New Hampshire.— See Coon *v.* Atwell, 46 N. H. 510.

New York.— Allen *v.* Addington, 7 Wend. 9; Benton *v.* Pratt, 2 Wend. 385, 20 Am. Dec. 623; Upton *v.* Vail, 6 Johns. 181, 5 Am. Dec. 210. In Gallager *v.* Brunel, 6 Cow. 346, it was held, however, that a parol promise to indorse a note for goods to be sold to a third person cannot be turned into a misrepresentation of his credit so as to subject the promisor to an action for deceit.

Vermont.— Ewins *v.* Calhoun, 7 Vt. 79; Weeks *v.* Burton, 7 Vt. 67.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 60 *et seq.* And see *supra*, IV, A, 4, c.

Contra.— Savage *v.* Jackson, 19 Ga. 305.

80. See the cases cited *infra*, this note.

The statute does not apply to a false representation as to the genuineness of the signatures of the indorsers of a promissory note which is implied by procuring the discount of the note (Cabot Bank *v.* Morton, 4 Gray (Mass.) 156); nor to false representations that the maker of promissory notes which were sold by defendant to plaintiff as collateral security was good and the notes collectable, because the statute is confined to cases where the representations form no part of the contract (Belcher *v.* Costello, 122 Mass. 189; Huntington *v.* Wellington, 12 Mich. 10); nor to a case where one was induced by the holder of a promissory note to indorse it through false and fraudulent representations as to the responsibility of the maker (Lenheim *v.* Fay, 27 Mich. 70. See Kemp *v.* National Bank of Republic, 109 Fed. 48, 48 C. C. A. 213); nor to false representations, made by an owner of property to subcontractors to induce them to furnish brick to the contractor, that he, the owner, had money under his control which was coming to the contractor, and that he would see the subcontractors paid first, since the gist of the action was a false representation, not as to the credit of the contractor, but as to the relations existing between the owner and the contractor (Daniel *v.* Robinson, 66 Mich. 296, 33 N. W. 497); nor to misrepresentations to a bank as to the identity of a certain person as the payee of a draft (Lahay *v.* City Nat. Bank, 15 Colo. 339, 25 Pac. 704, 22 Am. St. Rep. 407); nor to a statement or representation as to the ownership of a building on land belonging to the person making the statement (Harris *v.* Powers, 57 Ala. 139).

81. Cook *v.* Churchman, 104 Ind. 141, 3 N. E. 759; Hunter *v.* Randall, 62 Me. 423, 16 Am. Rep. 490.

82. Cook *v.* Churchman, 104 Ind. 141, 3 N. E. 759; Bush *v.* Sprague, 51 Mich. 41, 16 N. W. 222. But the statute does not apply to an actual conspiracy to defraud which goes beyond a representation as to the pecuniary ability of a third person who is insolvent. Hodgin *v.* Bryant, 114 Ind. 401, 16 N. E. 815.

83. Stannard *v.* Kingsbury, 179 Mass. 174, 60 N. E. 552; McKinney *v.* Whiting, 8 Allen (Mass.) 207; Kimball *v.* Comstock, 14 Gray (Mass.) 508; Norton *v.* Huxley, 13 Gray (Mass.) 285; Medbury *v.* Watson, 6 Metc. (Mass.) 246, 39 Am. Dec. 726; Bush *v.* Sprague, 51 Mich. 41, 16 N. W. 222.

The statute does not extend to verbal representations by defendant with reference to his own credit or to the value of property which he is selling to plaintiff. Hubbard *v.* Long, 105 Mich. 442, 63 N. W. 644; French *v.* Fitch, 67 Mich. 492, 35 N. W. 258. Therefore false representations by defendant as to the value of certain property and as to the price paid therefor by a third person, made to induce plaintiff to purchase the property at a price in excess of its value and not to obtain credit for a third person, are action-

2. Representations as to Specific Pecuniary Ability of Third Person. The statute extends not only to representations concerning a third person's general pecuniary ability but also to statements as to the ownership of specific property, if made concerning the credit, ability, trade, or dealings of another who is said to be the owner of such specific property.[84]

3. Ulterior Purpose to Benefit Defendant. A fraudulent verbal representation as to the pecuniary ability of a third person, and made for the purpose of obtaining credit for him being within the statute, it is immaterial that it was made for the purpose of enabling the person making it to procure the payment of his own debt or other advantage from such third person.[85]

4. Partial Dependence on Oral Representations. An action may be maintained in cases where, the representations being partly written and partly verbal, the written representations are shown to have been the principal inducement and the oral representations to have been merely incidental or stated in furtherance of the main ground of complaint.[86]

5. Representations Incapable of Reduction to Writing. The statute is not regarded as applicable to such representations as are not capable of being reduced to writing; and therefore such fraud as produces false impressions more by action than by words is not covered by the statute.[87]

6. Fraudulent Intent. In some jurisdictions the statute is held to have no reference to false verbal representations as to the credit of a third person if made with fraudulent intent,[88] but elsewhere a contrary view is taken.[89]

7. Application to Corporations. It is well settled that the word "person" as used in the statute includes a corporation, and therefore that oral representations made by its officers or by third persons with reference to its financial standing or means are not actionable;[90] but the rule is otherwise if the alleged corporation

able, although not made in writing (Medbury *v.* Watson, 6 Metc. (Mass.) 246, 39 Am. Dec. 726); and so are false representations relating to the value and validity of certificates of stock (Walker *v.* Russell, 186 Mass. 69, 71 N. E. 86, where it is said that the statute applies only to such representations as are made to induce plaintiff to enter into a transaction which will result in a debt due to him from the third person; and that representations as to the financial credit of a corporation, made to induce plaintiff to subscribe to its capital stock, to be paid for in cash, are representations of fact bearing upon the value of the shares and are not within the statute. See also Com. *v.* Coe, 115 Mass. 481); and so are false representations that a third person was a partner in a certain firm, made for the purpose of inducing plaintiff to sell goods to the firm (Clark *v.* Hurd, 79 Mich. 130, 44 N. W. 343), as well as fraudulent verbal representations by partners as to the amount invested by them in the partnership, made for the purpose of inducing plaintiff to contribute money to the partnership and become a member of it (St. John *v.* Hendrickson, 81 Ind. 350).

84. Cook *v.* Churchman, 104 Ind. 141, 3 N. E. 759; Hunnewell *v.* Duxbury, 157 Mass. 1, 31 N. E. 700; Lyde *v.* Barnard, 1 Gale 388, 5 L. J. Exch. 117, 1 M. & W. 101, Tyrw. & G. 250, in which case, however, the court was evenly divided.

85. Mann *v.* Blanchard, 2 Allen (Mass.) 386; Wells *v.* Prince, 15 Gray (Mass.) 562 (holding that fraudulent verbal representations by the agent of an insurance company as to its credit and pecuniary ability, whereby plaintiff was induced to insure therein, made for the purpose of obtaining a commission on the premium paid for insurance, are within the statute and are not actionable); Kimball *v.* Comstock, 14 Gray (Mass.) 508.

86. Clark *v.* Edgar, 84 Mo. 106, 54 Am. Rep. 84 [*affirming* 12 Mo. App. 345]; Weil *v.* Schwartz, 21 Mo. App. 372; Tatton *v.* Wade, 18 C. B. 370, 86 E. C. L. 370.

87. Bush *v.* Sprague, 51 Mich. 41, 16 N. W. 222.

88. Clark *v.* Dunham Lumber Co., 86 Ala. 220, 5 So. 560; Dent *v.* McGrath, 3 Bush (Ky.) 174; Warren *v.* Barker, 2 Duv. (Ky.) 155. See *supra*, IV, A, 4, c; V, A.

89. Cook *v.* Churchman, 104 Ind. 141, 3 N. E. 759; Nevada Bank *v.* Portland Nat. Bank, 59 Fed. 338, 344, where it was said: "By Lord Tenterden's act it was declared that representations concerning the credit of another should not be actionable unless in writing, and signed by the party making the same. What was the nature of the representations that were placed under the protection of the statute? They were obviously such as, prior to the statute, were actionable. There is no warrant for holding that the statute was intended to create a new cause of action, or to render representations actionable which before were not. The essence of the action after as well as before the statute was the fraudulent intent."

90. Hunnewell *v.* Duxbury, 157 Mass. 1, 31 N. E. 700; McKinney *v.* Whiting, 8 Allen (Mass.) 207; Bush *v.* Sprague, 51 Mich. 41, 16 N. W. 222. See also *infra*, X, A, 8.

has no legal existence, and is merely fraudulently represented to have been incorporated.[91]

VI. AGREEMENTS NOT TO BE PERFORMED WITHIN A YEAR.

A. Statutory Provisions in General. The English statute of frauds provided that no action should be brought upon any oral agreement that is not to be performed within the space of one year from the making thereof,[92] and in this country most of the states have enacted similar provisions.[93]

B. Agreements to Which Statute Applies[94] — **1. In General.** This provision of the statute has no reference to the subject-matter of a contract, but merely limits the time within which an oral contract, to be enforceable, must, by its terms, or by the understanding or manifest intent of the parties thereto be performed. A verbal agreement which cannot be performed within one year from the making thereof is within the statute, although performance might have been completed within one year from the time it was to begin. The year runs from the day when the agreement is made and not from the day when performance is to begin.[95] If the time stipulated for the performance of a contract exceeds a year by any period of time — be it ever so little — the statute applies.[96] It applies to oral promises to pay money as well as to oral agreements in which the parties stipulate to do some other act.[97] It does not apply to oral contracts which are by their terms to be performed within a year, even though they may be continued longer at the option of the parties.[98] It has been held that this clause of the statute does not apply to contracts relating to real estate.[99]

2. Agreements to Lease or Demise Realty. In some jurisdictions the clause of the statute of frauds forbidding the enforcement of an oral agreement that is not to be performed within one year from the time of the making thereof is held to apply to oral agreements relating to the transfer or creation of interests in realty, so that a parol agreement to demise real estate for a term of one year, the lease to commence in the future, is unenforceable;[1] but in other jurisdictions a contrary

Effect of statute on liability of directors who make parol representations concerning the character or credit of a corporation see CORPORATIONS, 10 Cyc. 847.

91. Stannard *v.* Kingsbury, 179 Mass. 174, 60 N. E. 552; Hess *v.* Culver, 77 Mich. 598, 43 N. W. 994, 18 Am. St. Rep. 421, 6 L. R. A. 498; Bush *v.* Sprague, 51 Mich. 41, 16 N. W. 222.

92. St. 29 Car. II, c. 3, § 4.

93. See the statutes of the several states.

94. Implied contracts see *infra*, X, A, 10.

95. Sharp *v.* Rhiel, 55 Mo. 97; Biest *v.* Versteeg Shoe Co., 97 Mo. App. 137, 70 S. W. 1081. However, a contract requiring one year for performance will not be regarded as within the statute if there is no evidence that by its terms the year was to commence at a future day. Sprague *v.* Foster, 48 Ill. App. 140.

96. Reynolds *v.* Wymore First Nat. Bank, 62 Nebr. 747, 87 N. W. 912; Bracegirdle *v.* Heald, 1 B. & Ald. 722, 726, 19 Rev. Rep. 442, where Lord Ellenborough said: "If we were to hold that a case which extended one minute beyond the time pointed out by the statute, did not fall within its prohibition, I do not see where we should stop; for in point of reason, an excess of twenty years will equally not be within the act."

97. Wilson *v.* Ray, 13 Ind. 1; Cabot *v.* Haskins, 3 Pick. (Mass.) 83.

98. Brigham *v.* Carlisle, 78 Ala. 243, 56 Am. Rep. 28; De Land *v.* Hall, 134 Mich. 381, 96 N. W. 449; Denn *v.* Peters, 36 Oreg. 486, 59 Pac. 1109.

99. Baynes *v.* Chastain, 68 Ind. 376, where it was held that an agreement to maintain a fence does not violate the provision in regard to contracts which are not to be performed within one year, since that provision has no application to real estate. See also *infra*, VI, B, 2.

1. *Alabama.*— Bain *v.* McDonald, 111 Ala. 269, 20 So. 77; White *v.* Levy, 93 Ala. 484, 9 So. 164; Treadway *v.* Smith, 56 Ala. 345; Parker *v.* Hollis, 50 Ala. 411; Crommelin *v.* Thiess, 31 Ala. 412, 70 Am. Dec. 499.

California.— Wickson *v.* Monarch Cycle Mfg. Co., 128 Cal. 156, 60 Pac. 764, 79 Am. St. Rep. 36.

Connecticut.— Janes *v.* Finny, 1 Root 549.

Illinois.— Wheeler *v.* Frankenthal, 78 Ill. 124; Strehl *v.* D'Evers, 66 Ill. 77; Comstock *v.* Ward, 22 Ill. 248; Olt *v.* Lohnas, 19 Ill. 576; Cooney *v.* Murray, 45 Ill. App. 463. But a parol lease made on the tenth day of the month to run for one year from the first day of the month is not within the statute. Ryan *v.* Kirchberg, 17 Ill. App. 132.

Kansas.— Wolf *v.* Dozer, 22 Kan. 436.

Kentucky.— Greenwood *v.* Strother, 91 Ky. 482, 16 S. W. 138, 13 Ky. L. Rep. 33, 12 Ky.

view is taken, and this clause of the statute is held not to apply to oral agreements of that nature.[2]

3. PROMISES OF MARRIAGE.[3] In some jurisdictions oral promises to marry which are not to be performed within a year are held to be within the statute,[4] but in other jurisdictions they are not.[5]

C. Agreements Containing No Definite Stipulation as to Time of Performance — 1. AGREEMENTS ADMITTING OF PERFORMANCE WITHIN A YEAR. In general a verbal agreement to do some particular act which fixes no definite or contingent time for its performance but which, in view of the understanding of the parties and of its subject-matter, is capable of full performance within one year after the making thereof, is not controlled by the statute.[6] The fact, however, that by

L. Rep. 352; Roberts *v.* Tennell, 3 T. B. Mon. 247; Thomas *v.* McManus, 64 S. W. 446, 23 Ky. L. Rep. 837; Watson *v.* Holmes, 8 Ky. L. Rep. 780; Taylor *v.* Kinkead, 4 Ky. L. Rep. 834.

Massachusetts.— Delano *v.* Montague, 4 Cush. 42.

Minnesota.— Brosius *v.* Evans, 90 Minn. 521, 97 N. W. 373; Johnson *v.* Albertson, 51 Minn. 333, 53 N. W. 642; Jellett *v.* Rhode, 43 Minn. 166, 45 N. W. 13, 7 L. R. A. 671; Mackey *v.* Potter, 34 Minn. 510, 26 N. W. 906.

Missouri.— Butts *v.* Fox, 96 Mo. App. 437, 70 S. W. 515; Cook *v.* Redman, 45 Mo. App. 397; Beiler *v.* Devoll, 40 Mo. App. 251; Briar *v.* Robertson, 19 Mo. App. 66.

Oregon.— White *v.* Holland, 17 Oreg. 3, 3 Pac. 573; Pulse *v.* Hamer, 8 Oreg. 251.

Pennsylvania.—Wheeler *v.* Conrad, 6 Phila. 209.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 66.

2. *Arkansas.*— Higgins *v.* Gager, 65 Ark. 604, 47 S. W. 848.

Colorado.— Sears *v.* Smith, 3 Colo. 287.

Georgia.— Steininger *v.* Williams, 63 Ga. 475. Formerly the rule was otherwise. Atwood *v.* Norton, 31 Ga. 507.

Indiana.— St. Joseph Hydraulic Co. *v.* Globe Tissue Paper Co., 156 Ind. 665, 59 N. E. 995; Worley *v.* Sipe, 111 Ind. 238, 12 N. E. 385; Wolke *v.* Fleming, 103 Ind. 105, 2 N. E. 325, 53 Am. Rep. 495; Cole *v.* Wright, 70 Ind. 179; Baynes *v.* Chastain, 68 Ind. 376; Fall *v.* Hazelrigg, 45 Ind. 576, 15 Am. Rep. 278; Huffman *v.* Starks, 31 Ind. 474.

Iowa.— Stem *v.* Nysonger, 69 Iowa 512, 29 N. W. 433; Jones *v.* Marcy, 49 Iowa 188; Sobey *v.* Brisbee, 20 Iowa 105.

Michigan.— Whiting *v.* Ohlert, 52 Mich. 462, 18 N. W. 219, 50 Am. Rep. 265. And see Tillman *v.* Fuller, 13 Mich. 113.

Mississippi.— McCroy *v.* Toney, 66 Miss. 233, 5 So. 392, 2 L. R. A. 847.

New York.— Ward *v.* Hasbrouck, 169 N. Y. 407, 62 N. E. 434; Becar *v.* Flues, 64 N. Y. 518; Young *v.* Dake, 5 N. Y. 463, 55 Am. Dec. 356 [*overruling* Croswell *v.* Crane, 7 Barb. 191]; Stearns *v.* Lichtenstein, 48 N. Y. App. Div. 498, 62 N. Y. Suppl. 949; Reeder *v.* Sayre, 6 Hun 562 [*affirmed* in 70 N. Y. 180, 26 Am. Rep. 567]; Taggard *v.* Roosevelt, 2 E. D. Smith 100. *Contra*, Spencer *v.* Halstead, 1 Den. 606; Wilson *v.* Martin, 1 Den. 602.

South Carolina.— Hillhouse *v.* Jennings, 60 S. C. 392, 38 S. E. 596.

Tennessee.— Hayes *v.* Arrington, 108 Tenn. 494, 68 S. W. 44.

Texas.— See Bateman *v.* Maddox, 86 Tex. 546, 26 S. W. 51; Randall *v.* Thompson, 1 Tex. App. Civ. Cas. § 1101; Styler *v.* Rector, 1 Tex. App. Civ. Cas. § 957.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 66.

3. **Validity of parol contract to marry** see also BREACH OF PROMISE TO MARRY, 5 Cyc. 999 note 8, 1018 note 58.

4. Paris *v.* Strong, 51 Ind. 339; Nichols *v.* Weaver, 7 Kan. 373; Derby *v.* Phelps, 2 N. H. 515; Ullman *v.* Meyer, 10 Fed. 241, 25 Alb. L. J. 409.

5. *Illinois.*— Blackburn *v.* Mann, 85 Ill. 222.

Maine.— Lawrence *v.* Cooke, 56 Me. 187, 96 Am. Dec. 443.

Maryland.— Lewis *v.* Tapman, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385.

New York.— Brick *v.* Gannar, 36 Hun 52.

Texas.— Clark *v.* Reese, 26 Tex. Civ. App. 619, 64 S. W. 783.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 66.

6. *California.*— Orland Bank *v.* Finnell, 133 Cal. 475, 65 Pac. 976; Dougherty *v.* Rosenberg, 62 Cal. 32 (where an oral agreement to pay an assessment when the promisee recovered judgment against other parties, if the latter would altogether forbear to sue the promisor, was held to be valid, because the judgment might be recovered within a year); Hoare *v.* Hindley, 49 Cal. 274.

Delaware.— Devalinger *v.* Maxwell, 4 Pennew. 185, 54 Atl. 684.

Illinois.— Vocke *v.* Peters, 58 Ill. App. 338.

Indiana.— Niagara F. Ins. Co. *v.* Greene, 77 Ind. 590; Paris *v.* Strong, 51 Ind. 339.

Kansas.— MacElree *v.* Wolfersberger, 59 Kan. 105, 52 Pac. 69; Larimer *v.* Kelley, 10 Kan. 298.

Kentucky.— Standard Oil Co. *v.* Denton, 70 S. W. 282, 24 Ky. L. Rep. 906; Burden *v.* Lucas, 44 S. W. 86, 19 Ky. L. Rep. 1581; McNamara *v.* Madden, 39 S. W. 697, 19 Ky. L. Rep. 229.

Maryland.— Neal *v.* Parker, 98 Md. 254, 57 Atl. 213.

Massachusetts.— Drew *v.* Wiswall, 183 Mass. 554, 67 N. E. 666; Scribner *v.* Flagg Mfg. Co., 175 Mass. 536, 56 N. E. 603; Somerby *v.* Buntin, 118 Mass. 279, 19 Am.

a mere possibility a contemplated act may be performed within a year will not of itself suffice to withdraw a case from the operation of the statute, if it clearly appears from the terms of the contract or from its nature that it was not the intention or understanding of the parties that it should be performed within that time.[7]

2. AGREEMENTS DEPENDENT ON THE HAPPENING OF A CONTINGENCY. An oral agreement the performance of which is dependent upon the happening of a certain contingency is not within the statute if the contingency is such as may occur within one year; and this is true, although the contingency may not in fact happen until after the expiration of the year, and although the parties may not have expected that it would occur within that period. It is sufficient if the possibility of performance within the prescribed time existed.[8] Thus the statute does not

Rep. 459, where an agreement to obtain letters patent was held to be an agreement which might be performed within a year.

Michigan.— Cummings *v.* Stone, 13 Mich. 70.

Missouri.— Winters *v.* Cherry, 78 Mo. 344; Suggett *v.* Cason, 26 Mo. 221; May *v.* Moore, 99 Mo. App. 27, 72 S. W. 476; Royal Remedy, etc., Co. *v.* Gregory Grocer Co., 90 Mo. App. 53.

New Hampshire.— Jackson *v.* Higgins, 70 N. H. 637, 49 Atl. 574.

New York.— Great Western Turnpike Co. *v.* Shafer, 57 N. Y. App. Div. 331, 68 N. Y. Suppl. 5 [*affirmed* in 172 N. Y. 662, 65 N. E. 1121]; Rochester Folding Box Co. *v.* Browne, 55 N. Y. App. Div. 444, 66 N. Y. Suppl. 867; Van Woert *v.* Albany, etc., R. Co., 1 Thomps. & C. 256 [*affirmed* in 67 N. Y. 538]; Everitt *v.* New York Engraving, etc., Co., 14 Misc. 580, 35 N. Y. Suppl. 1097; Von Kamen *v.* Roes, 20 N. Y. Suppl. 548; Burlingame *v.* Manderville, 7 N. Y. St. 858.

Ohio.— Randall *v.* Turner, 17 Ohio St. 262; Koehler *v.* Hunt, 8 Ohio Dec. (Reprint) 404, 7 Cinc. L. Bul. 302.

Texas.— Templeman *v.* Gibbs, 86 Tex. 358, 24 S. W. 792; New York, etc., Land Co. *v.* Dooley, (Civ. App. 1903) 77 S. W. 1030; Hintze *v.* Krabbenschmidt, (Civ. App. 1897) 44 S. W. 38; Long Mfg. Co. *v.* Gray, 13 Tex. Civ. App. 172, 35 S. W. 32; McDonnell *v.* Home Bitters Co., 1 Tex. App. Civ. Cas. § 1159.

Wisconsin.— Birdsall *v.* Birdsall, 52 Wis. 208, 8 N. W. 822; Ganter *v.* Atkinson, 35 Wis. 48, holding that where the term for which an oral lease was made does not appear, it will not be assumed that it was for more than a year.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 74.

Parol condition in subscription to corporate stock which is capable of being performed within a year see CORPORATIONS, 10 Cyc. 416.

7. *Kentucky.*— Saunders *v.* Kastenbine, 6 B. Mon. 17, where an oral agreement to purchase a slave for four hundred dollars, payable in monthly instalments of not less than four dollars nor more than eight dollars, was held to be within the statute.

Maine.— Herrin *v.* Butters, 20 Me. 119.

Missouri.— Biest *v.* Versteeg Shoe Co., 97 Mo. App. 137, 70 S. W. 1081.

New York.— Kellogg *v.* Clark, 23 Hun 393.

Vermont.— Hinckley *v.* Southgate, 11 Vt. 428.

England.—Boydell *v.* Drummond, 2 Campb. 157, 11 East 142, 10 Rev. Rep. 450, a leading case wherein it appeared that defendant became an oral subscriber to a proposed series of seventy-two large prints of scenes from Shakespeare's plays which plaintiff intended to publish in eighteen numbers at three guineas a number; that the prospectus issued by plaintiff announced that one number at least should be published annually, and that the proprietors were confident that they should be able to produce two numbers within the course of every year, and it was held that the statute applied.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 72 *et seq.*

8. *Alabama.*— Adams *v.* Adams, 26 Ala. 272.

California.— Osment *v.* McElrath, 68 Cal. 466, 9 Pac. 731, 58 Am. Rep. 17.

Georgia.— Burney *v.* Ball, 24 Ga. 505.

Illinois.— Birks *v.* Gillett, 13 Ill. App. 369.

Indiana.— Marley *v.* Noblett, 42 Ind. 85; Stroughan *v.* Indianapolis, etc., R. Co., 38 Ind. 185.

Kentucky.— Myers *v.* Korb, 50 S. W. 1108, 21 Ky. L. Rep. 163; Howard *v.* Snyder, 9 Ky. L. Rep. 358; Stowers *v.* Hollis, 7 Ky. L. Rep. 549.

Maryland.— Cole *v.* Singerly, 60 Md. 348; Ellicott *v.* Turner, 4 Md. 476.

Massachusetts.— Peters *v.* Westborough, 36 Mass. 364, 31 Am. Dec. 142.

Michigan.— Durgin *v.* Smith, 115 Mich. 239, 73 N. W. 361; Smalley *v.* Mitchell, 110 Mich. 650, 68 N. W. 978; Barton *v.* Gray, 57 Mich. 622, 24 N. W. 638; Sword *v.* Keith, 31 Mich. 247.

Mississippi.— Soggins *v.* Heard, 31 Miss. 426.

Missouri.— Suggett *v.* Cason, 26 Mo. 221; Biest *v.* Versteeg Shoe Co., 97 Mo. App. 137, 70 S. W. 1081.

New Hampshire.— Martin *v.* Batchelder, 69 N. H. 360, 41 Atl. 83.

New York.— Van Woert *v.* Albany, etc., R. Co., 67 N. Y. 538 [*affirming* 1 Thomps. & C. 256]; Smith *v.* Conlin, 19 Hun 234.

Ohio.— Westropp *v.* Westropp, 13 Ohio Cir. Ct. 244, 7 Ohio Cir. Dec. 14.

South Carolina.— Gadsden *v.* Lance, 1 McMull. Eq. 87, 37 Am. Dec. 548.

Texas.— Thomas *v.* Hammond, 47 Tex. 42;

apply to an oral promise to pay money or convey property upon the death of the promisor or of a third person;[9] nor to a promise to pay the promisee a sum of money out of the proceeds of property when it should be sold by the promisor;[10] nor to a parol promise to leave money or other property by will.[11] Upon the same principle, an oral contract of insurance which is to commence within the year is valid, since the contingency upon which the liability accrues may happen within the year; and the same is true of an oral agreement to issue a policy of insurance or to renew an existing policy.[12] In order to bring within the prohibi-

Thouvenin *v.* Lea, 26 Tex. 612; Long Mfg. Co. *v.* Gray, 13 Tex. Civ. App. 172, 35 S. W. 32.

Vermont.— Sherman *v.* Champlain Transp. Co., 31 Vt. 162.

West Virginia.— Hughes *v.* Frum, 41 W. Va. 445, 23 S. E. 604.

Wisconsin.— White *v.* Hanchett, 21 Wis. 415; Rogers *v.* Brightman, 10 Wis. 55.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 75.

Illustrations.— A parol promise to pay a sum of money upon the return of a certain ship is not within the statute, although the ship does not return within a year after the promise was made, for it was possible that she might return within that period (Anonymous, 1 Salk. 280); and so with a parol promise to pay money to plaintiff on the day of his marriage, although the marriage does not happen within a year (Peter *v.* Compton, Holt 326, Skin. 353 where it is said that "where the Agreement is to be performed upon a Contingent, and it does not appear within the Agreement, that it is to be performed after the year, there a Note in Writing is not necessary, for the Contingent might happen within the Year, but where it appears by the whole Tenour of the Agreement, that it is to be performed after the Year, there a Note is necessary." See also Francam *v.* Foster, Holt 25, Skin. 326); a parol promise to pay money or convey land on the termination of a pending suit (Heflin *v.* Milton, 69 Ala. 354; Derrick *v.* Brown, 66 Ala. 162; Gonzales *v.* Chartier, 63 Tex. 36) or when certain money should be paid to the promisor by a third person (Artcher *v.* Zeh, 5 Hill (N. Y.) 200); a parol promise to marry when the promisor should recover his health (McConahey *v.* Griffey, 82 Iowa 564, 48 N. W. 983), or when he should return from a voyage which might be terminated within a year (Clark *v.* Pendleton, 20 Conn. 495); a parol promise to take shares of stock in a corporation when it should be organized (Bullock *v.* Falmouth, etc., Turnpike Co., 7 Ky. L. Rep. 591, 85 Ky. 184, 3 S. W. 129, 8 Ky. L. Rep. 835); a parol agreement to accept payment of a note in articles other than money to be delivered as the payee might call for them (Fidler *v.* Dils, 8 Ky. L. Rep. 266); a parol promise to board the promisee during life, since he may die within a year; or that the promisee may retain property until he is reimbursed the cost of an improvement from the profits thereof, because this may take place within a year (Daily *v.* Cain, 13 S. W. 424, 11 Ky. L. Rep. 936); a parol promise that if the promisee would forbear to sue, the promisor's executor should pay the debt (Wells *v.* Horton, 4 Bing. 40, 13 E. C. L. 390, 2 C. & P. 383, 12 E. C. L. 630, 5 L. J. C. P. O. S. 41, 12 Moore C. P. 176, 29 Rev. Rep. 498); a parol promise to sell certain stock at the end of three years, with an option to the purchaser to call it at any time within that period (Seddon *v.* Rosenbaum, 85 Va. 928, 9 S. E. 326, 3 L. R. A. 337); or a parol promise to indemnify the surety on a bond from any liability which he might incur as surety by reason of a breach of the bond within the year (Blake *v.* Cole, 22 Pick. (Mass.) 97).

9. Riddle *v.* Backus, 38 Iowa 81; King *v.* Hanna, 9 B. Mon. (Ky.) 369; Sword *v.* Keith, 31 Mich. 247; Thompson *v.* Gordon, 3 Strobh. (S. C.) 196.

10. Worley *v.* Sipe, 111 Ind. 238, 12 N. E. 385; Bartlett *v.* Mystic River Corp., 151 Mass. 433, 24 N. E. 780; Hedges *v.* Strong, 3 Oreg. 18; McPherson *v.* Cox, 96 U. S. 404, 24 L. ed. 746 [*reversing* MacArthur & M. (D. C.) 23].

11. *Indiana.*— Frost *v.* Tarr, 53 Ind. 390; Bell *v.* Hewitt, 24 Ind. 280.

Kentucky.— Myles *v.* Myles, 6 Bush 237; Story *v.* Story, 61 S. W. 279, 22 Ky. L. Rep. 1731; Thomas *v.* Feese, 51 S. W. 150, 21 Ky. L. Rep. 206.

Massachusetts.— Wellington *v.* Apthorp, 145 Mass. 69, 13 N. E. 10.

New York.— Quackenbush *v.* Ehle, 5 Barb. 469.

Ohio.— Ewing *v.* Richards, 8 Ohio Dec. (Reprint) 357, 7 Cinc. L. Bul. 183.

Virginia.— Thomas *v.* Armstrong, 86 Va. 323, 10 S. E. 6, 5 L. R. A. 529.

Wisconsin.— Jilson *v.* Gilbert, 26 Wis. 637, 7 Am. Rep. 100.

England.— Ridley *v.* Ridley, 34 Beav. 478, 11 Jur. N. S. 475, 34 L. J. Ch. 462, 12 L. T. Rep. N. S. 481, 13 Wkly. Rep. 763; Fenton *v.* Emblers, 3 Burr. 1278, 1 W. Bl. 353.

Contra.— Izard *v.* Middleton, 1 Desauss. (S. C.) 116.

12. *Alabama.*— Springfield F. & M. Ins. Co. *v.* De Jarnett, 111 Ala. 248, 19 So. 995; Commercial F. Ins. Co. *v.* Morris, 105 Ala. 498, 18 So. 34.

Indiana.— Peoria M. & F. Ins. Co. *v.* Walser, 22 Ind. 73.

Kansas.— Phœnix Ins. Co. *v.* Ireland, 9 Kan. App. 644, 58 Pac. 1024.

Kentucky.— Howard Ins. Co. *v.* Owen, 94 Ky. 197, 21 S. W. 1037, 14 Ky. L. Rep. 881.

Maine.— Walker *v.* Metropolitan Ins. Co., 56 Me. 371.

Massachusetts.— Sanford *v.* Orient Ins. Co.,

tion of the statute an oral contract the performance of which is dependent upon a contingency which may or may not happen within a year from the making thereof, it must affirmatively appear either from the express or implied terms of the contract or from the situation of the parties that it was their understanding that it was not to be performed within the year.[13]

3. AGREEMENTS DETERMINABLE ON THE HAPPENING OF A CONTINGENCY. Oral agreements to continue to do some particular act until the happening of a certain contingency are valid if the contingency is one which may happen within the year, although it is possible that it may not happen within that time.[14] In the following instances of the application of the principle the contract is regarded as completely performed upon the death either of one of the parties or of a third

174 Mass. 416, 54 N. E. 883, 75 Am. St. Rep. 358; Emery *v.* Boston Mar. Ins. Co., 138 Mass. 398; Sanborn *v.* Fireman's Ins. Co., 16 Gray 448, 77 Am. Dec. 419.

Minnesota.— Wiebeler *v.* Milwaukee Mechanics' Mut. Ins. Co., 30 Minn. 464, 16 N. W. 363.

New York.—Brooklyn First Baptist Church *v.* Brooklyn F. Ins. Co., 19 N. Y. 305.

West Virginia.— Croft *v.* Hanover F. Ins. Co., 40 W. Va. 508, 21 S. E. 854, 52 Am. St. Rep. 902.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 75.

13. *Arkansas.*—Sweet *v.* Desha Lumber Co., 56 Ark. 629, 20 S. W. 514.

California.— Eikelman *v.* Perdew, 140 Cal. 687, 74 Pac. 291; Kutz *v.* Fleisher, 67 Cal. 93, 7 Pac. 195.

Connecticut.— Brown *v.* Throop, 59 Conn. 596, 22 Atl. 436, 13 L. R. A. 646; Haussman *v.* Burnham, 59 Conn. 117, 22 Atl. 1065, 21 Am. St. Rep. 74; Russell *v.* Slade, 12 Conn. 455, where plaintiff was hired to work for defendant "during the term of one year then to commence," and the court said there was nothing which forbade an immediate tender of plaintiff's services, and the jury found that they were to commence immediately.

Illinois.— Julin *v.* Bauer, 82 Ill. App. 157.

Indiana.— Durham *v.* Hiatt, 127 Ind. 514, 26 N. E. 401; Hinkle *v.* Fisher, 104 Ind. 84, 3 N. E. 624; Indiana, etc., R. Co. *v.* Scearce, 23 Ind. 223; Wilson *v.* Ray, 13 Ind. 1; Wiggins *v.* Keizer, 6 Ind. 252, which held valid an oral contract to pay for the future maintenance of the promisor's child.

Kansas.— Sutphen *v.* Sutphen, 30 Kan. 510, 2 Pac. 100.

Kentucky.— Fain *v.* Turner, 14 Ky. L. Rep. 478, 15 Ky. L. Rep. 653, 96 Ky. 634, 29 S. W. 628, 16 Ky. L. Rep. 719.

Maine.— Farwell *v.* Tillson, 76 Me. 227; Duffy *v.* Patten, 74 Me. 396; Linscott *v.* McIntire, 15 Me. 201, 33 Am. Dec. 602.

Nebraska.—Reynolds *v.* Wymore First Nat. Bank, 62 Nebr. 747, 87 N. W. 912; Powder River Live Stock Co. *v.* Lamb, 38 Nebr. 339, 56 N. W. 1019; Kiene *v.* Shaeffing, 33 Nebr. 21, 49 N. W. 773.

New York.— Jagau *v.* Goetz, 11 Misc. 380, 32 N. Y. Suppl. 144; Lockwood *v.* Barnes, 3 Hill 128, 38 Am. Dec. 620; Moore *v.* Fox, 10 Johns. 244, 6 Am. Dec. 368.

Ohio.— Blakeney *v.* Goode, 30 Ohio St. 350; Koehler *v.* Hunt, 8 Ohio Dec. (Reprint) 404, 7 Cinc. L. Bul. 302.

United States.— Walker *v.* Johnson, 96 U. S. 424, 24 L. ed. 834; McPherson *v.* Cox, 96 U. S. 404, 24 L. ed. 746.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 72 *et seq.*

14. *California.*— Raynor *v.* Drew, 72 Cal. 307, 13 Pac. 866, promise to give to the promisee a verbal lease until such time as the promisor should pay him a certain sum of money.

Georgia.— Alderman *v.* Chester, 34 Ga. 152, promise to allow to a person the use of certain property during his life.

Indiana.— Houghton *v.* Houghton, 14 Ind. 505, 77 Am. Dec. 69, promise to pay money to the promisee during her coverture.

Massachusetts.—Roberts *v.* Rockbottom Co., 7 Metc. 46, promise to work for a corporation so long as A shall continue to be its agent.

Michigan.— See Drew *v.* Billings-Drew Co., 132 Mich. 65, 92 N. W. 774, holding that a parol lease for an indefinite term until the lessor could obtain another tenant, being capable of performance within a year, and which was in fact completed within a year, is not within the statute.

Nebraska.— Connolly *v.* Giddings, 24 Nebr. 131, 37 N. W. 939, promise to pay the occupant of land the cost of improvements he may have made thereon at such time as he desires to give up possession.

New Hampshire.—Esty *v.* Aldrich, 46 N. H. 127, promise that cattle delivered by one party to the other should remain the property of the former until paid for by the latter.

Rhode Island.— Hodges *v.* Richmond Mfg. Co., 9 R. I. 482, agreement to continue to do a thing for two years or longer or until one of the parties had made a certain net profit, which he might do within the year.

Tennessee.— East Tennessee, etc., R. Co. *v.* Staub, 7 Lea 397, promise to retain plaintiff in the employ of defendant, by whose negligence he was injured, so long as plaintiff's disability continued.

England.— Gilbert *v.* Sykes, 16 East 150, 14 Rev. Rep. 327, promise to pay a sum of money to the promisee during the life of a third person.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 75 *et seq.*

person within the year, and that is an implied contingency which it is presumed was in the contemplation of the parties when entering into the agreement: A contract to support a person during his life,[15] or until he reaches his majority or attains a certain age, the contingency being implied that he may die within the year;[16] and, the same contingency being implied, to pay for the maintenance or education of a child;[17] or to board a person during his life.[18]

4. Agreements to Do Something Indefinitely — a. In General. An oral agreement to continue to do some particular act for an indefinite period of time is not within the statute if, by the fair import of its terms, either party may terminate it at any time whether after or before the expiration of the year.[19] Thus the statute does not apply to an oral agreement to give employment so long as the

See, however, Vose *v.* Strong, 45 Ill. App. 98, holding that a verbal contract by which the promisee is to manage the business and estate of the promisor during the life of the latter for a portion of the profits thereof is within the statute and void.

Illustrations.— The statute does not apply to a promise to work for the promisee during his life (Myles *v.* Myles, 6 Bush (Ky.) 237; Updike *v.* Ten Broeck, 32 N. J. L. 105; Kent *v.* Kent, 62 N. Y. 560, 20 Am. Rep. 502 [*reversing* 1 Hun 529, 3 Thomps. & C. 630]); nor to a promise to give a free pass on a railroad during the promisee's lifetime in consideration of a conveyance of land, such pass to be issued annually (Atchison, etc., R. Co. *v.* English, 38 Kan. 110, 16 Pac. 82; Weatherford, etc., R. Co. *v.* Wood, 88 Tex. 191, 30 S. W. 859, 28 L. R. A. 526).

15. *Georgia.*— Burney *v.* Ball, 24 Ga. 505.
Indiana.— Harper *v.* Harper, 57 Ind. 547.
Kentucky.— Bull *v.* McCrea, 8 B. Mon. 422; Whitley *v.* Whitley, 80 S. W. 825, 26 Ky. L. Rep. 134.
Maine.— Hutchinson *v.* Hutchinson, 46 Me. 154.
Michigan.— Carr *v.* McCarthy, 70 Mich. 258, 38 N. W. 241.
Nebraska.— McCormick *v.* Drummett, 9 Nebr. 384, 2 N. W. 729.
New Jersey.— Eiseman *v.* Schneider, 60 N. J. L. 291, 37 Atl. 623.
New York.— Thorp *v.* Stewart, 44 Hun 232; Dresser *v.* Dresser, 35 Barb. 573; Rhodes *v.* Rhodes, 3 Sandf. Ch. 279. In Tolley *v.* Greene, 2 Sandf. Ch. 91, it was intimated that a contract which is performable upon a contingency which neither party nor both together can hasten or retard, such as the death of one of them or of a third person, is within the statute, and that the possibility of performance contemplated by the decisions rested upon human effort or volition and not upon providential interference.
Wisconsin.— Heath *v.* Heath, 31 Wis. 223.
United States.— See Warner *v.* Texas, etc., R. Co., 164 U. S. 418, 17 S. Ct. 147, 41 L. ed. 495.
England.— Murphy *v.* O'Sullivan, 18 Ir. Jur. 111.
See 23 Cent. Dig. tit. "Frauds, Statute of," § 76.
Contra.— Deaton *v.* Tennessee Coal, etc., Co., 12 Heisk. (Tenn.) 650.

16. *Illinois.*— White *v.* Murtland, 71 Ill. 250, 22 Am. Rep. 100.
Maryland.— Wilhelm *v.* Hardman, 13 Md. 140.
Massachusetts.— Peters *v.* Westborough, 19 Pick. 364, 31 Am. Dec. 142.
New York.— McKinney *v.* McCloskey, 8 Daly 368 [*affirmed* in 76 N. Y. 594]; McLees *v.* Hale, 10 Wend. 426.
Texas.— Taylor *v.* Deseve, 81 Tex. 246, 16 S. W. 1008.
United States.— Wooldridge *v.* Stern, 42 Fed. 311, 9 L. R. A. 129.
See 23 Cent. Dig. tit. "Frauds, Statute of," § 76.
Contra.— Goodrich *v.* Johnson, 66 Ind. 258, holding that oral agreements to support a minor child until he attains majority are within the statute, and hence must be in writing.

17. Wiggins *v.* Keizer, 6 Ind. 252; Stowers *v.* Hollis, 83 Ky. 544; Ellicott *v.* Turner, 4 Md. 476; Wynn *v.* Followill, 98 Mo. App. 463, 72 S. W. 140.

18. Howard *v.* Burgen, 4 Dana (Ky.) 137; Daily *v.* Cain, 13 S. W. 424, 11 Ky. L. Rep. 936; McCabe *v.* Green, 18 N. Y. App. Div. 625, 45 N. Y. Suppl. 723; Dresser *v.* Dresser, 35 Barb. 573.

19. *Arkansas.*— Arkansas Midland R. Co. *v.* Whitley, 54 Ark. 199, 15 S. W. 465, 11 L. R. A. 621, verbal agreement by a railroad company that if an owner of land would permit the road to be built across his land, it would maintain good and sufficient cattle guards thereon.
New York.— Talmadge *v.* Rensselaer, etc., R. Co., 13 Barb. 493.
Rhode Island.— Greene *v.* Harris, 9 R. I. 401, verbal contract to "continue as long as the parties are mutually satisfied."
Virginia.— Richmond Union Pass. R. Co. *v.* Richmond, etc., R. Co., 96 Va. 670, 32 S. E. 787.
United States.— Warner *v.* Texas, etc., R. Co., 164 U. S. 418, 17 S. Ct. 147, 41 L. ed. 495 [*reversing* 54 Fed. 922, 4 C. C. A. 673], where a railroad company orally agreed to lay a switch for the use of the owner of a sawmill and maintain it as long as he should need it.
See 23 Cent. Dig. tit. "Frauds, Statute of," § 75 *et seq.*
See, however, Fallon *v.* Chronicle Pub. Co., 1 MacArthur (D. C.) 485; Day *v.* New York Cent. R. Co., 31 Barb. 548, 51 N. Y. 583 [*reversing* 53 Barb. 250], 89 N. Y. 616 [*affirming* 22 Hun 412].

employee does faithful and honest work,[20] or so long as the employer keeps his mills running, or is engaged in a certain business, or until the employee sees fit to quit,[21] or so long as the employer's contract with a third person shall remain in force,[22] or for life;[23] nor to a promise to pay plaintiff an annuity so long as she shall maintain defendant's illegitimate children.[24] Upon the question whether an oral agreement to put into writing a contract which will require more than a year for its performance there appears to be some conflict of authority.[25]

b. Contracts of Partnership. A parol contract of partnership which is to take effect immediately without any stipulated time for its duration is not within the statute;[26] but if, according to its terms or the understanding of the parties, it is to be continued beyond one year it is void.[27] Neither is it within the statute, although it is to continue for a term of years, if by its terms it may be sooner dissolved by the consent of the parties;[28] but a written agreement is necessary to bind parties to enter into a future copartnership to commence after the expiration of a year.[29]

5. Agreements to Refrain From Doing Something. An oral agreement thereafter to forbear or refrain altogether from doing a particular act is not within the statute, because, no definite period of forbearance being stipulated, it is implied that the forbearance shall continue during the life of the promisor; and, since his death may occur within the year, the contract may be completely performed within that period. These agreements occur most frequently in arrangements tending to prevent competition or rivalry in the same business in the same locality,[30] or to prevent the conduct of a particular kind of business on certain

20. Pennsylvania Co. *v.* Dolan, 6 Ind. App. 109, 32 N. E. 802, 51 Am. St. Rep. 289; Louisville, etc., R. Co. *v.* Offutt, 15 Ky. L. Rep. 301; Sax *v.* Detroit, etc., R. Co., 125 Mich. 252, 84 N. W. 314, 84 Am. St. Rep. 572; Hobbs *v.* Brush Electric Light Co., 75 Mich. 550, 42 N. W. 965; Harrington *v.* Kansas City Cable R. Co., 60 Mo. App. 223. But see Eley *v.* Positive Government Security L. Assur. Co., 1 Ex. D. 20, 88, 45 L. J. Exch. 451, 34 L. T. Rep. N. S. 190.

21. Yellow Poplar Lumber Co. *v.* Rule, 106 Ky. 455, 50 S. W. 685, 20 Ky. L. Rep. 2006; Carnig *v.* Carr, 167 Mass. 544, 46 N. E. 117, 57 Am. St. Rep. 488, 35 L. R. A. 512; Carter White Lead Co. *v.* Kinlin, 47 Nebr. 409, 66 N. W. 536.

22. Glenn *v.* Rudd, 3 Ont. L. Rep. 422.

23. Boggs *v.* Pacific Steam Laundry Co., 86 Mo. App. 616.

24. Knowlman *v.* Bluett, L. R. 9 Exch. 1, 43 L. J. Exch. 29, 29 L. T. Rep. N. S. 462, 22 Wkly. Rep. 77. See also Prout *v.* Webb, 87 Ala. 593, 6 So. 190; Blakeney *v.* Goode, 30 Ohio St. 350; Walker *v.* Wilmington, etc., R. Co., 26 S. C. 80, 1 S. E. 366; Sherman *v.* Champlain Transp. Co., 31 Vt. 162; Sterling Organ Co. *v.* House, 25 W. Va. 64.

25. **In Alabama** a verbal agreement to make a written lease for five years was held to be valid on the ground that the execution of the oral agreement would admit of performance within a year. Shakespeare *v.* Alba, 76 Ala. 351.

In New York an oral agreement to enter into a written contract of employment for a year was held to be unenforceable. Amburger *v.* Marvin, 4 E. D. Smith 393.

In England it has been intimated that if it was part of the oral agreement for a lease for a year or more that it should be put into writing the agreement would be enforceable. Hollis *v.* Whiteing, 1 Vern. Ch. 151, 23 Eng. Reprint 380.

26. Smith *v.* Tarlton, 2 Barb. Ch. (N. Y.) 336; Jordan *v.* Miller, 75 Va. 442; Treat *v.* Hiles, 68 Wis. 344, 32 N. W. 517, 60 Am. Rep. 858; McKay *v.* Rutherford, 13 Jur. 21, 6 Moore P. C. 413, 13 Eng. Reprint 743.

27. Wilson *v.* Ray, 13 Ind. 1; Wahl *v.* Barnum, 116 N. Y. 87, 22 N. E. 280, 5 L. R. A. 623.

28. Smith *v.* Tarlton, 2 Barb. Ch. (N. Y.) 336.

29. Smith *v.* Tarlton, 2 Barb. Ch. (N. Y.) 336.

30. *Illinois.*— Osgood *v.* Skinner, 211 Ill. 229, 71 N. E. 869 [*affirming* 111 Ill. App. 606].

Indiana.— O'Neal *v.* Hines, 145 Ind. 32, 43 N. E. 946 (agreement not to engage in the undertaking business in a certain place so long as the promisee should remain in such business there); Welz *v.* Rhodius, 87 Ind. 1, 44 Am. Rep. 747; Hill *v.* Jamieson, 16 Ind. 125, 79 Am. Dec. 414.

Kentucky.— Dickey *v.* Dickinson, 105 Ky. 748, 49 S. W. 761, 20 Ky. L. Rep. 1559, 88 Am. St. Rep. 337, agreement not to engage in the newspaper business in a certain place.

Massachusetts.— Worthy *v.* Jones, 11 Gray 168, 71 Am. Dec. 696; Lyon *v.* King, 11 Metc. 411, 45 Am. Dec. 219, agreement not to engage thereafter in the livery-stable business in a certain place.

Missouri.— Foster *v.* McO'Blenis, 18 Mo. 88.

Ohio.— Slocumb *v.* Seymour, 7 Ohio Dec. (Reprint) 563, 3 Cinc. L. Bul. 991.

Rhode Island.— Zanturjian *v.* Boornazian, 25 R. I. 151, 55 Atl. 199; Richardson *v.* Pierce, 7 R. I. 330.

premises,[31] and they are held not to be within the statute. As to whether the agreement is within the statute where the promisor agrees to refrain from doing a certain thing for a period of more than one year, the cases are not in accord.[32] It has been held that if the agreement is to refrain for a year from a future specified date, it is void unless in writing.[33]

6. Agreements Allowing More Than a Year. Although by the terms of an oral agreement a period in excess of a year may be allowed for its performance, yet if upon the happening of a certain stipulated event which may happen within a year it can be completely performed consistently with the rights and understanding of the parties thereto, it will not be regarded as within the statute.[34] It has been held, however, that such an agreement is within the statute if there is no contingency in which it is possible for the promisee to enforce the contract within a year's period.[35]

Texas.— See Jones *v.* Green, (Civ. App. 1895) 31 S. W. 1087.

Canada.—Whittaker *v.* Welch, 15 N. Brunsw. 436.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 76.

Agreement to refrain from practice of medicine or law in a certain locality see Smalley *v.* Greene, 52 Iowa 241, 3 N. W. 78, 35 Am. Rep. 267; Doty *v.* Martin, 32 Mich. 462; Blanding *v.* Sargent, 33 N. H. 239, 66 Am. Dec. 720; Blanchard *v.* Weeks, 34 Vt. 589, holding an oral agreement to be valid which stipulated that the promisor would refrain from the practice of medicine and surgery at a certain place, while plaintiff should reside and practice medicine and surgery at said place, forever.

31. Hall *v.* Solomon, 61 Conn. 476, 23 Atl. 876, 29 Am. St. Rep. 218.

32. Oral agreement held valid see Doyle *v.* Dixon, 97 Mass. 208, 212, 93 Am. Dec. 80 (holding that an agreement generally not to engage in a certain kind of business at a particular place and an agreement not to engage in such business for a specified number of years are within the same principle; "for," observes Gray, J., "whether a man agrees not to do a thing for his life, or never to do it, or only not to do it for a certain number of years, it is in either form an agreement by which he does not promise that anything shall be done after his death, and the performance of which is therefore completed with his life. An agreement to do a thing for a certain time may perhaps bind the promisor's representatives, and at any rate is not performed if he dies within that time. But a mere agreement that he will himself refrain from doing a certain thing is fully performed if he keeps it so long as he is capable of doing or refraining. The agreement of the defendant not to go into business again at Chicopee for five years was therefore not within the statute of frauds"); McGregor *v.* McGregor, 21 Q. B. D. 424, 52 J. P. 772, 57 L. J. Q. B. 591, 37 Wkly. Rep. 45 [*overruling* Davey *v.* Shannon, 4 Ex. D. 81, 48 L. J. Exch. 459, 40 L. T. Rep. N. S. 628, 27 Wkly. Rep. 599] (where an oral agreement by husband and wife to live separately, he to contribute a certain sum weekly toward her maintenance and that of their children, was held not to be within the statute). See also Self *v.* Cordell, 45 Mo. 345; Erwin *v.* Hayden, (Tex. Civ. App. 1897) 43 S. W. 610.

Oral agreement held unenforceable see McGirr *v.* Campbell, 71 N. Y. App. Div. 83, 75 N. Y. Suppl. 571; Gottschalk *v.* Witter, 25 Ohio St. 76.

33. Higgins *v.* Gager, 65 Ark. 604, 47 S. W. 848.

34. See cases cited *infra*, this note.

Illustrations.— An oral agreement to pay for certain sheep within three years, or as soon as the vendee can make the price out of the sheep, is valid, since the time for performance might arrive within a year. Southwell *v.* Beezley, 5 Oreg. 143, 458. So is an oral agreement that a contract should continue for two years or longer, or until one of the parties thereto had realized a certain amount as net profit (Hodges *v.* Richmond Mfg. Co., 9 R. I. 482), an oral contract to erect a building which stipulates a date for completion more than a year thereafter, since the building may be completed within a year (Plimpton *v.* Curtiss, 15 Wend. (N. Y.) 336. See also Sarles *v.* Sharlow, 5 Dak. 100, 37 N. W. 748; Davenport First Presb. Church *v.* Swanson, 100 Ill. App. 39), an oral agreement that one person may cut certain trees on the land of another at any time within ten years (Kent *v.* Kent, 18 Pick. (Mass.) 569), an oral agreement to construct a section of a road within a year and twenty days from the date of the contract, where the work could be completed within a year and the twenty days was a precaution against contingencies (Jones *v.* Pouch, 41 Ohio St. 146), an oral agreement upon a sale of land that the purchaser should pay to the vendor any excess over the price for which he might sell the land within five years thereafter, since it was capable of performance within one year (Parker *v.* Siple, 76 Ind. 345), and an oral contract for the sale and delivery of a quantity of wood, the vendor to deliver as much the first winter as possible, and the residue the next winter and year, since it would be possible to deliver all the wood within one year (Gault *v.* Brown, 48 N. H. 183, 2 Am. Rep. 210. See also Roberts *v.* Summit Park Co., 72 Hun (N. Y.) 458, 25 N. Y. Suppl. 297).

35. Mills *v.* O'Daniel, 62 S. W. 1123, 1124, 23 Ky. L. Rep. 73, where the court held that

7. Agreements Necessarily Requiring More Than a Year. A verbal contract or agreement which, although it stipulates no definite time for its performance, will of necessity, according to a reasonable interpretation of its terms, require more than a year for its performance is within the statute and void.[36]

8. Improbability of Performance Within a Year. A verbal contract which is susceptible of complete fulfilment within one year is not void under the statute of frauds because it is merely not likely or merely not expected to be performed within that time, or even because it is probable that it will not be so performed. The question is not what the probable, expected, or actual performance of the contract may be, but whether, according to the reasonable interpretation of its terms, it requires that it should not be performed within the year.[37]

9. Intent. If from the nature and terms of the contract it is manifest that the parties intended to enter into a permanent arrangement, or that they did not contemplate a complete performance within a year, the contract is within the statute, although no time for performance is specified.[38] The contingency upon which the performance of the contract depends must be such as in the ordinary course of nature is likely to occur within the year.[39]

D. Agreements Requiring More Than a Year by Their Terms — 1. In General. It is obvious that a verbal undertaking to do a particular act during, at, or after a definite period of time which is more than a year after the making of the agreement is within the express language of the enactment and cannot be enforced;[40] but an oral contract which by its terms is not to be performed in

a verbal agreement to pay a debt "within two years" was within the statute because "there was no contingency in which it was possible for the payees to enforce the collection of the debt within two years, and that seems to us to be as justly entitled to consideration in applying the test as that the payors might have elected to pay the debt within one year."

36. Eikelman *v.* Perdew, 140 Cal. 687, 74 Pac. 291; Maxwell *v.* Devalinger, 2 Pennew. (Del.) 504, 47 Atl. 381; Reynolds *v.* Wymore First Nat. Bank, 62 Nebr. 747, 87 N. W. 912.

Instances in which, according to the rule just stated, the statute is held to apply are oral agreements by a mortgagee who has entered to foreclose that, if he sells the premises, he will pay to the mortgagor all that he receives in excess of the mortgage debt, since by law he cannot sell in less than three years (Frary *v.* Sterling, 99 Mass. 461. But in Vermont such an agreement seems to be enforceable. McGinnis *v.* Cook, 57 Vt. 36, 52 Am. Rep. 115), by a lessee that he will leave certain buildings on the leased premises at the expiration of his lease, which has several years to run (Lawrence *v.* Woods, 4 Bosw. (N. Y.) 354), by a borrower of money to repay it out of the profits to be realized from nut-bearing trees which are yet to be planted, and would require several seasons to become productive (Swift *v.* Swift, 46 Cal. 266), by the seller of a share in a patent right to repay the price to the vendee if the latter should not within three years realize said sum out of the profits arising from the patent (Lapham *v.* Whipple, 8 Metc. (Mass.) 59, 41 Am. Dec. 487; Moore *v.* Vosburgh, 66 N. Y. App. Div. 223, 72 N. Y. Suppl. 696), and of such a nature also is an oral agreement, made when a child is five years of age, to support her until she is able to support herself (Farrington *v.* Donohoe, Ir. R. 1 C. L. 675, 14 Wkly. Rep. 922).

37. Warren Chemical, etc., Co. *v.* Holbrook, 118 N. Y. 586, 23 N. E. 908, 16 Am. St. Rep. 788; Randall *v.* Turner, 17 Ohio St. 262; Warner *v.* Texas, etc., R. Co., 164 U. S. 418, 17 S. Ct. 147, 41 L. ed. 495.

38. Schultz *v.* Tatum, 35 Mo. App. 136; Day *v.* New York Cent. R. Co., 31 Barb. (N. Y.) 548, 51 N. Y. 583 [*reversing* 53 Barb. 250], 89 N. Y. 616 [*affirming* 22 Hun 412]; Jones *v.* McMichael, 12 Rich. (S. C.) 176. See also *supra*, VI, C, 1, 2.

39. *Florida.*— Summerall *v.* Thomas, 3 Fla. 298, holding that an oral contract by which a female slave and her child were sold to three persons, one of whom was to have the child and the other two the next two children of the slave as they were born, is invalid.

Illinois.— Butler *v.* Shehan, 61 Ill. App. 561.

Indiana.— Groves *v.* Cook, 88 Ind. 169, 45 Am. Rep. 462, holding that an oral contract to breed plaintiff's mare to defendant's stallion and to deliver the colt at weaning time or four months after birth is unenforceable.

Kentucky.— Williams *v.* Calloway, 12 Ky. L. Rep. 716.

New York.— Van Dyke *v.* Clark, 19 N. Y. Suppl. 650; Lockwood *v.* Barnes, 3 Hill 128, 38 Am. Dec. 620.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 74 *et seq.*

40. *California.*— McKeany *v.* Black, 117 Cal. 587, 49 Pac. 710; Patten *v.* Hicks, 43 Cal. 509.

Delaware.— Harris *v.* Porter, 2 Harr. 27.

Illinois.— Peck *v.* McCormick Harvesting

a year may be taken out of the statute if it contains an option allowing either party to terminate it within the year.[41]

2. Contracts of Hiring For More Than a Year.[42] A verbal agreement to employ a person or to work for a person for a stipulated period of more than one year from the date of the contract is plainly within the statute,[43] although one or both of the parties have the privilege of terminating the agreement before the expiration of the year;[44] and equally so is a verbal contract of hiring for a year from a future day, even though it may be the next day after the making of the contract.[45] The rule applies equally to an oral agreement of an employee not to

Mach. Co., 94 Ill. App. 586 [*affirmed* in 196 Ill. 295, 63 N. E. 731].

Indiana.— Shipley *v.* Patton, 21 Ind. 169; Wilson *v.* Ray, 13 Ind. 1.

Kentucky.— Bastin Telephone Co. *v.* Richmond Telephone Co., 77 S. W. 702, 25 Ky. L. Rep. 1249.

Massachusetts.— De Montague *v.* Bacharach, 181 Mass. 256, 63 N. E. 435.

Michigan.— Dietrich *v.* Hoefelmeir, 128 Mich. 145, 87 N. W. 111; Carney *v.* Mosher, 97 Mich. 554, 56 N. W. 935.

Minnesota.— Cowles *v.* Warner, 22 Minn. 449.

Missouri.— Atwood *v.* Fox, 30 Mo. 499; Biest *v.* Versteeg Shoe Co., 97 Mo. App. 137, 70 S. W. 1081.

Nevada.— Buckley *v.* Buckley, 9 Nev. 373.

New York.— Gordon *v.* Niemann, 118 N. Y. 152, 23 N. E. 454; Durand *v.* Curtis, 57 N. Y. 7; Bartlett *v.* Wheeler, 44 Barb. 162; Vaughn *v.* De Wandler, 63 How. Pr. 378; Lower *v.* Winters, 7 Cow. 263.

Ohio.— Jones *v.* McReynolds, 4 Ohio Dec. (Reprint) 76, 1 Clev. L. Rep. 1.

Texas.— Moore *v.* Aldrich, 25 Tex. Suppl. 276.

Vermont.— Sheldon *v.* Preva, 57 Vt. 263; Foote *v.* Emerson, 10 Vt. 338, 33 Am. Dec. 205.

West Virginia.— Parkersburg Mill Co. *v.* Ohio River R. Co., 50 W. Va. 94, 40 S. E. 328; Kimmins *v.* Oldham, 27 W. Va. 258.

United States.— Buhl *v.* Stephens, 84 Fed. 922.

England.— Giraud *v.* Richmond, 2 C. B. 835, 10 Jur. 360, 15 L. J. C. P. 180, 52 E. C. L. 835; Roberts *v.* Tucker, 3 Exch. 632; Milsom *v.* Stafford, 80 L. T. Rep. N. S. 590.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 74 *et seq.*

Of such a nature is an oral agreement to buy goods of a certain person exclusively for five years (Mallett *v.* Lewis, 61 Miss. 105), to deliver to defendant enough logs to keep his sawmill running for two years (Patten *v.* Hicks, 43 Cal. 509), or to extend for five years the time of payment of a note (Morgan *v.* Wickliffe, 110 Ky. 215, 61 S. W. 13, 1017, 22 Ky. L. Rep. 1648; Tunstall *v.* Clifton, (Tex. Civ. App. 1898) 49 S. W. 244; Kearby *v.* Hopkins, 14 Tex. Civ. App. 166, 36 S. W. 506. See Harley *v.* Weber, 2 Ohio Cir. Ct. 57, 1 Ohio Cir. Dec. 360; Jones *v.* McReynolds, 4 Ohio Dec. (Reprint) 76, 1 Clev. L. Rep. 1).

41. Blake *v.* Voigt, 134 N. Y. 69, 31 N. E. 256, 30 Am. St. Rep. 622 [*affirming* 16 Daly 398, 11 N. Y. Suppl. 716]. See, however, *infra*, VI, D, 2.

42. Recovery of reasonable value of services performed under oral contract see *infra*, X, H, 4, c, (I).

43. *Arkansas.*— Meyer *v.* Roberts, 46 Ark. 80, 55 Am. Rep. 567.

Colorado.— Woodall *v.* Davis-Cresswell Mfg. Co., 9 Colo. App. 198, 48 Pac. 670.

Illinois.— William Butcher Steel Works *v.* Atkinson, 68 Ill. 421, 18 Am. Rep. 560.

Indiana.— Shumate *v.* Farlow, 125 Ind. 359, 25 N. E. 432.

Maine.— Tuttle *v.* Swett, 31 Me. 555.

Missouri.— Pitcher *v.* Wilson, 5 Mo. 46.

New York.— Jones *v.* Hay, 52 Barb. 501; Amburger *v.* Marvin, 4 E. D. Smith 393; Drummond *v.* Burrell, 13 Wend. 307; Shute *v.* Dorr, 5 Wend. 204.

Texas.— Milan *v.* Rio Grande, etc., R. Co., (Civ. App. 1896) 37 S. W. 165.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 71.

Contra.— Wilhelm *v.* Hardman, 13 Md. 140 [*following* Ellicott *v.* Turner, 4 Md. 476].

44. Biest *v.* Versteeg Shoe Co., 97 Mo. App. 137, 70 S. W. 1081. See, however, *supra*, VI, D, 1.

45. *Alabama.*— Scoggin *v.* Blackwell, 36 Ala. 351. In Dickson *v.* Frisbee, 52 Ala. 165, 23 Am. Rep. 565 [*following* Cawthorne *v.* Cordrey, 13 C. B. N. S. 406, 32 L. J. C. P. 152, 106 E. C. L. 406, and *criticized* in Billington *v.* Cahill, 51 Hun (N. Y.) 132, 4 N. Y. Suppl. 660; Levison *v.* Stix, 10 Daly (N. Y.) 229], it was held that a verbal contract made on one day for a year's service to commence on the following day did not fall within the statute.

Connecticut.— Comes *v.* Lamson, 16 Conn. 246.

Georgia.— Kelly *v.* Terrell, 26 Ga. 551.

Illinois.— Haynes *v.* Mason, 30 Ill. App. 85.

Indiana.— Clark County *v.* Howell, 21 Ind. App. 495, 52 N. E. 769.

Maine.— Hearne *v.* Chadbourne, 65 Me. 302.

Michigan.— Davis *v.* Michigan Mut. L. Ins. Co., 127 Mich. 559, 86 N. W. 1021; Palmer *v.* Marquette, etc., Rolling Mill Co., 32 Mich. 274.

Minnesota.— Lally *v.* Crookston Lumber Co., 85 Minn. 257, 88 N. W. 846.

Missouri.— Marks *v.* Davis, 72 Mo. App. 557.

leave the service of his employer before a certain time if that is more than a year after the making of the agreement.[46] It is otherwise, however, with a verbal contract of hiring for no definite time, because there, the contract being capable of performance within one year, the statute cannot apply.[47]

3. PAYMENT OF MONEY BY INSTALMENTS. A verbal agreement for the payment of money by annual instalments for a fixed period of years is within the statute.[48]

4. AGREEMENTS DEFEASIBLE ON THE OCCURRENCE OF A CERTAIN EVENT. A verbal contract which by its terms or by the understanding of the parties is not to be performed within a year, although subject to a defeasance by the happening of a

Nebraska.— Kansas City, etc., R. Co. *v.* Conlee, 43 Nebr. 121, 61 N. W. 111.

New Jersey.— McElroy *v.* Ludlum, 32 N. J. Eq. 828.

New York.— Fanger *v.* Caspary, 87 N. Y. App. Div. 417, 84 N. Y. Suppl. 410; Billington *v.* Cahill, 51 Hun 132, 4 N. Y. Suppl. 660; Levison *v.* Stix, 10 Daly 229; Blanck *v.* Littell, 9 Daly 268; Nones *v.* Homer, 2 Hilt. 116; Little *v.* Wilson, 4 E. D. Smith 422; Amburger *v.* Marvin, 4 E. D. Smith 393; Baker *v.* Codding, 18 N. Y. Suppl. 159; Berrien *v.* Southack, 7 N. Y. Suppl. 324; Townsend *v.* Minford, 1 N. Y. Suppl. 565; Poole *v.* Hayes, 14 N. Y. St. 585.

Ohio.— McCammon *v.* Wheeler, etc., Sewing Mach. Co., 6 Ohio Dec. (Reprint) 1155, 10 Am. L. Rec. 688, 7 Cinc. L. Bul. 32.

Rhode Island.— Sutcliffe *v.* Atlantic Mills, 13 R. I. 480, 43 Am. Rep. 39.

South Carolina.— Hillhouse *v.* Jennings, 60 S. C. 373, 38 S. E. 599; Mendelsohn *v.* Banov, 57 S. C. 147, 35 S. E. 499; Duckett *v.* Pool, 33 S. C. 238, 11 S. E. 689.

Texas.— Moody *v.* Jones, (Civ. App. 1896) 37 S. W. 379.

Vermont.— Hinckley *v.* Southgate, 11 Vt. 428.

Virginia.— Lee *v.* Hill, 87 Va. 497, 12 S. E. 1052, 24 Am. St. Rep. 666.

Wisconsin.— Draheim *v.* Evison, 112 Wis. 27, 87 N. W. 795.

England.— Smith *v.* Gold Coast, etc., Explorers, [1903] 1 K. B. 538, 72 L. J. K. B. 235, 88 L. T. Rep. N. S. 442, 51 Wkly. Rep. 373; Bracegirdle *v.* Heald, 1 B. & Ald. 722, 19 Rev. Rep. 442; Dollar *v.* Parkington, 84 L. T. Rep. N. S. 470.

Canada.— Strong *v.* Bent, 31 Nova Scotia 1.

However, a contract of employment for a year will not be regarded as falling within the statute if it does not appear that performance was not to begin at once, for the promisee might commence his services immediately and so complete the contract within the year. Russell *v.* Slade, 12 Conn. 455; Baltimore Breweries Co. *v.* Callahan, 82 Md. 106, 33 Atl. 460; A. B. Smith Co. *v.* Jones, 75 Miss. 325, 22 So. 802. Nor is it within the statute if the contract is made, for instance, on the tenth day of the month for a year from the first day of the same month. Franklin Sugar Co. *v.* Taylor, 37 Kan. 435, 15 Pac. 586. So if the contract is made verbally for one year to begin *in præsenti*, although no services are to be performed by the employee until a future day, the contract is operative from the day of the making, and the year ends with the ending of one year from that day. Cox *v.* Albany Brewing Co., 2 Silv. Supreme (N. Y.) 590, 6 N. Y. Suppl. 841; McAleer *v.* Corning, 50 N. Y. Super. Ct. 63. And an oral contract of hiring for a year is not void merely because, by consent of the parties, performance under it is not begun for a few days after it was made, if thereby the completion of it is not extended beyond the year. Wolff *v.* Warrington, 8 Ohio Dec. (Reprint) 219, 6 Cinc. L. Bul. 338.

Ratification or renewal.— The fact that work was commenced on the day agreed upon cannot be proved for the purpose of showing that there was a ratification or renewal of the oral contract, which was made at an earlier day (Comes *v.* Lamson, 16 Conn. 246; Oddy *v.* James, 48 N. Y. 685; Turnow *v.* Hochstadter, 7 Hun (N. Y.) 80. But as to the validity of a contract which was to be performed within one year after its adoption by a newly organized corporation, although more than a year after the making thereof by the promoters of the corporation, see McArthur *v.* Times Printing Co., 48 Minn. 319, 51 N. W. 216, 31 Am. St. Rep. 653); and a mere restatement or acknowledgment on the day when the work is to commence, or at any time within the year, of the terms of a verbal contract which was made on an earlier day, without an express renewal thereof, is insufficient to give validity to it (Blanton *v.* Knox, 3 Mo. 342; Odell *v.* Webendorfer, 50 N. Y. App. Div. 579, 64 N. Y. Suppl. 451).

46. Bernier *v.* Cabot Mfg. Co., 71 Me. 506, 36 Am. Rep. 343.

47. Mathews *v.* Wallace, 104 Mo. App. 96, 78 S. W. 296; Swain *v.* Thompson, 6 Misc. (N. Y.) 209, 26 N. Y. Suppl. 536 [*affirmed* in 6 Misc. 639, 26 N. Y. Suppl. 1132]; Haines *v.* Thompson, 19 N. Y. Suppl. 184 [*reversed* on another ground in 2 Misc. 385, 21 N. Y. Suppl. 991] (*affirmed* in 26 N. Y. Suppl. 1132, 6 Misc. 622, 26 N. Y. Suppl. 1135)]; East Line, etc., R. Co. *v.* Scott, 72 Tex. 70, 10 S. W. 99, 13 Am. St. Rep. 758. And see Tatterson *v.* Suffolk Mfg. Co., 106 Mass. 56.

48. Tiernan *v.* Granger, 65 Ill. 351; Berry *v.* Graddy, 1 Metc. (Ky.) 533; Dant *v.* Head, 10 Ky. L. Rep. 638; Parks *v.* Francis, 50 Vt. 626, 28 Am. Rep. 517; Jackson Iron Co. *v.* Negaunee Concentrating Co., 65 Fed. 298, 12 C. C. A. 636.

If payments are to be made in instalments of less than a year, and the time for com-

certain event which might or might not occur within that time, has been held to be within the statute of frauds.[49] So if an agreement is not to be performed within a year, the fact that it may be terminated or its further performance excused or rendered impossible by the death of either of the parties within the year is not sufficient to take it out of the operation of the statute.[50]

VII. REAL PROPERTY AND ESTATES AND INTERESTS THEREIN.

A. Creation of Estates — 1. STATUTORY PROVISIONS. The English statute of frauds provides in section 1, "All leases, estates, interests of freehold or terms of years or any uncertain interest of, in, to or out of any messuages, manors, lands, tenements or hereditaments made or created by livery and seisin only or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not either in law or equity be deemed or taken to have any other or greater force or effect any consideration for making any such parol leases or estates, or any former law or usage, to the contrary notwithstanding"; and in section 2, "Except nevertheless, all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term, shall amount unto two third parts at the least of the full improved value of the thing demised." Corresponding provisions have been enacted in nearly all the American jurisdictions.[51]

2. ESTATES IN FEE — a. Oral Grant — (i) *CIVIL-LAW RULE.* Under the Spanish law, which formerly prevailed in the territory of certain of the southern and southwestern states, title to land could be transferred by oral grant, accompanied by transfer of possession;[52] and the same is true of the civil law as it formerly existed in New Mexico, if the land was clearly ascertained and its boundaries

pletion of the payments is indefinite, the agreement is valid. Moore *v.* Fox, 10 Johns. (N. Y.) 244, 6 Am. Dec. 338.

49. Wilson *v.* Ray, 13 Ind. 1; Biest *v.* Versteeg Shoe Co., 97 Mo. App. 137, 70 S. W. 1031; Davey *v.* Shannon, 4 Ex. D. 81, 48 L. J. Exch. 459, 40 L. T. Rep. N. S. 628, 27 Wkly. Rep. 599; *In re* Pentreguinea Fuel Co., 4 De G. F. & J. 541, 8 Jur. N. S. 84, 31 L. J. Ch. 741, 7 L. T. Rep. N. S. 84, 10 Wkly. Rep. 656, 65 Eng. Ch. 421, 45 Eng. Reprint 1294; Booth *v.* Prittie, 6 Ont. App. 680.

Of such a nature is a verbal contract for the hire of a coach for five years, although the contract was determinable by either party at any time within that period (Birch *v.* Liverpool, 9 B. & C. 392, 17 E. C. L. 180), for the hiring of a traveler for more than a year, subject to a determination by three months' notice (Dobson *v.* Collis, 1 H. & N. 81, 25 L. J. Exch. 267, 4 Wkly. Rep. 512), for the use of a patent fuel-saving device on a steamboat "during the continuance of said patent," which then had twelve years to run, "if the said boat should last so long" (Washington, etc., Steam Packet Co. *v.* Sickles, 5 Wall. (U. S.) 580, 18 L. ed. 550 [*criticized* in Warner *v.* Texas, etc., R. Co., 164 U. S. 418, 17 S. Ct. 147, 41 L. ed. 495]). However, it has been observed that if by the terms of a contract a right to terminate it is permitted, then the exercise of that right is not a breach thereof, and if not a breach it is a performance; in other words if the contract permits its termination by the parties, that termination is merely carrying out the terms of the agreement. Johnston *v.* Bowersock, 62 Kan. 148, 61 Pac. 740.

50. Bernier *v.* Cabot Mfg. Co., 71 Me. 506, 36 Am. Rep. 343 (holding that a verbal agreement not to leave a person's employ for two years is within the statute; for although the death of the promisor within the year would have rendered his further performance impossible, it would not have been a fulfilment of the contract); Hill *v.* Hooper, 1 Gray (Mass.) 131 (holding that an agreement to employ a boy for five years and to pay his father certain sums at stated periods during that time is within the statute; for, although by the death of the boy the services which were the consideration for the promise would cease and the promise therefore be determined, it would not be completely performed).

51. See the statutes of the various states.

In New Mexico the English statute is considered in force without special enactment. Childers *v.* Talbott, 4 N. M. 168, 16 Pac. 275.

The American statutes differ from the English, however, in respect to the duration of leases which are excepted from their operation, and in some states the statute applies to all leases without exception. See the statutes of the different states.

52. Riddle *v.* Ratliff, 8 La. Ann. 106; Choppin *v.* Michel, 11 Rob. (La.) 233; Devall *v.* Choppin, 15 La. 566; Sacket *v.* Hooper, 3 La. 104; Ducrest *v.* Bijeau, 8 Mart. N. S. (La.) 192; Maes *v.* Gillard, 7 Mart. N. S. (La.) 314; Le Blanc *v.* Viator, 6 Mart. N. S. (La.) 253; Gonzales *v.* Sanchez, 4 Mart.

defined.[53] By the Mexican law, however, a conveyance of land was required to be in writing.[54]

(II) *Common-Law Rule*—(A) *In General.* It is doubtful if the statute of frauds was intended primarily to affect conveyances of the full legal title to real estate, for a deed was necessary for that purpose at common law; but the statute is wide enough to cover the transfer of the legal title to realty; and in accordance with its provisions the rule is that a mere oral grant of land is ineffective to pass title.[55] This rule of course has no application to those estates in land which arise by reason of the rules of substantive law regardless of the intent of the parties, such as dower interests and the like.[56]

(B) *Verbal Confirmation of Invalid Deed.* In accordance with the general rule stated in the preceding section, it is held that a voidable deed gains no validity by reason of an oral confirmation or ratification.[57]

(C) *Exceptions*—(1) Sales by Sheriff, Mortgagee, or Auctioneer. In some jurisdictions the rule is that upon a sale on execution the title to the land passes without deed if there be a subsequent written memorandum.[58] It seems,

N. S. (La.) 657; Gibson *v.* Chouteau, 39 Mo. 536; Allen *v.* Moss, 27 Mo. 354; Mitchell *v.* Tuckers, 10 Mo. 260; Sullivan *v.* Dimmitt, 34 Tex. 114; Monroe *v.* Searcy, 20 Tex. 348; Ferris *v.* Parker, 13 Tex. 385; Briscoe *v.* Bronaugh, 1 Tex. 326, 46 Am. Dec. 108; Scott *v.* Maynard, Dall. (Tex.) 548. See also Haughery *v.* Lee, 17 La. Ann. 1.

53. Maxwell Land Grant Co. *v.* Dawson, 7 N. M. 133, 34 Pac. 191 [*reversed* on another ground in 151 U. S. 586, 14 S. Ct. 458, 38 L. ed. 279].

54. Hoen *v.* Simmons, 1 Cal. 119, 52 Am. Dec. 291; Harris *v.* Brown, 1 Cal. 98.

55. *Alabama.*— McKinnon *v.* Mixon, 128 Ala. 612, 29 So. 690.

California.— Melton *v.* Lambard, 51 Cal. 258; Goller *v.* Fett, 30 Cal. 481; Patterson *v.* Keystone Min. Co., 30 Cal. 360; Copper Hill Min. Co. *v.* Spencer, 25 Cal. 18.

Idaho.— McGinness *v.* Stanfield, 6 Ida. 372, 55 Pac. 1020, 7 Ida. 23, 59 Pac. 936.

Iowa.— Price *v.* Lien, 84 Iowa 590, 51 N. W. 52.

Louisiana.— Castanedo *v.* Toll, 6 Mart. 557.

Maine.— Pitman *v.* Poor, 38 Me. 237.

Missouri.— Ames *v.* Scudder, 11 Mo. App. 168.

New Jersey.— Hetfield *v.* New Jersey Cent. R. Co., 29 N. J. L. 571.

Pennsylvania.— Huff *v.* McCauley, 53 Pa. St. 206, 91 Am. Dec. 203; Washabaugh *v.* Entriken, 36 Pa. St. 513; McFarland *v.* Hall, 3 Watts 37; Henry *v.* Colby, 3 Brewst. 171.

Texas.— Parrish *v.* Williams, (Civ. App. 1899) 53 S. W. 79; Randolph *v.* Junker, 1 Tex. Civ. App. 517, 21 S. W. 551.

Utah.— Maxfield *v.* West, 6 Utah 379, 24 Pac. 98.

United States.— Maxwell Land-Grant Co. *v.* Dawson, 151 U. S. 586, 14 S. Ct. 458, 38 L. ed. 279.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 83. And see Deeds, 13 Cyc. 536.

Estates in common.— It is immaterial to the application of this rule that the parties are tenants in common. Flinn *v.* Manning, 1 Cinc. Super. Ct. 110; Hill *v.* Meyers, 43 Pa. St. 170.

In Pennsylvania certain cases seem at first sight to establish the rule that title passes by an oral grant if possession is taken and held in accordance with the grant. See Washabaugh *v.* Entriken, 34 Pa. St. 74; Grier *v.* Sampson, 27 Pa. St. 183; Brawdy *v.* Brawdy, 7 Pa. St. 157; Frye *v.* Shepler, 7 Pa. St. 91; Wible *v.* Wible, 1 Grant (Pa.) 406. In the above cases actions of ejectment have been defeated by proof on the part of defendant of an oral sale under which possession has been taken and held. The explanation is that the Pennsylvania courts of common law administer also equitable rights and remedies, and that they were in these cases enforcing defendant's right to specific performance of contracts which had been partly performed.

An executory verbal contract of sale does not fall within a statute applying to a conveyance. Shropshire *v.* Lyle, 31 Fed. 694.

56. *Illinois.*— Taylor *v.* Farmer, (1886) 4 N. E. 370.

Kansas.— Washington Nat. Bank *v.* Woodrum, 60 Kan. 34, 55 Pac. 330.

Kentucky.— Davis *v.* Tingle, 8 B. Mon. 539.

Maine.— Parsons *v.* Copeland, 33 Me. 370, 54 Am. Dec. 628.

New Jersey.— See Heald *v.* Ross, (Ch. 1900) 47 Atl. 575, holding that the statute of frauds is no defense to an action brought to enforce liens created by defendant's predecessor in title.

Wisconsin.— See Halvorsen *v.* Halvorsen, 120 Wis. 52, 97 N. W. 494, holding that a vendor's lien arises by operation of law without writing.

See 23 Cent. Dig. tit. "Frauds, Statute of," §§ 82, 83.

57. Pepper *v.* Com., 6 T. B. Mon. (Ky.) 27; Price *v.* Hart, 29 Mo. 171.

58. *Kentucky.*— Watson *v.* Violett, 2 Duv. 332.

Maryland.— Barney *v.* Patterson, 6 Harr. & J. 182; Boring *v.* Lemmon, 5 Harr. & J. 223; Fenwick *v.* Floyd, 1 Harr. & G. 172.

New Jersey.— Joslin *v.* Ervien, 50 N. J. L. 39, 12 Atl. 136.

Pennsylvania.— Fulton *v.* Moore, 25 Pa. St. 468.

however, that this rule has no application to mortgagee's sales,[59] nor to auction sales in general.[60]

(2) Dedication. The statute has no application to the dedication of land to the public, which may be evidenced by acts and declarations without any writing.[61]

(3) Eminent Domain. Statutes authorizing the exercise of the power of eminent domain may be so drawn as to dispense with the necessity of writing to pass title,[62] but it is of course open to the legislature to require a writing.[63]

(4) Legislative Authority to Acquire Title With Owner's Consent. Where a corporation or person is authorized by the legislature to acquire land with the consent of the owner, it may be provided that such consent need not be evidenced in writing,[64] or a writing may be required,[65] as the legislature may see fit.

b. Parol Evidence to Establish Title — (i) *In Real Actions.* It is generally held that oral evidence of title to realty is inadmissible to establish title in real actions.[66]

(ii) *In Personal Actions.* The more generally accepted rule is that there is no distinction between real and personal actions as to parol proof of title.[67]

(iii) *Proof of Possession.* Possession may always, when material, be shown by oral evidence,[68] and in an action for rent it may be shown that oral per-

United States.— Remington *v.* Linthicum, 14 Pet. 84, 10 L. ed. 364.

Contra.— Currie *v.* Mann, 6 Ala. 531; Robinson *v.* Garth, 6 Ala. 204, 41 Am. Dec. 47; Ennis *v.* Waller, 3 Blackf. (Ind.) 472; Alexander *v.* Merry, 9 Mo. 514; Evans *v.* Ashley, 8 Mo. 177; Simonds *v.* Catlin, 2 Cai. (N. Y.) 61.

59. Jackson *v.* Scott, 67 Ala. 99; Andrews *v.* O'Mahoney, 112 N. Y. 567, 20 N. E. 374; Willets *v.* Van Alst, 26 How. Pr. (N. Y.) 325; Bicknell *v.* Byrnes, 23 How. Pr. (N. Y.) 486.

60. Jackson *v.* Bull, 1 Johns. Cas. (N. Y.) 81, 2 Cai. Cas. 301; Kurtz *v.* Cummings, 24 Pa. St. 35.

61. Harding *v.* Jasper, 14 Cal. 642; Mann *v.* Bergmann, 203 Ill. 406, 67 N. E. 814; Godfrey *v.* Alton, 12 Ill. 29, 52 Am. Dec. 476.

62. Tamm *v.* Kellogg, 49 Mo. 118; Embury *v.* Conner, 3 N. Y. 511, 53 Am. Dec. 325 [*reversing* 2 Sandf. 98].

63. Hetfield *v.* New Jersey Cent. R. Co., 29 N. J. L. 571 [*reversing* 29 N. J. L. 206].

64. Cottrill *v.* Myrick, 12 Me. 222; Embury *v.* Conner, 3 N. Y. 511, 53 Am. Dec. 325 [*reversing* 2 Sandf. 98].

65. Hetfield *v.* New Jersey Cent. R. Co., 29 N. J. L. 571 [*reversing* 29 N. J. L. 206].

66. *California.*— Bostwick *v.* Mahoney, 73 Cal. 238, 14 Pac. 832.

Illinois.— Shreve *v.* Cicero, 129 Ill. 226, 21 N. E. 815; Lavery *v.* Brooke, 37 Ill. App. 51.

Kansas.— Douglass *v.* Geiler, 32 Kan. 499, 4 Pac. 1039.

Louisiana.— McKenzie *v.* Bacon, 40 La. Ann. 157, 4 So. 65; Bailey *v.* Ward, 32 La. Ann. 839; Halsey *v.* Sanridge, 27 La. Ann. 198; French *v.* Bach, 26 La. Ann. 731; George *v.* Campbell, 26 La. Ann. 445; Bradford *v.* Cook, 4 La. Ann. 229; Freret *v.* Meux, 9 Rob. 414; White *v.* Holsten, 4 Mart. 471.

Michigan.— Jennison *v.* Haire, 29 Mich. 207.

Minnesota.— Moe *v.* Chesrown, 54 Minn. 118, 55 N. W. 832.

Missouri.— Hall *v.* Small, 178 Mo. 629, 77 S. W. 733.

New York.— Carter *v.* Pitcher, 87 Hun 580, 34 N. Y. Suppl. 549.

North Carolina.— Cox *v.* Ward, 107 N. C. 507, 12 S. E. 379.

Pennsylvania.— Arnold *v.* Cessna, 25 Pa. St. 34; Richardson *v.* Campbell, 1 Dall. 10, 1 L. ed. 15.

Texas.— Thompson *v.* Dutton, 96 Tex. 205, 71 S. W. 544 [*affirming* (Civ. App. 1902) 69 S. W. 641, 996].

See 23 Cent. Dig. tit. "Frauds, Statute of," § 85.

See, however, Compton *v.* Ivey, 59 Ind. 352.

Oral proof of a mortgage has been held to fall within this rule. Union Bank *v.* Ellis, 3 La. Ann. 188.

Oral disclaimers of title are inadmissible. Jackson *v.* Miller, 6 Wend. (N. Y.) 228, 21 Am. Dec. 316 [*affirming* 6 Cow. 751]; Jackson *v.* Vosburgh, 7 Johns. (N. Y.) 186.

67. Douglass *v.* Geiler, 32 Kan. 499, 4 Pac. 1039; Bradford *v.* Cook, 4 La. Ann. 229; Jackson *v.* Livingston, 7 Wend. (N. Y.) 136; Hart *v.* Vinsant, 6 Heisk. (Tenn.) 616. See, however, Grevenberg *v.* Borel, 25 La. Ann. 530.

68. *Delaware.*— Robinson *v.* Tunnell, 2 Houst. 387.

Indiana.— Stretch *v.* Schenck, 23 Ind. 77, so holding even where it operates to prove title by prescription.

Iowa.— Tuttle *v.* Becker, 47 Iowa 486, so holding even where, in connection with a parol sale, it gives a good title.

Louisiana.— Gusman *v.* Hearsay, 26 La. Ann. 251; Boudreau *v.* Boudreau, 12 Mart. 667; McGuire *v.* Amelung, 12 Mart. 649.

Tennessee.— Dunn *v.* Eaton, 92 Tenn. 743, 23 S. W. 163.

Wisconsin.— Boos *v.* Gomber, 24 Wis. 284.

mission was given to occupy the premises without rent,[69] notwithstanding the statute of frauds.

(iv) *Proof of Payment.* The fact that land has been paid for may be shown by parol;[70] but it cannot be shown by oral evidence that a sum of money paid was in part performance of an oral contract of sale if such sale is denied.[71]

(v) *Surrounding Circumstances.* All the circumstances surrounding a conveyance may be shown by oral evidence to rebut the presumption of a resulting trust,[72] to show that it was received as an advancement,[73] to show that a grantee had notice of certain facts,[74] or, in an action to recover the money received for a conveyance, to show that the conveyance was made.[75]

c. Trees, Growing Grass, and Crops. It is generally held that trees and growing grass are so far realty that title to them will not pass without writing,[76] but that crops raised by yearly labor are chattels and will pass by parol.[77] There is considerable authority for the rule that the question whether the sale of a growing article passes an interest in the land depends upon the question whether an immediate separation of the article from the soil is contemplated or whether the article is to derive benefit from the soil for an appreciable period.[78]

d. Improvements and Fixtures. The title to buildings which are affixed to the realty and belong to the owner of the soil will not pass without a deed,[79] but

See 23 Cent. Dig. tit. "Frauds, Statute of," § 85.

69. Bailey *v.* Ward, 32 La. Ann. 839.

70. Bouche *v.* Michel, 10 Rob. (La.) 92; Wells *v.* Compton, 3 La. 164.

71. Houston *v.* Townsend, 1 Del. Ch. 416, 12 Am. Dec. 109.

72. Myers *v.* Myers, 25 Pa. St. 100.

73. Parker *v.* McCluer, 3 Abb. Dec. (N. Y.) 454, 3 Keyes 318, 1 Transcr. App. 240, 5 Abb. Pr. N. S. 97, 36 How. Pr. 301.

74. Christopher *v.* Williams, 59 Ga. 779.

75. Johnson *v.* Jordan, 22 La. Ann. 486.

76. *Alabama.*— Heflin *v.* Bingham, 56 Ala. 566, 28 Am. Rep. 776.

Iowa.— Garner *v.* Mahoney, 115 Iowa 356, 88 N. W. 828.

Kansas.— Powers *v.* Clarkson, 17 Kan. 218.

Minnesota.— Kileen *v.* Kennedy, 90 Minn. 414, 97 N. W. 126; Kirkeby *v.* Erickson, 90 Minn. 299, 96 N. W. 705, 101 Am. St. Rep. 411.

Mississippi.— Walton *v.* Lowrey, 74 Miss. 484, 21 So. 243.

Missouri.— Alt *v.* Grosclose, 61 Mo. App. 409.

New Hampshire.— Reid *v.* McQuesten, 61 N. H. 421; Howe *v.* Batchelder, 49 N. H. 204; Kingsley *v.* Holbrook, 45 N. H. 313, 86 Am. Dec. 173; Olmstead *v.* Niles, 7 N. H. 522; Putney *v.* Day, 6 N. H. 430, 25 Am. Dec. 470.

New Jersey.— Slocum *v.* Seymour, 36 N. J. L. 138, 13 Am. Rep. 432.

New York.— Green *v.* Armstrong, 1 Den. 550; Van Elstyne *v.* Wimple, 5 Cow. 162.

North Carolina.— Drake *v.* Howell, 133 N. C. 162, 45 S. E. 539; Green *v.* North Carolina R. Co., 73 N. C. 524, *semble.*

Ohio.— Hirth *v.* Graham, 50 Ohio St. 57, 33 N. E. 90, 40 Am. St. Rep. 641, 19 L. R. A. 721.

Pennsylvania.—Miller *v.* Zufall, 113 Pa. St. 317, 6 Atl. 350; Bowers *v.* Bowers, 95 Pa. St. 477; Pattison's Appeal, 61 Pa. St. 294, 100 Am. Dec. 637. See, however, Pennsylvania cases cited *infra*, note 78.

Tennessee.— Knox *v.* Haralson, 2 Tenn. Ch. 232.

Vermont.— Buck *v.* Pickwell, 27 Vt. 157.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 86.

Contra.— Cutler *v.* Pope, 13 Me. 377; Leonard *v.* Medford, 85 Md. 666, 37 Atl. 365, 37 L. R. A. 449; Smith *v.* Bryan, 5 Md. 141, 59 Am. Dec. 104; Fluharty *v.* Mills, 49 W. Va. 446, 38 S. E. 521; McIntosh *v.* McLeod, 18 Nova Scotia 128, 6 Can. L. T. 449.

77. *Alabama.*— Gafford *v.* Stearns, 51 Ala. 434.

California.— Davis *v.* McFarlane, 37 Cal. 634, 99 Am. Dec. 340; Marshall *v.* Ferguson, 23 Cal. 65.

Illinois.— Bull *v.* Griswold, 19 Ill. 631.

Indiana.— Sherry *v.* Picken, 10 Ind. 375; Bricker *v.* Hughes, 4 Ind. 146; Northern *v.* State, 1 Ind. 113.

Maine.— Bryant *v.* Crosby, 40 Me. 9.

Missouri.— Wimp *v.* Early, 104 Mo. App. 85, 78 S. W. 343.

New York.— Newcomb *v.* Ramer, 2 Johns. 421 note.

North Carolina.— Walton *v.* Jordan, 65 N. C. 170; Brittain *v.* McKay, 23 N. C. 265, 35 Am. Dec. 738.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 86.

78. Byasse *v.* Reese, 4 Metc. (Ky.) 372, 83 Am. Dec. 481; Cain *v.* McGuire, 13 B. Mon. (Ky.) 340; Wiggins *v.* Jackson, 73 S. W. 779, 24 Ky. L. Rep. 2189; Cardwell *v.* Atwater, 15 Ky. L. Rep. 541, 570; Hunter *v.* Burchett, 5 Ky. L. Rep. 770; Sproule *v.* Hopkins, 4 Ky. L. Rep. 533; Robbins *v.* Farwell, 193 Pa. St. 37, 44 Atl. 260; Huff *v.* McCauley, 53 Pa. St. 206, 91 Am. Dec. 203.

79. Benedict *v.* Benedict, 5 Day (Conn.) 464; Hogsett *v.* Ellis, 17 Mich. 351; Brown *v.* Roland, 92 Tex. 54, 45 S. W. 795; McKenzie *v.* McDonald, 2 Nova Scotia Dec. 11.

no deed is necessary to pass title to buildings which are not permanently affixed to the soil or do not belong to the owner thereof.[80]

e. Mortgages. Mortgages cannot be created by parol agreement;[81] nor can the effect of a deed which is absolute in form be modified by an oral agreement that the land shall be held merely as security;[82] but the statute does not prevent the reformation of an instrument in which the defeasance has by mutual mistake been omitted.[83] A mortgage given to secure a debt cannot be extended by an oral agreement to secure a further indebtedness to the mortgagee;[84] nor can it be extended by an oral agreement to secure persons other than the original mortgagee;[85] nor can other real estate be substituted by oral agreement for land described in a mortgage.[86] If a mortgage has been paid it cannot be revived by oral agreement so as to secure a new indebtedness.[87] However, a first mortgage becomes subject to a second by the oral agreement of the first mortgagee so to hold it.[88]

f. Reservations. When land is conveyed, growing crops may be reserved by parol stipulation;[89] but trees and yearly products of the soil pass with land conveyed unless they are reserved in writing.[90] Neither the possession nor the right to the use of land can be reserved by parol.[91] Buildings which are affixed to the soil will pass when the land is conveyed notwithstanding oral reservations,[92] and

80. Powell *v.* McAshan, 28 Mo. 70; Keyser *v.* Sunapee School Dist. No. 8, 35 N. H. 477.

A right to remove a fixture may be sold by parol. Oswald *v.* Whitman, 22 Nova Scotia 13.

81. Bower *v.* Oyster, 3 Penr. & W. (Pa.) 239.

82. Crutcher *v.* Muir, 90 Ky. 142, 13 S. W. 435, 11 Ky. L. Rep. 989, 29 Am. St. Rep. 366; Molly *v.* Ulrich, 133 Pa. St. 41, 19 Atl. 305; Richardson *v.* Johnsen, 41 Wis. 100, 22 Am. Rep. 712. See, however, Landers *v.* Beck, 92 Ind. 49; Wasatch Min. Co. *v.* Jennings, 5 Utah 243, 15 Pac. 65, 5 Utah 385, 16 Pac. 399.

83. Taylor *v.* Luther, 23 Fed. Cas. No. 13,796, 2 Sumn. 228. See also Butler *v.* Threlkeld, 117 Iowa 116, 90 N. W. 584; Judson *v.* Miller, 106 Mich. 140, 63 N. W. 965.

84. *Alabama.*— Spies *v.* Price, 91 Ala. 166, 8 So. 405.

Illinois.— Walker *v.* Carleton, 97 Ill. 582.

Kansas.— Bell *v.* Coffin, 2 Kan. App. 337, 43 Pac. 861.

Missouri.— O'Neill *v.* Capelle, 62 Mo. 202; Curle *v.* Eddy, 24 Mo. 117, 66 Am. Dec. 699.

New York.— Stoddard *v.* Hart, 23 N. Y. 556.

United States.— Williams *v.* Hill, 19 How. 246, 15 L. ed. 570.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 88.

85. Irwin *v.* Hubbard, 49 Ind. 350, 19 Am. Rep. 679; Harper *v.* Spainhour, 64 N. C. 629.

Subrogation.— Where land is paid for by one party and title is taken by another and mortgages are subsequently paid off by the one who pays for the land, the facts that the statute of frauds prevents proof of an oral trust, and that resulting trusts are abolished by another statute, do not prevent the first party from being subrogated to the rights of the mortgagees. Jeremiah *v.* Pitcher, 20 Misc. (N. Y.) 513, 45 N. Y. Suppl. 758.

86. Castro *v.* Illies, 13 Tex. 229.

87. Stringfellow *v.* Ivie, 73 Ala. 209; Mead *v.* York, 6 N. Y. 449, 57 Am. Dec. 467; Truscott *v.* King, 6 N. Y. 147 [*reversing* 6 Barb. 346].

88. Loewen *v.* Forsee, 137 Mo. 29, 38 S. W. 712, 59 Am. St. Rep. 489, (1896) 35 S. W. 1138. See also Townsend *v.* White, 102 Iowa 477, 71 N. W. 337, where a similar agreement in relation to mechanics' liens was supported.

89. *Indiana.*— Harvey *v.* Million, 67 Ind. 90; Heavilon *v.* Heavilon, 29 Ind. 509; Kluse *v.* Sparks, 10 Ind. App. 444, 36 N. E. 914, 37 N. E. 1047.

North Carolina.— Flynt *v.* Conrad, 61 N. C. 190, 93 Am. Dec. 588.

Ohio.—Youmans *v.* Caldwell, 4 Ohio St. 71; Baker *v.* Jordan, 3 Ohio St. 438.

Pennsylvania.— Backenstoss *v.* Stahler, 33 Pa. St. 251, 75 Am. Dec. 592.

West Virginia.— Kerr *v.* Hill, 27 W. Va. 576.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 89.

Contra.— Powell *v.* Rich, 41 Ill. 466.

90. Dodder *v.* Snyder, 110 Mich. 69, 67 N. W. 1101; McIlvaine *v.* Harris, 20 Mo. 457, 64 Am. Dec. 196; Wintermute *v.* Light, 46 Barb. (N. Y.) 278; Flynt *v.* Conrad, 61 N. C. 190, 93 Am. Dec. 588. See, however, Helfrech Lumber, etc., Co. *v.* Honaker, 76 S. W. 342, 25 Ky. L. Rep. 717, holding that a lien for the price of growing timber may be reserved by parol.

91. Gilbert *v.* Bulkley, 5 Conn. 262, 13 Am. Dec. 57; Crouse *v.* Frothingham, 97 N. Y. 105.

Rents may be verbally reserved. Hereford Cattle Co. *v.* Powell, 13 Tex. Civ. App. 496, 36 S. W. 1033.

92. *Indiana.*— Smith *v.* Holloway, 124 Ind. 329, 24 N. E. 886.

Iowa.— Agne *v.* Seitsinger, 85 Iowa 305, 52 N. W. 228.

Massachusetts.— Stockbridge Iron Co. *v.* Hudson Iron Co., 107 Mass. 290.

Michigan.— Detroit, etc., R. Co. *v.* Forbes, 30 Mich. 165.

an oral agreement of a landlord that doors and partitions placed in a building shall remain the property of the tenant is valid.[93]

3. Estates Less Than Fee — a. In General. The English statute of frauds applies generally to the creation of all leases for a greater time than three years, while in America different periods are prescribed in different states beyond which an oral lease is unenforceable.[94]

b. Leases With Provisions For Renewal. An oral lease for the full period allowed by statute with the privilege of renewal for a longer time is invalid.[95]

c. Tenancies at Will. Tenancies at will are expressly excepted from the operation of the statute and may be created by parol.[96]

d. Leases For Less Than Statutory Period. A present parol demise is to be distinguished from a promise to give a lease.[97] The former, even if it is not to take effect immediately, is still a lease, and, when of such duration as to be expressly excepted from the operation of the second section, is held to be excepted by implication from the operation of the fourth section, and is valid;[98] but a promise to give a lease for however short a time is within the prohibition of the fourth section.[99]

e. Tenancies From Year to Year. A tenancy from year to year is not a lease for a term exceeding one year, and is valid, although verbal, in those states in which the statutory period is one year or greater.[1]

New Hampshire.— Harriman *v.* Park, 55 N. H. 471.

North Carolina.— Bond *v.* Coke, 71 N. C. 97.

Ohio.— Jones *v.* Timmons, 21 Ohio St. 596; Young *v.* Miller, 10 Ohio 85.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 89.

93. Broaddus *v.* Smith, 121 Ala. 335, 26 So. 34, 77 Am. St. Rep. 61.

94. *Illinois.*— Creighton *v.* Sanders, 89 Ill. 543; Leavitt *v.* Stern, 55 Ill. App. 416 [*affirmed* in 159 Ill. 526, 42 N. E. 869].

Kentucky.— Ragsdale *v.* Lander, 3 Ky. L. Rep. 562.

Massachusetts.— Wiessner *v.* Ayer, 176 Mass. 425, 57 N. E. 672.

Michigan.— Barrett *v.* Cox, 112 Mich. 220, 70 N. W. 446; Fratcher *v.* Smith, 104 Mich. 537, 62 N. W. 832; Carney *v.* Mosher, 97 Mich. 554, 56 N. W. 935.

Mississippi.— Phipps *v.* Ingraham, 41 Miss. 256.

New York.— Wilder *v.* Stace, 61 Hun 233, 15 N. Y. Suppl. 870; Geiger *v.* Braun, 6 Daly 506; Ithaca First Baptist Church *v.* Bigelow, 16 Wend. 28. And see Tomlinson *v.* Miller, 7 Abb. Pr. N. S. 364; Hobbs *v.* Wetherwax, 38 How. Pr. 385.

North Carolina.— Briles *v.* Pace, 35 N. C. 279.

Ohio.— Gladwell *v.* Holcomb, 60 Ohio St. 427, 54 N. E. 473, 71 Am. St. Rep. 724; McCoy *v.* Skinner, Tapp. 101.

Oregon.— Wallace *v.* Scoggins, 17 Oreg. 476, 21 Pac. 558.

Pennsylvania.— Sausser *v.* Steinmetz, 88 Pa. St. 324; Heartzog *v.* Borgel, 7 Pa. Super. Ct. 257.

Tennessee.— Porter *v.* Gordon, 5 Yerg. 100.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 90.

95. Hand *v.* Osgood, 107 Mich. 55, 64 N. W. 867, 61 Am. St. Rep. 312, 30 L. R. A. 379; Caley *v.* Thornquist, 89 Minn. 348, 94 N. W. 1084; Rosen *v.* Rose, 13 Misc. (N. Y.) 565, 34 N. Y. Suppl. 467, 2 N. Y. Annot. Cas. 194. *Contra*, Chaffe *v.* Benoit, 60 Miss. 34.

96. Smalley *v.* Mitchell, 110 Mich. 650, 68 N. W. 978; Murray *v.* Armstrong, 11 Mo. 209.

97. Tillman *v.* Fuller, 13 Mich. 113.

98. Eubank *v.* May, etc., Hardware Co., 105 Ala. 629, 17 So. 109; Yule *v.* Fell, 123 Iowa 622, 99 N. W. 559; Childers *v.* Talbott, 4 N. M. 168, 16 Pac. 275; Ward *v.* Hinckley, 26 Wash. 539, 67 Pac. 220. *Contra*, Union Banking Co. *v.* Gittings, 45 Md. 181; Davis *v.* Pollock, 36 S. C. 544, 15 S. E. 718; Edge *v.* Strafford, 1 Cromp. & J. 391. And see Bolton *v.* Tomlin, 5 A. & E. 856, 2 H. & W. 369, 6 L. J. K. B. 45, 1 N. & P. 247, 31 E. C. L. 855.

Amount of rent.— The English statute makes it essential to the validity of a short-term lease that the rent reserved be equal to two thirds of the value of the property demised. The provision concerning the value of the rent has been very generally disregarded by both the courts and subsequent legislatures. Himesworth *v.* Edwards, 5 Harr. (Del.) 376; Hosli *v.* Yokel, 57 Mo. App. 622; Smith *v.* Niver, 2 Barb. (N. Y.) 180; Sheets *v.* Allen, 89 Pa. St. 47; Ryley *v.* Hicks, 1 Str. 651. Some courts have, however, insisted on the letter of the statute. Gano *v.* Vanderveer, 34 N. J. L. 293; Birckhead *v.* Cummins, 33 N. J. L. 44; Power *v.* Griffin, 20 Nova Scotia 52. The courts of New Mexico have interpreted the statute as requiring a yearly rental equal to two thirds the yearly rental value and not two thirds the value of the fee. Childers *v.* Lee, 5 N. M. 576, 25 Pac. 781, 12 L. R. A. 67.

99. See *infra*, VII, C, 3, e, (I).

1. Brown *v.* Kayser, 60 Wis. 1, 18 N. W. 523.

f. Agreements For Board and Lodging. Agreements to provide board and lodgings are not leases;[2] neither are agreements to pay increased rent;[3] and both are valid although verbal.

g. Renewals and Extensions. An oral renewal or extension of an existing lease for a greater than the statutory period is within the statute;[4] but when the original written lease provides for an extension on written notice, there is authority for the position that such written notice may be waived and the term extended by parol.[5]

h. Postponement of Performance. If an oral lease is not to take effect immediately, the question arises whether the time between the making of the lease and its taking effect is to be included in determining whether the lease is excepted from the operation of the statute. Under the English statute it is held that such period must be computed, and the same rule obtains to some extent in the United States;[6] but the general rule under the statutes in this country is that such period is not to be included in the computation, and that a present oral lease for a year to commence at a future time is not to be considered a lease for more than a year.[7] In certain jurisdictions, however, it is held that no action lies on such leases on the ground that they constitute contracts not to be performed within one year.[8]

i. Verbal Leases as Tenancies From Year to Year. Under the statute verbal leases are allowed the effect of estates at will, and if there is an entry and payment of rent by the year or some fractional part thereof, the tenancy becomes one from year to year.[9]

4. Easements. The statute of frauds was not needed to establish the rule that easements cannot be created by word of mouth, for it was a maxim of the com-

2. White *v.* Maynard, 111 Mass. 250, 15 Am. Dec. 28; Wilson *v.* Martin, 1 Den. (N. Y.) 602; Wright *v.* Stavert, 2 E. & E. 721, 29 L. J. Q. B. 161, 8 Wkly. Rep. 413, 105 E. C. L. 721.

An actual lease of certain definite rooms in a building is of course within the statute. Porter *v.* Merrill, 124 Mass. 534; Edge *v.* Strafford, 1 Cromp. & J. 391; Inman *v.* Stamp, 1 Stark. 12, 18 Rev. Rep. 740, 2 E. C. L. 15.

3. Hollis *v.* Pool, 3 Metc. (Mass.) 350; Donellan *v.* Read, 3 B. & Ad. 899, 1 L. J. K. B. 269, 23 E. C. L. 391; Whiteacre *v.* Symonds, 10 East 13, 10 Rev. Rep. 224; Hoby *v.* Roebuck, 2 Marsh. 433, 7 Taunt 157, 17 Rev. Rep. 477, 2 E. C. L. 305.

4. Emery *v.* Boston Terminal Co., 178 Mass. 172, 59 N. E. 763, 86 Am. St. Rep. 473; Crawford *v.* Wick, 18 Ohio St. 190, 98 Am. Dec. 103.

5. Matter of Zillig, 13 N. Y. St. 891; McClelland *v.* Rush, 150 Pa. St. 57, 24 Atl. 354; Sheppard *v.* Rosenkrans, 109 Wis. 58, 85 N. W. 199, 83 Am. St. Rep. 886. See, however, Beller *v.* Robinson, 50 Mich. 264, 15 N. W. 448.

6. *Indiana.*— Schmitz *v.* Lauferty, 29 Ind. 400.

Minnesota.— Judd *v.* Arnold, 31 Minn. 430, 18 N. W. 151.

Pennsylvania.—Wheeler *v.* Conrad, 6 Phila. 209.

England.— Rawlins *v.* Turner, 1 Ld. Raym. 736.

Canada.—Brewing *v.* Berryman, 15 N. Brunsw. 115.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 92.

7. *Arkansas.*— Higgins *v.* Gager, 65 Ark. 604, 47 S. W. 848.

Colorado.— Sears *v.* Smith, 3 Colo. 287.

Iowa.— Jones *v.* Marcy, 49 Iowa 188; Sobey *v.* Brisbee, 20 Iowa 105.

Michigan.— Whiting *v.* Ohlert, 52 Mich. 462, 18 N. W. 219, 50 Am. Rep. 265.

New York.— Young *v.* Dake, 5 N. Y. 463, 55 Am. Dec. 356; Nathan *v.* Stern, 13 Daly 390; Taggard *v.* Roosevelt, 2 E. D. Smith 100; Herter *v.* Muser, 29 Misc. 641, 61 N. Y. Suppl. 61; Green *v.* Weckle, 16 Misc. 76, 37 N. Y. Suppl. 652; Goldberg *v.* Lavinski, 3 Misc. 607, 22 N. Y. Suppl. 552.

Texas.— Bateman *v.* Maddox, 86 Tex. 546, 26 S. W. 51; Randall *v.* Thompson, 1 Tex. App. Civ. Cas. § 1100; Styles *v.* Rector, 1 Tex. App. Civ. Cas. § 957.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 92.

8. See *supra*, VI, B, 2.

9. *Kentucky.*— Morehead *v.* Watkyns, 5 B. Mon. 228.

Missouri.—Ridgley *v.* Stillwell, 28 Mo. 400; Hoover *v.* Pacific Oil Co., 41 Mo. App. 317.

New Jersey.— Drake *v.* Newton, 23 N. J. L. 111.

New York.— Coudert *v.* Cohn, 118 N. Y. 309, 23 N. E. 298, 16 Am. St. Rep. 761, 7 L. R. A. 69; Blumenthal *v.* Bloomingdale, 100 N. Y. 558, 3 N. E. 292; Reeder *v.* Sayre, 6 Hun 562 [*affirmed* in 70 N. Y. 180, 26 Am. Rep. 567]; Taggard *v.* Roosevelt, 2 E. D. Smith 100; People *v.* Rickert, 8 Cow. 226; Schuyler *v.* Leggett, 2 Cow. 660.

mon law that "incorporeal hereditaments lie in grant"; but it is undoubtedly true that easements are covered by the statute as interests in land; and, whether by virtue of the common law or the statute of frauds, or by both, it is true that an easement cannot exist by parol independently of a writing,[10] whether the easement be a right of way,[11] a right to mine ore,[12] a right of drainage,[13] a right of

Pennsylvania.— McDowell *v.* Simpson, 3 Watts 129, 27 Am. Dec. 338.

Tennessee.— Rogers *v.* Wheaton, 88 Tenn. 665, 13 S. W. 689; Hammond *v.* Dean, 8 Baxt. 193; Duke *v.* Harper, 6 Yerg. 280, 27 Am. Dec. 462.

Wisconsin.— Koplitz *v.* Gustavus, 48 Wis. 48, 3 N. W. 754.

England.— Clayton *v.* Blakely, 8 T. R. 3, 4 Rev. Rep. 575.

In Massachusetts this rule was supposed to depend on the short-term exception of the second section, and as there is no such exception in the Massachusetts statute, the opposite rule was established. Ellis *v.* Page, 1 Pick. 43.

10. *Alabama.*— Tillis *v.* Treadwell, 117 Ala. 445, 22 So. 983; Clanton *v.* Scruggs, 95 Ala. 279, 10 So. 757.

Arkansas.— Plunkett *v.* Meredith, (1903) 77 S. W. 600.

District of Columbia.— Hutchins *v.* Munn, 22 App. Cas. 88.

Illinois.— Wilmington Water-Power Co. *v.* Evans, 166 Ill. 548, 46 N. E. 1083.

Indiana.— Brumfield *v.* Carson, 33 Ind. 94, 5 Am. Rep. 184; Richter *v.* Irwin, 28 Ind. 26.

Kentucky.— Dillion *v.* Crook, 11 Bush 321.

Louisiana.— Guier *v.* Guier, 7 La. Ann. 103.

Maine.— Weare *v.* Chase, 93 Me. 264, 44 Atl. 900.

Massachusetts.— Morse *v.* Copeland, 2 Gray 302; Cook *v.* Stearns, 11 Mass. 533.

New Jersey.— Peer *v.* Wadsworth, (Ch. 1904) 58 Atl. 379; Banghart *v.* Flummerfelt, 43 N. J. L. 28.

New York.— Taylor *v.* Millard, 118 N. Y. 244, 23 N. E. 376, 6 L. R. A. 667; Selden *v.* Delaware, etc., Canal Co., 29 N. Y. 634; Sweeney *v.* St. John, 28 Hun 634; Houghtaling *v.* Houghtaling, 5 Barb. 379; Pitkin *v.* Long Island R. Co., 2 Barb. Ch. 221, 47 Am. Dec. 320.

Pennsylvania.— Huff *v.* McCauley, 53 Pa. St. 206, 91 Am. Dec. 203; Yeakle *v.* Jacob, 33 Pa. St. 376.

Wisconsin.— Case *v.* Hoffman, (1897) 72 N. W. 390; Rice *v.* Roberts, 24 Wis. 461, 1 Am. Rep. 195.

Canada.—Huddlestone *v.* Love, 13 Manitoba 432.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 94.

See, however, Weynand *v.* Lutz, (Tex. Civ. App. 1895) 29 S. W. 1097, where it was held that easements might be created by the verbal agreements of a vendor of land with successive vendees who acted on his agreements.

Subsequent writing.— Where a user in another's land has commenced under parol permission, a subsequent written agreement takes it out of the statute. Louisville, etc., R. Co. *v.* Illinois Cent. R. Co., 174 Ill. 448, 51 N. E. 824.

11. *Colorado.*— Ward *v.* Farwell, 6 Colo. 66.

Indiana.— Robinson *v.* Thrailkill, 110 Ind. 117, 10 N. E. 647.

Kansas.— Phœnix Ins. Co. *v.* Haskett, 64 Kan. 93, 67 Pac. 446.

Kentucky.— Butt *v.* Napier, 14 Bush 39; Hall *v.* McLeod, 2 Metc. 98, 74 Am. Dec. 400; Goodwin *v.* Crider, 6 Ky. L. Rep. 48.

Massachusetts.— Cole *v.* Hadley, 162 Mass. 579, 39 N. E. 279.

Mississippi.—Bonelli *v.* Blakemore, 66 Miss. 136, 5 So. 228, 14 Am. St. Rep. 550.

Missouri.— See Davis *v.* Watson, 89 Mo. App. 15, where it was held that an executory contract for the sale of a right of way is within the statute.

New Jersey.— Heiser *v.* Martin, 9 N. J. L. J. 277.

Rhode Island.— Foster *v.* Browning, 4 R. I. 47, 67 Am. Dec. 505.

Tennessee.— Long *v.* Mayberry, 96 Tenn. 378, 36 S. W. 1040.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 94.

An agreement to open up a street through one's land if adjoining land is purchased has been held to be valid. Drew *v.* Wiswall, 183 Mass. 554, 67 N. E. 666. See, however, Hall *v.* Fisher, 126 N. C. 205, 35 S. E. 425.

It has been held that a right to collect tolls for the use of a right of way may be verbally surrendered. Great Western Turnpike Co. *v.* Shafer, 57 N. Y. App. Div. 331, 68 N. Y. Suppl. 5 [*affirmed* in 172 N. Y. 662, 65 N. E. 1121].

Since, upon a conveyance, an easement passes as appurtenant to the land, an assignment thereof is unnecessary, and oral misrepresentations concerning the easement will found a defense in a suit for the price. Noojin *v.* Cason, 124 Ala. 458, 27 So. 490.

12. Kamphouse *v.* Gaffner, 73 Ill. 453; Macheca *v.* Avegno, 20 La. Ann. 339; Blake *v.* Everett, 1 Allen (Mass.) 248; Desloge *v.* Pearce, 38 Mo. 588; Fuhr *v.* Dean, 26 Mo. 116, 69 Am. Dec. 484.

13. *California.*— Dorris *v.* Sullivan, 90 Cal. 279, 27 Pac. 216.

Colorado.—Stewart *v.* Stevens, 10 Colo. 440, 15 Pac. 786.

Illinois.— Deyo *v.* Ferris, 22 Ill. App. 154, 24 Ill. App. 416; Murray *v.* Gibson, 21 Ill. App. 488.

Maryland.— Hamilton *v.* Jones, 3 Gill & J. 127.

Michigan.— Schultz *v.* Huffman, 127 Mich. 276, 86 N. W. 823.

New York.— Fonda, etc., R. Co. *v.* Olmstead, 84 N. Y. App. Div. 127, 81 N. Y. Suppl. 1041; Ft. Edward Water-Works Co. *v.* Mc-

flowage,[14] or a right to maintain a dam on the land of another.[15] Nor can the right to maintain a building or part of one on another's land be acquired by parol;[16] nor a right of burial.[17]

5. Licenses. In general a revocable license to be exercised on the grantor's land may be granted by parol,[18] as for instance a license to take away trees;[19]

Intyre, 4 N. Y. Suppl. 638; Phillips *v.* Thompson, 1 Johns. Ch. 131.

West Virginia.— Pifer *v.* Brown, 43 W. Va. 412, 27 S. E. 399, 49 L. R. A. 497.

Wisconsin.— Thoemke *v.* Fiedler, 91 Wis. 386, 64 N. W. 1030; Fryer *v.* Warne, 29 Wis. 511.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 95.

A right to conduct water through a farm for irrigation purposes has been held to be capable of creation by parol on the ground that the land is benefited thereby and no real servitude is imposed. Croke *v.* American Nat. Bank, 18 Colo. App. 3, 70 Pac. 229; New Iberia Rice-Milling Co. *v.* Romero, 105 La. 439, 29 So. 876.

14. *Connecticut.*— Foot *v.* New Haven, etc., Co., 23 Conn. 214.

Illinois.— Tanner *v.* Volentine, 75 Ill. 624; Woodward *v.* Seely, 11 Ill. 157, 50 Am. Dec. 445.

Maine.— Seidensparger *v.* Spear, 17 Me. 123, 35 Am. Dec. 234.

Maryland.— Carter *v.* Harlan, 6 Md. 20.

Michigan.— Morrill *v.* Mackman, 24 Mich. 279, 9 Am. Rep. 124.

New York.— Brown *v.* Woodworth, 5 Barb. 550.

North Carolina.— Bridges *v.* Purcell, 18 N. C. 492.

Tennessee.— Harris *v.* Miller, Meigs 158, 33 Am. Dec. 138.

Wisconsin.— Clute *v.* Carr, 20 Wis. 531, 91 Am. Dec. 442.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 95.

However, when a right of flowage is given by statute, an oral waiver of damages has been held to be valid (Clement *v.* Durgin, 5 Me. 9; Smith *v.* Goulding, 6 Cush. (Mass.) 154); and the same is true of an oral agreement to take a certain annual compensation for such flowage (Short *v.* Woodward, 13 Gray (Mass.) 86).

15. Moulton *v.* Faught, 41 Me. 298; Stevens *v.* Stevens, 11 Metc. (Mass.) 251, 45 Am. Dec. 203; Brown *v.* Woodworth, 5 Barb (N. Y.) 550; Mumford *v.* Whitney, 15 Wend. (N. Y.) 380, 30 Am. Dec. 60.

An oral agreement to maintain a dam on one's own land for another's benefit is also unenforceable. Banghart *v.* Flummerfelt, 43 N. J. L. 28; Jackson *v.* Litch, 62 Pa. St. 451. But see Warner *v.* Texas, etc., R. Co., 164 U. S. 418, 17 S. Ct. 147, 41 L. ed. 495.

16. Collins Co. *v.* Marcy, 25 Conn. 239; Duncan *v.* Labouisse, 9 La. Ann. 49; Brown *v.* Galley, Lalor (N. Y.) 308; Trammell *v.* Trammell, 11 Rich. (S. C.) 471.

17. Matter of O'Rourke, 12 Misc. (N. Y.) 248, 34 N. Y. Suppl. 45.

18. *Alabama.*— Alabama Great Southern R. Co. *v.* South Alabama, etc., R. Co., 84 Ala. 570, 3 So. 286, 5 Am. St. Rep. 401 (license to use a right of way); Rhodes *v.* Otis, 33 Ala. 578, 73 Am. Dec. 439 (license to float logs on a stream).

Connecticut.— Collins Co. *v.* Marcy, 25 Conn. 242, license to make an addition to a building on the land of the licensor.

Illinois.— Parker *v.* Wilson, 66 Ill. App. 91, it being so provided by statute.

Massachusetts.— De Montague *v.* Bacharach, 183 Mass. 256, 63 N. E. 435 (license to conduct a restaurant); Johnson *v.* Wilkinson, 139 Mass. 3, 29 N. E. 62, 52 Am. Rep. 698 (license to use a dancing hall).

Michigan.—Sovereign *v.* Ortmann, 47 Mich. 181, 10 N. W. 191, holding that where a contract for the use of land is pending, a verbal permission to enter and use the land creates a valid revocable license.

Mississippi.— New Orleans, etc., R. Co. *v.* Moye, 39 Miss. 374, license to construct a road.

New Hampshire.— Amerscoggin Bridge *v.* Bragg, 11 N. H. 102, license to build a bridge.

New York.— People *v.* Goodwin, 5 N. Y. 568 (license to lay out a road through a building); Cayuga R. Co. *v.* Niles, 13 Hun 170 (license to a railroad to lay a track on land to take stone and soil); Dubois *v.* Kelly, 10 Barb. 496 (license to a tenant to remove buildings erected during his term); McLarney *v.* Pettigrew, 3 E. D. Smith 111 (license to insert beams in the wall of a house); Miller *v.* Auburn, etc., R. Co., 6 Hill 61 (license to obstruct a landowner's right of egress and ingress by building a street railroad).

Pennsylvania.— McKellip *v.* McIlhenny, 4 Watts 317, 28 Am. Dec. 711, license to erect a mill dam.

England.— Wood *v.* Lake, Say. 3, license to stack coals.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 96.

A license to dig and carry away minerals may be created by parol. Riddle *v.* Brown, 20 Ala. 412, 56 Am. Dec. 202; Anderson *v.* Simpson, 21 Iowa 399.

A license to flow lands may be created orally. Millerd *v.* Reeves, 1 Mich. 107; French *v.* Owen, 2 Wis. 250.

A license to lay a pipe from a spring may exist by parol. Durrett *v.* Simpson, 3 T. B. Mon. (Ky.) 517, 16 Am. Dec. 115; Sampson *v.* Burnside, 13 N. H. 264.

Parol evidence.— If a license is specially pleaded as a defense in an action of trespass, parol proof of it is admissible in bar of plaintiff's right to recover. Hamilton *v.* Windolf, 36 Md. 301, 11 Am. Rep. 491.

19. *Illinois.*— Faith *v.* Yocum, 51 Ill. App. 620.

and such licenses, although revocable, afford a defense for acts done while they are unrevoked.[20]

B. Assignment, Grant, or Surrender of Existing Estates or Interests — 1. Statutory Provisions. The English statute of frauds provides in section 3 "that no leases, estates, or interests, either of free hold or terms of years, or any uncertain interest, of, in, to or out of any messuages, manors, land, tenements, or hereditaments shall be assigned, granted or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting or surrendering the same or by their agents thereunto lawfully authorized by writing, or by act and operation of law." Corresponding statutory provisions have been enacted in certain of the American jurisdictions,[21] but this section is not represented so generally in the American statutes as are the preceding sections having to do with the creation of estates.[22]

2. Particular Estates or Interests[23] — a. Leases — (i) *Assignment.* The rule under the original statute and others which make no exception in favor of short-term leases is that a lease cannot be orally assigned, even though it might have been created by parol.[24]

(ii) *Surrender.* In jurisdictions where the English statute is followed an

Massachusetts.— Whitmarsh *v.* Walker, 1 Metc. 313.

Michigan.— Spalding *v.* Archibald, 52 Mich. 365, 17 N. W. 940, 50 Am. Rep. 253; Greeley *v.* Stilson, 27 Mich. 153.

New Hampshire.— Houston *v.* Laffee, 46 N. H. 505; Woodbury *v.* Parshley, 7 N. H. 237, 26 Am. Dec. 739.

Canada.— Kerr *v.* Connell, 2 N. Brunsw. 133.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 96.

License to cut trees see Bennett *v.* Scutt, 18 Barb. (N. Y.) 347.

License to erect a sawmill and cut off timber see Kleeb *v.* Bard, 7 Wash. 41, 34 Pac. 138.

20. *Michigan.*— Spalding *v.* Archibald, 52 Mich. 365, 17 N. W. 940, 50 Am. Rep. 253; Millerd *v.* Reeves, 1 Mich. 107.

Mississippi.— New Orleans, etc., R. Co. *v.* Moye, 39 Miss. 374.

New York.— Pierrepont *v.* Barnard, 6 N. Y. 279; Cayuga R. Co. *v.* Niles, 13 Hun 170; Dubois *v.* Kelly, 10 Barb. 496; Miller *v.* Auburn, etc., R. Co., 6 Hill 61.

Pennsylvania.— McKellip *v.* McIlhenny, 4 Watts 317, 28 Am. Dec. 711.

Wisconsin.— French *v.* Owen, 2 Wis. 250.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 96.

Revocation of license.— It has been held that an oral license when exercised became irrevocable (Cook *v.* Stearns, 11 Mass. 533; Woodbury *v.* Parshley, 7 N. H. 237, 26 Am. Dec. 739; Hall *v.* Turner, 110 N. C. 292, 14 S. E. 791; Taylor *v.* Waters, 2 Marsh. 551, 7 Taunt. 374, 2 E. C. L. 405; Wood *v.* Lake, Say. 3), but there are authorities that sustain the view that such license, even when executed, may be revoked at the will of the grantor (Wingard *v.* Tift, 24 Ga. 179; Houston *v.* Laffee, 46 N. H. 505; Hewlins *v.* Shippam, 5 B. & C. 221, 7 D. & R. 783, 4 L. J. K. B. O. S. 241, 31 Rev. Rep. 757, 11 E. C. L. 437; Wood *v.* Leadbitter, 9 Jur. 187, 14 L. J. Exch. 161, 13 M. & W. 838). The exercise of the right of revocation may, however, be actionable, if it is in violation of the licensor's contractual agreement. Johnson *v.* Wilkinson, 139 Mass. 3, 29 N. E. 62, 52 Am. Rep. 698; Whitmarsh *v.* Walker, 1 Metc. (Mass.) 313.

21. See the statutes of the different states.

22. See *supra*, VII, A, 1.

23. Parol agreement establishing boundary see Boundaries, 5 Cyc. 931.

24. *Delaware.*—Logan *v.* Barr, 4 Harr. 546.

Illinois.— Chicago Attachment Co. *v.* Davis Sewing Mach. Co., (1891) 28 N. E. 959.

Kentucky.— Smith *v.* Perkins, 24 S. W. 722, 15 Ky. L. Rep. 627; Smith *v.* Smith, 9 Ky. L. Rep. 100.

Maryland.— Lamar *v.* McNamee, 10 Gill & J. 116, 32 Am. Dec. 152.

Missouri.— Tiefenbrun *v.* Tiefenbrun, 65 Mo. App. 253.

New Hampshire.— Whitney *v.* Swett, 22 N. H. 10, 53 Am. Dec. 228.

New York.— Agate *v.* Gignoux, 1 Rob. 278; Welsh *v.* Schuyler, 6 Daly 412; Frank *v.* New York, etc., R. Co., 7 N. Y. St. 814; Rowan *v.* Lythe, 11 Wend. 616.

North Carolina.— Briles *v.* Pace, 35 N. C. 279.

United States.— Sampson *v.* Camperdown Cotton Mills, 64 Fed. 939.

England.— Botting *v.* Martin, 1 Camp. 317.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 98.

In Pennsylvania the rule is different. Leases can be orally assigned if they could have been created orally. Greider's Appeal, 5 Pa. St. 422; McKinney *v.* Reader, 7 Watts 123.

Assignment of rent.— It has been held that rent could not be orally assigned. King *v.* Kaiser, 3 Misc. (N. Y.) 523, 23 N. Y. Suppl. 21.

A tenant's claim for compensation for betterments may be verbally assigned. Lombard *v.* Ruggles, 9 Me. 62.

oral surrender of any lease is inoperative.[25] In other jurisdictions, where certain leases are excepted from the operation of the statute corresponding to the third section of the English statute, they may of course be surrendered by parol.[26]

b. Easements — (I) *ASSIGNMENT.* Easements in land cannot be transferred by oral assignment.[27]

(II) *SURRENDER AND EXTINGUISHMENT.* Easements cannot be extinguished by oral agreement alone,[28] but an easement may be extinguished by an executed oral license by the owner of the dominant estate to do acts inconsistent with the easement.[29]

c. Interests Created by Contract of Sale — (I) *ASSIGNMENT OF PURCHASER'S INTEREST.* The interest of a purchaser under an executory contract of sale is so far realty that it cannot be assigned verbally.[30]

(II) *ASSIGNMENT OF VENDOR'S INTEREST.* A vendor's interest under an executory contract is said to be merely a personal right and may be assigned without writing;[31] and he may orally waive conditions inserted for his benefit.[32]

(III) *RESCISSION.* On the question whether a written contract for the sale of

25. *Delaware.*— Logan *v.* Barr, 4 Harr. 546.

Maine.— Hesseltine *v.* Seavey, 16 Me. 212.

Maryland.— Polk *v.* Reynolds, 31 Md. 106; Lammott *v.* Gist, 2 Harr. & G. 433, 18 Am. Dec. 295.

Missouri.— B. Roth Tool Co. *v.* Champ Spring Co., 93 Mo. App. 530, 67 S. W. 967; Smith *v.* Smith, 62 Mo. App. 596.

New York.— Ogden *v.* Sanderson, 3 E. D. Smith 166.

Wisconsin.— Bailey *v.* Wells, 8 Wis. 141, 76 Am. Dec. 233.

England.— Mollett *v.* Brayne, 2 Campb. 103, 11 Rev. Rep. 676.

In Illinois there is no statutory provision which the courts construe as requiring surrenders to be in writing. Harms *v.* McCormick, 30 Ill. App. 125 [*reversed* on another ground in 132 Ill. 104, 22 N. E. 511].

In Pennsylvania there is the same exception in regard to the surrender of short-term leases as in regard to their assignment, and they may be orally surrendered if they could have been created orally. Kiester *v.* Miller, 25 Pa. St. 481; McKinney *v.* Reader, 7 Watts 123.

A tenancy from year to year cannot be cut down by an oral agreement to hold only from month to month. Strong *v.* Schmidt, 13 Ohio Cir. Ct. 302, 7 Ohio Cir. Dec. 233.

26. Strong *v.* Crosby, 21 Conn. 398; Ross *v.* Schneider, 30 Ind. 423; Smith *v.* Devlin, 23 N. Y. 363.

In Mississippi it seems that a lessee's privilege to cut timber may be orally waived. Lee *v.* Hawks, 68 Miss. 669, 9 So. 828, 13 L. R. A. 633.

Rescission.— It is not necessary in all cases that the express rescission of a lease should be in writing. Greider's Appeal, 5 Pa. St. 422.

Surrender by operation of law see *infra*, VII, B, 3, b.

27. Thompson *v.* Gregory, 4 Johns. (N. Y.) 81, 4 Am. Dec. 255.

28. Pue *v.* Pue, 4 Md. Ch. 386; Dyer *v.* Sanford, 9 Metc. (Mass.) 395, 43 Am. Dec. 399; Longendyck *v.* Anderson, 59 How. Pr. (N. Y.) 1.

29. King *v.* Murphy, 140 Mass. 254, 4 N. E. 566; Curtis *v.* Noonan, 10 Allen (Mass.) 406; Morse *v.* Copeland, 2 Gray (Mass.) 302; Stevens *v.* Stevens, 11 Metc. (Mass.) 251, 45 Am. Dec. 203; Dyer *v.* Sanford, 9 Metc. (Mass.) 395, 43 Am. Dec. 399; Pope *v.* O'Hara, 48 N. Y. 446; Winter *v.* Brockwell, 8 East 308, 9 Rev. Rep. 454.

Waiver of claim for compensation.— Where an easement in land is taken by authority of a statute which provides for compensation to the owner, the claim for compensation may be waived by parol. Clement *v.* Durgin, 5 Me. 9; Fitch *v.* Seymour, 9 Metc. (Mass.) 462; Seymour *v.* Carter, 2 Metc. (Mass.) 520; Fuller *v.* Plymouth County Com'rs, 15 Pick. (Mass.) 81.

30. *Mississippi.*— Connor *v.* Tippett, 57 Miss. 594.

New Hampshire.— Abbott *v.* Baldwin, 61 N. H. 583.

New York.— Getman *v.* Getman, 1 Barb. Ch. 499. See, however, Bailey *v.* Le Roy, 2 Edw. 514.

North Carolina.— Wilkie *v.* Womble, 90 N. C. 254; Love *v.* Cobb, 63 N. C. 324.

Pennsylvania.— Bowser *v.* Cravener, 56 Pa. St. 132, so holding where the purchaser entered and made improvements.

Texas.— Sanborn *v.* Murphy, 5 Tex. Civ. App. 509, 25 S. W. 459, the purchaser having partly performed. See, however, Bullion *v.* Campbell, 27 Tex. 653.

Wisconsin.— Whitney *v.* State Bank, 7 Wis. 620; Smith *v.* Clarke, 7 Wis. 551, both holding that school-land certificates, which the court construed as contracts for land, are not orally assignable.

United States.— Arden *v.* Brown, 1 Fed. Cas. No. 510, 4 Cranch C. C. 121.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 100.

Contra.— Currier *v.* Howard, 14 Gray (Mass.) 511.

31. Doggett *v.* Patterson, 18 Tex. 158. See also *In re* Huggins, 204 Pa. St. 167, 53 Atl. 746.

32. Blood *v.* Hardy, 15 Me. 61. See, however, Williamson *v.* Paxton, 18 Gratt. (Va.) 475.

land may be rescinded by an oral agreement, the authorities are squarely in conflict.[33]

d. Interests Created by Mortgage — (I) *Mortgagee's Interest* — (A) *Assignment.* It is generally held that when a mortgage debt is assigned, the mortgage passes with it without a written assignment.[34]

(B) *Release.* The weight of authority favors the view that a mortgage may be released by parol, and is extinguished by the payment of the debt without writing.[35]

(II) *Mortgagor's Interest* — (A) *Assignment.* A mortgagor's right to redeem is generally held to be real estate, and a verbal assignment of it is inoperative.[36]

(B) *Release.* The right of a mortgagor of real estate to redeem the property cannot be released by him without a writing,[37] and the same rule applies to an

33. That the contract cannot be rescinded by parol see the following cases:

Illinois.— Dougherty *v.* Catlett, 129 Ill. 431, 21 N. E. 932 [*affirming* 29 Ill. App. 294].

Iowa.— Fisher *v.* Koontz, 110 Iowa 498, 80 N. W. 551.

Kansas.— Carr *v.* Williams, 17 Kan. 575.

Kentucky.— Mt. Sterling, etc., Mill Turnpike Co. *v.* Barry, 38 S. W. 847, 18 Ky. L. Rep. 937.

Michigan.— Stewart *v.* McLaughlin, 126 Mich. 1, 85 N. W. 266, 87 N. W. 218; Grunow *v.* Salter, 118 Mich. 148, 76 N. W. 325; Grover *v.* Buck, 34 Mich. 519. See, however, Sullivan *v.* Dunham, 42 Mich. 518, 4 N. W. 223.

Missouri.— Pratt *v.* Morrow, 45 Mo. 404, 100 Am. Dec. 381.

North Carolina.— See Miller *v.* Pierce, 104 N. C. 389, 10 S. E. 554, holding that while the contract may be discharged by matter *in pais*, there must be something more than the mere oral agreement of the parties.

Ohio.— McCulloch *v.* Tapp. 2 Ohio Dec. (Reprint) 678, 4 West. L. Month. 575.

Pennsylvania.— Goucher *v.* Martin, 9 Watts 106 (the purchaser having entered and paid part of the price); Wells *v.* Wayman, 1 Lack. Leg. Rec. 485. *Contra,* Raffensberger *v.* Cullison, 28 Pa. St. 426 (the purchaser having paid nothing and having destroyed the contract, and consented to a sale to a third person); Boyce *v.* McCulloch, 3 Watts & S. 429, 39 Am. Dec. 35.

Texas.— Dial *v.* Crain, 10 Tex. 444.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 100.

That an oral rescission is valid see the following cases:

Alabama.— Arrington *v.* Porter, 47 Ala. 714.

California.— Beach *v.* Covillard, 4 Cal. 315.

Indiana.— Sutton *v.* Sears, 10 Ind. 223.

New York.— Proctor *v.* Thompson, 13 Abb. N. Cas. 340.

Vermont.— Adams *v.* Fullam, 43 Vt. 592.

Wisconsin.— Telford *v.* Frost, 76 Wis. 172, 44 N. W. 835. See also Maxon *v.* Gates, 112 Wis. 196, 88 N. W. 54.

Canada.— Barclay *v.* Proas, Ritch. Eq. Cas. (Nova Scotia) 317. See Murdoch *v.* Currell, 25 Nova Scotia 293.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 100.

Surrender of contract.— A written agreement to convey may be rescinded by the voluntary surrender or cancellation of the articles with the purpose to rescind. Sullivan *v.* Dunham, 42 Mich. 518, 4 N. W. 223; Raffensberger *v.* Cullison, 28 Pa. St. 426.

The vendee's right to insist on performance of a condition precedent may be orally waived. Negley *v.* Jeffers, 28 Ohio St. 90.

Where the original contract provides for a rescission on abandonment of possession, it would seem that such abandonment would work a rescission without writing, and it has been so held. Washington *v.* McGee, 7 T. B. Mon. (Ky.) 131.

34. Sims *v.* Hammond, 33 Iowa 368; Moore *v.* Louaillier, 2 La. 571; Dougherty *v.* Randall, 3 Mich. 581. But see Prescott *v.* Ellingwood, 23 Me. 345. See more particularly *infra,* VII, B, 3, e.

35. Wallis *v.* Long, 16 Ala. 738; Howard *v.* Gresham, 27 Ga. 347; Mutual Mill Ins. Co. *v.* Gordon, 121 Ill. 366, 12 N. E. 747 [*affirming* 20 Ill. App. 559]; Ackla *v.* Ackla, 6 Pa. St. 228.

An oral contract to execute a release is invalid.

Colorado.— Borcherdt *v.* Favor, 16 Colo. App. 406, 66 Pac. 251.

Connecticut.— Brooks *v.* Benham, 70 Conn. 92, 38 Atl. 908, 39 Atl. 1112, 66 Am. St. Rep. 87.

Maine.— Leavitt *v.* Pratt, 53 Me. 147.

Massachusetts.— Parker *v.* Barker, 2 Metc. 423.

New York.— Malins *v.* Brown, 4 N. Y. 403.

Vermont.— Merrill *v.* Pease, 51 Vt. 556.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 101.

See, however, Hemmings *v.* Doss, 125 N. C. 400, 34 S. E. 511.

An oral promise to obtain a release of a mortgage has been held valid. McCraith *v.* National Mohawk Valley Bank, 104 N. Y. 414, 10 N. E. 862.

An oral promise not to enforce the mortgage is invalid. Hunt *v.* Maynard, 6 Pick. (Mass.) 489.

An oral promise to give up possession is invalid. Norton *v.* Webb, 35 Me. 218.

36. Scott *v.* McFarland, 13 Mass. 309; Van Keuren *v.* McLaughlin, 19 N. J. Eq. 187.

37. Wendover *v.* Baker, 121 Mo. 273, 25 S. W. 918; Clark *v.* Condit, 18 N. J. Eq.

oral executory contract to release it,[38] both the release and the agreement being within the statute of frauds.

e. Dower. Dower cannot be surrendered by parol,[39] but as such interest vests in the wife by operation of law an oral designation or assignment of the land to be held by her for her dower is valid.[40]

f. Rights of Possession. The transfer of mere possessory rights may be carried out by mere change of possession without writing;[41] and it has been held that the possession of successive adverse holders could be connected so as to make up the statutory period necessary to bar the true owner even though no deed passed between them.[42]

g. Equitable Interests — (I) *ASSIGNMENT.* An equitable interest under a trust in realty cannot, since the statute of frauds, be transferred by oral assignment.[43]

(II) *SURRENDER.* An equitable title to land cannot be surrendered by parol.[44]

h. Liens. A mechanic's lien will not pass by oral assignment;[45] but a judgment creating a lien on real estate is assignable orally.[46]

358; Odell *v.* Montross, 68 N. Y. 499 [*reversing* 6 Hun 155]. *Contra,* Shaw *v.* Walbridge, 33 Ohio St. 1; Nolan *v.* Urmston, 18 Ohio 273.

Where, however, the right of redemption exists only by virtue of a verbal reservation made when an absolute deed was passed, such right may be orally surrendered. Baxter *v.* Pritchard, 122 Iowa 590, 98 N. W. 372.

It cannot be shown that the parties intended a conditional sale rather than a mortgage. Woods *v.* Wallace, 22 Pa. St. 171; Brown *v.* Nickle, 6 Pa. St. 390.

38. Starin *v.* Newcomb, 13 Wis. 519.

39. Carnall *v.* Wilson, 21 Ark. 62, 76 Am. Dec. 351; Keeler *v.* Tatnell, 23 N. J. L. 62; Houston *v.* Smith, 88 N. C. 312.

Verbal promises to surrender or procure the surrender of dower are within the statute.

Alabama.— Martin *v.* Wharton, 38 Ala. 637.

Indiana.— Switzer *v.* Hauk, 89 Ind. 73; Randles *v.* Randles, 63 Ind. 93.

Maine.— Lothrop *v.* Foster, 51 Me. 367.

Michigan.— Wright *v.* De Groff, 14 Mich. 164.

New Hampshire.— Gordon *v.* Gordon, 56 N. H. 170.

Ohio.— Finch *v.* Finch, 10 Ohio St. 501.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 102.

40. *Alabama.*— Johnson *v.* Neil, 4 Ala. 166.

Illinois.— Pearce *v.* Pearce, 184 Ill. 289, 56 N. E. 311 (so holding even though the entire estate of the deceased husband is set off to the wife); Lenfers *v.* Henke, 73 Ill. 405, 24 Am. Rep. 263.

Maine.— Baker *v.* Baker, 4 Me. 67.

Massachusetts.—Shattuck *v.* Gragg, 23 Pick. 88; Jones *v.* Brewer, 1 Pick. 314; Conant *v.* Little, 1 Pick. 189.

New Hampshire.— Pinkham *v.* Gear, 3 N. H. 163.

Ohio.— Sholwell *v.* Sedam, 3 Ohio 5.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 102.

41. *California.*— Table Mountain Tunnel Co. *v.* Stranahan, 20 Cal. 198; Gore *v.* McBrayer, 18 Cal. 582.

Colorado.— Conn *v.* Oberto, 32 Colo. 313, 76 Pac. 369.

Illinois.— Weber *v.* Anderson, 73 Ill. 439.

Maine.— Clark *v.* Gellerson, 20 Me. 18.

New Hampshire.— Blaisdell *v.* Martin, 9 N. H. 253.

New York.— Onderdonk *v.* Lord, Lalor 129.

Pennsylvania.— Read *v.* Thompson, 5 Pa. St. 327.

Delivery of title deeds alone is sufficient under certain circumstances. Tohler *v.* Folsom, 1 Cal. 207.

Preëmption rights are so far realty as to require transfer by deed. Foster *v.* Mabe, 4 Ala. 402, 37 Am. Dec. 749.

Where possessory interests in the public lands are included in the statutory definition of real estate they cannot be verbally assigned. Hopkins *v.* Noyes, 4 Mont. 550, 2 Pac. 280.

42. Thompson *v.* Dutton, (Tex. Civ. App. 1902) 69 S. W. 641; Illinois Steel Co. *v.* Budzisz, (Wis. 1900) 81 N. W. 1027, 106 Wis. 499, 82 N. W. 534, 80 Am. St. Rep. 54, 48 L. R. A. 830.

43. Shoofstall *v.* Adams, 2 Grant (Pa.) 209; Hogg *v.* Wilkins, 1 Grant (Pa.) 67; Cauble *v.* Worsham, 96 Tex. 86, 70 S. W. 737, 97 Am. St. Rep. 871; Darling *v.* Butler, 45 Fed. 332, 10 L. R. A. 469.

At common law a verbal assignment of an equitable interest in land was effective. Foy *v.* Foy, 3 N. C. 131.

The rights of a legatee of a portion of the proceeds of land which is to be sold can be orally assigned. Mellon *v.* Reed, 123 Pa. St. 1, 15 Atl. 906.

44. Millard *v.* Hathaway, 27 Cal. 119. *Contra,* Shoofstall *v.* Adams, 2 Grant (Pa.) 209.

45. Ritter *v.* Stevenson, 7 Cal. 388. But it may be relinquished without writing before the account and affidavit are filed (White Lake Lumber Co. *v.* Stone, 19 Nebr. 402, 27 N. W. 395), and it may be waived by an agent whose authority is oral (Hughes *v.* Lansing, 34 Oreg. 118, 55 Pac. 95, 75 Am. St. Rep. 574).

46. Winberry *v.* Koonce, 83 N. C. 351. And an oral promise not to enforce an exe-

3. Particular Means of Transfer — a. Parol Estoppel — (i) *In General.* It is generally held that title to real estate cannot be affected by estoppel arising from spoken words;[47] but when the question is merely as to the location of a boundary there may be an estoppel by parol.[48]

(ii) *Oral Admissions.* In accordance with the general rule as stated in the preceding section evidence of oral admissions is incompetent to prove or disprove title.[49]

b. Act or Operation of Law. In general a surrender of a lease by operation of law is expressly excepted from the statute of frauds; such surrender dispenses with the necessity of writing. The most common instance of a surrender of a lease by operation of law is when a new and valid lease is executed, delivered, and accepted by the tenant for the term, or a part thereof, covered by the old lease.[50] So also there is a surrender by operation of law when the tenant abandons the premises and a new tenant enters and is actually received by the landlord as such.[51] And an actual surrender of the premises by the tenant and an

cution against land is valid. Beegle *v.* Wentz, 55 Pa. St. 369, 93 Am. Dec. 762. However, the title of an execution purchaser cannot be orally assigned. Whiting *v.* Butler, 29 Mich. 122.

47. *Alabama.*— Kelly *v.* Hendricks, 57 Ala. 193; Thompson *v.* Campbell, 57 Ala. 183; Gimon *v.* Davis, 36 Ala. 589.

Georgia.— Roe *v.* Doe, 31 Ga. 544.

Illinois.— Chiles *v.* Davis, 58 Ill. 411.

Michigan.— Wood *v.* Michigan Air Line R. Co., 90 Mich. 334, 51 N. W. 263; De Mill *v.* Moffat, 49 Mich. 125, 13 N. W. 387; Shaw *v.* Chambers, 48 Mich. 355, 12 N. W. 486; Hayes *v.* Livingstone, 34 Mich. 384, 22 Am. Rep. 533.

Pennsylvania.— Washabaugh *v.* Entriken, 36 Pa. St. 513.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 104.

Contra.— Brown *v.* Wheeler, 17 Conn. 345, 44 Am. Dec. 550; Parker *v.* Barker, 2 Metc. (Mass.) 423; Murray Hill Min., etc., Co. *v.* Havenor, 24 Utah 73, 66 Pac. 762. See also Kershaw *v.* Kershaw, 102 Ill. 307 (holding that the acceptance of a deed expressed to be received by the grantee "as his full share of his father's estate" has the effect of a release of the grantee's expectancy in such estate); Goldman *v.* Ehrenreich, 33 Misc. (N. Y.) 433, 68 N. Y. Suppl. 424; Flower *v.* Barnekoff, 20 Oreg. 132, 25 Pac. 370, 11 L. R. A. 149.

48. Hayes *v.* Livingston, 34 Mich. 384, 22 Am. Rep. 533; Bell *v.* Goodnature, 50 Minn. 417, 52 N. W. 908.

Parol agreement establishing boundary see Boundaries, 5 Cyc. 931.

49. Jackson *v.* Cary, 16 Johns. (N. Y.) 302; Brant *v.* Livermore, 10 Johns. (N. Y.) 358; Jackson *v.* Kisselbrack, 10 Johns. (N. Y.) 336, 6 Am. Dec. 341; Jackson *v.* Pulver, 8 Johns. (N. Y.) 370; Jackson *v.* Shearman, 6 Johns. (N. Y.) 19; Paull *v.* Mackey, 3 Watts (Pa.) 110.

50. Hoag *v.* Carpenter, 18 Ill. App. 555; Smith *v.* Niver, 2 Barb. (N. Y.) 180; Abell *v.* Williams, 3 Daly (N. Y.) 17; Van Rensselaer *v.* Penniman, 6 Wend. (N. Y.) 569; Donellan *v.* Read, 3 B. & Ad. 899, 1 L. J. K. B. 269, 23 E. C. L. 391; Davison *v.* Stanley, 4 Burr. 2210; Wilson *v.* Sewell, 4 Burr. 1975; Lyon *v.* Reed, 18 Jur. 762, 13 L. J. Exch. 377, 13 M. & W. 285; Goodright *v.* Mark, 4 M. & S. 30.

The new lease must be valid to have that effect. Chamberlain *v.* Dunlop, 5 Silv. Supreme (N. Y.) 98, 8 N. Y. Suppl. 125; Doe *v.* Courtenay, 11 Q. B. 702, 12 Jur. 454, 17 L. J. Q. B. 151, 63 E. C. L. 702; Davison *v.* Stanley, 4 Burr. 2210; Wilson *v.* Sewell, 4 Burr. 1975.

51. *Maine.*— Hesseltine *v.* Seavey, 16 Me. 212.

Massachusetts.— Amory *v.* Kannoffsky, 117 Mass. 351, 19 Am. Rep. 416; Randall *v.* Rich, 11 Mass. 494.

Michigan.— Logan *v.* Anderson, 2 Dougl. 101.

Missouri.— Koenig *v.* Miller Bros. Brewing Co., 38 Mo. App. 182.

New Jersey.— Wallace *v.* Kennelly, 47 N. J. L. 242.

New York.— Bailey *v.* Delaplaine, 1 Sandf. 5; Smith *v.* Wheeler, 8 Daly 35.

England.— Nickells *v.* Atherstone, 10 Q. B. 944, 11 Jur. 778, 16 L. J. Q. B. 371, 59 E. C. L. 944; Thomas *v.* Cook, 2 B. & Ald. 119, 20 Rev. Rep. 374; Phipps *v.* Sculthorpe, 1 B. & Ald. 50, 18 Rev. Rep. 426; Stone *v.* Whiting, 2 Stark. 235, 19 Rev. Rep. 710, 3 E. C. L. 391.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 105.

The new tenancy must constitute a valid lease to have the effect of a surrender of the first lease. Schieffelin *v.* Carpenter, 15 Wend. (N. Y.) 400.

A mere executory agreement that a tenant shall quit and that the premises shall be leased to a new tenant does not operate as a surrender of the first term. Lammott *v.* Gist, 2 Harr. & G. (Md.) 433, 18 Am. Dec. 295; Wilson *v.* Lester, 64 Barb. (N. Y.) 431; Schieffelin *v.* Carpenter, 15 Wend. (N. Y.) 400; Johnstone *v.* Hudlestone, 4 B. & C. 922, 7 D. & R. 411, 4 L. J. K. B. O. S. 71, 28 Rev. Rep. 505, 10 E. C. L. 860; Taylor *v.* Chapman, 2 Peake Add. Cas. 19, 4 Rev. Rep. 884; Thomson *v.* Wilson, 2 Stark. 379, 20 Rev. Rep. 696, 3 E. C. L. 453.

acceptance of possession thereof by the landlord with mutual intent to terminate the lease will have that effect.[52]

c. Redelivery, Destruction, or Cancellation of Deed — (I) *In General.* As a general rule title to land conveyed does not revert to the grantor by the voluntary destruction, cancellation, or surrender of the instrument of conveyance,[53] particularly when the rights of third parties have intervened;[54] but there is some authority for the contention that a redelivery of an unrecorded deed with intent to revest title has by way of estoppel the effect intended.[55]

(II) *Rescission.* A deed cannot be rescinded by oral agreement so as to revest title in the grantor.[56]

d. Equitable Mortgage on Deposit of Title Deeds. It is held in England that on the deposit by a debtor of his title deeds as security for a loan an equitable mortgage arises which is not within the statute.[57] The English doctrine has some following in the United States,[58] but the more generally accepted American rule is to the contrary.[59]

52. *Maryland.*— Lamar *v.* McNamee, 10 Gill & J. 116, 32 Am. Dec. 152.

Massachusetts.— Amory *v.* Kannoffsky, 117 Mass. 351, 19 Am. Rep. 416.

Missouri.— Churchill *v.* Lammers, 1 Mo. App. Rep. 155.

New Jersey.— See Stotesbury *v.* Vail, 13 N. J. Eq. 390, where such a surrender was sustained in equity, although its validity at law was questioned.

New York.— Kelly *v.* Noxon, 64 Hun 281, 18 N. Y. Suppl. 909; Vandekar *v.* Reeves, 40 Hun 430; Allen *v.* Devlin, 6 Bosw. 1 [*affirmed* in 23 N. Y. 363]; Hurley *v.* Sehring, 17 N. Y. Suppl. 7; Tallman *v.* Earle, 13 N. Y. Suppl. 805.

Pennsylvania.— Auer *v.* Penn, 92 Pa. St. 444; Pratt *v.* H. M. Richards Jewelry Co., 69 Pa. St. 53.

England.— Grimman *v.* Legge, 8 B. & C. 324, 6 L. J. K. B. O. S. 321, 2 M. & R. 438, 15 E. C. L. 164; Phené *v.* Popplewell, 12 C. B. N. S. 334, 8 Jur. N. S. 1104, 31 L. J. C. P. 235, 6 L. T. Rep. N. S. 247, 10 Wkly. Rep. 523, 104 E. C. L. 334; Dodd *v.* Acklom, 13 L. J. C. P. 11, 6 M. & G. 672, 7 Scott N. R. 415, 46 E. C. L. 672.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 105.

A mere surrender of keys not accepted as a termination of the lease is inoperative. Kelly *v.* Noxon, 64 Hun (N. Y.) 281, 18 N. Y. Suppl. 909.

53. *Alabama.*— Mallory *v.* Stodder, 6 Ala. 801.

Connecticut.— Gilbert *v.* Bulkley, 5 Conn. 262, 13 Am. Dec. 57.

Iowa.— Smith *v.* Phelps, 32 Iowa 537.

Massachusetts.— Sherburne *v.* Fuller, 5 Mass. 133.

Michigan.— Warren *v.* Tobey, 32 Mich. 45; Gugins *v.* Van Gorder, 10 Mich. 523, 82 Am. Dec. 55.

New Jersey.— Wilson *v.* Hill, 13 N. J. Eq. 143.

New York.— Rowan *v.* Lytle, 11 Wend. 616; Jackson *v.* Page, 4 Wend. 585; Jackson *v.* Anderson, 4 Wend. 474.

Pennsylvania.— Rifener *v.* Bowman, 53 Pa. St. 313.

South Carolina.— Cornwell *v.* Spence, Harp. Eq. 258.

Estoppel.— A person who voluntarily destroys his deed may be estopped from relying thereon (Mallory *v.* Stodder, 6 Ala. 801; Banre *v.* Sutton, 3 Pennyp. (Pa.) 199), and will not be permitted to give evidence of its contents (Parker *v.* Kane, 4 Wis. 1, 65 Am. Dec. 283).

54. Nason *v.* Grant, 21 Me. 160.

55. Dodge *v.* Dodge, 33 N. H. 487; Mussey *v.* Holt, 24 N. H. 248, 55 Am. Dec. 234; Farrar *v.* Farrar, 4 N. H. 191, 17 Am. Dec. 410; Tomson *v.* Ward, 1 N. H. 9; Faulks *v.* Burns, 2 N. J. Eq. 250; Dycus *v.* Hart, 2 Tex. Civ. App. 354, 21 S. W. 299.

56. Craig *v.* Craig, 90 Ind. 215; Maxwell *v.* Wallace, 45 N. C. 251.

57. Burton *v.* Gray, L. R. 8 Ch. 932, 43 L. J. Ch. 229; Russel *v.* Russel, 1 Bro. Ch. 269, 28 Eng. Reprint 1121; Norris *v.* Wilkinson, 12 Ves. Jr. 192, 33 Eng. Reprint 73.

The same is true if part only of the deeds are deposited. Lacon *v.* Allen, 3 Drew. 579, 26 L. J. Ch. 18, 4 Wkly. Rep. 693; *Ex p.* Arkwright, 3 Mont. D. & De G. 129.

58. *New York.*— Chase *v.* Peck, 21 N. Y. 581; Jackson *v.* Parkhurst, 4 Wend. 369 (holding that while a deposit of title deeds to secure a loan may create an equitable lien in the nature of a mortgage, it cannot be set up as law so as to defeat a recovery in ejectment); Rockwell *v.* Hobby, 2 Sandf. Ch. 9.

Rhode Island.—Hackett *v.* Reynolds, 4 R. I. 512.

South Carolina.— Hutzler *v.* Phillips, 26 S. C. 136, 1 S. E. 502, 4 Am. St. Rep. 687.

Vermont.— Bicknell *v.* Bicknell, 31 Vt. 498.

Wisconsin.— Jarvis *v.* Dutcher, 16 Wis. 307.

United States.— Mandeville *v.* Welch, 5 Wheat. 277, 5 L. ed. 87.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 107.

59. *Alabama.*— Lehman *v.* Collins, 69 Ala. 127.

Kentucky.— Vanneter *v.* McFaddin, 8 B. Mon. 435.

Maine.— Hall *v.* McDuff, 24 Me. 311.

Mississippi.— Gothard *v.* Flynn, 25 Miss. 58.

Nebraska.— Bloomfield State Bank *v.* Mil-

e. Assignment of Debt Secured by Mortgage. It seems to be the more generally accepted doctrine that the interests of a mortgagee will pass by operation of law with the assignment or surrender of the debt secured by it,[60] but there is some dissent from this rule based on the recognition of a mortgage as in part a conveyance of real estate.[61]

f. Partition — (I) *TENANTS IN COMMON.* An oral partition by tenants in common under which possession is taken by the respective parties is very generally held to be effective;[62] but the authorities are by no means unanimous,

ler, 55 Nebr. 243, 75 N. W. 569, 70 Am. St. Rep. 381, 44 L. R. A. 387.

North Carolina.— Harper *v.* Spainhour, 64 N. C. 629.

Ohio.— Probasco *v.* Johnson, 2 Disn. 96.

Pennsylvania.— Shitz *v.* Dieffenbach, 3 Pa. St. 233.

Tennessee.— Meador *v.* Meador, 3 Heisk. 562.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 107.

60. *Alabama.*— McVay *v.* Bloodgood, 9 Port. 547.

California.— Tapia *v.* Demartini, 77 Cal. 383, 19 Pac. 641, 11 Am. St. Rep. 288; Bennett *v.* Solomon, 6 Cal. 134.

Connecticut.— Dudley *v.* Cadwell, 19 Conn. 218; Clark *v.* Beach, 6 Conn. 142; Huntington *v.* Smith, 4 Conn. 235; Barkhamstead *v.* Farrington, 2 Conn. 600; Crosby *v.* Brownson, 2 Day 425.

Illinois.— Mapps *v.* Sharpe, 32 Ill. 13; McConnell *v.* Hodson, 7 Ill. 640.

Iowa.— Indiana State Bank *v.* Anderson, 14 Iowa 544, 83 Am. Dec. 390.

Kentucky.— Burdett *v.* Clay, 8 B. Mon. 287; Waller *v.* Tate, 4 B. Mon. 529.

Louisiana.— Scott *v.* Turner, 15 La. Ann. 346.

Michigan.— Martin *v.* McReynolds, 6 Mich. 70.

Mississippi.— Henderson *v.* Herrod, 10 Sm. & M. 631, 49 Am. Dec. 41; Lewis *v.* Starke, 10 Sm. & M. 120; Dick *v.* Mawry, 9 Sm. & M. 448.

Missouri.— Potter *v.* Stevens, 40 Mo. 229.

New Hampshire.— Page *v.* Pierce, 26 N. H. 317; Whittemore *v.* Gibbs, 24 N. H. 484; Rigney *v.* Lovejoy, 13 N. H. 247; Parish *v.* Gilmanton, 11 N. H. 293; Ellison *v.* Daniels, 11 N. H. 274; Bell *v.* Morse, 6 N. H. 205; Southerin *v.* Mendum, 5 N. H. 420.

New York.— Gillet *v.* Campbell, 1 Den. 520; Wilson *v.* Troup, 2 Cow. 195, 14 Am. Dec. 458; Jackson *v.* Bronson, 19 Johns. 325; Runyan *v.* Mersereau, 11 Johns. 534, 6 Am. Dec. 393; Jackson *v.* Willard, 4 Johns. 41; Green *v.* Hart, 1 Johns. 580; Johnson *v.* Hart, 3 Johns. Cas. 322; Aymar *v.* Bill, 5 Johns. Ch. 570.

North Carolina.— Hyman *v.* Devereux, 63 N. C. 624.

Ohio.— Paine *v.* French, 4 Ohio 318.

Tennessee.— Ewing *v.* Arthur, 1 Humphr. 537.

Texas.— Perkins *v.* Sterne, 23 Tex. 561, 76 Am. Dec. 72.

Vermont.— Mussey *v.* Bates, 65 Vt. 449, 27 Atl. 167, 21 L. R. A. 516; Belding *v.* Manly, 21 Vt. 550; Keyes *v.* Wood, 21 Vt. 331; Pratt *v.* Bennington Bank, 10 Vt. 293, 33 Am. Dec. 201.

Wisconsin.— Croft *v.* Bunster, 9 Wis. 503.

England.— Martin *v.* Mowlin, 2 Burr. 969; Rex *v.* St. Michael's, Dougl. (3d ed.) 630; Chimney *v.* Blackburne, 1 H. Bl. 117 note; Matthews *v.* Wallwyn, 4 Ves. Jr. 118, 31 Eng. Reprint 62.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 108.

61. Smith *v.* Kelley, 27 Me. 237, 46 Am. Dec. 595; Vose *v.* Handy, 2 Me. 322, 11 Am. Dec. 101; Evans *v.* Merriken, 8 Gill & J. (Md.) 39; Morris *v.* Bacon, 123 Mass. 58, 25 Am. Rep. 17; Wolcott *v.* Winchester, 15 Gray (Mass.) 461; Young *v.* Miller, 6 Gray (Mass.) 152; Crane *v.* March, 4 Pick. (Mass.) 131, 16 Am. Dec. 329; Parsons *v.* Welles, 17 Mass. 419; McDermot *v.* Butler, 10 N. J. L. 158. But see Sayre *v.* Fredericks, 16 N. J. Eq. 205.

62. *California.*— Long *v.* Dollarhide, 24 Cal. 218.

Connecticut.— Baxter *v.* Gay, 14 Conn. 119.

Illinois.— Gage *v.* Bissell, 119 Ill. 298, 10 N. E. 238; Shepard *v.* Rinks, 78 Ill. 188; Grimes *v.* Butts, 65 Ill. 347; Tomlin *v.* Hilyard, 43 Ill. 300, 92 Am. Dec. 118; Lacy *v.* Gard, 60 Ill. App. 72. See Lavelle *v.* Strobel, 89 Ill. 370.

Indiana.— Tate *v.* Foshee, 117 Ind. 322, 20 N. E. 241; Bruce *v.* Osgood, 113 Ind. 360, 14 N. E. 563; Foltz *v.* Wert, 103 Ind. 404, 2 N. E. 950; Hauk *v.* McComas, 98 Ind. 460; Moore *v.* Kerr, 46 Ind. 468.

Kansas.— McCullough *v.* Finley, 69 Kan. 705, 77 Pac. 696.

Louisiana.— Gusman *v.* Hearsay, 26 La. Ann. 251; Johnston *v.* Labat, 26 La. Ann. 159; Bach *v.* Ballard, 13 La. Ann. 487, all holding that oral partitions are valid when proved, but if denied they can be proved only by written interrogations, the answers to which cannot be denied.

Mississippi.— Pipes *v.* Buckner, 51 Miss. 848; Wildey *v.* Bonney, 31 Miss. 644.

Missouri.— Bompart *v.* Roderman, 24 Mo. 385; Le Bourgeoise *v.* Blank, 8 Mo. App. 434.

New York.— Wood *v.* Fleet, 36 N. Y. 499, 93 Am. Dec. 528; Mount *v.* Morton, 20 Barb. 123; Ryerss *v.* Wheeler, 25 Wend. 434, 37 Am. Dec. 243; Jackson *v.* Vosburgh, 9 Johns. 270, 6 Am. Dec. 276; Jackson *v.* Harder, 4 Johns. 202, 4 Am. Dec. 262.

Ohio.— Cummins *v.* Nutt, Wright 713; Docktermann *v.* Elder, 11 Ohio Dec. (Reprint) 506, 27 Cinc. L. Bul. 195.

certain courts holding that such a partition amounts to more than an oral designation such as is permitted in case of dower; that it is really a transfer of title and ineffective if oral.[63]

(II) *JOINT TENANTS.* There can be no partition among joint tenants without writing.[64]

g. Exchange. An oral exchange of land is within the statute, and no title passes as a result thereof,[65] even though possession is taken in accordance with the agreement.[66]

Pennsylvania.— Wolf *v.* Wolf, 158 Pa. St. 621, 28 Atl. 164; McKnight *v.* Bell, 135 Pa. St. 358, 19 Atl. 1036; Maul *v.* Rider, 51 Pa. St. 377; McConnell *v.* Carey, 48 Pa. St. 345; Rider *v.* Maul, 46 Pa. St. 376; McMahan *v.* McMahan, 13 Pa. St. 376, 53 Am. Dec. 481; Calhoun *v.* Hays, 8 Watts & S. 127, 42 Am. Dec. 275; Ebert *v.* Wood, 1 Binn. 216, 2 Am. Dec. 436; Ernst *v.* Zerbe, 2 Leg. Chron. 129; Hill *v.* Roderick, 2 Pa. L. J. Rep. 161, 3 Pa. L. J. 417.

South Carolina.— Rountree *v.* Lane, 32 S. C. 160, 10 S. E. 941; Kennemore *v.* Kennemore, 26 S. C. 251, 1 S. E. 881; Haughabaugh *v.* Honald, 3 Brev. 97, 5 Am. Dec. 548; Goodhue *v.* Barnwell, Rice Eq. 198; McDaniel *v.* Moorman, 1 Harp. Eq. 108. See, however, Jones *v.* Reeves, 6 Rich. 132.

Texas.— Chace *v.* Gregg, 88 Tex. 552, 32 S. W. 520; Wardlow *v.* Miller, 69 Tex. 395, 6 S. W. 292; Mitchell *v.* Allen, 69 Tex. 70, 6 S. W. 745; Parker *v.* Spencer, 61 Tex. 155; Gibbons *v.* Bell, 45 Tex. 417; Stuart *v.* Baker, 17 Tex. 417; Mass *v.* Bromberg, 28 Tex. Civ. App. 145, 66 S. W. 468; Martin *v.* Harris, (Civ. App. 1894) 26 S. W. 91.

Utah.— Whittemore *v.* Cope, 11 Utah 344, 40 Pac. 256.

Washington.— Brazee *v.* Schofield, 2 Wash. Terr. 209, 3 Pac. 265.

Wisconsin.— Buzzell *v.* Gallagher, 28 Wis. 678.

United States.— Four Hundred and Twenty Min. Co. *v.* Bullion Min. Co., 9 Fed. Cas. No. 4,989, 3 Sawy. 634. See Berry *v.* Seawall, 65 Fed. 742, 13 C. C. A. 101.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 109.

However, an executory contract agreeing that a partition shall be made and that one of the parties shall have his choice of lots embraces more than a simple partition agreement and is void if not in writing. Zanderson *v.* Sullivan, 91 Tex. 499, 44 S. W. 484.

Exclusive possession must be taken in accordance with the partition else it is ineffectual. Lanterman *v.* Williams, 55 Cal. 60; Goodman *v.* Malcolm, (Kan. App. 1899) 58 Pac. 564; Slone *v.* Grider, 25 S. W. 110, 15 Ky. L. Rep. 761; Sanger *v.* Merritt, 131 N. Y. 614, 30 N. E. 100; Melvin *v.* Bullard, 82 N. C. 33; Medlin *v.* Steele, 75 N. C. 154; Snively *v.* Luce, 1 Watts (Pa.) 69; Slice *v.* Derrick, 2 Rich. (S. C.) 627. In some cases, however, the courts seem to have overlooked the necessity of taking possession. Meacham *v.* Meacham, 91 Tenn. 532, 19 S. W. 757; Aycock *v.* Kimbrough, 71 Tex. 330, 12 S. W. 71, 10 Am. St. Rep. 745; Smock *v.* Tandy, 28 Tex. 130; Linnartz *v.* McCulloch, (Tex. Civ. App. 1893) 27 S. W. 279.

63. *Florida.*— Simmons *v.* Spratt, (1887) 1 So. 860.

Kentucky.— Pringle *v.* Sturgeon, Litt. Sel. Cas. 112.

Maine.— John *v.* Sebattis, 69 Me. 473.

New Hampshire.— Ballou *v.* Hale, 47 N. H. 347, 93 Am. Dec. 438; Dow *v.* Jewell, 18 N. H. 340, 45 Am. Dec. 371.

New Jersey.— Lloyd *v.* Conover, 25 N. J. L. 47; Woodhull *v.* Longstreet, 18 N. J. L. 405; Watson *v.* Kelty, 16 N. J. L. 517.

North Carolina.— Anders *v.* Anders, 13 N. C. 529.

England.— Ireland *v.* Rittle, 1 Atk. 541, 26 Eng. Reprint 340; Whaley *v.* Dawson, 2 Sch. & Lef. 367; Johnson *v.* Wilson, Willes 248.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 110.

64. Lacy *v.* Overton, 2 A. K. Marsh. (Ky.) 440; Porter *v.* Hill, 9 Mass. 34, 6 Am. Dec. 22; Porter *v.* Perkins, 5 Mass. 233, 4 Am. Dec. 52.

65. *Maryland.*— Maydwell *v.* Carroll, 3 Harr. & J. 361.

New Hampshire.— Lane *v.* Shackford, 5 N. H. 130.

New York.— Rice *v.* Peet, 15 Johns. 503; Jackson *v.* Cris, 11 Johns. 437.

Ohio.— Lindsley *v.* Coats, 1 Ohio 243.

Vermont.— Newell *v.* Newell, 13 Vt. 24.

United States.— Clark *v.* Graham, 6 Wheat. 577, 5 L. ed. 334.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 111.

Executory contracts for the exchange of land are also within the statute.

Kentucky.— Stark *v.* Cannady, 3 Litt. 399, 14 Am. Dec. 76.

Minnesota.— Newlin *v.* Hoyt, 91 Minn. 409, 98 N. W. 323.

Missouri.— Beckmann *v.* Mepham, 97 Mo. App. 1094, 70 S. W. 1094.

New York.— Rice *v.* Peet, 15 Johns. 503.

United States.—Purcell *v.* Coleman, 4 Wall. 513, 18 L. ed. 435.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 111.

66. Morgan *v.* McGowan, 4 Mart. (La.) 209; Lindsley *v.* Coats, 1 Ohio 243; Laufer *v.* Powell, 30 Tex. Civ. App. 604, 71 S. W. 549. *Contra*, Brown *v.* Bailey, 159 Pa. St. 121, 28 Atl. 245; Moss *v.* Culver, 64 Pa. St. 414, 3 Am. Rep. 601; Reynolds *v.* Hewett, 27 Pa. St. 176; Miles *v.* Miles, 8 Watts & S. (Pa.) 135.

C. Executory Contracts of Sale — 1. Statutory Provisions. The original statute of frauds provided in section 4 that no action shall be brought whereby to charge any person "upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." Corresponding provisions have been enacted in nearly all the United States.[67]

2. Application of Statute — a. Contracts to Convey. The provision of St. 29 Car. II, c. 3, § 4, concerning contracts for the sale of land, and the corresponding provisions of the American statutes, apply generally to all oral executory contracts for the sale and conveyance of land, which are accordingly invalid unless in writing;[68] and for the same reason if such a contract is made by one

67. See the statutes of the different states. **Executory land contracts in general** see Vendor and Purchaser.

68. *Alabama.*— Allen *v.* Caylor, 120 Ala. 251, 24 So. 512, 74 Am. St. Rep. 31; Tillis *v.* Treadwell, 117 Ala. 445, 22 So. 983; Williams *v.* Gibson, 84 Ala. 228, 4 So. 350, 5 Am. St. Rep. 368; Flinn *v.* Barber, 64 Ala. 193; Hughes *v.* Hatchett, 55 Ala. 539; Howard *v.* Jackson, 2 Stew. 493.

California.— Hall *v.* Wallace, 88 Cal. 434, 26 Pac. 360; Wristen *v.* Bowles, 82 Cal. 84, 22 Pac. 1136.

Connecticut.— Tainter *v.* Brockway, 1 Root 59.

Georgia.— Lumpkin *v.* Johnson, 27 Ga. 485.

Idaho.— McGinness *v.* Stanfield, 6 Ida. 372, 55 Pac. 1020.

Illinois.— Preston *v.* Casner, 104 Ill. 262; Gaddis *v.* Leeson, 55 Ill. 83.

Indiana.— Parker *v.* Heaton, 55 Ind. 1; Sands *v.* Thompson, 43 Ind. 18; Thompson *v.* Elliott, 28 Ind. 55; Junction R. Co. *v.* Harpold, 19 Ind. 347; Lester *v.* Bartlett, 2 Ind. 628; McClure *v.* McCormick, 5 Blackf. 129; Crafton *v.* Carmichael, 29 Ind. App. 320, 64 N. E. 627; Hershman *v.* Pascal, 4 Ind. App. 330, 30 N. E. 932.

Iowa.— Mathes *v.* Bell, 121 Iowa 722, 96 N. W. 1093; East Omaha Land Co. *v.* Hanson, 117 Iowa 96, 90 N. W. 705; Holland *v.* Hensley, 4 Iowa 222; Morgan *v.* McLaren, 4 Greene 536.

Kentucky.— Harrow *v.* Johnson, 3 Metc. 578; Murray *v.* Pate, 6 Dana 335; Rowland *v.* Garman, 1 J. J. Marsh. 76, 19 Am. Dec. 54; Roberts *v.* Tennell, 3 T. B. Mon. 247; Frowman *v.* Gordon, Litt. Sel. Cas. 193; Owings *v.* Jouit, 2 A. K. Marsh. 380; Hawkins *v.* King, 2 A. K. Marsh. 108; Johnston *v.* Maconnell, 3 Bibb 1; Robinson *v.* Corn, 2 Bibb 124; Cumberland, etc., R. Co. *v.* Shelbyville, etc., R. Co., 77 S. W. 690, 25 Ky. L. Rep. 1265; Bishop *v.* Martin, 65 S. W. 807, 23 Ky. L. Rep. 1494; Burch *v.* Burch, 49 S. W. 798, 20 Ky. L. Rep. 1614.

Maine.— Brackett *v.* Brewer, 71 Me. 478; Patterson *v.* Cunningham, 12 Me. 506.

Maryland.— Nagengast *v.* Alz, 93 Md. 522, 49 Atl. 333; Albert *v.* Winn, 5 Md. 66.

Massachusetts.— Clifford *v.* Heald, 141 Mass. 322, 6 N. E. 227; Friend *v.* Pettingill, 116 Mass. 515.

Michigan.— Rogers *v.* Lamb, (1904) 100 N. W. 440; Hillebrands *v.* Nibbelink, 40 Mich. 646.

Minnesota.— Watson *v.* Chicago, etc., R. Co., 46 Minn. 321, 48 N. W. 1129.

Mississippi.— Steen *v.* Kirkpatrick, (1904) 36 So. 140; Weems *v.* Mayfield, 75 Miss. 286, 22 So. 892; Hairston *v.* Jaudon, 42 Miss. 380.

Nebraska.— Montpelier Sav. Bank, etc., Co. *v.* Follett, (1903) 94 N. W. 635; Morgan *v.* Bergen, 3 Nebr. 209.

New Hampshire.— Ham *v.* Goodrich, 37 N. H. 185; Crawford *v.* Parsons, 18 N. H. 293; Folsom *v.* Great Falls Mfg. Co., 9 N. H. 355.

New Jersey.— Smith *v.* Smith, 28 N. J. L. 208, 78 Am. Dec. 49.

North Carolina.— Fortesque *v.* Crawford, 105 N. C. 29, 10 S. E. 910; Young *v.* Young, 81 N. C. 91.

Oklahoma.— Fox *v.* Easter, 10 Okla. 527, 62 Pac. 283.

Rhode Island.— Bowen *v.* Sayles, 23 R. I. 34, 49 Atl. 103.

Vermont.— Merrill *v.* Pease, 51 Vt. 556; Hibbard *v.* Whitney, 13 Vt. 21.

Wisconsin.— Dodge *v.* Hopkins, 14 Wis. 630; Brandeis *v.* Neustadtl, 13 Wis. 142.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 113.

In Louisiana oral contracts to sell will be enforced if properly proved and possession has been taken; but if denied, they can be proved only by interrogatories addressed to defendant, the answers to which cannot be denied. Mason *v.* Towne, 12 La. Ann. 194; Marionneaux *v.* Edwards, 4 La. Ann. 103; Michel *v.* Dolliole, 1 La. Ann. 459; Barrett *v.* His Creditors, 12 Rob. 474; Smelser *v.* Williams, 4 Rob. 152; Patterson *v.* Bloss, 4 La. 374, 23 Am. Dec. 486; Nicholls *v.* Roland, 11 Mart. 190; Morgan *v.* McGowan, 4 Mart. 209; Grafton *v.* Fletcher, 3 Mart. 486; Watkins *v.* McDonough, 2 Mart. 154.

In Pennsylvania there is no provision applying to oral executory contracts for the purchase and sale of land, and an action at law will lie for breach thereof if clearly proved; but equity will not enforce them unless there be a change of possession or part payment. Darlington *v.* Darlington, 160 Pa. St. 65, 28 Atl. 503; Hielman *v.* Weinman, 139 Pa. St. 143, 21 Atl. 29; Miller *v.*

person in behalf of another without authority the latter cannot ratify it by parol.[69] In general any oral promise to convey land or any interest therein is unenforceable;[70] and it is immaterial that the contracting parties are tenants in common,[71] or that the vendor is acting in a representative capacity.[72]

b. Contracts to Encumber. A promise to mortgage land is within the statute,[73] and an agreement to create a lien must also be in writing.[74]

c. Contracts to Give Title Bond. A oral agreement to redeliver a bond to

Zufall, 113 Pa. St. 317, 6 Atl. 350; McCafferty *v.* Griswold, 99 Pa. St. 270; Shellhammer *v.* Ashbaugh, 83 Pa. St. 24; Thompson *v.* Sheplar, 72 Pa. St. 160; Beegle *v.* Wentz, 55 Pa. St. 369, 93 Am. Dec. 762; McGibbeny *v.* Burmaster, 53 Pa. St. 332; Willey *v.* Day, 51 Pa. St. 51, 88 Am. Dec. 562; Bonner *v.* Campbell, 48 Pa. St. 286; Miranville *v.* Silverthorn, 48 Pa. St. 147; Bender *v.* Bender, 37 Pa. St. 419; Poorman *v.* Kilgore, 37 Pa. St. 309; McNair *v.* Compton, 35 Pa. St. 23; Hertzog *v.* Hertzog, 34 Pa. St. 418; Postlethwait *v.* Frease, 31 Pa. St. 472; McCue *v.* Johnston, 25 Pa. St. 306; Blakeslee *v.* Blakeslee, 22 Pa. St. 237; McDowell *v.* Oyer, 21 Pa. St. 417; Dodds *v.* Dodds, 9 Pa. St. 315; Bash *v.* Bash, 9 Pa. St. 260; Jack *v.* McKee, 9 Pa. St. 235; Toe *v.* Toe, 3 Grant 74; Wible *v.* Wible, 1 Grant 406; Pattison *v.* Horn, 1 Grant 301; Malaun *v.* Ammon, 1 Grant 123; Ludwig *v.* Leonard, 9 Watts & S. 44; Williams *v.* Landman, 8 Watts & S. 55; Woods *v.* Farmare, 10 Watts 195; George *v.* Bartoner, 7 Watts 530; Bell *v.* Andrews, 4 Dall. 152, 1 L. ed. 779; Hughes *v.* Antill, 23 Pa. Super. Ct. 290; Walter *v.* Transue, 17 Pa. Super. Ct. 94; Dippel *v.* Cullom, 5 Pa. Dist. 216, 17 Pa. Co. Ct. 282; Lloyd *v.* Cozens, 2 Ashm. 131; Meason *v.* Kaine, 32 Leg. Int. 274. And see Abell *v.* Douglass, 4 Den. (N. Y.) 305. See, however, Sennett *v.* Johnson, 9 Pa. St. 335.

At common law an oral contract for the sale of land was valid. Wilson *v.* Miller, 42 Ill. App. 332; Bell *v.* Breckenridge, 1 A. K. Marsh. (Ky.) 563; McKennon *v.* Winn, 1 Okla. 327, 33 Pac. 582, 22 L. R. A. 501.

69. Roby *v.* Cossitt, 78 Ill. 638. See also Deiderick *v.* Alexander, 58 Kan. 56, 48 Pac. 594, holding that where one makes a written contract for the sale of land not his own, the owner of the land is not bound by his oral assent thereto.

70. *Georgia.*— Lyons *v.* Bass, 108 Ga. 573, 34 S. E. 721.

Illinois.— Cuddy *v.* Brown, 78 Ill. 415.

Indiana.— Cox *v.* Roberts, 25 Ind. App. 252, 57 N. E. 937.

Kentucky.— Persifull *v.* Boreing, 22 S. W. 440, 15 Ky. L. Rep. 165; Ratliff *v.* Trout, 6 J. J. Marsh. 605; Newman *v.* Sanders, 7 Ky. L. Rep. 294.

Maine.— Patterson *v.* Cunningham, 12 Me. 506.

Massachusetts.— Stone *v.* Crocker, 19 Pick. 292.

Michigan.— McLennan *v.* Boutell, 117 Mich. 544, 76 N. W. 75; Poppe *v.* Poppe, 114 Mich. 649, 72 N. W. 612, 68 Am. St. Rep. 503; Kelsey *v.* McDonald, 76 Mich. 188, 42 N. W. 1103.

Minnesota.— Fargusson *v.* Duluth Imp. Co., 56 Minn. 222, 57 N. W. 480.

New Jersey.— Brands *v.* De Witt, 44 N. J. Eq. 545, 14 Atl. 181, 14 Atl. 894, 6 Am. St. Rep. 909.

New York.— Stearns *v.* St. Louis, etc., R. Co., 4 N. Y. Suppl. 11, 8 N. Y. Suppl. 929; Badenhop *v.* McCahill, 42 How. Pr. 192.

North Carolina.— Vick *v.* Vick, 126 N. C. 123, 35 S. E. 257.

Rhode Island.— Pettis *v.* Ray, 12 R. I. 344.

Texas.— Sprague *v.* Haines, 68 Tex. 215, 4 S. W. 371; Arnold *v.* Ellis, 20 Tex. Civ. App. 262, 48 S. W. 883.

Virginia.— Walker *v.* Tyler, 94 Va. 532, 27 S. E. 434.

Washington.— Churchill *v.* Stephenson, 14 Wash. 620, 45 Pac. 28.

Wisconsin.—Koch *v.* Williams, 82 Wis. 186, 52 N. W. 257.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 113.

An agreement to convey lands in payment for services must be in writing. Burlingame *v.* Burlingame, 7 Cow. (N. Y.) 92; Sands *v.* Arthur, 84 Pa. St. 479; Jack *v.* McKee, 9 Pa. St. 235.

An agreement to sell land not owned by the promisor is also within the statute (Tillis *v.* Treadwell, 117 Ala. 445, 22 So. 983); but a mortgagee's promise to procure a conveyance from the mortgagor is not (Boos *v.* Hinkle, 18 Ind. App. 509, 48 N. E. 383).

A covenant to convey is not considered a contract for the sale of land in Alabama, and does not require a statement of the consideration in accordance with the rule in that state as to contracts. Holman *v.* Norfolk Bank, 12 Ala. 369.

Mistake.— It is immaterial that the purpose of the proposed conveyance is to correct a mistake in a previous conveyance. Butcher *v.* Buchanan, 17 Iowa 81.

71. Sanders *v.* Robertson, 57 Ala. 465.

72. *Nebraska.*— Allen *v.* Hall, 64 Nebr. 256, 89 N. W. 803, agent.

North Carolina.— Ingram *v.* Dowdle, 30 N. C. 455, trustee.

Tennessee.— Green *v.* Davidson, 4 Baxt. 488, administrator.

Virginia.— William, etc., College *v.* Powell, 12 Gratt. 372, trustee.

West Virginia.— Ralphsnyder *v.* Shaw, 45 W. Va. 680, 31 S. E. 953, trustee.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 113 *et seq.*

73. Albert *v.* Winn, 5 Md. 66; Hackett *v.* Watts, 138 Mo. 502, 40 S. W. 113.

74. Stringfellow *v.* Ivie, 73 Ala. 209; Marshall *v.* Livermore Spring Water Co., (Cal. 1884) 5 Pac. 101.

convey title which has been previously surrendered to the obligor by the obligee is within the statute.[75]

d. Contracts to Make or Warrant Title. An agreement to make a good title,[76] or to warrant and defend the title of a grantee,[77] must be in writing.

e. Conditional or Alternative Contracts. An agreement to convey if the promisor shall acquire title,[78] or an agreement in the alternative to execute a conveyance or forfeit a certain sum of money[79] is also void if verbal.

f. Contracts to Release Land. An executory contract to release land or any interest therein is generally unenforceable unless in writing.[80]

g. Contracts Affecting Litigation.[81] As a rule contracts concerning the conduct or disposition of legal proceedings involving title to realty are not within the statute.[82]

3. Nature of Property — a. In General. The English statute requires a writing to effectuate a contract or sale of lands, tenements, or hereditaments, "or any interest in or concerning them," and the American statutes are generally the same.[83]

b. Crops. An executory contract for the sale of growing crops is not a contract for the sale of an interest in land within the meaning of the statute,[84] and

An agreement to charge land with the payment of attorney's fees has been held to be within the statute. Merchant *v.* Cook, 7 App. Cas. (D. C.) 391.

75. Gaylord *v.* Couch, 5 Day (Conn.) 223.

76. Bryan *v.* Jamison, 7 Mo. 106.

77. Kelley *v.* Palmer, 42 Nebr. 423, 60 N. W. 924.

78. Clawater *v.* Tetherow, 27 Mo. 241; Marie *v.* Garrison, 13 Abb. N. Cas. (N. Y.) 210.

79. Goodrich *v.* Nichols, 2 Root (Conn.) 498.

80. Rainbolt *v.* East, 56 Ind. 538, 26 Am. Rep. 40 (holding that an oral agreement between persons about to marry that each will release all interest in the property of the other is invalid); Barnes *v.* Boston, etc., R. Co., 130 Mass. 388 (holding that an oral agreement to release land taken by right of eminent domain is invalid); Matter of Sproule, 42 Misc. (N. Y.) 448, 87 N. Y. Suppl. 432 (holding that an agreement by certain relatives of a decedent to release to others their share of the estate is ineffective to pass title). However, an oral agreement of a widow to retain possession of lands for life instead of claiming the fee to which she is entitled under her husband's will has been held valid. Chouquette *v.* Barada, 28 Mo. 491.

81. Parol submission to arbitration see Arbitration and Award, 3 Cyc. 600.

Parol award see Arbitration and Award, 3 Cyc. 666 note 72, 791 note 71, 793 note 84.

82. Murphy *v.* Murphy, 84 Ill. App. 292; Natchez *v.* Vandervelde, 31 Miss. 706, 66 Am. Dec. 581; Whitehead *v.* Jones, 197 Pa. St. 511, 47 Atl. 978. See, however, Kimberly *v.* Fox, 27 Conn. 307, where an oral agreement to dismiss a suit to compel a conveyance was held void.

83. See the statutes of the different states.

The Texas statute applies only to land itself, and a contract for the sale of a specified interest in land is not within it. Anderson *v.* Powers, 59 Tex. 213.

A pew in a church is an interest in land within the fourth section. Vielie *v.* Osgood, 8 Barb. (N. Y.) 130.

Ice, whether in or out of the water at the time, may be sold as personalty, and is not real estate within the statute. Higgins *v.* Kesterer, 41 Mich. 318, 2 N. W. 13, 32 Am. Rep. 160.

Sale of earth.— Where the principal inducement for the work of removing earth is not the price to be paid for the service but the earth itself, it is a contract for the sale of an interest in land. Welever *v.* I. H. Detwiler Co., 15 Ohio Cir. Ct. 680, 8 Ohio Cir. Dec. 668.

84. *California.*— Davis *v.* McFarlane, 37 Cal. 634, 99 Am. Dec. 340.

Kentucky.— Columbia Land, etc., Co. *v.* Tinsley, 60 S. W. 10, 22 Ky. L. Rep. 1082.

Maryland.— Purner *v.* Piercy, 40 Md. 212, 17 Am. Rep. 591.

Massachusetts.— Whitmarsh *v.* Walker, 1 Metc. 313.

Missouri.— Smock *v.* Smock, 37 Mo. App. 56.

Ohio.— Wisely *v.* Barclew, 1 Ohio Dec. (Reprint) 216, 4 West. L. J. 281.

Pennsylvania.— Everhart *v.* Everhart, 8 Luz. Leg. Reg. 217.

Tennessee.— Carson *v.* Browder, 2 Lea 701.

England.— Evans *v.* Roberts, 5 B. & C. 829, 8 D. & R. 611, 4 L. J. K. B. O. S. 313, 11 E. C. L. 700; Parker *v.* Staniland, 11 East 362; Warwick *v.* Bruce, 2 M. & S. 205; Sainsbury *v.* Matthews, 4 M. & W. 343. See Waddington *v.* Bristow, 2 B. & P. 452, 2 New Rep. 355; Emmerson *v.* Heelis, 2 Taunt. 38, 11 Rev. Rep. 520, both which may be said to be discredited.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 116.

Contracts for the sale of growing wheat and grass have, however, been held to be within the statute. Lansingburgh Bank *v.* Crary, 1 Barb. (N. Y.) 542; Kerr *v.* Hill, 27 W. Va. 576.

a verbal contract whereby one is to receive part of the proceeds in return for his services in working land is valid.[85]

c. Timber. In certain jurisdictions an executory contract for the sale of growing trees is invalid on the ground that it is a contract for the sale of that which is part of the realty.[86] In other jurisdictions oral contracts for the sale of timber are valid, even though the timber is to be cut by the vendee, on the theory that the article to which title will pass will be severed from the realty and be only a chattel.[87]

d. Improvements and Fixtures. An oral contract for the sale of improvements and buildings permanently affixed to the realty is a contract for the sale of real property and therefore invalid;[88] but contracts for the sale of improvements which are not permanently affixed and which are by the terms of the contract to be separated from the realty are viewed as contracts for the sale of chattels and are not within the statute;[89] and oral promises to pay for improvements which have been or are to be placed on land are valid.[90]

e. Leases — (i) *AGREEMENTS TO LEASE.* Certain American statutes except leases for less than a year from the operation of the section corresponding to the fourth section of the English statute.[91] Saving such exceptions any oral executory agreement to give a lease, as distinguished from a present oral demise, is invalid.[92]

85. Himesworth *v.* Edwards, 5 Harr. (Del.) 376.

86. Cool *v.* Peters Box, etc., Co., 87 Ind. 531; Owens *v.* Lewis, 46 Ind. 488, 15 Am. Rep. 295; Harrell *v.* Miller, 35 Miss. 700, 72 Am. Dec. 154; McGregor *v.* Brown, 10 N. Y. 114; Wood *v.* Shults, 4 Hun (N. Y.) 309, 6 Thomps. & C. 557; Green *v.* Armstrong, 1 Den. (N. Y.) 550; Lillie *v.* Dunbar, 62 Wis. 198, 22 N. W. 467; Daniels *v.* Bailey, 43 Wis. 566.

87. *Maine.*— Banton *v.* Shorey, 77 Me. 48; Erskine *v.* Plummer, 7 Me. 477, 22 Am. Dec. 216.

Massachusetts.—Nettleton *v.* Sikes, 8 Metc. 34; Claflin *v.* Carpenter, 4 Metc. 580, 88 Am. Dec. 381.

Minnesota.— Wilson *v.* Fuller, 58 Minn. 149, 59 N. W. 988.

New York.— Killmore *v.* Howlett, 48 N. Y. 569; Boyce *v.* Washburn, 4 Hun 792. See, however, New York cases cited *supra*, note 86.

South Carolina.— Jones *v.* McMichael, 12 Rich. 176.

Tennessee.— Dorris *v.* King, (Ch. App. 1899) 54 S. W. 683.

Vermont.— Yale *v.* Seeley, 15 Vt. 221.

England.— Smith *v.* Surman, 9 B. & C. 561, 7 L. J. K. B. O. S. 296, 4 M. & R. 455, 17 E. C. L. 253.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 117.

88. Meyers *v.* Schemp, 67 Ill. 469; Fenlason *v.* Rackliff, 50 Me. 362; Hutchins *v.* Masterson, 46 Tex. 551, 26 Am. Rep. 286.

However, an oral agreement to sell improvements erected by the vendor on public lands, in which he has no permanent interest, is not within the statute. Zickafosse *v.* Hulick, Morr. (Iowa) 175, 39 Am. Dec. 458; Whetmore *v.* Rhett, 12 Rich. (S. C.) 565.

89. *Alabama.*— Harris *v.* Powers, 57 Ala. 139; Scoggin *v.* Slater, 22 Ala. 687; Foster *v.* Mabe, 4 Ala. 402, 37 Am. Dec. 749.

Connecticut.— Bostwick *v.* Leach, 3 Day 476.

Indiana.— Rogers *v.* Cox, 96 Ind. 157, 49 Am. Rep. 152.

Ohio.— Long *v.* White, 42 Ohio St. 59.

Texas.— Moody *v.* Aiken, 50 Tex. 65.

England.— Hallen *v.* Runder, 1 Cromp. M. & R. 266, 3 L. J. Exch. 260, 3 Tyrw. 959.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 118.

90. *Alabama.*— Cassell *v.* Collings, 23 Ala. 676.

California.— Godeffroy *v.* Caldwell, 2 Cal. 489, 56 Am. Dec. 360.

Maryland.— South Baltimore Co. *v.* Muhlbach, 69 Md. 395, 16 Atl. 117, 1 L. R. A. 507.

Nebraska.— Stuht *v.* Sweesy, 48 Nebr. 767, 67 N. W. 748.

New Hampshire.— Moore *v.* Ross, 11 N. H. 547.

New York.— Lower *v.* Winters, 7 Cow. 263; Benedict *v.* Beebee, 11 Johns. 145; Frear *v.* Hardenbergh, 5 Johns. 272, 4 Am. Dec. 356.

North Carolina.— Houston *v.* Sledge, 101 N. C. 640, 8 S. E. 145, 2 L. R. A. 487.

Pennsylvania.— Wilkins Tp. School Dist. *v.* Milligan, 88 Pa. St. 96.

South Carolina.— Coleman *v.* Curtis, 36 S. C. 607, 15 S. E. 709, 16 S. E. 770.

Texas.— Thouvenin *v.* Lea, 26 Tex. 612; Brown *v.* Roland, 11 Tex. Civ. App. 648, 33 S. W. 273.

Vermont.— Scales *v.* Wiley, 68 Vt. 39, 33 Atl. 771; Forbes *v.* Hamilton, 2 Tyler 356.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 118.

91. See the statutes of the different states.

92. *Connecticut.*— Larkin *v.* Avery, 23 Conn. 304; Eaton *v.* Whitaker, 18 Conn. 222, 44 Am. Dec. 586.

Delaware.— Scotten *v.* Brown, 4 Harr. 324.

(II) *AGREEMENTS TO ASSIGN LEASES.* The interests of lessees are held to be so far interests in land that contracts for the sale of them are within the fourth section of the statute;[93] but contracts of tenants at will to sell their rights have been held not to be within the statute.[94]

f. Rights of Location. The right to locate a claim and settle thereon is not an interest in land, and contracts concerning the ownership of land to be located are not within the statute.[95]

g. Mining Rights. A right to mine is clearly an interest in land and a contract for the sale thereof must be in writing.[96]

h. Equitable Interests. Contracts for the sale of equitable interests in land are as much within the statute of frauds as contracts to convey the legal title.[97] So an executory contract for the sale of a right to redeem from a mortgage,[98] or

Illinois.— Strehl *v.* D'Evers, 66 Ill. 77; Holmes *v.* Holmes, 49 Ill. 31.

Indiana.— Stackberger *v.* Mosteller, 4 Ind. 461.

Massachusetts.— Bacon *v.* Parker, 137 Mass. 309; Townsend *v.* Townsend, 6 Metc. 319.

New Hampshire.— Smith *v.* Phillips, 69 N. H. 470, 43 Atl. 183.

New York.— Dunckel *v.* Dunckel, 56 Hun 25, 8 N. Y. Suppl. 888.

North Carolina.— Jordan *v.* Greensboro Furnace Co., 126 N. C. 143, 35 S. E. 247, 78 Am. St. Rep. 644.

Ohio.— Schneider *v.* Curran, 19 Ohio Cir. Ct. 224, 10 Ohio Cir. Dec. 239.

England.— Thursby *v.* Eccles, 70 L. J. Q. B. 91, 49 Wkly. Rep. 281.

See, however, Donovan *v.* P. Schoenhofen Brewing Co., 92 Mo. App. 341, where an oral agreement to give a lease which was to be performed within one year was held valid.

93. Kingsley *v.* Siebrecht, 92 Me. 23, 42 Atl. 249, 69 Am. St. Rep. 486; Johnson *v.* Reading, 36 Mo. App. 306; Tynan *v.* Warren, 53 N. J. Eq. 313, 31 Atl. 596; Ware *v.* Chew, 43 N. J. Eq. 493, 11 Atl. 746; Potter *v.* Arnold, 15 R. I. 350, 5 Atl. 379.

An agreement to mortgage a leasehold is also within the statute. Bernheimer *v.* Verdon, 63 N. J. Eq. 312, 49 Atl. 732.

An oral contract to sell certain rents is also invalid. Brown *v.* Brown, 33 N. J. Eq. 650.

94. Whittemore *v.* Gibbs, 24 N. H. 484; Reno *v.* Beardsley, 6 Utah 208, 21 Pac. 944. It has, however, been held that possession is an interest in land within the meaning of the statute (Boyd *v.* Paul, 125 Mo. 9, 28 S. W. 171; Howard *v.* Easton, 7 Johns. (N. Y.) 205), and that contracts for the conveyance of "squatter's rights" must be in writing (Hayes *v.* Skidmore, 27 Ohio St. 331).

95. *Iowa.*— Doyle *v.* Burns, 123 Iowa 488, 99 N. W. 195.

Montana.— See Hirbour *v.* Reeding, 3 Mont. 15, holding that a verbal contract of three parties to locate, take up, and develop a mine is not within the statute, and that the right of one of the parties to the land preëmpted is not affected by the fact that a dispute between the three and outside parties has been settled by a conveyance to the other two.

New Mexico.— Eberle *v.* Carmichael, 8 N. M. 696, 47 Pac. 717.

New York.— Fisher *v.* Fields, 10 Johns. 495.

Ohio.— Reed *v.* McGrew, 5 Ohio 375.

Tennessee.— Davis *v.* Walker, 4 Hayw. 295.

Texas.— Arnold *v.* Attaway, 89 Tex. 506, 35 S. W. 646; James *v.* Drake, 39 Tex. 143; Miller *v.* Roberts, 18 Tex. 16, 67 Am. Dec. 688; Evans *v.* Hardeman, 15 Tex. 480; Watkins *v.* Gilkerson, 10 Tex. 340.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 119.

96. Riddle *v.* Brown, 20 Ala. 412, 56 Am. Dec. 202; Lear *v.* Chouteau, 23 Ill. 39; Reagan *v.* McKibben, 11 S. D. 270, 76 N. W. 943.

Agreements for compensation.— An oral agreement to compensate one for his services in keeping a mine clear from water by giving him a per cent of the minerals taken out is not a contract for an interest in the land and is valid. Townsend *v.* Peasley, 35 Wis. 383. But see Williams *v.* Dolph, 5 Lack. Leg. N. (Pa.) 371. Neither is an agreement to work in another's mine for a share of the profits an agreement within the statute. McDonald *v.* Geldert, 3 Nova Scotia Dec. 551.

97. *Georgia.*— Pierce *v.* Parrish, 111 Ga. 725, 37 S. E. 79.

Massachusetts.—Richardson *v.* Richardson, 9 Gray 313.

New Hampshire.— Marble *v.* Marble, 5 N. H. 374.

New Jersey.— Tynan *v.* Warren, 53 N. J. Eq. 313, 31 Atl. 596.

North Carolina.— Holmes *v.* Holmes, 86 N. C. 205.

Oregon.— Chenoweth *v.* Lewis, 9 Oreg. 150.

Tennessee.— Newnan *v.* Carroll, 3 Yerg. 18. See under an earlier statute Danforth *v.* Lowry, 3 Hayw. 61.

Texas.— Clitus *v.* Langford, (Civ. App. 1893) 24 S. W. 325.

Wisconsin.— Gough *v.* Dorsey, 27 Wis. 119.

United States.— Smith *v.* Burnham, 22 Fed. Cas. No. 13,019, 3 Sumn. 435.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 120.

98. Marble *v.* Marble, 5 N. H. 374; Clitus *v.* Langford, (Tex. Civ. App. 1893) 24 S. W. 325.

to sell the interest of a purchaser under an executory contract of sale,[99] must be in writing.

4. Nature of Contract — a. Promise to Pay Consideration. An oral promise to pay the price agreed on for land is actionable, where the land has been actually conveyed or title has otherwise passed under the agreement of sale;[1] and so is an oral promise to pay for any interest in land which has been or is being actually occupied by the promisor.[2] So when land is taken for public purposes, an oral agreement to pay compensation is not within the statute.[3] And where the consideration for a deed is the grantee's oral promise to release to his brothers and sisters all claims in expectancy to his father's estate, the promise can be enforced;[4] and the same is true of an agreement to support the grantor for life, where such promise is the consideration for a deed actually made.[5] However, a purely executory agreement to take land and pay for it is of course within the statute.[6]

99. Simms *v.* Killian, 34 N. C. 252; Cravener *v.* Bowser, 4 Pa. St. 259; Newnan *v.* Carroll, 3 Yerg. (Tenn.) 18.

1. *Delaware.*— Devalinger *v.* Maxwell, 4 Pennew. 185, 34 Atl. 684.

Illinois.— Prevo *v.* Lathrop, 2 Ill. 305; Neagle *v.* Kelly, 44 Ill. App. 234 [*affirmed* in 146 Ill. 460, 34 N. E. 947].

Kentucky.— Mason *v.* Mason, 3 Bush 35; Vimont *v.* Stitt, 6 B. Mon. 474; Lewis *v.* Grimes, 7 J. J. Marsh. 336; Gully *v.* Grubbs, 1 J. J. Marsh. 387; Kaler *v.* Grady, 37 S. W. 955, 18 Ky. L. Rep. 678.

Maine.— Pierce *v.* Weymouth, 45 Me. 481; Nickerson *v.* Saunders, 36 Me. 413.

Massachusetts.— Hurlburt *v.* Fitzpatrick, 176 Mass. 287, 57 N. E. 464; Basford *v.* Pearson, 9 Allen 387, 85 Am. Dec. 764; Goodwin *v.* Gilbert, 9 Mass. 510.

Michigan.— Holland *v.* Hoyt, 14 Mich. 238.

Missouri.— Ott *v.* Garland, 7 Mo. 28.

Nebraska.— Patterson *v.* Hawley, 33 Nebr. 440, 50 N. W. 324.

New Jersey.— Hewitt *v.* Lehigh, etc., R. Co., 57 N. J. Eq. 511, 42 Atl. 325.

New York.— Abell *v.* Douglass, 4 Den. 305; Whitbeck *v.* Whitbeck, 9 Cow. 266, 18 Am. Dec. 503. In Reynolds *v.* Dunkirk, etc., R. Co., 17 Barb. 613, which is apparently in conflict with the rule stated in the text, title had never passed, although defendant had taken possession.

Ohio.— Negley *v.* Jeffers, 28 Ohio St. 90.

Pennsylvania.— Freed *v.* Richey, 115 Pa. St. 361, 8 Atl. 626; Baum *v.* Tonkin, 110 Pa. St. 569, 1 Atl. 535; McAboy *v.* Johns, 70 Pa. St. 9; Follmer *v.* Dale, 9 Pa. St. 83; Hillegass *v.* Hillegass, 2 Pa. Cas. 165, 5 Atl. 736.

Texas.— Johnson *v.* Clarkson, (Civ. App. 1894) 29 S. W. 178.

Vermont.— Ascutney Bank *v.* Ormsby, 28 Vt. 721; Hodges *v.* Green, 28 Vt. 358; Thayer *v.* Viles, 23 Vt. 494.

United States.— Kirk *v.* Williams, 24 Fed. 437.

England.— Boston *v.* Boston, 73 L. J. K. B. 17, 89 L. T. Rep. N. S. 468, 52 Wkly. Rep. 65.

Canada.— Murray *v.* Moffat, 19 N. Brunsw. 481; Gray *v.* Whitman, 3 Nova Scotia 157.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 124.

Recovery in assumpsit.— It is sometimes held that suit cannot be brought on such a contract, but that the vendor may have an action in the nature of *quantum meruit* in which the agreed price is evidence of the value of the land. Cocking *v.* Ward, 1 C. B. (Eng.) 858, 15 L. J. C. P. 245, 50 E. C. L. 858; Holmwood *v.* Gillespie, 11 Manitoba 186; McMillan *v.* Williams, 9 Manitoba 627; McCaffrey *v.* Gerrie, 3 Manitoba 559; Brown *v.* Harrower, 3 Manitoba 441.

A mortgagor's oral agreement to pay the debt if foreclosure does not result in full collection of the money has been held invalid. Veazie *v.* Morse, 67 Minn. 100, 69 N. W. 637. *Contra*, Fraser *v.* Child, 4 E. D. Smith (N. Y.) 153.

An oral agreement by an execution purchaser to pay a certain price for land without reference to the amount bid has been held to be within the statute. Howell *v.* Howell, Harp. Eq. (S. C.) 156.

A verbal promise to pay money as compensation for having obtained a land patent in one's own name which should have been obtained in the name of the promisee has been held invalid. Hughes *v.* Moore, 7 Cranch (U. S.) 176, 3 L. ed. 307.

An oral agreement as to the place where payment of the price of land shall be made is not within the statute. Sayre *v.* Mohney, 35 Oreg. 141, 56 Pac. 526.

2. Maverick *v.* Donaldson, 1 Ala. 535; Jewett *v.* Ricker, 68 Me. 377; Mitchell *v.* Bush, 7 Cow. (N. Y.) 185.

An agreement of a life-tenant to pay interest on a debt the payment of which the remainder-man assumes is not within the statute. Roberts *v.* Lamberton, 117 Wis. 635, 94 N. W. 650.

3. Noyes *v.* Chapin, 6 Wend. (N. Y.) 461; Coleman *v.* Chester, 14 S. C. 286; La Crosse, etc., R. Co. *v.* Seeger, 4 Wis. 268.

4. Galbraith *v.* McLain, 84 Ill. 379; Long *v.* Long, 19 Ill. App. 383.

However, the general rule is that an agreement to release such claims must be in writing. Gary *v.* Newton, 201 Ill. 170, 66 N. E. 267; Howton *v.* Gilpin, 69 S. W. 766, 24 Ky. L. Rep. 630; Riddell *v.* Riddell, (Nebr. 1903) 97 N. W. 609; Harris' Appeal, 3 Walk. (Pa.) 24.

5. Lyman *v.* Lyman, 133 Mass. 414.

6. Brumford *v.* Purcell, 4 Greene (Iowa) 488; Black *v.* Gesner, 3 Nova Scotia 157; Lindsay *v.* Zwicker, 2 Nova Scotia Dec. 100.

b. Promise to Pay Vendor Part of Proceeds of Subsequent Sale. A purchaser's promises concerning the disposition of the proceeds in case of a resale of land conveyed to him are generally held to affect no interest in land and are not within the statute,[7] and verbal contracts to sell an interest in the profits of sales of realty are valid.[8]

c. Contracts For Redemption. An agreement by a mortgagee or lienor extending the time in which the owner of land may redeem it is not a contract for the sale of the land within the statute;[9] but after a mortgagee's title has become absolute his promise,[10] or that of his grantee,[11] to allow a redemption is a contract for the sale of lands and must be in writing.

d. Agreements in Relation to Encumbrances — (i) *Existing Encumbrances.* A vendor's oral agreement to remove existing encumbrances is generally held to be valid,[12] but a general agreement to make a good title if the deed which is delivered does not have that effect is within the statute.[13] A purchaser's agreement to pay taxes,[14] or a mortgage,[15] is valid, although resting in parol. A mortgagee's oral promise to bid in land for the full amount of the debt if the mortgagor will permit foreclosure has been held to be valid,[16] and so is an agreement by a lienor that another might take possession of and title to the property free

7. *California.*— Price *v.* Sturgis, 44 Cal. 591.

Connecticut.— See Collins *v.* Tillou, 26 Conn. 368, 68 Am. Dec. 398, holding that an agent's oral agreement to pay over the proceeds of land conveyed to him by the principal by an absolute deed is actionable.

Indiana.— Reyman *v.* Mosher, 71 Ind. 596; Gwaltney *v.* Wheeler, 26 Ind. 415.

Iowa.— Miller *v.* Kendig, 55 Iowa 174, 7 N. W. 500.

New Hampshire.— Mahagan *v.* Mead, 63 N. H. 130; Graves *v.* Graves, 45 N. H. 323.

New York.— Conover *v.* Brush, 2 N. Y. Leg. Obs. 289.

North Carolina.— Michael *v.* Foil, 100 N. C. 178, 6 S. E. 264, 6 Am. St. Rep. 577; Massey *v.* Holland, 25 N. C. 197.

South Dakota.— Whiffen *v.* Hollister, 12 S. D. 68, 80 N. W. 156.

Vermont.— McGinnis *v.* Cook, 57 Vt. 36, 52 Am. Rep. 115.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 125.

8. Benjamin *v.* Zell, 100 Pa. St. 33.

9. *California.*— Byers *v.* Locke, 93 Cal. 493, 29 Pac. 119, 27 Am. St. Rep. 212.

Indiana.— Cox *v.* Ratcliffe, 105 Ind. 374, 5 N. E. 5; Rector *v.* Shirk, 92 Ind. 31.

Iowa.— Judd *v.* Mosely, 30 Iowa 423.

Kentucky.—Griffin *v.* Coffey, 9 B. Mon. 452, 50 Am. Dec. 519; Howard *v.* Whitt, (1887) 2 S. W. 776; Bedford *v.* Graves, 1 S. W. 534, 8 Ky. L. Rep. 262.

Michigan.— Laing *v.* McKee, 13 Mich. 124, 87 Am. Dec. 738.

Missouri.— Gillespie *v.* Stone, 70 Mo. 505; Rose *v.* Bates, 12 Mo. 30.

New York.— Burt *v.* Saxton, 1 Hun 551, 4 Thomps. & C. 109.

North Carolina.— Neely *v.* Torian, 21 N. C. 410.

United States.— *In re* Betts, 3 Fed. Cas. No. 1,371, 4 Dill. 93.

England.— Hamilton *v.* Terry, 11 C. B. 954, 21 L. J. C. P. 132, 73 E. C. L. 954.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 126.

A buyer at execution sale may create a valid trust by his oral agreement to allow redemption, coupled with the receipt of money from the debtor. Curd *v.* Williams, 18 S. W. 634, 13 Ky. L. Rep. 855.

An agreement to foreclose and convey at any time to the mortgagor on payment of the debt is a contract for sale, however. Pierce *v.* Clarke, 71 Minn. 114, 73 N. W. 522; Foster *v.* Ross, (Tex. Civ. App. 1903) 77 S. W. 990.

10. Littell *v.* Jones, 56 Ark. 139, 19 S. W. 497; Rose *v.* Fall River Five Cents Sav. Bank, 165 Mass. 273, 43 N. E. 93; Chisholm *v.* Butler, 19 Pa. Co. Ct. 550.

11. Rucker *v.* Steelman, 73 Ind. 396.

12. Post *v.* Gilbert, 44 Conn. 9; Carr *v.* Dooley, 119 Mass. 294; Green *v.* Randall, 51 Vt. 67.

However, an agreement "to invalidate" certain outstanding deeds is within the statute (Duvall *v.* Peach, 1 Gill (Md.) 172); and a grantor's oral agreement to pay off encumbrances made at the time of giving a conveyance without encumbrances is invalid (Duncan *v.* Blair, 5 Den. (N. Y.) 196).

13. Bishop *v.* Little, 5 Me. 362.

A covenant of warranty has been held to create an interest in land that cannot be verbally released. Bliss *v.* Thompson, 4 Mass. 488. But a contract to indemnify one against liability on such covenant need not be in writing. Weld *v.* Nichols, 17 Pick. (Mass.) 538.

14. Preble *v.* Baldwin, 6 Cush. (Mass.) 549; Brackett *v.* Evans, 1 Cush. (Mass.) 79.

15. Pike *v.* Brown, 7 Cush. (Mass.) 133; Fiske *v.* McGregory, 34 N. H. 414. And see Simonton *v.* Gandolfo, 2 Fla. 392; Owen *v.* Estes, 5 Mass. 330. See, however, Helm *v.* Logan, 4 Bibb (Ky.) 78; Davis *v.* Farr, 26 Vt. 592.

16. McQuat *v.* Cathcart, 84 Ind. 567.

from the lien, on condition that he should restore the lien after his purchase of the property.[17]

(II) *FUTURE ENCUMBRANCES.* A vendor's oral promise to pay future encumbrances is in no sense a sale of an interest in land, and may be enforced.[18]

e. Promises to Reconvey. A promise by the purchaser of land to reconvey is as much within the statute as an original contract to convey and must be in writing,[19] and so must an agreement by a purchaser to grant to the vendor certain easements in the premises sold.[20] Where, however, one advances the money necessary to pay for land and takes title as security, he may be compelled to reconvey on tender of such amount.[21]

f. Agreements as to Quantity of Land. An oral agreement by a vendor that if the land falls short of a specified amount he will return the consideration *pro tanto* is not within the statute;[22] and neither is the purchaser's agreement to pay an increased price if the quantity exceeds a certain amount.[23]

g. Oral Resuscitation of Dead Writings. Where a written contract for the sale of land has ceased to be operative in accordance with its terms, either by lapse of time or occurrence of specified conditions, an oral agreement reviving the contract is within the statute.[24]

h. Agreements in Relation to Fences and Party-Walls. Executory oral agreements to build and maintain partition fences, not being contracts for an interest in land, are valid.[25] An oral contract between adjoining owners in regard to the

17. Cornell *v.* Utica, etc., R. Co., 61 How. Pr. (N. Y.) 184.

18. Remington *v.* Palmer, 62 N. Y. 31 [*reversing* 1 Hun 619].

19. *Alabama.*— Goree *v.* Clements, 94 Ala. 337, 10 So. 906.

Arkansas.— Holt *v.* Moore, 37 Ark. 145.

California.— Gallagher *v.* Mars, 50 Cal. 23.

Illinois.— See Godschalk *v.* Fulmer, 176 Ill. 64, 51 N. E. 852, where it was held that one who takes a conveyance in his own name until a lien is discharged may plead the statute of frauds to an action on his oral promise to reconvey.

Indiana.— Thompson *v.* Elliott, 28 Ind. 55. But see Chambers *v.* Butcher, 82 Ind. 508, where a purchaser's promise to reconvey, coupled with an agreement to reduce his promise to writing, was held sufficient to support an action.

Maine.— Greer *v.* Greer, 18 Me. 16.

Massachusetts.— Hurley *v.* Donovan, 182 Mass. 64, 64 N. E. 685; Ahrend *v.* Odiorne, 118 Mass. 261, 19 Am. Rep. 449; Pierce *v.* Colcord, 113 Mass. 372; Boyd *v.* Stone, 11 Mass. 342.

Michigan.— McEwan *v.* Ortman, 34 Mich. 325.

New Hampshire.— Graves *v.* Graves, 45 N. H. 323.

North Carolina.— Campbell *v.* Campbell, 55 N. C. 364.

Pennsylvania.— McHale *v.* Brown, 3 Lack. Leg. N. 53.

Texas.— Lancaster *v.* Richardson, 13 Tex. Civ. App. 682, 35 S. W. 749.

Vermont.— Ballard *v.* Bond, 32 Vt. 355. But see Mussey *v.* Bates, 65 Vt. 449, 27 Atl. 167, 21 L. R. A. 516.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 128.

See, however, Martin *v.* Martin, 16 B. Mon. (Ky.) 8.

An agreement to take title in one's own name and convey to another is within the statute. Largey *v.* Leggat, 30 Mont. 148, 75 Pac. 950.

Agreement to buy back.— It was said in Burrell *v.* Root, 40 N. Y. 496, that a vendor's agreement to buy back land at a certain price is not within the statute; but inasmuch as the vendor's agreement was in writing and sealed the case can hardly be considered an authority for the proposition.

20. Morse *v.* Wellesley, 156 Mass. 95, 30 N. E. 77.

21. White *v.* Smith, 51 Ala. 405; Cousins *v.* Wall, 56 N. C. 43.

22. Haviland *v.* Sammis, 62 Conn. 44, 25 Atl. 394, 36 Am. St. Rep. 330; Gillet *v.* Burr [*cited* in Mott *v.* Hurd, 1 Root (Conn.) 73, 74]; Currie *v.* Hawkins, 118 N. C. 593, 24 S. E. 476; McGee *v.* Craven, 106 N. C. 351, 11 S. E. 375; Sherrill *v.* Hagan, 92 N. C. 345; Schriver *v.* Eckenrode, 94 Pa. St. 456; Cabot *v.* Christie, 42 Vt. 121, 1 Am. Rep. 313. *Contra,* Bradley *v.* Blodget, Kirby (Conn.) 22, 1 Am. Dec. 11.

23. McConnell *v.* Brayner, 63 Mo. 461; Garret *v.* Malone, 8 Rich. (S. C.) 335; Seward *v.* Mitchell, 1 Coldw. (Tenn.) 87; Davis *v.* Tisdale, 4 Yerg. (Tenn.) 173. And see Mott *v.* Hurd, 1 Root (Conn.) 73. *Contra,* Northrop *v.* Speary, 1 Day (Conn.) 23, 2 Am. Dec. 48.

24. Good *v.* Taylor, (Cal. 1890) 23 Pac. 220; Smith *v.* Taylor, 82 Cal. 533, 23 Pac. 217; Scott *v.* Sanders, 6 J. J. Marsh. (Ky.) 506; Davis *v.* Parish, Litt. Sel. Cas. (Ky.) 153, 12 Am. Dec. 287; Maxfield *v.* West, 6 Utah 327, 23 Pac. 754.

25. *Connecticut.*— Guyer *v.* Stratton, 29 Conn. 421.

Indiana.— Baynes *v.* Chastain, 68 Ind. 376.

Michigan.— Dodder *v.* Snyder, 110 Mich. 69, 67 N. W. 1101.

thickness of party-walls is within the statute, and accordingly unless they are in writing they are not enforceable.[26]

i. Agreements Restricting Use or Alienation. An oral agreement not to make a certain use of land is generally held to be valid,[27] and an oral agreement that land should not be sold for less than a certain sum is also valid.[28]

j. Contracts to Buy or Sell For Another — (i) *CONTRACTS TO BUY.* An oral agreement to act as agent in buying land is not within the statute and creates a valid agency,[29] and the fact that the agent is to receive a certain part of the profits on a resale is immaterial.[30] So an agreement creating an agency to exchange lands may rest in parol.[31] However, an agreement to procure a conveyance to one's self and then convey to the promisee is invalid,[32] and so is an agreement by one who is taking title to convey to another on payment of the purchase-price.[33]

(ii) *CONTRACTS TO SELL.* An oral agreement to act as agent for the owner in selling lands is not within the statute and hence is valid,[34] and it makes no

New Hampshire.— Page *v.* Hodgdon, 63 N. H. 53.

New Jersey.—Ivins *v.* Ackerson, 38 N. J. L. 220.

New York.— Talmadge *v.* Rensselaer, etc., R. Co., 13 Barb. 493; Polye *v.* Sheehy, 1 N. Y. City Ct. 98.

See, however, Rudisill *v.* Cross, 54 Ark. 519, 16 S. W. 575, 26 Am. St. Rep. 57, holding that the release of an agreement to maintain a fence is a release of an interest in real estate and must be in writing.

26. May *v.* Prendergast, 2 Pa. Dist. 613, 12 Pa. Co. Ct. 220.

27. Hall *v.* Solomon, 61 Conn. 476, 23 Atl. 876, 29 Am. St. Rep. 218; Bostwick *v.* Leach, 3 Day (Conn.) 476; Pierce *v.* Woodward, 6 Pick. (Mass.) 206; Ware *v.* Langmade, 9 Ohio Cir. Ct. 85, 6 Ohio Cir. Dec. 43; Leinau *v.* Smart, 11 Humphr. (Tenn.) 308. *Contra,* Duncan *v.* Labouisse, 9 La. Ann. 49.

When the agreement goes further and amounts to a contract to create an easement, it is of course within the statute. Day *v.* New York Cent. R. Co., 31 Barb. (N. Y.) 548.

28. Pitman *v.* Hodge, 67 N. H. 101, 36 Atl. 605.

29. Wilson *v.* Norton, 85 Cal. 598, 24 Pac. 784; Baker *v.* Wainwright, 36 Md. 336, 11 Am. Rep. 495; Hannan *v.* Prentis, 124 Mich. 417, 83 N. W. 102; Carr *v.* Leavitt, 54 Mich. 540, 20 N. W. 576; Hosford *v.* Carter, 10 Abb. Pr. (N. Y.) 452.

An oral agreement to obtain an assignment of a successful bid at an auction sale of land is valid. Hockaday *v.* Parker, 53 N. C. 16.

30. *Colorado.*— Huff *v.* Hardwick, (App. 1904) 75 Pac. 593.

Minnesota.— Snyder *v.* Wolford, 33 Minn. 175, 22 N. W. 254, 53 Am. Rep. 22.

North Carolina.— Abbott *v.* Hunt, 129 N. C. 403, 40 S. E. 119.

Tennessee.— Harben *v.* Congdon, 1 Coldw. 221.

Wisconsin.—Watters *v.* McGuigan, 72 Wis. 155, 39 N. W. 382.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 131.

If the agent is to receive part of the land itself as compensation the entire contract is void (Brosnan *v.* McKee, 63 Mich. 454, 30 N. W. 107; Russell *v.* Briggs, 165 N. Y. 500, 59 N. E. 303, 53 L. R. A. 556); and an oral agreement to take a half interest in land to be purchased is also invalid (Walker *v.* Herring, 21 Gratt. (Va.) 678, 8 Am. Rep. 616).

31. Lamb *v.* Baxter, 130 N. C. 67, 40 S. E. 850.

32. *Indiana.*— Green *v.* Groves, 109 Ind. 519, 10 N. E. 401.

Kentucky.— Hocker *v.* Gentry, 3 Metc. 463.

Michigan.— McDonald *v.* Maltz, 78 Mich. 685, 44 N. W. 337; Raub *v.* Smith, 61 Mich. 543, 28 N. W. 676, 1 Am. St. Rep. 619.

Missouri.— Allen *v.* Richard, 83 Mo. 55.

New York.— Wheeler *v.* Hall, 54 N. Y. App. Div. 49, 66 N. Y. Suppl. 257; Canda *v.* Totten, 87 Hun 72, 33 N. Y. Suppl. 952; Bauman *v.* Holzhausen, 26 Hun 505.

Pennsylvania.— Myers *v.* Byerly, 45 Pa. St. 368, 84 Am. Dec. 497.

United States.— Dunphy *v.* Ryan, 116 U. S. 491, 6 S. Ct. 486, 29 L. ed. 703 [*affirming* 4 Mont. 342, 1 Pac. 710].

See 23 Cent. Dig. tit. "Frauds, Statute of," § 131.

See, however, Cooley *v.* Osborne, 50 Iowa 526; Bannon *v.* Bean, 9 Iowa 395.

Agency to acquire real estate for another cannot be shown by parol. Telle *v.* Taylor, 42 La. Ann. 1165, 8 So. 399; Seaton *v.* Sharkey, 3 La. Ann. 332; Breed *v.* Gray, 10 Rob. (La.) 35.

An agreement to buy up a tax title is within the statute. Boyce *v.* Berger, 11 Nebr. 399, 9 N. W. 545.

33. Chambliss *v.* Smith, 30 Ala. 366; Wentworth *v.* Wentworth, 2 Minn. 277, 72 Am. Dec. 97; Wiley *v.* Robert, 31 Mo. 212.

34. *California.*— Smith *v.* Schiele, 93 Cal. 144, 28 Pac. 857.

Indiana.— Ferguson *v.* Ramsey, 41 Ind. 511.

Missouri.— Gerhart *v.* Peck, 42 Mo. App. 644.

New York.— Fiero *v.* Fiero, 52 Barb. 288.

Ohio.— Koehler *v.* Hunt, 8 Ohio Dec. (Re-

difference that the compensation to be received by the agent is dependent on the price to be obtained for the property.[35]

k. Contracts to Devise. An oral promise to devise real estate to the promisee is usually held to be within the statute.[36] So an oral promise that all one's property, real and personal, shall "go to" the promisee is invalid so far as it concerns the realty.[37] However, an oral agreement that part of one's property shall go to the promisee, which does not specify what property or its nature, will support an action.[38]

l. Auction Sales. Sales of real estate at public auction as such are within the statute, and if no sufficient memorandum is made they cannot be enforced against either the vendor[39] or the purchaser.[40]

m. Execution Sales. Sales of real estate by a sheriff or similar officer in execution of a judgment are generally held to be within the statute of frauds, and accordingly they cannot be enforced, unless there is a memorandum of the contract in writing, against either the purchaser of the property[41] or the judg-

print) 404, 7 Cinc. L. Bul. 302; Robinson *v.* Hathaway, 2 Ohio Dec. (Reprint) 581, 4 West. L. Month. 105.

South Dakota.— McLaughlin *v.* Wheeler, 1 S. D. 497, 47 N. W. 816.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 131.

35. Fuller *v.* Reed, 38 Cal. 99; Heyn *v.* Phillips, 37 Cal. 529; Lesley *v.* Rosson, 39 Miss. 368, 77 Am. Dec. 679; Cotton *v.* Rand, 93 Tex. 7, 51 S. W. 838, 53 S. W. 343.

36. *Alabama.*— Manning *v.* Pippen, 95 Ala. 537, 11 So. 56.

Illinois.— Wallace *v.* Rappleye, 103 Ill. 229.

Indiana.— Wallace *v.* Long, 105 Ind. 522, 5 N. E. 666, 55 Am. Rep. 222.

Maryland.— Hamilton *v.* Thirston, 93 Md. 213, 48 Atl. 709.

Massachusetts.— Gould *v.* Mansfield, 103 Mass. 408, 4 Am. Rep. 573.

Nebraska.— Teske *v.* Dittberner, 63 Nebr. 607, 88 N. W. 658 [*modified* in 65 Nebr. 167, 91 N. W. 181, 101 Am. St. Rep. 614].

New York.— Ludwig *v.* Bungart, 48 N. Y. App. Div. 613, 63 N. Y. Suppl. 91; Henning *v.* Miller, 66 Hun 588, 21 N. Y. Suppl. 831; Gooding *v.* Brown, 35 Hun 148.

Ohio.— Kling *v.* Bordner, 65 Ohio St. 86, 61 N. E. 148; Howard *v.* Brower, 37 Ohio St. 402; Hopple *v.* Hopple, 3 Ohio Cir. Ct. 102, 2 Ohio Cir. Dec. 59.

Tennessee.— Campbell *v.* Taul, 3 Yerg. 548.

Texas.— Newcomb *v.* Cox, 27 Tex. Civ. App. 583, 66 S. W. 338.

Virginia.— Hale *v.* Hale, 90 Va. 728, 19 S. E. 739.

Washington.— Swash *v.* Sharpstein, 14 Wash. 426, 44 Pac. 862, 32 L. R. A. 796.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 132.

Contra.— Myles *v.* Myles, 6 Bush (Ky.) 237.

A promise to leave a legacy does not concern real estate and is valid, although not in writing. King *v.* Hanna, 9 B. Mon. (Ky.) 369.

On an oral contract to give either a house or its cost on the death of the promisor suit can be maintained for the cost of the house. Dill *v.* Harbeck, 1 N. Y. Suppl. 832. But see Howard *v.* Brower, 37 Ohio St. 402.

37. Alerding *v.* Allison, 31 Ind. App. 397, 68 N. E. 185; McKinnon *v.* McKinnon, 46 Fed. 713 [*reversed* on other grounds in 56 Fed. 409, 5 C. C. A. 530].

The entire contract may be void. Loper *v.* Sheldon, 120 Wis. 26, 97 N. W. 524.

38. *Alabama.*— Adams *v.* Adams, 26 Ala. 272.

Indiana.— Lee *v.* Carter, 52 Ind. 342.

Missouri.— Sutton *v.* Hayden, 62 Mo. 101.

South Carolina.— Turnipseed *v.* Sirrine, 57 S. C. 559, 35 S. E. 757, 76 Am. St. Rep. 580, 35 S. E. 1035.

South Dakota.— Quinn *v.* Quinn, 5 S. D. 328, 58 N. W. 808, 49 Am. St. Rep. 875.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 132.

Necessity of writing for promise to dispose of property by will independent of statute of frauds see WILLS.

39. Boyd *v.* Greene, 162 Mass. 566, 39 N. E. 277; Jelks *v.* Barrett, 52 Miss. 315.

40. *Alabama.*— Carroll *v.* Powell, 48 Ala. 298.

California.— People *v.* White, 6 Cal. 75.

Georgia.— White *v.* Crew, 16 Ga. 416.

Illinois.— Burke *v.* Haley, 7 Ill. 614.

Maine.— Horton *v.* McCarty, 53 Me. 394.

Maryland.— Singstack *v.* Harding, 4 Harr. & J. 186, 7 Am. Dec. 669.

New York.— Bicknell *v.* Byrnes, 23 How. Pr. 486; Champlin *v.* Parish, 11 Paige 405.

Texas.— Brock *v.* Jones, 8 Tex. 78.

Virginia.— Brent *v.* Green, 6 Leigh 16.

United States.— Arden *v.* Brown, 1 Fed. Cas. No. 510, 4 Cranch C. C. 121.

England.— Blagden *v.* Bradbear, 12 Ves. Jr. 466, 8 Rev. Rep. 354, 33 Eng. Reprint 176.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 133.

In Pennsylvania, owing to the absence of any statutory provision corresponding to the fourth section of the original statute, there may be an action against the purchaser for the breach of an oral contract of sale at an auction. Kurtz *v.* Cummings, 24 Pa. St. 35.

41. *Alabama.*— Robinson *v.* Garth, 6 Ala. 204, 41 Am. Dec. 47.

ment debtor.[42] There is, however, some authority for the opposite view, arising from the confusion that has existed between execution sales and judicial sales.[43]

n. Judicial Sales.[44] Sales which are made by order of the court and which require the confirmation of the court are not within the statute, and when confirmed can be enforced even though there be no memorandum.[45]

o. Partnership Agreements — (1) *FORMATION OF PARTNERSHIP TO DEAL IN LANDS.* Land used for partnership purposes belongs to the firm, whether the title is in one or all the partners, and whether the title was obtained before or after the formation of the partnership.[46] Accordingly it becomes important to discover how far proof of partnership may be made by parol. There is no doubt that an ordinary partnership agreement is valid, although not in writing;[47] but on the question whether a valid partnership for the purpose of dealing in lands may be created by oral agreement, there is an irreconcilable conflict of authority, the weight seeming to favor the affirmative.[48]

Indiana.— Ruckle *v.* Barbour, 48 Ind. 274; Hadden *v.* Johnson, 7 Ind. 394; Chapman *v.* Harwood, 8 Blackf. 82, 44 Am. Dec. 736; Ennis *v.* Waller, 3 Blackf. 472. *Contra*, Cowgill *v.* Wooden, 2 Blackf. 332.

Kentucky.— Baker *v.* Jameson, 2 J. J. Marsh. 547.

Maryland.— Barney *v.* Patterson, 6 Harr. & J. 182.

Missouri.— Hartt *v.* Rector, 13 Mo. 497, 53 Am. Dec. 157; Alexander *v.* Merry, 9 Mo. 514; Evans *v.* Ashley, 8 Mo. 177.

New York.— Catlin *v.* Jackson, 8 Johns. 520 [*affirming* 2 Johns. 248, 3 Am. Dec. 415]; Simonds *v.* Catlin, 2 Cai. 61.

South Carolina.— Elfe *v.* Gadsden, 2 Rich. 373; Christie *v.* Simpson, 1 Rich. 407; Kinlock *v.* Savage, Speers Eq. 464.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 134.

42. Gossard *v.* Ferguson, 54 Ind. 519; Rugely *v.* Moore, 23 Tex. Civ. App. 10, 54 S. W. 379.

43. Tate *v.* Greenlee, 15 N. C. 149; Emley *v.* Drum, 36 Pa. St. 123; Nichol *v.* Ridley, 5 Yerg. (Tenn.) 63, 26 Am. Dec. 254; Lockridge *v.* Baldwin, 20 Tex. 303, 70 Am. Dec. 385.

44. See also *supra*, VII, C, 4, l, m.

45. See cases cited *infra*, this note.

Sales by commissioner see Hutton *v.* Williams, 35 Ala. 503, 76 Am. Dec. 297; Watson *v.* Violett, 2 Duv. (Ky.) 332; Robertson *v.* Smith, 94 Va. 250, 26 S. E. 579, 64 Am. St. Rep. 723.

Sales by executor or administrator see Halleck *v.* Guy, 9 Cal. 181, 70 Am. Dec. 643; White *v.* Crew, 16 Ga. 416; Warehime *v.* Graf, 83 Md. 98, 34 Atl. 364; King *v.* Gunnison, 4 Pa. St. 171. Where, however, a sale of land by an administrator is not required to be reported to the court for confirmation, it is not properly a judicial sale and is within the statute. Bozza *v.* Rowe, 30 Ill. 198, 83 Am. Dec. 184; Wingate *v.* Herschauer, 42 Iowa 506.

Sales by trustee see Warfield *v.* Dorsey, 39 Md. 299, 17 Am. Rep. 562; Atty.-Gen. *v.* Day, 1 Ves. 218, 27 Eng. Reprint 992.

Sales ordered by court to foreclose mortgages see Chandler *v.* Morey, 195 Ill. 596, 63 N. E. 512; Willets *v.* Van Alst, 26 How. Pr. (N. Y.) 325. An ordinary sale by a mortgagee under a power of sale is not a judicial sale within this rule. Seymour *v.* National Bldg., etc., Assoc., 116 Ga. 285, 42 S. E. 518, 94 Am. St. Rep. 131.

46. *Illinois.*— Allison *v.* Perry, 130 Ill. 9, 22 N. E. 492.

Kansas.— Marsh *v.* Davis, 33 Kan. 326, 6 Pac. 612.

Maine.— Collins *v.* Decker, 70 Me. 23.

Massachusetts.— Fall River Whaling Co. *v.* Borden, 10 Cush. 458; Howard *v.* Priest, 5 Metc. 582; Dyer *v.* Clark, 5 Metc. 562, 39 Am. Dec. 697; Burnside *v.* Merrick, 4 Metc. 537.

New Jersey.— Personette *v.* Pryme, 34 N. J. Eq. 26.

New York.— Fairchild *v.* Fairchild, 64 N. Y. 471.

North Carolina.— Hanff *v.* Howard, 56 N. C. 440.

South Carolina.— Jones *v.* McMichael, 12 Rich. 176.

Tennessee.— Boyers *v.* Elliott, 7 Humphr. 204; Wells *v.* Stratton, 1 Tenn. Ch. 328.

Virginia.— Henderson *v.* Hudson, 1 Munf. 510.

United States.— McKinnon *v.* McKinnon, 56 Fed. 409, 5 C. C. A. 530.

England.— Essex *v.* Essex, 20 Beav. 442, 52 Eng. Reprint 674; Jackson *v.* Jackson, 9 Ves. Jr. 591, 32 Eng. Reprint 732; Forster *v.* Hale, 5 Ves. Jr. 309, 4 Rev. Rep. 128, 31 Eng. Reprint 603.

47. See PARTNERSHIP.

48. *California.*—Coward *v.* Clanton, 79 Cal. 23, 21 Pac. 359 [*overruling* Gray *v.* Palmer, 9 Cal. 616].

Colorado.— Meylette *v.* Brennan, 20 Colo. 242, 38 Pac. 75; Murley *v.* Ennis, 2 Colo. 300.

Illinois.— Speyer *v.* Desjardins, 144 Ill. 641, 32 N. E. 283, 36 Am. St. Rep. 473; Eaton *v.* Graham, 104 Ill. App. 296; Frankenstein *v.* North, 79 Ill. App. 669; Van Housen *v.* Copeland, 79 Ill. App. 139; Allison *v.* Perry, 28 Ill. App. 396 [*affirmed* in 130 Ill. 9, 22 N. E. 492].

Indiana.— Holmes *v.* McCray, 51 Ind. 358, 19 Am. Rep. 735.

Iowa.— Richards *v.* Grinnell, 63 Iowa 44, 18 N. W. 668, 50 Am. Rep. 727 [*overruling* by implication Thorn *v.* Thorn, 11 Iowa 146].

(II) *AGREEMENTS TO SHARE PROFITS.* It is generally held that agreements to share profits and losses arising from the purchase and sale of real estate are not contracts for the sale or transfer of interests in land and need not be in writing.[49]

(III) *AGREEMENTS TO BUY JOINTLY.* Oral agreements to buy land on joint account, each party to have an interest in the premises, are generally regarded as contracts of partnership, and there is the same conflict of authority as to their validity as has already been noted in regard to partnership agreements to deal in land.[50]

Minnesota.— Fountain *v.* Menard, 53 Minn. 443, 55 N. W. 601, 39 Am. St. Rep. 617.

Mississippi.— Connell *v.* Mulligan, 13 Sm. & M. 388.

Montana.— Hirbour *v.* Reeding, 3 Mont. 15.

New York.— Chester *v.* Dickerson, 54 N. Y. 1, 13 Am. Rep. 550 [*affirming* 52 Barb. 349]; Bailey *v.* Weed, 36 N. Y. App. Div. 611, 44 N. Y. Suppl. 253; Bissell *v.* Harrington, 18 Hun 81; Wormser *v.* Meyer, 54 How. Pr. 189; Chester *v.* Dickinson, 45 How. Pr. 326; Smith *v.* Tarlton, 2 Barb. Ch. 336.

Oregon.—Flower *v.* Barnekoff, 20 Oreg. 132, 25 Pac. 370, 11 L. R. A. 149; Knott *v.* Knott, 6 Oreg. 142.

Pennsylvania.— Howell *v.* Kelly, 149 Pa. St. 473, 24 Atl. 224. See, however, McCormick's Appeal, 57 Pa. St. 54, 98 Am. Dec. 191; Hale *v.* Henrie, 2 Watts 143, 27 Am. Dec. 289; Harding *v.* Devitt, 10 Phila. 95.

Washington.— Raymond *v.* Johnson, 17 Wash. 232, 49 Pac. 492, 61 Am. St. Rep. 908.

United States.— McElroy *v.* Swope, 47 Fed. 380. *Contra,* Young *v.* Wheeler, 34 Fed. 98; Smith *v.* Burnham, 22 Fed. Cas. No. 13,019, 3 Sumn. 435.

England.— Essex *v.* Essex, 20 Beav. 442, 52 Eng. Reprint 674; Dale *v.* Hamilton, 5 Hare 369, 11 Jur. 163, 16 L. J. Ch. 126, 26 Eng. Ch. 369; Lake *v.* Craddock, 3 P. Wms. 158, 24 Eng. Reprint 1011. But see Caddick *v.* Skidmore, 2 De G. & J. 52, 3 Jur. N. S. 1185, 27 L. J. Ch. 153, 6 Wkly. Rep. 119, 59 Eng. Ch. 41, 44 Eng. Reprint 907.

See 23 Cent. Dig. tit. "Frauds, Statute of," §§ 135, 136.

Contra.— Rowland *v.* Boozer, 10 Ala. 690; Larkins *v.* Rhodes, 5 Port. (Ala.) 195; Gantt *v.* Gantt, 6 La. Ann. 677; Dunbar *v.* Bullard, 2 La. Ann. 810; Walsh *v.* Texada, 7 Mart. N. S. (La.) 231; Clancy *v.* Craine, 17 N. C. 263; Seymour *v.* Cushway, 100 Wis. 580, 76 N. W. 769, 69 Am. St. Rep. 957; McMillen *v.* Pratt, 89 Wis. 612, 62 N. W. 588. However, a mere planting partnership involving only the use of realty may be proved by parol. Battle *v.* Jenkins, 25 La. Ann. 593. And oral evidence is of course admissible to prove that property title to which is in one member of a firm was actually used for firm purposes. McKinnon *v.* McKinnon, 56 Fed. 409, 5 C. C. A. 530 [*reversing* 46 Fed. 713].

49. *Arkansas.*— McClintock *v.* Thweatt, 71 Ark. 323, 73 S. W. 1093.

California.— Bates *v.* Babcock, 95 Cal. 479; 30 Pac. 605, 29 Am. St. Rep. 133, 16 L. R. A. 745; Gorham *v.* Heiman, 90 Cal. 346, 27 Pac. 289.

Colorado.— Von Trotha *v.* Bamberger, 15 Colo. 1, 24 Pac. 883.

District of Columbia.— Kilbourn *v.* Latta, 5 Mackey 304, 60 Am. Rep. 373.

Iowa.— Pennybacker *v.* Leary, 65 Iowa 220, 21 N. W. 575.

Michigan.— Petrie *v.* Torrent, 88 Mich. 43, 49 N. W. 1076; Davis *v.* Gerber, 69 Mich. 246, 37 N. W. 281.

Minnesota.— Newell *v.* Cochran, 41 Minn. 374, 43 N. W. 84.

New Hampshire.— Pitman *v.* Hodge, 67 N. H. 101, 36 Atl. 605.

New York.— Babcock *v.* Read, 99 N. Y. 609, 1 N. E. 141 [*affirming* 50 N. Y. Super. Ct. 126]; Ostrander *v.* Snyder, 73 Hun 378, 26 N. Y. Suppl. 263 [*affirmed* in 148 N. Y. 757, 43 N. E. 988].

North Carolina.— Falkner *v.* Hunt, 73 N. C. 571.

Oregon.— Flower *v.* Barnekoff, 20 Oreg. 132, 25 Pac. 370, 11 L. R. A. 149.

Pennsylvania.— Everhart's Appeal, 106 Pa. St. 349.

South Dakota.— Davenport *v.* Buchanan, 6 S. D. 376, 61 N. W. 47.

Vermont.— Bruce *v.* Hastings, 41 Vt. 380, 98 Am. Dec. 592.

Washington.— Case *v.* Seger, 4 Wash. 492, 30 Pac. 646.

Wisconsin.— Treat *v.* Hiles, 68 Wis. 344, 32 N. W. 517, 60 Am. Rep. 858.

United States.— Wright *v.* Smith, 105 Fed. 841, 45 C. C. A. 87; McElroy *v.* Swope, 47 Fed. 380.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 137.

Contract conferring interest in land.— Where the agreement in reality is that one of the parties shall have an interest in the property itself rather than in the profits, there must be a writing. Slevin *v.* Wallace, 64 Hun (N. Y.) 288, 19 N. Y. Suppl. 87 [*affirmed* in 144 N. Y. 635, 39 N. E. 494]. So an oral agreement to manage property for a share in the profits, the rise in value of the land to be considered profits, has been held to be invalid. Vose *v.* Strong, 45 Ill. App. 98.

Contract to sell.— The oral agreement of owners of separate tracts of land to sell their respective tracts and divide the profits has been held invalid as involving a contract to sell. Goldstein *v.* Nathan, 158 Ill. 641, 42 N. E. 72 [*affirming* 57 Ill. App. 389].

50. Agreement held valid see Hunt *v.* Elliott, 80 Ind. 245, 31 Am. Rep. 794; Simon

(iv) *Contracts in Relation to Partnership Property.* Real estate owned by a partnership becomes for the purposes of the partnership personal property, and an oral agreement in relation to it, if made between the members of the firm, and if the contract has to do with partnership matters, is valid.[51] As concerns strangers to the partnership, however, the nature of the property is not changed, and contracts with them affecting firm realty must be in writing.[52]

p. Contracts Not Affecting Title. A contract which in no way looks to the passing of title to land or to any interest therein is not within the operation of the statute.[53]

VIII. SALES OF GOODS.[54]

A. Contracts Within Statute — 1. In General — a. Statutory Provisions. The English statute of frauds provides in section 17 that "No contract for the Sale of any Goods, Wares or Merchandizes, for the Price of ten pounds Sterling or upwards, shall be allowed to be good; except the Buyer shall accept Part of the Goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in Part of Payment, or that some Note or Memorandum in Writing of the said Bargain be made and signed by the Parties to be charged by such Contract, or their Agents thereunto lawfully authorized." Similar provisions have been enacted in most of the United States.[55]

b. Amount and Nature of Price. In most of the United States oral contracts

v. Gulick, 50 S. W. 992, 21 Ky. L. Rep. 104; Evans *v.* Green, 23 Miss. 294; Traphagen *v.* Burt, 67 N. Y. 30 [*distinguishing* Levy *v.* Brush, 45 N. Y. 589 (*reversing* Sweeny 653, 8 Abb. Pr. N. S. 418)]. See also Cornell *v.* Utica, etc., R. Co., 61 How. Pr. (N. Y.) 184.

Agreement held invalid see the following cases:

Georgia.— Roughton *v.* Rawlings, 88 Ga. 819, 16 S. E. 89.

Illinois.— Morton *v.* Nelson, 145 Ill. 586, 32 N. E. 916.

Massachusetts.— Parsons *v.* Phelan, 134 Mass. 109.

New Jersey.— Schultz *v.* Waldons, 60 N. J. Eq. 71, 47 Atl. 187.

United States.— See McKinley *v.* Lloyd, 128 Fed. 519.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 138.

Contract for reimbursement.— An oral collateral agreement that one of the buyers will reimburse the other for money he shall pay out is valid. Wetherbee *v.* Potter, 99 Mass. 354.

Contracts for the joint acquisition of public lands are not within the statute. Bryant *v.* Hendricks, 5 Iowa 256; Smith *v.* Crosby, 47 Tex. 121; Gibbons *v.* Bell, 45 Tex. 417.

51. *Illinois.*—Van Housen *v.* Copeland, 180 Ill. 74, 54 N. E. 169.

Iowa.— Frederick *v.* Cooper, 3 Iowa 171.

New Jersey.— Personette *v.* Pryme, 34 N. J. Eq. 26.

New York.— Hollister *v.* Simonson, 36 N. Y. App. Div. 63, 55 N. Y. Suppl. 372.

Texas.— Murrell *v.* Mandelbaum, 85 Tex. 22, 19 S. W. 880, 34 Am. St. Rep. 777.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 139.

Sales and contracts to convey.— An oral agreement by one partner to convey real estate owned by him and used for partnership purposes to another is invalid (Brewer *v.* Cropp, 10 Wash. 136, 38 Pac. 866), and so is an oral sale (Sim *v.* Sim, 22 Nova Scotia 185).

52. Smith *v.* Perkins, 14 Ky. L. Rep. 399; Carothers *v.* Alexander, 74 Tex. 309, 12 S. W. 4.

53. Halbut *v.* Forrest City, 34 Ark. 246 (agreement of tenant to return leased premises in the same condition as when taken); Hayes *v.* Moynihan, 60 Ill. 409 (promise to pay damages caused by building on land); Beach *v.* Allen, 7 Hun (N. Y.) 441 (agreement of mortgagor to pay a sum equal to mortgage debt in case of fire on premises); Storms *v.* Snyder, 10 Johns. (N. Y.) 109 (agreement to remove fence); Hamilton, etc., Hydraulic Co. *v.* Cincinnati, etc., R. Co., 29 Ohio St. 341 (agreement that artificial channel may be filled up).

Agreement to buy from third person.— An oral agreement to pay to the promisee a certain sum of money if he will buy land for himself of a third person is valid (Ambrose *v.* Ambrose, 94 Ga. 655, 19 S. E. 980; Little *v.* McCarter, 89 N. C. 233); and so is an oral agreement to buy land for one's self from a third person (Goldbeck *v.* Kensington Nat. Bank, 147 Pa. St. 267, 23 Atl. 565 [*affirming* 10 Pa. Co. Ct. 97]).

An agreement to procure a third person to convey to the promisee is not within the statute. Bannon *v.* Bean, 9 Iowa 395; Ratliff *v.* Trout, 6 J. J. Marsh. (Ky.) 605; Bruns *v.* Spalding, 90 Md. 349, 45 Atl. 194. *Contra*, Craig *v.* Prather, 2 B. Mon. (Ky.) 9; Rawdon *v.* Dodge, 40 Mich. 697.

54. **Sales of goods in general** see SALES.

55. See the statutes of the different states.

In New Mexico the English statute is in force. Kirchner *v.* Laughlin, 4 N. M. 218, 17 Pac. 132.

of sale are valid if the price of the goods is not in excess of fifty dollars.[56] It is not necessary that the price or value should be money; contracts of barter are within the statute.[57]

c. Separate Articles Included in Same Transaction. Where separate articles are the subject of sale, a price below the statutory limit being fixed for each, and the circumstances lead to a reasonable supposition that the whole series of transactions constitute one trade, it is one entire contract and within the statute;[58] but the circumstances may of course be such that each transaction may be a separate contract.[59]

Statute applied see the following cases:

California.— Stevens *v.* Stewart, 3 Cal. 140.

Colorado.— Wilson *v.* Ottenberg, 10 Colo. App. 516, 51 Pac. 1018.

Georgia.— Hazlehurst Co. *v.* Napier, 113 Ga. 1110, 39 S. E. 477; Groover *v.* Warfield, 50 Ga. 644; Sanderlin *v.* Savannah Roman Catholic Church, R. M. Charlt. 551.

Indiana.— Carpenter *v.* Galloway, 73 Ind. 418; Hausman *v.* Nye, 62 Ind. 485, 30 Am. Rep. 199; Bowman *v.* Conn, 8 Ind. 58; Henline *v.* Hall, 4 Ind. 189; Bailey *v.* Epperly, 2 Ind. 85; Smith *v.* Smith, 8 Blackf. 208.

Michigan.— Hudson *v.* Emmons, 107 Mich. 549, 65 N. W. 542; Winner *v.* Williams, 62 Mich. 363, 28 N. W. 904.

Mississippi.— Daniel *v.* Frazer, 40 Miss. 507.

Missouri.— Steinberg *v.* Kintzing, 39 Mo. 220; Palmer *v.* Elsberry, 79 Mo. App. 570.

New Jersey.— Roubicek *v.* Haddad, 67 N. J. L. 522, 51 Atl. 938; Carman *v.* Smick, 15 N. J. L. 252.

New York.— Ely *v.* Ormsby, 12 Barb. 570; Johnson *v.* Mulry, 4 Rob. 401 [*affirmed* in 51 N. Y. 634]; Ryers *v.* Tuska, 14 N. Y. Suppl. 926.

Utah.— Walker *v.* Bamberger, 17 Utah 239, 54 Pac. 108; Hudson Furniture Co. *v.* Freed Furniture, etc., Co., 10 Utah 31, 36 Pac. 132.

Wisconsin.— Kerkhof *v.* Atlas Paper Co., 68 Wis. 674, 32 N. W. 766; Smith *v.* Bouck, 33 Wis. 19.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 140.

56. See the statutes of the different states.

If no value is stated by the parties, a question of fact arises as to what is a reasonable value. Stewart *v.* Cook, 118 Ga. 541, 45 S. E. 398; Slesinger *v.* Bresler, 110 Mich. 198, 68 N. W. 128; Gerndt *v.* Conradt, 117 Wis. 15, 93 N. W. 804; Hoadley *v.* McLaine, 10 Bing. 482, 3 L. J. C. P. 162, 4 Moore & S. 340, 25 E. C. L. 231.

If the quantity is uncertain at the time of the agreement, and the amount ultimately exceeds the statutory limit, the contract is within the statute.

Indiana.— Carpenter *v.* Galloway, 73 Ind. 418; Bowman *v.* Conn, 8 Ind. 58.

Iowa.— Kaufman *v.* Farley Mfg. Co., 78 Iowa 679, 43 N. W. 612, 16 Am. St. Rep. 462.

Minnesota.— Brown *v.* Sanborn, 21 Minn. 402.

Missouri.— Wainscott *v.* Kellog, 84 Mo. App. 621.

New York.— Gray *v.* Payne, 16 Barb. 277.

England.— Watts *v.* Friend, 10 B. & C. 446, 8 L. J. K. B. O. S. 181, 21 E. C. L. 192.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 141.

57. *Indiana.*— Kuhns *v.* Gates, 92 Ind. 66.

Michigan.— Gorman *v.* Brossard, 120 Mich. 611, 79 N. W. 903.

Missouri.— Lyle *v.* Shinnebarger, 17 Mo. App. 66.

New Hampshire.— Ash *v.* Aldrich, 67 N. H. 581, 39 Atl. 442.

New Jersey.— Rutan *v.* Hinchman, 30 N. J. L. 255.

New York.— Combs *v.* Bateman, 10 Barb. 573; Chapin *v.* Potter, 1 Hilt. 366.

United States.— Raymond *v.* Colton, 104 Fed. 219, 43 C. C. A. 501.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 141.

58. *Maine.*— Weeks *v.* Crie, 94 Me. 458, 48 Atl. 107, 80 Am. St. Rep. 410.

Missouri.— Earl Fruit Co. *v.* McKinney, 65 Mo. App. 220.

Nebraska.— Farmer *v.* Gray, 16 Nebr. 401, 20 N. W. 276.

New Hampshire.— Standard Wall Paper Co. *v.* Towns, 72 N. H. 324, 56 Atl. 744; Gault *v.* Brown, 48 N. H. 183, 2 Am. Rep. 210; Gilman *v.* Hill, 36 N. H. 311.

New York.— Allard *v.* Greasert, 61 N. Y. 1; Brown *v.* Hall, 5 Lans. 177.

Wisconsin.— Gano *v.* Chicago, etc., R. Co., 66 Wis. 1, 27 N. W. 628, 838.

United States.— Garfield *v.* Paris, 96 U. S. 557, 24 L. ed. 821.

England.— Baldey *v.* Parker, 2 B. & C. 37, 3 D. & R. 220, 1 L. J. K. B. O. S. 229, 26 Rev. Rep. 260, 9 E. C. L. 26.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 142.

Separate articles sold at auction.—Although separate lots of goods are bought at auction, other purchases intervening, the dealings may constitute one transaction. Jenness *v.* Wendell, 51 N. H. 63, 12 Am. Rep. 48; Mills *v.* Hunt, 17 Wend. (N. Y.) 333, 20 Wend. 431. *Contra*, Couston *v.* Chapman, L. R. 2 H. L. Sc. 250; Emerson *v.* Heelis, 2 Taunt. 38, 11 Rev. Rep. 520. See Tompkins *v.* Haas, 2 Pa. St. 74; Coffman *v.* Hampton, 2 Watts & S. (Pa.) 377, 37 Am. Dec. 511; Kerr *v.* Shrader, 1 Wkly. Notes Cas. (Pa.) 33.

59. Carleton *v.* Woods, 28 N. H. 290; Tompkins *v.* Sheehan, 158 N. Y. 617, 53 N. E. 502; Aldrich *v.* Pyatt, 64 Barb. (N. Y.) 391; Seymour *v.* Davis, 2 Sandf. (N. Y.) 239. See Barclay *v.* Tracy, 5 Watts & S. (Pa.) 45.

2. Nature of Contract — a. In General. Only contracts for the sale of goods, wares, and merchandise are within the statute;[60] but if the contract is one to sell goods, the fact that it also requires the parties to do something else does not take it out of the statute.[61]

b. Executory Contracts. The statute applies to executory contracts of sale as well as to present sales.[62]

60. *California.*— Bibend *v.* Liverpool, etc., F., etc., Ins. Co., 30 Cal. 78, holding that the statute does not apply to an assignment of choses in action as collateral, where the property is delivered at the time of the assignment.

Indiana.— Clark *v.* Duffey, 24 Ind. 271, holding that an agreement with the mortgagee by a buyer of mortgaged chattels to waive all right to the property on receiving back the purchase-money note is not a contract of sale.

Iowa.— Calumet Paper Co. *v.* Stotts Invest. Co., 96 Iowa 147, 64 N. W. 782, 59 Am. St. Rep. 362, holding that an agreement to take over assets and assume liabilities is not a contract of sale.

Massachusetts.— Phelps *v.* Hendrick, 105 Mass. 106, holding that an agreement by a mortgagee of personalty that the mortgagor's vendee may have the property on paying the mortgage is not a contract of sale.

Michigan.— Green *v.* Brookins, 23 Mich. 48, 9 Am. Rep. 74, holding that an agreement to find a purchaser for shares of stock is not within the statute.

Minnesota.— Spinney *v.* Hill, 81 Minn. 316, 84 N. W. 116, holding that an agreement to pay a salary partly in cash and partly in stocks is not within the statute.

Montana.— Frank *v.* Murray, 7 Mont. 4, 14 Pac. 654, holding that a contract to buy property and sell or transfer it to a third person is not within the statute.

New York.—Beckwith *v.* Brackett, 97 N. Y. 52 (holding that a contract to procure the return of bonds to a third person is not a contract of sale); White *v.* Knapp, 47 Barb. 549 (holding that a delivery of personal property on approval is not a contract of sale).

Wisconsin.—Goodland *v.* Le Clair, 78 Wis. 176, 47 N. W. 268, holding that a contract for the publication of an advertisement is not a contract for the sale of goods within the statute.

United States.— Colton *v.* Raymond, 114 Fed. 863, 52 C. C. A. 382, holding that an agreement to resign an office is not within the statute.

England.— Cobbold *v.* Caston, 1 Bing. 399, 8 E. C. L. 566, 1 C. & P. 51, 12 E. C. L. 40, 2 L. J. C. P. O. S. 38, 8 Moore C. P. 456, holding that a contract to procure a cargo of coals at a foreign port and to deliver them on the return is not a contract of sale within the statute.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 154. And see *infra*, VIII, A, 2, b–f.

Agreement for cancellation of debt.— An agreement between one of two joint debtors and the creditor that the debt should be set off against a debt due the joint debtor individually from the creditor and the joint debt be thereby canceled, is not an agreement for the sale of a debt, so as to require a writing. Brand *v.* Brand, 48 N. Y. 675 [*reversing* 49 Barb. 346, 33 How. Pr. 167].

An agreement to deliver goods in payment of a preëxisting debt is a sale.

Alabama.— Sawyer *v.* Ware, 36 Ala. 675.

Georgia.— Daniel *v.* Hannah, 106 Ga. 91, 31 S. E. 734.

Indiana.— Galbraith *v.* Holmes, 15 Ind. App. 34, 43 N. E. 575.

New Jersey.— Matthiessen, etc., Refining Co. *v.* McMahon, 38 N. J. L. 536.

Oregon.— Milos *v.* Covacevich, 40 Oreg. 239, 66 Pac. 914.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 154.

Contra.— Woodford *v.* Patterson, 32 Barb. (N. Y.) 630.

Chattel mortgages.— It is doubtful whether a mortgage of personal property is within the statute. Gleason *v.* Drew, 9 Me. 79. An agreement to mortgage goods is not (Alexander *v.* Ghiselin, 5 Gill (Md.) 138); and a renewed hypothecation may be made by parol (Hoyt *v.* Hoyt, 8 Bosw. (N. Y.) 511).

Compromises.— A parol agreement to surrender an unmatured note for a payment less than its face is not a contract of sale within the statute. Schweider *v.* Lang, 29 Minn. 254, 13 N. W. 33, 43 Am. Rep. 202. A parol contract by a debtor with a creditor who had attached personalty that the creditor should take judgment, purchase the goods at the sheriff's sale, and give the debtor credit for their cost, irrespective of the amount bid, is a compromise, and not a sale within the statute. Jacobs Sultan Co. v. Union Mercantile Co., 17 Mont. 61, 42 Pac. 109. So of a parol contract between two execution creditors, who have levied on the same goods, to allow the goods to be sold under one execution and divide the proceeds. Mygatt *v.* Tarbell, 78 Wis. 351, 47 N. W. 618.

61. Irvine *v.* Stone, 6 Cush. (Mass.) 508; Harman *v.* Reeve, 18 C. B. 587, 25 L. J. C. P. 257, 4 Wkly. Rep. 599, 86 E. C. L. 587.

62. *Connecticut.*— Atwater *v.* Hough, 29 Conn. 508, 79 Am. Dec. 229.

Georgia.— Bowers *v.* Anderson, 49 Ga. 143; Cason *v.* Cheely, 6 Ga. 554.

Indiana.— Over *v.* Greenfield, 107 Ind. 231, 5 N. E. 872; Bailey *v.* Epperly, 2 Ind. 85.

Maine.— Edwards *v.* Grand Trunk R. Co., 48 Me. 379; Hight *v.* Ripley, 19 Me. 137.

Maryland.— Newman *v.* Morris, 4 Harr. & M. 421.

Massachusetts.— Waterman *v.* Meigs, 4 Cush. 497; Lamb *v.* Crafts, 12 Metc. 353.

Missouri.— Burrell *v.* Highleyman, 33 Mo. App. 183.

c. Rescission and Resale. A contract between the parties to an executed sale to resell the goods is within the statute.[63] A rescission of an unperformed contract of sale is not required by the statute to be in writing;[64] but it is otherwise of a modification of the contract which amounts to a new sale.[65]

d. Contracts of Partnership and Agency. An oral agreement to be partners in the purchase and sale of goods is not within the statute,[66] unless the agreement is further for a sale by one to the other.[67] Where one as agent buys for a principal, an agreement between them is not within the statute.[68]

e. Auction Sales. The statute of frauds covers sales of goods at public auction.[69]

f. Contracts For Sale or For Work and Labor. The interpretation of the statutory words "contract for the sale of any goods," etc., has led to the adoption of various rules in different jurisdictions whereby to distinguish contracts for sale from contracts for manufacture.[70] By what may be termed the Massachusetts

New Hampshire.— Gilman *v.* Hill, 36 N. H. 311.

New Jersey.— Finney *v.* Apgar, 31 N. J. L. 266; Carman *v.* Smick, 15 N. J. L. 252.

New York.— Seymour *v.* Davis, 2 Sandf. 239; Jackson *v.* Covert, 5 Wend. 139; Sewall *v.* Fitch, 8 Cow. 215; Crookshank *v.* Burrell, 18 Johns. 58, 9 Am. Dec. 187; Bennett *v.* Hull, 10 Johns. 364.

South Carolina.— Bird *v.* Muhlinbrink, 1 Rich. 199, 44 Am. Dec. 247.

Vermont.— Ide *v.* Stanton, 15 Vt. 685, 40 Am. Dec. 698.

Wisconsin.— Nichols *v.* Mitchell, 30 Wis. 329; Hooker *v.* Knab, 26 Wis. 511.

England.— Earlier authority in England was divided on this point. In accord with the text see Garbutt *v.* Watson, 5 B. & Ald. 613, 7 E. C. L. 335; Rondeau *v.* Wyatt, 2 H. Bl. 63; Cooper *v.* Elston, 7 T. R. 14. *Contra*, see Clayton *v.* Andrews, 4 Burr. 2101; Groves *v.* Buck, 3 M. & S. 178; Towers *v.* Osborne, 1 Str. 506. The law was settled in accordance with the text by "Lord Tenterden's Act," so-called. St. 9 Geo. IV, c. 14, § 7.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 157.

63. Smith *v.* Bryan, 5 Md. 141, 59 Am. Dec. 104; Chapman *v.* Searle, 3 Pick. (Mass.) 38; Gorman *v.* Brossard, 120 Mich. 611, 79 N. W. 903; Blanchard *v.* Trim, 38 N. Y. 225; Rankins *v.* Grupe, 36 Hun (N. Y.) 481.

However, in Dickinson *v.* Dickinson, 29 Conn. 600, an oral agreement for redelivery after an executed sale was upheld in equity as part of a partnership dissolution; and in Sturtevant *v.* Orser, 24 N. Y. 538, 82 Am. Dec. 321, and Salte *v.* Field, 5 T. R. 211, 2 Rev. Rep. 568, where an insolvent vendee repudiated an executed sale of goods, the title of the vendor was held in the former case superior to that of an attaching creditor of the vendee, and in the latter case superior to that of an assignee for creditors of the vendee. In neither case was the statute of frauds discussed, and in the former case there was some evidence of delivery and acceptance.

Promise by third person to repurchase.— In Chamberlain *v.* Jones, 32 N. Y. App. Div. 237, 52 N. Y. Suppl. 998, an oral agreement by a third person to repurchase bonds if unsatisfactory to the vendee was held to be within the statute.

64. Wulschner *v.* Ward, 115 Ind. 219, 17 N. E. 273. The question of rescission and variation of contracts of sale, although often discussed as if provided for by the statute of frauds, is one of law arising apart from the statute. See Cummings *v.* Arnold, 3 Metc. (Mass.) 486, 37 Am. Dec. 155.

65. Bailey *v.* Epperly, 2 Ind. 85.

66. *Indiana.*— Kelsey *v.* Henry, 48 Ind. 37.

Massachusetts.— Bullard *v.* Smith, 139 Mass. 492, 2 N. E. 86; Somerby *v.* Buntin, 118 Mass. 279, 19 Am. Rep. 459.

Michigan.— Green *v.* Brookins, 23 Mich. 48, 9 Am. Rep. 74.

Missouri.— Buckner *v.* Ries, 34 Mo. 357.

New York.— Coleman *v.* Eyre, 45 N. Y. 38 [*reversing* 1 Sweeny 476].

South Carolina.— Jones *v.* McMichael, 12 Rich. 176.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 159.

67. Mace *v.* Heath, 30 Nebr. 620, 46 N. W. 918; Brown *v.* Slauson, 23 Wis. 244.

68. Kutz *v.* Fleisher, 67 Cal. 93, 7 Pac. 195 (the case of a broker); Hatch *v.* McBrien, 83 Mich. 159, 47 N. W. 214; Hamilton *v.* Frothingham, 59 Mich. 253, 26 N. W. 486; Webster *v.* Zielly, 52 Barb. (N. Y.) 482; Stover *v.* Flack, 41 Barb. (N. Y.) 162 [*affirmed* in 30 N. Y. 64]; Bird *v.* Muhlinbrink, 1 Rich. (S. C.) 199, 44 Am. Dec. 247.

69. *Georgia.*— Sanderlin *v.* Savannah Roman Catholic Church, R. M. Charlt. 551.

Maine.— Pike *v.* Balch, 38 Me. 302, 61 Am. Dec. 248.

Massachusetts.— Davis *v.* Rowell, 2 Pick. 64, 13 Am. Dec. 398.

New York.— Bliss *v.* Misner, 4 Thomps. & C. 633.

South Carolina.— Davis *v.* Robertson, 1 Mill 71, 12 Am. Dec. 611.

England.—Kenworthy *v.* Schofield, 2 B. & C. 945, 4 D. & R. 556, 2 L. J. K. B. O. S. 175, 26 Rev. Rep. 600, 9 E. C. L. 406; Hinde *v.* Whitehouse, 7 East 558, 3 Smith K. B. 528, 8 Rev. Rep. 676. *Contra*, Simon *v.* Metivier, 1 W. Bl. 599, *semble*.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 160.

Several lots of goods sold at auction see *supra*, note 58.

70. See Hientz *v.* Burkhard, 29 Oreg. 55, 43 Pac. 866, 54 Am. St. Rep. 777, 31 L. R. A. 508.

rule an agreement by one to construct an article especially for or according to the plans of another, whether at an agreed price or not, although the transaction is to result in a sale of the article, is a contract for work and labor and not within the statute;[71] but if the article to be made and delivered is of a kind which the producer usually has for sale in the course of his business, it is a contract for sale and must be in writing.[72] The prevailing view throughout the United States accords substantially with the Massachusetts rule.[73] According to what may be termed the New York rule, where the substance of the contract is work and labor to be done in converting raw materials into a new and totally different article, although the transaction is to result in a sale, the contract is not within the statute;[74] but if at the time of the agreement the article sold substantially exists in its ultimate form,[75] or is to be procured in substantially its ultimate form from others,[76] even though acts remain to be done in finishing it, the agreement is a contract for sale and within the statute. Certain states have construed the statute by reference to the English cases or by adopting portions of the Massachusetts or New York rules without adhering exclusively to either.[77] Some

71. Dowling *v.* McKenney, 124 Mass. 478; Goddard *v.* Binney, 115 Mass. 450, 15 Am. Rep. 112; Spencer *v.* Cone, 1 Metc. (Mass.) 283; Mixer *v.* Howarth, 21 Pick. (Mass.) 205, 32 Am. Dec. 256.

72. May *v.* Ward, 134 Mass. 127; Clark *v.* Nichols, 107 Mass. 547; Waterman *v.* Meigs, 4 Cush. (Mass.) 497; Lamb *v.* Crafts, 12 Metc. (Mass.) 353; Gardner *v.* Joy, 9 Metc. (Mass.) 177.

Where the seller is to procure the article from another and make it according to models of the buyer, it is a contract of sale within the statute. Smalley *v.* Hamblin, 170 Mass. 380, 49 N. E. 626.

73. *Connecticut.*— Atwater *v.* Hough, 29 Conn. 508, 79 Am. Dec. 229; Allen *v.* Jarvis, 20 Conn. 38.

Georgia.— Cason *v.* Cheely, 6 Ga. 554.

Indiana.— Yoe *v.* Newcomb, (App. 1904) 71 N. E. 256, which follows the second branch of the Massachusetts rule. In Bowman *v.* Conn, 8 Ind. 58, however, the court approved the English construction of the statute stated *infra* in the text.

Maine.— Crockett *v.* Scribner, 64 Me. 447; Edwards *v.* Grand Trunk R. Co., 48 Me. 379, 54 Me. 105; Fickett *v.* Swift, 41 Me. 65, 66 Am. Dec. 214; Abbott *v.* Gilchrist, 38 Me. 260; Cummings *v.* Dennett, 26 Me. 397; Hight *v.* Ripley, 19 Me. 137.

Nevada.— O'Neil *v.* New York, etc., Min. Co., 3 Nev. 141.

New Mexico.— Orman *v.* Hager, 3 N. M. 331, 9 Pac. 363.

Vermont.— McDonald *v.* Webster, 71 Vt. 392, 45 Atl. 895; Forsyth *v.* Mann, 68 Vt. 116, 34 Atl. 481, 32 L. R. A. 788; Scales *v.* Wiley, 68 Vt. 39, 33 Atl. 771; Ellison *v.* Brigham, 38 Vt. 64; Mattison *v.* Wescott, 13 Vt. 258.

United States.— Beck, etc., Lithographing Co. *v.* Colorado Milling, etc., Co., 52 Fed. 700, 3 C. C. A. 248.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 147 *et seq.*

74. Deal *v.* Maxwell, 51 N. Y. 652; Higgins *v.* Murray, 4 Hun (N. Y.) 565 [*affirmed* in 73 N. Y. 252]; Ferren *v.* O'Hara, 62 Barb. (N. Y.) 517; Mead *v.* Case, 33 Barb. (N. Y.) 202; Parker *v.* Schenck, 28 Barb. (N. Y.) 38; Donovan *v.* Willson, 26 Barb. (N. Y.) 138; Courtright *v.* Stewart, 19 Barb. (N. Y.) 455; Bronson *v.* Wiman, 10 Barb. (N. Y.) 406 [*affirmed* in 3 N. Y. 182] Parsons *v.* Loucks, 4 Rob. (N. Y.) 216 [*affirmed* in 48 N. Y. 17, 8 Am. Rep. 517]; Robertson *v.* Vaughn, 5 Sandf. (N. Y.) 1; Donnell *v.* Hearn, 12 Daly (N. Y.) 230; Passaic Mfg. Co. *v.* Hoffman, 3 Daly (N. Y.) 495; Pelletreau *v.* U. S. Electric Light, etc., Co., 13 Misc. (N. Y.) 237, 34 N. Y. Suppl. 125; Hinds *v.* Kellogg, 13 N. Y. Suppl. 922 [*affirmed* in 133 N. Y. 536, 30 N. E. 1148]; Rutty *v.* Consolidated Fruit-Jar Co., 13 N. Y. Suppl. 331; Warren Chemical, etc., Co. *v.* Holbrook, 9 N. Y. St. 293; Sewall *v.* Fitch, 8 Cow. (N. Y.) 215; Crookshank *v.* Burrell, 18 Johns. (N. Y.) 58, 9 Am. Dec. 187. *Contra*, Evarts *v.* Thorn, 11 N. Y. 668.

In Maryland the court follows this portion of the New York rule. Bagby *v.* Walker, 78 Md. 239, 27 Atl. 1033; Rentch *v.* Long, 27 Md. 188; Eichelberger *v.* McCauley, 5 Harr. & J. (Md.) 213, 9 Am. Dec. 514.

75. Smith *v.* New York Cent. R. Co., 4 Abb. Dec. (N. Y.) 262, 4 Keyes (N. Y.) 180; Kellogg *v.* Witherhead, 4 Hun (N. Y.) 273, 6 Thomps. & C. (N. Y.) 525; Bates *v.* Coster, 1 Hun (N. Y.) 400, 3 Thomps. & C. (N. Y.) 580; Cooke *v.* Millard, 5 Lans. (N. Y.) 243 [*affirmed* in 65 N. Y. 352, 22 Am. Rep. 619]; Fitzsimmons *v.* Woodruff, 1 Thomps. & C. (N. Y.) 3; Flint *v.* Corbitt, 6 Daly (N. Y.) 429; Shrimpton *v.* Dworsky, 2 Misc. (N. Y.) 123, 21 N. Y. Suppl. 461; Dedrich *v.* Leonard, 3 N. Y. St. 780; Downs *v.* Ross, 23 Wend. (N. Y.) 270.

In Colorado the cases are in accord with this portion of the New York rule. Ellis *v.* Denver, etc., R. Co., 7 Colo. App. 350, 43 Pac. 457.

76. Millar *v.* Fitzgibbons, 9 Daly (N. Y.) 505; Seymour *v.* Davis, 2 Sandf. (N. Y.) 239; Joy *v.* Schloss, 15 Abb. N. Cas. (N. Y.) 373 [*reversed* in 12 Daly 533, 2 N. Y. City Ct. 132].

77. *Alabama.*—See Sawyer *v.* Ware, 36 Ala.

jurisdictions adopt the rule that where the contract primarily contemplates work and labor to be done upon goods to be sold so as to make work and labor the essential consideration, the contract is not within the statute;[78] but in England and Canada, where the contract is such that a chattel in which the buyer had no previous title is ultimately to be delivered to him, the contract is one for the sale of goods and within the statute, regardless of the amount of labor and talent to be expended in finishing the chattel.[79]

3. Nature of Property — a. In General. The language of the English statute and the statutes of many of the United States is "goods, wares, or merchandise." The language in other states is "personal property," and in yet others "goods, chattels, or things in action."[80] These expressions are held, in England, to include every kind of tangible, movable personal property, and in some of the United States certain intangible personal property as well.[81]

675, where the court, before the repeal of the statute, construed it by reference to its language without entering upon a discussion of the authorities.

Michigan.— Turner *v.* Mason, 65 Mich. 662, 32 N. W. 846.

Minnesota.— Brown, etc., Co. *v.* Wunder, 64 Minn. 450, 67 N. W. 357, 32 L. R. A. 593; Russell *v.* Wisconsin, etc., R. Co., 39 Minn. 145, 39 N. W. 302; Brown *v.* Sanborn, 21 Minn. 402; Phipps *v.* McFarlane, 3 Minn. 109, 74 Am. Dec. 743.

New Jersey.— Ronbicek *v.* Haddad, 67 N. J. L. 522, 51 Atl. 938 (discussing a contract made in New York); Mechanical Boiler Cleaner Co. *v.* Kellner, 62 N. J. L. 544, 43 Atl. 599; Pawelski *v.* Hargreaves, 47 N. J. L. 334, 54 Am. Rep. 162; Finney *v.* Apgar, 31 N. J. L. 266.

Oregon.— Hientz *v.* Burkhard, 29 Oreg. 55, 43 Pac. 866, 54 Am. St. Rep. 777, 31 L. R. A. 508.

Wisconsin.— Gross *v.* Heckert, 120 Wis. 314, 97 N. W. 952; Central Lithographing, etc., Co. *v.* Moore, 75 Wis. 170, 43 N. W. 1124, 17 Am. St. Rep. 186, 6 L. R. A. 788; Hanson *v.* Roter, 64 Wis. 622, 25 N. W. 530; Meincke *v.* Falk, 55 Wis. 427, 13 N. W. 545, 42 Am. Rep. 722. The earlier case of Hardell *v.* McClure, 2 Pinn. 289, 1 Chandl. 271, adopts the English rule stated *post* in the text.

78. *Missouri.*— Pratt *v.* Miller, 109 Mo. 78, 18 S. W. 965, 32 Am. St. Rep. 656; Fairbanks *v.* Richardson Drug Co., 42 Mo. App. 262; Burrell *v.* Highleyman, 33 Mo. App. 183; Wharton *v.* Missouri Car Foundry Co., 1 Mo. App. 577. These cases express approbation of the English rule in Lee *v.* Griffen, 1 B. & S. 272, 7 Jur. N. S. 1302, 30 L. J. Q. B. 252, 4 L. T. Rep. N. S. 546, 9 Wkly. Rep. 702, 101 E. C. L. 272, but do not go the length of that case on their facts.

New Hampshire.— Prescott *v.* Locke, 51 N. H. 94, 12 Am. Rep. 55; Pitkin *v.* Noyes, 48 N. H. 294, 97 Am. Dec. 615, 2 Am. Rep. 218; Gilman *v.* Hill, 36 N. H. 311.

South Carolina.— Suber *v.* Pullin, 1 S. C. 273; Barbour *v.* Disher, 11 Rich. 347; Winship *v.* Buzzard, 9 Rich. 103; Bird *v.* Muhlinbrink, 1 Rich. 199, 44 Am. Dec. 247; Gadsden *v.* Lance, McMull. Eq. 87, 37 Am. Dec. 548.

Washington.— Puget Sound Mach. Depot *v.* Rigby, 13 Wash. 264, 43 Pac. 39; Fox *v.* Utter, 6 Wash. 299, 33 Pac. 354; Puget Sound Iron Co. *v.* Worthington, 2 Wash. Terr. 472, 7 Pac. 882, 886.

Wyoming.— Williams-Hayward Shoe Co. *v.* Brooks, 9 Wyo. 424, 64 Pac. 342.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 147 *et seq.*

Statutory exceptions to the rule stated in the text exist in some jurisdictions, taking certain contracts of sale out of the statute of frauds. Cal. Civ. Code (1903), § 1740, excepts from the statute agreements to manufacture goods from materials furnished by the manufacturer or by a third person. Flynn *v.* Dougherty, 91 Cal. 669, 2 Pac. 1080, 14 L. R. A. 230. Iowa Code (1897), § 4626, excepts contracts where the article sold is not at the time of the contract owned by the seller and ready for delivery, but labor, skill, or money is necessarily to be expended in producing or procuring it. Dierson *v.* Petersmeyer, 109 Iowa 233, 80 N. W. 389; Lewis *v.* Evans, 108 Iowa 296, 79 N. W. 81; Mighell *v.* Dougherty, 86 Iowa 480, 53 N. W. 402, 41 Am. St. Rep. 511, 17 L. R. A. 755; Brown *v.* Allen, 35 Iowa 306; Partridge *v.* Wilsey, 8 Iowa 459; Bennett *v.* Nye, 4 Greene (Iowa) 410.

79. Lee *v.* Griffin, 1 B. & S. 272, 7 Jur. N. S. 1302, 30 L. J. Q. B. 252, 4 L. T. Rep. N. S. 546, 9 Wkly. Rep. 702, 101 E. C. L. 272; Canada Bank Note Engraving, etc., Co. *v.* Toronto R. Co., 22 Ont. App. 462; Wolfenden *v.* Wilson, 33 U. C. Q. B. 442. Prior cases in England developed various constructions of the statute. The simple rule of Lee *v.* Griffin, *supra*, is perhaps a result of 9 Geo. IV, c. 14, § 7, providing that the statute of frauds shall extend to all contracts for the sale of goods of the statutory value, "notwithstanding the Goods may be intended to be delivered at some future Time, or may not at the Time of such Contract be actually made, procured, or provided, or fit or ready for Delivery, or some Act may be requisite for the making or completing thereof, or rendering the same fit for Delivery."

80. See the statutes of the different states.

81. Jersey City *v.* Harrison, (N. J. Sup. 1904) 58 Atl. 100 (contract for water-supply); Peabody *v.* Speyers, 56 N. Y. 230

b. Choses in Action. In some jurisdictions, although not in England,[82] the statute is held to include promissory notes of third persons,[83] bonds,[84] and other choses in action.[85]

c. Stocks. Corporate stock is a species of intangible personal property quite generally held to be within the statute in the United States,[86] but not in England.[87]

d. Products of the Soil. The terms "goods, wares, and merchandise," as used in the seventeenth section of the statute of frauds, includes *fructus industriales*, that is, crops annually produced by human labor, whether or not growing or to remain in the soil;[88] but it does not include *fructus naturales*, that is,

(gold); Smith *v.* Bouck, 33 Wis. 19 (land-scrip). And see *infra*, VIII, A, 3, b–e.

"Goods, wares, or merchandise" does not include an interest in an invention before letters patent have been obtained (Somerby *v.* Buntin, 118 Mass. 285, 19 Am. Rep. 459; Dalzell *v.* Dueber Watch-Case Mfg. Co., 149 U. S. 315, 13 S. Ct. 886, 37 L. ed. 749; Cook *v.* Sterling Electric Co., 118 Fed. 45), or the interest of a partner in the firm (Vincent *v.* Vieths, 60 Mo. App. 9).

82. Colonial Bank *v.* Whinney, 30 Ch. D. 261.

83. Baldwin *v.* Williams, 3 Metc. (Mass.) 365; Riggs *v.* Magruder, 20 Fed. Cas. No. 11,828, 2 Cranch C. C. 143. *Contra*, Vawter *v.* Griffin, 40 Ind. 593; Howe *v.* Jones, 57 Iowa 130, 8 N. W. 451, 10 N. W. 299; Whittemore *v.* Gibbs, 24 N. H. 484.

84. Greenwood *v.* Law, 55 N. J. L. 168, 26 Atl. 134, 19 L. R. A. 688; Hagar *v.* King, 38 Barb. (N. Y.) 200.

85. *Georgia.*—Walker *v.* Supple, 54 Ga. 178, accounts. *Contra*, Beers *v.* Crowell, Dudley 28, treasury checks.

Maine.— Gooch *v.* Holmes, 41 Me. 523.

New Jersey.— French *v.* Schoonmaker, 69 N. J. L. 6, 54 Atl. 225, debt.

New York.— People *v.* Beebe, 1 Barb. 379; Talmadge *v.* Spofford, 41 N. Y. Super. Ct. 428. See also Kessell *v.* Albetis, 56 Barb. 362 (holding that an assignee by parol of a claim for the price of goods sold can maintain a suit against the purchaser of the goods); Greenberg *v.* Davidson, 39 Misc. 796, 81 N. Y. Suppl. 345.

Wisconsin.— Alexander *v.* Oneida County, 76 Wis. 56, 45 N. W. 21.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 144.

Contra.— Howe *v.* Jones, 57 Iowa 130, 8 N. W. 451, 10 N. W. 299.

Necessity of writing on assignment of chose in action see also ASSIGNMENTS, 4 Cyc. 39.

86. *California.*— Mayer *v.* Child, 47 Cal. 142.

Connecticut.— North *v.* Forest, 15 Conn. 400.

Florida.— Southern L. Ins., etc., Co. *v.* Cole, 4 Fla. 359.

Maine.— Pray *v.* Mitchell, 60 Me. 430.

Maryland.— Colvin *v.* Williams, 3 Harr. & J. 38, 5 Am. Dec. 417.

Massachusetts.— Boardman *v.* Cutter, 128 Mass. 388; Tisdale *v.* Harris, 20 Pick. 9.

Missouri.—Bernhardt *v.* Walls, 29 Mo. App. 206; Fine *v.* Hornsby, 2 Mo. App. 61.

New York.— Johnston *v.* Trask, 40 Hun 415 [*affirmed* in 116 N. Y. 136, 22 N. E. 377, 15 Am. St. Rep. 394, 5 L. R. A. 630]; Wooster *v.* Sage, 6 Hun 285 [*affirmed* in 67 N. Y. 67]; Fitzpatrick *v.* Woodruff, 48 N. Y. Super. Ct. 556 [*affirmed* in 96 N. Y. 561]; Nichols *v.* Clark, 40 Misc. 107, 81 N. Y. Suppl. 262.

Wisconsin.— Spear *v.* Bach, 82 Wis. 192, 52 N. W. 97.

United States.— Huntley *v.* Huntley, 114 U. S. 394, 5 S. Ct. 884, 29 L. ed. 130.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 145.

Contra.— Rogers *v.* Burr, 105 Ga. 432, 31 S. E. 438, 70 Am. St. Rep. 50.

A right to a subscription for stock is not included in "goods, wares and merchandise." Gadsden *v.* Lance, McMull. Eq. (S. C.) 87, 37 Am. Dec. 548.

Unissued stock is not included in "goods, wares, and merchandise." Webb *v.* Baltimore, etc., R. Co., 77 Md. 92, 26 Atl. 113, 39 Am. St. Rep. 396; Meehan *v.* Sharp, 151 Mass. 564, 24 N. E. 907.

87. Humble *v.* Mitchell, 11 A. & E. 205, 9 L. J. K. B. 29, 3 P. & D. 141, 2 R. & Can. Cas. 70, 39 E. C. L. 130; Bowlby *v.* Bell, 3 C. B. 284, 16 L. J. C. P. 18, 54 E. C. L. 284; Tempest *v.* Kilner, 3 C. B. 249, 54 E. C. L. 249; Knight *v.* Barber, 2 C. & K. 333, 10 Jur. 929; 16 L. J. Exch. 18, 16 M. & W. 66, 61 E. C. L. 333; Watson *v.* Spratley, 2 C. L. R. 1434, 10 Exch. 222, 24 L. J. Exch. 53, 2 Wkly. Rep. 627; Heseltine *v.* Siggers, 1 Exch. 856, 18 L. J. Exch. 166; Bradley *v.* Holdsworth, 1 H. & H. 156, 7 L. J. Exch. 153, 3 M. & W. 422; Duncuft *v.* Albrecht, 12 Sim. 189, 35 Eng. Ch. 162.

88. *California.*— Marshall *v.* Ferguson, 23 Cal. 65.

Massachusetts.— Ross *v.* Welch, 11 Gray 235.

Missouri.— Lyle *v.* Shinnebarger, 17 Mo. App. 66, under Nebraska statute.

New Jersey.— Westbrook *v.* Eager, 16 N. J. L. 81.

New York.— Frank *v.* Harrington, 36 Barb. 415.

England.— Jones *v.* Flint, 10 A. & E. 753, 9 L. J. Q. B. 252, 2 P. & D. 594, 37 E. C. L. 396; Evans *v.* Roberts, 5 B. & C. 829, 8 D. & R. 611, 4 L. J. K. B. O. S. 313, 11 E. C. L. 700.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 146.

Fructus industriales as personalty see also *supra*, VII, C, 3, b.

the natural products of the soil, such as timber or grass growing in the land and not severed from it.[89]

e. Fixtures. A sale of fixtures to be carried away by the buyer is apparently a sale of goods, wares, and merchandise within the statute,[90] but a contract to install fixtures or make improvements on land is not.[91]

B. Acceptance and Receipt of Part of Goods — 1. General Rules. By the terms of the original statute of frauds it does not apply to a contract for sale if the "buyer shall accept part of the goods so sold, and actually receive the same," and this provision is generally found in the statutes of the different American states.[92] Consequently an acceptance and receipt of part of the goods takes the case out of the statute.[93] However, the statutes generally require both

89. Marshall *v.* Green, 1 C. P. D. 35, 45 L. J. C. P. 153, 33 L. T. Rep. N. S. 404, 24 Wkly. Rep. 175, 1 Wm. Saund. 395; Jones *v.* Flint, 10 A. & E. 753, 9 L. J. Q. B. 252, 2 P. & D. 594, 37 E. C. L. 396; Evans *v.* Roberts, 5 B. & C. 829, 8 D. & R. 611, 4 L. J. K. B. O. S. 313, 11 E. C. L. 700; Rodwell *v.* Phillips, 1 Dowl. P. C. N. S. 885, 11 L. J. Exch. 217, 9 M. & W. 501; Carrington *v.* Roots, 1 Jur. 85, 6 L. J. Exch. 95, 2 M. & W. 248; Scorell *v.* Boxall, 1 Y. & J. 396.

If they are to be immediately severed, there is some authority for holding timber, grass, and the like to be within the statute. Wright *v.* Schneider, 14 Ind. 527; Leonard *v.* Medford, 85 Md. 666, 37 Atl. 365, 37 L. R. A. 449; Smith *v.* Bryan, 5 Md. 141, 59 Am. Dec. 104; Marshall *v.* Green, 1 C. P. D. 35, 45 L. J. C. P. 153, 33 L. T. Rep. N. S. 404, 24 Wkly. Rep. 175, 1 Wm. Saund. 395.

Fructus naturales as realty see also *supra*, VII, A, 2, c; VII, C, 3, c.

90. Bostwick *v.* Leach, 3 Day (Conn.) 476; Strong *v.* Doyle, 110 Mass. 92; Durkee *v.* Powell, 75 N. Y. App. Div. 176, 77 N. Y. Suppl. 368; Lawrence *v.* Woods, 4 Bosw. (N. Y.) 354.

Otherwise of a sale of fixtures by the tenant to the landlord. Lee *v.* Gaskell, 1 Q. B. D. 700, 45 L. J. Q. B. 540, 34 L. T. Rep. N. S. 759, 24 Wkly. Rep. 824; Hallen *v.* Runder, 1 C. M. & R. 266, 3 L. J. Exch. 260, 3 Tyrw. 959. See Powell *v.* McAshan, 28 Mo. 70.

91. *Michigan.*— Underfeed Stoker Co. *v.* Detroit Salt Co., 135 Mich. 431, 97 N. W. 959.

Minnesota.— Brown, etc., Co. *v.* Wunder, 64 Minn. 450, 67 N. W. 357, 32 L. R. A. 593.

New York.— Blewitt *v.* Olin, 2 N. Y. Suppl. 402.

Vermont.— Scales *v.* Wiley, 68 Vt. 39, 33 Atl. 771.

England.— Lee *v.* Gaskell, 1 Q. B. D. 700, 45 L. J. Q. B. 540, 34 L. T. Rep. N. S. 759, 24 Wkly. Rep. 824.

92. See the statutes of the different states.

93. *Arkansas.*— Swigart *v.* McGee, 19 Ark. 473; Fagan *v.* Faulkner, 5 Ark. 161.

California.— Terney *v.* Doten, 70 Cal. 399, 11 Pac. 743; Jamison *v.* Simon, 68 Cal. 17, 8 Pac. 502; Gardet *v.* Belknap, 1 Cal. 399.

Colorado.— Sloan Saw Mill, etc., Co. *v.* Guttshall, 3 Colo. 8.

Connecticut.— Calkins *v.* Lockwood, 17 Conn. 154, 42 Am. Dec. 729.

Georgia.— Johnson *v.* Watson, 1 Ga. 348.

Indiana.— Dehority *v.* Paxson, 97 Ind. 253; Barkalow *v.* Pfeiffer, 38 Ind. 214; Pierce *v.* Gibson, 2 Ind. 408; Galbraith *v.* Holmes, 15 Ind. App. 34, 43 N. E. 575.

Iowa.— Leggett, etc., Tobacco Co. *v.* Collier, 89 Iowa 144, 56 N. W. 417; Brown *v.* Wade, 42 Iowa 647.

Maine.— Weeks *v.* Crie, 94 Me. 458, 48 Atl. 107, 80 Am. St. Rep. 410; Young *v.* Blaisdell, 60 Me. 272; Bush *v.* Holmes, 53 Me. 417; Edwards *v.* Grand Trunk R. Co., 48 Me. 379; Davis *v.* Moore, 13 Me. 424; Phillips *v.* Hunnewell, 4 Me. 376.

Maryland.— Jones *v.* Mechanics' Bank, 29 Md. 287, 96 Am. Dec. 533.

Massachusetts.— Rodgers *v.* Jones, 129 Mass. 120; Townsend *v.* Hargraves, 118 Mass. 325; Davis *v.* Eastman, 1 Allen 422; Ross *v.* Welch, 11 Gray 235; Damon *v.* Osborn, 1 Pick. 476, 11 Am. Dec. 229.

Michigan.— Hudson *v.* Emmons, 107 Mich. 549, 65 N. W. 542; Wilcox *v.* Young, 66 Mich. 687, 33 N. W. 765; Whaley *v.* Gale, 48 Mich. 193, 12 N. W. 33; Scotten *v.* Sutter, 37 Mich. 526; Hill *v.* Chambers, 30 Mich. 422.

Mississippi.— Mississippi Cotton Oil Co. *v.* Smith, (1902) 33 So. 443.

Missouri.— Rickey *v.* Tenbroeck, 63 Mo. 563; Harvey *v.* St. Louis Butchers' Joint Stock, etc., Assoc., 39 Mo. 211; Houghtaling *v.* Ball, 19 Mo. 84, 59 Am. Dec. 331; Earl Fruit Co. *v.* McKinney, 65 Mo. App. 220; Montgomery *v.* Gann, 51 Mo. App. 187; Austin *v.* Boyd, 23 Mo. App. 317; Lyle *v.* Shinebarger, 17 Mo. App. 66.

Nebraska.— Wyler *v.* Rotschild, 53 Nebr. 566, 74 N. W. 41; Powder River Live Stock Co. *v.* Lamb, 38 Nebr. 339, 56 N. W. 1019; Farmer *v.* Gray, 16 Nebr. 401, 20 N. W. 276.

New Hampshire.—Towne *v.* Davis, 66 N. H. 396, 22 Atl. 450; Pinkham *v.* Mattox, 53 N. H. 600; Gault *v.* Brown, 48 N. H. 183, 2 Am. Rep. 210; Gilman *v.* Hill, 36 N. H. 311; Shepnerd *v.* Pressey, 32 N. H. 49.

New Jersey.— Matthiessen, etc., Refining Co. *v.* McMahon, 38 N. J. L. 536; Field *v.* Runk, 22 N. J. L. 525.

New York.— Schultz *v.* Bradley, 57 N. Y. 646; McKnight *v.* Dunlop, 5 N. Y. 537, 55 Am. Dec. 370; Bristol *v.* Mente, 79 N. Y. App. Div. 67, 80 N. Y. Suppl. 52 [*affirmed* in 178 N. Y. 599, 70 N. E. 1096]; Durkee *v.* Powell, 75 N. Y. App. Div. 176, 77 N. Y.

acceptance and receipt in order to make an oral contract valid;[94] and the acceptance and receipt must be of a part of the goods actually bought and sold.[95] There

Suppl. 368; Fish's Eddy Chemical Co. *v.* Stevens, 92 Hun 179, 36 N. Y. Suppl. 397; Baumann *v.* Moseley, 73 Hun 40, 25 N. Y. Suppl. 882 [*affirmed* in 145 N. Y. 620, 40 N. E. 163]; Hallenbeck *v.* Cochran, 20 Hun 416; Armstrong *v.* Cushney, 43 Barb. 340; Buskirk *v.* Cleveland, 41 Barb. 610; Woodford *v.* Patterson, 32 Barb. 630; Brayton *v.* Sherman, 1 Silv. Sup. 420, 5 N. Y. Suppl. 602; Van Woert *v.* Albany, etc., R. Co., 1 Thomps. & C. 256 [*affirmed* in 67 N. Y. 538]; Bradley *v.* Wheeler, 4 Bosw. 18 [*affirmed* in 44 N. Y. 495]; Sale *v.* Darragh, 2 Hilt. 184; Chapin *v.* Potter, 1 Hilt. 366; Ralph *v.* Stuart, 4 E. D. Smith 627; Dennison *v.* Carnahan, 1 E. D. Smith 144; Joseph *v.* Struller, 25 Misc. 173, 54 N. Y. Suppl. 162; Mackie *v.* Egan, 6 Misc. 95, 26 N. Y. Suppl. 13; Shrimpton *v.* Dworsky, 2 Misc. 123, 21 N. Y. Suppl. 461; Koster *v.* Koedding, 68 N. Y. Suppl. 794; Jones *v.* Reynolds, 7 N. Y. St. 586; Good *v.* Curtiss, 31 How. Pr. 4; Vincent *v.* Germond, 11 Johns. 283. See, however, Lewin *v.* Stewart, 10 How. Pr. 509 [*reversed* in 17 How. Pr. 5].

North Carolina.— White *v.* White, 20 N. C. 536.

North Dakota.— Dinnie *v.* Johnson, 8 N. D. 153, 77 N. W. 612.

Oregon.— Duzan *v.* Meserve, 24 Oreg. 523, 34 Pac. 548; Galvin *v.* MacKenzie, 21 Oreg. 184, 27 Pac. 1039; Meyer *v.* Thompson, 16 Oreg. 194, 18 Pac. 16.

South Carolina.— Smith *v.* Evans, 36 S. C. 69, 15 S. E. 344.

Vermont.— Wilkinson *v.* Wilkinson, 61 Vt. 409, 17 Atl. 795; Smith *v.* Fisher, 59 Vt. 53, 7 Atl. 816; Gibbs *v.* Benjamin, 45 Vt. 124; Danforth *v.* Walker, 40 Vt. 257; Richardson *v.* Squires, 37 Vt. 640; Gorham *v.* Fisher, 30 Vt. 428.

Wisconsin.— Crosby Hardwood Co. *v.* Tresster, 90 Wis. 412, 63 N. W. 1057; Spear *v.* Bach, 82 Wis. 192, 52 N. W. 97; Alexander *v.* Oneida County, 76 Wis. 56, 45 N. W. 21; Schmidt *v.* Thomas, 75 Wis. 529, 44 N. W. 771; Amson *v.* Dreher, 35 Wis. 615; Hill *v.* McDonald, 17 Wis. 97; Cotterill *v.* Stevens, 10 Wis. 422.

United States.— Hinchman *v.* Lincoln, 124 U. S. 38, 8 S. Ct. 369, 31 L. ed. 337; Huntley *v.* Huntley, 114 U. S. 394, 5 S. Ct. 884, 29 L. ed. 130; Garfield *v.* Paris, 96 U. S. 557, 24 L. ed. 821.

England.— Page *v.* Morgan, 15 Q. B. D. 228, 54 L. J. Q. B. 434, 53 L. T. Rep. N. S. 126, 33 Wkly. Rep. 793; Scott *v.* Eastern Counties R. Co., 7 Jur. 996, 13 L. J. Exch. 14, 12 M. & W. 33; Gilliat *v.* Roberts, 19 L. J. Exch. 410 (even though some of the goods are not completed); Elliott *v.* Thomas, 7 L. J. Exch. 129, 3 M. & W. 170.

See 23 Cent. Dig. tit. "Frauds, Statute of," §§ 162, 165, 174.

Effect as validating entire contract.— If an oral contract of sale rendered valid by acceptance and receipt or part payment contains a provision that the seller will take back the goods upon a condition, such as the buyer's becoming dissatisfied with them, such provision is a part of the contract and valid.

Georgia.— Henderson *v.* Touchstone, 22 Ga. 1.

Massachusetts.— Hilliard *v.* Weeks, 173 Mass. 304, 53 N. E. 818.

Nebraska.— Fremont Carriage Mfg. Co. *v.* Thomsen, 65 Nebr. 370, 91 N. W. 376.

New York.— Johnston *v.* Trask, 40 Hun 415 [*affirmed* in 116 N. Y. 136, 22 N. E. 377, 15 Am. St. Rep. 394, 5 L. R. A. 630]; Wooster *v.* Sage, 6 Hun 285 [*affirmed* in 67 N. Y. 67]; Fitzpatrick *v.* Woodruff, 48 N. Y. Super. Ct. 556 [*affirmed* in 96 N. Y. 561, and *overruling* Hagar *v.* King, 38 Barb. 200]; Paige *v.* Clough, 1 Alb. L. J. 162 [*affirmed* in 49 N. Y. 664].

Vermont.— Fay *v.* Wheeler, 44 Vt. 292.

England.— Williams *v.* Burgess, 10 A. & E. 499, 8 L. J. Q. B. 286, 2 P. & D. 422, 37 E. C. L. 271.

94. *California.*— Dauphiny *v.* Red Poll Creamery Co., 123 Cal. 548, 56 Pac. 451; Jamison *v.* Simon, 68 Cal. 17, 8 Pac. 502.

Maine.— Edwards *v.* Grand Trunk R. Co., 48 Me. 379.

Massachusetts.— Rodgers *v.* Jones, 129 Mass. 420; Howard *v.* Borden, 13 Allen 299.

Missouri.— Wainscott *v.* Kellog, 84 Mo. App. 621.

New York.— Caulkins *v.* Hellman, 47 N. Y. 449, 7 Am. Rep. 461; Rodgers *v.* Phillips, 40 N. Y. 519; Brewster *v.* Taylor, 39 N. Y. Super. Ct. 159 [*affirmed* in 63 N. Y. 587]; Clark *v.* Tucker, 2 Sandf. 157; Dedrich *v.* Leonard, 3 N. Y. St. 780.

North Dakota.— Dinnie *v.* Johnson, 8 N. D. 153, 77 N. W. 612.

Vermont.— Gibbs *v.* Benjamin, 45 Vt. 124.

England.— Phillips *v.* Bistolli, 2 B. & C. 511, 3 D. & R. 822, 2 L. J. K. B. O. S. 116, 26 Rev. Rep. 433, 9 E. C. L. 225; Smith *v.* Hudson, 6 B. & S. 431, 11 Jur. N. S. 622, 34 L. J. Q. B. 145, 12 L. T. Rep. N. S. 377, 13 Wkly. Rep. 683, 118 E. C. L. 431; Kibble *v.* Gough, 38 L. T. Rep. N. S. 204.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 166.

95. McCormick Harvesting Mach. Co. *v.* Cusack, 116 Mich. 647, 74 N. W. 1005, holding that where an agent, without authority but in order to bring about a sale, offers the buyer an additional article, its acceptance and receipt does not take the contract out of the statute.

An acceptance and receipt of samples, if they are not a part of the goods sold, is not sufficient to take the transaction out of the statute. Moore *v.* Love, 57 Miss. 765; Carver *v.* Lane, 4 E. D. Smith (N. Y.) 168; Johnson *v.* Smith, Anth. N. P. (N. Y.) 81; Scott *v.* Melady, 27 Ont. App. 193. Otherwise if the samples are a part of the property sold. Brock *v.* Knower, 37 Hun (N. Y.) 609; Gard-

may be a sufficient acceptance and receipt under the statute, although the goods are to be later weighed or measured to determine the price,[96] and although the buyer is not thereby precluded from objecting to the quantity or quality of the goods unaccepted.[97] The acceptance and receipt need not be contemporary with the making of the agreement but may take place at any time before the contract is sought to be enforced.[98] The receipt and acceptance may be sufficient, although occurring after a disaffirmance of the contract by the buyer,[99] but not after a disaffirmance by the seller;[1] and they are not invalidated by a subsequent return of the goods accepted and received.[2] The acceptance and receipt may be by an agent of the buyer,[3] or by one of a number of joint buyers.[4]

2. Acceptance — a. What Constitutes in General.[5] The acceptance required by the statute is some act or conduct by the buyer manifesting an intention to accept the goods as satisfying the contract, or part of the goods as satisfying the contract *pro tanto*.[6] In some jurisdictions, however, an absolute acceptance of

ner *v.* Grout, 2 C. B. N. S. 340, 89 E. C. L. 340; Hinde *v.* Whitehouse, 7 East 558, 3 Smith K. B. 528, 8 Rev. Rep. 676; Klinitz *v.* Surry, 5 Esp. 267, 8 Rev. Rep. 853.

96. Daniel *v.* Hannah, 106 Ga. 91, 31 S. E. 734; Macomber *v.* Parker, 13 Pick. (Mass.) 175; Bass *v.* Walsh, 39 Mo. 192; Wadhams *v.* Balfour, 32 Oreg. 313, 51 Pac. 642.

97. Meyer *v.* Thompson., 16 Oreg. 194, 18 Pac. 16; Garfield *v.* Paris, 96 U. S. 557, 24 L. ed. 821; Page *v.* Morgan, 15 Q. B. D. 228, 54 L. J. Q. B. 434, 53 L. T. Rep. N. S. 126, 33 Wkly. Rep. 793; Morton *v.* Tibbett, 15 Q. B. 428, 14 Jur. 669, 19 L. J. Q. B. 382, 69 E. C. L. 428; Kibble *v.* Gough, 38 L. T. Rep. N. S. 204. *Contra*, Stone *v.* Browning, 68 N. Y. 598; Caulkins *v.* Hellman, 47 N. Y. 449, 7 Am. Rep. 461. And see Simpson *v.* Krumdich, 28 Minn. 352, 10 N. W. 18.

Conditional acceptance see also *infra*, VIII, B, 2, a.

98. *Connecticut.*— Buckingham *v.* Osborne, 44 Conn. 133.

Idaho.— Coffin *v.* Bradbury, 3 Ida. 770, 35 Pac. 715, 95 Am. St. Rep. 37.

Maine.—Bush *v.* Holmes, 53 Me. 417; Davis *v.* Moore, 13 Me. 424.

Massachusetts.— Townsend *v.* Hargraves, 118 Mass. 325; Marsh *v.* Hyde, 3 Gray 331.

Minnesota.— Ortloff *v.* Klitzke, 43 Minn. 154, 44 N. W. 1085; McCarthy *v.* Nash, 14 Minn. 127.

Montana.— Slater Brick Co. *v.* Shackleton, 30 Mont. 390, 76 Pac. 805.

Nebraska.— Riley *v.* Bancroft, 51 Nebr. 864, 71 N. W. 745.

New Jersey.— Field *v.* Runk, 22 N. J. L. 525.

New York.— Jackson *v.* Tupper, 101 N. Y. 515, 5 N. E. 65; McKnight *v.* Dunlop, 5 N. Y. 537, 55 Am. Dec. 370; Petrie *v.* Dorwin, 1 Hun 617, 4 Thomps. & C. 695; Meriden Brittania Co. *v.* Zingsen, 4 Rob. 312; Sale *v.* Darragh, 2 Hilt. 184; Good *v.* Curtiss, 31 How. Pr. 4; Sprague *v.* Blake, 20 Wend. 61; Allan *v.* Aguira, 5 N. Y. Leg. Obs. 380.

Vermont.— Danforth *v.* Walker, 40 Vt. 257.

Wisconsin.— Cotterill *v.* Stevens, 10 Wis. 422.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 163.

99. Sullivan *v.* Sullivan, 70 Mich. 583, 38 N. W. 472. If, however, the buyer accepts and receives a part of the goods, but repudiates the contract as a whole, the sale is within the statute. Atherton *v.* Newhall, 123 Mass. 141, 25 Am. Rep. 47.

1. Taylor *v.* Wakefield, 6 E. & B. 765, 2 Jur. N. S. 1086, 88 E. C. L. 765.

2. Rasch *v.* Bissell, 52 Mich. 455, 18 N. W. 216; Koster *v.* Koedding, 68 N. Y. Suppl. 794; Galvin *v.* MacKenzie, 21 Oreg. 184, 27 Pac. 1039; Jackson *v.* Watts, 1 McCord (S. C.) 288.

3. *Georgia.*— Schroder *v.* Palmer Hardware Co., 88 Ga. 578, 15 S. E. 327.

Indiana.— Moore *v.* Hays, 12 Ind. App. 476, 40 N. E. 638.

Massachusetts.— Dean *v.* Tallman, 105 Mass. 443; Snow *v.* Warner, 10 Metc. 132, 43 Am. Dec. 417.

New Jersey.— Vanderbilt *v.* Central R. Co., 43 N. J. Eq. 669, 12 Atl. 188.

New York.— Barkley *v.* Rensselaer, etc., R. Co., 71 N. Y. 205; Rogers *v.* Gould, 6 Hun 229; Dows *v.* Montgomery, 5 Rob. 445; Outwater *v.* Dodge, 6 Wend. 397.

Wisconsin.— Becker *v.* Holm, 89 Wis. 86, 61 N. W. 307.

England.— Simmonds *v.* Humble, 13 C. B. N. S. 258, 9 L. T. Rep. N. S. 168, 1 New Rep. 27, 106 E. C. L. 258.

See 23 Cent. Dig. tit. "Frauds, Statute of," §§ 167, 175.

For cases holding that there was no agency to accept see Chiles *v.* Bernard, 3 Dana (Ky.) 95; Quintard *v.* Bacon, 99 Mass. 185; Walrath *v.* Richie, 5 Lans. (N. Y.) 362; Smith *v.* Mason, Anth. N. P. (N. Y.) 225.

Double agency.— The same person cannot act as agent of the seller to sell and agent of the buyer to accept and receive. Caulkins *v.* Hellman, 47 N. Y. 449, 7 Am. Rep. 461 [*reversing* 14 Hun 330].

Carrier as agent to accept and receive see *infra*, VIII, B, 2, d; VIII, B, 3, c.

4. Smith *v.* Milliken, 7 Lans. (N. Y.) 336. *Contra*, Chamberlain *v.* Dow, 10 Mich. 319.

5. Acceptance defined see 1 Cyc. 221.

6. *Georgia.*— Lloyd *v.* Wright, 25 Ga. 215.

Maine.— Young *v.* Blaisdell, 60 Me. 272.

Massachusetts.— Rodgers *v.* Jones, 129

the goods as meeting the contract is not necessary, but an acceptance which could not have been made except on admission of the contract and that the goods were sent under it may be sufficient.[7]

b. Property Already in Buyer's Possession. The fact that the property which is the subject of the contract of sale is already in the buyer's possession does not alone constitute an acceptance,[8] but there must further be some manifestation of an approval of the property as fulfilling the contract.[9]

c. Constructive Acceptance. Acceptance of goods may be inferred from conduct of the buyer thereof in treating the goods in a manner inconsistent with any other view than that he is the owner of them,[10] as where he sells the goods[11] or

Mass. 420; Atherton *v.* Newhall, 123 Mass. 141, 25 Am. Rep. 47; Remick *v.* Sandford, 120 Mass. 309; Knight *v.* Mann, 120 Mass. 219.

New Jersey.— Mechanical Boiler Cleaner Co. *v.* Kellner, 62 N. J. L. 544, 43 Atl. 599; Pawelski *v.* Hargreaves, 47 N. J. L. 334, 54 Am. Rep. 162; Matthiessen, etc., Refining Co. *v.* McMahon, 38 N. J. L. 536; Finney *v.* Apgar, 31 N. J. L. 266.

New York.— Stone *v.* Browning, 68 N. Y. 598; Caulkins *v.* Hellman, 47 N. Y. 449, 7 Am. Rep. 461; Fitzsimmons *v.* Woodruff, 1 Thomps. & C. 3; Brewster *v.* Taylor, 39 N. Y. Super. Ct. 159 [*affirmed* in 63 N. Y. 587]; Mommer *v.* Friedlander, 2 N. Y. City Ct. 247.

North Dakota.— Dinnie *v.* Johnson, 8 N. D. 153, 77 N. W. 612.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 167.

Dealing with the goods before they are ready for delivery is not an acceptance.

Indiana.—Sprankle *v.* Trulove, 22 Ind. App. 577, 54 N. E. 461.

Maine.— Edwards *v.* Brown, 98 Me. 165, 56 Atl. 654.

Maryland.— Corbett *v.* Wolford, 84 Md. 426, 35 Atl. 1088.

New Jersey.— Pawelski *v.* Hargreaves, 47 N. J. L. 334, 54 Am. Rep. 162.

England.— Maberley *v.* Sheppard, 10 Bing. 99, 2 L. J. C. P. 181, 3 Moore & S. 436, 25 E. C. L. 55.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 167.

Taking possession of the goods wrongfully (Follett Wool Co. *v.* Utica Trust, etc., Co., 84 N. Y. App. Div. 151, 82 N. Y. Suppl. 597; Baker *v.* Cuyler, 12 Barb. (N. Y.) 667; Brand *v.* Focht, 3 Rob. (N. Y.) 426, 30 How. Pr. 313 [*affirmed* in 1 Abb. Dec. 185, 3 Keyes 409, 2 Transcr. App. 357, 3 Abb. Pr. N. S. 225]) or under legal process (Washington Ice Co. *v.* Webster, 62 Me. 341, 16 Am. Rep. 462) is not an acceptance.

Goods which are selected by the purchaser are deemed to be accepted. Montgomery *v.* Gann, 51 Mo. App. 187; U. S. Reflector Co. *v.* Rushton, 7 Daly (N. Y.) 410; Vietor *v.* Stroock, 3 N. Y. Suppl. 801 [*affirmed* in 15 Daly 329, 5 N. Y. Suppl. 659, 7 N. Y. Suppl. 959]; Cusack *v.* Robinson, 1 B. & S. 299, 7 Jur. N. S. 542, 30 L. J. Q. B. 261, 4 L. T. Rep. N. S. 506, 9 Wkly. Rep. 735, 101 E. C. L. 299.

7. Smith *v.* Stoller, 26 Wis. 671; Page *v.* Morgan, 15 Q. B. D. 228, 54 L. J. Q. B. 434, 53 L. T. Rep. N. S. 126, 33 Wkly. Rep. 793; Morton *v.* Tibbett, 15 Q. B. 428, 14 Jur. 669, 19 L. J. Q. B. 382, 69 E. C. L. 428; Rickard *v.* Moore, 38 L. T. Rep. N. S. 841; Kibble *v.* Gough, 38 L. T. Rep. N. S. 204. In Taylor *v.* Smith, [1893] 2 Q. B. 65, 61 L. J. Q. B. 331, 67 L. T. Rep. N. S. 39, 40 Wkly. Rep. 486, the court, sitting as judges of fact, held that an inspection of the goods did not amount to an acceptance.

Conditional acceptance see *supra*, VIII, B, 1.

8. Dorsey *v.* Pike, 50 Hun (N. Y.) 534, 3 N. Y. Suppl. 730; *In re* Hoover, 33 Hun (N. Y.) 553.

9. *Maryland.*— Smith *v.* Bryan, 5 Md. 141, 59 Am. Dec. 104.

Massachusetts.— Norton *v.* Simonds, 124 Mass. 19.

New York.— Timoney *v.* Hoppock, 13 N. Y. Civ. Proc. 361.

Washington.— Reinhart *v.* Gregg, 8 Wash. 191, 35 Pac. 1075.

Wisconsin.— Snider *v.* Thrall, 56 Wis. 674, 14 N. W. 814; Couillard *v.* Johnson, 24 Wis. 533.

England.— Edan *v.* Dudfield, 1 Q. B. 302, 5 Jur. 317, 4 P. & D. 656, 41 E. C. L. 551; Lillywhite *v.* Devereux, 15 M. & W. 285.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 168.

10. Bulkley *v.* Waterman, 13 Conn. 328; Dyer *v.* Libby, 61 Me. 45; Davis *v.* Moore, 13 Me. 424; Leonard *v.* Medford, 85 Md. 666, 37 Atl. 365, 37 L. R. A. 449; Hewes *v.* Jordan, 39 Md. 472, 17 Am. Rep. 578; Beaumont *v.* Brengeri, 5 C. B. 301, 57 E. C. L. 301; Parker *v.* Wallis, 5 E. & B. 21, 3 Wkly. Rep. 417, 85 E. C. L. 21.

Dealing with the bill of lading of the goods may justify an inference of acceptance. Meredith *v.* Meigh, 2 E. & B. 364, 17 Jur. 649, 22 L. J. Q. B. 401, 1 Wkly. Rep. 368, 75 E. C. L. 364; Currie *v.* Anderson, 2 E. & E. 592, 6 Jur. N. S. 442, 29 L. J. Q. B. 87, 8 Wkly. Rep. 274, 105 E. C. L. 592.

11. *California.*— Marshall *v.* Ferguson, 23 Cal. 65.

Georgia.— Phillips *v.* Ocmulgee Mills, 55 Ga. 633.

Maine.— Goddard *v.* Demerritt, 48 Me. 211.

Nebraska.— Roman *v.* Bressler, 32 Nebr. 240, 49 N. W. 368.

New York.— Bowe *v.* Ellis, 3 Misc. 92, 22 N. Y. Suppl. 369.

Wisconsin.— Hill *v.* McDonald, 17 Wis. 97.

England.— Morton *v.* Tibbett, 15 Q. B. 428,

mortgages[12] the goods to a third person after their receipt. Acceptance cannot be inferred from the mere retention of the possession of the goods by the buyer for a time no longer than is necessary to enable him to examine their quantity and quality,[13] but it may be inferred from retaining the goods for a time longer than is reasonably required for such purpose.[14]

d. Carrier as Agent to Accept. Unless specially authorized a carrier is not an agent of the buyer to accept the goods,[15] even though designated by him to carry them.[16]

e. Delivery at Place Designated. A delivery of the goods by the seller at a place designated by the buyer does not constitute an acceptance of them within the statute.[17]

3. Receipt — a. What Constitutes in General. The receipt which is required

14 Jur. 669, 19 L. J. Q. B. 382, 69 E. C. L. 428; Chaplin *v.* Rogers, 1 East 192, 6 Rev. Rep. 249.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 169.

A sale in anticipation of the arrival of the goods is not necessarily an acceptance. Jones *v.* Mechanics' Bank, 29 Md. 287, 96 Am. Dec. 533.

12. Wyler *v.* Rothschild, 53 Nebr. 566, 74 N. W. 41.

13. *Maryland.*— Hewes *v.* Jordan, 39 Md. 472, 17 Am. Rep. 578.

New Jersey.— Mechanical Boiler Cleaner Co. *v.* Kellner, 62 N. J. L. 544, 43 Atl. 599.

New York.— Heermance *v.* Taylor, 14 Hun 149.

Wisconsin.— Bacon *v.* Eccles, 43 Wis. 227.

England.— Kent *v.* Huskinson, 3 B. & P. 233, 6 Rev. Rep. 777; Parker *v.* Wallis, 5 E. & B. 21, 3 Wkly. Rep. 417, 85 E. C. L. 21.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 169.

14. Standard Wall Paper Co. *v.* Towns, 72 N. H. 324, 56 Atl. 744; Lawton *v.* Keil, 61 Barb. (N. Y.) 558; Dyer *v.* Forest, 2 Abb. Pr. (N. Y.) 282; Spencer *v.* Hale, 30 Vt. 314, 73 Am. Dec. 309; Bushell *v.* Wheeler, 15 Q. B. 442 note, 14 Jur. 669, 19 L. J. Q. B. 382, 69 E. C. L. 442.

15. *Georgia.*— Denmead *v.* Glass, 30 Ga. 637; Lloyd *v.* Wright, 25 Ga. 215.

Indiana.— Keiwert *v.* Meyer, 62 Ind. 587, 30 Am. Rep. 206; Hausman *v.* Nye, 62 Ind. 485, 30 Am. Rep. 199.

Maine.— Maxwell *v.* Brown, 39 Me. 98, 63 Am. Dec. 605.

Massachusetts.— Frostberg Min. Co. *v.* New England Glass Co., 9 Cush. 115.

Michigan.— Gatiss *v.* Cyr, 134 Mich. 233, 96 N. W. 26; Rindskopf *v.* De Ruyter, 39 Mich. 1, 33 Am. Rep. 340; Grimes *v.* Van Vechten, 20 Mich. 410.

Minnesota.— Simmons Hardware Co. *v.* Mullen, 33 Minn. 195, 22 N. W. 294.

New York.— Rodgers *v.* Phillips, 40 N. Y. 519; Heermance *v.* Taylor, 14 Hun 149; Stevens *v.* Langeman, 5 N. Y. Leg. Obs. 19.

Utah.— Hudson Furniture Co. *v.* Freed Furniture, etc., Co., 10 Utah 31, 36 Pac. 132.

Vermont.— Agnew *v.* Dumas, 64 Vt. 147, 23 Atl. 634.

England.— Hanson *v.* Armitage, 5 B. & Ald. 557, 1 D. & R. 128, 24 Rev. Rep. 478, 7 E. C. L. 305.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 170.

16. *Colorado.*— Billin *v.* Henkel, 9 Colo. 394, 13 Pac. 420.

Maryland.— Jones *v.* Mechanics' Bank, 29 Md. 287, 96 Am. Dec. 533.

Massachusetts.— Johnson *v.* Cuttle, 105 Mass. 447, 7 Am. Rep. 545.

Michigan.—Smith *v.* Brennan, 62 Mich. 349, 28 N. W. 892, 4 Am. St. Rep. 867; Grimes *v.* Van Vechten, 20 Mich. 410.

Minnesota.— Waite *v.* McKelvy, 71 Minn. 167, 73 N. W. 727; Fontaine *v.* Bush, 40 Minn. 141, 41 N. W. 465, 12 Am. St. Rep. 722.

New York.— Allard *v.* Greasert, 61 N. Y. 1.

England.— Acebal *v.* Levy, 10 Bing. 376, 3 L. J. C. P. 98, 4 Moore & S. 217, 25 E. C. L. 180; Cusack *v.* Robinson, 1 B. & S. 299, 7 Jur. N. S. 542, 30 L. J. Q. B. 261, 4 L. T. Rep. N. S. 506, 9 Wkly. Rep. 735, 101 E. C. L. 299; Hunt *v.* Hecht, 8 Exch. 814, 22 L. J. Exch. 293; Norman *v.* Phillips, 9 Jur. 832, 14 L. J. Exch. 306, 14 M. & W. 277; Hopton *v.* McCarthy, 10 L. R. Ir. 266; Astey *v.* Emery, 4 M. & S. 262, 16 Rev. Rep. 460.

Canada.— Scott *v.* Melady, 27 Ont. App. 193.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 170.

Contra.— Strong *v.* Dodds, 47 Vt. 348; Spencer *v.* Hale, 30 Vt. 314, 73 Am. Dec. 309.

17. *Georgia.*— Bowers *v.* Anderson, 49 Ga. 143.

Indiana.— Galbraith *v.* Holmes, 15 Ind. App. 34, 43 N. E. 575.

Maryland.— Ft. Worth Packing Co. *v.* Consumers' Meat Co., 86 Md. 635, 39 Atl. 746.

Massachusetts.— Howard *v.* Borden, 13 Allen 299.

Missouri.— Shelton *v.* Thompson, 96 Mo. App. 327, 70 S. W. 256.

New Hampshire.— Clark *v.* Labreche, 63 N. H. 397.

New Jersey.— Finney *v.* Apgar, 31 N. J. L. 266.

New York.— Brewster *v.* Taylor, 63 N. Y. 587; Caulkins *v.* Hellman, 14 Hun 330; Cooke *v.* Millard, 5 Lans. 243 [*affirmed* in 65 N. Y. 352, 22 Am. Rep. 619].

Wisconsin.— Crosby Hardwood Co. *v.* Trester, 90 Wis. 412, 63 N. W. 1057.

England.— Hart *v.* Bush, E. B. & E. 494,

by the statute is in general the taking by the buyer of actual control of the goods after their delivery by the seller.[18]

b. Property in Seller's Possession. Although the goods remain in the possession of the seller, yet there may be a receipt by the buyer if the seller ceases to hold as owner and agrees to hold as the bailee of the buyer with his consent;[19] but to constitute a receipt in such a case the seller must have lost his lien for the price;[20] and if the sale is not accompanied by manual delivery or actual change of custody, there is authority for requiring proof of some act indicating a change in the seller's holding, proof of mere words being insufficient to show a receipt.[21]

c. Carrier as Agent to Receive. Although not an agent to accept the goods,[22] a common carrier particularly designated by the buyer is an agent to receive them.[23]

d. Goods in Possession of Seller's Bailee. In order to constitute a receipt within the statute where the goods are in the custody of a third person, there must be an assent by such custodian to hold the goods for the buyer.[24]

4 Jur. N. S. 633, 27 L. J. Q. B. 271, 96 E. C. L. 494.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 171.

Contra.— Whaley *v.* Gale, 48 Mich. 193, 12 N. W. 33.

18. *Connecticut.*— Michael *v.* Curtis, 60 Conn. 363, 22 Atl. 949.

Georgia.—Brunswick Grocery Co. *v.* Lamar, 116 Ga. 1, 42 S. E. 366.

Massachusetts.— Knight *v.* Mann, 120 Mass. 219; Dole *v.* Stimpson, 21 Pick. 384.

Michigan.— Richards *v.* Burroughs, 62 Mich. 117, 28 N. W. 755.

New York.— Shindler *v.* Houston, 1 N. Y. 261, 49 Am. Dec. 316; Brand *v.* Focht, 1 Abb. Dec. 185, 3 Keyes 409, 2 Transcr. App. 357, 5 Abb. Pr. N. S. 225; Grey *v.* Cary, 9 Daly 363.

United States.— Hinchman *v.* Lincoln, 124 U. S. 38, 8 S. Ct. 369, 31 L. ed. 337.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 175.

19. *New York.*— Rappleye *v.* Adee, 65 Barb. 589.

Vermont.— Green *v.* Merriam, 28 Vt. 801.

Wisconsin.— Janvrin *v.* Maxwell, 23 Wis. 51.

United States.— *Ex p.* Safford, 21 Fed. Cas. No. 12,212, 2 Lowell 563.

England.— Cusack *v.* Robinson, 1 B. & S. 299, 7 Jur. N. S. 542, 30 L. J. Q. B. 261, 4 L. T. Rep. N. S. 506, 9 Wkly. Rep. 735, 101 E. C. L. 299; Beaumont *v.* Brengeri, 5 C. B. 301, 57 E. C. L. 301; Marvin *v.* Wallis, 6 E. & B. 726, 2 Jur. N. S. 689, 25 L. J. Q. B. 369, 4 Wkly. Rep. 611, 88 E. C. L. 726; Castle *v.* Sworder, 6 H. & N. 828, 8 Jur. N. S. 233, 30 L. J. Exch. 310, 4 L. T. Rep. N. S. 865, 9 Wkly. Rep. 697; Elmore *v.* Stone, 1 Taunt. 458, 10 Rev. Rep. 578.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 175.

20. Devine *v.* Warner, 76 Conn. 229, 56 Atl. 562; Daniel *v.* Hannah, 106 Ga. 91, 31 S. E. 734; Safford *v.* McDonough, 120 Mass. 290; Dodsley *v.* Varley, 12 A. & E. 632, 4 P. & D. 448, 40 E. C. L. 316; Carter *v.* Toussaint, 5 B. & Ald. 855, 1 D. & R. 515, 24 Rev. Rep. 589, 7 E. C. L. 465; Tempest *v.* Fitzgerald, 3 B. & Ald. 680, 22 Rev. Rep. 526; Baldey *v.* Parker, 2 B. & C. 37, 3 D. & R. 220, 1 L. J. K. B. O. S. 229, 26 Rev. Rep. 260, 9 E. C. L. 26.

21. *California.*— Malone *v.* Plato, 22 Cal. 103.

Connecticut.— Devine *v.* Warner, 76 Conn. 229, 56 Atl. 562, 75 Conn. 375, 53 Atl. 782, 96 Am. St. Rep. 211.

Massachusetts.— Denny *v.* Williams, 5 Allen 1.

Michigan.— Gorman *v.* Brossard, 120 Mich. 611, 79 N. W. 903; Alderton *v.* Buchoz, 3 Mich. 322.

Missouri.— Kirby *v.* Johnson, 22 Mo. 354.

New Hampshire.— Shepherd *v.* Pressey, 32 N. H. 49.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 175.

22. See *supra*, VIII, B, 2, d.

23. Cross *v.* O'Donnell, 44 N. Y. 661, 4 Am. Rep. 721; Wilcox Silver Plate Co. *v.* Green, 9 Hun (N. Y.) 347 [*affirmed* in 72 N. Y. 17]; Meredith *v.* Meigh, 2 E. & B. 364, 17 Jur. 649, 22 L. J. Q. B. 401, 1 Wkly. Rep. 368, 75 E. C. L. 364.

Under a statute requiring only part delivery of the goods, delivery to a common carrier for transportation to the buyer is sufficient to take the contract out of the statute (Leggett, etc., Tobacco Co. *v.* Collier, 89 Iowa 144, 56 N. W. 417), although the carrier was not designated by the buyer (Bullock *v.* Tschergi, 13 Fed. 345, 4 McCrary 184).

24. *California.*— Stevens *v.* Stewart, 3 Cal. 140.

Maine.— Gooch *v.* Holmes, 41 Me. 523.

Massachusetts.— Boardman *v.* Spooner, 13 Allen 353, 90 Am. Dec. 196.

New York.— Marsh *v.* Rouse, 44 N. Y. 643; Dixon *v.* Buck, 42 Barb. 70.

Vermont.— Bassett *v.* Camp, 54 Vt. 232.

England.— Bentall *v.* Burn, 3 B. & C. 423, 10 E. C. L. 197, 5 D. & R. 284, 3 L. J. K. B. O. S. 42, R. & M. 107, 21 E. C. L. 712, 27 Rev. Rep. 391; Godts *v.* Rose, 17 C. B. 229, 1 Jur. N. S. 1173, 25 L. J. C. P. 61, 4 Wkly. Rep. 129, 84 E. C. L. 229; Farina *v.* Home, 16 L. J. Exch. 73, 16 M. & W. 119.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 179.

e. Symbolical Receipt. A manual delivery of the goods is not essential to constitute a receipt within the statute, but a delivery of the documents of title of the goods may be sufficient.[25] It has been held that where the seller delivers and the buyer accepts a key to a warehouse in which the goods are stored, it constitutes a sufficient receipt of the goods to take the sale out of the statute.[26]

C. Earnest or Part Payment — 1. Statutory Provisions. In addition to the exceptions in the cases of part acceptance and receipt, an oral contract for the sale of goods may by the terms of the statute be valid where the buyer gives something in earnest to bind the bargain or in part payment, although in several states the earnest clause does not appear.[27]

2. Time For Giving or Making. The earnest money need not be given or the part payment be made at the time the contract for sale is entered into,[28] unless the statute so requires, in which case earnest must be given or part payment be made at the time of the making of the contract originally or at its reaffirmance.[29]

3. Earnest. The earnest must be given absolutely, and not merely transferred and immediately returned.[30] It seems that the earnest must be of some value,[31] and must be intended as earnest.[32] Money deposited to be forfeited upon non-performance of the agreement cannot be considered earnest money.[33] The payment of earnest to the agent of several sellers, to be applied ratably to all, takes the several contracts of sale out of the statute.[34]

If, however, the goods are merely lying on the premises of, and not actually in the custody of, a third person, his assent is not necessary. Tansley *v.* Turner, 2 Bing. N. Cas. 151, 1 Hodges 267, 4 L. J. C. P. 273, 2 Scott 238, 29 E. C. L. 478; Cooper *v.* Bill, 3 H. & C. 722, 34 L. J. Exch. 161, 12 L. T. Rep. N. S. 466.

25. *Arkansas.*— King *v.* Jarman, 35 Ark. 190, 37 Am. Rep. 11.

Massachusetts.— Ullman *v.* Barnard, 7 Gray 554.

Missouri.— Mueller *v.* Guye, 12 Mo. App. 589.

New York.— Zachrisson *v.* Poppe, 3 Bosw. 171. See Smith *v.* Mason, Anth. N. P. 225, holding a delivery of a bill of parcels not to constitute both acceptance and receipt.

Oregon.— Wadhams *v.* Balfour, 32 Oreg. 313, 51 Pac. 642.

South Carolina.— Sahlman *v.* Mills, 3 Strobh. 384, 51 Am. Dec. 630.

England.— Meredith *v.* Meigh, 2 E. & B. 364, 17 Jur. 649, 22 L. J. Q. B. 401, 1 Wkly. Rep. 368, 75 E. C. L. 364.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 179.

26. Gray *v.* Davis, 10 N. Y. 285; Bailey *v.* Ogden, 3 Johns. (N. Y.) 399, 3 Am. Dec. 509. A delivery of the warehouse key may be sufficient to pass title to the goods. Wilkes *v.* Ferris, 5 Johns. (N. Y.) 335, 4 Am. Dec. 364; Chappel *v.* Marvin, 2 Aik. (Vt.) 79, 16 Am. Dec. 684.

27. See the statutes of the different states.

Statute applied see the following cases:

Idaho.— Shaw Lumber Co. *v.* Manville, 4 Ida. 369, 39 Pac. 559.

Indiana.— Baker *v.* Farmbrough, 43 Ind. 240; White *v.* Allen, 9 Ind. 561.

Iowa.— Howe *v.* Jones, 57 Iowa 130, 8 N. W. 451, 10 N. W. 299.

Massachusetts.— French *v.* Boston Nat. Bank, 179 Mass. 404, 60 N. E. 793.

Minnesota.— Burton *v.* Gage, 85 Minn. 355, 88 N. W. 997.

New York.— Walrath *v.* Ingles, 64 Barb. 265.

United States.— Cooper *v.* Bay State Gas Co., 127 Fed. 482.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 180.

Effect as validating entire contract see *supra*, page 246 note 93.

28. Thompson *v.* Alger, 12 Metc. (Mass.) 428.

29. Thompson *v.* Alger, 12 Metc. (Mass.) 428; Jackson *v.* Tupper, 101 N. Y. 515, 5 N. E. 65; Hunter *v.* Wetsell, 57 N. Y. 375, 15 Am. Rep. 508; Allis *v.* Read, 45 N. Y. 142; Allen *v.* Aguirre, 7 N. Y. 543 [*affirming* 10 Barb. 74]; Hunter *v.* Wetsell, 17 Hun 135 [*affirmed* in 84 N. Y. 549, 38 Am. Rep. 544]; Hallenbeck *v.* Cochran, 20 Hun 416; Walrath *v.* Ingles, 64 Barb. 265; Hawley *v.* Keeler, 62 Barb. 231 [*affirmed* in 53 N. Y. 114]; Webster *v.* Zielly, 52 Barb. 482; Crosby Hardwood Co. *v.* Trester, 90 Wis. 412, 63 N. W. 1057; Kerkhof *v.* Atlas Paper Co., 68 Wis. 674, 32 N. W. 766; Pike *v.* Vaughn, 39 Wis. 499; Paine *v.* Fulton, 34 Wis. 83; Bates *v.* Chesebro, 32 Wis. 594; Koewing *v.* Wilder, 128 Fed. 558, 63 C. C. A. 186; Raymond *v.* Colton, 104 Fed. 219, 43 C. C. A. 501. See, however, Bissell *v.* Balcom, 39 N. Y. 275.

30. Blenkinsop *v.* Clayton, 1 Moore C. P. 328, 7 Taunt. 597, 18 Rev. Rep. 602, 2 E. C. L. 508.

31. Goodall *v.* Skelton, 2 H. Bl. 316, 3 Rev. Rep. 379; Bach *v.* Owen, 5 T. R. 409.

32. Weir *v.* Hudnutt, 115 Ind. 525, 18 N. E. 24; Hudnut *v.* Weir, 100 Ind. 501.

33. Howe *v.* Hayward, 108 Mass. 54, 11 Am. Rep. 306; Jennings *v.* Dunham, 60 Mo. App. 635.

34. Burhans *v.* Corey, 17 Mich. 282.

4. Part Payment — a. In General. As in the case of earnest, the part payment must be actually given over.[35] An unaccepted tender of part payment will not take the contract out of the statute.[36] The part payment may be made in money,[37] or in anything of value.[38] A payment on a general account will take particular sales out of the statute,[39] but a payment for goods sold under a prior agreement will not take a subsequent agreement out of the statute.[40] Part payment to an agent of the seller is sufficient.[41]

b. Credit on Account or Discharge of Debt. A mere agreement to credit the price of the goods on an account due from the seller to the buyer is not a sufficient part payment, unless a receipt to that effect is given, or the price actually credited in the seller's books.[42] The discharge of a debt due to the buyer is a sufficient part payment.[43]

c. Payment by Check or Note. The act of giving a check drawn on funds in a bank is a good part payment;[44] but the giving of the buyer's promissory note is not sufficient.[45] The surrender of a note of the seller is a good part payment.[46]

IX. Requisites and Sufficiency of Memorandum.

A. Nature and Form — 1. In General. The fourth section of the English statute of frauds provides that no action shall be brought on the contracts enumerated "unless the agreement . . . or some memorandum or note thereof shall be in writing." The seventeenth section provides that no contract for the sale of goods "shall be allowed to be good except . . . some note or memorandum in writing of the said bargain be made." Similar provisions are found in America.[47] The statute does not exclusively require a written contract;[48] but where there is an oral contract good at common law,[49] the statute requires further a signed memorandum of its terms.[50]

35. Walrath *v.* Ingles, 64 Barb. (N. Y.) 265.

36. Edgerton *v.* Hodge, 41 Vt. 676.

37. Shaw Lumber Co. *v.* Manville, 4 Ida. 369, 39 Pac. 559; White *v.* Allen, 9 Ind. 561.

38. *Indiana.*— Kuhns *v.* Gates, 92 Ind. 66.

Iowa.— Howe *v.* Jones, 57 Iowa 130, 8 N. W. 451, 10 N. W. 299, which seems to hold services already rendered a good part payment.

Michigan.— Dallavo *v.* Richardson, 134 Mich. 226, 96 N. W. 20.

New York.— Woodford *v.* Patterson, 32 Barb. 630; White *v.* Drew, 56 How. Pr. 53, where payment was made by furnishing valuable information.

Ohio.— Post *v.* Wilson, 5 Ohio Dec. (Reprint) 368, 5 Am. L. Rec. 235, under New York statute, payment being made in services.

Vermont.— Dow *v.* Worthen, 37 Vt. 108.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 183.

39. Berwin *v.* Bolles, 183 Mass. 340, 67 N. E. 323.

40. Organ *v.* Stewart, 60 N. Y. 413 [*reversing* 1 Hun 411, 3 Thomps. & C. 598].

41. Jones *v.* Wattles, 66 Nebr. 533, 92 N. W. 765.

42. *Indiana.*—Galbraith *v.* Holmes, 15 Ind. App. 34, 43 N. E. 575.

Michigan.— Gorman *v.* Brossard, 120 Mich. 611, 79 N. W. 903.

New York.— Brabin *v.* Hyde, 32 N. Y. 519 [*reversing* 30 Barb. 265]; Wylie *v.* Kelly, 41 Barb. 594; Clark *v.* Tucker, 2 Sandf. 157.

Oregon.— Milos *v.* Covacevich, 40 Oreg. 239, 66 Pac. 914.

Wisconsin.— Norwegian Plow Co. *v.* Hanthorn, 71 Wis. 529, 37 N. W. 325.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 184.

Entry in books.— An entry on a separate memorandum book is not sufficient as a part payment. Teed *v.* Teed, 44 Barb. (N. Y.) 96. Nor is an entry on a blank leaf of an account-book. Brabin *v.* Hyde, 30 Barb. (N. Y.) 265 [*reversed* on another ground in 32 N. Y. 519].

43. Peake *v.* Conlan, 43 Iowa 297.

Novation.— A promise to pay to the seller's creditor, accepted by the latter, who thereupon discharges the seller, is a part payment of the price within the statute. Cotterill *v.* Stevens, 10 Wis. 422.

44. Logan *v.* Carroll, 72 Mo. App. 613; McLure *v.* Sherman, 70 Fed. 190.

45. Krohn *v.* Bantz, 68 Ind. 277; Combs *v.* Bateman, 10 Barb. (N. Y.) 573; Ireland *v.* Johnson, 18 Abb. Pr. (N. Y.) 392, 28 How. Pr. 463. See, however, Phillips *v.* Ocmulgee Mills, 55 Ga. 633, where a note payable in cotton was held sufficient.

46. Sharp *v.* Carroll, 66 Wis. 62, 27 N. W. 832.

47. See the statutes of the different states.

48. Wood *v.* Davis, 82 Ill. 311.

49. See *infra*, X, A, 9.

50. *California.*— Murphy *v.* Helmrich, 66 Cal. 69, 4 Pac. 958.

Iowa.— Haw *v.* American Wire Nail Co., 89 Iowa 745, 56 N. W. 501.

2. Form — a. In General. The memorandum need not formally recite its purpose as a note of the agreement; any memorandum, however informal, is adequate if it states the agreement with sufficient clearness.[51] For example the memorandum may be contained in a record of a corporate vote,[52] a certificate for stock not yet issued,[53] a bill or note,[54] a bond,[55] a bill rendered,[56] a general account containing the contract as an item,[57] a receipt for money,[58] or records made by municipal officers.[59] The memorandum may be in pencil,[60] and it may be filled in on a printed form.[61] The memorandum of a land contract need not be under seal.[62]

Pennsylvania.— Colt *v.* Selden, 5 Watts 525.

Texas.— Masterson *v.* Little, 75 Tex. 682, 13 S. W. 154.

Virginia.— Colgin *v.* Henley, 6 Leigh 85.

England.— Clinan *v.* Cooke, 1 Sch. & Lef. 32, 9 Rev. Rep. 3.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 192.

51. *Alabama.*— Adams *v.* McMillan, 7 Port. 73.

California.— Joseph *v.* Holt, 37 Cal. 250.

Illinois.— Davenport First Presb. Church *v.* Swanson, 100 Ill. App. 39; Gaines *v.* McAdam, 79 Ill. App. 201.

Kentucky.— Ewing *v.* Stanley, 69 S. W. 724, 24 Ky. L. Rep. 633; Winn *v.* Henry, 84 Ky. 48, 7 Ky. L. Rep. 693; Fugate *v.* Hansford, 3 Litt. 262.

Maine.— Wade *v.* Curtis, 96 Me. 309, 52 Atl. 762; Haskell *v.* Tukesbury, 92 Me. 551, 43 Atl. 500, 69 Am. St. Rep. 529.

Massachusetts.— McManus *v.* Boston, 171 Mass. 152, 50 N. E. 607.

Missouri.— Lash *v.* Parlin, 78 Mo. 391; Halsa *v.* Halsa, 8 Mo. 303.

New York.— Simonson *v.* Kissick, 4 Daly 143.

Pennsylvania.— Cadwalader *v.* App, 81 Pa. St. 194; Shoofstall *v.* Adams, 2 Grant 209.

United States.— Barry *v.* Coombe, 1 Pet. 640, 7 L. ed. 295.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 193.

52. Lamkin *v.* Baldwin, etc., Mfg. Co., 72 Conn. 57, 43 Atl. 593, 1042, 44 L. R. A. 786; Tufts *v.* Plymouth Gold Min. Co., 14 Allen (Mass.) 407.

53. Meehan *v.* Sharp, 151 Mass. 564, 24 N. E. 907.

54. *Alabama.*— Reynolds *v.* Kirk, 105 Ala. 446, 17 So. 95.

Georgia.— Phillips *v.* Ocmulgee Mills, 55 Ga. 633.

Illinois.— Work *v.* Cowhick, 81 Ill. 317.

Massachusetts.— Little *v.* Pearson, 7 Pick. 301, 19 Am. Dec. 289.

New York.— Raubitschek *v.* Blank, 44 N. Y. Super. Ct. 564 [*affirmed* in 80 N. Y. 478].

North Carolina.— Neaves *v.* North State Min. Co., 90 N. C. 412, 47 Am. Rep. 529.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 205.

55. Cox *v.* Cox, Peck (Tenn.) 443.

56. Linton *v.* Williams, 25 Ga. 391.

57. Bourland *v.* Peoria County, 16 Ill. 538; Barry *v.* Coombe, 1 Pet. (U. S.) 640, 7 L. ed. 295.

58. *Arkansas.*— Littell *v.* Jones, 56 Ark. 139, 19 S. W. 497.

Colorado.— Eppich *v.* Clifford, 6 Colo. 493.

Indiana.— Barickman *v.* Kuykendall, 6 Blackf. 21.

Kentucky.— Miller *v.* Antle, 2 Bush 407, 92 Am. Dec. 495; Ellis *v.* Deadman, 4 Bibb 466.

Missouri.— Ellis *v.* Bray, 79 Mo. 227.

Nebraska.— Gardels *v.* Kloke, 36 Nebr. 493, 54 N. W. 834.

New York.— Westervelt *v.* Matheson, Hoffm. 36.

North Carolina.— Gordon *v.* Collett, 102 N. C. 532, 9 S. E. 486.

Pennsylvania.— See Phillips *v.* Swank, 120 Pa. St. 76, 13 Atl. 712, 6 Am. St. Rep. 691; Shoofstall *v.* Adams, 2 Grant 209; Matter of Eargood, 1 Pearson 399.

South Carolina.— Cosack *v.* Descoudres, 1 McCord 425, 10 Am. Dec. 681; Hatcher *v.* Hatcher, McMull. Eq. 311.

Texas.— Morrison *v.* Dailey, (1887) 6 S. W. 426.

United States.— Williams *v.* Morris, 95 U. S. 444, 24 L. ed. 360.

England.— Evans *v.* Prothero, 1 De G. M. & G. 572, 21 L. J. Ch. 772, 50 Eng. Ch. 441, 42 Eng. Reprint 674.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 207.

59. *Iowa.*— Grimes *v.* Hamilton County, 37 Iowa 290.

Kentucky.— Evans *v.* Miller, 5 Ky. L. Rep. 606.

Massachusetts.— McManus *v.* Boston, 171 Mass. 152, 50 N. E. 607; Chase *v.* Lowell, 7 Gray 33.

Michigan.— Stevens *v.* Muskegon, 111 Mich. 72, 69 N. W. 227, 36 L. R. A. 777.

New Hampshire.— Curtis *v.* Portsmouth, 67 N. H. 506, 39 Atl. 439.

New York.— Argus Co. *v.* Albany, 7 Lans. 264 [*affirmed* in 55 N. Y. 495, 14 Am. Rep. 296].

Rhode Island.— Marden *v.* Champlin, 17 R. I. 423, 22 Atl. 938.

See Greenville *v.* Greenville Water Works Co., 125 Ala. 625, 27 So. 764.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 200.

60. Clason *v.* Bailey, 14 Johns. (N. Y.) 484; Draper *v.* Pattina, 2 Speers (S. C.) 292; McDowel *v.* Chambers, 1 Strobh. Eq. (S. C.) 347, 47 Am. Dec. 539.

61. Cole *v.* New York, etc., R. Co., 37 Hun (N. Y.) 394; Schneider *v.* Norris, 2 M. & S. 286, 15 Rev. Rep. 825.

62. Cadwalader *v.* App, 81 Pa. St. 194.

b. Written Offer or Written Acceptance. A written offer may constitute a sufficient memorandum of the contract to charge the party making it if later accepted by parol.[63] So a written acceptance of an oral offer may be an adequate memorandum to charge the accepter.[64]

c. Pleadings and Depositions. Setting forth the oral contract in pleading does not constitute a memorandum under the statute so as to deprive the party pleading from advancing the defense of the statute;[65] but a former petition filed in court,[66] or an answer filed in court in other proceedings,[67] may be a sufficient memorandum. A deposition of defendant taken in a former suit is not a sufficient memorandum, because involuntary.[68]

d. Letters and Telegrams. A letter may be a sufficient memorandum,[69] and

63. *Illinois.*— Gradle *v.* Warner, 140 Ill. 123, 29 N. E. 1118; Farwell *v.* Lowther, 18 Ill. 252.

Kansas.— Bogle *v.* Jarvis, 58 Kan. 76, 48 Pac. 558.

Massachusetts.— Howe *v.* Watson, 179 Mass. 30, 60 N. E. 415; Sanborn *v.* Flagler, 9 Allen 474.

Missouri.— Black *v.* Crowther, 74 Mo. App. 480.

New Hampshire.— McDonald *v.* Fernald, 68 N. H. 171, 38 Atl. 729.

New York.— Pettibone *v.* Moore, 75 Hun 461, 27 N. Y. Suppl. 455; Mason *v.* Decker, 42 N. Y. Super. Ct. 115 [*affirmed* in 72 N. Y. 595, 28 Am. Rep. 190].

Ohio.— Himrod Furnace Co. *v.* Cleveland, etc., R. Co., 22 Ohio St. 451.

South Carolina.— Griffin *v.* Rembert, 2 S. C. 410.

Texas.— Anderson *v.* Tinsley, (Civ. App. 1894) 28 S. W. 121.

United States.— Norton *v.* American Ring Co., 1 Fed. 684.

England.— Stewart *v.* Eddowes, L. R. 9 C. P. 311, 43 L. J. C. P. 204, 30 L. T. Rep. N. S. 333, 22 Wkly. Rep. 534; Reuss *v.* Picksley, L. R. 1 Exch. 342, 4 H. & C. 588, 12 Jur. N. S. 628, 35 L. J. Ch. 218, 15 L. T. Rep. N. S. 25, 14 Wkly. Rep. 924.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 195.

Contra.— Newburger *v.* Adams, 92 Ky. 26, 17 S. W. 162, 13 Ky. L. Rep. 339; Rector Provision Co. *v.* Sauer, 69 Miss. 235, 13 So. 623.

Sufficiency of acceptance see *infra*, page 281 note 32.

The party making the oral acceptance cannot be charged.— *Alabama.*— Linn *v.* McLean, 85 Ala. 250, 4 So. 777.

Kentucky.— Judge *v.* Cash, 5 Ky. L. Rep. 514.

Michigan.— See Wardell *v.* Williams, 62 Mich. 50, 28 N. W. 796, 4 Am. St. Rep. 814.

Minnesota.— Lanz *v.* McLaughlin, 14 Minn. 72.

Mississippi.— Rector Provision Co. *v.* Sauer, 69 Miss. 235, 13 So. 623.

New York.— Pettibone *v.* Moore, 75 Hun 461, 27 N. Y. Suppl. 455.

Wisconsin.— See Koch *v.* Williams, 82 Wis. 186, 52 N. W. 257; Brandeis *v.* Neustadtl, 13 Wis. 142.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 195.

An advertisement of an auction sale is not a sufficient memorandum of the contract of sale made at the auction. White *v.* Watkins, 23 Mo. 423; Ithaca First Baptist Church *v.* Bigelow, 16 Wend. (N. Y.) 28; Kurtz *v.* Cummings, 24 Pa. St. 35. *Contra,* Hobby *v.* Finch, Kirby (Conn.) 14.

Letters of credit.— The promise contained in a letter of credit addressed generally and acted on by one to whom it is presented has been held to be a guaranty within the statute of frauds, and the letter has been held to be a sufficient memorandum of the contract. Benedict *v.* Sherill, Lalor (N. Y.) 219; Griffin *v.* Rembert, 2 S. C. 410. See Lawrason *v.* Mason, 3 Cranch (U. S.) 492, 2 L. ed. 509; Plattsburgh First Nat. Bank *v.* Sowles, 46 Fed. 731; Williams *v.* Byrnes, 8 L. T. Rep. N. S. 69, 1 Moore P. C. N. S. 154, 15 Eng. Reprint 660.

64. Troy Fertilizer Co. *v.* Logan, 96 Ala. 619, 12 So. 712.

65. Winn *v.* Albert, 2 Md. Ch. 169; Brandeis *v.* Neustadtl, 13 Wis. 142. See Walker *v.* Walker, 55 S. W. 726, 21 Ky. L. Rep. 1521.

66. Shahan *v.* Swan, 48 Ohio St. 25, 26 N. E. 222, 29 Am. St. Rep. 517.

67. Jones *v.* Lloyd, 117 Ill. 597, 7 N. E. 119.

68. Cash *v.* Clark, 61 Mo. App. 636. See, however, Westheimer *v.* Peacock, 2 Iowa 528, holding that the testimony of the party to be charged may be used to prove a contract within the statute of frauds.

69. *Alabama.*— Troy Fertilizer Co. *v.* Logan, 96 Ala. 619, 12 So. 712.

Connecticut.— Linsley *v.* Tibbals, 40 Conn. 522.

Georgia.— Pitcher *v.* Lowe, 95 Ga. 423, 22 S. E. 678; Georgia Refining Co. *v.* Augusta Oil Co., 74 Ga. 497; Foster *v.* Leeper, 29 Ga. 294.

Indiana.— Roehl *v.* Haumesser, 114 Ind. 311, 15 N. E. 345.

Maryland.— Sloan *v.* Wilson, 4 Harr. & J. 322, 7 Am. Dec. 672.

Michigan.— Sherwood *v.* Walker, 66 Mich. 568, 33 N. W. 919, 11 Am. St. Rep. 531.

Nebraska.— Kenney *v.* Hews, 26 Nebr. 213, 41 N. W. 1006.

New Hampshire.— Neelson *v.* Sanborne, 2 N. H. 413, 9 Am. Dec. 108.

New York.— Thompson *v.* Menck, 4 Abb. Dec. 400, 2 Keyes 82 [*reversing* 22 How Pr. 431]; Napier *v.* French, 40 N. Y. Super. Ct.

so may a telegram;[70] and several letters and telegrams relating to the subject-matter of the contract may constitute a sufficient memorandum.[71] The memorandum is adequate, although the letter or telegram is addressed to the writer's agent,[72] or to a third person.[73]

e. Auctioneer's Memorandum. An auctioneer is the agent of both parties to the sale, and his memorandum thereof, if complete, is sufficient to charge either the vendor or the purchaser under the statute of frauds;[74] and the same is true

122; Voullaire *v.* Wise, 19 Misc. 659, 44 N. Y. Suppl. 510.

Pennsylvania.— Eilbert *v.* Finkbeiner, 68 Pa. St. 243, 8 Am. Rep. 176.

South Carolina.— Huguenot Mills *v.* Jempson, 68 S. C. 363, 47 S. E. 687, 102 Am. St. Rep. 673.

Wisconsin.— Hawkinson *v.* Harmon, 69 Wis. 551, 35 N. W. 28.

Wyoming.— North Platte Milling, etc., Co. *v.* Price, 4 Wyo. 293, 33 Pac. 664.

United States.— Barry *v.* Coombe, 1 Pet. 640, 7 L. ed. 295.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 199.

70. Little *v.* Dougherty, 11 Colo. 103, 17 Pac. 292; Smith *v.* Easton, 54 Md. 138, 39 Am. Rep. 355; Donovan *v.* P. Schoenhofen Brewing Co., 92 Mo. App. 341; Whaley *v.* Hinchman, 22 Mo. App. 483.

71. *California.*— Elbert *v.* Los Angeles Gas Co., 97 Cal. 244, 32 Pac. 9; Breckinridge *v.* Crocker, 78 Cal. 529, 21 Pac. 179.

Colorado.— Little *v.* Dougherty, 11 Colo. 103, 17 Pac. 292; Beckwith *v.* Talbot, 2 Colo. 639.

Georgia.— Brooks *v.* Miller, 103 Ga. 712, 30 S. E. 630.

Indiana.— Wills *v.* Ross, 77 Ind. 1, 40 Am. Rep. 279.

Kentucky.— Smith *v.* Theobald, 86 Ky. 141, 5 S. W. 394, 9 Ky. L. Rep. 449.

Maine.— Kingsley *v.* Siebrecht, 92 Me. 23, 42 Atl. 249, 69 Am. St. Rep. 486.

Massachusetts.— Williams *v.* Smith, 161 Mass. 248, 37 N. E. 455.

Minnesota.— Olson *v.* Sharpless, 53 Minn. 91, 55 N. W. 125; Sanborn *v.* Nockin, 20 Minn. 178.

Missouri.— Cunningham *v.* Williams, 43 Mo. App. 629; Greeley-Burnham Grocer Co. *v.* Capen, 23 Mo. App. 301.

Nebraska.— Vindquest *v.* Perky, 16 Nebr. 284, 20 N. W. 301.

New Hampshire.— Abbott *v.* Shepard, 48 N. H. 14.

New York.— Peck *v.* Vandermark, 33 Hun 214 [*affirmed* in 99 N. Y. 29, 1 N. E. 41].

South Carolina.—Neufville *v.* Stuart, 1 Hill Eq. 159.

Texas.— Gulf, etc., R. Co. *v.* Settegast, 79 Tex. 256, 15 S. W. 228; Kearby *v.* Hopkins, 14 Tex. Civ. App. 166, 36 S. W. 506.

United States.— Bibb *v.* Allen, 149 U. S. 481, 13 S. Ct. 950, 37 L. ed. 819; Ryan *v.* U. S., 136 U. S. 68, 10 S. Ct. 913, 34 L. ed. 447.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 199.

Separate writings in general see *infra*, IX, F.

72. *Illinois.*— Spangler *v.* Danforth, 65 Ill. 152.

Iowa.— Warfield *v.* Wisconsin Cranberry Co., 63 Iowa 312, 19 N. W. 224.

Mississippi.— Everman *v.* Herndon, (1892) 11 So. 652.

Missouri.— Cunningham *v.* Williams, 43 Mo. App. 629.

New York.— Barnett *v.* McCree, 76 Hun 610, 27 N. Y. Suppl. 820.

North Carolina.— Williamston, etc., R. Co. *v.* Battle, 66 N. C. 540.

Tennessee.— Lee *v.* Cherry, 85 Tenn. 707, 4 S. W. 835, 4 Am. St. Rep. 800.

Wisconsin.— Singleton *v.* Hill, 91 Wis. 51, 64 N. W. 588, 51 Am. St. Rep. 868.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 199.

73. Moss *v.* Atkinson, 44 Cal. 3; Miller *v.* Kansas City, etc., R. Co., 58 Kan. 189, 48 Pac. 853; Hollis *v.* Burgess, 37 Kan. 487, 15 Pac. 536; Moore *v.* Mountcastle, 61 Mo. 424; Gibson *v.* Holland, L. R. 1 C. P. 1, 1 H. & R. 1, 11 Jur. N. S. 1022, 35 L. J. C. P. 5, 13 L. T. Rep. N. S. 293, 14 Wkly. Rep. 86; Owen *v.* Thomas, 3 Myl. & K. 353, 10 Eng. Ch. 353, 40 Eng. Reprint 134; Ayliffe *v.* Tracy, 2 P. Wms. 65, 24 Eng. Reprint 642; Moore *v.* Hart, 1 Vern. Ch. 110, 23 Eng. Reprint 352.

74. *Alabama.*— Lewis *v.* Wells, 50 Ala. 198; Kelly *v.* Brooks, 25 Ala. 523.

Illinois.— Doty *v.* Wilder, 15 Ill. 407, 60 Am. Dec. 756; Burke *v.* Haley, 7 Ill. 614.

Kentucky.— McBrayer *v.* Cohen, 92 Ky. 479, 18 S. W. 123, 13 Ky. L. Rep. 667; Gill *v.* Hewett, 7 Bush 10; Thomas *v.* Kerr, 3 Bush 619, 96 Am. Dec. 262.

Maine.— Cleaves *v.* Foss, 4 Me. 1.

Missouri.— Boeckeler *v.* McGowan, 12 Mo. App. 507.

New York.— Pinckney *v.* Hagadorn, 1 Duer 89; Ithaca First Baptist Church *v.* Bigelow, 16 Wend. 28; Frost *v.* Hill, 3 Wend. 386.

North Carolina.— Proctor *v.* Finley, 119 N. C. 536, 26 S. E. 128.

Ohio.— Pugh *v.* Chesseldine, 11 Ohio 109, 37 Am. Dec. 414.

South Carolina.— Carter *v.* Bennett, Dudley 142; Davis *v.* Robertson, 1 Mill 71, 12 Am. Dec. 611; Macon Episcopal Church *v.* Wiley, 2 Hill Eq. 584, 30 Am. Dec. 386; Anderson *v.* Chick, Bailey Eq. 118. See Simmons *v.* Anderson, 7 Rich. 67; Leman *v.* Blackwood, Harp. 219.

Virginia.— Smith *v.* Jones, 7 Leigh 165, 30 Am. Dec. 498.

England.— Simon *v.* Motivos, 3 Burr. 1921, 1 W. Bl. 599; Hinde *v.* Whitehouse, 7 East 558, 3 Smith K. B. 528, 8 Rev. Rep. 676;

of a memorandum made by the auctioneer's clerk, since he stands in the place of the auctioneer.[75]

f. Officer's Memorandum. A sheriff is the agent of the purchaser at an execution sale to sign a memorandum for him, and a return, a book entry, or a certificate made at the sale, containing the terms of the contract, is a sufficient memorandum.[76] A memorandum made by a commissioner[77] or a master in chancery[78] in conducting a judicial sale also is sufficient to bind the parties. As to whether a memorandum made by a clerk of the officer is sufficient the cases are not in accord.[79]

g. Broker's Memorandum. A broker is the agent of both parties to make a memorandum of the contract charging either, and his book entries[80] or sales notes[81] of sales duly consummated by him, if otherwise sufficient, will satisfy the

White *v.* Proctor, 4 Taunt. 209, 13 Rev. Rep. 580; Emmerson *v.* Heelis, 2 Taunt. 38, 11 Rev. Rep. 520. For an earlier view see Stansfield *v.* Johnson, 1 Esp. 101.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 202.

Vendor as auctioneer.— If the vendor himself acted as auctioneer, his memorandum cannot be used to charge the buyer. Wingate *v.* Herschauer, 42 Iowa 506; Bent *v.* Cobb, 9 Gray (Mass.) 397, 69 Am. Dec. 295; Tull *v.* David, 45 Mo. 444, 100 Am. Dec. 385; Smith *v.* Arnold, 22 Fed. Cas. No. 13,004, 5 Mason 414.

75. *Illinois.*— Doty *v.* Wilder, 15 Ill. 407, 60 Am. Dec. 756.

Indiana.— Hart *v.* Woods, 7 Blackf. 568.

Maine.—Alna *v.* Plummer, 4 Me. 258.

North Carolina.— Cherry *v.* Long, 61 N. C. 466.

Virginia.— Smith *v.* Jones, 7 Leigh 165, 30 Am. Dec. 498.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 202.

Contra.— Peirce *v.* Corf, L. R. 9 Q. B. 210, 43 L. J. Q. B. 52, 29 L. T. Rep. N. S. 919, 22 Wkly. Rep. 299; Gosbell *v.* Archer, 2 A. & E. 500, 29 E. C. L. 238, 1 H. & W. 31, 4 L. J. K. B. 78, 4 N. & M. 485, 30 E. C. L. 591.

76. *Alabama.*— Simpson *v.* Pettus, 7 Ala. 453; Robinson *v.* Garth, 6 Ala. 204, 41 Am. Dec. 47.

Indiana.— Elston *v.* Castor, 101 Ind. 426, 51 Am. Rep. 754; Jones *v.* Kokomo Bldg. Assoc., 77 Ind. 340; Hunt *v.* Gregg, 8 Blackf. 105.

Kentucky.— Linn Boyd Tobacco Warehouse Co. *v.* Terrill, 13 Bush 463.

Maryland.— Hanson *v.* Barnes, 3 Gill & J. 359, 22 Am. Dec. 322; Fenwick *v.* Floyd, 1 Harr. & G. 172; Barney *v.* Patterson, 6 Harr. & J. 182.

Massachusetts.— Sanborn *v.* Chamberlin, 101 Mass. 409.

Minnesota.—Armstrong *v.* Vroman, 11 Minn. 220, 88 Am. Dec. 81.

Mississippi.— Endicott *v.* Penny, 14 Sm. & M. 144; Hand *v.* Grant, 5 Sm. & M. 508, 43 Am. Dec. 528.

Missouri.— Steward *v.* Garvin, 31 Mo. 36; Evans *v.* Ashley, 8 Mo. 177.

New York.— Hegeman *v.* Johnson, 35 Barb. 200.

South Carolina.—Elfe *v.* Gadsden, 1 Strobh. 225, 2 Rich. 373; Secrist *v.* Twitty, 1 McMull. 255.

Tennessee.— Nichol *v.* Ridley, 5 Yerg. 63, 26 Am. Dec. 254.

Vermont.— Stearns *v.* Edson, 63 Vt. 259, 22 Atl. 420, 25 Am. St. Rep. 758.

Virginia.— Brent *v.* Green, 6 Leigh 16.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 203.

77. Jenkins *v.* Hogg, 2 Treadw. (S. C.) 821.

78. Gordon *v.* Saunders, 2 McCord Eq. (S. C.) 151. See Willets *v.* Van Alst, 26 How. Pr. (N. Y.) 325; Bicknell *v.* Byrnes, 23 How. Pr. (N. Y.) 486.

79. In Carmack *v.* Masterson, 3 Stew. & P. (Ala.) 411, it was held that a memorandum made by the clerk of commissioners conducting a sale was invalid. The memorandum was, however, also insufficient on other grounds. See also Hutton *v.* Williams, 35 Ala. 503, 76 Am. Dec. 297; Christie *v.* Simpson, 1 Rich. (S. C.) 407. In Wolfe *v.* Sharp, 10 Rich. (S. C.) 60, it was held that an entry made at an administrator's sale by a clerk of the administrator was an adequate memorandum.

80. Williams *v.* Woods, 16 Md. 220; Clason *v.* Bailey, 14 Johns. (N. Y.) 484; Sievewright *v.* Archibald, 17 Q. B. 103, 15 Jur. 947, 20 L. J. Q. B. 529, 79 E. C. L. 103; Heyman *v.* Neale, 2 Campb. 337; Thornton *v.* Charles, 11 L. J. Exch. 302, 9 M. & W. 802.

81. *Massachusetts.*— Coddington *v.* Goddard, 16 Gray 436.

Missouri.— Greeley-Burnham Grocer Co. *v.* Capen, 23 Mo. App. 301.

New York.— Newberry *v.* Wall, 84 N. Y. 576 [*reversing* 46 N. Y. Super. Ct. 576]; Spyer *v.* Fisher, 37 N. Y. Super. Ct. 93; Sale *v.* Darragh, 2 Hilt. 184.

Oregon.— Reid *v.* Alaska Packing Co., 43 Oreg. 429, 73 Pac. 337.

United States.— Bibb *v.* Allen, 149 U. S. 481, 13 S. Ct. 950, 37 L. ed. 819 (holding that slip contracts in the form prescribed by the rules and regulations of the cotton exchange constitute bought and sold notes, which, taken together, as they should be, afford a sufficient memorandum in writing between the brokers or their principal and the vendee of the cotton to satisfy the requirements of the statute of frauds); Butler *v.* Thomson, 92 U. S.

statute. However, an agent for one party only cannot bind the other party by making a memorandum.[82]

h. Irregular Indorsement of Note. It has been held that where one indorses his name as guarantor on a non-negotiable note at the time of the making thereof, the payee is authorized to overwrite a contract of guaranty, and such writing is a sufficient memorandum under the statute of frauds;[83] and in some jurisdictions this is permitted in the case of an indorsement as guarantor of a negotiable note.[84] The rule is the same where the indorsement is made after delivery of the note,[85] and even after maturity thereof.[86]

i. Deed Inoperative as Conveyance. An undelivered deed made in pursuance of an oral contract for the sale of land will not, by the weight of authority, constitute an adequate memorandum of the contract;[87] and the same is true of a deed delivered in escrow.[88] However, a deed which has been delivered but which is formally defective may operate as a sufficient memorandum;[89] and the deed of an agent who has authority to make the contract of sale but no authority to sign a deed may still be adequate as a memorandum of the contract.[90]

B. Time of Making — 1. In General. In the absence of a statutory provision to the contrary,[91] the memorandum of the contract required by the statute of frauds may be made subsequently to the making of the contract itself.[92] If

412, 23 L. ed. 684 [*reversing* 4 Fed. Cas. No. 2,244, 11 Blatchf. 533].

England.— Sievewright *v.* Archibald, 17 Q. B. 103, 15 Jur. 947, 20 L. J. Q. B. 529, 79 E. C. L. 103; Thompson *v.* Gardiner, 1 C. P. D. 777; Goom *v.* Aflalo, 6 B. & C. 117, 9 D. & R. 148, 5 L. J. K. B. O. S. 31, 13 E. C. L. 64; Parton *v.* Crofts, 16 C. B. N. S. 11, 33 L. J. C. P. 189, 10 L. T. Rep. N. S. 34, 12 Wkly. Rep. 553, 111 E. C. L. 11; Rucker *v.* Cammeyer, 1 Esp. 105; Hawes *v.* Forster, 1 M. & Rob. 368.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 204.

82. Stoddert *v.* Port Tobacco Parish, 2 Gill & J. (Md.) 227; Shaw *v.* Finney, 13 Metc. (Mass.) 453; Wilson *v.* Lewiston Mill Co., 74 Hun (N. Y.) 612, 26 N. Y. Suppl. 847 [*affirmed* in 150 N. Y. 314, 44 N. E. 959, 55 Am. St. Rep. 680]; Dilworth *v.* Bostwick, 1 Sweeny (N. Y.) 581; Sewall *v.* Fitch, 8 Cow. (N. Y.) 215.

83. Underwood *v.* Hossack, 38 Ill. 208. See also Moies *v.* Bird, 11 Mass. 436, 6 Am. Dec. 179; Richards *v.* Warring, 4 Abb. Dec. (N. Y.) 47, 1 Keyes 576.

Time of overwriting contract of guaranty see *infra*, note 92.

84. Fuller *v.* Scott, 8 Kan. 25. See also Webster *v.* Cobb, 17 Ill. 459; Harding *v.* Water, 6 Lea (Tenn.) 324. *Contra*, Hood *v.* Robbins, 98 Ala. 484, 13 So. 574; Van Doran *v.* Tjader, 1 Nev. 380, 90 Am. Dec. 498; Hall *v.* Newcomb, 7 Hill (N. Y.) 416, 42 Am. Dec. 82 [*overruling* Nelson *v.* Dubois, 13 Johns. 175].

85. Tenney *v.* Prince, 4 Pick. (Mass.) 385, 16 Am. Dec. 347; Paul *v.* Stackhouse, 38 Pa. St. 302. *Contra*, Culbertson *v.* Smith, 52 Md. 628, 36 Am. Rep. 384; Hodgkins *v.* Bond, 1 N. H. 284; Hayden *v.* Weldon, 43 N. J. L. 128, 39 Am. Rep. 551.

Necessity of expressing consideration in contract see *infra*, IX, C, 3, g, (II), (B).

86. Beckwith *v.* Angell, 6 Conn. 315; Ulen *v.* Kittridge, 7 Mass. 233; Peterson *v.* Russell, 62 Minn. 220, 64 N. W. 555, 54 Am. St. Rep. 634, 29 L. R. A. 612; Frech *v.* Yawger, 47 N. J. L. 157, 54 Am. Rep. 123. *Contra*, Wilson *v.* Martin, 74 Pa. St. 159.

87. *Iowa.*— Steel *v.* Fife, 48 Iowa 99, 30 Am. Rep. 388. See also Logsdon *v.* Newton, 54 Iowa 448, 6 N. W. 715.

Maine.— Morrow *v.* Moore, 98 Me. 373, 57 Atl. 81, 99 Am. St. Rep. 410.

Massachusetts.— Parker *v.* Parker, 1 Gray 409.

Minnesota.— Comer *v.* Baldwin, 16 Minn. 172.

Nebraska.— Schneider *v.* Vogler, (1904) 97 N. W. 1018; Wier *v.* Batdorf, 24 Nebr. 83, 38 N. W. 22.

Pennsylvania.— See Allebach *v.* Godshalk, 116 Pa. St. 329, 9 Atl. 444; Parrish *v.* Koons, 1 Pars. Eq. Cas. 79.

Tennessee.— Wilson *v.* Winters, 108 Tenn. 398, 67 S. W. 800. See, however, Espie *v.* Urie, 3 Hayw. 125.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 208.

Contra.— Magee *v.* Blankenship, 95 N. C. 563; Parrill *v.* McKinley, 9 Gratt. (Va.) 1, 58 Am. Dec. 212; Bowles *v.* Woodson, 6 Gratt. (Va.) 78.

88. Freeland *v.* Charnley, 80 Ind. 132; Day *v.* Lacasse, 85 Me. 242, 27 Atl. 124; Cagger *v.* Lansing, 43 N. Y. 550. *Contra*, Griel *v.* Lomax, 89 Ala. 420, 6 So. 741; Johnston *v.* Jones, 85 Ala. 286, 4 So. 748.

89. Owen *v.* Frink, 24 Cal. 171; Henry *v.* Root, 33 N. Y. 526; Blacknall *v.* Parish, 59 N. C. 70, 78 Am. Dec. 239; Viser *v.* Rice, 33 Tex. 139; McCown *v.* Wheeler, 20 Tex. 372.

90. Dutton *v.* Warschauer, 21 Cal. 609, 82 Am. Dec. 765; Hersey *v.* Lambert, 50 Minn. 373, 52 N. W. 963; Blacknall *v.* Parish, 59 N. C. 70, 78 Am. Dec. 239.

91. Vanpel *v.* Woodward, 3 N. Y. Leg. Obs. 130, contract for sale of goods.

92. *California.*— Howland *v.* Aitch, 38 Cal. 133.

it is made before an action is brought on the contract it is sufficient to support a judgment for plaintiff.[93]

2. Memorandum by Auctioneer, Broker, or Officer. The agency of an auctioneer enabling him to sign a memorandum binding the buyer ends with the sale, and a memorandum made subsequently is inadequate.[94] A memorandum made by a broker after the vendor has repudiated a verbal sale is insufficient.[95] A memorandum or return of sheriff's sale must be made by the sheriff at the time of sale.[96]

C. Contents — 1. Sufficiency in General. In order to render an oral contract falling within the scope of the statute of frauds enforceable by action, the memorandum thereof must state the contract with such certainty that its essentials can be known from the memorandum itself, or by a reference contained in it to some other writing, without recourse to parol proof to supply them.[97] Accordingly if

Kentucky.— Schwerman *v.* Gunkel, 1 Ky. L. Rep. 406.

Maine.— Bird *v.* Munroe, 66 Me. 337, 22 Am. Rep. 571.

Massachusetts.—Mann *v.* Bishop, 136 Mass. 495; Whitwell *v.* Wyer, 11 Mass. 6.

Nebraska.— Sheehy *v.* Fulton, 38 Nebr. 691, 57 N. W. 395, 41 Am. St. Rep. 767.

New York.— Webster *v.* Zielly, 52 Barb. 482 (contract for sale of goods); Gale *v.* Nixon, 6 Cow. 445 (contract for sale of land).

North Carolina.— Magee *v.* Blankenship, 95 N. C. 563.

Oregon.— Fisk *v.* Henarie, 13 Oreg. 156, 9 Pac. 322.

South Dakota.— Townsend *v.* Kennedy, 6 S. D. 47, 60 N. W. 164.

Tennessee.—Macon *v.* Sheppard, 2 Humphr. 335.

Vermont.— Ide *v.* Stanton, 15 Vt. 685, 40 Am. Dec. 698.

England.— Munday *v.* Asprey, 13 Ch. D. 855, 49 L. J. Ch. 216, 28 Wkly. Rep. 347.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 209.

See, however, McAnnulty *v.* McAnnulty, 120 Ill. 26, 11 N. E. 397, 60 Am. Rep. 552, holding that in the absence of fraud affecting the equities between the parties, a reduction to writing, after marriage, of a verbal antenuptial contract will not take it out of the statute.

Irregular indorsement of note.— Where one indorses his name on a note as guarantor, it authorizes the payee to overwrite a contract of guaranty, which will constitute a sufficient memorandum (see *supra*, IX, A, 2, h), and this contract may be overwritten in the trial of an action to enforce the contract. Webster *v.* Cobb, 17 Ill. 459; Fuller *v.* Scott, 8 Kan. 25.

93. *Illinois.*— Gaines *v.* McAdam, 79 Ill. App. 201.

Maine.— Bird *v.* Munroe, 66 Me. 337, 22 Am. Rep. 571.

Missouri.— Heideman *v.* Wolfstein, 12 Mo. App. 366.

New York.— See Vanpel *v.* Woodward, 3 N. Y. Leg. Obs. 130.

England.— Sievewright *v.* Archibald, 17 Q. B. 103, 15 Jur. 947, 20 L. J. Q. B. 529, 79 E. C. L. 103; Bill *v.* Bament, 11 L. J. Exch. 81, 9 M. & W. 36.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 209.

94. *California.*— Craig *v.* Godfroy, 1 Cal. 415, 54 Am. Dec. 299.

Maine.— Horton *v.* McCarty, 53 Me. 394.

Massachusetts.— Gill *v.* Bicknell, 2 Cush. 355. See, however, White *v.* Dahlquist Mfg. Co., 179 Mass. 427, 60 N. E. 791.

Missouri.— White *v.* Watkins, 23 Mo. 423.

New York.— Goelet *v.* Cowdrey, 1 Duer 132; Hicks *v.* Whitmore, 12 Wend. 548; McQuade *v.* Warrin, 12 N. Y. Leg. Obs. 250.

Wisconsin.— Bamber *v.* Savage, 52 Wis. 110, 8 N. W. 609, 38 Am. Rep. 723.

United States.— Smith *v.* Arnold, 22 Fed. Cas. No. 13,004, 5 Mason 414.

England.— Buckmaster *v.* Harrop, 13 Ves. Jr. 456, 6 Rev. Rep. 132, 33 Eng. Reprint 365. See Mews *v.* Carr, 1 H. & N. 484, 26 L. J. Exch. 39.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 209.

95. Reed *v.* Latham, 40 Conn. 452; Williams *v.* Woods, 16 Md. 220; Elliot *v.* Barrett, 144 Mass. 256, 10 N. E. 820.

96. Gossard *v.* Ferguson, 54 Ind. 519; Hunt *v.* Gregg, 8 Blackf. (Ind.) 105.

97. *Alabama.*— Carroll *v.* Powell, 48 Ala. 298; Adams *v.* McMillan, 7 Port. 73.

Arkansas.— St. Louis, etc., R. Co. *v.* Beidler, 45 Ark. 17.

California.— *In re* Robinson, 142 Cal. 152, 75 Pac. 777; Brewer *v.* Horst, etc., Co., 127 Cal. 643, 60 Pac. 418, 50 L. R. A. 240.

Colorado.— Eppich *v.* Clifford, 6 Colo. 493; Salomon *v.* McRae, 9 Colo. App. 23, 47 Pac. 409; Ellis *v.* Denver, etc., R. Co., 7 Colo. App. 350, 43 Pac. 457.

Connecticut.— Morris *v.* Peckham, 51 Conn. 128; Nichols *v.* Johnson, 10 Conn. 192.

Florida.— Eckman *v.* Brash, 20 Fla. 763.

Georgia.— Turner *v.* Lorillard Co., 100 Ga. 645, 28 S. E. 383, 62 Am. St. Rep. 345; North *v.* Mendel, 73 Ga. 400, 54 Am. Rep. 879.

Illinois.— Gage *v.* Cameron, 212 Ill. 146, 72 N. E. 204; Wood *v.* Davis, 82 Ill. 311; Farwell *v.* Lowther, 18 Ill. 252; Doty *v.* Wilder, 15 Ill. 407, 60 Am. Dec. 756; Burke *v.*

an oral contract falling within the scope of the statute has terms not stated in the

Haley, 7 Ill. 614; Austin *v.* Kuehn, 111 Ill. App. 506 [*affirmed* in 211 Ill. 113, 71 N. E. 841].

Indiana.— Lee *v.* Hills, 66 Ind. 474; Ridgway *v.* Ingram, 50 Ind. 145, 19 Am. Rep. 706; Sprankle *v.* Trulove, 22 Ind. App. 577, 54 N. E. 461.

Iowa.— Allan *v.* Bemis, 120 Iowa 172, 94 N. W. 560; Watt *v.* Wisconsin Cranberry Co., 63 Iowa 730, 18 N. W. 898.

Kansas.— Ross *v.* Allen, 45 Kan. 231, 25 Pac. 570, 10 L. R. A. 835; Fry *v.* Platt, 32 Kan. 62, 3 Pac. 781; Reid *v.* Kenworthy, 25 Kan. 701.

Kentucky.— Tyler *v.* Onzts, 93 Ky. 331, 20 S. W. 256, 14 Ky. L. Rep. 321; Kay *v.* Curd, 6 B. Mon. 100; Loan *v.* Chenault, 3 J. J. Marsh. 294; Fowler *v.* Lewis, 3 A. K. Marsh. 443; Hayden *v.* McIlvain, 4 Bibb 57.

Maine.— Savage *v.* Robinson, 93 Me. 262, 44 Atl. 926; Nugent *v.* Smith, 85 Me. 433, 27 Atl. 342; Jenness *v.* Mt. Hope Iron Co., 53 Me. 20; O'Donnell *v.* Leeman, 43 Me. 158, 69 Am. Dec. 54; Tuttle *v.* Sweet, 31 Me. 555.

Maryland.— Fisher *v.* Andrews, 94 Md. 46, 50 Atl. 407; Frank *v.* Miller, 38 Md. 450.

Massachusetts.— Leatherbee *v.* Bernier, 182 Mass. 507, 65 N. E. 842; Burgess Sulphite Fibre Co. *v.* Broomfield, 180 Mass. 283, 62 N. E. 367; May *v.* Ward, 134 Mass. 127; Gardner *v.* Hazelton, 121 Mass. 494; Grace *v.* Denison, 114 Mass. 16; Boardman *v.* Spooner, 13 Allen 353, 90 Am. Dec. 196; Williams *v.* Bacon, 2 Gray 387; Gill *v.* Bicknell, 2 Cush. 355; Hawkins *v.* Chace, 19 Pick. 502; Atwood *v.* Cobb, 16 Pick. 227, 26 Am. Dec. 657; Penniman *v.* Hartshorn, 13 Mass. 87.

Michigan.— Proctor *v.* Plumer, 112 Mich. 393, 70 N. W. 1028; McElroy *v.* Buck, 35 Mich. 434; Hall *v.* Soule, 11 Mich. 494.

Minnesota.— Hanson *v.* Marsh, 40 Minn. 1, 40 N. W. 841.

Mississippi.— Redus *v.* Holcomb, (1900) 27 So. 524; Rector Provision Co. *v.* Sauer, 69 Miss. 235, 13 So. 623.

Missouri.— Kelly *v.* Thuey, 143 Mo. 422, 45 S. W. 300; Smith *v.* Shell, 82 Mo. 215, 52 Am. Rep. 365; Biest *v.* Versteeg Shoe Co., 97 Mo. App. 137, 70 S. W. 1081; Claes, etc., Mfg. Co. *v.* McCord, 65 Mo. App. 507; Rucker *v.* Harrington, 52 Mo. App. 481; Cunningham *v.* Williams, 43 Mo. App. 629. See O'Neil *v.* Crain, 67 Mo. 250.

Nebraska.— McWilliams *v.* Lawless, 15 Nebr. 131, 17 N. W. 349.

New Hampshire.— Rafferty *v.* Lougee, 63 N. H. 54; Webster *v.* Clark, 60 N. H. 36; Watts *v.* Sawyer, 55 N. H. 38.

New Jersey.— Bernheimer *v.* Verdon, 63 N. J. Eq. 312, 49 Atl. 732.

New York.— Slade *v.* Boutin, 63 N. Y. App. Div. 537, 71 N. Y. Suppl. 740 [*affirmed* in 173 N. Y. 592, 65 N. E. 1122]; Seymour *v.* Warren, 59 N. Y. App. Div. 120, 69 N. Y. Suppl. 236; Cheever *v.* Schall, 87 Hun 32, 33 N. Y. Suppl. 751; Drake *v.* Seaman, 27 Hun 63 [*affirmed* in 97 N. Y. 230]; Hagan *v.* Domestic Sewing Mach. Co., 9 Hun 73; Kuhn *v.* Brown, 1 Hun 244; Newbery *v.* Wall, 35 N. Y. Super. Ct. 106 [*affirmed* in 65 N. Y. 484]; Dilworth *v.* Bostwick, 1 Sweeny 581; Stocker *v.* Partridge, 2 Rob. 193; Blum *v.* Blum, 90 N. Y. Suppl. 445; Ullman *v.* Meyer, 10 Abb. N. Cas. 281; Dodge *v.* Lean, 13 Johns. 508; Abeel *v.* Radcliff, 13 Johns. 297, 7 Am. Dec. 377; Bailey *v.* Ogden, 3 Johns. 399, 3 Am. Dec. 509; Coles *v.* Bowne, 10 Paige 526; Cushman *v.* Burritt, 14 N. Y. Wkly. Dig. 59.

Ohio.— Kling *v.* Bordner, 65 Ohio St. 86, 61 N. E. 148.

Oregon.— Catterlin *v.* Bush, 39 Oreg. 496, 59 Pac. 706, 65 Pac. 1064.

Pennsylvania.— Conrade *v.* O'Brien, 1 Pa. Super. Ct. 104, 37 Wkly. Notes Cas. 493; Matter of Eargood, 1 Pearson 399; Patton *v.* Develin, 2 Phila. 103; Ward *v.* Orr, 30 Pittsb. Leg. J. 416.

Rhode Island.— Thornton *v.* Kelly, 11 R. I. 498; Hodges *v.* Howard, 5 R. I. 149; Ives *v.* Hazard, 4 R. I. 14, 67 Am. Dec. 500.

South Carolina.— Meadows *v.* Meadows, 3 McCord 458, 15 Am. Dec. 645; Givens *v.* Calder, 2 Desauss. 171, 2 Am. Dec. 686.

Tennessee.— Johnson *v.* Kellogg, 7 Heisk. 262; McCarty *v.* Kyle, 4 Coldw. 348; Wright *v.* Cobb, 5 Sneed 143; Sheid *v.* Stamps, 2 Sneed 172; McWhirter *v.* Jackson, 10 Humphr. 209; Allison *v.* Rutledge, 5 Yerg. 193.

Texas.— Zanderson *v.* Sullivan, 91 Tex. 499, 44 S. W. 484 [*affirming* 42 S. W. 1027]; Fulton *v.* Robinson, 55 Tex. 401; Johnson *v.* Granger, 51 Tex. 42.

Utah.— Abba *v.* Smyth, 21 Utah 109, 59 Pac. 756.

Vermont.— Rowell *v.* Dunwoodie, 69 Vt. 111, 37 Atl. 227; Ide *v.* Stanton, 15 Vt. 685, 40 Am. Dec. 698.

Virginia.— Rahm *v.* Klerner, 99 Va. 10, 37 S. E. 292.

West Virginia.— White *v.* Core, 20 W. Va. 272.

Wisconsin.— Bacon *v.* Eccles, 43 Wis. 227. See Hodson *v.* Carter, 3 Pinn. 212, 3 Chandl. 234.

United States.— Williams *v.* Morris, 95 U. S. 444, 24 L. ed. 360; Salmon Falls Mfg. Co. *v.* Goddard, 14 How. 446, 14 L. ed. 493; Snow *v.* Nelson, 113 Fed. 353; Sholtz *v.* Northwestern Mut. L. Ins. Co., 100 Fed. 573, 40 C. C. A. 556; Peoria Grape Sugar Co. *v.* Babcock Co., 67 Fed. 892; Clark *v.* Burnham, 5 Fed. Cas. No. 2,816, 2 Story 1; Williams *v.* Threlkeld, 29 Fed. Cas. No. 17,741, 2 Cranch C. C. 307.

England.— *In re* Alexander's Timber Co., 70 L. J. Ch. 767, 8 Manson 392; Hartnett *v.* Yeilding, 2 Sch. & Lef. 549, 9 Rev. Rep. 98.

Canada.— Scott *v.* Melady, 27 Ont. App. 193.

See 23 Cent. Dig. tit. " Frauds, Statute of," §§ 210, 211, 239 *et seq.* And see *infra*, XI, B, 3, a, (I).

A municipal record, if relied on as a memorandum, must contain the essential terms

memorandum,[98] or if the memorandum contains a reference to such terms or imports their existence by fair inference without clearly stating them,[99] or if the memorandum merely refers to the contract without stating its terms,[1] the case falls within the statute. Thus an auctioneer's memorandum must in itself or taken in connection with the proper captions in the entry book contain the essential terms of the contract for sale.[2] So a receipt for money, if

of the contract. Wiswell *v.* Tefft, 5 Kan. 263.

A written acceptance of an offer is not a sufficient memorandum to charge the accepter, if it does not contain the terms of the offer. Washington Ice Co. *v.* Webster, 62 Me. 341, 16 Am. Rep. 462; Gummer *v.* Omro, 45 Wis. 384.

A memorandum made up of several papers must state the terms of the contract with definiteness as in the case of any memorandum. Devine *v.* Warner, 76 Conn. 229, 56 Atl. 562; Camp *v.* Moreman, 84 Ky. 635, 2 S. W. 179, 8 Ky. L. Rep. 552; Boest *v.* Doran, 4 Ohio Dec. (Reprint) 525, 2 Clev. L. Rep. 313; Fitzmaurice *v.* Bayley, 9 H. L. Cas. 78, 6 Jur. N. S. 1215, 8 Wkly. Rep. 750, 11 Eng. Reprint 657; Brodie *v.* St. Paul, 1 Ves. Jr. 326, 30 Eng. Reprint 368.

A memorandum of a sale of land at auction is sufficient which contains the names of the vendor and purchaser, the terms of the sale, the amount bid and paid, and a description of the land sufficient to enable the purchaser from the surrounding facts and circumstances to identify and locate it. Springer *v.* Kleinsorge, 83 Mo. 152. A memorandum of a contract for the purchase and sale of real estate need not contain apt and definite words expressing the agreement to convey, but it is sufficient if from a consideration of the whole contract it can be gathered that it is the intention of one party to convey and of the other to purchase. Van Doen *v.* Roepke, 107 Wis. 535, 83 N. W. 754.

Written contract for sale of goods held sufficient see Sabre *v.* Smith, 62 N. H. 663.

Terms implied by law need not be set forth in the memorandum. Dunn *v.* McClintock, 64 Mo. App. 193. Implied consideration see *infra*, IX, C, 3, c. Implied contracts see *infra*, X, A, 10.

98. Norris *v.* Blair, 39 Ind. 90, 10 Am. Rep. 135; O'Donnell *v.* Leeman, 43 Me. 158, 69 Am. Dec. 54; Boardman *v.* Spooner, 13 Allen 353, 90 Am. Dec. 196; Ryan *v.* Hall, 13 Metc. 520; Morton *v.* Dean, 13 Metc. 385; Campbell *v.* Thomas, 42 Wis. 437, 24 Am. Rep. 427.

An offer by plaintiff to supplement the memorandum by proving additional terms is an admission that the memorandum is not a complete note of the contract.

Georgia.— Stewart *v.* Cook, 118 Ga. 541, 45 S. E. 398.

Maryland.— Walter *v.* Victor G. Bloede Co., 94 Md. 80, 50 Atl. 433.

Missouri.— Ringer *v.* Holtzclaw, 112 Mo. 519, 20 S. W. 800; Beckmann *v.* Mepham, 97 Mo. App. 161, 70 S. W. 1094; Bruckman *v.* Hargadine-McKittrick Dry Goods Co., 91 Mo. App. 454.

Wisconsin.— Saveland *v.* Western Wisconsin R. Co., 118 Wis. 267, 95 N. W. 130.

England.— Harnor *v.* Groves, 15 C. B. 667, 3 C. L. R. 406, 24 L. J. C. P. 53, 3 Wkly. Rep. 168, 80 E. C. L. 667; Holmes *v.* Mitchell, 7 C. B. N. S. 361, 6 Jur. N. S. 73, 28 L. J. C. P. 301, 97 E. C. L. 361; Boydell *v.* Drummond, 2 Campb. 157, 11 East 141, 10 Rev. Rep. 450; Fitzmaurice *v.* Bayley, 9 H. L. Cas. 78, 6 Jur. N. S. 1215, 3 L. T. Rep. N. S. 69, 8 Wkly. Rep. 750, 11 Eng Reprint 657.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 239 *et seq.*

99. *Alabama.*— Nelson *v.* Shelby Mfg., etc., Co., 96 Ala. 515, 11 So. 695, 38 Am. St. Rep. 116.

Georgia.— Lester *v.* Heidt, 86 Ga. 226, 12 S. E. 214, 10 L. R. A. 108.

Kansas.— Brundige *v.* Blair, 43 Kan. 364, 23 Pac. 482.

Massachusetts.— Riley *v.* Farnsworth, 116 Mass. 223.

Michigan.— Gault *v.* Stormont, 51 Mich. 636, 17 N. W. 214.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 210 *et seq.*

1. *Georgia.*— Smith *v.* Jones, 66 Ga. 338, 42 Am. Rep. 72.

Iowa.— Vaughn *v.* Smith, 58 Iowa 553, 12 N. W. 604.

Massachusetts.— Waterman *v.* Meigs, 4 Cush. 497.

Michigan.— Sheley *v.* Whitman, 67 Mich. 397, 34 N. W. 879.

Mississippi.—McGuire *v.* Stevens, 42 Miss. 724, 2 Am. Rep. 649.

New York.— Hunt *v.* Hunt, 55 N. Y. App. Div. 430, 66 N. Y. Suppl. 957; Hutchison *v.* Walter, 16 Misc. 77, 37 N. Y. Suppl. 677.

North Carolina.— Plummer *v.* Owens, 45 N. C. 254.

Ohio.— Boest *v.* Doran, 4 Ohio Dec. (Reprint) 525, 2 Clev. L. Rep. 313.

Pennsylvania.—McFarson's Appeal, 11 Pa. St. 503.

South Carolina.— Boozer *v.* Teaque, 27 S. C. 348, 3 S. E. 551.

Wisconsin.— Harney *v.* Burhans, 91 Wis. 348, 64 N. W. 1031.

United States.— Bibb *v.* Allen, 149 U. S. 481, 13 S. Ct. 950, 37 L. ed. 819.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 210 *et seq.*

2. *Maine.*— Horton *v.* McCarty, 53 Me. 394.

Massachusetts.— Gill *v.* Bicknell, 2 Cush. 355; Morton *v.* Dean, 13 Metc. 385.

Missouri.— Wiley *v.* Robert, 27 Mo. 388, 31 Mo. 212.

New Hampshire.— Rafferty *v.* Lougee, 63 N. H. 54.

New York.— Price *v.* Durin, 56 Barb. 647;

relied on as a memorandum, must state the essentials of the agreement.[3] And an undelivered deed made in pursuance of an oral contract for the sale of land cannot operate as a memorandum if it does not sufficiently state the terms of the contract.[4] If a writing relied on as a memorandum tends merely to show negotiations pending between the parties, it is not sufficient, although an oral contract in fact exists.[5] If the parties purport to make a written contract regarding a subject-matter within the statute of frauds but omit essential terms from the writing, the contract, being partly in parol, is within the statute, and there is no sufficient memorandum thereof.[6]

2. Designation and Description of Parties. The parties to the contract cannot be left to be shown by parol but must be stated in the memorandum.[7] Thus in a memorandum of a contract for sale it must appear who is the buyer and

Ithaca First Baptist Church *v.* Bigelow, 16 Wend. 28; Frost *v.* Hill, 3 Wend. 386.

North Carolina.— Gwathney *v.* Cason, 74 N. C. 5, 21 Am. Rep. 484.

Vermont.— Harvey *v.* Stevens, 43 Vt. 653.

England.— Rishton *v.* Whatmore, 8 Ch. D. 467, 47 L. J. Ch. 629, 26 Wkly. Rep. 827; Blagden *v.* Bradbear, 12 Ves. Jr. 466, 8 Rev. Rep. 354, 33 Eng. Reprint 176.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 202.

3. *Arkansas.*— Littell *v.* Jones, 56 Ark. 139, 19 S. W. 497.

Illinois.— Koenig *v.* Dohm, 209 Ill. 468, 70 N. E. 1061.

Kansas.— Ross *v.* Allen, 45 Kan. 231, 25 Pac. 570, 10 L. R. A. 835; Fry *v.* Platt, 32 Kan. 62, 3 Pac. 781.

Kentucky.— Kay *v.* Curd, 6 B. Mon. 100; Ellis *v.* Deadman, 4 Bibb 466.

Missouri.— Grumley *v.* Webb, 48 Mo. 562.

Oklahoma.— Fox *v.* Easter, 10 Okla. 527, 62 Pac. 283.

Pennsylvania.—Ott *v.* Heineman, 31 Pittsb. Leg. J. 161.

South Carolina.— Mims *v.* Chandler, 21 S. C. 480.

Texas.— Munk *v.* Weidner, 9 Tex. Civ. App. 491, 29 S. W. 409.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 207.

4. *Arkansas.*— See Henderson *v.* Beard, 51 Ark. 483, 11 S. W. 766.

California.— Swain *v.* Burnette, 89 Cal. 564, 26 Pac. 1093.

Illinois.— Kopp *v.* Reiter, 146 Ill. 437, 34 N. E. 942, 37 Am. St. Rep. 156, 22 L. R. A. 273.

Oregon.— Cooper *v.* Thomason, 30 Oreg. 161, 45 Pac. 296.

Utah.— See Leonard *v.* Woodruff, 23 Utah 494, 65 Pac. 199.

Wisconsin.— Popp *v.* Swanke, 68 Wis. 364, 31 N. W. 916; Thomas *v.* Sowards, 25 Wis. 631.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 208.

5. *Alabama.*— Carter *v.* Shorter, 57 Ala. 253.

California.— See Meux *v.* Hogue, 91 Cal. 442, 27 Pac. 744.

Colorado.— Bohm *v.* Hoffer, 2 Colo. App. 146, 29 Pac. 905.

Illinois.— Miller *v.* Wilson, 146 Ill. 523, 34 N. E. 1111, 37 Am. St. Rep. 186, (1892) 31 N. E. 423; Frazer *v.* Howe, 106 Ill. 563; Dovenmuehle *v.* Eilenberger, 70 Ill. App. 180.

Massachusetts.— Hastings *v.* Weber, 142 Mass. 232, 7 N. E. 846, 56 Am. Rep. 671; Ashcroft *v.* Butterworth, 136 Mass. 511; Smith *v.* Gowdy, 8 Allen 566.

Michigan.— Delaware, etc., Canal Co. *v.* Roberts, 72 Mich. 49, 40 N. W. 53.

Nebraska.— Fowler Elevator Co. *v.* Cottrell, 38 Nebr. 512, 57 N. W. 19; Barton *v.* Patrick, 20 Nebr. 654, 31 N. W. 370.

New York.— Coe *v.* Tough, 116 N. Y. 273, 22 N. E. 550; Haines *v.* Smither, 20 N. Y. Suppl. 444.

Ohio.— Boest *v.* Doran, 4 Ohio Dec. (Reprint) 525, 2 Clev. L. Rep. 313.

South Carolina.—Kennedy *v.* Gramling, 33 S. C. 367, 11 S. E. 1081, 26 Am. St. Rep. 676. See Kinlock *v.* Savage, Speers Eq. 464.

England.— Huddleston *v.* Briscoe, 11 Ves. Jr. 583, 32 Eng. Reprint 1215.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 210 *et seq.*

6. *Georgia.*— Jackson *v.* Strowger Automatic Tel. Exch., 108 Ga. 646, 34 S. E. 207.

Illinois.— Wright *v.* Raftree, 181 Ill. 464, 54 N. E. 998.

Missouri.— Ringer *v.* Holtzclaw, 112 Mo. 519, 20 S. W. 800; Weil *v.* Willard, 55 Mo. App. 376.

New York.— Wright *v.* Weeks, 3 Bosw. 372 [*affirmed* in 25 N. Y. 153].

England.— Bayley *v.* Fitzmaurice, 8 E. & B. 664, 92 E. C. L. 664.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 210 *et seq.*

This rule does not apply to a contract for the sale of goods where part of the property is accepted and received by the buyer (see *supra*, VIII, B) or where earnest money is given or part payment is made (see *supra*, VIII, C).

7. *California.*— Breckinridge *v.* Crocker, 78 Cal. 529, 21 Pac. 179.

Connecticut.—Nichols *v.* Johnson, 10 Conn. 192.

Georgia.— Oglesby Grocery Co. *v.* Williams Mfg. Co., 112 Ga. 359, 37 S. E. 372.

Indiana.— American Iron, etc., Mfg. Co. *v.* Midland Steel Co., 101 Fed. 200.

Massachusetts.— Lewis *v.* Wood, 153 Mass. 321, 26 N. E. 862, 11 L. R. A. 143; McGovern *v.* Hern, 153 Mass. 308, 26 N. E. 861, 25

who the seller.[8] Ordinarily, however, a mistake in a part of the name of one of the parties will not invalidate the memorandum.[9]

3. Statement of Consideration — a. In General. There is much conflict of opinion as to whether the memorandum of a contract falling within the statute of frauds must express the consideration for the undertaking. Some courts require a consideration to be expressed in all cases on the ground that the memorandum should contain within it all the elements of a complete contract without a resort to parol evidence.[10] Other courts draw a distinction between the "agreement" and the "promise" mentioned in the statute, and hold that where the "agreement" is required to be in writing the consideration must be expressed, and that where only the "promise" is required to be in writing the consideration need not be expressed.[11] Some courts again draw a distinction between the "agreement" mentioned in the fourth section and the "bargain" mentioned in the seventeenth section, and hold that the consideration is a part of the agreement and must be expressed in the memorandum, but that the consideration is not a part of the bargain and need not be noted in the writing.[12] The application of these different views to the various contracts falling within the scope of the statute is treated in other connections in this section.[13] In many states this conflict is done away with by statutes which expressly provide that the consideration must,[14] or need not,[15] be expressed in the memorandum of the contract.

Am. St. Rep. 632, 10 L. R. A. 815; Lincoln *v.* Erie Preserving Co., 132 Mass. 129.

Minnesota.— Clampet *v.* Bells, 39 Minn. 272, 39 N. W. 495.

Mississippi.—Phillips *v.* Cornelius, (1900) 28 So. 871.

Missouri.— Tombs *v.* Basye, 65 Mo. App. 30; Carrick *v.* Mincke, 60 Mo. App. 140.

New Hampshire.— Sherburne *v.* Shaw, 1 N. H. 157, 8 Am. Dec. 47.

New Jersey.— Bowers *v.* Glucksman, 68 N. J. L. 146, 52 Atl. 218; Hoffman *v.* Larne, 3 N. J. L. 685.

New York.— Calkins *v.* Falk, 39 Barb. 620 [*affirmed* in 41 N. Y. 610, 1 Abb. Dec. 291, 38 How. Pr. 62]; Marston *v.* French, 17 N. Y. Suppl. 509. See Darby *v.* Pettee, 2 Duer 139.

Wisconsin.— Seymour *v.* Cushway, 100 Wis. 580, 76 N. W. 769, 69 Am. St. Rep. 957.

United States.— Grafton *v.* Cummings, 99 U. S. 100, 25 L. ed. 366.

England.— Champion *v.* Plummer, 1 B. & P. N. R. 252, 5 Esp. 240, 8 Rev. Rep. 795; Carr *v.* Lynch, [1900] 1 Ch. 613, 69 L. J. Ch. 345, 82 L. T. Rep. N. S. 381, 48 Wkly. Rep. 616.

See 23 Cent. Dig. tit. "Frauds, Statute of," §§ 212, 213. And see *infra*, XI, B, 3, a, (I).

8. Nichols *v.* Johnson, 10 Conn. 192; Frank *v.* Eltringham, 65 Miss. 281, 3 So. 655. *Contra*, Salmon Falls Mfg. Co. *v.* Goddard, 14 How. (U. S.) 446, 14 L. ed. 493; Newell *v.* Radford, L. R. 3 C. P. 52, 37 L. J. C. P. 1, 17 L. T. Rep. N. S. 118, 16 Wkly. Rep. 97.

An auctioneer's memorandum must show who is the vendor or who is the vendor's agent on account of whom the auctioneer makes the sale.

Alabama.— Knox *v.* King, 36 Ala. 367.

Connecticut.— O'Sullivan *v.* Overton, 56 Conn. 102, 14 Atl. 300.

Maryland.— Batturs *v.* Sellers, 5 Harr. & J. 117, 9 Am. Dec. 492.

Massachusetts.— Gowen *v.* Klous, 101 Mass. 449.

Missouri.— See Briggs *v.* Munchon, 56 Mo. 467.

New York.— Mentz *v.* Newwitter, 122 N. Y. 491, 25 N. E. 1044, 19 Am. St. Rep. 514, 11 L. R. A. 97 [*reversing* 14 Daly 524, 1 N. Y. Suppl. 73]; Hicks *v.* Whitmore, 12 Wend. 548.

England.— Kenworthy *v.* Schofield, 2 B. & C. 945, 4 D. & R. 556, 2 L. J. K. B. O. S. 175, 26 Rev. Rep. 600, 9 E. C. L. 406.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 202.

9. Fessenden *v.* Mussey, 11 Cush. (Mass.) 127; Pinckney *v.* Hagadorn, 1 Duer (N. Y.) 89.

Material mistake.— The test seems to be whether the mistake is such that it is doubtful who is the party intended. If doubt exists, the memorandum is inadequate. Calkins *v.* Falk, 39 Barb. (N. Y.) 620 [*affirmed* in 1 Abb. Dec. 291, 2 Keyes 610, 38 How. Pr. 62]. This question should be distinguished from the question how far a written contract may be explained by parol. See Grant *v.* Naylor, 4 Cranch (U. S.) 224, 2 L. ed. 222; Plattsburgh First Nat. Bank *v.* Sowles, 46 Fed. 731. And see, generally, Evidence.

10. Saunders *v.* Wakefield, 4 B. & Ald. 595, 23 Rev. Rep. 409, 6 E. C. L. 616. And see Drake *v.* Seaman, 97 N. Y. 230.

11. Wain *v.* Warlters, 5 East 10, the leading case. This distinction is rejected in many cases. See for example Whitby *v.* Whitby, 4 Sneed (Tenn.) 473.

12. Egerton *v.* Mathews, 6 East 307, 2 Smith K. B. 389, 8 Rev. Rep. 489.

13. See *infra*, IX, C, 3, e–j.

14. See the statutes of the different states.

15. See the statutes of the different states. And see Steadman *v.* Guthrie, 4 Metc. (Ky.) 147; Strubbe *v.* Lewis, 76 S. W. 150, 25

b. Form and Sufficiency[16] — (I) *In General.* No particular form of words expressive of the consideration need be written in the memorandum,[17] but the consideration must nevertheless clearly appear.[18]

(II) *Separate Writings.*[19] Separate writings evidently referring to the same transaction should be construed together in determining whether the consideration is sufficiently expressed.[20]

(III) *Consideration Implied in Fact.*[21] The consideration need not be stated in express terms; if it is necessarily or fairly to be implied from the terms of the writing, it must be considered as in writing within the meaning of the statute.[22]

(IV) *"For Value Received."* Where the consideration is required to be stated, the words "for value received" constitute a sufficient recital of it; the particular consideration need not appear.[23]

(V) *Amount of Consideration.* The requirement of the statute is satisfied wherever a valuable consideration is expressed in the writing, however insignificant it may be in point of fact.[24]

c. Contracts Importing Consideration in Law[25] — (I) *In General.* If the law imports a consideration for a contract falling within the statute of frauds, no consideration need be expressed in the memorandum thereof.[26]

Ky. L. Rep. 605; Williams *v.* Robinson, 73 Me. 186, 40 Am. Rep. 352.

16. See also *infra*, IX, C, 3, e–j.

Parol evidence of consideration see *infra*, XI, B, 3, a, (I).

17. Hargroves *v.* Cooke, 15 Ga. 321; O'Bannon *v.* Chumasero, 3 Mont. 419.

18. Hargroves *v.* Cooke, 15 Ga. 321.

19. See, generally, *infra*, IX, F.

20. Strouse *v.* Elting, 110 Ala. 132, 20 So. 123 (holding that correspondence between the parties leading up to a contract of guaranty the memorandum of which does not express the consideration is admissible as part of the contract to show the consideration); Lecat *v.* Tavel, 3 McCord (S. C.) 158 (the writings bearing the same date). See also *infra*, IX, C, 3, g, (II), (B).

21. Consideration implied in law see *infra*, IX, C, 3, c.

22. *Maryland.*— Ordeman *v.* Lawson, 49 Md. 135; Hutton *v.* Padgett, 26 Md. 228.

Minnesota.— Straight *v.* Wright, 60 Minn. 515, 63 N. W. 105.

New Hampshire.— Simons *v.* Steele, 36 N. H. 73.

New Jersey.— Laing *v.* Lee, 20 N. J. L. 337.

New York.— Rogers *v.* Kneeland, 13 Wend. 114 [*affirming* 10 Wend. 218]. See, however, Packer *v.* Willson, 15 Wend. 343, holding that where the statute expressly requires that the writing shall express the consideration, it cannot be inferred, implied, or spelled out from the terms of the agreement.

England.— Hoadley *v.* McLaine, 10 Bing. 482, 3 L. J. C. B. 162, 4 Moore & S. 340, 25 E. C. L. 231.

See 23 Cent. Dig. tit. "Frauds, Statute of," §§ 214, 217.

23. *Alabama.*— Booth *v.* Dexter Steam Fire Engine Co. No. 1, 118 Ala. 369, 24 So. 405; Flowers *v.* Steiner, 108 Ala. 440, 19 So. 321. And see Neal *v.* Smith, 5 Ala. 568, guaranty of note.

Maryland.— Emerson *v.* Aultman, 69 Md. 125, 14 Atl. 671; Edelen *v.* Gough, 5 Gill 103. See also Nabb *v.* Koontz, 17 Md. 283. See, however, Sumwalt *v.* Ridgely, 20 Md. 107, holding that a note reciting "for value received we promise," etc., does not sufficiently express the consideration if it was given for the debt of a third person.

Minnesota.— Osborne *v.* Baker, 34 Minn. 307, 25 N. W. 606, 57 Am. Rep. 55.

Nevada.— White Sewing Mach. Co. *v.* Fowler, (1904) 78 Pac. 1034.

New York.— Miller *v.* Cook, 23 N. Y. 495, 22 How. Pr. 66; Mosher *v.* Hotchkiss, 3 Abb. Dec. 326, 2 Keyes 589, 3 Keyes 161; Smith *v.* Northrup, 80 Hun 65, 29 N. Y. Suppl. 851 [*affirmed* in 145 N. Y. 627, 40 N. E. 165] (guaranty of bond); Cooper *v.* Dedrick, 22 Barb. 516; Howard *v.* Holbrook, 9 Bosw. 237; Douglass *v.* Howland, 24 Wend. 35; Watson *v.* McLaren, 19 Wend. 557.

South Carolina.— Woodward *v.* Pickett, Dudley 30; McMorris *v.* Herndon, 2 Bailey 56, 21 Am. Dec. 515; Caldwell *v.* McKain, 2 Nott & M. 555.

Wisconsin.— Dahlman *v.* Hammel, 45 Wis. 466; Cheney *v.* Cook, 7 Wis. 413; Day *v.* Elmore, 4 Wis. 190.

See 23 Cent. Dig. tit. "Frauds, Statute of," §§ 214, 217.

24. Bolling *v.* Munchus, 65 Ala. 558, where a consideration of one dollar was expressed.

25. Consideration implied in fact see *supra*, IX, C, 3, b, (III).

26. Davidson *v.* Rothschild, 49 Ala. 104, holding that a note executed by a guardian of an insane person in his own name and that of the ward is *prima facie* evidence of assets, and so imports a consideration, and is a sufficient memorandum. See also Lehman *v.* Levy, 69 Ala. 48 (holding that if by statute a promissory note imports a consideration, the consideration for becoming a surety thereon is sufficiently expressed if the surety signs contemporaneously with the maker); Toomey *v.* Dunphy, 86 Cal. 639, 25 Pac. 130.

(II) *SEALED CONTRACTS.* If a contract or the memorandum thereof is executed under seal, it need not recite the consideration.[27]

(III) *STATUTORY OBLIGATIONS.*[28] The statute of frauds applies only to common-law agreements and not to instruments created by and deriving their obligation from special statutes without the acceptance or assent of the party for whose ultimate benefit they are given.[29]

d. Contracts in Which Consideration Is Executed.[30] It has been held that so far as the consideration is an executory term in the contract it must be expressed the same as any other term, but that when it has been executed it need not appear in the writing.[31]

e. Agreements in Consideration of Marriage. It has been held that the memorandum of an agreement made upon consideration of marriage must express the consideration on which it is based,[32] and in some states a statement of the consideration is expressly required by statute.[33]

f. Promises by Executors and Administrators. It has been held under a statute requiring the "promise or agreement" to be in writing that a special promise by an executor to answer damages out of his own estate need not express the consideration;[34] but in some states it is expressly required by statute that the consideration should appear.[35]

g. Promises to Answer For the Debt, Default, or Miscarriage of Another — (I) *NECESSITY FOR STATEMENT.*[36] In some states a statute requiring the "agreement" to be in writing is construed to require not only the promise to be expressed

If a statute provides that a written contract imports a consideration, a memorandum of a contract within the statute of frauds need not express the consideration. Steadman *v.* Guthrie, 4 Metc. (Ky.) 147. *Contra,* Rigby *v.* Norwood, 34 Ala. 129; Speer *v.* Crowder, (Ala. 1902) 32 So. 658.

Promissory note as importing consideration see also *infra,* note 51.

27. *Indiana.*— Gregory *v.* Logan, 7 Blackf. 112.

Kentucky.— Steadman *v.* Guthrie, 4 Metc. 147.

Maryland.— Edelen *v.* Gough, 5 Gill 103.

New York.— Smith *v.* Northrup, 80 Hun 65, 29 N. Y. Suppl. 851 [*affirmed* in 145 N. Y. 627, 40 N. E. 165]; Rosenbaum *v.* Gunter, 2 E. D. Smith 415; Gein *v.* Little, 43 Misc. 421, 89 N. Y. Suppl. 488; Livingstone *v.* Tremper, 4 Johns. 416; Bush *v.* Stevens, 24 Wend. 256; Douglass *v.* Howland, 24 Wend. 35. See, however, Rogers *v.* Kneeland, 13 Wend. 114 [*affirming* 10 Wend. 218].

Oregon.— Johnston *v.* Wadsworth, 24 Oreg. 494, 34 Pac. 13.

Wisconsin.— Kuener *v.* Smith, 108 Wis. 549, 84 N. W. 850

See 23 Cent. Dig. tit. 'Frauds, Statute of," §§ 214, 217.

28. **Application of statute to contracts implied in law** in general see *infra,* X, A, 10, b.

29. Doolittle *v.* Dininny, 31 N. Y. 350; Thompson *v.* Blanchard, 3 N. Y. 335 (both being cases of statutory undertaking entered into by sureties in order to give the right of appeal); Bildersee *v.* Aden, 62 Barb. (N. Y.) 175, 12 Abb. Pr. N. S. 324 [*reversing* 10 Abb. Pr. N. S. 163] (statutory undertaking given on the release of an attachment); Johnson *v.* Ackerson, 40 How. Pr. (N. Y.) 222 (statutory undertaking given to obtain the removal of a cause); Johnson *v.* Noonan, 16 Wis. 687 (statutory undertaking to stay execution of a foreclosure judgment pending an appeal, and to pay any deficiency, etc.).

30. **Application of statute to executed contracts** see *infra,* X, I.

31. Fudgate *v.* Hansford, 3 Litt. (Ky.) 262 (holding that where a contract for the purchase and sale of lands is executory on both sides it is doubtless necessary that the price should appear in the writing, but that where the contract is executed on the part of the purchaser by payment of the price, and that fact is evinced by the memorandum, it would seem sufficient without stating the precise price); Cruger *v.* Cruger, 5 Barb. (N. Y.) 225 (holding that the statute requiring the consideration to be expressed does not apply to executed contracts); Sayward *v.* Gardner, 5 Wash. 347, 31 Pac. 761, 33 Pac. 389 (holding that a memorandum of a contract for the sale of land which fails to state the price becomes sufficient on payment of the price).

32. Ogden *v.* Ogden, 1 Bland (Md.) 284, a case involving an agreement to pay a marriage portion.

33. See the statutes of the different states. And see Siemers *v.* Siemers, 65 Minn. 104, 67 N. W. 802, 60 Am. St. Rep. 430 (holding that a written promise to pay a woman 'on the wedding day when she shall become my wife, the sum of $1,000" does not sufficiently express the consideration for the promise); Van Doren *v.* Tjader, 1 Nev. 380, 90 Am. Dec. 498.

34. Britton *v.* Angier, 48 N. H. 420.

35. See the statutes of the different states.

36. See also *infra,* IX, C, 3, g, (II), (B).

in writing but also the consideration therefor;[37] but in other states a contrary view is taken.[38] If the statute requires merely the "promise,"[39] or the "promise or agreement,"[40] to be in writing, it is not necessary to express the consideration in the memorandum. In some states the statute expressly dispenses with the necessity of stating the consideration in the writing,[41] while in others the statute expressly requires it.[42] By the civil law no consideration is necessary to uphold a

37. *California.*— Ellison *v.* Jackson Water Co., 12 Cal. 542.

Georgia.—Hargroves *v.* Cooke, 15 Ga. 321; Henderson *v.* Johnson, 6 Ga. 390.

Maryland.— Ordeman *v.* Lawson, 49 Md. 135; Deutsch *v.* Bond, 46 Md. 164; Hutton *v.* Padgett, 26 Md. 228; Nabb *v.* Koontz, 17 Md. 283; Elliot *v.* Giese, 7 Harr. & J. 457; Wyman *v.* Gray, 7 Harr. & J. 409.

New Jersey.— Buckley *v.* Beardslee, 5 N. J. L. 570, 8 Am. Dec. 620. *Quære,* see Laing *v.* Lee, 20 N. J. L. 337.

New York.— Union Nat. Bank *v.* Leary, 77 N. Y. App. Div. 332, 79 N. Y. Suppl. 217; Castle *v.* Beardsley, 10 Hun 343; Brumm *v.* Gilbert, 27 Misc. 421, 59 N. Y. Suppl. 237; Bernstein *v.* Heinemann, 23 Misc. 464, 51 N. Y. Suppl. 467; Meriden Britannia Co. *v.* Zingsen, 4 Rob. 312; Kerr *v.* Shaw, 13 Johns. 236; Sears *v.* Brink, 3 Johns. 210, 3 Am. Dec. 475. Laws (1863), c. 364, re-enacting the statute of frauds as found in the Revised Statutes of 1830 with the omission of the clause expressly requiring the consideration to be stated, does not change the rule existing before the enactment of that clause, which required the consideration as well as the promise to answer for the debt of another to be stated in the writing. Barney *v.* Forbes, 118 N. Y. 580, 23 N. E. 890 [*affirming* 44 Hun 446, and *overruling* Speyers *v.* Lambert, 1 Sweeny 335, 6 Abb. Pr. N. S. 309, 37 How. Pr. 315]; Marston *v.* French, 17 N. Y. Suppl. 509.

Wisconsin.— Taylor *v.* Pratt, 3 Wis. 674.

England.— Saunders *v.* Wakefield, 4 B. & Ald. 595, 23 Rev. Rep. 409, 6 E. C. L. 616; Jenkins *v.* Reynolds, 3 B. & B. 14, 6 Moore C. P. 86, 7 E. C. L. 578; Morley *v.* Boothby, 3 Bing. 107, 3 L. J. C. P. O. S. 177, 10 Moore C. P. 395, 11 E. C. L. 61; Wain *v.* Warlters, 5 East 10, the leading case. This rule has since been abrogated by 19 & 20 Vict. c. 97, § 3.

Canada.— Lock *v.* Reid, 6 U. C. Q. B. O. S. 295.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 216.

38. *Connecticut.*— Sage *v.* Wilcox, 6 Conn. 81, where the statute requires the "contract or agreement" to be in writing.

Maine.— Gillighan *v.* Boardman, 29 Me. 79; King *v.* Upton, 4 Me. 387, 16 Am. Dec. 266; Levy *v.* Merrill, 4 Me. 180.

Massachusetts.— Packard *v.* Richardson, 17 Mass. 122, 9 Am. Dec. 123.

North Carolina.— Green *v.* Thornton, 49 N. C. 230; Ashford *v.* Robinson, 39 N. C. 114, where the statute requires the "contract" to be in writing.

Ohio.— Reed *v.* Evans, 17 Ohio 128.

Pennsylvania.— Moore *v.* Eisaman, 201 Pa. St. 190, 50 Atl. 982; Giltinan *v.* Strong, 64 Pa. St. 242; Shively *v.* Black, 45 Pa. St. 345.

South Carolina.— Woodward *v.* Pickett, Dudley 30; Fyler *v.* Givens, 3 Hill 48, Riley 56 [*overruling* Stephens *v.* Winn, 3 Brev. 17, 2 Nott & M. 372 note *a*].

Vermont.— Gregory *v.* Gleed, 33 Vt. 405; Patchin *v.* Swift, 21 Vt. 292; Smith *v.* Ide, 3 Vt. 290, where the statute requires the "contract or agreement" to be in writing.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 216.

39. Patmor *v.* Haggard, 78 Ill. 607; Dunlap *v.* Hopkins, 95 Fed. 231, 37 C. C. A. 52, following the Illinois decisions.

40. *Alabama.*— Thompson *v.* Hall, 16 Ala. 204.

Florida.— Dorman *v.* Bigelow, 1 Fla. 281.

Mississippi.— Wren *v.* Pearce, 4 Sm. & M. 91.

New Hampshire.— Brown *v.* Fowler, 70 N. H. 634, 47 Atl. 412; Goodnow *v.* Bond, 59 N. H. 150; Britton *v.* Angier, 48 N. H. 420 [*overruling dictum* in Neelson *v.* Sanborne, 2 N. H. 413, 9 Am. Dec. 108, and *doubting* Underwood *v.* Campbell, 14 N. H. 393].

Tennessee.— Gilman *v.* Kibler, 5 Humphr. 19; Campbell *v.* Findley, 3 Humphr. 330; Taylor *v.* Ross, 3 Yerg. 330.

Texas.— Thomas *v.* Hammond, 47 Tex. 42; Ellett *v.* Britton, 10 Tex. 208.

Virginia.— Colgin *v.* Henley, 6 Leigh 85.

United States.— Violett *v.* Patton, 5 Cranch 142, 3 L. ed. 61 [*affirming* 18 Fed. Cas. No. 10,839, 1 Cranch C. C. 463], construing the Virginia statute.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 216.

41. See the statutes of the different states. And see Black *v.* McBain, 32 Ga. 128; Sorrell *v.* Jackson, 30 Ga. 901; Hiatt *v.* Hiatt, 28 Ind. 53.

42. See the statutes of the different states.

Statute applied see the following cases:

Alabama.— Lindsay *v.* McRae, 116 Ala. 542, 22 So. 868 (holding that parol evidence is not competent to show the unexpressed consideration of the promise); Strouse *v.* Elting, 110 Ala. 132, 20 So. 123; White *v.* White, 107 Ala. 417, 18 So. 3; Hood *v.* Robbins, 98 Ala. 484, 13 So. 574; Foster *v.* Napier, 74 Ala. 393; Wells *v.* Thompson, 50 Ala. 83.

Montana.— O'Bannon *v.* Chumasero, 3 Mont. 419.

Nevada.— Van Doren *v.* Tjader, 1 Nev. 380, 90 Am. Dec. 498.

Wisconsin.— Commercial Nat. Bank *v.* Smith, 107 Wis. 574, 83 N. W. 766 [*following* Parry *v.* Spikes, 49 Wis. 384, 5

guaranty, and therefore in those states where the civil law prevails none need be expressed in the writing.[43]

(II) *Sufficiency of Statement*[44] — (A) *In General.* In those jurisdictions where it is necessary to state the consideration for the promise in the writing the consideration must clearly appear therefrom,[45] but no special form is required for the statement; the consideration need not be expressed in so many words, but may be implied from the instrument.[46] Thus if it appears from the writing that the promisee agrees to do or to forbear to do some act in consideration of the promise, the consideration is sufficiently expressed.[47]

N. W. 794, 35 Am. Rep. 782]; Twohy Mercantile Co. *v.* Ryan Drug Co., 94 Wis. 319, 68 N. W. 963.

United States.—Moses *v.* Lawrence County Nat. Bank, 149 U. S. 298, 13 S. Ct. 900, 37 L. ed. 743, applying the Alabama statute.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 216.

It was formerly so in New York. Brewster *v.* Silence, 8 N. Y. 207 [*affirming* 11 Barb. 144]; Gould *v.* Moring, 28 Barb. 444; Sackett *v.* Palmer, 25 Barb. 179; Weed *v.* Clark, 4 Sandf. 31; Bennett *v.* Pratt, 4 Den. 275; Walrath *v.* Thompson, 4 Hill 200.

43. Ringgold *v.* Newkirk, 3 Ark. 96, construing a Louisiana contract.

44. See also *supra*, IX, C, 3, b.

45. Deutsch *v.* Bond, 46 Md. 164 (holding that a contract of guaranty reciting, "We the undersigned take pleasure in recommending S. to D. & Co. We also severally agree to become responsible for $350 to said D. & Co. to be forthcoming in thirty days after the final delivery of the work," insufficiently expresses the consideration); Newcomb *v.* Clark, 1 Den. (N. Y.) 226 (holding that a promise to answer for the debt of another does not sufficiently express the consideration by using the word "agree").

46. McDonald *v.* Wood, 118 Ala. 589, 24 So. 86 [*distinguishing* Bullard *v.* Johns, 50 Ala. 382] (holding that a bond executed by sureties for the costs of an election contest shows that the consideration therefor was the institution of the contest and so sufficiently expresses the consideration); Lent *v.* Padelford, 10 Mass. 230, 6 Am. Dec. 119; Stymets *v.* Brooks, 10 Wend. (N. Y.) 206 (holding that where a party by a written instrument acknowledges having received a deed conveying lands to a third person, to be paid for in a specified manner, and at the foot of the instrument promises to see the contract fulfilled, the writing sufficiently expresses the consideration).

Implied consideration see also *supra*, IX, C, 3, b, (III).

47. *Alabama.*— Moog *v.* Strang, 69 Ala. 98, holding that where a mortgage executed to secure a debt for which the mortgagor is in no way liable contains an obligation on the part of the mortgagee to insure the mortgaged premises for two years, the consideration is sufficiently expressed.

Delaware.— Weldin *v.* Porter, 4 Houst. 236.

Minnesota.— Straight *v.* Wright, 60 Minn. 515, 63 N. W. 105.

Montana.— O'Bannon *v.* Chumasero, 3 Mont. 419.

New York.— Barney *v.* Force, 118 N. Y. 580, 23 N. E. 890 [*affirming* 44 Hun 446] (holding that a promise to become security for a debt if the creditor will release collateral security sufficiently expresses the consideration); Union Bank *v.* Coster, 3 N. Y. 203, 53 Am. Dec. 280; Waterbury *v.* Graham, 4 Sandf. 215 (holding that a written promise to become responsible for the rent if the promisee will let certain premises to a third person sufficiently expresses the consideration); Marquand *v.* Hipper, 12 Wend. 520 (holding that a writing whereby a party agrees to become security for a certain amount in silver which the promisee may from time to time during a certain period put into the hands of a third person for the purpose of having it manufactured sufficiently expresses the consideration).

Vermont.— Roberts *v.* Griswold, 35 Vt. 496, 84 Am. Dec. 641, holding that where an attorney was retained and rendered services, and a third person by writing stated that he would hold himself accountable that the client should pay the attorney for all the services he had rendered or might render him in the suit, the writing sufficiently showed the consideration.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 217.

Acceptances and advances.— If A agrees to advance to B a sum of money, and B is to be answerable, but upon the understanding that C will do some act for the security of A and enter into an agreement with A for that purpose, and the writing shows this, the consideration is sufficiently expressed. De Wolf *v.* Rabaud, 1 Pet. (U. S.) 476, 7 L. ed. 227 [*affirming* 20 Fed Cas. No. 11,519, 1 Paine 580]. A contract of guaranty reciting, "I hold myself responsible to . . . [plaintiffs] to the amount of $2,000 for any drafts they have accepted, or may hereafter accept for" a third person, sufficiently expresses the consideration for subsequent acceptances. Hutton *v.* Padgett, 26 Md. 228.

Goods furnished.— A written promise to be responsible for such goods as may be furnished by the promisee to a third person sufficiently expresses the consideration for the promise. Gates *v* McKee, 13 N. Y. 232, 64 Am. Dec. 545; Walrath *v.* Thompson, 4 Hill (N. Y.) 200; Finkelstein *v.* Kessler, 84 N. Y. Suppl. 266; Coxe *v.* Milbrath, 110 Wis. 499, 86 N. W. 174; Waldheim *v.* Miller, 97 Wis. 300, 72 N. W. 869; Eastman *v.*

(B) *Written Guaranty.* If a guaranty is written on the original undertaking at the time of the execution and delivery of the latter,[48] or contemporaneously on a separate instrument that sufficiently refers to the original undertaking,[49] it is supported by the consideration of the latter,[50] and if a consideration appears from the original undertaking,[51] no further expression thereof need appear in the

Bennett, 6 Wis. 232; Choate *v.* Hoogstraat, 105 Fed. 713, 46 C. C. A. 174, decided under the Wisconsin statute.

Forbearance, renewal, or extension of time. — A writing reciting that if plaintiff would renew a note for a third person then held by him defendant would guarantee payment of it sufficiently imports a consideration for the guaranty. Sloan *v.* Wilson, 4 Harr. & J. (Md.) 322, 7 Am. Dec. 672. A guaranty of the payment of a past-due note, "the one-half within six months and other half within twelve months," shows a consideration consisting of the holder's forbearance immediately to collect the note, and is hence sufficient. Neelson *v.* Sanborne, 2 N. H. 413, 9 Am. Dec. 108. A guaranty of payment of an overdue bond "within one year from the date of" the guaranty shows that the extension of time of payment of the bond for one year was the consideration for the promise. Smith *v.* Northrup, 80 Hun (N. Y.) 65, 29 N. Y. Suppl. 851 [*affirmed* in 145 N. Y. 627, 40 N. E. 165]. An undertaking entered into by sureties to stay the execution of a foreclosure pending an appeal, and to pay any deficiency, etc., sufficiently expresses the consideration, where it recites the rendition of judgment, and that the judgment defendant feels aggrieved thereby and intends to appeal therefrom and wishes to stay execution of the same. Johnson *v.* Noonan, 16 Wis. 687.

48. *Alabama.*— Lehman *v.* Levy, 69 Ala. 48, guaranty of note.

California.— Otis *v.* Haseltine, 27 Cal. 80 (guaranty of contract of sale); Hazeltine *v.* Larco, 7 Cal. 32 (guaranty of charter-party); Evoy *v.* Tewksbury, 5 Cal. 285 (guaranty of lease); Riggs *v.* Waldo, 2 Cal. 485, 54 Am. Dec. 356 (guaranty of note).

Maryland.— Culbertson *v.* Smith, 52 Md. 628, 36 Am. Rep. 384; Ordeman *v.* Lawson, 49 Md. 135; Nabb *v.* Koontz, 17 Md. 283, all being cases of guaranty of note.

Massachusetts.— See Bickford *v.* Gibbs, 8 Cush. 154, guaranty of note.

Minnesota.—Highland *v.* Dresser, 35 Minn. 345, 29 N. W. 55, guaranty of lease.

New Hampshire.— Simons *v.* Steele, 36 N. H. 73, guaranty of contract.

United States.—Moses *v.* Lawrence County Nat. Bank, 149 U. S. 298, 13 S. Ct. 900, 37 L. ed. 743 (decided under Alabama statute); Fowler *v.* McDonald, 9 Fed. Cas. No. 5,002, 4 Cranch C. C. 297 (decided under District of Columbia statute), both being cases of guaranty of note.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 216 *et seq.*

Contra.— Van Doran *v.* Tjader, 1 Nev. 380, 90 Am. Dec. 498 (guaranty of note); Parry *v.* Spikes, 49 Wis. 384, 5 N. W. 794, 35 Am. Rep. 782 [*following* Taylor *v.* Pratt, 3 Wis. 674, and *distinguishing* Houghton *v.* Ely, 26 Wis. 181, 7 Am. Rep. 52, on the ground that in that case the note on which the guaranty was indorsed was non-negotiable] (guaranty of note); Hutson *v.* Field, 6 Wis. 407 (guaranty of lease).

In New York the cases are in conflict. In accord with the text see Hardt *v.* Recknagel, 62 N. Y. App. Div. 106, 70 N. Y. Suppl. 782 (guaranty of return of loan); Marsh *v.* Chamberlain, 2 Lans. 287; Hanford *v.* Rogers, 11 Barb. 18 (both being cases of guaranty of bond); McKensie *v.* Farrell, 4 Bosw. 192 (guaranty of lease); Bailey *v.* Freeman, 11 Johns. 221, 6 Am. Dec. 371 (guaranty of contract of sale). To the contrary see Draper *v.* Snow, 20 N. Y. 331, 75 Am. Dec. 408 [*affirming* 6 Duer 662, and *distinguishing* Union Bank *v.* Coster, 3 N. Y. 203, 53 Am. Dec. 280 (*affirming* 1 Sandf. 563), a case of guaranty of letter of credit] (guaranty of contract of sale); Brewster *v.* Silence, 8 N. Y. 207 [*affirming* 11 Barb. 144, and *overruling* Leonard *v.* Vredenburgh, 8 Johns. 29, 5 Am. Dec. 317, a case of guaranty of note]; Hall *v.* Farmer, 2 N. Y. 553 [*affirming* 5 Den. 484]; Glen Cove Mut. Ins. Co. *v.* Harrold, 20 Barb. 298 (the last three being cases of guaranty of note).

Parol evidence that note and indorsement were made at same time see *infra*, page 318 note 82.

49. Jones *v.* Post, 6 Cal. 102 (guaranty of contract of sale); Ordeman *v.* Lawson, 49 Md. 135 (holding, however, that if a guaranty of a note contains no express consideration and is written on a separate piece of paper, its reference to the note must be so clear as to identify it with certainty else it falls within the statute); Roberts *v.* Woven Wire Mattress Co., 46 Md. 374 (guaranty of contract of agency); Mitchell *v.* McCleary, 42 Md. 374 (guaranty of covenant to pay rent); Wilson Sewing-Mach. Co. *v.* Schnell, 20 Minn. 40 (guaranty of note). See also *supra*, IX, C, 3, b, (II).

Parol evidence: To connect writings see *infra*, XI, B, 3, a, (II). To show contemporaneous execution of writings see *infra*, page 319 note 87.

50. See cases cited *supra*, notes 48, 49.

51. Nabb *v.* Koontz, 17 Md. 283.

A promissory note imports a consideration, and hence one who indorses it as guarantor at the time it is made and delivered is liable, although the consideration for his indorsement is not otherwise expressed. Lehman *v.* Levy, 69 Ala. 48 (by statute); Riggs *v.* Waldo, 2 Cal. 485, 56 Am. Dec. 356; Culbertson *v.* Smith, 52 Md. 628, 36 Am. Rep. 384; Ordeman *v.* Lawson, 49 Md. 135; Moses *v.* Lawrence County Nat. Bank, 149 U. S. 298, 13 S. Ct. 900, 37 L. ed. 743 (holding, under the Alabama statute, that a

guaranty, even in those jurisdictions where the consideration of a guaranty is required to be expressed in the memorandum of the contract. If, however, the guaranty is first made after the execution and delivery of the original undertaking, it is not enforceable unless it expresses the consideration on which it rests.[52] But if the holder of a note on transferring it for value guarantees its collection, the consideration for the guaranty need not be expressed.[53]

h. Agreements Not to Be Performed Within a Year. In some states the memorandum of an agreement not to be performed within a year from the making thereof is expressly required by statute to state the consideration therefor,[54] and a statement of the consideration has been held to be necessary even in the absence of an express statutory provision.[55]

i. Contracts Concerning Real Estate — (i) *In General.* As to whether the memorandum of a contract concerning real estate must state the consideration there is a conflict of authority similar to that which exists in the case of a promise to answer for the debt of another.[56] In some states it is held that the statute requiring the "agreement" or "contract" to be in writing requires the consideration to be expressed,[57] while in others a contrary view is taken.[58] If, however, the statute requires the "promise or agreement" to be in writing the consideration need not be expressed.[59] In some states the statute expressly provides that the consideration shall be expressed in the writing,[60] and in others the statute expressly dispenses with such a statement.[61]

negotiable promissory note, even if not purporting to be "for value received," imports a consideration). See also Nabb *v.* Koontz, 17 Md. 283, holding that an indorsement of a contract of guaranty on a note reciting "for value received," etc., if made at the time the note is executed and delivered, sufficiently expresses the consideration.

52. *Alabama.*— Hood *v.* Robbins, 98 Ala. 484, 13 So. 574; Rigby *v.* Norwood, 34 Ala. 129, both being cases of guaranty of note.

California.— Hazeltine *v.* Larco, 7 Cal. 32, guaranty of charter-party.

Maryland.— Culbertson *v.* Smith, 52 Md. 628, 36 Am. Rep. 384, guaranty of note.

Minnesota.— Moor *v.* Folsom, 14 Minn. 340, 100 Am. Dec. 227, guaranty of note.

New York.— Etz *v.* Place, 81 Hun 203, 30 N. Y. Suppl. 765; Clark *v.* Hampton, 1 Hun 612, 4 Thomps. & C. 75 [*following* Bridge *v.* Mason, 45 Barb. 37]; Packer *v.* Willson, 15 Wend. 343, all being cases of guaranty of note.

United States.—Moses *v.* Lawrence County Nat. Bank, 149 U. S. 298, 13 S. Ct. 900, 37 L. ed. 743 (decided under Alabama statute), guaranty of note.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 216 *et seq.*

53. Burt *v.* Horner, 5 Barb. (N. Y.) 501; Manrow *v.* Durham, 3 Hill (N. Y.) 584; Howe *v.* Kemball, 12 Fed. Cas. No. 6,748, 2 McLean 103. *Contra*, Nichols *v.* Allen, 23 Minn. 542. See *supra*, page 166 note 47.

54. See the statutes of the different states. And see Horton *v.* Wollner, 71 Ala. 452, holding that in order to take a contract for personal services for one year, to begin in the future, out of the statute, the memorandum thereof must state the amount of salary, and it is not sufficient that the memorandum states that the salary is to remain the same as that received for the previous year, since this renders a resort to parol evidence necessary.

55. Drake *v.* Seaman, 97 N. Y. 230, holding that N. Y. Laws (1863), c. 464, which struck out from the Revised Statutes of 1830 the clause expressly requiring the consideration to be expressed in the writing, did not dispense with the necessity of expressing the consideration.

56. See *supra*, IX, C, 3, g, (I).

57. Patmor *v.* Haggard, 78 Ill. 607; Chellis *v.* Grimes, 72 N. H. 337, 56 Atl. 742; Underwood *v.* Campbell, 14 N. H. 393.

58. Ivory *v.* Murphy, 36 Mo. 534; Thornburg *v.* Masten, 88 N. C. 293; Miller *v.* Irvine, 18 N. C. 103. And see Toomy *v.* Dunphy, 86 Cal. 639, 25 Pac. 130. See, however, cases cited *infra*, note 62.

59. Whitby *v.* Whitby, 4 Sneed (Tenn.) 473; Thomas *v.* Hammond, 47 Tex. 42.

60. See the statutes of the different states. And see Robinson *v.* Driver, 132 Ala. 169, 31 So. 495 (holding that a recital in the minute entry of a judgment of an agreement by the parties in open court for sale by plaintiff to defendant of the land sued for does not satisfy the statute); Phillips *v.* Adams, 70 Ala. 373 (holding that a bond for title executed in pursuance of a contract for the sale of land is not a sufficient memorandum where it does not show the consideration). However this provision of the statute does not apply to an instrument which of itself creates and passes an estate, title, or interest, by words of grant, assignment, surrender, or declaration of trust. Cruger *v.* Cruger, 5 Barb. (N. Y.) 225.

61. See the statutes of the different states. And see Patmor *v.* Haggard, 78 Ill. 607; Ewing *v.* Stanley, 69 S. W. 724, 24 Ky. L. Rep. 633; White *v.* Dahlquist Mfg. Co., 179 Mass. 427, 60 N. E. 791; Hayes *v.* Jackson, 159 Mass. 451, 34 N. E. 683.

(II) *Statement of Price.* It follows from what has been said in the preceding subsection that the authorities are in conflict as to whether the memorandum of the contract for the sale of land must state the price. In most jurisdictions this is necessary,[62] but in others it is not required.[63]

j. Contracts For Sale of Goods. In the case of a contract for the sale of goods, a statute requiring a written memorandum of the "bargain" does not require the consideration to be expressed in the writing,[64] and the same has been held of a statute requiring the "agreement" to be in writing,[65] in the absence of an express provision requiring the consideration to be stated.[66] It has been held that the consideration need not appear in the writing unless the price is fixed by the parties, in which event it becomes part of the bargain and must accordingly be noted the same as any other term.[67]

62. *Alabama.*— Phillips *v.* Adams, 70 Ala. 373; Adams *v.* McMillan, 7 Port. 73.

Michigan.— Messmore *v.* Cunningham, 78 Mich. 623, 44 N. W. 145; Webster *v.* Brown, 67 Mich. 328, 34 N. W. 676; James *v.* Muir, 33 Mich. 223.

Missouri.— Kelly *v.* Thuey, 143 Mo. 422, 45 S. W. 300; Boyd *v.* Paul, 125 Mo. 9, 28 S. W. 171; Ringer *v.* Holtzclaw, 112 Mo. 519, 20 S. W. 800 [*overruling* Ellis *v.* Bray, 79 Mo. 227; O'Neil *v.* Crain, 67 Mo. 250]; Halsa *v.* Halsa, 8 Mo. 303; Bean *v.* Valle, 2 Mo. 126.

New Hampshire.— Stockwell *v.* Williams, 68 N. H. 75, 41 Atl. 973; Rafferty *v.* Lougee, 63 N. H. 54; Phelps *v.* Stillings, 60 N. H. 505; Sherburne *v.* Shaw, 1 N. H. 157, 8 Am. Dec. 47.

New York.—Cameron *v.* Tompkins, 72 Hun 113, 25 N. Y. Suppl. 305, 30 Abb. N. Cas. 434.

North Carolina.— Hall *v.* Misenheimer, (1904) 49 S. E. 104, so holding where the purchaser is sought to be charged. See, however, North Carolina cases cited *supra,* note 58.

Oregon.— Stubblefield *v.* Imbler, 33 Oreg. 446, 54 Pac. 198.

Pennsylvania.— See Soles *v.* Hickman, 20 Pa. St. 180.

United States.— Arnold *v.* Garth, 106 Fed. 13 (following Missouri decisions); Smith *v.* Arnold, 22 Fed. Cas. No. 13,004, 5 Mason 414 (following Rhode Island decisions).

England.— Clerk *v.* Wright, 1 Atk. 12, 26 Eng. Reprint 9; Elmore *v.* Kingscote, 5 B. & C. 583, 8 D. & R. 343, 29 Rev. Rep. 341, 11 E. C. L. 594; Blagden *v.* Bradbear, 12 Ves. Jr. 466, 8 Rev. Rep. 354, 33 Eng. Reprint 176.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 238.

Executed and executory considerations.— Where a contract for the purchase and sale of lands is executory on both sides, it is doubtless necessary that the price should be evidenced by a memorandum in writing; but where the contract is executed on the part of the purchaser by the payment of the price, and that fact is evidenced by the memorandum, it would seem sufficient without stating the precise price. Fugate *v.* Hansford, 3 Litt. (Ky.) 262. So a memorandum of a contract of the sale of land which fails to state the price becomes sufficient upon payment of the price. Sayward *v.* Gardner, 5 Wash. 247, 31 Pac. 761, 33 Pac. 389.

Time of payment.— A memorandum of a contract for the sale of lands does not sufficiently express the consideration where it fixes the price without stating the time of payment, if it has been agreed on. Wright *v.* Weeks, 3 Bosw. (N. Y.) 372 [*affirmed* in 25 N. Y. 153].

Statement of price held sufficient see Gowen *v.* Klous, 101 Mass. 449; Atwood *v.* Cobb, 16 Pick. (Mass.) 227, 26 Am. Dec. 657; Bird *v.* Richardson, 8 Pick (Mass.) 252; Brown *v.* Bellows, 4 Pick. (Mass.) 179, holding that if the price is agreed to be determined by appraisers, a statement of that fact in the writing is a sufficient statement of the price.

63. *Connecticut.*— Edgerton *v.* Edgerton, 8 Conn. 6.

Massachusetts.— Atwood *v.* Cobb, 16 Pick. 227, 26 Am. Dec. 657, *semble.*

Nebraska.— See Rank *v.* Garvey, 66 Nebr. 767, 92 N. W. 1025, 99 N. W. 666.

Texas.— Fulton *v.* Robinson, 55 Tex. 401; Adkins *v.* Watson, 12 Tex. 199; Dyer *v.* Winston, (Civ. App. 1903) 77 S. W. 227.

Virginia.—See Johnson *v.* Ronald, 4 Munf. 77.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 238.

64. Egerton *v.* Mathews, 6 East 307, 2 Smith K. B. 389, 8 Rev. Rep. 489.

65. Williams *v.* Robinson, 73 Me. 186, 40 Am. Rep. 352.

66. See the statutes of the different states. And see Corbitt *v.* Salem Gas Light Co., 6 Oreg. 405, 25 Am. Rep. 541. However, a written contract whereby one party covenants to buy and the other to sell certain goods shows a consideration consisting of mutual promises, and is hence sufficient. Reid *v.* Alaska Packing Co., 43 Oreg. 429, 73 Pac. 337.

67. Ide *v.* Stanton, 15 Vt. 685, 40 Am. Dec. 698.

It will be presumed, if no consideration is expressed, that there is a promise to pay a reasonable price, which not being fixed by the parties need not be expressed; but this presumption may of course be rebutted by evidence of an express verbal agreement as to a fixed price. Hoadley *v.* McLaine, 10 Bing. 482, 3 L. J. C. P. 162, 4 Moore & S. 340, 25 E. C. L. 231.

4. Description of Subject-Matter — a. In General. The subject-matter of a contract falling within the statute of frauds must be so described in the memorandum as to be capable of certain identification.[68] If, however, the description contained in the memorandum points to specific property, parol evidence is admissible to identify that property, the rule being that that is certain which is capable of being made certain.[69]

b. Lands. In general the description of the land in a memorandum of a contract for the sale of lands must be sufficiently definite to identify the land by its own terms or by reference in it to external standards in existence at the time of the making of the contract and capable of being determined beyond dispute.[70] Where, however, the memorandum on its face appears to refer to a definite parcel of land, the description need not be such as to render entirely needless a resort to extrinsic aid to identify the property; it is enough if the description be sufficient, with the assistance of external evidence, to fit and comprehend the property which is the subject of the transaction to the exclusion of all other property.[71] Thus a description of the land by a familiar local appellation which

Where the price of goods is implied by law it is not necessary to state it in the memorandum. Hoadley *v.* McLaine, 10 Bing. 482, 3 L. J. C. P. 162, 4 Moore & S. 340, 25 E. C. L. 231.

68. Eppich *v.* Clifford, 6 Colo. 493; Ellis *v.* Denver, etc., R. Co., 7 Colo. App. 350, 43 Pac. 457 (holding that a memorandum of a contract for the sale of railroad ties of various descriptions which merely specifies the total number of ties without giving the number of ties of the various descriptions is insufficient); McConnell *v.* Brillhart, 17 Ill. 354, 65 Am. Dec. 661; May *v.* Ward, 134 Mass. 127 (contract for sale of iron).

69. Burgess Sulphite Fibre Co. *v.* Bloomfield, 180 Mass. 283, 62 N. E. 367 (holding that the memorandum of the contract to buy iron which states that it "covers everything in the line of iron, whether located in your mill or on your premises, except galvanized iron, . . . you to have the privilege of indicating what you desire to have us take and of reserving what you wish" is sufficient); Penniman *v.* Hartshorn, 13 Mass. 87 (holding that the memorandum of a contract to sell a certain number of bales of cotton is sufficient, although it does not specify the weight thereof); American Iron, etc., Mfg. Co. *v.* Midland Steel Co., 101 Fed. 200 (holding that where a memorandum of sale of steel billets stated that their size should be either one or the other of two sizes specified, the seller had the option to deliver either size, and that the description was sufficient under the Indiana statute). And see *infra*, XI, B, 3, a, (I).

70. *Arkansas.*— St. Louis, etc., R. Co. *v.* Beidler, 45 Ark. 17.

California.— Breckinridge *v.* Crocker, 78 Cal. 529, 21 Pac. 179.

Connecticut.— Andrew *v.* Babcock, 63 Conn. 109, 26 Atl. 715.

District of Columbia.— Repetti *v.* Maisak, 6 Mackey 366.

Illinois.— Wood *v.* Davis, 82 Ill. 311.

Indiana.— Wilstach *v.* Heyd, 122 Ind. 574, 23 N. E. 963.

Kentucky.— Overstreet *v.* Rice, 4 Bush 1, 96 Am. Dec. 279; Voorheis *v.* Eiting, 22 S. W. 80, 15 Ky. L. Rep. 161; Judge *v.* Cash, 6 Ky. L. Rep. 444.

Maryland.— Taney *v.* Bachtell, 9 Gill 205, holding that where an agreement for the conveyance of land described it as "a farm on which is a grist mill, saw mill, and milling apparatus, containing 230 acres," parol testimony is not admissible to correct the uncertainty in the description.

Massachusetts.—Tobin *v.* Larkin, 183 Mass. 389, 67 N. E. 340; Whelan *v.* Sullivan, 102 Mass. 204.

Michigan.—Alpena Lumber Co. *v.* Fletcher, 48 Mich. 555, 12 N. W. 849.

Mississippi.—Allen *v.* Bennett, 8 Sm. & M. 672.

Missouri.— Weil *v.* Willard, 55 Mo. App. 376.

New Jersey.— Claphan *v.* Barber, 65 N. J. Eq. 550, 56 Atl. 370; Nibert *v.* Baghurst, 47 N. J. Eq. 201, 20 Atl. 252.

Pennsylvania.— Ferguson *v.* Staver, 33 Pa. St. 411; Parrish *v.* Koons, 1 Pars. Eq. Cas. 78; Tighe *v.* Doran, 7 Kulp 124; Ward *v.* Orr, 30 Pittsb. Leg. J. 416.

South Carolina.— Church of the Advent *v.* Farrow, 7 Rich. Eq. 378.

Tennessee.— Hudson *v.* King, 2 Heisk. 560; Blair *v.* Snodgrass, 1 Sneed 1; Pipkin *v.* James, 1 Humphr. 325, 34 Am. Dec. 652; Hitchcock *v.* Southern Iron, etc., Co., (Ch. App. 1896) 38 S. W. 588.

Texas.— Johnson *v.* Granger, 51 Tex. 42.

United States.— Williams *v.* Threlkeld, 29 Fed. Cas. No. 17,741, 2 Cranch C. C. 307.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 225 *et seq.*

71. *Alabama.*— Smith *v.* Freeman, 75 Ala. 285.

Arkansas.— St. Louis, etc., R. Co. *v.* Beidler, 45 Ark. 17.

Connecticut.— Nichols *v.* Johnson, 10 Conn. 192.

Florida.— Lente *v.* Clarke, 22 Fla. 515, 1 So. 149.

Illinois.— Moore *v.* Pickett, 62 Ill. 158; Cossitt *v.* Hobbs, 56 Ill. 231.

refers to a definite tract may be sufficient.[72] So if a written contract of sale designates the land as a certain amount of land to be selected from a definitely named tract, and such selection has been made, the agreement will be valid.[73] And where it appears from extrinsic evidence that the vendor owns but one parcel of land answering the description in the memorandum, the courts are inclined to uphold a meager description of the property.[74] If, however, the description is uncertain on the face of the memorandum, or is shown by extrinsic evidence to be with equal plausibility applicable to more than one tract of land, the memorandum is insufficient under the statute.[75]

Indiana.— Tewksbury *v.* Howard, 138 Ind. 103, 37 N. E. 355.

Iowa.— Wilson *v.* Riddick, 100 Iowa 697, 69 N. W. 1039.

Kansas.— Hollis *v.* Burgess, 37 Kan. 487, 15 Pac. 536.

Kentucky.— Moayon *v.* Moayon, 114 Ky. 855, 72 S. W. 33, 102 Am. St. Rep. 303, 60 L. R. A. 415, 24 Ky. L. Rep. 1641; Hanly *v.* Blackford, 1 Dana 1, 25 Am. Dec. 114; Strubbe *v.* Lewis, 76 S. W. 150, 25 Ky. L. Rep. 605.

Massachusetts.— Slater *v.* Smith, 117 Mass. 96; Mead *v.* Parker, 115 Mass. 413, 15 Am. Rep. 110; Scanlon *v.* Geddes, 112 Mass. 15; Gowen *v.* Klous, 101 Mass. 449; Hurley *v.* Brown, 98 Mass. 545, 96 Am. Dec. 671; Atwood *v.* Cobb, 16 Pick. 227, 26 Am. Dec. 657.

Michigan.— Eggleston *v.* Wagner, 46 Mich. 610, 10 N. W. 37.

Missouri.— Black *v.* Crowther, 74 Mo. App. 480; Parks *v.* People's Bank, 31 Mo. App. 12.

Nebraska.— Ruzicka *v.* Hotovy, (1904) 101 N. W. 328.

New Jersey.— Price *v.* McKay, 53 N. J. Eq. 588, 32 Atl. 130.

New York.— Tallman *v.* Franklin, 14 N. Y. 584 [*reversing* 3 Duer 395]; Heyward *v.* Wilmarth, 78 N. Y. Suppl. 347.

North Carolina.— Falls of Neuse Mfg. Co. *v.* Hendricks, 106 N. C. 485, 11 S. E. 568.

Pennsylvania.— Phillips *v.* Swank, 120 Pa. St. 76, 13 Atl. 712, 6 Am. St. Rep. 691. See Troup *v.* Troup, 87 Pa. St. 149.

Tennessee.— White *v.* Motley, 4 Baxt. 544.

Texas.— Regan *v.* Milby, (Civ. App. 1899) 50 S. W. 587.

United States.— Ryan *v.* U. S., 136 U. S. 68, 10 S. Ct. 913, 34 L. ed. 447; Barry *v.* Coombe, 1 Pet. 640, 7 L. ed. 295; Gray *v.* Smith, 76 Fed. 525.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 225 *et seq.* And see *infra*, XI, B, 3, a, (I).

72. *Florida.*— Lente *v.* Clarke, 22 Fla. 515, 1 So. 149.

Kansas.— Hollis *v.* Burgess, 37 Kan. 487, 15 Pac. 536.

Kentucky.— Winn *v.* Henry, 84 Ky. 48.

Michigan.— Francis *v.* Barry, 69 Mich. 311, 37 N. W. 353.

Missouri.— See King *v.* Wood, 7 Mo. 389.

North Carolina.— Cherry *v.* Long, 61 N. C. 466.

Pennsylvania.— Ross *v.* Baker, 72 Pa. St. 186.

Tennessee.— Dougherty *v.* Chesnutt, 86 Tenn. 1, 5 S. W. 444; Farris *v.* Caperton, 1 Head 606. See, however, Wood *v.* Zeigler, 99 Tenn. 515, 42 S. W. 447.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 225 *et seq.*

73. Carpenter *v.* Lockhart, 1 Ind. 434, Smith 326; Lingeman *v.* Shirk, 15 Ind. App. 432, 43 N. E. 33; Brockway *v.* Frost, 40 Minn. 155, 41 N. W. 411.

74. *Alabama.*— White *v.* Breen, 106 Ala. 159, 19 So. 59, 32 L. R. A. 127.

Illinois.— McConnell *v.* Brillhart, 17 Ill. 354, 65 Am. Dec. 661; Doty *v.* Wilder, 15 Ill. 407, 60 Am. Dec. 756.

Kentucky.— Henderson *v.* Perkins, 94 Ky. 207, 21 S. W. 1035, 14 Ky. L. Rep. 782.

Massachusetts.— Giles *v.* Swift, 170 Mass. 461, 49 N. E. 737; Slater *v.* Smith, 117 Mass. 96; Mead *v.* Parker, 115 Mass. 413, 15 Am. Rep. 110; Scanlan *v.* Geddes, 112 Mass. 15; Hurley *v.* Brown, 98 Mass. 545, 96 Am. Dec. 671.

Minnesota.—Quinn *v.* Champagne, 38 Minn. 322, 37 N. W. 451.

New York.— Richards *v.* Edick, 17 Barb. 260.

England.— Plant *v.* Bourne, [1897] 2 Ch. 281, 66 L. J. Ch. 643, 76 L. T. Rep. N. S. 820, 46 Wkly. Rep. 59.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 225 *et seq.*

See, however, Mellon *v.* Davison, 123 Pa. St. 298, 16 Atl. 431.

75. *Alabama.*— Thompson *v.* New South Coal Co., 135 Ala. 630, 34 So. 31, 93 Am. St. Rep. 49.

California.— Craig *v.* Zelian, 137 Cal. 105, 69 Pac. 853.

Georgia.— Douglass *v.* Bunn, 110 Ga. 159, 35 S. E. 339.

Indiana.— Miller *v.* Campbell, 52 Ind. 125; Baldwin *v.* Kerlin, 46 Ind. 426.

Kansas.— Hartshorn *v.* Smart, 67 Kan. 543, 73 Pac. 73.

Kentucky.— Jones *v.* Tye, 93 Ky. 390, 20 S. W. 388, 14 Ky. L. Rep. 448; Usher *v.* Flood, 83 Ky. 552, 17 S. W. 132, 12 Ky. L. Rep. 721; Wortham *v.* Stith, 66 S. W. 390, 23 Ky. L. Rep. 1882.

Maryland.— Taney *v.* Bachtell, 9 Gill 205.

Massachusetts.— John F. Fowkes Mfg. Co. *v.* Metcalf, 169 Mass. 595, 48 N. E. 848; Doherty *v.* Hill, 144 Mass. 465, 11 N. E. 581; Sherer *v.* Trowbridge, 135 Mass. 500; Farwell *v.* Mather, 10 Allen 322, 87 Am. Dec. 641.

Minnesota.— Taylor *v.* Allen, 40 Minn. 433, 42 N. W. 292.

D. Signature — 1. In General. Under the terms of the different statutes of frauds, the memorandum must be authenticated by signing.[76]

2. Signature of Party to Be Charged — a. In General. A party not signing the memorandum obviously cannot be charged on the contract;[77] but in England, and generally in the United States, the only signature made necessary by the statute is that of the party against whom the contract is sought to be enforced.[78]

Mississippi.— Fisher *v.* Kuhn, 54 Miss. 480.

Missouri.— Fox *v.* Courtney, 111 Mo. 147, 20 S. W. 20; Schroeder *v.* Taaffe, 11 Mo. App. 267; Scarritt *v.* St. John's M. E. Church, 7 Mo. App. 174.

Montana.— Ryan *v.* Davis, 5 Mont. 505, 6 Pac. 339.

New Jersey.— Lippincott *v.* Bridgewater, 55 N. J. Eq. 208, 36 Atl. 672; Carr *v.* Passaic Land Imp., etc., Co., 19 N. J. Eq. 424.

New York.— Coole *v.* Lobdell, 82 Hun 98, 31 N. Y. Suppl. 202 [*affirmed* in 153 N. Y. 596, 47 N. E. 783]; Lawson *v.* Mead, Lalor 158; Rollin *v.* Pickett, 2 Hill 552.

North Carolina.— Murdock *v.* Anderson, 57 N. C. 77.

Pennsylvania.— See Harrisburg Bd. of Trade *v.* Eby, 1 Dauph. Co. Rep. 99.

Rhode Island.— Ray *v.* Card, 21 R. I. 362, 43 Atl. 846; Ives *v.* Armstrong, 5 R. I. 567.

South Carolina.— Humbert *v.* Brisbane, 25 S. C. 506.

Tennessee.— Davis *v.* Ross, (Ch. App. 1898) 50 S. W. 650.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 225 *et seq.* And see *infra*, page 318 note 85.

76. *Alabama.*— Adams *v.* McMillan, 7 Port. 73.

Indiana.— Ruckle *v.* Barbour, 48 Ind. 274.

Maryland.— McElroy *v.* Seery, 61 Md. 389, 48 Am. Rep. 110.

Massachusetts.— Sanborn *v.* Sanborn, 7 Gray 142.

Mississippi.— Johnson *v.* Brook, 31 Miss. 17, 66 Am. Dec. 547.

Missouri.— Moore *v.* Thompson, 93 Mo. App. 336, 67 S. W. 680.

New Jersey.— Johnson *v.* Buck, 35 N. J. L. 338, 10 Am. Rep. 243.

New York.— Champlin *v.* Parish, 11 Paige 405.

North Carolina.— Love *v.* Atkinson, 131 N. C. 544, 42 S. E. 966; Rice *v.* Carter, 33 N. C. 298.

Pennsylvania.— Henry *v.* Colby, 3 Brewst. 171.

Texas.— Moore *v.* Powell, 6 Tex. Civ. App. 43, 25 S. W. 472.

United States.— Barry *v.* Law, 89 Fed. 582.

England.— Hubert *v.* Turner, C. & M. 351, 41 E. C. L. 194, 6 Jur. 194, 11 L. J. C. P. 78, 3 M. & G. 743, 4 Scott N. R. 486, 42 E. C. L. 388; Selby *v.* Selby, 3 Meriv. 2, 17 Rev. Rep. 1, 36 Eng. Reprint 1; Hubert *v.* Moreau, 12 Moore C. P. 216, 22 E. C. L. 642; Hawkins *v.* Holmes, 1 P. Wms. 770, 24 Eng. Reprint 606.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 242. And see the statutes of the different states.

77. *Alabama.*— Marx *v.* Bell, 48 Ala. 497.

Georgia.— Smith *v.* Jones, 66 Ga. 338, 42 Am. Rep. 72.

Michigan.— Brown *v.* Snider, 126 Mich. 198, 85 N. W. 570.

New York.— Wilson *v.* Lewiston Mill Co., 150 N. Y. 314, 44 N. E. 959, 55 Am. St. Rep. 680; Briggs *v.* Smith, 4 Daly 110.

Texas.— Watson *v.* Winston, (Civ. App. 1897) 43 S. W. 852.

England.— Hucklesby *v.* Hook, 82 L. T. Rep. N. S. 117.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 244.

If several persons are sought to be charged on a contract within the statute all must sign the memorandum, in the absence of an agency authorizing some to sign for others. Johnson *v.* Brook, 31 Miss. 17, 66 Am. Dec. 547; Smith *v.* Wright, 5 Sandf. (N. Y.) 113 [*affirmed* in 4 Abb. Dec. 274, 1 Abb. Pr. 243]; Frazer *v.* Ford, 2 Head (Tenn.) 464.

78. *California.*—Luckhart *v.* Ogden, 30 Cal. 547.

Illinois.— Raphael *v.* Hartman, 87 Ill. App. 634.

Indiana.— Newby *v.* Rogers, 40 Ind. 9; Smith *v.* Smith, 8 Blackf. 208.

Maine.— Williams *v.* Robinson, 73 Me. 186, 40 Am. Rep. 352; Barstow *v.* Gray, 3 Me. 409.

Massachusetts.— Dresel *v.* Jordan, 104 Mass. 407; Old Colony R. Corp. *v.* Evans, 72 Mass. 25, 66 Am. Dec. 394; Penniman *v.* Hartshorn, 13 Mass. 87.

Minnesota.— Bowers *v.* Whitney, 88 Minn. 168, 92 N. W. 540; Kessler *v.* Smith, 42 Minn. 494, 44 N. W. 794; Wemple *v.* Knopf, 15 Minn. 440, 2 Am. Rep. 147; Morin *v.* Martz, 13 Minn. 191.

Mississippi.— Marqueze *v.* Caldwell, 48 Miss. 23; Williams *v.* Tucker, 47 Miss. 678.

Missouri.— Black *v.* Crowther, 74 Mo. App. 480; Cunningham *v.* Williams, 43 Mo. App. 629.

Nebraska.— See Spence *v.* Apley, (1903) 94 N. W. 109.

New Jersey.— Houghwout *v.* Boisaubin, 18 N. J. Eq. 315.

New York.— Justice *v.* Lang, 42 N. Y. 493, 1 Am. Rep. 576 [*reversing* 2 Rob. 333]; Bristol *v.* Mente, 79 N. Y. App. Div. 67, 80 N. Y. Suppl. 52; Mason *v.* Decker, 42 N. Y. Super. Ct. 115 [*affirmed* in 72 N. Y. 595, 28 Am. Rep. 190]; West *v.* Newton, 1 Duer 277; Fenly *v.* Stewart, 5 Sandf. 101; Woodward *v.* Harris, 3 Sandf. 272; Weidmann *v.* Champion, 12 Daly 522; Brooklyn Oil Refinery *v.*

b. Contracts For Sale of Land. In reference to contracts for the sale of land it is generally held, as in other agreements within the statute of frauds, that the party not signing the memorandum is not bound;[79] but that the only signature required is that of the party against whom the contract is sought to be enforced.[80] In some jurisdictions the statute requires a signing of the memorandum by the party making the sale, and where this is so the signature of the vendor binds both parties.[81] In other jurisdictions it has been determined that the vendor is

Brown, 38 How. Pr. 444; Russell *v.* Nicoll, 3 Wend. 112, 20 Am. Dec. 670; Roget *v.* Merritt, 2 Cai. 117. See Dykers *v.* Townsend, 24 N. Y. 57; Marcus *v.* Brainard, 4 Rob. 219.

Oregon.— J. I. Case Threshing-Mach. Co. *v.* Smith, 16 Oreg. 381, 18 Pac. 641.

Pennsylvania.— McFarson's Appeal, 11 Pa. St. 503.

Rhode Island.— Ives *v.* Hazard, 4 R. I. 14, 67 Am. Dec. 500.

Wisconsin.— Hodson *v.* Carter, 3 Pinn. 212, 3 Chandl. 234.

England.— Laythoarp *v.* Bryant, 2 Bing. N. Cas. 735, 2 Hodges 25, 5 L. J. C. P. 217, 3 Scott 238, 29 E. C. L. 739; Martin *v.* Mitchell, 2 Jac. & W. 413, 22 Rev. Rep. 184, 37 Eng. Reprint 685; Schneider *v.* Norris, 2 M. & S. 286, 15 Rev. Rep. 825; Allen *v.* Bennet, 3 Taunt. 169, 12 Rev. Rep. 633; Fowle *v.* Freeman, 9 Ves. Jr. 351, 7 Rev. Rep. 219, 32 Eng. Reprint 638; Seton *v.* Slade, 7 Ves. Jr. 265, 6 Rev. Rep. 124, 32 Eng. Reprint 108.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 244.

Contra.— Wilkinson *v.* Heavenrich, 58 Mich. 574, 26 N. W. 139, 55 Am. Rep. 708.

79. *Illinois.*— Wilson *v.* Miller, 42 Ill. App. 332.

Kansas.— Guthrie *v.* Anderson, 47 Kan. 383, 28 Pac. 164, 49 Kan. 416, 30 Pac. 459.

Massachusetts.— Cabot *v.* Haskins, 3 Pick. 83.

New Jersey.— Brehen *v.* O'Donnell, 36 N. J. L. 257.

North Carolina.— Durham Consol. Land, etc., Co. *v.* Guthrie, 116 N. C. 381, 21 S. E. 952; Rice *v.* Carter, 33 N. C. 298.

Pennsylvania.— See Lowry *v.* Mehaffy, 10 Watts 387.

Texas.— Moore *v.* Powell, 6 Tex. Civ. App. 43, 25 S. W. 472.

West Virginia.— Monongah Coal, etc., Co. *v.* Fleming, 42 W. Va. 538, 26 S. E. 201; Capehart *v.* Hale, 6 W. Va. 547.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 245.

80. *Arkansas.*— Drennen *v.* Boyer, 5 Ark. 497; Byers *v.* Aiken, 5 Ark. 419.

California.— Cavanaugh *v.* Casselman, 88 Cal. 543, 26 Pac. 515; Rutenberg *v.* Main, 47 Cal. 213; Vassault *v.* Edwards, 43 Cal. 458.

Connecticut.— Hodges *v.* Kowing, 58 Conn. 12, 18 Atl. 979, 7 L. R. A. 87.

Illinois.— Esmay *v.* Gorton, 18 Ill. 483; Farwell *v.* Lowther, 18 Ill. 252.

Indiana.— Burke *v.* Mead, 159 Ind. 252, 64 N. E. 880.

Massachusetts.— Harriman *v.* Tyndale, 184 Mass. 534, 69 N. E. 353.

North Carolina.— Durham Consol. Land, etc., Co. *v.* Guthrie, 116 N. C. 381, 21 S. E. 952; Love *v.* Welch, 97 N. C. 200, 2 S. E. 242; Mizell *v.* Burnett, 49 N. C. 249, 69 Am. Dec. 744.

Pennsylvania.— Matter of Eargood, 1 Pearson 399; Cadwalader *v.* App, 81 Pa. St. 194.

South Carolina.— Peay *v.* Seigler, 48 S. C. 496, 26 S. E. 885, 59 Am. St. Rep. 731; Douglass *v.* Spears, 2 Nott & M. 207, 10 Am. Dec. 588.

Texas.— Crutchfield *v.* Donathon, 49 Tex. 691, 30 Am. Rep. 112; Dyer *v.* Winston, (Civ. App. 1903) 77 S. W. 227.

England.— Lathoarp *v.* Bryant, 2 Bing. N. Cas. 735, 2 Hodges 25, 5 L. J. C. P. 217, 3 Scott 238, 29 E. C. L. 739.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 245.

Mutuality of obligation.— There is some authority for the rule that if the contract is to be enforced in equity both parties must have signed the memorandum. Nelson *v.* Shelby Mfg., etc., Co., 96 Ala. 515, 11 So. 695, 38 Am. St. Rep. 116; Thomas *v.* Harrodsburg, 3 A. K. Marsh. (Ky.) 298, 13 Am. Dec. 165; Maynard *v.* Brown, 41 Mich. 298, 2 N. W. 30; Cammeyer *v.* United German Lutheran Churches, 2 Sandf. Ch. (N. Y.) 186. See Parrish *v.* Koons, 1 Pars. Eq. Cas. (Pa.) 79. By the weight of authority, however, it is settled in equity, as well as at law, that, so far as the statute of frauds is concerned, the only signature required is that of the party to be charged. Shirley *v.* Shirley, 7 Blackf. (Ind.) 452; Old Colony R. Corp. *v.* Evans, 6 Gray (Mass.) 25, 66 Am. Dec. 394; Peevey *v.* Haughton, 72 Miss. 918, 17 So. 378, 18 So. 357, 48 Am. St. Rep. 592; Mastin *v.* Grimes, 88 Mo. 478. See Ivory *v.* Murphy, 36 Mo. 534; McClintock *v.* South Penn. Oil Co., 146 Pa. St. 144, 23 Atl. 211, 28 Am. St. Rep. 785; Ives *v.* Hazard, 4 R. I. 14, 67 Am. Dec. 500; Sams *v.* Fripp, 10 Rich. Eq. (S. C.) 447; Palmer *v.* Scott, 8 L. J. Ch. O. S. 127, 1 Russ. & M. 391, 5 Eng. Ch. 391, 39 Eng. Reprint 151, Taml. 488, 12 Eng. Ch. 488, 48 Eng. Reprint 194; Seton *v.* Slade, 7 Ves. Jr. 265, 6 Rev. Rep. 124, 32 Eng. Reprint 108. And see, generally, SPECIFIC PERFORMANCE.

81. *Michigan.*— Mull *v.* Smith, 132 Mich. 618, 94 N. W. 183; Ducett *v.* Wolf, 81 Mich. 311, 45 N. W. 829; Maynard *v.* Brown, 41 Mich. 298, 2 N. W. 30.

Montana.— Ide *v.* Leiser, 10 Mont. 5, 24 Pac. 695, 24 Am. St. Rep. 17.

Nebraska.— Gardels *v.* Kloke, 36 Nebr. 493, 54 N. W. 834; Smith *v.* Gibson, 25 Nebr. 511, 41 N. W. 360; Roberts *v.* Cheney, 17 Nebr.

the party to be charged intended by the statute, and a signature by the vendor binds both parties.[82]

3. Sufficiency. The signing required by the statute is a signature to the memorandum placed there with the intention of authenticating the writing.[83] If placed with this intention the signature may occur at the beginning of the memorandum,[84] in the body thereof,[85] or in the place designated for the witnesses' signatures,[86] except in certain jurisdictions where the statute requires the memorandum to be subscribed.[87] A signature by initials[88] or by mark[89] is suf-

681, 24 N. W. 382; Robinson *v.* Cheney, 17 Nebr. 673, 24 N. W. 378; Gartrell *v.* Stafford, 12 Nebr. 545, 11 N. W. 732, 41 Am. Rep. 767.

New York.— Bleecker *v.* Franklin, 2 E. D. Smith 93; Kittel *v.* Stueve, 10 Misc. 696, 31 N. Y. Suppl. 821; Earl *v.* Campbell, 14 How. Pr. 330; National F. Ins. Co. *v.* Loomis, 11 Paige 431; Champlin *v.* Parish, 11 Paige 405. For the rule under the earlier New York statute see Worrall *v.* Munn, 5 N. Y. 229, 55 Am. Dec. 330; Edwards *v.* Farmers' F. Ins., etc., Co., 21 Wend. 467; McCrea *v.* Purmort, 16 Wend. 460, 30 Am. Dec. 103; Bailey *v.* Ogden, 3 Johns. 399, 2 Am. Dec. 509.

Wisconsin.— Hubbard *v.* Marshall, 50 Wis. 322, 6 N. W. 497; Lowber *v.* Connit, 36 Wis. 176; Dodge *v.* Hopkins, 14 Wis. 630; Vilas *v.* Dickinson, 13 Wis. 488.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 245.

82. *California.*— Scott *v.* Glenn, 98 Cal. 168, 32 Pac. 983; Cavanaugh *v.* Casselman, 88 Cal. 543, 26 Pac. 515; Rutenberg *v.* Main, 47 Cal. 213; Vassault *v.* Edwards, 43 Cal. 458.

Kentucky.— Moore *v.* Chenault, 29 S. W. 140, 16 Ky. L. Rep. 531. See Davis *v.* Parish's Representatives, Litt. Sel. Cas. 153, 12 Am. Dec. 287.

Pennsylvania.— See Borie *v.* Satterthwaite, 12 Montg. Co. Rep. 194 [*affirmed* in 180 Pa. St. 542, 37 Atl. 102].

South Dakota.— McPherson *v.* Fargo, 10 S. D. 611, 74 N. W. 1057, 66 Am. St. Rep. 723.

Tennessee.— Frazer *v.* Ford, 2 Head 464.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 245.

83. *California.*— California Canneries Co. *v.* Scatena, 117 Cal. 447, 49 Pac. 462.

Indiana.— McMillen *v.* Terrell, 23 Ind. 163.

Maryland.— Drury *v.* Young, 58 Md. 546, 42 Am. Rep. 343.

Massachusetts.— Boardman *v.* Spooner, 13 Allen 353, 90 Am. Dec. 196.

Ohio.— Anderson *v.* Harold, 10 Ohio 399.

England.— Caton *v.* Caton, L. R. 2 H. L. 127, 36 L. J. Ch. 886, 16 Wkly. Rep. 1; Hubert *v.* Turner, C. & M. 351, 41 E. C. L. 194, 6 Jur. 194, 11 L. J. C. P. 78, 3 M. & G. 743, 42 E. C. L. 388, 4 Scott N. R. 486.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 247.

84. Penniman *v.* Hartshorn, 13 Mass. 87; Anderson *v.* Wallace Lumber, etc., Co., 30 Wash. 147, 70 Pac. 247; Tourret *v.* Cripps, 48 L. J. Ch. 567, 27 Wkly. Rep. 706; Propert *v.* Parker, 1 Russ. & M. 625, 5 Eng. Ch. 625, 39 Eng. Reprint 240; Western *v.* Russell, 3 Ves. & B. 187, 13 Rev. Rep. 178, 35 Eng. Reprint 450; Morison *v.* Turnour, 18 Ves. Jr. 175, 34 Eng. Reprint 284.

85. *Iowa.*— Wise *v.* Ray, 3 Greene 430.

Massachusetts.—New England Dressed Meat, etc., Co. *v.* Standard Worsted Co., 165 Mass. 328, 43 N. E. 112, 52 Am. St. Rep. 516.

New Jersey.— Smith *v.* Howell, 11 N. J. Eq. 349.

Washington.— Tingley *v.* Bellingham Bay Boom Co., 5 Wash. 644, 32 Pac. 737, 33 Pac. 1055.

England.— Johnson *v.* Dodgson, 6 L. J. Exch. 185, 2 M. & W. 653; Ogilvie *v.* Foljambe, 3 Meriv. 53, 36 Eng. Reprint 21.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 247.

Execution sale.— If an officer selling property on execution inserts the purchaser's name in the memorandum of sale it is a sufficient signature. Hunt *v.* Gregg, 8 Blackf. (Ind.) 105. *Contra*, Evans *v.* Ashley, 8 Mo. 177. See *supra*, IX, A, 2, f.

86. Coles *v.* Trecothick, 1 Smith K. B. 233, 9 Ves. Jr. 234, 7 Rev. Rep. 167, 32 Eng. Reprint 592; Welford *v.* Bezeley, 1 Wils. C. P. 118. See, however, Gosbell *v.* Archer, 2 A. & E. 500, 29 E. C. L. 238, 1 H. & W. 31, 4 L. J. K. B. 78, 4 N. & M. 485, 30 E. C. L. 591.

87. Coon *v.* Rigden, 4 Colo. 275; Doughty *v.* Manhattan Brass Co., 101 N. Y. 644, 4 N. E. 747; James *v.* Patten, 6 N. Y. 9, 55 Am. Dec. 376 [*reversing* 8 Barb. 344]; Vielie *v.* Osgood, 8 Barb. (N. Y.) 130; Johnson *v.* Mulvy, 4 Rob. (N. Y.) 401 [*affirmed* in 51 N. Y. 634]; Spear *v.* Hart, 3 Rob. (N. Y.) 420; McGivern *v.* Fleming, 12 Daly (N. Y.) 289, 66 How. Pr. 300; Dennison *v.* Carnahan, 1 E. D. Smith (N. Y.) 144; Davis *v.* Shields, 26 Wend. (N. Y.) 341 [*reversing* 24 Wend. 322]; Coles *v.* Bowne, 10 Paige (N. Y.) 526.

88. *Massachusetts.*— Sanborn *v.* Flagler, 9 Allen 474.

New Jersey.— Smith *v.* Howell, 11 N. J. Eq. 349.

New York.— Palmer *v.* Stephens, 1 Den. 471; Merchants' Bank *v.* Spicer, 6 Wend. 443.

United States.— Salmon Falls Mfg. Co. *v.* Goddard, 14 How. 446, 14 L. ed. 493.

England.— Phillimore *v.* Barry, 1 Campb. 513, 10 Rev. Rep. 742. See Selby *v.* Selby, 3 Meriv. 2, 17 Rev. Rep. 1, 36 Eng. Reprint 1.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 248.

89. Bickley *v.* Keenan, 60 Ala. 293; Morton *v.* Murray, 176 Ill. 54, 51 N. E. 767, 43 L. R. A. 529.

ficient; and a signature in a fictitious name is valid.[90] A printed or stamped name also may be a sufficient signature if adopted or intended as such.[91]

4. SIGNATURE BY AGENT — a. In General. The statute of frauds expressly provides that the memorandum of a contract within its provisions may be signed by the duly authorized agent of a party to the contract.[92] If authorized to make the contract, and not otherwise,[93] the agent may sign the memorandum thereof in his own name and it will bind the principal or may be taken advantage of by him whether or not the signature is expressed to be by an agent.[94] A signature

90. Augur *v.* Couture, 68 Me. 427; Brown *v.* Butchers', etc., Bank, 6 Hill (N. Y.) 443, 41 Am. Dec. 755.

91. Saunderson *v.* Jackson, 2 B. & P. 238, 3 Esp. 180, 5 Rev. Rep. 382; Durrell *v.* Evans, 1 H. & C. 174, 9 Jur. N. S. 104, 31 L. J. Exch. 337, 7 L. T. Rep. N. S. 97, 10 Wkly. Rep. 665; Schneider *v.* Norris, 2 M. & S. 286, 15 Rev. Rep. 825. See Vielie *v.* Osgood, 8 Barb. (N. Y.) 130.

92. *California.*—Rutenberg *v.* Main, 47 Cal. 213.

Iowa.— See Nebraska Bridge Supply, etc., Co. *v.* Conway, (1904) 98 N. W. 1024.

Maryland.— Higdon *v.* Thomas, 1 Harr. & G. 139.

Massachusetts.— New England Dressed Meat, etc., Co. *v.* Standard Worsted Co., 165 Mass. 328, 43 N. E. 112, 52 Am. St. Rep. 516.

Missouri.— Donovan *v.* P. Schoenhofen Brewing Co., 92 Mo. App. 341.

Nebraska.— Jones *v.* Wattles, 66 Nebr. 533, 92 N. W. 765.

New York.— Pringle *v.* Spaulding, 53 Barb. 17; Marie *v.* Garrison, 13 Abb. N. Cas. 210; Davis *v.* Shields, 26 Wend. 341 [*reversing* 24 Wend. 322]; McWhorter *v.* McMahan, Clarke 400.

Ohio.— Himrod Furnace Co. *v.* Cleveland, etc., R. Co., 22 Ohio St. 451.

Texas.—Tynan *v.* Dullnig, (Civ. App. 1894) 25 S. W. 465; Fisher *v.* Bowser, 1 Tex. Unrep. Cas. 346.

Virginia.— Kyle *v.* Roberts, 6 Leigh 495.

Wisconsin.— Hawkinson *v.* Harmon, 69 Wis. 551, 35 N. W. 28.

See 23 Cent. Dig. tit. "Frauds, Statute of," §§ 251, 252. And see the statutes of the different states.

93. *Alabama.*— Thompson *v.* New South Coal Co., 135 Ala. 630, 34 So. 31, 93 Am. St. Rep. 49.

Arkansas.— Henderson *v.* Beard, 51 Ark. 483, 11 S. W. 766.

Illinois.— Kozel *v.* Dearlove, 144 Ill. 23, 32 N. E. 542, 36 Am. St. Rep. 416.

Indiana.— Noakes *v.* Morey, 30 Ind. 103; Clark County *v.* Howell, 21 Ind. App. 495, 52 N. E. 769.

Nebraska.— Morgan *v.* Bergen, 3 Nebr. 209.

New York.— Newton *v.* Bronson, 13 N. Y. 587, 67 Am. Dec. 89; Coleman *v.* Garrigues, 18 Barb. 60.

Ohio.— Bickett *v.* White, 27 Ohio St. 405 [*reversing* 1 Cinc. Super. Ct. 170].

Vermont.— Welch *v.* Darling, 59 Vt. 136, 7 Atl. 547; Strong *v.* Dodds, 47 Vt. 348.

Virginia.— Chapman *v.* Jewett, (1896) 24 S. E. 261.

England.— Graham *v.* Musson, 5 Bing. N. Cas. 603, 8 L. J. C. P. 324, 7 Scott 769, 35 E. C. L. 324; Bushell *v.* Beavan, 1 Bing. N. Cas. 103, 3 L. J. C. P. 279, 4 Moore & S. 622, 27 E. C. L. 562.

See 23 Cent. Dig. tit. "Frauds, Statute of," §§ 251, 252.

A parol ratification by one partner of a guaranty given by his copartner is enforceable, since by such ratification the firm signature becomes his. Kittel *v.* Callahan, 19 N. Y. Suppl. 397. So the acceptance by a purchaser of a bill of parcels sold to him by a commission merchant is a sufficient recognition by him of the authority of the commission merchant to sign his name. Batturs *v.* Sellers, 5 Harr. & J. (Md.) 117, 9 Am. Dec. 492.

94. *Indiana.*— Tewksbury *v.* Howard, 138 Ind. 103, 37 N. E. 355.

Maine.— Kingsley *v.* Siebrecht, 92 Me. 23, 42 Atl. 249, 69 Am. St. Rep. 486.

Massachusetts.— White *v.* Dahlquist Mfg. Co., 179 Mass. 427, 60 N. E. 791; Hunter *v.* Giddings, 97 Mass. 41, 93 Am. Dec. 54; Williams *v.* Bacon, 2 Gray 387.

Mississippi.— Curtis *v.* Blair, 26 Miss. 309, 59 Am. Dec. 257.

Missouri.— Alexander *v.* Moore, 19 Mo. 143; Haubelt *v.* Rea, etc., Mill Co., 77 Mo. App. 672.

Nebraska.— Morgan *v.* Bergen, 3 Nebr. 209.

New York.— Dykers *v.* Townsend, 24 N. Y. 57. See Hankins *v.* Baker, 46 N. Y. 666.

North Carolina.— Hargrove *v.* Adcock, 111 N. C. 166, 16 S. E. 16; Washburn *v.* Washburn, 39 N. C. 306. See Phillips *v.* Hooker, 62 N. C. 193.

Ohio.— Walsh *v.* Barton, 24 Ohio St. 28.

Pennsylvania.— Brodhead *v.* Reinbold, 200 Pa. St. 618, 50 Atl. 229, 86 Am. St. Rep. 735.

Virginia.— Yerby *v.* Grigsby, 9 Leigh 387.

West Virginia.— Conaway *v.* Sweeney, 24 W. Va. 643.

United States.— Nevada Bank *v.* Portland Nat. Bank, 59 Fed. 338.

England.— Kenworthy *v.* Schofield, 2 B. & C. 945, 4 D. & R. 556, 2 L. J. K. B. O. S. 175, 26 Rev. Rep. 600, 9 E. C. L. 406; Wilson *v.* Hart, 1 Moore C. P. 45, 7 Taunt. 295, 2 E. C. L. 370. See Kelner *v.* Baxter, L. R. 2 C. P. 174, 12 Jur. N. S. 1016, 36 L. J. C. P. 94, 15 L. T. Rep. N. S. 313, 15 Wkly. Rep. 278; Higgins *v.* Senior, 11 L. J. Exch. 199, 8 M. & W. 844.

See 23 Cent. Dig. tit. "Frauds, Statute of," §§ 251, 252.

Contra.— Repetti *v.* Maisak, 6 Mackey (D. C.) 366; Clampet *v.* Bells, 39 Minn. 272, 39 N. W. 495.

to a memorandum in the name of a party to the contract, made in his presence and at his request, is an adequate signature.[95] The agent must be a person not a party to the contract, else he cannot sign as agent.[96]

b. Necessity of Authority in Writing[97] — (i) *In General.* In the absence of a statutory provision to the contrary,[98] an agent's authority to sign a memorandum of a contract within the statute of frauds is not required to be in writing any more than in any other case of agency.[99]

(ii) *Contracts For Sale or Purchase of Land.* Under the original statute of frauds and statutes in like form it is unnecessary that an agent should be authorized in writing to sign a written contract for the sale of lands or a memorandum of an oral contract for the sale of lands;[1] but in many jurisdictions the legislatures have specifically provided that the agent must be authorized

95. *Kentucky.*— Irvin *v.* Thompson, 4 Bibb 295.

Michigan.— Eggleston *v.* Wegner, 46 Mich. 610, 10 N. W. 37.

Nebraska.— Bigler *v.* Baker, 40 Nebr. 325, 58 N. W. 1026, 24 L. R. A. 255.

New York.— Dunning *v.* Roberts, 35 Barb. 463.

Pennsylvania.— See Fitzpatrick *v.* Engard, 4 Pa. Dist. 383; Walker *v.* Sphar, 31 Pittsb. Leg. J. 226.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 253.

96. *Iowa.*—Wingate *v.* Herschauer, 42 Iowa 506.

Massachusetts.— Bent *v.* Cobb, 9 Gray 397, 69 Am. Dec. 295.

Missouri.— Tull *v.* David, 45 Mo. 444, 100 Am. Dec. 385; McKeag *v.* Piednor, 74 Mo. App. 593.

New York.— Wilson *v.* Lewiston Mill Co., 74 Hun 612, 26 N. Y. Suppl. 847 [*affirmed* in 150 N. Y. 314, 44 N. E. 959, 55 Am. St. Rep. 680].

Pennsylvania.— Martin *v.* Duffey, 4 Phila. 75.

South Carolina.— Leland *v.* Creyon, 1 McCord 100, 10 Am. Dec. 654.

United States.— Smith *v.* Arnold, 22 Fed. Cas. No. 13,004, 5 Mason 414.

England.— Sharman *v.* Brandt, L. R. 6 Q. B. 720, 40 L. J. Q. B. 312, 19 Wkly. Rep. 936; Farebrother *v.* Simmons, 5 B. & Ald. 333, 24 Rev. Rep. 399, 7 E. C. L. 187; Wright *v.* Dannah, 2 Campb. 203, 11 Rev. Rep. 693; Tetley *v.* Shand, 25 L. T. Rep. N. S. 658, 20 Wkly. Rep. 206. See Bird *v.* Boulter, 4 B. & Ad. 443, 1 N. & M. 313, 24 E. C. L. 197.

97. See Factors and Brokers, 19 Cyc. 191, 219.

98. See the statutes of the different states.

Guaranties.— In some states it is provided by statute that an agent's authority to sign a guaranty must be in writing. Bullard *v.* Johns, 50 Ala. 382; Simpson *v.* Com., 89 Ky. 412, 12 S. W. 630, 11 Ky. L. Rep. 619; Covington First Nat. Bank *v.* Gaines, 87 Ky. 597, 9 S. W. 396, 10 Ky. L. Rep. 451; Dawson *v.* Lee, 83 Ky. 49.

99. Roehl *v.* Haumesser, 114 Ind. 311, 15 N. E. 345; Curtis *v.* Blair, 26 Miss. 309, 59 Am. Dec. 257; Blacknall *v.* Parish, 59 N. C. 70, 78 Am. Dec. 239. See Sigmund *v.* Newspaper Co., 82 Ill. App. 178; Miller *v.* New Orleans Canal, etc., Co., 8 Rob. (La.) 236; Muggah *v.* Greig, 2 La. 593.

1. *Alabama.*— Ledbetter *v.* Walker, 31 Ala. 175.

California.— Rutenberg *v.* Main, 47 Cal. 213. See also Patterson *v.* Keystone Min. Co., 30 Cal. 360.

Delaware.— Edwards *v.* Johnson, 3 Houst. 435.

Illinois.— Johnson *v.* Dodge, 17 Ill. 433.

Kansas.— Rottman *v.* Wasson, 5 Kan. 552.

Maine.— Blood *v.* Hardy, 15 Me. 61.

Maryland.— Moore *v.* Taylor, 81 Md. 644, 32 Atl. 320, 33 Atl. 886.

Minnesota.—Dickerman *v.* Ashton, 21 Minn. 538; Brown *v.* Eaton, 21 Minn. 409.

Mississippi.— Lobdell *v.* Mason, 71 Miss. 937, 15 So. 44, contract for lease.

Missouri.— Riley *v.* Minor, 29 Mo. 439; Johnson *v.* McGruder, 15 Mo. 365.

New Jersey.— Long *v.* Hartwell, 34 N. J. L. 116; Keim *v.* O'Reilly, 54 N. J. Eq. 418, 34 Atl. 1073; Keim *v.* Lindley, (Ch. 1895) 30 Atl. 1063; Doughaday *v.* Crowell, 11 N. J. Eq. 201.

New York.—Moody *v.* Smith, 70 N. Y. 598; Worrall *v.* Munn, 5 N. Y. 229, 55 Am. Dec. 330; Lawrence *v.* Taylor, 5 Hill 107; Champlin *v.* Parish, 11 Paige 405; McWhorter *v.* McMahan, 10 Paige 386; Mortimer *v.* Cornwell, Hoffm. 351.

Ohio.— Jones *v.* Lewis, 8 Ohio Dec. (Reprint) 368, 7 Cinc. L. Bul. 211; Robinson *v.* Hathaway, 2 Ohio Dec. (Reprint) 581, 4 West. L. Month. 105.

Texas.— Marlin *v.* Kosmyroski, (Civ. App. 1894) 27 S. W. 1042.

Virginia.— Yerby *v.* Grigsby, 9 Leigh 387.

Washington.— Carstens *v.* McReavy, 1 Wash. 359, 25 Pac. 471.

West Virginia.— Kennedy *v.* Ehlen, 31 W. Va. 540, 8 S. E. 398; Campbell *v.* Fetterman, 20 W. Va. 398.

Wisconsin.— Kreutzer *v.* Lynch, 122 Wis. 474, 100 N. W. 887; Dodge *v.* Hopkins, 14 Wis. 630.

England.— See Clinan *v.* Cooke, 1 Sch. & L. 32, 9 Rev. Rep. 3; Coles *v.* Trecothick, 1 Smith K. B. 233, 9 Ves. Jr. 234, 7 Rev. Rep. 167, 32 Eng. Reprint 592; Mortlock *v.* Muller, 10 Ves. Jr. 292, 7 Rev. Rep. 417, 32 Eng. Reprint 857.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 255.

The authority of an auctioneer to sell lands

in writing in order to make a binding contract or memorandum.[2] In some states the statute provides that an agent to purchase lands must have been authorized in writing, else the contract of purchase executed by him in his principal's behalf is not enforceable.[3]

c. Agents For Both Parties. Auctioneers[4] and brokers[5] are the agents of both parties to sign the memorandum of contracts consummated by them in their agencies.

E. Delivery. In some jurisdictions delivery of the paper relied on as a memorandum of the contract is held to be necessary;[6] in others the courts take the view that the literal requirements of the statute are fulfilled by the existence of the memorandum and no delivery is necessary to its validity.[7]

need not appear in writing. Doty *v.* Wilder, 15 Ill. 407, 60 Am. Dec. 756; Macon Episcopal Church *v.* Wiley, 2 Hill. Eq. (S. C.) 584, 30 Am. Dec. 386. *Contra*, Macarty *v.* New Orleans Canal, etc., Co., 8 Rob. (La.) 102 (by statute); Muffatt *v.* Gott, 74 Mich. 672, 42 N. W. 149 (by statute).

2. *California.*— Hall *v.* Wallace, 88 Cal. 434, 26 Pac. 360.

Colorado.— Castner *v.* Richardson, 18 Colo. 496, 33 Pac. 163.

Illinois.— Chappell *v.* McKnight, 108 Ill. 570; Kneedler *v.* Anderson, 43 Ill. App. 317.

Michigan.— Baldwin *v.* Schiappacasse, 109 Mich. 170, 66 N. W. 1091; Dickinson *v.* Wright, 56 Mich. 42, 22 N. W. 312.

Minnesota.— Power *v.* Immigration Land Co., 93 Minn. 247, 101 N. W. 161.

Missouri.— Roth *v.* Goeger, 118 Mo. 556, 24 S. W. 176 [*affirming* 51 Mo. App. 586]; Johnson *v.* Fecht, 185 Mo. 335, 83 S. W. 1077; Mine La Motte Lead, etc., Co. *v.* White, 106 Mo. App. 222, 80 S. W. 356; Shea *v.* Seelig, 89 Mo. App. 146, adoption of lease.

Nebraska.— O'Shea *v.* Rice, 49 Nebr. 893, 69 N. W. 308; Morgan *v.* Bergen, 3 Nebr. 209.

North Dakota.— Brandrup *v.* Britten, 11 N. D. 376, 92 N. W. 453.

Pennsylvania.— Parrish *v.* Koons, 1 Pars. Eq. Cas. 79; Tighe *v.* Doran, 7 Kulp 124; Knerr's Appeal, 16 Wkly. Notes Cas. 74; Heinicke *v.* Krouse, 14 Wkly. Notes Cas. 106. See, however, Ewing *v.* Tees, 1 Binn. 450, 2 Am. Dec. 455.

South Dakota.— Reagan *v.* McKibben, 11 S. D. 270, 76 N. W. 943.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 255.

It is immaterial whether the agent's authority was in writing where the principal with full knowledge of the sale and the terms and conditions thereof ratified the same in writing. Butman *v.* Butman, 213 Ill. 104, 72 N. E. 821.

3. Twitchell *v.* Philadelphia, 33 Pa. St. 212; Parrish *v.* Koons, 1 Pars. Eq. Cas. (Pa.) 79. However, the authority of an agent to execute a written contract for the purchase of lands may be shown by an oral ratification. Hammond *v.* Hannin, 21 Mich. 374, 4 Am. Rep. 490.

4. *Alabama.*— Adams *v.* McMillan, 7 Port. 73.

Indiana.— Hunt *v.* Gregg, 8 Blackf. 105.

Kentucky.— Norton *v.* Laughlin, 15 Ky. L. Rep. 783. See Martin *v.* McFadin, 4 Litt. 240; Thomas *v.* Harrodsburg, 3 A. K. Marsh. 298, 13 Am. Dec. 165.

Missouri.— Springer *v.* Kleinsorge, 83 Mo. 152.

New York.— McComb *v.* Wright, 4 Johns. Ch. 659. See Champlin *v.* Parish, 11 Paige 405; Miller *v.* Pelletier, 4 Edw. 102.

Pennsylvania.— See Sutter *v.* Isabella Furnace Co., (1904) 59 Atl. 476.

Tennessee.— See Adams *v.* Scales, 1 Baxt. 337, 25 Am. Rep. 772.

Texas.— Dawson *v.* Miller, 20 Tex. 171, 70 Am. Dec. 380.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 258. And *supra*, IX, A, 2, e.

5. See *supra*, IX, A, 2, g.

6. *California.*— Swain *v.* Burnette, 89 Cal. 564, 26 Pac. 1093.

Iowa.— Steel *v.* Fife, 48 Iowa 99, 30 Am. Rep. 388.

Massachusetts.— Callanan *v.* Chapin, 158 Mass. 113, 32 N. E. 941; Sanborn *v.* Sanborn, 7 Gray 142.

Minnesota.— Comer *v.* Baldwin, 16 Minn. 172.

Mississippi.— Johnson *v.* Brook, 31 Miss. 17, 66 Am. Dec. 547.

Nebraska.— See Sowards *v.* Moss, 59 Nebr. 71, 80 N. W. 268.

New Jersey.— Brown *v.* Brown, 33 N. J. Eq. 650.

New York.— Montauk Assoc. *v.* Daly, 32 Misc. 558, 67 N. Y. Suppl. 312 [*affirmed* in 62 N. Y. App. Div. 101, 70 N. Y. Suppl. 861].

Pennsylvania.— Grant *v.* Levan, 4 Pa. St. 393.

Tennessee.— Wilson *v.* Winters, 108 Tenn. 398, 67 S. W. 800.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 261.

Delivery by agent.— A memorandum of sale must be delivered by an agent before his agency expires. Johnson *v.* Craig, 21 Ark. 533.

Deed operative as memorandum see *supra*, IX, A, 2, i.

7. Drury *v.* Young, 58 Md. 546, 42 Am. Rep. 343; Hovekamp *v.* Elshoff, 4 Ohio S. & C. Pl. Dec. 171, 3 Ohio N. P. 158; Gibson *v.* Holland, L. R. 1 C. P. 1, 1 H. & R. 1, 11 Jur. N. S. 1022, 35 L. J. C. P. 5, 13 L. T. Rep. N. S. 293, 14 Wkly. Rep. 86; Johnson *v.* Dodgson, 6 L. J. Exch. 185, 2 M. & W. 653.

F. Separate Writings. There is nothing in the statute of frauds requiring the signed memorandum of a contract to be contained in a single paper. Two or more papers properly connected may constitute a sufficient memorandum,[8] such for instance as a series of letters, all showing that they relate to the subject-matter of the contract.[9] In general if but one of the several papers is signed, only such of the others as are referred to in it may be taken to constitute a part of the memorandum.[10]

An acceptance written below a written offer need not be delivered to the offerer. Alvord *v.* Wilson, 95 Ky. 506, 26 S. W. 539, 16 Ky. L. Rep. 70.

8. *Alabama.*— Folmar *v.* Carlisle, 117 Ala. 449, 23 So. 551; White *v.* Breen, 106 Ala. 159, 19 So. 59, 32 L. R. A. 127; Lakeside Land Co. *v.* Dromgoole, 89 Ala. 505, 7 So. 444.

Colorado.— Beckwith *v.* Talbot, 2 Colo. 639.

Connecticut.— Woodruff *v.* Butler, 75 Conn. 679, 55 Atl. 167.

Illinois.— Esmay *v.* Gorton, 18 Ill. 483; Bourland *v.* Peoria County, 16 Ill. 538.

Iowa.— American Oak Leather Co. *v.* Porter, 94 Iowa 117, 62 N. W. 658.

Kansas.— Newton *v.* Lyon, 62 Kan. 306, 62 Pac. 1000, 62 Kan. 651, 64 Pac. 592.

Kentucky.— Evans *v.* Miller, 5 Ky. L. Rep. 606.

Maine.— Kingsley *v.* Siebrecht, 92 Me. 23, 42 Atl. 249, 69 Am. St. Rep. 486.

Massachusetts.— Hibbard *v.* Hatch Storage Battery Co., 174 Mass. 296, 54 N. E. 658; Tufts *v.* Plymouth Gold Min. Co., 14 Allen 407; Rhoades *v.* Castner, 12 Allen 130; Lerned *v.* Wannemacher, 9 Allen 412.

Mississippi.— Wilkinson *v.* Taylor Mfg. Co., 67 Miss. 231, 7 So. 356; Fisher *v.* Kuhn, 54 Miss. 480.

Missouri.— Kansas City Y. M. C. A. *v.* Dubach, 82 Mo. 475.

Nebraska.— Collyer *v.* Davis, (1904) 101 N. W. 1001.

New York.— Bristol *v.* Mente, 79 N. Y. App. Div. 67, 80 N. Y. Suppl. 52 [*affirmed* in 178 N. Y. 599, 70 N. E. 1096]; Ward *v.* Hasbrouck, 44 N. Y. App. Div. 32, 60 N. Y. Suppl. 391; Currier *v.* Carnrick, 36 Misc. 176, 73 N. Y. Suppl. 146.

Pennsylvania.— Johnson *v.* McCue, 34 Pa. St. 180; Jones *v.* Pennel, 1 Phila. 539; Ward *v.* Orr, 30 Pittsb. Leg. J. 416.

South Carolina.— Louisville Ashpalt Varnish Co. *v.* Lorick, 29 S. C. 533, 8 S. E. 8, 2 L. R. A. 212; Cathcart *v.* Keirnaghan, 5 Strobh. 129.

South Dakota.— Townsend *v.* Kennedy, 6 S. D. 47, 60 N. W. 164.

Vermont.— Equitable Mfg. Co. *v.* Allen, 76 Vt. 22, 56 Atl. 87; Ide *v.* Stanton, 15 Vt. 685, 40 Am. Dec. 698.

Washington.— Underwood *v.* Stack, 15 Wash. 497, 46 Pac. 1031.

United States.— Bayne *v.* Wiggins, 139 U. S. 210, 11 S. Ct. 521, 35 L. ed. 144.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 262.

Papers physically connected with the signed paper may of course form part of the memorandum. Norman *v.* Molett, 8 Ala. 546; Tallman *v.* Franklin, 14 N. Y. 584 [*reversing* 3 Duer 395]; Union Bank *v.* Coster, 3 N. Y. 203, 53 Am. Dec. 280; Hagedorn *v.* Lang, 34 N. Y. App. Div. 117, 54 N. Y. Suppl. 602; Pearce *v.* Gardner, [1897] 1 Q. B. 688, 66 L. J. Q. B. 457, 76 L. T. Rep. N. S. 441, 45 Wkly. Rep. 518.

9. *California.*— Brewer *v.* Horst, etc., Co., 127 Cal. 643, 60 Pac. 418, 50 L. R. A. 240.

Massachusetts.— Lydig *v.* Braman, 177 Mass. 212, 58 N. E. 696; Lee *v.* Butler, 167 Mass. 426, 46 N. E. 52, 57 Am. St. Rep. 466.

Minnesota.— Swallow *v.* Strong, 83 Minn. 87, 85 N. W. 942.

Missouri.— Peycke *v.* Ahrens, 98 Mo. App. 456, 72 S. W. 151; Heideman *v.* Wolfstein, 12 Mo. App. 366.

New York.— Peabody *v.* Speyers, 56 N. Y. 230; Helios-Upton Co. *v.* Thomas, 96 N. Y. App. Div. 401, 89 N. Y. Suppl. 222.

Oklahoma.— Halsell *v.* Renfrow, (1904) 78 Pac. 118.

South Carolina.— Peay *v.* Seigler, 48 S. C. 496, 26 S. E. 885, 59 Am. St. Rep. 731.

Texas.— Patton *v.* Rucker, 29 Tex. 402.

United States.— Cooper *v.* Bay State Gas Co., 127 Fed. 482.

England.— Sheers *v.* Thimbleby, 76 L. T. Rep. N. S. 709.

See 23 Cent. Dig. tit. "Frauds, Statute of," §§ 262, 263. And see *supra*, IX, A, 2, d.

10. *Arkansas.*— St. Louis, etc., R. Co. *v.* Beidler, 45 Ark. 17.

Connecticut.—Andrew *v.* Babcock, 63 Conn. 109, 26 Atl. 715.

Illinois.— Western Union Tel. Co. *v.* Chicago, etc., R. Co., 86 Ill. 246, 29 Am. Rep. 28.

Indiana.— Ridgway *v.* Ingram, 50 Ind. 145, 19 Am. Rep. 706.

Maine.— O'Donnell *v.* Leeman, 43 Me. 158, 69 Am. Dec. 54.

Maryland.— See Drury *v.* Young, 58 Md. 546, 42 Am. Rep. 343.

Massachusetts.—Freeland *v.* Ritz, 154 Mass. 257, 28 N. E. 226, 26 Am. St. Rep. 244, 12 L. R. A. 561; Smith *v.* Colby, 136 Mass. 562.

Michigan.— New York Third Nat. Bank *v.* Steel, 129 Mich. 434, 88 N. W. 1050, 64 L. R. A. 119.

New Hampshire.— Brown *v.* Whipple, 58 N. H. 229.

New Jersey.— Johnson *v.* Buck, 35 N. J. L. 338, 10 Am. Rep. 243.

South Carolina.— Elfe *v.* Gadsden, 2 Rich. 373; Toomer *v.* Dawson, 1 Cheves 68.

Wisconsin.— Washburne *v.* Fletcher, 42 Wis. 152.

United States.— Beckwith *v.* Talbot, 95 U. S. 289, 24 L. ed. 496. See also Dodge *v.* Van Lear, 7 Fed. Cas. No. 3,956, 5 Cranch C. C. 278.

X. Operation and Effect.[11]

A. In General — 1. Statute as Part of American Common Law. On the question whether the statute of frauds extended to those colonies which were settled at the time of its enactment there is considerable difference of opinion.[12]

2. Operation as to Collateral Rights and Remedies. Under the original statute of frauds and statutes like in form, an oral contract falling within its scope is not void but is merely incapable of sustaining an action to enforce it.[13] The statute does not as a rule apply to the contract unless it is the foundation of a cause of action or an affirmative defense. If it comes in question only collaterally the contract may be relied on and proved.[14] In those states, however, in which the statute declares contracts within its terms to be void, it would seem that such contracts are of no effect whatever.[15]

3. Operation to Prevent Reformation of Instrument. The statute does not operate to prevent the reformation of an instrument which fails, by reason of mistake or fraud, to set forth correctly the intention of the parties.[16]

4. What Law Governs Transaction — a. General Rules. Except in the case of conveyances and contracts affecting land, which are governed by the law of the state where the land is situated,[17] it may be said that a contract is governed by the laws of the state where it is made.[18] If valid where made it will be enforced in another jurisdiction, even though it would have violated the statutory provisions of the second jurisdiction;[19] if invalid where made it will not be

See 23 Cent. Dig. tit. "Frauds, Statute of," § 263.

Maps not referred to in memorandum.— The fact that a map was used in the negotiations of the parties to a sale of land will not render valid a memorandum which does not sufficiently describe the land without the aid of the map, and which contains no reference to it. Clark *v.* Chamberlain, 112 Mass. 19; Adams *v.* Scales, 1 Baxt. (Tenn.) 337, 25 Am. Rep. 772. See, however, Scarlett *v.* Stein, 40 Md. 512.

A paper so referred to must have been in existence at the time of the signing, else it is not a part of the memorandum. Hazard *v.* Day, 14 Allen (Mass.) 487, 92 Am. Dec. 790.

Parol evidence to connect separate writings see *infra*, XI, B, 3, a, (II).

11. See, generally, Statutes.

12. **Statute held not to apply** see Hall *v.* Livingston, 3 Del. Ch. 348; McMillin *v.* McMillin, 7 T. B. Mon. (Ky.) 560; Anonymous, 1 Dall. (Pa.) 1, 1 L. ed. 11.

Statute held to apply see Sibley *v.* Williams, 3 Gill & J. (Md.) 52; Childers *v.* Talbott, 4 N. M. 168, 16 Pac. 275. In a very early case in Maryland it seems to have been supposed that the statute did not take effect in the colony until publication there. Clayland *v.* Pearce, 1 Harr. & M. 29.

13. See *infra*, X, C, 3.

14. *Alabama.*— Crawford *v.* Jones, 54 Ala. 459.

Connecticut.— Couch *v.* Meeker, 2 Conn. 302, 7 Am. Dec. 274.

Illinois.— Michels *v.* West, 109 Ill. App. 418.

Indiana.— Yater *v.* Mullen, 23 Ind. 562.

Michigan.— McNaughton *v.* Smith, (1904) 99 N. W. 382.

New Jersey.— Reeves *v.* Goff, 3 N. J. L. 609.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 266. See also *infra*, X, C, 3, 4; X, K.

15. Madigan *v.* Walsh, 22 Wis. 501. Therefore it has been held that a bill will not lie to rescind an oral contract for the sale of lands which is denied by defendant. Culligan *v.* Wingerter, 57 Mo. 241. See *infra*, X, C, 3.

16. *Arkansas.*— Blackburn *v.* Randolph, 33 Ark. 119.

Georgia.— Durham *v.* Taylor, 29 Ga. 166.

Indiana.— Dutch *v.* Boyd, 81 Ind. 146; Morrison *v.* Collier, 79 Ind. 417.

New York.— Rider *v.* Powell, 28 N. Y. 310, 4 Abb. Dec. 63.

Tennessee.— Johnson *v.* Johnson, 8 Baxt. 261.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 267.

17. Hall *v.* Yoell, 45 Cal. 584; Abell *v.* Douglass, 4 Den. (N. Y.) 305; Siegel *v.* Robinson, 56 Pa. St. 19, 93 Am. Dec. 775; Clark *v.* Graham, 6 Wheat. (U. S.) 577, 5 L. ed. 334.

18. Webber *v.* Howe, 36 Mich. 150, 24 Am. Rep. 590; Hunt *v.* Jones, 12 R. I. 265, 34 Am. Rep. 635.

The law of the place of performance has, however, been held to be the proper test. Turnow *v.* Hochstadter, 7 Hun (N. Y.) 80.

19. *Arkansas.*— Ringgold *v.* Newkirk, 3 Ark. 96.

Illinois.— Miller *v.* Wilson, 146 Ill. 523, 34 N. E. 1111, 37 Am. St. Rep. 186 [*reversing* 42 Ill. App. 332].

Indiana.— Johnson *v.* Chambers, 12 Ind. 102.

Louisiana.— Madry *v.* Young, 3 La. 160; Thatcher *v.* Walden, 5 Mart. N. S. 495.

enforced even in a jurisdiction where it would have been valid.[20] However, there is some authority for the rule that the statute of frauds affects the remedy merely, and if in violation of the *lex fori* it will not be enforced, even though valid under the laws of the state where it was made and was to be performed.[21]

b. State and Federal Courts. The statute of frauds of a state, even as applied to commercial instruments, is a rule of decision in the courts of the United States.[22]

5. General Rules of Construction. The rules of construction of the statute of frauds appear to be unsettled. It has been said that the court will follow the English construction;[23] that a doubt should be decided in favor of sustaining a contract;[24] that the exceptions to the statute are to be limited rather than extended;[25] and that greater latitude of construction is allowable under clauses of the statute having reference to mercantile transactions than under those referring to contracts for the sale of lands and goods.[26]

6. Statute as Engine of Fraud. It is generally true that if a person has been guilty of fraud he will not be permitted to shelter himself behind the statute of frauds;[27] nor will he be allowed to use the statute as a means of

Massachusetts.— Denny *v.* Williams, 5 Allen 1.

Mississippi.— Fox *v.* Matthews, 33 Miss. 433.

Missouri.— Houghtaling *v.* Ball, 20 Mo. 563.

New York.— Wilcox Silver Plate Co. *v.* Green, 72 N. Y. 17 [*affirming* 9 Hun 347]; Forward *v.* Harris, 30 Barb. 338; Gring *v.* Vanderbilt, 13 N. Y. St. 457.

Ohio.— Eldridge *v.* Heaton, 7 Ohio Cir. Ct. 499, 4 Ohio Cir. Dec. 698.

Tennessee.— Anderson *v.* May, 10 Heisk. 84.

United States.— Allen *v.* Schuchardt, 1 Fed. Cas. No. 236; Carrington *v.* Brents, 5 Fed. Cas. No. 2,446, 1 McLean 167 [*affirmed* in 9 Pet. 86, 9 L. ed. 60].

See 23 Cent. Dig. tit. "Frauds, Statute of," § 268.

20. Cochran *v.* Ward, 5 Ind. App. 89, 29 N. E. 795, 31 N. E. 581, 51 Am. St. Rep. 229; Dacosta *v.* Davis, 24 N. J. L. 319; Allshouse *v.* Ramsay, 6 Whart. (Pa.) 331, 37 Am. Dec. 417.

An oral acceptance of a draft in one state will not be invalidated because in the state where the draft was drawn an oral acceptance is void. The contract is made where the acceptance takes place. Mason *v.* Dousay, 35 Ill. 424, 85 Am. Dec. 368.

21. *Connecticut.*— Downer *v.* Chesebrough, 36 Conn. 39, 4 Am. Rep. 29.

Kentucky.— Kleeman *v.* Collins, 9 Bush 460.

Michigan.— New York Third Nat. Bank *v.* Steel, 129 Mich. 434, 88 N. W. 1050, 64 L. R. A. 119.

Ohio.— Heaton *v.* Eldridge, 56 Ohio St. 87, 46 N. E. 638, 60 Am. St. Rep. 737, 36 L. R. A. 817.

United States.— Buhl *v.* Stephens, 84 Fed. 922.

England.— Leroux *v.* Brown, 12 C. B. 801, 16 Jur. 1021, 22 L. J. C. P. 1, 1 Wkly. Rep. 22, 74 E. C. L. 801.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 268.

22. Moses *v.* Lawrence County Nat. Bank, 149 U. S. 298, 13 S. Ct. 900, 37 L. ed. 743; De Wolf *v.* Rabaud, 1 Pet. (U. S.) 476, 7 L. ed. 227 [*affirming* 20 Fed. Cas. No. 11,519, 1 Paine 580]. See, generally, Courts, 11 Cyc. 895 *et seq.*

23. Kennedy *v.* Kennedy, 2 Ala. 571; Bowman *v.* Conn, 8 Ind. 58. *Contra*, Gothard *v.* Flynn, 25 Miss. 58.

24. Phipps *v.* McFarlane, 3 Minn. 109, 74 Am. Dec. 743.

25. Mutual Ben. L. Ins. Co. *v.* Brown, 30 N. J. Eq. 193; Wallace *v.* Brown, 10 N. J. Eq. 308.

26. Isaacs *v.* McGrath, 1 Nott & M. (S. C.) 563.

27. *Arkansas.*— Bazemore *v.* Mullins, 52 Ark. 207, 12 S. W. 474.

California.— Hidden *v.* Jordan, 21 Cal. 92.

Illinois.— Martin *v.* Martin, 170 Ill. 639, 48 N. E. 924, 62 Am. St. Rep. 411; Union Mut. L. Ins. Co. *v.* White, 106 Ill. 67; Gates *v.* Fraser, 6 Ill. App. 229.

Michigan.— Gillett *v.* Knowles, 108 Mich. 602, 66 N. W. 497; Smelling *v.* Valley, 103 Mich. 580, 61 N. W. 878; Ochsenkehl *v.* Jeffers, 32 Mich. 482.

Mississippi.— Dickson *v.* Green, 24 Miss. 612.

Missouri.— Damschroeder *v.* Thias, 51 Mo. 100.

New Hampshire.— Newell *v.* Horn, 45 N. H. 421.

New Jersey.— Brannin *v.* Brannin, 18 N. J. Eq. 212.

New York.— Wood *v.* Rabe, 96 N. Y. 414, 48 Am. Rep. 640; Cagger *v.* Lansing, 43 N. Y. 550 [*reversing* 57 Barb. 421]; Ryan *v.* Dox, 34 N. Y. 307, 90 Am. Dec. 696 [*reversing* 25 Barb. 440]; Dodge *v.* Wellman, 1 Abb. Dec. 512, 43 How. Pr. 427; Willink *v.* Vanderveer, 1 Barb. 599; Wood *v.* Mulock, 48 N. Y. Super. Ct. 70; Dung *v.* Parker, 3 Daly 89.

North Carolina.— Ellington *v.* Currie, 40 N. C. 21.

South Carolina.— Cox *v.* Cox, 5 Rich. Eq. 365.

perpetrating fraud, since the chief object of the statute was to remove temptation to commit perjury.[28]

7. Retroactive Operation. The statute of frauds is not retroactive and does not affect contracts or conveyances made before its enactment. An oral contract or conveyance good when made remains valid notwithstanding the subsequent enactment of legislation which requires such a transaction to be in writing.[29] However, a legislative act construing the statute may properly apply to a contract made before such act is passed.[30]

8. Operation Against Corporations. The statute of frauds applies to contracts made by corporations as well as to those made by individuals.[31]

9. Necessity of Valid Common-Law Contract. To be enforceable a transaction falling within the scope of the statute of frauds must possess all the essential elements of a common-law contract. The statute does not say that all contracts within its scope and executed according to its requirements shall be enforceable; it says merely that all contracts within its scope and not executed according to its requirements shall be unenforceable.[32] Accordingly the fact that an agreement is reduced to writing or that a memorandum thereof is made as required

Texas.— Whitson *v.* Smith, 15 Tex. 33; Moore *v.* Aldrich, 25 Tex. Suppl. 276.

Vermont.— Sandford *v.* Rose, 2 Tyler 428.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 270.

28. *Minnesota.*— Evans *v.* Folsom, 5 Minn. 422.

Missouri.— Simily *v.* Adams, 88 Mo. App. 621.

Montana.— Sathre *v.* Rolfe, (1904) 77 Pac. 431.

Ohio.— Wilber *v.* Paine, 1 Ohio 251.

South Carolina.— Kinard *v.* Hiers, 3 Rich. Eq. 423, 55 Am. Dec. 643.

Texas.— Hunt *v.* Turner, 9 Tex. 385, 60 Am. Dec. 167.

Canada.— Amero *v.* Amero, Ritch. Eq. Cas. (Nova Scotia) 9.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 270.

29. *Indian Territory.*— Wilson *v.* Owens, 1 Indian Terr. 163, 38 S. W. 976.

Kentucky.— McMillin *v.* McMillin, 7 T. B. Mon. 560; Overton *v.* Lacy, 6 T. B. Mon. 13, 17 Am. Dec. 111; Fisher *v.* Cockerill, 5 T. B. Mon. 129; Barbour *v.* Whitlock, 4 T. B. Mon. 180; Allen *v.* Beal, 3 A. K. Marsh. 554, 13 Am. Dec. 203; Searcey *v.* Morgan, 4 Bibb 96; Ball *v.* Ball, 2 Bibb 65.

Louisiana.— McDonald *v.* Stewart, 18 La. Ann. 90; Taylor *v.* Smith, 15 La. Ann. 415.

North Carolina.— Dunn *v.* Tharp, 39 N. C. 7.

Pennsylvania.— Tucker *v.* Bitting, 32 Pa. St. 428; McQuewans *v.* Hamlin, 30 Pa. St. 215; Unangst *v.* Hibler, 26 Pa. St. 150.

Texas.— Nichols *v.* Pilgrim, 20 Tex. 426; Hodges *v.* Johnson, 15 Tex. 570.

Virginia.— Williams *v.* Lewis, 5 Leigh 686.

United States.— Wilson *v.* Owens, 86 Fed. 571, 30 C. C. A. 257.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 271.

30. Baker *v.* Herndon, 17 Ga. 568.

31. Smith *v.* Morse, 2 Cal. 524. See also *supra*, V, B, 7.

32. *California.*— Niles *v.* Hancock, 140 Cal. 157, 73 Pac. 840; Breckinridge *v.* Crocker, 78 Cal. 529, 21 Pac. 179.

Iowa.— Mathes *v.* Bell, 121 Iowa 722, 96 N. W. 1093; American Oak Leather Co. *v.* Porter, 94 Iowa 117, 62 N. W. 658; Warfield *v.* Wisconsin Cranberry Co., 63 Iowa 312, 19 N. W. 224.

Kentucky.— Cumberland, etc., R. Co. *v.* Shelbyville, etc., R. Co., 77 S. W. 690, 25 Ky. L. Rep. 1265.

Maryland.— Wyman *v.* Gray, 7 Harr. & J. 409.

Massachusetts.— Clarke *v.* Palmer, 129 Mass. 373; Oakman *v.* Rogers, 120 Mass. 214; Johnson *v.* Trinity Church Soc., 11 Allen 123.

Michigan.— Kroll *v.* Diamond Match Co., 113 Mich. 196, 71 N. W. 630; Francis *v.* Barry, 69 Mich. 311, 37 N. W. 353.

Mississippi.— Waul *v.* Kirkman, 27 Miss. 823.

Missouri.— Tucker *v.* Bartle, 85 Mo. 114.

New Jersey.— Jersey City *v.* Harrison, (Sup. 1904) 58 Atl. 100.

New York.— Haydock *v.* Stow, 40 N. Y. 363; Montauk Assoc. *v.* Daly, 62 N. Y. App. Div. 101, 70 N. Y. Suppl. 861.

Ohio.— Richardson *v.* Bates, 8 Ohio St. 257.

Pennsylvania.— Moyer's Appeal, 105 Pa. St. 432; Allen *v.* Allen, 45 Pa. St. 468; Grant *v.* Levan, 4 Pa. St. 393; Wily *v.* Pearson, 2 Woodw. 424.

South Carolina.— Davis *v.* Moore, 9 Rich. 215.

Washington.— Lombard Invest. Co. *v.* Carter, 7 Wash. 4, 34 Pac. 209, 38 Am. St. Rep. 861.

Wisconsin.— Turton *v.* Burke, 4 Wis. 119.

England.— Clinan *v.* Cooke, 1 Sch. & Lef. 32, 9 Rev. Rep. 3.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 266.

An unconditional acceptance of an offer is necessary, although the transaction is in writing. Cloud *v.* Greasley, 125 Ill. 313, 17 N. E. 826; Coburn *v.* Hall, 7 Ind. 291; Waul *v.* Kirkman, 27 Miss. 823; Marschall *v.* Eisen Vineyard Co., 7 Misc. (N. Y.) 674, 28 N. Y. Suppl. 62.

by the statute does not dispense with the necessity of a consideration for the agreement, since that is a common-law element of contract.[33]

10. Application to Implied Contracts — a. Contracts Implied in Fact. The statute of frauds applies to contracts implied in fact, and hence if they fall within its scope they are unenforceable.[34]

b. Contracts Implied in Law.[35] The statute does not extend to obligations implied by law, and hence they are enforceable, although there is no writing.[36]

B. Operation as Estate at Will or Otherwise of Estate or Interest Created Without Writing. According to the terms of the English statute, an oral lease for more than the statutory period has the force and effect of an estate at will only, and the statute has been so interpreted in certain of the

33. *Alabama.*— Beall *v.* Ridgeway, 18 Ala. 117; Hester *v.* Wesson, 6 Ala. 415.

Connecticut.— Pratt *v.* Humphrey, 22 Conn. 317.

Illinois.— Frame *v.* August, 88 Ill. 424.

Indiana.— Starr *v.* Earle, 43 Ind. 478.

Kentucky.— Mosely *v.* Taylor, 4 Dana 542.

Maine.— Cutler *v.* Everett, 33 Me. 201.

Maryland.— Aldridge *v.* Turner, 1 Gill & J. 427; Wyman *v.* Gray, 7 Harr. & J. 409.

Massachusetts.— Tenney *v.* Prince, 4 Pick. 385, 16 Am. Dec. 347.

Mississippi.— Byrd *v.* Holloway, 6 Sm. & M. 199.

New Jersey.— Buckley *v.* Beardslee, 5 N. J. L. 570, 8 Am. Dec. 620.

North Carolina.— Miller *v.* Irvine, 18 N. C. 103.

Tennessee.— Gass *v.* Hawkins, 1 Tenn. Cas. 167, Thomps. Cas. 238.

England.— Rann *v.* Hughes, 4 Bro. P. C. 27, 7 T. R. 350 note, 2 Eng. Reprint 18; Barrell *v.* Trussell, 4 Taunt. 117; Forth *v.* Stanton, 1 Wm. Saund. 210.

34. Chase *v.* Second Ave. R. Co., 48 N. Y. Super. Ct. 220 [*affirmed* in 97 N. Y. 384, 49 Am. Rep. 531], holding that if, at the completion of an oral contract for two years, the parties orally agree to let it go on at the same rate, the law will not imply a renewal of the contract for another term of two years, since it cannot imply an unwritten contract which the parties themselves cannot make without a writing. See, however, Baltimore, etc., R. Co. *v.* West, 57 Ohio St. 161, 49 N. E. 344 (holding that where a tenant from year to year holds over, his obligation to pay rent for a year arises by operation of law and is not within the statute, even where an oral lease for a year is invalid); Urquhart *v.* Brayton, 12 R. I. 169 (where it appeared that land subject to a mortgage was conveyed to a grantee who assumed the mortgage "as part of the consideration of this deed," and it was held that his promise to pay the mortgage debt was implied by law and not within the statute).

Where a contract is made for a year's services and on the expiration of that time the services are continued in the same way, the statute of frauds does not preclude the implication of a contract for services for a second year at the same rate. Aiken *v.* Nogle, 47 Kan. 96, 27 Pac. 825; Tatterson *v.* Suffolk Mfg. Co., 106 Mass. 56; Sines *v.* Superintendents of Poor, 58 Mich. 503, 25 N. W. 485; Bennett *v.* Mahler, 90 N. Y. App. Div. 22, 85 N. Y. Suppl. 669. So a contract of employment from month to month, although continued for three and a half years, is not within the statute. Kiene *v.* Shaeffing, 33 Nebr. 21, 49 N. W. 773.

Terms implied from express provisions see *supra*, page 258 note 97.

A promise cannot be implied on the part of one person by his mere silence or failure to object when informed that goods delivered to another are to be charged to him or that he is to be looked to for payment, nor by his oral assent to the correctness of an account against himself which includes items due from a third person and for which he is not liable, nor by merely asking his creditor to give time to a third person who is also indebted to such creditor (Martyn *v.* Arnold, 36 Fla. 446, 18 So. 791; Preston *v.* Zekind, 84 Mich. 641, 48 N. W. 180; Grice *v.* Noble, 59 Mich. 515, 26 N. W. 688. See Bristol *v.* Sutton, 119 Mich. 693, 78 N. W. 885; Rowland *v.* Barnes, 81 N. C. 234); nor by his oral submission of the claim of another to arbitration without an express promise to pay the award (Bryant *v.* Ellis, 20 Tex. Civ. App. 298, 49 S. W. 234).

35. **Account stated** see Accounts and Accounting, 1 Cyc. 368.

Contracts implied on part performance see *infra*, X, H, 4.

Statutory obligations see also *supra*, IX, C, 3, c, (III).

36. *Alabama.*— Greenville *v.* Greenville Water Works Co., 125 Ala. 625, 27 So. 764.

Connecticut.— Story *v.* Barrell, 2 Conn. 665; Stocking *v.* Sage, 1 Conn. 519; Smith *v.* Bradley, 1 Root 150.

Kansas.— Rayl *v.* Rayl, 58 Kan. 585, 50 Pac. 501.

Kentucky — Allen *v.* Pryor, 3 A. K. Marsh. 305.

Massachusetts.— Weeks *v.* Parsons, 176 Mass. 570, 58 N. E. 157; Pike *v.* Brown, 7 Cush. 133.

North Carolina.— Ray *v.* Honeycutt, 119 N. C. 510, 26 S. E. 127.

Ohio.— Baltimore, etc., R. Co. *v.* West, 57 Ohio St. 161, 49 N. E. 344.

Rhode Island.— Urquhart *v.* Brayton, 12 R. I. 169.

Contra.— See May *v.* Williams, 61 Miss. 125, 48 Am. Rep. 80.

United States.[37] Such estate may be extended by entry and payment of rent by the year or by a fraction of a year into a tenancy from year to year;[38] and the terms of rental will be governed by the original agreement.[39] If, however, the rent is paid monthly, the tenancy will be held to be one from month to month;[40] but the length of the term with reference to which rent is paid cannot be shown by the oral lease.[41]

C. Validity and Enforcement of Oral Conveyances and Contracts in General — 1. Conveyances. While an oral conveyance of property covered by the statute is generally ineffective to pass title, it does not follow that the transaction is always a nullity. The fact that such conveyance was made may be used to show that a user following it was not permissive but as of right.[42] And the same is true in respect to leases; a lessee in possession under an oral lease may maintain an action against his landlord for converting crops grown on the premises, although he could not have enforced his lease.[43] There is authority for the proposition that an oral lease for more than the statutory period is valid for the statutory period.[44] In Louisiana an oral sale is good if admitted or proved without objection or by interrogatories; but an answer to interrogatories denying the sale cannot be contradicted.[45]

37. *Alabama.*— Cromwelin *v.* Thiess, 31 Ala. 412, 70 Am. Dec. 499.

Georgia.— Cody *v.* Quarterman, 12 Ga. 386.

Louisiana.— Bailey *v.* Ward, 32 La. Ann. 839.

Maine.— Withers *v.* Larrabee, 48 Me. 570.

Massachusetts.— Ellis *v.* Paige, 1 Pick. 43.

Michigan.— Huyser *v.* Chase, 13 Mich. 98.

New Hampshire.— Whitney *v.* Swett, 22 N. H. 10, 53 Am. Dec. 228.

New York.— Jackson *v.* Rogers, 1 Johns. Cas. 33; Jackson *v.* Rogers, 2 Cai. Cas. 314.

Pennsylvania.— Adams *v.* McKesson, 53 Pa. St. 81, 91 Am. Dec. 183; Stover *v.* Cadwallader, 2 Pennyp. 117; Walter *v.* Transue, 17 Pa. Super. Ct. 94.

Tennessee.— Shepherd *v.* Cummings, 1 Coldw. 354; Duke *v.* Harper, 6 Yerg. 280, 27 Am. Dec. 462.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 272.

38. *Arkansas.*— Brockway *v.* Thomas, 36 Ark. 518.

Connecticut.— Larkin *v.* Avery, 23 Conn. 304; Strong *v.* Crosby, 21 Conn. 398.

Georgia.— Cody *v.* Quarterman, 12 Ga. 386.

Indiana.— Nash *v.* Berkmeir, 83 Ind. 536; Swan *v.* Clark, 80 Ind. 57.

Kentucky.— Smith *v.* Hornback, 4 Litt. 232, 14 Am. Dec. 122.

Michigan.— Steketee *v.* Pratt, 122 Mich. 80, 80 N. W. 989; Coan *v.* Mole, 39 Mich. 454.

Missouri.— Hammon *v.* Douglas, 50 Mo. 434; Ridgley *v.* Stillwell, 28 Mo. 400; Kerr *v.* Clark, 19 Mo. 132; Butts *v.* Fox, 96 Mo. App. 437, 70 S. W. 515; Delaney *v.* Flanagan, 41 Mo. App. 651.

Nebraska.— Humphrey Hardware Co. *v.* Herrick, (1904) 99 N. W. 233.

New Jersey.— Drake *v.* Newton, 23 N. J. L. 111.

New York.— Reeder *v.* Sayre, 70 N. Y. 180, 26 Am. Rep. 567 [*affirming* 6 Hun 562]; Lounsbery *v.* Snyder, 31 N. Y. 514; Craske *v.* Christian Union Pub. Co., 17 Hun 319; People *v.* Rickert, 8 Cow. 226; Schuyler *v.* Leggett, 2 Cow. 660. It has been held that if a tenant under an oral lease enters and remains only a few months, he cannot be held for rent for the balance of the year. Prial *v.* Entwistle, 10 Daly 398.

Oregon.— Rosenblat *v.* Perkins, 18 Oreg. 156, 22 Pac. 598, 6 L. R. A. 257; Williams *v.* Ackerman, 8 Oreg. 405; Garrett *v.* Clark, 5 Oreg. 464.

Vermont.— Barlow *v.* Wainwright, 22 Vt. 88, 53 Am. Dec. 79.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 273.

This principle does not apply to contracts for hiring. Lally *v.* Crookston Lumber Co., 85 Minn. 257, 88 N. W. 846.

In South Carolina by statute a tenant under a parol lease has a right of possession for twelve months from entry, and therefore is a tenant at will. Hillhouse *v.* Jennings, 60 S. C. 392, 38 S. E. 596.

39. Nash *v.* Berkmeir, 83 Ind. 536; Swan *v.* Clark, 80 Ind. 57; Reeder *v.* Sayre, 70 N. Y. 180, 26 Am. Rep. 567 [*affirming* 6 Hun 562]; People *v.* Rickert, 8 Cow. (N. Y.) 226.

40. Marr *v.* Ray, 151 Ill. 340, 37 N. E. 1029, 26 L. R. A. 799 [*affirming* 50 Ill. App. 415]; Browneil *v.* Welch, 91 Ill. 523; Warner *v.* Hale, 65 Ill. 395; Blake *v.* Kurrus, 41 Ill. App. 562; Utah L. & T. Co. *v.* Garbutt, 6 Utah 342, 23 Pac. 758.

41. Johnson *v.* Albertson, 51 Minn. 333, 53 N. W. 642. Formerly by statute oral leases of land in New York city were held valid until the first of May next following the making. Taggard *v.* Roosevelt, 2 E. D. Smith (N. Y.) 100, 8 How. Pr. 141.

42. Talbott *v.* Thorn, 91 Ky. 417, 16 S. W. 88, 13 Ky. L. Rep. 401.

43. Felch *v.* Harriman, 64 N. H. 472, 13 Atl. 418.

44. Friedhoff *v.* Smith, 13 Nebr. 5, 12 N. W. 820. *Contra*, Carey *v.* Richards, 2 Ohio Dec. (Reprint) 630, 4 West. L. Month. 251.

45. Bauduc *v.* Conrey, 10 Rob. 466; Brown *v.* Frantum, 6 La. 39; Hopkins *v.* Lacouture, 4 La. 64; Strawbridge *v.* Warfield, 4 La. 20;

2. **Damages For Breach of Oral Contract.** The primary effect of the statute of frauds is to prohibit an action for the breach of an oral contract falling within its terms. An action cannot therefore be maintained on an oral contract to sell land against either the vendor[46] or the purchaser.[47]

3. **Contracts Void and Voidable.** Contracts falling within the statute are not ordinarily void or illegal. The statute as a rule merely prohibits an action to be brought thereon, and if the parties see fit to carry them out the transactions are valid.[48] So when the parties see fit to carry out an oral lease they are bound by its terms as long as the relationship of landlord and tenant continues.[49] If, however, the statute expressly declares that the contract shall be void, it has no validity whatever.[50]

4. **Oral Contracts as Consideration For Other Promises.** An oral promise which is within the statute cannot constitute a consideration for a written agreement by the promisor;[51] nor can the release of such a promise constitute a consideration.[52] Thus a promissory note which is given to secure an oral promise

Bach *v.* Hall, 3 La. 116; Wells *v.* Hunter, 5 Mart. N. S. 119.

46. *Kentucky.*— McCampbell *v.* McCampbell, 5 Litt. 92, 15 Am. Dec. 48.

Louisiana.— Halsmith *v.* Castay, 17 La. Ann. 140; Marionneaux *v.* Edwards, 4 La. Ann. 103.

Maine.— Norton *v.* Preston, 15 Me. 14, 32 Am. Dec. 128.

Michigan.— Hillebrands *v.* Nibbelink, 40 Mich. 646.

Missouri.— Lydick *v.* Holland, 83 Mo. 703.

New Jersey.— Rutan *v.* Hinchman, 30 N. J. L. 255.

New York.— Baltzen *v.* Nicolay, 53 N. Y. 467 [*reversing* 35 N. Y. Super. Ct. 203]; Dung *v.* Parker, 52 N. Y. 494 [*reversing* 3 Daly 89]; Wheeler *v.* Hall, 54 N. Y. App. Div. 49, 66 N. Y. Suppl. 257.

North Carolina.— McCracken *v.* McCracken, 88 N. C. 272.

South Carolina.— Hillhouse *v.* Jennings, 60 S. C. 373, 392, 38 S. E. 599, 596; Davis *v.* Moore, 9 Rich. 215.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 277.

47. Leis *v.* Potter, 68 Kan. 117, 74 Pac. 622; Doty *v.* Smith, 62 Hun (N. Y.) 598, 17 N. Y. Suppl. 292; Norris *v.* Lain, 16 Johns. (N. Y.) 151; Sennett *v.* Johnson, 9 Pa. St. 335.

48. *Alabama.*— Godden *v.* Pierson, 42 Ala. 370; Aicardi *v.* Craig, 42 Ala. 311; Gillespie *v.* Battle, 15 Ala. 276.

Illinois.— Collins *v.* Thayer, 74 Ill. 138; Doe *v.* Cochran, 2 Ill. 209.

Indiana.— Wills *v.* Ross, 77 Ind. 1, 40 Am. Rep. 279; Fowler *v.* Burget, 16 Ind. 341; Hadden *v.* Johnson, 7 Ind. 394.

Iowa.— Merchant *v.* O'Rourke, 111 Iowa 351, 82 N. W. 759.

Kentucky.— Oldham *v.* Sale, 1 B. Mon. 76; Duncan *v.* Baird, 8 Dana 101; Weber *v.* Weber, 76 S. W. 507, 25 Ky. L. Rep. 908.

Louisiana.— Jacob *v.* Davis, 4 La. Ann. 39.

Maine.— Murphy *v.* Webber, 61 Me. 478; Gammon *v.* Butler, 48 Me. 344.

Mississippi.— Sims *v.* Hutchins, 8 Sm. & M. 328, 47 Am. Dec. 90.

Missouri.— Alexander *v.* Merry, 9 Mo. 514.

Nebraska.— Riley *v.* Bancroft, 51 Nebr. 864, 81 N. W. 745.

New Jersey.— Eaton *v.* Eaton, 35 N. J. L. 290.

North Carolina.— Dail *v.* Freeman, 92 N. C. 351; Syme *v.* Smith, 92 N. C. 338.

Ohio.— Minns *v.* Morse, 15 Ohio 568, 45 Am. Dec. 590.

Tennessee.— Hamilton *v.* Gilbert, 2 Heisk. 680; Roberts *v.* Francis, 2 Heisk. 127; Sneed *v.* Bradley, 4 Sneed 301.

United States.— Dupuy *v.* Delaware Ins. Co., 63 Fed. 680.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 277½.

Application of payments.—When a defendant is exonerated by the statute of frauds from liability upon his oral promise to pay for certain goods furnished by plaintiff to a third person before a certain date and liable for those furnished afterward, payment made by him on the orders of such third person, drawn payable upon the account generally, without reference to the question of liability, may be applied by the creditor to the oldest item. Murphy *v.* Webber, 61 Me. 478.

Oral sales of realty.— The rule that the transaction is voidable only and not void has been applied to oral sales of realty. Hamilton *v.* Gilbert, 2 Heisk. (Tenn.) 680; Roberts *v.* Francis, 2 Heisk. (Tenn.) 127; Sneed *v.* Bradley, 4 Sneed. (Tenn.) 301.

Retainer.— Since an oral contract within the statute is not void but only unenforceable, an administrator to whom a debt is due from decedent under an oral contract within the statute may retain the amount thereof and is entitled to credit therefor. Berry *v.* Graddy, 1 Metc. (Ky.) 553.

49. Ohio, etc., R. Co. *v.* Trapp, 4 Ind. App. 69, 30 N. E. 812; Peoples *v.* Evens, 8 N. D. 121, 77 N. W. 93.

50. Pierce *v.* Clarke, 71 Minn. 114, 73 N. W. 522. And see cases cited *supra*, note 15.

51. Hall *v.* Soule, 11 Mich. 494. *Contra*, Stout *v.* Ennis, 28 Kan. 706; Anderson *v.* Best, 176 Pa. St. 498, 35 Atl. 194.

52. North *v.* Forest, 15 Conn. 400.

within the statute is not enforceable;[53] and a promise to guarantee the performance of an oral invalid promise is not actionable.[54]

D. Promise to Reduce Agreement to Writing. The fact that an oral agreement within the statute contains a stipulation that the agreement shall be reduced to writing is not sufficient to save it from the operation of the statute;[55] neither will such an agreement be aided by a subsequent oral agreement to put it in writing.[56] But if a contract has been reduced to writing, the death of one who has promised to sign will take the case out of the statute.[57] An oral agreement to execute a contract to sell land is void;[58] and so is an agreement to execute a mortgage[59] or a lease.[60] However in some states equity will enforce an oral promise to sign the writing on the ground that to refuse to do so would permit the perpetration of a fraud.[61]

E. Contracts in Part Within Statute — 1. In General. If part of an oral contract falling within the scope of the statute of frauds is in violation of the statute, the whole contract, if it is entire and indivisible, is unenforceable;[62] but

53. Kraak *v.* Fries, 21 D. C. 100, 18 L. R. A. 142; Weatherley *v.* Choate, 21 Tex. 272. *Contra,* Dominick *v.* Randolph, 124 Ala. 557, 27 So. 481. See also COMMERCIAL PAPER, 7 Cyc. 720, 902.

54. Smith *v.* Bowler, 1 Disn. (Ohio) 520, 12 Ohio Dec. (Reprint) 770 [*affirmed* in 2 Disn. 153].

Property transferred as security for an oral promise may be recovered back even though the promise has not been carried out. Rice *v.* Peet, 15 Johns. (N. Y.) 503.

55. *California.*— Feeney *v.* Howard, 79 Cal. 525, 21 Pac. 984, 12 Am. St. Rep. 162, 4 L. R. A. 826.

Indiana.— Jackson *v.* Myers, 120 Ind. 504, 22 N. E. 90, 23 N. E. 86; Caylor *v.* Roe, 99 Ind. 1.

Iowa.— Dee *v.* Downs, 57 Iowa 589, 11 N. W. 2.

Maryland.— Green *v.* Pennsylvania Steel Co., 75 Md. 109, 23 Atl. 139.

Massachusetts.— Chase *v.* Fitz, 132 Mass. 359; Glass *v.* Hulbert, 102 Mass. 24, 3 Am. Rep. 418.

Mississippi.— Box *v.* Stanford, 13 Sm. & M. 93, 51 Am. Dec. 142.

New Jersey.— Wills *v.* Shinn, 42 N. J. L. 138.

New York.— Carville *v.* Crane, 5 Hill 483, 40 Am. Dec. 346.

South Carolina.— Taylor *v.* Drake, 4 Strobh. 431, 53 Am. Dec. 680.

Vermont.— Hawley *v.* Moody 24 Vt. 603.

Wisconsin.— Hardell *v.* McClure, 2 Pinn. 289, 1 Chandl. 271.

England.— Mallet *v.* Bateman, L. R. 1 C. P. 163, 1 H. & R. 109, 12 Jur. N. S. 122, 35 L. J. C. P. 40, 13 L. T. Rep. N. S. 410, 14 Wkly Rep. 225, *semble.*

See 23 Cent. Dig. tit. "Frauds, Statute of," § 279.

Contra.— Jenkins *v.* Eldredge, 13 Fed. Cas. No. 7,266, 3 Story 181.

56. Smith *v.* Bowler, 1 Disn. (Ohio) 520, 12 Ohio Dec. (Reprint) 770 [*affirmed* in 2 Disn. 153]; McKinley *v.* Lloyd, 128 Fed. 519. *Contra,* Henderson *v.* Touchstone, 22 Ga. 1.

57. Finucane *v.* Kearney, Freem. (Miss.) 65.

58. Ledford *v.* Ferrell, 34 N. C. 285; Yates *v.* Martin, 2 Pinn. (Wis.) 171, 1 Chandl. 118. *Contra,* McBurney *v.* Wellman, 42 Barb. (N. Y.) 390.

59. Wooldridge *v.* Scott, 69 Mo. 669; Stoddard *v.* Hart, 23 N. Y. 556; Marquat *v.* Marquat, 7 How. Pr. (N. Y.) 417 [*reversed* on other grounds in 12 N. Y. 336]. *Contra,* Magee *v.* McManus, 70 Cal. 553, 12 Pac. 451; McCarty *v.* Breckenridge, 1 Tex. Civ. App. 170, 20 S. W. 997. See, however, *infra,* note **61.**

60. Hurley *v.* Woodsides, 54 S. W. 8, 21 Ky. L. Rep. 1073; Pulse *v.* Hamer, 8 Oreg. 251.

Agreements not to be performed within a year.— A promise to lease land for a term of a year or more to commence in the future is not a contract not to be performed within one year if the lease is to take effect within a year (Eaton *v.* Whitaker, 18 Conn. 222, 44 Am. Dec. 586; Winters *v.* Cherry, 78 Mo. 344); but it has been held that an agreement to employ a person for a year to commence in the future and to reduce the contract to writing is within the statute (Amburger *v.* Marvin, 4 E. D. Smith (N. Y.) 393). See also *supra,* VI, C, 4, a.

61. Searle *v.* Hill, 73 Iowa 367, 35 N. W. 490, 5 Am. St. Rep. 688 (*semble*); Equitable Gaslight Co. *v.* Baltimore Coal-Tar, etc., Co., 63 Md. 285; McDonald *v.* Yungbluth, 46 Fed. 836.

An oral agreement to sign a mortgage may be enforced in equity. Irvine *v.* Armstrong, 31 Minn. 216, 17 N. W. 343; Ogden *v.* Ogden, 4 Ohio St. 182; Baker *v.* Baker, 2 S. D. 261, 49 N. W. 1064, 39 Am. St. Rep. 776.

62. *Arkansas.*— Higgins *v.* Gager, 65 Ark. 604, 47 S. W. 848.

California.— Fuller *v.* Reed, 38 Cal. 99.

Connecticut.— Atwater *v.* Hough, 29 Conn. 508, 79 Am. Dec. 229.

Illinois.— Dicken *v.* McKinley, 163 Ill. 318, 45 N. E. 134, 54 Am. St. Rep. 471.

Kansas.— Thisler *v.* Mackey, 5 Kan. App. 217, 47 Pac. 217, 7 Kan. App. 276, 53 Pac. 767.

Kentucky.— Holloway *v.* Hampton, 4 B. Mon. 415.

Massachusetts.— Hurley *v.* Donovan, 182

if the contract in question is divisible, that part of it which is not within the scope of the statute may be enforced.[63]

2. Contracts Including Real Property. An oral contract to sell or lease real and personal property which is invalid as to the realty is void as a whole if the contract is entire and indivisible;[64] and the same is true of agreements to leave both real and personal property by will; if the contract is entire and indivisible, the contract is void *in toto*.[65] And when there is a promise in the alternative, either to convey land or to pay money, no action can be maintained on either alternative.[66] If, however, that part of the contract relating to the personalty is clearly separable from the realty the contract, so far as it concerns the personalty, is actionable.[67]

3. Promises Including Liabilities Incurred and to Be Incurred. Oral promises to be responsible for both past and future liabilities of another are usually held to be actionable as to future liabilities on the ground that the contract is readily divisible.[68] Where, however, the promises as to the past and future lia-

Mass. 64, 64 N. E. 685; Irvine *v.* Stone, 6 Cush. 508.

Michigan.— Dietrich *v.* Hoefelmeir, 125 Mich. 145, 87 N. W. 111; Scott *v.* Bush, 29 Mich. 523.

Minnesota.— Hanson *v.* Marsh, 40 Minn. 1, 40 N. W. 841.

Missouri.— Beckmann *v.* Mepham, 97 Mo. App. 161, 70 S. W. 1094; Andrews *v.* Broughton, 78 Mo. App. 179.

New York.— De Beerski *v.* Paige, 36 N. Y. 537 [*affirming* 47 Barb. 172]; Shaffer *v.* Martin, 25 N. Y. App. Div. 501, 49 N. Y. Suppl. 853; Dow *v.* Way, 64 Barb. 255; Hobbs *v.* Wetherwax, 38 How. Pr. 385; Cushman *v.* Burritt, 14 N. Y. Wkly. Dig. 59.

Vermont.— Dyer *v.* Graves, 37 Vt. 369.

Wisconsin.— Martin *v.* Martin, 108 Wis. 284, 84 N. W. 439.

England.— Lea *v.* Barber, 2 Anstr. 425 note; Cooke *v.* Tombs, 2 Anstr. 420; Biddell *v.* Leeder, 1 B. & C. 327, 8 E. C. L. 141.

See 23 Cent. Dig. tit. "Frauds, Statute of." § 280.

63. *Alabama.*— Mobile Mar. Dock, etc., Ins. Co. *v.* McMillan, 31 Ala. 711.

Indiana.— Lowman *v.* Sheets, 124 Ind. 416, 24 N. E. 351, 7 L. R. A. 784; Doan *v.* Dow, 8 Ind. App. 324, 35 N. E. 709.

Maine.— Holbrook *v.* Armstrong, 10 Me. 31.

Massachusetts.— Rand *v.* Mather, 11 Cush. 1, 59 Am. Dec. 131.

Oregon.— Southwell *v.* Beezley, 5 Oreg. 458.

Pennsylvania.— Rees *v.* Jutte, 153 Pa. St. 56, 25 Atl. 998.

England.— Mayfield *v.* Wadsley, 3 B. & C. 357, 5 D. & R. 224, 3 L. J. K. B. O. S. 31, 10 E. C. L. 167; Wood *v.* Benson, 2 Cromp. & J. 94, 1 L. J. Exch. 18, 1 Price 169, 2 Tyrw. 98; *Ex p.* Littlejohn, 7 Jur. 474, 12 L. J. Bankr. 31, 3 Mont. D. & De G. 182.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 280.

64. *California.*— Reynolds *v.* Harris, 9 Cal. 338.

Connecticut.— Grant *v.* Grant, 63 Conn. 530, 29 Atl. 15, 38 Am. St. Rep. 379.

Illinois.— Pond *v.* Sheean, 132 Ill. 312, 23 N. E. 1018, 8 L. R. A. 414; Prante *v.* Schutte, 18 Ill. App. 62; Lill *v.* Brant, 6 Ill. App. 366 [*reversed* on another ground in 96 Ill. 608].

Kansas.— Dennis *v.* Kuster, 57 Kan. 215, 45 Pac. 602; Becker *v.* Mason, 30 Kan. 697, 2 Pac. 850.

Massachusetts.— Dowling *v.* McKenney, 124 Mass. 478; McMullen *v.* Riley, 6 Gray 500.

Michigan.— Jackson *v.* Evans, 44 Mich. 510, 7 N. W. 79; Scott *v.* Bush, 29 Mich. 523.

New York.— De Beerski *v.* Paige, 47 Barb. 172 [*affirmed* in 36 N. Y. 537]; Holzderber *v.* Forrestal, 13 Daly 34; Hobbs *v.* Wetherwax, 38 How. Pr. 385; Thayer *v.* Rock, 13 Wend. 53; Van Alstyne *v.* Wimple, 5 Cow. 162.

Oregon.— Banks *v.* Crow, 3 Oreg. 477.

Wisconsin.— Clark *v.* Davidson, 53 Wis. 317, 10 N. W. 384.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 281.

A memorandum of a sale of goods cannot be shown to have been a part of an agreement that land should be conveyed. Westmoreland *v.* Carson, 76 Tex. 619, 138 S. W. 559.

65. Shahan *v.* Swan, 48 Ohio St. 25, 26 N. E. 222, 29 Am. St. Rep. 517 [*reversing* 1 Ohio Cir. Ct. 216, 1 Ohio Cir. Dec. 119]; *In re* Kessler, 87 Wis. 660, 59 N. W. 129, 41 Am. Rep. 74; Ellis *v.* Cary, 74 Wis. 176, 42 N. W. 252, 17 Am. St. Rep. 125, 4 L. R. A. 55.

66. Mather *v.* Scoles, 35 Ind. 1. It has, however, been held that there may be a recovery on the promise to pay. Ridgely *v.* Clodfelter, 43 Ill. 195.

67. Jenkins *v.* Williams, 16 Gray (Mass.) 158; Stansell *v.* Leavitt, 51 Mich. 536, 16 N. W. 892; Clements *v.* Marston, 52 N. H. 31.

It is not open to the vendor, when the oral sale of the realty has been consummated by taking possession and making improvements, to treat the sale of the personalty as void and recover its value without regard to the contract price. Smith *v.* Smith, 14 Vt. 440.

An oral contract to reconvey land and meanwhile keep down interest on a mortgage will not support an action on the promise to keep down interest. Hurley *v.* Donovan, 182 Mass. 64, 64 N. E. 685.

68. King *v.* Edmiston, 88 Ill. 257; Owen *v.* Stevens, 78 Ill. 462; Haynes *v.* Nice, 100 Mass. 327, 1 Am. Rep. 109; Rand *v.* Mather,

bilities are so interdependent that the contract is not separable in this respect, the usual rule applies and it is invalid *in toto*.[69]

F. Modification of Contract — 1. In General. A written agreement which falls within the statute may or may not be modified by a subsequent parol agreement, depending on the nature of the subsequent agreement. If the subsequent agreement in itself constitutes a contract within the statute, it must of course be in writing to be valid, and if it is not valid, it can have no effect on the earlier contract.[70] If, however, a subsequent oral agreement does not in itself constitute a contract within the statute, it is valid and will operate to modify the first contract;[71] and if the original agreement, although not within the statute, is in writing, the rule is the same.[72]

2. Agreement Changing Time of Performance. There is considerable authority for the proposition that the time for the performance of a written contract within the statute cannot be changed by parol.[73] It will be found, however, upon examination of the cases that if the oral agreement is merely for a change of the time of performance and does not in effect amount to the rescission of the original

11 Cush. (Mass.) 1, 59 Am. Dec. 131; Chappell *v.* Barkley, 90 Mich. 35, 51 N. W. 351; Staats *v.* Howlett, 4 Den. (N. Y.) 559.

This is true as to liabilities for professional services (King *v.* Edmiston, 88 Ill. 257; Chappell *v.* Barkley, 90 Mich. 35, 51 N. W. 351), for materials furnished (Owen *v.* Stevens, 78 Ill. 462), for board and lodging (Haynes *v.* Nice, 100 Mass. 327, 1 Am. Rep. 109), or for work and labor (Rand *v.* Mather, 11 Cush. (Mass.) 1, 59 Am. Dec. 131).

69. Flournoy *v.* Van Campen, 71 Cal. 14, 12 Pac. 257; Hite *v.* Wells, 17 Ill. 88; Loomis *v.* Newhall, 15 Pick. (Mass.) 159; Noyes *v.* Humphreys, 11 Gratt. (Va.) 636.

70. *Indiana.*— Bradley *v.* Harter, 156 Ind. 499, 60 N. E. 139; Carpenter *v.* Galloway, 73 Ind. 418.

Kentucky.— McConathy *v.* Lanham, 116 Ky. 735, 76 S. W. 535, 25 Ky. L. Rep. 971; Wilson *v.* Beam, 14 S. W. 362, 12 Ky. L. Rep. 367; Wigginton *v.* Ewell, 9 S. W. 285, 10 Ky. L. Rep. 383.

Michigan.— Truski *v.* Streseveski, 60 Mich. 34, 26 N. W. 823; Cook *v.* Bell, 18 Mich. 387; Abell *v.* Munson, 18 Mich. 306, 100 Am. Dec. 165.

Minnesota.— Heisley *v.* Swanstrom, 40 Minn. 196, 41 N. W. 1029; Brown *v.* Sanborn, 21 Minn. 402.

Missouri.— Warren *v.* A. B. Mayer Mfg. Co., 161 Mo. 112, 61 S. W. 644; Beekmann *v.* Mepham, 97 Mo. App. 161, 70 S. W. 1094; Newman *v.* Watson Bank, 70 Mo. App. 135; Rucker *v.* Harrington, 52 Mo. App. 481.

New York.— Hill *v.* Blake, 97 N. Y. 216; Schultz *v.* Bradley, 57 N. Y. 646 [*reversing* 4 Daly 29]; Thomson *v.* Poor, 57 Hun 285, 10 N. Y. Suppl. 597, 22 N. Y. Suppl. 570.

South Carolina.— See Willis *v.* Hammond, 41 S. C. 153, 19 S. E. 310.

Vermont.— Dana *v.* Hancock, 30 Vt. 616.

Virginia.— Heth *v.* Wooldridge, 6 Rand. 605, 18 Am. Dec. 751; Walker *v.* Aicklin, 2 Munf. 357.

Wisconsin.— Hanson *v.* Gunderson, 95 Wis. 613, 70 N. W. 827.

United States.— Snow *v.* Nelson, 113 Fed. 353; Lawyer *v.* Post, 109 Fed. 512, 47 C. C. A. 491; Reid *v.* Diamond Plate-Glass Co., 85 Fed. 193, 29 C. C. A. 110; Smiley *v.* Barker, 83 Fed. 684, 28 C. C. A. 9; Swain *v.* Seamens, 9 Wall. 254, 19 L. ed. 554; Jones *v.* U. S., 11 Ct. Cl. 733.

England.— See Stead *v.* Dawbar, 10 A. & E. 57, 9 L. J. Q. B. 101, 2 P. & D. 447, 37 E. C. L. 54; Harvey *v.* Grabham, 5 A. & E. 61, 2 H. & W. 146, 5 L. J. K. B. 235, 6 N. & M. 154, 31 E. C. L. 524; Goss *v.* Nugent, 5 B. & Ad. 58, 2 L. J. K. B. 127, 2 N. & M. 28, 27 E. C. L. 34; Marshall *v.* Lynn, 9 L. J. Exch. 126, 6 M. & W. 109; Cuff *v.* Penn, 1 M. & S. 21.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 283.

71. *California.*— Stockton Combined Harvester, etc., Works *v.* Glens Falls Ins. Co., 121 Cal. 182, 53 Pac. 565.

Colorado.— Doherty *v.* Doe, 18 Colo. 456, 33 Pac. 165.

Illinois.— See Kneedler *v.* Anderson, 43 Ill. App. 317, modification by scrivener.

Indiana.— Friermood *v.* Pierce, 17 Ind. 461.

Kentucky.— Stark *v.* Wilson, 3 Bibb 476.

Maryland.— Kribs *v.* Jones, 44 Md. 396.

Massachusetts.— Cummings *v.* Arnold, 3 Metc. 486, 37 Am. Dec. 155.

Minnesota.— Scheerschmidt *v.* Smith, 74 Minn. 224, 77 N. W. 34.

New York.— Blumenthal *v.* Bloomingdale, 100 N. Y. 558, 3 N. E. 292; Beakes *v.* Da Cunha, 12 N. Y. Suppl. 351.

Ohio.— Negley *v.* Jeffers, 28 Ohio St. 90.

Tennessee.— Bryan *v.* Hunt, 4 Sneed 543, 70 Am. Dec. 262.

Texas.— Johnson *v.* Clarkson, (Civ. App. 1894) 30 S. W. 71.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 283.

72. Putnam Foundry, etc., Co. *v.* Canfield, 25 R. I. 548, 56 Atl. 1033; Evans *v.* Hardeman, 15 Tex. 480; Puget Sound Iron Co. *v.* Worthington, 2 Wash. Terr. 472, 7 Pac. 882, 886.

Parol agreement for discharge of contract see Contracts, 9 Cyc. 599.

73. See cases cited *infra*, note 75.

contract and the making of a new one within the statute it is valid,[74] and if it does in itself constitute a contract within the statute it is invalid.[75]

G. Readiness and Willingness to Perform Contract. If a promisor is ready and willing to perform in accordance with his oral agreement he cannot be compelled to give up or to pay for the consideration received on the sole ground that he could not be compelled to perform,[76] and he can maintain an action on

74. *California.*— Ward *v.* Matthews, 73 Cal. 13, 14 Pac. 604.

Maine.— Smith *v.* Loomis, 74 Me. 503.

Massachusetts.— Whittier *v.* Dana, 10 Allen 326; Stearns *v.* Hall, 9 Cush. 31.

Michigan.— Donovan *v.* Richmond, 61 Mich. 467, 28 N. W. 516.

Ohio.— Bever *v.* Butler, Wright 367.

Vermont.— Packer *v.* Steward, 34 Vt. 127.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 284.

Where, however, there is an oral contract which is not to be performed within one year, a subsequent oral assurance by defendant, within a year of the time set for completion, that the contract will be performed is not effective to charge defendant. Booker *v.* Heffner, 95 N. Y. App. Div. 84, 88 N. Y. Suppl. 499.

75. *California.*— Platt *v.* Butcher, 112 Cal. 634, 44 Pac. 1060.

New Hampshire.— Keyes *v.* Dearborn, 12 N. H. 52.

New Jersey.— Neldon *v.* Smith, 36 N. J. L. 148.

New York.— Clark *v.* Fey, 121 N. Y. 470, 24 N. E. 703 [*affirming* 4 N. Y. Suppl. 18]; Blood *v.* Goodrich, 9 Wend. 68, 24 Am. Dec. 121; Hasbrouck *v.* Tappen, 15 Johns. 200.

Ohio.— Clark *v.* Guest, 54 Ohio St. 298, 43 N. E. 862.

Rhode Island.— Hicks *v.* Aylsworth, 13 R. I. 562; Ladd *v.* King, 1 R. I. 224, 51 Am. Dec. 624.

South Carolina.— Doar *v.* Gibbes, Bailey Eq. 371.

Wisconsin.— Atlee *v.* Bartholomew, 69 Wis. 43, 33 N. W. 110, 5 Am. St. Rep. 103.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 284.

76. *Arkansas.*— Venable *v.* Brown, 31 Ark. 564.

Georgia.— McDonald *v.* Beall, 52 Ga. 576.

Illinois.— Swanzey *v.* Moore, 22 Ill. 63, 74 Am. Dec. 134; Crabtree *v.* Welles, 19 Ill. 55; Brockhausen *v.* Bowes, 50 Ill. App. 98; Mitchell *v.* McNab, 1 Ill. App. 297.

Indiana.— Day *v.* Wilson, 83 Ind. 463, 43 Am. Rep. 76; Lingle *v.* Clemens, 17 Ind. 124.

Kentucky.— Bennett *v.* Tiernay, 78 Ky. 580; Hill *v.* Spalding, 1 Duv. 216; Duncan *v.* Baird, 8 Dana 101; Nelson *v.* Forgey, 4 J. J. Marsh. 569.

Maine.— Plummer *v.* Bucknam, 55 Me. 105; Kneeland *v.* Fuller, 51 Me. 518; Richards *v.* Allen, 17 Me. 296.

Massachusetts.— Riley *v.* Williams, 123 Mass. 506; Kenniston *v.* Blakie, 121 Mass. 552; Coughlin *v.* Knowles, 7 Metc. 57, 39 Am. Dec. 759.

Mississippi.— Sims *v.* Hutchins, 8 Sm. & M. 328, 47 Am. Dec. 90.

New York.— Collier *v.* Coates, 17 Barb. 471; Torres *v.* Thompson, 29 Misc. 526, 60 N. Y. Suppl. 790; Butler *v.* Dinan, 19 N. Y. Suppl. 950; Abbott *v.* Draper, 4 Den. 51; Dowdle *v.* Camp, 12 Johns. 451.

North Carolina.— Durham Consol. Land, etc., Co. *v.* Guthrie, 116 N. C. 381, 21 S. E. 952; Syme *v.* Smith, 92 N. C. 338; Green *v.* North Carolina R. Co., 77 N. C. 95; Foust *v.* Shoffner, 62 N. C. 242.

Vermont.— Mack *v.* Bragg, 30 Vt. 571; Cobb *v.* Hall, 29 Vt. 510, 70 Am. Dec. 432; Shaw *v.* Shaw, 6 Vt. 69.

United States.— York *v.* Washburn, 129 Fed. 564, 64 C. C. A. 132.

See 23 Cent. Dig. tit. "Frauds, Statute of," §§ 285, 286.

In Alabama it is held, "First, That a purchaser of land, who has paid in part or in whole the purchase-money under his contract of purchase, cannot repudiate the contract and sue and recover back the money paid when there has been such a part performance on his part as to entitle him to enforce a specific performance of the contract against his vendor, if the contract itself is free from fraud, and there has been no rescission of the agreement, and the vendor is able to perform. Second, A purchaser cannot recover back money paid on a purchase of land, although he may not have signed or subscribed any note or memorandum in writing himself, as required by the Statute of Frauds, and may not have gone into possession of the land, if the vendor has on his part so complied with the Statute of Frauds by his written note of memorandum, as that he may be compelled to perform his contract by a court of equity, or held liable in damages for a breach thereof in any court of jurisdiction, and the contract itself is free from fraud in fact. Third, Where the contract for the sale of land is binding upon the vendor, and may be enforced against him, and the consideration of his obligation was the payment in whole or in part of money by a purchaser, and the vendor's obligation is accepted and held by the vendee in consideration of the money paid by him, the purchaser cannot, after receiving such benefit, at his election avoid the contract, so far as to entitle him to recover back the consideration paid, whether he subscribed any note or memorandum himself or not of the contract of sale, and without regard to the rights of the vendor to recover any unpaid balance of the purchase-money, if the contract was free from actual fraud, and the vendor is able to comply with his undertaking. In such a case the benefit to the promisor and detriment to the promisee is a sufficient consideration to support the contract against the promisor,

notes or checks that he has received in payment.[77] So a purchaser cannot, under an executory contract of sale, after his refusal to go on with the contract, recover the value of improvements;[78] and in general when one refuses to perform a contract he cannot recover the consideration which he has paid or the value of services performed thereunder.[79] If a vendor has once refused to give a deed because of inability to convey title, he cannot afterward tender a deed and maintain an action on the contract.[80]

H. Part Performance[81] — **1. In General — a. General Rule.** At law part performance of a contract within the statute does not in general remove it from the operation of the statute of frauds,[82] except where the statute so pro-

at least so far as it has been executed by him by payment of the money. Fourth, That a purchaser of land may recover back the amount paid (without previous demand) in all cases where the purchaser has not subscribed a note or memorandum in writing within the meaning of the Statute of Frauds, and was not let into possession, so as to bring the contract within the exception provided in the statute, and the vendor has not subscribed a note or memorandum in writing, within the requirements of the Statute of Frauds, and has not estopped himself from asserting the invalidity of the contract. In such cases, there is no binding obligation upon either party — the vendor has parted with nothing, and the vendee has received nothing — and the money in the hands of the vendor *ex aequo et bono* belongs to the purchaser." Nelson *v.* Shelby Mfg., etc., Co., 96 Ala. 515, 526, 11 So. 695, 38 Am. St. Rep. 116, reviewing prior Alabama cases.

If the promisor refuses to go on and relies on the statute, the purchaser can recover the consideration paid. Reynolds *v.* Harris, 9 Cal. 338; Cook *v.* Doggett, 2 Allen (Mass.) 439; Hawley *v.* Moody, 24 Vt. 603.

If by statute the oral contract is void rather than voidable, the consideration may be recovered without default on either side. Tucker *v.* Grover, 60 Wis. 233, 19 N. W. 92. See also Nelson *v.* Shelby Mfg., etc., Co., 96 Ala. 515, 11 So. 695, 38 Am. St. Rep. 116.

Use and occupation. — A purchaser who is in possession, is not in default, and is willing to perform cannot be held for use and occupation unless he has had notice to quit. Dwight *v.* Cutler, 3 Mich. 566, 64 Am. Dec. 105. A vendor who declines to perform because of the purchaser's default cannot recover for use and occupation without returning payments made under the contract before the default. Ayer *v.* Hawkes, 11 N. H. 148.

77. *Alabama.*— Houston *v.* Hilton, 67 Ala. 374; Rhodes *v.* Storr, 7 Ala. 346.

Indiana.— Schierman *v.* Beckett, 88 Ind. 52.

Missouri.— McGowen *v.* West, 7 Mo. 569, 38 Am. Dec. 468.

New York.— Fleischman *v.* Plock, 19 Misc. 649, 44 N. Y. Suppl. 413.

North Carolina.— Taylor *v.* Russell, 119 N. C. 30, 25 S. E. 710.

See 23 Cent. Dig. tit " Frauds, Statute of," § 285.

78. *Kentucky.*— Young *v.* Pate, 3 J. J. Marsh. 100.

Missouri.— Luckett *v.* Williamson, 37 Mo. 388.

New Hampshire.— Miller *v.* Tobie, 41 N. H. 84.

North Carolina.—McCracken *v.* McCracken, 88 N. C. 272; Long *v.* Finger, 74 N. C. 502.

Tennessee.— Rainer *v.* Huddleston, 4 Heisk. 223. *Contra,* Masson *v.* Swan, 6 Heisk. 450.

See 23 Cent. Dig. tit " Frauds, Statute of," §§ 285, 286.

79. *Connecticut.*— Clark *v.* Terry, 25 Conn. 395.

Illinois.— Taylor *v.* Greenburg, 46 Ill. App. 511.

Minnesota.— Kriger *v.* Leppel, 42 Minn. 6, 43 N. W. 484.

New York.— Bailey *v.* Gardner, 6 Abb. N. Cas. 147, holding that a parol contract for the conveyance of lands is void but not illegal, and does not give the contractee, agreeing to accept land for his services, a right to disaffirm the contract and recover for his services in money, until the contractor has refused to convey. It has been held, however, that the value of services rendered may be recovered by one who refuses to carry out a contract not to be entirely performed within one year. Hartwell *v.* Young, 67 Hun 472, 22 N. Y. Suppl. 486.

North Carolina.— Durham Consol. Land, etc., Co. *v.* Guthrie, 116 N. C. 381, 21 S. E. 952; Clancy *v.* Craine, 17 N. C. 363.

Vermont.— Philbrook *v.* Belknap, 6 Vt. 383.

See 23 Cent. Dig. tit " Frauds, Statute of," § 286.

80. Eveleth *v.* Scribner, 12 Me. 24, 28 Am. Dec. 147; Porter *v.* Citizens' Bank, 73 Mo. App. 513, so holding even where the purchaser took temporary possession.

81. Delivery and acceptance of goods as taking sale out of statute see *supra,* VIII, B.

Part payment as taking sale of goods out of statute see *supra,* VIII, C.

Part performance as ground for specific performance see SPECIFIC PERFORMANCE.

82. *Arkansas.*— Henry *v.* Wells, 48 Ark. 485, 3 S. W. 637.

Connecticut.— Eaton *v.* Whitaker, 18 Conn. 222, 44 Am. Dec. 586; North *v.* Forest, 15 Conn. 400.

District of Columbia.— Hutchins *v.* Munn, 22 App. Cas. 88.

Georgia.— Brunswick Grocery Co. *v.* Lamar, 116 Ga. 1, 42 S. E. 366; McGaughey *v.* Latham, 63 Ga. 67.

Illinois.— Wheeler *v.* Frankenthal, 78 Ill.

vides.[83] This does not mean that there is no redress at law for the party who has performed, but that he is left to his remedy on such promises as the law will imply from his performance.[84] In equity part performance may under certain conditions take the case out of the statute.[85]

b. Agreements Not to Be Performed Within One Year. The rule concerning the part performance of contracts not to be performed within one year is in general that part performance will not take such an agreement out of the statute.[86]

124; Sigmund *v.* Newspaper Co., 82 Ill. App. 178; Butler *v.* Shehan, 61 Ill. App. 561.

Kentucky.— Doty *v.* Doty, 80 S. W. 803, 26 Ky. L. Rep. 63; Mitchell *v.* Ray, 3 Ky. L. Rep. 754. But see Schwerman *v.* Gunkel, 1 Ky. L. Rep. 406.

Maryland.— Hamilton *v.* Thirston, 93 Md. 213, 48 Atl. 709.

Massachusetts.— Kidder *v.* Hunt, 1 Pick. 328, 11 Am. Dec. 183. In Davenport *v.* Mason, 15 Mass. 85, an action at law on such a contract was allowed on the ground that the court in Massachusetts then had no jurisdiction in equity and must give some relief in such cases.

Michigan.— Schultz *v.* Huffman, 127 Mich. 276, 86 N. W. 823; Hallett *v.* Gordon, 122 Mich. 567, 81 N. W. 556, 82 N. W. 827.

Minnesota.— Crain *v.* Thompson, 87 Minn. 172, 91 N. W. 483; Veazie *v.* Morse, 67 Minn. 100, 69 N. W. 637.

Missouri.— Cockrell *v.* McIntyre, 161 Mo. 59, 61 S. W. 648; Mine La Motte Lead, etc., Co. *v.* White, 106 Mo. App. 222, 80 S. W. 356.

Nebraska.— Riddell *v.* Riddell, (1903) 97 N. W. 609.

New Hampshire.— Lane *v.* Shackford, 5 N. H. 130.

New York.— Spota *v.* Hayes, 36 Misc. 532, 73 N. Y. Suppl. 959; Bruen *v.* Astor, Anth. N. P. 185. But see Graves *v.* Hunt, 8 N. Y. St. 308.

Ohio.— Kling *v.* Bordner, 65 Ohio St. 86, 61 N. E. 148.

Pennsylvania.— Burgess *v.* Burgess, 109 Pa. St. 312, 1 Atl. 167.

Texas.— Jones *v.* National Cotton Oil Co., 31 Tex. Civ. App. 420, 72 S. W. 248.

Vermont.— Congdon *v.* Darcy, 46 Vt. 478. See, however, Fay *v.* Wheeler, 44 Vt. 292.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 287.

Payment by administrator.— The claim was made in Milwee *v.* Jay, 47 S. C. 430, 25 S. E. 298, that a section of the statute of limitations providing that "payment of any part of principal or interest is equivalent to a promise in writing" applied to payments by an administrator so as to bind him individually by reason of a part payment of a claim against his decedent's estate, but the claim found no favor with the court.

83. Sivell *v.* Hogan, 119 Ga. 167, 46 S. E. 67; English *v.* S. P. Richards Co., 109 Ga. 635, 34 S. E. 1002; Burnett *v.* Blackmar, 43 Ga. 569; Bryan *v.* Southwestern R. Co., 37 Ga. 26; Boutwell *v.* O'Keefe, 32 Barb. (N. Y.) 434.

Mere non-action.— If part performance does take a contract out of the statute, mere non-action will not have that effect. Augusta Southern R. Co. *v.* Smith, etc., Co., 106 Ga. 864, 33 S. E. 28.

84. Watrous *v.* Chalker, 7 Conn. 224; Chittington *v.* Fowler, 2 Root (Conn.) 387; Pinney *v.* Pinney, 2 Root (Conn.) 191; Cone *v.* Tracy, 1 Root (Conn.) 479; Rogers *v.* Tracy, 1 Root (Conn.) 233; Noyes *v.* Moor, 1 Root (Conn.) 142; Wiley *v.* Bradley, 60 Ind. 62; Nones *v.* Homer, 2 Hilt. (N. Y.) 116. See *infra*, X, H, 4.

85. *Kentucky.*— Bryant *v.* Everley, 57 S. W. 231, 22 Ky. L. Rep. 345.

Louisiana.— See Harris *v.* Keigler, 25 La. Ann. 471.

Missouri.— Sheridan *v.* Nation, 159 Mo. 27, 59 S. W. 972; Bersch *v.* Dittrick, 19 Mo. 129.

New Jersey.— Pflugar *v.* Pultz, 43 N. J. Eq. 440, 11 Atl. 123.

Texas.— Davis *v.* Portwood, 20 Tex. Civ. App. 548, 50 S. W. 615.

Wisconsin.— Marsh *v.* Bellew, 45 Wis. 36.

United States.— Denver, etc., R. Co. *v.* Ristine, 77 Fed. 58, 23 C. C. A. 13.

See also SPECIFIC PERFORMANCE.

86. *Alabama.*— Treadway *v.* Smith, 56 Ala. 345.

Connecticut.— Comes *v.* Lamson, 16 Conn. 246; Hall *v.* Rowley, 2 Root 161.

Indiana.— Wolke *v.* Fleming, 103 Ind. 105, 2 N. E. 325, 53 Am. Rep. 495; Houghton *v.* Houghton, 14 Ind. 505, 77 Am. Dec. 69; Clark County *v.* Howell, 21 Ind. App. 495, 52 N. E. 769.

Iowa.— Powell *v.* Crampton, 102 Iowa 364, 71 N. W. 579.

Kansas.— Osborne *v.* Kimball, 41 Kan. 187, 21 Pac. 163; Thisler *v.* Mackey, 5 Kan. App. 217, 47 Pac. 175.

Kentucky.— Williams *v.* Calloway, 12 Ky. L. Rep. 716; Dant *v.* Head, 10 Ky. L. Rep. 638. So an agreement to issue a policy of fire insurance on a day certain every year is a contract not to be performed within one year, and the fact that there has been performance for several years does not render actionable a failure to perform for a later year. Klein *v.* Liverpool, etc., Ins. Co., 57 S. W. 250, 22 Ky. L. Rep. 250.

Missouri.— Sharp *v.* Rhiel, 55 Mo. 97; Atwood *v.* Fox, 30 Mo. 499; Biest *v.* Versteeg Shoe Co., 97 Mo. App. 137, 70 S. W. 1081; Marks *v.* Davis, 72 Mo. App. 557; Johnson *v.* Reading, 36 Mo. App. 306.

New Hampshire.— Emery *v.* Smith, 46 N. H. 151.

New York.— Oddy *v.* James, 48 N. Y. 685; Hartwell *v.* Young, 67 Hun 472, 22 N. Y.

There is, however, a considerable diversity of judicial opinion upon the question whether the statute applies if a contract has been fully performed by one of the parties within the year, so that nothing remains to be done but the payment of money or the fulfilment of a counter stipulation by the other party as a consideration for that part of the contract which has been performed. In England it seems to be settled that the statute does not apply, and that an action will lie for the recovery of damages for the breach of such executory stipulation.[87] The doctrine of the English cases has been followed in many American states,[88] and rejected in

Suppl. 486; Weir *v.* Hill, 2 Lans. 278; Baker *v.* Codding, 18 N. Y. Suppl. 159 [*affirmed* in 21 N. Y. Suppl. 1131]; Broadwell *v.* Getman, 2 Den. 87.

Ohio.— Towsley *v.* Moore, 30 Ohio St. 184, 27 Am. Rep. 434; Smith *v.* Bowler, 1 Disn. 520, 12 Ohio Dec. (Reprint) 770 [*affirmed* in 2 Disn. 153].

South Carolina.— Hillhouse *v.* Jennings, 60 S. C. 373, 38 S. E. 599; Izard *v.* Middleton, 1 Desauss. 116.

Vermont.— Sheldon *v.* Preva, 57 Vt. 263; Hinckley *v.* Southgate, 11 Vt. 428; Squire *v.* Whipple, 1 Vt. 69. See, however, Sherman *v.* Champlain Transp. Co., 31 Vt. 162.

Wisconsin.— Conway *v.* Mitchell, 97 Wis. 290, 72 N. W. 752.

United States.— Warner *v.* Texas, etc., Ry. Co., 54 Fed. 922, 4 C. C. A. 673.

England.— Boydell *v.* Drummond, 2 Campb. 157, 11 East 141, 10 Rev. Rep. 450.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 288.

87. Miles *v.* New Zealand Alford Estate Co., 32 Ch. D. 266, 55 L. J. Ch. 801, 54 L. T. Rep. N. S. 582, 34 Wkly. Rep. 669; Donellan *v.* Read, 3 B. & Ad. 899, 23 E. C. L. 391; Bracegirdle *v.* Heald, 1 B. & Ald. 722, 19 Rev. Rep. 442; Souch *v.* Strawbridge, 2 C. B. 808, 10 Jur. 357, 15 L. J. C. P. 170, 52 E. C. L. 808. In Donellan *v.* Read, *supra*, the facts were that, improvements upon demised premises having been made at the request of the tenant upon his agreement to pay an increased rent during the remainder of his term, which was more than one year, he enjoyed the benefit thereof but declined to pay for them. The court held that the contract was not within the statute, and Littledale, J., in delivering the opinion, said: "As to the contract not being to be performed within a year, we think that as the contract was entirely executed on one side within a year, and as it was the intention of the parties, founded on a reasonable expectation, that it should be so, the statute of frauds does not extend to such a case. In case of a parol sale of goods, it often happens that they are not to be paid for in full till after the expiration of a longer period of time than a year; and surely the law would not sanction a defence on that ground, when the buyer had had the full benefit of the goods on his part." In the earlier case of Bracegirdle *v.* Heald, *supra*, which was an action on a verbal contract of hiring for a year commencing at a future day, there was an intimation to the same effect by Abbott, J., who said that the case was distinguishable from the case put in argument of an agreement for goods to be delivered by one party in six months and to be paid for in eighteen months on the ground that in the latter case all that is to be performed on one side, viz., the delivery of the goods, is to be done within a year. In a later case, viz., Souch *v.* Strawbridge, *supra*, in which an oral agreement for the care of defendant's child so long as he should think proper was held not to be within the statute because it was dependent on a contingency which might happen within the year, viz., the determination of defendant's will, Tindal, C. J., remarked that the provision of the statute in question had no application to an action founded upon an executed consideration; but Coltman, J., remarked that if it had been necessary to decide the case upon that point he should have felt some difficulty in saying that plaintiff may rely on an executed consideration where he is obliged to resort to the executory contract in order to make out his case. In Smith *v.* Neale, 2 C. B. N. S. 67, 3 Jur. N. S. 516, 26 L. J. C. P. 143, 5 Wkly. Rep. 563, 89 E. C. L. 67, and Cherry *v.* Heming, 4 Exch. 631, 19 L. J. Exch. 64, the decision in Donellan *v.* Read, *supra*, was distinctly approved; but while that decision is still regarded as authoritative in England, it has been severely criticized by both English and American authorities. See notes to Peter *v.* Compton, 1 Smith Lead. Cas. (8th Am. ed.) 614. As is pointed out there and elsewhere, defendant, after allowing the improvements to be made, could not justly refuse to pay the increased rent which he had agreed to pay, and the landlord was consequently entitled to recover the amount under the count for use and occupation which was appended to the declaration; and as his right in this regard was irrespective of the validity of the contract the case can hardly be considered as an authority on the latter point.

88. *Alabama.*— Rake *v.* Pope, 7 Ala. 161.

Georgia.— Johnson *v.* Watson, 1 Ga. 348.

Illinois.— MacDonald *v.* Crosby, 192 Ill. 283, 61 N. E. 505; Curtis *v.* Sage, 35 Ill. 22; Hodgens *v.* Shultz, 92 Ill. App. 84.

Indiana.— Lowman *v.* Sheets, 124 Ind. 416, 24 N. E. 351, 7 L. R. A. 784; Piper *v.* Fosher, 121 Ind. 407, 23 N. E. 269; Wolke *v.* Fleming, 103 Ind. 105, 2 N. E. 325, 53 Am. Rep. 495; Haugh *v.* Blythe, 20 Ind. 24.

Iowa.— Smalley *v.* Greene, 52 Iowa 241, 3 N. W. 78, 35 Am. Rep. 267.

Kansas.— Atchison, etc., R. Co. *v.* English, 38 Kan. 110, 16 Pac. 82; Mackey *v.* Thisler, 7 Kan. App. 276, 53 Pac. 767. See Aiken *v.* Nogle, 47 Kan. 96, 27 Pac. 825.

others.[89] If, however, an action is brought by one whose oral agreement was not to be performed within a year against one who was to perform his part of the contract within that period, it has been held that the statute does not apply.[90] And the statute does not declare such a contract to be void, but merely that no action shall be maintained to enforce it. Therefore if the contract be executed by one party whereby a benefit inures to the benefit of the other party, the law implies a contract on the part of the latter to pay for the consideration received, upon which implied assumpsit an action may be maintained.[91]

c. Agreements Relating to Real Property — (i) *GENERAL RULE.* Speaking generally an oral contract relating to land is not at law removed from the operation of the statute by part performance;[92] but it is no objection to an action on a

Kentucky.— Graves County Water Co. *v.* Ligon, 112 Ky. 775, 66 S. W. 725, 23 Ky. L. Rep. 2149; Dant *v.* Head, 90 Ky. 255, 13 S. W. 1073, 12 Ky. L. Rep. 153, 29 Am. St. Rep. 369; Whitley *v.* Whitley, 80 S. W. 825, 26 Ky. L. Rep. 134; Jones *v.* Comer, 76 S. W. 392, 25 Ky. L. Rep. 773, 77 S. W. 184, 25 Ky. L. Rep. 1104; Botkin *v.* Middlesborough Town, etc., Co., 66 S. W. 747, 23 Ky. L. Rep. 1964.

Maine.— Holbrook *v.* Armstrong, 10 Me. 31.

Maryland.— Horner *v.* Frazier, 65 Md. 1, 4 Atl. 133; Ellicott *v.* Turner, 4 Md. 476; Harwood *v.* Jones, 10 Gill & J. 404, 32 Am. Dec. 180.

Minnesota.— Langan *v.* Iverson, 78 Minn. 299, 80 N. W. 1051.

Missouri.— Swon *v.* Stevens, 143 Mo. 384, 45 S. W. 270; Bless *v.* Jenkins, 129 Mo. 647, 31 S. W. 938; Winters *v.* Cherry, 78 Mo. 344; McConnell *v.* Brayner, 63 Mo. 461; Self *v.* Cordell, 45 Mo. 345; Suggett *v.* Cason, 26 Mo. 221; Blanton *v.* Knox, 3 Mo. 342; Chenoweth *v.* Pacific Express Co., 93 Mo. App. 185; Marks *v.* Davis, 72 Mo. App. 557; Smock *v.* Smock, 37 Mo. App. 56.

Nebraska.— Kendall *v.* Garneau, 55 Nebr. 403, 75 N. W. 852, adopting the English rule but not without an expression of disapproval.

New Hampshire.— Perkins *v.* Clay, 54 N. H. 518; Little *v.* Little, 36 N. H. 224; Blanding *v.* Sargent, 33 N. H. 239, 66 Am. Dec. 720. However, in Emery *v.* Smith, 46 N. H. 151, the English view is rejected, and it is held that performance on one side does not take the case out of the statute, but that where one party has received a benefit for performance by the other party, the latter must resort to a *quantum meruit* or other appropriate remedy. See also Cocheco Aqueduct Assoc. *v.* Boston, etc., R. Co., 59 N. H. 312.

New Jersey.—Berry *v.* Doremus, 30 N. J. L. 399; Robbins *v.* McKnight, 5 N. J. Eq. 642, 45 Am. Dec. 406.

Ohio.— Reinheimer *v.* Carter, 31 Ohio St. 579; Abbott *v.* Inskip, 29 Ohio St. 59; Randall *v.* Turner, 17 Ohio St. 262; Kurz *v.* U. S. Fidelity, etc., Co., 9 Ohio S. & C. Pl. Dec. 741, 7 Ohio N. P. 118. But see Towsley *v.* Moore, 30 Ohio St. 184, 27 Am. Rep. 431.

Rhode Island.— Warwick, etc., Water Co. *v.* Allen, (1896) 35 Atl. 579; Durfee *v.* O'Brien, 16 R. I. 213, 14 Atl. 857.

South Carolina.— Walker *v.* Wilmington, etc., R. Co., 26 S. C. 80, 1 S. E. 366; Compton *v.* Martin, 5 Rich. 14; Bates *v.* Moore, 2 Bailey 614; Gee *v.* Hicks, Rich. Eq. Cas. 5.

Texas.— Zabel *v.* Schroeder, 35 Tex. 308; Westfall *v.* Perry, (Civ. App. 1893) 23 S. W. 740; McDonnell *v.* Home Bitters Co., 1 Tex. App. Civ. Cas. § 1159.

Virginia.— Reed *v.* Gold, 102 Va. 37, 45 S. E. 868; Thomas *v.* Armstrong, 86 Va. 323, 10 S. E. 6, 5 L. R. A. 529; Seddon *v.* Rosenbaum, 85 Va. 928, 9 S. E. 326, 3 L. R. A. 337.

Washington.— *In re* Field, 33 Wash. 63, 73 Pac. 768.

Wisconsin.— Grace *v.* Lynch, 80 Wis. 166, 49 N. W. 751; Washburn *v.* Dosch, 68 Wis. 436, 32 N. W. 551, 60 Am. Rep. 873; McClellan *v.* Sanford, 26 Wis. 595.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 288. And see *infra*, X, H, 3, b.

89. Kelley *v.* Thompson, 175 Mass. 427, 56 N. E. 713; Marcy *v.* Marcy, 9 Allen (Mass.) 8; Bristol *v.* Sutton, 115 Mich. 365, 73 N. W. 424; Whipple *v.* Parker, 29 Mich. 369; Dodge *v.* Crandall, 30 N. Y. 294; Weir *v.* Hill, 2 Lans. (N. Y.) 278; Bartlett *v.* Wheeler, 44 Barb. (N. Y.) 162; Broadwell *v.* Getman, 2 Den. (N. Y.) 87; Parks *v.* Francis, 50 Vt. 626, 28 Am. Rep. 517; Pierce *v.* Paine, 28 Vt. 34.

In Mississippi the doctrine of the English cases, while not directly repudiated, is regarded with disfavor. Duff *v.* Snider, 54 Miss. 245.

90. Sheehy *v.* Adarene, 41 Vt. 541, 98 Am. Dec. 623.

91. *Indiana.*— Wilson *v.* Ray, 13 Ind. 1.

Kentucky.— Montague *v.* Garnett, 3 Bush 297; Gully *v.* Grubbs, 1 J. J. Marsh. 387; Roberts *v.* Tennell, 3 T. B. Mon. 247.

Michigan.— Cadman *v.* Markle, 76 Mich. 448, 43 N. W. 315, 5 L. R. A. 707; Whipple *v.* Parker, 29 Mich. 369.

Mississippi.— Duff *v.* Snider, 54 Miss. 245.

New Hampshire.—Emery *v.* Smith, 46 N. H. 151.

New York.— Barkley *v.* Renselaer, etc., R. Co., 71 N. Y. 205; Bartlett *v.* Wheeler, 44 Barb. 162.

Rhode Island.— Durfee *v.* O'Brien, 16 R. I. 213, 14 Atl. 857.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 288.

92. *Arkansas.*— Shirey *v.* Cumberhouse, 41 Ark. 97.

Illinois.— Creighton *v.* Sanders, 89 Ill. 543.

Iowa.— Burden *v.* Knight, 82 Iowa 584, 48

promise not within the statute that the contract of which it is a part contains promises relating to land which have been fulfilled,[93] and rights acquired under such part performance cannot be interfered with.[94]

(II) *AGREEMENTS PROVIDING FOR CONVEYANCES BY BOTH PARTIES.* If an oral contract provides for conveyances by both parties, a conveyance by one does not give him a right of action at law for the failure of the other party to convey;[95] but he may recover the value of the land he has conveyed.[96]

2. CONTRACTS PERFORMED AS TO PART WITHIN STATUTE — a. In General. If an agreement which was unenforceable because within the statute has been performed, an action will ordinarily lie for the refusal to perform a promise given in consideration thereof or in connection therewith.[97]

b. Agreements Relating to Real Property — (I) *GENERAL RULE.* Where an oral promise relating to the transfer of real property has been performed, the contract of which it is a part is no longer within the statute of frauds by reason of such promise and accordingly an action will lie for a breach thereof.[98] This is

N. W. 985; Thorp *v.* Bradley, 75 Iowa 50, 39 N. W. 177; Hunt *v.* Coe, 15 Iowa 197.

Kentucky.— Hayden *v.* McIlvain, 4 Bibb 57; Grant *v.* Craigmiles, 1 Bibb 203; Stephens *v.* Reavis, 3 Ky. L. Rep. 475.

Maine.— Norton *v.* Preston, 15 Me. 14, 32 Am. Dec. 128; Patterson *v.* Cunningham, 12 Me. 506.

Massachusetts.—Bacon *v.* Parker, 137 Mass. 309; Fickett *v.* Durham, 109 Mass. 419; Adams *v.* Townsend, 1 Metc. 483; Kidder *v.* Hunt, 1 Pick. 328, 11 Am. Dec. 183.

Mississippi.—Fisher *v.* Kuhn, 54 Miss. 480; Box *v.* Stanford, 13 Sm. & M. 93, 51 Am. Dec. 142.

New York.— Baldwin *v.* Palmer, 10 N. Y. 232, 61 Am. Dec. 743.

Ohio.— Lenington *v.* Campbell, Tapp. 137.

Tennessee.— Patton *v.* McClure, Mart. & Y. 333.

Texas.— Morris *v.* Gaines, 82 Tex. 255, 17 S. W. 538.

Virginia.— Brown *v.* Pollard, 89 Va. 696, 17 S. E. 6.

United States.— Reeves *v.* Pye, 20 Fed. Cas. No. 11,662, 1 Cranch C. C. 219.

See 23 Cent. Dig. tit. "Frauds, Statute of," §§ 289, 290.

See, however, Watrous *v.* Chalker, 7 Conn. 224; Connor *v.* Hingtgen, 19 Nebr. 472, 27 N. W. 443; Miller *v.* Hower, 2 Rawle (Pa.) 53; Adams *v.* Smilie, 50 Vt. 1.

93. *Connecticut.*— Downey *v.* Hotchkiss, 2 Day 225; Clark *v.* Brown, 1 Root 77.

Illinois.— Eaton *v.* Graham, 104 Ill. App. 296.

Iowa.— Evans *v.* McKanna, 89 Iowa 362, 56 N. W. 527.

Massachusetts.— Brown *v.* Bellows, 4 Pick. 179.

Missouri.—Parker *v.* Niggeman, 6 Mo. App. 546.

See 23 Cent. Dig. tit. "Frauds, Statute of," §§ 289, 290.

94. Farnsworth *v.* Western Union Tel. Co., 3 Silv. Sup. (N. Y.) 30, 6 N. Y. Suppl. 735.

95. Parker *v.* Heaton, 55 Ind. 1; Sands *v.* Thompson, 43 Ind. 18; Hibbard *v.* Whitney, 13 Vt. 21. In some states, however, such contract is actionable if admitted. Brown *v.* Frantum, 6 La. 39. And see Johnston *v.* Gill, 27 Gratt. (Va.) 587; Union Pac. R. Co. *v.* McAlpine, 129 U. S. 305, 9 S. Ct. 286, 32 L. ed. 673 [*affirming* 23 Fed. 168].

96. Baker *v.* Scott, 2 Thomps. & C. (N. Y.) 606.

97. *Alabama.*— Dargin *v.* Hewlitt, 115 Ala. 510, 22 So. 128.

Connecticut.— Ives *v.* Gilbert, 1 Root 89, 1 Am. Dec. 35.

Illinois.— Weil *v.* Defenbaugh, 65 Ill. App. 489.

Indiana.— Straughan *v.* Indianapolis, etc., R. Co., 38 Ind. 185.

Kansas.— Aiken *v.* Nogle, 47 Kan. 96, 27 Pac. 825.

Kentucky.— Rowland *v.* Bull, 5 B. Mon. 146; McCrum *v.* Preston, 5 J. J. Marsh. 332; Taylor *v.* Claysville, etc., Turnpike Co., 34 S. W. 226, 17 Ky. L. Rep. 1264.

Maryland.— Lamar *v.* McNamee, 10 Gill & J. 116, 32 Am. Dec. 152.

Massachusetts.— Hurley *v.* Donovan, 182 Mass. 64, 64 N. E. 685.

Missouri.— Blanton *v.* Knox, 3 Mo. 342.

New York.— Remington *v.* Palmer, 62 N. Y. 31; Allen *v.* Aguirre, 7 N. Y. 543 [*affirming* 10 Barb. 74]; Hanes *v.* Sackett, 56 N. Y. App. Div. 610, 67 N. Y. Suppl. 843.

South Carolina.— Compton *v.* Martin, 5 Rich. 14; Gee *v.* Hicks, Rich. Eq. Cas. 5.

United States.— Weightman *v.* Caldwell, 4 Wheat. 85, 4 L. ed. 520; Wheeling Bridge, etc., Co. *v.* Reymann Brewing Co., 90 Fed. 189, 32 C. C. A. 571.

England.— Angell *v.* Duke, L. R. 10 Q. B. 174, 44 L. J. Q. B. 78, 32 L. T. Rep. N. S. 25, 23 Wkly. Rep. 307; Morgan *v.* Griffith, L. R. 6 Exch. 70, 40 L. J. Exch. 46, 23 L. T. Rep. N. S. 783, 19 Wkly. Rep. 957; Cocking *v.* Ward, 1 C. B. 858, 15 L. J. C. P. 245, 50 E. C. L. 858; Green *v.* Saddington, 7 E. & B. 503, 3 Jur. N. S. 717, 5 Wkly. Rep. 593, 90 E. C. L. 503; Price *v.* Leyburn, Gow 109, 5 E. C. L. 885.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 293.

Delivery and acceptance of goods as taking sale out of statute see *supra*, VIII, B.

98. *Georgia.*—Watson *v.* Brightwell, 60 Ga. 212.

equally true of agreements to lease[99] and agreements to sell[1] real property or some interest therein.

(II) *EXECUTION AND DELIVERY OF DEED.* The statute is no bar to an action for the price of land actually conveyed where the deed has been accepted or title has otherwise passed, although the grantor could not have been compelled to convey, or the grantee to accept a deed, because the contract was oral,[2] and

Illinois.— Eaton *v.* Graham, 104 Ill. App. 296.

Indiana.— Humphrey *v.* Fair, 79 Ind. 410; Tinkler *v.* Swaynie, 71 Ind. 562.

Maryland.— Pool *v.* Horner, 64 Md. 131, 20 Atl. 1036; Frieze *v.* Glenn, 2 Md. Ch. 361.

Massachusetts.— Eastham *v.* Anderson, 119 Mass. 526; Trowbridge *v.* Wetherbee, 11 Allen 361; Page *v.* Monks, 5 Gray 492.

Michigan.— Waterman Real-Estate Exch. *v.* Stephens, 71 Mich. 104, 38 N. W. 685.

Missouri.— Woodson *v.* Hubbard, 45 Mo. App. 359.

Nebraska.—Harris *v.* Roberts, 12 Nebr. 631, 12 N. W. 89, 41 Am. Rep. 779.

New York.— Schenectady County *v.* McQueen, 15 Hun 551; Bennett *v.* Abrams, 41 Barb. 619. But see Baldwin *v.* Palmer, 10 N. Y. 232, 61 Am. Dec. 743.

Wisconsin.— Smith *v.* Putnam, 107 Wis. 155, 82 N. W. 1077, 83 N. W. 288.

England.— Seagoe *v.* Dean, 4 Bing. 459, 13 E. C. L. 588, 3 C. & P. 170, 14 E. C. L. 508, 6 L. J. C. P. O. S. 66, 1 M. & P. 227, 29 Rev. Rep. 599; Souch *v.* Strawbridge, 2 C. B. 808, 52 E. C. L. 808.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 294.

99. Nelson *v.* Webb, 54 Ala. 436; King *v.* Woodruff, 23 Conn. 56, 60 Am. Dec. 125; Gibson *v.* Wilcoxen, 16 Ind. 333; Hoyle *v.* Bush, 14 Mo. App. 408.

1. Smart *v.* Smart, 24 Hun (N. Y.) 127; Abell *v.* Douglass, 4 Den. (N. Y.) 305; Hill *v.* Smith, 12 Rich. (S. C.) 698; Busby *v.* Bush, 79 Tex. 656, 15 S. W. 638.

2. *Alabama.*—Merrell *v.* Witherby, 120 Ala. 418, 23 So. 994, 26 So. 974, 74 Am. St. Rep. 39.

Georgia.— Stringer *v.* Stringer, 93 Ga. 320, 20 S. E. 242.

Illinois.— Worden *v.* Sharp, 56 Ill. 104; Schlueter *v.* Leady, 103 Ill. App. 425.

Indiana.— Worley *v.* Sipe, 111 Ind. 238, 12 N. E. 385; Stephenson *v.* Arnold, 89 Ind. 426; Ayers *v.* Slifer, 89 Ind. 433; Arnold *v.* Stephenson, 79 Ind. 126; Huston *v.* Stewart, 64 Ind. 388; Curran *v.* Curran, 40 Ind. 473; McCoy *v.* McCoy, 32 Ind. App. 38, 69 N. E. 193, 102 Am. St. Rep. 223. It has been held, however, that the proper action is not on the purchaser's promise but on an implied promise arising from the conveyance. Fisher *v.* Wilson, 18 Ind. 133.

Kansas.— Greenlees *v.* Roche, 48 Kan. 503, 29 Pac. 590; Atchison, etc., R. Co. *v.* English, 38 Kan. 110, 16 Pac. 82.

Kentucky.— Hunter *v.* Simrall, 5 Litt. 62; Gaines *v.* Fitch, 14 Ky. L. Rep. 620.

Maine.— Jewett *v.* Ricker, 68 Me. 377; Linscott *v.* McIntire, 15 Me. 201, 33 Am. Dec. 602.

Maryland.— Morgan *v.* Bitzenberger, 3 Gill 350.

Massachusetts.— Root *v.* Burt, 118 Mass. 521; Nutting *v.* Dickinson, 8 Allen 540; Wilkinson *v.* Scott, 17 Mass. 249; Sherburne *v.* Fuller, 5 Mass. 133; Dillingham *v.* Runnells, 4 Mass. 400.

Michigan.— Gardner *v.* Gardner, 106 Mich. 18, 63 N. W. 988; Huff *v.* Hall, 56 Mich. 456, 23 N. W. 88. It has been held, however, that an oral agreement to pay for land to be conveyed to a third person is not actionable, even where the land has been conveyed. Liddle *v.* Needham, 39 Mich. 147, 33 Am. Rep. 359.

Nebraska.— Griffith *v.* Thompson, 50 Nebr. 424, 69 N. W. 946; Skow *v.* Locks, 3 Nebr. (Unoff.) 176, 91 N. W. 204.

New York.— Johnson *v.* Hathorn, 2 Abb. Dec. 465, 2 Keyes 476, 3 Keyes 126; Tuthill *v.* Roberts, 22 Hun 104.

North Carolina.— Smith *v.* Arthur, 110 N. C. 400, 15 S. E. 197; Farmer *v.* Willard, 71 N. C. 284.

Ohio.— Thayer *v.* Luce, 22 Ohio St. 62.

Rhode Island.—Providence Christian Union *v.* Eliott, 13 R. I. 74.

South Carolina.— Suber *v.* Richards, 61 S. C. 393, 39 S. E. 540.

Tennessee.— Hamilton *v.* Gilbert, 2 Heisk. 680.

Texas.— Showalter *v.* McDonnell, 83 Tex. 158, 18 S. W. 491; Zabel *v.* Schroeder, 35 Tex. 308.

Wisconsin.— Niland *v.* Murphy, 73 Wis. 326, 41 N. W. 335.

England.—Lavery *v.* Turley, 6 H. & N. 239, 30 L. J. Exch. 49.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 295.

A conveyance must be executed and accepted before the action is brought. Butler *v.* Lee, 11 Ala. 885, 46 Am. Dec. 230; Shultz *v.* Pinson, 63 Kan. 38, 64 Pac. 963; Wilson *v.* Clarke, 1 Watts & S. (Pa.) 554; Enterprise Land Co. *v.* Betz, 3 Pa. Dist. 327, 34 Wkly. Notes Cas. 284. But see Washington Glass Co. *v.* Mosbaugh, 19 Ind. App. 105, 49 N. E. 178.

Abatement of price.— If, upon a conveyance, possession has been taken, it cannot be objected to a suit to abate the price that the contract was not in writing. Wilkins *v.* Totty, (Tenn. Ch. App. 1901) 64 S. W. 338.

Outstanding title.— If a prospective purchaser of real estate buys in the outstanding title of a third person, he cannot, if the original contract was oral, be required to pay anything to the proposed vendor. Redmond *v.* Bowles, 5 Sneed (Tenn.) 547, 73 Am. Dec. 153.

the same is true of an oral agreement to assign the interest of a purchaser under an executory contract of sale; when the title has passed to the assignee he must pay the assignor the price agreed on.[3] The rule holds good when the consideration for the conveyance is not money but a promise of the grantee; an action will lie for the breach of such promise if it is not itself within the statute.[4] A conditional delivery of a deed is not a sufficient delivery to take a case out of the statute within the above rule;[5] but if the condition has been fulfilled the delivery becomes effective.[6]

(III) *PARTY-WALL AGREEMENTS.* An agreement that one shall have the use of a party-wall for a certain price is said to be withdrawn from the operation of the statute by part performance, and when he has had the use of the wall the defense of the statute cannot be interposed to an action for the price;[7] and it has also been held that a promise to pay the promisor's share of the cost of building a party-wall is actionable after the wall has been built.[8]

3. CONTRACTS PERFORMED ONLY AS TO PART NOT WITHIN STATUTE[9] — a. In General. In general it may be said that the performance of that part only of a contract which is not within the statute does not tend at law to remove the contract from the operation of the statute so as to allow an action for the breach of that part of the promise which is within the statute.[10]

b. Agreements Not to Be Performed Within One Year. An agreement which is not to be performed within one year is not taken out of the statute by the performance of a counter agreement which is to be performed immediately and therefore is not within the statute,[11] except where there is a special statutory pro-

3. McCarthy *v.* Pope, 52 Cal. 561; Kratz *v.* Stocke, 42 Mo. 351.

4. *Connecticut.*— Chapman *v.* Allen, Kirby 399, 1 Am. Dec. 24.

Iowa.— Trayer *v.* Reeder, 45 Iowa 272.

Kansas.— Atchison, etc., R. Co. *v.* English, 38 Kan. 110, 16 Pac. 82.

Kentucky.— Grant *v.* Settle, 1 Ky. L. Rep. 344.

Massachusetts.— Preble *v.* Baldwin, 6 Cush. 549; Brackett *v.* Evans, 1 Cush. 79.

Michigan.—Waldron *v.* Laird, 65 Mich. 237, 32 N. W. 29.

Minnesota.— Hagelin *v.* Wacks, 61 Minn. 214, 63 N. W. 624.

Missouri.— Smith *v.* Davis, 90 Mo. App. 533.

New York.— Herrick *v.* Stackweather, 54 Hun 532, 8 N. Y. Suppl. 145.

Wisconsin.— Coyle *v.* Davis, 20 Wis. 564.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 295.

5. Luzader *v.* Richmond, 128 Ind. 344, 27 N. E. 736; Freeland *v.* Charnley, 80 Ind. 132; Townsend *v.* Hawkins, 45 Mo. 286. But see Cannon *v.* Handley, 72 Cal. 133, 13 Pac. 315; Lewis *v.* Prather, 21 S. W. 538, 14 Ky. L. Rep. 749.

6. McCasland *v.* Ætna L. Ins. Co., 108 Ind. 130, 9 N. E. 119.

7. Walker *v.* Shackelford, 49 Ark. 503, 5 S. W. 887, 4 Am. St. Rep. 61; Rawson *v.* Bell, 46 Ga. 19; Pireaux *v.* Simon, 79 Wis. 392, 48 N. W. 674.

8. Rindge *v.* Baker, 57 N. Y. 209, 15 Am. Rep. 475.

9. Part payment as taking sale of goods out of statute see *supra*, VIII, C.

10. *Georgia.*—Daniel *v.* Mercer, 63 Ga. 442.

Massachusetts.— Brightman *v.* Hicks, 108 Mass. 246.

Missouri.—Bernhardt *v.* Walls, 29 Mo. App. 206.

New Hampshire.— Harris *v.* Rounsevel, 61 N. H. 250.

New Jersey.— Manning *v.* Riley, 52 N. J. Eq. 39, 27 Atl. 810.

New York.— Richardson *v.* Crandall, 48 N. Y. 348; Bruen *v.* Astor, Anth. N. P. 185. The decision in Jones *v.* Duff, 47 Hun 170, to the effect that one who has received the consideration for his oral promise not to contest a will will not be allowed to contest it, can be supported only on the ground that the contract was not within the statute at all, or that the court was in effect allowing specific performance of the promise based on part performance.

Ohio.— Shahan *v.* Swan, 48 Ohio St. 25, 26 N. E. 222, 29 Am. St. Rep. 517 [*reversing* 1 Ohio Cir. Ct. 216, 1 Ohio Cir. Dec. 119].

Pennsylvania.— See Hudson *v.* Watson, 2 Pa. Super. Ct. 422, 39 Wkly. Notes Cas. 160.

Wisconsin.— Smith *v.* Bouck, 33 Wis. 19.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 299.

If the statute so provides, part performance will take an oral contract out of the statute. Oliver *v.* Powell, 114 Ga. 592, 40 S. E. 826; Goolsby *v.* Bush, 53 Ga. 353; Badger Telephone Co. *v.* Wolf River Telephone Co., 120 Wis. 169, 97 N. W. 907.

11. *Colorado.*— De Bord *v.* Holcomb, 13 Colo. App. 161, 57 Pac. 548.

Illinois.— Vose *v.* Strong, 45 Ill. App. 98.

Michigan.— Whipple *v.* Parker, 29 Mich. 369.

New York.— Lockwood *v.* Barnes, 3 Hill 128, 38 Am. Dec. 620.

Ohio.— Reinheimer *v.* Carter, 31 Ohio St. 579.

Vermont.— Pierce *v.* Paine, 28 Vt. 34.

vision to that effect.[12] But when a contract has been so far performed that nothing remains to be done but the payment of the consideration for the performance, the fact that the contract does not require the payment within a year furnishes no defense to an action for the price.[13]

c. Agreements Relating to Real Property — (I) *GENERAL RULE.* In the case of oral agreements for the sale of land the rule at law is in general that performance by the purchaser will not operate to take the case out of the statute.[14]

(II) *POSSESSION.*[15] An oral promise to convey land gains no validity at law by reason of the taking possession of the land by the proposed purchaser,[16] except where the statute so provides;[17] but an oral promise to pay for land will support an action where the purchaser has entered into possession and received the title.[18] So entry under an oral lease is not sufficient part performance to remove the lease

West Virginia.— Kimmins *v.* Oldham, 27 W. Va. 258.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 300.

12. Barnett Line of Steamers *v.* Blackmar, 53 Ga. 98.

13. *Alabama.*— Rake *v.* Pope, 7 Ala. 161.

Illinois.— Curtis *v.* Sage, 35 Ill. 22.

Iowa.— Saum *v.* Saum, 49 Iowa 704.

Kentucky.— Dant *v.* Head, 90 Ky. 255, 13 S. W. 1073, 12 Ky. L. Rep. 153, 29 Am. St. Rep. 369.

Maine.— Holbrook *v.* Armstrong, 10 Me. 31.

New Jersey.—Berry *v.* Doremus, 30 N. J. L. 399.

Rhode Island.— Durfee *v.* O'Brien, 16 R. I. 213, 14 Atl. 857.

South Carolina.— Bates *v.* Moore, 2 Bailey 614; Gee *v.* Hicks, Rich. Eq. Cas. 5.

United States.— *In re* Little River Lumber Co., 92 Fed. 585.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 300. See also *supra*, X, H, 1, b.

14. Dicken *v.* McKinley, 163 Ill. 318, 45 N. E. 134, 54 Am. St. Rep. 471; Smith *v.* Phillips, 69 N. H. 470, 43 Atl. 183; Lane *v.* Shackford, 5 N. H. 130; Nye *v.* Taggart, 40 Vt. 295; Hannon *v.* Hounihan, 85 Va. 429, 12 S. E. 157. In Virginia it was formerly the rule that an oral contract to sell land would be enforced if the promise in consideration of which it was given had been performed. Carrington *v.* Brents, 5 Fed. Cas. No. 2,446, 1 McLean 167 [*affirmed* in 9 Pet. 86, 9 L. ed. 60].

An oral license may, however, become irrevocable by execution. Meetze *v.* Charlotte, etc., R. Co., 23 S. C. 1.

15. **Part performance by taking possession under an oral partition** see *supra*, VII, B, 3, f, (I).

16. *Alabama.*— Heflin *v.* Milton, 69 Ala. 354.

District of Columbia.— Purcell *v.* Coleman, 6 D. C. 59 [*affirmed* in 4 Wall. 513, 18 L. ed. 435].

Indiana.— Riley *v.* Haworth, 30 Ind. App. 377, 64 N. E. 928.

Kentucky.— Usher *v.* Flood, 83 Ky. 552, 7 Ky. L. Rep. 636, 17 S. W. 132, 12 Ky. L. Rep. 721.

Michigan.— Bartlett *v.* Bartlett, 103 Mich. 293, 61 N. W. 500; Kelsey *v.* McDonald, 76 Mich. 188, 42 N. W. 1103; Wetmore *v.* Neuberger, 44 Mich. 362, 6 N. W. 837.

Mississippi.— Catlett *v.* Bacon, 33 Miss. 269; Payson *v.* West, Walk. 515.

Missouri.— Bean *v.* Valle, 2 Mo. 126.

Pennsylvania.— *In re* Allen, 1 Watts & S. 383; Gratz *v.* Gratz, 4 Rawle 411.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 303 *et seq.*

It is sometimes otherwise in equity, but possession taken in opposition to the vendor's wishes is insufficient to render an oral contract for the sale of land enforceable in equity (Baxter *v.* Doane, 208 Pa. St. 585, 57 Atl. 1062); and the equitable right which arises upon possession may be lost by an abandonment of possession (Grier *v.* Sampson, 27 Pa. St. 183).

Liability for price.— It is doubtful if possession alone is sufficient to make a vendee who refuses to accept a deed liable in an action at law for the price. Washington Glass Co. *v.* Mosbaugh, 19 Ind. App. 105, 49 N. E. 178; Barnett *v.* Washington Glass Co., 12 Ind. App. 631, 40 N. E. 1102; Fite *v.* Orr, 1 S. W. 582, 8 Ky. L. Rep. 349.

17. Devin *v.* Eagleson, 79 Iowa 269, 44 N. W. 545; Tuttle *v.* Becker, 47 Iowa 486.

Possession under contract.—Even where the statute provides that possession shall take a contract out of the statute, the evidence must show clearly that the possession taken was under and in accordance with the contract. Lowery *v.* Lowery, 117 Iowa 704, 89 N. W. 1118; Hutton *v.* Doxsee, 116 Iowa 13, 89 N. W. 79; Benedict *v.* Bird, 103 Iowa 612, 72 N. W. 768.

18. *Alabama.*— McMahan *v.* Jacoway, 105 Ala. 585, 17 So. 39; Gillespie *v.* Battle, 15 Ala. 276.

Kentucky.— Edelin *v.* Clarkson, 3 B. Mon. 31, 38 Am. Dec. 177; Barnes *v.* Wise, 3 T. B. Mon. 167.

Missouri.— Tatum *v.* Brooker, 51 Mo. 148.

New Jersey.— Imlay *v.* Wikoff, 4 N. J. L. 132.

North Carolina.— See Green *v.* North Carolina R. Co., 73 N. C. 524, holding that where standing timber was sold and afterward delivered, the seller was entitled to recover the price.

United States.— Bissell *v.* Michigan Farmers', etc., Bank, 3 Fed. Cas. No. 1,446, 5 McLean 495.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 303 *et seq.*

from the operation of the statute at law.[19] There is some authority for the position that entry and retention of possession by the lessee renders him liable for the rent for the entire term,[20] but the better opinion is that he is liable only for use and occupation.[21] The possession of a tenant who holds a written lease is referable to that lease rather than to a subsequent oral lease.[22]

(III) *PAYMENT.* Payment of the price in whole or in part does not remove a contract to convey lands from the operation of the statute so as to allow an action at law for failure to convey,[23] or for failure to accept a conveyance and pay the price agreed on;[24] nor is it sufficient to vest title in the purchaser,[25] except where the statute so provides.[26] Neither is an oral promise to convey land rendered actionable by performance of services in consideration of the promise.[27] An oral lease acquires no validity at law by payment of rent.[28]

(IV) *POSSESSION AND PAYMENT.* Possession and payment together do not operate to take an oral promise to convey land out of the statute of frauds so as to allow an action at law for its breach,[29] save where the statute expressly so provides;[30] but actions for the price of land sold orally have been sustained when the purchaser has gone into possession and cannot return the premises in their original condition.[31] In regard to leases the rule is the same, and neither oral leases nor oral assignments of leases are valid at law as against the lessor or assignor by reason of payment being made and possession taken by the lessee[32] or

19. Anthony *v.* Hunt, 31 Ark. 481; Myers *v.* Croswell, 45 Ohio St. 543, 15 N. E. 866 [*reversing* 1 Ohio Cir. Ct. 63, 1 Ohio Cir. Dec. 38]; Pulse *v.* Hamer, 8 Oreg. 251.

20. Rosser *v.* Harris, 48 Ga. 512; Bless *v.* Jenkins, 129 Mo. 647, 31 S. W. 938; Christopher *v.* National Brewing Co., 72 Mo. App. 121; Edwards *v.* Spalding, 20 Mont. 54, 49 Pac. 443; Sorrells *v.* Goldberg, (Tex. Civ. App. 1904) 78 S. W. 711.

21. Warner *v.* Hale, 65 Ill. 395; Moore *v.* Beasley, 3 Ohio 294.

22. Crawford *v.* Wick, 18 Ohio St. 190, 98 Am. Dec. 103; Armstrong *v.* Kattenhorn, 11 Ohio 265.

23. *Alabama.*— Meredith *v.* Naish, 3 Stew. 207; Allen *v.* Booker, 2 Stew. 21, 19 Am. Dec. 33.

Illinois.— Koenig *v.* Dohm, 209 Ill. 468, 70 N. E. 1061.

Indiana.— Riley *v.* Haworth, 30 Ind. App. 377, 64 N. E. 928.

Kansas.— Goddard *v.* Donaha, 42 Kan. 754, 22 Pac. 708.

Kentucky.—Keith *v.* Patton, 1 A. K. Marsh. 23.

Massachusetts.— Thompson *v.* Gould, 20 Pick. 134.

Michigan.— Colgrove *v.* Solomon, 34 Mich. 494.

Minnesota.— Mackubin *v.* Clarkson, 5 Minn. 247.

Mississippi.— Nelson *v.* Lawson, 71 Miss. 819, 15 So. 798.

New York.— Cooley *v.* Lobdell, 153 N. Y. 596, 47 N. E. 783.

Wisconsin.—Bruley *v.* Garvin, 105 Wis. 625, 81 N. W. 1038, 48 L. R. A. 839.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 311 *et seq.*

24. Leis *v.* Potter, 68 Kan. 117, 74 Pac. 622; Guthrie *v.* Anderson, 47 Kan. 383, 28 Pac. 164, 49 Kan. 416, 30 Pac. 459; Baker *v.* Wiswell, 17 Nebr. 52, 22 N. W. 111; Cagger *v.* Lansing, 43 N. Y. 550 [*reversing* 57 Barb. 421].

25. Aird *v.* Alexander, 72 Miss. 358, 18 So. 478; Whitcher *v.* Morey, 39 Vt. 459; Jourdain *v.* Fox, 90 Wis. 99, 62 N. W. 936.

26. Pressley *v.* Roe, 83 Iowa 545, 50 N. W. 44; Dunlap *v.* Thomas, 69 Iowa 358, 28 N. W. 637; Devin *v.* Himer, 29 Iowa 297; Sykes *v.* Bates, 26 Iowa 521.

27. Wallace *v.* Long, 105 Ind. 522, 5 N. E. 666, 55 Am. Rep. 222; Ellis *v.* Cary, 74 Wis. 176, 42 N. W. 252, 17 Am. St. Rep. 125, 4 L. R. A. 55. But see Carney *v.* Carney, 95 Mo. 353, 8 S. W. 729.

28. *New Hampshire.*—Webster *v.* Blodgett, 59 N. H. 120.

New York.— Nasanowitz *v.* Hanf, 17 Misc. 157, 39 N. Y. Suppl. 327.

North Dakota.— Merchants' State Bank *v.* Ruettell, 12 N. D. 519, 97 N. W. 853.

Ohio.— Armstrong *v.* Kattenhorn, 11 Ohio 265.

Tennessee.— Townsend *v.* Sharp, 2 Overt. 192.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 317.

29. Barickman *v.* Kuykendall, 6 Blackf. (Ind.) 21. However, one who pays for land and goes into possession with the vendor's assent has such an equitable title in the land that he may maintain trover for timber which the vendor severs from the land. Pike *v.* Morey, 32 Vt. 37. And in Wilber *v.* Paine, 1 Ohio 251, an oral purchaser in possession who had made full payment was allowed to maintain an action for trespass against the vendor for removing crops raised by the purchaser.

30. Parrish *v.* Steadham, 93 Ala. 465, 9 So. 358, 102 Ala. 615, 15 So. 354; Franke *v.* Riggs, 93 Ala. 252, 9 So. 359; Wimberly *v.* Bryan, 55 Ga. 198.

31. Walker *v.* Owen, 79 Mo. 563; Reynolds *v.* Reynolds, 45 Mo. App. 622.

32. Cochran *v.* Ward, 5 Ind. App. 89, 29 N. E. 795, 31 N. E. 581, 51 Am. St. Rep. 229; Railsback *v.* Walke, 81 Ind. 409; O'Leary *v.* Delaney, 63 Me. 584. However, in Browder

assignee,[33] except under special statutory provision.[34] However, there is some authority for the rule that as against the lessee or assignee an action for the contract price may be supported even if he abandons possession, where he has once entered and made part payment.[35]

(v) *Possession, Payment, and Improvements.* Possession, payment, and improvements by one party will not at law render actionable an oral agreement by the other to convey land,[36] save under special statutory exception.[37] So improvements made by the owner of land at the request of a proposed lessee will not take out of the statute the oral agreement of the proposed lessee to accept a lease.[38] Where, however, equitable remedies are administered by courts of law, there may be an action on a promise to convey in reliance upon which there have been part payments and improvements,[39] and payments made may be recovered back if the vendor refuses to perform.[40]

4. Contracts Implied by Law on Part Performance[41] **— a. Recovery of Money Paid.** When the vendor under an oral contract for the sale of land declines to perform and sets up the statute of frauds, an action at law will lie against him for any part of the purchase price which he has received;[42] or, if he pleads the stat-

v. Phinney, 30 Wash. 74, 70 Pac. 264, it was held that a lessee might by part payment and possession have such a right to specific performance as would render his landlord liable for ejecting him.

33. Chicago Attachment Co. *v.* Davis Sewing Mach. Co., 142 Ill. 171, 31 N. E. 438, 15 L. R. A. 754, (1891) 28 N. E. 959, (1890) 25 N. E. 669; Nally *v.* Reading, 107 Mo. 350, 17 S. W. 978 [*affirming* 36 Mo. App. 306].

34. A. G. Rhodes Furniture Co. *v.* Weeden, 108 Ala. 252, 19 So. 318; Dahm *v.* Barlow, 93 Ala. 120, 9 So. 598.

35. Dewey *v.* Payne, 19 Nebr. 540, 26 N. W. 248; Grant *v.* Ramsey, 7 Ohio St. 157; Randall *v.* Thompson, 1 Tex. App. Civ. Cas. § 1100.

36. Sailors *v.* Gambril, 1 Ind. 88, Smith 82; Jackson *v.* Pierce, 2 Johns. (N. Y.) 221. The case of Clark *v.* Cincinnati, 1 Ohio Dec. (Reprint) 10, 1 West. L. J. 53, seems, so far as may be understood from the report, to be a decision to the contrary.

37. Steel *v.* Payne, 42 Ga. 207.

38. Cram *v.* Thompson, 87 Minn. 172, 91 N. W. 483.

39. Houston, etc., R. Co. *v.* Wright, 15 Tex. Civ. App. 151, 38 S. W. 836. See also Armstrong *v.* Fearnaw, 67 Ind. 429; Meyers *v.* Johnson, 15 Ind. 261.

40. Bennett *v.* Phelps, 12 Minn. 326.

41. See also *supra*, X, H, 1, a, b, c, (II); X, H, 2, b, (II); X, H, 3, b, c, (II), (V).

42. *Alabama.*— Flinn *v.* Barber, 64 Ala. 193; Flinn *v.* Barber, 59 Ala. 446; Allen *v.* Booker, 2 Stew. 21, 19 Am. Dec. 33.

Arkansas.— Littell *v.* Jones, 56 Ark. 139, 19 S. W. 497.

Illinois.—Collins *v.* Thayer, 74 Ill. 138.

Indiana.—Terrell *v.* Frazier, 79 Ind. 473.

Kentucky.— Mannen *v.* Bradberry, 81 Ky. 153; Hunt *v.* Sanders, 1 A. K. Marsh. 552; Fox *v.* Longly, 1 A. K. Marsh. 388; Grant *v.* Craigmiles, 1 Bibb 203; Graves County Water, etc., Co. *v.* Ligon, 66 S. W. 725, 23 Ky. L. Rep. 2149; Walker *v.* Walker, 55 S. W. 726, 21 Ky. L. Rep. 1521.

Maine.— Segars *v.* Segars, 71 Me. 530; Jellison *v.* Jordan, 68 Me. 373; Kneeland *v.* Fuller, 51 Me. 518; Patterson *v.* Yeaton, 47 Me. 308.

Massachusetts.— Dix *v.* Marcy, 116 Mass. 416; Kidder *v.* Hunt, 1 Pick. 328, 11 Am. Dec. 183; Seymour *v.* Bennet, 14 Mass. 266; Sherburne *v.* Fuller, 5 Mass. 133.

Minnesota.— Herrick *v.* Newell, 49 Minn. 198, 51 N. W. 819; Pressnell *v.* Lundin, 44 Minn. 551, 47 N. W. 161; Wyvell *v.* Jones, 37 Minn. 68, 33 N. W. 43; Johnson *v.* Krassin, 25 Minn. 117; Bennett *v.* Phelps, 12 Minn. 326.

Mississippi.— Beaman *v.* Buck, 9 Sm. & M. 207.

Missouri.—Blew *v.* McClelland, 29 Mo. 304.

New York.— Whitaker *v.* Burrows, 71 Hun 478, 24 N. Y. Suppl. 1011; Matter of Sherman, 24 Misc. 65, 53 N. Y. Suppl. 376; Lockwood *v.* Barnes, 3 Hill 128, 38 Am. Dec. 620; Gillet *v.* Maynard, 5 Johns. 85, 4 Am. Dec. 329. See also Marquat *v.* Marquat, 12 N. Y. 336 [*reversing* 7 How. Pr. 417].

North Carolina.— Durham Consol. Land, etc., Co. *v.* Guthrie, 116 N. C. 381, 21 S. E. 952.

Pennsylvania.— Hughes *v.* Heintzleman, 2 Walk. 426.

Tennessee.— Treece *v.* Treece, 5 Lea 221; Crippen *v.* Bearden, 5 Humphr. 129; Love *v.* Burton, (Ch. App. 1900) 61 S. W. 91.

Texas.— Brown *v.* Randolph, 26 Tex. Civ. App. 66, 62 S. W. 981; Moore *v.* Powell, 6 Tex. Civ. App. 43, 25 S. W. 472.

Vermont.— Adams *v.* Cooty, 60 Vt. 395, 15 Atl. 150; Welch *v.* Darling, 59 Vt. 136, 7 Atl. 547; Gifford *v.* Willard, 55 Vt. 36.

Wisconsin.— Whitman *v.* Lake, 32 Wis. 189; Brandeis *v.* Neustadtl, 13 Wis. 142.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 328.

One who deposits money to secure the performance of an oral agreement for the sale of land cannot recover it on the ground that the contract was within the statute. Chittenden *v.* Morris, 52 Hun (N. Y.) 601, 5 N. Y. Suppl. 713 [*affirmed* in 117 N. Y. 515, 23 N. E. 163].

ute to a bill in equity for specific performance, it is open to the court under a prayer for general relief to decree repayment of the amount paid,[43] and to make such payment a lien on the land;[44] and the same is true of payments made under contracts not to be performed within one year.[45] So money paid under the contract for the benefit of the repudiating party may be recovered.[46] It is necessary, however, to the application of this rule that the payment shall have inured to the benefit of defendant,[47] that plaintiff shall not have received the value of the payments from use and occupation or other benefits,[48] and that defendant shall have refused to perform.[49]

b. Recovery For Property Transferred. Where property has been transferred in consideration of an oral promise within the statute which the promisor refuses to perform, the law implies a promise on which an action will lie for the value of the property so transferred,[50] or, in equity, the land itself may be recovered.[51]

c. Recovery For Services — (i) *In General.* Where services are rendered on an agreement which is void by the statute, an action will lie on the implied promise to pay for such services;[52] but the promise is implied, not from the

Purchase-money notes.— The same principle allows a purchaser by parol to resist the payment of purchase-money notes (Bates *v.* Terrell, 7 Ala. 129; Black *v.* Gesner, 3 Nova Scotia 157; Lindsay *v.* Zwicker, 2 Nova Scotia Dec. 100); but not when he is in undisturbed possession (Gray *v.* Whitman, 3 Nova Scotia 157).

43. Wilkie *v.* Womble, 90 N. C. 254; Barnes *v.* Brown, 71 N. C. 507; Dunn *v.* Moore, 38 N. C. 364; Hilton *v.* Duncan, 1 Coldw. (Tenn.) 313. And see SPECIFIC PERFORMANCE.

44. Brown *v.* East, 5 T. B. Mon. (Ky.) 405; Hilton *v.* Duncan, 1 Coldw. (Tenn.) 313.

45. Swift *v.* Swift, 46 Cal. 266.

46. Interstate Hotel Co. *v.* Woodward, etc., Amusement Co., 103 Mo. App. 198, 77 S. W. 114.

47. Pierce *v.* Paine, 28 Vt. 34; Gazzam *v.* Simpson, 114 Fed. 71, 52 C. C. A. 19.

48. Cilley *v.* Burkholder, 41 Mich. 749, 3 N. W. 221.

49. De Montague *v.* Bacharach, 181 Mass. 256, 63 N. E. 435; Johnson *v.* Puget Mill Co., 28 Wash. 515, 68 Pac. 867; York *v.* Washburn, 118 Fed. 316.

50. *Indiana.*— Wolke *v.* Fleming, 103 Ind. 105, 2 N. E. 325, 53 Am. Rep. 495; Jarboe *v.* Severin, 85 Ind. 496.

Kentucky.— Montague *v.* Garnett, 3 Bush 297. It was formerly the rule that suit could not be brought on the implied promises to pay, but must be in the nature of detinue, or of trover, if the property was personalty. Duncan *v.* Baird, 8 Dana 101; Keith *v.* Patton, 1 A. K. Marsh. 23.

Maine.—Long *v.* Woodman, 65 Me. 56; Bassett *v.* Bassett, 55 Me. 127; Holbrook *v.* Armstrong, 10 Me. 31.

Massachusetts.— Peabody *v.* Fellows, 177 Mass. 290, 58 N. E. 1019; Miller *v.* Roberts, 169 Mass. 134, 47 N. E. 585; Basford *v.* Pearson, 9 Allen 387, 85 Am. Dec. 764.

Michigan.—Whipple *v.* Parker, 29 Mich. 369.

Missouri.— Andrews *v.* Broughton, 78 Mo. App. 179.

New York.— Day *v.* New York Cent. R. Co., 51 N. Y. 583; Henning *v.* Miller, 83 Hun 403, 31 N. Y. Suppl. 878; Day *v.* New York Cent. R. Co., 22 Hun 412; Wood *v.* Shultis, 4 Hun 309, 6 Thomps. & C. 557; Thomas *v.* Dickinson, 14 Barb. 90; Boyden *v.* Crane, 7 Alb. L. J. 203.

Tennessee.— Miller *v.* Jones, 3 Head 525.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 329.

51. Ramey *v.* Slone, 62 S. W. 879, 23 Ky. L. Rep. 301.

In New Hampshire one may recover the property transferred at law. Luey *v.* Bundy, 9 N. H. 298, 32 Am. Dec. 359.

52. *Alabama.*— Sims *v.* McEwen, 27 Ala. 184.

California.— Patten *v.* Hicks, 43 Cal. 509.

Connecticut.— Grant *v.* Grant, 63 Conn. 530, 29 Atl. 15, 38 Am. St. Rep. 379; Clark *v.* Terry, 25 Conn. 395.

Delaware.— Watson *v.* Watson, 1 Houst. 209.

Florida.— Mills *v.* Joiner, 20 Fla. 479.

Illinois.—William Butcher Steel Works *v.* Atkinson, 68 Ill. 421, 18 Am. Rep. 560.

Indiana.— Miller *v.* Eldridge, 126 Ind. 461, 27 N. E. 132; Wallace *v.* Long, 105 Ind. 522, 5 N. E. 666, 55 Am. Rep. 222; Wolke *v.* Fleming, 103 Ind. 105, 2 N. E. 325, 53 Am. Rep. 495; Gullett *v.* Gullett, 28 Ind. App. 670, 63 N. E. 782; Kettry *v.* Thumma, 9 Ind. App. 498, 36 N. E. 919; Taggart *v.* Tevanny, 1 Ind. App. 339, 27 N. E. 511.

Iowa.— Murphy *v.* De Haan, 116 Iowa 61, 89 N. W. 100.

Kansas.— Wonsettler *v.* Lee, 40 Kan. 367, 19 Pac. 862.

Kentucky.— Hambell *v.* Hamilton, 3 Dana 501; Davenport *v.* Gentry, 9 B. Mon. 427; Myers *v.* Korb, 50 S. W. 1108, 21 Ky. L. Rep. 163.

Maryland.— Hamilton *v.* Thirston, 93 Md. 213, 48 Atl. 709.

Massachusetts.— White *v.* Wieland, 109 Mass. 291; Williams *v.* Bemis, 108 Mass. 91, 11 Am. Rep. 318.

Michigan.— Snyder *v.* Neal, 129 Mich. 692, 89 N. W. 588; Moore *v.* Capewell Horse-Nail Co., 76 Mich. 606, 43 N. W. 644; Cadman *v.*

services alone, but from the benefit to defendant as well, and if defendant has received no benefit, as for instance where work has been performed on a chattel which is never delivered, there can be no recovery.[53]

(II) *Effect of Contract to Control Damages.* In an action to recover the value of services rendered on a void contract, the price agreed by parol to be paid is admissible on the question of the value of the services;[54] and this rule has in some cases been carried to the extent of holding the agreed price to be the measure of damages;[55] but the better rule would seem to be that while the

Markle, 76 Mich. 448, 43 N. W. 315, 5 L. R. A. 707.

Minnesota.— Spinney *v.* Hill, 81 Minn. 316, 84 N. W. 116.

Nevada.— Lapham *v.* Osborne, 20 Nev. 168, 18 Pac. 881.

New Hampshire.— Howe *v.* Day, 58 N. H. 516; Crawford *v.* Parsons, 18 N. H. 293.

New Jersey.— Buckingham *v.* Ludlum, 37 N. J. Eq. 137; McElroy *v.* Ludlum, 32 N. J. Eq. 828.

New York.— Moody *v.* Smith, 70 N. Y. 598; Reed *v.* McConnell, 62 Hun 153, 16 N. Y. Suppl. 586; Van Schoyck *v.* Backus, 9 Hun 68; Jones *v.* Hay, 52 Barb. 501; Quackenbush *v.* Ehle, 5 Barb. 469; Springer *v.* Bien, 16 Daly 275, 10 N. Y. Suppl. 530; Scheuer *v.* Monash, 35 Misc. 276, 71 N. Y. Suppl. 818; Matter of Sherman, 24 Misc. 65, 53 N. Y. Suppl. 376; King *v.* Brown, 2 Hill 485; Shute *v.* Dorr, 5 Wend. 204.

Oregon.— Albee *v.* Albee, 3 Oreg. 321.

South Carolina.— Carter *v.* Brown, 3 S. C. 298.

Texas.— Stevens *v.* Lee, 70 Tex. 279, 8 S. W. 40; Ray *v.* Young, 13 Tex. 550; Wanhscaffe *v.* Pontoja, (Civ. App. 1901) 63 S. W. 663.

Virginia.— McCrowell *v.* Burson, 79 Va. 290.

West Virginia.— Miller *v.* Wisener, 45 W. Va. 59, 30 S. E. 237.

Wisconsin.— *In re* Kessler, 87 Wis. 660, 59 N. W. 129, 41 Am. St. Rep. 74; Koch *v.* Williams, 82 Wis. 186, 52 N. W. 257; Salb *v.* Campbell, 65 Wis. 405, 27 N. W. 45; Cohen *v.* Stein, 61 Wis. 508, 21 N. W. 514; Clark *v.* Davidson, 53 Wis. 317, 10 N. W. 384.

Canada.— Swim *v.* Amos, 33 N. Brunsw. 49; Wier *v.* Letson, 12 Nova Scotia 299.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 330.

Action on contract.— The value of the services cannot, however, be recovered in a suit on the contract itself. Hillhouse *v.* Jennings, 60 S. C. 373, 38 S. E. 599. And see Gazzam *v.* Simpson, 114 Fed. 71, 52 C. C. A. 19.

Where the promisee is in undisturbed possession and is entitled to a decree for specific performance, an action for services will not lie. Hill *v.* Den, 121 Cal. 42, 53 Pac. 642.

53. *Illinois.*— Leavitt *v.* Stern, 159 Ill. 526, 42 N. E. 869 [*affirming* 55 Ill. App. 416].

Kentucky.— Bromley *v.* Broyles, 58 S. W. 984, 22 Ky. L. Rep. 830, holding that if services have neither benefited plaintiff nor been performed at his request, there can be no recovery.

Massachusetts.— Cook *v.* Doggett, 2 Allen 439.

Michigan.— Bristol *v.* Sutton, 115 Mich. 365, 73 N. W. 424.

New Hampshire.— Cocheco Aqueduct Assoc. *v.* Boston, etc., R. Co., 59 N. H. 312.

New Jersey.— Banker *v.* Henderson, 58 N. J. L. 26, 32 Atl. 700.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 330.

54. *Illinois.*— Frazer *v.* Howe, 106 Ill. 563; William Butcher Steel Works *v.* Atkinson, 68 Ill. 421, 18 Am. Rep. 560; Michels *v.* West, 109 Ill. App. 418.

Indiana.— Shumate *v.* Farlow, 125 Ind. 359, 25 N. E. 432.

Michigan.— Moore *v.* Capewell Horse-Nail Co., 76 Mich. 606, 43 N. W. 644.

Minnesota.— La Du-King Mfg. Co. *v.* La Du, 36 Minn. 473, 31 N. W. 938.

Mississippi.— Timberlake *v.* Thayer, 76 Miss. 76, 23 So. 767.

New Jersey.— Van Horn *v.* Van Horn, (Ch. 1890) 20 Atl. 826.

New York.— McGlucky *v.* Bitter, 1 E. D. Smith 618. But see Erben *v.* Lorillard, 19 N. Y. 299 [*reversing* 23 Barb. 82]; Erben *v.* Lorillard, 2 Keyes 567.

Texas.— Capers *v.* Stewart, 3 Tex. App. Civ. Cas. § 291.

West Virginia.— Miller *v.* Wisener, 45 W. Va. 59, 30 S. E. 237.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 331.

But see McGartland *v.* Steward, 2 Houst. (Del.) 277.

Presumption as to contract rate.— The oral contract is admissible to rebut any presumption that the work was to be done at a rate fixed by an earlier contract. Horton *v.* Wollner, 71 Ala. 452.

55. *Iowa.*— Murphy *v.* De Haan, 116 Iowa 61, 89 N. W. 100.

Kentucky.— Doty *v.* Doty, 80 S. W. 803, 26 Ky. L. Rep. 63.

Maryland.— Baker *v.* Lauterback, 68 Md. 64, 11 Atl. 703.

Michigan.— Fuller *v.* Rice, 52 Mich. 435, 18 N. W. 204.

Minnesota.— Lally *v.* Crookston Lumber Co., 85 Minn. 257, 88 N. W. 846.

New York.— Van Valkenburg *v.* Croffut, 15 Hun 147; Lisk *v.* Sherman, 25 Barb. 433; Nones *v.* Homer, 2 Hilt. 116; Scheuer *v.* Monash, 35 Misc. 276, 71 N. Y. Suppl. 818; King *v.* Brown, 2 Hill 485; Burlingame *v.* Burlingame, 7 Cow. 92.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 331.

agreed price may be admissible on the question of the value of the services it does not control it and is not necessarily the measure of damages.[56] If the oral agreement contemplates a conveyance of land, it has been held that the value of the land may be recovered.[57]

d. Recovery For Use and Occupation. If one has been in possession of land under a void oral lease he is liable in an action in the nature of assumpsit for the fair value of the use of the premises if he repudiates the oral agreement,[58] and the rental orally agreed on is evidence on the question of value;[59] and the terms of the oral agreement are admissible as showing when rent is to be paid;[60] but it is not open to the landlord to repudiate the lease and sue for use and occupation if the tenant is willing to perform his part of the agreement.[61] So too one who takes possession under an oral contract of sale and later refuses to accept a deed is liable for use and occupation;[62] but he cannot be so held unless he refuses to perform.[63]

e. Recovery For Improvements. The purchaser under an executory contract of sale who takes possession of the land and makes improvements may, if the vendor refuses to perform, recover the value of the improvements in an action on the vendor's promise, implied in law, to pay for them,[64] if they enhance the

56. *Illinois.*—William Butcher Steel Works *v.* Atkinson, 68 Ill. 421, 18 Am. Rep. 560; Schanzenback *v.* Brough, 58 Ill. App. 526; Barrett *v.* Riley, 42 Ill. App. 258.

Indiana.— Baxter *v.* Kitch, 37 Ind. 554.

Michigan.— Sutton *v.* Rowley, 44 Mich. 112, 6 N. W. 216; Hillebrands *v.* Nibbelink, 40 Mich. 646.

New Hampshire.— Emery *v.* Smith, 46 N. H. 151.

New York.— Galvin *v.* Prentice, 45 N. Y. 162, 6 Am. Rep. 58.

England.— Falmouth *v.* Thomas, 1 Cromp. & M. 89, 2 L. J. Exch. 57, 3 Tyrw. 26.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 331.

57. Bonnon *v.* Urton, 3 Greene (Iowa) 228; McDowell *v.* Oyer, 21 Pa. St. 417. But see Hertzog *v.* Hertzog, 34 Pa. St. 418, which may be considered as overruling McDowell *v.* Oyer, *supra*. In Burruss *v.* Hines, 94 Va. 413, 26 S. E. 875, it was held that the price at which realty was rented by oral agreement was admissible on the question of damages for delay in completing or building thereon. This principle has been carried so far as to allow a recovery of the value of land agreed to be conveyed to an infant in consideration of its surrender to the promisor. Benge *v.* Hiatt, 82 Ky. 666, 56 Am. Rep. 912.

58. *Alabama.*— Smith *v.* Pritchett, 98 Ala. 649, 13 So. 569; Nelson *v.* Webb, 54 Ala. 436; Parker *v.* Hollis, 50 Ala. 411.

Connecticut.— Howard Ins. Co. *v.* Hope Mut. Ins. Co., 22 Conn. 394; Wells *v.* Deming, 2 Root 149.

Illinois.— Warner *v.* Hale, 65 Ill. 395; Smith *v.* Kinkaid, 1 Ill. App. 620.

Kentucky.— Ragsdale *v.* Lander, 80 Ky. 61; Morehead *v.* Watkyns, 5 B. Mon. 228.

New York.— Herrmann *v.* Curiel, 3 N. Y. App. Div. 511, 38 N. Y. Suppl. 343; Prial *v.* Entwistle, 10 Daly 398; Talamo *v.* Spitzmiller, 10 N. Y. St. 241.

Texas.— Robb *v.* San Antonio St. R. Co., 82 Tex. 392, 18 S. W. 707.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 332.

The vendor may set off the value of the use and occupation in an action against him for the payments made. Collins *v.* Thayer, 74 Ill. 138; Harkness *v.* McIntyre, 76 Me. 201.

59. *Alabama.*— Smith *v.* Pritchett, 98 Ala. 649, 13 So. 569; Crawford *v.* Jones, 54 Ala. 459.

Arkansas.— Walker *v.* Schackelford, 49 Ark. 503, 5 S. W. 887, 4 Am. St. Rep. 61.

Connecticut.— King *v.* Woodruff, 23 Conn. 56, 60 Am. Dec. 625.

Illinois.— Donohue *v.* Chicago Bank Note Co., 37 Ill. App. 552.

Minnesota.— Steele *v.* Anheuser-Busch Brewing Assoc., 57 Minn. 18, 58 N. W. 685; Evans *v.* Winona Lumber Co., 30 Minn. 515, 16 N. W. 404.

New York.— Herrmann *v.* Curiel, 3 N. Y. App. Div. 511, 38 N. Y. Suppl. 343; Pierce *v.* Pierce, 25 Barb. 243.

Pennsylvania.— Stover *v.* Cadwallader, 2 Pennyp. 117.

Vermont.— Barlow *v.* Wainwright, 22 Vt. 88, 52 Am. Dec. 79.

United States.— Zachry *v.* Nolan, 66 Fed. 467, 14 C. C. A. 253.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 332.

Contract price.— In Walsh *v.* Colclough, 56 Fed. 778, 6 C. C. A. 114, the landlord was allowed to recover the contract price.

60. Norris *v.* Morrill, 40 N. H. 395.

61. Greton *v.* Smith, 33 N. Y. 245 [*affirming* 1 Daly 380].

62. Davidson *v.* Ernest, 7 Ala. 817; Mattox *v.* Hightshue, 39 Ind. 95; Pierce *v.* Pierce, 25 Barb. (N. Y.) 243.

63. Dogden *v.* Camp, 47 Ga. 328; Bishop *v.* Clark, 82 Me. 532, 20 Atl. 88.

64. *Kansas.*— Deisher *v.* Stein, 34 Kan. 39, 7 Pac. 608; Lister *v.* Batson, 6 Kan. 420.

Kentucky.— Findley *v.* Wilson, 3 Litt. 390, 14 Am. Dec. 72.

value of the land,[65] and are made before there is any repudiation by the vendor or his representative,[66] and the same has been held true of improvements under a parol license which the vendor revokes.[67]

I. Complete Performance[68] — **1. In General.** Where an oral contract which is unenforceable by reason of the statute of frauds has been entirely performed, the rights of the parties are no longer affected by the statute, and it is immaterial that either party might have refused to perform.[69]

Maine.— Lapham *v.* Norton, 71 Me. 83; Patterson *v.* Yeaton, 47 Me. 308.

Maryland.— McNamee *v.* Withers, 37 Md. 171.

Massachusetts.— Parker *v.* Tainter, 123 Mass. 185; White *v.* Wieland, 109 Mass. 291; Williams *v.* Bemis, 108 Mass. 91, 11 Am. Rep. 318.

New Jersey.— Smith *v.* Smith, 28 N. J. L. 208, 78 Am. Dec. 49.

New York.—Rosepaugh *v.* Vredenburgh, 16 Hun 60.

North Carolina.— Barnes *v.* Brown, 71 N. C. 507; Winton *v.* Fort, 58 N. C. 251; Thomas *v.* Kyles, 54 N. C. 302; Dunn *v.* Moore, 38 N. C. 364; Albea *v.* Griffin, 22 N. C. 9.

Pennsylvania.— Holthouse *v.* Rynd, 155 Pa. St. 43, 25 Atl. 760.

Tennessee.— Herring *v.* Pollard, 4 Humphr. 362, 40 Am. Dec. 653.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 333.

Right at law and in equity.— In Kentucky this right is denied at law (Gudgell *v.* Duvall, 4 J. J. Marsh. 229; Roach *v.* Wade, 4 T. B. Mon. 523; Shreve *v.* Grimes, 4 Litt. 220, 14 Am. Dec. 117); but in equity the purchaser may recover the value of his improvements if they exceed the fair rental price, but if the rental price exceeds the value of the improvements the purchaser must pay the difference (Grimes *v.* Shrieve, 6 T. B. Mon. 546; McCampbell *v.* McCampbell, 5 Litt. 92, 15 Am. Dec. 48; Stark *v.* Cannady, 3 Litt. 399; 14 Am. Dec. 76; McCracken *v.* Sanders, 4 Bibb 511). In Tennessee the rule is the same. Masson *v.* Swan, 6 Heisk. 450; Rhea *v.* Allison, 3 Head 176; Mathews *v.* Davis, 6 Humphr. 324.

Under an oral contract too vague to be specifically enforced, even in a state where part performance takes a contract out of the statute, a prospective buyer cannot recover for improvements. Geizzle *v.* Gaddis, 75 Ga. 350.

Work and labor.— In Todd *v.* Leach, 100 Ga. 227, 28 S. E. 43, an action for work and labor was maintained.

65. Vaughan *v.* Cravens, 1 Head (Tenn.) 108, 73 Am. Dec. 163.

66. Saunders *v.* Robinson, 7 Metc. (Mass.) 310.

67. Bush *v.* Sullivan, 3 Greene (Iowa) 344, 54 Am. Dec. 506.

A lessee holding over under a new verbal lease who leaves grass on the ground in reliance on the new lease is entitled to recover its value from the lessor, who seizes it. Henderson *v.* Treadway, 69 Ill. App. 357.

An injunction to restrain the cutting of timber by an oral purchaser is properly made conditional on payment by the vendor for improvements made. Sheldon *v.* Preva, 57 Vt. 263.

68. Executed oral contract of subscription to stock see CORPORATIONS, 10 Cyc. 416.

Stated account based on executed oral contract see ACCOUNTS AND ACCOUNTING, 1 Cyc. 368.

69. *Alabama.*— Kling *v.* Tunstall, 124 Ala. 268, 27 So. 420; Lagerfelt *v.* McKie, 100 Ala. 430, 14 So. 281; East Tennessee, etc., R. Co. *v.* Davis, 91 Ala. 615, 8 So. 349; Slatter *v.* Meek, 35 Ala. 528; Andrews *v.* Jones, 10 Ala. 400.

California.— Reedy *v.* Smith, 42 Cal. 245.

Colorado.— McLure *v.* Koen, 25 Colo. 284, 53 Pac. 1058; Doherty *v.* Doe, 18 Colo. 456, 33 Pac. 165.

Florida.— Craver *v.* Spencer, 40 Fla. 135, 23 So. 880.

Illinois.— Cleveland, etc., R. Co. *v.* Wood, 189 Ill. 352, 59 N. E. 619; Wheeler *v.* Frankenthal, 78 Ill. 124; Swanzey *v.* Moore, 22 Ill. 63, 74 Am. Dec. 134; Stautz *v.* Protzman, 84 Ill. App. 434.

Indiana.— Anderson School Tp. *v.* Milroy Lodge F. & A. M. No. 139, 130 Ind. 108, 29 N. E. 411, 30 Am. St. Rep. 206; Hatfield *v.* Miller, 123 Ind. 463, 24 N. E. 330; Savage *v.* Lee, 101 Ind. 514.

Iowa.— Door Cattle Co. *v.* Des Moines Nat. Bank, (1904) 98 N. W. 918.

Kansas.— Anderson *v.* Canter, 10 Kan. App. 167, 63 Pac. 285; Moore *v.* Chicago, etc., R. Co., 7 Kan. App. 242, 53 Pac. 775.

Kentucky.— Beinlein *v.* Johns, 102 Ky. 570, 44 S. W. 128, 19 Ky. L. Rep. 1969.

Massachusetts.— Stone *v.* Dennison, 13 Pick. 1, 23 Am. Dec. 654; Brown *v.* Bellows, 4 Pick. 179; Pomeroy *v.* Winship, 12 Mass. 514, 7 Am. Dec. 91.

Michigan.— Michigan Cent. R. Co. *v.* Chicago, etc., R. Co., 132 Mich, 324, 93 N. W. 882; Gerber *v.* Upton, 123 Mich. 605, 82 N. W. 363; Bennett *v.* Knowles, 111 Mich. 226, 69 N. W. 491; Wildey *v.* Crane, 69 Mich. 17, 36 N. W. 734.

Minnesota.— McCarthy *v.* Weare Commission Co., 87 Minn. 11, 91 N. W. 33; McCue *v.* Smith, 9 Minn. 252, 86 Am. Dec. 100; Nutting *v.* McCutcheon, 5 Minn. 382.

Missouri.— Maupin *v.* Chicago, etc., R. Co., 171 Mo. 187, 71 S. W. 334; Mitchell *v.* Branham, 104 Mo. App. 480, 79 S. W. 739; Andrews *v.* Broughton, 84 Mo. App. 640; Rich *v.* Donovan, 81 Mo. App. 184.

Nebraska.— Gray *v.* Peterson, 64 Nebr. 671,

2. Agreements Creating Interests in Land — a. General Rules. Where oral agreements creating interests in land have been carried into effect by the acts of the parties, the rights acquired thereunder are not affected by the statute.[70]

b. Oral Licenses. There is some authority for the doctrine that an oral license once executed becomes irrevocable;[71] but the better rule is that such license, while it constitutes a defense for anything done under it by the licensee so long as it remains in force, may be revoked at the will of the licensor.[72]

3. Agreements For Sale of Goods. Transfers of goods and chattels in performance of void oral agreements are not within the statute of frauds.[73]

90 N. W. 559; Wilson *v.* Moore, 13 Nebr. 240, 13 N. W. 217.

New Jersey.—Eaton *v.* Eaton, 35 N. J. L. 290.

New York.—De Hierapolis *v.* Reilly, 44 N. Y. App. Div. 22, 60 N. Y. Suppl. 417 [*affirmed* in 168 N. Y. 585, 60 N. E. 1110]; Westfall *v.* Parsons, 16 Barb. 645; Goldstein *v.* Goldstein, 35 Misc. 251, 71 N. Y. Suppl. 807.

Ohio.— Cooper *v.* Cooper, 8 Ohio S. & C. Pl. Dec. 35, 6 Ohio N. P. 99.

Pennsylvania.— German-American Title, etc., Co. *v.* Citizens' Trust, etc., Co., 19 Pa. St. 247, 42 Atl. 682; Lewis *v.* Smith, 17 Montg. Co. Rep. 30.

South Carolina.— Hart *v.* Hart, 3 Desauss. 592.

Texas.— Cauble *v.* Worsham, 96 Tex. 86, 70 S. W. 737, 97 Am. St. Rep. 871; Cobb *v.* Beall, 1 Tex. 342.

Vermont.—Gregg *v.* Willis, 71 Vt. 313, 45 Atl. 229.

Washington.— Horr *v.* Hollis, 20 Wash. 424, 55 Pac. 565.

Wisconsin.—Lathrop *v.* Humble, 120 Wis. 331, 97 N. W. 905.

United States.— Bibb *v.* Allen, 149 U. S. 481, 13 S. Ct. 950, 37 L. ed. 819.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 334.

On the same principle a defendant is not permitted to interpose the plea that the written contract fails to contain a provision which was part of the oral agreement, where plaintiff has carried out such provision. Donovan *v.* P. Shoenhofen Brewing Co., 102 Mo. App. 427, 76 S. W. 715.

70. *Alabama.*—Martin *v.* Blanchett, 77 Ala. 288; Gordon *v.* Tweedy, 71 Ala. 202; Woodward *v.* Smith, 7 Ala. 112.

Connecticut.—Baxter *v.* Gay, 14 Conn. 119.

Georgia.— Baldwin *v.* Sherwood, 117 Ga. 827, 45 S. E. 216.

Illinois.— Knecht *v.* Mitchell, 67 Ill. 86; Thayer *v.* McEwen, 4 Ill. App. 416.

Indiana.— Turpie *v.* Snowe, 158 Ind. 314, 62 N. E. 484, 92 Am. St. Rep. 310; Robinson *v.* Thrailkill, 110 Ind. 117, 10 N. E. 647; Arnold *v.* Cord, 16 Ind. 177; Hadden *v.* Johnson, 7 Ind. 394.

Iowa.— Anderson *v.* Simpson, 21 Iowa 399.

Kentucky.—Clary *v.* Marshall, 5 B. Mon. 266; McKinley *v.* McKinley, 66 S. W. 831, 23 Ky. L. Rep. 2314.

Maryland.— Clark *v.* Henckel, (1893) 26 Atl. 1039.

Massachusetts.— Peabody *v.* Rice, 113 Mass. 31.

Michigan.— White *v.* Cleaver, 75 Mich. 17, 42 N. W. 530; Doty *v.* Martin, 32 Mich. 462.

Mississippi.— Moore *v.* McAllister, 34 Miss. 500.

Missouri.— Grumley *v.* Webb, 48 Mo. 562.

New Jersey.— Bacon *v.* Fay, 63 N. J. Eq. 411, 51 Atl. 797.

New York.— Newman *v.* Nellis, 97 N. Y. 285; McKenna *v.* Bolger, 49 Hun 259, 1 N. Y. Suppl. 651 [*affirmed* in 117 N. Y. 651, 22 N. E. 1132]; Stowell *v.* Haslett, 5 Lans. 380 [*modified* in 57 N. Y. 637]; Carpenter *v.* Ottley, 2 Lans. 451; Willink *v.* Vanderveer, 1 Barb. 599; Polye *v.* Sheehy, 1 N. Y. City Ct. 98.

Pennsylvania.— Brown *v.* Bailey, 159 Pa. St. 121, 28 Atl. 245; Sackett *v.* Spencer, 65 Pa. St. 89; Martin *v.* McCord, 5 Watts 493, 30 Am. Dec. 342; Le Fevre *v.* Le Fevre, 4 Serg. & R. 241, 8 Am. Dec. 696.

South Carolina.—Pope *v.* Chafee, 14 Rich. Eq. 69.

Texas.— Robb *v.* San Antonio St. R. Co., 82 Tex. 392, 18 S. W. 707; Whitson *v.* Smith, 15 Tex. 33.

Wisconsin.— Goldsmith *v.* Darling, 92 Wis. 363, 66 N. W. 397; Larsen *v.* Johnson, 78 Wis. 300, 47 N. W. 615, 23 Am. St. Rep. 404.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 338.

71. *Illinois.*— Russell *v.* Hubbard, 59 Ill. 335.

Indiana.— Joseph *v.* Wild, 146 Ind. 249, 45 N. E. 467; Steinke *v.* Bentley, 6 Ind. App. 663, 34 N. E. 97.

Iowa.— Decorah Woolen Mill Co. *v.* Greer, 49 Iowa 490.

Kentucky.— Evans *v.* Miller, 4 Ky. L. Rep. 830.

Maine.— Ricker *v.* Kelly, 1 Me. 117, 10 Am. Dec. 38.

Michigan.— Kent Furniture Mfg. Co. *v.* Long, 111 Mich. 383, 69 N. W. 657.

Ohio.— Wilson *v.* Chalfant, 15 Ohio 248, 45 Am. Dec. 574.

Oregon.— Baldock *v.* Atwood, 21 Oreg. 73, 26 Pac. 1058.

Pennsylvania.— Dark *v.* Johnston, 55 Pa. St. 164, 93 Am. Dec. 732; Rhea *v.* Forsyth, 37 Pa. St. 503, 78 Am. Dec. 441.

Texas.— Texas, etc., R. Co. *v.* Jarrell, 60 Tex. 267; Harrison *v.* Boring, 44 Tex. 255.

Vermont.— Olmstead *v.* Abbott, 61 Vt. 281, 18 Atl. 315.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 339.

72. See *supra*, VII, A, 5.

73. Hinkle *v.* Fisher, 104 Ind. 84, 3 N. E. 624; Bucknam *v.* Nash, 12 Me. 474; Starratt

4. Agreements in Consideration of Marriage. There are many cases in which oral contracts have been performed after marriage, and of these it may be said that no gift or other executed transaction is to be defeated because made or carried out in pursuance of an oral antenuptial contract.[74] Antenuptial contracts that the wife's property should remain her own after marriage have been held to be executed if the husband has treated the property as his wife's and has allowed her to retain its management and control.[75]

5. Agreements Not to Be Performed Within One Year. The validity of acts done in performance of contracts which are not to be performed in one year is in no way affected by reason of the fact that the contracts, being verbal, could not have been enforced.[76]

6. Promises to Answer For Another. Where one has made good his oral promise to answer for the debt of another, his rights as guarantor are the same as if his promise had been in writing, and he may foreclose a mortgage executed for his indemnity,[77] or set off the amount paid in an action against him by the debtor;[78] and he is not allowed to dispute the validity of his acts in performance on the ground that they could not have been enforced. So his notes given to fulfil his oral guaranty are valid,[79] and he cannot recover money paid or property delivered;[80] nor can he insist that payments made on account of his guaranty shall be credited to his personal account.[81]

J. Discharge of Contract. A contract which is within the statute may be terminated by mutual consent expressed orally.[82]

K. Oral Contract as Ground of Defense or Equitable Relief — 1. General Rules. An oral contract within the scope of the statute of frauds cannot ordinarily be made the ground of a defense.[83] Thus an action to recover on a

v. Mullen, 148 Mass. 570, 20 N. E. 178, 2 L. R. A. 697; Brown *v.* Farmers' L. & T. Co., 117 N. Y. 266, 22 N. E. 952 [*affirming* 51 Hun 386, 4 N. Y. Suppl. 422].

74. *Alabama.*— Andrews *v.* Jones, 10 Ala. 400.

California.— Hussey *v.* Castle, 41 Cal. 239.

Connecticut.— Sanford *v.* Atwood, 44 Conn. 141.

Georgia.— Bradley *v.* Saddler, 54 Ga. 681.

Kentucky.— Southerland *v.* Southerland, 5 Bush 591 [*explained* in Mallory *v.* Mallory, 92 Ky. 316, 17 S. W. 737, 13 Ky. L. Rep. 579].

Maryland.— Crane *v.* Gough, 4 Md. 316; Bowie *v.* Bowie, 1 Md. 87; Dugan *v.* Gittings, 3 Gill 138, 43 Am. Dec. 306.

New York.— Kramer *v.* Kramer, 90 N. Y. App. Div. 176, 86 N. Y. Suppl. 129; Smith *v.* Kane, 2 Paige 303.

Vermont.— Flowers *v.* Kent, Brayt. 238.

Virginia.— Argenbright *v.* Campbell, 3 Hen. & M. 144.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 335.

75. Sanford *v.* Atwood, 44 Conn. 141; Bradley *v.* Saddler, 54 Ga. 681; Flowers *v.* Kent, Brayt. (Vt.) 238. In Vermont the court later adopted the view that irrespective of any treatment of the property after marriage, the oral contract, not being void, operated to prevent the divesting of the title of the wife's property; and that as the title remained in her she could assert it against her husband or his creditors without violating the statute. Child *v.* Pearl, 43 Vt. 224; Richardson *v.* Wait, 39 Vt. 535; Albee *v.* Cole, 39 Vt. 319; Caldwell *v.* Renfrew, 33 Vt. 213.

76. *California.*—Pico *v.* Cuyas, 47 Cal. 174.

Illinois.— Bennett *v.* Matson, 41 Ill. 332.

Kentucky.— Craig *v.* Vanpelt, 3 J. J. Marsh. 489.

New Jersey.— King *v.* King, 9 N. J. Eq. 44.

New York.— Adams *v.* Fitzpatrick, 125 N. Y. 124, 26 N. E. 143 [*affirming* 56 N. Y. Super. Ct. 580, 5 N. Y. Suppl. 181]; Dodge *v.* Crandall, 30 N. Y. 294; Ball *v.* Stover, 82 Hun 460, 31 N. Y. Suppl. 781; Hodge *v.* Newton, 14 Daly 372, 13 N. Y. St. 139.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 337.

77. Madden *v.* Floyd, 69 Ala. 221.

78. Beal *v.* Brown, 13 Allen (Mass.) 114.

79. Schultz *v.* Noble, 77 Cal. 79, 19 Pac. 182; Lines *v.* Smith, 4 Fla. 47.

80. Putnam *v.* Swinney, 63 Iowa 383, 19 N. W. 286; Webster *v.* Le Compte, 74 Md. 249, 22 Atl. 232; Fowler *v.* Moller, 10 Bosw. (N. Y.) 374; Richardson *v.* Crandall, 30 How. Pr. (N. Y.) 134; Central Texas Min., etc., Co. *v.* Weems, 73 Tex. 252, 11 S. W. 270.

Goods delivered from the guarantor's store by his clerk in his absence will not be held to be delivered in pursuance of his oral guaranty. Meiers *v.* Reen, 16 Ill. App. 537.

81. Armitage *v.* Saunders, 94 Mich. 482, 54 N. W. 174; Mueller *v.* Wiebracht, 47 Mo. 468.

82. Stone *v.* Buckner, 12 Sm. & M. (Miss.) 73; Picker *v.* Fitzelle, 60 N. Y. App. Div. 451, 69 N. Y. Suppl. 902; Jeffery *v.* Walker, 72 Hun (N. Y.) 628, 25 N. Y. Suppl. 161.

Executed oral agreement in full discharge of contract required to be in writing see Contracts, 9 Cyc. 599.

83. *Delaware.*— Scotten *v.* Brown, 4 Harr. 324.

quantum meruit for work and labor will not be defeated by proof that the labor was furnished under a contract within the statute.[84] So an oral contract for the purchase of land to be taken in part payment of a debt is inadmissible as a defense to action on the debt.[85] And an oral contract by plaintiff to convey cannot avail defendant in an action for the possession of land.[86] An oral lease which is within the statute is no defense to a possessory action,[87] nor to an action on a prior written lease on the theory of surrender by operation of law.[88] Neither can the breach of an oral contract within the statute be used in recoupment or set-off.[89] An oral contract is sometimes admissible purely as evidence.[90] So it has been held competent to show a plan of fraud,[91] or, in an action for services, that the services were not rendered for the benefit of defendant,[92] or, in an action for rent, that one occupied land rent free by oral permission.[93] So an oral lease may be shown to support the landlord's right of distress for rent when the tenant has entered;[94] and, in an action for work and labor done under an oral contract within the statute, the contract is admissible for the purpose of showing that there was to be no payment until all the work was done.[95]

2. Contract in Question Collaterally. If an oral contract within the statute of frauds comes in question only collaterally, it may constitute a valid defense.[96]

Illinois.— McGinnis *v.* Fernandes, 126 Ill. 228, 19 N. E. 44.

Indiana.— Smith *v.* Stevens, 3 Ind. 332.

Maine.— Bernier *v.* Cabot Mfg. Co., 71 Me. 506, 36 Am. Rep. 343.

Maryland.— Baker *v.* Lauterbach, 68 Md. 64, 11 Atl. 703.

Massachusetts.— King *v.* Welcome, 5 Gray 41.

Missouri.— Suggett *v.* Cason, 26 Mo. 221.

New York.— Little *v.* Martin, 3 Wend. 219, 20 Am. Dec. 688.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 343.

In Kentucky the broad ground is taken that as the statute only prevents actions on oral contracts, their validity for all other purposes is unaffected by the statute (Gray *v.* Gray, 2 J. J. Marsh. 21; Brown *v.* East, 5 T. B. Mon. 405; Roberts *v.* Tennell, 3 T. B. Mon. 247; Barnes *v.* Wise, 3 T. B. Mon. 167; Lucas *v.* Mitchell, 3 A. K. Marsh. 244; Kenny *v.* Marsh, 2 A. K. Marsh. 46; Hite *v.* Hise, 6 Ky. L. Rep. 363), but the terms of the contract must be certain and definite (Nichols *v.* Nichols, 1 A. K. Marsh. 166).

An oral agreement as to the disposition of land made after the rescission of a written agreement to convey is no defense to an action by the purchaser to recover purchase-money paid under the agreement in writing. Weaver *v.* Aitcheson, 65 Mich. 285, 32 N. W. 436.

84. *Connecticut.*— Comes *v.* Lamson, 16 Conn. 246.

Delaware.— McGartland *v.* Steward, 2 Houst. 277.

Illinois.— Peck *v.* McCormick Harvesting Mach. Co., 196 Ill. 295, 63 N. E. 731.

Indiana.— Tague *v.* Hayward, 25 Ind. 427.

Massachusetts.— King *v.* Welcome, 5 Gray 41.

Michigan.— Lemon *v.* Randall, 124 Mich. 687, 83 N. W. 994.

South Carolina.— Mendelsohn *v.* Banoy, 57 S. C. 147, 35 S. E. 499.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 343.

85. Schlanker *v.* Smith, 27 Mo. App. 516; Galway *v.* Shields, 1 Mo. App. 546; Cleveland *v.* Evans, 5 S. D. 53, 58 N. W. 8.

86. Masterson *v.* Little, 75 Tex. 682, 13 S. W. 154.

87. Wheeler *v.* Frankenthal, 78 Ill. 124.

88. Leavitt *v.* Stern, 159 Ill. 526, 42 N. E. 869 [*affirming* 55 Ill. App. 416].

89. Peck *v.* McCormick Harvesting Mach. Co., 94 Ill. App. 586; Kelley *v.* Thompson, 181 Mass. 122, 63 N. E. 332; Delventhal *v.* Jones, 53 Mo. 460.

90. Leach *v.* Ritzke, 86 Ill. App. 483 (holding that where plaintiff in a possessory action relies on defendant's breach of an oral contract, defendant may show the terms of the contract to prove that there was no breach); Friend *v.* Pettingill, 116 Mass. 515 (holding that an agreement to work on land for one third of the profits or a conveyance of land may be shown as a defense to an action for work and labor). And see *infra*, XI, B, 2.

91. McNaughton *v.* Smith, (Mich. 1904) 99 N. W. 382; Busick *v.* Van Ness, 44 N. J. Eq. 82, 12 Atl. 609.

92. Mahan *v.* Close, 63 Minn. 21, 65 N. W. 95.

93. Bailey *v.* Ward, 32 La. Ann. 839.

94. Roberts *v.* Tennell, 3 T. B. Mon. (Ky.) 247; Edwards *v.* Clemons, 24 Wend. (N. Y.) 480.

95. Clark *v.* Terry, 25 Conn. 395; Philbrook *v.* Belknap, 6 Vt. 383.

96. Doe *v.* Cochran, 2 Ill. 209; Owens *v.* Lewis, 46 Ind. 488, 15 Am. Rep. 295; Philbrook *v.* Belknap, 6 Vt. 383; Crosby *v.* Wadsworth, 6 East 602, 2 Smith K. B. 559, 8 Rev. Rep. 556; Carrington *v.* Roots, 6 L. J. Exch. 95, 1 M. & H. 14, 2 M. & W. 248.

It is no defense to a suit to compel a conveyance that the agreement to convey of other parties whose deed is necessary to vest complete title in plaintiff is merely oral. Blanchard *v.* Blanchard, 33 Misc. (N. Y.) 284, 67 N. Y. Suppl. 478.

But the fact that oral misrepresentations were made in negotiations resulting in an oral contract within the statute constitutes no defense to an action of fraud counting on such misrepresentations.[97]

L. Persons to Whom Statute Is Available — 1. Strangers in General. It is held almost universally that the defenses arising under the statute of frauds are personal to the parties to the contract and no one else can take advantage of them or require the parties to do so, and this is true whether the contract be for the sale of lands[98] or of goods,[99] or an oral agreement of guaranty.[1] It is not open to one who is sued for damage to land of which plaintiff is in possession under an oral contract of sale to object that plaintiff's contract is by parol;[2] nor to an agent of a mortgagee who has acted adversely to the mortgagee's interest that the mortgage was oral.[3]

97. *Colorado.*— Benjamin *v.* Mattler, 3 Colo. App. 227, 32 Pac. 837.

Illinois.— Tate *v.* Watts, 42 Ill. App. 103.

Kentucky.— Schneider *v.* Schleutker, 64 S. W. 505, 23 Ky. L. Rep. 951.

Maryland.— Lamm *v.* Port Deposit Homestead Assoc., 49 Md. 233, 33 Am. Rep. 246.

Missouri.— Corder *v.* O'Neill, 176 Mo. 401, 75 S. W. 764.

New York.— Rice *v.* Manley, 66 N. Y. 82, 23 Am. Rep. 30 [*reversing* 2 Hun 492, 5 Thomps. & C. 14]; Kirtland *v.* Schanck, 61 Barb. 348; Benton *v.* Pratt, 2 Wend. 385, 20 Am. Dec. 623. See, however, Dung *v.* Parker, 52 N. Y. 494 [*reversing* 3 Daly 89].

Rhode Island.— Barry *v.* Wixon, 22 R. I. 16, 46 Atl. 42; Arnold *v.* Garst, 16 R. I. 4, 11 Atl. 167.

Virginia.— McMullin *v.* Sanders, 79 Va. 356.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 343.

98. *Alabama.*— Mewburn *v.* Bass, 82 Ala. 622, 2 So. 520; Cooper *v.* Hornsby, 71 Ala. 62; Garrett *v.* Garrett, 27 Ala. 687.

California.— Ryan *v.* Tomlinson, 39 Cal. 639.

Colorado.— Daum *v.* Conley, 27 Colo. 56, 59 Pac. 753.

Illinois.— King *v.* Bushnell, 121 Ill. 656, 13 N. E. 245; Chicago Dock Co. *v.* Kinzie, 49 Ill. 289; Hughes *v.* Lumsden, 8 Ill. App. 185.

Indiana.— Burrow *v.* Terre Haute, etc., R. Co., 107 Ind. 432, 8 N. E. 167; Bodkin *v.* Merit, 102 Ind. 293, 1 N. E. 625; Savage *v.* Lee, 101 Ind. 514; Ferguson *v.* Ramsey, 41 Ind. 511.

Kentucky.— Crawford *v.* Woods, 6 Bush 200; Clary *v.* Marshall, 5 B. Mon. 266; Oldham *v.* Sale, 1 B. Mon. 76; Bohannon *v.* Pace, 6 Dana 194; Jacob *v.* Smith, 5 J. J. Marsh. 380.

Minnesota.— Mott *v.* Ferguson, 92 Minn. 201, 99 N. W. 804.

Mississippi.— Grisham *v.* Lutric, 76 Miss. 444, 24 So. 169.

Missouri.— St. Louis, etc., R. Co. *v.* Clark, 121 Mo. 169, 25 S. W. 192, 906, 26 L. R. A. 751; Coe *v.* Griggs, 76 Mo. 619; Huffman *v.* Ackley, 34 Mo. 277; Scudder *v.* Morris, 107 Mo. App. 634, 82 S. W. 217; Leahey *v.* Leahey, 11 Mo. App. 413.

North Carolina.— Davis *v.* Inscoe, 84 N. C. 396.

Pennsylvania.— Christy *v.* Brien, 14 Pa. St. 248.

South Carolina.— Rapley *v.* Klugh, 40 S. C. 134, 18 S. E. 680.

Tennessee.— Sneed *v.* Bradley, 4 Sneed 301.

Texas.— McManus *v.* Matthews, (Civ. App. 1900) 55 S. W. 589; Bell *v.* Beazley, 18 Tex. Civ. App. 639, 45 S. W. 401.

Utah.— Murray Hill Min., etc., Co. *v.* Havenor, 24 Utah 73, 66 Pac. 762.

Wisconsin.— Smith *v.* Clarke, 7 Wis. 551.

United States.— Book *v.* Justice Min. Co., 58 Fed. 106; Garcia *v.* U. S., 37 Ct. Cl. 243.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 344.

Heirs at law of a landowner may object to the validity of an oral contract to convey. Vaughn *v.* Vaughn, 100 Tenn. 282, 45 S. W. 677. But see Hawkins *v.* Dunmore, 24 Misc. (N. Y.) 623, 54 N. Y. Suppl. 165.

An assignee of a title bond who procured the assignment by fraud cannot set up against a subsequent assignee that the latter's assignment was received in fulfilment of an oral contract. McCormac *v.* Smith, 3 T. B. Mon. (Ky.) 429.

Lessor and lessee.— A lessor cannot object that his lessee's assignment is not in writing. B. Roth Tool Co. *v.* Champ Spring Co., 93 Mo. App. 530, 67 S. W. 967. The rule that the defense is personal is exemplified by a decision to the effect that it is not open even to a lessee if the lessor is willing to perform. Hallberg *v.* Brosseau, 64 Ill. App. 520.

99. Lavender *v.* Hall, 60 Ala. 214; Cowan *v.* Adams, 10 Me. 374, 25 Am. Dec. 242; Rickards *v.* Cunningham, 10 Nebr. 417, 6 N. W. 475. But see Law *v.* Hatcher, 4 Blackf. (Ind.) 364.

The defense that an assignment of a debt is not in writing is not open to the debtor. James *v.* Hicks, 58 Mo. App. 521. See also Burton *v.* Gage, 85 Minn. 355, 88 N. W. 997.

1. McCoy *v.* Williams, 6 Ill. 584; Tibbetts *v.* Flanders, 18 N. H. 284.

Sureties cannot object that the contract the performance of which they insure was not in writing. Davenport First Presb. Church *v.* Swanson, 100 Ill. App. 39.

2. St. Louis, etc., R. Co. *v.* Graham, 55 Ark. 294, 18 S. W. 56; International, etc., R. Co. *v.* Searight, 8 Tex. Civ. App. 593, 28 S. W. 39.

3. Dana *v.* Duluth Trust Co., 96 Wis. 663, 75 N. W. 429.

2. Fraudulent Intermeddlers and Tort-Feasors. One who has fraudulently prevented a contract from being carried out cannot defend on the ground that the contract was oral;[4] nor can one who retains money which has been collected for another on a sale of land object that the contract of sale, being oral, is within the statute.[5]

3. Creditors. It is not open to a creditor of a vendor to object to a sale, either executory[6] or executed,[7] on the ground that it is within the statute; such defense belongs to the debtor alone. Nor can creditors who succeed to a debtor's rights set up the statute in defense of a liability of the debtor.[8]

4. Vendees, Grantees, and Lessees. In regard to the grantees and lessees of a party who is entitled to plead the statute the decisions are by no means unanimous. In certain jurisdictions it is held that they are so far strangers to the original contract that they cannot avail themselves of the statute.[9] In other jurisdictions the rule is that they so far succeed to the rights of their grantor or lessor that they may set up the statute;[10] and the same is held to be true of vendees of personalty; they may set up any rights arising under the statute which their vendor had.[11]

5. Insurance Companies. One who has a contractual right to property has an insurable interest therein, and it is not open to an insurer to object that the insured's contract was by parol;[12] and one may have an insurable interest in the

4. Jackson *v.* Stanfield, 137 Ind. 592, 36 N. E. 345, 37 N. E. 14, 23 L. R. A. 588; Rice *v.* Manley, 66 N. Y. 82, 23 Am. Rep. 30 [*reversing* 2 Hun 492, 5 Thomps. & C. 14]; Benton *v.* Pratt, 2 Wend. (N. Y.) 385, 20 Am. Dec. 623. See also *supra*, X, K, 2.

5. Galley *v.* Galley, 14 Nebr. 174, 15 N. W. 318; Hagaman *v.* Gillis, 9 S. D. 61, 68 N. W. 192.

6. *Alabama.*— Gordon *v.* Tweedy, 71 Ala. 202.

Illinois.— Cross *v.* Weare Commission Co., 45 Ill. App. 255. See, however, Gary *v.* Newton, 201 Ill. 170, 66 N. E. 267.

Indiana.— Wright *v.* Jones, 105 Ind. 17, 4 N. E. 281.

Kentucky.— Walker *v.* Walker, 41 S. W. 315, 19 Ky. L. Rep. 626.

Nebraska.— Cresswell *v.* McCaig, 11 Nebr. 222, 9 N. W. 52; McCormick *v.* Drummett, 9 Nebr. 384, 2 N. W. 729.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 346.

7. Dixon *v.* Duke, 85 Ind. 434; Morrison *v.* Collier, 79 Ind. 417; Brown *v.* Rawlings, 72 Ind. 505; Aultman *v.* Booth, 95 Mo. 383, 8 S. W. 742; Lefferson *v.* Dallas, 20 Ohio St. 68; Minns *v.* Morse, 15 Ohio 568, 45 Am. Dec. 590; Roberts *v.* Francis, 2 Heisk. (Tenn.) 127.

8. Kemp *v.* National Bank, 109 Fed. 48, 48 C. C. A. 213.

An attachment by a sheriff has been held to carry all the debtor's rights, including the right to claim that a prior sale was invalid by reason of the statute of frauds. Waite *v.* McKelvy, 71 Minn. 167, 73 N. W. 727.

9. *Alabama.*— Shakespeare *v.* Alba, 76 Ala. 351; Meyer *v.* Mitchell, 75 Ala. 475.

Colorado.— Hill *v.* Groesbeck, 29 Colo. 161, 67 Pac. 167.

Connecticut.— Bulkley *v.* Storer, 2 Day 531.

Kentucky.— Walker *v.* Walker, 55 S. W. 726, 21 Ky. L. Rep. 1521.

Michigan.— Burke *v.* Wilber, 42 Mich. 327, 3 N. W. 861.

Ohio.— O'Connor *v.* Ryan, 6 Ohio Dec. 1095, 10 Am. L. Rec. 477, 6 Cinc. L. Bul. 819 [*affirmed* in 41 Ohio St. 368].

See 23 Cent. Dig. tit. "Frauds, Statute of," §§ 347, 348.

In Illinois and Indiana lessees cannot set up the statute (Best *v.* Davis, 44 Ill. App. 624; Boyce *v.* Graham, 91 Ind. 420), but grantees may (Grundies *v.* Kelso, 41 Ill. App. 200; Hunter *v.* Bales, 24 Ind. 299).

A mortgagee cannot raise the objection that a previous contract by his mortgagor was verbal. Collins *v.* Moore, 115 Ga. 327, 41 S. E. 609.

10. *Kentucky.*— Petty *v.* Petty, 4 B. Mon. 215, 39 Am. Dec. 501.

Nebraska.— Dailey *v.* Kinsler, 35 Nebr. 835, 53 N. W. 973; Hansen *v.* Berthelsen, 19 Nebr. 433, 27 N. W. 423.

Tennessee.— King *v.* Coleman, 98 Tenn. 561, 40 S. W. 1082.

Texas.— Sanborn *v.* Murphy, 86 Tex. 437, 25 S. W. 610; Masterson *v.* Little, 75 Tex. 682, 13 S. W. 154.

United States.— Moore *v.* Crawford, 130 U. S. 122, 9 S. Ct. 447, 32 L. ed. 878 [*affirming* 28 Fed. 824]; Bullion, etc., Bank *v.* Otto, 59 Fed. 256.

See 23 Cent. Dig. tit. "Frauds, Statute of," §§ 347, 348.

11. Shelton *v.* Thompson, 96 Mo. App. 327, 70 S. W. 256.

12. Mutual Mill Ins. Co. *v.* Gordon, 20 Ill. App. 559; Amsinck *v.* American Ins. Co., 129 Mass. 185; Cowell *v.* Phœnix Ins. Co., 126 N. C. 684, 36 S. E. 184, holding that a policy requiring unconditional ownership on the part of the insured is actionable notwithstanding the fact that the conveyance to the insured does not satisfy the requirements of the statute and could be defeated by the grantor.

life of his debtor notwithstanding that there may be a defense to his claim under the statute of frauds.[13]

6. Public Authorities. The public authorities, not parties to a contract, may nevertheless raise the question of its validity under the statute of frauds.[14]

M. Estoppel and Waiver.[15] Since a contract within the statute of frauds is not void or illegal and is subject merely to a defense, such defense may be waived by the party entitled thereto.[16] So an oral agreement to pay another's note may become enforceable against one who in pursuance of it signs a note in renewal of the first note,[17] and a waiver of the statute may be implied from the action of a vendee of bonds in instituting proceedings for an accounting against the seller, with whom he has left them for a resale;[18] and a waiver once made cannot be withdrawn.[19] One may become estopped to set up the statute,[20] either by his acts in recognition of the contract,[21] by his election of another ground of defense,[22] by failing to plead the statute,[23] by admitting the contract in his pleading,[24] or by failure to object to the introduction of evidence of the contract.[25]

XI. PROCEDURE.

A. Pleading[26] — **1. Declaration or Complaint.** Except in a few states wherein the codes of civil procedure are construed as having changed the rule formerly prevailing,[27] a declaration or complaint on a contract which is required

13. North Western Mut. L. Ins. Co. *v.* Heimann, 93 Ind. 24. But see O'Neill *v.* New York Cent., etc., R. Co., 60 N. Y. 138; Felthouse *v.* Bindley, 11 C. B. N. S. 869, 31 L. J. C. P. 204, 6 L. T. Rep. N. S. 157, 10 Wkly. Rep. 423, 103 E. C. L. 869; Stockdale *v.* Dunlop, 4 Jur. 681, 9 L. J. Exch. 83, 6 M. & W. 224.

14. Sebben *v.* Trezevant, 3 Desauss. (N. C.) 213 (where it was held that the public escheator, succeeding to the title of realty, in the absence of relatives capable of inheriting, might interpose the statute to a bill calling for specific performance of an oral contract to sell); Mahan *v.* U. S., 16 Wall. (U. S.) 143, 21 L. ed. 307 (where it was held that an oral sale of cotton within the statute would not be deemed to have so far passed title to a vendee as to give him any standing as a claimant for its proceeds). There is a statement in Briggs *v.* U. S., 143 U. S. 346, 12 S. Ct. 391, 36 L. ed. 180, a case similar to Mahan *v.* U. S., *supra*, to the opposite effect, but it was not necessary to the decision of the case, and was made without any reference to the earlier case.

15. See also *infra*, XI, A, 2; XI, C, 1.

16. Brown *v.* Board, 3 Ky. L. Rep. 612.

17. Boulden *v.* Scircle, 34 Ind. 60.

18. Porter *v.* Wormser, 94 N. Y. 431.

19. Battell *v.* Matot, 58 Vt. 271, 5 Atl. 479.

20. Dwight *v.* Williams, 25 Misc. (N. Y.) 667, 55 N. Y. Suppl. 201; Dock *v.* Boyd, 93 Pa. St. 92. *Contra*, Smith *v.* Tramel, 68 Iowa 488, 27 N. W. 471; Smith *v.* Smith, 62 Mo. App. 596.

Estoppel held not to arise.— A mere failure of a prospective lessee to notify his lessor that he will not perform will not estop him to set up the statute (White *v.* Levy, 93 Ala. 484, 9 So. 164); nor will an estoppel to deny payment arise from the waiver of a condition of an auction sale that part payment should be made (Baltzen *v.* Nicolay, 53 N. Y. 467 [*reversing* 35 N. Y. Super. Ct. 203]). Neither will a wife be estopped to deny the validity of a contract which she could not make because of coverture (Percifield *v.* Black, 132 Ind. 384, 31 N. E. 955); nor is a third person estopped to deny the validity of an oral transfer by reason of the fact that it was made under his advice (Sexey *v.* Adkison, 40 Cal. 408).

21. Curtis *v.* Hulburd, 46 Ill. App. 419; Geneva Mineral Springs Co. *v.* Coursey, 45 N. Y. App. Div. 268, 61 N. Y. Suppl. 98, 47 N. Y. App. Div. 634, 62 N. Y. Suppl. 1137; Schenectady County *v.* McQueen, 15 Hun (N. Y.) 551; Carter *v.* Hammett, 12 Barb. (N. Y.) 253; Roosevelt *v.* Smith, 17 Misc. (N. Y.) 323, 40 N. Y. Suppl. 381; Hodges *v.* Howard, 5 R. I. 149.

22. Graff *v.* Foster, 67 Mo. 512; Christensen *v.* Wooley, 41 Mo. App. 53; Mooney *v.* Elder, 56 N. Y. 238; Doyle *v.* Beaupre, 17 N. Y. Suppl. 287 [*affirmed* in 137 N. Y. 558, 33 N. E. 337].

23. See *infra*, XI, A, 1–3.

24. See *infra*, XI, A, 1–3.

25. See *infra*, XI, C, 1.

26. See, generally, Pleading.

27. Horner *v.* McConnell, 158 Ind. 280, 63 N. E. 472; Lowe *v.* Turpie, 147 Ind. 652, 44 N. E. 25, 47 N. E. 150, 37 L. R. A. 233; Waymire *v.* Waymire, 141 Ind. 164, 40 N. E. 523; Jarboe *v.* Severin, 85 Ind. 496; Pulse *v.* Miller, 81 Ind. 190; Baynes *v.* Chastain, 68 Ind. 376; Carlisle *v.* Brennan, 67 Ind. 12; Langford *v.* Freeman, 60 Ind. 46; Western Union Tel. Co. *v.* Hopkins, 49 Ind. 223; King *v.* Enterprise Ins. Co., 45 Ind. 43; McCoy *v.* McCoy, 32 Ind. App. 38, 69 N. E. 193, 102 Am. St. Rep. 223; Crafton *v.* Carmichael, 29 Ind. App. 320, 64 N. E. 627; Boos *v.* Hinkle, 18 Ind. App. 509, 48 N. E. 383; Burden *v.* Knight, 82 Iowa 584, 48 N. W. 985; Babcock *v.* Meek, 45 Iowa 137; Morgan *v.* Wickliffe, 110 Ky. 215, 61 S. W.

by the statute of frauds to be in writing need not contain an allegation that it is in writing;[28] there is a presumption to that effect which will save the declaration on demurrer;[29] and it is immaterial whether the promise declared on be a

13, 1017, 22 Ky. L. Rep. 1648, 1870; Smith *v.* Theobald, 86 Ky. 141, 5 S. W. 394, 9 Ky. L. Rep. 449; Smith *v.* Fah, 15 B. Mon. (Ky.) 443; Smith *v.* Coleman, 1 Bibb (Ky.) 488; Smith *v.* Theobald, 7 Ky. L. Rep. 444.

In New York it has been held that the code of civil procedure requires the complaint to state that the agreement is in writing (Le Roy *v.* Shaw, 2 Duer 626; Thurman *v.* Stevens, 2 Duer 609), but these decisions have been virtually overruled). See *infra*, note 28 *et seq.*

28. *Alabama.*— Dexter *v.* Ohlander, 89 Ala. 262, 7 So. 115; Ritch *v.* Thornton, 65 Ala. 309; Rigby *v.* Norwood, 34 Ala. 129; Robinson *v.* Tipton, 31 Ala. 595; Perrine *v.* Leachman, 10 Ala. 140; Click *v.* McAfee, 7 Port. 62; Brown *v.* Adams, 1 Stew. 51, 18 Am. Dec. 36.

California.— Morrow *v.* Norton, (1894) 38 Pac. 953.

Georgia.—Taliaferro *v.* Smiley, 112 Ga. 62, 37 S. E. 106; Long *v.* Lewis, 16 Ga. 154.

Indiana.— Booker *v.* Ray, 17 Ind. 522; Miller *v.* Upton, 6 Ind. 53; Bailey *v.* Ricketts, 4 Ind. 488; Hunt *v.* Gregg, 8 Blackf. 105.

Maine.— Cleaves *v.* Foss, 4 Me. 1.

Maryland.— Horner *v.* Frazier, 65 Md. 1, 4 Atl. 133.

Massachusetts.—Elliott *v.* Jenness, 111 Mass. 29; Price *v.* Weaver, 13 Gray 272.

Michigan.— Harris Photographic Supply Co. *v.* Fisher, 81 Mich. 136, 45 N. W. 661.

Missouri.— Mathews *v.* Wallace, 104 Mo. App. 96, 78 S. W. 296.

Montana.— Sweetland *v.* Barrett, 4 Mont. 217, 1 Pac. 745.

Nebraska.— Schmid *v.* Schmid, 37 Nebr. 628, 56 N. W. 207.

New Jersey.— Whitehead *v.* Burgess, 61 N. J. L. 75, 38 Atl. 802.

New York.— Miller *v.* Munroe, 59 N. Y. App. Div. 623, 69 N. Y. Suppl. 861; Hilliard *v.* Austin, 17 Barb. 141; Stern *v.* Drinker, 2 E. D. Smith 401; Dupignac *v.* Bernstrom, 37 Misc. 677, 76 N. Y. Suppl. 381 [*affirmed* in 76 N. Y. App. Div. 105, 78 N. Y. Suppl. 705]; Ottman *v.* Fletcher, 10 N. Y. Suppl. 128, 23 Abb. N. Cas. 430; Lewin *v.* Stewart, 10 How. Pr. 509; Elting *v.* Vanderlyn, 4 Johns. 237; Miller *v.* Drake, 1 Cai. 45. In Rockey *v.* Haslett, 91 N. Y. App. Div. 181, 86 N. Y. Suppl. 320, it was held that defendant might require plaintiff to specify whether the lease declared on was in writing.

Ohio.— Schwick *v.* Fulton, 6 Ohio Dec. (Reprint) 1168, 11 Am. L. Rec. 47; Hepworth *v.* Pendleton, 5 Ohio Dec. (Reprint) 386, 5 Am. L. Rec. 285; Rarey *v.* Cornell, 2 Ohio Dec. (Reprint) 315, 2 West. L. Month. 415; Donaldson *v.* Donaldson, 31 Cinc. L. Bul. 102.

Tennessee.— Carroway *v.* Anderson, 1 Humphr. 61; Townsend *v.* Sharp, 2 Overt. 192.

Texas.— Gonzales *v.* Chartier, 63 Tex. 36; Horm *v.* Shamblin, 57 Tex. 243; Lessing *v.* Cunningham, 55 Tex. 231; Lewis *v.* Alexander, 51 Tex. 578.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 353.

A demurrer will not lie to a bill in equity which sets out an agreement within the statute of frauds without alleging a compliance with the statute. Whiting *v.* Dyer, 21 R. I. 85, 41 Atl. 895; Cranston *v.* Smith, 6 R. I. 231.

29. *Alabama.*— Evans *v.* Southern R. Co., 133 Ala. 482, 32 So. 138; Strouse *v.* Elting, 110 Ala. 132, 20 So. 123; Beadle *v.* Seat, 102 Ala. 532, 15 So. 243; Harper *v.* Campbell, 102 Ala. 342, 14 So. 650; Piedmont Land Imp. Co. *v.* Piedmont Foundry, etc., Co., 96 Ala. 289, 11 So. 332.

Arkansas.—Gale *v.* Harp, 64 Ark. 462, 43 S. W. 144.

California.—Curtiss *v.* Ætna L. Ins. Co., 90 Cal. 245, 27 Pac. 211, 25 Am. St. Rep. 114; Barnard *v.* Lloyd, 85 Cal. 131, 24 Pac. 658; Brennan *v.* Ford, 46 Cal. 7.

Colorado.— Hunt *v.* Hayt, 10 Colo. 278, 15 Pac. 410; Tucker *v.* Edwards, 7 Colo. 209, 3 Pac. 233.

Connecticut.—Seymour *v.* Mitchel, 2 Root 145.

Georgia.—Ansley *v.* Hightower, 120 Ga. 719, 48 S. E. 197; Blumenthal *v.* Moore, 106 Ga. 424, 32 S. E. 344; Draper *v.* Macon Dry Goods Co., 103 Ga. 661, 30 S. E. 566, 68 Am. St. Rep. 136; Printup *v.* Johnson, 19 Ga. 73.

Idaho.— Bowman *v.* Ainslie, 1 Ida. 644.

Illinois.— Speyer *v.* Desjardins, 144 Ill. 641, 32 N. E. 283, 36 Am. St. Rep. 473; Switzer *v.* Skiles, 8 Ill. 529, 44 Am. Dec. 723; Williams *v.* Davis, 46 Ill. App. 228.

Maryland.— Hamilton *v.* Thirston, 93 Md. 213, 48 Atl. 709.

Michigan.— Stearns *v.* Lake Shore, etc., R. Co., 112 Mich. 651, 71 N. W. 148.

Minnesota.— Laybourn *v.* Zinns, 92 Minn. 208, 99 N. W. 798.

Missouri.— Phillips *v.* Hardenburg, 181 Mo. 463, 80 S. W. 891; Stillwell *v.* Hamm, 97 Mo. 579, 11 S. W. 252; Sharkey *v.* McDermott, 91 Mo. 647, 4 S. W. 107, 60 Am. Rep. 270; Sherwood *v.* Saxton, 63 Mo. 78; Wildbahn *v.* Robidoux, 11 Mo. 659; Walker *v.* Cooper, 97 Mo. App. 441, 71 S. W. 370; Reed *v.* Crane, 89 Mo. App. 670; Van Idour *v.* Nelson, 60 Mo. App. 523.

Montana.— Mayger *v.* Cruse, 5 Mont. 485, 6 Pac. 333.

New Jersey.— Hinchman *v.* Rutan, 31 N. J. L. 496.

New York.— Marston *v.* Swett, 66 N. Y. 206, 23 Am. Rep. 43 [*reversing* 4 Hun 153]; Lupean *v.* Brainard, 20 N. Y. App. Div. 212, 46 N. Y. Suppl. 1044, 4 N. Y. Annot. Cas. 322; Gibbs *v.* Nash, 4 Barb. 449; Oldham *v.*

promise to answer for the debt of another,[30] or a contract relating to land,[31] or one for the sale of goods.[32] So in declaring on a contract executed by an agent,

Pinkus, 31 Misc. 768, 64 N. Y. Suppl. 353; Cahill Iron Works *v.* Pemberton, 27 N. Y. Suppl. 927, 931, 30 Abb. N. Cas. 450; Lewin *v.* Stewart, 10 How. Pr. 509; Coles *v.* Bowne, 10 Paige 526.

North Carolina.— Loughran *v.* Giles, 110 N. C. 423, 14 S. E. 966.

Ohio.— Schwick *v.* Fulton, 8 Cinc. L. Bul. 32, 6 Ohio Dec. (Reprint) 1168, 11 Am. L. Rec. 47.

South Carolina.—Groce *v.* Jenkins, 28 S. C. 172, 5 S. E. 352.

Texas.—Robb *v.* San Antonio St. R. Co., 82 Tex. 392, 18 S. W. 707; Murphy *v.* Stell, 43 Tex. 123; New York, etc., Land Co. *v.* Dooley, (Civ. App. 1903) 77 S. W. 1030; Richerson *v.* Moody, 17 Tex. Civ. App. 67, 42 S. W. 317; Day *v.* Dalziel, (Civ. App. 1895) 32 S. W. 377; Tinsley *v.* Miles, (Civ. App. 1894) 26 S. W. 999; Slayden *v.* Ellison, (Civ. App. 1902) 68 S. W. 715.

Wisconsin.— Robbins *v.* Deverill, 20 Wis. 142.

United States.— Sanborn *v.* Rodgers, 33 Fed. 851.

England.— Young *v.* Austen, L. R. 4 C. P. 553, 38 L. J. C. P. 233, 20 L. T. Rep. N. S. 396, 17 Wkly. Rep. 706; Williams *v.* Leper, 3 Burr. 1886, 2 Wils. P. C. 302; Birch *v.* Bellamy, 12 Mod. 540. The rule in equity was different until changed by chancery rule. Whitchurch *v.* Bevis, 2 Bro. Ch. 559, 29 Eng. Reprint 306; Child *v.* Godolphin, 1 Dick. 39, 21 Eng Reprint, 181; Barkworth *v.* Young, 4 Drew. 1, 3 Jur. N. S. 34, 26 L. J. Ch. 153, 5 Wkly. Rep. 156; Spurrier *v.* Fitzgerald, 6 Ves. Jr., 548, 31 Eng Reprint 1189. See Catlin *v.* King, 5 Ch. D. 660, 46 L. J. Ch. 384, 36 L. T. Rep. N. S. 526, 25 Wkly. Rep. 550, a case under the new rule.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 354.

30. *Alabama.*— Brown *v.* Barnes, 6 Ala. 694; Blick *v.* Briggs, 6 Ala. 687; Pettigrew *v.* Pettigrew, 1 Stew. 580.

California.— Wakefield *v.* Greenhood, 29 Cal. 597.

Illinois.—Porter *v.* Drennan, 13 Ill. App. 362.

Indiana.— Mills *v.* Kuykendall, 2 Blackf. 47.

Maryland.— Ecker *v.* McAllister, 45 Md. 290; Ecker *v.* Bohn, 45 Md. 278.

Massachusetts.— Mullaly *v.* Holden, 123 Mass. 583.

Michigan.— Dayton *v.* Williams, 2 Dougl. 31.

Minnesota.— Walsh *v.* Kattenburgh, 8 Minn. 127; Wentworth *v.* Wentworth, 2 Minn. 277, 72 Am. Dec. 97.

Missouri.— Miles *v.* Jones, 28 Mo. 87.

New Hampshire.— Walker *v.* Richards, 39 N. H. 259.

New Jersey.— Shepherd *v.* Layton, 3 N. J. L. 618.

New York.— Hanna *v.* Laurence, 9 N. Y. St. 619; Elting *v.* Vanderlyn, 4 Johns. 237.

Utah.— State First Nat. Bank *v.* Kinner, 1 Utah 100.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 355.

Action against indorser.— It has been held in Pennsylvania that the declaration in an action against an irregular indorser on a promissory note must allege a promise in writing. Robinson *v.* Rebel, 1 Wkly. Notes Cas. (Pa.) 9.

Allegation of consideration.—The rule stated in the text is not inconsistent with the rule that the consideration for defendant's promise to answer for another's debt must be stated. Hayden *v.* Steadman, 3 Oreg. 550; Winkler *v.* Chesapeake, etc., R. Co., 12 W. Va. 699. The one rule arises under the statute of frauds; the other at common law.

For form of declaration on collateral promise see ASSUMPSIT, ACTION OF, 4 Cyc. 326.

Sufficiency of complaint on guaranty of note see COMMERCIAL PAPER, 8 Cyc. 117 note 60.

31. *Alabama.*— Kizer *v.* Lock, 9 Ala. 269; Bell *v.* Owen, 8 Ala. 312.

California.— McDonald *v.* Mission View Homestead Assoc., 51 Cal. 210; Brennan *v.* Ford, 46 Cal. 7.

Georgia.— Piercy *v.* Adams, 22 Ga. 109.

Kentucky.— Baker *v.* Jameson, 2 J. J. Marsh. 547; Drace *v.* Wyat, 1 A. K. Marsh. 336.

Maine.— Cleaves *v.* Foss, 4 Me. 1.

Michigan.—Kroll *v.* Diamond Match Co., 106 Mich. 127, 63 N. W. 983.

Minnesota.— Randall *v.* Constans, 33 Minn. 329, 23 N. W. 530.

Missouri.—Gist *v.* Eubank, 29 Mo. 248; Wildbahn *v.* Robidoux, 11 Mo. 659.

New Jersey.— Batten *v.* Ford, 3 N. J. L. 455.

New York.— McKensie *v.* Farrell, 4 Bosw. 192; Livingstone *v.* Smith, 14 How. Pr. 490; Miller *v.* Drake, 1 Cai. 45; Cozine *v.* Graham, 2 Paige 177.

Ohio.— McCulloch *v.* Tapp, 2 Ohio Dec. (Reprint) 678, 4 West. L. Month. 575.

Pennsylvania.— *In re* Breitenstein, 23 Pittsb. Leg. J. 255.

Texas.— Cross *v.* Everts, 28 Tex. 523; Dawson *v.* Miller, 20 Tex. 171, 70 Am. Dec. 380; Doggett *v.* Patterson, 18 Tex. 158.

Wisconsin.— Pettit *v.* Hamlyn, 43 Wis. 314.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 356.

32. *California.*— McMenomy *v.* Talbot, 84 Cal. 279, 23 Pac. 1099.

Missouri.— Taylor *v.* Penquite, 35 Mo. App. 389.

Utah.— Kilpatrick-Koch Dry-Goods Co. *v.* Box, 13 Utah 494, 45 Pac. 629.

Washington.— Shelton *v.* Conant, 10 Wash. 193, 38 Pac. 1013.

Wisconsin.— Gunderson *v.* Thomas, 87 Wis. 406, 58 N. W. 750.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 357.

it is not necessary to allege that the agent's authority was in writing.[33] If, however, plaintiff relies on an oral contract and part performance or other circumstances to avoid the statute, the facts relied on must be set out.[34] In an action to impeach an account on grounds which necessarily admit the existence of a formal contract, plaintiff cannot invoke the statute of frauds against the validity of the contract;[35] and the same rule applies to a plaintiff who alleges an oral contract and does not set up the statute; he cannot rely on the invalidity of the contract.[36] The sufficiency of a complaint on a contract within the scope of the statute of frauds in general respects is governed by the rules of pleading applicable to complaints on contract in other cases.[37]

2. Demurrer and Answer — a. In General. On the question of how far a defendant who fails to plead the statute specifically will be entitled to rely on it, there is in certain cases, as will be noted later, considerable conflict of opinion; but it is clear that when he makes no claim to its benefit, either by his pleadings or otherwise, the court is not bound to interpose the statute for him.[38] Thus if plaintiff declares on a writing and defendant does not deny the contract or claim that the writing is insufficient under the statute of frauds, he cannot raise that defense at the trial.[39] If a contract within the scope of the statute of frauds is set up in the answer, the answer need not in most jurisdictions allege that the contract is in writing;[40] but if defendant sets up an oral contract and relies on part

33. Fisher *v.* Bowser, 41 Tex. 222, 1 Tex. Unrep. Cas. 346.

34. *Arkansas.*— Baker *v.* Hollobaugh, 15 Ark. 322.

California.— Arguello *v.* Edinger, 10 Cal. 150.

Georgia.—Hancock *v.* Council, 96 Ga. 778, 22 S. E. 335.

Indiana.— Horner *v.* McConnell, 158 Ind. 280, 63 N. E. 472; Goodwine *v.* Cadwallader, 158 Ind. 202, 61 N. E. 939; Caldwell *v.* Huntington School City, 132 Ind. 92, 31 N. E. 566; Krohn *v.* Bantz, 68 Ind. 277. In Harper *v.* Miller, 27 Ind. 277, the ground is taken that when action is brought on an oral contract for the sale of goods, which may or may not be within the express words of the statute, it is not necessary to allege specifically the facts of part payment or delivery by reason of which the statute does not apply.

Massachusetts.— John F. Fowkes Mfg. Co. *v.* Metcalf, 169 Mass. 595, 48 N. E. 848.

Michigan.— Peckham *v.* Balch, 49 Mich. 179, 13 N. W. 506.

New Jersey.— Van Dyne *v.* Vreeland, 11 N. J. Eq. 370.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 358.

35. Porter *v.* Wormser, 94 N. Y. 431.

36. Atkinson *v.* Washington, etc., College, 54 W. Va. 32, 46 S. E. 253.

37. Pratt *v.* Humphrey, 22 Conn. 317 (where the declaration was held to allege sufficient consideration for an original promise of defendants); Davis *v.* Wiley, 3 Ky. L. Rep. 755 (holding that a declaration must be specific and disclose the promise, the promisor, and the promisee).

Sufficiency of complaint on contract within statute see also Contracts, 9 Cyc. 715.

38. *Alabama.*— Angel *v.* Simpson, 85 Ala. 53, 3 So. 758.

Illinois.— Wilson *v.* Van Winkle, 7 Ill. 684; Tarleton *v.* Vietes, 6 Ill. 470, 41 Am. Dec. 193; Hogan *v.* Easterday, 58 Ill. App. 45.

Maine.— Lawrence *v.* Chase, 54 Me. 196.

Missouri.— Hackworth *v.* Zeitinger, 48 Mo. App. 32.

New York.— McGowan *v.* Giveen Mfg. Co., 54 N. Y. App. Div. 233, 66 N. Y. Suppl. 708; Cruse *v.* Findlay, 16 Misc. 576, 38 N. Y. Suppl. 741.

Texas.— League *v.* Davis, 53 Tex. 9.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 363.

Failure of guardian to plead.— In Grant *v.* Craigmiles, 1 Bibb (Ky.) 203, it was held that an oral contract would not be enforced against infants because of the failure of their guardians to insist on the statute.

Failure of codefendant to plead.— One of two defendants in an equitable proceeding to recover land who sets up the statute is entitled to its benefit, even though his codefendant from whom he obtained title has waived it. Magnusson *v.* Johnson, 73 Ill. 156; Hayden *v.* McIlvain, 4 Bibb (Ky.) 57.

Estoppel by election to rely on another defense see *supra*, X, M.

39. Speer *v.* Crowder, (Ala. 1902) 32 So. 658; Crough *v.* Nurge, 168 N. Y. 657, 61 N. E. 1128 [*affirming* 44 N. Y. App. Div. 19, 60 N. Y. Suppl. 395]; Kramer *v.* Kramer, 90 N. Y. App. Div. 176, 86 N. Y. Suppl. 129; Cleaver *v.* North of Scotland Canadian Mortg. Co., 27 Grant Ch. (U. C.) 508. See also Benjamin *v.* Mattler, 3 Colo. App. 227, 32 Pac. 837, holding that if plaintiff declares on a written contract executed by an agent, defendant cannot object that the contract is invalid because the agent had no authority in writing to make the contract, where he does not plead the statute of frauds.

40. *Alabama.*— Martin *v.* Wharton, 38 Ala. 637.

Arkansas.— McDermott *v.* Cable, 23 Ark. 200; Duncan *v.* Clements, 17 Ark. 279.

performance or other circumstances to take the case out of the operation of the statute, the answer must allege those facts.[41]

b. When Plaintiff Declares on Oral Contract. When it is apparent on the face of plaintiff's pleadings that the contract is oral, and nothing taking the case out of the statute is alleged, defendant may demur,[42] or he may admit the making of the contract as alleged and set up the statute specifically in his plea or answer.[43] If he admits the making of the contract, and fails to claim the benefit of the statute or to demur, he will be taken to have waived it.[44] If he denies

California.— Bradford Invest. Co. *v.* Joost, 117 Cal. 204, 48 Pac. 1083.

Colorado.— Lehow *v.* Simonton, 3 Colo. 346.

Georgia.— Walker *v.* Edmundson, 111 Ga. 454, 36 S. E. 800.

New York.— Dewey *v.* Hoag, 15 Barb. 365.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 358.

Contra.— Estep *v.* Burke, 19 Ind. 87, under the code.

In Ohio a distinction is made between contracts declared on and those set up in defense; the latter must be stated to be in writing (Reinheimer *v.* Carter, 31 Ohio St. 579; Donaldson *v.* Donaldson, 31 Cinc. L. Bul. 102; McCulloch *v.* Tapp, 2 Ohio Dec. (Reprint) 678, 4 West. L. Month. 575); but an answer in the nature of a cross petition will be treated as an original complaint, and a contract alleged therein will be presumed to be in writing (Broch *v.* Becher, 5 Ohio Dec. (Reprint) 519, 6 Am. L. Rec. 380, 2 Cinc. L. Bul. 262).

41. Eberville *v.* Leadville Tunneling, etc., Co., 28 Colo. 241, 64 Pac. 200.

42. *Alabama.*— Clanton *v.* Scruggs, 95 Ala. 279, 10 So. 757; White *v.* Levy, 93 Ala. 484, 9 So. 164.

Illinois.— Dicken *v.* McKinlay, 163 Ill. 318, 45 N. E. 134, 54 Am. St. Rep. 471.

Iowa.— Burden *v.* Knight, 82 Iowa 584, 48 N. W. 985; Babcock *v.* Meek, 45 Iowa 137.

Kentucky.— Linn Boyd Tobacco Warehouse Co. *v.* Terrill, 13 Bush 463.

Massachusetts.— Putnam *v.* Grace, 161 Mass. 237, 37 N. E. 166; Elliot *v.* Jenness, 111 Mass. 29.

Minnesota.— Wentworth *v.* Wentworth, 2 Minn. 277, 72 Am. Dec. 97.

Montana.— Ducie *v.* Ford, 8 Mont. 233, 19 Pac. 414 [*affirmed* in 138 U. S. 587, 11 S. Ct. 417, 34 L. ed. 1091].

Nebraska.— Powder River Live Stock Co. *v.* Lamb, 38 Nebr. 339, 56 N. W. 1019.

New Jersey.— Van Dyne *v.* Vreeland, 11 N. J. Eq. 370.

Ohio.— Howard *v.* Brower, 37 Ohio St. 402.

Tennessee.— Macey *v.* Childress, 2 Tenn. Ch. 438.

Texas.— Bason *v.* Hughart, 2 Tex. 476; Aiken *v.* Hale, 1 Tex. Unrep. Cas. 318.

United States.— Randall *v.* Howard, 2 Black 585, 17 L. ed. 269.

See 23 Cent. Dig. tit. "Frauds, Statute of," §§ 360–362.

General demurrer.— Although plaintiff sues on an oral contract of sale, yet if part of the property sold is personalty, a general demurrer does not reach the question whether the oral promise to pay for the real estate is enforceable. Mullins *v.* Hand, 10 Ky. L. Rep. 79.

43. *California.*— Burt *v.* Wilson, 28 Cal. 632, 87 Am. Dec. 142.

Georgia.— Hollingshead *v.* McKenzie, 8 Ga. 457.

Indiana.— Ash *v.* Daggy, 6 Ind. 259.

Maryland.— Hamilton *v.* Jones, 3 Gill & J. 127.

Minnesota.— Taylor *v.* Allen, 40 Minn. 433, 42 N. W. 292.

Missouri.— Wildbahn *v.* Robidoux, 11 Mo. 659.

Nebraska.— Thomas *v.* Churchill, 48 Nebr. 266, 67 N. W. 182.

New Jersey.— Van Duyne *v.* Vreeland, 12 N. J. Eq. 142; Ashmore *v.* Evans, 11 N. J. Eq. 151; Dean *v.* Dean, 9 N. J. Eq. 425.

New York.— Cameron *v.* Tompkins, 72 Hun 113, 25 N. Y. Suppl. 305, 30 Abb. N. Cas. 434.

North Carolina.— Browning *v.* Berry, 107 N. C. 231, 12 S. E. 195, 10 L. R. A. 726; Holler *v.* Richards, 102 N. C. 545, 9 S. E. 460.

Pennsylvania.— Squires *v.* Ridgeway, 1 Leg. Gaz. 510.

West Virginia.— Barrett *v.* McAllister, 33 W. Va. 738, 11 S. E. 220; Fleming *v.* Holt, 12 W. Va. 143.

Wisconsin.— Whiting *v.* Gould, 2 Wis. 552.

United States.— Thompson *v.* Jamesson, 23 Fed. Cas. No. 13,960, 1 Cranch C. C. 295.

England.— Rowe *v.* Teed, 15 Ves. Jr. 372, 33 Eng. Reprint 794; Blagden *v.* Bradbear, 12 Ves. Jr. 466, 8 Rev. Rep. 354, 33 Eng. Reprint 176; Cooth *v.* Jackson, 6 Ves. Jr. 12, 31 Eng. Reprint 913.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 363 *et seq.*

This rule has been changed by statute in some states. Marr *v.* Burlington, etc., R. Co., 121 Iowa 117, 96 N. W. 716; Wiseman *v.* Thompson, 94 Iowa 607, 63 N. W. 346; Auter *v.* Miller, 18 Iowa 405; Gregg *v.* Garrett, 13 Mont. 10, 31 Pac. 721.

44. *Alabama.*—Shakespeare *v.* Alba, 76 Ala. 351.

Arkansas.— Guynn *v.* McCauley, 32 Ark. 97; Baker *v.* Hollobaugh, 15 Ark. 322.

Colorado.— Cerrusite Min. Co. *v.* Steele, 18 Colo. App. 216, 70 Pac. 1091.

Illinois.— Dyer *v.* Martin, 5 Ill. 146.

Kentucky.— Talbot *v.* Bowen, 1 A. K. Marsh. 436, 10 Am. Dec. 747; Richardson *v.* Milner, 5 Ky. L. Rep. 118.

Maine.— Douglass *v.* Snow, 77 Me. 91.

Maryland.— Winn *v.* Albert, 2 Md. Ch. 169; Small *v.* Owings, 1 Md. Ch. 363.

making the oral contract declared on, although he fails to set up the statute, he may nevertheless, by the weight of authority, insist on the statute as a defense at the trial;[45] and he is of course safe when he both denies the contract and sets up the statute.[46]

c. When Plaintiff Declares Generally. If plaintiff declares generally on a contract within the scope of the statute of frauds without alleging whether or not it is in writing, defendant may set up the statute by a special plea in bar;[47] and if he fails to deny or expressly admits the making of the contract, he cannot have the benefit of the statute unless he sets it up specifically in his pleadings.[48] Where defendant, in answer to general allegations, denies the making of the contract, the question whether he must also plead the statute in order to have the benefit of it arises; and on this point there is a great conflict of authority. In

Minnesota.— Iverson *v.* Cirkel, 56 Minn. 299, 57 N. W. 800.

Missouri.— Hurt *v.* Ford, (Sup. 1896) 36 S. W. 671.

Montana.— Christiansen *v.* Aldrich, (1904) 76 Pac. 1007.

Nebraska.— Davis *v.* Greenwood, 2 Nebr. (Unoff.) 317, 96 N. W. 526.

New Jersey.— Gough *v.* Williamson, 62 N. J. Eq. 526, 50 Atl. 523; Petrick *v.* Ashcroft, 20 N. J. Eq. 198; Van Duyne *v.* Vreeland, 12 N. J. Eq. 142; Ashmore *v.* Evans, 11 N. J. Eq. 151; Dean *v.* Dean, 9 N. J. Eq. 425.

New York.— Sanger *v.* French, 157 N. Y. 213, 51 N. E. 979 [*reversing* 91 Hun 599, 36 N. Y. Suppl. 653]; Agan *v.* Barry, 66 N. Y. App. Div. 101, 72 N. Y. Suppl. 667; Cheever *v.* Schall, 87 Hun 32, 33 N. Y. Suppl. 751; Belden *v.* Wilkinson, 33 Misc. 659, 68 N. Y. Suppl. 205; McHughes *v.* Harjes, 25 Misc. 294, 54 N. Y. Suppl. 562; Bailie *v.* Plaut, 11 Misc. 30, 31 N. Y. Suppl. 1015; Vaupell *v.* Woodward, 2 Sandf. Ch. 143.

Ohio.— Woods *v.* Dille, 11 Ohio 455.

Vermont.— Battell *v.* Matot, 58 Vt. 271, 5 Atl. 479.

West Virginia.— Barrett *v.* McAllister, 33 W. Va. 738, 11 S. E. 220; Fleming *v.* Holt, 12 W. Va. 143.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 366.

45. *California.*— Harris *v.* Frank, 81 Cal. 280, 22 Pac. 856.

Iowa.— Thompson *v.* Frakes, 112 Iowa 585, 84 N. W. 703.

Kentucky.—Hocker *v.* Gentry, 3 Metc. 463; Klein *v.* Liverpool, etc., Ins. Co., 57 S. W. 250, 22 Ky. L. Rep. 301.

Maryland.— Hamilton *v.* Thirston, 93 Md. 213, 48 Atl. 709; Small *v.* Owings, 1 Md. Ch. 363.

Mississippi.— Metcalf *v.* Brandon, 58 Miss. 841.

Missouri.— Hurt *v.* Ford, 142 Mo. 283, 44 S. W. 228, 41 L. R. A. 823.

New Jersey.—Wakeman *v.* Dodd, 27 N. J. Eq. 564 [*affirming* 26 N. J. Eq. 484]; Johns *v.* Norris, 22 N. J. Eq. 102; Van Duyne *v.* Vreeland, 12 N. J. Eq. 142.

New York.— See Ridgway *v.* Grace, 2 Misc. 293, 21 N. Y. Suppl. 934.

North Carolina.— Luton *v.* Badham, 127 N. C. 96, 37 S. E. 143, 80 Am. St. Rep. 783, 53 L. R. A. 337.

Rhode Island.— Rogers *v.* Rogers, 20 R. I. 400, 39 Atl. 755.

South Carolina.— Hillhouse *v.* Jennings, 60 S. C. 373, 38 S. E. 599.

Wyoming.—Williams-Hayward Shoe Co. *v.* Brooks, 9 Wyo. 424, 64 Pac. 342.

United States.— Buhl *v.* Stephens, 84 Fed. 922.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 372.

Contra.— Koenig *v.* Dohm, 209 Ill. 468, 70 N. E. 1061; Carpenter *v.* Davis, 72 Ill. 14; Hull *v.* Peer, 27 Ill. 312; Livesey *v.* Livesey, 30 Ind. 398.

46. Dunn *v.* Moore, 38 N. C. 364; Davidson *v.* Graves, Riley Eq. (S. C.) 219.

47. Myers *v.* Morse, 15 Johns. (N. Y.) 425, so holding in an action of assumpsit.

48. *Alabama.*— Espalla *v.* Wilson, 86 Ala. 487, 5 So. 867; Linn *v.* McLean, 80 Ala. 360; Ritch *v.* Thornton, 65 Ala. 309; Patterson *v.* Ware, 10 Ala. 444.

Georgia.—McDougald *v.* Banks, 13 Ga. 451.

Illinois.— Finucan *v.* Kendig, 109 Ill. 198; Yourt *v.* Hopkins, 24 Ill. 326; Lear *v.* Chouteau, 23 Ill. 39; Kinzie *v.* Penrose, 3 Ill. 515; Thornton *v.* Vaughan, 3 Ill. 218; Illinois, etc., Canal Co. *v.* Calhoun, 2 Ill. 521.

Maryland.— Lingan *v.* Henderson, 1 Bland 236.

Massachusetts.— Middlesex Co. *v.* Osgood, 4 Gray 447.

Missouri.— Graff *v.* Foster, 67 Mo. 512.

Nebraska.— Conner *v.* Hingtgen, 19 Nebr. 472, 27 N. W. 443.

New Jersey.—Hewitt *v.* Lehigh, etc., R. Co., 57 N. J. Eq. 511, 42 Atl. 325; Walker *v.* Hill, 21 N. J. Eq. 191.

New York.— Matthews *v.* Matthews, 154 N. Y. 288, 48 N. E. 531; Porter *v.* Wormser, 94 N. Y. 431; Duffy *v.* O'Donovan, 46 N. Y. 223; Cheever *v.* Schall, 87 Hun 32, 33 N. Y. Suppl. 751; Quinlin *v.* Raymond, 14 Daly 87 [*affirmed* in 118 N. Y. 670, 22 N. E. 1136]; Schwann *v.* Clark, 7 Misc. 242, 27 N. Y. Suppl. 262; Lewin *v.* Stewart, 10 How. Pr. 509.

Utah.— Lauer *v.* Richmond Co-Operative Mercantile Inst., 8 Utah 305, 31 Pac. 397.

See 23 Cent. Dig. tit. "Frauds, Statute of," §§ 363, 371.

In Kentucky it is not necessary specifically to insist on the statute before the trial court, if the declaration does not allege that the

certain jurisdictions it has been held that he must plead it;[49] but, at other times, in the same states, and in other jurisdictions, he has been allowed, under the general issue or a denial of the contract, to obtain the benefit of the statute at the trial.[50]

contract is in writing. Smith *v.* Fah, 15 B. Mon. 443.

49. *Alabama.*— Carter *v.* Fischer, 127 Ala. 52, 28 So. 376; Harper *v.* Campbell, 102 Ala. 342, 14 So. 650; Lagerfelt *v.* McKie, 100 Ala. 430, 14 So. 281; Smith *v.* Pritchett, 98 Ala. 649, 13 So. 569; Brigham *v.* Carlisle, 78 Ala. 243, 56 Am. Rep. 28; Martin *v.* Blanchett, 77 Ala. 288; Bailey *v.* Irwin, 72 Ala. 505; Clark *v.* Taylor, 68 Ala. 453.

California.— Osborne *v.* Endicott, 6 Cal. 149, 65 Am. Dec. 498.

Colorado.— McLure *v.* Keon, 25 Colo. 284, 53 Pac. 1058; Baldwin *v.* Central Sav. Bank, 17 Colo. App. 7, 67 Pac. 179; Hamill *v.* Hall, 4 Colo. App. 290, 35 Pac. 927; Benjamin *v.* Mattler, 3 Colo. App. 227, 32 Pac. 837.

Georgia.— Tift *v.* Wight, etc., Co., 113 Ga. 681, 39 S. E. 503.

Illinois.— Irwin *v.* Dyke, 114 Ill. 302, 1 N. E. 913; Chicago, etc., Coal Co. *v.* Liddell, 69 Ill. 639; Warren *v.* Dickson, 27 Ill. 115; Wickham *v.* Hyde Park Bldg., etc., Assoc., 80 Ill. App. 523.

Massachusetts.—Boston Duck Co. *v.* Dewey, 6 Gray 446.

Missouri.— Missouri Real Estate Syndicate *v.* Sims, 179 Mo. 679, 78 S. W. 1006; Condit *v.* Maxwell, 142 Mo. 266, 44 S. W. 467; Maybee *v.* Moore, 90 Mo. 340, 2 S. W. 471; Gordon *v.* Madden, 82 Mo. 193; Rabsuhl *v.* Lack, 35 Mo. 316; Gardner *v.* Armstrong, 31 Mo. 535; Randolph *v.* Frick, 50 Mo. App. 275; Donaldson *v.* Newman, 9 Mo. App. 235.

New York.— Crane *v.* Powell, 139 N. Y. 379, 34 N. E. 911 [*affirming* 19 N. Y. Suppl. 220]; Wells *v.* Monihan, 129 N. Y. 161, 29 N. E. 232 (*affirming* 13 N. Y. Suppl. 156]; Bennett *v.* Mahler, 90 N. Y. App. Div. 22, 85 N. Y. Suppl. 669; Hardt *v.* Recknagel, 62 N. Y. App. Div. 106, 70 N. Y. Suppl. 782; Irlbacker *v.* Roth, 25 N. Y. App. Div. 290, 49 N. Y. Suppl. 538; Lupean *v.* Brainard, 20 N. Y. App. Div. 212, 46 N. Y. Suppl. 1044, 4 N. Y. Annot. Cas. 322; Simis *v.* Wissel, 10 N. Y. App. Div. 323, 41 N. Y. Suppl. 1024; Thelberg *v.* National Starch Mfg. Co., 2 N. Y. App. Div. 173, 37 N. Y. Suppl. 738; Honsinger *v.* Muhlford, 90 Hun 589, 35 N. Y. Suppl. 986 [*affirmed* in 157 N. Y. 674, 51 N. E. 1091]; Smith *v.* Slosson, 89 Hun 568, 35 N. Y. Suppl. 547; Barrett *v.* Johnson, 77 Hun 527, 28 N. Y. Suppl. 892; Bannatyne *v.* Florence Milling, etc., Co., 77 Hun 289, 28 N. Y. Suppl. 334; Engelhorn *v.* Reitlinger, 55 N. Y. Super. Ct. 485 [*affirmed* in 122 N. Y. 76, 25 N. E. 297, 9 L. R. A. 548]; Schultz *v.* Cohen, 13 Misc. 638, 34 N. Y. Suppl. 927; Lewin *v.* Stewart, 10 How. Pr. 509 [*reversed* on other grounds in 17 How. Pr. 5].

North Carolina.— Lyon *v.* Crissman, 22 N. C. 268.

Ohio.— Robinson *v.* Hathaway, 2 Ohio Dec. (Reprint) 581, 4 West. L. Month. 105.

South Carolina.— Suber *v.* Richards, 61 S. C. 393, 39 S. E. 540.

South Dakota.— Cosand *v.* Bunker, 2 S. D. 294, 50 N. W. 84.

Tennessee.— Barnes *v.* Black Diamond Coal Co., 101 Tenn. 354, 47 S. W. 498; Citty *v.* Southern Queen Mfg. Co., 93 Tenn. 276, 24 S. W. 121, 42 Am. St. Rep. 919; Gregory *v.* Farris, (Ch. App. 1900) 56 S. W. 1059.

Texas.— Hart *v.* Garcia, (Civ. App. 1901) 63 S. W. 921.

Vermont.— Howe *v.* Chesley, 56 Vt. 727.

See 23 Cent. Dig. tit. "Frauds, Statute of," §§ 371, 372.

It will be presumed that in a justice's court, where the pleadings are oral, the statute was pleaded. Comstock *v.* Ward, 22 Ill. 248; Burke *v.* Haley, 7 Ill. 614.

Demurrer.— In assumpsit for the price of land defendant cannot avail himself of the statute of frauds by demurrer; he must plead it. Kibby *v.* Chitwood, 4 T. B. Mon. (Ky.) 91, 16 Am. Dec. 143.

50. *Arkansas.*— Trapnall *v.* Brown, 19 Ark. 39; Wynn *v.* Garland, 19 Ark. 23, 68 Am. Dec. 190.

California.—Feeney *v.* Howard, 79 Cal. 525, 21 Pac. 984, 12 Am. St. Rep. 162, 4 L. R. A. 826.

Colorado.—Salomon *v.* McRae, 9 Colo. App. 23, 47 Pac. 409.

Illinois.— Ruggles *v.* Gatton, 50 Ill. 412.

Indiana.— Suman *v.* Springate, 67 Ind. 115.

Kentucky.—Hocker *v.* Gentry, 3 Metc. 463; Brown *v.* East, 5 T. B. Mon. 405; Howard *v.* Snyder, 9 Ky. L. Rep. 358.

Maryland.— Billingslea *v.* Ward, 33 Md. 48; Wolf *v.* Corby, 30 Md. 356.

Massachusetts.—Reid *v.* Stevens, 120 Mass. 209.

Michigan.— New York Third Nat. Bank *v.* Steel, 129 Mich. 434, 88 N. W. 1050, 64 L. R. A. 119.

Minnesota.— Bean *v.* Lamprey, 82 Minn. 320, 84 N. W. 1016; Fontaine *v.* Bush, 40 Minn. 141, 41 N. W. 465, 12 Am. St. Rep. 722; Wentworth *v.* Wentworth, 2 Minn. 277, 72 Am. Dec. 97.

Missouri.— Hillman *v.* Allen, 145 Mo. 638, 47 S. W. 509; Hackett *v.* Watts, 138 Mo. 502, 40 S. W. 113; Bless *v.* Jenkins, 129 Mo. 647, 31 S. W. 938; Boyd *v.* Paul, 125 Mo. 9, 28 S. W. 171; Allen *v.* Richard, 83 Mo. 55; Hook *v.* Turner, 22 Mo. 333; Wildbahn *v.* Robidoux, 11 Mo. 659; Beckmann *v.* Mepham, 97 Mo. App. 161, 70 S. W. 1094; Shelton *v.* Thompson, 96 Mo. App. 327, 70 S. W. 256; State *v.* Cape Girardeau Water-Works, etc., Co., 74 Mo. App. 273; Porter *v.* Citizens' Bank, 73 Mo. App. 513; Dunn *v.* McClintock, 64 Mo. App. 193; Van Idour *v.* Nelson, 60 Mo. App. 523; Bernhardt *v.* Walls, 29 Mo. App. 206.

d. Sufficiency of Answer. It is not enough for a defendant to allege simply that the agreement sued on is within the statute; he must allege also that it is not in writing,[51] and show such other facts, not already appearing, as are necessary to bring the case within the statute.[52] If plaintiff alleges facts to avoid the effect of the statute they should be expressly denied.[53] It is not necessary to refer to the statute by name; it is enough to allege facts bringing the case within its provisions;[54] but it should be made clear that defendant relies on it.[55] In some states an oral plea is sufficient before a justice of the peace.[56] An answer admitting the execution of a deed which was never delivered is not an admission of the contract within a statute allowing proof of an oral land contract which is not denied in the pleadings.[57]

3. Reply or Demurrer to Plea or Answer. If plaintiff declares on a contract within the scope of the statute of frauds and the statute is set up in the

Montana.— Ryan *v.* Dunphy, 4 Mont. 342, 1 Pac. 710.

Nebraska.— Powder River Live Stock Co. *v.* Lamb, 38 Nebr. 339, 56 N. W. 1019.

New Jersey.— Busick *v.* Van Ness, 44 N. J. Eq. 82, 12 Atl. 609.

New York.— Unglish *v.* Marvin, 128 N. Y. 380, 28 N. E. 634 [*affirming* 55 Hun 45, 8 N. Y. Suppl. 283]; Marston *v.* Swett, 66 N. Y. 206, 23 Am. Rep. 43 [*reversing* 4 Hun 153, 6 Thomps. & C. 534]; Alger *v.* Johnson, 4 Hun 412, 6 Thomps. & C. 632; Reynolds *v.* Dunkirk, etc., R. Co., 17 Barb. 613; Blanck *v.* Littell, 9 Daly 268; Amburger *v.* Marvin, 4 E. D. Smith 393; Traver *v.* Purdy, 25 N. Y. Suppl. 452, 30 Abb. N. Cas. 443; Van Dyke *v.* Clark, 19 N. Y. Suppl. 650; Carling *v.* Purcell, 19 N. Y. Suppl. 183; Berrien *v.* Southack, 7 N. Y. Suppl. 324; Coles *v.* Bowne, Paige 526.

North Carolina.— Browning *v.* Berry, 107 N. C. 231, 12 S. E. 195, 10 L. R. A. 726; Holler *v.* Richards, 102 N. C. 545, 9 S. E. 460; Gulley *v.* Macy, 84 N. C. 434; Bonham *v.* Craig, 80 N. C. 224; Allen *v.* Chambers, 39 N. C. 125.

Ohio.— Birchell *v.* Neaster, 36 Ohio St. 331.

Oregon.—See Miller *v.* Lynch, 17 Oreg. 61, 19 Pac. 845, where it was held that under a general allegation of a promise to pay the debt of another, which defendant expressly denies, plaintiff cannot prove an oral collateral promise.

Pennsylvania.— Parrish *v.* Koons, 1 Pars. Eq. Cas. 79.

South Carolina.— Poag *v.* Sandifer, 5 Rich. Eq. 170.

Texas.— Johnson *v.* Flint, 75 Tex. 379, 12 S. W. 1120; Aiken *v.* Hale, 1 Tex. Unrep. Cas. 318; Moody *v.* Jones, (Civ. App. 1896) 37 S. W. 379.

Vermont.— Chickering *v.* Brooks, 61 Vt. 554, 18 Atl. 144; Hotchkiss *v.* Ladd, 36 Vt. 593, 86 Am. Dec. 679.

Virginia.— Rowton *v.* Rowton, 1 Hen. & M. 92.

England.— Leaf *v.* Tuton, 2 Dowl. P. C. N. S. 300, 12 L. J. Exch. 69, 10 M. & W. 393; Buttermer *v.* Hayes, 7 Dowl. P. C. 489, 9 L. J. Exch. 44, 5 M. & W. 456; Elliott *v.* Thomas, 7 L. J. Exch. 129, 3 M. & W. 170.

See 23 Cent. Dig. tit. "Frauds, Statute of," §§ 371, 372.

Cause of action not disclosed.— Where a declaration is on the common counts, and does not disclose the cause of action, a general denial will give defendant the benefit of the statute (Beard *v.* Converse, 84 Ill. 512; Durant *v.* Rogers, 71 Ill. 121; Taylor *v.* Merrill, 55 Ill. 52; Adams, etc., Co. *v.* Westlake, 92 Ill. App. 616; Schotte *v.* Puscheck, 79 Ill. App. 31; Lynch *v.* Scroth, 50 Ill. App. 668; Hunter *v.* Randall, 62 Me. 423, 16 Am. Rep. 490; Boston Duck Co. *v.* Dewey, 6 Gray (Mass.) 446); and the same principle applies to other cases where the foundation of plaintiff's claim is not apparent on the pleadings (Fanger *v.* Caspary, 87 N. Y. App. Div. 417, 84 N. Y. Suppl. 410; Buckley *v.* Zimmerman, 32 Misc. (N. Y.) 704, 65 N. Y. Suppl. 512; Mitchell *v.* Miller, 25 Misc. (N. Y.) 179, 54 N. Y. Suppl. 180).

In a court where oral pleadings are allowed, the statute need not be pleaded. Booker *v.* Heffner, 95 N. Y. App. Div. 84, 88 N. Y. Suppl. 499.

51. Hunt *v.* Johnson, 96 Ala. 130, 11 So. 387; Dinkel *v.* Gundelfinger, 35 Mo. 172; Bean *v.* Valle, 2 Mo. 126; Vaupell *v.* Woodward, 2 Sandf. Ch. (N. Y.) 143. See, however, Schoonmaker *v.* Plummer, 139 Ill. 612, 29 N. E. 1114, where it was held that an answer containing an averment that plaintiff would prove only a gift within the statute of frauds sufficiently claimed the benefit of the statute.

52. Pratt *v.* Humphrey, 22 Conn. 317.

53. Greenville *v.* Greenville Water Works Co., 125 Ala. 625, 27 So. 764; Meach *v.* Stone, 1 D. Chipm. (Vt.) 182, 6 Am. Dec. 719; Barrett *v.* McAllister, 35 W. Va. 103, 12 S. E. 1106; Bailey *v.* Wright, 2 Fed. Cas. No. 749, 2 Bond 181.

54. Speer *v.* Crowder, (Ala. 1902) 32 So. 658; Markham *v.* Katzenstein, 209 Ill. 607, 70 N. E. 1071; Koenig *v.* Dohm, 209 Ill. 468, 70 N. E. 1061; Clifford *v.* Heald, 141 Mass. 322, 6 N. E. 227; Jones *v.* Farrington, 1 Silv. Sup. 413, 5 N. Y. Suppl. 209; Goelet *v.* Cowdrey, 1 Duer (N. Y.) 132.

55. Jervis *v.* Smith, Hoffm. (N. Y.) 470; Skinner *v.* McDouall, 2 De G. & Sm. 265, 12 Jur. 741, 17 L. J. Ch. 347.

56. Brown *v.* Higgins, 45 Ark. 456.

57. Benedict *v.* Bird, 103 Iowa 612, 72 N. W. 768.

answer, plaintiff must in his reply either deny the facts alleged to bring the contract within the statute,[58] or set up further facts in avoidance of those alleged in the answer;[59] or, if he desires to raise the question whether the contract as it appears by the plea is within the statute, he may demur.[60] If a contract within the scope of the statute of frauds is set up in the answer, plaintiff may in some states take advantage of the statute without interposing a reply;[61] and he may of course waive the statute in his reply.[62]

4. Amendment. The rules of pleading as to amendments applicable in actions on contracts in general are applied in actions on contracts falling within the scope of the statute of frauds.[63]

5. Variance. If plaintiff declares on a contract in writing defendant may, without pleading the statute, object to proof of an oral agreement.[64]

B. Evidence[65]**— 1. Burden of Proof and Presumptions.** The presumption that a contract declared on in general terms is in writing, while it operates to save a declaration on demurrer,[66] is not sufficient, when the statute is pleaded, to avoid the rule that plaintiff must make out a valid cause of action; the burden is on him to show that the contract is in writing, or that there is such part performance as will avoid the statute.[67]

2. Admissibility in General. The statute of frauds obviously renders oral evidence of a contract within its scope incompetent in an action thereon;[68] but it is

58. Gernand *v.* Schmitt, 89 Ill. App. 547; Hotchkiss *v.* Ladd, 36 Vt. 593, 86 Am. Dec. 679.

59. Wilson *v.* Ray, 13 Ind. 1 (holding that an allegation that defendant requested, in order to defraud a third person, that the contract should not be reduced to writing is an insufficient answer to a plea setting up the statute); Wheelwright *v.* Moore, 1 Hall (N. Y.) 648.

60. Brookline Nat. Bank *v.* Moers, 19 N. Y. App. Div. 155, 45 N. Y. Suppl. 997.

61. Pattat *v.* Pattat, 93 N. Y. App. Div. 102, 87 N. Y. Suppl. 140; Steed *v.* Harvey, 18 Utah 367, 54 Pac. 1011, 72 Am. St. Rep. 789.

62. Brown *v.* Board, 3 Ky. L. Rep. 612.

63. Lupean *v.* Brainard, 20 N. Y. App. Div. 212, 46 N. Y. Suppl. 1044, 4 N. Y. Annot. Cas. 322 (holding that at the end of a trial, after the denial of a motion to dismiss on the ground that the contract sued on is within the statute, it is too late for defendant to obtain leave to amend by pleading the statute); Miller *v.* Lynch, 17 Oreg. 61, 19 Pac. 845 (holding that, although plaintiff declares on a promise to pay the debt of another, yet, if the evidence shows an original promise on the part of defendant, plaintiff may be allowed to amend the complaint so as to conform to the proof); Tufts *v.* Tufts, 24 Fed. Cas. No. 14,233, 3 Woodb. & M. 456 (where it was held that a plea referring to the "Revised Statute of Frauds" might be amended upon its appearing that the case arose under a previous statute). See also Tarleton *v.* Vietes, 6 Ill. 470, 41 Am. Dec. 193, where plaintiff was allowed to amend his bill so as to plead the statute, defendant having set up in defense a contract within the statute.

64. Haw *v.* American Wire Nail Co., 89 Iowa 745, 56 N. W. 501 (holding that a petition on a written contract is not supported by proof of an oral contract saved by special provision from the operation of the statute); Brauer *v.* Oceanic Steam Nav. Co., 178 N. Y. 339, 70 N. E. 863; Brunning *v.* Odhams, 75 L. T. Rep. N. S. 602. However, a complaint containing general allegations of the making of a contract and also alleging such part performance as would take an oral contract out of the statute may be supported by proof of either a written contract or an oral one partly performed. Slingerland *v.* Slingerland, 46 Minn. 100, 48 N. W. 605.

65. See, generally, Evidence.

66. See *supra*, XI, A, 1.

67. *Alabama.*— Jones *v.* Hagler, 95 Ala. 529, 10 So. 345; Jonas *v.* Field, 83 Ala. 445, 3 So. 893.

Arkansas.—Hurlburt *v.* Wheeler, etc., Mfg. Co., 38 Ark. 594.

Georgia.— Holland *v.* Atkinson, 112 Ga. 346, 37 S. E. 380.

Iowa.— Hutton *v.* Doxsee, 116 Iowa 13, 89 N. W. 79.

New York.— Baltzen *v.* Nicolay, 35 N. Y. Super. Ct. 203; Millar *v.* Fitzgibbons, 9 Daly 505; Livingston *v.* Smith, 14 How. Pr. 490.

Texas.— Shaw *v.* Gilmer, (Civ. App. 1902) 66 S. W. 679; Guthrie *v.* Mann, (Civ. App. 1896) 35 S. W. 710.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 373.

In Indiana the rule is different; the burden is on defendant to prove the contract within the statute. Solomon *v.* Walpole, 27 Ind. 464.

Measure of proof see *infra*, XI, B, 4.

Presumption of promise to pay reasonable price for goods see *supra*, page 269 note 67.

68. Hammond *v.* Barber, 1 Brev. (S. C.) 166 (where a court of equity had directed an issue and ordered that evidence of an oral contract for the sale of lands should be admitted, and the trial court refused nevertheless to admit such evidence, the suit being on such contract, and its refusal was sustained);

not a necessary result of the rule that no action shall be brought on an oral contract that no evidence shall be given of such contract under any circumstances. When the contract is offered as evidence merely and not for the purpose of founding a claim, it may be received;[69] and evidence of oral contracts within the statute is of course admissible under proper pleadings in connection with evidence to take them out of the statute;[70] but where the accompanying facts, if proved, would not avoid the statute, evidence of the oral contract is inadmissible.[71] Neither does it follow, because title is not to be proved by parol,[72] that possession may not be shown by parol evidence,[73] even when it operates to prove title.[74] Evidence of the contents of a lost contract is admissible, provided that the witnesses give the language of the contract and not their interpretation of it.[75] In an action to enforce an oral promise to pay for goods sold to another, evidence that the promisor requested the seller to endeavor, before resorting to him for payment, to secure payment from the buyer, or evidence that the buyer gave his note for the price of the goods sold, if unexplained, is competent to rebut the presumption that exclusive credit was given to the promisor.[76] On an issue whether an oral contract is to be performed within a year from the time of the making thereof, an unsigned memorandum prepared by one of the parties is admissible, although not signed.[77] The admissibility of evidence of matters not connected with the making of the contract is unaffected by the fact that the statute requires the contract to be in writing, and is to be determined without reference to that fact by the general rules of evidence.[78]

3. Parol Evidence[79] **— a. To Aid Memorandum**[80] **—** (i) *General Rules.* If the memorandum offered in support of the contract is insufficient under the

Bacon *v.* McChrystal, 10 Utah 290, 37 Pac. 563. And see cases cited *passim* this article.

Evidence of defendant.— Under a statute which allows the evidence of the party sought to be charged to be taken in an action on an oral sale of goods, evidence of defendant's agent is not admissible. Burnside *v.* Rawson, 37 Iowa 639.

69. Raymond *v.* Smith, 5 Conn. 555; Yater *v.* Mullen, 23 Ind. 562; Harlan *v.* Moore, 132 Mo. 483, 34 S. W. 70; Interstate Hotel Co. *v.* Woodward, etc., Amusement Co., 103 Mo. App. 198, 77 S. W. 114; Luton *v.* Badham, 127 N. C. 96, 37 S. E. 143, 80 Am. St. Rep. 783, 53 L. R. A. 337. See also *supra*, X, K, 1.

Operation of statute as to collateral rights and remedies see *supra*, X, A, 2; X, K, 2.

Oral contract as consideration for promise see *supra*, X, C, 4.

Oral contract as controlling damages in assumpsit see *supra*, X, H, 4, c, (II).

70. *Delaware.*— Houston *v.* Townsend, 1 Del. Ch. 416, 12 Am. Dec. 109.

Iowa.— Collins *v.* Vandever, 1 Iowa 573.

Michigan.— Rossman *v.* Bock, 97 Mich. 430, 56 N. W. 777.

Missouri.— Russell *v.* Berkstresser, 77 Mo. 417.

Pennsylvania.—Clarke *v.* Vankirk, 14 Serg. & R. 354.

Texas.— Texas, etc., R. Co. *v.* O'Mahoney, (Civ. App. 1899) 50 S. W. 1049.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 374.

71. Poorman *v.* Kilgore, 26 Pa. St. 365, 67 Am. Dec. 524; Givens *v.* Calder, 2 Desauss. (S. C.) 171, 2 Am. Dec. 686; Williams-Hayward Shoe Co. *v.* Brooks, 9 Wyo. 424, 64 Pac. 342.

72. Reynolds *v.* Clowdus, (Indian Terr. 1903) 76 S. W. 277.

Parol evidence to prove title to realty see *supra*, VII, A, 2, b; VII, B, 3, a.

73. Harris *v.* Murfree, 54 Ala. 161; Ford *v.* Garner, 49 Ala. 601; Barataria, etc., Canal Co. *v.* Field, 17 La. 421.

74. Guerin *v.* Bagneries, 13 La. 14; McGuire *v.* Amelung, 12 Mart. (La.) 649; Lyman *v.* Redman, 23 Me. 289.

The Louisiana rule allowing proof of an oral contract by interrogatories addressed to defendant, the answers to which cannot be denied (Barbin *v.* Gaspard, 15 La. Ann. 539; Knox *v.* Thompson, 12 La. Ann. 114; Stocks *v.* Furguson, 10 La. Ann. 132; Bauduc *v.* Conrey, 10 Rob. 466) is an anomaly.

75. Elwell *v.* Walker, 52 Iowa 256, 3 N. W. 64; Evans *v.* Miller, 5 Ky. L. Rep. 606.

Sufficiency of evidence of lost writing see *infra*, XI, B, 4.

76. Cole *v.* Hutchinson, 34 Minn. 410, 26 N. W. 319; Rottmann *v.* Pohlmann, 28 Mo. App. 399. See also *supra*, IV, E, 5.

77. Conway *v.* Mitchell, 97 Wis. 290, 72 N. W. 752.

78. *Alabama.*— O'Neal *v.* Curry, 134 Ala. 216, 32 So. 697.

Iowa.— Harbert *v.* Skinner, 37 Iowa 208.

Missouri.— Osborn *v.* Emery, 51 Mo. App. 408.

New York.— Stern *v.* James, 4 N. Y. Suppl. 16.

Wisconsin.— Cuddy *v.* Foreman, 107 Wis. 519, 83 N. W. 1103.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 374.

79. Parol evidence generally see Evidence.

80. See also *supra*, IX, C.

statute, oral evidence cannot ordinarily be given to supply the deficiency;[81] nor can agreements themselves within the statute be added to the memorandum by oral testimony.[82] However these rules do not prevent the admission of oral evidence to show the circumstances under which the contract was made,[83] to explain technical terms of the memorandum,[84] or to show to what subject-matter[85] or to what parties[86] it applies. So parol evidence is admissible under certain

81. *Alabama.*— Lindsay *v.* McRae, 116 Ala. 542, 22 So. 868.

Iowa.— Vaughn *v.* Smith, 58 Iowa 553, 12 N. W. 604.

Missouri.— Boyd *v.* Paul, 125 Mo. 9, 28 S. W. 171; Williams *v.* Stifel, 64 Mo. App. 138; Weil *v.* Willard, 55 Mo. App. 376; Miller *v.* Goodrich Bros. Banking Co., 53 Mo. App. 430.

New Hampshire.— Lang *v.* Henry, 54 N. H. 57.

New Jersey.— Bowers *v.* Glucksman, 68 N. J. L. 146, 52 Atl. 218.

New York.— Slade *v.* Boutin, 63 N. Y. App. Div. 537, 71 N. Y. Suppl. 740; Peltier *v.* Collins, 3 Wend. 459, 20 Am. Dec. 711.

United States.— Clerk *v.* Russell, 3 Dall. 415, 1 L. ed. 660; Plattsburgh First Nat. Bank *v.* Sowles, 46 Fed. 731.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 375. And see EVIDENCE, 17 Cyc. 748.

Mistake.— It has been held that even a mistake in a deed cannot be corrected by oral evidence. Churchill *v.* Rogers, 3 T. B. Mon. (Ky.) 81; McCann *v.* Pickup, 17 Phila. (Pa.) 56.

82. Russell *v.* Russell, 60 N. J. Eq. 282, 47 Atl. 37. See, however, Auten *v.* City Electric St. R. Co., 104 Fed. 395, holding that where property was conveyed by absolute deed to a "trustee," oral evidence of the agreement on which the deed was made was admissible in a suit against the grantor, the "trustee" making no objection thereto.

Terms not required to make a sufficient memorandum may be addel by parol. Hall's Succession, 28 La. Ann. 57.

Indorsement of negotiable instrument.— Where by the law of negotiable instruments an indorsement has acquired a certain definite meaning, it is impossible to add to that meaning by oral evidence of an intent or promise to become liable to any greater extent than the indorsement *ipso facto* indicates. Drake *v.* Markle, 21 Ind. 433, 83 Am. Dec. 358; Hauck *v.* Hund, 1 Bosw. (N. Y.) 431; Hall *v.* Newcomb, 7 Hill (N. Y.) 416, 42 Am. Dec. 82; Temple *v.* Baker, 125 Pa. St. 634, 17 Atl. 516, 11 Am. St. Rep. 926, 3 L. R. A. 709; Hauer *v.* Patterson, 84 Pa. St. 274; Wilson *v.* Martin, 74 Pa. St. 159, 10 Phila. 470; Murray *v.* McKee, 60 Pa. St. 35; Schafer *v.* Farmers', etc., Bank, 59 Pa. St. 144, 98 Am. Dec. 323; Jack *v.* Morrison, 48 Pa. St. 113; Allwine *v.* Garberick, 8 Phila. (Pa.) 637; Alter *v.* Langebartel, 5 Phila. (Pa.) 151; Jackson *v.* Barnes, 5 Phila. (Pa.) 33; Martin *v.* Duffey, 4 Phila. (Pa.) 75; Creveling *v.* Danville Nat. Bank, 1 Wkly. Notes Cas. (Pa.) 244. Where, however, an indorsement may mean one of two things according to the intent of the parties or other circumstances, such intent or circumstances may be proved by oral evidence. Castle *v.* Candee, 16 Conn. 223; Perkins *v.* Catlin, 11 Conn. 213, 29 Am. Dec. 282; Beckwith *v.* Angell, 6 Conn. 315; Chaddock *v.* Vanness, 35 N. J. L. 517, 10 Am. Rep. 256; Eilbert *v.* Finkbeiner, 68 Pa. St. 243, 8 Am. Rep. 176; Taylor *v.* McCune, 11 Pa. St. 460; Leech *v.* Hill, 4 Watts (Pa.) 448; Harding *v.* Water, 6 Lea (Tenn.) 324.

83. Union Nat. Bank *v.* Leary, 77 N. Y. App. Div. 332, 79 N. Y. Suppl. 217; North Platte Milling, etc., Co. *v.* Price, 4 Wyo. 293, 33 Pac. 664.

84. New England Dressed Meat, etc., Co. *v.* Standard Worsted Co., 165 Mass. 328, 43 N. E. 112, 52 Am. St. Rep. 516.

85. Lee *v.* Butler, 167 Mass. 426, 46 N. E. 52, 57 Am. St. Rep. 466; Tallman *v.* Franklin, 14 N. Y. 584 [*reversing* 3 Duer 395]; Goldbeck *v.* Eisele, 8 Wkly. Notes Cas. (Pa.) 512. See also *supra*, IX, C, 4. See, however, Dobson *v.* Litton, 5 Coldw. (Tenn.) 616, holding that parol evidence is not admissible to explain a contract where the description employed is one that must necessarily apply equally to any one of an indefinite number of tracts of land. See also *supra*, IX, C, 4, b.

Guaranty of account.— Parol evidence is admissible in an action on a written guaranty of the "account" of another for a stated sum to show that the word "account" referred to an indebtedness about to be created and not to one already existing. Walrath *v.* Thompson, 4 Hill (N. Y.) 200; Waldheim *v.* Miller, 97 Wis. 300, 72 N. W. 869.

86. Shreveport Rod, etc., Club *v.* Caddo Levee Dist., 48 La. Ann. 1081, 20 So. 293 (where it was claimed that defendants had obtained a deed from a corporation by fraudulent substitution of themselves for plaintiffs, whose offer to buy had been accepted by resolution of the directors, defendants were allowed to support their deed by oral evidence showing their own offer to buy and the resolution of the directors accepting it); Mantz *v.* Maguire, 52 Mo. App. 136 (holding that it is competent to show by extrinsic evidence who is the principal of one who signs confessedly as an agent); Bibb *v.* Allen, 149 U. S. 481, 13 S. Ct. 950, 37 L. ed. 819 (holding that a fictitious name may be shown to refer to one of the parties). See, however, Jacobs *v.* Miller, 50 Mich. 119, 15 N. W. 42 (where it was held that oral evidence could not be given that A, who had been described as X's wife in a deed to X and his wife, was not in reality the wife of X, on the ground that it would be in effect establishing an estate in common by parol evidence); Sturgis First Nat. Bank *v.* Bennett, 33 Mich. 520 (holding that parol evidence that a written

circumstances to show to what consideration the clause in a guaranty applies;[87] and if plaintiff relies on part performance as taking the contract out of the statute, he may supplement any writing that he has by oral evidence.[88]

(II) *CONNECTING WRITINGS.* Separate writings may be connected by oral evidence,[89] provided that they contain certain internal reference to each other.[90]

b. To Refute Memorandum. The contract being oral and the rules governing the variation of written contracts by parol being for that reason inapplicable, defendant may show by parol evidence that a memorandum does not contain all the terms of the oral agreement and is insufficient on that account;[91] and he may of course show by parol evidence that the memorandum is not a memorandum of a precedent contract; in other words that no contract existed.[92]

guaranty of indemnity given to sureties by the president of a corporation is in fact the guaranty of the corporation is inadmissible to bind the corporation).

To supply name.— A sufficiently certain description of a party, without any name being given, if contained in a memorandum otherwise adequate, may be shown to refer to a party to the contract. McConnell *v.* Brillhart, 17 Ill. 354, 65 Am. Dec. 661; Jones *v.* Dow, 142 Mass. 130, 7 N. E. 839.

87. Union Nat. Bank *v.* Leary, 77 N. Y. App. Div. 332, 79 N. Y. Suppl. 217; Walrath *v.* Thompson, 4 Hill (N. Y.) 200; Waldheim *v.* Miller, 97 Wis. 300, 72 N. W. 869. See, however, Wright *v.* Weeks, 25 N. Y. 153 [*affirming* 16 N. Y. Super. Ct. 372] (holding that a contract for the sale of land which fixes the price but refers to "terms as specified" not in the memorandum cannot be made good by parol evidence of the time agreed on for payment); Wood *v.* Wheelock, 25 Barb. (N. Y.) 625 (holding that if the holder of a note at the time of selling it indorses a guaranty of payment thereon without expressing the consideration for the promise, the buyer cannot vary the contract by parol proof that a valuable consideration was in fact paid by him); Weed *v.* Clark, 4 Sandf. (N. Y.) 31 (holding that, where the terms of a guaranty leave it doubtful whether the consideration was an executed one or not, parol evidence is not admissible to explain, the ambiguity being patent and the statute of frauds requiring a positive expression of the consideration).

Time of indorsement of guaranty.— If a guaranty indorsed on a note is not dated, parol evidence is admissible to show that it was indorsed at the time the note was made and delivered, and hence that the consideration was sufficiently expressed. Ordeman *v.* Lawson, 49 Md. 135; Wilson Sewing Mach. Co. *v.* Schnell, 20 Minn. 40.

88. Parkhurst *v.* Van Cortland, 14 Johns. (N. Y.) 15, 7 Am. Dec. 427 [*reversing* 1 Johns. Ch. 273]; Monahan *v.* Colgin, 4 Watts (Pa.) 436.

89. Lee *v.* Butler, 167 Mass. 426, 46 N. E. 52, 57 Am. St. Rep. 466.

90. *Alabama.*— Oliver *v.* Alabama Gold L. Ins. Co., 82 Ala. 417, 2 So. 445; Adams *v.* McMillan, 7 Port. 73. See Forst *v.* Leonard, 112 Ala. 296, 20 So. 587; Jenkins *v.* Harrison, 66 Ala. 345.

Georgia.— Turner *v.* Lorillard Co., 100 Ga. 645, 28 S. E. 383, 62 Am. St. Rep. 345.

Iowa.— See Lee *v.* Mahoney, 9 Iowa 344.

Maine.— Freeport First Parish *v.* Bartol, 3 Me. 340.

Maryland.— Ordeman *v.* Lawson, 49 Md. 135 (where the court held that if the contract whereby a note is guaranteed is written on a separate instrument, its reference to the note must be so clear as to identify it with certainty, else the contract must express the consideration, parol evidence not being admissible to identify the note by supplying defects in or removing doubts arising upon the reference thereto contained in the guaranty itself); Moale *v.* Buchanan, 11 Gill & J. 314.

Minnesota.— Tice *v.* Freeman, 30 Minn. 389, 15 N. W. 674.

New Jersey.— See Gough *v.* Williamson, 62 N. J. Eq. 526, 50 Atl. 323.

New York.— Ward *v.* Hasbrouck, 169 N. Y. 407, 62 N. E. 434.

Tennessee.— Blair *v.* Snodgrass, 1 Sneed 1.

Virginia.— Darling *v.* Cumming, 92 Va. 521, 23 S. E. 880; Hale *v.* Hale, 90 Va. 728, 19 S. E. 739.

United States.— Duff *v.* Hopkins, 33 Fed. 599, holding that a writing which does not on its face appear to refer to the transaction cannot be shown by extrinsic evidence to refer to it. See Remington *v.* Linthicum, 14 Pet. 84, 10 L. ed. 364.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 264.

91. Fisher *v.* Andrews, 94 Md. 46, 50 Atl. 407; Kriete *v.* Myer, 61 Md. 558; Boardman *v.* Spooner, 13 Allen (Mass.) 353, 90 Am. Dec. 196; Elmore *v.* Kingscote, 5 B. & C. 583, 8 D. & R. 343, 29 Rev. Rep. 341, 11 E. C. L. 594; Acebal *v.* Levy, 10 Bing. 376, 25 E. C. L. 180; Goodman *v.* Griffiths, 1 H. & N. 574, 26 L. J. Exch. 145, 5 Wkly. Rep. 369; Pitts *v.* Beckett, 14 L. J. Exch. 358, 13 M. & W. 743; McMullen *v.* Helberg, 6 L. R. Ir. 463. See Smith *v.* Shell, 82 Mo. 215, 52 Am. Rep. 365.

92. Elliot *v.* Barrett, 144 Mass. 256, 10 N. E. 820; Sanborn *v.* Fireman's Ins. Co., 16 Gray (Mass.) 448, 77 Am. Dec. 419; Hussey *v.* Horne-Payne, 4 App. Cas. 311, 48 L. J. Ch. 846, 41 L. T. Rep. N. S. 1, 27 Wkly. Rep. 585; Pym *v.* Campbell, 6 E. & B. 370, 2 Jur. N. S. 641, 25 L. J. Q. B. 277, 4 Wkly. Rep. 528, 88 E. C. L. 370; Wake *v.* Harrop, 6 H. & N. 768; Clever *v.* Kirkman, 33 L. T. Rep. N. S. 672, 24 Wkly. Rep. 159.

Necessity of valid common-law contract see *supra*, X, A, 9.

4. SUFFICIENCY.[93] Where plaintiff relies on a lost memorandum, the evidence must tend to show definitely what the writing was, and that it contained everything necessary to a memorandum under the statute;[94] and the rule is the same when he relies on an oral contract and part performance; the contract must be definitely proved as well as the performance.[95] But these rules do not require proof beyond a reasonable doubt.[96]

C. Trial[97]— 1. OBJECTIONS TO EVIDENCE. It is held in general that by failing to object to the proof of an oral contract a party waives the benefit of the statute and cannot afterward claim it;[98] but this is not so where the statute has been pleaded in defense.[99] If the evidence fails to show a written contract, advantage of the defect may be taken by a demurrer to the evidence.[1] Evidence of an oral contract should not be rejected unconditionally; it should be left open to plaintiff to prove such contract if he also proves facts saving it from the statute.[2]

2. QUESTIONS FOR JURY. Where the determination of the question whether a contract is within the statute depends on disputed facts, it is for the jury to say, under proper instructions, whether or not the case is in fact within the statute.[3]

93. Charges in account-books as evidence as to whom credit was given see *supra*, IV, E, 5.

94. Ballingall *v.* Bradley, 16 Ill. 373; Johnston *v.* Churchills, Litt. Sel. Cas. (Ky.) 177; Rector Provision Co. *v.* Sauer, 69 Miss. 235, 13 So. 623.

95. *Arkansas.*— Bromley *v.* Aday, 70 Ark. 351, 68 S. W. 32.

Georgia.— Holland *v.* Atkinson, 112 Ga. 346, 37 S. E. 380.

Indian Territory.— Rowe *v.* Henderson, (1903) 76 S. W. 250.

Iowa.— Williamson *v.* Williamson, 4 Iowa 279.

Kansas.— Long *v.* Duncan, 10 Kan. 294.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 376.

To establish a parol exchange of lands the terms of the agreement must be shown with precision, and it must clearly appear that there was a complete taking of possession by one of the parties of the land to be received by him. Taylor *v.* Henderson, 38 Pa. St. 60; Casey *v.* Castle, 112 Wis. 32, 87 N. W. 811. Where, however, the evidence shows a clear, unequivocal, and complete taking possession by one of the parties of the land received by him, less evidence will be necessary to show a possession by the other of the lands received by him. It is necessary only that the terms of the agreement be shown with precision, and that the evidence to support it carry conviction to a moral certainty of its truth; absolute certainty is not required, and a mere conflict in the testimony will not condemn it, provided that out of all of it the facts relied on emerge with reasonable distinctness and certainty. Jermyn *v.* McClure, 195 Pa. St. 245, 45 Atl. 938.

96. Ridgell *v.* Reeves, 2 Tex. App. Civ. Cas. § 436.

In Louisiana the statute requires one credible witness and corroborating circumstances in proof of contracts relating to personal property of which the value exceeds five hundred dollars. Turnage *v.* Wells, 19 La. Ann. 135; Moore *v.* New Orleans, 17 La. Ann. 312.

In Pennsylvania, although there is no statute corresponding to the fourth section of the English statute, the courts nevertheless require the strictest proof of the making of contracts such as are covered by the English statute. Moss *v.* Culver, 64 Pa. St. 414, 3 Am. Rep. 601; Ackerman *v.* Fisher, 57 Pa. St. 457; Cox *v.* Cox, 26 Pa. St. 375, 67 Am. Dec. 432; Poorman *v.* Kilgore, 26 Pa. St. 365, 67 Am. Dec. 524.

97. See, generally, TRIAL.

98. *California.*— Nunez *v.* Morgan, 77 Cal. 427, 19 Pac. 753; Livermore *v.* Stine, 43 Cal. 274.

Iowa.— Marr *v.* Burlington, etc., R. Co., 121 Iowa 117, 96 N. W. 716.

Louisiana.—Pauline *v.* Hubert, 14 La. Ann. 161; Strawbridge *v.* Warfield, 4 La. 20; Babineau *v.* Cormier, 1 Mart. N. S. 456. *Contra*, Merz *v.* Labuzan, 23 La. Ann. 747.

Missouri.—Royal Remedy, etc., Co. *v.* Gregory Grocer Co., 90 Mo. App. 53; Neuvirth *v.* Engler, 83 Mo. App. 420; Newman *v.* Watson Bank, 70 Mo. App. 135; Miller *v.* Harper, 63 Mo. App. 293.

Nebraska.— Eiseley *v.* Malchow, 9 Nebr. 174, 2 N. W. 372.

Texas.— Roe *v.* Bridges, (Civ. App. 1895) 31 S. W. 317.

Vermont.—Holt *v.* Howard, (1904) 58 Atl. 797; Pike *v.* Pike, 69 Vt. 535, 38 Atl. 265; Montgomery *v.* Edwards, 46 Vt. 151, 14 Am. Rep. 618.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 377.

99. Farwell *v.* Tillson, 76 Me. 227; Thomas *v.* Churchill, 48 Nebr. 266, 67 N. W. 182.

1. Bambrick *v.* Bambrick, 157 Mo. 423, 58 S. W. 8.

2. James *v.* Morey, 44 Ill. 352; Scharff *v.* Klein, 29 Mo. App. 549; Holcombe *v.* Munson, 103 N. Y. 682, 9 N. E. 443.

This is especially true where plaintiff has alleged facts which if proved will avoid the operation of the statute. Benedict *v.* Bird, 103 Iowa 612, 72 N. W. 768.

3. Weeks *v.* Crie, 94 Me. 458, 48 Atl. 107, 80 Am. St. Rep. 410 (holding that whether a series of transactions constitutes several or one entire contract is for the jury); Hawkins *v.* Chace, 19 Pick. (Mass.) 562 (holding

So it has been held that it is for the jury to say whether a promise is original or collateral,[4] and whether there has been a delivery and acceptance of goods sufficient to avoid the statute.[5]

3. INSTRUCTIONS. It follows from the rules stated in the preceding section that when there is evidence on which a finding either way might reasonably be made, the court should properly instruct the jury as to the law, and leave it to them to say whether the statute applies;[6] but that where the admitted facts remove a case from or include it within the operation of the statute, instructions to that effect

that whether defendant authorized the making of the memorandum is for the jury). See also Morton *v.* Tibbett, 15 Q. B. 428, 14 Jur. 669, 19 L. J. Q. B. 382, 69 E. C. L. 428; Tompkinson *v.* Straight, 25 L. J. C. P. 85, both holding that a contract of sale is made capable of proof by the acceptance and receipt of part of the goods, and when there is a dispute as to the terms of the contract, such terms must be found by the jury.

Whether the contract was to be performed within a year is a question for the jury. Reynolds *v.* Wisconsin Chair Co., 56 S. W. 653, 22 Ky. L. Rep. 12; Farwell *v.* Tillson, 76 Me. 227; Tatterson *v.* Suffolk Mfg. Co., 106 Mass. 56.

Whether there has been part performance is a question for the jury. Bryan *v.* Southwestern R. Co., 37 Ga. 26; Cuddy *v.* Foreman, 107 Wis. 519, 83 N. W. 1103.

4. *California.*— Harris *v.* Frank, 81 Cal. 280, 22 Pac. 856.

Georgia.— Worthen *v.* Sinclair, 98 Ga. 173, 25 S. E. 414.

Illinois.— Lush *v.* Throop, 189 Ill. 127, 59 N. E. 529; Jones *v.* McLaughlin-Patrick Constr. Co., 99 Ill. App. 320.

Kansas.— Calahan *v.* Ward, 45 Kan. 545, 26 Pac. 53.

Massachusetts.— Perkins *v.* Hinsdale, 97 Mass. 157.

Michigan.— Ford *v.* McLane, 131 Mich. 371, 91 N. W. 617.

Missouri.— Kansas City Sewer Pipe Co. *v.* Smith, 36 Mo. App. 608.

New Hampshire.— Walker *v.* Richards, 41 N. H. 388.

New Jersey.— Chesebrough *v.* Tirrill, 61 N. J. L. 628, 41 Atl. 215.

New York.— Ward *v.* Hasbrouck, 169 N. Y. 407, 62 N. E. 434 [*affirming* 52 N. Y. App. Div. 627, 65 N. Y. Suppl. 200]; Waddell *v.* Greenhall, 3 Silv. Sup. 378, 6 N. Y. Suppl. 267; Floyd *v.* Wise, 17 N. Y. Suppl. 725.

Pennsylvania.— Beard *v.* Heck, 13 Pa. Super. Ct. 390.

Vermont.— Sinclair *v.* Richardson, 12 Vt. 33.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 378.

The question as to whom the credit was actually given is essentially a question of fact for the jury. Temple *v.* Goldsmith, 118 Mich. 172, 76 N. W. 324; Morris *v.* Osterhout, 55 Mich. 262, 21 N. W. 339; Lindsey *v.* Heaton, 27 Nebr. 662, 43 N. W. 420; Cowdin *v.* Gottgetreu, 55 N. Y. 650; Waddell *v.* Greenhall, 3 Silv. Sup. (N. Y.) 378, 6 N. Y. Suppl. 267; McCaffil *v.* Radcliff, 3 Rob. (N. Y.) 445. Province of jury as to effect of charges in account-books on question as to whom credit was given see *supra*, IV, E, 5.

5. *Georgia.*— Johnson *v.* Watson, 1 Ga. 348.

Illinois.— Williams *v.* Andrew, 185 Ill. 98, 56 N. E. 1041 [*affirming* 84 Ill. App. 289].

Iowa.— Hutton *v.* Doxsee, 116 Iowa 13, 89 N. W. 79; Thompson *v.* Frakes, 112 Iowa 585, 84 N. W. 703.

Maryland.— Hewes *v.* Jordan, 39 Md. 472, 17 Am. Rep. 578.

Michigan.— Wilcox *v.* Young, 66 Mich. 687, 33 N. W. 765.

Mississippi.— Stonewall Mfg. Co. *v.* Peek, 63 Miss. 342.

Missouri.— Bass *v.* Walsh, 39 Mo. 192; Swafford *v.* Spratt, 93 Mo. App. 631, 67 S. W. 701.

New Hampshire.— Standard Wall Paper Co. *v.* Towns, 72 N. H. 324, 56 Atl. 744; Pinkham *v.* Mattox, 53 N. H. 600.

New York.— Jones *v.* Reynolds, 120 N. Y. 213, 24 N. E. 279; Burrows *v.* Whitaker, 71 N. Y. 291, 27 Am. Rep. 42; Gray *v.* Davis, 10 N. Y. 285; Rappleye *v.* Adee, 65 Barb. 589, 1 Thomps. & C. 126.

Washington.— Reinhart *v.* Gregg, 8 Wash. 191, 35 Pac. 1075.

Wisconsin.— Theilen *v.* Rath, 80 Wis. 263, 50 N. W. 183; Somers *v.* McLaughlin, 57 Wis. 358, 15 N. W. 442.

England.— Bushell *v.* Wheeler, 15 Q. B. 442 note, 8 Jur. 532, 69 E. C. L. 442; Morton *v.* Tibbett, 15 Q. B. 428, 14 Jur. 669, 69 E. C. L. 428, 19 L. J. Q. B. 382; Edan *v.* Dudfield, 1 Q. B. 302, 5 Jur. 317, 4 P. & D. 656, 41 E. C. L. 551; Blenkinsop *v.* Clayton, 1 Moore C. P. 328, 7 Taunt. 597, 18 Rev. Rep. 602, 2 E. C. L. 508.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 378.

Question for court.— Whether ascertained facts warrant the jury in finding an acceptance and receipt is a question of law.

Connecticut.— Bulkley *v.* Waterman, 13 Conn. 328.

Maine.—Dyer *v.* Libby, 61 Me. 45.

New Jersey.— Finney *v.* Apgar, 31 N. J. L. 266.

New York.—Stone *v.* Browning, 68 N. Y. 598; Outwater *v.* Dodge, 7 Cow. 85.

North Dakota.— Dinnie *v.* Johnson, 8 N. D. 153, 77 N. W. 612.

Wisconsin.— Becker *v.* Holm, 89 Wis. 86, 61 N. W. 307.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 378.

6. *Arkansas.*— Neal *v.* Brandon, 70 Ark. 79, 66 S. W. 200.

Maryland.— Atwell *v.* Miller, 6 Md. 10, 61 Am. Dec. 294.

should be given.[7] It has been held that the defense of the statute cannot be raised for the first time by a request for instructions.[8]

4. Findings. A finding of fact that there was a contract to sell real estate is presumed to mean a contract in writing.[9]

D. Review.[10] It is generally true that the defense afforded by the statute of frauds must be claimed in some way before the trial court, and is not open for the first time on appeal.[11] To work a reversal, error in the trial must have been prejudicial.[12]

FRAUDULENT. See Fraud, and Cross-References thereunder.

Nebraska.—Waters *v.* Shafer, 25 Nebr. 225, 41 N. W. 181.

New York.— Wilcox Silver Plate Co. *v.* Green, 72 N. Y. 17 [*affirming* 9 Hun 347]; Shrimpton *v.* Dworskly, 2 Misc. 123, 21 N. Y. Suppl. 461; Clews *v.* Alley, 18 N. Y. Suppl. 760.

North Carolina.— Horne *v.* People's Bank, 108 N. C. 109, 12 S. E. 840; Wiggins *v.* Guthrie, 101 N. C. 661, 7 S. E. 761.

Pennsylvania.— Irwin *v.* Irwin, 34 Pa. St. 525.

Texas.— Dockery *v.* Tyler Car, etc., Co., (Civ. App. 1896) 34 S. W. 660.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 379.

Acceptance and receipt.— In Devine *v.* Warner, 75 Conn. 375, 53 Atl. 782, 96 Am. St. Rep. 211, it was held that an instruction failing to distinguish between an acceptance of an order sufficient to complete a contract for the sale of goods at common law and an acceptance and receipt under the statute was erroneous.

7. *Illinois.*— Thayer *v.* McEwen, 4 Ill. App. 416.

Indiana.— Druly *v.* Hunt, 35 Ind. 507.

Iowa.— Johnson *v.* Holland, 124 Iowa 157, 99 N. W. 708; Marsh *v.* Bird, 31 Iowa 599. Under the Iowa statute, an instruction that defendant is not liable on the oral contract which fails to refer to the provision allowing him to be charged on his own testimony is properly refused. Lyons *v.* Thompson, 16 Iowa 62.

Maryland.— Hamilton *v.* Thirston, 93 Md. 213, 48 Atl. 709; Cooney *v.* Hax, 92 Md. 134, 48 Atl. 58.

Missouri.— Barham *v.* Colp, 87 Mo. App. 152.

New York.—Waddell *v.* Greenhall, 3 Silv. Sup. 378, 6 N. Y. Suppl. 267; Burgdorf *v.* Odell, 1 Silv. Sup. 556, 6 N. Y. Suppl. 59.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 379.

8. Scharff *v.* Klein, 29 Mo. App. 549; Newman *v.* Greeff, 101 N. Y. 663, 5 N. E. 335 [*affirming* 50 N. Y. Super. Ct. 531].

9. McDonald *v.* Mission View Homestead Assoc., 51 Cal. 210.

10. See, generally, Appeal and Error.

11. *Alabama.*— Lewis *v.* Teal, 82 Ala. 288, 2 So. 903.

California.— McDonald *v.* Mission View Homestead Assoc., 51 Cal. 210; Bunting *v.* Beideman, 1 Cal. 181.

Georgia.—Johnson *v.* Lattimer, 71 Ga. 470.

Illinois.— Deniston *v.* Hoagland, 67 Ill. 265; Boston *v.* Nichols, 47 Ill. 353.

Indiana.— Elston *v.* Castor, 101 Ind. 426, 51 Am. Rep. 754.

Iowa.— Byers *v.* Johnson, 89 Iowa 278, 56 N. W. 449; Holt *v.* Brown, 63 Iowa 319, 19 N. W. 235; Crossen *v.* White, 19 Iowa 109, 87 Am. Dec. 420.

Maryland.— Spencer *v.* Pearce, 10 Gill & J. 294.

Michigan.— Burroughs *v.* Morse, 48 Mich. 520, 12 N. W. 684.

Missouri.— Clement *v.* Gill, 59 Mo. App. 482; Hobart *v.* Murray, 54 Mo. App. 249; Scharff *v.* Klein, 29 Mo. App. 549.

New York.— Bommer *v.* American Spiral Spring Butt Hinge Mfg. Co., 81 N. Y. 468 (holding that, although the statute is pleaded as a defense, yet if no point in respect thereto is raised or exception taken on the trial, the question cannot be considered on appeal); Balmford *v.* Peffer, 31 Misc. 715, 65 N. Y. Suppl. 271.

North Carolina.— Cozart *v.* West Oxford Land Co., 113 N. C. 294, 18 S. E. 337; Brown *v.* Washington Com'rs, 63 N. C. 514.

Oregon.— Hawley *v.* Dawson, 16 Oreg. 344, 18 Pac. 592.

Texas.— League *v.* Davis, 53 Tex. 9; Erhard *v.* Callaghan, 33 Tex. 171.

See 23 Cent. Dig. tit. "Frauds, Statute of," § 381.

A request for ruling at the close of a trial to the refusal of which an exception is taken has been held sufficient to save a case from the operation of the above rule. Popp *v.* Swanke, 68 Wis. 364, 31 N. W. 916.

After a trial and judgment for defendant, which is reversed on appeal, defendant has been held to be debarred from withdrawing an admission already made and pleading the statute. Barrett *v.* McAllister, 35 W. Va. 103, 12 S. E. 1106.

12. League *v.* Davis, 53 Tex. 9, holding that where defendant does not interpose the statute, an error by the court in instructing the jury as to what would constitute a contract not to be performed within one year is immaterial. In Rawdon *v.* Dodge, 40 Mich. 697, it was contended, in an action on an oral contract, that, as the contract was unenforceable, its admission in evidence could not have prejudiced defendant, but the contention was not sustained.

FRAUDULENT CONVEYANCES

By Frederick S. Wait
of the New York Bar *

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- Devise or Bequest in Fraud of Creditors, see WILLS.
- Fraudulent:
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  - Chattel Mortgage, see CHATTEL MORTGAGES.
  - Conveyance or Transfer as Ground For:
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    - Corporations Generally, see CORPORATIONS.
    - Decedent in Fraud of Heirs, see DESCENT AND DISTRIBUTION.
    - Husband in Fraud of Wife, see DESCENT AND DISTRIBUTION; DIVORCE; DOWER; HUSBAND AND WIFE.
    - Partners, see PARTNERSHIP.
    - Wife in Fraud of Husband, see CURTESY; DESCENT AND DISTRIBUTION; HUSBAND AND WIFE.

I. INTRODUCTORY DISCUSSION.

A. In General — 1. RELIEF EXTENDED TO CREDITORS. Proceedings of a civil nature, instituted against debtors to reach property or assets secreted, or alienated in fraud of creditors, or rights and interests that are beyond the reach of ordinary process in legal actions, are a prolific source of contention in our courts, and a subject of frequent legislative supervision. Creditors are a favored class[1] and the preservation of their rights is a fundamental policy of all enlightened nations.[2] In ancient times so strong was the policy of the law in favor of the creditor class that an insolvent debtor might be put to death, or sold into slavery, by his creditor;[3] and where the delinquent debtor had several creditors they could dismember his body.[4] Credit is extended in reliance upon the evidence of the ability of the debtor to pay, and in confidence that his possessions will not be diminished to the prejudice of those who trust him. This reliance is disappointed, and this confidence abused, if he divests himself of his property by giving it away after he has obtained credit.[5] The tendency of modern legislation has been to prevent unfeeling creditors from oppressing or punishing a debtor for his poverty,[6] but a strong purpose is manifested in the more recent statutes and decisions of the courts to enlarge and strengthen the creditor's remedies against the property of the debtor.[7]

1. Fouche *v.* Brower, 74 Ga. 251; Gable *v.* Columbus Cigar Co., 140 Ind. 563, 566, 38 N. E. 474. See *infra*, I, C, 1; IV.
2. Story Eq. Jur. § 350; Wait Fraud. Conv. § 1.
3. Holmes Comm. L. 14.
4. Gibbons Hist. Dec. and Fall Roman Emp. 372, 373. Prof. Maine comments upon the uniform severity of very ancient systems of law to debtors and the extravagant powers which these laws lodged with creditors. See Maine Anc. L. (11th ed.) 321.

Providing necessaries to imprisoned debtor. — Neither the sheriff, nor the creditor, were obligated to provide an imprisoned debtor with food or clothes, and if his friends did not come to his rescue he would be allowed to die in prison. Manby *v.* Scott, 1 Mod. 124.

5. Washington Cent. Nat. Bank *v.* Hume, 128 U. S. 195, 204, 9 S. Ct. 41, 32 L. ed. 370.
6. Stevens *v.* Merrill, 41 N. H. 309.
7. See *infra*, II; XIV, A–C.

2. WHY FRAUDLENT CONVEYANCES ARE NUMEROUS. The abolition of imprisonment for debt is in a measure a cause for the increase in the number of conveyances made in fraud of creditors. The inconvenience and terror of the debtor's prison has been removed in most civilized countries, as regards contract claims, and the contract debtor need no longer fear disgrace from imprisonment.[8]

B. Origin of Written Law — 1. MAGNA CHARTA. Fraudulent alienations of property were of very early origin. A provision of Magna Charta is sometimes spoken of as one of the original sources of written law against fraudulent transfers. The article in the famous charter provided that no freeman should give or sell away his lands so that no residue would remain to the lord of the fee, out of which the service pertaining to the fee might be enforced.[9]

2. STATUTE OF 13 ELIZABETH AND EARLIER ENGLISH STATUTES. The parliament of England began to legislate against fraudulent conveyances at an early date. The statute of Richard II[10] contained provisions aimed at fraudulent debtors, as did also the statute of Edward III;[11] and by the statute of Henry VII "all deeds of gift of goods and chattels made or to be made of trust to the use of the person or persons that made the same deed of gift" were declared "void and of none effect."[12] The most famous and important of the statutes against fraudulent conveyances is that of 13 Elizabeth[13] perpetuated by the statute of 29 Elizabeth.[14] The statute of 13 Elizabeth provided in substance that all conveyances or dispositions of property, real or personal, made with the intention to defraud creditors, should be null and void as against the creditors.[15] The dates of these enactments against fraudulent transfers suggest historically a most important period in the development of civilization. They were enacted to overturn conveyances "fraudulent in their concoction" says Lord Ellenborough.[16]

3. STATUTES IN THE UNITED STATES. In the United States the statute of 13 Elizabeth, above referred to, has, in practically all the states, been either recognized as a part of the common law or expressly adopted or reënacted in more or less similar terms.[17] This statute, said Mr. Justice Story, referring to the

8. See Wait Fraud. Conv. (3d ed.) § 2.

9. Magna Charta, June 19, 1215.

10. St. 2 Rich. II, c. 3, enacted in 1379.

11. St. 50 Edw. III, c. 6, enacted in 1376.

12. St. 3 Hen. VIII, c. 4, enacted in 1487.

13. St. 13 Eliz. c. 5, enacted in 1570.

The statute of 10 Car. 1 is equivalent to 13 Eliz. c. 5. Wood *v.* Dixie, 7 Q. B. 892, 9 Jur. 796, 53 E. C. L. 892. See *In re* Moroney, L. R. 21 Ir. 27.

14. St. 29 Eliz. c. 5, enacted in 1587.

15. The statute declares that "all and every Feoffment, Gift, Grant, Alienation, Bargain and Conveyance of Lands, Tenements, Hereditaments, Goods and Chattels, or of any of them, or of any Lease, Rent, Common or other Profit or Charge out of the same Lands, Tenements, Hereditaments, Goods and Chattels, or any of them, by Writing or otherwise, and all and every Bond, Suit, Judgment and Execution, at any Time had or made sithence the Beginning of the Queen's Majesty's Reign that now is, or at any Time hereafter to be had or made, to or for any Intent or Purpose before declared and expressed, shall be from henceforth deemed and taken (only as against that Person or Persons, his or their Heirs, Successors, Executors, Administrators and Assigns, and every of them, whose Actions, Suits, Debts, Accounts, Damages, Penalties, Forfeitures, Heriots, Mortuaries and Reliefs, by such guileful, covinous or fraudulent Devices and Practices, as is aforesaid, are, shall or might be in any ways disturbed, hindered, delayed or defrauded) to be clearly and utterly void, frustrate and of none Effect; any Pretence, Colour, feigned Consideration, expressing of Use, or any other Matter or Thing to the contrary notwithstanding."

16. Meux *v.* Howell, 4 East 1. And see U. S. *v.* U. S. Bank, 8 Rob. (La.) 262, 402; Moore *v.* Hinnant, 89 N. C. 455, 459.

17. *Alabama.*— Anderson *v.* Anderson, 64 Ala. 403.

District of Columbia.— Kansas City Packing Co. *v.* Hoover, 1 App. Cas. 268.

Georgia.— Westmoreland *v.* Powell, 59 Ga. 256; Peck *v.* Land, 2 Ga. 1, 46 Am. Dec. 368.

Illinois.— Ewing *v.* Runkle, 20 Ill. 448.

Iowa.— Gardner *v.* Cole, 21 Iowa 205.

Kentucky.— Doyle *v.* Sleeper, 1 Dana 531.

Louisiana.— U. S. *v.* U. S. Bank, 8 Rob. 262, 402.

Maine.— Butler *v.* Moore, 73 Me. 151, 40 Am. Rep. 348; Whitmore *v.* Woodward, 28 Me. 392; Howe *v.* Ward, 4 Me. 195.

Maryland.— Crooks *v.* Brydon, 93 Md. 640, 49 Atl. 921.

Mississippi.— Carlisle *v.* Tindall, 49 Miss. 229, 234.

New Hampshire.— Robinson *v.* Holt, 39 N. H. 557, 75 Am. Dec. 233.

statute of 13 Elizabeth, "has been universally adopted in America as the basis of our jurisprudence upon the subject." [18]

4. Declaratory of the Common Law. The statute of 13 Elizabeth was not, nor were any of the early statutes, vitally essential to secure the avoidance of a conveyance, whether of real or personal property, made in fraud of creditors. At common law such conveyances could be set aside, and the statute is merely declaratory of the common law,[19] or, as Chancellor Kent said, "only in affirmance of the principles of the common law." [20] The common law enjoins integrity as a virtue paramount to generosity.[21]

New Jersey.— Mulford *v.* Peterson, 35 N. J. L. 127.

New York.— Sturtevant *v.* Ballard, 9 Johns. 337, 6 Am. Dec. 281.

North Carolina.— Moore *v.* Hinnant, 89 N. C. 455; Gowing *v.* Rich, 23 N. C. 553.

Pennsylvania.— Clark *v.* Douglass, 62 Pa. St. 408; McCulloch *v.* Hutchinson, 7 Watts 434, 32 Am. Dec. 776; Wilt *v.* Franklin, 1 Binn. 502, 2 Am. Dec. 474. And see Heath *v.* Page, 63 Pa. St. 108, 3 Am. Rep. 533.

Virginia.— Davis *v.* Turner, 4 Gratt. 422.

Washington.— Bates *v.* Drake, 28 Wash. 447, 68 Pac. 961; Wagner *v.* Law, 3 Wash. 500, 28 Pac. 1109, 29 Pac. 927, 28 Am. St. Rep. 56, 15 L. R. A. 784.

United States.— Peters *v.* Bain, 133 U. S. 670, 685, 10 S. Ct. 354, 33 L. ed. 696 (where Chief Justice Fuller says: "The Statute of Elizabeth, c. 5, against fraudulent conveyances has been universally adopted in American law as the basis of our jurisprudence on that subject, (Story Eq. Jur. § 353,) and reënacted in terms, or nearly so, or with some change of language, by the legislatures of the several States"); Cathcart *v.* Robinson, 5 Pet. 264, 8 L. ed. 120. See also Clement *v.* Nicholson, 6 Wall. 299, 18 L. ed. 786; Sumner *v.* Hicks, 2 Black 532, 17 L. ed. 355; Hamilton *v.* Russell, 1 Cranch 309, 2 L. ed. 118; McClellan *v.* Pyeatt, 66 Fed. 843, 14 C. C. A. 140 (act of congress of May 2, 1890, putting in force in Indian Territory the Arkansas statute in relation to fraudulent conveyances).

18. Story Eq. Jur. § 353.

19. *Alabama.*— Anderson *v.* Anderson, 64 Ala. 403; Adams *v.* Broughton, 13 Ala. 731; Anderson *v.* Hooks, 9 Ala. 704; Cato *v.* Easley, 2 Stew. 214, 220 (where it is said: "It is a well established rule of the common law, that all conveyances made with an intent to delay, hinder and defraud creditors, are fraudulent and void, and our statute of frauds and perjuries is declaratory of it"); Killough *v.* Steele, 1 Stew. & P. 262, 265.

Connecticut.—Fox *v.* Hills, 1 Conn. 295, 300 [*citing* Twyne's Case, 3 Coke 80*a*, 83; Coke Litt. 3*b*].

Georgia.— Peck *v.* Land, 2 Ga. 1, 10, 46 Am. Dec. 368.

Illinois.— Ewing *v.* Runkle, 20 Ill. 448, 461.

Iowa.— Gardner *v.* Cole, 21 Iowa 209, where Dillon, J., after remarking that Sts. 13 Eliz. and 27 Eliz. had never been legislatively reënacted in Iowa, said that, antedating as these statutes do the settlement of this country, and being mainly if not wholly declaratory of the common law, which sets a face of flint against fraud in every shape, they constitute the basis of American jurisprudence on these subjects, and are in that state part of the unwritten law.

Kansas.— Diefendorf *v.* Oliver, 8 Kan. 365.

Kentucky.— Doyle *v.* Sleeper, 1 Dana 531. 533; Lillard *v.* McGee, 4 Bibb 166.

Massachusetts.—*In re* Jordan, 9 Metc. 292.

Minnesota.— Blackman *v.* Wheaton, 13 Minn. 326; Piper *v.* Johnston, 12 Minn. 60.

New Hampshire.— Robinson *v.* Holt, 39 N. H. 557, 75 Am. Dec. 233.

New York.— Seymour *v.* Wilson, 19 N. Y. 417; Curtis *v.* Leavitt, 15 N. Y. 9, 124; Heroy *v.* Kerr, 2 Abb. Dec. 359, 2 Keyes 582; Nellis *v.* Clark, 20 Wend. 24; Sturtevant *v.* Ballard, 9 Johns. 337, 6 Am. Dec. 281; Sands *v.* Codwise, 4 Johns. 536, 559, 4 Am. Dec. 305. *Compare* Delaney *v.* Valentine, 154 N. Y. 692, 49 N. E. 65.

North Carolina.— O'Daniel *v.* Crawford, 15 N. C. 197, 202.

Ohio.— Brice *v.* Myers, 5 Ohio 121.

Pennsylvania.— Clark *v.* Douglass, 62 Pa. St. 408, 416; McCulloch *v.* Hutchinson, 7 Watts 434, 32 Am. Dec. 776.

South Carolina.— Hudnal *v.* Wilder, 4 McCord, 294, 17 Am. Dec. 744; Teasdale *v.* Atkinson, 2 Brev. 48; Footman *v.* Pendergrass, 3 Rich. Eq. 33.

Virginia.— Davis *v.* Turner, 4 Gratt. 422, 429.

United States.— Baker *v.* Humphrey, 101 U. S. 494, 25 L. ed. 1065; Clements *v.* Nicholson, 6 Wall. 299, 18 L. ed. 786; Sumner *v.* Hicks, 2 Black 532, 534, 17 L. ed. 355; Hamilton *v.* Russel, 1 Cranch 309, 2 L. ed. 118; Meeker *v.* Wilson, 16 Fed. Cas. No. 9,392, 1 Gall. 419.

England.— Cadogan *v.* Kennett, 2 Cowp. 432, where Lord Mansfield said: "The principles and rules of the common law, as now universally known and understood, are so strong against fraud in every shape, that the common law would have attained every end proposed by the statutes 13 El. c. 5, and 27 El. c. 4." See also notes to Twyne's Case, 3 Coke 80*a*, 1 Smith Lead. Cas. 1, continued in 18 Am. L. Reg. N. S. 137; and Wait Fraud. Conv. § 16.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 3 *et seq.*

20. Sands *v.* Codwise, 4 Johns. (N. Y.) 536, 596, 4 Am. Dec. 305.

21. Planters', etc., Bank *v.* Walker, 7 Ala. 926, 946.

C. Construction or Interpretation of Statutes — 1. IN GENERAL. Statutes for the suppression of fraud, including the statutes against fraudulent conveyances, are to be equitably or liberally expounded for the prevention of fraud and protection of creditors.[22] "These statutes," said Lord Mansfield, speaking of 13 and 27 Elizabeth, "cannot receive too liberal a construction, or be too much extended in suppression of fraud."[23]

2. IN FEDERAL COURTS. In the federal courts the construction placed upon the statute by the highest courts of the state are considered as controlling.[24]

3. RETROSPECTIVE OPERATION OF STATUTES. A statutory provision on the subject of fraudulent conveyances will not operate retrospectively so as to apply to conveyances made before its enactment, where it establishes a rule of property and not merely a rule of evidence or procedure.[25] Statutes merely affecting the remedy, however, may be given a retrospective effect.[26]

D. Repeal of Statutes. Whether or not a statute on the subject of fraudulent conveyances is repealed by a later statute depends of course upon the intention of the legislature.[27] As a rule a repeal is not to be implied where the two statutes are not inconsistent and both may stand.[28] But there is an implied

22. *Alabama.*— Anderson *v.* Anderson, 64 Ala. 403.

Connecticut.— Allen *v.* Rundle, 50 Conn. 9, 47 Am. Rep. 599.

Florida.— Gibson *v.* Love, 4 Fla. 217.

Georgia.— Peck *v.* Land, 2 Ga. 1, 46 Am. Dec. 368.

Maryland.— Spuck *v.* Logan, 97 Md. 152, 54 Atl. 989, 99 Am. St. Rep. 427; Welde *v.* Scotten, 59 Md. 72; Cooke *v.* Cooke, 43 Md. 522.

Mississippi.— Pennington *v.* Seal, 49 Miss. 518.

New York.— Young *v.* Heermans, 66 N. Y. 374, 383.

Ohio.— See Brice *v.* Myers, 5 Ohio 121.

Pennsylvania.— McCulloch *v.* Hutchinson, 7 Watts 434, 32 Am. Dec. 776.

England.— Gooch's Case, 5 Coke 60*a*; Cadogan *v.* Kennett, 2 Cowp. 432; Wimbish *v.* Tailbois, Plowd. 38*a*.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 4.

Liberal construction of term "creditors" see *infra*, IV.

23. Cadogan *v.* Kennett, 2 Cowp. 432, 434. It was said in Twyne's Case, 3 Coke 80*a*, 82*a*, 1 Smith Lead. Cas. 1, that "because fraud and deceit abound in these days more than in former times . . . all statutes made against fraud should be liberally and beneficially expounded to suppress the fraud."

24. Peters *v.* Bain, 133 U. S. 670, 10 S. Ct. 354, 33 L. ed. 696; Jaffray *v.* McGehee, 107 U. S. 361, 2 S. Ct. 367, 27 L. ed. 495; Lloyd *v.* Fulton, 91 U. S. 479, 23 L. ed. 363; Allen *v.* Massey, 17 Wall. (U. S.) 351, 21 L. ed. 542; Sumner *v.* Hicks, 2 Black (U. S.) 532, 17 L. ed. 355. See COURTS, 11 Cyc. 905.

25. Cook *v.* Cockins, 117 Cal. 140, 48 Pac. 1025 (holding that the California amendatory act of 1895 (Laws (1895) 154), declaring every transfer made without a valuable consideration by a party while insolvent, or in contemplation of insolvency, fraudulent and void as to existing creditors as a matter of law, and without regard to the intent, whereas under the statute amended the question of intent was one of fact and no transfer could be adjudged fraudulent solely because of want of a valuable consideration, establishes a rule of evidence, and does not apply therefore to prior transfers); McClellan *v.* Pyeatt, 66 Fed. 843, 14 C. C. A. 140. See CONSTITUTIONAL LAW, 8 Cyc. 1016; and, generally, STATUTES.

Indian Territory.— The act of congress of May 2, 1890, which put in force in the Indian Territory the Arkansas statute of frauds, making void conveyances to defraud creditors, had no retrospective effect, and before the passage of said act it was competent for an insolvent debtor to give away his property and deprive his creditors, who had not obtained liens, of the opportunity to collect their claims from such property. McClellan *v.* Pyeatt, 66 Fed. 843, 14 C. C. A. 140.

26. Stanton *v.* Keyes, 14 Ohio St. 443, holding that the seventeenth section of the Ohio act of April 6, 1859, regulating the mode of administering assignments, etc., applies to fraudulent conveyances made before, as well as to those made after, the passage of the act.

27. See, generally, STATUTES.

28. Westmoreland *v.* Powell, 59 Ga. 256 (holding that the provisions of the Georgia code in relation to fraudulent conveyances are amendatory and not in repeal of the statute of 13 Eliz.); Loos *v.* Wilkinson, 110 N. Y. 195, 18 N. E. 99, 1 L. R. A. 250 (holding that the provision of the New York statute (Birdseye Rev. St. 3058), declaring void every conveyance or assignment made to hinder, delay, and defraud creditors is still in force, notwithstanding the various acts relating to voluntary assignments for the benefit of creditors, and that an assignment made with such fraudulent intent may be set aside at the suit of judgment creditors); Otis *v.* Sill, 8 Barb. (N. Y.) 102 (holding that the act of April 29, 1833, relating to the filing of chattel mortgages, did not repeal the statute concerning fraudulent convey-

repeal where the two statutes are inconsistent, or where it appears that the legislature intended the later statute to cover the whole field.[29]

E. Definition and Tests — **1. Definition.** A conveyance is declared to be fraudulent when its object or effect is to defraud another, or the intent with which it is made is to avoid some duty or debt due by or incumbent upon the party making the transfer.[30]

2. Tests as to Fraudulent Conveyances. The question in every case, except in most jurisdictions in the case of voluntary conveyances, is whether the conveyance was a *bona fide* transaction, or a trick and contrivance to defeat creditors,[31] or whether it reserves to the debtor an advantage inconsistent with its avowed purpose.[32] It is not sufficient that it was founded on good consideration or was made with a *bona fide* intent; it must be both. If defective in either of these particulars, although good between the parties, it is voidable as to creditors.[33] The rule is universal both at law and in equity that whatever fraud creates justice will destroy.[34] The test as to whether or not a conveyance is fraudulent is, Does it prejudice the rights of creditors?[35]

ances, but only added another to the grounds on which a chattel mortgage would be declared void).

29. Vance *v.* Campbell, 3 Ky. L. Rep. 448, holding that the act of 1838, authorizing a suit in equity by a creditor to set aside a fraudulent conveyance, "whether his debt be or be not due, or be or be not in judgment," was repealed by Gen. St. c. 44, § 1, defining fraud as to creditors, and Civ. Code, §§ 194, 439, allowing attachment of property fraudulently conveyed, either on the giving of a bond or without bond on return of execution *nulla bona*.

30. See 2 Kent Comm. 440; Wait Fraud. Conv. § 15. To constitute a fraudulent conveyance "there must be a creditor to be defrauded, a debtor intending to defraud, and a conveyance of property which is appropriable by law to the payment of the debt due." O'Conner *v.* Ward, 60 Miss. 1025. See also Hoyt *v.* Godfrey, 88 N. Y. 669. A conveyance to be fraudulent must be devised "of malice, fraud, covin, collusion or guile." U. S. *v.* U. S. Bank, 8 Rob. (La.) 262. Any instrument is fraudulent which is a mere trick or sham contrivance, or which originates in bad motives or intentions, that is made and received for the purpose of warding off other creditors. Hughes *v.* Cory, 20 Iowa 399, 405.

31. Wagner *v.* Smith, 13 Lea (Tenn.) 560; Cadogan *v.* Kennett, 2 Cowp. 432, 434 (per Lord Mansfield); 2 Story Eq. Jur. § 353. See also *infra*, VII. The test of good faith in such cases is whether the transfer is a mere cloak for retaining a benefit to the grantor. Natha *v.* Maganchand, 27 Indian Law Rep. (Bombay Series) 327. And see Alton *v.* Harrison, L. R. 4 Ch. 622, 38 L. J. Ch. 669, 21 L. T. Rep. N. S. 282, 17 Wkly. Rep. 1034. See also *infra*, VII; IX; X.

Form not controlling.—The transaction may be perfect in form but, if fraudulent, it is void as to creditors. Skowhegan Bank *v.* Cutler, 49 Me. 315. See *infra*, III, A, 1.

32. *Georgia.*— Mitchell *v.* Stetson, 64 Ga. 442; Edwards *v.* Stinson, 59 Ga. 443.

Maine.— Graves *v.* Blondell, 70 Me. 190.

Minnesota.— Henry *v.* Hinman, 25 Minn. 199.

Mississippi.— Thompson *v.* Furr, 57 Miss. 478.

Missouri.— Monarch Rubber Co. *v.* Bunn, 78 Mo. App. 55.

New York.— Young *v.* Heermans, 66 N. Y. 374.

Pennsylvania.— Bentz *v.* Rockey, 69 Pa. St. 71.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 351 *et seq.*

Reservations and trusts for grantor see *infra*, X.

33. Basey *v.* Daniel, Smith (Ind.) 252; Glenn *v.* Randall, 2 Md. Ch. 220; Smith *v.* Muirheid, 34 N. J. Eq. 4; Randall *v.* Vroom, 30 N. J. Eq. 353; Sayre *v.* Fredericks, 16 N. J. Eq. 205; 1 Story Eq. Jur. § 353. Effect of consideration where there is fraudulent intent see also *infra*, VII, C.

34. Vreeland *v.* New Jersey Stone Co., 29 N. J. Eq. 188.

35. *Alabama.*— Pickett *v.* Pipkin, 64 Ala. 520.

Connecticut.— Barney *v.* Cuttler, 1 Root 489.

Georgia.— Brown *v.* Spivey, 53 Ga. 155.

Illinois.— Phillips *v.* North, 77 Ill. 243.

Iowa.— Hook *v.* Mowre, 17 Iowa 195.

Kentucky.— Hanby *v.* Logan, 1 Duv. 242; Shiveley *v.* Jones, 6 B. Mon. 274.

Louisiana.— Willis *v.* Scott, 33 La. Ann. 1026; Levi *v.* Morgan, 33 La. Ann. 532; Lafleur *v.* Hardy, 11 Rob. 493; Hubbard *v.* Hobson, 14 La. 453; Kenney *v.* Dow, 10 Mart. 577, 13 Am. Dec. 342.

Maine.— Crooker *v.* Holmes, 65 Me. 195, 20 Am. Rep. 687.

Michigan.— Bodine *v.* Simmons, 38 Mich. 682.

Mississippi.— Simmons *v.* Ingram, 60 Miss. 886; Winn *v.* Barnett, 31 Miss. 653.

New Hampshire.— Blake *v.* Williams, 36 N. H. 39.

New York.— Shand *v.* Hanley, 71 N. Y. 319.

Pennsylvania.— Haak's Appeal, 100 Pa. St. 59; Miner *v.* Warner, 2 Grant 448.

3. CHARACTERISTICS OF FRAUD. It is frequently declared that the question of fraud or no fraud is one necessarily compounded of fact and of law.[36] To establish the presence of fraud there must be a breach of some legal or equitable duty.[37] Fraud has various characteristics. It may be passive as well as active.[38] It may be any kind of artifice employed by one person to deceive another by word or act,[39] or it may be manifestly indicated by the circumstances,[40] although the law will not deduce fraud from any number of acts, each of which is lawful and innocent in itself.[41] Suspicion of fraud will not be sufficient to impart notice of it,[42] and facts of an equivocal tendency leading to no certain result are not sufficient to establish fraud.[43] The vital question is the good faith of the transaction.[44] Fraud, however, does not consist in mere intention, but in intention carried out by hurtful acts,[45] and it must be directed by the debtor against his creditors.[46]

4. CIRCUMSTANCES ESTABLISHING FRAUD. The general subject of evidence pertaining to fraudulent conveyance cases will be considered in another place.[47] Where fraud is in issue the field of circumstances investigated ought to be very wide,[48] and even negative evidence may sometimes have a positive value in cases of fraud.[49] All the surrounding circumstances may be examined.[50] The vermiculations of fraud are chiefly traceable by covered tracks and studious concealments.[51]

South Carolina.— Kid *v.* Mitchell, 1 Nott & M. 334, 9 Am. Dec. 702; King *v.* Clarke, 2 Hill Eq. 611.

Texas.— Kerr *v.* Hutchins, 36 Tex. 452.

See also *infra*, III, C, 6.

The conveyance is good unless made to assist the grantor in carrying out his fraudulent purpose. Thompson *v.* Zuckmayer, (Iowa 1903) 94 N. W. 476.

The vital question is, Does the conveyance deprive the creditor of a right which would be legally effective had the conveyance never been made? Salzenstein *v.* Hettrick, 105 Ill. App. 99.

A fraudulent transaction consummated through a sheriff's deed or other legal instruments may be avoided. Watson *v.* Bonfils, 116 Fed. 157, 53 C. C. A. 535. See *infra*, III, A, 4.

36. Jewell *v.* Knight, 123 U. S. 426, 8 S. Ct. 193, 31 L. ed. 190. See *infra*, XIV, L, 2.

37. Delaney *v.* Valentine, 154 N. Y. 692, 704, 49 N. E. 65, holding that there may be fraud in law where no actual fraudulent intent is proved, but in such cases the law presumes fraud, because it is a necessary consequence of some established act. In other words, fraud in law exists only when the acts upon which it is based carry in themselves inevitable evidence of it, independently of the motive of the actor. See *infra*, VII; XI.

A creditor cannot complain that the debtor is giving away his property unless he can show that the gift produces insolvency, and is made to defraud creditors. Rogers *v.* Dimon, 106 Ill. App. 201. See *infra*, VI; VIII, D.

38. Holt *v.* Creamer, 34 N. J. Eq. 181.

39. Coke Litt. 357*b*.

40. Stockwell *v.* Stockwell, 72 N. H. 69, 54 Atl. 701; Jones *v.* Emery, 40 N. H. 348. See *infra*, XIV, K, 3, b.

41. Engraham *v.* Pate, 51 Ga. 537; Wilson *v.* Watts, 9 Md. 356; Warren *v.* Union Bank, 157 N. Y. 259, 51 N. E. 1036, 68 Am. St. Rep. 777, 43 L. R. A. 256; Babcock *v.* Eckler, 24 N. Y. 623; Warner *v.* Blakeman, 4 Abb. Dec. (N. Y.) 535; Goff *v.* Alexander, 20 Misc. (N. Y.) 498, 45 N. Y. Suppl. 737; Kempner *v.* Churchill, 8 Wall. (U. S.) 362, 369, 19 L. ed. 461; Foster *v.* McAlester, 114 Fed. 145, 52 C. C. A. 107. See *infra*, XIV, K, 3.

42. Urdangen *v.* Doner, 122 Iowa 533, 98 N. W. 317. See *infra*, VII, B, 3, b, (III).

43. Foster *v.* McAlester, 114 Fed. 145, 52 C. C. A. 107. See *infra*, XIV, K, 3.

44. Lloyd *v.* Fulton, 91 U. S. 479, 485, 23 L. ed. 363, per Swayne, J. See *infra*, VII.

45. Williams *v.* Davis, 69 Pa. St. 21. See *infra*, VII, A, 3.

46. Metz *v.* Blackburn, 9 Wyo. 481, 65 Pac. 857. See *infra*, III, B.

47. See *infra*, XIV, K.

48. Engraham *v.* Pate, 51 Ga. 537. See *infra*, XIV, K, 2.

49. Sonnentheil *v.* Christian Moerlein Brewing Co., 172 U. S. 401, 19 S. Ct. 233, 43 L. ed. 492.

50. *Colorado.*— See Eversman *v.* Clements, 6 Colo. App. 224, 40 Pac. 575.

Maine.—Spear *v.* Spear, (1903) 54 Atl. 1106.

Maryland.— Atkinson *v.* Phillips, 1 Md. Ch. 507.

Wisconsin.— Winner *v.* Hoyt, 66 Wis. 227, 28 N. W. 380, 57 Am. Rep. 257.

United States.— Sonnentheil *v.* Christian Moerlein Brewing Co., 172 U. S. 401, 19 S. Ct. 233, 43 L. ed. 492; Humes *v.* Scruggs, 94 U. S. 22, 24 L. ed. 51.

England.— *In re* Holland, [1902] 2 Ch. 360, 71 L. J. Ch. 518, 86 L. T. Rep. N. S. 542, 9 Manson 259, 50 Wkly. Rep. 575; Thompson *v.* Webster, 28 L. J. Ch. 700, 7 Wkly. Rep. 648 [*affirmed* in 4 Drew. 628, 5 Jur. N. S. 668, 28 L. J. Ch. 700, 7 Wkly. Rep. 596].

See also *infra*, XIV, K, 2.

51. Bliss *v.* Couch, 46 Kan. 400, 26 Pac. 706.

F. Twyne's Case. This leading case was decided in 1601, just as the great reign of Elizabeth closed, and about thirty years after the enactment of the statute of 13 Elizabeth. It is one of the most conspicuous landmarks in the law, and is the fountain-head of much of the case law relating to fraudulent transfers. The conveyance was set aside by the court as fraudulent because: (1) The gift was general, without exception of the donor's apparel or of anything of necessity; (2) the donor continued in possession, and used the goods as his own, and by means thereof traded with others and defrauded and deceived them; (3) it was made in secret; (4) it was made pending the writ; (5) there was a secret trust between the parties, for the donor continued to use the goods; and (6) the deed expressed that the gift was made honestly, truly, and *bona fide; et clausulæ inconsuet semper inducunt suspicionem.*[52] As will presently appear, the principles of the case have been extended so as to avoid fraudulent conveyances as to subsequent creditors,[53] contingent subsequent creditors,[54] tort creditors,[55] as for slander and libel,[56] assault and battery,[57] or misapplication of trust moneys;[58] and so as to reach transfers of choses in action,[59] including corporate stock,[60] an annuity,[61] a policy of insurance,[62] an equity of redemption,[63] a legacy,[64] and the like.

G. Statute of 27 Elizabeth in Favor of Subsequent Purchasers — 1. In General. The statute of 27 Elizabeth was enacted in favor of purchasers, and renders void, as against subsequent purchasers of the same land, all conveyances made with the intent of defeating them, or containing a power of revocation.[65]

52. Twyne's Case, 3 Coke 80*a*, 1 Smith Lead. Cas. 1, 18 Am. Law Reg. N. S. 137. See also Peck *v.* Land, 2 Ga. 1, 46 Am. Dec. 368; Davis *v.* Schwartz, 155 U. S. 631, 15 S. Ct. 237, 39 L. ed. 289; Blennerhassett *v.* Sherman, 105 U. S. 100, 26 L. ed. 1080. *Compare* Billings *v.* Russell, 101 N. Y. 226, 4 N. E. 531; Kidd *v.* Rawlinson, 2 B. & P. 59, 3 Esp. 52, 5 Rev. Rep. 540.

Badges of fraud see *infra*, V.

Twyne's Case superseded in England.— The leading doctrine set forth in Twyne's Case, *supra*, has been practically superseded in England (56 & 57 Vict. c. 21, providing that a voluntary conveyance if made in good faith shall not be avoided), but the principles of the case are of very general application in the United States (Davis *v.* Schwartz, 155 U. S. 631, 15 S. Ct. 237, 39 L. ed. 289). See also *infra*, VIII, D.

53. See Laughton *v.* Harden, 68 Me. 208; Day *v.* Cooley, 118 Mass. 524. See *infra*, IV, C.

54. Pennington *v.* Seal, 49 Miss. 518; Jackson *v.* Seward, 5 Cow. (N. Y.) 67; Hoffman *v.* Junk, 51 Wis. 613, 8 N. W. 493. See *infra*, IV, B, 3.

55. Walradt *v.* Brown, 6 Ill. 397, 41 Am. Dec. 190; Weir *v.* Day, 57 Iowa 84, 10 N. W. 304; Gebhart *v.* Merfeld, 51 Md. 322; Cooke *v.* Cooke, 43 Md. 522; Langford *v.* Fly, 7 Humphr. (Tenn.) 585. See also *infra*, IV, E, 4.

56. Cooke *v.* Cooke, 43 Md. 522; Wilcox *v.* Fitch, 20 Johns. (N. Y.) 472; Jackson *v.* Myers, 18 Johns. (N. Y.) 425. See *infra*, IV, E, 4.

57. Slater *v.* Sherman, 5 Bush (Ky.) 206; Ford *v.* Johnston, 7 Hun (N. Y.) 563. See *infra*, IV, E, 4.

58. Strong *v.* Strong, 18 Beav. 408, 52 Eng. Reprint 161. See *infra*, IV, E, 4.

59. Drake *v.* Rice, 130 Mass. 410; Greenwood *v.* Brodhead, 8 Barb. (N. Y.) 593. See *infra*, II, B, 6, a.

60. Scott *v.* Indianapolis Wagon Works, 48 Ind. 75; Weed *v.* Pierce, 9 Cow. (N. Y.) 722; Bayard *v.* Hoffman, 4 Johns. Ch. (N. Y.) 450; Beckwith *v.* Burrough, 14 R. I. 366, 51 Am. Rep. 392. See *infra*, II, B, 6, a.

61. Norcutt *v.* Dodd, Cr. & Ph. 100, 41 Eng. Reprint 428.

62. Burton *v.* Farinhalt, 86 N. C. 260; Ætna Nat. Bank *v.* Manhattan L. Ins. Co., 24 Fed. 769. See *infra*, II, B, 11.

63. Simis *v.* Gaines, 64 Ala. 392.

64. Bigelow *v.* Ayrault, 46 Barb. (N. Y.) 143. See *infra*, II, B, 6, a.

65. St. 27 Eliz. c. 4. This statute provided in substance (section 2) that every conveyance, grant, charge, lease, estate, encumbrance, and limitation of use or uses of, in, or out of any lands, tenements, or other hereditaments whatsoever, had or made for the intent and of purpose to defraud and deceive such person or persons, bodies politic or corporate, as shall purchase in fee-simple, fee tail, for life, lives, or years, the same lands, tenements, and hereditaments, or any part or parcel thereof, so formerly conveyed, granted, leased, charged, encumbered, or limited in use, or to defraud and deceive such as shall purchase any rent, profit, or commodity in or out of the same, or any part thereof, shall be deemed and taken only as against that person and persons, bodies politic and corporate, his and their heirs, successors, executors, administrators, and assigns, and against all and every other person and persons lawfully having or claiming by, from, or under them, or any of them, which have purchased or shall hereafter so purchase for money or other good consideration, the same lands, tenements, or hereditaments, or any part or parcel thereof, or any rent, profit, or commodity in or out of the same, to be

This statute, like the statute of 13 Elizabeth,[66] has been held to be merely declaratory of the common law.[67] In the United States this statute has been either recognized as part of the common law or substantially reënacted.[68]

2. APPLICATION TO PERSONAL PROPERTY. In terms the statute of 27 Elizabeth, in favor of subsequent purchasers, and some of the statutes in the United States based upon it, unlike the statute of 13 Elizabeth in favor of creditors,[69] are limited to conveyances of real property, and it has been held that they do not extend to transfers of personal property.[70] On the other hand, however, it has been held that, although the statute in terms applies only to land, yet, since it is declaratory of the common law, and the common law applies to personal property, it may be interpreted as defining the nature and effect of fraudulent conveyances generally.[71]

II. ASSETS WHICH CREDITORS MAY REACH.[72]

A. In General. The development of the civil rights and remedies of creditors, as against debtors, has generally speaking kept pace with the changes in character which have come about as regards property rights and assets. As has been declared "the manifest tendency of the authorities is to reclaim every

utterly void, frustrate, and of none effect; any pretense, color, feigned consideration, or expressing of any use or uses to the contrary notwithstanding. Section 4 excepts conveyances, etc., had or made upon or for good consideration and *bona fide*. See *infra*, IV, H. Section 5 avoids conveyances containing a power of revocation. And section 6 provides that the act shall not avoid any lawful mortgage made *bona fide* and upon good consideration.

By 56 & 57 Vict. c. 21, an act to amend the law relating to voluntary conveyances, such conveyances if *bona fide* are not to be avoided under 27 Eliz. c. 4, saving transactions completed before the passing of the act.

66. See *supra*, I, B, 4.

67. *Alabama.*— Sewall *v.* Glidden, 1 Ala. 52; Killough *v.* Steele, 1 Stew. & P. 262.

Florida.— Gibson *v.* Love, 4 Fla. 217.

Georgia.— Harper *v.* Scott, 12 Ga. 125; Fleming *v.* Townsend, 6 Ga. 103, 50 Am. Dec. 318.

Iowa.— Gardner *v.* Cole, 21 Iowa 205.

New York.— Jackson *v.* Henry, 10 Johns. 185, 6 Am. Dec. 328.

South Carolina.— Hudnal *v.* Wilder, 4 McCord 294, 17 Am. Dec. 744; Teasdale *v.* Atkinson, 2 Brev. 48; Footman *v.* Pendergrass, 3 Rich. Eq. 33.

England.— Cadogan *v.* Kennett, 2 Cowp. 432.

68. *Alabama.*— See Sewall *v.* Glidden, 1 Ala. 52; Killough *v.* Steele, 1 Stew. & P. 262.

Florida.— Gibson *v.* Love, 4 Fla. 217.

Georgia.— Harper *v.* Scott, 12 Ga. 125; Fleming *v.* Townsend, 6 Ga. 103, 50 Am. Dec. 318.

Indiana.— See Anderson *v.* Etter, 102 Ind. 115, 26 N. E. 218; Pence *v.* Croan, 51 Ind. 336.

Iowa.— Gardner *v.* Cole, 21 Iowa 205.

Maryland.— Cooke *v.* Kell, 13 Md. 469; Baltimore *v.* Williams, 6 Md. 235.

New Jersey.— Mulford *v.* Peterson, 35 N. J. L. 127. And see Boice *v.* Conover, 54 N. J. Eq. 531, 35 Atl. 402.

New York.— Jackson *v.* Henry, 10 Johns. 185, 6 Am. Dec. 328.

North Carolina.— Garrison *v.* Brice, 48 N. C. 85; Hiatt *v.* Wade, 30 N. C. 340.

South Carolina.— See Teasdale *v.* Atkinson, 2 Brev. 48; Footman *v.* Pendergrass, 3 Rich. Eq. 33.

United States.— Cathcart *v.* Robinson, 5 Pet. 280, 8 L. ed. 120.

See also *infra*, IV, H.

69. See *supra*, I, B, 2; and *infra*, II, B, 1.

70. *Alabama.*— Sewall *v.* Glidden, 1 Ala. 52.

Maryland.— Bohn *v.* Headley, 7 Harr. & J. 257.

New Jersey.— Boice *v.* Conover, 54 N. J. Eq. 531, 35 Atl. 402.

North Carolina.— Garrison *v.* Brice, 48 N. C. 85.

South Carolina.— Teasdale *v.* Atkinson, 2 Brev. 48, holding that 27 Eliz. does not extend to goods and chattels, because the possession of these is evidence of title, and is sufficient to guard subsequent purchasers from the danger of suffering by prior voluntary conveyances.

England.— Jones *v.* Croucher, 1 Sim. & St. 315, 1 Eng. Ch. 315, 57 Eng. Reprint 128.

Growing grass is real property and within 27 Eliz. and similar statutes. Hiatt *v.* Wade, 30 N. C. 340. And see Garrison *v.* Brice, 48 N. C. 85.

71. Gibson *v.* Love, 4 Fla. 217. See also Hudnal *v.* Wilder, 4 McCord (S. C.) 294, 17 Am. Dec. 744, holding that, upon common-law principles, a fraudulent conveyance of chattels might be avoided by a subsequent *bona fide* purchaser for a valuable consideration. And see Harper *v.* Scott, 12 Ga. 125; Fleming *v.* Townsend, 6 Ga. 103, 50 Am. Dec. 318; Avery *v.* Wilson, 47 S. C. 78, 25 S. E. 286.

72. See also CREDITORS' SUITS, 12 Cyc. 25 *et seq.*

species of the debtor's property."[73] Manifestly the creditors have the right to resort to all the property of the debtor not protected by statute.[74] Hence if a conveyance of land is set aside as fraudulent the products of the land may also be reached by creditors.[75] A judgment creditor with the aid of equity may reach any property or interest of his debtor, not exempt from execution, which, with such aid, the debtor might himself reach.[76] Property, however, to be susceptible of fraudulent alienation must be of some value, and it must be property out of which the creditor might have realized the whole or some portion of his claim.[77]

73. Wait Fraud. Conv. § 24. In Stevenson *v.* Stevenson, 34 Hun (N. Y.) 157, 158, it is said: "At common law (since the statute of 13 Edward I, permitting lands to be taken on execution) all of a debtor's property, except necessary wearing apparel, might be taken to pay the claims of creditors. So might all rights of action arising from contract, and also judgments recovered for the wrongs of others." See also EXECUTIONS, 17 Cyc. 940; and *infra*, II, B.

74. Catchings *v.* Manlove, 39 Miss. 655; Schenck *v.* Barnes, 156 N. Y. 316, 50 N. E. 967, 41 L. R. A. 395. *Compare* Williams *v.* Thorn, 70 N. Y. 270; Graff *v.* Bonnett, 31 N. Y. 9, 88 Am. Dec. 236. See also EXECUTIONS, 17 Cyc. 940; and *infra*, II, B.

75. State *v.* McBride, 105 Mo. 265, 15 S. W. 72. See *infra*, II, B, 15, b.

Improvements made pending the action will not be allowed. Grandin *v.* Chicago First Nat. Bank, (Nebr. 1904) 98 N. W. 70. See XIII, A, 4, a, (III), (D); and, generally, IMPROVEMENTS.

76. *Alabama.*— Sims *v.* Gaines, 64 Ala. 392.

Arkansas.— Harris *v.* King, 16 Ark. 122.

Florida.— Robinson *v.* Springfield Co., 21 Fla. 203.

Nebraska.—Weckerly *v.* Taylor, (1905) 103 N. W. 1065; Millard *v.* Parsell, 57 Nebr. 178, 77 N. W. 390.

Nevada.— White *v.* Seldon, 4 Nev. 280.

New Jersey.— Haven *v.* Bliss, 26 N. J. Eq. 363; Stratton *v.* Dialogue, 16 N. J. Eq. 70.

Transfer of choses in action see *infra*, II, B, 6.

77. *Alabama.*— Adkins *v.* Bynum, 109 Ala. 281, 19 So. 400 (holding that a mortgage given by a debtor to secure the price of goods purchased by him, where it covered only the goods purchased and was given as part of the transaction of purchase, was not fraudulent as to his creditors, as the transaction did not withdraw from creditors any property which was subject to their claims); Dearman *v.* Dearman, 5 Ala. 202 (holding that joinder by a debtor with his son, in a conveyance of slaves which were the property of the son and not liable to be taken for the father's debts, was not fraudulent as to the father's creditors, although the father had once owned the slaves, and the conveyance was made from the apprehension that his creditors would seize them).

Connecticut.— Barbour *v.* Connecticut Mut. L. Ins. Co., 61 Conn. 240, 23 Atl. 154.

Georgia.— Rutherford *v.* Chapman, 59 Ga. 177.

Kentucky.— Steeley *v.* Steeley, 64 S. W. 642, 23 Ky. L. Rep. 966.

Louisiana.— Baldwin *v.* McDonald, 48 La. Ann. 1460, 21 So. 48; Coyle's Succession, 32 La. Ann. 79, holding that a father's renunciation of the usufruct of the property of his children was not fraudulent as against his creditors, as it was not liable for his debts.

Maine.—Pulsifer *v.* Waterman, 73 Me. 233; Hall *v.* Sands, 52 Me. 355; Hubbard *v.* Remick, 10 Me. 140; Wilson *v.* Ayer, 7 Me. 207.

Minnesota.— Aultman, etc., Co. *v.* Pikop, 56 Minn. 531, 58 N. W. 551; Blake *v.* Boisjoli, 51 Minn. 296, 53 N. W. 637.

Missouri.— Stam *v.* Smith, 183 Mo. 464, 81 S. W. 1217; Trabue *v.* Henderson, 180 Mo. 616, 79 S. W. 451 (deed by a son of his interest in his father's estate to pay debts, where the son's indebtedness to the estate exceeded his share); Ault *v.* Eller, 38 Mo. App. 598.

New York.— Hoyt *v.* Godfrey, 88 N. Y. 669; Mapes *v.* Snyder, 59 N. Y. 450; Stacy *v.* Deshaw, 7 Hun 449; Spaulding *v.* Keyes, 1 Silv. Sup. 203, 5 N. Y. Suppl. 227 [*affirmed* in 125 N. Y. 115, 26 N. E. 15].

Oregon.— Besser *v.* Joice, 9 Oreg. 310.

South Carolina.— Durham Fertilizer Co. *v.* Hemphill, 45 S. C. 621, 24 S. E. 85 (holding that a partner's mortgage of his individual property to secure a *bona fide* partnership debt was not invalid as an attempt to hinder, delay, or defraud firm creditors); Davidson *v.* Graves, Riley Eq. 232 (holding that a conveyance by a husband and wife of land of the wife, which was not liable to the husband's creditors, in trust for a daughter as a marriage portion, could not be avoided by the husband's creditors).

Tennessee.— Read *v.* Mosby, 87 Tenn. 759, 11 S. W. 940, 5 L. R. A. 122; Wagner *v.* Smith, 13 Lea 560; Leslie *v.* Joyner, 2 Head 514; Planters' Bank *v.* Henderson, 4 Humphr. 75, holding that the transfer by a debtor, without consideration, of an equitable interest in property not subject to be levied on at law, to hinder and delay his creditors, was not void as to his judgment creditors.

Texas.— Monday *v.* Vance, 11 Tex. Civ. App. 374, 32 S. W. 559.

United States.— Stewart *v.* Platt, 101 U. S. 731, 25 L. ed. 816.

England.— Clements *v.* Eccles, 11 Ir. Eq. 229.

Canada.— Lodor *v.* Creighton, 9 U. C. C. P. 295. And see Blakely *v.* Gould, 24 Ont. App. 153.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 95, 96, 112; and *infra*, II, B, 2.

Test usually applied.— It is a familar rule that, to authorize the setting aside of a con-

A conveyance or transfer of property by a debtor cannot be fraudulent as against creditors, where they have no right, either at law or in equity, to subject the property to the payment of their claims.[78] The fraudulent transfer does not in any sense enlarge the rights of the creditors, but leaves them to enforce such rights as if no conveyance had been made.[79]

B. Particular Property, Rights, and Interests — 1. Personal Property.[80] The statute of 13 Elizabeth in terms avoids voluntary conveyances of personal property, as well as land, as against creditors, and the same is true of most of the American statutes based upon it.[81] And where a statute avoids fraudulent conveyances of land as against creditors, and omits to mention transfers of personal property, it will not be construed as repealing the common-law rule making such fraudulent transfers void as to creditors.[82] It has also been held that the fact that the words "goods and chattels" have been omitted from the statutes of Elizabeth as revised does not render such statutes inapplicable to transfers of personal property.[83]

2. Property of Little or No Value. Although there are some cases to the contrary, it has generally been held that the courts will not treat as fraudulent gifts of no value at all or of trivial value.[84] It has accordingly been held that a

veyance, on the ground of fraud upon creditors, there must have been not only the conveyance itself, but it must transfer property out of which the creditor could have realized his claim, or some portion of it, and the transfer must have been made with intent to defraud. Guy *v.* Craighead, 21 N. Y. App. Div. 460, 47 N. Y. Suppl. 576. See also Hoyt *v.* Godfrey, 88 N. Y. 669.

Copyholds, not being naturally subject to debts, were held not to be the subject of a conveyance fraudulent as against creditors. Mathews *v.* Feaver, 1 Cox Ch. 278, 1 Rev. Rep. 39, 29 Eng. Reprint 1165.

Conveyance of homestead or other exempt property see *infra*, II, B, 21.

78. Stam *v.* Smith, 183 Mo. 464, 81 S. W. 1217; and other cases in the preceding note. See also *infra*, II, B, 11, 17, 18, 19, 21.

79. *Kentucky.*— Knevan *v.* Specker, 11 Bush 1.

Mississippi.— Dulion *v.* Harkness, 80 Miss. 8, 31 So. 416, 92 Am. St. Rep. 563.

Missouri.— See Vogler *v.* Montgomery, 54 Mo. 577.

North Carolina.— Crummen *v.* Bennet, 68 N. C. 494.

Ohio.— See Sears *v.* Hanks, 14 Ohio St. 298, 84 Am. Dec. 378.

United States.— Cox *v.* Wilder, 6 Fed. Cas. No. 3,308, 2 Dill. 45; McFarland *v.* Goodman, 16 Fed. Cas. No. 8,789, 6 Biss. 111.

80. Whether within statutes in favor of subsequent purchasers see *supra*, I, G, 2.

81. Garrison *v.* Brice, 48 N. C. 85. And see McClosky *v.* Stewart, 63 How. Pr. (N. Y.) 137.

82. Byrnes *v.* Volz, 53 Minn. 110, 54 N. W. 942; Blackman *v.* Wheaton, 13 Minn. 326. See also Benton *v.* Snyder, 22 Minn. 247; Hicks *v.* Stone, 13 Minn. 434.

83. Avery *v.* Wilson, 47 S. C. 78, 25 S. E. 286.

84. *Connecticut.*— Barbour *v.* Connecticut Mut. L. Ins. Co., 61 Conn. 240, 23 Atl. 154, life-insurance policies of trivial value.

Iowa.— McCormick Harvesting Mach. Co. *v.* Pouder, 123 Iowa 17, 98 N. W. 303, husband allowing wife to be substituted in his place as one of the tenants under a lease having no pecuniary value at the time, although profits afterward accrued under the lease.

Kentucky.— Hanby *v.* Logan, 1 Duv. 242. And see Steeley *v.* Steeley, 64 S. W. 642, 23 Ky. L. Rep. 996, life-insurance policy of no vendible value.

Louisiana.— The transfer, by an insolvent debtor, of the parts of an incomplete patented machine, of practically no value to any one but the patentee, to the latter, in payment of a debt, does not injure the other creditors, and hence will not be set aside. Baldwin *v.* McDonald, 48 La. Ann. 1460, 21 So. 48.

Maine.— French *v.* Holmes, 67 Me. 186, holding that the gift must at least be of sufficient value to pay for the expense of its sale by an officer on execution.

Massachusetts.— Williams *v.* Robbins, 15 Gray 590.

Minnesota.— Keith *v.* Albrecht, 89 Minn. 247, 94 N. W. 677, 99 Am. St. Rep. 566; Baldwin *v.* Rogers, 28 Minn. 544, 11 N. W. 77.

Missouri.— Mittelburg *v.* Harrison, 90 Mo. 444, 3 S. W. 203 [*affirming* 11 Mo. App. 136].

New York.— Hoyt *v.* Godfrey, 88 N. Y. 669 (cancellation of debt due from insolvent); Guy *v.* Craighead, 21 N. Y. App. Div. 460, 47 N. Y. Suppl. 576. *Compare* Fitts *v.* Beardsley, 8 N. Y. Suppl. 567 [*affirmed* without opinion in 126 N. Y. 645, 27 N. E. 853].

Pennsylvania.— Gross' Estate, 6 Pa. Co. Ct. 113, 19 Phila. 80, holding that articles of insignificant value given by an insolvent husband to his wife are not liable on his death for his debts. But see Garrison *v.* Monaghan, 33 Pa. St. 232 [*overruling* Fassit *v.* Phillips, 4 Whart. 399], holding that if one has title to real or personal property, no person can withhold it from creditors upon the simple allegation that it is of no value.

Washington.— Klosterman *v.* Vader, 6 Wash. 99, 32 Pac. 1055, assignment of lease

court of equity will not set aside as fraudulent a conveyance of an equity in land which was of little or no value.[85] The fraudulent intent is to be collected from the comparative value and magnitude of the gift.[86]

3. Various Estates Reached.[87] A contingent reversionary interest is within the statute against fraudulent conveyances.[88] The same is true of leaseholds,[89] of a husband's portion of an estate by the entirety,[90] of property taken by a debtor in the name of trustees for the debtor's family,[91] or in the name of the husband and wife,[92] and of an estate in expectancy.[93] But since the statute only avoids deeds which would deprive creditors of such property as they could make available without their debtor's aid,[94] it does not apply to the case of a tenant in tail opening his estate and resettling it on himself for life with remainder over.[95] Where a deed conveying realty in fee, and reserving a life-estate, is held fraudulent as to creditors, it cannot be upheld as to the reservation of the life-estate to the extent of requiring that the land be sold subject to the life-interest as an encumbrance.[96]

4. Title of Debtor — a. In General. As a rule the statute does not apply so as to entitle creditors to avoid a conveyance by their debtor of property to which he had no title at all or no such title as they could have subjected to the payment of their claims.[97] As will be seen, where a debtor has no beneficial interest in

of wild and unimproved lands, where it was not shown that the use of the same was of greater value than the rent reserved.

West Virginia.— Johnson *v.* Riley, 41 W. Va. 140, 23 S. E. 698.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 112, 113.

85. *Indiana.*— Marmon *v.* White, 151 Ind. 445, 51 N. E. 930.

Massachusetts.— Williams *v.* Robbins, 15 Gray 590.

Minnesota.— Keith *v.* Albrecht, 89 Minn. 247, 94 N. W. 677, 99 Am. St. Rep. 566; Aultman, etc., Co. *v.* Pikop, 56 Minn. 531, 58 N. W. 551; Blake *v.* Boisjoli, 51 Minn. 296, 53 N. W. 637; Horton *v.* Kelly, 40 Minn. 193, 41 N. W. 1031; Baldwin *v.* Rogers, 28 Minn. 544, 11 N. W. 77. *Compare* Spooner *v.* Travelers' Ins. Co., 76 Minn. 311, 79 N. W. 305, 77 Am. St. Rep. 651.

Missouri.— Mittelburg *v.* Harrison, 90 Mo. 444, 3 S. W. 203 [*affirming* 11 Mo. App. 136].

New York.—Stacy *v.* Deshaw, 7 Hun 449.

West Virginia.— Cox *v.* Horner, 43 W. Va. 786, 28 S. E. 780; Johnson *v.* Riley, 41 W. Va. 140, 23 S. E. 698, holding that property encumbered to its full value may be conveyed by an insolvent in satisfaction of the encumbrances.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 113.

Contra.— Rankin *v.* Gardner, (N. J. Ch. 1896) 34 Atl. 935; Garrison *v.* Monaghan, 33 Pa. St. 232 [*overruling* Fassit *v.* Phillips, 4 Whart. (Pa.) 399].

86. See French *v.* Holmes, 67 Me. 186; Hoyt *v.* Godfrey, 88 N. Y. 669; Washington Cent. Nat. Bank *v.* Hume, 128 U. S. 195, 9 S. Ct. 41, 32 L. ed. 370; Hopkirk *v.* Randolph, 12 Fed. Cas. No. 6,698, 2 Brock. 132; Partridge *v.* Gopp, Ambl. 596, 27 Eng. Reprint 388, 1 Eden 163, 28 Eng. Reprint 647. And see Emerson *v.* Bemis, 69 Ill. 537; Lush *v.* Wilkinson, 5 Ves. Jr. 384, 31 Eng. Reprint 642.

87. See also Creditors' Suits, 12 Cyc. 25 *et seq.*

88. French *v.* French, 6 De G. M. & G. 95, 2 Jur. N. S. 169, 25 L. J. Ch. 612, 4 Wkly. Rep. 139, 55 Eng. Ch. 74, 43 Eng. Reprint 1166. See also Neale *v.* Day, 4 Jur. N. S. 1225, 28 L. J. Ch. 45, 7 Wkly. Rep. 45.

89. Christy *v.* Courtenay, 26 Beav. 140, 53 Eng. Reprint 850. See also Daugherty *v.* Bogy, 3 Indian Terr. 197, 53 S. W. 542; Shears *v.* Rogers, 3 B. & Ad. 362, 1 L. J. K. B. 89, 23 E. C. L. 164.

90. Newlove *v.* Callaghan, 86 Mich. 297, 48 N. W. 1096, 24 Am. St. Rep. 123.

91. Barton *v.* Vanheythuysen, 11 Hare 126, 18 Jur. 344, 1 Wkly. Rep. 429, 45 Eng. Ch. 127.

92. Glaister *v.* Hewer, 8 Ves. Jr. 195, 32 Eng. Reprint 329, 9 Ves. Jr. 12, 32 Eng. Reprint 504, 11 Ves. Jr. 377, 32 Eng. Reprint 1133.

93. Read *v.* Mosby, 87 Tenn. 759, 11 S. W. 940, 5 L. R. A. 122, holding that a conveyance by an insolvent debtor, in consideration of love and affection, of his expectancy in his living father's estate, will not be upheld in equity as against creditors who were such either at the date of the conveyance or at the date of the father's death.

94. See *supra*, II, A.

95. Clements *v.* Eccles, 11 Ir. Eq. 229.

96. McNally *v.* White, 154 Ind. 163, 54 N. E. 794, 56 N. E. 214.

97. *Alabama.*— Dearman *v.* Dearman, 5 Ala. 202, joinder by a father in a conveyance by his son of property owned by the son, although the father had once owned the property and the conveyance was made from an apprehension that it would be seized by his creditors.

California.— Moore *v.* Besse, 43 Cal. 511, holding that where a judgment debtor sold public land to which he had acquired a preëmption right to defraud a judgment creditor, and the purchaser preëmpted the land and obtained a patent therefor, the creditor could not attack the patent for fraud, or the title of the purchaser, since at the time of

property, but holds the bare legal title for another, a conveyance by him is not in fraud of his creditors.[98] A husband has a right as against creditors to join in a conveyance to a trustee for his wife, in order to correct a mistake or clear up her title.[99]

b. Estate or Interest Acquired After Conveyance. A conveyance by a debtor with intent to defraud creditors or a voluntary conveyance may be void as against creditors with respect to an estate or interest acquired by the debtor after the conveyance.[1]

5. Property in Another County. A conveyance by a judgment debtor, after the rendition of the judgment, of lands situated in another county than that in which the judgment was rendered, is not fraudulent in law as against the judgment creditor.[2]

6. Choses in Action[3] — a. In General. Some of the courts have held, in the absence of a statute, that choses in action, not being subject to execution at common law, are not within the statute of 13 Elizabeth, and cannot be reached in equity by creditors when fraudulently transferred,[4] while other courts have held

the conveyance the debtor had no interest in the land liable to sale on execution.

Connecticut.— Jarvis *v.* Prentice, 19 Conn. 272.

Indiana.— Bremmerman *v.* Jennings, 101 Ind. 253, holding that an answer to a complaint to set aside an alleged fraudulent deed, stating that the deed was drawn up in the debtor's name as grantee, that it was never delivered, that the grantor intended to give the land to his daughter, the debtor's wife, and that at his request he made another deed conveying the land to her, was good, if for no other reason, because the deed was never delivered to the husband, and hence he never had any title to the property which his creditors could reach.

Kentucky.— Louisville City Nat. Bank *v.* Woolridge, 116 Ky. 641, 76 S. W. 542, 25 Ky. L. Rep. 869.

Michigan.— Petit *v.* Hubbell, 105 Mich. 405, 63 N. W. 407.

Mississippi.— Citizens' Mut. Ins. Co. *v.* Foster, 64 Miss. 288, 1 So. 238.

New Jersey.— Wisner *v.* Osborne, 64 N. J. Eq. 614, 55 Atl. 51.

New York.— Jackson *v.* Ham, 15 Johns. 261.

North Carolina.— Runyon *v.* Leary, 20 N. C. 373.

West Virginia.— Prim *v.* McIntosh, 43 W. Va. 790, 28 S. E. 742.

See 24 Cent. Dig. tit. "Fraudulent Conveyances, § 102.

Compare St. Francis Mill Co. *v.* Sogg, 169 Mo. 130, 69 S. W. 359, holding that in a suit to set aside a deed as being in fraud of the grantor's creditors, the decree cannot be denied on the ground that the grantor had no title to the land; that if plaintiff's petition states a good cause of action, and all the issues are found in his favor, the decree should follow as a matter of course, and in such case no suggestion of a defect in the title of the debtor, who made the fraudulent conveyance, should enter into a consideration of the case.

98. See *infra*, II, B, 17.

99. Bremmerman *v.* Jennings, 101 Ind. 253.

1. Flynn *v.* Williams, 29 N. C. 32, holding that where a debtor owning land in fee, subject to a limitation over to another in case of his dying without issue, conveyed the land in fraud of his creditors, and the person entitled to the remainder died leaving the debtor his heir at law, the whole estate in the land was liable to be subjected by the creditors of the grantor. See also Stokes *v.* Jones, 21 Ala. 731 (holding that a voluntary conveyance, with covenants of warranty, of lands to which, at the time of its execution, the grantor had not such an interest as could be subjected by his creditors, either at law or in equity, but to which he afterward acquired title, was void as to creditors and subsequent *bona fide* purchasers, if made to hinder, delay, and defraud creditors, since a voluntary fraudulent estoppel is impotent to defeat such claims of creditors and *bona fide* purchasers); Stokes *v.* Jones, 18 Ala. 734.

2. Baker *v.* Chandler, 51 Ind. 85, where no fraud in fact was alleged and a transcript of the judgment had not been filed in the county where the land was situated.

3. **Right of creditors to reach choses in action** see also Attachment, 1 Cyc. 571; Creditors' Suits, 12 Cyc. 27; Executions, 17 Cyc. 971; Garnishment, *post*.

4. *Alabama.*— Henderson *v.* Hall, 134 Ala. 455, 32 So. 840.

Indiana.— Stewart *v.* English, 6 Ind. 176.

Kentucky.—McFerran *v.* Jones, 2 Litt. 219.

Maryland.—Harper *v.* Clayton, 84 Md. 346, 35 Atl. 1083, 57 Am. St. Rep. 407, 35 L. R. A. 211; Watkins *v.* Dorsett, 1 Bland 530.

Michigan.— Columbia Bank *v.* Jacobs, 10 Mich. 349, 81 Am. Dec. 792, interest of mortgagee.

New Jersey.— See Green *v.* Tantum, 19 N. J. Eq. 105.

Rhode Island.— Greene *v.* Keene, 14 R. I. 388, 51 Am. Rep. 400.

Texas.— See White Sewing Mach. Co. *v.* Atkeson, 75 Tex. 330, 12 S. W. 812. *Compare* Taylor *v.* Gillean, 23 Tex. 508.

England.— Sims *v.* Thomas, 12 A. & E. 536, 9 L. J. Q. B. 399, 4 P. & D. 233, 40 E. C. L.

the contrary.[5] In most jurisdictions, however, by virtue of an express statutory provision, or under statutes rendering them subject to execution, attachment, or garnishment, choses in action fraudulently assigned or transferred may be reached by creditors in equity, or under some statutes even at law, like any other property fraudulently conveyed.[6] The rule applies for example to promissory notes,[7] drafts,[8] money and bank-bills,[9] corporate stock,[10] debts due under contracts for the

268 (bond not goods and chattels within 13 Eliz. c. 5); Grogan *v.* Cooke, 2 Ball. & B. 233; McCarthy *v.* Goold, 1 Ball. & B. 387; Stokoe *v.* Cowan, 29 Beav. 637, 7 Jur. N. S. 901, 4 L. T. Rep. N. S. 695, 9 Wkly. Rep. 801, 54 Eng. Reprint 775; Dundas *v.* Dutens, 2 Cox Ch. 235, 30 Eng. Reprint 109, 1 Ves. Jr. 196, 1 Rev. Rep. 112, 30 Eng. Reprint 298; Norcutt *v.* Dodd, Cr. & Ph. 100, 41 Eng. Reprint 428; Rider *v.* Kidder, 10 Ves. Jr. 360, 32 Eng. Reprint 884.

Canada.— Blakely *v.* Gould, 24 Ont. App. 153 (assignment of profits to be made under an executory contract); Lodor *v.* Creighton, 9 U. C. C. P. 295 (assignment of mortgage). See also CREDITORS' SUITS, 12 Cyc. 27.

5. *Georgia.*— Stinson *v.* Williams, 35 Ga. 170.

Illinois.— Hitt *v.* Ormsbee, 14 Ill. 233.

Maine.— Sargent *v.* Salmond, 27 Me. 539.

Massachusetts.— Drake *v.* Rice, 130 Mass. 410; Anthracite Ins. Co. *v.* Sears, 109 Mass. 383.

Michigan.— Ionia County Sav. Bank *v.* McLean, 84 Mich. 625, 48 N. W. 159.

Mississippi.— Catchings *v.* Manlove, 39 Miss. 655; Wright *v.* Petrie, Sm. & M. Ch. 282.

Missouri.— Pendleton *v.* Perkins, 49 Mo. 565.

Nebraska.— Rogers *v.* Jones, 1 Nebr. 417.

New Hampshire.— Abbott *v.* Tenney, 18 N. H. 109; Tappan *v.* Evans, 11 N. H. 311.

New York.— Greenwood *v.* Brodhead, 8 Barb. 593; Hadden *v.* Spader, 20 Johns. 554; Edmeston *v.* Lyde, 1 Paige 637, 19 Am. Dec. 454; Bayard *v.* Hoffman, 4 Johns. Ch. 450. See also Amsterdam First Nat. Bank *v.* Shuler, 153 N. Y. 163, 47 N. E. 262, 60 Am. St. Rep. 601; Knower *v.* Central Nat. Bank, 124 N. Y. 552, 27 N. E. 247, 21 Am. St. Rep. 700.

North Carolina.— Burton *v.* Farinholt, 86 N. C. 260; Powell *v.* Howell, 63 N. C. 283.

Ohio.— Bryans *v.* Taylor, Wright 245.

Pennsylvania.—Elliott's Appeal, 50 Pa. St. 75, 88 Am. Dec. 525.

United States.— Ætna Nat. Bank *v.* Manhattan L. Ins. Co., 24 Fed. 769.

England.— Partridge *v.* Gopp, Ambl. 596, 27 Eng. Reprint 388, 1 Eden 163, 28 Eng. Reprint 647; King *v.* Dupine, 2 Atk. 603 note, 26 Eng. Reprint 760; Taylor *v.* Jones, 2 Atk. 600, 26 Eng. Reprint 758; Ryall *v.* Rolle, 1 Atk. 165, 26 Eng. Reprint 107, 1 Ves. 348, 27 Eng. Reprint 1074.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 109 *et seq.*; and CREDITORS' SUITS, 12 Cyc. 27.

6. *California.*— Ballou *v.* Andrews Banking Co., 128 Cal. 562, 61 Pac. 102.

Connecticut.— Enos *v.* Tuttle, 3 Conn. 27.

Indiana.— Quarl *v.* Abbett, 102 Ind. 233, 1 N. E. 476, 52 Am. Rep. 662; Scott *v.* Indianapolis Wagon Works, 48 Ind. 75.

Kentucky.— Burnes *v.* Cade, 10 Bush 251; Davis *v.* Sharron, 15 B. Mon. 64.

Louisiana.— North *v.* Gordon, 15 La. Ann. 221.

Maine.— Spaulding *v.* Fisher, 57 Me. 411.

New Jersey.— Tenbrook *v.* Jessup, 60 N. J. Eq. 234, 46 Atl. 516; Mallory *v.* Kirkpatrick, 54 N. J. Eq. 50, 33 Atl. 205; Colgan *v.* Jones, 44 N. J. Eq. 274, 18 Atl. 55; Tantum *v.* Green, 21 N. J. Eq. 364 [*affirming* 19 N. J. Eq. 105].

Ohio.— Newark *v.* Funk, 15 Ohio St. 462. And see Maclaren *v.* Stone, 18 Ohio Cir. Ct. 854, 9 Ohio Cir. Dec. 794.

Rhode Island.— Beckwith *v.* Burrough, 14 R. I. 366, 51 Am. Dec. 392.

Wisconsin.— Bragg *v.* Gaynor, 85 Wis. 468, 55 N. W. 919, 21 L. R. A. 163; La Crosse Nat. Bank *v.* Wilson, 74 Wis. 391, 43 N. W. 153.

England.— Since the statute of 1 & 2 Vict. c. 110, § 12. See Stokoe *v.* Cowan, 29 Beav. 637, 7 Jur. N. S. 901, 4 L. T. Rep. N. S. 695, 9 Wkly. Rep. 801, 54 Eng. Reprint 775; Warden *v.* Jones, 2 De G. & J. 76, 4 Jur. N. S. 269, 27 L. J. Ch. 190, 6 Wkly. Rep. 180, 59 Eng. Ch. 61, 44 Eng. Reprint 916; Barrack *v.* McCulloch, 3 Jur. N. S. 180, 3 Kay L. J. 110, 26 L. J. Ch. 105, 5 Wkly. Rep. 38. See also Edmunds *v.* Edmunds, [1904] P. 362, 73 L. J. P. 97, 91 L. T. Rep. N. S. 568.

Canada.— Upper Canada Bank *v.* Shickluna, 10 Grant Ch. (U. C.) 157.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 109 *et seq.*; and CREDITORS' SUITS, 12 Cyc. 27.

7. *Connecticut.*— Enos *v.* Tuttle, 3 Conn. 27.

Louisiana.— North *v.* Gordon, 15 La. Ann. 221.

Maine.— Sargent *v.* Salmond, 27 Me. 539.

Nebraska.— Rogers *v.* Jones, 1 Nebr. 417.

Wisconsin.— Bragg *v.* Gaynor, 85 Wis. 468, 55 N. W. 919, 21 L. R. A. 161; La Crosse Nat. Bank *v.* Wilson, 74 Wis. 391, 43 N. W. 153.

8. La Crosse Nat. Bank *v.* Wilson, 74 Wis. 391, 43 N. W. 153.

9. Blair *v.* Smith, 114 Ind. 114, 15 N. E. 817, 5 Am. St. Rep. 593; Spaulding *v.* Fisher, 57 Me. 411; Hadden *v.* Spader, 20 Johns. (N. Y.) 554; Spader *v.* Davis, 5 Johns. Ch. (N. Y.) 280; Bayard *v.* Hoffman, 4 Johns. Ch. (N. Y.) 451; Shainwald *v.* Lewis, 6 Fed. 766, 770, 7 Sawy. 148.

Money of debtor in hands of sheriff.— Brenan *v.* Burke, 6 Rich. Eq. (S. C.) 200.

10. Quarl *v.* Abbett, 102 Ind. 233, 1 N. E. 476, 52 Am. Rep. 662; Scott *v.* Indianapolis

sale of land,[11] balances due on account,[12] rents due under a lease,[13] mortgages,[14] life-insurances policies,[15] subscriptions for stock in corporations,[16] legacies,[17] or distributive shares in a decedent's estate,[18] unassigned dower interest,[19] annuities,[20] judgments,[21] and claims for damages for torts with respect to property,[22] or, according to one case, with respect to the person.[23]

b. Canceled Debts. An insolvent's cancellation or release of a mortgage or other debt without consideration is fraudulent and void as against existing creditors.[24] The rule applies to the release by a grantor of his grantee's contract to

Wagon Works, 48 Ind. 75; Weed *v.* Pierce, 9 Cow. (N. Y.) 722; Edmeston *v.* Lyde, 1 Paige (N. Y.) 637, 19 Am. Dec. 454; Bayard *v.* Hoffman, 4 Johns. Ch. (N. Y.) 450; Beckwith *v.* Burrough, 14 R. I. 366, 51 Am. Dec. 392; Warden *v.* Jones, 2 De G. & J. 76, 4 Jur. N. S. 269, 27 L. J. Ch. 190, 6 Wkly. Rep. 180, 59 Eng. Ch. 61, 44 Eng. Reprint 916; Barrack *v.* McCulloch, 3 Jur. N. S. 180, 3 Kay & J. 110, 26 L. J. Ch. 105, 5 Wkly. Rep. 38.

11. Hitt *v.* Ormsbee, 14 Ill. 233.

12. Drake *v.* Rice, 130 Mass. 410. And see Ballou *v.* Andrews Banking Co., 128 Cal. 562, 61 Pac. 102, assignment of book-accounts.

13. Daugherty *v.* Bogy, 3 Indian Terr. 197, 53 S. W. 542.

14. Wright *v.* Petrie, Sm. & M. Ch. (Miss.) 282; Tantum *v.* Green, 21 N. J. Eq. 364 [*affirming* 19 N. J. Eq. 105]; Bragg *v.* Gaynor, 85 Wis. 468, 55 N. W. 919, 21 L. R. A. 161; Upper Canada Bank *v.* Shickluna, 10 Grant Ch. (U. C.) 157.

15. Catchings *v.* Manlove, 39 Miss. 655; Burton *v.* Farinholt, 86 N. C. 260; Stokoe *v.* Cowan, 29 Beav. 637, 7 Jur. N. S. 901, 4 L. T. Rep. N. S. 695, 9 Wkly. Rep. 801, 54 Eng. Reprint 775. See *infra*, II, B, 11.

16. Henry *v.* Vermillion R. Co., 17 Ohio 187; Miers *v.* Zanesville, etc., Turnpike Co., 11 Ohio 273, 13 Ohio 197; Pierce *v.* Milwaukee Constr. Co., 38 Wis. 253; Hatch *v.* Dana, 101 U. S. 205, 25 L. ed. 885; Handley *v.* Stutz, 139 U. S. 417, 11 S. Ct. 530, 35 L. ed. 227; Camden *v.* Stuart, 144 U. S. 104, 12 S. Ct. 585, 36 L. ed. 363; Ogilvie *v.* Knox Ins. Co., 22 How. (U. S.) 380, 16 L. ed. 349. See Marsh *v.* Burroughs, 16 Fed. Cas. No. 9,112, 1 Woods 463. And see CORPORATIONS, 10 Cyc. 653 *et seq.*

17. Bigelow *v.* Ayrault, 46 Barb. (N. Y.) 143; Taylor *v.* Jones, 2 Atk. 600, 26 Eng. Reprint 758. See, generally, WILLS.

18. Smith *v.* Patton, 194 Ill. 638, 62 N. E. 794; Moores *v.* White, 3 Gratt. (Va.) 139. See also DESCENT AND DISTRIBUTION, 14 Cyc. 224.

Surrender of right to contest will.— Where a son contesting a will leaving property to his father's widow was successful in the county court, and pending an appeal to the circuit court a compromise agreement was entered into between the attorneys, the widow not being present, providing that the will should be admitted to probate and that the widow should retain the property on conveying a certain amount to a daughter of the son, it was held that conveyances in pursuance of the agreement were fraudulent as to the son's creditors, and that it was immaterial that they had the right to convey to the daughter, or that the son had a right to dismiss his action, as such dismissal was the consideration for the agreement. Smith *v.* Patton, 194 Ill. 638, 62 N. E. 794.

19. See *infra*, II, B, 19, c.

20. De Hierapolis *v.* Lawrence, 115 Fed. 761 (holding that an annuity reserved for the individual benefit of the grantor in a conveyance of all of his property in trust to provide for the payment of his debts and the support of his family is liable for his debts, and may be subjected by a creditors' bill in the hands of one to whom he has assigned it, without consideration, for the purpose of placing it beyond the reach of creditors); King *v.* Dupine, 2 Atk. 603 note, 26 Eng. Reprint 760; Norcutt *v.* Dodd, Cr. & Ph. 100, 41 Eng. Reprint 428. See ANNUITIES, 2 Cyc. 471.

21. North *v.* Gordon, 15 La. Ann. 221; Egberts *v.* Pemberton, 7 Johns. Ch. (N. Y.) 208.

22. Reilly *v.* Sicilian Asphalt Paving Co., 170 N. Y. 40, 62 N. E. 772, 88 Am. St. Rep. 636, 57 L. R. A. 176; Hudson *v.* Plets, 11 Paige (N. Y.) 180; Cincinnati *v.* Hafer, 49 Ohio St. 60, 30 N. E. 197; Dening *v.* Nelson, 1 Ohio Dec. (Reprint) 503, 10 West. L. J. 215. *Compare*, however, Ten Broeck *v.* Sloo, 13 How. Pr. (N. Y.) 28.

23. It was held in a New Jersey case that where a debtor who had been injured in a collision on a railroad assigned his claim for damages to an attorney for a small sum, and the attorney sued and recovered a large verdict, the assignment was fraudulent as against antecedent creditors, and they could maintain a suit in equity to avoid the same. Colgan *v.* Jones, 44 N. J. Eq. 274, 18 Atl. 55. But other cases are to the effect that a debtor's mere right of action for a personal tort, as for assault and battery, slander, or malicious prosecution, cannot be reached by a creditors' bill. Bennett *v.* Sweet, 171 Mass. 600, 51 N. E. 183 (holding that a verdict for personal injuries before judgment has been entered thereon is not property which can be reached in equity by a creditor of plaintiff); Hudson *v.* Plets, 11 Paige (N. Y.) 180. *Compare* CREDITORS' SUITS, 12 Cyc. 28 note 33.

24. *Indiana.*— Johnson *v.* Jones, 79 Ind. 141, surrender of notes and mortgages.

Massachusetts.— Martin *v.* Root, 17 Mass. 222.

New Hampshire.— Everett *v.* Read, 3 N. H. 55.

assume and pay the mortgage debt.[25] It seems, however, that a debtor may release a contingent liability.[26]

7. Wages or Earnings — a. Of Debtor. It has been said that a debtor is not bound to apply the proceeds of his labor to the benefit of his creditors, leaving his family to suffer want;[27] but this must be taken with some qualification. Wages or earnings of a debtor assigned by him after they have become due, without consideration, or with intent to hinder, delay, or defraud creditors, may be reached by them in equity, like any other chose in action, if they are not exempt from the claims of creditors.[28] The same is true of an assignment of wages or earnings to be earned in the future under an existing contract, or, according to some of the cases, even under future contracts.[29] The rule does not apply of course where the assignment is not only for a valid consideration but also without any fraudulent intent,[30] or where the wages or earnings are exempted by statute from the claims of creditors.[31] And it has been held that a contract between employer and employee by which the wages are to be paid in advance is not fraudulent or illegal as against the employee's creditors, although it is understood by the parties that the purpose is to protect the wages from garnishment and thereby enable the employee to support his family and pursue his vocation.[32] The wife of a debtor who receives her husband's earnings may entirely consume them in the suitable support of his family, including herself, without becoming in any way answerable to his creditors.[33] But she has no right, as against his prior creditors, to appropriate his earnings or income to making investments in her own name, either for him or for herself.[34] It has been held, however, that where a husband makes a small monthly allowance to his wife and she saves out of such allowance moneys which constitute a part of the purchase-price of a small home, bought by her as a home for the family, the property cannot be reached by creditors of the husband to the extent of the sum contributed by him.[35] The obliga-

New Jersey.— Youngs *v.* Public School Trustees, 31 N. J. Eq. 290.

England.— Sibthorp *v.* Moxom, 3 Atk. 581, 26 Eng. Reprint 1134, 1 Ves. 49, 27 Eng. Reprint 883, cancellation of a debt by will is not good as against creditors.

Canada.— Upper Canada Bank *v.* Shickluna, 10 Grant Ch. (U. C.) 157, discharge of mortgage without consideration.

25. Youngs *v.* Public School Trustees, 31 N. J. Eq. 290, holding that a voluntary release by a grantor of the covenant of his grantee to assume and pay a debt secured by mortgage on the premises, although made without consideration, in anticipation of a bill by the mortgagee, and for the express purpose of releasing the grantee from liability for a deficiency, will not for that reason be invalid, but it is otherwise if the grantor is insolvent and the effect of the release is to hinder or defraud creditors.

26. McGay *v.* Keilback, 14 Abb. Pr. (N. Y.) 142.

27. Van Vleet *v.* Stratton, 91 Tenn. 473, 19 S. W. 428; Leslie *v.* Joyner, 2 Head (Tenn.) 514. See *infra*, II, B, 8, a.

28. Moran *v.* Moran, 12 Bush (Ky.) 301; Wolfsberger *v.* Mort, 104 Mo. App. 257, 78 S. W. 817; Robinson *v.* McKenna, 21 R. I. 117, 42 Atl. 510; Dow *v.* Taylor, 71 Vt. 337, 45 Atl. 220, 76 Am. St. Rep. 775.

29. Gragg *v.* Martin, 12 Allen (Mass.) 498, 90 Am. Dec. 164; Tripp *v.* Childs, 14 Barb. (N. Y.) 85; Lennon *v.* Parker, 22 R. I. 43, 46 Atl. 44; Robinson *v.* McKenna, 21 R. I. 117, 42 Atl. 510, 79 Am. St. Rep. 793; Dow *v.* Taylor, 71 Vt. 337, 45 Atl. 220, 76 Am. St. Rep. 775.

30. Boylen *v.* Leonard, 2 Allen (Mass.) 407; Lannan *v.* Smith, 7 Gray (Mass.) 150; Emery *v.* Lawrence, 8 Cush. (Mass.) 151; Dole *v.* Farwell, 72 N. H. 183, 55 Atl. 553; Fradd *v.* Charon, 69 N. H. 189, 44 Atl. 910.

Assignment of wages for support of family. — It has been held, however, that the assignment by a debtor of his future wages to his grocer is not fraudulent in law as against his creditors, in so far as it is made for the support of himself and his family. Dole *v.* Farwell, 72 N. H. 183, 55 Atl. 553; Provencher *v.* Brooks, 64 N. H. 479, 13 Atl. 641. See also Lannan *v.* Smith, 7 Gray (Mass.) 150; Emery *v.* Lawrence, 8 Cush. (Mass.) 151.

31. Exempt wages or earnings see *infra*, II, B, 21, a.

32. Van Vleet *v.* Stratton, 91 Tenn. 473, 19 S. W. 428.

33. Trefethen *v.* Lynam, 90 Me. 376, 38 Atl. 335, 60 Am. St. Rep. 271, 38 L. R. A. 190; Coyne *v.* Sayre, 54 N. J. Eq. 702, 39 Atl. 96. See also Eversole *v.* Bullock, 83 S. W. 556, 26 Ky. L. Rep. 1098.

34. Trefethen *v.* Lynam, 90 Me. 376, 38 Atl. 335, 38 L. R. A. 190, 60 Am. St. Rep. 271.

35. Greene *v.* Buckler, 40 S. W. 382, 19 Ky. L. Rep. 286. See also Eversole *v.* Bullock, 83 S. W. 556, 26 Ky. L. Rep. 1098;

tion of a husband to support his family is paramount to that of paying his debts, and such support involves provision of a home to shelter, as well as raiment to clothe, or food to sustain life.[36]

b. Of Debtor's Wife. At common law a husband is entitled to the earnings of his wife, and he cannot, by giving them to her or investing them or permitting her to invest them in property in her own name, withdraw them or the property from the claims of his existing creditors; and it has been held that this rule is not abrogated, in the absence of express provision, by the Married Women's Acts.[37] In most jurisdictions, however, this rule has been changed or modified by statutes giving a married woman the right to her earnings in carrying on a separate business with the express or implied consent of her husband, or after desertion by him.[38] In order that the earnings of a wife may be exempt from

O'Gorman *v.* Madden, 5 S. W. 756, 9 Ky. L. Rep. 567.

36. Greene *v.* Buckler, 40 S. W. 382, 19 Ky. L. Rep. 286.

37. *Alabama.*— Bates *v.* Morris, 101 Ala. 282, 13 So. 138; Bangs *v.* Edwards, 88 Ala. 382, 6 So. 764; Carter *v.* Worthington, 82 Ala. 334, 2 So. 516, 60 Am. Rep. 738; Wing *v.* Roswald, 74 Ala. 346; Gordon *v.* Tweedy, 71 Ala. 202; Evans *v.* Covington, 70 Ala. 440; Glaze *v.* Blake, 56 Ala. 379; McLemore *v.* Nuckolls, 37 Ala. 662; Pinkston *v.* McLemore, 31 Ala. 308.

Connecticut.— Hinman *v.* Parkis, 33 Conn. 188.

Illinois.— Bowman *v.* Ash, 143 Ill. 649, 32 N. E. 486; Schwartz *v.* Saunders, 46 Ill. 18.

Iowa.— Duncan *v.* Roselle, 15 Iowa 501.

Kentucky.— Penn *v.* Young, 10 Bush 626; Uhrig *v.* Horstman, 8 Bush 172. See Musgrave *v.* Parish, 11 S. W. 464, 10 Ky. L. Rep. 998.

Mississippi.— Apple *v.* Ganong, 47 Miss. 189.

New Hampshire.— Hoyt *v.* White, 46 N. H. 45.

New Jersey.— Cramer *v.* Reford, 17 N. J. Eq. 367, 90 Am. Dec. 594. But see Tresch *v.* Wirtz, 34 N. J. Eq. 124.

South Carolina.— McAfee *v.* McAfee, 28 S. C. 188, 5 S. E. 480; Bridgers *v.* Howell, 27 S. C. 425, 3 S. E. 790.

Tennessee.— Cox *v.* Scott, 9 Baxt. 305.

Virginia.— Grant *v.* Sutton, 90 Va. 771, 19 S. E. 784 (prior to May 1, 1888); Campbell *v.* Bowles, 30 Gratt. 652.

West Virginia.— Bailey *v.* Gardner, 31 W. Va. 94, 5 S. E. 636, 13 Am. St. Rep. 847.

United States.— Seitz *v.* Mitchell, 94 U. S. 580, 24 L. ed. 179 [*affirming* 1 McArthur (D. C.) 480]; Union Trust Co. *v.* Fisher, 25 Fed. 178.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 259; and, generally, HUSBAND AND WIFE.

Services or earnings of wife as consideration for transfer see *infra*, VIII, F, 1, e.

Subsequent creditors.— As against subsequent creditors a gift by a husband to his wife of her earnings is valid even at common law, unless assailable for actual fraud. Bates *v.* Morris, 101 Ala. 282, 13 So. 138; Bangs *v.* Edwards, 88 Ala. 382, 6 So. 764; Wing *v.* Roswald, 74 Ala. 346; Glaze *v.* Blake, 56 Ala. 379; Pinkston *v.* McLemore, 31 Ala. 308; Bowman *v.* Ash, 143 Ill. 649, 32 N. E. 486. Such gift, however, created by mere verbal declaration, cannot be established in equity even against the husband's subsequent creditors, where it appears that he retained and used the money in his own business, giving the wife no receipt or written evidence of indebtedness, without objection on her part, and without the assertion of any claim by her until after the lapse of a number of years, when the claims of the creditors had accrued and the husband had become embarrassed with debt, if not in fact insolvent. Evans *v.* Covington, 70 Ala. 440, 442, where it is said: "The evidence of the gift must have been clear, and it must have been apparent the husband intended to divest himself of all right to them, and to set them apart to the separate use of his wife." See also Carleton *v.* Rivers, 54 Ala. 467; Shaeffer *v.* Sheppard, 54 Ala. 244; McLemore *v.* Pinkston, 31 Ala. 266, 68 Am. Dec. 167.

38. *Alabama.*— Bates *v.* Morris, 101 Ala. 282, 13 So. 138; Carter *v.* Worthington, 82 Ala. 334, 2 So. 516, 60 Am. Rep. 738; Wing *v.* Roswald, 74 Ala. 346. See also Reeves *v.* McNeill, 127 Ala. 175, 28 So. 623.

Connecticut.— Whiting *v.* Beckwith, 31 Conn. 596.

Illinois.— Bowman *v.* Ash, 143 Ill. 649, 32 N. E. 486; Partridge *v.* Arnold, 73 Ill. 600.

Indiana.— Boots *v.* Griffith, 89 Ind. 246.

Iowa.— Gilbert *v.* Glenny, 75 Iowa 513, 39 N. W. 818, 1 L. R. A. 479, holding that the keeping of boarders by a married woman is such business, independent of her duties as a wife, as entitles her to hold the proceeds of such business as her own under Iowa Code, § 2211. See also King *v.* Wells, 106 Iowa 649, 77 N. W. 338; Carse *v.* Reticker, 95 Iowa 25, 63 N. W. 461, 58 Am. St. Rep. 421.

Kansas.— Larimer *v.* Kelley, 10 Kan. 298.

Kentucky.— Wallace *v.* Mason, 100 Ky. 560, 38 S. W. 887, 18 Ky. L. Rep. 935, holding that, since a statute provided that the wages of a married woman should be free from the debts and control of her husband, real estate paid for by the labor of a wife was not subject to a judgment against her husband. See also Clark *v.* Meyers, 68 S. W. 853, 24 Ky. L. Rep. 380; Rath *v.* Rankins, 33 S. W. 832, 17 Ky. L. Rep. 1120; Carter *v.* Drewery, 4 Ky. L. Rep. 888.

liability for the husband's debts, they must have accrued to her in conducting a separate business, and not in performance of the ordinary duties of a wife, or in merely assisting the husband in his business.[39]

c. Of Debtor's Minor Child. A father is entitled to the services and the wages or earnings of his minor child, if he has not been emancipated, and existing creditors of the father may reach and subject such wages or earnings, or property in which they have been invested by or for the child, if given by the father to the child without consideration.[40] A father, however, has no present valuable property in the future labor of his minor child, and may emancipate him. If he does so and permits him to contract for and retain his own wages or earnings, he does not thereby withdraw from his creditors any property or funds to which they are legally entitled for the payment of his debts; and therefore after such emancipation, his creditors cannot reach and subject such wages or earnings, or

Massachusetts.— Draper *v.* Buggee, 133 Mass. 258.

Missouri.— Gruner *v.* Scholz, 154 Mo. 415, 55 S. W. 441; Bartlett *v.* Umfried, 94 Mo. 530, 7 S. W. 581; Kidwell *v.* Kirkpatrick, 70 Mo. 214; Coughlin *v.* Ryan, 43 Mo. 99, 97 Am. Dec. 375; Beach *v.* Baldwin, 14 Mo. 597; Furth *v.* March, 101 Mo. App. 329, 74 S. W. 147 (holding that under a statute giving to a married woman the wages of her separate labor as her separate estate, where she purchased a home on her own account and kept boarders therein as a means of earning money for herself, such earnings were not subject to her husband's debts); Baer *v.* Pfaff, 44 Mo. App. 35.

New Jersey.— Peterson *v.* Mulford, 36 N. J. L. 481; Costello *v.* Prospect Brewing Co., 52 N. J. Eq. 357, 30 Atl. 682; Metropolis Nat. Bank *v.* Sprague, 20 N. J. Eq. 13; Quidort *v.* Pergeaux, 18 N. J. Eq. 472.

Pennsylvania.— Bucher *v.* Ream, 68 Pa. St. 421; Brown *v.* Pendleton, 60 Pa. St. 419. See also Phillips *v.* Hall, 160 Pa. St. 60, 28 Atl. 502; Holcomb *v.* People's Sav. Bank, 92 Pa. St. 338. *Compare* Leinbach *v.* Templin, 105 Pa. St. 522.

Tennessee.— Carpenter *v.* Franklin, 89 Tenn. 142, 14 S. W. 484, holding that the earnings of a wife become her separate estate without any express gift or contract by the husband, where she is permitted to receive and retain them, and to loan and invest them in her own name and for her own benefit.

Vermont.— Premo *v.* Hewitt, 55 Vt. 362.

Virginia.— Grant *v.* Sutton, 90 Va. 771, 19 S. E. 784, since May 1, 1888. See also Penn *v.* Whitehead, 17 Gratt. 503, 94 Am. Dec. 478.

West Virginia.— Stewart *v.* Stout, 38 W. Va. 478, 18 S. E. 726; Trapnell *v.* Conklyn, 37 W. Va. 242, 16 S. E. 570, 38 Am. St. Rep. 30.

England.— Ashworth *v.* Outram, 5 Ch. D. 923, 46 L. J. Ch. 687, 37 L. T. Rep. N. S. 85, 25 Wkly. Rep. 896; Laporte *v.* Costick, 31 L. T. Rep. N. S. 434, 23 Wkly. Rep. 131.

Canada.— Bohaker *v.* Morse, 20 Nova Scotia 212; Murray *v.* McCallum, 8 Ont. App. 277.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 259; and, generally, HUSBAND AND WIFE.

39. *Georgia.*— Dumas *v.* Neal, 51 Ga. 563, holding that a claim that a wife, by an alleged agreement with her husband, was to have one-half the proceeds of a boarding-house, in consideration that she would help him to carry it on, was in fraud of the creditors of the husband's estate.

Iowa.— Langford *v.* Thurlby, 60 Iowa 105, 14 N. W. 135.

New Jersey.— Metropolis Nat. Bank *v.* Sprague, 20 N. J. Eq. 13; Quidort *v.* Pergeaux, 18 N. J. Eq. 472.

New York.— Coleman *v.* Burr, 93 N. Y. 17, 45 Am. Rep. 160 [*affirming* 25 Hun 239], holding that where a woman contracted with her husband, for a certain compensation, to take care of his mother, who was a member of his household and had conveyed land to him in consideration of his agreement to support her, and in consideration of the wife's performance of the agreement for a term of years the husband conveyed real estate to her through a third person in good faith, the conveyance was void as against the husband's creditors.

South Carolina.— McAfee *v.* McAfee, 28 S. C. 188, 5 S. E. 480.

England.— Laporte *v.* Costick, 31 L. T. Rep. N. S. 434, 23 Wkly. Rep. 131.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 259; and, generally, HUSBAND AND WIFE.

40. *Alabama.*— Donegan *v.* Davis, 66 Ala. 362; Godfrey *v.* Graves, 6 Ala. 501, 41 Am. Dec. 58.

Kansas.— Stumbaugh *v.* Anderson, 46 Kan. 541, 26 Pac. 1045, 26 Am. St. Rep. 121.

Maryland.— Bullett *v.* Worthington, 3 Md. Ch. 99.

Mississippi.— Dick *v.* Grissom, Freem. 428.

New Jersey.— Gardner *v.* Schooley, 25 N. J. Eq. 150.

North Carolina.— Winchester *v.* Reid, 53 N. C. 377; Worth *v.* York, 35 N. C. 206.

Ohio.— Bell *v.* Hallenback, Wright 751.

Pennsylvania.— Beaver *v.* Bare, 104 Pa. St. 58, 49 Am. Rep. 567.

Texas.— Schuster *v.* Bauman Jewelry Co., 79 Tex. 179, 15 S. W. 259, 23 Am. St. Rep. 327.

United States.— Dowell *v.* Applegate, 15 Fed. 419, 8 Sawy. 427.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 41, 98, 301, 315.

property in which they have been invested, by or for the child.[41] This rule applies, although the child may continue a member of the father's family.[42]

d. Of Public Officers or Deputies. An assignment or release of fees or other compensation of a public officer are subject, of course, to the same rule as other wages or earnings, unless they are exempt; but it has been held that a sheriff may grant to his deputy all the fees earned by the latter, so that they will not be liable to be garnished for the sheriff's debts.[43]

8. Talents and Industry — a. In General. A debtor's property may be reached by creditors, but not his talents or industry. He cannot be compelled to labor for the benefit of his creditors, and therefore they are not defrauded and cannot complain if he donates his labor or services to another.[44] "He may bury

41. *Alabama.*— Donegan *v.* Davis, 66 Ala. 362; Lyon *v.* Bolling, 14 Ala. 753, 48 Am. Dec. 122.

Arkansas.— Bobo *v.* Bryson, 21 Ark. 387, 76 Am. Dec. 406.

California.— Lackman *v.* Wood, 25 Cal. 147.

Connecticut.— Atwood *v.* Holcomb, 39 Conn. 270, 12 Am. Rep. 386.

Georgia.— Wilson *v.* McMillan, 62 Ga. 16, 35 Am. Rep. 115.

Illinois.— Partridge *v.* Arnold, 73 Ill. 600. See also Heeren *v.* Kitson, 28 Ill. App. 259.

Indiana.— Jenison *v.* Graves, 2 Blackf. 440.

Iowa.— Bener *v.* Edgington, 76 Iowa 105, 40 N. W. 117; Wolcott *v.* Rickey, 22 Iowa 171.

Maine.— Lord *v.* Poor, 23 Me. 569.

Massachusetts.— Jenney *v.* Alden, 12 Mass. 375; Whiting *v.* Earle, 3 Pick. 201, 15 Am. Dec. 207.

Mississippi.— Dick *v.* Grissom, Freem. 428.

Missouri.— Mott *v.* Purcell, 98 Mo. 247, 11 S. W. 564; Dierker *v.* Hess, 54 Mo. 246.

Nebraska.— Shortel *v.* Young, 23 Nebr. 408, 36 N. W. 572; Clemens *v.* Brillhart, 17 Nebr. 335, 22 N. W. 779.

New Hampshire.— Johnson *v.* Silsbee, 49 N. H. 543.

New Jersey.— Wisner *v.* Osborn, 64 N. J. Eq. 614, 55 Atl. 51 (stock of a corporation bought by wages of an emancipated son); Coyne *v.* Sayre, 54 N. J. Eq. 702, 36 Atl. 96.

New York.— McCaffrey *v.* Hickey, 66 Barb. 489. See also Kain *v.* Larkin, 131 N. Y. 300, 30 N. E. 105 [*reversing* 17 N. Y. Suppl. 223].

Ohio.— Geringer *v.* Heinlein, 29 Cinc. L. Bul. 339, 6 Ohio S. & C. Pl. Dec. 26.

Oregon.— Flynn *v.* Baisley, 35 Oreg. 268, 57 Pac. 908, 76 Am. St. Rep. 495, 45 L. R. A. 645.

Pennsylvania.— Beaver *v.* Bare, 104 Pa. St. 58, 49 Am. Rep. 567; Rush *v.* Vought, 55 Pa. St. 437, 93 Am. Dec. 769; McCloskey *v.* Cyphert, 27 Pa. St. 220.

Tennessee.— Carpenter *v.* Franklin, 89 Tenn. 142, 14 S. W. 484; Leslie *v.* Joyner, 2 Head 514; Rosenbaum *v.* Davis, (Ch. App. 1898) 48 S. W. 706.

Texas.— Schuster *v.* L. Bauman Jewelry Co., 79 Tex. 183, 15 S. W. 259, 23 Am. St. Rep. 327; Furrh *v.* McKnight, 6 Tex. Civ. App. 583, 26 S. W. 95.

Vermont.— Bray *v.* Wheeler, 29 Vt. 514; Chase *v.* Smith, 5 Vt. 556; Chase *v.* Elkins, 2 Vt. 290.

Virginia.— Penn *v.* Whitehead, 17 Gratt. 503, 94 Am. Dec. 478.

West Virginia.— Trapnell *v.* Conklyn, 37 W. Va. 242, 16 S. E. 570, 38 Am. St. Rep. 30.

Wisconsin.— Wambold *v.* Vick, 50 Wis. 456, 7 N. W. 438.

Canada.— Jack *v.* Greig, 27 Grant Ch. (U. C.) 6.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 41, 98, 301, 315; and, generally, Parent and Child.

Labor on mother's separate estate.— If a minor child with the parent's consent gives his mother the benefit of his labor on her separate estate, profits arising from the child's labor will not be liable for the father's debts. Rush *v.* Vought, 55 Pa. St. 437, 93 Am. Dec. 769; Trapnell *v.* Conklyn, 37 W. Va. 242, 16 S. E. 570, 38 Am. St. Rep. 30; Atwood *v.* Dolan, 34 W. Va. 563, 12 S. E. 688.

Earnings or services of child as consideration for conveyance by parent see *infra*, VIII, G, 1, b, c.

42. Geringer *v.* Heinlein, 29 Cinc. L. Bul. 339, 6 Ohio S. & C. Pl. Dec. 26; McCloskey *v.* Cyphert, 27 Pa. St. 220; and other cases cited in the note preceding.

43. Pioneer Printing Co. *v.* Sanborn, 3 Minn. 413. See, generally, Officers; Sheriffs and Constables.

44. *Alabama.*— Nance *v.* Nance, 84 Ala. 375, 4 So. 699, 5 Am. St. Rep. 378.

Georgia.— King *v.* Skellie, 79 Ga. 147, 151, 3 S. E. 614, where it is said to be "an invariable principle that the debtor cannot be forced to apply his labor to the extinguishment of his creditor's claim."

Minnesota.— Eilers *v.* Conradt, 39 Minn. 242, 39 N. W. 320, 12 Am. St. Rep. 641.

Mississippi.— Buckley *v.* Dunn, 67 Miss. 710, 7 So. 550, 19 Am. St. Rep. 334, holding that a judgment creditor has no right to the products of his debtor's labor, which become, as soon as produced, the property of a third person, and that it is immaterial that the debtor refused to make a contract to furnish the products directly, fearing that they might be subjected to the judgment debt, but procured a contract to be made by such third person.

Missouri.— Gruner *v.* Scholz, 154 Mo. 415, 55 S. W. 441.

his talent in the earth, or he may give it to his wife or friend."[45] This rule of course does not permit a debtor to defraud his creditors by doing business for his own benefit in the name of another.[46]

b. Services Rendered by Husband For Wife. The principle above stated has been applied to the case of a husband donating his services to his wife, in working for her in a business owned and conducted by her as her separate property, or as her agent in executing a contract made by her with a third person, and, *a fortiori*, where the husband is employed by the wife on a salary, it being held that in such cases the husband's creditors cannot by reason of such donation of his services or employment reach and subject the property or claims thereby acquired by the wife.[47] The rule does not apply, however, where a husband, for the purpose of

New Jersey.— Tresch *v.* Wirtz, 34 N. J. Eq. 124.

New York.— Abbey *v.* Deyo, 44 N. Y. 343.

Pennsylvania.— Rush *v.* Vought, 55 Pa. St. 437, 93 Am. Dec. 769.

Tennessee.— Leslie *v.* Joyner, 2 Head 514, 516.

Vermont.— Webster *v.* Hildreth, 33 Vt. 457, 78 Am. Dec. 632.

Virginia.— Penn *v.* Whitehead, 17 Gratt. 503, 94 Am. Dec. 478.

West Virginia.— Boggees *v.* Richards, 39 W. Va. 567, 20 S. E. 599, 45 Am. St. Rep. 938, 26 L. R. A. 537; Trapnell *v.* Conklyn, 37 W. Va. 242, 16 S. E. 570, 38 Am. St. Rep. 30.

United States.— Voorhees *v.* Bonesteel, 16 Wall. 16, 31, 21 L. ed. 268.

Canada.— Baby *v.* Ross, 14 Ont. Pr. 440.

Wages or earnings see *supra*, II, B, 7.

45. Abbey *v.* Deyo, 44 N. Y. 343, 347.

46. Nickle *v.* Emerson Mercantile, etc., Co., (Ark. 1890) 13 S. W. 78; Wilson *v.* Loomis, 55 Ill. 352; Hamilton *v.* Lightner, 53 Iowa 470, 5 N. W. 603; Fass *v.* Rice, 30 La. Ann. 1278. An arrangement that a business be conducted in the name of another, with the understanding that the parties conducting it shall become the owners of the business when they have paid back money invested in it by such other person, is not a fraudulent arrangement in law; but whether or not it is fraudulent is a question of fact for the jury. Dunham-Buckley *v.* Halberg, 69 Mo. App. 509.

47. *Alabama.*— Nance *v.* Nance, 84 Ala. 375, 4 So. 699, 5 Am. St. Rep. 378 (holding that the personal skill and labor of a husband, expended in making valuable improvements on his wife's property, cannot be reached or subjected by his creditors for the satisfaction of their claims); Hoot *v.* Sorrell, 11 Ala. 386.

Arkansas.— Nickle *v.* Emerson Mercantile, etc., Co., (1890) 13 S. W. 78.

Delaware.— Kirkley *v.* Larcey, 7 Houst. 213, 30 Atl. 994.

Illinois.— Lachman *v.* Martin, 139 Ill. 450, 28 N. E. 795; Sexton *v.* Martin, 37 Ill. App. 537; Olsen *v.* Kern, 10 Ill. App. 578.

Indiana.— Cooper *v.* Ham, 49 Ind. 393.

Iowa.— McCormick Harvesting Mach. Co. *v.* Pouder, 123 Iowa 17, 98 N. W. 303; King *v.* Wells, 106 Iowa 649, 77 N. W. 338.

Minnesota.— Eilers *v.* Conradt, 39 Minn. 242, 39 N. W. 320, 12 Am. Rep. 641; Ladd *v.* Newell, 34 Minn. 107, 24 N. W. 366; Hossfeldt *v.* Dill, 28 Minn. 469, 10 N. W. 781.

Mississippi.— Buckley *v.* Dunn, 67 Miss. 710, 7 So. 550, 19 Am. St. Rep. 334.

Missouri.— Tipton Bank *v.* Adair, 172 Mo. 156, 72 S. W. 510; Gruner *v.* Scholz, 154 Mo. 415, 55 S. W. 441 (holding that a wife could employ her husband or accept his services in running her drug store, without subjecting the property to the claims of his creditors); Seay *v.* Hesse, 123 Mo. 450, 20 S. W. 1017, 27 S. W. 633; Wolfsberger *v.* Mort, 104 Mo. App. 257, 78 S. W. 817; Hibbard *v.* Heckart, 88 Mo. App. 544; Johnson *v.* Christie, 79 Mo. App. 46; Baer *v.* Pfaff, 44 Mo. App. 35.

New Jersey.— Tresch *v.* Wirtz, 34 N. J. Eq. 124. See also Arnold *v.* Talcott, 55 N. J. Eq. 519, 37 Atl. 891; Taylor *v.* Wands, 55 N. J. Eq. 491, 37 Atl. 315.

New York.— Abbey *v.* Deyo, 44 N. Y. 343; Gage *v.* Dauchy, 34 N. Y. 293; Buckley *v.* Wells, 33 N. Y. 518; Kluender *v.* Lynch, 2 Abb. Dec. 538.

North Carolina.— Osborne *v.* Wilkes, 108 N. C. 651, 13 S. E. 285.

Pennsylvania.— Rush *v.* Vought, 55 Pa. St. 437, 93 Am. Dec. 769.

South Carolina.— Hodges *v.* Cobb, 8 Rich. 50.

Vermont.—Webster *v.* Hildreth, 33 Vt. 457, 78 Am. Dec. 632.

West Virginia.— Bd. of Education *v.* Mitchell, 40 W. Va. 431, 21 S. E. 1017; Trapnell *v.* Conklyn, 37 W. Va. 242, 16 S. E. 570, 38 Am. St. Rep. 30.

Wisconsin.— Mayers *v.* Kaiser, 85 Wis. 382, 55 N. W. 688, 39 Am. St. Rep. 849, 21 L. R. A. 623; Dayton *v.* Walsh, 47 Wis. 113, 2 N. W. 65, 33 Am. Rep. 757. See also Beloit Second Nat. Bank *v.* Merrill, 81 Wis. 151, 50 N. W. 505, 29 Am. St. Rep. 877.

United States.— Voorhees *v.* Bonesteel, 16 Wall. 16, 21 L. ed. 268. See also Garner *v.* Providence Second Nat. Bank, 151 U. S. 420, 14 S. Ct. 390, 37 L. ed. 218; Aldridge *v.* Muirhead, 101 U. S. 397, 25 L. ed. 1013; Hyde *v.* Frey, 28 Fed. 819.

England.— Lovell *v.* Newton, 14 C. P. D. 7, 39 L. T. Rep. N. S. 609, 27 Wkly. Rep. 366.

Canada.— Baby *v.* Ross, 14 Ont. Pr. 440; Plows *v.* Maughan, 42 U. C. Q. B. 129; Arnoldi *v.* Stewart, 17 Quebec Super. Ct. 252.

See 24 Cent. Dig. tit. "Fraudulent Con-

defrauding his creditors, does business in his wife's name but for his own benefit.[48] The fact that the wife had neither experience in the business nor a separate estate when she entered into the agreement for the purchase of a stock of goods is a circumstance to be considered in determining the question of fraud, but is insufficient of itself to show that the agreement was merely colorable, and that the goods and business were really the husband's and not the wife's, and that the arrangement was merely a fraudulent device to defeat the rights of creditors.[49] In some states it has been held that if a married woman advances her own separate money and places the same in the hands of her husband for the purpose of carrying on any general trade, although in the wife's name, and the husband by his labor and skill in that undertaking increases the fund, the entire capital embarked in the enterprise, together with the increase, will not constitute the separate estate of the wife, but will be liable for the debts of the husband.[50] In other cases it is held that if a husband engages in business with his wife's capital and in her name, and owing to his skill and labor large profits accrue therefrom over and above the necessary expenses and indebtedness of the business,

veyances," §§ 58, 880; and, generally, HUSBAND AND WIFE.

Support of husband.— It is further held that where a husband has no interest in his wife's business, which he is managing as her agent, her title to the property, as against claims of his creditors, is not impaired by the fact that a portion of the income is applied to his support. Abbey *v.* Deyo, 44 N. Y. 343; Voorhees *v.* Bonesteel, 16 Wall. (U. S.) 16, 21 L. ed. 268.

Inventions perfected by a husband and patents therefor, where a salary and expenses are paid by the wife out of her separate estate, and the husband acts merely as her employee, are her separate property and not subject to his debts. Arnold *v.* Talcott, 55 N. J. Eq. 519, 37 Atl. 891.

48. *Arkansas.*— Nickle *v.* Emerson Mercantile, etc., Co., (1890) 13 S. W. 78.

Illinois.— Lachman *v.* Martin, 139 Ill. 450, 453, 28 N. E. 795 (where it is said that "an insolvent debtor cannot use his wife's name as a mere device to cover up and keep from his creditors the assets and profits of a business which is in fact his own. . . . It is a question of fact to be determined from all the circumstances of the case whether or not the husband is carrying on his own business, or is merely managing his wife's business. It must clearly appear that the wife is the *bona fide* owner of the capital invested in the business, and that the accumulations, which result from the conduct of the business, are the legitimate outcome of the investment of her property"); Robinson *v.* Brems, 90 Ill. 351; Mattingly *v.* Obley, 1 Ill. App. 626.

Iowa.— Hamill *v.* Augustine, 81 Iowa 302, 46 N. W. 1113; Hamilton *v.* Lightner, 53 Iowa 470, 5 N. W. 603.

Kentucky.— Moran *v.* Moran, 12 Bush 301. See also Gross *v.* Eddinger, 85 Ky. 168, 3 S. W. 1, 8 Ky. L. Rep. 829; Farmers' Bank *v.* Marshall, 35 S. W. 912, 18 Ky. L. Rep. 249.

Louisiana.—Fass *v.* Rice, 30 La. Ann. 1278.

Missouri.— Johnson *v.* Christie, 79 Mo. App. 46.

Nebraska.— Wedgewood *v.* Withers, 35 Nebr. 583, 53 N. W. 576.

New Jersey.— Talcott *v.* Arnold, 54 N. J. Eq. 570, 35 Atl. 532. And see Metropolis Nat. Bank *v.* Sprague, 20 N. J. Eq. 13.

New York.—Abbey *v.* Deyo, 44 N. Y. 343; O'Leary *v.* Walter, 10 Abb. Pr. N. S. 439.

Ohio.— Glidden *v.* Taylor, 16 Ohio St. 509, 91 Am. Dec. 98.

Pennsylvania.— Blum *v.* Ross, 116 Pa. St. 163, 10 Atl. 32; Keeney *v.* Good, 21 Pa. St. 349. See Vowinkle *v.* Johnston, 9 Pa. Cas. 85, 11 Atl. 634.

Virginia.— Catlett *v.* Alsop, 99 Va. 680, 40 S. E. 34.

England.— Lovell *v.* Newton, 4 C. P. D. 7, 39 L. T. Rep. N. S. 609, 27 Wkly. Rep. 366; Laporte *v.* Costick, 31 L. T. Rep. N. S. 434, 23 Wkly. Rep. 131.

Canada.— Campbell *v.* Cole, 7 Ont. 127; *In re* Gearing, 4 Ont. App. 173; Levine *v.* Claflin, 31 U. C. C. P. 600; Meakin *v.* Samson, 28 U. C. C. P. 355; Foulds *v.* Curtelett, 21 U. C. C. P. 368; Lett *v.* Commercial Bank, 24 U. C. Q. B. 552; Harrison *v.* Douglass, 4 U. C. Q. B. 410.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 58, 880.

Presumption.— The wife may carry on business through her husband as agent, and the fact that she employs him and supports him does not raise a presumption of fraud, although it is competent in trying the issue to show his manner of conducting the business. Osborne *v.* Wilkes, 108 N. C. 651, 13 S. E. 285. See Stanley *v.* National Union Bank, 115 N. Y. 122, 22 N. E. 29.

The fact that the husband is paid a salary by his wife does not of itself establish that the business belongs to the wife. Johnson *v.* Christie, 79 Mo. App. 46.

49. Catlett *v.* Alsop, 99 Va. 680, 40 S. E. 34.

50. Robinson *v.* Brems, 90 Ill. 351; Patton *v.* Gates, 67 Ill. 164; Wilson *v.* Loomis, 55 Ill. 352; Wortman *v.* Price, 47 Ill. 22; Brownell *v.* Dixon, 37 Ill. 197; Pease *v.* Barkowsky, 67 Ill. App. 274; Card *v.* Robinson, 2 Ill. App. 19; Guill *v.* Hanny, 1 Ill. App. 490;

including the support of himself, wife, and family, a court of equity will justly apportion such profits between his wife and his existing creditors.[51]

c. Services Rendered by Parent For Child. While a parent may no doubt donate his services to his child, subject to the qualifications above stated,[52] he cannot as against creditors do business under his child's name, but for his own benefit, using such device to cover up his property and earnings and protect them from his creditors.[53] A debtor will not be permitted to donate the services and earnings of teams belonging to him to his infant son, to avoid the payment of his debts to a creditor for whom such infant son, with such teams, performs labor.[54]

9. Earnings of Debtor's Property. A debtor will not be permitted to donate the use of property belonging to him to another in fraud of his creditors, and if he does so the earnings of such property may be reached and subjected by his creditors.[55]

10. Good-Will. The good-will of a business has been held assets available to creditors, and the subject of a fraudulent conveyance.[56]

11. Life Insurance — a. Assignment or Surrender of Policies. The interest of a debtor in a policy of insurance on his life payable to himself or his estate may, like other choses in action,[57] be reached by his creditors either during his life or after his death if fraudulently assigned, surrendered, or otherwise disposed of by him when insolvent,[58] unless the policy was taken out for the beneficiary

Brooks-Waterfield Co. *v.* Frisbie, 99 Ky. 125, 35 S. W. 106, 59 Am. St. Rep. 452; Gross *v.* Eddinger, 85 Ky. 168, 3 S. W. 1, 8 Ky. L. Rep. 829; Moran *v.* Moran, 12 Bush (Ky.) 301; Blackburn *v.* Thompson, 66 S. W. 5, 23 Ky. L. Rep. 1723, 56 L. R. A. 938; Edelmuth *v.* Wybrant, 53 S. W. 528, 21 Ky. L. Rep. 929; Glidden *v.* Taylor, 16 Ohio St. 509, 91 Am. Dec. 98. See also Shields *v.* Lewis, 70 S. W. 51, 24 Ky. L. Rep. 822.

51. Boggess *v.* Richards, 39 W. Va. 567, 20 S. E. 599, 45 Am. St. Rep. 938, 26 L. R. A. 537. See also Johnston *v.* Christie, 79 Mo. App. 46; Talcott *v.* Arnold, 54 N. J. Eq. 570, 35 Atl. 532; Catlett *v.* Alsop, 99 Va. 680, 40 S. E. 34; Penn *v.* Whitehead, 17 Gratt. (Va.) 503, 94 Am. Dec. 478. And see, generally, Husband and Wife.

52. See *supra*, II, B, 8, b.

53. Fass *v.* Rice, 30 La. Ann. 1278.

54. Tuckey *v.* Lovell, 8 Ida. 731, 71 Pac. 122.

55. Tuckey *v.* Lovell, 8 Ida. 731, 71 Pac. 122.

Exempt property.— The rule does not apply where the property is exempt from the claims of creditors. See Leslie *v.* Joyner, 2 Head (Tenn.) 514; and *infra*, II, B, 21.

56. French *v.* French, 6 De G. M. & G. 95, 2 Jur. N. S. 169, 25 L. J. Ch. 612, 4 Wkly. Rep. 139, 55 Eng. Ch. 74, 43 Eng. Reprint 1166; Neale *v.* Day, 4 Jur. N. S. 1225, 28 L. J. Ch. 45, 7 Wkly. Rep. 45, holding that where an attorney, being in insolvent circumstances, assigned the good-will of his business in consideration of a sum of money paid down and an annuity secured by bond to be paid to his wife for life, with remainder to himself for life, the settlement of the annuity was void as against his creditors.

57. **Choses in action generally** see *supra*, II, B, 6.

58. *Alabama.*— Friedman *v.* Fennell, 94 Ala. 570, 10 So. 649.

Connecticut.— Barbour *v.* Connecticut Mut. L. Ins. Co., 61 Conn. 240, 23 Atl. 154.

Kentucky.— Stokes *v.* Coffey, 8 Bush 533, exchange by a debtor of a policy payable to himself or his estate for one payable to his wife.

Maine.— Wyman *v.* Gay, 90 Me. 36, 37 Atl. 325, 60 Am. St. Rep. 238.

Massachusetts.—Anthracite Ins. Co. *v.* Sears, 109 Mass. 383.

Michigan.— Ionia County Sav. Bank *v.* McLean, 84 Mich. 625, 48 N. W. 159.

Mississippi.— Catchings *v.* Manlove, 39 Miss. 655.

New York.— Leonard *v.* Clinton, 26 Hun 288.

North Carolina.— Burton *v.* Farinholt, 86 N. C. 260.

Ohio.— Child *v.* Graham, 8 Ohio Dec. (Reprint) 294, 7 Cinc. L. Bul. 43.

Pennsylvania.— *In re* McKown, 198 Pa. St. 96, 47 Atl. 1111 (voluntary assignment of life-insurance policy by a husband, when insolvent, to his wife is presumptively fraudulent as against his creditors); McCutcheon's Appeal, 99 Pa. St. 133; Elliott's Appeal, 50 Pa. St. 75, 88 Am. Dec. 525 (assignment in trust for benefit of wife).

Tennessee.—Walter *v.* Hattman, (1902) 67 S. W. 476.

United States.—Ætna Nat. Bank *v.* Manhattan L. Ins. Co., 24 Fed. 769. See also Washington Cent. Nat. Bank *v.* Hume, 128 U. S. 195, 9 S. Ct. 41, 32 L. ed. 370.

England.— Since the statute of 1 & 2 Vict. c. 110, § 12, bringing insurance policies within 13 Eliz. c. 5. Stokoe *v.* Cowan, 29 Beav. 637, 7 Jur. N. S. 901, 4 L. T. Rep. N. S. 695, 9 Wkly. Rep. 801, 54 Eng. Reprint 775. See also Taylor *v.* Coenen, 1 Ch. D. 636, 34 L. T. Rep. N. S. 18; Freeman *v.* Pope, L. R. 9 Eq. 206, 39 L. J. Ch. 148 [*affirmed* in L. R. 5 Ch. 538, 39 L. J. Ch. 689, 21 L. T. Rep. N. S. 816, 18 Wkly. Rep. 906];

and is assigned in pursuance of the understanding at the time,[59] or the insurance is exempted by statute from the claims of creditors,[60] or the assignment is within an express statute for the protection of wife or children,[61] or within the rule of law recognized in some states, independently of statute, allowing reasonable provision to be thus made for them, where there is no intent to defraud creditors.[62]

Schondler *v.* Wace, 1 Campb. 487; Jenkyn *v.* Vaughan, 3 Drew. 419, 2 Jur. N. S. 109, 25 L. J. Ch. 338, 4 Wkly. Rep. 214.

Canada.— Prentice *v.* Steel, 4 Montreal Super. Ct. 319.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 56, 117.

A policy having no real value or a merely trivial value as an asset for creditors is not within the rule stated. Barbour *v.* Connecticut Mut. L. Ins. Co., 61 Conn. 240, 23 Atl. 154; Steeley *v.* Steeley, 64 S. W. 642, 23 Ky. L. Rep. 996 (holding that the assignment of an insurance policy by a debtor to his wife is not fraudulent as to creditors where the policy has no surrender value); Provident L., etc., Co. *v.* Fidelity Ins., etc., Co., 203 Pa. St. 82, 52 Atl. 34. And see *supra*, II, B, 2.

Subsequent creditors cannot attack the assignment as fraudulent merely because it was voluntary. Barbour *v.* Connecticut Mut. L. Ins. Co., 61 Conn. 240, 23 Atl. 154; Eppinger *v.* Canepa, 20 Fla. 262. See also *infra*, IV, C; VIII, D, 3.

Insurance on life of wife.— An assignment of policies on his wife's life, made by an insolvent father to his son, is not necessarily fraudulent. Sebring *v.* Brickley, 7 Pa. Super. Ct. 198, 42 Wkly. Notes Cas. 189.

Extent of creditors' rights.— Where an attempted assignment of an insurance policy is set aside as fraudulent as against the insured's creditors, and the insurance has become payable, by the death of insured, before the judgment annulling the transfer, the entire insurance inures to the benefit of creditors, and not merely the cash value thereof. Continental Nat. Bank *v.* Moore, 83 N. Y. App. Div. 419, 82 N. Y. Suppl. 302. See also *In re* McKown, 198 Pa. St. 96, 47 Atl. 111; Catchings *v.* Manlove, 39 Miss. 655; Ionia County Sav. Bank *v.* McLean, 84 Mich. 625, 48 N. W. 159; Stokoe *v.* Cowan, 29 Beav. 637, 7 Jur. N. S. 901, 4 L. T. Rep. N. S. 695, 9 Wkly. Rep. 801, 54 Eng. Reprint 775; Schondler *v.* Wace, 1 Campb. 487; and other cases cited above in this note.

Assignment in contemplation of suicide.— Continental Nat. Bank *v.* Moore, 83 N. Y. App. Div. 419, 82 N. Y. Suppl. 302.

59. Shaver *v.* Shaver, 35 N. Y. App. Div. 1, 54 N. Y. Suppl. 464.

60. See *infra*, II, B, 21, a.

Exemption of life-insurance money see EXEMPTIONS, 18 Cyc. 1436.

61. As in the case of a statute permitting a husband to cause his life to be insured for the sole use of his wife, or to assign a policy on his life to her for her sole use, and exempting the amount of such insurance from the claims of his creditors, or a statute permitting such assignment to wife or children. Earnshaw *v.* Stewart, 64 Md. 513, 2 Atl. 734 (Act (1878), c. 200); Elliott *v.* Bryan, 64 Md. 368, 1 Atl. 614 (Act (1862), c. 9). See also Cole *v.* Marple, 98 Ill. 58, 38 Am. Rep. 83; Morehead *v.* Mayfield, 109 Ky. 51, 58 S. W. 473, 22 Ky. L. Rep. 580; Thompson *v.* Cundiff, 11 Bush (Ky.) 567; McCutcheon's Appeal, 99 Pa. St. 133; Sebring *v.* Brickley, 7 Pa. Super. Ct. 198, 42 Wkly. Notes Cas. 189. See also Judson *v.* Walker, 155 Mo. 166, 55 S. W. 1083.

Transaction not within statute.— It has been held that a statute protecting as against creditors money payable on a life-insurance policy taken out by a husband or father for the benefit of his wife or children does not cover the assignment to them of a policy payable to himself, his executors, administrators, or assigns. Friedman *v.* Fennell, 94 Ala. 570, 10 So. 649; Ionia County Sav. Bank *v.* McLean, 84 Mich. 625, 48 N. W. 159; Burton *v.* Farinholt, 86 N. C. 260. An Illinois case, however, is to the contrary. Cole *v.* Marple, 98 Ill. 58, 38 Am. Rep. 83. So it seems in New York. Tuthill *v.* Goss, 89 Hun (N. Y.) 609, 35 N. Y. Suppl. 136. See also Judson *v.* Walker, 155 Mo. 166, 55 S. W. 1083.

An assignment with intent to defraud creditors is not within the Ohio statute. Child *v.* Graham, 8 Ohio Dec. (Reprint) 294, 7 Cinc. L. Bul. 43, construing Ohio Rev. St. §§ 3628, 3629, 6344.

Acknowledgment and recording of an assignment of a life-insurance policy by husband to wife is not necessary under Ky. St. § 2128, invalidating a gift, transfer, or assignment of "personal property" between husband and wife, unless the same be in writing and acknowledged and recorded as is required in the case of chattel mortgages, since this statute is intended to apply only to "property of a tangible, substantial nature or right, having at the time an ascertainable value, and thus an appreciable part of the husband's estate." Morehead *v.* Mayfield, 109 Ky. 51, 58 S. W. 473, 22 Ky. L. Rep. 580. See also Steeley *v.* Steeley, 64 S. W. 642, 23 Ky. L. Rep. 966. See to the same effect, under the Illinois statute, Cole *v.* Marple, 98 Ill. 58, 38 Am. Rep. 83.

62. Johnson *v.* Alexander, 125 Ind. 575, 25 N. E. 706, 9 L. R. A. 660 (sustaining such assignment by a debtor for the benefit of his wife and children, where the provision for them was reasonable, although the debtor was insolvent at the time of the assignment); State *v.* Tomlinson, 16 Ind. App. 662, 45 N. E. 1116, 59 Am. St. Rep. 335; Chapman *v.* McIlwrath, 77 Mo. 38, 46 Am. Rep. 1; David Adler, etc., Clothing Co. *v.* Hellman, 55 Nebr. 266, 75 N. W. 877. *Compare*, however, the cases cited *supra*, note 58.

The same is true of an assignment or surrender by the beneficiary of insurance on the life of another, where he or she has a vested interest, and it is not exempt by statute.[63]

b. Payment of Premiums. According to some of the authorities a man may, even as against existing creditors, devote a reasonable portion of his earnings to the purchase of life insurance for the benefit of his family, if he does so without fraudulent intent,[64] but in other cases this is denied.[65] If an insolvent debtor voluntarily pays premiums on a policy of insurance on his life for the benefit of his wife or children or another in fraud of his creditors, they may reach and subject the insurance in the hands of the insurance company or the beneficiary to some extent,[66] some of the cases holding that they may do so only to the extent of the premiums so paid, with interest,[67] while others allow them to subject the full amount of the insurance,[68] unless the transaction is protected by statute, as in the

63. See the cases cited *supra*, note 58. For a member of a beneficial association to surrender, in his last illness, certificates payable to his wife for new certificates payable to her in trust for herself and children, is not a fraud on the wife's creditors, where she has no vested rights under the original certificates which the husband cannot control. Schillinger *v.* Boes, 85 Ky. 357, 3 S. W. 427, 9 Ky. L. Rep. 18. And for a married woman, during the life of her husband, to assign a policy of insurance on his life for her benefit in trust for the benefit of her children is not fraudulent as to her creditors, since they could not take the policy so as to bar her right. Smillie *v.* Quinn, 90 N. Y. 492 [*affirming* 25 Hun 332].

64. *Colorado.*— See Hendrie, etc., Mfg. Co. *v.* Platt, 13 Colo. App. 15, 56 Pac. 209.

Indiana.— Johnson *v.* Alexander, 125 Ind. 575, 25 N. E. 706, 9 L. R. A. 660; Pence *v.* Makepeace, 65 Ind. 345; Foster *v.* Brown, 65 Ind. 234.

Kentucky.—Hise *v.* Hartford L. Ins. Co., 90 Ky. 101, 13 S. W. 367, 11 Ky. L. Rep. 924, 29 Am. St. Rep. 358; Thompson *v.* Cundiff, 11 Bush 567. See Stokes *v.* Coffey, 8 Bush 533.

Nebraska.— David Adler, etc., Clothing Co. *v.* Hellman, 55 Nebr. 266, 75 N. W. 877.

Pennsylvania.— Elliott's Appeal, 50 Pa. St. 75, 88 Am. Dec. 525.

United States.— Washington Cent. Nat. Bank *v.* Hume, 128 U. S. 195, 9 S. Ct. 41, 32 L. ed. 370 [*reversing* 3 Mackey (D. C.) 360, 51 Am. Rep. 780].

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 56, 117.

Unreasonable provision by an insolvent husband for his wife by taking out insurance on his life for her benefit is fraudulent as against his creditors. Stokes *v.* Coffey, 8 Bush (Ky.) 533.

65. Fearn *v.* Ward, 65 Ala. 33, 80 Ala. 555, 2 So. 114; Ft. Scott First Nat. Bank *v.* Simpson, 152 Mo. 638, 54 S. W. 506; Asbury Park First Nat. Bank *v.* White, (N. J. 1900) 46 Atl. 1092; Merchants', etc., Transp. Co. *v.* Borland, 53 N. J. Eq. 282, 31 Atl. 272; Stigler *v.* Stigler, 77 Va. 163.

66. Lehman *v.* Gunn, 124 Ala. 213, 27 So. 475, 82 Am. St. Rep. 159, 51 L. R. A. 112; Houston *v.* Maddux, 179 Ill. 377, 53 N. E. 599 (under special statute); Asbury Park First Nat. Bank *v.* White, (N. J. 1900) 46 Atl. 1092; Merchants', etc., Transp. Co. *v.* Borland, 53 N. J. Eq. 282, 31 Atl. 272; and other cases in the notes following.

67. *Colorado.*— Hendrie, etc., Mfg. Co. *v.* Platt, 13 Colo. App. 15, 56 Pac. 209.

District of Columbia.— Washington Cent. Nat. Bank *v.* Hume, 3 Mackey 360 [*reversed* on other grounds in 128 U. S. 195, 9 S. Ct. 41, 32 L. ed. 370].

Indiana.— Pence *v.* Makepeace, 65 Ind. 345.

Mississippi.— Jones *v.* Patty, 73 Miss. 179, 18 So. 794.

New York.— Shaver *v.* Shaver, 35 N. Y. App. Div. 1, 54 N. Y. Suppl. 464.

Ohio.— See Hoffman *v.* Kiefer, 19 Ohio Cir. Ct. 401, 10 Ohio Cir. Dec. 304.

Virginia.— Stigler *v.* Stigler, 77 Va. 163.

United States.— Ætna Nat. Bank *v.* U. S. Life Ins. Co., 24 Fed. 770 (where it is said of insurance on a husband's life for his wife's benefit, the premiums of which were paid by him, that "the insurance was upon her interest in his life, not the creditors' interest in his life, and the amount due represents her interest, and, beyond the amount of premiums, is hers"); *In re* Bear, 2 Fed Cas. No. 1,178, 11 Nat. Bankr. Reg. 46.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 56, 117.

Subsequent creditors.— Payment of premiums by an insolvent on a policy of insurance on his life for the benefit of a child is not a fraudulent investment as against subsequent creditors. May *v.* May, 19 Fla. 373; Wagner *v.* Koch, 45 Ill. App. 501; Jones *v.* Patty, 73 Miss. 179, 18 So. 794.

The debtor must have been insolvent when the premiums were paid. Jones *v.* Patty, 73 Miss. 179, 18 So. 794.

68. Lehman *v.* Gunn, 124 Ala. 217, 27 So. 475, 82 Am. St. Rep. 159, 51 L. R. A. 112 (the policy or the insurance which it represents being the subject of the gift, and not the premiums paid); Fearn *v.* Ward, 80 Ala. 555, 2 So. 114; Stone *v.* Knickerbocker L. Ins. Co., 52 Ala. 589; Asbury Park First Nat. Bank *v.* White, (N. J. 1900) 46 Atl. 1092.

Proceeds of insurance not assets of estate.— Proceeds of an insurance policy on the life of a deceased debtor payable to another than himself or his legal representatives are not

case of a statute of exemption or a statute permitting a debtor, as against creditors, to pay premiums for insurance for the benefit of his wife or children, or other dependent relations, some of which statutes, however, expressly except cases in which the premiums are paid with intent to defraud creditors.[69] Such statutes are

assets of his estate, but belong to the beneficiary, although he may have paid the premiums, and his creditors cannot reach the same by suit on the bond of his administrator as for a devastavit, or other proceedings to reach them as assets. Jones *v.* Patty, 73 Miss. 179, 18 So. 794. See also Bishop *v.* Curphey, 60 Miss 22; *In re* Van Dermoor, 42 Hun (N. Y.) 326 (where the policy was payable to the "assured, his executors, administrators or assigns . . . for the benefit of his widow, if any"); Simmons *v.* Briggs, 99 N. C. 236, 5 S. E. 235; Conigland *v.* Smith, 79 N. C. 303.

69. *Alabama.*— Felrath *v.* Schonfield, 76 Ala. 199, 52 Am. Rep. 319.

Connecticut.— See Continental L. Ins. Co. *v.* Palmer, 42 Conn. 60, 19 Am. Rep. 530.

Illinois.— Cole *v.* Marple, 98 Ill. 58, 38 Am. Rep. 83; Wagner *v.* Koch, 45 Ill. App. 501.

Kentucky.— Hise *v.* Hartford L. Ins. Co., 90 Ky. 101, 13 S. W. 367, 11 Ky. L. Rep. 924, 29 Am. St. Rep. 358; Thompson *v.* Cundiff, 11 Bush 567.

Maryland.— Elliott *v.* Bryan, 64 Md. 368, 1 Atl. 614.

Missouri.— See Judson *v.* Walker, 155 Mo. 166, 55 S. W. 1083; Pullis *v.* Robison, 73 Mo. 201, 39 Am. Rep. 497; Charter Oak L. Ins. Co. *v.* Brant, 47 Mo. 419, 4 Am. Rep. 328; Kiely *v.* Hickcox, 70 Mo. App. 617.

New Jersey.— See Merchants', etc., Transp. Co. *v.* Borland, 53 N. J. Eq. 282, 31 Atl. 272.

New York.— Baron *v.* Brummer, 100 N. Y. 372, 3 N. E. 474; Brummer *v.* Cohn, 86 N. Y. 11, 40 Am. Rep. 503 (it need not appear from the terms of the policy or extrinsic evidence that it was the intention of the insured to avail himself of the provisions of the statute, nor need the policy provide for disposition of the fund in case of the wife's death before the husband); Brick *v.* Campbell, 8 N. Y. St. 98.

Ohio.— See Weber *v.* Paxton, 48 Ohio St. 266, 26 N. E. 1051. Such a statute applies to a policy issued by a foreign insurance company as well as to one of those issued by domestic companies. Cross *v.* Armstrong, 44 Ohio St. 613, 10 N. E. 160.

Pennsylvania.— McCutcheon's Appeal, 99 Pa. St. 133.

Tennessee.— Rose *v.* Wortham, 95 Tenn. 505, 32 S. W. 458, 30 L. R. A. 609 (policy exempt by statute, although taken out by the husband before his marriage, and although payable to his legal representatives); Harvey *v.* Harrison, 89 Tenn. 470, 14 S. W. 1083.

Virginia.— Mahoney *v.* James, 94 Va. 176, 26 S. E. 384.

United States.— *In re* Jordan, 13 Fed. Cas. No. 7,511, 2 Hask. 362 (Maine statute); Smith *v.* Missouri Valley L. Ins. Co., 22 Fed. Cas. No. 13,083, 4 Dill. 353 (Missouri statute).

England.— Holt *v.* Everall, 2 Ch. D. 266, 45 L. J. Ch. 433, 34 L. T. Rep. N. S. 599, 24 Wkly. Rep. 471.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 56, 117.

Exemption of life-insurance money see EXEMPTIONS, 18 Cyc. 1436.

Transactions covered by statute.— It has been held that a policy procured by a debtor in favor of one of his children only was not within the protection of a statute authorizing a married woman to cause the life of her husband to be insured for the benefit of herself and children, free from the claims of the representatives of the husband or any of his creditors. Fearn *v.* Ward, 65 Ala. 33, 80 Ala. 555, 2 So. 114. But a statute providing that it shall be lawful for any married woman, by herself and in her own name, or in the name of any third person as her trustee, to cause the life of her husband to be insured for her sole use, and exempting such insurance from the claims of the husband's representatives or creditors, contemplates and includes cases where the husband procures for his wife a policy on his own life. Felrath *v.* Schonfield, 76 Ala. 199, 52 Am. Rep. 319; Houston *v.* Maddux, 179 Ill. 377, 53 N. E. 599.

An endowment policy has been held to be within such a statute. Brummer *v.* Cohn, 86 N. Y. 11, 40 Am. Rep. 503.

Premiums paid prior to the enactment of the statute are not protected. Thompson *v.* Cundiff, 11 Bush (Ky.) 567.

Death of wife before husband.—Under statutory provisions in Alabama (Code (1876), §§ 2733, 2734), since changed in phraseology (Code (1886), § 2356), the husband might insure his own life in favor of his wife, paying annual premiums of not more than five hundred dollars, and might make the policy payable to her children, in the event of her death before his; and these statutory provisions operating in the nature of an exemption law, the proceeds of the policy could not be subjected by creditors to the payment of the husband's debts. But the interest of the wife terminated on her death before her husband; and the policy being made payable to "her heirs, executors, or assigns," her children acquired no interest which could prevail against the husband's creditors, on his subsequent death. Tompkins *v.* Levy, 87 Ala. 263, 6 So. 346, 13 Am. St. Rep. 31.

Intent to defraud creditors.— Under a statute permitting the insurance of a husband's life for his wife's sole use, and exempting such insurance from the claims of the husband's representatives or creditors, but providing that if the premium on such a policy is paid by any person "with intent to defraud his creditors," an amount of the insurance equal to the premiums so paid shall inure to

in the nature of exemption laws and should be liberally construed.[70] If the husband expends more than is allowed by the statute, or if there is an intent to defraud creditors, the latter may in some states subject the insurance to the extent of such excess payments only,[71] while in other states they may subject the whole

the benefit of such creditors, it has been held that voluntary payment by a husband of premiums on a policy in favor of his wife while he is insolvent, since it results in hindering, delaying, or defrauding creditors, is fraudulent, within the meaning of the proviso, without reference to the motive or actual intention in making the payments. Houston *v.* Maddux, 179 Ill. 377, 53 N. E. 599. See also Marmon *v.* Harwood, 124 Ill. 104, 16 N. E. 236, 7 Am. St. Rep. 345; Cole *v.* Marple, 98 Ill. 58, 38 Am. Rep. 83; Wagner *v.* Koch, 45 Ill. App. 501; Merchants', etc., Transp. Co. *v.* Borland, 53 N. J. Eq. 282, 31 Atl. 272; Union Cent. L. Ins. Co. *v.* Eckert, 5 Ohio Dec. (Reprint) 528, 6 Am. L. Rec. 452. *Compare*, however, Weber *v.* Paxton, 48 Ohio St. 266, 26 N. E. 1051. Under the Kentucky statute of 1870, which provides in substance that insurances made by husbands, whether insolvent or not, for the benefit of their wives and children, are valid as against creditors, unless the insurance is made with intent to defraud creditors, in which case the premiums paid shall be subject to their claims, it has been held that if the husband be insolvent and the amount of the insurance unreasonable, this will be sufficient evidence of fraud. Hise *v.* Hartford L. Ins. Co., 90 Ky. 101, 13 S. W. 367, 11 Ky. L. Rep. 924, 29 Am. St. Rep. 358. See also Morehead *v.* Mayfield, 109 Ky. 51, 58 S. W. 473, 22 Ky. L. Rep. 580; Thompson *v.* Cundiff, 11 Bush (Ky.) 567.

Reservation of benefit to husband.— Where the husband takes out a policy of insurance on his own life, in favor of his wife, "her heirs, executors, or assigns," paying the premiums with his own funds, a provision to the effect that, after the expiration of fifteen years, on surrender of the policy, none of its provisions having been violated, the company would pay to him, his heirs, executors, or assigns, the equitable value of the policy, "as an endowment in cash," is the reservation of a benefit to himself, and renders the policy fraudulent as against his creditors. Tompkins *v.* Levy, 87 Ala. 263, 6 So. 346, 13 Am. St. Rep. 31.

Payment of premium by note of debtor.— It has been held that it is immaterial, so far as the claims of existing creditors are concerned, whether a debtor who takes out a policy of insurance on his life pays the premium in cash or executes his note therefor, since the fund to which the creditors have the right to look for the payment of their claims may be diminished by the fraudulent creation of additional claims against it, as well as by the improper diversion of assets which constituted it. Lehman *v.* Gunn, 124 Ala. 213, 27 So. 475, 82 Am. St. Rep. 159, 51 L. R. A. 112.

70. *Alabama.*— Tompkins *v.* Levy, 87 Ala. 263, 6 So. 346, 13 Am. St. Rep. 31; Felrath *v.* Schonfield, 76 Ala. 199, 52 Am. Rep. 319.

Illinois.— Houston *v.* Maddux, 179 Ill. 377, 53 N. E. 599; Cole *v.* Marple, 98 Ill. 58, 38 Am. Rep. 83; Ramsey *v.* Nichols, 73 Ill. App. 643.

Missouri.— Judson *v.* Walker, 155 Mo. 166, 55 S. W. 1083; Charter Oak L. Ins. Co. *v.* Brant, 47 Mo. 419, 4 Am. Rep. 328.

New York.— Brummer *v.* Cohn, 86 N. Y. 11, 40 Am. Rep. 503.

Tennessee.— Rose *v.* Wortham, 95 Tenn. 505, 32 S. W. 458, 30 L. R. A. 609.

71. *Illinois.*— Houston *v.* Maddux, 179 Ill. 377, 53 N. E. 599; Ramsey *v.* Nichols, 73 Ill. App. 643; Wagner *v.* Koch, 45 Ill. App. 501.

Kentucky.— Morehead *v.* Mayfield, 109 Ky. 51, 58 S. W. 473, 22 Ky. L. Rep. 580; Hise *v.* Hartford L. Ins. Co., 90 Ky. 101, 13 S. W. 367, 11 Ky. L. Rep. 924, 29 Am. St. Rep. 358; Thompson *v.* Cundiff, 11 Bush (Ky.) 567.

Missouri.— Judson *v.* Walker, 155 Mo. 166, 55 S. W. 1083; Pullis *v.* Robinson, 73 Mo. 201, 39 Am. Rep. 497; Kiely *v.* Hickcox, 70 Mo. App. 617.

New York.— Stokes *v.* Amerman, 121 N. Y. 337, 24 N. E. 819; Tuthill *v.* Goss, 35 N. Y. Suppl. 136.

Ohio.— See Union Cent. L. Ins. Co. *v.* Eckert, 5 Ohio Dec. (Reprint) 528, 6 Am. L. Rec. 452.

United States.— Ingles *v.* New England Mut. L. Ins. Co., 27 Fed. 249 (Massachusetts statute); *In re* Jordan, 13 Fed. Cas. No. 7,511, 2 Hask. 362 (Maine statute). In a federal case it was held that where policies on the life of a husband were made for the benefit of his wife, but the premiums were paid "from the property of the husband in fraud of the rights of his creditors," his creditors could subject the insurance to the amount of the premiums so paid. Although this decision was made in New York, there was no reference in the opinion to the New York statute allowing insurance to a limited extent on the life of the husband for the benefit of his wife. Ætna Nat. Bank *v.* U. S. Life Ins. Co., 24 Fed. 770.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 56, 117.

A quarterly premium not exceeding the statutory annual limitation, no other premium being paid, cannot be reached by creditors. *In re* Jordan, 13 Fed. Cas. No. 7,511, 2 Hask. 362.

Membership in a benevolent association is life insurance, within the meaning of the Illinois statute (Starr & C. Annot. St. c. 73, § 189) providing for recovery, by creditors of an insolvent of life-insurance premiums paid by such insolvent with intent to defraud his creditors. Ramsey *v.* Nichols, 73 Ill. App. 643.

insurance or such proportion of the insurance as the excess of premiums paid bears to the total amount paid.[72]

c. Transactions Not Voluntary or Fraudulent. The rules above stated do not render premiums paid by a debtor or the proceeds of the insurance liable to the claims of creditors where a policy is assigned or insurance effected for another's benefit in payment or as security for a *bona fide* debt due the assignee or beneficiary,[73] or where the assignor is solvent and there is no intent to hinder, delay, or defraud creditors,[74] or in some states where there is no fraudulent intent, although the assignor be insolvent.[75]

d. Premiums Not Paid by Debtor. And of course creditors cannot subject insurance on their debtor's life for the benefit of another, or premiums paid on such insurance, where the premiums were not paid by him.[76]

Excess premiums paid before contracting of debt.— Under the New York statute limiting the exemption of insurance policies on a husband's life from the claims of his creditors by declaring that where the amount of the annual premium paid out of the husband's funds or property exceeds a certain sum, the exemption shall not apply to such portions of the premiums as are in excess of the sums specified, it has been held that where the premiums so paid, after the contracting of a debt by the husband, do not exceed the sum limited, the creditor can acquire no lien, although prior to the contracting of the debt premiums were so paid in excess of the statutory limitation. Baron *v.* Brummer, 100 N. Y. 372, 3 N. E. 474.

A policy is not void because excessive premiums have been paid. Smith *v.* Missouri Valley L. Ins. Co., 22 Fed. Cas. No. 13,083, 4 Dill. 353.

72. Stone *v.* Knickerbocker L. Ins. Co., 52 Ala. 589.

Excess of insurance not assets of estate.— Jones *v.* Patty, 73 Miss. 179, 18 So. 794. See *supra*, note 68.

73. Fearn *v.* Ward, 80 Ala. 555, 2 So. 114. See also Asbury Park First Nat Bank *v.* White, 60 N. J. Eq. 487, 46 Atl. 1092 (holding that where a debtor agreed to take out a life-insurance policy in favor of his wife in consideration of being allowed the income from her estate during the life of the policy, and such income exceeded the amount of premiums paid by him, the payment of the premiums was not voluntary, but based on an adequate consideration, and therefore his creditors could not reach such insurance or the premiums paid therefor, on the ground that he was insolvent at the time of their payment); Sebring *v.* Brickley, 7 Pa. Super. Ct. 198. No presumption of an intent to defraud creditors arises from an insolvent husband insuring his life for the benefit of his wife and children in a large amount, where he is indebted to the wife in a sum greater than the aggregate of all the premiums paid; but the presumption is that, in paying such premiums, he was preferring his wife as a creditor, which entitled her, by virtue of her insurable interest in his life, to all the insurance such premiums would buy. Hendrie, etc., Mfg. Co. *v.* Platt, 13 Colo. App. 15, 56 Pac. 209.

Marriage as a consideration.— Where an insolvent debtor assigned a policy of insurance on his life in consideration of the assignee's promise to marry him, which she did, and she took the assignment without notice of his insolvency and without knowledge of any intent on his part to defraud his creditors, it was held that she took a good title as against his creditors. Provident L., etc., Co. *v.* Fidelity Ins., etc., Co., 203 Pa. St. 82, 52 Atl. 34.

74. Foster *v.* Brown, 65 Ind. 234; Langford *v.* Freeman, 60 Ind. 46; King *v.* Cram, 185 Mass. 103, 69 N. E. 1049; Ft. Scott First Nat. Bank *v.* Simpson, 152 Mo. 638, 54 S. W. 506; Trough's Estate, 8 Phila. (Pa.) 214. The fact that premiums on life insurance taken out by a husband for his wife on the distribution policy plan, the distribution period to be completed in twenty years, are paid while the husband is insolvent, will not entitle creditors to its proceeds, where the policy matures by the death of the insured previous to the expiration of the twenty years, and the husband is indebted to the wife in an amount more than sufficient to pay all the premiums. Hendrie, etc., Mfg. Co. *v.* Platt, 13 Colo. App. 15, 56 Pac. 209.

75. McCutcheon's Appeal, 99 Pa. St. 133, holding that an assignment by a husband to his wife of a policy on his own life could not be held fraudulent and subject to the claims of the husband's creditors merely because the husband was insolvent when the assignment was made. See also Chapman *v.* McIlwrath, 77 Mo. 38, 46 Am. Rep. 1; Weber *v.* Paxton, 48 Ohio St. 266, 26 N. E. 1051.

76. *Kentucky.*— Stokes *v.* Coffey, 8 Bush 533.

Missouri.— Ft. Scott First Nat. Bank *v.* Simpson, 152 Mo. 638, 54 S. W. 506.

New York.— Baron *v.* Brummer, 100 N. Y. 372, 3 N. E. 474.

Ohio.— Jacob *v.* Continental L. Ins. Co., 1 Cinc. Super. Ct. 519.

Tennessee.— Roberts *v.* Winton, 100 Tenn. 484, 45 S. W. 673, 41 L. R. A. 275.

United States.— *In re* Murrin, 17 Fed. Cas. No. 9,968, 2 Dill. 120.

England.— Holt *v.* Everall, 2 Ch. D. 266, 45 L. J. Ch. 433, 34 L. T. Rep. N. S. 599, 24 Wkly. Rep. 471.

Payment of premium note by third person. — It has been held, however, that since the

12. Fire Insurance.[77] Money due for loss under a fire-insurance policy is not the proceeds of the property, and therefore it cannot be followed, under the rule elsewhere stated,[78] as a fund for creditors who have been defrauded by a transfer of such property by their debtor to the insured,[79] even though the premiums may have been paid by the debtor;[80] but in the latter case the money may be reached to the extent of the premiums.[81] Where a policy on the goods of a debtor running to him was made payable to a mortgagee of the goods as his interest might appear, and a loss occurred, it was held that a creditor of the insured might garnish the insurance money in the hands of the insurer and attack the mortgage as fraudulent.[82]

13. Membership in Stock or Merchant's Exchange. Some of the courts hold that a seat or membership in a stock or merchant's exchange or board of trade is property which, if fraudulently conveyed or assigned, may be reached in equity by creditors,[83] while other courts seem to have held the contrary.[84]

14. Patents, Copyrights, and Trade-Marks. Where creditors may reach in equity the choses in action of their debtor,[85] they may reach and subject the fraudulently transferred interest of their debtor in letters patent,[86] but the rule does not apply to an unpatented invention.[87] In like manner creditors may reach the fraudulently transferred interest of their debtor in the copyright of a book, map, or picture,[88] or money due as royalties thereon.[89] And they may reach the right to use a trade-mark in connection with a business, if it is not personal in its character.[90]

right of existing creditors to proceed against the fund arising from an insurance policy of their debtor, the premiums on which were paid by him, arises upon the death of the debtor, their right cannot be affected by the fact that another person pays, after the death of the debtor, as an act of generosity to the beneficiaries named in the policy, the premium note given by the debtor. Lehman *v.* Gunn, 124 Ala. 213, 27 So. 475, 82 Am. St. Rep. 159, 51 L. R. A. 112.

77. Insurance on homestead see *infra*, II, B, 21, b, (VI).

78. Following proceeds of property fraudulently conveyed see *infra*, II, B, 22.

79. Forrester *v.* Gill, 11 Colo. App. 410, 53 Pac. 230; Lerow *v.* Wilmarth, 9 Allen (Mass.) 382; Bernheim *v.* Beer, 56 Miss. 149; Nippes' Appeal, 75 Pa. St. 472. See also McLean *v.* Hess, 106 Ind. 555, 7 N. E. 567.

80. Forrester *v.* Gill, 11 Colo. App. 410, 53 Pac. 230; Nippes' Appeal, 75 Pa. St. 472.

81. Nippes' Appeal, 75 Pa. St. 472.

82. North Star Boot, etc., Co. *v.* Ladd, 32 Minn. 381, 20 N. W. 334.

83. Habenicht *v.* Lissak, 78 Cal. 351, 20 Pac. 874, 12 Am. St. Rep. 63, 5 L. R. A. 713; Eliot *v.* Merchants' Exch., 14 Mo. App. 234; Platt *v.* Jones, 96 N. Y. 24; Powell *v.* Waldron, 89 N. Y. 328, 42 Am. Rep. 301; Colby *v.* Peabody, 52 N. Y. Super. Ct. 394; Ritterband *v.* Baggett, 42 N. Y. Super. Ct. 556, 4 Abb. N. Cas. 67; Sprogg *v.* Dichman, 28 Misc. (N. Y.) 409, 59 N. Y. Suppl. 966; Grocers' Bank *v.* Murphy, 60 How. Pr. (N. Y.) 426; Page *v.* Edmunds, 187 U. S. 596, 23 S. Ct. 200, 47 L. ed. 318; *In re* Ketchum, 1 Fed. 840. *Compare* Rowe *v.* Blake, 99 Cal. 167, 33 Pac. 864, 37 Am. St. Rep. 45. See also Bankruptcy, 5 Cyc. 352; Creditors' Suits, 12 Cyc. 33; Executions, 17 Cyc. 945, 1413.

84. Barclay *v.* Smith, 107 Ill. 349, 47 Am. Rep. 437 [*reversing* 21 Am. L. Reg. 408, 14 Chic. Leg. N. 222]. See also Pancoast *v.* Gowen, 93 Pa. St. 66; Thompson *v.* Adams, 93 Pa. St. 55; *In re* Sutherland, 23 Fed. Cas. No. 13,637, 6 Biss. 526.

85. Right to reach choses in action see *supra*, II, B, 6.

86. *California.*— Pacific Bank *v.* Robinson, 57 Cal. 520, 40 Am. Rep. 120.

Connecticut.— Vail *v.* Hammond, 60 Conn. 374, 22 Atl. 954, 25 Am. St. Rep. 330.

Massachusetts.— Wilson *v.* Martin-Wilson Automatic Fire Alarm Co., 149 Mass. 24, 20 N. E. 318, 151 Mass. 515, 24 N. E. 784, 8 L. R. A. 309; Barton *v.* White, 144 Mass. 281, 10 N. E. 840, 59 Am. Rep. 84. *Compare* Carver *v.* Peck, 131 Mass. 291.

New York.— Gillett *v.* Bate, 86 N. Y. 87 (holding also that want of utility or novelty is no defense to a creditors' bill, either on behalf of the patentee or his fraudulent assignee); Barnes *v.* Morgan, 3 Hun 703.

Rhode Island.— *In re* Keach, 14 R. I. 571.

United States.— Ager *v.* Murray, 105 U. S. 126, 26 L. ed. 942; Gorrell *v.* Dickson, 26 Fed. 454; Matthews *v.* Green, 19 Fed. 649, holding that a license to use a patented invention may by a bill in equity be subjected to sale for the payment of a judgment debt. *Compare* Ashcroft *v.* Walworth, 2 Fed. Cas. No. 580, Holmes 152.

See Creditors' Suits, 12 Cyc. 31.

87. See Gillett *v.* Bate, 86 N. Y. 87, 94.

88. Bryan *v.* University Pub. Co., 112 N. Y. 382, 19 N. E. 825, 2 L. R. A. 638; Stephens *v.* Cady, 14 How. (U. S.) 528, 14 L. ed. 528.

89. Lord *v.* Harte, 118 Mass. 271.

90. Warren *v.* Warren Thread Co., 134 Mass. 247.

15. Rights Arising Out of Real Estate[91] — **a. In General.** Creditors may secure important rights not necessarily pertaining to the absolute fee or ownership of real property but growing out of such ownership. A judgment creditor, after exhausting his remedy at law, may file his bill in chancery to obtain satisfaction of his debt out of any beneficial interest of his debtor in real property, as well as in personal estate, which cannot be reached by execution at law.[92] Where a conveyance is fraudulent and void as against creditors, those acquisitions of the grantee which are the mere fruit and outgrowth of the property conveyed share the same fate.[93]

b. Crops and Other Products.[94] Crops growing on a debtor's land may be levied upon by creditors if the sale or mortgage thereon by him is fraudulent as against them,[95] but not otherwise.[96] Where a conveyance of land is fraudulent and void as to creditors, the same is true of the products of the land, such as crops growing thereon at the time of the conveyance, and they may be reached and subjected by creditors of the grantor.[97] The rule also applies to ores and similar products.[98] A judgment creditor may also levy upon crops grown upon the land of his debtor after its conveyance in fraud of creditors, so far as the debtor retains an interest in them by an understanding with the grantee.[99] But if a fraudulent grantee enters into possession and cultivates the land upon his own account, the grantor's creditors cannot reach and subject the annual crops. They can only attach and levy upon what their debtor owned and fraudulently conveyed.[1] The same is true of other property produced by the grantee.[2]

c. Rents and Profits. Subject to qualifications hereafter stated, rents and profits may be recovered by a creditor from a fraudulent grantee, since debtors can no more give away the rents and profits of their real estate than they can give away the real estate itself.[3]

d. Improvements. Improvements placed by a debtor upon the real property of his wife, child, or other third person acting in collusion with him to defraud creditors can be followed and a charge established upon the real estate, or the rents and profits thereof, in favor of creditors for the value of the improvements.[4]

91. **Equitable rights and interests** see *infra*, II, B, 16.

Husband and wife see *infra*, II, B, 19.

92. Farnham *v.* Campbell, 10 Paige (N. Y.) 598.

93. Edwards *v.* Enthwisle, 2 Mackey (D. C.) 43; State *v.* McBride, 105 Mo. 265, 15 S. W. 72.

94. **Exempt crops** see *infra*, II, B, 21, a, text and note 59.

Crops grown on homestead see *infra*, II, B, 21, b, (III).

95. Merchants', etc., Sav. Bank *v.* Lovejoy, 84 Wis. 601, 55 N. W. 108, mortgage of growing crops by which an interest was reserved to the mortgagor. See also Haines *v.* McKinnon, 35 Oreg. 573, 57 Pac. 903. And see *infra*, XIII, A, 4, a, (I), (D), (2).

96. Haines *v.* McKinnon, 35 Oreg. 573, 57 Pac. 903.

A sale by a landlord of his rental interest in growing crops on the land leased, where it is made in good faith and for a valuable consideration, and with the intention of a present vesting of title, is valid as against his creditors. Hood *v.* Gibson, 8 Kan. App. 588, 56 Pac. 148.

Mortgage of crops see Chattel Mortgages, 6 Cyc. 1045.

97. Dodd *v.* Adams, 125 Mass. 398; Fury *v.* Strohecker, 44 Mich. 337; Pierce *v.* Hill, 35 Mich. 194, 24 Am. Rep. 541; Erickson *v.* Paterson, 47 Minn. 525, 50 N. W. 699; Merchants', etc., Sav. Bank *v.* Lovejoy, 84 Wis. 601, 55 N. W. 108. See also, *infra*, XIII, A, 4, a, (I), (D), (1), (2).

98. State *v.* McBride, 105 Mo. 265, 15 S. W. 72, holding that a judgment creditor may either levy upon and sell the land and then institute proceedings to set aside the fraudulent conveyance, or he may make his debt by levying upon and selling the ore.

99. Fury *v.* Strohecker, 44 Mich. 337, 6 N. W. 834, holding also that where there is reason to suppose there is such collusion, all doubt should be solved in the creditor's favor.

Crops on land purchased in wife's name.— Turner-Looker Co. *v.* Garvey, 43 S. W. 202, 19 Ky. L. Rep. 1205.

1. Jones *v.* Bryant, 13 N. H. 53; Kilbride *v.* Cameron, 17 U. C. C. P. 373.

2. Garbutt *v.* Smith, 40 Barb. (N. Y.) 22, holding that creditors of a fraudulent grantor could not seize by attachment or execution a quantity of gypsum or plaster, where the rock was dug from the soil by the grantee and made into plaster at his own expense.

3. Kipp *v.* Hanna, 2 Bland (Md.) 26; Loos *v.* Wilkinson, 110 N. Y. 195, 18 N. E. 99, 1 L. R. A. 250. See *infra*, XIII, A, 4, a, (II), (E), (2).

4. Seasongood *v.* Ware, 104 Ala. 212, 16

16. Equitable Rights and Interests — a. In General. Any equitable right or interest which may be reached in equity by a creditors' suit[5] may be the subject of a fraudulent conveyance, and may be reached and subjected by creditors in equity, or, by statute in some jurisdictions, even at law,[6] in the hands of the fraudulent transferee.[7] The rule applies where it is sought to reach and subject the beneficial interest of a *cestui que trust*,[8] including his interest in the income of a trust fund,[9] unless by some valid provision in the deed, will, or other instrument creating the trust, the interest of the *cestui que trust* in the property or income is rendered inalienable and placed beyond the reach of his creditors.[10]

b. Equity of Redemption. The doctrine applies so as to entitle creditors to reach and subject their debtor's equity of redemption in property,[11] if it is of any value,[12] and is not exempt.[13]

c. Interest Under Contract of Purchase. The doctrine also applies so as to entitle creditors to reach and subject the equitable interest of their debtor under a contract for the purchase of property.[14]

d. Property Purchased in Name of Third Person. In like manner where property is purchased by a debtor and the title is taken in the name of his wife, child, or other third person, it may be reached and subjected in equity by his creditors.[15]

So. 51; Heck *v.* Fisher, 78 Ky. 643; Isham *v.* Schafer, 60 Barb. (N. Y.) 317; Burt *v.* Timmons, 29 W. Va. 441, 2 S. E. 780, 6 Am. St. Rep. 664. See also *infra*, III, A, 3, d.

5. See Creditors' Suits, 12 Cyc. 25.

6. See *infra*, XIV, B.

7. *North Carolina.*— Frost *v.* Reynolds, 39 N. C. 494.

Pennsylvania.— Mackason's Appeal, 42 Pa. St. 330, 82 Am. Dec. 517.

South Carolina.— McNair *v.* Moore, 64 S. C. 82, 41 S. E. 829, transfer from husband to wife.

Tennessee.— Planter's Bank *v.* Henderson, 4 Humphr. 75.

United States.— Watson *v.* Bonfils, 116 Fed. 157, 53 C. C. A. 535; Sanford *v.* Lackland, 21 Fed. Cas. No. 12,312, 2 Dill. 6, holding that where a testator gave property to trustees to hold for his son until the latter should reach the age of twenty-six years, when it was to be paid over to him, and the son became a bankrupt at the age of twenty-four, his assignee in bankruptcy was entitled to the property.

England.— Barton *v.* Vanheythuysen, 11 Hare 126, 18 Jur. 344, 1 Wkly. Rep. 429, 45 Eng. Ch. 127.

Absence of fraud.— A debtor may sell his equitable interest in property, if it be done without fraud, before a bill is filed by a creditor to enforce the payment of his judgment out of such equitable interest. Russell *v.* Houston, 5 Ind. 180.

8. Nichols *v.* Levy, 5 Wall. (U. S.) 433, 441, 18 L. ed. 596, where Mr. Justice Swayne said: "It is a settled rule of law that the beneficial interest of a *cestui que trust*, whatever it may be, is liable for the payment of his debts. It cannot be so fenced about by inhibitions and restrictions as to secure to it the inconsistent characteristics of right and enjoyment to the beneficiary and immunity from his creditors." See also Creditors' Suits, 12 Cyc. 29, 30.

9. Sparhawk *v.* Cloon, 125 Mass. 263. See also Creditors' Suits, 12 Cyc. 29, 30; and, generally, Trusts. In some states the income of a trust estate enjoyed by a debtor, beyond an amount considered necessary for the actual support of himself, wife, and children, is available to creditors and this whether the trust estate is real or personal property. Hardenburgh *v.* Blair, 30 N. J. Eq. 645; Wetmore *v.* Wetmore, 149 N. Y. 529, 44 N. E. 169, 52 Am. St. Rep. 752, 33 L. R. A. 708; Tolles *v.* Wood, 99 N. Y. 616, 1 N. E. 251; Williams *v.* Thorn, 70 N. Y. 270; Graff *v.* Bonnett, 31 N. Y. 9, 88 Am. Dec. 236. See also Creditors' Suits, 12 Cyc. 30; and, generally, Trusts.

10. Broadway Nat. Bank *v.* Adams, 133 Mass. 170, 43 Am. Rep. 504; White *v.* White, 30 Vt. 338; Guernsey *v.* Lazear, 51 W. Va. 328, 41 S. E. 405; Potter *v.* Couch, 141 U. S. 296, 11 S. Ct. 1005, 35 L. ed. 721; Spindle *v.* Shreve, 111 U. S. 542, 4 S. Ct. 522, 28 L. ed. 512; Nichols *v.* Eaton, 91 U. S. 716, 23 L. ed. 254; Spindle *v.* Shreve, 4 Fed. 136, 9 Biss. 199. See also Creditors' Suits, 12 Cyc. 30; and, generally, Trusts.

11. Sims *v.* Gaines, 64 Ala. 392; Johnson *v.* Burnside, 8 Ohio S. & C. Pl. Dec. 412, 7 Ohio N. P. 74; Watson *v.* Bonfils, 116 Fed. 157, 53 C. C. A. 535; Fleury *v.* Pringle, 26 Grant Ch. (U. C.) 67. See also Creditors' Suits, 12 Cyc. 32. *Compare* Potter *v.* Skiles, 114 Ky. 132, 70 S. W. 301, 71 S. W. 627, 24 Ky. L. Rep. 910, 1457.

12. See *supra*, II, B, 2.

13. The rule does not apply to an equity of redemption in an exempt homestead. Winter *v.* Ritchie, 57 Kan. 212, 45 Pac. 595, 57 Am. St. Rep. 331. See *infra*, II, B, 21, b, (I).

14. Whitmore *v.* Woodward, 28 Me. 392; Frost *v.* Reynolds, 39 N. C. 494 (after payment of the purchase-money); McNair *v.* Moore, 64 S. C. 82, 41 S. E. 829; Barton *v.* Vanheythuysen, 11 Hare 126, 18 Jur. 344, 1 Wkly. Rep. 429, 45 Eng. Ch. 127. See also Creditors' Suits, 12 Cyc. 27.

15. *Colorado.*— Fox *v.* Lipe, 14 Colo. App. 258, 59 Pac. 850.

e. Reservations by Debtor. Any reservation made by a debtor for his own personal benefit in a conveyance may be reached by his creditors.[16] Hence, when lands are conveyed upon a trust to apply the income to the grantor for life with remainder over, the interest reserved by the grantor may be reached by his creditors.[17] A conveyance founded on a promise to provide a home and support to the grantor is fraudulent and void as to the grantor's creditors.[18]

17. Property Transferred by Debtor to Equitable Owner — a. In General. If a debtor holds the bare legal title to property for another and has no beneficial interest therein, it cannot, in the absence of elements of estoppel,[19] be reached and subjected to the payment of his debts, and therefore a conveyance thereof by him to the equitable owner, or to a third person at the request of the equitable owner, is not fraudulent as against his creditors.[20] The conveyance, however,

Delaware.— Newell *v.* Morgan, 2 Harr. 225.

Georgia.— Field *v.* Jones, 10 Ga. 229.

Indiana.— Demaree *v.* Driskill, 3 Blackf. 115; Kipper *v.* Glancey, 2 Blackf. 356.

Kentucky.— Matthews *v.* Arbritton, 83 Ky. 32; Doyle *v.* Sleeper, 1 Dana 531.

Maine.— Augusta Sav. Bank *v.* Crossman, (1886) 7 Atl. 396; Gray *v.* Chase, 57 Me. 558; Godding *v.* Brackett, 34 Me. 27, holding that personal property purchased by a debtor with his own money and for his own benefit could be reached by his creditors, although the bill of sale was made to a third person, and although the debtor pretended to buy for and the seller supposed he was selling to such third person.

Maryland.— Trego *v.* Skinner, 42 Md. 426.

Massachusetts.— Bresnihan *v.* Sheehan, 125 Mass. 11.

Minnesota.— Sumner *v.* Sawtelle, 8 Minn. 309.

Mississippi.— Simmons *v.* Ingram, 60 Miss. 886; Bernheim *v.* Beer, 56 Miss. 149.

Missouri.— Gutzwiller *v.* Lackman, 23 Mo. 168.

Nebraska.— Cochran *v.* Cochran, 62 Nebr. 450, 87 N. W. 152.

New Jersey.— Haggerty *v.* Nixon, 26 N. J. Eq. 42.

New York.— McCartney *v.* Bostwick, 31 Barb. 390.

North Carolina.— Gentry *v.* Harper, 55 N. C. 177.

South Carolina.— Godbold *v.* Lambert, 8 Rich. Eq. 155, 70 Am. Dec. 192.

Tennessee.— Goff *v.* Dabbs, 4 Baxt. 300.

Vermont.— Corey *v.* Morrill, 71 Vt. 51, 42 Atl. 976; Waterman *v.* Cochran, 12 Vt. 699.

West Virginia.— Lockhard *v.* Beckley, 10 W. Va. 87.

England.— Barton *v.* Vanheythuysen, 11 Hare 126, 18 Jur. 344, 1 Wkly. Rep. 429, 45 Eng. Ch. 127.

Canada.— O'Doherty *v.* Ontario Bank, 32 U. C. C. P. 285.

See also *infra*, III, A, 3, a; and Creditors' Suits, 12 Cyc. 26.

16. *New York.*— Schenck *v.* Barnes, 156 N. Y. 316, 50 N. E. 967, 41 L. R. A. 395 [*affirming* 25 N. Y. App. Div. 153, 49 N. Y. Suppl. 222]; Young *v.* Heermans, 66 N. Y. 374; Elias *v.* Farley, 2 Abb. Dec. 11, 3 Keyes 398, 2 Transcr. App. 116, 5 Abb. Pr. N. S. 39; Harris *v.* Osnowitz, 35 N. Y. App. Div. 594, 55 N. Y. Suppl. 172; Todd *v.* Monell, 19 Hun 362.

North Carolina.— Webb *v.* Atkinson, 124 N. C. 447, 32 S. E. 737.

Ohio.—Bowlus *v.* Shanabarger, 19 Ohio Cir. Ct. 137, 10 Ohio Cir. Dec. 167.

Pennsylvania.— Mackason's Appeal, 42 Pa. St. 330, 82 Am. Dec. 517.

United States.—De Hierapolis *v.* Lawrence, 115 Fed. 761.

See also *infra*, X.

17. Schenck *v.* Barnes, 156 N. Y. 316, 321, 50 N. E. 967, 41 L. R. A. 395 [*affirming* 25 N. Y. App. Div. 153, 49 N. Y. Suppl. 222], where it is said by Bartlett, J.: "It is the settled policy of this state that, where property is held in trust for a debtor and the fund proceeds from a third party, the creditor can only reach the surplus income after providing for the proper support of the *cestui que trust*, but if the debtor created the trust his entire reserved interest is a fund to which his creditors can resort." See also Graff *v.* Bonnett, 31 N. Y. 9, 88 Am. Dec. 236; Raymond *v.* Harris, 84 N. Y. App. Div. 546, 82 N. Y. Suppl. 689; Mackason's Appeal, 42 Pa. St. 330, 82 Am. Dec. 517. And see *infra*, X.

18. Webb *v.* Atkinson, 124 N. C. 447, 32 S. E. 737; Bowlus *v.* Shanabarger, 19 Ohio Cir. Ct. 137, 10 Ohio Cir. Dec. 167. See also *infra*, X, A, 4; X, B, 6.

19. See Estoppel, 16 Cyc. 671.

20. *Arkansas.*— Fairhurst *v.* Lewis, 23 Ark. 435, holding that where a son purchased with his own money land upon which his father had long resided, on an agreement that the deed should be made to himself, and by mistake the deed was executed to his father, the legal title was in the father in trust for the son, and his conveyance of the land to the son was not fraudulent as against his own creditors.

Connecticut.— Jarvis *v.* Prentice, 19 Conn. 272.

Illinois.— Seeders *v.* Allen, 98 Ill. 468.

Indiana.— Taylor *v.* Duesterberg, 109 Ind. 165, 9 N. E. 907; Bremmerman *v.* Jennings, 101 Ind. 253; Robertson *v.* Huffman, 92 Ind. 247.

Iowa.— McGregor First Nat. Bank *v.* Hostetter, 61 Iowa 395, 16 N. W. 289; Caffal

may be fraudulent *pro tanto*, if it also includes property of the debtor or improvements for which he has expended his own means.[21]

b. Conveyance in Pursuance of Parol Trust. It follows that where one who holds real or personal property under a parol trust makes a declaration of trust in accordance with the parol agreement, or conveys the property in accordance therewith, his creditors, in the absence of elements of estoppel,[22] cannot attack the declaration or conveyance as fraudulent and subject the property to the satisfaction of their claims.[23] The circumstances must have been such as to make the

v. Hale, 49 Iowa 53. See also Cottrell *v.* Smith, 63 Iowa 181, 18 N. W. 865.

Kentucky.— Clark *v.* Rucker, 7 B. Mon. 583. See also Mundy *v.* Mason, 4 Bush 339.

Maine.— Lewiston First Nat. Bank *v.* Dwelling, 72 Me. 223; Carter *v.* Porter, 55 Me. 337.

Michigan.— Desmond *v.* Myers, 113 Mich. 437, 71 N. W. 877; Petit *v.* Hubbell, 105 Mich. 405, 63 N. W. 407 (sustaining, as against an agent's creditors, a conveyance by the agent to his principal, where the land belonged to the principal and had been conveyed to the agent by mistake); Victor Sewing Mach. Co. *v.* Jacobs, 46 Mich. 494, 9 N. W. 532.

Minnesota.— Farnham *v.* Kennedy, 28 Minn. 365, 10 N. W. 20.

Mississippi.— Citizens' Mut. Ins. Co. *v.* Foster, 64 Miss. 288, 1 So. 238; Gallman *v.* Perrie, 47 Miss. 131, holding that where one purchased land for another through an agent, in whose name title was taken as trustee, and where judgment was about to be rendered against the trustee, he conveyed the land to secure it to the beneficiary originally intended, such conveyance was not fraudulent as against the trustee's creditor.

Missouri.— Perkins *v.* Meighan, 147 Mo. 617, 49 S. W. 498, 71 Am. St. Rep. 586; De Berry *v.* Wheeler, 128 Mo. 84, 30 S. W. 338, 49 Am. Rep. 538; Dermott *v.* Carter, 109 Mo. 21, 18 S. W. 1121; Caffee *v.* Smith, 101 Mo. 229, 13 S. W. 1050; Aultman *v.* Booth, 95 Mo. 383, 8 S. W. 742; Erwin *v.* Holderman, 92 Mo. 333, 5 S. W. 36; Bangert *v.* Bangert, 13 Mo. App. 144.

Nebraska.— Goldsmith *v.* Fuller, 30 Nebr. 563, 46 N. W. 712; Creswell *v.* McCaig, 11 Nebr. 222, 9 N. W. 52.

Nevada.— Stanton *v.* Crane, 25 Nev. 114, 58 Pac. 53.

New Jersey.— Silvers *v.* Potter, 48 N. J. Eq. 539, 22 Atl. 584; Carver *v.* Todd, 48 N. J. Eq. 102, 28 Atl. 943, 27 Am. St. Rep. 466. See also Beck *v.* Shultz, (N. J. Ch. 1895) 32 Atl. 695.

New York.— Amsterdam First Nat. Bank *v.* Miller, 24 N. Y. App. Div. 551, 49 N. Y. Suppl. 981 [*reversed* on other grounds in 163 N. Y. 164, 57 N. E. 308]; Davis *v.* Graves, 29 Barb. 480; Dunn *v.* Whalen, 21 N. Y. Suppl. 869; Bachs *v.* Tomlinson, 1 N. Y. St. 484; Jackson *v.* Ham, 15 Johns. 261. *Compare* Champlin *v.* Seeber, 56 How. Pr. 46.

North Carolina.— Brisco *v.* Norris, 112 N. C. 671, 16 S. E. 850; Buie *v.* Kelly, 27 N. C. 169; Runyon *v.* Leary, 20 N. C. 373.

Oregon.— Richmond *v.* Bloch, 36 Oreg. 590, 60 Pac. 385.

Pennsylvania.— Barncord *v.* Kuhn, 36 Pa. St. 383; Brown *v.* Williamson, 36 Pa. St. 338; Holdship *v.* Patterson, 7 Watts 547; Ashurst *v.* Given, 5 Watts & S. 323.

Tennessee.— Allen *v.* Holland, 3 Yerg. 343.

Texas.— Bicocchi *v.* Casey-Swasey Co., 91 Tex. 259, 42 S. W. 963, 66 Am. St. Rep. 875 [*reversing* (Civ. App. 1897) 40 S. W. 209]; Citizens' Nat. Bank *v.* Sturgis Nat. Bank, (Civ. App. 1904) 81 S. W. 550.

Vermont.— White *v.* White, 30 Vt. 338.

Washington.— Samuel *v.* Kittenger, 6 Wash. 261, 33 Pac. 509.

United States.— Schreyer *v.* Platt, 134 U. S. 405, 10 S. Ct. 579, 33 L. ed. 955; Mills *v.* Scott, 43 Fed. 452.

England.— Middleton *v.* Pollock, 2 Ch. D. 104, 45 L. J. Ch. 293; Houghton *v.* Tait, 3 Y. & J. 486.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 102, 105; and *infra*, VIII, A, 3; VIII, A, 9, b.

Illegality.— Where a married woman, being the owner of stock in a national bank, transferred the same to her husband to enable him to qualify as a director in a bank, on the understanding that as soon as he was elected director he should retransfer the stock, it was held that, although the arrangement resulted in an evasion of the federal statute respecting the qualification of national bank directors, the husband held the stock in trust for his wife until retransferred, and that after the retransfer, although without a consideration, the stock was not subject to garnishment by a creditor of the husband. Citizens' Nat. Bank *v.* Sturgis Nat. Bank, (Tex. Civ. App. 1904) 81 S. W. 550. See also Jackson *v.* Ham, 15 Johns. (N. Y.) 261, sustaining a reconveyance of land by a debtor to whom it had been conveyed for the purpose of qualifying him to vote at a public election.

21. Bachs *v.* Tomlinson, 1 N. Y. St. 484, holding that where a judgment debtor, who held lands in trust, upon which he had erected a building of his own, transferred the premises to one designated by the *cestui que trust* in compliance with the terms of the trust, the conveyance, as against judgment creditors, was valid as to the land, but void as to the building.

22. See ESTOPPEL, 16 Cyc. 671.

23. *Indiana.*— Hays *v.* Reger, 102 Ind. 524, 1 N. E. 386.

Iowa.— De Vore *v.* Jones, 82 Iowa 66, 47 N. W. 885; Caffal *v.* Hale, 49 Iowa 53.

Michigan.— Desmond *v.* Myers, 113 Mich.

debtor an equitable trustee in order to allow the creditors to attack such a declaration or conveyance as fraudulent.[24]

c. Conveyance by Husband To or For Wife. The rule applies, in the absence of elements of estoppel, as against creditors of a husband who conveys to his wife, directly or through a third person, property which has been purchased with her separate estate, and the title to which was taken in his name.[25] The equi-

437, 71 N. W. 877; Victor Sewing Mach. Co. *v.* Jacobs, 46 Mich. 494, 9 N. W. 532.

Missouri.— De Berry *v.* Wheeler, 128 Mo. 84, 30 S. W. 338, 49 Am. St. Rep. 538; Aultman *v.* Booth, 95 Mo. 383, 8 S. W. 742.

Nebraska.— Cresswell *v.* McCaig, 11 Nebr. 222, 9 N. W. 52.

New Jersey.— Iauch *v.* De Socarras, 56 N. J. Eq. 538, 39 Atl. 370; Silvers *v.* Potter, 48 N. J. Eq. 539, 22 Atl. 584; Carver *v.* Todd, 48 N. J. Eq. 102, 21 Atl. 943, 27 Am. St. Rep. 466; Pitney *v.* Bolton, 45 N. J. Eq. 639, 18 Atl. 211; Jamison *v.* Miller, 27 N. J. Eq. 586.

New York.— Davis *v.* Graves, 29 Barb. 480; Dunn *v.* Whalen, 21 N. Y. Suppl. 869.

North Carolina.— Brisco *v.* Norris, 112 N. C. 671, 16 S. E. 850; Buie *v.* Kelly, 27 N. C. 169.

Oregon.— Richmond *v.* Bloch, 36 Oreg. 590, 60 Pac. 385.

Texas.— Citizens' Nat. Bank *v.* Sturgis Nat. Bank, (Civ. App. 1904) 81 S. W. 550.

United States.— Mills *v.* Scott, 43 Fed. 452.

England.— Gardner *v.* Rowe, 3 L. J. Ch. O. S. 220, 2 Sim. & St. 346, 25 Rev. Rep. 214, 1 Eng. Ch. 346, 57 Eng. Reprint 378 [*affirmed* in 7 L. J. Ch. O. S. 2, 5 Russ. 258, 5 Eng. Ch. 258, 38 Eng. Reprint 1024].

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 105. And see, generally, TRUSTS.

But see Smith *v.* Lane, 3 Pick. (Mass.) 205.

24. Champlin *v.* Seeber, 56 How. Pr. (N. Y.) 46.

Illustration.— In a case where a voluntary conveyance from a mother to her daughter was attacked as fraudulent by a preëxisting creditor of the mother, and it appeared that the land conveyed was inherited by the mother from her intestate father, but it was set up in defense that the conveyance was in pursuance of his request to the mother a fortnight before his death, assented to by her, it was held that the mother could not in such case be regarded as an equitable trustee, and that the conveyance was invalid. Champlin *v.* Seeber, 56 How. Pr. (N. Y.) 46.

25. *Florida.*— Hill *v.* Meinhard, 39 Fla. 111, 21 So. 805.

Georgia.— See Rutherford *v.* Chapman, 59 Ga. 177.

Illinois.— Seeders *v.* Allen, 98 Ill. 468; Phillips *v.* North, 77 Ill. 243; McLaurie *v.* Partlow, 53 Ill. 340; Sweeney *v.* Damron, 47 Ill. 450; Torrey *v.* Dickinson, 111 Ill. App. 524; Fleming *v.* Weagley, 32 Ill. App. 183.

Indiana.— Taylor *v.* Duesterberg, 109 Ind. 165, 9 N. E. 907; Lord *v.* Bishop, 101 Ind. 334; Heaton *v.* White, 85 Ind. 376; Leonard *v.* Barnett, 70 Ind. 367; Eagan *v.* Downing, 55 Ind. 65; Simms *v.* Rickets, 35 Ind. 181, 9 Am. Rep. 679. See also Summers *v.* Hoover, 42 Ind. 153.

Iowa.— De Vore *v.* Jones, 82 Iowa 66, 47 N. W. 885; Payne *v.* Wilson, 76 Iowa 377, 41 N. W. 45.

Kentucky.— Campbell *v.* Campbell, 79 Ky. 395.

Maryland.— See Hinman *v.* Silcox, 91 Md. 576, 46 Atl. 1017.

Massachusetts.— Bancroft *v.* Curtis, 108 Mass. 47; Stetson *v.* O'Sullivan, 8 Allen 321.

Minnesota.— Farnham *v.* Kennedy, 28 Minn. 365, 10 N. W. 20.

Mississippi.— See Citizens' Mut. Ins. Co. *v.* Foster, 64 Miss. 288, 1 So. 238.

Missouri.— Bangert *v.* Bangert, 13 Mo. App. 144. See also Cooper *v.* Standley, 40 Mo. App. 138.

Nebraska.— Hews *v.* Kenney, 43 Nebr. 815, 62 N. W. 204; Goldsmith *v.* Fuller, 30 Nebr. 563, 46 N. W. 712. See also Jayne *v.* Hymer, 66 Nebr. 785, 92 N. W. 1019.

New Jersey.— Dresser *v.* Zabriskie, (Ch. 1898) 39 Atl. 1066; Beck *v.* Schultz, (Ch. 1895) 32 Atl. 695; Providence City Nat. Bank *v.* Hamilton, 34 N. J. Eq. 158.

New York.— Syracuse Chilled Plow Co. *v.* Wing, 85 N. Y. 421; Baldwin *v.* Ryan, 3 Thomps. & C. 251; Wickes *v.* Clarke, 3 Edw. 58. See also Holden *v.* Burnham, 5 Thomps. & C. 195.

North Carolina.— Brisco *v.* Norris, 112 N. C. 671, 16 S. E. 850.

Pennsylvania.— Heath *v.* Slocum, 115 Pa. St. 549, 9 Atl. 259.

Tennessee.—Wilkinson *v.* Wilkinson, 1 Head 305; Rosenbaum *v.* Davis, (Ch. App. 1898) 48 S. W. 706.

Texas.— McKamey *v.* Thorp, 61 Tex. 648; Citizens' Nat. Bank *v.* Sturgis Nat. Bank, (Civ. App. 1904) 81 S. W. 550; Aultman *v.* George, 12 Tex. Civ. App. 457, 34 S. W. 652.

Virginia.— Spence *v.* Repass, 94 Va. 716, 27 S. E. 583.

Washington.— Kemp *v.* Folsom, 14 Wash. 16, 43 Pac. 1100.

West Virginia.— Prim *v.* McIntosh, 44 W. Va. 790, 28 S. E. 742; Hamilton *v.* Steele, 22 W. Va. 348. *Compare* McGinnis *v.* Curry, 13 W. Va. 29, where the conveyance was not sustained because the property had been given by the wife to the husband.

Wisconsin.— Marsten *v.* Dresen, 85 Wis. 530, 55 N. W. 896.

United States.—Voorheis *v.* Blanton, 89 Fed. 885, 32 C. C. A. 384 [*affirming* 83 Fed. 234].

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 102, 105, 257, 258, 266. See also *infra*, VIII, F, 1, h, (I), (C)-(G).

table right of a wife to a settlement of her separate estate, not reduced to possession by her husband, is a sufficiently valuable consideration to support, as against his creditors, a conveyance to her or in trust for her from her husband, relinquishing such estate for her sole and separate use.[26]

d. Reconveyance by Fraudulent Grantee. Although a fraudulent grantee cannot be compelled to convey to the fraudulent grantor, and the property in his hands may be reached by his creditors or become subject to a lien as against him, yet, by the weight of authority, if he does reconvey before any lien has been acquired by his creditors, the reconveyance is valid as against them.[27] Some cases hold the contrary.[28]

18. Property Subject to Power of Appointment. In England it was well settled as a general rule that, where a person has a general power of appointment and executes it, the property appointed is deemed in equity a part of his assets

Use of personal property of a wife by her husband, after its reduction to his possession, in purchasing property in his own name during coverture, where by law the title to a married woman's personal property vests, as at common law, in her husband in all cases where he reduces the same to possession during coverture, raises no implied trust in favor of the wife, and a subsequent conveyance of property by the husband to the wife in consideration of a supposed implied trust will be treated as a voluntary conveyance as against his creditors. American Freehold Land, etc., Co. *v.* Maxwell, 39 Fla. 489, 22 So. 751. See also *infra*, II, B, 19, b.

Laches and estoppel of wife.— The right of the wife as against the husband's creditors may be determined by laches in asserting her right, although the conveyance may have been taken in her husband's name by mistake. Hinman *v.* Silcox, 91 Md. 576, 46 Atl. 1017.

26. *Alabama.*— Bradford *v.* Goldsborough, 15 Ala. 311.

Kentucky.— McClanahan *v.* Beasley, 17 B. Mon. 111; McCauley *v.* Rodes, 7 B. Mon. 462; Hurdt *v.* Courtenay, 4 Metc. 139.

Massachusetts.— Gassett *v.* Grout, 4 Metc. 486.

New York.— Ellis *v.* Myers, 4 Silv. Sup. 323, 8 N. Y. Suppl. 139; Wickes *v.* Clarke, 3 Edw. 58. See also Jaycox *v.* Caldwell, 51 N. Y. 395.

United States.— Gallego *v.* Chevallie, 9 Fed. Cas. No. 5,200, 2 Brock. 285.

England.—White *v.* Sansom, 3 Atk. 410, 26 Eng. Reprint 1037; *In re* Home, 54 L. T. Rep. N. S. 301; Moore *v.* Rycault, Prec. Ch. 22, 24 Eng. Reprint 12; Turnley *v.* Hooper, 3 Smale & G. 349; Dundas *v.* Dutens, 2 Cox Ch. 235, 30 Eng. Reprint 109, 1 Ves. Jr. 196, 30 Eng. Reprint 298, 1 Rev. Rep. 112.

See, generally, Husband and Wife.

27. *Indiana.*— Lafayette Second Nat. Bank *v.* Brady, 96 Ind. 498.

Iowa.— Davidson *v.* Dwyer, 62 Iowa 332, 17 N. W. 575; McGregor First Nat. Bank *v.* Hostetter, 61 Iowa 395, 16 N. W. 289.

Kentucky.— Clark *v.* Rucker, 7 B. Mon. 583.

Maine.— Matthews *v.* Buck, 43 Me. 265.

Missouri.— Schneider *v.* Patton, 175 Mo. 684, 75 S. W. 155.

New York.— Davis *v.* Graves, 29 Barb. 480. See Cramer *v.* Blood, 48 N. Y. 684, which was construed as supporting the text in the North Carolina case, Powell *v.* Ivey, *infra*. And see Jackson *v.* Ham, 15 Johns. 261.

North Carolina.— Powell *v.* Ivey, 88 N. C. 256.

Ohio.— Swift *v.* Holdridge, 10 Ohio 230, 36 Am. Dec. 85.

Tennessee.— Stanton *v.* Shaw, 3 Baxt. 12, holding that where the purchaser of real estate fraudulently procures the title to be made to a third person to hinder and delay his creditors, the creditors of such third person may subject the same to his debts while the title remains in him, but that, if the proceedings against him be not had before his reconveyance of the property to the true purchaser and owner, it cannot be reached in satisfaction of debts by his creditors.

Texas.— Bicocchi *v.* Casey-Swasey Co., 91 Tex. 259, 42 S. W. 963, 66 Am. St. Rep. 875 [*reversing* (Civ. App. 1897) 40 S. W. 209] (where there was an actual fraudulent intent, and the grantee participated in or knew of such intent); Peck *v.* Jones, 10 Tex. Civ. App. 335, 30 S. W. 382 (where the original conveyance was voluntary, but it did not appear that there was any intent to defraud creditors).

West Virginia.— Farmers' Bank *v.* Gould, 48 W. Va. 99, 35 S. E. 878, 86 Am. St. Rep. 24.

Wisconsin.— See Fargo *v.* Ladd, 6 Wis. 106.

See 24 Cent. Dig. tit "Fraudulent Conveyances," §§ 105, 106. And see *infra*, XIII, A, 2, e, (II); XIII, A, 3, c.

28. *Alabama.*— Keel *v.* Larkin, 83 Ala. 142, 3 So. 296, 3 Am. St. Rep. 702, where the original conveyance had been made with actual fraudulent intent, participated in by or known to the grantee.

Connecticut.— Chapin *v.* Pease, 10 Conn. 69, 25 Am. Dec. 56.

Massachusetts.— Smith *v.* Lane, 3 Pick. 205.

Mississippi.— Walton *v.* Tusten, 49 Miss. 569.

Pennsylvania.— Gerker *v.* Bowen, 6 Phila. 548.

Canada.— Johnson *v.* Cline, 16 Ont. 129.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 106.

and subject to the demands of his creditors in preference to the voluntary appointees;[29] and this doctrine, where it has not been abrogated by statute, is recognized in the United States.[30] But a court of equity will not interfere, unless the donee of the power has done some act indicating an intention to execute it.[31] And the power of appointment must be a general power.[32]

19. Husband and Wife — a. In General. Since a husband's creditors cannot subject to the payment of their claims the equitable or statutory separate property of his wife, neither her conveyance of such property nor the husband's joinder therein can be fraudulent as against his creditors,[33] even though the husband may have acted as the wife's agent or otherwise aided her in acquiring such

29. *In re* Harvey, 13 Ch. D. 216, 49 L. J. Ch. 3, 28 Wkly. Rep. 73; Shattock *v.* Shattock, L. R. 2 Eq. 182, 35 Beav. 489, 12 Jur. N. S. 405, 35 L. J. Ch. 509, 14 L. T. Rep. N. S. 452, 14 Wkly. Rep. 600, 55 Eng. Reprint 986; Pack *v.* Bathurst, 3 Atk. 269, 26 Eng. Reprint 957; *Ex p.* Caswall, 1 Atk. 559, 26 Eng. Reprint 351; Hinton *v.* Toye, 1 Atk. 465, 26 Eng. Reprint 296; Fleming *v.* Buchanan, 3 De G. M. & G. 976, 22 L. J. Ch. 886, 52 Eng. Ch. 758, 43 Eng. Reprint 382; Vaughan *v.* Vanderstegen, 2 Drew. 165; Jenney *v.* Andrews, 6 Madd. 264, 23 Rev. Rep. 216, 56 Eng. Reprint 1091; Lassells *v.* Cornwallis, 2 Vern. Ch. 465, 23 Eng. Reprint 898; Thompson *v.* Towne, 1 Prec. Ch. 52, 24 Eng. Reprint 26, 2 Vern. Ch. 319, 23 Eng. Reprint 806; Ashfield *v.* Ashfield, 2 Vern. Ch. 287, 23 Eng. Reprint 785; Townshend *v.* Windham, 2 Ves. 1, 28 Eng. Reprint 1; Brainton *v.* Ward, 2 Atk. 172, 26 Eng. Reprint 507, 7 Ves. Jr. 503 note, 32 Eng. Reprint 203.

30. *Massachusetts.*— Olney *v.* Balch, 154 Mass. 318, 28 N. E. 258; Clapp *v.* Ingraham, 126 Mass. 200.

New Hampshire.— Johnson *v.* Cushing, 15 N. H. 298, 41 Am. Dec. 694.

New York.— Tallmadge *v.* Sill, 21 Barb. 34, 53, where it is said: "The principle upon which the right of the creditor rests is, that the absolute power of conveying or disposing of property for one's own benefit, makes the person to whom it is given the owner. The power of absolute and beneficial control cannot and ought not to be separated from the ownership." In New York the rule subjecting property subject to a general power of appointment to the debts of the donee of the power, after its exercise, has been changed by statute, and this asset has been withdrawn from creditors. Cutting *v.* Cutting, 86 N. Y. 522 [*reversing* in part 20 Hun 360]. See also Crooke *v.* Kings County, 97 N. Y. 421.

Pennsylvania.— See Com. *v.* Duffield, 12 Pa. St. 277.

United States.— Brandies *v.* Cochrane, 112 U. S. 344, 5 S. Ct. 194, 28 L. ed. 760.

See, generally, Powers.

31. Johnson *v.* Cushing, 15 N. H. 298, 41 Am. Dec. 694. See, generally, Powers.

32. Johnson *v.* Cushing, 15 N. H. 298, 41 Am. Dec. 694. "By a general power we understand a right to appoint whomsoever the donee pleases. By a particular power it is meant that the donee is restricted to some objects designated in the deed creating the power, as to his own children." Tallmadge *v.* Sill, 21 Barb. (N. Y.) 34, 51 [*quoting* 1 Sugden Powers 471]. See also Johnson *v.* Cushing, 15 N. H. 298, 41 Am. Dec. 694.

33. *Alabama.*— Wing *v.* Roswald, 74 Ala. 346.

Georgia.— Sperry *v.* Haslam, 57 Ga. 412.

Illinois.— Sweeney *v.* Damron, 47 Ill. 450.

Indiana.— Eagan *v.* Downing, 55 Ind. 65; McConnell *v.* Martin, 52 Ind. 434.

Kentucky.— Marshall *v.* Marshall, 2 Bush 415 (holding that lands purchased by a wife, or with her separate funds acquired by her own skill and industry, and conveyed directly to her, cannot be subjected to the payment of her husband's debts); Eversole *v.* Bullock, 83 S. W. 556, 26 Ky. L. Rep. 1098.

Maine.— Hubbard *v.* Remick, 10 Me. 140; Wilson *v.* Ayer, 7 Me. 207.

Massachusetts.— Stetson *v.* O'Sullivan, 8 Allen 321.

Missouri.— Tipton Bank *v.* Adair, 172 Mo. 156, 72 S. W. 510; Cox *v.* Cox, 91 Mo. 71, 3 S. W. 585; Ault *v.* Eller, 38 Mo. App. 598.

Nebraska.— Jayne *v.* Hymer, 66 Nebr. 785, 92 N. W. 1019.

New Jersey.— Dresser *v.* Zabriskie, (Ch. 1898) 39 Atl. 1066; Quidort *v.* Pergeaux, 18 N. J. Eq. 472.

New York.— Mapes *v.* Snyder, 59 N. Y. 450 [*affirming* 2 Thomps. & C. 318]; Strong *v.* Skinner, 4 Barb. 546.

Oregon.— Besser *v.* Joyce, 9 Oreg. 310.

South Carolina.—Davidson *v.* Graves, Riley Eq. 232.

Tennessee.— Smith *v.* Greer, 3 Humphr. 118.

Texas.— McKamey *v.* Thorp, 61 Tex. 648; Aultman, etc., Co. *v.* George, 12 Tex. Civ. App. 457, 34 S. W. 652; Cavil *v.* Walker, 7 Tex. Civ. App. 305, 26 S. W. 854.

Washington.— Kemp *v.* Folsom, 14 Wash. 16, 43 Pac. 1100.

West Virginia.— Guernsey *v.* Lazear, 51 W. Va. 328, 41 S. E. 405; Hamilton *v.* Steele, 22 W. Va. 348.

United States.— Davis *v.* Fredericks, 104 U. S. 618, 26 L. ed. 849; Stewart *v.* Platt, 101 U. S. 731, 25 L. ed. 816; Voorhees *v.* Blanton, 83 Fed. 234 [*affirmed* in 89 Fed. 885, 32 C. C. A. 384].

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 96, 97, 257, 266; and, generally, Husband and Wife. See also *infra*, III, A, 3, a, (II).

property,[34] and although, in the absence of elements of estoppel, the title may have been taken, by mistake or otherwise, in the name of the husband or of the husband and wife jointly.[35] As will be elsewhere shown, property which is purchased by a husband, the title to which is taken in his wife's name, may be reached by his creditors, although it is otherwise if the property is purchased with the wife's separate estate, or if there is a sufficient consideration and no fraudulent intent.[36]

b. Husband's Curtesy or Other Interest in Wife's Property.[37] A husband's estate in his wife's land as tenant by the curtesy, either initiate or consummate, is liable to execution for his debts, and may be reached by his creditors if fraudulently released, disclaimed, or conveyed by him,[38] unless the common-law rule has been changed by statute.[39] So, in the absence of provision to the contrary,[40] where a husband, while indebted, releases his statutory dower interest in the land of his deceased wife to his children or her devisees, such release, being in fraud of creditors, will be set aside, and the interest subjected to the satisfaction of his creditors.[41] If by law a husband acquires his wife's personal property or her choses in action by reducing them to his possession, such property may afterward be reached and subjected by his creditors to the payment of their claims, if fraudulently transferred or invested in other property in his own or his wife's name.[42] A husband, however, may waive the interest given him by law in his

34. Tipton Bank *v.* Adair, 172 Mo. 156, 72 S. W. 510. See also Eagan *v.* Downing, 55 Ind. 65.

Donation of services by husband to wife see *supra*, II, B, 8, b.

35. Sweeney *v.* Damron, 47 Ill. 450; Eagan *v.* Downing, 55 Ind. 65; Snyder *v.* Martin, 52 Ind. 439; McConnell *v.* Martin, 52 Ind. 434; McClanahan *v.* Beasley, 17 B. Mon. (Ky.) 111.

Transfer by husband to wife of property which has been purchased with her separate estate, and the title to which has been taken in his name, see *supra*, II, B, 17, c.

Equitable right of wife to a settlement of her separate estate, not reduced to possession by the husband, as a sufficient consideration to support a conveyance by him as against his creditors, see *supra*, II, B, 17, c.

36. See *infra*, III, A, 3, a, (II).

37. Wife's earnings see *supra*, II, B, 7, b.

38. *District of Columbia.*— National Metropolitan Bank *v.* Hitz, 1 Mackey 111.

Illinois.— Gay *v.* Gay, 123 Ill. 221, 13 N. E. 813.

Indiana.— Huffman *v.* Copeland, 139 Ind. 221, 38 N. E. 861.

New York.— Wickes *v.* Clarke, 8 Paige 161.

North Carolina.— Teague *v.* Downs, 69 N. C. 280.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 111. See also CURTESY, 12 Cyc. 1003, 1015.

39. Shields *v.* Keys, 24 Iowa 298; Ault *v.* Eller, 38 Mo. App. 598 (holding that no conveyance by husband and wife of land which belongs to the wife, but is not her separate estate, can be fraudulent as to the husband's creditors, since Rev. St. § 3295, provides that the interest of the husband in his wife's land shall during coverture be exempt from attachment or levy of execution for the sole debts of the husband); Teague *v.* Downs, 69 N. C. 280; Besser *v.* Joyce, 9 Oreg. 310. A conveyance by a wife and husband of the wife's separate estate is not fraudulent as to creditors of the husband, where, by statute, he has no interest therein by curtesy until the death of the wife. Besser *v.* Joyce, *supra*; Guernsey *v.* Lazear, 51 W. Va. 328, 41 S. E. 405.

40. Shields *v.* Keys, 24 Iowa 298, holding that under the peculiar provisions of the Iowa statute a husband, entitled to statutory "dower" in real estate of his wife which she has devised to another, may, after her death, waive and relinquish his right thereto, so that the full title will pass to the devisee of the wife free from the lien of a judgment recovered against the husband in her lifetime.

Under the Indiana statute giving a surviving husband one-third of his deceased wife's real estate absolutely, irrespective of any will by her, the right of a surviving husband's creditors to reach this interest in his deceased wife's land is not defeated by the fact that the husband merely counseled or consented to her devising the land to others, or by the fact that he acquiesces in such will after her death (Roach *v.* White, 94 Ind. 510; O'Harra *v.* Stone, 48 Ind. 417); but it is otherwise, even as to existing creditors, where the will was made pursuant to an antenuptial or post-nuptial contract between the husband and wife, either written or oral, or where the husband is estopped to claim as against the will (Huffman *v.* Copeland, 139 Ind. 221, 38 N. E. 861; Wright *v.* Jones, 105 Ind. 17, 4 N. E. 281).

41. Maclaren *v.* Stone, 18 Ohio Cir. Ct. 854, 9 Ohio Cir. Dec. 794.

42. *Alabama.*— Bolling *v.* Jones, 67 Ala. 508.

Florida.— American Freehold Land, etc., Co. *v.* Maxwell, 39 Fla. 489, 22 So. 751, holding that after a wife's personal property has been reduced to possession by her hus-

wife's personal property and consent to her retaining or disposing of the same.[43] A husband has no interest in his wife's choses in action until he reduces them to his possession, and his failure to do so is not fraudulent as against his creditors.[44] Creditors of a husband who claim to be subrogated to his rights as against the property of his wife have no other rights than the husband against such property.[45]

c. Wife's Dower or Other Interest in Husband's Property.[46] The dower right of a widow prior to its assignment or admeasurement is a chose in action, within a statute, or the rule in equity in some jurisdictions, allowing creditors to reach

band and invested in the purchase of land in his own name, there is no implied trust for the wife which will support, as against creditors, a subsequent conveyance by him to her.

Georgia.— Sayre *v.* Flournoy, 3 Ga. 541.

Illinois.— Bridgford *v.* Reddell, 55 Ill. 261.

Indiana.— Meredith *v.* Citizens' Nat. Bank, 92 Ind. 343; Westerfield *v.* Kimmer, 82 Ind. 365; Brookville Nat. Bank *v.* Kimble, 76 Ind. 195; Buchanan *v.* Lee, 69 Ind. 117; Holland *v.* Moody, 12 Ind. 170.

Iowa.— Boulton *v.* Hahn, 58 Iowa 518, 12 N. W. 560.

Kentucky.— Lyne *v.* Commonwealth Bank, 5 J. J. Marsh. 545; Davis *v.* Justice, 21 S. W. 529, 14 Ky. L. Rep. 741 (holding that personal property inherited by a wife, but reduced to possession by the husband, is subject to his debts; and that his creditors have a right to follow the proceeds arising from a sale of such property into land purchased with them, the title to which is taken in the wife's name); Garvey *v.* Moore, 15 S. W. 136, 12 Ky. L. Rep. 732. And see Tapp *v.* Todd, 28 S. W. 147, 16 Ky. L. Rep. 382.

Maryland.—Wylie *v.* Basil, 4 Md. Ch. 327.

Massachusetts.— Pierce *v.* Thompson, 17 Pick. 391.

Missouri.— Hart *v.* Leete, 104 Mo. 315, 15 S. W. 976, holding that where a husband collects the money due on his wife's choses in action, not as agent or trustee, but for the purpose of devoting it to his own use, this constitutes a reduction to his possession, and the money then becomes his own and liable for his debts.

North Carolina.—Allen *v.* Allen, 41 N. C. 293.

Pennsylvania.— Gicker *v.* Martin, 50 Pa. St. 138.

South Carolina.— Suber *v.* Chandler, 36 S. C. 344, 15 S. E. 426, deed made by husband to wife in consideration of money inherited by her and taken possession of by him.

Tennessee.— Joiner *v.* Franklin, 12 Lea 420.

West Virginia.— Clarke *v.* King, 34 W. Va. 631, 12 S. E. 775.

Wisconsin.—Howe *v.* Colby, 19 Wis. 583.

United States.— Lee *v.* Hollister, 5 Fed. 752; Dick *v.* Hamilton, 7 Fed. Cas. No. 3,890, Deady 322.

England.—*In re* Holland, [1901] 2 Ch. 145, 70 L. J. Ch. 625, 85 L. T. Rep. N. S. 304, 8 Manson 266, 49 Wkly. Rep. 476.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 262; and, generally, HUSBAND AND WIFE.

43. *Alabama.*— Wing *v.* Roswald, 74 Ala. 346.

Kentucky.— Louisville City Nat. Bank *v.* Wooldridge, 116 Ky. 641, 76 S. W. 542, 25 Ky. L. Rep. 869 (consent to wife's testamentary disposition of her personal property); George *v.* Bussing, 15 B. Mon. 558; Bowling *v.* Winslow, 5 B. Mon. 29.

Missouri.— Hart *v.* Leete, 104 Mo. 315, 15 S. W. 976; Cox *v.* Cox, 91 Mo. 71, 3 S. W. 585.

New Jersey.— Peterson *v.* Mulford, 36 N. J. L. 481, holding that the gift by a husband to his wife of the avails of her own labor is good as against his creditors, if such proceeds have not been actually reduced to his possession.

New York.— Jaycox *v.* Caldwell, 51 N. Y. 395.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 96, 97, 266; and, generally, HUSBAND AND WIFE.

44. *Alabama.*— Bradford *v.* Goldsborough, 15 Ala. 311.

Georgia.— Sperry *v.* Haslam, 57 Ga. 412; Sayre *v.* Flournoy, 3 Ga. 541.

Kentucky.— McClanahan *v.* Beasley, 17 B. Mon. 111; McCauley *v.* Rodes, 7 B. Mon. 462 (holding that a deed by a husband, conveying in trust for his wife property to which she was entitled as heir of her father, and which he had not reduced to possession, was not fraudulent as against his creditors); Bowling *v.* Winslow, 5 B. Mon. 29 (to the same effect).

Maryland.— Drury *v.* Briscoe, 42 Md. 154.

Massachusetts.— Gassett *v.* Grout, 4 Metc. 486, wife's distributive share of her father's estate.

Missouri.— Hart *v.* Leete, 104 Mo. 315, 320, 15 S. W. 976; Cox *v.* Cox, 91 Mo. 71, 3 S. W. 585; Terry *v.* Wilson, 63 Mo. 493.

New York.— Jaycox *v.* Caldwell, 51 N. Y. 395 [*affirming* 37 How. Pr. 240]; Woodworth *v.* Sweet, 51 N. Y. 8 [*affirming* 44 Barb. 268].

Pennsylvania.— Donnelly *v.* Public Ledger, 2 Phila. 51; Smethurst *v.* Thurston, Brightly 127.

South Carolina.— Durr *v.* Bowyer, 2 McCord 368; Higgenbottom *v.* Peyton, 3 Rich. Eq. 398; Perryclear *v.* Jacobs, 2 Hill Eq. 504.

United States.— Gallego *v.* Chevallie, 9 Fed. Cas. No. 5,200, 2 Brock. 285.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 97, 262, 263, 266; and, generally, HUSBAND AND WIFE.

45. Sayre *v.* Flournoy, 3 Ga. 541.

46. See also *infra*, VIII, F.

and subject choses in action to the payment of their debts, and if the widow fraudulently releases such right without consideration to the heirs, her creditors may proceed in equity to compel assignment of dower for the satisfaction of their debts.[47] Where, by statute, a wife is given a certain portion of her husband's real estate absolutely in the event of a judicial sale of his real estate, such interest of the wife is not the subject of a fraudulent conveyance as regards the husband's creditors, whether the conveyance be to the wife herself or to a third person, since his creditors have no right to reach and subject such interest to the payment of their claims.[48]

d. Community Property. The transfer of community property from a husband to his wife is not even evidence of fraud as to separate creditors of the husband, where no one but community creditors can subject such property to payment of debts, as they only can question the good faith of such transfer.[49] In Texas a married woman has the right to convey her lands in trust for herself and her children, so as to withdraw the same from the community estate, and such a conveyance will not be fraudulent as to her husband's creditors.[50]

20. Property of Adopted Child. Where a statute places one who adopts a child under the same responsibility as if the child were his own, the property of an adopted child cannot be reached by creditors of the adopted parent on the ground that the child's maintenance has been borne by the latter, the provision made for the child not being unreasonable.[51]

21. Exempt Property — a. In General. The object of the statute of Elizabeth was to prevent debtors from dealing with their property in any way to the prejudice of their creditors, but dealing with that which creditors, irrespective of such dealing, could not have touched, is within neither the letter nor the spirit of the statute.[52] It follows from this that exempt property is not, generally speaking, susceptible of fraudulent alienation,[53] and according to the weight of

47. Tenbrook *v.* Jessup, 60 N. J. Eq. 234, 46 Atl. 516. See also Creditors' Suits, 12 Cyc. 26. It is otherwise in those jurisdictions where choses in action cannot be reached by creditors. Harper *v.* Clayton, 84 Md. 346, 35 Atl. 1083, 57 Am. St. Rep. 407, 35 L. R. A. 211. See *supra*, II, B, 6; and Creditors' Suits, 12 Cyc. 26.

48. Marmon *v.* White, 151 Ind. 445, 51 N. E. 930; Isgrigg *v.* Pauley, 148 Ind. 436, 47 N. E. 821; Taylor *v.* Duesterberg, 109 Ind. 165, 9 N. E. 907.

49. Deering *v.* Holcomb, 26 Wash. 588, 67 Pac. 240, 561. See, generally, Husband and Wife.

50. Mondy *v.* Vance, 11 Tex. Civ. App. 374, 32 S. W. 559. See, generally, Husband and Wife.

51. Anderson *v.* Mundo, 77 S. W. 926, 25 Ky. L. Rep. 1644.

52. Central Nat. Bank *v.* Hume, 128 U. S. 195, 9 S. Ct. 41, 32 L. ed. 370.

53. *Alabama.*— Skinner *v.* Jennings, 137 Ala. 295, 34 So. 622; Cross *v.* Berry, 132 Ala. 92, 31 So. 36; Brinson *v.* Edwards, 94 Ala. 447, 10 So. 219; Myers *v.* Conway, 90 Ala. 109, 7 So. 639; Nance *v.* Nance, 84 Ala. 375, 4 So. 699, 5 Am. St. Rep. 378; Alley *v.* Daniel, 75 Ala. 403; Wright *v.* Smith, 66 Ala. 514; Garner *v.* Bridges, 38 Ala. 276.

Arkansas.— Hinkle *v.* Broadwater, (1905) 84 S. W. 510; Wilks *v.* Vaughan, (1904) 83 S. W. 913; Sims *v.* Phillips, 54 Ark. 193, 15 S. W. 461; Sannoner *v.* King, 49 Ark. 299, 5 S. W. 327, 4 Am. St. Rep. 49; Bennett *v.* Hutson, 33 Ark. 762. Where the total valuation of a judgment debtor's property, including property fraudulently transferred to his wife, is less than the amount exempt by law, his creditors cannot seize the transferred property in the hands of the transferee. Sannoner *v.* King, *supra*.

Connecticut.— Ketchum *v.* Allen, 46 Conn. 414; Patten *v.* Smith, 4 Conn. 450, 10 Am. Dec. 166.

District of Columbia.— Cassin *v.* Bozzle, 6 D. C. 260.

Florida.— Eppinger *v.* Canepa, 20 Fla. 262.

Idaho.— Elliot *v.* Hall, 3 Ida. 421, 31 Pac. 796, 35 Am. St. Rep. 285, 18 L. R. A. 586.

Illinois.— Vaughan *v.* Thompson, 17 Ill. 78. See also Washburn *v.* Goodheart, 88 Ill. 229; Berry *v.* Hanks, 28 Ill. App. 51. A conveyance by a husband to his wife of property exempt from execution, when no execution exists against him, is not fraudulent as to subsequent execution creditors. Vinton *v.* Felts, 71 Ill. App. 630.

Indiana.— Hedrick *v.* Hall, 155 Ind. 371, 58 N. E. 257; Marmon *v.* White, 151 Ind. 445, 51 N. E. 930; Irquigg *v.* Pauley, 148 Ind. 436, 47 N. E. 821; Fulp *v.* Beaver, 136 Ind. 319, 36 N. E. 250; Phenix Ins. Co. *v.* Fulder, 133 Ind. 557, 33 N. E. 270; Citizens' Bank *v.* Bolen, 121 Ind. 301, 23 N. E. 146; Ray *v.* Yarnell, 118 Ind. 112, 20 N. E. 705; Goudy *v.* Werbe, 117 Ind. 154, 19 N. E. 764, 3 L. R. A. 114; Phelps *v.* Smith, 116 Ind. 387, 17 N. E. 602, 19 N. E. 156; Blair *v.* Smith, 114 Ind. 114, 15 N. E. 817, 5 Am. St.

authority an attempted fraudulent conveyance of personal property does not defeat

Rep. 593; Dumbould *v.* Rowley, 113 Ind. 353, 15 N. E. 463; Barnard *v.* Brown, 112 Ind. 53, 13 N. E. 401; Burdge *v.* Bolin, 106 Ind. 175, 6 N. E. 140; Kolb *v.* Raisor, 17 Ind. App. 551, 47 N. E. 177. The general rule that a voluntary conveyance, made by an insolvent debtor who has not sufficient other property subject to execution to pay his debts, is constructively fraudulent as against existing creditors applies only where the property so disposed of was not at the time exempt from execution, but such as the creditor might have reached in the hands of the debtor. Faurote *v.* Carr, 108 Ind. 123, 9 N. E. 350.

Iowa.— Nash *v.* Stevers, 96 Iowa 616, 65 N. W. 825; Gollobitsch *v.* Rainbow, 84 Iowa 567, 51 N. W. 48; Beyer *v.* Thoeming, 81 Iowa 517, 46 N. W. 1074; Payne *v.* Wilson, 76 Iowa 377, 41 N. W. 45; Brainard *v.* Simmons, 67 Iowa 646, 25 N. W. 844; Robb *v.* Brewer, 60 Iowa 539, 15 N. W. 420; Patterson *v.* Johnson, 59 Iowa 397, 13 N. W. 416.

Kansas.— Mull *v.* Jones, 33 Kan. 112, 5 Pac. 388; Arthur *v.* Wallace, 8 Kan. 267.

Kentucky.— Falkenburg *v.* Johnson, 102 Ky. 543, 44 S. W. 80, 19 Ky. L. Rep. 1606; Wallace *v.* Mason, 100 Ky. 560, 38 S. W. 887, 18 Ky. L. Rep. 935; Morton *v.* Reagan, 68 Ky. 334; Anthony *v.* Wade, 64 Ky. 110; Berry *v.* Ewen, 85 S. W. 227, 27 Ky. L. Rep. 467 (holding that under a statute exempting certain moneys of the husband from execution for his debts, a creditor of the husband cannot complain if the husband gives such exempt money to his wife, or invests it in land, the title to which is taken in her name); Minor *v.* Sharp, 33 S. W. 411, 17 Ky. L. Rep. 992.

Maine.— Pulsifer *v.* Hussey, 97 Me. 434, 54 Atl. 1076; Pulsifer *v.* Waterman, 73 Me. 233; Legro *v.* Lord, 10 Me. 161. *Compare*, however, Wyman *v.* Gay, 90 Me. 36, 37 Atl. 325, 60 Am. St. Rep. 238; Nason *v.* Hobbs, 75 Me. 396.

Massachusetts.— Mannan *v.* Merritt, 11 Allen 582; Bean *v.* Hubbard, 4 Cush. 85. *Compare* Tuesley *v.* Robinson, 103 Mass. 558, 4 Am. Rep. 575.

Michigan.— Gasser *v.* Crittenden, (1905) 103 N. W. 601; Bresnahan *v.* Nugent, 92 Mich. 76, 52 N. W. 735; Dull *v.* Merrill, 69 Mich. 49, 36 N. W. 677; Fisher *v.* McIntyre, 66 Mich. 681, 33 N. W. 762; Emerson *v.* Bacon, 58 Mich. 526, 25 N. W. 503; Buckley *v.* Wheeler, 52 Mich. 1, 17 N. W. 216; Anderson *v.* Odell, 51 Mich. 492, 16 N. W. 870; Rosenthal *v.* Scott, 41 Mich. 632, 2 N. W. 909.

Minnesota.— Horton *v.* Kelly, 40 Minn. 193, 41 N. W. 1031; Furman *v.* Tenny, 28 Minn. 77, 9 N. W. 172.

Mississippi.— Williamson *v.* Wilkinson, 81 Miss. 503, 33 So. 282; O'Conner *v.* Ward, 60 Miss. 1025; Smith *v.* Allen, 39 Miss. 469.

Missouri.— Stam *v.* Smith, 183 Mo. 464, 81 S. W. 1217; Versailles Bank *v.* Guthrey, 127 Mo. 189, 29 S. W. 1004, 48 Am. St. Rep. 621; Davis *v.* Land, 88 Mo. 436; Megehe *v.* Draper, 21 Mo. 510, 64 Am. Dec. 245; Jarboe *v.* Jarboe, 106 Mo. App. 459, 79 S. W. 1162; Furth *v.* March, 101 Mo. App. 329, 74 S. W. 147; Kiely *v.* Hickcox, 70 Mo. App. 617; Stotesbury *v.* Kirtland, 35 Mo. App. 148; Hombs *v.* Corbin, 34 Mo. App. 393; Kulage *v.* Schueler, 7 Mo. App. 250.

Montana.— Cushing *v.* Quigley, 11 Mont. 577, 29 Pac. 337.

Nebraska.— Munson *v.* Carter, 40 Nebr. 417, 58 N. W. 931; Bloedorn *v.* Jewell, 34 Nebr. 649, 52 N. W. 367; Union Pac. R. Co. *v.* Smersh, 22 Nebr. 751, 36 N. W. 139, 3 Am. St. Rep. 290; Gillespie *v.* Brown, 16 Nebr. 457, 20 N. W. 632; Boggs *v.* Thompson, 13 Nebr. 403, 14 N. W. 393. In an action by the vendee of exempt property to quiet his title as against judgment creditors of the vendor, fraud is an immaterial issue. Smith *v.* Neufeld, 61 Nebr. 699, 85 N. W. 898.

Nevada.— Bailey *v.* Littell, 24 Nev. 294, 53 Pac. 308.

New Hampshire.— Provencher *v.* Brooks, 64 N. H. 479, 13 Atl. 641.

New Jersey.— Dresser *v.* Zabriskie, (Ch. 1898) 39 Atl. 1066.

New Mexico.— Heisch *v.* Bell, (1902) 70 Pac. 572.

New York.— Smillie *v.* Quinn, 90 N. Y. 493; McGivney *v.* Childs, 41 Hun 607; Whiting *v.* Barrett, 7 Lans. 106; Spaulding *v.* Keyes, 1 Silv. Sup. 203, 5 N. Y. Suppl. 227; Youmans *v.* Boomhower, 3 Thomps. & C. 21.

North Carolina.— Arnold *v.* Estis, 92 N. C. 162; Gaster *v.* Hardie, 75 N. C. 460; Montgomery County *v.* Riley, 75 N. C. 144; Winchester *v.* Gaddy, 72 N. C. 115; Duvall *v.* Rollins, 71 N. C. 218.

North Dakota.—Kvello *v.* Taylor, 5 N. D. 76, 63 N. W. 889.

Ohio.— Tracy *v.* Cover, 28 Ohio St. 61; Stump *v.* Frary, 13 Ohio Cir. Ct. 619, 6 Ohio Cir. Dec. 357.

Pennsylvania.— Holmes *v.* Tallada, 125 Pa. St. 133, 17 Atl. 238, 11 Am. St. Rep. 880, 3 L. R. A. 219; Clark *v.* Ingraham, 15 Phila. 646.

South Carolina.— Barron *v.* Williams, 58 S. C. 280, 36 S. E. 561; Bridgers *v.* Howell, 27 S. C. 425, 3 S. E. 790.

South Dakota.— Noyes *v.* Belding, 5 S. D. 603, 59 N. W. 1069; First Nat. Bank *v.* North, 2 S. D. 480, 51 N. W. 96.

Tennessee.— Rose *v.* Wortham, 95 Tenn. 505, 32 S. W. 458, 30 L. R. A. 609; Harvey *v.* Harrison, 89 Tenn. 470, 14 S. W. 1083; Leslie *v.* Joyner, 2 Head 514; Layman *v.* Denton, (Ch. App. 1897) 42 S. W. 153, crops.

Texas.— Couner *v.* Hawkins, 66 Tex. 639, 2 S. W. 520; Wood *v.* Chambers, 20 Tex. 247, 70 Am. Dec. 382; McClelland *v.* Barnard, 36 Tex. Civ. App. 118, 81 S. W. 591; Heidelbach *v.* Carter, 34 Tex. Civ. App. 579, 79 S. W. 346; Eaves *v.* Williams, 10 Tex. Civ. App. 423, 31 S. W. 86.

Vermont.— Darling *v.* Ricker, 68 Vt. 471, 35 Atl. 376; Wolcott *v.* Hamilton, 61 Vt. 79, 17 Atl. 39; Premo *v.* Hewitt, 55 Vt. 362; Leavitt *v.* Jones, 54 Vt. 423, 41 Am. Rep. 849; Prout *v.* Vaughn, 52 Vt. 451; Hayward

the debtor's right to claim his exemption privilege and to establish and enforce his rights thereunder.[54] "Creditors have no right to complain of dealings with property which the law does not allow them to apply on their claims."[55] The rule applies to exempted wages or earnings,[56] life-insurance policies,[57] pension or bounty

v. Clark, 50 Vt. 612; Jewett *v.* Guyer, 38 Vt. 209; Foster *v.* McGregor, 11 Vt. 595, 34 Am. Dec. 713.

Wisconsin.— Chicago Coffin Co. *v.* Maxwell, 70 Wis. 282, 35 N. W. 733; Allen *v.* Perry, 56 Wis. 178, 14 N. W. 3; Carhart *v.* Harshaw, 45 Wis. 340, 30 Am. Rep. 752; Pike *v.* Miles, 23 Wis. 164, 99 Am. Dec. 148; Dreutzer *v.* Bell, 11 Wis. 114; Bond *v.* Seymour, 2 Pinn. 105, 1 Chandl. 40.

United States.— *In re* Wilson, 123 Fed. 20, 59 C. C. A. 100; Daugherty *v.* Bogy, 104 Fed. 938, 44 C. C. A. 266.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 114 *et seq.*

Reservation of exempt property see *infra*, XI, A, 11.

54. *Arkansas.*— Sannoner *v.* King, 49 Ark. 299, 5 S. W. 327, 4 Am. St. Rep. 49.

Michigan.— Rosenthal *v.* Scott, 41 Mich. 632, 2 N. W. 909.

Missouri.— Megehe *v.* Draper, 21 Mo. 510, 64 Am. Dec. 245; State *v.* Koch, 47 Mo. App. 269.

North Carolina.— Gaster *v.* Hardie, 75 N. C. 460; Duvall *v.* Rollins, 71 N. C. 218.

Ohio.— Tracy *v.* Cover, 28 Ohio St. 61.

Texas.— King *v.* Harter, 70 Tex. 579, 8 S. W. 308.

United States.— Naumburg *v.* Hyatt, 24 Fed. 898.

Contra.— *Illinois.*— Bohn *v.* Weeks, 50 Ill. App. 236.

Indiana.— Chandler *v.* Jessup, 132 Ind. 351, 31 N. E. 1109, holding that where a conveyance of land was set aside as fraudulent and the property sold, the grantor could not claim a portion of the proceeds as exempt. See also Jones *v.* Dipert, 123 Ind. 594, 23 N. E. 944; Holman *v.* Martin, 12 Ind. 553; Mandlove *v.* Burton, 1 Ind. 39.

Maine.— Wyman *v.* Gay, 90 Me. 36, 37 Atl. 325, 60 Am. St. Rep. 238; Nason *v.* Hobbs, 75 Me. 396.

Massachusetts.— Stevenson *v.* White, 5 Allen 148.

Mississippi.— Williamson *v.* Wilkinson, 81 Miss. 503, 33 So. 282, holding that where a sale of property is held fraudulent as to the seller's creditors, this does not restore the title to the seller beneficially, so as to allow him to claim an exemption in the property, but the buyer has any right there is to claim the exemption.

New Hampshire.— Tilton *v.* Sanborn, 59 N. H. 290.

Pennsylvania.— Moore *v.* Baker, 2 Pa. Dist. 142; Carl *v.* Smith, 8 Phila. 569.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 114. And see EXEMPTIONS, 18 Cyc. 1458.

Forfeiture of exemption by fraud.— Some of the cases hold that a debtor may lose the benefit of the exemption laws by concealment of his property or other fraud as against his creditors. Cassell *v.* Williams, 12 Ill. 387; Cook *v.* Scott, 6 Ill. 333; Kreider's Estate, 135 Pa. St. 584, 19 Atl. 1073; Imhoff's Appeal, 119 Pa. St. 350, 13 Atl. 279; Smith *v.* Emerson, 43 Pa. St. 456; Strouse *v.* Beeker, 38 Pa. St. 190; Gilleland *v.* Rhoads, 34 Pa. St. 187; Freeman *v.* Smith, 30 Pa. St. 264; Dieffenderfer *v.* Fisher, 3 Grant (Pa.) 30; Carl *v.* Smith, 8 Phila. (Pa.) 569; Larkin *v.* McAnnally, 5 Phila. (Pa.) 17; Rose *v.* Sharpless, 33 Gratt. (Va.) 153.

Forfeiture of exemptions by fraudulent conveyance or concealment see EXEMPTIONS, 18 Cyc. 1458.

55. Anderson *v.* Odell, 51 Mich. 492, 493, 16 N. W. 870.

56. *Idaho.*— Elliot *v.* Hall, 3 Ida. 421, 31 Pac. 796, 35 Am. St. Rep. 285, 18 L. R. A. 586.

Iowa.— Nash *v.* Stevens, 96 Iowa 616, 65 N. W. 825; Robb *v.* Brewer, 60 Iowa 539, 15 N. W. 420; Patterson *v.* Johnson, 59 Iowa 397, 13 N. W. 416.

Kentucky.— Wallace *v.* Mason, 100 Ky. 560, 38 S. W. 887, 18 Ky. L. Rep. 935.

Missouri.— Jarboe *v.* Jarboe, 106 Mo. App. 459, 79 S. W. 1162; Furth *v.* March, 101 Mo. App. 329, 74 S. W. 147.

Montana.— Cushing *v.* Quigley, 11 Mont. 577, 29 Pac. 337.

Nebraska.— Union Pac. R. Co. *v.* Smersh, 22 Nebr. 751, 36 N. W. 139, 3 Am. St. Rep. 290.

New Hampshire.—Provencher *v.* Brooks, 64 N. H. 479, 13 Atl. 641.

Ohio.— Stump *v.* Frary, 13 Ohio Cir. Ct. 619, 6 Ohio Cir. Dec. 357, holding that it is not fraudulent as to creditors for a husband to give his exempt wages to his wife, who applies them in part to paying for a home, taking the title in her name.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 115.

Under the Wisconsin statute providing that the earnings of a married person with a dependent family shall be exempt to the amount of sixty dollars a month for three months next preceding garnishment process, the exemption expires at the end of three months if the earnings remain in the hands of the employer, and the exemption cannot be extended by the act of the husband in transferring the earnings to the wife from time to time as they may be earned. Bloodgood *v.* Meissner, 84 Wis. 452, 54 N. W. 772.

57. *Florida.*— Eppinger *v.* Canepa, 20 Fla. 262.

Maine.— Pulsifer *v.* Hussey, 97 Me. 434, 54 Atl. 1076, construing in this connection the Federal Bankruptcy Act of 1898 and Me. Rev. St. c. 49, § 75, c. 75, § 10. But see Wyman *v.* Gay, 90 Me. 36, 37 Atl. 325, 60 Am. St. Rep. 238.

moneys,[58] or crops,[59] and to exempt improvements on Indian lands.[60] The rule does not apply, however, where the property was not exempt at the time of the conveyance or transfer,[61] as where a necessary selection or claim had not been made,[62]

Maryland.— Elliott *v.* Bryan, 64 Md. 368, 1 Atl. 614.

New York.— Smillie *v.* Quinn, 90 N. Y. 492.

South Carolina.— Barron *v.* Williams, 58 S. C. 280, 36 S. E. 561, 79 Am. St. Rep. 840.

Tennessee.— Rose *v.* Wortham, 95 Tenn. 505, 32 S. W. 458, 30 L. R. A. 609; Harvey *v.* Harrison, 89 Tenn. 470, 14 S. W. 1083.

See also *supra*, II, B, 11.

58. Falkenburg *v.* Johnson, 102 Ky. 543, 44 S. W. 80, 19 Ky. L. Rep. 1606, 80 Am. St. Rep. 369; Whiting *v.* Barrett, 7 Lans. (N. Y.) 106 (bounty money); Youmans *v.* Boomhower, 3 Thomps. & C. (N. Y.) 20 (bounty money); Holmes *v.* Tallada, 125 Pa. St. 133, 17 Atl. 238, 11 Am. St. Rep. 880, 3 L. R. A. 219; Clark *v.* Ingraham, 15 Phila. (Pa.) 646; Hayward *v.* Clark, 50 Vt. 612. Since by U. S. Rev. St. § 4747, pension money is exempted from the claims of creditors, not only while with the pension office or any officer or agent thereof, but also while in course of transmission to the pensioner, a check or draft for pension money is exempt in the hands of the pensioner, and its transfer by him to his wife as her separate estate is valid as against his creditors. Falkenburg *v.* Johnson, 102 Ky. 543, 44 S. W. 80, 19 Ky. L. Rep. 1606, 80 Am. St. Rep. 369. See also Hayward *v.* Clark, 50 Vt. 612. And so it has been held of the proceeds of a pension check which the pensioner has deposited in a bank for collection, and which have not come to his hands as cash. Reiff *v.* Mack, 160 Pa. St. 265, 28 Atl. 699, 40 Am. St. Rep. 720. In some states it has been held that the pension money is not exempt after it reaches the hands of the pensioner, and where this rule obtains, creditors may reach pension money fraudulently transferred after coming to their debtor's hands, or land purchased by him with pension money in his own name or the name of another, or fraudulently conveyed by him. Johnson *v.* Elkins, 90 Ky. 163, 13 S. W. 448, 13 Ky. L. Rep. 967, 8 L. R. A. 552; Robion *v.* Walker, 82 Ky. 60, 56 Am. Rep. 880; Sims *v.* Walsham, 7 S. W. 557, 9 Ky. L. Rep. 912; Hudspeth *v.* Harrison, 6 Ky. L. Rep. 304. In New York, however, by statute, pensions are expressly exempted from execution, and the exemption protects property in which pension money is invested, so that such investment or transfer of the pension money or property in which it is invested is not fraudulent as to creditors. Yates County Nat. Bank *v.* Carpenter, 119 N. Y. 550, 23 N. E. 1108, 16 Am. St. Rep. 855, 7 L. R. A. 557; Stockwell *v.* Malone Bank, 36 Hun (N. Y.) 583; Burgett *v.* Fancher, 35 Hun (N. Y.) 647; Spaulding *v.* Keyes, 1 Silv. Sup. (N. Y.) 203, 5 N. Y. Suppl. 227. The pensioner may relinquish the exemption by transfer to another. Firtz *v.* Worden, 20 N. Y. App. Div. 241, 46 N. Y. Suppl. 1040; Burgett *v.* Fancher, 35 Hun (N. Y.) 647. See *infra*, note 61.

Exemption of pension and bounty money and property purchased therewith see EXEMPTIONS, 18 Cyc. 1440.

Crown money.— Where a debtor purchased lands with moneys payable to him by the crown for work done under a contract, which lands he procured to be conveyed to his wife, it was held that, although the moneys could not be reached by garnishing them before being paid by the crown, yet that the money having passed out of the crown, by reason of the husband's appointment in favor of his wife, the effect was to defraud creditors, and the gift was therefore void under the statute of Elizabeth. Nicholson *v.* Shannon, 28 Grant Ch. (U. C.) 378.

59. Layman *v.* Denton, (Tenn. Ch. App. 1897) 42 S. W. 153, holding that under the statute prohibiting creditors from levying on growing crops before November 15 of the year in which they are grown, unless the owner of the crops has absconded, creditors cannot, as a matter of law, complain of anything the owner of a growing crop may do with it prior to November 15.

Crops grown on homestead see *infra*, II, B, 21, b, (III).

60. Daugherty *v.* Bogy, 104 Fed. 938, 44 C. C. A. 266.

61. Phenix Ins. Co. *v.* Fielder, 133 Ind. 557, 33 N. E. 270; Alt *v.* Lafayette Bank, 9 Mo. App. 91.

Partnership assets.— A court of equity will set aside an assignment of partnership assets by an individual as his own, made in order to defeat creditors by claiming the proceeds as exempt, and will subject such proceeds in the assignee's hands to payment of partnership debts. Luce *v.* Barnum, 19 Mo. App. 359.

Gift to take effect on death.— If one gives personal property exempt from levy to another, the gift to take effect on the donor's death, and it is made solely for the purpose of avoiding the payment of debts, it is void. Martin *v.* Crosby, 11 Lea (Tenn.) 198.

Property purchased with pension money.— Where a husband owning land exempt from execution because purchased with pension money conveyed it by absolute deed to his wife, on an agreement by her to reconvey on demand, which was void, because oral, and the wife guaranteed the note of her son while the title was in her, and afterward conveyed the property to her husband, it was held that the exempt character of the property was lost by the conveyance to the wife, and that the reconveyance was fraudulent as against her creditors. Fritz *v.* Worden, 20 N. Y. App. Div. 241, 46 N. Y. Suppl. 1040.

62. *Alabama.*— Cross *v.* Berry, 132 Ala. 92, 31 So. 36, holding that, in a suit to set aside a chattel mortgage as fraudulent as against

or where the debtor had abandoned such use of the property as was required to render it exempt,[63] or had never intended or made such use.[64] Nor does the rule apply as against a judgment for the purchase-price, where the property is expressly made subject to such a judgment by the statute.[65] The fact that, after a sale or gift of exempt property, valid when made, the debtor, from some change in his circumstances, could no longer hold the property as exempt if the sale or gift were avoided is immaterial.[66] It is not a fraud upon creditors for their debtor to apply money or other non-exempt property to the purchase of exempt property, even though he does so for the purpose of putting it beyond their reach.[67]

b. Homesteads — (i) *In General.* The rule above stated applies to exempt homesteads. As a general rule a conveyance of a homestead cannot be fraudulent as against creditors, whether the conveyance be to the wife or to a third person, since they have no recourse against it.[68] And, although there are cases

creditors, a contention that the mortgagor could mortgage the property as it was exempt was without merit, where the value of the property exceeded the amount of exemption allowed, since the rule that a conveyance of exempt property is not fraudulent as to creditors is applicable "only in case where the property conveyed constitutes all that is owned and possessed by the grantor, and does not exceed in value his exemption under the law." See also Skinner *v.* Jennings, 137 Ala. 295, 34 So. 622; Alley *v.* Daniel, 75 Ala. 403.

California.— Barton *v.* Brown, 68 Cal. 11, 8 Pac. 517.

Illinois.— Bohn *v.* Weeks, 50 Ill. App. 236.

Indiana.— Phenix Ins. Co. *v.* Fielder, 133 Ind. 557, 33 N. E. 270.

Maine.— Wyman *v.* Gay, 90 Me. 36, 37 Atl. 325, 60 Am. St. Rep. 238 (holding that exemption of property is a personal privilege of the debtor, which he may waive, and he does waive it when he conveys the property to another; so that, if the conveyance works a fraudulent preference under the insolvent law the assignee may recover the property or its value); Nason *v.* Hobbs, 75 Me. 396 (to the same effect).

Missouri.— Garrett *v.* Wagner, 125 Mo. 450, 28 S. W. 762; Stewart *v.* Stewart, 65 Mo. App. 663; Stotesbury *v.* Kirtland, 35 Mo. App. 148; Hombs *v.* Corbin, 34 Mo. App. 393; Alt *v.* Lafayette Bank, 9 Mo. App. 91.

New York.— Field *v.* Ingreham, 15 Misc. 529, 37 N. Y. Suppl. 1135.

Pennsylvania.— Huey's Appeal, 29 Pa. St. 219; Larkin *v.* McAnnally, 5 Phila. 17.

See also Exemptions, 18 Cyc. 1467.

Payment for property in instalments.— Where an insolvent debtor pays for property bought by or in the name of his wife in small instalments, the fact that, during the time such payments were being made, he did not have at any time the amount of personal property exempt to him from execution does not render the gift valid as against his creditors. Garrett *v.* Wagner, 125 Mo. 450, 28 S. W. 762.

63. Stevenson *v.* White, 5 Allen (Mass.) 148. See also Rayner *v.* Whicher, 6 Allen (Mass.) 292. But see Ketchum *v.* Allen, 46 Conn. 414.

64. Conner *v.* Hawkins, 66 Tex. 639, 2 S. W. 520.

65. Lillibridge *v.* Walsh, 97 Mich. 459, 56 N. W. 854, holding that under a statute subjecting exempt personal property to execution on judgment for the purchase-price, and providing that the sale thereof after suit commenced for the price shall be void as against such an execution, provided plaintiff filed a certain notice, the buyer's right of alienation is not restricted except where such notice is given; but where the buyer, in order to defeat the seller's right to subject the property, fraudulently transfers it to another, it is as much a fraud against him as would be a similar transfer of property generally subject to sale on execution a fraud on general creditors; and if such a transfer is made the property in the hands of the transferee is subject to levy for the satisfaction of the debt on a judgment therefor against the buyer, although the seller may have failed to file the statutory notice of suit. See Exemptions, 18 Cyc. 1390.

66. Carhart *v.* Hershaw, 45 Wis. 340, 30 Am. Rep. 752, sale of library of professional man.

67. Cipperly *v.* Rhodes, 53 Ill. 346; Tucker *v.* Drake, 11 Allen (Mass.) 145, 146 (where it is said: "If a debtor, knowing that he is unable to pay his debts, purchases property exempt from levy on execution, he exercises a privilege which the law gives him, and wrongs no one. If he buys provisions for his family, or a cow, or necessary clothing, he merely puts his property in a shape which the humanity of the law authorizes"); O'Donnell *v.* Segar, 25 Mich. 367; Comstock *v.* Bechtel, 63 Wis. 656, 24 N. W. 465 (where, however, there is *dictum* to the effect that if an insolvent debtor sells property subject to execution and with the proceeds immediately purchases exempt property, he will be presumed to have done so to hinder, delay, or defraud his creditors, and that, while the property so purchased does not, for that reason, cease to be exempt, the creditor may have a remedy by attacking the sale of the non-exempt property).

68. *Alabama.*— Steiner *v.* Berney, 130 Ala. 289, 30 So. 570; Talladega First Nat. Bank *v.* Browne, 128 Ala. 557, 29 So. 552, 86 Am.

which uphold the contrary doctrine, nevertheless the homestead right, according

St. Rep. 156; Kennedy *v.* Tuscaloosa First Nat. Bank, 107 Ala. 170, 18 So. 396, 36 L. R. A. 308; Pollak *v.* McNeil, 100 Ala. 203, 13 So. 937; Fuller *v.* Whitlock, 99 Ala. 411, 13 So. 80; Hodges *v.* Winston, 95 Ala. 514, 11 So. 200, 36 Am. St. Rep. 241; Lehman *v.* Bryan, 67 Ala. 558; Fellows *v.* Lewis, 65 Ala. 343, 39 Am. Rep. 1.

Arizona.— Luhrs *v.* Hancock, (1899) 57 Pac. 605.

Arkansas.— Gibson *v.* Barrett, (1905) 87 S. W. 435; Hinkle *v.* Broadwater, (1905) 84 S. W. 510; Wilks *v.* Vaughan, (1904) 83 S. W. 913; Gray *v.* Patterson, 65 Ark. 273, 46 S. W. 730, 1119, 67 Am. St. Rep. 937; Pipkin *v.* Williams, 57 Ark. 242, 21 S. W. 433, 38 Am. St. Rep. 241; Campbell *v.* Jones, 52 Ark. 493, 12 S. W. 1016, 6 L. R. A. 783; Bogan *v.* Cleveland, 52 Ark. 101, 12 S. W. 159, 20 Am. St. Rep. 158; Carmack *v.* Lovett, 44 Ark. 180; Stanley *v.* Snyder, 43 Ark. 429; Flask *v.* Tindall, 39 Ark. 571; Bennett *v.* Hutson, 33 Ark. 762.

California.— Wetherly *v.* Straus, 93 Cal. 283, 28 Pac. 1045.

Colorado.— Barnett *v.* Knight, 7 Colo. 365, 3 Pac. 747, holding that a conveyance of a homestead in consideration of the future support of the grantor could not be set aside at the suit of his creditors.

Florida.— Murphy *v.* Farquhar, 39 Fla. 350, 22 So. 681.

Illinois.— Peoria First Nat. Bank *v.* Rhea, 155 Ill. 434, 40 N. E. 551; Quinn *v.* People, 146 Ill. 275, 34 N. E. 148; Moore *v.* Flynn, 135 Ill. 74, 25 N. E. 844; Leupold *v.* Krause, 95 Ill. 440; Boyd *v.* Barnett, 24 Ill. App. 199; Redden *v.* Potter, 16 Ill. App. 265; Shackleford *v.* Todhunter, 4 Ill. App. 271; Lytle *v.* Scott, 2 Ill. App. 646.

Indiana.— Isgrigg *v.* Pauley, 148 Ind. 436, 47 N. E. 821; Nichols, etc., Co. *v.* Burch, 128 Ind. 324, 27 N. E. 737; Blair *v.* Smith, 114 Ind. 114, 15 N. E. 817, 5 Am. St. Rep. 593; Taylor *v.* Duesterberg, 109 Ind. 165, 9 N. E. 907.

Iowa.—Richards *v.* Orr, 118 Iowa 724, 92 N. W. 655; State Ins. Co. *v.* Prestage, 116 Iowa 466, 90 N. W. 62; Stubblefield *v.* Gadd, 112 Iowa 681, 84 N. W. 917; Wheeler, etc., Mfg. Co. *v.* Bjelland, 97 Iowa 637, 66 N. W. 885; Wells *v.* Anderson, 97 Iowa 201, 66 N. W. 102, 59 Am. St. Rep. 409; Clark *v.* Raymond, 86 Iowa 661, 53 N. W. 354; Beyer *v.* Thoeming, 81 Iowa 517, 46 N. W. 1074; Payne *v.* Wilson, 76 Iowa 377, 41 N. W. 45; Aultman *v.* Heiney, 59 Iowa 654, 13 N. W. 856; Griffin *v.* Sheley, 55 Iowa 513, 8 N. W. 343; Officer *v.* Evans, 48 Iowa 557; Delashmut *v.* Trau, 44 Iowa 613; Hugunin *v.* Dewey, 20 Iowa 368.

Kansas.— Winter *v.* Ritchie, 57 Kan. 212, 45 Pac. 595, 57 Am. St. Rep. 331; Roser *v.* Wichita Fourth Nat. Bank, 56 Kan. 129, 42 Pac. 341; Wilson *v.* Taylor, 49 Kan. 774, 31 Pac. 697; Hixon *v.* George, 18 Kan. 253; Merchant's Nat. Bank *v.* Kopplin, 1 Kan. App. 599, 42 Pac. 263.

Kentucky.— Roark *v.* Bach, 116 Ky. 457, 76 S. W. 340, 25 Ky. L. Rep. 699; Davis *v.* H. Feltman Co., 112 Ky. 293, 65 S. W. 615, 23 Ky. L. Rep. 1510, 99 Am. St. Rep. 289; Morrow *v.* Bailey, 109 Ky. 359, 22 Ky. L. Rep. 861, 59 S. W. 2, 95 Am. St. Rep. 382; Carroll *v.* Dawson, 103 Ky. 736, 46 S. W. 222, 20 Ky. L. Rep. 349; Baker *v.* Hines, 102 Ky. 329, 43 S. W. 452, 19 Ky. L. Rep. 1354; Snapp *v.* Snapp, 87 Ky. 554, 9 S. W. 705, 10 Ky. L. Rep. 598; Fuqua *v.* Ferrell, 80 Ky. 69; Dowd *v.* Hurley, 78 Ky. 260; Kuevan *v.* Specker, 11 Bush 1 (conveyance by husband and wife to third person, who reconveyed to wife); Lishy *v.* Perry, 6 Bush 515; Kuhn *v.* Kuhn, 69 S. W. 1077, 24 Ky. L. Rep. 787; Perry *v.* Cornelius, 63 S. W. 23, 23 Ky. L. Rep. 425; Thomas *v.* Payne, 51 S. W. 450, 21 Ky. L. Rep. 401; McMillan *v.* Stephens, 49 S. W. 778, 20 Ky. L. Rep. 1528; Sallee *v.* Sallee, 35 S. W. 437, 18 Ky. L. Rep. 74; Whayne *v.* Morgan, 12 S. W. 128, 11 Ky. L. Rep. 254; Maynard *v.* May, 11 S. W. 806, 11 Ky. L. Rep. 166; Richart *v.* Utterback, 9 S. W. 422, 10 Ky. L. Rep. 548; Marshall *v.* Strange, 9 S. W. 250, 10 Ky. L. Rep. 410; Trimble *v.* McGuire, 4 Ky. L. Rep. 986; Tong *v.* Eifort, 3 Ky. L. Rep. 647.

Louisiana.— See Cottingham's Succession, 29 La. Ann. 669.

Maine.— Legro *v.* Lord, 10 Me. 161.

Massachusetts.— Castle *v.* Palmer, 6 Allen 401, conveyance by a husband to a third person and by the latter to the wife.

Michigan.— Gasser *v.* Crittenden, (1905) 103 N. W. 601; Palmer *v.* Bray, (1904) 98 N. W. 849; Michigan Trust Co. *v.* Comstock, 130 Mich. 572, 90 N. W. 331; Eagle *v.* Smylie, 126 Mich. 612, 85 N. W. 1111, 86 Am. St. Rep. 562; Dickey *v.* Converse, 117 Mich. 449, 457, 76 N. W. 80, 72 Am. St. Rep. 568; Patnode *v.* Darveau, 112 Mich. 127, 70 N. W. 439, 71 N. W. 1095; Nash *v.* Geraghty, 105 Mich. 382, 63 N. W. 437; Shay *v.* Wheeler, 69 Mich. 254, 37 N. W. 210; Dull *v.* Merrill, 69 Mich. 49, 36 N. W. 677; Freehling *v.* Bresnahan, 61 Mich. 540, 28 N. W. 531, 1 Am. St. Rep. 617; Riggs *v.* Sterling, 60 Mich. 643, 27 N. W. 705, 1 Am. St. Rep. 554; Vermont Sav. Bank *v.* Elliott, 53 Mich. 256, 18 N. W. 805; Pulte *v.* Geller, 47 Mich. 560, 11 N. W. 385; Rhead *v.* Hounson, 46 Mich. 243, 9 N. W. 267; Smith *v.* Rumsey, 33 Mich. 183.

Minnesota.— Blake *v.* Boisjoli, 51 Minn. 296, 53 N. W. 637; Horton *v.* Kelly, 40 Minn. 193, 41 N. W. 1031; Baldwin *v.* Rogers, 28 Minn. 544, 11 N. W. 77; Furman *v.* Tenny, 28 Minn. 77, 9 N. W. 172; Ferguson *v.* Kumler, 27 Minn. 156, 6 N. W. 618; Morrison *v.* Abbott, 27 Minn. 116, 6 N. W. 455.

Mississippi.— Dulion *v.* Harkness, 80 Miss. 8, 31 So. 416, 92 Am. St. Rep. 563; Wilcher *v.* Thompson, (1893) 12 So. 828; Hodges *v.* Hickley, 67 Miss. 715, 7 So. 404; O'Conner *v.* Ward, 60 Miss. 1025.

Missouri.— Stam *v.* Smith, 183 Mo. 464, 81 S. W. 1217; Balz *v.* Nelson, 171 Mo. 682, 72 S. W. 527; Spratt *v.* Early, 169 Mo. 357,

to the great weight of authority, is not forfeited by such a transfer or attempted

69 S. W. 13; Moore *v.* Wilkerson, 169 Mo. 334, 68 S. W. 1035; Versailles Bank *v.* Guthrey, 127 Mo. 189, 29 S. W. 1004, 48 Am. St. Rep. 621; Hart *v.* Leete, 104 Mo. 315, 15 S. W. 976; Grimes *v.* Portman, 99 Mo. 229, 12 S. W. 792; Muenks *v.* Bunch, 90 Mo. 500, 3 S. W. 63 (conveyance of homestead by father to sons in consideration of future support of himself and wife); Davis *v.* Land, 88 Mo. 436; Stinde *v.* Behrens, 81 Mo. 254; Vogler *v.* Montgomery, 54 Mo. 577; Harris *v.* Meredith, 106 Mo. App. 586, 81 S. W. 203. Where the owner of a homestead sold it and invested the proceeds in a new homestead, which he occupied until he conveyed it to another, such last conveyance was held not fraudulent as to his creditors, although made without consideration. Spratt *v.* Early, 169 Mo. 357, 69 S. W. 13.

Nebraska.—Wheatley *v.* Chamberlain Banking House, (1904) 101 N. W. 1135; National Bank of Commerce *v.* Chamberlain, (1904) 100 N. W. 943; Brown *v.* Campbell, (1903) 93 N. W. 1007; Jayne *v.* Hymer, 66 Nebr. 785, 92 N. W. 1019; Plummer *v.* Rohman, 62 Nebr. 145, 84 N. W. 600, 87 N. W. 11; Smith *v.* Neufeld, 61 Nebr. 699, 85 N. W. 898; Roberts *v.* Robinson, 49 Nebr. 717, 68 N. W. 1035, 59 Am. Rep. 567; Mundt *v.* Hagadorn, 49 Nebr. 409, 68 N. W. 610; Munson *v.* Carter, 40 Nebr. 417, 58 N. W. 931; Edwards *v.* Reid, 39 Nebr. 645, 58 N. W. 202, 42 Am. St. Rep. 607; Stubendorf *v.* Hoffman, 23 Nebr. 360, 36 N. W. 581; Schribar *v.* Platt, 19 Nebr. 625, 28 N. W. 289; Derby *v.* Weyrich, 8 Nebr. 174, 30 Am. Rep. 827; Scheel *v.* Lackner, 4 Nebr. (Unoff.) 221, 93 N. W. 741.

Nevada.— Bailey *v.* Littell, 24 Nev. 294, 53 Pac. 308.

New Mexico.— Heisch *v.* Bell, (1902) 70 Pac. 572.

North Carolina.— Dortch *v.* Benton, 98 N. C. 190, 3 S. E. 638, 2 Am. St. Rep. 331; Rankin *v.* Shaw, 94 N. C. 405; Arnold *v.* Estis, 92 N. C. 162; Crummen *v.* Bennet, 68 N. C. 494.

North Dakota.— Dalrymple *v.* Security Imp. Co., 11 N. D. 65, 88 N. W. 1033; Olson *v.* O'Connor, 9 N. D. 504, 84 N. W. 359, 81 Am. St. Rep. 595; Kvello *v.* Taylor, 5 N. D. 76, 63 N. W. 889.

Ohio.— Roig *v.* Schults, 42 Ohio St. 165; Prosek *v.* Kuchta, 9 Ohio Dec. (Reprint) 129, 11 Cinc. L. Bul. 65; Stewart *v.* Wooley, 2 Ohio Dec. (Reprint) 341, 2 West. L. Month. 471. See also Sears *v.* Hanks, 14 Ohio St. 298, 84 Am. Dec. 378.

South Carolina.— McNair *v.* Moore, 64 S. C. 82, 41 S. E. 829; Barrow *v.* Williams, 58 S. C. 280, 36 S. E. 561, 79 Am. St. Rep. 840; Finley *v.* Cartwright, 55 S. C. 198, 33 S. E. 359; Aultman *v.* Salinas, 44 S. C. 299, 22 S. E. 465; Wood *v.* Timmerman, 29 S. C. 175, 7 S. E. 74.

Texas.— King *v.* Harter, 70 Tex. 579, 8 S. W. 308; Scheuber *v.* Ballow, 64 Tex. 166; Beard *v.* Blum, 64 Tex. 59; Martel *v.* Somers, 26 Tex. 551; Cox *v.* Shropshire, 25 Tex. 113; Wood *v.* Chambers, 20 Tex. 247, 70 Am. Dec. 382; Heidelbach *v.* Carter, 34 Tex. Civ. App. 579, 79 S. W. 346; Finn *v.* Kent, 13 Tex. Civ. App. 36, 34 S. W. 1013; Archenhold *v.* B. C. Evans Co., 11 Tex. Civ. App. 138, 32 S. W. 795; Picton *v.* Sloan, (Civ. App. 1894) 28 S. W. 251; Patterson *v.* Keller, (Civ. App. 1894) 26 S. W. 301; Willis *v.* Pounds, 6 Tex. Civ. App. 512, 25 S. W. 715; Freeman *v.* Hamblin, 1 Tex. Civ. App. 157, 21 S. W. 1019; Porter *v.* Porter, 2 Tex. App. Civ. Cas. § 433. Where a homestead is conveyed with intent to defraud creditors, but the grantor continues in occupation of the homestead, using it as such, the conveyance is not in law fraudulent as to the creditors. Brown *v.* Moore, (Civ. App. 1901) 64 S. W. 781.

Vermont.— Darling *v.* Ricker, 68 Vt. 471, 35 Atl. 376; Pease *v.* Shirlock, 63 Vt. 622, 22 Atl. 661; Premo *v.* Hewitt, 55 Vt. 362 (proceeds of insurance on homestead); Prout *v.* Vaughn, 52 Vt. 451; Danforth *v.* Beattie, 43 Vt. 138; Jewett *v.* Guyer, 38 Vt. 209.

Virginia.— Mahony *v.* James, 94 Va. 176, 26 S. E. 384; Williams *v.* Lord, 75 Va. 390.

Wisconsin.— Bank of Commerce *v.* Fowler, 93 Wis. 241, 67 N. W. 423; Rozek *v.* Redzinski, 87 Wis. 525, 58 N. W. 262; Shawano County Bank *v.* Koeppen, 78 Wis. 533, 47 N. W. 723; Hoffman *v.* Junk, 51 Wis. 613, 8 N. W. 493; Murphy *v.* Crouch, 24 Wis. 365; Pike *v.* Miles, 23 Wis. 164, 99 Am. Dec. 148; Dreutzer *v.* Bell, 11 Wis. 114.

Wyoming.— North Platte Milling, etc., Co. *v.* Price, 4 Wyo. 293, 33 Pac. 664.

United States.— *In re* Wilson, 123 Fed. 20, 59 C. C. A. 100; Thompson *v.* McConnell, 107 Fed. 33, 46 C. C. A. 124; Thomson *v.* Crane, 73 Fed. 327; Green *v.* Root, 62 Fed. 191; Farwell *v.* Kerr, 28 Fed. 345; Volentine *v.* Hurd, 21 Fed. 749; Cox *v.* Wilder, 6 Fed. Cas. No. 3,308, 2 Dill. 45; Smith *v.* Kehr, 22 Fed. Cas. No. 13,071, 2 Dill. 50.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 118 *et seq.*

Title in wife's name.— Where a debtor acquiring real estate as a homestead takes title in the name of his wife, the fact that other property owned by him, and more than sufficient to pay his debts, was his homestead prior to the purchase does not render it fraudulent as to his creditors. Lang *v.* Williams, 166 Mo. 1, 65 S. W. 1012.

Good faith not investigated.— A creditor of the husband cannot inquire into his good faith in deeding a homestead to his wife. Merchants' Nat. Bank *v.* Kopplin, 1 Kan. App. 599, 42 Pac. 263; and other cases cited *supra*, this note.

Equity in homestead.— Where the equity of redemption in a homestead is worth less than one thousand dollars, its conveyance is not fraudulent as against creditors of the grantor. Palmer *v.* Bray, (1904) 98 N. W. 849; Balz *v.* Nelson, 171 Mo. 682, 72 S. W. 527.

Equity of no value.— Where a tract of land including a homestead is subject to a mortgage and judgments for a sum larger than the value of the portion of the land, which is not

transfer.[69] There may be a bad motive but there is no illegal act.[70] A fraudu-

included in the homestead, a voluntary conveyance by the owner to his wife is not fraudulent. Stubblefield *v.* Gadd, 112 Iowa 681, 84 N. W. 917. See *supra*, II, B, 2.

Where tenants in common occupy a homestead, a conveyance by one of them of his interest to his cotenants is not void as to their creditors. Fordyce *v.* Hicks, 80 Iowa 272, 45 N. W. 750. And where a tenant in common of a homestead conveys his interest to his children who have rendered him valuable service, such conveyance cannot be set aside as fraudulent as to his creditors. Eagle *v.* Smylie, 126 Mich. 612, 85 N. W. 1111, 86 Am. St. Rep. 562.

Agricultural homestead.— A debtor may, although not residing upon an agricultural homestead, increase it to the maximum area, in order to protect a conveyance thereof from being adjudged fraudulent as against creditors. Wilks *v.* Vaughan, (Ark. 1904) 83 S. W. 913.

Equitable mortgage.— Since a debtor's homestead is not subject to the claims of creditors, an absolute conveyance of it for the purpose of placing it beyond their reach does not preclude him from having the deed declared a mortgage, if the circumstances justify such relief. Patnode *v.* Darveau, 112 Mich. 127, 70 N. W. 439, 71 N. W. 1095; O'Conner *v.* Ward, 60 Miss. 1025, 1037.

Reservation of exempt property see *infra*, XI, A, 11.

69. *Alabama.*—Kennedy *v.* Tuscaloosa First Nat. Bank, 107 Ala. 170, 18 So. 396, 36 L. R. A. 308.

Arkansas.— Carmack *v.* Lovett, 44 Ark. 180.

Illinois.— Peoria First Nat. Bank *v.* Rhea, 155 Ill. 434, 40 N. E. 551; Quinn *v.* People, 146 Ill. 275, 34 N. E. 148; Ammondson *v.* Ryan, 111 Ill. 506; Bell *v.* Devore, 96 Ill. 217; Leupold *v.* Krause, 95 Ill. 440; Hartwell *v.* McDonald, 69 Ill. 293; Redden *v.* Potter, 16 Ill. App. 265.

Kentucky.— Kuevan *v.* Specker, 11 Bush 1.

Massachusetts.— Castle *v.* Palmer, 6 Allen 401.

Minnesota.— Baldwin *v.* Rogers, 28 Minn. 544, 11 N. W. 77.

Mississippi.— Edmonson *v.* Meacham, 50 Miss. 34. Where, after a conveyance of land by a husband to his wife has been adjudged fraudulent as to certain creditors of the husband, he moves on to the land with his family, and makes it his home, he is entitled to homestead rights therein, and a sale thereof under such judgment should be enjoined. Dulion *v.* Harkness, 80 Miss. 8, 31 So. 416, 92 Am. St. Rep. 663.

Missouri.— State *v.* Diveling, 66 Mo. 375; Vogler *v.* Montgomery, 54 Mo. 577.

Nebraska.— Stubendorf *v.* Hoffman, 23 Nebr. 360, 36 N. W. 581.

North Carolina.— Dortch *v.* Benton, 98 N. C. 190, 3 S. E. 638, 2 Am. St. Rep. 331; Rankin *v.* Shaw, 94 N. C. 405; Arnold *v.* Estis, 92 N. C. 162.

Ohio.— Roig *v.* Schults, 42 Ohio St. 165; Bills *v.* Bills, 41 Ohio St. 296; Sears *v.* Hanks, 14 Ohio St. 298, 84 Am. Dec. 378.

South Carolina.— Wood *v.* Timmerman, 29 S. C. 175, 7 S. E. 74.

Texas.— Beard *v.* Blum, 64 Tex. 59.

Virginia.— Mahoney *v.* James, 94 Va. 176, 26 S. E. 384; Hatcher *v.* Crews, 83 Va. 371, 5 S. E. 221; Marshall *v.* Sears, 79 Va. 49; Boynton *v.* McNeal, 31 Gratt. 456; Shipe *v.* Repass, 28 Gratt. 716. But *compare* Rose *v.* Sharpless, 33 Gratt. 153.

Wisconsin.— Murphy *v.* Crouch, 24 Wis. 365.

United States.— Farwell *v.* Kerr, 28 Fed. 345; Cox *v.* Wilder, 6 Fed. Cas. No. 3,308, 2 Dill. 45; McFarland *v.* Goodman, 16 Fed. Cas. No. 8,789, 6 Biss. 111; Smith *v.* Kehr, 22 Fed. Cas. No. 13,071, 2 Dill. 50.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 118.

Contra.— Some of the cases, however, hold that the homestead exemption may be forfeited or lost by a conveyance made with intent to hinder, delay, or defraud creditors.

Arkansas.— Chambers *v.* Sallie, 29 Ark. 407, holding that where a debtor in failing circumstances, for the purpose of hindering and delaying his creditors, conveyed his homestead tract of land in trust for the benefit of his wife, the conveyance was fraudulent and void as to creditors.

Minnesota.— Piper *v.* Johnston, 12 Minn. 60.

New Hampshire.— Currier *v.* Sutherland, 54 N. H. 475, 20 Am. Dec. 143.

South Dakota.— Kettleschlager *v.* Ferrick, 12 S. D. 455, 81 N. W. 889, 76 Am. St. Rep. 623, holding that a transfer of the homestead from husband to wife, without consideration and to prevent creditors from subjecting such premises to the satisfaction of their claims in case the debtor should remove therefrom and with other funds purchase and occupy other premises as a homestead, is fraudulent as to creditors.

Tennessee.— Nichol *v.* Davidson County, 8 Lea 389. *Compare* Ruohs *v.* Hooke, 3 Lea 302, 31 Am. Rep. 642, holding that a wife is entitled to a homestead out of lands fraudulently conveyed by her husband, where she did not join in the deed or otherwise participate in the fraud.

Wisconsin.— Barker *v.* Dayton, 28 Wis. 367.

United States.— Minor *v.* Wilson, 58 Fed. 616; Pratt *v.* Burr, 19 Fed. Cas. No. 11,372, 5 Biss. 36.

Forfeiture of homestead exemption by fraud see, generally, HOMESTEADS.

Purchase of personalty from loan on homestead.— Where money is obtained by a loan on the homestead standing in the name of the wife, a purchase of personalty in the name of the wife, paid for by a portion of the money so obtained, is not fraudulent as to the creditors of the husband. Farmers' Trust Co. *v.* Linn, 103 Iowa 159, 72 N. W. 496.

70. O'Conner *v.* Ward, 60 Miss. 1025, 1036. See also Bogan *v.* Cleveland, 52 Ark. 101, 12

lent conveyance does not enlarge the rights of creditors, but merely leaves them to enforce their rights as if no conveyance had been made.[71] A debtor, in the disposition of his property, can commit a fraud upon his creditors only by disposing of such of his property as the creditors have a legal right to look to for satisfaction of their claims, and therefore a debtor cannot commit a fraud upon his creditors by disposing of his homestead.[72] The same is true of the proceeds of a sale of the homestead or lands received in exchange therefor, where, by statute, they also are exempt.[73] The rule does not apply where, under the statute in the particular jurisdiction, at the time of the conveyance the land was not exempt as a homestead,[74] as, for instance, because of the debtor's failure to occupy, select, or claim the same as his homestead,[75] or because of its abandonment.[76] And a

S. W. 159, 20 Am. St. Rep. 158. To property so exempted the creditor has no right to look. Nichols *v.* Eaton, 91 U. S. 716, 23 L. ed. 254.

71. Kuevan *v.* Specker, 11 Bush (Ky.) 1.

72. Hixon *v.* George, 18 Kan. 253.

73. *California.*— Wetherly *v.* Straus, 93 Cal. 283, 28 Pac. 1045.

Iowa.— Jones *v.* Brandt, 59 Iowa 332, 10 N. W. 854, 13 N. W. 310; Officer *v.* Evans, 48 Iowa 557, holding that a conveyance to a wife of real estate received in exchange for the homestead is not fraudulent as against existing creditors.

Kansas.— Winter *v.* Ritchie, 57 Kan. 212, 45 Pac. 595, 57 Am. St. Rep. 331.

Kentucky.— Whitt *v.* Kendall, 11 S. W. 592, 11 Ky. L. Rep. 116.

Missouri.— Stinde *v.* Behrens, 81 Mo. 254 (conveyance of land to wife in consideration of a conveyance of the homestead by husband and wife); Harris *v.* Meredith, 106 Mo. App. 586, 81 S. W. 203 (sale of homestead with intent to invest the proceeds in another homestead, and gift of a portion of the proceeds to wife).

Nebraska.— Scheel *v.* Lackner, 4 Nebr. (Unoff.) 221, 93 N. W. 741.

Texas.— Blum *v.* Light, 81 Tex. 414, 16 S. W. 1090.

Vermont.— Keyes *v.* Rives, 37 Vt. 260, 86 Am. Dec. 707.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 124, 125. See, generally, HOMESTEADS.

A gift by a husband to his wife of the proceeds to be received from the sale of their homestead, made to induce her to join in the sale, is not fraudulent as to creditors. Wetherly *v.* Straus, 93 Cal. 283, 28 Pac. 1045; Blum *v.* Light, 81 Tex. 414, 16 S. W. 1090; Gatewood *v.* Scurlock, 2 Tex. Civ. App. 98, 21 S. W. 55; Montgomery *v.* Brown, 1 Tex. App. Civ. Cas. § 1303; Allen *v.* Hall, 1 Tex. App. Civ. Cas. § 1279; Keyes *v.* Rines, 37 Vt. 260, 86 Am. Dec. 707.

74. Phenix Ins. Co. *v.* Fielder, 133 Ind. 557, 33 N. E. 270; and other cases in the notes following.

75. Reeves *v.* Slade, 71 Ark. 611, 77 S. W. 54; La Point *v.* Blanchard, 101 Cal. 549, 36 Pac. 98; Stewart *v.* Stewart, 65 Mo. App. 663; Currier *v.* Sutherland, 54 N. H. 475, 20 Am. Rep. 143. And see Phenix Ins. Co. *v.* Fielder, 133 Ind. 557, 33 N. E. 270. The mere fact that property conveyed by an insolvent debtor to a creditor with intent to prefer him is of such a nature that it could and probably would have been set aside to the debtor as a homestead does not render the conveyance any the less a fraud on the other creditors. La Point *v.* Blanchard, 101 Cal. 549, 36 Pac. 98. Where real estate not used as a homestead may become exempt by selection, such selection cannot be made after a sale of the property. Stewart *v.* Stewart, 65 Mo. App. 663. Where a debtor transfers in fraud of his creditors lands not occupied or designated as a homestead, although the transfer is made before judgment on a debt existing at the time, he cannot defeat the rights of a creditor by securing a reconveyance of the land. Gaines *v.* National Exch. Bank, 64 Tex. 18. And see, generally, HOMESTEADS.

Selection of a homestead by the owner is unnecessary, within the meaning of the rule above stated, where the area and value of the homestead do not exceed the limit allowed by law as exempt and the homestead is not a part of a larger tract of land, since "the law intervenes and attaches the right of exemption without any act on the part of the exemptioner, as if the particular property were especially claimed and designated as exempt." Pollak *v.* McNeil, 100 Ala. 203, 13 So. 937. See, generally, HOMESTEADS.

76. *Arkansas.*— Chambers *v.* Sallie, 29 Ark. 407.

Iowa.— Belden *v.* Younger, 76 Iowa 567, 41 N. W. 317.

Mississippi.— Edmonson *v.* Meacham, 50 Miss. 34.

Nebraska.— Edwards *v.* Reid, 39 Nebr. 645, 58 N. W. 202, 42 Am. St. Rep. 607.

New Hampshire.— Currier *v.* Sutherland, 54 N. H. 475, 20 Am. Rep. 143.

South Dakota.— Kettleschlager *v.* Ferrick, 12 S. D. 455, 81 N. W. 889, 76 Am. St. Rep. 623, holding that a transfer of the homestead from husband to wife, without consideration, to prevent creditors from subjecting such premises to the satisfaction of their claims, in case the debtor should remove therefrom, and with other funds purchase and occupy other premises as a homestead, is fraudulent as to creditors.

Texas.— Taylor *v.* Ferguson, 87 Tex. 1, 26 S. W. 46; Baines *v.* Baker, 60 Tex. 139 (holding that a conveyance of the homestead by a husband to his wife, intended not to pass title

conveyance of a homestead with intent to defraud creditors will be void, if their judgments would be a lien on the land.[77] The homestead may be changed.[78] It seems that a conveyance of a homestead may be valid as to a particular estate and invalid as to the fee.[79]

(II) *HOMESTEAD INCLUDED IN CONVEYANCE OF OTHER PROPERTY.* Where a conveyance by a debtor includes both property exempt as a homestead and property not so exempt, his creditors may reach the property not exempt, if the conveyance thereof is fraudulent as to them, but the conveyance will be valid as to the exempt homestead.[80] This rule applies where a debtor conveys a tract of land

but to enable the husband to thus protect it through the ostensible owner from the claims of creditors, is, after its abandonment as a homestead, within the statute in relation to fraudulent conveyances and invalid as to creditors); Cox *v.* Shropshire, 25 Tex. 113; Rives *v.* Stephens, (Tex. Civ. App. 1894) 28 S. W. 707; Willis *v.* Pounds, 6 Tex. Civ. App. 512, 25 S. W. 715.

Wisconsin.—Barker *v.* Dayton, 28 Wis. 367.

United States.— Thompson *v.* McConnell, 107 Fed. 33, 46 C. C. A. 124.

See, generally, HOMESTEADS.

To constitute an abandonment of the homestead, so as to render a conveyance thereof subject to attack by creditors as fraudulent, there must be both an intention to abandon and actual abandonment. Edwards *v.* Reid, 39 Nebr. 645, 58 N. W. 202, 42 Am. St. Rep. 607. See also Carroll *v.* Dawson, 103 Ky. 736, 46 S. W. 222, 20 Ky. L. Rep. 349; Willis *v.* Pounds, 6 Tex. Civ. App. 512, 25 S. W. 715. And see, generally, HOMESTEADS.

Fraudulent conveyance by heir.— The legal title to a homestead descends, on the death of the owner intestate, to his widow and children, and gives such children a valuable interest, which they cannot convey in fraud of creditors. Hollinger *v.* Boatman's Bank, 69 Kan. 519, 77 Pac. 263.

Collusive mortgage.— A mortgage executed to defraud the mortgagor's creditors will be set aside in favor of creditors of his heir, where the latter colluded with the mortgagee to keep it alive to defraud his creditors; the property being the homestead of the mortgagor, and descending to the heir free from the former's debt. Dorroh *v.* Holberg, (Miss. 1899) 25 So. 661.

77. Piper *v.* Johnston, 12 Minn. 60. See, generally, HOMESTEADS.

78. Winter *v.* Ritchie, 57 Kan. 212, 45 Pac. 595, 57 Am. St. Rep. 331; Richards *v.* Orr, 118 Iowa 724, 92 N. W. 655; Scheel *v.* Lackner, 4 Nebr. (Unoff.) 221, 93 N. W. 741; Green *v.* Root, 62 Fed. 191. See also Harris *v.* Meredith, (Mo. App. 1904) 81 S. W. 203; and, generally, HOMESTEADS.

79. Chambers *v.* Sallie, 29 Ark. 407 (holding that where a debtor in failing circumstances, for the purpose of hindering and delaying his creditors, conveys the homestead tract of land in trust for the benefit of his wife, the conveyance will be fraudulent and void as to creditors as to the fee of the land after the wife's death); Younger *v.* Ritchie, 116 N. C. 782, 21 S. E. 911 (holding that N. C. Acts (1893), c. 78, providing that in an action to set aside a voluntary conveyance to a wife as in fraud of creditors, the fact that the lands do not exceed in value the homestead exemption shall be no defense, provided that the act shall not be construed to authorize the sale of the land until after the expiration of the homestead exemption, enables the creditors to sue immediately to set aside such a conveyance as a cloud on the title and to render their judgment a lien on the reversion).

In Missouri it was formerly held that since the homestead law of 1875 only secured to the widow and children an estate in the land limited by the widow's life and the attainment of majority by the youngest child, there might be a fraudulent conveyance of the homestead by the party entitled thereto so far as the fee after the expiration of the limited estate was concerned. Miller *v.* Leeper, 120 Mo. 466, 25 S. W. 378; Hannah *v.* Hannah, 109 Mo. 236, 19 S. W. 87; Schaffer *v.* Beldsmeier, 107 Mo. 314, 17 S. W. 797; Kirksville Sav. Bank *v.* Spangler, 59 Mo. App. 172. These cases were overruled, however, and the contrary held in Versailles Bank *v.* Guthrey, 127 Mo. 189, 196, 29 S. W. 1004, 48 Am. St. Rep. 621, where it was said: "To hold that the fee in the homestead may be subjected to the payment of the debts of its owner, subject to the homestead right, is to deprive him of the right which is expressly conferred by statute, to sell, mortgage or exchange it for another homestead, a contention to which we are unwilling to give our assent. The homestead includes the fee; they are not two separable and divisible interests."

80. *Illinois.*— Bell *v.* Devore, 96 Ill. 217.

Nebraska.— Brown *v.* Campbell, (1903) 93 N. W. 1007.

North Carolina.— Crummen *v.* Brunet, 68 N. C. 494.

South Carolina.—McNair *v.* Moore, 64 S. C. 82, 41 S. E. 829.

Tennessee.— Gibbs *v.* Patten, 2 Lea 180.

Vermont.— Danforth *v.* Beattie, 43 Vt. 138.

United States.— Thompson *v.* McConnell, 107 Fed. 33, 46 C. C. A. 124; Farwell *v.* Kerr, 28 Fed. 345.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 120.

Burden of proof.— Where it is sought to set aside, as in fraud of plaintiff's rights as creditor, a sale of a city lot containing less than a quarter of an acre, with buildings thereon, and it is admitted by the pleadings that a part of said property was the vendor's homestead, the burden is upon plaintiff

which exceeds the area or value of his homestead exemption, in which case creditors may reach the excess and no more.[81]

(III) *CROPS GROWN ON HOMESTEAD.*[82] Where the statute exempts crops grown on the homestead, they are subject, like any other exempt property, to a conveyance as against creditors.[83] But where such crops are not exempted and the homestead is conveyed without consideration or with intent to defraud creditors, the creditors may subject the crops growing on the homestead to the payment of their claims.[84]

(IV) *PURCHASE OF HOMESTEAD AND PAYMENT OF LIENS.* By the overwhelming weight of authority it is not fraudulent as against creditors, either existing or subsequent, for a debtor, although insolvent, to use his non-exempt money or other non-exempt property in purchasing or creating a homestead which will be beyond their reach,[85] even though the title be taken by the debtor in the

of showing facts which deprived the remainder of the lot of that character. Hoffman *v.* Junk, 51 Wis. 613, 8 N. W. 493.

81. *Arkansas.*— Campbell *v.* Jones, 52 Ark. 493, 12 S. W. 1016, 6 L. R. A. 783.

Illinois.— Peoria First Nat. Bank *v.* Rhea, 155 Ill. 434, 40 N. E. 551; Quinn *v.* People, 146 Ill. 275, 34 N. E. 148; Muller *v.* Indereiden, 79 Ill. 382.

Kentucky.— Cincinnati Tobacco Warehouse Co. *v.* Matthews, 74 S. W. 242, 24 Ky. L. Rep. 2445; Wilson *v.* Calvert, 24 S. W. 3, 15 Ky. L. Rep. 489, holding that where a grantor's deed of his homestead, the object of which was to secure the land to his family, was fraudulent in effect, a creditor, if the land exceeded the amount of the homestead exemption, could subject it and sell the entire tract, if indivisible, or allot the homestead to the extent of the exemption and subject the balance.

Minnesota.— Baldwin *v.* Rogers, 28 Minn. 544, 11 N. W. 77.

Nebraska.— Brown *v.* Campbell, (1903) 93 N. W. 1007; Hicks *v.* Mack, 19 Nebr. 339, 27 N. W. 230.

North Carolina.— Dortch *v.* Benton, 98 N. C. 190, 3 S. E. 638, 2 Am. St. Rep. 331; Crummen *v.* Bennet, 68 N. C. 494.

South Carolina.— Aultman *v.* Salinas, 44 S. C. 299, 22 S. E. 465.

Vermont.— Danforth *v.* Beattie, 43 Vt. 138.

Virginia.— Hatcher *v.* Crews, 83 Va. 371, 5 S. E. 221.

Wisconsin.— Commerce Bank *v.* Fowler, 93 Wis. 241, 67 N. W. 423; Rozek *v.* Redzinski, 87 Wis. 525, 58 N. W. 262.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 120. And see the cases cited *supra*, note 80.

Crediting purchase-money received upon homestead allowance.— Johnson *v.* Burnside, 8 Ohio S. & C. Pl. Dec. 412, 7 Ohio N. P. 74.

Allotment of particular part of tract.— Doyle *v.* Wamego First Nat. Bank, (Tex. Civ. App. 1899) 50 S. W. 480.

Part of homestead included by mistake.— Where a deed from plaintiff to H stated that it was the intention to convey all of plaintiff's land except a homestead of two hundred acres, and by mutual mistake the clause in the deed included part of the land reserved as a homestead, and the conveyance was set aside as in fraud of creditors and a judgment entered giving them possession of the land conveyed, it was held that they did not obtain title to the homestead land embraced in the deed, either as against plaintiff or his wife. Freeman *v.* Hamblin, 1 Tex. Civ. App. 157, 21 S. W. 1019. Where a deed of a debtor's homestead conveyed twenty acres in addition to the amount which was exempt, but such excess was inadvertently included, it was held that the rule that a deed fraudulent in part as against the grantor's creditors is fraudulent *in toto* did not apply, since the rule was not applicable to an excess of a few acres inadvertently included. Thompson *v.* McConnell, 107 Fed. 33, 46 C. C. A. 124.

82. See also *supra*, II, B, 15, b.

83. Eaves *v.* Williams, 10 Tex. Civ. App. 423, 31 S. W. 86. See, generally, HOMESTEADS.

84. Erickson *v.* Paterson, 47 Minn. 525, 50 N. W. 699. But, although crops grown on the homestead owned by the husband are subject to his debts, the fact that a transfer of the homestead from the husband to the wife passes title to subsequent crops to her does not make such transfer fraudulent as to the husband's creditors, since it merely passes title to the land; the subsequent crops having no value in law. Olson *v.* O'Connor, 9 N. D. 504, 84 N. W. 359, 81 Am. St. Rep. 595.

85. *Alabama.*— Kelley *v.* Connell, 110 Ala. 543, 18 So. 9; Reeves *v.* Peterman, 109 Ala. 366, 19 So. 512.

California.— Simonson *v.* Burr, 121 Cal. 582, 54 Pac. 87; Fitzell *v.* Leaky, 72 Cal. 477, 14 Pac. 198.

Colorado.— McPhee *v.* O'Rourke, 10 Colo. 301, 15 Pac. 420, 3 Am. St. Rep. 579.

Illinois.— Cipperly *v.* Rhodes, 53 Ill. 346.

Kansas.— Hixon *v.* George, 18 Kan. 253.

Massachusetts.— Tucker *v.* Drake, 11 Allen 145.

Michigan.— Meigs *v.* Dibble, 73 Mich. 101, 40 N. W. 935.

Minnesota.— Jacoby *v.* Parkland Distilling Co., 41 Minn. 227, 43 N. W. 52.

Mississippi.— Edmonson *v.* Meacham, 50 Miss. 34.

Nebraska.— Paxton *v.* Sutton, 53 Nebr. 81, 73 N. W. 221, 68 Am. St. Rep. 589.

New Hampshire.— Gove *v.* Campbell, 62 N. H. 401.

name of his wife.[86] On the same principle creditors cannot reach the homestead of their debtor because the latter, while insolvent, appropriated money or property in his hands to the payment of a debt which was a lien thereon, by mortgage or otherwise.[87] The rule first above stated does not apply as to existing creditors, where the statute does not exempt the homestead from liability for debts contracted before its acquisition.[88]

(v) *Improvements.*[89] The fact that a person, knowing himself to be insolvent, invests money in improvements on his homestead, so as to keep it from his creditors, will not prevent the exemption of the homestead from liability for his debts or subject such improvements to the claims of his creditors, where the value does not exceed the exemption,[90] unless there is some statutory provision to the contrary.[91] In some jurisdictions the statute exempts a homestead without any limitation as to the value of improvements thereon.[92]

(vi) *Insurance.*[93] The right of exemption which attaches to a homestead and improvements thereon attaches also to money which may be due to the debtor for insurance on the homestead.[94] It is not a fraud upon creditors, under

Texas.— Chase *v.* Swayne, 88 Tex. 218, 30 S. W. 1049, 53 Am. St. Rep. 742; North *v.* Shearn, 15 Tex. 174; Bell *v.* Beazley, 18 Tex. Civ. App. 639, 45 S. W. 401; Finn *v.* Krut, 13 Tex. Civ. App. 36, 34 S. W. 1013.

Wisconsin.— Kapernick *v.* Louk, 90 Wis. 232, 62 N. W. 1057; Palmer *v.* Hawes, 80 Wis. 474, 50 N. W. 341.

United States.— *In re* Wilson, 123 Fed. 20, 59 C. C. A. 100; *In re* Stone, 116 Fed. 35 (moving into a building after insolvency and in contemplation of bankruptcy does not defeat the right to a homestead exemption therein); Humbolt First Nat. Bank *v.* Glass, 79 Fed. 706, 25 C. C. A. 151; Kelly *v.* Sparks, 54 Fed. 70; Backer *v.* Meyer, 43 Fed. 702.

Compare infra, VII, B, 2, b, (I), (B), note 48. See also HOMESTEADS.

Contra.— *In re* Boothroyd, 3 Fed. Cas. No. 1,652; Pratt *v.* Burr, 19 Fed. Cas. No. 11,372, 5 Biss. 36; *In re* Sauthoff, 21 Fed. Cas. No. 12,380, 8 Biss. 35; *In re* Wright, 30 Fed. Cas. No. 18,067, 3 Biss. 359.

The transfer by one partner, although in failing circumstances, of all his firm interest, constituting all his available assets, to his copartner, in exchange for a homestead, or other use of non-exempt partnership property in purchasing a homestead, is not a fraud upon creditors. Bell *v.* Beazley, 18 Tex. Civ. App. 639, 45 S. W. 401. See also Blanchard *v.* Paschal, 68 Ga. 32, 45 Am. Rep. 474; Hunnicutt *v.* Summey, 63 Ga. 586. *Contra, In re* Boothroyd, 3 Fed. Cas. No. 1,652; *In re* Sauthoff, 21 Fed. Cas. No. 12,380, 8 Biss. 35. See, generally, HOMESTEADS; PARTNERSHIP.

86. *Alabama.*— Kelley *v.* Connell, 110 Ala. 543, 18 So. 9; Reeves *v.* Peterman, 109 Ala. 366, 19 So. 512.

Illinois.— Cipperly *v.* Rhodes, 53 Ill. 346.

Kansas.— Hixon *v.* George, 18 Kan. 253; Monroe *v.* May, 9 Kan. 466.

New Hampshire.— Gove *v.* Campbell, 62 N. H. 401.

United States.— Humbolt First Nat. Bank *v.* Glass, 79 Fed. 706, 25 C. C. A. 151; Backer *v.* Meyer, 43 Fed. 702.

See also *infra,* XI, F, 7, b; and, generally, HOMESTEADS.

Contra.— Rogers *v.* McCauley, 22 Minn. 384; Sumner *v.* Sawtelle, 8 Minn. 309.

87. *Arkansas.*— Flash *v.* Tindall, 39 Ark. 571.

California.— Randall *v.* Buffington, 10 Cal. 491.

Kansas.— Sproul *v.* Atchison Nat. Bank, 22 Kan. 336.

Washington.— Bradley *v.* Gotzian, 12 Wash. 71, 40 Pac. 623.

Wisconsin.— Palmer *v.* Hawes, 80 Wis. 474, 50 N. W. 341.

United States.— *In re* Wilson, 123 Fed. 20, 59 C. C. A. 100; *In re* Henkel, 11 Fed. Cas. No. 6,362, 2 Sawy. 305.

See, generally, HOMESTEADS.

88. See Fish *v.* Hunt, 81 Ky. 584; and, generally, HOMESTEADS.

89. See also *supra,* II, B, 15, d.

90. Chase *v.* Swayne, 88 Tex. 218, 30 S. W. 1049, 53 Am. St. Rep. 742 [*reversing* (Civ. App. 1895) 29 S. W. 418]; Kelly *v.* Sparks, 54 Fed. 70. And see *In re* Parks, 18 Fed. Cas. No. 10,765. See, generally, HOMESTEADS.

91. Fish *v.* Hunt, 81 Ky. 584, holding that a debtor could not improve his land, not occupied as a homestead, by expending his means for that purpose, so as to affect existing creditors, where the homestead exemption statute provided that it should not apply to sales, etc., at the suit of creditors, if the debt or liability existed "prior to the purchase of the land or the erection of the improvements." See also Butler *v.* Davis, 23 S. W. 220, 15 Ky. L. Rep. 273. *Compare* Nichols *v.* Sennitt, 78 Ky. 630; Thomas *v.* Lucas, (Ky. 1898) 45 S. W. 68.

92. Chase *v.* Swayne, 88 Tex. 218, 30 S. W. 1049, 53 Am. St. Rep. 742 [*reversing* (Civ. App. 1895) 29 S. W. 418].

93. **Fire-insurance money generally** see *supra,* II, B, 12.

94. Chase *v.* Swayne, 88 Tex. 218, 30 S. W. 1049, 53 Am. St. Rep. 742 [*reversing* (Civ. App. 1895) 29 S. W. 418]. See, generally, HOMESTEADS.

the homestead law, for a debtor to use his means to procure insurance upon his homestead.[95]

22. Change in Character of Property and Following Proceeds. The property of a debtor cannot be placed beyond the reach of his creditors by changing its form or by substituting other property.[96] A complaining creditor has a right to follow and subject the fund or proceeds resulting from a fraudulent conveyance and to pursue the same into any property in which it may have been invested, so far as it can be traced,[97] unless it has reached the hands of a *bona fide* pur-

95. Bernheim *v.* Davitt, 5 S. W. 193, 9 Ky. L. Rep. 229. See, generally, Homesteads.

96. Metcalf *v.* Arnold, (Ala. 1902) 32 So. 763; Abney *v.* Kingsland, 10 Ala. 355, 44 Am. Dec. 491; Beidler *v.* Crane, 135 Ill. 92, 25 N. E. 655, 25 Am. St. Rep. 349 [*affirming* 22 Ill. App. 538]; Brown *v.* Matthaus, 14 Minn. 205 (holding that where a debtor transferred a note to his wife to be used in the support of himself and family, and the wife, for the purpose of avoiding proceedings by judgment creditors of the husband to subject the note, surrendered it to the maker, by consent of the debtor, and took a new note payable to herself, creditors were entitled, in an action for that purpose, to subject the new note to the payment of their judgments; but where the maker of the note was not a party to the action, the old note could not be applied on the judgments); Fleury *v.* Pringle, 26 Grant Ch. (U. C.) 67; and other cases cited in the notes following.

Property purchased in the name of a third person see *supra*, II, B, 16, d; *infra*, III, A, 3, a.

Improvements on property of third person see *supra*, II, B, 15, d; *infra*, III, A, 3, d.

Change to exempt property.— The rule, as has been seen, does not prevent a debtor from converting non-exempt into exempt property. See *supra*, II, B, 21, a; IV, B, 21, b, (iv).

97. *Alabama.*— Metcalf *v.* Arnold, (1902) 32 So. 763; Weingarten *v.* Marcus, 121 Ala. 187, 25 So. 852; Birmingham Shoe Co. *v.* Torrey, 121 Ala. 89, 25 So. 763; Dickinson *v.* National Bank of Republic, 98 Ala. 546, 14 So. 550; Bryant *v.* Young, 21 Ala. 264; Carville *v.* Stout, 10 Ala. 796; Abney *v.* Kingsland, 10 Ala. 355, 44 Am. Dec. 491.

Arkansas.— Bryant-Brown Shoe Co. *v.* Block, 52 Ark. 458, 12 S. W. 1073.

Colorado.— Forrester *v.* Gill, 11 Colo. App. 410, 53 Pac. 230.

Florida.— Mayer *v.* Wilkins, 37 Fla. 244, 19 So. 632.

Illinois.— French *v.* Commercial Nat. Bank, 199 Ill. 213, 65 N. E. 252 [*affirming* 97 Ill. App. 533]; Beidler *v.* Crane, 135 Ill. 92, 25 N. E. 655, 25 Am. St. Rep. 349 [*affirming* 22 Ill. App. 538] (holding that where a patentee assigns his patent with intent to defraud his creditors, and the assignee transfers it to a corporation in exchange for corporate stock, such stock is subject to the claims of such creditors); Hall *v.* Stroufe, 52 Ill. 421; Steere *v.* Hoagland, 50 Ill. 377, 39 Ill. 264.

Indiana.— Phelps *v.* Smith, 116 Ind. 387, 17 N. E. 602, 19 N. E. 156; Blair *v.* Smith, 114 Ind. 114, 15 N. E. 817, 5 Am. St. Rep. 593, holding that if land is converted by the fraudulent grantee into money and he still retains the money, it may be reached in equity by the grantor's creditors.

Iowa.— Shumaker *v.* Davidson, (1901) 87 N. W. 441; Davis *v.* Gibbon, 24 Iowa 257.

Kentucky.— Treadway *v.* Turner, 10 S. W. 816, 10 Ky. L. Rep. 949.

Maine.— Sparrow *v.* Chesley, 19 Me. 79.

Massachusetts.— Robinson *v.* Bliss, 121 Mass. 428.

Michigan.— Bresnahan *v.* Nugent, 92 Mich. 76, 92 N. W. 735; Kinter *v.* Pickard, 67 Mich. 125, 34 N. W. 535.

Mississippi.— Bernheim *v.* Beer, 56 Miss. 149; Edmonson *v.* Meacham, 50 Miss. 34; Carlisle *v.* Tindall, 49 Miss. 229.

Nebraska.— Selz *v.* Hocknell, 62 Nebr. 101, 86 N. W. 905, 63 Nebr. 503, 88 N. W. 767.

New Hampshire.— Gutterson *v.* Morse, 58 N. H. 529; Coolidge *v.* Melvin, 42 N. H. 510.

New York.— Mandeville *v.* Avery, 124 N. Y. 376, 26 N. E. 951, 21 Am. St. Rep. 678 [*reversing* 57 Hun 78, 10 N. Y. Suppl. 323]; Durand *v.* Hankerson, 39 N. Y. 287 (holding that in a creditor's suit to set aside an alleged fraudulent conveyance, the court may order the payment to a receiver of a mortgage given by the grantee for the price, to be applied on plaintiff's judgment); McConihe *v.* Derby, 62 Hun 90, 16 N. Y. Suppl. 474; Nicholson *v.* Leavitt, 4 Sandf. 252 (holding that the creditor may affirm the sale and go for the price, or impeach the sale as fraudulent and follow the goods or their proceeds; but that he cannot hold the buyer liable for the latter when he has never received either); Hedges *v.* Polhemus, 9 Misc. 680, 30 N. Y. Suppl. 556; McCloskey *v.* Stewart, 63 How. Pr. 137 (holding that a creditors' bill will lie to reach personal property as well as real property claimed to have been transferred by a judgment debtor in fraud of his creditors, and where the property that can be reached is machinery, tools, etc., such new tools and machinery as have been purchased for the purpose of supplying waste of ordinary wear and tear are properly included). See also Lawrence *v.* Bank of Republic, 35 N. Y. 320. *Compare* McCaffrey *v.* Hickey, 66 Barb. 489; Henderson *v.* Brooks, 3 Thomps. & C. 445, holding that property purchased by the grantee with the avails of property conveyed in fraud of creditors is not subject to a resulting trust in favor of such creditors; but if the amount advanced by the debtor in fraud of creditors and invested in the property can

chaser for value,[98] or has been taken in good faith by creditors of the fraudulent transferee,[99] or has been reconveyed or paid over to the fraudulent grantor,[1] or his other creditors,[2] or unless there is an adequate remedy at law against the property itself,[3] or the right to reach and subject the land or other property originally conveyed is barred by laches or the statute of limitations.[4] The rule does not apply so as to allow creditors to reach and subject money or property

be ascertained, it might constitute a lien on the lands for the benefit of creditors.

Pennsylvania.— Heath *v.* Page, 63 Pa. St. 108, 3 Am. Rep. 533, holding that the principle of the statute of 13 Elizabeth, rendering fraudulent conveyances void as to creditors, should be extended to the proceeds representing the grantor's estate, when the title has passed into the hands of a *bona fide* purchaser.

Tennessee.— Williamson *v.* Williams, 11 Lea 355; Richards *v.* Ewing, 11 Humphr. 327; Tubb *v.* Williams, 7 Humphr. 367.

Texas.— Schultze *v.* Schultze, (Civ. App. 1901) 66 S. W. 56 (holding that where a defendant in divorce conveyed his real estate to his father in secret trust for his own benefit, and one who knew all the facts took a conveyance from the father as security for debts of the son, such conveyances should be adjudged fraudulent as against the wife's claim for alimony or allowances); Heath *v.* Cleburne First Nat. Bank, 19 Tex. Civ. App. 63, 46 S. W. 123 (holding that so far, and so far only, as proceeds of a fraudulent conveyance or property of the fraudulent grantor go to the purchase of other lands by the grantee, such lands can be subjected to the debts of the grantor).

Virginia.— Burbridge *v.* Higgins, 6 Gratt. 119.

Wisconsin.— Bank of Commerce *v.* Fowler, 93 Wis. 241, 67 N. W. 423.

United States.— Clements *v.* Nicholson, 6 Wall. 299, 18 L. ed. 786. See also Stewart *v.* Platt, 101 U. S. 731, 25 L. ed. 816.

Canada.— Masuret *v.* Stewart, 22 Ont. 290; Fleury *v.* Pringle, 26 Grant Ch. (U. C.) 67.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 554 *et seq.* See also, as to rights and liabilities of the grantee and those claiming under him, *infra*, XIII, A, 4.

Proceeds of sales under fraudulent judgments are within the rule. Taggart *v.* Phillips, 5 Del. Ch. 237; French *v.* Commercial Nat. Bank, 199 Ill. 213, 65 N. E. 252 [*affirming* 97 Ill. App. 533]; Phelps *v.* Smith, 116 Ind. 387, 17 N. E. 602, 19 N. E. 156; Kohl *v.* Sullivan, 140 Pa. St. 35, 21 Atl. 247. See also *infra*, III, A, 4, b.

The proceeds of insurance on property fraudulently conveyed are not proceeds of the property within the rule. See *supra*, II, B, 12.

Election between land and proceeds.—Where land is conveyed by a debtor in fraud of creditors, the latter may subject the land to the payment of their debts, provided the title has not been acquired by a *bona fide* purchaser, but they cannot take both the land and the consideration therefor. Shumaker *v.* Davidson, 116 Iowa 569, 87 N. W. 441. See *infra*, XIII, A, 4, a, (I), (A).

Crops and other products of land see *supra*, II, B, 15, b.

Rents and profits see *supra*, II, B, 15, c.

Effect of intermingling goods see *infra*, XIII, A, 4, a, (I), (C).

98. Heath *v.* Page, 63 Pa. St. 108, 3 Am. Rep. 533; Richards *v.* Ewing, 11 Humphr. (Tenn.) 327; Simpson *v.* Simpson, 7 Humphr. (Tenn.) 275. See also *infra*, XIII, B, 2.

99. Standard Nat. Bank *v.* Garfield Nat. Bank, 70 N. Y. App. Div. 46, 75 N. Y. Suppl. 28. See *infra*, XIII, A, 4, a.

1. Schneider *v.* Patton, 175 Mo. 684, 75 S. W. 155, holding that in a suit to set aside certain deeds as having been made with intent to defraud the grantor's creditors, to the knowledge of the grantee, a personal judgment cannot be rendered against the grantee for the money received by him from a sale of the land to an innocent third party, where the money has been turned over by the grantee to the grantor before any proceedings against the grantee by the grantor's creditors. See also *infra*, XIII, A, 4.

2. Steere *v.* Hoagland, 50 Ill. 377 (holding also that where a sale was made in such a manner as to render the transaction fraudulent in law as to the vendor's creditors, although there was no fraudulent intent on the part of the purchaser, and several years afterward a creditors' bill was filed to subject the proceeds of the sale to the satisfaction of their debts, but it appeared that the purchaser had, prior to notice of the suit, given his own note and acceptances to other *bona fide* creditors, who received the same in full payment of their debts, the purchaser should receive credit therefor as if he had already paid the money); Kitts *v.* Willson, 140 Ind. 604, 39 N. E. 313. See also *infra*, XIII, A, 4.

3. Davis *v.* Yonge, (Ark. 1905) 85 S. W. 90, holding that where a judgment was procured before a sale of a judgment debtor's land, and there was nothing to preclude the enforcement of the judgment against the land in the hands of the purchaser, the judgment creditor had a plain remedy at law, and had no occasion therefore to seek relief in equity by a suit to follow the proceeds of the sale. See *infra*, XIV, C.

4. Mickel *v.* Walraven, 92 Iowa 423, 60 N. W. 633, holding that where an action by creditors to subject to the payment of their claims land conveyed in fraud of creditors is barred by their laches, they cannot sue to subject thereto other land purchased by the grantee from the profits of the first land.

resulting from the capital and labor of the grantee, although applied in the use of the property fraudulently transferred.[5] And it has been held that the fact that a purchase of a store and stock of goods is constructively fraudulent does not affect the title of the purchaser to other goods which he has afterward purchased with the proceeds of sales from the store and put into the stock.[6] It has also been held that the statute of Elizabeth and similar statutes do not enable creditors to subject the proceeds of property fraudulently conveyed, or other property in which they may have been invested, as the statute only applies to property conveyed by the debtor, and therefore that the only remedy of the creditor to reach such proceeds or property is in equity.[7]

III. Nature, Form, and Effect of Transfer.

A. Nature and Form of Transfer — 1. In General. In determining the right of creditors to reach and subject property fraudulently conveyed by their debtor, the form of the transfer is generally immaterial. Whatever mode a debtor may adopt for the purpose of disposing of property to which creditors have a right to resort for the satisfaction of their claims, creditors may in all cases show the fraud and, according to the circumstances and the statute in the particular jurisdiction,[8] either treat the transfer as a nullity or sue in equity to set it aside.[9] If a conveyance is executed with the intent to hinder, delay, or defraud creditors, it is none the less subject to attack by them because it is accomplished by means of an instrument otherwise lawful.[10] In some jurisdictions the statute against fraudulent conveyances expressly defines the term "conveyance" as embracing "every instrument in writing, except a last will and testament, whatever may be its form and by whatever name it may be known in law, by which any estate or interest in lands is created, aliened, assigned, or surrendered."[11]

5. Peters *v.* Light, 76 Pa. St. 289, holding that where the insolvent owner of iron works transferred all of his real estate to a trustee, in trust to carry on the iron works, manufacture and sell the iron so long as his creditors might determine it to be to their interest to do so, and until the debts should be paid, and, when the creditors should determine, to convert the estate into money and distribute it among them, etc., and the trustee took possession, advanced money, and made a large quantity of iron, such product, being the result of the capital and labor of the trustee, could not be seized by a judgment creditor of the assignor who did not assent to the arrangement. See also *supra*, II, B, 15, b.

6. Capron *v.* Porter, 43 Conn. 383. See also Lucas *v.* Birdsey, 41 Conn. 357.

7. Tubb *v.* Williams, 7 Humphr. (Tenn.) 367. See also Kinter *v.* Pickard, 67 Mich. 125, 34 N. W. 535; Henderson *v.* Hoke, 21 N. C. 119; Richards *v.* Ewing, 11 Humphr. (Tenn.) 327.

8. Remedies of creditors see *infra*, XIV.

9. *Indiana.*— Buck *v.* Voreis, 89 Ind. 116.

Louisiana.— Haas *v.* Haas, 35 La. Ann. 885.

Maryland.— Schaferman *v.* O'Brien, 28 Md. 565, 92 Am. Dec. 708.

Mississippi.—White *v.* Trotter, 14 Sm. & M. 30, 53 Am. Dec. 112.

United States.— Watson *v.* Bonfils, 116 Fed. 157, 53 C. C. A. 465.

10. Buck *v.* Voreis, 89 Ind. 116, 117 (where it is said: "A conveyance, however made, is void if the intent and purpose of the grantor and grantee is to defraud creditors. What cannot be done directly cannot be done by indirection. Forms are of little moment, for where fraud appears courts will drive through all matters of form and expose and punish the corrupt act"); Lee *v.* Cole, 44 N. J. Eq. 318, 15 Atl. 531; Metropolitan Bank *v.* Durant, 22 N. J. Eq. 35, 41; Decker *v.* Decker, 108 N. Y. 128, 15 N. E. 307; Hardt *v.* Schwab, 72 Hun (N. Y.) 109, 25 N. Y. Suppl. 402; Watson *v.* Bonfils, 116 Fed. 157, 53 C. C. A. 535. However solemn the instrument in its formalities, if it had its origin in fraud it is a nullity, so far as the creditors of the grantor are concerned. Schaferman *v.* O'Brien, 28 Md. 565, 92 Am. Dec. 708. See also Skowhegan Bank *v.* Cutler, 49 Me. 315.

The use of sheriff's deeds and other legal instruments to effect a fraudulent transfer of property by a debtor is no bar to its avoidance by creditors. Lee *v.* Cole, 44 N. J. Eq. 323, 15 Atl. 531; Metropolitan Bank *v.* Durant, 22 N. J. Eq. 35; Watson *v.* Bonfils, 116 Fed. 157, 53 C. C. A. 535. And see *infra*, III, A, 4, d.

Fraud vitiates all compacts.— Whether the contract is oral or in writing, or under seal or otherwise, or stamped with judicial sanction or regular corporate form, if it be contaminated with the vice of fraud the law declares it a nullity as regards creditors. Booth *v.* Bunce, 33 N. Y. 139, 88 Am. Dec. 372.

11. See Mill Annot. St. Colo. (1891) § 2036; Mich. Comp. Laws (1897), § 9538;

2. PARTICULAR FORMS OF TRANSFER — a. In General. A conveyance or transfer of property in fraud of creditors may take the form of an absolute sale and conveyance or transfer of real[12] or personal[13] property, even though a valuable consideration is paid,[14] and even though the instrument of conveyance be duly acknowledged and recorded.[15] Or it may take the form of an assignment or transfer of a note, life-insurance policy, patent right, or other chose in action;[16] a deed of trust, mortgage of real or personal property, or a pledge of personal property or choses in action;[17] a voluntary conveyance or transfer;[18] an antenuptial or post-nuptial settlement by a husband on his wife, directly or through a third person, or to trustees for her benefit;[19] a bond and mortgage;[20] a fraudulent judgment, by confession or in legal proceedings, and a sale on execution thereon;[21] a fraudulent attachment;[22] a fraudulent foreclosure of a real estate or chattel mortgage;[23] or fraudulent organization of a corporation and transfer of

Minn. St. (1894) § 4226; Wis. St. (1898) § 2326.

12. *Indiana.*— Tharp *v.* Jarrell, 66 Ind. 52. *Louisiana.*— Emswiler *v.* Burham, 6 La. Ann. 710. *Maryland.*— Birely *v.* Staley, 5 Gill & J. 432, 25 Am. Dec. 303; Duvall *v.* Waters, 1 Bland 569, 18 Am. Dec. 350. *Mississippi.*— Roach *v.* Deering, 9 Sm. & M. 316. *New Jersey.*— McKeague *v.* Armstrong, 50 N. J. Eq. 309, 24 Atl. 398. *Ohio.*— Piatt *v.* St. Clair, 6 Ohio 227, Wright 261, sale by administrator. *Oregon.*— Morrell *v.* Miller, 28 Oreg. 354, 43 Pac. 490. *Pennsylvania.*— American Academy of Music *v.* Smith, 54 Pa. St. 130 (conveyance to avoid payment of ground rent); Hays *v.* Heidelberg, 9 Pa. St. 203 (sale on execution to administrator of judgment debtor to hold in trust for creditors while the value of the property increases).

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 33 *et seq.*; and *infra*, V *et seq.*

Transfer sustained.— Blish *v.* Collins, 68 Mich. 542, 36 N. W. 731; Samuel *v.* Kittenger, 6 Wash. 261, 33 Pac. 509. See *infra*, V *et seq.*

13. *Alabama.*— Rodenberg *v.* H. B. Claflin Co., 104 Ala. 560, 16 So. 448; H. B. Claflin Co. *v.* Rodenberg, 101 Ala. 213, 13 So. 272. *Illinois.*— Grieb *v.* Caraker, 69 Ill. App. 236; Thorne *v.* Crawford, 17 Ill. App. 395. *Louisiana.*— Emswiler *v.* Burham, 6 La. Ann. 710; Meeker *v.* Hays, 18 La. 19, although the sale was by notarial act. *Maine.*— Richardson *v.* Kimball, 28 Me. 463, transfer of vessel. *Maryland.*— Duvall *v.* Waters, 1 Bland 569, 18 Am. Dec. 350. *Massachusetts.*— Bliss *v.* Crosier, 159 Mass. 498, 34 N. E. 1075 (usual course of business); Killam *v.* Peirce, 153 Mass. 502, 27 N. E. 520. *Missouri.*— Crane *v.* Timberlake, 81 Mo. 431. *Nebraska.*— Switz *v.* Bruce, 16 Nebr. 463, 20 N. W. 639. *New York.*— Downing *v.* Kelly, 49 Barb. 547. *Pennsylvania.*— Forsyth *v.* Matthews, 14 Pa. St. 100, 53 Am. Dec. 522. *Vermont.*— Read *v.* Moody, 60 Vt. 668, 15 Atl. 345. *Virginia.*— Briscoe *v.* Clarke, 1 Rand. 213. *United States.*— Kempner *v.* Churchill, 8 Wall. 362, 19 L. ed. 461; Smith *v.* New York L. Ins. Co., 57 Fed. 133; Judson *v.* Courier, 15 Fed. 541; Nisbet *v.* Quinn, 7 Fed. 760.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 33 *et seq.*; and *infra*, V *et seq.*

Transfers held valid.— *Alabama.*— Andrews *v.* Jones, 10 Ala. 400. *Illinois.*— Ewing *v.* Runkle, 20 Ill. 448. *Indiana.*— Kane *v.* Drake, 27 Ind. 29, taking attested bill of sale not a badge of fraud. *Iowa.*— Johnson *v.* McGrew, 11 Iowa 151, 77 Am. Dec. 137. *Louisiana.*— Hirsch *v.* Fudicker, 43 La. Ann. 886, 9 So. 742. *Minnesota.*— Derby *v.* Gallup, 5 Minn. 119. *Missouri.*— State *v.* Merritt, 70 Mo. 275. *Pennsylvania.*— Forsyth *v.* Matthews, 14 Pa. St. 100, 53 Am. Dec. 522. *United States.*— Jones *v.* Sleeper, 13 Fed. Cas. No. 7,496.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 33 *et seq.*; and *infra*, V *et seq.*

By statute in some states a bill of sale is invalid unless indorsed with an affidavit as to the consideration and *bona fides* thereof. See Denton *v.* Griffith, 17 Md. 301; and, generally, SALES.

14. See *infra*, VII, C.

15. Schaferman *v.* O'Brien, 28 Md. 565, 92 Am. Dec. 708.

16. Killam *v.* Peirce, 153 Mass. 502, 27 N. E. 520; Gillett *v.* Bate, 86 N. Y. 87; Harding *v.* Elliott, 91 Hun 502, 36 N. Y. Suppl. 648 [*reversing* 12 Misc. 521, 33 N. Y. Suppl. 1095], assignment of deposit by solvent non-resident to prevent attachment. See also *supra*, II, B, 6.

17. See *infra*, III, A, 2, b.

18. See *infra*, VIII, D.

19. Fisher *v.* Schlosser, 41 Ohio St. 147; Kanawha Valley Bank *v.* Wilson, 25 W. Va. 242; Bulmer *v.* Hunter, L. R. 8 Eq. 46, 38 L. J. Ch. 543, 20 L. T. Rep. N. S. 942. See also *infra*, VIII, A, 10.

20. Jordan *v.* Fenno, 13 Ark. 593.

21. See *infra*, III, A, 4.

22. See *infra*, III, A, 4, e.

23. See *infra*, III, A, 4, c.

property to it.[24] Other cases as to the form of transfer are referred to in the note below.[25]

b. Transfers as Security — (I) *In General.* Transfers of personal property as security, including choses in action,[26] either by way of pledge,[27] or by way of chattel mortgage, deed of trust, or contract for a lien, are valid as against creditors if *bona fide*, and if they do not contain provisions hindering or delaying other creditors of the mortgagor or pledgor;[28] but it is otherwise if the transfer or contract is not *bona fide*, but made without consideration or with intent to hinder, delay, or defraud creditors, or if it contains provisions which have such effect.[29] A mortgage or deed of trust of real property is within the statute of Elizabeth, and is void as against the mortgagor's creditors if made with intent to hinder, delay, or defraud them, but not otherwise.[30] If there is actual fraud the transfer is not the less void because it is given to secure *bona fide* debts.[31]

(II) *Absolute Transfers as Security.* Some of the courts have held that a conveyance absolute on its face, but intended as a mere security for the payment of a debt, is fraudulent and void as against existing creditors,[32] while other

24. See *infra*, III, A, 5.

25. **An attempted creation of a joint tenancy** to prevent the collection of a judgment is fraudulent as against the creditor. Foster *v.* Whelpley, 123 Mich. 350, 82 N. W. 123.

Emancipation of child see *supra*, II, B, 7, c.

Release of right to wife's earnings see *supra*, II, B, 7, b.

26. See *supra*, II, B, 6.

27. Goodbar *v.* Locke, 56 Ark. 314, 19 S. W. 924.

28. *Alabama.*— Walthall *v.* Rives, 34 Ala. 91.

Arkansas.—Goodbear *v.* Locke, 56 Ark. 314, 19 S. W. 924.

Massachusetts.— Bliss *v.* Crosier, 159 Mass. 498, 34 N. E. 1075, usual course of business.

Texas.— Simon *v.* McDonald, 85 Tex. 237, 20 S. W. 52.

Washington.— Vincent *v.* Suoqualmie Mill Co., 7 Wash. 566, 35 Pac. 396.

See *infra*, V *et seq.*; and, generally Chattel Mortgages, 6 Cyc. 1096 *et seq.*

Bill of sale of personal property, with condition of defeasance or mortgage.— Killough *v.* Steele, 1 Stew. & P. (Ala.) 262.

29. *Alabama.*— Wiswall *v.* Ticknor, 6 Ala. 178.

Georgia.— Hoffer *v.* Gladden, 75 Ga. 532.

Illinois.— Grieb *v.* Caraker, 69 Ill. App. 236.

Maine.— Wheelden *v.* Wilson, 44 Me. 11.

Michigan.— Pettibone *v.* Byrne, 97 Mich. 85, 56 N. W. 236.

Mississippi.— Tobin *v.* Allen, 53 Miss. 563.

Missouri.— Oliver-Finnie Grocer Co. *v.* Miller, 53 Mo. App. 107.

New York.— Dearing *v.* McKinnon Dash, etc., Co., 33 N. Y. App. Div. 31, 53 N. Y. Suppl. 513.

Tennessee.—McCrasly *v.* Haslock, 4 Baxt. 1.

Texas.— Gregg *v.* Cleveland, 82 Tex. 187, 17 S. W. 777.

West Virginia.— Shattuck *v.* Knight, 25 W. Va. 590.

Wisconsin.— Baum *v.* Bosworth, 68 Wis. 196, 31 N. W. 744.

United States.— Tuck *v.* Olds, 29 Fed. 738; *In re* Bloom, 3 Fed. Cas. No. 1,557.

A verbal agreement between a debtor and creditor, by which the former gives a lien on certain property to the latter, is void as to creditors. Ostertag *v.* Galbraith, 23 Nebr. 730, 37 N. W. 637.

30. *Alabama.*— McDowell *v.* Steele, 87 Ala. 493, 6 So. 288; Hall *v.* Heydon, 41 Ala. 242; Wiswall *v.* Ticknor, 6 Ala. 178.

Connecticut.— De Wolf *v.* A. & W. Sprague Mfg. Co., 49 Conn. 282; North *v.* Belden, 13 Conn. 376, 35 Am. Dec. 83.

Kentucky.— Beeler *v.* Bullitt, 3 A. K. Marsh. 280.

Maine.— Aiken *v.* Kilburne, 27 Me. 252.

Missouri.— Oliver-Finnie Grocer Co. *v.* Miller, 53 Mo. App. 107.

Tennessee.— Bennett *v.* Union Bank, 5 Humphr. 612.

West Virginia.— Hope *v.* Valley City Salt Co., 25 W. Va. 789.

United States.— Valentine *v.* Hurd, 21 Fed. 749; Stephens *v.* Sherman, 22 Fed. Cas. No. 13,369*a* [*affirmed* in 105 U. S. 100, 26 L. ed. 1080].

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 33 *et seq.*; and *infra*, V *et seq.*

Mortgages held valid.— Vincent *v.* Suoqualmie Mill Co., 7 Wash. 566, 35 Pac. 396; Rio Grande R. Co. *v.* Vinet, 132 U. S. 565, 10 S. Ct. 168, 33 L. ed. 438; U. S. *v.* Griswold, 8 Fed. 496. See also *supra*, V *et seq.*

A statute which provides that all deeds of trust and mortgages made to secure the payment of debts shall be void as to creditors, unless it is expressly declared therein that the proceeds arising from the sale of the property so mortgaged or conveyed in trust shall be appropriated to the payment of all the debts and liabilities of the grantor or mortgagor equally *pro rata*, applies only to debts existing at the date of the execution of such mortgage, etc., or which grew out of the transaction itself. McKay *v.* Gilliam, 65 N. C. 130.

31. See *infra*, VII, C.

32. Hartshorn *v.* Williams, 31 Ala. 149.

courts have announced the contrary to be the proper rule in the absence of actual fraud.[33]

c. Conditional Sales. A conditional as well as an absolute sale may be fraudulent as against creditors.[34] At common law a conditional sale, that is, a sale under an agreement that the title to the property, although possession is delivered to the purchaser, shall remain in the seller until the purchase-price is paid, is perfectly valid between the parties, and also, by the weight of authority, valid as against creditors of the purchaser and subsequent purchasers, in the absence of fraud.[35] In some jurisdictions, however, they are required to be recorded, to be valid as against innocent third persons.[36]

3. Expenditures by Debtor — a. Purchase of Property in Name of Third Person — (I) *In General.* It has been held that where a debtor expends his money in the purchase of property and causes the conveyance to be made to a third person, there is no conveyance in fraud of creditors, within the meaning of the statute of 13 Elizabeth and similar statutes in the United States, so as to prevent the title from vesting in the grantee or one to whom he afterward conveys at the request of the debtor, since the statute applies only to conveyances by the debtor.[37] Such transactions, however, have been held fraudulent as against creditors in equity and independently of the statute, generally on the ground that the grantee holds the property in trust for the debtor,[38] and in some of the

33. See *infra*, V, B, 3; X, B, 2.

34. Gifford *v.* Ford, 5 Vt. 532.

35. Blackwell *v.* Walker, 5 Fed. 419, 2 McCrary 33.

36. See, generally, Sales.

37. *Kentucky.*— Marshall *v.* Marshall, 2 Bush 415; Doyle *v.* Sleeper, 1 Dana 531; Crozier *v.* Young, 3 T. B. Mon. 157, stock subscribed and paid for by a father for and in the names of his children, without consideration, and while insolvent.

Mississippi.— Edmonson *v.* Meacham, 50 Miss. 34.

New York.— Cramer *v.* Blood, 57 Barb. 155.

North Carolina.— Gowing *v.* Rich, 23 N. C. 553.

Ohio.— Shorten *v.* Woodrow, 34 Ohio St. 645. But see Combs *v.* Watson, 32 Ohio St. 228. And *compare* Bloomingdale *v.* Stein, 42 Ohio St. 168.

South Carolina.— Taylor *v.* Heriot, 4 Desauss. Eq. 227.

England.— Lamplugh *v.* Lamplugh, 1 P. Wms. 111, 24 Eng. Reprint 316.

38. *Alabama.*— Kelley *v.* Connell, 110 Ala. 543, 18 So. 9; Stoutz *v.* Huger, 107 Ala. 248, 18 So. 126; Elliott *v.* Horn, 10 Ala. 348, 44 Am. Dec. 488; Doe *v.* McKinney, 5 Ala. 719. And see Peevey *v.* Cabaniss, 70 Ala. 253.

Arkansas.— Miller *v.* Fraley, 21 Ark. 22. And see Stix *v.* Chaytor, 55 Ark. 116, 17 S. W. 707; Bennett *v.* Hutson, 33 Ark. 762.

Colorado.— Fox *v.* Lipe, 14 Colo. App. 258, 59 Pac. 850.

Connecticut.— Botsford *v.* Beers, 11 Conn. 369; Whittlesey *v.* McMahon, 10 Conn. 137, 26 Am. Dec. 389.

Delaware.— Newell *v.* Morgan, 2 Harr. 225.

District of Columbia.— Thyson *v.* Foley, 1 App. Cas. 182.

Florida.— Reel *v.* Livingston, 34 Fla. 377, 16 So. 284, 43 Am. St. Rep. 202; Alston *v.* Rowles, 13 Fla. 117.

Georgia.— See Field *v.* Jones, 10 Ga. 229 [*citing* Pitts *v.* Bullard, 3 Ga. 5, 46 Am. Dec. 405].

Illinois.— Bowman *v.* Ash, 143 Ill. 649, 32 N. E. 486.

Indiana.— Lindley *v.* Cross, 31 Ind. 106, 99 Am. Dec. 610; Ewing *v.* Gray, 12 Ind. 64; Demaree *v.* Driskill, 3 Blackf. 115; Kipper *v.* Glancey, 2 Blackf. 356.

Iowa.— Boulton *v.* Hahn, 58 Iowa 518, 12 N. W. 560; Gear *v.* Schrei, 57 Iowa 666, 11 N. W. 625.

Kentucky.— Matthews *v.* Albritton, 83 Ky. 32; Adams *v.* O'Rear, 80 Ky. 129; Rucker *v.* Abell, 8 B. Mon. 566, 48 Am. Dec. 406; Baker *v.* Dobyns, 4 Dana 220; Doyle *v.* Sleeper, 1 Dana 531; Turner-Looker Co. *v.* Garvey, 43 S. W. 202, 19 Ky. L. Rep. 1205; Straus *v.* Head, 21 S. W. 537, 14 Ky. L. Rep. 740; Davis *v.* Justice, 21 S. W. 529, 14 Ky. L. Rep. 741.

Maine.— Augusta Sav. Bank *v.* Crossman, (1886) 7 Atl. 396; Gray *v.* Chase, 57 Me. 558; Dockray *v.* Mason, 48 Me. 178; Godding *v.* Brackett, 34 Me. 27. See also Trefethen *v.* Lynam, 90 Me. 376, 38 Atl. 335, 60 Am. St. Rep. 271, 38 L. R. A. 190; Call *v.* Perkins, 65 Me. 439; Spaulding *v.* Fisher, 57 Me. 411; Legro *v.* Lord, 10 Me. 161.

Maryland.— Baltimore Second Nat. Bank *v.* Yeatman, 53 Md. 443; Trego *v.* Skinner, 42 Md. 426.

Massachusetts.— Bresnihan *v.* Sheehan, 125 Mass. 11; Clark *v.* Chamberlain, 13 Allen 257.

Minnesota.— Blake *v.* Boisjoli, 51 Minn. 296, 53 N. W. 637; Sumner *v.* Sawtelle, 8 Minn. 309.

Mississippi.— Simmons *v.* Ingram, 60 Miss. 886; Bernheim *v.* Beer, 56 Miss. 149; Edmonson *v.* Meacham, 50 Miss. 34.

Missouri.— Garrett *v.* Wagner, 125 Mo. 450, 28 S. W. 762; Patton *v.* Bragg, 113 Mo. 595, 20 S. W. 1059, 35 Am. St. Rep. 730; Hart *v.* Leete, 104 Mo. 315, 15 S. W. 976;

cases the rule has also been applied at law.[39] In many states the terms of the statutes against fraudulent conveyances and transfers are broad enough to include such transactions.[40]

(II) *HUSBAND AND WIFE.* What has been said in the preceding section as to the purchase of property in the name of a third person applies where a husband purchases property with his own means and causes the conveyance to be made to his wife or to a third person for her benefit.[41] And the rule is the same when a husband so expends money or property which was his wife's but which has become his by reduction to possession.[42] But creditors of the husband cannot reach property which was paid for with the wife's separate estate.[43] The same is true

Rinehart *v.* Long, 95 Mo. 396, 8 S. W. 559; Gutzwiller *v.* Lackman, 23 Mo. 168.

Nebraska.— Cochran *v.* Cochran, 62 Nebr. 450, 87 N. W. 152.

New Jersey.—Conover *v.* Ruckman, 36 N. J. Eq. 493; Haggerty *v.* Nixon, 26 N. J. Eq. 42; Metropolis Nat. Bank *v.* Sprague, 20 N. J. Eq. 13.

New York.— McCartney *v.* Bostwick, 32 N. Y. 53 [*reversing* 31 Barb. 390]; Kline *v.* McDonnell, 62 Hun 177, 16 N. Y. Suppl. 649.

North Carolina.— Gentry *v.* Harper, 55 N. C. 177; Dobson *v.* Erwin, 18 N. C. 569.

Ohio.— Vanzant *v.* Davies, 6 Ohio St. 52; Miller *v.* Wilson, 15 Ohio 108; Edgington *v.* Williams, Wright 439. And see Parrish *v.* Rhodes, Wright 339.

Pennsylvania.—Kimmel *v.* McWright, 2 Pa. St. 38.

South Carolina.— Godbold *v.* Lambert, 8 Rich. Eq. 155, 70 Am. Dec. 192; Brown *v.* McDonald, 1 Hill Eq. 297; Taylor *v.* Heriot, 4 Desauss. Eq. 227, 234.

South Dakota.— Smith *v.* Tosini, 1 S. D. 632, 48 N. W. 299.

Tennessee.— Goff *v.* Dabbs, 4 Baxt. 300; Gaugh *v.* Henderson, 2 Head 628; Walters *v.* Brown, (Ch. App.) 46 S. W. 777.

Vermont.— Corey *v.* Morrill, 71 Vt. 51, 42 Atl. 976; Dewey *v.* Long, 25 Vt. 564; Waterman *v.* Cochran, 12 Vt. 699.

Virginia.— Coleman *v.* Cocke, 6 Rand. 618, 18 Am. Dec. 757. And see Quarles *v.* Lacy, 4 Munf. 251.

Washington.— Curry *v.* Catlin, 9 Wash. 495, 37 Pac. 678, 39 Pac. 101.

West Virginia.— Martin *v.* Warner, 34 W. Va. 182, 12 S. E. 477; Burt *v.* Timmons, 29 W. Va. 441, 2 S. E. 780, 6 Am. St. Rep. 664; McMasters *v.* Edgar, 22 W. Va. 673; Rose *v.* Brown, 11 W. Va. 122; Lockhard *v.* Beckley, 10 W. Va. 87.

Wisconsin.— Hoxie *v.* Price, 31 Wis. 82.

England.— Stone *v.* Van Heythuysen, 18 Jur. 344, 11 Hare 126, 1 Wkly. Rep. 429, 45 Eng. Ch. 127.

Canada.— O'Doherty *v.* Ontario Bank, 32 U. C. C. P. 285.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 45, 576. See also *supra*, II, B, 16, d; *infra*, VIII, F, 1, f; XII, B, 3; XII, C, 2; XIII, A, 4, a, (II), (B).

39. Elliott *v.* Horn, 10 Ala. 348, 44 Am. Dec. 488; Kimmel *v.* McRight, 2 Pa. St. 38.

In Massachusetts, by statute, the land is liable to execution on a judgment against the person paying the consideration. Clark *v.* Chamberlain, 13 Allen 257.

40. *Indiana.*—Thornton St. (1897) §§ 3461, 3462.

Kentucky.— Under a provision that when a deed shall be made to one person, and the consideration shall be paid to another, "such deeds shall be deemed fraudulent as against the existing debts and liabilities of the person paying the consideration." Adams *v.* O'Rear, 80 Ky. 129.

Michigan.— Comp. Laws (1897), §§ 8835, 8836; Fairbairn *v.* Middlemiss, 47 Mich. 372, 11 N. W. 203.

Minnesota.— Blake *v.* Boisjoli, 51 Minn. 296, 53 N. W. 637; Wolford *v.* Farnham, 47 Minn. 95, 49 N. W. 528; Stone *v.* Myers, 9 Minn. 303, 86 Am. Dec. 104.

New York.— 3 Birdseye Rev. St. p. 3025, § 74; Dunlap *v.* Hawkins, 59 N. Y. 342; McCartney *v.* Bostwick, 32 N. Y. 53 [*reversing* 31 Barb. 390]; Kline *v.* McDonnell, 62 Hun 177, 16 N. Y. Suppl. 649; Tappan *v.* Butler, 7 Bosw. 480.

Ohio.— Bloomingdale *v.* Stein, 42 Ohio St. 168, under a statute providing that "all transfers, conveyances, or assignments made with intent to hinder, delay, or defraud creditors, shall be declared void at the suit of any creditor."

41. See the cases cited *supra*, notes 37–40.

42. Davis *v.* Justice, 21 S. W. 529, 14 Ky. L. Rep. 741. See also *supra*, II, B, 19, b.

43. *Georgia.*— Rutherford *v.* Chapman, 59 Ga. 177.

Indiana.— Jones *v.* Snyder, 117 Ind. 229, 20 N. E. 140; Tracy *v.* Kelley, 52 Ind. 535; Malady *v.* McEnary, 30 Ind. 273.

Iowa.— Gilbert *v.* Glenny, 75 Iowa 513, 39 N. W. 818, 1 L. R. A. 479; Stoddard *v.* Rowe, 74 Iowa 670, 39 N. W. 84.

Kentucky.— Howard *v.* Tenney, 87 Ky. 52, 7 S. W. 547, 10 Ky. L. Rep. 94; Truitt *v.* Curd, 16 S. W. 364, 13 Ky. L. Rep. 118.

Michigan.— Buhl *v.* Peck, 70 Mich. 44, 37 N. W. 876.

Missouri.—Bartlett *v.* Umfried, 94 Mo. 530, 7 S. W. 581.

Nebraska.— Morse *v.* Raben, 27 Nebr. 145, 42 N. W. 901; Wood *v.* O'Hanlon, 26 Nebr. 527, 42 N. W. 733; Shortel *v.* Young, 23 Nebr. 408, 36 N. W. 572.

New York.— Popfinger *v.* Yutte, 102 N. Y. 38, 6 N. E. 259.

Pennsylvania.— Bollinger *v.* Gallagher, 170 Pa. St. 84, 32 Atl. 569, holding that a wife

where the husband gives his note for land, and the note is paid by his wife from her separate estate.[44] By the weight of authority, however, in the case of a conveyance to the wife of a debtor it will be presumed that the consideration was paid by the husband, and the burden is on the wife to show affirmatively that it was paid from her separate estate.[45]

(III) *PURCHASE OF PERSONAL PROPERTY.* If a debtor purchases personal property, paying the purchase-money, and has the bill of sale made in the name of his wife or other third person, the transaction is fraudulent as against his creditors and they may reach and subject the property even at law by judgment and execution against him.[46]

b. Payment of Liens. The principles on which the purchase of property by a debtor and taking title in the name of a third person is fraudulent as against creditors apply where a debtor pays off a mortgage or other lien on the lands of his wife or other third person.[47]

c. Loans. They also apply where a debtor lends his money and takes as security a bond and mortgage payable to his wife or another.[48]

d. Making Improvements on Another's Land. If a debtor expends his money or property in improvements upon the real property of his wife, child, or other third person, without consideration or with intent to defraud creditors, and the owner of the property participates in or has knowledge of such intent, creditors can reach and subject the real estate, or the rents and profits thereof, to the satisfaction of their claims to the extent of the value of such improvements.[49] The

may take good title to property bought on her credit, and the addition of her husband's name on the notes given for the purchase-money will not invalidate the conveyance as to her husband's creditors where she shows the purchase to have been exclusively on her credit.

Tennessee.— Cook *v.* Jones, (Ch. App. 1897) 47 S. W. 14, where the husband purchased land at a judicial sale with the wife's money and in her behalf and by her direction took title in his name in trust to support himself and her children, free from his debts, contracts, and liabilities.

Virginia.— Scott *v.* Rowland, 82 Va. 484, 4 S. E. 595, holding that where a conveyance is taken in the names of husband and wife, the wife is entitled to hold such part of the lands as was paid for by her, free from the husband's debts.

United States.— Frankenthal *v.* Gilbert, 34 Fed. 5.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 255 *et seq.* See also *supra*, II, B, 19, a, b; *infra*, VIII, F; XII, B, 3.

44. Rutherford *v.* Chapman, 59 Ga. 177.

45. *Illinois.*— Bowman *v.* Ash, 143 Ill. 649, 32 N. E. 486.

Kentucky.— Treadway *v.* Turner, 10 S. W. 816, 10 Ky. L. Rep. 949.

Missouri.— Patton *v.* Bragg, 113 Mo. 595, 20 S. W. 1059, 35 Am. St. Rep. 730.

South Dakota.— Smith *v.* Tosini, 1 S. D. 632, 48 N. W. 299.

West Virginia.— Martin *v.* Warner, 34 W. Va. 182, 12 S. E. 477; Burt *v.* Timmons, 29 W. Va. 441, 2 S. E. 780, 6 Am. St. Rep. 664; Rose *v.* Brown, 11 W. Va. 122.

Contra.— Walters *v.* Brown, (Tenn. Ch. App. 1898) 46 S. W. 777.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 814.

46. Craig *v.* Gamble, 5 Fla. 430; Mercer *v.* Hooker, 5 Fla. 277; Laird *v.* Davidson, 124 Ind. 412, 25 N. E. 7; Godding *v.* Brackett, 34 Me. 27.

47. Reel *v.* Livingston, 34 Fla. 377, 16 So. 284, 43 Am. St. Rep. 202; Blair *v.* Smith, 114 Ind. 114, 15 N. E. 817, 5 Am. St. Rep. 593.

48. Conover *v.* Ruckman, 36 N. J. Eq. 493.

49. *Alabama.*— Ware *v.* Seasongood, 92 Ala. 152, 9 So. 138.

Illinois.— Dietz *v.* Atwood, 19 Ill. App. 96.

Indiana.— Blair *v.* Smith, 114 Ind. 114, 15 N. E. 817, 5 Am. St. Rep. 593; Moore *v.* Lampton, 80 Ind. 301.

Kentucky.— Brooks-Waterfield Co. *v.* Frisbie, 99 Ky. 125, 35 S. W. 106, 59 Am. St. Rep. 452; Heck *v.* Fisher, 78 Ky. 643; Athey *v.* Knotts, 6 B. Mon. 24.

Maine.— Trefethen *v.* Lynam, 90 Me. 376, 38 Atl. 335, 60 Am. St. Rep. 271, 38 L. R. A. 190.

Massachusetts.— Lynde *v.* McGregor, 13 Allen 182, 90 Am. Dec. 188.

Minnesota.— Christian *v.* Klein, 77 Minn. 116, 79 N. W. 602.

Missouri.— Kirby *v.* Bruns, 45 Mo. 234, 100 Am. Dec. 376.

New Hampshire.—Caswell *v.* Hill, 47 N. H. 407, card.

New York.— Isham *v.* Schafer, 60 Barb. 317; Bachs *v.* Tomlinson, 1 N. Y. St. 484.

Pennsylvania.— People's Nat. Bank *v.* Loeffert, 184 Pa. St. 164, 38 Atl. 996.

West Virginia.— Humphrey *v.* Spencer, 36 W. Va. 11, 14 S. E. 410; Burt *v.* Timmons, 29 W. Va. 441, 2 S. E. 780, 6 Am. St. Rep. 664; Rose *v.* Brown, 11 W. Va. 122. See also Vandervoort *v.* Fouse, 52 W. Va. 214, 43 S. E. 112.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 580.

rule does not apply, however, as to subsequent creditors in the absence of an intent to defraud them participated in or known to the owner of the property.[50]

e. Payment For Life Insurance. As we have seen, the same rule applies, subject to some qualifications, where a debtor appropriates money to the payment of premiums for life insurance.[51]

4. Collusive and Fraudulent Legal Proceedings — a. In General. Debtors frequently attempt to cover up their property or transfer it in fraud of creditors by means of collusive and fraudulent legal proceedings; but it is well settled that such proceedings, however legal they may be in form, are void as against creditors, and the property so disposed of, real or personal, may be reached and subjected to the satisfaction of their claims.[52] Transactions, it has been said, which the law mercilessly reprobates and brands will not be permitted to be successfully shielded under the deceptive garb of apparently regular and sanctified judicial proceedings.[53]

b. Judgments[54] — (i) *In General.* A debtor will not be allowed to hinder, delay, or defraud his creditors by means of a collusive and fraudulent judgment and execution thereon, although the judgment may be recovered in all due legal form in an action.[55] A creditor may show in a collateral proceeding that a judgment was procured through fraud of the debtor, or complicity of both parties,

Contra.—Webster *v.* Hildreth, 33 Vt. 457, 78 Am. Dec. 632; White *v.* Hildreth, 32 Vt. 265.

Effect on prior valid conveyance.— Expenditure by a parent of money in paying off encumbrances and improving land previously conveyed voluntarily to his children by way of settlement does not render such prior conveyance invalid as against the parent's creditors, where it was valid in its inception. Judson *v.* Courier Co., 15 Fed. 541.

50. Robinson *v.* Huffman, 15 B. Mon. (Ky.) 80, 61 Am. Dec. 177; Caswell *v.* Hill, 47 N. H. 407; Sexton *v.* Wheaton, 8 Wheat. (U. S.) 229, 5 L. ed. 603.

51. See *supra*, II, B, 11.

52. *Alabama.*— Cartwright *v.* Bamberger, 90 Ala. 405, 8 So. 264.

Georgia.— Beach *v.* Atkinson, 87 Ga. 288, 13 S. E. 591.

Illinois.— French *v.* Commercial Nat. Bank, 199 Ill. 213, 65 N. E. 252 [*affirming* 97 Ill. App. 533]; Thomas *v.* Van Meter, 62 Ill. App. 309, assignment by beneficiary of a decree to defeat an intervening creditor, and sale by a master thereunder without consideration paid.

Indiana.— Wright *v.* Mack, 95 Ind. 332.

Iowa.— Milliman *v.* Eddie, 115 Iowa 530, 88 N. W. 964.

Kentucky.— Yoder *v.* Standiford, 7 T. B. Mon. 478.

Louisiana.— Newman *v.* Baer, 50 La. Ann. 323, 23 So. 279; Haas *v.* Haas, 35 La. Ann. 885.

Massachusetts.—Goddard *v.* Divoll, 1 Metc. 413.

Mississippi.— Hyman *v.* Stadler, 63 Miss. 362.

Pennsylvania.— Clark *v.* Douglass, 62 Pa. St. 408.

Wisconsin.— Bloodgood *v.* Meissner, 84 Wis. 452, 54 N. W. 772.

United States.— James *v.* Milwaukee, etc., R. Co., 6 Wall. 752, 18 L. ed. 885.

England.— Bateman *v.* Ramsay, Sau. & Sc. 459.

Canada.— Dickson *v.* McMahon, 14 U. C. C. P. 521.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 72 *et seq.*

"A collusive suit is one in which the parties who occupy ostensibly adverse positions are, in fact, in accord, and whose real though concealed purpose is to accomplish the same result." Hyman *v.* Stadler, 63 Miss. 362, 370.

53. Haas *v.* Haas, 35 La. Ann. 885.

54. See also *infra*, XI, D, 1; XIII, A, 4, (I), (A).

55. *California.*— Anderson *v.* Lassen County Bank, 140 Cal. 695, 74 Pac. 287.

Georgia.— Beach *v.* Atkinson, 87 Ga. 288, 13 S. E. 591.

Illinois.—French *v.* Commercial Nat. Bank, 199 Ill. 213, 65 N. E. 252 [*affirming* 97 Ill. App. 533].

Indiana.— Phelps *v.* Smith, 116 Ind. 387, 17 N. E. 602, 19 N. E. 156.

Kentucky.— Wilson *v.* Snelling, 3 Bush 322.

Louisiana.— Anheuser-Busch Brewing Assoc. *v.* McGowan, 49 La. Ann. 630, 21 So. 766.

Massachusetts.— Sartwell *v.* North, 144 Mass. 188, 10 N. E. 824; Lamb *v.* Smith, 132 Mass. 574; Pierce *v.* Jackson, 6 Mass. 242; Pierce *v.* Partridge, 3 Metc. 44; Goddard *v.* Divoll, 1 Metc. 413.

New Jersey.— Squier *v.* Mechanics' Nat. Bank, 35 N. J. Eq. 344; Mechanics' Nat. Bank *v.* H. C. Burnet Mfg. Co., 33 N. J. Eq. 486. And see Wandling *v.* Thompson, 41 N. J. L. 309.

New York.— Kingsley *v.* Bath First Nat. Bank, 31 Hun 329 (insolvent corporation allowing judgments to be taken against it before expiration of the time allowed for answering); Pitney *v.* Leonard, 1 Paige 461 (in ejectment).

with a design to hinder, delay, or defraud him.[56] A judgment recovered against a debtor is not necessarily shown to be collusive and fraudulent by the fact that defendant voluntarily appeared in the action,[57] or did not defend,[58] although he defended actions by other creditors against him,[59] or by the fact that after the recovery of the judgment he released or waived the right of appeal or review, even for a consideration paid to him,[60] or to hasten collection of the judgment waived inquisition or stay of execution for a consideration.[61]

(II) *CONFESSION OF JUDGMENT* — (A) *In General.* A collusive and fraudulent confession of judgment and execution thereon, as in the case where a creditor obtains a confession of judgment, not for the purpose of collecting a *bona fide* debt, but to aid the debtor in covering up his property, or in hindering, delaying, or defrauding other creditors, will be set aside,[62] even, in the case of fraudulent

Pennsylvania.— Kohl *v.* Sullivan, 140 Pa. St. 35, 21 Atl. 247; Clark *v.* Douglass, 62 Pa. St. 408 (holding that creditors can attack a judgment on a verdict by evidence that it was taken by consent or default, or that the defense set up was a sham); Hall *v.* Hamlin, 2 Watts 354; Gilbert *v.* Hoffman, 2 Watts 66, 26 Am. Dec. 103; Foulk *v.* McFarlane, 1 Watts & S. 297, 37 Am. Dec. 467; Gaskill *v.* Benton, 14 Phila. 487. And see Miners' Trust Co. Bank *v.* Roseberry, 81 Pa. St. 309; *In re* Dougherty, 9 Watts & S. 189, 42 Am. Dec. 326.

Wisconsin.— Bloodgood *v.* Meissner, 84 Wis. 452, 54 N. W. 772 (by statute); Nassauer *v.* Techner, 65 Wis. 388, 27 N. W. 40.

United States.— Sowles *v.* Witters, 55 Fed. 159, judgment by consent where there was no liability.

England.— Edison Gen. Electric Co. *v.* Westminster, etc., Tramway Co., [1897] A. C. 193, 66 L. J. P. C. 36, 75 L. T. Rep. N. S. 438, 4 Manson 244.

Canada.— King *v.* Duncan, 29 Grant Ch. (U. C.) 113; Knox *v.* Travers, 23 Grant Ch. (U. C.) 41; Stevenson *v.* Nichols, 13 Grant Ch. (U. C.) 489; McDonald *v.* Boice, 12 Grant Ch. (U. C.) 48; Dickson *v.* McMahon, 14 U. C. C. P. 521 (judgment and execution in excess of amount due, with other suspicious circumstances); Bevan *v.* Wheat, 14 U. C. C. P. 51.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 72 *et seq.*, 399, 401, 556, 672.

A judgment by default for an amount in excess of plaintiff's claim has been held fraudulent and void as against the defendant's creditors. Peirce *v.* Partridge, 3 Metc. (Mass.) 44.

Execution of a judgment by default, by levy upon lands in possession adverse to the execution debtor, was held not to be a "fraudulent conveyance" by him to the execution creditor, within the Vermont statute of 1807. Farnsworth *v.* Converse, 1 D. Chipm. (Vt.) 139.

Preference by allowing judgment by default see *infra*, XI, D, 1.

Keeping judgment open after satisfaction. — Booth *v.* Moret, 1 Brev. (S. C.) 216.

The fact that an execution is taken out with a view to hinder and delay creditors, and that it has such effect, does not render the judgment invalid as against creditors, where it was valid in its inception. Wilder *v.* Winne, 6 Cow. (N. Y.) 284.

56. Anheuser-Busch Brewing Assoc. *v.* McGowan, 49 La. Ann. 630, 21 So. 766.

Foreign judgment.— In an action of ejectment, a judgment of another court, on which defendant's title is founded, may be impeached on the ground of fraud. Hall *v.* Hamlin, 2 Watts (Pa.) 354.

Reference to ascertain amount due on impeached judgment.— Stevenson *v.* Nichols, 13 Grant Ch. (U. C.) 489.

57. McGoldrick *v.* Slevin, 43 Ind. 522; Bell *v.* Throop, 140 Pa. St. 641, 21 Atl. 408; McConihay *v.* Wright, 121 U. S. 201, 7 S. Ct. 940, 30 L. ed. 932. *Compare* Wright *v.* Mack, 95 Ind. 332, where there was additional evidence of collusion. And see Mathews *v.* Mack, 95 Ind. 431.

Contra, under statute.— Bass *v.* Woolff, 88 Ga. 427, 14 S. E. 589.

58. Snarr *v.* Waddell, 24 U. C. Q. B. 165. *Contra*, where there were also other suspicious circumstances. Bevan *v.* Wheat, 14 U. C. C. P. 51.

Failure to set up the statute of limitations, which would have been a bar, and suffering judgment by default, does not show collusion or fraud. Sloan *v.* Whalen, 15 U. C. C. P. 319. See also Allen *v.* Smith, 129 U. S. 465, 9 S. Ct. 338, 32 L. ed. 732.

59. Snarr *v.* Waddell, 24 U. C. Q. B. 165.

60. Boylston *v.* Carver, 11 Mass. 515; Inglehart *v.* Thousand Island Hotel Co., 109 N. Y. 454, 17 N. E. 358; Shibler *v.* Hartley, 201 Pa. St. 286, 50 Atl. 950, 88 Am. St. Rep. 811.

61. Shibler *v.* Hartley, 201 Pa. St. 286, 50 Atl. 950, 88 Am. St. Rep. 811.

62. *Alabama.*— Davidson *v.* Watts Min. Car Wheel Co., 121 Ala. 591, 25 So. 758 (agreement for benefit of debtor); Weingarten *v.* Marcus, 121 Ala. 187, 25 So. 852.

California.— Anderson *v.* Lassen County Bank, 140 Cal. 695, 74 Pac. 287 (judgment for more than is due); Wilcoxon *v.* Burton, 27 Cal. 228, 87 Am. Dec. 66.

Delaware.— Newell *v.* Morgan, 2 Harr. 225; Taggart *v.* Philips, 5 Del. Ch. 237.

Illinois.— French *v.* Commercial Nat. Bank, 199 Ill. 213, 65 N. E. 252; Argo *v.* Fox, 95 Ill. App. 610; Atlas Nat. Bank *v.* More, 40 Ill. App. 336 [*affirmed* in 152 Ill. 528, 38 N. E. 684, 43 Am. St. Rep. 274].

intent, although the debt may be actually due;[63] and such a judgment may be

Louisiana.— Marx *v.* Meyer, 50 La. Ann. 1229, 23 So. 923; Muse *v.* Yarborough, 11 La. 521.

Maryland.— Citizens' F., etc., Ins. Co. *v.* Wallis, 23 Md. 173.

Missouri.— Benne *v.* Schnecko, 100 Mo. 250, 13 S. W. 82; Field *v.* Liverman, 17 Mo. 218; Loth *v.* Faconesowich, 22 Mo. App. 68.

Nebraska.— Pitkin *v.* Burnham, 62 Nebr. 385, 87 N. W. 160, 89 Am. St. Rep. 763, 55 L. R. A. 280.

New Jersey.— Shallcross *v.* Deats, 43 N. J. L. 177; Wandling *v.* Thompson, 41 N. J. L. 309; Metropolitan Bank *v.* Durant, 22 N. J. Eq. 35; Jones *v.* Naughright, 10 N. J. Eq. 298.

New York.— Gale *v.* Tode, 148 N. Y. 270, 42 N. E. 673 [*reversing* on other grounds 74 Hun 542, 26 N. Y. Suppl. 633] (by statute); Hardt *v.* Schwab, 72 Hun 109, 25 N. Y. Suppl. 402; Wood *v.* Mitchell, 53 Hun 451, 6 N. Y. Suppl. 232, 17 N. Y. Civ. Proc. 346 (confession of judgment in favor of infants as upon contract, for a cause of action in tort, without the appointment of a guardian *ad litem*); Williams *v.* Brown, 4 Johns. Ch. 682; Burns *v.* Morse, 6 Paige 108 (holding that if a judgment is confessed for a debt which is not then due and payable, or for more than is then actually due, or if the whole amount is fully secured upon real estate and the judgment is given for the purpose of covering the personal estate also, so as to prevent a creditor from obtaining satisfaction of his debt out of such property, and with a view to defraud him, the whole judgment and the proceedings under it are fraudulent and void as against him, and must be set aside); Pitney *v.* Leonard, 1 Paige 461 (confession of judgment in ejectment).

North Carolina.— Rollins *v.* Henry, 78 N. C. 342 (consent decree in action to recover land); Leroy *v.* Dickenson, 11 N. C. 223.

Ohio.— Bloomingdale *v.* Stein, 42 Ohio St. 168, execution of note without consideration, with a warrant of attorney to confess judgment, entry of judgment thereon, and levy of execution.

Pennsylvania.— Clark *v.* Douglass, 62 Pa. St. 408; Bunn *v.* Ahl, 29 Pa. St. 387, 72 Am. Dec. 639 (holding that where a judgment is given and received for a fraudulent purpose, the giving of the judgment is such an act done in pursuance of the fraudulent intent as renders it voidable by any person who is in a position to question it); Serfoss *v.* Fisher, 10 Pa. St. 184; Nusbaum *v.* Louchheim, 1 Pa. Cas. 106, 1 Atl. 391; Yocum *v.* Kehler, 1 Walk. 84; Campbell *v.* Kent, 3 Penr. & W. 72; Ditchburn *v.* Jermyn, etc., Co-operative Assoc., 3 Pa. Dist. 635; Gaskill *v.* Benton, 14 Phila. 487; Building Assoc. *v.* O'Connor, 3 Phila. 453. See also Taylor's Appeal, 45 Pa. St. 71, where a firm entered into collusion with a third person to defraud its creditors, and in pursuance thereof executed its judgment notes payable to such person's creditors, but without having had any dealings or communications with such creditors.

South Carolina.— Beattie *v.* Pool, 13 S. C. 379.

Tennessee.— Hickerson *v.* Balnton, 2 Heisk. 160.

Wisconsin.— Bloodgood *v.* Meissner, 84 Wis. 452, 54 N. W. 772; Nassauer *v.* Techner, 65 Wis. 388, 27 N. W. 40.

United States.— Sowles *v.* Witters, 55 Fed. 159; Smith *v.* Schwed, 9 Fed. 483.

England.— Edison Gen. Electric Co. *v.* Westminster Tramway Co., [1897] A. C. 193, 66 L. J. P. C. 36, 75 L. T. Rep. N. S. 438, 4 Manson 244 (holding also that if the fraudulent intent is proved, it is immaterial that the consent to the judgment was given under pressure); Bateman *v.* Ramsay, Sau. & Sc. 459.

Canada.— Martin *v.* McAlpine, 8 Ont. App. 675; McGee *v.* Baird, 3 Ont. Pr. 9; Swayne *v.* Ruttan, 6 U. C. C. P. 399; Servos *v.* Tobin, 2 U. C. Q. B. 530; Knapp *v.* Forrest, 6 U. C. Q. B. O. S. 577 (gross usury in taking confession of judgment); Bergin *v.* Pindar, 3 U. C. Q. B. O. S. 574 (fictitious debt).

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 72 *et seq.*, 399, 400, 556, 672.

A judgment confessed by an insolvent or indebted man for more than is due is *prima facie* fraudulent. Clark *v.* Douglass, 62 Pa. St. 408.

Judgment in favor of indorser.— Before maturity of a note held by a bank which has discounted it for the maker, there is nothing due from the maker to an indorser, and a confession of judgment on the note by the maker in favor of the indorser will be set aside at the instance of a subsequent judgment creditor of the maker. Forrester *v.* Strauss, 18 N. Y. Suppl. 41. See *infra*, VIII, A, 7, b.

Void or voidable.— Judgment confessed for the purpose and with the intent to defraud creditors of the judgment debtor, the court having jurisdiction over the parties and the subject-matter, is not absolutely void, but voidable only at the instance of the person or persons attempted to be defrauded, in a proper proceeding brought for the purpose of avoiding such judgment. Pitkin *v.* Burnham, 62 Nebr. 385, 87 N. W. 160, 89 Am. St. Rep. 763, 55 L. R. A. 280.

Decree by consent creating lien.— Union Bank *v.* Marin, 3 La. Ann. 34, in proceeding by children against their father.

Judgment confessed to secure future advances see *infra*, VIII, A, 7, a, (v), note 43.

An action by a judgment creditor to set aside executions issued on judgments confessed by the debtor before the recovery of plaintiff's judgment is not a collateral attack on the judgments on which such executions were issued. Forrester *v.* Strauss, 18 N. Y. Suppl. 41.

63. Jones *v.* Naughright, 10 N. J. Eq. 298; Hardt *v.* Schwab, 72 Hun (N. Y.) 109, 25 N. Y. Suppl. 402 (may compel judgment

collaterally attacked.[64] A confession of judgment may be rendered fraudulent as against subsequent as well as existing creditors.[65] The confession of judgment must be either voluntary or with fraudulent intent participated in or known to the creditor in whose favor it is confessed, and in the absence of statutory prohibition the mere fact that its effect is to give a preference and thereby hinder or delay other creditors is not enough.[66] Furthermore the confession of judgment

creditor to refund); Bunn *v.* Ahl, 29 Pa. St. 387, 72 Am. Dec. 639 (holding that a judgment confessed for an amount honestly due is voidable by defendant's creditors, if it was given and received for the purpose of forcing such creditors into a compromise of their claims, even though it was never used for that purpose, and that such a judgment originally given and received for the purpose of defrauding creditors cannot even be used as against such creditors, to collect the amount due to the party to whom it was so given); Smith *v.* Schwed, 9 Fed. 483. See also *supra*, VII, C.

Partial invalidity or illegality of consideration see *infra*, VIII, C, 1.

64. See *infra*, XIV, B, 3.

65. Field *v.* Liverman, 17 Mo. 218 (where the judgment creditor directed the sheriff to hold up his execution and not to proceed until further orders); Serfoss *v.* Fisher, 10 Pa. St. 184 (holding that a judgment voluntarily confessed by one who is not indebted, with intent to defeat a supposed liability which did not exist, is rendered fraudulent as to subsequent creditors by reviving it by scire facias and issuing an execution thereon); Campbell *v.* Kent, 3 Penr. & W. (Pa.) 72.

A judgment note given without consideration by a merchant in contemplation of insolvency is fraudulent, not only as to creditors of the maker existing at the time of execution of the note, but also as to those existing at the time of its attempted enforcement. Chronister *v.* Anderson, 73 Ill. App. 524.

66. *Alabama.*— McBroom *v.* Rives, 1 Stew. 72, holding that the owner of a deed of trust may, on discovering a defect therein, take judgment by confession against his debtor and sell the property on execution.

California.— Pond *v.* Davenport, 44 Cal. 481.

Illinois.— Weigley *v.* Matson, 125 Ill. 64, 16 N. E. 881, 8 Am. St. Rep. 335 [*affirming* 24 Ill. App. 178].

Louisiana.— Ellis *v.* Fisher, 10 La. Ann. 482.

Minnesota.— Atwater *v.* Manchester Sav. Bank, 45 Minn. 341, 48 N. W. 187, 12 L. R. A. 741.

Missouri.— Hard *v.* Foster, 98 Mo. 297, 11 S. W. 760.

New Jersey.— Den *v.* Gaston, 25 N. J. L. 615; Jones *v.* Naughright, 10 N. J. Eq. 298.

New York.— Rutherford *v.* Schattman, 119 N. Y. 604, 23 N. E. 440; Barker *v.* Franklin, 37 Misc. 292, 75 N. Y. Suppl. 305.

North Carolina.— Merchants' Nat. Bank *v.* Newton Cotton Mills, 115 N. C. 507, 20 S. E. 765; Rollins *v.* Henry, 78 N. C. 342 (consent decree in action to recover land); Finley *v.* Smith, 24 N. C. 225.

Pennsylvania.— Page *v.* Williamsport Suspender Co., 191 Pa. St. 511, 43 Atl. 345; Lowry *v.* Coulter, 9 Pa. St. 349 (confession of judgment without intervention of the creditor and immediate issue of execution at the creditor's request); Kline *v.* O'Donnell, 11 Pa. Co. Ct. 38; Ballou *v.* Minard, 2 Brewst. 560 (giving judgment note).

South Carolina.— Drake *v.* Steadman, 46 S. C. 474, 24 S. E. 458.

England.— Meux *v.* Howell, 4 East 1.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 73; and, generally, JUDGMENTS.

Preference of creditor.— A judgment confessed by an insolvent to secure a *bona fide* creditor, although it be intended to, and has the effect of, giving him a preference over other creditors, is not fraudulent in law. Braden *v.* O'Neil, 183 Pa. St. 462, 38 Atl. 1023, 63 Am. St. Rep. 761. See *infra*, XI.

Husband and wife.— A judgment by confession of a husband in favor of his wife for a *bona fide* indebtedness incurred when the husband had no creditors is valid as against the husband's creditors. Logue *v.* Atherholt, 7 Pa. Dist. 365.

A cognovit may be taken as a continuing security for future acceptances and will be good as against other creditors. Potter *v.* Pickle, 2 Ont. Pr. 391.

Surety obtaining judgment before paying. — Where plaintiffs had incurred liabilities by joining with a trader in notes, and took a judgment by confession from him before they had discharged such liabilities, or before any actual debt was owing from such trader to them, it was held that such transaction was not necessarily void as against the creditors of such trader, and that it was properly left to the jury to say whether it was *bona fide*. Swayne *v.* Ruttan, 6 U. C. C. P. 399.

A provision for the creditor's attorney's fees in a warrant of attorney to confess judgment is not fraudulent as to other creditors if the fees are not unreasonable. Weigley *v.* Matson, 125 Ill. 64, 16 N. E. 881, 8 Am. St. Rep. 335 [*affirming* 24 Ill. App. 178]; Pirie *v.* Stern, 97 Wis. 150, 72 N. W. 370, 65 Am. St. Rep. 103.

Contingent liability of indorser.— A judgment confessed by an insolvent is not fraudulent in law because the amount inserted is sufficient to cover the debtor's contingent liability on indorsements as well as his actual indebtedness. Braden *v.* O'Neil, 183 Pa. St. 462, 38 Atl. 1023, 63 Am. St. Rep. 761. See *infra*, VIII, A, 7.

Several confessions of judgment.— A judgment confessed for a *bona fide* debt is not rendered fraudulent and invalid because of the

must be prejudicial to the complaining creditor.[67] A third person has no right, in the absence of fraud, to object to a judgment by confession on the ground that it was confessed without any authority.[68]

(B) *Statutory Requirements.* In some jurisdictions statutes expressly require a confession of judgment to be accompanied by certain formalities, such as an affidavit or statement of the indebtedness, the particulars of the indebtedness, good faith, etc., so that failure to comply with the requirements will render a judgment by confession *prima facie*, or, in some jurisdictions, conclusively fraudulent and void as against both existing and subsequent creditors.[69]

c. Foreclosure of Mortgages and Deeds of Trust. A collusive and fraudulent sale under foreclosure of a mortgage or deed of trust on real or personal property, either under a power therein or by legal proceedings, will be set aside at the suit of creditors of the mortgagor or grantor.[70]

confession of other judgments with fraudulent intent, where the transactions are not connected, but separate and distinct. Illinois Watch Co. *v.* Payne, 11 N. Y. Suppl. 408 [*affirmed* in 132 N. Y. 597, 30 N. E. 1151]. See *infra*, III, C, 3.

67. Bird *v.* Folger, 17 U. C. Q. B. 536, holding that where goods had been attached, a creditor obtaining a confession of judgment from the debtor without service of process, and execution upon it before the attaching creditors, did not obtain priority, and therefore on the affidavits filed no case was made out for setting aside the judgment so obtained for fraud or collusion.

68. Chicago Tip, etc., Co. *v.* Chicago Nat. Bank, 74 Ill. App. 439.

69. *California.*—Pond *v.* Davenport, 44 Cal. 481, 45 Cal. 225; Wilcoxson *v.* Burton, 27 Cal. 228, 87 Am. Dec. 66; Cordier *v.* Schloss, 12 Cal. 143, 18 Cal. 576; Richards *v.* McMillan, 6 Cal. 419, 65 Am. Dec. 521.

Iowa.— Miller *v.* Clarke, 37 Iowa 325; Vanfleet *v.* Phillips, 11 Iowa 558; Bernard *v.* Douglas, 10 Iowa 370; Kennedy *v.* Lowe, 9 Iowa 580.

Minnesota. — Atwater *v.* Manchester Sav. Bank, 45 Minn. 341, 48 N. W. 187, 12 L. R. A. 741; Wells *v.* Gieseke, 27 Minn. 478, 8 N. W. 380, void in part only.

Missouri.— Claflin *v.* Dodson, 111 Mo. 195, 19 S. W. 711 (statement held sufficient); Hard *v.* Foster, 98 Mo. 297, 11 S. W. 760 (clerical error does not invalidate); How *v.* Dorscheimer, 31 Mo. 349; Bryan *v.* Miller, 28 Mo. 32, 75 Am. Dec. 107 (amendment of statement); Teasdale Commission Co. *v.* Van Hardenberg, 53 Mo. App. 326; Stern *v.* Mayer, 19 Mo. App. 511; McHenry *v.* Shephard, 2 Mo. App. 378.

New Jersey.— Sheppard *v.* Sheppard, 10 N. J. L. 250; Cliver *v.* Applegate, 5 N. J. L. 479.

New York.— Ingram *v.* Robbins, 33 N. Y. 409, 88 Am. Dec. 393; Neusbaum *v.* Keim, 24 N. Y. 325; Lanning *v.* Carpenter, 20 N. Y. 447; Dunham *v.* Waterman, 17 N. Y. 9, 72 Am. Dec. 406 [*reversing* 3 Duer 166); Chappel *v.* Chappel, 12 N. Y. 215, 64 Am. Dec. 496; Gandall *v.* Finn, 2 Abb. Dec. 232, 1 Keyes 217, 33 How. Pr. 444; Acker *v.* Acker, 1 Abb. Dec. 1, 1 Keyes 291; Flour City Nat. Bank *v.* Doty, 41 Hun 76; Claflin *v.* Sanger, 31 Barb. 36; Clements *v.* Gerow, 30 Barb. 325; Winnebrenner *v.* Edgerton, 30 Barb. 185; Butts *v.* Schieffelin, 5 N. Y. Civ. Proc. 415; Marks *v.* Reynolds, 12 Abb. Pr. 403, 20 How. Pr. 338; Claflin *v.* Sanger, 11 Abb. Pr. 338; McKee *v.* Tyson, 10 Abb. Pr. 392; Thompson *v.* Van Vechten, 5 Abb. Pr. 458; Moody *v.* Townsend, 3 Abb. Pr. 375; Kinderhook Bank *v.* Jenison, 15 How. Pr. 41; Von Beck *v.* Shuman, 13 How. Pr. 472; Bonnell *v.* Henry, 13 How. Pr. 142; Hoppock *v.* Donaldson, 12 How. Pr. 141; Purdy *v.* Upton, 10 How. Pr. 494; Mann *v.* Brooks, 7 How. Pr. 449; Seaving *v.* Brinkerhoff, 5 Johns. Ch. 329.

North Carolina.— Davidson *v.* Alexander, 84 N. C. 621.

Utah.— Bacon *v.* Raybould, 4 Utah 357, 10 Pac. 481, 11 Pac. 510.

Washington.— Puget Sound Nat. Bank *v.* Levy, 10 Wash. 499, 39 Pac. 142, 45 Am. St. Rep. 803.

Wisconsin.— Thompson *v.* Hintgen, 11 Wis. 112.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 74, 75. And see, generally, JUDGMENTS.

70. *Illinois.*— Laflin *v.* Central Pub. House, 52 Ill. 432, holding that a statute rendering liable to attachment property sold with intent to hinder or delay creditors includes mortgaged chattels so sold by fraudulent collusion between the mortgagor and mortgagee as to prevent any surplus proceeds from arising, although there may have been no fraud in giving or taking the mortgage.

Indiana.— Wright *v.* Mack, 95 Ind. 332.

Iowa.— Milliman *v.* Eddie, 115 Iowa 530, 88 N. W. 964, holding a judgment of foreclosure of a mortgage, which had been paid but assigned to the mortgagor's children, to be in effect a voluntary confession of judgment, and fraudulent and void as against the mortgagor's creditors.

Missouri.— Woodard *v.* Martin, 106 Mo. 324, 17 S. W. 308, holding that the fact that a trust deed was itself valid and made in good faith will not protect a purchaser thereunder, as against the grantor's creditors, where the sale and purchase were collusively and fraudulently made for the purpose of covering up the grantor's equity.

New York.— Fuller *v.* Brown, 35 Hun 162,

d. Execution and Other Judicial Sales. A collusive and fraudulent execution or other judicial sale with intent to hinder, delay, or defraud creditors of the execution debtor by covering up property in another's name or securing it or any part thereof to the debtor himself or his family, particularly where he pays the whole or part of the purchase-money, or by giving the execution creditor more than he is entitled to, will be set aside at the suit of his creditors.[71] The use of

assignment and foreclosure of mortgage to cut off liens to the prejudice of the mortgagor's creditors.

South Carolina.— Magruder *v.* Clayton, 29 S. C. 407, 7 S. E. 844. *Compare* Bickley *v.* Norris, 2 Brev. 252.

United States.— James *v.* Milwaukee, etc., R. Co., 6 Wall. 752, 18 L. ed. 885; Watson *v.* Bonfils, 116 Fed. 157, 53 C. C. A. 535.

Canada.— King *v.* Duncan, 29 Grant Ch. (U. C.) 113 (fictitious breach of chattel mortgage, and judgment before expiration of period of credit); Watson *v.* McCarthy, 10 Grant Ch. (U. C.) 416 (setting aside a sale under the power in a mortgage as collusive and tending to delay creditors, within 13 Eliz. c. 5).

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 72 *et seq.*, 878.

Compare Danforth *v.* Roberts, 20 Me. 307.

A sale of a railroad under a mortgage to secure bonds was held fraudulent as against the company's creditors where the notice grossly misstated the sum due. James *v.* Milwaukee, etc., R. Co., 6 Wall. (U. S.) 752, 18 L. ed. 885.

Facts not showing fraud.— Creditors cannot reach land which their debtor owned, where one having a mortgage thereon foreclosed it, without any fraudulent design, and, after expiration of the time to redeem, sold to a third person, although the mortgagee bid in the property for a sum much below its value, and sold it cheap, and although the purchaser from him bought at the suggestion of the debtor, and advanced him money to carry on business there, it not appearing that the debtor contributed anything to the purchase, or was promised any interest in the property or its proceeds. Reeves *v.* Miller, 121 Mich. 311, 80 N. W. 19. See also Van Riswick *v.* Spalding, 117 U. S. 370, 6 S. Ct. 788, 29 L. ed. 913.

71. *Alabama.*— Forrest *v.* Camp, 16 Ala. 642.

Arkansas.— Miller *v.* Fraley, 21 Ark. 22, holding that where lands are sold under execution and purchased by a party at the request and with the means of defendant in the execution, upon an agreement to hold them for his use and benefit, although by the sale, purchase, and conveyance of the sheriff the purchaser obtains the legal title to the lands, his title is fraudulent and void as against the creditors of defendant, and, in equity, he holds the lands as trustee for their benefit; and if he sells and conveys them to another, the title of his vendee is equally worthless and void, if he purchased with notice of the fraud.

Delaware.— Pennington *v.* Chandler, 5 Harr. 394.

Georgia.— Smith *v.* Dobbins, 87 Ga. 303, 33 S. E. 496.

Indiana.— Buck *v.* Voreis, 89 Ind. 116.

Kentucky.— Yoder *v.* Standiford, 7 T. B. Mon. 478, agreement between debtor and purchaser at sheriff's sale to extend the time to redeem.

Louisiana.— Lee *v.* Whitehead, 8 La. Ann. 81; Dawson *v.* Holbert, 4 La. Ann. 36; Lawrence *v.* Young, 1 La. Ann. 297, consent of insolvent debtor to dispense with forms of law.

Mississippi.— Burke *v.* Murphy, 27 Miss. 167; White *v.* Trotter, 14 Sm. & M. 30, 53 Am. Dec. 112; Stovall *v.* Farmers', etc., Bank, 8 Sm. & M. 305, 47 Am. Dec. 85.

Missouri.—Morrison *v.* Herrington, 120 Mo. 665, 25 S. W. 568; Dallam *v.* Renshaw, 26 Mo. 533 (holding that if plaintiff in an execution, acting in concert with defendant therein, purchases in the property of defendant with a view to cover up the same from the latter's creditors, the transaction is fraudulent and the other creditors may treat the execution sale and the sheriff's deed as nullities); Carter *v.* Shotwell, 42 Mo. App. 663. See also Benne *v.* Schnecko, 100 Mo. 250, 13 S. W. 82.

New York.— Decker *v.* Decker, 108 N. Y. 128, 15 N. E. 307; Crary *v.* Sprague, 12 Wend. 41, 27 Am. Dec. 110; Wilder *v.* Fondey, 4 Wend. 100; Burnell *v.* Johnson, 9 Johns. 343.

North Carolina.— Worthy *v.* Caddell, 76 N. C. 82 (purchase at grossly inadequate price); Den *v.* Erwin, 18 N. C. 569 (holding that if defendant in an execution places money in the hands of another person for the purpose of purchasing his own property, at a sale under the execution, with an intent to defraud his creditors, and that person buys it and takes a deed from the sheriff, defendant is still the owner of it, and another of his judgment creditors may at law subject it to the satisfaction of his debt, although the first execution be for a *bona fide* debt, and the sheriff who sold under it is not a party to the fraudulent contrivance of the debtor).

Ohio.— Edgington *v.* Williams, Wright 439.

Pennsylvania.— Hall *v.* Hamlin, 2 Watts 354; Mitchell *v.* Gendell, 7 Phila. 107.

South Carolina.— Booth *v.* Moret, 1 Brev. 216, sale on execution after payment of judgment.

Texas.— Smith *v.* Boquet, 27 Tex. 507.

Wisconsin.— Reynolds *v.* Vilas, 8 Wis. 471, 76 Am. Dec. 238, holding that if a sale and conveyance be made by a sheriff upon execution, by collusion of the parties, with the intent to defraud prior or subsequent purchasers for a valuable consideration, the parties thereto can no more avoid the statute

sheriff's deeds and other legal instruments to effect a fraudulent conveyance of property by a debtor is no bar to its avoidance.[72] The fact that a transfer of a debtor's property with intent to defraud his creditors is accomplished through the agency of a valid judgment lawfully enforced does not alter its fraudulent character or enable it to defy justice.[73] Preventing competitive bidding at an execution or other judicial sale may render it fraudulent and void as against other creditors.[74] The rule above stated does not apply where the purchaser acted in good faith and did not participate in or know of the fraudulent intent of the debtor,[75] or where there is no fraud, although the purchaser may afterward convey, or cause the sheriff to convey, to the debtor or his wife or children, or in trust for them.[76] And an execution sale is not necessarily fraudulent as against the debtor's creditors because of agreements between the purchaser and the debtor to the advantage of the latter.[77]

e. Attachment. A collusive and fraudulent attachment or sale thereunder will be set aside at the suit of creditors of the attaching defendant who are

of frauds by this ceremony of the sale of the sheriff than if the deed had been given directly by the owner of the land to the grantee with the like intent.

United States.— Johnson *v.* Waters, 111 U. S. 640, 4 S. Ct. 619, 28 L. ed. 547.

Canada.— Servos *v.* Tobin, 2 U. C. Q. B. 530; Doe *v.* Vankoughnet, 5 U. C. Q. B. O. S. 246.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 72, 79–81, 878.

Retention of possession by debtor.— Where personal property is purchased at sheriff's or marshal's sale, and is left by the vendee in the possession of defendant in the execution, and permitted to so remain for two years or more, the sale will be at least *prima facie* fraudulent as to creditors. Stovall *v.* Farmers', etc., Bank, 8 Sm. & M. (Miss.) 305, 47 Am. Dec. 85. See also Buck *v.* Voreis, 89 Ind. 116. And see *infra*, IX.

Title of purchaser.— A fraudulent vendee under a collusive judgment and execution sale gains no title to the land, nor interest in it, notwithstanding an innocent creditor may by that very sale obtain a good title to the money. It shall be a good sale as to the creditor to entitle him to receive the money, and yet no sale as to the fraudulent vendee, to enable him to shelter the land against pursuit. Foulk *v.* McFarlane, 1 Watts & S. (Pa.) 297, 37 Am. Dec. 467.

A sale of land by an administrator to a trustee, with the intention of placing the property out of the reach of creditors, for the benefit of the heirs, is fraudulent and void; and even a confirmation of the sale by the court of probate gives no validity to the act in favor of the parties. Piatt *v.* St. Clair, 6 Ohio 227, Wright 261.

A sale on execution to the administrator of a judgment debtor, without consideration, to hold on trust for the creditors of the estate while the value of the property increases, is fraudulent as delaying creditors. Hays *v.* Heidelberg, 9 Pa. St. 203.

72. Forrest *v.* Lyon, 16 Ala. 642; Buck *v.* Voreis, 89 Ind. 116; Wilder *v.* Fondey, 4 Wend. (N. Y.) 100; Watson *v.* Bonfils, 116 Fed. 157, 53 C. C. A. 535.

73. Decker *v.* Decker, 108 N. Y. 128, 15 N. E. 307.

74. Saxton *v.* Seiberling, 48 Ohio St. 554, 29 N. E. 179; Simonton *v.* Davis, 4 Strobh. (S. C.) 133; Carson *v.* Law, 2 Rich. Eq. (S. C.) 296; Johnson *v.* Waters, 111 U. S. 640, 4 S. Ct. 619, 28 L. ed. 547, executor's sale under orders of the probate court. See also EXECUTIONS, 17 Cyc. 1274; and, generally, JUDICIAL SALES.

75. H. B. Claflin Co. *v.* Lass, 17 Colo. App. 156, 67 Pac. 910; Holmes *v.* Barbin, 15 La. Ann. 553. If a judgment is valid in its inception, the taking out of an execution thereon is not rendered fraudulent as to creditors merely because it is taken with a view to hinder and delay them. Wilder *v.* Winne, 6 Cow. (N. Y.) 284.

A purchase by an attorney of his client's land at an execution sale in the proceedings in which the attorney is employed is not presumptively fraudulent as to the client's creditors. Fisher *v.* McInerney, 137 Cal. 28, 69 Pac. 622, 907, 92 Am. St. Rep. 68.

76. McLaughlin *v.* McLaughlin, 91 Pa. St. 462; McMahan *v.* Dawkins, 22 S. C. 314.

Keeping the certificate of an execution sale in force by advancing money to a third person to enable him to purchase and take an assignment of the certificate is not, in the absence of actual fraud, invalid as against subsequent creditors. Rankin *v.* Arndt, 44 Barb. (N. Y.) 251.

77. Smith *v.* Dobbins, 87 Ga. 303, 13 S. E. 496 (holding that an execution sale was not fraudulent *per se* as against the insolvent debtor's creditors, because of an agreement between the heir and the purchaser by which the latter gives the former a year's time to refund the purchase-money with interest, and agrees on his doing so to convey the land to him, the plaintiff in fieri facias not participating in the agreement; or because of a stipulation that the debtor should have the crop then upon the land without paying for it; or because the purchaser afterward pays the debtor or his assign for a release from the agreement); Chicago, etc., R. Co. *v.* Watson, 113 Ill. 195; Parsons *v.* Black, 2 Grant (Pa.) 339.

hindered, delayed, or defrauded thereby.[78] A writ of attachment issued collusively between creditor and debtor for the purpose of giving a prohibited preference, when the debtor is insolvent, or with intent to effect a fraudulent transfer of the debtor's property to the attaching plaintiff, is a void suit or proceeding, within the meaning of a statute.[79] And it is an attempt to fraudulently transfer the attached property, within the meaning of a statute.[80] That an attachment is sued out without just ground therefor is a wrong against the debtor, but such attachment is not vulnerable to attack on that ground by ordinary bill by other creditors.[81]

5. Organization of Corporation. A conveyance or transfer in fraud of creditors may be effected by the fraudulent organization of a corporation and the transfer of property to it in exchange for stock, or by fraudulent reorganization or consolidation. In such a case the property, or the stock representing it, may be reached and subjected by creditors to the satisfaction of their claims,[82] except

78. *Louisiana.*—Newman *v.* Baer, 50 La. Ann. 323, 23 So. 279; Haas *v.* Haas, 35 La. Ann. 885.

Massachusetts.— Pierce *v.* Jackson, 6 Mass. 242.

Mississippi.— Henderson *v.* Thornton, 37 Miss. 448, 75 Am. Dec. 70.

Missouri.— Norton *v.* Thiebes Stierling Music Co., 82 Mo. App. 216.

Texas.— Zadik *v.* Schafer, 77 Tex. 501, 14 S. W. 153.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 82, 399, 883.

Attachments sustained.— Cartwright *v.* Bamberger, 99 Ala. 622, 14 So. 477; Hyman *v.* Stadler, 63 Miss. 362.

Preference by suffering attachment see *infra*, XI, D, 1.

The compromising of a suit after obtaining an attachment for less than was alleged to be due is no evidence that the prosecution of the attachment was fraudulent as to the other creditors of the defendant. Alexander *v.* Hemrich, 4 Wash. 727, 31 Pac. 21.

An attachment which does not hinder or delay creditors, as where the debtor has no property to be attached, is not within the rule. Norton *v.* Thiebes Stierling Music Co., 82 Mo. App. 216.

79. Under Ala. Code, § 2156 (1735). See Butler *v.* Feeder, 130 Ala. 604, 31 So. 799; Stern *v.* Butler, 123 Ala. 606, 26 So. 359, 82 Am. St. Rep. 146; Montgomery First Nat. Bank *v.* Acme White Lead, etc., Co., 123 Ala. 344, 26 So. 354; Rice *v.* Eiseman, 122 Ala. 343, 25 So. 214; Collier *v.* Wertheimer-Schwartz Shoe Co., 122 Ala. 320, 25 So. 191; Gassenheimer *v.* Kellogg, 121 Ala. 109, 26 So. 29; Comer *v.* Heidelbach, 109 Ala. 220, 19 So. 719; Rice *v.* Less, 105 Ala. 298, 16 So. 917 (attachments obtained by relative of debtor); Cartwright *v.* Bamberger, 90 Ala. 405, 8 So. 264.

Solvency or insolvency.— An attachment issued collusively between a creditor and a debtor, insolvent or not, for the purpose of procuring a preference over other creditors, is void as against such creditors, within the meaning of Ala. Code, § 2156, declaring any "suit commenced, decree or judgment suffered," with intent to defraud creditors, shall be void. Butler *v.* Feeder, 130 Ala. 604, 31 So. 799.

80. See Cartwright *v.* Bamberger, 90 Ala. 405, 407, 8 So. 264, where it is said: "The scope of the statute would be unnecessarily narrowed, and its utility greatly impaired, to hold that the phrase, 'attempted to be fraudulently transferred or conveyed,' has reference only to the imperfect execution of formal transfers or conveyances signed by the debtor. Such a transfer may be made equally through the medium of an attachment suit, and the agency of the sheriff. This being true, the ineffectual resort to such judicial machinery, with the collusive purpose of transferring the debtor's property, may, with propriety, be characterized as 'an attempt' to make such fraudulent transfer." See also Comer *v.* Heidelbach, 109 Ala. 220, 19 So. 719, where the debt was not fictitious or simulated.

81. Meyrovitz *v.* Glaser, 132 Ala. 103, 31 So. 360.

82. *Alabama.*— Metcalf *v.* Arnold, 110 Ala. 180, 20 So. 301, 132 Ala. 74, 32 So. 763, where partners dissolved and conveyed part of the firm property to their wives, and all the property was turned over to a corporation for stock issued to the partners and their wives.

Colorado.— Colorado Trading, etc., Co. *v.* Acres Commission Co., 18 Colo. App. 253, 70 Pac. 954.

District of Columbia.— Clark *v.* Walter T. Bradley Coal, etc., Co., 6 App. Cas. 437.

Georgia.— Buckwalter *v.* Whipple, 115 Ga. 484, 41 S. E. 1010 (holding that where the members of a corporation, for the purpose of defeating existing creditors, form a new corporation, to whom the assets of the original corporation are transferred, and stock is issued to the amount of the agreed value of such assets, such transaction is void as to existing creditors. Planters', etc., Bank *v.* Willeo Cotton Mills, 60 Ga. 168.

Illinois.— Hinkley *v.* Reed, 182 Ill. 440, 55 N. E. 337 [*reversing* 82 Ill. App. 60], holding that as to a judgment creditor of a partnership, which made a fraudulent transfer of its property to a corporation, receiving therefor shares of stock therein, the subsequent assignments for the benefit of creditors by the

as against persons occupying the position of *bona fide* purchasers for value,[83] for the rule which regards a corporation as an artificial person will not be applied to support a fraudulent conveyance, where the object of the incorporators who own the stock is to make the corporation the owner of property fraudulently transferred to defeat creditors.[84] Such a transaction, however, is not necessarily fraudulent as against creditors, in the absence of a fraudulent intent.[85]

partners of their stock, and by the corporation of all their assets, were void.

Iowa.— Shumaker *v.* Davidson, 116 Iowa 569, 87 N. W. 441.

Kansas.—Kellogg *v.* Douglas County Bank, 58 Kan. 43, 48 Pac. 587, 62 Am. St. Rep. 596, sustaining an attachment of the property conveyed to the corporation.

Maryland.— Chatterton *v.* Mason, 86 Md. 236, 37 Atl. 960.

Massachusetts.—Allen *v.* French, 178 Mass. 539, 60 N. E. 125.

Michigan.— See Plant *v.* Billings-Drew Co., 127 Mich. 11, 86 N. W. 399, holding, however, that where a debtor is one of the organizers of a corporation, and transfers his stock of goods to the corporation in exchange for its stock, his creditors cannot attach the corporation as garnishee, on the grounds that the transfer of the property by the debtor and the receipt of the goods by the corporation were fraudulent as to creditors, since the property, in its new form (the stock), is still subject to levy and sale to satisfy the debt owing the creditors.

Minnesota.— Benton *v.* Minneapolis Tailoring, etc., Co., 73 Minn. 498, 76 N. W. 265.

New Jersey.—See Mulford *v.* Doremus, (Ch. 1900) 45 Atl. 688; Terhune *v.* Skinner, 45 N. J. Eq. 344, 19 Atl. 377; Van Campen *v.* Ingram, (Ch. 1888), 12 Atl. 537.

New York.— Booth *v.* Bunce, 33 N. Y. 139, 88 Am. Dec. 372 (property is subject to execution); Persse, etc., Paper Works *v.* Willett, 1 Rob. 131, 19 Abb. Pr. 416; Syracuse Third Nat. Bank *v.* Keeffe, 30 Misc. 400, 63 N. Y. Suppl. 1049.

Ohio.— Chicago First Nat. Bank *v.* F. C. Trebein Co., 59 Ohio St. 316, 52 N. E. 834, holding that where an insolvent forms a corporation composed of himself and the members of his family, and takes substantially all of the stock, and conveys his property to the corporation, and places his stock to the credit of his creditors, who have knowledge of the facts, to secure their claims, and as president retains control, the conveyance is fraudulent as to his other creditors, who may have it set aside.

Oregon.— Bennett *v.* Minott, 28 Oreg. 339, 39 Pac. 997, 44 Pac. 288.

Pennsylvania.— Pennsylvania Knitting Co. *v.* Bibb Mfg. Co., 21 Pa. Co. Ct. 537.

Tennessee.— Bristol Bank, etc., Co. *v.* Jonesboro Banking Trust Co., 101 Tenn. 545, 48 S. W. 228.

Wisconsin.—See Densmore Commission Co. *v.* Shong, 98 Wis. 380, 74 N. W. 114.

Canada.— See Rielle *v.* Reid, 26 Ont. App. 54 [*reversing* 28 Ont. 497, and *applying* Salomon *v.* Salomon, [1897] A. C. 22, 66 L. J. Ch. 35, 75 L. T. Rep. N. S. 426, 4 Manson 89, 45 Wkly. Rep. 193].

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 59.

83. Shumaker *v.* Davidson, 116 Iowa 569, 87 N. W. 441; Kellogg *v.* Douglas County Bank, 58 Kan. 43, 48 Pac. 587, 62 Am. St. Rep. 596. A corporation fraudulently organized by persons for their own benefit, and to which they fraudulently transfer their property for the purpose of defrauding their creditors, is not a *bona fide* purchaser for value. Clark *v.* Walter T. Bradley Coal, etc., Co., 6 App. Cas. (D. C.) 437; and other cases cited in the preceding note.

84. Booth *v.* Bunce, 33 N. Y. 139, 88 Am. Dec. 372; Pennsylvania Knitting Co. *v.* Bibb Mfg. Co., 21 Pa. Co. Ct. 537; and other cases cited *supra*, note 82. See also CORPORATIONS, 10 Cyc. 287 *et seq.*; 306 *et seq.*

85. *Alabama.*— Henderson *v.* Perryman, 114 Ala. 647, 22 So. 24, holding that the fact that an insolvent's father, to whom he had transferred property in payment of a debt, organized a corporation several months later, and employed the insolvent therein at a moderate salary, did not show a secret understanding in the transfer, the father being wealthy and liberal, and all the parties to the transfer testifying that it involved nothing but what appeared on its face.

Georgia.— Planters', etc., Bank *v.* Willeo Cotton Mills, 60 Ga. 168.

Illinois.— Kingman *v.* Mowry, 182 Ill. 256, 55 N. E. 330, 74 Am. St. Rep. 169 [*affirming* 81 Ill. App. 462], holding that where a debtor, after notice to all his creditors, and with the consent of most of them except complainant, in pursuance of a plan therefor previously outlined to his creditors, formed a corporation and conveyed to it all his property, and received in consideration therefor shares of stock, which he pledged to secure money with which to settle his debts, the transaction was neither fraudulent in law nor in fact, so as to support a bill by a judgment creditor to compel the application of the property so conveyed to the satisfaction of his judgment.

Iowa.— Shumaker *v.* Davidson, 116 Iowa 569, 87 N. W. 441, holding that where a debtor organized a corporation to take title to land, the fact that others invested money therein, and transferred property in consideration of stock received, was sufficient to show that the scheme was not one to defraud creditors; and that the mere fact that assignments of stock were made to such debtor's relatives was not alone sufficient to show that the transaction was in fraud of creditors.

New York.— Persse, etc., Paper Works *v.*

6. Waste or Loss Through Negligence. The mere fact that a debtor has been wronged out of his property, or has wasted it or negligently allowed it to pass into the hands of others, gives his creditors no right to have the transaction set aside.[86]

7. Payment of Debt Before Due. The statute against fraudulent conveyances does not apply to the case of a payment of a debt before it is due, made by a debtor to his creditor in order to prevent creditors of the latter from attaching or garnishing the debt.[87]

8. Release or Cancellation of Debt or Claim. A fraudulent transfer may take the form of a release or cancellation of a debt or claim without consideration or with intent to hinder, delay, or defraud creditors,[88] where choses in action are subject to the claims of creditors.[89]

9. Rescission of Contracts and Neglect or Failure to Take Conveyance. Where the rescission of a land contract by both parties is made to enable the vendee to defraud his creditors, it will not affect them, and they may proceed against the land for the satisfaction of their claims.[90] An agreement by one entitled to a conveyance that the grantor shall remain in possession and shall not convey, in order to cover the land from the grantee's creditors, amounts to a conveyance to defraud creditors.[91]

10. Doing Business in Name of Another. If a debtor, for the purpose of covering up property from the claims of creditors, conducts business in the name of his wife, child, or other third person, when the business is in fact his own, he perpetrates a fraud upon his creditors, and they may reach and subject to the payment of their claims the property acquired or used by him in such business.[92]

11. Keeping Mortgage in Force After Payment. If a mortgage is in fact paid, but instead of being discharged is fraudulently assigned with intent to defraud creditors, it is not a valid lien and those who have received a grant of the property from the mortgagor's assignee in bankruptcy, subject to valid encumbrances,

Willett, 1 Rob. 131, 19 Abb. Pr. 416; Kessler *v.* Levy, 11 Misc. 275, 32 N. Y. Suppl. 260.

Pennsylvania.— Coaldale Coal Co. *v.* State Bank, 142 Pa. St. 288, 21 Atl. 811 (holding that where a solvent mercantile firm transferred their business and all their property to a corporation of which the members of the firm were the stock-holders, and the partners afterward pledged most of their stock to secure certain creditors, the transactions were not in fraud of the unsecured creditors); Lasher *v.* Medical Press Co., 3 Pa. Super. Ct. 571, 40 Wkly. Notes Cas. 19 (organization of corporation after confession of judgment by a limited company and sale of its property thereunder).

Tennessee.— Bristol Bank, etc., Co. *v.* Jonesboro Banking Trust Co., 101 Tenn. 545, 48 S. W. 228, holding that the fact that a corporation name was almost identical with a prior partnership name was not conclusive of a device to defraud partnership creditors by incorporating.

Texas.— Sayers *v.* Texas Land, etc., Co., 78 Tex. 244, 14 S. W. 578.

Wisconsin.— Densmore Commission Co. *v.* Shong, 98 Wis. 380, 74 N. W. 114, holding that where partners organized a corporation, in which they were the stock-holders, and transferred the property and business of the partnership to the corporation, the mere fact that the debts of the partnership were not provided for was not sufficient to impeach the *bona fides* of the transaction.

United States.— *In re* A. L. Robertshaw Mfg. Co., 133 Fed. 556.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 59.

Preference by organization of corporation and issue of stock see *infra*, XI, D, 1, note 89.

86. Johns *v.* Jordan, (Kan. 1898) 51 Pac. 889; Parker *v.* Roberts, 116 Mo. 657, 22 S. W. 914. See also *infra*, III, B.

87. Fletcher *v.* Pillsbury, 35 Vt. 16.

88. *Indiana.*— Johnson *v.* Jones, 79 Ind. 141, surrender of note and mortgage.

Massachusetts.— Martin *v.* Root, 17 Mass. 222.

Mississippi.— Wright *v.* Petrie, Sm. & M. Ch. 282.

New Hampshire.— Everett *v.* Read, 3 N. H. 55.

England.— Sibthorp *v.* Moxom, 3 Atk. 580, 26 Eng. Reprint 1134, 1 Ves. 49, 27 Eng. Reprint 883, cancellation of debt by will.

Canada.— Upper Canada Bank *v.* Shickluna, 10 Grant Ch. (U. C.) 157.

See also *supra*, II, B, 6, b.

89. See *supra*, II, B, 6.

90. Maloney *v.* Bewley, 10 Heisk. (Tenn.) 642; Fleming *v.* Martin, 2 Head (Tenn.) 43.

91. Pennington *v.* Clifton, 11 Ind. 162.

92. *Arkansas.*— Nickle *v.* Emerson Mercantile, etc., Co., (1890) 13 S. W. 78.

Illinois.— Robinson *v.* Brems, 90 Ill. 351; Moran *v.* Lilley, 10 Ill. App. 103.

Iowa.— Hamill *v.* Augustine, 81 Iowa 302,

are entitled to have the mortgage declared paid, and the fraudulent assignment adjudged void.[93]

12. Keeping Judgment Open After Payment. A judgment will not avail against creditors where it is fraudulently kept open after it has in fact been paid; nor will a sale by a sheriff under such a judgment give a good title to a purchaser who participated in or knew of the fraud.[94]

B. Fraud Directed Against Debtor. The fraud of which a creditor may avail himself when assailing a transfer or conveyance by his debtor is not a fraud on the debtor which he could assert as a ground of relief against the transfer or conveyance, but it is a fraud directed against purchasers or creditors which is denounced by the statutes.[95] That a mortgage or other transfer of property was obtained by fraud or duress practised on the mortgagor or transferrer is a fact of which he alone can take advantage. It cannot be urged by his creditors as a ground for setting aside the mortgage or transfer, for the statutes against fraudulent conveyances are directed against acts of the transferrer done with intent to hinder, delay, or defraud creditors, and not against acts of the transferee done to defraud the transferrer.[96]

C. Effect of Fraudulent Conveyance — 1. In General. Under the English statutes of 13 and 27 Elizabeth as well as under most of the statutes in the United States which are based thereon, a fraudulent conveyance is absolutely void as to creditors and subsequent *bona fide* purchasers,[97] both in equity and at

46 N. W. 1113; Hamilton *v.* Lightner, 53 Iowa 470, 5 N. W. 603.

Louisiana.— Fass *v.* Rice, 30 La. Ann. 1278.

New Hampshire.— Levy *v.* Woodcock, 63 N. H. 413.

New Jersey. — Metropolis Nat. Bank *v.* Sprague, 20 N. J. Eq. 13.

Wisconsin.— Ansorge *v.* Barth, 88 Wis. 553, 60 N. W. 1055, 43 Am. St. Rep. 928.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 58. See also *supra*, II, 8, a, b.

93. McMaster *v.* Campbell, 41 Mich. 513, 2 N. W. 836.

94. Booth *v.* Moret, 1 Brev. (S. C.) 216.

95. *Alabama.*— Meyrovitz *v.* Glaser, 132 Ala. 103, 31 So. 360; Savage *v.* Johnson, 125 Ala. 673, 28 So. 547; Henry *v.* Murphy, 54 Ala. 246.

Iowa.— See Sprague *v.* Benson, 101 Iowa 678, 70 N. W. 731.

Kansas.— Johns *v.* Jordan, (1898) 51 Pac. 889.

Michigan.— Lewis *v.* Rice, 61 Mich. 97, 27 N. W. 867, in which it is held that the statute which allows creditors to treat certain dealings as absolutely void confines their redress to fraud aimed against creditors.

Missouri.— Colbern *v.* Robinson, 80 Mo. 541.

New Jersey.— Garretson *v.* Kane, 27 N. J. L. 208.

Wyoming.—Metz *v.* Blackburn, 9 Wyo. 481, 65 Pac. 857.

Judgment against debtor.— The fraud which will authorize a creditor to impeach a judgment obtained by another against his debtor must be a fraud against the creditor, not a mere overreaching of the debtor in his litigation. There must be collusion. McAlpine *v.* Sweetser, 76 Ind. 78; *In re* Dougherty, 9 Watts & S. (Pa.) 189, 42 Am. Dec. 326.

Decrease of debtor's means.— The fact that by the fraud practised on the debtor his means of satisfying his creditors are decreased does not give such creditors the right to set aside the transfer. Parker *v.* Roberts, 116 Mo. 657, 22 S. W. 914. See also *supra*, III, A, 6.

96. Parker *v.* Roberts, 116 Mo. 657, 22 S. W. 914; Colbern *v.* Robinson, 80 Mo. 541; Marion Distilling Co. *v.* Ellis, 63 Mo. App. 17, duress. See also Eaton *v.* Perry, 29 Mo. 96.

97. *Alabama.*— Nelson *v.* Warren, 93 Ala. 408, 8 So. 413; Henry *v.* Murphy, 54 Ala. 246; High *v.* Nelms, 14 Ala. 350, 48 Am. Dec. 103; Carville *v.* Stout, 10 Ala. 796.

Arkansas.— Norton *v.* McNutt, 55 Ark. 59, 17 S. W. 362; Hershy *v.* Latham, 42 Ark. 305.

Connecticut.— Price *v.* Heubler, 63 Conn. 374, 28 Atl. 524; Owen *v.* Dixon, 17 Conn. 492; Starr *v.* Tracy, 2 Root 528; Pruden *v.* Leavensworth, 2 Root 129.

District of Columbia.— Hayes *v.* Johnson, 6 D. C. 174.

Georgia.— Gormerly *v.* Chapman, 51 Ga. 421; Feagan *v.* Cureton, 19 Ga. 404.

Illinois.— Willard *v.* Masterson, 160 Ill. 443, 43 N. E. 771; McKinney *v.* Farmers' Nat. Bank, 104 Ill. 180; Gould *v.* Steinburg, 84 Ill. 170; Ward *v.* Enders, 29 Ill. 519; Getzler *v.* Saroni, 18 Ill. 511.

Indiana.— Stevens *v.* Works, 81 Ind. 445.

Iowa.— Brainard *v.* Van Kuran, 22 Iowa 261.

Kentucky.— Scott *v.* Scott, 85 Ky. 385, 3 S. W. 598, 5 S. W. 423, 9 Ky. L. Rep. 363; Worland *v.* Outten, 3 Dana 477; Snapp *v.* Orr, 4 Ky. L. Rep. 355.

Louisiana.— Vickers *v.* Block, 31 La. Ann. 672; Mora *v.* Avery, 22 La. Ann. 417; Southern Bank *v.* Wood, 14 La. Ann. 554, 74 Am. Dec. 446; Emswiler *v.* Burham, 6 La. Ann. 710; Maxwell *v.* Mallard, 5 La. Ann. 702;

law,[98] if they see fit to impeach it, but not otherwise;[99] but, although thus void as to creditors and purchasers, it is, when executed, valid and binding as between the parties and their heirs and representatives;[1] and it is void as to creditors only

Hughes *v.* Winfrey, 5 La. Ann. 668; Meeker *v.* Hays, 18 La. 19; Price *v.* Bradford, 4 La. 35; Kimble *v.* Kimble, 1 Mart. N. S. 633.

Maine.— Wyman *v.* Fox, 59 Me. 100; Brown *v.* Snell, 46 Me. 490; Frost *v.* Goddard, 25 Me. 414.

Maryland.— Cooke *v.* Cooke, 43 Md. 522; Spindler *v.* Atkinson, 3 Md. 409, 56 Am. Dec. 755.

Massachusetts.— Sherman *v.* Davis, 137 Mass. 132; Edwards *v.* Mitchell, 1 Gray 241.

Michigan.— Michigan Trust Co. *v.* Chapin, 106 Mich. 384, 64 N. W. 334, 58 Am. St. Rep. 490; Pierce *v.* Hill, 35 Mich. 194, 24 Am. Rep. 541; Trask *v.* Green, 9 Mich. 358.

Minnesota.—Jackson *v.* Holbrook, 36 Minn. 494, 32 N. W. 852, 1 Am. St. Rep. 683; Campbell *v.* Jones, 25 Minn. 155.

Mississippi.— Thomason *v.* Neeley, 50 Miss. 310.

Missouri.— Woodard *v.* Mastin, 106 Mo. 324, 17 S. W. 308; Ryland *v.* Callison, 54 Mo. 513; Potter *v.* Stevens, 40 Mo. 229; Kinealy *v.* Macklin, 2 Mo. App. 241.

New Jersey.— Mulford *v.* Peterson, 35 N. J. L. 127.

New York.— Smith *v.* Reid, 134 N. Y. 568, 31 N. E. 1082; Bergen *v.* Carman, 79 N. Y. 146 [*reversing* 18 Hun 355]; Rinchey *v.* Stryker, 28 N. Y. 45, 84 Am. Dec. 324, 26 How. Pr. 75, 31 N. Y. 140.

North Carolina.— Flynn *v.* Williams, 29 N. C. 32; Burgin *v.* Burgin, 23 N. C. 160; Henderson *v.* Hoke, 21 N. C. 119; Hoke *v.* Henderson, 14 N. C. 12; West *v.* Dubberly, 4 N. C. 478.

Ohio.— Fowler *v.* Trebein, 16 Ohio St. 493, 91 Am. Dec. 95.

Pennsylvania.— Janney *v.* Howard, 150 Pa. St. 339, 24 Atl. 740; Stewart *v.* Coder, 11 Pa. St. 90; Hays *v.* Heidelberg, 9 Pa. St. 203; McKee *v.* Gilchrist, 3 Watts 230.

South Carolina.— Paris *v.* Du Pre, 17 S. C. 282; Jones *v.* Crawford, 1 McMull. 373; Lowry *v.* Pinson, 2 Bailey 324, 23 Am. Dec. 140; Abrahams *v.* Cole, 5 Rich. Eq. 335.

Texas.— Lynn *v.* Le Gierse, 48 Tex. 138.

Virginia.— Wilson *v.* Buchanan, 7 Gratt. 334.

United States.— Thompson *v.* Baker, 141 U. S. 648, 12 S. Ct. 89, 35 L. ed. 889; Beadle *v.* Beadle, 40 Fed. 315, 2 McCrary 586; Lenox *v.* Notrebe, 15 Fed. Cas. No. 8,246*c*, Hempst. 251.

England.— Twyne's Case, 3 Coke 80*a*, 1 Smith Lead. Cas. 1.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 22, 658, 662; and *infra*, XIV, A–C.

98. See *infra*, XIV, B, C.

99. *Arkansas.*— Doster *v.* Manistee Nat. Bank, 67 Ark. 325, 55 S. W. 137, 77 Am. St. Rep. 116, 48 L. R. A. 339.

Massachusetts.— Oriental Bank *v.* Haskins, 3 Metc. 332, 37 Am. Dec. 140.

Minnesota.— Hathaway *v.* Brown, 22 Minn. 214.

New Hampshire.— Hill *v.* Pine River Bank, 45 N. H. 300.

North Carolina.— Boyd *v.* Turpin, 94 N. C. 137, 55 Am. Rep. 597.

Ohio.— Brown *v.* Webb, 20 Ohio 389.

Pennsylvania.— Byrod's Appeal, 31 Pa. St. 241.

South Carolina.— Kid *v.* Mitchell, 1 Nott & M. 334, 9 Am. Dec. 702.

Washington.— Preston-Parton Milling Co. *v.* Horton, 22 Wash. 236, 60 Pac. 412, 79 Am. St. Rep. 928.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 22, 658; and *infra*, IV; XIV, A, C.

"Voidable."— For this reason it is sometimes called "voidable," and not "void," but by this is meant merely that the conveyance will stand good as between the parties thereto, and also as against purchasers or creditors who affirm it or are estopped to attack it, or do not take any steps to impeach it, either at law or in equity; but if creditors or purchasers do impeach it in any legal way then it is not merely voidable, but void as against them. See *infra*, XIV, A–C.

1. *Alabama.*— Nelson *v.* Warren, 93 Ala. 408, 8 So. 413.

Arkansas.— Norton *v.* McNutt, 55 Ark. 59, 17 S. W. 362; King *v.* Clay, 34 Ark. 291.

California.— Brown *v.* Cline, 109 Cal. 156, 41 Pac. 862.

Connecticut.— Chapin *v.* Pease, 10 Conn. 69, 25 Am. Dec. 56.

Georgia.— Fouche *v.* Brower, 74 Ga. 251; Anderson *v.* Brown, 72 Ga. 713.

Illinois.— Harmon *v.* Harmon, 63 Ill. 512.

Indiana.— Henry *v.* Stevens, 108 Ind. 281, 9 N. E. 356; Anderson *v.* Etter, 102 Ind. 115, 26 N. E. 218; Etter *v.* Anderson, 84 Ind. 333.

Iowa.— Mellen *v.* Ames, 39 Iowa 283.

Kentucky.— Jones *v.* Hill, 9 Bush 692; Anderson *v.* Bradford, 5 J. J. Marsh. 69.

Louisiana.— Keane *v.* Goldsmith, 14 La. Ann. 349.

Maine.— Hatch *v.* Bates, 54 Me. 136; Thompson *v.* Moore, 36 Me. 47; Woodman *v.* Bodfish, 25 Me. 317.

Maryland.—Atkinson *v.* Phillips, 1 Md. Ch. 507.

Massachusetts.— Stillings *v.* Turner, 153 Mass. 534, 27 N. E. 671; Edwards *v.* Mitchell, 1 Gray 239; Perry *v.* Hayward, 12 Cush. 344.

Michigan.— Wheeler *v.* Wallace, 53 Mich. 364, 19 N. W. 33.

Minnesota.— Piper *v.* Johnston, 12 Minn. 60; Lemay *v.* Bibeau, 2 Minn. 291.

Mississippi.— Whitney *v.* Freeland, 26 Miss. 481.

Missouri.— McLaughlin *v.* McLaughlin, 16 Mo. 242.

Nebraska.— Baldwin *v.* Burt, 43 Nebr. 245, 61 N. W. 601.

so far as to enable such as are prejudiced thereby to enforce their demands against the grantor.[2] If a conveyance is fraudulent as against one creditor it is void as against all.[3] The rule that a fraudulent conveyance is absolutely void so that the property can be seized under execution against the grantor does not apply to the case where a debtor purchases land and has the conveyance made to a third person, as the statute of Elizabeth and like statutes only apply to conveyances by the debtor.[4]

2. Partial Invalidity. It may be laid down as a general rule that, in the case of actual fraud participated in or known to the grantee, a conveyance which is fraudulent in part is void *in toto* and as to all the property conveyed;[5] but the

New Jersey.—Evans *v.* Herring, 27 N. J. L. 243.

New York.— Osborne *v.* Moss, 7 Johns. 161, 5 Am. Dec. 252.

North Carolina.—Powell *v.* Inman, 53 N. C. 436, 82 Am. Dec. 426.

Ohio.— Douglas *v.* Dunlap, 10 Ohio 162.

Pennsylvania.— Janney *v.* Howard, 150 Pa. St. 339, 24 Atl. 740; Bonesteel *v.* Sullivan, 104 Pa. St. 9.

Rhode Island.— Hudson *v.* White, 17 R. I. 519, 23 Atl. 57.

South Carolina.— Swanzy *v.* Hunt, 2 Nott & M. 211; Kid *v.* Mitchell, 1 Nott & M. 334, 9 Am. Dec. 702.

Tennessee.— Bayless *v.* Elcan, 1 Coldw. 96; Williams *v.* Lowe, 4 Humphr. 62.

Texas.— Wilson *v.* Trawick, 10 Tex. 428; Texarkana Nat. Bank *v.* Hall, (Civ. App. 1895) 30 S. W. 73.

Wisconsin.— Norton *v.* Kearney, 10 Wis. 443; Schettler *v.* Brunette, 7 Wis. 197.

United States.— Lenox *v.* Notrebe, 15 Fed. Cas. No. 8,246c, Hempst. 251.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 22, 523, 624; and *infra*, XIII, A.

2. Collinson *v.* Jackson, 14 Fed. 305, 8 Sawy. 357.

Necessity for prejudice to attacking creditor see *infra*, III, D.

3. Hoke *v.* Henderson, 14 N. C. 12.

4. *Massachusetts.*— Hamilton *v.* Cone, 99 Mass. 478; Howe *v.* Bishop, 3 Metc. 26.

Michigan.— Maynard *v.* Hoskins, 9 Mich. 485; Trask *v.* Green, 9 Mich. 358.

Mississippi.— Ferguson *v.* Bobo, 54 Miss. 121; Carlisle *v.* Tindall, 49 Miss. 229.

New Jersey.— Haggerty *v.* Nixon, 26 N. J. Eq. 42.

New York.— Brewster *v.* Power, 10 Paige 562.

North Carolina.— Everett *v.* Raby, 104 N. C. 479, 10 S. E. 526, 17 Am. St. Rep. 685; Gentry *v.* Harper, 55 N. C. 177; Den *v.* Rich, 23 N. C. 553.

South Carolina.— Bauskett *v.* Holsonback, 2 Rich. 624.

Tennessee.— Smith *v.* Hinson, 4 Heisk. 250.

Vermont.— Buck *v.* Gilson, 37 Vt. 653.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 662; and *supra*, III, A, 3, a.

Contra, under some statutes.— Tevis *v.* Doe, 3 Ind. 129; Clark *v.* Chamberlain, 13 Allen (Mass.) 257; Dunnica *v.* Coy, 28 Mo. 525, 75 Am. Dec. 133; Herrington *v.* Herrington, 27 Mo. 560; Dunnica *v.* Coy, 24 Mo. 167, 69 Am. Dec. 420; Eddy *v.* Baldwin, 23 Mo. 588; Rankin *v.* Harper, 23 Mo. 579; Winch's Appeal, 61 Pa. St. 424.

5. *Alabama.*— Tatum *v.* Hunter, 14 Ala. 557; Tickner *v.* Wiswall, 9 Ala. 305, holding that a conveyance colorable and fraudulent as to a part is void as to the whole of the property conveyed.

Illinois.— Biggins *v.* Lambert, 213 Ill. 625, 73 N. E. 371, 104 Am. St. Rep. 238 (holding that where land was conveyed at a sum much less than its value, in order to defraud the grantors' creditors, and the grantee had a guilty knowledge, the conveyance, at the suit of a creditor, would be set aside in its entirety, and not sustained as to a portion equal to the actual value paid); Oakford *v.* Dunlap, 63 Ill. App. 498 (where part of the property was taken in payment of debts and the rest was purchased for cash or its equivalent).

Indiana.— Reagan *v.* Chicago First Nat. Bank, 157 Ind. 623, 61 N. E. 575, 62 N. E. 701, holding that a mortgage in favor of its creditors by an insolvent corporation, in which it fraudulently preferred stock-holders to unsecured creditors, was by such preference rendered void as an entirety as the legal part thereof could not be separated from the illegal.

Kansas.— Miami County Nat. Bank *v.* Barkalow, 53 Kan. 68, 35 Pac. 796 (holding that while plaintiff was entitled to take security from a failing firm for the amount actually due from them, the inclusion in the mortgage of a large debt due plaintiff from one not a member of firm, amounting to more than the total assets of the firm, rendered the mortgage void *in toto*); Wallach *v.* Wylie, 28 Kan. 138 (chattel mortgage purporting to secure certain sum, less than half of which was a *bona fide* indebtedness, and the rest fraudulent, was held void *in toto*); Harley *v.* Adsit, 3 Kan. App. 122, 42 Pac. 836.

Maryland.— Albert *v.* Wynn, 7 Gill 446, holding conveyance good in part and void in part as contrary to the provisions of statute void *in toto*, although no fraud intended.

Massachusetts.— Lynde *v.* McGregor, 13 Allen 172.

Michigan.— Clark *v.* Lee, 78 Mich. 221, 44 N. W. 260; Pierson *v.* Manning, 2 Mich. 445 (assignment fraudulent in any of its provisions is void *in toto* as against creditors);

rule does not necessarily apply where the conveyance is not actually but only constructively fraudulent.[6] If part of the consideration for a deed, mortgage, confession of judgment, or other conveyance or transfer is fraudulent or fictitious the transfer is void *in toto*.[7] And if a conveyance is made with intent to defraud

Kirby *v.* Ingersoll, Harr. 172 (holding deed as assignment fraudulent in part void *in toto*).

Mississippi.— Burke *v.* Murphy, 27 Miss. 167.

Missouri.— Boland *v.* Ross, 120 Mo. 208, 25 S. W. 524 (entire mortgage avoided where part of indebtedness for which given fraudulent as to creditors); Hanna *v.* Finley, 33 Mo. App. 645 (where creditor took more of debtor's assets than reasonably necessary to pay his claim, with the understanding that he was to conceal surplus for a time and then account for it, the whole transaction was avoided); State *v.* Excelsior Distilling Co., 20 Mo. App. 21; McNichols *v.* Richter, 13 Mo. App. 515 (assignment by insolvent debtor of more property than reasonably necessary, under fraudulent pretense of paying debt).

Nebraska.— Switz *v.* Bruce, 16 Nebr. 463, 20 N. W. 639.

New Jersey.— Holt *v.* Creamer, 34 N. J. Eq. 181.

New York.— Baldwin *v.* Short, 125 N. Y. 553, 26 N. E. 928; Billings *v.* Russell, 101 N. Y. 226, 4 N. E. 531; Dewey *v.* Moyer, 72 N. Y. 70; Spies *v.* Boyd, 1 E. D. Smith 445; Johnson *v.* Philips, 2 N. Y. Suppl. 432 (holding that transfers given in part for valid debts, including also fictitious liabilities, are invalid as security for the actual indebtedness); Marks *v.* Reynolds, 12 Abb. Pr. 403; Austin *v.* Bell, 20 Johns. 442, 11 Am. Dec. 297; Hyslop *v.* Clarke, 14 Johns. 458 (holding assignment for the benefit of creditors, good in part, and void in part as being in violation of statute, void *in toto*); Goodrich *v.* Downs, 6 Hill 438 (holding that where any part of assignment contrary to statute for protection of creditors against fraudulent transfers, whole is void); Wakeman *v.* Grover, 4 Paige 23 [*affirmed* in 11 Wend. 187, 25 Am. Dec. 624] (assignment for the benefit of creditors void in part because contrary to statute held void *in toto*); Mackie *v.* Cairns, Hopk. 373 [*affirmed* in 5 Cow. 547, 15 Am. Dec. 477] (assignment for the benefit of creditors containing reservation in favor of assignor void as to whole); Boyd *v.* Dunlap, 1 Johns. Ch. 478.

North Carolina.— Johnson *v.* Murchison, 60 N. C. 286 (where part of consideration was feigned or fraudulent as to creditors); Stone *v.* Marshall, 52 N. C. 300 (holding deed void *in toto* as to creditors where part of consideration feigned); Hafner *v.* Irwin, 23 N. C. 490 (part of consideration fraudulent).

Pennsylvania.— Gates *v.* Johnston, 3 Pa. St. 52; McClurg *v.* Lecky, 3 Penr. & W. 83, 23 Am. Dec. 64 (holding assignment for the benefit of creditors fraudulent *in toto* where it contains reservation in favor of debtor or his family); Thomas *v.* Jenks, 5 Rawle 221 (holding assignment of partnership effects for benefit of creditors, containing provision for release of all claims by creditors against partners individually and as copartners, void where partners had separate property); Whiting *v.* Johnson, 11 Serg. & R. 328, 14 Am. Dec. 633 (where bond taken for more than real debt with intent to defraud creditors).

Tennessee.— Simpson *v.* Mitchell, 8 Yerg. 417; Sommerville *v.* Horton, 4 Yerg. 541, 26 Am. Dec. 242; Young *v.* Pate, 4 Yerg. 164; Darwin *v.* Handley, 3 Yerg. 502, holding a deed of trust fraudulent, where some of articles contained in deed are consumable in use and maker of deed allowed to retain possession.

Texas.— Brasher *v.* Jamison, 75 Tex. 139, 12 S. W. 809 (where part of consideration for deed unreal or fictitious); Lambeth *v.* McClinton, 65 Tex. 108.

Virginia.— Garland *v.* Rives, 4 Rand. 282, 15 Am. Dec. 756.

West Virginia.— Kanawha Valley Bank *v.* Wilson, 25 W. Va. 242; Livesay *v.* Beard, 22 W. Va. 585.

Canada.— Cameron *v.* Perrin, 14 Ont. App. 565.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 24 *et seq.*

Fraudulent judgment.— Taaffe *v.* Josephson, 7 Cal. 352 (holding that where a creditor commenced suit against a debtor on four promissory notes, one of which was not due, and obtained judgment by default, it must stand or fall as a whole and was void as to subsequent attaching creditors); Simons *v.* Goldbach, 56 Hun (N. Y.) 204, 9 N. Y. Suppl. 359 (judgment fraudulently confessed for amount in excess of obligation then due by party confessing); Marks *v.* Reynolds, 12 Abb. Pr. (N. Y.) 403; Gates *v.* Johnston, 3 Pa. St. 52; Hardt *v.* Heidweyer, 152 U. S. 547, 14 S. Ct. 671, 38 L. ed. 548 (transfer by failing debtor of assets largely in excess of their claims to injury of other general creditors). See *supra*, III, A, 4, b.

Fraudulent execution sale.— Floyd *v.* Goodwin, 8 Yerg. (Tenn.) 484, 29 Am. Dec. 130, holding execution sale partly colorable, void. See *supra*, III, A, 4, d.

6. Rogers *v.* Munnerlyn, 36 Fla. 591, 18 So. 669 (holding that a mortgage covering merchandise and real estate, which is constructively void as to the goods because of the mortgagee's permission to sell them in the usual course of trade, without accounting for the proceeds, is not thereby rendered invalid as to the real estate, in the absence of actual fraud); Chase *v.* Walker, 26 Me. 555.

Reimbursement see *infra*, XIII, A, 4, a, (III), (A).

7. Tatum *v.* Hunter, 14 Ala. 557; Holt *v.* Creamer, 34 N. J. Eq. 181; Marks *v.* Rey-

one creditor only, it is void also as to other creditors.[8] But the fact that a conveyance is fraudulent and void as to part of the property does not necessarily render it void as to other property, as where creditors had no right to subject such other property to the satisfaction of their claims.[9] And a transfer to two creditors or purchasers may be valid as to one and fraudulent and void as to the other.[10]

3. Several Transactions. Where several conveyances of property are made by a debtor to the same grantee at different times or about the same time, the fact that one of them is executed with fraudulent intent, or is otherwise invalid, will not render the others void, if they are separate and distinct transactions;[11] but it is otherwise if they are so connected as to constitute parts of the same

nolds, 12 Abb. Pr. (N. Y.) 403; Gates *v.* Johnston, 3 Pa. St. 52. See *infra*, VIII, C, 1.

8. Hoke *v.* Henderson, 14 N. C. 12. See *infra*, VII, A, 2.

9. Chase *v.* Walker, 26 Me. 555.

10. *Alabama.*— Robert Graves Co. *v.* McDade, 108 Ala. 420, 19 So. 86.

Massachusetts.— Prince *v.* Shepard, 9 Pick. 176.

Michigan.— Kock *v.* Bostwick, 113 Mich. 302, 71 N. W. 473.

Minnesota.— Thompson *v.* Johnson, 55 Minn. 515, 57 N. W. 223.

New Jersey.—Farrel *v.* Colwell, 30 N. J. L. 123, purchase by partners, where one of them only purchased in fraud of creditors and the other was a *bona fide* purchaser.

New York.—Commercial Bank *v.* Sherwood, 162 N. Y. 310, 56 N. E. 834 [*affirming* 20 N. Y. App. Div. 70, 46 N. Y. Suppl. 734], holding that a transfer to two creditors, in payment of a distinct indebtedness to each, gives each of them an undivided one-half interest in the property, and may be sustained as to one of them, although the transfer to the other is invalid as in fraud of creditors.

Tennessee.— Troustine *v.* Lask, 4 Baxt. 162.

Texas.— Sonnentheil *v.* Texas Guaranty, etc., Co., 10 Tex. Civ. App. 274, 30 S. W. 945; Willis *v.* Murphy, (Civ. App. 1894) 28 S. W. 362; Kraus *v.* Haas, 6 Tex. Civ. App. 665, 25 S. W. 1025.

West Virginia.— Livesay *v.* Beard, 22 W. Va. 585.

United States.— Tefft *v.* Stern, 73 Fed. 591, 21 C. C. A. 67, one creditor secured by a mortgage having knowledge of a fraudulent purpose and the other not having such knowledge. See also Crawford *v.* Neal, 144 U. S. 585, 12 S. Ct. 759, 36 L. ed. 552 [*affirming* 36 Fed. 29].

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 26, 27.

Contra, where a preference was given by transferring property to a creditor and to another, who, although he paid part of the price in money, knew of the fraudulent purpose. Thompson *v.* Johnson, 55 Minn. 515, 57 N. W. 223.

11. *Alabama.*— Nelms *v.* Steiner, 113 Ala. 562, 22 So. 435 (holding that where goods were sold to plaintiff, and afterward the seller gave plaintiff mortgages which were wholly disconnected from the sale, fraud as to creditors in the mortgages would not affect the sale, if that in itself was free from fraud); Thornton *v.* Cook, 97 Ala. 630, 12 So. 403; Buford *v.* Shannon, 95 Ala. 205, 10 So. 263.

California.— Gray *v.* Galpin, 98 Cal. 633, 33 Pac. 725.

Connecticut.— Lucas *v.* Birdsey, 41 Conn. 357; Cook *v.* Swan, 5 Conn. 140; Clark *v.* Johnson, 5 Day 373.

Illinois.— Rutt *v.* Shuler, 49 Ill. App. 655.

Indiana.— Keen *v.* Preston, 24 Ind. 395, holding that a sale of chattels to a creditor in part satisfaction of his debt and a transfer of collateral security to him for the balance of the debt, although made in pursuance of the same agreement, were separate transactions, so that a fraudulent transfer of the collaterals would not contaminate the sale, where the latter was *bona fide*.

Iowa.— Muir *v.* Miller, 103 Iowa 127, 72 N. W. 409, holding that the fact that one note in controversy was obtained by the garnishee, wife of defendant, from her husband without consideration and in fraud of creditors, raised no presumption against the validity of the transfer of another note between the same parties.

Kansas.— Bowling *v.* Armourdale Bank, 57 Kan. 174, 45 Pac. 584, holding that the taking of a second and separate mortgage by a creditor, although invalid, does not defeat the first mortgage, if it was free from fraud.

Kentucky.— Ford *v.* Williams, 3 B. Mon. 550.

Maine.— Matthews *v.* Buck, 43 Me. 265.

Massachusetts.— Boyd *v.* Brown, 17 Pick. 453.

Michigan.— Kock *v.* Bostwick, 113 Mich. 302, 71 N. W. 473 (holding that the fact that two chattel mortgages executed by an insolvent corporation to different persons were authorized by the board of directors at the same meeting, and given on the same day, did not make them one transaction, so that the fraudulency of one as to creditors vitiated the other); Sheldon *v.* Mann, 85 Mich. 265, 48 N. W. 573; Krolik *v.* Root, 63 Mich. 562, 30 N. W. 339.

Missouri.— St. Louis Mut. L. Ins. Co. *v.* Cravens, 69 Mo. 72.

Nebraska.— Bierbower *v.* Polk, 17 Nebr. 268, 22 N. W. 698.

New Hampshire.— Pettee *v.* Dustin, 58 N. H. 309.

New Jersey.— Stillman *v.* Stillman, 21 N. J. Eq. 126.

New York.— Maass *v.* Falk, 146 N. Y. 34,

transaction.[12] And where several conveyances of property by a debtor to several grantees are made with a common purpose on the part of the grantor and grantees to defraud the creditors of the former, the several conveyances, whether made at different times or about the same time, and although made to different grantees, will be treated as one transaction, and any fact sufficient to vitiate one deed will invalidate all.[13] It is otherwise, however, where the conveyances are separate transactions and one is not tainted with fraud.[14] Fraud will be presumed where

40 N. E. 504; Friedman *v.* Rose, 83 Hun 542, 31 N. Y. Suppl. 1040 (holding that a bill of sale which was void because not filed, and because of retention of possession, was taken as additional security to a chattel mortgage did not render the mortgage also void); Kinghorn *v.* Wright, 45 N. Y. Super. Ct. 615; Nicholson *v.* Leavitt, 4 Sandf. 252; Wise *v.* Rider, 34 N. Y. Suppl. 782. See Brooks *v.* Wilson, 53 Hun 173, 6 N. Y. Suppl. 116, holding that where a grantee in a conveyance made to defraud creditors, at the request of the grantor, mortgaged the property conveyed to secure a debt owing by the grantor to the mortgagee, the latter had the same rights as if the mortgage had been made before the fraudulent conveyance.

North Carolina.— Winborne *v.* Lassiter, 89 N. C. 1; White *v.* White, 35 N. C. 265; King *v.* Cantrel, 26 N. C. 251.

Ohio.— O'Connell *v.* Cruise, 1 Handy 164, 12 Ohio Dec. (Reprint) 81.

Tennessee.— Robinson *v.* Baugh, (Ch. App. 1900) 61 S. W. 98, holding that when there is no attempt to amend a mortgage containing a fraudulent reservation in favor of the mortgagor by means of a subsequent trust deed to secure other debts, or to incorporate the mortgage into the deed, the validity of the deed is not affected by the invalidity of the mortgage, although the mortgage debt is made a preferred debt in the deed.

Wisconsin.— Kickbusch *v.* Corwith, 108 Wis. 634, 85 N. W. 148 (holding that where an insolvent transferred nearly all his property to two of his principal debtors, who also had recorded mortgages thereon, under an unrecorded agreement which amounted to a voluntary assignment for the benefit of creditors, the fact that the transfers made by the agreement were void did not avoid prior valid mortgages of the transferees, who, on the fraudulent agreement being set aside, were restored to their legal rights under the mortgages); Hoey *v.* Pierron, 67 Wis. 262, 30 N. W. 692 (several chattel mortgages executed at the same time, one of which was invalid for lack of sufficient consideration).

United States.— Stewart *v.* Dunham, 115 U. S. 61, 5 S. Ct. 1163, 29 L. ed. 329; Hunter *v.* Marlboro, 12 Fed. Cas. No. 6,908, 2 Woodb. & M. 168, holding that where a trust made to defraud creditors is executed by the trustee, who conveys the property to a third person to secure a loan to the *cestui que trust,* whose rights the grantee distinctly recognizes, the trust created by such conveyance between the grantee and the *cestui que trust* is enforceable.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 27, 28, 29.

12. *California.*— Chenery *v.* Palmer, 6 Cal. 119, 65 Am. Dec. 493.

Colorado.— Anders *v.* Barton, 3 Colo. App. 324, 33 Pac. 142.

Iowa.— Snouffer *v.* Kinley, 96 Iowa 102, 64 N. W. 770.

Kansas.— Bowling *v.* Armourdale Bank, 57 Kan. 174, 45 Pac. 584.

Massachusetts.—Lynde *v.* McGregor, 13 Allen 182, 90 Am. Dec. 188.

Michigan.— Hubbard *v.* Taylor, 5 Mich. 155.

Missouri.—State *v.* Excelsior Distilling Co., 20 Mo. App. 21.

Nebraska.— Switz *v.* Bruce, 16 Nebr. 463, 20 N. W. 639.

South Carolina.— Bates *v.* Cobb, 29 S. C. 395, 7 S. E. 743, 13 Am. St. Rep. 742; McSween *v.* McCown, 23 S. C. 342; Hipp *v.* Sawyer, Rich. Eq. Cas. 410.

Texas.— Baylor *v.* Brown, 3 Tex. Civ. App. 177, 21 S. W. 73, conveyance of entire stock of goods, fixtures, etc., followed on the same day by a transfer of all notes and accounts.

United States.—Burdick *v.* Gill, 7 Fed. 668, 2 McCrary 486.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 27, 28, 29.

13. *Alabama.*— Russell *v.* Davis, 133 Ala. 647, 31 So. 514, 91 Am. St. Rep. 56.

New York.— Illinois Watch Co. *v.* Payne, 11 N. Y. Suppl. 408 [*affirmed* in 132 N. Y. 597, 30 N. E. 1151].

South Carolina.— Younger *v.* Massey, 39 S. C. 115, 17 S. E. 711 (holding that where a conveyance to a debtor's father-in-law was set aside for fraud, a subsequent reconveyance by such fraudulent grantee to the debtor's wife would be regarded as part of the original scheme to defraud creditors, and a perpetuation thereof); Hipp *v.* Sawyer, Rich. Eq. Cas. 410.

Tennessee.— Summers *v.* Howland, 2 Baxt. 407.

Texas.— Hughes *v.* Roper, 42 Tex. 116, holding that a deed from a father to some of his children to whom he was indebted, and from them to others, as to whom no indebtedness existed, might be considered as one transaction, and as a deed of gift to the extent of the second transfer.

West Virginia.— Livesay *v.* Beard, 22 W. Va. 585.

Fraudulent confession of judgment.— Illinois Watch Co. *v.* Payne, 11 N. Y. Suppl. 408 [*affirmed* in 132 N. Y. 597, 30 N. E. 1151].

Fraudulent consent judgment and subsequent purchase by wife at execution sale.— Benne *v.* Schnecko, 100 Mo. 250, 13 S. W. 82.

14. *Illinois.*— Rutt *v.* Shuler, 49 Ill. App. 655.

a voluntary conveyance to a wife is followed within a short time by the fraudulent disposition of the remaining estate of the grantor.[15] Where a debtor made a conveyance, fraudulent as to creditors, and took from the grantee a mortgage to secure trust funds in the grantor's hands, it was held that a court of equity, while setting aside the conveyance, would recognize the validity of the mortgage.[16] A conveyance which is constructively fraudulent, but is made to cure the defects in a prior valid conveyance, will not affect the validity of such prior conveyance.[17]

4. Conveyance Must Itself Be Fraudulent When Made. A conveyance, to be fraudulent and void as against creditors, must have itself been fraudulent when made, and if it was not, then it cannot be rendered so by a fraudulent intent existing either before or after that time, or by the prior or subsequent conduct of the parties, or by other separate and distinct transactions, prior or subsequent, which were fraudulent.[18] But the question is to be determined as of the time the

Kentucky.— Ford *v.* Williams, 3 B. Mon. 550.

Michigan.— Sheldon *v.* Mann, 85 Mich. 265, 48 N. W. 573.

Nebraska.— Bierbower *v.* Polk, 17 Nebr. 268, 22 N. W. 698.

New Jersey.— Stillman *v.* Stillman, 21 N. J. Eq. 126.

Tennessee.— Summers *v.* Howland, 2 Baxt. 407.

Wisconsin.— Hoey *v.* Pierron, 67 Wis. 262, 30 N. W. 692, several chattel mortgages executed at the same time, one of which was invalid for lack of sufficient consideration.

United States.—Crawford *v.* Neal, 144 U. S. 585, 12 S. Ct. 759, 36 L. ed. 552 [*affirming* 36 Fed. 29].

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 27.

15. Burdick *v.* Gill, 7 Fed. 668, 2 McCrary 486.

16. Clinton First Nat. Bank *v.* Cummins, 39 N. J. Eq. 577.

17. Warren *v.* Jones, 68 Ala. 449.

18. *Alabama.*— Buford *v.* Shannon, 95 Ala. 205, 10 So. 263; Warren *v.* Jones, 68 Ala. 449; Stokes *v.* Jones, 18 Ala. 734; Pope *v.* Wilson, 7 Ala. 690.

Arkansas.— Cornish *v.* Dews, 18 Ark. 172; Hempstead *v.* Johnston, 18 Ark. 123, 65 Am. Dec. 458.

California.— Gray *v.* Galpin, 98 Cal. 633, 33 Pac. 725.

Connecticut.— Clark *v.* Johnson, 5 Day 373.

Georgia.— Scott *v.* Winship, 20 Ga. 429, holding that the fact that a judgment debtor fraudulently conceals property supposed to be subject to his debts will not render a prior conveyance fraudulent as to creditors, unless the grantee was privy to the act.

Illinois.— Klemm *v.* Bishop, 56 Ill. App. 613; Rutt *v.* Shuler, 49 Ill. App. 655.

Indiana.— Rose *v.* Colter, 76 Ind. 590 (subsequent insolvency of vendor); Ray *v.* Simons, 76 Ind. 150.

Kansas.— Bowling *v.* Armourdale Bank, 57 Kan. 174, 45 Pac. 584, holding that the taking of a second and separate mortgage by a creditor, even if invalid, does not necessarily defeat the first mortgage.

Kentucky.— U. S. Bank *v.* Huth, 4 B. Mon. 423.

Massachusetts.— Hatch *v.* Smith, 5 Mass. 42.

Michigan.— Sheldon *v.* Mann, 85 Mich. 265, 48 N. W. 573; Page *v.* Kendrick, 10 Mich. 300.

Missouri.— Krueger *v.* Vorhauer, 164 Mo. 156, 63 S. W. 1098 (holding that schemes to defraud his existing and subsequent creditors, entered into by a party after making a deed of trust, cannot affect the validity of such deed); Page *v.* Dixon, 59 Mo. 43; Gates *v.* Labeaume, 19 Mo. 17 (holding that an assignment for the benefit of creditors, valid in its creation, is not vitiated by subsequent fraudulent or illegal acts of the assignor).

Nebraska.— Bierbower *v.* Polk, 17 Nebr. 268, 22 N. W. 698.

New Jersey.— Owen *v.* Arvis, 26 N. J. L. 22; Stillman *v.* Stillman, 21 N. J. Eq. 126.

New York.— Maass *v.* Falk, 146 N. Y. 34, 40 N. E. 504 (holding that the fact that, on the day after a transfer of property to secure certain creditors, the debtor made a general assignment, does not of itself raise a presumption that the transfer was fraudulent); Friedman *v.* Rose, 83 Hun 542, 31 N. Y. Suppl. 1040 (bill of sale void because it was not filed and there was no change of possession, taken as additional security to a valid chattel mortgage); Kinghorn *v.* Wright, 45 N. Y. Super. Ct. 615; Nicholson *v.* Leavitt, 4 Sandf. 252; Wilder *v.* Winne, 6 Cow. 284; Weller *v.* Wayland, 17 Johns. 102 (holding that a bill of sale valid at the time of execution is not rendered invalid by allowing part of the goods included therein to remain in the possession of vendor).

North Carolina.— Winborne *v.* Lassiter, 89 N. C. 1.

Texas.— Cleveland *v.* Empire Mills, 6 Tex. Civ. App. 479, 25 S. W. 1055, subsequent conduct of debtor and trustee in conveyance for benefit of preferred creditors not acquiesced in by the beneficiaries.

Virginia.— Claytor *v.* Anthony, 6 Rand. 285, holding that if a deed of trust is fairly executed to secure a *bona fide* debt, it cannot be impeached on the ground of fraud for any matter *ex post facto*.

Washington.— Sanders *v.* Main, 12 Wash. 665, 42 Pac. 122.

instrument was delivered and not the time of its execution.[19] And it has been held that a conveyance not fraudulent at first may become so afterward by being concealed, or not pursued, by means of which creditors have been induced to give credit,[20] or by being subsequently used to cover up property or otherwise defraud creditors.[21] So also prior and subsequent conduct and transactions may not only furnish evidence of fraudulent intent, but may in themselves be sufficient evidence that a conveyance was in fact fraudulent.[22] A voluntary conveyance which is valid in its inception, because there is no fraudulent intent and the debtor retains sufficient property to meet all his debts, is not rendered invalid as against subsequent creditors or purchasers by subsequent embarrassments of the grantor.[23]

5. Validating Conveyance by Matter Ex Post Facto — a. Acts of Parties. That fraud in a conveyance may be purged by matter *ex post facto* is well set-

West Virginia.— Harden *v.* Wagner, 22 W. Va. 356.

United States.— Schreyer *v.* Scott, 134 U. S. 405, 10 S. Ct. 579, 33 L. ed. 955; Stewart *v.* Dunham, 115 U. S. 61, 5 S. Ct. 1163, 29 L. ed. 329; Judson *v.* Courier Co., 15 Fed. 541, holding that a voluntary conveyance from a parent to his children by way of settlement, when otherwise valid as to creditors, is not rendered invalid by subsequent contributions by the parent of money for the purpose of paying off encumbrances and improving the property.

England.—Stone *v.* Grubham, 2 Bulst. 217.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 23, 27, 28, 29. And see the cases cited *supra*, III, C, 3.

If a judgment be valid in its inception, it is not rendered invalid because execution is taken out thereon with a view to hinder and delay creditors, and has such effect. Wilder *v.* Winne, 6 Cow. (N. Y.) 284.

Benefit given debtor after conveyance.— The fact that after completion of an absolute and valid sale and delivery of property promises are made to the seller to give him the proceeds of the sale of the property in excess of a certain amount does not operate retroactively on the sale and avoid it in favor of a creditor of the seller. Klemm *v.* Bishop, 56 Ill. App. 613.

Compelling execution of trust.— Although a conveyance valid in its inception, made for the security of creditors, but becoming, by subsequent events, oppressive and injurious to other creditors, is not for that reason invalid as against them, yet a court of equity may interfere to compel an immediate execution of the trust and, after satisfying its purposes, apply the surplus to the payment of other debts. Pope *v.* Wilson, 7 Ala. 690.

19. Stewart *v.* Mannington Exch. Bank, 55 N. J. Eq. 795, 38 Atl. 952, holding that a deed which when drawn was intended by the grantor to put his property out of the reach of his creditors will not be set aside as fraudulent if, at the time of its delivery and acceptance by the grantee, the sole object of both the parties to the instrument was that it should be held by the grantee as a security for a debt due from the grantor to a third person.

20. Lamont *v.* Regan, 96 Ill. App. 359.

21. Woodard *v.* Mastin, 106 Mo. 324, 17 S. W. 308 (holding that the fact that a trust deed was made in good faith and valid will not protect a purchaser under it, as against the grantor's creditors, where the sale and purchase are collusively and fraudulently made for the purpose of covering up the grantor's equity); Bauer Grocery Co. *v.* Smith, 61 Mo. App. 665 (holding that a mortgage, although valid in its inception, will become fraudulent if used to cover up goods other than those conveyed thereby); Carter *v.* Grimshaw, 49 N. H. 100 (holding that where a deed of settlement by a father to his minor children is put to a fraudulent use as to subsequent creditors, the fraud may be carried back to the date of the conveyance, so as to invalidate it as to them).

22. *Alabama.*— Constantine *v.* Twelves, 29 Ala. 607.

Massachusetts.— Lynde *v.* McGregor, 13 Allen 182, 90 Am. Dec. 188.

Missouri.—Benne *v.* Schnecko, 100 Mo. 250, 13 S. W. 82.

South Carolina.— McSween *v.* McCown, 23 S. C. 342.

West Virginia.— Livesay *v.* Beard, 22 W. Va. 585.

United States.— Burdict *v.* Gill, 7 Fed. 668, 2 McCrary 486, holding that fraud would be presumed where a voluntary conveyance to a wife was followed within a short time by the fraudulent disposition of the grantor's remaining estate.

England.— Worseley *v.* De Mattos, 1 Burr. 467, 2 Ld. Ken. 218.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 27. See also *infra*, XIV, K.

Fraudulent consent judgment and subsequent purchase by wife on execution.— Where, on the same date that plaintiff's judgment by default was recovered against a husband, a third person, by "mutual consent," also recovered a judgment against him, and a motion to set aside the default in plaintiff's case was made in behalf of the husband, and matters were so managed that the consent judgment obtained a priority over plaintiff's, it was held that a purchase of the land for a small amount by the debtor's wife at an execution sale under the consent judgment was in furtherance of and tainted with the original fraud. Benne *v.* Schnecko, 100 Mo. 250, 13 S. W. 82.

23. Brackett *v.* Waite, 4 Vt. 389.

tled, but the extent to which this may be done is not altogether clear. The doctrine seems to be that if, in the case of a conveyance fraudulent as to creditors, the contract be afterward rescinded and the fraudulent purpose wholly abandoned, and a new conveyance made, which is free from fraud, or, in the case of a conveyance which creditors may set aside merely because it is voluntary and without consideration, if a consideration is afterward paid, this may purge the fraud and give validity to the transaction.[24] But where a contract or conveyance expressly and intentionally fraudulent has been made, it cannot be rendered valid, in whole or in part, by any subsequent payment or advances, without rescinding the whole. If any part of the original purpose is fraudulent, the whole may be avoided, although there is a sufficient consideration, and in like manner, if any part of the fraudulent purpose remains, it vitiates the whole.[25]

24. Lynde *v.* McGregor, 13 Allen (Mass.) 172. And see the following cases:

Alabama.— Borland *v.* Mayo, 8 Ala. 104.

Indiana. — Langsdale *v.* Woollen, 99 Ind. 575.

Louisiana.— Roussel *v.* Dukeylus, 4 Mart. 218.

Maine.— Matthews *v.* Buck, 43 Me. 265, holding that where a contract made in fraud of creditors is voluntarily rescinded, no disability will attach by reason of any previous fraud to any subsequent arrangement in regard to the same property, either with other persons, or between the parties to the contract, when no rights have been acquired by third persons.

Massachusetts.— Oriental Bank *v.* Haskins, 3 Metc. 332, 37 Am. Dec. 140; Boyd *v.* Brown, 17 Pick. 453; Richards *v.* Allen, 8 Pick. 405, holding that an absolute conveyance intended as a security for future advances, if it could be avoided by creditors, is rendered valid by a bond, given after the advances have been made, to reconvey upon the payment of the money so advanced.

Mississippi.— Agricultural Bank *v.* Dorsey, Freem. 338.

New Hampshire.— Smyth *v.* Carlisle, 17 N. H. 417.

New York.—Hurd *v.* New York, etc., Steam Laundry Co., 52 N. Y. App. Div. 467, 65 N. Y. Suppl. 125 [*reversing* 29 Misc. 183, 60 N. Y. Suppl. 813] (holding that where a corporation of which R was president transferred part of its property to another corporation, receiving stock in payment, the fact that the stock was issued to the wife of R did not invalidate the sale, where it was subsequently conveyed by her to the corporation and no one was prejudiced); Hardt *v.* Deutsch, 30 N. Y. App. Div. 589, 52 N. Y. Suppl. 335; Wise *v.* Rider, 34 N. Y. Suppl. 782 (holding that the fact that a mortgage on a stock of goods is void as to other creditors of the mortgagor, because it authorizes the mortgagor to sell the property and use the proceeds in his business, does not affect the right of the mortgagor to give another mortgage to secure the debt, free from such infirmity). See also Brooks *v.* Wilson, 53 Hun 173, 6 N. Y. Suppl. 116, holding that where a grantee in a conveyance made to defraud creditors, at the request of the grantor, mortgaged the property conveyed to secure a debt owing by the grantor to the mortgagee, the latter had the same rights as if the mortgage had been made before the fraudulent conveyance.

North Carolina.— White *v.* White, 35 N. C. 265; King *v.* Cantrel, 26 N. C. 251.

United States.— Stewart *v.* Dunham, 115 U. S. 61, 5 S. Ct. 1163, 29 L. ed. 329; Sumner *v.* Hicks, 2 Black 532, 535, 17 L. ed. 355, where it is said to be "a settled principle that a deed voluntary or even fraudulent in its creation, and voidable by a purchaser, may become good by matter *ex post facto*."

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 29, 30.

Assignment.— If the debtor makes an assignment which is void, and afterward, but before any creditor has acquired a lien, makes another which is free from objection, the latter assignment is valid. Sumner *v.* Hicks, 2 Black (U. S.) 532, 17 L. ed. 355.

Purchase by fraudulent grantee from execution purchaser see Dimock *v.* Ridgeway, 169 Mass. 526, 48 N. E. 338.

Delivery of possession after sale or mortgage see IX, A, 3; IX, A, 9, b.

25. Lynde *v.* McGregor, 13 Allen (Mass.) 172. And see the following cases:

Illinois.— Head *v.* Harding, 166 Ill. 353, 46 N. E. 890 [*affirming* 62 Ill. App. 302].

Kentucky. — Poague *v.* Boyce, 6 J. J. Marsh. 70.

Maryland.— Moore *v.* Blondheim, 19 Md. 172.

Missouri.— Gentry *v.* Field, 143 Mo. 399, 45 S. W. 286 (holding that a conveyance made in fraud of creditors is not purged by any subsequent act of the grantor); Woodard *v.* Mastin, 106 Mo. 324, 17 S. W. 308; Martin *v.* Rice, 24 Mo. 581; Lowrance *v.* Barker, 82 Mo. App. 125.

New York.— Bailey *v.* Burton, 8 Wend. 339.

Pennsylvania.— Bunn *v.* Ahl, 29 Pa. St. 387, 72 Am. Dec. 639.

South Carolina.— McSween *v.* McCown, 23 S. C. 342.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 27, 29, 30.

Payment for property by a vendee who acquired it under a contract made between him and his vendor with an intent to defraud the creditors of vendor will not legitimate the contract, nor rescue the property from the grasp of the creditors. Poague *v.* Boyce, 6

No rights can be lost or acquired by a fraudulent conveyance or transfer of property, where the property is retransferred before the fraudulent purpose is effected and before any lien has been acquired by creditors.[26] Where property is fraudulently conveyed by a debtor to avoid attachment and is subsequently transferred by the holder to a creditor of such debtor, and at his request, such creditor will hold the property by a good title.[27]

b. Assent or Confirmation by Creditors. A fraudulent conveyance may also be rendered valid by the subsequent assent or confirmation of the creditors entitled to avoid the same, whether such assent or confirmation be express or implied from the receipt by them of the purchase-money from the grantor or grantee, or proceeding against the grantee therefor, or from the receipt of the proceeds of a sale of the property or a dividend under an assignment or deed of trust.[28]

D. Prejudice to Creditors. In order that a conveyance or transfer may be attacked as being fraudulent and void as against creditors, it is necessary, even where there is an actual fraudulent intent, that prejudice to the rights of creditors shall result therefrom,[29] for fraud does not consist in mere intent not

J. J. Marsh. (Ky.) 70. To the same effect see McSween *v.* McCown, 23 S. C. 342.

Mortgage not abandoned.— Where plaintiff in her original petition based her claim to certain property on a mortgage, and in an amended petition simply claimed title without alleging its source, and testified at the trial that she claimed under the mortgage, she was not entitled, after the mortgage was declared invalid, to claim under a bill of sale executed on the same day the property was attached by the mortgagor's creditors, since there was no abandonment of the mortgage, so as to purge the transaction from fraud and entitle plaintiff to the rights of a *bona fide* purchaser under the bill of sale. Lowrance *v.* Barker, 82 Mo. App. 125.

A subsequent purchase of the land at an execution sale by the fraudulent purchaser at a trustee's sale does not validate his title as against a *bóna fide* judgment creditor of the grantor. Woodard *v.* Mastin, 106 Mo. 324, 17 S. W. 308.

26. Davidson *v.* Dwyer, 62 Iowa 332, 17 N. W. 575. See also Lafayette Second Nat. Bank *v.* Brady, 96 Ind. 498; McCord, etc., Mercantile Co. *v.* Burson, 38 Kan. 278, 16 Pac. 664 (holding that where a fraudulent sale of goods is shortly afterward revoked by consent of the parties, and the conditions existing prior to such sale are restored, the creditors of the vendor have no ground of complaint); Matthews *v.* Buck, 43 Me. 265; Wheeler *v.* Kirkland, 23 N. J. Eq. 13; Cramer *v.* Blood, 48 N. Y. 684 [*affirming* 57 Barb. 155, 671]; Stanton *v.* Shaw, 3 Baxt. (Tenn.) 12 (holding that a bill to subject to payment of a debt land fraudulently put in title of a third party comes too late after its reconveyance to the true purchaser).

27. Boyd *v.* Brown, 17 Pick. (Mass.) 453.

28. *Alabama.*— Hatchett *v.* Blanton, 72 Ala. 423; Butler *v.* O'Brien, 5 Ala. 316.

Arkansas.— Bowden *v.* Spellman, 59 Ark. 251, 27 S. W. 602; Millington *v.* Hill, 47 Ark. 301, 1 S. W. 547.

Colorado.— Sickman *v.* Abernathy, 14 Colo. 174, 23 Pac. 447.

Florida.— Simon *v.* Levy, 36 Fla. 438, 18 So. 777.

Indiana.— Kitts *v.* Willson, 140 Ind. 604, 39 N. E. 313.

Iowa.— Heaton *v.* Ainley, (1898) 74 N. W. 766, holding that the title of a fraudulent grantee cannot be attacked by a creditor who has taken a mortgage from him.

Louisiana.— Theriot *v.* Michel, 28 La. Ann. 107.

Minnesota.— Lemay *v.* Bibeau, 2 Minn. 291.

Missouri.— Gutzwiller *v.* Lackman, 23 Mo. 168.

New York.— Fitts *v.* Beardsley, 8 N. Y. Suppl. 567.

Ohio.— Rennick *v.* Chillicothe Bank, 8 Ohio 529.

Pennsylvania.— Zuver *v.* Clark, 104 Pa. St. 222; Furness *v.* Ewing, 2 Pa. St. 479.

Tennessee.— Cunningham *v.* Campbell, 3 Tenn. Ch. 708.

Wisconsin.— Shawano County Bank *v.* Koeppen, 78 Wis. 533, 47 N. W. 723; Geisse *v.* Beall, 3 Wis. 367.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 656 *et seq.* See also *infra*, IV, G, 2, 4; XIII, A, 4, a, (I), (H); XIV, D, 1.

Estoppel to attack assignment see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 113.

29. *Alabama.*— Pickett *v.* Pipkin, 64 Ala. 520. See also Danner Land, etc., Co. *v.* Stonewall Ins. Co., 77 Ala. 184.

Colorado.— McPhee *v.* O'Rourke, 10 Colo. 301, 15 Pac. 420, 3 Am. St. Rep. 579.

Connecticut.— Barney *v.* Cuttler, 1 Root 489.

Georgia.— Brown *v.* Spivey, 53 Ga. 155.

Illinois.— Phillips *v.* North, 77 Ill. 243.

Iowa.— Day *v.* Lown, 51 Iowa 384, 71 N. W. 786; Hook *v.* Mowre, 17 Iowa 195.

Kentucky.— Hanby *v.* Logan, 1 Duv. 242; Shiveley *v.* Jones, 6 B. Mon. 274.

Louisiana.— Willis *v.* Scott, 33 La. Ann. 1026; Payne *v.* Kemp, 33 La. Ann. 818; Levi *v.* Morgan, 33 La. Ann. 532; Meche *v.* Lalamie, 30 La. Ann. 1136; Gillis *v.* Dansby,

resulting in injury.[30] A conveyance made with intent to defraud creditors is not fraudulent if there were no creditors; and it is for the law to determine whether there were creditors or not.[31]

E. What Law Governs. The validity of a transfer of real estate by a debtor, as by any other person, is to be determined in accordance with the law of the place where such real estate is situated;[32] but a transfer of personal property which is valid by the law of the domicile of the debtor, or of the place where it is made, is sufficient to transfer such property wherever situated, unless such transfer is in conflict with the settled policy or the law of the place where the property is situated.[33] If, however, a transfer is valid in the state where made,

26 La. Ann. 711; Lafleur *v.* Hardy, 11 Rob. 493; Lott *v.* Gray, 6 Rob. 152; Hubbard *v.* Hobson, 14 La. 453; Kenney *v.* Dow, 10 Mart. 577, 13 Am. Dec. 342.

Maine.— Crooker *v.* Holmes, 65 Me. 195, 20 Am. Rep. 687.

Michigan.— Bodine *v.* Simmons, 38 Mich. 682.

Mississippi.— Simmons *v.* Ingram, 60 Miss. 866; Henderson *v.* Thornton, 37 Miss. 448, 75 Am. Dec. 70; Winn *v.* Barnett, 31 Miss. 653; Everett *v.* Winn, Sm. & M. Ch. 67.

New Hampshire.— Blake *v.* Williams, 36 N. H. 39; Bean *v.* Brackett, 34 N. H. 102.

New York.— Shand *v.* Hanley, 71 N. Y. 319.

Pennsylvania.— Haak's Appeal, 100 Pa. St. 59; Miner *v.* Warner, 2 Grant 448; Boyle *v.* Thomas, 1 Chest. Co. Rep. 117.

South Carolina.— Kid *v.* Mitchell, 1 Nott & M. 334, 9 Am. Dec. 702; King *v.* Clarke, 2 Hill Eq. 611.

Texas.— Kerr *v.* Hutchins, 46 Tex. 384, 36 Tex. 452.

West Virginia.— Zell Guano Co. *v.* Heatherly, 45 W. Va. 311, 31 S. E. 932.

Wisconsin.— Ingram *v.* Rankin, 47 Wis. 406, 2 N. W. 755, 32 Am. Rep. 762.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 1. And see *supra*, I, E, 2; *infra*, IV, A.

If one of two joint judgment debtors conveys property to the other, such conveyance is not prejudicial to the rights of the judgment creditor, and cannot be made the basis of a creditors' bill to set aside the conveyance as fraudulent. McPhee *v.* O'Rourke, 10 Colo. 301, 15 Pac. 420, 3 Am. St. Rep. 579.

Purchase of property in another's name.— When a husband, whether solvent or insolvent at the time, purchases property for his wife and children, taking title to himself, as their trustee, paying nothing, but giving his note for the price, and afterward dies insolvent, leaving the note wholly unpaid, and where his widow, after his death, discharges the note with her own means, the husband's creditors have not been injured or defrauded, and cannot subject the property, although their claims were in existence when the trust was created. Rutherford *v.* Chapman, 59 Ga. 177. See *supra*, III, A, 3, a, (II); *infra*, VIII, F.

Transfer of exempt property see *supra*, II, B, 21.

Property of little or no value see *supra*, II, B, 2.

30. See the cases cited in the preceding note. And see *infra*, VII, A, 3.

31. Day *v.* Lown, 51 Iowa 364, 71 N. W. 786. See also *infra*, IV.

32. *Alabama.*— Danner *v.* Brewer, 69 Ala. 191.

District of Columbia.— Keane *v.* Chamberlain, 14 App. Cas. 84.

Kansas.— Watson *v.* Holden, 58 Kan. 657, 50 Pac. 883.

Kentucky.— Brown *v.* Early, 2 Duv. 369.

Massachusetts.— Chipman *v.* Peabody, 159 Mass. 420, 34 N. E. 563, 38 Am. St. Rep. 437.

Ohio.— Brannon *v.* Brannon, 2 Disn. 224.

Oklahoma.— Williams *v.* Kemper, etc., Dry-Goods Co., 4 Okla. 145, 43 Pac. 1148.

United States.— Spindle *v.* Shreve, 111 U. S. 542, 4 S. Ct. 522, 28 L. ed. 512; Nichol *v.* Levy, 5 Wall. 433, 18 L. ed. 596. See also Nichols *v.* Eaton, 91 U. S. 716, 23 L. ed. 254.

33. *Alabama.*— Hardaway *v.* Semmes, 38 Ala. 657; Inge *v.* Murphy, 10 Ala. 885.

California.— Forbes *v.* Scannell, 13 Cal. 242.

Connecticut.— Ward *v.* Connecticut Pipe Mfg. Co., 71 Conn. 345, 41 Atl. 1057, 71 Am. St. Rep. 207, 72 L. R. A. 706; Ballard *v.* Winter, 39 Conn. 179; Koster *v.* Merritt, 32 Conn. 246.

Indiana.— Ames Iron Works *v.* Warren, 76 Ind. 512, 40 Am. Rep. 258.

Kansas.— Mackey *v.* Pettijohn, 6 Kan. App. 57, 49 Pac. 636.

Kentucky.— Levy *v.* Kentucky Distilling Co., 9 Ky. L. Rep. 103.

Louisiana.— See Olivier *v.* Townes, 2 Mart. N. S. 93.

Maryland.— Pleasanton *v.* Johnson, 91 Md. 673, 47 Atl. 1025; Moore *v.* Land, etc., Co., 82 Md. 288, 33 Atl. 641; Baltimore, etc., R. Co. *v.* Glenn, 28 Md. 287, 92 Am. Dec. 288.

Massachusetts.— Frank *v.* Bobbitt, 155 Mass. 112, 29 N. E. 209. See also Hallgarten *v.* Oldham, 135 Mass. 1, 46 Am. Rep. 433.

Minnesota.— *In re* Kahn, 55 Minn. 509, 57 N. W. 154; *In re* Dalpay, 41 Minn. 532, 43 N. W. 564, 16 Am. St. Rep. 729, 6 L. R. A. 108. See also Lewis *v.* Bush, 30 Minn. 244, 15 N. W. 113.

New Hampshire.— See Sessions *v.* Little, 9 N. H. 271.

New Jersey.— Frazier *v.* Fredericks, 24 N. J. L. 162.

New York.— Keller *v.* Paine, 107 N. Y. 83, 13 N. E. 635; Warner *v.* Jaffray, 96 N. Y.

the courts of another state will not hold it void in favor of a non-resident creditor, even though not in harmony with the law and policy of the state where the property is situated.[34] A transfer of movable property duly carried out according to the law of the place where the property is situated is not rendered ineffectual by showing that such transfer as carried out is not in accordance with what would be required by law in the place where the owner is domiciled.[35] When the place where a mortgage including both real and personal property is made is also the place where the property is situated, the law of that place will control as against the law of the domicile, in determining the validity of the mortgage as to creditors.[36] Whether a wife acquired such an interest in her earnings as will constitute a consideration for a conveyance from her husband to her is to be determined by the law of the state of which they were citizens when the earnings were made;[37] and in determining the liability of a husband for the rents and profits of property of his wife, when it is alleged that the consideration for a conveyance to her is an indebtedness from him, of which such rents and profits received and converted by him form a part, the courts will give effect to the laws of the state where such husband and wife were domiciled when such rents and profits were received and used.[38]

248, 48 Am. Rep. 616; Ockerman *v.* Cross, 54 N. Y. 29.

North Carolina.— See Drewry *v.* Phillips, 44 N. C. 81.

Oklahoma.— Williams *v.* Kemper, etc., Dry-Goods Co., 4 Okla. 145, 43 Pac. 1148.

Pennsylvania.— See Townsend *v.* Maynard, 45 Pa. St. 198.

Tennessee.— Lally *v.* Holland, 1 Swan 399. See also Flickey *v.* Loney, 4 Baxt. 169.

Texas.— Fowler *v.* Bell, 90 Tex. 150, 37 S. W. 1058, 59 Am. St. Rep. 788, 39 L. R. A. 254.

United States.— Green *v.* Van Bushkirk, 5 Wall. 307, 18 L. ed. 599, 7 Wall. 139, 19 L. ed. 109.

And see CHATTEL MORTGAGES, 6 Cyc. 1060.

Compare Smith *v.* Jones, 63 Ark. 232, 37 S. W. 1052, holding that the rule that a foreign assignment will not be upheld as against domestic creditors does not apply to an absolute and *bona fide* sale.

Protection of domestic creditors.—"Judicial comity does not require us to enforce any clause of the instrument, which, even if valid under the *lex domicilii*, conflicts with the policy of our state relating to property within its borders, or impairs the rights or remedies of domestic creditors. . . . A transfer in another state, although valid there, which would be void as to creditors if made here, does not confer title to personal property situated here that is good as against a resident of this state armed with legal process to collect a debt. . . . To this extent, in nearly all jurisdictions, the rule of comity yields to the policy of the state with reference to the collection of debts due to its own citizens, out of property within its boundaries and protected by its laws." Dearing *v.* McKinnon Dash, etc., Co., 165 N. Y. 78, 87, 58 N. E. 773, 80 Am. St. Rep. 708 [*affirming* 33 N. Y. App. Div. 31, 53 N. Y. Suppl. 513].

Validity of transfer invalid by the lex loci see Arkansas City Bank *v.* Cassidy, 71 Mo. App. 186; Wattson *v.* Campbell, 38 N. Y. 153; Pyatt *v.* Powell, 51 Fed. 551, 2 C. C. A. 367.

34. Williams *v.* Kemper, etc., Dry-Goods Co., 4 Okla. 145, 43 Pac. 1148; Barnett *v.* Kinney, 147 U. S. 476, 13 S. Ct. 403, 37 L. ed. 247. See also Rhode Island Cent. Bank *v.* Danforth, 14 Gray (Mass.) 123; State Bank *v.* Plainfield First Nat. Bank, 34 N. J. Eq. 450.

35. *In re* Queensland Mercantile, etc., Co., [1891] 1 Ch. 536.

Illustration.—A creditor resided in the state of New York, and the debtor in the state of Connecticut. The debtor was in failing circumstances, which was known to the creditor. The latter applied to the debtor in Connecticut for payment, and it was arranged between them that the debtor should deliver to the creditor, at his residence in the state of New York, certain personal property owned by him which the creditor was to take in full of his debt; and the property was immediately afterward so delivered. Two days after the debtor made a general assignment for the benefit of his creditors under the insolvent law of Connecticut. One of the provisions of that law is that all transfers of property made in view of insolvency at any time within sixty days before such an assignment shall be void. The parties, in the arrangement for the payment of the debt in the particular mode agreed on, had it in view to evade the provisions of the Connecticut law. In an action of trover, brought by the trustee in insolvency against the creditor, it was held: (1) That the title to the property legally passed to defendant in New York at the time of its delivery to him there, such sale being legal under the laws of New York; and (2) that the insolvent law of Connecticut could not divest the title thus legally acquired. Mead *v.* Dayton, 28 Conn. 33.

36. Boehme *v.* Rall, 51 N. J. Eq. 541, 26 Atl. 832.

37. Hinman *v.* Parkis, 33 Conn. 188.

38. Gilkey *v.* Pollock, 82 Ala. 503, 3 So. 99.

IV. PERSONS WHO MAY ATTACK CONVEYANCE.

A. In General. Under the statute of 13 Elizabeth, and statutes based thereon, a conveyance in fraud of creditors can be assailed only by creditors, and it is valid as to all other parties.[1] Since a conveyance, however fraudulent as to creditors, may be good between the parties,[2] a creditor cannot impeach it without showing that he has been injured thereby, and, to entitle him to equitable relief, it is necessary for him to show that he has been thereby deprived of his remedy at law, and is therefore compelled to resort to equity.[3] However, the fact that

1. *Alabama.*—Grisham *v.* Bodman, 111 Ala. 194, 20 So. 514; Pickett *v.* Pipkin, 64 Ala. 520.

Arkansas.— King *v.* Clay, 34 Ark. 291; Jordan *v.* Fenno, 13 Ark. 593.

California.— Brown *v.* Cline, 109 Cal. 156, 41 Pac. 862; Sexey *v.* Adkinson, 34 Cal. 346, 91 Am. Dec. 698; Labish *v.* Hardy, (1889) 23 Pac. 123.

Illinois.— Chicago *v.* McGraw, 75 Ill. 566; Currier *v.* Ford, 26 Ill. 488.

Indiana.— Clendening *v.* Ohl, 118 Ind. 46, 20 N. E. 639; Etter *v.* Anderson, 84 Ind. 333; Bentley *v.* Dunkle, 57 Ind. 374; O'Neil *v.* Chandler, 42 Ind. 471.

Kentucky.— Jones *v.* Hill, 9 Bush 692; Warren *v.* Hall, 6 Dana 450; Anderson *v.* Bradford, 5 J. J. Marsh. 69.

Louisiana.— Johnson *v.* Mayer, 30 La. Ann. 1203; Keane *v.* Goldsmith, 14 La. Ann. 349.

Maine.— Hatch *v.* Bates, 54 Me. 136; Thompson *v.* Moore, 36 Me. 47; Woodman *v.* Bodfish, 25 Me. 317.

Massachusetts.— Perry *v.* Hayward, 12 Cush. 344.

Michigan.— Richardson *v.* Welch, 47 Mich. 309, 11 N. W. 172; McAuliffe *v.* Farmer, 27 Mich. 76; Morey *v.* Forsyth, Walk. 465.

Mississippi.— Shaw *v.* Millsaps, 50 Miss. 380; Whitney *v.* Freeland, 26 Miss. 481.

Missouri.— Larimore *v.* Tyler, 88 Mo. 661; McLaughlin *v.* McLaughlin, 16 Mo. 242.

Nebraska.— Baldwin *v.* Burt, 43 Nebr. 245, 61 N. W. 601.

New Jersey.— Evans *v.* Herring, 27 N. J. L. 243; Garretson *v.* Kane, 27 N. J. L. 208.

New York.— Graser *v.* Stellwagen, 25 N. Y. 315; Clute *v.* Fitch, 25 Barb. 428; Newton *v.* Manwarring, 10 N. Y. Suppl. 347. See Butler *v.* Viele, 44 Barb. 166.

North Carolina.— Smith *v.* Bowen, 3 N. C. 296, holding that a conveyance cannot be deemed fraudulent as against creditors, unless it be proved that there was a creditor to be defrauded.

Ohio.— Burgett *v.* Burgett, 1 Ohio 469, 13 Am. Dec. 634. See Union Cent. L. Ins. Co. *v.* Eckert, 5 Ohio Dec. (Reprint) 528, 6 Am. L. Rec. 452.

Pennsylvania.— Phipps *v.* Boyd, 54 Pa. St. 342; Brown *v.* Scott, 51 Pa. St. 357.

Rhode Island.— Hudson *v.* White, 17 R. I. 519, 23 Atl. 57.

South Carolina.— Swanzy *v.* Hunt, 2 Nott & M. 211; Kid *v.* Mitchell, 1 Nott & M. 334, 9 Am. Dec. 702.

Tennessee.—Bayless *v.* Elcan, 1 Coldw. 96.

Texas.— Shields *v.* Ord, (Civ. App. 1899) 51 S. W. 298; Texarkana Nat. Bank *v.* Hall, (Civ. App. 1895) 30 S. W. 73.

Vermont.— Boutwell *v.* McClure, 30 Vt. 674, must be a *bona fide* creditor.

Wisconsin.— Remington *v.* Willard, 15 Wis. 646; Norton *v.* Kearney, 10 Wis. 443; Schettler *v.* Brunette, 7 Wis. 197; Eaton *v.* White, 2 Wis. 292; Jones *v.* Lake, 2 Wis. 210.

United States.— Voorheis *v.* Blanton, 89 Fed. 885, 32 C. C. A. 384.

England.— Strong *v.* Strong, 18 Beav. 408, 52 Eng. Reprint 161.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 624; and *infra*, XIII, A.

The term "creditors" as used in the Alabama statutes has always been construed liberally and ineludes any person who has a right, claim, or demand founded on contract, whether contingent or absolute, for the performance of a duty or payment of damages in case of non-performance, although no breach may occur until after the execution of the conveyance. Anderson *v.* Anderson, 64 Ala. 403.

Creditors of grantee.— The creditors of a purchaser of personal property under a fraudulent sale cannot object thereto, the creditors of the owner being the only ones who have a right to complain. Bell *v.* Greenwood, 21 Ark. 249. See O'Connell *v.* Cruise, 12 Ohio Dec. (Reprint) 81, 1 Handy 164.

2. See *infra*, XIII, A.

3. *Alabama.*— Pickett *v.* Pipkin, 64 Ala. 520.

California.— Harris *v.* Taylor, 15 Cal. 348.

Connecticut.— Graves *v.* Atwood, 52 Conn. 512, 52 Am. Rep. 610; Barney *v.* Cuttler, 1 Root 489.

Florida.— Howse *v.* Judson, 1 Fla. 133.

Georgia.— Weed *v.* Davis, 25 Ga. 684.

Illinois.— Mullan *v.* O'Shay, 85 Ill. App. 385.

Indiana.— Emerson *v.* Opp, 139 Ind. 27, 38 N. E. 330; Brumbaugh *v.* Richcreek, 127 Ind. 240, 26 N. E. 664, 22 Am. St. Rep. 649; Bentley *v.* Dunkle, 57 Ind. 374.

Kansas.— Hunt *v.* Spencer, 20 Kan. 126; Bradley *v.* Larkin, 5 Kan. App. 11, 47 Pac. 315.

Kentucky.— Hanby *v.* Logan, 1 Duv. 242.

Louisiana.— Mendelsohn *v.* Blaise, 52 La. Ann. 1104, 27 So. 707; Willis *v.* Scott, 33 La. Ann. 1026; Meche *v.* Lalamie, 30 La. Ann. 1136; Berens *v.* Dupre, 6 La. Ann. 494; Le Blanc *v.* Dubroca, 6 La. Ann. 360; Weder-

complainant had not expended money or altered his situation on the strength of defendant having any ownership in the property conveyed is not in itself sufficient to defeat complainant's right to relief.[4]

B. Existing Creditors — 1. In General. The general rule is that any preëxisting creditor has the right to attack a conveyance made by his debtor as being in fraud of the rights of his creditors.[5]

strandt *v.* Marsh, 11 Rob. 533; Lafleur *v.* Hardy, 11 Rob. 493; Lott *v.* Gray, 6 Rob. 152 (holding that a creditor cannot annul a sale the avoidance of which would exclusively benefit another creditor having priority by an anterior seizure); Taylor *v.* Whittemore, 2 Rob. 99; Potier *v.* Harman, 1 Rob. 527. See also Gillis *v.* Dansby, 26 La. Ann. 711.

Maryland.— Christopher *v.* Christopher, 64 Md. 583, 3 Atl. 296.

Michigan.— Bodine *v.* Simmons, 38 Mich. 682.

Minnesota.— Johnston *v.* Piper, 4 Minn. 192.

Mississippi.— Edmunds *v.* Mister, 58 Miss. 765; Cowen *v.* Alsop, 51 Miss. 158; Henderson *v.* Thornton, 37 Miss. 448, 75 Am. Dec. 70; Everett *v.* Winne, Sm. & M. Ch. 67.

Missouri.— Burke *v.* Adams, 80 Mo. 504, 50 Am. Rep. 510; Steadman *v.* Hayes, 80 Mo. 319; Updegraff *v.* Theaker, 57 Mo. App. 45.

Nebraska.— Lewis *v.* Holdrege, 56 Nebr. 379, 76 N. W. 890; Anthes *v.* Schroeder, 3 Nebr. (Unoff.) 604, 92 N. W. 196.

New Hampshire.— Cook *v.* Lee, 72 N. H. 569, 58 Atl. 511, holding that since a fraudulent conveyance is voidable by those who are injured by defendant, the only persons who can avoid a fraudulent conveyance are those who might take the property from the grantor or from his heirs if no conveyance had been made.

New York.— Cushman *v.* Addison, 52 N. Y. 628; Fidelity Trust, etc., Co. *v.* Bell, 63 N. Y. App. Div. 523, 71 N. Y. Suppl. 651; Spicer *v.* Ayers, 53 How. Pr. 405.

North Carolina.— Arnett *v.* Wanett, 28 N. C. 41; Jones *v.* Young, 18 N. C. 352, 28 Am. Dec. 569.

Ohio.— Brannon *v.* Purcell, 8 Ohio Dec. (Reprint) 159, 6 Cinc. L. Bul. 67.

Pennsylvania.— Miner *v.* Warner, 2 Grant 448.

South Carolina.— Buchanan *v.* McNinch, 3 S. C. 498.

Tennessee.— Levis Zukoski Mercantile Co. *v.* Bowers, 105 Tenn. 138, 58 S. W. 287; Burkey *v.* Self, 4 Sneed 121.

Texas.— Walker *v.* Loring, (Civ. App. 1896) 34 S. W. 405.

Vermont.— Durkee *v.* Mahoney, 1 Aik. 116.

Wisconsin.— Frei *v.* McMurdo, 101 Wis. 423, 77 N. W. 915.

United States.— Providence Sav. Bank *v.* Huntington, 10 Fed. 871.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 625. And see *supra*, III, D; *infra*, XIV, C.

4. Iauch *v.* De Socarras, 56 N. J. Eq. 538, 39 Atl. 370.

5. *Alabama.*— Donley *v.* McKiernan, 62 Ala. 34; Jacobson *v.* Simms, 60 Ala. 185; Snodgrass *v.* Decatur Branch Bank, 25 Ala. 161, 60 Am. Dec. 505.

Illinois.— Chicago Daily News Co. *v.* Siegel, 212 Ill. 617, 72 N. E. 810; Campbell, etc., Co. *v.* Ross, 187 Ill. 553, 58 N. E. 596 [*affirming* 86 Ill. App. 356]; Highley *v.* American Exch. Nat. Bank, 185 Ill. 565, 57 N. E. 436; Springer *v.* Bingford, 160 Ill. 495, 43 N. E. 751; Croarkin *v.* Hutchinson, 108 Ill. 633, 58 N. E. 678 [*reversing* 87 Ill. App. 557]; Wooldridge *v.* Gage, 68 Ill. 157; Moore *v.* Montelius, 29 Ill. App. 197; Ives *v.* Hulce, 14 Ill. App. 389; Shackleford *v.* Todhunter, 4 Ill. App. 271.

Iowa.— Babcock *v.* Hamilton, 64 Iowa 558, 21 N. W. 33; Day *v.* Kendall, 60 Iowa 414, 14 N. W. 234; Fifield *v.* Gaston, 12 Iowa 218; Whitescarver *v.* Bonney, 9 Iowa 480.

Kentucky.— Johnson *v.* Skaggs, 2 S. W. 493, 8 Ky. L. Rep. 601.

Louisiana.— Meche *v.* Lalamie, 30 La. Ann. 1136; Lopez *v.* Bergel, 12 La. 197.

Maine.— American Agricultural Chemical Co. *v.* Huntington, 99 Me. 361, 59 Atl. 515.

Maryland.— Kipp *v.* Hanna, 2 Bland 26.

Michigan.— Bodine *v.* Simmons, 38 Mich. 682.

Minnesota.— Schmitt *v.* Dahl, 88 Minn. 506, 93 N. W. 665, 67 L. R. A. 590; Wabasha First Nat. Bank *v.* Burkhardt, 71 Minn. 185, 73 N. W. 858; Stone *v.* Myers, 9 Minn. 303, 86 Am. Dec. 104; Zimmerman *v.* Lamb, 7 Minn. 421.

Mississippi.— Armfield *v.* Armfield, Freem. 311.

Missouri.— Headley Grocer Co. *v.* Walker, 69 Mo. App. 553.

New Hampshire.— Russell *v.* Dyer, 33 N. H. 186.

New Jersey.— Iauch *v.* De Socarras, 56 N. J. Eq. 538, 39 Atl. 370.

New York.— Dygert *v.* Remerschnider, 32 N. Y. 629; Wright *v.* Douglass, 3 Barb. 554; Botts *v.* Cozine, Hoffm. 79.

North Carolina.— Hoke *v.* Henderson, 14 N. C. 12.

Pennsylvania.— Ketner *v.* Donten, 15 Pa. Super. Ct. 604, holding that a conveyance of property by a debtor, fraudulent as to one creditor, is fraudulent as to all creditors in existence at the time of the conveyance.

South Dakota.— Meyer Boot, etc., Co. *v.* Shenkberg Co., 11 S. D. 620, 80 N. W. 126.

Tennessee.— Lippman *v.* Boals, 16 Lea 283.

Texas.— De Garca *v.* Galvan, 55 Tex. 53; Riske *v.* Rotan Grocery Co., (Civ. App. 1904) 84 S. W. 243; Monday *v.* Vance, (Civ. App. 1899) 51 S. W. 346.

Vermont.— Farmers' Nat. Bank *v.* Thomson, 74 Vt. 442, 52 Atl. 961; Fair Haven Marble, etc., Slate Co. *v.* Owens, 69 Vt. 246, 37 Atl. 749.

2. Who Are Existing Creditors. Existing creditors are, as the words imply, persons having subsisting obligations against the debtor at the time the fraudulent alienation was made or the secret trust created, although their claims may not have matured or been reduced to judgment until after such conveyance.[6]

3. Contingent Obligation. A contingent liability is as fully protected against fraudulent and voluntary conveyances as a claim certain and absolute, and whoever has a claim or demand arising out of a preëxisting contract, although it may be contingent, is a creditor whose rights are affected by such conveyances and can avoid them when the contingency happens upon which the claim depends.[7]

Washington.— Goodfellow *v.* Le May, 15 Wash. 684, 47 Pac. 25.

United States.— Thompson Nat. Bank *v.* Corwine, 89 Fed. 774.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 629.

6. *District of Columbia.*— Smith *v.* Cook, 10 App. Cas. 487.

Iowa.— O'Brien *v.* Stambach, 101 Iowa 40, 69 N. W. 1133, 63 Am. St. Rep. 368.

Nebraska.— Omaha Brewing Assoc. *v.* Zeller, 4 Nebr. (Unoff.) 198, 93 N. W. 762, holding that the indebtedness will relate back to its original inception as regards the question of constituting the claimant an existing creditor.

New Jersey.— Perrine *v.* Perrine, (Ch. 1901) 50 Atl. 694 (holding that it is sufficient to show that the debt antedated the transfer, although the judgment was subsequent to it); Mason *v.* Somers, 59 N. J. Eq. 451, 45 Atl. 602; Severs *v.* Dodson, 53 N. J. Eq. 633, 34 Atl. 7, 51 Am. St. Rep. 641 (holding that the terms "existing debts" and "existing liabilities" are not synonymous, and that an accommodation indorser of a promissory note that is not dishonored is not an existing creditor).

Ohio.— Bowlus *v.* Shanabarger, 19 Ohio Cir. Ct. 137, 10 Ohio Cir. Dec. 167.

Tennessee.— Nelson *v.* Vanden, 99 Tenn. 224, 42 S. W. 5, where at the time of a voluntary conveyance the grantor was indebted to complainant. The debt was afterward paid, but at the time of payment a new indebtedness had arisen between the parties, and it was held on a bill by complainant to set aside the conveyance as fraudulent that he was a subsequent creditor in whose favor no presumption of fraud arose.

United States.— Schreyer *v.* Platt, 134 U. S. 405, 10 S. Ct. 579, 33 L. ed. 955; Horbeck *v.* Hill, 112 U. S. 144, 149, 5 S. Ct. 81, 28 L. ed. 670; Thomson *v.* Crane, 73 Fed. 327.

The difference between existing and subsequent debts in reference to voluntary conveyances is this: "As to the former, the fraud is an inference of law, but as to the latter, there must be fraud in fact." Cook *v.* Johnson, 12 N. J. Eq. 51, 72 Am. Dec. 381.

Creditor by elegit.— In England a bill lay by a creditor by elegit to set aside a fraudulent conveyance, whether he could recover at law or not. Bennet *v.* Musgrove, 2 Ves. 51, 28 Eng. Reprint 34.

Wife covenantee.— Under a covenant on marriage by a husband with trustees, in case the wife should survive him, to pay her a sum of money, she is a creditor within the statute of 13 Eliz. c. 5, against fraudulent conveyances. Rider *v.* Kidder, 10 Ves. Jr. 360, 32 Eng. Reprint 884.

A creditor under a voluntary post-obit bond is in England as much entitled to the benefit of 3 Eliz. c. 5, as any other creditor. Adames *v.* Hallett, L. R. 6 Eq. 468, 18 L. T. Rep. N. S. 789.

7. *Alabama.*— Washington *v.* Norwood, 128 Ala. 383, 30 So. 405; Yeend *v.* Weeks, 104 Ala. 331, 16 So. 165, 53 Am. St. Rep. 50; Bragg *v.* Patterson, 85 Ala. 233, 4 So. 716; Keel *v.* Larkin, 72 Ala. 493; Fearn *v.* Ward, 65 Ala. 33; Anderson *v.* Anderson, 64 Ala. 403; Bibb *v.* Freeman, 59 Ala. 612; Gannard *v.* Eslava, 20 Ala. 732; Foote *v.* Cobb, 18 Ala. 585.

Arkansas.— Williams *v.* Bizzell, 11 Ark. 716.

Florida.— Reel *v.* Livingston, 34 Fla. 377, 16 So. 284, 43 Am. St. Rep. 202.

Georgia.— Banks *v.* McCandless, 119 Ga. 793, 47 S. E. 332.

Illinois.— Hatfield *v.* Merod, 82 Ill. 113; Choteau *v.* Jones, 11 Ill. 300, 50 Am. Dec. 460; Sanderson *v.* Snow, 68 Ill. App. 384; Dunphy *v.* Gorman, 29 Ill. App. 132.

Indiana.— Bowen *v.* State, 121 Ind. 235, 23 N. E. 75; Wright *v.* Nipple, 92 Ind. 310.

Kentucky.— Poynter *v.* Mallory, 45 S. W. 1042, 20 Ky. L. Rep. 284; Johnson *v.* Harrison, 6 Ky. L. Rep. 591. See, however, Doty *v.* Louisville Banking Co., 11 S. W. 78, 10 Ky. L. Rep. 898.

Maine.—Whitehouse *v.* Bolster, 95 Me. 458, 50 Atl. 240; Sargent *v.* Salmond, 27 Me. 539; Thompson *v.* Thompson, 19 Me. 244, 36 Am. Dec. 751; Howe *v.* Ward, 4 Me. 195.

Michigan.— Pashby *v.* Mandigo, 42 Mich. 172, 3 N. W. 927.

Minnesota.— Stone *v.* Myers, 9 Minn. 303, 86 Am. Dec. 104.

Mississippi.— Loughridge *v.* Bowland, 52 Miss. 546; Pennington *v.* Seal, 49 Miss. 518.

New Hampshire.— Parsons *v.* McKnight, 8 N. H. 35.

New Jersey.— Long Branch Banking Co. *v.* Dennis, 56 N. J. Eq. 549, 39 Atl. 689; Post *v.* Stiger, 29 N. J. Eq. 554; Cramer *v.* Reford, 17 N. J. Eq. 367, 90 Am. Dec. 594; Cook *v.* Johnson, 12 N. J. Eq. 51, 72 Am. Dec. 381. See also Soden *v.* Soden, 34 N. J. Eq. 115.

New York.— Young *v.* Heermans, 66 N. Y. 374; Moosbrugger *v.* Walsh, 89 Hun 564, 35 N. Y. Suppl. 550; McLaggan *v.* Smith, 35

4. Running Accounts. In cases of running accounts, the earlier indebtedness being paid by the proceeds of the later, the continuing indebtedness stands upon the same footing as an indebtedness existing at the time of the conveyance, and the right of a preëxisting creditor to attack a conveyance for fraud is not affected by a renewal or change of form of the evidence of debt.[8]

5. Prior Encumbrancers. The general rule is that prior lien creditors cannot complain of a subsequent fraudulent conveyance or encumbrance of the property, since their rights cannot be affected thereby.[9]

Misc. 564, 71 N. Y. Suppl. 1121; Citizens' Nat. Bank *v.* Fonda, 18 Misc. 114, 41 N. Y. Suppl. 112; Van Wyck *v.* Seward, 18 Wend. 375; Jackson *v.* Seward, 5 Cow. 67.

North Carolina.— Tatum *v.* Tatum, 36 N. C. 113.

Pennsylvania.— Heath *v.* Page, 63 Pa. St. 108, 3 Am. Rep. 533; Shontz *v.* Brown, 27 Pa. St. 123; Hamet *v.* Dundass, 4 Pa. St. 178.

Tennessee.— Greene *v.* Starnes, 1 Heisk. 582; Shapiro *v.* Paletz, (Ch. App. 1900) 59 S. W. 774. See also Ridout *v.* Williams, 7 Lea 59.

Virginia.— Curd *v.* Miller, 7 Gratt. 185.

West Virginia.— Hawker *v.* Moore, 40 W. Va. 49, 20 S. E. 848.

Wisconsin.— Crocker *v.* Huntzicker, 113 Wis. 181, 88 N. W. 232.

United States.— McLaughlin *v.* Potomac Bank, 7 How. 220, 12 L. ed. 675; Thomson *v.* Crane, 73 Fed. 327; Yardley *v.* Torr, 67 Fed. 857.

See, however, Fales *v.* Thompson, 1 Mass. 134; Henderson *v.* Dodd, Bailey Eq. (S. C.) 138.

8. *Alabama.*— Moore *v.* Spence, 6 Ala. 506.

Illinois.— Thomas *v.* Lye, 37 Ill. App. 482.

Indiana.— Stout *v.* Stout, 77 Ind. 537.

Kansas.— Kellogg *v.* Bank, 58 Kan. 43, 48 Pac. 587, 62 Am. St. Rep. 596.

Kentucky.— Lowry *v.* Fisher, 2 Bush 70, 92 Am. Dec. 475; Buffington *v.* Mosby, 34 S. W. 704, 17 Ky. L. Rep. 1307. See also Little *v.* Ragan, 7 Ky. L. Rep. 391, holding that where a creditor has an account due from his debtor at the date of the latter's voluntary or fraudulent conveyance, although the amount is afterward increased by subsequent purchases, the whole is to be taken as a liability existing at the date of the deed.

Maryland.— Spuck *v.* Logan, 97 Md. 152, 54 Atl. 989, 99 Am. St. Rep. 427. See, however, Diggs *v.* McCullough, 69 Md. 592, 16 Atl. 453.

Michigan.— Preston Nat. Bank *v.* Pierson, 112 Mich. 435, 70 N. W. 1013.

Mississippi.— Thomson *v.* Hester, 55 Miss. 656. See Chapman *v.* Hughes, 61 Miss. 339, holding that a judgment creditor whose debt for which the judgment was rendered was partly contracted before and partly after a voluntary conveyance of lands so subjected by him for the payment of such debt will not be treated as a subsequent creditor as to the entire indebtedness.

Nebraska.— Omaha Brewing Assoc. *v.* Zeller, 4 Nebr. (Unoff.) 198, 93 N. W. 762.

New Hampshire.—See Parsons *v.* McKnight, 8 N. H. 35.

New Jersey.— Asbury Park First Nat. Bank *v.* White, 60 N. J. Eq. 487, 46 Atl. 1092.

New Mexico.— Albuquerque First Nat. Bank *v.* McClelland, 9 N. M. 636, 58 Pac. 347.

New York.— Loeschigk *v.* Addison, 19 Abb. Pr. 169.

North Carolina.— Johnson *v.* Murchison, 60 N. C. 286.

Tennessee.—Trezevant *v.* Terrell, 96 Tenn. 528, 33 S. W. 109.

Vermont.— Farmers' Nat. Bank *v.* Thomson, 74 Vt. 442, 52 Atl. 961; Sanborn *v.* Kittredge, 20 Vt. 632, 50 Am. Dec. 58.

Wisconsin.— Crocker *v.* Huntzicker, 113 Wis. 181, 88 N. W. 232.

England.— Whittington *v.* Jennings, 3 L. J. Ch. 157, 6 Sim. 493, 9 Eng. Ch. 493.

Canada.— Ferguson *v.* Kenny, 16 Ont. App. 276.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 630.

Contra.— See Bank *v.* Marchaud, T. U. P. Charlt. (Ga.) 247. *Compare* Boone County Nat. Bank *v.* Newkirk, 144 Mo. 472, 46 S. W. 606.

Blending demands.— It has been held in Maine that where a creditor having demands accruing partly before and partly after a conveyance by his debtor which he would impeach on the ground of fraud blends them in a suit thereon and recovers judgment, and extends his execution on the land, he occupies the position of a subsequent creditor only. Quinby *v.* Dill, 40 Me. 528; Husher *v.* Hazelton, 5 Me. 471, 17 Am. Dec. 253; Reed *v.* Woodman, 4 Me. 400. See also Miller *v.* Miller, 23 Me. 22, 39 Am. Dec. 597.

Holder of renewal note may attack conveyance.— See Commercial Paper, 7 Cyc. 880.

9. *Louisiana.*—Payne *v.* Kemp, 33 La. Ann. 818; Levi *v.* Morgan, 33 La. Ann. 532.

Maine.— Crooker *v.* Holmes, 65 Me. 195, 20 Am. Rep. 687.

Maryland.— See Baltimore High Grade Brick Co. *v.* Amis, 95 Md. 571, 52 Atl. 582, 53 Atl. 148.

Massachusetts.— Powers *v.* Russell, 13 Pick. 69.

Missouri.— Brinkerhoff-Faris Trust, etc., Co. *v.* Horn, 83 Mo. App. 114.

New Hampshire.— Blake *v.* Williams, 36 N. H. 39.

New Jersey.—See Meeker *v.* Warren, 66 N. J. Eq. 146, 57 Atl. 421, holding that a judgment creditor cannot maintain a bill to set aside as fraudulent a quitclaim deed not conveying the fee.

6. General Unsecured Creditors. As a general rule, subject to exceptions, as will be hereafter shown,[10] a general creditor cannot assail an assignment or other transfer of property by the debtor as fraudulent against creditors, but he must first establish his debt by the judgment of a court of competent jurisdiction, and either acquire a lien upon the specific property or be in a situation to perfect a lien thereon, and subject it to the payment of his judgment upon the removal of the obstacle presented by the fraudulent assignment or transfer.[11]

C. Subsequent Creditors — 1. General Rule. The general rule is that a voluntary conveyance cannot be set aside at the instance of subsequent creditors, in the absence of proof that the conveyance was made with actual fraudulent

Ohio.— Stephenson *v.* Donahue, 40 Ohio St. 184 [*affirming* 6 Ohio Dec. (Reprint) 828, 8 Am. L. Rec. 358].

Oklahoma.— See Enid First Nat. Bank *v.* Yeoman, 14 Okla. 626, 78 Pac. 388.

Pennsylvania.— Armington *v.* Rau, 100 Pa. St. 165; Haak's Appeal, 100 Pa. St. 59; Byrod's Appeal, 31 Pa. St. 241; Barrell *v.* Adams, 26 Pa. Super. Ct. 635; Boyle *v.* Thomas, 1 Chest. Co. Rep. 117.

Texas.— Pearson *v.* Hudson, 52 Tex. 352.

West Virginia.— Carr *v.* Summerfield, 47 W. Va. 155, 34 S. E. 804.

Canada.— Crombie *v.* Young, 26 Ont. 194.

Compare Shiveley *v.* Jones, 6 B. Mon. (Ky.) 274, holding that a first mortgagee may take advantage of a fraud against creditors in a subsequent mortgage on the land, so far as it may impede him, since a conveyance fraudulent as to some creditors is fraudulent as to all.

10. See *infra*, XIV, E.

11. *Arkansas.*— Meux *v.* Anthony, 11 Ark. 411, 52 Am. Dec. 274.

California.— Aigeltinger *v.* Einstein, 143 Cal. 609, 77 Pac. 669, 101 Am. St. Rep. 131.

Colorado.— Hugus *v.* Hardenburg, 19 Colo. App. 464, 76 Pac. 543.

Illinois.— Rogers *v.* Dimon, 106 Ill. App. 201; Koster *v.* Hiller, 4 Ill. App. 21.

Indiana.— State Bank *v.* Backus, (App. 1903) 66 N. E. 475 [*affirmed* in 160 Ind. 682, 67 N. E. 512].

Iowa.— Klay *v.* McKellar, 122 Iowa 163, 97 N. W. 1091. *Contra*, Mallow *v.* Walker, 115 Iowa 238, 88 N. W. 452, 91 Am. St. Rep. 158.

Kansas.— Chicago Bldg., etc., Co. *v.* I. A. Taylor Banking Co., (1904) 78 Pac. 808; Daugherty *v.* Powell, 67 Kan. 857, 72 Pac. 274, 74 Pac. 242.

Kentucky.— McKinley *v.* Combs, 1 T. B. Mon. 105.

Maryland.— Wanamaker *v.* Bowes, 36 Md. 42; Griffith *v.* Frederick County Bank, 6 Gill & J. 424.

Michigan.— Eslow *v.* Mitchell, 26 Mich. 500; Fox *v.* Clark, Walk. 535.

Missouri.— Davidson *v.* Dockery, 179 Mo. 687, 78 S. W. 624 (holding that in order to enable a creditor to attack a conveyance as fraudulent, he must either have reduced his claim to judgment, have a legal, equitable, or attachment lien on the land, or show that, although but a general creditor, he has no adequate remedy at law); Rosencranz *v.* Swofford Bros. Dry Goods Co., 175 Mo. 518, 75 S. W. 445, 97 Am. St. Rep. 609; Peters Shoe Co. *v.* Arnold, 82 Mo. App. 1.

New Jersey.— Guy B. Waite Co. *v.* Otto, (Ch. 1903) 54 Atl. 425 (holding that a creditor of a living debtor, to maintain a suit to set aside a fraudulent conveyance, must have a lien, which is not created by a foreign judgment); Hunt *v.* Field, 9 N. J. Eq. 36, 57 Am. Dec. 365.

New York.— Prentiss *v.* Bowden, 145 N. Y. 342, 40 N. E. 13; Southard *v.* Benner, 72 N. Y. 424 (holding that a creditor by simple contract is within the protection of the statute as much as a creditor by judgment, but until he has a judgment and a lien or a right to a lien upon the specific property, he is not in a condition to assert his rights by action as a creditor); Estes *v.* Wilcox, 67 N. Y. 264; Geery *v.* Geery, 63 N. Y. 252; Rinchey *v.* Stryker, 28 N. Y. 45, 84 Am. Dec. 324 (holding, however, that a party procuring an attachment is not to be deemed a mere creditor at large of defendant therein after the writ is served, but a creditor having a specific lien upon the goods attached); Cramer *v.* Blood, 57 Barb. 155; Davis *v.* Graves, 29 Barb. 480; Wintringham *v.* Wintringham, 20 Johns. 296; Brinkerhoff *v.* Brown, 4 Johns. Ch. 671, 6 Johns Ch. 139.

North Carolina.—Cowan *v.* Phillips, 122 N. C. 70, 28 S. E. 961.

Tennessee.—Hopkins *v.* Webb, 9 Humphr. 519.

Texas.— Herring-Hall-Marvin Co. *v.* Kroeger, 23 Tex. Civ. App. 672, 57 S. W. 980.

Virginia.— Tate *v.* Liggat, 2 Leigh 84.

Washington.—Rothchild *v.* Trewella, 36 Wash. 679, 79 Pac. 480, 104 Am. St. Rep. 973, 68 L. R. A. 281.

West Virginia.— Kennewig Co. *v.* Moore, 49 W. Va. 323, 38 S. E. 558.

Wisconsin.— Miller *v.* Drane, 122 Wis. 315, 99 N. W. 1017.

United States.— Jones *v.* Green, 1 Wall. 330, 17 L. ed. 553; Day *v.* Washburn, 24 How. 352, 16 L. ed. 712; Viquesney *v.* Allen, 131 Fed. 21, 65 C. C. A. 259; U. S. *v.* Ingate, 48 Fed. 251.

England.— Collins *v.* Burton, 4 De G. & J. 612, 61 Eng. Ch. 485, 45 Eng. Reprint 238; Smith *v.* Hurst, 10 Hare 30, 17 Jur. 30, 22 L. J. Ch. 289, 15 Eng. L. & Eq. 520, 44 Eng. Ch. 30; Angell *v.* Draper, 1 Vern. Ch. 399, 23 Eng. Reprint 543; Colman *v.* Croker, 1 Ves. Jr. 160, 30 Eng. Reprint 280.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 646. And see *infra*, XIV, E.

intent.[12] Where, however, a conveyance is made with the intent to defraud sub-

12. *Alabama.*— Wilson *v.* Stevens, 129 Ala. 630, 29 So. 678, 87 Am. St. Rep. 86; Elyton Land Co. *v.* Iron City Steam Bottling Works, 109 Ala. 602, 20 So. 51; O'Neil *v.* Birmingham Brewing Co., 101 Ala. 383, 13 So. 576; Lockard *v.* Nash, 64 Ala. 385; Cole *v.* Varner, 31 Ala. 244.

Arkansas.— Crampton *v.* Schaap, 56 Ark. 253, 19 S. W. 669; Stix *v.* Chaytor, 55 Ark. 116, 17 S. W. 707.

Colorado.— Arnett *v.* Coffey, 1 Colo. App. 34, 27 Pac. 614.

Connecticut.—Whiting *v.* Ralph, 75 Conn. 41, 52 Atl. 406; Barbour *v.* Connecticut Mut. L. Ins. Co., 61 Conn. 240, 23 Atl. 154; Smith *v.* Gaylord, 47 Conn. 380.

Georgia.— Clayton *v.* Brown, 30 Ga. 490.

Illinois.—Chicago Daily News Co. *v.* Siegel, 212 Ill. 617, 72 N. E. 810; Springer *v.* Bigford, 160 Ill. 495, 43 N. E. 751; Faloon *v.* McIntyre, 118 Ill. 292, 8 N. E. 315 [*affirming* 17 Ill App. 479]; Durand *v.* Weightman, 108 Ill. 489; Tunison *v.* Chamblin, 88 Ill. 378; Lincoln *v.* McLaughlin, 74 Ill. 11; Bridgford *v.* Riddell, 55 Ill. 261; Mixell *v.* Lutz, 34 Ill. 382; Carter *v.* Lewis, 29 Ill. 500; Hunt *v.* Connor, 74 Ill. App. 298; Racine Wagon, etc., Co. *v.* Roberts, 54 Ill. App. 515; Sweet *v.* Dean, 43 Ill. App. 650; Edgerly *v.* Lyons First Nat. Bank, 30 Ill. App. 425.

Indiana.— Bishop *v.* Redmond, 83 Ind. 157.

Iowa.— Keehn *v.* Keehn, 115 Iowa 467, 88 N. W. 957; Heaton *v.* Ainley, 108 Iowa 112, 78 N. W. 798; Everist *v.* Pierce, 107 Iowa 44, 77 N. W. 508.

Kansas.—Chase State Bank *v.* Chatten, 69 Kan. 435, 77 Pac. 96; Voorhis *v.* Michaelis, 45 Kan. 255, 25 Pac. 592.

Kentucky.— Gregory *v.* Lamb, 101 Ky. 727, 42 S. W. 339, 19 Ky. L. Rep. 943; Mundy *v.* Mason, 4 Bush 339; Haskell *v.* Bakewell, 10 B. Mon. 206; Lillard *v.* McGee, 4 Bibb 165; Howell *v.* Smith, 1 Ky. L. Rep. 415.

Louisiana.— Mossop *v.* His Creditors, 41 La. Ann. 296, 6 So. 134; Davis *v.* Stern, 15 La. Ann. 177; Simpson *v.* Mills, 12 La. Ann. 173; Brunet *v.* Duvergis, 5 La. 124; Brown *v.* Ferguson, 4 La. 257; Morgan *v.* Davis, 4 La. 141; Mercer *v.* Andrews, 2 La. 538; Henry *v.* Hyde, 5 Mart. N. S. 633; Hesser *v.* Black, 5 Mart. N. S. 96.

Maine.— Fletcher *v.* Clarke, 29 Me. 485; Whitmore *v.* Woodward, 28 Me. 392.

Maryland.— Diggs *v.* McCullough, 69 Md. 592, 16 Atl. 453; Matthai *v.* Heather, 57 Md. 483; Ward *v.* Hollins, 14 Md. 158; Williams *v.* Banks, 11 Md. 198; Faringer *v.* Ramsay, 4 Md. Ch. 33.

Massachusetts.— Plimpton *v.* Goodell, 143 Mass. 365, 9 N. E. 791; Day *v.* Cooley, 118 Mass. 524.

Michigan.—Barkworth *v.* Palmer, 118 Mich. 50, 76 N. W. 151; Cole *v.* Brown, 114 Mich. 396, 72 N. W. 247, 68 Am. St. Rep. 491; Hopson *v.* Payne, 7 Mich. 334.

Mississippi.—Pennington *v.* Seal, 49 Miss. 518; Summers *v.* Roos, 42 Miss. 749, 2 Am. Rep. 653; Henry *v.* Fullerton, 13 Sm. & M. 631.

Missouri.—Krueger *v.* Vorhauer, 164 Mo. 156, 63 S. W. 1098; Caldwell *v.* Smith, 88 Mo. 44; Scudder *v.* Morris, 107 Mo. App. 634, 82 S. W. 217.

Nebraska.— Pender State Bank *v.* Frey, 3 Nebr. (Unoff.) 83, 91 N. W. 239.

New Jersey.— Kinsey *v.* Feller, 64 N. J. Eq. 367, 51 Atl. 485 [*reversing* (Ch. 1901) 50 Atl. 680]; Carter *v.* Carter, 63 N. J. Eq. 726, 53 Atl. 160 [*affirmed* in 65 N. J. Eq. 766, 55 Atl. 1132]; Burne *v.* Kunzman, (Ch. 1890) 19 Atl. 667; Campbell *v.* Tompkins, 32 N. J. Eq. 170; Allaire *v.* Day, 30 N. J. Eq. 231; Carpenter *v.* Carpenter, 27 N. J. Eq. 502; Metropolis Nat. Bank *v.* Sprague, 20 N. J. Eq. 13; Beeckman *v.* Montgomery, 14 N. J. Eq. 106, 80 Am. Dec. 229.

New York.— Phœnix Bank *v.* Stafford, 89 N. Y. 405; Phillips *v.* Wooster, 36 N. Y. 412; Wadsworth *v.* Havens, 3 Wend. 411.

North Carolina.— See Smith *v.* Reavis, 29 N. C. 341.

Ohio.— Evans *v.* Lewis, 30 Ohio St. 11; Robinson *v.* Von Dolcke, 3 Ohio S. & C. Pl. Dec. 107, 1 Ohio N. P. 429.

Pennsylvania. — Westmoreland Guarantee Bldg., etc., Assoc. *v.* Thomas, 207 Pa. St. 513, 56 Atl. 1072; Kuder *v.* Chadwick, 207 Pa. St. 182, 56 Atl. 407; Best *v.* Smith, 193 Pa. St. 89, 44 Atl. 329, 74 Am. St. Rep. 676; Harlan *v.* Maglaughlin, 90 Pa. St. 293; Monroe *v.* Smith, 79 Pa. St. 459; Larkin *v.* McMullin, 49 Pa. St. 29; Murphy *v.* Solms, 6 Pa. Co. Ct. 264; Brown *v.* Atkinson, 9 Kulp 164; Clark *v.* Krieg, 7 Phila. 126. See also Reese *v.* Reese, 157 Pa. St. 200, 27 Atl. 703.

South Carolina.— King *v.* Clarke, 2 Hill Eq. 611; Henderson *v.* Dodd, Bailey Eq. 138.

Tennessee.— Churchill *v.* Wells, 7 Coldw. 364; Hickman *v.* Perrin, 6 Coldw. 135; Nicholas *v.* Ward, 1 Head 323, 73 Am. Dec. 177; Dillard *v.* Dillard, 3 Humphr. 41.

Texas.— Martin Brown Co. *v.* Perrill, 77 Tex. 199, 13 S. W. 975; Heath *v.* Cleburne First Nat. Bank, 19 Tex. Civ. App. 63, 46 S. W. 123.

Vermont.— McLane *v.* Johnson, 43 Vt. 48; Church *v.* Chapin, 35 Vt. 223.

Virginia.— Yates *v.* Law, 86 Va. 117, 9 S. E. 508; Pratt *v.* Cox, 22 Gratt. 330; Johnston *v.* Zane, 11 Gratt. 552.

West Virginia.— Farmers' Bank *v.* Gould, 48 W. Va. 99, 35 S. E. 878, 86 Am. St. Rep. 24; Rogers *v.* Verlander, 30 W. Va. 619, 5 S. E. 847; Silverman *v.* Greaser, 27 W. Va. 550.

United States.—Graham *v.* La Crosse, etc., Co., 102 U. S. 148, 26 L. ed. 106; Mattingly *v.* Nye, 8 Wall. 370, 17 L. ed. 380; Sexton *v.* Wheaton, 8 Wheat. 229, 5 L. ed. 603; Central Trust Co. *v.* Worcester Cycle Mfg. Co., 110 Fed. 491; Continental Trust Co. *v.* Toledo, etc., R. Co., 82 Fed. 642; Metropolitan Nat. Bank *v.* Rogers, 47 Fed. 148; Burdick *v.* Gill, 7 Fed. 668, 2 McCrary 486.

England.— *In re* Lane-Fox, [1900] 2 Q. B.

sequent creditors,[13] or there was secrecy in the transaction by which knowledge of it was withheld from such creditors, who dealt with the grantor upon the faith of his owning the property transferred,[14] or the transfer was made with a view of entering into some new and hazardous business, the risk of which the grantor intended should be cast upon the parties having dealings with him in the new business,[15] such conveyance is fraudulent as to subsequent creditors, and may be attacked by them. However, a mere expectation of future indebtedness, or even an intent to contract debts, if it be only an intent, not coupled with a purpose to convey the property in order to keep it from being reached by the creditors, will not make the deed invalid as against such future creditors.[16]

508, 69 L. J. Q. B. 508, 83 L. T. Rep. N. S. 176, 7 Manson 295, 48 Wkly. Rep. 650; Stileman *v.* Ashdown, Ambl. 13, 27 Eng. Reprint 7, 2 Atk. 477, 26 Eng. Reprint 688; Gugen *v.* Sampson, 4 F. & F. 974; Holmes *v.* Penny, 3 Jur. N. S. 80, 3 Kay & J. 90, 26 L. J. Ch. 179, 5 Wkly. Rep. 132; Kidney *v.* Coussmaker, 12 Ves. Jr. 136, 2 Rev. Rep. 118, 33 Eng. Reprint 53.

Canada.— Ferguson *v.* Ferguson, 9 Ont. 218; Darling *v.* Price, 27 Grant Ch. (U. C.) 331.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 631. See also *infra*, VIII, D, 3.

13. *Colorado.*— Emery *v.* Yount, 7 Colo. 107, 1 Pac. 686.

Indiana.— Barrow *v.* Barrow, 108 Ind. 345, 9 N. E. 371.

Kentucky.— Johnson *v.* Skaggs, 2 S. W. 493.

Maryland.— Spuck *v.* Logan, 97 Md. 152, 54 Atl. 989, 99 Am. St. Rep. 427.

New York.— Ebbitt *v.* Dunham, 25 Misc. 232, 55 N. Y. Suppl. 78.

Texas.— Tucker *v.* Pennington, (Civ. App. 1898) 45 S. W. 313.

Wisconsin.— Zimmerman *v.* Bannon, 101 Wis. 407, 77 N. W. 735; Hoffman *v.* Junk, 51 Wis. 613, 8 N. W. 493.

14. *Iowa.*— Corning First Nat. Bank *v.* Reid, 122 Iowa 280, 98 N. W. 107; Hitt *v.* Sterling-Goold Mfg. Co., 111 Iowa 458, 82 N. W. 919; Hook *v.* Mowre, 17 Iowa 195.

Mississippi.— Winn *v.* Barnett, 31 Miss. 653.

New York.— Shand *v.* Hanley, 71 N. Y. 319.

Ohio.—Bowlus *v.* Shanabarger, 19 Ohio Cir. Ct. 137, 10 Ohio Cir. Dec. 167.

South Carolina.— Kid *v.* Mitchell, 1 Nott & M. 334, 9 Am. Dec. 702.

A secret trust for a grantor's benefit is manifestly void, both as to existing and subsequent creditors. Graham *v.* Townsend, 62 Nebr. 364, 87 N. W. 169. See *infra*, X, B.

15. *Alabama.*—Echols *v.* Orr, 106 Ala. 237, 17 So. 677; Seals *v.* Robinson, 75 Ala. 363; Kirksey *v.* Snedecor, 60 Ala. 192.

Maryland.— Diggs *v.* McCullough, 69 Md. 592, 16 Atl. 453; Matthai *v.* Heather, 57 Md. 483.

Michigan.— Herschfeldt *v.* George, 6 Mich. 456.

Nebraska.— Ayers *v.* Wolcott, 66 Nebr. 712, 92 N. W. 1036.

New Jersey.— Hildebrand *v.* Willig, 64 N. J. Eq. 249, 53 Atl. 1035; Minzesheimer *v.* Doolittle, 56 N. J. Eq. 206, 39 Atl. 386; Providence City Nat. Bank *v.* Hamilton, 34 N. J. Eq. 158.

New York.— Todd *v.* Nelson, 109 N. Y. 316, 16 N. E. 360; Young *v.* Heermans, 66 N. Y. 374; Case *v.* Phelps, 39 N. Y. 164; Savage *v.* Murphy, 34 N. Y. 508, 90 Am. Dec. 733; Dygert *v.* Remerschnider, 32 N. Y. 629; O'Brien *v.* Whigam, 9 N. Y. App. Div. 113, 41 N. Y. Suppl. 40.

Ohio.— Hedrick *v.* Gregg, 10 Ohio S. & C. Pl. Dec. 462, 8 Ohio N. P. 24.

Pennsylvania.— Mullen *v.* Wilson, 44 Pa. St. 413, 84 Am. Dec. 461; Black *v.* Nease, 37 Pa. St. 433; Sanders *v.* Wagonseller, 19 Pa. St. 248; Thomson *v.* Dougherty, 12 Serg. & R. 448; Mateer *v.* Hissim, 3 Penr. & W. 160.

Texas.— Lewis *v.* Simon, 72 Tex. 470, 10 S. W. 554; Cole *v.* Terrell, 71 Tex. 549, 9 S. W. 668.

United States.—Schreyer *v.* Platt, 134 U. S. 405, 10 S. Ct. 579, 33 L. ed. 955; Horbach *v.* Hill, 112 U. S. 144, 5 S. Ct. 81, 28 L. ed. 670; Graham *v.* La Crosse, etc., R. Co., 102 U. S. 148, 26 L. ed. 106; Smith *v.* Vodges, 92 U. S. 183, 23 L. ed. 481; Mattingly *v.* Nye, 8 Wall. 370, 19 L. ed. 380; Sexton *v.* Wheaton, 8 Wheat. 229, 5 L. ed. 603; Burdick *v.* Gill, 7 Fed. 668, 2 McCrary 486; Ridgeway *v.* Underwood, 20 Fed. Cas. No. 11,815, 4 Wash. 129.

England.— *Ex p.* Russell, 19 Ch. D. 588, 51 L. J. Ch. 521, 46 L. T. Rep. N. S. 113, 30 Wkly. Rep. 584; Mackay *v.* Douglas, L. R. 14 Eq. 106, 41 L. J. Ch. 539, 26 L. T. Rep. N. S. 721, 20 Wkly. Rep. 652; Stileman *v.* Ashdown, Ambl. 13, 27 Eng. Reprint 7, 2 Atk. 477, 26 Eng. Reprint 688; Barling *v.* Bishopp, 29 Beav. 417, 6 Jur. N. S. 812, 8 Wkly. Rep. 631, 54 Eng. Reprint 689; Richardson *v.* Smallwood, Jac. 552, 4 Eng. Ch. 552, 37 Eng. Reprint 958.

Canada.— Buckland *v.* Rose, 7 Grant Ch. (U. C.) 440; Bank of British North America *v.* Rattenbury, 7 Grant Ch. (U. C.) 383.

16. *Iowa.*— Lyman *v.* Cessford, 15 Iowa 229.

Maryland.— Totten *v.* Brady, 54 Md. 170.

Missouri.— Payne *v.* Stanton, 59 Mo. 158; Pepper *v.* Carter, 11 Mo. 540.

New Jersey.— See Gray *v.* Folwell, 57 N. J. Eq. 446, 41 Atl. 869.

New York.— Neuberger *v.* Keim, 134 N. Y. 35, 31 N. E. 268.

Oregon.— See Marquam *v.* Sengfelder, 24 Oreg. 2, 32 Pac. 676.

Pennsylvania.— Harlan *v.* Maglaughlin, 90

2. Effect of Fraud on Preëxisting Creditors. There is considerable conflict of authority upon the question as to whether subsequent creditors can attack a prior conveyance of a debtor's property solely on the ground of fraud as to existing creditors. In many jurisdictions it is held that they can so attack simply upon showing actual fraud as against existing creditors, the theory being that proof of such fraud is sufficient evidence of fraud upon subsequent creditors.[17] In other jurisdictions it is held that a conveyance which is void as to existing creditors on account of fraud is not necessarily void as to subsequent creditors, and that they can only attack such conveyance on the ground of actual fraud as against them.[18]

Pa. St. 293; Williams *v.* Davis, 69 Pa. St. 21; Snyder *v.* Christ, 39 Pa. St. 499.

Texas.— Gonzales *v.* Adoue, 94 Tex. 120, 58 S. W. 951 [*reversing* (Civ. App. 1900) 56 S. W. 543].

Virginia.— Engleby *v.* Harvey, 93 Va. 440, 25 S. E. 225.

United States.—Schreyer *v.* Platt, 134 U. S. 405, 10 S. Ct. 579, 33 L. ed. 955; Adams *v.* Riley, 122 U. S. 382, 7 S. Ct. 1208, 30 L. ed. 1207; Wallace *v.* Penfield, 106 U. S. 260, 1 S. Ct. 216, 27 L. ed. 147.

Canada.—Fleming *v.* Edwards, 23 Ont. App. 718; Mulholland *v.* Williamson, 14 Grant Ch. (U. C.) 291 [*reversing* 12 Grant Ch. (U. C.) 91].

17. *Alabama.*— Prestwood *v.* Troy Fertilizer Co., 115 Ala. 668, 22 So. 77; Heinz *v.* White, 105 Ala. 670, 17 So. 185; Yeend *v.* Weeks, 104 Ala. 331, 16 So. 165, 53 Am. St. Rep. 50; Dickson *v.* McLarney, 97 Ala. 383, 12 So. 398; Pinkston *v.* McLemore, 31 Ala. 308; Johnson *v.* Thweatt, 18 Ala. 741.

Arkansas.— Semmes *v.* Underwood, 64 Ark. 415, 42 S. W. 1069; May *v.* State Nat. Bank, 59 Ark. 614, 28 S. W. 431; Toney *v.* McGehee, 38 Ark. 419.

Colorado.— Mulock *v.* Wilson, 19 Colo. 296, 35 Pac. 532 (where the grantee had notice of the intent to defraud existing creditors); Wilcoxen *v.* Morgan, 2 Colo. 473.

Connecticut.— Bassett *v.* McKenna, 52 Conn. 437. See Barbour *v.* Connecticut Mut. L. Ins. Co., 61 Conn. 240, 23 Atl. 154.

District of Columbia.— Edwards *v.* Entwisle, 2 Mackey 43; Killian *v.* Clark, 3 MacArthur 379.

Kentucky.— Dishman *v.* Davidson, 39 S. W. 515, 19 Ky. L. Rep. 139.

Maine.— Whitmore *v.* Woodward, 28 Me. 392; Clark *v.* French, 23 Me. 221, 39 Am. Dec. 618.

Massachusetts.— Woodbury *v.* Sparrell Print, 187 Mass. 426, 73 N. E. 547; Livermore *v.* Boutelle, 11 Gray 217, 71 Am. Dec. 708; Parkman *v.* Welch, 19 Pick. 231; Clapp *v.* Leatherbee, 18 Pick. 131; Damon *v.* Bryant, 2 Pick. 411.

Michigan.— Hopson *v.* Payne, 7 Mich. 334; Herschfeldt *v.* George, 6 Mich. 456.

New Hampshire.— Cook *v.* Lee, 72 N. H. 569, 58 Atl. 511; Coolidge *v.* Melvin, 42 N. H. 510; Smyth *v.* Carlisle, 16 N. H. 464, 17 N. H. 417.

New York.— Carr *v.* Breese, 81 N. Y. 584; Mead *v.* Gregg, 12 Barb. 653; Weld *v.* Reilly, 48 N. Y. Super. Ct. 531; Loeschigk *v.* Addison, 19 Abb. Pr. 169; Spicer *v.* Ayers, 53 How. Pr. 405; Anderson *v.* Roberts, 18 Johns. 515, 9 Am. Dec. 235; King *v.* Wilcox, 11 Paige 589; Reade *v.* Livingston, 3 Johns. Ch. 481, 8 Am. Dec. 520. But see Holmes *v.* Clark, 48 Barb. 237.

Ohio.— Evans *v.* Lewis, 30 Ohio St. 11; Vanzant *v.* Davies, 6 Ohio St. 52; Hedrick *v.* Gregg, 10 Ohio S. & C. Pl. Dec. 462, 8 Ohio N. P. 24.

Tennessee.— Nelson *v.* Vanden, 99 Tenn. 224, 42 S. W. 5; Trezevant *v.* Terrell, 96 Tenn. 528, 33 S. W. 109; Nichol *v.* Nichol, 4 Baxt. 145; White *v.* Bettis, 9 Heisk. 645; Nicholas *v.* Ward, 1 Head 323, 73 Am. Dec. 177; Hester *v.* Wilkinson, 6 Humphr. 215, 44 Am. Dec. 303; Young *v.* Pate, 4 Yerg. 164; Carpenter *v.* Scales, (Ch. App. 1897) 48 S. W. 249.

Vermont.— McLane *v.* Johnson, 43 Vt. 48. See Dewey *v.* Long, 25 Vt. 264.

Virginia.— Hutchison *v.* Kelly, 1 Rob. 123, 39 Am. Dec. 250. See also Yates *v.* Law, 86 Va. 117, 9 S. E. 508.

West Virginia.— See Rogers *v.* Verlander, 30 W. Va. 619, 5 S. E. 847.

United States.— Lilienthal *v.* Drucklieb, 92 Fed. 753, 34 C. C. A. 657; Voorhees *v.* Blanton, 83 Fed. 234, construing the North Carolina statute. And see Toole *v.* Darden, 41 N. C. 394.

Canada.— See Struthers *v.* Glennie, 14 Ont. 726.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 22, 632.

18. *California.*— Banning *v.* Marleau, 133 Cal. 485, 65 Pac. 964; Hussey *v.* Castle, 41 Cal. 239; Horn *v.* Volcano Water Co., 13 Cal. 62, 73 Am. Dec. 569; Wells *v.* Stout, 9 Cal. 479.

Georgia.— Cartersville First Nat. Bank *v.* Bayless, 96 Ga. 684, 23 S. E. 851 (holding that a gift by an insolvent debtor is not void as to subsequent creditors in the absence of fraud, although money was obtained of a subsequent creditor for the express purpose of paying debts existing when the gift was made, as to which the gift was fraudulent, and was actually used for that purpose); Brown *v.* Spivey, 53 Ga. 155; Cunningham *v.* Schley, 41 Ga. 426.

Illinois.— Higgins *v.* White, 118 Ill. 619, 8 N. E. 808; Jackson *v.* Miner, 101 Ill. 550; Crawford *v.* Logan, 97 Ill. 396; Phillips *v.* North, 77 Ill. 243; Blakely Printing Co. *v.* Pease, 95 Ill. App. 341.

Indiana.— Stumph *v.* Bruner, 89 Ind. 556

3. Effect of Prior and Continuing Indebtedness. In some jurisdictions the fact that the grantor was indebted at the time of the conveyance and continued so up to the time of the attack upon the conveyance by a subsequent creditor,[19] or liquidated such former indebtedness with money or property received from a subsequent creditor, will render the conveyance void as to such subsequent creditor.[20]

4. Knowledge or Notice of Fraudulent Transaction. The general rule is that a conveyance cannot be attacked on the ground of fraud by a creditor whose

(holding that subsequent creditors cannot set aside a conveyance made for the purpose of defrauding existing creditors, under Rev. St. (1881) § 2975, if there was no secret trust or intent to defraud the subsequent creditors); Lynch *v.* Raleigh, 3 Ind. 273; Doe *v.* Hurd, 7 Blackf. 510; Paine *v.* Doe, 7 Blackf. 485. *Compare* Dart *v.* Stewart, 17 Ind. 221; Rufling *v.* Tilton, 12 Ind. 259.

Iowa.— Brundage *v.* Cheneworth, 101 Iowa 256, 70 N. W. 211, 63 Am. St. Rep. 382; Rock Island Stove Co. *v.* Walrod, 75 Iowa 479, 39 N. W. 811; State *v.* Wallace, 67 Iowa 77, 24 N. W. 609; Lyman *v.* Cessford, 15 Iowa 229. See Carbiener *v.* Montgomery, 97 Iowa 659, 66 N. W. 900.

Minnesota.— Fullington *v.* Northwestern Importers', etc., Assoc., 48 Minn. 490, 51 N. W. 475, 31 Am. St. Rep. 663 [*explaining* Walsh *v.* Byrnes, 39 Minn. 527, 40 N. W. 831]; Bloom *v.* Moy, 43 Minn. 397, 45 N. W. 715, 19 Am. St. Rep. 243; Hartman *v.* Weiland, 36 Minn. 223, 30 N. W. 815; Sanders *v.* Chandler, 26 Minn. 273, 3 N. W. 351; Stone *v.* Myers, 9 Minn. 303, 86 Am. Dec. 104; Bruggerman *v.* Hoerr, 7 Minn. 337, 82 Am. Dec. 97.

Mississippi.— Simmons *v.* Ingram, 60 Miss. 886; Winn *v.* Barnett, 31 Miss. 653; Henry *v.* Fullerton, 13 Sm. & M. 631.

Missouri.— Johnson *v.* Murphy, 180 Mo. 597, 79 S. W. 909; Burgess *v.* McLean, 85 Mo. 678; Pepper *v.* Carter, 11 Mo. 540; Mutual L. Ins. Co. *v.* Sandfelder, 9 Mo. App. 285. See, however, Bracken *v.* Milner, 99 Mo. App. 187, 73 S. W. 225.

Nebraska.—Ayers *v.* Wolcott, 66 Nebr. 712, 92 N. W. 1036; Racek *v.* North Bend First Nat. Bank, 62 Nebr. 669, 87 N. W. 542; Graham *v.* Townsend, 62 Nebr. 364, 87 N. W. 169.

New Jersey.— Zinn *v.* Brinkerhoff, 48 N. J. Eq. 513, 22 Atl. 353. And see Gray *v.* Folwell, 57 N. J. Eq. 446, 41 Atl. 869.

Pennsylvania.— Buckley *v.* Duff, 114 Pa. St. 596, 8 Atl. 188; Kimble *v.* Smith, 95 Pa. St. 69; Harlan *v.* Maglaughlin, 90 Pa. St. 293; Monroe *v.* Smith, 79 Pa. St. 459; Staller *v.* Kirkpatrick, 1 Mona. 486. But see Ammon's Appeal, 63 Pa. St. 284.

South Carolina.— Richardson *v.* Rhodus, 14 Rich. 95; Ingrem *v.* Phillips, 3 Strobh. 565; Iley *v.* Niswanger, 1 McCord Eq. 518.

South Dakota.— Aldous *v.* Olverson, 17 S. D. 190, 95 N. W. 917.

Texas.— Bavouset *v.* York, 18 Tex. Civ. App. 428, 46 S. W. 61.

Washington.— Mayer *v.* Frasch, 7 Wash. 504, 35 Pac. 409.

West Virginia.— Greer *v.* O'Brien, 36 W. Va. 277, 15 S. E. 74; Rose *v.* Brown, 11 W. Va. 122; Lockhard *v.* Beckley, 10 W. Va. 87.

United States.— Wallace *v.* Penfield, 106 U. S. 260, 1 S. Ct. 216, 27 L. ed. 147; Sexton *v.* Wheaton, 8 Wheat. 229, 5 L. ed. 603.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 22, 632.

Reason for rule.— Subsequent creditors are in a less favorable position to attack a voluntary conveyance as fraudulent because their debts, being contracted after the conveyance they seek to impeach, cannot be said to have been incurred on the faith of the property conveyed. Pike *v.* Miles, 23 Wis. 164, 99 Am. Dec. 148.

19. *Arkansas.*— Toney *v.* McGehee, 38 Ark. 419.

Connecticut.— Paulk *v.* Cooke, 39 Conn. 566.

Maryland.— Spuck *v.* Logan, 97 Md. 152, 54 Atl. 989, 99 Am. St. Rep. 427.

New Jersey.— Claflin *v.* Mess, 30 N. J. Eq. 211.

New York.— Savage *v.* Murphy, 34 N. Y. 508, 90 Am. Dec. 733 [*affirming* 8 Bosw. 75].

South Carolina.— McElwee *v.* Sutton, 2 Bailey 128.

England.— Freeman *v.* Pope, L. R. 9 Eq. 206, 39 L. J. Ch. 148, 21 L. T. Rep. N. S. 816, 18 Wkly. Rep. 399 [*affirmed* in L. R. 5 Ch. 538, 39 L. J. Ch. 689, 18 Wkly. Rep. 906]; Jenkyn *v.* Vaughan, 3 Drew. 419, 2 Jur. N. S. 109, 25 L. J. Ch. 338, 4 Wkly. Rep. 214.

Canada.— Ferguson *v.* Kenny, 16 Ont. App. 276.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 633.

Contra.— Mayer *v.* Frasch, 7 Wash. 504, 35 Pac. 409.

20. *Illinois.*— Thomas *v.* Lye, 37 Ill. App. 482.

Iowa.— Barhydt *v.* Perry, 57 Iowa 416, 10 N. W. 820.

New York.— Savage *v.* Murphy, 34 N. Y. 508, 90 Am. Dec. 733 [*affirming* 8 Bosw. 75] (holding that the fact that the grantor paid up all indebtedness existing at the time of the transfer by means of credit obtained afterward is only a transfer, and not a payment of the then existing indebtedness); Mills *v.* Morris, Hoffm. 419.

South Carolina.— McElwee *v.* Sutton, 2 Bailey 128.

Virginia.— Wilson *v.* Buchanan, 7 Gratt. 334.

claim was acquired after due notice, either actual or constructive, of such conveyance,[21] although a deed made and recorded in the partial execution of a purpose to defraud subsequent creditors of the grantor would, as to such creditors, be declared invalid and void upon the consummation of the fraud.[22] In several jurisdictions, however, it is held that notice to a creditor at the time of the creation of his debt of a prior conveyance made with a fraudulent intent will not affect such creditor's subsequent right to have the conveyance set aside, these decisions being based on the ground that such conveyance is void *ab initio*.[23]

D. Creditors Whose Claims Are Barred or Satisfied. A creditor whose claim is barred by the statute of limitations,[24] or whose debt has been satisfied, cannot maintain a bill to subject to the payment of such claim property assigned by the debtor in fraud of creditors.[25]

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 633.

Contra.— Cartersville First Nat. Bank *v.* Bayless, 96 Ga. 684, 23 S. E. 851.

21. *Connecticut.*— Smith *v.* Gaylord, 47 Conn. 380.

Georgia.— Brown *v.* Spivey, 53 Ga. 155. See also Sims *v.* Albea, 72 Ga. 751.

Illinois.— Henebery *v.* Johnson, 95 Ill. App. 537.

Indiana.— Parke County Coal Co. *v.* Terre Haute Paper Co., 129 Ind. 73, 26 N. E. 884.

Iowa.— Saunders *v.* King, 119 Iowa 291, 93 N. W. 272.

Kansas.— Chase State Bank *v.* Chatten, 69 Kan. 435, 77 Pac. 96; Sheppard *v.* Thomas, 24 Kan. 780.

Maryland.— Kane *v.* Roberts, 40 Md. 590; Williams *v.* Banks, 11 Md. 198; Roberts *v.* Gibson, 6 Harr. & J. 116. See, however, Scott *v.* Keane, 87 Md. 709, 40 Atl. 1070, 42 L. R. A. 359, holding that a creditor who contracts with notice of a trust deed placing property of his debtor beyond the reach of creditors, and under which the debtor exercises all the rights of ownership, is not estopped to have such deed declared fraudulent and against the policy of the law.

Mississippi.— Donoghue *v.* Shull, 85 Miss. 404, 37 So. 817.

New York.— Baker *v.* Gilman, 52 Barb. 26; Pell *v.* Tredwell, 5 Wend. 661. See, however, Martin *v.* Walker, 12 Hun 46.

Pennsylvania.— Monroe *v.* Smith, 79 Pa. St. 459; Snyder *v.* Christ, 39 Pa. St. 499; Thomas *v.* Butler, 16 Pa. Super. Ct. 268.

South Carolina.— State Bank *v.* Ballard, 12 Rich. 259; Eigleberger *v.* Kibler, 1 Hill Eq. 113, 26 Am. Dec. 192.

Tennessee.— Nelson *v.* Vanden, 99 Tenn. 224, 42 S. W. 5. See Churchill *v.* Wells, 7 Coldw. 364, holding that such notice must be actual, and that constructive notice, such as registry of the deed, is not sufficient.

Texas.— Lehmberg *v.* Biberstein, 51 Tex. 457.

Virginia.— See Alexandria Bank *v.* Patton, 1 Rob. 499.

West Virginia.— Horner-Gaylord Co. *v.* Fawcett, 50 W. Va. 487, 40 S. E. 564, 57 L. R. A. 869.

United States.— *In re* May, 2 Fed. 845.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 634.

22. Diggs *v.* McCullough, 69 Md. 592, 16 Atl. 453; Matthai *v.* Heather, 57 Md. 483; Moore *v.* Blondheim, 19 Md. 172; Williams *v.* Banks, 11 Md. 198. See also Marshall *v.* Rhode, 139 Pa. St. 399, 20 Atl. 999, 23 Am. St. Rep. 198, holding that a conveyance made with the fraudulent intent of placing property beyond the reach of creditors is void as to a subsequent creditor who had no knowledge thereof, although the conveyance was of record.

23. Echols *v.* Peurrung, 107 Ala. 660, 18 So. 250; O'Kane *v.* Vinnedge, 108 Ky. 34, 55 S. W. 711, 21 Ky. L. Rep. 1551; Pincus *v.* Reynolds, 19 Mont. 564, 49 Pac. 145; Spielman *v.* Knowles, 50 N. J. Eq. 796, 27 Atl. 1033 [*affirming* 50 N. J. Eq. 120, 24 Atl. 571]. See also Buffington *v.* Mosby, 34 S. W. 704, 17 Ky. L. Rep. 1307. See, however, Hanson *v.* Power, 8 Dana (Ky.) 91; Shipp *v.* Hibler, 4 Ky. L. Rep. 47.

24. *Alabama.*—Herstein *v.* Walker, 85 Ala. 37, 4 So. 262. And see Merchants' Nat. Bank *v.* McGee, 108 Ala. 304, 19 So. 356; Larkin *v.* Mead, 77 Ala. 485.

Louisiana.— Hopkins *v.* Buck, 5 La. Ann. 487.

Mississippi.— Fox *v.* Wallace, 31 Miss. 660; Edwards *v.* McGee, 31 Miss. 143.

Oregon.— Davis *v.* Davis, 20 Oreg. 78, 25 Pac. 140.

Texas.— McClenney *v.* McClenney, 3 Tex. 192, 49 Am. Dec. 738.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 635.

25. *Georgia.*— Feagan *v.* Cureton, 19 Ga. 404.

Indiana.— See Voorhees *v.* Carpenter, 127 Ind. 300, 26 N. E. 838.

Kansas.— Daugherty *v.* Powell, 67 Kan. 857, 72 Pac. 274, 74 Pac. 242 (holding that one who has ceased to be a creditor with an enforceable lien cannot attack his debtor's conveyance); Robbins *v.* Sackett, 23 Kan. 301.

Maryland.— See Helden *v.* Hellen, 80 Md. 616, 31 Atl. 506, 45 Am. St. Rep. 371.

Massachusetts.— See Plimpton *v.* Goodell, 143 Mass. 365, 9 N. E. 791.

Michigan.— See Cranson *v.* Smith, 47 Mich. 189, 10 N. W. 194.

New York.— Weaver *v.* Toogood, 1 Barb. 238; Jackson *v.* Cadwell, 1 Cow. 622.

E. Nature of Claims of Creditors — 1. Claims in General. As a general rule the statute of 13 Elizabeth relating to fraudulent conveyances, and the statutes enacted in various states founded thereon, embrace as creditors within the meaning of such statutes all persons having a valid cause of action.[26] A creditor who has taken a mortgage as security for his debt can attack a prior fraudulent transfer or mortgage made by his mortgagor.[27]

2. Contracts Founded on Illegal Consideration. To enable a person to attack a conveyance as fraudulent, he must be a *bona fide* creditor, and he is not such a creditor where the contract under which he claims is founded on an illegal consideration.[28]

Tennessee.— Tyler *v.* Hamblin, 11 Heisk. 152.

Texas.— Willis *v.* Hudson, 72 Tex. 598, 10 S. W. 713; Hodges *v.* Taylor, 57 Tex. 196.

United States.— Walker *v.* Powers, 104 U. S. 245, 26 L. ed. 729; Gottlieb *v.* Thatcher, 34 Fed. 435, holding that under the circumstances a bill to set aside a conveyance as fraudulent should be dismissed, the creditor having in equity been more than paid in full.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 635.

Compromise claim.— A conveyance by a husband to his wife cannot be set aside as fraudulent by creditors of the husband who compromised their claims against him after the conveyance was recorded. Landreth Co. *v.* Schevenel, 102 Tenn. 486, 52 S. W. 148.

Negligence in pursuing remedy.— The rule that giving time to the principal debtor discharges the surety does not apply in the case of a judgment creditor seeking to subject property, voluntarily conveyed by the debtor, in the hands of the grantee, so as to make a stay of execution on the judgment by plaintiff, under an arrangement for its payment by instalments, a bar to a suit to subject the property in his hands, although the debt might certainly have been satisfied had the creditor proceeded in the usual manner. Hopkirk *v.* Randolph, 12 Fed. Cas. No. 6,698, 2 Brock. 132.

26. *Illinois.*— Walradt *v.* Brown, 6 Ill. 397, 41 Am. Dec. 190.

Maryland.— Welde *v.* Scotten, 59 Md. 72; Gebhart *v.* Merfeld, 51 Md. 322.

Massachusetts.— Woodbury *v.* Sparrell Print, 187 Mass. 426, 73 N. E. 547.

New Hampshire.— See Esty *v.* Long, 41 N. H. 103.

New Jersey.— Townsend *v.* Tuttle, 28 N. J. Eq. 449, holding, however, that such creditor must be a *bona fide* one.

New York.— Stimson *v.* Wrigley, 86 N. Y. 332; Wilcox *v.* Fitch, 20 Johns. 472, holding that a plaintiff in ejectment is a creditor within the meaning of the statute of frauds. See Bowlsby *v.* Tompkins, 18 Hun 219.

South Dakota.— Custer City First Nat. Bank *v.* Calkins, 16 S. D. 445, 93 N. W. 646.

Vermont.— See Fairbanks *v.* Benjamin, 50 Vt. 99.

Officers of a court holding claims for costs are such creditors as may set aside their debtor's conveyance as fraudulent. Chapman *v.* Chapman, 13 Ind. 396.

A claim of a witness for attendance, etc., is such a debt or demand upon the party by whom he was summoned as is protected by the statute against fraudulent conveyances. Worland *v.* Outten, 3 Dana (Ky.) 477.

27. *Georgia.*— Lee *v.* Brown, 7 Ga. 275.

Maine.— Sprague *v.* Graham, 29 Me. 160.

Michigan.— Fox *v.* Clark, Walk. 575.

New York.— Anderson *v.* Hunn, 5 Hun 79, holding that the holder of a junior chattel mortgage given for an antecedent debt may attack a senior chattel mortgage for fraud, since his mortgage gives him a specific lien.

United States.— People's Sav. Bank *v.* Bates, 120 U. S. 556, 7 S. Ct. 679, 30 L. ed. 754, construing Michigan statutes.

England.— Bartow *v.* Vanheythuysen, 11 Hare 126, 18 Jur. 344, 1 Wkly. Rep. 429, 45 Eng. Ch. 127; Bill *v.* Cureton, 4 L. J. Ch. 98, 2 Myl. & K. 503, 7 Eng. Ch. 503, 39 Eng. Reprint 1036.

Canada.— Warren *v.* Taylor, 8 Can. L. J. O. S. 243, 9 Grant Ch. (U. C.) 59.

In New Jersey, however, a creditor who accepts a chattel mortgage as security for his debt is held to be a purchaser, and cannot therefore while relying on his mortgage have a prior voluntary conveyance or mortgage by the mortgagor declared fraudulent as to him, since 27 Eliz., and the New Jersey statute based thereon, applies only to realty. Boice *v.* Conover, 54 N. J. Eq. 531, 35 Atl. 402. See *supra*, I, G, 2.

28. *Alabama.*— See Mohr *v.* Seal, 85 Ala. 114, 4 So. 736.

Massachusetts.— Alexander *v.* Gould, 1 Mass. 165.

Minnesota.— Bruggerman *v.* Hoerr, 7 Minn. 337, 82 Am. Dec. 97.

Mississippi.— Edmunds *v.* Mister, 58 Miss. 765.

Pennsylvania.— Hart *v.* Hart, 5 Watts 106.

Virginia.— Burton *v.* Mill, 78 Va. 468.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 639.

A note given for liquors sold in the state of New Hampshire, without a license, although made in another state, being void through illegality of consideration, will not create the relation of debtor and creditor between the parties so as to entitle the payee to question the validity of the sale made by the maker to a third person as fraudulent. Fuller *v.* Bean, 30 N. H. 181.

Partial illegality.— Where a creditor seeks to set aside a conveyance and subject the

3. Claims Not Matured. According to the better rule a creditor cannot attack a conveyance as being in fraud of creditors prior to the maturity of his claim or debt.[29]

4. Torts. The well-nigh universal rule is that claims for damages arising from torts are within the protection of the statutes against fraudulent conveyances.[30] Thus, persons having a cause of action for libel or slander,[31] assault and

property for certain claims, part of which are so tainted with illegality that equity will not enforce it, and part of which are valid and enforceable, but the creditor refuses to produce his accounts so as to enable the valid items to be distinguished from the illegal ones, the former will share the fate of the latter, and equity will refuse him aid altogether. Hanson *v.* Power, 8 Dana (Ky.) 91.

29. *Alabama.*— McGhee *v.* Importers', etc., Nat. Bank, 93 Ala. 192, 9 So. 734; Freider *v.* Lienkauff, 92 Ala. 469, 8 So. 758; Jones *v.* Massey, 79 Ala. 370.

Indiana.— Collins *v.* Nelson, 81 Ind. 75; Evans *v.* Thornburg, 77 Ind. 106. See, however, McCormick *v.* Hartley, 107 Ind. 248, 6 N. E. 357, holding that a mortgagee of chattels may sue for equitable relief against a subsequent fraudulent mortgage of the chattels and a judgment foreclosing the same, although the debt secured is not yet due him, the decision being put on the ground that the creditor had a subsisting lien upon the property at the time of the fraudulent conveyance.

Kentucky.— U. S. Bank *v.* Huth, 4 B. Mon. 423.

Massachusetts.— England *v.* Adams, 157 Mass. 449, 32 N. E. 665.

Virginia.— Simon *v.* Ellison, (1895) 22 S. E. 860.

United States.— Adler *v.* Fenton, 24 How. 407, 16 L. ed. 696.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 640.

Compare, however, Stein *v.* Gibbons, 16 La. 103; Mowry *v.* Schroder, 4 Strobh. (S. C.) 69 (holding that in a suit to set aside an alleged fraudulent conveyance, where the complaint alleges that the whole debt to plaintiff is lost, it is immaterial whether it was due before or after the action was brought); Reg. *v.* Henry, 21 Ont. 113.

30. *Alabama.*— Gunn *v.* Hardy, 130 Ala. 642, 31 So. 443.

Connecticut.— Fox *v.* Hills, 1 Conn. 295, holding that a voluntary conveyance to defeat a claim of a third person for damages for a tort is void at common law as against such third person.

Georgia.— Westmoreland *v.* Powell, 59 Ga. 256.

Illinois.— Bongard *v.* Block, 81 Ill. 186, 25 Am. Rep. 276; Walradt *v.* Brown, 6 Ill. 397, 41 Am. Dec. 190.

Indiana.— Petree *v.* Brotherton, 133 Ind. 692, 32 N. E. 300; Shean *v.* Shay, 42 Ind. 375, 13 Am. Rep. 366; Pennington *v.* Clifton, 11 Ind. 162.

Iowa.— Carbiener *v.* Montgomery, 97 Iowa 659, 66 N. W. 900; Wier *v.* Day, 57 Iowa 84, 10 N. W. 304; Corder *v.* Williams, 40 Iowa 582.

Kentucky.— Slater *v.* Sherman, 5 Bush 206; Lillard *v.* McGee, 4 Bibb 165.

Maine.— Tobie, etc., Mfg. Co. *v.* Waldron, 75 Me. 472.

Maryland.— Welde *v.* Scotten, 59 Md. 72. And see Gebhart *v.* Merfeld, 51 Md. 322.

Massachusetts.— Leonard *v.* Bolton, 153 Mass. 428, 26 N. E. 1118.

Michigan.— Schaible *v.* Ardner, 90 Mich. 70, 56 N. W. 1105.

Mississippi.— McInnis *v.* Wiscassett Mills, 78 Miss. 52, 28 So. 725.

Missouri.— McCollum *v.* Crane, 101 Mo. App. 522, 74 S. W. 650.

New Jersey.— Thorpe *v.* Leibrecht, 56 N. J. Eq. 499, 39 Atl. 361; Boid *v.* Dean, 48 N. J. Eq. 193, 21 Atl. 618; Post *v.* Stiger, 29 N. J. Eq. 554; Scott *v.* Hartman, 26 N. J. Eq. 89.

New York.— Kain *v.* Larkin, 4 N. Y. App. Div. 209, 38 N. Y. Suppl. 546; Fuller *v.* Brown, 76 Hun 557, 28 N. Y. Suppl. 189; Hepworth *v.* Union Ferry Co., 62 Hun 257, 16 N. Y. Suppl. 692; Martin *v.* Walker, 12 Hun 46; Ford *v.* Johnston, 7 Hun 563; Pendleton *v.* Hughes, 65 Barb. 136; Jackson *v.* Myers, 18 Johns. 425.

North Dakota.— Soly *v.* Aasen, 10 N. D. 108, 86 N. W. 108.

Rhode Island.— McKenna *v.* Crowley, 16 R. I. 364, 17 Atl. 354.

South Carolina.— McAfee *v.* McAfee, 28 S. C. 188, 5 S. E. 480.

Tennessee.— Patrick *v.* Ford, 5 Sneed 532 [*overruling* Langford *v.* Fly, 7 Humphr. 585]; Farnsworth *v.* Bell, 5 Sneed 531.

Texas.— Holden *v.* McLaury, 60 Tex. 228.

Vermont.— Corey *v.* Morrill, 71 Vt. 51, 42 Atl. 976. See, however, Green *v.* Adams, 59 Vt. 602, 10 Atl. 742, 59 Am. Rep. 761.

Virginia.— Harris *v.* Harris, 23 Gratt. 737.

Washington.— Bates *v.* Drake, 28 Wash. 447, 68 Pac. 961.

England.— Crossley *v.* Elworthy, L. R. 12 Eq. 158, 40 L. J. Ch. 480, 24 L. T. Rep. N. S. 607, 19 Wkly. Rep. 842; Barling *v.* Bishopp, 29 Beav. 417, 6 Jur. N. S. 812, 8 Wkly. Rep. 631, 54 Eng. Reprint 689; Strong *v.* Strong, 18 Beav. 408, 52 Eng. Reprint 161. See, however, Leukener *v.* Freeman, 2 Freem. 236, 22 Eng. Reprint 1182, Prec. Ch. 105, 24 Eng. Reprint 51.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 5, 641.

31. *California.*— Chalmers *v.* Sheehy, 132 Cal. 459, 64 Pac. 709.

Connecticut.— Fowler *v.* Frisbie, 3 Conn. 320, holding that while a conveyance made to defeat a claim for damages in an action of

battery,[32] bastardy,[33] seduction,[34] breach of promise to marry,[35] trespass,[36] usury penalties,[37] or deceit,[38] are regarded as creditors and within the meaning of such statutes. In a few instances, however, it has been held that until a claim arising out of a tort has been reduced to judgment, the claimant is not a creditor within the purview of the statute.[39]

5. Alimony Creditors. A conveyance by a husband of his property made with the intent to prevent the recovery of alimony is fraudulent as to his wife, and may be set aside in an action brought by her,[40] although the conveyance may have been made prior to the institution of the divorce proceedings.[41]

F. Representatives — 1. Assignees of Creditors. The general rule is that the right to attack a conveyance as being in fraud of creditors is not personal to the original creditor, but may be exercised by his successors or assigns whenever he might have done so.[42]

slander is not within the statute concerning fraudulent conveyances, yet it is void at common law.

Kentucky.— Lillard *v.* McGee, 4 Bibb 165.

Maine.— Hall *v.* Sands, 52 Me. 355.

Maryland.— Gebhart *v.* Merfeld, 51 Md. 322; Cooke *v.* Cooke, 43 Md. 522.

Tennessee.— Farnsworth *v.* Bell, 5 Sneed 531.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 641, 642.

The word "creditors," in the statute of frauds, is not to be taken in its strict technical sense, but applies to all persons who have demands, accounts, interests, or causes of action for which they might recover any debt, damages, penalty, or forfeiture, in actions *ex delicto* or *ex contractu*, and hence includes a claim for damages for slander. Walradt *v.* Brown, 6 Ill. 397, 41 Am. Dec. 190.

32. Anglin *v.* Conley, 114 Ky. 741, 71 S. W. 926, 24 Ky. L. Rep. 1551; Slater *v.* Sherman, 5 Bush 206; Floyd *v.* Martin, 4 Ky. L. Rep. 891; Martin *v.* Walker, 12 Hun (N. Y.) 46.

33. Bishop *v.* Redmond, 83 Ind. 157; Schuster, etc., Co. *v.* Stout, 30 Kan. 529, 2 Pac. 642; Leonard *v.* Bolton, 153 Mass. 428, 26 N. E. 1118; Pierstoff *v.* Jorges, 86 Wis. 128, 56 N. W. 735, 39 Am. St. Rep. 881.

34. Hunsinger *v.* Hofer, 110 Ind. 390, 11 N. E. 463; Bishop *v.* Redmond, 83 Ind. 157; Carbiener *v.* Montgomery, 97 Iowa 659, 66 N. W. 900; McKenna *v.* Crowley, 16 R. I. 364, 17 Atl. 354.

35. Thompson *v.* Robinson, 89 Me. 46, 35 Atl. 1002; McVeigh *v.* Ritenour, 40 Ohio St. 107; Smith *v.* Culbertson, 9 Rich. (S. C.) 106; Lowry *v.* Pinson, 2 Bailey (S. C.) 324, 23 Am. Dec. 140; Hoffman *v.* Junk, 51 Wis. 613, 8 N. W. 493.

36. Westmoreland *v.* Powell, 59 Ga. 256; Gebhart *v.* Merfeld, 51 Md. 322; Schaible *v.* Ardner, 98 Mich. 70, 56 N. W. 1105; Paul *v.* Crooker, 8 N. H. 288.

Victim of robbery.— A person upon whom a robbery has been committed is entitled to be considered as a creditor of the party committing the robbery. Reid *v.* Kennedy, 21 Grant Ch. (U. C.) 86.

37. Heath *v.* Page, 63 Pa. St. 108, 3 Am. Rep. 533.

38. Miner *v.* Warner, 2 Grant (Pa.) 448.

39. *Maine.*— Meserve *v.* Dyer, 4 Me. 52.

Michigan.— Hill *v.* Bowman, 35 Mich. 191.

Mississippi.— Jones *v.* Jones, 79 Miss. 261, 30 So. 651.

Ohio.— Detwiler *v.* Louison, 18 Ohio Cir. Ct. 434, 10 Ohio Cir. Dec. 95.

Tennessee.— Langford *v.* Fly, 7 Humphr. 585.

40. Scott *v.* Magloughlin, 133 Ill. 33, 24 N. E. 1030 [*affirming* 33 Ill. App. 162]; Tyler *v.* Tyler, 126 Ill. 525, 21 N. E. 616, 9 Am. St. Rep. 642; De Ruiter *v.* De Ruiter, 28 Ind. App. 9, 62 N. E. 100, 91 Am. St. Rep. 107; Feigley *v.* Feigley, 7 Md. 537, 61 Am. Dec. 375. See also Hall *v.* Harrington, 7 Colo. App. 474, 44 Pac. 365; Holland *v.* Holland, 121 Mich. 109, 79 N. W. 1102; Chittenden *v.* Chittenden, 22 Ohio Cir. Ct. 498, 12 Ohio Cir. Dec. 526; Schultze *v.* Schultze, (Tex. Civ. App. 1901) 66 S. W. 56.

41. Gregory *v.* Filbeck, 12 Colo. 379, 21 Pac. 489; Platner *v.* Platner, 66 Iowa 378, 23 N. W. 764; Weber *v.* Rothchild, 15 Oreg. 385, 15 Pac. 650, 3 Am. St. Rep. 162; Blenkinsopp *v.* Blenkinsopp, 1 De G. M. & G. 495, 16 Jur. 787, 21 L. J. Ch. 401, 50 Eng. Ch. 379, 42 Eng. Reprint 644.

For a full discussion of this subject see Divorce, 14 Cyc. 798.

42. *Alabama.*— Jones *v.* Smith, 92 Ala. 455, 9 So. 179; Ruse *v.* Bromberg, 88 Ala. 619, 7 So. 384; Bragg *v.* Patterson, 85 Ala. 233, 4 So. 716; Fearn *v.* Ward, 80 Ala. 555, 2 So. 114.

California.— Windhaus *v.* Bootz, (1890) 25 Pac. 404; Hobart *v.* Tyrrell, 68 Cal. 12, 8 Pac. 525.

Colorado.— Rose *v.* Dunklee, 12 Colo. App. 403, 56 Pac. 342. See, however, Kaufman *v.* Burchinell, 15 Colo. App. 520, 63 Pac. 786.

Connecticut.— Shipman *v.* Ætna Ins. Co., 29 Conn. 245.

Iowa.— Searing *v.* Berry, 58 Iowa 20, 11 N. W. 708.

Maine.— Simpson *v.* Warren, 55 Me. 18; Warren *v.* Williams, 52 Me. 343. See Annis *v.* Butterfield, 99 Me. 181, 58 Atl. 898, holding that the assignment by a trustee in bankruptcy of the mere naked right to set aside a fraudulent conveyance by the bankrupt is invalid.

Maryland.— Schaferman *v.* O'Brien, 28 Md.

2. RECEIVERS IN SUPPLEMENTARY PROCEEDINGS.[43] Under statutes providing for the appointment of a receiver in proceedings supplementary to execution, the general rule is that such receiver is not the mere agent or representative of the debtor, but occupies the relation of a trustee for the creditors, and may institute actions in his own name to set aside fraudulent conveyances made by the debtor with a view to defeating his creditors.[44]

3. SURETIES AND INDORSERS. The general rule is that a surety[45] or an accom-

565, 92 Am. Dec. 708; Waters *v.* Dashiell, 1 Md. 455.

Massachusetts.— Freeland *v.* Freeland, 102 Mass. 475; Lynde *v.* McGregor, 13 Allen 172; Blake *v.* Sawin, 10 Allen 340; Gibbs *v.* Thayer, 6 Cush. 30.

Michigan.— Noble *v.* McKeith, 127 Mich. 163, 86 N. W. 526; Howd *v.* Breckenridge, 97 Mich. 65, 56 N. W. 221 (holding that the rule that a cause of action for fraud is not assignable does not apply to a contractual debt as the basis of a suit to set aside fraudulent conveyances); Sweet *v.* Converse, 88 Mich. 1, 49 N. W. 899.

Mississippi.— Cook *v.* Liggin, 54 Miss. 368.

New Jersey.— Wimpfheimer *v.* Perrine, (1901) 50 Atl. 356. See Winans *v.* Graves, 43 N. J. Eq. 263, 11 Atl. 25.

New York.— *In re* Cornell, 110 N. Y. 351, 18 N. E. 142; Southard *v.* Benner, 72 N. Y. 424; McMahon *v.* Allen, 35 N. Y. 403; Bostwick *v.* Scott, 40 Hun 212.

Ohio.— Kilbourne *v.* Fay, 29 Ohio St. 264, 23 Am. Rep. 741; Hallowell *v.* Bayliss, 10 Ohio St. 536.

Pennsylvania.— Tams *v.* Bullitt, 35 Pa. St. 308; Moncure *v.* Hanson, 15 Pa. St. 385.

Rhode Island.— Doyle *v.* Peckham, 9 R. I. 21.

Virginia.— Staton *v.* Pittman, 11 Gratt. 99; Clough *v.* Thompson, 7 Gratt. 26; Shirley *v.* Long, 6 Rand. 735.

Washington.— Bates *v.* Drake, 28 Wash. 447, 68 Pac. 961.

West Virginia.— Highland *v.* Highland, 5 W. Va. 63.

Wisconsin.— Sutton *v.* Hasey, 58 Wis. 556, 17 N. W. 416.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 548.

Compare, however, Carrigan *v.* Byrd, 23 S. C. 89 (where the decision seemed to turn more upon the question of notice of the conveyance which the assignee had); Pierce *v.* Bowers, 8 Baxt. (Tenn.) 353; Kearby *v.* Hopkins, 14 Tex. Civ. App. 166, 36 S. W. 506; Lumsden *v.* Scott, 4 Ont. 323.

43. **Assignee for the benefit of creditors** see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 235.

Trustee or assignee in bankruptcy see BANKRUPTCY, 5 Cyc. 346.

Assignee or receiver in insolvency see INSOLVENCY.

44. *Michigan.*— Prescott *v.* Pfeiffer, 57 Mich. 21, 23 N. W. 477.

Minnesota.— Dunham *v.* Byrnes, 36 Minn. 106, 30 N. W. 402.

New Jersey.— Miller *v.* Mackenzie, 29 N. J. Eq. 291. But *compare* Higgins *v.* Gillesheiner, 26 N. J. Eq. 308, holding that a receiver appointed under the act to prevent fraudulent trusts and assignments (Nix Dig. p. 297), has no power to impeach a grant made by the debtor in fraud of creditors.

New York.— Kennedy *v.* Thorp, 51 N. Y. 174; Bostwick *v.* Menck, 40 N. Y. 383; Porter *v.* Williams, 9 N. Y. 142, 59 Am. Dec. 519; Manley *v.* Rassiga, 13 Hun 288. See also Bennett *v.* McGuire, 58 Barb. 625; Gere *v.* Dibble, 17 How. Pr. 31. The earlier doctrine of the New York supreme court was directly the reverse of that laid down in the text. Hayner *v.* Fowler, 16 Barb. 300; Seymour *v.* Wilson, 16 Barb. 294.

Wisconsin.— Hamlin *v.* Wright, 23 Wis. 491.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 649.

Compare Olney *v.* Tanner, 18 Fed. 636, 21 Blatchf. 540, holding that such receiver cannot maintain a suit to reach property transferred by a bank in fraud of creditors, where there is an assignee in bankruptcy; in such case the assignee in bankruptcy being the only person who can assail the transfer.

45. *Alabama.*— Washington *v.* Norwood, 128 Ala. 383, 30 So. 405; Jenkins *v.* Lockhard, 66 Ala. 377; Cato *v.* Easley, 2 Stew. 214.

Arkansas.— Williams *v.* Bizzell, 11 Ark. 716.

Georgia.— Banks *v.* McCandless, 119 Ga. 793, 47 S. E. 332.

Illinois.— Choteau *v.* Jones, 11 Ill. 300, 50 Am. Dec. 460; Dunphy *v.* Gorman, 29 Ill. App. 132.

Indiana.— Barnes *v.* Sammons, 128 Ind. 596, 27 N. E. 747.

Kentucky.— Partlow *v.* Lane, 3 B. Mon. 424, 39 Am. Dec. 473; Poynter *v.* Mallory, 45 S. W. 1042, 20 Ky. L. Rep. 284; Johnson *v.* Harrison, 6 Ky. L. Rep. 591.

Maine.— Whitehouse *v.* Bolster, 95 Me. 458, 50 Atl. 240; Danforth *v.* Robinson, 80 Me. 466, 15 Atl. 27, 6 Am. St. Rep. 224; Sargent *v.* Salmond, 27 Me. 539; Howe *v.* Ward, 4 Me. 195.

Mississippi.— Ames *v.* Dorroh, 76 Miss. 187, 23 So. 768, 71 Am. St. Rep. 522; Loughridge *v.* Bowland, 52 Miss. 546.

New York.— Martin *v.* Walker, 12 Hun 46.

North Carolina.— Tatum *v.* Tatum, 36 N. C. 113.

Ohio.— Boies *v.* Johnson, 25 Ohio Cir. Ct. 331.

Tennessee.— Williams *v.* Tipton, 5 Humphr. 66, 42 Am. Dec. 420; Shapira *v.* Paletz, (Ch. App. 1900) 59 S. W. 774. See Oneal *v.* Smith, 10 Lea 340.

Virginia.— Curd *v.* Miller, 7 Gratt. 185.

modation indorser[46] is the creditor of the principal debtor from the date of signing the surety bond, or the date of indorsement, and, upon the payment of the debt, is entitled to attack a fraudulent conveyance made by the debtor in the interim; and the same rule applies as between cosureties.[47]

4. Purchasers at Judicial Sales. The general rule is that a purchaser at a judicial sale has the same right to attack a prior conveyance on the ground of it being made to defraud creditors as such creditors would possess,[48] unless such purchaser had actual or constructive notice of the conveyance at the time of his purchase.[49]

5. Personal Representatives. In many jurisdictions by special statutory enactment or judicial construction of statutes, a personal representative may institute proceedings to set aside a fraudulent conveyance made by his decedent,[50] while in

West Virginia.— Hawker *v.* Moore, 40 W. Va. 49, 20 S. E. 848.

Wisconsin.— Ellis *v.* Southwestern Land Co., 108 Wis. 313, 84 N. W. 417, 81 Am. St. Rep. 909.

United States.— Thomson *v.* Crane, 73 Fed. 327.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 650.

46. Lyon *v.* Bolling, 9 Ala. 463, 44 Am. Dec. 444; Phelps *v.* Morrison, 24 N. J. Eq. 195, holding that an indorser of a note for the accommodation of the maker, who has been compelled to pay, is a creditor of the maker, within the statute prohibiting fraudulent conveyances, and is therefore entitled to maintain an action to vacate such conveyance. See also Severs *v.* Dodson, 53 N. J. Eq. 633, 34 Atl. 7, 51 Am. St. Rep. 641. *Compare*, however, Mason *v.* Somers, (N. J. Ch. 1900) 45 Atl. 602, holding that an indorser who lends his name to give credit to a note does not thereby become a creditor of the maker, so as to raise a presumption that the maker's subsequent voluntary conveyance of his property is as to such indorser fraudulent.

47. Washington *v.* Norwood, 128 Ala. 383, 30 So. 405; Jenkins *v.* Lockard, 66 Ala. 377; Gibson *v.* Love, 4 Fla. 217; Whitehouse *v.* Bolster, 95 Me. 458, 50 Atl. 240; Pashby *v.* Mandigo, 42 Mich. 172, 3 N. W. 927; Smith *v.* Rumsey, 33 Mich. 183.

48. *Georgia.*— Murray *v.* Jones, 50 Ga. 109.

Illinois.— Murphy *v.* Orr, 32 Ill. 489.

Indiana.— Frakes *v.* Brown, 2 Blackf. 295.

Kentucky.— Fuller *v.* Pinson, 98 Ky. 441, 33 S. W. 399, 17 Ky. L. Rep. 1002; Shiveley *v.* Jones, 6 B. Mon. 274.

Massachusetts.— Gerrish *v.* Mace, 9 Gray 235.

Michigan.— Watson *v.* Mead, 98 Mich. 330, 57 N. W. 181.

Minnesota.— Millis *v.* Lombard, 32 Minn. 259, 20 N. W. 187.

Mississippi.— Maye *v.* Rose, Freem. 703.

Missouri.— Lindell Real Estate Co. *v.* Lindell, 133 Mo. 386, 33 S. W. 466; Rinehart *v.* Long, 95 Mo. 396, 8 S. W. 559; Gentry *v.* Robinson, 55 Mo. 260; Ryland *v.* Callison, 54 Mo. 513; Dunnica *v.* Coy, 28 Mo. 525, 75 Am. Dec. 133; Pepper *v.* Carter, 11 Mo. 540. See also Wood *v.* Augustine, 61 Mo. 46.

New Jersey.— Smith *v.* Espy, 9 N. J. Eq. 160.

New York.— Smith *v.* Reid, 134 N. Y. 568, 31 N. E. 1082 [*affirming* 11 N. Y. Suppl. 739, 19 N. Y. Civ. Proc. 363]; Berger *v.* Carman, 79 N. Y. 146 [*reversing* 18 Hun 355]; Sands *v.* Hildreth, 14 Johns. 493 [*affirming* 2 Johns. Ch. 35].

Ohio.— Barr *v.* Hatch, 3 Ohio 527.

Oregon.— Wood *v.* Fisk, 45 Oreg. 276, 77 Pac. 128, 738.

Pennsylvania.— See Ferris *v.* Irons, 83 Pa. St. 179.

Rhode Island.— Belcher *v.* Arnold, 14 R. I. 613.

South Carolina.— McGee *v.* Jones, 34 S. C. 146, 13 S. E. 326; Ford *v.* Aiken, 4 Rich. 121; Caston *v.* Cunningham, 3 Strobh. 59.

Wisconsin.— Eastman *v.* Schettler, 13 Wis. 324.

United States.— Farrar *v.* Bernheim, 74 Fed. 435, 20 C. C. A. 496; Middleton *v.* Sinclair, 17 Fed. Cas. No. 9,534, 5 Cranch C. C. 409.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 651.

Contra.— Thigpen *v.* Pitt, 54 N. C. 49.

49. Doe *v.* Hurd, 7 Blackf. (Ind.) 510; Davis *v.* Briscoe, 81 Mo. 27; Den *v.* Lippencott, 6 N. J. L. 473.

In South Carolina the rule is that notice had by the purchaser is immaterial, if the creditor had no notice of the conveyance. McGee *v.* Jones, 34 S. C. 146, 13 S. E. 326; Ford *v.* Aiken, 4 Rich. 121.

50. *California.*— Emmons *v.* Barton, 109 Cal. 662, 42 Pac. 303.

Indiana.— Jarrell *v.* Brubaker, 115 Ind. 260, 49 N. E. 1050.

Massachusetts.— Putney *v.* Fletcher, 148 Mass. 247, 19 N. E. 370.

Michigan.— Beith *v.* Porter, 119 Mich. 365, 78 N. W. 336, 75 Am. St. Rep. 402.

New Hampshire.—Matthews *v.* Hutchins, 68 N. H. 412, 40 Atl. 1063.

New York.— West Troy Nat. Bank *v.* Levy, 127 N. Y. 549, 28 N. E. 592 [*reversing* 2 N. Y. Suppl. 162]; Harvey *v.* McDonnell, 113 N. Y. 526, 21 N. E. 695.

North Carolina.— Webb *v.* Atkinson, 122 N. C. 683, 29 S. E. 949.

Ohio.— Hoffman *v.* Kiefer, 19 Ohio Cir. Ct.

other jurisdictions the right of an executor or administrator to attack a conveyance of property made by the decedent on the ground of fraud as to the creditors is denied.[51]

G. Estoppel — 1. In General. Where complainant in a suit to set aside a fraudulent conveyance has not sought or received any benefit from the deed, or caused defendant to forego any rightful advantage in respect to the subject-matter or defense of the suit, he is not estopped to invoke proper relief.[52]

2. Knowledge, Assent, or Affirmance. The general rule is that the right of an existing creditor to have a conveyance set aside as being in fraud of his rights is not affected by his mere knowledge of the fraud at the time the conveyance was executed.[53] However, a conveyance in fraud of creditors made with the full knowledge of existing creditors is valid, as far as the creditors who assent to or affirm the conveyance are concerned.[54]

3. Participation. Where it is shown that a complainant in a bill to set aside

401, 10 Ohio Cir. Dec. 304, holding, however, that the personal representative's right to sue is not exclusive, and that the creditor's right to prosecute such an action remains.

Pennsylvania.— Stewart *v.* Kearney, 6 Watts 453, 31 Am. Dec. 482.

Vermont.— McLane *v.* Johnson, 43 Vt. 48.

Wisconsin.— Eckler *v.* Wolcott, 115 Wis. 19, 90 N. W. 1081.

51. *Alabama.*— Davis *v.* Swanson, 54 Ala. 277, 25 Am. Rep. 678.

Arkansas.—Anderson *v.* Dunn, 19 Ark. 650.

District of Columbia.— Tierney *v.* Corbett, 2 Mackey 264.

Georgia.— Anderson *v.* Brown, 72 Ga. 713.

Illinois.— Majorowicz *v.* Payson, 153 Ill. 484, 39 N. E. 127.

Kansas.— Crawford *v.* Lehr, 20 Kan. 509.

Mississippi.— Blake *v.* Blake, 53 Miss. 182.

Missouri.— Hall *v.* Callahan, 66 Mo. 316.

Rhode Island.— Gardner *v.* Gardner, 17 R. I. 751, 24 Atl. 785.

Texas.— Wilson *v.* Denander, 71 Tex. 603, 9 S. W. 678.

Virginia.— Spooner *v.* Hilbish, 92 Va. 333, 23 S. E. 751.

West Virginia.—Jones *v.* Patton, 10 W. Va. 653.

See, generally, Executors and Administrators, 18 Cyc. 196, 197.

52. Woods *v.* Potts, 140 Ala. 425, 37 So. 253; Los Angeles First Nat. Bank *v.* Maxwell, 123 Cal. 360, 55 Pac. 980, 69 Am. St. Rep. 64; Corbitt *v.* Cutcheon, 79 Mich. 41, 44 N. W. 163 (holding that there must have been such a benefit conferred upon the creditor or disadvantage suffered by the vendee as ought to bind the conscience of the creditor or clothe his act with the character of a contract, in order to estop him from attacking the conveyance on the ground of fraud); Geiler *v.* Littlefield, 148 N. Y. 603, 43 N. E. 66. See also Stout *v.* Stout, 77 Ind. 537 (holding that a creditor joining in a deed of partition after his debtor has made a fraudulent conveyance of his interest in the land partitioned does not thereby waive his right to maintain a bill to subject his debtor's interest in the land to the payment of his debt, where the partition deed recited that it should in no wise prejudice the creditor from maintaining such bill); Woodson *v.* Carter, 135 Mo. 521, 35 S. W. 1005, 37 S. W. 197.

53. Fitch *v.* Corbett, 64 Cal. 150, 28 Pac. 231; Cole *v.* Tyler, 65 N. Y. 73 (holding that the fact that a creditor having knowledge of the conveyance by the debtor of his land makes no objection does not estop him from afterward questioning such conveyance, in the absence of evidence that he knew the debtor had thereby deprived himself of the means to pay his debts); Armstrong Co. *v.* Elbert, 14 Tex. Civ. App. 141, 36 S. W. 139. See also Dingley *v.* Robinson, 5 Me. 127.

54. *Alabama.*— Robins *v.* Wooten, 128 Ala. 373, 30 So. 681.

Colorado.— Sickman *v.* Abernathy, 14 Colo. 174, 23 Pac. 447.

Florida.— Simon *v.* Levy, 36 Fla. 438, 18 So. 777.

Indiana.— Smith *v.* Wells Mfg. Co., 148 Ind. 333, 46 N. E. 1000.

Louisiana.— Theriot *v.* Michel, 28 La. Ann. 107 (holding that where plaintiff by a formal authenticated act recognized defendant's title to the property, he is estopped to allege that the conveyance as to him was fraudulent); Wright *v.* Hogan, 11 La. Ann. 563.

Maine.— Graves *v.* Blondell, 70 Me. 190, holding that to estop the creditor from setting up fraud in a conveyance of all his property by the debtor, the holder of the property must allege and prove that the creditor knowing the purpose of the conveyance assented to it, and that such assent induced him to accept.

Massachusetts.— Oriental Bank *v.* Haskins, 3 Metc. 332, 37 Am. Dec. 140.

Minnesota.— Hathaway *v.* Brown, 22 Minn. 214.

Nebraska.— Rockford Watch Co. *v.* Manifold, 36 Nebr. 801, 55 N. W. 236.

New York.— Pell *v.* Tredwell, 5 Wend. 661.

Ohio.— Rennick *v.* Chillicothe Bank, 8 Ohio 530.

Pennsylvania.— Zuver *v.* Clark, 104 Pa. St. 222; Appeal of Byrod, 31 Pa. St. 241.

South Carolina.— Kid *v.* Mitchell, 1 Nott & M. 334, 9 Am. Dec. 702.

England.—See Olliver *v.* King, 8 De G. M. & G. 110, 2 Jur. N. S. 312, 25 L. J. Ch. 427, 4 Wkly. Rep. 382, 57 Eng. Ch. 86, 44 Eng. Reprint 331.

a fraudulent conveyance participated in or instigated such conveyance, the court will as a general rule leave him in the position which he was instrumental in creating, and will hold that he is estopped by his conduct from attacking the conveyance.[55]

4. Receipt of Benefit Under Conveyance. The general rule is that a creditor who, with knowledge of the transaction, receives a benefit under a conveyance fraudulent as to creditors, thereby elects to affirm it, and is estopped from questioning its validity.[56] Thus a purchaser at an execution sale who secures the property for a smaller price by reason of the title being clouded by the judgment debtor's prior fraudulent conveyance is estopped from afterward attacking such conveyance, since the existence of such conveyance inures to his benefit.[57]

Canada.— Blackley *v.* Kenny, 16 Ont. App. 522.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 22, 654, 657; and *supra*, III, C, 5, b.

55. *Illinois.*— Dobbins *v.* Cruger, 108 Ill. 188; Perisho *v.* Perisho, 95 Ill. App. 644.

Indiana.— Reagan *v.* Chicago First Nat. Bank, 157 Ind. 623, 61 N. E. 575, (1902) 62 N. E. 701; Smith *v.* Wells Mfg. Co., 148 Ind. 333, 46 N. E. 1000; Sharpe *v.* Davis, 76 Ind. 17.

Kentucky.—Bull *v.* Harris, 18 B. Mon. 195.

Michigan.— Bunce *v.* Bailey, 39 Mich. 192.

Missouri.—Thompson *v.* Cohen, 127 Mo. 215, 28 S. W. 984, 29 S. W. 885 [*reversing* (App.) 24 S. W. 1023]; Bobb *v.* Bobb, 99 Mo. 578, 12 S. W. 893.

New Jersey.— Brinkerhoff *v.* Brinkerhoff, 23 N. J. Eq. 477; Smith *v.* Espy, 9 N. J. Eq. 160. See also Schenck *v.* Hart, 32 N. J. Eq. 774.

New York.— Phillips *v.* Wooster, 36 N. Y. 412.

Pennsylvania.— McDonald *v.* O'Neil, 161 Pa. St. 245, 28 Atl. 1081; French *v.* Mehan, 56 Pa. St. 286.

Texas.— Jacobs *v.* Jefferson Lumber Co., (1890) 15 S. W. 236.

United States.— Bacon *v.* Harris, 62 Fed. 99.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 655.

Compare, however, Waterhouse *v.* Benton, 5 Day (Conn.) 136; Norton *v.* Norton, 5 Cush. (Mass.) 524; Schmelz *v.* Michelson, 8 Ohio Dec. (Reprint) 538, 8 Cinc. L. Bul. 304, holding that in view of the unequal conditions of the parties, a niece who had participated in a fraud was not thereby estopped from afterward subjecting the property so conveyed to the payment of her claim.

Execution purchaser.— Where a creditor is estopped by participation in a fraudulent conveyance from afterward questioning it, a purchaser at an execution sale under such creditor's judgment is likewise precluded from doing so. Sharpe *v.* Davis, 76 Ind. 17.

56. *Alabama.*— Mobile Sav. Bank *v.* McDonnell, 87 Ala. 736, 6 So. 703; Butler *v.* O'Brien, 5 Ala. 316. See, however, Proskauer *v.* People's Sav. Bank, 77 Ala. 257.

Arkansas.— Bryan-Brown, etc., Shoe Co. *v.* Block, 52 Ark. 458, 12 S. W. 1073; Millington *v.* Hill, 47 Ark. 301, 1 S. W. 547.

Indiana.— Reagan *v.* Chicago First Nat. Bank, 157 Ind. 623, 61 N. E. 575, (1902) 62 N. E. 701.

Minnesota.—Lemay *v.* Bibeau, 2 Minn. 291.

Missouri.— Gutzwiler *v.* Latches, 23 Mo. 168; Torreyson *v.* Turnbaugh, 105 Mo. App. 439, 79 S. W. 1002. *Compare*, however, Martin *v.* Johnson, 23 Mo. App. 96, holding that in an action by attachment in which an interpleader claims the attached property under a previous transfer thereof to himself from defendant in exchange for promissory notes, the fact that the notes had been received by plaintiff from defendant in due course of business does not estop him from challenging the transfer of the property to the interpleader as fraudulent as to creditors.

Ohio.— Crumbaugh *v.* Kugler, 3 Ohio St. 544.

Pennsylvania.— Furness *v.* Ewing, 2 Pa. St. 479.

Tennessee.— Cunningham *v.* Campbell, 3 Tenn. Ch. 708. *Compare*, however, Nichol *v.* Nichol, 4 Baxt. 145, where it was held that the creditor did not receive such benefit under the fraudulent conveyance as would preclude him from afterward attacking it.

Vermont.—See Ingals *v.* Brooks, 29 Vt. 398.

England.— Rielle *v.* Reid, 26 Ont. App. 54 [*reversing* 28 Ont. 497 and following Wood *v.* Reesor, 22 Ont. App. 57]; Young *v.* Ward, 24 Ont. App. 147.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 656.

Compare, however, Wadsworth *v.* Marsh, 9 Conn. 481.

57. *Kentucky.*— White *v.* Cates, 7 Dana 357.

Michigan.— Marshall *v.* Blass, 82 Mich. 518, 46 N. W. 947, 47 N. W. 516.

New Jersey.— De Grauw *v.* Mechan, 48 N. J. Eq. 219, 21 Atl. 193.

New York.— Friedrich *v.* Brewster, 26 Hun 236, where a party purchased at a foreclosure sale under an expressed condition that it was made subject to certain judgments, and it was held that he could not afterward assail such judgments as fraudulent, since to permit him to do so would be to give him an inequitable advantage over other bidders at the sale, who, but for the condition announced, might have bid more for the property.

North Carolina.— Thigpen *v.* Pitt, 54 N. C. 49.

H. Subsequent Purchasers; 27 Elizabeth — 1. In General. By the statute of 27 Elizabeth,[58] and by the adoption of or substantial reënactment of this statute in most of the United States, a voluntary transfer or conveyance of lands may be avoided by subsequent *bona fide* purchasers of the same property from him, upon proof that the prior conveyance was made with fraudulent intent.[59] In many jurisdictions the statute of 27 Elizabeth has been extended by statute to apply to the conveyance of personal as well as real property.[60] In some juris-

Compare, however, Wagner *v.* Law, 3 Wash. 500, 28 Pac. 1109, 29 Pac. 927, 28 Am. St. Rep. 56, 15 L. R. A. 784, holding that the right of an execution creditor purchasing at his own sale to set aside his debtor's prior fraudulent conveyance is not affected by his purchase of the lands for a trifle on account of the existence of such conveyance.

58. St. 27 Eliz. c. 4; and *supra*, I, G. See De Mestre *v.* West, [1891] A. C. 264, 55 J. P. 613, 60 L. J. P. C. 66, 64 L. T. Rep. N. S. 375; *In re* Cameron, 37 Ch. D. 32, 57 L. J. Ch. 69, 57 L. T. Rep. N. S. 645, 36 Wkly. Rep. 5; Shurmur *v.* Sedgwick, 24 Ch. D. 597, 53 L. J. Ch. 87, 49 L. T. Rep. N. S. 156, 31 Wkly. Rep. 884; Cracknall *v.* Janson, 11 Ch. D. 1, 48 L. J. Ch. 168, 40 L. T. Rep. N. S. 640, 27 Wkly. Rep. 851; Doe *v.* Rolfe, 8 A. & E. 650, 7 L. J. Q. B. 251, 3 N. & P. 648, 35 E. C. L. 775; Doe *v.* Roe, 1 Arn. 279, 4 Bing. N. Cas. 737, 6 Scott 525, 33 E. C. L. 950; Doe *v.* Bottriell, 5 B. & Ad. 131, 2 L. J. K. B. 158, 2 N. & M. 64, 27 E. C. L. 64; Willats *v.* Bushby, 5 Beav. 193, 12 L. J. Ch. 105, 49 Eng. Reprint 551; Douglasse *v.* Waad, 1 Ch. Cas. 99, 22 Eng. Reprint 713; Lloyd *v.* Attwood, 3 De G. & J. 614, 5 Jur. N. S. 1322, 29 L. J. Ch. 97, 60 Eng. Ch. 475, 44 Eng. Reprint 1405; Cotterell *v.* Homer, 7 Jur. 544, 13 Sim. 506, 36 Eng. Ch. 506; *In re* Barker, 44 L. J. Ch. 487, 23 Wkly. Rep. 944; Currie *v.* Nind, 5 L. J. Ch. 169, 1 Myl. & Cr. 17, 13 Eng. Ch. 17, 40 Eng. Reprint 283; Shaw *v.* Standish, 2 Vern. Ch. 326, 23 Eng. Reprint 811; Jason *v.* Jervis, 1 Vern. Ch. 284, 23 Eng. Reprint 472; Townshend *v.* Windham, 2 Ves. 1, 28 Eng. Reprint 1; Goodright *v.* Moses, 2 W. Bl. 1019.

In Canada see Harper *v.* Culbert, 5 Ont. 152 (holding, however, that a voluntary or covinous conveyance under 27 Eliz. c. 4, is voidable only, and is good and valid until avoided); Buchanan *v.* Campbell, 14 Grant Ch. (U. C.) 163; Osborne *v.* Osborne, 5 Grant Ch. (U. C.) 619; Demorest *v.* Miller, 42 U. C. Q. B. 56; Miller *v.* McGill, 24 U. C. Q. B. 597; Wilson *v.* Wilson, 8 U. C. C. P. 525.

A purchaser from an heir is not entitled under 27 Eliz. c. 4, to set aside a voluntary conveyance by the ancestor. Lewis *v.* Rees, 3 Jur. N. S. 12, 3 Kay & J. 132, 26 L. J. Ch. 101, 5 Wkly. Rep. 96.

Charitable gift.— A voluntary gift for charitable purposes is not to be treated as covinous within the meaning of 27 Eliz. c. 4, and is not avoided by a subsequent conveyance for value. Ramsay *v.* Gilchrist, [1892] A. C. 412, 56 J. P. 711, 61 L. J. P. C. 72, 66 L. T. Rep. N. S. 806.

59. *Alabama.*— Stokes *v.* Jones, 18 Ala. 734; McGuire *v.* Miller, 15 Ala. 394; Elliott *v.* Horn, 10 Ala. 348, 44 Am. Dec. 488. See Walton *v.* Bonham, 24 Ala. 513.

California.— Kohner *v.* Ashenauer, 17 Cal. 578.

Georgia.—Brown *v.* Burke, 22 Ga. 574; Fowler *v.* Waldrip, 10 Ga. 350; Lee *v.* Brown, 7 Ga. 275.

Iowa.— Wolf *v.* Van Metre, 23 Iowa 397; Gardner *v.* Cole, 21 Iowa 205.

Kentucky.— Edwards *v.* Ballard, 14 B. Mon. 289; Dalton *v.* Mitchell, 4 J. J. Marsh. 372.

Louisiana.— Ray *v.* Harris, 7 La. Ann. 138.

Massachusetts.— Hill *v.* Ahern, 135 Mass. 158; Blanchard *v.* McKey, 125 Mass. 124; Freeland *v.* Freeland, 102 Mass. 475; Cox *v.* Jackson, 88 Mass. 108.

Missouri.— Chapman *v.* Callahan, 66 Mo. 299; Henderson *v.* Dickey, 50 Mo. 161.

New Hampshire.— Marston *v.* Brackett, 9 N. H. 336.

New York.— Wadsworth *v.* Havens, 3 Wend. 411.

North Carolina.— Latta *v.* Morrison, 23 N. C. 149.

Rhode Island.— Tiernay *v.* Claflin, 15 R. I. 220, 2 Atl. 762.

South Carolina.— Sutton *v.* Pettus, 4 Rich. 163.

Tennessee.— Laird *v.* Scott, 5 Heisk. 314.

Vermont.— Hoy *v.* Wright, Brayt. 208.

Wisconsin.— Reynolds *v.* Vilas, 8 Wis. 471, 76 Am. Dec. 238.

United States.— Cathcart *v.* Robinson, 5 Pet. 264, 8 L. ed. 120. See Greenbank *v.* Ferguson, 58 Fed. 18.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 598 *et seq.*; and *supra*, I, G.

Estoppel.— One who has made a voluntary conveyance of his property to defraud his creditors, and subsequently conveys the same to a purchaser in good faith and for a valuable consideration, is estopped from denying the later conveyance. Hurley *v.* Osler, 44 Iowa 642.

60. *Alabama.*— Corprew *v.* Arthur, 15 Ala. 525; Eddins *v.* Wilson, 1 Ala. 237.

Colorado.— McKee *v.* Bassick Min. Co., 8 Colo. 392, 8 Pac. 561.

Iowa.— Osborn *v.* Ratliff, 53 Iowa 748, 5 N. W. 746.

Montana.—See Stevens *v.* Curran, 28 Mont. 366, 72 Pac. 753.

New York.— See Clute *v.* Fitch, 25 Barb. 428.

North Carolina.— Potts *v.* Blackwell, 56 N. C. 449 (holding that a trustee or mortgagee is a purchaser for a valuable consid-

dictions, by statute, a fraudulent conveyance can be attacked by subsequent purchasers only when made with intent to defraud such purchasers, and they cannot take advantage of the fact that such conveyance was made with intent to hinder, delay, and defraud existing creditors.[61]

2. Who Are. The general rule is that to constitute a party a subsequent purchaser he must have a legal title, which he can enforce at law, and not a mere equity, such as a contract to convey, for a breach of which damages alone are given.[62] However, purchasers at an execution sale[63] and *bona fide* mortgagees[64] are regarded as subsequent purchasers under 27 Elizabeth and statutes based thereon.

3. Purchaser For Value. To entitle a subsequent purchaser to attack a conveyance on the ground of fraud, it is essential that he be a purchaser in good faith and for a valuable consideration, since such conveyance would be valid as against a mere volunteer or a fraudulent purchaser.[65]

eration within the provisions of 27 Elizabeth); Freeman *v.* Lewis, 27 N. C. 91.

South Carolina.— Hudnal *v.* Wilder, 4 McCord 294, 17 Am. Dec. 744.

Texas.— Fowler *v.* Stoneum, 11 Tex. 478, 62 Am. Dec. 490.

See *supra*, I, G.

61. Prestidge *v.* Cooper, 54 Miss. 74; Davidson *v.* Dockery, 179 Mo. 687, 78 S. W. 624; Reynolds *v.* Faust, 179 Mo. 21, 77 S. W. 855; Evans *v.* David, 98 Mo. 405, 11 S. W. 975 (holding likewise that the purchaser must have been a party or privy to the fraud); Bonney *v.* Taylor, 90 Mo. 63, 1 S. W. 740; Quimby *v.* Williams, 67 N. H. 489, 41 Atl. 862, 68 Am. St. Rep. 685; Harton *v.* Lyons, 97 Tenn. 180, 36 S. W. 851. See also Zimmerman *v.* Schoenfeldt, 3 Hun (N. Y.) 692, 6 Thomps. & C. 142.

62. Hopkins *v.* Webb, 9 Humphr. (Tenn.) 519.

Lessee.— Where a mining lease for ninety-nine years contained provisions enabling the lessor to demand at his option a royalty upon the proceeds of the mines, or four thousand dollars in lieu of such royalty, and the lessor had not exercised such option, it was held that the lessee was a purchaser for value, and that a prior voluntary conveyance was void as against him. Conlin *v.* Elmer, 16 Grant Ch. (U. C.) 541.

A judgment creditor is not a purchaser for value within the statute of 27 Eliz. c. 4. Beavan *v.* Oxford, 6 De G. M. & G. 507, 2 Jur. N. S. 121, 25 L. J. Ch. 299, 41 Wkly. Rep. 275, 55 Eng. Ch. 395, 43 Eng. Reprint 1331; Gillespie *v.* Van Egmondt, 6 Grant Ch. (U. C.) 533.

63. Carter *v.* Castleberry, 5 Ala. 277; Rinehart *v.* Long, 95 Mo. 396, 8 S. W. 559; Gray *v.* Tappan, Wright (Ohio) 117. See Gentry *v.* Robinson, 55 Mo. 260.

64. *Illinois.*— Snyder *v.* Partridge, 138 Ill. 173, 29 N. E. 851, 32 Am. St. Rep. 130.

Indiana.— Sanders *v.* Muegge, 91 Ind. 214, where, however, it was held that the mortgagee had constructive notice of the prior conveyance, and was therefore barred from attacking same.

Iowa.— Osborn *v.* Ratliff, 53 Iowa 748, 5 N. W. 746. See Cox *v.* Collis, 109 Iowa 270, 80 N. W. 343.

Kentucky.— Cook *v.* Landrum, 82 S. W. 585, 26 Ky. L. Rep. 813.

Maryland.— Stewart *v.* Iglehart, 7 Gill & J. 132, 28 Am. Dec. 202, holding, however, that the mortgagee could not attack, on account of the fact that he had notice of the previous conveyance.

Michigan.— Fox *v.* Clark, Walk. 535.

New Hampshire.— Plaisted *v.* Holmes, 58 N. H. 619.

New Jersey.— Boice *v.* Conover, 54 N. J. Eq. 531, 35 Atl. 402.

Virginia.— Tate *v.* Liggat, 2 Leigh 84.

England.— Dolphin *v.* Aylward, L. R. 4 H. L. 486, 23 L. T. Rep. N. S. 636, 19 Wkly. Rep. 49; Cracknall *v.* Janson, 11 Ch. D. 1, 48 L. J. Ch. 168, 40 L. T. Rep. N. S. 640, 27 Wkly. Rep. 851; Townshend *v.* Windham, 2 Ves. 1, 28 Eng. Reprint 1. See Herrick *v.* Attwood, 2 De G. & J. 21, 4 Jur. N. S. 101, 27 L. J. Ch. 121, 6 Wkly. Rep. 204, 59 Eng. Ch. 17, 44 Eng. Reprint 895.

Canada.— Gordon *v.* Proctor, 20 Ont. 53.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 600, 601.

65. *Alabama.*— Eddins *v.* Wilson, 1 Ala. 237. See also Dent *v.* Portwood, 21 Ala. 588.

Illinois.— Campbell *v.* Whitson, 68 Ill. 240, 18 Am. Dec. 553.

Indiana.— Anderson *v.* Etter, 102 Ind. 115, 26 N. E. 218; Way *v.* Lyon, 3 Blackf. 76.

Kentucky.— Edwards *v.* Ballard, 14 B. Mon. 289.

Massachusetts.— Cox *v.* Jackson, 6 Allen 108; Clapp *v.* Tirrell, 20 Pick. 247.

Mississippi.— Montgomery *v.* McGuire, 59 Miss. 193.

New Jersey.— De Witt *v.* Van Sickle, 29 N. J. Eq. 209.

New York.— See Starr *v.* Strong, 2 Sandf. Ch. 139.

North Carolina.— McKay *v.* Gilliam, 65 N. C. 130; Hiatt *v.* Wade, 30 N. C. 340; Fullenwider *v.* Robertson, 20 N. C. 420.

Ohio.— See Varwig *v.* Cleveland, etc., R. Co., 54 Ohio St. 455, 44 N. E. 92.

Texas.— Lewis *v.* Castleman, 27 Tex. 407. See also McClenny *v.* Floyd, 10 Tex. 159.

Vermont.— Prout *v.* Vaughan, 52 Vt. 451.

Virginia.— Roane *v.* Vidal, 4 Munf. 187.

England.— Dolphin *v.* Aylward, L. R. 4 H. L. 486, 23 L. T. Rep. N. S. 636, 19 Wkly.

4. Effect of Notice — a. In General. In England the courts in construing the statute of 27 Elizabeth have held that all voluntary conveyances and conveyances by way of settlement in consideration merely of love and affection, or a sense of moral duty, are *ipso facto* fraudulent and void as against subsequent purchasers for value with or without notice of the prior voluntary conveyance;[66] and this construction of the statute has been followed in Canada.[67] In the United States in some of the earlier cases the English rule has been followed;[68] but the prevailing and sounder American doctrine is that a person purchasing property with full knowledge of a previous voluntary or fraudulent conveyance thereof by his grantor cannot maintain an action to set such conveyance aside.[69] In

Rep. 49; Doe *v.* Routledge, 2 Cowp. 705; Lewis *v.* Rees, 3 Jur. N. S. 12, 3 Kay & J. 132, 26 L. J. Ch. 101, 5 Wkly. Rep. 96; Cadell *v.* Bewley, 16 L. T. Rep. N. S. 141, 15 Wkly. Rep. 703.

Canada.— Weller *v.* Hartgraves, 14 U. C. C. P. 360.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 602.

Inadequate consideration.— The protection accorded to a *bona fide* purchaser for value will not be given to a purchaser for a grossly inadequate consideration; he must have paid a fair consideration, although not necessarily the full value. Worthy *v.* Caddell, 76 N. C. 82. See, however, Boyer *v.* Tucker, 70 Mo. 457, holding that one who purchased at a sheriff's sale land worth four thousand dollars for twenty-three dollars for the purpose of speculation was entitled, notwithstanding the smallness of the consideration paid, to set aside as fraudulent a prior conveyance by the execution defendant made for the purpose of defeating creditors.

66. Dolphin *v.* Aylward, L. R. 4 H. L. 486, 23 L. T. Rep. N. S. 636, 19 Wkly. Rep. 49; Doe *v.* Rusham, 17 Q. B. 723, 16 Jur. 359, 21 L. J. Q. B. 139, 79 E. C. L. 723; Talton *v.* Liddell, 17 Q. B. 390, 15 Jur. 1170, 20 L. J. Q. B. 507, 7 Eng. L. & Eq. 360, 79 E. C. L. 390; Butterfield *v.* Heath, 15 Beav. 408, 22 L. J. Ch. 270, 51 Eng. Reprint 595; Doshet *v.* Martyr, 1 B. & P. N. R. 332, 8 Rev. Rep. 821; Evelyn *v.* Templar, 2 Bro. Ch. 148, 29 Eng. Reprint 85; Gooch's Case, 5 Coke 59*b*; Twyne's Case, 3 Coke 80*a*; Doe *v.* Routledge, 2 Cowp. 705; Chapman *v.* Emery, 1 Cowp. 278; French *v.* French, 6 De G. M. & G. 95, 2 Jur. N. S. 169, 25 L. J. Ch. 612, 4 Wkly. Rep. 139, 55 Eng. Ch. 74, 43 Eng. Reprint 1166; Nixon *v.* Hamilton, 2 Dr. & Wal. 364, 1 Ir. Eq. 55; Doe *v.* James, 16 East 212; Doe *v.* Manning, 9 East 59, 9 Rev. Rep. 503; Alden *v.* Gregory, 2 Eden 280, 28 Eng. Reprint 905; Holloway *v.* Millard, 1 Madd. 414, 56 Eng. Reprint 152; Hill *v.* Exeter, 2 Taunt. 69, 11 Rev. Rep. 527; Metcalfe *v.* Pulvertoft, 1 Ves. & B. 180, 35 Eng. Reprint 71; Townshend *v.* Windham, 2 Ves. 1, 28 Eng. Reprint 1; Buckle *v.* Mitchell, 18 Ves. Jr. 100, 11 Rev. Rep. 155, 34 Eng. Reprint 255; Pulvertoft *v.* Pulvertoft, 18 Ves. Jr. 84, 11 Rev. Rep. 151, 34 Eng. Reprint 249.

Voluntary conveyances act.— But by 56 & 57 Vict. c. 21 [1893], it is enacted that voluntary conveyances, if *bona fide*, are not to be avoided under 27 Eliz. c. 4.

The voluntary conveyances act of 1868 (31 Vict. c. 9) gives effect as against subsequent purchasers to voluntary conveyances executed in good faith, and to them only, and a voluntary conveyance to a wife for the purpose of protecting property from the creditors is not good as against a subsequent mortgage to a creditor. Richardson *v.* Armitage, 18 Grant Ch. (U. C.) 512.

67. Demorest *v.* Miller, 42 U. C. Q. B. 56.

68. *Kentucky.*—Waller *v.* Cralle, 8 B. Mon. 11; Anderson *v.* Green, 7 J. J. Marsh. 448, 23 Am. Dec. 417.

Massachusetts.— Ricker *v.* Ham, 14 Mass. 137.

Missouri.— Howe *v.* Waysman, 12 Mo. 169, 49 Am. Dec. 126.

New York.— Roberts *v.* Anderson, 3 Johns. Ch. 371; Sterry *v.* Arden, 1 Johns. Ch. 261.

South Carolina.— Barrineau *v.* McMurray, 3 Brev. 204; Rutledge *v.* Smith, 1 McCord Eq. 119.

United States.— Sexton *v.* Wheaton, 8 Wheat. 229, 5 L. ed. 603.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 598 *et seq.*

69. *California.*— Gregory *v.* Haworth, 25 Cal. 653.

Colorado.— McKee *v.* Bassick Min. Co., 8 Colo. 392, 8 Pac. 561.

Illinois.— Chaffin *v.* Kimball, 23 Ill. 36.

Indiana.— Aiken *v.* Bruen, 21 Ind. 137; Paine *v.* Doe, 7 Blackf. 485; McNealy *v.* Ricker, 6 Blackf. 391.

Michigan.— Dennis *v.* Dennis, 119 Mich. 380, 78 N. W. 333; Cooper *v.* Bigly, 13 Mich. 463.

Minnesota.— Olson *v.* Hanson, 74 Minn. 337, 77 N. W. 231; Fitzpatrick *v.* Hanson, 55 Minn. 195, 56 N. W. 814.

Mississippi.— Prestidge *v.* Cooper, 54 Miss. 74; Coppage *v.* Barnett, 34 Miss. 621; Farmers' Bank *v.* Douglass, 11 Sm. & M. 469.

Missouri.— Davis *v.* Kline, 96 Mo. 401, 9 S. W. 724, 2 L. R. A. 78; Bonney *v.* Taylor, 90 Mo. 63, 1 S. W. 740.

Nebraska.— Earle *v.* Burch, 21 Nebr. 702, 33 N. W. 254 (holding that if a creditor receives his pay in mortgaged property with knowledge of the mortgage, he will take the property subject to the mortgage, and cannot contest its validity); Bradt *v.* Hartson, 4 Nebr. (Unoff.) 889, 96 N. W. 1008.

New Hampshire.— Quimby *v.* Williams, 67 N. H. 489, 41 Atl. 862, 68 Am. St. Rep. 685; Stevens *v.* Morse, 47 N. H. 532. See also Marston *v.* Brackett, 9 N. H. 336.

several jurisdictions a distinction is drawn between a voluntary conveyance made in good faith and a conveyance made with fraudulent intent, holding that the latter may be avoided by subsequent *bona fide* purchasers, even where they have notice of the previous conveyance, while in the former case purchasers with notice cannot attack the conveyance.[70]

b. Constructive Notice. In some jurisdictions it is held that constructive notice is sufficient to bar a subsequent purchaser's right of action to set aside a fraudulent conveyance;[71] while in other jurisdictions it is held that the notice must be actual and that constructive notice is not sufficient.[72]

V. BADGES OF FRAUD.[73]

A. In General. There are circumstances so frequently attending convey-

New Jersey.— Boice *v.* Conover, 54 N. J. Eq. 531, 35 Atl. 402.

North Carolina.— Pass *v.* Lynch, 117 N. C. 453, 23 S. E. 357; Triplett *v.* Witherspoon, 70 N. C. 589; Long *v.* Wright, 48 N. C. 290; Hiatt *v.* Wade, 30 N. C. 340. See also Squires *v.* Riggs, 4 N. C. 253, 6 Am. Dec. 564.

Ohio.— Mathews *v.* Rentz, 5 Ohio Dec. (Reprint) 72, 2 Am. L. Rec. 371.

Pennsylvania.— Thomson *v.* Dougherty, 12 Serg. & R. 448; Foster *v.* Walton, 5 Watts 378.

South Carolina.— Moultrie *v.* Jennings, 2 McMull. 508; Hudnal *v.* Wilder, 4 McCord 294, 17 Am. Dec. 744; Kid *v.* Mitchell, 1 Nott & M. 334, 9 Am. Dec. 702; Footman *v.* Pendergrass, 3 Rich. Eq. 33.

Tennessee.— Hubbs *v.* Brockwell, 3 Sneed 574. *Compare* Laird *v.* Scott, 5 Heisk. 314, holding that if a voluntary conveyance was intended to defraud a subsequent purchaser, notice of registration will not affect such purchaser's right to attack the conveyance for actual fraud.

Texas.— Fowler *v.* Stoneum, 11 Tex. 478, 62 Am. Dec. 490; Robinson *v.* Martell, 11 Tex. 149; McClenny *v.* Floyd, 10 Tex. 159.

United States.— Cathcart *v.* Robinson, 5 Pet. 264, 8 L. ed. 120, declaring that at the commencement of the American revolution, the construction of the statute of 27 Elizabeth seems not to have been settled; that the universally received doctrine of that day unquestionably went as far as to hold that a subsequent sale, without notice, by a person who had made a settlement not on valuable consideration, was presumptive evidence of fraud, which threw on those claiming under such settlement the burden of proving that it was *bona fide*; and that this principle therefore according to the uniform course of this court must be adopted in construing the statute of 27 Elizabeth as it applies to the case.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 598 *et seq.*

70. *Alabama.*— Gilliland *v.* Fenn, 90 Ala. 230, 8 So. 15, 9 L. R. A. 413; Gardner *v.* Boothe, 31 Ala. 186; Corprew *v.* Arthur, 15 Ala. 525; Griffin *v.* Doe, 12 Ala. 783; Elliott *v.* Horn, 10 Ala. 348, 44 Am. Dec. 488; Frisbie *v.* McCarty, 1 Stew. & P. 68.

Iowa.— Wolf *v.* Van Metre, 23 Iowa 397. See also Saunders *v.* King, 119 Iowa 291, 93 N. W. 272; Gardner *v.* Cole, 21 Iowa 205.

Kentucky.— Earle *v.* Couch, 3 Metc. 450; Enders *v.* Williams, 1 Metc. 346; Neighbors *v.* Holt, 14 Ky. L. Rep. 237; Winter *v.* Mannen, 4 Ky. L. Rep. 949.

Maine.— Wyman *v.* Brown, 50 Me. 139. See, however, Spofford *v.* Weston, 29 Me. 148. 48 Am. Dec. 521.

Maryland.— Cooke *v.* Kell, 13 Md. 469; Baltimore *v.* Williams, 6 Md. 235.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," 598 *et seq.*

71. *Indiana.*—McNeely *v.* Rucker, 6 Blackf. 391, holding that the record of a voluntary conveyance is sufficient notice to a subsequent purchaser to preclude him from attacking it as fraudulent.

Massachusetts.— See Beal *v.* Warren, 2 Gray 447.

Missouri.— Frank *v.* Caruthers, 108 Mo. 569, 18 S. W. 927. And see State *v.* Estel, 6 Mo. App. 6.

New Jersey.— De Witt *v.* Van Sickle, 29 N. J. Eq. 209.

North Carolina.— See Harris *v.* De Graffenreid, 33 N. C. 89.

Pennsylvania.— Tate *v.* Clement, 176 Pa. St. 550, 35 Atl. 214.

South Carolina.— Aultman *v.* Utsey, 34 S. C. 559, 13 S. E. 848.

Tennessee.— Harton *v.* Lyons, 97 Tenn. 180, 36 S. W. 851; Laird *v.* Scott, 5 Heisk. 314.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 598 *et seq.*

Facts putting on inquiry.— Where property is conveyed by a husband to his wife in consideration of love and affection, such conveyance, being void as against subsisting creditors, is sufficient to put a *bona fide* purchaser from the wife on inquiry, and where he neglects to inquire he will be supposed to know all facts that such inquiry would have revealed. Milholland *v.* Tiffany, 64 Md. 455, 2 Atl. 831.

72. Gardner *v.* Cole, 21 Iowa 205 (holding that the constructive notice arising from the record of a deed which is actually fraudulent does not defeat the right of a subsequent purchaser without actual notice to avoid an instrument that would otherwise work a fraud upon him); Enders *v.* Williams, 1 Metc. (Ky.) 346; Jones *v.* Jenkins, 7 Ky. L. Rep. 408; Winter *v.* Mannen, 4 Ky. L. Rep. 949; Spofford *v.* Weston, 29 Me. 140; Lewis *v.* Castleman, 27 Tex. 407.

73. See also *supra*, XIV, K.

ances and transfers intended to hinder, delay, and defraud creditors that they are denominated badges of fraud.[74] These badges of fraud do not in themselves or *per se* constitute fraud, but are rather signs or *indicia* from which its existence may be properly inferred as matter of evidence.[75] They are more or less strong or weak according to their nature and the number concurring in the same case.[76] They are as infinite in number and form as are the resources and versatility of human artifice.[77]

74. See the following cases:

Iowa.— Glenn *v.* Glenn, 17 Iowa 498.

Kentucky.— Herrin *v.* Morford, 9 Dana 450.

Missouri.— St. Louis Brewing Assoc. *v.* Steimke, 68 Mo. App. 52.

Oregon.— Weaver *v.* Owens, 16 Oreg. 304, 18 Pac. 379.

Virginia.— Hickman *v.* Trout, 83 Va. 478, 3 S. E. 131.

England.— Twyne's Case, 3 Coke 80*a*, 1 Smith Lead. Cas. 1.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 17.

Badges of fraud defined.— It has been said that badges of fraud "are suspicious circumstances that overhang a transaction" (Helms *v.* Green, 105 N. C. 251, 11 S. E. 470, 18 Am. St. Rep. 893) calling for an explanation (Peebles *v.* Horton, 64 N. C. 374); that they "are inferences drawn by experience, from the customary conduct of mankind" (Terrell *v.* Green, 11 Ala. 207).

75. Shealy *v.* Edwards, 75 Ala. 411. See also Thames *v.* Rembert, 63 Ala. 561. See also *infra*, XIV, K.

76. Shealy *v.* Edwards, 75 Ala. 411. See also Williams *v.* Barnett, 52 Tex. 130.

Weight of badges of fraud.— "To overcome the presumption which always exists in favor of innocence, when the fact to be proved involves moral delinquency (Corner *v.* Pendleton, 8 Md. 337), various circumstances, usually denominated *indicia* or badges of fraud, have been relied on. These *indicia* are open to explanation, and they are, therefore, not necessarily conclusive, as is an irrebuttable legal presumption. In many instances they furnish strong and satisfactory evidence of the existence of fraud; but as they are relative and not absolute as respects their probative value, the special circumstances accompanying each inquiry must be known and considered in order that the weight properly attributable to those *indicia* may be given to them." Thompson *v.* Williams, 100 Md. 195, 199, 60 Atl. 26. See also *infra*, XIV, K, 1, 3.

77. Shealy *v.* Edwards, 75 Ala. 411.

Circumstances indicating fraud.— *Georgia.* — Trice *v.* Rose, 79 Ga. 75, 3 S. E. 701; Howard *v.* Snelling, 32 Ga. 195.

Illinois.— Merchants' Nat. Bank *v.* Lyon, 185 Ill. 343, 56 N. E. 1083; Schroeder *v.* Walsh, 120 Ill. 403, 11 N. E. 70; Carter *v.* Gunnels, 67 Ill. 270; Blow *v.* Gage, 44 Ill. 208; Gray *v.* St. John, 35 Ill. 222; Boies *v.* Henney, 32 Ill. 130.

Iowa.— Dunning *v.* Baily, 120 Iowa 729, 95 N. W. 248; Corn Exch. Bank *v.* Applegate, 91 Iowa 411, 59 N. W. 268.

Kentucky.— Lillard *v.* McGee, 4 Bibb 165, selling at auction without previous notice or advertisement.

Maine.— Hartshorn *v.* Eames, 31 Me. 93.

Massachusetts.— Parker *v.* Barker, 2 Metc. 423, holding that a promise by the mortgagee to the mortgagor's creditors that he will relinquish his claim if they will accept another mortgage and give the mortgagor time is presumptive evidence of fraud.

Minnesota.— Welch *v.* Bradley, 45 Minn. 540, 48 N. W. 440.

Missouri.— St. Louis Brewing Assoc. *v.* Steimke, 68 Mo. App. 52.

New Jersey.— Moore *v.* Roe, 35 N. J. Eq. 90.

New York.— St. John Wood-Working Co. *v.* Smith, 178 N. Y. 629, 71 N. E. 1139 [*affirming* 82 N. Y. App. Div. 348, 82 N. Y. Suppl. 1025]; Syracuse Third Nat. Bank *v.* Keeffe, 30 Misc. 400, 63 N. Y. Suppl. 1049; Stoddard *v.* Butler, 20 Wend. 507, a transfer of property to a creditor, toward the satisfaction of his claim merely and not in full payment, is a badge of fraud.

North Carolina.— Brown *v.* Mitchell, 102 N. C. 347, 9 S. E. 702, 11 Am. St. Rep. 748.

Pennsylvania.— Kaine *v.* Weigley, 22 Pa. St. 179. See also Waterhouse *v.* Waterhouse, 206 Pa. St. 433, 55 Atl. 1067.

Tennessee.— Carter *v.* Baker, 10 Heisk. 640.

Virginia.— American Net, etc., Co. *v.* Mayo, 97 Va. 182, 97 S. E. 523; Click *v.* Green, 77 Va. 827.

West Virginia.— Richardson *v.* Ralphsnyder, 40 W. Va. 15, 20 S. E. 854; Goshorn *v.* Snodgrass, 17 W. Va. 717; Hunter *v.* Hunter, 10 W. Va. 321; Lockhard *v.* Beckley, 10 W. Va. 87.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 17.

Circumstances not indicating fraud.— *Alabama.*— Chipman *v.* Stern, 89 Ala. 207, 7 So. 409; Sandlin *v.* Anderson, 82 Ala. 330, 3 So. 28.

Arkansas.—Blass *v.* Anderson, 57 Ark. 483, 22 S. W. 94, holding that the fact that a sale is illegal because against the prohibition of a statute, as because it was made on Sunday, does not establish that it is fraudulent as to creditors.

Georgia.— Colquitt *v.* Thomas, 8 Ga. 258.

Illinois.— Freishenmeyer *v.* Lehmkuhl, 29 Ill. App. 465, holding that a mortgage will not be deemed fraudulent merely because the wife of the mortgagor omitted to sign it and release homestead rights, or because the note secured contained no provision for the annual payment of interest.

B. Particular Badges — 1. Matters Concerning Consideration — a. Fictitiousness of Consideration. The fact that the consideration of a conveyance is fictitious in whole or in part is evidence of fraud.[78]

b. Inadequacy of Consideration. Inadequacy of consideration is a fact calling for explanation, and therefore a badge of fraud,[79] especially when such inade-

Indiana.— Kane *v.* Drake, 27 Ind. 29, holding that, although the title, upon a sale of personal property, passes to the purchaser by delivery, and no bill of sale is necessary, the taking of a bill of sale attested by a witness is not of itself a badge of fraud.

Maryland.— Wilson *v.* Russell, 13 Md. 494, 71 Am. Dec. 645 (holding that where a mortgage is given to secure notes of the mortgagees, to be loaned by them to the mortgagor, the fact that the mortgagees purchased the notes so loaned at a heavy discount from the broker, to whom they were given to negotiate, raises no presumption of fraud); Bullett *v.* Worthington, 3 Md. Ch. 99.

Michigan.— Bendetson *v.* Moody, 100 Mich. 553, 59 N. W. 252.

Minnesota.— Derby *v.* Gallup, 5 Minn. 119, holding that, in an action in which the validity of a bill of sale was questioned, the refusal of the court to charge "that uncommon stipulations or clauses in a bill of sale are badges of fraud" was no ground for reversal of a judgment against the party attacking the bill of sale.

Mississippi.— Donly *v.* Ray, (1889) 6 So. 324, holding that where property was conveyed to the grantor's sons in payment of debts due them, the fact that the deed ran to both sons, although the amount due to each was unequal, was not an objection that could avail a third party.

New Jersey.— Emerald, etc., Brewing Co. *v.* Sutton, 68 N. J. L. 246, 56 Atl. 302, holding that refusal of a debtor to apply the proceeds of a sale of his property to a particular creditor is not sufficient to justify the conclusion that the sale was made to defraud creditors.

New York.—Craig *v.* Tappin, 2 Sandf. Ch. 78.

North Carolina.— Cannon *v.* Young, 89 N. C. 264, holding that the fact that an insolvent debtor has, by sale, converted his land into money or property not subject to execution does not indicate that such sale is fraudulent.

Pennsylvania.— Barncord *v.* Kuhn, 36 Pa. St. 383 (a husband's possession of his wife's property is not a badge of fraud); Forsyth *v.* Matthews, 14 Pa. St. 100, 53 Am. Dec. 522 (holding that the fact that a transfer of personal property was evidenced by an elaborate written instrument is a circumstance of but slight importance in determining fraud); Strong *v.* Burdick, 1 Pennyp. 498.

South Carolina.— Leake *v.* Anderson, 43 S. C. 448, 21 S. E. 439, holding that the fact that a mortgage is dated on Sunday is not sufficient, in an action to set it aside as in fraud of creditors, to show that it was antedated for some fraudulent purpose.

Texas.— Mack *v.* Block, (1888) 8 S. W. 495; Eason *v.* Garrison, 36 Tex. Civ. App. 574, 82 S. W. 800.

Vermont.— Wallace *v.* Berry, 51 Vt. 602.

Virginia.— Harvey *v.* Anderson, (1896) 24 S. E. 914.

Washington.— Commercial Bank *v.* Chilberg, 14 Wash. 47, 44 Pac. 112.

Wisconsin.— Fortner *v.* Whelan, 87 Wis. 88, 58 N. W. 253; Peninsula Stove Co. *v.* Sacket, 74 Wis. 526, 43 N. W. 491.

United States.— Gottlieb *v.* Thatcher, 151 U. S. 271, 14 S. Ct. 319, 38 L. ed. 157 (holding that the mere fact that a non-resident who purchases land from his brother subsequently gives the latter a power of attorney to dispose of all his lands in the state raises no presumption that the purchase was for the purpose of defrauding the brother's creditors, when it appears that the donor had other lands in the state); Ryttenberg *v.* Schaefer, 131 Fed. 313; U. S. Bank *v.* Lee, 2 Fed. Cas. No. 922, 5 Cranch C. C. 319 [*affirmed* in 13 Pet. 107, 10 L. ed. 81].

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 17.

78. *Missouri.*— Boland *v.* Ross, 120 Mo. 208, 25 S. W. 524; National Tube Works *v.* Ring Refrigerating, etc., Co., 118 Mo. 365, 22 S. W. 947; Seger *v.* Thomas, 107 Mo. 635, 18 S. W. 33; State *v.* Hope, 102 Mo. 410, 14 S. W. 985; Haydon *v.* Alkire Grocery Co., 88 Mo. App. 241; Webb City Lumber Co. *v.* Victor Min. Co., 78 Mo. App. 676; Ball *v.* O'Neil, 64 Mo. App. 388.

New York.— Baldwin *v.* Short, 125 N. Y. 553, 26 N. E. 928.

North Carolina.— Hawkins *v.* Alston, 39 N. C. 137, where it is said that no device can be more deceptive, and more likely to baffle, delay, or defeat creditors, than the creating encumbrances upon their property by embarrassed men, for debts that are fictitious or mainly so.

Texas.— Watts *v.* Dubois, (Civ. App. 1902) 66 S. W. 698.

Wisconsin.— Liver *v.* Thielke, 115 Wis. 389, 91 N. W. 975; Bradley Co. *v.* Paul, 94 Wis. 488, 69 N. W. 168; Butts *v.* Peacock, 23 Wis. 359.

United States.— Kellogg *v.* Clyne, 54 Fed. 696, 4 C. C. A. 554.

See *infra*, VII, B, 2, b, (I), (C); VIII, A, 4.

79. *Alabama.*— Marshall *v.* Croom, 52 Ala. 554.

Arkansas.— Apperson *v.* Burgett, 33 Ark. 328.

Connecticut.— See Shelton *v.* Church, 38 Conn. 416.

Florida.— Loring *v.* Dunning, 16 Fla. 119.

Illinois.— Stevens *v.* Dillman, 86 Ill. 233; Steere *v.* Hoagland, 39 Ill. 264.

quacy is gross.[80] Mere inadequacy of price, however, unattended by other circumstances giving color and form to the transaction, is not usually sufficient to establish fraud.[81]

c. False Statements as to Consideration. An incorrect statement of the consideration of a mortgage, deed of trust, or other conveyance is a badge of fraud.[82] But the mere fact that the consideration expressed in a mortgage or other conveyance was not the true one does not conclusively show that the conveyance was in fraud of creditors.[83] The misrecital must be intentional and not the result of

Iowa.— Urdangen *v.* Doner, 122 Iowa 533, 98 N. W. 317; Mertens *v.* Welsing, 85 Iowa 508, 52 N. W. 362.

Kansas.— Dodson *v.* Cooper, 50 Kan. 680, 32 Pac. 370.

Kentucky.— Behan *v.* Warfield, 90 Ky. 151, 13 S. W. 439, 11 Ky. L. Rep. 960; Herrin *v.* Morford, 9 Dana 450, holding that the fact that the sale was for a much less price than that paid for the property when bought a few months before, although it was advancing in value, was a badge of fraud. See also Smead *v.* Williamson, 16 B. Mon. 492.

Maryland.— Fuller *v.* Brewster, 53 Md. 358.

Missouri.— Stern Auction, etc., Co. *v.* Mason, 16 Mo. App. 473.

New York.— Amsterdam First Nat. Bank *v.* Miller, 163 N. Y. 164, 57 N. E. 308; Laidlaw *v.* Gilmore, 47 How. Pr. 67.

Texas.— Brown *v.* Texas Cactus Hedge Co., 64 Tex. 396.

Wisconsin.— Sommermeyer *v.* Schwartz, 89 Wis. 66, 61 N. W. 311.

See *infra*, VII, B, 2, b, (I), (B); VII, B, 3, b, (IV), (V); VIII, E.

Compare Schatz *v.* Kirker, 17 Wkly. Notes Cas. (Pa.) 43; Voorhees *v.* Blanton, 83 Fed. 234.

80. *Alabama.*— Bozman *v.* Draughan, 3 Stew. 243.

Missouri.— Knoop *v.* Kelsey, 121 Mo. 642, 26 S. W. 683; Ames *v.* Gilmore, 59 Mo. 537; St. Louis Brewing Assoc. *v.* Steimke, 68 Mo. App. 52.

North Carolina.— Darden *v.* Skinner, 4 N. C. 259.

Virginia.— Hickman *v.* Trout, 83 Va. 478, 3 S. E. 131.

England.— Herne *v.* Meeres, 1 Vern. Ch. 465, 23 Eng. Reprint 591.

See *infra*, VII, B, 3, b, (IV), (V); VIII, E.

81. Goddard *v.* Weil, 165 Pa. St. 419, 30 Atl. 1000; McPherson *v.* McPherson, 21 S. C. 261; Bierne *v.* Ray, 37 W. Va. 571, 16 S. E. 804. See also *infra*, VII, B, 2, b, (I), (B).

82. *Alabama.*— Harris *v.* Russell, 93 Ala. 59, 9 So. 541 (enlarging the debt by adding usury); Pickett *v.* Pipkin, 64 Ala. 520; Stover *v.* Herrington, 7 Ala. 142, 41 Am. Dec. 86.

Arkansas.— Henry *v.* Harrell, 57 Ark. 569, 22 S. W. 433.

Connecticut.— North *v.* Belden, 13 Conn. 376, 35 Am. Dec. 83.

Indiana.— Goff *v.* Rogers, 71 Ind. 459.

Iowa.— Bussard *v.* Bullitt, 95 Iowa 736, 64 N. W. 658; Taylor *v.* Wendling, 66 Iowa 562, 24 N. W. 40; Lombard *v.* Dows, 66 Iowa 243, 23 N. W. 649.

Kentucky.— Enders *v.* Swayne, 8 Dana 103.

Massachusetts.— Lynde *v.* McGregor, 13 Allen 172.

Michigan.— Patrick *v.* Riggs, 105 Mich. 616, 63 N. W. 532; Ferris *v.* McQueen, 94 Mich. 367, 54 N. W. 164; Showman *v.* Lee, 86 Mich. 556, 49 N. W. 578; King *v.* Hubbell, 42 Mich. 597, 4 N. W. 440; Willison *v.* Desenberg, 41 Mich. 156, 2 N. W. 201.

Minnesota.— Hanson *v.* Bean, 51 Minn. 546, 53 N. W. 871, 38 Am. St. Rep. 516.

Missouri.— Benne *v.* Schnecko, 100 Mo. 250, 13 S. W. 82. See also Glasgow Milling Co. *v.* Burns, 144 Mo. 192, 45 S. W. 1074. *Compare* Wall *v.* Beedy, 161 Mo. 625, 61 S. W. 864.

New Hampshire.— Kennard *v.* Gray, 58 N. H. 51.

New Jersey.— Newman *v.* Kirk, 45 N. J. Eq. 677, 8 Atl. 224; Heintze *v.* Bentley, 34 N. J. Eq. 562 [*affirming* 33 N. J. Eq. 405].

New York.— McKinster *v.* Babcock, 26 N. Y. 378. See also Griffin *v.* Cranston, 1 Bosw. 281.

North Carolina.— Perry *v.* Hardison, 99 N. C. 21, 5 S. E. 230; Foster *v.* Woodfin, 33 N. C. 339. See also Peebles *v.* Horton, 64 N. C. 374.

Pennsylvania.— Gordon *v.* Preston, 1 Watts 385, 26 Am. Dec. 75.

South Carolina.— Hipp *v.* Sawyer, Rich. Eq. Cas. 410.

Tennessee.— Thurman *v.* Jenkins, 2 Baxt. 426.

West Virginia.— Bartlett *v.* Cleavenger, 35 W. Va. 719, 14 S. E. 273.

Wisconsin.— Rice *v.* Morner, 64 Wis. 599, 25 N. W. 668; Blakeslee *v.* Rossman, 43 Wis. 116; Butts *v.* Peacock, 23 Wis. 359.

United States.— Davis *v.* Schwartz, 155 U. S. 631, 15 S. Ct. 237, 39 L. ed. 289; Stinson *v.* Hawkins, 16 Fed. 850, 5 McCrary 284.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 38; and *infra*, VII, B, 2, b, (I), (C).

Deeds, reciting an erroneous consideration and withheld from record, given by a debtor to his sons, who knew of his insolvent condition, will be set aside. Ellis *v.* Musselman, 61 Nebr. 262, 85 N. W. 75.

83. *Alabama.*— Troy Fertilizer Co. *v.* Norman, 107 Ala. 667, 18 So. 201. See also Cottingham *v.* Greely-Barnham Grocery Co., 137 Ala. 149, 34 So. 956; Pique *v.* Arendale, 71 Ala. 91.

Colorado.— See Jefferson County Bank *v.* Hummel, 11 Colo. App. 337, 53 Pac. 286.

an innocent error,[84] and the fraudulent intent must be known to or participated in by the grantee.[85]

d. Excess of Security. It is not usually a badge of fraud that a mortgage or other like conveyance covers more property than is necessary to secure the debt,[86] but the giving or taking of an unusual amount of security is a circumstance that is sometimes considered, in connection with other facts, as bearing against the transaction.[87]

e. Excess in Amount Secured. That a mortgage is executed[88] or a judgment confessed[89] by a debtor in failing circumstances, for a sum known by the creditor at the time to be in excess of what is actually due, is evidence of fraud. But the mere fact that a mortgage given by an insolvent secures a greater sum than is actually due is not necessarily conclusive of fraud.[90] Judgment notes purposely

Connecticut.— Merrills *v.* Swift, 18 Conn. 257, 46 Am. Dec. 315.

Illinois.— Wooley *v.* Fry, 30 Ill. 158.

Indiana.— Adams *v.* Laugel, 144 Ind. 608, 42 N. E. 1017; Goff *v.* Rogers, 71 Ind. 459.

Iowa.—Mason *v.* Franklin, 58 Iowa 506, 12 N. W. 554. See also Wood *v.* Scott, 55 Iowa 114, 7 N. W. 465; Culbertson *v.* Luckey, 13 Iowa 12.

Kansas.— Bowling *v.* Armourdale Bank, 57 Kan. 174, 45 Pac. 584; Bush *v.* Bush, 33 Kan. 556, 6 Pac. 794; Rexroad *v.* Johnson, 6 Kan. App. 607, 49 Pac. 699.

Kentucky.— Highland *v.* Anderson, 17 S. W. 866, 13 Ky. L. Rep. 710.

Louisiana.— Brown *v.* Brown, 30 La. Ann. 966.

Michigan.— Louden *v.* Vinton, 108 Mich. 313, 66 N. W. 222.

Minnesota.—Heim *v.* Chapel, 62 Minn. 338, 64 N. W. 825; Berry *v.* O'Connor, 33 Minn. 29, 21 N. W. 840; Manor *v.* Sheehan, 30 Minn. 419, 15 N. W. 687.

Missouri.— Wall *v.* Beatty, 161 Mo. 625, 61 S. W. 864; Schroeder *v.* Babbitt, 108 Mo. 289, 18 S. W. 1093; Finke *v.* Pike, 50 Mo. App. 564.

New Hampshire.— Whittredge *v.* Edmunds, 63 N. H. 248.

Vermont.— Brackett *v.* Wait, 6 Vt. 411.

Virginia.— Norris *v.* Lake, 89 Va. 513, 16 S. E. 663; Keagy *v.* Trout, 85 Va. 390, 7 S. E. 329.

Wisconsin.— Barkow *v.* Sanger, 47 Wis. 500, 3 N. W. 16.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 38.

84. Kalk *v.* Fielding, 50 Wis. 339, 7 N. W. 296.

85. Carpenter *v.* Muren, 42 Barb. (N. Y.) 300; Kevan *v.* Crawford, 6 Ch. D. 29, 46 L. J. Ch. 729, 37 L. T. Rep. N. S. 322, 26 Wkly. Rep. 49. See *infra*, VII, B.

86. Davis *v.* Schwartz, 155 U. S. 631, 15 S. Ct. 237, 39 L. ed. 287; Downs *v.* Kissam, 10 How. (U. S.) 102, 13 L. ed. 346.

87. *California.*— Sukeforth *v.* Lord, 87 Cal. 399, 25 Pac. 497.

Iowa.— See Richards *v.* Schreiber, 98 Iowa 422, 67 N. W. 569; Lycoming Rubber Co. *v.* King, 90 Iowa 343, 57 N. W. 864.

Michigan.— See Showman *v.* Lee, 86 Mich. 556, 49 N. W. 578; King *v.* Hubbell, 42 Mich. 597, 4 N. W. 440.

Missouri.—See Colbern *v.* Robinson, 80 Mo. 541; McKinney *v.* Wade, 43 Mo. App. 152.

Nebraska.—Kilpatrick-Koch Dry Goods Co. *v.* Strauss, 45 Nebr. 793, 64 N. W. 223; Smith *v.* Boyer, 29 Nebr. 76, 45 N. W. 265, 26 Am. St. Rep. 373.

New Jersey.— See Clinton Hill Lumber, etc., Co. *v.* Strieby, 52 N. J. Eq. 576, 29 Atl. 589.

North Carolina.— Burgin *v.* Burgin, 23 N. C. 453.

Ohio.— Brinkerhoff *v.* Tracy, 55 Ohio St. 558, 45 N. E. 1100.

United States.— Smith *v.* New York L. Ins. Co., 57 Fed. 133.

See also *infra*, VIII, A, B, 9, a, (II).

Where a corporation conveys all its property to secure a debt and further credit, and the property conveyed is many times the amount secured, this tends to establish fraud. Omaha First Nat. Bank *v.* East Omaha Box Co., (1902) 90 N. W. 223.

88. *Alabama.*— Stover *v.* Herrington, 7 Ala. 142, 41 Am. Dec. 86.

Illinois.— See Strauss *v.* Kranert, 56 Ill. 254.

Iowa.— Carson *v.* Byers, 67 Iowa 606, 25 N. W. 826; Lombard *v.* Dows, 66 Iowa 243, 23 N. W. 649; Davenport *v.* Cummings, 15 Iowa 219.

Kansas.— See Smith *v.* Parry Mfg. Co., 9 Kan. App. 877, 61 Pac. 966.

Michigan.— Patrick *v.* Riggs, 105 Mich. 616, 63 N. W. 532.

Missouri.— Imhoff *v.* McArthur, 146 Mo. 371, 48 S. W. 456.

United States.— Kellogg *v.* Clyne, 54 Fed. 696, 4 C. C. A. 554.

See also *infra*, VIII, A, 9, a, (III).

A trust deed given for a greater sum than is actually due is void. Bates County Bank *v.* Gailey, 177 Mo. 181, 75 S. W. 646.

89. Werner *v.* Zierfuss, 162 Pa. St. 360, 29 Atl. 737; Meckley's Appeal, 102 Pa. St. 536; Clark *v.* Douglass, 62 Pa. St. 415; Davenport *v.* Wright, 51 Pa. St. 292.

90. *Illinois.*— Wooley *v.* Fry, 30 Ill. 158. *Compare* Sawyer *v.* Bradshaw, 125 Ill. 440, 17 N. E. 812; Mitchell *v.* Sawyer, 115 Ill. 650, 5 N. E. 109; Upton *v.* Craig, 57 Ill. 257.

Indiana.— Adams *v.* Laugel, 144 Ind. 608, 42 N. E. 1017; Goff *v.* Rogers, 71 Ind. 459.

Iowa.— Wood *v.* Scott, 55 Iowa 114, 7 N. W. 465.

given to preferred creditors for sums largely in excess of the amount due them, and afterward satisfied in full, are fraudulent as to other creditors thereby prevented from receiving payment.[91]

2. Transfer in Anticipation of or Pending Suit. If a transfer is made by a debtor in anticipation of a suit against him,[92] or after a suit has been begun and while it is pending against him,[93] this is a badge of fraud; but the pendency of

Kansas.— Bowling *v.* Armourdale Bank, 57 Kan. 174, 45 Pac. 584; Bush *v.* Bush, 33 Kan. 556, 6 Pac. 794. See also Hughes *v.* Shull, 33 Kan. 127, 133, 5 Pac. 414, 770, holding that a mortgage in excess of the actual indebtedness, executed without any intention to defraud, to take up a prior mortgage for an actual indebtedness, all the credits on the old note to be applied to the new, is not void *in toto*. *Compare* McCord, etc., Mercantile Co. *v.* Burson, 38 Kan. 278, 16 Pac. 664.

Michigan.—Louden *v.* Vinton, 108 Mich. 313, 66 N. W. 222. See also Brace *v.* Berdan, 104 Mich. 356, 62 N. W. 568; Lyon *v.* Ballentine, 63 Mich. 97, 29 N. W. 837, 6 Am. St. Rep. 284.

Minnesota.—Heim *v.* Chapel, 62 Minn. 338, 64 N. W. 825; Nazro *v.* Ware, 38 Minn. 443, 38 N. W. 359.

New Hampshire.— Whittredge *v.* Edmunds, 63 N. H. 248; Putnam *v.* Osgood, 52 N. H. 148.

Pennsylvania.— Gordon *v.* Preston, 1 Watts 385, 26 Am. Dec. 75.

Wisconsin.— Barkow *v.* Sanger, 47 Wis. 500, 3 N. W. 16; Bradley Co. *v.* Paul, 94 Wis. 488, 69 N. W. 168. See also Liner *v.* Thielke, 115 Wis. 389, 91 N. W. 975.

See also *infra*, VIII, A, 9, a, (III).

91. Hardt *v.* Heidweyer, 152 U. S. 147, 17 S. Ct. 671, 38 L. ed. 548. See also Wilcoxson *v.* Burton, 27 Cal. 228, 87 Am. Dec. 66.

92. *Alabama.*— Scott *v.* Brown, 106 Ala. 604, 17 So. 731.

Illinois.— Dunaway *v.* Robertson, 95 Ill. 419.

Indiana.— Shean *v.* Shay, 42 Ind. 375, 13 Am. Rep. 366.

Iowa.— Corder *v.* Williams, 40 Iowa 582. See also Weir *v.* Day, 57 Iowa 84, 10 N. W. 304.

Maryland.— Gebhart *v.* Merfeld, 51 Md. 322.

New Jersey.— Morris Canal, etc., Co. *v.* Stearns, 23 N. J. Eq. 414. See also Boid *v.* Dean, 48 N. J. Eq. 193, 21 Atl. 618, holding that a voluntary conveyance made to enable the grantor to slander another with impunity is voidable against a judgment for the slander.

New York.— See Fuller *v.* Brown, 76 Hun 557, 28 N. Y. Suppl. 189.

Ohio.— McVeigh *v.* Ritenour, 40 Ohio St. 107. See also La Roche *v.* Brewer, 8 Ohio Cir. Ct. 508, 5 Ohio Cir. Dec. 432.

Tennessee.— Lewis *v.* Gibson, 1 Tenn. Cas. 163, Thomps. Cas. 234. *Compare* Vance *v.* Smith, 2 Heisk. 343.

West Virginia.— State *v.* Burkeholder, 30 W. Va. 593, 5 S. E. 439.

England.— See Alton *v.* Harrison, L. R. 4 Ch. 622, 38 L. J. Ch. 669, 21 L. T. Rep. N. S. 282, 17 Wkly. Rep. 1034.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 166.

Fraudulency of transfer in anticipation of attachment.— *Alabama.*— Trager *v.* Feibleman, 95 Ala. 60, 10 So. 213.

California.— Gregory *v.* Clabrough, 129 Cal. 475, 62 Pac. 72; Ryan *v.* Daly, 6 Cal. 238.

Indiana.— Lowry *v.* Howard, 35 Ind. 170, 9 Am. Rep. 676.

Massachusetts.— Gragg *v.* Martin, 12 Allen 498, 90 Am. Dec. 164.

Vermont.— Marsh *v.* Davis, 24 Vt. 363.

Wisconsin.— Messersmith *v.* Defendorf, 54 Wis. 498, 11 N. W. 906; Lord *v.* Defendorf, 54 Wis. 491, 11 N. W. 903, 41 Am. Rep. 58.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 167.

Transfer in anticipation of deficiency judgment.— Mortgaged premises were sold and a decree for deficiency taken against the mortgagor. A few days before the sale the mortgagor conveyed all his property to his two sons in satisfaction of an alleged indebtedness of a much less amount than the value of the property, no other debts being shown. It was held that the conveyance was fraudulent as against the mortgagee. Hoboken Sav. Bank *v.* Beckman, 36 N. J. Eq. 83.

93. *Alabama.*— Crawford *v.* Kirksey, 50 Ala. 590; Williams *v.* Jones, 2 Ala. 314.

Arkansas.— Reeves *v.* Sherwood, 45 Ark. 520.

Georgia.— Gregory *v.* Gray, 88 Ga. 172, 14 S. E. 187; Hoffer *v.* Gladden, 75 Ga. 532; Barber *v.* Terrell, 54 Ga. 146. See also Smith *v.* Wellborn, 75 Ga. 799.

Indiana.— Ray *v.* Roe, 2 Blackf. 258, 18 Am. Dec. 159.

Iowa.— Thomas *v.* Pyne, 55 Iowa 348, 7 N. W. 576; Glenn *v.* Glenn, 17 Iowa 498.

Kentucky.— Anglin *v.* Conley, 114 Ky. 741, 71 S. W. 926, 24 Ky. L. Rep. 1551; Behan *v.* Warfield, 90 Ky. 151, 13 S. W. 439, 11 Ky. L. Rep. 960; Herrin *v.* Morford, 9 Dana 450; Lillard *v.* McGee, 4 Bibb 165.

Louisiana.— Goodwell *v.* Minchew, 26 La. Ann. 621.

Maine.— Thompson *v.* Robinson, 89 Me. 46, 35 Atl. 1002; Hartshorn *v.* Eames, 31 Me. 93.

Maryland.— Schaferman *v.* O'Brien, 28 Md. 565, 92 Am. Dec. 708.

Missouri.— Mason *v.* Perkins, 180 Mo. 702, 79 S. W. 683, 103 Am. St. Rep. 591; McCollum *v.* Crain, (App. 1903) 74 S. W. 650, the fact that the suit is in tort makes no difference.

New Jersey.— Thorp *v.* Leibrecht, 56 N. J. Eq. 499, 39 Atl. 361; Christie *v.* Bridgman,

a suit will not overturn a conveyance made in good faith and for value.[94] If a conveyance is made pending a suit against the grantor, for the purpose of preventing the collection of such a judgment as may be recovered, and with knowledge of the grantee that it is so made, it will be set aside at the instance of the plaintiff in such suit after judgment for him therein, whether made with or without a valuable consideration.[95] A transfer pending an action of tort against the grantor, with intention to defeat the collection of any judgment that may be recovered in such action, is fraudulent,[96] even though such transfer is made for a

51 N. J. Eq. 331, 25 Atl. 939, 30 Atl. 429; Moore *v.* Roe, 35 N. J. Eq. 90; Morris Canal, etc., Co. *v.* Stearns, 23 N. J. Eq. 414; Randall *v.* Vroom, 30 N. J. Eq. 353.

New York.— Cole *v.* Millerton Iron Co., 133 N. Y. 164, 30 N. E. 847, 28 Am. St. Rep. 615; Maasch *v.* Grauer, 58 N. Y. App. Div. 560, 69 N. Y. Suppl. 187; Ford *v.* Johnston, 7 Hun 563; Stephens *v.* Sinclair, 1 Hill 143; Stoddard *v.* Butler, 20 Wend. 507. *Compare* Jackson *v.* Ham, 15 Johns. 261.

Ohio.— Fisher *v.* Schlosser, 41 Ohio St. 147; Barr *v.* Hatch, 3 Ohio 527.

Pennsylvania.— Redfield, etc., Mfg. Co. *v.* Dysart, 62 Pa. St. 62; Avery *v.* Street, 6 Watts 247.

South Carolina.— Smith *v.* Henry, 2 Bailey 118; Hipp *v.* Sawyer, Rich. Eq. Cas. 410. See also Watson *v.* Kennedy, 3 Strobh. Eq. 1; Pettus *v.* Smith, 4 Rich. Eq. 197.

Tennessee.— Carter *v.* Baker, 10 Heisk. 640.

Virginia.— Hickman *v.* Trout, 83 Va. 478, 3 S. E. 131; Click *v.* Green, 77 Va. 827.

West Virginia.— Butler *v.* Thompson, 45 W. Va. 660, 31 S. E. 960, 72 Am. St. Rep. 838.

Wisconsin.— Hoffman *v.* Junk, 51 Wis. 613, 8 N. W. 493; Godfrey *v.* Germain, 24 Wis. 410. See also Bragg *v.* Gaynor, 85 Wis. 468, 55 N. W. 919, 21 L. R. A. 161.

United States.— Dent *v.* Ferguson, 132 U. S. 50, 10 S. Ct. 13, 33 L. ed. 242.

England.— Barling *v.* Bishopp, 29 Beav. 417, 6 Jur. N. S. 812, 8 Wkly. Rep. 631, 54 Eng. Reprint 689; Twyne's Case, 3 Coke 80*a*, 1 Smith Lead Cas. 1. See also Blenkinsopp *v.* Blenkinsopp, 1 De G. M. & G. 495, 16 Jur. 787, 21 L. J. Ch. 401, 50 Eng. Ch. 379, 42 Eng. Reprint 644.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 169; and *infra*, VII, B, 3, b, (VII).

Compare, however, Pelham *v.* Aldrich, 8 Gray (Mass.) 515, 69 Am. Dec. 266; Stockwell *v.* Stockwell, 72 N. H. 69, 54 Atl. 701; Howard *v.* Crawford, 21 Tex. 399.

94. *Alabama.*— Crawford *v.* Kirksey, 50 Ala. 590.

District of Columbia.— Birdsall *v.* Welch, 6 D. C. 316.

Illinois.— Coan *v.* Morrison, 34 Ill. App. 352.

Indiana.— Lowry *v.* Howard, 35 Ind. 170, 9 Am. Rep. 676.

Kansas.— Berkley *v.* Tootle, 46 Kan. 335, 26 Pac. 730.

Kentucky.— Ward *v.* Trotter, 19 Ky. 1.

Mississippi.— Surget *v.* Boyd, 57 Miss. 485.

Missouri.— Kuykendall *v.* McDonald, 15 Mo. 416, 57 Am. Dec. 412.

Oregon.— See Garnier *v.* Wheeler, 40 Oreg. 198, 66 Pac. 812.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 169.

The fact that a mortgage was executed upon the same day that a judgment was rendered against the mortgagor is not alone sufficient to attach to it the imputation of fraud. Thornton *v.* Davenport, 2 Ill. 296, 29 Am. Dec. 358.

Not void as to subsequent creditors.— A conveyance of real estate pending an action against the grantor does not of itself render such conveyance void as to subsequent creditors. Ray *v.* Roe, 2 Blackf. (Ind.) 258, 18 Am. Dec. 159.

Effect of non-recovery.— If a conveyance is made to defeat an expected recovery in a suit, it will not be deemed fraudulent to defeat creditors should the recovery not take place. Brady *v.* Ellison, 3 N. C. 348.

Transfer after allowance of time to answer. — In the absence of fraud a judgment by confession will not be void simply because it was given by a debtor after obtaining an extension of time to answer in an action then pending against him. Wood *v.* Mitchell, 17 N. Y. Suppl. 782. *Compare* H. B. Claflin Co. *v.* Arnheim, 87 Hun (N. Y.) 236, 33 N. Y. Suppl. 1037.

Fraudulency of transfer pending supplementary proceedings.—De Witt *v.* Van Sickle, 29 N. J. Eq. 209.

Fraudulency of transfer pending action to review.— Parsons *v.* McKnight, 8 N. H. 35.

Fraudulency of transfer pending execution. — Reinheimer *v.* Heminway, 35 Pa. St. 432; Streeper *v.* Eckart, 2 Whart. (Pa.) 302, 30 Am. Dec. 258; Bullock *v.* Gordon, 4 Munf. (Va.) 450.

95. Rogers *v.* Evans, 3 Ind. 574, 56 Am. Dec. 537; Wright *v.* Brandis, 1 Ind. 336; Goshorn *v.* Snodgrass, 17 W. Va. 717. See also Smith *v.* Culbertson, 9 Rich. (S. C.) 106.

96. *District of Columbia.*—Barth *v.* Heider, 7 D. C. 71.

Maine.— Tobie, etc., Mfg. Co. *v.* Waldron, 75 Me. 472.

New Jersey.— Scott *v.* Hartman, 26 N. J. Eq. 89.

New York.— Jackson *v.* Myers, 18 Johns. 425.

Tennessee.— Farnsworth *v.* Bell, 2 Sneed 531.

Virginia.— Johnson *v.* Wagner, 76 Va. 587.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 172.

valuable consideration, if the grantee had knowledge of, or participated in, this purpose.[97] It is a badge of fraud that a conveyance was made after the rendition of a verdict in favor of a creditor, and while a stay of proceedings was in force.[98]

3. Absolute Conveyance as Security. The giving of an absolute conveyance which is intended to operate only as security is held to be a badge of fraud,[99] and some of the cases hold such a conveyance conclusively fraudulent as to existing creditors.[1] Other cases hold that the conveyance is not conclusively fraudulent, and that if no fraud was in fact intended the security may be enforced[2] to the amount advanced.[3]

4. Concealment of or Failure to Record Conveyance. The fact that a conveyance is withheld from record or is otherwise concealed is a badge of fraud.[4] Failure to record a conveyance is, however, only a circumstance to be considered in connection with other facts, and is insufficient in and by itself to establish a

97. Cooke *v.* Cooke, 43 Md. 522.

98. Maasch *v.* Grauer, 58 N. Y. App. Div. 560, 69 N. Y. Suppl. 187.

99. Brown *v.* Bradford, 103 Iowa 378, 72 N. W. 648; Earnshaw *v.* Stewart, 64 Md. 513, 2 Atl. 734; and cases cited in the note following. See also *infra*, X, B, 2.

1. *Alabama.*— Sims *v.* Gaines, 64 Ala. 392; Hartshorn *v.* Williams, 31 Ala. 149.

Illinois.— Beidler *v.* Crane, 135 Ill. 92, 25 N. E. 655, 25 Am. St. Rep. 349.

Missouri.— Pattison *v.* Letton, 56 Mo. App. 325.

New Hampshire.— Watkins *v.* Arms, 64 N. H. 99, 6 Atl. 92; Stratton *v.* Putney, 63 N. H. 577, 4 Atl. 876; Badger *v.* Story, 16 N. H. 168.

New Jersey.— See White *v.* Megill, (Ch. 1889) 18 Atl. 355.

North Carolina.— Bernhardt *v.* Brown, 122 N. C. 587, 29 S. E. 884, 65 Am. St. Rep. 725; Gulley *v.* Macy, 84 N. C. 434.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 63; and *infra*, X, B, 2.

2. *Arkansas.*—Doswell *v.* Adler, 28 Ark. 82.

Colorado.— McClure *v.* Smith, 14 Colo. 299, 23 Pac. 786; Ross *v.* Duggan, 5 Colo. 85.

Iowa.— Brown *v.* Bradford, 103 Iowa 378, 72 N. W. 648. See also Fuller *v.* Griffith, 91 Iowa 632, 60 N. W. 247.

Kansas.— Peoria First Nat. Bank *v.* Jaffray, 41 Kan. 694, 21 Pac. 242.

Maine.— Emmons *v.* Bradley, 56 Me. 333; Stevens *v.* Hinckley, 43 Me. 440; Ulmer *v.* Hills, 8 Me. 326.

Massachusetts.—Harrison *v.* Phillips Academy, 12 Mass. 456.

Michigan.— Columbia Bank *v.* Jacobs, 10 Mich. 349, 81 Am. Dec. 792.

Mississippi.— Mobile Bank *v.* Tishomingo Sav. Inst., 62 Miss. 250.

Oregon.— Haseltine *v.* Espey, 13 Oreg. 301, 10 Pac. 423.

Vermont.— Bigelow *v.* Topliff, 25 Vt. 273, 60 Am. Dec. 264; Smith *v.* Onion, 19 Vt. 427. See also Gibson *v.* Seymour, 4 Vt. 518.

Washington.— Samuel *v.* Kittenger, 6 Wash. 261, 33 Pac. 509.

Wisconsin.— Rock *v.* Collins, 99 Wis. 630, 75 N. W. 426, 67 Am. St. Rep. 885; McFarlane *v.* Louden, 99 Wis. 620, 75 N. W. 394, 67 Am. St. Rep. 883.

United States.— Chickering *v.* Hatch, 5 Fed. Cas. No. 2,672, 3 Sumn. 474; Gaffney *v.* Signaigo, 9 Fed. Cas. No. 5,169, 1 Dill. 158.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 63; and *infra*, X, B, 2.

3. Joseph M. Smith Co. *v.* O'Brien, 57 N. J. Eq. 365, 41 Atl. 492.

4. *Alabama.*— Crawford *v.* Kirksey, 50 Ala. 590, 598.

Colorado.— Stock-Growers' Bank *v.* Newton, 13 Colo. 245, 22 Pac. 444.

Connecticut.— Curtis *v.* Lewis, 74 Conn. 367, 50 Atl. 878.

Illinois.— See Hass *v.* Sternbach, 156 Ill. 44, 41 N. E. 51; McNeil, etc., Co. *v.* Plows, 83 Ill. App. 186; Blackman *v.* Preston, 24 Ill. App. 237.

Iowa.— See Mull *v.* Dooley, 89 Iowa 312, 56 N. W. 513.

Kansas.— Wafer *v.* Harvey County Bank, 46 Kan. 597, 26 Pac. 1032.

Kentucky.— Scrivenor *v.* Scrivenor, 7 B. Mon. 374. See Hildeburn *v.* Brown, 17 B. Mon. 779.

Mississippi.— Day *v.* Goodbar, 69 Miss. 687, 12 So. 30; Klein *v.* Richardson, 64 Miss. 41, 8 So. 204.

Missouri.— See Boone County Nat. Bank *v.* Newkirk, 144 Mo. 472, 46 S. W. 606; Gentry *v.* Field, 143 Mo. 399, 45 S. W. 286; Williams *v.* Kirk, 68 Mo. App. 457.

New Jersey.— See Claflin *v.* Freudenthal, 58 N. J. Eq. 298, 43 Atl. 529; Flemington Nat. Bank *v.* Jones, 50 N. J. Eq. 244, 24 Atl. 928; Thouron *v.* Pearson, 29 N. J. Eq. 487.

New York.— St. John Wood-Working Co. *v.* Smith, 178 N. Y. 629, 71 N. E. 1139 [*affirming* 82 N. Y. App. Div. 348, 82 N. Y. Suppl. 1025]; Guy *v.* Craighead, 21 N. Y. App. Div. 460, 47 N. Y. Suppl. 576; White *v.* Benjamin, 3 Misc. 490, 23 N. Y. Suppl. 981; Talcott *v.* Levy, 20 N. Y. Suppl. 440, 29 Abb. N. Cas. 3; U. S. Bank *v.* Housman, 6 Paige 526; Hildreth *v.* Sands, 2 Johns. Ch. 35. *Compare* Billings *v.* Russell, 101 N. Y. 226, 4 N. E. 531.

North Carolina.—Hafner *v.* Irwin, 23 N. C. 490.

Ohio.— See Stewart *v.* Hopkins, 30 Ohio St. 502.

Pennsylvania.— See Coates *v.* Gerlach, 44 Pa. St. 43.

fraudulent intent.[5] The mere non-recording of deeds does not render them fraudulent in law as to creditors, where no fraud was intended and no one was misled.[6] Where it is either found that all the acts of the parties were done honestly and in good faith, or it is not found that they were dishonest or fraudulent, a deed or mortgage cannot be adjudged fraudulent and void solely on the ground that it was not recorded, and that in ignorance of the existence of the instrument assailed credit was given to the grantor upon the faith of his supposed ownership of the property.[7] Where the deed is withheld from record merely to gratify the feelings of a proud debtor the omission is not a fraudulent act.[8]

5. Secrecy or Haste. Secrecy[9] is a badge of fraud; and so is undue or

South Dakota.— Jewett *v.* Sundback, 5 S. D. 111, 58 N. W. 20.

Texas.— See Banner *v.* Robinson, (Civ. App. 1896) 34 S. W. 355.

Virginia.— Hickman *v.* Trout, 83 Va. 478, 3 S. E. 131.

Wisconsin.— Standard Paper Co. *v.* Guenther, 67 Wis. 101, 30 N. W. 298. *Compare* McFarlane *v.* Louden, 99 Wis. 620, 75 N. W. 394, 67 Am. St. Rep. 883. See also Kickbusch *v.* Corwith, 108 Wis. 634, 85 N. W. 148.

United States.— Davis *v.* Schwartz, 155 U. S. 631, 15 S. Ct. 237, 39 L. ed. 289; Blennerhassett *v.* Sherman, 105 U. S. 100, 26 L. ed. 1080; Brown *v.* Easton, 112 Fed. 592; Thompson Nat. Bank *v.* Corwine, 89 Fed. 774; Dobson *v.* Snyder, 70 Fed. 10; Beecher *v.* Clark, 3 Fed. Cas. No. 1,223, 12 Blatchf. 256; McLean *v.* Lafayette Bank, 16 Fed. Cas. No. 8,888, 3 McLean 587.

England.— Hungerford *v.* Earle, 2 Vern. Ch. 261, 262, 23 Eng. Reprint 768, where it is said that "a deed not at first fraudulent, may afterwards become so by being concealed, or not pursued."

An agreement not to record is a badge of fraud. Clayton *v.* Exchange Bank, 121 Fed. 630, 57 C. C. A. 656.

5. *Massachusetts.*— Folsom *v.* Clemence, 111 Mass. 273.

Mississippi.— Day *v.* Goodbar, 69 Miss. 687, 12 So. 30.

Missouri.— Wall *v.* Beedy, 161 Mo. 625, 61 S. W. 864. See State *v.* O'Neill, 151 Mo. 67, 52 S. W. 240; Mauch Chunk First Nat. Bank *v.* Rohrer, 138 Mo. 369, 39 S. W. 1047.

New Jersey.— Flemington Nat. Bank *v.* Jones, 50 N. J. Eq. 244, 24 Atl. 928. See also Andrus *v.* Burke, 61 N. J. Eq. 297, 48 Atl. 228; Asbury Park Bldg., etc., Assoc. *v.* Shepherd, (Ch. 1901) 50 Atl. 65.

New York.— Hardin *v.* Dolge, 46 N. Y. App. Div. 416, 61 N. Y. Suppl. 753.

South Carolina.—See McElwee *v.* Kennedy, 56 S. C. 154, 34 S. E. 86.

Wisconsin.— McFarlane *v.* Louden, 99 Wis. 620, 75 N. W. 394, 67 Am. St. Rep. 883.

United States.— Curry *v.* McCauley, 20 Fed. 583.

Canada.— Bertrand *v.* Parkes, 8 Manitoba 175.

Compare infra, IX, C, 3, b.

6. Brown *v.* Bradford, 103 Iowa 378, 72 N. W. 648. See also National State Bank *v.* Sanford Fork, etc., Co., 157 Ind. 10, 60 N. E. 699. See *infra,* IX, C, 3, b.

7. State Bank *v.* Backus, 160 Ind. 682, 67 N. E. 512 [*citing* American Trust, etc., Bank *v.* McGettigan, 152 Ind. 582, 52 N. E. 793, 71 Am. St. Rep. 345; Heiney *v.* Lontz, 147 Ind. 417, 46 N. E. 665; Farmers' L. & T. Co. *v.* Canada, etc., R. Co., 127 Ind. 250, 26 N. E. 784, 11 L. R. A. 740; Wilson *v.* Campbell, 119 Ind. 286, 21 N. E. 893; Stix *v.* Sadler, 109 Ind. 254, 9 N. E. 905].

8. See Campbell *v.* Remaly, 112 Mich. 214, 70 N. W. 432, 67 Am. St. Rep. 393; Claflin *v.* Freudenthal, 58 N. J. Eq. 298, 43 Atl. 529. See also Flemington Nat. Bank *v.* Jones, 50 N. J. Eq. 244, 24 Atl. 928 [*affirmed* in 50 N. J. Eq. 486, 27 Atl. 636]. But see Montgomery *v.* Phillips, 53 N. J. Eq. 203, 31 Atl. 622.

9. *California.*— Daugherty *v.* Daugherty, 104 Cal. 221, 37 Pac. 889.

Connecticut.— See New Haven Steamboat, etc., Co. *v.* Vanderbilt, 16 Conn. 420.

Georgia.— Fishel *v.* Lockard, 52 Ga. 632.

Iowa.—Stewart *v.* Mills County Nat. Bank, 76 Iowa 571, 41 N. W. 318. *Compare* Nicholas *v.* Higby, 35 Iowa 401.

Kansas.— Small *v.* Small, 56 Kan. 1, 42 Pac. 323, 54 Am. St. Rep. 581, 30 L. R. A. 243, but if a man's disposition of his property is fair and lawful, the concealment of the transaction cannot render it fraudulent.

Kentucky.— Herrin *v.* Munford, 9 Dana 450.

Massachusetts.— Folsom *v.* Clemence, 111 Mass. 273 (the secrecy is matter for the jury to consider); Gould *v.* Ward, 4 Pick. 104.

Minnesota.— Filley *v.* Register, 4 Minn. 391, 77 Am. Dec. 522.

North Carolina.— Darden *v.* Skinner, 4 N. C. 259. See also Peebles *v.* Horton, 64 N. C. 374.

Pennsylvania.— Avery *v.* Street, 6 Watts 247.

Virginia.— Hickman *v.* Trout, 83 Va. 478, 3 S. E. 131.

United States.— Davis *v.* Schwartz, 155 U. S. 631, 15 S. Ct. 237, 39 L. ed. 289; Warner *v.* Norton, 20 How. 448, 15 L. ed. 950; Foster *v.* McAlester, 114 Fed. 145, 52 C. C. A. 107.

England.— Twyne's Case, 3 Coke 80*a*, 1 Smith Lead. Cas. 1.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 19; and *infra,* VII, B, 3, b, (IV), (V).

Compare Negeler *v.* Peru First Nat. Bank, 129 Ill. 157, 21 N. E. 812, 16 Am. St. Rep. 257 [*affirming* 28 Ill. App. 112]; Stackhouse

unusual haste[10] a badge of fraud, Secrecy is a circumstance which may give force to other evidence[11] and from which in connection with other facts fraud may be inferred.[12]

6. Sales on Credit. The mere fact that a sale is made upon credit does not require that the transaction should be declared invalid;[13] but a sale upon credit of part of his property by an insolvent debtor is a circumstance which may be considered, with others, as bearing upon the question of fraudulent intent;[14] and an unusual length of credit[15] is a badge of fraud. So too the giving of long

v. Holden, 66 N. Y. App. Div. 423, 73 N. Y. Suppl. 203; National Hudson River Bank *v.* Davison, 28 N. Y. App. Div. 311, 51 N. Y. Suppl. 64; Reeves *v.* John, 95 Tenn. 434, 32 S. W. 312; Peninsula Stove Co. *v.* Sacket, 74 Wis. 526, 43 N. W. 491.

Secrecy and haste in giving preferences see *infra*, XI, H, 4.

A mortgage concealed by fraudulent representations to the injury of third persons is void. McLean *v.* Lafayette Bank, 16 Fed. Cas. No. 8,889, 3 McLean 587.

Open sale.— Where defendant sold a part of his property openly, and removed the balance without any attempt at concealment, the mere fact that he afterward pretended, when called on by creditors, that he had nothing with which to satisfy their demands, does not show that the sale was fraudulent. Fortner *v.* Whelan, 87 Wis. 88, 58 N. W. 253.

10. *Alabama.*— Schaungut *v.* Udell, 93 Ala. 302, 9 So. 550; Carter *v.* Coleman, 84 Ala. 256, 4 So. 151; Hodges *v.* Coleman, 76 Ala. 103.

Arkansas.—Adler-Goldman Commission Co. *v.* Hathcock, 55 Ark. 579, 18 S. W. 1048.

Michigan.— Bendetson *v.* Moody, 100 Mich. 553, 59 N. W. 252.

Missouri.— St. Louis Brewing Assoc. *v.* Steimke, 68 Mo. App. 52.

New Jersey.— Kimmouth *v.* White, (Ch. 1900) 47 Atl. 1.

United States.— Foster *v.* McAlester, 114 Fed. 145, 52 C. C. A. 107.

England.— Herne *v.* Meeres, 1 Vern. Ch. 465, 23 Eng. Reprint 591.

See also *infra*, VII, B, 3, b, (IV), (V).

Illustration.— Evidence that the sale was consummated in the evening, and that the goods were shipped, the same night, overland in wagons to a neighboring town, is of such a suspicious character as to throw the burden of proving the good faith of the transaction on defendants. Hetterman Bros. Co. *v.* Young, (Tenn. Ch. App. 1898) 52 S. W. 532.

Haste in giving preference see *infra*, XI, H, 4.

11. *Kentucky.*— Hildeburn *v.* Brown, 17 B. Mon. 779.

Maryland.— Gill *v.* Griffith, 2 Md. Ch. 270.

Mississippi.— Hilliard *v.* Cagle, 46 Miss. 309.

New Hampshire.— See Haven *v.* Richardson, 5 N. H. 113.

New Jersey.— See Thouron *v.* Pearson, 29 N. J. Eq. 487.

North Carolina.— Hafner *v.* Irwin, 23 N. C. 490.

West Virginia.— Greer *v.* O'Brien, 36 W. Va. 277, 15 S. E. 74; Reynolds *v.* Gawthrop, 37 W. Va. 3, 16 S. E. 364.

United States.— See Blennerhassett *v.* Sherman, 105 U. S. 100, 26 L. ed. 1080; Neslin *v.* Wells, 104 U. S. 428, 26 L. ed. 802.

England.— Worseley *v.* De Mattos, 1 Burr. 467, 2 Ld. Ken. 218; Griffin *v.* Stanhope, Cro. Jac. 454; Corlett *v.* Radcliffe, 14 Moore P. C. 121, 4 L. T. Rep. N. S. 1, 15 Eng. Reprint 251; Leonard *v.* Baker, 1 M. & S. 251.

12. Ross *v.* Crutsinger, 7 Mo. 245; Dobson *v.* Snider, 70 Fed. 10.

13. *Alabama.*— Lienkauf *v.* Morris, 66 Ala. 406; Andrews *v.* Jones, 10 Ala. 400.

Georgia.— Nicoll *v.* Crittenden, 55 Ga. 497.

Illinois.— Nelson *v.* Smith, 28 Ill. 495.

Iowa.— Ray *v.* Teabout, 65 Iowa 157, 21 N. W. 497; Hughes *v.* Monty, 24 Iowa 499.

Michigan.— Lewis *v.* Rice, 61 Mich. 97, 27 N. W. 867.

Missouri.— John Deere Plow Co. *v.* Sullivan, 158 Mo. 440, 59 S. W. 1005; Adam Roth Grocery Co. *v.* Lewis, 69 Mo. App. 463. But *compare* Seger *v.* Thomas, 107 Mo. 635, 18 S. W. 33, holding void a sale of goods to a creditor, where they exceeded in value the amount of his debt, and the sale as to the excess was on credit.

New York.— Ruhl *v.* Phillips, 48 N. Y. 125, 8 Am. Rep. 522 [*reversing* 4 Daly 45]; Loeschigk *v.* Bridge, 42 N. Y. 421; Matthews *v.* Rice, 31 N. Y. 457; Evans *v.* Sims, 82 Hun 396, 31 N. Y. Suppl. 259.

North Carolina.— Beasley *v.* Bray, 98 N. C. 266, 3 S. E. 497.

Tennessee.— McCasland *v.* Carson, 1 Head 117 (sale of land on credits of one, two, and three years not fraudulent in law); Harper *v.* Trent, (Ch. App. 1899) 53 S. W. 245.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 62; and *infra*, VIII, A, 7, a, (I), (II).

But *compare* Elser *v.* Graber, 69 Tex. 222, 6 S. W. 560 (to the same effect); Blum *v.* McBride, 69 Tex. 60, 5 S. W. 641 (where a sale of land on credit was held void).

The fact that the vendee gave a note payable in two years is not a badge of fraud. John Deere Plow Co. *v.* Sullivan, 158 Mo. 440, 59 S. W. 1005.

14. Hughes *v.* Monty, 24 Iowa 499; Smead *v.* Williamson, 16 B. Mon. (Ky.) 492; Roberts *v.* Shepard, 2 Daly (N. Y.) 110; Tillman *v.* Heller, (Tex. 1890) 14 S. W. 271. And see Elser *v.* Graber, 69 Tex. 222, 6 S. W. 560; Blum *v.* McBride, 69 Tex. 60, 5 S. W. 641.

15. *Alabama.*— Borland *v.* Walker, 7 Ala. 269.

credit to an irresponsible purchaser without security[16] has been considered to be a badge of fraud.

7. Insolvency or Indebtedness of Debtor. Evidence of large indebtedness, or of complete insolvency, is an important element in marshaling badges of fraud to overturn fraudulent transfers,[17] but mere indebtedness of the grantor at the time of making a conveyance is not generally of itself such evidence of fraud as will avoid a conveyance, although it is voluntary.[18]

8. Transfer of All the Debtor's Property. The transfer of all or nearly all of his property by a debtor, especially when he is insolvent or greatly embarrassed financially, is a badge of fraud.[19] But it is not a badge of fraud that the debtor

Illinois.— Cowling *v.* Estes, 15 Ill. App. 255.

Iowa.— Spaulding *v.* Adams, 63 Iowa 437, 19 N. W. 341.

Kansas.— Roberts *v.* Radcliff, 35 Kan. 502, 11 Pac. 406.

Mississippi.— Pope *v.* Andrews, Sm. & M. Ch. 135.

Texas.— Jacobs *v.* Totty, 76 Tex. 343, 13 S. W. 372, indefinite credit.

Virginia.— Hickman *v.* Trout, 83 Va. 478, 3 S. E. 131.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 62; and *infra*, VIII, A, 7, a, (I).

16. Glenn *v.* Glenn, 17 Iowa 498; Fulkerson *v.* Sappington, 104 Mo. 472, 15 S. W. 941; Robinson *v.* Frankel, 85 Tenn. 475, 3 S. W. 652; Hickman *v.* Trout, 83 Va. 478, 3 S. E. 131. See also Smead *v.* Williamson, 16 B. Mon. (Ky.) 492; Litchfield *v.* Pelton, 6 Barb. (N. Y.) 187. But see Matthews *v.* Rice, 31 N. Y. 457, sale to infant partly on credit not void in law as against creditors. And *compare* Nicol *v.* Crittenden, 55 Ga. 497.

17. *Arkansas.*— Ringgold *v.* Waggoner, 14 Ark. 69. *Compare* Reeves *v.* Sherwood, 45 Ark. 520; Cox *v.* Fraley, 26 Ark. 20.

California.— Daugherty *v.* Daugherty, 104 Cal. 221, 37 Pac. 889; Purkitt *v.* Polack, 17 Cal. 327.

Florida.— Barrow *v.* Bailey, 5 Fla. 9. See Ballard *v.* Eckman, 20 Fla. 661.

Iowa.— Glenn *v.* Glenn, 17 Iowa 498.

Kentucky.— Bibb *v.* Baker, 17 B. Mon. 292.

Maine.— Blodgett *v.* Chaplin, 48 Me. 322; Hartshorn *v.* Eames, 31 Me. 93.

Maryland.— See Applegarth *v.* Wagner, 86 Md. 468, 38 Atl. 940; Earnshaw *v.* Stewart, 64 Md. 513, 2 Atl. 734; Fuller *v.* Brewster, 53 Md. 358.

Missouri.— State *v.* Merritt, 70 Mo. 275.

Nebraska.— Leffel *v.* Schermerhorn, 13 Nebr. 342, 14 N. W. 418.

New York.— St. John Wood-Working Co. *v.* Smith, 178 N. Y. 629, 71 N. E. 1139 [*affirming* 82 N. Y. App. Div. 348, 82 N. Y. Suppl. 1025].

North Carolina.— Darden *v.* Skinner, 4 N. C. 259.

Pennsylvania.— Clark *v.* Depew, 25 Pa. St. 509, 64 Am. Dec. 717.

Texas.— See Stephens *v.* Allen, (Civ. App. 1895) 31 S. W. 314.

Virginia.— Hickman *v.* Trout, 83 Va. 478, 3 S. E. 131.

United States.— Hudgins *v.* Kemp, 20 How. 45, 15 L. ed. 853; McRea *v.* Mobile Branch Bank, 19 How. 376, 15 L. ed. 688.

England.— See Grogan *v.* Cooke, 2 Ball & B. 234; Clements *v.* Eccles, 11 Ir. Eq. 229; Holmes *v.* Penny, 3 Jur. N. S. 80, 3 Kay & J. 90, 26 L. J. Ch. 179, 5 Wkly. Rep. 132; Penhall *v.* Elwin, 1 Smale & G. 258.

See also *infra*, VI.

18. Bittinger *v.* Kasten, 111 Ill. 260; Thacher *v.* Phinney, 7 Allen (Mass.) 146; Willis *v.* Whitsitt, 67 Tex. 673, 4 S. W. 253. See also *infra*, VI.

19. *Arkansas.*— Ringgold *v.* Waggoner, 14 Ark. 69.

California.— Ballou *v.* Andrews Banking Co., 128 Cal. 562, 61 Pac. 102 (a transfer of all the firm account-books and accounts is *prima facie* fraudulent); Daugherty *v.* Daugherty, 104 Cal. 221, 37 Pac. 889.

Connecticut.— Redfield *v.* Buck, 35 Conn. 328, 95 Am. Dec. 241, such a conveyance is constructively fraudulent as to both existing and subsequent creditors. *Compare* Fishel *v.* Motta, 76 Conn. 197, 56 Atl. 558; Quinnipiac Brewing Co. *v.* Fitzgibbons, 71 Conn. 80, 40 Atl. 913.

Georgia.— Hoffer *v.* Gladden, 75 Ga. 532. See also Scott *v.* Winship, 20 Ga. 429.

Iowa.— Barhydt *v.* Perry, 57 Iowa 416, 10 N. W. 820; Glenn *v.* Glenn, 17 Iowa 498. *Compare* Cowles *v.* Ricketts, 1 Iowa 582, holding that a transfer of all a debtor's property to pay a *bona fide* preëxisting debt is not *per se* fraudulent as to creditors.

Kansas.— Roberts *v.* Radcliff, 35 Kan. 502, 11 Pac. 436.

Kentucky.— Herrin *v.* Morford, 9 Dana 450; Heiatt *v.* Barnes, 5 Dana 219; Bradley *v.* Buford, Ky. Dec. 12, 2 Am. Dec. 703.

Louisiana.— Gregg *v.* Lee, 37 La. Ann. 164; Emswiler *v.* Burham, 6 La. Am. 710.

Maine.— Hartshorn *v.* Eames, 31 Me. 93.

Maryland.— Zimmer *v.* Miller, 64 Md. 296, 1 Atl. 858; Ecker *v.* McAllister, 45 Md. 290.

Minnesota.— See Welch *v.* Bradley, 45 Minn. 540, 48 N. W. 440.

Mississippi.— Pope *v.* Andrews, Sm. & M. Ch. 135.

Missouri.— Benne *v.* Schnecko, 100 Mo. 250, 13 S. W. 82. See also Seger *v.* Thomas, 107 Mo. 635, 18 S. W. 33; Jacob Furth Grocery Co. *v.* May, 78 Mo. App. 323.

Nebraska.— Karll *v.* Kuhn, 38 Nebr. 539, 57 N. W. 379; Beels *v.* Flynn, 28 Nebr. 575, 44 N. W. 732, 26 Am. St. Rep. 351. See also

conveyed away the whole of his property at different times by deeds and levies of execution, although they passed chiefly into the hands of one person.[20]

9. Attempt to Give Appearance of Fairness. Circumstances indicating excessive effort to give the transaction the appearance of fairness or regularity, which are not usually found in such transactions, are to be regarded as badges of fraud.[21]

10. Failure to Produce Evidence. Where the circumstances under which a transfer of property by a debtor is made are suspicious, the failure of the parties to testify or to produce available explanatory or rebutting evidence is a badge of fraud.[22]

11. Retention of Possession. The unexplained retention by the grantor of the possession of the property transferred is a badge of fraud.[23]

Nebraska Moline Plow Co. *v.* Klingman, 48 Nebr. 204, 66 N. W. 1101. *Compare* Goldsmith *v.* Erickson, 48 Nebr. 48, 66 N. W. 1029, holding that this fact does raise a presumption of law that the transfer was fraudulent.

New York.— St. John Wood-Working Co. *v.* Smith, 178 N. Y. 629, 71 N. E. 1139 [*affirming* 82 N. Y. App. Div. 348, 82 N. Y. Suppl. 1025]; Clark *v.* Wise, 46 N. Y. 612 [*reversing* 39 How. Pr. 97]; Barker *v.* Franklin, 37 Misc. 292, 75 N. Y. Suppl. 305. See also Litchfield *v.* Pelton, 6 Barb. 187; Wheeler *v.* Brady, 4 Thomps. & C. 547. But see Ruhl *v.* Phillips, 48 N. Y. 125 [*reversing* 2 Daly 45].

Pennsylvania.— See Ditchburn *v.* Jermyn, 13 Pa. Co. Ct. 1.

Rhode Island.— Sarle *v.* Arnold, 7 R. I. 582.

South Carolina.— Wade *v.* Colvert, 2 Mill 27, 12 Am. Dec. 652.

Texas.— Green *v.* Banks, 24 Tex. 522; Reynolds *v.* Lansford, 16 Tex. 286.

Vermont.— See Amsden *v.* Fitch, 67 Vt. 522, 32 Atl. 478.

West Virginia.— Reilly *v.* Barr, 34 W. Va. 95 11 S. E. 750.

Wisconsin.— Bigelow *v.* Doolittle, 36 Wis. 115.

United States.— Sexton *v.* Wheaton, 8 Wheat. 229, 5 L. ed. 603.

England.— See Twyne's Case, 3 Coke 80*a*, 1 Smith Lead. Cas. 1.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 20; and *infra*, VII, B, 3, b, (IV), (V).

20. Preston *v.* Griffin, 1 Conn. 393.

21. Comstock *v.* Rayford, 12 Sm. & M. (Miss.) 369; Loeschigk *v.* Addison, 19 Abb. Pr. (N. Y.) 169; Hart *v.* Sandy, 39 W. Va. 644, 20 S. E. 665; Twyne's Case, 3 Coke 80*a*, 1 Smith Lead. Cas. 1. But *compare* Kane *v.* Drake, 27 Ind. 29; and Forsyth *v.* Matthews, 14 Pa. St. 100, 53 Am. Dec. 522, both referred to *supra*, page 441 note 77.

22. *Iowa.*— Glenn *v.* Glenn, 17 Iowa 498.

Kentucky.— Behan *v.* Warfield, 90 Ky. 151, 13 S. W. 439, 11 Ky. L. Rep. 960.

Missouri.—See Leeper *v.* Bates, 85 Mo. 224; Goldshy *v.* Johnson, 82 Mo. 602; Henderson *v.* Henderson, 55 Mo. 534.

North Carolina.— Helms *v.* Green, 105 N. C. 251, 11 S. E. 470, 18 Am. St. Rep. 893.

Tennessee.— Shapira *v.* Paletz, (Ch. App. 1900) 59 S. W. 774.

West Virginia.— Knight *v.* Capito, 23 W. Va. 639.

Wisconsin.— Mace *v.* Roberts, 97 Wis. 199, 72 N. W. 866.

Wyoming.— Stirling *v.* Wagner, 4 Wyo. 5, 31 Pac. 1032, 32 Pac. 1128.

See Evidence, 16 Cyc. 1059–1064.

23. *Alabama.*— Teague *v.* Bass, 131 Ala. 422, 31 So. 4; Marshall *v.* Croom, 52 Ala. 554; Moog *v.* Benedicks, 49 Ala. 512.

Arkansas.— Ringgold *v.* Waggoner, 14 Ark. 69.

California.— Daugherty *v.* Daugherty, 104 Cal. 221, 37 Pac. 889.

Georgia.— Ross *v.* Cooley, 113 Ga. 1047, 39 S. E. 471; Peck *v.* Land, 2 Ga. 1, 46 Am. Dec. 368.

Iowa.— Glenn *v.* Glenn, 17 Iowa 498.

Kentucky.— Behan *v.* Warfield, 90 Ky. 151, 13 S. W. 439, 11 Ky. L. Rep. 960; Herrin *v.* Morford, 9 Dana 450.

Louisiana.— See Goothye *v.* De Latour, 111 La. 766, 35 So. 896.

Maine.— Hartshorn *v.* Eames, 31 Me. 93.

Maryland.— Thompson *v.* Williams, 100 Md. 195, 60 Atl. 26.

New York.—Amsterdam First Nat. Bank *v.* Miller, 163 N. Y. 164, 57 N. E. 308; St. John Woodworking Co. *v.* Smith, 82 N. Y. App. Div. 348, 82 N. Y. Suppl. 1025 [*affirmed* in 178 N. Y. 629, 71 N. E. 1139].

North Carolina.— Darden *v.* Skinner, 4 N. C. 259.

Pennsylvania.— Avery *v.* Street, 6 Watts 247.

Virginia.— Hickman *v.* Trout, 83 Va. 478, 3 S. E. 131.

England.— Twyne's Case, 3 Coke 80*a*, 1 Smith Lead. Cas. 1.

Canada.— Waddle *v.* McGinty, 15 Grant Ch. (U. C.) 261.

See *infra*, IX.

Retention of management by husband after conveyance to wife.— That a husband who was financially embarrassed, after a transfer of lots to his wife in satisfaction of a debt due her, had retained management of them, is not a badge of fraud, nor does it show that the conveyance was merely colorable, where the wife knew nothing concerning the business of selling lots. Dresser *v.* Zabriskie, (N. J. Ch. 1898) 39 Atl. 1066.

12. Reservation For Grantor. The reservation of a trust or benefit for the grantor is generally a badge of fraud.[24]

13. Relationship of Parties. While transactions between relatives are subject to rigid scrutiny, and the fact of relationship is to be considered as to the intent with which a transfer was made, and may even shift the burden of proof, yet relationship, it has been held, is not of itself a badge of fraud.[25]

14. Other Circumstances. The fact that the transaction took place out of business hours or otherwise not in the usual course of business or not in the usual mode,[26]

24. *Maine.*— Hapgood *v.* Fisher, 34 Me. 407, 56 Am. Dec. 663.
Massachusetts.— Pacific Nat. Bank *v.* Windram, 133 Mass. 175.
New Hampshire.— Drew *v.* Rust, 36 N. H. 335.
New York.— Young *v.* Heermans, 66 N. Y. 374.
England.— Twyne's Case, 3 Coke 80*a*, 1 Smith Lead. Cas. 1.
See *infra*, X.

25. *Alabama.*—Moog *v.* Farley, 79 Ala. 246.
Kentucky.— Williams *v.* Tye, 42 S. W. 90, 19 Ky. L. Rep. 818.
Missouri— Martin *v.* Fox, 40 Mo. App. 664.
Virginia.— Hickman *v.* Trout, 83 Va. 478, 3 S. E. 131.
Wisconsin.— Missinskie *v.* McMurdo, 107 Wis. 578, 83 N. W. 758.
United States.— Vansickle *v.* Wells, 105 Fed. 16.
See *infra*, XII.

26. *Alabama.*—Hodges *v.* Coleman, 76 Ala. 103, sale of stock of goods at night.
Georgia.— Hoffer *v.* Gladden, 75 Ga. 532, sale or mortgage of entire property in unusual mode.
Louisiana.— Emswiler *v.* Burham, 6 La. Ann. 710, transfer by insolvent debtor of all his real and personal property. *Compare* Lowenstein *v.* Fudickar, 43 La. Ann. 886, 9 So. 742, holding that a sale made to one not a creditor must be considered as one in the ordinary course of business, if made for an adequate consideration, and paid in cash or its equivalent; and that the fact that a portion of the purchase-price was subsequently applied to the discharge of the vendor's debt will not vitiate the sale as an onerous contract.
Massachusetts.— Killam *v.* Pierce, 153 Mass. 502, 27 N. E. 520, holding under the Massachusetts statute (*infra*, this note) that where an insolvent debtor sold his stock of goods late at night, taking notes in payment, and soon after the sale indorsed the notes to defendants' agent in payment of his indebtedness to them, part of this indebtedness consisting of accounts not yet due, and it appeared that he had never before paid defendants before their accounts were due, and had always paid by cash, the court would have been warranted in finding as a fact that the payment was not made in the regular course of business, and it should not have been held, as a matter of law, to have been in the regular course of business.
Michigan.— Bendetson *v.* Moody, 100 Mich. 553, 59 N. W. 252, sale of stock of goods at night.
Missouri.— State *v.* Merritt, 70 Mo. 275.
New York.— Wick *v.* Kunzeman, 30 Misc. 457, 62 N. Y. Suppl. 537, sale of stock of merchandise by an employer to employee, who was without apparent means, at midnight for one thousand four hundred dollars.
Rhode Island.— Tillinghast *v.* Champlin, 4 R. I. 173, 67 Am. Dec. 510, conveyance made and purchase-money paid secretly and at night, the vendor absconding on the same night.
Vermont.— Read *v.* Moody, 60 Vt. 668, 15 Atl. 345, holding that where defendant's son called on him at an early hour in the morning and handed him certain notes, without any explanation or direction as to their use, simply saying that he had sold out and was going away, the transfer was not in the usual course of business and was therefore presumptively fraudulent.
United States.— Walbrun *v.* Babbitt, 16 Wall. 577, 21 L. ed. 489 (sudden sale by country merchant of entire stock); Foster *v.* McAlester, 114 Fed. 145, 52 C. C. A. 107; Judson *v.* Courier Co., 15 Fed. 541; Nisbet *v.* Quinn, 7 Fed. 760 (sales amounting to one thousand one hundred dollars, one thousand nine hundred dollars, and two thousand two hundred dollars, made in one week to three persons by a retail dealer who owed eleven thousand dollars, and whose stock consisted of merchandise worth eight thousand dollars, and whose sales in the usual course of business amounted to one thousand one hundred dollars per month).
Canada.— Upper Canada Bank *v.* Beatty, 9 Grant Ch. 321, conveyance executed at night.
See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 34.
Compare Reeves *v.* John, 95 Tenn. 434, 32 S. W. 312, holding that the fact that a deed of trust of a stock of merchandise was executed in the night, and registered at an unusual hour, at the time when the debtor was being pressed by creditors, and for the purpose of preferring certain creditors, did not render it fraudulent where it was shown that the debts secured were *bona fide*, and that possession was to be immediately taken by the trustee.
Secrecy or haste see *supra*, V, B, 5.
Transfer of all debtor's property see *supra*, V, B, 8.
By express statutory provision in some states, if a sale, assignment, transfer, or conveyance is not made in the usual and ordinary course of business of the debtor, that fact is *prima facie* evidence of fraud. Bliss *v.* Crosier, 159 Mass. 498, 34 N. E. 1075; Killam *v.* Pierce, 153 Mass. 520, 27 N. E.

the failure of the purchaser of goods to examine them,[27] the failure to take an inventory of the goods bought,[28] misdescription or insufficient description of the property transferred,[29] a demand that two thirds of the price should be at once paid in cash,[30] payment by check which was afterward taken up by giving money and a note,[31] the fact that the purchaser offered soon after to resell the property bought at a much less price,[32] the fact that the notes given are made payable to a relative of the grantor who lives in a distant state,[33] the fact that but little, if any, of the property transferred had been assessed for taxes against the vendees,[34] the fact that the grantee was the grantor's mother and a non-resident,[35] concealment of an alteration in the attestation of the conveyance,[36] the fact that the conveyance was so made as to concentrate the property in the debtor's two sons-in-law who had no use for the property, and never applied it to their personal use,[37] the fact that notes had not been actually executed at the time of the making of a mortgage to secure them, but were made subsequently so as to correspond with the mortgage,[38] the fact that the grantor in a conveyance delivers the same to the recorder for the purpose of having such deed recorded,[39] or the fact that a grantor keeps his other property inaccessible to his creditors[40] has each been held a circumstance indicating fraud. On the other hand an agreement between a creditor

520; Read *v.* Moody, 60 Vt. 668, 15 Atl. 345. Under such a statute it must appear that the transaction was not according to the usual and ordinary course of business of the particular person whose conveyance is in question, and not that such transactions are unusual in the general conduct of business throughout the community. Bliss *v.* Crosier, *supra*; Nary *v.* Merrill, 8 Allen (Mass.) 451.

The former federal bankruptcy act declared *prima facie* fraudulent sales, assignments, transfers, or conveyances not made in the usual and ordinary course of business of the debtor, and there are many decisions construing and applying such provision. See Ecker *v.* McAllister, 45 Md. 290, 54 Md. 362; Otis *v.* Hadley, 112 Mass. 100; Walbrun *v.* Babbitt, 16 Wall. (U. S.) 577, 21 L. ed. 489 [*affirming* 2 Fed. Cas. No. 694, 1 Dill. 19]; Judson *v.* Courier Co., 15 Fed. 541; Nisbet *v.* Quinn, 7 Fed. 760; Norton *v.* Billings, 4 Fed. 623; Brooks *v.* Davis, 4 Fed. Cas. No. 1,950; Davis *v.* Armstrong, 7 Fed. Cas. No. 3,624; Graham *v.* Stark, 10 Fed. Cas. No. 5,676, 3 Ben. 520; *In re* Hunt, 12 Fed. Cas. No. 6,881; Hurley *v.* Smith, 12 Fed. Cas. No. 6,920, 1 Hask. 308; Judson *v.* Kelty, 14 Fed. Cas. No. 7,567, 5 Ben. 348; *In re* Kahley, 14 Fed. Cas. No. 7,593, 2 Biss. 383; Main *v.* Glen, 16 Fed. Cas. No. 8,973, 7 Biss. 86; Moore *v.* Young, 17 Fed. Cas. No. 9,782, 4 Biss. 128; North *v.* House, 18 Fed. Cas. No. 10,310; Rison *v.* Knapp, 20 Fed. Cas. No. 11,861, 1 Dill. 187; Schrenkeisen *v.* Miller, 21 Fed. Cas. No. 12,480, 9 Ben. 55; Webb *v.* Sachs, 29 Fed. Cas. No. 17,325, 4 Sawy. 158; Wilson *v.* Stoddard, 30 Fed. Cas. No. 17,838.

See 6 Cent. Dig. tit. "Bankruptcy," § 264.

Law or fact.— Whether a transaction was in the usual and ordinary course of business may be a question of law under some circumstances (Nary *v.* Merrill, 8 Allen (Mass.) 451; Walbrun *v.* Babbitt, 16 Wall. (U. S.) 577, 21 L. ed. 489), but it is usually a question of fact (Bliss *v.* Crosier, 159 Mass. 498, 34 N. E. 1075; Leighton *v.* Morrill, 159 Mass. 271, 34 N. E. 256; Killam *v.* Pierce, 153 Mass. 502, 27 N. E. 520; Peabody *v.* Knapp, 153 Mass. 242, 26 N. E. 696; Bridges *v.* Miles, 152 Mass. 249, 25 N. E. 249; Stevens *v.* Pierce, 147 Mass. 510, 18 N. E. 411; Buffum *v.* Jones, 144 Mass. 29, 10 N. E. 471; Alden *v.* Marsh, 97 Mass. 160; Nary *v.* Merrill, 8 Allen (Mass.) 451; State *v.* Merritt, 70 Mo. 275.

27. Schaungut *v.* Udell, 93 Ala. 302, 9 So. 550.

28. Adler-Goldman Commission Co. *v.* Hathcock, 55 Ark. 579, 18 S. W. 1048. See also Chamberlain *v.* Dorrance, 69 Ala. 40; J. S. Brittain Dry Goods Co. *v.* Plowman, 113 Iowa 624, 85 N. W. 810; St. Louis Brewing Assoc. *v.* Steimke, 68 Mo. App. 52; Blum *v.* Simpson, 66 Tex. 84, 17 S. W. 402. But see Nelson *v.* Smith, 28 Ill. 495.

29. Rodenberg *v.* H. B. Claflin Co., 104 Ala. 560, 16 So. 448 (bill of sale); H. B. Claflin & Co. *v.* Rodenberg, 101 Ala. 213, 13 So. 272; Duvall *v.* Waters, 1 Bland (Md.) 569, 18 Am. Dec. 350 (conveyance of land, plantation utensils, furniture, etc.); Lang *v.* Lee, 3 Rand. (Va.) 410. But *compare* McCain *v.* Wood, 4 Ala. 258; Carr *v.* Brigg, 156 Mass. 78, 30 N. E. 470; Judge *v.* Houston, 34 N. C. 108; Jones *v.* Sleeper, 13 Fed. Cas. No. 7,496.

30. Adler-Goldman Commission Co. *v.* Hathcock, 55 Ark. 579, 18 S. W. 1048.

31. Schaungut *v.* Udell, 93 Ala. 302, 9 So. 550.

32. Hodges *v.* Coleman, 76 Ala. 103.

33. Blum *v.* Simpson, 66 Tex. 84, 17 S. W. 402.

34. Glenn *v.* Glenn, 17 Iowa 498.

35. Behan *v.* Warfield, 90 Ky. 151, 13 S. W. 439, 11 Ky. L. Rep. 960.

36. Hoffer *v.* Gladden, 75 Ga. 532.

37. Herrin *v.* Morford, 9 Dana (Ky.) 450.

38. Prior *v.* White, 12 Ill. 261.

39. Ward *v.* Wehman, 27 Iowa 279. *Compare* Mason *v.* Franklin, 58 Iowa 506, 12 N. W. 554.

40. Cohen *v.* Parish, 100 Ga. 335, 28 S. E. 122.

and a debtor that the latter will give a mortgage when demanded, to secure his indebtedness,[41] or the fact that an attorney who thinks he knows the title, having confidence in the vendor, purchases without an abstract or examination of title of real property,[42] does not indicate fraud. The mere fact that a creditor who has been secured or paid by a legitimate transfer of property requires that he be fully reimbursed for all expenses and advances incident to the transfer as a condition of selling such property long afterward to another creditor in no degree tends to indicate the existence of a fraudulent intent in the original transaction.[43] The employment of the vendor on a salary is not necessarily evidence of fraud in a transfer.[44]

C. Repelling Badges of Fraud. Badges of fraud are repelled by showing that a full consideration was paid for the property, but the proof of fairness would be more stringent than if such badges of fraud did not exist.[45] Where numerous signs or badges of fraud exist it is incumbent on the party seeking to uphold the transfer to meet and overcome them.[46]

VI. FINANCIAL CONDITION OF GRANTOR.

A. Grantor Indebted But Not Insolvent — 1. As Preventing Conveyance For Valuable Consideration. The mere fact that a grantor is indebted does not preclude him from conveying his property for a valuable consideration, and where there is no intent to defraud the conveyance cannot be set aside by his creditors.[47]

2. As Preventing Voluntary Conveyance. In most of the states mere indebtedness, not amounting to insolvency on the part of the transferrer, will not of itself make a voluntary conveyance fraudulent as to creditors,[48] although the existence of such indebtedness is evidence of fraud.[49] If the gift is of such an amount or

41. Foster *v.* McAlester, 114 Fed. 145, 52 C. C. A. 107. See also Groetzinger *v.* Wyman, 105 Iowa 574, 75 N. W. 512.

42. Jenkins *v.* Einstein, 14 Fed. Cas. No. 7,265, 3 Biss. 128.

43. O'Connor *v.* Docen, 50 N. Y. App. Div. 610, 64 N. Y. Suppl. 206.

44. McKenzie *v.* Thomas, 118 Ga. 728, 45 S. E. 610; Blakely Printing Co. *v.* Pease, 95 Ill. App. 341. See also Reed *v.* Wilson, 22 Ill. 377, 74 Am. Dec. 159; Brown *v.* Riley, 22 Ill. 45; Pease *v.* Dawson, 97 Ill. App. 620; McCord *v.* Gilbert, 64 Ill. App. 233; Jones *v.* Whitbread, 11 C. B. 406, 15 Jur. 612, 20 L. J. C. P. 217, 73 E. C. L. 406.

Employment of vendor's clerk.— Whether the vendee's employment of a clerk of the vendor is a badge of fraud depends upon the circumstances of the case. Ivancovich *v.* Stern, 14 Nev. 341. See also Faunce *v.* Lesley, 6 Pa. St. 121.

45. Terrell *v.* Green, 11 Ala. 207. See also Shealy *v.* Edwards, 75 Ala. 411. See *infra*, XIV, K, 1, 3.

46. Trice *v.* Rose, 79 Ga. 75, 3 S. E. 701. See *infra*, XIV, K, 1, 3.

47. *Illinois.*— Miller *v.* Kirby, 74 Ill. 242; Hessing *v.* McCloskey, 37 Ill. 341; Nelson *v.* Smith, 28 Ill. 495; Waddams *v.* Humphrey, 22 Ill. 661.

Maryland.— Faringer *v.* Ramsay, 4 Md. Ch. 33.

Massachusetts.— Kimball *v.* Thompson, 4 Cush. 441, 50 Am. Dec. 799.

Missouri.— See Missouri Lead Min., etc., Co. *v.* Reinhard, 114 Mo. 218, 21 S. W. 488, 35 Am. St. Rep. 746, holding that the sale of the property of one corporation to another is not fraudulent merely because the payment of one contested claim was not provided for.

Nebraska.— Davis *v.* Getchell, 32 Nebr. 792, 49 N. W. 776.

South Carolina.— Ingram *v.* Phillips, 5 Strobh. 200.

Texas.— Willis *v.* Whitsitt, 67 Tex. 673, 4 S. W. 253.

England.— Arundell *v.* Phipps, 10 Ves. Jr. 139, 32 Eng. Reprint 797, holding that a purchase by a married woman from her husband, through the medium of trustees, for her separate use and appointment, may be sustained against creditors, if *bona fide*, although the husband is indebted at the time; and even though the object is to preserve from his creditors for the family the subject of the purchase, such as ancient family pictures, furniture, and other articles, of a peculiar nature and value.

A conveyance by husband to wife to replace her money or property used or alienated by him is within the rule. Lehman *v.* Levy, 30 La. Ann. 745. See also Hume, etc., Co. *v.* Condon, 44 W. Va. 553, 30 S. E. 56.

48. This is only another way of saying that a voluntary deed is not necessarily void as to existing creditors. See *infra*, VIII, D, 2.

49. *Indiana.*— Geisendorff *v.* Eagles, 106 Ind. 38, 5 N. E. 743; Hubbs *v.* Bancroft, 4 Ind. 388.

Maine.— French *v.* Holmes, 67 Me. 186.

made under such circumstances, taking into account all existing conditions, that it must necessarily hinder, delay, or defraud the donor's creditors, the conveyance is fraudulent notwithstanding the fraudulent intent is not otherwise shown.[50] So if the grantor is indebted to an extent which might in view of ordinary contingencies endanger the rights of his creditors, the deed will be deemed fraudulent on his subsequently becoming insolvent.[51] On the other hand if the amount of the indebtedness is small as compared with the assets of the grantor, so that the property retained is amply sufficient to pay the existing creditors, the conveyance will not be set aside, in the absence of an actual intent to defraud.[52]

3. What Constitutes Indebtedness — a. Contingent Liability. A person who is bound by a contract upon which he may become liable for the payment of money is indebted, although his liability is contingent,[53] as in the case of the indorser of a note,[54] or a surety,[55] or a guarantor;[56] but such liability at the time of the conveyance should not be counted as indebtedness where it is afterward paid by the party primarily liable.[57] *A fortiori* a grantor is indebted after a

Maryland.— Worthington *v.* Bullitt, 6 Md. 172.

Mississippi.— Edmonson *v.* Meacham, 50 Miss. 34.

Missouri.— Woodson *v.* Pool, 19 Mo. 340; Hastings *v.* Crossland, 13 Mo. App. 592.

South Carolina.— Gruber *v.* Boyles, 1 Brev. 266, 2 Am. Dec. 665.

Texas.— Reynolds *v.* Lansford, 16 Tex. 286.

West Virginia.— Hume, etc., Co. *v.* Condon, 44 W. Va. 553, 30 S. E. 56.

United States.—Hudgins *v.* Kemp, 20 How. 45, 15 L. ed. 853.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 128.

Prima facie fraudulent.— A voluntary gift made when the donor is in debt is *prima facie* fraudulent.

Maryland.— Goodman *v.* Wineland, 61 Md. 449.

Missouri.— Patten *v.* Casey, 57 Mo. 118.

New York.— Smith *v.* Reid, 134 N. Y. 568, 31 N. E. 1082.

Virginia.— Wilson *v.* Buchanan, 7 Gratt. 334.

United States.— Gilmore *v.* North American Land Co., 10 Fed. Cas. No. 5,448, Pet. C. C. 460.

England.— See Scarf *v.* Soulby, 1 Hall & T. 426, 13 Jur. 1109, 19 L. J. Ch. 30, 1 Macn. & G. 364, 47 Eng. Ch. 293, 41 Eng. Reprint 1306.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 128.

50. Whitehouse *v.* Bolster, 95 Me. 458, 50 Atl. 240; Gardiner Sav. Inst. *v.* Emerson, 91 Me. 535, 40 Atl. 551; Williams *v.* Banks, 11 Md. 198; Baxter *v.* Sewell, 3 Md. 334; Worthington *v.* Shipley, 5 Gill (Md.) 449; Sewell *v.* Baxter, 2 Md. Ch. 447; Atkinson *v.* Phillips, 1 Md. Ch. 507; Wickes *v.* Clarke, 3 Edw. (N. Y.) 58. See Loeschigk *v.* Hatfield, 5 Rob. (N. Y.) 26, holding that proof of large indebtedness is insufficient in absence of showing of inability to discharge it.

51. Lowry *v.* Fisher, 2 Bush (Ky.) 70, 92 Am. Dec. 475; Parkman *v.* Welch, 19 Pick. (Mass.) 231. See also *infra*, VI, B, 4.

The amount of indebtedness which will raise a presumption that a voluntary gift was made to defraud creditors is such an indebtedness as produces embarrassment and approaches insolvency, i. e., a state of indebtedness which, if any calamitous acts should happen to the property or any fall in the price of it should take place, would probably leave the donor without the means of paying his creditors. Wilson *v.* Buchanan, 7 Gratt. (Va.) 334.

Must have direct tendency to impair rights of creditors.— Patrick *v.* Patrick, 77 Ill. 555; Lloyd *v.* Fulton, 91 U. S. 479, 23 L. ed. 363. See Brice *v.* Myers, 5 Ohio 121.

A voluntary post-nuptial settlement is not fraudulent if it is not disproportionate to the husband's means, taking into view his debts and situation, and if it is clear of any intent, actual or constructive, to defraud creditors. Kehr *v.* Smith, 20 Wall. (U. S.) 31, 22 L. ed. 313.

52. See *infra*, VI, B, 3.

53. Jones *v.* Leeds, 10 Ohio S. & C. Pl. Dec. 173, 7 Ohio N. P. 480.

54. Pulsifer *v.* Waterman, 73 Me. 233; Thacher *v.* Jones, 31 Me. 528; Jones *v.* Leeds, 10 Ohio S. & C. Pl. Dec. 173, 7 Ohio N. P. 480; Farmers' Nat. Bank *v.* Thomson, 74 Vt. 442, 52 Atl. 961, also holding that it was immaterial that the maker of the note was considered financially responsible when the conveyance was executed.

Accommodation indorser.— Primrose *v.* Browning, 56 Ga. 369; Williams *v.* Banks, 11 Md. 198; Post *v.* Stiger, 29 N. J. Eq. 554; Cook *v.* Johnson, 12 N. J. Eq. 51, 72 Am. Dec. 381.

55. Bowen *v.* State, 121 Ind. 235, 23 N. E. 75; Carlisle *v.* Rich, 8 N. H. 44; Jones *v.* Leeds, 10 Ohio S. & C. Pl. Dec. 173, 7 Ohio N. P. 480; Russell *v.* Stinson, 3 Hayw. (Tenn.) 7. See *In re* Appeal Surety, 5 Ohio S. & C. Pl. Dec. 571, 7 Ohio N. P. 668, appeal-bond. *Contra*, see Fales *v.* Thompson, 1 Mass. 134.

56. Jackson *v.* Seward, 5 Cow. (N. Y.) 67; *In re* Ridler, 22 Ch. D. 74, 52 L. J. Ch. 343, 48 L. T. Rep. N. S. 396, 31 Wkly. Rep. 93 [*distinguishing* Price *v.* Jenkins, 5 Ch. D. 619].

57. Ayers *v.* Harrell, 111 Ga. 864, 36 S. E. 946.

breach of the condition of a bond on which he is surety.[58] A cause of action for damages for fraud is not a debt, at least before suit brought.[59]

b. Secured Debts. If the indebtedness is sufficiently secured, it should not be taken into consideration.[60] So where the debt is a lien on the property conveyed, there is no such indebtedness as will invalidate the conveyance.[61]

4. Payment of Indebtedness. The existence of indebtedness at the time of the conveyance is usually immaterial where it is afterward paid by the grantor,[62] and the fact that the conveyance itself provides for the payment of the grantor's debts is at least evidence to repel the idea of fraud;[63] but the payment of particular debts does not rebut the inference of fraud where the indebtedness is a continuing one, and the amount remains practically the same.[64]

5. Agreement by Grantee to Pay Indebtedness. An agreement by the grantee to pay a part,[65] or all, of the debts of the grantor, does not of itself preclude the right of creditors to attack the conveyance as fraudulent, where their claims are not in fact paid.[66]

B. Grantor Insolvent — 1. As Preventing Transfer For Valuable Consideration. A debtor is not deprived of his right to sell, for a valuable consideration, a part or all of his property, merely because he is financially embarrassed or insolvent, even though such sale may hinder or delay creditors. The fact that the grantor is insolvent at the time he executes the conveyance is not of itself a ground for setting aside the conveyance.[67] Such a conveyance is not fraudulent

58. Bay *v.* Cook, 31 Ill. 336. See Sharp *v.* Hicks, 94 Ga. 624, 21 S. E. 208.

The surety on an appeal-bond is considered indebted where judgment has been rendered against the appellant. Kerber *v.* Ruff, 4 Ohio S. & C. Pl. Dec. 406, 3 Ohio N. P. 165, See *In re* Appeal Surety, 5 Ohio S. & C. Pl. Dec. 571, 7 Ohio N. P. 668.

59. Sanders *v.* Logue, 88 Tenn. 355, 12 S. W. 722.

60. Polk County Nat. Bank *v.* Scott, 132 Fed. 897, 66 C. C. A. 51; Reade *v.* Livingston, 3 Johns. Ch. (N. Y.) 481, 8 Am. Dec. 520; Lockhard *v.* Beckley, 10 W. Va. 87.

61. Van Wyck *v.* Seward, 6 Paige (N. Y.) 62 (holding it immaterial, where the land conveyed was sufficient to satisfy the debt, that it was afterward sold by the creditor and bought in by him at a nominal price, so that the grantor was liable for the deficiency); Nippes' Appeal, 75 Pa. St. 472; Williams *v.* Davis, 69 Pa. St. 21. See Matter of Babcock, 12 N. Y. St. 841. But see Powell *v.* Westmoreland, 60 Ga. 572.

62. *Illinois.*— Songer *v.* Partridge, 107 Ill. 529; Parker *v.* Tiffany, 52 Ill. 286.

Louisiana.— Copelly *v.* Deverges, 11 Mart. 641.

New Jersey.— Claflin *v.* Mess, 30 N. J. Eq. 211.

New York.— Ocean Nat. Bank *v.* Hodges, 9 Hun 161; Dygert *v.* Remerschneider, 39 Barb. 417.

North Carolina.—Smith *v.* Reavis, 29 N. C. 341.

South Carolina.— Ingrem *v.* Phillips, 3 Strobh. 565; Hudnal *v.* Wilder, 4 McCord 294, 17 Am. Dec. 744, holding, however, that if no change of property was actually intended, but the property was to revert on payment of the debts, such payment will not effect the rights of a subsequent purchaser.

Tennessee.— Spence *v.* Dunlap, 6 Lea 457; Levering *v.* Norvell, 9 Baxt. 176, holding, however, the contrary as to part payment.

Texas.— See Sanger *v.* Colbert, 84 Tex. 668, 19 S. W. 863.

Wisconsin.— See Wheeler *v.* Single, 62 Wis. 380, 22 N. W. 569.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 136.

Payment is evidence as to the intent of the grantor in making the conveyance. Winchester *v.* Charter, 97 Mass. 140.

63. Dygert *v.* Remerschneider, 39 Barb. (N. Y.) 417; Reade *v.* Livingston, 3 Johns. Ch. (N. Y.) 481, 8 Am. Dec. 520; Vance *v.* Smith, 2 Heisk. (Tenn.) 343. See Hester *v.* Wilkinson, 6 Humphr. (Tenn.) 215, 44 Am. Dec. 303.

64. Rights of subsequent creditors whose moneys have been used by debtor to pay off prior indebtedness see *supra*, IV, C, 3.

65. Bassett *v.* McKenna, 52 Conn. 437. See Jacobi *v.* Schloss, 7 Coldw. (Tenn.) 385. *Compare* Thomas *v.* Goodwin, 12 Mass. 140.

66. Drum *v.* Painter, 27 Pa. St. 148.

Assumption of liability for debts as consideration for conveyance see *infra*, VIII, A, 8.

67. *Alabama.*— Eufaula Grocery Co. *v.* Petty, 116 Ala. 260, 22 So. 505; Lienkauf *v.* Morris, 66 Ala. 406; Harkins *v.* Bailey, 48 Ala. 376.

Arkansas.— Dardenne *v.* Hardwick, 9 Ark. 482.

Florida.— Ballard *v.* Eckman, 20 Fla. 661.

Georgia.— Thornton *v.* Lane, 11 Ga. 459.

Illinois.— Wightman *v.* Hart, 37 Ill. 123; Holbrook *v.* First Nat. Bank, 10 Ill. App. 140.

Indiana.— Evans *v.* Pence, 78 Ind. 439; Wooters *v.* Osborn, 77 Ind. 513; Frank *v.* Peters, 9 Ind. 343.

unless there is a fraudulent intent which is common to both seller and purchaser.[68] But insolvency of the grantor is evidence of fraud,[69] especially where the sale is of all his property.[70]

2. As Preventing Voluntary Conveyance. Insolvency of the grantor at the time of his conveyance renders it fraudulent as against existing creditors, where the conveyance is not based on a valuable consideration,[71] and the grantor is insolvent, within this rule, where he does not retain property sufficient to pay his debts.[72]

Iowa.— Connolly *v.* Dillrance, 50 Iowa 92.
Kentucky.— Ward *v.* Trotter, 3 T. B. Mon. 1.
Louisiana.— Pecot *v.* Armelin, 21 La. Ann. 667; Whiting *v.* Prentice, 12 Rob. 141; Barrett *v.* His Creditors, 4 Rob. 408; Dwight *v.* Bemiss, 16 La. 145; Wright *v.* His Creditors, 12 La. 308; Bauduc *v.* His Creditors, 4 La. 247.
Maine.—Stevens *v.* Robinson, 72 Me. 381.
Minnesota.— See Wolford *v.* Farnham, 47 Minn. 95, 49 N. W. 528.
Missouri.—State *v.* Merritt, 70 Mo. 275; Mears *v.* Gaga, (App. 1904) 80 S. W. 712.
Nebraska.— Crites *v.* Hart, 49 Nebr. 53, 68 N. W. 362; Rothell *v.* Grimes, 22 Nebr. 526, 35 N. W. 392; Joiner *v.* Van Alstyne, 22 Nebr. 172, 34 N. W. 366; Leffel *v.* Schermerhorn, 13 Nebr. 342, 14 N. W. 418.
New York.— Fuller Electrical Co. *v.* Lewis, 101 N. Y. 674, 5 N. E. 437; Loeschigk *v.* Bridge, 42 N. Y. 421.
Ohio.—Sigler *v.* Knox County Bank, 8 Ohio St. 511.
Wisconsin.— Hage *v.* Campbell, 78 Wis. 572, 47 N. W. 179, 23 Am. St. Rep. 422.
See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 138.
Sales on long credit and without security are within the rule. Greensboro Nat. Bank *v.* Gilmer, 116 N. C. 684, 22 S. E. 2; Beasley *v.* Bray, 98 N. C. 266, 3 S. E. 497. *Compare supra*, V, B, 6.
Leases are within the rule. Stanley *v.* Robbins, 36 Vt. 422.
68. See *infra*, VII.
69. *Alabama.*— Harkins *v.* Bailey, 48 Ala. 376; Beeson *v.* Wiley, 28 Ala. 575.
Colorado.— Sutton *v.* Dana, 15 Colo. 98, 25 Pac. 90.
Illinois.— Beach *v.* Miller, 130 Ill. 162, 22 N. E. 464, 17 Am. St. Rep. 291.
Iowa.— Henny Buggy Co. *v.* Patt, 73 Iowa 485, 35 N. W. 587.
Maryland.— Worthington *v.* Shipley, 5 Gill 449.
Minnesota.— Wolford *v.* Farnham, 47 Minn. 95, 49 N. W. 258; Mower *v.* Hanford, 6 Minn. 535.
North Carolina.— Holmes *v.* Marshall, 78 N. C. 262.
Badge of fraud see *supra*, V, B, 7.
Matters to be considered.— The relations of the parties to each other, the price agreed to be paid, the credit given, and other circumstances of a suspicious character are to be considered. Greensboro Nat. Bank *v.* Gilmer, 116 N. C. 684, 22 S. E. 2; Loeschigk *v.* Bridge, 42 N. Y. 421.
70. Dodson *v.* Cooper, 50 Kan. 680, 32 Pac. 370; Clark *v.* Wise, 57 Barb. (N. Y.) 416, 39 How. Pr. 97. See also *supra*, V, B, 8.
71. *Arkansas.*— Sumpter *v.* Arkansas Nat. Bank, 69 Ark. 224, 62 S. W. 577.
California.— Swartz *v.* Hazlett, 8 Cal. 118.
Delaware.— Dulany *v.* Green, 4 Harr. 285.
Florida.— Craig *v.* Gamble, 5 Fla. 430.
Georgia.— Cothran *v.* Forsyth, 68 Ga. 560.
Illinois.— Houston *v.* Maddux, 179 Ill. 377, 53 N. E. 599; Koster *v.* Hiller, 4 Ill. App. 21.
Kentucky.— Lowry *v.* Fisher, 2 Bush 70, 92 Am. Dec. 475; Sievers *v.* Martin, 82 S. W. 631, 26 Ky. L. Rep. 904.
Maryland.— Baxter *v.* Sewell, 3 Md. 334.
Massachusetts.— Matthews *v.* Thompson, 186 Mass. 14, 71 N. E. 93, 104 Am. St. Rep. 550, 66 L. R. A. 421, holding that where an insolvent husband gives practically all his property to his wife with power to sell and to pay such debts of the husband as seems judicious to her, the transfer is fraudulent, although the motive of the husband was innocent.
Missouri.— Pullis *v.* Robison, 5 Mo. App. 548.
New Jersey.— Youngs *v.* Public School Trustees, 31 N. J. Eq. 290.
New York.— Royer Wheel Co. *v.* Fielding, 31 Hun 274; Manhattan Co. *v.* Osgood, 15 Johns. 162.
Ohio.— Godell *v.* Taylor, Wright 82.
South Carolina.— Du Rant *v.* Du Rant, 36 S. C. 49, 14 S. E. 929; Ingram *v.* Phillips, 5 Strobh. 200; Wade *v.* Colvert, 2 Mill 26, 12 Am. Dec. 652.
Vermont.— Farmers' Nat. Bank *v.* Thomson, 74 Vt. 442, 52 Atl. 961.
Virginia.— Wilson *v.* Buchanan, 7 Gratt. 334.
See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 138; and *infra*, VIII, D.
Intent of grantee immaterial see *infra*, VII, B, 1, b.
72. *California.*— Burpee *v.* Bunn, 22 Cal. 194; Swartz *v.* Hazlett, 8 Cal. 118.
Colorado.— Gwynn *v.* Butler, 17 Colo. 114, 28 Pac. 466.
Connecticut.— Freeman *v.* Burnham, 36 Conn. 469.
Georgia.— Studebaker Bros. Mfg. Co. *v.* Key, 99 Ga. 144, 25 S. E. 14; Booher *v.* Worrill, 57 Ga. 235.
Illinois.— Wisconsin Granite Co. *v.* Gerrity, 144 Ill. 77, 33 N. E. 31; Marmon *v.* Harwood, 124 Ill. 104, 16 N. E. 236, 7 Am. St. Rep. 345; Bittinger *v.* Kasten, 111 Ill. 260; Bon-

3. What Constitutes Insolvency — a. In General. A person is insolvent when his property, subject to the payment of his debts, is not sufficient to pay all his debts.[73] He is solvent if he has property, encumbered, or unencumbered,[74] subject to legal process and sufficient to meet all his liabilities.[75] He is not insolvent merely because he has not money enough on hand to meet his liabilities as they fall due in the course of trade,[76] nor because he has been obliged to secure exten-

gard *v.* Block, 81 Ill. 186, 25 Am. Rep. 276; Emerson *v.* Bemis, 69 Ill. 537; Sanderson *v.* Snow, 68 Ill. App. 384; Bohn *v.* Weeks, 50 Ill. App. 236; Lytle *v.* Scott, 2 Ill. App. 646.

Indiana.— Personette *v.* Cronkhite, 140 Ind. 586, 40 N. E. 59, holding that absence of intent to defraud the particular creditor who was plaintiff was immaterial.

Iowa.— Clearfield Bank *v.* Olin, 112 Iowa 476, 84 N. W. 508; Ware *v.* Purdy, (1894) 60 N. W. 526.

Louisiana.— Queyrouze *v.* Thibodeaux, 30 La. Ann. 1114.

Maine.— Jose *v.* Hewett, 50 Me. 248; Welcome *v.* Batchelder, 23 Me. 85.

Maryland.— Swan *v.* Dent, 2 Md. Ch. 111.

Minnesota.— Filley *v.* Register, 4 Minn. 391, 77 Am. Dec. 522.

Mississippi.— Edmonson *v.* Meacham, 50 Miss. 34; Vertner *v.* Humphreys, 14 Sm. & M. 130.

Missouri.— Needles *v.* Ford, 167 Mo. 495, 67 S. W. 240; Snyder *v.* Free, 114 Mo. 360, 21 S. W. 847; Oberneir *v.* Treseler, 19 Mo. App. 519.

New Hampshire.— Abbott *v.* Tenney, 18 N. H. 109. See Smith *v.* Smith, 11 N. H. 459.

New York.— Cole *v.* Tyler, 65 N. Y. 73; Multz *v.* Price, 91 N. Y. App. Div. 116, 86 N. Y. Suppl. 480; Spotten *v.* Keeler, 12 N. Y. St. 385.

North Carolina.— Worthy *v.* Brady, 91 N. C. 265; Houston *v.* Bogle, 32 N. C. 496.

Ohio.— Farmers' Nat. Bank *v.* Miller, 9 Ohio Cir. Ct. 111, 6 Ohio Cir. Dec. 1.

South Carolina.— Jackson *v.* Lewis, 34 S. C. 1, 12 S. E. 560; Richardson *v.* Rhodus, 14 Rich. 95; Ingram *v.* Phillips, 5 Strobh. 200; McElwee *v.* Sutton, 2 Bailey 128; Kirkley *v.* Blakeney, 2 Nott & M. 544.

Utah.— Ogden State Bank *v.* Barker, 12 Utah 13, 40 Pac. 765.

Vermont.— Durkee *v.* Mahoney, 1 Aik. 116.

Washington.— Klosterman *v.* Harrington, 11 Wash. 138, 39 Pac. 376; Frederick *v.* Shorey, 4 Wash. 75, 29 Pac. 766.

West Virginia.— See Reynolds *v.* Gawthrop, 37 W. Va. 3, 16 S. E. 364.

United States.— Scott *v.* Mead, 37 Fed. 865. See Newlin *v.* Garwood, 18 Fed. Cas. No. 10,172.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 140 *et seq.*

What constitutes insolvency see *infra*, VI, B, 3.

73. David Adler, etc., Clothing Co. *v.* Hellman, 55 Nebr. 266, 75 N. W. 877; Carr *v.* Summerfield, 47 W. Va. 155, 34 S. E. 804; Wolfe *v.* McGugin, 37 W. Va. 552, 16 S. E. 797; and other cases cited *supra*, note 72.

Insolvency is also defined as the inability to pay debts as they become due.

Alabama.— Smith *v.* Collins, 94 Ala. 394, 10 So. 334.

Georgia.— Cohen *v.* Parish, 100 Ga. 335, 28 S. E. 122; Brown *v.* Spivey, 53 Ga. 155.

Louisiana.— Lafleur *v.* Hardy, 11 Rob. 493.

Missouri.— Moore *v.* Carr, 65 Mo. App. 64.

Nebraska.— David Adler, etc., Clothing Co. *v.* Hellman, 55 Nebr. 266, 75 N. W. 877.

New Jersey.— Metropolis Nat. Bank *v.* Sprague, 21 N. J. Eq. 530.

Wisconsin.— See Marvin *v.* Anderson, 111 Wis. 387, 87 N. W. 226, holding that such definition is the proper one, as the term is used in insolvency and bankruptcy laws, but that its general meaning is a substantial excess of a person's liabilities over the fair cash value of his property.

United States.— Merchants Nat. Bank *v.* Cook, 95 U. S. 342, 24 L. ed. 412; Buchanan *v.* Smith, 16 Wall. 277, 21 L. ed. 280.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 140.

Evidence sufficient to show insolvency see Hayford *v.* Wallace, (Cal. 1896) 46 Pac. 301; Gonzales *v.* Adoue, (Tex. Civ. App. 1900) 56 S. W. 543. And see *infra*, XIV, K, 3, e.

74. Wooters *v.* Osborn, 77 Ind. 513. But see *infra*, VI, B, 3, b.

75. Hendon *v.* Morris, 110 Ala. 106, 20 So. 27; Jennings *v.* Howard, 80 Ind. 214; McCole *v.* Loehr, 79 Ind. 430; Sherman *v.* Hogland, 54 Ind. 578. See Davis *v.* Yonge, (Ark. 1905) 85 S. W. 90; Treacey *v.* Liggett, 9 Can. Sup. Ct. 441. But see Cohen *v.* Parish, 100 Ga. 335, 28 S. E. 122, holding that one is not insolvent where he owns property in excess of his debts, although it is not subject to execution, but in such case if there is no leviable property the conveyance is *prima facie* fraudulent.

Cash in hand is property to be counted in determining solvency. Cohen *v.* Parish, 100 Ga. 335, 28 S. E. 122.

Notes, accounts, and other evidences of debt are to be counted as property. Powell *v.* Westmoreland, 60 Ga. 572.

Concealment of property.— A debtor who has concealed his property in order to defraud his creditors is to be regarded as insolvent, although he has sufficient assets to pay his debts. Blake *v.* Sawin, 10 Allen (Mass.) 340.

76. Smith *v.* Collins, 94 Ala. 394, 10 So. 334. A person is not insolvent merely because he is unable to meet the demands of creditors in the ordinary course of business without borrowing money. Silver Valley Min. Co. *v.* North Carolina Smelting Co., 119 N. C. 417, 25 S. E. 954.

sions from his creditors.[77] He is deemed insolvent where the value of his remaining property is so near the amount of his debts that the conveyance tends to impair the creditors' power to force collection by judicial process.[78] A voluntary deed will be set aside where the grantor's solvency was contingent upon the stability of the market in the business in which he was engaged.[79]

b. Amount and Nature of Property Retained. Except in those states where a voluntary conveyance is *per se* fraudulent as to existing creditors,[80] a transfer is not fraudulent because of the financial embarrassment of the grantor if the other property retained by him is sufficient to satisfy his debts;[81] that is, if he can

77. Brandt *v.* Shamburgh, 2 Mart. N. S. (La.) 329.

78. Rose *v.* Dunklee, 12 Colo. App. 403, 56 Pac. 342.

79. Carpenter *v.* Roe, 10 N. Y. 227; Brown *v.* Case, 41 Oreg. 221, 69 Pac. 43. See Bertrand *v.* Elder, 23 Ark. 494.

80. See *infra*, VIII, D, 2.

81. *Arkansas.*—Chambers *v.* Sallie, 29 Ark. 407; Smith *v.* Yell, 8 Ark. 470.

California.—Windhaus *v.* Bootz, (1890) 25 Pac. 404; Morgan *v.* Hecker, 74 Cal. 540, 16 Pac. 317.

Connecticut.—State *v.* Martin, 77 Conn. 142, 58 Atl. 745; Graves *v.* Atwood, 52 Conn. 512, 52 Am. Rep. 610; Salmon *v.* Bennett, 1 Conn. 525, 7 Am. Dec. 237.

Florida.—Howse *v.* Judson, 1 Fla. 133.

Georgia.—Wellmaker *v.* Wellmaker, 113 Ga. 1155, 39 S. E. 475; Brown *v.* Spivey, 53 Ga. 155; Weed *v.* Davis, 25 Ga. 684.

Illinois.—Eames *v.* Dorsett, 147 Ill. 540, 35 N. E. 735; Bittinger *v.* Kasten, 111 Ill. 260; Merrell *v.* Johnson, 96 Ill. 224; Fanning *v.* Russell, 94 Ill. 386; Bridgford *v.* Riddell, 55 Ill. 261; Gridley *v.* Watson, 53 Ill. 186; Moritz *v.* Hoffman, 35 Ill. 553; Hitt *v.* Ormsbee, 12 Ill. 166; Nichols *v.* Wallace, 31 Ill. App. 408; Koster *v.* Hiller, 4 Ill. App. 21; Lytle *v.* Scott, 2 Ill. App. 646; Russell *v.* Fanning, 2 Ill. App. 632.

Indiana.—Emerson *v.* Opp, 139 Ind. 27, 38 N. E. 330; Sell *v.* Bailey, 119 Ind. 51, 21 N. E. 338; Phelps *v.* Smith, 116 Ind. 387, 17 N. E. 602, 19 N. E. 156; Eiler *v.* Crull, 112 Ind. 318, 14 N. E. 79; Bishop *v.* State, 83 Ind. 67; Noble *v.* Hines, 72 Ind. 12; Holman *v.* Elliott, 65 Ind. 78; Bentley *v.* Dunkle, 57 Ind. 374; Eagan *v.* Downing, 55 Ind. 65; McConnell *v.* Martin, 52 Ind. 434; Brookbank *v.* Kennard, 41 Ind. 339; Ewing *v.* Patterson, 35 Ind. 326.

Iowa.—Robinson *v.* Frankville First M. E. Church, 59 Iowa 717, 12 N. W. 772; Pearson *v.* Maxfield, 51 Iowa 76, 50 N. W. 77; Shepard *v.* Pratt, 32 Iowa 296; Stewart *v.* Rogers, 25 Iowa 395, 95 Am. Dec. 794.

Kansas.—Hunt *v.* Spencer, 20 Kan. 126.

Kentucky.—Enders *v.* Williams, 1 Metc. 346; Harris *v.* Harris, 10 Ky. L. Rep. 819.

Maryland.—Christopher *v.* Christopher, 64 Md. 583, 3 Atl. 296; Goodman *v.* Wineland, 61 Md. 449; Ellinger *v.* Crowl, 17 Md. 361; Williams *v.* Banks, 11 Md. 198; Baxter *v.* Sewell, 3 Md. 334. See Warner *v.* Dove, 33 Md. 579.

Massachusetts.—Bennett *v.* Bedford Bank, 11 Mass. 421.

Michigan.—Beach *v.* White, Walk. 495.

Minnesota.—Wetherill *v.* Canney, 62 Minn. 341, 64 N. W. 818; Reich *v.* Reich, 26 Minn. 97, 1 N. W. 804; Johnston *v.* Piper, 4 Minn. 192.

Mississippi.—Edmunds *v.* Mister, 58 Miss. 765; Cowen *v.* Alsop, 51 Miss. 158; Cock *v.* Oakley, 50 Miss. 628.

Missouri.—Lang *v.* Williams, 166 Mo. 1, 65 S. W. 1012; Fehlig *v.* Busch, 165 Mo. 144, 65 S. W. 542; Walsh *v.* Ketchum, 84 Mo. 427 [*affirming* 12 Mo. App. 580]; Bohannon *v.* Combs, 79 Mo. 805; Updegraff *v.* Theaker, 57 Mo. App. 45.

Montana.—Story *v.* Black, 5 Mont. 26, 1 Pac. 1, 51 Am. Rep. 37.

Nebraska.—Schreck *v.* Hanlon, 66 Nebr. 451, 92 N. W. 625; David Adler, etc., Clothing Co. *v.* Hellman, 55 Nebr. 266, 75 N. W. 877; Trester *v.* Pike, 43 Nebr. 779, 62 N. W. 211.

New Jersey.—Cort *v.* Skillin, 29 N. J. Eq. 70.

New York.—Kain *v.* Larkin, 131 N. Y. 300, 30 N. E. 105; Dunlap *v.* Hawkins, 59 N. Y. 342; Cushman *v.* Addison, 52 N. Y. 628; Loeschigk *v.* Hatfield, 51 N. Y. 660; Carpenter *v.* Roe, 10 N. Y. 227; McCormick *v.* Wilder, 61 N. Y. App. Div. 619, 70 N. Y. Suppl. 627; Aultman, etc., Co. *v.* Syme, 23 N. Y. App. Div. 344, 48 N. Y. Suppl. 231; Guy *v.* Craighead, 21 N. Y. App. Div. 460, 47 N. Y. Suppl. 576, 46 N. Y. App. Div. 614, 61 N. Y. Suppl. 988; Wilbur *v.* Fradenburgh, 52 Barb. 474; Holmes *v.* Clerk, 48 Barb. 237; Spicer *v.* Ayers, 53 How. Pr. 405; Jackson *v.* Peek, 4 Wend. 300; Van Wyck *v.* Seward, 6 Paige 62; Starr *v.* Strong, 2 Sandf. Ch. 139.

North Carolina.—Taylor *v.* Eatman, 92 N. C. 601; Thacker *v.* Saunders, 45 N. C. 145; Smith *v.* Reavis, 29 N. C. 341; Arnett *v.* Wanett, 28 N. C. 41; Jones *v.* Young, 18 N. C. 352, 28 Am. Dec. 569. See Hodges *v.* Spicer, 79 N. C. 223.

Ohio.—Miller *v.* Wilson, 15 Ohio 108; Brice *v.* Myers, 5 Ohio 121; Boies *v.* Johnson, 25 Ohio Cir. Ct. 331; Bowlus *v.* Shanabarger, 19 Ohio Cir. Ct. 137, 10 Ohio Cir. Dec. 167.

Pennsylvania.—Conley *v.* Bentley, 87 Pa. St. 40. See McNair *v.* Riesher, 8 Pa. Co. Ct. 494.

South Carolina.—Harrell *v.* Kea, 37 S. C. 369, 16 S. E. 42; Buchanan *v.* McNinch, 3 S. C. 498; Richardson *v.* Rhodus, 14 Rich. 95; Hudnal *v.* Widner, 4 McCord 294, 17 Am. Dec. 744.

Tennessee.—Burkey *v.* Self, 4 Sneed 121.

withdraw the gift from his funds without hazarding his creditors or in any material degree lessening their prospects of payment.[82] The property retained must be clearly and amply sufficient to satisfy the grantor's debts,[83] the sufficiency to be determined by the fair market value of the property.[84] Whether the property retained or reserved by the grantor is what will be deemed ample does not depend entirely on the nominal amount and value of such property, but regard must be had to the nature and state of the property, the amount of the liabilities, and whether the effect of the conveyance might not probably be to delay or defeat creditors.[85] The property retained must be available to creditors,[86] subject

Texas.— Dixon *v.* Sanderson, 72 Tex. 359, 10 S. W. 535, 13 Am. St. Rep. 801; Morrison *v.* Clark, 55 Tex. 437; Walker *v.* Loring, (Civ. App. 1896) 34 S. W. 405.

Utah.— Ogden State Bank *v.* Barker, 12 Utah 13, 40 Pac. 765.

Vermont.—Brackett *v.* Waite, 4 Vt. 389; Durkee *v.* Mahoney, 1 Aik. 116.

Virginia.— Wilson *v.* Buchanan, 7 Gratt. 334.

West Virginia.—Hume, etc., Co. *v.* Condon, 44 W. Va. 553, 30 S. E. 56.

Wisconsin.— Pike *v.* Miles, 23 Wis. 164, 99 Am. Dec. 148.

Wyoming.—Metz *v.* Blackburn, 9 Wyo. 481, 65 Pac. 857.

United States.— Bean *v.* Patterson, 122 U. S. 496, 7 S. Ct. 1298, 30 L. ed. 1126; Hinde *v.* Longworth, 11 Wheat. 199, 6 L. ed. 454; Providence Sav. Bank *v.* Huntington, 10 Fed. 871; Dick *v.* Hamilton, 7 Fed. Cas. No. 3,890, Deady 322; Hopkirk *v.* Randolph, 12 Fed. Cas. No. 6,698, 2 Brock. 132.

England.— Jackson *v.* Bowley, C. & M. 97, 41 E. C. L. 59. *Contra*, see Spirett *v.* Willows, 3 De G. J. & S. 293, 11 Jur. N. S. 70, 34 L. J. Ch. 365, 12 L. T. Rep. N. S. 614, 13 Wkly. Rep. 329, holding that if the debt of the creditor, by whom a voluntary settlement is impeached, existed at the time of the settlement, and it is shown that the remedy of the creditor is defeated or delayed by the existence of the settlement, it is immaterial whether the debtor was or was not solvent after making the settlement, although the contrary rule prevails if the settlement is impeached by his subsequent creditors.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 144. And see *infra*, VIII, D, 2.

Rule applies to trust created for wife or children. Nichols *v.* Wallace, 41 Ill. App. 627. See Greer *v.* Baughman, 13 Md. 257; Barnes *v.* Vetterlein, 16 Fed. 218.

Purchases by husband, where title is taken in name of wife, are within this rule. Lang *v.* Williams, 166 Mo. 1, 65 S. W. 1012. See *supra*, III, A, 3, a.

82. Emerson *v.* Bemis, 69 Ill. 537; Kipp *v.* Hanna, 2 Bland (Md.) 26.

83. *Arkansas.*— Bertrand *v.* Elder, 23 Ark. 494.

Illinois.— Ketcham *v.* Hallock, 55 Ill. App. 632.

Maryland.— Williams *v.* Banks, 11 Md. 198. See Kipp *v.* Hanna, 2 Bland 26.

New Hampshire.— Gove *v.* Campbell, 62 N. H. 401. See Bailey *v.* Ballou, 69 N. H. 414, 44 Atl. 124.

Ohio.— Crumbaugh *v.* Kugler, 2 Ohio St. 373.

Pennsylvania.— Wilson *v.* Howser, 12 Pa. St. 109.

United States.— Lloyd *v.* Fulton, 91 U. S. 479, 23 L. ed. 363.

Sufficiency of assets determined by the result.— Ordinarily the question of whether sufficient assets have been retained may be determined by the result, where the suit to set aside the conveyance is brought shortly after the transfer. But it only becomes competent to show such result as tending to determine the state and condition of the debtor's estate at the time of the alleged fraudulent transfer. Rose *v.* Dunklee, 12 Colo. App. 403, 56 Pac. 342; Harting *v.* Jockers, 136 Ill. 627, 27 N. E. 188, 29 Am. St. Rep. 341.

Property of speculative character.— It is not sufficient to retain property of a speculative character and of an uncertain value which soon thereafter is insufficient to pay the debts of the grantor. Dillman *v.* Nedelhoffer, 162 Ill. 625, 45 N. E. 680.

Business prospects cannot be considered as assets. Wooster *v.* Devote, 6 Mackey (D. C.) 362.

Illustrations of sufficient assets.— Page *v.* Kendrick, 10 Mich. 300; Babcock *v.* Eckler, 24 N. Y. 623; Jackson *v.* Peck, 4 Wend. (N. Y.) 300; Ricketts *v.* McCully, 7 Heisk. (Tenn.) 712.

Illustrations of insufficient assets.— Bohn *v.* Weeks, 50 Ill. App. 236 (gift of six thousand five hundred dollars, assets seven thousand two hundred dollars, debts four hundred dollars, not reasonable); Williams *v.* Banks, 11 Md. 198 (holding that a life-estate retained was not sufficient property where donor was ninety years old); Edmunds *v.* Mister, 58 Miss. 765 (reversion in property conveyed and personal property of evanescent character); Black *v.* Sanders, 46 N. C. 67.

84. Stratton *v.* Edwards, 174 Mass. 374, 54 N. E. 886; Judson *v.* Walker, 155 Mo. 166, 55 S. W. 1083. *Contra*, Walker *v.* Loring, 89 Tex. 668, 36 S. W. 246, which holds that the value is what the property would bring at forced sale.

85. Patterson *v.* McKinney, 97 Ill. 41; Church *v.* Chapin, 35 Vt. 223.

86. *Florida.*— Howse *v.* Judson, 1 Fla. 133.

Mississippi.— Edmunds *v.* Mister, 58 Miss. 765; Cock *v.* Oakley, 50 Miss. 628.

Missouri.— State *v.* Koontz, 83 Mo. 323.

New Hampshire.— Pomeroy *v.* Bailey, 43 N. H. 118.

to execution,[87] and not encumbered so as to necessitate litigation to reach the property.[88]

4. Insolvency Subsequent to Transfer — a. In General. If insolvency follows within a short time after a voluntary conveyance, it is generally considered fraudulent, especially where the grantor at the time was deeply embarrassed and of doubtful solvency.[89] But excluding from consideration those states in which all voluntary conveyances are fraudulent as to existing creditors,[90] the rule is that a conveyance by one who is solvent at the time, although indebted, is not rendered fraudulent by his subsequent insolvency resulting from causes not produced thereby nor existing at the time of such conveyance.[91]

b. Executory Contract or Gift Consummated After Insolvency. An executory contract by a debtor to convey property, based on a valuable consideration, made while the debtor is solvent, may be consummated by delivery after he has become

Texas.— Walker *v.* Loring, (Civ. App. 1896) 34 S. W. 405.

England.— French *v.* French, 6 De G. M. & G. 95, 2 Jur. N. S. 169, 25 L. J. Ch. 612, 4 Wkly. Rep. 139, 55 Eng. Ch. 74, 43 Eng. Reprint 1166.

87. Eiler *v.* Crull, 112 Ind. 318, 14 N. E. 79; Camp *v.* Thompson, 25 Minn. 175; Hastings *v.* Crossland, 13 Mo. App. 592; Terry *v.* O'Neal, 71 Tex. 592, 9 S. W. 673, under statute so expressly providing.

The words "subject to execution," as used in a statute making a deed which is not based on a valuable consideration void as to prior creditors, unless the debtor was possessed of property within the state and subject to execution sufficient to pay his existing debts means not only that the property should be such as may be legally levied on and sold, but that it should also be such as is actually capable of being levied on. Walker *v.* Loring, 89 Tex. 668, 36 S. W. 246.

Exempt property is not to be considered (Williams *v.* Hughes, 136 N. C. 58, 48 S. E. 518), although it has been held that property which the debtor might have had exempted should be counted as his property where there is no evidence of any intention on his part to take an exemption. Westmoreland *v.* Powell, 59 Ga. 256.

Property in another state is insufficient. Baker *v.* Lyman, 53 Ga. 339; Harding *v.* Elliott, 91 Hun (N. Y.) 502, 36 N. Y. Suppl. 648. See Heath *v.* Page, 63 Pa. St. 108, 3 Am. Rep. 533.

Debts which cannot be attached by trustee process are not assets to be considered. Church *v.* Chapin, 35 Vt. 223.

Property concealed from creditors is not to be considered. Walker *v.* Loring, 89 Tex. 668, 36 S. W. 246. See Cohen *v.* Parish, 100 Ga. 335, 28 S. E. 122.

Unencumbered immovable property must be retained in Louisiana. Chase *v.* McCay, 21 La. Ann. 195.

88. Williams *v.* Banks, 11 Md. 198; Bullett *v.* Worthington, 3 Md. Ch. 99. But see Walker *v.* Loring, 89 Tex. 668, 36 S. W. 246, holding that the price the equity of redemption in property heavily encumbered would bring at forced sale may be considered. *Compare* also *supra*, VI, B, 3, a.

89. U. S. Trust Co. *v.* Sedgwick, 97 U. S. 304, 24 L. ed. 954. See Banning *v.* Purinton, 105 Iowa 642, 75 N. W. 639.

90. See *infra*, VIII, D, 2.

91. *Arkansas.*— Smith *v.* Yell, 8 Ark. 470; Dodd *v.* McCraw, 8 Ark. 83, 46 Am. Dec. 301.

California.— Windhaus *v.* Bootz, 92 Cal. 617, 28 Pac. 557.

Connecticut.— State *v.* Martin, 77 Conn. 142, 58 Atl. 745.

Georgia.— Ayers *v.* Harrell, 111 Ga. 864, 36 S. E. 946.

Illinois.— Harting *v.* Jockers, 136 Ill. 627, 27 N. E. 188, 29 Am. St. Rep. 341 (subsequent insolvency of makers of notes held by grantor); Patterson *v.* McKinney, 97 Ill. 41.

Indiana.— Boyd *v.* Vickrey, 138 Ind. 276, 37 N. E. 972; Eiler *v.* Crull, 112 Ind. 318, 14 N. E. 79; Barkley *v.* Tapp, 87 Ind. 25; Dunn *v.* Dunn, 82 Ind. 42.

Louisiana.— Jacobs *v.* His Creditors, 11 La. 93.

Maine.— Usher *v.* Hazeltine, 5 Me. 471, 17 Am. Dec. 253.

Massachusetts.— See Stratton *v.* Edwards, 174 Mass. 374, 54 N. E. 886.

Missouri.— Johnson *v.* Murphy, 180 Mo. 597, 79 S. W. 909; Payne *v.* Stanton, 59 Mo. 158; Patten *v.* Casey, 57 Mo. 118; Potter *v.* McDowell, 31 Mo. 62; American Nat. Bank *v.* Thronburrow, 109 Mo. App. 639, 83 S. W. 771; Walsh *v.* Ketchum, 12 Mo. App. 580 [*affirmed* in 74 Mo. 427]. But see Lionberger *v.* Baker, 88 Mo. 447.

Nebraska.— Hill *v.* Fouse, 32 Nebr. 637, 49 N. W. 760.

New Hampshire.— Leavitt *v.* Leavitt, 47 N. H. 329.

New Jersey.— Rankin *v.* Gardner, (Ch. 1896) 34 Atl. 935.

New York.— Payne *v.* Freer, 4 N. Y. Suppl. 644. See *In re* Kellogg, 104 N. Y. 648, 10 N. E. 152; Guy *v.* Craighead, 46 N. Y. App. Div. 614, 61 N. Y. Suppl. 988.

Ohio.— Creed *v.* Lancaster Bank, 1 Ohio St. 1.

Pennsylvania.— Gross' Estate, 6 Pa. Co. Ct. 113.

South Carolina.— Buchanan *v.* McNinch, 3 S. C. 498 (emancipation act); Howard *v.* Williams, 1 Bailey 575, 21 Am. Dec. 483; Hamilton *v.* Hamilton, 2 Rich. Eq. 355, 46 Am. Dec. 58; Izard *v.* Middleton, Bailey Eq. 228; Jacks *v.* Tunno, 3 Desauss Eq. 1.

insolvent.[92] But a gift cannot be consummated after insolvency so as to be effective against existing creditors,[93] unless there was a visible change of ownership when the gift was made and all that remained to be done was to execute a deed.[94]

5. Insolvency at Commencement of Action. It has been held that, in the absence of an intent to defraud, the failure to retain sufficient property does not make the deed fraudulent unless it is also shown that the grantor had no such property at the time of commencement of the action to set aside the conveyance.[95]

6. Solvency of Debtor Jointly Liable With Grantor. There is some conflict as to whether a conveyance by an insolvent may be attacked where one jointly and severally liable with him is solvent.[96]

VII. Fraudulent Intent and Knowledge.

A. Intent of Grantor — 1. In General. To render an alienation void as to creditors, it must as a general rule have been made by the debtor with an intent to defraud, delay, or hinder creditors;[97] but where a conveyance is voluntary an

Vermont.— Wilbur *v.* Nichols, 61 Vt. 432, 18 Atl. 154; Brackett *v.* Waite, 4 Vt. 389.

Washington.— Deering *v.* Holcomb, 26 Wash. 588, 67 Pac. 240, 561.

West Virginia.— Kanawha Valley Bank *v.* Wilson, 25 W. Va. 242.

United States.— Metropolitan Nat. Bank *v.* Rogers, 53 Fed. 776, 3 C. C. A. 666 (panic); *In re* Smith, 9 Fed. 592; Wiswell *v.* Jarvis, 9 Fed. 84.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 150.

Statutory provisions.— Black *v.* Sanders, 46 N. C. 67.

A conveyance from a husband to his wife in contemplation of his early death is not fraudulent as to creditors where, at the time of the conveyance, his other property was ample to pay his debts but, on account of his living longer than he expected, he afterward became unable to satisfy his debts. American Forcite Powder Mfg. Co. *v.* Hanna, 31 N. Y. App. Div. 117, 52 N. Y. Suppl. 547.

92. Wyer *v.* Sweet, 2 Mart. N. S. (La.) 588; Holmes *v.* Winchester, 133 Mass. 140. See Adams *v.* Hitner, 140 Pa. St. 166, 21 Atl. 260; Boustead *v.* Shaw, 27 Grant Ch. (U. C.) 280.

93. Hubbard *v.* Allen, 59 Ala. 283; Hendon *v.* White, 52 Ala. 597; Doe *v.* McKinney, 5 Ala. 719; Rucker *v.* Abell, 8 B. Mon. (Ky.) 566, 48 Am. Dec. 406; Fairmont First Nat. Bank *v.* Bowman, 36 W. Va. 649, 14 S. E. 989.

94. Patterson *v.* McKinney, 97 Ill. 41, holding that where a gift of land was made at a time when the donor was clearly solvent and the donee then moved on the land and paid taxes and made valuable improvements, but six years later when the deed was given the donor was in failing circumstances and soon after became insolvent, his creditors could not attack the gift. See also Beloit Second Nat. Bank *v.* Merrill, etc., Iron Works, 81 Wis. 142, 50 N. W. 503, 29 Am. St. Rep. 870, holding that where a gift was consummated before insolvency but the conveyance in exchange for the gift and moneys due was after the donor's insolvency, the property could not be reached, in the absence of a fraudulent intent. *Compare* Willows Bank *v.* Small, 144 Cal. 709, 78 Pac. 263; Talcott *v.* Levy, 20 N. Y. Suppl. 440, 29 Abb. N. Cas. 3, holding that where a deed was not recorded because it was deemed to be inoperative, a subsequent conveyance in contemplation of insolvency, although made to effectuate the first conveyance, was fraudulent. See also *infra*, IX.

95. Taylor *v.* Johnson, 113 Ind. 164, 15 N. E. 238; Eiler *v.* Crull, 112 Ind. 318, 14 N. E. 79; Bishop *v.* State, 83 Ind. 67; Wooters *v.* Osborn, 77 Ind. 513; Banning *v.* Purinton, 105 Iowa 642, 75 N. W. 639. See Montana Lumber, etc., Co. *v.* Gerhold, 17 Mont. 558, 44 Pac. 87, holding that a finding of available property at the time of "or since" the execution of the conveyance was not sufficiently definite. See also Burlington Protestant Hospital Assoc. *v.* Gerlinger, 111 Iowa 293, 82 N. W. 765.

96. See *infra*, XIV, E, 6.

97. *Alabama.*— Griffin *v.* Doe, 12 Ala. 783.

Arkansas.— Erb *v.* Cole, 31 Ark. 554. See also Norton *v.* McNutt, 55 Ark. 59, 17 S. W. 362.

California.— Bull *v.* Bray, 89 Cal. 286, 26 Pac. 873, 13 L. R. A. 576.

Georgia.— Powell *v.* Westmoreland, 60 Ga. 572; Nicol *v.* Crittenden, 55 Ga. 497.

Illinois.— Bowden *v.* Bowden, 75 Ill. 143; Hovey *v.* Holcomb, 11 Ill. 660.

Indiana.— Citizens' Bank *v.* Bolen, 121 Ind. 301, 23 N. E. 146.

Iowa.— Dunham *v.* Bentley, 103 Iowa 136, 72 N. W. 437; Drummond *v.* Couse, 39 Iowa 442.

Kansas.— Van Vliet *v.* Halsey, 37 Kan. 116, 14 Pac. 482.

Kentucky.— Griffith *v.* Cox, 79 Ky. 562.

Louisiana.— Byrne *v.* Hibernia Bank, 31 La. Ann. 81; Ziques *v.* Rivas, 16 La. Ann. 402; Wederstrandt *v.* Marsh, 11 Rob. 533; La Fleur *v.* Hardy, 11 Rob. 493; Planters' Bank *v.* Watson, 9 Rob. 267; Taylor *v.* Whittemore, 2 Rob. 99; Potier *v.* Harman, 1 Rob. 527; Gravier *v.* Carraby, 17 La. 118,

actual intent to defraud is not necessary to render it fraudulent as to existing creditors.[98] Such intent will not ordinarily be presumed as a matter of law,[99] but is a question of fact[1] to be determined upon a consideration of all the facts and circumstances of the case.[2] Where, however, the effect of a particular transaction

36 Am. Dec. 608; Gilbert *v.* His Creditors, 6 La. 145. See also Mobile Bank *v.* Harris, 6 La. Ann. 811.

Maine.— Stevens *v.* Robinson, 72 Me. 381.

Maryland.— Zimmer *v.* Miller, 64 Md. 296, 1 Atl. 858.

Massachusetts.— See King *v.* Cram, 185 Mass. 103, 69 N. E. 1049.

Michigan.— Hollister *v.* Loud, 2 Mich. 309. See also Ryan *v.* Meyer, 108 Mich. 638, 66 N. W. 667; Warren *v.* Carpenter, 99 Mich. 287, 58 N. W. 308; Sturgis First Nat. Bank *v.* Buck, 56 Mich. 394, 23 N. W. 57.

Minnesota.— Horton *v.* Williams, 21 Minn. 187.

Missouri.— Sibly *v.* Hood, 3 Mo. 290; Gens *v.* Hargadine, 56 Mo. App. 245.

Nebraska.— See Brower *v.* Fass, 60 Nebr. 590, 83 N. W. 832.

New York.— Truesdell *v.* Sarles, 104 N. Y. 164, 10 N. E. 139; Bedell *v.* Chase, 34 N. Y. 386; Allen *v.* Cowan, 23 N. Y. 502, 80 Am. Dec. 316; McCormick *v.* Wilder, 61 N. Y. App. Div. 619, 70 N. Y. Suppl. 627; Pochel *v.* Read, 20 N. Y. App. Div. 208, 46 N. Y. Suppl. 775.

North Carolina.— Worthy *v.* Brady, 91 N. C. 265; Moore *v.* Hinnant, 89 N. C. 455.

North Dakota.— Dalrymple *v.* Security L. & T. Co., 9 N. D. 306, 83 N. W. 245.

Ohio.— Creed *v.* Lancaster Bank, 1 Ohio St. 1.

Pennsylvania.— Ditman *v.* Raule, 124 Pa. St. 225, 16 Atl. 819. See also Ahl's Appeal, 129 Pa. St. 49, 18 Atl. 475; McKibben *v.* Martin, 64 Pa. St. 352, 3 Am. Rep. 588; Heiney *v.* Anderson, 9 Lanc. Bar 13.

South Carolina.— See Hudnal *v.* Wilder, 4 McCord 294, 17 Am. Dec. 744. See also Hamilton *v.* Greenwood, 1 Bay 173, 1 Am. Dec. 607.

Tennessee.— See Floyd *v.* Goodwin, 8 Yerg. 484, 29 Am. Dec. 130.

Texas.— Sanger *v.* Colbert, 84 Tex. 668, 19 S. W. 863.

West Virginia.— Bishoff *v.* Hartley, 9 W. Va. 100. See also Douglass Merchandise Co. *v.* Laird, 37 W. Va. 687, 17 S. E. 188; Duncan *v.* Custard, 24 W. Va. 730.

Wisconsin.— See Kickbusch *v.* Corwith, 108 Wis. 634, 85 N. W. 148.

United States.— Foster *v.* McAlester, 114 Fed. 145, 52 C. C. A. 107. See also Smith *v.* Vodges, 92 U. S. 183, 23 L. ed. 481; *In re* Jewett, 3 Fed. 503.

England.— *In re* Holland, [1902] 2 Ch. 360, 9 Manson 259, 71 L. J. Ch. 518, 86 L. T. Rep. N. S. 542, 50 Wkly. Rep. 575.

Canada.— Carr *v.* Corfield, 20 Ont. 218; Gottwalls *v.* Mulholland, 15 U. C. C. P. 62.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 10.

The meaning of "fraudulent intent" in respect to creditors is a design to prevent the debtor's property from being applied, either in whole or in part, to the payment of his debts. Alabama L. Ins., etc., Co. *v.* Peltway, 24 Ala. 544; Wheaton *v.* Neville, 19 Cal. 41; Dana *v.* Stanfords, 10 Cal. 269; Nicholson *v.* Leavitt, 4 Sandf. (N. Y.) 252; Lucas *v.* Claflin, 76 Va. 269.

Character of intent necessary to establish fraud.— The fraud contemplated is the actual fraud of which intent is a necessary element. A transfer out of the usual course of business and tending to create a preference is insufficient as evidence of fraud. Roberts *v.* Burr, 135 Cal. 156, 67 Pac. 46. See *infra*, XI.

Insolvency as element of intent.— Insolvency of the debtor is not an indispensable element in the proof of a fraudulent intent as to creditors; it is only an item of evidence on this issue. The intent may have been fraudulent, notwithstanding the solvency of the debtor; it may have been innocent notwithstanding his insolvency. Weeks *v.* Hill, 88 Me. 111, 33 Atl. 778; Wolford *v.* Farnham, 47 Minn. 95, 49 N. W. 528; Hastings *v.* Crossland, 13 Mo. App. 592; Arnold *v.* Peoples, 13 Tex. Civ. App. 26, 34 S. W. 755.

Insolvency of debtor see *supra*, VI.

98. Wooten *v.* Steele, 109 Ala. 563, 19 So. 972, 55 Am. St. Rep. 947; Farmers, etc., Bank *v.* Puce, 41 Mo. App. 291; Bouquet *v.* Heyman, 50 N. J. Eq. 114, 24 Atl. 266. And see *infra*, VIII, D, 2.

99. Nicol *v.* Crittenden, 55 Ga. 497. And see *infra*, XIV, K, 1, i; XIV, L, 2.

1. *California.*— Bull *v.* Bray, 89 Cal. 286, 26 Pac. 873, 13 L. R. A. 576, by statute.

Colorado.— Knapp *v.* Day, 4 Colo. App. 21, 34 Pac. 1008. See also Colorado Trading, etc., Co. *v.* Acres Commission Co., 18 Colo. App. 253, 70 Pac. 954.

Illinois.— Bowden *v.* Bowden, 75 Ill. 143; Eickstaedt *v.* Moses, 105 Ill. App. 634.

Indiana.— Citizens' Bank *v.* Bolen, 121 Ind. 301, 23 N. E. 146, by statute.

Iowa.— Davenport *v.* Cummings, 15 Iowa 219. See also McCreary *v.* Skinner, 83 Iowa 362, 49 N. W. 986.

Maine.— Wheelden *v.* Wilson, 44 Me. 11.

Maryland.— Zimmer *v.* Miller, 64 Md. 296, 1 Atl. 858.

Michigan.— Adams *v.* Kellogg, 63 Mich. 105, 29 N. W. 679; Baldwin *v.* Buckland, 11 Mich. 389.

Minnesota.— Hicks *v.* Stone, 13 Minn. 434.

Missouri.— Burgert *v.* Borchert, 59 Mo. 80.

Texas.— Weisiger *v.* Chisholm, 28 Tex. 780.

West Virginia.— Reynolds *v.* Gawthrop, 37 W. Va. 3, 16 S. E. 364.

United States.— Atlas Nat. Bank *v.* Abram French Sons Co., 134 Fed. 746.

See *infra*, XIV, K, 1, i, L, 2.

2. *Colorado.*— Eversman *v.* Clements, 6 Colo. App. 224, 40 Pac. 575.

with a debtor is to hinder, delay, or defraud creditors the law infers or supplies the intent, although there may be no direct evidence of a corrupt or dishonorable motive, but on the contrary an actual, honest, but mistaken motive existed. The law interposes and declares that every man is presumed to intend the natural and necessary consequences of his acts; and the courts must presume the intention to exist, when the prohibited consequences must necessarily follow from the act, and will not listen to an argument against it. Hence it has been remarked that where a conveyance, by its terms, operates to hinder, delay, or defraud creditors, the intent to do so is imputed to the parties, and no evidence of intention can change that presumption.[3] A conveyance will be set aside where it is made with intent either to hinder, delay, or defraud. An intent to defraud absolutely is unnecessary for

Illinois.— Young *v.* Ward, 115 Ill. 264, 3 N. E. 512; Bowden *v.* Bowden, 75 Ill. 143.

Iowa.— Davenport *v.* Cummings, 15 Iowa 219.

Maryland.— Zimmer *v.* Miller, 64 Md. 296, 1 Atl. 858; Ecker *v.* McAllister, 45 Md. 290.

Massachusetts.—Winchester *v.* Charter, 102 Mass. 272.

Michigan.— Gumberger *v.* Treusch, 103 Mich. 543, 61 N. W. 872; Wessels *v.* Beeman, 87 Mich. 481, 49 N. W. 483.

Minnesota.— Riddell *v.* Munro, 49 Minn. 532, 52 N. W. 141; Hicks *v.* Stone, 13 Minn. 434.

Missouri.— Burgert *v.* Borchert, 59 Mo. 80.

Texas.— Weisiger *v.* Chisholm, 28 Tex. 780.

West Virginia.— Reynolds *v.* Gawthrop, 37 W. Va. 3, 16 S. E. 364; Lockhard *v.* Beckley, 10 W. Va. 87.

United States.— Rea *v.* Missouri, 17 Wall. 532, 21 L. ed. 707; Warner *v.* Norton, 20 How. 448, 15 L. ed. 950; Foster *v.* Lincoln, 79 Fed. 170, 24 C. C. A. 470.

England.— *In re* Holland, [1902] 2 Ch. 360, 71 L. J. Ch. 518, 86 L. T. Rep. N. S. 542, 9 Manson 259, 50 Wkly Rep. 575.

When intent may be honest.— Where the circumstances attending a conveyance are consistent either with a fraudulent intent or honesty of purpose fraud will not be imputed. Drummond *v.* Couse, 39 Iowa 442.

A jury is not at liberty to deduce a fraudulent intent from what the law pronounces honest. Shibler *v.* Hartley, 201 Pa. St. 286, 50 Atl. 950, 88 Am. St. Rep. 811.

3. *Alabama.*— McDowell *v.* Steele, 87 Ala. 493, 6 So. 288; Sims *v.* Gaines, 64 Ala. 392. See also Pope *v.* Wilson, 7 Ala. 690.

California.— Lukeforth *v.* Lord, 87 Cal. 399, 25 Pac. 497.

Colorado.— Knapp *v.* Day, 4 Colo. App. 21, 34 Pac. 1008.

Delaware.— Logan *v.* Brick, 2 Del. Ch. 206.

Florida.— McKeown *v.* Allen, 37 Fla. 490, 20 So. 556; Logan *v.* Logan, 22 Fla. 561, 10 Am. St. Rep. 212; Gibson *v.* Love, 4 Fla. 217.

Illinois.— Haas *v.* Sternbach, 156 Ill. 44, 41 N. E. 51; Lawson *v.* Funk, 108 Ill. 502; Bell *v.* Devore, 96 Ill. 217. See also Marmon *v.* Harwood, 124 Ill. 104, 16 N. E. 236, 7 Am. St. Rep. 345; Ramsey *v.* Nichols, 73 Ill. App. 643.

Indiana.— Ewing *v.* Gray, 12 Ind. 64.

Iowa.— See Runnels *v.* Smith, 89 Iowa 636, 57 N. W. 589.

Maryland.— Farrow *v.* Hayes, 51 Md. 498; Schuman *v.* Peddicord, 50 Md. 560; Whedbee *v.* Stewart, 40 Md. 414.

Michigan.— Viers *v.* Detroit Paper-Package Co., 119 Mich. 192, 77 N. W. 700; Cutcheon *v.* Buchanan, 88 Mich. 594, 50 N. W. 756; Fellows *v.* Smith, 40 Mich. 689; Oliver *v.* Eaton, 7 Mich. 108; Buck *v.* Sherman, 2 Dougl. 176.

Minnesota.— Greenleaf *v.* Edes, 2 Minn. 264.

Mississippi.— Marks *v.* Bradley, 69 Miss. 1, 10 So. 922; Harman *v.* Hoskins, 56 Miss. 142. See also Henderson *v.* Downing, 24 Miss. 106; Arthur *v.* Commercial, etc., Bank, 9 Sm. & M. 394, 48 Am. Dec. 719.

Missouri.— Snyder *v.* Free, 114 Mo. 360, 21 S. W. 847; Seger *v.* Thomas, 107 Mo. 635, 18 S. W. 33; Payne *v.* Stanton, 59 Mo. 158; Potter *v.* McDowell, 31 Mo. 62. See also Dunham-Buckley *v.* Halberg, 69 Mo. App. 509.

Nebraska.— See Selz *v.* Hocknell, 63 Nebr. 503, 88 N. W. 767, 62 Nebr. 101, 86 N. W. 905.

New Jersey.—Cook *v.* Johnson, 12 N. J. Eq. 51, 72 Am. Dec. 381.

New York.— See Spotten *v.* Keeler, 12 N. Y. St. 385, 22 Abb. N. Cas. 105; Angrave *v.* Stone, 25 How. Pr. 167.

North Carolina.— Booth *v.* Carstarphen, 107 N. C. 395, 12 S. E. 375; Phifer *v.* Erwin, 100 N. C. 59, 6 S. E. 672; Boone *v.* Hardie, 87 N. C. 72, 83 N. C. 470; Cheatham *v.* Hawkins, 80 N. C. 161.

Ohio.— Jones *v.* Leeds, 10 Ohio S. & C. Pl. Dec. 173, 7 Ohio N. P. 480. See also Brannon *v.* Purcell, 8 Ohio Dec. (Reprint) 159, 6 Cinc. L. Bul. 67; Johnson *v.* Burnside, 8 Ohio S. & C. Pl. Dec. 412, 7 Ohio N. P. 74.

Oregon.— Crawford *v.* Beard, 12 Oreg. 447, 8 Pac. 537.

Pennsylvania.—Kisterbock's Appeal, 51 Pa. St. 483; Clark *v.* Depew, 25 Pa. St. 509, 64 Am. Dec. 717. See also McKibben *v.* Martin, 64 Pa. St. 352, 3 Am. Rep. 588; Hays *v.* Heidelberg, 9 Pa. St. 203.

Rhode Island.— Robinson *v.* McKenna, 21 R. I. 117, 42 Atl. 510, 79 Am. St. Rep. 793; Eichenberg *v.* Marcy, 18 R. I. 169, 26 Atl. 46.

Tennessee.— Churchill *v.* Wells, 7 Coldw. 364.

Texas.— See Miller *v.* Jannett, 63 Tex. 82.

Virginia.— See Garland *v.* Rives, 4 Rand. 282, 15 Am. Dec. 756.

United States.— Thomson *v.* Crane, 73 Fed.

the statute is in the disjunctive, and either intent is sufficient.[4] But the mere fact that a conveyance may incidentally delay or hinder creditors is not sufficient to make it void, as undoubtedly every conveyance of a debtor's property may in some degree have that effect.[5] One in debt may sell his property, although the effect of the sale is to hinder creditors, if the sale is not made for that purpose,[6] and a debtor, although in failing circumstances or insolvent, may dispose of his

327; Fleischman *v.* Bowser, 62 Fed. 259, 10 C. C. A. 370.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 15.

But *compare* Hempstead *v.* Johnston, 18 Ark. 123, 65 Am. Dec. 458.

Fraud in law.— There can be no fraud in law or in fact without a breach of some legal or equitable duty, and although there may be fraud in law where no actual fraudulent intent is proved, it exists only when the acts upon which it is based carry in themselves inevitable evidence of it, independently of the motive of the actor. Delaney *v.* Valentine, 154 N. Y. 692, 49 N. E. 65.

In New York, under 2 Rev. St. p. 137, § 4, providing that the question of fraudulent intent "shall be deemed a question of fact and not of law," it has been held that every party must be deemed to have intended the natural and inevitable consequences of his acts, and where his acts are voluntary and necessarily operate to defraud others, he must be deemed to have intended the fraud. Coursey *v.* Morton, 132 N. Y. 556, 30 N. E. 231; Coleman *v.* Burr, 93 N. Y. 17, 45 Am. Rep. 160; Babcock *v.* Eckler, 24 N. Y. 623; Ford *v.* Williams, 24 N. Y. 359; Edgell *v.* Hart, 9 N. Y. 213, 59 Am. Dec. 532; Briggs *v.* Mitchell, 60 Barb. 288; New York Commercial Co. *v.* Carpenter, 4 Misc. 240, 24 N. Y. Suppl. 248; Cunningham *v.* Freeborn, 11 Wend. 240.

4. *Alabama.*— Lehman *v.* Kelly, 68 Ala. 192.

Illinois.—See Adams *v.* Pease, 113 Ill. App. 356.

Iowa.— McCreary *v.* Skinner, 75 Iowa 411, 39 N. W. 674.

Missouri.— Rupe *v.* Alkire, 77 Mo. 641; Dougherty *v.* Cooper, 77 Mo. 528; Crow *v.* Beardsley, 68 Mo. 435; Burgert *v.* Borchert, 59 Mo. 80; Baer *v.* Lisman, 85 Mo. App. 317; Dunham-Buckley *v.* Halberg, 69 Mo. App. 509; State *v.* Nauert, 2 Mo. App. 295.

Nebraska.—Foley *v.* Doyle, 1 Nebr. (Unoff.) 643, 95 N. W. 1067. See also Knapp *v.* Fisher, 58 Nebr. 651, 79 N. W. 553.

New York.— Buell *v.* Rope, 6 N. Y. App. Div. 113, 39 N. Y. Suppl. 475.

North Carolina.— Peeler *v.* Peeler, 109 N. C. 628, 14 S. E. 59.

Texas.— Ellis *v.* Valentine, 65 Tex. 532; Cook *v.* Greenberg, (Civ. App. 1896) 34 S. W. 687; Houston, etc., R. Co. *v.* Shirley, (Civ. App. 1894) 24 S. W. 809.

Virginia.— See Quarles *v.* Kerr, 14 Gratt. 48.

West Virginia.—Edgell *v.* Smith, 50 W. Va. 349, 40 S. E. 402; Lockhard *v.* Beckley, 10 W. Va. 87.

Wisconsin.— Norwegian Plow Co. *v.* Hawthorn, 71 Wis. 529, 37 N. W. 825; David *v.* Birchard, 53 Wis. 492, 10 N. W. 557; Pilling *v.* Otis, 13 Wis. 495.

Canada.— Murthau *v.* McKenna, 14 Grant Ch. (U. C.) 59.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 12.

Compare Meade *v.* Smith, 16 Conn. 346.

Mortgage hindering creditors.— A mortgage given by an insolvent to secure creditors, which provides that it shall only operate in favor of those assenting to its terms, and requires all whose debts are due to extend the time of payment for ninety days, and places the property of the mortgagor beyond reach of creditors for an indefinite period, hinders and delays creditors, within the meaning of the statute against fraudulent conveyances, and is therefore void. Dearing *v.* McKinnon Dash, etc., Co., 165 N. Y. 78, 58 N. E. 773, 80 Am. St. Rep. 708 [*citing* Grover *v.* Wakeman, 11 Wend. (N. Y.) 187, 25 Am. Dec. 624; Hyslop *v.* Clarke, 14 Johns. (N. Y.) 458; Marsh *v.* Bennett, 16 Fed. Cas. No. 9,110, 5 McLean 117].

Compelling compromise.— A conveyance of property by a debtor for the purpose of compelling a creditor to compromise by the hindrance and delay thereby occasioned is voidable as to all creditors. Voorheis *v.* Blanton, 89 Fed. 885, 32 C. C. A. 384, 83 Fed. 234.

5. *Illinois.*— Nelson *v.* Leiter, 93 Ill. App. 176 [*affirmed* in 190 Ill. 414, 60 N. E. 851, 83 Am. St. Rep. 142].

Indian Territory.—Noyes *v.* Tootle, 2 Indian Terr. 144, 48 S. W. 1031.

Louisiana.— Coyle's Succession, 32 La. Ann. 79; U. S. *v.* U. S. Bank, 8 Rob. 262.

Massachusetts.— Kimball *v.* Thompson, 4 Cush. 441, 50 Am. Dec. 799.

Mississippi.— Ingraham *v.* Grigg, 13 Sm. & M. 22.

Missouri.— State *v.* Estel, 6 Mo. App. 6; State *v.* Laurie, 1 Mo. App. 371.

New Hampshire.— McCormick *v.* Towns, 64 N. H. 278, 9 Atl. 97; True *v.* Congdon, 44 N. H. 48.

New Jersey.— Bergen *v.* Porpoise Fishing Co., 42 N. J. Eq. 397, 8 Atl. 523; Atwood *v.* Impson, 20 N. J. Eq. 150.

North Carolina.— Moore *v.* Hinnant, 89 N. C. 455.

Virginia.— Harvey *v.* Anderson, (1896) 24 S. E. 914.

United States.— See Strauss *v.* Abrahams, 32 Fed. 310.

6. Hessing *v.* McCloskey, 37 Ill. 341; Forrester *v.* Moore, 77 Mo. 651; Rupe *v.* Alkire, 77 Mo. 641; Dougherty *v.* Cooper, 77 Mo. 528. See also *In re* Strenz, 8 Fed. 311.

property in good faith to obtain money to meet his obligations, although such sale may in fact hinder and delay his creditors.[7]

2. Intent to Defraud One Creditor.[8] It is not necessary in order to vitiate a conveyance by a debtor that he intended to defraud all of his creditors. If a conveyance is given to defraud one existing creditor, it is fraudulent as to all existing creditors; and if it is given to defraud one subsequent creditor, it is fraudulent as to all creditors of this class.[9]

3. Accomplishment of Purpose. A fraudulent intent alone is not sufficient; there must be superadded to it, in addition to the sale or conveyance, actual fraud, hindrance, or delay resulting therefrom to the creditors. Fraud does not consist in mere intention, but in intention acted out by conduct that operates prejudicially on the rights of others, and which was intended to have such effect.[10] Where, however, a conveyance is executed with a personal intent to defraud creditors, it does not matter that it would not harm any one if not avoided, by reason of the fact that the debtor has other property ample in amount within reach of creditors;[11] for a rich man may make a fraudulent conveyance as well as a poor one.[12]

B. Knowledge and Intent of Grantee — 1. Effect of Want of Knowledge or Notice — a. Where Transfer Is For Valuable Consideration. If a transfer is for a valuable consideration, creditors cannot attack it because of the fraudulent intent of the grantor, where the grantee neither had (1) actual notice of such intent, nor (2) notice of any fact or facts calculated to put him on inquiry and which would lead to a discovery of such intent, nor (3) participated in the fraud.[13] This rule is merely a reiteration of the statute of 13 Elizabeth which provides

7. State *v.* Purcell, 131 Mo. 312, 33 S. W. 13; Adam Roth Grocery Co. *v.* Ashton, 69 Mo. App. 463. See also Farwell *v.* Norton, 77 Ill. App. 685; Lowry *v.* Howard, 35 Ind. 170, 9 Am. Rep. 676; Pochel *v.* Reed, 20 N. Y. App. Div. 208, 46 N. Y. Suppl. 775.

8. Whether a conveyance fraudulent as to existing creditors is so as to subsequent creditors see *supra*, IV, C, 2; *infra*, VIII, D, 3.

9. *Alabama.*— Lehman *v.* Kelly, 68 Ala. 192.

Connecticut.— Allen *v.* Rundle, 50 Conn. 9, 47 Am. Rep. 599.

Indiana.—Personette *v.* Cronkhite, 140 Ind. 586, 40 N. E. 59.

Maryland.— Spuck *v.* Logan, 97 Md. 152, 54 Atl. 989, 99 Am. St. Rep. 427.

Massachusetts.— Washburn *v.* Hammond, 151 Mass. 132, 24 N. E. 33.

Michigan.— Allen *v.* Kinyon, 41 Mich. 281, 1 N. W. 863.

North Carolina.— Savage *v.* Knight, 92 N. C. 493, 53 Am. Rep. 423.

Pennsylvania.— Barrett *v.* Nealon, 119 Pa. St. 171, 12 Atl. 861, 4 Am. St. Rep. 628; Miner *v.* Warner, 2 Grant 448.

Vermont.— See Corey *v.* Morrill, 71 Vt. 51, 42 Atl. 976.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 162.

10. *Maine.*— Rice *v.* Perry, 61 Me. 145.

North Carolina.— See Brisco *v.* Norris, 112 N. C. 671, 16 S. E. 850.

Ohio.— Bancroft *v.* Blizzard, 13 Ohio 30.

Pennsylvania.— Williams *v.* Davis, 69 Pa. St. 21; Bunn *v.* Ahl, 29 Pa. St. 387, 72 Am. Dec. 639. See also Smith *v.* Smith, 21 Pa. St. 367, 60 Am. Dec. 51. *Compare* Drum *v.* Painter, 27 Pa. St. 148.

Tennessee.— See Wagner *v.* Smith, 13 Lea 560.

Texas.— See Ellis *v.* Valentine, 65 Tex. 532; Moore *v.* Robinson, (Civ. App. 1903) 75 S. W. 890.

But see Main *v.* Lynch, 54 Md. 658.

If there are no creditors to be defrauded, a conveyance, although made with intent to defraud, is not void. Day *v.* Lown, 51 Iowa 364, 1 N. W. 786. See *supra*, III, D.

11. Los Angeles First Nat. Bank *v.* Maxwell, 123 Cal. 360, 55 Pac. 980, 69 Am. St. Rep. 64. *Compare infra*, XIV, E.

12. Hager *v.* Shindler, 29 Cal. 47.

13. *Alabama.*— Teague *v.* Bass, 131 Ala. 422, 31 So. 4; Roden *v.* Ellis, 113 Ala. 652, 21 So. 71; Simmons *v.* Shelton, 112 Ala. 284, 21 So. 309, 57 Am. St. Rep. 39; Carter *v.* O'Bryan, 105 Ala. 305, 16 So. 894; Jaffrey *v.* McGough, 83 Ala. 202, 3 So. 594; Keel *v.* Larkin, 83 Ala. 142, 3 So. 296, 3 Am. St. Rep. 702; Kiser *v.* Gamble, 75 Ala. 386; Bradley *v.* Ragsdale, 64 Ala. 558; Pickett *v.* Pipkin, 64 Ala. 520; Marshall *v.* Croom, 60 Ala. 121; Coleman *v.* Smith, 55 Ala. 368; Marshall *v.* Croom, 52 Ala. 554; Governor *v.* Campbell, 17 Ala. 566; Borland *v.* Mayo, 8 Ala. 104; Stover *v.* Herrington, 7 Ala. 142, 41 Am. Dec. 86.

Arkansas.— Erb *v.* Cole, 31 Ark. 554; Trieber *v.* Andrews, 31 Ark. 163; Galbreath *v.* Cook, 30 Ark. 417; Splawn *v.* Martin, 17 Ark. 146; De Prato *v.* Jester, (1892) 20 S. W. 807. See Wallace *v.* Bernheim, 63 Ark. 108, 37 S. W. 712.

California.— Grunsky *v.* Perlin, 110 Cal. 179, 42 Pac. 575. See also Priest *v.* Brown, 100 Cal. 626, 35 Pac. 323; Cohen *v.* Knox, 90 Cal. 266, 27 Pac. 215, 13 L. R. A. 711.

inter alia that a conveyance "upon good Consideration and *bona fide* lawfully conveyed or assured to any Person or Persons, or Bodies Politick or Corporate,

Colorado.— Riethmann *v.* Godsman, 23 Colo. 202, 46 Pac. 684.

Connecticut.— Sisson *v.* Roath, 30 Conn. 15; Partelo *v.* Harris, 26 Conn. 480. See also Unmack *v.* Douglass, 75 Conn. 633, 55 Atl. 12; Knower *v.* Cadden Clothing Co., 57 Conn. 202, 17 Atl. 580.

District of Columbia.— Droop *v.* Ridenour, 11 App. Cas. 224; Birdsall *v.* Welch, 6 D. C. 316.

Georgia.— Hollis *v.* Sales, 103 Ga. 75, 29 S. E. 482; Newhoff *v.* Clegg, 99 Ga. 167, 25 S. E. 184.

Illinois.— Hughes *v.* Noyes, 171 Ill. 575, 49 N. E. 703; Marmon *v.* Harwood, 124 Ill. 104, 16 N. E. 236, 7 Am. St. Rep. 345; Schroeder *v.* Walsh, 120 Ill. 403, 11 N. E. 70; Sawyer *v.* Moyer, 109 Ill. 461; Seeders *v.* Allen, 98 Ill. 468; Jewett *v.* Cook, 81 Ill. 260; Hatch *v.* Jordon, 74 Ill. 414; Miller *v.* Kirby, 74 Ill. 242; Mathes *v.* Dobschuetz, 72 Ill. 438; Herkelrath *v.* Stookey, 63 Ill. 486; Rothgerber *v.* Gough, 52 Ill. 436; Gridley *v.* Bingham, 51 Ill. 153; Hessing *v.* McCloskey, 37 Ill. 341; Meixsell *v.* Williamson, 35 Ill. 529; Myers *v.* Kinzie, 26 Ill. 36; Brown *v.* Riley, 22 Ill. 45; Ewing *v.* Runkle, 20 Ill. 448; Eickstraedt *v.* Moses, 105 Ill. App. 634; Edwards *v.* Story, 105 Ill. App. 433; Ball *v.* Callahan, 95 Ill. App. 615; Johnston *v.* Hirschberg, 85 Ill. App. 47; Oakford *v.* Dunlap, 63 Ill. App. 498; Rhoades, etc., Co. *v.* Smith, 43 Ill. App. 400; Aultman, etc., Co. *v.* Weir, 34 Ill. App. 615; Griffin *v.* Wolf, 31 Ill. App. 554.

Indiana.— Hedrick *v.* Hall, 155 Ind. 371, 58 N. E. 257; Marmon *v.* White, 151 Ind. 445, 51 N. E. 930; Straight *v.* Roberts, 126 Ind. 383, 26 N. E. 73; Scott *v.* Davis, 117 Ind. 232, 20 N. E. 139; Crawfordsville First Nat. Bank *v.* Carter, 89 Ind. 317; Trentman *v.* Swartzell, 85 Ind. 443; Moore *v.* Lampton, 80 Ind. 301; Brown *v.* Rawlings, 72 Ind. 505; Spaulding *v.* Myers, 64 Ind. 264; Johnston *v.* Field, 62 Ind. 377; Kyger *v.* F. Hull Skirt Co., 34 Ind. 249; McCormick *v.* Hyatt, 33 Ind. 546; Palmer *v.* Henderson, 20 Ind. 297; Ewing *v.* Gray, 12 Ind. 64; Stewart *v.* English, 6 Ind. 176; Doe *v.* Horn, 1 Ind. 363, 50 Am. Dec. 470; South Bend Iron Works Co. *v.* Duddleson, (App. 1891) 27 N. E. 312; Wilson *v.* Clark, 1 Ind. App. 182, 27 N. E. 310. See Neisler *v.* Harris, 115 Ind. 560, 18 N. E. 39.

Iowa.— Urdanger *v.* Doner, 122 Iowa 533, 98 N. W. 917; Thompson *v.* Zuckmayer, (1903) 94 N. W. 476; Roberts *v.* Press, 97 Iowa 475, 66 N. W. 756; Davis *v.* Garrison, 85 Iowa 447, 52 N. W. 359; Stroff *v.* Swafford, 81 Iowa 695, 47 N. W. 1023; Kellogg *v.* Aherin, 48 Iowa 299; Jones *v.* Hetherington, 45 Iowa 681; Drummond *v.* Couse, 39 Iowa 442; Preston *v.* Turner, 36 Iowa 671; Chase *v.* Walters, 28 Iowa 460; Steele *v.* Ward, 25 Iowa 535; Fifield *v.* Gaston, 12 Iowa 218; Miller *v.* Bryan, 3 Iowa 58. See Brooks *v.* Jones, 114 Iowa 385, 82 N. W. 434, 86 N. W. 300.

Kansas.— Parmenter *v.* Lomax, 68 Kan. 61, 74 Pac. 634; Schram *v.* Taylor, 51 Kan. 547, 33 Pac. 315; Farlin *v.* Sook, 30 Kan. 401, 1 Pac. 123, 46 Am. Rep. 100; Wilson *v.* Fuller, 9 Kan. 176; Diefendorf *v.* Oliver, 8 Kan. 365; Roach *v.* Barry, 5 Kan. App. 879, 48 Pac. 866; La Clef *v.* Campbell, 3 Kan. App. 756, 45 Pac. 461.

Kentucky.— Beadles *v.* Miller, 9 Bush 405; Ratcliff *v.* Trimble, 12 B. Mon. 32; Brown *v.* Smith, 7 B. Mon. 361; Brown *v.* Foree, 7 B. Mon. 357, 46 Am. Dec. 519; Boyce *v.* Waller, 2 B. Mon. 91; Violett *v.* Violett, 2 Dana 323; Carter *v.* Richardson, 60 S. W. 397, 22 Ky. L. Rep. 1204; American Brewing Co. *v.* McGruder, 32 S. W. 603, 17 Ky. L. Rep. 762; Farmers', etc., Nat. Bank *v.* Connor, 13 Ky. L. Rep. 592; Meyer *v.* Specker, 10 Ky. L. Rep. 116; Wiseman *v.* McAlpin, 6 Ky. L. Rep. 660; Allen *v.* Gilliland, 5 Ky. L. Rep. 320; Ferguson *v.* May, 4 Ky. L. Rep. 989.

Louisiana.— Chaffe *v.* Gill, 43 La. Ann. 1054, 10 So. 361; Lowenstein *v.* Fudickar, 43 La. Ann. 886, 9 So. 742; Leen Kee *v.* Smith, 35 La. Ann. 518; Bastian *v.* Christesen, 34 La. Ann. 883; Montgomery *v.* Wilson, 31 La. Ann. 196; Shultz *v.* Morgan, 27 La. Ann. 616; Billgery *v.* Schnell, 26 La. Ann. 467; Southern Dry Dock Co. *v.* Bayou Sara Packet Co., 24 La. Ann. 217; Whiting *v.* Prentice, 12 Rob. 141; Planters' Bank *v.* Watson, 9 Rob. 267; Barrett *v.* His Creditors, 4 Rob. 408; Thompson *v.* Gordon, 12 La. 260; Rhodes *v.* Beaman, 10 La. 363; McManus *v.* Jewett, 9 La. 170; Bauduc *v.* His Creditors, 4 La. 247; Kenney *v.* Dow, 10 Mart. 577, 13 Am. Dec. 342.

Maine.— Tolman *v.* Ward, 86 Me. 303, 29 Atl. 1081, 41 Am. St. Rep. 556; Blodgett *v.* Chaplin, 48 Me. 322; Stevens *v.* Hinckley, 43 Me. 440; McLarren *v.* Thompson, 40 Me. 284; Davis *v.* Tibbetts, 39 Me. 279.

Maryland.— Crooks *v.* Brydon, 93 Md. 640, 49 Atl. 921; Cooke *v.* Cooke, 43 Md. 522; Troxall *v.* Applegarth, 24 Md. 163; Waters *v.* Riggin, 19 Md. 536. *Compare* Atkinson *v.* Phillips, 1 Md. Ch. 507.

Massachusetts.— Russell *v.* Cole, 167 Mass. 6, 44 N. E. 1057, 57 Am. St. Rep. 432; Morse *v.* Aldrich, 130 Mass. 578; Snow *v.* Paine, 114 Mass. 520; Hamilton *v.* Cone, 99 Mass. 478; Green *v.* Tanner, 8 Metc. 411; Foster *v.* Hall, 12 Pick. 89, 22 Am. Dec. 400; Kittredge *v.* Sumner, 11 Pick. 50; Bridge *v.* Eggleston, 14 Mass. 245, 7 Am. Dec. 209; Harrison *v.* Phillips Academy, 12 Mass. 456.

Michigan.— Delavan *v.* Wright, 110 Mich. 143, 67 N. W. 1110; Spring Lake Ins. Co. *v.* Waters, 50 Mich. 13, 14 N. W. 679; Fisher *v.* Hall, 44 Mich. 493, 7 N. W. 72.

Mississippi.— Tennent-Stribling Shoe Co. *v.* Davie, 75 Miss. 447, 23 So. 188; Ladnier *v.* Ladnier, 64 Miss. 368, 1 So. 492; Ewing *v.*

not having at the Time of such Conveyance or Assurance to them made, any Manner of Notice or Knowledge of such Covin, Fraud or Collusion" shall not

Cargill, 13 Sm. & M. 79; Pope *v.* Andrews, S. & M. Ch. 135; Bernheim *v.* Dibrell, (1892) 11 So. 795. *Compare* Bernheim *v.* Dibrell, 66 Miss. 199, 5 So. 693.

Missouri.— Mansur-Tebbetts Implement Co. *v.* Ritchie, 159 Mo. 213, 60 S. W. 87; Alberger *v.* White, 117 Mo. 347, 23 S. W. 92; State *v.* Mason, 112 Mo. 374, 20 S. W. 629, 34 Am. St. Rep. 390; Hurley *v.* Taylor, 78 Mo. 238; Henderson *v.* Henderson, 55 Mo. 534; Byrne *v.* Becker, 42 Mo. 264; Wise *v.* Wimer, 23 Mo. 237; Little *v.* Eddy, 14 Mo. 160; Kelly-Goodfellow Shoe Co. *v.* Vail, 84 Mo. App. 94; Wachtel *v.* Ewing, 82 Mo. App. 594; Esselbruegge Mercantile Co. *v.* Troll, 79 Mo. App. 558; Simon-Gregory Dry Goods Co. *v.* Schooley, 66 Mo. App. 406; Stevens Lumber Co. *v.* Kansas City Planing Mill Co., 59 Mo. App. 373; Pierson *v.* Slifer, 52 Mo. App. 273; Gens *v.* Hargadine, 45 Mo. App. 38; Hausmann *v.* Hope, 20 Mo. App. 193. See also State *v.* Hope, 102 Mo. 410, 14 S. W. 985.

Montana.— Curtis *v.* Valiton, 3 Mont. 153.

Nebraska.— Farmers', etc., Nat. Bank *v.* Mosher, 63 Nebr. 130, 88 N. W. 552; Powell *v.* Yeazel, 46 Nebr. 225, 64 N. W. 695; Blumer *v.* Bennett, 44 Nebr. 873, 63 N. W. 14; Edwards *v.* Reid, 39 Nebr. 645, 58 N. W. 202, 42 Am. St. Rep. 607; Farrington *v.* Stone, 35 Nebr. 456, 53 N. W. 389; Crabb *v.* Morrissey, 31 Nebr. 161, 47 N. W. 697; Hedman *v.* Anderson, 6 Nebr. 392. See also Steinberg *v.* Buffum, 61 Nebr. 778, 86 N. W. 491.

Nevada.— Gregory *v.* Frothingham, 1 Nev. 253.

New Hampshire.— Currier *v.* Taylor, 19 N. H. 189; Badger *v.* Story, 16 N. H. 168.

New Jersey.— Kinmonth *v.* White, (Ch. 1900) 47 Atl. 1; Flemington Nat. Bank *v.* Jones, 50 N. J. Eq. 244, 24 Atl. 928; Mathiez *v.* Day, 36 N. J. Eq. 88; Roe *v.* Moore, 35 N. J. Eq. 526; New York Fire Ins. Co. *v.* Tooker, 35 N. J. Eq. 408; Muirheid *v.* Smith, 35 N. J. Eq. 303; Freehold First Nat. Bank *v.* Irons, 28 N. J. Eq. 43 [*affirmed* in 28 N. J. Eq. 625]; Tantum *v.* Green, 21 N. J. Eq. 364; Atwood *v.* Impson, 20 N. J. Eq. 150.

New York.— Jaeger *v.* Kelley, 62 N. Y. 274; Dudley *v.* Danforth, 61 N. Y. 626; Ruhl *v.* Phillips, 48 N. Y. 125, 8 Am. Rep. 522; Lary *v.* Pettit, 55 N. Y. App. Div. 631, 66 N. Y. Suppl. 834; Demarest *v.* House, 91 Hun 290, 36 N. Y. Suppl. 291; Dorr *v.* Beck, 76 Hun 540, 28 N. Y. Suppl. 206; Van Wyck *v.* Baker, 16 Hun 168; Stowell *v.* Haslett, 5 Lans. 380; Holmes *v.* Clark, 48 Barb. 237; Newman *v.* Cordell, 43 Barb. 448; Carpenter *v.* Muren, 42 Barb. 300; Hall *v.* Arnold, 15 Barb. 599; Gowing *v.* Warner, 30 Misc. 593, 62 N. Y. Suppl. 797; Ravin *v.* Subin, 30 Misc. 193, 61 N. Y. Suppl. 1104 [*reversed* in 31 Misc. 742, 64 N. Y. Suppl. 138]; Sing Sing First Nat. Bank *v.* Hamilton, 27 N. Y. Suppl. 1029; Laidlaw *v.* Gilmore, 47 How. Pr. 67; Sands *v.* Hildreth, 14 Johns. 493. See also Galle *v.* Tode, 148 N. Y. 270, 42 N. E. 673; Starin *v.* Kelly, 88 N. Y. 421; Bogert *v.* Hess, 50 N. Y. App. Div. 253, 63 N. Y. Suppl. 977; Metcalf *v.* Moses, 35 N. Y. App. Div. 596, 55 N. Y. Suppl. 179 [*modifying* 22 Misc. 664, 50 N. Y. Suppl. 1060].

North Carolina.— Wolf *v.* Arthur, 118 N. C. 890, 24 S. E. 671; Nadal *v.* Britton, 112 N. C. 180, 16 S. E. 914; Woodruff *v.* Bowles, 104 N. C. 197, 10 S. E. 482; Brown *v.* Mitchell, 102 N. C. 347, 9 S. E. 702, 11 Am. St. Rep. 748; Beasley *v.* Bray, 98 N. C. 266, 3 S. E. 497; Savage *v.* Knight, 92 N. C. 493, 53 Am. Rep. 423; Tredwell *v.* Graham, 88 N. C. 208; Lassiter *v.* Davis, 64 N. C. 498.

Ohio.— Bancroft *v.* Blizzard, 13 Ohio 30.

Oklahoma.— McFadyen *v.* Masters, 8 Okla. 174, 56 Pac. 1059; Kansas Moline Plow Co. *v.* Sherman, 3 Okla. 204, 41 Pac. 623, 32 L. R. A. 33; Jackson *v.* Glaze, 3 Okla. 143, 41 Pac. 79; Chandler *v.* Colcord, 1 Okla. 260, 32 Pac. 330.

Oregon.— Garnier *v.* Wheeler, 40 Oreg. 198, 66 Pac. 812; Sabin *v.* Columbia Fuel Co., 25 Oreg. 15, 34 Pac. 692, 42 Am. St. Rep. 756; Bonser *v.* Miller, 5 Oreg. 110.

Pennsylvania.— Snayberger *v.* Fahl, 195 Pa. St. 336, 45 Atl. 1065, 78 Am. St. Rep. 818; Werner *v.* Zierfuss, 162 Pa. St. 360, 29 Atl. 737; Thompson *v.* Lee, 3 Watts & S. 479; Towar *v.* Barrington, Brightly 253. See Helfrich *v.* Stem, 17 Pa. St. 143.

South Carolina.— McElwee *v.* Kennedy, 56 S. C. 154, 34 S. E. 86; Weinges *v.* Cash, 15 S. C. 44; Means *v.* Feaster, 4 S. C. 249; Union Bank *v.* Toomer, 2 Hill Eq. 27.

Tennessee.— Jones *v.* Cullen, 100 Tenn. 1, 42 S. W. 873.

Texas.— Sanger *v.* Colbert, 84 Tex. 688, 19 S. W. 863; Dodd *v.* Gaines, 82 Tex. 429, 18 S. W. 618; Le Page *v.* Slade, 79 Tex. 473, 15 S. W. 496; Tillman *v.* Heller, (1890) 14 S. W. 271; Hadock *v.* Hill, 75 Tex. 193, 12 S. W. 974; Collins *v.* Cook, 40 Tex. 238; Mills *v.* Howeth, 19 Tex. 257, 70 Am. Dec. 331; Garahy *v.* Bayley, 25 Tex. Suppl. 294; Mills *v.* Waller, Dall. 416; Hillboldt *v.* Waugh, (Civ. App. 1898) 47 S. W. 829; Tempel *v.* Dodge, 11 Tex. Civ. App. 42, 31 S. W. 686; Cox *v.* Morrison, (Civ. App. 1895) 31 S. W. 85; Dittman *v.* Weiss, (Civ. App. 1895) 31 S. W. 67; Ward *v.* Wofford, (Civ. App. 1894) 26 S. W. 321; Bailey *v.* Crittenden, 3 Tex. App. Civ. Cas. § 179. See also Wade *v.* Odle, 21 Tex. Civ. App. 656, 54 S. W. 786; Koch *v.* Bruce, 20 Tex. Civ. App. 634, 49 S. W. 1101.

Vermont.— Wilson *v.* Spear, 68 Vt. 145, 34 Atl. 429; Leach *v.* Francis, 41 Vt. 670.

Virginia.— Wheby *v.* Moir, 102 Va. 875, 47 S. E. 1005; Merchants' Bank *v.* Belt, (1898) 30 S. E. 467; Clay *v.* Walter, 79 Va. 92.

West Virginia.— Timms *v.* Timms, 54 W. Va. 414, 46 S. E. 141; Casto *v.* Fry, 33 W. Va. 449, 10 S. E. 799; Lockhard *v.* Beckley, 10 W. Va. 87; Bishoff *v.* Hartley, 9

be fraudulent.[14] The rule also applies to mortgages, deeds of trust, pledges, confessions of judgment, and other transfers to secure creditors,[15] as well as to absolute conveyances, and to transfers of personal as well as of real prop-

W. Va. 100; Hill *v.* Ruffner, 3 W. Va. 538. See also Baer Sons Grocer Co. *v.* Williams, 43 W. Va. 323, 27 S. E. 345.

Wisconsin.— Bannister *v.* Phelps, 81 Wis. 256, 51 N. W. 417; Beloit Second Nat. Bank *v.* Merrill, 81 Wis. 142, 50 N. W. 503, 29 Am. St. Rep. 870; Mehlhop *v.* Pettibone, 54 Wis. 652, 11 N. W. 553, 12 N. W. 443; Hopkins *v.* Langton, 30 Wis. 379; Sterling *v.* Ripley, 3 Pinn. 155, 3 Chandl. 166. See Bleiler *v.* Moore, 94 Wis. 385, 69 N. W. 164; Shoemaker *v.* Katz, 74 Wis. 374, 43 N. W. 151.

United States.— Prewit *v.* Wilson, 103 U. S. 22, 26 L. ed. 360; Rea *v.* Missouri, 17 Wall. 532, 21 L. ed. 707; Clements *v.* Nicholson, 6 Wall. 299, 18 L. ed. 786; Astor *v.* Wells, 4 Wheat. 466, 4 L. ed. 616; Watson *v.* Bonfils, 116 Fed. 157, 53 C. C. A. 535; Vansickle *v.* Wells, 105 Fed. 16; Means *v.* Montgomery, 23 Fed. 421; Moline Wagon Co. *v.* Rummell, 14 Fed. 155; Howe Mach. Co. *v.* Claybourn, 6 Fed. 438; Jenkins *v.* Einstein, 13 Fed. Cas. No. 7,265, 3 Biss. 128; Magniac *v.* Thompson, 16 Fed. Cas. No. 8,956, Baldw. 344 [*affirmed* in 7 Pet. 348, 8 L. ed. 709]; Wilson *v.* Prewett, 30 Fed. Cas. No. 17,828, 3 Woods 631. See also Evans *v.* Mansur, etc., Implement Co., 87 Fed. 275, 30 C. C. A. 640.

England.— Halifax Banking Co. *v.* Gledhill, [1891] 1 Ch. 31, 60 L. J. Ch. 181, 63 L. T. Rep. N. S. 623, 39 Wkly. Rep. 104; Parnell *v.* Stedman, 1 Cab. & E. 153; Golden *v.* Gillam, 51 L. J. Ch. 503 [*affirming* 20 Ch. D. 389, 51 L. J. Ch. 154, 46 L. T. Rep. N. S. 222]. See also *In re* Reis, (1904) 2 K. B. 769, 73 L. J. K. B. 929, 91 L. T. Rep. N. S. 592, 11 Manson 229, 20 L. T. Rep. 547, 53 Wkly. Rep. 122.

Canada.— Bank of Montreal *v.* Condon, 11 Manitoba 366; Tucker *v.* Young, Manitoba t. Wood 186; Mason *v.* Scott, 20 Grant Ch. (U. C.) 84. See also Allan *v.* McTavish, 8 Ont. App. 440; Brown *v.* Sweet, 7 Ont. App. 725; Smith *v.* Moffatt, 28 U. C. Q. B. 486 [*affirming* 27 U. C. Q. B. 195].

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 493 *et seq.*

Grantees as bona fide purchasers see *infra*, XIII, A, 4, a, (IV).

14. St. 13 Eliz. c. 5, § 6. See *supra*, I, B, 2.

15. *Arkansas.*— Cornish *v.* Dews, 18 Ark. 172.

California.— Roberts *v.* Burr, 135 Cal. 156, 67 Pac. 46.

Connecticut.— Hamilton *v.* Staples, 34 Conn. 316.

Delaware.— Slessinger *v.* Topkis, 1 Marv. 140, 40 Atl. 717; Gamble *v.* Harris, 5 Del. Ch. 512.

Georgia.— Newhoff *v.* Clegg, 99 Ga. 167, 25 S. E. 184.

Illinois.— Young *v.* Clapp, 147 Ill. 176, 32 N. E. 187, 35 N. E. 372; School Trustees *v.* Mason, (1887) 13 N. E. 235; Webber *v.* Mackey, 31 Ill. App. 369.

Indiana.— Pinnell *v.* Stringer, 59 Ind. 555.

Iowa.— Mills *v.* Miller, 109 Iowa 688, 81 N. W. 169; Cox *v.* Collis, 109 Iowa 270, 80 N. W. 343; Roberts *v.* Press, 97 Iowa 475, 66 N. W. 756; Kohn *v.* Clement, 58 Iowa 589, 12 N. W. 550; Moss *v.* Dearing, 45 Iowa 530.

Kansas.— Davis *v.* McCarthy, 52 Kan. 116, 34 Pac. 399.

Kentucky.— Foster *v.* Grigsby, 1 Bush 86; Ford *v.* Williams, 3 B. Mon. 550.

Michigan.—Franklin Needle Co. *v.* Amazon Hosiery Co., 128 Mich. 198, 87 N. W. 211; Andrews *v.* Fillmore, 46 Mich. 315, 9 N. W. 431; Beurmann *v.* Van Buren, 44 Mich. 496, 7 N. W. 67.

Missouri.— Byrne *v.* Becker, 42 Mo. 264; Chouteau *v.* Sherman, 11 Mo. 385; Frank *v.* Curtis, 58 Mo. App. 349; Kendall *v.* Baltis, 26 Mo. App. 411.

Nebraska.— National Bank of Commerce *v.* Chapman, 50 Nebr. 484, 70 N. W. 39; Hedman *v.* Anderson, 6 Nebr. 392.

New Jersey.— Platt *v.* McClong, (Ch. 1901) 49 Atl. 1125; Folk *v.* Fonda, (Ch. 1894) 29 Atl. 676; Demarest *v.* Terhune, 18 N. J. Eq. 45.

New York.— Fuller Electrical Co. *v.* Lewis, 101 N. Y. 674, 5 N. E. 437; Metcalf *v.* Moses, 35 N. Y. App. Div. 596, 55 N. Y. Suppl. 179; Smith *v.* Post, 3 Thomps. & C. 647.

North Carolina.— Battle *v.* Mayo, 102 N. C. 413, 9 S. E. 384. But see Mitchell *v.* Eure, 126 N. C. 77, 35 S. E. 190, where a son assigned his property in trust to secure his debt to his father with intent to defraud several creditors, and the transfer was held to be void, although neither the trustee nor the father knew of or participated in the fraud.

Pennsylvania.— Magee *v.* Raiguel, 64 Pa. St. 110; Greenwalt *v.* Austin, 1 Grant 169; Jennings *v.* Smith, 22 Pa. Co. Ct. 554, 30 Pittsb. Leg. J. 125.

South Carolina.— Anderson *v.* Pilgram, 41 S. C. 423, 19 S. E. 1002, 20 S. E. 64; Smith *v.* Pate, 3 S. C. 204.

Tennessee.— Wilson *v.* Eifler, 7 Coldw. 31.

Texas.— Galveston Dry Goods Co. *v.* Blum, 23 Tex. Civ. App. 703, 57 S. W. 1121; White *v.* Sterzing, 11 Tex. Civ. App. 553, 32 S. W. 909; Lewis *v.* Alexander, (Civ. App. 1895) 31 S. W. 414.

Virginia.—Oberdorfer *v.* Meyer, 88 Va. 384, 13 S. E. 756.

Washington.— Samuel *v.* Kittenger, 6 Wash. 261, 33 Pac. 509.

West Virginia.— Baer Sons Grocer Co. *v.* Williams, 43 W. Va. 323, 27 S. E. 345.

Wisconsin.— Dornbrook *v.* M. Rumely Co., 120 Wis. 36, 97 N. W. 493.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 493 *et seq.*

erty.[16] It also applies to an antenuptial settlement, which will not be set aside in the absence of clear proof of the intended wife's knowledge or participation in the fraud.[17]

b. Where Transfer Is Voluntary. Where the conveyance is a voluntary one, that is, not based on a valuable consideration, the good faith of the donee does not validate it, where it is otherwise fraudulent as to the donor's creditors.[18] In

16. See the cases in the two preceding notes.

17. *Alabama.*— Nance *v.* Nance, 84 Ala. 375, 4 So. 699, 5 Am. St. Rep. 378.

Oregon.— Bonser *v.* Miller, 5 Oreg. 110.

Pennsylvania.— Ethridge *v.* Dunshee, 31 Pittsb. Leg. J. 39.

Virginia.— Noble *v.* Davies, (1887) 4 S. E. 206.

United States.— Prewit *v.* Wilson, 103 U. S. 22, 26 L. ed. 360; Magniac *v.* Thompson, 7 Pet. 348, 8 L. ed. 709.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 493.

18. *Alabama.*— Wooten *v.* Steele, 109 Ala. 563, 19 So. 972, 55 Am. St. Rep. 947; Hudson *v.* Bauer Grocery Co., 105 Ala. 200, 16 So. 693; Early *v.* Owens, 68 Ala. 171; Pickett *v.* Pipkin, 64 Ala. 520 (holding that there can be no inquiry into the good faith of the grantee, although the conveyance recites a valuable consideration, if the recital is not true in fact); Anderson *v.* Anderson, 64 Ala. 403.

Arkansas.— Hershy *v.* Latham, 46 Ark. 542; Dodd *v.* McCraw, 8 Ark. 83, 46 Am. Dec. 301.

California.— Bush, etc., Co. *v.* Helbing, 134 Cal. 676, 66 Pac. 967; Chalmers *v.* Sheehy, 132 Cal. 459, 64 Pac. 709, 84 Am. St. Rep. 62; Threlkel *v.* Scott, (1893) 34 Pac. 851; Lee *v.* Figg, 37 Cal. 328, 99 Am. Dec. 271; Swartz *v.* Hazlett, 8 Cal. 118.

Colorado.— Wells *v.* Schuster-Hax Nat. Bank, 23 Colo. 534, 48 Pac. 809; Gwynn *v.* Butler, 17 Colo. 114, 28 Pac. 466; Knapp *v.* Day, 4 Colo. App. 21, 34 Pac. 1008.

Connecticut.— Mallory *v.* Gallagher, 75 Conn. 665, 55 Atl. 209; Hitchcock *v.* Kiely, 41 Conn. 611.

Delaware.— Russell *v.* Thatcher, 2 Del. Ch. 320.

Florida.— McKeown *v.* Allen, 37 Fla. 490, 20 So. 556.

Georgia.— Westmoreland *v.* Powell, 59 Ga. 256.

Illinois.— Bauer Grocer Co. *v.* McKee Shoe Co., 87 Ill. App. 434; Head *v.* Harding, 62 Ill. App. 302; Marmon *v.* Harwood, 26 Ill. App. 341.

Indiana.— Gilliland *v.* Jones, 144 Ind. 662, 43 N. E. 939, 55 Am. St. Rep. 210; York *v.* Rockwood, 132 Ind. 358, 31 N. E. 1110; Heaton *v.* Shanklin, 115 Ind. 595, 18 N. E. 172; Meredith *v.* Citizens' Nat. Bank, 92 Ind. 343; Wright *v.* Nipple, 92 Ind. 310; McCole *v.* Loehr, 79 Ind. 430; Sherman *v.* Hogland, 73 Ind. 472; Spinner *v.* Weick, 50 Ind. 213; Borror *v.* Carrier, 34 Ind. App. 353, 73 N. E. 123; Trent *v.* Edmonds, 32 Ind. App. 432, 70 N. E. 169; Spiers *v.* Whitesell, 27 Ind. App. 204, 61 N. E. 28.

Iowa.— Gaar *v.* Hart, 77 Iowa 597, 42 N. W. 451; Lyons *v.* Hamilton, 72 Iowa 759, 33 N. W. 655; Lyons *v.* Hamilton, 69 Iowa 47, 28 N. W. 429; Watson *v.* Riskamire, 45 Iowa 231.

Maine.— Spear *v.* Spear, 97 Me. 498, 54 Atl. 1106; Weeks *v.* Hill, 88 Me. 111, 33 Atl. 778; Laughton *v.* Harden, 68 Me. 208; Emery *v.* Vinall, 26 Me. 295; Tucker *v.* Andrews, 13 Me. 124.

Maryland.— Rickards *v.* Rickards, 98 Md. 136, 56 Atl. 397, 103 Am. St. Rep. 379, 63 L. R. A. 724; Goodman *v.* Wineland, 61 Md. 449; Foley *v.* Bitter, 34 Md. 646; Dorn *v.* Bayer, 16 Md. 144; Worthington *v.* Bullitt, 6 Md. 172.

Massachusetts.— Gray *v.* Chase, 184 Mass. 444, 68 N. E. 676; Clark *v.* Chamberlain, 13 Allen 257; Blake *v.* Sawin, 10 Allen 340.

Michigan.— Schaible *v.* Ardner, 98 Mich. 70, 56 N. W. 1105; Matson *v.* Melchor, 42 Mich. 477, 4 N. W. 200.

Minnesota.— Knatvold *v.* Wilkinson, 83 Minn. 265, 86 N. W. 99.

Mississippi.— Young *v.* White, 25 Miss. 146.

Missouri.— Bohannon *v.* Combs, 79 Mo. 305; Gamble *v.* Johnson, 9 Mo. 605; Farmers, etc., Bank *v.* Price, 41 Mo. App. 291.

Nebraska.— Nebraska Nat. Bank *v.* Hallowell, 63 Nebr. 309, 88 N. W. 556; Ayres *v.* Wolcott, 62 Nebr. 805, 87 N. W. 906; Smith *v.* Schmitz, 10 Nebr. 600, 7 N. W. 329.

New Hampshire.— Preston *v.* Cutter, 64 N. H. 461, 13 Atl. 874; Carter *v.* Grimshaw, 49 N. H. 100.

New Jersey.— Bouquet *v.* Heyman, 50 N. J. Eq. 114, 24 Atl. 266; Providence Nat. Bank *v.* Hamilton, 34 N. J. Eq. 158; Morris Canal, etc., Co. *v.* Stearns, 23 N. J. Eq. 414.

New York.— Young *v.* Heermans, 66 N. Y. 374; Whyte *v.* Denike, 53 N. Y. App. Div. 320, 65 N. Y. Suppl. 577; Truesdell *v.* Bourke, 29 N. Y. App. Div. 95, 51 N. Y. Suppl. 409; Wood *v.* Hunt, 38 Barb. 302; Savage *v.* Murphy, 8 Bosw. 75; New York, etc., R. Co. *v.* Kyle, 5 Bosw. 587; White's Bank *v.* Farthing, 10 N. Y. St. 830; Salomon *v.* Moral, 53 How. Pr. 342; Smart *v.* Harring, 52 How. Pr. 505; Hildreth *v.* Sands, 2 Johns. Ch. 35; Mohawk Bank *v.* Atwater, 2 Paige 54.

North Carolina.— Helms *v.* Green, 105 N. C. 251, 11 S. E. 470, 18 Am. St. Rep. 893; Lassiter *v.* Davis, 64 N. C. 498; Green *v.* Kornegay, 49 N. C. 66, 67 Am. Dec. 261.

North Dakota.— Faber *v.* Wagner, 10 N. D. 287, 86 N. W. 963.

Pennsylvania.— Clark *v.* Depew, 25 Pa. St. 509, 64 Am. Dec. 717.

Rhode Island.— Shreveport First. Nat. Bank *v.* Randall, 20 R. I. 319, 38 Atl. 1055, 78

other words the intent of the donee is immaterial. This rule applies to attacks by subsequent as well as by existing creditors.[19]

2. Effect of Knowledge or Notice — a. Where Transfer Is to One Not a Creditor — (i) *Knowledge or Notice Equivalent to Intent.* A purchase made by one not a creditor is fraudulent and void as against creditors, where it is made with notice[20] of the fraudulent intent of the seller,[21] notwithstanding the

Am. St. Rep. 867; McKenna *v.* Crowley, 16 R. I. 364, 17 Atl. 354.

South Carolina.— Jackson *v.* Lewis, 34 S. C. 1, 12 S. E. 560; Woody *v.* Dean, 24 S. C. 499; Beckham *v.* Secrest, 2 Rich. Eq. 54; Miller *v.* Tollison, Harp. Eq. 145, 14 Am. Dec. 712.

Tennessee.— Wilson *v.* Eifler, 7 Coldw. 31.

Texas.— Brown *v.* Texas Cactus Hedge Co., 64 Tex. 396; Belt *v.* Raguet, 27 Tex. 471.

Vermont.— Corey *v.* Morrill, 71 Vt. 51, 42 Atl. 976; Wilson *v.* Spear, 68 Vt. 145, 34 Atl. 429.

West Virginia.— Lockhard *v.* Beckley, 10 W. Va. 87.

United States.— Beecher *v.* Clark, 3 Fed. Cas. No. 1,223, 12 Blatchf. 256.

Canada.— Oliver *v.* McLaughlin, 24 Ont. 41.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 520.

19. Gilliland *v.* Jones, 144 Ind. 662, 43 N. E. 939, 55 Am. St. Rep. 210; Wilson *v.* Spear, 68 Vt. 145, 34 Atl. 429.

20. Constructive notice see *infra*, VII, B, 3.

21. *Alabama.*— Reeves *v.* Skipper, 94 Ala. 407, 10 So. 309; Crawford *v.* Kirksey, 55 Ala. 282, 27 Am. Rep. 704; Pulliam *v.* Newberry, 41 Ala. 168.

Arkansas.—Galbreath *v.* Cook, 30 Ark. 417.

Georgia.— Conley *v.* Buck, 100 Ga. 187, 28 S. E. 97; Cothran *v.* Forsyth, 68 Ga. 560; Watts *v.* Kilburn, 7 Ga. 356; Peck *v.* Land, 2 Ga. 1, 46 Am. Dec. 368.

Illinois.— Jewett *v.* Cook, 81 Ill. 260; Boies *v.* Henney, 32 Ill. 130; Hoff *v.* Larimore, 106 Ill. App. 589; Oakford *v.* Dunlap, 63 Ill. App. 498.

Indiana.— Hoffman *v.* Henderson, 145 Ind. 613, 44 N. E. 629; Pierce *v.* Hower, 142 Ind. 626, 42 N. E. 223; Buck *v.* Voreis, 89 Ind. 116; Bishop *v.* Redmond, 83 Ind. 157; Tyner *v.* Somerville, 1 Ind. 175; Johnson *v.* Brandis, Smith 263; Basey *v.* Daniel, Smith 252.

Iowa.— Liddle *v.* Allen, 90 Iowa 738, 57 N. W. 603; Baxter *v.* Myers, (1891) 47 N. W. 879; Douglass *v.* Hannah, 81 Iowa 469, 46 N. W. 1053; Taylor *v.* Branscombe, 74 Iowa 534, 38 N. W. 400; Sweet *v.* Wright, 57 Iowa 510, 10 N. W. 870; Chapel *v.* Clapp, 29 Iowa 191. See also Williamson *v.* Wachenheim, 58 Iowa 277, 12 N. W. 302.

Kentucky.— Carter *v.* Richardson, 60 S. W. 397, 22 Ky. L. Rep. 1204; McFarland *v.* McFarland, 1 Ky. L. Rep. 422.

Louisiana.— Shultz *v.* Morgan, 27 La. Ann. 616; Danjean *v.* Blacketer, 13 La. Ann. 595; Barker *v.* Phillips, 11 Rob. 190; Hiriar *v.* Roger, 13 La. 126.

Maine.— Dockray *v.* Mason, 48 Me. 178; Howe *v.* Ward, 4 Me. 195.

Maryland.— Glenn *v.* Randall, 2 Md. Ch. 220. See Biddinger *v.* Wiland, 67 Md. 359, 10 Atl. 202.

Massachusetts.— Day *v.* Cooley, 118 Mass. 524; Wadsworth *v.* Williams, 100 Mass. 126.

Michigan.— Coon *v.* Henry, 49 Mich. 208, 13 N. W. 518.

Mississippi.— Buckingham *v.* Wesson, 54 Miss. 526; Farmers' Bank *v.* Douglass, 11 Sm. & M. 469.

Missouri.— Stewart *v.* Outhwaite, 141 Mo. 562, 44 S. W. 326; Garesche *v.* MacDonald, 103 Mo. 1, 15 S. W. 379; Stone *v.* Spencer, 77 Mo. 356; Shelley *v.* Boothe, 73 Mo. 74, 39 Am. Rep. 481; Johnson *v.* Sullivan, 23 Mo. 474; Kurtz *v.* Troll, 86 Mo. App. 649; Christian *v.* Smith, 85 Mo. App. 117; Esselbruegge Mercantile Co. *v.* Troll, 79 Mo. App. 558; Monarch Rubber Co. *v.* Bunn, 78 Mo. App. 55; Sellers *v.* Bailey, 29 Mo. App. 174; Clark *v.* Finn, 12 Mo. App. 583. See Findley *v.* Findley, 93 Mo. 493, 6 S. W. 369.

Nebraska.— Snyder *v.* Dangler, 44 Nebr. 600, 63 N. W. 20; Hedrick *v.* Strauss, 42 Nebr. 485, 60 N. W. 928; Meyer *v.* Stone, 21 Nebr. 717, 33 N. W. 420; Savage *v.* Hazard, 11 Nebr. 323, 9 N. W. 83; Tootle *v.* Dunn, 6 Nebr. 93.

New Hampshire.— Robinson *v.* Holt, 39 N. H. 557, 75 Am. Dec. 233.

New Jersey.— Kinmonth *v.* White, (Ch. 1900) 47 Atl. 1; Atwood *v.* Impson, 20 N. J. Eq. 150; Danbury *v.* Robinson, 14 N. J. Eq. 213, 82 Am. Dec. 244.

New York.— Decker *v.* Decker, 108 N. Y. 128, 15 N. E. 307; Gilmour *v.* Colcord, 96 N. Y. App. Div. 358, 89 N. Y. Suppl. 689; New York Ice Co. *v.* Cousins, 23 N. Y. App. Div. 560, 48 N. Y. Suppl. 799; Roeber *v.* Bowe, 26 Hun 554; Union Nat. Bank *v.* Warner, 12 Hun 306; Hayes *v.* Reilly, 49 N. Y. Super. Ct. 334; Gowing *v.* Warner, 30 Misc. 593, 62 N. Y. Suppl. 797; Sands *v.* Codwise, 4 Johns. 536, 4 Am. Dec. 305.

North Carolina.— Peeler *v.* Peeler, 109 N. C. 628, 14 S. E. 59; Hudson *v.* Jordan, 108 N. C. 10, 12 S. E. 1029; Cansler *v.* Cobb, 77 N. C. 30.

North Dakota.— Salemonson *v.* Thompson, (N. D. 1904) 101 N. W. 320; Flulgel *v.* Henschel, 7 N. D. 276, 74 N. W. 996, 66 Am. St. Rep. 642.

Ohio.— Brown *v.* Webb, 20 Ohio 389; Shur *v.* Statler, 2 Ohio Dec. (Reprint) 70, 1 West. L. Month. 317.

Oregon.— Lyons *v.* Leahy, 15 Oreg. 8, 13 Pac. 643, 3 Am. St. Rep. 133. See Morton *v.* Denham, 39 Oreg. 227, 64 Pac. 384.

Pennsylvania.— Renninger *v.* Spatz, 128 Pa. St. 524, 18 Atl. 405, 15 Am. St. Rep. 692; Ashmead *v.* Hean, 13 Pa. St. 584.

South Carolina.— Lenhardt *v.* Ponder, 64

fact that the buyer has paid an adequate consideration.[22] Knowledge or implied notice is equivalent to, and constitutes, participation, where the transfer is to one not a creditor.[23] It is not necessary that the purchaser shall have bought with the intention of aiding the grantor in his fraudulent design,[24] nor that there shall have been a combination or confederation between the transferrer and the transferee to delay and defraud creditors.[25] The motives and intents of the trans-

S. C. 354, 42 S. E. 169; Thomas *v.* Jeter, 1 Hill 380; Hipp *v.* Sawyer, Rich. Eq. Cas. 410.

Tennessee.— Carny *v.* Palmer, 2 Coldw. 35; Trotter *v.* Watson, 6 Humphr. 509.

Texas.— Weisiger *v.* Chisholm, 28 Tex. 780, 22 Tex. 670; Tuttle *v.* Turner, 28 Tex. 759; Walcott *v.* Brander, 10 Tex. 419; Mosely *v.* Gainer, 10 Tex. 393; Wallace *v.* Butts, (Civ. App. 1895) 31 S. W. 687; Thomson *v.* Shackleford, 6 Tex. Civ. App. 121, 24 S. W. 980; Blankenship *v.* Turner, 3 Tex. App. Civ. Cas. § 427.

Vermont.— Fuller *v.* Sears, 5 Vt. 527; Edgell *v.* Lowell, 4 Vt. 405.

Virginia.— Garland *v.* Rives, 4 Rand. 282, 15 Am. Dec. 756.

Washington.— O'Leary *v.* Duvall, 10 Wash. 666, 39 Pac. 163.

West Virginia.— Murdoch *v.* Baker, 46 W. Va. 78, 32 S. E. 1009; Gillespie *v.* Allen, 37 W. Va. 675, 17 S. E. 184; Livesay *v.* Beard, 22 W. Va. 585; Hedrick *v.* Walker, 17 W. Va. 916; Goshorn *v.* Snodgrass, 17 W. Va. 717. See also Frank *v.* Zeigler, 46 W. Va. 614, 33 S. E. 761.

Wisconsin.— Gardinier *v.* Otis, 13 Wis. 460.

United States.— Collinson *v.* Jackson, 14 Fed. 305, 8 Sawy. 357; Singer *v.* Jacobs, 11 Fed. 559, 3 McCrary 638.

England.—Cornish *v.* Clark, L. R. 14 Eq. 184, 42 L. J. Ch. 14, 26 L. T. Rep. N. S. 494, 20 Wkly. Rep. 897; Bulmer *v.* Hunter, L. R. 8 Eq. 46, 38 L. J. Ch. 543, 20 L. T. Rep. N. S. 942; Bott *v.* Smith, 21 Beav. 511, 52 Eng. Reprint 957; Harman *v.* Richards, 10 Hare 81, 22 L. J. Ch. 1066, 44 Eng. Ch. 78.

Canada.— Merchants' Bank *v.* Clark, 18 Grant Ch. (U. C.) 594; Wood *v.* Irwin, 16 Grant Ch. (U. C.) 398.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 506.

Exception to rule.— If one is so connected with the property of another and the business in which it is used that he honestly supposes it necessary for the preservation of his business interests to purchase it, and does purchase it for a full consideration, for that reason, and with no intent to aid the seller in a fraud upon his creditors, the sale will be valid, so far as regards the purchaser, as against the creditors of the vendor, notwithstanding the purchaser knows that the object of the seller in making the sale is to defraud his creditors. Root *v.* Reynolds, 32 Vt. 139.

Fraud may be imputed to a grantee either by direct coöperation in the original design at the time of its concoction, or by constructive coöperation from notice of it and carrying the design into operation. Magniac *v.* Thomson, 7 Pet. (U. S.) 348, 8 L. ed. 709.

Knowledge of a judgment against the grantor, where the purchase is for the purpose of defeating the collection thereof by the judgment creditor, renders the sale invalid. Jackson *v.* Myers, 18 Johns. (N. Y.) 425; Jackson *v.* Terry, 13 Johns. (N. Y.) 471; Wickham *v.* Miller, 12 Johns. (N. Y.) 320; Beals *v.* Guernsey, 8 Johns. (N. Y.) 446, 5 Am. Dec. 348; Eigenbrun *v.* Smith, 98 N. C. 207, 4 S. E. 122.

The fact that the seller assigned the purchase-price notes to the holder of a valid demand against himself does not validate the conveyance where otherwise fraudulent. Kurtz *v.* Troll, 86 Mo. App. 649.

22. See *infra*, VII, C.

23. *Alabama.*— Lehman *v.* Kelly, 68 Ala. 192.

Iowa.— Urdangen *v.* Doner, 122 Iowa 533, 98 N. W. 317; Redhead *v.* Pratt, 72 Iowa 99, 33 N. W. 382; Jones *v.* Hetherington, 45 Iowa 681.

Kentucky.— Huffman *v.* Leslie, 66 S. W. 822, 23 Ky. L. Rep. 1981.

Michigan.— Gumberg *v.* Treusch, 110 Mich. 451, 68 N. W. 236; Bedford *v.* Penny, 58 Mich. 424, 25 N. W. 381; Hough *v.* Dickinson, 58 Mich. 89, 24 N. W. 809.

New Hampshire.— Robinson *v.* Holt, 39 N. H. 557, 75 Am. Dec. 233.

New Jersey.— Hancock *v.* Elmer, 61 N. J. Eq. 558, 49 Atl. 140 [*affirmed* in 63 N. J. Eq. 802, 52 Atl. 1131].

New York.— Holmes *v.* Clark, 48 Barb. 237.

North Dakota.— Lockren *v.* Rustan, 9 N. D. 43, 81 N. W. 60; Fluegel *v.* Henschel, 7 N. D. 276, 74 N. W. 996, 66 Am. St. Rep. 642.

Texas.— Humphries *v.* Freeman, 22 Tex. 45.

Participation, as the term is used, need not be by some affirmative action on the part of the transferee in consummating the fraudulent intent of the transferrer, but the transferee is a participator in the fraud if he takes the conveyance with actual notice of the grantor's fraudulent intent, or under circumstances where the law will impute to him knowledge of the purpose of the transferrer without his actively taking part in the fraudulent design of the transfer other than the taking of it. Kansas Moline Plow Co. *v.* Sherman, 3 Okl. 204, 41 Pac. 623, 32 L. R. A. 33.

24. Cowling *v.* Estes, 15 Ill. App. 255; Ferguson *v.* May, 4 Ky. L. Rep. 989; Summers *v.* Taylor, 4 Ky. L. Rep. 290; Hathaway *v.* Brown, 18 Minn. 414; Cansler *v.* Cobb, 77 N. C. 30.

25. Burgert *v.* Borchert, 59 Mo. 80; State *v.* Nauert, 2 Mo. App. 295.

ferrer and the transferee need not be the same, if the latter has knowledge of the fraudulent intent of the former.[26]

(II) *Effect of Proper Application of Proceeds.* If the purchaser has knowledge of, and actively participates in, the seller's fraudulent intent, the sale is invalid notwithstanding the fact that the purchase-money is applied to the payment of *bona fide* debts of the grantor, or to the payment of a debt the purchaser owed to a third person who did not participate in the fraud.[27]

(III) *Knowledge of Co-Grantee.* A deed which is void as to one grantee because of his knowledge of the fraudulent intent of the grantor is not void as to a co-grantee who has no knowledge of such intent,[28] although the knowledge of a grantee that the deed was fraudulent as to a co-grantee will render it fraudulent as to him as well as to the fraudulent co-grantee.[29]

b. Where Transfer Is to a Creditor — (I) *Participation in Fraudulent Intent* — (A) *Where Debt Is Sole Consideration.* A person who receives property from an insolvent debtor in payment of an antecedent debt occupies a more favored position than a purchaser for a present consideration.[30] A preferential transfer of property cannot be declared fraudulent as to other creditors, although the debtor in making it intended to defeat their claims, and the creditor had knowledge of such intention, if the preferred creditor did not actually participate in the debtor's fraudulent purpose.[31] For instance, a confession of judgment,

26. Lyons *v.* Hamilton, 69 Iowa 47, 28 N. W. 429; Edgell *v.* Lowell, 4 Vt. 405.

27. Kurtz *v.* Troll, 175 Mo. 506, 75 S. W. 386 [*distinguishing* Sammons *v.* O'Neill, 60 Mo. App. 530, where the consideration was money paid directly by the purchaser to the creditor]; Frank *v.* Zeigler, 46 W. Va. 614, 33 S. E. 761. See also *infra*, VII, B, 2, d.

28. Livesay *v.* Beard, 22 W. Va. 585.

29. Swartz *v.* Hazlett, 8 Cal. 118.

30. *Alabama.*— Pollock *v.* Meyer, 96 Ala. 172, 11 So. 385; Carter *v.* Coleman, 84 Ala. 256, 4 So. 151; Hodges *v.* Coleman, 73 Ala. 103; Crawford *v.* Kirksey, 55 Ala. 282, 28 Am. Rep. 704.

Maine.— Hartshorn *v.* Eames, 31 Me. 93.

North Dakota.— Lockren *v.* Rustan, 9 N. D. 43, 81 N. W. 60.

Texas.— Greenleve *v.* Blum, 59 Tex. 124 [*approved* in Lewy *v.* Fischl, 65 Tex. 311].

United States.— Bamberger *v.* Schoolfield, 160 U. S. 149, 16 S. Ct. 225, 40 L. ed. 374.

"The reasons that have been assigned for the distinction between one who purchases for a present consideration and one who purchased in satisfaction of a pre-existing debt are sound and unassailable. The former is in every sense a volunteer. He has nothing at stake,— no self-interests to serve. He may, with perfect safety, keep out of the transaction. Having no motive of interest prompting him to enter it, if yet he does enter it, knowing the fraudulent purpose of the grantor, the law, very properly, says that he enters it for the purpose of aiding that fraudulent purpose. Not so with him who takes the property in satisfaction of a pre-existing indebtedness. He has an interest to serve. He can keep out of the transaction only at the risk of losing his claim. The law throws upon him no duty of protecting other creditors. He has the same right to accept a voluntary preference that he has to obtain a preference by superior diligence. He may know the fraudulent purpose of the grantor, but the law sees that he has a purpose of his own to serve, and, if he go no further than is necessary to serve that purpose, the law will not charge him with fraud by reason of such knowledge." Lockren *v.* Rustan, 9 N. D. 43, 48, 81 N. W. 60.

31. *Alabama.*— Morrow *v.* Campbell, 118 Ala. 330, 24 So. 852; Henderson *v.* Perryman, 114 Ala. 647, 22 So. 24; Goetter *v.* Norman, 107 Ala. 585, 19 So. 56; Hornthall *v.* Schonfeld, 79 Ala. 107; Meyer *v.* Sulzbacher, 76 Ala. 120; Hodges *v.* Coleman, 76 Ala. 103; Kiser *v.* Gamble, 75 Ala. 386; Cromelin *v.* McCauley, 67 Ala. 542; Alabama L. Ins., etc., Co. *v.* Pettway, 24 Ala. 544.

Arkansas.— Rice *v.* Wood, 61 Ark. 442, 33 S. W. 636, 31 L. R. A. 609; Wood *v.* Keith, 60 Ark. 425, 30 S. W. 756; Trieber *v.* Andrews, 31 Ark. 163.

California.— Wheaton *v.* Neville, 19 Cal. 41.

Delaware.— Slessinger *v.* Topkis, 1 Marv. 140, 40 Atl. 717.

Illinois.— Walsh *v.* O'Neill, 192 Ill. 202, 61 N. E. 409; Rothgerber *v.* Gough, 52 Ill. 436; Gray *v.* St. John, 35 Ill. 222; Ball *v.* Callahan, 95 Ill. App. 615 [*affirmed* in 197 Ill. 318, 64 N. E. 295]; Oakford *v.* Dunlap, 63 Ill. App. 498; Kuhlenbeck *v.* Hotz, 53 Ill. App. 675; Aultman, etc., Co. *v.* Weir, 34 Ill. App. 615; Webber *v.* Mackey, 31 Ill. App. 369; Chapman *v.* Windmiller, 29 Ill. App. 393; Anderson *v.* Warner, 5 Ill. App. 416. See Funk *v.* Staats, 24 Ill. 633; Mayr *v.* Hodge, etc., Co., 78 Ill. App. 556.

Iowa.— Thompson *v.* Zuckmayer, (1903) 94 N. W. 476; Kerr *v.* Kennedy, 119 Iowa 239, 93 N. W. 353; Johnson *v.* Johnson, 101 Iowa 405, 70 N. W. 598; Richards *v.* Schreiber, etc., Co., 98 Iowa 422, 67 N. W. 569; Bussard *v.* Bullitt, 95 Iowa 736, 64 N. W. 658; Stewart *v.* Mills County Nat. Bank, 76 Iowa 571, 41 N. W. 318; Aulman *v.* Aulman,

although fraudulent on the part of the judgment debtor, cannot be attacked by

71 Iowa 124, 32 N. W. 240, 60 Am. Rep. 783; Aultman *v.* Heiney, 59 Iowa 654, 13 N. W. 856; Chase *v.* Walters, 28 Iowa 460; Wilson *v.* Horr, 15 Iowa 489. But see Kelliher *v.* Sutton, 115 Iowa 632, 89 N. W. 26; Bixby *v.* Carskaddon, 55 Iowa 533, 8 N. W. 354.

Kansas.— Concordia First Nat. Bank *v.* Marshall, 56 Kan. 441, 43 Pac. 774; Hasie *v.* Connor, 53 Kan. 713, 37 Pac. 128.

Kentucky.— Brown *v.* Smith, 7 B. Mon. 361; Worland *v.* Kimberlin, 6 B. Mon. 608, 44 Am. Dec. 785. But see Foster *v.* Grigsby, 1 Bush 86; Ward *v.* Trotter, 3 T. B. Mon. 1.

Maine.— McLarren *v.* Thompson, 40 Me. 284; Hartshorn *v.* Eames, 31 Me. 93.

Massachusetts.— Carr *v.* Briggs, 156 Mass. 78, 30 N. E. 470; Banfield *v.* Whipple, 14 Allen 13; Bridge *v.* Eggleston, 14 Mass. 245, 7 Am. Dec. 209. See Harrison *v.* Phillips Academy, 12 Mass. 456.

Michigan.— Eureka Iron, etc., Works *v.* Bresnahan, 66 Mich. 489, 33 N. W. 834; Fraser *v.* Passage, 63 Mich. 551, 30 N. W. 334; Olmstead *v.* Mattison, 45 Mich. 617, 8 N. W. 555; Fisher *v.* Hall, 44 Mich. 493, 7 N. W. 72.

Mississippi.— Ferguson *v.* Oxford Mercantile Co., (1900) 27 So. 877; Hirsch *v.* Richardson, 65 Miss. 227, 3 So. 569. See Brister *v.* Moore, (1895) 16 So. 596. *Compare* Harney *v.* Pack, 4 Sm. & M. 229, holding that a deed of trust made to secure an antecedent debt may be void, although neither the trustees nor the *cestui que trust* participated in the fraudulent intent.

Missouri.— Mansur-Tebbetts Implement Co. *v.* Ritchie, 159 Mo. 213, 60 S. W. 87; Farmers' Bank *v.* Worthington, 145 Mo. 91, 46 S. W. 745; Stokes *v.* Burns, 132 Mo. 214, 33 S. W. 460; Alberger *v.* White, 117 Mo. 347, 23 S. W. 92; State *v.* Mason, 112 Mo. 374, 20 S. W. 629, 34 Am. St. Rep. 390; Sexton *v.* Anderson, 95 Mo. 373, 8 S. W. 564; Holmes *v.* Braidwood, 82 Mo. 610; Shelley *v.* Boothe, 73 Mo. 74, 39 Am. Rep. 481; Henderson *v.* Henderson, 55 Mo. 534; White *v.* Million, 102 Mo. App. 437, 76 S. W. 733; Haydon *v.* Alkire Grocery Co., 88 Mo. App. 241 (which, however, held, on the authority of Alberger *v.* White, 117 Mo. 347, 23 S. W. 92, that it was not error to instruct that if the intention of the debtor was to defraud other creditors and that the creditor had knowledge of such fraudulent intention "and aided or in any way assisted" him in carrying out such intention, the conveyance must be held fraudulent); Mayfield Woolen Mills *v.* Wilson, 87 Mo. App. 145; Kurtz *v.* Lewis Voight, etc., Co., 86 Mo. App. 649; Esselbruegge Mercantile Co. *v.* Troll, 79 Mo. App. 558; Monarch Rubber Co. *v.* Bunn, 78 Mo. App. 55; Schawacker *v.* Ludington, 77 Mo. App. 415; Ross *v.* Ashton, 73 Mo. App. 254; Mapes *v.* Burns, 72 Mo. App. 411; Sammons *v.* O'Neill, 60 Mo. App. 530; Frank *v.* Curtis, 58 Mo. App. 349; Russell *v.* Letton, 56 Mo. App. 541; Morgan *v.* Wood, 38 Mo. App. 255; Deering *v.* Collins, 38 Mo. App. 80; Schroeder *v.* Mason, 25 Mo. App. 190; State *v.* Mason, 24 Mo. App. 321; Gaff *v.* Stern, 12 Mo. App. 115. See also State *v.* Hope, 102 Mo. 410, 14 S. W. 985. But see Roan *v.* Winn, 93 Mo. 503, 4 S. W. 736; Kitchen *v.* St. Louis, etc., R. Co., 69 Mo. 224.

Nebraska.— Blair State Bank *v.* Bunn, 61 Nebr. 464, 85 N. W. 527; Sunday Creek Coal Co. *v.* Burnham, 52 Nebr. 364, 72 N. W. 487 [*disapproving* Bollman *v.* Lucas, 22 Nebr. 796, 36 N. W. 465]; Grosshans *v.* Gold, 49 Nebr. 599, 68 N. W. 1031; Jones *v.* Loree, 37 Nebr. 816, 822, 56 N. W. 390 (in which Irvine, C., said: "To say that knowledge upon the part of an existing creditor of the debtor's intention to defraud creditors would render any security demanded by such creditor fraudulent would be equivalent to saying that the creditor is estopped from protecting himself by knowledge of the very facts which warrant him in seeking protection"); Switz *v.* Bruce, 16 Nebr. 463, 20 N. W. 639; Grainger *v.* Erwin, 3 Nebr. (Unoff.) 204, 91 N. W. 592. See also Steinberg *v.* Buffum, 61 Nebr. 778, 86 N. W. 491.

New Hampshire.— Dole *v.* Farwell, 72 N. H. 183, 55 Atl. 553; Fradd *v.* Charon, 69 N. H. 189, 44 Atl. 910; Blake *v.* White, 13 N. H. 267.

New Jersey.— Gray *v.* Folwell, 57 N. J. Eq. 446, 41 Atl. 869; Roe *v.* Moore, 35 N. J. Eq. 526; Schmidt *v.* Opie, 33 N. J. Eq. 138; Goodwin *v.* Hamill, 26 N. J. Eq. 24.

New York.— Dudley *v.* Danforth, 61 N. Y. 626; Shidlovsky *v.* Gorman, 51 N. Y. App. Div. 253, 64 N. Y. Suppl. 993; Carpenter *v.* Muren, 42 Barb. 300; Hyde *v.* Bloomingdale, 23 Misc. 728, 51 N. Y. Suppl. 1025; Beals *v.* Guernsey, 8 Johns. 446, 5 Am. Dec. 348. See Dart *v.* Farmers' Bank, 27 Barb. 337.

North Carolina.— Beasley *v.* Bray, 98 N. C. 266, 3 S. E. 497; Rose *v.* Coble, 61 N. C. 517. But see Wolf *v.* Arthur, 118 N. C. 890, 24 S. E. 671.

North Dakota.— Lockren *v.* Rustan, 9 N. D. 43, 81 N. W. 60.

Ohio.— Walker *v.* Walker, 6 Ohio S. & C. Pl. Dec. 355, 4 Ohio N. P. 324.

Pennsylvania.— Snayberger *v.* Fahl, 195 Pa. St. 336, 45 Atl. 1065; Hopkins *v.* Beebe, 26 Pa. St. 85; Covanhovan *v.* Hart, 21 Pa. St. 495, 60 Am. Dec. 57; Benson *v.* Maxwell, 10 Pa. Cas. 380, 14 Atl. 161. See *In re* Bear, 60 Pa. St. 430.

South Carolina.— McElwee *v.* Kennedy, 56 S. C. 154, 34 S. E. 86; Monaghan Bay Co. *v.* Dickinson, 39 S. C. 146, 17 S. E. 696, 39 Am. St. Rep. 704; McIntyre *v.* Legon, 38 S. C. 457, 17 S. E. 253.

Tennessee.— Phillips *v.* Cunningham, (Ch. App. 1899) 58 S. W. 463. And see Wilson *v.* Eifler, 7 Coldw. 31.

Texas.— Owens *v.* Clark, 78 Tex. 547, 15 S. W. 101; Smith *v.* Whitfield, 67 Tex. 124, 2 S. W. 822; Edwards *v.* Dickson, 66 Tex. 613, 2 S. W. 718; Lewy *v.* Fischl, 65 Tex. 311; Iglehart *v.* Willis, 58 Tex. 306; Watts *v.* Dubois, (Civ. App. 1902) 66 S. W.

creditors unless the intent was participated in by the judgment creditor.[32] If the only purpose of the creditor is to secure his debt and the property is not worth materially more than the amount of the debt, the transaction is not fraudulent,[33]

698; Head *v.* Bracht, (Civ. App. 1897) 40 S. W. 630; Wood *v.* Castlebury, (Civ. App. 1896) 34 S. W. 653; Rock Island Plow Co. *v.* Hill, (Civ. App. 1895) 32 S. W. 242; Byrd *v.* Perry, 7 Tex. Civ. App. 378, 26 S. W. 749; Kraus *v.* Haas, 6 Tex. Civ. App. 665, 25 S. W. 1025; Rider *v.* Hunt, 6 Tex. Civ. App. 238, 25 S. W. 314; Hamilton-Brown Shoe Co. *v.* Cameron, (Civ. App. 1893) 23 S. W. 525; Hamilton-Brown Shoe Co. *v.* Kellum, (Civ. App. 1893) 23 S. W. 524; Hamilton-Brown Shoe Co. *v.* Whitaker, 4 Tex. Civ. App. 380, 23 S. W. 520. But see Frost *v.* Mason, 17 Tex. Civ. App. 465, 44 S. W. 53.

Wisconsin. — German-American Bank *v.* Magill, 102 Wis. 582, 78 N. W. 782; H. B. Claflin Co. *v.* Grashorn, 99 Wis. 356, 74 N. W. 783; Carey *v.* Dyer, 97 Wis. 554, 73 N. W. 29; Koch *v.* Peters, 97 Wis. 492, 73 N. W. 25; Bleiler *v.* Moore, 94 Wis. 385, 69 N. W. 164 [*overruling* David *v* Buchard, 53 Wis. 492, 10 N. W. 557]; Barr *v.* Church, 82 Wis. 382, 52 N. W. 591; Sterling *v.* Ripley, 3 Pinn. 155, 3 Chandl. 166.

United States.— Crawford *v.* Neal, 144 U. S. 585, 12 S. Ct. 759, 36 L. ed. 552 [*affirming* 36 Fed. 29]; Huiskamp *v.* Moline, Wagon Co., 121 U. S. 310, 7 S. Ct. 899, 30 L. ed. 971; Rindskopf *v.* Vaughan, 40 Fed. 394. See Foster *v.* McAlester, 114 Fed. 145, 52 C. C. A. 107.

Canada.— Allan *v.* McTavish, 8 Ont. App. 440.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 373, 515. See also *infra*, XI, H.

Contra.— Bigby *v.* Warnock, 115 Ga. 385, 41 S. E. 622, 57 L. R. A. 754; Conley *v.* Buck, 100 Ga. 187, 28 L. ed. 97; Claflin *v.* Ballance, 91 Ga. 411, 11 S. E. 309; Palmour *v.* Johnson, 84 Ga. 91, 10 S. E. 500; Phinizy *v.* Clark, 62 Ga. 623.

Illustration.— Where defendants procured goods fraudulently and transferred them to secure a *bona fide* debt to a bank, and the goods so transferred were not excessive security, the fact that the bank knew of such fraud, and had represented defendants to be in good financial standing, is not sufficient to avoid the trust deed, at the suit of a creditor who did not seek to disaffirm his sale of goods to defendants. Bangs Milling Co. *v.* Burns, 152 Mo. 350, 53 S. W. 923.

Rule does not apply to a mere volunteer purchaser who, by direction of the debtor, pays the price to a preferred creditor. Pope *v.* Kingman, 2 Nebr. (Unoff.) 184, 96 N. W. 519.

The fraudulent purpose of the grantor "must have been shared in" by the grantee. Bank of Commerce *v.* Schlotfeldt, 40 Nebr. 212, 58 N. W. 727.

Reconveyance fraudulent as to original grantee's creditors.— Where property fraudulently conveyed to hinder or delay creditors, with the understanding that the grantee is to reconvey on request, is reconveyed by such grantee with the intent to hinder, delay, and defraud his creditors, the conveyance will not be avoided, although the original grantor has knowledge of the fraudulent intent; he having requested the reconveyance to protect and preserve his property. Lockren *v.* Rustan, 9 N. D. 43, 81 N. W. 60. See *supra*, II, B, 17, d.

32. Galle *v.* Tode, 148 N. Y. 270, 42 N. E. 673 [*reversing* 74 Hun 542, 26 N. Y. Suppl. 633, and *overruling* Simons *v.* Goldbach, 56 Hun 204, 9 N. Y. Suppl. 359]; Unangst *v.* Goodyear India-Rubber Mfg. Co., 141 Pa. St. 127, 21 Atl. 499; Bell *v.* Throop, 140 Pa. St. 641, 21 Atl. 408; Hutchinson *v.* McClure, 20 Pa. St. 63; Dalley's Estate, 13 Pa. Super. Ct. 506.

In New York a distinction is drawn between judgments confessed in proceedings instituted by the creditor and those confessed on the debtor's own motion. In the latter case the fraud of the debtor is held to vitiate the judgment. Metcalf *v.* Moses, 35 N. Y. App. Div. 596, 55 N. Y. Suppl. 179; Barker *v.* Franklin, 37 Misc. 292, 75 N. Y. Suppl. 305.

33. *Alabama.* — Cooper *v.* Berney Nat. Bank, 99 Ala. 119, 11 So. 760; Howell *v.* Bowman, 99 Ala. 100, 10 So. 640.

Arkansas.— Hempstead *v.* Johnston, 18 Ark. 123, 65 Am. Dec. 458.

Indiana.— Fleming *v.* Yost, 137 Ind. 95, 36 N. E. 705.

Iowa.— Ruthven *v.* Clarke, 109 Iowa 25, 79 N. W. 454; Gaar *v.* Klein, 93 Iowa 313, 61 N. W. 918; Des Moines Ins. Co. *v.* Lent, 75 Iowa 522, 39 N. W. 826.

Kansas.— Standard Implement Co. *v.* Parlin, etc., Co., 51 Kan. 632, 33 Pac. 362.

Kentucky.—McFerran *v.* Jones, 2 Litt. 219.

Maryland.—Commonwealth Bank *v.* Kearns, 100 Md. 202, 59 Atl. 1010.

Mississippi.— Farmers' Bank *v.* Douglass, 11 Sm. & M. 469.

Missouri.— Schawacker *v.* Ludington, 77 Mo. App. 415.

Nebraska.— Dunn *v.* Bozarth, 59 Nebr. 244, 80 N. W. 811; H. T. Clarke Drug Co. *v.* Boardman, 50 Nebr. (Unoff.) 687, 70 N. W. 248.

New York.— Sommers *v.* Cottentin, 26 N. Y. App. Div. 241, 49 N. Y. Suppl. 652; Hall *v.* Arnold, 15 Barb. 599. See New York County Nat. Bank *v.* American Surety Co., 69 N. Y. App. Div. 153, 74 N. Y. Suppl. 692.

North Carolina.— Nadal *v.* Britton, 112 N. C. 180, 16 S. E. 914.

Pennsylvania.— See Damon *v.* Bache, 55 Pa. St. 67, 93 Am. Dec. 730.

Tennessee.— Wilson *v.* Eifler, 7 Coldw. 31; Phillips *v.* Cunningham, (Ch. App. 1899) 58 S. W. 463.

Texas.— Brown *v.* Lessing, 70 Tex. 544, 7 S. W. 783; Garritty *v.* Rankin, (Civ. App. 1900) 55 S. W. 367.

and this is so, although the creditor knows that the debtor is insolvent,[34] that the transfer is of all the debtor's property,[35] that the debtor is actuated solely by a desire to defraud his other creditors,[36] or that the conveyance secures the debts of more than one creditor.[37] If, however, the transfer is not in reality a preference of an actual debt but is a mere colorable device to place the debtor's property beyond the reach of his creditors, or if the transaction extends beyond the necessary purposes of a mere preference so as to secure to the debtor some benefit or advantage or unnecessarily hinder and delay other creditors, such being the purpose of the parties, the transfer will be held fraudulent, even though there was an actual indebtedness to be discharged or secured.[38] The preferred creditor "partici-

Utah.— Ogden State Bank *v.* Barker, 12 Utah 27, 40 Pac. 769.

Vermont.— Gregory *v.* Harrington, 33 Vt. 241.

Wisconsin.— Ritzinger *v.* Eau Claire Nat. Bank, 103 Wis. 346, 79 N. W. 410.

United States.— Foster *v.* McAlester, 114 Fed. 145, 52 C. C. A. 107.

Canada.— Mulcahey *v.* Archibald, 28 Can. Sup. Ct. 523.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 373 *et seq.* See also *infra*, XI, H.

34. *Alabama.*— Crawford *v.* Kirksey, 55 Ala. 282, 28 Am. Rep. 704.

Illinois.— Kiehn *v.* Bestor, 30 Ill. App. 458; Axtell *v.* Cullen, 3 Ill. App. 527.

Indiana.— Straight *v.* Roberts, 126 Ind. 383, 26 N. E. 73.

Iowa.— Rockford Boot, etc., Mfg. Co. *v.* Mastin, 75 Iowa 112, 39 N. W. 219; Citizens' Bank *v.* Rhutasel, 68 Iowa 597, 27 N. W. 774.

Michigan.—Oshkosh Nat. Bank *v.* Ironwood First Nat. Bank, 100 Mich. 485, 59 N. W. 231.

Missouri.— Sevier *v.* Allen, 80 Mo. App. 187.

Oregon.— Marquam *v.* Sengfelder, 24 Oreg. 2, 32 Pac. 676.

Pennsylvania.—Harman *v.* Reese, 1 Browne 11.

South Carolina.— McElwee *v.* Kennedy, 56 S. C. 154, 34 S. E. 86.

Virginia.— Shields *v.* Mahoney, 94 Va. 487, 27 S. E. 23.

Washington.— Furth *v.* Snell, 6 Wash. 542, 33 Pac. 830.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 516. See also *infra*, XI, H.

Contra, in Louisiana, where it is held that where a debtor transfers property to a creditor, resulting in a preference to the latter over other creditors, and the creditor so favored knew of the insolvency or embarrassed condition of the debtor, the contract will be set aside as fraudulent. Johnson *v.* Levy, 109 La. 1036, 34 So. 68; Stone *v.* Kidder, 6 La. Ann. 552; Gillespie *v.* Cammack, 3 La. Ann. 248; De Blanc *v.* Martin, 2 Rob. (La.) 38; Henderson *v.* Morgan, 4 Mart. N. S. (La.) 649; Hodge *v.* Morgan, 2 Mart. N. S. (La.) 61.

35. Johnson *v.* McGrew, 11 Iowa 151, 77 Am. Dec. 137; Goldsmith *v.* Erickson, 48 Nebr. 48, 66 N. W. 1029. See Beaubien *v.* Perrault, 17 Quebec Super. Ct. 410. See also *supra*, V, B, 8; *infra*, XI, E.

36. Lockren *v.* Rustan, 9 N. D. 43, 81 N. W. 60. See *infra*, XI, H.

37. Anderson *v.* Hooks, 9 Ala. 704 (holding that the embarrassment of a debtor, his relationship to his creditor, and the contiguity of their places of residence to each other are not sufficient to warrant the inference that the creditor participated with the debtor in the intent to defraud his creditors, by a deed which he executed in part for that purpose, in which the debt of the creditor and another simulated debt was provided for); Rosenheim *v.* Flanders, 114 Iowa 291, 86 N. W. 293.

38. *Alabama.*— Montgomery First Nat. Bank *v.* Acme White Lead, etc., Co., 123 Ala. 344, 26 So. 354; Ziegler *v.* Carter, 94 Ala. 291, 10 So. 260; Harris *v.* Russell, 93 Ala. 59, 9 So. 541; McDowell *v.* Steele, 87 Ala. 493, 6 So. 288; Leinkauff *v.* Frenkle, 80 Ala. 136; Levy *v.* Williams, 79 Ala. 171; Tatum *v.* Hunter, 14 Ala. 557. And see Russell *v.* Davis, 133 Ala. 647, 31 So. 514, 91 Am. St. Rep. 56.

Colorado.— Shideler *v.* Fisher, 13 Colo. App. 106, 57 Pac. 864.

Connecticut.— Starr *v.* Plant, 28 Conn. 377.

Illinois.— Comstock-Castle Stove Co. *v.* Baldwin, 169 Ill. 636, 48 N. E. 723 [*reversing* 63 Ill. App. 255]; Slattery *v.* Stewart, 45 Ill. 293; Merry *v.* Bostwick, 13 Ill. 398, 54 Am. Dec. 434; McNeil, etc., Co. *v.* Plows, 83 Ill. App. 186; Ley *v.* Reitz, 25 Ill. App. 615.

Indiana.— Bunch *v.* Hart, 138 Ind. 1, 37 N. E. 537. See Roberts *v.* Farmers', etc., Bank, 136 Ind. 154, 36 N. E. 128, 137 Ind. 697, 36 N. E. 1091.

Indian Territory.— Foster *v.* McAlester, 3 Indian Terr. 307, 58 S. W. 679.

Iowa.— Bryant *v.* Fink, 75 Iowa 516, 39 N. W. 820.

Kentucky.— Foster *v.* Grigsby, 1 Bush 86; Ward *v.* Trotter, 3 T. B. Mon. 1; Buckler *v.* Brewer, 9 Ky. L. Rep. 1013.

Maine.— Hartshorn *v.* Eames, 31 Me. 93.

Mississippi.— Mangum *v.* Finucane, 38 Miss. 354, holding that preferences between husband and wife are subject to the same rule.

Missouri.— Gutta Percha Rubber Mfg. Co. *v.* Kansas City Fire Dept. Supply Co., 149 Mo. 538, 50 S. W. 912; Martin *v.* Estes, 132 Mo. 402, 28 S. W. 65, 34 S. W. 53; Alberger *v.* White, 117 Mo. 347, 23 S. W. 92; Kuykendall *v.* McDonald, 15 Mo. 416, 57 Am. Dec. 212; Hungerford *v.* Greengard, 95 Mo. App. 653, 69 S. W. 602; Farwell *v.* Meyer, 67 Mo.

pates" in the fraudulent intent of the debtor where his purpose is not to secure the payment of his own debt but to aid the debtor in defeating other creditors, in covering up his property, in giving him a secret interest therein, or in locking it up in any way for the debtor's own use and benefit.[39] He participates in the

App. 566; McKinney *v.* Wade, 43 Mo. App. 152; Hanna *v.* Finley, 33 Mo. App. 645; Gaff *v.* Stern, 12 Mo. App. 115; Cordes *v.* Straszer, 8 Mo. App. 61. See also McDonald *v.* Hoover, 142 Mo. 484, 44 S. W. 334.

Nebraska.— Columbia Nat. Bank *v.* Baldwin, 64 Nebr. 732, 90 N. W. 890; Ellis *v.* Musselman, 61 Nebr. 262, 85 N. W. 75; Landauer *v.* Mack, 43 Nebr. 430, 61 N. W. 597; Marcus *v.* Leake, 4 Nebr. (Unoff.) 354, 94 N. W. 100.

New Jersey.— Richey *v.* Carpenter, (Ch. 1895) 33 Atl. 472; Folk *v.* Fonda, (Ch. 1894) 29 Atl. 676; Moore *v.* Williamson, 44 N. J. Eq. 496, 15 Atl. 587, 1 L. R. A. 336; Metropolis Nat. Bank *v.* Sprague, 21 N. J. Eq. 530.

New York.— Billings *v.* Russell, 101 N. Y. 226, 4 N. E. 531 [*reversing* 31 Hun 65]; New York County Nat. Bank *v.* American Surety Co., 69 N. Y. App. Div. 153, 74 N. Y. Suppl. 692; Metcalf *v.* Moses, 35 N. Y. App. Div. 596, 55 N. Y. Suppl. 179 [*modifying* 22 Misc. 664, 50 N. Y. Suppl. 1060]; Vilas Nat. Bank *v.* Newton, 25 N. Y. App. Div. 62, 48 N. Y. Suppl. 1009; New York Ice Co. *v.* Cousins, 23 N. Y. App. Div. 560, 48 N. Y. Suppl. 799; Howe *v.* Sommers, 22 N. Y. App. Div. 417, 48 N. Y. Suppl. 162; Victor *v.* Levy, 72 Hun 263, 25 N. Y. Suppl. 644 [*affirmed* in 148 N. Y. 739, 42 N. E. 726]; King *v.* Munzer, 28 N. Y. Suppl. 587; Loeschigk *v.* Addison, 19 Abb. Pr. 169. See also Davis *v.* Leopold, 87 N. Y. 620; Woods *v.* Van Brunt, 6 N. Y. App. Div. 220, 39 N. Y. Suppl. 896.

North Carolina.— Peeler *v.* Peeler, 109 N. C. 628, 14 S. E. 59; Hafner *v.* Irwin, 23 N. C. 490.

North Dakota.— Daisy Roller Mills *v.* Ward, 6 N. D. 317, 70 N. W. 271.

Ohio.— Fassett *v.* Traber, 20 Ohio 540; Brooks *v.* Todd, 1 Handy 169.

Pennsylvania.— Thornburn *v.* Thompson, 192 Pa. St. 298, 43 Atl. 992; Werner *v.* Zierfuss, 162 Pa. St. 360, 29 Atl. 737; Bunn *v.* Ahl, 29 Pa. St. 387, 72 Am. Dec. 639; Jaroslawski *v.* Simon, 3 Brewst. 37.

South Carolina.— Pickett *v.* Pickett, 2 Hill Eq. 470 (assisting debtor to remove property out of the state to defeat liens); Fryer *v.* Bryan, 2 Hill Eq. 56.

Texas.— Edrington *v.* Rogers, 15 Tex. 188; Louisiana Sugar Refining Co. *v.* Harrison, 9 Tex. Civ. App. 141, 29 S. W. 500; Mixon *v.* Symonds, 2 Tex. Civ. App. 629, 21 S. W. 772.

Virginia.— National Valley Bank *v.* Hancock, 100 Va. 101, 40 S. E. 611, 93 Am. St. Rep. 933.

Wisconsin.— Zimmerman *v.* Bannon, 101 Wis. 407, 77 N. W. 735.

United States.— Drury *v.* Milwaukee, etc., R. Co., 7 Wall. 299, 19 L. ed. 40; Fechheimer *v.* Sloman, 33 Fed. 787, 2 L. R. A. 153; Smith *v.* Craft, 12 Fed. 856, 11 Biss. 340 [appeal *dismissed* in 123 U. S. 436, 8 S. Ct. 196, 31 L. ed. 267].

England.— Twyne's Case, 3 Coke 80*a*, 1 Smith Lead. Cas. 1.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 373, 517. See also *infra*, VII, C.

Illustrations.— Where a debtor conveys his property to a trustee, who is to continue the business indefinitely until the creditor for whose benefit it is made is paid, when it is to be reconveyed to the debtor, the conveyance is fraudulent in law whether or not the property is of less value than the creditor's claim. Gutta Percha Rubber Mfg. Co. *v.* Kansas City Fire Dept. Supply Co., 149 Mo. 538, 50 S. W. 912. A commission firm, indebted in the aggregate for one thousand nine hundred and ninety-five dollars, and having assets invoiced at one thousand four hundred dollars, but of the actual value of six hundred and fifty dollars, organized together with the agent of a creditor a corporation, to which its assets were transferred. The firm executed its check to the creditor in satisfaction of his debt, and at the same time the creditor gave to the firm his check for a like amount in payment for a half interest in the corporation. It was held that the creditor represented in the formation of the corporation, having full knowledge of the facts and having placed himself in the position of a satisfied creditor who had purchased a half interest in the corporation after it was formed, could not protect himself as a preferred creditor. Colorado Trading, etc., Co. *v.* Acres Commission Co., 18 Colo. App. 253, 70 Pac. 954.

Liability for excess.— Where a mortgage creditor of an insolvent debtor, with knowledge of facts sufficient to give a prudent man notice of the debtor's insolvency, took an absolute conveyance of all the debtor's property, it was held that the creditor was liable, under the Wisconsin statute, as garnishee, to other creditors, for the value of the property in excess of the indebtedness due him. Carter, etc., Co. *v.* McDonald, 94 Wis. 186, 68 N. W. 655.

Retention of possession or title see *infra*, IX.

Reservations and trusts for grantor see *supra*, X.

39. Sunday Creek Coal Co. *v.* Burnham, 52 Nebr. 364, 72 N. W. 487. See Johnson *v.* Whitwell, 7 Pick. (Mass.) 71; McDonald *v.* Hoover, 142 Mo. 484, 44 S. W. 334.

Retention of possession by mortgagor.— The fact that a mortgage is given to secure an indebtedness with the understanding that the mortgagor shall retain possession of the land as a home for himself and his family, the mortgage being given for no more than the amount justly due, is not fraudulent as to preëxisting creditors. Billings *v.* Billings, 31 Hun (N. Y.) 65.

fraudulent intent of the grantor where he knows that the goods transferred to him were bought by the debtor by false representations, or an intentional concealment, as to his financial ability.[40] In short the whole purpose of the parties and the effect of the transfer must be to devote the property to the payment or security of the debt preferred, and not to cause any more hindrance or delay to other creditors than would naturally and necessarily result from the transfer itself.[41] Proof of a valid indebtedness does not disprove the existence of a fraudulent intent.[42]

(B) *Where Debt Is Only Part of Consideration.* The fact that the property conveyed, or the security given to a creditor, is materially in excess of the debt, does not necessarily stamp the transfer as fraudulent as to other creditors, if a fair sum is paid for the difference between the value of the property and the amount of the debt,[43] even though all of the property of the debtor is included

A creditor has a perfect right to protect his own interests, but in so doing he must not lend himself to any scheme whereby others may be defrauded; and he does this whenever he knowingly accepts the benefits of an arrangement by which others are deceived or misled and the interests of the debtor thereby improperly protected from the lawful demands of his creditors. Thompson *v.* Furr, 57 Miss. 478.

Mere knowledge that the debtor prefers a creditor and is indebted to other parties is not sufficient to show that a creditor was actuated by a fraudulent purpose in taking the conveyance. Bank of Commerce *v.* Schlotfeldt, 40 Nebr. 212, 58 N. W. 727.

Failure to give notice to other creditors.— A creditor is not guilty of fraud as to other creditors in failing to give them notice of judgment notes given to him by the debtor. Field *v.* Ridgely, 116 Ill. 424, 6 N. E. 156. So the fact that the purchaser of an insolvent's stock of merchandise gave a check for the price, and after the sale, at the seller's request, refrained from informing the seller's creditors of the check until it had been collected, is insufficient to show that the purchaser participated in the seller's intention to defraud his creditors. Keet-Roundtree Shoe Co. *v.* Lisman, 149 Mo. 85, 50 S. W. 276.

Failure to point out the debtor's property to an officer having a writ of attachment does not show fraud on the part of a preferred creditor. Steinberg *v.* Buffum, 61 Nebr. 778, 86 N. W. 491.

Giving the debtor authority to sell goods delivered to the creditor to sell and apply the proceeds to his debt does not show that the creditor participated in the fraud. Marsalis *v.* Brown, 1 Tex. App. Civ. Cas. § 453.

To prevent attachment.— A conveyance to a creditor, where its object is not to secure his debt or to raise money for the payment of other debts but to prevent attachment of the property by other creditors and to secure its continued use in the business of the seller, is fraudulent. Bernard *v.* Barney Myroleum Co., 147 Mass. 356, 17 N. E. 887.

Pledges.— It is not fraudulent to give or receive a pledge for the payment of an honest debt, especially if the pledge does not exceed in value the amount of the debt; but it is otherwise if done collusively and the real object is to delay or defeat other creditors. Reynolds *v.* Wilkins, 14 Me. 104.

40. Hill *v.* Mallory, 112 Mich. 387, 70 N. W. 1016.

41. Hafner *v.* Irwin, 23 N. C. 490; Fassett *v.* Traber, 20 Ohio 540; Brooks *v.* Todd, 1 Handy (Ohio) 169, 12 Ohio Dec. (Reprint) 84; Walker *v.* Walker, 6 Ohio S. & C. Pl. Dec. 355, 4 Ohio N. P. 324.

"**It is necessary that the utmost good faith should be observed** toward the rights of other creditors. The creditor must act solely for the purpose of securing himself, without interposing any barrier to the rights of others, except such as may be necessary to effect that object." Fassett *v.* Traber, 20 Ohio 540, 545. See also Foster *v.* Grigsby, 1 Bush (Ky.) 86.

Device to force compromise.— A failing debtor will not be allowed to place his property beyond the reach of his creditors with a view to his own advantage by forcing them to release their claims for less than the amount due, although the transaction assumes the form of a transfer to one or more preferred creditors; provided of course that the preferred creditors participated in the debtor's fraudulent purpose. Young *v.* Clapp, 147 Ill. 176, 32 N. E. 187, 35 N. E. 372; Bunn *v.* Ahl, 29 Pa. St. 387, 72 Am. Dec. 639.

Uniting with third person in fraudulent scheme.— The purchasing creditor cannot go beyond the legitimate purpose of obtaining payment of his debt. A creditor who enters with other persons, not creditors, into a scheme to defraud other creditors of the debtor, forfeits his right to preference, and if in furtherance and consummation of such scheme one of the confederates purchases property for cash with such fraudulent intent, a purchase of other property by the creditor in payment of his debt comes within the operation of the principles governing a purchase on a new consideration; and all proper inquiries as to the fraudulent intent of the debtor, and the participation therein by the creditor arise. Harris *v.* Russell, 93 Ala. 59, 9 So. 541.

42. Billings *v.* Russell, 101 N. Y. 226, 4 N. E. 531 [*reversing* 31 Hun 65]. And see *infra*, VII, C.

43. Nathan *v.* Sands, 52 Nebr. 660, 72 N. W. 1030; Goldsmith *v.* Erickson, 48 Nebr.

in the transfer.[44] But if a creditor purchases more than enough property to pay his debt, although he pays a consideration for the remainder, the sale will not be upheld unless it was made under such circumstances as would validate it if made to any other purchaser,[45] that is, unless he has no knowledge of the seller's fraudulent intention nor grounds for reasonable suspicion.[46] If the sale is for an amount

48, 66 N. W. 1029; Smith *v.* Phelan, 40 Nebr. 765, 59 N. W. 562. See Murphy *v.* Murphy, 74 Conn. 198, 50 Atl. 394. See *supra*, V, B, 1, d.

Illustration.— A mortgage on a stock of hardware of the value of six thousand dollars, given by one heavily in debt to secure a *bona fide* debt of one thousand dollars, by allowing the mortgagee to run the business until the sales equaled the amount of his claim, and then to turn over the property to the debtor, is valid as against subsequent attachment creditors, where the mortgagee took the property in good faith, and not for the purpose of protecting the debtor's interest from other creditors. Farmers', etc., Bank *v.* Orme, 5 Ariz. 304, 52 Pac. 473.

Badge of fraud.— The taking of a mortgage of an amount in excess of the debt is but a badge of fraud, and only becomes a fraud in law when the purpose is to protect the debtor's interest from other creditors. Farmers', etc., Bank *v.* Orme, 5 Ariz. 304, 52 Pac. 473; Richards *v.* Schreiber, etc., Co., 98 Iowa 422, 67 N. W. 569; Lycoming Rubber Co. *v.* King, 90 Iowa 343, 57 N. W. 864. See *supra*, V, B, 1, d.

Belief of buyer as to value.— Where property conveyed is not worth more than the debt, it is immaterial that the creditor believed the property to be worth considerably more. Miller *v.* Krueger, 36 Kan. 344, 13 Pac. 641.

Belief as to application of payments.— If the purchaser is justified in believing that the money paid by him for goods beyond the quantity necessary to secure his debt is to be devoted to the payment of a *bona fide* indebtedness of the seller, such purchase is not necessarily fraudulent. St. Louis Coffin Co. *v.* Rubelman, 15 Mo. App. 280.

Ignorance of creditor as to amount of debt. — The fact that a judgment confessed was greatly in excess of the amount due the creditor does not show fraud on the part of the creditor where she was not experienced in business, but relied on the statement of the judgment debtor, who was her brother, as to the amount due her. Merchants Bldg., etc., Assoc. *v.* Barber, (N. J. Ch. 1894) 30 Atl. 865.

44. Richards *v.* Schreiber, etc., Co., 98 Iowa 422, 67 N. W. 569. See *supra*, V, B, 8.

45. *Alabama.* — Brinson *v.* Edwards, 94 Ala. 447, 10 So. 219; Harris *v.* Russell, 93 Ala. 59, 9 So. 541; Owens *v.* Hobbie, 82 Ala. 467, 3 So. 145; Carter *v.* Coleman, 82 Ala. 177, 2 So. 354; Levy *v.* Williams, 79 Ala. 171.

Michigan.— Allen *v.* Stingel, 95 Mich. 195, 54 N. W. 880.

Nebraska.— Chamberlain Banking House *v.* Turner-Frazier Mercantile Co., 66 Nebr. 48, 92 N. W. 172; Henney Buggy Co. *v.* Ashenfelter, 60 Nebr. 1, 82 N. W. 118, 83 Am. St. Rep. 503; Switz *v.* Bruce, 16 Nebr. 463, 20 N. W. 639.

New York.— Hyde *v.* Bloomingdale, 23 Misc. 728, 51 N. Y. Suppl. 1025.

Texas.— Allen *v.* Carpenter, 66 Tex. 138, 18 S. W. 347.

Vermont.— Prout *v.* Vaughn, 52 Vt. 451.

United States.— Dorrance *v.* McAlester, 91 Fed. 614, 34 C. C. A. 28.

46. *Alabama.*— Guyton *v.* Terrell, 132 Ala. 66, 31 So. 83; Montgomery *v.* Bayliss, 96 Ala. 342, 11 So. 198; Levy *v.* Williams, 79 Ala. 171; Wiley *v.* Knight, 27 Ala. 336. See Chipman *v.* Glennon, 98 Ala. 263, 13 So. 822.

Arkansas.— Carl, etc., Co. *v.* Beal, etc., Grocer Co., 64 Ark. 373, 42 S. W. 664.

Florida.— Walling *v.* Christian, etc., Grocery Co., 41 Fla. 479, 27 So. 46, 47 L. R. A. 608.

Georgia.— Conley *v.* Buck, 100 Ga. 187, 28 S. E. 97; Phinizy *v.* Clark, 62 Ga. 623.

Illinois.— Strohm *v.* Hayes, 70 Ill. 41; Hanchett *v.* Goetz, 25 Ill. App. 445.

Indiana.— Bray *v.* Hussey, 24 Ind. 228.

Indian Territory.— Daugherty *v.* Bogy, 3 Indian Terr. 197, 53 S. W. 542.

Iowa.— Rosenheim *v.* Flanders, 114 Iowa 291, 86 N. W. 293.

Kansas.— Davis *v.* McCarthy, 40 Kan. 18, 19 Pac. 356; McDonald *v.* Gaunt, 30 Kan. 693, 2 Pac. 871.

Kentucky.— Foster *v.* Grigsby, 1 Bush 86; Thompson *v.* Drake, 3 B. Mon. 565.

Michigan.— See Allen *v.* Stingel, 95 Mich. 195, 54 N. W. 880.

Missouri.— Imhoff *v.* McArthur, 146 Mo. 371, 48 S. W. 456; Riley *v.* Vaughan, 116 Mo. 169, 22 S. W. 707, 38 Am. St. Rep. 586; State *v.* Durant, 53 Mo. App. 493; Meyberg *v.* Jacobs, 40 Mo. App. 128.

Nebraska.— Smith *v.* Logan, 52 Nebr. 585, 72 N. W. 844.

New Jersey.— Perrine *v.* Perrine, (Ch. 1901) 50 Atl. 694.

New York.— Levy *v.* Hamilton, 68 N. Y. App. Div. 277, 74 N. Y. Suppl. 159; Hyde *v.* Bloomingdale, 23 Misc. 728, 51 N. Y. Suppl. 1025. See Billings *v.* Russell, 101 N. Y. 226, 4 N. E. 531.

Pennsylvania.— Heiney *v.* Anderson, 9 Lanc. Bar 13.

Tennessee.— Darwin *v.* Handley, 3 Yerg. 502.

Texas.— McKinnon *v.* Reliance Lumber Co., 63 Tex. 30; Willis *v.* Yates, (Sup. 1889) 12 S. W. 232; Halff *v.* Goldfrank, (Civ. App. 1899) 49 S. W. 1095; Proetzel *v.* Buck Stove, etc., Co., (Civ. App. 1894) 26 S. W. 1110; Stuart *v.* Smith, (Civ. App. 1893) 21 S. W. 1026. But see Haas *v.* Kraus, 75 Tex. 106, 12 S. W. 394.

in excess of the debt, with the purpose on the part of the debtor to place the excess beyond the reach of other creditors, it is void if the creditor knew of that purpose[47] or intended to aid the seller in secreting a part of his property from his creditors.[48] These rules, however, are subject to the exception that where by agreement the purchaser or seller applies the cash or notes in payment of other indebtedness of the seller, the sale being otherwise fair, it will not be set aside.[49]

(c) *Recital of False Consideration.* A mortgage executed to hinder and delay the mortgagor's creditors, and which purposely exaggerates the mortgagee's demand, and the object of which is known to the mortgagee at the time of its execution, is void as against such creditors.[50]

(II) *When Creditor's Intent Is Immaterial.* The effect of the transfer may control the intent of the creditor. For instance, if the deed contains provisions which must necessarily defraud other creditors, it is immaterial that the only motive of the creditor was to secure his debt and that the debtor refused to secure it in any other way.[51] On the other hand, where the debt is *bona fide* and the amount thereof not materially less than the fair value of the property sold, the fraudulent intent of the purchaser will not vitiate the sale.[52]

(III) *Participation of Trustee as Imputable to Beneficiary.* Although the preferred creditor in a trust deed is himself innocent of fraud, yet his trustee's participation therein destroys the security,[53] except where the trustee is

Virginia.— Wright *v.* Hencock, 3 Munf. 521.

West Virginia.— Murdoch *v.* Baker, 46 W. Va. 78, 32 S. E. 1009.

Canada.— Merritt *v.* Niles, 28 Grant Ch. (U. C.) 346.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 373 *et seq.*

Compare Nichols *v.* Reynolds, 1 R. I. 30, 36 Am. Dec. 238.

Where necessity compels a purchase of more than sufficient to pay the debt, the buyer's notice of the seller's fraudulent intent is not sufficient to invalidate the sale unless participated in by the buyer. Fly *v.* Screeton, 64 Ark. 184, 41 S. W. 764; Wood *v.* Keith, 60 Ark. 425, 30 S. W. 756. But such necessity means a reasonable necessity arising from the natural situation or condition of the property. Levy *v.* Williams, 79 Ala. 171; Maddox *v.* Reynolds, 69 Ark. 541, 64 S. W. 266.

Constructive notice sufficient.— Where a firm creditor purchased an entire stock of goods, paying one thousand one hundred dollars in cash, in order to collect his claim of five hundred and forty-seven dollars, and his attorney knew that another creditor had sued, and reported to his client that the only way to collect the debt was to buy the stock, it was held sufficient to put the purchaser on inquiry as to the firm's intent. Carl, etc., Co. *v.* Beal, etc., Grocer Co., 64 Ark. 373, 42 S. W. 664.

47. McVeagh *v.* Baxter, 82 Mo. 518; Murdoch *v.* Baker, 46 W. Va. 78, 32 S. E. 1009; Hart *v.* Sandy, 39 W. Va. 644, 20 S. E. 665; Gillespie *v.* Allen, 37 W. Va. 675, 17 S. E. 184. See Herman *v.* McKinney, 47 Fed. 758.

48. Schram *v.* Taylor, 51 Kan. 547, 33 Pac. 315; Hadley *v.* Adsit, 3 Kan. App. 122, 42 Pac. 836; Thompson *v.* Furr, 57 Miss. 478; Blumenthal *v.* Michel, 33 N. Y. App. Div. 636, 54 N. Y. Suppl. 81; Sweet's Petition, 20 R. I. 557, 40 Atl. 502.

Rule applies to judgment by confession.— Smith *v.* Schwed, 9 Fed. 483. See *supra*, III, A, 4, b, (II).

Converting non-exempt into exempt property.— A scheme by an insolvent debtor and a preferred creditor to dispose of the entire stock of such debtor, to put the purchase-price into a homestead for the benefit of the debtor, and fraudulently apply the balance to pay the creditor, is illegal in so far at least as the preferred creditor is concerned. Carson *v.* Hawley, 82 Minn. 204, 84 N. W. 746; Holt *v.* Creamer, 34 N. J. Eq. 181. See Powell *v.* Jeffries, 5 Ill. 387. *Compare supra*, II, B, 21, b, (IV).

49. Fargason *v.* Hall, 99 Ala. 209, 13 So. 302; Rosenheim *v.* Flanders, 114 Iowa 291, 86 N. W. 293; Troustine *v.* Lask, 4 Baxt. (Tenn.) 162; Tennent, etc., Shoe Co. *v.* Partridge, 82 Tex. 329, 18 S. W. 310.

50. Alabama L. Ins., etc., Co. *v.* Pettway, 24 Ala. 544; Taylor *v.* Wood, (N. J. Ch. 1886) 5 Atl. 818; Wallis *v.* Adoue, 76 Tex. 118, 13 S. W. 63; Stinson *v.* Hawkins, 13 Fed. 833, 4 McCrary 500, 16 Fed. 850, 5 McCrary, 284. See also *supra*, V, B, 1, a, c; *infra*, VIII, A, 4.

Recital of a false consideration in an absolute conveyance intended as a mortgage to secure a much smaller sum than that recited is strong evidence of participation in the grantor's fraudulent intent. Bailey *v.* Cheatham, 4 Ky. L. Rep. 351.

51. Garland *v.* Rives, 4 Rand. (Va.) 282, 15 Am. Dec. 756. See *supra*, VII, A, 1.

52. Morrow *v.* Campbell, 118 Ala. 330, 24 So. 852.

53. State *v.* Manhattan Rubber Mfg. Co., 149 Mo. 181, 50 S. W. 321; Crow *v.* Beardsley, 68 Mo. 435; Ross *v.* Ashton, 73 Mo. App. 254; Batavia *v.* Wallace, 102 Fed. 240, 42

merely a repository of the legal title, and has had no previous connection therewith, and has no active duties to perform with respect to the trust property.[54]

(iv) *Participation of One Creditor as Imputable to All.* Where the security covers the debts of two or more persons, the fact that one of them participated in the fraudulent intent of the grantor does not invalidate the security so far as it covers the debt of an innocent creditor,[55] except where the guilty creditor acts as agent for the others in procuring the security,[56] or the creditors are so related that knowledge of one is the knowledge of all, as where they are partners.[57]

c. Time When Knowledge Is Acquired. Knowledge or notice acquired by the grantee after the transfer does not invalidate the conveyance,[58] except where it is acquired before the payment of the purchase-price.[59] This rule applies where a check or promissory note is given for the purchase-price. Knowledge acquired before payment of a check and before its transfer to an innocent holder requires the buyer to stop payment thereof.[60] So if a promissory note is given for the

C. C. A. 310; Wilson *v.* Prewett, 30 Fed. Cas. No. 17,828, 3 Woods 631. *Compare* Hughes *v.* Kelley, (Va. 1898) 30 S. E. 387.

54. Emporia First Nat. Bank *v.* Ridenour, 46 Kan. 707, 27 Pac. 150, 26 Am. St. Rep. 167; Batavia *v.* Wallace, 102 Fed. 240, 42 C. C. A. 310.

In Texas it is held that the participation of the trustee in the fraud is not imputable to an innocent beneficiary where the trustee was not the agent of the beneficiary in procuring the execution of the instrument. Sutton *v.* Simon, 91 Tex. 638, 45 S. W. 559; Wade *v.* Odle, 21 Tex. Civ. App. 656, 54 S. W. 786.

In Tennessee the rule is the same. Jones *v.* Cullen, 100 Tenn. 1, 42 S. W. 873.

55. *Massachusetts.*— Prince *v.* Shepard, 9 Pick. 176.

New York.— Commercial Bank *v.* Sherwood, 162 N. Y. 310, 56 N. E. 834.

Tennessee.— Jones *v.* Cullen, 100 Tenn. 1, 42 S. W. 873; Troustine *v.* Lask, 4 Baxt. 162.

Texas.— Sullivan *v.* Thurmond, (Civ. App. 1898) 45 S. W. 393; Sonnentheil *v.* Texas Guaranty, etc., Co., 10 Tex. Civ. App. 274, 30 S. W. 945; Willis *v.* Murphy, (Civ. App. 1894) 28 S. W. 362; Kraus *v.* Haas, 6 Tex. Civ. App. 665, 25 S. W. 1025. But *compare* Simon *v.* Ash, 1 Tex. Civ. App. 202, 20 S. W. 719.

United States.— Tefft *v.* Stern, 73 Fed. 591, 21 C. C. A. 67. But *compare* Wise *v.* Tripp, 13 Me. 9; Thompson *v.* Johnson, 55 Minn. 515, 57 N. W. 223. See also Rownd *v.* State, 152 Ind. 39, 51 N. E. 914, 52 N. E. 395.

56. Jaffray *v.* Wolf, 4 Okla. 303, 47 P. 496; Morris *v.* Lindauer, 54 Fed. 23, 4 C. C. A. 162.

57. Gowing *v.* Warner, 30 Misc. (N. Y.) 593, 62 N. Y. Suppl. 797.

58. *Arkansas.*— Massie *v.* Enyart, 32 Ark. 251.

Iowa.— Payne *v.* Wilson, 76 Iowa 377, 41 N. W. 45; Jones *v.* Hetherington, 45 Iowa 681.

Massachusetts.—Bliss *v.* Crosier, 159 Mass. 498, 34 N. E. 1075.

Virginia.— Clay *v.* Walter, 79 Va. 92.

Washington.— Prignon *v.* Daussat, 4 Wash. 199, 29 Pac. 1046, 31 Am. St. Rep. 914.

United States.— Yardley *v.* Sibbs, 84 Fed. 531.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 511.

59. *Georgia.*— Colquitt *v.* Thomas, 8 Ga. 258.

Illinois.— Hulman *v.* McBryde, 80 Ill. App. 592.

Indiana.— Hunsinger *v.* Hofer, 110 Ind. 390, 11 N. E. 463; Parkinson *v.* Hanna, 7 Blackf. 400.

Missouri.— Young *v.* Kellar, 94 Mo. 581, 7 S. W. 293, 4 Am. St. Rep. 405; Dougherty *v.* Cooper, 77 Mo. 528; Arnholt *v.* Hartwig, 73 Mo. 485; Pierson *v.* Slifer, 52 Mo. App. 273; Stein *v.* Burnett, 43 Mo. App. 477; Cheek *v.* Waldron, 39 Mo. App. 21; McNichols *v.* Richter, 13 Mo. App. 515.

Nebraska.— Savage *v.* Hazard, 11 Nebr. 323, 9 N. W. 83.

North Dakota.—Halloran *v.* Holmes, (1904) 101 N. W. 310, holding that it is essential not only that the purchase was in good faith but that the consideration was actually paid in good faith without notice.

United States.— Parrish *v.* Danford, 18 Fed. Cas. No. 10,770, 1 Bond 345.

England.— Story *v.* Windsor, 2 Atk. 630, 26 Eng. Reprint 776.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 512.

But *compare* Fisher *v.* Hall, 44 Mich. 493, 7 N. W. 72.

A bond for title given by the purchaser who agrees to convey land to the seller as part of the consideration is not a payment so as to prevent subsequent notice from making that part of the consideration fraudulent. Cleveland *v.* Butts, 13 Tex. Civ. App. 272, 35 S. W. 804.

60. Carter *v.* Richardson, 60 S. W. 397, 22 Ky. L. Rep. 1204. *Compare* Weil *v.* Reiss, 167 Mo. 125, 66 S. W. 946.

Where a check is given with the understanding that it is not to be paid immediately, and after knowledge that the creditors have attached the property on the ground of fraud in the transfer, the payee orders the check paid and it is paid, he is not a *bona*

price, and it remains in the possession of the seller, payment thereof after notice of the fraudulent intention of the seller will not protect the buyer.[61] So the rule applies to the execution of deeds, which were a part of the consideration, after knowledge of the fraudulent intent.[62] But notice acquired after the sale, but before the complete fulfilment of the terms thereof, does not prevent the purchaser being a *bona fide* purchaser, where, as a part of the consideration, he agreed to pay to certain other creditors the amount of their debts, and such creditors consented thereto.[63] If part of the payments are made before and part after notice, the purchaser is a *bona fide* purchaser, but will be protected only as to the payments made before notice.[64]

d. Duty to See to Application of Proceeds. The purchaser is ordinarily under no duty to see to it that the proceeds of the sale are applied to the payment of the debts of the seller, even though he knows that the seller is financially embarrassed[65] or even insolvent,[66] unless he knows or should know that the sale was made with intent to defraud creditors.[67]

3. Constructive or Implied Notice — a. As Equivalent to Actual Knowledge. The general rule is that if a purchaser had knowledge of facts and circumstances naturally and justly calculated to excite suspicion in the mind of a person of ordinary prudence, and which would naturally prompt him to pause and inquire before consummating the transaction, and such inquiry would have necessarily led to a discovery of the fact with notice of which he is sought to be charged, he will be considered to be affected with such notice, whether he made inquiry or not.[68]

fide purchaser. Arnholt *v.* Hartwig, 73 Mo. 485 [*distinguished* in Keet-Roundtree Shoe Co. *v.* Lisman, 149 Mo. 85, 50 S. W. 276, where a draft drawn by one bank upon another to the buyer's order and indorsed by him, given for the price, was held to constitute a payment so that the buyer had no power to stop its payment].

61. Keyser *v.* Angle, 40 N. J. Eq. 481, 4 Atl. 641; Fluegel *v.* Henschel, 7 N. D. 276, 74 N. W. 996, 66 Am. St. Rep. 642. See also Powell *v.* Jeffries, 5 Ill. 387. *Contra*, see Shealy *v.* Edwards, 78 Ala. 176; Nicol *v.* Crittenden, 55 Ga. 497.

62. Dodson *v.* Cooper, 37 Kan. 346, 15 Pac. 200.

63. Tennent-Stribling Shoe Co. *v.* Ruty, 53 Mo. App. 196.

64. *Alabama.*— Florence Sewing Mach. Co. *v.* Zeigler, 58 Ala. 221; Crawford *v.* Kirksey, 55 Ala. 282, 28 Am. Rep. 704.

Indiana.— Rhodes *v.* Green, 36 Ind. 7.

Kansas.— Work *v.* Coverdale, 47 Kan. 307, 27 Pac. 984; Bush *v.* Collins, 35 Kan. 535, 11 Pac. 425.

Minnesota.—See Riddell *v.* Munro, 49 Minn. 532, 52 N. W. 141.

Mississippi.— Perkins *v.* Swank, 43 Miss. 349.

Nebraska.— Bender *v.* Kingman, (1902) 90 N. W. 886; Hedrick *v.* Strauss, 42 Nebr. 485, 60 N. W. 928.

Ohio.— Stinson *v.* Racer, 3 Ohio S. & C. Pl. Dec. 421, 2 Ohio N. P. 316.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 512.

65. Gist *v.* Barrow, 42 Ark. 521; Priest *v.* Brown, 100 Cal. 626, 35 Pac. 323; Missinskie *v.* McMurdo, 107 Wis. 578, 83 N. W. 758.

66. Meyer Bros. Drug Co. *v.* Durham, 35 Tex. Civ. App. 71, 79 S. W. 860; Ligon *v.* Tilman, (Tex. Civ. App. 1897) 43 S. W. 1069. See Metropolitan Bank *v.* Aarons-Mendelsohn Co., 50 La. Ann. 1047, 24 So. 125, holding that knowledge that the payment is to be applied to create a preference does not render the sale fraudulent.

67. Armstrong *v.* Elliott, 20 Tex. Civ. App. 41, 48 S. W. 605, 49 S. W. 635; Proetzel *v.* Buck Stove, etc., Co., (Tex. Civ. App. 1894) 26 S. W. 1110; Missinskie *v.* McMurdo, 107 Wis. 578, 83 N. W. 758; Avery *v.* Johann, 27 Wis. 246, holding that the fact that the grantor informs the grantee at the time of the sale that one of his objects in making it is to obtain funds with which to pay his debts does not purge the transaction of fraud unless the purchaser sees that the purchase-money is actually applied to the discharge of the debts, where the purchaser knows that the vendor has, a short time before, declared his intention not to pay his creditors.

68. *Alabama.* — Norwood *v.* Washington, 136 Ala. 657, 33 So. 869; Jordan *v.* Collins, 107 Ala. 572, 18 So. 137; Lehman *v.* Kelly, 68 Ala. 192.

Arkansas.— Dyer *v.* Taylor, 50 Ark. 314, 7 S. W. 258.

California.— Salisbury *v.* Burr, 114 Cal. 451, 46 Pac. 270.

Florida.— Mayer *v.* Wilkins, 37 Fla. 244, 19 So. 632.

Georgia.— Clarke *v.* Ingram, 107 Ga. 565, 33 S. E. 802; Livingston *v.* Wright, 88 Ga. 33, 13 S. E. 832; Smith *v.* Wellborn, 75 Ga. 799. See Park *v.* Battey, 80 Ga. 353, 5 S. E. 492.

Illinois.— Boies *v.* Henney, 32 Ill. 130; Cowling *v.* Estes, 15 Ill. App. 255.

Indiana.— See Reagan *v.* Chicago First

In some of the states, however, it is held that the rule of constructive notice does not apply, and that the existence of facts to put the purchaser on inquiry merely raises a question of fact for the jury as to whether the purchaser had actual notice.[69]

Nat. Bank, 157 Ind. 623, 61 N. E. 575, 62 N. E. 701.

Indian Territory.— Dorrance *v.* McAlester, 1 Indian Terr. 473, 45 S. W. 141.

Iowa.— Urdangen *v.* Doner, 122 Iowa 533, 98 N. W. 317; Shumaker *v.* Davidson, 116 Iowa 569, 87 N. W. 441; Rosenheim *v.* Flanders, 114 Iowa 291, 86 N. W. 293; Gamet *v.* Simmons, 103 Iowa 163, 72 N. W. 444; Kelley *v.* Flory, 84 Iowa 671, 51 N. W. 181; Redhead *v.* Pratt, 72 Iowa 99, 33 N. W. 382; Lyons *v.* Hamilton, 69 Iowa 47, 28 N. W. 429, 72 Iowa 759, 33 N. W. 655; Gordon *v.* Worthley, 48 Iowa 429; Kellogg *v.* Aherin, 48 Iowa 299. See also J. S. Brittain Dry Goods Co. *v.* Plowman, 113 Iowa 624, 85 N. W. 810; Williamson *v.* Wachenheim, 58 Iowa 277, 12 N. W. 302.

Kansas.— Richolson *v.* Freeman, 56 Kan. 463, 43 Pac. 772; Martin *v.* Marshall, 54 Kan. 147, 37 Pac. 977; Gollober *v.* Martin, 33 Kan. 252, 6 Pac. 267; Hood *v.* Gibson, 8 Kan. App. 588, 56 Pac. 148; Haskett *v.* Auhl, 3 Kan. App. 744, 45 Pac. 608.

Kentucky.— Lain *v.* Morton, 63 S. W. 286, 23 Ky. L. Rep. 438; Meyer *v.* Specker, 10 Ky. L. Rep. 116; Wiseman *v.* McAlpin, 6 Ky. L. Rep. 660; Ferguson *v.* May, 4 Ky. L. Rep. 989.

Louisiana.—Breaux-Renoudet Cypress-Lumber Co. *v.* Shadel, 52 La. Ann. 2094, 28 So. 292.

Maryland.— Smith *v.* Pattison, 84 Md. 341, 35 Atl. 963. But see Cole *v.* Albers, 1 Gill 412.

Michigan.— Gumberg *v.* Treusch, 110 Mich. 451, 68 N. W. 236; Redford *v.* Penny, 58 Mich. 424, 25 N. W. 381.

Minnesota.— Manwaring *v.* O'Brien, 75 Minn. 542, 78 N. W. 1; Thompson *v.* Johnson, 55 Minn. 515, 57 N. W. 223; Dow *v.* Sutphin, 47 Minn. 479, 50 N. W. 604.

Mississippi.— Pruit *v.* Tennent-Stribling Shoe Co., 75 Miss. 447, 23 So. 188.

Nebraska.— Grainger *v.* Erwin, (1902) 91 N. W. 592; Brown *v.* Sloan, 61 Nebr. 237, 85 N. W. 37; Edwards *v.* Reid, 39 Nebr. 645, 58 N. W. 202, 42 Am. St. Rep. 607; Bollman *v.* Lucas, 22 Nebr. 796, 36 N. W. 465.

Nevada.— Greenwell *v.* Nash, 13 Nev. 286.

New Jersey.— Moore *v.* Williamson, 44 N. J. Eq. 496, 15 Atl. 587, 1 L. R. A. 336; New York F. Ins. Co. *v.* Tooker, 35 N. J. Eq. 408; Holt *v.* Creamer, 34 N. J. Eq. 181; Tantum *v.* Green, 21 N. J. Eq. 364 [*affirming* 19 N. J. Eq. 574]; Atwood *v.* Impson, 20 N. J. Eq. 150.

North Carolina.—Wolf *v.* Arthur, 118 N. C. 890, 24 S. E. 671.

North Dakota.— Fluegel *v.* Henschel, 7 N. D. 276, 74 N. W. 996, 66 Am. St. Rep. 642.

Oklahoma.— Kansas Moline Plow Co. *v.* Sherman, 3 Okla. 204, 41 Pac. 623, 32 L. R. A. 33 [*overruling* Chandler *v.* Colcord, 1 Okla. 260, 32 Pac. 330].

Pennsylvania.— See Keichline *v.* Keichline, 54 Pa. St. 75.

Texas.— Ullman *v.* Crenshaw, (1891) 16 S. W. 1012; Traylor *v.* Townsend, 61 Tex. 144; Humphries *v.* Freeman, 22 Tex. 45; Garahy *v.* Bayley, 25 Tex. Suppl. 294; Scheuber *v.* Wheeler, (App. 1891) 15 S. W. 503; Davis *v.* Culp, (Civ. App. 1903) 78 S. W. 554; Holloway Seed Co. *v.* City Nat. Bank, (Civ. App. 1898) 47 S. W. 77; Louisiana Sugar Refining Co. *v.* Harrison, 9 Tex. Civ. App. 141, 29 S. W. 500; McConnell *v.* Bruggerhoff, 1 Tex. App. Civ. Cas. § 1004.

Virginia.—Anderson *v.* Mossy Creek Woolen Mills Co., 100 Va. 420, 41 S. E. 854; Newberry *v.* Princeton Bank, 98 Va. 471, 36 S. E. 515; Ferguson *v.* Daughtrey, 94 Va. 308, 26 S. E. 822.

West Virginia.— Wilson *v.* Carrico, 50 W. Va. 336, 40 S. E. 439; Keneweg Co. *v.* Schilansky, 47 W. Va. 287, 34 S. E. 773; Dent *v.* Pickens, 46 W. Va. 378, 33 S. E. 303; Bowyer *v.* Martin, 27 W. Va. 442.

Wisconsin.— Rindskopf *v.* Myers, 87 Wis. 80, 57 N. W. 967; Hooser *v.* Hunt, 65 Wis. 71, 26 N. W. 442.

United States.— Shauer *v.* Alterton, 151 U. S. 607, 14 S. Ct. 442, 38 L. ed. 286; Prewit *v.* Wilson, 103 U. S. 22, 26 L. ed. 360; Brittain *v.* Crowther, 54 Fed. 295, 4 C. C. A. 341; Walker *v.* Collins, 50 Fed. 737, 1 C. C. A. 642; Holladay's Case, 27 Fed. 830; Partles *v.* Gibson, 17 Fed. 293; Singer *v.* Jacobs, 11 Fed. 559, 3 McCrary 638.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 495.

69. *Colorado.*— Riethmann *v.* Godsman, 23 Colo. 202, 46 Pac. 684.

Connecticut.— Knower *v.* Cadden Clothing Co., 57 Conn. 202, 17 Atl. 580.

Massachusetts.— See Carroll *v.* Hayward, 124 Mass. 120.

Missouri.— John Deere Plow Co. *v.* Sullivan, 158 Mo. 440, 59 S. W. 1005; Van Raalte *v.* Harrington, 101 Mo. 602, 14 S. W. 710, 20 Am. St. Rep. 626, 11 L. R. A. 424; State *v.* Purcell, 131 Mo. 312, 33 S. W. 13; State *v.* Mason, 112 Mo. 374, 20 S. W. 629, 34 Am. St. Rep. 390; Eck *v.* Hatcher, 58 Mo. 235; White *v.* Million, 102 Mo. App. 437, 76 S. W. 733; Hearn *v.* Due, 79 Mo. App. 322; Simon-Gregory Dry Goods Co. *v.* Schooley, 66 Mo. App. 406. See Looney *v.* Bartlett, 106 Mo. App. 619, 81 S. W. 481. But see State *v.* Estel, 6 Mo. App. 6.

Nebraska.— Bender *v.* Kingman, (1902) 90 N. W. 886.

Oregon.— Coolidge *v.* Heneky, 11 Oreg. 327, 8 Pac. 281. See Garnier *v.* Wheeler, 40 Oreg. 198, 66 Pac. 812; Philbrick *v.* O'Connor,

b. Duty to Inquire — (I) *In General.* It is not the duty of the vendee to inquire into the motives or circumstances of his vendor unless he is in possession of such facts and circumstances as would put a prudent man on inquiry.[70] The purchaser may presume that he is dealing with an honest man, and until some suspicious circumstance arises in the transaction, that is, something appears that is not reconcilable with ordinary business integrity, he is not bound to stop and inquire.[71]

(II) *Matters of Common Knowledge.* Matters of common knowledge in the community in which the buyer lives are sufficient to put him on inquiry in regard thereto.[72]

(III) *Mere Suspicion.* Mere suspicion is insufficient to charge the buyer with the fraud of the seller,[73] but while a suspicion will not require inquiry, it is

15 Oreg. 15, 13 Pac. 612, 3 Am. St. Rep. 139; Lyons *v.* Leahy, 15 Oreg. 8, 13 Pac. 643, 3 Am. St. Rep. 133.

United States.— Batavia *v.* Wallace, 102 Fed. 240, 42 C. C. A. 310, decided under rule in Missouri.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 495.

In New York the statute provides that the title of a purchaser for a valuable consideration shall not be affected, unless it shall appear that such purchaser "had previous notice of the fraudulent intent of his grantor," and it is held thereunder that actual notice must be given of the fraudulent intent or knowledge of circumstances which are equivalent to such notice and that circumstances to put the purchaser on inquiry where full value has been paid are not sufficient. Greenwald *v.* Wales, 174 N. Y. 140, 66 N. E. 665; Amsterdam First Nat. Bank *v.* Miller, 163 N. Y. 164, 57 N. E. 308; Anderson *v.* Blood, 152 N. Y. 285, 46 N. E. 493, 57 Am. St. Rep. 515; Wilson *v.* Marion, 147 N. Y. 589, 42 N. E. 190; Jacobs *v.* Morrison, 136 N. Y. 101, 32 N. E. 552; Parker *v.* Conner, 93 N. Y. 118, 45 Am. Rep. 178; Starin *v.* Kelly, 88 N. Y. 418; Stearns *v.* Gage, 79 N. Y. 102; Bailey *v.* Fransioli, 101 N. Y. App. Div. 140, 91 N. Y. Suppl. 852; Gilmour *v.* Colcord, 96 N. Y. App. Div. 358, 89 N. Y. Suppl. 689; Peetsch *v.* Sommers, 31 N. Y. App. Div. 255, 53 N. Y. Suppl. 438, 28 N. Y. Civ. Proc. 124; King *v.* Holland Trust Co., 8 N. Y. App. Div. 112, 40 N. Y. Suppl. 480; Wilmerding *v.* Jarmulowsky, 85 Hun 285, 32 N. Y. Suppl. 983; Farley *v.* Carpenter, 27 Hun 359. *Compare* Vilas Nat. Bank *v.* Newton, 25 N. Y. App. Div. 62, 48 N. Y. Suppl. 1009. *Contra,* Salomon *v.* Moral, 53 How. Pr. 342.

70. Ferguson *v.* May, 4 Ky. L. Rep. 989; Fluegal *v.* Henschel, 7 N. D. 276, 74 N. W. 996, 66 Am. St. Rep. 642; Jackson *v.* Glaze, 3 Okla. 143, 41 Pac. 79.

Hearing reports as to an encumbrance on the land about to be purchased does not amount to notice. Colquitt *v.* Thomas, 8 Ga. 258.

False statements by seller.— The fact that the purchaser was told by the seller that he was not indebted except as to those debts assumed by the purchaser, and that the purchaser discovered a small claim against the seller on the day of the purchase, is not sufficient to charge him with notice. B. C. Evans Co. *v.* Reeves, 6 Tex. Civ. App. 254, 26 S. W. 219.

The fact that land given in exchange was deeded to the seller's wife should put one on inquiry. Summers *v.* Taylor, 4 Ky. L. Rep. 290.

As dependent on source of information.— While it is settled that vague and general assertions, resting on mere hearsay and made by strangers in authority and interest, may be disregarded, and will not bind the conscience of the purchaser or affect his legal or equitable rights, even when true in point of fact, yet a direct statement to a purchaser of the existence and nature of an adverse claim or title will operate as notice whether it be made by or on behalf of the holder of the adverse title or by a mere stranger. Martel *v.* Somers, 26 Tex. 551.

Access to books and papers.— Access to invoices which show that the stock was purchased on credit is not of itself sufficient to put the purchaser on inquiry as to the seller's solvency. Smith *v.* Kaufman, 94 Ala. 364, 10 So. 229.

71. Jackson *v.* Glaze, 3 Okla. 143, 41 Pac. 79.

The mere general statement that a transaction is fraudulent is not sufficient to put a contemplated purchaser on inquiry, for the reason that such notice does not tend to direct attention to any specific source of knowledge. The known fact or facts must be of unusual or suspicious nature, must have reference to the transaction sought to be impeached, and must so relate to it that, if faithfully pursued and inquired into, they will lead to a knowledge of the fraud committed. Hodges *v.* Coleman, 76 Ala. 103.

72. Dent *v.* Pickens, 46 W. Va. 378, 33 S. E. 303.

General knowledge of a fact in a community may be proved, as evidence tending to trace notice of such fact, its existence being otherwise shown, but general rumor that a particular sale was fraudulent does not amount to general knowledge or notoriety, and is not evidence tending to show notice. Hodges *v.* Coleman, 76 Ala. 103.

73. *Arkansas.*— Erb *v.* Cole, 31 Ark. 554.

Iowa.— Urdangen *v.* Doner, 122 Iowa 533, 98 N. W. 317.

Mississippi.— Tuteur *v.* Chase, 66 Miss.

not necessary that there be "good and substantial evidence," such as sends conviction home to the mind.[74]

(iv) *Knowledge of Indebtedness or Insolvency of Transferrer.* Knowledge of indebtedness,[75] or even the insolvency,[76] of the transferrer, standing by itself, does not put the purchaser or mortgagee on inquiry;[77] but knowledge of the financial embarrassment of the grantor may constitute notice to the buyer where there are other suspicious circumstances,[78] such as inadequacy of price,[79] an inventory taken at night,[80] the absence of any inventory,[81] great haste in making the sale,[82] or the fact that the sale is of all the debtor's property.[83]

(v) *Inadequacy of Consideration.* Inadequacy of price is not sufficient to

476, 6 So. 241, 14 Am. St. Rep. 577, 4 L. R. A. 832.

New York.— Pohalski *v.* Ertheiler, 18 Misc. 33, 41 N. Y. Suppl. 10.

Texas.— Hooks *v.* Pafford, 34 Tex. Civ. App. 516, 78 S. W. 991.

United States.— Wilson *v.* Welsh, 41 Fed. 570; Simms *v.* Morse, 2 Fed. 325, 4 Hughes 579.

74. Hopkins *v.* Langton, 30 Wis. 379.

75. *Alabama.*— Simmons *v.* Shelton, 112 Ala. 284, 21 So. 309, 57 Am. St. Rep. 39.

Arkansas.— Riggan *v.* Wolf, 53 Ark. 537, 14 S. W. 922.

District of Columbia.— Davis *v.* Harper, 14 App. Cas. 463.

Kansas.— Baughman *v.* Penn, 33 Kan. 504, 6 Pac. 890.

Kentucky.— Wood *v.* Elliott, 7 S. W. 624, 9 Ky. L. Rep. 952.

Missouri.— Durkee *v.* Chambers, 57 Mo. 575.

New York.— Beals *v.* Guernsey, 8 Johns. 446, 5 Am. Dec. 348.

North Carolina.— Eigenbrun *v.* Smith, 98 N. C. 207, 4 S. E. 122.

Oregon.— Spalding *v.* Brown, 36 Oreg. 160, 59 Pac. 185.

Pennsylvania.— Platt *v.* McQuown, 20 Pa. Co. Ct. 401.

Texas.— Armstrong Co. *v.* Elbert, 14 Tex. Civ. App. 141, 36 S. W. 139.

United States.—Prewit *v.* Wilson, 103 U. S. 22, 26 L. ed. 360.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 507.

76. *Alabama.*— Buford *v.* Shannon, 95 Ala. 205, 10 So. 263; Crawford *v.* Kirksey, 55 Ala. 282, 28 Am. Rep. 704; Dubose *v.* Young, 14 Ala. 139.

Connecticut.—Sisson *v.* Roath, 30 Conn. 15.

Illinois.— Mathews *v.* Reinhardt, 149 Ill. 635, 37 N. E. 85; Bentley *v.* Wells, 61 Ill. 59, 14 Am. Rep. 53; Frey *v.* Harris, 29 Ill. App. 243.

Indiana.— Sellers *v.* Hayes, 163 Ind. 422, 72 N. E. 119.

Iowa.— Darland *v.* Rosencrans, 56 Iowa 122, 8 N. W. 776; Hughes *v.* Monty, 24 Iowa 499.

Kansas.— Vickers *v.* Buck Stove, etc., Co., 60 Kan. 598, 57 Pac. 517; Baughman *v.* Penn, 33 Kan. 504, 6 Pac. 890.

Missouri.— Schroeder *v.* Mason, 25 Mo. App. 190.

New Jersey.— Merchants' Nat. Bank *v.* Northrup, 22 N. J. Eq. 58; Atwood *v.* Impson, 20 N. J. Eq. 150.

New York.—Ruhl *v.* Phillips, 48 N. Y. 125, 8 Am. Rep. 522; Loeschigk *v.* Bridge, 42 N. Y. 421; New York County Nat. Bank *v.* American Surety Co., 69 N. Y. App. Div. 153, 74 N. Y. Suppl. 692 [*affirmed* in 174 N. Y. 544, 67 N. E. 1086]; Walsh *v.* Kelly, 42 Barb. 98.

Texas.— Traders' Nat. Bank *v.* Clare, 76 Tex. 47, 13 S. W. 183.

Wisconsin.— Erdall *v.* Atwood, 79 Wis. 1, 47 N. W. 1124.

Canada.— Hickerson *v.* Parrington, 18 Ont. App. 635.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 508.

77. Mere knowledge by a purchaser of insolvency of the vendor does not show fraudulent intent, where the sale is in the usual course of business and for an adequate price. Hayes *v.* Crockett, 7 La. Ann. 645.

Knowledge that the sale was of all the non-exempt property of the seller, together with knowledge of the latter's failure to pay his debts, is not constructive notice. Kuhn *v.* Gustafson, 73 Iowa 633, 35 N. W. 660.

78. Hastings Malting Co. *v.* Heller, 47 Minn. 71, 49 N. W. 400; Paddock *v.* Jackson, 16 Tex. Civ. App. 655, 41 S. W. 700.

Sale on credit.— Knowledge of insolvency, together with the fact that only a small part of the consideration is paid in cash and the balance in long-term notes, is sufficient to put on inquiry. Keyser *v.* Angle, 40 N. J. Eq. 481, 4 Atl. 641.

79. Gollober *v.* Martin, 33 Kan. 252, 6 Pac. 267; Monessen Nat. Bank *v.* Lichtenstein, 207 Pa. St. 187, 56 Atl. 405. See also *supra* V, B, 1, b; *infra*, VIII, E.

80. Temple *v.* Smith, 13 Nebr. 513, 14 N. W. 527. See also *supra*, V, B, 5.

81. Gollober *v.* Martin, 33 Kan. 252, 6 Pac. 267.

82. Gollober *v.* Martin, 33 Kan. 252, 6 Pac. 267; Temple *v.* Smith, 13 Nebr. 513, 14 N. W. 527. See also *supra*, V, B, 5.

83. Reed *v.* Loney, 22 Wash. 433, 61 Pac. 41, holding that where an insolvent debtor conveyed all his property to his sons, who took the conveyance with knowledge of his financial condition, and without parting with anything of value at the time, they were chargeable with sufficient notice to put them on inquiry.

put the purchaser on inquiry or to invalidate the sale,[84] unless the price is grossly inadequate,[85] or unless there are other suspicious circumstances connected with the purchase which, in addition to the inadequacy, would put a reasonable man on his inquiry.[86] Whether the price paid is so wholly inadequate as to excite suspicion depends largely upon the circumstances of the case and the conditions prevailing in the community where the sale takes place.[87]

(VI) *SALE OF ALL OF STOCK OF MERCHANDISE.* The fact that the purchase is of all the seller's stock of merchandise does not put the purchaser on inquiry,[88]

84. Zick *v.* Guebert, 142 Ill. 154, 31 N. E. 601 [*affirming* 41 Ill. App. 603]; Blum *v.* Simpson, 66 Tex. 84, 17 S. W. 402, 71 Tex. 628, 9 S. W. 662; Bierne *v.* Ray, 37 W. Va. 571, 16 S. E. 804; Hinds *v.* Keith, 57 Fed. 10, 6 C. C. A. 231. See also Urdanger *v.* Doner, 122 Iowa 533, 98 N. W. 317 (but may be considered on the question of the purchaser's good faith); Copis *v.* Middleton, 2 Madd. 410, 17 Rev. Rep. 226, 56 Eng. Reprint 386; *In re* Cranston, 9 Morr. Bankr. Cas. 160.

Illustrations.— The payment of two thousand five hundred dollars for an original decree of foreclosure for four thousand six hundred and eighty dollars on property which is encumbered by unpaid taxes and special assessments running back many years, and the title to which can be cleared only by long and expensive litigation, is not so inadequate as to constitute notice of fraud to the purchaser, although the amount of the decree has about doubled by accumulated interest. Thomas *v.* Van Meter, 164 Ill. 304, 45 N. E. 405. No knowledge of a fraudulent intent on the part of a debtor in disposing of his property can be imputed to the grantee because he bought property for forty dollars an acre, for which the grantor had formerly asked fifty dollars. Farmers' Bank *v.* Worthington, 145 Mo. 91, 46 S. W. 745.

Where the consideration is not so inadequate as to shock the common sense of honesty, the transaction is not it seems fraudulent. Feigley *v.* Feigley, 7 Md. 537, 61 Am. Dec. 375. See also *infra*, VIII, E.

In New York, where the doctrine of constructive notice does not apply, actual notice of the fraudulent intent of the seller is necessary. Jaeger *v.* Kelley, 52 N. Y. 274; Greenough *v.* Greenough, 32 N. Y. App. Div. 631, 53 N. Y. Suppl. 1104. See *supra*, VII, B, 3, a, note 69.

85. *Arkansas.*— De Prato *v.* Jester, (1892) 20 S. W. 807; Adler-Goldman Commission Co. *v.* Hathcock, 55 Ark. 579, 18 S. W. 1048.

California.— Argenti *v.* San Francisco, 6 Cal. 677.

Indiana.—Frankfort First Nat. Bank *v.* Smith, 149 Ind. 443, 49 N. E. 376. See Jameson *v.* Dilley, 27 Ind. App. 429, 61 N. E. 601.

Kentucky.— Adams *v.* Branch, 3 Ky. L. Rep. 178.

Michigan.— Bendetson *v.* Moody, 100 Mich. 553, 59 N. W. 252.

New York.— Moyer *v.* Bloomingdale, 38 N. Y. App. Div. 227, 56 N. Y. Suppl. 991; Ross *v.* Caywood, 16 N. Y. App. Div. 591, 44 N. Y. Suppl. 985; Wood *v.* Hunt, 38 Barb. 302.

United States.— Wilson *v.* Jones, 76 Fed. 484.

Illustrations of gross inadequacy.— Purchase at thirty-five cents on the dollar. Pollock *v.* Butler, (Miss. 1898) 23 So. 577. One-fourth the face value of a mortgage. Monessen Nat. Bank *v.* Lichtenstein, 207 Pa. St. 187, 56 Atl. 405. Nominal consideration. Gustin *v.* Mathews, 25 Utah 168, 70 Pac. 402.

86. *Alabama.*— Smith *v.* Heineman, 118 Ala. 195, 24 So. 364, 72 Am. St. Rep. 150.

Illinois.— Hulman *v.* McBryde, 80 Ill. App. 592.

Iowa.— Dunn *v.* Wolf, 81 Iowa 688, 47 N. W. 887; Peterson *v.* Rome, 76 Iowa 447, 41 N. W. 68.

Kentucky.—Carter *v.* Richardson, 60 S. W. 397, 22 Ky. L. Rep. 1204.

Mississippi.— Pollock *v.* Butler, (1898) 23 So. 577.

New York.— Ross *v.* Caywood, 16 N. Y. App. Div. 591, 44 N. Y. Suppl. 985.

Texas.— See Yerby *v.* Martin, (Civ. App. 1897) 38 S. W. 541.

Illustrations.— The fact that the price is inadequate, together with the fact that the grantee cannot satisfactorily show where he obtained the money to pay for the property, and the fact that the grantor continued to exercise acts of ownership over the land is sufficient to show that the grantee had knowledge that the transfer was fraudulent. Mertens *v.* Welsing, 85 Iowa 508, 52 N. W. 362. Where a defendant, in order to defraud his creditors, conveyed valuable property at a low price to two business men, the transfer being hurried through without an examination of title, and the purchasers admitting notice of his financial condition, the creditors could redeem the property. Kinmonth *v.* White, (N. J. Ch. 1900) 47 Atl. 1.

Where coupled with knowledge of intent of grantor.— A conveyance, the consideration of which is an agreement to pay certain of the grantor's debts, will be set aside as fraudulent where the land was worth much more than the debts charged on it and the grantee knew of the grantor's intent to defeat his creditors. Union Nat. Bank *v.* Warner, 12 Hun (N. Y.) 306.

87. Jackson *v.* Glaze, 3 Okla. 143, 41 Pac. 79.

88. Barker *v.* Boyd, 71 S. W. 528, 24 Ky. L. Rep. 1389; Spratlin *v.* Colson, 80 Miss. 278, 31 So. 814; Le Gierse *v.* Whitehurst, 66 Tex. 244, 18 S. W. 510.

Sale of book-accounts.— Knowledge ac-

unless there are other suspicious circumstances,[89] as where the purchase is at a considerable discount.[90]

(VII) *PENDENCY OF ACTION AGAINST TRANSFERRER.* The fact that an action is pending against the grantor when he conveys property is not of itself sufficient to show that the grantee knew of the grantor's fraudulent intent to defraud his creditors;[91] although that fact, in connection with other facts, such as the inadequacy of price, the intimate relations of the grantor and grantee, the poverty of the grantee, etc., may be sufficient to show that the grantee had knowledge of the grantor's fraudulent intent.[92]

(VIII) *KNOWLEDGE THAT SELLER IS ABOUT TO ABSCOND.* Where the purchase is with knowledge that the seller is about to abscond, knowledge of his fraudulent intent will be presumed.[93]

c. Sufficiency of Inquiry — (I) *IN GENERAL.* Ordinary diligence and good faith are what is required in making the inquiry.[94] It is not sufficient to merely inquire of the seller where better sources of information are open,[95] although it is not necessary that the inquiry be made of the persons defrauded.[96]

(II) *EXAMINATION OF BOOKS AND PAPERS.* The purchaser may rely on the statements of the seller without demanding an inspection of his books,[97] and he is not chargeable, as a matter of law, with knowledge of all facts which he might have ascertained by an inspection of papers received by him with the purchase.[98]

d. Knowledge of, or Notice to, Agent. Knowledge of an agent is notice to the principal where it arises from or is at the time connected with the subject-matter of his agency,[99] except where he has a personal interest antagonistic to

quired by the purchase of book-accounts in a lump that the seller contemplated winding up his business would not affect the buyer with knowledge of either fraud or insolvency on the part of the seller. Doxsee *v.* Waddick, 122 Iowa 599, 98 N. W. 483.

89. Chipman *v.* Glennon, 98 Ala. 263, 13 So. 822. See also Williamson *v.* Wachenheim, 58 Iowa 277, 12 N. W. 302; and *supra*, V, B, 8.

90. Beels *v.* Flynn, 28 Nebr. 575, 44 N. W. 732, 26 Am. St. Rep. 351.

91. Stewart *v.* English, 6 Ind. 176; Graham *v.* Morgan, 83 Miss. 601, 35 So. 874.

General rule as to purchases pendente lite see LIS PENDENS.

Mere notice of an attachment suit on the ground of fraud is not sufficient as notice that the grantor made the sale with intent to defraud. Moxley *v.* Haskin, 39 Kan. 653, 18 Pac. 820; Mannen *v.* Stebbins, 1 Kan. App. 261, 40 Pac. 1085.

92. Summers *v.* Taylor, 80 Ky. 429 (where conveyance was by a client to his attorney); Philbrick *v.* O'Connor, 15 Oreg. 15, 13 Pac. 612, 3 Am. St. Rep. 139. See also Williamson *v.* Wachenheim, 58 Iowa 277, 12 N. W. 302; and *supra*, V, B, 2.

93. Danjean *v.* Blacketer, 13 La. Ann. 595; Garr *v.* Hill, 9 N. J. Eq. 210; Tillinghast *v.* Champlin, 4 R. I. 173, 67 Am. Dec. 510. *Contra*, Hall *v.* Kissock, 11 U. C. Q. B. 9.

94. Hodges *v.* Coleman, 76 Ala. 103 (holding that it is only when known suspicious facts and circumstances are entirely disregarded — facts and circumstances which, if followed up, would probably lead to a discovery of the fraud; or, when such suspicious facts and circumstances followed up lead to confirmation of the fraud, or the inquiry is conducted so heedlessly and imperfectly as to lead to no satisfactory explanation of the attendant suspicious facts and circumstances, that notice of facts sufficient to put one on inquiry is the equivalent of notice of the fraud itself); Hoyt *v.* Shelden, 3 Bosw. (N. Y.) 267; Sanger *v.* Thomasson, (Tex. Civ. App. 1898) 44 S. W. 408.

The purchaser need not exhaust all sources of information as to the financial condition of the transferrer. Stewart *v.* Cockrell, 2 Lea (Tenn.) 369.

Mere opinions that a transaction is free from fraud or that a purchaser will get a good title is not the sort of information one must seek, when the facts and circumstances put him on inquiry; and when the transaction consists of matters *in pais* — when consideration and motive are the tests by which legality is determined — an opinion on the whole case, even by an attorney, that it is valid or legal, is worth nothing, unless based on a knowledge of the facts, such as he could testify to. Hodges *v.* Coleman, 76 Ala. 103.

95. Singer *v.* Jacobs, 11 Fed. 559, 3 McCrary 638.

96. Hodges *v.* Coleman, 76 Ala. 103.

97. Kelly *v.* Schillinger, 102 Ala. 336, 14 So. 764. See Stix *v.* Keith, 85 Ala. 465, 5 So. 184.

98. Richolson *v.* Freeman, 56 Kan. 463, 43 Pac. 772.

99. *Connecticut.*— Trumbell *v.* Hewitt, 65 Conn. 60, 31 Atl. 492; Clark *v.* Fuller, 39 Conn. 238.

Maryland.— O'Connell *v.* Kilpatrick, 64 Md. 122, 21 Atl. 98.

New Hampshire.— Clark *v.* Marshall, 62 N. H. 498.

New Jersey.— Lund *v.* Equitable L. Assur. Soc., 31 N. J. Eq. 355.

that of his principal in the subject-matter of the contract, as where he is a party to the fraudulent conveyance.[1] Subject to these limitations, knowledge of a husband who is the agent for his wife is equivalent to knowledge of the wife.[2] So knowledge of an attorney is imputable to his client.[3]

e. Effect of Relationship or Intimacy of Parties. Notice will not be implied merely from intimacy or relationship between the parties to the alleged fraudulent transfer,[4] although notice of the financial condition of the transferrer and of his intent to defraud is sometimes implied from the relationship of the parties in connection with other circumstances,[5] as where they are parent and child,[6] husband and wife,[7] brothers,[8] or attorney and client.[9]

C. Effect of Consideration. A conveyance or transfer, whether founded

United States.— Morris *v.* Lindauer, 54 Fed. 23, 4 C. C. A. 162.

See, generally, PRINCIPAL AND AGENT.

Where one of several mortgagees acted as agent for the other in procuring the mortgage, his knowledge of the mortgagor's fraudulent intent is chargeable to the others and will render the mortgage fraudulent *in toto*. Jaffray *v.* Wolf, 4 Okla. 303, 47 Pac. 496.

If the agent has no authority to act in the matter, his knowledge is not imputable to his principal. Bruen *v.* Dunn, 87 Iowa 483, 54 N. W. 468; Cowell *v.* Daggett, 97 Mass. 434; Hargardine McKittrick Dry Goods Co. *v.* Krug, 2 Nebr. (Unoff.) 52, 96 N. W. 286; Cooper *v.* Sawyer, 31 Tex. Civ. App. 620, 73 S. W. 992. See, generally, PRINCIPAL AND AGENT.

Fraud of the trustee or the beneficiary for life in a trust deed will not be imputed to the children of the beneficiary. McNeill *v.* Arnold, 22 Ark. 477.

Knowledge or acts of trustee in trust deed as imputable to beneficiary see *supra*, VII, B, 2, b, (III).

1. Clark *v.* Marshall, 62 N. H. 498. See Lindsey *v.* Lambert Bldg., etc., Assoc., 4 Fed. 48. See, generally, PRINCIPAL AND AGENT.

2. *Connecticut.*— Trumbull *v.* Hewitt, 65 Conn. 60, 31 Atl. 492; Clark *v.* Fuller, 39 Conn. 238.

Illinois.— Jeffery *v.* J. W. Butler Paper Co., 37 Ill. App. 96.

Indiana.— See Phillips *v.* Kennedy, 139 Ind. 419, 38 N. E. 410, 39 N. E. 417.

Missouri.— Monarch Rubber Co. *v.* Bunn, 78 Mo. App. 55.

New York.— Sommers *v.* Cottentin, 26 N. Y. App. Div. 241, 49 N. Y. Suppl. 652.

West Virginia.— Hart *v.* Sandy, 39 W. Va. 644, 20 S. E. 665.

See, generally, HUSBAND AND WIFE.

3. Shideler *v.* Fisher, 13 Colo. App. 106, 57 Pac. 864; Morrell *v.* Miller, 28 Oreg. 354, 43 Pac. 490, 45 Pac. 246. But see Burns *v.* Wilson, 28 Can. Sup. Ct. 207; Gibbons *v.* Wilson, 17 Ont. App. 1; Cameron *v.* Hutchison, 16 Grant Ch. (U. C.) 526. See also ATTORNEY AND CLIENT, 4 Cyc. 933.

4. *Colorado.*— Johnson *v.* Jones, 16 Colo. 138, 26 Pac. 584.

North Dakota.— Fluegel *v.* Henschel, 7 N. D. 276, 74 N. W. 996, 66 Am. St. Rep. 642.

Texas.— Cleveland *v.* Sims, 69 Tex. 153, 6 S. W. 634.

Wisconsin.— Mehlhof *v.* Pettibone, 54 Wis. 652, 11 N. W. 553, 12 N. W. 443.

United States.— Evans *v.* Mansur, etc., Implement Co., 87 Fed. 275, 30 C. C. A. 640, attorney.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 498, 499.

A clerk in a store who purchases the stock of his employer cannot be charged, as a matter of law, from his business relationship, with knowledge of the employer's indebtedness. Jones *v.* Dunbar, 52 Nebr. 151, 71 N. W. 976.

5. *Colorado.*— See Johnson *v.* Jones, 16 Colo. 138, 26 Pac. 584, holding that knowledge is not a necessary inference to be drawn from the extent or character of their friendship.

Illinois.— Beidler *v.* Crane, 22 Ill. App. 538 [*affirmed* in 135 Ill. 92, 25 N. E. 655, 25 Am. St. Rep. 349].

Indiana.— See Phillips *v.* Kennedy, 139 Ind. 419, 38 N. E. 410, 39 N. E. 147.

Iowa.—Leich *v.* Dee, 86 Iowa 709, 47 N. W. 881, 52 N. W. 209; Dickerman *v.* Farrell, 59 Iowa 759, 13 N. W. 422.

Kentucky.— Caudill *v.* Goeble, 6 Ky. L. Rep. 515.

Mississippi.— Pope *v.* Andrews, Sm. & M. Ch. 135.

Missouri.— Roan *v.* Winn, 93 Mo. 503, 4 S. W. 736, where the grantor was a bank and the grantee a director thereof.

Nebraska.— Dorrington *v.* Minnick, 15 Nebr. 397, 19 N. W. 456, where a grantee was a clerk in the grantor's store.

North Carolina.— See Nadal *v.* Britton, 112 N. C. 180, 16 S. E. 914.

Tennessee.— Dunlap *v.* Haynes, 4 Heisk. 476.

Texas.— Castro *v.* Illies, 22 Tex. 479, 73 Am. Dec. 277.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 498, 499.

6. Dickerman *v.* Farrell, 59 Iowa 759, 13 N. W. 422; Caudill *v.* Goeble, 6 Ky. L. Rep. 515; Dunlap *v.* Haynes, 4 Heisk. (Tenn.) 476. See also *infra*, XII, C.

7. Leich *v.* Dee, 86 Iowa 709, 47 N. W. 881, 52 N. W. 209; Castro *v.* Illies, 22 Tex. 479, 73 Am. Dec. 277. See also *infra*, XII, B.

8. Pope *v.* Andrews, 1 Sm. & M. (Miss.) 135. See *infra*, XII, A, 2.

9. Summers *v.* Taylor, 4 Ky. L. Rep. 290. See also *infra*, XII, A, 1.

on a valuable and adequate consideration or not, if entered into by the parties thereto with the intent to hinder, delay, or defraud creditors, is void as to them.[10] It is not enough, in order to support a conveyance or transfer as against creditors, that it be made for a valuable consideration; it must be also *bona fide*;[11] and when it appears that the parties to a transaction impugned for fraud were actuated by a motive which the statute denounces as fraudulent, to wit, to hinder, delay, or defraud creditors, it is utterly immaterial how valuable a consideration may have passed from the grantee or transferee, for the conveyance is none the less void in law.[12] But as has been seen a mere fraudulent intent on the part of

10. *Alabama.*— Lehman *v.* Kelly, 68 Ala. 192; Bozman *v.* Draughan, 3 Stew. 243.

Arkansas.— May *v.* State Nat. Bank, 59 Ark. 614, 28 S. W. 431.

California.— Swinford *v.* Rogers, 23 Cal. 233.

Georgia.— Cothran *v.* Forsyth, 68 Ga. 560.

Illinois.— Beidler *v.* Crane, 135 Ill. 99, 25 N. E. 655, 25 Am. St. Rep. 349; Weber *v.* Mick, 131 Ill. 520, 23 N. E. 646; Boies *v.* Henney, 32 Ill. 130; Salzenstein *v.* Hettrick, 105 Ill. App. 99; Rahn *v.* Kniess, 74 Ill. App. 367; Oakford *v.* Dunlap, 63 Ill. App. 498; Hupp *v.* Hupp, 61 Ill. App. 445.

Indiana.— Slagel *v.* Hoover, 137 Ind. 314, 36 N. E. 1099; Buck *v.* Voreis, 89 Ind. 116; Flannagan *v.* Donaldson, 85 Ind. 517; Ruffing *v.* Tilton, 12 Ind. 259.

Kentucky.— Lyne *v.* Commonwealth Bank, 5 J. J. Marsh. 545; Mason *v.* Baker, 1 A. R. Marsh. 208, 10 Am. Dec. 724.

Maine.— Hartshorn *v.* Eames, 31 Me. 93; Pullen *v.* Hutchinson, 25 Me. 249; Clark *v.* French, 23 Me. 221, 39 Am. Dec. 618.

Maryland.— Spuck *v.* Logan, 97 Md. 152, 54 Atl. 989, 99 Am. St. Rep. 427; Chatterton *v.* Mason, 86 Md. 236, 37 Atl. 960; Zimmer *v.* Miller, 64 Md. 296, 1 Atl. 858; Gebhart *v.* Merfeld, 51 Md. 322; Cooke *v.* Cooke, 43 Md. 522; Glenn *v.* Grover, 3 Md. Ch. 29.

Massachusetts.— See Crowninshield *v.* Kittridge, 7 Metc. 520.

Minnesota.— Braley *v.* Byrnes, 20 Minn. 435.

Mississippi.—Vasser *v.* Henderson, 40 Miss. 519, 90 Am. Dec. 351; Pope *v.* Pope, 40 Miss. 516; Reed *v.* Carl, 3 Sm. & M. 74.

Missouri.— Murray *v.* Cason, 15 Mo. 378; Frankenthal *v.* Goldstein, 44 Mo. App. 189; Stewart *v.* Cabanne, 16 Mo. App. 517. See also McDonald *v.* Hoover, 142 Mo. 484, 44 S. W. 334; National Tube-Works Co. *v.* Ring Refrigerating, etc., Co., 118 Mo. 365, 22 S. W. 947; Fink *v.* Algermissen, 25 Mo. App. 186.

Nebraska.—Foley *v.* Doyle, 1 Nebr. (Unoff.) 643, 95 N. W. 1067.

New Hampshire.— True *v.* Congdon, 44 N. H. 48; Kendall *v.* Fitts, 22 N. H. 1; McConihe *v.* Sawyer, 12 N. H. 396; Carlisle *v.* Rich, 8 N. H. 44.

New Jersey.— Smith *v.* Muirheid, 34 N. J. Eq. 4; Randall *v.* Vroom, 30 N. J. Eq. 353; Sayre *v.* Fredericks, 16 N. J. Eq. 205; Doughten *v.* Gray, 10 N. J. Eq. 323.

New York.— Billings *v.* Russell, 101 N. Y. 226, 4 N. E. 531; Davis *v.* Loepold, 87 N. Y. 620; Woods *v.* Van Brunt, 6 N. Y. App. Div. 220, 39 N. Y. Suppl. 896; Mohawk Bank *v.* Atwater, 2 Paige 54.

North Carolina.— Devries *v.* Phillips, 63 N. C. 53.

North Dakota.— Daisy Roller Mills Co. *v.* Ward, 6 N. D. 317, 70 N. W. 271.

Pennsylvania.— Clark *v.* Douglass, 62 Pa. St. 408; Covanhovan *v.* Hart, 21 Pa. St. 495, 60 Am. Dec. 57.

South Carolina.— Beattie *v.* Pool, 13 S. C. 379; Jones *v.* Crawford, 1 McMull. 373; Hamilton *v.* Greenwood, 1 Bay 173, 1 Am. Dec. 607.

Tennessee.— Churchill *v.* Wells, 7 Coldw. 364; Phillips *v.* Cunningham, (Ch. App. 1899) 58 S. W. 463.

Texas.— Tuttle *v.* Turner, 28 Tex. 759; Mills *v.* Howeth, 19 Tex. 257, 70 Am. Dec. 331.

Virginia.— Garland *v.* Rives, 4 Rand. 282, 15 Am. Dec. 756.

West Viriginia.—Frank *v.* Zeigler, 46 W. Va. 614, 33 S. E. 761; Lockhard *v.* Beckley, 10 W. Va. 87.

Wisconsin.— Fisher *v.* Shelver, 53 Wis. 498, 10 N. W. 681.

United States.— Chandler *v.* Von Roeder, 24 How. 224, 16 L. ed. 633; Potts *v.* Hahn, 38 Fed. 682; Moline Wagon Co. *v.* Rummell, 12 Fed. 658, 2 McCrary 307; Alexander *v.* Todd, 1 Fed. Cas. No. 175, 1 Bond 175; Gilmore *v.* North American Land Co., 10 Fed. Cas. No. 5,448, Pet. C. C. 460; Parrish *v.* Danford, 18 Fed. Cas. No. 10,770, 1 Bond 345.

England.— Bott *v.* Smith, 21 Beav. 511, 52 Eng. Reprint 957; Twyne's Case, 3 Coke 80*a*, 1 Smith Lead. Cas. 1; Harman *v.* Richards, 10 Hare 81, 22 L. J. Ch. 1066, 44 Eng. Ch. 78; Corlett *v.* Radcliffe, 14 Moore P. C. 121, 4 L. T. Rep. N. S. 1, 15 Eng. Reprint 251.

Canada.— Smith *v.* Moffatt, 28 U. C. Q. B. 486 [*affirming* 27 U. C. Q. B. 195].

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 11. And see *supra*, VII, B, 2, b, (I); *infra*, XIII, A, 4, a, (I), (A).

Effect of prior contract to convey.— A conveyance made and accepted with the intent to defraud creditors is invalid, although the grantor was bound by a prior agreement with a third person to convey the same property to the same grantee. Phillips *v.* Cunningham, (Tenn. Ch. App. 1899) 58 S. W. 463.

11. Blennerhassett *v.* Sherman, 105 U. S. 100, 26 L. ed. 1080.

12. McDonald *v.* Hoover, 142 Mo. 484, 44 S. W. 334.

the grantor will not invalidate a conveyance or transfer which is accepted by the grantee in good faith and for a valuable consideration.[13]

VIII. CONSIDERATION.

A. Nature and Sufficiency — 1. IN GENERAL. As will be seen elsewhere, the want of a consideration is not always a ground for avoiding a sale or conveyance made by a debtor.[14] But when a consideration is necessary it must be a valuable one; a good consideration is insufficient.[15] An extended discussion as to what constitutes a valuable consideration is found elsewhere in this work, and the rules there stated generally apply as to the transactions now under discussion.[16] The payment of money to the grantor is of course a valuable consideration;[17] and so are the payment by the grantee of debts due by the grantor to a third person,[18] and the discharge of legal or equitable liabilities to the grantee.[19] The consideration, however, need not necessarily involve the payment of money.[20]

13. Crawford *v.* Kirksey, 55 Ala. 282, 28 Am. Rep. 704; Birdsall *v.* Welch, 6 D. C. 316; Chandler *v.* Fleeman, 50 Mo. 239; Haas *v.* Kraus, 86 Tex. 687, 28 S. W. 256. See *supra*, VII, B, 1, a.

14. Holden *v.* Burnham, 63 N. Y. 74; Seward *v.* Jackson, 8 Cow. (N. Y.) 406. See Kain *v.* Larkin, 131 N. Y. 300, 30 N. E. 105. And see *infra*, VIII, D.

15. *Alabama.*— Norwood *v.* Washington, 136 Ala. 657, 33 So. 869; Killough *v.* Steele, 1 Stew. & P. 262.

Connecticut.— Trumbull *v.* Hewitt, 62 Conn. 448, 26 Atl. 350; Washband *v.* Washband, 27 Conn. 424.

Missouri.— Lyons *v.* Murray, 95 Mo. 23, 8 S. W. 170, 6 Am. St. Rep. 17.

New York.— Seymour *v.* Wilson, 19 N. Y. 417; Smith *v.* Perine, 1 N. Y. Suppl. 495; Seward *v.* Jackson, 8 Cow. 406.

North Carolina.— Jones *v.* Ruffin, 14 N. C. 404.

Pennsylvania.— Wilson *v.* Howser, 12 Pa. St. 109.

Texas.— Deutsch *v.* Allen, 57 Tex. 89.

Virginia.— Davis *v.* Anderson, 99 Va. 620, 39 S. E. 588; Harvey *v.* Steptoe, 17 Gratt. 289; Ruddle *v.* Ben, 10 Leigh 467; Broadfoot *v.* Dyer, 3 Munf. 350.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 194, 197.

A gratuity cannot subsequently be converted into a debt so as to become the consideration of a conveyance by the grantor to the injury of his creditors. Clay *v.* McCally, 5 Fed. Cas. No. 2,869, 4 Woods 605.

A gift mortis causa will not affect the rights of creditors of the donor. Chase *v.* Redding, 13 Gray (Mass.) 418.

Failure to state consideration.— If there is in reality a valuable and sufficient consideration for a conveyance, it is immaterial whether the amount is specified therein or not. Lowry *v.* Howard, 35 Ind. 170, 9 Am. Rep. 676. See also Hannan *v.* Towers, 3 Harr. & J. (Md.) 147, 5 Am. Dec. 427.

Misstatement as to nature of consideration. — The fact that a conveyance recites a receipt of a money consideration does not render it invalid as against creditors where the actual consideration is an indebtedness to the grantee equaling the expressed consideration. Commonwealth Bank *v.* Kearns, 100 Md. 202, 59 Atl. 1010. *Compare supra*, V, B, 1, c.

Recital of consideration not proof.— Where creditors assail a conveyance from husband to wife as fraudulent, as between them and the grantee the consideration recited in the deed is not evidence of its existence, but must be proven by independent evidence. Ezzell *v.* Brown, 121 Ala. 150, 25 So. 832.

Uncertainty in the amount of consideration is a circumstance to be looked into in determining whether a conveyance is fraudulent. Montgomery *v.* Kirksey, 26 Ala. 172. *Compare* Angell *v.* Pickard, 61 Mich. 561, 28 N. W. 680.

Payment of consideration.— Where, on the question whether a deed was fraudulent and void as to creditors, facts were adduced and relied on by both parties, and many of the usual badges of fraud were proved; among other facts, that a small balance out of a large consideration recited in the deed was unpaid, it was held error in the court to make the question of fraud turn upon the payment or the non-payment of the whole consideration expressed in the deed. Felton *v.* White, 49 N. C. 301. See also McCaskle *v.* Amarine, 12 Ala. 17.

16. Consideration generally see CONTRACTS, 9 Cyc. 311 *et seq.*

17. Miller *v.* Rowan, 108 Ala. 98, 19 So. 9 (opinion by Brickell, C. J.); Billgery *v.* Ferguson, 30 La. Ann. 84.

18. Miller *v.* Rowan, 108 Ala. 98, 19 So. 9; Pique *v.* Arendale, 71 Ala. 91.

19. Miller *v.* Rowan, 108 Ala. 98, 19 So. 9; Carlisle *v.* Gaskill, 4 Ind. 219 (holding that a conveyance of land to a husband in satisfaction of a claim for damages for the seduction of his wife is valid); Neal *v.* Foster, 36 Fed. 29. *Compare* Simon *v.* Norton, 56 Mo. App. 338, holding that a conveyance by a debtor to an attorney of preferred creditors to pay counsel fees incurred by such creditors in the defense of the preferences against other creditors is invalid, there being no obligation on the part of the debtor to pay such fees.

20. *California.*— Hunt *v.* Hammel, 142 Cal. 456, 76 Pac. 378, services performed.

Colorado.— Homestead Min. Co. *v.* Rey-

It may consist of other things that constitute a pecuniary equivalent.[21] A conveyance of the equity of redemption by a mortgagor to a mortgagee, without the payment of any new consideration, cannot be considered a voluntary conveyance and void as against creditors, when the amount due on the note or other obligation, the payment of which is secured by the mortgage, is equal to the whole value of the mortgaged premises.[22]

2. **Natural Love and Affection.** A conveyance or transfer in consideration of natural love and affection, as in the case of a conveyance to wife or child, is merely voluntary.[23]

3. **Moral Obligation.** Although there are some authorities which seem to hold the contrary to be true,[24] it is nevertheless well settled on principle and

nolds, 30 Colo. 330, 70 Pac. 422; McMurtrie *v.* Riddell, 9 Colo. 497, 13 Pac. 181.

Iowa.— Hinkle *v.* Downing, 116 Iowa 693, 88 N. W. 1088.

Massachusetts.— Parker *v.* Barker, 2 Metc. 423.

Missouri.— Redpath *v.* Lawrence, 42 Mo. App. 101.

Nebraska.— Jones *v.* Dunbar, 52 Nebr. 151, 71 N. W. 976, relinquishment of a valid entry of land under the timber culture act of congress.

New Jersey.— Asbury Park First Nat. Bank *v.* White, 60 N. J. Eq. 487, 46 Atl. 1092.

Texas.— Weaver *v.* Nugent, 72 Tex. 272, 10 S. W. 458, 13 Am. St. Rep. 792; Chesher *v.* Clamp, 10 Tex. Civ. App. 350, 30 S. W. 466, exchange of merchandise for land.

Virginia.— Ruddle *v.* Ben, 10 Leigh 467.

West Virginia.— Farmers' Bank *v.* Gould, 48 W. Va. 99, 35 S. E. 878, 86 Am. St. Rep. 24.

United States.— Stanley *v.* Schwalby, 162 U. S. 255, 16 S. Ct. 754, 40 L. ed. 960.

England.— Blount *v.* Doughty, 3 Atk. 481, 26 Eng. Reprint 1076; Stephens *v.* Olive, 2 Bro. Ch. 90, 29 Eng. Reprint 52; Heap *v.* Tonge, 9 Hare 90, 20 L. J. Ch. 661, 41 Eng. Ch. 90; *In re* Greer, Ir. R. 11 Eq. 502; Worrall *v.* Jacob, 3 Meriv. 256, 36 Eng. Reprint 98; Carter *v.* Hind, 2 Wkly. Rep. 27. *Compare* Doe *v.* Rolfe, 8 A. & E. 650, 3 N. & P. 648, 35 E. C. L. 775; Peacock *v.* Monk, 1 Ves. 127, 27 Eng. Reprint 934.

Canada.— See Randall *v.* Dopp, 22 Ont. 422.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 192 *et seq.*

Services rendered by an attorney are a sufficient consideration. Reed *v.* Mellor, 5 Mo. App. 567; Sullivan *v.* Ball, 55 S. C. 343, 33 S. E. 486. A clause in a judgment note authorizing the confession and entry of judgment for ten per cent attorney's fees in addition to the amount unpaid on the note does not render such confession and entry void as to creditors of the maker, unless such fees are shown to be unreasonable and fraudulent in fact. Pirie *v.* Stern, 97 Wis. 150, 72 N. W. 370, 65 Am. St. Rep. 103. See *supra*, III, A, 4, b, (II), (A).

True ownership of property is a sufficient consideration to support a reconveyance by a fraudulent grantee to his grantor. Farmers' Bank *v.* Gould, 48 W. Va. 99, 35 S. E. 878, 86 Am. St. Rep. 24. See *supra*, II, B, 17, d.

Conveyance to the equitable owner by the holder of the legal title is valid as against creditors. See *supra*, II, B, 17.

Where the consideration for a deed fails, the obligation to reconvey is a sufficient consideration for a deed executed for that purpose. Forbush *v.* Willard, 16 Pick. (Mass.) 42.

A mortgage to secure the debt of another is not voluntary. Marden *v.* Babcock, 2 Metc. (Mass.) 99.

Stock of corporation organized by debtor. — Where a debtor organizes a corporation, and transfers his property to it without other consideration than the stock of such corporation, the transaction is fraudulent as to creditors. Shumaker *v.* Davidson, 116 Iowa 569, 87 N. W. 441. See *supra*, III, A, 5.

21. Stanley *v.* Schwalby, 162 U. S. 255, 16 S. Ct. 754, 40 L. ed. 960.

22. Williams *v.* Robbins, 15 Gray (Mass.) 590.

Conveyance of valueless equity of redemption see *supra*, II, B, 2.

23. *Alabama.*— McKee *v.* West, (1904) 37 So. 740; Potter *v.* Gracie, 58 Ala. 303, 29 Am. Rep. 748; Gannard *v.* Eslava, 20 Ala. 732.

Connecticut.— Redfield *v.* Buck, 35 Conn. 328, 95 Am. Dec. 241.

Maryland.— Atkinson *v.* Phillips, 1 Md. Ch. 507.

Michigan.— Farrand *v.* Caton, 69 Mich. 235, 37 N. W. 199.

New Hampshire.— Pomeroy *v.* Bailey, 43 N. H. 118.

New York.— Seward *v.* Jackson, 8 Cow. 406; Jackson *v.* Town, 4 Cow. 599, 15 Am. Dec. 405; Frazer *v.* Western, 1 Barb. Ch. 220; Thompson *v.* Hammond, 1 Edw. 497.

North Carolina.— Freeman *v.* Eatman, 38 N. C. 81, 40 Am. Dec. 444.

Ohio.— Holmes *v.* Sullivan, 9 Ohio Dec. (Reprint) 499, 14 Cinc. L. Bul. 167.

Texas.— Moreland *v.* Atchison, 34 Tex. 351.

United States.— Burton *v.* Leroy, 4 Fed. Cas. No. 2,217, 5 Sawy. 510.

England.— Mathews *v.* Feaver, 1 Cox Ch. 278, 1 Rev. Rep. 39, 29 Eng. Reprint 1165.

Canada.— Doe *v.* Blanchfield, 1 U. C. Q. B. 350.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 201½.

24. *Iowa.*— Cottrell *v.* Smith, 63 Iowa 181, 18 N. W. 865.

by the weight of authority that a merely moral obligation is not a sufficient consideration.[25]

4. Fictitious Consideration. Where the consideration for a conveyance or transfer is a fictitious one, such conveyance or transfer will be set aside at the instance of creditors.[26]

5. Illegal Consideration. An illegal consideration will not support a conveyance or transfer of a debtor's property.[27] A conveyance in consideration of past sexual intercourse is merely voluntary and subject to be set aside like other conveyances of that character.[28]

6. Nominal Consideration. The general rule is that a conveyance with a consideration merely nominal will be considered voluntary as against attacking creditors.[29]

Kentucky.— See Poynter *v.* Mallory, 45 S. W. 1042, 20 Ky. L. Rep. 284.

Nebraska.— See Columbia Nat. Bank *v.* Baldwin, 64 Nebr. 732, 90 N. W. 890.

New York.— See Smith *v.* Perine, 1 N. Y. Suppl. 495; Ocean Nat. Bank *v.* Hodges, 9 Hun 161; Fellows *v.* Emperor, 13 Barb. 92.

North Dakota.— See Lockren *v.* Rustan, 9 N. D. 43, 81 N. W. 60.

Pennsylvania.— See Dougherty *v.* Mortland, 8 Pa. Cas. 384, 11 Atl. 234.

Tennessee.— Rosenbaum *v.* Davis, (Ch. App. 1898) 48 S. W. 706.

Wisconsin.— Martin *v.* Remington, 100 Wis. 540, 76 N. W. 614, 69 Am. St. Rep. 941, moral obligation to execute a voidable trust a sufficient consideration.

United States.— See Georgia Bank *v.* Higginbottom, 9 Pet. 48, 9 L. ed. 46.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 200.

The agreement of a woman during coverture to pay a valid debt of her husband out of her separate estate gives rise to a moral obligation which is a sufficient consideration to support a conveyance to secure such debt executed after the death of her husband. Sharpless Appeal, 140 Pa. St. 63, 21 Atl. 239.

A conveyance which equity would have compelled will be sustained. Moog *v.* Farley, 79 Ala. 246.

A transfer by the holder of the legal title to land, to the equitable owner, although without pecuniary consideration, is not a voluntary conveyance. Stanton *v.* Crane, 25 Nev. 114, 58 Pac. 53 [*citing* Cottrell *v.* Smith, 63 Iowa 181, 18 N. W. 865; Schreyer *v.* Platt, 134 U. S. 405, 10 S. Ct. 579, 33 L. ed. 955]. See *supra*, II, B, 17.

25. *Alabama.*— Hubbard *v.* Allen, 59 Ala. 283.

California.— Fidelity, etc., Co. *v.* Thompson, 128 Cal. 506, 61 Pac. 94.

Maine.— Jose *v.* Hewitt, 50 Me. 248.

Mississippi.— Cock *v.* Oakley, 50 Miss. 628.

England.— Gilham *v.* Locke, 9 Ves. Jr. 612, 32 Eng. Reprint 741.

And see, generally, Contracts, 9 Cyc. 356.

A moral obligation to pay for services rendered to a debtor without a contract for compensation by members of his family is not a sufficient consideration for a transfer of property to them. Fair Haven Marble, etc., Co. *v.* Owens, 69 Vt. 246, 37 Atl. 749.

Preëxisting liability see *infra*, VIII, A, 9.

26. *Alabama.*— Weingarten *v.* Marcus, 121 Ala. 187, 25 So. 852.

Kentucky.— Drane *v.* Underwood, 1 Ky. L. Rep. 317.

Michigan.— Hunt *v.* Shier, 59 Mich. 286, 26 N. W. 494.

Missouri.— Kramer *v.* McCaughey, 11 Mo. App. 426.

North Carolina.— Johnson *v.* Murchison, 60 N. C. 286; Leadman *v.* Harris, 14 N. C. 144.

Pennsylvania.—See Taylor's Appeal, 45 Pa. St. 71.

Tennessee.—Gibbs *v.* Thompson, 7 Humphr. 179.

Texas.— Watts *v.* Dubois, (Civ. App. 1902) 66 S. W. 698. See also Hinson *v.* Walker, 65 Tex. 103.

Wyoming.— Stirling *v.* Wagner, 4 Wyo. 5, 31 Pac. 1032, 32 Pac. 1128.

Canada.—See Ball *v.* Ballantyne, 11 Grant Ch. (U. C.) 199.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 195. See also *supra*, V, B, 1, a, c; VII, B, 2, b, (I), (C).

27. *Indiana.*— Marmon *v.* White, 151 Ind. 445, 51 N. E. 930.

New York.— Friedman *v.* Bierman, 43 Hun 387; Morgan *v.* Potter, 17 Hun 403 (agreement to discontinue an action for divorce); Waite *v.* Day, 4 Den. 439 (future illicit intercourse).

West Virginia.—Dent *v.* Pickens, 46 W. Va. 378, 33 S. E. 303.

Wisconsin.— Oppenheimer *v.* Collins, 115 Wis. 283, 91 N. W. 690, 60 L. R. A. 406, discontinuance of divorce proceedings.

United States.— Sharp *v.* Philadelphia Warehouse Co., 10 Fed. 379, agreement not to prosecute a debtor for a misdemeanor affecting public interest.

28. Jackson *v.* Miner, 101 Ill. 550; Hargroves *v.* Meray, 2 Hill Eq. (S. C.) 222. See also Fletcher *v.* Sidley, 2 Vern. 490.

29. *Alabama.*— Gunn *v.* Hardy, 130 Ala. 642, 31 So. 443; Houston *v.* Blackman, 66 Ala. 559, 41 Am. Rep. 756; Felder *v.* Harper, 12 Ala. 612.

Florida.— McKeown *v.* Allen, 37 Fla. 490, 20 So. 556.

Kentucky.— Ward *v.* Trotter, 3 T. B. Mon. 1; McKinley *v.* Combs, 1 T. B. Mon. 105.

Missouri.— Lionberger *v.* Baker, 88 Mo. 447 [*affirming* 14 Mo. App. 353].

7. Executory or Contingent Consideration — a. Executory Consideration — (i) *In General.* An executory consideration which fails will not support a conveyance or transfer as against creditors of the grantor.[30] But when a transfer of property by a debtor is in other respects fair and legal, allowing time for the payment of the consideration does not vitiate such transfer.[31] The legal obligation to pay the price is a valid consideration for the transfer of the property.[32]

(ii) *Promissory Notes.* A negotiable promissory note is such a consideration as will support a conveyance by a debtor,[33] especially where the insolvency of the maker is not shown,[34] and where the grantee is without knowledge of any fraudulent intent toward his creditors on the part of the debtor.[35]

(iii) *Future Services.* As a general rule a transfer of property in consideration of future services of any kind is void as against existing creditors,[36] where

New York.— Ten Eyck *v.* Witbeck, 135 N. Y. 40, 31 N. E. 994, 31 Am. St. Rep. 809; O'Brien *v.* Cavanagh, 36 Misc. 362, 73 N. Y. Suppl. 558; Royer Wheel Co. *v.* Fielding, 61 How. Pr. 437; Manhattan Co. *v.* Evertson, 6 Paige 457.

Ohio.— Stoltz *v.* Vanatta, 32 Cinc. L. Bul. 100.

Oregon.— Scoggin *v.* Schloath, 15 Oreg. 380, 15 Pac. 635.

Utah.— Gustin *v.* Mathews, 25 Utah 168, 70 Pac. 402.

United States.— Polk County Nat. Bank *v.* Scott, 132 Fed. 897, 66 C. C. A. 51; Ridgeway *v.* Underwood, 20 Fed. Cas. No. 11,815, 4 Wash. 129.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 198.

But *compare* Martin *v.* White, 115 Ga. 866, 42 S. E. 279; Ferguson's Appeal, 117 Pa. St. 426, 11 Atl. 885.

A slight consideration, when not disproportionate to the value of the property or interest transferred, is sufficient. Klosterman *v.* Vader, 6 Wash. 99, 32 Pac. 1055.

30. Wisner *v.* Farnheim, 2 Mich. 472. See also Warren *v.* Wilder, 12 N. Y. St. 757.

31. Priest *v.* Brown, 100 Cal. 626, 35 Pac. 323; O'Neil *v.* Orr, 5 Ill. 1; Helfrich *v.* Stein, 17 Pa. St. 143; Ligon *v.* Tillman, (Tex. Civ. App. 1897) 43 S. W. 1069. *Compare* Sattler *v.* Marino, 30 La. Ann. 355; Owen *v.* Arvis, 26 N. J. L. 22; Grannis *v.* Smith, 3 Humphr. (Tenn.) 179; Hickman *v.* Trout, 83 Va. 478, 3 S. E. 131, holding that unusual length of credit is a badge of fraud. See also *supra*, V, B, 6.

32. Boswell *v.* Green, 25 N. J. L. 390.

33. Le Page *v.* Slade, 79 Tex. 473, 15 S. W. 496; Tillman *v.* Heller, (Tex. 1890) 14 S. W. 271; Weaver *v.* Nugent, 72 Tex. 272, 10 S. W. 458, 13 Am. St. Rep. 792. See also Earl *v.* Earl, 186 Ill. 370, 57 N. E. 1079 [*reversing* 87 Ill. App. 491]; Gordon *v.* Alexander, (Mich. 1899) 80 N. W. 978; Crites *v.* Hart, 49 Nebr. 53, 68 N. W. 362; McCreery *v.* Gordon, 38 Hun (N. Y.) 467; Rodgers *v.* Kinsey, 8 Ohio Dec. (Reprint) 308, 7 Cinc. L. Bul. 64, holding that a sale by a debtor in failing circumstances of his entire stock in trade and business, for an adequate consideration in promissory notes, which are used to pay his creditors, cannot be set aside. *Compare* Oppenheimer *v.* Guckenheimer, 39 Fla. 617, 23 So. 9; Burgroff *v.* Bagby, 32 S. W. 940, 17 Ky. L. Rep. 820; Williams *v.* Barnett, 52 Tex. 130. See also *supra*, V, B, 6.

Notes of an infant are not a sufficient consideration. Vance *v.* Phillips, 6 Hill (N. Y.) 433. See also Overall *v.* Parker, (Tenn. Ch. App. 1899) 58 S. W. 905.

The unsecured note of a person not financially responsible is not a sufficient consideration. See Beaver *v.* Danville Shirt Co., 69 Ill. App. 320; Haymaker's Appeal, 53 Pa. St. 306; Dillard, etc., Co. *v.* Smith, 105 Tenn. 372, 59 S. W. 1010.

34. Weaver *v.* Nugent, 72 Tex. 272, 10 S. W. 458, 13 Am. St. Rep. 792. See also Danby *v.* Sharp, 2 MacArthur (D. C.) 435; Nesbitt *v.* Digby, 13 Ill. 387.

35. Starin *v.* Kelly, 36 N. Y. Super. Ct. 366; Le Page *v.* Slade, 79 Tex. 473, 15 S. W. 496. See also Nesbitt *v.* Digby, 13 Ill. 387; Deakers *v.* Temple, 41 Pa. St. 234; Kepner *v.* Burkhart, 5 Pa. St. 478.

36. Swift *v.* Hart, 35 Hun (N. Y.) 128; Lehman *v.* Bentley, 60 N. Y. Super. Ct. 473, 18 N. Y. Suppl. 778. See also Fuller *v.* Croco, 46 Kan. 634, 26 Pac. 944; Winfield Nat. Bank *v.* Croco, 46 Kan. 629, 26 Pac. 942; Perry *v.* Hardison, 99 N. C. 21, 5 S. E. 230.

Future legal services.— A conveyance by an insolvent debtor of property to an attorney in payment of services to be rendered in the future is as a general rule fraudulent and void as to creditors (Ringgold *v.* Leith, 73 Ill. App. 656. See also Shideler *v.* Fisher, 13 Colo. App. 106, 57 Pac. 864; Crain *v.* Gould, 46 Ill. 293; Winfield Nat. Bank *v.* Croco, 46 Kan. 629, 26 Pac. 942. But see Farmers', etc., Bank *v.* Mosher, 63 Nebr. 130, 88 N. W. 552); but it has been held that an insolvent debtor may mortgage his property to an attorney to secure the latter a fee for services to be rendered in litigation which the debtor anticipates will arise in the winding up of his affairs (Cortland Wagon Co. *v.* Gordy, 98 Ga. 527, 25 S. E. 574. See also *In re* Parsons, 150 Mass. 343, 23 N. E. 50).

Services rendered prior to attack.— A conveyance made in consideration of services rendered by the grantees will not be set aside as in fraud of creditors, although at the time of the conveyance the value of the property was in excess of the sum then due the grantees, where, before the conveyance was attacked by creditors, the value of the services

the person for whose benefit the transfer is made is under no present legal obligation to render such services.[37]

(iv) *Future Support.* An agreement for future support is not a sufficient consideration to uphold a conveyance or transfer by a debtor, when to do so will operate to the prejudice of existing creditors,[38] as where all the debtor's property is conveyed or transferred.[39] Where, however, support has been furnished in good faith, the conveyance will be sustained to that extent;[40] and where an agreement for future support has been fully performed it becomes a valuable consideration, and in order to set the conveyance aside as fraudulent against creditors, it is necessary to show that such conveyance was made with fraudulent intent, and that the grantee at the time of the conveyance had notice of such intent.[41]

of the grantees amounted to a sum equal to the value of all the property conveyed. Darling *v.* Ricker, 68 Vt. 471, 35 Atl. 376 [*citing* Kelsey *v.* Kelley, 63 Vt. 41, 22 Atl. 597, 13 L. R. A. 640].

37. Matter of Gordon, 49 Hun (N. Y.) 370, 3 N. Y. Suppl. 589.

38. *Alabama.*— Woodward *v.* Kelly, 85 Ala. 368, 5 So. 164, 7 Am. St. Rep. 57.

Connecticut.— See Pettibone *v.* Stevens, 15 Conn. 19, 38 Am. Dec. 57.

Illinois.— Davidson *v.* Burke, 143 Ill. 132, 32 N. E. 514, 36 Am. St. Rep. 367; Harting *v.* Jockers, 136 Ill. 627, 27 N. E. 188, 29 Am. St. Rep. 341 [*affirming* 31 Ill. App. 67]; Annis *v.* Bonar, 86 Ill. 128.

Indiana.— Spiers *v.* Whitesell, 21 Ind. App. 204, 61 N. E. 28.

Iowa.— Coleman *v.* Gammon, (1900) 83 N. W. 898; Seekel *v.* Winch, 108 Iowa 102, 78 N. W. 821 (a conveyance in consideration of future support is voluntary); Strong *v.* Lawrence, 58 Iowa 55, 12 N. W. 74; Graham *v.* Rooney, 42 Iowa 567.

Kentucky.— Hawkins *v.* Moffitt, 10 B. Mon. 81; Brown *v.* Moore, 52 S. W. 944, 21 Ky. L. Rep. 664.

Maine.— Spear *v.* Spear, 97 Me. 498, 54 Atl. 1106 (speaking of such a conveyance as voluntary); Graves *v.* Blondell, 70 Me. 190; Sidensparker *v.* Sidensparker, 52 Me. 481, 83 Am. Dec. 527; Webster *v.* Withey, 25 Me. 326; Rollins *v.* Mooers, 25 Me. 192.

Minnesota.— McCord *v.* Knowlton, 79 Minn. 299, 82 N. W. 589.

New Hampshire.— Albee *v.* Webster, 16 N. H. 362; Smith *v.* Smith, 11 N. H. 459.

New York.— Robinson *v.* Stewart, 10 N. Y. 189; Todd *v.* Monell, 19 Hun 362.

Ohio.— Krider *v.* Koons, 5 Ohio Cir. Ct. 221, 3 Ohio Cir. Dec. 110.

Pennsylvania.— Downing *v.* Gault, 8 Pa. Super. Ct. 52; Shakely *v.* Guthrie, 2 Pa. Super. Ct. 414.

Vermont.— Church *v.* Chapin, 35 Vt. 223; Jones *v.* Spear, 21 Vt. 426; Crane *v.* Stickles, 15 Vt. 252. *Compare* Lyndon *v.* Belden, 14 Vt. 423.

West Virginia.— Flaherty *v.* Stephenson, (1904) 49 S. E. 131; Hanna *v.* Charleston Nat. Bank, 55 W. Va. 185, 46 S. E. 920.

Wisconsin.— Faber *v.* Matz, 86 Wis. 370, 57 N. W. 39.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 206.

But *compare* Gale *v.* Williamson, 10 L. J. Exch. 446, 8 M. & W. 405.

Not void as to subsequent creditors.— Hennon *v.* McClane, 88 Pa. St. 219; Gorman *v.* Urquhart, 2 N. Bhunsw. Eq. 42. See also Mahony *v.* Hunter, 30 Ind. 246; Webster *v.* Withey, 25 Me. 326.

Future support a part of consideration.— A grantee in good faith and for a valuable and sufficient consideration, even where a part of the consideration is an agreement to support the grantor in the future, will be protected, although the grantor was in debt and intended by such sale to defraud his creditors. In such a case, however, the creditors may treat the agreement to support as a mere debt to the grantor, and hold the grantee for the excess of the value of the property over the consideration actually paid and discharged. Farlin *v.* Sook, 30 Kan. 401, 1 Pac. 123, 46 Am. Rep. 100. Where a full and adequate compensation is paid by the grantee the fact that he also agrees to support the grantor will not render a conveyance void as to creditors. Torrey Cedar Co. *v.* Eul, 95 Wis. 615, 70 N. W. 823. A conveyance by a debtor to another for an inadequate consideration, together with an agreement for future support, is void as to existing creditors. Egery *v.* Johnson, 70 Me. 258. See also Graves *v.* Blondell, 70 Me. 190.

39. *Illinois.*— Parker *v.* Cain, 28 Ill. App. 598.

Iowa.— Mallow *v.* Walker, 115 Iowa 238, 88 N. W. 452, 91 Am. St. Rep. 158.

Kansas.— Pettyjohn *v.* Newhart, 7 Kan. App. 64, 51 Pac. 969.

Minnesota.— Henry *v.* Hinman, 25 Minn. 199.

Missouri.— Massey *v.* McCoy, 79 Mo. App. 169.

New York.— See Kain *v.* Larkin, 4 N. Y. App. Div. 209, 38 N. Y. Suppl. 546.

Vermont.— Woodward *v.* Wyman, 53 Vt. 645.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 206.

40. Harris *v.* Brink, 100 Iowa 366, 69 N. W. 684, 62 Am. St. Rep. 578. See also Walker *v.* Cady, 106 Mich. 21, 63 N. W. 1005; Long Branch Banking Co. *v.* Dennis, 56 N. J. Eq. 549, 39 Atl. 689; Constable *v.* Weaser, 8 Ohio Dec. (Reprint) 339, 7 Cinc. L. Bul. 113.

41. Hays *v.* Montgomery, 118 Ind. 91, 20 N. E. 646; Gregory *v.* Lamb, 42 S. W. 339,

Where property is conveyed in consideration of the grantee's agreement to support the grantor during life, a conveyance of the property by the grantee to one who in consideration thereof assumes the first grantee's obligation is valid as to the first grantee's creditors.[42]

(v) *FUTURE ADVANCES.* A mortgage or other such conveyance given in whole or in part to secure future advances is not necessarily void as to creditors of the grantor,[43] if it is free from fraud.[44] It has been held that such a conveyance need not show upon its face that it was given for that purpose,[45] nor state the amount intended to be secured.[46]

b. Contingent Liability — (i) *IN GENERAL.* A contingent debt or liability may be a sufficient consideration for a conveyance by a debtor to secure the same.[47]

19 Ky. L. Rep. 943; Kelsey *v.* Kelley, 63 Vt. 41, 22 Atl. 597, 13 L. R. A. 640. See also Hisle *v.* Rudasill, 89 Va. 519, 16 S. E. 673.

42. Hendrick *v.* Dillon, 62 Vt. 430, 18 Atl. 814. See also Perkins *v.* Scott, 7 Ky. L. Rep. 596.

Assumption of liability see *infra*, VIII, A, 8.

43. *Alabama.*— Lawson *v.* Alabama Warehouse Co., 80 Ala. 341.

California.— Tully *v.* Harloe, 35 Cal. 302, 95 Am. Dec. 102.

Iowa.— Carson *v.* Byers, 67 Iowa 606, 25 N. W. 826.

Kansas.— Clement *v.* Hartzell, 57 Kan. 482, 46 Pac. 961.

Maryland.— Wilson *v.* Russell, 13 Md. 494, 71 Am. Dec. 645.

Massachusetts.— Commercial Bank *v.* Cunningham, 24 Pick. 270, 35 Am. Dec. 322; Adams *v.* Wheeler, 10 Pick. 199.

Michigan.— Brace *v.* Berdan, 104 Mich. 356, 62 N. W. 568. See also Dummer *v.* Smedley, 110 Mich. 466, 68 N. W. 260, 38 L. R. A. 490; Newkirk *v.* Newkirk, 56 Mich. 525, 23 N. W. 206.

Minnesota.— Berry *v.* O'Connor, 33 Minn. 29, 21 N. W. 840.

Mississippi.— Arthur *v.* Commercial, etc., Bank, 9 Sm. & M. 394, 48 Am. Dec. 719.

New Hampshire.— North *v.* Crowell, 11 N. H. 251.

South Carolina.— Seaman *v.* Flemming, 7 Rich. Eq. 283.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 210.

But *compare* Heiney *v.* Anderson, 9 Lanc. Bar (Pa.) 13.

A transfer to secure existing debts and future advances is valid. Hendricks *v.* Walden, 17 Johns. (N. Y.) 438; Hendricks *v.* Robinson, 2 Johns. Ch. (N. Y.) 283. See also *Ex p.* Gaines, 12 Ch. D. 314, 40 L. T. Rep. N. S. 789, 27 Wkly. Rep. 744.

If all the property of a debtor is conveyed to secure future advances to be made by the grantee in preference to debts already due, it is void. Barnum *v.* Hempstead, 7 Paige (N. Y.) 568. See also Lawyer *v.* Barker, 45 W. Va. 468, 31 S. E. 964.

Advances made before levy on property transferred.— Where an insolvent debtor in good faith conveys property to a creditor, partly as security for future advances, and before creditors levy an attachment on the property the grantee has made advances to and incurred liabilities for the grantor to the full value of the property, the conveyance is valid as to creditors. Coles *v.* Sellers, 1 Phila. (Pa.) 533.

A judgment confessed to secure future advances is by statute in some jurisdictions void as to creditors. See Gladney *v.* Manning, 48 La. Ann. 316, 19 So. 276; Clapp *v.* Ely, 27 N. J. L. 555; State *v.* Fife, 2 Bailey (S. C.) 337. Where, however, the advances are made, equity will not interfere notwithstanding such a statute, unless the judgment is fraudulent. Clapp *v.* Ely, *supra*.

Fraudulent confession of judgment see *supra*, III, A, 4, b, (II).

44. Seaman *v.* Flemming, 7 Rich. Eq. (S. C.) 283. See also Garvin *v.* Garvin, 55 S. C. 360, 33 S. E. 458; Farguson *v.* Johnson, 36 Fed. 134.

45. Tully *v.* Harloe, 35 Cal. 302, 95 Am. Dec. 102; Dummer *v.* Smedley, 110 Mich. 466, 68 N. W. 260, 38 L. R. A. 490; Brace *v.* Berdan, 104 Mich. 356, 62 N. W. 568. But see Matz *v.* Erick, 76 Conn. 388, 56 Atl. 630; Divver *v.* McLaughlin, 2 Wend. (N. Y.) 596, 20 Am. Dec. 655; Turbeville *v.* Gibson, 5 Heisk. (Tenn.) 565; Neuffer *v.* Pardue, 3 Sneed (Tenn.) 191.

46. Alexandria Sav. Inst. *v.* Thomas, 29 Gratt. (Va.) 483. See also Robinson *v.* Williams, 22 N. Y. 380.

47. Marks *v.* Reynolds, 12 Abb. Pr. (N. Y.) 403, 20 How. Pr. 338; Gibson *v.* Walker, 33 N. C. 327; Braden *v.* O'Neil, 183 Pa. St. 462, 38 Atl. 1023, 63 Am. St. Rep. 761; Warren *v.* His Creditors, 3 Wash. 48, 28 Pac. 257. See also Moore *v.* Ragland, 74 N. C. 343; Creighton *v.* Scranton Lace-Curtain Mfg. Co., 191 Pa. St. 231, 43 Atl. 134. *Compare* Pemberton *v.* Klein, 43 N. J. Eq. 98, 10 Atl. 837.

"A liability to pay on a contract in force is a sufficient consideration for a mortgage or pledge; and the ratio of the consideration to the value of the thing pledged is of no importance." Jewett *v.* Warren, 12 Mass. 300, 303, 7 Am. Dec. 74.

An indorser of a promissory note is contingently liable to the holder of the note and he may secure the holder by a confession of judgment. Braden *v.* O'Neil, 183 Pa. St. 462, 38 Atl. 1023, 63 Am. St. Rep. 761. See also *supra*, III, A, 4, b, (II).

(II) *Security to Surety or Indorser.* A pledge of his property by the debtor to indemnify one who has become surety or indorser for him, or a mortgage, deed of trust, or other such conveyance given for that purpose, is based on a valid consideration.[48] The mere fact of having become surety on an antecedent bond is not, however, a valuable consideration sufficient to sustain an absolute conveyance against the creditors of the grantor, the surety incurring no new, additional, or contemporaneous liability.[49] And the mere liability of a surety to pay his principal's debt cannot, as against the principal's existing creditors, be deemed a valid consideration for the absolute conveyance by the principal of substantially all his property to the surety.[50]

8. Assumption of Liability — a. In General. The assumption of *bona fide* debts of the grantor by the grantee is a valuable and sufficient consideration for the conveyance or transfer of so much of the former's property[51] as is not

A covenant to indemnify, from which the covenantor may be relieved on account of the failure of a transfer for which it was made, is not a valuable consideration. Arnold *v.* Hagerman, 45 N. J. Eq. 186, 17 Atl. 93, 14 Am. St. Rep. 712.

48. *Delaware.*— Tunnell *v.* Jefferson, 5 Harr. 206.

Illinois.—See Farmers', etc., Bank *v.* Spear, 49 Ill. App. 509.

Kentucky.— Beatty *v.* Dudley, 4 Ky. L. Rep. 212.

Louisiana.— Woodward *v.* Braynard, 6 Mart. 572. See also Edgar *v.* Simons, 2 La. 19.

Maryland.— Griffith *v.* Frederick County Bank, 6 Gill & J. 424. *Compare* Amoss *v.* Robinson, 2 Harr. & J. 320.

Massachusetts.— Rogers *v.* Abbott, 128 Mass. 102; Gardner *v.* Webber, 17 Pick. 407; Cutler *v.* Dickinson, 8 Pick. 386; Ripley *v.* Severance, 6 Pick. 474, 17 Am. Dec. 397; Stevens *v.* Bell, 6 Mass. 339.

Michigan.—Bostwick *v.* Benjamin, 63 Mich. 289, 29 N. W. 714; Spear *v.* Rood, 51 Mich. 140, 16 N. W. 312; Adams *v.* Niemann, 46 Mich. 135, 8 N. W. 719; Hubbard *v.* Taylor, 5 Mich. 155.

Missouri.— Gee *v.* Van Natta-Lynds Drug Co., 105 Mo. App. 27, 78 S. W. 288.

Montana.—See Tudor *v.* De Long, 18 Mont. 499, 46 Pac. 258.

Nebraska.— Grimes *v.* Sherman, 25 Nebr. 843, 41 N. W. 814. *Compare* Morse *v.* Steinrod, 29 Nebr. 108, 46 N. W. 922.

New Hampshire.—Lane *v.* Sleeper, 18 N. H. 209.

New York.— Peetsch *v.* Somners, 31 N. Y. App. Div. 255, 53 N. Y. Suppl. 438, 28 N. Y. Civ. Proc. 124; Miller *v.* Miller Knitting Co., 23 Misc. 404, 52 N. Y. Suppl. 184; Dodge *v.* McKechnie, 35 N. Y. Suppl. 1106 [*affirmed* in 156 N. Y. 514, 51 N. E. 268]. *Compare* Browning *v.* Hart, 6 Barb. 91; Bailey *v.* Burton, 8 Wend. 339.

Pennsylvania.— Goodwin *v.* McMinn, 204 Pa. St. 162, 53 Atl. 762; Candee's Appeal, 191 Pa. St. 644, 43 Atl. 1093; Heiney *v.* Anderson, 9 Lanc. Bar 13.

Rhode Island.— Johnson's Petition, 20 R. I. 108, 37 Atl. 531.

Tennessee.— Madisonville Bank *v.* McCoy, (Ch. App. 1897) 42 S. W. 814.

Texas.— Keating Implement, etc., Co. *v.* Terre Haute Carriage, etc., Co., 11 Tex. Civ. App. 216, 32 S. W. 556; Alamo Cement Co. *v.* San Antonio, (Civ. App. 1893) 23 S. W. 449.

Vermont.— Spaulding *v.* Austin, 2 Vt. 555.

Virginia.— Harvey *v.* Anderson, (1896) 24 S. E. 914.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 213.

Compare Crawford *v.* Kirksey, 50 Ala. 590, 55 Ala. 282, 28 Am. Rep. 704.

Misstatement as to consideration.— A mortgage which purports upon its face to secure an absolute indebtedness, but which in fact is given in good faith to secure the liability of the mortgagee as surety, will be sustained as against creditors of the mortgagor. Rexroad *v.* Johnson, 6 Kan. App. 607, 49 Pac. 699. See *supra*, V, B, 1, c.

Confession of judgment.—There being nothing due from the maker to an indorser before the maturity of a note held by a bank which had discounted it for the maker, a confession of judgment on the note by the maker in favor of the indorser will be set aside at the instance of a subsequent judgment creditor of the maker. Forrester *v.* Strauss, 18 N. Y. Suppl. 41, 21 N. Y. Civ. Proc. 166. See *supra*, III, A, 4, b, (II).

In a deed of trust to indemnify sureties by giving them a preference, the debt of the creditor supplies the consideration to support the deed; the creditor's interest is therefore the primary object to be protected in equity, and the sureties' indemnity, although expressed to be first, is but secondary and incidental to the other object. Wiswall *v.* Potts, 58 N. C. 184.

49. Proskauer *v.* People's Sav. Bank, 77 Ala. 257. See also Gorham *v.* Herrick, 2 Me. 87.

50. Craft *v.* Schlag, 61 N. J. Eq. 567, 49 Atl. 431.

51. *Indiana.*— Old Nat. Bank *v.* Heckman, 148 Ind. 490, 47 N. E. 953; Miller *v.* Lebanon Lodge No. 48 I. O. O. F., 88 Ind. 286; Anderson *v.* Smith, 5 Blackf. 395.

Iowa.— Smith *v.* Mack, 94 Iowa 539, 63 N. W. 181.

Kentucky.— See Cavanaugh *v.* Riley, 19 S. W. 745, 14 Ky. L. Rep. 263.

Massachusetts.— See Boston Mar. Ins.

materially greater in value than the amount of the debts assumed.[52] A conveyance or transfer of property to a creditor in consideration of his debt and of the payment by him of debts due some of the grantor's other creditors is valid if the debt due the grantee and those assumed by him together amount to the fair value of the property.[53] Where a grantee in part consideration of a conveyance makes

Co. *v.* Proctor, 168 Mass. 498, 47 N. E. 414; Guild *v.* Leonard, 18 Pick. 511.

Michigan.— Globe Casket Mfg. Co. *v.* Walcott, 106 Mich. 151, 64 N. W. 10.

Missouri.— Baker *v.* Harvey, 133 Mo. 453, 34 S. W. 853.

New Hampshire.— Hutchins *v.* Sprague, 4 N. H. 496, 17 Am. Dec. 439.

New York.— Rutherford *v.* Schattman, 119 N. Y. 604, 23 N. E. 440; Hine *v.* Bowe, 114 N. Y. 350, 21 N. E. 733 (partnership debt); Weaver *v.* White, 19 N. Y. Suppl. 616. *Compare* Stutson *v.* Brown, 7 Cow. 732.

Oregon.— Jolley *v.* Kyle, 27 Oreg. 95, 39 Pac. 999.

Texas.— Traders' Nat. Bank *v.* Clare, 76 Tex. 47, 13 S. W. 183; Duveneck *v.* Kutzer, 17 Tex. Civ. App. 577, 43 S. W. 541.

United States.—Sonstiby *v.* Keeley, 11 Fed. 578.

England.— See Bungard *v.* Seabrook, 1 F. & F. 321.

Canada.— See Dedesdernier *v.* Burton, 12 Grant Ch. (U. C.) 569.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 214.

Compare Rahn *v.* Kniess, 74 Ill. App. 367; Riegel *v.* Wooley, 81* Pa. St. 227.

Debt for which grantor not liable.— An assumption by a grantee of the payment of a debt of another for which the grantor is not liable, and of the payment of attorney's fees for services to be rendered for the grantor, is not a valid consideration. Shepherd *v.* Fish, 78 Ill. App. 198.

Misstatement as to amount of consideration.— Where the amount of indebtedness assumed and paid by the grantee is equal to or greater than the actual value of the property conveyed to him, it is no evidence of fraud that the expressed consideration for the deed was really larger than the amount of such indebtedness. Wall *v.* Beedy, 161 Mo. 625, 61 S. W. 864. See *supra*, V, B, 1, c.

Assumption of indebtedness, after the conveyance has been made and process has issued against the property included therein is not a valid consideration. Farmers', etc., Bank *v.* Conner, 20 S. W. 265, 14 Ky. L. Rep. 316.

Knowledge or consent of creditors whose debts are assumed.— The assumption of certain obligations of a debtor is a sufficient consideration for a transfer of property by the debtor to the person assuming them, although the assumption was without the knowledge of the person whose debts were assumed. National Bank of Republic *v.* Dickinson, 107 Ala. 265, 18 So. 144. A parol promise of a party to whom a conveyance of land is made for the purpose to pay specified debts of the grantor owing to third persons is valid and obligatory upon the promisor, without the concurrence or consent of the creditors being given to the arrangement, and without any suspension or extinguishment of the claims of those creditors as against the original debtor. Seaman *v.* Hasbrouck, 35 Barb. (N. Y.) 151.

Payment necessary.—An agreement to pay a portion of an insolvent's debts, sufficient in amount to form an adequate consideration for a transfer of his land, will not be upheld as against his creditors where the grantee in fact paid only small portion of the debt agreed to be paid. In order to support the conveyance the consideration must have been fully executed in good faith before notice of the transferrer's insolvency. Warren *v.* Wilder, 12 N. Y. St. 757.

Assumption of an unmatured debt is a sufficient consideration. National Bank of Republic *v.* Dickinson, 107 Ala. 265, 18 So. 144.

An assignment of certain rents to accrue for one year in consideration of the assignee's agreement, provided the rents are paid to him, to pay certain sums on account of the assignor, is valid against the assignee's creditors to the extent of such payments by the assignee, although the payments are made before collecting the rents. Smith *v.* Jennings, 15 Gray (Mass.) 69.

Insolvency of grantee.— "A debtor cannot substitute for the solid value of his property, the colorable provision of an insolvent's engagement to pay the debts." Waller *v.* Mills, 14 N. C. 515, 518. Where, however, the grantor is insolvent, the fact that the grantee is also insolvent and unable to comply with his agreement to pay debts of the grantor is immaterial, as the creditors are in no worse position than they were before. Bell *v.* Beazley, 17 Tex. Civ. App. 639, 45 S. W. 401. *Compare* Gilbert *v.* Washington Ben. Endowment Assoc., 10 App. Cas. (D. C.) 316.

52. Gamble *v.* Aultman, 125 Ala. 372, 28 So. 30. See also Grieb *v.* Caraker, 69 Ill. App. 236; Diamond Coal Co. *v.* Carter Dry Goods Co., 49 S. W. 438, 20 Ky. L. Rep. 1444; Randall *v.* Vroom, 30 N. J. Eq. 353.

53. *Alabama.*— Chipman *v.* Sturn, 89 Ala. 207, 7 So. 409; McCord *v.* Tennille, 81 Ala. 168, 1 So. 177; Smith *v.* Spencer, 73 Ala. 299.

California.— Saunderson *v.* Broadwell, 82 Cal. 132, 23 Pac. 36.

Iowa.— Gould *v.* Hurto, 61 Iowa 45, 15 N. W. 588.

Maine.— Stevens *v.* Hinckley, 43 Me. 440. *Compare* Welcome *v.* Batchelder, 23 Me. 85.

Mississippi.— See Agricultural Bank *v.* Dorsey, Freem. 338.

Nebraska.— Berry *v.* Berk, 62 Nebr. 535, 87 N. W. 309; Keith *v.* Heffelfinger, 12 Nebr. 497, 11 N. W. 749.

Texas.— Sweeney *v.* Connelly, 71 Tex. 543, 9 S. W. 548; Mack *v.* Block, (1888) 8 S. W.

himself liable for the payment of distributive shares to the grantor's heirs, this constitutes a valuable consideration for the conveyance.[54]

b. By Surety or Indorser. If the surety in good faith assumes the payment of the debt of his principal, it is a valid consideration for a conveyance or transfer of the latter's property to him.[55] A conveyance or transfer of property by the maker of a promissory note or other such instrument to the indorser thereof, upon the latter's assuming its payment, is based upon a valid consideration.[56]

c. Assumption of Encumbrance. A conveyance in consideration of the assumption of a mortgage or other encumbrance on the property conveyed is based upon a valid consideration.[57]

d. Executed Agreement to Pay Debts. That the grantee has in good faith paid the debts which he agreed to pay as the condition of the conveyance or transfer to him is a good defense to an action brought against him by other creditors of the grantor.[58]

9. Preëxisting Liability — a. Preëxisting Debt — (i) *In General.* A preëxisting debt is a good and sufficient consideration for a conveyance or transfer by a debtor, either in payment of or as security for such debt;[59] but in order to sup-

495; Hugo *v.* Hirsch, (Civ. App. 1901) 63 S. W. 163; Dix *v.* Jackman, (Civ. App. 1896) 37 S. W. 344.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 214.

54. Constable *v.* Weaser, 8 Ohio Dec. (Reprint) 339, 7 Cinc. L. Bul. 113.

55. *Alabama.*— Pollock *v.* Jones, 96 Ala. 492, 11 So. 529; Harmon *v.* McRay, 91 Ala. 401, 8 So. 548; Pennington *v.* Woodall, 17 Ala. 685. See also State Bank *v.* McDade, 4 Port. 252.

Georgia.— McWhorter *v.* Wright, 5 Ga. 555.

Indiana.— Powell *v.* Stickney, 88 Ind. 310.

Kansas.— Smith *v.* Rankin, 45 Kan. 176, 25 Pac. 586.

Maine.— Stevens *v.* Hinckley, 43 Me. 440; Stedman *v.* Vickery, 42 Me. 132.

Nebraska.— Kaufman *v.* Coburn, 30 Nebr. 672, 36 N. W. 1010.

United States.— Coffin *v.* Day, 34 Fed. 687.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 215.

Compare Ayres *v.* Hulsted, 15 Conn. 504.

56. State *v.* Mason, 96 Mo. 559, 10 S. W. 179; Ellis *v.* Herrin, (N. J. Ch. 1892) 24 Atl. 129; Flannery *v.* Van Tassel, 16 N. Y. Suppl. 741.

57. Miles *v.* Miles, 6 Oreg. 266, 25 Am. Rep. 522; Dubbs *v.* Finley, 2 Pa. St. 397. See also Goodenow *v.* Friott, 89 Iowa 671, 57 N. W. 437. *Compare* Webb *v.* Atkinson, 124 N. C. 447, 32 S. E. 737.

Encumbrance must equal value of property. Randall *v.* Vroom, 30 N. J. Eq. 353. See also Jameson *v.* Dilley, 27 Ind. App. 429, 61 N. E. 601.

58. Watson *v.* Tool, 36 Ala. 13; Seaman *v.* Hasbrouck, 35 Barb. (N. Y.) 151; Harman *v.* Reese, 1 Browne (Pa.) 11. See also Robinson *v.* Mitchell, 62 N. H. 529.

59. *Alabama.*— Taylor *v.* Dwyer, 131 Ala. 91, 32 So. 509; Henderson *v.* Perryman, 114 Ala. 647, 22 So. 24; Harmon *v.* McRae, 91 Ala. 401, 8 So. 548; Turner *v.* McFee, 61 Ala. 468.

Arkansas.— Davis *v.* Jones, 67 Ark. 122, 53 S. W. 301; Smith *v.* Jones, 63 Ark. 232, 37 S. W. 1052.

California.— Casey *v.* Leggett, 125 Cal. 664, 58 Pac. 264.

Colorado.— Beaman *v.* Stewart, 19 Colo. App. 226, 74 Pac. 344; Krippendorf-Dittman Co. *v.* Trenoweth, 16 Colo. App. 178, 64 Pac. 373; Sargent *v.* Chapman, 12 Colo. App. 529, 56 Pac. 194. See also Denver Jobbers' Assoc. *v.* Rumsey, 18 Colo. App. 320, 71 Pac. 1001.

Delaware.— Brown *v.* Dickerson, 2 Marv. 119, 42 Atl. 421.

Georgia.— Davis *v.* Anderson, 1 Ga. 176.

Illinois.— Walsh *v.* O'Neill, 192 Ill. 202, 61 N. E. 409 [*affirming* 92 Ill. App. 61]; Peoria First Nat. Bank *v.* Rhea, 155 Ill. 434, 40 N. E. 551; McIntire *v.* Yates, 104 Ill. 491; Mix *v.* Bloomington Nat. Bank, 91 Ill. 20, 33 Am. Rep. 44; Manning *v.* McClure, 36 Ill. 490; Vietor *v.* Swisky, 87 Ill. App. 583.

Indiana.— Adam, etc., Co. *v.* Stewart, 157 Ind. 678, 61 N. E. 1002, 87 Am. St. Rep. 240; Morgan *v.* Worden, 145 Ind. 600, 32 N. E. 783; McLaughlin *v.* Ward, 77 Ind. 383; Aiken *v.* Buren, 21 Ind. 137; Jones *v.* Gott, 10 Ind. 240; Work *v.* Brayton, 5 Ind. 396.

Indian Territory.— Turner Hardware Co. *v.* Reynolds, 2 Indian Terr. 49, 47 S. W. 307; Dorrance *v.* McAlester, 1 Indian Terr. 473, 45 S. W. 141.

Iowa.— Pieter *v.* Bales, 126 Iowa 170, 101 N. W. 865; Baxter *v.* Pritchard, 113 Iowa 422, 85 N. W. 633; Wolfe *v.* Jaffray, 88 Iowa 358, 55 N. W. 91; Meyer *v.* Evans, 66 Iowa 179, 23 N. W. 386.

Kansas.— Crystal Salt, etc., Co. *v.* Leckie, 57 Kan. 165, 45 Pac. 604; Hoisington *v.* Ostrom, 27 Kan. 110; Murray *v.* Concordia First Nat. Bank, 5 Kan. App. 456, 49 Pac. 326, holding that a party to whom land is conveyed for an adequate price in consideration of a *bona fide* indebtedness due him from the grantor takes the same free from any claim of lien for indebtedness not a legal lien on such land at the date of the conveyance.

port such a conveyance or transfer the debt forming the consideration must be a

Kentucky.— Ward *v.* Trotter, 3 T. B. Mon. 1.

Louisiana.— Brander *v.* Bowmar, 16 La. 370. See also Morris *v.* Cain, 39 La. Ann. 712, 1 So. 797, 2 So. 418; D'Meza *v.* Generes, 22 La. Ann. 285.

Maryland.— Commonwealth Bank *v.* Kearns, 100 Md. 202, 59 Atl. 1010.

Massachusetts.— Commercial Bank *v.* Cunningham, 24 Pick. 270, 35 Am. Dec. 322. See also Simpson *v.* Carleton, 1 Allen 109, 79 Am. Dec. 707; Boyd *v.* Brown, 17 Pick. 453.

Michigan.— Greene *v.* Williams, 131 Mich. 46, 90 N. W. 699; Hauser *v.* Beaty, 93 Mich. 499, 53 N. W. 628; Wright *v.* Towle, 67 Mich. 255, 34 N. W. 578; Jordan *v.* White, 38 Mich. 253.

Minnesota.— See Aretz *v.* Kloos, 89 Minn. 432, 95 N. W. 216, 769.

Mississippi.— Surget *v.* Boyd, 57 Miss. 485 [*explaining* Perkins *v.* Swank, 43 Miss. 349; Pope *v.* Pope, 40 Miss. 516; Harney *v.* Pack, 4 Sm. & M. 229], holding that security for a preëxisting debt without a new consideration does not, like a purchase for value, cut off secret equities and frauds, but that unless they are shown to exist the recipient is equally entitled to protection.

Missouri.— Meyer Bros. Drug Co. *v.* White, 165 Mo. 136, 65 S. W. 295; Bangs Milling Co. *v.* Burns, 152 Mo. 350, 53 S. W. 923; Kincaid *v.* Irvine, 140 Mo. 615, 41 S. W. 963; Sevier *v.* Allen, 80 Mo. App. 187.

Montana.— Mueller *v.* Renkes, 31 Mont. 100, 77 Pac. 512.

Nebraska.— McNerny *v.* Hubbard, (1903) 97 N. W. 1118, 3 Nebr. (Unoff.) 108, 93 N. W. 1123, 3 Nebr. (Unoff.) 104, 91 N. W. 245; Sheldon *v.* Russell, 53 Nebr. 26, 73 N. W. 213; Rachman *v.* Clapp, 50 Nebr. 648, 70 N. W. 259; Luston State Bank *v.* O. S. Kelly Co., 49 Nebr. 242, 68 N. W. 481; Chaffee *v.* Atlas Lumber Co., 43 Nebr. 224, 61 N. W. 637, 47 Am. St. Rep. 753; Wymore First Nat. Bank *v.* Myers, 38 Nebr. 152, 56 N. W. 889; Beagle *v.* Miller, 37 Nebr. 855, 56 N. W. 710; Ward *v.* Parlin, 30 Nebr. 376, 46 N. W. 529; Turner *v.* Killian, 12 Nebr. 580, 12 N. W. 101.

New Hampshire.— Doolittle *v.* Lyman, 44 N. H. 608.

New Jersey.— Jones *v.* Beekman, (Ch. 1900) 47 Atl. 71; Doremus *v.* Daniels, (Ch. 1890) 20 Atl. 147.

New York.— New York County Nat. Bank *v.* American Surety Co., 174 N. Y. 544, 67 N. E. 1086 [*affirming* 69 N. Y. App. Div. 153, 74 N. Y. Suppl. 692]; Seymour *v.* Wilson, 19 N. Y. 417; Pearson *v.* Cuthbert, 58 N. Y. App. Div. 395, 68 N. Y. Suppl. 1031; King *v.* Simmons, 36 N. Y. App. Div. 623, 55 N. Y. Suppl. 173; Commercial Bank *v.* Bolton, 20 N. Y. App. Div. 70, 46 N. Y. Suppl. 734; Columbus Watch Co. *v.* Hodenpyl, 61 Hun 557, 16 N. Y. Suppl. 337; Loeschigk *v.* Baldwin, 1 Rob. 377; Goff *v.* Alexander, 20 Misc. 498, 45 N. Y. Suppl. 737; Fitts *v.* Beardsley, 8 N. Y. Suppl. 567; Ludlow *v.* Hurd, 19 Johns. 218.

North Carolina.— Feimester *v.* McRorie, 34 N. C. 287; Lee *v.* Flannagan, 29 N. C. 471.

Ohio.— Campbell Printing Press, etc., Co. *v.* Bellman Bros. Co., 11 Ohio Cir. Ct. 360, 5 Ohio Cir. Dec. 389.

Oregon.— Hesse *v.* Barrett, 41 Oreg. 202, 68 Pac. 751, holding that where an insolvent conveyed property to a *bona fide* creditor, receiving credit for the full value thereof, the fact that he expected that the property would be reconveyed to his children, there being no agreement for such reconveyance, did not render the conveyance fraudulent.

Pennsylvania.— Snayberger *v.* Fahl, 195 Pa. St. 336, 45 Atl. 1065, 78 Am. St. Rep. 818; Penn Plate Glass Co. *v.* Jones, 189 Pa. St. 290, 42 Atl. 189; Werner *v.* Zierfuss, 162 Pa. St. 360, 29 Atl. 737; Smith's Appeal, 2 Pa. St. 331; Peck, etc., Co. *v.* Stevenson, 6 Pa. Super. Ct. 536, 42 Wkly. Notes Cas. 119; Small *v.* Ehrgood, 1 Lack. Leg. N. 167. See also Covanovan's Appeal, 2 Pa. Cas. 79, 5 Atl. 820.

South Carolina.— McElwee *v.* Kennedy, 56 S. C. 154, 34 S. E. 86; Cox *v.* McBee, 1 Speers 195.

Tennessee.— Phillips *v.* Cunningham, (Ch. App. 1899) 58 S. W. 463; Madisonville Bank *v.* McCoy, (Ch. App. 1897) 42 S. W. 814; Bennet *v.* Union Bank, 5 Humphr. 612.

Texas.— Schoelkopf *v.* Phillips, 88 Tex. 31, 29 S. W. 645; Watts *v.* Dubois, (Civ. App. 1902) 66 S. W. 698; Belknap *v.* Groover, (Civ. App. 1900) 56 S. W. 249; Texas Drug Co. *v.* Shields, (Civ. App. 1899) 48 S. W. 882.

Vermont.—Gibson *v.* Seymour, 4 Vt. 518.

Virginia.— Saunders *v.* Parrish, 86 Va. 592, 10 S. E. 748.

West Virginia.—Smith *v.* Smith, 48 W. Va. 51, 35 S. E. 876.

Wisconsin.— H. B. Claflin Co. *v.* Grashorn, 99 Wis. 356, 74 N. W. 783. See also Ramash *v.* Scheuer, 85 Wis. 269, 55 N. W. 700.

United States.— Conard *v.* Atlantic Ins. Co., 1 Pet. 386, 7 L. ed. 189 [*affirming* 2 Fed. Cas. No. 627, 4 Wash. 662]; U. S. *v.* Coffin, 33 Fed. 337.

England.— See Allen *v.* Bonnett, L. R. 5 Ch. 577, 23 L. T. Rep. N. S. 437, 18 Wkly. Rep. 874; Sladden *v.* Sergeant, 1 F. & F. 322.

Canada.—Granger *v.* Latham, 2 Ch. Chamb. (U. C.) 419; Moore *v.* Davis, 16 Grant Ch. (U. C.) 224.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 230.

Preferences see *infra*, XI.

Surrender of notes.— The surrender by a grantee of a note which he holds against his grantor is such a valuable consideration for a conveyance as will sustain it against the attack of the grantor's other creditors. Starin *v.* Kelly, 36 N. Y. Super. Ct. 366. See also Neal *v.* Foster, 36 Fed. 29, holding that a conveyance by an insolvent for the alleged consideration of the surrender of cer-

legally enforceable obligation.[60] An existing debt is not a consideration for a conveyance, where there is no consent or understanding on the part of the grantee that the conveyance shall discharge the debt,[61] and the transfer of property for an antecedent debt without the extinguishment or surrender of such debt and of the old securities therefor is not sufficient to constitute the transferee a *bona fide* purchaser for a valuable consideration.[62] A conveyance or transfer of property

tain notes payable to the grantee, which notes are in fact without consideration, is voluntary and fraudulent.

Further indulgence.—A deed of trust made to secure a preëxisting debt in consideration of further indulgence of a year is not so unreasonable as to raise any presumption of an intent to hinder or delay creditors. Lee *v.* Flannagan, 29 N. C. 471.

A mortgage given in consideration of the extension of a debt, and of the mortgagor being permitted to pay the debt in instalments, is not necessarily void, as given to hinder or defraud other creditors. U. S. National Bank *v.* Westervelt, 55 Nebr. 424, 75 N. W. 857.

Satisfaction of trust.— A deed to one for whose wife the grantor held funds in trust for which he had accounted, and which was made to satisfy the trust, cannot be regarded as a voluntary conveyance. Irion *v.* Mills, 41 Tex. 310.

Subsequent insolvency of mortgagor.— The validity of a mortgage given to secure a preëxisting debt is not affected by the subsequent insolvency of the mortgagor. California Bank *v.* Puget Sound Loan, etc., Co., 20 Wash. 636, 56 Pac. 395.

Usurious interest.— A transfer of property to pay a loan is valid as against the vendor's creditors, although he has contracted to pay usurious interest, if the value of the property does not exceed the principal. McLendon *v.* Grice, 119 Ala. 513, 24 So. 846; Belknap *v.* Groover, (Tex. Civ. App. 1900) 56 S. W. 249.

Fraudulent use of money borrowed.— The fact that fraud was practised by an insolvent corporation in the use of money borrowed from a bank, loaned to it in good faith and without participation in the fraud, does not invalidate the corporation's transfer of its property in payment of the money borrowed. Ferguson *v.* Oxford Mercantile Co., (Miss. 1900) 27 So. 877.

A mortgage executed by a fraudulent purchaser of goods, to secure antecedent creditors, will be held valid as to such creditors where, in consideration of the mortgage and without notice of fraud, they extended the time of their debt or assumed any new or additional obligation. Adam, etc., Co. *v.* Stewart, 157 Ind. 678, 61 N. E. 1002, 87 Am. St. Rep. 240.

A worthless debt of a third person is not a valuable consideration. Seymour *v.* Wilson, 19 N. Y. 417.

Proceeds of sale of property applied to debts.— Fraud cannot be attributed to a debtor who sells his property for a fair consideration and applies the proceeds to the payment of *bona fide* creditors. Farwell *v.* Norton, 77 Ill. App. 685. See also Pochel *v.* Read, 20 N. Y. App. Div. 208, 46 N. Y. Suppl. 775. *Compare* Lehman *v.* Kelly, 68 Ala. 192.

A transfer of partnership property in payment of an individual debt of one of the partners is void as to creditors of the partnership. Henderson *v.* Perryman, 114 Ala. 647, 22 So. 24. See also Leonard *v.* Winslow, 2 Grant Cas. (Pa.) 139. And see, generally, PARTNERSHIP.

60. *Alabama.*— British, etc., Mortg. Co. *v.* Norton, 125 Ala. 522, 28 So. 31; Hubbard *v.* Allen, 59 Ala. 283.

California.— Fidelity, etc., Co. *v.* Thompson, 128 Cal. 506, 61 Pac. 94.

Illinois.— Boulton *v.* Smith, 113 Ill. 481.

Indiana.—See Hadley *v.* Hood, 94 Ind. 119.

Iowa.— Schoonover *v.* Foley, (1903) 94 N. W. 492; Parriott *v.* Bowers, 111 Iowa 740, 82 N. W. 998; Burlington Protestant Hospital Assoc. *v.* Gerlinger, 111 Iowa 293, 82 N. W. 765.

Kansas.— Holyoke Envelope Co. *v.* Heagler, (App. 1901) 63 Pac. 450.

Maine.— Jose *v.* Hewett, 50 Me. 248.

New York.— Lippitt *v.* Gilmartin, 37 N. Y. App. Div. 411, 55 N. Y. Suppl. 1042. See also Wilbur *v.* Fradenburgh, 52 Barb. 474.

Pennsylvania.— *In re* Hoover, 12 Montg. Co. L. Rep. 113.

Wisconsin.— Livre *v.* Thielke, 115 Wis. 389, 91 N. W. 975. *Compare* Appleton First Nat. Bank *v.* Bertschky, 52 Wis. 438, 9 N. W. 534.

United States.—Knower *v.* Haines, 31 Fed. 513, 24 Blatchf. 488.

England.— See Penhall *v.* Elwin, 1 Smale & G. 258.

Including uncollectable interest.— A mortgage given for a just debt is not rendered fraudulent by including in it interest on the debt not collectable by law, where the allowance of interest is just and equitable. Spencer *v.* Ayrault, 10 N. Y. 202. See also Doty *v.* Clint, 11 N. Y. St. 87.

61. Ames *v.* Dorroh, 76 Miss. 187, 23 So. 768, 71 Am. St. Rep. 522; Crecelius *v.* Bierman, 72 Mo. App. 355.

62. *In re* Morse, 17 Fed. Cas. No. 9,851, 17 Blatchf. 72. See also Wellington *v.* Fuller, 38 Me. 61; Whitaker *v.* Sumner, 20 Pick. (Mass.) 399; Pope *v.* Pope, 40 Miss. 516; Harney *v.* Pack, 4 Sm. & M. (Miss.) 229; Wood *v.* Robinson, 22 N. Y. 564; Oliver *v.* Moore, 23 Ohio St. 473; Starr *v.* Starr, 1 Ohio 321. *Compare* Westerly Sav. Bank *v.* Stillman Mfg. Co., 16 R. I. 497, 17 Atl. 918.

Retaining evidence of indebtedness.—When a conveyance made in consideration of a preëxisting debt has been perfected, it is a badge of fraud for the grantee to retain the

by an embarrassed or insolvent debtor to his creditor in payment of an antecedent debt will be upheld if the debt be *bona fide*, its amount not materially less than the fair and reasonable value of the property, and payment of the debt is the sole consideration and no use or benefit is secured or reserved to the debtor.[63] Where, however, the evidence of debt is unsatisfactory,[64] or it appears that it was not recognized as an obligation until the grantor was threatened with financial troubles,[65] the conveyance or transfer will not be sustained.

(II) *PROPERTY IN EXCESS OF DEBT.* A conveyance or transfer by a debtor to one of his creditors of property, the value of which is greatly in excess of the debt in payment of which the conveyance or transfer is made, will generally be

evidence of such indebtedness in his possession uncanceled. Webb *v.* Ingham, 29 W. Va. 389, 1 S. E. 816. See also Gardner *v.* Broussard, 39 Tex. 372.

63. *Alabama.*— McLendon *v.* Grice, 119 Ala. 513, 24 So. 846; Graves Co. *v.* McDade, 108 Ala. 420, 19 So. 86; Goetter *v.* Norman, 107 Ala. 585, 19 So. 56; Goetter *v.* Smith, 104 Ala. 481, 16 So. 534; Curran *v.* Olmstead, 101 Ala. 692, 14 So. 398; Fargason *v.* Hall, 99 Ala. 209, 13 So. 302; Steiner *v.* Lowery, 98 Ala. 208, 13 So. 320; Dawson *v.* Flash, 97 Ala. 539, 12 So. 67; Chipman *v.* Stern, 89 Ala. 207, 7 So. 409; Mobile Sav. Bank *v.* McConnell, 87 Ala. 736, 6 So. 703; McDowell *v.* Steele, 87 Ala. 493, 6 So. 288; Knowles *v.* Street, 87 Ala. 357, 6 So. 273; Jefferson County Sav. Bank *v.* Eborn, 84 Ala. 529, 4 So. 386. See also Truitt *v.* Crook, 129 Ala. 377, 30 So. 618; Moog *v.* Farley, 79 Ala. 246.

Arkansas.— Carl, etc., Co. *v.* Beal, etc., Grocer Co., 64 Ark. 373, 42 S. W. 664.

Colorado.— Tennis *v.* Barnes, 11 Colo. App. 196, 52 Pac. 1038.

Illinois.— Hessing *v.* McClosky, 37 Ill. 341; McQuown *v.* Law, 18 Ill. App. 34. See also Beidler *v.* Crane, (1889) 19 N. E. 714.

Indiana.— Jones *v.* Gott, 10 Ind. 240.

Maryland.— Washington Brewing Co. *v.* Carry, (1892) 24 Atl. 151.

Michigan.— Oliver, etc., Wire Co. *v.* Wheeler, 106 Mich. 408, 64 N. W. 195.

Missouri.— Kuykendall *v.* McDonald, 15 Mo. 416, 57 Am. Dec. 212; Pierce *v.* Lowder, 54 Mo. App. 25; State *v.* Excelsior Distilling Co., 20 Mo. App. 21.

New York.— O'Connor *v.* Docen, 50 N. Y. App. Div. 610, 64 N. Y. Suppl. 206; Stacy *v.* Deshaw, 7 Hun 449; Loeschigk *v.* Hatfield, 5 Rob. 26.

Pennsylvania.— Rahn *v.* McElrath, 6 Watts 151.

Tennessee.— See Hickman *v.* Quinn, 6 Yerg. 96.

Texas.— La Belle Wagon-Works *v.* Tidball, 69 Tex. 161, 6 S. W. 672; Smith *v.* Whitfield, 67 Tex. 124, 2 S. W. 822; Noyes *v.* Sanger, 8 Tex. Civ. App. 388, 27 S. W. 1022.

Wisconsin.— Noyes *v.* Qvale, 70 Wis. 224, 35 N. W. 310; Gleason *v.* Day, 9 Wis. 498.

United States.— Repauno Chemical Co. *v.* Victor Hardware Co., 101 Fed. 948, 42 C. C. A. 106; Budlong *v.* Kent, 28 Fed. 13.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 221.

Advantage to debtor or injury to other creditor.— To impeach a conveyance in payment of or as security for an actual debt there must be evidence tending to show either some advantage or benefit to the debtor beyond a discharge of his obligation, or some other benefit to the creditor beyond a mere payment of his debt, or some injury to other creditors beyond mere postponement to the debt preferred. Snayberger *v.* Fahl, 195 Pa. St. 336, 45 Atl. 1065, 78 Am. St. Rep. 818; Meyers *v.* Meyers, 24 Pa. Super. Ct. 603.

To support a preferential transfer in payment of a debt, not only must the indebtedness be actual but the payment must be a *bona fide* transaction. A debtor is not at liberty to transfer to a creditor more property than is required to satisfy the debt if thereby he exhausts his property so as to hinder or defeat the claims of other creditors. Hulse *v.* Mershon, 125 Ill. 52, 57, 17 N. E. 50 (where the court said: "The right of the insolvent to give a preference can only be exercised as to the amount actually and lawfully due"); Morris *v.* Coombs, 109 Ill. App. 176, 179 (holding therefore an instruction to be erroneous which stated that "a person who is indebted and unable to pay all his debts in full, may prefer any one or more of his *bona fide* creditors to the exclusion of all others; and in the payment of a *bona fide* indebtedness to one of his creditors, a debtor may exhaust the whole of his property, so as to leave nothing for his other creditors"); Edrington *v.* Rogers, 15 Tex. 188.

Agreement to convey to grantor's wife.— A conveyance of real estate to the father-in-law of the grantor in payment of a pre-existing debt is not fraudulent as to other creditors, although made with the understanding that the property should be conveyed to the grantor's wife as a gift. Smith *v.* Riggs, 56 Iowa 488, 8 N. W. 479, 9 N. W. 385.

Note given for excess in value.— A purchase *bona fide* made from his debtor who is in failing circumstances is not fraudulent simply because the consideration of the purchase is the debt due, and a promissory note *bona fide* given at the time for an overplus in the price agreed to be paid above the debt due. Hobbs *v.* Davis, 50 Ga. 213.

64. O'Kane *v.* Vinnedge, 108 Ky. 34, 55 S. W. 711, 21 Ky. L. Rep. 1551.

65. Ashmead *v.* Baylor, 59 N. J. Eq. 469, 45 Atl. 699. See also Adoue *v.* Spencer, 59

set aside at the instance of his other creditors.[66] As a general rule if a preferential transfer includes practically all the debtor's property, the value of which is greatly in excess of the debt, the creditor having knowledge of the transferrer's indebtedness or insolvency, it may well be deemed fraudulent as to creditors whose claims are thereby defeated.[67] A slight excess in value will not, however, invalidate a conveyance or transfer.[68] In such cases the law allows room for ordi-

N. J. Eq. 231, 46 Atl. 543; Fleischner *v.* McMinnville First Nat. Bank, 36 Oreg. 553, 54 Pac. 884, 60 Pac. 603, 61 Pac. 345; Mitchell *v.* Mitchell, 42 S. C. 475, 20 S. E. 405.

66. *Alabama.*— Henderson *v.* Perryman, 114 Ala. 647, 22 So. 24; Moore *v.* Penn, 95 Ala. 200, 10 So. 343.

California.— Sukeforth *v.* Lord, 87 Cal. 399, 25 Pac. 497.

Georgia.— Banks *v.* Clapp, 12 Ga. 514; Peck *v.* Lang, 2 Ga. 1, 46 Am. Dec. 368. *Compare* Carey *v.* Giles, 10 Ga. 9.

Illinois.— See Head *v.* Harding, 166 Ill. 353, 46 N. E. 890 [*affirming* 62 Ill. App. 302].

Kansas.— Schram *v.* Taylor, 51 Kan. 547, 33 Pac. 315.

Louisiana.— Sattler *v.* Marino, 30 La. Ann. 355; Worrell *v.* Vickers, 30 La. Ann. 202.

Michigan.— Ryan *v.* Meyer, 108 Mich. 638, 66 N. W. 667. See also Steuben County Wine Co. *v.* Lee, 127 Mich. 698, 87 N. W. 129.

Missouri.— Hewitt *v.* Price, 99 Mo. 666, 74 S. W. 414. See also Scott Hardware Co. *v.* Riddle, 84 Mo. App. 275.

Nebraska.— See Ogg *v.* Schultz, 61 Nebr. 221, 85 N. W. 64; Morse *v.* Steinrod, 29 Nebr. 108, 46 N. W. 922.

New Jersey.— Clinton Hill Lumber, etc., Co. *v.* Strieby, 52 N. J. Eq. 576, 29 Atl. 589. *Compare* Brock *v.* Hudson County Bank, 48 N. J. Eq. 615, 23 Atl. 269, 27 Am. St. Rep. 451 [*citing* Demarest *v.* Terhune, 18 N. J. Eq. 532].

New York.— See Amsterdam First Nat. Bank *v.* Miller, 163 N. Y. 164, 57 N. E. 308 [*reversing* 24 N. Y. App. Div. 551, 49 N. Y. Suppl. 981]; Hollis *v.* Drescher, 46 N. Y. App. Div. 151, 63 N. Y. Suppl. 378.

Pennsylvania.— Jaroslawski *v.* Simon, 3 Brewst. 37.

South Carolina.— See Fryer *v.* Bryan, 2 Hill Eq. 56.

Texas.— Howerton *v.* Holt, 23 Tex. 51; Baylor *v.* Brown, 3 Tex. Civ. App. 177, 21 S. W. 73. See also Torrey *v.* Cameron, 73 Tex. 583, 11 S. W. 583; Oppenheimer *v.* Halff, 68 Tex. 409, 4 S. W. 562.

West Virginia.— See Reilly *v.* Barr, 34 W. Va. 95, 11 S. E. 750; Knight *v.* Capito, 23 W. Va. 639.

United States.— Mitchell *v.* McKibbin, 17 Fed. Cas. No. 9,666, fraudulent with respect to the property in excess of the value of the debt.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 223; and *supra*, V, B, 1, d.

Compare George *v.* Kimball, 24 Pick. (Mass.) 234, holding that where an assignment of a large amount of property for the payment of a small amount of debt was made in good faith to secure debts fairly due, and with the intention that the surplus should be held liable to trustee process in the assignee's hands, the assignee received and could convey a valid title. But see Alberger *v.* National Bank of Commerce, 123 Mo. 313, 27 S. W. 657.

Speculative value.— The assignment of a right of action with a speculative value is not fraudulent as to other creditors because its value is in excess of the debts secured. Hutmacher *v.* Anheuser-Busch Brewing Assoc., 71 Ill. App. 154.

Presumption of law not raised.— It has been held that the fact that the value of the property transferred to the creditor is greater than the amount of the debt to be paid or secured affords no basis for a presumption of law that a fraudulent intent exists, but is merely one of the circumstances in the light of which the transaction is to be judged. Tackaberry *v.* Gilmore, 57 Nebr. 450, 78 N. W. 32; Dayton Spice-Mills Co. *v.* Sloan, 49 Nebr. 622, 68 N. W. 1040; Kilpatrick-Koch Dry Goods Co. *v.* Strauss, 45 Nebr. 793, 64 N. W. 223 [*distinguishing* Thompson *v.* Richardson Drug Co., 33 Nebr. 714, 50 N. W. 948, 29 Am. St. Rep. 505; Brown *v.* Work, 30 Nebr. 800, 47 N. W. 192; Morse *v.* Steinrod, 29 Nebr. 108, 46 N. W. 922]; Grand Island Banking Co. *v.* Costello, 45 Nebr. 119, 63 N. W. 376; Kilpatrick-Koch Dry Goods Co. *v.* Bremers, 44 Nebr. 863, 62 N. W. 1105; Kilpatrick-Koch Dry Goods Co. *v.* McPheely, 37 Nebr. 800, 56 N. W. 389.

67. Williams *v.* Stowell, (Kan. App. 1897) 48 Pac. 894; Scott Hardware Co. *v.* Riddle, 84 Mo. App. 275; Edrington *v.* Rogers, 15 Tex. 188; Thompson *v.* Rosenstein, (Tex. Civ. App. 1902) 67 S. W. 439; Halff *v.* Goldfrank, (Tex. Civ. App. 1899) 49 S. W. 1095. And see Oppenheimer *v.* Halff, 68 Tex. 409, 4 S. W. 562.

68. *Iowa.*—Warfield *v.* Lynd, 67 Iowa 722, 25 N. W. 896; Rusie *v.* Jameson, 62 Iowa 52, 17 N. W. 103.

Kansas.—Wilhite *v.* Daniels, (1902) 67 Pac. 452.

Missouri.— Scott Hardware Co. *v.* Riddle, 84 Mo. App. 275.

Nebraska.— Chamberlain *v.* Woolsey, 66 Nebr. 141, 92 N. W. 181, 95 N. W. 38.

New York.— Laidlaw *v.* Gilmore, 47 How. Pr. 67.

Pennsylvania.— Hand *v.* Hitner, 140 Pa. St. 166, 21 Atl. 260; Covanhovan *v.* Hart, 21 Pa. St. 495, 60 Am. Dec. 57 [*approved* in Werner *v.* Zierfuss, 162 Pa. St. 360, 29 Atl. 737].

Tennessee.— McGrew *v.* Hancock, (Ch. App. 1899) 52 S. W. 500.

Texas.— Davis *v.* Beason, 77 Tex. 604, 14 S. W. 198.

United States.— Repauno Chemical Co. *v.*

nary differences of opinion and will not weigh the estimates of values in too exacting a balance.[69] A mortgage or other conveyance executed to secure a preëxisting debt which covers property of a greater value than the debt which it is given to secure is not for that reason invalid.[70] But where the value of property included in such a conveyance is greatly in excess of the debt secured, a presumption of fraud is raised.[71]

(III) *EXCESS IN AMOUNT SECURED.* Where a mortgage or other conveyance executed by an embarrassed debtor as security is for a sum in excess of the debt actually due fraud will generally be presumed,[72] but this presumption is not con-

Victor Hardware Co., 101 Fed. 948, 42 C. C. A. 106.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 223.

69. Fergason *v.* Hall, 99 Ala. 209, 214, 13 So. 302 [*citing* Mobile Sav. Bank *v.* McDonnell, 89 Ala. 434, 8 So. 137, 18 Am. St. Rep. 137, 9 L. R. A. 645].

70. *District of Columbia.*— Birdsall *v.* Welch, 6 D. C. 316.

Kansas.— Clement *v.* Hartzell, 57 Kan. 482, 46 Pac. 961.

Michigan.— Warner *v.* Littlefield, 89 Mich. 329, 50 N. W. 721. See also Michigan Trust Co. *v.* Bennett, 106 Mich. 381, 64 N. W. 330.

Mississippi.— See Taylor *v.* Watkins, (1893) 13 So. 811.

Nebraska.— Kilpatrick-Koch Dry Goods Co. *v.* Strauss, 45 Nebr. 793, 64 N. W. 223; Grand Island Banking Co. *v.* Costello, 45 Nebr. 119, 63 N. W. 376; Sherwin *v.* Gahagen, 39 Nebr. 238, 57 N. W. 1005; Grimes *v.* Farrington, 19 Nebr. 44, 26 N. W. 618.

New York.— Boessneck *v.* Cohn, 7 N. Y. Suppl. 620.

North Carolina.— Burgin *v.* Burgin, 23 N. C. 453.

Tennessee.— Roane *v.* Nashville Bank, 1 Head 526.

Wisconsin.— Cunningham *v.* Eagan, 102 Wis. 272, 78 N. W. 402; Menzesheimer *v.* Kennedy, 75 Wis. 411, 44 N. W. 508.

United States.— Davis *v.* Schwartz, 155 U. S. 631, 15 S. Ct. 237, 39 L. ed. 289; Downs *v.* Kissam, 10 How. 102, 13 L. ed. 346.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 233.

Stipulation for delay in foreclosure.— A mortgage of nearly all the debtor's estate to a principal debtor, fifty per cent more in value than the debt secured, with a stipulation for two years' delay in its foreclosure, is void. Reynolds *v.* Welch, 47 Ala. 200.

Where there is more property included in a trust deed than is sufficient to satisfy all the debts secured by it, a pursuing creditor may file a bill against all the parties interested to have the trust closed and the property subjected, first to the payment of the trust debts, and the excess to the satisfaction of the complainant's debts. Cornish *v.* Dews, 18 Ark. 172.

Several chattel mortgages executed simultaneously to secure debts, the aggregate of which is not unreasonably less than the property mortgaged, are not void because no one of such debts is in itself sufficient to justify so great a security. Jones *v.* Loree, 37 Nebr. 816, 56 N. W. 390.

Mortgage intended as an absolute transfer. — Where it appears that a mortgagor was insolvent, that the mortgage covered practically his whole estate, and that it was not given in good faith for the sole purpose of securing his debt, but as an intended transfer to one creditor to the exclusion of others, it will be held invalid. Mitchell *v.* Mitchell, 42 S. C. 475, 20 S. E. 405.

71. Williams *v.* Stowell, (Kan. App. 1897) 48 Pac. 894; Thompson *v.* Richardson Drug Co., 33 Nebr. 714, 50 N. W. 948, 29 Am. St. Rep. 505. See also Whitney *v.* Levon, 34 Nebr. 443, 51 N. W. 972; Omaha First Nat. Bank *v.* East Omaha Box Co., 2 Nebr. (Unoff.) 820, 90 N. W. 223; Crosby *v.* Huston, 1 Tex. 203. *Compare* Black Hills Mercantile Co. *v.* Gardiner, 5 S. D. 246, 256, 58 N. W. 557, 559, holding that under a statute making a chattel mortgage a lien on the mortgaged property, and allowing a creditor to levy on the mortgaged property after paying or tendering the amount for which such mortgage is a *bona fide* lien, the taking of a mortgage on property worth about five times as much as the debt secured is not on that account fraudulent.

72. *Arkansas.*— Henry *v.* Harrell, 57 Ark. 569, 22 S. W. 433.

California.— Tully *v.* Harloe, 35 Cal. 302, 95 Am. Dec. 102; Wilcoxson *v.* Burton, 27 Cal. 228, 87 Am. Dec. 66.

Connecticut.— Bramhall *v.* Flood, 41 Conn. 68.

Illinois.— Wooley *v.* Fry, 30 Ill. 158; Adams *v.* Pease, 113 Ill. App. 356.

Indiana.— Adams *v.* Laugel, 144 Ind. 608, 42 N. E. 1017; Goff *v.* Rogers, 71 Ind. 459.

Iowa.— Bussard *v.* Bullitt, 95 Iowa 736, 64 N. W. 658; Taylor *v.* Wendling, 66 Iowa 562, 24 N. W. 40.

Kansas.— Bowling *v.* Armourdale Bank, 57 Kan. 174, 45 Pac. 584; Bush *v.* Bush, 33 Kan. 556, 6 Pac. 794. See also Williams *v.* Stowell, (App. 1897) 48 Pac. 894.

Michigan.— Louden *v.* Vinton, 108 Mich. 313, 66 N. W. 222; Patrick *v.* Riggs, 105 Mich. 616, 63 N. W. 532; Ferris *v.* Queen, 94 Mich. 367, 54 N. W. 164; Showman *v.* Lee, 86 Mich. 556, 45 N. W. 578; King *v.* Hubbell, 42 Mich. 597, 4 N. W. 440.

Minnesota.— Heim *v.* Chapel, 62 Minn. 338, 64 N. W. 825; Hanson *v.* Bean, 51 Minn. 546, 53 N. W. 871, 38 Am. St. Rep. 516.

Missouri.— Plattsburg First Nat. Bank *v.*

clusive.[73] It must appear that the mortgage was intentionally taken for a greater sum than the amount of the debt.[74]

(iv) *Debts Not Yet Due.* A conveyance is not fraudulent merely because made in payment of or as security for a debt not yet due;[75] but when the prop-

Fry, 168 Mo. 492, 68 S. W. 348; Imhoff *v.* McArthur, 148 Mo. 371, 48 S. W. 456. *Compare,* however, Colbern *v.* Robinson, 80 Mo. 541.

New Hampshire.— Whittredge *v.* Edmunds, 63 N. H. 248.

New Jersey.— Heintze *v.* Bentley, 34 N. J. Eq. 562 [*affirming* 33 N. J. Eq. 405].

Pennsylvania.— Gordon *v.* Preston, 1 Watts 385, 26 Am. Dec. 75; Whiting *v.* Johnson, 11 Serg. & R. 328, 14 Am. Dec. 633; Hieber *v.* Neary, 7 Pa. Dist. 596. See also Orr *v.* Peters, 197 Pa. St. 606, 47 Atl. 849. But see Heiney *v.* Anderson, 9 Lanc. Bar 13.

South Carolina.— Hipp *v.* Sawyer, Rich. Eq. Cas. 410. *Compare* Smith *v.* Pate, 3 S. C. 204.

Wisconsin.— Rice *v.* Morner, 64 Wis. 599, 25 N. W. 688; Barkow *v.* Sanger, 47 Wis. 500, 3 N. W. 16. See also Stein *v.* Hermann, 23 Wis. 132.

United States.— Hardt *v.* Heidweyer, 152 U. S. 547, 14 S. Ct. 671, 38 L. ed. 548; Hubbard *v.* Turner, 12 Fed. Cas. No. 6,819, 2 McLean 519.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 232. And see *supra,* V, B, 1, e.

Misstatement of amount of debt secured by chattel mortgage see CHATTEL MORTGAGES, 6 Cyc. 1018.

A miscalculation, mistake, or unintentional error in the amount of the debt secured will not vitiate the conveyance.

Alabama.— Pennington *v.* Woodall, 17 Ala. 685.

Kansas.— Symns Grocer Co. *v.* Lee, 9 Kan. App. 574, 58 Pac. 237. See also Bush *v.* Bush, 33 Kan. 556, 6 Pac. 794.

Missouri.— See Rogers, etc., Hardware Co. *v.* Randell, 69 Mo. App. 342.

Nebraska.— Trompen *v.* Yates, 66 Nebr. 525, 92 N. W. 647.

Pennsylvania.— Baldwin *v.* Harron, 19 Pa. Co. Ct. 634.

Texas.— Freybe *v.* Tiernan, 76 Tex. 286, 13 S. W. 370.

Amount not known.—The giving of a mortgage by an insolvent for an amount really larger than he owed is not a fraud on his other creditors where it appears that neither he nor the mortgagee knew accurately the amount due, which embraced dealings for a series of years, and that it was agreed that the mortgage should secure only the sum actually due. Lycoming Rubber Co. *v.* King, 90 Iowa 343, 57 N. W. 864. See also Wood *v.* Scott, 55 Iowa 114, 7 N. W. 465; Davis *v.* Charles, 8 Pa. St. 82.

Value of property less than actual debt.— The execution of a deed of trust to secure a debt of three thousand dollars, when only about half that sum is due, does not show such conveyance to be fraudulent as to other creditors, where the value of the land embraced in such conveyance is but six hundred and fifty dollars. Sawyer *v.* Bradshaw, 125 Ill. 440, 17 N. E. 812.

"Where the expressed consideration is largely more than the debt, and the conveyance is claimed to be a mortgage, courts will view the transaction with suspicion, and the evidence of good faith and absence of fraudulent intent as against contesting creditors must be full and satisfactory. Such transfers are closely scrutinized, and unless the proof be ample, courts will not uphold them. In this state these conveyances are not constructively fraudulent." Jefferson County Bank *v.* Hummel, 11 Colo. App. 337, 53 Pac. 286, 287 [*distinguishing* Innis *v.* Carpenter, 4 Colo. App. 30, 34 Pac. 1011]. See also McClure *v.* Smith, 14 Colo. 297, 23 Pac. 786; Ross *v.* Duggan, 5 Colo. 85.

Debt and advances equal to amount of mortgage.— A mortgage given to secure an existing debt and a sum to be immediately advanced sufficient to make the debt equal at least to the face of the mortgage is valid. Bradley Co. *v.* Paul, 94 Wis. 488, 69 N. W. 168.

Enforced only for amount due.— A mortgage to secure an antecedent debt is not fraudulent because given for a larger sum than the debt secured, where it does not appear that it will be enforced for more than the amount actually due. Sargent *v.* Chapman, 12 Colo. App. 529, 56 Pac. 194.

73. *Alabama.*— Stover *v.* Herrington, 7 Ala. 142, 41 Am. Dec. 86.

Illinois.— See Bell *v.* Prewitt, 62 Ill. 361.

Iowa.— Lombard *v.* Dows, 66 Iowa 243, 23 N. W. 649; Wood *v.* Scott, 55 Iowa 114, 7 N. W. 465; Davenport *v.* Cummings, 15 Iowa 219. See also Van Patten *v.* Thompson, 73 Iowa 103, 34 N. W. 763.

Kansas.— Hughes *v.* Shull, 33 Kan. 127, 133, 5 Pac. 414, 770.

Massachusetts.— Parker *v.* Barker, 2 Metc. 423.

Michigan.— Patrick *v.* Riggs, 105 Mich. 616, 63 N. W. 532; Willison *v.* Desenberg, 41 Mich. 156, 2 N. W. 201.

Minnesota.— Berry *v.* O'Connor, 33 Minn. 29, 29 N. W. 840.

Nebraska.— Smith *v.* Bowen, 51 Nebr. 245, 70 N. W. 949.

Tennessee.— Bumpas *v.* Dotson, 7 Humphr. 310, 46 Am. Dec. 81.

United States.— Kellogg *v.* Clyne, 54 Fed. 696, 4 C. C. A. 554; U. S. *v.* Griswold, 8 Fed. 496, 7 Sawy. 296.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 232.

Compare Butts *v.* Peacock, 23 Wis. 359.

74. Kalk *v.* Fielding, 50 Wis. 339, 7 N. W. 296.

75. McGrew *v.* Hancock, (Tenn. Ch. App. 1899) 52 S. W. 500. See also Pond *v.* Daven-

erty transferred is largely in excess of such a debt the conveyance will be set aside.[76]

(v) *Debts Barred by Limitation.* The fact that the debt in payment of which a debtor makes a transfer of his property is barred by the statute of limitations does not of itself render the transaction fraudulent as to creditors.[77]

(vi) *Additional Security For Debts.* A mortgage given by one greatly indebted, and purporting to secure a debt already amply secured, is fraudulent.[78] A creditor may, however, take any number of securities if the debtor be not insolvent, or even if insolvent, provided the securities be not so excessive as to indicate a purpose to shield the property from other creditors.[79] A secret transfer of choses in action made to a creditor after the execution of a deed of trust for his benefit, with intent to give him additional security, is fraudulent as to other creditors.[80]

b. Conveyance in Execution of Prior Agreement. Where a final agreement on a valuable consideration is made to convey property, and it is carried into effect by giving the deed, the consideration for the agreement is to be deemed the consideration for the deed, and if sufficient will support it as against creditors.[81]

10. Marriage as Consideration — a. Antenuptial Settlement — (i) *In General.* Marriage is in contemplation of law a consideration of the highest value and is therefore sufficient to support an antenuptial conveyance or settlement of property

port, 45 Cal. 225; Symns Grocery Co. *v.* Smith, 6 Kan. App. 258, 51 Pac. 803; East Side Bank *v.* Columbus Tanning Co., 15 Pa. Co. Ct. 357; Shedd *v.* Brattleboro Bank, 32 Vt. 709. But *compare* Taaffe *v.* Josephson, 7 Cal. 352.

76. Brown *v.* Work, 30 Nebr. 800, 47 N. W. 192; Hartman *v.* Allen, 9 Lea (Tenn.) 657. See also Lee *v.* Wathen, 3 B. Mon. (Ky.) 297.

77. *Georgia.*— Comer *v.* Allen, 72 Ga. 1.

Iowa.— Roberts *v.* Brothers, 119 Iowa 309, 93 N. W. 289; City Bank *v.* White, 68 Iowa 132, 26 N. W. 35.

Kansas.— Kennedy *v.* Powell, 34 Kan. 22, 7 Pac. 606.

Minnesota.— Frost *v.* Steele, 46 Minn. 1, 48 N. W. 413.

Missouri.— Gentry *v.* Field, 143 Mo. 399, 45 S. W. 286.

Nebraska.— Plummer *v.* Rohman, 61 Nebr. 61, 84 N. W. 600, 62 Nebr. 145, 87 N. W. 11; Dayton Spice-Mills Co. *v.* Sloan, 49 Nebr. 622, 68 N. W. 1040.

New York.— Manchester *v.* Tibbetts, 121 N. W. 219, 24 N. E. 304, 18 Am. St. Rep. 816; McConnell *v.* Barber, 86 Hun 360, 33 N. Y. Suppl. 480; De Valle *v.* Hyland, 76 Hun 493, 27 N. Y. Suppl. 1059; Davis *v.* Howard, 73 Hun 347, 26 N. Y. Suppl. 194; Mellen *v.* Banning, 72 Hun 176, 25 N. Y. Suppl. 542; Ellis *v.* Myers, 4 Silv. Sup. 323, 8 N. Y. Suppl. 139.

Pennsylvania.— Keene *v.* Kleckner, 42 Pa. St. 529.

South Carolina.— McPherson *v.* McPherson, 21 S. C. 261. See also Leake *v.* Anderson, 43 S. C. 448, 21 S. E. 439.

Texas.— See Pierce *v.* Wimberly, 78 Tex. 187, 14 S. W. 454; Meyer Bros. Drug Co. *v.* Rather, (Civ. App. 1895) 30 S. W. 812.

Virginia.— See Robinson *v.* Bass, 100 Va. 190, 40 S. E. 660.

United States.— Wilson *v.* Jones, 76 Fed. 484. See also Vansickle *v.* Wells, 105 Fed. 16.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 235. See also *infra*, XI, J, 2.

Compare, however, Sturm *v.* Chalfant, 38 W. Va. 248, 18 N. E. 451; Crawford *v.* Carper, 4 W. Va. 56.

Statute inapplicable as between husband and wife.— It has been held that neither the statute of limitations nor the presumption of payment from lapse of time applies to a debt due by a husband to his wife, so as to render fraudulent a conveyance by the husband to her in payment thereof. Dice *v.* Irvin, 110 Ind. 561, 11 N. E. 488. See also Beloit Second Nat. Bank *v.* Merrill, etc., Iron Works, 81 Wis. 151, 50 N. W. 505, 29 Am. St. Rep. 877.

Fact that debt barred not conclusive of fraud.— The fact that a debt due from a husband to his wife has existed for a period sufficient to bar an action thereon is not such conclusive evidence of a want of good faith as to give his other creditors ground to complain of a conveyance made to her in payment thereof. French *v.* Motley, 63 Me. 326. *Compare* Kanawha Valley Bank *v.* Atkinson, 32 W. Va. 203, 9 S. E. 175, 25 Am. St. Rep. 806.

78. Crapster *v.* Williams, 21 Kan. 109; Jaffray *v.* Wolf, 4 Okla. 303, 47 Pac. 496. See also Lombard *v.* Dows, 66 Iowa 243, 23 N. W. 649.

79. Hendon *v.* Morris, 110 Ala. 106, 20 So. 27.

80. Reeves *v.* John, 95 Tenn. 434, 32 S. W. 312.

81. Pulte *v.* Geller, 47 Mich. 560, 11 N. W. 385. See also Mundy *v.* Mason, 4 Bush (Ky.) 339; Norton *v.* Mallory, 63 N. Y. 434 [*affirming* 1 Hun 499]; Bilsborow *v.* Titus, 15 How. Pr. (N. Y.) 95; Gottstein *v.* Wist, 22 Wash. 581, 61 Pac. 715. But *com-*

as against creditors of the grantor,[82] even though made by the grantor with an

pare Zimmerman *v.* Bannon, 101 Wis. 407, 77 N. W. 735.

82. *Alabama.*— Nance *v.* Nance, 84 Ala. 375, 4 So. 699, 5 Am. St. Rep. 378; Andrews *v.* Jones, 10 Ala. 400.

California.— Cohen *v.* Knox, 90 Cal. 266, 27 Pac. 215, 13 L. R. A. 711; Peek *v.* Peek, 77 Cal. 106, 19 Pac. 227, 11 Am. St. Rep. 244, 1 L. R. A. 185.

Connecticut.— Sanford *v.* Atwood, 44 Conn. 141.

Georgia.— Bradley *v.* Saddler, 54 Ga. 681; Vason *v.* Bell, 53 Ga. 416.

Illinois.— McAnnulty *v.* McAnnulty, 120 Ill. 26, 11 N. E. 397, 60 Am. Rep. 552; Campbell, etc., Co. *v.* Ross, 86 Ill. App. 356 [*affirmed* in 187 Ill. 553, 58 N. E. 596].

Indiana.— Marmon *v.* White, 151 Ind. 445, 51 N. E. 930; State *v.* Osborn, 143 Ind. 671, 42 N. E. 921.

Kentucky.— Sanders *v.* Miller, 79 Ky. 517, 42 Am. Rep. 237.

Maine.— Tolman *v.* Ward, 86 Me. 305, 29 Atl. 1081, 41 Am. St. Rep. 556.

Maryland.— Albert *v.* Winn, 5 Md. 66; Betts *v.* Union Bank, 1 Harr. & G. 175, 18 Am. Dec. 283.

Massachusetts.— Clark *v.* McMahon, 170 Mass. 91, 48 N. E. 939.

Mississippi.— Armfield *v.* Armfield, 4 Freem. 311. See also Spears *v.* Shropshire, 11 La. Ann. 559, 66 Am. Dec. 206, decided under the law of Mississippi.

Missouri.— Ploss *v.* Thomas, 6 Mo. App. 157.

New York.— De Hierapolis *v.* Reilly, 44 N. Y. App. Div. 22, 60 N. Y. Suppl. 417 [*affirmed* in 168 N. Y. 585, 60 N. E. 1110]; Wright *v.* Wright, 59 Barb. 505 [*affirmed* in 54 N. Y. 437]; Sterry *v.* Arden, 1 Johns. Ch. 261.

Ohio.— Henry *v.* Henry, 27 Ohio St. 121.

Oregon.— Bonser *v.* Miller, 5 Oreg. 110.

Pennsylvania.— Provident Life, etc., Co. *v.* Fidelity Ins. Trust, etc., Co., 203 Pa. St. 82, 52 Atl. 34; Jones' Appeal, 62 Pa. St. 324; Frank's Appeal, 59 Pa. St. 190; Ethridge *v.* Dunshee, 31 Pittsb. Leg. J. 39.

South Carolina.— Rivers *v.* Thayer, 7 Rich. Eq. 136; Ramsay *v.* Richardson, Riley Eq. 271; Tunno *v.* Trezevant, 2 Desauss. 264; Johnston *v.* Dilliard, 1 Bay 232.

Tennessee.— Cains *v.* Jones, 5 Yerg. 249.

Vermont.— Pierce *v.* Harrington, 58 Vt. 649, 7 Atl. 462.

West Virginia.— Boggess *v.* Richard, 39 W. Va. 567, 20 S. E. 599, 45 Am. St. Rep. 938, 26 L. R. A. 537.

United States.— Magniac *v.* Thompson, 7 Pet. 348, 8 L. ed. 709 [*affirming* 16 Fed. Cas. No. 8,956, Baldw. 344].

England.— Barrow *v.* Barrow, 2 Dick. 504, 21 Eng. Reprint 365; Campion *v.* Cotton, 17 Ves. Jr. 263, 34 Eng. Reprint 102; Nairn *v.* Prowse, 6 Ves. Jr. 752, 6 Rev. Rep. 37, 31 Eng. Reprint 1291.

Canada.— See Ryland *v.* Alnutt, 11 Grant Ch. (U. C.) 135. *Compare* Turgeon *v.* Shannon, 20 Quebec Super. Ct. C. S. 135.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 236, 241. And see *infra*, XIII, A, 4, a, (v), (b), (2).

In Louisiana a donation *propter nuptias*, when made by one who is insolvent, to the knowledge of the donee, and when it embraces the whole of the donor's property, is not valid as against creditors. Harmon *v.* Ryan, 10 La. Ann. 661. Under the code of 1808 such a donation made by the husband in the marriage contract, on the eve of the marriage, does not have the effect of a mortgage on the husband's property against creditors, unless the state of the husband's affairs at the time of the donation authorized it. Cable *v.* Coe, 4 La. 554; Mercer *v.* Andrews, 2 La. 538.

In Virginia, by statute, conveyances in consideration of marriage are void as to existing creditors. Va. Code, § 2459. And see Snyder *v.* Grandstaff, 96 Va. 473, 31 S. E. 647, 70 Am. St. Rep. 863. Prior to the enactment of this statute the usual rules on the subject prevailed. Bumgardner *v.* Harris, 92 Va. 188, 23 S. E. 229; Noble *v.* Davies, (1887) 4 S. E. 206; Herring *v.* Wickham, 29 Gratt. 628, 26 Am. Rep. 405; Bentley *v.* Harris, 2 Gratt. 357; Coutts *v.* Greenhow, 2 Munf. 363, 5 Am. Dec. 472 [*reversing* 4 Hen. & M. 485].

Specific marriage.— "Marriage furnishes a valuable consideration for an agreement, as much so as money paid or agreed to be paid; and the consideration arises in a contract made, in contemplation of a specific marriage, between the parties to the intended union, or between one or both of them, and a third person who has reason to desire their intermarriage. If such third person promises or agrees, in the event of such intermarriage, to convey or settle, or pay, property or money, to or for the parties to the marriage tie, or either of them, then the occurrence of the marriage is a sufficient consideration for such promise or agreement; the law presuming that the latter was an inducement to the performance of the solemn and irrevocable specific act which it contemplated. In such a contract, the law recognizes mutuality both of promise and consideration. It is quite otherwise where no specific marriage is in treaty or contemplated, and the promise is in reference to a future possible state or condition of matrimony. As where a father promises a daughter, that if at any after period of life, she shall choose to enter into wedlock, he will in that event, and upon its occurrence, give, convey, or pay to her specified money or property. In such a case, there is no mutuality either of promise or consideration. The agreement of the father is founded upon no undertaking or promise of the daughter, and upon no valuable consideration, but is merely for a future contingent advancement of the daughter. It is not in the eye of the law in consideration of mar-

intent to defraud them, unless such intent is known to or participated in by the grantee.[83]

(II) *EFFECT OF MARRIAGE ON PRIOR VOLUNTARY CONVEYANCE.* If a person is induced to marry the grantee of a voluntary conveyance, on account of the

riage, but of natural love and affection." Welles *v.* Cole, 6 Gratt. (Va.) 645, 652.

A conveyance or transfer by a parent, in consideration of the marriage of his child, is not voluntary. Toulmin *v.* Buchanan, 1 Stew. (Ala.) 67; Cohen *v.* Knox, 90 Cal. 266, 27 Pac. 215, 13 L. R. A. 711; La Prince *v.* Guillemot, 1 Rich. Eq. (S. C.) 187; Moore *v.* Dawney, 3 Hen. & M. (Va.) 127. But *compare* Lionberger *v.* Baker, 88 Mo. 447 [*affirming* 14 Mo. App. 353]; Davidson *v.* Graves, Riley Eq. (S. C.) 219.

Time of delivery of deed.— A deed made in consideration of marriage is valid, as against existing creditors of the grantor, although not delivered until after the marriage is consummated, in the absence of bad faith on the part of the wife. Wood, etc., Bank *v.* Read, 131 Mo. 553, 33 S. W. 176.

Marriage failing to take place.— Where a party promises to marry in good faith and for a consideration, he or she is entitled to the consideration for such promise, and if, without fault upon his or her part, the marriage does not take place, it does not affect the title to the consideration. De Hierapolis *v.* Reilly, 44 N. Y. App. Div. 22, 60 N. Y. Suppl. 417.

Marriage prevented by death.— Where a man conveys land to a woman on promise of marriage by her, she can hold the same against his creditors, although the marriage is prevented by his death. Smith *v.* Allen, 5 Allen (Mass.) 454, 81 Am. Dec. 758.

The trustees of a marriage settlement are purchasers for valuable consideration. *In re* Donelan, [1902] 1 Ir. 109.

After-acquired property.— A covenant by a husband in a settlement made in consideration of marriage to settle all his after-acquired property except business assets is not fraudulent and void as against creditors. *In re* Reis, [1904] 2 K. B. 769, 73 L. J. K. B. 929, 91 L. T. Rep. N. S. 592, 11 Manson 229, 20 T. L. R. 547, 53 Wkly. Rep. 122 [*overruling Ex p.* Bolland, L. R. 17 Eq. 115, 43 L. J. Bankr. 16, 29 L. T. Rep. N. S. 543, 22 Wkly. Rep. 152].

Contract as to wife's earnings.— An antenuptial contract by which the wife is to hold her own future earnings to her separate use has been held fraudulent with respect to both previous and subsequent creditors of the husband. Keith *v.* Woombell, 8 Pick. (Mass.) 211. *Compare supra*, II, B, 7, b.

Where property is settled upon a wife for her life, with remainder over to the sister of the grantor and her children, the remainder is without valuable consideration and void as to creditors whose claims existed at the time of the settlement. Bumgardner *v.* Harris, 92 Va. 188, 22 S. E. 229.

83. *California.*— Cohen *v.* Knox, 90 Cal. 266, 27 Pac. 215, 13 L. R. A. 711.

Georgia.— Comer *v.* Allen, 72 Ga. 1.

Indiana.— State *v.* Osborn, 143 Ind. 671, 42 N. E. 921; Bunnel *v.* Witherow, 29 Ind. 123.

Maine.— Gibson *v.* Bennett, 79 Me. 302, 9 Atl. 727.

Massachusetts.— Clark *v.* McMahon, 170 Mass. 91, 48 N. E. 939.

Oregon.— Bonser *v.* Miller, 5 Oreg. 110.

Pennsylvania.— Frank's Appeal, 59 Pa. St. 190.

Rhode Island.— National Exch. Bank *v.* Watson, 13 R. I. 91, 43 Am. Rep. 132.

West Virginia.—Dent *v.* Pickens, 46 W. Va. 378, 33 S. E. 303.

United States.— Prewit *v.* Wilson, 103 U. S. 22, 26 L. ed. 360 [*reversing* 30 Fed. Cas. No. 17,828, 3 Woods 631].

England.— Bulmer *v.* Hunter, L. R. 8 Eq. 46, 38 L. J. Ch. 543, 20 L. T. Rep. N. S. 942; Wheeler *v.* Caryl, Ambl. 121, 27 Eng. Reprint 79; Fraser *v.* Thompson, 1 Giff. 49, 5 Jur. N. S. 669, 7 Wkly. Rep. 607; Campion *v* Cotton, 17 Ves. Jr. 271, 34 Eng. Reprint 102. See also Wenman *v.* Lyon, [1891] 1 Q. B. 634, 64 L. T. Rep. N. S. 88, 39 Wkly. Rep. 301 [*affirmed* in [1892] 2 Q. B. 192, 60 L. J. Q. B. 663, 65 L. T. Rep. N. S. 136, 39 Wkly. Rep. 519]; Kirk *v.* Clark, Prec. Ch. 275, 24 Eng. Reprint 133; Columbine *v.* Penhall, 1 Smale & G. 228.

Canada.— Commercial Bank *v.* Cooke, 9 Grant Ch. (U. C.) 524. See also Thompson *v.* Gore, 12 Ont. 651 [*approving* and *distinguishing* Fraser *v.* Thompson, 1 Giff. 49, 5 Jur. N. S. 669, 7 Wkly. Rep. 607].

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 236.

Participation in fraud avoids.— Although a woman may know that a man is in embarrassed circumstances and that her marrying him at the time may be of service to him and preserve his property, if nevertheless her object in marrying him is not solely for the purpose of preserving his property, but for the ordinary reasons which lead men and women to take that position with regard to each other, an antenuptial settlement executed by the husband will not be void. But where the marriage is not an honest marriage, and is entered into solely for the purpose of attempting to make a settlement valid which otherwise would be void, and where, but for a desire to defraud the creditors, no marriage between the two parties would have taken place, the antenuptial settlement will be set aside. Thus where a man executed an antenuptial settlement and married a woman with whom he had had an immoral intimacy, and the evidence showed that such marriage was entered into solely with intent to defraud his creditors, the wife being implicated in the transaction, the settlement was fraudulent and void as against the creditors. *Re* Pennington, 59 L. T. Rep. N. S. 774, 5 Morr.

provisions made therein for such grantee, it ceases to be voluntary.[84] It should be made to appear, however, that the conveyance was the cause of the marriage, and the mere fact that one holding a conveyance of property marries will not make the conveyance good.[85]

(III) *Settlements in Accordance With Antenuptial Agreements.* A settlement made after marriage will be sustained if it is made in pursuance of a valid agreement entered into before marriage;[86] but such a settlement, if made in pursuance of an antenuptial parol promise, such a promise being unenforceable under the statute of frauds, and if followed by nothing on the part of the husband or wife but marriage, is voluntary.[87]

b. Post-Nuptial Settlements. A post-nuptial conveyance to or settlement upon

Bankr. Cas. 216 [*affirmed* in 5 Morr. 268]. See *supra*, VII, B, 2, a.

Conveyance of all of property of grantor. — The fact that the conveyance transfers the whole property of the grantor is sufficient to charge the grantee with notice of fraud. McGowan *v.* Hitt, 16 S. C. 602, 42 Am. Rep. 650; Davidson *v.* Graves, Riley Eq. (S. C.) 232. See also Croft *v.* Arthur, 3 Desauss. (S. C.) 223. See *supra*, V, B, 8.

The insolvency of the grantor at the time of making the conveyance to his intended wife, in consideration of her marrying him, does not of itself render the conveyance fraudulent as to creditors, when the grantee had no notice or knowledge of such fact. Otis *v.* Spencer, 102 Ill. 622, 40 Am. Rep. 617. See also Keep *v.* Keep, 7 Abb. N. Cas. (N. Y.) 240. And see *supra*, VI; VII, B, 1, a.

84. Wood *v.* Jackson, 8 Wend. (N. Y.) 9, 22 Am. Dec. 603; Whelan *v.* Whelan, 3 Cow. (N. Y.) 537; Verplank *v.* Sterry, 12 Johns. (N. Y.) 536, 7 Am. Dec. 348; Sterry *v.* Arden, 1 Johns. Ch. (N. Y.) 261. See also Huston *v.* Cantrill, 11 Leigh (Va.) 136; Guardian Assur. Co. *v.* Avonmore, Ir. R. 6 Eq. 396.

85. Whelan *v.* Whelan, 3 Cow. (N. Y.) 537. See also Stokes *v.* Jones, 18 Ala. 734; O'Brien *v.* Coulter, 2 Blackf. (Ind.) 421.

86. *Alabama.*— Nance *v.* Nance, 84 Ala. 375, 4 So. 699, 5 Am. St. Rep. 378; Lockwood *v.* Nelson, 16 Ala. 294.

Indiana.— Marmon *v.* White, 151 Ind. 445, 51 N. E. 930. See also Clow *v.* Brown, (App. 1904) 72 N. E. 534.

Kentucky.— Sanders *v.* Miller, 79 Ky. 517, 42 Am. Rep. 237; Kinnard *v.* Daniel, 13 B. Mon. 496.

Virginia.—See Dabney *v.* Kennedy, 7 Gratt. 317.

Wyoming.— North Platte Milling, etc., Co. *v.* Price, 4 Wyo. 293, 33 Pac. 664. See also Metz *v.* Blackburn, 9 Wyo. 481, 65 Pac. 857.

United States.— Magniac *v.* Thompson, 7 Pet. 348, 8 L. ed. 709 [*affirming* 16 Fed. Cas. No. 8,956, Baldw. 344].

England.— Brunsden *v.* Stratton, Prec. Ch. 520, 24 Eng. Reprint 233. *Compare* Battersbee *v.* Farrington, 1 Swanst. 106, 36 Eng. Reprint 317, 1 Wils. Ch. 88, 37 Eng. Reprint 40, 18 Rev. Rep. 32.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 242.

Compare State Bank *v.* Mitchell, Rice Eq. (S. C.) 389, holding that a settlement in pursuance of a marriage agreement not recorded as required by statute will be set aside.

Settlement in excess of agreement.— A settlement after marriage in which a greater interest in the property is secured to the wife than was provided for in the marriage agreement is void as against creditors. Saunders *v.* Ferrill, 23 N. C. 97. *Compare* Maguire *v.* Nicholson, Beatty 592.

Settlement extinguished.— Where an antenuptial settlement was, by agreement between all the parties interested under it after the marriage, extinguished, and the property named in it was divided and delivered, it was held that it could not constitute a consideration for a subsequent conveyance by the husban to his wife of the property received by him under such division. Harper *v.* Scott, 12 Ga. 125.

87. *Alabama.*— Carter *v.* Worthington, 82 Ala. 334, 2 So. 516, 60 Am. Rep. 738.

Illinois.— Keady *v.* White, 168 Ill. 76, 48 N. E. 314 [*affirming* 69 Ill. App. 405].

Maryland.— Albert *v.* Wynn, 5 Md. 66.

Massachusetts.—Deshon *v.* Wood, 148 Mass. 132, 19 N. E. 1, 1 L. R. A. 518.

New Jersey.— Manning *v.* Riley, 52 N. J. Eq. 39, 27 Atl. 810. See also Le Pard *v.* Russell, (Ch. 1898) 39 Atl. 1059.

New York.— Hunt *v.* Hunt, 171 N. Y. 296, 64 N. E. 159, 59 L. R. A. 306 [*affirming* 55 N. Y. App. Div. 430, 66 N. Y. Suppl. 957]; Dygert *v.* Remerschnider, 32 N. Y. 629 [*affirming* 39 Barb. 417]; Whyte *v.* Denike, 53 N. Y. App. Div. 320, 65 N. Y. Suppl. 577; Reade *v.* Livingston, 3 Johns. Ch. 481, 8 Am. Dec. 520.

North Carolina.— See Credle *v.* Carrawan, 64 N. C. 422.

Pennsylvania.— Barnes *v.* Black, 193 Pa. St. 447, 44 Atl. 550, 74 Am. St. Rep. 694; Flory *v.* Houck, 186 Pa. St. 263, 40 Atl. 482.

England.— *In re* Holland, [1902] 2 Ch. 360, 71 L. J. Ch. 518, 86 L. T. Rep. N. S. 542, 9 Manson 259, 50 Wkly. Rep. 575; Warden *v.* Jones, 2 De G. & J. 76, 4 Jur. N. S. 269, 27 L. J. Ch. 190, 6 Wkly. Rep. 180, 59 Eng. Ch. 61, 44 Eng. Reprint 916; L'Estrange *v.* Robinson, 1 Hog. 202; Randall *v.* Morgan, 12 Ves. Jr. 67, 8 Rev. Rep. 289, 33 Eng. Reprint 26.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 236, 242.

Compare Mechanics' Bank *v.* Taylor, 16

a wife or husband, made without a valuable consideration and not in pursuance of a binding antenuptial agreement, is a mere voluntary conveyance and of the same validity as to creditors as other conveyances of that character.[88] Of course such a conveyance or settlement, if made for an honest purpose upon a valuable and adequate consideration, will not be set aside;[89] but if the consideration is insufficient it may be.[90] A settlement after marriage in consideration of a portion paid by the wife's father is good against the husband's creditors.[91]

B. Adequacy of Consideration. A valuable consideration does not necessarily mean full value; it is sufficient if the sum paid is a substantial sum compared with the value of the property transferred.[92] At law the adequacy of the consideration will not be inquired into, except for the purpose of throwing light on the intent of the parties. If the consideration is in the terms of the law a

Fed. Cas. No. 9,386, 2 Cranch C. C. 507. And see Wood *v.* Savage, Walk. (Mich.) 471.

88. *Alabama.*— Costillo *v.* Thompson, 9 Ala. 937.

District of Columbia.—Offutt *v.* King, 1 MacArthur 312.

Georgia.—Deubell *v.* Fisher, R. M. Charlt. 36.

Illinois.—Phillips *v.* Meyers, 82 Ill. 67, 25 Am. Rep. 295. See also Sweeney *v.* Damron, 47 Ill. 450.

Maryland.— Atkinson *v.* Phillips, 1 Md. Ch. 507.

Mississippi.— Bullitt *v.* Taylor, 34 Miss. 708, 69 Am. Dec. 412; Vertner *v.* Humphreys, 14 Sm. & M. 130.

Missouri.— Chapman *v.* McIlwrath, 77 Mo. 38, 46 Am. Rep. 1; Potter *v.* McDowell, 31 Mo. 62.

New Jersey.— Manning *v.* Riley, 52 N. J. Eq. 39, 27 Atl. 810; Belford *v.* Crane, 16 N. J. Eq. 265, 84 Am. Dec. 155; Doughty *v.* King, 10 N. J. Eq. 396.

New York.— Wickes *v.* Clarke, 3 Edw. 58 [*affirmed* in 8 Paige 161]. See also Seaman *v.* Wall, 54 How. Pr. 47.

North Carolina.— Woodruff *v.* Bowles, 104 N. C. 197, 10 S. E. 482; Walton *v.* Parish, 95 N. C. 259; Kissam *v.* Edmonston, 36 N. C. 180.

Ohio.— U. S. Bank *v.* Ennis, Wright 604; Woodrow *v.* Sargent, 5 Ohio Dec. (Reprint) 209, 3 Am. L. Rec. 522; Case *v.* Hewitt, 10 Ohio S. & C. Pl. Dec. 365, 7 Ohio N. P. 609.

Pennsylvania.— Thompson *v.* Allen, 103 Pa. St. 44, 49 Am. Rep. 116.

South Carolina.— Davidson *v.* Graves, Riley Eq. 246; Reaborne *v.* Teasdale, 2 Bay 546.

Tennessee.— Perkins *v.* Perkins, 1 Tenn. Ch. 537.

Texas.— Reynolds *v.* Lansford, 16 Tex. 286.

Virginia.— Flynn *v.* Jackson, 93 Va. 341, 25 S. E. 1; De Farges *v.* Ryland, 87 Va. 404, 12 S. E. 805, 24 Am. St. Rep. 659; Perry *v.* Ruby, 81 Va. 317; Fink *v.* Denny, 75 Va. 663; Russell *v.* Randolph, 26 Gratt. 705; Lewis *v.* Caperton, 8 Gratt. 148; Harvey *v.* Alexander, 1 Rand. 219, 10 Am. Dec. 518; Alexandria Bank *v.* Patton, 1 Rob. 499.

United States.— Cathcart *v.* Robinson, 5 Pet. 264, 8 L. ed. 120; Sexton *v.* Wheaton, 8 Wheat. 229, 5 L. ed. 603; Wiswell *v.* Jarvis, 9 Fed. 84; U. S. *v.* Griswold, 8 Fed. 556, 7 Sawy. 311.

England.— See Middlecome *v.* Marlow, 2 Atk. 519, 26 Eng. Reprint 712; Stephens *v.* Olive, 2 Bro. Ch. 90, 29 Eng. Reprint 52; Kidney *v.* Coussmaker, 12 Ves. Jr. 136, 2 Rev. Rep. 118, 33 Eng. Reprint 53; Lush *v.* Wilkinson, 5 Ves. Jr. 384, 31 Eng. Reprint 642.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 283–288.

Compare Hume *v.* Condon, 44 W. Va. 553, 30 S. E. 56.

89. Butler *v.* Rickets, 11 Iowa 107; Wickes *v.* Clark, 3 Edw. (N. Y.) 58 [*affirmed* in 8 Paige 161]; Wadsworthville Poor School *v.* Bryson, 34 S. C. 401, 13 S. E. 619; U. S. Bank *v.* Brown, 2 Hill Eq. (S. C.) 558, 30 Am. Dec. 380; Hargroves *v.* Meray, 2 Hill Eq. (S. C.) 222; Walden *v.* Walden, 33 Gratt. (Va.) 88. See also Napier *v.* Wightman, Speers Eq. (S. C.) 357; *In re* Tetley, 66 L. J. Q. B. 111, 75 L. T. Rep. N. S. 166, 3 Manson 226.

90. Hord *v.* Rust, 4 Bibb (Ky.) 231; Peigne *v.* Snowden, 1 Desauss. Eq. (S. C.) 591; Beecher *v.* Wilson, 84 Va. 813, 6 S. E. 209, 10 Am. St. Rep. 883.

91. Lanoy *v.* Athol, 2 Atk. 444, 26 Eng. Reprint 668; Brown *v.* Jones, 1 Atk. 188, 26 Eng. Reprint 122; Russel *v.* Hammond, 1 Atk. 13, 26 Eng. Reprint 9; Jones *v.* Marsh, Cas. t. Talb. 64, 25 Eng. Reprint 664; Anonymous, Prec. Ch. 101, 24 Eng. Reprint 49; Ward *v.* Shallet, 2 Ves. 16, 28 Eng. Reprint 11.

92. Greenough *v.* Greenough, 21 Misc. (N. Y.) 727, 47 N. Y. Suppl. 1096. See also McCaskle *v.* Amarine, 12 Ala. 17; King *v.* Simmons, 55 N. Y. Suppl. 173.

Cloud on title.— The fact that the title to real estate is in doubt will be considered in determining whether a conveyance thereof was made upon an adequate consideration. Banta *v.* Terry, 2 Ky. L. Rep. 202.

Where the consideration paid for land, together with the encumbrances thereon, amounts to almost its reasonable value, the fact that such consideration is small will not be taken as a badge of fraud. Day *v.* Cole, 44 Iowa 452. A conveyance is not shown to have been without consideration and fraudulently made where the cash payment and mortgage on the property, assumed by

valuable one, it matters not whether it is adequate;[93] but in equity, when the property is of greater value than the consideration, the conveyance may be impeached as being voluntary to a partial extent, and if there is no actual fraud on the part of the grantee, will be sustained to the extent of the consideration.[94] If, however, the conveyance was made by the grantor with a fraudulent intent which was participated in by the grantee, it is absolutely void and will not be permitted to stand as a security for any purpose of reimbursement or indemnity.[95]

C. Partially Invalid or Illegal Consideration — 1. In General. As a general rule, where a part of the consideration is fictitious, fraudulent, or illegal, the entire conveyance or transfer will be vitiated;[96] but the fact that a part of the consideration is invalid does not always render a transfer of property fraudulent and

the grantee, were about the full value of the property, although it was soon after sold to speculators, who by booming it sold it at an unusual price. Mullins *v.* Hands, 31 S. W. 726, 17 Ky. L. Rep. 612.

93. *Alabama.*— Andrews *v.* Jones, 10 Ala. 400.

Connecticut.—See Washband *v.* Washband, 27 Conn. 424.

Georgia.—Martin *v.* White, 115 Ga. 866, 42 S. E. 279.

Nebraska.— Jones *v.* Dunbar, 52 Nebr. 151, 71 N. W. 976.

Ohio.— Jones *v.* Leeds, 10 Ohio S. & C. Pl. Dec. 173, 7 Ohio N. P. 480.

Oregon.— See Brown *v.* Case, 41 Oreg. 221, 69 Pac. 43.

Vermont.— See Foster *v.* Foster, 56 Vt. 540.

United States.— See Wright *v.* Stanard, 30 Fed. Cas. No. 18,094, 2 Brock. 311.

94. *Alabama.*— Kilkey *v.* Pollock, 82 Ala. 503, 3 So. 99.

Florida.— Loring *v.* Dunning, 16 Fla. 119; Barrow *v.* Bailey, 5 Fla. 9.

Illinois.—McManus *v.* Mills, 19 Ill. App. 398.

Indiana.— Smith *v.* Selz, 114 Ind. 229, 16 N. E. 524.

Iowa.— Lyon *v.* Haddock, 59 Iowa 682, 13 N. W. 737; Strong *v.* Lawrence, 58 Iowa 55, 12 N. W. 74; Keeder *v.* Murphy, 43 Iowa 413. See also Wiltse *v.* Flack, 115 Iowa 51, 87 N. W. 729; Cox *v.* Collis, 109 Iowa 270, 80 N. W. 343; Hansen *v.* Gregory, (1897) 73 N. W. 478.

Kentucky.— Farmers' Bank *v.* Long, 7 Bush 337. See also Short *v.* Tinsley, 1 Metc. 397, 71 Am. Dec. 482.

Maryland.— Hull *v.* Deering, 80 Md. 424, 31 Atl. 416; Cone *v.* Cross, 72 Md. 102, 19 Atl. 391; Hinkle *v.* Wilson, 53 Md. 287; Worthington *v.* Bullitt, 6 Md. 172; Williams *v.* Savage Mfg. Co., 3 Md. Ch. 418.

Massachusetts.—See Norton *v.* Norton, 5 Cush. 524.

Mississippi.— Willis *v.* Gattman, 53 Miss. 721.

Nebraska.— See Omaha Brewing Assoc. *v.* Zeller, 4 Nebr. (Unoff.) 198, 93 N. W. 762.

New Jersey.— Gnichtel *v.* Jewell, (Ch. 1898) 41 Atl. 227 [*affirmed* in 59 N. J. Eq. 651, 44 Atl. 1099]; Muirheid *v.* Smith, 35 N. J. Eq. 303. See also Withrow *v.* Warner, 56 N. J. Eq. 795, 35 Atl. 1057, 40 Atl. 721, 67 Am. St. Rep. 501.

New York.— Van Wyck *v.* Baker, 16 Hun 168; Bigelow *v.* Ayrault, 46 Barb. 143; Boyd *v.* Dunlap, 1 Johns. Ch. 478. See also Robinson *v.* Stewart, 10 N. Y. 189.

North Carolina.— See McCanless *v.* Reynolds, 74 N. C. 301.

South Carolina.—McMeekin *v.* Edmunds, 1 Hill Eq. 288, 26 Am. Dec. 203.

Vermont.— Foster *v.* Foster, 56 Vt. 540. See also Church *v.* Chapin, 35 Vt. 223.

Virginia.— See Rixey *v.* Deitrick, 85 Va. 42, 6 S. E. 615.

Wisconsin.— Appleton First Nat. Bank *v.* Bertschy, 52 Wis. 438, 9 N. W. 534.

United States.— Wright *v.* Stanard, 30 Fed. Cas. No. 18,094, 2 Brock. 311. See also Clements *v.* Nicholson, 6 Wall. 299, 18 L. ed. 786.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 323.

95. Baldwin *v.* Short, 125 N. Y. 553, 26 N. E. 928 [*affirming* 54 Hun 473, 7 N. Y. Suppl. 717]; Sands *v.* Codwise, 4 Johns. (N. Y.) 536, 4 Am. Dec. 305; Boyd *v.* Dunlap, 1 Johns. Ch. (N. Y.) 478. See also Loring *v.* Dunning, 16 Fla. 119; Farmers' Bank *v.* Long, 7 Bush (Ky.) 337. And see *supra*, VII, C; *infra*, VIII, C; XIII, A, 4, a, (III), (A), (2).

96. *Alabama.*— Harris *v.* Russell, 93 Ala. 59, 9 So. 541; Tatum *v.* Hunter, 14 Ala. 557.

Illinois.— Oakford *v.* Dunlap, 63 Ill. App. 498.

Indiana.— See Reagan *v.* Chicago First Nat. Bank, 157 Ind. 623, 61 N. E. 575, 62 N. E. 701.

Missouri.—Plattsburg First Nat. Bank *v.* Fry, 168 Mo. 492, 68 S. W. 348; National Tube Works Co. *v.* Ring Refrigerating, etc., Co., 118 Mo. 365, 22 S. W. 947; State *v.* Hope, 102 Mo. 410, 14 S. W. 985; Haydon *v.* Alkire Grocery Co., 88 Mo. App. 241; Webb City Lumber Co. *v.* Victor Min. Co., 78 Mo. App. 676; Ball *v.* O'Neill, 64 Mo. App. 388; Cordes *v.* Straszer, 8 Mo. App. 61. See also Mansur, etc., Implement Co. *v.* Jones, 143 Mo. 253, 45 S. W. 41.

New York.—Levy *v.* Hamilton, 68 N. Y. App Div. 277, 74 N. Y. Suppl. 159; Shaffer *v.* Martin, 25 N. Y. App. Div. 501, 49 N. Y. Suppl. 853.

Vermont.— Dow *v.* Taylor, 71 Vt. 337, 45 Atl. 220, 76 Am. St. Rep. 775.

Canada.— Totten *v.* Douglas, 15 Grant Ch. (U. C.) 126; Commercial Bank *v.* Wilson,

void;[97] and where there is no proof of actual fraud,[98] and a part of the consideration which is divisible[99] is fair and legal,[1] it will be upheld to that extent.[2] Where a mortgage or deed of trust is made to secure a number of debts to different creditors, each acting for himself and knowing nothing of the claims or intention of the others, although some of such debts are feigned and fraudulent, it will be sustained for the benefit of the true creditors, but as to the fraudulent debts it will be avoided.[3] If, however, a conveyance is made or a judgment confessed to secure indebtedness to one creditor, and a part of such indebtedness is fraudulent, such conveyance or judgment is void *in toto* because the creditor necessarily participates in the fraud.[4]

2. USURY. A debtor may pay or secure to be paid a debt which he might

14 Grant Ch. (U. C.) 473, 3 Grant Err. & App. (U. C.) 257. See also Campbell *v.* Patterson, 21 Can. Sup. Ct. 645.

97. Matz *v.* Arick, 76 Conn. 388, 56 Atl. 630; Columbia Sav. Bank *v.* Winn, 132 Mo. 80, 33 S. W. 457. See also Seiler *v.* Walz, 100 Ky. 105, 29 S. W. 338, 31 S. W. 729, 17 Ky. L. Rep. 301; Stokoe *v.* Cowan, 29 Beav. 637, 7 Jur. N. S. 901, 4 L. T. Rep. N. S. 695, 9 Wkly. Rep. 801, 54 Eng. Reprint 775.

Additional invalid consideration.— When a full and adequate consideration is paid upon a sale of goods made without any actual intention of defrauding creditors, the sale is not to be deemed fraudulent because a farther distant consideration is added, which of itself and standing alone would be insufficient and constructively fraudulent as to creditors. Albee *v.* Webster, 16 N. H. 362.

98. Coley *v.* Coley, 14 N. J. Eq. 350; Appleton First Nat. Bank *v.* Bertschy, 52 Wis. 438, 9 N. W. 534.

99. Hawes *v.* Mooney, 39 Conn. 37.

1. Brown *v.* Kenner, 3 Mart. (La.) 270.

2. *Alabama.*— Gilkey *v.* Pollock, 82 Ala. 503, 3 So. 99.

Illinois.— See Dennehy *v.* Smith, 83 Ill. App. 656.

Indiana.— See Reed *v.* Thayer, 9 Ind. 157.

Iowa.— Morrell *v.* Sharp, (1898) 74 N. W. 749.

Kentucky.—See Williamson *v.* Blackburn, 82 S. W. 600, 26 Ky. L. Rep. 857.

New Jersey.—See Smith *v.* O'Brien, 57 N. J. L. 365, 41 Atl. 492.

New York.— McArthur *v.* Hoysradt, 11 Paige 495.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 323, 324. And see *supra*, VIII, B.

A conveyance not being intentionally fraudulent, but merely excessive, by reason of a mistake as to the rights of the grantee, will stand as security for the amount of the actual consideration. Rosenbaum *v.* Davis, (Tenn. Ch. App. 1898) 48 S. W. 706.

3. *Alabama.*— Anderson *v.* Hooks, 9 Ala. 704.

Arkansas.— Riggan *v.* Wolfe, 53 Ark. 537, 14 S. W. 922.

Illinois.—Hutmacher *v.* Anheuser-Busch Brewing Assoc., 71 Ill. App. 154.

Iowa.— Miller Co. *v.* Bracken, 104 Iowa 643, 74 N. W. 2.

Minnesota.—Henderson *v.* Kendrick, 72 Minn. 253, 75 N. W. 127.

Missouri.—Woodson *v.* Carson, 135 Mo. 521, 35 S. W. 1005, 37 S. W. 197.

New York.—Commercial Bank *v.* Sherwood, 162 N. Y. 310, 56 N. E. 834; Commercial Bank *v.* Bolton, 20 N. Y. App. Div. 70, 46 N. Y. Suppl. 734.

North Carolina.—Woodruff *v.* Bowles, 104 N. C. 197, 10 S. E. 482; Morris *v.* Pearson, 79 N. C. 253, 28 Am. Rep. 315 [*distinguishing* Hafner *v.* Irwin, 23 N. C. 490, and *overruling* Stone *v.* Marshall, 52 N. C. 300; Johnson *v.* Murchison, 60 N. C. 286]. See also Blair *v.* Brown, 116 N. C. 631, 21 S. E. 434.

Texas.— Pittman *v.* Rotan Grocery Co., 15 Tex. Civ. App. 676, 39 S. W. 1108; Linz *v.* Atchison, 14 Tex. Civ. App. 647, 38 S. W. 640, 47 S. W. 542; Ryder *v.* Hunt, 6 Tex. Civ. App. 238, 25 S. W. 314 [*overruling* Simon *v.* Ash, 1 Tex. Civ. App. 202, 20 S. W. 719].

Virginia.—See Lewis *v.* Caperton, 8 Gratt. 148.

West Virginia.— Zell Guano Co. *v.* Heatherly, 38 W. Va. 409, 18 S. E. 611; Cohn *v.* Ward, 36 W. Va. 516, 15 S. E. 140, 32 W. Va. 34, 9 S. E. 41.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 323, 324.

Contra.— Showman *v.* Lee, 86 Mich. 556, 49 N. W. 578; Adams *v.* Niemann, 46 Mich. 135, 8 N. W. 719.

4. *Alabama.*— Proskauer *v.* People's Sav. Bank, 77 Ala. 257.

Connecticut.—See Hawes *v.* Mooney, 39 Conn. 37.

Kansas.—Miami County Nat. Bank *v.* Barkalow, 53 Kan. 68, 35 Pac. 796. See also Marborough *v.* Lewis Cook Mfg. Co., 32 Kan. 636, 5 Pac. 181; Winstead *v.* Hulme, 32 Kan. 568, 4 Pac. 994; Wallach *v.* Wylie, 28 Kan. 138.

Michigan.— Clark *v.* Lee, 78 Mich. 221, 44 N. W. 260; King *v.* Hubbell, 42 Mich. 597, 4 N. W. 440.

Missouri.— Bates County Bank *v.* Gailey, 177 Mo. 181, 75 S. W. 646; Woodson *v.* Carson, 135 Mo. 521, 35 S. W. 1005, 37 S. W. 197; Boland *v.* Ross, 120 Mo. 208, 25 S. W. 524; Segar *v.* Thomas, 107 Mo. 635, 18 S. W. 33; State *v.* Hope, 102 Mo. 410, 14 S. W. 985; Cole *v.* Yansey, 62 Mo. App. 234; H. T. Simon-Gregory Dry Goods Co. *v.* McMahan, 61 Mo. App. 499; Gregory *v.* Sitlington, 54 Mo. App. 60.

New York.—Simons *v.* Goldbach, 56 Hun

defend as usurious; or if he has agreed to pay interest upon unpaid interest, he may pay or secure its payment, and if done in good faith the payment made or security taken cannot be set aside by his creditors.[5] The mere fact that a debtor has paid or agreed to pay in good faith and in the usual course of business more than the legal rate of interest is not enough to establish a fraud upon creditors;[6] and the mere refusal of the debtor to contest a usurious claim against him does not of itself amount to fraud; it is only where a usurious contract is entered into collusively as a scheme to hinder and delay creditors that the latter have any standing to contest a judgment entered upon such usurious contract.[7] A mortgage may be impeached for usury by subsequent creditors of the mortgagor;[8] but to enable them to do so, they must first show that the circumstances attending the transaction or the financial condition of the mortgagor was such as to raise a reasonable presumption of intended fraud, or of such a state of facts as would amount to fraud in law.[9]

D. Effect of Want of Consideration — 1. In General. A voluntary conveyance made with the actual intent to defraud either existing or subsequent creditors is void as to the creditors to whom such intent extends,[10] and the fact that the debtor still retains property sufficient to satisfy his creditors is no defense to an attack made upon the conveyance by existing creditors whom he intended to defraud.[11]

2. As to Existing Creditors — a. In General. There are decisions to the effect that a voluntary conveyance is, as to existing creditors, *per se* fraudulent, without regard to the grantor's intent or to the amount and value of the property retained by him;[12] but according to the great weight of authority the mere fact

204, 9 N. Y. Suppl. 359; Johnson *v.* Phillips, 2 N. Y. Suppl. 432.

Oklahoma.—Jaffray *v.* Wolf, 4 Okla. 303, 47 Pac. 496.

Texas.— Blair *v.* Finlay, 75 Tex. 210, 12 S. W. 983; Brasher *v.* Jamison, 75 Tex. 139, 12 S. W. 809.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 323, 324.

Consideration partly fictitious.— Where a part of the indebtedness of a father to his children, alleged as the consideration for a conveyance, was fictitious, the conveyance was declared void *in toto* as to the father's creditors, although he in fact owed a part of such consideration. Plattsburg First Nat. Bank *v.* Fry, 168 Mo. 492, 68 S. W. 348.

5. Mellen *v.* Banning, 72 Hun (N. Y.) 176, 25 N. Y. Suppl. 542. See also McConnell *v.* Barber, 86 Hun (N. Y.) 360, 33 N. Y. Suppl. 480; Mills *v.* Carnly, 1 Bosw. (N. Y.) 159.

6. Lennig's Appeal, 93 Pa. St. 301; Wheelock *v.* Wood, 93 Pa. St. 298. See also Spaulding *v.* Austin, 2 Vt. 555.

7. Lennig's Appeal, 93 Pa. St. 301; Wheelock *v.* Wood, 93 Pa. St. 298; Titusville Second Nat. Bank's Appeal, 85 Pa. St. 528. See also Scales *v.* Scott, 13 Cal. 76; Miller *v.* Clarke, 37 Iowa 325; Cahn *v.* Farmers', etc., Bank, 1 S. D. 237, 46 N. W. 185.

8. Building Assoc. *v.* O'Connor, 3 Phila. (Pa.) 453.

9. Lombaert *v.* Morris, 2 Del. Co. (Pa.) 457.

10. Churchill *v.* Wells, 7 Coldw. (Tenn.) 364; Billingsley *v.* Clelland, 41 W. Va. 234, 23 S. E. 812. See also Ernest *v.* Merritt, 107 Ga. 61, 32 S. E. 898; May *v.* Huntington, 66 Ga. 208; Westmoreland *v.* Powell, 59 Ga. 256; Johnson *v.* Jones, 79 Ind. 141; Le Herisse *v.* Hess, (N. J. Ch. 1904) 57 Atl. 808; Mead *v.* Combs, 19 N. J. Eq. 112; Marks *v.* Crow, 14 Oreg. 382, 13 Pac. 55; Corey *v.* Morrill, 71 Vt. 51, 42 Atl. 976.

11. *California.*— Los Angeles First Nat. Bank *v.* Maxwell, 123 Cal. 360, 55 Pac. 980, 69 Am. St. Rep. 64; Hager *v.* Shindler, 29 Cal. 47.

Illinois.— Phillips *v.* Kesterson, 154 Ill. 572, 39 N. E. 599.

Mississippi.—Edmunds *v.* Mister, 58 Miss. 765.

Nebraska.— Shreck *v.* Hanlon, 66 Nebr. 451, 92 N. W. 625; McIntyre *v.* Malone, 3 Nebr. (Unoff.) 159, 91 N. W. 246.

New York.—Fox *v.* Moyer, 54 N. Y. 125; Harding *v.* Elliott, 91 Hun 502, 36 N. Y. Suppl. 648.

Vermont.—Wilson *v.* Spear, 68 Vt. 145, 34 Atl. 429.

Compare Flannagan *v.* Donaldson, 85 Ind. 517.

12. *Alabama.*—Wood *v.* Potts, 140 Ala. 425, 37 So. 253; Guyton *v.* Terrell, 132 Ala. 66, 31 So. 83; Henderson *v.* Farley Nat. Bank, 123 Ala. 547, 26 So. 226, 82 Am. St. Rep. 140; Wooten *v.* Steele, 109 Ala. 563, 19 So. 972, 55 Am. St. Rep. 947; Ruse *v.* Bromberg, 88 Ala. 619, 7 So. 384; Early *v.* Owens, 68 Ala. 171; Anderson *v.* Anderson, 64 Ala. 403; Lockard *v.* Nash, 64 Ala. 385; Bibb *v.* Freeman, 59 Ala. 612; McAnally *v.* O'Neal, 56 Ala. 299; Crawford *v.* Kirksey, 55 Ala. 282, 28 Am. Rep. 702; Foote *v.* Cobb, 18 Ala. 585; High *v.* Nelms, 14 Ala. 350, 48 Am. Dec. 103; Moore *v.* Spence, 6 Ala. 506; Miller *v.* Thompson, 3 Port. 196. See also McClarin *v.* Anderson, 109 Ala. 571, 19 So. 982;

that a conveyance is voluntary raises at most only a presumption of fraud which may be rebutted. In determining whether such a conveyance is valid the amount of the grantor's indebtedness, the total value of his property, and the value of the part conveyed, are to be considered, and if it appears that the grantor retained property amply sufficient to pay all his debts, the conveyance is not invalid.[13] If,

Spencer *v.* Godwin, 30 Ala. 355; Gannard *v.* Eslava, 20 Ala. 732; Doe *v.* McKinney, 5 Ala. 719.

New Jersey.— Kinsey *v.* Feller, 64 N. J. Eq. 367, 51 Atl. 485; Hancock *v.* Elmer, 61 N. J. Eq. 558, 49 Atl. 140 [*affirmed* in 63 N. J. Eq. 802, 52 Atl. 1131]; Long Branch Banking Co. *v.* Dennis, 56 N. J. Eq. 549, 39 Atl. 689; Severs *v.* Dodson, 53 N. J. Eq. 633, 34 Atl. 7, 51 Am. St. Rep. 641; Merchants', etc., Transp. Co. *v.* Borland, 53 N. J. Eq. 282, 31 Atl. 272; Bouquet *v.* Heyman, 50 N. J. Eq. 114, 24 Atl. 266; Francis *v.* Lawrence, 48 N. J. Eq. 508, 22 Atl. 259; Gardner *v.* Kleinke, 46 N. J. Eq. 90, 18 Atl. 457; Aber *v.* Brant, 36 N. J. Eq. 116; City Nat. Bank *v.* Hamilton, 34 N. J. Eq. 158; Haston *v.* Castner, 31 N. J. Eq. 697; Budd *v.* Atkinson, 30 N. J. Eq. 530; Kuhl *v.* Martin, 26 N. J. Eq. 60; Phelps *v.* Morrison, 24 N. J. Eq. 195; Annin *v.* Annin, 24 N. J. Eq. 184; Morris Canal, etc., Co. *v.* Stearns, 23 N. J. Eq. 414; Smith *v.* Vreeland, 16 N. J. Eq. 198; Cook *v.* Johnson, 12 N. J. Eq. 51, 72 Am. Dec. 381. See also Palmer *v.* Martindell, 43 N. J. Eq. 90, 10 Atl. 802; Randall *v.* Vroom, 30 N. J. Eq. 353; Hecht *v.* Koegel, 25 N. J. Eq. 135; Sayre *v.* Fredericks, 16 N. J. Eq. 205; Coley *v.* Coley, 14 N. J. Eq. 350.

New York.— Reade *v.* Livingston, 3 Johns. Ch. 481, 8 Am. Dec. 520. This case, which seems to be the leading American one on the subject, was subsequently overruled (Seward *v.* Jackson, 8 Cow. 406), and the contrary rule is now established by statute (see Holden *v.* Burnham, 63 N. Y. 74).

South Carolina.— Woody *v.* Dean, 24 S. C. 499; Beckham *v.* Secrest, 2 Rich. Eq. 54; Blake *v.* Jones, 1 Bailey Eq. 141, 21 Am. Dec. 530. See also Hudnall *v.* Teasdall, 1 McCord 227, 10 Am. Dec. 671. The only qualification to the general rule is that where the indebtedness is slight, as for the current expenses of the family, or the debts are inconsiderable as compared with the value of the donor's estate, and the creditor by his delay or laches has allowed the reserved estate to be wasted — in such case the conveyance will be held valid. Richardson *v.* Rhodus, 14 Rich. 95; Hudnal *v.* Wilder, 4 McCord 294, 17 Am. Dec. 744. See also Steinmeyer *v.* Steinmeyer, 55 S. C. 9, 33 S. E. 15; Blakeney *v.* Kirkley, 2 Nott & M. 544.

United States.— See Hopkirk *v.* Randolph, 12 Fed. Cas. No. 6,698, 2 Brock. 132.

England.— Stileman *v.* Ashdown, Ambl. 13, 27 Eng. Reprint 7, 2 Atk. 481, 26 Eng. Reprint 688; White *v.* Sansom, 3 Atk. 410, 26 Eng. Reprint 1037; Fitzer *v.* Fitzer, 2 Atk. 511, 26 Eng. Reprint 708; Russell *v.* Hammond, 1 Atk. 13, 26 Eng. Reprint 9; Shears *v.* Rogers, 3 B. & Ad. 362, 1 L. J. K. B. 89, 23 E. C. L. 164; Doe *v.* Martyr, 1 B. & P. N. R. 332, 8 Rev. Rep. 821; Gardiner *v.* Painter, Cas. t. King 65, 25 Eng. Reprint 225; Doe *v.* Manning, 9 East 59, 9 Rev. Rep. 503; Tonkins *v.* Ennis, 1 Eq. Cas. Abr. 334, 21 Eng. Reprint 1084; Hill *v.* Exeter, 2 Taunt. 69, 11 Rev. Rep. 527; Nunn *v.* Wilsmore, 8 T. R. 521, 5 Rev. Rep. 434; *Ex p.* Berry, 19 Ves. Jr. 218, 34 Eng. Reprint 499; Buckle *v.* Mitchell, 18 Ves. Jr. 100, 11 Rev. Rep. 155, 34 Eng. Reprint 255; Townshend *v.* Windham, 2 Ves. I, 28 Eng. Reprint 1; Beaumont *v.* Thorpe, 1 Ves. 27, 27 Eng. Reprint 869. See also Harman *v.* Richards, 10 Hare 81, 22 L. J. Ch. 1066, 44 Eng. Ch. 78.

Canada.— Irwin *v.* Freeman, 13 Grant Ch. (U. C.) 465.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 186, 188.

13. *Arkansas.*— De Prato *v.* Jester, (1892) 20 S. W. 807; Chambers *v.* Sallie, 29 Ark. 407; Bertrand *v.* Elder, 23 Ark. 494; Dodd *v.* McCraw, 8 Ark. 83, 46 Am. Dec. 301. See also Smith *v.* Yell, 8 Ark. 470.

Colorado.— Fox *v.* Lipe, 14 Colo. App. 258, 59 Pac. 850.

Connecticut.— Fishel *v.* Motta, 76 Conn. 197, 56 Atl. 558.

Delaware.— Russell *v.* Thatcher, 2 Del. Ch. 320.

District of Columbia.— Edwards *v.* Entwistle, 2 Mackey 43; Offutt *v.* King, 1 MacArthur 312.

Florida.— McKeown *v.* Allen, 37 Fla. 490, 20 So. 556; Claflin *v.* Ambrose, 37 Fla. 78, 19 So. 628.

Georgia.— Ernest *v.* Merritt, 107 Ga. 61, 32 S. E. 898; Brown *v.* Spivey, 53 Ga. 155; Weed *v.* Davis, 25 Ga. 684. See also Lytle *v.* Black, 107 Ga. 386, 33 S. E. 414.

Illinois.— Harting *v.* Jockers, 136 Ill. 627, 27 N. E. 188, 29 Am. St. Rep. 341; Higgins *v.* White, 118 Ill. 619, 8 N. E. 808; Bittinger *v.* Kasten, 111 Ill. 260; Merrell *v.* Johnson, 96 Ill. 224; Mathews *v.* Jordan, 88 Ill. 602; Patrick *v.* Patrick, 77 Ill. 555; Gridley *v.* Watson, 53 Ill. 186; Moritz *v.* Hoffman, 35 Ill. 553; Smith *v.* J. A. Somers Mfg. Co., 69 Ill. App. 230; Dillman *v.* Nadelhoffer, 56 Ill. App. 517; Uhre *v.* Melum, 17 Ill. App. 182; Koster *v.* Hiller, 4 Ill. App. 21; Russell *v.* Fanning, 2 Ill. App. 632 [*affirmed* in 94 Ill. 386]. See also Head *v.* Harding, 166 Ill. 353, 46 N. E. 890 [*affirming* 62 Ill. App. 302]; Hitt *v.* Ormsbee, 12 Ill. 166; Choteau *v.* Jones, 11 Ill. 300, 50 Am. Dec. 460; Sammis *v.* Poole, 89 Ill. App. 118 [*affirmed* in 188 Ill. 396, 58 N. E. 934]; Aultman *v.* Huddlestun, 31 Ill. App. 556.

Iowa.— Triplett *v.* Graham, 58 Iowa 135, 12 N. W. 143; Gwyer *v.* Figgins, 37 Iowa 517; Stewart *v.* Rogers, 25 Iowa 395, 95 Am.

however, the grantor is at the time of the conveyance insolvent or nearly so, the

Dec. 794; Gardiner *v.* Baker, 25 Iowa 343; Carson *v.* Foley, 1 Iowa 524. See also Eighmy *v.* Brock, 126 Iowa 535, 102 N. W. 444; Cloud *v.* Malvin, 108 Iowa 52, 75 N. W. 645, 78 N. W. 791, 45 L. R. A. 209.

Kansas.—Chantland *v.* Midland Nat. Bank, 66 Kan. 549, 72 Pac. 230; Tootle *v.* Caldwell, 30 Kan. 125, 1 Pac. 329.

Maine.— Spear *v.* Spear, 97 Me. 454, 98 Atl. 1106; Stevens *v.* Robinson, 72 Me. 381 [*overruling* McLean *v.* Weeks, 65 Me. 411; Wescott *v.* McDonald, 22 Me. 402]; French *v.* Holmes, 67 Me. 186 (holding that the wife stands in no worse relation to a gift from her husband as to creditors than would any other donee from him of the same gift); Grant *v.* Ward, 64 Me. 239; Neil *v.* Tenney, 42 Me. 322; Emery *v.* Vinall, 26 Me. 295. See also Borneman *v.* Sidlinger, 15 Me. 429, 33 Am. Dec. 626.

Maryland.— Cristopher *v.* Cristopher, 64 Md. 583, 3 Atl. 296; Grover, etc., Sewing Mach. Co. *v.* Radcliff, 63 Md. 496; Goodman *v.* Wineland, 61 Md. 449; Warner *v.* Dove, 33 Md. 579; Ellinger *v.* Crowl, 17 Md. 361; Dorn *v.* Bayer, 16 Md. 144; Baxter *v.* Sewell, 3 Md. 334; Worthington *v.* Shipley, 5 Gill 449. See also Chatterton *v.* Mason, 86 Md. 236, 37 Atl. 960; Allein *v.* Sharp, 7 Gill & J. 96; Atkinson *v.* Phillips, 1 Md. Ch. 507; Kipp *v.* Hanna, 2 Bland 26; Hoye *v.* Penn, 1 Bland 28.

Massachusetts.— Matthews *v.* Thompson, 186 Mass. 14, 71 N. E. 93, 104 Am. St. Rep. 550, 66 L. R. A. 421; Gray *v.* Chase, 184 Mass. 444, 68 N. E. 676; Jaquith *v.* Massachusetts Baptist Convention, 172 Mass. 439, 52 N. E. 544; Clark *v.* McMahon, 170 Mass. 911, 48 N. E. 939; Cook *v.* Holbrook, 146 Mass. 66, 14 N. E. 943; Blake *v.* Sawin, 10 Allen 340; Lerow *v.* Wilmarth, 9 Allen 382. See also Stratton *v.* Edwards, 174 Mass. 374, 54 N. E. 886; Green *v.* Tanner, 8 Metc. 441.

Michigan.— Wooden *v.* Wooden, 72 Mich. 347, 40 N. W. 460.

Minnesota.— See Blake *v.* Boisjoli, 51 Minn. 296, 53 N. W. 637; Filley *v.* Register, 4 Minn. 391, 77 Am. Dec. 522.

Mississippi.— Wilson *v.* Kohlheim, 46 Miss. 346; Young *v.* White, 25 Miss. 146. See also Cowen *v.* Alsop, 51 Miss. 158; Pennington *v.* Seal, 49 Miss. 518; Warren *v.* Brown, 25 Miss. 66, 57 Am. Dec. 191. But *compare* Swayze *v.* Doe, 13 Sm. & M. 317; Bogard *v.* Gardley, 4 Sm. & M. 302.

Missouri.— Bohannon *v.* Combs, 79 Mo. 305; Payne *v.* Stanton, 59 Mo. 158; Patten *v.* Casey, 57 Mo. 118; Lane *v.* Kingsbury, 11 Mo. 402; American Nat. Bank *v.* Thornburrow, 109 Mo. App. 639, 83 S. W. 771; Farmers, etc., Bank *v.* Price, 41 Mo. App. 291. See also Fehlig *v.* Busch, 165 Mo. 144, 65 S. W. 542; Lander *v.* Ziehr, 150 Mo. 403, 51 S. W. 742, 73 Am. St. Rep. 456; Ridenour-Baker Grocery, etc., Co. *v.* Monroe, 142 Mo. 165, 43 S. W. 633; Hoffman *v.* Nolte, 127 Mo. 120, 29 S. W. 1006; Lionberger *v.* Baker, 88 Mo. 447; Buckner *v.* Stine, 48 Mo. 407; Hickey *v.* Ryan, 15 Mo. 63; Bird *v.* Bolduc, 1 Mo. 701; Boyle *v.* Boyle, 6 Mo. App. 594.

Nebraska.— Smith *v.* Schmitz, 10 Nebr. 600, 7 N. W. 329. See also Light *v.* Kennard, 11 Nebr. 129, 7 N. W. 539.

New Hampshire.— Gove *v.* Campbell, 62 N. H. 401. See also Drew *v.* Rust, 36 N. H. 335.

New York.— See Van Wyck *v.* Seward, 6 Paige 62.

Ohio.— Crumbaugh *v.* Kugler, 2 Ohio St. 373; Miller *v.* Wilson, 15 Ohio 108; Godell *v.* Taylor, Wright 82. See also Johnson *v.* Burnside, 8 Ohio S. & C. Pl. Dec. 412, 7 Ohio N. P. 74.

Oregon.— Elfelt *v.* Hinch, 5 Oreg. 255. See also Robson *v.* Hamilton, 41 Oreg. 239, 69 Pac. 651.

Pennsylvania.— Mullen *v.* Wilson, 44 Pa. St. 413, 84 Am. Dec. 461; *In re* Greenfield, 14 Pa. St. 489; Mateer *v.* Hissim, 3 Penr. & W. 160; Thomson *v.* Dougherty, 12 Serg. & R. 448. See also Kelly's Appeal, 77 Pa. St. 232; Updegraff *v.* Rowland, 52 Pa. St. 317; Forsyth *v.* Matthews, 14 Pa. St. 100, 53 Am. Dec. 522; Chambers *v.* Spencer, 5 Watts 404; Bankard *v.* Shaw, 23 Pa. Co. Ct. 561, 16 Montg. Co. Rep. 137.

Tennessee.— Conway *v.* Brown, 5 Heisk. 237. See also Walter *v.* Hartman, (1902) 67 S. W. 476.

Texas.— Van Bibber *v.* Mathis, 52 Tex. 406.

Vermont.— Wilson *v.* Spear, 68 Vt. 145, 34 Atl. 429.

Wisconsin.— Probert *v.* Sonju, 110 Wis. 181, 85 N. W. 647.

United States.— Lloyd *v.* Fulton, 91 U. S. 479, 23 L. ed. 363; Hinde *v.* Longworth, 11 Wheat. 199, 6 L. ed. 454; Wiswell *v.* Jarvis, 9 Fed. 84; Magniac *v.* Thompson, 16 Fed. Cas. No. 8,956, Baldw. 344 [*affirmed* in 7 Pet. 348, 8 L. ed. 709]. See also Beecher *v.* Clarke, 3 Fed. Cas. No. 1,223, 12 Blatchf. 256 [*affirmed* in 154 U. S. 631, 14 S. Ct. 1184, 24 L. ed. 705]; Hopkirk *v.* Randolph, 12 Fed. Cas. No. 6,698, 2 Brock. 132; Polk County Nat. Bank *v.* Scott, 132 Fed. 897, 66 C. C. A. 51.

England.— *In re* Lane-Fox, [1900] 2 Q. B. 508, 69 L. J. Q. B. 722, 83 L. T. Rep. N. S. 176, 7 Manson 295, 48 Wkly. Rep. 650; Townsend *v.* Westacott, 2 Beav. 340, 4 Jur. 187, 9 L. J. Ch. 241, 17 Eng. Ch. 340, 48 Eng. Reprint 1212; Doe *v.* Routledge, 2 Cowp. 705; Cadogan *v.* Kennett, 2 Cowp. 432; Gale *v.* Williamson, 10 L. J. Exch. 446, 8 M. & W. 405; Sedgwick *v.* Place, 25 L. T. Rep. N. S. 307, 5 Nat. Bankr. Reg. 168; Sagitary *v.* Hide, 2 Vern. Ch. 44, 23 Eng. Reprint 639. See also Freeman *v.* Pope, L. R. 5 Ch. 538, 39 L. J. Ch. 689, 23 L. T. Rep. N. S. 208, 18 Wkly. Rep. 906 [*affirming* L. R. 9 Eq. 206, 39 L. J. Ch. 148, 21 L. T. Rep. N. S. 816, 18 Wkly. Rep. 399, and *explaining* Spirett *v.* Willows, 3 De G. J. & S. 293, 11 Jur. N. S. 70, 34 L. J. Ch. 365, 11 L. T. Rep.

conveyance will generally be set aside.[14] And the same is true where the conveyance embraces all or most of the debtor's property, leaving him without the

N. S. 614, 13 Wkly. Rep. 329]; Kent *v.* Riley, L. R. 14 Eq. 190, 41 L. J. Ch. 569, 27 L. T. Rep. N. S. 263, 20 Wkly. Rep. 852.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 186, 188.

The test of the validity of a voluntary transfer, according to this view, is whether sufficient property remained to pay the debts.

Illinois.— Marmon *v.* Harwood, 124 Ill. 104, 16 N. E. 236, 7 Am. St. Rep. 345 (property retained must be actually sufficient and not merely apparently so); Lythe *v.* Scott, 2 Ill. App. 646.

Maine.— Jose *v.* Hewitt, 50 Me. 248.

Minnesota.— Camp *v.* Thompson, 25 Minn. 175.

Nebraska.— See Adler, etc., Clothing Co. *v.* Hellman, 55 Nebr. 266, 75 N. W. 877.

New Hampshire.— Abbott *v.* Tenney, 18 N. H. 109.

New York.— See Spotten *v.* Keeler, 12 N. Y. St. 385.

North Carolina.— See Houston *v.* Bogle, 32 N. C. 496.

If there is a reasonable doubt as to its sufficiency, the transaction will be set aside in the interest of creditors, as fraudulent. Ketcham *v.* Hallock, 55 Ill. App. 632; Williams *v.* Banks, 11 Md. 198.

Property subject to execution.— A voluntary conveyance by one who at the time of making it had no other property subject to execution may be avoided by his creditors as fraudulent. Williams *v.* Osborne, 95 Ind. 347; Iles *v.* Cox, 83 Ind. 577.

Property readily accessible.— The property reserved must not only be ample, but must be readily accessible to the creditors. Ames *v.* Dorroh, 76 Miss. 187, 23 So. 768, 71 Am. St. Rep. 522.

Effect of subsequent payment of debts.— "Where a debtor, subsequent to his voluntary deed, pays all his debts, this rebuts the evidence of a fraudulent purpose alone from the voluntary conveyance." Levering *v.* Norvell, 9 Baxt. (Tenn.) 176, 184. See also Barbour *v.* Connecticut Mut. L. Ins. Co., 61 Conn. 240, 23 Atl. 154.

14. *California.*— Gray *v.* Brunold, 140 Cal. 615, 74 Pac. 303, by statute. See also Wolters *v.* Rossi, 126 Cal. 644, 59 Pac. 143.

Connecticut.— Trumbull *v.* Hewitt, 62 Conn. 448, 26 Atl. 350.

Florida.— McKeown *v.* Allen, 37 Fla. 490, 20 So. 556.

Georgia.— Cothran *v.* Forsyth, 68 Ga. 560.

Illinois.— See Ramsey *v.* Nichols, 73 Ill. App. 643.

Indiana.— See Farmers' Bank *v.* Frankfort First Nat. Bank, 30 Ind. App. 520, 66 N. E. 503.

Kentucky.— See Lowry *v.* Fisher, 2 Bush 70, 92 Am. Dec. 475.

Maine.— Robinson *v.* Clark, 76 Me. 493; Stevens *v.* Robinson, 72 Me. 381 [*overruling* McLean *v.* Weeks, 65 Me. 611; Wescott *v.* McDonald, 22 Me. 407]; French *v.* Holmes, 67 Me. 186.

Maryland.— Myers *v.* King, 42 Md. 65.

Massachusetts.— Gray *v.* Chase, 184 Mass. 444, 68 N. E. 676.

Michigan.— Beach *v.* White, Walk. 495.

Minnesota.— Knatvold *v.* Wilkinson, 83 Minn. 265, 86 N. W. 99.

Mississippi.— Catchings *v.* Manlove, 39 Miss. 655.

Missouri.— Needles *v.* Ford, 167 Mo. 495, 67 S. W. 240; White *v.* McPheeters, 75 Mo. 286; Reppy *v.* Reppy, 46 Mo. 571; Gamble *v.* Johnson, 9 Mo. 605. See also St. Georges Church Soc. *v.* Branch, 120 Mo. 226, 25 S. W. 218; Bohannon *v.* Combs, 79 Mo. 305.

New Hampshire.— Pomeroy *v.* Bailey, 43 N. H. 118.

New York.— See Warren *v.* Wilder, 12 N. Y. St. 757.

North Carolina.— See Hallyburton *v.* Slagle, 130 N. C. 482, 41 S. E. 877; Burton *v.* Farinholt, 86 N. C. 260; Morgan *v.* McLelland, 14 N. C. 82.

Ohio.— See Humbert *v.* Cincinnati M. E. Church, Wright 213.

Pennsylvania.— Carl *v.* Smith, 8 Phila. 569.

Texas.— Van Bibber *v.* Mathis, 52 Tex. 406.

Utah.— Gustin *v.* Mathews, 25 Utah 168, 70 Pac. 402; Ogden State Bank *v.* Barker, 12 Utah 13, 40 Pac. 765.

Virginia.— See Chamberlayne *v.* Temple, 2 Rand. 384, 14 Am. Dec. 786.

England.— Taylor *v.* Coenen, 1 Ch. D. 636, 34 L. T. Rep. N. S. 18; Lush *v.* Wilkinson, 5 Ves. Jr. 384, 31 Eng. Reprint 642.

Compare Mitchell *v.* Adams, (Tenn. Ch. App. 1898) 52 S. W. 316.

What constitutes insolvency.— "Wherever the amount of the property so closely approximates the amount of the liabilities that the conveyance would have a direct tendency to impair the rights of creditors if they should attempt to force collection by judicial process, the debtor is adjudged insolvent. The better way to ascertain the real worth of the property is to look at the results, rather than at the evidence of witnesses, concerning value. If, in the end, as the result of the situation, it turns out that the debtor is insolvent, and owes more than he is able to pay, this is taken as sufficient evidence of his insolvency as to existing creditors to permit them to attack a voluntary conveyance. The property which must remain to the debtor after such transfer must be, as some of the cases put it, clearly and amply sufficient to satisfy his debts; and it is enough in such a case to show that the grantor was embarrassed, and in doubtful circumstances, and his solvency or insolvency may be judged by what happens." Rose *v.* Dunklee, 12 Colo. App. 403, 56 Pac. 342, 345 [*quoted* in Brown *v.* Case, 41 Oreg. 221, 69 Pac. 43]. See also *supra*, VI, B, 3.

"**Actual insolvency** is not necessary in or-

means of paying his debts.[15] It has been held that the true rule by which the fraudulency or fairness of a voluntary conveyance is to be ascertained is founded on comparative indebtedness; or in other words, on the pecuniary ability of the grantor at the time of the conveyance to withdraw the amount of the donation from his estate without hazard to his creditors, or in any material degree lessening their prospects of payment.[16] An actual intent to defraud existing creditors is not necessary to render a voluntary conveyance void as to them;[17] but even where there is no fraudulent intent, if the grantor was considerably indebted and embarrassed at the time, or if the nature of the gift was unreasonable, considering the condition in life of the grantor, disproportioned to his property, and left a scanty

der to render a voluntary conveyance void; for if a person, largely indebted, makes a voluntary conveyance, and shortly afterwards becomes insolvent, that is enough to set aside the conveyance as fraudulent." Hauk *v.* Van Ingen, 196 Ill. 20, 28, 63 N. E. 705 [*affirming* 97 Ill. App. 642, and *citing* Morrill *v.* Kilner, 113 Ill. 318; Patterson *v.* McKinney, 97 Ill. 41; Moritz *v.* Hoffman, 35 Ill. 553]. See *supra*, VI, B, 3.

Subsequent insolvency.— The mere fact that a grantor subsequently becomes insolvent, if his insolvency is not produced by causes existing at the time of the conveyance, will not affect it. American Nat. Bank *v.* Thornburrow, 109 Mo. App. 639, 83 S. W. 771. See also Johnson *v.* Murphy, 180 Mo. 597, 79 S. W. 909; Fehlig *v.* Busch, 165 Mo. 144, 65 S. W. 542; Walsh *v.* Ketchum, 84 Mo. 427. See *supra*, VI, B, 4.

Belief as to solvency.— In the case of a voluntary deed the grantor's belief as to his solvency is immaterial. Brown *v.* Case, 41 Oreg. 221, 69 Pac. 43.

15. *Arkansas.*— Dennis *v.* Ball-Warren Commission Co., (1903) 77 S. W. 903.

Kentucky.— See Heiatt *v.* Barnes, 5 Dana 219.

Maine.— Spear *v.* Spear, 97 Me. 498, 54 Atl. 1106.

Michigan.—Cicotte *v.* Gagnier, 2 Mich. 381.

Missouri.—Woodson *v.* Poole, 19 Mo. 340; Farmers', etc., Bank *v.* Price, 41 Mo. App. 291.

Texas.—Donnebaum *v.* Tinsley, 54 Tex. 362; Reynolds *v.* Lansford, 16 Tex. 286.

Vermont.— Farmers' Nat. Bank *v.* Thomson, 74 Vt. 442, 52 Atl. 961; Durkee *v.* Mahoney, 1 Aik. 116.

United States.—Yardley *v.* Torr, 67 Fed. 857; Schlesinger *v.* Kansas City, etc., R. Co., 39 Fed. 741; Alexander *v.* Todd, 1 Fed. Cas. No. 175, 1 Bond 175.

England.— See *In re* Ridler, 22 Ch. D. 74, 47 J. P. 479, 52 L. J. Ch. 343, 48 L. T. Rep. N. S. 396, 31 Wkly. Rep. 93.

See *supra*, VI, B, 3.

Recital of consideration.— A voluntary conveyance by which a debtor deprives himself of all his property is *prima facie* fraudulent and void as to the creditor, and the grantee is not protected by a recital of consideration in the deed. Snyder *v.* Free, 114 Mo. 360, 21 S. W. 847.

Where one in debt conveys substantially the whole of his estate to his brother, ostensibly in satisfaction of his debt to the latter, in a suit by creditors to set aside said deed for fraud, it is incumbent upon the grantee to establish by satisfactory proof that there was a valuable and adequate consideration for the deed. And unless he can give a clear and precise account of the items constituting the alleged debt, a fraudulent intent will be inferred. Marks *v.* Crow, 14 Oreg. 382, 13 Pac. 55.

16. *Connecticut.*— Abbe *v.* Newton, 19 Conn. 20; Whittlesey *v.* McMahon, 10 Conn. 137, 26 Am. Dec. 389; Salmon *v.* Bennett, 1 Conn. 525, 7 Am. Dec. 237.

Illinois.— Emerson *v.* Bemis, 69 Ill. 537.

Kansas.— See Miller *v.* Wilkerson, 10 Kan. App. 576, 62 Pac. 253.

Maine.—Whitehouse *v.* Bolster, 95 Me. 458, 50 Atl. 240.

Maryland.— Kipp *v.* Hanna, 2 Bland 33.

Pennsylvania.—Kelly's Appeal, 77 Pa. St. 232; Townsend *v.* Maynard, 45 Pa. St. 198; Clark *v.* Depew, 25 Pa. St. 509, 64 Am. Dec. 717; Wilson *v.* Hawser, 12 Pa. St. 109.

Virginia.— See Wilson *v.* Buchanan, 7 Gratt. 334.

United States.—Washington Cent. Nat. Bank *v.* Hume, 128 U. S. 195, 9 S. Ct. 41, 32 L. ed. 370; Kehr *v.* Smith, 20 Wall. 31, 22 L. ed. 213; Hinde *v.* Longworth, 11 Wheat. 199, 6 L. ed. 454.

England.— See Cornish *v.* Clark, L. R. 14 Eq. 184, 42 L. J. Ch. 14, 26 L. T. Rep. N. S. 494, 20 Wkly. Rep. 897; Denison *v.* Tattersall, 18 L. T. Rep. N. S. 303.

Canada.— Goodwin *v.* Williams, 5 Grant Ch. (U. C.) 539 [*citing* French *v.* French, 6 De G. M. & G. 95, 2 Jur. N. S. 169, 25 L. J. Ch. 612, 4 Wkly. Rep. 139, 55 Eng. Ch. 74, 43 Eng. Reprint 1166.

17. *Connecticut.*— Quinnipiac Brewing Co. *v.* Fitzgibbons, 71 Conn. 80, 40 Atl. 913.

Maine.— Whitehouse *v.* Bolster, 95 Me. 458, 50 Atl. 2.

Michigan.— Walker *v.* Cady, 106 Mich. 21, 63 N. W. 1005; Felker *v.* Chubb, 90 Mich. 24, 51 N. W. 110; Matson *v.* Melchor, 42 Mich. 477, 4 N. W. 200; Fellers *v.* Smith, 40 Mich. 689.

Missouri.— McCollum *v.* Crain, 101 Mo. App. 522, 74 S. W. 650; Headley Grocer Co. *v.* Walker, 69 Mo. App. 553; Loehr *v.* Murphy, 45 Mo. App. 519.

Ohio.—Kennedy *v.* Dodge, 19 Ohio Cir. Ct. 425, 10 Ohio Cir. Dec. 360.

United States.—Parish *v.* Murphree, 13 How. 92, 14 L. ed. 65.

Motive immaterial.— "The motive which

provision for the payment of his debts, then such conveyance will be void as to creditors.[18]

b. Conveyance in Performance of Prior Verbal Promise. The validity of a voluntary conveyance, although it is executed in compliance with a previous verbal promise, must depend upon the financial condition of the grantor at the time of executing the conveyance, a gift of land merely verbal being wholly inoperative until a conveyance is executed; and in a jurisdiction where a voluntary conveyance is invalid *per se* as to existing creditors, it will be set aside at their instance, although at the time of making the promise the grantor was not indebted.[19]

c. Statutory Provisions. In some jurisdictions this question has been the subject of express statutory enactment,[20] some of which statutes make a voluntary conveyance always fraudulent as to existing creditors,[21] while others pro-

prompts the person to make the gift is wholly immaterial. If the grantor or donor is indebted at the time, and the future event proves that it is necessary to resort to the property attempted to be conveyed away by a voluntary deed, for the purpose of paying such indebtedness, the voluntary conveyance will be set aside, and the property subjected to the payment of such indebtedness, upon the ground that it would otherwise operate as a legal fraud upon the rights of creditors, even though it might be perfectly clear that the transaction was entirely free from any trace of moral fraud." Thomson *v.* Crane, 73 Fed. 327, 330.

18. *Arkansas.*— Wright *v.* Campbell, 27 Ark. 637; Smith *v.* Yell, 8 Ark. 470, 475 (where the court said: "The correct distinction seems to be, that in cases where the father does not retain a sufficiency to meet all demands existing against him, the gift is *per se* fraudulent; but where he does so retain sufficient to satisfy all his just debts, it is not in itself a fraud, but requires proof *aliunde* to establish it"); Dodd *v.* McCraw, 8 Ark. 83, 46 Am. Dec. 301.

Connecticut.— Salmon *v.* Bennett, 1 Conn. 525, 7 Am. Dec. 237.

Illinois.— Stevens *v.* Dillman, 86 Ill. 233; Austin *v.* Morrison First Nat. Bank, 47 Ill. App. 224 (holding that a voluntary conveyance by an insolvent to his son will be presumed fraudulent as to creditors, without regard to the intent of the parties); Russell *v.* Fanning, 2 Ill. App. 632.

Indiana.— Burtch *v.* Elliott, 3 Ind. 99.

Iowa.— Gameet *v.* Simmons, 103 Iowa 163, 72 N. W. 444.

Kentucky.— Trimble *v.* Ratcliff, 9 B. Mon. 511; Adams *v.* Branch, 3 Ky. L. Rep. 178.

Maine.— Wheelden *v.* Wilson, 44 Me. 11.

Maryland.— Benson *v.* Benson, 70 Md. 253, 16 Atl. 657; Biddinger *v.* Wiland, 67 Md. 359, 10 Atl. 202; Richards *v.* Swan, 7 Gill 366.

Missouri.— Snyder *v.* Free, 114 Mo. 360, 21 S. W. 847; Donovan *v.* Dunning, 69 Mo. 436; Dunlap *v.* Mitchell, 80 Mo. App. 393.

New Jersey.— Den *v.* Lippencott, 6 N. J. L. 473.

New York.— Holmes *v.* Clark, 48 Barb. 237, holding that the conveyance being voluntary, the grantee need not be implicated in the fraud in order to enable the creditors to set the conveyance aside.

North Carolina.— Burton *v.* Farinholt, 86 N. C. 260; Black *v.* Caldwell, 49 N. C. 150.

Ohio.— Humbert *v.* Cincinnati M. E. Church, Wright 213.

Pennsylvania.— Kern's Estate, 4 Pa. Dist. 73.

Tennessee.— Carpenter *v.* Scales, (Ch. App. 1897) 48 S. W. 249.

Texas.— Van Bibber *v.* Mathis, 52 Tex. 406.

Virginia.— Coleman *v.* Cocke, 6 Rand. 618, 18 Am. Dec. 757.

United States.— Hinde *v.* Longworth, 11 Wheat. 199, 6 L. ed. 454.

19. Hubbard *v.* Allen, 59 Ala. 283. See also Rucker *v.* Abell, 8 B. Mon. (Ky.) 566, 48 Am. Dec. 406.

Effect of taking possession and making improvements.— One who has been placed in possession of a tract of land, and on the faith of an oral gift of the same to him has made valuable and lasting improvements thereon, stands before a court of equity in the attitude of a purchaser and may compel a conveyance and has a good title as against the creditors of the grantor. Dozier *v.* Matson, 94 Mo. 328, 7 S. W. 268, 4 Am. St. Rep. 388. See also Rumbold *v.* Parr, 51 Mo. 592. *Compare* Layton *v.* Calhoun Bank, 59 S. W. 322, 22 Ky. L. Rep. 872.

20. See the statutes of the several states.

21. Townsend *v.* Wilson, 114 Ky. 504, 71 S. W. 440, 24 Ky. L. Rep. 1276; O'Kane *v.* Vinnedge, 108 Ky. 34, 55 S. W. 711, 21 Ky. L. Rep. 1551; Yankey *v.* Sweeney, 85 Ky. 55, 2 S. W. 559, 8 Ky. L. Rep. 944; Ward *v.* Thomas, 81 Ky. 452; Stokes *v.* Coffey, 8 Bush (Ky.) 523; Miller *v.* Desha, 3 Bush (Ky.) 212; Lowry *v.* Fisher, 2 Bush (Ky.) 70, 92 Am. Dec. 475; Todd *v.* Hartley, 2 Metc. (Ky.) 206; Mitchell *v.* Berry, 1 Metc. (Ky.) 602; Enders *v.* Williams, 1 Metc. (Ky.) 346; Rucker *v.* Abell, 8 B. Mon. (Ky.) 566, 48 Am. Dec. 406; Hanson *v.* Buckner, 4 Dana (Ky.) 251, 29 Am. Dec. 401; Beatty *v.* Thompson, 66 S. W. 384, 23 Ky. L. Rep. 1850; Hamilton *v.* Combs, 60 S. W. 371, 22 Ky. L. Rep. 1263; Porter *v.* Green, 9 S. W. 401, 10 Ky. L. Rep. 484; Marcum *v.* Powers, 9 S. W. 255, 10 Ky. L. Rep. 380; Dougherty *v.* Halloran, 6 S. W. 718, 9 Ky. L. Rep. 768; McElrath *v.* Spillman, 7 Ky. L. Rep. 308;

vide against a conveyance being adjudged fraudulent merely because it is voluntary.[22]

3. As to Subsequent Creditors. A voluntary conveyance is not void as against subsequent creditors of the grantor, unless it is shown that such voluntary conveyance was made with an actual fraudulent intent.[23] According to some of the

Leavell *v.* Leavell, 4 Ky. L. Rep. 889; Davis *v.* Anderson, 99 Va. 620, 39 S. E. 588; Norris *v.* Jones, 93 Va. 176, 24 S. E. 911; Bickle *v.* Chrisman, 76 Va. 678; Fink *v.* Denny, 75 Va. 663; Wick *v.* Dawson, 42 W. Va. 43, 24 S. E. 587; McCue *v.* McCue, 41 W. Va. 151, 23 S. E. 689; Humphrey *v.* Spencer, 36 W. Va. 11, 14 S. E. 410; Rogers *v.* Verlander, 30 W. Va. 619, 5 S. E. 847. *Compare* Hutchison *v.* Kelly, 1 Rob. (Va.) 123, 39 Am. Dec. 250; Coleman *v.* Cocke, 6 Rand. (Va.) 618, 18 Am. Dec. 757, both cases decided prior to the Virginia statute on the subject. But see Hume *v.* Condon, 44 W. Va. 553, 30 S. E. 56, holding that notwithstanding the statute a husband may make a donation to his wife or return to her a loan of money received, augmented by profits, if he retain an amount of tangible property largely more than sufficient to pay all his just indebtedness.

22. *California.*— Cook *v.* Cockins, 117 Cal. 140, 48 Pac. 1025; Knox *v.* Moses, 104 Cal. 502, 38 Pac. 318; Threlkel *v.* Scott, (1893) 34 Pac. 851; McFadden *v.* Mitchell, 54 Cal. 628; Thornton *v.* Hook, 36 Cal. 223; Swartz *v.* Haslett, 8 Cal. 118; Gillan *v.* Metcalf, 7 Cal. 137.

Colorado.— Wells *v.* Schuster-Hax Nat. Bank, 23 Colo. 534, 48 Pac. 809; Burdsall *v.* Waggoner, 4 Colo. 256; Thomas *v.* Mackey, 3 Colo. 390.

Indiana.— Emerson *v.* Opp, 139 Ind. 27, 38 N. E. 330; Heaton *v.* Shanklin, 115 Ind. 595, 18 N. E. 172; Cavanaugh *v.* Smith, 84 Ind. 380; Bishop *v.* State, 83 Ind. 67; Dunn *v.* Dunn, 82 Ind. 42; Wooters *v.* Osborn, 77 Ind. 513; Hardy *v.* Mitchell, 67 Ind. 485; Pence *v.* Croan, 51 Ind. 336; Parton *v.* Yates, 41 Ind. 456; Frank *v.* Kessler, 30 Ind. 8; Hubbs *v.* Bancroft, 4 Ind. 388.

New York.— Smith *v.* Reid, 134 N. Y. 568, 31 N. E. 1082; Kain *v.* Larkin, 131 N. Y. 300, 30 N. E. 105; Fuller Electrical Co. *v.* Lewis, 101 N. Y. 674, 5 N. E. 37; Genesee River Nat. Bank *v.* Mead, 92 N. Y. 637; Carr *v.* Breese, 81 N. Y. 584; Cole *v.* Tyler, 65 N. Y. 73; Holden *v.* Burnham, 63 N. Y. 74; Dunlap *v.* Hawkins, 59 N. Y. 342; Erickson *v.* Quinn, 47 N. Y. 410; Dygert *v.* Remerschnider, 32 N. Y. 629; Babcock *v.* Eckler, 24 N. Y. 623; Carpenter *v.* Roe, 10 N. Y. 227; Multz *v.* Price, 82 N. Y. App. Div. 339, 81 N. Y. Suppl. 931; Saugerties Bank *v.* Mack, 34 N. Y. App. Div. 494, 54 N. Y. Suppl. 360; Royer Wheel Co. *v.* Fielding, 31 Hun 274; Emmerich *v.* Hefferan, 53 N. Y. Super. Ct. 98; White's Bank *v.* Farthing, 10 N. Y. St. 830.

North Carolina.— Mitchell *v.* Eure, 126 N. C. 77, 35 S. E. 190; Woodruff *v.* Bowles, 104 N. C. 197, 10 S. E. 482; Taylor *v.* Eatman, 92 N. C. 601; Worthy *v.* Brady, 91 N. C. 265. *Compare* O'Daniel *v.* Crawford, 15 N. C. 197, decided prior to the statute.

Wisconsin.— Hyde *v.* Chapman, 33 Wis. 391.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 188.

23. *Alabama.*—Wilson *v.* Stevens, 129 Ala. 630, 29 So. 678, 87 Am. St. Rep. 86; Elyton Land Co. *v.* Iron City Steam Bottling Works, 109 Ala. 602, 20 So. 51; Seals *v.* Robinson, 75 Ala. 363; Lockard *v.* Nash, 64 Ala. 385; Kriksey *v.* Snedecor, 60 Ala. 192; Davidson *v.* Lanier, 51 Ala. 318; Stiles *v.* Lightfoot, 26 Ala. 443; Randall *v.* Lang, 23 Ala. 751; Thomas *v.* Degraffenreid, 17 Ala. 602.

Arkansas.— Crampton *v.* Schaap, 56 Ark. 253, 19 S. W. 669; Rudy *v.* Austin, 56 Ark. 73, 19 S. W. 111, 35 Am. St. Rep. 85.

California.— Bush, etc., Co. *v.* Helbing, 134 Cal. 676, 66 Pac. 967; Kane *v.* Desmond, 63 Cal. 464; Wells *v.* Stout, 9 Cal. 479.

Colorado.— Wilcoxen *v.* Morgan, 2 Colo. 473.

Connecticut.— Whiting *v.* Ralph, 75 Conn. 41, 52 Atl. 406; Smith *v.* Gaylord, 47 Conn. 380; Converse *v.* Hartley, 31 Conn. 372; Benton *v.* Jones, 8 Conn. 186. But *compare* State *v.* Martin, 77 Conn. 142, 58 Atl. 745; Barbour *v.* Connecticut Mut. L. Ins. Co., 61 Conn. 240, 23 Atl. 154.

Florida.— Florida L. & T. Co. *v.* Crabb, (1903) 33 So. 523.

Georgia.— See Horn *v.* Ross, 20 Ga. 210, 65 Am. Dec. 621.

Illinois.— Highley *v.* American Exch. Nat. Bank, 185 Ill. 565, 57 N. E. 436; Faloon *v.* McIntyre, 118 Ill. 292, 8 N. E. 315; Lucas *v.* Lucas, 103 Ill. 121; Tunison *v.* Chamblin, 88 Ill. 378; Bridgford *v.* Riddell, 55 Ill. 261; Mixell *v.* Lutz, 34 Ill. 382; Carter *v.* Lewis, 29 Ill. 500; Racine Wagon, etc., Co. *v.* Roberts, 54 Ill. App. 515; Sweet *v.* Dean, 43 Ill. App. 650; Edgerly *v.* Lyons First Nat. Bank, 30 Ill. App. 425. See also Durand *v.* Weightman, 108 Ill. 489; Jackson *v.* Miner, 101 Ill. 550; Lincoln *v.* McLaughlin, 74 Ill. 11; Lamont *v.* Regan, 96 Ill. App. 359; Hunt *v.* Connor, 74 Ill. App. 298. But see Morrill *v.* Kilner, 113 Ill. 318.

Indiana.— Stumph *v.* Bruner, 89 Ind. 556.

Iowa.— King *v.* Wells, 106 Iowa 649, 77 N. W. 338; Carbiener *v.* Montgomery, 97 Iowa 659, 66 N. W. 900; Hook *v.* Mowre, 17 Iowa 195.

Kansas.— Voorhis *v.* Michaelis, 45 Kan. 255, 25 Pac. 592.

Kentucky.— Place *v.* Rhem, 7 Bush 585; Duhme *v.* Young, 3 Bush 343; Hurdt *v.* Courtenay, 4 Metc. 139; Enders *v.* Williams, 1 Metc. 346; Hanson *v.* Buckner, 4 Dana 251, 29 Am. Dec. 401; Cosby *v.* Ross, 3 J. J.

cases it is sufficient to show an actual fraudulent intent as against existing

Marsh. 290, 20 Am. Dec. 140; Rose *v.* Campbell, 76 S. W. 505, 25 Ky. L. Rep. 885, 77 S. W. 707, 25 Ky. L. Rep. 1263; Little *v.* Ragan, 7 Ky. L. Rep. 391; Fletcher *v.* Harl, 3 Ky. L. Rep. 335.

Louisiana.— Hopkins *v.* Buck, 5 La. Ann. 487; Brunet *v.* Duvergis, 5 La. 124; Morgan *v.* Davis, 4 La. 141; Henry *v.* Hyde, 5 Mart. N. S. 633; Hesser *v.* Black, 5 Mart. N. S. 96.

Maine.— Davis *v.* Herrick, 37 Me. 397; Howe *v.* Ward, 4 Me. 195.

Maryland.— Niller *v.* Johnson, 27 Md. 6; Ward *v.* Hollins, 14 Md. 158. See also Bohn *v.* Headley, 7 Harr. & J. 257.

Michigan.— Barkworth *v.* Palmer, 118 Mich. 50, 76 N. W. 151; Cole *v.* Brown, 114 Mich. 396, 72 N. W. 247, 68 Am. St. Rep. 491.

Mississippi.— Pennington *v.* Seal, 49 Miss. 518.

Missouri.— Krueger *v.* Vorhauer, 164 Mo. 156, 63 S. W. 1098; Caldwell *v.* Smith, 88 Mo. 44; Payne *v.* Stanton, 59 Mo. 158; Pepper *v.* Carter, 11 Mo. 540; Loy *v.* Rorick, 100 Mo. App. 105, 71 S. W. 842; Bracken *v.* Milner, 99 Mo. App. 187, 73 S. W. 225; Bauer Grocery Co. *v.* Smith, 74 Mo. App. 419; Boatmen's Sav. Bank *v.* Overall, 16 Mo. App. 510; Mittelburg *v.* Harrison, 11 Mo. App. 136; Mutual L. Ins. Co. *v.* Sandfelder, 9 Mo. App. 285. See also Baker *v.* Welch, 4 Mo. 484.

Nebraska.— Jayne *v.* Hymer, 66 Nebr. 785, 92 N. W. 1019; Ayers *v.* Wolcott, 66 Nebr. 712, 92 N. W. 1036; Racek *v.* North Bend First Nat. Bank, 62 Nebr. 669, 87 N. W. 542. See also Wake *v.* Griffin, 9 Nebr. 47, 2 N. W. 461.

New Hampshire.— Coolidge *v.* Melvin, 42 N. H. 510; Smyth *v.* Carlisle, 16 N. H. 464; Carlisle *v.* Rich, 8 N. H. 44.

New Jersey.— Kinsey *v.* Feller, 64 N. J. Eq. 367, 51 Atl. 485; Minzesheimer *v.* Doolittle, 56 N. J. Eq. 206, 39 Atl. 386; Bouquet *v.* Heyman, 50 N. J. Eq. 114, 24 Atl. 266; Burne *v.* Kunzman, (Ch. 1890) 19 Atl. 667; Campbell *v.* Tompkins, 32 N. J. Eq. 170; Carpenter *v.* Carpenter, 27 N. J. Eq. 502. See also Long Branch Banking Co. *v.* Dennis, 56 N. J. Eq. 549, 39 Atl. 689.

New York.— Phœnix Bank *v.* Stafford, 89 N. Y. 405; Philips *v.* Wooster, 36 N. Y. 412; Lormore *v.* Campbell, 60 Barb. 62; Ebbitt *v.* Dunham, 25 Misc. 232, 55 N. Y. Suppl. 78; Loeschigk *v.* Addison, 4 Abb. Pr. N. S. 210, 19 Abb. Pr. 169; Barnum *v.* Farthing, 40 How. Pr. 25. See also Shand *v.* Hanley, 71 N. Y. 319.

North Carolina.— Clement *v.* Cozart, 109 N. C. 173, 13 S. E. 862.

North Dakota.— Red River Valley Nat. Bank *v.* Barnes, 8 N. D. 432, 79 N. W. 880.

Ohio.— Creed *v.* Lancaster Bank, 1 Ohio St. 1; Robinson *v.* Von Dolcke, 3 Ohio S. & C. Pl. Dec. 107, 1 Ohio N. P. 429.

Oregon.— Morton *v.* Denham, 39 Oreg. 227, 64 Pac. 384.

Pennsylvania.— Best *v.* Smith, 193 Pa. St. 89, 44 Atl. 329, 74 Am. St. Rep. 676; Reese *v.* Reese, 157 Pa. St. 200, 27 Atl. 703; Staller *v.* Kirkpatrick, 1 Mona. 486; Lieber *v.* Lieber, 17 Montg. Co. Rep. 34; Tatham *v.* Crawford, 2 Wkly. Notes Cas. 365.

South Carolina.— Gentry *v.* Lanneau, 54 S. C. 514, 32 S. E. 523, 71 Am. St. Rep. 814; Jackson *v.* Phyler, 38 S. C. 496, 17 S. E. 255, 37 Am. St. Rep. 782; Walker *v.* Bollman, 22 S. C. 512; Richardson *v.* Rhodus, 14 Rich. 95; Footman *v.* Pendergrass, 3 Rich. Eq. 33; Brock *v.* Bowman, Rich. Eq. Cas. 185; King *v.* Clarke, 2 Hill Eq. 611; Blake *v.* Jones, Bailey Eq. 141, 21 Am. Dec. 530; Henderson *v.* Dodd, Bailey Eq. 138; Smith *v.* Littlejohn, 2 McCord 362.

South Dakota.— Aldous *v.* Olverson, 17 S. D. 190, 95 N. W. 917.

Tennessee.— Nelson *v.* Vanden, 99 Tenn. 224, 42 S. W. 5; Hickman *v.* Perrin, 6 Coldw. 135; Nicholas *v.* Ward, 1 Head 323, 73 Am. Dec. 177; Dillard *v.* Dillard, 3 Humphr. 41; Hamilton *v.* Bradley, 5 Hayw. 127. But *compare* Trezevant *v.* Terrell, 96 Tenn. 528, 33 S. W. 109; Hester *v.* Wilkinson, 6 Humphr. 215, 44 Am. Dec. 303.

Texas.— Moulton *v.* Sturgis Nat. Bank, (Civ. App. 1901) 65 S. W. 1114; O'Neal *v.* Clymer, (Civ. App. 1900) 61 S. W. 545; Heath *v.* Cleburne First Nat. Bank, 19 Tex. Civ. App. 63, 46 S. W. 123.

Vermont.— Fair Haven Marble, etc., Co. *v.* Owens, 69 Vt. 246, 37 Atl. 749; McLane *v.* Johnson, 43 Vt. 48; Church *v.* Chapin, 35 Vt. 223.

Virginia.— New South Bldg., etc., Assoc. *v.* Reed, 96 Va. 345, 31 S. E. 514, 70 Am. St. Rep. 858; Johnston *v.* Zane, 11 Gratt. 552; Davis *v.* Payne, 4 Rand. 332.

West Virginia.— Enslow *v.* Sliger, 51 W. Va. 405, 41 S. E. 173; Bronson *v.* Vaughn, 44 W. Va. 406, 29 S. E. 1022; Greer *v.* O'Brien, 36 W. Va. 277, 15 S. E. 74; McClaugherty *v.* Morgan, 36 W. Va. 191, 14 S. E. 992; Rogers *v.* Verlander, 30 W. Va. 619, 5 S. E. 847; Rose *v.* Brown, 11 W. Va. 122; Lockhard *v.* Beckley, 10 W. Va. 87.

Wisconsin.— Wheeler, etc., Mfg. Co. *v.* Monahan, 63 Wis. 198, 23 S. W. 127.

United States.— Graham *v.* La Crosse, etc., R. Co., 102 U. S. 148, 26 L. ed. 106; Hinde *v.* Longworth, 11 Wheat. 199, 6 L. ed. 454; Sexton *v.* Wheaton, 8 Wheat. 229, 5 L. ed. 603; Metropolitan Nat. Bank *v.* Rogers, 47 Fed. 148; Burdick *v.* Gill, 7 Fed. 668, 2 McCrary 486; Herring *v.* Richards, 3 Fed. 439, 1 McCrary 570. See also Sedgwick *v.* Place, 21 Fed. Cas. No. 12,621, 12 Blatchf. 163.

England.— Russel *v.* Hammond, 1 Atk. 13, 26 Eng. Reprint 9; Holmes *v.* Penny, 3 Jur. N. S. 80, 3 Kay & J. 90, 26 L. J. Ch. 179, 5 Wkly. Rep. 132; Spirett *v.* Willows, 10 L. T. Rep. N. S. 450; Holloway *v.* Millard, 1 Madd. 414, 56 Eng. Reprint 152; Battersbee *v.* Farrington, 1 Swanst. 106, 36 Eng. Reprint 317, 1 Wils. Ch. 88, 18 Rev. Rep. 32, 37 Eng. Reprint 40; George *v.* Milbanke,

creditors;[24] and of course it is uniformly held that it is sufficient to show such an intent as against subsequent creditors.[25] But a voluntary conveyance is void as to subsequent creditors if the grantor executes it in the expectation of shortly contracting debts, and with the design of so placing the property conveyed that if misfortune afterward befalls him and he becomes unable to pay his debts, it shall be beyond the reach of his creditors.[26] That such was the motive of a conveyance may fairly be inferred from a grantor's having entered into a new an-

9 Ves. Jr. 190, 7 Rev. Rep. 157, 32 Eng. Reprint 575; Townshend *v.* Windham, 2 Ves. 1, 28 Eng. Reprint 1. See also Meggison *v.* Forster, 7 Jur. 546, 12 L. J. Ch. 415, 2 Y. & Coll. 336, 21 Eng. Ch. 336.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 189.

Possession retained by grantor.— A voluntary deed, delivered to the grantee, conveying to him slaves, reserving to the grantor a life-estate, is operative at common law against purchasers and subsequent creditors, and is also valid as between the grantee, and the personal representative of the grantor, although he dies in possession, and his estate is declared insolvent. Adams *v.* Broughton, 13 Ala. 731.

Subsequent purchaser.— A voluntary conveyance to a child of the grantor made in good faith by a person not indebted at the time is valid as against a subsequent purchaser from the grantor with notice of the conveyance. Verplank *v.* Sterry, 12 Johns. (N. Y.) 536, 7 Am. Dec. 348.

24. *Alabama.*— Heinz *v.* White, 105 Ala. 670, 17 So. 185; Huggins *v.* Perrine, 30 Ala. 396, 68 Am. Dec. 131.

Arkansas.— May *v.* State Nat. Bank, 59 Ark. 614, 28 S. W. 431; Toney *v.* McGehee, 38 Ark. 419; Dodd *v.* McCraw, 8 Ark. 83, 46 Am. Dec. 301.

Connecticut.— See State *v.* Martin, 77 Conn. 142, 58 Atl. 745; Barbour *v.* Connecticut Mut. L. Ins. Co., 61 Conn. 240, 23 Atl. 154.

Maine.— Marston *v.* Marston, 54 Me. 476.

Massachusetts.— Thacher *v.* Phinney, 7 Allen 146. See also Brooks *v.* Dalrymple, 12 Allen 102.

New York.— King *v.* Wilcox, 11 Paige 589. See also Partridge *v.* Stokes, 66 Barb. 586.

Tennessee.— Nelson *v.* Vanden, 99 Tenn. 224, 42 S. W. 5.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 189.

Contra.—*Mississippi.*—Simmons *v.* Ingram, 60 Miss. 886 [*overruling* Vertner *v.* Humphreys, 14 Sm. & M. (Miss.) 130; Henry *v.* Fullerton, 13 Sm. & M. (Miss.) 631].

Missouri.— Davidson *v.* Dockery, 179 Mo. 687, 78 S. W. 624.

Nebraska.— State Bank *v.* Frey, 3 Nebr. (Unoff.) 83, 91 N. W. 239.

Pennsylvania.— Kimble *v.* Smith, 95 Pa. St. 69; Harlan *v.* Maglaughlin, 90 Pa. St. 293.

Virginia.— New South Bldg., etc., Assoc. *v.* Reed, 96 Va. 345, 31 S. E. 514, 70 Am. St. Rep. 858.

United States.— Schreyer *v.* Platt, 134 U. S. 405, 10 S. Ct. 579, 33 L. ed. 955.

In Texas it is provided by statute that a voluntary conveyance void as to prior creditors shall not, on that account merely, be void as to subsequent creditors. See Lewis *v.* Simon, 72 Tex. 470, 10 S. W. 554.

25. *Arkansas.*— May *v.* State Nat. Bank, 59 Ark. 614, 28 S. W. 431.

California.— Bush, etc., Co. *v.* Helbing, 134 Cal. 676, 66 Pac. 967.

District of Columbia.— Holladay *v.* Towers, 20 D. C. 577; Walter *v.* Lane, 1 MacArthur 275.

Indiana.— Petree *v.* Brotherton, 133 Ind. 692, 32 N. E. 300; Barrow *v.* Barrow, 108 Ind. 345, 9 N. E. 371.

Kansas.— McPherson *v.* Kingsbaker, 22 Kan. 646.

Maine.— Laughton *v.* Harden, 68 Me. 208; Marston *v.* Marston, 54 Me. 476; Pullen *v.* Hutchinson, 25 Me. 249.

Maryland.— Matthai *v.* Heather, 57 Md. 483.

Mississippi.— Wynne *v.* Mason, 72 Miss. 424, 18 So. 422; Summers *v.* Roos, 42 Miss. 749, 2 Am. Rep. 653; Bullitt *v.* Taylor, 34 Miss. 708, 69 Am. Dec. 412.

Missouri.— Boatmen's Sav. Bank *v.* Overall, 90 Mo. 410, 3 S. W. 64 [*affirming* 16 Mo. App. 510].

New Hampshire.— Carlisle *v.* Rich, 8 N. H. 44.

Ohio.— Evans *v.* Lewis, 30 Ohio St. 11; Bowlus *v.* Shanabarger, 19 Ohio Cir. Ct. 137, 10 Ohio Cir. Dec. 167.

Pennsylvania.— Haak's Appeal, 100 Pa. St. 59; Murphy *v.* Solms, 6 Pa. Co. Ct. 264; Andress *v.* Lewis, 1 Pa. Co. Ct. 293, 17 Wkly. Notes Cas. 270. See also Connell's Estate, 13 Phila. 393.

Texas.— Rives *v.* Stephens, (Civ. App. 1894) 28 S. W. 707.

West Virginia.— Billingsley *v.* Clelland, 41 W. Va. 234, 23 S. E. 812.

United States.— Horbach *v.* Hill, 112 U. S. 144, 5 S. Ct. 81, 28 L. ed. 670; Burdick *v.* Gill, 7 Fed. 668, 2 McCrary 486; U. S. *v.* Stiner, 28 Fed. Cas. No. 16,404, 8 Blatchf. 544.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 189; and cases cited *supra*, note 23.

26. *Alabama.*— See Echols *v.* Orr, 106 Ala. 237, 17 So. 677.

Colorado.— Arnett *v.* Coffey, 1 Colo. App. 34, 27 Pac. 614.

Illinois.— Morrill *v.* Kilner, 113 Ill. 318; Bridgford *v.* Riddell, 55 Ill. 261; Bay *v.* Cook, 31 Ill. 336; Cramer *v.* Bode, 24 Ill. App. 219.

Kansas.—Peoria First Nat. Bank *v.* Jaffray, 41 Kan. 694, 21 Pac. 242.

hazardous business about the time the conveyance was made, or from his having contracted large debts immediately thereafter.[27] A mere expectation of future indebtedness, or even an intent to contract debts, if it be only an intent not coupled with a purpose to convey the property in order to keep it from being reached by future creditors, will not, it seems, render a voluntary deed invalid as against such creditors.[28] Where a debtor executes such a conveyance that, if those who were creditors at the time should complain, it would be void as against them, and then makes an arrangement by which such creditors are paid off and new creditors substituted, the conveyance will be void as against the subsequent creditors.[29]

E. Effect of Inadequacy of Consideration. Mere inadequacy of price unattended by suspicious circumstances is not sufficient to establish fraud.[30] A

Kentucky.— Haskell *v.* Bakewell, 10 B. Mon. 206.

Missouri.— Kinealy *v.* Macklin, 89 Mo. 433, 14 S. W. 507; Fisher *v.* Lewis, 69 Mo. 629.

New Jersey.— Providence City Nat. Bank *v.* Hamilton, 34 N. J. Eq. 158; Carpenter *v.* Carpenter, 25 N. J. Eq. 194; Cramer *v.* Reford, 17 N. J. Eq. 367, 90 Am. Dec. 594; Beeckman *v.* Montgomery, 14 N. J. Eq. 106, 80 Am. Dec. 229.

New York.— Savage *v.* Murphy, 8 Bosw. 75 [*affirmed* in 34 N. Y. 508, 90 Am. Dec. 733].

Pennsylvania.— Buckley *v.* Duff, 114 Pa. St. 596, 8 Atl. 188; Bouslough *v.* Bouslough, 68 Pa. St. 495; *In re* Greenfield, 14 Pa. St. 489; Waterson *v.* Wilson, 1 Grant 74. See also Haak's Appeal, 100 Pa. St. 59.

South Carolina.— See Kohn *v.* Meyer, 19 S. C. 190; Kid *v.* Mitchell, 1 Nott & M. 334, 9 Am. Dec. 702.

Tennessee.— Churchill *v.* Wells, 7 Coldw. 364; Hickman *v.* Parrin, 6 Coldw. 135; Russell *v.* Stinson, 3 Hayw. 1.

United States.— Smith *v.* Vodges, 92 U. S. 183, 23 L. ed. 481.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 179.

27. *Missouri.*— Fisher *v.* Lewis, 69 Mo. 629.

Nebraska.— Ayres *v.* Wolcott, 62 Nebr. 805, 87 N. W. 906.

New Jersey.— Providence City Nat. Bank *v.* Hamilton, 34 N. J. Eq. 158. See also Hildebrand *v.* Willig, 64 N. J. Eq. 249, 53 Atl. 1035.

New York.— See Todd *v.* Nelson, 109 N. Y. 316, 16 N. E. 360. *Compare* Neuberger *v.* Keim, 53 Hun 60, 5 N. Y. Suppl. 941 [*affirmed* in 134 N. Y. 35, 31 N. E. 268], holding that a conveyance which was recorded immediately after its execution was not fraudulent as to subsequent creditors, although it was voluntary and was made to remove the property from the risk of a contemplated enterprise, where there was no evidence that credit was obtained by reason of the ownership of the property, or that the contemplated business was hazardous and that the indebtedness was incurred soon after the conveyance.

Pennsylvania.— Buckley *v.* Duff, 114 Pa. St. 956, 8 Atl. 188; Monroe *v.* Smith, 79 Pa. St. 459; Woolstron's Appeal, 51 Pa. St. 452; Mullen *v.* Wilson, 44 Pa. St. 413, 84 Am. Dec. 461; Snyder *v.* Christ, 39 Pa. St. 499; Thomson *v.* Dougherty, 12 Serg. & R. 448.

United States.— Ridgeway *v.* Underwood, 20 Fed. Cas. No. 11,815, 4 Wash. 129.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 181.

28. Williams *v.* Davis, 69 Pa. St. 21; Snyder *v.* Christ, 39 Pa. St. 499. See also Hilton *v.* Morse, 75 Me. 258; Connell's Estate, 13 Phila. (Pa.) 393.

29. Ferguson *v.* Kenny, 16 Ont. App. 276. See also Richardson *v.* Smallwood, Jac. 552, 4 Eng. Ch. 52, 37 Eng. Reprint 958; Holmes *v.* Penny, 3 Jur. N. S. 80, 3 Kay & J. 90, 26 L. J. Ch. 179, 5 Wkly. Rep. 132.

30. *Connecticut.*—Washband *v.* Washband, 27 Conn. 424.

District of Columbia.— Clark *v.* Krause, 2 Mackey 559.

Georgia.— See Sharp *v.* Hicks, 94 Ga. 624, 21 S. E. 208.

Illinois.— Klemm *v.* Bishop, 56 Ill. App. 613.

Iowa.— Rusie *v.* Jameson, 62 Iowa 52, 17 N. W. 103.

Kentucky.— Talbott *v.* Hooser, 12 Bush 408.

Louisiana.— Montgomery *v.* Wilson, 31 La. Ann. 196; Keller *v.* Blanchard, 19 La. Ann. 53.

Maryland.— Feigley *v.* Feigley, 7 Md. 537, 61 Am. Dec. 375. But *compare* Worthington *v.* Bullitt, 6 Md. 172.

Mississippi.— Foster *v.* Pugh, 12 Sm. & M. 416.

Missouri.— Demuth *v.* Boehler, 11 Mo. App. 588. See also Lionberger *v.* Baker, 88 Mo. 447; Nelson Distilling Co. *v.* Vossmeyer, 25 Mo. App. 578.

Montana.— Mueller *v.* Renkes, (1904) 77 Pac. 512. See also Maloy *v.* Berkin, 11 Mont. 138, 27 Pac. 442.

New Jersey.— Hudnit *v.* Tomson, 26 N. J. Eq. 239.

New York.— Hardt *v.* Deutsch, 22 Misc. 66, 48 N. Y. Suppl. 564. See also O'Connor *v.* Docen, 50 N. Y. App. Div. 610, 64 N. Y. Suppl. 206; Andreae *v.* Bourke, 33 N. Y. App. Div. 638, 53 N. Y. Suppl. 885.

North Carolina.— Wachonia Loan, etc., Co. *v.* Forbes, 120 N. C. 355, 27 S. E. 43.

Ohio.— See Jones *v.* Leeds, 10 Ohio S. & C. Pl. Dec. 173, 7 Ohio N. P. 480.

Oregon.— Brown *v.* Case, 41 Oreg. 221, 69 Pac. 43.

person in embarrassed circumstances, but capable of contracting, may sell his property for the purpose of discharging his debts, for such consideration as he may agree to accept; and if there be nothing illegal in the transaction it will stand as against his creditors.[31] Inadequacy of consideration,[32] especially when great,[33] is, however, generally regarded as evidence of fraud; and where the dis-

Pennsylvania.— Goddard *v.* Weil, 165 Pa. St. 419, 30 Atl. 1000; Shatz *v.* Kirker, 1 Pa. Cas. 332, 2 Atl. 93.

South Carolina.— McPherson *v.* McPherson, 21 S. C. 261.

Texas.— Moore *v.* Lowery, 27 Tex. 541.

Virginia.— Moore *v.* Triplett, (1885) 23 S. E. 69; Sutherlin *v.* March, 75 Va. 223.

West Virginia.— Bierne *v.* Ray, 37 W. Va. 571, 16 S. E. 804.

United States.— Kempner *v.* Churchill, 8 Wall. 362, 19 L. ed. 461.

England.— See Blount *v.* Blount, 3 Atk. 481, 26 Eng. Reprint 1076.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 187.

31. Lowry *v.* Howard, 35 Ind. 170, 9 Am. Rep. 676; Frank *v.* Peters, 9 Ind. 343; Hubbs *v.* Bancroft, 4 Ind. 388. But see Farmers' Bank *v.* Douglass, 11 Sm. & M. (Miss.) 469.

32. *Alabama.*— McCaskle *v.* Amarine, 12 Ala. 17; Seamans *v.* White, 8 Ala. 656.

Colorado.— Rose *v.* Dunklee, 12 Colo. App. 403, 56 Pac. 342.

Florida.— Barrow *v.* Bailey, 5 Fla. 9.

Georgia.— Hawkinsville Bank, etc., Co. *v.* Walker, 99 Ga. 242, 25 S. E. 205.

Illinois.— Mathews *v.* Reinhardt, 149 Ill. 635, 37 N. E. 85 [*affirming* 43 Ill. App. 169]; McArtee *v.* Engart, 13 Ill. 242.

Indiana.— Hubbs *v.* Bancroft, 4 Ind. 388. *Compare* Milburn *v.* Phillips, 136 Ind. 680, 34 N. E. 983, 36 N. E. 360.

Iowa.— Urdangen *v.* Doner, 122 Iowa 533, 98 N. W. 317.

Kansas.— Dodson *v.* Cooper, 50 Kan. 680, 32 Pac. 370.

Kentucky.— Easum *v.* Pirtle, 81 Ky. 561, 5 Ky. L. Rep. 572. See also Diamond Coal Co. *v.* Carter Dry Goods Co., 49 S. W. 438, 20 Ky. L. Rep. 1444.

Maryland.— Baltimore *v.* Williams, 6 Md. 235.

Massachusetts.— Schaefer Brewing Co. *v.* Moebs, 187 Mass. 571, 73 N. E. 858.

Missouri.— State *v.* Mason, 112 Mo. 374, 20 S. W. 629, 34 Am. Rep. 390; Robinson *v.* Robards, 15 Mo. 459.

New Hampshire.— Claflin *v.* Batchelder, 65 N. H. 29, 17 Atl. 1060.

New Jersey.— Gnitchel *v.* Jewell, (Ch. 1888) 41 Atl. 227.

New York.— Amsterdam First Nat. Bank *v.* Miller, 163 N. Y. 164, 57 N. E. 308; Maasch *v.* Grauer, 58 N. Y. App. Div. 560, 69 N. Y. Suppl. 187; Andreae *v.* Bourke, 33 N. Y. App. Div. 638, 53 N. Y. Suppl. 885; Delaware *v.* Ensign, 21 Barb. 85; Stoddard *v.* Butler, 20 Wend. 507; Osgood *v.* Franklin, 2 Johns. Ch. 1, 7 Am. Dec. 513.

Oregon.— Brown *v.* Case, 41 Oreg. 221, 69 Pac. 43.

Pennsylvania.— Rhoads *v.* Blatt, 84 Pa. St. 31.

Texas.— Moore *v.* Lowery, 27 Tex. 541.

Virginia.— Tebbs *v.* Lee, 76 Va. 744.

Wisconsin.— Fisher *v.* Shelver, 53 Wis. 498, 10 N. W. 681.

United States.—Hudgins *v.* Kemp, 20 How. 45, 15 L. ed. 853; Bartles *v.* Gibson, 17 Fed. 293; Wright *v.* Stanard, 30 Fed. Cas. No. 18,094, 2 Brock. 311. *Compare* Voorhees *v.* Blanton, 83 Fed. 234, holding that mere inadequacy in honest family settlements is not a badge of fraud.

Canada.— Carradice *v.* Currie, 19 Grant Ch. (U. C.) 108; Crawford *v.* Meldrum, 3 Grant Err. & App. (U. C.) 101.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 187.

Inadequacy at time of sale.— To raise a presumption of fraud as to creditors of the grantor, from an insufficiency of consideration, any disparity between the consideration paid and the actual value of the property transferred must be shown to have existed at the time of the sale. Mills *v.* Waller, Dall. (Tex.) 416.

If a deed is intended as a mortgage, inadequacy of consideration is of no moment in determining the issue of fraud. Cathcart *v.* Grieve, 104 Iowa 330, 73 N. W. 835.

33. *Alabama.*— Bozman *v.* Draughan, 3 Stew. 243. See also Fairfield Packing Co. *v.* Kentucky Jeans Clothing Co., 110 Ala. 536, 20 So. 63; Gordon *v.* Tweedy, 71 Ala. 202.

Arkansas.— Galbreath *v.* Cook, 30 Ark. 417; Beebe *v.* De Baun, 8 Ark. 510.

Florida.— Gainer *v.* Russ, 20 Fla. 157.

Illinois.— Jewett *v.* Cook, 81 Ill. 260; Bay *v.* Cook, 31 Ill. 336. See also Monell *v.* Schenick, 54 Ill. 269.

Iowa.— Boyd *v.* Ellis, 11 Iowa 97.

Kentucky.—Carter *v.* Richardson, 60 S. W. 397, 22 Ky. L. Rep. 1204. See also Cincinnati Tobacco Warehouse Co. *v.* Matthews, 74 S. W. 242, 24 Ky. L. Rep. 2445.

Louisiana.— Shultz *v.* Morgan, 27 La. Ann. 616.

Maine.—Jones *v.* Light, 86 Me. 437, 30 Atl. 71; Wyman *v.* Brown, 50 Me. 139.

Michigan.— See Shay *v.* Wheeler, 69 Mich. 254, 37 N. W. 210.

Minnesota.— Carson *v.* Hawley, 82 Minn. 204, 84 N. W. 746.

Mississippi.— Foster *v.* Pugh, 12 Sm. & M. 416; Taylor *v.* Eckford, 11 Sm. & M. 21.

Missouri.— State *v.* Mason, 112 Mo. 374, 20 S. W. 629, 34 Am. St. Rep. 390; Ames *v.* Gilmore, 59 Mo. 537.

North Carolina.— Shober *v.* Wheeler, 113 N. C. 370, 18 S. E. 328.

Pennsylvania.— Hamet *v.* Dundass, 4 Pa. St. 178.

Texas.— Bryant *v.* Kelton, 1 Tex. 415.

parity between the true value and the price paid or agreed upon is so great as to shock a correct mind,[34] and produce a conviction that the transaction was not *bona fide*,[35] the sale or conveyance will be avoided.

F. Transactions Between Husband and Wife — 1. Nature, Adequacy, and Sufficiency of Consideration — a. In General. In transactions between husband and wife, the general rules as to the nature, adequacy, and sufficiency of consideration apply;[36] and so a conveyance or transfer for a nominal[37] or a fictitious consideration,[38] or in consideration of natural love and affection,[39] is not based upon

West Virginia.— Livesay *v.* Beard, 22 W. Va. 585.

United States.— Surget *v.* Byers, 24 Fed. Cas. No. 13,629, Hempst. 715 [*affirmed* in 19 How. 303, 15 L. ed. 670].

England.— Strong *v.* Strong, 18 Beav. 408, 52 Eng. Reprint 161.

Canada.— Toronto Bank *v.* Irwin, 28 Grant Ch. (U. C.) 397.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 187.

Mistake as to price.— While a grossly inadequate price is evidence of fraud, yet if the parties, although mistakenly, believe that the price is a fair one the transaction is not fraudulent. Bossart's Estate, 11 Pa. Super. Ct. 100.

34. McGhee *v.* Wells, 57 S. C. 280, 35 S. E. 529, 76 Am. St. Rep. 567. See also Flook *v.* Armentrout, 100 Va. 638, 42 S. E. 686.

Conscience of court.— Inadequacy of consideration to constitute fraud must shock the conscience of the court. Harbottle *v.* Rawlins, 11 Hawaii 105.

35. *Alabama.*— Prosser *v.* Henderson, 11 Ala. 484; Borland *v.* Mayo, 8 Ala. 104; Pope *v.* Brandon, 2 Stew. 401, 20 Am. Dec. 49. See also Gamble *v.* C. Aultman, 125 Ala. 372, 28 So. 30.

Indiana.— Cagney *v.* Cuson, 77 Ind. 494.

Michigan.— See Noble *v.* Laidlaw, (1904) 100 N. W. 179.

Missouri.— Wells *v.* Thomas, 10 Mo. 237.

Nebraska.— See Knight *v.* Darby, 55 Nebr. 16, 75 N. W. 48.

New York.— See Morris *v.* Morris, 71 Hun 45, 24 N. Y. Suppl. 579.

Ohio.— Citizens' Nat. Bank *v.* Wehrle, 18 Ohio Cir. Ct. 535, 9 Ohio Cir. Dec. 330; Hamill *v.* Wright, 8 Ohio S. & C. Pl. Dec. 467, 5 Ohio N. P. 9.

Rhode Island.— See Sweet's Petition, 20 R. I. 557, 40 Atl. 502.

Tennessee.—Merriman *v.* Lacefield, 4 Heisk. 209. See also McTeer *v.* Huntsman, (Ch. App. 1898) 49 S. W. 57.

Texas.— Numsen *v.* Ellis, 3 Tex. App. Civ. Cas. § 134.

Vermont.— See Church *v.* Chapin, 35 Vt. 223.

West Virginia.— Wood *v.* Harmison, 41 W. Va. 376, 23 S. E. 560; Douglass *v.* Douglass, 41 W. Va. 13, 23 S. E. 671.

Wisconsin.— See Crocker *v.* Huntzicker, 133 Wis. 181, 88 N. W. 232.

Wyoming.— Stirling *v.* Wagner, 4 Wyo. 5, 31 Pac. 1032, 32 Pac. 1128.

United States.— Jenkins *v.* Einstein, 13 Fed. Cas. No. 7,265, 3 Biss. 128.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 187.

Secret trust.— The consideration must be so far short of the value of the property as to raise a presumption in the mind that the person who took the property took it under some kind of secret trust. McPherson *v.* McPherson, 21 S. C. 261. See also Kuykendall *v.* McDonald, 15 Mo. 416, 57 Am. Dec. 212. And see *infra*, X.

36. *Connecticut.*— Paulk *v.* Cooke, 39 Conn. 566.

Illinois.— Fox *v.* Peck, 151 Ill. 226, 37 N. E. 873 [*affirming* 45 Ill. App. 239].

Indiana.— Gable *v.* Columbus Cigar Co., 140 Ind. 563, 38 N. E. 474; Secor *v.* Souder, 95 Ind. 95; Schæffer *v.* Fithian, 17 Ind. 463.

Iowa.— Cox *v.* Collis, 109 Iowa 270, 80 N. W. 343; Davis *v.* Garrison, 85 Iowa 447, 52 N. W. 359.

Kentucky.— Ray *v.* Life Assoc. of America, 6 Ky. L. Rep. 514.

Michigan.— Otis *v.* Sprague, 118 Mich. 61, 76 N. W. 154.

Mississippi.— Wynne *v.* Mason, 72 Miss. 424, 18 So. 422.

New Jersey.— Faitoute *v.* Sayre, (Ch. 1894) 28 Atl. 711; Aber *v.* Brant, 36 N. J. Eq. 116.

New York.— Sandman *v.* Seaman, 84 Hun 337, 32 N. Y. Suppl. 338.

North Carolina.— Walton *v.* Parish, 95 N. C. 259.

Ohio.— German Nat. Bank *v.* Gunther, 3 Ohio S. & C. Pl. Dec. 686, 3 Ohio N. P. 311.

Pennsylvania.— Duffy *v.* Mechanics', etc., Ins. Co., 8 Watts & S. 413.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 248, 251. And see *supra*, VIII, A–E.

Maintenance for the wife and the children of the marriage is a sufficient consideration to support a settlement by a husband from whom the wife has separated because of his having lived in a state of adultery. Hobbs *v.* Hull, 1 Cox Ch. 445, 29 Eng. Reprint 1242.

37. See Houston *v.* Blackman, 66 Ala. 559, 41 Am. Rep. 756; Shaw *v.* Manchester, 84 Iowa 246, 50 N. W. 985.

38. Hodges *v.* Hickey, 67 Miss. 715, 7 So. 404; Robert *v.* Hodges, 16 N. J. Eq. 299; Smith *v.* Perine, 1 N. Y. Suppl. 495.

39. Baker *v.* Hollis, 84 Iowa 682, 51 N. W. 78; Milholland *v.* Tiffany, 64 Md. 455, 2 Atl. 831. See also Houston *v.* Blackman, 66 Ala. 559, 41 Am. Rep. 756; Shaw *v.* Manchester, 84 Iowa 246, 50 N. W. 985; Baldwin *v.* Tuttle, 23 Iowa 66. *Compare* Woodruff *v.* Bowles, 104 N. C. 197, 10 S. E. 482.

such a consideration as will support it against creditors. An agreement by a wife to go from a city to the country and live with her husband is not a sufficient consideration to support a conveyance from him as against his creditors.[40]

b. Release of Dower Right. But the release by a wife of her right of dower in the lands of her husband is a sufficient consideration to support a conveyance or transfer to her of property of her husband;[41] and this is true whether the release be made contemporaneously with the conveyance or transfer,[42] or pursuant to a preceding agreement.[43] Although the value of the right of dower is considerably less than the value of such property, the conveyance or transfer is not absolutely void, and in a court of law must be adjudged valid;[44] but in equity such a conveyance or transfer will be considered valid only to the extent of the value of the dower right released by the wife.[45] Where the disparity between the value of

40. Radley *v.* Riker, 80 Hun (N. Y.) 353, 30 N. Y. Suppl. 130.

41. *Alabama.*— Keel *v.* Larkin, 83 Ala. 142, 3 So. 296, 3 Am. St. Rep. 702; Gordon *v.* Tweedy, 71 Ala. 202.

Arkansas.— Davis *v.* Yonge, (1905) 85 S. W. 90; Hershy *v.* Latham, 46 Ark. 542.

Florida.— Nalle *v.* Lively, 15 Fla. 130.

Illinois.— Payne *v.* Miller, 103 Ill. 442. *Compare* McCaffrey *v.* Dustin, 43 Ill. App. 34.

Indiana.— Baldwin *v.* Heil, 155 Ind. 682, 58 N. E. 200; Citizens' Bank *v.* Bolen, 121 Ind. 301, 23 N. E. 146; Sedgwick *v.* Tucker, 90 Ind. 271; Brown *v.* Rawlings, 72 Ind. 505; Hollowell *v.* Simonson, 21 Ind. 398.

Kentucky.— Potter *v.* Skiles, 114 Ky. 132, 70 S. W. 301, 71 S. W. 627, 24 Ky. L. Rep. 910, 1457; Harrow *v.* Johnson, 3 Metc. 578; Marshall *v.* Hutchison, 5 B. Mon. 298; Darling *v.* Hanks, (1897) 42 S. W. 1130; Green *v.* Green, 4 Ky. L. Rep. 250. See also Jones *v.* Basham, (1891) 16 S. W. 88.

Maryland.— See Unger *v.* Price, 9 Md. 552.

Massachusetts.— Matthews *v.* Thompson, 186 Mass. 14, 71 N. E. 93, 104 Am. St. Rep. 550, 66 L. R. A. 421; Holmes *v.* Winchester, 133 Mass. 140; Bullard *v.* Briggs, 7 Pick. 533, 19 Am. Dec. 292.

Michigan.— German-American Seminary *v.* Saenger, 66 Mich. 249, 33 N. W. 301.

Nebraska.— Adler, etc., Clothing Co. *v.* Hellman, 55 Nebr. 266, 75 N. W. 877.

New Hampshire.— Rundlett *v.* Ladd, 59 N. H. 15.

Ohio.— Singree *v.* Welch, 32 Ohio St. 320; Williams *v.* Williams, 2 Ohio Dec. (Reprint) 467, 3 West. L. Month. 157.

Virginia.— Runkle *v.* Runkle, 98 Va. 663, 37 S. E. 279; Ficklin *v.* Rixey, 89 Va. 832, 17 S. E. 325, 37 Am. St. Rep. 891; Strayer *v.* Long, 86 Va. 557, 10 S. E. 574; Keagy *v.* Trout, 85 Va. 390, 7 S. E. 329; Burwell *v.* Lumsden, 24 Gratt. 443, 18 Am. Rep. 648; Taylor *v.* Moore, 2 Rand. 563; Harvey *v.* Alexander, 1 Rand. 219, 10 Am. Dec. 519; Blanton *v.* Taylor, Gilm. 209; Quarles *v.* Lacy, 4 Munf. 251. See also Lewis *v.* Caperton, 8 Gratt. 148; Harrison *v.* Carroll, 11 Leigh 476.

West Virginia.— Glascock *v.* Brandon, 35 W. Va. 84, 12 S. E. 1102.

United States.— Mattoon *v.* McGrew, 112 U. S. 713, 5 S. Ct. 369, 28 L. ed. 917; Hitz *v.* National Metropolitan Bank, 111 U. S. 722, 4 S. Ct. 613, 28 L. ed. 577; Dick *v.* Hamilton, 7 Fed. Cas. No. 3,890, Deady 322.

England.— See Mills *v.* Eden, 10 Mod. 487. *Compare In re* Conlan, L. R. 29 Ir. 199.

Canada.— Morris *v.* Martin, 19 Ont. 564; Forrest *v.* Laycock, 18 Grant Ch. (U. C.) 611. See also Beavis *v.* Maguire, 7 Ont. App. 704; Patulo *v.* Boyington, 4 U. C. C. P. 125.

See 24 Cent. Dig. tit. "Fraudulent Conveyances, §§ 260, 287. See also DOWER, 14 Cyc. 952 *et seq.*

But *compare* Haynes *v.* Kline, 64 Iowa 308, 20 N. W. 453; Le Saulnier *v.* Krueger, 85 Wis. 214, 54 N. W. 774.

Right of dower valueless.— The relinquishment by the wife of her right of dower in property encumbered to almost its full value, when her husband is embarrassed, is not a sufficient consideration to support a conveyance of other real estate by the husband to her. Commonwealth Ins., etc., Co. *v.* Brown, 166 Pa. St. 477, 31 Atl. 205.

A mere joinder by the wife in a fraudulent conveyance of real property by the husband through a trustee to himself and wife, to hold by entireties, does not form such a consideration as will support the conveyance. Phillips *v.* Kennedy, 139 Ind. 419, 38 N. E. 410, 39 N. E. 147.

42. Gordon *v.* Tweedy, 71 Ala. 202.

43. Gordon *v.* Tweedy, 71 Ala. 202; U. S. Bank *v.* Lee, 13 Pet. (U. S.) 107, 10 L. ed. 81 [*affirming* 2 Fed. Cas. No. 922, 5 Cranch C. C. 319]. See also Payne *v.* Hutcheson, 32 Gratt. (Va.) 812. *Compare* Harrison *v.* Carroll, 11 Leigh (Va.) 476, holding that a parol agreement to release dower will not support a transfer of property to a wife.

44. Hoot *v.* Sorrell, 11 Ala. 386; Peaslee *v.* Collier, 83 Mich. 549, 47 N. W. 353; Smith *v.* Seiberling, 35 Fed. 677; Wright *v.* Stanard, 30 Fed. Cas. No. 18,094, 2 Brock. 311.

45. *Kentucky.*— Ward *v.* Crotty, 4 Metc. 59. See also Darling *v.* Hanks, (1897) 42 S. W. 1130.

Nebraska.— See Adler, etc., Clothing Co. *v.* Hellman, 55 Nebr. 266, 75 N. W. 877.

New York.— Smart *v.* Haring, 14 Hun 276 [*modifying* 52 How. Pr. 505].

Virginia.— See Johnston *v.* Gill, 27 Gratt. 587; Davis *v.* Davis, 25 Gratt. 587; Taylor *v.* Moore, 2 Rand. 563; Blanton *v.* Taylor, Gilm. 209.

the dower right and of the property conveyed or transferred is so great as to shock the conscience, fraud may be inferred and a conveyance or transfer avoided.[46] A conveyance in consideration of a previous release of the right of dower is merely voluntary.[47]

c. Release of Homestead Right. A release by a wife of her homestead right is such a consideration as will support a conveyance or transfer of property to her by her husband.[48]

d. Property Acquired by Marriage. A conveyance by a husband to his wife in consideration of property acquired by him by virtue of the marriage is merely voluntary.[49]

e. Services, Savings, and Earnings of Wife. Neither the services of a wife to her husband,[50] nor savings from money given to her by him,[51] are a sufficient

United States.— Wright *v.* Stanard, 30 Fed. Cas. No. 18,094, 2 Brock. 311.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 260.

46. Gordon *v.* Tweedy, 71 Ala. 202; Garvey *v.* Moore, 15 S. W. 136, 12 Ky. L. Rep. 732; Clinton First Nat. Bank *v.* Cummins, 38 N. J. Eq. 191. See also Black *v.* Fountain, 23 Grant Ch. (U. C.) 174.

47. Woodson *v.* Pool, 19 Mo. 340.

48. *Arkansas.*— Davis *v.* Yonge, (1905) 85 S. W. 90.

Illinois.— Payne *v.* Miller, 103 Ill. 442.

Michigan.— Sullivan *v.* Parkinson, 128 Mich. 527, 87 N. W. 639.

Missouri.— Novelty Mfg. Co. *v.* Pratt, 21 Mo. App. 171.

Texas.— Burnham *v.* McMichael, 6 Tex. Civ. App. 496, 26 S. W. 887.

Wisconsin.— Allen *v.* Perry, 56 Wis. 178, 14 N. W. 3.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 261.

Where money is obtained by a loan on the homestead standing in the name of the wife, a purchase of personalty in the name of the wife, paid for by a portion of the money so obtained, is not fraudulent as to the creditors of the husband. Farmers' Trust Co. *v.* Linn, 103 Iowa 159, 72 N. W. 496.

49. *Alabama.*— Jaffrey *v.* McGough, 83 Ala. 202, 3 So. 594. *Compare* Bradford *v.* Goldsborough, 15 Ala. 311, holding that the equitable right of the wife to a settlement of her distributive share of the estate of her deceased father, in the hands of his personal representative, is a consideration sufficiently valuable to support a deed to her from her husband relinquishing such distributive share for her sole and separate use.

Illinois.— Bridgford *v.* Riddell, 55 Ill. 261.

Kentucky.— Anderson *v.* Anderson, 80 Ky. 638; Hurdt *v.* Courtenay, 4 Metc. 139; Lyne *v.* Commonwealth Bank, 5 J. J. Marsh. 545; Tapp *v.* Todd, 28 S. W. 147, 16 Ky. L. Rep. 382; Davis *v.* Justice, 21 S. W. 529, 14 Ky. L. Rep. 741; Garvey *v.* Moore, 15 S. W. 136, 12 Ky. L. Rep. 732. See also Darling *v.* Hanks, (1897) 42 S. W. 1130.

Maryland.— Wylie *v.* Basil, 4 Md. Ch. 327.

Massachusetts.— Peirce *v.* Thompson, 17 Pick. 391.

Missouri.— Benne *v.* Schnecko, 100 Mo. 250, 13 S. W. 82. See also Columbia Sav. Bank *v.* Winn, 132 Mo. 80, 33 S. W. 457; Hart *v.* Leete, 104 Mo. 315, 15 S. W. 976.

New Jersey.—Taylor *v.* Dawes, (Ch. 1888) 13 Atl. 593; Smock *v.* Jones, (Ch. 1887) 11 Atl. 497.

North Carolina.— Allen *v.* Allen, 41 N. C. 293.

Pennsylvania.— Gicker *v.* Martin, 50 Pa. St. 138.

South Carolina.— Suber *v.* Chandler, 36 S. C. 344, 15 S. E. 426; Irby *v.* Henry, 16 S. C. 617; Sibely *v.* Tutt, McMull. Eq. 320.

Tennessee.— Joiner *v.* Franklin, 12 Lea 420.

Vermont.— Warren *v.* Ranney, 50 Vt. 653.

Virginia.— Rixey *v.* Deitrick, 85 Va. 42, 6 S. E. 615; Poindexter *v.* Jeffries, 15 Gratt. 363; Harvey *v.* Alexander, 1 Rand. 219, 10 Am. Dec. 519.

West Virginia.— Clarke *v.* King, 34 W. Va. 631, 12 S. E. 775.

Wisconsin.— Howe *v.* Colby, 19 Wis. 583.

United States.— Lee *v.* Hollister, 5 Fed. 752; Dick *v.* Hamilton, 7 Fed. Cas. No. 3,890, Deady 322.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 262.

Compare Comer *v.* Allen, 72 Ga. 1; Sperry *v.* Haslam, 57 Ga. 412.

Property not reduced to possession as a consideration see Drury *v.* Briscoe, 42 Md. 154; Jaycox *v.* Caldwell, 51 N. Y. 395 [*affirming* 37 How. Pr. 240]; Woodworth *v.* Sweet, 51 N. Y. 8 [*affirming* 44 Barb. 268]; U. S. Bank *v.* Brown, 2 Hill Eq. (S. C.) 558, 30 Am. Dec. 380; Cox *v.* Scott, 9 Baxt. (Tenn.) 305.

50. McAfee *v.* McAfee, 28 S. C. 188, 5 S. E. 480. See also Lee *v.* Savannah Guano Co., 99 Ga. 572, 27 S. E. 159, 59 Am. St. Rep. 243; Dumas *v.* Neal, 51 Ga. 563; Kedey *v.* Petty, 153 Ind. 179, 54 N. E. 798; Coleman *v.* Burr, 93 N. Y. 17, 45 Am. Rep. 160 [*affirming* 25 Hun 239]; Farmers' Nat. Bank *v.* Thomson, 74 Vt. 442, 52 Atl. 961.

51. Petingale *v.* Barker, 21 D. C. 156; Wisconsin Granite Co. *v.* Gerrity, 144 Ill. 77, 33 N. E. 31 [*reversing* 44 Ill. App. 240]. But see Smyth *v.* Reber, (N. J. Ch. 1889) 18 Atl. 462; Carpenter *v.* Franklin, 89 Tenn. 142, 14 S. W. 484.

Contract for payment for services.— "A contract between a husband and wife by which the latter is to be paid for her services rendered in the household is void as against

consideration. Nor are her earnings when they belong to him as they do at common law,[52] although there is an antecedent agreement by which the husband stipulates with the wife that such earnings as she may derive from her own personal services shall belong to her exclusively.[53] Under constitutional or statutory provisions making the earnings of a wife her separate property they are, however, a sufficient consideration.[54]

f. Consideration Paid by Husband For Property Conveyed to Wife. Where property is purchased in the name of the wife and conveyed or transferred to her, but is paid for with funds of the husband, such conveyance or transfer is, as to creditors, without sufficient consideration.[55] Property conveyed to a wife but

the creditors of the husband; and if his estate is transferred to the wife in payment of such services and in performance of such a contract, the transfer is void as against the creditors of the husband, and the property so transferred or purchased with the avails of such a contract may be reached by his creditors." Conger *v.* Corey, 39 N. Y. App. Div. 241, 244, 57 N. Y. Suppl. 236.

52. McAfee *v.* McAfee, 28 S. C. 188, 5 S. E. 480; Campbell *v.* Bowles, 30 Gratt. (Va.) 652. See also Glaze *v.* Blake, 56 Ala. 379; McLemore *v.* Nuckols, 37 Ala. 662; Pinkston *v.* McLemore, 31 Ala. 308; Hinman *v.* Parkis, 33 Conn. 188; Kedey *v.* Petty, 153 Ind. 179, 54 N. E. 798; Union Trust Co. *v.* Fisher, 25 Fed. 178. And see *supra*, II, B, 7, b.

53. McAfee *v.* McAfee, 28 S. C. 188, 5 S. E. 480. But see Bartlett *v.* Umfried, 94 Mo. 530, 7 S. W. 581; Carpenter *v.* Franklin, 89 Tenn. 142, 14 S. W. 484.

54. Gilbert *v.* Glenny, 75 Iowa 513, 39 N. W. 818, 1 L. R. A. 479; Falkenburg *v.* Johnson, 102 Ky. 543, 44 S. W. 80, 19 Ky. L. Rep. 1606, 80 Am. St. Rep. 369; Draper *v.* Buggee, 133 Mass. 258. See *supra*, II, B, 7, b.

55. *Alabama.*— Peevey *v.* Cabaniss, 70 Ala. 253. See also Stoutz *v.* Huger, 107 Ala. 248, 18 So. 126.

Arkansas.— Stix *v.* Claytor, 55 Ark. 116 17 S. W. 707. See also Baldwin *v.* Johnston, 8 Ark. 260.

Colorado.— See Phillips *v.* Rhodes, 2 Colo. App. 70, 29 Pac. 1011.

Connecticut.— Trumbull *v.* Hewitt, 62 Conn. 448, 26 Atl. 350.

District of Columbia.— Thyson *v.* Foley, 1 App. Cas. 182.

Florida.— Reel *v.* Livingston, 34 Fla. 377, 16 So. 284, 43 Am. St. Rep. 202; Alston *v.* Rowles, 13 Fla. 117; Craig *v.* Gamble, 5 Fla. 430.

Illinois.— Bowman *v.* Ash, 143 Ill. 649, 32 N. E. 486 [*affirming* 36 Ill. App. 115]; New *v.* Oldfield, 110 Ill. 138; Pratt *v.* Myers, 56 Ill. 23.

Indiana.— Laird *v.* Davidson, 124 Ind. 412, 25 N. E. 7. See also Wilds *v.* Bogan, 55 Ind. 331; Mendenhall *v.* Treadway, 44 Ind. 131.

Iowa.— Gear *v.* Schrei, 57 Iowa 666, 11 N. W. 625. See also Van Hoesen *v.* Teachout, 88 Iowa 458, 55 N. W. 486; Peckenbaugh *v.* Cook, 61 Iowa 477, 16 N. W. 530.

Kentucky.— See Dickinson *v.* Johnson, 110 Ky. 236, 61 S. W. 267, 22 Ky. L. Rep. 1686, 96 Am. St. Rep. 434, 54 L. R. A. 566; Hearn *v.* Lander, 11 Bush 669; Fink *v.* Nolan, 54 S. W. 948, 21 Ky. L. Rep. 1305; Straus *v.* Head, 21 S. W. 537, 14 Ky. L. Rep. 740; McBride *v.* McLaughlin, 5 Ky. L. Rep. 174; Yates *v.* Fisher, 4 Ky. L. Rep. 721. *Compare* McChord *v.* Noe, 1 S. W. 644, 8 Ky. L. Rep. 344.

Maine.— Berry *v.* Berry, 84 Me. 541, 24 Atl. 957; Call *v.* Perkins, 65 Me. 439.

Mississippi.— Bernheim *v.* Beer, 56 Miss. 149.

Missouri.— Osborne *v.* Evans, 185 Mo. 509, 84 S. W. 867; Rinehart *v.* Long, 95 Mo. 396, 8 S. W. 559; Reppy *v.* Reppy, 46 Mo. 571. See also Miller *v.* Leeper, 120 Mo. 466, 25 S. W. 378.

New York.— Stokes *v.* Amerman, 7 N. Y. Suppl. 733. *Compare* Tappan *v.* Butler, 7 Bosw. 480.

North Carolina.— Markham *v.* Whitehurst, 109 N. C. 307, 13 S. E. 904 [*distinguishing* Osborne *v.* Wilkes, 108 N. C. 651, 13 S. E. 285].

Ohio.— See Parish *v.* Rhodes, Wright 339.

Pennsylvania.— See Bucher *v.* Ream, 68 Pa. St. 421.

Virginia.— Quarles *v.* Lacy, 4 Munf. 251.

West Virginia.— Rose *v.* Brown, 11 W. Va. 122.

Wisconsin.— Hoxie *v.* Price, 31 Wis. 82.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 252; and *supra*, III, A, 3, a, (II).

Presumption as to payment.— Where property is alleged to have been purchased by a wife, or a conveyance of property is made to her during coverture, the burden is upon her to prove distinctly that she paid for it with means not derived from her husband. Evidence that she made the purchase, or that the property was conveyed to her, amounts to nothing, unless it is accompanied by clear and full proof that she paid for it with her own separate estate; and in the absence of such proof the presumption is that her husband furnished the means to pay for it and it will be subject to his debts. McMasters *v.* Edgar, 22 W. Va. 673. See also Burt *v.* Timmons, 29 W. Va. 441, 2 S. E. 780, 6 Am. St. Rep. 664; and *supra*, III, A, 3, a, (II).

In Minnesota, where such a transaction takes place, the statute imputes a fraudulent intent by the debtor, and the party endeavoring to sustain the transaction must disprove such intent; a finding that the debtor was

paid for by her husband is *prima facie* a gift by him to her; and where it does not appear that he was indebted at the time, or intended to defraud his subsequent creditors, the proceeds of such gift belong to her free from claims by him or his creditors;[56] but where actual fraud is shown in the transaction, the conveyance or transfer is void as to subsequent as well as to existing creditors.[57]

g. Assumption of Husband's Debts. The assumption by a wife of the debts of her husband is of the same validity as a consideration for a transfer of property to her as the assumption of debts by a stranger.[58]

h. Preëxisting Liability — (i) *Preëxisting Debt* — (a) *In General.* A *bona fide* debt due by the husband to his wife, like a debt due from one stranger to another, is a sufficient consideration to support a conveyance or transfer of property in payment of or as security for such debt,[59] and the general rules on the

solvent is not sufficient. Wolford *v.* Farnheim, 44 Minn. 159, 46 N. W. 295, construing Gen. St. (1878) c. 43, § 8. See also Matthews *v.* Torinus, 22 Minn. 132.

56. Pitkin *v.* Mott, 56 Mo. App. 401. See also Irvine *v.* Greever, 32 Gratt. (Va.) 411.

57. Core *v.* Cunningham, 27 W. Va. 206. See also Holmes *v.* Harshberger, 31 W. Va. 516, 7 S. E. 452; Marshall *v.* Whitney, 43 Fed. 343.

58. *California.*— Threlkel *v.* Scott, (1893) 34 Pac. 851.

Georgia.— Park *v.* Battey, 80 Ga. 353, 5 S. E. 492.

Indiana.— Huffman *v.* Copeland, 86 Ind. 224.

South Carolina.—Ferguson *v.* Harrison, 41 S. C. 340, 19 S. E. 619; McAfee *v.* McAfee, 28 S. C. 188, 5 S. E. 480.

Virginia.—Tebbs *v.* Lee, 76 Va. 744. See also Barton *v.* Brent, 87 Va. 385, 13 S. E. 29.

West Virginia.—Wood *v.* Harmison, 41 W. Va. 376, 23 S. E. 560.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 267. And see *supra*, VIII, A, 8.

59. *Alabama.*— Birmingham First Nat. Bank *v.* Smith, 93 Ala. 97, 9 So. 548; Lyne *v.* Wann, 72 Ala. 43; Warren *v.* Jones, 68 Ala. 449; Barclay *v.* Plant, 50 Ala. 509. *Compare* Robinson, *v.* Moseley, 93 Ala. 70, 9 So. 372.

California.— Greenwalt *v.* Mueller, 126 Cal. 636, 59 Pac. 137.

Delaware.— Jones *v.* Cannon, 8 Houst. 1, 31 Atl. 521; Hood *v.* Jones, 5 Del. Ch. 77.

Georgia.— Booher *v.* Worrill, 57 Ga. 235.

Illinois.— Thomas *v.* Mueller, 106 Ill. 36; Dean *v.* Plane, 96 Ill. App. 428 [*affirmed* in 195 Ill. 495, 63 N. E. 274].

Indiana.— Jones *v.* Snyder, 117 Ind. 229, 20 N. E. 140; Cornell *v.* Gibson, 114 Ind. 144, 16 N. E. 130, 5 Am. St. Rep. 605. *Compare* Bunch *v.* Hart, 138 Ind. 1, 37 N. E. 537.

Iowa.— Meyer *v.* Houck, 85 Iowa 319, 52 N. W. 235; Neighbor *v.* Hoblitcel, 84 Iowa 598, 51 N. W. 53; Peck *v.* Lincoln, 76 Iowa 424, 41 N. W. 61; McFarland *v.* Elliott, 71 Iowa 755, 36 N. W. 418; Jones *v.* Brandt, 59 Iowa 332, 10 N. W. 854, 13 N. W. 310.

Kentucky.— Noel *v.* Gaines, 66 S. W. 625, 23 Ky. L. Rep. 2093. *Compare* Clay *v.* Trimble, 16 S. W. 83, 13 Ky. L. Rep. 61.

Michigan.— Ullman *v.* Thomas, 126 Mich. 61, 85 N. W. 245; Parker *v.* Barkenowitz, 116 Mich. 58, 74 N. W. 290; Strauss *v.* Parshall, 91 Mich. 475, 51 N. W. 1117; Meigs *v.* Dibble, 73 Mich. 101, 40 N. W. 935; Hyde *v.* Powell, 47 Mich. 156, 10 N. W. 181; Kalamazoo First Nat. Bank *v.* McAllister, 46 Mich. 397, 9 N. W. 446.

Mississippi.—Graham *v.* Morgan, 83 Miss. 601, 35 So. 874; Rogers *v.* Mayer, 59 Miss. 524.

Missouri.— Hart *v.* Leete, 104 Mo. 315, 15 S. W. 976.

New Jersey.—Berla *v.* Meisel, (Ch. 1902) 52 Atl. 999; Dresser *v.* Zabriskie, (Ch. 1898) 39 Atl. 1066; Rue *v.* Scott, (Ch. 1891) 21 Atl. 1048; Cole *v.* Lee, 45 N. J. Eq. 779, 18 Atl. 854; Hagerman *v.* Buchanan, 45 N. J. Eq. 292, 17 Atl. 946, 14 Am. St. Rep. 732; Jones *v.* Davenport, 44 N. J. Eq. 33, 13 Atl. 652.

New York.—Ocean Nat. Bank *v.* Hodges, 9 Hun 161; Schaffner *v.* Reuter, 37 Barb. 44; Flannigan *v.* Barker, 12 N. Y. St. 554. *Compare* Blumenthal *v.* Michel, 33 N. Y. App. Div. 636, 54 N. Y. Suppl. 81.

Ohio.— See Hitesman *v.* Donnel, 40 Ohio St. 287.

Pennsylvania.— Rine *v.* Hall, 187 Pa. St. 264, 40 Atl. 1088; Grabill *v.* Moyer, 45 Pa. St. 530.

South Carolina.— McElwee *v.* Kennedy, 56 S. C. 154, 34 S. E. 86; McGee *v.* Wells, 52 S. C. 472, 30 S. E. 602; Gerald *v.* Gerald, 28 S. C. 442, 6 S. E. 290.

Tennessee.— Blackmore *v.* Crutcher, (Ch. App. 1898) 46 S. W. 310; Sanford *v.* Allen, (Ch. App 1897) 42 S. W. 183. See also Rosenbaum *v.* Davis, (Ch. App. 1898) 48 S. W. 706.

Texas.— Bonds *v.* Eagle, etc., Mfg. Co., (Civ. App. 1898) 44 S. W. 539. See also Cooper *v.* Sawyer, 31 Tex Civ. App. 620, 73 S. W. 992.

Vermont.— Drew *v.* Corliss, 65 Vt. 650, 27 Atl. 613.

Virginia.— Robinson *v.* Bass, 100 Va. 190, 40 S. E. 660; McConville *v.* National Valley Bank, 98 Va. 9, 34 S. E. 891; Spence *v.* Repass, (1897) 27 S. E. 583. *Compare* Perry *v.* Ruby, 81 Va. 317.

United States.— Metsker *v.* Bonebrake, 108 U. S. 66, 2 S. Ct. 351, 27 L. ed. 654; Bean *v.* Patterson, 12 Fed. 739, 4 McCrary 179; Lee *v.* Hollister, 5 Fed. 752.

subject are applicable.[60] Where, however, a wife advances money to her husband, without any promise to repay the same, or under such circumstances as not to create the relation of debtor and creditor at the time, such advancement is no consideration as against his creditors for a subsequent conveyance to her.[61] But if the wife advance money to her husband, although no time be fixed for payment and no express promise is made to repay, and the circumstances attending the receipt

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 270, 279.

Compare Stockslager *v.* Mechanics' Loan, etc., Inst., 87 Md. 232, 39 Atl. 742; Hoagland *v.* Wilson, 15 Nebr. 320, 18 N. W. 78.

Claims against the husband purchased by his wife are sufficient consideration for a conveyance from him to her. Strong *v.* Skinner, 4 Barb. (N Y.) 546. See also Wingerd *v.* Fallon, 95 Pa. St. 184.

Conveyance without adequate consideration as a mortgage.—A conveyance of property by a husband to his wife in payment of an indebtedness to her will, as to creditors, be construed as a mortgage if the consideration is inadequate. German Nat. Bank *v.* Gunther, 3 Ohio S. & C. Pl. Dec. 686, 3 Ohio N. P. 311.

Fraudulent intent of husband.— Where the wife is a *bona fide* creditor, a conveyance made to her for the purpose of paying her debt will not be defeated, even if the husband has a fraudulent intent, unless the wife has knowledge thereof or participates therein. Riley *v.* Vaughan, 116 Mo. 169, 22 S W. 707, 38 Am. St. Rep. 586; Williams *v.* Harris, 4 S. D. 22, 54 N. W. 926, 46 Am. St. Rep. 753. See *supra*, VII, B, 1.

A transfer by an insolvent husband to his wife in consideration of an honest debt to her is valid. Lassiter *v.* Hoes, 11 Misc. (N. Y.) 1, 31 N. Y. Suppl. 850.

The fact that a wife destroyed a note given her by her father, which had been given him by her husband for money loaned, does not create such an indebtedness from her husband to her as to sustain a conveyance as against his creditors. Meredith *v.* Citizens' Nat. Bank, 92 Ind. 343.

60. See the cases cited in the preceding note; and *supra*, VIII, A, 9.

61. *Arkansas.*— Reeves *v.* Slade, 71 Ark. 611, 77 S. W. 54.

Illinois.— Vietor *v.* Swisky, 200 Ill. 257, 65 N. E. 625 [*reversing* 87 Ill. App. 583]; Coale *v.* Moline Plow Co., 134 Ill. 350, 25 N. E. 1016.

Indiana.— Hoffman *v.* Henderson, 145 Ind. 613, 44 N. E. 629.

Iowa.— Woods *v.* Allen, 109 Iowa 484, 80 N. W. 540; Iseminger *v.* Criswell. 98 Iowa 382, 67 N. W. 289; Carbiener *v.* Montgomery, 97 Iowa 659, 66 N. W. 900; Tyler *v.* Budd, 96 Iowa 29, 64 N. W. 679; Peninsular Stove Co. *v.* Roark, 94 Iowa 560, 63 N. W. 326; Porter *v.* Goble, 88 Iowa 565, 55 N. W. 530; Hanson *v.* Manley, 72 Iowa 48, 33 N. W. 357; Moore *v.* Orman, 56 Iowa 39, 8 N. W. 689. See also Dunham *v.* Bentley, 103 Iowa 136, 72 N. W. 437.

Kansas.— Bailey *v.* Kansas Mfg. Co., 32 Kan. 73, 3 Pac. 756.

Maryland.— Diggs *v.* McCullough, 69 Md. 592, 16 Atl. 453; Grover, etc., Sewing Mach. Co. *v.* Radcliff, 63 Md. 496; Kuhn *v.* Stansfield, 28 Md. 210, 92 Am. Dec. 681.

Michigan.— Sykes *v.* City Sav. Bank, 115 Mich. 321, 73 N. W. 369, 69 Am. St. Rep. 562.

Nebraska.— Wake *v.* Griffin, 9 Nebr. 47, 2 N. W. 461.

New Jersey.— Cole *v.* Lee, 45 N. J. Eq. 779, 18 Atl. 854; Luers *v.* Brunjes, 34 N. J. Eq. 19 [*affirmed* in 34 N. J. Eq. 561]; Post *v.* Stiger, 29 N. J Eq. 554, holding that a claim by a wife against her husband, first put in writing when his liabilities began to embarrass him, will be regarded with suspicion and rejected unless clearly proved when attempted to be enforced as against the husband's creditors.

New Mexico.—Albuquerque First Nat. Bank *v.* McClellan, 9 N. M. 636, 58 Pac. 347.

New York.— Clift *v.* Moses, 75 Hun 517, 27 N. Y. Suppl. 728.

Pennsylvania.—Grabill *v.* Moyer, 45 Pa. St. 530.

Virginia.— New South Bldg., etc., Assoc. *v.* Reed, 96 Va. 345, 31 S. E. 514, 70 Am. St. Rep. 858; Flynn *v.* Jackson, 93 Va. 341, 25 S. E. 1.

West Virginia.— Maxwell *v.* Hanshaw, 24 W. Va. 405; McGinnis *v.* Curry, 13 W. Va. 29. See also Bennett *v.* Bennett, 37 W. Va. 396, 16 S. E. 638, 38 Am. St. Rep. 47.

Wisconsin.— Le Saulnier *v.* Krueger, 85 Wis. 214, 54 N. W. 774.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 271, 272.

Promise to repay not implied from delivery of money to husband.—"Where a husband becomes insolvent, the wife can not convert into debts, as against his creditors, former deliveries of her money or other property to him or permitted receipts by him of her income or proceeds of her separate estate, which at the time of such delivery or receipt were simply gifts intended by the wife to assist her husband in his business or to pay their common expenses of living; and considering the relation between them the law does not, merely from such delivery or receipt, imply a promise on the part of the husband to repay or replace the same, as it would between parties not so related; but it requires more, — there must be either an express promise or circumstances attending the transaction to establish the fact, that they dealt with each other as debtor and creditor." Zinn *v.* Law, 32 W. Va. 447, 451, 9 S. E. 871. But see Sykes *v.* City Sav. Bank, 115 Mich. 321, 73 N. W. 369, 69 Am. St. Rep. 562.

of the money by the husband are such as to show that they dealt with each other as debtor and creditor, the husband may pay or secure the indebtedness by making a conveyance or transfer of property to her.[62]

(B) *Repayment of Money Loaned by Wife.* A conveyance by the husband to his wife in consideration of money loaned by her, the amount of which bears a reasonable proportion to the value of the property conveyed, is valid as against creditors.[63]

(C) *Appropriation of Wife's Estate.* Where the husband converts his wife's separate estate to his own use he becomes indebted to her and may transfer property to her in payment of or as security for such debt.[64] And where the husband simply takes the wife's property and appropriates the proceeds to his own use, the rule that a gift by the wife to the husband, without promise of repayment, will not support a subsequent transfer of property by the husband to her, does not apply.[65]

(D) *Rents and Profits of Wife's Estate.* Where the rents of the separate estate of a married woman are by her direction paid to her husband, upon the understanding that they are to be invested for her benefit, a debt is created which will constitute a sufficient consideration for a subsequent conveyance from him to

62. Bailey *v.* Kansas Mfg. Co., 32 Kan. 73, 3 Pac. 756; Sykes *v.* City Sav. Bank, 115 Mich. 321, 73 N. W. 369, 69 Am. St. Rep. 562.

Express promise to repay not always necessary.— "It is not, however, as supposed, a rule of law, that at the time of each delivery or receipt of the separate property of the wife by the husband, the latter must expressly promise to repay the former, or to secure her out of his estate, to constitute the relation of debtor and creditor between them in regard to it. Such a promise, made before such transactions and looking forward to and covering them, would, at law as in common sense, avail as well to prove the character of them, precisely as it would between other parties who were dealing with each other on credit and in confidence. Nor is it true that an express prior promise to secure or repay out of the estate of the husband is requisite, in such a case, to prove that her husband received her separate property as a loan, and was therefore, entitled, as against his creditors, thus to secure or repay her." Steadman *v.* Wilbur, 7 R. I. 481, 487 [*quoted* in Willis *v.* Willis, 79 N. Y. App. Div. 9, 13, 79 N. Y. Suppl. 1028].

63. *Illinois.*— McQuown *v.* Law, 18 Ill. App. 34.

Indiana.— Fulp *v.* Beaver, 136 Ind. 319, 36 N. E. 250; Dillen *v.* Johnson, 132 Ind. 75, 30 N. E. 786; Hogan *v.* Robinson, 94 Ind. 138; Kyger *v.* F. Hull Skirt Co., 34 Ind. 249.

Iowa.— Muir *v.* Miller, 103 Iowa 127, 72 N. W. 409; Citizens' Nat. Bank *v.* Webster, 76 Iowa 281, 41 N. W. 47; Rockford Boot, etc., Mfg. Co. *v.* Mastin, 75 Iowa 112, 39 N. W. 219. See also Payne *v.* Wilson, 76 Iowa 377, 41 N. W. 45.

Kansas.— Monroe *v.* May, 9 Kan. 466.

Kentucky.— Latimer *v.* Glenn, 2 Bush 535.

Maine.— Randall *v.* Lunt, 51 Me. 246.

Massachusetts.— Atlantic Nat. Bank *v.* Tavener, 130 Mass. 407.

Nebraska.— Lipscomb *v.* Lyon, 19 Nebr. 511, 27 N. W. 731.

New York.— Savage *v.* O'Neil, 44 N. Y. 298 [*reversing* 42 Barb. 374]; Brooklyn Bank *v.* Lamon, 9 N. Y. Suppl. 849.

Pennsylvania.— *In re* Jamison, 183 Pa. St. 219, 38 Atl. 604; Mancil *v.* Mancil, 2 Del. Co. 531.

Texas.— Shryock *v.* Latimer, 57 Tex. 674.

West Virginia.— Cumberland First Nat. Bank *v.* Parsons, 42 W. Va. 137, 24 S. E. 554.

United States.— Vansickle *v.* Wells, 105 Fed. 16.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 274.

Failure to disclose loan to creditors.— The fact that a wife failed to disclose to her husband's creditors that she had loaned him money does not render fraudulent a transfer by her husband in payment of such loan, where no inquiry was made of her as to her husband's financial condition. Robinson *v.* Stephens, 93 Ga. 535, 21 S. E. 96.

Securing interest not agreed to be paid.— A judgment honestly confessed by an insolvent in favor of his wife, to secure money loaned him by her, is not fraudulent merely because including interest when there had been no agreement therefor. Hawley *v.* Griffith, 187 Pa. St. 306, 41 Atl. 30; Meckley's Appeal, 102 Pa. St. 536.

Loan used for wife's benefit.— Where the loan is used for the benefit of the wife's separate estate, the indebtedness on account of the loan is settled and a subsequent transfer of property by the husband in trust for the wife's benefit is without consideration. Grevils *v.* Smith, 29 Tex. Civ. App. 150, 68 S. W. 291.

64. Vincent *v.* State, 74 Ala. 274; Northington *v.* Faber, 52 Ala. 45; Rowland *v.* Plummer, 50 Ala. 182; Leonard *v.* Barnett, 70 Ind. 367; Thompson *v.* Mills, 39 Ind. 528; Taylor *v.* Heriot, 4 Desauss. (S. C.) 227; McKamey *v.* Thorp, 61 Tex. 648. See *supra*, II, B, 17, c.

65. Dunham *v.* Bentley, 103 Iowa 136, 72 N. W. 437. See *supra*, II, B, 17, c.

her.[66] But where under a statute as to the separate estates of married women, the husband is under no duty or obligation to account to the wife for the rents, income, and profits of her statutory estate, received by him and converted to his own use, or remaining in his hands after payment of all family expenses, a conveyance of property by him to his wife, the consideration of which is such rents, income, and profits received and used by him, or the unexpended surplus thereof, is voluntary.[67]

(E) *Satisfaction of Wife's Paraphernal Rights.* A transfer of property by a husband to his wife in payment of an indebtedness on account of paraphernal rights is based upon a sufficient consideration;[68] the essentials to the validity of a *dation en paiment* in satisfaction of such rights are the just and honest claim of the wife against the husband, the just proportion of the value of the thing given to the amount of the wife's claim, and the delivery to the wife of that which is the subject of the *dation*.[69]

(F) *Value of Property Conveyed or Transferred.* The general rules[70] that the value of the property conveyed or secured should bear a reasonable proportion to the amount of the debt paid or secured;[71] that when the value of such property greatly exceeds the debt, the conveyance or transfer will be set aside;[72] and that a slight excess in value is not a ground for such action[73] apply as to conveyances or transfers made by a husband to his wife, of which a preëxisting debt is the consideration.

(G) *Laches of Wife in Asserting Claim.* Where funds of the wife are received and used by the husband with her knowledge and consent, and no evidence of indebtedness is taken by her, or no claim that he is her debtor is made by her during the lapse of many years, a conveyance in consideration of such funds will not be sustained, especially where it is made after the husband has become insolvent or greatly financially embarrassed.[74]

66. Tarsney *v.* Turner, 48 Fed. 818. See *supra*, II, B, 17, c.

67. O'Neal *v.* Seixas, 85 Ala. 80, 4 So. 745; Gilkey *v.* Pollock, 82 Ala. 503, 3 So. 99; Wing *v.* Roswald, 74 Ala. 346; Early *v.* Owens, 68 Ala. 171 [*overruling* Brevard *v.* Jones, 50 Ala. 221]; Bolling *v.* Jones, 67 Ala. 508. See also Long *v.* Efurd, 86 Ala. 267, 5 So. 482.

68. Ardis *v.* Theus, 47 La. Ann. 1436, 17 So. 865; Hewitt *v.* Williams, 47 La. Ann. 742, 17 So. 269, 48 La. Ann. 686, 19 So. 604; Freiburg *v.* Langfelder, 46 La. Ann. 1417, 15 So. 677; Hyman *v.* Schlenker, 44 La. Ann. 108, 10 So. 623; Renshaw *v.* Dowty, 39 La. Ann. 608, 2 So. 58; Burns *v.* Thompson, 39 La. Ann. 377, 1 So. 913; Thompson *v.* Freeman, 34 La. Ann. 992; Chaffe *v.* Scheen, 34 La. Ann. 684; Payne *v.* Kemp, 33 La. Ann. 818; Levi *v.* Morgan, 33 La. Ann. 532; Lehman *v.* Levy, 30 La. Ann. 745; Barus *v.* Bidwell, 23 La. Ann. 163; Murrison *v.* Seiler, 22 La. Ann. 327; Judice *v.* Neda, 8 La. Ann. 484; Spurlock *v.* Mainer, 1 La. Ann. 301.

69. Colvin *v.* Johnston, 104 La. 655, 29 So. 274.

70. See *supra*, VIII, A, 9.

71. See McQuown *v.* Law, 18 Ill. App. 34; Brigham *v.* Hubbard, 115 Ind. 474, 17 N. E. 920; Columbia Sav. Bank *v.* Winn, 132 Mo. 80, 33 S. W. 457.

How value of property determined see Torrey *v.* Cameron, 73 Tex. 583, 11 S. W. 840.

72. Paulk *v.* Cooke, 39 Conn. 566; Case Mfg. Co. *v.* Perkins, 106 Mich. 349, 64 N. W. 201; Torrey *v.* Cameron, 73 Tex. 583, 11 S. W. 840; Webb *v.* Ingham, 29 W. Va. 389, 1 S. E. 816.

Mistake as to amount due.— A judgment confessed by a husband to his wife for an amount in excess of what is actually due will not be set aside where it appears that there was an honest mistake on the part of the wife as to the amount due. Falkman *v.* Bedillion, 131 Pa. St. 385, 18 Atl. 922, 923.

73. See De Prato *v.* Jester, (Ark. 1892) 20 S. W. 807.

74. *Alabama.*— Wood *v.* Riley, 121 Ala. 100, 25 So. 723; Evans *v.* Covington, 70 Ala. 440.

Georgia.— See Nollis *v.* Rodgers, 106 Ga. 13, 31 S. C. 783.

Illinois.— Hauk *v.* Van Ingen, 196 Ill. 20, 63 N. E. 705 [*affirming* 97 Ill. App. 642]; Dillman *v.* Nadelhoffer, 56 Ill. App. 517 [*affirmed* in 162 Ill. 625, 45 N. E. 680]; Miller *v.* Payne, 4 Ill. App. 112. See also Schuberth *v.* Schillo, 76 Ill. App. 356 [*affirmed* in 177 Ill. 346, 52 N. E. 319].

Indiana.— Brookville Nat. Bank *v.* Kimble, 76 Ind. 195.

Iowa.— Williams *v.* Snyder, (1903) 94 N. W. 845; McCreary *v.* Skinner, 83 Iowa 362, 49 N. W. 986.

Kentucky.— Allen *v.* Meriwether, 9 S. W. 807, 10 Ky. L. Rep. 600; Floyd *v.* Martin, 4 Ky. L. Rep. 891; Anderson *v.* Anderson, 4 Ky. L. Rep. 579.

Missouri.— Balz *v.* Nelson, 171 Mo. 682, 72 S. W. 527.

(II) *Conveyance in Execution of Prior Agreement.* A conveyance in fulfilment of a previous valid agreement between a husband and wife, such agreement being based upon a sufficient consideration, will be upheld as against creditors.[75]

(III) *Conveyance to Validate or Effectuate Prior Conveyance.* A subsequent conveyance from a husband to his wife, made to avoid any question as to the validity of a former deed, although made without substantial consideration, will be sustained as against creditors of the husband where the first conveyance was based upon a sufficient consideration.[76] But where a deed of gift made while the husband is solvent is withheld from record because he believes it is inoperative, a subsequent conveyance made in contemplation of insolvency, to a third person who conveys the land to the wife, is fraudulent as to creditors, although made to effectuate the first conveyance.[77]

2. Effect of Want or Insufficiency of Consideration. The general rules[78] as to the effect of the want or insufficiency of consideration are applicable to transactions between husband and wife.[79]

Nebraska.— Brownell *v.* Stoddard, 42 Nebr. 177, 60 N. W. 380.

New Jersey.— Lee *v.* Cole, 44 N. J. Eq. 318, 15 Atl. 531; Leathwhite *v.* Bennet, (Ch. 1887) 11 Atl. 29; Hubbard *v.* Little, (Ch. 1887) 10 Atl. 839; Jackson *v.* Beach, (Ch. 1887) 9 Atl. 380; Borden *v.* Doughty, 42 N. J. Eq. 314, 3 Atl. 352; Watson *v.* Cummins, 40 N. J. Eq. 483, 4 Atl. 629.

New York.— Briggs *v.* Mitchell, 60 Barb. 288.

West Virginia.— Kanawha Valley Bank *v.* Atkinson, 32 W. Va. 203, 9 S. E. 175, 25 Am. St. Rep. 806.

United States.— Humes *v.* Scruggs, 94 U. S. 22, 24 L. ed. 51.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 281.

75. *Indiana.*— Summers *v.* Hoover, 42 Ind. 153.

Kansas.— Sproul *v.* Atchison Nat. Bank, 22 Kan. 336.

Kentucky.— Hackworth *v.* Johns, 9 S. W. 656, 10 Ky. L. Rep. 568. See also Craig *v.* Conover, 72 S. W. 2, 24 Ky. L. Rep. 1682. But *compare* Chinn *v.* Curtis, 71 S. W. 923, 24 Ky. L. Rep. 1563.

Maryland.— Stocket *v.* Holliday, 9 Md. 480.

Michigan.— Popendick *v.* Frobenius, 66 Mich. 317, 33 N. W. 887.

Nebraska.— Van Deuzer *v.* Peacock, 11 Nebr. 245, 9 N. W. 90.

New York.— Odell *v.* Mylins, 53 How. Pr. 250.

Tennessee.— Ready *v.* Bragg, 1 Head 511.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 268.

76. Fitzpatrick *v.* Burchill, 7 Misc. (N. Y.) 463, 28 N. Y. Suppl. 389.

77. Talcott *v.* Levy, 20 N. Y. Suppl. 440, 29 Abb. N. Cas. 3 [*affirmed* without opinion in 3 Misc. 615, 23 N. Y. Suppl. 1162].

78. See *supra*, VIII, D, E.

79. See the following cases:

Alabama.— Davidson *v.* Lanier, 51 Ala. 318.

California.— Threlkel *v.* Scott, (1893) 34 Pac. 851.

Colorado.— Phillips *v.* Rhodes, 21 Colo. 217, 40 Pac. 453 [*affirming* 2 Colo. App. 70, 29 Pac. 1011].

Georgia.—Hawkinsville Bank, etc., Co. *v.* Walker, 99 Ga. 242, 25 S. E. 205.

Illinois.— Hauk *v.* Van Ingen, 196 Ill. 20, 63 N. E. 705 [*affirming* 97 Ill. App. 642]; Keady *v.* White, 168 Ill. 76, 48 N. E. 314 [*modifying* 69 Ill. App. 405]; McCaffrey *v.* Dustin, 43 Ill. App. 34.

Indiana.— Spinner *v.* Weick, 50 Ind. 213.

Iowa.— Langford *v.* Thurlby, 60 Iowa 105, 14 N. W. 135; Boulton *v.* Hahn, 58 Iowa 518, 12 N. W. 560; Watson *v.* Riskamire, 45 Iowa 231; Gardner *v.* Baker, 25 Iowa 343.

Kentucky.— Plaut *v.* Geffinger, 60 S. W. 520, 22 Ky. L. Rep. 1475; Clarkson *v.* Clarkson, 4 Ky. L. Rep. 901.

Maine.— Motley *v.* Sawyer, 38 Me. 68.

Maryland.— Niller *v.* Johnson, 27 Md. 6.

Massachusetts.— Williams *v.* Thomson, 13 Pick. 298.

Michigan.— Riggs *v.* Whitaker, 130 Mich. 327, 89 N. W. 954; Palmer *v.* Smith, 126 Mich. 352, 85 N. W. 870; Blue *v.* Schurtz, 115 Mich. 690, 74 N. W. 178.

Missouri.—Jordan *v.* Buschmeyer, 97 Mo. 94, 10 S. W. 616; State *v.* Jones, 83 Mo. App. 151.

Nebraska.— Hill *v.* Schmuck, 65 Nebr. 173, 90 N. W. 928.

New Hampshire.— Claflin *v.* Batchelder, 65 N. H. 29, 17 Atl. 1060.

New York.— Bennett *v.* McGuire, 5 Lans. 183; Cropsey *v.* McKinney, 30 Barb. 47; Smart *v.* Harring, 52 How. Pr. 505.

North Carolina.— Woodruff *v.* Bowles, 104 N. C. 197, 10 S. E. 482.

Ohio.— Fowler *v.* Trebein, 16 Ohio St. 493, 91 Am. Dec. 95.

Oregon.— Elfelt *v.* Hinch, 5 Oreg. 255.

Pennsylvania.—*In re* McKown, 198 Pa. St. 96, 47 Atl. 1111; Henderson *v.* Henderson, 133 Pa. St. 399, 19 Atl. 424, 19 Am. St. Rep. 650; Stickney *v.* Borman, 2 Pa. St. 67.

Tennessee.— Gribble *v.* Ford, (Ch. App. 1898) 52 S. W. 1007.

Texas.— Castro *v.* Illies, 22 Tex. 479, 73 Am. Dec. 277.

Utah.— Gustin *v.* Mathews, 25 Utah 168, 70 Pac. 402.

Vermont.— Farmers' Nat. Bank *v.* Thomson, 74 Vt. 442, 52 Atl. 961.

G. Transactions Between Parent and Child — 1. Nature, Adequacy, and Sufficiency — a. In General. In transactions between parent and child, questions as to the nature, adequacy, and sufficiency of consideration are to be settled in accordance with the general rules on the subject.[80] Thus while love and affection is such a consideration as will between the parties support a conveyance from a parent to his child,[81] it will not support the conveyance as against creditors.[82]

Virginia.— Tebbs *v.* Lee, 76 Va. 744.
Washington.— Klosterman *v.* Harrington, 11 Wash. 138, 39 Pac. 376.
West Virginia.— Wick *v.* Dawson, 42 W. Va. 43, 24 S. E. 587.
Wisconsin.— Bloodgood *v.* Meissner, 84 Wis. 452, 54 N. W. 772; Wheeler, etc., Mfg. Co. *v.* Monahan, 63 Wis. 198, 23 N. W. 127; Fisher *v.* Shelver, 53 Wis. 498, 10 N. W. 681; Horton *v.* Dewey, 53 Wis. 410, 10 N. W. 599.
United States.— Brittain *v.* Crowther, 54 Fed. 295, 4 C. C. A. 341; Caller *v.* McNabb, 4 Fed. Cas. No. 2,322; Wilson *v.* Jordan, 30 Fed. Cas. No. 17,814, 3 Woods 642.
See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 243, 244, 245, 247.

80. See *supra*, VIII, A–E. And see the following cases:
Alabama.— Abney *v.* Kingsland, 10 Ala. 355, 44 Am. Dec. 491.
California.— Salmon *v.* Wilson, 41 Cal. 595.
Indiana.— Proctor *v.* Cole, 104 Ind. 373, 3 N. E. 106, 4 N. E. 303; Goff *v.* Rogers, 71 Ind. 459.
Iowa.— Bunn *v.* Cheney, 36 Iowa 697.
Kansas.— Hunt *v.* Spencer, 20 Kan. 126.
Kentucky.— Trimble *v.* Ratcliff, 9 B. Mon. 511; Waller *v.* Todd, 3 Dana 503, 28 Am. Dec. 94; Caldwell *v.* Eminence Deposit Bank, 35 S. W. 625, 18 Ky. L. Rep. 156; Daniel *v.* Brandenburgh, 20 S. W. 255, 14 Ky. L. Rep. 310; Merritt *v.* Merritt, 11 S. W. 593, 11 Ky. L. Rep. 493; Green *v.* Green, 4 Ky. L. Rep. 250.
Louisiana.—Maurin *v.* Rouquer, 19 La. 594.
Maine.— Bowman *v.* Houdlette, 18 Me. 245.
Maryland.— Benson *v.* Benson, 70 Md. 253, 16 Atl. 657; Bullett *v.* Worthington, 3 Md. Ch. 99.
Missouri.— Dozier *v.* Matson, 94 Mo. 328, 7 S. W. 268, 4 Am. St. Rep. 388; Donovan *v.* Dunning, 69 Mo. 436; Rumbolds *v.* Parr, 51 Mo. 592.
New Jersey.— Taylor *v.* Dawes, (Ch. 1888) 13 Atl. 593; Hoboken Sav. Bank *v.* Beckman, 33 N. J. Eq. 53.
New York.— Hyde *v.* Houston, 29 N. Y. Suppl. 818; Lawrenceville Cement Co. *v.* Parker, 15 N. Y. Suppl. 577, 21 N. Y. Civ. Proc. 263.
North Carolina.— Webb *v.* Atkinson, 124 N. C. 447, 32 S. E. 737; Greensboro Nat. Bank *v.* Gilmer, 116 N. C. 684, 22 S. E. 2; Morris *v.* Allen, 32 N. C. 203; Buie *v.* Kelly, 27 N. C. 169.
Pennsylvania.— Ketner *v.* Donten, 15 Pa. Super. Ct. 604; Harman *v.* Reese, 1 Browne 11.
South Carolina.— Jackson *v.* Lewis, 29 S. C. 193, 7 S. E. 252.
Tennessee.— Gaugh *v.* Henderson, 2 Head 628; Phillips *v.* Cunningham, (Ch. App. 1899) 58 S. W. 463; Carpenter *v.* Scales, (Ch. App. 1897) 48 S. W. 249. See also Grimmett *v.* Midgett, (Ch. App. 1899) 57 S. W. 399.
Texas.— Wylie *v.* Posey, 71 Tex. 34, 9 S. W. 87; Hawkins *v.* Cramer, 63 Tex. 99.
Virginia.— Parr *v.* Saunders, (1880) 11 S. E. 979; Stokes *v.* Oliver, 76 Va. 72; Braxton *v.* Gaines, 4 Hen. & M. 151.
West Virginia.— Sturm *v.* Chalfant, 38 W. Va. 248, 18 S. E. 451.
See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 295, 296, 297.
Board of mother-in-law.— A mother-in-law has the right as against creditors to compensate her son-in-law for her board and living expenses, where she lives in his family as a member thereof, without any previous agreement for compensation. Pettyjohn *v.* Newhart, 7 Kan. App. 64, 51 Pac. 969.

81. *District of Columbia.*— Offutt *v.* King, 1 MacArthur 312.
Illinois.— Davis *v.* Kennedy, 105 Ill. 300.
New York.— Brown *v.* Austen, 35 Barb. 341.
South Carolina.— Smith *v.* Smith, 24 S. C. 304.
Vermont.— Brackett *v.* Waite, 4 Vt. 389.
Virginia.— Charlton *v.* Gardner, 11 Leigh 281.
United States.— King *v.* Thompson, 9 Pet. 204, 9 L. ed. 102.
See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 293.

82. *Connecticut.*— Salmon *v.* Bennett, 1 Conn. 525, 7 Am. Dec. 237.
Illinois.— Russell *v.* Fanning, 2 Ill. App. 632.
Kentucky.— Yankey *v.* Sweeney, 85 Ky. 55, 2 S. W. 559, 8 Ky. L. Rep. 944; Franklin *v.* Cooper, 44 S. W. 976, 19 Ky. L. Rep. 1976.
Maryland.— Worthington *v.* Shipley, 5 Gill 449.
Massachusetts.— Lerow *v.* Wilmarth, 9 Allen 382.
Mississippi.—Wilson *v.* Kohlheim, 46 Miss. 346.
Missouri.— Snyder *v.* Free, 114 Mo. 360, 21 S. W. 847; Dunlap *v.* Mitchell, 80 Mo. App. 393.
New Jersey.— Den *v.* Lippencott, 6 N. J. L. 473; Lockyer *v.* De Hart, 6 N. J. L. 450.
New York.— Holmes *v.* Clark, 48 Barb. 237; Seward *v.* Jackson, 8 Cow. 406.
Ohio.— Hayes *v.* Moore, 5 Ohio S. & C. Pl. Dec. 520, 5 Ohio N. P. 220.
Pennsylvania.— Kern's Estate, 4 Pa. Dist. 73.

And a conveyance from a parent to a child for a consideration which is so grossly inadequate as to raise a presumption of fraud will be set aside.[83]

b. Earnings of Minor Child. Since a father is entitled to the earnings of his minor child,[84] the receipt by him of such earnings is not, where there had been no emancipation before the earnings were made, a sufficient consideration to support a conveyance by the father to the child as against the father's creditors.[85] It is otherwise, however, where the child had been emancipated so that the earnings belonged to him, and they were loaned to or received by the father under a valid agreement to repay the same to the son, or to convey property to him in consideration thereof.[86]

c. Services Rendered — (i) *By Minor Child.* Since it is the duty of a minor child to labor for his parent in consideration of the latter's furnishing him maintenance and education, a conveyance by a father to his minor child, in consideration of services rendered by the latter, is purely voluntary,[87] and subject to be set aside like other conveyances of this character.[88] Since, however, a father may emancipate his minor child,[89] it has been held that if he does so and enters into a *bona fide* contract with the child to pay for services performed by the child under such contract, such services are a sufficient consideration to support a conveyance by the father to the child as against the father's creditors.[90]

Virginia.— Fones *v.* Rice, 9 Gratt. 568.

United States.— Hinde *v.* Longworth, 11 Wheat. 199, 6 L. ed. 454.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 293; and *supra*, VIII, A, 2.

83. Johnston Harvester Co. *v.* Cibula, 62 Iowa 697, 13 N. W. 418. See also Clinton First Nat. Bank *v.* Cummins, 38 N. J. Eq. 191; and *supra*, VIII, B, E.

84. See *supra*, II, B, 7, c.

85. Winchester *v.* Reid, 53 N. C. 377 (holding that where a father, being insolvent, made a deed of land to his minor son and received from him in part payment money which he had earned as wages, and his note for the residue of the price, the deed was fraudulent and void as against the father's creditors, since the money so received by the father belonged to him); Bell *v.* Hallenbach, Wright (Ohio) 751. *Compare* Rains *v.* Dunnegan, 71 Mo. 148. See also *supra*, II, B, 7, c; and *infra*, VIII, G, 1, c.

86. *Massachusetts.*— Jenney *v.* Alden, 12 Mass. 375.

New Jersey.—Berla *v.* Meisel, (Ch. 1902) 52 Atl. 999.

New York.— McCaffrey *v.* Hickey, 66 Barb. 489.

Oregon.— Flynn *v.* Baisley, 35 Oreg. 268, 57 Pac. 908, 76 Am. St. Rep. 495, 45 L. R. A. 645.

Tennessee.— Rosenbaum *v.* Davis, (Ch. App. 1898) 48 S. W. 706, holding also that the fact that a son with whom a debtor deals is only thirteen years of age does not render the transaction fraudulent as to creditors, where he had worked for himself with his father's consent and had saved money out of his wages.

Vermont.— Chase *v.* Elkins, 2 Vt. 290.

Canada.— Jack *v.* Greig, 27 Grant Ch. (U. C.) 6.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 301; and *supra*, II, B, 7, c; *infra*, VIII, G, 1, c.

87. *Alabama.*— Godfrey *v.* Hays, 6 Ala. 501, 41 Am. Dec. 58.

California.— Swartz *v.* Hazlett, 8 Cal. 118.

Iowa.— Gamet *v.* Simmons, 103 Iowa 163, 72 N. W. 444, services of a minor stepchild are not a sufficient consideration.

Kansas.— Stumbaugh *v.* Anderson, 46 Kan. 541, 26 Pac. 1045, 26 Am. St. Rep. 121.

Maryland.— Bullett *v.* Worthington, 3 Md. Ch. 99.

Mississippi.— Dick *v.* Grissom, Freem. 428.

New Jersey.— Gardner *v.* Schooley, 25 N. J. Eq. 150.

Oregon.— Flynn *v.* Baisley, 35 Oreg. 268, 57 Pac. 908, 76 Am. St. Rep. 495, 45 L. R. A. 645.

United States.— Dowell *v.* Applegate, 15 Fed. 419, 8 Sawy. 427.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 315; and *supra*, II, B, 7, c.

88. See *supra*, VIII, D.

89. See *supra*, II, B, 7, c.

90. *Georgia.*— Wilson *v.* McMillan, 62 Ga. 16, 35 Am. Rep. 115, holding that the father, although insolvent, may in a *bona fide* contract promise his minor child a reasonable part of a prospective crop as compensation for the child's labor, and such part will not be liable for the father's debt.

Illinois.— Heeren *v.* Kitson, 28 Ill. App. 259, holding that, where a father agreed to pay his minor son as much as any other man would give him if he would stay and work on the farm until his majority, and a certain sum thereafter, a substantial performance on his part of the agreement by the son was sufficient to support a deed and mortgage to him from the father as against the latter's creditors.

Kentucky.— Perry *v.* Cornelius, 63 S. W. 23, 23 Ky. L. Rep. 425.

Nebraska.— Clemens *v.* Brillhart, 17 Nebr. 335, 22 N. W. 779, sustaining a mortgage given by a father to his emancipated minor son to secure wages due under contract.

(II) *By Child After Attaining Majority.* Services rendered by children who have attained their majority, to their parents while residing with them, without any agreement for compensation, do not constitute a valuable consideration for conveyances by the parents, since the law implies no promise to pay for services rendered each other by persons standing in this relation;[91] but a conveyance by a parent to his child, in consideration of services rendered under an agreement for compensation therefor, is valid as against creditors of the parent.[92]

(III) *By Grandchild.* A conveyance to a grandchild, in pursuance of a promise to convey in consideration of the grandchild remaining with the grandparent and working for him during minority, is based upon a sufficient consideration as against the grandparent's creditors, even when the rule would not apply to parent and child.[93]

d. Support — (I) *Future Support* — (A) *In General.* An agreement between a parent and his child for the future support of the parent is, like such an agreement between strangers, not usually such a consideration as will support a conveyance as against existing creditors who are prejudiced thereby;[94] but a convey-

New York.— Kain *v.* Larkin, 131 N. Y. 300, 30 N. E. 105 [*reversing* 17 N. Y. Suppl. 223], sustaining a deed by a father to his emancipated daughter in consideration of services rendered by the latter under a promise to make such conveyance.

Pennsylvania.— Brown's Appeal, 86 Pa. St. 524, sustaining an insolvent father's confession of judgment in favor of his son for wages due under contract.

United States.— See Wilson *v.* Jones, 76 Fed. 484.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 315. And see *supra*, II, B, 7, c; VIII, G, 1, b.

Contra, where the child remains at home. Godfrey *v.* Hays, 6 Ala. 501, 41 Am. Dec. 58; Dowell *v.* Applegate, 15 Fed. 419, 8 Sawy. 427. But see Donegan *v.* Davis, 66 Ala. 362.

91. *Illinois.*— Guffin *v.* Morrison First Nat. Bank, 74 Ill. 259.

Iowa.— Irish *v.* Bradford, 64 Iowa 303, 20 N. W. 447; Hart *v.* Flinn, 36 Iowa 366.

Michigan.— Ionia County Sav. Bank *v.* McLean, 84 Mich. 625, 48 N. W. 159.

Minnesota.— McCord *v.* Knowlton, 79 Minn. 299, 82 N. W. 589.

Missouri.— Snyder *v.* Free, 114 Mo. 360, 21 S. W. 847.

New Hampshire.— See Lord *v.* Locke, 62 N. H. 566.

New Jersey.— Miller *v.* Sauerbier, 30 N. J. Eq. 71.

New York.— Breen *v.* Henry, 34 Misc. 232, 69 N. Y. Suppl. 627.

Pennsylvania.— Sanders *v.* Wagonseller, 19 Pa. St. 248; Hack *v.* Stewart, 8 Pa. St. 213.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 316.

92. *Alabama.*— Halsey *v.* Connell, 111 Ala. 221, 20 So. 445.

Iowa.— Citizens' State Bank *v.* Weston, 103 Iowa 736, 72 N. W. 542; Chadwick *v.* Devore, 69 Iowa 637, 29 N. W. 757; Collier *v.* French, 64 Iowa 577, 21 N. W. 90; Hunt *v.* Hoover, 34 Iowa 77.

Kansas.— Mitchell *v.* Simpson, 62 Kan. 343, 63 Pac. 440.

Minnesota.— Leqve *v.* Stoppel, 64 Minn. 152, 66 N. W. 124.

New Jersey.— See Low *v.* Wortman, 44 N. J. Eq. 193, 7 Atl. 654, 14 Atl. 586.

Tennessee.— See Gardenhire *v.* White, (Ch. App. 1900) 59 S. W. 661.

West Virginia.— Stuart *v.* Neely, 50 W. Va. 508, 40 S. E. 441.

Wisconsin.— Byrnes *v.* Clarke, 57 Wis. 13, 14 N. W. 815; Manseau *v.* Mueller, 45 Wis. 430. See also Seymour *v.* Briggs, 11 Wis. 196. *Compare* Haney *v.* Nugent, 13 Wis. 283.

United States.— Vansickle *v.* Wells, 105 Fed. 25.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 316.

93. Dowell *v.* Applegate, 15 Fed. 419, 8 Sawy. 427.

94. *Alabama.*— Stokes *v.* Jones, 21 Ala. 731.

Connecticut.— Graves *v.* Atwood, 52 Conn. 512, 52 Am. Rep. 610.

Illinois.— Funk *v.* Lawson, 12 Ill. App. 229. See also Guffin *v.* Morrison First Nat. Bank, 74 Ill. 259.

Indiana.— Tyner *v.* Somerville, Smith 149.

Iowa.— Strong *v.* Lawrence, 58 Iowa 55, 12 N. W. 74. See also Graham *v.* Rooney, 42 Iowa 567.

Kentucky.— See Howell *v.* Smith, 1 Ky. L. Rep. 415. *Compare* Layton *v.* Calhoon Bank, 59 S. W. 322, 22 Ky. L. Rep. 872.

Maine.— Sidensparker *v.* Sidensparker, 52 Me. 481, 83 Am. Dec. 527; Hapgood *v.* Fisher, 34 Me. 407, 56 Am. Dec. 663.

Massachusetts.— See Gunn *v.* Butler, 18 Pick. 248; Slater *v.* Dudley, 18 Pick. 373.

Michigan.— Rynearson *v.* Turner, 52 Mich. 7, 17 N. W. 219; Pursel *v.* Armstrong, 37 Mich. 326.

New York.— Spotten *v.* Keeler, 12 N. Y. St. 385; Jackson *v.* Parker, 9 Cow. 73. *Compare* Seward *v.* Jackson, 8 Cow. 406 [*reversing* 5 Cow. 67].

Ohio.— Bowlus *v.* Shanabarger, 19 Ohio Cir. Ct. 137, 10 Ohio Cir. Dec. 167.

Pennsylvania.— Geiger *v.* Welsh, 1 Rawle 349.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 306; and *supra*, VIII, A, 7, a, (IV).

Compare Worthington *v.* Jones, 23 Vt. 546.

ance upon such a consideration is valid as to subsequent creditors.[95] A conveyance by a father to his son in consideration of an agreement that the grantee shall support his invalid brothers during their respective lives is not voluntary, but is founded upon a valuable consideration.[96]

(B) *As Part of Consideration.* An agreement for future support as a part of the consideration of a conveyance does not necessarily invalidate it;[97] but if a conveyance is otherwise valid and is supported by a sufficient consideration, it will not be invalidated because of a gratuitous agreement for future support.[98] If, however, the agreement for such support is a substantial part of a consideration which is not otherwise adequate, the conveyance is invalid.[99]

(II) *PAST SUPPORT.* Where support has been furnished a parent by a child, in accordance with an agreement between them, a conveyance in consideration of such support is valid as to creditors.[1]

e. Assumption of Debts. A conveyance from a parent to his child, or from a child to his parent, in consideration of an agreement on the part of the grantee to assume the payment of debts of the grantor, is valid as to creditors,[2] unless such conveyance is made and accepted with a fraudulent intent,[3] or unless the

Security for agreement to support.—Where an insolvent debtor attempts to appropriate his property to the benefit of himself and wife during their several lives, by a conveyance in consideration of future support, the agreement being secured by a mortgage back on the property, such mortgage is void and fraudulent as to creditors. De Witt *v.* Van Sickle, 29 N. J. Eq. 209. Where one conveyed land to his son, the deed expressing a valuable consideration, but the son verbally engaging to support the grantor during life, as a consideration for the land; and a year afterward the son, being about to die insolvent, gave a mortgage to the father, conditioned for the support of his father during the residue of his life, it was held, in an action by the father against one claiming the land by virtue of a sale by the son's administrator, that the mortgage was good, even against the creditors of the son. Tyler *v.* Carlton, 7 Me. 175, 20 Am. Dec. 357.

Keeping cow for lessor.— A stipulation in a lease of property by a father to his son that the lessee shall keep a cow for the lessor is not an obligation for support of such a personal character as will avoid the lease as to the creditors of the lessor. Stanley *v.* Robbins, 36 Vt. 422.

Validity of farming contract between father and son see Glasgow *v.* Turner, 91 Tenn. 163, 18 S. W. 261 [*citing* Leslie *v.* Joyner, 2 Head (Tenn.) 514].

95. Faloon *v.* McIntyre, 118 Ill. 292, 8 N. E. 315; Buchanan *v.* Clark, 28 Vt. 799; Rutland, etc., R. Co. *v.* Powers, 25 Vt. 15. But see McLean *v.* Button, 19 Barb. (N. Y.) 450.

96. Worthy *v.* Brady, 91 N. C. 265, 108 N. C. 440, 12 S. E. 1034.

97. Hapgood *v.* Fisher, 34 Me. 407, 56 Am. Dec. 663; Dougherty *v.* Harsel, 91 Mo. 161, 3 S. W. 583; Muenks *v.* Bunch, 90 Mo. 500, 3 S. W. 63; Vial *v.* Mathewson, 34 Hun (N. Y.) 70.

98. Easum *v.* Pirtle, 81 Ky. 561; Nichols *v.* Walker, 7 Ky. L. Rep. 295; Jones *v.* Geery, 153 Mo. 476, 55 S. W. 73; Bent *v.* Bent, 3 N. Y. Suppl. 750; Jolly *v.* Kyle, 27 Oreg. 95, 39 Pac. 999.

99. *Illinois.*— Gordon *v.* Reynolds, 114 Ill. 118, 28 N. E. 455; Lawson *v.* Funk, 108 Ill. 502; Vanston *v.* Davidson, 41 Ill. App. 646.

Kentucky.— Marshall *v.* Strange, 9 S. W. 250, 10 Ky. L. Rep. 410.

New Hampshire.— Morrison *v.* Morrison, 49 N. H. 69; Albee *v.* Webster, 16 N. H. 362.

New York.— Kain *v.* Larkin, 4 N. Y. App. Div. 209, 38 N. Y. Suppl. 546.

Pennsylvania.— Sanders *v.* Wagonseller, 19 Pa. St. 248; Miner *v.* Warner, 2 Grant 448; Johnson *v.* Harvey, 2 Penr. & W. 82, 21 Am. Dec. 426.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 307.

1. Nichols *v.* Nirch, 128 Ind. 324, 27 N. E. 737; Sweatman *v.* Spears, 6 Ky. L. Rep. 515. See also Howard *v.* Rynearson, 50 Mich. 307, 15 N. W. 486; Kelsey *v.* Kelly, 63 Vt. 41, 22 Atl. 597, 32 L. R. A. 640.

2. Jenkins *v.* Peace, 46 N. C. 413; Pattison *v.* Stewart, 6 Watts & S. (Pa.) 72. See also Willis *v.* Heath, (Tex. 1891) 18 S. W. 801. And see *supra*, VIII, A, 8.

Assumption of encumbrance.— Where a father who is financially embarrassed conveys land to his son upon the latter's agreement to discharge an encumbrance thereon, the conveyance as to the surplus of the value of the land above the encumbrance is without consideration and void as to the creditors of the grantor. Priest *v.* Conklin, 38 Ill. App. 180.

3. Grieb *v.* Caraker, 69 Ill. App. 236.

Evading payment of part of debts.— A transfer by a father of all his property to his son to pay just debts, and to evade the payment of unjust debts, is fraudulent. "The law does not authorize father and son, to stipulate, which of the father's debts shall be paid, as just, and which shall go unpaid, as unjust, and the transfer of all the father's property to the son with a view to pay the just debts, and to evade the payment of the unjust debts. The judicial tribunals of

value of the property conveyed is materially greater than the amount of the debts assumed.[4]

f. Preëxisting Liability. A preëxisting debt or other liability is a sufficient consideration for a conveyance or transfer from a parent to his child, or a child to his parent, if such debt or liability is *bona fide*, and the property conveyed is fairly proportionate in value to such debt or liability.[5] An advancement by a parent to his child does not make the child a debtor to the parent so as to constitute a consideration as against creditors for a conveyance by the child to the parent.[6] It is not necessary that there should have been an agreement between the parent and the child in order to constitute money paid by the former for the benefit of the latter an advancement, but in order that money so paid should constitute a debt, the contemporaneous facts and circumstances must make it appear that it was understood and intended at the time to be a debt.[7]

2. Effect of Want or Insufficiency of Consideration. In transactions between parent and child, want or insufficiency of consideration has the same effect as in transactions between strangers.[8]

the country, must settle what debts are just, and what unjust." Brady *v.* Briscoe, 2 J. J. Marsh. (Ky.) 212, 213.

4. Jessup *v.* Johnstone, 48 N. C. 335, 67 Am. Dec. 243. See also Clark *v.* Raymond, 86 Iowa 661, 53 N. W. 354.

5. See *supra*, VIII, A, 9. And see the following cases:

Alabama.— Donegan *v.* Davis, 66 Ala. 362.

Illinois.— Schuberth *v.* Schillo, 177 Ill. 346, 52 N. E. 319 [*affirming* 76 Ill. App. 356].

Indiana.— Clow *v.* Brown, (App. 1904) 72 N. E. 534.

Iowa.— Rockford Boot, etc., Mfg. Co. *v.* Mastin, 75 Iowa 112, 39 N. W. 219.

Kansas.— Beavers *v.* McKinley, 50 Kan. 602, 32 Pac. 363, 33 Pac. 359.

Maryland.— McNeal *v.* Glenn, 4 Md. 87.

Michigan.— Rindge *v.* Grow, 99 Mich. 482, 58 N. W. 468; Nichols *v.* Bancroft, 74 Mich. 191, 41 N. W. 891; Woodhull *v.* Whittle, 63 Mich. 575, 30 N. W. 368 [*following* State Bank *v.* Whittle, 48 Mich. 1, 11 N. W. 756].

Mississippi.— Davis *v.* Harris, 13 Sm. & M. 9.

Nebraska.— Carson *v.* Murphy, 1 Nebr. (Unoff.) 519, 96 N. W. 110.

New Jersey.— Silvers *v.* Potter, 48 N. J. Eq. 539, 22 Atl. 584; Clinton First Nat. Bank *v.* Cummins, 38 N. J. Eq. 191; Updike *v.* Titus, 13 N. J. Eq. 151.

New York.— Port Jervis Nat. Bank *v.* Bonnell, 46 N. Y. App. Div. 302, 61 N. Y. Suppl. 521 [*affirming* 26 Misc. 541, 57 N. Y. Suppl. 486]; Saugerties Bank *v.* Mack, 34 N. Y. App. Div. 494, 54 N. Y. Suppl. 360; Edison Electric Illuminating Co. *v.* Riker, 35 N. Y. Suppl. 906; Foote *v.* Stryker, 10 N. Y. Suppl. 472, 12 N. Y. Suppl. 178.

Ohio.— Webb *v.* Roff, 9 Ohio St. 430.

Pennsylvania.— Sebring *v.* Brickley, 7 Pa. Super. Ct. 198, 42 Wkly. Notes Cas. 189.

Texas.— Barnett *v.* Vincent, 69 Tex. 685, 7 S. W. 525, 5 Am. St. Rep. 98.

Virginia.— Grayson *v.* George, 85 Va. 908, 9 S. E. 13.

West Virginia.— Knight *v.* Capito, 23 W. Va. 639.

United States.— Gorrell *v.* Dickson, 26 Fed. 454.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 311, 314.

A claim by a father for board furnished a son is not a valid consideration, as against creditors, for a conveyance by the son to the father, where there was no agreement, express or implied, on the son's part to pay for the board. Morrow *v.* Campbell, 118 Ala. 330, 24 So. 852.

Deed in escrow destroyed before delivery to grantee.— Where a father conveys land to his son, retaining sufficient property to pay his debts, and delivers the deed in escrow, and such deed is destroyed before the grantee has performed the condition necessary for the transfer of title, a subsequent deed to him of the same property is not in fraud of his father's creditors. Gudgel *v.* Kitterman, 108 Ill. 50.

6. Bomar *v.* Means, 53 S. C. 232, 31 S. E. 234. See also Pearson *v.* Cuthbert, 58 N. Y. App. Div. 395, 68 N. Y. Suppl. 1031.

7. Higham *v.* Vanosdol, 125 Ind. 74, 25 N. E. 140.

8. See *supra*, VIII, D, E. And see the following cases:

Alabama.— Harrell *v.* Mitchell, 61 Ala. 270; Hubbard *v.* Allen, 59 Ala. 283.

Illinois.— Stevens *v.* Dillman, 86 Ill. 233; Austin *v.* Morrison First Nat. Bank, 47 Ill. App. 224.

Indiana.— Burtch *v.* Elliott, 3 Ind. 99; O'Brien *v.* Coulter, 2 Blackf. 421; Farmers' Bank *v.* Frankfort First Nat. Bank, 30 Ind. App. 520, 66 N. E. 503.

Iowa.— Cloud *v.* Malvin, (1898) 75 N. W. 645.

Kentucky.— Loving *v.* Sweeney, 49 S. W. 961, 20 Ky. L. Rep. 1654; Adams *v.* Branch, 3 Ky. L. Rep. 178.

Maryland.— Richards *v.* Swan, 7 Gill 366.

Mississippi.— Moore *v.* Jeffries, (1895) 18 So. 272.

Missouri.— Ridenour-Baker Grocery Co. *v.* Monroe, 142 Mo. 165, 43 S. W. 633; Lionberger *v.* Baker, 14 Mo. App. 353 [*affirmed* in 88 Mo. 447].

IX. RETENTION OF POSSESSION OR APPARENT TITLE.

A. As Evidence of Fraud — 1. IN GENERAL. In all cases the retention of possession of goods and chattels by the seller is deemed evidence, more or less conclusive, of fraud upon existing creditors of the seller.[9]

2. REBUTTABLE PRESUMPTION. But there has been much difference of opinion as to the conclusiveness of the evidence. According to the English rule the continuance in possession of goods and chattels by the seller, after the execution of a bill of sale, is a badge and evidence of fraud, but is not conclusive, and the good faith of the transaction should be left to the jury, especially where the circumstances under which the seller retained possession were well known in the neighborhood, and the retention of possession is consistent with the terms of the agreement.[10] Such is also the rule in Canada.[11] And according to the weight of American authority the retention of possession of chattels by the vendor, after a sale purporting to be absolute, is not necessarily fraudulent as against the vendor's creditors, subsequent purchasers, or mortgagees. It is, however, *prima facie* evidence of fraud and throws upon those seeking to uphold the transaction the burden of showing that it was *bona fide* throughout and that such retention of possession is consistent with good faith and the absolute disposition of the property. Where this is the rule, facts explanatory of the transaction tending to show good faith or the want of it should always be allowed to go to the jury, under appropriate instructions from the court.[12]

Nebraska.— Greenwood First Nat. Bank *v.* Reece, 64 Nebr. 292, 89 N. W. 804.

New Hampshire.— Caswell *v.* Hill, 47 N. H. 407.

New York.— Barker *v.* Woods, 1 Sandf. Ch. 129.

Tennessee. — Walter *v.* Hartman, (1902) 67 S. W. 476.

Texas.— Hughes *v.* Roper, 42 Tex. 116; Walters *v.* Cantrell, (Civ. App. 1902) 66 S. W. 790.

Vermont.— Dewey *v.* Long, 25 Vt. 564.

Virginia.— Norris *v.* Jones, 93 Va. 176, 24 S. E. 911.

Wisconsin. — Fischer *v.* Schultz, 98 Wis. 462, 74 N. W. 222.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 289.

Transfer on promise not binding.—A transfer of property to one's stepdaughter, based on a promise which is not binding on the promisor, is voluntary. Gamet *v.* Simmons, 103 Iowa 163, 72 N. W. 444.

9. Twyne's Case, 3 Coke 80*a*, 1 Smith Lead. Cas. 1 (the leading case under 13 Eliz. c. 5); and cases in the notes following.

10. Martindale *v.* Booth, 3 B. & Ad. 498, 1 L. J. K. B. 166, 23 E. C. L. 223; Latimer *v.* Batson, 4 B. & C. 652, 10 E. C. L. 742, 7 D. & R. 106, 4 L. J. K. B. O. S. 25; Kidd *v.* Rawlinson, 2 B. & P. 59, 3 Esp. 52, 5 Rev. Rep. 540; Jezeph *v.* Ingram, 1 Moore C. P. 189, 8 Taunt. 838, 4 E. C. L. 406; Leonard *v.* Baker, 1 M. & S. 251; Watkins *v.* Birch, 4 Taunt. 823; Arundell *v.* Phipps, 10 Ves. Jr. 139, 32 Eng. Reprint 797. As to the notoriety of the sale as a circumstance to rebut the presumption of fraud when the seller remains in possession see Latimer *v.* Batson, 4 B. & C. 652, 10 E. C. L. 742; Kidd *v.* Rawlinson, 2 B. & P. 59, 3 Esp. 52, 5 Rev. Rep. 540; Cole *v.* Davies, 1 Ld. Raym. 724; Macdona *v.* Swiney, 8 Ir. C. L. 73. In some of the early cases the judges were inclined to the opinion that a sale of chattels without any change of possession was fraudulent in point of law. See Edwards *v.* Harben, 2 T. R. 587, 1 Rev. Rep. 548 (opinion of Buller, J.); Wordall *v.* Smith, 1 Campb. 332 (opinion of Lord Ellenborough). But in Hale *v.* Metropolitan Saloon Omnibus Co., 4 Drew. 492, 28 L. J. Ch. 777, 779, 7 Wkly. Rep. 316, Vice-Chancellor Kindersley thus declares the result of the decisions: "It was at one time attempted to lay down rules that particular things were indelible badges of fraud; but, in truth, every case must stand upon its own footing; and the Court or the jury must consider whether, having regard to all the circumstances, the transaction was a fair one, and intended to pass the property for a good and valuable consideration." See also Graham *v.* Thurber, 14 C. B. 410, 2 C. L. R. 10, 452, 18 Jur. 226, 23 L. J. C. P. 51, 2 Wkly. Rep. 163, 78 E. C. L. 410.

11. Fraser *v.* Murray, 34 Nova Scotia 186.

12. *Alabama.*— Teague *v.* Bass, 131 Ala. 422, 31 So. 4; Troy Fertilizer Co. *v.* Norman, 107 Ala. 667, 18 So. 201; Ullman *v.* Myrick, 93 Ala. 532, 8 So. 410; Crawford *v.* Kirksey, 55 Ala. 283, 28 Am. Rep. 704; Moog *v.* Benedicks, 49 Ala. 512; Mayer *v.* Clark, 40 Ala. 259; Wyatt *v.* Stewart, 34 Ala. 716; Millard *v.* Hall, 24 Ala. 209; Blocker *v.* Burness, 2 Ala. 354; Hobbs *v.* Bibb, 2 Stew. 54. See also Upson *v.* Raiford, 29 Ala. 188.

Arizona.— Leibes *v.* Steffy, 4 Ariz. 11, 32 Pac. 261.

Arkansas.— Stix *v.* Chaytor, 55 Ark. 116, 17 S. W. 707; Valley Distilling Co. *v.* Atkins, 50 Ark. 289, 7 S. W. 137; Collins *v.*

3. Conclusive Presumption. By statute in some jurisdictions a sale or mortgage of chattels not accompanied by an immediate delivery and a continued

Lightle, 50 Ark. 97, 6 S. W. 596; Apperson *v.* Burgett, 33 Ark. 328; Hempstead *v.* Johnston, 18 Ark. 123, 65 Am. Dec. 458; Danley *v.* Rector, 10 Ark. 211, 50 Am. Dec. 242; Field *v.* Simco, 7 Ark. 269. The vendor's retention of possession is *prima facie* evidence of a secret trust which is fraudulent as to creditors, and, if unexplained, the presumption becomes conclusive. Smith *v.* Jones, 63 Ark. 232, 37 S. W. 1052; Valley Distilling Co. *v.* Atkins, 50 Ark. 289, 7 S. W. 137; Martin *v.* Ogden, 41 Ark. 186.

District of Columbia.— Justh *v.* Wilson, 19 D. C. 529.

Florida.— Spencer *v.* Mugge, (1903) 34 So. 271; Briggs *v.* Weston, 36 Fla. 629, 18 So. 852; Holliday *v.* McKinne, 22 Fla. 153; Sanders *v.* Pepoon, 4 Fla. 465; Gibson *v.* Love, 4 Fla. 217. It devolves upon the vendee to show that the possession of the vendor is either consistent with the bill of sale, is unavoidable, or is temporary for the reasonable convenience of the vendee. Volusia County Bank *v.* Bertola, 44 Fla. 734, 33 So. 448.

Georgia.—Ross *v.* Cooley, 113 Ga. 1047, 39 S. E. 471; Pool *v.* Gramling, 88 Ga. 653, 16 S. E. 52; Collins *v.* Taggart, 57 Ga. 355; Goodwyn *v.* Goodwyn, 20 Ga. 600; Carter *v.* Stanfield, 8 Ga. 49; Fleming *v.* Townsend, 6 Ga. 103, 50 Am. Dec. 318.

Indiana.— Seavey *v.* Walker, 108 Ind. 78, 9 N. E. 347; Rose *v.* Colter, 76 Ind. 590; Kane *v.* Drake, 27 Ind. 29; Nutter *v.* Harris, 9 Ind. 88. See also Maple *v.* Burnside, 22 Ind. 139; South Branch Lumber Co. *v.* Stearns, 2 Ind. App. 7, 28 N. E. 117.

Kansas.— Locke *v.* Hedrick, 24 Kan. 763; Phillips *v.* Reitz, 16 Kan. 396; Wolfley *v.* Rising, 8 Kan. 297.

Louisiana.—Hughes *v.* Mattes, 104 La. 218, 28 So. 1006; Yale *v.* Bond, 45 La. Ann. 997, 13 So. 587; Cochrane *v.* Gilbert, 41 La. Ann. 735, 6 So. 731; Devonshire *v.* Gauthreaux, 32 La. Ann. 1132; Pendleton *v.* Eaton, 23 La. Ann. 435; Keller *v.* Blanchard, 19 La. Ann. 53; Hill *v.* Hanney, 15 La. Ann. 654; Zacharie *v.* Kirk, 14 La. Ann. 433; McCandlish *v.* Kirkland, 7 La. Ann. 614; Brown *v.* Glathary, 4 La. Ann. 124; Jorda *v.* Lewis, 1 La. Ann. 59; Thompson *v.* Chretien, 12 Mart. 250; Pierce *v.* Curtis, 6 Mart. 418.

Maine.— Reed *v.* Reed, 70 Me. 504; Farrar *v.* Smith, 64 Me. 74; Fairfield Bridge Co. *v.* Nye, 60 Me. 372; McKee *v.* Garcelon, 60 Me. 165, 11 Am. Rep. 200; Googins *v.* Gilmore, 47 Me. 9, 74 Am. Dec. 472; Sawyer *v.* Nichols, 40 Me. 212; Gardiner Bank *v.* Hodgdon, 14 Me. 453; Ulmer *v.* Hills, 8 Me. 326; Reed *v.* Jewett, 5 Me. 96.

Maryland.— Bruce *v.* Smith, 3 Harr. & J. 499; Hudson *v.* Warner, 2 Harr. & G. 415.

Massachusetts.—Ashcroft *v.* Simmons, 163 Mass. 437, 40 N. E. 171; Ingalls *v.* Herrick, 108 Mass. 351, 11 Am. Rep. 360; Allen *v.* Wheeler, 4 Gray 123; Jones *v.* Huggeford, 3 Metc. 515; Oriental Bank *v.* Haskins, 3 Metc. 332, 37 Am. Dec. 140; Briggs *v.* Parkman, 2 Metc. 258, 37 Am. Dec. 89; Marden *v.* Babcock, 2 Metc. 99; Shurtleff *v.* Willard, 19 Pick. 202; Macomber *v.* Parker, 14 Pick. 497; Fletcher *v.* Willard, 14 Pick. 464; Parsons *v.* Dickinson, 11 Pick. 352; Shumway *v.* Rutter, 8 Pick. 443, 19 Am. Dec. 340; Ward *v.* Sumner, 5 Pick. 59; Gould *v.* Ward, 4 Pick. 104; Wheeler *v.* Train, 3 Pick. 255; Homes *v.* Crane, 2 Pick. 607; Bartlett *v.* Williams, 1 Pick. 288; Brooks *v.* Powers, 15 Mass. 244, 8 Am. Dec. 99.

Michigan.— Williams *v.* Brown, (1904) 100 N. W. 786; Jansen *v.* McQueen, 105 Mich. 199, 63 N. W. 73; Hopkins *v.* Bishop, 91 Mich. 328, 51 N. W. 902, 30 Am. St. Rep. 480; Kipp *v.* Lamoreaux, 81 Mich. 299, 45 N. W. 1002; Clark *v.* Lee, 78 Mich. 221, 44 N. W. 260; Buhl Iron Works *v.* Teuton, 67 Mich. 623, 35 N. W. 804; Waite *v.* Mathews, 50 Mich. 392, 15 N. W. 524; Webster *v.* Anderson, 42 Mich. 554, 4 N. W. 288, 36 Am. Rep. 452; Webster *v.* Bailey, 40 Mich. 641; Molitor *v.* Robinson, 40 Mich. 200; Hatch *v.* Fowler, 28 Mich. 205; Jackson *v.* Dean, 1 Dougl. 519.

Minnesota.— Flanigan *v.* Pomeroy, 85 Minn. 264, 88 N. W. 761; Cortland Wagon Co. *v.* Sharvy, 52 Minn. 216, 53 N. W. 1147; Baker *v.* Pottle, 48 Minn. 479, 51 N. W. 383; Mackellar *v.* Pillsbury, 48 Minn. 396, 51 N. W. 222; Lathrop *v.* Clayton, 45 Minn. 124, 47 N. W. 544; Chickering *v.* White, 42 Minn. 457, 44 N. W. 988; Murch *v.* Swensen, 40 Minn. 421, 42 N. W. 290; Camp *v.* Thompson, 25 Minn. 175; Benton *v.* Snyder, 22 Minn. 247; Vose *v.* Stickney, 19 Minn. 367; Blackman *v.* Wheaton, 13 Minn. 326.

Mississippi.— Charlotte Supply Co. *v.* Britton, etc., Bank, (1898) 23 So. 630; Hilliard *v.* Cagle, 46 Miss. 309; Summers *v.* Roos, 42 Miss. 749, 2 Am. Rep. 653; Johnston *v.* Dick, 27 Miss. 277; Comstock *v.* Rayford, 12 Sm. & M. 369; Farmers' Bank *v.* Douglass, 11 Sm. & M. 469; Garland *v.* Chambers, 11 Sm. & M. 337, 49 Am. Dec. 63; Bogard *v.* Gardley, 4 Sm. & M. 302; Carter *v.* Graves, 6 How. 9.

Nebraska.— Snyder *v.* Dangler, 44 Nebr. 600, 63 N. W. 20; Paxton *v.* Smith, 41 Nebr. 56, 59 N. W. 690; Denver First Nat. Bank *v.* Lowrey, 36 Nebr. 290, 54 N. W. 568; Fitzgerald *v.* Meyer, 25 Nebr. 77, 41 N. W. 123; Miller *v.* Morgan, 11 Nebr. 121, 7 N. W. 755; Densmore *v.* Tomer, 11 Nebr. 118, 7 N. W. 535; Robison *v.* Uhl, 6 Nebr. 328.

New Jersey.— Shreve *v.* Miller, 29 N. J. L. 250; Sherron *v.* Humphreys, 14 N. J. L. 217; Hall *v.* Snowhill, 14 N. J. L. 8; Runyon *v.* Groshon, 12 N. J. Eq. 86.

New York.— Prentiss Tool, etc., Co. *v.* Schirmer, 136 N. Y. 305, 32 N. E. 849, 32 Am. St. Rep. 737; Preston *v.* Southwick, 115 N. Y. 139, 21 N. E. 1031; Siedenbach *v.* Riley, 111 N. Y. 560, 19 N. E. 275; Blaut *v.* Gabler, 77 N. Y. 461; Tilson *v.* Terwilliger, 56 N. Y. 273; May *v.* Walter, 56 N. Y. 8; Mitchell *v.*

change of possession is fraudulent *per se* and void as against existing creditors of

West, 55 N. Y. 107; Miller *v.* Lockwood, 32 N. Y. 293; Ball *v.* Loomis, 29 N. Y. 412; Ford *v.* Williams, 24 N. Y. 359; Gardner *v.* McEwen, 19 N. Y. 123; Thompson *v.* Blanchard, 4 N. Y. 303; Van Buskirk *v.* Warren, 4 Abb. Dec. 457; National Hudson River Bank *v.* Chaskin, 28 N. Y. App. Div. 311, 51 N. Y. Suppl. 64; Wallace *v.* Nodine, 57 Hun 239; Tate *v.* McCormick, 23 Hun 218; Schoonmaker *v.* Vervalen, 9 Hun 138; Hollacher *v.* O'Brien, 5 Hun 277; Brown *v.* Wilmerding, 5 Duer 220; Betz *v.* Conner, 7 Daly 550; Stark *v.* Grant, 16 N. Y. Suppl. 526; Parmenter *v.* Fitzpatrick, 14 N. Y. Suppl. 748; Southard *v.* Pinckney, 5 Abb. N. Cas. 184; Stout *v.* Rappelhagen, 51 How. Pr. 75; Hanford *v.* Artcher, 4 Hill 271; Cole *v.* White, 26 Wend. 511; Smith *v.* Acker, 23 Wend. 653; Murray *v.* Burtis, 15 Wend. 212; Collins *v.* Brush, 9 Wend. 198; Hall *v.* Tuttle, 8 Wend. 375; Divver *v.* McLaughlin, 2 Wend. 596, 20 Am. Dec. 655; Bissell *v.* Hopkins, 3 Cow. 166, 15 Am. Dec. 259; Butts *v.* Swartwood, 2 Cow. 431; Beals *v.* Guernsey, 8 Johns. 446, 5 Am. Dec. 348; Barrow *v.* Paxton, 5 Johns. 258, 4 Am. Dec. 354. See also Amsterdam First Nat. Bank *v.* Miller, 163 N. Y. 164, 57 N. E. 308; Menken *v.* Baker, 40 N. Y. App. Div. 609, 57 N. Y. Suppl. 541 [*affirmed* in 166 N. Y. 628, 60 N. E. 1116]; New York Ice Co. *v.* Cousins, 23 N. Y. App. Div. 560, 48 N. Y. Suppl. 799. If no satisfactory explanation of the vendor's retention of possession be given, it is the duty of the court to direct a verdict or a nonsuit. Stevens *v.* Fisher, 19 Wend. 181; Randall *v.* Cook, 17 Wend. 53; Doane *v.* Eddy, 16 Wend. 523.

North Carolina.— Brown *v.* Mitchell, 102 N. C. 347, 9 S. E. 702, 11 Am. St. Rep. 748; Phifer *v.* Erwin, 100 N. C. 59, 6 S. E. 672; Boone *v.* Hardie, 83 N. C. 470; Cheatham *v.* Hawkins, 80 N. C. 161, 76 N. C. 335; Foster *v.* Woodfin, 33 N. C. 339; Rea *v.* Alexander, 27 N. C. 644; Howell *v.* Elliott, 12 N. C. 76; Smith *v.* Niel, 8 N. C. 341; Trotter *v.* Howard, 8 N. C. 320, 9 Am. Dec. 640; Falkner *v.* Perkins, 3 N. C. 224. See Hardy *v.* Skinner, 31 N. C. 191.

North Dakota.— Under a former statute the presumption of fraud was conclusive. Morrison *v.* Oium, 3 N. D. 76, 44 N. W. 288; Conrad *v.* Smith, 2 N. D. 408, 51 N. W. 720. But now by Rev. Codes, § 5053, the conclusive presumption is converted into a rebuttable presumption of fraud. Conrad *v.* Smith, 6 N. D. 337, 70 N. W. 815.

Ohio.— Thorne *v.* Wilmington First Nat. Bank, 37 Ohio St. 254; Ferguson *v.* Gilbert, 16 Ohio St. 88; Collins *v.* Myers, 16 Ohio 547; Hombeck *v.* Vanmetre, 9 Ohio 153; Rogers *v.* Dare, Wright 136.

Oregon.— Haines *v.* McKinnon, 35 Oreg. 573, 57 Pac. 903; Pierce *v.* Kelly, 25 Oreg. 95, 34 Pac. 963; Marks *v.* Miller, 21 Oreg. 317, 28 Pac. 14, 14 L. R. A. 190; McCully *v.* Swackhamer, 6 Oreg. 438; Moore *v.* Floyd, 4 Oreg. 101; Monroe *v.* Hussey, 1 Oreg. 188, 75 Am. Dec. 552.

Rhode Island.— Mead *v.* Gardiner, 13 R. I. 257; Goodell *v.* Fairbrother, 12 R. I. 233, 34 Am. Rep. 631; Sarle *v.* Arnold, 7 R. I. 582; Anthony *v.* Wheatons, 7 R. I. 490.

South Carolina.— Pregnall *v.* Miller, 21 S. C. 385, 53 Am. Rep. 684; Nelson *v.* Good, 20 S. C. 223; Kohn *v.* Meyer, 19 S. C. 190; Pringle *v.* Rhame, 10 Rich. 72, 67 Am. Dec. 560; Smith *v.* Henry, 1 Hill 16; Smith *v.* Henry, 2 Bailey 118; Howard *v.* Williams, 1 Bailey 575, 21 Am. Dec. 483; Terry *v.* Belcher, 1 Bailey 568. See also Perkins *v.* Douglass, 52 S. C. 129, 29 S. E. 400; Werts *v.* Spearman, 22 S. C. 200.

Tennessee.— Carney *v.* Carney, 7 Baxt. 284; Tennessee Nat. Bank *v.* Ebbert, 9 Heisk. 153; Grubbs *v.* Greer, 5 Coldw. 160; Ocoee Bank *v.* Nelson, 1 Coldw. 186; Wiley *v.* Lashlee, 8 Humphr. 717; Galt *v.* Dibrell, 10 Yerg. 146; Simpson *v.* Mitchell, 8 Yerg. 417; Maney *v.* Killough, 7 Yerg. 440; Young *v.* Pate, 4 Yerg. 164; Darwin *v.* Handley, 3 Yerg. 502; Callen *v.* Thompson, 3 Yerg. 475, 24 Am. Dec. 587; Morris *v.* Clark, (Ch. App. 1901) 62 S. W. 673.

Texas.— Traders' Nat. Bank *v.* Day, 87 Tex. 101, 26 S. W. 1049; Edwards *v.* Dickson, 66 Tex. 613, 2 S. W. 718; Kerr *v.* Hutchins, 46 Tex. 384; Thornton *v.* Tandy, 39 Tex. 544; Van Hook *v.* Walton, 28 Tex. 59; Stadtler *v.* Wood, 24 Tex. 622; Green *v.* Banks, 24 Tex. 508; Howerton *v.* Holt, 23 Tex. 51; Gibson *v.* Hill, 21 Tex. 225, 23 Tex. 77; Mills *v.* Walton, 19 Tex. 271; Earle *v.* Thomas, 14 Tex. 583; Converse *v.* McKee, 14 Tex. 20; McQuinnay *v.* Hitchcock, 8 Tex. 33; Morgan *v.* Republic, 2 Tex. 279; Bryant *v.* Kelton, 1 Tex. 415; Perry *v.* Patton, (Civ. App. 1902) 68 S. W. 1018; Landman *v.* Glover, (Civ. App. 1894) 25 S. W. 994; Johnston *v.* Luling Mfg. Co., (Civ. App. 1894) 24 S. W. 996.

Virginia.— King *v.* Levy, (1895) 22 S. E. 492; Norris *v.* Lake, 89 Va. 513, 16 S. E. 663; Sipe *v.* Earman, 26 Gratt. 563; Dance *v.* Seaman, 11 Gratt. 778; Curd *v.* Miller, 7 Gratt. 185; Forkner *v.* Stuart, 6 Gratt. 197.

West Virginia.— Poling *v.* Flanagan, 41 W. Va. 191, 23 S. E. 685; Curtin *v.* Isaacsen, 36 W. Va. 391, 15 S. E. 171; Blackshire *v.* Pettit, 35 W. Va. 547, 14 S. E. 133; Bindley *v.* Martin, 28 W. Va. 773.

Wisconsin.— Densmore Commission Co. *v.* Shong, 98 Wis. 380, 74 N. W. 114; Cook *v.* Van Horne, 76 Wis. 520, 44 N. W. 767; Norwegian Plow Co. *v.* Hanthorn, 71 Wis. 520, 37 N. W. 825; Sharp *v.* Carroll, 66 Wis. 62, 27 N. W. 832; Williams *v.* Porter, 41 Wis. 422; Janvrin *v.* Maxwell, 23 Wis. 51; Bullis *v.* Borden, 21 Wis. 136; Mayer *v.* Webster, 18 Wis. 393; Livingston *v.* Littell, 15 Wis. 218; Grant *v.* Lewis, 14 Wis. 487, 80 Am. Dec. 785; Smith *v.* Welch, 10 Wis. 91; Gleason *v.* Day, 9 Wis. 498; Whitney *v.* Brunette, 3 Wis. 621; Sterling *v.* Ripley, 3 Pinn. 155, 3 Chandl. 166; Bond *v.* Seymour, 2 Pinn. 105, 1 Chandl. 40.

The rule as stated in New Hampshire is

the vendor and subsequent purchasers in good faith.[13] And the fact that a delivery is made before the creditor levies on the goods does not help the matter.[14] And in a number of states it has been judicially determined that whenever the subject-matter of a transfer is reasonably susceptible of actual delivery, the retention of possession of personal property by a vendor or mortgagor is fraudulent *per se*. In other words when these facts are admitted or established, the transaction is, as a matter of law, a fraud upon the creditors of the vendor or mortgagor as well as subsequent purchasers in good faith to whom delivery is made, and there is no question for the jury. Where this is the rule the courts in such

that the retention of possession of chattels by the vendor is always *prima facie*, and, if not satisfactorily explained, conclusive evidence of a secret trust which is fraud in law. Harrington *v.* Blanchard, 70 N. H. 597, 49 Atl. 576; Thompson *v.* Esty, 69 N. H. 55, 45 Atl. 566; Doucet *v.* Richardson, 67 N. H. 186, 29 Atl. 635; Parker *v.* Marvell, 60 N. H. 30; Flagg *v.* Pierce, 58 N. H. 348; Sumner *v.* Dalton, 58 N. H. 295; Cutting *v.* Jackson, 56 N. H. 253; Coburn *v.* Pickering, 3 N. H. 415, 14 Am. Dec. 375. An agreement that the vendor shall still have the right to use the thing sold in and about his business is inconsistent with an absolute sale and constitutes a secret trust from which fraud as to the vendor's creditors is an inference of law; and the actual intention of the parties will not be inquired into. Lang *v.* Stockwell, 55 N. H. 561. Where an actual delivery of the property has been made subsequent possession by the vendor for some special purpose is open to explanation. Towne *v.* Rice, 59 N. H. 412. In Baldwin *v.* Thayer, 71 N. H. 257, 52 Atl. 852, 93 Am. St. Rep. 510, the property sold was situated in Vermont, and the court applied the Vermont rule where the presumption of fraud is conclusive.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 407 *et seq.*

A conveyance of real estate duly executed and recorded, but fraudulent and void as to creditors, is not a substitute for a change of possession of personal property conveyed by bill of sale executed at the same time. Flagg *v.* Pierce, 58 N. H. 348.

13. *California.*— Riebli *v.* Husler, (1902) 69 Pac. 1061; McKee Stair Bldg. Co. *v.* Martin, 126 Cal. 557, 58 Pac. 1044; O'Kane *v.* Whelan, 124 Cal. 200, 56 Pac. 880, 71 Am. St. Rep. 42; Davis *v.* Winona Wagon Co., 120 Cal. 244, 52 Pac. 487; Howe *v.* Johnson, 117 Cal. 37, 48 Pac. 978; Rothschild *v.* Swope, 116 Cal. 670, 48 Pac. 911; Dubois *v.* Spinks, 114 Cal. 289, 46 Pac. 95; Murphy *v.* Mulgrew, 102 Cal. 547, 36 Pac. 857, 41 Am. St. Rep. 200; Dean *v.* Walkenhorst, 64 Cal. 78, 28 Pac. 60; Harter *v.* Donahoe, (1886) 9 Pac. 651; Edwards *v.* Sonoma Valley Bank, 59 Cal. 148; Watson *v.* Rodgers, 53 Cal. 401; Whitney *v.* Stark, 8 Cal. 514, 68 Am. Dec. 360; Chenery *v.* Palmer, 6 Cal. 119, 65 Am. Dec. 493.

Colorado.— Roberts *v.* Hawn, 20 Colo. 77, 36 Pac. 886; Baur *v.* Beall, 14 Colo. 383, 23 Pac. 345; Sweeney *v.* Coe, 12 Colo. 485, 21 Pac. 705; Bassinger *v.* Spangler, 9 Colo. 175, 10 Pac. 809; McCraw *v.* Welch, 2 Colo. 284; Helgert *v.* Stewart, (App. 1904) 77 Pac. 1091; Willis *v.* Roberts, 18 Colo. App. 149, 70 Pac. 445; Israel *v.* Day, 17 Colo. App. 200, 68 Pac. 122; Goff *v.* Landon, 5 Colo. App. 452, 39 Pac. 69.

Dakota.— Pierre First Nat. Bank *v.* Comfort, 4 Dak. 167, 28 N. W. 855.

Idaho.— Hallett *v.* Parrish, 5 Ida. 496, 51 Pac. 109; Murphy *v.* Brasse, 3 Ida. 544, 32 Pac. 208; Harkness *v.* Smith, 2 Ida. 952, 28 Pac. 423. Under Rev. St. § 3021, a sale of chattels, if not followed by delivery or any change of possession, is void as to a creditor of the vendor levying execution on the chattels twenty days thereafter. Hallett *v.* Parrish, 5 Ida. 496, 51 Pac. 109.

Iowa.— McIntosh *v.* Wilson, 81 Iowa 339, 46 N. W. 1003; Hickok *v.* Buell, 51 Iowa 655, 2 N. W. 512; McKay *v.* Clapp, 47 Iowa 418; Boothby *v.* Brown, 40 Iowa 104 (unless the instrument is recorded); Prather *v.* Parker, 24 Iowa 26. Where a sale was invalid as to creditors because the seller retained possession, and no instrument of conveyance was filed, the seller could not claim right to possession by virtue of an agreement with the purchaser whereby the seller was to have possession for life. Young *v.* Evans, 118 Iowa 144, 92 N. W. 111. But *compare* Jaffray *v.* Greenbaum, 64 Iowa 492, 20 N. W. 775.

Montana.—Morris *v.* McLaughlin, 29 Mont. 151, 64 Pac. 219; Yank *v.* Bordeaux, 23 Mont. 205, 58 Pac. 42, 75 Am. St. Rep. 522; Harmon *v.* Hawkins, 18 Mont. 525, 46 Pac. 439; Botcher *v.* Berry, 6 Mont. 448, 13 Pac. 45.

Nevada.— Wilson *v.* Hill, 17 Nev. 401, 30 Pac. 1076; Tognini *v.* Kyle, 17 Nev. 209, 30 Pac. 829, 45 Am. Rep. 442; Lawrence *v.* Burnham, 4 Nev. 361, 97 Am. Dec. 540; Carpenter *v.* Clark, 2 Nev. 243; Doak *v.* Brubaker, 1 Nev. 218.

South Dakota.—Howard *v.* Dwight, 8 S. D. 398, 66 N. W. 935; Longley *v.* Daly, 1 S. D. 257, 46 N. W. 247.

Washington.— Whiting Mfg. Co. *v.* Gephart, 6 Wash. 615, 34 Pac. 161; Banner *v.* May, 2 Wash. 221, 26 Pac. 248.

United States.— *In re* Tweed, 131 Fed. 355.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 407 *et seq.*

14. Edwards *v.* Sonoma Valley Bank, 59 Cal. 148; Watson *v.* Rodgers, 53 Cal. 401. But see Scully *v.* Albers, 89 Mo. App. 118, holding that although there be no change of possession from the vendor to the vendee at

cases are principally occupied in determining whether there is sufficient evidence of an actual change of possession to submit that question to the jury.[15]

the time of the sale, yet, if before a levy of attachment the vendee takes actual possession, the sale is good as against the levying creditor.

15. *Connecticut.*— Huebler *v.* Smith, 62 Conn. 186, 25 Atl. 658, 36 Am. St. Rep. 337; Hull *v.* Sigsworth, 48 Conn. 258, 40 Am. Rep. 167; Capron *v.* Porter, 43 Conn. 383; Hatstat *v.* Blakeslee, 41 Conn. 301; Webster *v.* Peck, 31 Conn. 495; Lake *v.* Morris, 30 Conn. 201; Beers *v.* Lyon, 21 Conn. 604; Ingraham *v.* Wheeler, 6 Conn. 277. *Compare* Lake *v.* Morris, 30 Conn. 201. The purpose of the provisions of Gen. St. (1902) § 4868, requiring a sale by a retail trader of his entire stock in one transaction and not in the regular course of business to be acknowledged and recorded in the office of the town clerk, like those of section 4864, requiring conditional sales to be acknowledged and recorded, was to prevent fraud, and not to change the law as to the effect of the retention of possession by a vendor of personal property after its sale. Spencer *v.* Broughton, 77 Conn. 38, 58 Atl. 236.

Delaware.— Miller *v.* Lacey, 7 Houst. 8, 30 Atl. 640; Bowman *v.* Herring, 4 Harr. 458; Perry *v.* Foster, 3 Harr. 293; Colbert *v.* Sutton, 5 Del. Ch. 294.

Illinois.— Huschle *v.* Morris, 131 Ill. 587, 23 N. E. 643; Wellington *v.* Heermans, 110 Ill. 564; Rozier *v.* Williams, 92 Ill. 187; Allen *v.* Carr, 85 Ill. 388; Johnson *v.* Holloway, 82 Ill. 334; Lewis *v.* Swift, 54 Ill. 436; Monell *v.* Scherrick, 54 Ill. 269; Bay *v.* Cook, 31 Ill. 336; Rhines *v.* Phelps, 8 Ill. 455; Thornton *v.* Davenport, 2 Ill. 296, 29 Am. Dec. 358; Schultz *v.* Reader, 69 Ill. App. 295; Hewett *v.* Griswold, 43 Ill. App. 43; Gillette *v.* Stoddart, 30 Ill. App. 231; Curran *v.* Bernard, 6 Ill. App. 341. See also Orr *v.* Gilbert, 68 Ill. App. 429. Upon a sale of personal property in the possession of the vendor, a change of possession is essential to protect the title of the vendee against attaching or execution creditors of the vendor. If possession remains with the vendor, it is fraudulent *per se* against creditors. Morris *v.* Coombs, 109 Ill. App. 176.

Kentucky.— Vanmeter *v.* Estill, 78 Ky. 456; Morton *v.* Ragan, 5 Bush 334; Foster *v.* Grigsby, 1 Bush 86; Jarvis *v.* Davis, 14 B. Mon. 529, 61 Am. Dec. 166; Brummel *v.* Stockton, 3 Dana 134; Hundley *v.* Webb, 3 J. J. Marsh. 643, 20 Am. Dec. 189; Waller *v.* Cralle, 8 B. Mon. 11; Dale *v.* Arnold, 2 Bibb 605. *Compare* Wash *v.* Medley, 1 Dana 269; Baylor *v.* Smithers, 1 Litt. 105.

Missouri.— State *v.* Goetz, 131 Mo. 675, 33 S. W. 161; Mills *v.* Thompson, 72 Mo. 367; State *v.* Merritt, 70 Mo. 275; Claflin *v.* Rosenberg, 42 Mo. 439, 97 Am. Dec. 336; King *v.* Bailey, 6 Mo. 575; Sibly *v.* Hood, 3 Mo. 290; Foster *v.* Wallace, 2 Mo. 231; Potter *v.* Gratiot, 1 Mo. 368; Bowles Live Stock Commission Co. *v.* Hunter, 91 Mo. App. 418; Link *v.* Harrington, 41 Mo. App. 635; Knoop *v.* Nelson Distilling Co., 26 Mo. App. 303. *Compare* State *v.* Evans, 38 Mo. 150 (conclusive unless explained); McDermott *v.* Barnum, 16 Mo. 114; Kuykendall *v.* McDonald, 15 Mo. 416, 57 Am. Dec. 212; Shepherd *v.* Trigg, 7 Mo. 151.

Oklahoma.— Washburn *v.* Oates, 14 Okla. 5, 76 Pac. 151; Walters *v.* Ratliff, 10 Okla. 262, 61 Pac. 1070.

Pennsylvania.— White *v.* Gunn, 205 Pa. St. 229, 54 Atl. 901; Barlow *v.* Fox, 203 Pa. St. 114, 52 Atl. 57; McCullough *v.* Willey, 200 Pa. St. 168, 49 Atl. 944; Lehr *v.* Brodbeck, 192 Pa. St. 535, 43 Atl. 1006, 73 Am. St. Rep. 828; Stephens *v.* Gifford, 137 Pa. St. 219, 20 Atl. 542, 21 Am. St. Rep. 868; Buckley *v.* Duff, 114 Pa. St. 596, 8 Atl. 188; McKibbin *v.* Martin, 64 Pa. St. 352, 3 Am. Rep. 588; Barr *v.* Reitz, 53 Pa. St. 256; Milne *v.* Henry, 40 Pa. St. 352; Born *v.* Shaw, 29 Pa. St. 288, 72 Am. Dec. 633; Stark *v.* Ward, 3 Pa. St. 328; Hoofsmith *v.* Cope, 6 Whart. 53; Hoffner *v.* Clark, 5 Whart. 545; Streeper *v.* Eckart, 2 Whart. 302, 30 Am. Dec. 258; Clow *v.* Woods, 5 Serg. & R. 275, 9 Am. Dec. 346; Weller *v.* Meeder, 2 Pa. Super. Ct. 488; Medalis *v.* Weimer, 22 Pa. Co. Ct. 91; Eckfeldt *v.* Frick, 4 Phila. 116. Otherwise as to subsequent creditors. Ditman *v.* Raule, 124 Pa. St. 225, 16 Atl. 819.

Utah.— Nelden-Judson Drug Co. *v.* Commercial Nat. Bank, 27 Utah 59, 74 Pac. 195.

Vermont.— Hildreth *v.* Fitts, 53 Vt. 684; Weeks *v.* Prescott, 53 Vt. 57; White *v.* Miller, 46 Vt. 65; Rothchild *v.* Rowe, 44 Vt. 389; Daniels *v.* Nelson, 41 Vt. 161, 98 Am. Dec. 577; Houston *v.* Howard, 39 Vt. 54; Hart *v.* Farmers', etc., Bank, 33 Vt. 252; Weeks *v.* Wead, 2 Aik. 64; Mott *v.* McNiel, 1 Aik. 162; Boardman *v.* Keeler, 1 Aik. 158, 15 Am. Dec. 670; Durkee *v.* Mahoney, 1 Aik. 116.

United States.— In some of the early cases in the federal courts it was held that the transaction was fraudulent as a matter of law unless possession was taken and retained by the purchaser. Hamilton *v.* Russel, 1 Cranch (U. S.) 309, 2 L. ed. 118; Smith *v.* Hunter, 22 Fed. Cas. No. 13,063, 5 Cranch C. C. 467; Phettiplace *v.* Sayles, 19 Fed. Cas. No. 11,083, 4 Mason 312. But in Warner *v.* Norton, 20 How. (U. S.) 448, 460, 15 L. ed. 950, McLean, J., speaking for the court, said: "It would seem to be difficult, on principle, to maintain that the possession of goods sold is, *per se*, fraud, to be so pronounced by the court, as that cuts off all explanation of the transaction, which may have been entirely unexceptionable." And in later cases the supreme court seems to have settled down on the principle that the local rule of the state in which the court sits should be followed. Etheridge *v.* Sperry, 139 U. S. 266, 11 S. Ct. 565, 35 L. ed. 171; Smith *v.* Craft, 123 U. S. 436, 8 S. Ct. 196, 31 L. ed. 267; Jewell *v.* Knight, 123 U. S. 426, 8 S. Ct. 193, 31 L. ed. 190. See also

B. What Constitutes Change of Possession — 1. Must Be Open and Visible. When the property is susceptible of it, there must be an actual, open, and notorious change of possession, indicated by such outward and visible signs as give notice to all the world that title to the property has passed to the vendee, and that the vendor's control over it has ceased.[16]

2. Must Be Exclusive — a. In General. The vendee should take exclusive possession of the property purchased. A concurrent or joint possession with the vendor is presumptively fraudulent and will not place the property beyond the reach of the vendor's creditors.[17] In case of a joint possession by the vendor and

In re Rodgers, 125 Fed. 169, 60 C. C. A. 567.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 407 *et seq.*

The sale of a growing crop standing in the field, where the possession is permitted to remain with the vendor, is fraudulent *per se*, and void as to creditors and subsequent purchasers. Davis *v.* Shepherd, 87 Ill. App. 467.

16. *California.*— Hunt *v.* Hammel, 142 Cal. 456, 76 Pac. 378; Hickey *v.* Coschina, 133 Cal. 81, 65 Pac. 313; McKee Stair Bldg. Co. *v.* Martin, 126 Cal. 557, 58 Pac. 1044; Hart *v.* Mead, 84 Cal. 244, 24 Pac. 118; Engles *v.* Marshall, 19 Cal. 320.

Colorado.— Cook *v.* Mann, 6 Colo. 21; McCraw *v.* Welch, 2 Colo. 284; Helgert *v.* Stewart, (App. 1904) 77 Pac. 1091; Donovan *v.* Gathe, 3 Colo. App. 151, 32 Pac. 436; Goard *v.* Gunn, 2 Colo. App. 66, 29 Pac. 918.

Connecticut.— Dann *v.* Luke, 74 Conn. 146, 50 Atl. 46; Potter *v.* Payne, 21 Conn. 361.

Dakota.— See Grady *v.* Baker, 3 Dak. 296, 19 N. W. 417.

Illinois.— Monmouth Second Nat. Bank *v.* Gilbert, 174 Ill. 485, 51 N. E. 584, 66 Am. St. Rep. 306; Martin *v.* Duncan, 156 Ill. 274, 41 N. E. 43; Allen *v.* Carr, 85 Ill. 388; Morris *v.* Coombs, 109 Ill. App. 176; Gillette *v.* Stoddart, 30 Ill. App. 231.

Indiana.— Nutter *v.* Harris, 9 Ind. 88.

Iowa.— Nuckolls *v.* Pence, 52 Iowa 581, 3 N. W. 631; Woodworth *v.* Byerly, 43 Iowa 106.

Michigan.— Doyle *v.* Stevens, 4 Mich. 87.

Missouri.— Rice *v.* Sally, 176 Mo. 107, 75 S. W. 398; State *v.* Goetz, 131 Mo. 675, 33 S. W. 161; State *v.* Merritt, 70 Mo. 275; Wright *v.* McCormick, 67 Mo. 426; Burgert *v.* Borchert, 59 Mo. 80; Bishop *v.* O'Connell, 56 Mo. 158; Lesem *v.* Herriford, 44 Mo. 323; Reynolds *v.* Beck, 108 Mo. App. 188, 83 S. W. 292; Revercomb *v.* Duker, 74 Mo. App. 570; State *v.* Flynn, 66 Mo. App. 373; State *v.* Durant, 53 Mo. App. 493; Dyer *v.* Balsley, 40 Mo. App. 559; Knoop *v.* Nelson Distilling Co., 26 Mo. App. 303; Franklin *v.* Gumersell, 11 Mo. App. 306.

Montana.— O'Gara *v.* Lowry, 5 Mont. 427, 5 Pac. 583.

Nebraska.— Brunswick *v.* McClay, 7 Nebr. 137.

Nevada.— Gray *v.* Sullivan, 10 Nev. 416.

New Hampshire.— Baldwin *v.* Thayer, 71 N. H. 257, 52 Atl. 852, 93 Am. St. Rep. 510; Clark *v.* Morse, 10 N. H. 236.

New York.— Steele *v.* Benham, 84 N. Y. 634; Porter *v.* Parmley, 52 N. Y. 185; Hale *v.* Sweet, 40 N. Y. 97; Topping *v.* Lynch, 2 Rob. 484; Randall *v.* Parker, 3 Sandf. 69; Rheinfeldt *v.* Dahlman, 19 Misc. 162, 43 N. Y. Suppl. 281; Spotten *v.* Keeler, 12 N. Y. St. 385; Stout *v.* Rappelhagen, 51 How. Pr. 75.

Oklahoma.— Swartsburg *v.* Dickerson, 12 Okla. 566, 73 Pac. 282.

Oregon.— Pierce *v.* Kelly, 25 Oreg. 95, 34 Pac. 963.

Pennsylvania.— McMarlan *v.* English, 74 Pa. St. 296; Miller *v.* Garman, 69 Pa. St. 134; Trunick *v.* Smith, 63 Pa. St. 18; Cadbury *v.* Nolen, 5 Pa. St. 320; Hoofsmith *v.* Cope, 6 Whart. 53; Schwab *v.* Woods, 24 Pa. Super. Ct. 433.

Utah.— Ewing *v.* Merkley, 3 Utah 406, 4 Pac. 244.

Vermont.— Wheeler *v.* Selden, 63 Vt. 429, 21 Atl. 615, 26 Am. St. Rep. 711, 12 L. R. A. 600; Weeks *v.* Preston, 53 Vt. 57; Rothchild *v.* Rowe, 44 Vt. 389; Flanagan *v.* Wood, 33 Vt. 332; Parker *v.* Kendrick, 29 Vt. 388; Kendall *v.* Samson, 12 Vt. 515; Gates *v.* Gaines, 10 Vt. 346.

Wisconsin.— Missinskie *v.* McMurdo, 107 Wis. 578, 83 N. W. 758; Manufacturers' Bank *v.* Rugee, 59 Wis. 221, 18 N. W. 251.

United States.— Shauer *v.* Alterton, 151 U. S. 607, 14 S. Ct. 442, 38 L. ed. 286; Dooley *v.* Pease, 88 Fed. 446, 31 C. C. A. 582; Cramton *v.* Tarbell, 6 Fed. Cas. No. 3,349; Comly *v.* Fisher, 6 Fed. Cas. No. 3,053, Taney 121.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 473 *et seq.*

A change of possession in order to protect the vendee against creditors of the vendor must be indicated by appearances to an observer, and the creditors are bound to see what others see, and judge and act upon it with that prudence which is required of men in business affairs. Stanley *v.* Robbins, 36 Vt. 422; Parker *v.* Kendrick, 29 Vt. 388.

17. *California.*— Regli *v.* McClure, 47 Cal. 612.

Colorado.— Bassinger *v.* Spangler, 9 Colo. 175, 10 Pac. 809; Cook *v.* Mann, 6 Colo. 21.

Mississippi.— Wooten *v.* Clark, 23 Miss. 75.

Missouri.— State *v.* Merritt, 70 Mo. 275; Claflin *v.* Rosenberg, 42 Mo. 439, 97 Am. Dec. 336; Reynolds *v.* Beck, 108 Mo. App. 188, 83 S. W. 292.

Nevada.— Gray *v.* Sullivan, 10 Nev. 416.

New Hampshire.— Sumner *v.* Dalton, 58 N. H. 295; Plaisted *v.* Holmes, 58 N. H. 293; Lang *v.* Stockwell, 55 N. H. 561; Trask *v.* Bowers, 2 N. H. 309.

New York.— Burnham *v.* Brennan, 42 N. Y.

vendee the property may be seized for the debts of the vendor, if a candid observer would be at a loss to decide which of the two has the chief control and possession of it.[18]

b. Where Parties Live Together — (I) *In General.* The fact that the vendor and vendee are members of the same family inhabiting the same house does not dispense with the necessity for a change of possession of property in the possession of the vendor and reasonably susceptible of actual delivery.[19] But when delivery has been made it would be unreasonable to require a vendee or donee to withdraw the property from family use in order to maintain continued and exclusive possession of it. The mere fact that the vendor or donor afterward uses the property as a member of the family without any pretense of ownership raises no presumption of fraud.[20]

(II) *Gifts to Minor Children.* Frequently parents while solvent in good faith make gifts of chattels to their minor children. In such a case the mere fact that the parent is afterward found in possession of the property is not a badge of fraud, for, so long as the parties reside together, the possession of the parent is that of the child.[21]

Super. Ct. 49; Jones *v.* O'Brien, 36 N. Y. Super. Ct. 58.

Oregon.— Pierce *v.* Kelly, 25 Oreg. 95, 34 Pac. 963.

Pennsylvania.— Ziegler *v.* Handrick, 106 Pa. St. 87; Smith *v.* Crisman, 91 Pa. St. 428; Worman *v.* Kramer, 73 Pa. St. 378; Miller *v.* Garman, 69 Pa. St. 134; Brown *v.* Keller, 43 Pa. St. 104, 82 Am. Dec. 554; Rex *v.* Jones, 6 Pa. Co. Ct. 401; Myers *v.* Wood, 1 Phila. 24. A possession which is concurrent is such as will lead persons to infer that there has been no actual change. McKibbin *v.* Martin, 64 Pa. St. 352, 3 Am. Rep. 588.

Texas.— Stadtler *v.* Wood, 24 Tex. 622.

Vermont.— Weeks *v.* Prescott, 53 Vt. 57; Mills *v.* Warner, 19 Vt. 609, 47 Am. Dec. 711; Hall *v.* Parsons, 17 Vt. 271; Kendall *v.* Samson, 12 Vt. 515.

West Virginia.— Livesay *v.* Beard, 22 W. Va. 585.

Wisconsin.— Osen *v.* Sherman, 27 Wis. 501.

United States.— Allen *v.* Massey, 17 Wall. 351, 21 L. ed. 542.

England.— Latimer *v.* Batson, 4 B. & C. 652, 10 E. C. L. 742, 7 D. & R. 106, 4 L. J. K. B. O. S. 25; Wordall *v.* Smith, 1 Campb. 332.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 474.

18. Flanagan *v.* Wood, 33 Vt. 332.

19. *California.*—Kennedy *v.* Conroy, (1896) 44 Pac. 795.

Colorado.— Bassinger *v.* Spangler, 9 Colo. 175, 11 Pac. 809.

Kentucky.— Jarvis *v.* Davis, 14 B. Mon. 529, 61 Am. Dec. 166; Waller *v.* Cralle, 8 B. Mon. 11; Breckenridge *v.* Anderson, 3 J. J. Marsh. 710.

Maine.— McKee *v.* Garcelon, 60 Me. 165, 11 Am. Rep. 200.

Michigan.— McLaughlin *v.* Lange, 42 Mich. 81, 3 N. W. 267.

Pennsylvania.— Steelwagon *v.* Jeffries, 44 Pa. St. 407; Brawn *v.* Keller, 43 Pa. St. 104, 82 Am. Dec. 554; Hoffner *v.* Clark, 5 Whart. 545.

United States.—Travers *v.* Ramsay, 24 Fed. Cas. No. 14,152, 3 Cranch C. C. 354.

20. *Arkansas.*— Humphries *v.* McCraw, 9 Ark. 91.

California.— Morgan *v.* Ball, 81 Cal. 93, 22 Pac. 331, 15 Am. St. Rep. 34, 5 L. R. A. 579; Clark *v.* Rush, 19 Cal. 393.

Connecticut.— Gilligan *v.* Lord, 51 Conn. 562.

Georgia.— Hargrove *v.* Turner, 112 Ga. 134, 37 S. E. 89, 81 Am. St. Rep. 24; Ector *v.* Welsh, 29 Ga. 443.

Illinois.— Neece *v.* Haley, 23 Ill. 416, sale to minor brother who resided with the vendor.

Kentucky.— Enders *v.* Williams, 1 Metc. 346; Hamilton *v.* Combs, 60 S. W. 371, 22 Ky. L. Rep. 1263.

Mississippi.— Bullitt *v.* Taylor, 34 Miss. 708, 69 Am. Dec. 412.

New York.—Danforth *v.* Woods, 11 Paige 9.

North Carolina.— Jones *v.* Hall, 58 N. C. 26; Bell *v.* Blaney, 6 N. C. 171.

Pennsylvania.—McClure *v.* Forney, 107 Pa. St. 414; Evans *v.* Scott, 89 Pa. St. 136.

South Carolina.— Perkins *v.* Douglass, 52 S. C. 129, 29 S. E. 400; Howard *v.* Williams, 1 Bailey 575, 21 Am. Dec. 483. See also McElwee *v.* Kennedy, 56 S. C. 154, 34 S. E. 86.

Utah.— Farr *v.* Swigart, 13 Utah 150, 44 Pac. 711.

Constructive delivery.— In Brown *v.* Mitchell, 102 N. C. 347, 9 S. E. 702, 11 Am. St. Rep. 748, a constructive delivery by a husband to his wife was upheld where the husband continued to use the property for the benefit of the family.

21. *Arkansas.*— Rector *v.* Danley, 14 Ark. 304.

Georgia.— Hargrove *v.* Turner, 112 Ga. 134, 37 S. E. 89, 81 Am. St. Rep. 24; Ector *v.* Welsh, 29 Ga. 443.

Iowa.— Pierson *v.* Heisey, 19 Iowa 114.

Kentucky.— Enders *v.* Williams, 1 Metc. 346; Forsyth *v.* Kreakbaum, 7 T. B. Mon. 97; Kenningham *v.* McLaughlin, 3 T. B. Mon. 30.

Mississippi.— Bullitt *v.* Taylor, 34 Miss. 708, 69 Am. Dec. 412.

3. A Question For the Jury. Whether or not there has been an actual and continuous change of possession is a question of fact to be determined on the evidence adduced in the case, and should be submitted to the jury where there is evidence tending to show such change.[22] If a *bona fide* purchase of personal property has been made and the price paid, slight acts are sufficient to show a delivery that will avail the buyer against the claims of third persons.[23] The mere cessation of acts of ownership on the part of the vendor is not evidence of an actual change of possession.[24]

4. Must Be Permanent — a. In General. A mere temporary change of possession, although it might be a good delivery as between the parties, cannot avail against the grantor's creditors. To defeat them the change must be open and so long continued as to indicate to the world at large that there has been a change of ownership.[25] If, however, the vendor repossesses himself of the property by force his creditors cannot hold it.[26]

b. Vendor as Agent or Bailee of Purchaser. But when the vendee has taken possession openly and held it exclusively for a sufficient length of time to advertise the change of ownership and the cessation of the vendor's control, it is not essential to the continuous change of possession required by law that the vendor shall never afterward be in charge of the property as agent, bailee, or employee of the vendee or his successor in interest.[27] Where the vendee has in good faith taken possession the mere fact that he occasionally loans or hires the

North Carolina.— Jones *v.* Hall, 58 N. C. 26; Bell *v.* Blaney, 6 N. C. 171.

Vermont.— Ross *v.* Draper, 55 Vt. 404, 45 Am. Rep. 624.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 484.

22. Feeley *v.* Boyd, 143 Cal. 282, 76 Pac. 1029, 62 L. R. A. 943; Dubois *v.* Spinks, 114 Cal. 289, 46 Pac. 95; Lake *v.* Morris, 30 Conn. 201; McLaughlin *v.* Lange, 42 Mich. 81, 3 N. W. 267; Burrows *v.* Stebbins, 26 Vt. 659; Stephenson *v.* Clark, 20 Vt. 624; Hall *v.* Parsons, 17 Vt. 271. See also Goddard *v.* Weil, 165 Pa. St. 419, 30 Atl. 1000.

23. Stinton *v.* Clark, 6 Allen (Mass.) 340; Phelps *v.* Cutler, 4 Gray (Mass.) 137; Shumway *v.* Rutter, 7 Pick. (Mass.) 56.

24. Hickok *v.* Buell, 51 Iowa 655, 2 N. W. 512; Boothby *v.* Brown, 40 Iowa 104.

25. *California.*— Ruddle *v.* Givens, 76 Cal. 457, 18 Pac. 421; Engles *v.* Marshall, 19 Cal. 320; Van Pelt *v.* Littler, 10 Cal. 394; Bacon *v.* Scannell, 9 Cal. 271.

Colorado.— McCraw *v.* Welch, 2 Colo. 284.

Connecticut.— Webster *v.* Peck, 31 Conn. 495.

Illinois.— Allen *v.* Carr, 85 Ill. 388; Wood *v.* Loomis, 21 Ill. App. 604.

Indiana.— Nutter *v.* Harris, 9 Ind. 88.

Iowa.— Sutton *v.* Ballou, 46 Iowa 617.

Kentucky.— Meredith *v.* Sanders, 2 Bibb 101.

Michigan.— Hopkins *v.* Bishop, 91 Mich. 328, 51 N. W. 902, 30 Am. St. Rep. 480; Clark *v.* Lee, 78 Mich. 221, 44 N. W. 260.

Minnesota.— Lathrop *v.* Clayton, 45 Minn. 124, 47 N. W. 544; Chickering *v.* White, 42 Minn. 457, 44 N. W. 988 Murch *v.* Swensen, 40 Minn. 421, 42 N. W. 290.

Missouri.— Bishop *v.* O'Connell, 56 Mo. 158; Steppacher *v.* Saunders, 74 Mo. App. 475.

Nevada.— Chamberlain *v.* Stern, 11 Nev. 268; Gray *v.* Sullivan, 10 Nev. 416; Carpenter *v.* Clark, 2 Nev. 243.

New York.— Steele *v.* Benham, 84 N. Y. 634; Blaut *v.* Gabler, 77 N. Y. 461; Tilson *v.* Terwilliger, 56 N. Y. 273; Topping *v.* Lynch, 2 Rob. 484; Rheinfeldt *v.* Dahlman, 19 Misc. 162, 43 N. Y. Suppl. 281; Stout *v.* Rappelhagen, 51 How. Pr. 75; Butler *v.* Stoddard, 7 Paige 163.

Pennsylvania.— McMarlan *v.* English, 74 Pa. St. 296; Garman *v.* Cooper, 72 Pa. St. 32; Miller *v.* Garman, 69 Pa. St. 134; Davis *v.* Bigler, 62 Pa. St. 242, 1 Am. Rep. 393; Barr *v.* Reitz, 53 Pa. St. 256; Steele *v.* Miller, 1 Pa. Cas. 151, 1 Atl. 434; McBride *v.* McClelland, 6 Watts & S. 94.

Utah.— Blish *v.* McCornick, 15 Utah 188, 49 Pac. 529; Everett *v.* Taylor, 14 Utah 242, 47 Pac. 75.

Vermont.— Morris *v.* Hyde, 8 Vt. 352, 30 Am. Dec. 475.

Wisconsin.— Missinskie *v.* McMurdo, 107 Wis. 578, 83 N. W. 758; Manufacturers' Bank *v.* Rugee, 59 Wis. 221, 18 N. W. 251.

Canada.— McMillan *v.* McSherry, 15 Grant Ch. (U. C.) 133; McMaster *v.* Garland, 31 U. C. C. P. 320; Burnham *v.* Waddell, 28 U. C. C. P. 263; Turner *v.* Mills, 11 U. C. C. P. 366; William *v.* Rapelje, 8 U. C. C. P. 186; Taylor *v.* Commercial Bank, 4 U. C. C. P. 447.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 476 *et seq.*

The storage of a wagon by the vendee of the same, six days after the sale, in the barn of the vendor over night for convenience and security, is not conclusive evidence of fraud. Towne *v.* Rice, 59 N. H. 412.

26. Post *v.* Berwind-White Coal Min. Co., 176 Pa. St. 297, 35 Atl. 111.

27. *California.*— Adams *v.* Weaver, 117 Cal. 42, 48 Pac. 972; Roberts *v.* Burr, (1898) 54 Pac. 849; Levy *v.* Scott, 115 Cal. 39, 46

property to the vendor is not sufficient to subject it to seizure by the creditors of the latter.[28]

c. Vendor as Clerk or Servant of Purchaser. Where there has been a sufficient delivery, actual or constructive, and the vendee is in possession, the fact that the vendor is employed about the establishment in such a capacity as to hold out no *indicia* of ownership is not such concurrent possession as the law condemns.[29] Thus the employment of the vendor as an agent or clerk to take charge of the property and conduct the business, although a fact tending to excite suspicion, is not necessarily inconsistent with good faith.[30]

d. Vendor as Lessee of Purchaser. And the same is true where the vendee

Pac. 892; Porter *v.* Bucher, 98 Cal. 454, 33 Pac. 335; Etchepare *v.* Aguirre, 91 Cal. 288, 27 Pac. 668, 25 Am. St. Rep. 180; Gould *v.* Huntley, 73 Cal. 399, 15 Pac. 24; Goldstein *v.* Nunan, 66 Cal. 542, 6 Pac. 451; Waldie *v.* Doll, 29 Cal. 555; Ford *v.* Chambers, 28 Cal. 13; Godchaux *v.* Mulford, 26 Cal. 316, 85 Am. Dec. 178; Stevens *v.* Irwin, 15 Cal. 503, 76 Am. Dec. 500.

Maine.— Goodwin *v.* Goodwin, 90 Me. 23, 37 Atl. 352, 60 Am. St. Rep. 231.

Massachusetts.— Hobbs *v.* Carr, 127 Mass. 532; Ingalls *v.* Herrick, 108 Mass. 351, 11 Am. Rep. 360; Green *v.* Rowland, 16 Gray 58.

Michigan.— Hopkins *v.* Bishop, 91 Mich. 328, 51 N. W. 902, 30 Am. St. Rep. 480.

Missouri.— Claflin *v.* Rosenberg, 42 Mo. 439, 97 Am. Dec. 336.

Montana.— Dodge *v.* Jones, 7 Mont. 121, 14 Pac. 707; O'Gara *v.* Lowry, 5 Mont. 427, 5 Pac. 583.

Nevada.— Lewis *v.* Wilcox, 6 Nev. 215.

Tennessee.— Overall *v.* Parker, (Ch. App. 1899) 58 S. W. 905.

Utah.— Everett *v.* Taylor, 14 Utah 242, 47 Pac. 75.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 479, 480.

Where there is a completed contract of sale and an agreement by the vendor to hold as bailee for the vendee in lieu of actual delivery, the sale is valid as against the vendor's creditors, if it is not otherwise fraudulent. Shaul *v.* Harrington, 54 Ark. 305, 15 S. W. 835.

Where animals have been sold and delivered, the fact that they are afterward delivered to the vendor as an agister for hire will not defeat the vendee's title. Henderson *v.* Hart, 122 Cal. 332, 54 Pac. 1110.

28. *Arkansas.*— Stone *v.* Waggoner, 8 Ark. 204.

Illinois.— Brown *v.* Riley, 22 Ill. 45.

Iowa.— Deere *v.* Needles, 65 Iowa 101, 21 N. W. 203.

New York.— Knight *v.* Forward, 63 Barb. 311.

Vermont.— Lyndon *v.* Belden, 14 Vt. 423.

29. *In re* Fisher, 25 Oreg. 64, 34 Pac. 1024; Ziegler *v.* Handrick, 106 Pa. St. 87; McKibbin *v.* Martin, 64 Pa. St. 352, 3 Am. Rep. 588. See also Hilliker *v.* Kuhn, 71 Cal. 214, 16 Pac. 707.

30. *Alabama.*— Troy Fertilizer Co. *v.* Norman, 107 Ala. 667, 18 So. 201; Ullman *v.* Myrick, 93 Ala. 532, 8 So. 410.

California.— Hickey *v.* Coschina, 133 Cal. 81, 65 Pac. 313.

Connecticut.— Dann *v.* Luke, 74 Conn. 146, 50 Atl. 46.

Delaware.— Groff *v.* Cooper, 6 Houst. 36.

Illinois.— Warner *v.* Carlton, 22 Ill. 415; Brown *v.* Riley, 22 Ill. 45; Blakely Printing Co. *v.* Pease, 95 Ill. App. 341; Sechler Carriage Co. *v.* Dryden, 71 Ill. App. 583; McCord *v.* Gilbert, 64 Ill. App. 233; Loucheim *v.* Seyfarth, 49 Ill. App. 561.

Kentucky.— McGuire *v.* West, 43 S. W. 458, 19 Ky. L. Rep. 1364.

Minnesota.— Bruggemann *v.* Wagener, 72 Minn. 329, 75 N. W. 230; Vose *v.* Stickney, 19 Minn. 367.

Missouri.— Hibbard *v.* Heckart, 88 Mo. App. 544; Baker, etc., Co. *v.* Schneider, 85 Mo. App. 412; State *v.* Flynn, 56 Mo. App. 236; Pollard *v.* Farwell, 48 Mo. App. 42.

Montana.— Gallick *v.* Bordeaux, 22 Mont. 470, 56 Pac. 961.

Nevada.— Gray *v.* Sullivan, 10 Nev. 416.

New Hampshire.— Robinson *v.* Mitchell, 62 N. H. 529.

New Jersey.— Dresser *v.* Zabriskie, (Ch. 1898) 39 Atl. 1066.

New York.— Preston *v.* Southwick, 115 N. Y. 139, 21 N. E. 1031; Blumenthal *v.* Michel, 33 N. Y. App. Div. 636, 54 N. Y. Suppl. 81; Brown *v.* Harmon, 29 N. Y. App. Div. 31, 51 N. Y. Suppl. 820; Sommers *v.* Cottentin, 26 N. Y. App. Div. 241, 49 N. Y. Suppl. 652; Kelly *v.* Mesier, 18 N. Y. App. Div. 329, 46 N. Y. Suppl. 51; Drury *v.* Wilson, 4 N. Y. App. Div. 232, 38 N. Y. Suppl. 538.

Pennsylvania.—Billingsley *v.* White, 59 Pa. St. 464; Hugus *v.* Robinson, 24 Pa. St. 9; Steele *v.* Miller, 1 Pa. Cas. 151, 1 Atl. 434; Gattle *v.* Kremp, 6 Pa. Super. Ct. 514.

Rhode Island.— Mead *v.* Gardiner, 13 R. I. 257.

Utah.— Everett *v.* Taylor, 14 Utah 242, 47 Pac. 75; Ewing *v.* Merkley, 3 Utah 406, 4 Pac. 244.

Vermont.— Dewey *v.* Thrall, 13 Vt. 281.

Virginia.— Alsop *v.* Catlett, 97 Va. 364, 34 S. E. 48; Benjamin *v.* Madden, 94 Va. 66, 36 S. E. 392.

United States.— Olney *v.* Tanner, 10 Fed. 101; Reed *v.* Minor, 20 Fed. Cas. No. 11,647, 3 Cranch C. C. 82.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 479, 480.

It is otherwise where possession was not

takes possession and then leases the property to the vendor. In such case the possession of the vendor is the possession of the vendee.[31]

5. When Constructive Delivery Is Sufficient — a. Vessel or Cargo at Sea. Where chattels are so situated that a delivery cannot be made at the time of sale, as in case of the sale of a vessel or cargo in a foreign port or at sea, a delivery of such evidence of title as the vendor possesses is sufficient until the vessel returns to port and the purchaser has had a reasonable opportunity to take possession.[32]

b. Property Not Susceptible of Manual Delivery — (i) *In General.* So where personal property sold is not reasonably susceptible of actual manual delivery a constructive delivery is sufficient, and it is not necessary that the vendee should do more than assume such control of it as reasonably to indicate the fact of the change of ownership and the termination of the vendor's control.[33]

actually delivered to the vendee. Seavey *v.* Walker, 108 Ind. 78, 9 N. E. 347.

31. *Alabama.*— Danner Land, etc., Co. *v.* Stonewall Ins. Co., 77 Ala. 184; Crawford *v.* Kirksey, 50 Ala. 590.

Arkansas.— Smith *v.* Jones, 63 Ark. 232, 37 S. W. 1052.

Massachusetts.— Wheeler *v.* Train, 3 Pick. 255.

Missouri.— Wall *v.* Beedy, 161 Mo. 625, 61 S. W. 864.

New Hampshire.— Thompson *v.* Esty, 69 N. H. 55, 45 Atl. 566.

Pennsylvania.— McCullough *v.* Willey, 200 Pa. St. 168, 49 Atl. 944, 192 Pa. St. 176, 43 Atl. 999; Bell *v.* McCloskey, 155 Pa. St. 319, 26 Atl. 547.

South Carolina.— Pringle *v.* Rhame, 10 Rich. 72, 67 Am. Dec. 560.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 480.

Where there is no actual delivery of the property, the mere delivery of a bill of sale accompanied by a lease of the property to the vendor will not avail against a subsequent purchaser in good faith or an attaching creditor of the vendor. Harlow *v.* Hall, 132 Mass. 232; Packard *v.* Wood, 4 Gray (Mass.) 307.

Where no lease exists.— Where goods capable of delivery are allowed by a buyer to remain in the seller's possession, no lease being executed, and the seller not being in the relation of agent or servant of the buyer, the mere fact that the buyer has a power to assume control of the property, which power he does not exercise, will not make the sale valid as against the seller's creditors. Hastings *v.* Sproul, 44 Wkly. Notes Cas. (Pa.) 37.

32. Ludwig *v.* Fuller, 17 Me. 162, 35 Am. Dec. 245; Brinley *v.* Spring, 7 Me. 241; Turner *v.* Coolidge, 2 Metc. (Mass.) 350; Joy *v.* Sears, 9 Pick. (Mass.) 4; Gardner *v.* Howland, 2 Pick. (Mass.) 599; Badlam *v.* Tucker, 1 Pick. (Mass.) 389, 11 Am. Dec. 202; Buffington *v.* Curtis, 15 Mass. 528, 8 Am. Dec. 115; Putnam *v.* Dutch, 8 Mass. 287; Portland Bank *v.* Stacey, 4 Mass. 661, 3 Am. Dec. 253; Harris *v.* De Wolf, 4 Pet. (U. S.) 147, 7 L. ed. 811; Lempriere *v.* Pasley, 2 T. R. 485. See also Lanfear *v.* Sumner, 17 Mass. 110, 9 Am. Dec. 119; White *v.* Cole, 24 Wend. (N. Y.) 116.

Property in hands of sheriff.— Mumper *v.* Rushmore, 79 N. Y. 19.

33. *California.*— Feeley *v.* Boyd, 143 Cal. 282, 76 Pac. 1029, 65 L. R. A. 943; Harris *v.* Smith, 132 Cal. 316, 64 Pac. 409; Curtner *v.* Lyndon, 128 Cal. 35, 60 Pac. 462; How *v.* Johnson, 117 Cal. 37, 48 Pac. 978; Woods *v.* Bugbey, 29 Cal. 466; Walden *v.* Murdock, 23 Cal. 540, 83 Am. Dec. 135; Cartwright *v.* Phœnix, 7 Cal. 281.

Colorado.— Cook *v.* Mann, 6 Colo. 21.

Connecticut.— Dann *v.* Luke, 74 Conn. 146, 50 Atl. 46.

Idaho.— Rapple *v.* Hughes, (1904) 77 Pac. 722; Simons *v.* Daly, (1903) 72 Pac. 507.

Illinois.— Hart *v.* Wing, 44 Ill. 141.

Kentucky.— Kenton *v.* Ratcliff, 105 Ky. 376, 49 S. W. 14, 20 Ky. L. Rep. 1239; Street *v.* Tuggle, 13 Ky. L. Rep. 539.

Maine.— Boynton *v.* Veazie, 24 Me. 286; Ludwig *v.* Fuller, 17 Me. 162, 35 Am. Dec. 245.

Massachusets.— Russell *v.* O'Brien, 127 Mass. 349; Thorndike *v.* Bath, 114 Mass. 116, 19 Am. Rep. 318; Cushing *v.* Breed, 14 Allen 376, 92 Am. Dec. 777; Stinson *v.* Clark, 6 Allen 340; Homes *v.* Crane, 2 Pick. 607; Badlam *v.* Tucker, 1 Pick. 389, 11 Am. Dec. 202; Jewett *v.* Warren, 12 Mass. 300, 7 Am. Dec. 74; Allen *v.* Smith, 10 Mass. 308.

Minnesota.— Lathrop *v.* Clayton, 45 Minn. 124, 47 N. W. 544.

Montana.— Tuttle *v.* Merchants' Nat. Bank, 19 Mont. 11, 47 Pac. 203.

New Hampshire.— Baldwin *v.* Thayer, 71 N. H. 257, 52 Atl. 852, 93 Am. St. Rep. 510.

New York.— Fisher *v.* Stout, 74 N. Y. App. Div. 97, 77 N. Y. Suppl. 945; Hollingsworth *v.* Napier, 3 Cai. 182, 2 Am. Dec. 268.

Oklahoma.— Masters *v.* Teller, 7 Okla. 668, 56 Pac. 1067.

Pennsylvania.— Goddard *v.* Weil, 165 Pa. St. 419, 30 Atl. 1000; McGuire *v.* James, 143 Pa. St. 521, 22 Atl. 751; Renninger *v.* Spatz, 128 Pa. St. 524, 18 Atl. 405, 15 Am. St. Rep. 692; Buckley *v.* Duff, 114 Pa. St. 596, 8 Atl. 188; Cessna *v.* Nimick, 113 Pa. St. 70, 4 Atl. 193; Evans *v.* Scott, 89 Pa. St. 136; McKibbin *v.* Martin, 64 Pa. St. 352, 3 Am. Rep. 588; Benford *v.* Schell, 55 Pa. St. 393; Schwab *v.* Woods, 24 Pa. Super. Ct. 433; Huffman *v.* McIlvaine, 13 Pa. Super. Ct. 108.

So it is of logs floating in the water or piled upon the bank of a stream,[34] of grain or merchandise stored in a granary or warehouse,[35] of chattels in process of manufacture,[36] and of ore in a mine.[37]

(II) *PONDEROUS AND BULKY ARTICLES.* Ponderous and bulky articles difficult to remove will pass by a bill of sale without further change of possession.[38] A change of location is not in all cases necessary to constitute a valid delivery of a chattel as against creditors of the vendor. In many cases this would be extremely inconvenient and even injurious to the property.[39]

(III) *PROPERTY IN POSSESSION OF BAILEE*—(A) *In General.* When chattels are in the possession of a bailee no actual delivery is necessary. The delivery of a bill of sale completes the transaction between the parties, and it is good as against creditors and subsequent purchasers if the purchaser give the bailee notice of the sale before the goods are taken from his possession, unless it is otherwise fraudulent.[40] Thus where property is stored in the warehouse of a

Wisconsin.— Missinskie *v.* McMurdo, 107 Wis. 578, 83 N. W. 758.

United States.— Stelling *v.* G. W. Jones Lumber Co., 116 Fed. 261, 53 C. C. A. 81.

England.— Harman *v.* Anderson, 2 Campb. 243, 11 Rev. Rep. 706; Manton *v.* Moore, 7 T. R. 67.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 457 *et seq.*

34. Bethel Steam Mill Co. *v.* Brown, 57 Me. 9, 99 Am. Dec. 752; Boynton *v.* Veazie, 24 Me. 286; Riddle *v.* Varnum, 20 Pick. (Mass.) 280; Kingsley *v.* White, 57 Vt. 565; Ross *v.* Draper, 55 Vt. 404, 45 Am. Rep. 624; Sterling *v.* Baldwin, 42 Vt. 306; Fitch *v.* Burk, 38 Vt. 683; Birge *v.* Edgerton, 28 Vt. 291; Hutchins *v.* Gilchrist, 23 Vt. 82; Sanborn *v.* Kittredge, 20 Vt. 632, 50 Am. Dec. 58; Leonard *v.* Davis, 1 Black (U. S.) 476, 17 L. ed. 222; Stelling *v.* G. W. Jones Lumber Co., 116 Fed. 261, 53 C. C. A. 81. It is a good delivery of timber in rafts in a river to go within sight of it and point it out to the vendee as the timber conveyed. Jewett *v.* Warren, 12 Mass. 300, 7 Am. Dec. 74.

35. **Delivery of key.**— Sharp *v.* Carroll, 66 Wis. 62, 27 N. W. 832.

Vendee's nailing up entrance to corn-crib.— Pope *v.* Cheney, 68 Iowa 563, 27 N. W. 754.

36. Thorndike *v.* Bath, 114 Mass. 116, 19 Am. Rep. 318, unfinished piano left with manufacturer for completion.

Bricks in a kiln.— Macomber *v.* Parker, 13 Pick. (Mass.) 175; Hawkins *v.* Kansas City Hydraulic Press Brick Co., 63 Mo. App. 64.

Wagon.— Boud *v.* Bronson, 80 Pa. St. 360.

37. Finding *v.* Hartman, 14 Colo. 596, 23 Pac. 1004.

38. *California.*— Dubois *v.* Spinks, 114 Cal. 289, 46 Pac. 95; Walden *v.* Murdock, 23 Cal. 540, 83 Am. Dec. 135.

Illinois.— Ticknor *v.* McClelland, 84 Ill. 471; Funk *v.* Staats, 24 Ill. 633; Taylor *v.* Thurber, 68 Ill. App. 114; Hewett *v.* Griswold, 43 Ill. App. 43.

Kentucky.— Street *v.* Tuggle, 13 Ky. L. Rep. 539.

Maryland.— Thompson *v.* Baltimore, etc., R. Co., 28 Md. 396; Van Brunt *v.* Pike, 4 Gill 270, 45 Am. Dec. 126.

Massachusetts.— Rice *v.* Austin, 17 Mass. 197.

Minnesota.— Lathrop *v.* Clayton, 45 Minn. 124, 47 N. W. 544.

New York.— Hayden *v.* Demets, 53 N. Y. 426.

Pennsylvania.— Haynes *v.* Hunsicker, 26 Pa. St. 58.

Vermont.— Kingsley *v.* White, 57 Vt. 565.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 458.

Thus the sale of a shop will be effectual against creditors by the delivery of the key, and that too at a place distant from the shop sold. Vining *v.* Gilbreth, 39 Me. 496.

Heavy printing machinery.—Kellogg Newspaper Co. *v.* Peterson, 162 Ill. 158, 44 N. E. 411, 53 Am. St. Rep. 300.

39. *California.*— Dubois *v.* Spinks, 114 Cal. 289, 46 Pac. 95.

Illinois.— Ticknor *v.* McClelland, 84 Ill. 471.

Kentucky.— Kenton *v.* Ratcliffe, 105 Ky. 376, 49 S. W. 14, 20 Ky. L. Rep. 1239; Street *v.* Tuggle, 13 Ky. L. Rep. 539.

Minnesota.— Lathrop *v.* Clayton, 45 Minn. 124, 47 N. W. 544.

Pennsylvania.— Ayers *v.* McCandless, 147 Pa. St. 49, 23 Atl. 344; Cessna *v.* Nimick, 113 Pa. St. 70, 4 Atl. 193.

A sale of saw-logs piled on land so low and wet that it would be impossible to remove them without great expense except on frozen ground is valid against attaching creditors, although the logs have been removed. Kingsley *v.* White, 57 Vt. 565.

40. *Arkansas.*— Field *v.* Simco, 7 Ark. 269.

California.— Cameron *v.* Calberg, (1892) 31 Pac. 530; Morgan *v.* Miller, 62 Cal. 492; Williams *v.* Lerch, 56 Cal. 330. See also Dubois *v.* Spinks, 114 Cal. 289, 46 Pac. 95.

Colorado.— Jones *v.* Mackenzie Bros. Wall Paper, etc., Co., 19 Colo. App. 121, 73 Pac. 847; Weiland *v.* Potter, 8 Colo. App. 79, 44 Pac. 769. The rule that to render the sale of personal property valid against the seller's creditors it must be accompanied by an immediate, open, notorious, and continued change of possession has no application where, prior to the sale, the seller has bailed the property to a third person, and

third person, a delivery of the warehouse receipts is equivalent to delivery of the property itself.[41]

(B) *Grain Stored in Elevator.* The use of elevators for the storage of grain has introduced some new methods of dealing, but the rights of parties who adopt these methods must be determined by the principles of the common law. The proprietors of the elevator are the agents of the various parties for whom they act. When several parties have stored various parcels of grain and it is put into one mass, according to a usage to which they must be deemed to have assented, they are tenants in common of the grain. Each is entitled to such a proportion as the quantity placed there by him bears to the whole mass. When one of them sells a certain number of bushels, it is a sale of property owned by him in common. It is not necessary to take it away in order to complete the purchase. If the vendor gives an order on the agents to deliver it to the vendee and the agents accept the order and agree with the vendee to store the property for him and give him a receipt therefor, the delivery is thereby complete and the

the bailee has taken open and notorious possession thereof; but in such case a direction by the purchaser to the bailee to hold the property for him is sufficient. Hendrie, etc., Mfg. Co. *v.* Collins, 29 Colo. 102, 67 Pac. 164 [*reversing* 13 Colo. App. 8, 56 Pac. 815].

Idaho.— Murphy *v.* Braase, 3 Ida. 544, 32 Pac. 208.

Illinois.— Hodges *v.* Hurd, 47 Ill. 363; Christy *v.* Ashlock, 93 Ill. App. 651; Chambersburg Nat. Bank *v.* Buckeye Iron, etc., Works, 46 Ill. App. 526.

Iowa.— Campbell *v.* Hamilton, 63 Iowa 293, 19 N. W. 220; Case *v.* Burrows, 54 Iowa 679, 7 N. W. 130; Sansee *v.* Wilson, 17 Iowa 582; Thomas *v.* Hillhouse, 17 Iowa 67.

Maine.— Wheeler *v.* Nichols, 32 Me. 233.

Massachusetts.— Dempsey *v.* Gardner, 127 Mass. 381, 34 Am. Rep. 389; Cushing *v.* Breed, 14 Allen 376, 92 Am. Dec. 777; Bullard *v.* Wait, 16 Gray 55; Hardy *v.* Potter, 10 Gray 89; Appleton *v.* Bancroft, 10 Metc. 231; Carter *v.* Willard, 19 Pick. 1; Tuxworth *v.* Moore, 9 Pick. 347, 20 Am. Dec. 479.

Michigan.— Buhl Iron Works *v.* Teuton, 67 Mich. 623, 35 N. W. 804; Carpenter *v.* Graham, 42 Mich. 191, 3 N. W. 974.

Minnesota.— Freiberg *v.* Steenbock, 54 Minn. 509, 56 N. W. 175.

Missouri.— How *v.* Taylor, 52 Mo. 592; Wachtel *v.* Ewing, 82 Mo. App. 594; Halderman *v.* Stillington, 63 Mo. App. 212; Harrison *v.* Foster, 62 Mo. App. 603.

Nevada.— Estey *v.* Cooke, 12 Nev. 276; Doak *v.* Brubaker, 1 Nev. 218.

New Hampshire.— Stowe *v.* Taft, 58 N. H. 445; Kendall *v.* Fitts, 22 N. H. 1; Morse *v.* Powers, 17 N. H. 286.

New York.— Mumper *v.* Rushmore, 79 N. Y. 19.

Pennsylvania.— Woods *v.* Hull, 81* Pa. St. 451; Worman *v.* Kramer, 73 Pa. St. 378; Linton *v.* Butz, 7 Pa. St. 89, 47 Am. Dec. 501; Keil *v.* Harris, 4 Pa. Cas. 201, 6 Atl. 750; Steele *v.* Miller, 1 Pa. Cas. 151, 1 Atl. 434.

Rhode Island.— Anthony *v.* Wheatons, 7 R. I. 490.

Vermont.— Wing *v.* Peabody, 57 Vt. 19; Flanagan *v.* Wood, 33 Vt. 332; Whitney *v.* Lynde, 16 Vt. 579; Potter *v.* Washburn, 13 Vt. 558, 37 Am. Dec. 615; Pierce *v.* Chipman, 8 Vt. 334; Spaulding *v.* Austin, 2 Vt. 555.

Virginia.— Kroesen *v.* Seevers, 5 Leigh 434.

United States.— Strahorn-Hutton-Evans Commission Co. *v.* Quigg, 97 Fed. 735, 38 C. C. A. 395.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 410, 468.

Where a horse sold is in the hands of a third person, who is notified of a change of ownership and undertakes to keep the property for the new owner, it is a sufficient change of possession to vest the title in the new owner as against other creditors or purchasers. Christy *v.* Ashlock, 93 Ill. App. 651.

Assent of bailee.— In some of the cases a mere notice to the bailee is considered sufficient to constitute delivery as against the vendor's creditors. Lufkins *v.* Collins, 2 Ida. (Hasb.) 150, 7 Pac. 95; Hodges *v.* Hurd, 47 Ill. 363. In others it has been said that unless the bailee consents to act as the agent of the purchaser he ought to take actual possession of the property. Buhl Iron Works *v.* Teuton, 67 Mich. 623, 35 N. W. 804; Carpenter *v.* Graham, 42 Mich. 191, 3 N. W. 974; Sheldon *v.* Warner, 26 Mich. 403. But in case of the bailee's non-consent and retention of the property he will become the vendee's agent by operation of law. Buhl Iron Works *v.* Teuton, 67 Mich. 623, 35 N. W. 804. But it has been held that unless the bailee assent and agree to keep the property for the vendee it is liable to be attached by the creditors of the vendor. Whitney *v.* Lynde, 16 Vt. 579. In Bentall *v.* Burn, 3 B. & C. 423, 10 E. C. L. 197, 5 D. & R. 284, 3 L. J. K. B. O. S. 42, R. & M. 107, 21 E. C. L. 712, 27 Rev. Rep. 391, it was considered that there could be no actual delivery until the bailee accepted the order for delivery, although it was said that the bailee might lay himself liable to an action for refusing to do so.

41. Broadwell *v.* Howard, 77 Ill. 305; Kerner *v.* Boardman, 133 N. Y. 539, 30 N. E. 1148 [*affirming* 14 N. Y. Suppl. 787]; Niag-

property belongs to the vendee. The vendor has nothing more to do to complete the sale, nor has he any further dominion over the property.[42]

(c) *Vendor's Agent as Bailee.* When the known and previously recognized agent or servant of an alleged vendor remains in possession of personal property, the appearance to the world is the same as though the vendor himself remained in possession, unless there are substantial and visible signs of a change of possession, and his mere employment by the alleged vendee to take charge of the property is not sufficient as against creditors of the vendor.[43]

(iv) *Delivery of a Part in Token of the Whole.* An actual delivery of a part of the property in token of a delivery of the whole is sufficient to enable the buyer to hold the property as against the creditors of the seller.[44]

(v) *Intangible Property.* The rule that possession must accompany the title does not apply to the sale or assignment of intangible property such as a debt which may be assigned by transfer and notice to the debtor,[45] or to the benefit of an executory contract.[46]

c. Delivery of Bill of Sale. When property in the possession of the vendor is reasonably susceptible of actual delivery the mere delivery of a bill of sale or bill of parcels will not avail against subsequent purchasers in good faith or attaching creditors of the vendor.[47]

d. Possession of Land on Which Property Is Situated. When the purchaser of personal property takes possession of the real estate on which it is situated, this carries with it the possession of the personal property. No useless formality is required in such case to constitute possession of the personal property, and the law will require neither a permanent nor a temporary removal of the chattels purchased.[48] But the mere acquisition of title to the land is not sufficient where the grantor remains in possession and control of he land,[49] unless of course his

ara County Nat. Bank *v.* Lord, 33 Hun (N. Y.) 557.

42. Cushing *v.* Breed, 14 Allen (Mass.) 376, 92 Am. Dec. 777.

43. *California.*— Mosgrove *v.* Harris, 94 Cal. 162, 29 Pac. 490; Chester *v.* Bower, 55 Cal. 46. See Hurlburd *v.* Bogardus, 10 Cal. 518.

Connecticut.— Crouch *v.* Carrier, 16 Conn. 505, 41 Am. Dec. 156.

Idaho.— Coombs *v.* Collins, 6 Ida. 536, 57 Pac. 310.

Illinois.— Monmouth Second Nat. Bank *v.* Gilbert, 174 Ill. 485, 51 N. E. 584, 66 Am. St. Rep. 306; Watkins *v.* Petefish, 49 Ill. App. 80.

Indiana.— Seavey *v.* Walker, 108 Ind. 78, 9 N. E. 347.

Nevada.— Sharon *v.* Shaw, 2 Nev. 289, 90 Am. Dec. 546; Doak *v.* Brubaker, 1 Nev. 218.

Pennsylvania.— Stephens *v.* Gifford, 137 Pa. St. 219, 20 Atl. 542, 21 Am. St. Rep. 868.

Vermont.— Flanagan *v.* Wood, 33 Vt. 332; Sleeper *v.* Pollard, 28 Vt. 709, 67 Am. Dec. 741.

44. Hobbs *v.* Carr, 127 Mass. 532; Legg *v.* Willard, 17 Pick. (Mass.) 140, 28 Am. Dec. 282; Macomber *v.* Parker, 13 Pick. (Mass.) 175; Leonard *v.* Davis, 1 Black (U. S.) 476, 17 L. ed. 222.

45. Kane *v.* Drake, 27 Ind. 29; Schawacker *v.* Ludington, 77 Mo. App. 415; Stackhouse *v.* Holden, 66 N. Y. App. Div. 423, 73 N. Y. Suppl. 203; National Hudson River Bank *v.* Chaskin, 28 N. Y. App. Div. 311, 51 N. Y. Suppl. 64; Young *v.* Upson, 115 Fed. 192.

Liquor-tax certificate.— Niles *v.* Mathusa, 162 N. Y. 546, 57 N. E. 184 [*affirming* 20 N. Y. App. Div. 483, 47 N. Y. Suppl. 38].

46. Frankfort Chair Co. *v.* Buchanan, 51 S. W. 179, 21 Ky. L. Rep. 269.

47. *Arkansas.*— Davis *v.* Meyer, 47 Ark. 210, 1 S. W. 95.

Maine.— McKee *v.* Garcelon, 60 Me. 165, 11 Am. Rep. 200.

Massachusetts.— Dempsey *v.* Gardner, 127 Mass. 381, 34 Am. Rep. 389; Burge *v.* Cone, 6 Allen 412; Veazie *v.* Somerby, 5 Allen 280; Rourke *v.* Bullens, 8 Gray 549; Packard *v.* Wood, 4 Gray 307; Carter *v.* Willard, 19 Pick. 1; Shumway *v.* Rutter, 7 Pick. 56, 8 Pick. 443, 19 Am. Dec. 340; Lanfear *v.* Sumner, 17 Mass. 110, 9 Am. Dec. 119.

Missouri.— Mitchell *v.* Tinsley, 83 Mo. App. 586.

Nevada.— Comaita *v.* Kyle, 19 Nev. 38, 5 Pac. 666.

New Hampshire.—Flagg *v.* Pierce, 58 N. H. 348; Solomons *v.* Chesley, 58 N. H. 238.

48. Gilligan *v.* Lord, 51 Conn. 562; Elmer *v.* Welch, 47 Conn. 56; Nichols *v.* Patten, 18 Me. 231, 35 Am. Dec. 713; Weeks *v.* Prescott, 53 Vt. 57; Burrows *v.* Stebbins, 26 Vt. 659; Stephenson *v.* Clark, 20 Vt. 624; Wilson *v.* Hooper, 12 Vt. 653, 36 Am. Dec. 366. Where a purchaser buys a farm with the personal property on it and puts his deed on record and enters upon the premises and assumes full control of the property, this is sufficient where neither of the parties resides upon the premises. Wilson *v.* Hooper, 12 Vt. 653, 36 Am. Dec. 366.

49. Dorman *v.* Soto, (Cal. 1894) 36 Pac. 588; Weeks *v.* Prescott, 53 Vt. 57; Flanagan

continued possession and control of the land is merely as a tenant or agent of the purchaser.[50]

6. Delivery to Common Carrier. A delivery of goods to a common carrier, especially one designated by the purchaser, is a delivery to the purchaser and is good as against attaching creditors of the vendor.[51]

7. Vendee Already in Possession. Where the chattels described in a bill of sale are at the time it is made and delivered already in the possession and under the exclusive control of the vendee or his agent, the sale is complete, and no formal delivery is necessary; it would be an idle ceremony.[52] And the same is true where a tenant in common of personalty sells his interest to his cotenant already in possession.[53]

8. Effect of Marking Property. Where the vendee takes possession of property not easily removable and marks his name upon it this is sufficient if the vendor's dominion over it ceases.[54] When animals are selected from a herd and branded with the mark of the purchaser, this is a sufficient delivery, although they are permitted to run at large on the vendor's range.[55]

9. Time of Delivery — a. Within Reasonable Time. It is frequently said that there must be an immediate delivery, or that delivery must accompany the sale or mortgage; but the true rule is that delivery must be made within a reasonable time and no definite rule can be laid down as to what is a reasonable time. It must be determined by the circumstances of each particular case, giving due regard to the nature of the property and its condition and situation at the time of the transaction.[56]

b. Before Seizure. As a general rule where an absolute bill of sale, fair in itself, is not followed by immediate possession it is sufficient, as against existing creditors of the vendor, if possession be taken before the property is seized upon execution or attachment or a specific lien upon it is otherwise acquired.[57] But

v. Wood, 33 Vt. 332; Stiles *v.* Shumway, 16 Vt. 435.

50. Banning *v.* Marleau, 101 Cal. 238, 35 Pac. 772; Talcott *v.* Wilcox, 9 Conn. 134. See also Bernal *v.* Hovious, 17 Cal. 541, 79 Am. Dec. 147; Visher *v.* Webster, 13 Cal. 58.

51. Hope Lumber Co. *v.* Foster, etc., Hardware Co., 53 Ark. 196, 13 S. W. 731; Everett *v.* Brigham, (Utah 1896) 47 Pac. 75.

52. Lake *v.* Morris, 30 Conn. 201; Nichols *v.* Patten, 18 Me. 231, 35 Am. Dec. 713; Martin *v.* Adams, 104 Mass. 262; Warden *v.* Marshall, 99 Mass. 305; Shurtleff *v.* Willard, 19 Pick. 202; Macomber *v.* Parker, 13 Pick. 175.

53. Cushing *v.* Breed, 14 Allen (Mass.) 376, 92 Am. Dec. 777; Macomber *v.* Parker, 13 Pick. (Mass.) 175; Kittredge *v.* Sumner, 11 Pick. (Mass.) 50; Beaumont *v.* Crane, 14 Mass. 400; Yank *v.* Bordeaux, 23 Mont. 205, 58 Pac. 42, 75 Am. St. Rep. 522.

54. Byxbee *v.* Dewey, (Cal. 1896) 47 Pac. 52; Ayers *v.* McCandless, 147 Pa. St. 49, 23 Atl. 344.

55. Dodge *v.* Jones, 7 Mont. 121, 14 Pac. 707.

56. *Alabama.*— State Bank *v.* McDade, 4 Port. 252.

California.— Feeley *v.* Boyd, 143 Cal. 282, 76 Pac. 1029, 60 L. R. A. 943; Dubois *v.* Spinks, 114 Cal. 289, 46 Pac. 95; Porter *v.* Bucher, 98 Cal. 454, 33 Pac. 335; Hogan *v.* Cowell, 73 Cal. 211, 14 Pac. 780.

Colorado.— Bailey *v.* Johnson, 9 Colo. 365, 12 Pac. 209, one day.

Connecticut.— Gilbert *v.* Decker, 53 Conn. 401, 4 Atl. 685; Seymour *v.* O'Keefe, 44 Conn. 128 (twelve days held too much); Ingraham *v.* Wheeler, 6 Conn. 277.

Delaware.— Miller *v.* Lacey, 7 Houst. 8, 30 Atl. 640; Sanders *v.* Clark, 6 Houst. 462.

Illinois.— Cruikshank *v.* Cogswell, 26 Ill. 366; Hardin *v.* Sisson, 36 Ill. App. 383.

Louisiana.— Russell *v.* Keefe, 28 La. Ann. 928.

Missouri.— McIntosh *v.* Smiley, 107 Mo. 377, 17 S. W. 979; Bishop *v.* O'Connell, 56 Mo. 158; Bass *v.* Walsh, 39 Mo. 192; Cunningham *v.* Ashbrook, 20 Mo. 553; Dillin *v.* Kincaid, 70 Mo. App. 670; Kendall Boot, etc., Co. *v.* Bain, 46 Mo. App. 581; State *v.* Hellman, 20 Mo. App. 304; Kane *v.* Stern, 13 Mo. App. 581.

Montana.— O'Gara *v.* Lowry, 5 Mont. 427, 5 Pac. 583, one day's delay.

New York.— Drury *v.* Wilson, 4 N. Y. App. Div. 232, 38 N. Y. Suppl. 538; Kellogg *v.* Wilkie, 23 How. Pr. 233.

Pennsylvania.— McMarlan *v.* English, 74 Pa. St. 296; Chase *v.* Garrett, 1 Pa. Cas. 16, 1 Atl. 912.

Texas.— Osborn *v.* Koenigheim, 57 Tex. 91.

Utah.— White *v.* Pease, 15 Utah 170, 49 Pac. 416.

United States.— Kleinschmidt *v.* McAndrews, 117 U. S. 282, 6 S. Ct. 761, 29 L. ed. 905.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 462.

57. *Connecticut.*— Gilbert *v.* Decker, 53 Conn. 401, 4 Atl. 685.

where by statute a sale of personal property unaccompanied by immediate delivery is void as to creditors, a delivery before a seizure of the property does not help the matter.[58]

c. Assignment in Trust For Creditors. Under a conveyance in trust for the benefit of creditors, possession consistent with the terms and object of the deed is not legal fraud. Although the want of an immediate change of possession may be a circumstance from which fraud may be inferred, it is nevertheless susceptible of explanation, as the assignee always has a reasonable time in which to reduce the property to possession.[59]

10. Possession Remaining With Mortgagor. Where the mortgagor of a stock of goods remains in possession thereof and continues to sell the same in the usual course of business pursuant to an agreement with the mortgagee that he will apply the proceeds of all sales upon the debt secured by the mortgage, the court, in the absence of a statute, cannot pronounce the transaction fraudulent as a matter of law, but it presents a question of good faith for the jury.[60] But a chattel mortgage permitting the mortgagor to remain in possession, sell the goods, and appropriate the proceeds or any part of them to his own use is fraudulent and void in law as against the mortgagor's creditors.[61] And the same is true where the chattels mortgaged are necessarily consumable in their use.[62]

Idaho.— Cornwall *v.* Mix, 3 Ida. 687, 34 Pac. 893.

Iowa.— Blake *v.* Graves, 18 Iowa 312.

Louisiana.— Brown *v.* Glathary, 4 La. Ann. 124.

Massachusetts.— Adams *v.* Wheeler, 10 Pick. 199; Shumway *v.* Rutter, 8 Pick. 443, 19 Am. Dec. 340; Bartlett *v.* Williams, 1 Pick. 288.

Missouri.— Halderman *v.* Stillington, 63 Mo. App. 212; Toney *v.* Goodley, 57 Mo. App. 235; Markey *v.* Umstattd, 53 Mo. App. 20.

Nevada.— Clute *v.* Steele, 6 Nev. 335.

Vermont.— Kendall *v.* Samson, 12 Vt. 515.

Virginia.— Carr *v.* Glasscock, 3 Gratt. 343; McKinley *v.* Ensell, 2 Gratt. 333; Sydnor *v.* Gee, 4 Leigh 535.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 463½.

58. Edwards *v.* Sonoma Valley Bank, 59 Cal. 148; Watson *v.* Rodgers, 53 Cal. 401; Chenery *v.* Palmer, 6 Cal. 119, 65 Am. Dec. 493; Autrey *v.* Bowen, 7 Colo. App. 408, 43 Pac. 908.

59. *Connecticut.*— Ingraham *v.* Wheeler, 6 Conn. 277.

Illinois.— Lowe *v.* Matson, 140 Ill. 108, 29 N. E. 1036.

Kentucky.— Christopher *v.* Covington, 2 B. Mon. 357; Vernon *v.* Morton, 8 Dana 247.

Michigan.— Stamp *v.* Case, 41 Mich. 267, 2 N. W. 27, 32 Am. Rep. 156.

Missouri.— Goodwin *v.* Kerr, 80 Mo. 276.

Ohio.— Johnson *v.* Sharp, 31 Ohio St. 611, 27 Am. Rep. 529.

Pennsylvania.—Mitchell *v.* Willock, 2 Watts & S. 253; Wilt *v.* Franklin, 1 Binn. 502, 2 Am. Dec. 474.

60. *Alabama.*— Thornton *v.* Cook, 97 Ala. 630, 12 So. 403.

Kansas.— Frankhouser *v.* Ellett, 22 Kan. 127, 31 Am. Rep. 171.

Massachusetts.— Hall *v.* Tay, 131 Mass. 192; Jones *v.* Huggeford, 3 Metc. 515.

Montana.— Noyes *v.* Ross, 23 Mont. 425, 59 Pac. 367, 75 Am. St. Rep. 543, 47 L. R. A. 400.

Nebraska.— Lepin *v.* Coon, 54 Nebr. 664, 74 N. W. 1079.

New York.— Brackett *v.* Harvey, 91 N. Y. 214; Brown *v.* Kiefer, 71 N. Y. 610; Frost *v.* Warren, 42 N. Y. 204; Russell *v.* Winne, 37 N. Y. 591, 97 Am. Dec. 755; Miller *v.* Lockwood, 32 N. Y. 293; Conkling *v.* Shelley, 28 N. Y. 360, 84 Am. Dec. 348; Ford *v.* Williams, 24 N. Y. 359; Ostrander *v.* Fay, 3 Abb. Dec. 431, 2 Keyes 586; Southard *v.* Pinckney, 5 Abb. N. Cas. 184.

North Carolina.— Such a transaction approaches the verge of being on its face fraudulent in law, but is not so. Cheatham *v.* Hawkins, 76 N. C. 335, 80 N. C. 161.

North Dakota.— Red River Valley Nat. Bank *v.* Barnes, 8 N. D. 432, 79 N. W. 880.

Ohio.— Kleine *v.* Katzenberger, 20 Ohio St. 110, 5 Am. Rep. 630.

South Dakota.— Meyer Boot, etc., Co. *v.* Shenkberg Co., 11 S. D. 620, 80 N. W. 126.

Tennessee.— McGrew *v.* Hancock, (Ch. App.) 52 S. W. 500.

Texas.— Scott *v.* Alford, 53 Tex. 82.

United States.— Davis *v.* Turner, 120 Fed. 605, 56 C. C. A. 669.

See Chattel Mortgages, 6 Cyc. 1053 *et seq.*

61. Southard *v.* Benner, 72 N. Y. 424; Robinson *v.* Baugh, (Tenn. Ch. App. 1900) 61 S. W. 98; McTeer *v.* Huntsman, (Tenn. Ch. App. 1898) 49 S. W. 57; Collins *v.* Corwith, 94 Wis. 514, 69 N. W. 349; Blakeslee *v.* Rossman, 43 Wis. 116. Where a mortgagor of chattels in possession thereof is permitted to sell the goods in the ordinary course of trade for his own benefit, the mortgage is fraudulent as to creditors. Black *v.* Fuller, 4 Nebr. (Unoff.) 303, 93 N. W. 1010.

62. Acme Lumber Co. *v.* Hoyt, 71 Miss. 106, 14 So. 464; Harman *v.* Hoskins, 56 Miss. 142; Ewing *v.* Cargill, 13 Sm. & M. (Miss.) 79; Farmers' Bank *v.* Douglass, 11 Sm. & M.

11. Effect of Retaining Vendor's Sign. It has been said that the retention of the vendor's sign amounts to a declaration that he is still the proprietor of the establishment.[63] But upon principle this can be nothing but an evidential circumstance, and where the possession of the vendee is in other respects open, notorious, and unequivocal, his failure to remove the old sign should not control,[64] especially if the sign is impersonal and does not indicate who is the proprietor.[65]

C. Notice of Transaction — 1. Public Notoriety — a. In General. When the transfer is founded on a good consideration and there is no intention in fact to defraud creditors the presumption of fraud created by the non-delivery of possession does not arise if the transfer or transaction was a matter of public notoriety.[66]

b. Judicial Sales. Thus on account of the notoriety of judicial sales they are, according to the great weight of authority, made an exception to the general rule requiring a change of possession on the sale of personal property to make the sale valid as against creditors, and where the sale is otherwise fair and unimpeached fraud is not inferred from the fact that the debtor is permitted to remain in possession of the property, especially where it was purchased by a person other than the judgment creditor.[67] It has been held otherwise, however, where the statute draws no distinction between modes of transfer.[68]

2. Actual Notice — a. To Existing Creditors. Notice of a transfer of personal property without delivery will not prevent an existing *bona fide* creditor from purchasing the property so transferred in satisfaction of his claim or from seizing it upon attachment or execution.[69]

(Miss.) 469; Simpson *v.* Mitchell, 8 Yerg. (Tenn.) 417; Sommerville *v.* Horton, 4 Yerg. (Tenn.) 541, 26 Am. Dec. 242; Darwin *v.* Handley, 3 Yerg. (Tenn.) 502.

63. Wright *v.* McCormick, 67 Mo. 426; Revercomb *v.* Duker, 74 Mo. App. 570; Howard *v.* Dwight, 8 S. D. 398, 66 N. W. 935.

64. Hugus *v.* Robinson, 24 Pa. St. 9; Benjamin *v.* Madden, 94 Va. 66, 26 S. E. 392. In Huels *v.* Boettger, 40 Mo. App. 310, it was held that a sale was not rendered invalid as to the vendor's creditors, because the vendee failed to remove a curtain having the vendor's name on it, when his acts were otherwise sufficient to constitute an open and notorious change of possession. See also Pollard *v.* Farwell, 48 Mo. App. 42. "That the old sign was not removed, nor any new one set up near it, are facts which the trial court, no doubt, carefully considered; but they are not sufficient, as matter of law, to show that its ultimate conclusions as to a change of possession were incorrect." Greenthal *v.* Lincoln, 68 Conn. 384, 389, 36 Atl. 813, per Baldwin, J.

65. Burchinell *v.* Smidle, 5 Colo. App. 417, 38 Pac. 1097.

66. Lowe *v.* Matson, 140 Ill. 108, 29 N. E. 1036; Sechler Carriage Co. *v.* Dryden, 71 Ill. App. 583.

67. *Alabama.*— Wyatt *v.* Stewart, 34 Ala. 716; Anderson *v.* Brooks, 11 Ala. 953; Abney *v.* Kingsland, 10 Ala. 355, 44 Am. Dec. 491.

California.— Matteucci *v.* Whelan, 123 Cal. 312, 55 Pac. 990, 69 Am. St. Rep. 60.

Delaware.— Pennington *v.* Chandler, 5 Harr. 394.

Illinois.— Lowe *v.* Matson, 140 Ill. 108, 29 N. E. 1036; Hanford *v.* Obrecht, 49 Ill. 146.

Kentucky.—Allen *v.* Johnson, 4 J. J. Marsh. 235; Kilby *v.* Haggin, 3 J. J. Marsh. 208.

Louisiana.—Holmes *v.* Barbin, 15 La. Ann. 553.

Mississippi.— Ewing *v.* Cargill, 13 Sm. & M. 79; Foster *v.* Pugh, 12 Sm. & M. 416; Garland *v.* Chambers, 11 Sm. & M. 337, 49 Am. Dec. 63.

Missouri.— Thompson *v.* Cohen, 127 Mo. 215, 28 S. W. 984, 29 S. W. 885; Clark *v.* Cox, 118 Mo. 652, 24 S. W. 221; Lampert *v.* Haydel, 96 Mo. 439, 9 S. W. 780, 9 Am. St. Rep. 358, 2 L. R. A. 113; Gutzweiler *v.* Lachman, 28 Mo. 434.

Pennsylvania.— Bisbing *v.* Third Nat. Bank, 93 Pa. St. 79, 39 Am. Rep. 726; Smith *v.* Crisman, 91 Pa. St. 428; Craig's Appeal, 77 Pa. St. 448; Walter *v.* Gernant, 13 Pa. St. 515, 53 Am. Dec. 491; Dick *v.* Lindsay, 2 Grant 431.

South Carolina.— Sloan *v.* Hunter, 56 S. C. 385, 34 S. E. 658, 879, 76 Am. St. Rep. 551; Garrett *v.* Rhame, 9 Rich. 407, 67 Am. Dec. 557; Guignard *v.* Aldrich, 10 Rich. Eq. 253; Poole *v.* Mitchell, 1 Hill 404.

Tennessee.— Carlock *v.* Atlee, (Ch. App. 1899) 53 S. W. 186.

Vermont.— Austin *v.* Soule, 36 Vt. 645; Gates *v.* Gaines, 10 Vt. 346; Bates *v.* Carter, 5 Vt. 602; Boardman *v.* Keeler, 1 Aik. 158, 15 Am. Dec. 670.

Virginia.— Carr *v.* Glasscock, 3 Gratt. 343.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 445 *et seq.*

68. Stimson *v.* Wrigley, 86 N. Y. 332; Gardenier *v.* Tubbs, 21 Wend. (N. Y.) 169; Fonda *v.* Gross, 15 Wend. (N. Y.) 628.

69. Rothschild *v.* Swope, 116 Cal. 670, 48 Pac. 911; Lassiter *v.* Bussy, 14 La. Ann. 699; Stark *v.* Ward, 3 Pa. St. 328; Warwick Iron

b. To Subsequent Creditors and Purchasers. In the absence of a positive statutory rule a creditor who trusts the vendor after actual notice of a sale of property can take no advantage of its non-delivery. To trust the vendor on the faith of property known to belong to another is an act of folly against which no one has a right to ask the law to protect him.[70] And *a fortiori* a subsequent purchaser of property with actual knowledge of a prior sale to another cannot profit by its non-delivery to the first purchaser. To buy from one person property known to have been previously sold to another is an act of positive bad faith which if upheld would render such purchaser the perpetrator rather than the victim of fraud.[71] But where there has been no change of possession actual notice even to subsequent creditors will not avail where the statute in terms renders the transaction void.[72]

3. Constructive Notice and Want of It — a. Recording Instrument of Transfer. The recording of an instrument when the law does not require or authorize it is not notice to any one.[73] But if an instrument be duly recorded according to law, all persons must take notice no matter who is in possession of the property affected by it.[74]

b. Withholding Instrument From Record. Under the recording acts where the grantee or mortgagee withholds his conveyance from record and permits the grantor or mortgagor to retain the apparent title by remaining in possession, the transaction, although it may be valid as between the parties, will not stand as against creditors of the grantor or mortgagor who have extended him credit upon the faith of his apparent title.[75] But withholding a deed or mortgage from

Co. *v.* Honeybrook First Nat. Bank, 10 Pa. Cas. 14, 13 Atl. 79; Perrin *v.* Reed, 35 Vt. 2.

70. Vanmeter *v.* Estill, 78 Ky. 456; Ludwig *v.* Fuller, 17 Me. 162, 35 Am. Dec. 245. Even a gift will be supported against subsequent creditors with notice, although the donor retains possession after the gift. Madden *v.* Day, 1 Bailey (S. C.) 587.

71. Vanmeter *v.* Estill, 78 Ky. 456.

72. Harkness *v.* Smith, 3 Ida. 221, 28 Pac. 423.

73. Bassinger *v.* Spangler, 9 Colo. 175, 10 Pac. 809; Fechheimer *v.* Baum, 43 Fed. 719, 2 L. R. A. 153.

74. Mitchell *v.* Steelman, 8 Cal. 363.

75. *Alabama.*— Griffin *v.* Hall, 129 Ala. 289, 29 So. 783; Watt *v.* Parsons, 73 Ala. 202.

Arkansas.— Sumpter *v.* Arkansas Nat. Bank, 69 Ark. 224, 62 S. W. 577; Bunch *v.* Schaer, 66 Ark. 98, 48 S. W. 1071.

California.— Stafford *v.* Lick, 7 Cal. 479.

Florida.— American Freehold Land, etc., Co. *v.* Maxwell, 39 Fla. 489, 22 So. 751; Campbell Printing Press, etc., Co. *v.* Walker, 22 Fla. 412, 1 So. 59.

Georgia.— Ross *v.* Cooley, 113 Ga. 1047, 39 S. E. 471.

Illinois.— Lewis *v.* Lanphere, 79 Ill. 187.

Indiana.— National State Bank *v.* Sandford Fork, etc., Co., 157 Ind. 10, 60 N. E. 699.

Iowa.— Lemert *v.* McKibben, 91 Iowa 345, 59 N. W. 207; Miller *v.* Bryan, 3 Iowa 58.

Kentucky.— Scrivenor *v.* Scrivenor, 7 B. Mon. 374.

Louisiana.— Ft. Wayne First Nat. Bank *v.* Ft. Wayne Artificial Ice Co., 105 La. 133, 29 So. 379.

Maine.— Shaw *v.* Wilkshire, 65 Me. 485.

Michigan.— Buhl Iron Works *v.* Teuton, 67 Mich. 623, 35 N. W. 804; Talcott *v.* Crippen, 52 Mich. 633, 18 N. W. 392.

Minnesota.— Baker *v.* Pottle, 48 Minn. 479, 51 N. W. 383.

Mississippi.— Charlotte Supply Co. *v.* Britton, etc., Bank, (1898) 23 So. 630; Loughridge *v.* Bowland, 52 Miss. 546; Hilliard *v.* Cagle, 46 Miss. 309.

Missouri.— Singer Mfg. Co. *v.* Stephens, 169 Mo. 1, 68 S. W. 903; Williams *v.* Kirk, 68 Mo. App. 457; Sauerwein *v.* Renard Champagne Co., 68 Mo. App. 29; Sauer *v.* Behr, 49 Mo. App. 86.

New Jersey.— Burne *v.* Partridge, 61 N. J. Eq. 434, 48 Atl. 770.

New York.— Raymond *v.* Richmond, 78 N. Y. 351; Chemung Canal Bank *v.* Payne, 22 N. Y. App. Div. 353, 47 N. Y. Suppl. 877.

Oregon.— Davis *v.* Bowman, 25 Oreg. 189, 35 Pac. 264.

Pennsylvania.— Hartley *v.* Millard, 167 Pa. St. 322, 31 Atl. 641.

Tennessee.— Williams *v.* Walton, 8 Yerg. 387, 29 Am. Dec. 122; Douglas *v.* Morford, 8 Yerg. 373; Malone *v.* Brown, (Ch. App. 1897) 46 S. W. 1004.

Texas.— Puckett *v.* Reed, 3 Tex. Civ. App. 350, 22 S. W. 515; Russell *v.* Nall, 2 Tex. Civ. App. 60, 20 S. W. 1006, 23 S. W. 901.

Virginia.—Grasswitt *v.* Connally, 27 Gratt. 19; Lewis *v.* Caperton, 8 Gratt. 148; Shirley *v.* Long, 6 Rand. 764.

Wisconsin.— Kickbusch *v.* Corwith, 108 Wis. 634, 85 N. W. 148; Van Dusen *v.* Hinz, 108 Wis. 178, 84 N. W. 151.

United States.—Blennerhassett *v.* Sherman, 105 U. S. 100, 26 L. ed. 1080; Hodgson *v.* Butts, 3 Cranch 139, 2 L. ed. 391; Clayton *v.* Macon Exch. Bank, 121 Fed. 630, 57

record is not fraudulent unless the grantor or mortgagor is thereby enabled to obtain fictitious credit.[76]

D. Whether Rule Applicable to Real Estate— 1. In General. The rule governing sales of personal property that retention of possession by the vendor is fraudulent either *prima facie* or as matter of law does not apply to sales and conveyances of real estate, the title to which is governed by the conveyance as its index and not by the possession. The public look to the proper records and not to the possession for information concerning the title to such property.[77] But a long

C. C. A. 656; Corwine *v.* Thompson Nat. Bank, 105 Fed. 196, 44 C. C. A. 442.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 485 *et seq.*

Withholding a mortgage, not fraudulent as to creditors in its inception, from the records, at the request of the mortgagor, to deceive the public, until the mortgagor becomes insolvent, renders it fraudulent as to persons extending credit without knowledge thereof. Curtis *v.* Lewis, 74 Conn. 367, 50 Atl. 878.

A chattel mortgage, given in connection with a secret agreement to keep its existence a secret for the purpose of protecting the mortgagor's credit, is fraudulent as to creditors. Moore *v.* Wood, (Tenn. Ch. App. 1901) 61 S. W. 1063.

76. *Alabama.*— Danner Land, etc., Co. *v.* Stonewall Ins. Co., 77 Ala. 184.

Delaware.— Cochran *v.* McBeath, 1 Del. Ch. 187.

Georgia.— Trounstine *v.* Irving, 91 Ga. 92, 16 S. E. 310.

Illinois.— German Ins. Co. *v.* Bartlett, 188 Ill. 165, 58 N. E. 1075, 80 Am. St. Rep. 172; Earl *v.* Earl, 186 Ill. 370, 57 N. E. 1079.

Indiana.— State Bank *v.* Backus, 160 Ind. 682, 67 N. E. 512.

Iowa.— Groetzinger *v.* Wyman, 105 Iowa 574, 75 N. W. 512; Brown *v.* Bradford, 103 Iowa 378, 72 N. W. 648; Lemert *v.* McKibben, 91 Iowa 345, 59 N. W. 207.

Kentucky.— U. S. Bank *v.* Huth, 4 B. Mon. 423.

Michigan.— Campbell *v.* Remaly, 112 Mich. 214, 70 N. W. 432, 67 Am. St. Rep. 393.

Missouri.— Gentry *v.* Field, 143 Mo. 399, 45 S. W. 286; Mauch Chunk First Nat. Bank *v.* Rohrer, 138 Mo. 369, 39 S. W. 1047.

Nebraska.— News Pub. Co. *v.* Tyndale, 2 Nebr. (Unoff.) 256, 96 N. W. 125.

New Jersey.— Andrus *v.* Burke, 61 N. J. Eq. 297, 48 Atl. 228.

New York.— Castleman *v.* Mayer, 55 N. Y. App. Div. 515, 67 N. Y. Suppl. 229; Hardin *v.* Dolge, 46 N. Y. App. Div. 416, 61 N. Y. Suppl. 753.

South Carolina.— McElwee *v.* Kennedy, 56 S. C. 154, 34 S. E. 86.

Wisconsin.— McFarlane *v.* Louden, 99 Wis. 620, 75 N. W. 394, 67 Am. St. Rep. 883.

United States.— Corwine *v.* Thompson Nat. Bank, 105 Fed. 196, 44 C. C. A. 442.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 485 *et seq.* And see *supra*, V, B, 4.

Delay in recording not affecting conveyance. — Where a conveyance from an insolvent debtor to a creditor is not recorded by the latter until nine days after its receipt, but there is no agreement withholding it from record, and the creditor does not obtain other credit thereon, the delay does not render the conveyance fraudulent. Wall *v.* Beedy, 161 Mo. 625, 61 S. W. 864. And the fact alone that deeds conveying property were withheld from record by the grantee for a number of years affords no ground for setting aside such deeds in a creditor's suit by a judgment creditor of the grantor whose judgment was not obtained until after they were recorded, although it is entitled to consideration as evidence on the question of the *bona fides* of the transaction; nor does the further fact that during such time portions of the lands were sold and deeds were made to the purchasers by the grantor, who still held the title of record, sustain a claim of fraud, where it is shown that the proceeds were paid to the grantee. Brown *v.* Easton, 112 Fed. 592. See also *In re* Shirley, 112 Fed. 301, 50 C. C. A. 252.

77. *Alabama.*— Miller *v.* Rowan, 108 Ala. 98, 19 So. 9; Tompkins *v.* Nichols, 53 Ala. 197; Noble *v.* Coleman, 16 Ala. 77; Paulling *v.* Sturgus, 3 Stew. 95.

Arkansas.— Godfrey *v.* Herring, (1905) 85 S. W. 232; Apperson *v.* Burgett, 33 Ark. 328.

Connecticut.— Tibbals *v.* Jacobs, 31 Conn. 428.

Indiana.— Pennington *v.* Flock, 93 Ind. 378.

Iowa.— Suiter *v.* Turner, 10 Iowa 517.

Kentucky.— Short *v.* Tinsley, 1 Metc. 397, 71 Am. Dec. 482; Waller *v.* Todd, 3 Dana 503, 28 Am. Dec. 94; Lyne *v.* Commonwealth Bank, 5 J. J. Marsh. 545.

Louisiana.— Parmer *v.* Mangham, 31 La. Ann. 348.

Maryland.— Thompson *v.* Williams, 100 Md. 195, 60 Atl. 26, holding that where a father, indebted to a daughter who was living in the same house with him, conveyed to the daughter the real estate on which they were residing while he was indebted to others, the mere fact that he continued to reside on the premises after the conveyance, as he had done for years prior thereto, did not show bad faith in the transaction.

Missouri.— King *v.* Moon, 42 Mo. 551; Stewart *v.* Thomas, 35 Mo. 202.

New Hampshire.— Merrill *v.* Locke, 41 N. H. 486.

New Jersey.— Dresser *v.* Zabriskie, (Ch. 1898) 39 Atl. 1066.

New York.—Clute *v.* Newkirk, 46 N. Y. 684; Willis *v.* Willis, 79 N. Y. App. Div. 9, 79 N. Y. Suppl. 1028; Every *v.* Edgerton, 7 Wend. 259.

and unexplained continuance of the grantor's possession may be considered in connection with other suspicious circumstances as tending to show a secret trust in his favor.[78] Where after an absolute conveyance of real estate the grantor, being in failing circumstances, remains in possession without contract and without accounting for the use of the land, these facts are evidence of fraudulent intent.[79] Where there has been a sale and conveyance of land by the absolute owner without change of possession the creditors of the vendor, without notice actual or constructive, may seize it upon attachment or execution.[80] And the presumption of fraud becomes the stronger when it appears that the conveyance was made to near relatives of the grantor who were themselves financially embarrassed.[81]

Ohio.— Barr *v.* Hatch, 3 Ohio 527.

Pennsylvania. — Allentown Bank *v.* Beck, 49 Pa. St. 394. "It is well established that where land is conveyed, want of correspondent possession is less evincive of fraud than where a chattel is sold, because the title to the former is evidenced by possession, not of the thing, but of the title-deeds, which, like manual occupation in the case of a chattel, is the criterion." Avery *v.* Street, 6 Watts 247, 249, per Gibson, C. J.

South Carolina.— Kid *v.* Mitchell, 1 Nott & M. 334, 9 Am. Dec. 702.

Virginia.— Keagy *v.* Trout, 85 Va. 390, 7 S. E. 329.

United States.— Crawford *v.* Neal, 144 U. S. 585, 12 S. Ct. 759, 36 L. ed. 552; Phettiplace *v.* Sayles, 19 Fed. Cas. No. 11,083, 4 Mason 312.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 435.

78. *Alabama.*— Miller *v.* Rowan, 108 Ala. 98, 19 So. 9; Cooper *v.* Davison, 86 Ala. 367, 3 So. 650; Noble *v.* Coleman, 16 Ala. 77; Ravisies *v.* Alston, 5 Ala. 297.

Arkansas.— Apperson *v.* Burgett, 33 Ark. 328.

Indiana.— Tedrowe *v.* Esher, 56 Ind. 443.

Louisiana.— Cole *v.* Cole, 39 La. Ann. 878, 2 So. 794.

Mississippi.— Wooten *v.* Clark, 23 Miss. 75.

Missouri.— King *v.* Moon, 42 Mo. 551.

New York.— Clute *v.* Newkirk, 46 N. Y. 684; Savage *v.* Murphy, 34 N. Y. 508, 90 Am. Dec. 733; Willis *v.* Willis, 79 N. Y. App. Div. 9, 79 N. Y. Suppl. 1028.

Texas.— Hancock *v.* Horan, 15 Tex. 507.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 435.

The fact that the grantor remains as a tenant of the grantee is a sufficient explanation. Danner Land, etc., Co. *v.* Stonewall Ins. Co., 77 Ala. 184; Glenn *v.* Grover, 3 Md. 212; Wall *v.* Beedy, 161 Mo. 625, 61 S. W. 864; Blackshire *v.* Pettit, 35 W. Va. 547, 14 S. E. 133.

In Georgia it has been held that the continued and unexplained possession of the grantor after an absolute sale of land is *prima facie* evidence of fraud. Collins *v.* Taggart, 57 Ga. 355; Perkins *v.* Patten, 10 Ga. 241; Fleming *v.* Townsend, 6 Ga. 103, 50 Am. Dec. 318; Peck *v.* Land, 2 Ga. 1, 46 Am. Dec. 368.

79. *Arkansas.*— Retention of possession of real estate after an alleged conveyance is not *prima facie* fraudulent as against the grantor's creditors, but is an *indicium* of fraud. Godfrey *v.* Herring, (1905) 85 S. W. 232.

Georgia.— Collins *v.* Taggart, 57 Ga. 355.

Kentucky.— Anglin *v.* Conley, 114 Ky. 741, 71 S. W. 926, 24 Ky. L. Rep. 1551.

Maryland.— Thompson *v.* Williams, 100 Md. 195, 60 Atl. 26.

Mississippi.— Johnston *v.* Dick, 27 Miss. 277.

Texas.— Where the owner of land, in contemplation of insolvency, signed and acknowledged a deed thereof, which he retained in his possession more than a year and then recorded, and thereafter without consideration delivered it to the grantee, a creditor of such grantor, the debt having been contracted between the date of the deed and date of delivery, on thereafter recovering judgment on such debt, may attack such deed as fraudulent, and have the land sold to pay his judgment. Owens *v.* Foley, 30 Tex. Civ. App. 86, 69 S. W. 811.

West Virginia.— Timms *v.* Timms, 54 W. Va. 414, 46 S. E. 141.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 435.

Not conclusive.— The fact that the owner of land after conveying it remained on the land is not conclusive of fraud as to the creditors; the deed being of record. Stam *v.* Smith, 183 Mo. 464, 81 S. W. 1217. Continuance in possession by a grantor of real estate after conveyance to another, while a circumstance to be considered with the other evidence, does not of itself warrant the legal conclusion that the deed was fraudulent as to creditors. Willis *v.* Willis, 79 N. Y. App. Div. 9, 79 N. Y. Suppl. 1028.

80. Hart *v.* Farmers', etc., Bank, 33 Vt. 252.

81. Johnston *v.* Dick, 27 Miss. 277. Where a debtor conveyed a tract of land to his father, and his homestead to his brother, and purchased realty, title to which was put in his wife's name, and by these transactions divested himself of nearly all his available property, and he continued in possession of the tract conveyed to his father, rented it out and received the rentals, and included it as a part of his assets in a statement of his financial condition made to a creditor, it was held that the conveyance to the father was void, as a fraud on creditors. Dennis *v.* Ball-Warren Commission Co., (Ark. 1903) 77 S. W. 903. A conveyance by a debtor to a member of his family, which is tainted with

2. Growing Crops. Obviously there can be no actual delivery of a growing crop without putting the vendee in possession of the land itself.[82] Hence from the very necessity of the case such sales must be excepted from the general rule unless the law interdicts them altogether. Accordingly it is held that a sale of growing annual crops, *fructus industriales*, is valid without a change of possession not only between the parties but as to the vendor's creditors, although when the crop is harvested it is the duty of the purchaser to take and retain possession.[83] But growing perennial crops, *fructus naturales*, are a part of the real estate and a sale of them passes no title as against the vendor's creditors until they are harvested and delivered.[84]

E. Burden of Proof. In a contest with creditors who seek to set aside as fraudulent a sale by the debtor, which was not followed by a change of possession, the burden of showing good faith is on the grantee.[85]

X. Reservations and Trusts For Grantor.

A In General — 1. Rule Stated. One of the surest tests of a fraudulent conveyance is that it reserves to the grantor an advantage inconsistent with its avowed purpose or secures for him an unusual indulgence,[86] and as a general rule any provision in a transfer of property by a person indebted at the time whereby he reserves or secures a benefit to himself or family at the expense of his creditors is, unless assented to by them, deemed to be evidence of fraud either actual or constructive and renders the transfer liable to be avoided at the instance of such creditors.[87] To render the transfer fraudulent, however, there

actual fraud against his creditors, and which is not accompanied by an open and notorious change of possession, is fraudulent as against subsequent as well as existing creditors. Perrine *v.* Perrine, (N. J. Ch. 1901) 50 Atl. 694.

82. Raventas *v.* Green, 57 Cal. 254; Smith *v.* Champney, 50 Iowa 174; Noble *v.* Smith, 2 Johns. (N. Y.) 52, 3 Am. Dec. 399; Brantom *v.* Griffits, 2 C. P. D. 212, 46 L. J. C. P. 408, 36 L. T. Rep. N. S. 4, 25 Wkly. Rep. 313.

83. *California.*—O'Brien *v.* Ballou, 116 Cal. 318, 48 Pac. 130; Davis *v.* McFarlane, 37 Cal. 634, 99 Am. Dec. 340; Quiriaque *v.* Dennis, 24 Cal. 154.

Illinois.— Ticknor *v.* McClelland, 84 Ill. 471; Thompson *v.* Wilhite, 81 Ill. 356; Graff *v.* Fitch, 58 Ill. 373, 11 Am. Rep. 85; Bull *v.* Griswold, 19 Ill. 631.

Kentucky.— Morton *v.* Ragan, 5 Bush 334; Cummins *v.* Griggs, 2 Duv. 87, 87 Am. Dec. 482; Robbins *v.* Oldham, 1 Duv. 28.

Pennsylvania.— Dutton *v.* Wetmore, 10 Pa. Super. Ct. 530.

Vermont.— Bellows *v.* Wells, 36 Vt. 599.

Compare Smith *v.* Champney, 50 Iowa 174; State *v.* Durant, 53 Mo. App. 493; State *v.* Casteel, 51 Mo. App. 143.

It is otherwise if it appears to have been the intention of the parties that the vendor should continue in active control of the crop for his own benefit where only a portion of the crop not particularly described or bounded, was the subject of sale. Davis *v.* Shepherd, 87 Ill. App. 467.

84. Stone *v.* Peacock, 35 Me. 385; Lamson *v.* Patch, 5 Allen (Mass.) 586, 81 Am. Dec. 765.

85. *Alabama.*— Blocker *v.* Burness, 2 Ala. 354.

Arkansas.— Field *v.* Simco, 7 Ark. 269. *Compare* Shaul *v.* Harrington, 54 Ark. 305, 15 S. W. 835.

Indiana.— Rose *v.* Colter, 76 Ind. 590.

Louisiana.— Baldwin *v.* Bond, 45 La. Ann. 1012, 13 So. 742; Yale *v.* Bond, 45 La. Ann. 997, 13 So. 587.

Maine.— Hartshorn *v.* Eames, 31 Me. 93.

Mississippi.— Comstock *v.* Rayford, 12 Sm. & M. 369. *Compare* Summers *v.* Roos, 42 Miss. 749, 9 Am. Rep. 653.

Nebraska.— Snyder *v.* Dangler, 44 Nebr. 600, 63 N. W. 20.

New Jersey.— Bleakley *v.* Nelson, 56 N. J. Eq. 674, 39 Atl. 912; Runyon *v.* Groshon, 12 N. J. Eq. 86.

Tennessee. — Grubbs *v.* Greer, 5 Coldw. 160; Maney *v.* Killough, 7 Yerg. 440.

Texas.— Mills *v.* Walton, 19 Tex. 271.

Virginia.— Curd *v.* Miller, 7 Gratt. 185.

West Virginia.— Curtin *v.* Isaacsen, 36 W. Va. 391, 15 S. E. 171.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 407 *et seq.*; and other cases cited *supra*, IX, A. See also *infra*, XIV, K, 1, j.

86. Thompson *v.* Furr, 57 Miss. 478.

87. *Alabama.*— McDowell *v.* Steele, 87 Ala. 493, 6 So. 288; Pritchett *v.* Pollock, 82 Ala. 169, 2 So. 735; Sandlin *v.* Robbins, 62 Ala. 477; Stokes *v.* Jones, 18 Ala. 734.

Arkansas.— Sparks *v.* Mack, 31 Ark. 666.

California.— Riddell *v.* Shirley, 5 Cal. 488.

Georgia.— Coleman, etc., Co. *v.* Rice, 115 Ga. 510, 42 S. E. 5; Mitchell *v.* Stetson, 64 Ga. 442 (holding that two years' reservation of the use and possession of land sold a few

must be some reservation of an interest in the property itself or some reservation

weeks before judgment by an insolvent debtor destroys the validity of the conveyance so far as such judgment creditor is concerned); Edwards *v.* Stinson, 59 Ga. 443; Hobbs *v.* Davis, 50 Ga. 213; Eastman *v.* McAlpin, 1 Ga. 157.

Illinois.— Hurd *v.* Ascherman, 117 Ill. 501, 6 N. E. 160; Gardner *v.* Commercial Nat. Bank, 95 Ill. 298; Beidler *v.* Crane, 22 Ill. App. 538 [*affirmed* in 135 Ill. 92, 25 N. E. 655, 25 Am. St. Rep. 349]. See also Hardin *v.* Osborne, 60 Ill. 93.

Kentucky.— German Ins. Bank *v.* Nunes, 80 Ky. 334.

Louisiana.— Mobile Bank *v.* Harris, 6 La. Ann. 811.

Maine.— Jones *v.* Light, 86 Me. 437, 30 Atl. 71; Wyman *v.* Brown, 50 Me. 139; Smith *v.* Parker, 41 Me. 452.

Maryland.— Franklin *v.* Claflin, 49 Md. 24.

Minnesota.— Pabst Brewing Co. *v.* Butchart, 67 Minn. 191, 69 N. W. 809, 64 Am. St. Rep. 408.

Mississippi.— Wooten *v.* Clark, 23 Miss. 75. See also Arthur *v.* Commercial, etc., Bank, 9 Sm. & M. 394, 48 Am. Dec. 719.

Missouri.— Monarch Rubber Co. *v.* Bunn, 78 Mo. App. 55.

New Hampshire.— Albee *v.* Webster, 16 N. H. 362. See Coolidge *v.* Melvin, 42 N. H. 510; Trask *v.* Bowers, 4 N. H. 309. *Compare* Low *v.* Carter, 21 N. H. 433.

New York.— Young *v.* Heermans, 66 N. Y. 374, 382 (where it is said: "A conveyance by one indebted at the time, by which the grantor secures some benefit to himself at the expense of creditors, or by which creditors are prevented from compelling an immediate appropriation of the debtor's property to the payment of his debts is deemed fraudulent and void"); Elias *v.* Farley, 2 Abb. Dec. 11, 3 Keyes 398, 2 Transcr. App. 116, 5 Abb. Pr. N. S. 39; Austin *v.* Bell, 20 Johns. 442, 11 Am. Dec. 297; Sturtevant *v.* Ballard, 9 Johns. 337, 6 Am. Dec. 281; Cook *v.* Smith, 3 Sandf. Ch. 333.

North Carolina.— Holmes *v.* Marshall, 78 N. C. 262.

Pennsylvania.— Hennon *v.* McClane, 88 Pa. St. 219; Bentz *v.* Rockey, 69 Pa. St. 71; Johnson *v.* Harvey, 2 Penr. & W. 82, 21 Am. Dec. 426; Pennsylvania Knitting Mills *v.* Bibb Mfg. Co., 12 Pa. Super. Ct. 346 [*affirming* 21 Pa. Co. Ct. 537]; Low *v.* Ivy, 10 Pa. Super. Ct. 32. See Houseman *v.* Groosman, 177 Pa. St. 453, 35 Atl. 736.

South Carolina.— Smith *v.* Henry, 1 Hill 16.

Tennessee.— Doyle *v.* Smith, 1 Coldw. 15; Austin *v.* Johnson, 7 Humphr. 191; Gibbs *v.* Thompson, 7 Humphr. 179.

Texas.— Donnebaum *v.* Tinsley, 54 Tex. 362 (holding that a voluntary conveyance by a husband of all his property to his wife, reserving all the property to himself should she separate from him and to his heirs after his death should she marry again, was void as to creditors); Baldwin *v.* Peet, 22 Tex. 708, 75 Am. Dec. 806; Reynolds *v.* Lansford, 16 Tex. 286.

Virginia.— Rucker *v.* Moss, 84 Va. 634, 5 S. E. 527.

Wisconsin.— Merchants', etc., Sav. Bank *v.* Lovejoy, 84 Wis. 601, 55 N. W. 108; Stevens Point First Nat. Bank *v.* Knowles, 67 Wis. 373, 28 N. W. 225.

United States.— Robinson *v.* Elliott, 22 Wall. 513, 22 L. ed. 758; Clements *v.* Nicholson, 6 Wall. 299, 18 L. ed. 786; Kellog *v.* Richardson, 19 Fed. 70; Burbank *v.* Hammond, 4 Fed. Cas. No. 2,137, 3 Sumn. 429.

England.— *In re* Pearson, 3 Ch. D. 807, 35 L. T. Rep. N. S. 68, 25 Wkly. Rep. 126; Ware *v.* Gardner, L. R. 7 Eq. 317, 38 L. J. Ch. 348, 20 L. T. Rep. N. S. 71, 17 Wkly. Rep. 439; Twyne's Case, 3 Coke 80*a*, 1 Smith Lead. Cas. 1; French *v.* French, 6 De G. M. & G. 95, 2 Jur. N. S. 169, 25 L. J. Ch. 612, 4 Wkly. Rep. 139, 55 Eng. Ch. 74, 43 Eng. Reprint 1166; Neale *v.* Day, 4 Jur. N. S. 1225, 28 L. J. Ch. 45, 7 Wkly. Rep. 45. See also Higinbotham *v.* Holme, 12 Rev. Rep. 146, 19 Ves. Jr. 88, 34 Eng. Reprint 451.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 351, 352.

A conveyance made to prefer a creditor by which the debtor obtains a benefit to himself at the expense of other creditors is fraudulent and void.

Arkansas.— Sparks *v.* Mack, 31 Ark. 666.

Indian Territory.— Noyes *v.* Tootle, 2 Indian Terr. 144, 48 S. W. 1031.

Minnesota.— Carson *v.* Hawley, 82 Minn. 204, 84 N. W. 746, holding that a scheme by an insolvent debtor and a preferred creditor to dispose of the entire stock of such debtor, to put the purchase-price into a homestead for the benefit of the debtor, and fraudulently apply the balance to pay the creditor, is illegal in so far at least as the preferred creditor is concerned.

New York.— Mackie *v.* Cairns, 5 Cow. 547, 15 Am. Dec. 477 [*reversing* Hopk. 373].

North Carolina.— Sturdivant *v.* Davis, 31 N. C. 365.

Pennsylvania.— Thornburn *v.* Thompson, 192 Pa. St. 298, 43 Atl. 992; Bentz *v.* Rockey, 69 Pa. St. 71.

Rhode Island.— Lennon *v.* Parker, 22 R. I. 43, 46 Atl. 44.

South Carolina.— Smith *v.* Henry, 1 Hill 16.

Tennessee.— Austin *v.* Johnson, 7 Humphr. 191.

Texas.— Temple Grocer Co. *v.* Clabaugh, 18 Tex. Civ. App. 655, 45 S. W. 482.

Virginia.— Saunders *v.* Waggoner, 82 Va. 316.

See also *infra*, XI, H.

Reservation inconsistent with avowed purpose of transfer.— The reservation of a benefit or power to the grantor, inconsistent with and adequate to defeat the avowed purpose for which the conveyance is made, renders it fraudulent and void. Saunders *v.* Waggoner,

inconsistent with a genuine transfer.[88] The effect of a reservation of an interest for the grantor's benefit depends to a great extent upon the character of the instrument.[89] A reservation which results from the nature and character of the transfer and which, whether expressed or not, the law operating upon the transfer would confer, is not as a general rule to be deemed the reservation of a benefit rendering the transfer fraudulent.[90]

2. CONVEYANCE IN TRUST FOR GRANTOR. The general rule is well settled that a person cannot settle his estate in trust for his own benefit, so as to be free from liability for his debts;[91] the intention of the parties to such transfer, whether

82 Va. 316; Young *v.* Willis, 82 Va. 291; Burton *v.* Mill, 78 Va. 468; Brockenbrough *v.* Brockenbrough, 31 Gratt. (Va.) 580; Lang *v.* Lee, 3 Rand. (Va.) 410; Kuhn *v.* Mack, 4 W. Va. 186. See also Baldwin *v.* Peet, 22 Tex. 708, 75 Am. Dec. 806.

Deed of trust reserving use of property to grantor until sale.— No irresistible inference of intent to defraud is deducible from a provision in a deed of trust to postpone a sale of the property conveyed for a reasonable length of time, reserving the use of the property to the grantor until a sale, even though a portion of the property conveyed may be perishable in its nature and consumable in the use. Young *v.* Willis, 82 Va. 291; Brockenbrough *v.* Brockenbrough, 31 Gratt. (Va.) 580. See also Lanier *v.* Driver, 24 Ala. 149; Keagy *v.* Trout, 85 Va. 390, 7 S. E. 329.

In Kansas it has been held that to render a chattel mortgage void by reason of some benefit resulting to the mortgagor from the giving of the mortgage, such benefit must have been given for the purpose of hindering, delaying, or defrauding creditors. Whitson *v.* Griffis, 39 Kan. 211, 17 Pac. 801, 7 Am. St. Rep. 546 [*following* Frankhouser *v.* Ellett, 22 Kan. 127, 31 Am. Rep. 171].

88. Hobbs *v.* Davis, 50 Ga. 213, holding that a purchase *bona fide* made by a creditor from his debtor who is in failing circumstances is not fraudulent simply because the consideration of the purchase is the debt due and a promissory note *bona fide* given at the time for an overplus in the price agreed to be paid above the debt due.

Paying a debtor money to induce him to give a preferential conveyance to a creditor is not in violation of the statutory provisions in Missouri against reservations, etc., for the benefit of the grantor. Bangs Milling Co. *v.* Burns, 152 Mo. 350, 53 S. W. 923.

Transfer in consideration of future services. — The fact that the consideration of a transfer is largely for services to be performed in the future does not necessarily render the transfer fraudulent. Farmers', etc., Nat. Bank *v.* Mosher, 63 Nebr. 130, 135, 88 N. W. 552.

Indulgence by a creditor as consideration for mortgage.— In Harshaw *v.* Woodfin, 64 N. C. 568, it was held that a transaction in which one creditor consents upon receiving security by way of mortgage to give indulgence to his debtor is not fraudulent as to other creditors, since the equity of redemption is open to them, and a purchaser would have an election either to pay the mortgage debt and call for title or else to take the benefit of the extended credit.

A judgment by confession is not fraudulent as to creditors as reserving a benefit for the debtor because of a stipulation therein that no action shall issue for a certain time. Merchants' Nat. Bank *v.* Newton Cotton Mills, 115 N. C. 507, 20 S. E. 765.

Transfer in consideration of public use beneficial to grantor.— A transfer of personal property accompanied by an actual, immediate, and continued change of possession is not fraudulent as to creditors because made in consideration of a promise by the transferee to use the property for a public purpose in such manner that the transferrer would derive pecuniary benefit therefrom. Lewin *v.* Hopping, 67 Cal. 541, 8 Pac. 73.

Mortgage securing claim of cosureties for contribution.— A mortgage is not void as to creditors on the ground of reserving an interest to the mortgagor because it secures claims that certain cosureties of his may have against him for contribution. Steele *v.* Farber, 37 Mo. 71.

The open and admitted inclusion of a small claim on behalf of another creditor in a chattel mortgage to secure a *bona fide* debt will not render such mortgage and possession thereunder fraudulent as to attaching creditors. Taylor *v.* Harle-Haas Drug Co., (Nebr. 1903) 96 N. W. 182.

89. Baldwin *v.* Peet, 22 Tex. 708, 75 Am. Dec. 806.

90. Goetter *v.* Smith, 104 Ala. 481, 16 So. 534; Harmon *v.* McRae, 91 Ala. 401, 8 So. 548; McDowell *v.* Steele, 87 Ala. 493, 6 So. 288.

91. *Alabama.*— Smith *v.* Hall, 103 Ala. 235, 15 So. 525; McDermott *v.* Eborn, 90 Ala. 258, 7 So. 751; Benedict *v.* Renfro, 75 Ala. 121, 51 Am. Rep. 429; Sandlin *v.* Robbins, 62 Ala. 477; Reynolds *v.* Crook, 31 Ala. 634; Johnson *v.* Thweatt, 18 Ala. 741.

Colorado.—Innis *v.* Carpenter, 4 Colo. App. 30, 34 Pac. 1011. See also Wilson *v.* American Nat. Bank, 7 Colo. App. 194, 42 Pac. 1037.

Georgia.— Coleman, etc., Co. *v.* Rice, 115 Ga. 510, 42 S. E. 5; Hobbs *v.* Davis, 50 Ga. 213; Eastman *v.* McAlpin, 1 Ga. 157; Cameron *v.* Scudder, 1 Ga. 204.

Illinois.— Hardin *v.* Osborne, 60 Ill. 93.

Indiana.— Stout *v.* Price, (1900) 56 N. E. 857; Plunkett *v.* Plunkett, 114 Ind. 484, 16 N. E. 612, 17 N. E. 562.

Iowa.— Hook *v.* Mowre, 17 Iowa 195.

Kansas.— Clark *v.* Robbins, 8 Kan. 574.

honest or fraudulent, being, it is declared, wholly immaterial.[92] The statute of 13 Henry VII, declaratory of this rule, and the statutes in many jurisdictions to the same effect, are limited by their terms to goods and chattels,[93] but the principle upon which it rests is a part of the common law and applies to realty as well as personalty.[94] The rule is founded upon the self-evident proposition that a man's property should be subject to the payment of his debts, although he has vested a nominal title thereto in some other person.[95] It has been held, however, that neither the statutes nor the common-law principle have any application to cases in which the conveyance is made for the real and actual use of the grantee, and any reservation to the grantor is merely incidental.[96] It is not necessary that the deed in so many words should express that it is in trust for the use of the grantor, but if such is the legal effect of it as gathered from the language the court will as a matter of law declare it void.[97]

3. Reservation of Life-Estate or Interest — a. In General. A person cannot settle his estate in trust so as to have the benefit of it during life and place the right to the income retained by him beyond the reach of his creditors, either

Maine.— Hamlin *v.* Bridge, 24 Me. 145. See also Legro *v.* Lord, 10 Me. 161.

Minnesota.—Smith *v.* Conkwright, 28 Minn. 23, 8 N. W. 876.

Missouri. — Bigelow *v.* Stringer, 40 Mo. 195; Armstrong *v.* Tuttle, 34 Mo. 432; Robinson *v.* Robards, 15 Mo. 459; Scudder *v.* Payton, 65 Mo. App. 314; State *v.* Mueller, 10 Mo. App. 87; State *v.* Jacob, 2 Mo. App. 183.

Nebraska.— Graham *v.* Townsend, 62 Nebr. 364, 87 N. W. 169.

New Jersey.— Newman *v.* Van Duyne, 42 N. J. Eq. 485, 7 Atl. 897.

New York.— Young *v.* Heermans, 66 N. Y. 374; Collomb *v.* Caldwell, 16 N. Y. 484; Curtis *v.* Leavitt, 15 N. Y. 9; Leitch *v.* Hollister, 4 N. Y. 211; Barney *v.* Griffin, 2 N. Y. 365; Vilas Nat. Bank *v.* Newton, 25 N. Y. App. Div. 62, 48 N. Y. Suppl. 1009; Bier *v.* Kibbe, 43 Hun 174; McLean *v.* Button, 19 Barb. 450; Doremus *v.* Lewis, 8 Barb. 124; Spotten *v.* Keeler, 12 N. Y. St. 385; Goodrich *v.* Downs, 6 Hill 438.

North Carolina.—Carter *v.* Cocke, 64 N. C. 239; Sturdivant *v.* Davis, 31 N. C. 365; Smith *v.* Blank, 3 N. C. 229.

Pennsylvania.—Ghormley *v.* Smith, 139 Pa. St. 584; Bentz *v.* Rockey, 69 Pa. St. 71; Mackason's Appeal, 42 Pa. St. 330, 82 Am. Dec. 517; Hart *v.* McFarland, 13 Pa. St. 182; Shaffer *v.* Watkins, 7 Watts & S. 219; Andrews *v.* Lewis, 1 Pa. Co. Ct. 293; Patrick *v.* Smith, 39 Wkly. Notes Cas. 4; Catherwood's Estate, 29 Wkly. Notes Cas. 344.

South Carolina.— Ford *v.* Caldwell, 3 Hill 248; Wilson *v.* Cheshire, 1 McCord Eq. 233.

Texas.— Rives *v.* Stephens, (Civ. App. 1894) 28 S. W. 707.

Virginia.— Burton *v.* Mill, 78 Va. 468; Lewis *v.* Caperton, 8 Gratt. 148.

Wisconsin.— Stapleton *v.* Brannan, 102 Wis. 26, 78 N. W. 181; Severin *v.* Rueckerick, 62 Wis. 1, 21 N. W. 789.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 361, 362.

92. Wetherill *v.* Canney, 62 Minn. 341, 64 N. W. 818.

93. Sandlin *v.* Robbins, 62 Ala. 477; Wetherill *v.* Canney, 62 Minn. 341, 64 N. W. 818.

In Nebraska under a statute providing that "all deeds of gift, all conveyances, and all transfers or assignments, verbal or written, of goods, chattels, or things in action, made in trust for the use of the person making the same, shall be void as against the creditors, existing or subsequent of such persons," it has been held that interests in lands transferred in trust for the use of the grantor may be seized by either prior or subsequent creditors for the satisfaction of their claims against him. Racek *v.* North Bend First Nat. Bank, 62 Nebr. 669, 87 N. W. 542.

In Idaho under statute providing that all deeds of gift or conveyance and all transfers or assignments, verbal or written, of goods, chattels, or things in action, made in trust for the use of the person making the same, are void as against the creditors existing or subsequent of such person, it has been held that the words "deed of gift" do not refer to or include a deed of gift of real property not made in trust and admitted to have been made without any intention to defraud the party. Brown *v.* Perrault, 5 Ida. 729, 51 Pac. 752.

94. Sandlin *v.* Robbins, 62 Ala. 477; Wetherill *v.* Canney, 62 Minn. 341, 64 N. W. 818.

95. Wetherill *v.* Canney, 62 Minn. 341, 64 N. W. 818.

96. Jefferson County Bank *v.* Hummel, 11 Colo. App. 337, 53 Pac. 286; Hunt *v.* Ahnemann, (Minn. 1904) 102 N. W. 376 (where the rule was applied in an action to set aside a deed which was made in consideration of past services to the grantor, coupled with a promise to share the crops with the grantor and pay certain relatives a part of the consideration); Wetherill *v.* Canney, 62 Minn. 341, 64 N. W. 818; Camp *v.* Thompson, 25 Minn. 175; Vose *v.* Stickney, 19 Minn. 367; Truitt *v.* Caldwell, 3 Minn. 364, 74 Am. Dec. 764. See also Low *v.* Carter, 21 N. H. 433; Curtis *v.* Leavitt, 15 N. Y. 9; Shoemaker *v.* Hastings, 61 How. Pr. (N. Y.) 79.

97. Zeigler *v.* Maddox, 26 Mo. 575.

prior or subsequent, by a provision against alienation or otherwise.[93] This rule has been applied in the case of a conveyance of property in trust by a married[99] or unmarried woman.[1] Indeed the reservation of a life-estate in a conveyance by a person indebted at the time is evidence either of actual or constructive fraud so as to render the entire conveyance liable to annulment at the instance of existing[2] or subsequent creditors.[3] On the other hand the rule has been laid down that when a person who is not indebted at the time transfers a trust fund or other property in trust, of which the income is to be paid to him during his life, and the principal or *corpus* at his death, to be paid or transferred to others, the principal or *corpus* may be beyond the reach of future creditors.[4]

b. Reservation of Life-Estate With Power of Appointment After Death. There are several authorities to the effect that where a person conveys property in trust for his own benefit during life, with the power of appointment or disposition at his death, the principal or *corpus*, as well as the income, may be subjected by his creditors both prior and subsequent.[5]

4. Support or Care of Grantor or Family. Where a debtor in failing circumstances makes a provision or stipulation in a sale or conveyance of the property for the support of himself or of his family the law will look upon the transaction with suspicion,[6] and there are many authorities to the effect that where in such a sale or conveyance there is a substantial trust secured to the grantor or seller the transaction will be, either *prima facie* or conclusively,[7] fraudulent

98. *Kansas.*— Polley *v.* Johnson, 52 Kan. 478, 35 Pac. 8, 23 L. R. A. 258.

Maryland.— Brown *v.* Macgill, 87 Md. 161, 39 Atl. 613, 67 Am. St. Rep. 334, 39 L. R. A. 806.

Massachusetts.— Pacific Nat. Bank *v.* Windram, 133 Mass. 175.

Missouri.— McIlvaine *v.* Smith, 42 Mo. 45, 97 Am. Dec. 295 [*affirmed* in Lambert *v.* Haydel, 96 Mo. 439, 9 S. W. 780, 9 Am. St. Rep. 358, 2 L. R. A. 213].

New York.— Schenck *v.* Barnes, 156 N. Y. 316, 50 N. E. 967, 41 L. R. A. 395; Young *v.* Heermans, 66 N. Y. 374.

Pennsylvania.— Ghormley *v.* Smith, 139 Pa. St. 584, 21 Atl. 135, 23 Am. St. Rep. 215, 11 L. R. A. 565; Mackason's Appeal, 42 Pa. St. 330, 82 Am. Dec. 517; Catherwood's Estate, 29 Wkly. Notes Cas. 344; Andrews *v.* Lewis, 17 Wkly. Notes Cas. 270.

Virginia.— Lewis *v.* Caperton, 8 Gratt. 148.

United States.—De Hierapolis *v.* Lawrence, 115 Fed. 761.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 361.

99. Brown *v.* Macgill, 87 Md. 161, 39 Atl. 613, 67 Am. St. Rep. 334, 39 L. R. A. 806; Pacific Nat. Bank *v.* Windram, 133 Mass. 175.

1. Brown *v.* Macgill, 87 Md. 161, 39 Atl. 613, 67 Am. St. Rep. 334, 39 L. R. A. 806; Ghormley *v.* Smith, 139 Pa. St. 584, 21 Atl. 135, 23 Am. St. Rep. 215, 11 L. R. A. 565.

2. *Alabama.*— Sandlin *v.* Robbins, 62 Ala. 477.

Indiana.— McNally *v.* White, 154 Ind. 163, 54 N. E. 794, 56 N. E. 214.

New Hampshire.— Coolidge *v.* Melvin, 42 N. H. 510. *Compare* Low *v.* Carter, 21 N. H. 433, holding that a conveyance made in good faith and for an adequate consideration by a husband to a trustee for his wife and children is not void against creditors because it secures an estate for life to the husband in case he should survive his wife.

New York.— Young *v.* Heermans, 66 N. Y. 374, holding that a transfer by a debtor of all his property, both real and personal, without consideration, in trust for himself and for his benefit during life and after his death for the payment of his debts, etc., is conclusively fraudulent and void as to existing creditors.

Ohio.— Berry *v.* Haas, 12 Ohio Cir. Ct. 189, 5 Ohio Cir. Dec. 48.

South Carolina.— Ford *v.* Caldwell, 3 Hill 248; De Millon *v.* McAlliley, 2 McMull. 499; Swindersine *v.* Miscally, Bailey Eq. 304.

England.— Taylor *v.* Jones, 2 Atk. 600, 26 Eng. Reprint 758; Tarback *v.* Marbury, 2 Vern. Ch. 510, 23 Eng. Reprint 926.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 361.

3. Coolidge *v.* Melvin, 42 N. H. 510; Young *v.* Heermans, 66 N. Y. 374; Ford *v.* Caldwell, 3 Hill (S. C.) 248. *Compare* Adams *v.* Broughton, 13 Ala. 731, holding that a voluntary deed delivered to the grantee, conveying to him slaves and reserving to the grantor a life-estate, was operative at common law against purchasers and subsequent creditors.

4. Pacific Nat. Bank *v.* Windram, 133 Mass. 175.

5. Scott *v.* Keane, 87 Md. 709, 40 Atl. 1070, 42 L. R. A. 359; Brinton *v.* Hook, 3 Md. Ch. 477; Mackason's Appeal, 42 Pa. St. 330, 82 Am. Dec. 517; Patrick *v.* Smith, 2 Pa. Super. Ct. 113; Catherwood's Estate, 29 Wkly. Notes Cas. (Pa.) 344. See also Ghormley *v.* Smith, 139 Pa. St. 584, 21 Atl. 135, 23 Am. St. Rep. 215, 11 L. R. A. 565; Hunters *v.* Waite, 3 Gratt. (Va.) 26.

6. Wooten *v.* Clark, 23 Miss. 75.

7. See *infra*, XIV, K, 1, k.

and void as to existing creditors and the property sold or conveyed may be subjected to their claims either at law or in equity.[8]

5. Reservation of Power of Revocation. The contract by which the debtor parts with his property must be absolute and unconditional, for if he retains the right to revoke the contract and resume the ownership of the property such a right is inconsistent with a fair, honest, and absolute sale and renders the transfer fraudulent and void.[9] The same rule has been applied to a conveyance containing a power in any way equivalent in its effects to a power of revocation.[10] So if a purchaser from an insolvent debtor has the right to rescind or annul the contract before the purchase-money is paid and thus to restore the ownership of the property to the seller, this right in the purchaser tends directly to hinder and delay creditors of the vendor and renders the contract void.[11] But such reservations

8. *Alabama.*— Sandlin *v.* Robbins, 62 Ala. 477; Green *v.* Montgomery Branch Bank, 33 Ala. 643 (holding, however, that a provision in a deed for the payment of all the grantor's just debts is not necessarily avoided by another provision for the support of the grantor's family); Stokes *v.* Jones, 18 Ala. 734.

Illinois.— See Faloon *v.* McIntyre, 118 Ill. 292, 8 N. E. 315.

Louisiana.— Duval *v.* Ardrey, 1 La. Ann. 243. *Compare* Bourgeat *v.* Dumoulin, 12 La. Ann. 204.

Maine.— Hapgood *v.* Fisher, 34 Me. 407, 56 Am. Dec. 663.

Mississippi.— Hunt *v.* Knox, 34 Miss. 655.

New Hampshire.— Albee *v.* Webster, 16 N. H. 362; Smith *v.* Smith, 11 N. H. 459.

New York.— Stearns *v.* Gage, 79 N. Y. 102; Townsend *v.* Bumpus, 29 N. Y. App. Div. 122, 51 N. Y. Suppl. 513; Todd *v.* Monell, 19 Hun 363; McLean *v.* Button, 19 Barb. 450; Keep *v.* Keep, 7 Abb. N. Cas. 240. *Compare* Hungerford *v.* Cartwright, 13 Hun 647.

Pennsylvania.— Hauseman *v.* Grossman, 177 Pa. St. 453, 35 Atl. 736; Hennon *v.* McClane, 88 Pa. St. 219; Miner *v.* Warner, 2 Grant 448; Johnson *v.* Harvey, 2 Penr. & W. 82, 21 Am. Dec. 426; Kirker *v.* Johnson, 13 Wkly. Notes Cas. 385.

Wisconsin.— Stapleton *v.* Brannan, 102 Wis. 26, 78 N. W. 181; Merchants', etc., Sav. Bank *v.* Lovejoy, 84 Wis. 601, 55 N. W. 108; Severin *v.* Rueckerick, 62 Wis. 1, 21 N. W. 789.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 354.

In Connecticut it is held that if the contract is made in good faith no fraud can be inferred from a provision for the grantor's support. Tibbals *v.* Jacobs, 31 Conn. 428.

Retention of property sufficient to pay debts.— In Hapgood *v.* Fisher, 34 Me. 407, 56 Am. Dec. 663, it was held that transfer of property by a debtor in part consideration of an agreement for his support and maintenance cannot be considered as a fraud in law where the debtor retains an abundance of property to discharge all his obligations. But in Albee *v.* Webster, 16 N. H. 362 [*criticizing* Smith *v.* Smith, 11 N. H. 459], it was held that a debtor has no right in this way to appropriate and secure his property for the use of himself and his family to the prejudice of those to whom he is indebted at the time, even if he supposes that he has property enough left to satisfy his existing creditors and his intentions are fair.

Effect of adequate consideration apart from agreement for maintenance.— In Albee *v.* Webster, 16 N. H. 362, it was held that if it can be shown that the grantee has paid or secured to the grantor the value of the land apart from the agreement to maintain, and this was done without any design or intention to defraud or delay creditors, the addition of the obligation to maintain will not avoid the conveyance.

Validity of provision as against subsequent creditors.— In McLean *v.* Button, 19 Barb. (N. Y.) 450, it was held that a conveyance of personal property, the consideration of which is the future support of the grantor and his wife and children, is within the section of the Revised Statutes of New York relating to transfers of personal property in trust for the use of the grantor and is therefore void as to subsequent creditors of the grantor. *Compare* Bowlus *v.* Shanabarger, 19 Ohio Cir. Ct. 137, 10 Ohio Cir. Dec. 167 (holding that a conveyance in consideration of a life-support of the grantor by the grantee is valid as against subsequent creditors, if without actual intent to defraud future creditors the grantor retains property sufficient to satisfy existing creditors); Holmes *v.* Penny, 3 Jur. N. S. 80, 3 Kay & J. 90, 26 L. J. Ch. 179, 5 Wkly. Rep. 132.

9. West *v.* Snodgrass, 17 Ala. 549; Riggs *v.* Murray, 2 Johns. Ch. (N. Y.) 565; Cannon *v.* Peebles, 26 N. C. 204; Jenkyn *v.* Vaughan, 3 Drew. 419, 2 Jur. N. S. 109, 25 L. J. Ch. 338, 4 Wkly. Rep. 214. See also Westfall *v.* Jones, 23 Barb. (N. Y.) 9.

Reservation of power to revoke in assignment for benefit of creditors see Assignments For Benefit of Creditors, 4 Cyc. 180 note 35.

10. Riggs *v.* Murray, 2 Johns. Ch. (N. Y.) 565 [*citing* Lavender *v.* Blackstone, 2 Lev. 146]; Lang *v.* Lee, 3 Rand. (Va.) 410; Tarback *v.* Marbury, 2 Vern. Ch. 510, 23 Eng. Reprint 926, a reservation of a power to mortgage.

11. West *v.* Snodgrass, 17 Ala. 549. See also Shannon *v.* Com., 8 Serg. & R. (Pa.) 444, where the deed by an insolvent purported to be an absolute conveyance with a pro-

being often required to meet the varying interests of family connections, are usually found in family settlements,[12] and hence it has been held that a power of revocation and appointment preserved in a deed, from a husband to his wife, does not impair its validity and efficacy or create an imputation upon the grantor's good faith and honesty in the transaction.[13]

6. Reservation of Surplus Proceeds. It is a general rule that stipulations in a mortgage of realty or personalty or in an instrument in the nature of a mortgage given by a failing debtor reserving to the grantor the surplus proceeds or the unsold property remaining after the payment of the debt or debts secured is but the expression of what the law would imply without a reservation, and does not vitiate the instrument.[14]

7. Reservation of Power to Direct Application of Proceeds. In order to make a valid transfer the debtor must not only part with his property, but must also surrender all power to interfere authoritatively afterward, in the appropriation of the proceeds; and hence a conveyance by one indebted to a third person in trust to sell, the grantor reserving the power to direct the application of the proceeds, is fraudulent, at least as to prior creditors.[15] But a stipulation in an assignment of property securing an indebtedness, reserving the right to direct the application of surplus proceeds, is no more than the law implies in every transfer of property as a security for debts and does not render the instrument void.[16] So

viso by which the grantee was permitted to relinquish the bargain at any time he might choose and on a redelivery of the property was to receive from the grantor any money which he had expended.

12. Riggs *v.* Murray, 2 Johns. Ch. (N. Y.) 565; Jones *v.* Clifton, 101 U. S. 225, 25 L. ed. 908.

13. Jones *v.* Clifton, 101 U. S. 225, 25 L. ed. 908.

14. *Alabama.*—Loucheim *v.* Talladega First Nat. Bank, 98 Ala. 521, 13 So. 374; Perry Ins., etc., Co. *v.* Foster, 58 Ala. 502, 29 Am. Rep. 779; Miller *v.* Stetson, 32 Ala. 161; Brown *v.* Lyon, 17 Ala. 659; Hindman *v.* Dill, 11 Ala. 689; Ravisies *v.* Alston, 5 Ala. 297; Johnson *v.* Cunningham, 1 Ala. 249; Malone *v.* Hamilton, Minor 286, 12 Am. Dec. 49.

Georgia.— Calloway *v.* People's Bank, 54 Ga. 441; Lay *v.* Seago, 47 Ga. 82. See also Carey *v.* Giles, 10 Ga. 9.

Illinois.— See Beach *v.* Bestor, 47 Ill. 521.

Indiana.— Hays *v.* Hostetter, 125 Ind. 60, 25 N. E. 134 (a reservation of the surplus to the grantor's wife); Dessar *v.* Field, 99 Ind. 548.

Maryland.— Fouke *v.* Fleming, 13 Md. 392; McCall *v.* Hinkley, 4 Gill 128.

Minnesota.— Butler *v.* White, 25 Minn. 432; Camp *v.* Thompson, 25 Minn. 175.

Missouri.— Barton *v.* Sitlington, 128 Mo. 164, 30 S. W. 514; Bigelow *v.* Stringer, 40 Mo. 195. *Compare* Paddock-Hawley Iron Co. *v.* McDonald, 61 Mo. App. 559; State *v.* Mueller, 10 Mo. App. 87.

New Jersey.— Muchmore *v.* Budd, 53 N. J. L. 369, 22 Atl. 518.

New York.— Hine *v.* Bowe, 114 N. Y. 350, 21 N. E. 733; Royer Wheel Co. *v.* Fielding, 101 N. Y. 504, 5 N. E. 431; Dunham *v.* Whitehead, 21 N. Y. 131; Curtis *v.* Leavitt, 15 N. Y. 9; Leitch *v.* Hollister, 4 N. Y. 211; Ottman *v.* Cooper, 81 Hun 530, 30 N. Y. Suppl. 1086; Bier *v.* Kibbe, 43 Hun 174; Royer Wheel Co. *v.* Frost, 13 Daly 233. *Compare* Delaney *v.* Valentine, 80 Hun 476, 30 N. Y. Suppl. 512.

North Carolina.— Burgin *v.* Burgin, 23 N. C. 453.

Tennessee.— Austin *v.* Johnson, 7 Humphr. 191.

Texas.— McClure *v.* Sheek, 68 Tex. 426, 4 S. W. 552; Stiles *v.* Hill, 62 Tex. 429; Baldwin *v.* Peet, 22 Tex. 708, 75 Am. Dec. 806; Parlin, etc., Co. *v.* Hanson, 21 Tex. Civ. App. 401, 53 S. W. 62; Sutton *v.* Gregory, (Civ. App. 1898) 45 S. W. 932 (holding that a trust deed for the benefit of certain creditors is not illegal because it provides that the surplus remaining after payment of the secured debts shall be subject to the order of the grantors, on the ground that such claim makes it a negotiable instrument); Greer *v.* Richardson Drug Co., 1 Tex. Civ. App. 634, 20 S. W. 1127.

Virginia.— Harvey *v.* Anderson, (1896) 24 S. E. 914.

West Virginia.— See Keneweg Co. *v.* Schilansky, 47 W. Va. 287, 34 S. E. 773.

Wisconsin.— Kneeland *v.* Cowles, 3 Pinn. 316, 4 Chandl. 46.

United States.— Huntly *v.* Kingman, 152 U. S. 527, 14 S. Ct. 688, 38 L. ed. 540; Fechheimer *v.* Baum, 43 Fed. 719, 2 L. R. A. 153. *Compare* Kellog *v.* Richardson, 19 Fed. 70, decided under Missouri statute.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 357.

Compare Frey *v.* Gessler, 9 Pa. Cas. 509, 12 Atl. 854.

Reservation of surplus in assignment for benefit of creditors see Assignments For Benefit of Creditors, 4 Cyc. 184 *et seq.*

15. Kittredge *v.* Slack, 67 Ill. App. 128; Mitchell *v.* Stiles, 13 Pa. St. 306.

16. Vallance *v.* Miners' L. Ins., etc., Co., 42 Pa. St. 441; Huntly *v.* Kingman, 152

it is held that where property is conveyed to a creditor by way of preference a stipulation that the excess shall be paid to such other creditors as the debtor may designate is valid, as it merely recognizes the debtor's legal right to make preferences and is not a reservation of a use or benefit to himself.[17]

8. Reservation of Right to Repurchase. A transfer of property as security for a *bona fide* debt will not be deemed necessarily fraudulent because the instrument of transfer contains a stipulation providing for repurchase by the debtor upon the payment or satisfaction of his indebtedness,[18] or for the return of the property by the debtor in case of a contemplated adjustment of his affairs.[19] But a transfer by an insolvent, purporting to be an absolute conveyance for a valuable consideration, with the proviso, however, by which the purchaser was permitted to relinquish the bargain at pleasure, and on redelivery of the property receive any money he had expended, has been held to be fraudulent.[20]

9. Reservation of Power to Substitute Trustee. It has been held that a grantor in a deed of trust conveying property to secure debts may reserve the power to appoint a substitute for the trustee named in the event of his failure to act, and that such reservation will not affect the validity of the instrument at least where no occasion has arisen for the exercise of such power.[21]

10. Employment of Grantor or Debtor. The mere fact of a stipulation in a transfer of a stock of goods for the employment of the seller at a reasonable salary to manage or wind up the business does not as a general rule render the transaction fraudulent and void as a matter of law, upon the ground that it necessarily implies a reservation of a benefit to the seller.[22]

11. Reservation of Property Exempt by Law. A conveyance is not invalidated by the fact that it is made subject to the exemptions allowed by law.[23]

B. Secret Reservations or Trusts — 1. In General. As a general rule a transfer of property by a debtor in failing circumstances, purporting on its face to be absolute and without reservation and yet accompanied by a concealed agreement between the parties reserving an interest, benefit, or advantage to the debtor inconsistent with its terms is either *prima facie* or conclusively[24] fraudulent against creditors injured thereby.[25] This principle has been applied to transfers

U. S. 527, 14 S. Ct. 688, 38 L. ed. 540; *In re* Robertshaw Mfg. Co., 133 Fed. 556. See also Chicago, etc., R. Co. *v.* Watson, 113 Ill. 195; Stockbridge *v.* Franklin Bank, 86 Md. 189, 37 Atl. 645. See also *supra*, X, A, 6.

17. Goetter *v.* Smith, 104 Ala. 481, 16 So. 534; Hine *v.* Bowe, 114 N. Y. 350, 21 N. E. 733.

18. *In re* Robertshaw Mfg. Co., 133 Fed. 556.

19. McCartney *v.* Earle, 115 Fed. 462, 53 C. C. A. 392.

20. Shannon *v.* Com., 8 Serg. & R. (Pa.) 444. *Compare* Mahler *v.* Schloss, 7 Daly (N. Y.) 291.

21. Cook, etc., Co. *v.* Hunt, 18 Tex. Civ. App. 314, 45 S. W. 153.

22. Havens *v.* Extein, 5 N. Y. Suppl. 735; Cowan *v.* Phillips, 119 N. C. 26, 25 S. E. 711; Smith *v.* Craft, 123 U. S. 436, 441, 8 S. Ct. 196, 31 L. ed. 267 [*affirming* 17 Fed. 705], where it is said: "But whether such a stipulation is valid or invalid depends upon its intention. If its object appeared on its face to have been to secure a benefit to the debtor or his family, it would be fraudulent in law. Lukins *v.* Aird, 6 Wall. (U. S.) 78, 18 L. ed. 750; McClurg *v.* Lecky, 3 Penr. & W. (Pa.) 83, 23 Am. Dec. 64; Harris *v.* Sumner, 2 Pick. (Mass.) 129. But if its sole purpose was to obtain services necessary to wind up the business and turn the goods into money as promptly and economically as possible, for the benefit of the other party, it is valid. Wilcoxon *v.* Annesley, 23 Ind. 285; Baxter *v.* Wheeler, 9 Pick. (Mass.) 21; Strong *v.* Carrier, 17 Conn. 319." See also Cribb *v.* Bagley, 83 Ga. 105, 10 S. E. 194; Wilcox *v.* Landberg, 30 Minn. 93, 14 N. W. 365; Griffin *v.* Cranston, 10 Bosw. (N. Y.) 1; Nicholson *v.* Leavitt, 4 Sandf. (N. Y.) 252. *Compare* Birmingham Dry Goods Co. *v.* Roden, 110 Ala. 511, 18 So. 135, 55 Am. St. Rep. 35; Bluthenthal *v.* Magnus, 97 Ala. 530, 13 So. 7; Stephens *v.* Regenstein, 89 Ala. 561, 8 So. 68, 18 Am. St. Rep. 156.

23. McCord *v.* Moore, 5 Heisk. (Tenn.) 734; Farquharson *v.* McDonald, 2 Heisk. (Tenn.) 404; Brockenbrough *v.* Brockenbrough, 31 Gratt. (Va.) 580. See also *supra*, II, B, 21.

24. See *infra*, XIV, K, 1, k.

25. *Alabama.*— Davidson *v.* Watts Min. Car Wheel Co., 121 Ala. 591, 25 So. 758; Jordan *v.* Collins, 107 Ala. 572, 18 So. 137; Smith *v.* Hall, 103 Ala. 235, 15 So. 525; McDermott *v.* Eborn, 90 Ala. 258, 7 So. 751;

of various characters; for example the principle has been repeatedly applied not

Pritchett *v.* Pollock, 82 Ala. 169, 2 So. 735; Fellows *v.* Lewis, 65 Ala. 343, 39 Am. Rep. 1; Simes *v.* Gaines, 64 Ala. 392; Borland *v.* Walker, 7 Ala. 269. See also Crawford *v.* Kirksey, 55 Ala. 282, 28 Am. Rep. 704.

Arkansas.— Sparks *v.* Mack, 31 Ark. 666.

Colorado.— Taub *v.* Swofford Bros. Dry Goods Co., 8 Colo. App. 213, 45 Pac. 513; Innis *v.* Carpenter, 4 Colo. App. 30, 34 Pac. 1011.

Dakota.— Pierre First Nat. Bank *v.* Comfort, 4 Dak. 167, 28 N. W. 855.

Delaware.— Dutton *v.* Jackson, 2 Del. Ch. 86.

Florida.— Neubert *v.* Massman, 37 Fla. 91, 19 So. 625.

Georgia.— Edwards *v.* Stinson, 59 Ga. 443; Davis *v.* Anderson, 1 Ga. 176.

Illinois.— Best *v.* Fuller, 185 Ill. 43, 56 N. E. 1077 [*affirming* 85 Ill. App. 500]; Highley *v.* American Exch. Nat. Bank, 185 Ill. 565, 57 N. E. 436; Bostwick *v.* Blake, 145 Ill. 85, 34 N. E. 38; Beidler *v.* Crane, 135 Ill. 92, 25 N. E. 655, 25 Am. St. Rep. 349 [*affirming* 22 Ill. App. 538]; Tyler *v.* Tyler, 126 Ill. 525, 21 N. E. 616, 9 Am. St. Rep. 642; Hurd *v.* Ascherman, 117 Ill. 501, 6 N. E. 160; Mitchell *v.* Sawyer, 115 Ill. 650, 5 N. E. 109; Moore *v.* Wood, 100 Ill. 451; Steere *v.* Hoagland, 39 Ill. 264; McNeil, etc., Co. *v.* Hoyland, 91 Ill. App. 315; Hutchinson Nat. Bank *v.* Crow, 56 Ill. App. 558; Perisho *v.* Quinn, 52 Ill. App. 102. See also Bush *v.* Downey, 195 Ill. 82, 62 N. E. 868.

Indiana.— Plunkett *v.* Plunkett, 114 Ind. 484, 16 N. E. 612, 17 N. E. 562; Pennington *v.* Clifton, 11 Ind. 162; Stout *v.* Price, 24 Ind. App. 360, 55 N. E. 964, 56 N. E. 857.

Iowa.— Parlin, etc., Co. *v.* Daniels, 111 Iowa 640, 82 N. W. 1015; Brundage *v.* Cheneworth, 101 Iowa 256, 70 N. W. 211, 63 Am. St. Rep. 382.

Kentucky.—White *v.* Graves, 7 J. J. Marsh. 523.

Maine.— Jones *v.* Light, 86 Me. 437, 30 Atl. 71; Sidensparker *v.* Sidensparker, 52 Me. 481, 83 Am. Dec. 527.

Maryland.— Spuck *v.* Logan, 97 Md. 152, 54 Atl. 989, 99 Am. St. Rep. 427; Franklin *v.* Claflin, 49 Md. 24; Brooks *v.* Dent, 1 Md. Ch. 523. See also Jones *v.* Slubey, 5 Harr. & J. 372.

Massachusetts.— Plimpton *v.* Goodell, 143 Mass. 365, 9 N. E. 791; Rice *v.* Cunningham, 116 Mass. 466; Oriental Bank *v.* Haskins, 3 Metc. 332, 37 Am. Dec. 140 (holding that a secret trust inconsistent with the terms of the sale, while evidence of fraud, does not amount to fraud *per se*); Parkman *v.* Welch, 19 Pick. 231; Cutler *v.* Dickinson, 8 Pick. 386. *Compare* Stratton *v.* Edwards, 171 Mass. 374, 54 N. E. 886, holding that an absolute conveyance made in secret trust for the grantor is not fraudulent and void as to subsequent creditors on mere proof that the grantor had a general purpose to secure the property from the hazards of future business and the claims of future creditors, but it must appear that at the time of the conveyance he had an actual intent to contract debts and a purpose to avoid their payment by the conveyance.

Minnesota.—Smith *v.* Conkwright, 28 Minn. 23, 8 N. W. 876; Thompson *v.* Bickford, 19 Minn. 17.

Mississippi.— Thompson *v.* Fur, 57 Miss. 478; Hunt *v.* Knox, 34 Miss. 655.

Missouri.— Zeigler *v.* Maddox, 26 Mo. 575; Scudder *v.* Payton, 65 Mo. App. 314; Pattison *v.* Letton, 56 Mo. App. 325.

Nebraska.— Racek *v.* North Bend First Nat. Bank, 62 Nebr. 669, 87 N. W. 542; Bacon *v.* P. Brockman Commission Co., 48 Nebr. 365, 67 N. W. 304; Grimes Dry Goods Co. *v.* Shaffer, 41 Nebr. 112, 59 N. W. 741 [*following* Houck *v.* Heinzman, 37 Nebr. 463, 55 N. W. 1062]; Gillespie *v.* Cooper, 36 Nebr. 775, 55 N. W. 302.

New Hampshire.—Doucet *v.* Richardson, 67 N. H. 186, 29 Atl. 635; Stratton *v.* Putney, 63 N. H. 577, 4 Atl. 876; Putnam *v.* Osgood, 52 N. H. 148; Coolidge *v.* Melvin, 42 N. H. 510; Low *v.* Carter, 21 N. H. 433; Towle *v.* Hoit, 14 N. H. 61; Paul *v.* Crooker, 8 N. H. 288; Trask *v.* Bowers, 4 N. H. 309; Parker *v.* Pattee, 4 N. H. 176; Coburn *v.* Pickering, 3 N. H. 415, 14 Am. Dec. 375.

New Jersey.— See Muchmore *v.* Budd, 53 N. J. L. 369, 22 Atl. 518, holding that a bill of sale of personalty accompanied by a parol reservation of a worthless equity of redemption is not conclusively fraudulent.

New York.— Stoddard *v.* Butler, 20 Wend. 507. See also Hardt *v.* Deutsch, 22 Misc. 66, 48 N. Y. Suppl. 564.

North Carolina.— Clement *v.* Cozart, 109 N. C. 173, 13 N. E. 862; Carter *v.* Cocke, 64 N. C. 239; Morrison *v.* McNeill, 53 N. C. 45; Sturdivant *v.* Davis, 31 N. C. 365.

North Dakota.— Newell *v.* Wagness, 1 N. D. 62, 44 N. W. 1014.

Ohio.— Bowlus *v.* Shanabarger, 19 Ohio Cir. Ct. 137, 10 Ohio Cir. Dec. 167; Schultz *v.* Brown, 3 Ohio Cir. Ct. 609, 2 Ohio Cir. Dec. 353.

Pennsylvania.— Thornburn *v.* Thompson, 192 Pa. St. 298, 43 Atl. 992; Bentz *v.* Rockey, 69 Pa. St. 71; Connelly *v.* Walker, 45 Pa. St. 449; Shaffer *v.* Watkins, 7 Watts & S. 219; McCulloch *v.* Hutchinson, 7 Watts 434, 32 Am. Dec. 776; Passmore *v.* Eldridge, 12 Serg. & R. 198.

Rhode Island.— Lennon *v.* Parker, 22 R. I. 43, 46 Atl. 44.

South Carolina.— Winsmith *v.* Winsmith, 15 S. C. 611.

Tennessee.— Hornsby *v.* City Nat. Bank, (Ch. App. 1900) 60 S. W. 160, a parol trust in favor of the grantor's wife and children.

Texas.— Baldwin *v.* Peet, 22 Tex. 708, 75 Am. Dec. 836; Schultze *v.* Schultze, (Civ. App. 1901) 66 S. W. 56.

Vermont.— McLane *v.* Johnson, 43 Vt. 48.

Virginia.— Young *v.* Willis, 82 Va. 291.

only to absolute conveyances of land,[26] and to mortgages or deeds of trust of

Washington.—Adams *v.* Dempsey, 35 Wash. 80, 76 Pac. 538.

Wisconsin.— Franzke *v.* Hitchon, 105 Wis. 11, 80 N. W. 931.

United States.— Huntley *v.* Kingman, 152 U. S. 527, 14 S. Ct. 688, 38 L. ed. 540; Dent *v.* Ferguson, 132 U. S. 50, 10 S. Ct. 13, 33 L. ed. 242; Smith *v.* Craft, 123 U. S. 436, 8 S. Ct. 196, 31 L. ed. 267; Lukins *v.* Aird, 6 Wall. 78, 18 L. ed. 750; *In re* Dauchy, 122 Fed. 688; Blythe *v.* Thomas, 45 Fed. 784; Home Mach. Co. *v.* Claybourn, 6 Fed. 438 (holding under a Michigan statute that a secret reservation of a benefit to the grantor while a badge of fraud is not conclusive); Burbank *v.* Hammond, 4 Fed. Cas. No. 2,137, 3 Sumn. 429. See also Hamilton *v.* Russell, 1 Cranch 309, 2 L. ed. 118.

England.— Twyne's Case, 3 Coke 80*a*, 1 Smith Lead. Cas. 1.

Canada.— Beamish *v.* Pomeroy, 6 Grant Ch. (U. C.) 586.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 364, 365.

Actual insolvency of the grantor is not required to render his conveyance when made on a secret trust void as to creditors; all that is necessary is that the grantor be deeply indebted. Parkman *v.* Welch, 19 Pick. (Mass.) 231.

One holding money as the secret trustee or depositary of the owner in order to keep the latter's creditors from reaching it may be made liable as a garnishee at the suit of a creditor. Fearey *v.* Cummings, 41 Mich. 376, 1 N. W. 946.

A confession of judgment by an insolvent debtor in favor of the executor of an estate in which he is interested as a devisee is void as to existing creditors because upon a secret trust in the debtor's favor. Manley *v.* Larkin, 59 Kan. 660, 53 Pac. 859.

Secret agreement for benefit of creditors.— It has been held that a bill of sale, although absolute on its face, is fraudulent against the grantor's creditors, if there was a secret agreement with the grantee by which the grantor should derive an ultimate benefit out of the property, either to himself individually or in payment of debts other than his debt to the grantee. Ely, etc., Dry Goods Co. *v.* Walker, 78 Mo. App. 578. On the other hand it has been held that the Colorado statute providing that conveyances in trust for the use of grantor shall be void as against existing creditors does not apply to a deed to secure a creditor made in good faith before the lien or right of any other creditor has attached, although the grantee separately agreed to apply the surplus in payment of other specific debts of the grantor. Jefferson County Bank *v.* Hummel, 11 Colo. App. 337, 53 Pac. 286.

Grantor's sharing in provision made for wife.— A conveyance by a husband to a third person to aid in paying the husband's debts, with an agreement that when they are paid the lands shall be conveyed to his wife as a home for her and their children, is not a secret trust, as regards subsequent creditors of his, merely because he shares the home thus secured, the provision for the wife being otherwise valid. Edgerly *v.* Lyons First Nat. Bank, 30 Ill. App. 425.

26. *Alabama.*— Deposit Bank *v.* Caffee, 135 Ala. 208, 33 So. 152.

Illinois.— Bostwick *v.* Blake, 145 Ill. 85, 34 N. E. 38; Tyler *v.* Tyler, 126 Ill. 525, 21 N. E. 616, 9 Am. St. Rep. 642; Mitchell *v.* Sawyer, 115 Ill. 650, 5 N. E. 109; Moore *v.* Wood, 100 Ill. 451.

Massachusetts.— Rice *v.* Cunningham, 116 Mass. 466.

Minnesota.— Thompson *v.* Bickford, 19 Minn. 17.

Nebraska.— Gillespie *v.* Cooper, 36 Nebr. 775, 55 N. W. 302.

New Jersey.— Scott *v.* Hartman, 26 N. J. Eq. 89.

North Carolina.— Clement *v.* Cozart, 109 N. C. 173, 13 S. E. 862.

Ohio.— Schultz *v.* Brown, 3 Ohio Cir. Ct. 609, 2 Ohio Cir. Dec. 353.

Texas.— Baldwin *v.* Peet, 22 Tex. 708, 75 Am. Dec. 806.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 364, 365.

Reservation of life-estate.— The fact that a grantor in a deed, absolute on its face, by a secret contemporaneous writing reserves to himself for life the use of the property conveyed is evidence either of legal or actual fraud. Donovan *v.* Dunning, 69 Mo. 436; Brown *v.* McDonald, 1 Hill Eq. (S. C.) 297. See also Yardley *v.* Sibbs, 84 Fed. 531.

Secret reservation of use of lands without payment of rent.— So the rule is laid down that where land is conveyed with a secret reservation that the vendor shall have the right to use and enjoy it for a time without the payment of rent, such use and enjoyment constituting a part of the consideration, the conveyance is fraudulent in law although based upon a valuable consideration. Sims *v.* Gaines, 64 Ala. 392; Page *v.* Francis, 97 Ala. 379, 11 So. 736 (where the rents were received for the benefit of the father and mother of the grantor); Dean *v.* Skinner, 42 Iowa 418; Macomber *v.* Peck, 39 Iowa 351; Scott *v.* Hartman, 26 N. J. Eq. 89; Lukins *v.* Aird, 6 Wall. (U. S.) 78, 18 L. ed. 750. But this rule is held not to apply where there is no secret reservation of the use of the land in part consideration for the conveyance, but an independent contract or agreement to lease based upon a new consideration. Eddy *v.* Wearin, 105 Iowa 387, 75 N. W. 177; Brown *v.* Bradford, 103 Iowa 378, 72 N. W. 648; Stroff *v.* Swafford, 81 Iowa 695, 47 N. W. 1023.

Delivery of deed to grantee with secret agreement postponing its taking effect.— Defendant's grantor had given defendant a mortgage on certain property as security for a debt. Later he delivered a quitclaim deed of such property, which was not to be re-

realty,[27] but also to absolute transfers[28] or mortgages of personalty.[29] It is immaterial that the interest reserved is not of great value; it is sufficient if it is a substantial interest,[30] nor is the rule altered, although the transfer was upon a valuable consideration.[31] The burden is upon the contesting creditor to establish by competent evidence the fact of a secret trust or reservation for the benefit of the seller or grantor.[32] A secret trust or confidence created for the benefit of the

corded, and conveyed no title, unless such grantor within six months thereafter failed to pay the mortgagee, in which event the deed was to become absolute and could be recorded. After the six months, the grantor having failed to pay the mortgage, defendant recorded the deed and claimed title in fee. It was held that the execution and delivery of the deed to the grantor with such understanding, no claim of ownership having been asserted by such grantee during the six months, was not such conclusive evidence of fraud as to avoid the deed after the happening of the contingency, and that it had no tendency to hinder or delay the creditors of such grantor, or conceal the grantor's property or prevent its attachment. Stavers *v.* Stavers, 69 N. H. 158, 45 Atl. 319.

27. Davis *v.* Anderson, 1 Ga. 176; Roberts *v.* Barnes, 127 Mo. 405, 30 S. W. 113, 48 Am. St. Rep. 640; Westfall *v.* Jones, 23 Barb. (N. Y.) 9; Winsmith *v.* Winsmith, 15 S. C. 611.

A deed of trust, to be valid, need not be so certain and definite in its terms as to exclude the possibility of the existence of a secret reservation in favor of the grantor, fraudulent and inconsistent with the avowed purposes of the parties. Ballard *v.* Chewning, 49 W. Va. 508, 39 S. E. 170.

28. *Alabama.*— Jordan *v.* Collins, 107 Ala. 572, 18 So. 137; Sheppard *v.* Iverson, 12 Ala. 97. See also Hyer *v.* Bromberg, 74 Ala. 524.

Illinois.— Tyler *v.* Tyler, 126 Ill. 525, 21 N. E. 616, 9 Am. St. Rep. 642; Steere *v.* Hoagland, 39 Ill. 264.

Maryland.— See Franklin *v.* Claflin, 49 Md. 24.

Missouri.— Mankato First Nat. Bank *v.* Kansas City Lime Co., 43 Mo. App. 561.

New Hampshire.— Paul *v.* Crooker, 8 N. H. 288.

Pennsylvania.— Connelly *v.* Walker, 45 Pa. St. 449.

South Carolina.— Miller *v.* Furse, 1 Bailey Eq. 187.

United States.— Blythe *v.* Thomas, 45 Fed. 784.

An assignment of wages to a creditor, who collected the same and turned them over to the assignor, retaining a small part to apply on his claim, is fraudulent as against attaching creditors, whose claims antedated the assignment. Lennon *v.* Parker, 22 R. I. 43, 46 Atl. 44. But the fact that an assignor is permitted by his assignee, by orders given for that purpose, to draw wages he assigned, which he immediately turned over to the assignee, does not render the assignment fraudulent and void. Dolan *v.* Hughes, 20 R. I. 513, 40 Atl. 344, 40 L. R. A. 735.

29. *Alabama.*— Roden *v.* Norton, 128 Ala. 129, 29 So. 637. See also Pugh *v.* Harwell, 108 Ala. 486, 18 So. 535.

Dakota.— Pierre First Nat. Bank *v.* Comfort, 4 Dak. 167, 28 S. W. 855.

Indiana.— New *v.* Sailors, 114 Ind. 407, 16 N. E. 609, 5 Am. St. Rep. 632; Stout *v.* Price, 24 Ind. App. 360, 55 N. E. 964, 56 N. E. 857.

Nebraska.— Bacon *v.* P. Brockman Commission Co., 48 Nebr. 365, 67 N. W. 304.

New Hampshire.— Putnam *v.* Osgood, 51 N. H. 192.

Washington.—Adams *v.* Dempsey, 29 Wash. 155, 69 Pac. 738.

Wisconsin.— Franzke *v.* Hitchon, 105 Wis. 11, 80 N. W. 931.

Agreement after execution of mortgage.— An agreement or understanding between a mortgagor and mortgagee of chattels, although made after the execution of a mortgage, that the mortgagor may sell the mortgaged property, or part of it, on his own account, renders the mortgage void as to creditors, and such agreement or understanding will be proved by evidence that the mortgagor did so sell with the knowledge of the mortgagee, and without objection on his part. Putnam *v.* Osgood, 52 N. H. 148.

Reservation as to part of property mortgaged.— In Indiana under statute the fact that a chattel mortgagee verbally agrees at the time the mortgage is given that the mortgagor may sell certain of the property covered thereby for his own benefit does not invalidate the mortgage as to other property to which such agreement does not apply. Lockwood *v.* Harding, 79 Ind. 129; Davenport *v.* Foulke, 68 Ind. 382, 34 Am. Rep. 265; *In re* Soudan Mfg. Co., 113 Fed. 804, 51 C. C. A. 476. To the same effect see Barnet *v.* Fergus, 51 Ill. 352, 99 Am. Dec. 547. *Compare* Stout *v.* Price, 24 Ind. App. 360, 55 N. E. 964, 56 N. E. 857.

30. Sparks *v.* Mack, 31 Ark. 666; Stout *v.* Price, 24 Ind. App. 360, 55 N. E. 964, 56 N. E. 857; Lukins *v.* Aird, 6 Wall. (U. S.) 78, 18 L. ed. 750.

31. Bostwick *v.* Blake, 145 Ill. 85, 34 N. E. 38; Thompson *v.* Furr, 57 Miss. 478; Scott *v.* Hartman, 26 N. J. Eq. 89; Lukins *v.* Aird, 6 Wall. (U. S.) 78, 18 L. ed. 750. See *supra*, VII, C.

A transfer of goods even to a creditor accompanied by a secret trust tends to delay and defraud creditors and so is within the letter and spirit of the statute of 13 Elizabeth. Connelly *v.* Walker, 45 Pa. St. 449.

32. *Alabama.*— Pugh *v.* Harwell, 108 Ala. 486, 18 So. 535; Pollak *v.* Searcy, 84 Ala. 259, 4 So. 137.

Iowa.— Jamison *v.* Weaver, 87 Iowa 72, 53 N. W. 1076.

grantor may be express or implied from extrinsic circumstances and may be proved by parol.[33]

2. Absolute Transfer Intended as Security. In some jurisdictions the rule has been laid down that a conveyance of lands[34] or a sale of personalty[35] made by an insolvent or embarrassed debtor is void against creditors where it is secretly intended merely as a security for a debt antecedent or contemporaneously contracted, although it is absolute on its face. And it is so held, although the

Michigan.— Sutherland *v.* Danaher, 35 Mich. 422.

New York.— Crouse *v.* Frothingham, 97 N. Y. 105; Spiegel *v.* Hays, 5 N. Y. St. 879.

West Virginia.— Armstrong *v.* Bailey, 43 W. Va. 778, 28 S. E. 766.

United States.— Bamberger *v.* Schoolfield, 160 U. S. 149, 16 S. Ct. 225, 40 L. ed. 374.

33. Rice *v.* Cunningham, 116 Mass. 466; Coolidge *v.* Melvin, 42 N. H. 510; Connelly *v.* Walker, 45 Pa. St. 449; Lukins *v.* Aird, 6 Wall. (U. S.) 78, 18 L. ed. 750.

Subsequent declaration of grantor.— A conveyance by a husband to the wife is not shown to have been in trust for the husband by his declaration, long after the conveyance was made that it was made for fear the husband's grantor might set aside the sale on the ground of fraud. Moulton *v.* Sturgis Nat. Bank, (Tex. Civ. App. 1901) 65 S. W. 1114.

34. *Alabama.*— McDermott *v.* Eborn, 90 Ala. 258, 7 So. 751; Campbell *v.* Davis, 85 Ala. 56, 4 So. 140 (where it is said that actual fraud, an intent to delay, hinder, or defraud creditors, is not essential. The fraud is deduced by the law from the fact that the conveyance or sale operates as a secret reservation of a benefit for an embarrassed debtor and this conclusion is not subject to rebuttal) Tryon *v.* Flournoy, 80 Ala. 321 (but valid as against subsequent creditors in the absence of actual fraud); Proskauer *v.* People's Sav. Bank, 77 Ala. 257; Sims *v.* Gaines, 64 Ala. 392; Hartshorn *v.* Williams, 31 Ala. 149; Bryant *v.* Young, 21 Ala. 264.

Florida.— Neubert *v.* Massman, 37 Fla. 91, 19 So. 625.

Minnesota.—Smith *v.* Conkwright, 28 Minn. 23, 8 N. W. 876.

Mississippi.— Thompson *v.* Furr, 57 Miss. 478.

Missouri.— See Rock Island Nat. Bank *v.* Powers, 134 Mo. 432, 34 S. W. 869, 35 S. W. 1132. *Compare* Robinson *v.* McCune, 128 Mo. 577, 30 S. W. 156.

New Hampshire.— Stratton *v.* Putney, 63 N. H. 577, 4 Atl. 876 (holding such trust to be void as to subsequent and existing creditors); Tifft *v.* Walker, 10 N. H. 150; Smith *v.* Lowell, 6 N. H. 67. See also Quimby *v.* Williams, 67 N. H. 489, 41 Atl. 862, 68 Am. St. Rep. 685; Watkins *v.* Arms, 64 N. H. 99, 6 Atl. 92; Ladd *v.* Wiggin, 35 N. H. 421, 69 Am. Dec. 551; Smyth *v.* Carlisle, 16 N. H. 464; Badger *v.* Story, 16 N. H. 168.

North Carolina.— Bernhardt *v.* Brown, 122 N. C. 587, 29 S. E. 884, 65 Am. St. Rep. 725; Gulley *v.* Macy, 84 N. C. 434; Holcombe *v.* Ray, 23 N. C. 340 (as against subsequent as well as existing creditors); Gregory *v.* Perkins, 15 N. C. 50.

Canada.— See Gillies *v.* How, 19 Grant Ch. (U. C.) 32.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 63, 367.

Secret agreement for a reconveyance to grantor's wife.— Harris *v.* Osnowitz, 35 N. Y. App. Div. 594, 55 N. Y. Suppl. 172.

In Maryland the rule has been laid down that an understanding that the grantor may remit the property when the circumstances improve will not vitiate a conveyance in other respects unobjectionable; the only effect of such a reservation being to convert an absolute conveyance into a mortgage or to make unconditional a conditional sale. Glenn *v.* Randall, 2 Md. Ch. 220.

Absolute conveyance held not a mortgage.— A conveyance absolute on its face will not be rendered fraudulent as to creditors of the grantor therein, on the ground that it is a mortgage, by the fact that, a few days after its execution, the parties entered into a new contract in writing, by which the grantee gave the grantor a right to repurchase the property at the same price. Danner Land, etc., Co. *v.* Stonewall Ins. Co., 77 Ala. 184.

35. *Alabama.*— Steiner *v.* Scholze, 114 Ala. 88, 21 So. 428. *Compare* Killough *v.* Steele, 1 Stew. & P. 262.

California.— See Chenery *v.* Palmer, 6 Cal. 119, 65 Am. Dec. 493. *Compare* Godchaux *v.* Mulford, 26 Cal. 316, 85 Am. Dec. 178.

Illinois.— Highley *v.* American Exch. Nat. Bank, 185 Ill. 565, 57 N. E. 436 [*affirming* 86 Ill. App. 48]; Best *v.* Fuller, etc., Co., 185 Ill. 43, 56 N. E. 1077 [*affirming* 85 Ill. App. 500]; Beidler *v.* Crane, 135 Ill. 92, 25 N. E. 655, 25 Am. St. Rep. 349, assignment of a patent.

Missouri.— Revercomb *v.* McCully, 74 Mo. App. 575; Pattison *v.* Letton, 56 Mo. App. 325; Molaska Mfg. Co. *v.* Steele, 36 Mo. App. 496.

Nebraska.— William B. Grimes Dry Goods Co. *v.* Shaffer, 41 Nebr. 112, 59 N. W. 741.

New Hampshire.—Parker *v.* Pattee, 4 N. H. 176.

North Carolina.— Johnson *v.* Murchison, 60 N. C. 286; King *v.* Cantrel, 26 N. C. 251; Gaither *v.* Mumford, 4 N. C. 600.

North Dakota.— Newell *v.* Wagness, 1 N. D. 62, 44 N. W. 1014.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 63, 367.

Absolute sale and not a mortgage.— An absolute bill of slaves, accompanied with a parol agreement between the parties that the vendor might redeem or repurchase the slaves by

claim secured equals or exceeds in value the property so taken in trust.[36] In other jurisdictions, however, a conveyance of lands[37] or sale of personalty[38]

repaying the same price, was held not void against creditors of the vendor, under N. C. Act of 1820 or 13 Eliz., where it was admitted that the sale was not intended to be a mortgage, but was *bona fide*, absolute, and for a fair price. Newsom *v.* Roles, 23 N. C. 179.

36. Pattison *v.* Letton, 56 Mo. App. 325; Molaska Mfg. Co. *v.* Steele, 36 Mo. App. 496; Parker *v.* Pattee, 4 N. H. 176; Passmore *v.* Eldridge, 12 Serg. & R. (Pa.) 198. *Compare* Muchmore *v.* Budd, 53 N. J. L. 369, 22 Atl. 518; Grant *v.* Lewis, 14 Wis. 487, 80 Am. Dec. 785.

37. *Arkansas.*— Doswell *v.* Adler, 28 Ark. 82 (such circumstance of itself no evidence of fraud); McCarron *v.* Cassidy, 18 Ark. 34.

California.— Broughton *v.* Vasquez, 73 Cal. 325, 11 Pac. 806, 14 Pac. 885.

Colorado.— McClure *v.* Smith, 14 Colo. 299, 23 Pac. 786; Ross *v.* Duggan, 5 Colo. 85.

Connecticut.— Mead's Appeal, 46 Conn. 417. But see Hough *v.* Ives, 1 Root 492, which is to the contrary.

Iowa.— Cathcart *v.* Grieve, 104 Iowa 330, 73 N. W. 835; Brown *v.* Bradford, 103 Iowa 378, 72 N. W. 648; Fuller *v.* Griffith, 91 Iowa 632, 60 N. W. 247; Wright *v.* Mahaffey, 76 Iowa 96, 40 N. W. 112 Keeder *v.* Murphy, 43 Iowa 413.

Kansas.— Peoria First Nat. Bank *v.* Jaffray, 41 Kan. 694, 21 Pac. 242.

Louisiana.— Wang *v.* Finnerty, 32 La. Ann. 94; Bailey *v.* Chase, 18 La. Ann. 732.

Maine.— Wyman *v.* Brown, 50 Me. 139; Stevens *v.* Hinckley, 43 Me. 440; Gilbert *v.* Merrill, 12 Me. 74; Reed *v.* Woodman, 4 Me. 404.

Massachusetts.— Oriental Bank *v.* Haskins, 3 Metc. 332, 34 Am. Dec. 140; Cutler *v.* Dickinson, 8 Pick. 386; Harrison *v.* Phillips Academy, 12 Mass. 456.

Michigan.— Columbia Bank *v.* Jacobs, 10 Mich. 349, 81 Am. Dec. 792.

Minnesota.— Thompson *v.* Bickford, 19 Minn. 17.

Mississippi.— Mobile Bank *v.* Tishomingo Sav. Inst., 62 Miss. 250.

Nebraska.— Kemp *v.* Small, 32 Nebr. 318, 49 N. W. 169.

New Jersey.— Adoue *v.* Spencer, 62 N. J. Eq. 782, 49 Atl. 10, 90 Am. St. Rep. 484, 56 L. R. A. 817 [*reversing* 59 N. J. Eq. 231, 46 Atl. 543].

New York.— Rigney *v.* Tallmadge, 17 How. Pr. 556.

Oregon.— Haseltine *v.* Espey, 13 Oreg. 301, 10 Pac. 423.

Tennessee.— Jones *v.* Cullen, 100 Tenn. 1, 42 S. W. 873. See also Gibbs *v.* Thompson, 7 Humphr. 179.

Vermont.— Bigelow *v.* Topliff, 25 Vt. 273, 60 Am. Dec. 264; Smith *v.* Onion, 19 Vt. 427; Gibson *v.* Seymour, 4 Vt. 518.

Washington.— Samuel *v.* Kittenger, 6 Wash. 261, 33 Pac. 509.

Wisconsin.— Rock *v.* Collins, 99 Wis. 630, 75 N. W. 426, 67 Am. St. Rep. 885; McFarlane *v.* Louden, 99 Wis. 620, 75 N. W. 394, 67 Am. St. Rep. 883.

United States.—Chickering *v.* Hatch, 5 Fed. Cas. No. 2,672, 3 Sumn. 474; Gaffney *v.* Signaigo, 9 Fed. Cas. No. 5,169, 1 Dill. 158.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 63, 367; and, generally, MORTGAGES.

Treating conveyance as security for money advanced.— A conveyance, absolute in form, to a creditor of the grantor may be treated as security simply for moneys advanced, where the grantor at the time of executing it was indebted to others than the grantee, and the property may be ordered to be sold and the proceeds, after discharging the grantee's debt, may be subjected to the claims of other creditors. Keeder *v.* Murphy, 43 Iowa 413. And see Wang *v.* Finnerty, 32 La. Ann. 94; Joseph M. Smith Co. *v.* O'Brien, 57 N. J. Eq. 365, 41 Atl. 492; Bigelow *v.* Topliff, 25 Vt. 273, 60 Am. Dec. 264.

38. *Maine.*— Emmons *v.* Bradley, 56 Me. 333; Stevens *v.* Hinckley, 43 Me. 440; Ulmer *v.* Hills, 8 Me. 326; Reed *v.* Jewett, 5 Me. 96. *Compare* Thompson *v.* Pennell, 67 Me. 159.

Maryland.— Earnshaw *v.* Stewart, 64 Md. 513, 2 Atl. 734. *Compare* Glenn *v.* Randall, 2 Md. Ch. 220.

Massachusetts.— Parsons *v.* Topliff, 119 Mass. 245; Glover *v.* Austin, 6 Pick. 209; New England Mar. Ins. Co. *v.* Chandler, 16 Mass. 275.

Mississippi.— See Carey-Halliday Lumber Co. *v.* Cain, 70 Miss. 628, 13 So. 229.

Nebraska.— Kemp *v.* Small, 32 Nebr. 318, 49 N. W. 169.

New Jersey.— Muchmore *v.* Budd, 53 N. J. L. 369, 22 Atl. 518.

Vermont.— Barker *v.* French, 18 Vt. 460.

Virginia.— Didier *v.* Patterson, 93 Va. 534, 25 S. E. 661.

Wisconsin.— Rock *v.* Collins, 99 Wis. 630, 75 N. W. 426, 67 Am. St. Rep. 885; Grant *v.* Lewis, 14 Wis. 487, 80 Am. Dec. 785.

England.— Wood *v.* Dixie, 7 Q. B. 892, 9 Jur. 796, 53 E. C. L. 892; Darvill *v.* Terry, 6 H. & N. 807, 30 L. J. Exch. 355.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 63, 367; and CHATTEL MORTGAGES, 6 Cyc. 991, 992.

Circumstances amounting to fraud.— Of course an absolute conveyance or transfer of real or personal property intended as a mortgage is, like any other conveyance or transfer, void as against creditors if there is an actual fraudulent intent on the part of the grantor or transferrer known to or participated in by the grantee or transferee, or if it contains provisions, or there is a secret agreement, which will hinder, delay, or defraud creditors.

Colorado.— Innis *v.* Carpenter, 4 Colo. App. 30, 34 Pac. 1011.

Illinois.— Beidler *v.* Crane, 135 Ill. 92, 25

accompanied by a secret understanding of this character, while a badge of fraud, is not fraudulent *per se*.

3. Reservation of Surplus. So the rule has been laid down that a conveyance of lands or transfer of personalty made by a debtor in failing circumstances to a preferred creditor and purporting on its face to be an absolute transfer, but in reality accompanied with a secret trust that the creditor shall hold and dispose of the property for the discharge of the creditor's debt and pay over the balance to the debtor, is fraudulent in law and void as to other creditors.[39] But according to other authorities while such transaction is evidence of actual fraud it does not amount to fraud in law.[40]

4. Reservation of Right to Repurchase. So a transfer of property by a per-

N. E. 655, 25 Am. St. Rep. 349, assignment of a patent.

Iowa.— Fuller *v.* Griffith, 91 Iowa 632, 60 N. W. 247 (concealment of true nature of conveyance); Wright *v.* Mahaffey, 76 Iowa 96, 40 N. W. 112.

Kansas.— McCluskey *v.* Cubbison, (App. 1899) 57 Pac. 496.

Maine.— Wellington *v.* Fuller, 38 Me. 61, deed given as security merely, but without any consideration being paid or any security surrendered.

Massachusetts.— Hassam *v.* Barrett, 115 Mass. 256.

Michigan.— Meigs *v.* Weller, 90 Mich. 629, 51 N. W. 681, where a creditor took from his debtor absolute deeds and a bill of sale, giving back an instrument whereby he agreed to reconvey on payment of the debt in one year, and, after garnishment proceedings were begun by other creditors against him, conveyed all of the property to a third person; and where, although there was evidence that the property was worth twice the amount of the debt, he refused to state the value of the property or what he sold it for.

New Jersey.— See White *v.* Megill, (Ch. 1899) 18 Atl. 355.

North Carolina.— Johnson *v.* Murchison, 60 N. C. 286, absolute conveyance declared to be made in payment of a debt, but in fact given to indemnify against an event which had not happened and might never happen.

Vermont.— Barker *v.* French, 18 Vt. 460, holding that, although a person may take security for a debt by an absolute bill of sale intended only as security, yet if he claims that the purchase was absolute and thereby seeks to protect from other creditors the property of the vendor, and endeavors to conceal the true nature of the transaction, it is evidence of fraud.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 63, 367.

Creditors attacking a bill of sale absolute on its face as fraudulent may show by parol evidence that it was intended as a mortgage and is void by reason of actual fraud. McCluskey *v.* Cubbison, (Kan. App. 1899) 57 Pac. 496.

39. *District of Columbia.*— Smith *v.* Kenney, 1 Mackey 12.

Idaho.— Johnson *v.* Sage, 4 Ida. 758, 44 Pac. 641.

Kentucky.—White *v.* Graves, 7 J. J. Marsh. 523.

Mississippi.— See Hunt *v.* Knox, 34 Miss. 655.

Missouri.— Scudder *v.* Payton, 65 Mo. App. 314; Molaska Mfg. Co. *v.* Steele, 36 Mo. App. 496. See also Roberts *v.* Barnes, 127 Mo. 405, 30 S. W. 113, 48 Am. St. Rep. 640.

Nebraska.— Bacon *v.* P. Brockman Commission Co., 48 Nebr. 365, 67 N. W. 304; William B. Grimes Dry Goods Co. *v.* Shaffer, 41 Nebr. 112, 59 N. W. 741; Gillespie *v.* Cooper, 36 Nebr. 775, 55 N. W. 302.

New Hampshire.—Parker *v.* Pattee, 4 N. H. 176.

New York.— Jackson *v.* Brush, 20 Johns. 5.

North Dakota.—Newell *v.* Wagness, 1 N. D. 62, 44 N. W. 1014.

Pennsylvania.— Connelly *v.* Walker, 45 Pa. St. 449; McCulloch *v.* Hutchinson, 7 Watts 434, 32 Am. Dec. 776.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 366.

An assignment of property for the payment of a debt, accompanied by a parol agreement that the residue of the proceeds of the sale of the property after the payment of the debt shall be returned to the assignor, does not of itself render the transfer fraudulent, so long as the property transferred bears a reasonable proportion to the debt provided for. Rahn *v.* McElrath, 6 Watts (Pa.) 151; *In re* Robertshaw Mfg. Co., 133 Fed. 556.

40. Sukeforth *v.* Lord, 87 Cal. 399, 25 Pac. 497; St. John *v.* Camp, 17 Conn. 222; New England Mar. Ins. Co. *v.* Chandler, 16 Mass. 275; Muchmore *v.* Budd, 53 N. J. L. 369, 22 Atl. 518.

Sale held actually fraudulent.— In Menton *v.* Adams, 49 Cal. 620, it was held that if a debtor makes a sale of his personal property to one of his creditors with an understanding that out of the proceeds of the sale of the property the creditor shall retain enough to pay his own debt and then pay certain other creditors, and then pay the balance of the proceeds over to the debtor, and the sale is made to prevent other creditors from attaching property, it is actual fraud and vitiates the sale as to other creditors.

Fraud of creditor's agent.— If the agent of a creditor receives from an insolvent debtor goods in payment of his debt, with the secret understanding between the creditor's agent and the debtor that from future sales of the goods the creditor shall receive all money in excess of the amount of the debt, with a view of hindering and delaying other cred-

son in failing circumstances is either *prima facie* or conclusively fraudulent[41] where, although absolute on its face it is accompanied by a secret agreement that the grantor shall have a reconveyance on repayment of the purchase-money,[42] or upon some other stipulated contingency, such as the discharge or payment of the grantor's debts.[43]

5. Employment of Grantor or Debtor. The mere fact that the purchaser of a business and stock of goods employs at a reasonable salary the seller to manage the business or to assist in a clerical capacity in the disposition of the goods is not sufficient in itself to prove the transaction fraudulent, and can at best be but competent evidence to be considered by the jury in determining whether or not a secret benefit was reserved to the seller.[44] And the same rule has been applied

itors, such payment would be void as to such other creditors, although the creditor thus receiving payment may not in fact have known of the fraudulent intent. The act of the agent in negotiating the settlement must be deemed in law the act of his principal. Greenleve *v.* Blum, 59 Tex. 124.

41. See *infra*, XIV, K, 1, k.

42. *Georgia.*— Ward *v.* Lamberth, 31 Ga. 150.

Illinois.— See Brinton *v.* Gerry, 7 Ill. App. 238.

New Hampshire.— Winkley *v.* Hill, 9 N. H. 31, 31 Am. Dec. 215 [*explained* and *modified* in Albee *v.* Webster, 16 N. H. 362].

Pennsylvania.— Mead *v.* Conroe, 113 Pa. St. 220, 8 Atl. 374, holding that an agreement between the purchaser and the debtor, to the effect that the purchaser will convey to the debtor the property upon being reimbursed for all the money he has expended, is not conclusive evidence of fraud.

Wisconsin.— Grant *v.* Lewis, 14 Wis. 487, 80 Am. Dec. 785.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 368.

Compare Carey-Halliday Lumber Co. *v.* Cain, 70 Miss. 628, 13 So. 239; Mahler *v.* Schloss, 7 Daly (N. Y.) 291.

Option to reconvey in purchaser.— It has been held that the fact that a corporation conveying lands by resolution of its board of directors authorizes its president to give to the vendee a bond to place the amount of the consideration money to his credit, if within one year he reconveys the property to the company, is not fraudulent as showing the existence of a secret trust where nothing is done under the resolution by which either party acquires any rights or becomes subject to any obligations, and where the resolution does not purport on its face that there shall be reserved to the company any right or privilege to redeem, but the option merely is given to the purchaser of reconveying within a given time. Barr *v.* Hatch, 3 Ohio 527.

Conveyance by unembarrassed grantor.— Where in an action to set aside a deed as given to defraud creditors, it appeared that the grantor's title to the premises was clouded by a tax-sale; that he was a non-resident and owned no other property, but the grantee as a consideration for the deed agreed to pay the costs of litigation necessary to quiet the title in himself and to sell the premises back to the grantor at any time within six months on repayment to him of these costs and expenses, the title to become absolute in the grantee if not so repurchased, and it was also shown that the only claim being urged against the grantor at the time of the transfer was one which his attorney assured him was barred by the statute of limitations, it was held that the transfer was not fraudulent. Robinson *v.* McCune, 128 Mo. 577, 30 S. W. 156.

43. Jackson *v.* Marshall, 5 N. C. 323, 3 Am. Dec. 695; Vick *v.* Flowers, 5 N. C. 321; Weis *v.* Quinan, (Tex. 1888) 7 S. W. 804.

Agreement for reconveyance after payment of debts due on property.— Where a sale purported to be made for cash, but it was shown that no money was paid and that it was understood between the parties that the property was conveyed in trust to the apparent vendee, he assuming to pay the debts due on the property, and it was agreed that when these debts were paid the property was to be reconveyed, it was held that the sale was a mere simulation, and creditors of the vendor seizing such property under execution had a right to maintain the seizure by showing the simulation. Gleises *v.* McHatton, 14 La. Ann. 560.

44. *Georgia.*— Cribb *v.* Bagley, 83 Ga. 105, 10 S. E. 194.

Illinois.— See Fuller, etc., Co. *v.* Gaul, 85 Ill. App. 500 [*affirmed* in 185 Ill. 43, 56 N. E. 1077].

Indiana.— Wilcoxon *v.* Annesley, 23 Ind. 285.

Minnesota.— Wilcox *v.* Lundberg, 30 Minn. 93, 14 N. W. 365; Vose *v.* Stickney, 19 Minn. 367.

New York.— Griffin *v.* Cranston, 10 Bosw. 1. See also Nicholson *v.* Leavitt, 4 Sandf. 252.

North Dakota.— Red River Valley Nat. Bank *v.* Barnes, etc., Co., 8 N. D. 432, 79 N. W. 880.

Pennsylvania.— Davis *v.* Hukill, 173 Pa. St. 138, 33 Atl. 882. *Compare* Bentz *v.* Rockey, 69 Pa. St. 71.

Texas.— Peters Saddlery, etc., Co. *v.* Schoelkopf, 71 Tex. 418, 9 S. W. 336; Van Hook *v.* Walton, 28 Tex. 59.

United States.— Bamberger *v.* Schoolfield, 160 U. S. 149, 16 S. Ct. 225, 40 L. ed. 374; *In re* Robertshaw Mfg. Co., 133 Fed. 566.

where a creditor to whom the business of his debtor had been transferred employed the debtor at a reasonable commission to sell the entire business.[45]

6. Future Support of Grantor. If by a secret understanding the consideration of the transfer in whole or in part is an obligation for the future support of the grantor or his family, the transfer is either *prima facie* or conclusively[46] fraudulent and void as to existing creditors.[47] And it has been intimated that such an arrangement is a continuing fraud of which subsequent as well as precedent creditors may take advantage.[48]

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 366.

Compare Roden *v.* Norton, 128 Ala. 129, 29 So. 637; Birmingham Dry Goods Co. *v.* Roden, 110 Ala. 511, 18 So. 135, 55 Am. St. Rep. 35; Stephens *v.* Regenstein, 89 Ala. 561, 8 So. 68, 18 Am. St. Rep. 156.

Employment without agreement to pay for services.— In Bluthenthal *v.* Magnus, 97 Ala. 530, 13 So. 7, it was held that where a person sold goods and agreed by a separate instrument to retain and sell the same for the purchaser and pay over to the latter the proceeds of the sale less the necessary expenses to be incurred in making the sale, there was no stipulation that the seller was to be paid for his services, and in the absence of any express agreement the transaction was not fraudulent on the ground of a reservation of a benefit to the seller.

Employment of debtor in subsequent distinct transaction.— In Henderson *v.* Perryman, 114 Ala. 647, 22 So. 24, it was held that the fact that the sale of property was made in part to pay a *bona fide* debt due from the insolvent debtor to his father, who was shown to be a man of fortune and liberal with his sons, and who several months after the sale organized a corporation and employed the debtor, his son, as its secretary and treasurer at a moderate salary, did not warrant the inference of a reservation of benefit to the debtor in the sale.

Where a chattel mortgage on a stock of goods provided that the mortgagor should remain in possession, and sell the property at retail for cash only, and turn the proceeds each day over to the creditor, the fact that after the execution of the mortgage the parties agreed that the mortgagor should retain a reasonable stipulated salary as compensation for selling the goods at retail was held not to make the mortgage fraudulent, as embodying a secret trust for the benefit of the debtor. Red River Valley Nat. Bank *v.* Barnes, 8 N. D. 432, 79 N. W. 880. See also Manley *v.* Larkin, 59 Kan. 528, 53 Pac. 859; Armstrong *v.* Bailey, 43 W. Va. 778, 28 S. E. 766. So where a chattel mortgagee consents that the mortgagor may sell a portion of the mortgaged property and apply the proceeds on the mortgage debt, the fact that the purchaser is allowed to retain a small amount, which might be a suitable commission to the mortgagor for making the sale to pay a debt of the mortgagor to the purchaser, is not such evidence of fraud as to avoid the mortgage. Atchison County Bank *v.* Shackelford, 67 Mo. App. 475.

45. Davis *v.* Hukill, 173 Pa. St. 138, 33 Atl. 882. See also *In re* Robertshaw Mfg. Co., 133 Fed. 556.

46. See *infra*, XIV, K, 1, k.

47. New *v.* Sailors, 114 Ind. 407, 16 N. E. 609, 5 Am. St. Rep. 632; Graves *v.* Blondell, 70 Me. 194; Sidensparker *v.* Sidensparker, 52 Me. 481, 83 Am. Dec. 527; Hapgood *v.* Fisher, 34 Me. 407, 56 Am. Dec. 663; Rollins *v.* Mooers, 25 Me. 192; Welcome *v.* Batchelder, 23 Me. 85; Rice *v.* Cunningham, 116 Mass. 466; Smith *v.* Smith, 11 N. H. 459. See also Stout *v.* Price, 24 Ind. App. 360, 55 N. E. 964, 56 N. E. 857; Hunt *v.* Knox, 34 Miss. 655. *Compare* Longmont First Nat. Bank *v.* Beasley, 12 Colo. App. 313, 55 Pac. 616. See also *supra*, VIII, A, 7, a, (IV).

Assignment of wages in consideration of support.— Where one ostensibly assigned all his wages due or to become due up to a certain date to his grocer with whom he had an account, and made a contemporaneous secret agreement by which the grocer was to continue to furnish him with groceries, give him eleven dollars per month with which to pay his rent, and allow him from time to time such other sums as he needed out of his earnings, and apply the remainder to the old and running account, it was held that the assignment was fraudulent as to creditors, regardless of the intent of the parties thereto. Robinson *v.* McKenna, 21 R. I. 117, 42 Atl. 510, 79 Am. St. Rep. 793. *Compare* Scofield *v.* McConnell, 119 Mass. 368.

Indefinite agreement for support.— Although at the time a lease to one and his son was surrendered and a lease to his wife and the son made in place thereof the son assured him that he would be provided for, such agreement for support is too indefinite and uncertain to be treated as part of the consideration for the transaction, so as to make it fraudulent as to his creditors. McCormick Harvesting Mach. Co. *v.* Pouder, 123 Iowa 17, 98 N. W. 303.

Conveyance to children with reservation of power to use property for their support.— Where the father of certain minor children conveys to them land to pay a debt due by him to their mother, and it is understood and agreed that he shall look after the land, collect the rents, and apply the same to the support and education of said grantees, this does not constitute the reservation of a benefit to the grantor, such as will invalidate the conveyance at the instance of an existing creditor. Eufaula Nat. Bank *v.* Pruett, 128 Ala. 470, 30 So. 731.

48. Sidensparker *v.* Sidensparker, 52 Me. 481, 83 Am. Dec. 527. *Compare* Bowlus *v.* Shanabarger, 19 Ohio Cir. Ct. 137, 10 Ohio

7. Purchase at Execution Sales, Etc. It is not necessary that the debtor shall in person convey his property to render his transfer fraudulent, but it will be sufficient if the steps taken by the grantee at the sale by a sheriff, trustee, or the like to obtain title thereto were by the consent and procurement of the debtor with the secret understanding that the property was to be held in whole or in part for the benefit of the debtor.[49]

8. Subsequent Disposition of Property by Creditor in Debtor's Favor. After a creditor has fairly collected his debt either in money or by the purchase of property, it is his right to dispose of it as he sees fit, regardless of the other creditors of the debtor, even though such disposition is favorable to the debtor.[50] Hence the mere fact of a resale or reconveyance by the creditor to the debtor or a member of his family, while it may be competent evidence to be considered in determining whether or not a secret benefit was reserved to the debtor in the original transaction,[51] does not constitute fraud as a matter of law,[52] and this, although the debtor at the time of the original transaction may have expected a reconveyance, provided there was no understanding to this effect.[53] So the mere fact that a debtor confessing a judgment for a *bona fide* debt believes or knows that the creditor intends to settle the principal part of the debt upon the debtor's wife is not conclusive evidence of fraud.[54]

9. Discharge of Secret Trust by Subsequent Agreement. A fraudulent grant may be purged of the fraud by matter *ex post facto* whereby the fraudulent contract is abandoned and the grant confirmed for good and adequate consideration *bona fide*;[55] and hence, although a transfer may be fraudulent as to creditors on account of a secret trust accompanying it, yet if by subsequent agreement before the creditors interfere this secret trust is discharged and the transfer is otherwise made valid, the fact that the trust once existed will not operate longer to vitiate the transfer.[56] Thus where a creditor holds a chattel mortgage upon property of his debtor, which is voidable by other creditors on account of an illegal verbal

Cir. Dec. 167, holding that a voluntary conveyance accompanied by an agreement on the part of the grantee to support the grantor for life may in the absence of any intentional fraud be valid as to subsequent creditors, although void as to existing creditors.

49. Bostwick *v.* Blake, 145 Ill. 85, 34 N. E. 38. See *supra*, III, A, 4.

This rule has been applied to purchases at execution sales (Miller *v.* Fraley, 21 Ark. 22; Bostwick *v.* Blake, 145 Ill. 85, 34 N. E. 38; Clarkson *v.* White, 8 Dana (Ky.) 11; Stovall *v.* Farmers', etc., Bank, 16 Miss. 305, 47 Am. Dec. 85; Decker *v.* Decker, 108 N. Y. 128, 15 N. E. 307), sales under deeds of trust (State *v.* McBride, 105 Mo. 265, 15 S. W. 72; Levine *v.* Rouss, (Tex. Civ. App. 1899) 49 S. W. 1051. See also Monarch Rubber Co. *v.* Bunn, 78 Mo. App. 55), and foreclosure sales (Whitney *v.* Leominster Sav. Bank, 141 Mass. 85, 6 N. E. 551. *Compare* Richardson *v.* Champion, 143 Mo. 538, 45 S. W. 280). See also *supra*, III, A, 4, c, d.

50. Young *v.* Dumas, 39 Ala. 60; Solomon *v.* Schneider, 56 Nebr. 680, 77 N. W. 65; Bamberger *v.* Schoolfield, 160 U. S. 149, 16 S. Ct. 225, 40 L. ed. 374. See also Bush *v.* Downey, 195 Ill. 82, 62 N. E. 868.

51. Reynolds *v.* Lansford, 16 Tex. 286 (holding that where property is conveyed by a debtor in failing circumstances to a third person, and by the latter conveyed by deed of gift to the wife of the former, it is *prima facie* fraudulent and void as to antecedent creditors); Bamberger *v.* Schoolfield, 160 U. S. 149, 16 S. Ct. 225, 40 L. ed. 374.

52. Young *v.* Dumas, 39 Ala. 60; McPherson *v.* McPherson, 21 S. C. 261; Bamberger *v.* Schoolfield, 160 U. S. 149, 16 S. Ct. 225, 40 L. ed. 374. See also Crawfordsville First Nat. Bank *v.* Carter, 89 Ind. 317.

The fact that a mortgagee sells the mortgaged property to a third person for the amount due on his debt, but for less than its value, and that such person by a distinct transaction conveys it to the mortgagor, is no evidence of fraud. Pugh *v.* Harwell, 108 Ala. 486, 18 So. 535.

53. Hesse *v.* Barrett, 41 Oreg. 202, 68 Pac. 751; McPherson *v.* McPherson, 21 S. C. 261.

54. Cureton *v.* Doby, 10 Rich. Eq. (S. C.) 411, 73 Am. Dec. 96.

55. Oriental Bank *v.* Haskins, 3 Metc. (Mass.) 332, 37 Am. Dec. 140; Smyth *v.* Carlisle, 17 N. H. 417. See *supra*, III, C, 5, a.

56. Tyler *v.* Tyler, 126 Ill. 525, 21 N. E. 616, 9 Am. St. Rep. 642 (holding that it is competent in the case of a conveyance or assignment fraudulent on account of a secret reservation for the parties thereto to subsequently make a new and independent agreement for a sufficient valid consideration whereby the grantee or assignee shall be obligated to hold the property in trust for the grantor or assignor, but that such agreement must be open and notorious and made in good faith to establish a trust in the prop-

agreement, whereby a benefit is reserved to the debtor, but before the rights of other creditors have become fixed or they have taken any action to disaffirm it or obtain any lien the illegal agreement is annulled and the debtor voluntarily transfers possession of the property to the mortgagee as security for the indebtedness, the subsequent transfer is not invalidated by the voidable character of the original mortgage.[57]

XI. PREFERENCES.

A. Validity in General. By the common law a debtor has an absolute right to prefer in payment one creditor over another, and such a preference, in the absence of fraud, is perfectly valid as against other creditors. This right arises from the right of disposition which is incident to the absolute ownership of property. It is well settled therefore that in the absence of express statutory provisions to the contrary, a debtor, although insolvent or in failing circumstances, may prefer one or more of his creditors by payment in money or other property or by giving security for the debt, and that the preference thus given will be valid, notwithstanding that the claims of other creditors will thereby be delayed or defeated; provided, however, that the debt is actual, that the property transferred does not greatly exceed the amount of the claim, and that the transaction is not a mere device to secure an advantage to the debtor or to hinder, delay, or defraud other creditors.[58] Such a preference, although it may, in paying one creditor,

erty, for otherwise it would be but attempting to create anew a secret trust); Songer *v.* Partridge, 107 Ill. 529; Oriental Bank *v.* Haskins, 3 Metc. (Mass.) 332, 37 Am. Dec. 140; Thomas *v.* Goodwin, 12 Mass. 140; Mandigo *v.* Healey, 69 N. H. 94, 45 Atl. 318; Albee *v.* Webster, 16 N. H. 362; Hutchins *v.* Sprague, 4 N. H. 469, 17 Am. Dec. 439. See also Parker *v.* Tiffany, 52 Ill. 286; Stavers *v.* Stavers, 69 N. H. 158, 45 Atl. 319. *Compare supra*, III, C, 5, a.

57. Hardt *v.* Deutsch, 30 N. Y. App. Div. 589, 52 N. Y. Suppl. 335.

58. *Alabama.*— Montgomery First Nat. Bank *v.* Acme White Lead, etc., Co., 123 Ala. 344, 26 So. 354; Davidson *v.* Kahn, 116 Ala. 427, 22 So. 539; Goetter *v.* Norman, 107 Ala. 585, 19 So. 56; Bray *v.* Ely, 105 Ala. 553, 17 So. 180; Goetter *v.* Smith, 104 Ala. 481, 16 So. 534; Schloss *v.* McGuire, 102 Ala. 626, 15 So. 275; Fargason *v.* Hall, 99 Ala. 209, 13 So. 302; Dawson *v.* Flash, 97 Ala. 539, 12 So. 67; Lathrop-Hatten Lumber Co. *v.* Bessemer Sav. Bank, 96 Ala. 350, 11 So. 418; Pollock *v.* Meyer, 96 Ala. 172, 11 So. 385; Ellison *v.* Moses, 95 Ala. 221, 11 So. 347; Birmingham First Nat. Bank *v.* Smith, 93 Ala. 97, 9 So. 548; Harris *v.* Powell, 93 Ala. 59, 9 So. 541; Chipman *v.* Stern, 89 Ala. 207, 7 So. 409; Mobile Sav. Bank *v.* McDonnell, 87 Ala. 736, 6 So. 703; Carter *v.* Coleman, 84 Ala. 257, 4 So. 151; Wood *v.* Moore, 84 Ala. 253, 3 So. 912; Jefferson County Sav. Bank *v.* Eborn, 84 Ala. 529, 4 So. 389; Levy *v.* Williams, 79 Ala. 171; Moog *v.* Farley, 79 Ala. 246; Hodges *v.* Coleman, 76 Ala. 103; Shealy *v.* Edwards, 75 Ala. 411; Heyer *v.* Bromberg, 74 Ala. 524; Warren *v.* Jones, 68 Ala. 449; Perry Ins., etc., Co. *v.* Foster, 58 Ala. 502, 29 Am. Rep. 779; Crawford *v.* Kirksey, 55 Ala. 282, 28 Am. Rep. 704 [*explaining* Pulliam *v.* Newbury, 41 Ala. 168]; Stover *v.* Herrington, 7 Ala. 142, 41 Am. Dec. 86; Williams *v.* Jones, 2 Ala. 314. See also Inman *v.* Schloss, 122 Ala. 461, 25 So. 739; Chamberlain *v.* Dorrance, 69 Ala. 40; Turner *v.* McFee, 61 Ala. 468; Young *v.* Dumas, 39 Ala. 60; Borland *v.* Mayo, 8 Ala. 104.

Arkansas.—Gilkerson-Sloss Commission Co. *v.* Carnes, 56 Ark. 414, 19 S. W. 1061; Goodbar *v.* Locke, 56 Ark. 314, 19 S. W. 924; Sparks *v.* Mack, 31 Ark. 666; Doswell *v.* Adler, 28 Ark. 82; Cox *v.* Fraley, 26 Ark. 20.

California.— Merced Bank *v.* Ivett, 127 Cal. 134, 59 Pac. 393; Bonney *v.* Tilley, 109 Cal. 346, 42 Pac. 439; Dyer *v.* Bradley, 89 Cal. 557, 26 Pac. 1103; Dean *v.* Grimes, 72 Cal. 442, 14 Pac. 178; Ross *v.* Sedgwick, 69 Cal. 247, 10 Pac. 400; Wood *v.* Franks, 67 Cal. 32, 7 Pac. 50; Walden *v.* Murdock, 23 Cal. 540, 83 Am. Dec. 135; Wheaton *v.* Neville, 19 Cal. 41; Randall *v.* Buffington, 10 Cal. 491; Dana *v.* Stanford, 10 Cal. 269. And see Priest *v.* Brown, 100 Cal. 626, 35 Pac. 323; Saunderson *v.* Broadwell, 82 Cal. 132, 23 Pac. 36.

Colorado.— Campbell *v.* Colorado Coal, etc., Co., 9 Colo. 60, 10 Pac. 248; Burr *v.* Clement, 9 Colo. 1, 7 Pac. 633. And see Sutton *v.* Dana, 15 Colo. 98, 25 Pac. 90. *Compare* Schideler *v.* Fisher, 13 Colo. App. 106, 57 Pac. 864.

Connecticut.— Warner Glove Co. *v.* Jennings, 58 Conn. 74, 19 Atl. 239; Smith *v.* Skeary, 47 Conn. 47; Kirtland *v.* Snow, 20 Conn. 23.

Delaware.— Sessinger *v.* Topkis, 1 Marv. 140, 40 Atl. 717; Stockley *v.* Horsey, 4 Houst. 603; Wharton *v.* Clements, 3 Del. Ch. 209.

District of Columbia.— Barnard *v.* Life Ins. Co., 4 Mackey 63; Clark *v.* Krause, 2 Mackey 559.

Florida.— McKeown *v.* Coagler, 18 Fla. 866; Holbrook *v.* Allen, 4 Fla. 87.

Georgia.— Simms *v.* Tidwell, 98 Ga. 686, 25 S. E. 555; Comer *v.* Allen, 72 Ga. 1; Carter *v.* Neal, 24 Ga. 346, 71 Am. Dec. 136; Savannah Bank *v.* Planters' Bank, 22 Ga. 466; Lavender *v.* Thomas, 18 Ga. 668; Mc-

exhaust or so reduce the assets of the debtor as to leave other creditors unpaid and without the means of collecting their claims, does not of itself "hinder, delay

Whorter *v.* Wright, 5 Ga. 555; Cameron *v.* Scudder, 1 Ga. 204; Davis *v.* Anderson, 1 Ga. 176; Eastman *v.* McAlpin, 1 Ga. 157.

Illinois.— Murray Nelson Co. *v.* Leiter, 190 Ill. 414, 60 N. E. 851, 83 Am. St. Rep. 142 [*affirming* 93 Ill. App. 176]; Williams *v.* Andrew, 185 Ill. 98, 56 N. E. 1041; Glover *v.* Lee, 140 Ill. 102, 29 N. E. 680; Hulse *v.* Mershon, 125 Ill. 52, 17 N. E. 50; Wood *v.* Clark, 121 Ill. 359, 12 N. E. 271 [*affirming* 21 Ill. App. 464]; Schroeder *v.* Walsh, 120 Ill. 403, 11 N. E. 70; Chicago, etc., R. Co. *v.* Watson, 113 Ill. 195; Welsch *v.* Werschem, 92 Ill. 115; Morris *v.* Tillson, 81 Ill. 607; Hessing *v.* McCloskey, 37 Ill. 341; Funk *v.* Staats, 24 Ill. 633; Cooper *v.* McClun, 16 Ill. 435; Cross *v.* Bryant, 3 Ill. 36; Eickstaedt *v.* Moses, 105 Ill. App. 634; Spalding *v.* Heideman, 96 Ill. App. 405; Cooke *v.* Peter, 93 Ill. App. 1; Wickler *v.* People, 68 Ill. App. 282; Taylor *v.* Smith, 68 Ill. App. 109; Oakford *v.* Dunlap, 63 Ill. App. 498; Locke *v.* Duncan, 47 Ill. App. 110; Sweet *v.* Scherber, 42 Ill. App. 237; Weir *v.* Dustin, 28 Ill. App. 605; Chicago Stamping Co. *v.* Hanchett, 25 Ill. App. 198; Holbrook *v.* First Nat. Bank, 10 Ill. App. 140; Storey *v.* Agnew, 2 Ill. App. 353. And see Williams *v.* Andrew, 185 Ill. 98, 59 N. E. 1041 [*affirming* 84 Ill. App. 289]; Dueber Watch Case Mfg. Co. *v.* Young, 155 Ill. 226, 40 N. E. 582 [*affirming* 54 Ill. App. 383]; Young *v.* Clapp, 147 Ill. 176, 32 N. E. 187, 35 N. E. 372; Francis *v.* Rankin, 84 Ill. 169; Stainbrook *v.* Duncan, 45 Ill. App. 344.

Indiana.— Owens *v.* Gascho, 154 Ind. 225, 56 N. E. 224; Levering *v.* Bimel, 146 Ind. 545, 45 N. E. 775; Rockland Co. *v.* Summerville, 139 Ind. 695, 39 N. E. 307; Thomas *v.* Johnson, 137 Ind. 244, 36 N. E. 893; Dice *v.* Irvin, 110 Ind. 561, 11 N. E. 488; O'Donald *v.* Constant, 82 Ind. 212; O'Connor *v.* Coats, 79 Ind. 596; Wilcoxon *v.* Annesley, 23 Ind. 285; Wynne *v.* Glidewell, 17 Ind. 446; Jones *v.* Gott, 10 Ind. 240; Stewart *v.* English, 6 Ind. 176; Anderson *v.* Smith, 5 Blackf. 395.

Iowa.— Meredith *v.* Schaap, (1901) 85 N. W. 628; Latrobe First Nat. Bank *v.* Garretson, 107 Iowa 196, 77 N. W. 856; Stroff *v.* Swafford, 81 Iowa 695, 47 N. W. 1023; Loomis *v.* Stewart, 75 Iowa 387, 39 N. W. 660; Southern White Lead Co. *v.* Hass, 73 Iowa 399, 33 N. W. 657, 35 N. W. 494; Aulman *v.* Aulman, 71 Iowa 124, 3 N. W. 240, 60 Am. Rep. 783; Garrett *v.* Burlington Plow Co., 70 Iowa 597, 29 N. W. 395, 59 Am. Rep. 461; Farwell *v.* Howard, 26 Iowa 381; Davis *v.* Gibbon, 24 Iowa 257; Lampson *v.* Arnold, 19 Iowa 479; Hutchinson *v.* Watkins, 17 Iowa 475; Buell *v.* Buckingham, 16 Iowa 284, 85 Am. Dec. 516; Johnson *v.* McGrew, 11 Iowa 151, 77 Am. Dec. 137; Cowles *v.* Ricketts, 1 Iowa 582. And see Thompson *v.* Zuckmayer, (1903) 94 N. W. 476; Cathcart *v.* Grieve, 104 Iowa 330, 73 N. W. 835; Johnson *v.* Johnson, 101 Iowa 405, 70 N. W. 598.

Kansas.— Smith-McCord Dry Goods Co. *v.* Carson, 59 Kan. 295, 52 Pac. 880; Hasie *v.* Connor, 53 Kan. 713, 37 Pac. 128; Bliss *v.* Couch, 46 Kan. 400, 26 Pac. 706; Voorhis *v.* Michaelis, 45 Kan. 255, 25 Pac. 592; Tootle *v.* Coldwell, 30 Kan. 125, 1 Pac. 329; Randall *v.* Shaw, 28 Kan. 419; Bishop *v.* Jones, 28 Kan. 680; Arn *v.* Hoersman, 26 Kan. 413; Campbell *v.* Warner, 22 Kan. 604; Avery *v.* Eastes, 18 Kan. 505; Cuendet *v.* Lahmer, 16 Kan. 527; Pettyjohn *v.* Newhart, 7 Kan. App. 64, 51 Pac. 969. And see Schram *v.* Taylor, 51 Kan. 547, 33 Pac. 315; Lewis *v.* Hughes, 49 Kan. 23, 30 Pac. 177; Emporia First Nat. Bank *v.* Ridenour, 46 Kan. 707, 718, 27 Pac. 150, 26 Am. St. Rep. 167.

Kentucky.— Kennaird *v.* Adams, 11 B. Mon. 102; Worland *v.* Kimberlin, 6 B. Mon. 608, 44 Am. Dec. 785; Reinhard *v.* Commonwealth Bank, 6 B. Mon. 252; Young *v.* Stallings, 5 B. Mon. 307; Marshall *v.* Hutchison, 5 B. Mon. 298; Ford *v.* Williams, 3 B. Mon. 550; Whitehead *v.* Woodruff, 11 Bush 209; Bergen *v.* Farmers, etc., Bank, 8 Ky. L. Rep. 613; Com. *v.* Campbell, 7 Ky. L. Rep. 746; Beard *v.* Runyan, 6 Ky. L. Rep. 514. See also Short *v.* Tinsley, 1 Metc. 397, 71 Am. Dec. 482.

Louisiana.— U. S. *v.* U. S. Bank, 8 Rob. 262, construing the law of Pennsylvania.

Maine.— Hanscom *v.* Buffum, 66 Me. 246; Ferguson *v.* Spear, 65 Me. 277; French *v.* Motley, 63 Me. 326; Hartshorn *v.* Eames, 31 Me. 93.

Maryland.—Thompson *v.* Williams, (1905) 60 Atl. 26; Baltimore City Com. Bank *v.* Kearns, (1905) 59 Atl. 1010; Nicholson *v.* Schmucker, 81 Md. 459, 32 Atl. 182; Rich *v.* Levy, 16 Md. 74; Glenn *v.* Grover, 3 Md. 212; Wheeler *v.* Stone, 4 Gill 38; Cole *v.* Albers, 1 Gill 412; State *v.* State Bank, 6 Gill & J. 205, 26 Am. Dec. 561; Hickley *v.* Farmers', etc., Bank, 5 Gill & J. 377; Anderson *v.* Tydings, 3 Md. Ch. 167, 8 Md. 427, 63 Am. Dec. 708; Powles *v.* Dilley, 2 Md. Ch. 119 [*affirmed* in 9 Gill 222]; Stewart *v.* Union Bank, 2 Md. Ch. 58 [*affirmed* in 7 Gill 439]; Malcolm *v.* Hall, 1 Md. Ch. 172. And see Stockbridge *v.* Franklin Bank, 86 Md. 189, 37 Atl. 645; Totten *v.* Brady, 54 Md. 170.

Massachusetts.— Traders' Nat. Bank *v.* Steere, 165 Mass. 387, 43 N. E. 189; Sawyer *v.* Levy, 162 Mass. 190, 38 N. E. 365; Train *v.* Kendall, 137 Mass. 366; Easton First Nat. Bank *v.* Smith, 133 Mass. 26; Atlantic Nat. Bank *v.* Tavener, 130 Mass. 407; Banfield *v.* Whipple, 14 Allen 13; Green *v.* Tanner, 8 Metc. 411; New England Mar. Ins. Co. *v.* Chandler, 16 Mass. 275; Thomas *v.* Goodwin, 12 Mass. 140; Widgery *v.* Haskell, 5 Mass. 144, 4 Am. Dec. 41; Hatch *v.* Smith, 5 Mass. 42. And see Giddings *v.* Sears, 115 Mass. 505; Burt *v.* Perkins, 9 Gray 317; Harrison *v.* Phillips Academy, 12 Mass. 456.

Michigan.— Michigan Trust Co. *v.* Comstock, 130 Mich. 572, 90 N. W. 331; Scripps *v.* Crawford, 123 Mich. 173, 81 N. W. 1098;

or defraud" creditors within the meaning of the general statutes on this subject.

Beckman *v.* Noble, 115 Mich. 523, 73 N. W. 803; Warner *v.* Littlefield, 89 Mich. 329, 50 N. W. 721; Eureka Iron, etc., Works *v.* Bresnahan, 66 Mich. 489, 33 N. W. 834; Jordan *v.* White, 38 Mich. 253; Hill *v.* Bowman, 35 Mich. 191; People *v.* Bristol, 35 Mich. 28. And see Geer *v.* Traders' Bank, 132 Mich. 215, 93 N. W. 437; Belding Sav. Bank *v.* Moore, 118 Mich. 150, 76 N. W. 368; Ferris *v.* McQueen, 94 Mich. 367, 54 N. W. 164; Sheldon *v.* Mann, 85 Mich. 265, 48 N. W. 573; Dalton *v.* Stiles, 74 Mich. 726, 42 N. W. 169; Whitfield *v.* Stiles, 57 Mich. 410, 24 N. W. 119; How *v.* Camp, Walk. 427.

Minnesota.— Mackellar *v.* Pillsbury, 48 Minn. 396, 51 N. W. 222; Berry *v.* O'Connor, 33 Minn. 29, 21 N. W. 840; Smith *v.* Deidrick, 30 Minn. 60, 14 N. W. 262; Vose *v.* Stickney, 19 Minn. 367.

Mississippi.— Harris *v.* Sledge, (1897) 21 So. 783; Holberg *v.* Jaffray, 64 Miss. 746, 2 So. 168; Richardson *v.* Marqueze, 59 Miss. 80, 42 Am. Rep. 353; Eldridge *v.* Phillipson, 58 Miss. 270; Savage *v.* Dowd, 54 Miss. 728; Summers *v.* Roos, 42 Miss. 749, 2 Am. Rep. 653; Stanton *v.* Green, 34 Miss. 576; Merrick *v.* Henderson, Walk. 485. See also Hyman *v.* Stadler, 63 Miss. 362.

Missouri.— Wood *v.* Porter, 179 Mo. 56, 77 S. W. 762; Wall *v.* Beedy, 161 Mo. 625, 61 S. W. 864; Crothers *v.* Busch, 153 Mo. 606, 55 S. W. 149; Bangs Milling Co. *v.* Burns, 152 Mo. 350, 53 S. W. 923; Alberger *v.* National Bank of Commerce, 123 Mo. 313, 27 S. W. 657; Jaffrey *v.* Mathews, 120 Mo. 317, 25 S. W. 187; Schroeder *v.* Bobbitt, 108 Mo. 289, 18 S. W. 1093; Sexton *v.* Anderson, 95 Mo. 373, 8 S. W. 564; Forrester *v.* Moore, 77 Mo. 651; Shelley *v.* Boothe, 73 Mo. 74, 39 Am. Rep. 481; Henderson *v.* Henderson, 55 Mo. 534; Kuykendall *v.* McDonald, 15 Mo. 416, 57 Am. Dec. 212; Murray *v.* Cason, 15 Mo. 378; Bell *v.* Thompson, 3 Mo. 84; Sammons *v.* O'Neill, 60 Mo. App. 530; W. W. Kendall Boot, etc., Co. *v.* Bain, 46 Mo. App. 581; Deering *v.* Collins, 38 Mo. App. 80; State *v.* Excelsior Distilling Co., 20 Mo. App. 21; Gaff *v.* Stern, 12 Mo. App. 115. And see Kingman *v.* Cornell-Tebbetts Mach., etc., Co., 150 Mo. 282, 51 S. W. 727; Alberger *v.* White, 117 Mo. 347, 23 S. W. 92; Scott Hardware Co. *v.* Riddle, 84 Mo. App. 275; Smith *v.* National R., etc., Exposition Assoc., 47 Mo. App. 462.

Montana.— Teitig *v.* Boesman, 12 Mont. 404, 31 Pac. 371.

Nebraska.— Blair State Bank *v.* Bunn, 61 Nebr. 464, 85 N. W. 527; Bennett *v.* McDonald, 59 Nebr. 234, 80 N. W. 826; Grand Island Banking Co. *v.* Costello, 45 Nebr. 119, 63 N. W. 376; Robinson Notion Co. *v.* Foot, 42 Nebr. 156, 60 N. W. 316; Hunt *v.* Huffman, 41 Nebr. 244, 59 N. W. 889; Meyer *v.* Union Bag, etc., Co., 41 Nebr. 67, 59 N. W. 696; John V. Farwell Co. *v.* Wright, 38 Nebr. 445, 56 N. W. 984; Jones *v.* Loree, 37 Nebr. 816, 56 N. W. 390 [*overruling* Bonns *v.* Carter, 22 Nebr. 495, 35 N. W. 394]; Kilpatrick-Koch Dry Goods Co. *v.* McPheely, 37 Nebr. 800, 56 N. W. 389; Costello *v.* Chamberlain, 36 Nebr. 45, 53 N. W. 1034; Brown *v.* Williams, 34 Nebr. 376, 51 N. W. 851; Davis *v.* Scott, 27 Nebr. 642, 43 N. W. 407; Elwood *v.* May, 24 Nebr. 373, 38 N. W. 793; Rothell *v.* Grimes, 22 Nebr. 526, 35 N. W. 392. And see Tackaberry *v.* Gilmore, 57 Nebr. 450, 78 N. W. 32; Smith *v.* Bowen, 51 Nebr. 245, 70 N. W. 949; Kavanaugh *v.* Oberfelder, 37 Nebr. 647, 56 N. W. 316 (construing Nebr. Comp. St. c. 6, § 42).

New Hampshire.— Osgood *v.* Thorne, 63 N. H. 375; Buffum *v.* Green, 5 N. H. 71, 20 Am. Dec. 562.

New Jersey.— Tillou *v.* Britton, 9 N. J. L. 120; Thompson *v.* Williamson, 67 N. J. Eq. 212, 58 Atl. 602; Green *v.* McCrane, 55 N. J. Eq. 436, 37 Atl. 318; Low *v.* Wortman, 44 N. J. Eq. 193, 7 Atl. 654, 14 Atl. 586; Uhl *v.* Beatty, (Ch. 1885) 3 Atl. 524; Essex *v.* Lindsley, 41 N. J. Eq. 189, 3 Atl. 391; Metropolis Nat. Bank *v.* Sprague, 20 N. J. Eq. 13; Coley *v.* Coley, 14 N. J. Eq. 350; Jones *v.* Naughright, 10 N. J. Eq. 298; Garr *v.* Hill, 9 N. J. Eq. 210.

New York.—Dodge *v.* McKechnie, 156 N. Y. 514, 51 N. E. 268; Delaney *v.* Valentine, 154 N. Y. 692, 49 N. E. 65; Tompkins *v.* Hunter, 149 N. Y. 117, 43 N. E. 532; Galle *v.* Tode, 148 N. Y. 270, 42 N. E. 673 [*affirming* 74 Hun 542, 26 N. Y. Suppl. 633]; Maass *v.* Falk, 146 N. Y. 34, 42, 40 N. E. 504; Abegg *v.* Bishop, 142 N. Y. 286, 289, 36 N. E. 1058; Central Nat. Bank *v.* Seligman, 138 N. Y. 435, 441, 34 N. E. 196; Talcott *v.* Harder, 119 N. Y. 536, 23 N. E. 1056; Fuller Electrical Co. *v.* Lewis, 101 N. Y. 674, 5 N. E. 437; Murphy *v.* Briggs, 89 N. Y. 446; Spaulding *v.* Strang, 37 N. Y. 135; Seymour *v.* Wilson, 19 N. Y. 417; Leavitt *v.* Blatchford, 17 N. Y. 521; Stackhouse *v.* Holden, 66 N. Y. App. Div. 423, 73 N. Y. Suppl. 203; Hoffman *v.* Susemihl, 15 N. Y. App. Div. 405, 44 N. Y. Suppl. 52; Drury *v.* Wilson, 4 N. Y. App. Div. 232, 38 N. Y. Suppl. 538; Gomez *v.* Hagaman, 84 Hun 148, 32 N. Y. Suppl. 453; London *v.* Martin, 79 Hun 229, 29 N. Y. Suppl. 396 [*affirmed* in 149 N. Y. 586, 44 N. E. 1125]; Vietor *v.* Levy, 72 Hun 263, 25 N. Y. Suppl. 644 [*affirmed* in 148 N. Y. 739, 42 N. E. 726]; Bishop *v.* Stebbins, 41 Hun 243; Swift *v.* Hart, 35 Hun 128; Jewett *v.* Noteware, 30 Hun 194; Hale *v.* Stewart, 7 Hun 591; Archer *v.* O'Brien, 7 Hun 146; Auburn Exch. Bank *v.* Fitch, 48 Barb. 344; Brett *v.* Catlin, 47 Barb. 404; Carpenter *v.* Muren, 42 Barb. 300; Dunckel *v.* Failing, 1 Silv. Sup. 543, 5 N. Y. Suppl. 504; Sweetser *v.* Smith, 5 N. Y. Suppl. 378, 22 Abb. N. Cas. 319 note; Citizens' Nat. Bank *v.* Riddell, 2 N. Y. Suppl. 331; Hauslet *v.* Vilmar, 2 Abb. N. Cas. 222; Laidlaw *v.* Gilmore, 47 How. Pr. 67; Waterbury *v.* Sturtevant, 18 Wend. 353; Wilder *v.* Winne, 6 Cow. 284; Murray *v.* Riggs, 15 Johns. 571; Phœnix *v.* Dey, 5 Johns. 412; Wilkes *v.* Ferris, 5 Johns. 335, 4 Am. Dec. 364; Wil-

The transaction "does not deprive other creditors of any legal right, for they have

liams *v.* Brown, 4 Johns. Ch. 682; McMenomy *v.* Roosevelt, 3 Johns. Ch. 446; Hendricks *v.* Robinson, 2 Johns. Ch. 283 [*affirmed* in 17 Johns. 438].

North Carolina.— Guggenheimer *v.* Brookfield, 90 N. C. 232; Cheek *v.* Davis, 26 N. C. 284; Hafner *v.* Irwin, 23 N. C. 490; Sellers *v.* Bryan, 17 N. C. 358.

North Dakota.— Cutter *v.* Pollock, 4 N. D. 205, 59 N. W. 1062, 50 Am. St. Rep. 644, 25 L. R. A. 377. And see Lockren *v.* Rustan, 9 N. D. 43, 81 N. W. 60.

Ohio.— Stevenson *v.* Agry, 7 Ohio, Pt. II, 247; Barr *v.* Hatch, 3 Ohio 527; Hauel *v.* Mintzer, 1 Handy 375, 12 Ohio Dec. (Reprint) 191; Sack *v.* Hemann, 6 Ohio Dec. (Reprint) 1104, 10 Am. L. Rec. 483; Grote *v.* Meyer, 6 Ohio Dec. (Reprint) 1025, 9 Am. L. Rec. 623.

Oklahoma.— Brittain *v.* Burnham, 9 Okla. 522, 60 Pac. 241; Jaffray *v.* Wolfe, 1 Okla. 312, 33 Pac. 945.

Oregon.— Hesse *v.* Barrett, 41 Oreg. 202, 68 Pac. 751; Ladd *v.* Johnson, 32 Oreg. 195, 49 Pac. 756; Sabin *v.* Wilkins, 31 Oreg. 450, 48 Pac. 425, 37 L. R. A. 465; Inman *v.* Sprague, 30 Oreg. 321, 47 Pac. 826; Marquam *v.* Sengfelder, 24 Oreg. 2, 32 Pac. 676 [*following* Kruse *v.* Prindle, 8 Oreg. 158].

Pennsylvania.— Snayberger *v.* Fahl, 195 Pa. St. 336, 45 Atl. 1065, 78 Am. St. Rep. 818; Candee's Appeal, 191 Pa. St. 644, 43 Atl. 1093; Penn Plate Glass Co. *v.* Jones, 189 Pa. St. 290, 42 Atl. 189; Braden *v.* O'Neil, 183 Pa. St. 462, 38 Atl. 1023, 63 Am. St. Rep. 761; Werner *v.* Zierfuss, 162 Pa. St. 360, 29 Atl. 737; Kitchen *v.* McCloskey, 150 Pa. St. 376, 24 Atl. 688, 30 Am. St. Rep. 811; Lake Shore Banking Co. *v.* Fuller, 110 Pa. St. 156, 1 Atl. 731; Walker *v.* Marine Nat. Bank, 98 Pa. St. 574; Bentz *v.* Rockey, 69 Pa. St. 71, 77; Keen *v.* Kleckner, 42 Pa. St. 529; York County Bank *v.* Carter, 38 Pa. St. 446, 80 Am. Dec. 494; Uhler *v.* Maulfair, 23 Pa. St. 481 [*overruling* Ashmead *v.* Hean, 13 Pa. St. 584]; Covanhovan *v.* Hart, 21 Pa. St. 495, 60 Am. Dec. 57; Worman *v.* Wolfersberger, 19 Pa. St. 59 [*limiting* Summer's Appeal, 16 Pa. St. 169]; Davis *v.* Charles, 8 Pa. St. 82; Blakley's Appeal, 7 Pa. St. 449; Russell's Appeal, 2 Walk. 363; Wilt *v.* Franklin, 1 Binn. 502, 2 Am. Dec. 474 (per Tilghman, C. J.); Meyers *v.* Meyers, 24 Pa. Super. Ct. 603; Harman *v.* Reese, 1 Browne 11; Hammett *v.* Harrison, 1 Phila. 349.

Rhode Island.— Coates *v.* Wilson, 20 R. I. 106, 37 Atl. 537; Elliott *v.* Benedict, 13 R. I. 463.

South Carolina.— McElwee *v.* Kennedy, 56 S. C. 154, 34 S. E. 86; Perkins *v.* Douglass, 52 S. C. 129, 29 S. E. 400; Magovern *v.* Richard, 27 S. C. 272, 3 S. E. 340; McPherson *v.* McPherson, 21 S. C. 261; Smith *v.* Henry, 1 Hill 16; Cureton *v.* Doby, 10 Rich. Eq. 411, 73 Am. Dec. 96; Bird *v.* Aitken, Rice Eq. 73. And see Sloan *v.* Hunter, 56 S. C. 385, 34 S. E. 658, 879, 76 Am. St. Rep. 551; Thorpe *v.* Thorpe, 12 S. C. 154; Maples *v.* Maples, Rice Eq. 300.

South Dakota.— Church *v.* Foley, 10 S. D. 74, 71 N. W. 759; Jewett *v.* Downs, 6 S. D. 319, 60 N. W. 76; Sandwich Mfg. Co. *v.* Max, 5 S. D. 125, 58 N. W. 14, 24 L. R. A. 524.

Tennessee.— Nelson *v.* Kinney, 93 Tenn. 428, 25 S. W. 100; Bennet *v.* Union Bank, 5 Humphr. 612; Warren *v.* Hinson, (Ch. App. 1899) 52 S. W. 498; Feder *v.* Erwin, (Ch. App. 1896) 38 S. W. 446, 36 L. R. A. 335. And see McGrew *v.* Hancock, (Ch. App. 1899) 52 S. W. 500.

Texas.— Wallis *v.* Schneider, 79 Tex. 479, 15 S. W. 492; Owens *v.* Clark, 78 Tex. 547, 15 S. W. 101; Black *v.* Vaughan, 70 Tex. 47, 7 S. W. 604; Oppenheimer *v.* Halff, 68 Tex. 409, 4 S. W. 562; Scott *v.* McDaniel, 67 Tex. 315, 3 S. W. 291; Smith *v.* Whitfield, 67 Tex. 124, 2 S. W. 822; Edwards *v.* Dickson, 66 Tex. 613, 2 S. W. 718; Ellis *v.* Valentine, 65 Tex. 532; Lewy *v.* Fischl, 65 Tex. 311; Greenleve *v.* Blum, 59 Tex. 124; Iglehart *v.* Willis, 58 Tex. 306; Frazer *v.* Thatcher, 49 Tex. 26; Thornton *v.* Tandy, 39 Tex. 544; Moore *v.* Robinson, (Civ. App. 1903) 75 S. W. 890; Bowie *v.* Hedrick, (Civ. App. 1896) 35 S. W. 317; Scarborough *v.* Hilliard, (Civ. App. 1894) 28 S. W. 231; Martin-Brown Co. *v.* Siebe, 6 Tex. Civ. App. 232, 26 S. W. 327; Reynolds *v.* Weinman, (Civ. App. 1894) 25 S. W. 33; Butler *v.* Sanger, 4 Tex. Civ. App. 411, 23 S. W. 487; California Bank *v.* Marshall, 1 Tex. Civ. App. 704, 23 S. W. 246 [writ of error *denied* in (Sup. 1893) 22 S. W. 6]; Loeb *v.* Leon, 2 Tex. Unrep. Cas. 445; Williams *v.* Perry, 3 Tex. App. Civ. Cas. § 209; Numsen *v.* Ellis, 3 Tex. App. Civ. Cas. § 134; Gamble *v.* Talbot, 2 Tex. App. Civ. Cas. § 729; Thompson *v.* Hervey, 2 Tex. App. Civ. Cas. § 506. See also Moore *v.* Robinson, (Civ. App. 1903) 75 S. W. 890; Bowie *v.* Hedrick, (Civ. App. 1896) 35 S. W. 317.

Utah.— Henderson *v.* Adams, 15 Utah 30, 48 Pac. 398.

Vermont.— Marsh *v.* Davis, 24 Vt. 363; Morse *v.* Slason, 13 Vt. 296; Lyon *v.* Rood, 12 Vt. 233.

Virginia.— Johnson *v.* Lucas, 103 Va. 36, 48 S. E. 497; Barton *v.* Brent, 87 Va. 385, 13 S. E. 29; Paul *v.* Baugh, 85 Va. 955, 9 S. E. 329; Lucas *v.* Clafflin, 76 Va. 269; Williams *v.* Lord, 75 Va. 390; McCullough *v.* Sommerville, 8 Leigh 415; Skipwirth *v.* Cunningham, 8 Leigh 271, 31 Am. Dec. 642.

Washington.— Vietor *v.* Glover, 17 Wash. 37, 48 Pac. 788, 40 L. R. A. 297; Langert *v.* David, 14 Wash. 389, 44 Pac. 875; West Coast Grocery Co. *v.* Stinson, 13 Wash. 255, 43 Pac. 35; Samuel *v.* Kittenger, 6 Wash. 261, 33 Pac. 509; Turner *v.* Iowa Nat. Bank, 2 Wash. 192, 26 Pac. 256.

West Virginia.— See Frank *v.* Zeigler, 46 W. Va. 614, 33 S. E. 761; Harden *v.* Wagner, 22 W. Va. 356.

no right to a priority";[59] and it "is not fraudulent either in law or in fact."[60] A creditor has a legal right to influence his debtor to give him a preference,[61] and "violates no rule of law when he takes payment or security for his demand, although

Wisconsin.— Haring *v.* Hamilton, 107 Wis. 112, 82 N. W. 698; Erdall *v.* Atwood, 79 Wis. 1, 47 N. W. 1124; Stevens *v.* Breen, 75 Wis. 595, 44 N. W. 645; Carter *v.* Rewey, 62 Wis. 552, 22 N. W. 129; Allen *v.* Kennedy, 49 Wis. 549, 5 N. W. 906; Gage *v.* Chesebro, 49 Wis. 486, 5 N. W. 881. And see Kickbusch *v.* Corwith, 108 Wis. 634, 85 N. W. 148; Greene, etc., Co. *v.* Remington, 72 Wis. 648, 39 N. W. 767, 4 N. W. 643; Ingram *v.* Osborn, 70 Wis. 184, 35 N. W. 304; Landauer *v.* Vietor, 69 Wis. 434, 34 N. W. 229; Carter *v.* Rewey, 62 Wis. 552, 22 N. W. 129.

United States.— Bamberger *v.* Schoolfield, 160 U. S. 149, 16 S. Ct. 225, 40 L. ed. 374 (applying the law of Alabama); Davis *v.* Schwartz, 155 U. S. 631, 15 S. Ct. 237, 39 L. ed. 289; Huntley *v.* Kingman, 152 U. S. 527, 14 S. Ct. 688, 38 L. ed. 540; Chicago Union Bank *v.* Kansas City Bank, 136 U. S. 223, 10 S. Ct. 1013, 34 L. ed. 341 [construing the Missouri statutes, and *overruling* Martin *v.* Hausman, 14 Fed. 160, and cases following it]; Jewell *v.* Knight, 123 U. S. 426, 8 S. Ct. 193, 31 L. ed. 190; People's Sav. Bank *v.* Bates, 120 U. S. 556, 7 S. Ct. 679, 30 L. ed. 754; Stewart *v.* Dunham, 115 U. S. 61, 5 S. Ct. 1163, 29 L. ed. 329 (construing the law of Mississippi); Tompkins *v.* Wheeler, 16 Pet. 106, 10 L. ed. 903; Clark *v.* White, 12 Pet. 178, 9 L. ed. 1046; Magniac *v.* Thompson, 7 Pet. 348, 8 L. ed. 709; Marbury *v.* Brooks, 7 Wheat. 556, 5 L. ed. 522, 11 Wheat. 78, 6 L. ed. 423; Foster *v.* McAlester, 114 Fed. 145, 52 C. C. A. 107; Kemp *v.* National Bank of Republic, 109 Fed. 48, 48 C. C. A. 213 (applying the law of Virginia); Ontario Bank *v.* Hurst, 103 Fed. 231, 43 C. C. A. 193; Repauno Chemical Co. *v.* Victor Hardware Co., 101 Fed. 948, 42 C. C. A. 106; Voorhees *v.* Blanton, 83 Fed. 234; Wilson *v.* Jones, 76 Fed. 484 (applying the law of Virginia); Randolph *v.* Allen, 73 Fed. 23, 19 C. C. A. 353 (applying the law of Texas); Williams *v.* Simons, 70 Fed. 40, 16 C. C. A. 628; Strauss *v.* Abrahams, 32 Fed. 310; Hills *v.* Stockwell, etc., Furniture Co., 23 Fed. 432; Smith *v.* Craft, 12 Fed. 856, 11 Biss. 347 [appeal *dismissed* in 123 U. S. 436, 8 S. Ct. 196, 31 L. ed. 267]; Simms *v.* Morse, 2 Fed. 325, 4 Hughes 579. See also Kellog *v.* Richardson, 19 Fed. 70 (construing the law of Missouri); Walker *v.* Adair, 29 Fed. Cas. No. 17,064, 1 Bond 158.

England.— Maskelyne *v.* Smith, [1902] 2 K. B. 158, 71 L. J. K. B. 476, 86 L. T. Rep. N. S. 832, 9 Manson 139 [*disapproving* Spencer *v.* Slater, 4 Q. B. 13, 48 L. J. Q. B. 204, 39 L. T. Rep. N. S. 424, 27 Wkly. Rep. 134]; Alton *v.* Harrison, L. R. 4 Ch. 622, 38 L. J. Ch. 669, 21 L. T. Rep. N. S. 282, 17 Wkly. Rep. 1034; Middleton *v.* Pollock, 2 Ch. D. 104, 45 L. J. Ch. 293; Wood *v.* Dixie, 7 Q. B. 892, 9 Jur. 796, 53 E. C. L. 892; Caillaud *v.* Estwick, 2 Anstr. 381, 5 T. R. 420; Goss *v.* Neale, 5 Moore C. P. 19, 16 E. C. L. 387; Pickstock *v.* Lyster, 3 M. & S. 371, 16 Rev. Rep. 300; Holbird *v.* Anderson, 5 T. R. 235. See also Meux *v.* Howell, 4 East 1.

Canada.— See Atty.-Gen. *v.* Harmer, 16 Grant Ch. (U. C.) 533; McMaster *v.* Clare, 7 Grant Ch. (U. C.) 550, per Blake, C. See also Ashley *v.* Brown, 17 Ont. App. 500; Gurofski *v.* Harris, 27 Ont. 201 [*affirmed* in 23 Ont. App. 717]; Daglish *v.* McCarthy, 19 Grant Ch. (U. C.) 578; White *v.* Stevens, 7 U. C. Q. B. 340.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 369, 370, 382, 385.

Reason of rule.— Dana *v.* Stanford, 10 Cal. 269, 278. See also Campbell *v.* Colorado Coal, etc., Co., 9 Colo. 60, 10 Pac. 248; Dalton *v.* Stiles, 74 Mich. 726, 42 N. W. 169; Braden *v.* O'Neil, 183 Pa. St. 462, 38 Atl. 1023, 63 Am. St. Rep. 761; Covanhovan *v.* Hart, 21 Pa. St. 495, 500, 60 Am. Dec. 57.

"The tests turn not upon the right of the creditor to prefer, nor on the failure of the non-preferred creditor to secure, his claim, but upon the honesty of the parties to the transaction in simply giving and receiving a preference and the absence of any intent to secure a benefit for the debtor or to hinder or delay his other creditors." Green *v.* McCrane, 55 N. J. Eq. 436, 446, 37 Atl. 318. Therefore in a suit to set aside a preferential conveyance the inquiry should be whether the act done was a *bona fide* transaction or a mere trick or contrivance to defeat creditors. Stewart *v.* English, 6 Ind. 176; Atty.-Gen. *v.* Harmer, 16 Grant Ch. (U. C.) 533.

Transfer of property in excess of debt see *supra*, VIII, B, E.

Retention of possession by debtor see *supra*, IX.

Reservations for debtor's benefit see *supra*, X.

Preferences among creditors of decedent see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 544 *et seq.*

Preferences by corporations see CORPORATIONS, 10 Cyc. 1246; FOREIGN CORPORATIONS, 19 Cyc. 1209, 1249.

59. Uhler *v.* Maulfair, 23 Pa. St. 481; Johnson *v.* Lucas, 103 Va. 36, 48 S. E. 497.

60. Uhler *v.* Maulfair, 23 Pa. St. 481.

61. Bangs Milling Co. *v.* Burns, 152 Mo. 350, 53 S. W. 923; Candee's Appeal, 191 Pa. St. 644, 43 Atl. 1093; Foster *v.* McAlester, 114 Fed. 145, 52 C. C. A. 107. And see Mabbett *v.* White, 12 N. Y. 442; West Coast Grocery Co. *v.* Stinson, 13 Wash. 255, 43 Pac. 35.

Payment by creditor to obtain preference. — The fact that the creditor pays the debtor a sum of money to obtain a conveyance of property to secure the debt does not make the preference fraudulent, where the value of the property conveyed does not equal or exceed the amount of the debt; for the payment does not deprive the unsecured creditors of any-

others are thereby deprived of all means of obtaining satisfaction of their equally meritorious claims."[62] While preferences by insolvent debtors are not favored in courts of equity,[63] an honest preference is as valid in equity as at law.[64] Aside from any fraudulent intent the private motives of a debtor in giving a preference to a creditor are wholly immaterial.[65] Thus it makes no difference whether or not the creditor preferred was demanding payment,[66] or whether the preference was made by reason of the fact that other creditors were pressing their demands against the debtor.[67] And the fact that the debtor knows or expects that the preferred creditor will make some provision for the former's family out of the property taken for the debt will not make the preference fraudulent if there is no agreement that any such provision shall be made.[68] In brief, when the result of any given conveyance by a debtor to one of his creditors is to appropriate the property conveyed, at a fair valuation, to the payment of an honest debt, the transaction does not fall within the prohibition of the statute as to fraudulent

thing that they otherwise could claim, but on the contrary increases the remaining assets of the debtor. Bangs Milling Co. *v.* Burns, 152 Mo. 350, 53 S. W. 923.

62. Wheaton *v.* Neville, 19 Cal. 41; Dana *v.* Stanfords, 10 Cal. 269. And see Williams *v.* Andrew, 185 Ill. 98, 56 N. E. 1041 [*affirming* 84 Ill. App. 289]; Gray *v.* St. John, 35 Ill. 222; Storey *v.* Agnew, 2 Ill. App. 353; Ellis *v.* Valentine, 65 Tex. 532.

63. Williams *v.* Brown, 4 Johns. Ch. (N. Y.) 682; Woonsocket Rubber Co. *v.* Falley, 30 Fed. 808.

64. *Georgia.*— Lavender *v.* Thomas, 18 Ga. 668.

Maryland.— Crawford *v.* Austin, 34 Md. 49.

Mississippi.— Agricultural Bank *v.* Dorsey, Freem. 338.

New Jersey.— Green *v.* McCrane, 55 N. J. Eq. 436, 37 Atl. 318.

New York.— Williams *v.* Brown, 4 Johns. Ch. 682.

Ohio.— Hauel *v.* Mintzer, 1 Handy 375, 12 Ohio Dec. (Reprint) 191.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 369, 370, 382, 385; and other cases cited *supra*, note 58.

65. *Alabama.*— Bray *v.* Ely, 105 Ala. 553, 17 So. 180; Bates *v.* Vandiver, 102 Ala. 249, 14 So. 631; Kilgore *v.* Stoner, (1892) 12 So. 60 (preference to debtor's wife); Birmingham First Nat. Bank *v.* Smith, 93 Ala. 97, 9 So. 548.

Illinois.— Wickler *v.* People, 68 Ill. App. 282.

Kentucky.— Young *v.* Stallings, 5 B. Mon. 307.

Maryland.—Crawford *v.* Austin, 34 Md. 49.

New York.— National Park Bank *v.* Whitmore, 104 N. Y. 297, 10 N. E. 524; Grover *v.* Wakeman, 11 Wend. 187, 25 Am. Dec. 624.

North Dakota.— See Lockren *v.* Rustan, 9 N. D. 43, 81 N. W. 60.

Ohio.— Barr *v.* Hatch, 3 Ohio 527, where the debtor's motive was to prevent sacrifice of his property.

South Carolina.— Cureton *v.* Doby, 10 Rich. Eq. 411, 73 Am. Dec. 96 [*followed* in Thorpe *v.* Thorpe, 12 S. C. 154].

Tennessee.— Jones *v.* Cullen, 100 Tenn. 1, 42 S. W. 873.

Texas.— Greenleve *v.* Blum, 59 Tex. 124.

United States.— Marbury *v.* Brooks, 7 Wheat. 556, 5 L. ed. 522, 11 Wheat. 78, 6 L. ed. 423; Smith *v.* Craft, 17 Fed. 705 [appeal *dismissed* in 123 U. S. 436, 8 S. Ct. 196, 31 L. ed. 267].

England.— Wood *v.* Dixie, 7 Q. B. 892, 9 Jur. 796, 53 E. C. L. 892.

Canada.— Atty.-Gen. *v.* Harmer, 16 Grant Ch. (U. C.) 533; McMaster *v.* Clare, 7 Grant Ch. (U. C.) 550, per Blake, C.

See also *infra*, XI, H.

"Preferences are no doubt always made from secret motives or inducements operating upon the mind of the grantor, but equity does not inquire into them, if the debts preferred are in good faith, and all the property of the grantor, without reservation, is dedicated to the use and benefit of creditors." Crawford *v.* Austin, 34 Md. 49, 51.

To prevent prosecution for felony.— It is no objection to the validity of a preferential assignment that it was made by the grantor and received by the grantee as trustee, in the hope and with a view of preventing prosecution for a felony connected with his transactions with his creditors; if the preferred creditors have done nothing to excite that hope, and the assignment was made without their knowledge or concurrence at the time of its execution, and without a knowledge of the motives which influenced the debtor, or was not afterward assented to by them, under some engagement, express or implied, to suppress or forbear the prosecution. Marbury *v.* Brooks, 7 Wheat. (U. S.) 556, 5 L. ed. 522, 11 Wheat. (U. S.) 78, 6 L. ed. 423 [*followed* in Jones *v.* Cullen, 100 Tenn. 1, 42 S. W. 873]. Indeed a promise by the preferred creditor to compound the debtor's felony will not avoid the preference as to other creditors. See *infra*, XI, I, 5.

66. McFadden *v.* Ross, 126 Ind. 341, 26 N. E. 78.

67. McAllister *v.* Honea, 71 Miss. 256, 14 So. 264. See also *infra*, XI, H, 5.

68. Young *v.* Stallings, 5 B. Mon. (Ky.) 307; Hesse *v.* Barrett, 41 Oreg. 202, 68 Pac. 751; McPherson *v.* McPherson, 21 S. C. 261; Cureton *v.* Doby, 10 Rich. Eq. (S. C.) 411, 73 Am. Dec. 96.

As to reservations for grantor's benefit see *supra*, X.

conveyances.[69] Under the foregoing principles a transfer of property to a preferred creditor in payment *pro tanto* of the debtor's obligation is valid as against other creditors.[70] Since a general creditor of a fraudulent grantor has the right by filing a bill to avoid the conveyance to acquire a lien on the property superior to that of a subsequent judgment debtor,[71] and since the parties may voluntarily accomplish that which the court would compel,[72] the general creditor may accept from the grantor a mortgage on the property fraudulently conveyed, and may foreclose it by bill in equity making the fraudulent grantees parties. In such a transaction there is nothing of which the subsequent judgment creditor can complain.[73]

B. Statutory Regulations — 1. In General.[74] The common-law right of a debtor to prefer creditors has in some states been affirmed by statute.[75] On the other hand provisions limiting and restricting the right to give preferences are contained in the Federal Bankruptcy Act,[76] the state insolvency laws,[77] the statutes relating to assignments for the benefit of creditors,[78] and other legislation designed to enforce a just and equitable distribution of a debtor's property among his creditors;[79] but in cases not falling within the scope of these enactments,

69. Bangs Milling Co. *v.* Burns, 152 Mo. 350, 53 S. W. 923.

Illustrations.— The fact that an insolvent debtor was induced by his counsel to prefer a creditor represented by the same counsel instead of another creditor, in order that such other creditor should be forced to purchase the property, does not invalidate the preference. Martin-Brown Co. *v.* Siebe, 6 Tex. Civ. App. 232, 26 S. W. 327. It is not a fraud on unsecured creditors for a creditor secured by mortgage to waive his lien so that the mortgagor may apply the property to pay another creditor. Hooker *v.* Sutcliff, 71 Miss. 792, 15 So. 140. A creditor who holds a note due his insolvent debtor as security for his debt, and who surrenders it at the debtor's request to another *bona fide* creditor of the debtor, does not thereby commit a fraud on other creditors that will *per se* render void a subsequent transfer of property by the debtor to him in payment of his debt, if the note was not surrendered in contemplation of the property being turned over to him. Tennent, etc., Shoe Co. *v.* Partridge, 82 Tex. 329, 18 S. W. 310 [*distinguishing* Seligson *v.* Brown, 61 Tex. 180]. An agreement that a debtor shall execute a chattel mortgage upon his entire stock of goods, but reserving the right to withdraw a certain amount of goods to be turned over to another creditor in payment of a claim conceded to be just, is not fraudulent as against other creditors, and a chattel mortgage executed and delivered under such agreement is not thereby rendered fraudulent. First Nat. Bank *v.* North, 2 S. D. 480, 51 N. W. 96. One of two firms who had agreed to pro-rate their losses on common debtors transferred a note of such a debtor to a third person, who was a director in the firm, but who had no knowledge of the agreement. The debtor, becoming insolvent, preferred the third person in a chattel mortgage. It was held that the agreement did not invalidate the preference, it not being shown that the latter firm was insolvent, as the remedy of the former firm was for a breach of the agreement. Martin-Brown Co. *v.* Siebe, 6 Tex. Civ. App. 232, 26 S. W. 327.

70. Dawson *v.* Flash, 97 Ala. 539, 12 So. 67; Ullman *v.* Myrick, 93 Ala. 532, 8 So. 410.

71. See *infra*, XIV, C, E.

72. See *supra*, II, B, 17.

73. Battle *v.* Reid, 68 Ala. 149.

74. See *infra*, XI, D, 2, a, note 2; XI, G.

75. See Priest *v.* Brown, 100 Cal. 626, 35 Pac. 323 [*citing* Cal. Code Civ. Proc. § 3433]; Brittain *v.* Burnham, 9 Okla. 522, 60 Pac. 241 [*citing* St. (1893) § 2660]; First Nat. Bank *v.* North, 2 S. D. 480, 51 N. W. 96 [*citing* Comp. Laws, § 4653]; Frees *v.* Baker, 81 Tex. 216, 16 S. W. 900, 13 L. R. A. 340 [*citing* Tex. Rev. St. art. 2365].

76. See Bankruptcy, 5 Cyc. 369.

77. See, generally, Insolvency.

78. See Assignments For Benefit of Creditors, 4 Cyc. 121 *et seq.*, 163, 166 *et seq.*

79. **In Louisiana** it seems that under the provisions of the civil code all preferences are prohibited except payments in money. See Johnson *v.* Leavy, 109 La. 1036, 34 So. 68; Petetin *v.* His Creditors, 51 La. Ann. 1660, 26 So. 471; Minge *v.* Barbre, 51 La. Ann. 1285, 26 So. 180; Appleby *v.* Lehman, 51 La. Ann. 473, 25 So. 132; H. T. Simon-Gregory Dry Goods Co. *v.* Newman, 50 La. Ann. 338, 23 So. 329; Newman *v.* Baer, 50 La. Ann. 323, 23 So. 279; Prevost *v.* Walther, 48 La. Ann. 227, 19 So. 249; Block *v.* Marks, 47 La. Ann. 107, 16 So. 649; Newman *v.* Mahoney, 44 La. Ann. 423, 10 So. 766; Pochelu *v.* Catonnet, 40 La. Ann. 327, 4 So. 74; Haas *v.* Haas, 35 La. Ann. 885; Lovell *v.* Payne, 30 La. Ann. 511; De Greck *v.* Murphy, 26 La. Ann. 296; Merchants' Mut. Ins. Co. *v.* Louisiana State Mut. Ins. Co., 23 La. Ann. 800; Benit *v.* Benit, 18 La. Ann. 675; Xigues *v.* Rivas, 16 La. Ann. 402 (holding that the payments of just debts in money are valid, although the debtor is insolvent and the fact is known to the creditor); Ellis *v.* Fisher, 10 La. Ann. 482; Stone *v.* Kidder, 6 La. Ann. 552; Florance *v.* Nolan, 4 La. Ann. 329; De Blanc *v.* Martin, 2 Rob. 38; Dwight *v.* Bemiss, 16 La. 145; Muse *v.* Yarborough, 11 La. 521; Fennessy *v.* Gonsoulin, 11 La. 419, 30 Am. Dec. 720; Zacharie *v.* Buckman, 8 La. 305; Ingham *v.* Thomas,

preferences are valid as stated above.[80] In some states preferences given in contemplation of insolvency are declared to inure to the benefit of all the creditors, and express provision is made for enforcing the rights thus given.[81] But under such statutes it has been held that a preference otherwise unobjectionable can be assailed only in proceedings provided for by the statute itself, and that if not thus attacked it remains valid as at common law.[82]

2. CONSTITUTIONALITY. A statute declaring that all transfers of property which are made for the purpose of preferring creditors or which would have that effect, whether made by a solvent or insolvent debtor, shall be illegal and void and that the preferred creditors shall share only ratably in the distribution of the debtor's assets, has been held unconstitutional in that it deprives a solvent debtor of his property rights.[83]

C. What Law Governs.[84] The validity of a preferential transfer of real estate is determined by the law of the jurisdiction where the property is situated and not by that of the jurisdiction where the preferential contract was made or the instrument of transfer executed.[85] But the validity of a preferential sale of per-

6 La. 82; De Blanc *v.* De Blanc, 4 La. 419; Taylor *v.* Knox, 2 La. 16; Saul *v.* His Creditors, 5 Mart. N. S. 569, 16 Am. Dec. 212; Misotiere *v.* Coignard, 3 Mart. 561. "The property of the debtor is the common pledge of his creditors, and any arrangement, whether through the machinery of the courts, or otherwise, whereby the debtor unites with one creditor to give such creditor an advantage over others, is in violation of the prohibitions of the law, and will not be permitted to stand." Minge *v.* Barbre, 51 La. Ann. 1285, 1290, 26 So. 180. *Compare* Sentell *v.* Hewitt, 49 La. Ann. 1021, 22 So. 242, holding that under a revocatory action, a transfer by an insolvent debtor to one creditor will not be annulled or rescinded unless it is shown that it was to the prejudice of other creditors; that, to the knowledge of the transferee, the debtor was insolvent; and that they sought to commit fraud, or to gain an undue advantage.

In Nebraska it has been said that the common-law right of a debtor to prefer creditors is very much restricted by virtue of the attachment, assignment, and other laws, and will not be applied to any case where a just and fair distribution of the proceeds of the debtor's property can be made among all his creditors. Morse *v.* Steinrod, 29 Nebr. 108, 46 N. W. 922.

In North Carolina preferences were prohibited by a statute (Laws (1895), c. 466), which, however, was soon repealed (Laws (1897), c. 14). This statute did not apply to transfers for a present consideration but only to those given to secure preëxisting debts. Farthing *v.* Carrington, 116 N. C. 315, 22 S. E. 9. And see McKay *v.* Gilliam, 65 N. C. 130, construing an earlier statute of similar import.

As to the Canadian statutes and their construction see Stephens *v.* McArthur, 19 Can. Sup. Ct. 446; Molson Bank *v.* Halter, 18 Can. Sup. Ct. 88; Long *v.* Hancock, 12 Can. Sup. Ct. 532; Colquhoun *v.* Seagram, 11 Manitoba 339; Fisher *v.* Brock, 8 Manitoba 137; Roe *v.* Massey Mfg. Co., 8 Manitoba 126; Ashley *v.* Brown, 17 Ont. App. 500; Gibbons *v.* Wilson, 17 Ont. App. 1; Coats *v.* Kelly, 15 Ont. App. 81; Smith *v.* Fair, 11 Ont. App. 755; Boyd *v.* Glass, 8 Ont. App. 632; Gibbons *v.* Wilson, 7 Ont. App. 1; Gurofski *v.* Harris, 27 Ont. 201; Goulding *v.* Deeming, 15 Ont. 201; River Stave Co. *v.* Sill, 12 Ont. 557; McRoberts *v.* Steinoff, 11 Ont. 369; Powell *v.* Calder, 8 Ont. 505; Tidey *v.* Craib, 4 Ont. 696; Segsworth *v.* Meriden Silver Plating Co., 3 Ont. 413; Labatt *v.* Bixel, 28 Grant Ch. (U. C.) 593; Clemmow *v.* Converse, 16 Grant Ch. (U. C.) 547; Montreal Bank *v.* McTavish, 13 Grant Ch. (U. C.) 395; Toronto Bank *v.* McDougall, 15 U. C. C. P. 475; Ferrie *v.* Cleghorn, 19 U. C. Q. B. 241. And see, generally, INSOLVENCY.

80. See the cases cited *supra*, XI, A, note 58; and ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 121 *et seq.*, 163, 166 *et seq.*; BANKRUPTCY, 5 Cyc. 369; INSOLVENCY.

81. See the local statutes. And see ASSIGNMENT FOR BENEFIT OF CREDITORS, 4 Cyc. 163 *et seq.*; BANKRUPTCY, 5 Cyc. 369; and, generally, INSOLVENCY.

82. Redd *v.* Redd, 67 S. W. 367, 23 Ky. L. Rep. 2379; Hoover *v.* Hawks, 51 S. W. 606, 21 Ky. L. Rep. 190; Atkins *v.* Hoeberlin, 43 S. W. 711, 19 Ky. L. Rep. 1547 (holding that the goods transferred cannot be attached as the property of the debtor); Rosenberg *v.* Smith, 40 S. W. 243, 19 Ky. L. Rep. 341; Spurrier *v.* Haley, 4 Ky. L. Rep. 364; Dyson *v.* St. Paul Nat. Bank, 74 Minn. 439, 77 N. W. 236, 73 Am. St. Rep. 358; Berry *v.* O'Connor, 33 Minn. 29, 21 N. W. 840; Bartles *v.* Dodd, 56 W. Va. 383, 49 S. E. 414. And see the titles referred to in the note above.

83. Third Nat. Bank *v.* Divine Grocery Co., 97 Tenn. 603, 37 S. W. 390, 34 L. R. A. 445 [*following* Stratton *v.* Morris, 89 Tenn. 497, 15 S. W. 87, 12 L. R. A. 70]. See CONSTITUTIONAL LAW, 8 Cyc. 886 *et seq.*

84. See ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 113; BANKRUPTCY, 5 Cyc. 227; and, generally, INSOLVENCY.

Transactions between husband and wife see, generally, HUSBAND AND WIFE.

85. Brown *v.* Early, 2 Duv. (Ky.) 369; Chipman *v.* Peabody, 159 Mass. 420, 34 N. E.

sonal property is determined by the law of the place where the contract was made,[86] and not by the law of the place where the goods were received by the creditor, if nothing remained for the creditor to do but receive the goods on their arrival.[87]

D. How Preferences May Be Made[88] — **1. In General.** If the preference is otherwise unobjectionable the particular form of the transaction by which it is made appears to be immaterial so far as the rights of other creditors are concerned,[89] except where some positive statutory prohibition intervenes.[90] Thus under the principle stated above[91] a valid preference in favor of a creditor may be given by confession of judgment,[92] by allowing a judgment to be taken by

563, 38 Am. St. Rep. 437; Brannon *v.* Brannon, 2 Disn. (Ohio) 224.

86. Koster *v.* Merritt, 32 Conn. 246; *In re* Kahn, 55 Minn. 509, 57 N. W. 154.

87. *In re* Kahn, 55 Minn. 509, 57 N. W. 154.

88. Matters relating to preference by fraudulent grantee to creditor of grantor see *infra*, XIII, B, 1, d.

89. *California.*— Priest *v.* Brown, 100 Cal. 626, 35 Pac. 323.

Illinois.— Chicago, etc., R. Co. *v.* Watson, 113 Ill. 195.

Maryland.— See Anderson *v.* Tydings, 3 Md. Ch. 167, 8 Md. 427, 63 Am. Dec. 708, where the debtor purchased land and had the deed executed to his wife for the purpose of satisfying the claim of one of his creditors.

New Jersey.— Metropolis Nat. Bank *v.* Sprague, 20 N. J. Eq. 13.

New York.— Delaney *v.* Valentine, 154 N. Y. 692, 49 N. E. 65; Wilder *v.* Winne, 6 Cow. 284.

Pennsylvania.— York County Bank *v.* Carter, 38 Pa. St. 446, 80 Am. Dec. 494; Uhler *v.* Maulpair, 23 Pa. St. 481; Covanhovan *v.* Hart, 21 Pa. St. 495, 60 Am. Dec. 57. See also Werner *v.* Zierfuss, 162 Pa. St. 360, 29 Atl. 737.

Washington.— Troy *v.* Morse, 22 Wash. 280, 60 Pac. 648; Vietor *v.* Glover, 17 Wash. 37, 48 Pac. 788, 40 L. R. A. 297.

United States.— Rice *v.* Adler-Goldman Commission Co., 71 Fed. 151, 18 C. C. A. 15; Smith *v.* Craft, 12 Fed. 856, 11 Biss. 340 [appeal *dismissed* in 123 U. S. 436, 8 S. Ct. 196, 31 L. ed. 267].

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 382 *et seq.*

Assisting creditor to obtain attachment.— Where a partner desiring to prefer a creditor of the firm, the other partner being unwilling to do so, assists the creditor in suing out an attachment against the firm, his act does not necessarily render the suit a collusive one as against other firm creditors. Hyman *v.* Stadler, 63 Miss. 362. See also *supra*, III, A, 4, e.

Organization of corporation and issue of stock.— That a valid preference may be effected by the debtor's organizing a corporation, transferring his property to the company, and having stock issued to pay or secure certain of his creditors see Scripps *v.* Crawford, 123 Mich. 173, 81 N. W. 1098; Troy *v.* Morse, 22 Wash. 280, 60 Pac. 648; Fisher *v.* Campbell, 101 Fed. 156, 41 C. C. A. 256. But *compare* Colorado Trading, etc., Co. *v.* Acres Commission Co., 18 Colo. App. 253, 70 Pac. 954. See also *supra*, III, A, 5.

90. As for instance the assignment laws prohibiting preferences in assignments for the benefit of creditors. See ASSIGNMENT FOR BENEFIT OF CREDITORS, 4 Cyc. 163.

91. See *supra*, XI, A.

92. *Alabama.*— Warren *v.* Hunt, 114 Ala. 506, 21 So. 939. *Compare* Montgomery First Nat. Bank *v.* Acme White Lead, etc., Co., 123 Ala. 344, 26 So. 354.

California.— See Meeker *v.* Harris, 19 Cal. 278, 79 Am. Dec. 215.

Delaware.— Slessinger *v.* Topkis, 1 Marv. 140, 40 Atl. 717.

Illinois.— Young *v.* Clapp, 147 Ill. 176, 32 N. E. 187, 35 N. E. 372; Chicago Stamping Co. *v.* Hanchett, 25 Ill. App. 198, preferences by giving judgment notes resulting in the entry of judgments. A judgment confessed by an insolvent debtor cannot be attacked by other judgment creditors for fraud against the debtor, unless there was collusion between him and the creditor, by which the attacking creditors were defrauded. Havens, etc., Co. *v.* Pana First Nat. Bank, 162 Ill. 35, 44 N. E. 384 [*reversing* 61 Ill. App. 213].

Maryland.— Citizens' F., etc., Ins. Co. *v.* Wallis, 23 Md. 173.

Mississippi.— Holberg *v.* Jaffray, 64 Miss. 746, 2 So. 168.

Missouri.— Hard *v.* Foster, 98 Mo. 297, 11 S. W. 760.

New Jersey.— Goodwin *v.* Hamill, 26 N. J. Eq. 24.

New York.— Galle *v.* Tode, 148 N. Y. 270, 42 N. E. 673 [*affirming* 74 Hun 542, 26 N. Y. Suppl. 633]; Columbus Watch Co. *v.* Hodenpyl, 135 N. Y. 430, 32 N. E. 239 [*affirming* 61 Hun 557, 16 N. Y. Suppl. 337]; Rothchild *v.* Mannesovitch, 29 N. Y. App. Div. 580, 51 N. Y. Suppl. 253; London *v.* Martin, 79 Hun 229, 29 N. Y. Suppl. 396 [*affirmed* in 149 N. Y. 586, 44 N. E. 1125]; Childs *v.* Latham, 60 Hun 578, 14 N. Y. Suppl. 507; Stein *v.* Levy, 55 Hun 381, 8 N. Y. Suppl. 505; Beards *v.* Wheeler, 11 Hun 539; Williams *v.* Brown, 4 Johns. Ch. 682. See also Robinson *v.* Hawley, 45 N. Y. App. Div. 287; 61 N. Y. Supp. 138.

Ohio.— Hauel *v.* Mintzer, 1 Handy 375, 12 Ohio Dec. (Reprint) 191.

Pennsylvania.— Candee's Appeal, 191 Pa. St. 644, 43 Atl. 1093; Braden *v.* O'Neil, 183 Pa. St. 462, 38 Atl. 1023, 63 Am. St. Rep. 761; Werner *v.* Zierfuss, 162 Pa. St. 360, 29 Atl. 737; Lake Shore Banking Co. *v.* Fuller, 110 Pa. St. 156, 1 Atl. 731; Walker *v.* Marine

default,[93] by consenting to an order in a creditor's suit requiring the debtor to transfer property to the receiver,[94] by taking out a policy of life insurance in favor of the creditor,[95] by mortgage of land or chattels or both,[96] provided that the equity of

Nat. Bank, 98 Pa. St. 574; Keen *v.* Kleckner, 42 Pa. St. 529; Guy *v.* McIlree, 26 Pa. St. 92; Worman *v.* Wolfersberger, 19 Pa. St. 59; Davis *v.* Charles, 8 Pa. St. 82; Blakey's Appeal, 7 Pa. St. 449; Greenwalt *v.* Austin, 1 Grant 169; Haldeman *v.* Michael, 6 Watts & S. 128, 40 Am. Dec. 546; Heiney *v.* Anderson, 9 Lanc. Bar 12; Wetmore *v.* Wisner, 2 Luz. Leg. Obs. 204.

South Carolina.— Sloan *v.* Hunter, 56 S. C. 385, 34 S. E. 658, 76 Am. St. Rep. 551; Weinges *v.* Cash, 15 S. C. 44; Bevins *v.* Dunham, 1 Speers 39; Cureton *v.* Doby, 10 Rich. Eq. 411, 73 Am. Dec. 96; Bird *v.* Aitken, Rice Eq. 73; Hill *v.* Rogers, Rice Eq. 7.

Virginia.— Johnson *v.* Lucas, 103 Va. 36, 48 S. E. 497.

United States.— Rice *v.* Adler-Goldman Commission Co., 71 Fed. 151, 18 C. C. A. 15.

England.—Meux *v.* Howell, 4 East 1; Holdbird *v.* Anderson, 5 T. R. 235, warrant of attorney to confess judgment.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 400. *Compare supra*, III, A, 4, b, (II).

The fraudulent intent of the debtor cannot be imputed to the creditor who consents to confession of judgment in his favor, nor does such consent create the relation of principal and agent between the parties. Hard *v.* Foster, 98 Mo. 297, 11 S. W. 760. And see *infra*, XI, H, 3.

One judgment in favor of several creditors. — Fraud cannot be inferred from the fact that a single judgment by confession includes the separate claims of several creditors, the object being to place them on a footing of equality. Indeed the practice is rather to be commended, inasmuch as it gives the judgment creditors equal rights and prevents a "race of diligence" which might occur if separate judgments were given. Harris *v.* Alcock, 10 Gill & J. (Md.) 226, 32 Am. Dec. 158.

93. Rothchild *v.* Mannesovitch, 29 N. Y. App. Div. 580, 51 N. Y. Suppl. 253; Morgan's Appeal, 20 Pa. St. 152 [*following* Worman *v.* Wolfersberger, 19 Pa. St. 59].

Irregularity in entry.— A judgment by default which gives preference to a certain creditor, although irregularly entered, is not to be deemed on that account alone a fraudulent one. Rothchild *v.* Mannesovitch, 29 N. Y. App. Div. 580, 51 N. Y. Suppl. 253.

94. Young *v.* Clapp, 147 Ill. 176, 32 N. E. 187, 35 N. E. 372.

95. Dunckel *v.* Failing, 1 Silv. Sup. (N. Y.) 543, 5 N. Y. Suppl. 504. And see, generally, LIFE INSURANCE.

96. *Alabama.*— McWilliams *v.* Rodgers, 56 Ala. 87.

Arkansas.— See Marquese *v.* Felsenthal, 58 Ark. 293, 24 S. W. 493; Huff *v.* Roane, 22 Ark. 184; Cox *v.* Fraley, 26 Ark. 20.

California.— Wood *v.* Franks, 67 Cal. 32, 7 Pac. 50.

Georgia.— Hollingsworth *v.* Johns, 92 Ga. 428, 17 S. E. 621. That a preferential mortgage was not within the prohibition of the act of 1818 see Solomon *v.* Sparks, 27 Ga. 385; Lavender *v.* Thomas, 18 Ga. 668; Davis *v.* Anderson, 1 Ga. 176; Seals *v.* Cashin, Ga. Dec. Pt. II, 76.

Illinois.— Union Nat. Bank *v.* State Nat. Bank, 168 Ill. 256, 48 N. E. 169 [*affirming* 68 Ill. App. 43]; Weber *v.* Mick, 131 Ill. 520, 23 N. E. 646; Kahn *v.* Kohn, 35 Ill. App. 437.

Indiana.— Ayers *v.* Adams, 82 Ind. 109.

Iowa.— Cathcart *v.* Grieve, 104 Iowa 330, 73 N. W. 835; Southern White Lead Co. *v.* Haas, 73 Iowa 390, 33 N. W. 657, 35 N. W. 494; Farwell *v.* Howard, 26 Iowa 381; Fromme *v.* Jones, 13 Iowa 474.

Kansas.— Connor *v.* Hardwick, 53 Kan. 60, 35 Pac. 777; Emporia First Nat. Bank *v.* Ridenour, 46 Kan. 707, 718, 27 Pac. 150, 26 Am. St. Rep. 167. See Matthewson *v.* Caldwell, 59 Kan. 126, 52 Pac. 104; Abilene First Nat. Bank *v.* Naill, 52 Kan. 211, 34 Pac. 797; Standard Implement Co. *v.* Parlin, etc., Co., 51 Kan. 632, 33 Pac. 362; Randall *v.* Shaw, 28 Kan. 419.

Kentucky.— Brewer *v.* Cosby, 8 Bush 388; Kennaird *v.* Adams, 11 B. Mon. 102; Robinson *v.* Collier, 11 B. Mon. 332, 52 Am. Dec. 572.

Massachusetts.— Henshaw *v.* Sumner, 23 Pick. 446. See also Harrison *v.* Phillips Academy, 12 Mass. 456.

Michigan.— Warner *v.* Littlefield, 89 Mich. 329, 50 N. W. 721; Whitfield *v.* Stiles, 57 Mich. 410, 24 N. W. 119; Adams *v.* Niemann, 46 Mich. 135, 8 N. W. 719. See also Ferris *v.* McQueen, 94 Mich. 367, 54 N. W. 164.

Mississippi.— Summers *v.* Roos, 42 Miss. 749, 2 Am. Rep. 653.

Missouri.— Schroeder *v.* Bobbitt, 108 Mo. 289, 18 S. W. 1093; Colbern *v.* Robinson, 80 Mo. 541; Donk Bros. Coal, etc., Co. *v.* Stevens, 74 Mo. App. 39.

Nebraska.— Grand Island Banking Co. *v.* Costello, 45 Nebr. 119, 63 N. W. 376; Kilpatrick-Koch Dry Goods Co. *v.* McPheely, 37 Nebr. 800, 56 N. W. 389; Denver First Nat. Bank *v.* Lowrey, 36 Nebr. 290, 54 N. W. 568; Davis *v.* Scott, 27 Nebr. 642, 43 N. W. 407; Grimes *v.* Farrington, 19 Nebr. 44, 26 N. W. 618.

New Jersey.— Green *v.* McCrane, 55 N. J. Eq. 436, 37 Atl. 318 [*distinguishing* Milton *v.* Boyd, 49 N. J. Eq. 142, 22 Atl. 1078]; Metropolis Nat. Bank *v.* Sprague, 20 N. J. Eq. 13; Jones *v.* Naughright, 10 N. J. Eq. 298.

New York.— Delaney *v.* Valentine, 154 N. Y. 692, 49 N. E. 65 [*reversing* 11 N. Y. App. Div. 631]; Carpenter *v.* Muren, 42 Barb. 300. And see New York County Nat. Bank *v.* American Surety Co., 69 N. Y. App. Div. 153, 74 N. Y. Suppl. 692 [*affirmed* in 174

redemption is not improperly withdrawn from the reach of the unsecured creditors,[97] or by conveyance of real or personal property, whether made directly to the creditor in satisfaction of his claim[98] or to a third person for the creditor's benefit.[99]

N. Y. 544, 67 N. E. 1086]; Manchester *v.* Tibbetts, 4 N. Y. Suppl. 23.

North Dakota.— Cutter *v.* Pollack, 4 N. D. 205, 59 N. W. 1062, 50 Am. St. Rep. 644, 25 L. R. A. 377.

Ohio.— Kemp *v.* Walker, 16 Ohio 118.

Oklahoma.— Jaffray *v.* Wolf, 1 Okla. 312, 35 Pac. 945.

Pennsylvania.— Lindle *v.* Neville, 13 Serg. & R. 227.

South Carolina.— Bomar *v.* Means, 53 S. C. 232, 31 S. E. 234; McGee *v.* Wells, 52 S. C. 472, 30 S. E. 602. See also Central R., etc., Co. *v.* Claghorn, Speers Eq. 545, construing the Georgia statute of 1818.

South Dakota.— Jones *v.* Meyer, 7 S. D. 152, 63 N. W. 773.

Tennessee.— Phillips *v.* Cunningham, (Ch. App. 1899) 58 S. W. 463; McGrew *v.* Hancock, (Ch. App. 1899) 52 S. W. 500.

Texas.— Compton *v.* Marshall, 88 Tex. 50, 27 S. W. 121, 28 S. W. 518, 29 S. W. 1059; Martin-Brown Co. *v.* Siebe, 6 Tex. Civ. App. 232, 26 S. W. 327.

Vermont.— McGregor *v.* Chase, 37 Vt. 225.

Washington.— Turner *v.* Iowa Nat. Bank, 2 Wash. 192, 26 Pac. 256.

Wisconsin.— Stevens *v.* Breen, 75 Wis. 595, 44 N. W. 645; Chicago Coffin Co. *v.* Maxwell, 70 Wis. 282, 35 N. W. 733. And see Kickbusch *v.* Corwith, 108 Wis. 634, 85 N. W. 148.

United States.— Davis *v.* Schwartz, 155 U. S. 631, 15 S. Ct. 237, 39 L. ed. 289 (applying the law of Iowa); Huiskamp *v.* Moline Wagon Co., 121 U. S. 310, 7 S. Ct. 899, 30 L. ed. 971 [*reversing* 14 Fed. 155]; Foster *v.* McAlester, 114 Fed. 145, 52 C. C. A. 107.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 393.

The Minnesota insolvent law (Laws (1881), c. 148) does not have the effect to render chattel mortgages fraudulent or void as respects the mortgagor's creditors, on the ground that they are preferential, except in proceedings under the statute. Outside of such proceedings the preferences are not *per se*, or as a matter of law, objectionable. Berry *v.* O'Connor. 33 Minn. 29, 21 N. W. 840. See, generally, INSOLVENCY.

A conveyance absolute in terms but intended by the parties to operate as a mortgage is not, in most jurisdictions, necessarily fraudulent as to the grantor's creditors but may be given effect as a mortgage. Doswell *v.* Adler, 28 Ark. 82; Cathcart *v.* Grieve, 104 Iowa 330, 73 N. W. 835; Harrison *v.* Phillips Academy, 12 Mass. 456, where an instrument of defeasance was given by the grantee. *Compare* Fuller *v.* Griffith, 91 Iowa 632, 60 N. W. 247; Ellis *v.* Musselman, 61 Nebr. 262, 85 N. W. 75. And see *supra*, V, B, 3; X, B.

97. Chafee *v.* Blatchford, 6 Mackey (D. C.) 459.

98. *Alabama.*— Cook *v.* Thornton, 109 Ala. 523, 20 So. 14; Bray *v.* Ely, 105 Ala. 553, 17 So. 180; Goetter *v.* Smith, 104 Ala. 481, 16 So. 534; Schloss *v.* McGuire, 102 Ala. 626, 15 So. 275; Bates *v.* Vandiver, 102 Ala. 249, 14 So. 631; Fargason *v.* Hall, 99 Ala. 209, 13 So. 302; Pollock *v.* Meyer, 96 Ala. 172, 11 So. 385; Ellison *v.* Moses, 95 Ala. 221, 11 So. 347.

Illinois.— Oakford *v.* Dunlap, 63 Ill. App. 498.

Indiana.— Thomas *v.* Johnson, 137 Ind. 244, 36 N. E. 893.

Kansas.— Schram *v.* Taylor, 51 Kan. 547, 33 Pac. 315.

Kentucky.— Young *v.* Stallings, 5 B. Mon. 307.

Maryland.—Commonwealth Bank *v.* Kearns, 100 Md. 202, 59 Atl. 1010; Thompson *v.* Williams, 100 Md. 195, 60 Atl. 26.

Missouri.— Kuykendall *v.* McDonald, 15 Mo. 416, 57 Am. Dec. 212.

New York.— Obermeyer *v.* Jung, 51 N. Y. App. Div. 247, 64 N. Y. Suppl. 959; Drury *v.* Wilson, 4 N. Y. App. Div. 232, 38 N. Y. Suppl. 538.

Pennsylvania.— Snayberger *v.* Fahl, 195 Pa. St. 336, 45 Atl. 1065, 78 Am. Dec. 818; Clemens *v.* Davis, 7 Pa. St. 263.

Texas.— Greenleve *v.* Blum, 59 Tex. 124.

Vermont.— Lyon *v.* Rood, 12 Vt. 233.

United States.— Bamberger *v.* Schoolfield, 160 U. S. 149, 16 S. Ct. 225, 40 L. ed. 374 (construing law of Alabama); Smith *v.* Craft, 12 Fed. 856, 11 Biss. 340 [appeal *dismissed* in 123 U. S. 436, 8 S. Ct. 196, 31 L. ed. 267].

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 385. And see the cases cited *supra*, XI, A, many of which support transfers of this character.

Bill of sale not fraudulent per se.— Goetter *v.* Smith, 104 Ala. 481, 16 So. 534.

Transfer of goods in bulk and without inventory not fraudulent.— Cocke *v.* Carrington Shoe Co., (Miss. 1895) 18 So. 683.

99. Delaney *v.* Valentine, 154 N. Y. 692, 49 N. E. 65 [*reversing* 11 N. Y. App. Div. 631, 42 N. Y. Suppl. 1123, and *distinguishing* Sutherland *v.* Bradner, 116 N. Y. 410, 22 N. E. 554; Collomb *v.* Caldwell, 16 N. Y. 484; Barney *v.* Griffin, 2 N. Y. 365; Goodrich *v.* Downs, 6 Hill (N. Y.) 438], holding that a debtor whose property is insufficient to pay his debts may, when acting in good faith and making no provision for the return of any of the property to himself, make a valid sale, mortgage, or pledge of a part of his property to a third person to secure a part of his creditors.

Deed to take effect on grantor's death.—A valid preference may be made by a deed of real estate, duly executed and delivered to a third person in trust to be delivered to the grantee at the decease of the grantor

2. SALE TO PAY PREFERRED CREDITORS[1] — a. In General. A valid preference may also be made by selling property to a third person for a fair price and paying over the proceeds to the creditor to be preferred,[2] although the purchaser

unless the latter shall otherwise direct during his lifetime. If no subsequent direction be given, the deed, upon the decease of the grantor, takes effect from the first delivery. Morse *v.* Slason, 13 Vt. 296.

Deeds of trust.—A preference made by conveying property to a trustee for the benefit of the creditors to be preferred is valid except where the instrument falls within the prohibition of the assignment laws or is tainted with fraud.

Alabama.— Stetson *v.* Miller, 36 Ala. 642; Miller *v.* Stetson, 32 Ala. 161; Evans *v.* Lamar, 21 Ala. 333.

Arkansas.— Dews *v.* Cornish, 20 Ark. 332.

California.— Heath *v.* Wilson, 139 Cal. 362, 73 Pac. 182.

Massachusetts.— New England Mar. Ins. Co. *v.* Chandler, 16 Mass. 275; Stevens *v.* Bell, 6 Mass. 339. And see Henshaw *v.* Sumner, 23 Pick. 446, construing the act of 1836.

Michigan.— Geer *v.* Traders' Bank, 132 Mich. 215, 93 N. W. 437 [*citing* Comp. Laws, § 8839].

Mississippi.— Baldwin *v.* Flash, 58 Miss. 593, where it was held that, although a deed of trust of personal property was invalid as to third persons because not recorded, yet the delivery of the goods to the trustee passed the title and operated as a valid preference.

Missouri.— Crothers *v.* Busch, 153 Mo. 606, 55 S. W. 149; Jaffrey *v.* Mathews, 120 Mo. 317, 25 S. W. 187; Crow *v.* Beardsley, 68 Mo. 435; Bell *v.* Thompson, 3 Mo. 84.

Tennessee.— Fidelity, etc., Co. *v.* O'Brien, (Ch. App. 1896) 38 S. W. 417.

Texas.— Johnson *v.* Robinson, 68 Tex. 399, 4 S. W. 625; Iglehart *v.* Willis, 58 Tex. 306; Martin-Brown Co. *v.* Siebe, 6 Tex. Civ. App. 232, 26 S. W. 327; Pessels *v.* Schwab Clothing Co., (Civ. App. 1894) 25 S. W. 814.

United States.— Union Bank *v.* Kansas City Bank, 136 U. S. 223, 10 S. Ct. 1013, 34 L. ed. 341 (construing the Missouri statutes) [*overruling* Martin *v.* Hausman, 14 Fed. 160, and cases following it]; Bean *v.* Patterson, 122 U. S. 496, 7 S. Ct. 1298, 30 L. ed. 1126; Ontario Bank *v.* Hurst, 103 Fed. 231, 43 C. C. A. 193 (construing the law of Michigan).

England.— Alton *v.* Harrison, L. R. 4 Ch. 622, 38 L. J. Ch. 669, 21 L. T. Rep. N. S. 282, 17 Wkly. Rep. 1034.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 382, 392; and ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 163 *et seq.*; CHATTEL MORTGAGES, 6 Cyc. 996, 1013.

As a contract.— "A debtor may in good faith voluntarily prefer some of his creditors; and when he executes a deed of trust looking to that end, transferring his property for such purpose, and the trustee and the beneficiaries act upon the instrument and accept its benefits, this, between the parties, constitutes a contract resting upon mutual promises that may result in a benefit and advantage to one of the contracting parties or a loss to the other." Butler *v.* Sanger, 4 Tex. Civ. App. 411, 415, 23 S. W. 487.

Deed of trust of debtor's equity of redemption held valid.— Wood *v.* Porter, 179 Mo. 56, 77 S. W. 762.

Second preferential trust deed of surplus.— Where a deed of trust is made by an insolvent debtor for the purpose of having the property sold and the proceeds applied to pay the claim of the preferred creditor, and a second deed of trust is made for the benefit of another creditor, the deed purporting to include such property previously transferred as may remain after satisfying the first creditor, and the second creditor having full knowledge of the prior transaction and the debtor's financial condition; the second creditor has no priority over the first unless fraud be shown in the making and accepting of the first deed. Iglehart *v.* Willis, 58 Tex. 306.

A mortgage given to trustees for the benefit of preferred creditors stands on the same basis as a mortgage executed directly to the creditors. Metropolis Nat. Bank *v.* Sprague, 20 N. J. Eq. 13.

But under the Georgia statute of 1818, a conveyance by an insolvent debtor in trust for a part of his creditors was void as to the creditors excluded. Norton *v.* Cobb, 20 Ga. 44; Brown *v.* Lee, 7 Ga. 267; Ezekiel *v.* Dixon, 3 Ga. 146.

1. Assumption of debts by preferred creditor see *infra*, XI, I, 4.

2. *Alabama.*— Fargason *v.* Hall, 99 Ala. 209, 13 So. 302.

California.— Priest *v.* Brown, 100 Cal. 626, 35 Pac. 323. *Compare* Mamlock *v.* White, 20 Cal. 598.

Illinois.— Holbrook *v.* First Nat. Bank, 10 Ill. App. 140.

Indiana.— See Wilcoxon *v.* Annesly, 23 Ind. 285; Anderson *v.* Smith, 5 Blackf. 395.

Kansas.— Bishop *v.* Jones, 28 Kan. 680.

New York.— Ruhl *v.* Phillips, 48 N. Y. 125, 8 Am. Rep. 522; Bedell *v.* Chase, 34 N. Y. 386.

Pennsylvania.— York County Bank *v.* Carter, 38 Pa. St. 446, 80 Am. Dec. 494.

Texas.— Ellis *v.* Valentine, 65 Tex. 532.

Vermont.— Gregory *v.* Harrington, 33 Vt. 241.

United States.— Clements *v.* Nicholson, 6 Wall. 299, 18 L. ed. 786.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 388.

But under statutes providing that preferences made by a debtor when insolvent or contemplating insolvency shall inure to the benefit of all the creditors, a sale to pay preferred creditors is prohibited and the proceeds will be ratably distributed. King *v.* Moody, 79 Ky. 63; Powers-Taylor Drug Co. *v.* Faulconer, 52 W. Va. 581, 44 S. E. 204, enforcing ratable distribution between the pre-

knows that the vendor's intent is to make a preference,[3] and although the sale is made on credit, the vendor taking the purchaser's notes.[4] Likewise an insolvent or failing debtor may sell his property to a third person in consideration that the purchaser pay certain debts owing by the vendor.[5]

b. Failure to Apply Proceeds to Debts. Where a debtor sells his property for the avowed purpose of raising money to pay preferred creditors, the purchaser believing that the proceeds will be applied to that purpose, the sale, being valid when made, cannot be impeached by reason of the debtor's failure to use the purchase-money in payment of his debts.[6] On the other hand if the sale is made with the intent on the part of the debtor, known to the creditor, to hinder or delay a particular creditor or creditors generally, the purchaser is liable in equity for so much of the purchase-price as the debtor divests from the payment of his debts, but no more.[7]

3. Splitting Debt to Expedite Recovery. It is not fraudulent for a debtor to divide the debt into small sums and give separate notes therefor so that the creditor may sue before a justice or magistrate and thus obtain separate judgments with more speed than if he sued on the original debt.[8]

4. Delegation of Power to Prefer. The right to give preferences among

ferred creditor and the unsecured creditors who attack the transaction within the time and in the manner prescribed by the statute. See also Wolf *v.* McGugin, 37 W. Va. 552, 16 S. E. 797. *Compare* Hoover *v.* Hawks, 51 S. W. 606, 21 Ky. L. Rep. 190, holding that the only remedy of the excluded creditors is to have the transaction declared to operate as an assignment under the statute.

3. *California.*— Priest *v.* Brown, 100 Cal. 626, 35 Pac. 323.

New York.— Ruhl *v.* Phillips, 48 N. Y. 125, 8 Am. Rep. 522.

Pennsylvania.— York County Bank *v.* Carter, 38 Pa. St. 446, 80 Am. Dec. 494.

Texas.— See Ellis *v.* Valentine, 65 Tex. 532.

Vermont.— Gregory *v.* Harrington, 33 Vt. 241.

United States.— See Clements *v.* Nicholson, 6 Wall. 299, 18 L. ed. 786.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 388.

4. Priest *v.* Brown, 100 Cal. 626, 35 Pac. 323; Ruhl *v.* Phillips, 48 N. Y. 125, 8 Am. Rep. 522; Bedell *v.* Chase, 34 N. Y. 386; Gregory *v.* Harrington, 33 Vt. 241; Clements *v.* Nicholson, 6 Wall. (U. S.) 299, 18 L. ed. 786. But *compare* Brinson *v.* Edwards, 94 Ala. 447, 10 So. 219.

5. *Indiana.*— Wilcoxon *v.* Annesley, 23 Ind. 285; Anderson *v.* Smith, 5 Blackf. 395.

Kentucky.— Rosenberg *v.* Smith, 40 S. W. 243, 19 Ky. L. Rep. 341, holding such a transaction to be valid unless attacked under the act of 1856.

Oregon.— Hesse *v.* Barrett, 41 Oreg. 202, 68 Pac. 751.

Pennsylvania.— Uhler *v.* Maulfair, 23 Pa. St. 481.

Texas.— Ellis *v.* Valentine, 65 Tex. 532.

Wisconsin.— Greene, etc., Co. *v.* Remington, 72 Wis. 648, 39 S. W. 767, 40 N. W. 643; Ingram *v.* Osborn, 70 Wis. 184, 35 N. W. 304.

United States.— Blackmore *v.* Parkes, 81 Fed. 899, 26 C. C. A. 670.

See Assignments For Benefit of Creditors, 4 Cyc. 113.

Illustration.— Deeds executed by one who was largely indebted as indorser of notes of a corporation in which he was a stockholder, conveying property to his children for a consideration which was not inadequate and which was fully paid by taking up such of the obligations upon which the father was indorser as he directed, are not fraudulent as to other creditors of the grantor, where preferences are permitted by the laws of the state. Corwine *v.* Thompson Nat. Bank, 105 Fed. 196, 44 C. C. A. 442.

Note given to creditor — West Virginia statute.— When an insolvent mercantile firm sells its stock of merchandise to a disinterested party, such purchaser may, as a part of the purchase-money, make a note payable directly to a bank that holds the note of said firm for a *bona fide* preëxisting debt, and substitute such note for the note of said firm held by the bank. This is not prohibited by W. Va. Code, c. 74, § 2, as amended by Acts (1895), c. 4, making preferential transfers by an insolvent fraudulent as to creditors, but providing that nothing in said section shall effect any transfer of any "evidences of debt in payment of or as collateral security for the payment of a *bona fide* debt," whether made at the time such debt is contracted or in payment of a preëxisting debt. Merchant *v.* Whitescarver, 47 W. Va. 361, 34 S. E. 813. And see Armstrong *v.* Oil-Well Supply Co., 47 W. Va. 455, 35 S. E. 967. *Compare* Powers-Taylor Drug Co. *v.* Faulconer, 52 W. Va. 581, 44 S. E. 204. See also Insolvency.

6. Priest *v.* Brown, 100 Cal. 626, 35 Pac. 323. And see Gist *v.* Barrow, 42 Ark. 521. See *supra*, VII, B, 2, d.

7. Clements *v.* Nicholson, 6 Wall. (U. S.) 299, 18 L. ed. 786.

8. Andrews *v.* Kaufmans, 60 Ga. 669; Alexander *v.* Young, 23 Ga. 616; Savannah Bank *v.* Planters' Bank, 22 Ga. 466; Laven-

creditors is a personal privilege of the debtor which cannot be delegated by him to another to be exercised at the latter's discretion. Therefore instruments conveying property for the benefit of creditors and providing that the transferee shall have the power to prefer creditors at his discretion have been held invalid.[9]

E. What Property May Be Transferred. The nature of the property transferred to pay or secure the debt is immaterial.[10] A failing debtor may pay a creditor with property bought on credit from another person.[11] While the capital of a corporation may in a sense be a trust fund for the creditors of the company,[12] it is not a trust fund for the creditors of contractors who construct the plant of the corporation. Therefore where a corporation turns over some of its stock and bonds to a contractor in payment for the erection of its plant, the contractor may use them to pay or secure some of his creditors to the exclusion of others, and the latter cannot claim that such securities constitute a trust fund for all the contractor's creditors.[13]

F. What Debts May Be Preferred[14]**— 1. In General.** The debt preferred must be a valid subsisting demand capable of being enforced by action; otherwise the preference is a mere gift which may be set aside by other creditors.[15] But any legal indebtedness of the debtor or any legal liability incurred by a third person on his behalf may become the subject of a preference.[16] The fact that part of the debt is for whisky and tobacco which the debtor had used lavishly does not make the debt immoral or illegal.[17]

2. Debts Not Due. The fact that the debt to be paid or secured by the preferential transfer was not due at the time the transfer was made does not afford any evidence of fraud and does not affect the validity of the transaction as to other creditors.[18]

der *v.* Thomas, 18 Ga. 668; Newdigate *v.* Jacobs, 9 Dana (Ky.) 17. But *compare* Beach *v.* Atkinson, 87 Ga. 288, 13 S. E. 591, in which there was evidence of fraudulent collusion and the amount of each note exceeded the jurisdiction of the justice's court.

9. Waggoner *v.* Cooley, 17 Ill. 239; Seger *v.* Thomas, 107 Mo. 635, 18 S. W. 33; Hargardine-McKittrick Dry Goods Co. *v.* Carnahan, 79 Mo. App. 219; Strong *v.* Skinner, 4 Barb. (N. Y.) 546; Boardman *v.* Halliday, 10 Paige (N. Y.) 223; Barnum *v.* Hempstead, 7 Paige (N. Y.) 568. *Compare* Dubose *v.* Dubose, 7 Ala. 235, 42 Am. Dec. 588, holding that a discretion given to a trustee who is also a surety of the grantor and for whose indemnity a trust is created, to pay first either of two debts for both of which he is liable as surety, warrants no inference of a fraudulent intention.

10. Covanhovan *v.* Hart, 21 Pa. St. 495, 500, 60 Am. Dec. 57, where the court said: "To pay a creditor his just debt in land, at a fair valuation, is no more a fraud upon other creditors than to pay him in bank notes or silver dollars." And see the cases cited *supra*, XI, A.

Assignment of contract.— Ingram *v.* Osborn, 70 Wis. 184, 35 N. W. 304.

Assignment of judgment.— Langert *v.* David, 14 Wash. 389, 44 Pac. 875.

Assignment of wages.— Hax *v.* Acme Cement Plaster Co., 82 Mo. App. 447. See Assignments, 4 Cyc. 17 *et seq.*

Transfer of note.— Marsh *v.* Davis, 24 Vt. 363.

11. O'Donald *v.* Constant, 82 Ind. 212. See also Baldwin *v.* Flash, 58 Miss. 593. But *compare* Krippendorf *v.* Hyde, 28 Fed. 788.

12. See Corporations, 10 Cyc. 461 *et seq.*

Preferences by corporations see Corporations, 10 Cyc. 1246.

13. McNeal Pipe, etc., Co. *v.* Bullock, 174 Pa. St. 93, 34 Atl. 594.

14. Other debts assumed by transferee see *infra*, XI, I, 4.

15. Bouton *v.* Smith, 113 Ill. 481. See *supra*, VIII.

16. See the cases cited in the following notes.

Purchase-price of slaves.— Sloan *v.* Hunter, 56 S. C. 385, 34 S. E. 658, 879, 76 Am. St. Rep. 551.

17. Iley *v.* Niswanger, 1 McCord Eq. (S. C.) 518.

18. *Georgia.*—Alexander *v.* Young, 23 Ga. 616.

Illinois.— Cipher *v.* McFall, 69 Ill. App. 228.

Missouri.— State *v.* Excelsior Distilling Co., 20 Mo. App. 21.

New York.— Carpenter *v.* Muren, 42 Barb. 300, debt not due included in a mortgage.

Ohio.— Hauel *v.* Mintzer, 1 Handy 375, 12 Ohio Dec. (Reprint) 191.

Pennsylvania.— Com. *v.* Smith, 1 Brewst. 347.

South Carolina.— McElwee *v.* Kennedy, 56 S. C. 154, 34 S. E. 86.

Tennessee.—McGrew *v.* Hancock, (Ch. App. 1899) 52 S. W. 500.

Texas.— Frees *v.* Baker, 81 Tex. 216, 16 S. W. 900, 13 L. R. A. 340; Mayer *v.* Templeton, (Civ. App. 1899) 53 S. W. 68 (rent);

3. CONTINGENT DEBTS AND LIABILITIES ON BEHALF OF DEBTOR. A valid preference may be made not only for a present indebtedness but to secure a person against a contingent liability on behalf of the debtor.[19] The liability of an indorser on notes that are not due,[20] the liability of an accepter of a bill of exchange,[21] the liability of a surety,[22] and of bail[23] for the debtor may be the subjects of valid

Butler *v.* Sanger, 4 Tex. Civ. App. 411, 23 S. W. 487.

United States.— Smith *v.* Craft, 12 Fed. 856, 11 Biss. 340 [appeal *dismissed* in 123 U. S. 436, 8 S. Ct. 196, 31 L. ed. 267].

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 402 *et seq.*

"The law does not forbid a debtor to pay and a creditor to receive a debt before it is due, provided the creditor's purpose is to receive his own debt and not to defeat or delay another's." McElwee *v.* Kennedy, 56 S. C. 154, 171, 34 S. E. 86.

Where there are two debts owing to the same creditor, one already due and payable and the other payable at a distant day, the creditor may take from his debtor security for the payment of both without inference or imputation of fraud, although the debtor is in failing circumstances. Carpenter *v.* Muren, 42 Barb. (N. Y.) 300.

19. Candee's Appeal, 191 Pa. St. 644, 43 Atl. 1093; Braden *v.* O'Neil, 183 Pa. St. 462, 38 Atl. 1023, 63 Am. St. Rep. 761.

Not a fraud in law.— A confession of judgment by a debtor to secure a contingent liability is not a fraud in law, and whether it is a fraud in fact depends upon the attendant circumstances. Braden *v.* O'Neil, 183 Pa. St. 462, 38 Atl. 1023, 63 Am. St. Rep. 761.

20. Weller *v.* Wayland, 17 Johns. (N. Y.) 102 (accommodation indorser); Candee's Appeal, 191 Pa. St. 644, 43 Atl. 1043; Braden *v.* O'Neil, 183 Pa. St. 462, 38 Atl. 1023, 63 Am. St. Rep. 761; Bamberger *v.* Schoolfield, 160 U. S. 149, 16 S. Ct. 225, 40 L. ed. 374.

When an accommodation indorser has assumed the payment of notes not yet due, and thereby made himself absolutely liable for their payment, he may in good faith take security from the debtor to indemnify him from ultimate loss. Hauel *v.* Mintzer, 1 Handy (Ohio) 375, 12 Ohio Dec. (Reprint) 191.

21. Perry Ins., etc., Co. *v.* Foster, 58 Ala. 502, 29 Am. Rep. 779.

22. A debtor may secure a surety who is liable for him, in preference to paying other creditors, if he does so in good faith and without any design to conceal his property from his creditors.

Alabama.— Coker *v.* Shropshire, 59 Ala. 542; Hopkins *v.* Scott, 20 Ala. 179.

Delaware.— Tunnell *v.* Jefferson, 5 Harr. 206.

Georgia.— Alexander *v.* Young, 23 Ga. 616.

Illinois.— Wood *v.* Clark, 121 Ill. 359, 12 N. E. 271 [*affirming* 21 Ill. App. 464]; Frank *v.* Welch, 89 Ill. 38; Cipher *v.* McFall, 69 Ill. App. 228.

Indiana.— Owens *v.* Gascho, 154 Ind. 225, 56 N. E. 224.

Kentucky.— Beatty *v.* Dudley, 80 Ky. 381.

Massachusetts.— Stevens *v.* Bell, 6 Mass. 339.

Missouri.— Albert *v.* Besel, 88 Mo. 150.

New Jersey.— Essex County *v.* Lindsley, 41 N. J. Eq. 189, 3 Atl. 391.

Ohio.— Hauel *v.* Mintzer, 1 Handy 375, 12 Ohio Dec. (Reprint) 191.

Texas.— Frees *v.* Baker, 81 Tex. 216, 16 S. W. 900, 13 L. R. A. 340 [*citing* Rev. St. art. 2465]; Butler *v.* Sanger, 4 Tex. Civ. App. 411, 23 S. W. 487.

Vermont.— See Spaulding *v.* Austin, 2 Vt. 555.

United States.— Leggett *v.* Humphreys, 21 How. 66, 16 L. ed. 50.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 404.

A chattel mortgage honestly and fairly given as indemnity is valid; and if merely an indemnity to the extent of securing the mortgagor's debts more directly, and made with the express concurrence of the creditors who hold them, it is not void as against creditors. Adams *v.* Niemann, 46 Mich. 135, 8 N. W. 719.

A deed of trust executed by a defaulting guardian to indemnify and save harmless his sureties, which recites that the grantor is indebted to his ward in an amount equal to or greater than the value of the property conveyed by it, and authorizes the trustee to sell whenever he may think a sale most conducive to the advancement of the purposes of the trust, and to permit the grantor to retain the possession of all the property until the sale takes place, is not fraudulent on its face. Hopkins *v.* Scott, 20 Ala. 179.

A mortgage given both for an existing debt and to indemnify the mortgagee against his liability as surety for the mortgagor must state the purposes for which it is given and show the respective amounts of the liabilities which it is intended to secure. If on its face it purports to be given solely for an existing debt between the parties, whereas part of the stated sum consists of liabilities for which the mortgagee is surety, it cannot, as against the mortgagor's creditors, be supported further than to secure the amount actually due from the mortgagor to the mortgagee, although in equity it may be held valid to that extent. Sanford *v.* Wheeler, 13 Conn. 165, 33 Am. Dec. 389.

If a surety in good faith assumes the payment of the debt on which he is liable, this constitutes a valid consideration for a deed of trust executed to him by his principal. Pennington *v.* Woodall, 17 Ala. 685. See, generally, PRINCIPAL AND SURETY.

23. Davis *v.* Charles, 8 Pa. St. 82 [*approved* in Braden *v.* O'Neil, 183 Pa. St. 462, 38 Atl. 1023, 63 Am. St. Rep. 761].

preferences. But it has been held that there must be an actual liability on the part of the person preferred; that a merely nominal liability is insufficient to support the preference.[24]

4. Usurious Interest. The fact that the debt for which a preferential transfer of property is made is partly made up of usurious interest is not of itself sufficient ground for other creditors to impeach the transaction.[25] If at the creation of the debt there is a stipulation for usurious interest with no view to its ulterior use for a fraudulent purpose, and the debt is otherwise *bona fide*, the transaction cannot be assailed as fraudulent by reason of the usury.[26] But if there is no previous agreement as to the rate of interest, and usurious interest is allowed for the purpose of swelling the debt to an amount not materially less than the value of the property, the transaction should be pronounced fraudulent.[27]

5. Attorney's Fees. A transfer of property by a debtor to his attorney, in payment of services rendered, is not invalid as against a judgment creditor against whose claim the attorney had defended the vendor.[28] Attorney's fees when constituting a part of a debt may be included in a preference to the creditor.[29] Likewise the fees of an attorney for services in drawing a preferential deed of trust and in advising the trustee as to his duties may be included in the preference.[30] But since an insolvent debtor will not be allowed to give to one of his creditors more than the sum owing,[31] he cannot in a preferential confession of judgment add attorney's fees to the full amount of the debt, for by so doing he would *pro tanto* be making a gift to the preferred creditor.[32]

6. Debts Arising Out of Breach of Trust.[33] Where a trustee misapplies trust funds he may, although insolvent, replace the sum misapplied[34] or may protect the beneficiaries by giving security for its payment[35] without being guilty of fraud as against his other creditors. But it must appear that there has been an actual misapplication of the trust funds. If the trustee in expending money of the trust estate merely performed his duty under the terms of the trust, he will

24. Crawford *v.* Kirksey, 50 Ala. 590, 55 Ala. 282, 28 Am. Rep. 704, holding that a mortgage executed by an insolvent debtor to indemnify the sureties on his official bond as executor is without consideration and fraudulent and void in law as against creditors, where at the time of its execution the liability of the sureties was merely nominal, and on a subsequent final settlement the executor was found not to be indebted to the estate and was discharged.

25. See the cases cited in the following note.

Usury paid by creditor to a third person.— The validity of a deed of trust given to a creditor is not affected by the fact that one of the items of the debt consists of usurious interest which the creditor was compelled to pay to a third person for the purpose of replacing money which the debtor had borrowed and failed to return. Pennington *v.* Woodall, 17 Ala. 685.

26. Harris *v.* Russell, 93 Ala. 59, 9 So. 541; Lehman *v.* Greenhut, 88 Ala. 478, 7 So. 299.

27. Harris *v.* Russell, 93 Ala. 59, 9 So. 541; Lehman *v.* Greenhut, 88 Ala. 478, 7 So. 299.

28. Barker *v.* Archer, 49 N. Y. App. Div. 80, 63 N. Y. Suppl. 298.

29. Mayer *v.* Templeton, (Tex. Civ. App. 1899) 53 S. W. 68; Martin-Brown Co. *v.* Siebe, 6 Tex. Civ. App. 232, 26 S. W. 327, holding that if upon certain contingencies which afterward happen attorney's fees have been made a part of a debt, and an insolvent debtor prefers the debt, the fees are included in the preference.

30. Hamilton-Brown Shoe Co. *v.* Lastinger, (Tex. Civ. App. 1894) 26 S. W. 924; Butler *v.* Sanger, 4 Tex. Civ. App. 411, 23 S. W. 487. And see Mayer *v.* Templeton, (Tex. Civ. App. 1899) 53 S. W. 68.

31. See *supra*, VIII, B, E.

32. Young *v.* Clapp, 147 Ill. 176, 32 N. E. 187, 35 N. E. 372; Hulse *v.* Mershon, 125 Ill. 52, 17 N. E. 50 [*affirming* 25 Ill. App. 292]; Bauer Grocer Co. *v.* McKee Shoe Co., 87 Ill. App. 434; Farmers', etc., Bank *v.* Spear, 49 Ill. App. 509.

But where the debtor's property is insufficient to pay the preferred debts after deducting the attorney's fee, so that none of it is actually applied to such fee, the fact that the fee was included in the preference appears to be immaterial. Young *v.* Clapp, 147 Ill. 176, 32 N. E. 187, 35 N. E. 372. See *supra*, III, D.

33. See also, generally, Trusts.

34. Jackson *v.* Spivey, 63 N. C. 261, where the beneficiary was the trustee's son.

35. McLaughlin *v.* Carter, 13 Tex. Civ. App. 694, 37 S. W. 666; Middleton *v.* Pollock, 2 Ch. D. 104, 45 L. J. Ch. 293.

A guardian notwithstanding that he has given bond may as against his creditors give a note and mortgage to secure his ward reimbursement for property which the guardian has appropriated to his own use.

not be allowed to defeat his creditors by refunding the money on the theory that he was personally liable to meet the obligations for which the expenditures were made.[36]

7. Secured Debts — a. In General. The payment of a debt for which the creditor holds security cannot be held fraudulent, as by the discharge of the debt the security will be released and will become liable to the claims of other creditors.[37] According to the better considered cases the giving of cumulative security stands on a different basis from the payment of a secured debt. If the debtor is insolvent or contemplates insolvency and the creditor has knowledge of this fact, the creditor "cannot be permitted to pile security on security unnecessarily to the detriment of other creditors." Such a transaction requires explanation to save it from being held fraudulent.[38] But a preferred creditor has the right to accept other security in consideration of his release of the securities held by him and the transaction is valid unless it appears that the securities surrendered cannot be reached by other creditors.[39]

b. Discharge of Mortgage on Homestead. An insolvent or failing debtor may discharge by way of preference a debt secured by mortgage on his homestead, although the effect of the transaction is to enable the debtor to hold his homestead exempt from the claims of all his creditors.[40]

c. Conveyance of Mortgaged Property to Satisfy Mortgage. Where the fair value of mortgaged property does not exceed the amount of the mortgage the mortgagor may convey the property to the mortgagee in satisfaction of the debt, and the transaction will not be fraudulent as against other creditors.[41]

G. Transfer of All the Debtor's Property. A transfer of all the debtor's property to pay or secure a valid debt is not a fraud on other creditors if the value of the property does not materially exceed the amount of the indebtedness for which it is given and there is no reservation of any trust or benefit for the debtor beyond what the law would allow him in the absence of contract.[42] But

Plummer *v.* Green, 49 Nebr. 316, 68 N. W. 500. And see Jennings *v.* Jennings, 104 Cal. 150, 37 Pac. 794.

36. National Valley Bank *v.* Hancock, 100 Va. 101, 40 S. E. 611, 93 Am. St. Rep. 933, 57 L. R. A. 728, holding that where a debtor, acting as trustee for his minor children, has exercised the discretion imposed on him by the trust, and supported them out of the trust funds, he will not be permitted to restore to the trust estate the sums so expended, on the theory that it is his personal duty to support his children, where by so doing he will evade the payment of his honest debts.

37. Lucas *v.* Clafflin, 76 Va. 269, Anderson, J., delivering the opinion of the court.

38. Lombard *v.* Downs, 66 Iowa 243, 23 N. W. 649; Crapster *v.* Williams, 21 Kan. 109; Jaffray *v.* Wolf, 4 Okla. 303, 47 Pac. 496.

But in some cases the giving of additional security has not been regarded with any marked disfavor, and such transactions have been sustained. Plummer *v.* Green, 49 Nebr. 316, 68 N. W. 500; Padgitt *v.* Porter, (Tex. Civ. App. 1894) 26 S. W. 429 (holding that a chattel mortgage given to secure the claims of certain creditors is not void as to other creditors because one of the claims is otherwise secured); West Coast Grocery Co. *v.* Stinson, 13 Wash. 255, 43 Pac. 35.

39. Compton *v.* Marshall, 88 Tex. 50, 27 S. W. 121, 28 S. W. 518, 29 S. W. 1059; Compton *v.* Marshall, (Tex. Civ. App. 1894) 25 S. W. 441. And see McGregor *v.* Chase, 37 Vt. 225; Bradley *v.* Gotzian, 12 Wash. 71, 40 Pac. 623.

40. Randall *v.* Buffington, 10 Cal. 491 [*distinguishing* Riddell *v.* Shirley, 5 Cal. 488]; Bradley *v.* Gotzian, 12 Wash. 71, 40 Pac. 623. And see Flask *v.* Tindall, 39 Ark. 571. See also *supra* II, B, 21, b, (IV).

41. Wiggins *v.* Tumlin, 96 Ga. 753, 23 S. E. 75; Jackson *v.* Miller, 32 La. Ann. 432; Johnson *v.* Riley, 41 W. Va. 140, 23 S. E. 698; Smith *v.* Hardy, 36 Wis. 417, where a partial substitution of other property was held not to render the transaction invalid. See also Morse *v.* Velzy, 123 Mich. 532, 82 N. W. 225.

42. *Alabama.*— Cook *v.* Thornton, 109 Ala. 523, 20 So. 14; Chipman *v.* Stern, 89 Ala. 207, 7 So. 409; Carter *v.* Coleman, 84 Ala. 256, 4 So. 151; Hodges *v.* Coleman, 76 Ala. 103; Chamberlain *v.* Dorrance, 69 Ala. 40. Although a failing debtor, prior to the enactment of Code (1896), § 2156, which requires general assignments by debtors to be for the benefit of all creditors, had a right to prefer a creditor to the extent of conveying his entire estate, such conveyance was invalid if not absolute, or if any benefit was reserved to the grantor, or if the property conveyed was materially in excess of the debt, or if the debt, or a portion thereof, was fictitious, or if cash was received as a part consideration for the conveyance.

under some statutes a preferential transfer of substantially all the debtor's property inures to the benefit of all his creditors.[43] And it seems that any stipulations of the parties whereby the preferred creditor is enabled to control the future action of the debtor with regard to his other creditors may render the preference fraudulent.[44]

H. Knowledge and Intent of Parties[45] — **1. In General.** To render a preference invalid, in the absence of statutory prohibition, it must be accompanied by an intent to hinder, delay, or defraud other creditors;[46] that is, there must be an actual design to prevent in whole or in part the application of the debtor's property to the satisfaction of his debts.[47] An honest preference being

Russell *v.* Davis, 133 Ala. 647, 31 So. 514, 91 Am. St. Rep. 56.

California.— *In re* Muller, 118 Cal. 432, 50 Pac. 660; Dana *v.* Stanford, 10 Cal. 269.

Delaware.— Stockley *v.* Horsey, 4 Houst. 603.

Georgia.— McWhorter *v.* Wright, 5 Ga. 555.

Iowa.— Southern White Lead Co. *v.* Haas, 73 Iowa 399, 33 N. W. 657, 35 N. W. 494; Aulman *v.* Aulman, 71 Iowa 124, 32 N. W. 240, 60 Am. St. Rep. 783; Gage *v.* Parry, 69 Iowa 605, 29 N. W. 822; Farwell *v.* Howard, 26 Iowa 381; Johnson *v.* McGrew, 11 Iowa 151, 77 Am. Dec. 137; Cowles *v.* Ricketts, 1 Iowa 582.

Kansas.— Schram *v.* Taylor, 51 Kan. 547, 33 Pac. 315; Emporia First Nat. Bank *v.* Ridenour, 46 Kan. 707, 718, 27 Pac. 150, 26 Am. St. Rep. 167.

Massachusetts.— Stevens *v.* Bell, 6 Mass. 339.

Missouri.— Jaffrey *v.* Mathews, 120 Mo. 317, 25 S. W. 187; Crow *v.* Beardsley, 68 Mo. 435; Murray *v.* Cason, 15 Mo. 378.

Nebraska.— Blair State Bank *v.* Bunn, 61 Nebr. 464, 85 N. W. 527; Bennett *v.* McDonald, 59 Nebr. 234, 80 N. W. 826.

New York.— See Manning *v.* Beck, 129 N. Y. 1, 29 N. E. 90, 14 L. R. A. 198; London *v.* Martin, 79 Hun 229, 29 N. Y. Suppl. 396 [*affirmed* in 149 N. Y. 586, 44 N. E. 1125]; Vietor *v.* Levy, 72 Hun 263, 25 N. Y. Suppl. 644 [*affirmed* in 148 N. Y. 739, 42 N. E. 726]; Auburn Exch. Bank *v.* Fitch, 48 Barb. 344.

Oklahoma.— Jaffray *v.* Wolf, 1 Okla. 312, 33 Pac. 945.

Rhode Island.— Elliott *v.* Benedict, 13 R. I. 463.

South Carolina.— McElwee *v.* Kennedy, 56 S. C. 154, 34 S. E. 86.

Tennessee.— McGrew *v.* Hancock, (Ch. App. 1899) 52 S. W. 500; Fidelity, etc., Co. *v.* O'Brien, (Ch. App. 1896) 38 S. W. 417.

Washington.— Turner *v.* Iowa Nat. Bank, 2 Wash. 192, 26 Pac. 256.

Wisconsin.— Gage *v.* Chesebro, 49 Wis. 486, 5 N. W. 881.

United States.— Stewart *v.* Dunham, 115 U. S. 61, 5 S. Ct. 1163, 29 L. ed. 329 (construing the law of Mississippi); Foster *v.* McAlester, 114 Fed. 145, 52 C. C. A. 107; Repauno Chemical Co. *v.* Victor Hardware Co., 101 Fed. 948, 42 C. C. A. 106.

England.— Alton *v.* Harrison, L. R. 4 Ch. 622, 38 L. J. Ch. 669, 21 L. T. Rep. N. S. 282, 17 Wkly. Rep. 1034; *Ex p.* Games, 12 Ch. D. 314, 40 L. T. Rep. N. S. 789, 27 Wkly. Rep. 744.

Canada.— See Brown *v.* Sweet, 7 Ont. App. 725.

See also *infra*, XI, H, 1, text and note 50.

43. See e. g., Baxley *v.* Simmons, 132 Ala. 117, 31 So. 76. See the statutes of the several states, and see Assignments For Benefit of Creditors, 4 Cyc. 121 *et seq.*; and, generally, Insolvency.

Contra in Missouri.— Jaffrey *v.* Mathews, 120 Mo. 317, 25 S. W. 187; Crow *v.* Beardsley, 68 Mo. 435; Union Bank *v.* Kansas City Bank, 136 U. S. 223, 10 S. Ct. 1013, 34 L. ed. 341 [*overruling* Martin *v.* Hausman, 14 Fed. 160, and cases following it].

44. Tompkins *v.* Hunter, 65 Hun (N. Y.) 441, 20 N. Y. Suppl. 355.

Agreement not to make general assignment.— Thus a stipulation that the debtor should not thereafter make an assignment for the benefit of creditors has been held to render the preference invalid, because it indicated an intent to avoid the provisions of the general assignment law under which the preference might be avoided. Tompkins *v.* Hunter, 65 Hun (N. Y.) 441, 20 N. Y. Suppl. 355.

45. See, generally, *supra*, VII.

46. *California.*— Dana *v.* Stanford, 10 Cal. 269.

Delaware.— Stockley *v.* Horsey, 4 Houst. 603.

Illinois.— Ewing *v.* Runkle, 20 Ill. 448.

New Jersey.— Green *v.* McCrane, 55 N. J. Eq. 436, 37 Atl. 318.

Pennsylvania.— Candee's Appeal, 191 Pa. St. 644, 43 Atl. 1093; Werner *v.* Zierfuss, 162 Pa. St. 360, 29 Atl. 737.

United States.— Huiskamp *v.* Moline Wagon Co., 121 U. S. 310, 7 S. Ct. 899, 30 L. ed 971; Foster *v.* McAlester, 114 Fed. 145, 52 C. C. A. 107.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 373; and cases cited in the following notes. See also *supra*, XI, A.

47. Alabama L. Ins., etc., Co. *v.* Pettway, 24 Ala. 544, 566; Wheaton *v.* Neville, 19 Cal. 46; Dana *v.* Stanford, 10 Cal. 269; Lucas *v.* Clafflin, 76 Va. 269. And see Ewing *v.* Runkle, 20 Ill. 448.

Cal. Civ. Code, § 3439, declares that every transfer of property with intent to defraud any creditor is void as to all creditors of the debtor; but the fraud contemplated is an actual fraud, of which intent is a necessary

valid, it follows that when there is an actual debt or liability to be discharged or secured, the act of preference cannot be held fraudulent on the ground that it tends to hinder, delay, or defeat creditors, and that no inference of a fraudulent intent can be drawn from the purpose to give or obtain the preference.[48] The fact that the transfer of property to the preferred creditor has the effect of diminishing the debtor's assets and may thus actually obstruct or defeat the claims of other creditors is not sufficient to impeach the transaction, for this is only the necessary effect of giving a preference;[49] and this is true, although all the debtor's property is applied to the claim preferred, since if necessary to secure or discharge the debt a debtor may devote his entire estate to that purpose and thus defeat the claims of all his other creditors.[50] Nor is a preference of a valid

element, and a mere transfer out of the usual course of business, and tending to prefer a particular creditor, which would be evidence of fraud under the insolvent or bankrupt act, is insufficient. Roberts *v.* Burr, 135 Cal. 156, 67 Pac. 46.

48. *Alabama.*— Warren *v.* Hunt, 114 Ala. 506, 21 So. 939.

California.— Randall *v.* Buffington, 10 Cal. 491.

Illinois.— Nelson *v.* Leiter, 190 Ill. 414, 60 N. E. 851, 83 Am. St. Rep. 142 [*affirming* 93 Ill. App. 176]; Wood *v.* Clark, 121 Ill. 359, 12 N. E. 271 [*affirming* 21 Ill. App. 464].

Kentucky.— Kennaird *v.* Adams, 11 B. Mon. 102.

Maine.— Gardiner Nat. Bank *v.* Hagar, 65 Me. 359.

Missouri.— Bell *v.* Thompson, 3 Mo. 84; Derring *v.* Collins, 38 Mo. App. 80.

Nebraska.— Dempster Mill Mfg. Co. *v.* Holdredge First Nat. Bank, 49 Nebr. 321, 68 N. W. 477; Robinson Notion Co. *v.* Foot, 42 Nebr. 156, 60 N. W. 316; John V. Farwell Co. *v.* Wright, 38 Nebr. 445, 56 N. W. 984; Jones *v.* Loree, 37 Nebr. 816, 56 N. W. 390 [*overruling* Bonns *v.* Carter, 22 Nebr. 495, 35 N. W. 394].

New York.— Auburn Exch. Bank *v.* Fitch, 48 Barb. 344.

Pennsylvania.— Candee's Appeal, 191 Pa. St. 644, 43 Atl. 1093; Werner *v.* Zierfuss, 162 Pa. St. 360, 29 Atl. 737; York County Bank *v.* Carter, 38 Pa. St. 446, 80 Am. Dec. 494; Uhler *v.* Maulfair, 23 Pa. St. 481 [*overruling* Ashmead *v.* Hean, 13 Pa. St. 584]; Covanhovan *v.* Hart, 21 Pa. St. 495, 60 Am. Dec. 57; Davis *v.* Charles, 8 Pa. St. 82; Meyers *v.* Meyers, 24 Pa. Super. Ct. 603; Peck *v.* Spruks, 6 Lack. Leg. N. 132.

Tennessee.— McGrew *v.* Hancock, (Ch. App. 1899) 52 S. W. 500.

Texas.— Owens *v.* Clark, 78 Tex. 547, 15 S. W. 101; Ellis *v.* Valentine, 65 Tex. 532; Lewy *v.* Fischl, 65 Tex. 311; Greenleve *v.* Blum, 59 Tex. 124; Iglehart *v.* Willis, 58 Tex. 306.

Virginia.— Lucas *v.* Clafflin, 76 Va. 269.

Washington.— West Coast Grocery Co. *v.* Stinson, 13 Wash. 255, 43 Pac. 35.

Wisconsin.— Haben *v.* Harshaw, 49 Wis. 379, 5 N. W. 872.

United States.— Davis *v.* Schwartz, 155 U. S. 631, 15 S. Ct. 237, 39 L. ed. 289; Tompkins *v.* Wheeler, 16 Pet. 106, 10 L. ed. 903; Foster *v.* McAlester, 114 Fed. 145, 52 C. C. A. 204; Repauno Chemical Co. *v.* Victor Hardware Co., 101 Fed. 948, 42 C. C. A. 106.

England.— Middleton *v.* Pollock, 2 Ch. D. 104, 45 L. J. Ch. 293.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 369.

49. *Alabama.*— Crawford *v.* Kirksey, 55 Ala. 282, 28 Am. Rep. 704.

California.— Dana *v.* Stanford, 10 Cal. 269.

Indiana.— Levering *v.* Bimel, 146 Ind. 545, 45 N. E. 775.

Iowa.— Southern White Lead Co. *v.* Haas, 73 Iowa 399, 33 N. W. 657, 35 N. W. 494.

Michigan.— Geer *v.* Traders' Bank, 132 Mich. 215, 93 N. W. 437.

Missouri.— Gaff *v.* Stern, 12 Mo. App. 115.

Nebraska.— Blair State Bank *v.* Bunn, 61 Nebr. 464, 85 N. W. 527; Jones *v.* Loree, 37 Nebr. 816, 56 N. W. 390.

New Jersey.— Metropolis Nat. Bank *v.* Sprague, 20 N. J. Eq. 13.

Pennsylvania.— Werner *v.* Ziefuss, 162 Pa. St. 360, 29 Atl. 737; Lake Shore Banking Co. *v.* Fuller, 110 Pa. St. 156, 1 Atl. 731; Bentz *v.* Rockey, 69 Pa. St. 71; York County Bank *v.* Carter, 38 Pa. St. 446, 80 Am. Dec. 494.

South Carolina.— Thorpe *v.* Thorpe, 12 S. C. 154; Maples *v.* Maples, Rice Eq. 300.

Texas.— Edwards *v.* Dickson, 66 Tex. 613, 2 S. W. 718; Ellis *v.* Valentine, 65 Tex. 532; Lewy *v.* Fischl, 65 Tex. 311; Iglehart *v.* Willis, 58 Tex. 306; Noyes *v.* Sanger, 8 Tex. Civ. App. 388, 27 S. W. 1022.

Virginia.— Lucas *v.* Clafflin, 76 Va. 269.

West Virginia.— Harden *v.* Wagner, 22 W. Va. 356.

Wisconsin.— Stevens *v.* Breen, 75 Wis. 595, 44 N. W. 645.

United States.— Foster *v.* McAlester, 114 Fed. 145, 52 C. C. A. 107.

And see cases cited *supra*, XI, A.

The criterion is not the effect of the preference but the intent with which it was made. Werner *v.* Zierfuss, 162 Pa. St. 360, 29 Atl. 737.

50. *California.*— Dana *v.* Stanford, 10 Cal. 269.

Kansas.— Schram *v.* Taylor, 51 Kan. 547, 33 Pac. 315.

Nebraska.— Blair State Bank *v.* Bunn, 61 Nebr. 464, 85 N. W. 527; Jones *v.* Loree, 37 Nebr. 816, 56 N. W. 390.

debt rendered fraudulent by the fact that the creditor knows that the debtor is insolvent or that both parties know that by reason of the preference the claims of other creditors will be delayed or defeated.[51] That the debtor had promised another creditor to pay him out of the proceeds of the same property which was afterward transferred to the preferred creditor, and that the preferred creditor knew this, will not render the preference fraudulent.[52]

New York.— Auburn Exch. Bank *v.* Fitch, 48 Barb. 344.

Wisconsin.— Gage *v.* Chesebro, 49 Wis. 486, 5 N. W. 881.

United States.— Foster *v.* McAlester, 114 Fed. 145, 52 C. C. A. 107; Repauno Chemical Co. *v.* Victor Hardware Co., 101 Fed. 948, 42 C. C. A. 106.

And see *supra*, XI, G, where certain statutory restrictions on this right are also stated.

51. *Alabama.*— Cook *v.* Thornton, 109 Ala. 523, 20 So. 14; Bray *v.* Ely, 105 Ala. 553, 17 So. 180; Goetter *v.* Smith, 104 Ala. 481, 16 So. 534; Bates *v.* Vandiver, 102 Ala. 249, 14 So. 631; Pollock *v.* Meyer, 96 Ala. 172, 11 So. 385; Birmingham First Nat. Bank *v.* Smith, 93 Ala. 97, 9 So. 548; Chamberlain *v.* Dorrance, 69 Ala. 40; Crawford *v.* Kirksey, 55 Ala. 282, 28 Am. Rep. 704.

California.— Wheaton *v.* Neville, 19 Cal. 41; Dana *v.* Stanford, 10 Cal. 269.

Indiana.— Dice *v.* Irvin, 110 Ind. 561, 11 N. E. 488.

Iowa.— Aulman *v.* Aulman, 71 Iowa 124, 32 N. W. 240, 60 Am. Rep. 783. And see Johnson *v.* McGrew, 11 Iowa 151, 77 Am. Dec. 137; Cowles *v.* Ricketts, 1 Iowa 582.

Massachusetts.— Giddings *v.* Sears, 115 Mass. 505; Banfield *v.* Whipple, 14 Allen 13.

Michigan.— Webber *v.* Webber, 109 Mich. 147, 66 N. W. 960; Ferris *v.* McQueen, 94 Mich. 367, 54 N. W. 164; Sheldon *v.* Mann, 85 Mich. 265, 48 N. W. 573.

Missouri.— See Crothers *v.* Busch, 153 Mo. 606, 55 S. W. 149.

New York.— New York County Nat. Bank *v.* American Surety Co., 69 N. Y. App. Div. 153, 74 N. Y. Suppl. 692 [*affirmed* in 174 N. Y. 544, 67 N. E. 1086]; Beards *v.* Wheeler, 11 Hun 539; Auburn Exch. Bank *v.* Fitch, 48 Barb. 344.

Ohio.— Walker *v.* Walker, 6 Ohio S. & C. Pl. Dec. 355, 4 Ohio N. P. 324.

Oregon.— Marquam *v.* Sengfelder, 24 Oreg. 2, 32 Pac. 676.

Pennsylvania.— Penn Plate Glass Co. *v.* Jones, 189 Pa. St. 290, 42 Atl. 189; Werner *v.* Zierfuss, 162 Pa. St. 360, 29 Atl. 737; Uhler *v.* Maulfair, 23 Pa. St. 481 [*overruling* Ashmead *v.* Hean, 13 Pa. St. 584]; Covanhovan *v.* Hart, 21 Pa. St. 495, 60 Am. Dec. 57.

South Carolina.— McElwee *v.* Kennedy, 56 S. C. 154, 34 S. E. 86.

Tennessee.— McGrew *v.* Hancock, (Ch. App. 1899) 52 S. W. 500; Johnson *v.* Goldston, (Ch. App. 1899) 52 S. W. 474; Feder *v.* Ervin, (Ch. App. 1896) 38 S. W. 446, 36 L. R. A. 335.

Texas.— Smith *v.* Whitfield, 67 Tex. 124, 2 S. W. 822; Lewy *v.* Fischl, 65 Tex. 311; Greenleve *v.* Blum, 59 Tex. 124; Iglehart *v.* Willis, 58 Tex. 306.

Virginia.— Johnson *v.* Lucas, 103 Va. 36, 48 S. E. 497.

Washington.— See Langert *v.* David, 14 Wash. 389, 44 Pac. 875, where a judgment was assigned to the preferred creditor who knew that another creditor was expecting to be paid out of the proceeds of the judgment, and the court held that this fact did not invalidate the preference.

Wisconsin.—Gage *v.* Chesebro, 49 Wis. 486, 5 N. W. 881. And see Ingram *v.* Osborn, 70 Wis. 184, 35 N. W. 304.

United States.— Bamberger *v.* Schoolfield, 160 U. S. 149, 16 S. Ct. 225, 40 L. ed. 374 (applying the law of Alabama); Huiskamp *v.* Moline Wagon Co., 121 U. S. 310, 7 S. Ct. 899, 30 L. ed. 971; McCartney *v.* Earle, 115 Fed. 462, 53 C. C. A. 392 [*affirming* 112 Fed. 372]; Wilson *v.* Jones, 76 Fed. 484 (applying the law of Virginia); Repauno Chemical Co. *v.* Victor Hardware Co., 101 Fed. 948, 42 C. C. A. 106.

Knowledge and intent of debtor.— "A debtor who is indebted to a number of creditors, when he exercises the right to prefer one of his creditors and to secure the payment of his indebtedness to such creditor by a mortgage or deed to a trustee creating a prior lien on his real estate, must, of course, not only be conscious that his act of preference will hinder and delay,— possibly defeat,— the collection of other demands against him, but if he intends his mortgage or trust deed shall be effective, his purpose being to subordinate the claims of the other creditors to that of the creditor he desires to prefer, it may always be said his intention is to hinder and delay all the unpreferred creditors." Nelson *v.* Leiter, 190 Ill. 414, 422, 60 N. E. 851, 83 Am. St. Rep. 142 [*affirming* 93 Ill. App. 176].

"**The test** to be applied is whether the debtor, in exercising the privilege of making the preference, acts in good faith, with the intent to pay, or secure the payment of, a just indebtedness against him, and he cannot be deprived of the right on the ground that he knows or intends that the preference given to one creditor, to the extent of such preference shall be available and effective, will operate to hinder and delay other creditors." Nelson *v.* Leiter, 190 Ill. 414, 422, 60 N. E. 851, 83 Am. St. Rep. 142 [*affirming* 93 Ill. App. 176].

52. McKeown *v.* Coogler, 18 Fla. 866; Langert *v.* Davis, 14 Wash. 389, 44 Pac. 875.

Prior mortgage not delivered.—A mortgage to a creditor was left for delivery with a third person, but the delivery was not to take place prior to assent given by the mort-

2. PARTICIPATION OF PREFERRED CREDITOR. The fact that the creditor has knowledge that the purpose of the debtor is to defeat other creditors does not invalidate the preference, if the sole consideration is the preëxisting debt and the value of the property transferred is not materially in excess of the debt, provided the creditor does not actually participate in the fraud;[53] but the knowledge of the creditor is equivalent to participation in the fraud where the preëxisting debt is only part of the consideration.[54]

3. PREFERENCE NOT INVALIDATED BY MERE FRAUDULENT INTENT. If a preferential transfer of property has no other effect between the parties than to pay or secure an actual debt, no more property being transferred than is reasonably necessary for that purpose and no interest or benefit being reserved for the debtor, the transaction cannot be assailed as fraudulent, although the parties intended not only to create a preference but to hinder, delay, or defeat other creditors and the transfer has this effect. In such a case, the act of preference being lawful, there is nothing from which fraudulent motives can be inferred, and any fraudulent motives the parties may actually have are wholly immaterial.[55] Hence when a preferential sale or conveyance of property by an insolvent debtor to one or more of his creditors is assailed by other creditors as fraudulent, the only questions for consideration are: (1) The existence, *bona fides* and amount of the purchasing creditors' claims; (2) whether the sale was in absolute payment and satisfaction of the debts, at a fair valuation of the property; and (3) whether any benefit or interest was reserved or inured to the debtor.[56] In short a charge of fraud can

gagor. Before delivery the debtor conveyed the same premises to another creditor. It was held that since a debtor may use his property to secure his creditors in such order as he may select, the deed would not be set aside. Belding Sav. Bank *v.* Moore, 118 Mich. 150, 76 N. W. 368.

53. See *supra*, VII, B, 2, b, (I), (A).

54. See *supra*, VII, B, 2, b, (I), (B).

55. *Alabama.*—Beddow *v.* Sheppard, 118 Ala. 474, 23 So. 662; Pollock *v.* Meyer, 96 Ala. 172, 11 So. 385; Ellison *v.* Moses, 95 Ala. 221, 11 So. 347; Birmingham First Nat. Bank *v.* Smith, 93 Ala. 97, 9 So. 548; Harris *v.* Russell, 93 Ala. 59, 9 So. 541; Chipman *v.* Stern, 89 Ala. 207, 7 So. 409; Carter *v.* Coleman, 84 Ala. 256, 4 So. 151; Levy *v.* Williams, 79 Ala. 171; Hodges *v.* Coleman, 76 Ala. 103. And see Dawson *v.* Flash, 97 Ala. 539, 12 So. 67.

Illinois.— Holbrook *v.* First Nat. Bank, 10 Ill. App. 140.

New York.— Auburn Exch. Bank *v.* Fitch, 48 Barb. 344; Brett *v.* Catlin, 47 Barb. 404; Wilson *v.* Berger, 5 N. Y. St. 822. And see Archer *v.* O'Brien, 7 Hun 146.

Pennsylvania.— Snayberger *v.* Fahl, 195 Pa. St. 336, 45 Atl. 1065, 78 Am. St. Rep. 818; Werner *v.* Zierfuss, 162 Pa. St. 360, 29 Atl. 737; Covanhovan *v.* Hart, 21 Pa. St. 495, 60 Am. Dec. 57; Peck *v.* Sprucks, 6 Lack. Leg. N. 132. But see Bunn *v.* Ahl, 29 Pa. St. 387, 72 Am. Dec. 639.

Texas.— Ellis *v.* Valentine, 65 Tex. 532. And see Texas Drug Co. *v.* Baker, 20 Tex. Civ. App. 684, 50 S. W. 157; Scarborough *v.* Hilliard, (Civ. App. 1894) 28 S. W. 231; Reynolds *v.* Weinman, (Civ. App. 1894) 25 S. W. 33.

United States.— Bamberger *v.* Schoolfield, 160 U. S. 149, 16 S. Ct. 225, 40 L. ed. 374, applying the law of Alabama.

England.— See Wood *v.* Dixie, 7 Q. B. 892, 9 Jur. 796, 53 E. C. L. 892.

Canada.— McMaster *v.* Clare, 7 Grant Ch. (U. C.) 550 per Blake, C. And see Atty.-Gen. *v.* Harmer, 16 Grant Ch. (U. C.) 533.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 373, 385. See also *infra*, XI, H, 5, b.

Reason of rule.— "The law condemns motives and intents, only when they are carried into an act which is itself illegal. If the end accomplished be lawful, it is immaterial what may have prompted it, provided the intent itself inflict no personal or pecuniary wrong, and does not aggravate the result." Carter *v.* Coleman, 84 Ala. 256, 257, 3 So. 151. See also Ellis *v.* Valentine, 65 Tex. 532. In Wilson *v.* Berger, 5 N. Y. St. 822, 825, the court said: "Here it is a mere mental intent or purpose that is shown, in no way allied to, or accompanied by, an illegal act; for the act of preference was a lawful act. A mere intent accompanied by no illegal act will not give a ground of action."

When fraudulent provisions immaterial.— Where the value of the property conveyed to pay or secure a preferred creditor does not equal the amount of the debt, the fact that the instrument of transfer contains provisions that would otherwise tend to hinder or delay unsecured creditors in collecting their claims is immaterial. Wade *v.* Odle, 21 Tex. Civ. App. 656, 54 S. W. 786. See *supra*, III, D.

56. Fargason *v.* Hall, 99 Ala. 209, 13 So. 302; Harris *v.* Russell, 93 Ala. 59, 9 So. 541; Carter *v.* Coleman, 84 Ala. 256, 4 So. 151; Hesse *v.* Barrett, 41 Oreg. 202, 68 Pac. 751. And see Archer *v.* O'Brien, 7 Hun (N. Y.) 146.

All inferences of fraud rebutted.— If these questions are determined in favor of the pref-

be based only on some fact which makes the transaction something different from or more than a mere preference.[57] But there are a number of *dicta* and a few decisions to the effect that a preferential transfer made and accepted with the intent to hinder, delay, or defeat other creditors of the transferrer is fraudulent and invalid as against such other creditors notwithstanding that it was also given to pay or secure a valid debt;[58] the transaction being put upon the same basis as a transfer for a present consideration.[59] It is believed, however, that most of these cases can be distinguished on the ground that the facts involved showed something more than a preference given to and accepted by one creditor with the intent to defeat another.[60]

4. SECRECY AND HASTE.[61] Secrecy and haste in effectuating a preference constitute no evidence of fraud, for the debtor has a legal right to give the preference and the creditor has an equal right to use influence to obtain it and to be secretive and energetic in order that other creditors may not forestall him.[62] Nor is fraud shown by the debtor's failure to disclose to his other creditors the existence of

erence the facts "absolutely rebut all inferences that might be drawn from attendant badges of fraud, and impart validity to the conveyance as an allowable preference of the particular creditor." Hodges *v.* Coleman, 76 Ala. 103, 120.

57. Auburn Exch. Bank *v.* Fitch, 48 Barb. (N. Y.) 344 [*explaining* Waterbury *v.* Sturtevant, 18 Wend. (N. Y.) 353]; Wilson *v.* Berger, 5 N. Y. St. 822 [*distinguishing* Billings *v.* Russell, 101 N. Y. 226, 4 N. E. 531]. And see the cases cited in the preceding notes.

"It may be said as a general rule, that to impeach the payment or securing of an actual debt there should be evidence tending to show either, first, some other advantage or benefit to the debtor beyond the discharge of his obligation; or, secondly, some other benefit to the creditor, beyond mere payment of his debt; or lastly some injury to the other creditors beyond mere postponement to the debt preferred." Werner *v.* Zierfuss, 162 Pa. St. 360, 367, 29 Atl. 737 [*approved* in Snayberger *v.* Fahl, 195 Pa. St. 336, 45 Atl. 1065, 78 Am. St. Rep. 818]. See also Dalley's Estate, 13 Pa. Super. Ct. 506; Repauno Chemical Co. *v.* Victor Hardware Co., 101 Fed. 948, 42 C. C. A. 106.

58. *Georgia.*— Bigby *v.* Warnock, 115 Ga. 385, 41 S. E. 622, 57 L. R. A. 754; Monroe Mercantile Co. *v.* Arnold, 108 Ga. 449, 34 S. E. 176; Phinizy *v.* Clark, 62 Ga. 623. And see Conley *v.* Buck, 100 Ga. 187, 28 S. E. 97.

Indiana.— Wynne *v.* Glidewell, 17 Ind. 446.

Kentucky.— Ward *v.* Trotter, 3 T. B. Mon. 1.

Massachusetts.— Crowninshield *v.* Kittridge, 7 Metc. 520.

Missouri.— Crow *v.* Beardsley, 68 Mo. 435; Scott Hardware Co. *v.* Riddle, 84 Mo. App. 275; Ross *v.* Ashton, 73 Mo. App. 254.

New York.— Billings *v.* Russell, 101 N. Y. 226, 4 N. E. 531 [*reversing* 31 Hun 65]; New York Ice Co. *v.* Cousins, 23 N. Y. App. Div. 560, 48 N. Y. Suppl. 799; Howe *v.* Sommers, 22 N. Y. App. Div. 417, 48 N. Y. Suppl. 162.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 373.

59. Billings *v.* Russell, 101 N. Y. 226, 4 N. E. 531 [*reversing* 31 Hun 65].

60. See for example the New York cases cited *supra*, note 58. And see *supra*, XI, H, 2.

61. See, *supra*, V, B, 5.

62. *Alabama.*— Carter *v.* Coleman, 84 Ala. 256, 258, 4 So. 151 (in which the court said: "So long as the law allows a failing debtor to prefer some of his creditors at the expense of others, it permits, if it does not invite, a race of diligence); Hodges *v.* Coleman, 76 Ala. 103. And see Warren *v.* Hunt, 114 Ala. 506, 21 So. 939.

Arkansas.— Rice *v.* Wood, 61 Ark. 442, 33 S. W. 636, 31 L. R. A. 609.

Mississippi.— Holberg *v.* Jaffray, 64 Miss. 746, 2 So. 168.

New York.— Thompson *v.* Fuller, 5 Silv. Sup. 41, 8 N. Y. Suppl. 62.

Pennsylvania.— Candee's Appeal, 191 Pa. St. 644, 43 Atl. 1093.

Tennessee.— Reeves *v.* John, 95 Tenn. 434, 32 S. W. 312.

United States.— Davis *v.* Schwartz, 155 U. S. 631, 15 S. Ct. 237, 39 L. ed. 289; Foster *v.* McAlester, 114 Fed. 145, 52 C. C. A. 107; Repauno Chemical Co. *v.* Victor Hardware Co., 101 Fed. 948, 42 C. C. A. 106; Rice *v.* Adler-Goldman Commission Co., 71 Fed. 151, 18 C. C. A. 15.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 375.

But *compare* McNeil, etc., Co. *v.* Plows, 83 Ill. App. 186, and the remarks of the court in Hancock *v.* Horan, 15 Tex. 507; Edrington *v.* Rogers, 15 Tex. 188.

Instructions which convey to a jury the impression that secrecy or haste in a transaction by which a debtor secures one of his creditors, or the fact that the giving of such security operates to hinder and delay other creditors, are badges of fraud which place the burden on the secured creditor to sustain the validity of his security, are misleading and erroneous without a full explanation of the legal right of a *bona fide* creditor to obtain security for his debt to the exclusion of others, if done in good faith; and such instructions are not warranted in any case

the preferred debt or of the preferential agreement.[63] Indeed it seems that secrecy and haste which would be sufficient to show fraud in a sale of property for a money consideration will not avail to impeach a transfer in satisfaction of an antecedent debt.[64]

5. Preference Pending Suit — a. In General. A preference is not rendered fraudulent by the fact that it is made during the pendency of an action by another creditor against the debtor.[65] The fact that the preference is made by an insolvent debtor pending bankruptcy proceedings against him and in violation of the Federal Bankruptcy Act does not affect its validity under the laws of the state.[66]

b. Intent to Defeat Judgment, Execution, or Attachment. An actual preference of a valid debt is not rendered fraudulent by the fact that it was made and accepted with the intent to defeat a judgment or execution against the debtor.[67] The fact that the transfer is made by an insolvent debtor on the eve of rendition of judgments against him is merely a badge of fraud;[68] and when it appears that the transfer is a sale to a creditor in payment of a debt admitted to be justly due,

unless there is other evidence tending to impeach the good faith of the transaction, since such facts are entirely consistent with the exercise by the creditor of his legal rights. Foster *v.* McAlester, 114 Fed. 145, 52 C. C. A. 107.

63. Robinson *v.* Hawley, 45 N. Y. App. Div. 287, 61 N. Y. Suppl. 138; Smith *v.* Munroe, 1 N. Y. App. Div. 77, 37 N. Y. Suppl. 62; McElwee *v.* Kennedy, 56 S. C. 154, 34 S. E. 86.

64. Carter *v.* Coleman, 84 Ala. 256, 4 So. 151; Hodges *v.* Coleman, 76 Ala. 103.

65. *Alabama.*— Crawford *v.* Kirksey, 50 Ala. 590; Stetson *v.* Miller, 36 Ala. 642; Williams *v.* Jones, 2 Ala. 314.

Indiana.— Dice *v.* Irvin, 110 Ind. 561, 11 N. E. 488.

Kansas.— Randall *v.* Shaw, 28 Kan. 419.

Kentucky.— See Kennaird *v.* Adams, 11 B. Mon. 102.

Minnesota.— Ferguson *v.* Kumler, 11 Minn. 104.

Mississippi.— Donoghue *v.* Shull, 85 Miss. 404, 37 So. 817.

Missouri.— Kuykendall *v.* McDonald, 15 Mo. 416, 57 Am. Dec. 212.

New Jersey.— Doremus *v.* Daniels, (Ch. 1890) 20 Atl. 147; Goodwin *v.* Hamill, 26 N. J. Eq. 24.

New York.— Waterbury *v.* Sturtevant, 18 Wend. 353.

Ohio.— Barr *v.* Hatch, 3 Ohio 527.

Pennsylvania.— See Snayberger *v.* Fahl, 195 Pa. St. 336, 45 Atl. 1065, 78 Am. St. Rep. 818.

South Carolina.— Weinges *v.* Cash, 15 S. C. 44; Bevins *v.* Dunham, 1 Speers 39.

Utah.— Henderson *v.* Adams, (1897) 48 Pac. 398.

Virginia.— Lucas *v.* Clafflin, 76 Va. 269; Williams *v.* Lord, 75 Va. 390.

United States.— Davis *v.* Schwartz, 155 U. S. 631, 15 S. Ct. 237, 39 L. ed. 289; Vansickle *v.* Wells, 105 Fed. 25.

See *supra*, V, B, 2.

Pending extended time to answer.—A judgment confessed for a just and legal debt while a suit by another creditor is pending against the debtor, and during an extension of time obtained by the debtor's attorneys within which to answer the complaint, does not constitute a fraud on plaintiff in the action. Wood *v.* Mitchell, 17 N. Y. Suppl. 782 [*affirming* 14 N. Y. Suppl. 7, 26 Abb. N. Cas. 129]. *Compare* H. B. Claflin Co. *v.* Arnheim, 87 Hun (N. Y.) 236, 33 N. Y. Suppl. 1037, 1 N. Y. Annot. Cas. 391.

66. Talcott *v.* Harder, 119 N. Y. 536, 23 N. E. 1056.

67. *California.*— Walden *v.* Murdock, 23 Cal. 540, 83 Am. Dec. 135; Wheaton *v.* Neville, 19 Cal. 41.

Florida.— Gassett *v.* Wilson, 3 Fla. 235.

Illinois.— Funk *v.* Staats, 24 Ill. 633.

Indiana.— Steele *v.* Moore, 54 Ind. 52.

Massachusetts.—Carpenter *v.* Cushman, 121 Mass. 265.

Missouri.— Kuykendall *v.* McDonald, 15 Mo. 416, 57 Am. Dec. 212. And see Shelley *v.* Boothe, 73 Mo. 74, 39 Am. Rep. 481.

New Jersey.— Goodwin *v.* Hamill, 26 N. J. Eq. 24.

New York.— Hall *v.* Arnold, 15 Barb. 599; Waterbury *v.* Sturtevant, 18 Wend. 353; Wilder *v.* Winne, 6 Cow. 284; Weller *v.* Wayland, 17 Johns. 102.

Pennsylvania.— Clemens *v.* Davis, 7 Pa. St. 263.

Texas.— Frazer *v.* Thatcher, 49 Tex. 26. See also Moore *v.* Robinson, (Civ. App. 1903) 75 S. W. 890.

Virginia.— Lucas *v.* Clafflin, 76 Va. 269.

United States.— Davis *v.* Schwartz, 155 U. S. 631, 15 S. Ct. 237, 39 L. ed. 289.

England.— Alton *v.* Harrison, L. R. 4 Ch. 622, 38 L. J. Ch. 669, 21 L. T. Rep. N. S. 282, 17 Wkly. Rep. 1034; Wood *v.* Dixie, 7 Q. B. 892, 9 Jur. 796, 53 E. C. L. 892. And see Riches *v.* Evans, 9 C. & P. 640, 38 E. C. L. 373; Darvill *v.* Terry, 6 H. & N. 807, 30 L. J. Exch. 355; Marlow *v.* Orgill, 8 Jur. N. S. 829; Holbird *v.* Anderson, 5 T. R. 235. And see Meux *v.* Howell, 4 East 1. *Compare* Pickstock *v.* Lyster, 3 M. & S. 371, 16 Rev. Rep. 300.

Canada.— See Gurofski *v.* Harris, 27 Ont. 201 [*affirmed* in 23 Ont. App. 717]; White *v.* Stevens, 7 U. C. Q. B. 340.

68. Williams *v.* Jones, 2 Ala. 314.

and for a full and fair price, and that the debt is thereby discharged, all presumption of fraud arising from the pendency of suit is removed.[69] On the other hand the right of the plaintiff in an action to enter and have the benefit of a judgment will be protected by the courts against the actual fraud of the defendant debtor, as where the latter by false promises and assurance or ungrounded opposition obtains delay in the proceedings and meanwhile transfers his property or confesses judgment in favor of another creditor. In such a case the plaintiff's judgment will be given priority.[70]

6. Prior Agreement to Prefer. A creditor having the right to ask, and his debtor having the right to give, an honest preference to the debt, the mere fact that the preference is given in performance of a previous agreement to do so does not make it fraudulent,[71] even where the agreement was to give the preference in the event that the debtor should become financially embarrassed or insolvent,[72] although the question is one proper to be submitted to the jury on the issue of fraud.[73] But an agreement to turn over the debtor's property to the creditor in the event of the former's insolvency has been held to be in contravention of the local insolvency laws.[74]

I. Transfer Partly For Present Consideration — 1. In General. If a preferential sale to a creditor is partly in payment of the debt and partly for a present consideration, the validity of the transaction as against other creditors is determined by the rules applying where the sale is entirely for a present consideration.[75] The creditor in such a case must pay a reasonably fair price and must secure to the debtor no benefit which the law would not secure to him in the absence of contract.[76] But if these requirements are complied with and there is nothing else on which to predicate fraud, the transaction will be valid as to other creditors.[77] A preferential conveyance of land is not rendered fraud-

69. Barr *v.* Hatch, 3 Ohio 527.

70. Montgomery First Nat. Bank *v.* Acme White Lead, etc., Co., 123 Ala. 344, 26 So. 354; Robinson *v.* Hawley, 45 N. Y. App. Div. 287, 61 N. Y. Suppl. 138 (where entry of judgment was delayed by assurances that the judgment would be paid); H. B. Claflin Co. *v.* Arnheim, 87 Hun (N. Y.) 236, 33 N. Y. Suppl. 1037, 1 N. Y. Annot. Cas. 391 [*distinguishing* Wood *v.* Mitchell, 17 N. Y. Suppl. 782] (where an extension of time to answer was gained by a promise that the debtor would pay plaintiff's claim and that in the meantime there should be no change in his property, that no judgment should be entered against him, and that plaintiff should not in any way be prejudiced by the delay; but during this time defendant confessed judgment to another creditor).

71. Marquese *v.* Felsenthal, 58 Ark. 293, 24 S. W. 493; National Park Bank *v.* Whitmore, 104 N. Y. 297, 10 N. E. 524; Foster *v.* McAlester, 114 Fed. 145, 52 C. C. A. 107; Fechheimer *v.* Baum, 43 Fed. 719, 2 L. R. A. 153; Smith *v.* Craft, 17 Fed. 705 [appeal *dismissed* in 123 U. S. 436, 8 S. Ct. 196, 31 L. ed. 267]. See also Teitig *v.* Boesman, 12 Mont. 404, 31 Pac. 371; First Nat. Bank *v.* North, 2 S. D. 480, 51 N. W. 96.

72. National Park Bank *v.* Whitmore, 104 N. Y. 297, 10 N. E. 524; Robinson *v.* Hawley, 45 N. Y. App. Div. 287, 61 N. Y. Suppl. 138; Smith *v.* Munroe, 1 N. Y. App. Div. 77, 37 N. Y. Suppl. 62; Fechheimer *v.* Baum, 43 Fed. 719, 2 L. R. A. 153; Smith *v.* Craft, 17 Fed. 705 [appeal *dismissed* in 123 U. S. 436, 8 S. Ct. 196, 31 L. ed. 267]. See also Pierce Steam Heating Co. *v.* Ransom, 16 N. Y. App. Div. 258, 44 N. Y. Suppl. 623. But *compare* Krippendorf *v.* Hyde, 28 Fed. 788.

Failure to record preferential agreement.— In the absence of a local statute requiring or authorizing such agreement to be recorded, the failure to record the agreement to give a preference is immaterial, for if it were recorded the record would not constitute notice. Fechheimer *v.* Baum, 43 Fed. 719, 2 L. R. A. 153 [construing the law of Georgia, and *distinguishing* Blennerhassett *v.* Sherman, 105 U. S. 100, 26 L. ed. 1080].

73. Marquese *v.* Felsenthal, 58 Ark. 293, 24 S. W. 493; Smith *v.* Craft, 123 U. S. 436, 8 S. Ct. 196, 31 L. ed. 267.

In the absence of any findings on the question of actual fraud it cannot be said as a matter of law that an agreement to give a preference is fraudulent or that it is not; but the question is one of fact. Smith *v.* Craft, 123 U. S. 436, 8 S. Ct. 196, 31 L. ed. 267.

74. Chevalier *v.* Commins, 106 Cal. 580, 39 Pac. 929. See, generally, Insolvency.

75. See *supra*, VII, B, 2, b, (I), (B).

76. Leinkauff *v.* Frenkle, 80 Ala. 136.

77. *Arkansas.*— Gist *v.* Barrow, 42 Ark. 521.

Iowa.— Adams *v.* Ryan, 61 Iowa 733, 17 N. W. 159; Johnson *v.* McGrew, 11 Iowa 151, 77 Am. Dec. 137.

Missouri.— Cahn *v.* Groves, 46 Mo. App. 263.

Vermont.— Lyon *v.* Rood, 12 Vt. 233.

ulent by the purchasing creditor's agreement to pay to the debtor's wife a sum of money for the relinquishment of her dower right.[78] It has been held, however, that where the balance of the consideration over and above the antecedent debt is secured to be paid to the debtor in the future, other creditors may attack the transaction as tending to hinder and delay them in collecting their claims.[79]

2. PRESENT CONSIDERATION EXEMPT.[80] In case of a transfer partly for an antecedent debt and partly for a present consideration, if the cash payment or note given for a deferred payment, together with such property as the debtor may retain, does not exceed the exemptions to which he is entitled, other creditors cannot complain of the transaction for they are not injured;[81] provided, however, that it be proved that the debtor is a resident of the state and thus entitled to the exemption.[82]

3. PRESENT CONSIDERATION TO BE PAID BY DEBTOR TO OTHER CREDITOR. A sale of property at a fair valuation by an insolvent or failing debtor, partly in satisfaction of an antecedent debt and partly for a present consideration, is not rendered fraudulent by the fact that the consideration paid is applied by the debtor on another *bona fide* debt according to an agreement of the parties.[83] Such a stipulation is not objectionable as being a reservation of a benefit to the debtor.[84]

4. OTHER DEBTS ASSUMED BY TRANSFEREE.[85] A preferential transfer of property by an insolvent or failing debtor to a creditor to pay or secure the debt is not rendered fraudulent by the fact that debts owing to certain other creditors are assumed by the transferee as part of the consideration.[86] And this is true,

Washington.— Langret *v.* David, 14 Wash. 389, 44 Pac. 875.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 389.

But in Texas if a preferred creditor of a failing debtor receives from the latter property much more than sufficient to satisfy the debt and pays the excess in cash to the debtor, he becomes a purchaser, and in paying the excess is considered to be aiding the debtor in placing his property beyond the reach of creditors. In such a case the transfer will be set aside not only as to the excess in value but as to all the property transferred. Black *v.* Vaughan, 70 Tex. 47, 7 S. W. 604. See also Seligson *v.* Brown, 61 Tex. 180; Greenleve *v.* Blum, 59 Tex. 124.

78. Marshall *v.* Hutchinson, 5 B. Mon. (Ky.) 298.

79. Brinson *v.* Edwards, 94 Ala. 447, 10 So. 219; Seger *v.* Thomas, 107 Mo. 635, 18 S. W. 33; Elser *v.* Graber, 69 Tex. 222, 6 S. W. 560. But see Langret *v.* David, 14 Wash. 389, 44 Pac. 875.

80. See also *supra*, II, B, 21.

81. Fargason *v.* Hall, 99 Ala. 209, 13 So. 302; Brinson *v.* Edwards, 94 Ala. 447, 10 So. 219.

82. Brinson *v.* Edwards, 94 Ala. 447, 10 So. 219.

83. Fargason *v.* Hall, 99 Ala. 209, 13 So. 302; Carter *v.* Coleman, 84 Ala. 256, 4 So. 151; Rankin *v.* Vandiver, 78 Ala. 562. And see Moog *v.* Farley, 79 Ala. 246.

84. Rankin *v.* Vandiver, 78 Ala. 562. See *supra*, X, A, 7.

85. See also *supra*, XI, D, 2.

86. *Alabama.*— Goetter *v.* Smith, 104 Ala. 481, 16 So. 534; Chipman *v.* Stern, 89 Ala. 207, 7 So. 409 (holding this to be true, although the conveyance is of all the debtor's property); Dixon *v.* Higgins, 82 Ala. 284, 2 So. 289.

California.— Saunderson *v.* Broadwell, 82 Cal. 132, 23 Pac. 36.

Connecticut.— See Koster *v.* Merritt, 32 Conn. 246.

Illinois.— See Ewing *v.* Runkle, 20 Ill. 448.

Indiana.— Wilcoxson *v.* Annesley, 23 Ind. 285.

Iowa.— Lycoming Rubber Co. *v.* King, 90 Iowa 343, 57 N. W. 864 (mortgage); Johnson *v.* McGrew, 11 Iowa 151, 77 Am. Dec. 137.

New Jersey.— See Essex County *v.* Lindsley, 41 N. J. Eq. 189, 3 Atl. 391.

New York.— Hine *v.* Bowe, 114 N. Y. 350, 21 N. E. 733 [*affirming* 46 Hun 196]; Carpenter *v.* Muren, 42 Barb. 300, mortgage.

Pennsylvania.— York County Bank *v.* Carter, 38 Pa. St. 446, 80 Am. Dec. 494.

Tennessee.— Johnson *v.* Coldston, (Ch. App. 1899) 52 S. W. 474, where the transferee assumed all the transferrer's debts, paid some of them, and became liable for the rest.

Texas.— Jacobs *v.* Totty, 76 Tex. 343, 13 S. W. 372; Noyes *v.* Sanger, 8 Tex. Civ. App. 388, 27 S. W. 1022.

Virginia.— See Janney *v.* Barnes, 11 Leigh 100.

Wisconsin.— Ingram *v.* Osborn, 70 Wis. 184, 35 N. W. 304.

United States.— Randolph *v.* Allen, 73 Fed. 23, 19 C. C. A. 353, applying the law of Texas.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 389.

Compare Foster *v.* Grigsby, 1 Bush (Ky.) 86; Smith *v.* Conkwright, 28 Minn. 23, 8 N. W. 876.

although the transaction may result in the preference of the creditors whose claims are thus assumed, or such preference is stipulated for by the parties; for the debtor has a legal right to direct the application of the surplus and to give preferences therefrom.[87] A stipulation enabling the debtor thus to direct the application of the surplus to other debts is not objectionable as being a reservation of a benefit to him.[88] But a stipulation giving to the purchasing creditor the right to make preferments among the vendor's creditors at his own discretion will render the transfer invalid.[89]

5. Creditor's Promise to Compound Felony. A preferential transfer does not become fraudulent as to other creditors merely because the creditor on receiving satisfaction and giving up the evidence of his debt illegally promises to compound a felony of which the debtor is guilty, no more property being transferred than is necessary to discharge the debt.[90]

J. Preferences Between Relatives — 1. In General. The fact that there is a family relationship between the debtor and the preferred creditor does not of itself affect the validity of the preference and is not a badge of fraud. If the debt is valid and no fraud attends the transaction a preference given to a relative or a member of the debtor's family is as valid as if made to any other creditor.[91]

Where there is a complete novation, the debtor being released and the other creditors accepting the obligation of the purchasing creditor, the transaction may be upheld. McCann *v.* Dillabaugh, 117 Mich. 446, 75 N. W. 929 [*distinguishing* Hill *v.* Mallory, 112 Mich. 387, 70 N. W. 1016; Allen *v.* Stingel, 95 Mich. 195, 54 N. W. 880].

87. *Alabama.*— Goetter *v.* Smith, 104 Ala. 481, 16 So. 534.

Indiana.— Wilcoxson *v.* Annesley, 23 Ind. 285.

Iowa.— Lycoming Rubber Co. *v.* King, 90 Iowa 343, 57 N. W. 864.

New York.— Hine *v.* Bowe, 114 N. Y. 350, 21 N. E. 733 [*affirming* 46 Hun 196].

Wisconsin.— Ingram *v.* Osborn, 70 Wis. 184, 35 N. W. 304.

United States.— Randolph *v.* Allen, 73 Fed. 23, 19 C. C. A. 353, applying the law of Texas.

88. Goetter *v.* Smith, 104 Ala. 481, 16 So. 534. And see *supra*, X, A, 7.

89. Seger *v.* Thomas, 107 Mo. 635, 18 S. W. 33. And see *supra*, XI, D, 4.

90. Traders' Nat. Bank *v.* Steere, 165 Mass. 389, 43 N. E. 187. And see *In re* Mapleback, 4 Ch. D. 150, 13 Cox C. C. 374, 46 L. J. Bankr. 14, 35 L. T. Rep. N. S. 503, 25 Wkly. Rep. 103.

91. *Alabama.*— Worthington *v.* Rogan, (1898) 26 So. 299; Owens *v.* Hobbie, 82 Ala. 467, 3 So. 145; Moog *v.* Farley, 79 Ala. 246; Crawford *v.* Kirksey, 50 Ala. 590 [*citing* Montgomery *v.* Kirksey, 26 Ala. 172].

Arkansas.— Hempstead *v.* Johnston, 18 Ark. 123, 65 Am. Dec. 458.

California.— Roberts *v.* Burr, 135 Cal. 156, 67 Pac. 46; Saunderson *v.* Broadwell, 82 Cal. 132, 23 Pac. 36.

Illinois.—Schuberth *v.* Schillo, 177 Ill. 346, 52 N. E. 319 [*affirming* 76 Ill. App. 356]. See also Vietor *v.* Swisky, 87 Ill. App. 583.

Indiana.— Rockland Co. *v.* Summerville, 139 Ind. 695, 39 N. E. 307; Laird *v.* Davidson, 124 Ind. 412, 25 N. E. 7. See Nappanee Canning Co. *v.* Reid, 159 Ind. 614, 64 N. E. 870, 1115, 59 L. R. A. 199; Adams *v.* Curtis, 137 Ind. 175, 36 N. E. 1095; Jones *v.* Snyder, 117 Ind. 229, 20 N. E. 140; Wilson *v.* Wilson, 113 Ind. 415, 15 N. E. 513; Dice *v.* Irvin, 110 Ind. 561, 11 N. E. 488; Goff *v.* Rogers, 71 Ind. 459.

Iowa.— Roberts *v.* Brothers, 119 Iowa 309, 93 N. W. 289; Brooks *v.* Jones, (1900) 82 N. W. 434; Stroff *v.* Swafford, 81 Iowa 695, 47 N. W. 1023; Rockford Boot, etc., Mfg. Co. *v.* Mastin, 75 Iowa 112, 39 N. W. 219. And see Adams *v.* Ryan, 61 Iowa 733, 17 N. W. 159.

Kansas.— Winfield Nat. Bank *v.* Croco, 46 Kan. 629, 26 Pac. 942; Bliss *v.* Couch, 46 Kan. 400, 26 Pac. 706; Cooper *v.* Washington First Nat. Bank, 40 Kan. 5, 18 Pac. 937.

Kentucky.— Young *v.* Stallings, 5 B. Mon. 307. See Stokes *v.* Coffey, 8 Bush 533.

Maryland.—Commonwealth Bank *v.* Kearns, 100 Md. 202, 59 Atl. 1010.

Michigan.— Webber *v.* Webber, 109 Mich. 147, 66 N. W. 960; Leppig *v.* Bretzel, 48 Mich. 321, 12 N. W. 199.

Mississippi.— Donoghue *v.* Shull, 85 Miss. 404, 37 So. 817.

Missouri.— See Ridge *v.* Greenwell, 53 Mo. App. 479; Cahn *v.* Groves, 46 Mo. App. 263.

Nebraska.— Blair State Bank *v.* Bunn, 61 Nebr. 464, 85 N. W. 527 [*following* Farrington *v.* Stone, 35 Nebr. 456, 53 N. W. 389].

New Jersey.— Silvers *v.* Potter, 48 N. J. Eq. 539, 22 Atl. 584; Coley *v.* Coley, 14 N. J. Eq. 350.

New York.— Lindsley *v.* Van Cortlandt, 67 Hun 145, 22 N. Y. Suppl. 222 [*affirmed* in 142 N. Y. 682, 37 N. E. 825]; Toffey *v.* Williams, 5 Thomps. & C. 294.

Ohio.— Thacker *v.* Newell, 7 Ohio Dec. (Reprint) 576, 3 Cinc. L. Bul. 1159.

Oregon.— Hesse *v.* Barrett, 41 Oreg. 202, 68 Pac. 751; Feldman *v.* Nicolai, 28 Oreg. 34, 40 Pac. 1010 [*following* Jolly *v.* Kyle, 27 Oreg. 95, 39 Pac. 999].

Pennsylvania.— Candee's Appeal, 191 Pa. St. 644, 43 Atl. 1093 [*citing* Kitchen *v.* Mc-

Thus according to the general rule previously stated[92] a debtor may give a valid preference to his father,[93] his mother,[94] his child,[95] his brother,[96] or his sister.[97]

Closkey, 150 Pa. St. 376, 24 Atl. 688, 30 Am. St. Rep. 811; Collins *v.* Cronin, 117 Pa. St. 35, 11 Atl. 869].

South Carolina.— See Mechanics' Bldg., etc., Assoc. *v.* Fowler, 57 S. C. 110, 35 S. E. 433; Thorpe *v.* Thorpe, 12 S. C. 154.

South Dakota.— Studebaker Mfg. Co. *v.* Zollars, 12 S. D. 296, 81 N. W. 292.

Tennessee.— Nelson *v.* Kinney, 93 Tenn. 428, 25 S. W. 100; Miller *v.* Winton, (Ch. App. 1900) 56 S. W. 1049; Maryville Bank *v.* Thornton, (Ch. App. 1895) 35 S. W. 565.

Virginia.— Johnson *v.* Lucas, 103 Va. 36, 40, 48 S. E. 497, in which the court said: "Relationship is not a badge of fraud. There is no law which forbids persons standing in near relations of consanguinity, affinity, or business, from dealing with each other, or which requires them to conduct their business with each other differently from the manner in which they conduct it with other persons."

United States.— Davis *v.* Schwartz, 155 U. S. 631, 15 S. Ct. 237, 39 L. ed. 289; Micou *v.* Montgomery First Nat. Bank, 104 U. S. 530, 26 L. ed. 834; Corwine *v.* Thompson Nat. Bank, 105 Fed. 196, 44 C. C. A. 442; Vansickle *v.* Wills, 100 Fed. 25; Hinchman *v.* Parlin, etc., Co., 74 Fed. 698, 21 C. C. A. 273; Buford *v.* Cook, 36 Fed. 21. And see Walker *v.* Houghteling, 120 Fed. 928, 57 C. C. A. 218.

England.— Grogan *v.* Cooke, 2 Ball & B. 234.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 379.

92. See *supra*, XI, A.

93. *Indiana.*— Rockland County *v.* Summerville, 139 Ind. 695, 39 N. E. 307; McFadden *v.* Ross, 126 Ind. 341, 26 N. E. 78.

Michigan.— Fenton State Bank *v.* Whittle, 48 Mich. 1, 11 N. W. 756.

Minnesota.—Ferguson *v.* Kumler, 11 Minn. 104.

Nebraska.— Peregoy *v.* Krantz, 31 Nebr. 58, 47 N. W. 422.

New York.— Lindsley *v.* Van Cortlandt, 67 Hun 145, 22 N. Y. Suppl. 222 [*affirmed* in 142 N. Y. 682, 37 N. E. 825].

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 381.

94. Coley *v.* Coley, 14 N. J. Eq. 350; Jones *v.* Naughright, 10 N. J. Eq. 298; Leach *v.* Flack, 31 Hun (N. Y.) 605; Auburn Exch. Bank *v.* Fitch, 48 Barb. (N. Y.) 344; Lloyd *v.* Williams, 21 Pa. St. 327. And see Roberts *v.* Burr, 135 Cal. 156, 67 Pac. 46.

95. *Indiana.*— Clow *v.* Brown, (1904) 72 N. E. 534.

Iowa.— Riddick *v.* Parr, 111 Iowa 733, 82 N. W. 1002; Sands *v.* Pierson, 61 Iowa 702, 17 N. W. 107.

Kansas.— Pettyjohn *v.* Newhart, 7 Kan. App. 64, 51 Pac. 969; Murray *v.* Concordia First Nat. Bank, 5 Kan. App. 456, 49 Pac. 326.

Kentucky.— Seiler *v.* Walz, 100 Ky. 105, 29 S. W. 338, 31 S. W. 729, 17 Ky. L. Rep. 301; Caldwell *v.* Eminence Deposit Bank, 35 S. W. 625, 18 Ky. L. Rep. 156; Spurrier *v.* Haley, 4 Ky. L. Rep. 364.

Maryland.— Thompson *v.* Williams, 100 Md. 195, 60 Atl. 26.

Mississippi.— Donly *v.* Ray, (1889) 6 So. 324.

Missouri.— See Lillard *v.* Johnson, 148 Mo. 23, 49 S. W. 889.

Nebraska.— Carson *v.* Murphy, 1 Nebr. (Unoff.) 519, 96 N. W. 110.

New Jersey.— Doremus *v.* Daniels, (Ch. 1890) 20 Atl. 147.

New York.— Port Jervis Nat. Bank *v.* Bonnell, 26 Misc. 541, 57 N. Y. Suppl. 486. See also Hyde *v.* Houston, 29 N. Y. Suppl. 818.

Tennessee.— Nelson *v.* Kinney, 93 Tenn. 428, 25 S. W. 100.

Wisconsin.— Barr *v.* Church, 82 Wis. 382, 52 N. W. 591.

United States.— Micou *v.* Montgomery First Nat. Bank, 104 U. S. 530, 26 L. ed. 834; Vattier *v.* Hinde, 7 Pet. 252, 8 L. ed. 675 [*reversing* 12 Fed. Cas. No. 6,512, 1 McLean 110].

Canada.— Smith *v.* Wright, 2 N. Brunsw. Eq. 528. See also Gurofski *v.* Harris, 27 Ont. 201 [*affirmed* in 23 Ont. App. 717].

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 381.

Where a father emancipates his child and thereafter borrows money from him, a conveyance by the father to the child in consideration of such loan is not in fraud of existing creditors of the former. Flynn *v.* Baisley, 35 Oreg. 268, 57 Pac. 908, 76 Am. St. Rep. 495, 45 L. R. A. 645; Bomor *v.* Means, 53 S. C. 232, 31 S. E. 234; Rosenbaum *v.* Davis, (Tenn. Ch. App. 1898) 48 S. W. 706. See *supra*, II, B, 7, c; VIII, G, 1, b.

96. *Alabama.*— Moog *v.* Farley, 79 Ala. 246.

California.— Saunderson *v.* Broadwell, 82 Cal. 132, 23 Pac. 36.

Colorado.— Krippendorp-Dittman Co. *v.* Trenoweth, 16 Colo. App. 178, 64 Pac. 373.

Iowa.— Adams *v.* Ryan, 61 Iowa 733, 17 N. W. 159.

Kentucky.— See Shaw *v.* Shaw, 24 S. W. 630, 15 Ky. L. Rep. 592.

Pennsylvania.— Kitchen *v.* McCloskey, 150 Pa. St. 376, 24 Atl. 688, 30 Am. St. Rep. 811. And see Candee's Appeal, 191 Pa. St. 644, 43 Atl. 1093, where one member of a firm which was the debtor was a brother of a member of a firm which was the creditor.

South Carolina.— Sloan *v.* Hunter, 56 S. C. 385, 34 S. E. 658, 879, 76 Am. St. Rep. 551; Thorpe *v.* Thorpe, 12 S. C. 154.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 379.

97. Cahn *v.* Groves, 46 Mo. App. 263; Toffey *v.* Williams, 5 Thomps. & C. (N. Y.) 294.

But where the transaction will have the effect of hindering or defeating the just claims of other creditors, fraud being charged, it will be more closely scrutinized than if it took place between strangers.[98]

2. Between Husband and Wife. While transfers of property by a husband to his wife should when charged as being fraudulent be very clearly scrutinized on account of the opportunities afforded by the confidential relations of the parties for the perpetration of fraud,[99] yet a husband honestly indebted to his wife may give her a valid preference, either by transfer of money or property in payment or by giving security, to the same extent as he may prefer any other creditor, and such a preference is not of itself fraudulent as to other creditors of the husband.[1]

98. *Alabama.*— Russell *v.* Davis, (1901) 31 So. 514; Calhoun *v.* Hannan, 87 Ala. 277, 6 So. 291; Moog *v.* Farley, 79 Ala. 246.

Maryland.— Commonwealth Bank *v.* Kearns, 100 Md. 202, 59 Atl. 1010.

Nebraska.— Blair State Bank *v.* Bunn, 61 Nebr. 464, 85 N. W. 527 [*following* Farrington *v.* Stone, 35 Nebr. 456, 53 N. W. 389; Steinkraus *v.* Korth, 44 Nebr. 777, 62 N. W. 1110].

New York.— Lindsley *v.* Van Cortlandt, 67 Hun 145, 22 N. Y. Suppl. 222 [*affirmed* in 142 N. Y. 682, 37 N. E. 570].

North Carolina.— Mitchell *v.* Eure, 126 N. C. 77, 35 S. E. 190; Allen *v.* McLendon, 113 N. C. 321, 18 S. E. 206.

Oregon.— Feldman *v.* Nicolai, 28 Oreg. 34, 40 Pac. 1010 [*following* Jolly *v.* Kyle, 27 Oreg. 95, 39 Pac. 999].

Pennsylvania.— Lloyd *v.* Williams, 21 Pa. St. 327.

Virginia.— Johnson *v.* Lucas, 103 Va. 36, 48 S. E. 497.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 379. And see *infra*, XII.

Where a debtor prefers a creditor related by blood or marriage, clearer proof of good faith is required than in the case of strangers. Schloss *v.* McGuire, 102 Ala. 626, 15 So. 275; Smith *v.* Collins, 94 Ala. 314, 10 So. 334; Owens *v.* Hobbie, 82 Ala. 467, 3 So. 145.

Good faith must be clearly established.— Calhoun *v.* Hannan, 87 Ala. 277, 6 So. 291; Bonwit *v.* Heyman, 43 Nebr. 537, 61 N. W. 716; Plummer *v.* Rummel, 26 Nebr. 142, 42 N. W. 336; Bartlett *v.* Cheesbrough, 23 Nebr. 767, 37 N. W. 652; Brooks *v.* Todd, 1 Handy (Ohio) 169, 12 Ohio Dec. (Reprint) 84.

Burden of proof see *infra*, XIV, K, 1, d.

Transactions held fraudulent.— Arnold *v.* Wilds, 77 Iowa 593, 42 N. W. 555; Wise *v.* Wilds, 77 Iowa 586, 42 N. W. 553; Brooks *v.* Todd, 1 Handy (Ohio) 169, 12 Ohio Dec. (Reprint) 84.

99. Hollis *v.* Rodgers, 106 Ga. 13, 31 S. E. 783; Manchester *v.* Tibbetts, 121 N. Y. 219, 24 N. E. 304, 18 Am. St. Rep. 816; McElwee *v.* Kennedy, 56 S. C. 154, 34 S. E. 86; Hairston *v.* Hairston, 35 S. C. 298, 14 S. E. 634. See, generally, *infra*, XII, B.

1. *Alabama.*— National Bank of Republic *v.* Dickinson, 107 Ala. 265, 18 So. 144; Kilgore *v.* Stoner, (1892) 12 So. 60; Whaun *v.* Atkinson, 84 Ala. 592, 4 So. 681; Northington *v.* Faber, 52 Ala. 45. And see Beddow *v.* Sheppard, 118 Ala. 474, 23 So. 662, opinion of Haralson, J.

California.— Roberts *v.* Burr, 135 Cal. 156, 67 Pac. 46.

Colorado.— Pueblo First Nat. Bank *v.* Kavanagh, 7 Colo. App. 160, 43 Pac. 217; Stramann *v.* Scheeren, 7 Colo. App. 1, 42 Pac. 191.

Florida.— Hill *v.* Meinhard, 39 Fla. 111, 21 So. 805.

Georgia.— Simms *v.* Tidwell, 98 Ga. 686, 25 S. E. 555; Comer *v.* Allen, 72 Ga. 1.

Illinois.— German Ins. Co. *v.* Bartlett, 188 Ill. 165, 58 N. E. 1075, 80 Am. St. Rep. 172, 52 L. R. A. 283 [*affirming* 89 Ill. App. 469]; Tomlinson *v.* Matthews, 98 Ill. 178; Earl *v.* Earl, 186 Ill. 370, 57 N. E. 1079 [*reversing* 87 Ill. App. 491]; Cooke *v.* Peter, 93 Ill. App. 1; Vietor *v.* Swisky, 87 Ill. App. 583; Cartwright *v.* Cartwright, 68 Ill. App. 74; Hensley *v.* Hensley, 65 Ill. App. 195; Hughes *v.* Bell, 62 Ill. App. 74; Fleming *v.* Weagley, 32 Ill. App. 183; Rudershausen *v.* Atwood, 19 Ill. App. 58.

Indiana.— Laird *v.* Davidson, 124 Ind. 412, 25 N. E. 7; Brigham *v.* Hubbard, 115 Ind. 474, 17 N. E. 920; Dice *v.* Irvin, 110 Ind. 561, 11 N. E. 488; Hoes *v.* Boyer, 108 Ind. 494, 9 N. E. 427; Bragg *v.* Stanford, 82 Ind. 234; Sims *v.* Rickets, 35 Ind. 181, 9 Am. Rep. 679; Kyger *v.* F. Hull Skirt Co., 34 Ind. 249.

Iowa.— Clark *v.* Ford, 126 Iowa 460, 102 N. W. 421; Meredith *v.* Schaap, (1901) 85 N. W. 628; Muir *v.* Miller, 103 Iowa 127, 72 N. W. 409; Sprague *v.* Benson, 101 Iowa 678, 70 N. W. 731; Jones *v.* Brandt, 59 Iowa 332, 10 N. W. 854, 13 N. W. 310. And see Fowler Co. *v.* McDonnell, 100 Iowa 536, 69 N. W. 873.

Kansas.— Fuller *v.* Croco, 46 Kan. 634, 26 Pac. 944; Winfield Nat. Bank *v.* Croco, 46 Kan. 629, 26 Pac. 942; De Ford *v.* Nye, 40 Kan. 665, 20 Pac. 481; Cooper *v.* Washington First Nat. Bank, 40 Kan. 5, 18 Pac. 937; Chapman *v.* Summerfield, 36 Kan. 610, 14 Pac. 235; Miller *v.* Krueger, 36 Kan. 344, 13 Pac. 641; Kennedy *v.* Powell, 34 Kan. 22, 7 Pac. 606.

Kentucky.—Taylor *v.* Cooley, 49 S. W. 335, 20 Ky. L. Rep. 1365. And see Cochran *v.* Rennison, 67 S. W. 5, 23 Ky. L. Rep. 2326; McCandless *v.* Rea, 56 S. W. 10, 21 Ky. L. Rep. 1687.

Maine.— Ferguson *v.* Spear, 65 Me. 277; French *v.* Motley, 63 Me. 326.

Maryland.— Crane *v.* Barkdoll, 59 Md. 534.

Massachusetts.— Atlantic Nat. Bank *v.* Tavener, 130 Mass. 407, conveyance through a third person.

In this respect it has been said that the same principles apply between husband and wife as between any other persons occupying toward each other the relation of debtor and creditor.[2] That the debt is for money lent by the wife out of the proceeds of her individual property which was given to her by the husband when perfectly solvent does not affect the validity of the preference, although the husband is then insolvent.[3] The fact that the debt or a part thereof is barred by the statute of limitations does not affect the validity of the preference, for the husband is under no duty to his creditors to interpose the statute;[4] and indeed it has

Michigan.— Strauss *v.* Parshall, 91 Mich. 475, 51 N. W. 1117; Jordan *v.* White, 38 Mich. 253; Allen *v.* Antisdale, 38 Mich. 229; Hill *v.* Bowman, 35 Mich. 191. And see Cole *v.* Cole, 126 Mich. 569, 85 N. W. 1098; Dull *v.* Merrill, 69 Mich. 49, 36 N. W. 677; Leppig *v.* Bretzel, 48 Mich. 321, 12 N. W. 199; Hyde *v.* Powell, 47 Mich. 156, 10 N. W. 181.

Minnesota.— See Frost *v.* Steele, 46 Minn. 1, 48 N. W. 413.

Mississippi.— Savage *v.* Dowd, 54 Miss. 728. *Compare* Mangum *v.* Finucane, 38 Miss. 354.

Missouri.— See Sedalia Third Nat. Bank *v.* Cramer, 78 Mo. App. 476.

Montana.— Lambrecht *v.* Patten, 15 Mont. 260, 38 Pac. 1063.

Nebraska.— Dayton Spice-Mills Co. *v.* Sloan, 49 Nebr. 622, 68 N. W. 1040; Ward *v.* Parlin, 30 Nebr. 376, 46 N. W. 529.

New Jersey.— Brock *v.* Hudson County Nat. Bank, 48 N. J. Eq. 615, 23 Atl. 269, 27 Am. St. Rep. 451. And see Talcott *v.* Arnold, 54 N. J. Eq. 570, 35 Atl. 532.

New York.— Manchester *v.* Tibbetts, 121 N. Y. 219, 24 N. E. 304, 18 Am. St. Rep. 816; Jewett *v.* Noteware, 30 Hun 192; Woodworth *v.* Sweet, 44 Barb. 268 [*affirmed* in 51 N. Y. 8]; Sing Sing First Nat. Bank *v.* Hamilton, 27 N. Y. Suppl. 1029; Doty *v.* Clint, 11 N. Y. St. 87. And see Baker *v.* Georgi, 10 N. Y. App. Div. 249, 41 N. Y. Suppl. 1030.

Oregon.— Sabin *v.* Wilkins, 31 Oreg. 450, 48 Pac. 425, 37 L. R. A. 465.

Pennsylvania.— Benson *v.* Maxwell, 105 Pa. St. 274, 10 Pa. Cas. 380, 14 Atl. 161; Lahr's Appeal, 90 Pa. St. 507; Matter of Bradway, 1 Ashm. 212.

South Carolina.— McElwee *v.* Kennedy, 56 S. C. 154, 34 S. E. 86 [*following* McGhee *v.* Wells, 52 S. C. 472, 30 S. E. 602]; Gerald *v.* Gerald, 28 S. C. 442, 6 S. E. 290. And see Hairston *v.* Hairston, 35 S. C. 298, 14 S. E. 634.

Texas.— McCrory *v.* Lutz, 94 Tex. 650, 64 S. W. 780 [*affirming* (Civ. App. 1901) 62 S. W. 1094]; Torrey *v.* Cameron, 73 Tex. 585, 11 S. W. 840; Thompson *v.* Wilson, 24 Civ. App. 666, 60 S. W. 354; Massie *v.* McKee, (Civ. App. 1900) 56 S. W. 119; Jacobs *v.* Womack, (Civ. App. 1894) 26 S. W. 431.

West Virginia.—Righter *v.* Riley, 42 W. Va. 633, 26 S. E. 357; Cale *v.* Shaw, 33 W. Va. 299, 10 S. E. 637. See also Bennett *v.* Bennett, 37 W. Va. 396, 16 S. E. 638, 38 Am. St. Rep. 47.

Wisconsin.— Brickley *v.* Walker, 68 Wis. 563, 32 N. W. 773.

United States. — New York Fourth Nat. Bank *v.* American Mills Co., 137 U. S. 234, 11 S. Ct. 52, 34 L. ed. 655; Jewell *v.* Knight, 123 U. S. 426, 8 S. Ct. 193, 31 L. ed. 190; Bean *v.* Patterson, 122 U. S. 496, 7 S. Ct. 1298, 30 L. ed. 1126; Magniac *v.* Thompson, 7 Pet. 348 [*affirming* 16 Fed. Cas. No. 8,956, Baldw. 344]; Vansickle *v.* Wells, 105 Fed. 16; Hinchman *v.* Parlin, etc., Co., 74 Fed. 698, 21 C. C. A. 273.

Canada. — Fair *v.* Young, 26 Grant Ch. (U. C.) 544.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 380.

Illustration.—A wife advanced money to her husband for the purpose of building upon lots owned by him, under an agreement that he should afterward convey the lots and buildings to her. He neglected to do so until a judgment was about to be entered against him for a debt which he had incurred before he got title to the lots upon which he built. Just before the judgment was entered he conveyed the lots to his wife. The judgment creditor filed a bill to have this deed set aside, as a fraud upon creditors. It was held that the husband had the right to pay or secure his wife in preference to other creditors, and that, in the absence of any fraudulent intention on the part of the wife to hinder creditors, the conveyance should be regarded as a mortgage to secure her the amount of her advances. Brock *v.* Hudson County Nat. Bank, 48 N. J. Eq. 615, 23 Atl. 269, 27 Am. St. Rep. 451.

The failure of the wife to make her claim known does not deprive her of her rights as a creditor even as against one of the husband's creditors who gave credit to him in ignorance of the wife's claim. Dull *v.* Merrill, 69 Mich. 49, 36 N. W. 677; Hyde *v.* Powell, 47 Mich. 156, 10 N. W. 181.

2. Vietor *v.* Swisky, 87 Ill. App. 583; Rudershausen *v.* Atwood, 19 Ill. App. 58; Torrey *v.* Cameron, 73 Tex. 583, 590, 11 S. W. 840. And see Righter *v.* Riley, 42 W. Va. 633, 26 S. E. 357.

3. De Prato *v.* Jester, (Ark. 1892) 20 S. W. 807; Knox *v.* Clark, 15 Colo. App. 356, 62 Pac. 334; Laird *v.* Davidson, 124 Ind. 412, 25 N. E. 7 (money previously given by the husband to the wife); Bean *v.* Patterson, 122 U. S. 496, 7 S. Ct. 1298, 30 L. ed. 1126 (where the purchase-money for the wife's property had been furnished by the husband).

4. Frost *v.* Steele, 46 Minn. 1, 48 N. W. 413; Manchester *v.* Tibbetts, 121 N. Y. 219, 24 N. E. 304, 18 Am. St. Rep. 816; Vansickle *v.* Wells, 105 Fed. 16. See also French

been held that neither the statute of limitations nor the presumption of payment from lapse of time has any application to the husband's debt to his wife.[5] But the staleness of the wife's claim may be considered by the jury in determining whether an actual indebtedness existed.[6]

XII. TRANSACTIONS BETWEEN PERSONS IN CONFIDENTIAL RELATIONS.

A. In General — 1. TRANSFERS BETWEEN PERSONS NOT RELATIVES. The fact that a conveyance is between personal friends,[7] or between persons occupying confidential relations, such as attorney and client,[8] partners, principal and agent, or trustee and *cestui que trust*[9] does not of itself show that the transaction is fraudulent; but evidence of the confidential relations existing between the parties is admissible,[10] and such transactions are subject to more careful scrutiny than those between strangers, and clearer proof of their fairness is necessary.[11] A conveyance by an employer to his employee will be held fraudulent where it is evident that it is merely a scheme to defraud the creditors of the employer.[12]

2. TRANSFERS BETWEEN RELATIVES. The fact that the parties to a conveyance are related to each other, either by blood or marriage, does not of itself establish fraud in the transfer;[13] but the fact of relationship may properly be considered in connection with other evidence tending to impeach the transaction.[14] In some

v. Motley, 63 Me. 326. See *supra*, VIII, A, 9, a, (v).

5. Dice *v.* Irvin, 110 Ind. 561, 11 N. E. 488. See, generally, HUSBAND AND WIFE; LIMITATIONS OF ACTIONS.

6. Hollis *v.* Rodgers, 106 Ga. 13, 31 S. E. 783. And see Dillman *v.* Nadelhoffer, 162 Ill. 625, 45 N. E. 680 [*affirming* 56 Ill. App. 517]; Vansickle *v.* Wells, 105 Fed. 16.

7. Schroeder *v.* Walsh, 16 Ill. App. 590.

8. Summers *v.* Taylor, 80 Ky. 429; White *v.* Slaughter, 5 La. Ann. 136.

9. Bronson *v.* Thompson, 77 Conn. 214, 58 Atl. 692.

10. Strong *v.* Hines, 35 Miss. 201; Heilbronner *v.* Lloyd, 17 Mont. 299, 42 Pac. 853; Blum *v.* Jones, 86 Tex. 492, 25 S. W. 694.

11. Leavitt *v.* La Force, 71 Mo. 353. See also *infra*, XIV, K, 1, d, 3, d, (II).

12. Johnston *v.* Ferris, 12 N. Y. St. 666; Vance *v.* Phillips, 6 Hill (N. Y.) 433; O'Connell *v.* Cruise, 1 Handy (Ohio) 164, 12 Ohio Dec. (Reprint) 81; La Crosse Nat. Bank *v.* Wilson, 74 Wis. 391, 43 N. W. 153. Where a vendor, who is known to be totally insolvent by his confidential clerk and manager, sells to the latter who has no means, his whole stock of goods, on long credit and without security, the sale will be declared fraudulent and simulated. Walton *v.* Birch, 10 La. Ann. 100; Beck *v.* Brady, 7 La. Ann. 124.

13. *Alabama.*— Smith *v.* Collins, 94 Ala. 394, 10 So. 334; Montgomery *v.* Kirksey, 26 Ala. 172. See also Morrow *v.* Campbell, 118 Ala. 330, 24 So. 852.

District of Columbia.— Clark *v.* Krause, 2 Mackey 559.

Illinois.— Nelson *v.* Smith, 28 Ill. 495.

Indiana.— Basye *v.* Daniel, 1 Ind. 378.

Iowa.— Conry *v.* Benedict, (1898) 76 N. W. 840; Adams *v.* Ryan, 61 Iowa 733, 17 N. W. 159.

Louisiana.— Shadburne *v.* Amonett, 7 La. Ann. 89; Maurin *v.* Rouquer, 19 La. 594; Beale *v.* Delancy, 6 Mart. N. S. 640, 17 Am. Dec. 199; Ham *v.* Herriman, 1 Mart. N. S. 535; St. Avid *v.* Weimprender, 9 Mart. 648.

Nebraska.— Lininger *v.* Herron, 18 Nebr. 450, 25 N. W. 578.

New Jersey.— Demarest *v.* Terhune, 18 N. J. Eq. 45.

New York.— Du Bois *v.* Barker, 4 Hun 80, 6 Thomps. & C. 349.

Pennsylvania.— Reehling *v.* Byers, 94 Pa. St. 316; Newton *v.* Shaffer, 6 Kulp 357.

Tennessee.— Sporrer *v.* Eifler, 1 Heisk. 633; Bumpas *v.* Dotson, 7 Humphr. 310, 46 Am. Dec. 81.

Wisconsin.— Bleiler *v.* Moore, 88 Wis. 438, 60 N. W. 792; Sterling *v.* Ripley, 3 Pinn. 155, 3 Chandl. 166.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 329.

Brothers.— The fact that the parties to a conveyance are brothers does not, of and in itself, cast suspicion on the transaction, or create such a *prima facie* presumption against its validity as will require a court to hold it to be invalid, without proof of fraud on the part of the grantor participated in by the grantee. Shealy *v.* Edwards, 75 Ala. 411; Duffield *v.* Delancey, 36 Ill. 258; Norfolk City Nat. Bank *v.* Bridgers, 114 N. C. 383, 19 S. E. 666; Lane *v.* Starr, 1 S. D. 107, 45 N. W. 212; Gottlieb *v.* Thatcher, 151 U. S. 271, 14 S. Ct. 319, 38 L. ed. 157.

Brothers-in-law.— Thompson *v.* Zuckmayer, (Iowa 1903) 94 N. W. 476; Fluegel *v.* Henschel, 7 N. D. 276, 74 N. W. 996, 66 Am. St. Rep. 642.

Mother-in-law and son-in-law.— Tompkins *v.* Nichols, 53 Ala. 197.

Father-in-law.— Stevens *v.* Breen, 75 Wis. 595, 44 N. W. 645.

Nephew.— Copis *v.* Middleton, 2 Madd. 410, 17 Rev. Rep. 226, 56 Eng. Reprint 386.

14. *Illinois.*— Schroeder *v.* Walsh, 120 Ill. 403, 11 N. E. 70.

Iowa.— Adams *v.* Ryan, 61 Iowa 733, 17

states it is held that the transaction will be more closely scrutinized than if it were between strangers,[15] and that it may be shown to be fraudulent by less proof than in cases where such relationship does not exist; and that the party claiming the benefit of such transaction is held to a fuller and stricter proof of its justice, and the fairness of the transaction, after it is shown to be *prima facie* fraudulent, than would otherwise be required.[16] If a fair price is paid, the transaction will not be held fraudulent merely because the parties are related to each other;[17] but the conveyance will be looked on with suspicion where the grantor is heavily indebted and the conveyance is of all his property.[18] If the consideration is fic-

N. W. 159, holding that it is always competent to show the relationship of the parties to an alleged fraudulent conveyance; but such evidence is not sufficient to avoid a legal title, without a showing that there was a want of consideration, or that the grantee had knowledge of the fraudulent intent of the grantor.

Kansas.— Whitson *v.* Griffis, 39 Kan. 211, 17 Pac. 801, 7 Am. St. Rep. 546; Burton *v.* Boyd, 7 Kan. 17.

Louisiana.— Cadiére *v.* Gaidry, 42 La. Ann. 169, 7 So. 232.

Missouri.— Martin *v.* Fox, 40 Mo. App. 664.

Oregon.— See Goodale *v.* Wheeler, 41 Oreg. 190, 68 Pac. 753.

Texas.— Steinam *v.* Gahwiler, (Civ. App. 1895) 30 S. W. 472.

Wisconsin.— Missinskie *v.* McMurdo, 107 Wis. 578, 83 N. W. 758.

United States.— See Whetmore *v.* Murdock, 29 Fed. Cas. No. 17,509, 3 Woodb. & M. 380.

15. Marshall *v.* Croom, 60 Ala. 121; Penn *v.* Trompen, (Nebr. 1904) 100 N. W. 312; Blair State Bank *v.* Bunn, 61 Nebr. 464, 85 N. W. 527; Schott *v.* Machamer, 54 Nebr. 514, 74 N. W. 854; Farrington *v.* Stone, 35 Nebr. 456, 53 N. W. 389; Knudson *v.* Parker, 3 Nebr. (Unoff.) 481, 91 N. W. 350; Colston *v.* Miller, 55 W. Va. 490, 47 S. E. 268; Bierne *v.* Ray, 37 W. Va. 571, 16 S. E. 804. See also Gregory *v.* Gray, 88 Ga. 172, 14 S. E. 187; Mellier *v.* Bartlett, 106 Mo. 381, 17 S. W. 295.

A brother-in-law is a "relative" within the rule that transactions between relatives should be closely scrutinized. Marcus *v.* Leake, 4 Nebr. (Unoff.) 354, 94 N. W. 100.

16. Lehman *v.* Greenhut, 88 Ala. 478, 7 So. 299; Hubbard *v.* Allen, 59 Ala. 283; Burt *v.* Timmons, 29 W. Va. 441, 2 S. E. 780, 6 Am. St. Rep. 664. See also Braffman *v.* Glover, 35 S. C. 431, 14 S. E. 935.

Contra.—See Clewis *v.* Malon, 119 Ala. 312, 24 So. 767; Morrow *v.* Campbell, 118 Ala. 330, 24 So. 852; Goetter *v.* Norman, 107 Ala. 585, 19 So. 56 (distinguishing between transfers for cash and transfers to secure and pay pre-existing debts, and between cases where relationship was accompanied by positive *indicia* of fraud); Teague *v.* Lindsey, 106 Ala. 266, 17 So. 538; Reehling *v.* Byers, 94 Pa. St. 316; Curry *v.* Lloyd, 22 Fed. 258. See also *infra*, XIV, K, 1, d, (I), 3, d, (II).

Transfer to nephew.— Butler *v.* Thompson, 45 W. Va. 660, 31 S. E. 960, 72 Am. St. Rep. 838.

Transfers between brothers.— Reeves *v.* Skipper, 94 Ala. 407, 10 So. 309; Martin *v.* Duncan, 156 Ill. 274, 41 N. E. 43.

Relationship as strengthening presumption of fraud.— The fact that a party conveys his property to a son or brother is not *per se* a badge of fraud, but, when such conveyance is assailed as fraudulent, such relationship, connected with other circumstances, may strengthen the presumption of fraud. Farmers' Transp. Co. *v.* Swaney, 48 W. Va. 272, 37 S. E. 592.

Presumption and burden of proof see *infra*, XIV, K, 1, d, (I).

17. *Alabama.*— Bradley *v.* Ragsdale, 64 Ala. 558; Young *v.* Dumas, 39 Ala. 60.

Delaware.— Hagany *v.* Herbert, 3 Houst. 628.

Florida.— Wilson *v.* Lott, 5 Fla. 305.

Illinois.— Schroeder *v.* Walsh, 120 Ill. 403, 11 N. E. 70; English *v.* Porter, 109 Ill. 285.

Iowa.— Adams *v.* Ryan, 61 Iowa 733, 17 N. W. 159. See Austin *v.* Bowman, 81 Iowa 277, 46 N. W. 1111.

Missouri.— Martin *v.* Fox, 40 Mo. App. 664.

Tennessee.—Ocoee Bank *v.* Nelson, 1 Coldw. 186.

Transactions between brothers.— *Alabama.* — Russell *v.* Davis, 133 Ala. 647, 31 So. 514, 91 Am. St. Rep. 56.

Georgia.— Cowart *v.* Epstein, 101 Ga. 1, 29 S. E. 270, holding that the fact that the grantees in conveyances attacked as being in fraud of creditors are brothers of the grantor, and on intimate terms with him, and are employed by him, or have an office in the same building in which he conducts his business, subjects the conveyancer to greater scrutiny than if the parties to the deeds were strangers.

Kentucky.— Mills *v.* Hunt, 15 S. W. 518, 12 Ky. L. Rep. 866.

Mississippi.— Verner *v.* Verner, 64 Miss. 184, 1 So. 52.

Nebraska.— McEvony *v.* McCann, 31 Nebr. 597, 48 N. W. 389.

Transfer to brother-in-law.— Thompson *v.* Zuckmayer, (Iowa 1903) 94 N. W. 476.

Transfers between uncle and nephew.— Waterman *v.* Donalson, 43 Ill. 29; Wightman *v.* Hart, 37 Ill. 123.

Rule applies to mortgage.— Troy *v.* Smith, 33 Ala. 469; Noyes *v.* Ross, 23 Mont. 425, 59 Pac. 367, 75 Am. St. Rep. 543, 47 L. R. A. 400.

18. Borland *v.* Mayo, 8 Ala. 104. See also *supra*, V, B, 8; VI.

titious and the conveyance is made when the grantor is insolvent, the conveyance will be set aside.[19] If the consideration is inadequate, the sale will be deemed fraudulent where the seller is heavily indebted and the sale is attended with suspicious circumstances,[20] such as the fact that the transferee is possessed of no means,[21] the fact that the sale is on a long credit,[22] the fact that there is no reasonable apparent motive for the purchase,[23] the fact that the seller takes an active interest in the property and business after its transfer,[24] the fact that the parties cannot explain how the indebtedness with the grantee arose and how the amount claimed is made up,[25] or the fact that the consideration is an unsecured note of the grantee who is insolvent,[26] etc.

B. Husband and Wife[27] — **1. In General.** There is but little in the law of fraudulent conveyances which is peculiar to transactions between husband and wife. It is well settled that a husband may convey property to his wife as a gift where he has other property amply sufficient to pay his debts,[28] and that he may convey for a valuable consideration, even though insolvent, where there is an adequate consideration paid from the wife's separate estate,[29] or where the consideration is a debt owing by the husband to the wife and the value of the property is not materially in excess of the debt.[30] The mere relationship of husband and wife between the parties to a transfer is not sufficient ground for setting aside a conveyance,[31] although the fact of the existence of such relationship may be considered on the question of fraud.[32] It is held, however, that transactions between husband and wife to the prejudice of the husband's creditors will be closely scrutinized to see that they are fair and honest, and not mere contrivances resorted to for the purpose of placing the husband's property beyond the reach

19. Martin *v.* Kennedy, 83 Ky. 335; Friedlander *v.* Brooks, 35 La. Ann. 741; Birdsale *v.* Lakey, 6 La. Ann. 646.

20. Barrow *v.* Bailey, 5 Fla. 9; Milner *v.* Davis, 65 Iowa 265, 21 N. W. 599; Cox *v.* Cox, 39 Kan. 121, 17 Pac. 847; Burgess *v.* Simonson, 45 N. Y. 225; Sands *v.* Codwise, 4 Johns. (N. Y.) 536, 4 Am. Dec. 305.

21. Pickett *v.* Pipkin, 64 Ala. 520; Gamet *v.* Simmons, 103 Iowa 163, 72 N. W. 444; Robinson *v.* Frankel, 85 Tenn. 475, 3 S. W. 652; Steinam *v.* Gahwiler, (Tex. Civ. App. 1895) 30 S. W. 472. See Schumacher *v.* Bell, 164 Ill. 181, 45 N. E. 428 [*affirming* 61 Ill. App. 644].

22. Thames *v.* Rembert, 63 Ala. 561; Cowling *v.* Estes, 15 Ill. App. 255; Bibb *v.* Baker, 17 B. Mon. (Ky.) 292; Robinson *v.* Frankel, 85 Tenn. 475, 3 S. W. 652. See also *supra*, V, B, 6.

23. Bibb *v.* Baker, 17 B. Mon. (Ky.) 292.

24. American Nat. Bank *v.* Viterbo, 46 La. Ann. 1313, 16 So. 199.

25. Marks *v.* Crow, 14 Oreg. 382, 13 Pac. 55.

26. Helms *v.* Green, 105 N. C. 251, 11 S. E. 470, 18 Am. St. Rep. 893.

27. **Employing husband as agent to manage business of wife** see *supra*, II, B, 8, b.

Improvements on wife's property as subject to creditors of husband see *supra*, III, A, 3, d.

Transfer of earnings, see *supra*, II, B, 7.

28. See *supra*, VI; VIII, B. See also Sims *v.* Rickets, 35 Ind. 181, 9 Am. St. Rep. 679, where the court lays down nine rules which govern transfers between husband and wife.

29. See *supra*, VIII, F, 1, a.

30. See *supra*, VIII, F, 1, h; XI, J, 2.

Conveyances from a husband to his wife are not sustained in equity, if there is some feature in them impeaching their fairness and certainty, as that they are not in the nature of a provision for the wife, or where they interfere with the rights of creditors, or when the property given or granted is not distinctly separated from the mass of the husband's property. Sims *v.* Rickets, 35 Ind. 181, 9 Am. Rep. 679.

31. *Alabama.*— Copeland *v.* Kehoe, 57 Ala. 246.

Maine.— Grant *v.* Ward, 64 Me. 239.

Michigan.— Steel *v.* De May, 102 Mich. 274, 60 N. W. 684; Buhl *v.* Peck, 70 Mich. 44, 47 N. W. 876.

Minnesota.— Teller *v.* Bishop, 8 Minn. 226.

Mississippi.—Kaufman *v.* Whitney, 50 Miss. 103.

Nebraska.— Wanser *v.* Lucas, 44 Nebr. 759, 62 N. W. 1108; Hill *v.* Fouse, 32 Nebr. 637, 49 N. W. 760; Lipscomb *v.* Lyon, 19 Nebr. 511, 27 N. W. 731.

New York.— Childs *v.* Connor, 38 N. Y. Super. Ct. 471, 48 How. Pr. 513.

West Virginia.— Cumberland First Nat. Bank *v.* Parsons, 42 W. Va. 137, 24 S. E. 554.

Wisconsin.— Allen *v.* Perry, 56 Wis. 178, 14 N. W. 3.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 337.

Increase in value after purchase.— The fact that a mine purchased for five hundred dollars by a wife from her funds, from her husband, is afterward sold for ten thousand dollars, is not sufficient of itself to show that the transfer was fraudulent. Sears *v.* Robinson, 61 Iowa 745, 16 N. W. 66.

32. Sherman *v.* Hogland, 73 Ind. 472.

of creditors.[33] A conveyance from husband to wife should be closely scrutinized to see that it is honest, that the consideration is adequate, and that it is paid out of the wife's separate estate.[34] Where a purchase by the wife from her husband is attacked, she must show that the property was purchased by her out of her separate estate.[35] And it has been held that, as against a preëxisting creditor, a wife who takes a conveyance from her husband must show an adequate consideration by clearer and fuller proof than is required in transactions between strangers.[36] In some states the transfer, where prejudicial to creditors, is presumptively fraudulent.[37]

33. *Alabama.*— McTeers *v.* Perkins, 106 Ala. 411, 17 So. 547.

Arkansas.— Hershy *v.* Latham, 46 Ark. 542.

Connecticut.— Norwalk *v.* Ireland, 68 Conn. 1, 35 Atl. 804; Fishel *v.* Matta, 76 Conn. 197, 56 Atl. 558; Throckmorton *v.* Chapman, 65 Conn. 441, 32 Atl. 930; Gilligan *v.* Lord, 51 Conn. 562.

Georgia.— Reese *v.* Shell, 95 Ga. 749, 22 S. E. 580; Kelly *v.* Simmons, 73 Ga. 716; Rountree *v.* Lathrop, 69 Ga. 757; Shorter *v.* Methvin, 52 Ga. 225.

Illinois.— Vietor *v.* Swisky, 200 Ill. 257, 65 N. E. 625; Dillman *v.* Nadelhoffer, 162 Ill. 625, 45 N. E. 680; Harting *v.* Jockers, 136 Ill. 627, 27 N. E. 188, 29 Am. St. Rep. 341; Frank *v.* King, 121 Ill. 250, 12 N. E. 720; Gibson *v.* Kimmit, 113 Ill. App. 611.

Kentucky.— Gross *v.* Eddinger, 85 Ky. 168, 3 S. W. 1, 8 Ky. L. Rep. 829.

Louisiana.— Brown *v.* Ferguson, 4 La. 257.

Maine.— Trefethen *v.* Lynam, 90 Me. 376, 38 Atl. 335, 60 Am. St. Rep. 271, 38 L. R. A. 190; Robinson *v.* Vlark, 76 Me. 493.

Maryland.— Duttera *v.* Babylon, 83 Md. 536, 35 Atl. 64.

Mississippi.— Wynne *v.* Mason, 72 Miss. 424, 18 So. 422.

Montana.— Shepherd *v.* Butte First Nat. Bank, 16 Mont. 24, 40 Pac. 67; Lambrecht *v.* Patten, 15 Mont. 260, 38 Pac. 1063.

Nebraska.— Omaha First Nat. Bank *v.* Bartlett, 8 Nebr. 319, 1 N. W. 199; Aultman *v.* Obermeyer, 6 Nebr. 260.

New York.— White *v.* Benjamin, 150 N. Y. 258, 44 N. E. 956; Allee *v.* Slane, 26 N. Y. App. Div. 455, 50 N. Y. Suppl. 55.

Pennsylvania.— Sutton *v.* Guthrie, 188 Pa. St. 359, 41 Atl. 528; Billington *v.* Sweeting, 172 Pa. St. 161, 33 Atl. 543; Reese *v.* Reese, 157 Pa. St. 200, 27 Atl. 703; Wilson *v.* Silkman, 97 Pa. St. 509.

South Carolina.—Charleston Bank *v.* Dowling, 52 S. C. 345, 29 S. E. 788.

South Dakota.— Williams *v.* Harris, 4 S. D. 22, 54 N. W. 926, 46 Am. St. Rep. 753.

Texas.— Flanagan *v.* Oberthier, 50 Tex. 379.

Virginia.— Spence *v.* Repass, 94 Va. 716, 27 S. E. 583.

Wisconsin.— Hoxie *v.* Price, 31 Wis. 82.

United States.— Hinchman *v.* Parlin, etc., Co., 74 Fed. 698, 21 C. C. A. 273; Graves *v.* Davenport, 50 Fed. 881.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 337.

The husband may pay rent to his wife for the use of her property occupied as a home, although such a transaction will be viewed with suspicion. Frost *v.* Steele, 46 Minn. 1, 48 N. W. 413.

Payments in lieu of rent.— "Where a husband voluntarily expends money in paying the current expenses of interest, taxes, insurance, and repairs on the family residence belonging to his wife, instead of paying rent, he is simply fulfilling the duty which law and society impose upon him and which is approved by good morals." Brundage *v.* Munger, 54 N. Y. App. Div. 549, 552, 66 N. Y. Suppl. 1014.

Where the wife sets up a secret contract between herself and her husband, it is improper to harge that contracts made and debts incurred between husband and wife were legal, "the only difference is, that the law requires it should perhaps be looked into a little more closely." Under such circumstances the jury should have been directed to scan the transaction closely, and that good faith should be clearly established before they could find for the wife. Skellie *v.* James, 81 Ga. 419, 8 S. E. 607.

34. Kennedy *v.* Powell, 34 Kan. 22, 7 Pac. 606.

35. See *infra*, XIV, K, 1, d, (II).

36. Wedgworth *v.* Wedgworth, 84 Ala. 274, 4 So. 149; Claflin *v.* Ambrose, 37 Fla. 78, 19 So. 628; Livey *v.* Winton, 30 W. Va. 554, 4 S. E. 451. *Contra*, Rachofsky *v.* Benson, 19 Colo. App. 173, 74 Pac. 655.

37. *Alabama.*— Kelley *v.* Connell, 110 Ala. 543, 18 So. 9; Lammons *v.* Allen, 88 Ala. 417, 6 So. 915; Bangs *v.* Edwards, 88 Ala. 382, 6 So. 764; Booker *v.* Waller, 81 Ala. 549, 8 So. 225.

Louisiana.— Kirkpatrick *v.* Finney, 30 La. Ann. 223.

Missouri.— Stivers *v.* Horne, 62 Mo. 473.

Nebraska.—David Adler, etc., Clothing Co. *v.* Hellman, 55 Nebr. 266, 75 N. W. 877; Glass *v.* Zutavern, 43 Nebr. 334, 61 N. W. 579, 47 Am. St. Rep. 763; Hill *v.* Fouse, 32 Nebr. 637, 49 N. W. 760; Omaha First Nat. Bank *v.* Bartlett, 8 Nebr. 319, 1 N. W. 199; Lynch *v.* Englehardt-Winning-Davison Mercantile Co., 1 Nebr. (Unoff.) 528, 96 N. W. 524.

Virginia.— Hunters *v.* White, 3 Gratt. 26.

West Virginia.— Burt *v.* Timmons, 29 W. Va. 441, 2 S. E. 780, 6 Am. St. Rep. 664 (holding that a transfer of property, either directly or indirectly, by an insolvent husband to his wife, is justly regarded with suspicion; and unless it clearly appears to

2. Purchase of Husband's Property at Private or Public Sale. The purchase by the wife of the property of her husband at private or public sale is not in fraud of his creditors, where it is shown that the price was paid out of her separate property or that the purchase was on her own credit,[38] unless there was an intent to defraud to which the wife was a party.[39] If the wife purchases at a sheriff's sale with her own and her husband's money, for the purpose of defrauding his creditors, she will not be protected even for the amount of her own money invested.[40]

3. Conveyances to Wife From Third Persons. A third person may make a transfer of property to a wife, where the husband pays no part of the consideration and assumes no obligation on account of it,[41] which will not be subject to the claims of the creditors of the husband;[42] and this is so where there was an agreement by the third person to transfer the property to the husband, if such agreement was not enforceable because of want of consideration.[43] It is immaterial that the transfer to the wife was of property previously conveyed by the husband in payment of his debt.[44] But if the consideration for the transfer to the wife comes from the husband, wholly or in part,[45] the property may be reached by his

have been entirely free from intent to withdraw the property from the husband's creditors, or the presumption of fraud be overcome by satisfactory affirmative proof, it will not be sustained); Core *v.* Cunningham, 27 W. Va. 206; Maxwell *v.* Hanshaw, 24 W. Va. 405.

See also *infra*, XIV, K, 1, d, (II).

Contra.— See Droop *v.* Ridenour, 11 App. Cas. (D. C.) 224; Gottlieb *v.* Thatcher, 151 U. S. 271, 14 S. Ct. 319, 38 L. ed. 157.

38. *Georgia.*— Belcher *v.* Black, 68 Ga. 93.

Kentucky.— Howard *v.* Tenney, 87 Ky. 52, 7 S. W. 547, 10 Ky. L. Rep. 94.

Missouri.— Hibbard *v.* Heckart, 88 Mo. App. 544.

Pennsylvania.— Keeney *v.* Good, 21 Pa. St. 349. See Walter *v.* Jones, 148 Pa. St. 589, 24 Atl. 119.

Tennessee.—Cheatham *v.* Thornton, 11 Lea 295.

United States.— See Carite *v.* Trotot, 105 U. S. 751, 26 L. ed. 1223; Frankenthal *v.* Gilbert, 34 Fed. 5.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 344.

The husband's name on the notes given for the price will not prevent the wife from showing that the purchase was made exclusively on her credit. Bollinger *v.* Gallagher, 170 Pa. St. 84, 32 Atl. 569.

Payment of mortgage by husband.— Where a wife buys her husband's land at sheriff's sale in good faith, and with her own funds, taking title subject to existing mortgages, if the husband subsequently pays such mortgages or some of them, his judgment creditors may levy on and sell his interest in the land subject to the wife's prior lien for the amount paid by her. Delo *v.* Johnson, 110 Mo. App. 642, 85 S. W. 109.

39. Cox *v.* Miller, 54 Tex. 16.

40. Ewing *v.* Gray, 12 Ind. 64.

41. Clark *v.* Krause, 6 Mackey (D. C.) 108.

42. *Alabama.*— Paulk *v.* Wolfe, 34 Ala. 541.

Illinois.— May *v.* Jenkins, 15 Ill. 101.

Indiana.— Stone *v.* Brown, 116 Ind. 78, 18 N. E. 392.

Iowa.— Pringey *v.* Warrall, 73 Iowa 561, 35 N. W. 632.

Minnesota.— De Lancey *v.* Finnegan, 86 Minn. 255, 90 N. W. 387.

Mississippi.— Fulton *v.* Woodman, 54 Miss. 158.

Missouri.— Bay *v.* Sullivan, 30 Mo. 191.

Nebraska.— Jayne *v.* Hymer, 66 Nebr. 785, 92 N. W. 1019 (holding that, in order to maintain a creditor's suit against the wife to set aside a conveyance to her by a third person, plaintiff must allege and prove that the relation of debtor and creditor existed between himself and the husband when the conveyance was executed, or that it was executed with the expectation that the husband would become indebted to plaintiff, and to prevent the collection of such debt when contracted); May *v.* Hoover, 48 Nebr. 199, 66 N. W. 1134; Stevenson *v.* Craig, 12 Nebr. 464, 12 N. W. 1.

Pennsylvania.— Winch *v.* James, 68 Pa. St. 297.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 345.

Where a deed of gift made to husband and wife jointly is not delivered or recorded, the property may afterward be conveyed to the wife alone at the request of the husband, since no title passes before delivery of the deed. Stow *v.* Miller, 16 Iowa 460. Where a deed by a father to his daughter and her husband conveys no estate to the husband except as trustee for the wife, it may be surrendered and a new deed executed to the wife alone. Barncord *v.* Kuhn, 36 Pa. St. 383.

43. Powell *v.* Burk, 7 Ky. L. Rep. 220.

44. Blossom *v.* Negus, 182 Mass. 515, 65 N. E. 846; Popfinger *v.* Yutte, 102 N. Y. 38, 6 N. E. 259 [*reversing* 49 N. Y. Super. Ct. 312].

45. Turner *v.* Gottwals, 15 App. Cas. (D. C.) 43.

creditors,[46] provided the conveyance could be attacked if it were a direct one from the husband to the wife.[47]

4. Giving False Credit to Husband. While the fact that a wife has intrusted the management of her property to her husband is not of itself evidence that she held the property in fraud of her husband's creditors,[48] yet where the wife permits her husband to use her money or property as his own and to incur obligations on the faith that the property belongs to him, the rights of his creditors who rely on such apparent ownership are superior to the rights of the wife.[49] For instance, where the title to land bought with moneys belonging to the wife is taken in the name of the husband, and she allows the title to stand in his name, persons who give him credit in the belief that he is the owner may subject the land to their debts irrespective of whether it is afterward conveyed to the wife,[50] unless the wife was ignorant that credit was being extended to the

46. *Alabama.*— Wimberly *v.* Montgomery Fertilizer Co., 132 Ala. 107, 31 So. 524; Watts *v.* Burgess, 131 Ala. 333, 30 So. 868.

Arkansas.— See Davis *v.* Yonge, (1905) 85 S. W. 90.

Florida.— Florida L. & T. Co. *v.* Crabb, (1903) 33 So. 523.

Kentucky.— Robinson *v.* Woolstein, 58 S. W. 706, 22 Ky. L. Rep. 883.

Michigan.— See Adams *v.* Bruske, 135 Mich. 339, 97 N. W. 766.

Missouri.— Johnson *v.* Christie, 79 Mo. App. 46.

Nebraska.— Omaha Brewing Assoc. *v.* Zeller, 4 Nebr. (Unoff.) 198, 93 N. W. 762.

47. Fox *v.* Lipe, 14 Colo. App. 258, 59 Pac. 850 (holding that real estate purchased by a husband, the title whereof is taken in the name of the wife, cannot be subjected to the claims of existing creditors, where the husband at the time of the purchase is substantially free from debt and solvent); Scott *v.* Holman, 117 Wis. 206, 94 N. W. 30 (holding that where the consideration was savings both of the husband and wife, and the property bought was for a homestead, the conveyance could not be assailed by creditors).

48. Hensley *v.* Hensley, 65 Ill. App. 195; Emerson *v.* Hewins, 64 Me. 297.

49. Meade *v.* Stairs, 88 Ky. 66, 10 S. W. 272, 10 Ky. L. Rep. 702; Swartz *v.* McClelland, 31 Nebr. 646, 48 N. W. 461. See also Lander *v.* Ziehr, 150 Mo. 403, 51 S. W. 742, 73 Am. St. Rep. 456. But see Buhl *v.* Peck, 70 Mich. 44, 37 N. W. 876 (holding that when a wife lends money to her husband, which he uses in his business, she need not notify persons with whom he deals that he is trading with her capital, nor take any writing showing the state of her account with him, and if, while solvent, he buys, with her money, land which is conveyed to her, it cannot, when he becomes insolvent, be subjected to pay his debts; Merritt *v.* Lyon, 3 Barb. (N. Y.) 110 (holding that suffering the separate property of a married woman to remain in the possession of the husband is not necessarily fraudulent as to creditors, if the husband's possession is not inconsistent with the trust, and the question of fraud should be left to the jury). See also Estoppel, 16 Cyc. 773–777.

Repeal of statute.— Section 2499 of the revision of 1860 providing that if personal property of the wife is left under the control of the husband, it will, in favor of third persons acting in good faith and without knowledge of the real ownership, be presumed to have been transferred to him, having been repealed by the code of 1873, has no application to persons who became creditors of the husband after the adoption of the later code. Gilbert *v.* Glenny, 75 Iowa 513, 39 N. W. 818, 1 L. R. A. 479.

50. *Illinois.*— Torrey *v.* Dickinson, 213 Ill. 36, 72 N. E. 703 [*reversing* 111 Ill. App. 524]; Lowentrout *v.* Campbell, 130 Ill. 503, 22 N. E. 744; Maddox *v.* Epler, 48 Ill. App. 265.

Indiana.— Minnich *v.* Shaffer, 135 Ind. 634, 34 N. E. 987.

Mississippi.— Myers *v.* Little, 60 Miss. 203, decided on a statute so providing.

New Jersey.— Stillwell *v.* Stillwell, (Ch.) 18 Atl. 679; Providence City Nat. Bank *v.* Hamilton, 34 N. J. Eq. 158.

Wisconsin.— Hopkins *v.* Joyce, 78 Wis. 443, 47 N. W. 722.

United States.— Moyer *v.* Adams, 2 Fed. 182, 9 Biss. 390.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 342. See also Estoppel, 16 Cyc. 775.

Including the land as assets in the husband's statement to commercial agencies.— Cowling *v.* Hill, 69 Ark. 350, 63 S. W. 800, 86 Am. St. Rep. 200. See White *v.* Magarahan, 87 Ga. 217, 13 S. E. 509.

That the title was taken in the husband's name by mistake is immaterial where the wife was notified and allowed the husband to manage the estate as though it were his own. Sears *v.* Davis, 40 Oreg. 236, 66 Pac. 913. See also Talbott *v.* Gillespie, 53 S. W. 1047, 21 Ky. L. Rep. 1065.

Where the transfer is to husband and wife jointly, the same rule applies. Ward *v.* Krumm, 54 How. Pr. (N. Y.) 95.

Where credit is not given in reliance on the supposed title in the husband, the conveyance to the wife cannot be attacked. Plattsmouth First Nat. Bank *v.* Peterson, 3 Nebr. (Unoff.) 102, 91 N. W. 195. See also Hill *v.* Meinhard, 39 Fla. 111, 21 So. 805.

husband on the belief of his ownership.[51] The same rule applies where title is taken in the name of the husband and the consideration was paid out of a common fund to which both husband and wife contributed,[52] or where, although the record title is in the wife, she permits the husband to appear as the owner, and he thereby obtains credit.[53]

C. Parent and Child[54] **— 1. In General.** The general rule is that the relationship of the parties in the transaction as parent and child is not considered in law as a badge of fraud, but is simply a circumstance proper to be shown, and which when shown calls for closer scrutiny and clearer explanation of the transaction.[55] A conveyance from father to child is proper and cannot be attacked by the creditors of the father where the title to land purchased in part with the mother's money was taken in the name of the father, under an agreement that the mother should own a portion of the land, although the deed was executed after

51. Alkire Grocer Co. *v.* Ballenger, 137 Mo. 369, 38 S. W. 911.

52. Maple Valley Tp. *v.* Foley, 113 Mich. 622, 71 N. W. 1086.

53. McCanless *v.* Smith, 51 N. J. Eq. 505, 25 Atl. 211.

54. **Preferences** see *supra*, XI, J, 1.

Release of minor's future earnings see *supra*, II, B, 7, c.

Voluntary conveyances see *supra*, VIII, B.

55. *Alabama.*— Morrow *v.* Campbell, 118 Ala. 330, 24 So. 852; Teague *v.* Lindsey, 106 Ala. 266, 17 So. 538; Harmon *v.* McRae, 91 Ala. 401, 8 So. 548.

California.— Gray *v.* Galpin, 98 Cal. 633, 33 Pac. 725. See Willows Bank *v.* Small, 144 Cal. 709, 98 Pac. 263.

Georgia.— Cooley *v.* Abbey, 111 Ga. 439, 442, 36 S. E. 786, holding that such a conveyance, while regarded with suspicion, "will stand unless shown to be fraudulent; and while, in determining whether the conveyance is fraudulent or not, slight circumstances may have weight, yet it is entirely within the province of the jury to determine the fact as to whether the fraud existed."

Illinois.—See Hewitt *v.* Gibson, 93 Ill. App. 427.

Iowa.— Riddick *v.* Parr, 111 Iowa 733, 82 N. W. 1002.

Kansas.— See Gilmore *v.* Swisher, 59 Kan. 172, 52 Pac. 426.

Kentucky.— Redd *v.* Redd, 67 S. W. 367, 23 Ky. L. Rep. 2379; Williams *v.* Tye, 42 S. W. 90, 19 Ky. L. Rep. 818.

Louisiana.— Maurin *v.* Rouguer, 19 La. 594; Layson *v.* Rowan, 7 Rob. 1.

Minnesota.— Nichols, etc., Co. *v.* Gerlich, 84 Minn. 483, 87 N. W. 1120.

Missouri.— State *v.* True, 20 Mo. App. 176. See also McKinney *v.* Hensley, 74 Mo. 326.

Montana.— Mueller *v.* Renkes, (1904) 77 Pac. 512; Noyes *v.* Ross, 23 Mont. 425, 59 Pac. 367, 75 Am. St. Rep. 543, 47 L. R. A. 400.

Nebraska.— See Gibson *v.* Hammang, 63 Nebr. 349, 88 N. W. 500.

New Jersey.— Clinton First Nat. Bank *v.* Cummins, 38 N. J. Eq. 191; Hoboken Sav. Bank *v.* Beckman, 36 N. J. Eq. 83.

New York.— Bristol *v.* Hull, 166 N. Y. 59, 59 N. E. 698; Amsterdam First Nat. Bank *v.* Miller, 163 N. Y. 164, 57 N. E. 308; Bailey *v.* Fransioli, 101 N. Y. App. Div. 140, 91 N. Y. Suppl. 852; Morris *v.* Morris, 71 Hun 45, 24 N. Y. Suppl. 579; Scofield *v.* Spaulding, 54 Hun 523, 7 N. Y. Suppl. 927; Nichols *v.* Morrow, 11 N. Y. Suppl. 878.

North Carolina.— Mitchell *v.* Eure, 126 N. C. 77, 35 S. E. 190; Kelly *v.* Fleming, 113 N. C. 133, 18 S. E. 81; Jenkins *v.* Peace, 46 N. C. 413, holding that the related parties are held to a stricter and more exact proof of the fairness of the transaction.

Pennsylvania.— Reehling *v.* Byers, 94 Pa. St. 316. See Sebring *v.* Brickley, 7 Pa. Super. Ct. 198, 42 Wkly. Notes Cas. 189, holding that an assignment of policies on his wife's life, made by an insolvent father to his son, is not necessarily fraudulent.

South Carolina.— Weaver *v.* Wright, 13 Rich. 9.

South Dakota.— Steudebaker Bros. Mfg. Co. *v.* Zollars, 12 S. D. 296, 81 N. W. 292.

Tennessee.— Rosenbaum *v.* Davis, (Ch. App. 1898) 48 S. W. 706.

West Virginia.— Miller *v.* Gillispie, 54 W. Va. 450, 46 S. E. 451; Farmers' Transp. Co. *v.* Swaney, 48 W. Va. 272, 37 S. E. 592; Douglass *v.* Douglass, 41 W. Va. 13, 23 S. E. 671; Harden *v.* Wagner, 22 W. Va. 356.

Wisconsin.— Missinski *v.* McMurdo, 107 Wis. 578, 83 N. W. 758; Bleiler *v.* Moore, 88 Wis. 438, 60 N. W. 792.

England.— See also Golden *v.* Gillam, 51 L. J. Ch. 503.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 347.

Compare Curry *v.* Lloyd, 22 Fed. 258, holding that business dealings between parent and child are to be treated as are the transactions of other people, and if the *bona fides* thereof is attacked the fraud alleged must be proved.

As dependent on intent of parties.— Miller *v.* Thompson, 3 Port. (Ala.) 196; May *v.* Hoover, 48 Nebr. 199, 66 N. W. 1134. See also Barnard *v.* Davis, 54 Ala. 565.

Lands held by father as trustee.— Land conveyed to a father in trust for his minor son, who pays the consideration with moneys given to him by the father while the latter was solvent, cannot be reached by the creditors of the father where he has transferred it to the son after becoming insolvent. Hayford *v.* Wallace, (Cal. 1896) 46 Pac. 293.

the death of the mother and when the father was insolvent.[56] While a deed of an insolvent parent to his child for less than the fair value of the property is presumptively fraudulent,[57] inadequacy of consideration is not of itself conclusive evidence of fraud, and the presumption may be overcome by proof of good faith.[58]

2. PROCURING CONVEYANCE FROM THIRD PERSON. Where one purchases real estate with his own money, and to defraud his creditors causes the conveyance to be made to his child, it is a fraudulent transfer.[59]

XIII. RIGHTS AND LIABILITIES OF PARTIES AND PURCHASERS.

A. Original Parties — 1. VALIDITY OF TRANSACTION — a. In General. Because of the familiar rule that parties to a transaction tainted with fraud shall be left by the court in the position in which they have placed themselves, based upon the well-known maxims, *Ex dolo malo non oritur actio* (a cause of action cannot arise out of fraud), and *In pari delicto potior est conditio defendentis*, and also because the statutes of 13 and 27 Elizabeth and statutes based thereon avoid transfers for the protection of creditors and *bona fide* purchasers only, a transfer of property made to defraud creditors is valid and binding as between the parties thereto, their privies, assigns, and persons claiming under them;[60]

56. Sparks *v.* Colson, 109 Ky. 711, 60 S. W. 540, 22 Ky. L. Rep. 1369, 63 S. W. 739, 23 Ky. L. Rep. 145.

A conveyance by a father to his children in settlement of bona fide gifts received from their deceased mother's father, although made with a fraudulent intent on his part, does not affect the legality of the transaction if they did not share in the fraudulent purpose. Gleitz *v.* Schuster, 168 Mo. 298, 67 S. W. 561, 90 Am. St. Rep. 461.

57. *Indiana.*— Tyner *v.* Somerville, 1 Ind. 175.

Iowa.— Johnston Harvester Co. *v.* Cibula, 62 Iowa 697, 13 N. W. 418.

Kentucky.— Cincinnati, etc., Co. *v.* Matthews, 74 S. W. 242, 24 Ky. L. Rep. 2445; City Nat. Bank *v.* Gardner, 5 Ky. L. Rep. 689.

Mississippi.— See Richards *v.* Vacarro, 67 Miss. 516, 7 So. 506, 19 Am. St. Rep. 322.

Missouri.— Mason *v.* Perkins, 180 Mo. 702, 79 S. W. 683, 103 Am. St. Rep. 591; Imhoff *v.* McArthur, 146 Mo. 371, 48 S. W. 456; Lionberger *v.* Baker, 14 Mo. App. 353.

New Jersey.— Le Herisse *v.* Hess, (Ch. 1904) 57 Atl. 808; Mason *v.* Somers, 59 N. J. Eq. 451, 45 Atl. 602; Clinton First Nat. Bank *v.* Cummins, 38 N. J. Eq. 191.

New York.— Port Jervis Nat. Bank *v.* Bonnell, 26 Misc. 541, 57 N. Y. Suppl. 486; Pell *v.* Tredwell, 5 Wend. 661. See also Lowville First Nat. Bank *v.* Moffatt, 77 Hun 468, 28 N. Y. Suppl. 1078.

North Carolina.— McCanless *v.* Flinchum, 89 N. C. 373; Tredwell *v.* Graham, 88 N. C. 208.

Texas.— Gibson *v.* Hill, 23 Tex. 77, holding that where the vendor and vendee of property are father and son and live together, the evidence of good faith in the contract of sale as against the creditors should be indisputable.

West Virginia.— Blackshire *v.* Pettit, 35 W. Va. 547, 14 S. E. 133.

Canada.— McDonald *v.* McQueen, 9 Manitoba 315.

58. Commonwealth Bank *v.* Kearns, 100 Md. 202, 59 Atl. 1010; Schaefer Brewing Co. *v.* Moebs, 187 Mass. 571, 73 N. E. 858. See also Caldwell *v.* Eminence Deposit Bank, 35 S. W. 625, 18 Ky. L. Rep. 156; Green *v.* Green, 4 Ky. L. Rep. 250.

59. *Alabama.*— Patterson *v.* Campbell, 9 Ala. 933.

California.— Lander *v.* Beers, 48 Cal. 546.

Georgia.— See Cohen *v.* Parish, 105 Ga. 339, 31 S. E. 205, holding that the validity of the transfer depends on the solvency of the parent at the time of the conveyance and the absence of any intention on his part to hinder, delay, or defraud his creditors.

Indiana.— Demaree *v.* Driskill, 3 Blackf. 115.

Iowa.— Smalley *v.* Mass, 72 Iowa 171, 33 N. W. 619. See Indiana State Bank *v.* Harrow, 26 Iowa 426.

Louisiana.—Frazer *v.* Pritchard, 6 La. Ann. 728.

North Carolina.— See Wall *v.* Fairley, 73 N. C. 464.

South Carolina.— Godbold *v.* Lambert, 8 Rich. Eq. 155, 70 Am. Dec. 192; Croft *v.* Arthur, 3 Desauss. 223.

Virginia.— Coleman *v.* Cocke, 6 Rand. 618, 18 Am. Dec. 757.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 349.

60. *Alabama.*— Kirby *v.* Raynes, 138 Ala. 194, 35 So. 118, 100 Am. St. Rep. 39; Means *v.* Hicks, 65 Ala. 241; Pickett *v.* Pipkin, 64 Ala. 520; King *v.* King, 61 Ala. 479; Greenwood *v.* Coleman, 34 Ala. 150; McGuire *v.* Miller, 15 Ala. 394; Dearman *v.* Dearman, 4 Ala. 521.

Arkansas.— Bell *v.* Wilson, 52 Ark. 171, 12 S. W. 328, 5 L. R. A. 370; Millington *v.* Hill, 47 Ark. 301, 1 S. W. 547.

California.— Montgomery *v.* Hunt, 5 Cal. 366.

such transfers have been considered as valid as between the parties and their

Connecticut.— Owen *v.* Dixon, 17 Conn. 492; Chapin *v.* Pease, 10 Conn. 69, 25 Am. Dec. 56; Stores *v.* Snow, 1 Root 181.

Florida.— Bellamy *v.* Bellamy, 6 Fla. 62.

Georgia.— McDowell *v.* McMurria, 107 Ga. 812, 33 S. E. 709, 73 Am. St. Rep. 155; Parrott *v.* Baker, 82 Ga. 364, 9 S. E. 1068; Fouche *v.* Brower, 74 Ga. 251; Tufts *v.* Du Bignon, 61 Ga. 322; Jones *v.* Dougherty, 10 Ga. 273.

Illinois.— Moore *v.* Horsley, 156 Ill. 36, 40 N. E. 323; Springfield Homestead Assoc. *v.* Roll, 137 Ill. 205, 27 N. E. 184, 31 Am. St. Rep. 358; Harmon *v.* Harmon, 63 Ill. 512; Horner *v.* Zimmerman, 45 Ill. 14; De Wolf *v.* Pratt, 42 Ill. 198; Ward *v.* Enders, 29 Ill. 519; Davis *v.* Ransom, 26 Ill. 100.

Indiana.— Phenix Ins. Co. *v.* Fielder, 133 Ind. 557, 33 N. E. 270; Henry *v.* Stevens, 108 Ind. 281, 9 N. E. 356; Stout *v.* Stout, 77 Ind. 537; Garner *v.* Graves, 54 Ind. 188; Edwards *v.* Haverstick, 53 Ind. 348; O'Neil *v.* Chandler, 42 Ind. 471; Welby *v.* Armstrong, 21 Ind. 489; Moore *v.* Meek, 20 Ind. 484; Scott *v.* Purcell, 7 Blackf. 66, 39 Am. Dec. 453; Findley *v.* Cooley, 1 Blackf. 262.

Iowa.— McClenahan *v.* Stevenson, 118 Iowa 106, 91 N. W. 925; Fordyce *v.* Hicks, 76 Iowa 41, 40 N. W. 79; Mellen *v.* Ames, 39 Iowa 238; Stephens *v.* Harrow, 26 Iowa 458. See Cloud *v.* Malvin, 108 Iowa 52, 75 N. W. 645, 78 N. W. 791, 45 L. R. A. 209; Mercer *v.* Mercer, 29 Iowa 557.

Kansas.— Weatherbee *v.* Cockrell, 44 Kan. 380, 24 Pac. 417; Crawford *v.* Lehr, 20 Kan. 509.

Kentucky.— Wickliffes *v.* Lyon, 5 J. J. Marsh. 84; Tobin *v.* Helm, 4 J. J. Marsh. 288; Adkins *v.* Adkins, 7 Ky. L. Rep. 686.

Maine.— Nichols *v.* Patten, 18 Me. 231, 36 Am. Dec. 713.

Maryland.— Stewart *v.* Iglehart, 7 Gill & J. 132, 28 Am. Dec. 202; Atkinson *v.* Phillips, 1 Md. Ch. 507.

Massachusetts.— Stillings *v.* Turner, 153 Mass. 534, 27 N. E. 671; Harvey *v.* Varney, 98 Mass. 118; Canton *v.* Dorchester, 8 Cush. 525. See Stratton *v.* Edwards, 174 Mass. 374, 54 N. E. 886; Lerow *v.* Wilmarth, 9 Allen 382.

Michigan.— Wheeler *v.* Wallace, 53 Mich. 355, 364, 19 N. W. 33, 37; McMaster *v.* Campbell, 41 Mich. 513, 2 N. W. 836; Cool *v.* Snover, 38 Mich. 562; Millar *v.* Babcock, 29 Mich. 526.

Minnesota.— Piper *v.* Johnston, 12 Minn. 60; Lemay *v.* Bibeau, 2 Minn. 291.

Mississippi.— Brett *v.* Brett, (1888) 5 So. 105; Walton *v.* Tusten, 49 Miss. 569; Ellis *v.* McBride, 27 Miss. 155. See Bullitt *v.* Taylor, 34 Miss. 708, 69 Am. Dec. 412.

Missouri.— Whitaker *v.* Whitaker, 157 Mo. 342, 58 S. W. 5; Mulock *v.* Mulock, 156 Mo. 431, 57 S. W. 122; Larimore *v.* Tyler, 88 Mo. 661; Van Winkle *v.* McKee, 7 Mo. 435.

Nebraska.— Lewis *v.* Holdrege, 56 Nebr. 379, 76 N. W. 890.

Nevada.— Allison *v.* Hagan, 12 Nev. 38.

New Jersey.—Garretson *v.* Kane, 27 N. J. L. 208; Osborne *v.* Tunis, 25 N. J. L. 633; Robinson *v.* Monjoy, 7 N. J. L. 173; Hendricks *v.* Mount, 5 N. J. L. 738, 8 Am. Dec. 623; Hildebrand *v.* Willig, 64 N. J. Eq. 249, 53 Atl. 1035; Schwalber *v.* Ehman, 62 N. J. Eq. 314, 49 Atl. 1085; Doughty *v.* Miller, 50 N. J. Eq. 529, 25 Atl. 153; Schenck *v.* Hart, 32 N. J. Eq. 774; Ruckman *v.* Ruckman, 32 N. J. Eq. 259.

New York.— Moore *v.* Livingston, 14 How. Pr. 1; Jackson *v.* Cadwell, 1 Cow. 622; Osborne *v.* Moss, 7 Johns. 161, 5 Am. Dec. 252.

North Carolina.— McManus *v.* Tarleton, 126 N. C. 790, 36 S. E. 338; Boyd *v.* Turpin, 94 N. C. 137, 55 Am. Rep. 597; Powell *v.* Inman, 53 N. C. 436, 82 Am. Dec. 426.

Ohio.— Brown *v.* Webb, 20 Ohio 389; Tremper *v.* Barton, 18 Ohio 418; Barton *v.* Morris, 15 Ohio 408; Douglas *v.* Dunlap, 10 Ohio 162; Burgett *v.* Burgett, 1 Ohio 469, 13 Am. Dec. 634.

Oregon.—Bradtfeldt *v.* Cooke, 27 Oreg. 194, 40 Pac. 1, 50 Am. St. Rep. 701, when there is a consideration to support it.

Pennsylvania.— Bonesteel *v.* Sullivan, 104 Pa. St. 9; French *v.* Mehan, 56 Pa. St. 286; Huey's Appeal, 29 Pa. St. 219; Drum *v.* Painter, 27 Pa. St. 148; Stoner *v.* Com., 16 Pa. St. 387; Sherk *v.* Endress, 3 Watts & S. 255; McGee *v.* Campbell, 7 Watts 545, 32 Am. Dec. 783; Telford *v.* Adams, 6 Watts 429; Hartley *v.* McAnulty, 4 Yeates 95, 2 Am. Dec. 396. See Haak's Appeal, 100 Pa. St. 59.

Rhode Island.— Hazard *v.* Coyle, 22 R. I. 435, 48 Atl. 442.

South Carolina.— Broughton *v.* Broughton, 4 Rich. 491; Sumner *v.* Murphy, 2 Hill 488, 27 Am. Dec. 397; Kid *v.* Mitchell, 1 Nott & M. 334, 9 Am. Dec. 702.

Tennessee.— Nichol *v.* Nichol, 4 Baxt. 145 (holding that a vendor cannot, for the purpose of conveying to his purchaser a good title, charge that a prior deed given by himself was in fraud of creditors); Jacobi *v.* Schloss, 7 Coldw. 385; Williams *v.* Lowe, 4 Humphr. 62.

Texas.— Stephens *v.* Adair, 82 Tex. 214, 18 S. W. 102; Lewis *v.* Castleman, 27 Tex. 407.

Vermont.— Martin *v.* Martin, 1 Vt. 91, 18 Am. Dec. 675.

Virginia.— Ratliff *v.* Ratliff, 102 Va. 880, 47 S. C. 1007; Law *v.* Law, 76 Va. 527; Harris *v.* Harris, 23 Gratt. 737; Owen *v.* Sharp, 12 Leigh 427; Terrell *v.* Imboden, 10 Leigh 321; James *v.* Bird, 8 Leigh 510, 31 Am. Dec. 668; Stark *v.* Littlepage, 4 Rand. 368.

Washington.— Shoemake *v.* Finlayson, 22 Wash. 12, 60 Pac. 50.

West Virginia.— Poling *v.* Williams, 55 W. Va. 69, 46 S. E. 704; Thornburg *v.* Bowen, 37 W. Va. 538, 16 S. E. 825; Farmers' Bank *v.* Corder, 32 W. Va. 232, 9 S. E. 220; Love *v.* Tinsley, 32 W. Va. 25, 9 S. E. 44; Core *v.* Cunningham, 27 W. Va. 206. See Linsey *v.* McGannon, 9 W. Va. 154.

heirs,[61] or personal representatives,[62] although the conveyance was a voluntary one,[63] or the possession of personal property conveyed is retained by the vendor;[64]

Wisconsin.— Gross *v.* Gross, 94 Wis. 14, 68 N. W. 469; Davy *v.* Kelley, 66 Wis. 452, 29 N. W. 232; Clemens *v.* Clemens, 28 Wis. 637, 9 Am. Rep. 520; La Crosse, etc., R. Co. *v.* Seeger, 4 Wis. 268.

United States.— Collinson *v.* Jackson, 14 Fed. 305, 8 Sawy. 357; Randall *v.* Phillips, 19 Fed. Cas. No. 11,555, 3 Mason 378.

England.— *Ex p.* Bell, 1 Glyn & J. 282; Shaw *v.* Jeffery, 3 L. T. Rep. N. S. 1, 13 Moore P. C. 432, 15 Eng. Reprint 162; Curtis *v.* Price, 12 Ves. Jr. 89, 8 Rev. Rep. 303, 33 Eng. Reprint 35.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 523; and *supra*, IV, A.

A receiver in so far as he is the representative of the debtor who assigns property to him in fraud of creditors is within the above rule. Bostwick *v.* Mench, 40 N. Y. 383.

That an alleged conveyance did not contain a list of the property affected by it, and was not recorded, would not affect its validity as between the original parties as such requirements are only for the protection of creditors. Walker *v.* Walker, 175 Mass. 349, 56 N. E. 601.

That one deed in an exchange of lands is void as to creditors does not affect the validity of the other deed. Mehlhop *v.* Pettibone, 54 Wis. 652, 11 N. W. 553, 12 N. W. 443.

61. *Arkansas.*— Jordan *v.* Fenne, 13 Ark. 593.

California.— Bickerstaff *v.* Doub, 19 Cal. 109, 79 Am. Dec. 204.

Delaware.— Jackson *v.* Dutton, 3 Harr. 98.

Illinois.— Mehan *v.* Mehan, 203 Ill. 180, 67 N. E. 770; McElroy *v.* Hiner, 133 Ill. 156, 24 N. E. 435; Finley *v.* McConnell, 60 Ill. 259; Horner *v.* Zimmerman, 45 Ill. 14; Getzler *v.* Saroni, 18 Ill. 511.

Indiana.— Edwards *v.* Haverstick, 53 Ind. 348; Laney *v.* Laney, 2 Ind. 196.

Iowa.— Stephens *v.* Harrow, 26 Iowa 458.

Kentucky.— Gillespie *v.* Gillespie, 2 Bibb 89.

Massachusetts.—Drinkwater *v.* Drinkwater, 4 Mass. 354.

Mississippi.— Shaw *v.* Millsaps, 50 Miss. 380; Ellis *v.* McBride, 27 Miss. 155; Foules *v.* Foules, (1903) 33 So. 972.

Missouri.— George *v.* Williamson, 26 Mo. 190, 72 Am. Dec. 203; McLaughlin *v.* McLaughlin, 16 Mo. 242.

New Hampshire.—Jewell *v.* Porter, 31 N. H. 34.

New Jersey.— Hildebrand *v.* Willig, 64 N. J. Eq. 249, 53 Atl. 1035; Lokerson *v.* Stillwell, 13 N. J. Eq. 357.

New York.— Dwelly *v.* Van Houghton, 4 N. Y. Leg. Obs. 101.

North Carolina.— Coltraine *v.* Causey, 38 N. C. 246, 42 Am. Dec. 168.

Ohio.— White *v.* Brocaw, 14 Ohio St. 339; Tremper *v.* Barton, 18 Ohio 418; Barton *v.* Morris, 15 Ohio 408.

Pennsylvania.— Buehler *v.* Gloninger, 2 Watts 226; Reichart *v.* Castator, 5 Binn. 109, 6 Am. Dec. 402.

Tennessee.— Battle *v.* Street, 85 Tenn. 282, 2 S. W. 384; Dunbar *v.* McFall, 9 Humphr. 505; Lassiter *v.* Cole, 8 Humphr. 621; Neely *v.* Wood, 10 Yerg. 486.

Texas.— Fowler *v.* Stoneum, 11 Tex. 478, 62 Am. Dec. 490; Epperson *v.* Young, 8 Tex. 135; Danzey *v.* Smith, 4 Tex. 411.

Wisconsin.—Dietrich *v.* Koch, 35 Wis. 618; Fargo *v.* Ladd, 6 Wis. 106; La Crosse, etc., R. Co. *v.* Seeger, 4 Wis. 268.

United States.— Lenox *v.* Notrebe, 15 Fed. Cas. No. 8,246*c*, Hempst. 251.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 523; *infra*, XIII, A, 2, a, text and note 77; and DESCENT AND DISTRIBUTION, 14 Cyc. 90.

62. Schwalber *v.* Ehman, 62 N. J. Eq. 314, 49 Atl. 1085 (gift); Gilbert *v.* Stockman, 81 Wis. 602, 51 N. W. 1076, 52 N. W. 1045, 29 Am. St. Rep. 922. And see cases cited in preceding notes. See also EXECUTORS AND ADMINISTRATORS, 18 Cyc. 196, 197.

63. *Alabama.*— Means *v.* Hicks, 65 Ala. 241; Strange *v.* Graham, 56 Ala. 614; Greenwood *v.* Coleman, 34 Ala. 150.

Arkansas.— Anderson *v.* Dunn, 19 Ark. 650.

Illinois.— Moore *v.* Horsley, 156 Ill. 36, 40 N. E. 323; Fitzgerald *v.* Forristal, 48 Ill. 228; Choteau *v.* Jones, 11 Ill. 300, 50 Am. Dec. 460.

Indiana.— Anderson *v.* Etter, 102 Ind. 115, 26 N. E. 218; Sharpe *v.* Davis, 76 Ind. 17.

Kentucky.— Stewart *v.* Dailey, Litt. Sel. Cas. 212.

Michigan.— Jackson *v.* Cleveland, 15 Mich. 94, 90 Am. Dec. 266.

Mississippi.— Newell *v.* Newell, 34 Miss. 385.

New Hampshire.— Jewell *v.* Porter, 31 N. H. 34; Abbott *v.* Tenney, 18 N. H. 109.

New Jersey.— Gardner *v.* Short, 19 N. J. Eq. 341; Tantum *v.* Miller, 11 N. J. Eq. 551.

New York.— Jackson *v.* Garnsey, 16 Johns. 189; Bunn *v.* Winthrop, 1 Johns. Ch. 329, although the deed be retained by the grantor.

Pennsylvania.— Thomson *v.* Dougherty, 12 Serg. & R. 448.

Texas.— Herndon *v.* Reed, 82 Tex. 647, 18 S. W. 665.

Virginia.— Chamberlayne *v.* Temple, 2 Rand. 384, 14 Am. Dec. 786.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 525.

What conveyances are voluntary see *supra*, VIII, A. And see DEEDS, 13 Cyc. 530 note 14.

A voluntary bond, although fraudulent as to creditors, is as between the parties both in law and equity a gift of the money secured by it. Handy *v.* Philadelphia, etc., R. Co., 1 Phila. (Pa.) 31.

64. *Connecticut.*— Meade *v.* Smith, 16 Conn. 346.

and notwithstanding statutes making it a penal or criminal offense to give or receive such a conveyance,[65] or providing for the equitable distribution of insolvent estates among creditors.[66]

b. Applications of Rule. This rule applies to fraudulent transfers from parent to child,[67] from husband to wife,[68] or from a third person to a wife of property purchased by her husband to defraud his creditors,[69] or to a trustee to pay debts;[70] and includes, besides deeds generally, any sort of transfer or conveyance by which creditors are defrauded,[71] such as mortgages and deeds of trust,[72]

Illinois.— Tuttle *v.* Robinson, 78 Ill. 332; Cruikshank *v.* Cogswell, 26 Ill. 366.

Maryland.— Gough *v.* Edelen, 5 Gill 101.

Massachusetts.— Shumway *v.* Rutter, 7 Pick. 56.

Pennsylvania.— Ditman *v.* Raule, 124 Pa. St. 225, 16 Atl. 819; Yocum *v.* Kehler, 1 Walk. 84. See McCullough *v.* Willey, 192 Pa. St. 176, 4 Atl. 999.

Texas.— Robinson *v.* Martell, 11 Tex. 149; Danzey *v.* Smith, 4 Tex. 411. See Hoeser *v.* Kraeka, 29 Tex. 450.

Virginia.— Thomas *v.* Soper, 5 Munf. 28.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 526.

Retention of possession as an element of fraud see *supra*, IX.

65. Anderson *v.* Etter, 102 Ind. 115, 26 N. E. 218 (misdemeanor under Rev. St. (1881) § 2156); Galpin *v.* Galpin, 74 Iowa 454, 38 N. W. 156; Andrews *v.* Marshall, 48 Me. 46; Ellis *v.* Higgins, 32 Me. 34; Davy *v.* Kelley, 66 Wis. 452, 29 N. W. 232 (penal offense under Rev. St. (1878) § 4437, to sell or assign property to defraud creditors). See *infra*, XV.

66. Lassiter *v.* Cole, 8 Humphr. (Tenn.) 621. See BANKRUPTCY, 5 Cyc. 384 *et seq.*; and, generally, INSOLVENCY.

67. Thweatt *v.* McCullough, 84 Ala. 517, 4 So. 399, 5 Am. St. Rep. 391; Dearman *v.* Radcliffe, 5 Ala. 192; Burtch *v.* Elliott, 3 Ind. 99; Robinson *v.* Stewart, 10 N. Y. 189; Murphy *v.* Hubert, 16 Pa. St. 50; Eyrick *v.* Hetrick, 13 Pa. St. 488; Geiger *v.* Welsh, 1 Rawle (Pa.) 349; Smith *v.* Gibson, 1 Yeates (Pa.) 291; and other cases cited in the preceding notes.

68. *Illinois.*— Grosse *v.* Sweet, 188 Ill. 555, 59 N. E. 432 [*affirming* 89 Ill. App. 418] (fraudulent assignment by employee to his wife of claims against his employer); Moore *v.* Horsley, 156 Ill. 36, 40 N. E. 323.

Iowa.— Hays *v.* Marsh, 123 Iowa 81, 98 N. W. 604; King *v.* Tharp, 26 Iowa 283.

Massachusetts.— Pierce *v.* Le Monier, 172 Mass. 508, 53 N. E. 125.

Mississippi.— Wyatt *v.* Wyatt, 81 Miss. 219, 32 So. 317; Dulion *v.* Harkness, 80 Miss. 8, 31 So. 416, 92 Am. St. Rep. 563.

New Jersey.— Stillwell *v.* Stillwell, 47 N. J. Eq. 275, 20 Atl. 960, 24 Am. St. Rep. 408.

Texas.— Herndon *v.* Reed, 82 Tex. 647, 18 S. W. 665; Wilson *v.* Trawick, 10 Tex. 428; B. C. Evans Co. *v.* Guipel, (Civ. App. 1896) 35 S. W. 940; Frank *v.* Frank, (Civ. App. 1894) 25 S. W. 819.

Vermont.— Roberts *v.* Lund, 45 Vt. 82.

69. *Arkansas.*— Knight *v.* Glasscock, 51 Ark. 390, 11 S. W. 580.

Georgia.— Flannery *v.* Coleman, 112 Ga. 648, 37 S. E. 878.

Illinois.— Dobbins *v.* Cruger, 108 Ill. 188.

Montana.— Fredericks *v.* Davis, 3 Mont. 251.

Pennsylvania.—Moore *v.* Moore, 165 Pa. St. 464, 30 Atl. 932.

Virginia.— Ratliff *v.* Ratliff, 102 Va. 880, 47 S. E. 1007.

West Virginia.— Burt *v.* Timmons, 29 W. Va. 441, 2 S. E. 780, 6 Am. St. Rep. 664.

70. Neresheimer *v.* Smyth, 167 N. Y. 202, 60 N. E. 449 [*affirming* 35 N. Y. App. Div. 632, 55 N. Y. Suppl. 1144]; Worth *v.* Northam, 26 N. C. 102, conveyance to trustee for certain creditors. See, generally, ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 146.

71. Welby *v.* Armstrong, 21 Ind. 489; Everett *v.* Winn, Sm. & M. Ch. (Miss.) 67 (agreement to hold property in secret trust); Hummel's Estate, 161 Pa. St. 215, 28 Atl. 1113 (bonds); Harvin *v.* Weeks, 11 Rich. (S. C.) 601.

A written instrument creating a lien in favor of one creditor to the preference of others is within the above rule. Steele *v.* Moore, 54 Ind. 52.

72. *Illinois.*— Upton *v.* Craig, 57 Ill. 257; Fitzgerald *v.* Forristal, 48 Ill. 228.

Indiana.— Van Wy *v.* Clark, 50 Ind. 259.

Massachusetts.— Pierce *v.* Le Monier, 172 Mass. 508, 53 N. E. 125.

Michigan.— Hess *v.* Final, 32 Mich. 515.

Mississippi.— Barwick *v.* Moyse, 74 Miss. 415, 21 So. 238, 60 Am. St. Rep. 512; Parkhurst *v.* McGraw, 24 Miss. 134.

New Hampshire.— Blake *v.* Williams, 36 N. H. 39.

New Jersey.— Risley *v.* Parker, 50 N. J. Eq. 284, 23 Atl. 424; Campbell *v.* Tompkins, 32 N. J. Eq. 170.

Oregon.— U. S. Mortgage Co. *v.* Marquam, 41 Oreg. 391, 69 Pac. 37, 41.

Pennsylvania.— Bonesteel *v.* Sullivan, 104 Pa. St. 9; Gill *v.* Henry, 95 Pa. St. 388.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 523; and cases cited in the preceding notes.

A chattel mortgage may be good as between the parties, although void as to creditors by reason of its not complying with certain statutory requisites. See Adlard *v.* Rodgers, 105 Cal. 327, 38 Pac. 889; Harms *v.* Silva, 91 Cal. 636, 27 Pac. 1088; Hackett *v.* Manlove, 14 Cal. 85; Davis *v.* Ransom, 26 Ill. 100; Lane *v.* Lutz, 23 Wend. (N. Y.) 653; Stewart *v.* Platt, 101 U. S. 731, 25 L. ed.

bills of sale,[73] and has been held to include confessions of judgment,[74] or assignments.[75]

2. MUTUAL RIGHTS AND LIABILITIES — a. In General. It follows from the above rule as to rights and liabilities of the parties that courts will not grant affirmative relief to either of the parties to the fraudulent transfer by impeaching or rescinding it, whether the relief is sought by way of defense or as a direct cause of action, at the instance of one of the parties, his assigns, privies,[76] heirs or

816; Lloyd *v.* Foley, 11 Fed. 410, 6 Sawy. (U. S.) 424. And see, generally, CHATTEL MORTGAGES, 6 Cyc. 1104.

73. *Florida.*— Kahn *v.* Wilkins, 36 Fla. 428, 18 So. 584.

Kentucky.—Mason *v.* Baker, 1 A. K. Marsh. 208, 10 Am. Dec. 724.

New Jersey.—Evans *v.* Herring, 27 N. J. L. 243.

Pennsylvania.—Jones *v.* Shaw, 8 Pa. Super. Ct. 487, 43 Wkly. Notes Cas. 168.

Texas.— McClenny *v.* Floyd, 10 Tex. 159.

Vermont.— Boutwell *v.* McClure, 30 Vt. 674.

74. Franklin *v.* Stagg, 22 Mo. 193; Shallcross *v.* Deats, 43 N. J. L. 177; Seaving *v.* Brinkerhoff, 5 Johns. Ch. (N. Y.) 329; Blystone *v.* Blystone, 51 Pa. St. 373; Becker *v.* Hammes, 2 Kulp (Pa.) 404; Garrett *v.* Longnecker, 2 Leg. Rec. (Pa.) 174.

In an action on a note it is no defense that the note was given in consideration of a judgment confessed for the purpose of defrauding creditors. Harbaugh *v.* Butner, 148 Pa. St. 273, 23 Atl. 983.

Proof.— Between the original parties to a judgment note, where it is admitted that there was no consideration, but a recovery is sought on the ground that the note was executed in fraud of creditors, plaintiff must prove that at the time of its execution the obligor was in debt or contemplating indebtedness. Clarkson *v.* Thorn, 2 Pennyp. (Pa.) 491.

75. *Illinois.*— Grosse *v.* Sweet, 188 Ill. 555, 59 N. E. 432 [*affirming* 89 Ill. App. 418].

Kansas.— Robinson *v.* Blood, 64 Kan. 290, 67 Pac. 842.

Minnesota.— Jones *v.* Rahilly, 16 Minn. 320.

Missouri.— Looney *v.* Bartlett, 106 Mo. App. 619, 81 S. W. 481, assignment of certificate of deposit.

New Jersey.— Pillsbury *v.* Kingon, 31 N. J. Eq. 619.

New York.— Mills *v.* Argall, 6 Paige 577. See Brownell *v.* Curtis, 10 Paige 210.

Pennsylvania.— Ahl's Appeal, 129 Pa. St. 49, 18 Atl. 471.

Rhode Island.— Gardner *v.* Commercial Nat. Bank, 13 R. I. 155.

England.— Bessey *v.* Windham, 6 Q. B. 166, 14 L. J. Q. B. 7, 51 E. C. L. 166; Robinson *v.* McDonnell, 2 B. & Ald. 134. See Steel *v.* Brown, 1 Campb. 512 note, 1 Taunt. 381, 9 Rev. Rep. 795.

See also ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 146; BANKRUPTCY 5 Cyc. 288; and, generally, INSOLVENCY.

76. *Alabama.*— Kirby *v.* Raynes, 138 Ala. 194, 35 So. 118, 100 Am. St. Rep. 39; Glover *v.* Walker, 107 Ala. 540, 18 So. 251; Williams *v.* Higgins, 69 Ala. 517; Roden *v.* Murphy, 10 Ala. 804.

Arkansas.— Noble *v.* Noble, 26 Ark. 317; Payne *v.* Bruton, 10 Ark. 53.

California.— Donnelly *v.* Rees, 141 Cal. 56, 74 Pac. 433.

District of Columbia.— Rider *v.* White, 3 Mackey 305; Fletcher *v.* Fletcher, 2 MacArthur 38.

Florida.— Kahn *v.* Wilkins, 36 Fla. 428, 18 So. 584.

Georgia.— Parrott *v.* Baker, 82 Ga. 364, 9 S. E. 1068; Beale *v.* Hall, 22 Ga. 431; Goodwyn *v.* Goodwyn, 20 Ga. 600; McCleskey *v.* Leadbetter, 1 Ga. 551.

Illinois.— Brady *v.* Huber, 197 Ill. 291, 64 N. E. 264, 90 Am. St. Rep. 161; Kirkpatrick *v.* Clark, 132 Ill. 342, 24 N. E. 71, 22 Am. St. Rep. 531, 8 L. R. A. 511; Dobbins *v.* Cruger, 108 Ill. 188; Fast *v.* McPherson, 98 Ill. 496; Perisho *v.* Perisho, 95 Ill. App. 644 [*affirming* 71 Ill. App. 222].

Iowa.— Holliday *v.* Holliday, 10 Iowa 200. See Gebhard *v.* Sattler, 40 Iowa 152.

Kansas.— Durand *v.* Higgins, 67 Kan. 110, 72 Pac. 567, holding that a fraudulent grantor cannot have his title quieted as against such a conveyance.

Kentucky.— Helton *v.* Cunnagim, 54 S. W. 851, 21 Ky. L. Rep. 1244; Warden *v.* Field, 5 Ky. L. Rep. 855.

Louisiana.— Kerwin *v.* Hibernia Ins. Co., 35 La. Ann. 33.

Maine.— Rich *v.* Hayes, 99 Me. 51, 58 Atl. 62; Bryant *v.* Mansfield, 22 Me. 360, holding that relief that a note given by a grantee might be canceled upon reconveyance of the property should be denied.

Maryland.— Watts *v.* Vansant, 99 Md. 577, 58 Atl. 433; Snyder *v.* Snyder, 51 Md. 77; Schuman *v.* Peddicord, 50 Md. 560; Cushwa *v.* Cushwa, 5 Md. 44.

Michigan.— Hess *v.* Final, 32 Mich. 515.

Minnesota.— Jones *v.* Rahilly, 16 Minn. 320.

Mississippi.— Martin *v.* Tillman, 70 Miss. 614, 13 So. 251; Moore *v.* Jordan, 65 Miss. 229, 3 So. 737, 7 Am. St. Rep. 641; Walton *v.* Tusten, 49 Miss. 569.

Missouri.— Whitaker *v.* Whitaker, 157 Mo. 342, 58 S. W. 5.

Montana.— Fredericks *v.* Davis, 3 Mont. 251.

Nebraska.— Parker *v.* Parker, 4 Nebr. (Unoff.) 692, 96 N. W. 208.

Nevada.— Allison *v.* Hagan, 12 Nev. 38.

New Hampshire.— Blake *v.* Williams, 36

distributees,[77] or at the instance of any person other than a defrauded cred-

N. H. 39. See Costello *v.* Portsmouth Brewing Co., 69 N. H. 405, 43 Atl. 640.

New Jersey.— Shallcross *v.* Deats, 43 N. J. L. 177; Evans *v.* Herring, 27 N. J. L. 243; Anderson *v.* Tuttle, 26 N. J. Eq. 144; Eyre *v.* Eyre, 19 N. J. Eq. 42; Servis *v.* Nelson, 14 N. J. Eq. 94; Tantum *v.* Miller, 11 N. J. Eq. 551.

New York.— Freelove *v.* Cole, 41 Barb. 318 [*affirmed* in 41 N. Y. 619 note]. See Bolt *v.* Rogers, 3 Paige 154.

North Carolina.— Hart *v.* Hart, 109 N. C. 368, 13 S. E. 1020; Ellington *v.* Currie, 40 N. C. 21.

Ohio.— Pride *v.* Andrew, 51 Ohio St. 405, 38 N. E. 84; White *v.* Brocaw, 14 Ohio St. 339.

Oregon.— U. S. Mortgage Co. *v.* Marquam, 41 Oreg. 391, 69 Pac. 37, 41.

Pennsylvania.— Gill *v.* Henry, 95 Pa. St. 388; French *v.* Mehan, 56 Pa. St. 286; Blystone *v.* Blystone, 51 Pa. St. 373; Hershey *v.* Weiting, 50 Pa. St. 240; Sickman *v.* Lapsley, 13 Serg. & R. 224, 15 Am. Dec. 596; Reichart *v.* Castator, 5 Binn. 109, 6 Am. Dec. 402; Simon's Estate, 20 Pa. Super. Ct. 450; Becker *v.* Hammes, 2 Kulp 404.

Rhode Island.— Hudson *v.* White, 17 R. I. 519, 23 Atl. 57.

South Carolina.— See Latimer *v.* Latimer, 53 S. C. 483, 31 S. E. 304, setting up release of debt as defense.

Texas.— Stephens *v.* Adair, 82 Tex. 214, 18 S. W. 102; Cuney *v.* Dupree, 21 Tex. 211; Hunter *v.* Magee, 31 Tex. Civ. App. 304, 72 S. W. 230; Leach *v.* Devereux, (Civ. App. 1895) 32 S. W. 837.

Utah.— Schroeder *v.* Pratt, 21 Utah 176, 60 Pac. 512.

Virginia.— Ratliff *v.* Ratliff, 102 Va. 880, 47 S. E. 1007; Smith *v.* Chilton, 84 Va. 840, 6 S. E. 142; Turner *v.* Campbell, 3 Gratt. 77; James *v.* Bird, 8 Leigh 510, 31 Am. Dec. 668; Smith *v.* Elliott, 1 Patt. & H. 307.

West Virginia.— Poling *v.* Williams, 55 W. Va. 69, 46 S. E. 704; Edgell *v.* Smith, 50 W. Va. 349, 40 S. E. 402; Billingsley *v.* Menear, 44 W. Va. 651, 30 S. E. 61; McClintock *v.* Loisseau, 31 W. Va. 865, 8 S. E. 612, 2 L. R. A. 816.

Wisconsin.— Krouskop *v.* Krouskop, 95 Wis. 296, 70 N. W. 475; Sommers *v.* Hamburger, 91 Wis. 107, 64 N. W. 880.

United States.— Dent *v.* Ferguson, 132 U. S. 50, 10 S. Ct. 13, 33 L. ed. 242; Greenbank *v.* Ferguson, 58 Fed. 18; Beadle *v.* Beadle, 40 Fed. 315, 2 McCrary 586.

England Smith *v.* Garland, 2 Meriv. 123, 16 Rev. Rep. 154, 35 Eng. Reprint 887.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 527.

Right of personal representative to avoid a fraudulent conveyance by his decedent see EXECUTORS AND ADMINISTRATORS, 17 Cyc. 196, 197.

A court of equity will interpose to restrain proceedings at law for the recovery of property conveyed in fraud of creditors. Gridley *v.* Wynant, 23 How. (U. S.) 500, 16 L. ed. 411.

A creditor giving a receipt in full for a debt to defraud other creditors cannot show that it was not intended as a discharge. Aborn *v.* Rathbone, 54 Conn. 444, 8 Atl. 677.

Where a creditor agrees to accept less than the amount due and then assigns the entire debt and the debtors permit judgment to be entered for the entire amount in order to defraud other creditors, they cannot fall back on their compromise with the creditor to defeat the rights of the assignee. Smith *v.* Chilton, 84 Va. 840, 6 S. E. 142.

A wife who joins her husband in a conveyance in fraud of creditors cannot, after obtaining a divorce, have the conveyance set aside and the land subjected to a judgment for alimony in her favor. Barrow *v.* Barrow, 108 Ind. 345, 9 N. E. 371.

77. *Alabama.*— Dearman *v.* Radcliffe, 5 Ala. 192.

Colorado.— Lathrop *v.* Pollard, 6 Colo. 424.

Georgia.— Anderson *v.* Brown, 72 Ga. 713.

Illinois.— Francis *v.* Wilkinson, 147 Ill. 370, 35 N. E. 150; White *v.* Russell, 79 Ill. 155; Ellis *v.* Petty, 51 Ill. App. 636.

Indiana.— Kitts *v.* Willson, 130 Ind. 492, 29 N. E. 401.

Kentucky.— Warren *v.* Hall, 6 Dana 450; Neal *v.* Neal, 82 S. W. 981, 26 Ky. L. Rep. 962; Helton *v.* Cunnagim, 54 S. W. 851, 21 Ky. L. Rep. 1244; Tinsley *v.* Tinsley, 7 Ky. L. Rep. 295.

Louisiana.— Guidry *v.* Grivot, 2 Mart. N. S. 13, 14 Am. Dec. 193, legatee. In this state it is held that legatees and simple heirs will not be permitted to question such a conveyance of immovables but that forced heirs may do so to the extent and for the purpose of protecting their *legitime* (Kerwin *v.* Hibernia Ins. Co., 35 La. Ann. 33), except that it seems that they cannot question a simulated sale to a favorite child (Dupuy *v.* Dupont, 11 La. Ann. 226).

Mississippi.— Foules *v.* Foules, (1903) 33 So. 972; Winn *v.* Barnett, 31 Miss. 653; Gully *v.* Hull, 31 Miss. 20; Snodgrass *v.* Andrews, 30 Miss. 472, 60 Am. Dec. 169; Ellis *v.* McBride, 27 Miss. 155, distributee.

Missouri.— Sell *v.* West, 125 Mo. 621, 28 S. W. 969, 46 Am. St. Rep. 508; Thomas *v.* Thomas, 107 Mo. 459, 18 S. W. 27; Hall *v.* Callahan, 66 Mo. 316; McLaughlin *v.* McLaughlin, 16 Mo. 242; Ober *v.* Howard, 11 Mo. 425.

New Jersey.— Hildebrand *v.* Willig, 64 N. J. Eq. 249, 53 Atl. 1035.

Pennsylvania.— Hummel's Estate, 161 Pa. St. 215, 28 Atl. 1113.

South Carolina.— Anderson *v.* Rhodus, 12 Rich. Eq. 104.

Texas.— Wilson *v.* Demander, 71 Tex. 603, 9 S. W. 678; Fowler *v.* Stoneum, 11 Tex. 478, 62 Am. Dec. 490; Danzey *v.* Smith, 4 Tex. 411.

itor or purchaser.[78] But nevertheless this rule does not prevent the parties from rescinding the transaction by mutual agreement.[79] In order that a transfer may be fraudulent within the meaning of the above rule, it is not necessary that there shall have been an intent to defraud any particular creditor or that the fraud should have been successful.[80]

b. Applications of Rule. The grantor cannot have such a conveyance set aside even though he has not parted with possession of the property,[81] has not received the purchase-money,[82] or although the grantee had no knowledge of the fraudulent intent.[83] The fraudulent character of the transaction cannot be set up by one of the parties thereto, for the purpose of defeating an action attacking the transfer on other grounds,[84] or to defeat an action to dispossess,[85] or an action of replevin[86] or ejectment,[87] or to defeat an action to establish equitable rights in certain land,[88] or to defeat an action on a note regular on its face given to defraud creditors.[89] But the fraudulent transaction may be set up by the grantee or one claiming under him, for the purpose of showing a good title as against the grantor, his privies, etc.,[90] and equity may even grant affirmative relief to the grantee where, after he has acquired title, the property is taken from him by means of fraud.[91]

c. Where Parties Are Not In Pari Delicto. Where the transfer is procured under circumstances of oppression, imposition, or undue influence, or when the grantor was at a great disadvantage with the grantee, the parties are not *in pari delicto* and equity will grant relief to the grantor or his heirs, etc.,[92] as by setting

Vermont.— Peaslee *v.* Barney, 1 D. Chipm. 331, 6 Am. Dec. 743.

United States.— Gridley *v.* Wynant, 23 How. 500, 16 L. ed. 411.

See 24 Cent. Dig. tit. "Fraudulent Conances," § 528; *supra*, XIII, A, 1, a, text and note 61; and DESCENT AND DISTRIBUTION, 14 Cyc. 90.

78. *Illinois.*— Fitzgerald *v.* Forristal, 48 Ill. 228.

Indiana.— Springer *v.* Drosch, 32 Ind. 486, 2 Am. Rep. 356.

Massachusetts.— Harvey *v.* Varney, 98 Mass. 118; Fairbanks *v.* Blackington, 9 Pick. 93.

Rhode Island.— Gardner *v.* Commercial Nat. Bank, 13 R. I. 155.

Wisconsin.— Clemens *v.* Clemens, 28 Wis. 637, 9 Am. Rep. 520.

And see cases cited in preceding notes; and *infra*, XIII, A, 3, a.

79. Goetter *v.* Smith, 104 Ala. 481, 16 So. 534.

Reconveyance by fraudulent grantee see *supra*, II, B, 17, d; *infra*, XIII, A, 2, e, (II).

80. Blount *v.* Costen, 47 Ga. 534.

81. Parrott *v.* Baker, 82 Ga. 364, 9 S. E. 1068.

82. Parrott *v.* Baker, 82 Ga. 364, 9 S. E. 1068.

83. Weir *v.* Day, 57 Iowa 84, 10 N. W. 304.

84. See Ferguson *v.* Dent, 24 Fed. 412.

85. Tufts *v.* Du Bignon, 61 Ga. 322. See Bibb *v.* Baker, 17 B. Mon. (Ky.) 292.

86. Dunnels *v.* Fitch, 8 Pa. St. 495.

87. *Georgia.*— Bush *v.* Rogan, 65 Ga. 320, 38 Am. St. Rep. 785. But see Harrison *v.* Hatcher, 44 Ga. 638.

Nevada.— Peterson *v.* Brown, 17 Nev. 172, 30 Pac. 697, 45 Am. Rep. 437.

New York.— Moseley *v.* Moseley, 15 N. Y. 334.

Pennsylvania.— Murphy *v.* Hubert, 16 Pa. St. 50.

Vermont.— Norton *v.* Perkins, 67 Vt. 203, 31 Atl. 148.

And see EJECTMENT, 15 Cyc. 74 note 45.

Contra.— Kirkpatrick *v.* Clark, 132 Ill. 342, 24 N. E. 71, 22 Am. St. Rep. 531, 8 L. R. A. 511.

88. Clemens *v.* Clemens, 28 Wis. 637, 9 Am. Rep. 520.

89. Murphy *v.* Murphy, 74 Conn. 198, 50 Atl. 394 (where the transferee did not participate in the fraud); Butler *v.* Moore, 73 Me. 151, 40 Am. Rep. 348; Moore *v.* Thompson, 6 Mo. 353; Winton *v.* Freeman, 102 Pa. St. 366.

90. Chapin *v.* Pease, 10 Conn. 69, 25 Am. Dec. 56.

91. Stillwell *v.* Stillwell, 47 N. J. Eq. 275, 20 Atl. 960, 24 Am. St. Rep. 408.

92. *District of Columbia.*— See Fletcher *v.* Fletcher, 2 MacArthur 38.

Illinois.— Herrick *v.* Lynch, 150 Ill. 283, 37 N. E. 221 [*affirming* 49 Ill. App. 657].

Iowa.— Wiley *v.* Carter, 77 Iowa 751, 42 N. W. 566 (recovery of amount paid on fraudulent note); Davidson *v.* Carter, 55 Iowa 117, 7 N. W. 466.

Kentucky.— Sanford *v.* Reed, 85 S. W. 213, 27 Ky. L. Rep. 431.

Maryland.— Roman *v.* Mali, 42 Md. 513; Stewart *v.* Iglehart, 7 Gill & J. 132, 28 Am. Dec. 202.

Michigan.— Eldredge *v.* Sherman, 79 Mich. 484, 44 N. W. 948, recovery of property taken in foreclosure proceedings upon a mortgage procured by the fraud of the mortgagee.

Mississippi.— O'Conner *v.* Ward, 60 Miss. 1025; Prewett *v.* Coopwood, 30 Miss. 369.

aside and canceling the conveyance and ordering the property so conveyed to be restored.[93]

d. Property Rights — (i) *In General.* An absolute conveyance of property, although made to defraud creditors, will convey the legal and equitable titles to the grantee as against all the world except defrauded creditors,[94] and entitles

New York.— Place *v.* Hayward, 117 N. Y. 487, 23 N. E. 25.

North Carolina.— Pinckston *v.* Brown, 56 N. C. 494.

Virginia.—Austin *v.* Winston, 1 Hen. & M. 33, 3 Am. Dec. 583.

Where the grantor is not so culpable as the grantee, it would seem that a court of equity ought not to altogether refuse relief to the grantor, but to apportion the relief granted to the degree of criminality in both parties so as on the one hand to avoid the encouragement of fraud, and on the other hand to prevent extortion and oppression. Austin *v.* Winston, 1 Hen. & M. (Va.) 33, 3 Am. Dec. 583.

A grantor's wife who has no knowledge of the intended fraud may impeach a conveyance by her husband, although she joined therein. Kitts *v.* Willson, 130 Ind. 492, 29 N. E. 401.

93. *Arkansas.*—Hutchinson *v.* Park, (1904) 82 S. W. 843.

California.— Donnelly *v.* Rees, 141 Cal. 56, 74 Pac. 433.

Iowa.— Kervick *v.* Mitchell, 68 Iowa 273, 24 N. W. 151, 26 N. W. 434.

Kentucky.— Harper *v.* Harper, 85 Ky. 160, 3 S. W. 5, 8 Ky. L. Rep. 820, 7 Am. St. Rep. 583; Sanford *v.* Reed, 85 S. W. 213, 27 Ky. L. Rep. 431.

Missouri.— Holliway *v.* Holliway, 77 Mo. 392; Poston *v.* Balch, 69 Mo. 115.

New York.— Ingersoll *v.* Weld, 103 N. Y. App. Div. 554, 93 N. Y. Suppl. 291; Watkins *v.* Jones, 78 Hun 496, 29 N. Y. Suppl. 557; Goodenough *v.* Spencer, 2 Thomps. & C. 508, 15 Abb. Pr. N. S. 248.

Washington.— Melbye *v.* Melbye, 15 Wash. 648, 47 Pac. 16; Rozell *v.* Vansyckle, 11 Wash. 79, 39 Pac. 270.

Wisconsin.— Krouskop *v.* Krouskop, 95 Wis. 296, 70 N. W. 475.

The fact that the grantee induces the conveyance by reason of his intimacy with and influence over the grantor will not, where the grantor is not of weak mind and the relation of attorney and client does not exist, enable the grantor to have such a conveyance set aside as a fraud upon him. Renfrew *v.* McDonald, 11 Hun (N. Y.) 254.

A grantor's conveyance of his homestead cannot be fraudulent as to his creditors, and therefore rescission of a deed thereto executed with intent to defraud the creditors of the grantor should not be denied on the ground that parties were *in pari delicto.* Sallee *v.* Sallee, 35 S. W. 437, 18 Ky. L. Rep. 74. See *supra,* II, B, 21, b.

Mental incapacity.— The rule that a conveyance in fraud of creditors is valid and binding as against the fraudulent grantor does not prevent the avoidance of a fraudulent conveyance on the ground of the grantor's mental incapacity. Tatum *v.* Tatum, 101 Va. 77, 43 S. E. 184.

94. *Alabama.*— Pond *v.* Wadsworth, 24 Ala. 531; Dearman *v.* Radcliffe, 5 Ala. 192; Rochelle *v.* Harrison, 8 Port. 351.

Arkansas.— Doster *v.* Manistee Nat. Bank, 67 Ark. 325, 55 S. W. 137, 77 Am. St. Rep. 116, 48 L. R. A. 334; Meux *v.* Anthony, 11 Ark. 411, 52 Am. Dec. 274.

California.— Goad *v.* Moulton, 67 Cal. 536, 8 Pac. 63.

Connecticut.— Wolfe *v.* Beecher Mfg. Co., 47 Conn. 231 (holding that an action for damages to freehold, the title to which had been conveyed to another in fraud of plaintiff's creditors, will not lie by the grantor); Owen *v.* Dixon, 17 Conn. 492.

Illinois.— Moore *v.* Horsley, 156 Ill. 36, 40 N. E. 323; Lane *v.* Union Nat. Bank, 75 Ill. App. 299 [*affirmed* in 177 Ill. 171, 52 N. E. 361, 69 Am. St. Rep. 216].

Indiana.— Henry *v.* Stevens, 108 Ind. 281, 9 N. E. 356; Jones *v.* Reeder, 22 Ind. 111; Doe *v.* Hurd, 7 Blackf. 510.

Iowa.— Fordyce *v.* Hicks, 76 Iowa 41, 40 N. W. 79; Parker *v.* Parker, 56 Iowa 111, 8 N. W. 806.

Kentucky.— Lynch *v.* Sanders, 9 Dana 59.

Massachusetts.— Leonard *v.* Bryant, 2 Cush. 32.

Minnesota.— Brasie *v.* Minneapolis Brewing Co., 87 Minn. 456, 92 N. W. 340, 94 Am. St. Rep. 709, 67 L. R. A. 865.

Mississippi.— Walton *v.* Tusten, 49 Miss. 569.

Montana.— See Yoder *v.* Reynolds, 28 Mont. 183, 72 Pac. 417.

New Hampshire.— Jones *v.* Bryant, 13 N. H. 53.

New Jersey.— Guest *v.* Barton, 32 N. J. Eq. 120, holding that a debtor who has conveyed his property in fraud of creditors has no standing in equity to question the fairness or adequacy of the price obtained at a public sale of such premises under a creditor's bill.

New York.—Davis *v.* Graves, 29 Barb. 480; Paddon *v.* Williams, 1 Rob. 340, 2 Abb. Pr. N. S. 88.

North Carolina.— York *v.* Merritt, 80 N. C. 285.

North Dakota.— Lockren *v.* Rustan, 9 N. D. 43, 81 N. W. 60.

Ohio.— Douglas *v.* Dunlap, 10 Ohio 162.

Pennsylvania.— Murphy *v.* Hubert, 16 Pa. St. 50; Patrick *v.* Smith, 2 Pa. Super. Ct. 113.

South Carolina.— Steinmeyer *v.* Steinmeyer, 64 N. C. 413, 42 S. E. 184, 92 Am. St. Rep. 809.

Tennessee.— Jacobi *v.* Schloss, 7 Coldw. 385; Williams *v.* Love, 4 Humphr. 62.

the grantee to maintain an action for the property against his grantor in possession,[95] or for its value where he has lost his title by acts of the grantor,[96] unless the grantor was not *in pari delicto* with the grantee.[97] After such conveyance the grantor has no interest which can be asserted either in law or equity.[98] But an executory contract of sale made to defraud creditors does not pass the title of the property as between the parties.[99]

Texas.— Biering *v.* Flett, (1888) 7 S. W. 229; Robb *v.* Robb, (Civ. App. 1897) 41 S. W. 92; Frank *v.* Frank, (Civ. App. 1894) 25 S. W. 819. See Claybrooks *v.* Kelly, 61 Tex. 634.

Washington.— Preston-Parton Milling Co. *v.* Horton, 22 Wash. 236, 60 Pac. 412, 79 Am. St. Rep. 928; Shoemake *v.* Finlayson, 22 Wash. 12, 60 Pac. 50.

West Virginia.— Poling *v.* Williams, 55 W. Va. 69, 46 S. E. 704.

United States.— Claflin *v.* Lisso, 27 Fed. 420; Atwater *v.* Seely, 2 Fed. 133, 1 McCrary 264; Backhouse *v.* Jett, 2 Fed. Cas. No. 710, 1 Brock. 500.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 530.

Property fraudulently conveyed as assets of decedent's estate see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 195.

Rights and liabilities of fraudulent grantee as against grantor's assignee in bankruptcy see BANKRUPTCY, 5 Cyc. 346.

Title passes to the grantee until some creditor defeats it by the levy of an execution, and when defeated it is rendered void only from the time of the levy. Jones *v.* Bryant, 13 N. H. 53.

Where property of a surety, by his consent, is sold under execution against his principal, and is bought in by the principal through an agent, if the transaction was intended by the principal and surety, both being insolvent at the time, to hinder and delay the creditors of the surety, the agent who became the purchaser would hold the property against both and might dispose of it as he pleased; and if he did not participate in the fraud, but acted in good faith as agent, the principal's title would prevail against the surety. Pond *v.* Wadsworth, 24 Ala. 531.

A deed of trust in fraud of creditors entitles the grantee to hold as against the grantor and the beneficiaries, whether the trust is by parol or in writing, and whether the grantee is in possession or not. Murphy *v.* Hubert, 16 Pa. St. 50.

The execution and recording of a conveyance of land by a debtor with intent to defraud creditors made without consent of the grantee who at once repudiated it does not pass title. Witz *v.* Lockridge, 39 W. Va. 463, 19 S. E. 876; Guggenheimer *v.* Lockridge, 39 W. Va. 457, 19 S. E. 874.

95. *Alabama.*— Greenwood *v.* Coleman, 34 Ala. 150.

Georgia.— Goodwyn *v.* Goodwyn, 20 Ga. 600, if he has paid a consideration therefor.

Kentucky.— Elmore *v.* Elmore, 58 S. W. 980, 22 Ky. L. Rep. 856; Jones *v.* Jenkins, 7 Ky. L. Rep. 408.

New York.— See Paddon *v.* Williams, 2 Abb. Pr. N. S. 88.

North Carolina.— York *v.* Merritt, 80 N. C. 285.

South Carolina.— Broughton *v.* Broughton, 4 Rich. 491.

Virginia.— Starke *v.* Littlepage, 4 Rand. 368, holding that the grantee may enforce the conveyance in a court of law, and the grantor cannot defeat it by showing the fraud.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 530.

After-acquired possession of the property by the grantor does not prevent the grantee from recovering it from him in the absence of proof that he acquired such possession under a contract with the grantee. Pond *v.* Wadsworth, 24 Ala. 531; Bibb *v.* Baker, 17 B. Mon. (Ky.) 292.

96. Nichols *v.* Patten, 18 Me. 231, 35 Am. Dec. 713; Hoeser *v.* Kraeka, 29 Tex. 450, where the grantor has kept possession and disposed of the property.

97. Hays *v.* Windsor, 130 Cal. 230, 62 Pac. 395, holding that a fraudulent grantee who induces a conveyance in fraud of the grantor's creditors, the grantor not sharing in the fraudulent intent, cannot maintain replevin to recover the property from the grantor. See *supra*, XIII, A, 2, c.

98. *Alabama.*— Heinz *v.* White, 105 Ala. 670, 17 So. 185.

Iowa.— Howland *v.* Knox, 59 Iowa 46, 12 N. W. 777.

New York.— Robertson *v.* Sayre, 134 N. Y. 97, 31 N. E. 250, 30 Am. St. Rep. 627 [*affirming* 53 Hun 490, 6 N. Y. Suppl. 649], holding also that it is immaterial that the grantee is not a participant in the fraud.

Washington.— Preston-Parton Milling Co. *v.* Horton, 22 Wash. 236, 60 Pac. 412, 79 Am. St. Rep. 928, holding that no interest remains upon which the lien of a judgment subsequently acquired can attach.

West Virginia.— Poling *v.* Williams, 55 W. Va. 69, 46 S. E. 704. See McClintock *v.* Loisseau, 31 W. Va. 865, 8 S. E. 612, 2 L. R. A. 816; Billingsley *v.* Menear, 44 W. Va. 651, 30 S. E. 61; Edgell *v.* Smith, 50 W. Va. 349, 40 S. E. 402.

Conveyance of a homestead in fraud of creditors is valid as between the parties so that the grantor cannot afterward claim the benefit of homestead rights in the premises. McDowell *v.* McMurria, 107 Ga. 812, 33 S. E. 709, 73 Am. St. Rep. 155; Piper *v.* Johnston, 12 Minn. 60; Williamson *v.* Wilkinson, 81 Miss. 503, 33 So. 282. *Compare, supra*, II, B, 21, b.

99. Rochelle *v.* Harrison, 8 Port. (Ala.) 351.

(II) *As to After-Acquired Title.* In some jurisdictions it is held that where a fraudulent grantor subsequently acquires title to the property conveyed by purchase at an execution sale of such property or by conveyance to him by the purchaser thereat, the title so acquired inures to the former fraudulent grantee,[1] but in other jurisdictions it is held otherwise.[2]

(III) *By Adverse Possession.* In accordance with the general rules relating to adverse possession,[3] a fraudulent grantor may acquire title by adverse possession as against his fraudulent grantee,[4] except where his possession is in subordination to his grantee's title.[5] On the other hand it has been held that possession by a fraudulent grantee is not adverse to the grantor but in trust for him.[6]

(IV) *Effect of Setting Aside Conveyance.* If a conveyance is set aside by creditors of the grantor it is set aside only as to such creditors and does not operate to revest title in the grantor, his heirs, or one claiming under him;[7] and any surplus resulting from the property belongs to the grantee.[8]

e. Recovery of Property Fraudulently Conveyed — (I) *In General.* As a general rule the courts will not aid a fraudulent grantor, his heirs, his assigns, his privies, etc., to reclaim or recover from his transferee property transferred in fraud of creditors, or its proceeds,[9] even though an agreement to reconvey was

1. Perry *v.* Calvert, 22 Mo. 361; Eisner *v.* Heileman, 52 N. J. L. 378, 20 Atl. 46, 19 Am. St. Rep. 449, 9 L. R. A. 96 (holding that a judgment debtor cannot defeat his own fraudulent conveyance by purchasing through another the property so conveyed at a sale under a judgment rendered against him subsequent to the conveyance); Hallyburton *v.* Slagle, 130 N. C. 482, 41 S. E. 877.

2. Thompson *v.* Hammond, 1 Edw. (N. Y.) 497, holding that where land under mortgage is conveyed in consideration of natural affection, and the mortgage is foreclosed upon an understanding that upon payment of the debt by the vendor the land should be reconveyed to him, a subsequent conveyance to him, upon payment of the debt, does not inure to the benefit of the vendee, as the vendor was not remitted to his former title. Where the creditor to be defrauded purchases on execution under a judgment prior to the conveyance, and reconveys it to the fraudulent grantor, this title does not inure to the fraudulent grantee under the covenants of warranty in the deed to him. Gilliland *v.* Fenn, 90 Ala. 230, 8 So. 15, 9 L. R. A. 413.

3. See, generally, Adverse Possession, 1 Cyc. 1043.

4. Elwell *v.* Hinckley, 138 Mass. 225.

5. Williams *v.* Higgins, 69 Ala. 517.

6. Daniel *v.* McHenry, 4 Bush (Ky.) 277. See also Adverse Possession, 1 Cyc. 1042. But see Bobb *v.* Woodward, 50 Mo. 95; Marr *v.* Rucker, 1 Humphr. (Tenn.) 348. Possession by grantee under bond for title, where no consideration has been paid, is not sufficient adverse possession as against the grantor. Brandenburg *v.* Louisville Tin, etc., Co., 36 S. W. 7, 18 Ky. L. Rep. 297. See, generally, Adverse Possession, 1 Cyc. 1098. Adverse possession as between grantee and creditors see *infra*, XIV, A, 4, a, (I), (F).

7. Bohn *v.* Weeks, 50 Ill. App. 236; Phenix Ins. Co. *v.* Fielder, 133 Ind. 557, 33 N. E. 270; Keeton *v.* Bandy, 74 S. W. 1047, 23 Ky. L. Rep. 233; Smith *v.* Hutchcraft, 2 Ky. L. Rep. 65; Claflin *v.* Lisso, 27 Fed. 420. *Compare* Horton *v.* Kelly, 40 Minn. 193, 41 N. W. 1031, as to effect of setting aside fraudulent conveyance of homestead.

8. See *infra*, XIII, A, 2, h.

9. *Arkansas.*— Britt *v.* Aylett, 11 Ark. 475, 52 Am. Dec. 282.

Colorado.—Lathrop *v.* Pollard, 6 Colo. 424.

Connecticut.— Nichols *v.* McCarthy, 53 Conn. 299, 23 Atl. 95, 55 Am. Rep. 105; Chapin *v.* Pease, 10 Conn. 69, 25 Am. Dec. 56.

Delaware.—Jackson *v.* Dutton, 3 Harr. 98; Hollis *v.* Morris, 2 Harr. 128.

Georgia.— Edwards *v.* Kilpatrick, 70 Ga. 328; Galt *v.* Jackson, 9 Ga. 151. See also Beale *v.* Hall, 22 Ga. 431.

Illinois.— Brady *v.* Huber, 197 Ill. 291, 64 N. E. 264, 90 Am. St. Rep. 161; Springfield Homestead Assoc. *v.* Roll, 137 Ill. 205, 27 N. E. 184, 31 Am. St. Rep. 358; Songer *v.* Partridge, 107 Ill. 529; Dunaway *v.* Robertson, 95 Ill. 419; Kassing *v.* Durand, 41 Ill. App. 93.

Kansas.— Robinson *v.* Blood, 64 Kan. 290, 67 Pac. 842 (or its value); Weatherbee *v.* Cockrell, 44 Kan. 380, 24 Pac. 417. See Setter *v.* Avey, 15 Kan. 157.

Louisiana.— Ackerman *v.* Peters, 113 La. 156, 36 So. 923; Hood *v.* Frellsen, 31 La. Ann. 577; Denton *v.* Willcox, 2 La. Ann. 60.

Maine.— Rich *v.* Hayes, 99 Me. 51, 58 Atl. 62; Andrews *v.* Marshall, 43 Me. 272.

Maryland.— Roman *v.* Mali, 42 Md. 513.

Massachusetts.— Gibbs *v.* Chase, 10 Mass. 125.

Michigan.— Poppe *v.* Poppe, 114 Mich. 649, 72 N. W. 612, 68 Am. St. Rep. 503.

Minnesota.— Jones *v.* Rahilly, 16 Minn. 320.

Missouri.— Scudder *v.* Atwood, 55 Mo. App. 512.

New Jersey.— Hildebrand *v.* Willig, 34 N. J. Eq. 249, 53 Atl. 1035; Ruckman *v.* Conover, 37 N. J. Eq. 583; Eyre *v.* Eyre, 19 N. J. Eq. 42.

New York.— Solinger *v.* Earle, 82 N. Y. 393, holding that money secretly paid to in-

entered into at the time of the conveyance;[10] unless the grantor was not *in pari delicto* with the grantee,[11] or public policy or the court's innate sense of justice requires its intervention in favor of the grantor;[12] or the transfer was merely a

duce certain creditors to unite in a composition of debts with other creditors cannot be recovered.

Ohio.— Kihlken *v.* Kihlken, 59 Ohio St. 106, 51 N. E. 969; Pride *v.* Andrew, 51 Ohio St. 405, 38 N. E. 84; Emrie *v.* Gilbert, Wright 764 (fraudulent transfer of share in partnership business); O'Connor *v.* Ryan, 9 Ohio Dec. (Reprint) 575, 15 Cinc. L. Bul. 152.

Pennsylvania.— Dieffenderfer *v.* Fisher, 3 Grant 30 (holding that a conveyance or transfer of property in fraud of creditors estops the debtor from demanding a portion of it or its proceeds); Stewart *v.* Kearney, 6 Watts 453, 31 Am. Dec. 482; Jones *v.* Shaw, 8 Pa. Super. Ct. 487, 43 Wkly. Notes Cas. 168.

Washington.— Chantler *v.* Hubbell, 34 Wash. 211, 75 Pac. 802.

United States.— Dent *v.* Ferguson, 132 U. S. 50, 10 S. Ct. 13, 33 L. ed. 242; Schermerhorn *v.* De Chambrun, 64 Fed. 195, 12 C. C. A. 81.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 533.

One who has suffered a judgment and execution upon his land to defraud his creditors cannot recover back the land. Franklin *v.* Stagg, 22 Mo. 193.

Where an owner, during the pendency of a suit against him, and in view of a possible judgment being rendered therein adversely to him, conveys his property to another with intent to defeat the satisfaction of such judgment as may be recovered against him, he cannot after judgment in such suit in his favor have the aid of a court of equity to compel the grantee to reconvey to him the property. Pride *v.* Andrew, 51 Ohio St. 405, 38 N. E. 84.

10. *Colorado.*— Lathrop *v.* Pollard, 6 Colo. 424.

Georgia.— Cronic *v.* Smith, 96 Ga. 794, 22 S. E. 915 (holding that a suit cannot be maintained against the fraudulent vendee for a breach of a bond to reconvey the land at the vendor's request); Parrot *v.* Baker, 82 Ga. 364, 9 S. E. 1068; Edwards *v.* Kilpatrick, 70 Ga. 328.

Illinois.— Tyler *v.* Tyler, 126 Ill. 525, 21 N. E. 616, 9 Am. St. Rep. 642 [*reversing* 25 Ill. App. 333]; Ryan *v.* Ryan, 97 Ill. 38.

Indiana.— Kitts *v.* Willson, 130 Ind. 492, 29 N. E. 401.

Iowa.— Briggs *v.* Coffin, 91 Iowa 329, 59 N. W. 259; Jones *v.* Farris, 70 Iowa 739, 29 N. W. 812; Stephens *v.* Harrow, 26 Iowa 458.

Kentucky.— Ford *v.* Lewis, 10 B. Mon. 127 (holding that no obligation to reconvey, growing out of the fraudulent transaction or forming a part of it, can either be itself enforced or form the consideration of an enforceable promise or covenant, written or parol); Jones *v.* Read, 3 Dana 540 (secret bond for reconveyance).

Maryland.— Freeman *v.* Sedwick, 6 Gill 28, 46 Am. Dec. 650.

Massachusetts.— Canton *v.* Dorchester, 8 Cush. 525.

Michigan.— Poppe *v.* Poppe, 114 Mich. 649, 72 N. W. 612, 68 Am. St. Rep. 503.

Missouri.— Mitchell *v.* Henley, 110 Mo. 598, 19 S. W. 993, holding that the grantee may set up the fraud as a defense, where it yet lies in contract and is merely executory.

New Hampshire.— See Stockwell *v.* Stockwell, 72 N. H. 69, 54 Atl. 701.

New Jersey.— Eyre *v.* Eyre, 19 N. J. Eq. 42, subsequent agreement.

New York.— Sweet *v.* Tinslar, 52 Barb. 271; St. John *v.* Benedict, 6 Johns. Ch. 111.

North Carolina.— York *v.* Merritt, 77 N. C. 213; Jackson *v.* Marshall, 5 N. C. 323, 3 Am. Dec. 695; Vick *v.* Flowers, 5 N. C. 321. See Smith *v.* Bowen, 3 N. C. 296; Smith *v.* ——, 3 N. C. 229.

Pennsylvania.— Guggenheimer's Appeal, 1 Pa. Cas. 526, 4 Atl. 46. See Reynolds *v.* Boland, 202 Pa. St. 642, 52 Atl. 19.

Texas.— Farrell *v.* Duffy, 5 Tex. Civ. App. 435, 27 S. W. 20.

United States.— Randall *v.* Howard, 2 Black 585, 17 L. ed. 269.

Canada.— Emes *v.* Barber, 15 Grant Ch. (U. C.) 679.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 534.

Compare Greffin *v.* Lopez, 5 Mart. (La.) 145.

11. Vitoreno *v.* Corea, 92 Cal. 69, 28 Pac. 95; Aubic *v.* Gil, 2 La. Ann. 342; Bartlett *v.* Bartlett, 15 Nebr. 593, 19 N. W. 691; Boyd *v.* De la Montaignie, 73 N. Y. 498, 29 Am. Rep. 197; Freelove *v.* Cole, 41 Barb. (N. Y.) 318 [*affirmed* in 41 N. Y. 619]. See also Beale *v.* Hall, 22 Ga. 431; Fraser *v.* Rodney, 12 Grant Ch. (U. C.) 154 [*affirming* 11 Grant Ch. (U. C.) 426]. And see cases cited *supra*, XIII, A, 2, c.

A married woman who includes her separate property in a bill of sale by her husband under the mistaken idea that it is necessary to thus protect it from her husband's creditors may recover it back. Bloomingdale *v.* Chittenden, 75 Mich. 305, 42 N. W. 836.

An infant who joins in a bill of sale by his father of property owned by himself and his father to protect it from his father's creditors may recover it from the vendee since it is not subject to his father's debts and hence there is no fraud on his part. Bloomingdale *v.* Chittenden, 74 Mich. 698, 42 N. W. 166.

12. See Buttlar *v.* Buttlar, 67 N. J. Eq. 136, 56 Atl. 722, holding that the fact that the property once held by parties jointly was voluntarily conveyed by the complainant to defendant for the purpose of hindering and delaying complainant's creditors does not prevent a court of equity from favoring its return to the original owner.

lease,[13] or bailment;[14] or unless the grantor can show a right of recovery without disclosing the fraud;[15] or there was in fact no creditor, although there was a fraudulent intent.[16] But it has been held that where the transferrer abandons his fraudulent purpose, he may after notice thereof to the grantee and demand of restoration recover his property for the benefit of his creditors.[17] So a subsequent agreement to reconvey independent of the former transaction or after the transfer has been purged of the fraud may be enforced.[18]

(II) *Effect of Voluntary Reconvenance.* While a fraudulent grantee is under no legal obligation to reconvey, it is said that he is under a moral obligation to do so,[19] and all subsequent acts done by him in execution of this duty should be favorably considered in equity.[20] If in fulfilment of his moral obligation he makes a reconveyance, such act will be binding on him, and if the rights of no innocent third person have intervened, the fraudulent grantor will become revested both in law and in equity with the title previously conveyed to his grantee;[21] and the grantee will be estopped from thereafter setting up any claim to the property.[22]

f. Redemption of Fraudulent Mortgage or Security. Although a fraudulent mortgagor may be permitted to redeem from the mortgage,[23] yet where the conveyance is absolute on its face, equity will not allow the grantor to redeem by permitting it to be shown that it was in fact intended as a mortgage,[24] or collateral

13. Perkins *v.* McCullough, 31 Oreg. 69, 49 Pac. 861, holding that where an owner of property made a lease thereof in the name of his wife to defraud creditors, she did not thereby acquire title; and hence the rule that equity will not lend its aid to a seller of personal property transferred in fraud of creditors, when he seeks to recover it back, does not apply in an action wherein the husband does not assert his title as against his creditors.

14. Brown *v.* Thayer, 12 Gray (Mass.) 1; Gowan *v.* Gowan, 30 Mo. 472; Allgear *v.* Walsh, 24 Mo. App. 134; Block *v.* Darling, 140 U. S. 234, 11 S. Ct. 832, 35 L. ed. 476.

If the bailee wrongfully converts the property to his own use he will be liable therefor. Watson *v.* Harmon, 85 Mo. 443.

15. Haigh *v.* Kaye, L. R. 7 Ch. 469, 41 L. J. Ch. 567, 26 L. T. Rep. N. S. 675, 20 Wkly. Rep. 597; Day *v.* Day, 17 Ont. App. 157.

16. Rivera *v.* White, (Tex. 1901), 63 S. W. 125, holding that where a husband, fearing that alimony would be decreed against him in a divorce suit, conveyed land on the understanding that the grantee would sell the land for his benefit, or reconvey it when he desired, a recovery of the land by the husband would not be denied because of the intent with which it was conveyed, it not appearing that any alimony was decreed. But see Pride *v.* Andrew, 51 Ohio St. 405, 38 N. E. 84.

17. Carll *v.* Emery, 148 Mass. 32, 18 N. E. 574, 12 Am. St. Rep. 515, 1 L. R. A. 618.

18. Songer *v.* Partridge, 107 Ill. 529; Taylor *v.* McMillan, 123 N. C. 390, 31 S. E. 730.

Purging fraud see *supra*, III, C, 5, a.

19. Springfield Homestead Assoc. *v.* Roll, 137 Ill. 205, 27 N. E. 184, 31 Am. St. Rep. 358; Powell *v.* Ivey, 88 N. C. 256. See Bicocchi *v.* Casey-Swasey Co., 91 Tex. 259, 42 S. W. 963, 66 Am. St. Rep. 875.

20. See White *v.* Brocaw, 14 Ohio St. 339.

21. Cartledge *v.* McCoy, 98 Ga. 560, 25 S. E. 588; Springfield Hardware Assoc. *v.* Roll, 137 Ill. 205, 27 N. E. 184, 31 Am. St. Rep. 358; Lafayette Second Nat. Bank *v.* Brady, 96 Ind. 498; Moore *v.* Livingston, 14 How. Pr. (N. Y.) 1; Fargo *v.* Ladd, 6 Wis. 106. See Bicocchi *v.* Casey-Swasey Co., 91 Tex. 259, 42 S. W. 963, 66 Am. St. Rep. 875.

If the deed of reconveyance is taken from the prior grantor and withheld by the alienee, the grantor may have a judgment for its redelivery and for an account of the rents and profits. Moore *v.* Livingston, 14 How. Pr. (N. Y.) 1.

22. Fargo *v.* Ladd, 6 Wis. 106.

Effect of reconveyance as against creditors see *supra*, II, B, 17, d.

23. Pierce *v.* Le Monier, 172 Mass. 508, 53 N. E. 125, holding that in this state it is not necessary in order to redeem from a fraudulent mortgage to show that the transaction has been purged of the fraud. See, generally, MORTGAGES.

24. *Alabama.*— Brantley *v.* West, 27 Ala. 542.

California.— Ybarra *v.* Lorenzana, 53 Cal. 197.

Illinois.— Halloran *v.* Halloran, 137 Ill. 100, 27 N. E. 82, holding that the grantor cannot have a deed, absolute on its face, declared a satisfied mortgage and canceled.

Indiana.— Kitts *v.* Willson, 130 Ind. 492, 29 N. E. 401.

Kentucky.— Thomas *v.* McCormack, 9 Dana 108; Wright *v.* Wright, 2 Litt. 8.

Maryland.— Brown *v.* Reilly, 72 Md. 489, 20 Atl. 239.

Massachusetts.— Hassam *v.* Barrett, 115 Mass. 256. *Compare* Taylor *v.* Weld, 5 Mass. 109.

Michigan.— Patnode *v.* Darveau, 112 Mich. 127, 70 N. W. 439, 71 N. W. 1095. *Compare*

security,[25] unless the parties were not *in pari delicto*.[26] But where the fraudulent use of the conveyance was not intended until after it came into existence,[27] or where the grantee is a creditor, colluding with the grantor to defraud other creditors,[28] or where the conveyance is not absolute on its face,[29] this relief may be granted.

g. Enforcement of Fraudulent Contract or Conveyance — (i) *In General.* In most jurisdictions a party to an executory agreement, made to defraud creditors, can maintain no suit to coerce its execution.[30] But the fact that the original conveyance was in fraud of creditors is no defense to an action for the specific performance of an agreement entered into subsequent to the fraudulent conveyance.[31]

Crawford *v.* Osmun, 70 Mich. 561, 38 N. W. 573.

New York.—Harris *v.* Osnowitz, 35 N. Y. App. Div. 594, 55 N. Y. Suppl. 172, holding that a conveyance of property by an insolvent firm to one of its creditors in satisfaction of his debt, with a secret understanding to reconvey it to the wives of grantors, being fraudulent as to creditors, cannot be upheld as a mortgage.

Rhode Island.—Apponaug Bleaching, etc., Co. *v.* Rawson, 22 R. I. 123, 46 Atl. 455.

South Carolina.—Anderson *v.* Rhodus, 12 Rich. Eq. 104.

England.— Baldwin *v.* Cawthorne, 19 Ves. Jr. 166, 34 Eng. Reprint 480.

Canada.— Mundell *v.* Tinkis, 6 Ont. 625.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 536.

Since a debtor's homestead is not subject to the claims of creditors, a conveyance of it for the purpose of placing it beyond their reach does not preclude him from having the deed declared a mortgage, if the circumstances justify such relief. Patnode *v.* Darveau, 112 Mich. 127, 70 N. W. 439, 71 N. W. 1095. See *supra*, II, B, 21, b.

25. Moore *v.* Tarlton, 3 Ala. 444, 37 Am. Dec. 701 (holding that equity will not aid a grantee in a deed void as in fraud of grantor's creditors, because, although absolute in terms, it was really intended merely as security for a debt not exceeding one fifth of the consideration expressed); York *v.* Merritt, 77 N. C. 213.

26. Herrick *v.* Lynch, 150 Ill. 283, 37 N. E. 221 [*affirming* 49 Ill. App. 657]; O'Conner *v.* Ward, 60 Miss. 1025. See *supra*, XIII, A, 2, c.

27. Ballard *v.* Jones, 6 Humphr. (Tenn.) 455, holding that, although a bill of sale absolute in form, but in fact a mortgage, was so used after it came into existence, it does not preclude the mortgagor from redeeming and claiming an account in chancery as against the mortgagor, but would as against a purchaser.

28. Still *v.* Buzzell, 60 Vt. 478, 12 Atl. 209, holding that where a debtor executes a deed absolute in form, but in fact a mortgage, as security for a debt, and also to cover the property to prevent other creditors from attaching, he is entitled to reconveyance on payment of the debt.

29. Jones *v.* Rahilly, 16 Minn. 320.

30. *Alabama.*— Dearman *v.* Dearman, 4 Ala. 521.

Arkansas.— Payne *v.* Bruton, 10 Ark. 53.

Georgia.— Parrott *v.* Baker, 82 Ga. 364, 9 S. E. 1068; Hill *v.* Hill, 81 Ga. 516, 8 S. E. 879; Goodwyn *v.* Goodwyn, 20 Ga. 600.

Illinois.— McElroy *v.* Hiner, 133 Ill. 156, 24 N. E. 435; Ryan *v.* Ryan, 97 Ill. 38.

Kentucky.— Norris *v.* Norris, 9 Dana 317, 35 Am. Dec. 138; Kingsbury *v.* Haswell, 6 Ky. L. Rep. 591.

Louisiana.—Ackerman *v.* Peters, 113 La. 156, 36 So. 923.

Maine.—Rich *v.* Hayes, 99 Me. 51, 58 Atl. 62.

Nebraska.— Bradt *v.* Harston, 4 Nebr. (Unoff.) 889, 96 N. W. 1008.

New Jersey.—Marlatt *v.* Warwick, 19 N. J. Eq. 439.

North Carolina.— McManus *v.* Tarleton, 126 N. C. 790, 36 S. E. 338; York *v.* Merritt, 77 N. C. 213.

South Carolina.— Harvin *v.* Weeks, 11 Rich. 601.

Tennessee.— Mulloy *v.* Young, 10 Humphr. 298.

Texas.— Davis *v.* Sittig, 65 Tex. 497, although the contract may have been fully executed by one of the parties but not by the other.

West Virginia.— Lowther Oil Co. *v.* Miller-Sibley Oil Co., 53 W. Va. 501, 44 S. E. 433, 97 Am. St. Rep. 1027.

United States — Randall *v.* Howard, 2 Black 585, 17 L. ed. 269.

England.— Leicester *v.* Rose, 4 East 371, 1 Smith K. B. 41.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 537; and cases cited *supra*, XIII, A, 2, e, (I). And see CONTRACTS, 9 Cyc. 468, 470, 546.

But *compare* Springer *v.* Drosch, 32 Ind. 486, 2 Am. Rep. 356 [*overruling* Welby *v.* Armstrong, 21 Ind. 489]; Moore *v.* Meek, 20 Ind. 484 (especially in favor of a third person to whom a promise, growing out of such transaction, had been made); Telford *v.* Adams, 6 Watts (Pa.) 429; Clemens *v.* Clemens, 28 Wis. 637, 9 Am. Rep. 520.

Where a vendor has the right to sell and his agreement to convey is fair, his insolvency and the rights of his creditors cannot be urged in defense of an action for specific performance. Cone *v.* Cone, 118 Iowa 458, 92 N. W. 665.

31. Lynn *v.* Lyerle, 113 Ill. 128. See Dent

(II) *Enforcement of Fraudulent Mortgage.* The holder of a note and mortgage given to and received by him for the purpose of defrauding the mortgagor's creditors cannot enforce or foreclose the same,[32] unless he can show a *prima facie* right to recover on the face of the instrument without revealing fraud in the transaction;[33] but in such case it has been held that defendant may show that the mortgage was given without consideration or with intent to defraud his creditors.[34] Nor can a grantor enforce a purchase-money mortgage given to him for property conveyed in fraud of his creditors.[35] This rule does not apply, however, where the mortgagee did not participate in the fraud, so as to prevent him from bringing an action on the note for the amount of his debt.[36]

(III) *Enforcement of Trust* — (A) *In General.* Where a conveyance absolute in form is made for the purpose of defrauding creditors a resulting trust does not arise in favor of the grantor as against his grantee;[37] nor will the courts grant relief to him or his heirs, etc., by implying or enforcing a trust arising out of the transaction,[38] unless the grantor is not *in pari delicto* with the

v. Ferguson, 132 U. S. 50, 10 S. Ct. 13, 33 L. ed. 242.

32. *Illinois.*— Cook *v.* Meyers, 166 Ill. 282, 46 N. E. 765; Miller *v.* Marckle, 21 Ill. 152; Ellwood *v.* Walter, 103 Ill. App. 219.

Indiana.— O'Kane *v.* Terrell, 144 Ind. 599, 43 N. E. 869.

Iowa.— Baldwin *v.* Davis, 118 Iowa 36, 91 N. W. 778; Galpin *v.* Galpin, 74 Iowa 454, 38 N. W. 156.

Kentucky.— Jones *v.* Jenkins, 83 Ky. 391, 7 Ky. L. Rep. 408.

Louisiana.— Bowman *v.* McKleroy, 14 La. Ann. 587.

Maryland.— Snyder *v.* Snyder, 51 Md. 77.

Massachusetts.— See Wearse *v.* Peirce, 24 Pick. 141.

Michigan.— Williams *v.* Clink, 90 Mich. 297, 51 N. W. 453, 30 Am. St. Rep. 443. See Judge *v.* Vogel, 38 Mich. 569.

Minnesota.— Moffett *v.* Parker, 71 Minn. 139, 73 N. W. 850, 70 Am. St. Rep. 319.

North Carolina.— New Hanover Bank *v.* Adrian, 116 N. C. 537, 21 S. E. 972.

Ohio.— McQuade *v.* Rosecrans, 36 Ohio St. 442.

Utah.— Schroeder *v.* Pratt, 21 Utah 176, 60 Pac. 512.

Virginia.— Jones *v.* Comer, 5 Leigh 350.

Washington.— Puget Sound Hotaling Co. *v.* Clancy, 21 Wash. 1, 56 Pac. 929.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 538.

Compare Blake *v.* Williams, 36 N. H. 39.

Contra.— Bradtfeldt *v.* Cooke, 27 Oreg. 194, 40 Pac. 1, 50 Am. St. Rep. 701, holding that a mortgage given to secure a fictitious consideration for land conveyed by the mortgagee to the mortgagor in fraud of the former's creditors is enforceable between the parties thereto.

33. Barwick *v.* Moyse, 74 Miss. 415, 21 So. 238, 60 Am. St. Rep. 512; Millican *v.* Headon, 8 Ont. 503 (holding that in an action on covenant contained in a mortgage defendant cannot set up that the mortgage was to defraud creditors); Scoble *v.* Henson, 12 U. C. C. P. 65.

34. Galpin *v.* Galpin, 74 Iowa 454, 38 N. W. 156.

35. Rowland *v.* Martin, 3 Pa. Cas. 162, 6 Atl. 223.

36. Murphy *v.* Murphy, 74 Conn. 198, 50 Atl. 394.

37. Heinz *v.* White, 105 Ala. 670, 17 So. 185; Burleigh *v.* White, 64 Me. 23; Lockren *v.* Rustan, 9 N. D. 43, 81 N. W. 60; Broughton *v.* Broughton, 4 Rich. (S. C.) 491. See Robertson *v.* Sayre, 134 N. Y. 97, 31 N. E. 250, 30 Am. St. Rep. 627 [*affirming* 53 Hun 490, 6 N. Y. Suppl. 649]. And see, generally, Trusts.

38. *Alabama.*— Glover *v.* Walker, 107 Ala. 540, 18 So. 251; Heinz *v.* White, 105 Ala. 670, 17 So. 185; Smith *v.* Hall, 103 Ala. 235, 15 So. 525; Kelly *v.* Karsner, 72 Ala. 106; King *v.* King, 61 Ala. 479; Brantley *v.* West, 27 Ala. 542. See Patton *v.* Beecher, 62 Ala. 579.

Illinois.— Brady *v.* Huber, 197 Ill. 291, 64 N. E. 264, 90 Am. St. Rep. 161; Springfield Homestead Assoc. *v.* Roll, 137 Ill. 205, 27 N. E. 184, 31 Am. St. Rep. 358; McElroy *v.* Hiner, 133 Ill. 156, 24 N. E. 435; Kirkpatrick *v.* Clark, 132 Ill. 342, 24 N. E. 71, 22 Am. St. Rep. 531, 8 L. R. A. 511; Kassing *v.* Durand, 41 Ill. App. 93.

Iowa.— Hays *v.* Marsh, 123 Iowa 81, 98 N. W. 604.

Kentucky.— Grider *v.* Graham, 4 Bibb 70; Bailey *v.* Cheatham, 4 Ky. L. Rep. 351.

Maine.— Burleigh *v.* White, 64 Me. 23.

Mississippi.— Hemphill *v.* Hemphill, 34 Miss. 68.

Nebraska.— Bartlett *v.* Bartlett, 13 Nebr. 456, 14 N. W. 385 [*overruled* as to facts in 15 Nebr. 593, 19 N. W. 691].

New Jersey.— Servis *v.* Nelson, 14 N. J. Eq. 94. See Conover *v.* Beckett, 38 N. J. Eq. 384.

North Carolina.— Guthrie *v.* Bacon, 107 N. C. 337, 12 S. E. 204. But see Smith *v.* ——, 3 N. C. 229.

Ohio.— Robinson *v.* Robinson, 17 Ohio St. 480, holding this to be true, although the property may have been acquired by the grantor after his insolvency, or from resources which creditors might have been unable to make available.

grantee,[39] as where the transfer is made by a client to his attorney, or between parties standing in a confidential relation technically the same.[40] But where the grantee voluntarily executes the trust he is bound thereby.[41]

(B) *Against Purchaser at Execution Sale For Debtor's Benefit.* Where a secret arrangement is made between a defendant in execution and a third person to the effect that the latter shall purchase the property at a sale under the execution and hold it upon a trust for the benefit of defendant, the object being to prevent the debtor's creditors from subjecting the property to their claims, a court of equity will not grant relief upon the agreement by compelling the purchaser to convey to defendant an execution,[42] except where a creditor has availed himself of his power over the debtor and by misrepresentations induced him to enter into such a transaction in fraud of other creditors.[43]

h. Right to Proceeds and Profits. The surplus of proceeds or profits arising from property conveyed in fraud of creditors after satisfying such creditors belongs to the grantee or his heirs or representatives;[44] and the grantor cannot

Pennsylvania.— Simon's Estate, 20 Pa. Super. Ct. 450.

Virginia.— Owen *v.* Sharp, 12 Leigh 427.

Washington.— Chantler *v.* Hubbell, 34 Wash. 211, 75 Pac. 802.

West Virginia.— McClintock *v.* Loisseau, 31 W. Va. 865, 8 S. E. 612, 2 L. R. A. 816.

Wisconsin.— Fargo *v.* Ladd, 6 Wis. 106.

United States.— Hunter *v.* Marlboro, 12 Fed. Cas. No. 6,908, 2 Woodb. & M. 168; Kinney *v.* Consolidated Virginia Min. Co., 14 Fed. Cas. No. 7,827, 4 Sawy. 382.

Canada.— Rosenburgher *v.* Thomas, 3 Grant Ch. (U. C.) 635.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 539; and cases cited *supra*, XIII, A, 2, e, f.

But *compare* Bunn *v.* Winthrop, 1 Johns. Ch. (N. Y.) 329.

Secret trust as an element of fraud as to creditors see *supra*, X.

The fraudulent trust cannot be set up by the grantor to defeat an action on notes given in fraud of creditors, and to enforce a lien on land for the amount of the notes. Burks *v.* Burks, 14 S. W. 686, 953, 12 Ky. L. Rep. 552.

Where two owners in common have joined in a conveyance of property to be held in trust for them as tenants in common, and there were reasons of convenience sufficient to account for the transfer as to both, the fact that one of them intended thereby to defraud his creditors does not prevent the other from enforcing the trust as between him and the trustee, if there is no satisfactory evidence that he intended to aid the other in carrying out his fraudulent intention. Pitney *v.* Bolton, 45 N. J. Eq. 639, 18 Atl. 211 [*affirmed* in 46 N. J. Eq. 610, 22 Atl. 56].

A surety of the grantor, at whose instance the conveyance was made, and who holds a declaration of trust subsequently made for his benefit, cannot set up the fraud to prevent the grantor or his heirs from asserting an equity in the premises. Irwin *v.* Longworth, 20 Ohio 581.

39. See Williams *v.* Williams, 180 Ill. 361, 54 N. E. 229. And see cases cited *supra*, XIII, A, 2, c.

40. De Chambrum *v.* Schermerhorn, 59 Fed. 504, holding that where an assignment absolute in form is made between parties in confidential relations similar to attorney and client, but under a secret trust for the assignor's benefit, equitable relief should not be refused in such case because the contract was given to prevent third parties from reaching the fund by means of inequitable contracts previously given to them on an inadequate consideration.

41. Fargo *v.* Ladd, 6 Wis. 106. See *supra*, XIII, A, 2, e, (II).

42. Walker *v.* Hill, 22 N. J. Eq. 513; Marlatt *v.* Warwick, 19 N. J. Eq. 439; Smith *v.* Boquet, 27 Tex. 507; Randall *v.* Howard, 2 Black (U. S.) 585, 17 L. ed. 269.

When from the circumstances there is no reason to impute fraud and the agreement seems to be to the advantage of all the creditors, it will be enforced. Marlatt *v.* Warwick, 19 N. J. Eq. 439.

Where a purchaser represents himself to be acting under an agreement with a debtor and for his benefit when in fact there is no agreement, the advantage thus obtained will be taken away from him on the ground of fraud, and the benefit of the purchase will be given to the debtor. McDonald *v.* May, 1 Rich. Eq. (S. C.) 91.

Pleading and proof.— In an action to recover the proceeds of property purchased under such an agreement, a general denial will not admit the defense that the agreement was void because of plaintiff's insolvency; nor can defendant avail himself of the testimony on cross-examination. Gibson *v.* Jenkins, 97 Mo. App. 27, 70 S. W. 1076.

43. Austin *v.* Winston, 1 Hen. & M. (Va.) 33, 3 Am. Dec. 583.

44. Burtch *v.* Elliott, 3 Ind. 99; Mallow *v.* Walker, 115 Iowa 238, 88 N. W. 452, 91 Am. St. Rep. 158; Wheeler *v.* Wallace, 53 Mich. 355, 364, 19 N. W. 33, 37.

A judgment setting aside the conveyance should provide that on satisfying the creditors the property be returned to the grantee (Comyns *v.* Riker, 83 Hun (N. Y.) 471, 31 N. Y. Suppl. 1042. See also Metcalf *v.* Moses, 35 N. Y. App. Div. 596, 55 N. Y.

compel him to account for such proceeds or profits,[45] although there was an agreement between the parties to that effect,[46] unless such agreement was entered into subsequent to the fraudulent conveyance.[47]

i. Right to Enforce Payment of Consideration — (i) *In General.* In some jurisdictions it is held that a purchaser cannot resist payment of a demand for the price of property sold and delivered to him on the ground that the sale was in fraud of the seller's creditors.[48] But in other jurisdictions it is held otherwise.[49]

(ii) *Enforcement of Note Given as Consideration.* In some jurisdictions, as between the parties, the grantee or his privies cannot defeat the payment of a note given for property conveyed in fraud of the grantor's creditors, on that ground,[50] even though the property is taken from him by the grantor's creditors.[51] But in other jurisdictions the grantor cannot enforce the collection of a note so given if the grantee sets up the defense of fraud.[52] But the maker may show that the note was made without consideration to defraud his creditors under an

Suppl. 179; Kennedy *v.* Barandon, 67 Barb. (N. Y.) 209); and a judgment providing for the return of the surplus to the grantor is erroneous (Looney *v.* Bartlett, 106 Mo. App. 619, 81 S. W. 481; Maze *v.* Griffin, 65 Mo. App. 377).

45. Kahn *v.* Wilkin, 36 Fla. 428, 18 So. 584; Crowninshield *v.* Kittredge, 7 Metc. (Mass.) 520. *Compare* Ballard *v.* Jones, 6 Humphr. (Tenn.) 455, where there was no fraudulent purpose until after the conveyance.

46. Kahn *v.* Wilkin, 36 Fla. 428, 18 So. 584; Cornell *v.* Pierson, 8 N. J. Eq. 478. And see cases cited *supra*, XIII, A, 2, g, (III).

47. Stillings *v.* Turner, 153 Mass. 534, 27 N. E. 671.

48. Allen *v.* Meriwether, 9 S. W. 807, 10 Ky. L. Rep. 600; Gary *v.* Jacobson, 55 Miss. 204, 30 Am. Rep. 514; Stanton *v.* Green, 34 Miss. 576. See Hall *v.* Richardson, 22 Hun (N. Y.) 444.

49. Heineman *v.* Newman, 55 Ga. 262, 21 Am. Rep. 279; Smith *v.* Hubbs, 10 Me. 71; McConaughy *v.* Farney, (Nebr. 1902) 89 N. W. 812 (where the transferee participated in the fraud); Schroeder *v.* Kisselbach, 5 Ohio Dec. (Reprint) 158, 3 Am. L. Rec. 295. See Lynn *v.* Lyerle, 113 Ill. 128, as to enforcing of promise to pay purchase-money under a new agreement after the prior transaction was set aside as in fraud of creditors.

A vendor's lien cannot arise out of such a transaction. Glover *v.* Walker, 107 Ala. 540, 18 So. 251. See, generally, Vendor and Purchaser.

50. *Alabama.*— Giddens *v.* Bolling, 93 Ala. 92, 9 So. 427, note for rent executed for the purpose of hindering and delaying creditors of the tenant.

California.— See Smith *v.* 49 & 56 Quartz Min. Co., 14 Cal. 242.

Indiana.— Stevens *v.* Songer, 14 Ind. 342; Findley *v.* Cooley, 1 Blackf. 262.

Kentucky.— Allen *v.* Meriwether, 9 S. W. 807, 10 Ky. L. Rep. 600. See also Drane *v.* Underwood, 1 Ky. L. Rep. 317.

Louisiana.— Landwirth *v.* Shaphran, 47 La. Ann. 336, 16 So. 839. See Freeman *v.* Savage, 2 La. Ann. 269.

Maine.— Butler *v.* Moore, 73 Me. 151, 40 Am. Rep. 348.

Massachusetts.— Dyer *v.* Homer, 22 Pick. 253; Payson *v.* Whitcomb, 15 Pick. 212. But *compare* Gordon *v.* Clapp, 113 Mass. 335, as to note given for services rendered in carrying out the fraudulent transaction.

Mississippi.— Gary *v.* Jacobson, 55 Miss. 204, 30 Am. Rep. 514; Stanton *v.* Green, 34 Miss. 576.

Pennsylvania.— Harbaugh *v.* Butner, 148 Pa. St. 273, 23 Atl. 983, whether the transaction is executed or executory.

Tennessee.— Hamilton *v.* Gilbert, 2 Heisk. 680. *Compare* Walker *v.* McConnico, 10 Yerg. 228, holding that a note given without consideration in fraud of creditors cannot be enforced by the payee against the maker.

Vermont.— Carpenter *v.* McClure, 39 Vt. 9, 91 Am. Dec. 370.

Wisconsin.— See Clemens *v.* Clemens, 28 Wis. 637, 9 Am. Rep. 520.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 543. See also Commercial Paper, 7 Cyc. 743.

51. Stanton *v.* Green, 34 Miss. 576.

52. *Missouri.*— Fenton *v.* Ham, 35 Mo. 409; Hamilton *v.* Scull, 25 Mo. 165, 69 Am. Dec. 460; Clay County Bank *v.* Keith, 85 Mo. App. 409. But see Moore *v.* Thompson, 6 Mo. 353.

New Jersey.— Church *v.* Muir, 33 N. J. L. 318. *Compare* Servis *v.* Nelson, 14 N. J. Eq. 94.

New York.— Starin *v.* Kelly, 36 N. Y. Super. Ct. 366; Nellis *v.* Clark, 4 Hill 424 [*reversing* 20 Wend. 24].

North Carolina.— Powell *v.* Inman, 52 N. C. 28, 53 N. C. 436, 82 Am. Dec. 426.

Ohio.— Goudy *v.* Gebhart, 1 Ohio St. 262.

South Carolina.— Harvin *v.* Weeks, 11 Rich. 601. See Blake *v.* Lowe, 3 Desauss. 263.

Texas.— Arnold *v.* Peoples, 13 Tex. Civ. App. 26, 34 S. W. 755.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 543. See also Commercial Paper, 7 Cyc. 743.

A note given a creditor to induce him to consent to a composition of debts cannot be

agreement with the payee to the effect that the note might be canceled at any time.[53]

j. Grantee's Right to Reimbursement. Where the property conveyed is seized and sold on execution against the fraudulent grantor, or the grantee's title is annulled by the court, the latter has no claim for reimbursement against the grantor for the amount paid or lost by him in consideration of the conveyance,[54] unless he was without any fraudulent intent and without any knowledge or belief that the grantor had such an intent.[55] Where the conveyance is vacated at the instance of the grantor, by reason of its having been obtained from him by fraud or undue influence, the grantee is entitled to reimbursement for taxes paid on the land as a condition to such vacation.[56]

k. Rights and Liabilities of Several Grantees Inter Se — (I) *IN GENERAL.* Under the maxims, *Ex dolo malo non oritur actio*, and, *In pari delicto potior est conditio defendentis*, relief will not be granted to any one of several grantees, as between themselves, who have entered into a fraudulent arrangement by which they procured a conveyance in fraud of the grantor's creditors.[57]

(II) *CONTRIBUTION.* Where, although the grantees were technically parties to the fraud, there was no actual fraudulent intent, and the property conveyed to one is taken to pay the grantor's debts, there may be contribution among them according to their existing equities,[58] except where the grantor retained sufficient property to satisfy the debt paid and to which the execution creditor might have been compelled to resort.[59]

3. RIGHTS AND LIABILITIES AS TO THIRD PERSONS GENERALLY — a. In General. As a general rule third persons other than creditors and purchasers have no standing to question or impeach the validity of a conveyance in fraud of creditors.[60] Until

enforced. Cockshott *v.* Bennett, 2 T. R. 763, 1 Rev. Rep. 617.

53. McCausland *v.* Ralston, 12 Nev. 195, 28 Am. Rep. 781.

54. Surlott *v.* Beddow, 3 T. B. Mon. (Ky.) 109; Connecticut Mut. L. Ins. Co. *v.* Smith, 117 Mo. 261, 22 S. W. 623, 38 Am. St. Rep. 656; Leach *v.* Tilton, 40 N. H. 473, money.

Notes previously held by the grantee against the grantor and given up to the latter as part of the consideration for a conveyance to him may be recovered from the grantor, where the conveyance is avoided by creditors of the grantor. Leach *v.* Tilton, 40 N. H. 473.

Grantee's right to reimbursement as against creditors see *infra*, XIII, A, 4, a, (III).

55. Leach *v.* Tilton, 40 N. H. 473; Haven *v.* Low, 2 N. H. 13, 9 Am. Dec. 25.

56. Hutchinson *v.* Park, (Ark. 1904) 82 S. W. 843.

57. Riddle *v.* Lewis, 7 Bush (Ky.) 193 (holding that such a grantee who receives property to manage for the grantor is not responsible to the other grantees for permitting the grantor to have or dispose of any part of the property); Milhous *v.* Sally, 43 S. C. 318, 21 S. E. 268, 49 Am. St. Rep. 834 (conveyance by one of such grantees to the others refused).

58. Janvrin *v.* Curtis, 63 N. H. 312; Chamberlayne *v.* Temple, 2 Rand. (Va.) 384, 14 Am. Dec. 786.

59. Thompson *v.* Perry, 2 Hill Eq. (S. C.) 204, 29 Am. Dec. 68.

Contribution among volunteers will not be compelled to remove a general lien upon property conveyed to them unless there was an inevitable necessity that the property should pay the lien and there cannot be such necessity where the grantor is solvent. Thompson *v.* Perry, 2 Hill Eq. (S. C.) 204, 29 Am. Dec. 68.

60. *Alabama.*— Yeend *v.* Weeks, 104 Ala. 331, 16 So. 165, 53 Am. St. Rep. 50.

Illinois.— Engel *v.* Salomon, 41 Ill. App. 411, holding that a seller of goods on rescinding the sale on the ground that it was procured by fraud of the purchaser cannot retake them from one to whom they had been transferred in fraud of creditors.

Indiana.— Edwards *v.* Haverstick, 53 Ind. 348; O'Neil *v.* Chandler, 42 Ind. 471.

Louisiana.— Long *v.* Klein, 35 La. Ann. 384.

Minnesota.— Piper *v.* Johnston, 12 Minn. 60.

Missouri.—Amy *v.* Ramsey, 4 Mo. 505. See White *v.* Million, 102 Mo. App. 437, 76 S. W. 733.

New Hampshire.— Cutting *v.* Pike, 21 N. H. 347.

New Jersey.— Den *v.* Tunis, 25 N. J. L. 633; Hendricks *v.* Mount, 5 N. J. L. 738, 8 Am. Dec. 623.

North Carolina.— Saunders *v.* Lee, 101 N. C. 3, 7 S. E. 590.

Ohio.— Burgett *v.* Burgett, 1 Ohio 469, 13 Am. Dec. 634.

Pennsylvania.— Drum *v.* Painter, 27 Pa. St. 148.

South Carolina.— Kid *v.* Mitchell, 1 Nott & M. 334, 9 Am. Dec. 702.

Texas.— Seligman *v.* Wilson, 1 Tex. App. Civ. Cas. § 895.

Vermont.— Gibbs *v.* Linsley, 13 Vt. 208.

the fraudulent grantee's title is divested by some proceeding instituted by creditors, it is sufficient to support an action for the recovery of the property from a third person and damages for its detention.[61]

b. Maker of Note Fraudulently Transferred. The maker of a note cannot defend an action thereon by an assignee on the ground that the assignment was made with intent to defraud the payee's creditors,[62] unless he is prejudiced by such assignment.[63]

c. Creditors of Grantee.[64] Since a conveyance in fraud of creditors vests title to the property transferred in the grantee,[65] so long as the grantee holds such title the property is subject to the claims of his creditors to the same extent as any other property to which he has title; and neither he nor his fraudulent grantor can set up the fraudulent character of the conveyance as against such creditors.[66] But by the weight of authority until the creditors of the grantee

Wisconsin.— La Crosse, etc., R. Co. *v.* Seeger, 4 Wis. 268.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 549; and *supra*, IV, A.

Right of assignee in bankruptcy to avoid conveyance by debtor in fraud of creditors see BANKRUPTCY, 5 Cyc. 346.

Where an assignment of a debt is made to defraud creditors, the debtor cannot set up the fraud as a defense to a suit by the assignee. Morey *v.* Forsyth, Walk. (Mich.) 465.

A creditor of one obtaining possession from a fraudulent grantee cannot avoid the original conveyance which is fraudulent and void as against the creditors of the parties to the fraud. Puryear *v.* Beard, 14 Ala. 121.

61. Saunders *v.* Lee, 101 N. C. 3, 7 S. E. 590. See Delesdernier *v.* Mowry, 20 Me. 150.

Defendant in such a case, in order to impeach plaintiff's title on the ground that the conveyance was in fraud of creditors, must show not only such fraud and that the creditors have by some act avoided the conveyance, but also that he duly represents a creditor's title, and is therefore entitled to set it up against that of the grantee. Delesdernier *v.* Mowry, 20 Me. 150. See *supra*, IV.

A mortgagee under a mortgage executed subsequent to the rendition of a judgment against the mortgagor may maintain an action against any one who does not connect himself with the judgment. Street *v.* McClerkin, 77 Ala. 580.

A bank with which a note is deposited by the payee for collection cannot refuse to return it or its proceeds to the depositor on the ground that it was given to the payee to defraud creditors unless the bank itself is one of those creditors. Leadville First Nat. Bank *v.* Leppel, 9 Colo. 594, 13 Pac. 776.

62. *Massachusetts.*— Harding *v.* Colon, 123 Mass. 299.

Minnesota.— Rohrer *v.* Turrill, 4 Minn. 407.

Missouri.— Sauter *v.* Leveridge, 103 Mo. 615, 15 S. W. 981. *Compare* Steele *v.* Parsons, 9 Mo. 283.

New York.—Sullivan *v.* Bonesteel, 79 N. Y. 631.

North Carolina.— Newsom *v.* Russell, 77 N. C. 277.

Tennessee.— Wells *v.* Schoonover, 9 Heisk. 805.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 550.

Where the holder of a note assigns the debt to another and for that purpose gives up the note to the maker causing him to execute and deliver another to the assignee, the maker is no longer liable to the holder of the first note nor to his creditors, although the assignment and subsequent transaction was for the purpose of defrauding and delaying the creditors of the first holder if the maker of the notes was ignorant of the fraudulent design. Patterson *v.* Whittier, 19 N. H. 192.

63. See Wells *v.* Schoonover, 9 Heisk. (Tenn.) 805.

64. **Creditors of fraudulent grantee as bona fide purchasers** see *infra*, XIII, B, 2, d, (II), (D).

65. See *supra*, XIII, A, 2, d, (I).

66. *Illinois.*— Oliver *v.* Wilhite, 201 Ill. 552, 66 N. E. 837.

Indiana.— Edwards *v.* Haverstick, 53 Ind. 348, holding that a conveyance by the original grantor, after levy and sale under execution against the grantee, passes no title.

Kentucky.— Berg *v.* Frantz, 113 Ky. 888, 69 S. W. 801, 24 Ky. L. Rep. 689; Clark *v.* Rucker, 7 B. Mon. 583.

Massachusetts.— Gibbs *v.* Chase, 10 Mass. 125.

Nevada.— Maher *v.* Swift, 14 Nev. 324; Allison *v.* Hagan, 12 Nev. 38.

New York.—Davis *v.* Graves, 29 Barb. 480.

South Carolina.— See Davidson *v.* Graves, Riley Eq. 232.

Tennessee.— Stanton *v.* Shaw, 3 Baxt. 12.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 552.

The grantee's violation of a promise not to record the deed cannot affect his creditor who knew nothing of the promise. Oliver *v.* Wilhite, 201 Ill. 552, 66 N. E. 837.

Where the owner of land allows the apparent title to remain in another who obtains credit on such appearance, the land is liable to the claims of the creditor after its conveyance to the owner, although such owner did not have actual knowledge of the obtaining of the credit. Singer Mfg. Co. *v.* Stephens, 169 Mo. 1, 68 S. W. 903.

obtain a lien upon the property, the latter's right of alienation is perfect in respect to it, and it is not fraud upon his creditors for him to reconvey it to his grantor; until then the creditors of the grantee have no legal or equitable claim in respect to the property superior to that of the grantor.[67]

4. Rights and Liabilities of Grantees as to Creditors and Subsequent Purchasers — a. As to Creditors — (i) *As to Property and Proceeds Thereof* — (a) *In General.* As respects creditors of the grantor a fraudulent grantee stands in the grantor's place and has no equities or rights superior to those possessed by the grantor against such creditors.[68] The title acquired by the fraudulent grantee will not prevail against the grantor's creditors, and the property or its proceeds, including property or its proceeds acquired by means of a judgment and execution collusively confessed or entered for the purpose of defrauding creditors,[69] is subject to be taken by such creditors,[70] to the extent that it is necessary to satisfy

67. *Arkansas.*—Bell *v.* Greenwood, 21 Ark. 249, holding that after reconveyance the original grantor may maintain a bill in equity against subsequent attaching creditors of the grantee.

Indiana.— Lafayette Second Nat. Bank *v.* Brady, 96 Ind. 498; Edwards *v.* Haverstick, 53 Ind. 348.

Kentucky.— Berg *v.* Frantz, 113 Ky. 888, 69 S. W. 801, 24 Ky. L. Rep. 689; Clark *v.* Rucker, 7 B. Mon. 583.

New Jersey.— See Budd *v.* Atkinson, 30 N. J. Eq. 530.

New York.—Davis *v.* Graves, 29 Barb. 480.

North Carolina.— Powell *v.* Ivey, 88 N. C. 256.

North Dakota.—Lockren *v.* Rustan, 9 N. D. 43, 81 N. W. 60.

Tennessee.— Stanton *v.* Shaw, 3 Baxt. 12. *Compare* Susong *v.* Williams, 1 Heisk. 625.

Texas.— Bicocchi *v.* Casey-Swasey Co., 91 Tex. 259, 42 S. W. 963, 66 Am. St. Rep. 875. See Peck *v.* Jones, 10 Tex. Civ. App. 335, 30 S. W. 382.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 552. See also *supra,* II, B, 17, d.

But see Maher *v.* Swift, 14 Nev. 324; and *supra,* II, B, 17, d.

Consideration.— The moral obligation resting upon the grantee holding under a fraudulent transfer is sufficient to support a reconveyance as against his creditors. Berg *v.* Frantz, 113 Ky. 888, 69 S. W. 801, 24 Ky. L. Rep. 689; Lockren *v.* Rustan, 9 N. D. 43, 81 N. W. 60; Bicocchi *v.* Casey-Swasey Co., 91 Tex. 259, 42 S. W. 963, 66 Am. St. Rep. 875.

68. See Kline *v.* McGuckin, 24 N. J. Eq. 411.

69. Taggart *v.* Philips, 5 Del. Ch. 237 (holding that the proceeds of sale under such execution will be applied to satisfy a judgment subsequently obtained by a *bona fide* creditor); French *v.* Commercial Nat. Bank, 199 Ill. 213, 65 N. E. 252 [*affirming* 97 Ill. App. 533]; Phelps *v.* Smith, 116 Ind. 387, 17 N. E. 602, 19 N. E. 156; Kohl *v.* Sullivan, 140 Pa. St. 35, 21 Atl. 247 (holding this rule to apply, although the creditors' judgments were not obtained until after the property seized under the judgment had been sold by the sheriff, where by the issuance of executions on their judgments they have acquired a lien on the proceeds of such sale in the sheriff's hands). See also *supra,* III, A, 4, b.

The fact that the debts for which judgments were confessed were just ones will not exonerate the judgment creditors from refunding any sums acquired by them in an attempt to place the debtor's property beyond the reach of the other creditors, for the benefit of the failing debtor. Hardt *v.* Schwab, 72 Hun (N. Y.) 109, 25 N. Y. Suppl. 402.

70. *Alabama.*— Bryant *v.* Young, 21 Ala. 264; Abney *v.* Kingsland, 10 Ala. 355, 44 Am. Dec. 491.

California.— Swartz *v.* Hazlett, 8 Cal. 118.

Illinois.— Union Nat. Bank *v.* Lane, 177 Ill. 171, 52 N. E. 361, 69 Am. St. Rep. 216 [*affirming* 75 Ill. App. 299]; Hall *v.* Sroufe, 52 Ill. 421; Steere *v.* Hoagland, 39 Ill. 264.

Iowa.— Shumaker *v.* Davidson, 116 Iowa 569, 87 N. W. 441; Knorr *v.* Lohr, 108 Iowa 181, 78 N. W. 904; Cloud *v.* Malvin, 108 Iowa 52, 75 N. W. 645, 78 N. W. 791, 45 L. R. A. 209; Risser *v.* Rathburn, 71 Iowa 113, 32 N. W. 198.

Massachusetts.— Pierce *v.* Le Monier, 172 Mass. 508, 53 N. E. 125.

Mississippi.— Chapman *v.* White Sewing-Mach. Co., 76 Miss. 821, 25 So. 868; Ames *v.* Dorroh, 76 Miss. 187, 23 So. 768, 71 Am. St. Rep. 522.

Missouri.—Antram *v.* Burch, 84 Mo. App. 256.

Montana.— See Davis *v.* Morgan, 19 Mont. 141, 47 Pac. 793.

New York.—Boessneck *v.* Edelson, 40 N. Y. App. Div. 631, 57 N. Y. Suppl. 1029; Mc Caffrey *v.* Hickey, 66 Barb. 489; Nicholson *v.* Leavitt, 4 Sandf. 252. See Durand *v.* Hankerson, 39 N. Y. 287.

North Carolina.— Webb *v.* Atkinson, 124 N. C. 447, 32 S. E. 737.

Oklahoma.— McFayden *v.* Masters, 11 Okla. 16, 66 Pac. 284, 8 Okla. 174, 56 Pac. 1059.

Pennsylvania.— Haymaker's Appeal, 53 Pa. St. 306.

Tennessee.— Citizens' Bank, etc., Co. *v.* Bradt, (Ch. App. 1898) 50 S. W. 778, lien to secure grantee's interest inferior to grantor's creditors.

their claims,[71] notwithstanding the grantee paid a consideration for the property;[72] but in the latter case if a creditor makes an excessive levy he is liable to the grantee for damages.[73] The creditors cannot take both the property and the consideration therefor;[74] nor, in those jurisdictions in which the conveyance is voidable only, can they subject the property in the grantee's hands, until the fraud is exposed, and the transfer set aside in some judicial proceeding,[75] notwithstanding a sale of the property by a creditor on execution against the grantor.[76] If the property fraudulently acquired is exchanged for other property the latter stands in place of the original, and if tangible and susceptible of identification may be reached by the creditors.[77] A fraudulent grantee's title is good, however, even against a creditor of the grantor to the extent that he may defend an action against him by showing defects in the proceedings[78] or contest the validity of a creditor's claim.[79]

Texas.— See Choate *v.* McIlhenny Co., 71 Tex. 119, 9 S. W. 83.

Virginia.— Fones *v.* Rice, 9 Gratt. 568; Graysons *v.* Richards, 10 Leigh 57.

United States.— Farrar *v.* Bernheim, 75 Fed. 136, 21 C. C. A. 264 (heirs of grantee); Fisher *v.* Moog, 39 Fed. 665 (holding the fraudulent grantee estopped to deny the grantor's title and to allege that creditors were not injured by the conveyance).

Canada.— King *v.* Keating, 12 Grant Ch. (U. C.) 29.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 554. See also *supra*, XIII, A, 2, d, (I).

Following proceeds of property fraudulently conveyed see *supra*, II, B, 22.

Grantee's right of subrogation see *infra*, XIII, A, 4, a, (III).

Right of dower on setting aside fraudulent conveyance see DOWER, 14 Cyc. 959.

A court of equity will not enjoin an execution creditor of a husband from proceeding against the wife's real estate when she claimed under a deed executed by the husband to a third person for the purpose of passing title to her, which deed the creditor of the husband alleges to have been fraudulently executed. Mahle *v.* Kurtz, 9 Pa. Co. Ct. 280.

That the property was originally purchased and paid for by the grantees and the title transferred to their grantor for the purpose of defrauding their creditors will not sustain the subsequent conveyance to them against an attack upon it by creditors of their grantor. Cloud *v.* Malvin, 108 Iowa 52, 75 N. W. 645, 78 N. W. 791, 45 L. R. A. 209.

The courts will not order a sale of the property at the instance of the fraudulent grantees against the interests of the defrauded creditors (Hayden *v.* Denslow, 27 Conn. 335), although such creditors have taken no steps to ascertain their rights (Hayden *v.* Denslow, *supra*).

A reconveyance to the fraudulent grantee from a bona fide purchaser to whom he had sold the property places him in no better position than he occupied originally, and he holds the property subject to the rights of those who were creditors of the fraudulent grantor at the time of the original conveyance. Schultz *v.* Brown, 3 Ohio Cir. Ct. 609, 2 Ohio Cir. Dec. 353.

71. Campbell *v.* Whitson, 68 Ill. 240, 18 Am. Rep. 553; Rousseau *v.* Bleau, 8 N. Y. Suppl. 823; Eaves *v.* Williams, 10 Tex. Civ. App. 423, 31 S. W. 86.

In an action to subject the property only so much can be taken as is necessary to satisfy plaintiff's claim, notwithstanding there may be other creditors who have not joined in the suit. Kaupe *v.* Bridge, 2 Rob. (N. Y.) 459.

72. Bigby *v.* Warnock, 115 Ga. 385, 41 S. E. 622, 57 L. R. A. 754; Biggins *v.* Lambert, 213 Ill. 625, 73 N. E. 371, 104 Am. St. Rep. 238; Williamson *v.* Wachenheim, 58 Iowa 277, 12 N. W. 302. See *supra*, VII, C.

Grantee's right to reimbursement of consideration paid see *infra*, XII, A, 4, a, (III), (A).

73. Eaves *v.* Williams, 10 Tex. Civ. App. 423, 31 S. W. 86.

74. Shumaker *v.* Davidson, 116 Iowa 569, 87 N. W. 441; Allen *v.* White, 17 Vt. 69; Allen *v.* Mower, 17 Vt. 61, both of the latter holding that where a fraudulent grantee has paid a full consideration for the property a court of equity will not require him to pay the value of the property a second time for the benefit of creditors. See also *supra*, II, B, 22.

75. Brasie *v.* Minneapolis Brewing Co., 87 Minn. 456, 92 N. W. 340, 94 Am. St. Rep. 709, 67 L. R. A. 865.

Trover may be maintained by the fraudulent grantee against a creditor who takes the property from him without judicial process. Stockbridge *v.* Crockett, 15 Tex. Civ. App. 69, 38 S. W. 401.

76. Brasie *v.* Minneapolis Brewing Co., 87 Minn. 456, 92 N. W. 340, 94 Am. St. Rep. 709, 67 L. R. A. 865.

77. Bryant *v.* Young, 21 Ala. 264; Abney *v.* Kingsland, 10 Ala. 355, 44 Am. Dec. 491; Treadway *v.* Turner, 10 S. W. 816, 10 Ky. L. Rep. 949. See also *supra*, II, B, 22.

78. Leonard *v.* Bryant, 2 Cush. (Mass.) 32, holding that where a creditor of the grantor brings a writ of entry against the grantee, the latter has such title as to defend the action by showing that the levy was void for defects therein.

79. Toop *v.* Smith, 181 N. Y. 283, 73 N. E. 1113 [*affirming* 87 N. Y. App. Div.

(B) *Right to Require Resort to Other Property.* A fraudulent donee or purchaser of personalty taken on execution against his grantor cannot object that the real property of the debtor should have been resorted to before taking the personalty.[80] But an innocent grantee under a voluntary conveyance may require that a subsequent conveyance of other property made with the express purpose of defrauding the creditors should be set aside and resorted to before the creditors are permitted to resort to the property first conveyed.[81]

(C) *Intermingled Goods.* Where a vendee fraudulently intermingles the goods purchased by him with his own, with the intention of frustrating an attachment by the vendor's creditors, he must distinguish his own goods or the whole mass may be taken by such creditors.[82] But if the intermingling was without confusion and done innocently, even though the vendee refuses to distinguish the property, it does not justify the vendor's creditors in taking the property of the vendee together with that of the vendor.[83] If new goods are purchased with the proceeds of part of the original goods, and mingled therewith, it is incumbent upon the vendee to distinguish the goods so mingled or to prove their value, and if he refuses to do so, the whole mass is subject to creditors' claims,[84] unless the original fraud was merely a constructive one, and the intermingling was done innocently.[85]

(D) *Increase or Product of Property* — (1) IN GENERAL. The grantor's creditors may claim from the grantee the natural increase of the property, such as of live stock, for a reasonable time;[86] but the privilege will not be extended for an unreasonable length of time, where a portion of the increase at least is produced by the labor and at the expense of the grantee.[87]

(2) GROWING CROPS. Growing crops on land fraudulently conveyed are subject to execution in favor of the grantor's creditors, at least to the extent of the grantor's interest therein,[88] notwithstanding such crops had not been sown at the time of the fraudulent conveyance,[89] except where the conveyance is unimpeached, in which case the grantee, as against the creditors of the grantor, has title to the crops that he raises on the farm,[90] unless it be shown that he manages the farm and raises the crops for the benefit of the grantor.[91]

241, 84 N. Y. Suppl. 326], holding that a grantee may contest the validity of a mechanic's lien against the grantor, notice of which had not been given in the manner prescribed by statute. See also *supra*, IV.

A judgment against the fraudulent grantee should allow him full opportunity to contest all claims not determined in the action. Rousseau *v.* Bleau, 8 N. Y. Suppl. 823.

80. Flanders *v.* Batten, 50 Hun (N. Y.) 542, 3 N. Y. Suppl. 728 [*affirmed* in 123 N. Y. 627, 25 N. E. 952].

81. Walker *v.* Manchester Bank, 79 S. W. 222, 25 Ky. L. Rep. 1950.

82. Treat *v.* Barber, 7 Conn. 274; McDowell *v.* Rissell, 37 Pa. St. 164. See also CONFUSION OF GOODS, 8 Cyc. 573.

83. Treat *v.* Barber, 7 Conn. 274.

84. See French *v.* Reel, 61 Iowa 143, 12 N. W. 573, 16 N. W. 55. *Compare* Capron *v.* Porter, 43 Conn. 383. See also CONFUSION OF GOODS, 8 Cyc. 574.

85. Capron *v.* Porter, 43 Conn. 383.

The rule which should govern in such a case should be to charge defendant with the actual value of the goods at the time of the transfer, with interest to the time when the purchaser had paid some of the debts of his vendor according to an understanding between them and upon any balance remaining in the purchaser's hands until the final decree. Steere *v.* Hoagland, 50 Ill. 377.

86. Wheeler *v.* Wallace, 53 Mich. 355, 364, 19 N. W. 33, 37; Backhouse *v.* Jett, 2 Fed. Cas. No. 710, 1 Brock. 500. *Compare* Wolcott *v.* Hamilton, 61 Vt. 79, 17 Atl. 39. See also *supra*, II, B, 15, b.

87. Wheeler *v.* Wallace, 53 Mich. 355, 364, 19 N. W. 33, 37. See also *supra*, II, B, 15, b.

The subsequent product of a factory transferred in fraud of creditors is not liable to levy and sale under execution against the grantor. McDonald *v.* Cohen, 5 N. Y. App. Div. 161, 38 N. Y. Suppl. 1110.

88. Dodd *v.* Adams, 125 Mass. 398 (holding hay cut on such land subject to execution to satisfy a debt of the grantor contracted subsequent to the conveyance); Fury *v.* Strohecker, 44 Mich. 337, 6 N. W. 834; Stehman *v.* Huber, 21 Pa. St. 260. See Wolcott *v.* Hamilton, 61 Vt. 79, 17 Atl. 39. See also *supra*, II, B, 15, b.

89. Fury *v.* Strohecker, 44 Mich. 337, 6 N. W. 834. But see Jones *v.* Bryant, 13 N. H. 53.

90. Cain *v.* Mead, 66 Minn. 195, 68 N. W. 840; Hartman *v.* Weiland, 36 Minn. 223, 30 N. W. 815. See *supra*, II, B, 15, b.

91. Hartman *v.* Weiland, 36 Minn. 223, 30 N. W. 815. See *supra*, II, B, 15, b.

(E) *Several Fraudulent Grantees.* If there are several fraudulent grantees the property in the hands of each is liable to its full extent, if required to pay the debts of the creditors, and not merely to the proportion thereof which it bears to the property conveyed to others.[92]

(F) *Rights of Grantee by Adverse Possession.*[93] In some jurisdictions it is held that a grantee under a fraudulent conveyance cannot be deemed to be in adverse possession, so as to acquire title as against the fraudulent grantor's creditors, or a purchaser at an execution sale in favor of such creditors,[94] before the latter have acquired a right of entry by levy of execution on the property,[95] unless the creditors, having knowledge of the fraud, were guilty of laches in proceeding against the property.[96] In other jurisdictions, however, a fraudulent grantee may acquire title as against the grantor's creditors or a purchaser under the creditor's execution by holding the property for the statutory period from the time he acquired possession under the fraudulent conveyance,[97] unless the creditors could not by reasonable diligence have discovered that the conveyance was fraudulent,[98] or unless the grantee recognizes a trust in favor of the grantor and disclaims any personal interest in the property.[99]

(G) *Right of Grantee to Attack Execution Sale.* A fraudulent grantee cannot dispute and contest the regularity of the title of a purchaser at an execution sale of the property under a judgment recovered by a creditor of the grantor,[1] as

92. Adams *v.* Holcombe, Harp. Eq. (S. C.) 202, 14 Am. Dec. 719; Hapkirk *v.* Randolph, 12 Fed. Cas. No. 6,698, 2 Brock. 132.

Contribution between grantees see *supra*, XIII, A, 2, k, (II).

Where by a fraudulent combination the property is transferred from one person to another by a system of leases, mortgages, and deeds, all of which are fictitious, all the guilty parties are answerable for the whole of the property. Bruce *v.* Kelly, 39 N. Y. Super. Ct. 27.

93. **Adverse possession as between grantee and grantor** see *supra*, XIII, A, 2, d, (III).

Limitation of actions see *infra*, XIV, I, 4, a.

94. *Connecticut.*— Beach *v.* Catlin, 4 Day 284, 4 Am. Dec. 221.

Louisiana.— Decuir *v.* Veazey, 8 La. Ann. 453.

North Carolina.— Hoke *v.* Henderson, 14 N. C. 12; Pickett *v.* Pickett, 14 N. C. 6.

South Carolina.— Garvin *v.* Garvin, 40 S. C. 435, 19 S. E. 79; Suber *v.* Chandler, 36 S. C. 344, 15 S. E. 426; Aikin *v.* Ballard, Rice Eq. 13.

Virginia.— Snoddy *v.* Haskins, 12 Gratt. 363.

United States.— Farrar *v.* Bernheim, 74 Fed. 435, 20 C. C. A. 496, holding that the fraudulent conveyance affords no beginning point for the running of the statute of limitations in favor of the grantee or his heirs as against the defrauded creditors or one claiming as purchaser at an execution sale in favor of such creditor.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 560; ADVERSE POSSESSION.

95. Beach *v.* Catlin, 4 Day (Conn.) 284, 4 Am. Dec. 221; Hoke *v.* Henderson, 14 N. C. 12; Pickett *v.* Pickett, 14 N. C. 6. And see the cases in the preceding note.

96. Garvin *v.* Garvin, 40 S. C. 435, 19 S. E. 79; Farrar *v.* Bernheim, 74 Fed. 435, 20 C. C. A. 496.

97. *Alabama.*— Werborn *v.* Kahn, 93 Ala. 201, 9 So. 729; Lockard *v.* Nash, 64 Ala. 385; Snodgrass *v.* Decatur Branch Bank, 25 Ala. 161, 60 Am. Dec. 505. But see High *v.* Nelms, 14 Ala. 350, 48 Am. Dec. 103; McCaskle *v.* Amarine, 12 Ala. 17.

Illinois.— Cook *v.* Norton, 48 Ill. 20.

Maryland.— See Sewell *v.* Baxter, 2 Md. Ch. 447 [*affirmed* in 3 Md. 334].

Minnesota.— Brasie *v.* Minneapolis Brewing Co., 87 Minn. 456, 92 N. W. 340, 94 Am. St. Rep. 709, 67 L. R. A. 865.

Mississippi.— Snodgrass *v.* Andrews, 30 Miss. 472, 64 Am. Dec. 169.

Missouri.— Walker *v.* Bacon, 32 Mo. 144. See Potter *v.* Adams, 125 Mo. 118, 28 S. W. 490, 46 Am. St. Rep. 478.

Tennessee.— Welcker *v.* Staples, 88 Tenn. 49, 12 S. W. 340, 17 Am. St. Rep. 869; McBee *v.* Bearden, 7 Lea 731; Ramsay *v.* Quillen, 5 Lea 184; Knight *v.* Jordan, 6 Humphr. 101; Reeves *v.* Dougherty, 7 Yerg. 222, 27 Am. Dec. 496; Mulloy *v.* Paul, 2 Tenn. Ch. 156. But see Marr *v.* Rucker, 1 Humphr. 348; Jones *v.* Read, 1 Humphr. 335.

Texas.— Reynolds *v.* Lansford, 16 Tex. 286; B. C. Evans Co. *v.* Guipel, (Civ. App. 1896) 35 S. W. 940.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 560. See also ADVERSE POSSESSION, 1 Cyc. 1043.

98. Lockard *v.* Nash, 64 Ala. 385; Snodgrass *v.* Decatur Branch Bank, 25 Ala. 161, 60 Am. Dec. 505; Belt *v.* Raguet, 27 Tex. 471.

99. Smith *v.* Hall, 103 Ala. 235, 13 So. 525.

1. Floyd *v.* Goodwin, 8 Yerg. (Tenn.) 484, 29 Am. Dec. 130. See Flanders *v.* Batten, 50 Hun (N. Y.) 542, 3 N. Y. Suppl. 728 [*affirmed* in 123 N. Y. 627, 25 N. E. 952]. But see Miller *v.* Koertge, 70 Tex. 162, 7 S. W. 691, 8 Am. St. Rep. 587.

on the ground that the price paid for the property by the purchaser at such a sale was inadequate.[2]

(H) *Right of Grantee to Pay Creditor's Claim and Retain Property.* If the creditor accepts from a fraudulent grantee payment of the amount of his claim against the grantor, the grantee's title is thereafter good as against such creditor;[3] but after an execution sale and purchase by the creditor it is too late for the grantee to ask the court to fix a time within which he could pay off a creditor's judgment and take the land freed from his lien.[4] If the grantee has acted in good faith and paid the consideration for the property, upon setting aside the conveyance as fraudulent as to creditors, he should be given the alternative of paying the grantor's debts or of having the property held and the proceeds applied first to his reimbursement and second to the claims of the existing creditors of the grantor.[5]

(II) *PERSONAL LIABILITY OF GRANTEE*[6]—(A) *In General.* A fraudulent grantee who accepts a conveyance of property for the purpose of enabling the grantor to keep it from his creditors is liable to account therefor as a trustee for such creditors.[7] Like any other trustee the grantee must preserve the property intact for the grantor's creditors,[8] and as long as the property remains in his possession he is not liable to a personal judgment in favor of creditors of the

2. Den *v.* Lippencott, 6 N. J. L. 473. But see Miller *v.* Koertge, 70 Tex. 162, 7 S. W. 691, 8 Am. St. Rep. 587, holding that a fraudulent grantee of property is not precluded from having a sheriff's sale of the property under an execution against his grantor set aside on showing irregularities in the proceedings.

3. Kitts *v.* Willson, 140 Ind. 604, 39 N. E. 313. See *supra*, III, C, 5, b.

4. Pickens *v.* Taylor, 47 Kan. 294, 27 Pac. 986.

5. Adams *v.* Branch, 3 Ky. L. Rep. 178.

6. Liability to action for damages see *infra*, XIV, B, 4.

7. *Alabama.*— Lockard *v.* Nash, 64 Ala. 385; Bryant *v.* Young, 21 Ala. 264.

Arkansas.— Miller *v.* Fraley, 21 Ark. 22.

Indiana.— Doherty *v.* Holliday, 137 Ind. 282, 32 N. E. 315, 36 N. E. 907; Buck *v.* Voreis, 89 Ind. 116; Stout *v.* Stout, 77 Ind. 537.

Massachusetts.— Cheney *v.* Gleason, 117 Mass. 557.

Michigan.— Thayer *v.* Swift, Harr. 430.

Mississippi.— Johnson *v.* Ingram, (1891) 9 So. 822.

Missouri.— Columbia Sav. Bank *v.* Winn, 132 Mo. 80, 33 S. W. 457; Ryland *v.* Callison, 54 Mo. 513; Aspinall *v.* Jones, 17 Mo. 209.

Nebraska.— Selz *v.* Hocknell, 63 Nebr. 503, 88 N. W. 767, 62 Nebr. 101, 86 N. W. 905; Lininger *v.* Herron, 18 Nebr. 450, 25 N. W. 578, holding a conveyance to certain creditors, not actually intended to defraud other creditors, valid as to their claims, but that the balance in their hands was a trust fund for the benefit of other creditors.

New Jersey.— Belford *v.* Crane, 16 N. J. Eq. 265, 84 Am. Dec. 155.

New York.— Fox *v.* Erbe, 100 N. Y. App. Div. 343, 91 N. Y. Suppl. 832; Hillyer *v.* Le Roy, 84 N. Y. App. Div. 129, 82 N. Y. Suppl. 80, trustee *ex maleficio.*

Ohio.— Starr *v.* Wright, 20 Ohio St. 97.

Oregon.— Bremer *v.* Fleckenstein, 9 Oreg. 266, holding a fraudulent mortgagee who to defeat a subsequent attachment procures a foreclosure decree, and takes the proceeds of the sale thereunder, liable as trustee for the attaching creditor.

Virginia.— Sutherlin *v.* March, 75 Va. 223.

Wisconsin.— Mason *v.* Pierron, 69 Wis. 585, 34 N. W. 921; Ferguson *v.* Hillman, 55 Wis. 181, 12 N. W. 389.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 575.

If the conveyance is only partially invalid as to creditors, the grantee will hold as trustee to the extent that it is invalid. Columbia Sav. Bank *v.* Winn, 132 Mo. 80, 33 S. W. 457; Lininger *v.* Herron, 18 Nebr. 450, 25 N. W. 578; Sutherlin *v.* March, 75 Va. 223.

A judgment, representing the property, recovered against an attaching creditor by the fraudulent grantee is held in trust for the benefit of creditors. Hollister *v.* Lefevre, 35 Conn. 456.

A wife who receives a conveyance of property from her husband may to that extent be held as a trustee for his creditors. Johnson *v.* Ingram, (Miss. 1891) 9 So. 822; Lawson *v.* Dunn, 66 N. J. Eq. 90, 57 Atl. 415; Belford *v.* Crane, 16 N. J. Eq. 265, 84 Am. Dec. 155.

Effect of proceedings in another state.— The liability of a creditor to whom goods were delivered by a debtor in fraud of other creditors is not affected by judicial proceedings thereafter taken in another state, to which the goods have since been carried, whereby the creditor attaches the goods as property of the debtor. Rothschild *v.* Knight, 184 U. S. 334, 22 S. Ct. 391, 46 L. ed. 573 [*affirming* 176 Mass. 48, 57 N. E. 337].

8. Mason *v.* Pierron, 69 Wis. 585, 34 N. W. 921. See, generally, TRUSTS.

grantor, as the proper course for such creditors to pursue is to subject the property in his hands.[9] But if he disposes of the property or otherwise places it beyond the reach of the grantor's creditors, equity will compel him to account for the proceeds,[10] or if justice requires, charge him with the value of the property,[11] even where the fraudulent grantee is the debtor's wife, if she retains the proceeds or her separate estate has the benefit thereof.[12] If he lessens the value of the property by giving a mortgage or other encumbrance on it to a *bona fide* mortgagee or encumbrancer,[13] he is guilty of a breach of duty for which he must answer to the creditors in damages; the measure of damages being the amount of the encumbrance.[14] The grantee is not chargeable, however, to the

9. Aspinall *v.* Jones, 17 Mo. 209; McLean *v.* Cary, 88 N. Y. 391 (holding that the proper course for the court upon setting aside the fraudulent transfer is to appoint a receiver to dispose of the property and satisfy plaintiff's demand from the avails); Vance Shoe Co. *v.* Haught, 41 W. Va. 275, 23 S. E. 553. See Le Gierse *v.* Kellum, 66 Tex. 242, 18 S. W. 509.

10. Doherty *v.* Holliday, 137 Ind. 282, 32 N. E. 315, 36 N. E. 907; Blair *v.* Smith, 114 Ind. 114, 15 N. E. 817, 5 Am. St. Rep. 593; Jones *v.* Reeder, 22 Ind. 111; Warner *v.* Blakeman, 4 Abb. Dec. (N. Y.) 530, 4 Keyes 487; Williamson *v.* Williams, 11 Lea (Tenn.) 355; Kickbusch *v.* Corwith, 108 Wis. 634, 85 N. W. 148; Mason *v.* Pierron, 69 Wis. 585, 34 N. W. 921. But see Simpson *v.* Simpson, 7 Humphr. (Tenn.) 275.

11. *Alabama.*—Cottingham *v.* Greely Barnham Grocery Co., 129 Ala. 200, 30 So. 560, 87 Am. St. Rep. 58; Muskegon Valley Furniture Co. *v.* Phillips, 113 Ala. 314, 21 So. 822, taking property beyond jurisdiction of court.

California.— Swinford *v.* Rogers, 23 Cal. 233.

Illinois.— Coale *v.* Moline Plow Co., 134 Ill. 350, 25 N. E. 1016.

Indiana.— Doherty *v.* Holliday, 137 Ind. 282, 32 N. E. 315, 36 N. E. 907; Chamberlin *v.* Jones, 114 Ind. 458, 16 N. E. 178; Jenison *v.* Graves, 2 Blackf. 440.

Michigan.— Reeg *v.* Burnham, 55 Mich. 39, 20 N. W. 708, 21 N. W. 431; Robinson *v.* Boyd, 17 Mich. 128, holding the fraudulent grantee liable, whether or not he succeeds in collecting the price from his vendee.

Mississippi.— Ames *v.* Dorroh, 76 Miss. 187, 23 So. 768, 71 Am. St. Rep. 522; Redfield *v.* Hewes, 67 Miss. 479, 6 So. 776, holding, however, as the case was one between actual fraud satisfactorily proved and constructive fraud, the transfer should be set aside upon terms of justice between the parties.

Nevada.— Hulley *v.* Chedic, 22 Nev. 127, 36 Pac. 783, 58 Am. St. Rep. 729, holding that a judgment creditor whose execution has been returned unsatisfied has a right of action to recover a money judgment against a fraudulent grantee who has converted the property into money.

New Jersey.— Post *v.* Stiger, 29 N. J. Eq. 554.

New York.— Murtha *v.* Curley, 90 N. Y. 372; Talcott *v.* Levy, 29 Abb. N. Cas. 3, 20 N. Y. Suppl. 440 [*affirmed* in 3 Misc. 615, 23 N. Y. Suppl. 1162 (*affirmed* in 143 N. Y. 636, 37 N. E. 826)].

Oregon.— Morrell *v.* Miller, 28 Oreg. 354, 43 Pac. 490, 45 Pac. 246.

Virginia.—Williamson *v.* Goodwyn, 9 Gratt. 503; Greer *v.* Wright, 6 Gratt. 154, 52 Am. Dec. 111.

West Virginia.—Hinton *v.* Ellis, 27 W. Va. 422.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 568.

A fraudulent assignee of accounts is chargeable at the suit of the assignor's creditors, for all money collected by him on such accounts, for all accounts which he might have collected by the use of reasonable diligence, and for those accounts which he fails to produce or account for. Dilworth *v.* Curts, 139 Ill. 508, 29 N. E. 861 [*affirming* 38 Ill. App. 93].

Where choses in action have been transferred, the fraudulent vendee must account for the amount thereof less reasonable costs of collection. Muskegon Valley Furniture Co. *v.* Phillips, 113 Ala. 314, 21 So. 822.

12. Bigby *v.* Warnock, 115 Ga. 385, 41 S. E. 622, 57 L. R. A. 754; Chamberlain *v.* O'Brien, 46 Minn. 80, 48 N. W. 447; Sheldon *v.* Parker, 66 Nebr. 610, 92 N. W. 923, 95 N. W. 1015. But see U. S. Trust Co. *v.* Sedgwick, 97 U. S. 304, 24 L. ed. 954 [*affirming* 95 U. S. 3, 24 L. ed. 591], holding that on account of the wife's disabilities a judgment *in personam* cannot be rendered against her or her executors in such a case.

Separate real estate owned by the wife in her own right before the transaction took place cannot be subjected to her husband's creditors, where other property is transferred to her in fraud of such creditors. McKinney *v.* Ward, 39 Kan. 279, 18 Pac. 196.

13. Mason *v.* Pierron, 69 Wis. 585, 34 N. W. 921.

That the mortgage given also covered the fraudulent grantee's homestead is immaterial as is also the use to which he put the money raised by the mortgage so long as none of it went to the creditors of the fraudulent grantor. Mason *v.* Pierron, 69 Wis. 585, 34 N. W. 921.

14. Mason *v.* Pierron, 69 Wis. 585, 34 N. W. 921.

If the grantee mortgages the property he will be held to account to the creditors for

extent that, before the creditors have fixed their rights by a judgment and the filing of a bill, he has in good faith restored the property to the debtor,[15] loaned it to him,[16] or used it in paying his debts.[17]

(B) *Conveyance in Name of Third Person.* Where property purchased by a debtor is conveyed to a third person for the purpose of defrauding his creditors,[18] including cases where a conveyance is made to a wife of property purchased

the money received on the mortgage without regard to the use made of it (Coale *v.* Moline Plow Co., 134 Ill. 350, 25 N. E. 1016; Hubbell *v.* Currier, 10 Allen (Mass.) 333 (holding that where such a mortgage is transferred to a *bona fide* purchaser for value, both the mortgagor and the mortgagee who had notice of the fraud are liable for the amount of the mortgage to the grantor's creditors); Salt Springs Nat. Bank *v.* Fancher, 92 Hun (N. Y.) 327, 36 N. Y. Suppl. 742 (holding this to be true where the creditor's judgment was recovered before the mortgage was made by the grantee); unless its use inured to the benefit of the creditor (Coale *v.* Moline Plow Co., 134 Ill. 350, 25 N. E. 1016).

Conditions precedent.— If the fraudulent grantee mortgages the property to an innocent person, it is not necessary in a suit by a creditor of the grantor to order a sale of the land before holding the fraudulent grantee personally liable for the creditor's claim. Dilworth *v.* Curts, 139 Ill. 508, 29 N. E. 861 [*affirming* 38 Ill. App. 93].

15. *Massachusetts.*— Rayner *v.* Whicher, 6 Allen 292.

New Hampshire.— Gutterson *v.* Morse, 58 N. H. 529.

New York.— Cramer *v.* Blood, 48 N. Y. 684. See Henderson *v.* Brooks, 3 Thomps. & C. 445.

Ohio.— White *v.* Brocaw, 14 Ohio St. 339; Swift *v.* Holdridge, 10 Ohio 230, 36 Am. Dec. 85.

Virginia.— Norris *v.* Jones, 93 Va. 176, 24 S. E. 911.

Canada.— Tennant *v.* Gallow, 25 Ont. 56 [*distinguishing* Cornish *v.* Clark, L. R. 14 Eq. 184, 42 L. J. Ch. 14, 26 L. T. Rep. N. S. 494, 20 Wkly. Rep. 897; Masuret *v.* Stewart, 22 Ont. 290].

16. Norris *v.* Jones, 93 Va. 176, 24 S. E. 911.

17. *Alabama.*— Cottingham *v.* Greely Barnham Grocery Co., 129 Ala. 200, 30 So. 560, 87 Am. St. Rep. 58, holding this to be true, although he is forced to pay the proceeds of the property by means of the process of attachment.

Massachusetts.— Thomas *v.* Goodwin, 12 Mass. 140, holding that the grantee cannot be held as trustee after having paid *bona fide* debts of the grantor to the full amount of the property received.

South Dakota.— Sprague *v.* Ryan, 11 S. D. 54, 75 N. W. 390.

Virginia.— Norris *v.* Jones, 93 Va. 176, 24 S. E. 911.

Wisconsin.— Ferguson *v.* Hillman, 55 Wis. 181, 12 N. W. 389.

Canada.— Tennant *v.* Gallow, 25 Ont. 56 [*distinguishing* Cornish *v.* Clark, L. R. 14 Eq. 184, 42 L. J. Ch. 14, 26 L. T. Rep. N. S. 494, 20 Wkly. Rep. 897; Masuret *v.* Stewart, 22 Ont. 290].

Grantee's right to reimbursement of debts paid see *infra*, XIII, A, 4, a, (III).

Burden of proof.— Cottingham *v.* Greely, Barnham Grocery Co., 129 Ala. 200, 30 So. 560, 87 Am. St. Rep. 58.

18. Gardiner Bank *v.* Wheaton, 8 Me. 373; Bobb *v.* Woodward, 50 Mo. 95; Bridges *v.* Bidwell, 20 Nebr. 185, 29 N. W. 302; Dewey *v.* Long, 25 Vt. 564. See *supra*, III, A, 3, a.

By statute in some jurisdictions a grant to one person, the consideration for which is paid by another, shall be presumed fraudulent as against existing creditors of the person paying the consideration, and unless a fraudulent intent is disproved, a trust results in favor of such creditors. Fairbairn *v.* Middlemiss, 47 Mich. 372, 11 N. W. 203; Overmire *v.* Haworth, 48 Minn. 372, 51 N. W. 121, 31 Am. St. Rep. 660 (Gen. St. (1878) §§ 7, 8); Wolford *v.* Farnham, 47 Minn. 95, 49 N. W. 528; Leonard *v.* Green, 30 Minn. 496, 16 N. W. 399, 34 Minn. 137, 24 N. W. 915; Foster *v.* Berkey, 8 Minn. 351; Niver *v.* Crane, 98 N. Y. 40 (1 Rev. St. p. 728, §§ 51, 52); McCartney *v.* Bostwick, 32 N. Y. 53 [*affirming* 31 Barb. 390]; Wood *v.* Robinson, 22 N. Y. 564; Garfield *v.* Hatmaker, 15 N. Y. 475; Donovan *v.* Sheridan, 37 N. Y. Super. Ct. 256; Jackson *v.* Forrest, 2 Barb. Ch. 576. See *supra*, III, A, 3, a.

Payment of consideration.— Under the New York statutes a resulting trust does not arise unless the consideration is paid at or before the execution of the conveyance. Niver *v.* Crane, 98 N. Y. 40. If the grantee makes a purchase with his own money or credit no subsequent transaction, whether of payment or reimbursement by another, can produce such a trust. Niver *v.* Crane, *supra*. But where a note is given for the consideration, although it was not delivered until the day after the delivery of the deed, if it appears that the deed was delivered in expectation of receiving the note and the note was delivered to close the transaction, the two may be regarded as contemporaneous for the purpose of creating a resulting trust allowed by statute (1 Rev. St. p. 728, § 52). Kline *v.* McDonnell, 62 Hun (N. Y.) 177, 16 N. Y. Suppl. 649.

Where a note is given for the consideration upon such a conveyance, although it is not paid by the maker and only part of it is paid by his personal representatives, a trust results as to a creditor of the maker existing at the time of giving the note, but only in respect of so much of the land as is repre-

with her husband's money,[19] a resulting trust arises in favor of the debtor's creditors unless he was under an obligation to pay the money to or for the grantee and he pays the consideration solely for the purpose of discharging that obligation.[20]

(c) *As to Property Never in Possession.* A fraudulent grantee cannot be charged with the value of property which has never been in his possession or under his control,[21] unless by reason of his fraudulent acts and connivance creditors have been injured by the property being placed beyond their reach.[22]

(d) *Liability as Garnishee.* In some jurisdictions, but not in others, a fraudulent grantee is liable to his grantor's creditors in garnishment.[23]

(e) *Extent of Liability* — (1) In General. To the extent necessary to satisfy the pursuing creditors' claims, a fraudulent grantee is liable for the full value of the property received by him, regardless of what he may have paid for it, or, if sold or exchanged, for what he received on the sale or exchange,[24] includ-

sented by the amount paid. Kline *v.* McDonnell, 62 Hun (N. Y.) 177, 16 N. Y. Suppl. 649.

19. *Arkansas.*— Stix *v.* Chaytor, 55 Ark 116, 17 S. W. 707. See Hershy *v.* Latham, 42 Ark. 305.

Indiana.— Hanna *v.* Aebker, 84 Ind. 411, holding this to be true under Rev. St. (1881) §§ 752, 2974, 2975.

Kentucky.— Adam *v.* Orear, 3 Ky. L. Rep. 605, under Gen. St. c. 63, art. 1, § 20. See Hinkle *v.* Gale, 11 S. W. 664, 11 Ky. L. Rep. 126.

Minnesota.— Overmire *v.* Haworth, 48 Minn. 372, 51 N. W. 121, 31 Am. St. Rep. 660; Wolford *v.* Farnham, 47 Minn. 95, 49 N. W. 528; Chamberlain *v.* O'Brien, 46 Minn. 80, 48 N. W. 447; Leonard *v.* Green, 30 Minn. 496, 16 N. W. 399, 34 Minn. 137, 24 N. W. 915.

New Jersey.— Belford *v.* Crane, 16 N. J. Eq. 265, 84 Am. Dec. 155.

New York.— Kline *v.* McDonnell, 62 Hun 177, 16 N. Y. Suppl. 649; Jencks *v.* Alexander, 11 Paige 619.

North Carolina.— Thurber *v.* La Roque, 105 N. C. 301, 11 S. E. 460, holding that where part of the consideration is paid by the husband and part by the wife, the latter holds a share of the property in proportion to the amount paid by the husband, in trust for his creditors, subject to his claim to a homestead; and it is immaterial what amounts are furnished by each for subsequent improvements.

Ohio.— Jaffray *v.* Weatherby, 12 Ohio Cir. Ct. 205, 5 Ohio Cir. Dec. 201; Woodrow *v.* Sargent, 5 Ohio Dec. (Reprint) 209.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 576. And see *supra*, III, A, 3, a, (II).

Where a grantee impressed with such a trust subsequently conveys to the debtor's wife, she also takes the land impressed with the same trust. Donovan *v.* Sheridan, 37 N. Y. Super. Ct. 256.

If the husband agrees to pay off a mortgage on the premises as a part of the consideration, the fact that he does not pay it off until after the conveyance does not apportion the trust or make it a trust *pro tanto* only. Leonard *v.* Green, 34 Minn. 137, 24 N. W. 915.

Where an insolvent invests in the name of his wife or expends in enhancing the value of her separate estate money which he has acquired by his labor, a resulting trust may arise in her property in favor of his creditors to the extent of the money so invested or expended. Whedon *v.* Champlin, 59 Barb. (N. Y.) 61. But where he is at the same time indebted to the wife and she is not guilty of actual fraud in the transaction, she cannot be compelled to account to his creditors for the money so advanced until her claim against her husband is satisfied. Oliver *v.* Moore, 26 Ohio St. 298.

If the wife conveys away the property to innocent purchasers she may be proceeded against personally for the value thereof. Chamberlain *v.* O'Brien, 46 Minn. 80, 48 N. W. 447.

20. Wolford *v.* Farnham, 47 Minn. 95, 49 N. W. 528, moral obligation.

21. Gutterson *v.* Morse, 58 N. H. 529 (although he holds a fraudulent bill of sale therefor); Greenleaf *v.* Perrin, 8 N. H. 273; Putzel *v.* Schulhof, 59 N. Y. Super. Ct. 88, 13 N. Y. Suppl. 231; Nicholson *v.* Leavitt, 4 Sandf. (N. Y.) 252; Bolling *v.* Harrison, 2 Patt. & H. (Va.) 532.

22. James Goold Co. *v.* Maheady, 38 Hun (N. Y.) 294; Hughes *v.* Bloomer, 9 Paige (N. Y.) 269.

23. See *infra*, XIV, B, 2, e. And see Garnishment, *post*.

24. *Illinois.*— Powell *v.* Jeffries, 5 Ill. 387.

Kentucky.— Jones *v.* Henry, 3 Litt. 427.

Missouri.— St. Louis Brewing Assoc. *v.* Steimke, 68 Mo. App. 52.

Nebraska.— Meyer *v.* Stone, 21 Nebr. 717, 33 N. W. 420; Smith *v.* Sands, 17 Nebr. 498, 23 N. W. 356.

New York.— Decker *v.* Decker, 108 N. Y. 128, 15 N. E. 307; Leonard *v.* Clinton, 26 Hun 288.

Pennsylvania.— Penrod *v.* Mitchell, 8 Serg. & R. 522.

South Carolina.— McGahan *v.* Crawford, 47 S. C. 566, 25 S. E. 123 (holding that the grantee must account for the value of the land included in the conveyance and alien-

ing any incidental appreciation in value of the property,[25] and notwithstanding some of the property has been stolen from him.[26] If the grantee sells or exchanges the property, he is liable for what he received for it, although more than he paid,[27] unless he sold or exchanged it for less than its value, in which case he would be liable for its value,[28] except where the creditors delay in asserting their right.[29] He is liable to such creditor not only for the money collected on notes, accounts, etc., but also for the value of those which remain in his hands.[30] As to pursuing creditors the grantee is entitled to a deduction from the value of the property for prior encumbrances existing against it;[31] but not for an indebted-

ated by him after taking possession before commencement of the action to set aside the deed); Watson *v.* Kennedy, 3 Strobh. Eq. 1.

Texas.— Simon *v.* Ash, 1 Tex. Civ. App. 202, 20 S. W. 719, holding a trustee, who is garnished for the property and who afterward disposes thereof, liable for the value of the property at the date of notice in such proceedings that the conveyance would be contested.

Wisconsin.— Bank of Commerce *v.* Fowler, 93 Wis. 241, 67 N. W. 423; Sutton *v.* Hasey, 58 Wis. 556, 17 N. W. 416, holding that under Rev. St. § 2322, providing that a conveyance void as to creditors shall be void as to their assignees, an assignee may recover the full amount of the debt assigned from the grantees, without regard to how much he paid for it.

United States.— Klein *v.* Hoffheimer, 132 U. S. 367, 10 S. Ct. 130, 33 L. ed. 373; Backhouse *v.* Jett, 2 Fed. Cas. No. 710, 1 Brock. 500.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 569.

Grantee's right to reimbursement for consideration paid see *infra*, XIII, A, 4, a, (III), (A).

Where, in an action by a divorced wife to collect an allowance made to her in the decree of divorce for the support of a child, a conveyance of property made by her husband is adjudged void as to her, she cannot complain that it is adjudged valid as between him and the grantee, subject to her claims. Schultze *v.* Schultze, (Tex. Civ. App. 1901) 66 S. W. 56.

The criterion in determining the value of the property is its value at the time and place of the conveyance. Cottingham *v.* Greely Barnham Grocery Co., 129 Ala. 200, 30 So. 560, 87 Am. St. Rep. 58; Muskegon Valley Furniture Co. *v.* Phillips, 113 Ala. 314, 21 So. 822; Oppenheimer *v.* Halff, 68 Tex. 409, 4 S. W. 562.

A sum exceeding the value of the property cannot be awarded against the grantee, in order to punish him for his wrong-doing, however scandalous the fraud may be. Hamilton Nat. Bank *v.* Halsted, 134 N. Y. 520, 31 N. E. 900, 30 Am. St. Rep. 693.

25. Gillett *v.* Bate, 86 N. Y. 87, 10 Abb. N. Cas. 88, holding that where stock of a corporation is taken in exchange, the incidental appreciation in value of the stock accrues to the grantor's creditors.

Where the property advances in value beyond the legal rate of interest, the creditors are restricted to the purchase-price with legal interest thereon. Hart *v.* Dogge, 27 Nebr. 256, 42 N. W. 1035.

26. Hargreaves *v.* Tennis, 63 Nebr. 356, 88 N. W. 486.

27. Jones *v.* Davenport, 44 N. J. Eq. 33, 13 Atl. 652 (holding the grantee, who paid less for the property than she realized thereon several months afterward, personally responsible to creditors for the sum which she received from the sale); Warner *v.* Blakeman, 4 Abb. Dec. (N. Y.) 530, 4 Keyes 487; Vance Shoe Co. *v.* Haught, 41 W. Va. 275, 23 S. E. 553; Ringold *v.* Suiter, 35 W. Va. 186, 13 S. E. 46.

28. Hargreaves *v.* Tennis, 63 Nebr. 356, 88 N. W. 486; Hamilton Nat. Bank *v.* Halsted, 134 N. Y. 520, 31 N. E. 900, 30 Am. St. Rep. 693 [*modifying* 56 Hun 530, 9 N. Y. Suppl. 852]; Vietor *v.* Levy, 72 Hun (N. Y.) 263, 25 N. Y. Suppl. 644 (holding the transferee chargeable with the value of the property, although he transfers it to another without receiving value therefor); Vance Shoe Co. *v.* Haught, 41 W. Va. 275, 23 S. E. 553.

29. Cutcheon *v.* Corbitt, 99 Mich. 578, 58 N. W. 479 [*modifying* 88 Mich. 594, 50 N. W. 756], holding that if the creditors delay for some time to assert their rights, and the grantee has acted in good faith, he is chargeable only with what he actually received for the property, and not with its estimated value.

30. Bouton *v.* Smith, 113 Ill. 481; Klein *v.* Hoffheimer, 132 U. S. 367, 10 S. Ct. 130, 33 L. ed. 373.

The proper decree in favor of a creditor against the fraudulent holder is for an account for the amounts received and for the proceeds of the notes, and not for the nominal amount of the notes. Bozman *v.* Draughan, 3 Stew. (Ala.) 243.

31. Powell *v.* Jeffries, 5 Ill. 387; Wells *v.* White, 142 Mass. 518, 8 N. E. 442; Meyer *v.* Stone, 21 Nebr. 717, 33 N. W. 420; Smith *v.* Sands, 17 Nebr. 498, 23 N. W. 356; Hamilton Nat. Bank *v.* Halsted, 134 N. Y. 520, 31 N. E. 900, 30 Am. St. Rep. 693 [*modifying* 56 Hun 530, 9 N. Y. Suppl. 852], holding that where personal property pledged to secure the payment of a valid debt is fraudulently transferred by the owner, his creditors are not, upon setting aside the transfer, entitled to recover from the fraudulent transferee the full value of the property, but only its value after deducting the amount of the debt.

ness due him by the grantor,[32] unless the transaction was fraudulent only as to the excess.[33]

(2) Rents and Profits. The fraudulent grantee is also chargeable with the rents and profits of the property during his possession thereof,[34] where the creditors of the grantor had already obtained a judgment or decree against the debtor,[35] except where the grantee takes possession in good faith, believing his deed to be a valid one;[36] or where the fraudulent grantee was the debtor's wife,[37]

32. Bigby *v.* Warnock, 115 Ga. 385, 41 S. E. 622, 57 L. R. A. 754 (holding that where a wife, as fraudulent grantee of her husband, conveys the property as security for a loan to herself, she cannot, in an action by a judgment creditor of the husband to enforce her personal liability as such fraudulent grantee, plead in set-off a debt due her by her husband); Hargreaves *v.* Tennis, 63 Nebr. 356, 88 N. W. 486.

33. Bouton *v.* Smith, 113 Ill. 481.

34. *Alabama.*— Kitchell *v.* Jackson, 71 Ala. 556 [*overruling* Marshall *v.* Croom, 60 Ala. 121], holding him liable for rents from the time of the commencement of the action to set aside the conveyance.

Georgia.— See Jones *v.* McCleod, 61 Ga. 602.

Illinois.— Hadley *v.* Morrison, 39 Ill. 392, but the bill must be so framed as to admit of an account being decreed of the rents and profits.

Kentucky.— Bartram *v.* Burns, 43 S. W. 248, 19 Ky. L. Rep. 1295.

Maryland.— Strike *v.* McDonald, 2 Harr. & G. 191 [*affirming* 1 Bland 57]; Kipp *v.* Hanna, 2 Bland 26.

Missouri.— Allen *v.* Berry, 50 Mo. 90.

New Jersey.— Lee *v.* Cole, 44 N. J. Eq. 318, 15 Atl. 531; Mead *v.* Combs, 19 N. J. Eq. 112. See Lawson *v.* Dunn, 66 N. J. Eq. 90, 57 Atl. 415.

New York.— Loos *v.* Wilkinson, 110 N. Y. 195, 18 N. E. 99, 1 L. R. A. 250 [*affirmed* in 51 Hun 74, 5 N. Y. Suppl. 410]; Salt Springs Nat. Bank *v.* Fancher, 92 Hun 327, 36 N. Y. Suppl. 742 (holding that where the grantee had the use of the property he was chargeable with its rental value, although he received no rent); Popfinger *v.* Yutte, 49 N. Y. Super. Ct. 312; Farnham *v.* Campbell, 10 Paige 598. But see Warner *v.* Blakeman, 4 Abb. Dec. 530, 4 Keyes 487.

Pennsylvania.— Lynch *v.* Welsh, 3 Pa. St. 294.

South Carolina.— McGahan *v.* Crawford, 47 S. C. 566, 25 S. E. 123.

West Virginia.— Stout *v.* Phillippi Mfg., etc., Co., 41 W. Va. 339, 23 S. E. 571, 56 Am. St. Rep. 843; Flaherty *v.* Stephenson, 56 W. Va. 192, 49 S. E. 131, holding the grantee not liable for rents and profits until they have been sequestered.

United States.— Backhouse *v.* Jett, 2 Fed. Cas. No. 710, 1 Brock. 500.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 570. See also *supra*, II, B, 15, c.

But *compare* Cecile *v.* St. Denis, 9 Rob. (La.) 231, under Civ. Code, art. 1972.

Where the grantor becomes bankrupt after the fraudulent conveyance, the grantee is accountable for rents and profits subsequent to the act of bankruptcy, and from the time when the right of the creditors to call him to account accrued. Sands *v.* Codwise, 4 Johns. (N. Y.) 536, 4 Am. Dec. 305.

Presumption of possession.— Where it is shown that property fraudulently conveyed was actually turned over to the grantee, it will be presumed in the absence of evidence to the contrary that he thereafter remained in possession, so as to authorize a judgment for rents and profits. McGahan *v.* Crawford, 47 S. C. 566, 25 S. E. 123.

35. Parr *v.* Saunders, (Va. 1880) 11 S. E. 979 (holding the grantee liable for rents and profits prior to the time of the decree against him, where the creditors had already obtained judgments against the debtor); Blow *v.* Maynard, 2 Leigh (Va.) 29 (holding also that the grantee is not accountable for profits prior to a decree setting aside the conveyance, where the creditors were not judgment creditors).

Judgment or lien creditors and not creditors at large are the only creditors to whom the grantee must account for rents and profits prior to the time when a receiver is appointed. Loos *v.* Wilkinson, 110 N. Y. 195, 18 N. E. 99, 1 L. R. A. 250; Robinson *v.* Stewart, 10 N. Y. 189.

36. McGahan *v.* Crawford, 47 S. C. 566, 25 S. E. 123, holding that, where in such case the conveyance is set aside, the grantee is not chargeable with the annual rental value of the property while in possession, but merely with the amount of rents and profits actually received therefrom.

37. Morel *v.* Haller, 7 Ky. L. Rep. 122 (holding that where, for the purpose of defrauding his creditors, a debtor gave his stock of goods and business to his wife, who had been made a free trader, while the creditors could pursue the goods and subject them in the wife's hands, they could not subject the profits of the business made by her while conducting it); Clark *v.* Beecher, 154 U. S. 631, 14 S. Ct. 1184, 24 L. ed. 705; U. S. Trust Co. *v.* Sedgwick, 97 U. S. 304, 24 L. ed. 954 [*following* Phipps *v.* Sedgwick, 95 U. S. 3, 24 L. ed. 591] (holding that a judgment *in personam* cannot be rendered against her for rents, issues, and profits, and the use and occupation of the premises, on account of her disabilities). But see Heck *v.* Fisher, 78 Ky. 643; Popfinger *v.* Yutte, 49 N. Y. Super. Ct. 312. *Compare* Lawson *v.* Dunn, 66 N. J. Eq. 90, 57 Atl. 415, holding that the wife, grantee of a member of an insolvent partner-

and no fraud on her part is shown or circumstances exist from which such fraud may be implied or presumed.[38]

(3) Interest. Except where the fraud is merely constructive,[39] the fraudulent grantee is chargeable with interest upon the value of the property or its proceeds from the time he took possession or appropriated it to his own use,[40] and upon rents and profits received by him.[41]

(iii) *Reimbursement, Indemnity, and Subrogation* — (a) *Consideration and Expenditures* — (1) In Case of Constructive Fraud or Good Faith of Grantee. Where a conveyance is merely constructively fraudulent or where the grantee is not a participant in or chargeable with knowledge of the fraud of the grantor, such grantee is entitled to reimbursement and the conveyance may be allowed to stand as security for money or property actually paid or advanced by such grantee as a consideration for the conveyance,[42] or to pay off

ship, cannot claim rent for the property which had been rented to the firm, while firm debts remain unpaid.

38. *In re* Karstorp, 158 Pa. St. 30, 27 Atl. 739.

39. Priest *v.* Conklin, 38 Ill. App. 180.

40. *Alabama.*— Muskegon Valley Furniture Co. *v.* Phillips, 113 Ala. 314, 21 So. 822.

Iowa.— Risser *v.* Rathburn, 71 Iowa 113, 32 N. W. 198; Wilson *v.* Horr, 15 Iowa 489.

Nebraska.—Hargreaves *v.* Tennis, 63 Nebr. 356, 88 N. W. 486.

West Virginia.—Hinton *v.* Ellis, 27 W. Va. 422.

United States.— Backhouse *v.* Jett, 2 Fed. Cas. No. 710, 1 Brock. 500, liable for interest on price of property sold from time of demand by creditors.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 571.

A purchaser of a stock of goods who takes charge of the stock and also of the book-accounts is liable for interest on the amounts collected by him on such accounts from the dates of collection. Armour Packing Co. *v.* London, 53 S. C. 539, 31 S. E. 500.

41. Loos *v.* Wilkinson, 51 Hun (N. Y.) 74, 5 N. Y. Suppl. 410; Cowing *v.* Howard, 46 Barb. (N. Y.) 579.

42. *Alabama.*— Campbell *v.* Davis, 85 Ala. 56, 4 So. 140; Caldwell *v.* King, 76 Ala. 149; Gordon *v.* Tweedy, 71 Ala. 202. But see Wiley *v.* Knight, 27 Ala. 336.

Georgia.— Park *v.* Snyder, 78 Ga. 571, 3 S. E. 557 (holding, under Code, § 1955, the grantee to have a lien in the nature of a mortgage); Scott *v.* Winship, 20 Ga. 429.

Illinois.— Lobstein *v.* Lehn, 120 Ill. 549, 12 N. E. 68 [*affirming* 20 Ill. App. 254]; Phelps *v.* Curts, 80 Ill. 109.

Indiana.— Marmon *v.* White, 151 Ind. 445, 51 N. E. 930.

Iowa.— Stamy *v.* Laning, 58 Iowa 662, 12 N. W. 628.

Kentucky.—Wood *v.* Goff, 7 Bush 59; Short *v.* Tinsley, 1 Metc. 397, 71 Am. Dec. 482; Botts *v.* Botts, 74 S. W. 1093, 25 Ky. L. Rep. 300; Chinn *v.* Curtis, 71 S. W. 923, 24 Ky. L. Rep. 1563; Smiser *v.* Stevens-Wolford Co., 45 S. W. 357, 20 Ky. L. Rep. 501; Neighbors *v.* Holt, 14 Ky. L. Rep. 237, holding that while a wife could not be compelled to perform her agreement to pay her husband's indebtedness, which was the consideration for a sale and conveyance to her of all his property, still, after she had performed it in part, the property could not be taken from her without reimbursing her. See also Diamond Coal Co. *v.* Carter Dry Goods Co., 49 S. W. 438, 20 Ky. L. Rep. 1444. *Compare* Bradley *v.* Buford, Ky. Dec. 12, 2 Am. Dec. 703.

Maine.— Gardiner Bank *v.* Wheaton, 8 Me. 373.

Maryland.— Cone *v.* Cross, 72 Md. 102, 19 Atl. 391; Hinkle *v.* Wilson, 53 Md. 287. See Williams *v.* Savage Mfg. Co., 3 Md. Ch. 418.

Massachusetts.—Thomas *v.* Beals, 154 Mass. 51, 27 N. E. 1004, holding him entitled to receive back the price paid with interest from time of payment.

Michigan.— Walker *v.* Cady, 106 Mich. 21, 63 N. W. 1005; Joslin *v.* Goebel, 90 Mich. 71, 51 N. W. 354 (holding that where a conveyance is made by a husband to his wife in performance of a post-nuptial agreement, and for moneys loaned and advanced by the wife to her husband, upon the conveyance being set aside, she should be charged with the difference between her loans and advances, with interest, and the value of the property, and with moneys paid by her husband for her, and that the total amount decreed against her should be made a lien on the land conveyed); Cutcheon *v.* Buchanan, 88 Mich. 594, 50 N. W. 756; Herschfeldt *v.* George, 6 Mich. 456.

Minnesota.— Leqve *v.* Stoppel, 64 Minn. 74, 66 N. W. 208; Thompson *v.* Bickford, 19 Minn. 17.

Nebraska.— Farmers', etc., Nat. Bank *v.* Mosher, (1903) 94 N. W. 1003 [*modifying* 63 Nebr. 130, 88 N. W. 552]; Connecticut River Sav. Bank *v.* Barrett, 33 Nebr. 709, 50 N. W. 1134.

New Jersey.— O'Connor *v.* Williams, (Ch. 1902) 53 Atl. 550; Kinmouth *v.* White, (Ch. 1900) 47 Atl. 1; Withrow *v.* Warner, 56 N. J. Eq. 795, 35 Atl. 1057, 40 Atl. 721, 67 Am. St. Rep. 501.

New York.— Robinson *v.* Stewart, 10 N. Y. 189; Pond *v.* Comstock, 20 Hun 492; Van Wyck *v.* Baker, 16 Hun 168; Bigelow *v.* Ayrault, 46 Barb. 143; Warren *v.* Wilder, 12

encumbrances,[43] or the grantor's debts,[44] the grantee in such cases being subrogated to the rights of the creditors whom he has paid;[45] or other equities being equal, the conveyance will be allowed to stand as security for a *bona fide* debt due to the grantee from the grantor.[46]

N. Y. St. 757. See Varnum *v.* Bolton Shoe Co., 84 N. Y. Suppl. 967.

Oregon.— Wright *v.* Craig, 40 Oreg. 191, 66 Pac. 807; Scoggin *v.* Schloath, 15 Oreg. 380, 15 Pac. 635, consideration repaid with interest.

South Carolina.— Anderson *v.* Fuller, McMull. Eq. 27, 36 Am. Dec. 290; Parker *v.* Holmes, 2 Hill Eq. 95; Brown *v.* McDonald, 1 Hill Eq. 297; McMeekin *v.* Edmonds, 1 Hill Eq. 288, 26 Am. Dec. 203.

Tennessee.— Hartfield *v.* Simmons, 12 Heisk. 253; Turbeville *v.* Gibson, 5 Heisk. 565; Alley *v.* Connell, 3 Head 578; Rosenbaum *v.* Davis, (Ch. App. 1898) 48 S. W. 706; Carpenter *v.* Scales, (Ch. App. 1897) 48 S. W. 249.

Vermont.— Foster *v.* Foster, 56 Vt. 540.

Virginia.— Flynn *v.* Jackson, 93 Va. 341, 25 S. E. 1; Rixey *v.* Detrick, 85 Va. 42, 6 S. E. 615.

West Virginia.— Kimble *v.* Wotring, 48 W. Va. 412, 37 S. E. 606; Burton *v.* Gibson, 32 W. Va. 406, 9 S. E. 255; Livesay *v.* Beard, 22 W. Va. 585.

Wisconsin.— Kickbusch *v.* Corwith, 108 Wis. 634, 85 N. W. 148.

United States.— U. S. *v.* Griswold, 8 Fed. 496, 7 Sawy. 296.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 578, 582, 594.

A sale of personalty without a transfer of possession will be treated in equity as constructive fraud and held good to the amount of the consideration paid. Short *v.* Tinsley, 1 Metc. (Ky.) 397, 71 Am. Dec. 482.

Where an antenuptial settlement is declared fraudulent as to the husband's creditors a portion of the wife's fortune suffered to go into the husband's possession on the faith of the settlement should be paid to her and the settled realty to stand charge of its payment. Davidson *v.* Graves, Bailey Eq. (S. C.) 268. See Davidson *v.* Graves, Riley Eq. (S. C.) 232.

43. *Alabama.*— Potter *v.* Gracie, 58 Ala. 303, 29 Am. Rep. 748.

California.— Ackerman *v.* Merle, 137 Cal. 169, 69 Pac. 983, mortgage.

Iowa.— Garner *v.* Philips, 35 Iowa 597, prior mortgage.

Minnesota.— Leqve *v.* Stoppel, 64 Minn. 74, 66 N. W. 208.

New Jersey.— Costello *v.* Prospect Brewing Co., 52 N. J. Eq. 557, 30 Atl. 682.

New York.— Lore *v.* Dierkes, 51 N. Y. Super. Ct. 144, 16 Abb. N. Cas. 47.

South Carolina.— Fulmore *v.* Burrows, 2 Rich. Eq. 95; Anderson *v.* Fuller, McMull. Eq. 27, 36 Am. Dec. 290.

West Virginia.— Kimble *v.* Wotring, 48 W. Va. 412, 37 S. E. 606; Herold *v.* Barlow, 47 W. Va. 750, 36 S. E. 8.

Wisconsin.— Kickbusch *v.* Corwith, 108 Wis. 634, 85 N. W. 148.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 578, 582.

44. Diamond Coal Co. *v.* Carter Dry Goods Co., 49 S. W. 438, 20 Ky. L. Rep. 1444; Leqve *v.* Stoppel, 64 Minn. 74, 66 N. W. 208; Pond *v.* Comstock, 20 Hun (N. Y.) 492; Wood *v.* Hunt, 38 Barb. (N. Y.) 302; New York Public Library *v.* Tilden, 29 Misc. (N. Y.) 169, 79 N. Y. Suppl. 161. See Ogle *v.* Lichteberger, 1 Am. L. Reg. (Pa.) 121; Clements *v.* Nicholson, 6 Wall. (U. S.) 299, 18 L. ed. 786.

Where a wife relinquishes her interest in property, or assumes the payment of debts due from her husband, so as to make them charges on her separate estate, on the faith of a post-nuptial settlement which is void as to the husband's creditors, the settlement will be held good to the extent of a just compensation for the interest she may have parted with or of the debts which she has assumed to pay. Flynn *v.* Jackson, 93 Va. 341, 25 S. E. 1.

The grantee can prove a purchased claim only for the amount which he paid for it. Armour Packing Co. *v.* London, 53 S. C. 539, 31 S. E. 500.

If he has paid no consideration for the conveyance, the mere subsequent voluntary payment or purchase by him of existing debts or obligations against the grantor does not create a presumption in favor of his good faith. Wood *v.* Hunt, 38 Barb. (N. Y.) 302.

45. Duke *v.* Pigman, 110 Ky. 756, 62 S. W. 867, 23 Ky. L. Rep. 209; Arnold *v.* Haschiedt, 69 Minn. 101, 71 N. W. 829; Robinson *v.* Stewart, 10 N. Y. 189; Lillianthal *v.* Lesser, 102 N. Y. App. Div. 500, 92 N. Y. Suppl. 619; Kimble *v.* Wotring, 48 W. Va. 412, 37 S. E. 606. And see cases cited in preceding notes.

46. *Alabama.*— Gilkey *v.* Pollock, 82 Ala. 503, 3 So. 99; Price *v.* Masterson, 35 Ala. 483, holding that where a trust deed is fraudulent as to creditors, the trustee may retain the property to satisfy a *bona fide* debt to himself if he was ignorant of the fraud.

Illinois.— Lobstein *v.* Lehn, 120 Ill. 549, 12 N. E. 68 [*affirming* 20 Ill. App. 254]; Walker *v.* Matthews, 58 Ill. 196; Byrns *v.* Shaw, 45 Ill. App. 281.

Iowa.— Kerr *v.* Kennedy, 119 Iowa 239, 93 N. W. 353 (holding also that the grantee could not retain the property for debts due by the grantor's wife); Fuller *v.* Griffith, 91 Iowa 632, 60 N. W. 247.

Kentucky.— Other equities being equal, a court of equity will not divest a creditor of a conveyance that has been transferred to him by an insolvent debtor for the purpose of benefiting another creditor of the insolvent until all his just claims against the insolvent are satisfied (Swigert *v.* Commonwealth Bank, 17 B. Mon. 268), unless such

(2) In Case of Actual Fraud. But where the conveyance is founded in actual fraud, the grantee as a general rule is regarded as a *particeps criminis*, and is not entitled to reimbursement or to have the conveyance stand for any purpose of reimbursement or indemnity, either for consideration or advances paid or liabilities incurred.[47] In such case the conveyance will not, as a general rule, be allowed to stand as security either for a *bona fide* indebtedness of the grantor to

claims were created subsequent to notice of the equity of the creditor seeking to subject it (Swigert *v.* Commonwealth Bank, *supra*).

Louisiana.— See Wang *v.* Finnerty, 32 La. Ann. 94.

Maine.— See Augusta Sav. Bank *v.* Crossman, (1886) 7 Atl. 396.

New Jersey.— Merchants' Bldg., etc., Assoc. *v.* Barber, (Ch. 1894) 30 Atl. 865.

New York.— Brown *v.* Chubb, 135 N. Y. 174, 31 N. E. 1030 [*reversing* 8 N. Y. Suppl. 61] (may hold land as security for debt honestly due); Nichols *v.* Nichols, 40 Misc. 9, 81 N. Y. Suppl. 156.

South Carolina.— Anderson *v.* Fuller, 1 McMull. Eq. 27, 36 Am. Dec. 290, where grantee is entitled to preference in payment as the oldest execution creditor.

Where certain conveyances free from fraud have been made as security, a decree for the sale of the lands thus pledged, and for an account, when no redemption is sought, and no payment of the debt secured is offered, cannot be sustained. Cole *v.* Lee, 45 N. J. Eq. 779, 18 Atl. 854.

Where the grantee procures the assignment of an outstanding mortgage, he is entitled to its payment out of the property, but he is not entitled to hold the entire property under the mortgage so assigned, if less than the value of the property. Wells *v.* White, 142 Mass. 518, 8 N. E. 442.

Where part of the indebtedness is legal and part affected by a legal infirmity the conveyance may be allowed to stand as security for the legal part. Sanford *v.* Wheeler, 13 Conn. 165, 33 Am. Dec. 389.

Where an absolute deed received by a creditor in good faith as security is held to be a mortgage, the creditor should be adjudged to have a lien upon the premises for the amount of the debt secured. Lazarus *v.* Rosenberg, 70 N. Y. App. Div. 105, 75 N. Y. Suppl. 11. See Popfinger *v.* Yutte, 102 N. Y. 38, 6 N. E. 259 [*reversing* 49 N. Y. Super. Ct. 312].

A debt due from the grantor as to which the grantee stood on the footing of creditors generally should not be allowed priority. Lore *v.* Dierkes, 51 N. Y. Super. Ct. 144, 16 Abb. N. Cas. 47.

47. *Alabama.*— Pritchett *v.* Jones, 87 Ala. 317, 6 So. 75; Campbell *v.* Davis, 85 Ala. 56, 4 So. 140; Borland *v.* Walker, 7 Ala. 269. See Tickner *v.* Wiswall, 9 Ala. 305.

Arkansas.— Millington *v.* Hill, 47 Ark. 301, 1 S. W. 547.

California.— Burke *v.* Koch, 75 Cal. 356, 17 Pac. 228; Swinford *v.* Rogers, 23 Cal. 233; Goodwin *v.* Hammond, 13 Cal. 168, 73 Am. Dec. 574.

Illinois.— Biggins *v.* Lambert, 213 Ill. 625, 73 N. E. 371, 104 Am. St. Rep. 238; Head *v.* Harding, 166 Ill. 353, 46 N. W. 890 [*affirming* 62 Ill. App. 302] (advances subsequently made to the grantor); Beidler *v.* Crane, 135 Ill. 92, 25 N. E. 655, 25 Am. St. Rep. 349; Lobstein *v.* Lehn, 120 Ill. 549, 12 N. E. 68 [*affirming* 20 Ill. App. 254].

Indiana.— Bunch *v.* Hart, 138 Ind. 1, 37 N. E. 537; Seivers *v.* Dickover, 101 Ind. 495, even though the amount paid went to *bona fide* creditors.

Iowa.— Chapman *v.* Ransom, 44 Iowa 377.

Kentucky.— Wood *v.* Goff, 7 Bush 59. See Lyons *v.* Lancaster, 14 S. W. 405, 12 Ky. L. Rep. 434.

Louisiana.— By statute in this state (Civ. Code, art. 1977) a purchaser in bad faith will not be entitled to a restitution of the consideration unless he proves that it inured to the benefit of the creditors, by adding to the amount applicable to the payment of their debts. Chaffe *v.* Gill, 43 La. Ann. 1054, 10 So. 361; Mobile Bank *v.* Harris, 6 La. Ann. 811; Barker *v.* Phillips, 11 Rob. 199. See Metropolitan Bank *v.* Aarons-Mendelsohn Co., 50 La. Ann. 1047, 24 So. 125.

Maryland.— Chatterton *v.* Mason, 86 Md. 236, 37 Atl. 960, holding the grantee not entitled to credit for money paid the grantor for counsel fees, nor for money paid for the grantor's living expenses.

Massachusetts.—Lamb *v.* McIntire, 183 Mass. 367, 67 N. E. 320; Holland *v.* Cruft, 20 Pick. 321.

Michigan.— Morley *v.* Stringer, 133 Mich. 690, 95 N. W. 978; How *v.* Camp, Walk. 427.

Minnesota.— Leqve *v.* Stoppel, 64 Minn. 74, 66 N. W. 208; Byrnes *v.* Volz, 53 Minn. 110, 54 N. W. 942; Thompson *v.* Bickford, 19 Minn. 17.

Mississippi.— McLean *v.* Letchford, 60 Miss. 169 (holding that where a conveyance at a sale under a deed of trust is set aside as fraudulent as to creditors, the fraudulent grantee is not entitled to reimbursement for the amount he paid to redeem from the trust deed, although that was a valid encumbrance on the debtor's property); Stovall *v.* Farmers,' etc., Bank, 8 Sm. & M. 305, 47 Am. Dec. 85.

Missouri.— Allen *v.* Berry, 50 Mo. 90; Potter *v.* Stevens, 40 Mo. 229; Lampkin *v.* People's Nat. Bank, 98 Mo. App. 239, 244; McNichols *v.* Richter, 13 Mo. App. 515.

Nebraska.— See Farmers', etc., Nat. Bank *v.* Mosher, (1903) 94 N. W. 1003.

New Jersey.— McCanless *v.* Smith, 51 N. J. Eq. 505, 25 Atl. 211. See Englebrecht *v.* Mayer, (Ch. 1889) 17 Atl. 1081.

the grantee;[48] or for claims existing against the grantor, and purchased or paid by the grantee;[49] or for claims created subsequent to notice of the equity of a creditor seeking to subject the property;[50] or for expenditures made by the grantee to protect his title.[51] This rule, however, is not an inflexible one and, although the circumstances are so suspicious that the court does not feel warranted in allowing the conveyance to stand, yet where the evidence of fraud is not clear or conclusive, the court may allow the conveyance to stand as security for the reimbursement of the grantee,[52] at least for money expended by him for the

New York.— Hamilton Nat. Bank *v.* Halsted, 134 N. Y. 520, 31 N. E. 900, 30 Am. St. Rep. 693 [*modifying* 56 Hun 530, 9 N. Y. Suppl. 852]; Baldwin *v.* Short, 125 N. Y. 553, 26 N. E. 928; Davis *v.* Leopold, 87 N. Y. 620 (conveyance to wife who had knowledge of the fraud); Weiser *v.* Kling, 38 N. Y. App. Div. 266, 57 N. Y. Suppl. 48 [*affirming* 5 N. Y. Annot. Cas. 196, 53 N. Y. Suppl. 578]; Union Nat. Bank *v.* Warner, 12 Hun 306; Sands *v.* Codwise, 4 Johns. 536, 4 Am. Dec. 305.

North Dakota.— Daisy Roller Mills *v.* Ward, 6 N. D. 317, 70 N. W. 271.

Oregon.— Sabin *v.* Anderson, 31 Oreg. 487, 49 Pac. 870.

Pennsylvania.— Kohl *v.* Sullivan, 140 Pa. St. 35, 21 Atl. 247, money paid to release prior liens.

South Carolina.— Pettus *v.* Smith, 4 Rich. Eq. 197 (holding that where a prior mortgage is paid by the grantee for the purpose of forwarding the fraud, it will not be reimbursed on setting aside the conveyance); Dickinson *v.* Way, 3 Rich. Eq. 412; Bowie *v.* Free, 3 Rich. Eq. 403; Parker *v.* Holmes, 2 Hill Eq. 95; Miller *v.* Tollison, Harp. Eq. 145, 14 Am. Dec. 712.

Tennessee.— Shepherd *v.* Woodfolk, 10 Lea 593; Alley *v.* Connell, 3 Head 578; Brooks *v.* Caughran, 3 Head 464; Brown *v.* Morristown Co-Operative Stove Co., (Ch. App. 1897) 42 S. W. 161.

Virginia.— Hazlewood *v.* Forrer, 94 Va. 703, 27 S. E. 507.

West Virginia.— Timms *v.* Timms, 54 W. Va. 414, 46 S. E. 141; Webb *v.* Ingham, 29 W. Va. 389, 1 S. E. 816; Kanawha Valley Vank *v.* Wilson, 25 W. Va. 242; Livesay *v.* Beard, 22 W. Va. 585.

Wisconsin.— Bank of Commerce *v.* Fowler, 93 Wis. 241, 67 N. W. 423; Sommermeyer *v.* Schwartz, 89 Wis. 66, 61 N. W. 311; Ferguson *v.* Hillman, 55 Wis. 181, 12 N. W. 389.

United States.— Milwaukee, etc., R. Co. *v.* Soutter, 13 Wall. 517, 20 L. ed. 543; Lynch *v.* Burt, 132 Fed. 417, 67 C. C. A. 305; Burt *v.* Gotzian, 102 Fed. 937, 43 C. C. A. 59; Bean *v.* Smith, 2 Fed. Cas. No. 1,174, 2 Mason 252.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 578, 582; and *supra*, VII, C.

That a wife as a voluntary grantee of her husband has spent large sums in paying off mortgages on the land and improving it does not entitle her to invoke the aid of the doctrine of estoppel against an antecedent creditor who was kept in entire ignorance of the conveyance. Annin *v.* Annin, 24 N. J. Eq. 184.

48. *Alabama.*— Hall *v.* Heydon, 41 Ala. 242; Price *v.* Masterson, 35 Ala. 483.

Iowa.— Rosenheim *v.* Flanders, 114 Iowa 291, 86 N. W. 293.

New Hampshire.— Bailey *v.* Ross, 20 N. H. 302.

New York.— Manderville *v.* Avery, 124 N. Y. 376, 26 N. E. 951, 21 Am. St. Rep. 678; Woods *v.* Van Brunt, 6 N. Y. App. Div. 220, 39 N. Y. Suppl. 896; Baldwin *v.* June, 68 Hun 284, 22 N. Y. Suppl. 852.

Wisconsin.— Sommermeyer *v.* Schwartz, 89 Wis. 66, 61 N. W. 311.

A mortgage which is void as in fraud of creditors, because founded in part upon a pretended debt will not be sustained to the extent of the honest debt as against creditors, although their claims may have been created since the filing of the mortgage, and with knowledge of its existence. Levy *v.* Hamilton, 68 N. Y. App. Div. 277, 74 N. Y. Suppl. 159.

49. Byrnes *v.* Valz, 53 Minn. 110, 54 N. W. 942; Thompson *v.* Bickford, 19 Minn. 17; Phillips *v.* Chamberlain, 61 Miss. 740; McLean *v.* Letchford, 60 Miss. 169; Wood *v.* Hunt, 38 Barb. (N. Y.) 302. See Armour Packing Co. *v.* London, 53 S. C. 539, 31 S. E. 500.

50. Swigert *v.* Kentucky Bank, 17 B. Mon. (Ky.) 268.

51. Lynch *v.* Burt, 132 Fed. 417, 67 C. C. A. 305.

52. Smith *v.* Grimes, 43 Iowa 356; Leqve *v.* Stoppel, 64 Minn. 74, 66 N. W. 203; Van Keuren *v.* McLaughlin, 19 N. J. Eq. 187 (holding that where land is conveyed to secure a *bona fide* debt, and subsequently the grantor and grantee fraudulently agree that the conveyance shall be absolute, whereby other creditors would be defrauded, the grantee will be allowed to retain his priority to the amount of his bill, after which the property will be subject to claims of the creditors); Bates *v.* McConnell, 31 Fed. 588. See Barrow *v.* Bailey, 5 Fla. 9. And see *supra*, XIII, A, 4, a, (III), (A), (1).

The value of property given in exchange for the property fraudulently conveyed may be allowed the grantee. Baldwin *v.* June, 68 Hun (N. Y.) 284, 22 N. Y. Suppl. 852.

Where the conveyance is to the debtor's wife, in part consideration for which she gives her separate estate, the conveyance should be allowed to stand as security for the value of such separate estate. Harder *v.* Rohn, 43 Ill. App. 365; Hull *v.* Deering,

benefit of the property, as by paying off encumbrances,[53] or other debts against the grantor.[54]

(B) *Purchase of Judgment Against Grantor.* Where a grantee purchases a judgment against his grantor, a junior judgment creditor cannot disturb the grantee's title without paying or offering to pay such judgment.[55]

(C) *Care of Property and Expenses in General.* A fraudulent grantee on accounting for the use and occupation of property conveyed to him and also for the rents and profits thereof is as a general rule entitled to credit for such sums as he may in good faith have paid for taxes,[56] interest on encumbrances,[57] necessary

80 Md. 424, 31 Atl. 416; Hinkle *v.* Wilson, 53 Md. 287. See McKenzie *v.* Salyer, 43 S. W. 450, 19 Ky. L. Rep. 1414.

Where the grantee has exchanged the property and that received in exchange is more valuable, and he has paid the difference, equity will give him a lien for his reimbursement. Abney *v.* Kingsland, 10 Ala. 355, 44 Am. Dec. 491.

Where in an action on a bond given for a larger sum than was due, in order to defraud creditors, such creditors defended as to the amount due under a plea of payment, although the bond was wholly void as to creditors, yet on such plea the obligee is entitled to a verdict for the sum due. Numan *v.* Kapp, 5 Binn. (Pa.) 73.

53. Smith *v.* Grimes, 43 Iowa 356; Leqve *v.* Stoppel, 64 Minn. 74, 66 N. W. 208; Costello *v.* Prospect Brewing Co., 52 N. J. Eq. 557, 30 Atl. 682; Hamilton Nat. Bank *v.* Halsted, 134 N. Y. 520, 31 N. E. 900, 30 Am. St. Rep. 693 [*modifying* 56 Hun 530, 9 N. Y. Suppl. 852]. And see *supra*, XIII, A, 4, a, (III), (A), (1).

54. *Illinois.*— Steere *v.* Hoagland, 50 Ill. 377, holding that he should receive credit for notes and acceptances given to *bona fide* creditors.

Kentucky.— Diamond Coal Co. *v.* Carter Dry Goods Co., 49 S. W. 438, 20 Ky. L. Rep. 1444.

Maryland.— Chatterton *v.* Mason, 86 Md. 236, 37 Atl. 960, payment of claim of attaching creditor.

Massachusetts.— Ripley *v.* Severance, 6 Pick. 474, 17 Am. Dec. 397, holding that where a surety receives from his principal property to secure him against his liabilities, and the principal subsequently makes a settlement with the surety, in which he transfers to the surety his whole interest in the property for a grossly inadequate consideration, the settlement is fraudulent against creditors of the principal, but the surety may deduct from the proceeds all payments which he has made on account of his liabilities as surety and all amounts which he is still liable to pay.

Michigan.— How *v.* Camp, Walk. 427.

Wisconsin.— Croker *v.* Huntzicker, 113 Wis. 181, 88 N. W. 232.

United States.— Voorhees *v.* Blanton, 83 Fed. 234.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 578, 582.

The grantee should be credited with the pro rata share to which creditors whom he has paid would be entitled if the value of the property conveyed had been distributed among all the creditors. Chatterton *v.* Mason, 86 Md. 236, 37 Atl. 960.

55. Boggs *v.* Douglass, 100 Iowa 385, 69 N. W. 689; Fordyce *v.* Hicks, 76 Iowa 41, 40 N. W. 79; Brown *v.* Chubb, 135 N. Y. 174, 31 N. E. 1030 [*reversing* 8 N. Y. Suppl. 61]; Daisy Roller Mills *v.* Ward, 6 N. D. 317, 70 N. W. 271.

The purchase of the judgment admits the validity of the lien, which renders the trial of the action unnecessary. Boggs *v.* Douglass, 100 Iowa 385, 69 N. W. 689.

Subrogation.— The assignment to the grantee of a judgment and mortgage constituting a lien on the property entitles him to be subrogated to the rights of the assignor, notwithstanding the fraud in his conveyance. Phillips *v.* Chamberlain, 61 Miss. 740.

56. *Alabama.*— Gordon *v.* Tweedy, 74 Ala. 232, 49 Am. Rep. 813; Potter *v.* Gracie, 58 Ala. 303, 29 Am. Rep. 748, where the conveyance is not tainted with actual fraud.

Kentucky.— Bartram *v.* Burns, 43 S. W. 248, 686, 19 Ky. L. Rep. 1295.

Massachusetts.— Lamb *v.* McIntire, 183 Mass. 367, 67 N. E. 320.

Michigan.— How *v.* Camp, Walk. 427.

New Jersey.— Burne *v.* Partridge, 61 N. J. Eq. 434, 48 Atl. 770.

New York.— Loos *v.* Wilkinson, 113 N. Y. 485, 21 N. E. 392, 10 Am. St. Rep. 495, 4 L. R. A. 353 [*reversing* 51 Hun 74, 55 N. Y. Suppl. 410].

Ohio.— Bomberger *v.* Turner, 13 Ohio St. 263, 82 Am. Dec. 438.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 579.

57. Burne *v.* Partridge, 61 N. J. Eq. 434, 48 Atl. 770; Loos *v.* Wilkinson, 113 N. Y. 485, 21 N. E. 392, 10 Am. St. Rep. 495, 4 L. R. A. 353 [*reversing* 51 Hun 74, 55 N. Y. Suppl. 410] (holding, however, that he cannot have credit for interest paid at a rate higher than the legal rate which the encumbrance could have demanded); Brown *v.* Townsend, 8 N. Y. Suppl. 61. But see Musselman *v.* Kent, 33 Ind. 452; Cooper *v.* Friedman, 23 Tex. Civ. App. 585, 57 S. W. 581, in both of which cases there was fraud in fact.

Interest paid on a senior mortgage after a decree declaring the grantee to be a fraudulent transferee of the property cannot be recovered by him in a suit to foreclose a junior mortgage. Weiser *v.* Weisel, 53 N. Y. Suppl. 578, 5 N. Y. Annot. Cas. 196.

repairs,[58] insurance,[59] except where the insurance is effected in his own name and for his own benefit,[60] and any other necessary expenses;[61] and this rule has been held to apply even though the grantee was a guilty participant in the fraud.[62] He may also be credited with expenditures shown to have been made in collecting choses in action transferred,[63] and where the property is large and valuable with commissions paid by him for collection of rents.[64] If the conveyance is constructively fraudulent the grantee is entitled to reasonable compensation for his services in taking care of the property,[65] but not where the conveyance was fraudulent in fact.[66]

(D) *Compensation For Improvements.* A fraudulent grantee in possession is not entitled as against creditors to reimbursement for permanent improvements made by him on the property,[67] unless he was in *bona fide* possession without any intention of participating in the fraud, and made the improvements in good faith.[68]

58. Loos *v.* Wilkinson, 113 N. Y. 485, 21 N. E. 392, 10 Am. St. Rep. 495, 4 L. R. A. 353 [*reversing* 51 Hun 74, 55 N. Y. Suppl. 410]; Brown *v.* Townsend, 8 N. Y. Suppl. 61.

59. Potter *v.* Gracie, 58 Ala. 303, 29 Am. Rep. 748.

60. Loos *v.* Wilkinson, 113 N. Y. 485, 21 N. E. 392, 10 Am. St. Rep. 495, 4 L. R. A. 353 [*reversing* 51 Hun 74, 55 N. Y. Suppl. 410]. See Cooper *v.* Friedman, 23 Tex. Civ. App. 585, 57 S. W. 581.

61. Gardiner Bank *v.* Wheaton, 8 Me. 373; Loos *v.* Wilkinson, 113 N. Y. 485, 21 N. E. 392, 10 Am. St. Rep. 495, 4 L. R. A. 353 [*reversing* 51 Hun 74, 55 N. Y. Suppl. 410]; Brown *v.* Townsend, 8 N. Y. Suppl. 61; Lore *v.* Dierkes, 51 N. Y. Super. Ct. 144, 16 Abb. N. Cas. 47; Kickbusch *v.* Corwith, 108 Wis. 634, 85 N. W. 148.

In Oregon under Hill Code, § 2874, which makes family expenses chargeable on the property of both husband and wife, a wife who takes a voluntary conveyance from her husband, and pays a sum which had accrued as family expenses before the conveyance to her, is entitled to have the same paid to her out of the first proceeds of the sale of the land at the suit of a judgment creditor of the husband, attacking the conveyance for fraud. Davis *v.* Davis, 20 Oreg. 78, 25 Pac. 140.

62. Loos *v.* Wilkinson, 113 N. Y. 485, 21 N. E. 392, 10 Am. St. Rep. 495, 4 L. R. A. 353 [*reversing* 51 Hun 74, 5 N. Y. Suppl. 410]. See How *v.* Camp, Walk. (Mich.) 427. But see Strike's Case, 1 Bland (Md.) 57; Cooper *v.* Friedman, 23 Tex. Civ. App. 585, 57 S. W. 581; Burt *v.* Gotzian, 102 Fed. 937, 43 C. C. A. 59.

63. Muskegon Valley Furniture Co. *v.* Phillips, 113 Ala. 314, 21 So. 822; Saugerties Bank *v.* Mack, 35 N. Y. App. Div. 398, 54 N. Y. Suppl. 950.

64. Loos *v.* Wilkinson, 113 N. Y. 485, 21 N. E. 392, 10 Am. St. Rep. 495, 4 L. R. A. 353 [*reversing* 51 Hun 74, 55 N. Y. Suppl. 410].

65. Noyes *v.* Brent, 18 Fed. Cas. No. 10,372, 5 Cranch C. C. 551.

Attorney's fees.— Where the assignment of a claim for personal injuries to an attorney is constructively fraudulent as to the assignor's creditors, the attorney is entitled to reasonable compensation for his services, in collecting the claim. Colgan *v.* Jones, 44 N. J. Eq. 274, 18 Atl. 55.

66. French *v.* Commercial Nat. Bank, 199 Ill. 213, 65 N. E. 252 [*affirming* 97 Ill. App. 533], holding that a purchaser at a sheriff's sale under a fraudulent judgment entered for the purpose of defrauding creditors cannot claim compensation as trustee when required to account for the property so purchased.

67. Gordon *v.* Tweedy, 74 Ala. 232, 49 Am. Rep. 813; Strike *v.* McDonald, 2 Harr. & G. (Md.) 192 [*affirming* 1 Bland 57]; Shand *v.* Hanley, 71 N. Y. 319; Sherazee *v.* Shoastry, 6 Moore Ind. App. 27, 19 Eng. Reprint 11, 8 Moore P. C. 90, 14 Eng. Reprint 35. See Livermore *v.* Boutelle, 11 Gray (Mass.) 217, 71 Am. Dec. 708 (holding a tenant with notice of the fraud not entitled to such improvements under Rev. St. c. 101, unless he files a claim therefor before verdict in favor of the party recovering from him); Annin *v.* Annin, 24 N. J. Eq. 184; Milwaukee, etc., R. Co. *v.* Soutter, 13 Wall. (U. S.) 517, 20 L. ed. 543. But see How *v.* Camp, Walk. (Mich.) 427. After a judgment creditor has docketed his judgment, grantees of the judgment debtor put improvements on the lands at their peril. Flanary *v.* Kane, 102 Va. 547, 46 S. E. 312, 681.

Where a trustee uses his own money in making improvements on the trust property for the purpose of placing it beyond the reach of his individual creditors, equity will not interfere further than to protect the trust property. Lathrop *v.* Gilbert, 10 N. J. Eq. 344.

A subsequent creditor is not entitled to the benefit of improvements made by the fraudulent grantee so far as the value of the property is actually enhanced by such improvements. King *v.* Wilcox, 11 Paige (N. Y.) 589.

Expense of preparing property for market will not be allowed the fraudulent grantee. Saugerties Bank *v.* Mack, 35 N. Y. App. Div. 398, 54 N. Y. Suppl. 950.

Improvements made pending action not allowed.— Gordon *v.* Tweedy, 74 Ala. 232, 49 Am. Rep. 813; Grandin *v.* Chicago First Nat. Bank, (Nebr. 1904) 98 N. W. 70.

68. *Alabama.*— Gordon *v.* Tweedy, 74 Ala. 232, 49 Am. Rep. 813.

Illinois.— Walker *v.* Matthews, 58 Ill. 196.

And on the other hand he is not chargeable with any increase of rent by reason of improvements for which he is not allowed reimbursement.[69]

(IV) *TITLE SUBSEQUENTLY ACQUIRED BY GRANTEE.* Where a fraudulent grantee purchases the property in good faith at a sale under an execution constituting a paramount lien or acquires it from one purchasing at such sale, his title thus acquired will prevail over subsequent creditors of the original grantor.[70] But a reconveyance to him by one to whom he had transferred the property for the purpose of carrying out the fraudulent design does not strengthen his title as against the original grantor's creditors, whether their debts occurred prior or subsequent to the fraudulent conveyances.[71]

(V) *RIGHTS OF GRANTEES AS BONA FIDE PURCHASERS*—(A) *In General.* Until a debtor's creditors have acquired some lien upon his property he may dispose of it and give a good title to *bona fide* purchasers without regard to such creditors,[72] even to a creditor;[73] and where a grantee pays an adequate and valuable consideration for the property without notice of a fraudulent intent on the part of his grantor to place the property beyond the reach of his creditors,[74] or where, although originally a fraudulent grantee, he subsequently acquires title to

Kentucky.— Rucker *v.* Abell, 8 B. Mon. 566, 48 Am. Dec. 406; Bartram *v.* Burns, 43 S. W. 248, 686, 19 Ky. L. Rep. 1295.

Maryland.— Williams *v.* Snebly, 92 Md. 9, 48 Atl. 43; Strike *v.* McDonald, 2 Harr. & G. 191 [*affirming* 1 Bland 57].

New Jersey.— Borden *v.* Doughty, 42 N. J. Eq. 314, 3 Atl. 352.

Ohio.— Romberger *v.* Turner, 13 Ohio St. 263, 82 Am. Dec. 438.

Pennsylvania.— Skiles' Appeal, 110 Pa. St. 248, 20 Atl. 722.

Texas.— See McWilliams *v.* Thomas, (Civ. App. 1903) 74 S. W. 596, holding that where the grantee made no improvements on the land within a year before the institution of a suit to vacate, except on the part which was the grantor's homestead, no allowance for improvements could be made to the grantee on cancellation of the conveyance.

Wisconsin.— Evans *v.* Laughton, 69 Wis. 138, 33 N. W. 573.

United States.— Corwine *v.* Thompson Nat. Bank, 105 Fed. 196, 44 C. C. A. 442. See Voorhees *v.* Blanton, 89 Fed. 885, 32 C. C. A. 384 [*affirming* 83 Fed. 234], improvements made by grantee's partner who had no connection with the fraud.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 580.

69. Phillips *v.* Chamberlain, 61 Miss. 740.

70. Seals *v.* Pheiffer, 77 Ala. 278; Dimock *v.* Ridgeway, 169 Mass. 526, 48 N. E. 338.

71. Brown *v.* Niles, 16 Ill. 385.

72. McMahan *v.* Morrison, 16 Ind. 172, 79 Am. Dec. 418. See Gillet *v.* Phelps, 12 Wis. 392. See also *supra*, VII, B; XIII, A.

73. Wilson *v.* Fawkner, 38 Ill. App. 438 (holding that a debtor may sell his goods to pay his debts, and a *bona fide* creditor taking them in discharge of his debt for a fair consideration is entitled to hold them as against other creditors, although they lose their whole debt thereby); Windmiller *v.* Chapman, 38 Ill. App. 276. See *supra*, VIII; XI.

74. *Alabama.*— Taylor *v.* Huntsville Branch Bank, 21 Ala 581, conveyance consummated before lien of execution attached, and no fraud shown in transaction.

Arkansas.—Massie *v.* Enyart, 32 Ark. 251; Galbreath *v.* Cook, 30 Ark. 417. See Christian *v.* Greenwood, 23 Ark. 258, 79 Am. Dec. 104.

California.— Priest *v.* Brown, 100 Cal. 626, 35 Pac. 323.

Colorado.— Sickman *v.* Abernathy, 14 Colo. 174, 23 Pac. 447.

Indiana.— Dugan *v.* Vattier, 3 Blackf. 245, 25 Am. Dec. 105; Doe *v.* Horn, Smith 242.

Iowa.— Deering *v.* Lawrence, 79 Iowa 610, 44 N. W. 899; Aultman, etc., Co. *v.* Witcik, 60 Iowa 752, 14 N. W. 357, holding also that it is immaterial that the grantee subsequently agrees to reconvey to the debtor's wife on repayment of the sum paid by him, with interest.

Kansas.— Bush *v.* Collins, 35 Kan. 535, 11 Pac. 425.

Missouri.— Gleitz *v.* Schuster, 168 Mo. 298, 67 S. W. 561, 90 Am. St. Rep. 461; Forrester *v.* Moore, 77 Mo. 651; Rupe *v.* Alkire, 77 Mo. 641; Dougherty *v.* Cooper, 77 Mo. 528.

New Jersey.— Cole *v.* Lee, 45 N. J. Eq. 779, 18 Atl. 854.

New York.— Van Wyck *v.* Baker, 16 Hun 168; Starin *v.* Kelly, 36 N. Y. Super. Ct. 366; Buffalo Third Nat. Bank *v.* Cornes, 5 N. Y. Suppl. 799.

Oklahoma.— Jackson *v.* Glaze, 3 Okla. 143, 41 Pac. 79.

Pennsylvania.— Heath *v.* Page, 63 Pa. St. 108, 3 Am. Rep. 533.

Rhode Island.— Tiernay *v.* Cleflin, 15 R. I. 220, 2 Atl. 762, construing Pub. St. c. 173, § 1.

Texas.— Pierson *v.* Tom, 1 Tex. 577, holding that such a purchaser is as much favored and protected by the law as a creditor.

Virginia.— Paul *v.* Baugh, 85 Va. 955, 9 S. E. 329; Rixey *v.* Deitrick, 85 Va. 42, 6 S. E. 615 (holding that in a suit by creditors to reach a deceased debtor's lands, conveyed by him in trust for his wife and chil-

the property through one who is a *bona fide* holder or purchaser,[75] he is a *bona fide* purchaser and acquires a good title to the property as against the grantor's creditors, notwithstanding the grantor's fraudulent intent, except to the extent that he has not paid the purchase-money before notice of the grantor's fraudulent intent.[76] Under such title the *bona fide* purchaser is entitled to all the property purchased and paid for,[77] and his interest therein is not limited to the amount paid by him.[78] If a portion of the property is wrongfully attached by an officer as property of the vendor, such officer is liable in an action for damages,[79] notwithstanding that after the seizure property still retained by the purchaser was of sufficient value to reimburse him for the purchase-price actually paid.[80]

(B) *Nature and Extent of Consideration*[81] — (1) IN GENERAL. To constitute one a *bona fide* purchaser of property sold for the purpose of defrauding the vendor's creditors the whole consideration must be actually paid before the purchaser has notice of the fraudulent intent.[82] He is entitled to an equity *pro tanto* for money paid or property or security actually appropriated as payment before he received notice of the fraud;[83] but not as to any payment he

dren, where the deed is valid, and with good consideration as to the children, but no more, a decree should be made to sell the land after allotment of dower, and apply the proceeds first to the children's claims, and then to those of creditors); Scott *v.* Rowland, 82 Va. 484, 4 S. E. 595.

West Virginia.— Lockhard *v.* Beckley, 10 W. Va. 87.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 590, 591. See also *supra*, VII, B.

That the grantee had knowledge of suspicious dealings by the debtors with their property among themselves, or that attachment proceedings were threatened, or that writs were issued, does not affect his title unless an actual levy was made. Windmiller *v.* Chapman, 38 Ill. App. 276.

That the debtor did not use the proceeds of the sale to pay his creditors as he had avowed does not affect the purchaser's title. Priest *v.* Brown, 100 Cal. 626, 35 Pac. 323.

75. Funkhouser *v.* Lay, 78 Mo. 458 [*affirmed* in 9 Mo. App. 585], holding that where a fraudulent grantee of an equity of redemption of land covered by a *bona fide* mortgage buys at the mortgage sale he will acquire a title free from taint.

That a purchaser with notice may protect himself by buying the title of a bona fide purchaser without notice is a general rule of equity. Funkhouser *v.* Lay, 78 Mo. 458 [*affirmed* in 9 Mo. App. 585].

76. See *infra*, XIII, A, 4, a, (V), (B).

77. Walker *v.* Collins, 50 Fed. 737, 1 C. C. A. 642.

78. Walker *v.* Collins, 50 Fed. 737, 1 C. C. A. 642.

79. Walker *v.* Collins, 50 Fed. 737, 1 C. C. A. 642.

Where he has paid only a portion of the purchase-money before notice of his vendor's fraudulent intent, whether he can recover, in an action of trespass against an officer who has levied in behalf of creditors, more damages than the amount he has paid, depends upon the extent of his liability over to his vendor under the contract of purchase. Riddell *v.* Munro, 49 Minn. 532, 52 N. W. 141.

80. Walker *v.* Collins, 50 Fed. 737, 1 C. C. A. 642.

81. See also *supra*, VIII.

82. *Alabama.*— Florence Sewing Mach. Co. *v.* Zeigler, 58 Ala. 221.

Arkansas.— Massie *v.* Enyart, 32 Ark. 251; Galbreath *v.* Cook, 30 Ark. 417.

Indiana.— Dugan *v.* Vattier, 3 Blackf. 245, 25 Am. Dec. 105.

Iowa.— See Williamson *v.* Wachenheim, 58 Iowa 277, 12 N. W. 302.

Kansas.— Bush *v.* Collins, 35 Kan. 535, 11 Pac. 425.

Louisiana.—Shultz *v.* Morgan, 27 La. Ann. 616.

Michigan.— Dixon *v.* Hill, 5 Mich. 404.

Missouri.— Dougherty *v.* Cooper, 77 Mo. 528; Arnholt *v.* Hartwig, 73 Mo. 485; Stein *v.* Burnett, 43 Mo. App. 477; Pribe *v.* Glenn, 31 Mo. App. 215.

Nebraska.— Hedrick *v.* Strauss, 42 Nebr. 485, 60 N. W. 928.

Oklahoma.— McFadyen *v.* Masters, 11 Okla. 16, 66 Pac. 284, 8 Okla. 174, 56 Pac. 1059.

Oregon.— Goodale *v.* Wheeler, 41 Oreg. 190, 68 Pac. 753.

Texas.— Tillman *v.* Heller, 78 Tex. 597, 14 S. W. 700, 22 Am. St. Rep. 77, 11 L. R. A. 628.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 593.

83. *Alabama.*— Florence Sewing Mach. Co. *v.* Zeigler, 58 Ala. 221.

Kansas.— Work *v.* Coverdale, 47 Kan. 307, 27 Pac. 984. See Wafer *v.* Harvey County Bank, 46 Kan. 597, 26 Pac. 1032; Green *v.* Green, 41 Kan. 472, 21 Pac. 586; Moxley *v.* Haskin, 39 Kan. 653, 18 Pac. 820.

Missouri.— Dougherty *v.* Cooper, 77 Mo. 528.

Nebraska.— Hedrick *v.* Strauss, 42 Nebr. 485, 60 N. W. 928.

New Jersey.— Phelps *v.* Morrison, 24 N. J. Eq. 195.

Oklahoma.— McFadyen *v.* Masters, 11

makes after such notice,[84] nor as to any unpaid portion.[85] Nor will he be protected where he takes the conveyance without any or at a grossly inadequate consideration without notice.[86]

(2) MARRIAGE. Marriage being a valuable consideration the wife is considered in the light of a *bona fide* purchaser under a marriage settlement and will be protected as such.[87]

(VI) *EFFECT OF AVOIDING CONVEYANCE AS TO GRANTEE'S PREËXISTING RIGHTS.* Where creditors avoid a fraudulent conveyance the law remits and restores the grantee to his previously existing rights as to such creditors.[88]

b. As to Subsequent Purchasers — (I) *IN GENERAL.* A fraudulent grantee holding under a conveyance made to defraud subsequent purchasers can derive no benefit from his conveyance, as against such a purchaser for value from the original grantor,[89] notwithstanding, in some jurisdictions, such subsequent purchaser had notice of the prior conveyance.[90] In some jurisdictions the grantee

Okla. 16, 66 Pac. 284, 8 Okla. 174, 56 Pac. 1059.

Texas.— Tillman *v.* Heller, 78 Tex. 597, 14 S. W. 700, 22 Am. St. Rep. 77, 11 L. R. A. 628; Schuster *v.* Farmers', etc., Nat. Bank, 23 Tex. Civ. App. 206, 54 S. W. 777, 55 S. W. 1121, 56 S. W. 93; Cleveland *v.* Butts, 13 Tex. Civ. App. 272, 35 S. W. 804.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 593. See also *supra*, XIII, A, 4, a, (III), (A).

The above principle can be invoked only where it is determined that the seller sold with fraudulent intent, and that the purchaser was not aware of his intent. Adam Roth Grocery Co. *v.* Ashton, 69 Mo. App. 463. See *supra*, VII, C.

The grantee has a preferred lien on the land, as against the grantor's creditors, for the amount actually paid by him. Adams *v.* Branch, 3 Ky. L. Rep. 178.

Where payment is made partly in money and partly by note, the purchaser will be protected only to the extent of the payment actually made, unless the note is negotiable; and the burden of proof is upon him to show its negotiability. Tillman *v.* Heller, 78 Tex. 597, 14 S. W. 700, 22 Am. St. Rep. 77, 11 L. R. A. 628.

84. *Alabama.*— Florence Sewing Mach. Co. *v.* Zeigler, 58 Ala. 221.

Arkansas.— Massie *v.* Enyart, 32 Ark. 251.

Indiana.— Parkinson *v.* Hanna, 7 Blackf. 400.

Oregon.—Goodale *v.* Wheeler, 41 Oreg. 190, 68 Pac. 753.

Texas.— Cleveland *v.* Butts, 13 Tex. Civ. App. 272, 35 S. W. 804, holding that a bond for deed given after notice of the fraud was not a payment at the time of the sale so as to protect the purchaser to that extent.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 593.

85. *Indiana.*— Rhodes *v.* Green, 36 Ind. 7.

Kansas.— Bush *v.* Collins, 35 Kan. 535, 11 Pac. 425.

Michigan.— Ball *v.* Phenicie, 94 Mich. 355, 53 N. W. 1114, holding that where only eight thousand dollars of an agreed price of ten thousand dollars has been paid a court of equity will subject the land to a vendor's lien of two thousand dollars and subrogate the vendor's creditors to his rights as vendor.

Nebraska.— Hedrick *v.* Strauss, 42 Nebr. 485, 60 N. W. 928.

West Virginia.— Lockhard *v.* Beckley, 10 W. Va. 87.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 593.

86. Galbreath *v.* Cook, 30 Ark. 417; Preston *v.* Cutter, 64 N. H. 461, 13 Atl. 874. See also *supra*, VIII.

Where there is doubt as to whether the grantee has paid any consideration he will not be favored in equity. Kuevan *v.* Specker, 11 Bush (Ky.) 1.

87. Armfield *v.* Armfield, Freem. (Miss.) 311. And see *supra*, VIII, A, 10.

88. Ladd *v.* Wiggin, 35 N. H. 421, 69 Am. Dec. 551; Irish *v.* Clayes, 10 Vt. 81, holding that where an absolute conveyance to a mortgagee is avoided by creditors of the grantor, it leaves the mortgage in force as to such creditors.

89. Howe *v.* Waysman, 12 Mo. 169, 49 Am. Dec. 126; Mellick *v.* Mellick, 47 N. J. Eq. 86, 19 Atl. 870 (fraudulent assignment of bond and mortgage); Searcy *v.* Carter, 4 Sneed (Tenn.) 271 (holding that a grantee without consideration of a fraudulent grantor will not occupy, in a controversy in a court of equity with *bona fide* purchasers, any better ground than his grantor).

If the fraudulent vendee admits that he acquired no title to property in his possession, but that the sale to him was simulated, and permits a creditor of his vendor to sell the property at public sale, the purchaser will acquire a valid title without a suit to annul his sale. Harris *v.* Denison, 8 La. 543.

90. Brown *v.* Connell, 85 Ky. 403, 3 S. W. 794, 9 Ky. L. Rep. 27 (holding that a conveyance which is actually fraudulent as to the grantor's creditors is void as to subsequent purchasers for value, such purchasers not being affected by either actual or constructive notice of the conveyance); Mellick *v.* Mellick, 47 N. J. Eq. 86, 19 Atl. 870 (holding that constructive notice of the prior conveyance will not affect the right of such subsequent purchaser). *Compare supra*, IV, H, 4.

is permitted to hold the property for the period within which the conveyance may be attacked.[91]

(II) *As Bona Fide Purchaser.* Where the grantee, at the time of the conveyance is both ignorant and innocent of the fraud, and has paid or parted with a valuable consideration for it,[92] he will be protected to the extent that he has parted with value on the strength of the conveyance and before notice of the fraud.[93]

B. Purchasers From Grantee — 1. In General — a. Rights and Liabilities in General. The fraudulent character of the conveyance between the original parties does not *per se* affect the title of a purchaser or other transferee from the fraudulent grantee;[94] and as a general rule the title of such a purchaser or transferee cannot be affected, in favor of creditors of the original grantor, by the prior fraudulent conveyance, unless it be charged and shown that he participated in or had knowledge of the fraud,[95] except where the consideration was so inadequate as to show fraud.[96] But unless he is a *bona fide* purchaser without notice,[97] he stands in no better position than his vendor.[98]

b. As to Original Grantor. A purchaser from the fraudulent grantee, whether with or without notice of the fraudulent transaction, acquires a good title as against the original grantor and the latter cannot recover the property from him,[99] except where the grantee had reconveyed the property to the original grantor

91. Brown *v.* Connell, 85 Ky. 403, 3 S. W. 794, 9 Ky. L. Rep. 27. But see McCaskle *v.* Amarine, 12 Ala. 17, holding that the possession of a fraudulent vendee cannot be deemed adverse as against subsequent purchasers from the vendor under judicial process.

92. Mellick *v.* Mellick, 47 N. J. Eq. 86, 19 Atl. 870.

Color of title.— Deeds, although fraudulent on the part of the grantor, if accepted *bona fide* by the grantee, and without knowledge of the fraud, give a color of title, under the statute of limitations. Gregg *v.* Sayre, 8 Pet. (U. S.) 244, 8 L. ed. 932.

93. Mellick *v.* Mellick, 47 N. J. Eq. 86, 19 Atl. 870 [*affirmed* in 48 N. J. Eq. 613, 23 Atl. 582].

He cannot be allowed for a past indebtedness against the grantor unless he has given up some security or has otherwise changed his position on the strength of the conveyance. Mellick *v.* Mellick, 47 N. J. Eq. 86, 19 Atl. 870.

94. Gridley *v.* Wynant, 23 How. (U. S.) 500, 16 L. ed. 411.

95. *Arkansas.*— Apperson *v.* Ford, 23 Ark. 746.

Georgia.— Colquitt *v.* Thomas, 8 Ga. 258, holding it necessary for plaintiff in a suit to subject the property to prove such knowledge or participation.

Illinois.— Boies *v.* Henney, 32 Ill. 130.

Iowa.— Burtis *v.* Humboldt County Bank, 77 Iowa 103, 41 N. W. 585.

Louisiana.— Delacroix *v.* Lacaze, 14 La. Ann. 519.

Massachusetts.— Mansfield *v.* Dyer, 131 Mass. 200 (holding that the fact the purchaser took his title by quitclaim was not conclusive that he was not a purchaser in good faith without notice of the fraud); Morse *v.* Aldrich, 130 Mass. 578.

Missouri.— White *v.* Million, 102 Mo. App. 437, 76 S. W. 733.

United States.— Pratt *v.* Curtis, 19 Fed. Cas. No. 11,375, 2 Lowell 87.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 611.

Evidence to be considered by the jury see Bois *v.* Henney, 32 Ill. 130.

A mortgage for value executed by both the fraudulent grantor and the fraudulent grantee is good as against a creditor without judgment intended to be defrauded by the prior conveyance, although the mortgagee had notice that the conveyance was made for the purpose of defrauding that particular creditor, provided the purpose of the mortgage is not to defraud creditors. Sipley *v.* Wass, 49 N. J. Eq. 463, 24 Atl. 233.

96. Burtis *v.* Humboldt County Bank, 77 Iowa 103, 41 N. W. 585.

97. See *infra*, XIII, B, 2.

98. Watson *v.* Dickens, 12 Sm. & M. (Miss.) 608. And see the cases cited in the following notes.

99. *Kansas.*— Weatherbee *v.* Cockrell, 44 Kan. 380, 24 Pac. 417.

Louisiana.— See Bookout *v.* Anderson, 2 La. Ann. 246.

New York.— Cole *v.* Malcolm, 66 N. Y. 363 [*reversing* 7 Hun 31].

Ohio.— Douglas *v.* Dunlap, 10 Ohio 162.

Oregon.— Alliance Trust Co. *v.* O'Brien, 32 Oreg. 333, 50 Pac. 801, 51 Pac. 640.

Virginia.— Terrell *v.* Imboden, 10 Leigh 321.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 606.

Redemption and subrogation.— Such purchaser is entitled to redeem the property from the claim of judgment creditors against such grantor and to be subrogated to their rights against him by an assignment to him of the judgment upon his paying them. Cole *v.* Malcolm, 66 N. Y. 363 [*reversing* 7 Hun 31].

A purchaser under a judgment against a fraudulent grantee, whether he has notice of

before conveying to a purchaser other than a *bona fide* purchaser without notice.[1] Nor can the original grantor show a trust in the grantee as against parties claiming under him.[2] On the other hand equity will not grant relief to a purchaser in bad faith as against the original grantor or his heirs.[3]

c. As to Original Grantee. Since no person other than defrauded creditors or purchasers can impeach a fraudulent conveyance,[4] a purchaser from the fraudulent grantee cannot set up the fraudulent character of the original conveyance to defeat the payment of purchase-money due from him.[5] And this is true, although the purchaser is a creditor of the original grantor and supposes he is purchasing such grantor's property, where, upon being informed of the transfer immediately after the purchase, he still retains the property.[6] But the fraudulent grantee cannot charge his purchaser with rents and profits during the latter's possession, although such purchaser had notice of the fraud.[7]

d. As to Creditors of Original Grantor. A purchaser or other transferee not a *bona fide* purchaser for value without notice from a fraudulent grantee acquires no better right or title as to defrauded creditors of the original grantor than that held by the fraudulent grantee; and such purchaser will hold the property subject to all the remedies that could be enforced against it in the hands of his vendor.[8] Such a purchaser may be compelled to account to the original grantor's creditors

the fraud or not, acquires a good title as against the fraudulent grantor or a purchaser from him. Douglas *v.* Dunlap, 10 Ohio 162.

Where a chattel mortgage is given without consideration for the purpose of being sold, the mortgagor is estopped as against a purchaser from claiming that it secured a real debt. Judge *v.* Vogel, 38 Mich. 569. But where it is not shown that a sale was intended he is not estopped to set up such claim, since such purchaser takes the security for what it is worth as between the original parties, and if it secures no debt nothing can be collected on it. Judge *v.* Vogel, 38 Mich. 569.

1. Curtin *v.* Curtin, 11 N. Y. Suppl. 937.

2. Hays *v.* Marsh, 123 Iowa 81, 98 N. W. 604.

3. Stickney *v.* Borman, 2 Pa. St. 67, holding that a purchaser claiming under a deed by a husband to his wife will not be aided in equity against the assignee of the heir of the husband where the transaction was fraudulent as to creditors of the husband.

4. See *supra*, XIII, A, 3, a.

5. Root *v.* Wood, 34 Ill. 283; Campbell *v.* Erie R. Co., 46 Barb. (N. Y.) 540.

6. Mudge *v.* Oliver, 1 Allen (Mass.) 74.

7. See Stout *v.* Phillippi Mfg., etc., Co., 41 W. Va. 339, 23 S. E. 571, 56 Am. St. Rep. 843, holding that in an action to set aside a trust securing the claim of a bank against a grantor as in fraud of creditors, a purchaser under the trustee with knowledge of the fraud could not, at the instance of the bank, be charged with rents and profits during his possession pending the suit, since the bank was an actual party to the fraud.

8. *Alabama.*— Smith *v.* Heineman, 118 Ala. 195, 24 So. 364, 72 Am. St. Rep. 150; Roden *v.* Ellis, 113 Ala. 652, 21 So. 71; Spencer *v.* Godwin, 30 Ala. 355.

Arkansas.— Miller *v.* Fraley, 21 Ark. 22.

California. — Ballou *v.* Andrews Banking Co., 128 Cal. 562, 61 Pac. 102, although such purchaser pays full value.

Colorado. — Wilcoxen *v.* Morgan, 2 Colo. 473; Rizer *v.* McCarthy, 3 Colo. App. 348, 33 Pac. 191.

Connecticut. — Walp *v.* Mooar, 76 Conn. 515, 57 Atl. 277; Curtis *v.* Lewis, 74 Conn. 367, 50 Atl. 878.

Florida.— Mayer *v.* Wilkins, 37 Fla. 244, 19 So. 632.

Georgia.— Kelly *v.* Simmons, 73 Ga. 716; Cottle *v.* Harrold, 72 Ga. 830.

Illinois.— Waggoner *v.* Cooley, 17 Ill. 339; Brown *v.* Niles, 16 Ill. 385; Hoff *v.* Larimore, 106 Ill. App. 589; Ringgold *v.* Leith, 73 Ill. App. 656; Wallace *v.* White, 12 Ill. App. 177.

Indiana. — Corwin *v.* Reddington, 4 Ind. 198.

Iowa.— Joyce *v.* Perry, 111 Iowa 567, 82 N. W. 941.

Kentucky.— Jones *v.* Read, 3 Dana 540; Stern *v.* Sedden, 4 Bibb 178; Edgewood Distilling Co. *v.* Nowland, 44 S. W. 364, 19 Ky. L. Rep. 1740. See Sanders *v.* Alexander, 2 J. J. Marsh. 301.

Maryland.— Green *v.* Early, 39 Md. 223.

Massachusetts.— Carroll *v.* Hayward, 124 Mass. 120, mortgage.

Minnesota.—Smith *v.* Conkwright, 28 Minn. 23, 8 N. W. 876.

Missouri.— Sloan *v.* Torry, 78 Mo. 623; Lesem *v.* Herriford, 44 Mo. 323.

New Jersey.— Newman *v.* Kirk, 45 N. J. Eq. 677, 18 Atl. 224; Mingus *v.* Condit, 23 N. J. Eq. 313.

New York.— St. John Woodworking Co. *v.* Smith, 82 N. Y. App. Div. 348, 82 N. Y. Suppl. 1025.

North Carolina.— Wade *v.* Saunders, 70 N. C. 270.

Rhode Island.— *In re* Sweet, 20 R. I. 557, 40 Atl. 502, holding that a corporation formed substantially out of a firm which it succeeded, in taking an assignment, apparently

for rents and profits received by him.[9] But where the purchaser's conveyance is merely constructively fraudulent, a court of equity in setting aside the conveyances will protect him, as well as the creditor, where both can be protected without injury to either,[10] as by requiring that the purchaser be reimbursed for a prior encumbrance against the property which he has paid,[11] or for taxes paid.[12]

e. Mortgage or Conveyance to Creditors of Grantor. A fraudulent grantee may lawfully dispose of the property in any manner in which the grantor might have disposed of it before the fraudulent conveyance,[13] and since a debtor may prefer one of his creditors by transfer of property in satisfaction of his debt or as security therefor,[14] if a fraudulent grantee transfers or mortgages the property to a *bona fide* creditor of the grantor who has no connection with the fraud and such creditor accepts the transfer or mortgage in good faith, either in payment of or as security for his debt, before any other creditor has acquired a lien upon the property, he acquires a valid title, at least to the extent of his claim as against such other creditors, whether he had notice or not of the prior fraudulent conveyance.[15] Such mortgage or conveyance, however, is invalid as to the claims of

without consideration, of a mortgage held by the firm, to defraud the mortgagor's creditors, is subject to the same equities as the firm.

Texas.— Cook *v.* Greenberg, (Civ. App. 1896) 34 S. W. 687.

Virginia.— Com. *v.* Ricks, 1 Gratt. 416.

West Virginia.— Spence *v.* Smith, 34 W. Va. 697, 12 S. E. 828; Goshorn *v.* Snodgrass, 17 W. Va. 717.

United States.— Nickerson *v.* Meacham, 14 Fed. 881, 5 McCrary 5; Dexter *v.* Smith, 7 Fed. Cas. No. 3,866, 2 Mason 303; Rateau *v.* Bernard, 20 Fed. Cas. No. 11,579, 3 Blatchf. 244.

Canada.— Buchanan *v.* Dinsley, 11 Grant Ch. (U. C.) 132.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 608.

Rights of bona fide purchaser from grantee see *infra*, XIII, B, 2, d, (II), (A).

Land for which the land fraudulently conveyed has been exchanged by such purchaser is also subject to be taken by the original grantor's creditors. Sloan *v.* Torry, 78 Mo. 623. See *supra*, II, B, 22.

Where the fraudulent grantee assigns and transfers the property for the payment of his own creditors, the trustees to whom he has thus transferred cannot be deemed purchasers for a valuable consideration and stand on no better footing than the fraudulent grantor himself. Jewett *v.* Tucker, 139 Mass. 566, 2 N. E. 680; Holland *v.* Cruft, 20 Pick. (Mass.) 321.

Judgment creditor by confession.— In the absence of fraud in the entry of a judgment by confession against the grantor, purchasers who are not *bona fide* purchasers for value cannot object that the statement on which the judgment was entered was insufficient. St. John Woodworking Co. *v.* Smith, 82 N. Y. App. Div. 348, 82 N. Y. Suppl. 1025.

9. Jones *v.* McCleod, 61 Ga. 602, holding this to be true where the creditors have no other resource for the collection of their claims.

10. Tompkins *v.* Sprout, 55 Cal. 31.

A purchaser at a sheriff's sale may hold the title acquired from the sheriff as security for the amount actually paid the sheriff. Newman *v.* Kirk, 45 N. J. Eq. 677, 18 Atl. 224.

11. Tompkins *v.* Sprout, 55 Cal. 31; Lynch *v.* Burt, 132 Fed. 417, 67 C. C. A. 305. See Wolcott *v.* Tweddle, 133 Mich. 389, 95 N. W. 419, as against purchaser at execution sale.

Costs.— On the other hand such purchaser, although not made a party to the creditor's suit to set aside the fraudulent conveyance until shortly before the decree, is chargeable as against his claim for reimbursement with the taxable costs incurred in the suit after the date when he became a party in interest. Lynch *v.* Burt, 132 Fed. 417, 67 C. C. A. 305.

12. Graves *v.* Winans, (N. J. Ch. 1886) 4 Atl. 645; Lynch *v.* Burt, 132 Fed. 417, 67 C. C. A. 305.

13. Dolan *v.* Van Demark, 35 Kan. 304, 10 Pac. 848; Brown *v.* Scheffer, 72 Minn. 27, 74 N. W. 902.

14. See *supra*, XI.

15. *District of Columbia.*— Petingale *v.* Barker, 21 D. C. 156.

Kansas.— Dolan *v.* Van Demark, 35 Kan. 304, 10 Pac. 848.

Kentucky.— Copenheaver *v.* Huffaker, 6 B. Mon. 18.

Massachusetts.— Boyd *v.* Brown, 17 Pick. 453.

Minnesota.— Brown *v.* Scheffer, 72 Minn. 27, 74 N. W. 902; Butler *v.* White, 25 Minn. 432.

Nebraska.— Longfellow *v.* Barnard, 58 Nebr. 612, 79 N. W. 255, 76 Am. St. Rep. 117.

New Jersey.— Thompson *v.* Williamson, 67 N. J. Eq. 212, 58 Atl. 602.

New York.— Munoz *v.* Wilson, 111 N. Y. 295, 18 N. E. 855; Murphy *v.* Briggs, 89 N. Y. 446 [*affirming* 23 Hun 95]; Mahoney *v.* McWalters, 3 N. Y. App. Div. 248, 38 N. Y. Suppl. 256.

Ohio.— Webb *v.* Brown, 3 Ohio St. 246; Brown *v.* Webb, 20 Ohio 389.

Pennsylvania.— Stark *v.* Ward, 3 Pa. St. 328.

Tennessee.— Keith *v.* Proctor, 8 Baxt. 189,

creditors who had acquired a lien on the property prior thereto;[16] or where the creditor taking the mortgage or conveyance knowingly participates in a purpose to defraud other creditors,[17] as where subsequent to the mortgage he takes an absolute conveyance fraudulent as to other creditors,[18] or where with notice of the fraud his debt is created contemporaneous with or subsequent to the fraudulent conveyance.[19]

2. **Bona Fide Purchasers — a. In General.** To constitute one a *bona fide* purchaser from the fraudulent grantee he must have purchased the property for a valuable consideration,[20] and, except where he purchases from a *bona fide* grantee,[21] without notice, actual or constructive, of the fraud,[22] must be innocent of any purpose to further the fraud, even to protect himself.[23]

b. Sufficiency of Notice. While actual notice of the fraud makes one a purchaser *mala fides*,[24] it is not necessary that he should have actual notice or positive and legal proof of the fraud;[25] but it is sufficient if he has constructive notice, as where he has knowledge of circumstances such as should put a prudent man upon inquiry and if prosecuted diligently would expose the fraud,[26] where he pur-

holding such a conveyance good against a judgment creditor of the grantor, to the amount of the transferee's debt, the latter being unaware of the fraud.

Texas.— Rilling *v.* Schultze, 95 Tex. 352, 67 S. W. 401 [*affirming* (Civ. App. 1901) 66 S. W. 56].

United States.—Johnson *v.* American Trust Co., 104 Fed. 174, 43 C. C. A. 458.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 610.

But *compare* Jewett *v.* Cook, 81 Ill. 260; Hoff *v.* Larimore, 106 Ill. App. 589.

Assent.— Such mortgage or conveyance requires no other assent of the original grantor than that which is contained in the vesting of the grantee of all the grantor's rights in the property. Longfellow *v.* Barnard, 58 Nebr. 612, 79 N. W. 255, 76 Am. St. Rep. 117; Webb *v.* Brown, 3 Ohio St. 246.

Assignment of mortgage.— Where a mortgage given to defraud creditors is assigned by the mortgagee who is also the vendee of the property as security to a *bona fide* creditor of the mortgagor, such transaction is in substance a restoration of the property to the owner and an execution by him of a mortgage thereon to secure the just claim of a creditor. The original mortgage is thereby purged of the fraud with which it was originally tainted and becomes a valid and enforceable security. Longfellow *v.* Barnard, 58 Nebr. 612, 79 N. W. 255, 76 Am. St. Rep. 117.

16. Wood *v.* Robinson, 22 N. Y. 564; Mahoney *v.* McWalters, 3 N. Y. App. Div. 248, 38 N. Y. Suppl. 256. And see cases cited in preceding note.

17. Webb *v.* Brown, 3 Ohio St. 246. A creditor cannot, as against other existing creditors, accept as collateral security for a preëxisting debt the benefit of the debtor's fraudulent conveyances to a third person, if he has reason to suspect its character. Thompson *v.* Furr, 57 Miss. 478.

18. Copenheaver *v.* Huffaker, 6 B. Mon. (Ky.) 18, holding that in such a case both the mortgage and conveyance were fraudulent.

19. Rilling *v.* Schultze, 95 Tex. 352, 67 S. W. 401 [*affirming* (Civ. App. 1901) 66 S. W. 56].

20. See *infra*, XIII, B, 2, c.

21. See *infra*, XIII, B, 2, d, (II), (E).

22. Stix *v.* Chaytor, 55 Ark. 116, 17 S. W. 707; Schwabacher *v.* Leibrook, 48 La. Ann. 821, 19 So. 758; Earle *v.* Burch, 21 Nebr. 702, 33 N. W. 254; Miller *v.* Jamison, 26 N. J. Eq. 404. And see *infra*, XIII, B, 2, b. But see Dalglish *v.* McCarthy, 19 Grant Ch. (U. C.) 578.

23. De Witt *v.* Van Sickle, 29 N. J. Eq. 209.

24. Schwabacher *v.* Leibrook, 48 La. Ann. 821, 19 So. 758; Earle *v.* Burch, 21 Nebr. 702, 33 N. W. 254; Miller *v.* Jamison, 26 N. J. Eq. 404.

25. Hodges *v.* Coleman, 76 Ala. 103; Arnold *v.* Hoschildt, 69 Minn. 101, 71 N. W. 829; De Witt *v.* Van Sickle, 29 N. J. Eq. 209.

26. *Alabama.*— Hodges *v.* Coleman, 76 Ala. 103.

Arkansas.— Stix *v.* Chaytor, 55 Ark. 116, 17 S. W. 707.

Kansas.—Meibergen *v.* Smith, 45 Kan. 405, 25 Pac. 881.

Minnesota.— Arnold *v.* Hoschildt, 69 Minn. 101, 71 N. W. 829.

Missouri.— Reid *v.* Loyd, 52 Mo. App. 278, holding that the fact that the purchaser did not take an inventory and knew that his vendor was embarrassed and compelled to close up business was sufficient to put on inquiry.

Nebraska.— Lane *v.* Starkey, 15 Nebr. 285, 18 N. W. 47.

New Jersey.— De Witt *v.* Van Sickle, 29 N. J. Eq. 209.

New York.— Stearns *v.* Gage, 79 N. Y. 102; Baker *v.* Bliss, 39 N. Y. 70, 6 Transcr. App. 346; Roberts *v.* Anderson, 3 Johns. Ch. 371.

Oregon.— Lyons *v.* Leahy, 15 Oreg. 8, 13 Pac. 643, 3 Am. St. Rep. 133.

West Virginia.— McMasters *v.* Edgar, 22 W. Va. 673.

chases after an execution sale of the property,[27] where he purchases with notice that proceedings are pending to set aside the former conveyance as fraudulent and to subject the property to a judgment against the original grantor,[28] where the conveyance to the fraudulent grantee is clearly fraudulent on its face,[29] or where he has notice that another claims a right to recover the property on the ground that it was conveyed in fraud of creditors.[30] But, in the absence of actual notice, a subsequent purchaser is not chargeable with notice of the fraud where the grantee's recorded deed and possession give no indication of fraud or trust;[31] nor by the mere fact that the original conveyance was a voluntary one in consideration of love and affection;[32] nor by the fact that he had knowledge of the indebtedness of the original grantor.[33] It has been held that if he purchases from a

United States.— Thompson Nat. Bank *v.* Corwine, 95 Fed. 54, 89 Fed. 774.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 616.

Ordinary diligence is all that the purchaser can be charged with in determining whether he had notice of the fraud. Sanger *v.* Thomasson, (Tex. Civ. App. 1898) 44 S. W. 408.

Facts sufficient to charge purchaser with notice of the fraud.— That the purchaser, an attorney, had defended in a former suit to set aside the fraudulent conveyance (Russell *v.* Russell, 4 Dana (Ky.) 40); that he had formerly prosecuted an action in which the same fraud was directly charged in his complaint (Farmers' Bank *v.* Frankfort First Nat. Bank, 30 Ind. App. 520, 66 N. E. 503); and that he had been present in court on the trial of an action in which his grantor was a party, and had heard evidence proving his grantor's title to be fraudulent (Wise *v.* Tripp, 13 Me. 9).

Facts insufficient to charge purchaser with fraud.— That the property is sold for less than its value (Mathews *v.* Reinhardt, 149 Ill. 635, 37 N. E. 85); the record of a judgment against the grantor where at the time of the purchase the legal title was in the grantee (Phelps *v.* Morrison, 24 N. J. Eq. 195; Danbury *v.* Robinson, 14 N. J. Eq. 213, 82 Am. Dec. 244); and filing a writ of attachment against the original grantor (Morrow *v.* Graves, 77 Cal. 218, 19 Pac. 489; Halverson *v.* Brown, 75 Iowa 702, 38 N. W. 123; Ashland Sav. Bank *v.* Mead, 63 N. H. 435; Clerf *v.* Montgomery, 15 Wash. 483, 46 Pac. 1028, 48 Pac. 733).

27. Stivers *v.* Horne, 62 Mo. 473.

The record of a sheriff's deed under a sale on execution levied on the land of the debtor, after he had conveyed it in fraud of the creditor, is notice of the fraud to a subsequent purchaser for value. Baxter *v.* Sewell, 3 Md. 334; McGregor *v.* White, 15 Tex. Civ. App. 299, 39 S. W. 1024. But a sheriff's deed, although recorded, is not notice of the fraud, to one who had purchased from the fraudulent grantee prior to the sheriff's sale. Crockett *v.* Maguire, 10 Mo. 34.

28. *Arkansas.*— Stix *v.* Chaytor, 55 Ark. 116, 17 S. W. 707.

Kentucky.— Copenheaver *v.* Huffaker, 6 B. Mon. 18.

Louisiana.— New Orleans *v.* Marchand, 35 La. Ann. 222.

Minnesota.— Smith *v.* Conkwright, 28 Minn. 23, 8 N. W. 876.

Mississippi.— Willis *v.* Gattman, 53 Miss. 721.

West Virginia.— Goshorn *v.* Snodgrass, 17 W. Va. 717.

Wisconsin.— Hamlin *v.* Wright, 26 Wis. 50.

A purchaser at a mortgage sale made during the pendency of an action to which the purchaser is a party to set aside the mortgage as fraudulent is not an innocent purchaser. Henry *v.* Harrell, 57 Ark. 569, 22 S. W. 433.

29. Johnson *v.* Thweatt, 18 Ala. 741.

30. Walker *v.* Cady, 106 Mich. 21, 63 N. W. 1005.

31. Peck *v.* Dyer, 147 Ill. 592, 35 N. E. 479 [45 Ill. App. 184]; Fox *v.* Peck, 45 Ill. App. 239; Leach *v.* Ansbacher, 55 Pa. St. 85 (holding that in such case a *bona fide* and duly vigilant purchaser from him is not required to make inquiry therefor); Hart *v.* Bates, 17 S. C. 35.

Under Mass. Gen. St. c. 123, § 55, where a sheriff attaches real estate of a debtor in the hands of his fraudulent grantee, but makes no addition to his return describing the property and stating the name of the person in whom the record title stands there is no notice to a third person afterward purchasing for value and in good faith from the fraudulent grantee, and the attachment is invalid as to such purchaser. Morse *v.* Aldrich, 130 Mass. 578.

32. McKee *v.* West, (Ala. 1904) 37 So. 740; Davis *v.* Woods, 7 Ky. L. Rep. 308; Yardley *v.* Torr, 67 Fed. 857. But see Milholland *v.* Tiffany, 64 Md. 455, 2 Atl. 831; New England L. & T. Co. *v.* Avery, (Tex. Civ. App. 1897) 41 S. W. 673.

The mere fact that the purchaser has notice that the title was not founded upon a pecuniary consideration is not sufficient to make it his duty, at his peril, to inquire whether the title of his grantor was not fraudulent. On the contrary, he has a right to act upon the legal presumption that such a deed of gift, or voluntary settlement, was honestly made, until some other fact is brought to his knowledge to raise a suspicion in his mind that the conveyance was intended to defraud someone. Frazer *v.* Western, 1 Barb. Ch. (N. Y.) 220.

33. Davis *v.* Woods, 7 Ky. L. Rep. 308.

creditor who was the fraudulent grantee,[34] or if he has paid a valuable consideration for the property constructive notice is not sufficient, but it must be shown that he had actual notice of the fraud.[35]

c. Sufficiency of Consideration. It is essential to constitute one a *bona fide* purchaser from a fraudulent grantee that a valuable consideration shall have passed before notice of the fraud or that something of value shall have been parted with,[36] such as the surrender of a valuable right,[37] or the assumption of an irrevocable obligation.[38] But the mere surrender of a preëxisting debt due from the grantee to such a purchaser without the actual payment of other consideration is not a valuable consideration within this rule,[39] and the fact that he parts with a small sum of money in addition does not make it sufficient.[40] Nor is a consideration of love and affection sufficient.[41]

d. Rights and Liabilities — (i) *As to Original Parties.* As against a *bona fide* purchaser from a fraudulent grantee the original grantor or his heirs are estopped from setting up the fraudulent character of the original conveyance,[42] either for the purpose of recovering the property,[43] enforcing an equity or trust arising out of the transaction,[44] or defeating a right of action accruing to such purchaser,[45] such as the right to foreclose a fraudulent mortgage transferred to him by the mortgagee.[46] But the purchaser can only enforce such rights as he acquires from his grantee, and has no right of action to enforce a voluntary contract existing between the original parties.[47] Nor, on the other hand, can the

34. White *v.* Million, 102 Mo. App. 437, 76 S. W. 733, holding that such knowledge may go to the jury to show actual knowledge, but in itself is not actual knowledge.

35. Stearns *v.* Gage, 79 N. Y. 102; Lyons *v.* Leahy, 15 Oreg. 8, 13 Pac. 643, 3 Am. St. Rep. 133. But see White *v.* Million, 102 Mo. App. 437, 76 S. W. 733; McMasters *v.* Edgar, 22 W. Va. 673.

36. *Iowa.*— Des Moines Ins. Co. *v.* Lent, 75 Iowa 522, 39 N. W. 826.

Michigan.— Dixon *v.* Hill, 5 Mich. 404.

Minnesota.— Hicks *v.* Stone, 13 Minn. 434.

New Jersey.— De Witt *v.* Van Sickle, 29 N. J. Eq. 209.

Rhode Island.— Anthony *v.* Boyd, 15 R. I. 495, 8 Atl. 701, 10 Atl. 657.

Texas.— Miller *v.* Vernoy, 2 Tex. Civ. App. 675, 22 S. W. 64, assumption by surety of one half of debt not sufficient.

United States.— Thompson Nat. Bank *v.* Corwine, 95 Fed. 54, 89 Fed. 774.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 618.

Paying mortgage debt.— When a stranger pays a mortgage debt in whole or in part, he becomes in the absence of evidence to the contrary by implication a purchaser of the debt to the extent of his payment. If the mortgaged property is conveyed to such stranger, the payment of the mortgage is a sufficient consideration to support the conveyance, and if the grantee takes the conveyance without knowledge of the intention of the grantor to defeat creditors, he is entitled to hold the property. Jennings *v.* Smith, 22 Pa. Co. Ct. 554.

37. Case Plow Works *v.* Ross, 74 Mo. App. 437 (surrender of securities); De Witt *v.* Van Sickle, 29 N. J. Eq. 209.

38. De Witt *v.* Van Sickle, 29 N. J. Eq. 209; Taylor's Appeal, 45 Pa. St. 71.

39. Agricultural Bank *v.* Dorsey, Freem. (Miss.) 338; Case Plow Works *v.* Ross, 74 Mo. App. 437; De Witt *v.* Van Sickle, 29 N. J. Eq. 209; Mingus *v.* Condit, 23 N. J. Eq. 313; Victoria Paper Mills *v.* New York, etc., Co., 28 Misc. (N. Y.) 123, 58 N. Y. Suppl. 1070 [*affirming* 27 Misc. 179, 57 N. Y. Suppl. 397].

40. Victoria Paper Mills *v.* New York, etc., Co., 28 Misc. (N. Y.) 123, 58 N. Y. Suppl. 1070 [*affirming* 27 Misc. 179, 57 N. Y. Suppl. 397].

41. Harrison *v.* Hatcher, 44 Ga. 638.

42. See Fury *v.* Kempin, 79 Mo. 477 [*affirming* 9 Mo. App. 30].

43. Somers *v.* Pumphrey, 24 Ind. 231; Fury *v.* Kempin, 79 Mo. 477 [*affirming* 9 Mo. App. 30].

Under a Texas statute (Act Jan. 18, 1840, § 2) a purchaser from one who has been in possession of goods, chattels, or slaves, for more than three years, cannot commit a fraud against one who asserts that he had loaned the property to the party in possession, without exhibiting any written contract of loan. Grumbles *v.* Sneed, 22 Tex. 565.

44. Sorrells *v.* Sorrells, 4 Ark. 296; O'Brien *v.* Gaslin, 20 Nebr. 347, 30 N. W. 274; Danbury *v.* Robinson, 14 N. J. Eq. 213, 82 Am. Dec. 244.

45. See Moffett *v.* Parker, 71 Minn. 139, 73 N. W. 850, 70 Am. St. Rep. 319.

46. Moffett *v.* Parker, 71 Minn. 139, 73 N. W. 850, 70 Am. St. Rep. 319; Alliance Trust Co. *v.* O'Brien, 32 Oreg. 333, 50 Pac. 801, 51 Pac. 640, holding that the grantor cannot invoke the doctrine that possession is notice of his rights to such property, as against a *bona fide* mortgagee.

47. Quirk *v.* Thomas, 6 Mich. 76, holding that he cannot enforce a voluntary contract

fraudulent grantee set up the fraudulent character of the original conveyance as against his innocent purchaser.[48]

(II) *As to Creditors of Original Grantor* — (A) *In General.* Although it has been held that a purchaser from a fraudulent grantee occupies no higher or better position than the fraudulent grantee, where such conveyance is assailed by a creditor,[49] the doctrine now is that a *bona fide* purchaser for value is protected under the statutes of 13 and 27 Elizabeth as adopted in this country, whether he purchases from a fraudulent grantor or fraudulent grantee; and there is no difference in this respect between a conveyance to defraud subsequent creditors, and one to defraud subsequent purchasers.[50] In accordance with this doctrine a *bona fide* purchaser or encumbrancer from a fraudulent grantee or vendee before the creditors have taken any steps to subject the property or set aside the fraudulent conveyance acquires a good title and is entitled to protection,[51] as against the claims of creditors of the original grantor, who have not acquired a prior lien on the property,[52] or as against a subsequent purchaser at an

between the grantor and grantee to convey the land.

48. See Silverman *v.* Bullock, 98 Ill. 11.

49. Preston *v.* Crofut, 1 Conn. 527 note [*disapproved* in Parker *v.* Crittenden, 37 Conn. 148]; Birdsall *v.* Welch, 6 D. C. 316 (holding that under 13 Eliz. c. 5, a *bona fide* purchaser from a fraudulent grantee gets no title by his conveyance); Roberts *v.* Anderson, 3 Johns. Ch. (N. Y.) 371 [*reversed* in 18 Johns. 515, 9 Am. Dec. 235]; Read *v.* Staton, 3 Hayw. (Tenn.) 159, 9 Am. Dec. 740. See McKee *v.* West, (Ala. 1904) 37 So. 740; Thames *v.* Rembert, 63 Ala. 561.

The statute 13 Eliz. c. 5, being intended to protect creditors, a *bona fide* purchaser from a fraudulent vendee has no title against the creditors of the vendor. But 27 Elizabeth being intended for the benefit of purchasers, the first *bona fide* purchaser, whether from the fraudulent vendor or vendee, is within its operation. Hoke *v.* Henderson, 14 N. C. 12.

50. Wright *v.* Howell, 35 Iowa 288; Danbury *v.* Robinson, 14 N. J. Eq. 213, 82 Am. Dec. 244; Anderson *v.* Roberts, 18 Johns. (N. Y.) 515, 9 Am. Dec. 235; Boyer *v.* Weimer, 204 Pa. St. 295, 54 Atl. 21; Reynolds *v.* Vilas, 8 Wis. 471, 76 Am. Dec. 238. And see cases cited in the following notes.

51. *Alabama.*— Thames *v.* Rembert, 63 Ala. 561; Abney *v.* Kingsland, 10 Ala. 355, 44 Am. Dec. 491.

California.— Paige *v.* O'Neal, 12 Cal. 483.

Connecticut.— Lee *v.* Abbe, 2 Root 359, 1 Am. Dec. 78.

Florida.— Neal *v.* Gregory, 19 Fla. 356.

Illinois.— O'Neil *v.* Patterson, 52 Ill. App. 26.

Indiana.— Hampson *v.* Fall, 64 Ind. 382; Scott *v.* Purcell, 7 Blackf. 66, 39 Am. Dec. 453; Dugan *v.* Vattier, 3 Blackf. 245, 25 Am. Dec. 105.

Louisiana.— Hiriart *v.* Roger, 13 La. 126; Thomas *v.* Mead, 8 Mart. N. S. 341, 19 Am. Dec. 187.

Maine.— Sparrow *v.* Chesley, 19 Me. 79 (holding that such title will be protected in a court of law); Neal *v.* Williams, 18 Me. 391; Trott *v.* Warren, 11 Me. 227.

Massachusetts.— Green *v.* Tanner, 8 Metc. 411.

Mississippi.— Agricultural Bank *v.* Dorsey, Freem. 338.

Missouri.— Craig *v.* Zimmerman, 87 Mo. 475, 56 Am. Rep. 466; Knox *v.* Hunt, 18 Mo. 174; Wineland *v.* Coonce, 5 Mo. 296, 32 Am. Dec. 320.

Montana.— Yoder *v.* Reynolds, 28 Mont. 183, 72 Pac. 417.

North Carolina.— King *v.* Trice, 38 N. C. 568; Martin *v.* Cowles, 18 N. C. 29.

Ohio.— Schultz *v.* Brown, 3 Ohio Cir. Ct. 609, 2 Ohio Cir. Dec. 353.

Pennsylvania.— Sinclair *v.* Healy, 40 Pa. St. 417, 80 Am. Dec. 589.

United States.— Bean *v.* Smith, 2 Fed. Cas. No. 1,174, 2 Mason 252; Sedgwick *v.* Place, 21 Fed. Cas. No. 12,621, 12 Blatchf. 163 [*reversing* 21 Fed. Cas. No. 12,620, 5 Ben. 184].

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 620. And see cases in the following note.

Trespass.— Such a purchaser may maintain trespass against an officer who wrongfully seizes the property. Sinclair *v.* Healy, 40 Pa. St. 417, 80 Am. Dec. 589.

Adverse possession.— Where personal property assigned by a recorded deed fraudulent on its face is subsequently purchased by a party for value and has remained in his actual, undisturbed, and continuous possession for five years, his title thereto is perfect, provided he was not a party to the fraudulent assignment, and has not in any way nor by any means, direct or indirect, obstructed the creditors of the fraudulent assignor in the prosecution of their rights. Thornburg *v.* Bowen, 37 W. Va. 538, 16 S. E. 825.

52. *Alabama.*— McKee *v.* West, 141 Ala. 531, 37 So. 740; Bryant *v.* Young, 21 Ala. 264; Dargan *v.* Waring, 11 Ala. 988, 46 Am. Dec. 234; Abney *v.* Kingsland, 10 Ala. 355, 44 Am. Dec. 491.

Arkansas.— Riggan *v.* Wolf, 53 Ark. 537, 14 S. W. 922.

execution sale of the property under a judgment against the fraudulent grantor,[53] even though the creditors had no notice of the purchaser's conveyance, by record or otherwise.[54] Such purchaser's title, however, is not good as against a prior purchaser at an execution sale.[55] An innocent purchaser from a conditional vendee is not protected by the statute against fraudulent conveyances, although the conditional sale is not recorded as required by the statute, unless such purchaser or those under whom he claims has had possession for the period prescribed by the statute.[56]

California.— Williams *v.* Borgwardt, 119 Cal. 80, 51 Pac. 15 (as against subsequently attaching creditor); Morrow *v.* Graves, 77 Cal. 218, 19 Pac. 489.

Connecticut.— Williamson *v.* Russell, 39 Conn. 406; Parker *v.* Crittenden, 37 Conn. 148 [*disapproving* Preston *v.* Crofut, 1 Conn. 527 note].

Delaware.— Mears *v.* Waples, 3 Houst. 581.

Georgia.— Sawyer *v.* Almand, 89 Ga. 314, 15 S. E. 315; Colquitt *v.* Thomas, 8 Ga. 258.

Illinois.— Spicer *v.* Robinson, 73 Ill. 519 (holding that such purchaser may reconvey to his grantor, and take back a purchase-money mortgage, which will be sustained as against creditors); Mason *v.* School Trustees, 11 Ill. App. 454.

Indiana.— Carnahan *v.* McCord, 116 Ind. 67, 18 N. E. 177; Studabaker *v.* Langard, 79 Ind. 320; Blair *v.* Bass, 4 Blackf. 539; Dugan *v.* Vattier, 3 Blackf. 245, 25 Am. Dec. 105.

Iowa.— Halverson *v.* Brown, 75 Iowa 702, 38 N. W. 123; McConnell *v.* Denham, 72 Iowa 494, 34 N. W. 298.

Kansas.— Wilson *v.* Fuller, 9 Kan. 176; Hildinger *v.* Tootle, 9 Kan. App. 582, 58 Pac. 226.

Kentucky.— Adams *v.* Branch, 3 Ky. L. Rep. 178.

Maine.— Erskine *v.* Decker, 39 Me. 467.

Michigan.— Quirk *v.* Thomas, 6 Mich. 76; Fox *v.* Clark, Walk. 535.

Missouri.— Gordon *v.* Ritenour, 87 Mo. 54; Davis *v.* Briscoe, 81 Mo. 27.

Montana.— Yoder *v.* Reynolds, 28 Mont. 183, 72 Pac. 417.

Nebraska.— Hackney *v.* Lincoln First Nat. Bank, (1904) 98 N. W. 412, (1903) 94 N. W. 805.

New Hampshire.— Lewis *v.* Dudley, 70 N. H. 594, 49 Atl. 572; Preston *v.* Cutter, 64 N. H. 461, 13 Atl. 874; Comey *v.* Pickering, 63 N. H. 126; Gordon *v.* Haywood, 2 N. H. 402.

New Jersey.— Phelps *v.* Morrison, 25 N. J. Eq. 538, as against a subsequent judgment creditor of the original grantor.

New York.— Zoeller *v.* Riley, 100 N. Y. 102, 2 N. E. 388, 53 Am. Rep. 157; Warner *v.* Blakeman, 4 Abb. Dec. 530, 4 Keyes 487; Heroy *v.* Kerr, 2 Abb. Dec. 359, 2 Keyes 582 [*affirming* 8 Bosw. 194, 21 How. Pr. 409]; Reynolds *v.* Park, 5 Lans. 149; Frazer *v.* Western, 1 Barb. Ch. 220; Winchester *v.* Crandall, Clarke 371.

North Carolina.— Saunders *v.* Lee, 101 N. C. 3, 7 S. E. 590; McCorkle *v.* Earnhardt, 61 N. C. 300.

Ohio.— Holmes *v.* Gardner, 50 Ohio St. 167, 33 N. E. 644, 20 L. R. A. 329.

Pennsylvania.— Hood *v.* Fahnestock, 8 Watts 489, 34 Am. Dec. 489; Thompson *v.* McKean, 1 Ashm. 129.

Tennessee.— Friedenwald *v.* Mullan, 10 Heisk. 226; Richards *v.* Ewing, 11 Humphr. 327; Simpson *v.* Simpson, 7 Humphr. 275.

Texas.— Compton *v.* Perry, 23 Tex. 414.

Virginia.— Coleman *v.* Cocke, 6 Rand. 618, 18 Am. Dec. 757.

Washington.— Sawtelle *v.* Weymouth, 14 Wash. 21, 43 Pac. 1101.

West Virginia.— Blackshire *v.* Pettit, 35 W. Va. 547, 14 S. E. 133.

Wyoming.— Metz *v.* Blackburn, 9 Wyo. 481, 65 Pac. 857.

United States.— Townsend *v.* Little, 109 U. S. 504, 3 S. Ct. 357, 27 L. ed. 1012; Simms *v.* Morse, 2 Fed. 325, 4 Hughes 579; Bean *v.* Smith, 2 Fed. Cas. No. 1,174, 2 Mason 252.

England.— Halifax Joint Stock Banking Co. *v.* Gledhill, [1891] 1 Ch. 31, 60 L. J. Ch. 181, 63 L. T. Rep. N. S. 623, 39 Wkly. Rep. 104.

Canada.— See Dalglish *v.* McCarthy, 19 Grant Ch. (U. C.) 578.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 620. And see cases cited in preceding note.

A bona fide vendee of a purchaser at a tax sale may hold the title as against creditors, although the debtor permitted the sale to avoid creditors. Brooks *v.* Jones, 114 Iowa 385, 82 N. W. 434, 86 N. W. 300.

Marshaling assets.— Where a fraudulent grantee made a valid mortgage on the property conveyed, with other property, on a finding by a court of equity that the creditors of the grantor are entitled to set the conveyance aside, the mortgagee will be required to first exhaust the other property covered by his mortgage. Thompson Nat. Bank *v.* Corwine, 89 Fed. 774.

53. *Indiana.*— Scott *v.* Purcell, 7 Blackf. 66, 39 Am. Dec. 453.

Iowa.— Clark *v.* Allen, 34 Iowa 190.

Massachusetts.— Mansfield *v.* Dyer, 131 Mass. 200.

New York.— Anderson *v.* Roberts, 18 Johns. 515, 9 Am. Dec. 235; Ledyard *v.* Butler, 9 Paige 132, 37 Am. Dec. 379.

North Carolina.— Young *v.* Lathrop, 67 N. C. 63, 12 Am. Rep. 603.

Ohio.— Detwiler *v.* Louison, 18 Ohio Cir. Ct. 434, 10 Ohio Cir. Dec. 95.

Pennsylvania.— Boyer *v.* Weimer, 204 Pa. St. 295, 54 Atl. 21.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 620.

54. Chaffe *v.* Halpin, 62 Miss. 1.

55. Reed *v.* Smith, 14 Ala. 380.

56. Patton *v.* McCane, 15 B. Mon. (Ky.) 555.

(B) *Extent of Protection.* A *bona fide* purchaser or encumbrancer from the fraudulent grantee is entitled to protection to the extent of moneys advanced or paid by him, on the faith of the title before notice of the fraud.[57] But for that which is advanced after such notice,[58] or which remains unpaid thereafter,[59] he is liable to the defrauded creditors.

(C) *Mortgages and Pledges.*[60] A *bona fide* holder of a mortgage or pledge from a fraudulent grantee, without notice of the fraud, is a *bona fide* purchaser to the extent of his interest in the mortgaged or pledged property, and to that extent his rights are paramount to the rights of the fraudulent grantor's creditors, who had not acquired a prior lien.[61]

(D) *Creditors of Grantee.*[62] Innocent creditors of the fraudulent grantee who have acquired a lien and levied on the property before its reconveyance, and before any steps have been taken by the creditors of the fraudulent grantor, will hold the property as against such other creditors;[63] but not as against prior lien

57. Thames *v.* Rembert, 63 Ala. 561; Graves *v.* Winans, (N. J. Ch. 1886) 4 Atl. 645; Holmes *v.* Gardner, 50 Ohio St. 167, 33 N. E. 644, 20 L. R. A. 329; Paddock *v.* Fish, 10 Fed. 125. See Dugan *v.* Vattier, 3 Blackf. 245, 25 Am. Dec. 105.

58. Thames *v.* Rembert, 63 Ala. 561; Hamlin *v.* Wright, 26 Wis. 50, holding that he is not protected as to purchase-money paid after service of summons upon him in an action by a creditor of his vendor's grantor to set aside the conveyance.

59. Tappan *v.* Harbison, 43 Ark. 84; Vance Shoe Co. *v.* Haught, 41 W. Va. 275, 23 S. E. 553; Dowell *v.* Applegate, 7 Fed. 881, 7 Sawy. 232, holding that a court of equity will give a defrauded creditor a lien upon the premises for such amount.

60. Mortgage to creditor of grantor see *supra*, XIII, B, 1, e.

61. *Connecticut.*— Quinnipiac Brewing Co. *v.* Fitzgibbons, 73 Conn. 191, 47 Atl. 128, valid as to subsequent judgment creditor.

Illinois.— Bradley *v.* Luce, 99 Ill. 234; Fox *v.* Peck, 45 Ill. App. 239.

Iowa.— Clapp *v.* Saunders, 75 Iowa 634, 36 N. W. 655, holding the mortgage good as against a subsequent judgment against the fraudulent grantor and a sheriff's deed issued thereunder.

Kentucky.— McLeod *v.* O'Neill, 22 S. W. 220, 15 Ky. L. Rep. 152, holding the mortgage good as against attaching creditors of the original grantor, whose attachments issued subsequent to the execution and recordation of the mortgage.

Massachusetts.— Carroll *v.* Hayward, 124 Mass. 120; Hubbell *v.* Currier, 10 Allen 333; Curtis *v.* Riddle, 7 Allen 185.

Michigan.— Farrand *v.* Caton, 69 Mich. 235, 37 N. W. 199.

Minnesota.— Noblet *v.* St. John, 29 Minn. 180, 12 N. W. 527.

Missouri.— Block *v.* Chase, 15 Mo. 344; Lee *v.* Wilkins, 79 Mo. App. 159.

New Hampshire.— Lewis *v.* Dudley, 70 N. H. 594, 49 Atl. 572.

New Jersey.— Danbury *v.* Robinson, 14 N. J. Eq. 213, 82 Am. Dec. 244.

New York.— Ledyard *v.* Butler, 9 Paige 132, 37 Am. Dec. 379.

North Carolina.— Potts *v.* Blackwell, 56 N. C. 449.

Ohio.— Holmes *v.* Gardner, 50 Ohio St. 167, 33 N. E. 644, 20 L. R. A. 329; Shorten *v.* Drake, 38 Ohio St. 76 [*reversing* 8 Ohio Dec. (Reprint) 184, 6 Cinc. L. Bul. 202].

United States.— Freiburg *v.* Dreyfus, 135 U. S. 478, 10 Sup. Ct. 716, 34 L. ed. 206.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 613.

Payment pending suit.— Where a suit brought by creditors attacks only the realty of the pledge or mortgage, the fact that the pledgee pays the balance of the loan pending such suit, before it is amended so as attack the original fraudulent conveyance, does not affect his rights. Freiburg *v.* Dreyfus, 135 U. S. 478, 10 S. Ct. 716, 34 L. ed. 206.

Where a house built on another's land is sold to him for the purpose of defrauding the vendor's creditors, it becomes a part of the realty and a subsequent mortgage of the realty to an innocent third person will prevent a creditor of the fraudulent vendor from establishing a title to the house, as personal property by an intervening attachment and a subsequent levy and sale upon execution, so as to enable him, after purchasing it at the sheriff's sale, to maintain an action of tort against the fraudulent vendee for the conversion of it. Curtis *v.* Riddle, 7 Allen (Mass.) 185.

Such mortgagee may purchase for his own benefit an outstanding title which is paramount to the fraudulent grantor's title. Gjerness *v.* Mathews, 27 Minn. 320, 7 N. W. 355.

Notice.— The retention of possession by the grantor will not charge the mortgagee with notice of the fraud; nor will he be affected by notice of levies made upon the property subsequent to the conveyance. Shorten *v.* Drake, 38 Ohio St. 76 [*reversing* 8 Ohio Dec. (Reprint) 184, 6 Cinc. L. Bul. 202].

62. Priorities in disposition of proceeds of sale of property see *infra*, XIV, M, 3.

63. Applegate *v.* Applegate, 107 Iowa 312, 78 N. W. 34; Stockton *v.* Craddick, 4 La. Ann. 282; Standard Nat. Bank *v.* Garfield Nat. Bank, 70 N. Y. App. Div. 46, 75 N. Y.

creditors of the original grantor.[64] But until they have acquired such lien they have no right to the property superior to the equities of the grantor's creditors.[65]

(E) *Purchaser From Bona Fide Grantee.* A purchaser from a *bona fide* grantee without notice acquires a perfect title as against the original grantor's creditors or execution purchasers, whether or not he had notice of the fraud of the original grantor,[66] and whether he had paid any or an inadequate consideration therefor,[67] or paid but part cash and gave his notes secured on the property for the balance;[68] or whether his conveyance was a voluntary one,[69] or was intended as a mortgage as between the parties.[70] This rule applies to a purchaser from a *bona fide* mortgagee of the fraudulent grantee,[71] and a purchaser under the mortgage title is not affected by the pendency of a suit to set the fraudulent conveyance aside.[72]

(F) *Original Grantor as Purchaser.* The principle that one with notice may acquire a good title from one without notice[73] does not apply where the title becomes revested in the original grantor through the *bona fide* purchaser; in such case the original equities reattach to the property in his hands.[74]

(III) *As to Purchasers From Original Grantor.* The title of a *bona fide* purchaser from a fraudulent grantee is also good against a subsequent grantee with notice from the original grantor,[75] or as against a prior pretended contract of sale between the fraudulent grantor and a third person, although he had notice of it.[76] So a *bona fide* transferee of a fraudulent mortgage will pre-

Suppl. 28; Parker *v.* Freeman, 2 Tenn. Ch. 612. But *compare* Winslow *v.* Stewart, 7 Ky. L. Rep. 368. *Contra,* Richardson *v.* Gerli, (N. J. Ch. 1903) 54 Atl. 438, holding that a judgment creditor of a fraudulent grantee who has levied on the property prior to the appointment of a receiver of the grantor is not a *bona fide* purchaser for a good consideration within the meaning of the New Jersey statute (N. J. Gen. St. p. 1605, § 15), and that he acquires no title or lien prior to that of the judgment creditors of the grantor whose debts existed at the time of the fraudulent conveyance. See also Couse *v.* Columbia Powder Mfg. Co., (N. J. Ch. 1895) 33 Atl. 297.

64. Manhattan Co. *v.* Evertson, 6 Paige (N. Y.) 457.

65. Davis *v.* Graves, 29 Barb. (N. Y.) 480. See Haymaker's Appeal, 53 Pa. St. 306. See also *supra,* XIII, A, 3, c.

66. *Alabama.*—Freeman *v.* Pullen, 130 Ala. 653, 31 So. 451.

California.— Casey *v.* Leggett, 125 Cal. 664, 58 Pac. 264.

Connecticut.— Walp *v.* Mooar, 76 Conn. 515, 57 Atl. 277.

Dakota.— Young *v.* Harris, 4 Dak. 367, 32 N. W. 97.

Georgia.— Colquitt *v.* Thomas, 8 Ga. 258.

Indiana.— Arnold *v.* Smith, 80 Ind. 417; Studabaker *v.* Langard, 79 Ind. 320; Evans *v.* Nealis, 69 Ind. 148; Hampson *v.* Fall, 64 Ind. 382.

Iowa.— Mast *v.* Henry, 65 Iowa 193, 21 N. W. 559.

Louisiana.— Burg *v.* Rivera, 105 La. 144, 29 So. 482.

Maine.— Davis *v.* Tibbetts, 39 Me. 279.

Minnesota.— Mix *v.* Ege, 67 Minn. 116, 69 N. W. 703.

Missouri.— Craig *v.* Zimmerman, 87 Mo. 475, 56 Am. Rep. 466; Crow *v.* Andrews, 24 Mo. App. 159.

Nevada.— Allison *v.* Hagan, 12 Nev. 38.

New York.— Adelberg *v.* Horowitz, 32 N. Y. App. Div. 408, 52 N. Y. Suppl. 1125.

Texas.— Bergen *v.* Producers' Marble Yard, 72 Tex. 53, 11 S. W. 1027; Sanger *v.* Thomasson, (Civ. App. 1898) 44 S. W. 408.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 612.

Such a purchaser may recover for the conversion of the property, although he may know that the prior sale was made by the seller to defraud his creditors. Sanger *v.* Thomasson, (Tex. Civ. App. 1898) 44 S. W. 408.

67. Casey *v.* Leggett, 125 Cal. 664, 58 Pac. 264.

68. Freeman *v.* Pullen, 130 Ala. 653, 31 So. 451; Burg *v.* Rivera, 105 La. 144, 29 So. 482.

69. Savage *v.* Dowd, 54 Miss. 728. *Compare* Shaw *v.* Tracy, 83 Mo. 224.

70. Casey *v.* Leggett, 125 Cal. 664, 58 Pac. 264.

71. Bradley *v.* Luce, 99 Ill. 234; Noblet *v.* St. John, 29 Minn. 180, 12 N. W. 527.

72. Bradley *v.* Luce, 99 Ill. 234.

73. See *supra,* XIII, B, 2, d, (II), (E).

74. *Connecticut.*— Birge *v.* Nock, 34 Conn. 156.

Georgia.— Bourquin *v.* Bourquin, 120 Ga. 115, 47 S. E. 639.

Nevada.— Allison *v.* Hagan, 12 Nev. 38.

Ohio.— Schultz *v.* Brown, 3 Ohio Cir. Ct. 609, 2 Ohio Cir. Dec. 353.

Oregon.— Perkins *v.* McCullough, 31 Oreg. 69, 49 Pac. 861.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 614.

75. Aiken *v.* Bruen, 21 Ind. 137.

76. Poling *v.* Williams, 55 W. Va. 69, 46 S. E. 704.

vail over a prior mortgagor whose mortgage was not recorded until after the fraudulent mortgage was recorded, although prior to its transfer.[77]

XIV. REMEDIES.

A. In General. The courts look with favor upon the rights of creditors and will afford them every remedy and facility to detect and defeat any effort to defraud them of their just rights.[78] And courts of law and courts of equity generally have concurrent jurisdiction in the matter of affording relief against fraudulent conveyances by debtors.[79] The form of the remedy is to be determined by the *lex fori*.[80]

B. Remedies at Law — 1. In General. Courts of law, as has been already stated, generally have concurrent jurisdiction with courts of equity to give relief to creditors against a fraudulent conveyance by the debtor of his property.[81] The remedies administered in a court of law are usually based upon the theory that the conveyance assailed is void or voidable as to creditors,[82] and that a creditor

77. Clarke *v.* Forbes, 9 Nebr. 476, 4 N. W. 58.

78. Banks *v.* McCandless, 119 Ga. 793, 47 S. E. 332.

79. *Georgia.*—Lathrop *v.* McBurney, 71 Ga. 815; Thurmond *v.* Reese, 3 Ga. 449, 46 Am. Dec. 440.

Michigan.— Cleland *v.* Taylor, 3 Mich. 201.

Missouri.— Potter *v.* Adams, 125 Mo. 118, 28 S. W. 490, 46 Am. St. Rep. 478.

New Jersey.— Mulford *v.* Peterson, 35 N. J. L. 127; Moore *v.* Williamson, 44 N. J. Eq. 496, 14 Atl. 587, 1 L. R. A. 336; Smith *v.* Wood, 42 N. J. Eq. 563, 7 Atl. 881 [*affirmed* in 44 N. J. Eq. 603, 17 Atl. 1104]; Cox *v.* Gruver, 40 N. J. Eq. 473, 3 Atl. 172.

Virginia.— Garland *v.* Rives, 4 Rand. 282, 15 Am. Dec. 756.

United States.— Orendorf *v.* Budlong, 12 Fed. 24.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 674. See also *infra*, XIV, B, C.

Nature of action see Goldman *v.* Biddle, 118 Ind. 492, 21 N. E. 43; Voorhees *v.* Reford, 14 N. J. Eq. 155.

80. Drake *v.* Rice, 130 Mass. 410, holding that, if an assignment of a chose in action made in fraud of creditors is voidable in some form of judicial process by the law of the state where the assignment is made and by the law of the state where the remedy is sought, the question as to the form of the remedy is to be determined by the law of the latter state.

81. Doe *v.* Clark, 42 Iowa 123 (action by administrator); Cleland *v.* Taylor, 3 Mich. 201; Potter *v.* Adams, 125 Mo. 118, 28 S. W. 490, 46 Am. St. Rep. 478; Cox *v.* Gruner, 40 N. J. Eq. 473, 3 Atl. 172; Mulford *v.* Peterson, 35 N. J. Eq. 127. But *compare* Anderson *v.* Belcher, 1 Hill (S. C.) 246, 26 Am. Dec. 174; Pease *v.* Shirlock, 63 Vt. 622, 22 Atl. 661. And see Snodgrass *v.* Andrews, 30 Miss. 472, 64 Am. Dec. 169. Under the statute of frauds a chattel mortgage that is fraudulently contrived for the purpose of defeating creditors is void at law as well as in equity. Lobsenz *v.* Burton, 68 N. J. L. 566, 53 Atl. 546.

Relief based upon theory that the conveyance creates a trust in favor of creditors.— Where a debtor conveys property with intent to create a secret resulting trust or interest in the grantor and with the purpose of defrauding creditors, the transfer will give rise to a trust in favor of the creditors meant to be defrauded, which may be enforced through the medium of an action at common law. Robinett *v.* Donnelly, 5 Phila. (Pa.) 361.

Remedy by scire facias.— In some states there have been statutory provisions by virtue of which the creditor could have a scire facias against any person claiming an estate under an alleged fraudulent conveyance. See Morrison *v.* McNeill, 51 N. C. 450; Wintz *v.* Webb, 14 N. C. 27.

82. See the cases cited *infra*, this note. Although in many jurisdictions the word "void," as used in the statute of Elizabeth, and in the statutes of the different states in this country based upon the said statute, is held to mean that a conveyance fraudulent as to creditors is absolutely void as to them (Mason *v.* Vestal, 88 Cal. 396, 26 Pac. 213, 22 Am. St. Rep. 310; Judson *v.* Lyford, 84 Cal. 505, 24 Pac. 286; Kimmel *v.* McRight, 2 Pa. St. 38; Patrick *v.* Smith, 2 Pa. Super. Ct. 113; Jacobi *v.* Schloss, 7 Coldw. (Tenn.) 385; Thompson *v.* Baker, 141 U. S. 648, 12 S. Ct. 89, 35 L. ed. 889), there is strong support for the position that such a conveyance is not absolutely void but that it will only be regarded as invalid at the instance of some creditor taking active measures to subject the property involved to his debt (Parrott *v.* Crawford, (Indian Terr. 1904) 82 S. W. 688; Webb *v.* Brown, 3 Ohio St. 246; French Lumbering Co. *v.* Theriault, 107 Wis. 627, 83 N. W. 927, 81 Am. St. Rep. 856, 51 L. R. A. 910; *In re* Estes, 5 Fed. 60, where the court held that notwithstanding the strong language used in the statutes based upon 13 Eliz., a conveyance, fraudulent as to creditors, is only voidable at the election of the creditor and that a judgment rendered after such a conveyance is not in itself a lien upon the property). Practically the

may by legal proceedings seize the property conveyed or its equivalent in the hands of the fraudulent grantee,[83] and, on the assertion of a claim to the property by the grantee, either in the proceeding in which the seizure is made,[84] or in some other proceeding,[85] show the fraudulent character of the conveyance.

2. Remedies of Creditors Based Upon Nullity of Transfer — a. In General. A conveyance of property by a debtor made with intent to defraud his creditors to one participating in the fraudulent intent is declared by statute both in this country and in England and by the decisions of the courts as either void or voidable as to creditors, and they may generally pursue legal process against the subject of the conveyance as though the title to the property were not embarrassed by the fraudulent conveyance.[86] The title, for the purpose of enabling creditors to enforce their debts against the property conveyed, still remains in the grantor, just as though the conveyance had not been made.[87] A direct action to set aside the conveyance is not required.[88] In pursuing such process, however,

conveyance is only voidable at the instance of creditors proceeding in the mode prescribed by law and even then not as against a *bona fide* purchaser. *In re* Estes, 3 Fed. 134, 6 Sawy. 459. See *supra*, XIII, A, B. Such a conveyance is not void *per se* even as between debtor and creditor. If the creditor condones the fraud and takes no steps to avoid the conveyance, it stands forever as a divestiture of the title of the debtor. Parrott *v.* Crawford, (Indian Terr. 1904) 82 S. W. 688. See *supra*, III, C, 5, b; XII, A. A deed made with intent to hinder, delay, or defraud creditors, which is declared "void" by Tex. Rev. St. (1895) art. 2544, is voidable only, and the land cannot be recovered from the grantee or his successor in title without first procuring a decree setting it aside by action for that purpose. Rutherford *v.* Carr, (Tex. Civ. App. 1905) 84 S. W. 659. When a conveyance is said to be void against creditors those creditors are meant who have obtained judgment and caused execution to be issued or have availed themselves of such other remedies as the law has provided for the collection of debts. Van Heusen *v.* Radcliff, 17 N. Y. 580, 72 Am. Dec. 480. See *infra*, XIV, E. And see Harding *v.* Elliott, 12 Misc. (N. Y.) 521, 33 N. Y. Suppl. 1095, where it was said that where the transfer is executed, although with intent to defraud creditors, the transferee has a good title until the same is impeached by creditors in an action brought for that purpose.

83. See *infra*, XIV, B.

84. See *infra*, XIV, B, 7.

85. See *infra*, XIV, B, 6.

86. *Arkansas.*— Hershy *v.* Latham, 42 Ark. 365.

Connecticut.— Price *v.* Heubler, 63 Conn. 374, 28 Atl. 524; Owen *v.* Dixon, 17 Conn. 492.

District of Columbia.— Hayes *v.* Johnson, 6 D. C. 174.

Georgia.— A transfer or assignment of his property by an insolvent debtor, which is fraudulent and void under section 2695 of the civil code, may be attacked by the person interested, either in direct or collateral proceedings, where it is sought to set up such transfer. Coleman, etc., Co. *v.* Rice, 115 Ga. 510, 42 S. E. 5.

Illinois.— Willard *v.* Masterson, 160 Ill. 443, 43 N. E. 771.

Iowa.— Brainard *v.* Van Kuran, 22 Iowa 261.

Kentucky.— Scott *v.* Scott, 85 Ky. 385, 3 S. W. 598, 5 S. W. 423, 9 Ky. L. Rep. 363.

Louisiana.— Muse *v.* Yarborough, 11 La. 521. See *infra*, XIV, B, 2, b.

Maine.— Fletcher *v.* Tuttle, 97 Me. 491, 54 Atl. 1110.

Maryland.— Spindler *v.* Atkinson, 3 Md. 409, 56 Am. Dec. 755.

Michigan.— Pierce *v.* Hill, 35 Mich. 194, 24 Am. Rep. 541; Trask *v.* Green, 9 Mich. 358.

Minnesota.— Jackson *v.* Holbrook, 36 Minn. 494, 32 N. W. 852, 1 Am. St. Rep. 683; Campbell *v.* Jones, 25 Minn. 155; Arper *v.* Baze, 9 Minn. 108.

Mississippi.— Shaw *v.* Millsops, 50 Miss. 380; Thomason *v.* Neeley, 50 Miss. 310; Johnson *v.* Ingram, (1891) 9 So. 822.

New York.— Smith *v.* Reid, 134 N. Y. 568, 31 N. E. 1082; Bergen *v.* Carman, 79 N. Y. 146.

North Carolina.— Smitherman *v.* Allen, 59 N. C. 17.

Texas.— Lynn *v.* Le Gierse, 48 Tex. 138.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 658, 659. And see *infra*, XIV, B, 2, c–e.

87. Campbell *v.* Jones, 25 Minn. 155; and other cases cited in the preceding note.

Theory that trust results in favor of creditors.— When one makes a conveyance of his lands in order to hinder, delay, and defraud his creditors, there is created thereby a resulting trust in favor of his creditors, and such property can be sold on an execution against him. Ryland *v.* Callison, 54 Mo. 513.

As to rights of creditor as against a postnuptial settlement made by the debtor and invalid because of failure to comply with a statute requiring its registration see Abrahams *v.* Cole, 5 Rich. Eq. (S. C.) 335.

88. *Arkansas.*— Hershy *v.* Latham, 42 Ark. 305.

District of Columbia.— Hayes *v.* Johnson, 6 D. C. 174.

Illinois.— Willard *v.* Masterson, 160 Ill. 443, 43 N. E. 771.

Iowa.— Brainard *v.* Van Kuran, 22 Iowa 261.

the creditor must strictly observe the course prescribed by law.[89] And any departure from such course will disable the creditor from enforcing any supposed rights acquired under the levy.[90] Furthermore the rule that a conveyance in fraud of creditors is void, so that they may pursue their remedy as if no conveyance had been made, does not apply where the title has never been in the debtor, as in the case where a debtor purchases land and causes the conveyance to be made to his wife or another.[91] And so where property fraudulently transferred by a debtor has been converted into money by the transferee, or money so transferred has been converted into other property, which is claimed by the transferee.[92]

b. Rule in Louisiana. In Louisiana the rule is that where the transfer is simulated or purely fictitious, a judgment creditor can seize the property conveyed without suing to annul the transfer;[93] but where the transaction has all

Kentucky.— Scott *v.* Scott, 85 Ky. 385, 3 S. W. 598, 5 S. W. 423, 9 Ky. L. Rep. 363.

New York.— Smith *v.* Reid, 134 N. Y. 568, 31 N. E. 1082.

Texas.— Lynn *v.* Le Gierse, 48 Tex. 138.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 659; and other cases cited *infra*, XIV, B, 2, c–e.

A creditor of a fraudulent mortgagor, instead of proceeding in equity, may reach the property included in such mortgage by garnishing the mortgagee. Brainard *v.* Van Kuran, 22 Iowa 261.

Right of levying officer, when sued, to attack conveyance.— A levying officer may defend an action for possession, brought by a claimant under a conveyance from the debtor, by showing fraud therein, without first instituting a direct proceeding to have the conveyance set aside. Pierce *v.* Hill, 35 Mich. 194, 24 Am. Rep. 541. See also *infra*, XIV, B, 2, g.

89. Owen *v.* Dixon, 17 Conn. 492; Osborne *v.* Moss, 7 Johns. (N. Y.) 161, 5 Am. Dec. 252; Williford *v.* Conner, 12 N. C. 379. The creditor cannot seize and dispose of the property transferred otherwise than by authority of law, and an officer as his agent or legal representative has no greater power. Andrews *v.* Marshall, 43 Me. 272.

90. Esten *v.* Jackson, 68 Me. 292.

91. Webster *v.* Folsom, 58 Me. 230; Maynard *v.* Haskins, 9 Mich. 485; Wright *v.* Douglass, 3 Barb. (N. Y.) 554; Jimmerson *v.* Duncan, 48 N. C. 537. See *supra*, II, B, 16, d; III, A, 3, a; *infra*, XIV, B, 2, j.

92. Lanning *v.* Streeter, 57 Barb. (N. Y.) 33.

93. Walsh *v.* Carrene, 36 La. Ann. 199; White *v.* Gaines, 29 La. Ann. 769; Gaidry *v.* Lyons, 29 La. Ann. 4; Brown *v.* Brown, 22 La. Ann. 475; Holmes *v.* Barbin, 15 La. Ann. 553; North *v.* Gordon, 15 La. Ann. 221 (holding that where a promissory note or a judgment has been transferred to a third person, for the purpose of defeating the legal pursuit of creditors, and the transfer is a simulation, a creditor may disregard such transfer, and attach them, without resorting to the revocatory action, and making the transferee a party to the suit); Scully *v.* Kearns, 14 La. Ann. 436; Simpson *v.* Mills, 12 La. Ann. 173; Weeks *v.* Flower, 9 La. 379.

What constitutes simulation.— Where one buys property, and to elude creditors causes the title to be inscribed in the name of another, that part of the transaction relating to the name is a simulation, and to uncover the true owner is the proper province of an action *en declaration de simulation*. Hoffmann *v.* Ackermann, 110 La. 1070, 35 So. 293.

Distinction between fraudulent and simulated conveyances.— Real property held under an apparently good title, accompanied by continuous possession and control as owner, cannot be directly seized by a creditor of the grantor in disregard of the apparent title on proof of the fraudulent character of the conveyance offered collaterally. Carter *v.* Farrell, 39 La. Ann. 102, 1 So. 279. This rule, however, does not apply, and the validity of the transfer can be contested by a direct seizure, if the elements of continuous possession and control by the debtor as owner are wanting (Cochrane *v.* Gilbert, 41 La. Ann. 735, 6 So. 731), as where the grantor continues to administer the property and collect the rents after the transfer (Carter *v.* Farrell, 39 La. Ann. 102, 1 So. 279), and especially if th transfer is accompanied by a counter-letter clearly establishing its fraudulent character (Carter *v.* Farrell, *supra*). And this distinction between fraudulent and simulated contracts applies to donations and voluntary conveyances. Johnson *v.* Alden, 15 La. Ann. 505. Although, where a purchaser is in possession, the question of fraud cannot be raised collaterally on a seizure, yet a seizing creditor, enjoined by a third person, alleging possession and claiming vindictive damages, may show that the debtor is still in possession, and that the third person's title is simulated to cover the debtor's property. Weeks *v.* Flower, 9 La. 379.

Parol testimony is admissible to expose a simulation. Hoffmann *v.* Ackermann, 110 La. 1070, 35 So. 293.

Admission that sale was simulated.— If the vendee by his conduct tacitly admits the sale to be simulated, and permits a creditor of his vendor to seize and sell the subject thereof, and give up possession to the marshal, the purchaser acquires a valid title without suit to annul the first sale. Harris *v.* Denison, 8 La. 543.

the appearance of an actual transfer of the property and there has been a change of possession, the creditor cannot disregard the transfer but must sue to annul it.[94]

c. Execution — (i) *In General.* In accordance with the rule above stated,[95] a judgment creditor may in most jurisdictions, subject to the general provisions of the statutes with reference to executions,[96] levy an execution upon the property constituting the subject of the fraudulent conveyance by his debtor, as though the conveyance did not exist;[97] and this is true, not only of transfers directly from

94. Pochelu *v.* Catonnet, 40 La. Ann. 327, 4 So. 74; Johnson *v.* Kingsland, etc., Mfg. Co., 38 La. Ann. 248; Majors *v.* Dennis, 35 La. Ann. 336; Willis *v.* Scott, 33 La. Ann. 1026; Redwitz *v.* Waggaman, 33 La. Ann. 26; Theurer *v.* McGibbon, 28 La. Ann. 29; Johnson *v.* Alden, 15 La. Ann. 505; Hanna *v.* Pritchard, 6 La. Ann. 730.

The revocatory action is the remedy for creditors seeking relief against sales or other dispositions of the debtor's property in fraud of creditors under Civ. Code, arts. 1970, 1978, 1982, 1989 *et seq.* Metropolitan Bank *v.* Aarons-Mendelsohn Co., 50 La. Ann. 1047, 24 So. 125.

Where transfer is accompanied by change of possession.— The rule is that where immovable property is held under a title translative of property accompanied by actual delivery and continuous possession and control as owner, it cannot be directly seized by a creditor of the transferrer on the ground of fraud in the transfer (Carter *v.* Farrell, 39 La. Ann. 102, 1 So. 279), but the creditor must resort to a direct action in avoidance of the sale (Weathers *v.* Pecot, 52 La. Ann. 932, 27 So. 538). The principle upon which this rule rests is that men are presumed to act honestly until the contrary is proved, that the conveyances alleged to be fraudulent are *prima facie* correct, and that it is improper, in opposition to these presumptions, that the creditor should exercise rights that could only properly belong to him in case the acts of his debtor were null and of no effect. Peet *v.* Morgan, 6 Mart. N. S. (La.) 137. Under this rule it is necessary that the possession and control by the grantee shall be perfect and complete. If there is any interruption, infirmity, or ambiguity in the possession established which tends to rebut the presumption of ownership the rule does not apply. Carter *v.* Farrell, 39 La. Ann. 102, 1 So. 279; Samory *v.* Hebrard, 17 La. 555. *Compare* Lawler *v.* Cosgrove, 39 La. Ann. 488, 2 So. 34; Shaughnessy *v.* Fogg, 15 La. Ann. 330.

Conveyance of record.— A conveyance of record must be attacked by a direct revocative action. Cage *v.* Wells, 7 Humphr. (Tenn.) 195, under Louisiana statute. A judgment creditor cannot seize real property sold by his debtor after the authentic act of the sale of the same is recorded, and when enjoined by the purchaser from selling the property set up the defense that the sale was fraudulent, his defense in such case is confined to the question of simulation. We must resort to the direct action of nullity to set aside the sale because of fraud. Kelder *v.* Blanchard, 19 La. Ann. 53. See also Peet *v.* Morgan, 6 Mart. N. S. (La.) 137.

Attack upon consent judgment.— A revocatory action is the remedy for creditors seeking relief against an alleged fraudulent disposition of the debtor's property, claimed to have been accomplished by a consent judgment voidable for want of jurisdiction, and not a direct seizure of the property. Atkins *v.* Scarborough, 52 La. Ann. 800, 27 So. 134.

95. See *supra*, XIV, B, 1, 2, a.

96. See, generally, Executions, 17 Cyc. 878. Where a creditor levies an execution on property fraudulently conveyed by his debtor, all the subsequent steps prescribed by law must be taken; and if any of them be omitted, the property is discharged from the lien and must be restored to the owner. Owen *v.* Dixon, 17 Conn. 492. See also Williford *v.* Conner, 12 N. C. 379.

97. *Alabama.*— Howard *v.* Corey, 126 Ala. 283, 28 So. 682; Gilliland *v.* Fenn, 90 Ala. 230, 8 So. 15, 9 L. R. A. 413; Loeb *v.* Manasses, 78 Ala. 555; High *v.* Nelms, 14 Ala. 350, 48 Am. Dec. 103; Carville *v.* Stout, 10 Ala. 796.

Arizona.— Rountree *v.* Marshall, (1899) 59 Pac. 109.

Arkansas.— Hershy *v.* Latham, 42 Ark. 305.

Connecticut.— Price *v.* Heubler, 63 Conn. 374, 28 Atl. 524; Staples *v.* Bradley, 23 Conn. 167, 60 Am. Dec. 630; Owen *v.* Dixon, 17 Conn. 492.

District of Columbia.— Hayes *v.* Johnson, 6 D. C. 174.

Georgia.— Gormerly *v.* Chapman, 51 Ga. 421; Feagan *v.* Cureton, 19 Ga. 404.

Illinois.— Willard *v.* Masterson, 160 Ill. 443, 43 N. E. 771; Gould *v.* Steinburg, 84 Ill. 170.

Indiana.— Stevens *v.* Wroks, 81 Ind. 445; Frank *v.* Kessler, 30 Ind. 8.

Kentucky.— Scott *v.* Scott, 85 Ky. 385, 3 S. W. 598, 5 S. W. 423, 9 Ky. L. Rep. 363; Worland *v.* Outten, 3 Dana 477; Howard *v.* Duke, 45 S. W. 69, 19 Ky. L. Rep. 2008; Mt. Vernon Banking Co. *v.* Henderson Hominy Mills, 15 Ky. L. Rep. 333; Snapp *v.* Orr, 4 Ky. L. Rep. 355.

Louisiana.— Kimble *v.* Kimble, 1 Mart. N. S. 633. See *supra*, XIV, B, 2, b.

Maine.— Wyman *v.* Richardson, 62 Me. 293; Wyman *v.* Fox, 59 Me. 100; Brown *v.* Snell, 46 Me. 490.

Maryland.— Spindler *v.* Atkinson, 3 Md. 409, 56 Am. Dec. 755.

the debtor, but also of transfers whereby his title and ownership are passed to another with a fraudulent intent through the agency of a judicial sale.[98] At the

Massachusetts.— Sherman *v.* Davis, 137 Mass. 132.

Michigan.— Pierce *v.* Hill, 35 Mich. 194, 24 Am. Rep. 541; Trask *v.* Green, 9 Mich. 358. See French *v.* Newberry, 124 Mich. 147, 82 N. W. 840.

Minnesota.— Brasie *v.* Minneapolis Brewing Co., 87 Minn. 456, 92 N. W. 340, 94 Am. St. Rep. 709, 59 L. R. A. 865; Jackson *v.* Holbrook, 36 Minn. 494, 32 N. W. 852, 1 Am. St. Rep. 683; Campbell *v.* Jones, 25 Minn. 155; Arper *v.* Baze, 9 Minn. 108.

Mississippi.— Johnson *v.* Ingram, (1891) 9 So. 822.

Missouri.— Woodard *v.* Mastin, 106 Mo. 324, 17 S. W. 308; Ryland *v.* Callison, 54 Mo. 513; Kinealy *v.* Macklin, 2 Mo. App. 241.

New York.— Smith *v.* Reid, 134 N. Y. 568, 31 N. E. 1082; Bergen *v.* Carman, 79 N. Y. 146 [*reversing* 18 Hun 355].

North Carolina.— Burgin *v.* Burgin, 23 N. C. 160.

North Dakota.— Salemonson *v.* Thompson, (1904) 101 N. W. 320.

Ohio.— Fowler *v.* Trebein, 16 Ohio St. 493, 91 Am. Dec. 95.

Pennsylvania.— Drum *v.* Painter, 27 Pa. St. 148; Stewart *v.* Coder, 11 Pa. St. 90; Hays *v.* Heidelberg, 9 Pa. St. 203.

Rhode Island.— Tucker *v.* Denico, 26 R. I. 560, 59 Atl. 920.

South Carolina.— Paris *v.* Du Pre, 17 S. C. 282; Jones *v.* Crawford, 1 McMull. 373.

Tennessee.— Russell *v.* Stinson, 3 Hayw. 1.

Texas.— Lynn *v.* Le Gierse, 48 Tex. 138.

Virginia.— Wilson *v.* Buchanan, 7 Gratt. 334.

Wisconsin.— Eastman *v.* Shettler, 13 Wis. 324.

United States.— Lynch *v.* Burt, 132 Fed. 417, 67 C. C. A. 305, under North Dakota statute.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 658–664.

One who purchases the property from the fraudulent purchaser between the date at which the writ is placed in the officer's hands and the date of the levy takes subject to the execution lien. Mt. Vernon Banking Co. *v.* Henderson Hominy Mills, 15 Ky. L. Rep. 333.

The fact that the debtor will gain an indirect advantage by having the property which he himself could not recover applied to the payment of his debt does not constitute such a favoring of a wrong-doer as will preclude his creditors from levying on the property, and applying it to the satisfaction of his debt, in defiance of the grantee's claim thereto. Feagan *v.* Cureton, 19 Ga. 404.

Where witnesses' certificates have the force and effect of executions, a party holding such a claim may disregard his debtor's fraudulent conveyance, and levy on and sell the property conveyed in the same manner as if he had obtained judgment and execution. Worland *v.* Outten, 3 Dana (Ky.) 477.

Remedy by suit against transferee.—Where a debtor fraudulently transfers his stock in trade, the course for the creditor to pursue is, not to sue the transferee on his demand, but to levy upon the property under an execution or attachment against the original debtor. Aspinall *v.* Jones, 17 Mo. 209.

Sale subject to interest of grantee.— Where the sale under execution is made subject to the interest of the alleged fraudulent grantee the purchaser at the execution sale acquires nothing. Stonebridge *v.* Perkins, 141 N. Y. 1, 35 N. E. 980.

In Louisiana a judgment creditor may seize upon execution property which his debtor has transferred by a simulated sale. Vickers *v.* Block, 31 La. Ann. 672; Mora *v.* Avery, 22 La. Ann. 417; Southern Bank *v.* Wood, 14 La. Ann. 554, 74 Am. Dec. 446; Emswiler *v.* Burham, 6 La. Ann. 710; Maxwell *v.* Mallard, 5 La. Ann. 702; Hughes *v.* Winfrey, 5 La. Ann. 668. But if there has been an actual transfer of the property the creditor must resort to a direct action to annul the transfer. See *supra*, XIV, B, 2, b.

Right to levy execution after death of debtor.—A judgment creditor is not required to proceed in the orphans' court to sell property conveyed by decedent in fraud of creditors, but is entitled to subject such property to the payment of his judgment by execution against the administrator. Irwin *v.* Hess, 12 Pa. Super. Ct. 163.

Notice to widow and heirs.— Since a conveyance of land, although made with intent to defraud creditors, is good between the parties, creditors having a judgment against the administrator of a fraudulent grantor may levy upon and sell the land conveyed without notice to the widow and heirs. Drum *v.* Painter, 27 Pa. St. 148.

Right of execution creditor to sue in his own name.— The fact that land has been fraudulently conveyed by a debtor, and that the fraudulent grantee has quitclaimed his title to a third person, will not prevent a prior creditor, subsequently levying his execution thereon, from obtaining "momentary seizin," within Rev. St. c. 76, § 13, providing that a levy may be made on land fraudulently conveyed by a debtor, and the officer shall deliver to the creditor a momentary seizin, which shall be sufficient to enable him to maintain an action for the recovery of the land in his own name. Morse *v.* Sleeper, 58 Me. 329.

Sufficiency of levy and return of execution. — Under a statutory provision to the effect that lands fraudulently conveyed by a debtor may be taken in execution for his debts, it is not necessary that the officer state in his return that the levy was made on land "fraudulently" standing in the name of another. Berry *v.* Gates, 175 Mass. 373, 56 N. E. 581.

98. Lynch *v.* Burt, 132 Fed. 417, 67 C. C. A. 305. See *supra*, III, A, 4.

execution sale, the legal title will pass to the purchaser,[99] and if possession is withheld from him he may establish the character of the transfer and recover the property in ejectment or replevin.[1] In some states it has been held, on the theory that the conveyance is "clearly and utterly void," that the judgment creditor may levy his execution upon the property conveyed and subject it to sale without any reference to the question whether the debtor possesses other property or whether there are other defendants having property liable to the same judgment.[2] In some jurisdictions the method of attacking a fraudulent conveyance of land by levying execution on the same and then proceeding to sell under the writ, leaving the purchaser to contest the validity of the conveyance in an action of ejectment against the fraudulent vendee, is not looked upon with favor.[3] The right to levy an execution where the debtor's interest is merely equitable, including cases in which he has purchased property and the title has been taken in the name of another, is elsewhere considered.[4]

(II) *WHERE THE PROPERTY HAS BEEN DISPOSED OF BY GRANTEE OR PURCHASER.* Where the grantee in a fraudulent conveyance himself conveys the property, reserving a trust for his own benefit, an execution may still be levied upon the property.[5] But where the property constituting the subject of the conveyance has been converted into money or other property by the fraudulent grantee,[6] or the conveyed property has been sold by the grantee and its identity is gone,[7] the weight of authority supports the rule that the property received in exchange,[8] or the proceeds arising from the sale,[9] cannot be levied upon as the property of the fraudulent grantor.[10] And where the subject of the conveyance is again conveyed by the grantee to an innocent person, the creditor cannot proceed as though the conveyance were void.[11]

(III) *WHERE CONVEYANCE WAS MADE BEFORE RENDITION OF JUDGMENT.* According to the weight of authority, the fact that the fraudulent conveyance was made before the rendition of the judgment does not make it necessary for the judgment creditor to pursue an equitable remedy instead of his legal remedy by levy and sale under execution.[12] In some jurisdictions, however, if the fraudulent conveyance was made before the rendition of the judgment to which it is sought to subject the property conveyed, sale under execution of the property

99. Judson *v.* Lyford, 84 Cal. 505, 24 Pac. 286; Bull *v.* Ford, 66 Cal. 176, 4 Pac. 1175; Gould *v.* Steinburg, 84 Ill. 170; Spindler *v.* Atkinson, 3 Md. 409, 56 Am. Dec. 755; Woodward *v.* Mastin, 106 Mo. 324, 17 S. W. 308; and other cases cited *supra*, note 97. The title transferred by the execution sale is not merely the right to control the legal title, but it is the legal title itself. Judson *v.* Lyford, 84 Cal. 505, 24 Pac. 286. The purchaser, however, takes his title subject to liens which may have been acquired by third persons before the rendering of the judgment under which the sale is had. Niederhoffer *v.* Bange, 12 Lanc. Bar (Pa.) 37.

1. Brasie *v.* Minneapolis Brewing Co., 87 Minn. 456, 92 N. W. 340, 94 Am. St. Rep. 709, 67 L. R. A. 865; Jackson *v.* Holbrook, 36 Minn. 494, 32 N. W. 852, 1 Am. St. Rep. 683; Potter *v.* Adams, 125 Mo. 118, 28 So. 490, 46 Am. St. Rep. 478; Scoville *v.* Halladay, 16 Abb. N. Cas. (N. Y.) 43; Eastman *v.* Schettler, 13 Wis. 324; and *infra*, XIV, B, 2, f.

2. Gormerly *v.* Chapman, 51 Ga. 421; Vasser *v.* Henderson, 40 Miss. 519, 90 Am. Dec. 351; Paris *v.* Du Pre, 17 S. C. 282.

3. Doster *v.* Manistee Nat. Bank, 67 Ark. 325, 55 S. W. 137, 77 Am. St. Rep. 116, 48 L. R. A. 334. See also Preston-Parton Milling Co. *v.* Horton, 22 Wash. 236, 60 Pac. 412, 79 Am. St. Rep. 928.

4. See *infra*, XIV, B, 2, j.

5. Wyman *v.* Fox, 59 Me. 100.

6. Lanning *v.* Streeter, 57 Barb. (N. Y.) 33; Henderson *v.* Hoke, 21 N. C. 119.

7. Post *v.* Bird, 28 Fla. 1, 9 So. 888; Thurber *v.* Blanck, 50 N. Y. 80; Campbell *v.* Erie R. Co., 46 Barb. (N. Y.) 540; Tubb *v.* Williams, 7 Humphr. (Tenn.) 367.

8. Rutledge *v.* Evans, 11 Iowa 287.

9. Richards *v.* Ewing, 11 Humphr. (Tenn.) 327.

10. See the cases cited in the preceding notes. But see *contra*, Carville *v.* Stout, 10 Ala. 796, holding that where the property transferred has been sold and the proceeds invested in other property, the property so invested in may be levied upon.

11. Morse *v.* Aldrich, 130 Mass. 578.

As to right of judgment creditor to follow the land conveyed or its proceeds into the hands of *bona fide* purchasers *compare* Brown *v.* Campbell, 100 Cal. 635, 35 Pac. 433, 38 Am. St. Rep. 314. And see *supra*, XIII, B.

12. Smith *v.* Reid, 134 N. Y. 568, 31 N. E. 1082; and other cases cited *supra*, XIV, B, 2, c, (I), note 97.

will confer no rights, the courts holding that the conveyance is not void and that the judgment is not a lien on the land.[13]

d. Attachment — (i) *In General.* In accordance with the rule hereinbefore stated,[14] property which has been conveyed by a debtor with the purpose of hindering, delaying, or defrauding his creditors may be levied upon by them under attachment, just as if no such conveyance had been made.[15] In some states,

13. Doster *v.* Manistee Nat. Bank, 67 Ark. 325, 55 S. W. 137, 77 Am. St. Rep. 116, 48 L. R. A. 334 (holding that a judgment creditor has no lien upon lands which have been fraudulently conveyed prior to the rendition of his judgment; under Sandars & H. Dig. § 4204, making a judgment a lien on defendant's real estate, and section 3049, providing that all real estate whereof defendant, or any person for his use, was seized in law or equity on the day of the rendition of a judgment, shall be liable to sale on execution; that under section 3472, declaring that every conveyance made with intent to defraud creditors "shall be void" as to them, a fraudulent conveyance is not void *per se* as between the debtor and creditor, or as between creditors, but conveys legal title, subject only to be avoided by creditors; and that where a judgment creditor seeks to reach property conveyed by the debtor before rendition of the judgment, the proper remedy is to first exhaust the legal process of the court, and then bring a suit in equity to avoid the conveyance); Parrott *v.* Crawford, (Indian Terr. 1904) 82 S. W. 688; Preston-Parton Milling Co. *v.* Horton, 22 Wash. 236, 60 Pac. 412, 79 Am. St. Rep. 928 (holding that where a debtor conveys land by a deed valid between the parties, a lien in favor of a subsequent judgment does not attach under 2 Ballinger Annot. Codes & St. § 5132, providing that the real estate of any judgment debtor, and such as he may acquire, shall be held and bound to satisfy any judgment; that a judgment creditor is not entitled to treat a prior fraudulent conveyance by the judgment debtor as void and sell the land conveyed under execution; and that if he does so, and bids it in at the sale, he acquires no rights as against a subsequent judgment creditor who proceeds by creditors' suit to set the conveyance aside, and sells the land to satisfy his judgment, bidding it in himself). See also Sawtelle *v.* Weymouth, 14 Wash. 21, 43 Pac. 1101; U. S. *v.* Eisenbeis, 88 Fed. 4; *In re* Estes, 3 Fed. 134, 6 Sawy. 459. In Eastman *v.* Schettler, 13 Wis. 324, it was held that one purchasing at a sale under execution issued from a judgment rendered after the alleged fraudulent conveyance could maintain ejectment against the grantee therein. But the later decisions in Wisconsin are to the effect that the docketing of a judgment does not create a lien upon lands made the subject of a prior fraudulent conveyance. Gilbert *v.* Stockman, 81 Wis. 602, 51 N. W. 1076, 52 N. E. 1045, 29 Am. St. Rep. 922.

14. See *supra*, XIV, B, 2, a, c.

15. *Colorado.*— Colorado Trading, etc., Co. *v.* Acres Commission Co., 18 Colo. App. 253, 70 Pac. 954.

Connecticut.— Price *v.* Heubler, 63 Conn. 374, 28 Atl. 524; Hawes *v.* Mooney, 39 Conn. 37; Owen *v.* Dixon, 17 Conn. 492; Enos *v.* Tuttle, 3 Conn. 27; Starr *v.* Tracy, 2 Root 528; Pruden *v.* Leavenworth, 2 Root 129.

Florida.— McClellan *v.* Solomon, 23 Fla. 437, 2 So. 825, 11 Am. St. Rep. 381.

Georgia.— Buckwalter *v.* Whipple, 115 Ga. 484, 41 S. E. 1010, reorganization by corporation for purpose of defrauding creditors.

Illinois.— McKinney *v.* Farmers' Nat. Bank, 104 Ill. 180; Getzler *v.* Saroni, 18 Ill. 511.

Indiana.— Trent *v.* Edmonds, 32 Ind. App. 432, 70 N. E. 169, under express statutory provision.

Iowa.— Byers *v.* McEniry, 117 Iowa 499, 91 N. W. 797.

Louisiana.— North *v.* Gordon, 15 La. Ann. 221; Meeker *v.* Hays, 18 La. 19; Price *v.* Bradford, 4 La. 35; Peet *v.* Morgan, 6 Mart. N. S. 137. See, in this state, *supra*, XIV, B, 2, b.

Maine.— Fletcher *v.* Tuttle, 97 Me. 491, 54 Atl. 1110.

Michigan.— Michigan Trust Co. *v.* Chapin, 106 Mich. 384, 64 N. W. 334, 58 Am. St. Rep. 490.

Minnesota.—Arper *v.* Baze, 9 Minn. 108.

Nebraska.— Westervelt *v.* Baker, 1 Nebr. (Unoff.) 635, 95 N. W. 793.

New Jersey.— Curtis *v.* Steever, 36 N. J. L. 304; Williams *v.* Michenor, 11 N. J. Eq. 520.

New York.— Mechanics', etc., Bank *v.* Dakin, 51 N. Y. 519; Rinchey *v.* Stryker, 28 N. Y. 45, 84 Am. Dec. 324, 26 How. Pr. 75, 31 N. Y. 140.

Rhode Island.— Tucker *v.* Denico, 26 R. I. 560, 59 Atl. 920.

Tennessee.— Jacobi *v.* Schloss, 7 Coldw. 385; Adams *v.* Paletz, (Ch. App. 1897) 43 S. W. 133; Hamburg *v.* Paletz, (Ch. App. 1897) 42 S. W. 807.

Utah.— McKibbon *v.* Brigham, 18 Utah 78, 55 Pac. 66.

United States.— Thompson *v.* Baker, 141 U. S. 648, 12 S. Ct. 89, 35 L. ed. 889.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 658, 659, 665–667. See also ATTACHMENT, 4 Cyc. 562, where various qualifications of the rule are shown.

The theory of the law is that a fraudulent deed passes nothing. For all purposes of attachment the subject of the conveyance is the property of the debtor, and by force of a subsequent levy of execution the title passes directly from the debtor to the exe-

under statutory provisions, the creditor may pursue either the remedy by attachment or by garnishment.[16]

(II) *Property Subject to Attachment.* Questions as to whether particular kinds of property are subject to attachment when fraudulently conveyed or transferred must depend upon the law governing attachments generally.[17] As a rule the right to attach extends to any property which is liable to be taken on execution,[18] including both real[19] and personal[20] property, and choses in action,[21] and in some states by statute, but not otherwise, property in which the debtor has a mere equitable interest, including property purchased in the name of another.[22]

(III) *Where the Property Has Been Disposed of by Grantee or Purchaser.* If the fraudulent grantee or purchaser has disposed of the property to an innocent purchaser, neither the property itself,[23] nor the proceeds of property

cution creditor. Pratt *v.* Wheeler, 6 Gray (Mass.) 520.

Where the property has been attached and replevied by giving bond and security, it will be liable to a second attachment by another creditor of the vendor. Jacobi *v.* Schloss, 7 Coldw. (Tenn.) 385.

Judgment not necessary.— Under the attachment law of New Mexico a general creditor may in that proceeding attack a conveyance of the debtor on the ground of fraud, either actual or constructive, without first reducing his demand to judgment. Meyer, etc., Co. *v.* Black, 4 N. M. 190, 16 Pac. 620. See *infra*, XIV, E, 2.

Necessity of tender to transferee of sum actually due to him.— In Montana it has been held apparently under statutory provision that, although it is conceded that a bill of sale given to secure a debt is fraudulent, a sheriff cannot justify a seizure of the goods under a writ of attachment against the debtor without first tendering to the transferee whatever amount is actually due to him. Wise *v.* Jefferis, 51 Fed. 641, 2 C. C. A. 432.

16. Jordan *v.* Crickett, 123 Iowa 576, 99 N. W. 163, garnishment held not to be the exclusive remedy.

Garnishment see *infra*, XIV, B, 2, e.

17. See, generally, ATTACHMENT, 4 Cyc. 554 *et seq.*

Money in sheriff's hands.— Moneys in the hands of a sheriff are liable to seizure by virtue of a writ of attachment against the property of one to whom they belong, although the title is fraudulently held by a third person. Conover *v.* Ruckman, 33 N. J. Eq. 303.

18. See ATTACHMENT, 4 Cyc. 554, 559.

19. *Florida.*— McClellan *v.* Solomon, 23 Fla. 437, 2 So. 825, 11 Am. St. Rep. 381.

Illinois.— McKinney *v.* Farmers' Nat. Bank, 104 Ill. 180.

Indiana.— Trent *v.* Edmonds, 32 Ind. App. 432, 70 N. E. 169.

Michigan.— Michigan Trust Co. *v.* Chapin, 106 Mich. 384, 64 N. W. 334, 58 Am. St. Rep. 490.

Minnesota.— Arper *v.* Baze, 9 Minn. 108.

New Jersey.— Williams *v.* Michenor, 11 N. J. Eq. 520.

New York.— Rinchey *v.* Stryker, 28 N. Y. 45, 84 Am. Dec. 324, 26 How. Pr. 75, 31 N. Y. 140.

United States.— Thompson *v.* Baker, 141 U. S. 648, 12 S. Ct. 89, 35 L. ed. 889.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 365, 666. See also ATTACHMENT, 4 Cyc. 559, 562.

20. Starr *v.* Tracy, 2 Root (Conn.) 528; Laflin *v.* Central Pub. House, 52 Ill. 432; Bates *v.* Plonsky, 28 Hun (N. Y.) 112, 2 N. Y. Civ. Proc. 389, 64 How. Pr. 232; Jacobi *v.* Schloss, 7 Coldw. (Tenn.) 385. See ATTACHMENT, 4 Cyc. 555, 562.

21. Wilson *v.* Beadle, 2 Head (Tenn.) 510. See also *infra*, XIV, B, 2, e; and, generally. ATTACHMENT, 4 Cyc. 562, 571; GARNISHMENT, *post*.

In New York it is held that a levy of an attachment upon choses in action becomes a lien upon only such debts as at the time belong to the debtor by a legal title and for the recovery of which he can maintain an action at law, and as a consequence that where before levy of the attachment he has parted with the legal title even with intent to defraud his creditors, there remains in him for their benefit only an equity which they cannot reach and so the sheriff cannot assail the transfer as fraudulent. Anthony *v.* Wood, 96 N. Y. 180, 67 How. Pr. 424 [*reversing* 29 Hun 239]; Sterrett *v.* Buffalo Third Nat. Bank, 10 N. Y. St. 818. And a statute providing that where the property sought to be attached is capable of manual delivery, including a bond, promissory note, or other instrument for the payment of money, the levy is to be made by taking the same into the sheriff's actual custody, does not change the above rule. Anthony *v.* Wood, 96 N. Y. 180.

Promissory notes.— Enos *v.* Tuttle, 3 Conn. 27; Wilson *v.* Beadle, 2 Head (Tenn.) 510. *Contra*, Anthony *v.* Wood, 96 N. Y. 180, 67 How. Pr. 424 [*reversing* 29 Hun 239].

Life-insurance policy.— Conyne *v.* Jones, 51 Ill. App. 17.

Bond and mortgage.—Mechanics', etc., Bank *v.* Dakin, 51 N. Y. 519.

Corporate stock.— Curtis *v.* Steever, 36 N. J. L. 304. *Contra*, Van Norman *v.* Jackson Cir. Judge, 45 Mich. 204, 7 N. W. 796.

22. See *infra*, XIV, B, 2, j.

23. See *supra*, XIII, B.

received in exchange, nor property in which the proceeds are invested, are subject to attachment, in the absence of a statute, but the creditor's remedy is in equity.[24]

(iv) *Action by Sheriff in Aid of Attachment.* Under the practice prevailing in some states a sheriff may levy an attachment upon property constituting the subject-matter of a fraudulent conveyance by the debtor and then bring suit to set aside the conveyance.[25]

e. Garnishment — (i) *In General.* Where property or choses in action have been conveyed or transferred for the purpose of defrauding creditors, the grantee or transferee may in many jurisdictions be held to the liability of a garnishee or trustee on account of the property so conveyed, or the proceeds if he has disposed of the same.[26] And this is so, although the conveyance is not void as between the parties and the general rule is that the garnishing creditor

24. Post *v.* Bird, 28 Fla. 1, 9 So. 888; Rutledge *v.* Evans, 11 Iowa 287; Lanning *v.* Streeter, 57 Barb. (N. Y.) 33. See also *supra*, XIV, B, 2, c, (II); and ATTACHMENT, 4 Cyc. 563.

25. Harding *v.* Elliott, 91 Hun (N. Y.) 502, 36 N. Y. Suppl. 648, 25 N. Y. Civ. Proc. 294; Lanning *v.* Streeter, 57 Barb. (N. Y.) 33. See, generally, ATTACHMENT, 4 Cyc. 830. Under such a statute, however, it is held that the identical thing fraudulently conveyed must be attached and that where the property conveyed has been converted into other property before the attachment, the sheriff cannot sue and that the remedy of the creditor is by creditor's bill. Lanning *v.* Streeter, 57 Barb. (N. Y.) 33.

26. *Alabama.*—Cottingham *v.* Greely Barnham Grocery Co., 129 Ala. 200, 30 So. 560.

Connecticut.— Hawes *v.* Mooney, 39 Conn. 37; Pruden *v.* Leavensworth, 2 Root 129.

Idaho.— Van Ness *v.* McLeod, 3 Ida. 439, 31 Pac. 798.

Illinois.— Grassly *v.* Reinbach, 4 Ill. App. 341, assignment of mortgage.

Indiana.— Jaseph *v.* People's Sav. Bank, 132 Ind. 39, 31 N. E. 524 [*overruling* Jaseph *v.* Kronenberger, 120 Ind. 495, 22 N. E. 301].

Iowa.— Risser *v.* Rathburn, 71 Iowa 113, 32 N. W. 198. See also Citizens' State Bank *v.* Council Bluffs Fuel Co., 89 Iowa 618, 57 N. W. 444.

Massachusetts.— Hastings *v.* Baldwin, 17 Mass. 552; Burlingame *v.* Bell, 16 Mass. 318.

Michigan.— Gumberg *v.* Trensch, 103 Mich. 543, 61 N. W. 872 (express statutory provision); Crippen *v.* Fletcher, 56 Mich. 386, 23 N. W. 56.

Mississippi.— People's Bank *v.* Smith, 75 Miss. 753, 23 So. 428.

Missouri.—Dunlap *v.* Mitchell, 80 Mo. App. 393. In this state, under legislative enactment, the creditor may by garnishment reach all moneys which the garnishee may have by reason of the sale of property which has been conveyed to him in fraud of the creditors of the principal defendant. Wells, etc., Grocery Co. *v.* Clark, 79 Mo. App. 401.

New Hampshire.— Green *v.* Doughty, 6 N. H. 572. And see Proctor *v.* Lane, 62 N. H. 457.

Oregon.— Sabin *v.* Michell, 27 Oreg. 66, 39 Pac. 635.

Pennsylvania.— Heath *v.* Page, 63 Pa. St. 108, 3 Am. Rep. 533.

Texas.— Armstrong Co. *v.* Elbert, 14 Tex. Civ. App. 141, 36 S. W. 139.

Vermont.— Crane *v.* Stickles, 15 Vt. 252.

Washington.— Millar *v.* Plass, 11 Wash. 237, 39 Pac. 956.

Wisconsin.— Sutton *v.* Hasey, 58 Wis. 556, 17 N. W. 416. See also Mace *v.* Roberts, 97 Wis. 199, 72 N. W. 866; Stevens Point First Nat. Bank *v.* Knowles, 67 Wis. 373, 28 N. W. 225; Healey *v.* Butler, 66 Wis. 9, 27 N. W. 822.

United States.— Perego *v.* Bonesteel, 19 Fed. Cas. No. 10,977, 5 Biss. 69. See also Treusch *v.* Ottenburg, 54 Fed. 867, 4 C. C. A. 629, under Michigan statute.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 668 *et seq.*

Attachment not only remedy.— A creditor may maintain a trustee process against the vendee of property which has been fraudulently purchased to keep it from being attached, and is not obliged to try the validity of the sale by attaching the property. Crane *v.* Stickles, 15 Vt. 252; and other cases above cited.

The effect of the garnishment is to confer upon the creditor a right to the payment of his claim by reason of the indebtedness existing from the garnishee to defendant or because of the garnishee having in his possession property of defendant. Citizens' State Bank *v.* Council Bluffs Fuel Co., 89 Iowa 618, 57 N. W. 444; and other cases above cited.

Garnishment after ineffectual attempt to levy attachment.— Where one member of a firm, the other being out of the state, to secure certain creditors executes to two of his clerks a bill of sale in trust for them, without their knowledge or consent, and then closes the store, and the sheriff, on his attempt to levy plaintiff's writ of attachment, is ordered by the clerks, who are in possession, not to take possession of the goods, under threats of prosecution for trespass, the attachment of the goods by serving garnishment process on the clerks is warranted. Sabin *v.* Michell, 27 Oreg. 66, 39 Pac. 635.

Notes transferred to, or taken from, garnishee.— Where notes are taken from the grantee in a fraudulent conveyance in payment of the price of the property conveyed

has no other legal rights against the garnishee than those of the principal defendant.[27] But the transferee cannot be held as garnishee if before service of process he has surrendered back the possession of the property to the principal defendant,[28] or if he has paid the full value of the property to the vendor or seller.[29] And the creditor cannot follow the property into the hands of a third person who has in good faith purchased the property from the original fraudulent grantee.[30]

(II) *WHERE LANDS ARE SUBJECT OF CONVEYANCE.* Lands held by virtue of a conveyance which is fraudulent as to creditors are not attachable by garnishment or trustee process,[31] unless, as is the case in some jurisdictions, they are made

the notes are subject to the process of garnishment. Enos *v.* Tuttle, 3 Conn. 27; Patton *v.* Gates, 67 Ill. 164. So where notes owned by the debtor are transferred to the garnishee, although he has received no money upon them. Kenosha Stove Co. *v.* Shedd, 82 Iowa 540, 48 N. W. 933.

Whether lien created.— In some states the process creates a lien (Armstrong Co. *v.* Elbert, 14 Tex. Civ. App. 141, 36 S. W. 139), while in other states it is held that no lien is created upon the property transferred by the process of garnishment as in the case of execution or attachment, but that by garnishment a creditor may create or establish a personal liability against the one holding the property involved (Citizens' State Bank *v.* Council Bluffs Fuel Co., 89 Iowa 618, 57 N. W. 444).

Property held under agreement creating trust in favor of debtor.— Although trust funds are not liable to garnishment, yet where a conveyance, being fraudulent as to creditors, is ineffectual to create a trust, the trustee is as to such creditors a mere stakeholder and liable as garnishee. Donk Coal, etc., Co. *v.* Kinealy, 81 Mo. App. 646. See also Millar *v.* Plass, 11 Wash. 237, 39 Pac. 956. But see Baltimore, etc., R. Co. *v.* Kensington Land Co., 175 Pa. St. 95, 34 Atl. 345, in which it was held that where moneys or property are held by one as trustee for the debtor and are sought to be reached by the process of garnishment the question of fraud in the agreement by virtue of which the trust was created cannot be raised and that the only remedy is by bill in equity.

Liability of agent of transferee.— An agent of the transferee in possession may be held as garnishee if the agent was aware of the fraudulent intent of the grantor. Citizens' State Bank *v.* Council Bluffs Fuel Co., 89 Iowa 618, 57 N. W. 444.

Rule in Louisiana.— In Louisiana it is held that a simulated or fraudulent title cannot be attacked by the process of garnishment. Kearney *v.* Nixon, 19 La. Ann. 16. See *supra*, XIV, B, 2, b.

Nature of proceeding.— In some jurisdictions garnishment is regarded as an equitable proceeding. Mayr *v.* Hodge, etc., Co., 78 Ill. App. 556. See GARNISHMENT, *post*.

27. Cottingham *v.* Greely Barnham Grocery Co., 129 Ala. 200, 30 So. 560, 87 Am. St. Rep. 58; People's Bank *v.* Smith, 75 Miss. 753, 23 So. 428, 65 Am. St. Rep. 618; and other cases cited in the preceding note. But see Chatroop *v.* Borgard, 40 Ill. App. 279, holding that the general rule that a garnishee creditor can have no greater right to recover from the garnishee than the principal defendant applies where a sale by defendant to the garnishee is attacked for fraud.

Attack upon mortgage as fraudulent and holding mortgagee as garnishee.— A creditor may attack a mortgage for fraud in its inception, in a garnishee action against the mortgagee, and the relief which the creditor may have is not limited to that which the debtor is entitled to, as it is when he only seeks to recover a demand of his debtor against the garnishee, untainted with fraud. Healey *v.* Butler, 66 Wis. 9, 27 N. W. 822.

28. Bailey *v.* Ross, 20 N. H. 302. A creditor cannot by process of garnishment reach property which is no longer in the possession of the garnishee but has been returned to the custody of the principal debtor, although the latter claims to be acting as the agent of the garnishee. Gutterson *v.* Morse, 58 N. H. 529.

29. Jaseph *v.* Kronenberger, 120 Ind. 495, 22 N. E. 301; Thomas *v.* Goodwin, 12 Mass. 140.

Otherwise if the transferee has paid the price of the property conveyed to him after the service of the writ of garnishment upon him. Potter *v.* Stevens, 40 Mo. 591.

30. Greenleaf *v.* Mumford, 50 Barb. (N. Y.) 543 [*affirming* 30 How. Pr. 30]. See *supra*, XIII, B.

Where money of a debtor was fraudulently deposited in a bank in the name of another person, and the bank treated the deposit as the property of the depositor, it was held that it could not be seized by attachment in an action by creditors of the debtor, since no debt existed from the bank to the debtor, but to the depositor only. Greenleaf *v.* Mumford, 50 Barb. (N. Y.) 543 [*affirming* 30 How. Pr. 30]. To the same effect see Himstedt *v.* German Bank, 46 Ark. 537, holding that the remedy is by a suit in equity in which the debtor and depositor and the bank are all necessary parties.

31. Chapman *v.* Williams, 13 Gray (Mass.) 416; Sanford *v.* Bliss, 12 Pick. (Mass.) 116; Tucker *v.* Clisby, 12 Pick. (Mass.) 22; Guild *v.* Holbrook, 11 Pick. (Mass.) 101; Ripley *v.* Severance, 6 Pick. (Mass.) 474, 17 Am. Dec. 397; How *v.* Field, 5 Mass. 390; National Union Bank *v.* Brainerd, 65 Vt. 291, 26 Atl. 723; Hunter *v.* Case, 20 Vt. 195. And see, generally, GARNISHMENT, *post*.

so by express statutory provision.[32] If the land has been sold by the fraudulent grantee the proceeds in his hands may be reached by garnishment.[33]

(III) *Rule Where Transferee in Conveyance Is One Other Than Garnishee.* The fact that a debt owing by the garnishee to the principal debtor,[34] or goods in the possession of the garnishee which are sought to be reached by the process of garnishment,[35] have been made the subject of a fraudulent conveyance by the principal defendant to one other than the garnishee will not defeat such process;[36] and it is competent for the creditor to investigate and have settled the issue as to the fraudulent character of the transfer in the garnishment proceeding.[37]

(IV) *Effect of Statutory Provisions.* In some states, by virtue of express legislative enactment, one who is in the possession of property, real or personal, which he holds by virtue of a conveyance or transfer which is fraudulent and void as to creditors of the grantor or transferrer, may be adjudged liable

A purchaser of real estate under a conveyance fraudulent and void as to creditors of the grantor cannot be held as trustee on account of the land held by him under such conveyance unless he is indebted to the principal debtor for the price stipulated. Stevens *v.* Kirk, 37 Vt. 204. In Chapman *v.* Williams, 13 Gray (Mass.) 416, it was held that it is not open to a creditor, by process of garnishment, to hold the purchaser of land from the principal defendant to account for the actual value of the land in contradistinction to the price agreed upon by the parties or the sum actually paid for the same.

Under a statute which provides that if the person summoned as trustee or garnishee shall have in his possession any goods, etc., of the principal defendant which he holds by a conveyance or title that is void as to creditors of the principal defendant he may be adjudged a trustee on account of such goods, although the principal defendant cannot maintain an action therefor against him, a person summoned as trustee cannot be held chargeable on account of real estate which he holds by conveyance from the principal defendant, although the conveyance is fraudulent and void as to creditors as the words of the statute evidently mean personal estate. Hunter *v.* Case, 20 Vt. 195.

In New Hampshire real estate is neither goods, money, chattels, rights, nor credits within the meaning of the statute regulating foreign attachments. Wright *v.* Bosworth, 7 N. H. 590. *Compare* Heywood *v.* Brooks, 47 N. H. 231; Pittsfield Bank *v.* Clough, 43 N. H. 178.

In Missouri a conveyance of land cannot be challenged as in fraud of creditors by a garnishment proceeding. Greene County Bank *v.* Epperson, 74 Mo. App. 10.

32. Webber *v.* Hayes, 117 Mich. 256, 75 N. W. 622.

In Wisconsin under a statute providing that if it appears from the answer of the garnishee that he is indebted to the principal defendant or that he has property in his hands belonging to defendant, etc., he shall forthwith deliver such property or pay the amount of his debt to the officer, and that if it appears from his answer that he holds the title to any real estate or any interest therein in trust for defendant or for his benefit he shall convey the same to the officer, etc., it has been held that the garnishee may convey real estate held under a fraudulent conveyance to the officer. Perego *v.* Bonesteel, 19 Fed. Cas. No. 10,977, 5 Biss. 69.

33. Heath *v.* Page, 63 Pa. St. 108, 3 Am. Rep. 533, holding that there is no difference in principle with respect to the right to garnish such proceeds, between the proceeds of the sale of goods and of the sale of lands. See *supra*, XIV, B, 2, e, (I).

34. North Star Boot, etc., Co. *v.* Ladd, 32 Minn. 381, 20 N. W. 334, holding that a creditor, garnishing in the hands of an insurer insurance money which is claimed in the garnishment proceedings by a mortgagee of the property insured, may attack the mortgage for fraud as to creditors.

In Pennsylvania where a distributive share in the hands of the executor has been levied on by a foreign attachment, as provided by the act of July 27, 1842, it may be shown that a previous assignment of such share is void as against creditors. Sinnickson *v.* Painter, 32 Pa. St. 384.

35. Franklin *v.* Larabee, 1 Root (Conn.) 488; Allen *v.* Erie City Bank, 57 Pa. St. 129; Sinnickson *v.* Painter, 32 Pa. St. 384.

36. Effect of paying claim to transferee thereof after service of process.—That a trustee has no notice of the fraudulent character of an assignment of a claim owed by him does not justify him in paying the debt to the assignee after service of trustee process upon him, the service being sufficient notice that the ownership of the fund is in question. Dow *v.* Taylor, 71 Vt. 337, 45 Atl. 220, 76 Am. St. Rep. 775.

37. People's Bank *v.* Smith, 75 Miss. 753, 23 So. 428, 65 Am. St. Rep. 618; Van Winkle *v.* McKee, 7 Mo. 435. Not to allow a creditor, suing out a writ of garnishment to attack as fraudulent an alleged transfer of the claim or property which the creditor seeks to reach, would enable the debtor in many cases to defeat his creditors. Van Ness *v.* McLeod, 3 Ida. 439, 31 Pac. 798.

as a garnishee on account of such property in proceedings instituted by such creditors.[38]

f. Ejectment. A conveyance of land by a debtor may be attacked as fraudulent, by a creditor who has purchased the same at an execution or other judicial sale, in an action of ejectment brought by or against the grantee in the conveyance.[39]

g. Right of Creditor or Levying Officer to Attack Conveyance in Action by Grantee — (i) *In General.* Where a creditor is allowed to seize property fraudulently conveyed, it is a necessary deduction that where the grantee brings ejectment, replevin, trespass, trover, or other proceedings against him, or against the officer making the levy, to compel the restoration of the property or recover damages for the seizure, he should be permitted to show the character of the conveyance.[40] So where the grantee asserts his claim in the proceeding in which the seizure is made.[41] And this right of one claiming under an execution to show the fraudulent character of the conveyance when sued by the grantee extends to

38. Page *v.* Smith, 25 Me. 256; Harmon *v.* Osgood, 151 Mass. 501, 24 N. E. 401; Gumberg *v.* Treusch, 103 Mich. 543, 61 N. W. 872; Fearey *v.* Cummings, 41 Mich. 376, 1 N. W. 946; Davis *v.* Mendenhall, 19 Minn. 149; French *v.* Breidelman, 2 Grant (Pa.) 319.

In Michigan the statute authorizes the process to issue against all property held by the garnishee by title or transfer which is void as to creditors of the principal debtor, and under this statute property held under a fraudulent chattel mortgage may be reached in the hands of the mortgagee by creditors of the mortgagor by the process of garnishment. Crippen *v.* Fletcher, 56 Mich. 386, 23 N. W. 56.

In Wisconsin the statute provides that any property, moneys, goods, and effects held by a garnishee by a conveyance or title void as to creditors of the principal defendant shall be embraced in his liability to plaintiff. Stevens Point First Nat. Bank *v.* McDonald Mfg. Co., 67 Wis. 373, 28 N. W. 225. And see La Crosse Nat. Bank *v.* Wilson, 74 Wis. 391, 43 N. W. 153; Sutton *v.* Hasey, 58 Wis. 556, 17 N. W. 416.

In some states both the remedy by attachment and garnishment are given. Hastings *v.* Baldwin, 17 Mass. 552; Dahlman *v.* Greenwood, 99 Wis. 163, 74 N. W. 215.

Pendency of other action.—Under Kan. Gen. St. § 4296, authorizing the garnishment of property held under a conveyance void as to creditors, the fact that, after the garnishment of such property by a creditor, another creditor, on behalf of himself and other creditors, has commenced a suit to set aside the conveyance, and for an accounting by the garnishee, does not affect the right of the former under his prior garnishment. Citizens' Bank *v.* Farwell, 63 Fed. 117, 11 C. C. A. 108.

39. *Florida.*— McClellan *v.* Solomon, 23 Fla. 437, 2 So. 825, 11 Am. St. Rep. 381.

Michigan.— Cleland *v.* Taylor, 3 Mich. 201.

Minnesota.— Jackson *v.* Holbrook, 36 Minn. 494, 32 N. W. 852, 1 Am. St. Rep. 683.

Missouri.— Potter *v.* Adams, 125 Mo. 118, 28 S. W. 490, 46 Am. St. Rep. 478.

New Jersey.— Mulford *v.* Peterson, 35 N. J. L. 127.

Pennsylvania.— Girard Nat. Bank *v.* Maguire, 15 Phila. 313.

Wisconsin.— Eastman *v.* Schettler, 13 Wis. 324.

After death of grantor.— As to whether ejectment is the proper remedy under statutory provisions where the grantor has died see Pease *v.* Shirlock, 63 Vt. 622, 22 Atl. 661.

40. *California.*— Bolander *v.* Gentry, 36 Cal. 105, 95 Am. Dec. 162.

Massachusetts.— Gates *v.* Gates, 15 Mass. 310. *Compare* Bond *v.* Endicott, 149 Mass. 282, 21 N. E. 361.

Michigan.— French *v.* Newbery, 124 Mich. 147, 82 N. W. 840; Pierce *v.* Hill, 35 Mich. 194, 24 Am. Rep. 541; Haynes *v.* Ledyard, 33 Mich. 319.

New Hampshire.— Russell *v.* Dyer, 3 N. H. 186; Walker *v.* Lovell, 28 N. H. 138, 61 Am. Dec. 605.

New York.— Rinchey *v.* Stryker, 28 N. Y 45, 84 Am. Dec. 324; Hall *v.* Stryker, 27 N. Y. 596; Thayer *v.* Willet, 18 N. Y. Super. Ct. 344, 9 Abb. Pr. 325. But see Deutsch *v.* Reilly, 57 How. Pr. 75.

Ohio.— Dougherty *v.* Schlotman, 1 Cinc. Super. Ct. 292.

South Carolina.— Paris *v.* Du Pre, 17 S. C. 282; Swanzey *v.* Hunt, 2 Nott. & M. 211.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 652.

Right of officer after relinquishing lien.— In an action in claim and delivery, to recover from an attaching officer, under a claim of ownership, personal property taken from the possession of plaintiff as the property of an attachment debtor, said officer is precluded from questioning the *bona fides* of a prior sale of said property by defendant in the attachment suit to plaintiff, and upon which he bases his right to immediate possession, when it appears that such officer has relinquished his lien, and becomes a trespasser from the beginning, by voluntarily and unlawfully turning the property over to an agent of plaintiff in the attachment proceedings. Griswold .. Sundback, 4 S. D. 441, 57 N. W. 339, 6 S. D. 269, 60 N. W. 1068.

41. See *infra*, XIV, B, 2, h.

a purchaser from the execution creditor.[42] In jurisdictions in which the conveyance is regarded as absolutely void, the levying officer, when sued, may show the fraudulent character of the conveyance without pleading the defense.[43] If a judgment creditor has been made a party to the action by the grantee he may attack the conveyance, although he has not attempted to seize the property under his judgment if affirmative relief is sought against him.[44] But where the relief sought in an action brought by the grantee in the alleged fraudulent conveyance cannot in any way prejudice a creditor, he will not usually be allowed to collaterally assail the conveyance as fraudulent.[45]

(II) *Matters to Be Shown by Creditor or Officer.* Where an action is brought by the grantee to recover back the property levied upon by the creditor of the grantor, or to recover damages for the seizure, the creditor or the officer seeking to justify the levy must prove the existence of a debt owing to the alleged creditor,[46] and that the execution or attachment was regularly issued.[47] And where an execution is levied upon the subject of the conveyance and the officer making the levy seeks to justify under it he must prove that a judgment has been obtained against the transferrer and that the execution was issued pursuant thereto.[48]

h. Right of Creditor on Intervention by Grantee. Where a creditor has levied an execution or attachment upon property made the subject of a fraudulent conveyance by the debtor he can resist the claim of the grantee or transferee on his intervention under statutory provisions.[49] In some states the statute provides that where an execution is so levied, a claim of the grantee by virtue of the conveyance shall be tried by a jury who are to determine whether the conveyance is fraudulent or not.[50] And in some states under statutory provisions the burden rests upon the grantee to show that the conveyance was made in good faith.[51]

i. Right of Creditors to Intervene. Creditors are sometimes allowed to intervene in suits affecting the property or interests of their debtors where there

42. Russell *v.* Fabyan, 34 N. H. 218.

43. Mason *v.* Vestal, 88 Cal. 396, 26 Pac. 213, 22 Am. St. Rep. 310.

44. Kelly *v.* Lenihan, 56 Ind. 448; Evans *v.* Ely, 55 Wis. 194, 12 N. W. 372.

Where, in an action to reform a deed so as to make it include lands not described therein, judgment creditors of the grantor, who claim that their judgment is a lien on the land in question, are made defendants, and relief asked against them, they may defend on the ground that the deed was made in fraud of creditors; and, upon proof of that fact, their rights should be expressly saved by the judgment. Evans *v.* Ely, 55 Wis. 194, 12 N. W. 372.

45. Stone *v.* Bartlett, 46 Me. 438, action brought by grantee to redeem from a prior mortgage.

46. Trowbridge *v.* Bullard, 81 Mich. 451, 45 N. W. 1012; Sanford Mfg. Co. *v.* Wiggin, 14 N. H. 441, 40 Am. Dec. 198.

Although the officer levying the writ of attachment and made defendant in an action by the transferee of the property to recover back the property seized need not show a recovery of a judgment against the transferrer (Botcher *v.* Berry, 6 Mont. 448, 13 Pac. 45), he must show that a debt was owing to the attaching creditor by the transferrer (Maley *v.* Barrett, 2 Sneed (Tenn.) 501).

47. If the officer acts under an execution he must show a judgment and if he seizes the property under an attachment he must show that the attachment was regularly issued. Keys *v.* Grannis, 3 Nev. 548.

48. McKinley *v.* Bowe, 97 N. Y. 93. A judgment must be shown if the officer justifies under an execution or a debt if under a writ of attachment because it is only by showing that he acted for the creditor that he can question the title of the transferee. Sandford Mfg. Co. *v.* Wiggin, 14 N. H. 441, 40 Am. Dec. 198.

49. *Alabama.*— Loeb *v.* Manasses, 78 Ala. 555.

Arkansas.— Blair *v.* Alston, 26 Ark. 41.

California.— Mamlock *v.* White, 20 Cal. 598.

Georgia.— Cole *v.* Byrd, 83 Ga. 207, 9 S. E. 613.

Maryland.— Cecil Bank *v.* Snively, 23 Md. 253.

Minnesota.— North Star Boot, etc., Co. *v.* Ladd, 32 Minn. 381, 20 N. W. 334.

Nebraska.— Greenwood *v.* Ingersoll, 61 Nebr. 785, 86 N. W. 476.

An attaching creditor may show the fraudulent character of a conveyance of the property to one asserting a claim as a third person in the attachment proceedings. Bernheim *v.* Dibrell, (Miss. 1892) 11 So. 795.

50. Smith *v.* Newlon, 62 Miss. 230.

51. North Star Boot, etc., Co. *v.* Ladd, 32 Minn. 381, 20 N. W. 334.

Burden of proof generally see *infra*, XIV, K, 1.

is reason to believe that the debtor is not sufficiently active in defending his rights or that he has colluded with others for the purpose of surrendering such rights in fraud of creditors;[52] but there should be reasonable ground for the belief of the creditor.[53]

j. Remedy Where Equitable Interests in Real Estate Are Sought to Be Reached. The rules applicable to a levy upon real estate, the title to which was once in the judgment debtor, are not necessarily those which apply to a levy upon real estate in which he has a mere equitable interest, and where he has never been possessed of the legal title thereto.[54] Equitable interests of a debtor cannot be reached by execution or attachment,[55] in the absence of a statute allowing such remedy.[56] Therefore where a debtor purchases lands and causes them to be conveyed to his wife, child, or other third person with intent to defraud creditors,[57] his interest in the property so purchased and conveyed being regarded as an equitable and not a legal asset, cannot, in the absence of a statute, be reached by a creditor by levy of execution or attachment upon such interest, but the remedy is by bill in equity, or an action in the nature of a bill in equity, to subject the land to the debt.[58] In some jurisdictions, however, by statute, the interest of a debtor in lands which he has purchased and caused to be conveyed

52. Baum's Succession, 11 Rob. (La.) 314; Clapp *v.* Ely, 27 N. J. L. 555.

Rule where creditor will derive no benefit from attack on conveyance.— But a mere general creditor cannot intervene to stop the execution of a judgment against his debtor on the ground that it is fraudulent and void as to him, since, if he should succeed in setting aside the execution, it would not redound to his benefit, but the debtor, into whose possession the goods levied upon would be returned, might sell or dispose of them at pleasure. Ludlow *v.* Dutton, 1 Phila. (Pa.) 226.

53. Robinson *v.* Stewart, 1 Rich. (S. C.) 3.

A suggestion against a confession of judgment as fraudulent can only be filed by leave of court, on cause shown creating a reasonable ground to believe that the confession is fraudulent, and upon such conditions as the court may impose. Hatch *v.* Clark, Rice (S. C.) 268.

54. Peterson *v.* Farnum, 121 Mass. 476.

55. Hartshorn *v.* Eames, 31 Me. 93; Anthony *v.* Wood, 96 N. Y. 180, 67 How. Pr. 424 [*reversing* 29 Hun 239]. See, generally, ATTACHMENT, 4 Cyc. 560; EXECUTIONS, 17 Cyc. 957. When one has an estate in equity which enables him to call for the legal title without further condition save the proof of the facts which establish his estate, this trust estate is made the subject of sale under execution; but where one has only a right in equity to convert the holder of the legal estate into a trustee and call for a conveyance his right is not subject to sale under execution. Hinsdale *v.* Thornton, 75 N. C. 381.

56. Peterson *v.* Farnum, 121 Mass. 476; Livermore *v.* Boutelle, 11 Gray (Mass.) 217, 71 Am. Dec. 708; Shute *v.* Harder, 1 Yerg. (Tenn.) 3, 24 Am. Dec. 427. And see, generally, ATTACHMENT, 4 Cyc. 560; EXECUTIONS, 17 Cyc. 957.

57. See *supra*, II, B, 16, d; III, A, 3, a.

58. *Alabama.*— Doe *v.* McKinney, 5 Ala. 719.

Florida.— Robinson *v.* Springfield Co., 21 Fla. 203.

Maine.— Fletcher *v.* Tuttle, 97 Me. 491, 54 Atl. 1110; Webster *v.* Folsom, 58 Me. 230; Hartshorn *v.* Eames, 31 Me. 93. See also Griffin *v.* Nitcher, 57 Me. 270.

Massachusetts.— Hamilton *v.* Cone, 99 Mass. 478; Howe *v.* Bishop, 3 Metc. 26.

Michigan.— Maynard *v.* Hoskins, 9 Mich. 485; Trask *v.* Green, 9 Mich. 358.

Mississippi.— Ferguson *v.* Bobo, 54 Miss. 121; Carlisle *v.* Tindall, 49 Miss. 229.

New Jersey.— Haggerty *v.* Nixon, 26 N. J. Eq. 42.

New York.— In an early decision it was held that one paying the consideration for land and causing it to be conveyed to a third person in fraud of creditors had such an interest therein as could be seized on execution. Wait *v.* Day, 4 Den. 439. See also Arnot *v.* Beadle, Lalor 181. But this case has been overruled and by later decisions it is settled that the interest of the debtor can only be reached by bill in equity. Garfield *v.* Hatmaker, 15 N. Y. 475. See also Underwood *v.* Sutcliffe, 77 N. Y. 58; Everett *v.* Everett, 48 N. Y. 218; Ocean Nat. Bank *v.* Olcott, 46 N. Y. 12; McCartney *v.* Bostwick, 32 N. Y. 53; Wood *v.* Robinson, 22 N. Y. 564; Wright *v.* Douglass, 3 Barb. 554; Brewster *v.* Power, 10 Paige 562.

North Carolina.— Everett *v.* Raby, 104 N. C. 479, 10 S. E. 526, 17 Am. St. Rep. 685; Gentry *v.* Harper, 55 N. C. 177; Jimmerson *v.* Duncan, 48 N. C. 537; Gowing *v.* Rich, 23 N. C. 553. *Compare* Dobson *v.* Erwin, 18 N. C. 569, holding that land fraudulently purchased by a debtor through an agent, who takes title in his own name, is still the property of the debtor, and is liable to the execution of his judgment creditors.

Oregon.— Silver *v.* Lee, 38 Oreg. 508, 63 Pac. 882, holding that a purchaser at execution sale acquires no title.

South Carolina.— Bauskett *v.* Holsonback, 2 Rich. 624.

to a third person for the purpose of defrauding creditors is liable to attachment or execution.[59] In some states while a levy of execution or attachment will not divest the legal estate in the land, the levy is so far effective that it will enable the execution creditor to bring his bill in equity to have the legal title transferred.[60] Where a debtor purchases personal property in the name of a third person, even though a bill of sale be made to the latter, his creditors may levy execution thereon.[61]

k. Right of Creditor to Appropriate Property Without Legal Process. A creditor cannot without process seize property fraudulently conveyed or transferred in the hands of the grantee or transferee and appropriate it to the satisfaction of his debt.[62] The grantor cannot by a subsequent conveyance to the creditor enable the latter without process to take the property from the grantee in the fraudulent conveyance.[63] And it has been held that where the grantee has acted

Tennessee.— Smith *v.* Hinson, 4 Heisk. 250.

Vermont.— Buck *v.* Gilson, 37 Vt. 653; Dewey *v.* Long, 25 Vt. 564.

Wisconsin.—Allen *v.* McRae, 91 Wis. 226, 64 N. W. 889; Gilbert *v.* Stockman, 81 Wis. 602, 51 N. W. 1076, 52 N. W. 1045, 29 Am. St. Rep. 922; Gettelman *v.* Gitz, 78 Wis. 439, 47 N. W. 660; Hyde *v.* Chapman, 33 Wis. 391.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 659, 661, 662, 666, 667. See also *supra*, II, B, 16, d; III, A, 3, a; and EXECUTIONS, 17 Cyc. 960.

59. *Arkansas.*— Stix *v.* Chaytor, 55 Ark. 116, 17 S. W. 707; Hershy *v.* Latham, 42 Ark. 305; Harman *v.* May, 40 Ark. 146. *Compare* Doster *v.* Manistee Nat. Bank, 67 Ark. 325, 55 S. W. 137, 77 Am. St. Rep. 116, 48 L. R. A. 334.

Indiana.— Eve *v.* Louis, 91 Ind. 457; Hanna *v.* Aebker, 84 Ind. 411; Hubble *v.* Osborn, 31 Ind. 249; Tevis *v.* Doe, 3 Ind. 129.

Massachusetts.— Peterson *v.* Farnum, 121 Mass. 476; Clark *v.* Chamberlain, 13 Allen 257.

Missouri.— Dunnica *v.* Coy, 28 Mo. 525, 75 Am. Dec. 133; Herrington *v.* Herrington, 27 Mo. 560; Dunnica *v.* Coy, 24 Mo. 167, 69 Am. Dec. 420; Eddy *v.* Baldwin, 23 Mo. 588; Rankin *v.* Harper, 23 Mo. 579.

Pennsylvania.— Winch's Appeal, 61 Pa. St. 424.

Tennessee.— Shute *v.* Harder, 1 Yerg. 3, 24 Am. Dec. 427; Thomas *v.* Walker, 6 Humphr. 93; Smitheal *v.* Gray, 1 Humphr. 491, 34 Am. Dec. 664; Russell *v.* Stinson, 3 Hayw. 1.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 662. And see EXECUTIONS, 17 Cyc. 960.

Levy on crops raised upon land conveyed.— Where the husband buys land, and has it conveyed to his wife, intending to pay for it with the proceeds of his own labor or of other property, with intent to defraud his creditors, crops raised by him thereon are subject to execution for his debts. Turner-Looker Co. *v.* Garvey, 43 S. W. 202, 19 Ky. L. Rep. 1205.

60. Botsford *v.* Beers, 11 Conn. 369; Griffin *v.* Nitcher, 57 Me. 270; Low *v.* Marco, 53 Me. 45; Dockray *v.* Mason, 48 Me. 178; Williams *v.* Michenor, 11 N. J. Eq. 520. See also Getzler *v.* Saroni, 18 Ill. 511. *Compare* Mason *v.* Eichels, 8 Ohio Dec. (Reprint) 436, 8 Cinc. L. Bul. 7.

61. Godding *v.* Brackett, 34 Me. 27; French *v.* Newberry, 124 Mich. 147, 82 N. W. 840. See *supra*, II, B, 16, d; III, A, 3, a, (III). But where A contracted for land and paid for the same, and had the title made to B with a fraudulent intent to hinder and delay his creditors in the collection of their debts, and afterward B, with the same fraudulent intent on the part of A, by his direction, conveyed the land to C, who sold and conveyed the same for a chattel, it was held that this chattel could not be taken by execution for the debt of A. Parris *v.* Thompson, 46 N. C. 57.

62. Price *v.* Heubler, 63 Conn. 310, 28 Atl. 524; Owen *v.* Dixon, 17 Conn. 492; Tolbert *v.* Horton, 31 Minn. 518, 15 N. W. 647; Hilzheim *v.* Drane, 10 Sm. & M. (Miss.) 556. And *compare* Hill *v.* Pine River Bank, 45 N. H. 300.

Abandonment of process.— Where a creditor of a fraudulent vendor attached the property in the possession of the vendee and sold the same by virtue of authority from the vendor, and applied the avails in payment of his debt, it was held in trover brought by the vendee against the creditor that the creditor was liable. Owen *v.* Dixon, 17 Conn. 492.

Conveyance good as against inactive creditors.— A conveyance made to defraud creditors, although void as to a creditor who is pursuing legal process to reach the property, is valid as against inactive creditors when collaterally drawn in question. Boyd *v.* Turpin, 94 N. C. 137, 55 Am. Rep. 597. See *supra*, III, C, 1.

63. Owen *v.* Dixon, 17 Conn. 492.

The debtor cannot substitute his own conveyance for the process of the law and thus indirectly, by his own act, defeat the legal title of the grantee in the alleged fraudulent conveyance which he could not have assailed directly. Tolbert *v.* Horton, 31 Minn. 518, 15 N. W. 647.

A simple contract creditor cannot acquire any ownership or right of possession of the property conveyed by an attempted purchase

in good faith, but has paid an inadequate consideration, the creditor of the grantor cannot subject the property to his judgment by tendering to the grantee the amount which he actually paid.[64] On the other hand it is held in some jurisdictions that a creditor is not restricted to legal process but may obtain satisfaction for his debt by taking a subsequent transfer of the property involved from the debtor.[65]

3. Method of Attacking Fraudulent Judgment.[66] It is permissible for one creditor to show the fraudulent character of a judgment obtained against his debtor by another alleged creditor,[67] and this proof is admissible even in a collateral proceeding.[68] As a general rule a creditor who is not a party to the proceeding in which the fraudulent judgment is suffered cannot, in the absence of a specific lien upon a fund in court, attack the judgment in such proceeding.[69] The mode of attacking a prior judgment, on the ground that it was suffered by collusion, is very largely governed by statutory provisions.[70] In some states a judgment so suffered in fraud of creditors is declared to be void as against such creditors.[71]

4. Remedy by Action For Damages. The rule, supported by the weight of authority, is that an action for damages by a simple contract creditor against the grantee in a fraudulent conveyance cannot be based upon the mere fact of his participation in the fraudulent intent of the grantor, and his purpose to aid in preventing the debtor's property from being appropriated by due process of law to the payment of his debts.[72] But where the creditor has acquired a specific

after the conveyance. Jones *v.* Rahilly, 16 Minn. 320.

64. Sharp *v.* Hicks, 94 Ga. 624, 21 S. E. 208.

65. Frost *v.* Goddard, 25 Me. 414; Brown *v.* Webb, 20 Ohio 389.

A creditor may with the consent of the parties to the conveyance appropriate the subject of it to the payment of his claims without resort to legal process (Johnson *v.* Trust Co. of America, 104 Fed. 174, 43 C. C. A. 458), as by taking a mortgage to secure his claim from the purchaser of the property conveyed (Brown *v.* Webb, 20 Ohio 389).

66. In Louisiana see *supra*, XIV, B, 2, b, note 94.

67. *Maryland.*— Citizens' F., etc., Co. *v.* Wallis, 23 Md. 173; Thomas *v.* Mason, 8 Gill 1.

New Jersey.— Wandling *v.* Thompson, 41 N. J. L. 309.

North Carolina.— Morrison *v.* McNeill, 51 N. C. 450.

Pennsylvania.— *In re* Dougherty, 9 Watts & S. 189, 42 Am. Dec. 326; Building Assoc. *v.* O'Connor, 3 Phila. (Pa.) 453.

Wisconsin.—Nassauer *v.* Techner, 65 Wis. 388, 27 N. W. 40.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 672. See also *supra*, III, A, 4.

But where, in an action at law, the title to the property in controversy has been adjudged to be in the grantee, a judgment creditor of the grantor cannot subsequently attach the property by garnishee proceedings on the ground that the transfer was fraudulent. Schneider *v.* Lee, (Oreg. 1888) 17 Pac. 269.

68. Whenever a judgment or decree is procured through the fraud of either of the parties or by collusion of both for the purpose of defrauding other creditors, the latter may show, even in a collateral proceeding, the fraud or collusion by which the judgment was obtained. Atlas Nat. Bank *v.* More, 152 Ill. 528, 38 N. E. 684, 43 Am. St. Rep. 274. See also the other cases cited in the preceding note; and *supra*, III, A, 4. And see, generally, Judgments.

69. Bloodgood *v.* Meissner, 84 Wis. 452, 54 N. W. 722.

70. Stevens *v.* Newman, 68 Ill. App. 549.

Necessity of filing bond.— In Pennsylvania a rule to show cause why the validity of a judgment should not be investigated and the judgment set aside is without the jurisdiction of the court, as to a petitioning creditor who intervened, but never filed a bond. Page *v.* Williamsport Suspender Co., 191 Pa. St. 511, 43 Atl. 345.

71. In proceedings against a husband as debtor and his wife as garnishee, plaintiff can show that a judgment in favor of the wife, and on which the husband had made payments, was based on no consideration, and was fraudulent as to creditors; garnishment being in the nature of a creditors' bill, and, under Rev. St. § 2320, every judgment suffered with intent to hinder, delay, or defraud creditors being void against such creditors. Bloodgood *v.* Meissner, 84 Wis. 452, 54 N. W. 772.

72. Smith *v.* Blake, 1 Day (Conn.) 258; Moody *v.* Burton, 27 Me. 427, 46 Am. Dec. 612; Lamb *v.* Stone, 11 Pick. (Mass.) 527; Murtha *v.* Curley, 47 N. Y. Super. Ct. 393. In the absence of special legislation a general creditor cannot bring an action on the case against his debtor or against those combining or colluding with him to make disposition of his property, although the object of such disposition be to defraud creditors. Adler *v.* Fenton, 24 How. (U. S.) 407, 16 L. ed. 696. An action cannot be maintained by a creditor upon mere proof that defendant conspired with plaintiff's

lien upon the property of the debtor which is the subject of the fraudulent conveyance, and such lien is defeated by the act of the grantee, the rule is otherwise.[78] And there is authority for the proposition that where one or more per-

debtor to defraud plaintiff of his debt by taking and foreclosing a fraudulent chattel mortgage upon the debtor's property and selling the property covered thereby before the issue of execution on plaintiff's judgment. Murtha *v.* Curley, 47 N. Y. Super. Ct. 393.

A reason given for this holding is that if one creditor could maintain such an action all other creditors would be entitled to sue and that the effect upon the grantee would be to subject him to damages in no degree regulated by the amount of property received. Moody *v.* Burton, 27 Me. 427, 46 Am. Dec. 612. Another reason given is that the damages resulting to a general creditor from the wrongful act are uncertain, contingent, and remote. Hurwitz *v.* Hurwitz, 10 Misc. (N. Y.) 353, 31 N. Y. Suppl. 25; Gardiner *v.* Sherrod, 9 N. C. 173. And on this theory an action for fraudulent acts intended to induce, and by which a creditor was induced, not to secure a debt by legal process, by which means he lost the debt, will not lie at common law, even though a conspiracy for the purpose be charged. Austin *v.* Barrows, 41 Conn. 287. A creditor cannot recover personal judgment against the grantee on the ground that he has conspired with the grantor to defraud plaintiff, and has in pursuance of the fraudulent scheme received and concealed property of the debtor which would otherwise be subject to plaintiff's process as the damage sustained is in being deprived of an opportunity to make a levy and this damage is too remote. Le Gierse *v.* Kellum, 66 Tex. 242, 18 S. W. 509. To the same effect see Blum *v.* Goldman, 66 Tex. 621, 1 S. W. 899; Lemp Brewing Co. *v.* La Rose, 20 Tex. Civ. App. 575, 50 S. W. 460. The damage, which is the gist of the action, is too remote, inasmuch as the general creditor has not an assured right but simply a chance of securing his claim by attachment or levy which he may or may not succeed in improving. Klous *v.* Hennessey, 13 R. I. 332. In Wellington *v.* Small, 3 Cush. (Mass.) 145, 50 Am. Dec. 719, the court says that the uncertainty of the damage which a general creditor suffers from the act of the grantee in taking a fraudulent conveyance seems of itself alone to be a sufficient reason for not permitting the creditor to recover and that the fact that the creditor has suffered actual damage from defendant's conduct is not capable of legal proof because it is not within the compass of human knowledge, since even if the property had not been conveyed, other creditors might have attached it before plaintiff, or it might have been stolen or destroyed while in the debtor's possession.

Depreciation of property after conveyance. — In Louisiana where a simulated sale was set aside at the suit of a creditor of the pretended vendor, it was held that the creditor could not hold the vendee for damages on account of a depreciation of the property arising after the pretended sale, when he failed to show that the simulated conveyance caused the depreciation. Gardiner *v.* Scherer, 31 La. Ann. 527.

Right of creditor without lien at time of acts complained of. — Where, after an execution against the property of the debtor and his surety was delivered to the sheriff, defendant fraudulently converted certain goods of the debtor to his own use, the latter having no other property, and the execution was then levied upon the property of the surety who paid a part of the judgment, it was held that the surety could not maintain an action for damages against defendant for his tort since the surety had no legal interest in the goods when the injury was committed. Smith *v.* Wright, 6 Blackf. (Ind.) 550. In Braem *v.* Merchants' Nat. Bank, 127 N. Y. 508, 28 N. E. 597, defendant obtained a judgment against an insolvent corporation according to the forms of law upon a valid debt due from the judgment debtor, but, under a statute, because the judgment was obtained by an offer made by the corporation, it was invalid, and it was held that plaintiff who obtained his judgment subsequent to the entry of the judgment in favor of defendant and who had no lien at the time of the entry of defendant's judgment could not maintain an action for damages.

Contrary decisions. — But in Penrod *v.* Morrison, 2 Penr. & W. (Pa.) 126, in which it was contended that plaintiff could not maintain the action because he had no specific lien upon the property at the time that the wrong was committed, the court said that as the property sought to be reached was choses in action and this was not the subject of execution plaintiff would not have been in any different position with an execution and that it could see no reason for a distinction between creditors with a lien and without a lien.

Action for fraudulently removing property from the premises of the debtor see Yates *v.* Joyce, 11 Johns. (N. Y.) 136.

Right to sue for false representations, inducing a creditor to refrain from suing out attachment for execution, *compare* Bradley *v.* Fuller, 118 Mass. 239.

73. Adams *v.* Paige, 7 Pick. (Mass.) 542; Yates *v.* Joyce, 11 Johns. (N. Y.) 136; Smith *v.* Tonstall, Carth. 3.

Right of judgment creditor. — Where one purchases from a debtor property for the purpose of aiding the debtor by defrauding a judgment creditor and such purchase results in injury to such creditor, the latter may maintain an action on the case for the damages resulting from such act of the pur-

sons conspire with a debtor to defraud his creditors and in pursuance of such conspiracy take a conveyance of his property an action on the case for a conspiracy against the grantor and grantee may be maintained,[74] although plaintiff has not recovered judgment,[75] and although the claim of plaintiff had not matured at the time of the wrongful acts complained of.[76] In some states statutory provisions enable creditors to maintain an action for damages against the fraudulent grantee.[77]

5. ACTION FOR PENALTY. Under the statute of Elizabeth,[78] and under some of the statutes in this country,[79] the creditor is given a right of action to recover a penalty from the grantee for knowingly aiding the debtor in the fraudulent transfer of his property,[80] and an action to recover such penalty may be joined with an action to set aside the fraudulent transfer.[81] The right to sue for the penalty may be waived.[82]

C. Remedies in Equity — 1. IN GENERAL. The affording of relief to creditors against a fraudulent conveyance of the property of the debtor constitutes a substantial ground for the assumption of jurisdiction by a court of equity,[83] and

chaser. Powers *v.* Wheeler, 63 Ill. 29. To the same effect see Ley *v.* Madill, 1 U. C. Q. B. 546. In Quinby *v.* Strauss, 90 N. Y. 664, an action by a judgment creditor to recover damages for the fraud of the debtor and his grantee in conspiring to defraud plaintiff by the execution of chattel mortgages upon the debtor's property to secure fictitious debts was sustained.

74. Penrod *v.* Mitchell, 8 Serg. & R. (Pa.) 522.

75. Mott *v.* Danforth, 6 Watts (Pa.) 304, 31 Am. Dec. 468. In Lamb *v.* Stone, 11 Pick. (Mass.) 527, the court distinguishes those cases in which a conspiracy or an illegal combination or confederacy is charged.

Contra.— The weight of authority, however, is to the effect that the charge of conspiracy is not material and that in the absence of a specific lien the creditor cannot maintain the action. Austin *v.* Barrows, 41 Conn. 287; Le Gierse *v.* Kellum, 66 Tex. 242, 18 S. W. 509. In Adler *v.* Fenton, 24 How. (U. S.) 407, 16 L. ed. 696, it is held that the action cannot be sustained because there has been conspiracy or combination to do injurious acts, the court applying the principle that an act legal in itself and violating no right cannot be made actionable on account of the motive which superinduced it. And see Hurwitz *v.* Hurwitz, 10 Misc. (N. Y.) 353, 31 N. Y. Suppl. 25, holding that the absence of a legal wrong is not supplied by allegation and proof that the act was done in pursuance of a conspiracy.

76. Mott *v.* Danforth, 6 Watts (Pa.) 304, 31 Am. Dec. 468.

77. Spaulding *v.* Fisher, 57 Me. 411.

78. Millar *v.* McTaggart, 20 Ont. 617.

79. Smith *v.* Blake, 1 Day (Conn.) 258; Fogg *v.* Lawry, 71 Me. 215; Spaulding *v.* Fisher, 57 Me. 411.

80. See also *infra*, XV, A.

81. Millar *v.* McTaggart, 20 Ont. 617.

82. Fogg *v.* Lawry, 71 Me. 215.

83. *Alabama.*— Ladd *v.* Smith, 107 Ala. 506, 18 So. 195.

California.— Swift *v.* Arents, 4 Cal. 390.

Maine.— Traip *v.* Gould, 15 Me. 82; Augusta Sav. Bank *v.* Crossman, (1886) 7 Atl. 396.

Maryland.— Allein *v.* Sharp, 7 Gill & J. 96.

Michigan.— Trask *v.* Green, 9 Mich. 358.

Missouri.— George *v.* Williamson, 26 Mo. 190, 72 Am. Dec. 203.

New Hampshire.— Dodge *v.* Griswold, 8 N. H. 425.

New Jersey.— Cubberly *v.* Yager, (Ch. 1886) 2 Atl. 814.

New York.— Hammond *v.* Hudson River Iron, etc., Co., 20 Barb. 378.

Ohio.— Mason *v.* Eichels, 8 Ohio Dec. (Reprint) 436, 8 Cinc. L. Bul. 7.

South Carolina.—Bomar *v.* Means, 53 S. C. 232, 31 S. E. 234.

Texas.— Morris *v.* House, 32 Tex. 492.

Wisconsin.— Kickbusch *v.* Corwith, 108 Wis. 634, 85 N. W. 148.

United States.— Currie *v.* Jordan, 6 Fed. Cas. No. 3,491, 4 Biss. 513; Odenheimer *v.* Hanson, 18 Fed. Cas. No. 10,429, 4 McLean 437.

Canada.— Sawyer *v.* Linton, 23 Grant Ch. (U. C.) 43.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 674 *et seq.*

The jurisdiction of a court of equity in such case does not depend upon statute. McCaffrey *v.* Hickey, 66 Barb. (N. Y.) 489; Shainwald *v.* Lewis, 6 Fed. 766, 7 Sawy. 148. And statutes which confer such jurisdiction are merely declaratory of the common law. Alden *v.* Gibson, 63 N. H. 12.

Where discovery is necessary or a trust estate is involved.— Fraud forms one of the great heads of the jurisdiction of equity, and especially will a court of equity not refuse its aid where the wrong alleged is stated to have been done by contrivances and combination and where a discovery may be necessary to prove the complicity of some of the guilty parties. Gray *v.* Simon, 1 Phila. (Pa.) 551. A bill alleging that attempts to collect judgments against defendant are fruitless, but that he has fraudulently transferred property to an estate held by him as trustee for his wife and children,

the rule which prevails in such a court that in many cases where fraud is charged the fact that a legal remedy exists is not inconsistent with the awarding of equitable relief[84] applies to a suit by a creditor to set aside such a conveyance.[85] Under this rule, while equity will usually decline to take jurisdiction of the application of the creditor if there is a remedy at law in all respects adequate,[86]

and has so intermingled his money with that belonging to the trust estate that a separation is difficult, and praying his interest therein may be determined, etc., states a case for equitable interposition. Lathrop *v.* McBurney, 71 Ga. 815.

Where conspiracy is charged.— A suit in the nature of a creditors' bill to set aside the mortgage is the proper remedy for a judgment creditor who is defrauded by a conspiracy between the judgment debtor and his fraudulent chattel mortgagee to foreclose the mortgage before execution could issue. Murtha *v.* Curley, 47 N. Y. Super. Ct. 393 [*reversed* in 90 N. Y. 372].

Action against purchaser at execution sale. — So such an action lies to reach property in the hands of one who purchased it at an execution sale, and holds it for the benefit of the debtor to defraud the creditors of the debtor. Decker *v.* Decker, 108 N. Y. 128, 15 N. E. 307.

Awarding lien upon property of grantee.— Where debtors conspiring with another to defraud their creditors furnish materials for erecting buildings on his land, he not paying therefor or in any way becoming indebted to them, the creditors may be awarded a lien on the real estate to the extent the debtor's property became merged therein. People's Nat. Bank *v.* Loeffert, 184 Pa. St. 164, 38 Atl. 996.

Property not subject to execution.—A court of equity has the power not only to set aside a fraudulent conveyance so as to disembarrass complainant's remedy by execution at law, but also, where the property cannot be reached by execution, to subject the property fraudulently assigned directly to the payment of complainant's debt, under its own jurisdiction. Catchings *v.* Manlove, 39 Miss. 655; Hunt *v.* Knox, 34 Miss. 655.

Setting aside transfer made by debtor after execution sale.— But where, at an execution sale of real estate, the title which the judgment debtor had when the judgment became a lien was sold, a subsequent fraudulent transfer of the property furnishes no ground for a creditor's bill. Newman Grove State Bank *v.* Linderholm, (Nebr. 1903) 94 N. W. 616.

84. See EQUITY, 16 Cyc. 81.

85. *Alabama.*— Planters', etc., Bank *v.* Walker, 7 Ala. 926.

District of Columbia.— Fecheimer *v.* Hollander, 6 Mackey 512, 1 L. R. A. 368.

Florida.— Logan *v.* Logan, 22 Fla. 561, 1 Am. St. Rep. 212.

Georgia.— Lathrop *v.* McBurney, 71 Ga. 815.

Kentucky.— Baker *v.* Dobyns, 4 Dana 220; Lillard *v.* McGee, 4 Bibb 165.

Maine.— Hartshorn *v.* Eames, 31 Me. 93.

Massachusetts.— Stratton *v.* Hernon, 154 Mass. 310, 28 N. E. 269.

Mississippi.— Vicksburg, etc., R. Co. *v.* Phillips, 64 Miss. 108, 1 So. 7.

New Jersey.— Smith *v.* Wood, 42 N. J. Eq. 563, 7 Atl. 881, 44 N. J. Eq. 603, 17 Atl. 1104; Cox *v.* Graver, 40 N. J. Eq. 473, 3 Atl. 172.

Pennsylvania.— Orr *v.* Peters, 197 Pa. St. 606, 47 Atl. 849.

Tennessee.—Templeton *v.* Mason, 107 Tenn. 625, 65 S. W. 25.

United States.— Bean *v.* Smith, 2 Fed. Cas. No. 1,174, 2 Mason 252.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 674 *et seq.*

Remedy by attachment or execution.— The fact that a judgment creditor may at law sell under execution lands fraudulently aliened by the debtor and that the purchaser may recover them in ejectment (Flewellen *v.* Crane, 58 Ala. 627), or that the debtor has always retained possession of the property conveyed, so that it might have been attached by the debtor's creditors, is not an obstacle to the maintenance of the creditors' suit to set aside the fraudulent conveyance, since, if the parties have combined to give a colorable title to the grantee to keep the property from creditors, it is such a fraud, within the statute of Elizabeth, as equity will relieve against (Hartshorn *v.* Eames, 31 Me. 93). Where land has been fraudulently conveyed by a judgment debtor the creditor may enforce his judgment by a sale of the lands under execution or he may bring an action to remove the obstruction caused by the debtor's fraudulent act and proceed to enforce his judgment by a sale of the land embarrassed by the cloud of the transfer. Hillyer *v.* Le Roy, 179 N. Y. 369, 72 N. E. 237, 103 Am. St. Rep. 919.

86. *Colorado.*— Bailey *v.* American Nat. Bank, (App. 1898) 54 Pac. 912.

Georgia.— Manheim *v.* Claflin, 81 Ga. 129, 7 S. E. 284; Bessman *v.* Cronan, 65 Ga. 559.

Kansas.— Taylor *v.* Lander, 61 Kan. 588, 60 Pac. 320.

Massachusetts.— Ames *v.* Sheehan, 161 Mass. 274, 37 N. E. 199; Swamscott Mach. Co. *v.* Perry, 119 Mass. 123; Mill River Loan Fund Assoc. *v.* Claflin, 91 Mass. 101.

Michigan.— Ideal Clothing Co. *v.* Hazle, 126 Mich. 262, 85 N. W. 735.

Missouri.— Humphreys *v.* Atlantic Milling Co., 98 Mo. 542, 10 S. W. 140.

North Carolina.— Smitherman *v.* Allen, 59 N. C. 17.

Pennsylvania.— McAndrew *v.* McAndrew, 3 C. Pl. 174.

Texas.— White Sewing-Mach. Co. *v.* Atkeson, 75 Tex. 330, 12 S. W. 812.

West Virginia.— Horner-Gaylord Co. *v.*

it will not necessarily do so because there is a remedy at law which may be effectively pursued,[87] for at best the legal remedy is slow and expensive compared with the remedy in equity.[88] And where the remedy at law is not plain and adequate equity will invariably entertain a bill to set aside the conveyance.[89] The right of

Fawcett, 50 W. Va. 487, 40 S. E. 564, 57 L. R. A. 869.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 681 *et seq.*

Where a creditor has an honest mortgage on personalty, and has foreclosed the same at law, he has no occasion, either as a substitute for or in aid of his foreclosure proceeding, to file a bill in a court of equity in order to realize the fruits of his foreclosure as against fraudulent mortgages of prior date on the same property, which are also foreclosed, and under which the property has been seized and is about to be sold. The remedy of the honest creditor is ample, full, and adequate at law. Manheim *v.* Claflin, 81 Ga. 129, 7 S. E. 284.

Right of creditor, after selling under execution, to sue in equity.— When shares of stock, although still standing in the name of the assignee on the company's books, appear to have been levied upon and sold by a judgment creditor of the assignor, and it is not shown that the purchaser has experienced any difficulty in obtaining a transfer, the title of the purchaser cannot be enforced, or the assignee's lien be removed in an action by the judgment creditor to set aside the assignment as fraudulent. Gray *v.* Folwell, 57 N. J. Eq. 446, 41 Atl. 869.

Remedy against collusive judgment.— In Massachusetts where an insolvent gives notes, without consideration, to persons aware of his insolvency, and procures his property to be attached and seized on execution, a bill will not lie to vacate the judgment and to set aside a levy, and recall execution thereon, as Pub. St. c. 157, § 96, providing that when an insolvent, "with a view to give a preference to a person who has a claim against him," procures his property to be attached and seized on execution, the person to be benefited thereby having reasonable cause to believe him insolvent, such transaction shall be void, and the assignees may recover the value of the property from the person so benefited, furnishes a complete remedy at law. Ames *v.* Sheehan, 161 Mass. 274, 37 N. E. 199.

Remedy of subsequent creditor.— Where a trust deed is given to cover a stock of goods and after-acquired property, a subsequent creditor has an adequate remedy at law as to the after-acquired property and equity will afford him no relief. Horner-Gaylord Co. *v.* Fawcett, 50 W. Va. 487, 40 S. E. 564, 57 L. R. A. 869.

Where debtor has absconded.— Where a debtor conveyed all his property with an intent to defraud his creditors, and then left the state, it was held that a creditor could not maintain a suit in equity to have his debt satisfied out of the property, under the statute (N. C. Rev. Code, p. 7, § 20), his remedy being at Law. Smitherman *v.* Allen, 59 N. C. 17.

87. Sheppard *v.* Iverson, 12 Ala. 97; Bean *v.* Smith, 2 Fed. Cas. No. 1,174, 2 Mason 252. Suit to set aside a conveyance made when the grantor was insolvent is an available remedy, even where proceedings supplemental to execution would have reached the notes for the purchase-money for the land conveyed (Vansickle *v.* Shenk, 150 Ind. 413, 50 N. E. 381); or notwithstanding there may be also a remedy by ejectment, upon the ground that no remedy is fully adequate and complete which leaves a fraudulent deed outstanding as an apparent cloud upon the title (Orendorf *v.* Budlong, 12 Fed. 24). In the federal courts it is held that a bill in equity lies to set aside fraudulent conveyances, for there is not, in the proper sense of the terms, "a plain, adequate and complete remedy" at law, within the meaning of the sixteenth section of the Judiciary Act of 1789, c. 20, § 16, which is merely affirmative of the general doctrines of courts of equity. Bean *v.* Smith, 2 Fed. Cas. No. 1,176, 2 Mason 252.

88. Brown *v.* J. Wayland Kimball Co., 84 Me. 492, 24 Atl. 1007. The remedy against a fraudulent conveyance by levying an execution on the same and then proceeding to sell under the writ is circuitous and cumbersome and leaves a cloud upon the record title. Doster *v.* Manistee Nat. Bank, 67 Ark. 325, 55 S. W. 137, 77 Am. St. Rep. 116, 48 L. R. A. 334. Although a creditor may perhaps have a remedy by the ordinary proceedings at law which will eventually be effectual to secure him in the possession of the subject of the conveyance, it is usually not adequate to the exigencies of the case (Marston *v.* Brackett, 9 N. H. 336), or for all the purposes for which plaintiff may claim relief (Smith *v.* Cockrell, 66 Ala. 64). No relief is complete and adequate for all purposes excepting that which removes a fraudulent title. Towle *v.* Janvrin, 61 N. H. 605. But see Hall *v.* Greenly, 1 Del. Ch. 274, for a case in which it was considered that under the circumstances more complete relief could be had at law than in equity. See also Bessman *v.* Cronan, 65 Ga. 559; Smitherman *v.* Allen, 59 N. C. 17.

89. *Georgia.*— Kruger *v.* Walker, 111 Ga. 383, 36 S. E. 794.

Illinois.— Harting *v.* Jockers, 31 Ill. App. 67.

New Jersey.— Williams *v.* Michenor, 11 N. J. Eq. 520.

New York.— Patchen *v.* Rofkar, 52 N. Y. App. Div. 367, 65 N. Y. Suppl. 122.

Pennsylvania.— People's Nat. Bank *v.* Loeffert, 184 Pa. St. 164, 38 Atl. 996.

Texas.— Gaines *v.* National Exch. Bank, 64 Tex. 18.

the creditor to relief in equity against a fraudulent conveyance will not generally be defeated by the fact that he has a remedy by attachment[90] or by garnishment;[91] nor by the fact that he may levy execution upon the property conveyed and sell it under such execution as though the conveyance had not been made.[92]

United States.— Lee *v.* Hollister, 5 Fed. 752; Bean *v.* Smith, 2 Fed. Cas. No. 1,174, 2 Mason 252.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 674 *et seq.*

A court of equity has jurisdiction of a bill by a judgment creditor charging that the debtor has fraudulently transferred his property to another defendant and praying a discovery. Hartshorn *v.* Eames, 31 Me. 93. And it has jurisdiction, independently of any necessity of discovery, in all cases of fraud, where a complete and adequate remedy cannot be had at law; and no remedy is sufficient and complete against a fraudulent conveyance, unless it gives a release (Tappan *v.* Evans, 11 N. H. 311), or removes the fraudulent title or encumbrance (Stone *v.* Anderson, 26 N. H. 506).

Remedy against collusive judgment.— An action in equity will lie, at the suit of judgment creditors, to set aside as fraudulent a chattel mortgage given by the debtor, and judgments entered on judgment notes given by him, and execution levies under such judgments. Sweetser *v.* Silber, 87 Wis. 102, 58 N. W. 239.

Inability to give indemnity to levying officer.— Where an execution has been returned wholly unsatisfied, the fact that the creditor might have caused the execution to be levied on property in the hands of a fraudulent vendee of the debtor will not deprive a court of equity of jurisdiction of a creditor's bill to reach such property, since the legal remedy might prove inadequate by the creditor's inability to furnish the sheriff with a proper indemnifyng bond. Pierstoff *v.* Jorges, 86 Wis. 128, 56 N. W. 735, 39 Am. St. Rep. 881.

Right of state as judgment creditor.— The fact that the state has an additional statutory mode of enforcing its judgment against the real estate of its debtor, by levying upon and selling the property, which is not conferred upon private individuals, being only available where there is no question as to the ownership of such real estate, and the title is unobstructed by any fraudulent conveyances, does not preclude the state from sustaining a bill in equity to set aside as fraudulent its debtor's conveyance of his realty. State *v.* Bowen, 38 W. Va. 91, 18 S. E. 375.

90. Brown *v.* J. Wayland Kimball Co., 84 Me. 492, 24 Atl. 1007; Hartshorn *v.* Eames, 31 Me. 93.

91. Sheppard *v.* Iverson, 12 Ala. 97; Mann *v.* Appel, 31 Fed. 378. Ordinarily the remedy of garnishment will not be so full and complete as the remedy in equity. Phillips *v.* Wesson, 16 Ga. 137. The remedy by foreign attachment is partial and limited. Baxter *v.* Moses, 77 Me. 465, 1 Atl. 350, 52 Am. Rep. 783. And where a judgment creditor has exhausted his remedy at law by execution, and return of *nulla bona*, equity will assist him to reach the effects of his debtor fraudulently transferred, and will not remit him to such statutory remedy. Vicksburg, etc., R. Co. *v.* Phillips, 64 Miss. 108, 1 So. 7. But see Wells, etc., Grocery Co. *v.* Clark, 79 Mo. App. 401, in which it was held that equity would not entertain jurisdiction as there was a clear and undoubted legal remedy by garnishment.

92. *Alabama.*— Planters', etc., Bank *v.* Walker, 7 Ala. 926.

District of Columbia.— Fecheimer *v.* Hollander, 6 Mackay 512, 1 L. R. A. 368.

Florida.— Logan *v.* Logan, 22 Fla. 561, 1 Am. St. Rep. 212.

Georgia.— Lathrop *v.* McBurney, 71 Ga. 815; Thurmond *v.* Reese, 3 Ga. 449, 46 Am. Dec. 440.

Indiana.— Scott *v.* Indianapolis Wagon Works, 48 Ind. 75.

Kentucky.— Baker *v.* Dobyns, 4 Dana 220; Lillard *v.* McGee, 4 Bibb 165.

Mississippi.— Vasser *v.* Henderson, 40 Miss. 519, 90 Am. Dec. 351.

Missouri.— Central Nat. Bank *v.* Doran, 109 Mo. 40, 18 S. W. 836; Zoll *v.* Soper, 75 Mo. 460.

Nebraska.— Columbus First Nat. Bank *v.* Hollerin, 31 Nebr. 558, 48 N. W. 392.

New Jersey.— Cook *v.* Johnson, 12 N. J. Eq. 51, 72 Am. Dec. 381.

North Carolina.— Frank *v.* Robinson, 96 N. C. 28, 1 S. E. 781.

Wisconsin.— Gullickson *v.* Madsen, 87 Wis. 19, 57 N. W. 965.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 681, 683.

A judgment creditor is without an adequate remedy by levy and sale under execution, when the title of his debtor's property is clouded by a fraudulent assignment, and by another judgment which, although fraudulent, is held a prior lien, and the property is in the hands of a receiver to be sold to satisfy it. Martin *v.* Atchison, 2 Ida. (Hasb.) 624, 33 Pac. 47. And a court of equity has jurisdiction, at the suit of lien creditors whose judgments attached after an alleged fraudulent conveyance, to decree the deed void, for while the creditor might levy on and buy the land, and in an action of ejectment try the question of fraud, *non constat* that he has the money, or that he desires the land, and by removing the false deed the probabilities are that the land will sell for its full value, and thus complete justice be done to all. Boyle *v.* Thomas, 1 Chest. Co. Rep. (Pa.) 117. And it has been held that the remedy given to a judgment creditor by statute for subjecting property fraudulently conveyed to his execution by scire facias does not exclude the jurisdiction

But where the conveyance assailed is made after the attacking creditor has acquired a specific lien upon the subject thereof his remedy by way of enforcement of the lien is deemed sufficiently adequate to preclude his suing in equity to set aside the conveyance,[93] whether such lien has been acquired by attachment[94] or by judgment.[95] In some of the states where, under statutory provisions, a judgment creditor may institute proceedings in aid of his execution the remedy so afforded is regarded as a remedy at law. Where such is the case, it is usually held that its existence will not prevent the creditor from resorting to equity.[96] In some states a concurrent remedy in equity is given by express statutory provision.[97]

2. ACTION IN EQUITY IN AID OF LEGAL REMEDY. Where a creditor has acquired a specific lien upon the property fraudulently conveyed, either by judgment and execution or otherwise, a remedy very commonly invoked is to bring an action in the nature of a creditor's suit to remove or set aside the fraudulent conveyance as constituting an impediment to the enforcement of the lien.[98] The jurisdiction

of a court of equity to set aside the fraudulent conveyance. Abbey *v.* Commercial Bank, 31 Miss. 434.

Contrary view.— Field *v.* Jones, 10 Ga. 229. And see Bailey *v.* American Nat. Bank, 12 Colo. App. 66, 54 Pac. 912.

In Massachusetts it has been held that where a debtor has conveyed land in fraud of creditors there is an adequate remedy at law by a writ of entry. Clark *v.* Jones, 5 Allen 379. See also Swamscott Mach. Co. *v.* Perry, 119 Mass. 123.

In Pennsylvania it is held that ordinarily plaintiff has a full and adequate remedy at law by selling the property conveyed under his execution and testing the validity of the conveyance in ejectment. People's Nat. Bank *v.* Kern, 193 Pa. St. 59, 88, 44 Atl. 331, 1103.

93. Taylor *v.* Lander, 61 Kan. 588, 60 Pac. 320.

94. Lander *v.* Pollard, 5 Kan. App. 621, 46 Pac. 975 [*affirmed* in 61 Kan. 588, 60 Pac. 320], holding that an equitable suit to set aside a conveyance of land transferred after it has been attached cannot be maintained where the creditor obtained judgment in the attachment action, and an order for the sale of the real estate so seized. See Weingarten *v.* Marcus, 121 Ala. 187, 25 So. 852.

95. Davis *v.* Yonge, (Ark. 1905) 85 S. W. 90.

96. Scanlan *v.* Murphy, 51 Minn. 536, 53 N. W. 799; Klosterman *v.* Mason County Cent. R. Co., 8 Wash. 281, 36 Pac. 136; Faber *v.* Matz, 86 Wis. 370, 57 N. W. 39. A creditor will not be required to exhaust statutory proceedings in aid of execution before resorting to equity to charge another creditor for chattel property of a debtor fraudulently obtained and disposed of. Chamberlain Banking House *v.* Turner-Frazier Mercantile Co., 66 Nebr. 48, 92 N. W. 172. Nor will he even where proceedings supplemental to execution would have reached the notes for the purchase-money for the land conveyed. Vansickle *v.* Shenk, 150 Ind. 413, 50 N. E. 381. And see *infra*, XIV, C, 3.

97. Weingarter *v.* Marcus, 121 Ala. 187, 25 So. 852; Stratton *v.* Hernon, 154 Mass. 310, 28 N. E. 269. Under a statute giving to equity jurisdiction of suits to reach and apply in payment of a debt any property which cannot be come at to be attached on writ or taken on execution and not exempt from such attachment and seizure, and any property or interest conveyed in fraud of creditors, a creditor may by bill in equity reach property fraudulently transferred, although it may be seized on execution. Brown *v.* J. Wayland Kimball Co., 84 Me. 492, 24 Atl. 1007.

98. *Alabama.*— Chardavoyne *v.* Galbraith, 81 Ala. 521, 1 So. 771; Planters', etc., Bank *v.* Walker, 7 Ala. 926.

Connecticut.— Botsford *v.* Beers, 11 Conn. 369.

Illinois.— Getzler *v.* Saroni, 18 Ill. 511; Farnsworth *v.* Strasler, 12 Ill. 482; Merchants' Nat. Bank *v.* Hogle, 25 Ill. App. 543.

Maine.— Wyman *v.* Fox, 59 Me. 100; Dockray *v.* Mason, 48 Me. 178. *Compare* Esten *v.* Jackson, 68 Me. 292.

Mississippi.— Fowler *v.* McCartney, 27 Miss. 509.

Nebraska.— Howard *v.* Raymers, 64 Nebr. 213, 89 N. W. 1004; Foley *v.* Doyle, 1 Nebr. (Unoff.) 643, 95 N. W. 1067.

New Jersey.— Robert *v.* Hodges, 16 N. J. Eq. 299; Cox *v.* Dunham, 8 N. J. Eq. 594.

New York.— Stowell *v.* Haslett, 5 Lans. 380; Nicholson *v.* Leavitt, 4 Sandf. 252; Hendricks *v.* Robinson, 2 Johns. Ch. 283, 484.

Wisconsin.— Level Land Co. No. 3 *v.* Sivyer, 112 Wis. 442, 88 N. W. 317.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 664, 679.

Where a lien has been acquired by the levy of an execution, or where there is an outstanding execution in the hands of an officer, and a fraudulent obstruction has been interposed to prevent its being levied, a bill may be filed in a court of chancery for a discovery, and to remove such obstruction. Thayer *v.* Swift, Harr. (Mich.) 430. So where a judgment debtor fraudulently conveyed land and took back a deed reconveying the land to him, which was not put on record. Lewis *v.* Lanphere, 79 Ill. 187.

of equity in such a case does not depend upon statute,[99] nor does it depend upon want of a legal remedy.[1] And so far as legislation has affected the situation the tendency has been to enlarge rather than diminish the jurisdiction of equity in this respect.[2] In some states, under statutory provisions, one who seeks to enforce a mechanic's lien, may, in such action, have a fraudulent conveyance by defendant set aside as constituting an obstacle to the enforcement of his lien.[3]

3. Effect of Statutory Provisions For Proceedings Supplemental to Execution. The statutory remedy, given in a number of the states, by virtue of which a creditor may institute proceedings supplemental to his execution in aid thereof,[4] is regarded in some of the states as of an equitable nature, and to be intended as a substitute for the creditor's bill as formerly used in chancery.[5] But in other states where such supplementary proceedings may be resorted to they are held not to supersede the remedy by creditor's bill for the purpose of setting aside a fraudulent conveyance, but to constitute merely an additional remedy.[6]

Aid of garnishment.— So where the creditor has acquired a lien upon the property transferred by garnishment proceedings. Hargreaves *v.* Tennis, 63 Nebr. 356, 88 N. W. 486.

The jurisdiction of a court of equity is ample, either before or after sale under a judgment, to set aside a deed made in fraud of creditors, before sale, to enable the creditor to present an unembarrassed title for sale, after sale, to remove clouds from the title. Gallman *v.* Perrie, 47 Miss. 131. And a judgment creditor can maintain a bill to set aside a fraudulent transfer of property which is an impediment to his legal remedy, although he can, by indemnifying the sheriff, take the property from the one to whom it has been transferred. Taylor *v.* Dwyer, 131 Ala. 91, 32 So. 509. In such a case the remedy in equity and at law by sale of the property under execution are concurrent. Anderson *v.* Provident Life, etc., Co., 25 Wash. 20, 64 Pac. 933.

Action in aid of lien acquired by attachment.— Coulson *v.* Galtsman, 1 Nebr. (Unoff.) 502, 96 N. W. 349.

Right of execution creditor not in possession.— The rule that a bill to quiet title and remove a cloud therefrom lies only where complainant is in possession has no application where a deed is sought to be set aside as fraudulent toward creditors, and hence the execution creditor purchasing at his own sale may sue to set aside such conveyance, although he is not in possession of the land. Phillips *v.* Kesterson, 154 Ill. 572, 39 N. E. 599.

Rule in Canada.— Kerr *v.* Bain, 11 Grant Ch. (U. C.) 423.

99. Hirsch *v.* Israel, 106 Iowa 498, 76 N. W. 811. Such a proceeding in aid of the legal remedy is one formerly recognized and much favored in the court of chancery. Hammond *v.* Hudson River Iron, etc., Co., 20 Barb. (N. Y.) 378.

A statute providing that any one having a lien on land shall have the same right of action as the owner in fee in possession to test the validity of any other lien or encumbrance does not take away the jurisdiction which courts of equity exercised before the statute to grant relief to a creditor, who has secured a specific lien on the property, by setting aside his debtor's fraudulent conveyance. Ahlhauser *v.* Doud, 74 Wis. 400, 43 N. W. 169; Rozek *v.* Redzinski, 87 Wis. 525, 58 N. W. 262.

1. Guyton *v.* Terrell, 132 Ala. 66, 31 So. 83; Chardavoyne *v.* Galbraith, 81 Ala. 521, 1 So. 771; Wollenberg *v.* Minard, 37 Oreg. 621, 62 Pac. 532. Where the creditor brings an action to set aside a fraudulent conveyance of his debtor's property upon which he has a specific lien for the purpose of rendering his lien more available equity will take jurisdiction, not because the remedy at law is utterly futile, but because it is inadequate. Schofield *v.* Ute Coal, etc., Co., 92 Fed. 269, 34 C. C. A. 334.

As to the ancillary character of the jurisdiction assumed by equity in removing the fraudulent conveyance as constituting an impediment to the enforcement of an execution and as to the scope of such jurisdiction *compare* Ewing *v.* Cantrell, Meigs (Tenn.) 364.

2. Hammond *v.* Hudson River Iron, etc., Co., 20 Barb. (N. Y.) 378. The statutes in aid of executions issued on judgments at law do not abolish the right of a judgment creditor to maintain a creditors' bill to enforce payment of a judgment from land fraudulently conveyed. Anderson *v.* Provident Life, etc., Co., 25 Wash. 20, 64 Pac. 933.

3. Linneman *v.* Bieber, 85 Hun (N. Y.) 477, 33 N. Y. Suppl. 129; Meehan *v.* Williams, 36 How. Pr. (N. Y.) 73. See, generally, Mechanics' Liens.

4. See Executions, 17 Cyc. 1403.

5. Importers', etc., Nat. Bank *v.* Quackenbush, 143 N. Y. 567, 38 N. E. 728.

6. Feldenheimer *v.* Tressel, 6 Dak. 265, 43 N. W. 94; Chamberlain Banking House *v.* Turner-Frazer Mercantile Co., 66 Nebr. 48, 92 N. W. 172.

The reason is that the remedy afforded by proceedings supplementary to execution is not as effective as that furnished by creditors' bills as administered by courts of equity. They are merely proceedings in the original action for the purpose of enforcing the judgment already recovered. Feldenheimer *v.* Tressel, 6 Dak. 265, 43 N. W. 94. See also Allen *v.* Tritch, 5 Colo. 222; Ludes *v.* Hood, 29 Kan. 49; Scanlan *v.* Murphy,

The mere fact that the creditor has instituted supplementary proceedings under the statute will not preclude him from subsequently suing in equity to set aside the conveyance.[7]

4. Remedy Where Conveyance Is Attacked After Death of Grantor — a. Action by Personal Representative. Ordinarily an administrator can only maintain such actions at law as the decedent might if living, and therefore, as the grantor in the conveyance is bound by it, his administrator will as a general rule, in the absence of statute, also be bound.[8] But in many of the states this rule has been changed by statutes relating to the distribution of estates and the duties of administrators,[9] and now in many states the administrator is permitted to sue to recover back property fraudulently conveyed by his decedent.[10] In some states the statute makes the personal representative of the decedent the trustee of the creditors, in which case it is held that he may sue to set aside a fraudulent conveyance.[11]

b. Action by Creditor. It is usually held that where a creditor, after the death of the debtor, attacks a conveyance made by the decedent as fraudulent his proper remedy is by a bill in equity.[12] In many of the states the right of the

51 Minn. 536, 53 N. W. 799; Monroe *v.* Reid, 46 Nebr. 316, 61 N. W. 983; Klosterman *v.* Mason County Cent. R. Co., 8 Wash. 281, 36 Pac. 136.

In Wisconsin in consequence of decisions announcing the rule that the remedy by creditors' bill was superseded by the code provisions for supplementary proceedings, a statute was enacted restoring the remedy by creditors' bill as it had existed before the code. Winslow *v.* Dousman, 18 Wis. 456.

7. Bennett *v.* McGuire, 58 Barb. (N. Y.) 625 (holding that the action was maintainable where no receiver had been appointed); Faber *v.* Matz, 86 Wis. 370, 57 N. W. 39. And in Gere *v.* Dibble, 17 How. Pr. (N. Y.) 31, it was held that the creditors' suit to set aside the conveyance was maintainable after a receiver had been appointed in supplementary proceedings.

8. *Alabama.*— Davis *v.* Swanson, 54 Ala. 277, 25 Am. Rep. 678.

Arkansas.—Anderson *v.* Dunn, 19 Ark. 650.

Georgia.—Anderson *v.* Brown, 72 Ga. 713.

Iowa.— Cooley *v.* Brown, 30 Iowa 470.

Kansas.— Crawford *v.* Lehr, 20 Kan. 509.

Mississippi.— Snodgrass *v.* Andrews, 30 Miss. 472, 64 Am. Dec. 169.

Missouri.— Hall *v.* Callahan, 66 Mo. 316.

Ohio.— Doney *v.* Dunnick, 8 Ohio Cir. Ct. 163, 4 Ohio Cir. Dec. 380.

South Carolina.— Giles *v.* Pratt, 1 Hill 239, 26 Am. Dec. 170.

Texas.— Wilson *v.* Demander, 71 Tex. 603, 9 S. W. 678.

Compare Beith *v.* Porter, 119 Mich. 365, 78 N. W. 336, 75 Am. St. Rep. 402 (where it was intimated that a statute making it the duty of administrators when there is a deficiency of assets to take steps to set aside fraudulent conveyances, etc., was declaratory of the common law); Webb *v.* Atkinson, 122 N. C. 683, 29 S. E. 949 (holding that an administrator could on principles of equitable jurisprudence sue to set aside a conveyance by the decedent of personal property in fraud of creditors, the estate in the administrator's hands being insufficient to pay the debts of the decedent). See also Parker *v.* Flagg, 127 Mass. 28; Janvrin *v.* Curtis, 63 N. H. 312. And see, generally, Executors and Administrators, 18 Cyc. 196, 197.

9. Cooley *v.* Brown, 30 Iowa 470.

10. Doe *v.* Clark, 42 Iowa 123; Martin *v.* Crosby, 11 Lea (Tenn.) 198; McLane *v.* Johnson, 43 Vt. 48.

In Michigan it has been held that a statute making it the duty of administrators when there is a deficiency of assets to take steps to subject such property as may have been conveyed in fraud of creditors to the payment of the debts of the estate authorizes the personal representative to recover property for which the decedent paid and which he caused to be conveyed to a third person in fraud of his creditors. Beith *v.* Porter, 119 Mich. 365, 78 N. W. 336, 75 Am. St. Rep. 402.

In New York the statute provides that any executor or administrator may, for the benefit of creditors, disaffirm all transfers in fraud of rights of creditors. West Troy Nat. Bank *v.* Levy, 127 N. Y. 549, 28 N. E. 592.

Under the Wisconsin statute to entitle the administrator to sue, it must appear that there is or will be a deficiency of assets to pay creditors existing at the time of the fraudulent transfer. Ecklor *v.* Wolcott, 115 Wis. 19, 90 N. W. 1081.

11. Frost *v.* Libby, 79 Me. 56, 8 Atl. 149; Caswell *v.* Caswell, 28 Me. 232.

In Ohio the administrator of an insolvent estate is a trustee for the creditors of his decedent, with respect to lands conveyed by him in fraud of his creditors. Doney *v.* Clark, 55 Ohio St. 294, 45 N. E. 316.

12. Chambers *v.* Sallie, 29 Ark. 407 (where the creditor proved his judgment against the estate of a decedent and sued to set aside a conveyance by the decedent and subject the land to the payment of his claim, and it was held that a court of chancery had jurisdiction); Snodgrass *v.* Andrews, 30 Miss. 472, 64 Am. Dec. 169. *Compare* Bottorff *v.* Covert, 90 Ind. 508.

creditor in such a case to sue to set aside the conveyance is governed by statute.[13] In some states creditors may sue on obtaining leave of court,[14] and in other states they may bring suit after a request of the personal representative to sue has been refused.[15] Where the personal representative is by statute given power to sue or is required to sue to recover property fraudulently conveyed, for the benefit of creditors, a creditor may nevertheless maintain the action if there is some reason why the action cannot be brought by the personal representative,[16] or he stands in a position of antagonism to the interests of creditors,[17] or refuses, on request, to bring the action.[18] In some states the creditor has a primary right to sue to set aside the conveyance, although the statute also gives such right to the personal representative.[19]

Where the debtor died without other assets than the property conveyed the creditor need not pursue a fruitless remedy through an administration of the estate in the probate court. Heard *v.* McKinney, 1 Tex. Unrep. Cas. 83.

In Pennsylvania where in ordinary cases a creditor's bill does not lie to set aside a fraudulent conveyance and the remedy of the creditor is by levy of execution and sale of the property conveyed at sheriff's sale, and then contesting the title of the fraudulent vendee in an action of ejectment, it is held that the death of a judgment debtor furnishes a reason for entertaining such a bill (Houseman *v.* Grossnan, 177 Pa. St. 453, 35 Atl. 736), at least if the creditor has a lien (Fowler's Appeal, 87 Pa. St. 449; Bankes *v.* Lindemuth, 23 Pa. Co. Ct. 459).

Remedy against grantee as executor de son tort.— It is no objection to a bill on behalf of judgment creditors to set aside a conveyance by their debtor, who has since deceased, that they might maintain a suit at law against the grantee as executor *de son tort*, since the jurisdiction of law and equity is concurrent in cases of fraud. Trippe *v.* Ward, 2 Ga. 304.

Action against administrator and grantee. —A court of equity has jurisdiction of a bill by a judgment creditor to obtain satisfaction of his judgment out of his debtor's property, whether legal or equitable, against the administrator of the debtor, and against a party holding all the property of the deceased under conveyances absolute in form, but accompanied with secret trusts in favor of the grantor, designed to defraud such creditor, and to prevent him from obtaining payment of his judgment. Hagan *v.* Walker, 14 How. (U. S.) 29, 14 L. ed. 312.

13. Lichtenberg *v.* Herdtfelder, 103 N. Y. 302, 8 N. E. 526.

In Massachusetts the remedy of the creditor is through the administrator who is required to bring an action at the request of the creditors and if he refuses after an offer of proper indemnity, he may be removed and another appointed in his place. Putney *v.* Fletcher, 148 Mass. 247, 19 N. E. 370.

14. Farmers' Nat. Bank *v.* Thomson, 74 Vt. 442, 52 Atl. 961, holding that Vt. St. 2477, authorizing creditors of a deceased person to institute, by leave of the probate court, suit in the name of the debtor's executor or administrator to set aside a fraudulent conveyance made by the debtor during life, does not require a creditor to obtain leave of court to prosecute such a suit in his own name, such leave being necessary only when the suit is in the name of the executor or administrator.

15. Montgomery *v.* Boyd, 78 N. Y. App. Div. 64, 79 N. Y. Suppl. 879.

16. Emmons *v.* Barton, 109 Cal. 662, 42 Pac. 303, where the alleged fraudulent grantee was the personal representative.

17. Barker *v.* Battey, 62 Kan. 584, 64 Pac. 75.

18. Harvey *v.* McDonnell, 113 N. Y. 526, 21 N. E. 695. And see Nill *v.* Phelps, 20 Misc. (N. Y.) 488, 46 N. Y. Suppl. 662.

A merely general creditor may sue.— In such a case the creditor stands in the place of the trustee and it is immaterial that he is not a judgment creditor. Harvey *v.* McDonnell, 113 N. Y. 526, 21 N. E. 695.

What constitutes refusal of request to sue. —Where the foreign executor of a non-resident decedent refused requests of a resident creditor to take out ancillary letters and the creditor sued to set aside as fraudulent the decedent's transfer of his beneficial interest in personalty held in trust and located in the state where the action was brought, it was held that as the foreign executor could not have sued to set aside the transfer without taking out the ancillary letters, his refusal so to do was equivalent to a refusal to bring the action to set aside the conveyance. Montgomery *v.* Boyd, 78 N. Y. App. Div. 64, 79 N. Y. Suppl. 879.

Rule in New York.— In New York, since statutes enacted in 1894 and 1897, providing that the personal representative may disaffirm the fraudulent conveyance of the decedent and also providing that a creditor of a deceased insolvent debtor may disaffirm a fraudulent conveyance and sue to set it aside, and that for the purpose of maintaining such an action it shall not be necessary that he shall have previously obtained judgment, the power of the creditor to commence suit does not depend upon the refusal of the personal representative to sue. Lilienthal *v.* Drucklieb, 92 Fed. 753, 34 C. C. A. 657. See National Bank of Republic *v.* Thurber, 39 Misc. (N. Y.) 13, 78 N. Y. Suppl. 766.

19. National Bank of Republic *v.* Thurber, 39 Misc. (N. Y.) 13, 78 N. Y. Suppl. 766.

5. Relief in Equity on Theory of Resulting Trust. In the absence of any statute on the subject some courts are not inclined to afford relief to creditors on the theory that a trust results in their favor from the fraudulent transaction.[20] In many states, however, sometimes by virtue of express statutory provisions, where a debtor pays the consideration for property which he causes to be conveyed to a third person with intent to defraud his creditors, a trust results in favor of the creditors, enforceable in equity, to the extent that may be necessary to satisfy their just demands.[21]

6. Jurisdiction With Respect to Transfers of Personal Property. Equity has jurisdiction to set aside fraudulent transfers of personalty under the same circumstances and upon the same ground that it has of fraudulent transfers of real estate.[22]

D. Election of Remedies[23] — 1. In General. It is a general rule that one having the right to rescind a transaction may waive such right and recover on the theory that the transaction is valid, but that he cannot both rescind and affirm. He must elect which course he will pursue. In the case of a fraudulent transfer by a debtor of his property, the creditor cannot pursue the property in the hands of the grantee and at the same time ratify the sale and collect the purchase-money agreed to be given by the grantee upon the theory of a valid sale.[24]

2. Election Between Legal and Equitable Remedies. The general rule is that where a court of law and a court of equity have concurrent jurisdiction, one seeking relief may elect in which tribunal he shall proceed,[25] and while one seeking relief against a fraudulent conveyance by his debtor may sometimes be compelled to elect between his legal and his equitable remedy,[26] an election will not be com-

20. Perea *v.* De Gallegos, 3 N. M. 151, 3 Pac. 246. *Compare* Whitney *v.* Stearns, 11 Metc. (Mass.) 319.

Where a debtor caused property purchased by him to be conveyed to a third person to be held for his benefit in fraud of creditors, the court held that the remedy of a creditor defrauded by the transaction was by a suit in equity founded on the fraud and not on the theory of a trust. Rhem *v.* Tull, 35 N. C. 57.

21. Overmire *v.* Haworth, 48 Minn. 372, 51 N. W. 121, 31 Am. St. Rep. 660; Mason *v.* Eichels, 8 Ohio Dec. (Reprint) 436, 8 Cinc. L. Bul. 7. This is so in New York under a statute declaring that every such conveyance shall be presumed fraudulent as against the creditors of the person paying the consideration, and that where a fraudulent intent is not disproved a trust shall result in favor of the creditors. Wood *v.* Robinson, 22 N. Y. 564. See also *supra*, II, B, 16, d; III, A, 3, a; XIV, B, 2, j.

22. Feldenheimer *v.* Tressel, 6 Dak. 265, 43 N. W. 94; Sobernheimer *v.* Wheeler, 45 N. J. Eq. 614, 18 Atl. 234; Smith *v.* Wood, 42 N. J. Eq. 563, 7 Atl. 881, 44 N. J. Eq. 603, 17 Atl. 1104; Murtha *v.* Curley, 90 N. Y. 372; Webb *v.* Staves, 1 N. Y. App. Div. 145, 37 N. Y. Suppl. 414; McClosky *v.* Stewart, 63 How. Pr. (N. Y.) 137; Meyer Boot, etc., Co. *v.* Shenkberg Co., 11 S. D. 620, 20 N. W. 126.

23. See, generally, Election of Remedies, 15 Cyc. 251.

24. James *v.* Kennedy, 10 Heisk. (Tenn.) 607; Memphis First Nat. Bank *v.* Pettit, 9 Heisk. (Tenn.) 447; Cunningham *v.* Campbell, 3 Tenn. Ch. 708. See also *supra*, III, C, 5, b; IV, G, 4. A judgment creditor who sells an equity of redemption under execution admits the validity of the mortgage, and is estopped from thereafter bringing a bill to set it aside as fraudulent, and subject the land to the balance of his debt. Knoop *v.* Kelsey, 102 Mo. 291, 14 S. W. 110, 22 Am. St. Rep. 777. But a suit to avoid a sale as fraudulent as to creditors, and to subject the goods, as those of the debtor, to the debt, and at the same time to hold the fraudulent grantee liable for such as he and his assignees have converted since suit brought, is not in violation of the principle that, if a creditor elects to treat the sale as fraudulent, he cannot treat it as valid as to the portion disposed of, and recover the proceeds. Dillard, etc., Co. *v.* Smith, 105 Tenn. 372, 59 S. W. 1010.

25. See Election of Remedies, 15 Cyc. 264.

26. Planters', etc., Bank *v.* Walker, 7 Ala. 926; Lanahan *v.* Latrobe, 7 Md. 268. A judgment creditor who seeks by direct action to annul an outstanding title conferred by his debtor cannot, pending the action, proceed by seizure and sale of the property. Ulrich *v.* Duson, 36 La. Ann. 989.

Right on levy of execution and replevin against levying officer. — Where a judgment creditor levies execution on property alleged to be that of the debtor, but which he has sold to another, who replevies it from the officer holding execution, the creditor cannot bring an action to set aside the sale as being in fraud of creditors, while the execution subsists; for by the levy the execution is

pelled unless the legal proceeding and the proceeding in equity are instituted to obtain the same relief.[27] The mere fact that he has caused execution to be levied upon the property conveyed will not deprive him of the right to go into equity in order to vacate the conveyance;[28] and the rule supported by the weight of authority is that where a judgment creditor proceeds to execution and causes the land conveyed to be sold under the execution and himself purchases the property at the sale he may then file his bill in equity to remove the conveyance as a cloud upon his title.[29] But in some jurisdictions it has been held that where a judgment creditor has pursued the property in question to execution and has purchased it at the sale under his execution, he cannot then bring an action in equity to set aside the conveyance.[30] In some jurisdictions it has been held, under statu-

sub modo satisfied, and the replevin bond is substituted for the property, and the title of the purchaser cannot be disturbed, but the question of title will be settled in the replevin suit, and, if decided adversely to plaintiff therein, the execution will be collected from the proceeds of the replevin judgment. Rodgers *v.* Kinsey, 8 Ohio Dec. (Reprint) 308, 7 Cinc. L. Bul. 64.

27. See ELECTION OF REMEDIES, 15 Cyc. 260.

28. Planters', etc., Bank *v.* Walker, 7 Ala. 926; Fitch *v.* Rising Sun First Nat. Bank, 99 Ind. 443. See *supra*, XIV, C, 2.

The only effect of the levy on the remedy in equity is to compel plaintiff, upon the interposition of a claim to the property by the transferee, to elect, if the matters in controversy are identical, whether the suit shall be prosecuted at law or in equity. Planters', etc., Bank *v.* Walker, 7 Ala. 926.

29. *Indiana.*— Frakes *v.* Brown, 2 Blackf. 295.

Iowa.— Howland *v.* Knox, 59 Iowa 46, 12 N. W. 777.

Kentucky.— Gaitskill *v.* Stivers, 5 Ky. L. Rep. 856.

Mississippi.— Gallman *v.* Perrie, 47 Miss. 131.

Missouri.— Lionberger *v.* Baker, 88 Mo. 447 [*affirming* 14 Mo. App. 353]; Kinealy *v.* Macklin, 2 Mo. App. 241 [*reversed* on other grounds in 67 Mo. 95].

New York.— Best *v.* Staple, 61 N. Y. 71; Carpenter *v.* Simmons, 1 Rob. 360; Porter *v.* Parmley, 14 Abb. N. S. 16.

Ohio.— Barr *v.* Hatch, 3 Ohio 527.

Rhode Island.— Tucker *v.* Denico, 26 R. I. 560, 59 Atl. 920.

Texas.— Lynn *v.* Le Gierse, 48 Tex. 138.

Washington.— Wagner *v.* Law, 3 Wash. 500, 28 Pac. 1109, 29 Pac. 927, 28 Am. St. Rep. 56, 15 L. R. A. 784.

United States.— Orendorf *v.* Budlong, 12 Fed. 24.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 674 *et seq.*; and *supra*, XIV, C, 2.

A creditor purchasing at execution sale under his judgment an entry that belonged to his debtor when the judgment was rendered procures an equitable title to the land, where the debtor had assigned the entry before the levy thereon to defraud his creditor, to the knowledge of his assignee, and the assignee holds the legal title for such creditor, to whom the land should be decreed on the filing of a bill therefor. Burrow *v.* Smith, 2 Sneed (Tenn.) 566.

Lands to which debtor has never had legal title.— Where a creditor acquired title by the execution of a sheriff's deed after service of an attachment on the land of his debtor which was standing in the name of another as the result of a fraudulent conveyance, which was void under the direct provisions of a statute, equity has jurisdiction to cancel the conveyance at the suit of the creditor, and put the creditor in possession. Tucker *v.* Denico, 26 R. I. 560, 59 Atl. 920.

30. Betts *v.* Nichols, 84 Ala. 278, 4 So. 195; Pettus *v.* Glover, 68 Ala. 417; Grigg *v.* Swindal, 67 Ala. 187; Smith *v.* Cockrell, 66 Ala. 64; Cranson *v.* Smith, 47 Mich. 189, 10 N. W. 194. In Thigpen *v.* Pitt, 54 N. C. 49, it was held that where a debtor makes a conveyance of land with intent to defraud creditors and they proceed to have the land sold under execution, treating the conveyance as void, one who becomes purchaser and takes a sheriff's deed has no right to call upon a court of equity to have the fraudulent deed removed as a cloud upon his title.

The reasons given for such a holding is that the conveyance is to be treated as a nullity and that the title of the purchaser at the execution sale is legal or it is nothing (Smith *v.* Cockrell, 66 Ala. 64), and that the creditor by thus failing to directly attack the conveyance as fraudulent leaves the question of the fraudulent character of the conveyance in doubt and thereby discourages bidding at the same (Cranson *v.* Smith, 47 Mich. 189, 10 N. W. 194). But in reply to this latter contention it was said in Tubb *v.* Williams, 7 Humphr. (Tenn.) 367, that even if the judgment creditor should buy the land at less than its value, neither the fraudulent transferee nor the fraudulent grantor could complain.

In Canada it has been held that a creditor who desires the aid of a court of equity in setting aside a fraudulent conveyance should seek such aid in the first instance, and that after he has sold the subject of the conveyance under his execution and purchased the property at the execution sale, he can then only obtain relief as a judgment creditor with respect to the fraudulent conveyance. He cannot sue as a purchaser to remove a cloud from the title. Malloch *v.* Plunkett, 9 Grant Ch. (U. C.) 556.

tory provisions giving a remedy by attachment to general creditors, that where such general creditors have availed themselves of the statutory provision they cannot then resort to equity.[31]

E. Conditions Precedent to Suit in Equity to Set Aside Conveyance — 1. Exhausting Remedy at Law in General. As has been seen the remedy most commonly invoked by a creditor aggrieved by a fraudulent conveyance of his debtor's property is a creditor's suit, or an action in the nature of a creditor's suit, to set aside the conveyance.[32] Such an action is governed by the general rules which prevail in equity proceedings,[33] and, first of all, it is laid down, in general terms, that a creditor must first have exhausted his legal remedies in attempting to obtain satisfaction of his debt before resorting to equity to that end,[34] or before suing in equity to reach the equitable estate of his debtor or to set aside a fraudulent conveyance.[35] But this statement must be considered in connection with the rule laid down above, that in many cases of fraud courts of law and courts of equity have concurrent jurisdiction;[36] and the strictness of the application of the rule and how far a creditor must go in exhausting his legal remedies will also depend upon whether the assets constituting the subject of the conveyance are equitable, or whether they are in their nature subject to execution. In the former case the rule is that the creditor must have pursued his legal remedies to every available extent and have secured a return of his execution *nulla bona*,[37] while in the latter case the creditor as a rule seeks the aid of a court

31. Manheim *v.* Claflin, 81 Ga. 129, 7 S. E. 284; Haralson *v.* Newton, 63 Ga. 163.

32. See *supra*, XIV, C, 1.

33. Robinson *v.* Frankville First M. E. Church, 59 Iowa 717, 12 N. W. 772.

34. Mesmer *v.* Jenkins, 61 Cal. 151; Detroit Copper, etc., Mills *v.* Ledwidge, 162 Ill. 305, 44 N. E. 751; Mullen *v.* Hewitt, 103 Mo. 639, 15 S. W. 924.

35. *Arkansas.*— Doster *v.* Manistee Nat. Bank, 67 Ark. 325, 55 S. W. 137, 77 Am. St. Rep. 116, 48 L. R. A. 334.

Florida.— Robinson *v.* Springfield Co., 21 Fla. 203.

Illinois.— Detroit Copper, etc., Mills *v.* Ledwidge, 162 Ill. 305, 44 N. E. 751; McConnel *v.* Dickson, 43 Ill. 99; Stone *v.* Manning, 3 Ill. 530, 35 Am. Dec. 119.

Indian Territory.— Parrott *v.* Crawford, (1904) 82 S. W. 688.

Iowa.— Goode *v.* Garrity, 75 Iowa 713, 38 N. W. 150.

Kentucky.— Moffat *v.* Ingham, 7 Dana 495.

Maine.— Caswell *v.* Caswell, 28 Me. 232.

Missouri.— Davidson *v.* Dockery, 179 Mo. 687, 78 S. W. 624; Atlas Nat. Bank *v.* John Moran Packing Co., 138 Mo. 59, 39 S. W. 71; Humphreys *v.* Atlantic Milling Co., 98 Mo. 542, 10 S. W. 140.

New Jersey.— Brown *v.* Fuller, 13 N. J. Eq. 271.

New York.— National Tradesman's Bank *v.* Wetmore, 42 Hun 359.

North Carolina.— Wheeler *v.* Taylor, 41 N. C. 225.

South Carolina.— Screven *v.* Bostick, 2 McCord Eq. 410, 16 Am. Dec. 664.

Texas.— Taylor *v.* Gillean, 23 Tex. 508.

United States.— Jones *v.* Green, 1 Wall. 330, 17 L. ed. 553.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 714 *et seq.*

When legal remedies deemed exhausted.— To entitle a creditor to set a conveyance by the debtor aside as fraudulent, he must show an unsatisfied judgment upon a cause of action that accrued prior to the conveyance, the issuance of process and inability to find property out of which to make the debt, and that defendant, being possessed of property out of which it might have been satisfied altogether or in part, conveyed the same for the purpose of defrauding his creditors. Clark *v.* Anthony, 31 Ark. 546. A bill in equity by a non-resident complainant against a non-resident defendant to set aside an alleged fraudulent conveyance of real estate, and to subject the same to the satisfaction of a debt contracted in another jurisdiction, is not maintainable where the bill simply alleges that defendant has no property in the jurisdiction in which the suit is brought which can be reached by any known process. Such an allegation does not exclude the possibility that defendant may have property more than sufficient to satisfy complainant's claim in another jurisdiction subject to execution at law. Hess *v.* Horton, 2 App. Cas. (D. C.) 81. But where the complainant has secured a judgment at law against the grantor upon which an execution has been issued and returned unsatisfied and he has no other visible property out of which satisfaction of the judgment can be obtained, the remedies at law have been exhausted. Brown *v.* Fuller, 13 N. J. Eq. 271. See also Thorp *v.* Leibrecht, 56 N. J. Eq. 499, 39 Atl. 361.

36. See *supra*, XIV, A; XIV, C, 1.

37. *Florida.*— Robinson *v.* Springfield Co., 21 Fla. 203.

Illinois.— Ishmael *v.* Parker, 13 Ill. 324.

Mississippi.— Farned *v.* Harris, 11 Sm. & M. 366.

New York.— Child *v.* Brace, 4 Paige 309.

of equity to remove some obstruction fraudulently or inequitably interposed to prevent or embarrass a sale under execution,[38] and he is not required to first absolutely exhaust his legal remedies,[39] it being usually held sufficient if he has pursued his remedy at law to the extent of acquiring a lien upon the specific property sought to be reached.[40]

2. Necessity of Obtaining Judgment at Law — a. In General. The general rule, as laid down in many decisions, is that a simple contract creditor or ordinary claimant at large cannot attack as fraudulent a transfer by the debtor of property applicable to the payment of the debt; but he must first recover judgment against the debtor; and, where the property sought to be reached is in its nature subject to execution, he must follow up the judgment with whatever steps may be necessary to make it a specific lien upon the subject of the conveyance or to put him in a position to perfect such a lien upon the setting aside of the conveyance.[41] One

Texas.— Taylor *v.* Gillean, 23 Tex. 508.

Wisconsin.—Galloway *v.* Hamilton, 68 Wis. 651, 32 N. W. 636.

United States.— Jones *v.* Green, 1 Wall. 330, 17 L. ed. 553.

It is because there can be no levy or right of lien upon the equitable assets that a court of equity lays hold of it and applies it to the judgment. The right to resort to the jurisdiction of equity attaches because of the fact that there is no property which can be reached by execution. Fleming *v.* Grafton, 54 Miss. 79. But this rule does not require that a creditor should attempt to reach such equitable assets by legal process. Case *v.* Beauregard, 101 U. S. 688, 25 L. ed. 1004.

Property purchased in name of third person.— Mandeville *v.* Campbell, 45 N. Y. App. Div. 512, 61 N. Y. Suppl. 443.

38. Fleming *v.* Grafton, 54 Miss. 79.

39. Loving *v.* Pairo, 10 Iowa 282, 77 Am. Dec. 108; Spooner *v.* Travelers' Ins. Co., 76 Minn. 311, 79 N. W. 305, 77 Am. St. Rep. 651; Galloway *v.* Hamilton, 68 Wis. 651, 32 N. W. 636.

Where a creditor has a lien upon property for the debt due him he may go into equity without exhausting legal processes or remedies. Case *v.* Beauregard, 101 U. S. 688, 25 L. ed. 1004.

Although property fraudulently conveyed may be sold on execution, the creditor is not bound to do this. Stock-Growers' Bank *v.* Newton, 13 Colo. 245, 22 Pac. 444; Logan *v.* Logan, 22 Fla. 561, 1 Am. St. Rep. 212; Zoll *v.* Soper, 75 Mo. 460. A court of equity has nevertheless jurisdiction of the fraud, to clear away the impediment to the obtaining of a full price for the property when exposed to sale. Lillard *v.* McGee, 4 Bibb (Ky.) 165. In this class of cases it is the inadequacy and not the utter futility of the remedy at law which confers the jurisdiction. Schofield *v.* Ute Coal, etc., Co., 92 Fed. 269, 34 C. C. A. 334.

40. Wadsworth *v.* Schisselbauer, 32 Minn. 84, 19 N. W. 390. See *infra*, XIV, E, 3, a, (III).

Whenever a creditor has a vested right in or a lien upon property, the enforcement of which is hindered or rendered inadequate by a fraudulent conveyance or encumbrance, he may sue in equity to remove it without showing an execution or return of it unsatisfied or without exhausting his other legal remedies. Schofield *v.* Ute Coal, etc., Co., 92 Fed. 269, 34 C. C. A. 334.

41. *Alabama.*— Deposit Bank *v.* Caffee, 135 Ala. 208, 33 So. 152; Sanders *v.* Watson, 14 Ala. 198.

Arkansas.— Doster *v.* Manistee Nat. Bank, 67 Ark. 325, 55 S. W. 137, 77 Am. St. Rep. 116, 48 L. R. A. 334; Hunt *v.* Weiner, 39 Ark. 70; Clark *v.* Anthony, 31 Ark. 546; Sale *v.* McLean, 29 Ark. 621; Wright *v.* Campbell, 27 Ark. 637; Phelps *v.* Jackson, 27 Ark. 585; Meux *v.* Anthony, 11 Ark. 411, 52 Am. Dec. 274.

California.— Ohm *v.* San Francisco Super. Ct., 85 Cal. 545, 26 Pac. 244, 20 Am. St. Rep. 245; Mesmer *v.* Jenkins, 61 Cal. 151; McMinn *v.* Whalen, 27 Cal. 300; Bickerstaff *v.* Doub, 19 Cal. 109, 79 Am. Dec. 294.

District of Columbia.— Hess *v.* Horton, 2 App. Cas. 81.

Florida.— Robinson *v.* Springfield Co., 21 Fla. 203; Barrow *v.* Bailey, 5 Fla. 9; Carter *v.* Bennett, 4 Fla. 283.

Georgia.— McDermott *v.* Blois, R. M. Charlt. 281.

Illinois.—Austin *v.* Bruner, 169 Ill. 178, 48 N. E. 449; Detroit Copper, etc., Rolling Mills *v.* Ledwidge, 162 Ill. 305, 44 N. E. 751; Dormueil *v.* Ward, 108 Ill. 216; Goembel *v.* Arnett, 100 Ill. 34; Bennett *v.* Stout, 98 Ill. 47; Shufeldt *v.* Boehm, 96 Ill. 560; Moritz *v.* Hoffman, 35 Ill. 553 (no creditor without a lien has any right to complain that his debtor is giving away property); Greenway *v.* Thomas, 14 Ill. 271; Rogers *v.* Dimon, 106 Ill. App. 201; Beidler *v.* Douglass, 35 Ill. App. 124.

Indiana.— Shirley *v.* Shields, 8 Blackf. 273.

Iowa.— Klay *v.* McKellar, 122 Iowa 163, 97 N. W. 1091; Goode *v.* Garrity, 75 Iowa 713, 38 N. W. 150; Joseph *v.* McGill, 52 Iowa 127, 2 N. W. 1007; Buchanan *v.* Marsh, 17 Iowa 494.

Kansas.— Tennent *v.* Battey, 18 Kan. 324.

Kentucky.— Behan *v.* Warfield, 90 Ky. 151, 13 S. W. 439, 11 Ky. L. Rep. 960; Kyle *v.* O'Neil, 88 Ky. 127, 10 S. W. 275, 10 Ky.

reason for the rule is that a court of equity can only interfere with the right of the debtor to dispose of his property at the instigation of *bona fide* creditors and

L. Rep. 709; Martz *v.* Pfeifer, 80 Ky. 600; Napper *v.* Yager, 79 Ky. 241.

Louisiana.— Zimmerman *v.* Fitch, 28 La. Ann. 454.

Maine.— Baxter *v.* Moses, 77 Me. 465, 1 Atl. 350, 52 Am. Rep. 783; Griffin *v.* Nitcher, 57 Me. 270; Fletcher *v.* Holmes, 40 Me. 364; Skeele *v.* Stanwood, 33 Me. 307; Caswell *v.* Caswell, 28 Me. 232; Webster *v.* Clerk, 25 Me. 313.

Maryland.— Rich *v.* Levy, 16 Md. 74; Uhl *v.* Dillon, 10 Md. 500, 69 Am. Dec. 172.

Michigan.— Trowbridge *v.* Bullard, 81 Mich. 451, 45 N. W. 1012; Nugent *v.* Nugent, 70 Mich. 52, 37 N. W. 706; Marshall First Nat. Bank *v.* Hosmer, 48 Mich. 200, 12 N. E. 212; Tyler *v.* Peatt, 30 Mich. 63.

Minnesota.— Tolbert *v.* Horton, 31 Minn. 518, 18 N. W. 647; Jones *v.* Rahilly, 16 Minn. 320; Massey *v.* Gorton, 12 Minn. 145, 90 Am. Dec. 287.

Mississippi.— Ferguson *v.* Bobo, 54 Miss. 121; Fleming *v.* Grafton, 54 Miss. 79; Vasser *v.* Henderson, 40 Miss. 519, 90 Am. Dec. 351; Parish *v.* Lewis, Freem. 299.

Missouri.— Davidson *v.* Dockery, 179 Mo. 687, 78 S. W. 624; Muilen *v.* Hewitt, 103 Mo. 639, 15 S. W. 924; Crim *v.* Walker, 79 Mo. 335; Fisher *v.* Tallman, 74 Mo. 39; Alnutt *v.* Leper, 48 Mo. 319; Turner *v.* Adams, 46 Mo. 95; Merry *v.* Fremon, 44 Mo. 518; Martin *v.* Michael, 23 Mo. 50, 66 Am. Dec. 656; Clarke *v.* Laird, 60 Mo. App. 289; Dodd *v.* Levy, 10 Mo. App. 121; Kent *v.* Curtis, 4 Mo. App. 121.

Nebraska.— Fairbanks *v.* Welshans, 55 Nebr. 362, 75 N. W. 865; Crowell *v.* Horacek, 12 Nebr. 622, 12 N. W. 99. See Weinland *v.* Cochran, 9 Nebr. 480, 4 N. W. 67; Weil *v.* Lankins, 3 Nebr. 384.

New Jersey.— Francis *v.* Lawrence, 48 N. J. Eq. 508, 22 Atl. 259; Haggerty *v.* Nixon, 26 N. J. Eq. 42; Hunt *v.* Field, 9 N. J. Eq. 36, 57 Am. Dec. 365.

New Mexico.— Wolcott *v.* Ashenfelter, 5 N. M. 442, 23 Pac. 780, 8 L. R. A. 691; Talbott *v.* Randall, 3 N. M. 226, 5 Pac. 533.

New York.— Whitney *v.* Davis, 148 N. Y. 256, 42 N. E. 661; Weaver *v.* Haviland, 142 N. Y. 534, 37 N. E. 641, 40 Am. St. Rep. 631; Karst *v.* Gane, 136 N. Y. 316, 32 N. E. 1073; Frothingham *v.* Hodenpyl, 135 N. Y. 630, 32 N. E. 240 (holding that a general creditor cannot attack another creditor's judgment); Spelman *v.* Friedman, 130 N. Y. 421, 29 N. E. 765; Briggs *v.* Austin, 129 N. Y. 208, 29 N. E. 4; Tremaine *v.* Mortimer, 128 N. Y. 1, 27 N. E. 1060; Sullivan *v.* Miller, 106 N. Y. 635, 13 N. E. 772; Reynolds *v.* Ellis, 103 N. Y. 115, 8 N. E. 392, 57 Am. Rep. 701; McKinley *v.* Bowe, 97 N. Y. 93; Adsit *v.* Butler, 87 N. Y. 585; Sturges *v.* Vanderbilt, 73 N. Y. 384; Southard *v.* Benner, 72 N. Y. 424; Briggs *v.* Oliver, 68 N. Y. 336; Geery *v.* Geery, 63 N. Y. 252; Thompson *v.* Van Vechten, 27 N. Y. 568; Reubens *v.* Joel, 13 N. Y. 488; Robinson *v.* Stewart, 10 N. Y. 189; Voorhees *v.* Howard, 4 Abb. Dec. 503, 4 Keyes 371; Van Dewater *v.* Gear, 21 N. Y. App. Div. 201, 47 N. Y. Suppl. 503; Webster *v.* Lawrence, 47 Hun 565; Burnett *v.* Gould, 27 Hun 366; Mills *v.* Block, 30 Barb. 549; Cropsey *v.* McKinney, 30 Barb. 47; Frisbey *v.* Thayer, 25 Wend. 396. *Compare* Rocky Mountain Nat. Bank *v.* Bliss, 89 N. Y. 338, in which case statutory provisions requiring a creditor of a corporation to first obtain judgment against it before suing the stock-holder were construed.

North Carolina.— Hafner *v.* Irwin, 26 N. C. 529.

North Dakota.— Amundson *v.* Wilson, 11 N. D. 193, 91 N. W. 37.

Oregon.— Dawson *v.* Coffey, 12 Oreg. 513, 8 Pac. 838.

Rhode Island.— Smith *v.* Millett, 12 R. I. 59.

Tennessee.— McKeldin *v.* Gouldy, 91 Tenn. 680, 20 S. W. 231 (in equity no one is recognized as a creditor until he has first obtained a judgment at law or a decree in equity); Hopkins *v.* Webb, 9 Humphr. 519; Williams *v.* Tipton, 5 Humphr. 66, 42 Am. Dec. 420; Chester *v.* Greer, 5 Humphr. 26.

Texas.— Arbuckle Bros. Coffee Co. *v.* Werner, 77 Tex. 43, 13 S. W. 963; Overstreet *v.* Manning, 67 Tex. 657, 4 S. W. 248.

Vermont.— Bassett *v.* St. Albans Hotel Co., 47 Vt. 313.

Virginia.— Tate *v.* Liggat, 2 Leigh 84; Chamberlayne *v.* Temple, 2 Rand. 384, 14 Am. Dec. 786.

Washington.— Rothchild *v.* Trewella, 36 Wash. 679, 79 Pac. 480, 104 Am. St. Rep. 973, 68 L. R. A. 281 (holding that under Laws (1901), p. 222, c. 109, declaring fraudulent and void a sale of a stock of goods in bulk unless the purchaser obtains a list of the seller's creditors, and sees that the purchase-money is applied on their claims, a simple contract creditor of the seller, without judgment or lien, cannot maintain a direct action at law against a purchaser not complying with the act to recover on the seller's debt to him); Klosterman *v.* Mason County Cent. R. Co., 8 Wash. 281, 36 Pac. 136; Thompson *v.* Caton, 3 Wash. Terr. 31, 13 Pac. 185.

West Virginia.— Frye *v.* Miley, 54 W. Va. 324, 46 S. E. 135; Kennewig Co. *v.* Moore, 49 W. Va. 323, 38 S. E. 558.

Wisconsin.— Miller *v.* Drane, 122 Wis. 315, 99 N. W. 1017; Weber *v.* Weber, 90 Wis. 467, 63 N. W. 757; Gregory *v.* Rosenkrans, 78 Wis. 451, 47 N. W. 832; Ullman *v.* Duncan, 78 Wis. 213, 47 N. W. 266, 9 L. R. A. 683; Manson *v.* Phœnix Ins. Co., 64 Wis. 26, 24 N. W. 407, 54 Am. Rep. 573.

United States.— Hollins *v.* Brierfield Coal, etc., Co., 150 U. S. 371, 14 S. Ct. 127, 37 L. ed. 1113; Cates *v.* Allen, 149 U. S. 451, 13 S. Ct. 883, 37 L. ed. 804; Scott *v.* Neely, 140 U. S. 106, 11 S. Ct. 712, 35 L. ed. 358;

that it cannot be known with certainty that any one is an actual and subsisting creditor until a judgment has been obtained upon his claim.[42] It is not sufficient

People's Sav. Bank *v.* Bates, 120 U. S. 556, 7 S. Ct. 679, 30 L. ed. 754; *Ex p.* Boyd, 105 U. S. 647, 26 L. ed. 1200; Case *v.* Beauregard, 101 U S. 688, 25 L. ed. 1004; Smith *v.* Ft. Scott, etc., R. Co., 99 U. S. 398, 25 L. ed. 437; Virginia Bd. of Public Works *v.* Columbia College, 17 Wall. 521, 21 L. ed. 687; Jones *v.* Green, 1 Wall. 330, 17 L. ed. 553; England *v.* Russell, 71 Fed. 818; Morrow Shoe Mfg. Co. *v.* New England Shoe Co., 57 Fed. 685, 6 C. C. A. 508, 24 L. R. A. 417; Chadbourne *v.* Coe, 51 Fed. 479, 2 C. C. A. 327; Dahlman *v.* Jacobs, 15 Fed. 863, 5 McCrary 130; Stewart *v.* Fagan, 23 Fed. Cas. No. 13,426, 2 Woods 215.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 697 *et seq.*

Lien by judgment or otherwise necessary.— A creditor whose claim has not been reduced to judgment (Reese *v.* Bradford, 13 Ala. 837; Chicago Bldg., etc., Co. *v.* Taylor Banking Co., (Kan. 1904) 78 Pac. 808), and who has neither a general lien upon the debtor's property (Missouri, etc., Trust Co. *v.* Richardson, 57 Nebr. 617, 78 N. W. 273), nor a specific lien upon the subject of the conveyance assailed (Turner *v.* Short, (Ky. 1887) 4 S. W. 347), is not entitled to have such property impounded as security for his claim or to have a fraudulent conveyance thereof set aside or to have future conveyances thereof enjoined (Missouri, etc., Trust Co. *v.* Richardson, 57 Nebr. 617, 78 N. W. 273). See also *infra*, XIV, E, 4.

Effect of assignment for benefit of creditors. — To maintain a creditor's bill to set aside a fraudulent conveyance, the creditor must first have judgment at law, although the debtor has made an assignment for the benefit of creditors. Austin *v.* Bruner, 65 Ill. App. 301.

Enforcement of resulting trust.— Overmire *v.* Haworth, 48 Minn. 372, 51 N. W. 121, 31 Am. St. Rep. 660.

In federal courts.— The rule that equity will not grant relief where there is a plain and adequate remedy at law is most closely adhered to in the federal courts (Hess *v.* Horton, 2 App. Cas. (D. C.) 81), and a simple contract creditor cannot maintain a bill in equity in such court to set aside a fraudulent conveyance of his debtor's property (Hollins *v.* Brierfield Coal, etc., Co., 150 U. S. 371, 14 S. Ct. 127, 37 L. ed. 1113; Cates *v.* Allen, 149 U. S. 451, 13 S. Ct. 883, 37 L. ed. 804; Scott *v.* Neely, 140 U. S. 106, 11 S. Ct. 712, 35 L. ed. 358; Viquesney *v.* Allen, 131 Fed. 21, 65 C. C. A. 259; Parkersburg First Nat. Bank *v.* Prager, 91 Fed. 689, 34 C. C. A. 51; Tompkins Co. *v.* Catawba Mills, 82 Fed. 782; Putney *v.* Whitmire, 66 Fed. 385), such courts holding that the attacking creditor must be one with a specific right or equity in the property sought to be reached (Cates *v.* Allen, 149 U. S. 451, 13 S. Ct. 883, 37 L. ed. 804), and that a judgment is necessary for the purpose of showing an exhaustion of the legal remedy (Cates *v.* Allen, *supra*).

Who are simple contract creditors.— The United States is merely a simple contract creditor, within the rule, of the sureties on the official bond of a collector of internal revenue after he has defaulted. U. S. *v.* Ingate, 48 Fed. 251. Where an order of court directed that defendant should pay certain moneys, converted by him while acting as executor of an estate, to his immediate successors in office, and such successors having died or resigned, plaintiff succeeded to the trust, and the order was assigned to him, it was held that plaintiff, having procured judgment against defendant to be entered upon the order in the names of the persons to whom it was payable, was a judgment creditor of defendant. Stokes *v.* Amerman, 121 N. Y. 337, 24 N. E. 819 [*affirming* 7 N. Y. Suppl. 733]. A landlord who has levied a distress warrant is held to be no more than a simple contract creditor of the tenant. See Hastings *v.* Belknap, 1 Den. (N. Y.) 190. And the fact that the general creditor has obtained possession of the property alleged to have been fraudulently conveyed does not take him out of the rule. Andrews *v.* Durant, 18 N. Y. 496.

A surety who has discharged a judgment rendered against him and his principal is a simple contract creditor of his principal within the rule. Sanders *v.* Watson, 14 Ala. 198. Mugge *v.* Ewing, 54 Ill. 236; Peeples *v.* Tatum, 36 N. C. 414. But where a surety looks altogether exclusively to a court of equity to recover money which he has paid out for his principal and files a bill for a decree for his money, adding a prayer for an auxiliary decree to remove obstructions fraudulently interposed to embarrass the remedial action of the court, it has been held that the fact that he has not obtained a judgment will not prevent the court from granting the relief prayed for. Waller *v.* Todd, 3 Dana (Ky.) 503, 28 Am. Dec. 94.

Effect of approval in insolvency court.— For the purpose of enforcing their rights against fraudulent or void acts of an insolvent, the allowance and approval of creditors' claims in an insolvency court are equivalent to a judgment. Ruggles *v.* Cannedy, (Cal. 1898) 53 Pac. 911.

Judgment in county of debtor's residence enough. — Where a creditor has recovered judgment against the debtor in the county of his residence, and issued execution thereon, which is returned unsatisfied, he has exhausted his legal remedy; the judgment need not be docketed in the county where the land conveyed is located. Lanahan *v.* Caffrey, 40 N. Y. App. Div. 124, 57 N. Y. Suppl. 724.

42. Kankakee Woolen Mill Co. *v.* Kampe, 38 Mo. App. 229.

that the creditor, after filing his bill to set aside the conveyance and before answer, has secured a judgment.[43] And the mere fact that a suit would be useless does not change the rule.[44] In some states this rule has been recognized by legislative enactment.[45] The rule is founded upon the necessity of there being an express adjudication of the fact of the existence of a debt and of its amount,[46] and also upon the theory that a judgment is necessary as a step in the process of exhausting the legal remedy,[47] since courts of equity generally speaking do not interfere in behalf of a mere legal demand until the creditor has tried his legal remedies and found them ineffectual.[48] A further reason given by some of the courts is that the creditor should have a specific lien upon the property involved and that without a judgment he is not in a position to sustain legal injury from any disposition which the debtor may make of his property.[49] The above rule has, however, by legislation in some states,[50] and by judicial decisions in others, undergone important modifications.[51]

43. St. Michael's College *v.* Merrick, 26 Grant Ch. (U. C.) 216. And see Brinkerhoff *v.* Brown, 4 Johns. Ch. (N. Y.) 671.

Mere bringing of action not sufficient.— Post *v.* Roach, 26 Fla. 442, 7 So. 854.

44. Kankakee Woolen Mill Co. *v.* Kampe, 38 Mo. App. 229, holding that if the debtor is entirely without assets such fact would only dispense with the necessity of issuing an execution.

The insolvency of the debtor and the danger of a transfer to an innocent purchaser does not relieve the creditor from the necessity of reducing his claim to judgment. Austin *v.* Bruner, 169 Ill. 178, 48 N. E. 449 [*affirming* 65 Ill. App. 301].

45. Bach *v.* Leopold, 8 La. Ann. 386.

46. Colman *v.* Croker, 1 Ves. Jr. 161, 27 Eng. Reprint 280, holding that to impeach a settlement for fraud there must be a creditor to complain of it, and he must be enabled to sue, by having obtained judgment at law for his debt, and must state that he is defrauded by it. And see Whitney *v.* Davis, 148 N. Y. 256, 42 N. E. 661; Prentiss *v.* Bowden, 145 N. Y. 342, 40 N. E. 13; Decker *v.* Decker, 108 N. Y. 128, 15 N. E. 307; Candee *v.* Lord, 2 N. Y. 269, 51 Am. Dec. 294; Rogers *v.* Rogers, 3 Paige (N. Y.) 379; Powell *v.* Howell, 63 N. C. 283; Virginia Bd. of Public Works *v.* Columbia College, 17 Wall. (U. S.) 521, 21 L. ed. 687.

47. *Illinois.*— Austin *v.* Bruner, 65 Ill. App. 301.

Minnesota.— Brasie *v.* Minneapolis Brewing Co., 87 Minn. 456, 92 N. W. 340, 94 Am. St. Rep. 709, 67 L. R. A. 865. See Jackson *v.* Holbrook, 36 Minn. 494, 32 N. W. 852, 1 Am. St. Rep. 683.

Missouri.— Davidson *v.* Dockery, 179 Mo. 687, 78 S. W. 624; Crim *v.* Walker, 79 Mo. 335; Fisher *v.* Tallman, 74 Mo. 39; Merry *v.* Fremon, 44 Mo. 518.

New York.— Importers', etc., Nat. Bank *v.* Quackenbush, 143 N. Y. 567, 38 N. E. 728.

Rhode Island.— Stone *v.* Westcott, 18 R. I. 517, 28 Atl. 662.

United States.— Hollins *v.* Brierfield Coal, etc., Co., 150 U. S. 371, 14 S. Ct. 127, 37 L. ed. 1113; Viquesney *v.* Allen, 131 Fed. 21, 65 C. C. A. 259.

48. *Nebraska.*—Brumbaugh *v.* Jones, (1904) 98 N. W. 54.

New Jersey.— Bayley *v.* Bayley, 66 N. J. Eq. 84, 57 Atl. 271.

New York.— Importers', etc., Nat. Bank *v.* Quackenbush, 143 N. Y. 567, 38 N. E. 728.

North Carolina.— Brown *v.* Long, 36 N. C. 190, 36 Am. Dec. 43.

Wisconsin.— French Lumbering Co. *v.* Theriault, 107 Wis. 627, 83 N. W. 927, 81 Am. St. Rep. 856, 51 L. R. A. 910.

Courts of equity are not tribunals for the collection of debts. Howe *v.* Whitney, 66 Me. 17; Webster *v.* Clark, 25 Me. 313; Fleming *v.* Grafton, 54 Miss. 79; Taylor *v.* Bowker, 111 U. S. 110, 4 S. Ct. 397, 28 L. ed. 368.

49. Ready *v.* Smith, 170 Mo. 163, 70 S. W. 484.

50. See *infra*, XIV, E, 2, b. Statutes conferring upon a court power to hear both legal and equitable actions give the court the power to entertain an action to recover a legal demand and at the same time to set aside a conveyance by the debtor and subject the property conveyed to the payment of the debt. De Lacy *v.* Hurst, 83 Ga. 223, 9 S. E. 1052. To the same effect see Mebane *v.* Layton, 86 N. C. 571. In Texas it has been held that as the judicial system prevailing there is one of blended law and equity a creditor may in the same proceeding sue to recover a debt and also seek to set aside a conveyance by the debtor in fraud of creditors. Cassaday *v.* Anderson, 53 Tex. 527. But a statute which provides that where personal service of process cannot be made at law and when no original attachment at law will lie and no judgment at law can be obtained, a court of chancery shall have jurisdiction to subject legal and equitable interests in property to the payment of a legal demand, although no judgment has been obtained thereon, if the amount due has been ascertained by the verdict of a jury does not permit a non-resident general creditor without judgment to file a bill against a non-resident debtor and a fraudulent grantee of the latter to set aside the conveyance. Gasget *v.* Scott, 9 Yerg. (Tenn.) 244.

51. Sandorn *v.* Maxwell, 18 App. Cas. (D. C.) 245; Frank *v.* Kissler, 30 Ind. 8;

b. Statutory Modification of Rule as to Necessity of Judgment. In a number of states, under statutory provisions, the creditor has been relieved from the necessity of obtaining judgment before suit to set aside a fraudulent conveyance.[52] And in some states statutory provisions conferring upon a court jurisdic-

Chadbourne *v.* Coe, 51 Fed. 479, 2 C. C. A. 327.

Distinction between legal and actual fraud. — In some cases a distinction is made between legal fraud and a conveyance which is assailed on the ground of actual moral fraud in its inception, and it is held that in the latter case the rule requiring judgment and a return of execution *nulla bona* for the purpose of showing that the creditor has exhausted his legal remedies, being an arbitrary one, should not be applied if there is other proof that such remedies have been exhausted. Meinhard *v.* Youngblood, 37 S. C. 231, 15 S. E. 950, 16 S. E. 771.

Rule in English and Canadian courts.— In Canadian and English courts a distinction has been drawn between actions in which the relief asked is merely the setting aside of a fraudulent conveyance and those actions in which the creditor seeks to subject the property conveyed to his execution, and it is held that in the former case a simple contract creditor may maintain the suit; the ruling being based upon the words of the act of parliament which declare the conveyance to be fraudulent as to all creditors without distinction of priority. Longeway *v.* Mitchell, 17 Grant Ch. (U. C.) 190. To the same effect see Reese River Silver Min. Co. *v.* Atwell, L. R. 7 Eq. 347, 20 L. T. Rep. N. S. 163, 17 Wkly. Rep. 601, holding that it is not necessary that the creditor should have any lien or charging order on the property comprised in the conveyance in order to sue to set it aside, but that in the absence of such lien a court will not apply his property in satisfaction of the creditor's claim. To the objection that the decree in such a case can be of no utility, the reply is made that it will interpose an effectual obstacle to any dealing with the property by the grantee. Longeway *v.* Mitchell, 17 Grant Ch. (U. C.) 190.

52. *Alabama.*— Alabama Iron, etc., Co. *v.* McKeever, 112 Ala. 134, 20 So. 84; Carter *v.* Coleman, 82 Ala. 177, 2 So. 354; Bromberg *v.* Heyer, 69 Ala. 22; Lehman *v.* Meyer, 67 Ala. 396; Evans *v.* Welch, 63 Ala. 250; Lide *v.* Parker, 60 Ala. 165; McAnally *v.* O'Neal, 56 Ala. 299; Reynolds *v.* Welch, 47 Ala. 200. Under a statute providing that a creditor without a lien may file a bill to subject to his debt any property fraudulently transferred by his debtor, the creditor need not first exhaust his legal remedies to a return of *nulla bona*; and this whether the debtor be living or dead. Freeman *v.* Pullen, 119 Ala. 235, 24 So. 57.

Indiana.— Phelps *v.* Smith, 116 Ind. 387, 17 N. E. 602, 19 N. E. 156; Carr *v.* Huette, 73 Ind. 378.

Kentucky.— Smith *v.* Curd, 72 S. W. 744, 24 Ky. L. Rep. 1960.

Maryland.—Christopher *v.* Christopher, 64 Md. 583, 3 Atl. 296; Schaferman *v.* O'Brien, 28 Md. 565, 92 Am. Dec. 708; Sanderson *v.* Stockdale, 11 Md. 563; Richards *v.* Swan, 7 Gill 366; Swan *v.* Dent, 2 Md. Ch. 111.

Mississippi.— McBride *v.* State Revenue Agent, 70 Miss. 716, 12 So. 699.

North Carolina.— Dawson Bank *v.* Harris, 84 N. C. 206.

Ohio.— Combs *v.* Watson, 32 Ohio St. 228. A judgment is not necessary under the statute declaring that all transfers made with intent to defraud creditors "shall be declared void at the suit of any creditor." Bloomingdale *v.* Stein, 42 Ohio St. 168.

South Carolina.— Miller *v.* Hughes, 33 S. C. 530, 12 S. E. 419; Austin *v.* Morris, 23 S. C. 393.

Tennessee.— August *v.* Seeskind, 6 Coldw. 166; Croone *v.* Bivens, 2 Head 339; Fay *v.* Jones, 1 Head 442.

West Virginia.— Witz *v.* Lockridge, 39 W. Va. 463, 19 S. E. 876; Guggenheimer *v.* Lockridge, 39 W. Va. 457, 19 S. E. 874; State *v.* Bowen, 38 W. Va. 91, 18 S. E. 375; Tuft *v.* Pickering, 28 W. Va. 330.

United States.—*In re* Andrae Co., 117 Fed. 561.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 697 *et seq.*

Right, under statute, to attack mortgage for failure to record.— Karst *v.* Gane, 136 N. Y. 316, 32 N. E. 1073; Thompson *v.* Van Vechten, 27 N. Y. 568.

The state, when a creditor, is entitled to the benefit of such statutory provision. State *v.* Bowen, 38 W. Va. 91, 18 S. E. 375.

Suing before maturity of debt or liquidation of claim.— But a statute which provides that a creditor may sue to set aside a fraudulent conveyance without having previously obtained judgment against the debtor for his debt does not enable such creditor to sue before the maturity of his claim. Frye *v.* Miley, 54 W. Va. 324, 46 S. E. 135. See *supra*, IV, E, 3. Nor does it authorize a suit to recover damages for an alleged tort and at the same time subject to any judgment which may be recovered the subject of the alleged fraudulent conveyance. Jones *v.* Jones, 79 Miss. 261, 30 So. 651. See *supra*, IV, E, 4.

Effect of obtaining judgment.— Where a statute provides that judgment shall not be necessary the fact that the creditor obtains judgment does not make it necessary for him to issue execution. Russell *v.* Randolph, 26 Gratt. (Va.) 705. So where the statute provides that a creditor of a deceased insolvent debtor may without obtaining judgment upon his claim maintain an action to set aside the fraudulent transfer, the fact that such claim has been placed in judgment does not prevent him from availing

tion of both legal and equitable actions have been held to give to the creditor the right to sue to recover judgment upon his debt and at the same time to recover a judgment setting aside an alleged fraudulent conveyance.[53] But as state laws do not constitute a rule of decision in federal courts of equity,[54] and new equitable rights created by the states are enforced only so far as they do not interfere with the rights conferred by the constitution or laws of the United States,[55] statutory provisions enacted by the different state legislatures enabling creditors at large to maintain an action in equity to set aside fraudulent conveyances are without effect in the federal courts,[56] such statutes conflicting with the provisions of the federal constitution securing the right to trial by jury.[57]

c. Sufficiency of Judgment in General. A merely formal defect in the judgment will not enable defendant to raise the objection that the creditor has not exhausted his remedy at law.[58] And the fact that the statement furnishing the basis for a confession of judgment is not as full and as explicit as it ought to be under the statute will not necessarily impair the sufficiency of the judgment as a foundation for a suit in equity.[59] A judgment obtained on service by publication

himself of the statute. Rosselle *v.* Klein, 42 N. Y. App. Div. 316, 59 N. Y. Suppl. 94.

Condition precedent to making statute available.— Under a statute permitting a creditor without first having obtained judgment at law to sue to set aside a fraudulent conveyance, and providing that upon filing such a bill a writ of attachment may be granted, it is not necessary in order to invoke the jurisdiction of equity to first attach the property. Nailer *v.* Young, 7 Lea (Tenn.) 735; August *v.* Seeskind, 6 Coldw. (Tenn.) 166.

Extraterritorial effect of statute.— Ala. Code (1876), § 3886, authorizing a creditor by simple contract without a lien to come into equity to subject property fraudulently conveyed by his debtor, applies only to property situated within the state. Lide *v.* Parker, 60 Ala. 165.

53. Harker *v.* Glidewell, 23 Ind. 219; Dawson Bank *v.* Harris, 84 N. C. 206.

Property never in debtor's name.— Where a conveyance of real estate, for a valuable consideration, is made to one person, the consideration being paid by another, for the purpose of defrauding the creditors of the latter, such a creditor may, under the code, have a complete remedy in one action; a judgment may be obtained against the debtor and the real estate in question be subjected to the payment of the judgment. Lindley *v.* Cross, 31 Ind. 106, 99 Am. Dec. 610.

In Georgia, under Acts (1887), p. 64, establishing a uniform procedure in actions legal and equitable, and conferring jurisdiction of both on the superior courts, an action can be maintained against a debtor and those to whom he has conveyed property to defraud his creditors to annul such conveyance and to subject the property to the payment of plaintiff's debt, although the latter has not, by a judgment and execution returned *nulla bona,* exhausted his legal remedy. De Lacy *v.* Hurst, 83 Ga. 223, 9 S. E. 1052. Where plaintiff declared on a dormant judgment against a partnership, alleging that defendant, one of the partners, for the purpose of defrauding him, entered into a conspiracy with another person, by which he purchased certain lots and had them conveyed to himself as trustee, and prayed for a judgment against the partnership, and that the lots be subjected to such judgments, the petition was not demurrable because plaintiff had not reduced his claim to judgment, and had no lien on the property of the principal defendant. Kruger *v.* Walker, 111 Ga. 383, 36 S. E. 794.

54. See COURTS, 11 Cyc. 896.

55. Scott *v.* Neely, 140 U. S. 106, 11 S. Ct. 712, 35 L. ed. 358.

56. Cates *v.* Allen, 149 U. S. 451, 13 S. Ct. 883, 977, 37 L. ed. 804.

57. Cates *v.* Allen, 149 U. S. 451, 13 S. Ct. 883, 977, 37 L. ed. 804; Scott *v.* Neel, 140 U. S. 106, 11 S. Ct. 712, 35 L. ed. 358.

58. Produce Bank *v.* Morton, 67 N. Y. 199. And *compare* King *v.* Baer, 31 Misc. (N. Y.) 308, 64 N. Y. Suppl. 228 [*citing* Produce Bank *v.* Morton, 67 N. Y. 199; Hiler *v.* Hetterick, 5 Daly (N. Y.) 33]. Where on the face of a judgment-roll in an action against three defendants it appeared that the judgment was founded upon a joint obligation and execution was in fact issued against the joint property of all the debtors and returned unsatisfied, it was held that the fact that the judgment was not in form entered against all the joint debtors did not enable the one against whom it was not entered to raise the objection that the remedy at law, as to him, had not been exhausted. Produce Bank *v.* Morton, 67 N. Y. 199.

59. Merry *v.* Fremon, 44 Mo. 518; Robinson *v.* Hawley, 45 N. Y. App. Div. 287, 61 N. Y. Suppl. 138.

Confession of judgment, although defective in form, will uphold a suit to impeach a fraudulent transfer. Neusbaum *v.* Keim, 24 N. Y. 325.

The absence of an affidavit of the authority of defendant's attorney to confess judgment is a mere irregularity of which defendant's grantee in a conveyance fraudulent as to judgment creditors cannot take advantage. St. John Woodworking Co. *v.* Smith, 82 N. Y.

in attachment proceedings, although not a personal judgment, is sufficient to authorize the suit.[60] But where the judgment obtained by the creditor is void for want of jurisdiction it does not entitle him to attack the conveyance.[61] And a creditor after reversal of his judgment and before he has obtained judgment upon the second trial is merely a creditor at large.[62]

d. Effect of Foreign Judgment. Until a foreign judgment is made a judgment of the local court it is treated like any simple contract as a mere evidence of indebtedness.[63] And where the action to set aside is brought in a state court a previous judgment obtained against the grantor in a federal court is in some states treated as a foreign judgment for the purposes of the rule.[64] A judgment recovered against an administrator of a deceased person in one state is no such evidence of indebtedness as will sustain a suit by the same plaintiff in another state, either against an administrator or against any other person having assets of the deceased, to reach such assets or set aside a fraudulent conveyance.[65]

e. Effect of Judgment of Justice of the Peace. Since the general rule, as laid down in many jurisdictions, is that the creditor must have acquired a lien upon the specific property sought to be reached or be in a position to perfect a lien thereon before suing to set aside a fraudulent conveyance thereof,[66] the further rule has been deduced that a judgment obtained by a creditor in a justice's court is not sufficient upon which to predicate such an action,[67] unless such judgment is made a lien upon the debtor's real estate by being docketed in a court of

App. Div. 348, 82 N. Y. Suppl. 1025 [*affirmed* in 178 N. Y. 629, 71 N. E. 1139].

60. Parmenter *v.* Lomox, 68 Kan. 61, 74 Pac. 634.

61. Epstein *v.* Ferst, 35 Fla. 498, 17 So. 414; Millar *v.* Babcock, 29 Mich. 526.

Where attachment proceedings are instituted against a non-resident and no personal service of the writ is obtained and defendant has in no manner appeared in the cause, a strict compliance with the statutory requirements is essential to secure a judgment upon which a creditor's bill may be based. Nugent *v.* Nugent, 70 Mich. 52, 37 N. W. 706.

62. North Hudson Mut. Bldg., etc., Assoc. *v.* Childs, 86 Wis. 292, 56 N. W. 870, holding that the creditor could not, upon the second trial, bring in by amended complaint as parties defendant grantees of the debtor and ask to have the conveyance set aside and to restrain the grantees from disposing of the property.

63. *California.*— Brown *v.* Campbell, 100 Cal. 635, 35 Pac. 433, 38 Am. St. Rep. 314.

Illinois.— Winslow *v.* Leland, 128 Ill. 304, 21 N. E. 588; Steere *v.* Hoagland, 39 Ill. 264.

Iowa.— Buchanan *v.* Marsh, 17 Iowa 494.

Mississippi.— Berryman *v.* Sullivan, 13 Sm. & M. 65; Farned *v.* Harris, 11 Sm. & M. 366.

Missouri.— Crim *v.* Walker, 79 Mo. 335.

New Jersey.— Guy B. Waite Co. *v.* Otto, (Ch.) 54 Atl. 425; Mechanics', etc., Transp. Co. *v.* Borland, 53 N. J. Eq. 282, 31 Atl. 272; Davis *v.* Dean, 26 N. J. Eq. 436.

New York.— Davis *v.* Bruns, 23 Hun 648; Tarbell *v.* Griggs, 3 Paige 207, 23 Am. Dec. 790. A foreign judgment can no more constitute a basis for the ordinary creditor's action than the general indebtedness itself. Patchen *v.* Rofkar, 12 N. Y. App. Div. 475, 42 N. Y. Suppl. 35. Plaintiff must first sue upon such judgment, and recover a new judgment and issue an execution thereon, and have it returned unsatisfied, and thus establish the fact that he has exhausted his remedy at law. McCartney *v.* Bostwick, 31 Barb. 390.

South Carolina.— King *v.* Clarke, 2 Hill Eq. 611.

64. Steere *v.* Hoagland, 39 Ill. 264; Davis *v.* Bruns, 23 Hun (N. Y.) 648; Tompkins *v.* Parcell, 12 Hun (N. Y.) 662; Tarbell *v.* Griggs, 3 Paige (N. Y.) 207, 23 Am. Dec. 790. *Contra,* Brown *v.* Bates, 10 Ala. 432; Bullitt *v.* Taylor, 34 Miss. 708.

Effect in federal court of judgment in state court.—A creditor's bill may be maintained in the United States circuit court upon a state court judgment. Wilkinson *v.* Yale, 29 Fed. Cas. No. 17,678, 6 McLean 16.

65. King *v.* Clarke, 2 Hill Eq. (S. C.) 611; Johnson *v.* Powers, 139 U. S. 156, 11 S. Ct. 525, 35 L. ed. 112 (holding that a judgment against an administrator in one state for a debt of the decedent is not a judgment *in rem* and therefore cannot be used as the basis of proceeding in another state against an administrator there appointed to set aside a conveyance by the decedent of property in that state); McLean *v.* Meek, 18 How. (U. S.) 16, 15 L. ed. 277; Aspden *v.* Nixon, 4 How. (U. S.) 467, 11 L. ed. 1059.

66. Peterson *v.* Gittings, 107 Iowa 306, 77 N. W. 1056. See *supra,* XIV, E, 4.

67. Swayze *v.* Swayze, 9 N. J. Eq. 273. In Bailey *v.* Burton, 8 Wend. (N. Y.) 339, the court said that chancery might as well aid the judgment of a justice of the peace as any other judgment, but in this case the creditor's bill related to personal property which had been taken under execution issued by a justice and on which there was a lien by reason of the levy.

record,[68] or under some statutory provision.[69] When, however, a judgment of the justice has been docketed in a court of record, the judgment creditor becomes as much entitled to the aid of a court of equity as though it was originally recovered in a court of record.[70] And where the assets sought to be reached are equitable and no lien can be created upon them in any event a justice's judgment is sufficient.[71] In some jurisdictions it has been held that a justice's judgment is a sufficient foundation for a creditor's bill if the judgment is large enough to confer jurisdiction on the court of chancery;[72] and in some states statutory provisions allow the action to be based upon the judgment of the justice.[73]

f. Effect of Having Acquired Lien by Attachment.[74] In many jurisdictions where a lien upon the debtor's property can be secured by attachment, the attaching creditor may before judgment sue to set aside a fraudulent conveyance.[75] The reason given for allowing this is that an attachment serves the same purpose as an execution, the object of the attachment being to enable a party to acquire a lien for the security of his demand by a levy made before instead of after the entry of the judgment.[76] In some states this position has been reached by statutory construction.[77] In other jurisdictions the attaching creditor must

68. Crippen *v.* Hudson, 13 N. Y. 161. The reason being that until so docketed the creditor has not exhausted his legal remedies. Peterson *v.* Gittings, 107 Iowa 306, 77 N. W. 1056. A judgment of a justice of the peace is not sufficient to support a creditor's bill where the land sought to be subjected to it is located in another county. State Ins. Co. *v.* Prestage, 116 Iowa 466, 90 N. W. 62.

69. Swayze *v.* Swayze, 9 N. J. Eq. 273.

70. Peterson *v.* Gittings, 107 Iowa 306, 77 N. W. 1056.

71. Ballentine *v.* Beall, 4 Ill. 203.

72. Steere *v.* Hoagland, 39 Ill. 264.

73. A statute subjecting a debtor's choses in action, or equitable or legal interest in any estate, real, personal, or mixed, to the payment of "any judgment," is held to be such an enabling statute. Heiatt *v.* Barnes, 5 Dana (Ky.) 219. And under such a statute the return upon an execution by the proper officer that the debtor has no property by which it can be satisfied is sufficient evidence of an obstruction of the legal remedy to authorize equity to interpose to aid the judgment. Newdigate *v.* Jacobs, 9 Dana (Ky.) 17.

74. See also *infra*, XIV, E, 4.

75. *Iowa.*— Taylor *v.* Branscombe, 74 Iowa 534, 38 N. W. 400.

Kentucky.— Martz *v.* Pfeifer, 80 Ky. 600.

Mississippi.— Cogburn *v.* Pollock, 54 Miss. 639.

New Hampshire.—Formerly in New Hampshire, a creditor having nothing more than an attachment could not sue to set aside the conveyance. Dodge *v.* Griswold, 8 N. H. 425. But in the later cases the rule has been settled to be otherwise. Perham *v.* Haverhill Fibre Co., 64 N. H. 2, 3 Atl. 312; Stone *v.* Anderson, 26 N. H. 506; Kittredge *v.* Warren, 14 N. H. 509; Tappan *v.* Evans, 11 N. H. 311.

New Jersey.— Francis *v.* Lawrence, 48 N. J. Eq. 508, 22 Atl. 259; Cocks *v.* Varney, 45 N. J. Eq. 72, 17 Atl. 108; Robert *v.* Hodges, 16 N. J. Eq. 299; Williams *v.* Michenor, 11 N. J. Eq. 520. Where a creditor, admitted as such by rule under attachment, seeks to maintain such a bill, the statutory affidavit is sufficient to create the lien on the property attached essential to the maintenance of the bill. Curry *v.* Glass, 25 N. J. Eq. 108.

Oregon.— Bennett *v.* Minott, 28 Oreg. 339, 39 Pac. 997, 44 Pac. 288; Dawson *v.* Sims, 14 Oreg. 561, 13 Pac. 506.

Washington.— Benham *v.* Ham, 5 Wash. 128, 31 Pac. 459, 34 Am. St. Rep. 851; Meachem Arms Co. *v.* Swartz, 2 Wash. Terr. 412, 7 Pac. 859.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 708.

76. Dawson *v.* Sims, 14 Oreg. 561, 13 Pac. 506. The writ of attachment accomplishes all that an execution under a judgment does. The issuing and return of an execution is proof that the creditor has exhausted his legal remedy and an attachment serves the same purpose. Francis *v.* Lawrence, 48 N. J. Eq. 508, 22 Atl. 259.

Right of attaching creditor to intervene to prevent sale under alleged fraudulent judgment.— Breslauer *v.* Geilfuss, 65 Wis. 377, 27 N. W. 47.

77. **In Kentucky,** under a statute giving a remedy by attachment where the debtor has conveyed property with intent to defraud his creditors, it has been held that the remedy in such case is as ample when the property has been fraudulently conveyed as the jurisdiction of a court of equity upon a return of no property. A lien is created on the property upon which the attachment is levied and this gives the court jurisdiction over it. Martz *v.* Pfeifer, 80 Ky. 600.

In Missouri, since legislation enacted in 1889, an attaching creditor may sue to set aside a fraudulent conveyance. Davidson *v.* Dockery, 179 Mo. 687, 78 S. W. 624.

In Oregon the rule is the same under the statute making an attaching creditor a *bona fide* purchaser for a valuable consideration. Hahn *v.* Salmon, 20 Fed. 801.

In Wisconsin under a statute giving to every "owner and holder of any lien or in-

obtain judgment before he can resort to equity to set aside the conveyance.[78] The courts which take the latter view, however, permit an attaching creditor or officer in possession, when sued by the alleged fraudulent grantee, to attack the conveyance, although he has not secured judgment.[79]

cumbrance on land the same right of action as the owner in fee in possession, to test the legality and validity of any other claim, lien, or incumbrance on such land" one who has acquired by attachment a specific lien upon the land of his debtor may sue to set aside a fraudulent conveyance thereof. Evans *v.* Laughton, 69 Wis. 138, 33 N. W. 573.

What record must show with reference to attachment.— Since a creditor cannot sue to set aside a debtor's conveyance as fraudulent until he has acquired a lien on the property by judgment or attachment, plaintiff was not entitled to maintain such action on submitting the record of an action which showed that he had attached defendant's goods, but did not show whether or not the attachment was prior to his action to set aside the conveyances. Fleischner *v.* McMinnville First Nat. Bank, 36 Oreg. 553, 54 Pac. 884, 60 Pac. 603, 61 Pac. 345.

78. *California.*—Aigeltinger *v.* Einstein, 143 Cal. 609, 77 Pac. 669, 101 Am. St. Rep. 131; McMinn *v.* Whelan, 27 Cal. 300.

Illinois.— Bigelow *v.* Andress, 31 Ill. 322, holding that the party who has simply commenced his suit at law by suing out an attachment and procuring a service of garnishee process upon the fraudulent grantee of the debtor is a simple contract creditor.

Kansas.— Tennent *v.* Battey, 18 Kan. 324.

Missouri.— Turner *v.* Adams, 46 Mo. 95; Martin *v.* Michael, 23 Mo. 50, 66 Am. Dec. 656; Greene County Bank *v.* Epperson, 74 Mo. App. 10.

Nebraska.— Weinland *v.* Cochran, 9 Nebr. 480, 4 N. W. 67; Weil *v.* Lankins, 3 Nebr. 384. *Compare* Fairbanks *v.* Welshans, 55 Nebr. 362, 75 N. W. 865.

Canada.— Whiting *v.* Lawrason, 7 Grant Ch. (U. C.) 603.

The reasons given by the courts who assume this position are that, although the attachment is a specific lien, it is a lien of very uncertain tenure, as it may be defeated by dissolution on motion or by a judgment in favor of defendant on the merits of the claim and that no advantage will inure to the creditor except in the mere matter of time by sustaining the equitable action by him before obtaining judgment. Aigeltinger *v.* Einstein, 43 Cal. 609, 77 Pac. 669, 101 Am. St. Rep. 131.

Attachment must be followed by judgment. Griffin *v.* Nitcher, 57 Me. 270.

In New York the decisions are conflicting. In the late case of Whitney *v.* Davis, 148 N. Y. 256, 42 N. E. 661, the court of appeals holds that there is no reason or justification for excepting an attaching creditor from the operation of the general rule that a creditor must reduce his demand to judgment before being allowed to assail a fraudulent conveyance. See also Bowe *v.* Arnold, 31 Hun 256; Bentley *v.* Goodwin, 38 Barb. 633 (holding that none but a judgment creditor can impeach the *bona fides* of a judgment confessed by a debtor to a third person, and that an attaching creditor, whose attachment was levied after such confession, cannot do so); Hall *v.* Stryker, 29 Barb. 105 [*reversed* on other grounds in 27 N. Y. 596]. But there seems to be a steadily growing tendency to enlarge the rights of the attaching creditor. It has been held, ever since the decision of Rinchey *v.* Stryker, 28 N. Y. 45, 84 Am. Dec. 324, that a creditor who has attached property constituting the subject-matter of an alleged fraudulent conveyance may, when sued by the alleged fraudulent grantee, impeach the validity of the conveyance. Hess *v.* Hess, 117 N. Y. 306, 22 N. E. 956; Frost *v.* Mott, 34 N. Y. 253. And in People *v.* Van Buren, 136 N. Y. 252, 32 N. E. 775, 20 L. R. A. 446, it was held that an attaching creditor ceases to occupy the defenseless position of a creditor at large and becomes in a certain sense invested with the privileges of a creditor whose debt has been adjudged valid; and that while the mere existence of a fraudulent transfer is not sufficient to authorize a suit by an attaching creditor to set aside the conveyance, if it is sought to make use of such a transfer for the purpose of removing the attached property from the jurisdiction of the officer who has it in his custody, equity may interpose. People *v.* Van Buren, 136 N. Y. 252, 32 N. E. 775, 20 L. R. A. 446. So in Lopez *v.* Merchants', etc., Nat. Bank, 18 N. Y. App. Div. 427, 46 N. Y. Suppl. 91, this principle was applied to enable an attaching creditor to sue to set aside fraudulent judgments under which executions had been levied upon the property attached. And see Greenleaf *v.* Mumford, 30 How. Pr. (N. Y.) 30. See also Falconer *v.* Freeman, 4 Sandf. Ch. (N. Y.) 602, decided under the statute relating to the issuance of attachment against absent and concealed debtors in which the court said that there was no reason why the court should not interfere to aid the enforcement of the lien under the attachment in the same manner that it was accustomed to aid an execution creditor. In Brooks *v.* Stone, 19 How. Pr. (N. Y.) 395, however, it was held in direct contradiction to the decision in Lopez *v.* Merchants', etc., Nat. Bank, *supra*, that a creditor attaching real estate cannot sue to set aside a prior judgment alleged to be fraudulent and for an injunction to restrain the sale of the attached property under and by virtue of such judgment. As to right of attaching creditor to sue to set aside a transfer of mere equitable assets *compare* Thurber *v.* Blanck, 50 N. Y. 80.

79. Aigeltinger *v.* Einstein, 143 Cal. 609, 77 Pac. 669, 101 Am. St. Rep. 131; Bolander

g. Effect of Lien Acquired Otherwise Than by Judgment or Attachment. In many of the decisions the essential thing required of the creditor is to obtain a specific lien upon the property involved in the fraudulent conveyance.[80] And in some states it is held that a creditor who has obtained a lien upon the property of a debtor by taking a chattel mortgage may sue to set aside a prior fraudulent encumbrance;[81] and it has been held that one who has acquired a mechanic's lien stands upon a similar footing in this regard to that of a mortgagee.[82] Elsewhere, however, it is held that a mortgagee, although a judgment creditor, cannot sue to set aside a prior fraudulent conveyance without taking out execution upon his judgment and levying upon the property fraudulently conveyed.[83]

h. Circumstances Excusing Failure to Obtain Judgment — (i) *In General.* The rule that a creditor must first obtain judgment and issue execution thereon before suing to set aside a fraudulent conveyance is applied more strictly in some jurisdictions than in others,[84] but while the judgment and fruitless execution issued thereon are the best evidence that the legal remedies of the creditor have been exhausted, they are not the only possible means of proof of such fact;[85] and in all jurisdictions the rule is not so strict as to deny to a party the interposition of the equity powers of the court when the situation is such as to render impossible the aid of a court of law in taking the preliminary steps ordinarily treated as a condition precedent to the application for equitable relief.[86] The fact that the creditor has been enjoined from suing is a sufficient excuse for failure to obtain judgment,[87] but where the restraining order is a nullity it will not operate as an excuse.[88]

(ii) *Non-Residence of Debtor or Absence From Jurisdiction.* In some jurisdictions the rule is laid down that a bill will lie to set aside a fraudulent conveyance of property without the necessity of first obtaining judgment against the grantor if he has removed from the jurisdiction or is a non-resident,[89] the

v. Gentry, 36 Cal. 105, 95 Am. Dec. 162; Sheafe *v.* Sheafe, 40 N. H. 516; People *v.* Van Buren, 136 N. Y. 252, 32 N. E. 775, 20 L. R. A. 446; Hess *v.* Hess, 117 N. Y. 306, 22 N. E. 956; Frost *v.* Mott, 34 N. Y. 253; Rinchey *v.* Stryker, 28 N. Y. 45, 84 Am. Dec. 324, 26 How. Pr. 75; Hall *v.* Stryker, 27 N. Y. 596; Lux *v.* Davidson, 56 Hun (N. Y.) 345, 9 N. Y. Suppl. 816; Webster *v.* Lawrence, 47 Hun (N. Y.) 565; Bowe *v.* Arnold, 31 Hun (N. Y.) 256; Gross *v.* Daly, 5 Daly (N. Y.) 540; Noble *v.* Holmes, 5 Hill (N. Y.) 194; Swanzy *v.* Hunt, 2 Nott & M. (S. C.) 211. And see *supra*, XIV, B, 2, g.

80. See *infra*, XIV, E, 4.

81. Anderson *v.* Hunn, 5 Hun (N. Y.) 79.

82. Mahoney *v.* McWalters, 3 N. Y. App. Div. 248, 38 N. Y. Suppl. 256; Meehan *v.* Williams, 36 How. Pr. (N. Y.) 73.

83. Fox *v.* Willis, 1 Mich. 321.

84. Ideal Clothing Co. *v.* Hazle, 126 Mich. 262, 85 N. W. 735; National Tradesmen's Bank *v.* Wetmore, 124 N. Y. 241, 26 N. E. 548.

85. Early Times Distillery Co. *v.* Zeiger, 9 N. M. 31, 49 Pac. 723, holding that where a creditors' bill contains such allegations of fact that the court can see that there is no remedy at law, or that such remedy is wholly inadequate, or shows that the creditor claims a trust in his favor, and that the relief can only be made available in a court of chancery, the court will not require him in the first instance to obtain an empty judgment and fruitless execution, as a condition precedent to entertaining his bill.

If the debtor is shown to have been utterly insolvent at the time of the fraudulent transfer, it is not necessary for the creditor, before impeaching the transaction, to recover a judgment at law. Austin *v.* Morris, 23 S. C. 393.

When the debtor's estate is a mere equitable one which cannot be reached by any proceeding at law, there is no reason for requiring attempts to reach it by legal process. Case *v.* Beauregard, 101 U. S. 688, 25 L. ed. 817. And see Talley *v.* Curtain, 54 Fed. 43, 4 C. C. A. 177.

86. National Tradesmen's Bank *v.* Wetmore, 124 N. Y. 241, 26 N. E. 548.

Disability of debtor as an excuse for failure to sue him.— It has been held that the fact that the debtor was a married woman constituted an excuse for failure to recover judgment. Dahlman *v.* Jacobs, 16 Fed. 614, 5 McCrary 230. But, on the other hand, it has been held that the fact that the debtor was of unsound mind did not constitute an excuse in the absence of any statutory provision for such an exception. Faivre *v.* Gillman, 84 Iowa 573, 51 N. W. 46.

87. Cleveland *v.* Chambliss, 64 Ga. 352.

88. Weber *v.* Weber, 90 Wis. 467, 63 N. W. 757.

89. Riverside First Nat. Bank *v.* Eastman, 144 Cal. 487, 77 Pac. 1043, 103 Am. St. Rep. 95; Quarl *v.* Abbett, 102 Ind. 233, 1 N. E. 476, 52 Am. Rep. 662; Kipper *v.* Glancey, 2

exception to the general rule being based upon the ground that the creditor cannot obtain a personal judgment against a non-resident,[90] and that a judgment recovered against the debtor in any other state where jurisdiction can be obtained of his person will have no other validity in the state where the subject of the conveyance is located than a simple contract claim.[91] In other jurisdictions the rule is stated to be that if the fact of such non-residence or removal from the jurisdiction is conjoined with the further fact of the non-existence of property within the state which is subject to appropriation by legal proceedings the bill will lie without first obtaining judgment.[92] But, as already indicated, the rule in many jurisdictions is that if an absent debtor has property within the state which can be reached and appropriated by legal proceedings, the creditor should pursue such property in the mode pointed out by statute and obtain judgment for his claim before suing in equity to set aside a fraudulent conveyance of the debtor's property.[93] When a judgment has been obtained against a non-resident on service by publication in attachment proceedings, it is, although not a personal judgment,[94] valid so far as the property seized is concerned, and is sufficient to authorize the suit.[95]

i. Enforcement of Claims Against Estates of Decedents. It is generally held that the death of a debtor before the creditor has secured a judgment at law constitutes a sufficient reason for failure to obtain it and he may proceed in equity without it,[96] if the legal assets in the hands of the administrator are not sufficient

Blackf. (Ind.) 356; Corn Exch. Bank *v.* Applegate, 91 Iowa 411, 59 N. W. 268 (a case in which an action at law against the absent debtor, aided by attachment, had previously been commenced); Taylor *v.* Branscombe, 74 Iowa 534, 38 N. W. 400; Scott *v.* McMillen, 1 Litt. (Ky.) 302, 13 Am. Dec. 239.

If the removal of the debtor from the state has made it impossible for the creditor to serve process upon the debtor and so obtain judicial recognition of his claim, such removal will excuse the failure to obtain judgment. Anderson *v.* Bradford, 5 J. J. Marsh. (Ky.) 69.

Where both the debtor and his grantee are residents of another state a creditor at large may maintain a suit in equity to set aside the conveyance as fraudulent. Peay *v.* Morrison, 10 Gratt. (Va.) 149.

90. Quarl *v.* Abbett, 102 Ind. 233, 1 N. E. 476, 52 Am. Rep. 662.

91. Patchen *v.* Rokfar, 42 N. Y. Suppl. 35.

92. *Illinois.*— Getzler *v.* Saroni, 18 Ill. 511.

Minnesota.— Overmire *v.* Haworth, 48 Minn. 372, 51 N. W. 121, 31 Am. St. Rep. 660.

New York.— Patchen *v.* Rokfar, 42 N. Y. Suppl. 35. But see Ballou *v.* Jones, 13 Hun 629.

Rhode Island.— Merchants' Nat. Bank *v.* Paine, 13 R. I. 592.

Vermont.— Hanks *v.* Hanks, 75 Vt. 273, 54 Atl. 959.

Enforcement of resulting trust in favor of creditor defrauded.— Overmire *v.* Haworth, 48 Minn. 372, 51 N. W. 121, 31 Am. St. Rep. 660.

Reason.— The cases which thus hold proceed upon the principle that the creditor has exhausted his remedy at law or that he has no adequate remedy at law (Humphreys *v.* Atlantic Milling Co., 98 Mo. 542, 10 S. W. 140), it being held in some jurisdictions that no legal remedy is adequate if the party is compelled to go into a foreign jurisdiction to avail himself of it (Stanton *v.* Embry, 46 Conn. 595).

93. Dewey *v.* Eckert, 62 Ill. 218; Greenway *v.* Thomas, 14 Ill. 271; Dodd *v.* Levy, 10 Mo. App. 121. And see Sanders *v.* Watson, 14 Ala. 198 (holding that, in the absence of a statute, the mere fact that the debtor has removed to another state does not constitute an excuse for failure to recover judgment against him); Reese *v.* Bradford, 13 Ala. 837.

94. See, generally, JUDGMENTS.

95. Parmenter *v.* Lomax, 68 Kan. 61, 74 Pac. 634.

96. Johnson *v.* Jones, 79 Ind. 141; Mallow *v.* Walker, 115 Iowa 238, 88 N. W. 452, 91 Am. St. Rep. 158; Nill *v.* Phelps, 20 Misc. (N. Y.) 488, 46 N. Y. Suppl. 662; Gardner *v.* Gardner, 17 R. I. 751, 24 Atl. 785. A creditor at large may proceed in equity to subject real estate fraudulently conveyed to the payment of his claim where there is no dispute as to the claim and where the debtor died notoriously insolvent (Nieters *v.* Brockman, 11 Mo. App. 600), or where a decree in a suit between an administrator and creditors of the estate declares that a certain sum remains in the hands of the administrator applicable to specialties (Brown *v.* McDonald, 1 Hill Eq. (S. C.) 297). In Spicer *v.* Ayers, 2 Thomps. & C. (N. Y.) 626, in which case the fraudulent grantee was at the same time the administrator of the decedent, an action by a creditor at large was sustained. The creditor in such case merely seeks to obtain for administration, by rescuing from the hands of persons not entitled to them, assets of the estate which cannot otherwise be reached. Schurtz *v.*

for the payment of the debt,[97] and if he has had his claim allowed by the proper tribunal,[98] or if the claim is not disputed.[99] The view is taken that where the claim sought to be enforced is against the estate of a decedent, courts of equity have primary jurisdiction.[1] In some states statutes have been enacted in partial or full recognition of the above rule,[2] or making the debts of a decedent a lien

Howell, 30 N. J. Eq. 418. See also Gardner *v.* Lansing, 28 Hun (N. Y.) 413.

As a judgment and execution against the personal representative would be unavailing the creditor may resort to a court of chancery in the first instance, especially when it appears that the estate is insolvent and that the debt will not be paid in the ordinary course of administration. Steere *v.* Hoagland, 39 Ill. 264. See Loomis *v.* Tifft, 16 Barb. (N. Y.) 541.

In Canada it seems that after the debtor's death there is no objection to the maintenance by a simple contract creditor of a bill to set aside a conveyance as a fraud upon creditors. Longeway *v.* Mitchell, 17 Grant Ch. (U. C.) 190.

Right of creditor obtaining verdict before death of grantor.— Fowler's Appeal, 87 Pa. St. 449 [*followed* in Cairns *v.* Ingram, 8 Pa. Super. Ct. 514, 43 Wkly. Notes Cas. 210].

97. Battle *v.* Reid, 68 Ala. 149. Here again the rule applies that equity takes jurisdiction only because of the inadequacy of legal remedies against the personal representative, and these remedies are not inadequate if there are legal assets sufficient to pay the debt and which ought in the course of due administration to be so applied. Battle *v.* Reid, 68 Ala. 149. But if there is no personal estate in the hands of the personal representative a simple contract creditor may sue. Dunn *v.* Murt, 4 Mackey (D. C.) 289. And an averment that the debtor died insolvent, and an admission of the fact in writing, made to avoid the expense of taking testimony to prove it, are sufficient proof of deficiency of legal assets. Battle *v.* Reid, 68 Ala. 149.

98. *Alabama.*— Battle *v.* Reid, 68 Ala. 149; Halfman *v.* Ellison, 51 Ala. 543.

Arkansas.— Williamson *v.* Furbush, 31 Ark. 539; Wright *v.* Campbell, 27 Ark. 637.

California.— Hills *v.* Sherwood, 48 Cal. 386.

District of Columbia.— Dunn *v.* Murt, 4 Mackey 289; Offutt *v.* King, 1 MacArthur 312.

Illinois.— White *v.* Russell, 79 Ill. 155; Steere *v.* Hoagland, 39 Ill. 264; Hall *v.* Black, 21 Ill. App. 293.

Indiana.— Johnson *v.* Jones, 79 Ind. 141; Love *v.* Mikals, 11 Ind. 227; Kipper *v.* Glancey, 2 Blackf. 356.

Iowa.— Mallow *v.* Walker, 115 Iowa 238, 88 N. W. 452, 91 Am. St. Rep. 158.

Missouri.— Lyons *v.* Murray, 95 Mo. 23, 8 S. W. 170, 6 Am. St. Rep. 17.

New Jersey.— Haston *v.* Castner, 29 N. J. Eq. 536.

New York.— Phelps *v.* Platt, 50 Barb. 430; Loomis *v.* Tifft, 16 Barb. 541; Spicer *v.* Ayers, 2 Thomps. & C. 626.

Pennsylvania.— Fowler's Appeal, 87 Pa. St. 449; Irwin *v.* Hess, 12 Pa. Super. Ct. 163.

Rhode Island.— Gardner *v.* Gardner, 17 R. I. 751, 24 Atl. 785.

South Carolina.— Reeder *v.* Speake, 4 S. C. 293.

Tennessee.— Armstrong *v.* Croft, 3 Lea 191; Spencer *v.* Armstrong, 12 Heisk. 707.

Allowance by proper tribunal regarded in nature of judgment.—A judgment of a court of law is not required to lay the foundation of a proceeding by the administrator for the benefit of the creditors of an insolvent estate. The commission of insolvency, the report thereon allowing certain claims, and the acceptance thereof without appeal on judicial proceedings are in the nature of a judgment. Fletcher *v.* Holmes, 40 Me. 364; Winn *v.* Barnett, 31 Miss. 653; Adoue *v.* Spencer, 59 N. J. Eq. 231, 46 Atl. 543.

Lien not necessary.— It is not necessary that the creditor should have a lien to set aside a conveyance made by a decedent. Bullock *v.* Gordon, 4 Munf. (Va.) 450; Hagan *v.* Walker, 14 How. (U. S.) 29, 14 L. ed. 312. And where the lien of a judgment obtained against a decedent has expired by lapse of time the creditor may still sue to set aside a fraudulent conveyance by the debtor. Shell *v.* Boyd, 32 S. C. 359, 11 S. E. 205.

99. Merchants', etc., Transp. Co. *v.* Borland, 53 N. J. Eq. 282, 21 Atl. 272.

1. Claflin *v.* Ambrose, 37 Fla. 78, 19 So. 628.

The jurisdiction of courts of equity in matters of administration in relation to the enforcement of the claim of creditors is sustained upon considerations essentially distinct from those which influence such courts in rendering assistance to creditors whose demands are not connected with administrations. In the one case the jurisdiction is original and primary, resting upon the general powers of the court of equity in relation to the settlement of estates; in the other it is ancillary or in aid of the legal tribunals whose powers are found inadequate to the emergency. Pharis *v.* Leachman, 20 Ala. 662. Where a judgment creditor of a decedent sought to reach property fraudulently conveyed by the debtor and by reason of lapse of time was not in a position to enforce his judgment by execution, the court held that it would entertain a bill by the creditor to set aside the conveyance as an exercise of its original jurisdiction and that a previous revival of the judgment by scire facias was not necessary. Hagan *v.* Walker, 14 How. (U. S.) 29, 14 L. ed. 312.

Enforcement of claim against estate of deceased partner.— Claflin *v.* Ambrose, 37 Fla. 78, 19 So. 628.

2. Harvey *v.* McDonnell, 113 N. Y. 526, 21 N. E. 695, holding that a general creditor of

upon his lands for a certain time after his death.[3] But, as already indicated, the creditor should present his claim to the proper tribunal for approval,[4] and it has been held that where equitable assets of the estate are sought to be subjected to the claim of the creditor, a judgment must first be secured against the personal representative.[5]

j. Enforcement by Equity of Its Own Decrees. The rule that a judgment at law must be first obtained before a creditor can invoke the aid of equity to set aside a fraudulent conveyance does not apply where equity is asked to enforce its own previous decree establishing a debt.[6]

k. Waiver of Failure to Secure Judgment. The failure of the creditor to obtain judgment at law against his debtor before suing in equity to set aside a fraudulent conveyance may be waived.[7]

3. Issuance, Levy, and Return of Execution — a. Necessity of Issuance of Execution — (i) *In General.* As has been seen above,[8] one of the reasons for requiring the creditor to obtain judgment at law before suing in equity to set aside a fraudulent conveyance is to show that he has exhausted his legal remedy. In the decisions in which this view is uppermost the general rule is logically deduced that an execution must issue[9] and be returned unsatisfied to show that

a decedent's estate, whose claim remains partially unpaid after the assets in the administrator's hands are exhausted, may sue on behalf of himself and other creditors to set aside fraudulent conveyances of property made by decedent in his lifetime, if the administrators, when requested, refuse to bring such an action as, by N. Y. Laws (1858), c. 314, § 1, they may do.

3. Fowler's Appeal, 87 Pa. St. 449.

4. Williamson *v.* Furbush, 31 Ark. 539; Mesmer *v.* Jenkins, 61 Cal. 151 (holding that in the absence of a judgment an allowance of the claim by the administrator is necessary); Hall *v.* Black, 21 Ill. App. 293.

Where the claims of creditors of the estate of the decedent are at large and unsettled, it is necessary that they be adjusted and allowed by some tribunal duly constituted for that purpose in order to charge the estate with them, and until the estate is so charged there is no basis for a bill to set aside a fraudulent conveyance by the decedent in order to recover means to pay such claims. O'Connor *v.* Boylan, 49 Mich. 209, 13 N. W. 519. Thus a creditor at large of a deceased person, who has not presented his claim to the personal representative under a statute, cannot sue. Rutherford *v.* Alyea, 54 N. J. Eq. 411, 34 Atl. 1078.

The holder of a promissory note which has never been allowed against the deceased maker's estate cannot maintain a bill in equity to satisfy his demand out of the trust fund, created by statute, consisting of the amount of premiums paid by the deceased maker on his life insurance while insolvent. Houston *v.* Maddux, 179 Ill. 377, 53 N. E. 599 [*following* Scripps *v.* King, 103 Ill. 469 (*overruling* Steere *v.* Hoagland, 39 Ill. 264)].

Right of creditor to require administrator to sue.— Ohm *v.* San Francisco Super. Ct., 85 Cal. 545, 26 Pac. 244, 20 Am. St. Rep. 245.

Sufficiency of compliance with statutory requirements as to filing claim.— Austin *v.* Bruner, 169 Ill. 178, 48 N. E. 449 [*affirming* 65 Ill. App. 301].

5. Estes *v.* Wilcox, 67 N. Y. 264.

6. Weightman *v.* Hatch, 17 Ill. 281 (holding that a party has the right to the same remedies to enforce the collection of a decree in chancery for a specific sum of money that he has to enforce a judgment at law); Farnsworth *v.* Strasler, 12 Ill. 482; Brown *v.* McDonald, 1 Hill Eq. (S. C.) 297. Where a decree in equity has been rendered ascertaining the amount due from a debtor to a creditor and declaring the debtor to be insolvent, it is sufficient after the death of the debtor upon which to found an application to equity to set aside a fraudulent conveyance. Ætna Nat. Bank *v.* Manhattan L. Ins. Co., 24 Fed. 769.

Where a purchaser at a judicial sale refused to complete his purchase, and was ordered by the court to pay a certain sum as damages, it was held that this order afforded a sufficient basis for a creditors' suit to set aside conveyances made by the purchaser in fraud of creditors. Lydecker *v.* Smith, 44 Hun (N. Y.) 454.

Enforcement of decree for alimony.— Twell *v.* Twell, 6 Mont. 19, 9 Pac. 537.

7. McMakin *v.* Stratton, 82 Ky. 226.

Where a trust deed that was the subject of attack recognized plaintiff's claim, the necessity for a judgment before filing a bill in equity was declared not to exist. Springfield Grocery Co. *v.* Thomas, 3 Indian Terr. 330, 58 S. W. 557. See Stevens *v.* Curran, 28 Mont. 366, 72 Pac. 753.

8. See *supra*, XIV, E, 2, a.

9. Chandler *v.* Colcord, 1 Okla. 260, 32 Pac. 330 (holding that to enable a creditor to assail the validity of a chattel mortgage executed by his debtor, he must not only obtain a judgment, but also a valid execution against the property of the debtor); Adsit *v.* Butler, 87 N. Y. 585; Bostwick *v.* Scott, 40 Hun (N. Y.) 212; McCullough *v.* Colby, 5 Bosw. (N. Y.) 477; North American F.

the legal remedy has been exhausted.[10] This rule, however, as will be shown hereafter, is subject to a number of limitations.[11] And where the action to set aside the conveyance is brought in aid of the legal remedy or to make effectual a lien already acquired, varying views are entertained as to the necessity of the issuance of the execution.

(II) *RULE WHERE JUDGMENT IS NOT PER SE A LIEN.* In accordance with the general rule as above laid down,[12] in jurisdictions where a judgment does not create a lien upon the real estate of the debtor, a creditor is usually required to follow up his judgment by issuing an execution against the subject of the conveyance before he can maintain his bill in equity.[13] There is authority, however, for the proposition that a judgment which does not operate as a lien is capable of supporting a bill to remove obstructions fraudulently interposed to impede the execution of the judgment.[14] And since a judgment does not operate as a lien upon personalty, if the creditor seeks aid in regard to the personal estate of the debtor he must show not only a judgment but also an execution giving him a legal preference or lien upon the debtor's goods and chattels.[15]

Ins. Co. *v.* Graham, 7 Sandf. (N. Y.) 197; Bassett *v.* St. Albans Hotel Co., 47 Vt. 313.

Equitable assets.— Where the property sought to be reached stands in the name of a third person and has never been in the name of the debtor, the issue of an execution upon plaintiff's judgment is necessary. Allyn *v.* Thurston, 53 N. Y. 622.

10. See *infra*, XIV, E, 3, b, c.

Where a creditors' judgment is docketed subsequent to a conveyance by the debtor of his real estate, made with intent to hinder, delay, and defraud creditors, such creditor cannot maintain a bill to subject the real estate to the lien of his judgment, where no execution has been issued thereon; Wis. Rev. St. § 3029, providing for such an action whenever the execution shall have been returned unsatisfied. Gilbert *v.* Stockman, 81 Wis. 602, 51 N. W. 1076, 52 N. W. 1045, 29 Am. St. Rep. 922.

11. See *infra*, XIV, E, 3, b, c.

12. See *supra*, XIV, E, 2, a.

13. Dana *v.* Haskell, 41 Me. 25; Webster *v.* Clark, 25 Me. 313.

Effect of judgment rendered after conveyance.— Under a statute giving a lien to one obtaining a judgment upon the real estate of his debtor of which he is seized in law or equity from the day of the rendition of the judgment, it has been held that a debtor who has fraudulently conveyed away his real estate before the rendition of the judgment is not in any sense the owner of such real estate within the meaning of the statute. Doster *v.* Manistee Nat. Bank, 67 Ark. 325, 55 S. W. 137, 77 Am. St. Rep. 116, 48 L. R. A. 334. So under a statute which provides for an action to subject real estate, conveyed by a debtor to defraud his creditors, to a judgment whenever the execution shall have been returned unsatisfied, it has been held that the docketing of a judgment subsequent to the conveyance does not make it a lien so as to dispense with the necessity of issuing an execution. Gilbert *v.* Stockman, 81 Wis. 602, 51 N. W. 1076, 52 N. W. 1045, 29 Am. St. Rep. 922. In Iowa, prior to the enactment of a recent statute, the rule was that a judgment rendered, or an attachment levied subsequent to the fraudulent conveyance imposed no lien upon the property conveyed. Byers *v.* McEnirny, 117 Iowa 499, 91 N. W. 797; Joyce *v.* Perry, 111 Iowa 567, 82 N. W. 941. And see Snedeker *v.* Snedeker, 18 Hun (N. Y.) 355, in which it was held that one claiming under a judgment recovered after the fraudulent conveyance could not, in a proceeding for the distribution of surplus arising from a foreclosure of a prior mortgage, attack the conveyance since his execution had not been returned unsatisfied. The rule in New York, however, as established by the court of appeals, is that the lien of the creditors' judgment attaches to any real estate which may have previously been fraudulently conveyed. Hillyer *v.* Le Roy, 179 N. Y. 369, 72 N. E. 237, 103 Am. St. Rep. 919.

Rule in Wisconsin.— In Wisconsin it is held that a judgment against a fraudulent vendor of real property which has been duly docketed in the county where such real estate is located does not of itself create a lien on such property because, as between the parties, the conveyance vests the title in the vendee, and that the creditor can only avoid the transfer and obtain a specific lien upon the property covered by it by a seizure thereof under a writ of attachment or execution or after exhausting all legal remedies to collect the debt. French Lumbering Co. *v.* Theriault, 107 Wis. 627, 83 N. W. 927, 81 Am. St. Rep. 856, 51 L. R. A. 910. In the absence of such a seizure the judgment creditor has only a right to a lien upon the property fraudulently conveyed. French Lumbering Co. *v.* Theriault, 107 Wis. 627, 83 N. W. 927, 81 Am. St. Rep. 856, 51 L. R. A. 910.

14. Freeman Ex. § 427.

15. Wadsworth *v.* Schisselbauer, 32 Minn. 84, 19 N. W. 390; Robert *v.* Hodges, 16 N. J. Eq. 299; Dunham *v.* Cox, 10 N. J. Eq. 437, 64 Am. Dec. 460; Brinkerhoff *v.* Brown, 4 Johns. Ch. (N. Y.) 671. Where the property involved is personalty the creditor is required not only to obtain a judgment but also to take out execution and have it lev-

(III) *RULE WHERE CREDITOR HAS ACQUIRED A LIEN.* Under the statutes of many of the states the lien of a judgment attaches to the real estate of a debtor when the judgment or a transcript of it is recorded or filed in the proper office of the county where the land is situated.[16] Where this is the case a creditor may file his bill to set aside a fraudulent conveyance as soon as he has obtained a judgment without issuing execution thereon,[17] if the action is brought for the purpose of making his lien more available and efficient and in aid of an execution thereafter to be issued.[18] Under this doctrine it must be shown that

ied or returned. Frye *v.* Miley, 54 W. Va. 324, 46 S. E. 135.

16. Wisconsin Granite Co. *v.* Gerrity, 144 Ill. 77, 33 N. E. 31; Schofield *v.* Ute Coal, etc., Co., 92 Fed. 269.

17. *Illinois.*—Getzler *v.* Saroni, 18 Ill. 511.

Maine.— Baxter *v.* Moses, 77 Me. 465, 1 Atl. 350, 52 Am. Rep. 783.

Minnesota.— Wadsworth *v.* Schisselbauer, 32 Minn. 84, 19 N. W. 390.

Mississippi.— Fleming *v.* Grafton, 54 Miss. 79.

New Jersey.— Robert *v.* Hodges, 16 N. J. Eq. 299.

New York.— Mohawk Bank *v.* Atwater, 2 Paige 54; Reade *v.* Livingston, 3 Johns. Ch. 481, 8 Am. Dec. 520.

Wisconsin.— Level Land Co. No. 3 *v.* Sivyer, 112 Wis. 442, 88 N. W. 317.

United States.—Bean *v.* Smith, 2 Fed. Cas. No. 1,174, 2 Mason 252; McCalmont *v.* Lawrence, 15 Fed. Cas. No. 8,676, 1 Blatchf. 232, holding that chancery has jurisdiction of a bill filed by a judgment creditor, for relief against a conveyance of land by his debtor with intent to defeat the lien of the judgment, or to hinder or delay its satisfaction, whether execution has issued or not.

England.— Mountford *v.* Taylor, 6 Ves. Jr. 788, 31 Eng. Reprint 1309.

Where by statute a judgment is made a lien on all defendant's property, the issuance of an execution is not necessary before suit by a judgment creditor to set aside the transfer. Lazarus Jewelry Co. *v.* Steinhardt, 112 Fed. 614, 50 C. C. A. 393.

In Nebraska, where an attachment is levied on real estate fraudulently alienated by the attachment debtor and grantor, for the purpose of hindering, delaying, and defrauding creditors, even though the legal title of record is in another, the attachment creditor acquires thereby a lien upon the interest of the debtor in the land attached, which he may enforce by appropriate proceedings after recovery of judgment (Westervelt *v.* Hagge, 61 Nebr. 647, 85 N. W. 852, 54 L. R. A. 333; Coulson *v.* Galtsman, 1 Nebr. (Unoff.) 502, 96 N. W. 349), without issuing an execution (Grandin *v.* Chicago First Nat. Bank, (Nebr. 1904) 98 N. W. 70).

In Minnesota the rule is that in order to set aside a conveyance of real estate it is only necessary to obtain judgment and docket it in the county where the lands are situated. Wadsworth *v.* Schisselbauer, 32 Minn. 84, 19 N. W. 390.

In New York the decisions seem to be in conflict as to whether the judgment alone is sufficient to enable the creditor to bring a suit to set aside a fraudulent conveyance of land in aid of his legal remedy. Fox *v.* Moyer, 54 N. Y. 125. It is not necessary to issue an execution in order to establish a judgment creditor's lien upon the real estate of his debtor (Royer Wheel Co. *v.* Fielding, 61 How. Pr. (N. Y.) 437), as that is bound by the docketing of the judgment (Shaw *v.* Dwight, 27 N. Y. 244, 84 Am. Dec. 275). But in North American F. Ins. Co. *v.* Graham, 5 Sandf. (N. Y.) 197, and in McCullough *v.* Colby, 5 Bosw. (N. Y.) 477, it was held after a review of the English decisions that an execution must first be issued before the filing of a bill to set aside encumbrances or obstructions on real estate for the purpose of showing that there is no other property which the creditor can reach. In Shaw *v.* Dwight, 27 N. Y. 244, 84 Am. Dec. 275, the court said that an execution should be returned unsatisfied for the purpose of showing that plaintiff is under the necessity of asking the aid of a court of equity on account of his inability to collect his debt against the debtor's goods and chattels. In Payne *v.* Sheldon, 63 Barb. (N. Y.) 169 [*reversing* 43 How. Pr. 1], however, it is held that if, as a matter of fact, the grantor in a fraudulent conveyance of land has no other property subject to execution than that conveyed, the issuance of an execution would not change the situation or benefit either party, and that such issuance is not therefore necessary before filing a bill in aid of the judgment; and the court criticizes the prior decisions in North American F. Ins. Co. *v.* Graham, *supra*, and McCullough *v.* Colby, *supra*, as being in opposition to the previous practice of the equity court of the state of New York.

Rule in Wisconsin.— In Cornell *v.* Radway, 22 Wis. 260, it was said that as a judgment is by statute made a specific lien upon the land of the debtor without the issue or levy of an execution, it would seem that plaintiff is entitled to the aid of the court whether execution has been issued and returned unsatisfied or not. And see dissenting opinion in Gilbert *v.* Stockman, 81 Wis. 602, 52 N. W. 1045, 29 Am. St. Rep. 922. But the later decisions seem to lay down the rule that a judgment does not of itself operate as a lien and that the complainant must generally allege and show issue of the execution and its levy. Level Land Co. No. 3 *v.* Sivyer, 112 Wis. 442, 88 N. W. 317.

18. *Alabama.*— Dargan *v.* Waring, 11 Ala. 988, 46 Am. Dec. 234.

the judgment is an existing lien, and if, by reason of the fact that an execution has not been issued thereon within the time prescribed by statute, the lien no longer exists,[19] and if the judgment cannot be revived,[20] the creditor cannot maintain the suit.

(iv) *Effect of Statutory Provisions.* Where the statute provides that the obtaining of a judgment shall not be necessary as a condition precedent to the beginning of an action in equity to set aside a fraudulent conveyance,[21] the fact that the creditor does secure judgment does not require him to issue execution thereon.[22]

b. Necessity of Levy of Execution. Where a creditor is required to cause execution to be issued upon his judgment before suing to set aside the conveyance, whether he must cause the execution to be actually levied upon the subject of the conveyance will usually be found to depend upon whether a levy is necessary to create a lien.[23] In some states the statute provides that a levy must be made to preserve the lien of the judgment if the property sought to be reached is capable of being levied on.[24] But where a specific lien upon the real estate of the debtor has been acquired by the filing of a judgment or the issuance of execution thereon and the action is brought in aid of the lien, a levy of the execution is not required.[25] And a levy is not necessary if it would be of no practical utility.[26]

Illinois.— Newman *v.* Willetts, 52 Ill. 98; Andrews *v.* Donnerstag, 70 Ill. App. 236; Binnie *v.* Walker, 25 Ill. App. 82; Redden *v.* Potter, 16 Ill. App. 265.

Kansas.— Metzger *v.* Burnett, 5 Kan. App. 374, 48 Pac. 599.

New Jersey.— Hall *v.* Nash, 58 N. J. L. 554, 43 Atl. 683.

New York.— Payne *v.* Sheldon, 63 Barb. 169.

Oregon.— Multnomah St. R. Co. *v.* Harris, 13 Oreg. 198, 9 Pac. 402; Schofield *v.* Ute Coal, etc., Co., 92 Fed. 269, 34 C. C. A. 334.

Where a creditor seeks to remove an obstruction which prevents a legal lien from operating upon the subject of the conveyance, he need only proceed at law to the extent necessary to give him a complete title and a judgment which acts as a lien upon the property is sufficient. Vasser *v.* Henderson, 40 Miss. 519, 90 Am. Dec. 351. And it has been held that he may file his bill before he has made any effort to satisfy his judgment out of the other property of the creditor. Weightman *v.* Hatch, 17 Ill. 281.

In Minnesota where the action is brought to remove an obstruction in the way of the creditors' legal remedy by way of execution, it is only necessary that the plaintiff shall have a lien by judgment on the real estate subsequent to the fraudulent conveyance. Peaslee *v.* Ridgway, 82 Minn. 288, 84 N. W. 1024; Scanlon *v.* Murphy, 51 Minn. 536, 53 N. W. 799. And it is not necessary for the creditor to follow his legal remedy further than to recover and docket the judgment.

19. Weis *v.* Tiernan, 91 Ill. 27; Chambers *v.* Jones, 72 Ill. 275; Newman *v.* Willetts, 52 Ill. 98; Fleming *v.* Grafton, 54 Miss. 79.

20. Mullen *v.* Hewitt, 103 Mo. 639, 15 S. W. 924.

After revival of judgment.— But the fact that at the time a conveyance is made to the debtor's wife, the creditor's judgment is no lien on the land, by reason of no execution having been issued thereon within a year, will not prevent the creditor, after the revival of his judgment and suing out an execution, from questioning the *bona fides* of the transaction. Bennett *v.* Stout, 98 Ill. 47.

21. See *supra*, XIV, E, 2, b.

22. State *v.* Bowen, 38 W. Va. 91, 18 S. E. 375. And see Russell *v.* Randolph, 26 Gratt. (Va.) 705.

23. Gilbert *v.* Stockman, 81 Wis. 602, 51 N. W. 1076, 52 N. W. 1045, 29 Am. St. Rep. 922. But *compare* Gullickson *v.* Madsen, 87 Wis. 19, 57 N. W. 965.

It has been held that a levy is essential in order to transfer to the creditor the debtor's title. Corey *v.* Greene, 51 Me. 114.

Setting aside sale of personalty.— In New Jersey a judgment creditor who has delivered his writ of execution to the sheriff may sue in equity to set aside a fraudulent sale of personal property made by defendant, as under the statute the execution from the time of its delivery to the sheriff binds the goods of defendant as against himself and his assigns. Hall *v.* Nash, 58 N. J. Eq. 554, 43 Atl. 683.

24. Spence *v.* Repass, 94 Va. 716, 27 S. E. 583.

25. Schofield *v.* Ute Coal, etc., Co., 92 Fed. 269, 34 C. C. A. 334.

26. Hamlen *v.* McGillicuddy, 62 Me. 268.

Title never in judgment debtor.— A levy of the execution is not prerequisite to the filing of the creditors' bill where the judgment debtor never had the legal title to the premises sought to be reached (Griffin *v.* Nitcher, 57 Me. 270; Fairbairn *v.* Middlemiss, 47 Mich. 372, 11 N. W. 203), as where the debtor has paid the purchase-money and caused the land to be conveyed by the grantor to a third person, a return of the execution *nulla bona* in such case being all that is required to lay the foundation for a suit in

c. Necessity of Return of Execution Unsatisfied or Nulla Bona — (i) *In General.* Where a creditor invokes the jurisdiction of equity to set aside a fraudulent conveyance by the debtor on the ground that he has no remedy at law for the collection of the debt, the general rule is that, in addition to having secured judgment at law, and caused execution to be issued thereon, he must also cause the execution to be returned *nulla bona* before beginning his action.[27] But as the

equity (Corey *v.* Greene, 51 Me. 114). It is only when the debtor once had a title to the land and has conveyed it away fraudulently that a levy can be of any use. Des Brisay *v.* Hogan, 53 Me. 554.

27. *Alabama.*— Morton *v.* New Orleans, etc., R. Co., 79 Ala. 590; Roper *v.* McCook, 7 Ala. 318.

California.— Castle *v.* Bader, 23 Cal. 75.

Georgia.— Woodward *v.* Solomon, 7 Ga. 246.

Illinois.— Beach *v.* Bestor, 45 Ill. 341; Heacock *v.* Durand, 42 Ill. 230; Weightman *v.* Hatch, 17 Ill. 281; Dillman *v.* Nadelhoffer, 56 Ill. App. 517; Beidler *v.* Douglas, 35 Ill. App. 124.

Kentucky.— Kyle *v.* O'Neil, 88 Ky. 127, 10 S. W. 275, 10 Ky. L. Rep. 709; Yankey *v.* Sweeney, 85 Ky. 55, 2 S. W. 559, 562, 563, 8 Ky. L. Rep. 944; Scott *v.* Wallace, 4 J. J. Marsh. 654; Hill *v.* Cannon, 6 Ky. L. Rep. 591; Kroger *v.* Roger Wheel Co., 1 Ky. L. Rep. 419.

Maine.— Webster *v.* Clark, 25 Me. 313.

Mississippi.— Vasser *v.* Henderson, 40 Miss. 519, 90 Am. Dec. 351; Hogan *v.* Burnett, 37 Miss. 617.

Missouri.— Merry *v.* Fremon, 44 Mo. 518.

Nebraska.— Morgan *v.* Bogue, 7 Nebr. 429.

New York.— Adsit *v.* Butler, 87 N. Y. 585 [*affirming* 23 Hun 45]; Geery *v.* Geery, 63 N. Y. 252; Dunlevy *v.* Tallmadge, 32 N. Y. 457; Bowe *v.* Arnold, 31 Hun 256 [*affirmed* in 101 N. Y. 652]; Howell *v.* Cooper, 37 Barb. 582; McElwain *v.* Willis, 9 Wend. 548; Lawton *v.* Levy, 2 Edw. 197.

North Carolina.— Gentry *v.* Harper, 55 N. C. 177.

South Carolina.— Compton *v.* Patterson, 28 S. C. 152, 5 S. E. 470; Verner *v.* Downs, 13 S. C. 449; Hall *v.* Joiner, 1 S. C. 186.

Wisconsin.— Gates *v.* Boomer, 17 Wis. 455.

United States.— Swan Land, etc., Co. *v.* Frank, 148 U. S. 603, 13 S. Ct. 691, 37 L. ed. 577; Schofield *v.* Ute Coal, etc., Co., 92 Fed. 269, 34 C. C. A. 334; Moore *v.* Baker, 34 Fed. 1 (holding that the right of a creditor to pursue specific real property alleged to have been fraudulently conveyed by the debtor to obtain satisfaction of his debt depends upon the fact of his having exhausted his legal remedy by the recovery of a judgment and return of execution unsatisfied); Kimberling *v.* Hartly, 1 Fed. 571, 1 McCrary 136.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 720.

The insolvency of the debtor must be shown by a return of the execution unsatisfied or by other evidence. Gwyer *v.* Figgins, 37 Iowa 517.

If the property sought to be reached is not subject to levy or sale the creditor must show that he has exhausted his legal remedy by an actual return upon his execution that no goods or property can be found before he can file a bill to reach such property. Tappan *v.* Evans, 11 N. H. 311.

Execution under judgment whose lien has expired.— In New York, where proceedings supplementary to execution are held to be an equitable remedy and intended as a substitute for the creditors' bill as formerly used in chancery, it has been held that the return of an execution issued upon a judgment whose lien has expired is not such evidence of exhaustion of the legal remedy as will warrant such proceedings. Importers', etc., Nat. Bank *v.* Quackenbush, 143 N. Y. 567, 38 N. E. 728.

Rule in Kentucky.— In Kentucky, prior to the act of March 8, 1896 (Johnson *v.* Bonfield, 47 S. W. 697, 19 Ky. L. Rep. 300; Vance *v.* Campbell, 3 Ky. L. Rep. 448) an action to set aside an alleged fraudulent conveyance, and subject the property conveyed to the satisfaction of plaintiff's debt against the grantor, could not be maintained without an attachment on the ground of non-residence, or an execution issued on a personal judgment against the debtor returned *nulla bona* (Beadles *v.* Jones, 7 S. W. 916, 9 Ky. L. Rep. 986).

Equitable assets.— In Parish *v.* Lewis, Freem. (Miss.) 299, the court said that where equitable assets constitute the subject of the fraudulent conveyance, the fact that an execution has not been returned unsatisfied is not a mere technical objection but goes to the very foundation of a suit to set aside the conveyance and that no state of facts will excuse failure to so return the execution. In National Tube Works Co. *v.* Ballou, 146 U. S. 517, 523, 13 S. Ct. 165, 36 L. ed. 1070, Mr. Justice Blatchford said: "Where it is sought by equitable process to reach equitable interests of a debtor, the bill, unless otherwise provided by statute, must set forth a judgment in the jurisdiction where the suit in equity is brought, the issuing of an execution thereon, and its return unsatisfied, or must make allegations showing that it is impossible to obtain such a judgment in any court within such jurisdiction."

In Maine the rule is that when an attempt is made by process in equity to reach equitable interests, choses in action, or the avails of property fraudulently conveyed, it must appear that judgment has been obtained and that execution has been issued and returned unsatisfied. Baxter *v.* Moses, 77 Me. 465, 1 Atl. 350, 52 Am. Rep. 783.

Title never in debtor.— Where the debtor has never had the legal title to the property

rule requiring a judgment is not enforced under all circumstances,[23] so here, if it is shown that the judgment debtor is insolvent and that the issue of an execution would necessarily be of no practical utility, etc., its issue and return may be dispensed with.[29] In other words the fact that the legal remedy has been exhausted may appear by other means than the return of the execution unsatisfied.[30]

(II) *RULE WHERE ACTION IS BROUGHT IN AID OF EXECUTION OR LEGAL REMEDY.* With respect to the necessity of the return of the execution unsatisfied a distinction is made between a creditor's bill proper whose object is to discover assets and to reach equitable estates that cannot be reached by common-law process, and an action in aid of legal process, the latter action not being employed for the purpose of discovering assets but only for the purpose of reaching tangible assets in their nature subject to execution and upon which plaintiff has obtained a specific lien.[31] And the rule is that a return of the execution unsatisfied is not necessary where the property sought to be reached is in its nature liable to execu-

in question a levy is not required, but there must be a return of *nulla bona* to lay the foundation of a suit in equity. Griffin *v.* Nitcher, 57 Me. 270.

28. See *supra*, XIV, E, 2, h.

29. *Georgia.*— Thurmond *v.* Reese, 3 Ga. 449, 46 Am. Dec. 440.

Indiana.— Towns *v.* Smith, 115 Ind. 480, 16 N. E. 811.

Iowa.— Smalley *v.* Mass, 72 Iowa 171, 33 N. W. 619; Gordon *v.* Worthley, 48 Iowa 429; Miller *v.* Dayton, 47 Iowa 312.

Missouri.— Turner *v.* Adams, 46 Mo. 95; Dodd *v.* Levy, 10 Mo. App. 121.

Washington.— Benham *v.* Ham, 5 Wash. 128, 31 Pac. 453, 34 Am. St. Rep. 851.

Neither law nor equity require the doing of entirely useless things, and if it is shown that the judgment debtor is insolvent, the creditor need not incur the expense and delay incident to the issuance and return of an execution *nulla bona.* O'Brien *v.* Stambach, 101 Iowa 40, 69 N. W. 1133, 63 Am. St. Rep. 368.

This rule has been applied to actions against stock-holders, it being held that where a corporation is notoriously insolvent, it is not necessary to cause execution against the corporation to be returned *nulla bona* before proceeding in equity against the stockholder. Hodges *v.* Silver Hill Min. Co., 9 Oreg. 200.

30. *California.*— See Blanc *v.* Paymaster Min. Co., 95 Cal. 524, 30 Pac. 765, 29 Am. St. Rep. 149.

Indiana.— Towns *v.* Smith, 115 Ind. 480, 16 N. E. 811.

Indian Territory.— Springfield Grocery Co. *v.* Thomas, 3 Indian Terr. 330, 58 S. W. 557.

Kentucky.— Locheim *v.* Eversole, 70 S. W. 661, 24 Ky. L. Rep. 1031; Treadway *v.* Turner, 10 S. W. 816, 10 Ky. L. Rep. 949.

Missouri.— Reyburn *v.* Mitchell, 106 Mo. 365, 16 S. W. 592, 27 Am. St. Rep. 350; Kankakee Woolen Mill Co. *v.* Kampe, 38 Mo. App. 229.

Wisconsin.— Oppenheimer *v.* Collins, 115 Wis. 283, 91 N. W. 690, 60 L. R. A. 406; Mueller *v.* Bruss, 112 Wis. 406, 88 N. W. 229.

United States.— Sage *v.* Memphis, etc., R. Co., 125 U. S. 361, 8 S. Ct. 887, 31 L. ed. 694; Case *v.* Beauregard, 101 U. S. 688, 25 L. ed. 1004; *In re* H. G. Andrae Co., 117 Fed. 561; *In re* Pekin Plow Co., 112 Fed. 308, 50 C. C. A. 257. See Chicago, etc., Bridge Co. *v.* Anglo-American Packing, etc., Co., 46 Fed. 584; Consolidated Tank-Line Co. *v.* Kansas City Varnish Co., 45 Fed. 7. *Compare* Cates *v.* Allen, 149 U. S. 451, 13 S. Ct. 883, 977, 37 L. ed. 804, and the dissenting opinion.

Return of execution not only evidence of insolvency.—Although return of the execution unsatisfied is the most satisfactory evidence of the insolvency of the debtor, it may otherwise appear. Austin *v.* Morris, 23 S. C. 393. In Miller *v.* Hughes, 33 S. C. 530, 12 S. E. 419, it is said that while it is true that, where a creditor attacks his debtor's conveyance as voluntary, he must show that the debtor had no other property available for the payment of his claim, and this may best be done by a return of execution *nulla bona,* yet, where the conveyance is assailed for actual fraud, the fact that the debtor has no other property to which the creditor can resort may be established by any proof which under the circumstances is reasonable and satisfactory. See also Haskell *v.* Wynne, 3 Ky. L. Rep. 54.

31. Paulson *v.* Ward, 4 N. D. 100, 58 N. W. 792. The legal rights of the creditor are not affected by a fraudulent transfer of the equitable assets of the debtor, and before a court of equity will set it aside the creditor must show that he has no adequate remedy at law for the collection of the debt, or in other words that he has no way of securing payment of his debt except out of the debtor's equitable assets, and the best and as a rule the only evidence of these facts is the return of an execution *nulla bona.* But in an action by a creditor who has acquired a legal lien upon the property of his debtor to set aside a transfer thereof for actual fraud, the plaintiff is not bound to allege or prove that the debtor has no other property out of which the debt can be satisfied or that the debtor is insolvent or that an execution has been returned *nulla bona.* Spooner *v.* Travelers' Ins. Co., 76 Minn. 311, 79 N. W. 305, 77 Am. St. Rep. 651.

tion, but has been fraudulently transferred by the debtor and the judgment creditor seeks to set aside the conveyance in aid of the execution,[32] or seeks to subject it to the payment of a judgment which in itself constitutes a lien upon the property involved,[33] or has otherwise acquired a specific lien upon the property conveyed.[34]

(III) *EFFECT OF STATUTORY PROVISIONS.* In some of the states there are statutes which dispense with the necessity of a return of the execution unsatisfied.[35]

(IV) *ENFORCEMENT OF PURELY EQUITABLE CLAIMS.* Where the claim is purely equitable and such as a court of equity will take cognizance of in the first

32. *Arkansas.*— Hunt *v.* Weiner, 39 Ark. 70.

California.— Hager *v.* Shindler, 29 Cal. 47.

Florida.— Logan *v.* Logan, 22 Fla. 561, 1 Am. St. Rep. 212.

Georgia.— Stephens *v.* Beal, 4 Ga. 319.

Illinois.— Scott *v.* Aultman Co., 211 Ill. 612, 71 N. E. 1112, 103 Am. St. Rep. 215 [*affirming* 113 Ill. App. 581]; French *v.* Commercial Nat. Bank, 79 Ill. App. 110; Dillman *v.* Nadelhoffer, 56 Ill. App. 517; Quinn *v.* People, 45 Ill. App. 547; Fusze *v.* Stern, 17 Ill. App. 429.

Iowa.— Brainard *v.* Van Kuran, 22 Iowa 261.

Mississippi.— Lewis *v.* Cline, (1888) 5 So. 112.

New York.— Mechanics', etc., Bank *v.* Dakin, 51 N. Y. 519 [*reversing* 50 Barb. 587].

Ohio.— Gormley *v.* Potter, 29 Ohio St. 597.

United States.— McCalmont *v.* Lawrence, 15 Fed. Cas. No. 8,676, 1 Blatchf. 232.

Equity clearly recognizes an action in aid of a legal process, which action, while closely allied to a creditors' bill proper, is distinct therefrom, and in such action it is not necessary that an execution be issued, and returned *nulla bona.* Paulson *v.* Ward, 4 N. D. 100, 58 N. W. 792. The creditor may sue to remove a fraudulent conveyance out of the way of an execution issued or to be issued against the debtor (Foley *v.* Doyle, 1 Nebr. (Unoff.) 643, 95 N. W. 1067) as soon as he has obtained a specific lien upon the property sought to be reached, whether the lien be obtained by attachment, judgment, or the issuing of an execution (Tappan *v.* Evans, 11 N. H. 311). See also Merchants' Nat. Bank *v.* Greenhood, 16 Mont. 395, 41 Pac. 250, 851; Galloway *v.* Hamilton, 68 Wis. 651, 32 N. E. 636; Jones *v.* Green, 1 Wall. (U. S.) 330, 17 L. ed. 553.

33. Austin *v.* Morrison First Nat. Bank, 47 Ill. App. 224; Pulliam *v.* Taylor, 50 Miss. 551; Buswell *v.* Lincks, 8 Daly (N. Y.) 518.

Title to property never in debtor.— In Stephens *v.* Parvin, (Colo. 1904) 78 Pac. 688, a judgment creditor was allowed to file his bill, without first exhausting his legal remedies or alleging a return of *nulla bona,* in aid of an execution levied upon real property purchased in the name of a third person with the debtor's money and held in trust for him, the court holding that the filing of the transcript of judgment in the county where the real property was situated created a lien upon the legal and equitable interests of the debtor in such property.

34. Stephens *v.* Parvin, (Colo. 1904) 78 Pac. 688; Emery *v.* Yount, 7 Colo. 107, 1 Pac. 686; Level Land Co. No. 3 *v.* Sivyer, 112 Wis. 442, 88 N. W. 317; Gilbert *v.* Stockman, 81 Wis. 602, 51 N. W. 1076, 52 N. W. 954, 29 Am. St. Rep. 922; Case *v.* Beauregard, 101 U. S. 688, 25 L. ed. 1004.

Lien acquired by attachment.— Grandin *v.* Chicago First Nat. Bank, (Nebr. 1904) 98 N. W. 70. But where the attempted attachment is not effectual because the property sought to be reached has never stood in the name of the debtor, a bill in equity cannot be based upon such attempted attachment. Fletcher *v.* Tuttle, 97 Me. 491, 54 Atl. 1110.

Upon a bill in equity in aid of an attachment at law levied upon real property alleged to have been fraudulently conveyed by the debtor, if the conveyance is found to be *bona fide,* the bill cannot be maintained for the purpose of subjecting a mortgage taken back by the debtor at the time of the conveyance, since, the attachment not having become a specific lien at law on the mortgage and notes secured thereby, the bill in equity cannot be regarded as in aid of such specific lien. Evans *v.* Virgin, 69 Wis. 148, 33 N. W. 585.

35. Under statutes which declare that conveyances made with intent to defraud creditors shall be void, a judgment creditor by the levy of an execution upon lands fraudulently conveyed acquires a lien such as will sustain an action in equity to set aside the conveyance in aid of his execution. Ahlhauser *v.* Doud, 74 Wis. 400, 43 N. W. 169. But a statute which allows a judgment creditor to sue to set aside a fraudulent conveyance does not dispense with the necessity of the return of an execution *nulla bona.* Baxter *v.* Moses, 77 Me. 465, 1 Atl. 350, 52 Am. St. Rep. 783.

In Alabama where the statute provides that a creditor may sue to set aside a fraudulent conveyance, although the debtor has other legal assets, it follows of course that the solvency or insolvency of the debtor is of no consequence and that the return of an execution unsatisfied is not necessary. Henderson *v.* Farley Nat. Bank, 123 Ala. 547, 26 So. 226, 82 Am. St. Rep. 140.

In Kentucky, since the act of March 12, 1896, a creditor may, without having execution returned *nulla bona,* maintain the action (Locheim *v.* Eversole, 70 S. W. 661, 24 Ky. L. Rep. 1031), and such statute applies to pending actions (O'Kane *v.* Vinnedge, 108 Ky. 34, 55 S. W. 711, 21 Ky. L. Rep. 1551).

instance, such court may in a suit to enforce said claim remove obstructions which may lie in the way of such enforcement, although there has been no return of execution unsatisfied.[36]

d. Sufficiency of Return in General. The return of the execution should show, as above indicated,[37] the exhaustion, by the creditor, of his legal remedies; but no precise rule can be laid down as to what will constitute a sufficient pursuit of the legal remedy to justify resort to equity,[38] and the sufficiency of the steps taken and of the return must depend largely upon the circumstances of the case.[39] An execution returned before the return-day thereof is sufficient upon which to base a suit in equity,[40] although so made at the request of plaintiff,[41] unless collusion is shown.[42] And since the object of the return of an execution unsatisfied is to show the insolvency of the debtor, if one execution has been so returned, it is usually not necessary that other executions against the same debtor, on the same or another judgment, shall be returned unsatisfied.[43]

e. Effect of Return of Execution Unsatisfied. The return of the execution unsatisfied is *prima facie* a sufficient showing that the legal remedy of the creditor has been exhausted,[44] and in some jurisdictions a return of *nulla bona* has

36. McMakin *v.* Shelton, 6 Ky. L. Rep. 154.

A bill by a surety against a cosurety to compel contribution and to set aside certain conveyances and subject the property conveyed to the satisfaction of such liability is not a creditors' bill, and a court of equity may, upon suitable averments, proceed to grant such relief, without requiring the surety to first exhaust his remedy at law by judgment and return of *nulla bona*. Moore *v.* Baker, 34 Fed. 1.

37. See *supra*, XIV, E, 3, c, (I).

38. Poague *v.* Boyce, 6 J. J. Marsh. (Ky.) 70.

Return must be nulla bona.— It has been held that the fact that the writ has been returned unsatisfied is not sufficient, but that it must be returned *nulla bona*. Stephens *v.* Parvin, (Colo. 1904) 78 Pac. 688.

39. Harrison *v.* Campbell, 6 Dana (Ky.) 263.

It may be shown by the parol testimony of the sheriff that he made certain entries on plaintiff's execution, and that the property levied on has not been sold, and such a return may be sufficient to enable plaintiff to bring suit to set aside a deed on the ground of fraud upon creditors. Newberry Nat. Bank *v.* Kinard, 28 S. C. 101, 5 S. E. 464.

Execution against partners.— The return of a sheriff that partners against whom an execution has been taken out are not, either as partners or individually, possessed of any property which could be taken by virtue of an execution, is sufficient to entitle the judgment creditor to the aid of a court of equity to satisfy the judgment by setting aside fraudulent conveyances of one of the partners. Randolph *v.* Daly, 16 N. J. Eq. 313.

Execution against firm but not against some of the members.— Hyatt *v.* Dusenbury, 12 N. Y. Civ. Proc. 152.

Return by coroner defective.— Under Ky. Code Pr. § 667, providing that "every process in an action . . . shall be directed to the sheriff of the county," and, if he be interested in the suit, then to the coroner, it was considered that, where an execution was directed to the sheriff of another county, but, there being none at the time in the county, was received and returned by the coroner "No property found," there was no return of *nulla bona* upon which to base an action to set aside a fraudulent conveyance. Johnson *v.* Elkins, 90 Ky. 163, 13 S. W. 448, 11 Ky. L. Rep. 967, 8 L. R. A. 552.

40. Reeves *v.* Sherwood, 45 Ark. 520; Barth *v.* Heider, 7 D. C. 71.

41. Forbes *v.* Waller, 25 N. Y. 430.

42. Leggat *v.* Leggat, 79 N. Y. App. Div. 141, 80 N. Y. Suppl. 327.

43. Selz *v.* Hocknell, 63 Nebr. 503, 88 N. W. 767. Where a creditor attacking a conveyance as fraudulent has procured issuance of execution on one judgment and return thereof unsatisfied, relief will be given him as to another judgment on which execution has not been issued, the issuance and return of execution on the first judgment conferring jurisdiction on the court. St. John Woodworking Co. *v.* Smith, 82 N. Y. App. Div. 348, 82 N. Y. Suppl. 1025. But see Mullen *v.* Hewitt, 103 Mo. 639, 15 S. W. 924, holding that the issuance of a single execution is not sufficient.

44. *California.*—Windhaus *v.* Bootz, (1890) 25 Pac. 404.

Illinois.— Lewis *v.* Lanphere, 79 Ill. 187.

Indiana.— Warmoth *v.* Dryden, 125 Ind. 355, 25 N. E. 433; Lee *v.* Lee, 77 Ind. 251.

Maine.— See Corey *v.* Greene, 51 Me. 114; Hartshorn *v.* Eames, 31 Me. 93.

New York.— Leggat *v.* Leggat, 79 N. Y. App. Div. 141, 80 N. Y. Suppl. 327; Baker *v.* Potts, 73 N. Y. App. Div. 29, 76 N. Y. Suppl. 406.

South Carolina.— Bates *v.* Cobb, 29 S. C. 395, 7 S. E. 743, 13 Am. St. Rep. 742.

Wisconsin.— Oppenheimer *v.* Collins, 115 Wis. 283, 91 N. W. 690, 60 L. R. A. 406; Daskam *v.* Neff, 79 Wis. 161, 47 N. W. 1132; Hopkins *v.* Joyce, 78 Wis. 443, 47 N. W. 722; Zweig *v.* Horican Iron, etc., Co., 17 Wis. 362.

Return of execution unsatisfied dispenses with any other proof that the debtor is with-

been held conclusive.[45] The effect of a return *nulla bona* will not be defeated by the fact of a subsequent levy by the sheriff upon an equitable interest of the debtor in property.[46]

f. Necessity That Execution Shall Be Outstanding. Where the action is brought in aid of plaintiff's execution it should remain outstanding, particularly where the property is personalty whereon a lien exists only by virtue of the levy; and in any event such is the better practice.[47] It has been held, however, that, although the execution should be issued, it is not necessary that it should remain outstanding in the hands of the sheriff, and in some states statutes have been enacted enabling a judgment creditor, after the return of the execution, to maintain an action in equity to set aside a fraudulent conveyance.[48]

g. Issuance and Return of Execution Against Decedent's Estate. As we have seen, one of the reasons given for requiring a common-law judgment and a return of an execution unsatisfied before a creditor can institute an equitable action is that plaintiff must exhaust his legal remedies before he can resort to such action;[49] and ordinarily, in the absence of statute, this rule is inapplicable to the enforcement of claims against decedents' estates.[50] The difficulties existing in the way of enforcing an execution against such an estate are usually held a sufficient reason for not requiring the creditor to cause execution to be first issued and returned.[51] Where a statute gives the right to a simple contract creditor of a decedent to sue to set aside a conveyance of the decedent the fact that the creditor has secured a judgment does not prevent him from occupying the position of a simple contract creditor under the statute.[52] But in some states there are statu-

out property other than that which the creditor seeks to reach by his bill. Goddard *v.* Fishel-Schlichten Importing Co., 9 Colo. App. 306, 48 Pac. 279.

Duty of sheriff.— In Pope *v.* Cole, 55 N. Y. 124, 14 Am. Rep. 198, it is said that it is the duty of the sheriff to ascertain whether the debtor has property to satisfy the execution, and when the sheriff makes return that he has no property, the legal remedy is exhausted.

To what period return relates.— Where an execution is issued against a grantor about two weeks after the execution of a voluntary conveyance, and is returned about a month later unsatisfied, it is evidence of the grantor's financial condition at the time the conveyance was made. Fuller *v.* Brown, 76 Hun (N. Y.) 557, 28 N. Y. Suppl. 189. But the return of an execution *nulla bona* five years after the making of a gift by a father to his son is not sufficient to establish the father's insolvency when the gift was made. Windhaus *v.* Bootz, (Cal. 1890) 25 Pac. 404.

45. U. S. *v.* Lotridge, 26 Fed. Cas. No. 15,628, 1 McLean 246, holding that on a bill to set aside a fraudulent conveyance of land levied on by execution, the court will not inquire as to whether there was personal property on which the marshal should have first levied, where the return declares that the defendant had "no goods," but the court will consider the return conclusive on this point, and that the remedy for a false return is by an action at law. And *compare* Lewis *v.* Lanphere, 79 Ill. 187.

46. Wright *v.* Petrie, Sm. & M. Ch. (Miss.) 282.

47. Adsit *v.* Butler, 87 N. Y. 585; Paulson *v.* Ward, 4 N. D. 100, 58 N. W. 792. A bill in aid of an execution to set aside an alleged fraudulent conveyance is not maintainable unless a lien has been acquired by levy of the writ of execution and unless such lien exists at the time the bill is filed. Blish *v.* Collins, 68 Mich. 542, 36 N. W. 731.

48. Haswell *v.* Lincks, 87 N. Y. 637; Royer Wheel Co. *v.* Fielding, 31 Hun (N. Y.) 274, 18 N. Y. Wkly. Dig. 409; Wilcox *v.* Payne, 8 N. Y. Suppl. 407; Gullickson *v.* Madsen, 87 Wis. 19, 57 N. W. 965.

49. See *supra*, XIV, E, 2, a.

50. Hamilton *v.* Mississippi College, 52 Miss. 65; Lyons *v.* Murray, 95 Mo. 23, 8 S. W. 170, 6 Am. St. Rep. 17.

51. Treadway *v.* Turner, 10 S. W. 816, 10 Ky. L. Rep. 949.

Creditors having general judgments against a debtor cannot issue executions thereon after the debtor's death; and where the debtor's estate proves to be insolvent they need not proceed further at law to entitle them to equitable relief as against the debtor's fraudulent grantee. Lyons *v.* Murray, 95 Mo. 23, 8 S. W. 170, 6 Am. St. Rep. 17.

In New York the statute provides that real estate belonging to any deceased person shall not be affected by any judgment against his executors or administrators. Lichtenberg *v.* Herdtfelder, 103 N. Y. 302, 8 N. E. 526.

Effect of outstanding legal assets not reduced to possession.— But if the bill of the creditor shows on its face that there may be outstanding legal assets which have not been reduced to possession by the administrator, he must show that an execution has issued upon a judgment obtained against the administrator. Quarles *v.* Grigsby, 31 Ala. 172.

52. Jones *v.* Davenport, 44 N. J. Eq. 33, 13 Atl. 652.

tory provisions permitting the issuance of an execution against the estate of a decedent on a judgment rendered before his death.[53]

4. Necessity of Lien. While it has been held that any lien which may be acquired by the creditor upon the property sought to be reached in the process of exhausting his legal remedy is merely an incident and not the object of the proceedings, and that it is not necessary that he should show the existence of a lien upon the property proposed to be charged,[54] the view is presented in many of the decisions that the creditor must acquire a specific lien upon the property which constitutes the subject of the conveyance in order that he may ask a court of equity to set aside the conveyance,[55] some courts holding that the question of fraud cannot be litigated by any person who has no interest in the property involved, and that a mere outsider or person having no lien either by contract or process cannot raise any question of fraud arising with reference to the convey-

53. Adsit *v.* Butler, 87 N. Y. 585 [*affirming* 23 Hun 45]; Lefevre *v.* Phillips, 81 Hun (N. Y.) 232, 30 N. Y. Suppl. 709.

Circumstances excusing issuance of execution as provided by statute.— In New York a judgment creditor may sue the grantee of the deceased judgment debtor to set aside the conveyance, although no execution has been issued on the judgment, where the judgment never became a lien on the debtor's realty, because it was not indexed in the name of the debtor (Code Civ. Proc. § 1246), in consequence of which execution could not be issued after the death of the debtor, as provided by Code Civ. Proc. § 1380. Lefevre *v.* Phillips, 81 Hun (N. Y.) 232, 30 N. Y. Suppl. 709.

54. Merry *v.* Fremon, 44 Mo. 518; Dodd *v.* Levy, 10 Mo. App. 121; Carr *v.* Parker, 10 Mo. App. 364.

In Maryland it has been held that the case of a guardian suing in behalf of his wards, who was a surety on the bond given by the former guardian and therefore could not maintain an action at law on the bond, might constitute an exception to the general rule in vogue prior to Acts (1835), c. 380, that a creditor, before suing to set aside his debtor's fraudulent conveyance, must have perfected a lien on the property by judgment or otherwise. Swan *v.* Dent, 2 Md. Ch. 111.

Rights of creditors of decedent's estates.— Snodgrass *v.* Andrews, 30 Miss. 472, 64 Am. Dec. 169.

Legal title never in debtor.— Notwithstanding the fact that a judgment is not a lien upon lands which have been purchased by the judgment debtor in the name of a third person, the creditor may sue to transfer the title from such third person to the debtor and to subject the land to his judgment. Arbuckle Bros.' Coffee Co. *v.* Werner, 77 Tex. 43, 13 S. W. 963. Under 2 Rev. St. p. 174, §§ 38, 39, providing that a judgment creditor may file a bill in chancery against his debtor or any other person to compel discovery of any property or thing in action belonging to the debtor, or of any property or thing in action held in trust for him, whether the same might or might not have been originally taken in execution, a creditor may reach real property, which his debtor paid for but caused to be conveyed to another person, although his judgment never was a lien on the property, or by reason of the lapse of time has ceased to be a lien on any real property. Scoville *v.* Halladay, 16 Abb. N. Cas. (N. Y.) 43.

55. *Arkansas.*— Harman *v.* May, 40 Ark. 146.

Illinois.— Scripps *v.* King, 103 Ill. 469.

Kansas.— Daugherty *v.* Powell, 67 Kan. 857, 72 Pac. 274, 74 Pac. 242.

Maine.— Wyman *v.* Richardson, 62 Me. 293.

Michigan.— Krolik *v.* Root, 63 Mich. 562, 30 N. W. 339; Trask *v.* Green, 9 Mich. 358; Fox *v.* Willis, 1 Mich. 321; McKibben *v.* Barton, 1 Mich. 213.

Mississippi.— Hilzheim *v.* Drane, 18 Miss. 556.

Nevada.— Clute *v.* Steele, 6 Nev. 335.

Washington.— Thompson *v.* Caton, 3 Wash. Terr. 31, 13 Pac. 185.

Wisconsin.— Weber *v.* Weber, 90 Wis. 467, 63 N. W. 757; Gilbert *v.* Stockman, 81 Wis. 602, 51 N. W. 1076, 52 N. W. 1045, 29 Am. St. Rep. 922.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 706.

The jurisdiction of a court of equity attaches, as a general rule, by virtue of a lien created either by operation of law, as by judgment, attachment, or other proceeding in the nature of a proceeding *in rem*, or by contract. Cassaday *v.* Anderson, 53 Tex. 527. The object of the attachment or execution is to bring the attacking party into privity with the property. People's Sav. Bank *v.* Bates, 120 U. S. 556, 7 S. Ct. 679, 30 L. ed. 754.

A creditor must show judgment and execution, by which he has gained a legal lien and preference at the time of filing his bill, or at least before issue joined. Williams *v.* Brown, 4 Johns. Ch. (N. Y.) 682. Or he must show some other claim which would be a lien on the property, if the title were in the debtor. Holdrege *v.* Gwynne, 18 N. J. Eq. 26. And see Green *v.* Tantum, 19 N. J. Eq. 105.

If a creditor is a judgment creditor he must show that he has a lien either by judgment, if the statute gives such lien, but if the lien arises from the execution, he must show that one has been issued, and if the lien arises

ance of property by a debtor.[56] And where a creditor, in aid of a lien acquired upon the debtor's property, seeks to set aside a fraudulent conveyance of it, the lien or vested right in the property and the fraudulent obstruction to the adequate enforcement of his lien or right are the only essentials to the jurisdiction of equity.[57] In some of the states the statute dispenses with the necessity of a lien.[58] The question as to the necessity of the creditor acquiring a specific lien upon the property involved in the conveyance has also been discussed in connection with the necessity of obtaining judgment and issuing execution thereon.[59]

5. Necessity That Creditor Shall Resort to Other Property of the Debtor — a. In General. The general rule, supported by the weight of authority, is that if the debtor has property, other than that which constitutes the subject-matter of the fraudulent conveyance, available to satisfy the debt, a bill to set aside the conveyance will not lie.[60] In some states this rule has been embodied in the form of a statute.[61] Where one having a lien upon certain property of his debtor seeks to set aside a fraudulent conveyance of other property, he must show that the property outside of the property involved in the conveyance including the sub-

from the levy of the writ, he must show that a levy has been made. Cates *v.* Allen, 149 U. S. 451, 13 S. Ct. 883, 977, 37 L. ed. 804. It is by virtue of the lien that the creditor may go into a court of equity to displace a fraudulent conveyance even before levy. Pulliam *v.* Taylor, 50 Miss. 551.

As to right of creditor who has not acquired a lien upon the personal property of the debtor to attack a prior mortgage on the ground that it has not been recorded and for fraud see Ruggles *v.* Cannedy, (Cal. 1898) 53 Pac. 911.

56. Dana *v.* Haskell, 41 Me. 25. Griswold *v.* Sundback, 4 S. D. 411, 57 N. W. 339.

A creditor before obtaining a judgment and execution has no certain claim upon the property of his debtor and has no concern with conveyances of any kind affecting his property for the reason that he may never obtain a judgment and if he does not he cannot be injured by any disposition of the property. Mullen *v.* Hewitt, 103 Mo. 639, 15 S. W. 924.

57. Schofield *v.* Ute Coal, etc., Co., 92 Fed. 269, 34 C. C. A. 334.

58. Wooten *v.* Steele, 109 Ala. 563, 19 So. 972, 55 Am. St. Rep. 947, holding that a judgment creditor without a lien is a creditor within the meaning of a statute giving a creditor without a lien the right to file a bill to set aside a fraudulent conveyance. See *supra*, XIV, E, 2, b.

59. See *supra*, XIV, E, 2, 3.

60. *Arkansas.*— Clark *v.* Anthony, 31 Ark. 546.

California.— Harris *v.* Taylor, 15 Cal. 348.

Indiana.— Sell *v.* Bailey, 119 Ind. 51, 21 N. E. 338; Towns *v.* Smith, 115 Ind. 480, 16 N. E. 811; Lee *v.* Lee, 77 Ind. 251; Morgan *v.* Olvey, 53 Ind. 6; Baugh *v.* Boles, 35 Ind. 524; Jackson *v.* Sayler, 30 Ind. App. 72, 63 N. E. 881.

Iowa.— Gwyer *v.* Figgins, 37 Iowa 517.

Maryland.— Morsell *v.* Baden, 22 Md. 391.

New York.— Morris *v.* Morris, 62 Hun 256, 16 N. Y. Suppl. 824 (action to set aside conveyance of real estate not maintainable where debtor has abundant personal property out of which to pay the debt); Hyatt *v.* Dusenbury, 12 N. Y. Civ. Proc. 152. Where a creditor seeks the aid of equity to remove a fraudulent conveyance out of the way of his execution, it must appear that there is no ther property of the debtor out of which the judgment can be paid. Payne *v.* Sheldon, 63 Barb. 169.

Wisconsin.— Mason *v.* Pierron, 63 Wis. 239, 23 N. W. 119.

Illustrations.— Where it appears that a debtor has ample personal property out of which a judgment creditor's claim can be satisfied, and that any fraud connected with the transfer of such property can be disposed of in an action at law, equity will not entertain a suit to set aside the debtor's conveyance of his real estate as fraudulent toward creditors. Pierce *v.* Rich, 76 Mich. 648, 43 N. W. 582; Brock *v.* Rich, 76 Mich. 644, 43 N. W. 580. A judgment creditor who has levied on some of the debtor's property cannot maintain a bill when, from all that appears, property covered by the levy may be sufficient to pay his debt. Burne *v.* Kunzman, (N. J. Ch. 1890) 19 Atl. 667. And a creditor of a deceased person cannot maintain a bill to set aside as fraudulent a conveyance of the decedent's lands, when the bill shows that the personal property of the decedent is ample to pay his debts. Rutherford *v.* Alyea, 54 N. J. Eq. 411, 34 Atl. 1078.

Acquisition by the debtor of property at any time before the bringing of suit in equity to set aside the conveyance will defeat such suit. Brumbaugh *v.* Richcreek, 127 Ind. 240, 26 N. E. 664, 22 Am. St. Rep. 649.

Where a surety, seeking to enforce contribution against a cosurety, sues to set aside a conveyance of lands made by the cosurety before the original judgment which the surety has paid became a lien upon such lands, the surety must show as a condition precedent to setting aside such conveyance that the cosurety is insolvent. Mason *v.* Pierron, 63 Wis. 239, 23 N. W. 119.

61. Coyle's Succession, 32 La. Ann. 79.

ject of the lien is inadequate to satisfy the debt.[62] But if the lien which the creditor has on property other than that involved in the fraudulent conveyance is unavailable because of prior liens he need not attempt to enforce such lien before seeking to set aside such conveyance.[63] The above rule, however, has been limited in some jurisdictions,[64] and altogether denied in others.[65] The creditor need not go beyond the jurisdiction to find other property,[66] and where the suit is in aid of the creditor's legal remedy, it is held that he need not show that the debtor has no other property than that constituting the subject of the conveyance.[67] In some states statutory provisions enable the creditor to sue, although the debtor has other property.[68] The mere fact that the debtor has other property will not prevent the creditor from suing in equity if such other property is not sufficient to satisfy the debt.[69] And in cases where there have been several

62. Gayoso *v.* Lewis, 4 La. 329; Burne *v.* Kunzman, (N. J. Ch. 1890) 19 Atl. 667; Canaday *v.* Nuttall, 37 N. C. 265.

63. Allis *v.* Newman, 33 Nebr. 597, 50 N. W. 1048. In this case plaintiff furnished machinery for a mill under a contract with the owners, and filed a mechanic's lien against the mill property. The property being encumbered by prior liens to an extent greater than its value, he obtained a judgment against said owners, and sued to set aside as fraudulent a deed of other land conveyed by one of the judgment debtors, and to subject the land to satisfaction of the judgment. It was considered that the suit could be maintained without first enforcing the lien against the mill property.

64. Rohrer *v.* Snyder, 29 Wash. 199, 69 Pac. 748.

65. Yankey *v.* Sweeney, 85 Ky. 55, 2 S. W. 559, 562, 563, 8 Ky. L. Rep. 944; Patton *v.* Bragg, 113 Mo. 595, 20 S. W. 1059, 35 Am. St. Rep. 730; Westerman *v.* Westerman, 25 Ohio St. 500; Hoffman *v.* Fleming, 43 W. Va. 762, 28 S. E. 790, holding that a creditor has an absolute right to a suit in equity to annul a fraudulent conveyance, and he need not first subject other property of the debtor, by execution or otherwise.

The reason given by the courts so holding is that no title whatever passes by virtue of the conveyance as against existing creditors and they may levy upon the property and sell it without reference to the conveyance and without resorting to a suit in equity. Yankey *v.* Sweeney, 85 Ky. 55, 2 S. W. 559, 562, 563, 8 Ky. L. Rep. 944. The grantee's title being tainted with fraud he has no right to say that all other means shall be exhausted before he shall be disturbed in his title. Miller *v.* Davidson, 8 Ill. 518, 44 Am. Dec. 715; Dunphy *v.* Gorman, 29 Ill. App. 132.

66. Rohrer *v.* Snyder, 29 Wash. 199, 69 Pac. 748.

67. Botsford *v.* Beers, 11 Conn. 369; Robinson *v.* Springfield Co., 21 Fla. 303; Smith *v.* Muirheid, 34 N. J. Eq. 4; Gormley *v.* Potter, 29 Ohio St. 597.

Where plaintiff has acquired a legal lien on property of his debtor, and the suit is one to set aside a transfer thereof fraudulent in fact as to creditors, which is an obstruction in the way of plaintiff's right to enforce his lien, he has the right to be placed in the same position which he would have occupied had the transfer never been made; and he is not bound, as a condition of obtaining the relief, to allege or prove that the debtor has no other property, or that he is insolvent, or that any execution has been returned unsatisfied. Spooner *v.* Travelers' Ins. Co., 76 Minn. 311, 79 N. W. 305, 77 Am. St. Rep. 651. In such a case the mere fact that the judgment creditor has collateral security for his judgment does not raise any equity in favor of the fraudulent grantee to compel the creditor to first exhaust his collateral security. Spooner *v.* Travelers' Ins. Co., 76 Minn. 311, 79 N. W. 305, 77 Am. St. Rep. 651.

Where the action is in aid of an attachment upon the lands conveyed the insolvency of the debtor need not be shown. Smith *v.* Muirheid, 34 N. J. Eq. 4.

68. Henderson *v.* Farley Nat. Bank, 123 Ala. 547, 26 So. 226, 82 Am. St. Rep. 140; Beall *v.* Lehman Durr Co., 110 Ala. 446, 18 So. 230; O'Neil *v.* Birmingham Brewing Co., 101 Ala. 383, 13 So. 576. In Alabama under a statute providing that a creditor without a lien may file a bill to subject to the payment of his debt any property which has been fraudulently transferred, etc., a creditor is authorized to proceed without regard to the existence of other legal assets and the issue as to the debtor's ownership of other property is therefore not material. McClarin *v.* Anderson, 109 Ala. 571, 19 So. 982. Under such a statute the creditors of the deceased grantor in a voluntary conveyance may subject the land conveyed to the satisfaction of their claims, without regard to the sufficiency of the legal assets of the estate. Wood *v.* Potts, 140 Ala. 425, 37 So. 253. The same rule prevails in Mississippi under a similar statute. Citizens' Bank *v.* Buddig, 65 Miss. 284, 4 So. 94.

Under a statute dispensing with the necessity of obtaining a judgment at law and having execution returned *nulla bona*, it is still necessary, before a creditors' bill will lie to set aside the conveyance, to prove the insolvency of the debtor. Euclid Ave. Nat. Bank *v.* Judkins, 66 Ark. 486, 51 S. W. 632.

69. McConnell *v.* Citizens' State Bank, 130 Ind. 127, 27 N. E. 616; Lee *v.* Lee, 77 Ind. 251.

fraudulent conveyances or transfers the creditor has a right to choose the one which he will attack.[70]

b. Enforcement of Claims Against Decedent's Estate. A creditor of a decedent's estate cannot sue in equity to set aside a fraudulent conveyance made by the decedent if the assets of the estate are sufficient to pay his claim.[71] But in some states this rule has been changed by statute.[72] And where it appears that there is no personal estate a creditor need not first proceed against the administrator.[73]

6. Necessity to Pursue Legal Remedy Against Persons Jointly Bound With Creditor. It has been held in some jurisdictions that where the creditor has a legal remedy against others jointly bound with the grantor he should first seek to enforce such remedy against the coöbligors before suing to set aside a fraudulent conveyance.[74] But if the coöbligor is in another jurisdiction, this will constitute a sufficient excuse for failure to enforce such legal remedy.[75] And if persons jointly bound with a judgment debtor occupy the position of sureties merely, they need not first be sued.[76] Where the grantor in the alleged fraudulent conveyance is severally as well as jointly liable with his coöbligors, it is not necessary to exhaust the legal remedy against such coöbligors before suing to set aside the conveyance.[77] This is the rule in states in which a statute has abolished all distinction between joint and several liabilities and authorizes action to be brought against any one of several parties to a joint obligation.[78]

70. Miller *v.* Dayton, 47 Iowa 312; Marshall First Nat. Bank *v.* Hosmer, 48 Mich. 200, 12 N. E. 212.

Where a debtor has conveyed away both personalty and realty and both transfers are alleged to be fraudulent, a judgment creditor may permit the transfer of the personalty to stand and sue to set aside the transfer of the realty. Cox *v.* Dunham, 8 N. J. Eq. 594.

71. State *v.* Parsons, 147 Ind. 579, 47 N. E. 17, 62 Am. St. Rep. 430; Jordan *v.* Stephenson, 17 Iowa 514. Ordinarily creditors, alleging their debtor's sale fraudulent, must show the want of effects to satisfy their claims; and if he be dead this must be shown by a judicial settlement of his succession. Semple *v.* Fletcher, 3 Mart. N. S. (La.) 382.

A creditor without any lien cannot come into equity to subject property fraudulently conveyed by decedent without alleging and proving a deficiency of assets. State Bank *v.* Ellis, 30 Ala. 478; Chamberlayne *v.* Temple, 2 Rand. (Va.) 384, 14 Am. Dec. 786.

But in Nebraska where a creditor obtains an attachment lien in a debtor's lifetime, and subsequently judgment and order of sale are entered against the debtor's executrix, it seems that jurisdiction to clear the title of the attached lands of fraudulent deeds of the debtor does not depend on the insolvency of his estate. Madison First Nat. Bank *v.* Tompkins, 3 Nebr. (Unoff.) 328, 91 N. W. 551.

72. Wood *v.* Potts, 140 Ala. 425, 37 So. 253.

73. Jordan *v.* Stephenson, 17 Iowa 514.

74. Eller *v.* Lacy, 137 Ind. 436, 36 N. E. 1088; Geiser Mfg. Co. *v.* Lee, 33 Ind. App. 38, 66 N. E. 701; Riddick *v.* Parr, 111 Iowa 733, 82 N. W. 1002; Wales *v.* Lawrence, 36 N. J. Eq. 207; Randolph *v.* Daly, 16 N. J. Eq. 313. A judgment creditor cannot maintain an action to set aside a fraudulent conveyance, made by one of several joint judgment debtors, unless the other joint judgment debtors are sureties merely, or are insolvent, as otherwise he has an adequate remedy at law. Euclid Ave. Nat. Bank *v.* Judkins, 66 Ark. 486, 51 S. W. 632.

In Louisiana where by express law a creditor has a right of action against all of his debtors bound *in solido* for the payment of the debt, one of two debtors *in solido* being insolvent, the creditor is without a right of action to have annulled a transfer by the insolvent debtor. Dreyfus *v.* Childs, 48 La. Ann. 872, 19 So. 929.

75. Alford *v.* Baker, 53 Ind. 279. See *supra*, XIV, E, 2, h, (II).

76. Harvey *v.* State, 123 Ind. 260, 24 N. E. 239; Duffy *v.* State, 115 Ind. 351, 17 N. E. 615.

Where a mortgagor sold the mortgaged property, but the vendee did not assume the mortgage debt, but thereafter executed a bond as collateral security for the debt, and the mortgage was foreclosed, and the land sold, a deficiency judgment rendered against the mortgagor and her vendee, and execution returned unsatisfied against them, although the vendee was the owner of other lands, it was held that the fact that such lands were not sold under the judgment did not preclude action by the judgment creditor to set aside a fraudulent conveyance of lands of the mortgagor, the latter being primarily liable for the debt, and the vendee only liable as surety. Baker *v.* Potts, 73 N. Y. App. Div. 29, 76 N. Y. Suppl. 406.

77. Tuthill *v.* Goss, 35 N. Y. Suppl. 136; Clarkson *v.* Dunning, 4 N. Y. Suppl. 430.

78. Strong *v.* Lawrence, 58 Iowa 55, 12 N. W. 74.

7. Obligations of Plaintiff With Reference to Grantee or Other Creditors. The rule that a person seeking equity must come with clean hands to entitle him to relief applies to actions to set aside a fraudulent conveyance.[79] So also the rule that one seeking the aid of equity must accord to the other party all the equitable rights to which he is entitled in respect to the subject-matter of the conveyance[80] applies, and it sometimes happens that the grantee in a fraudulent conveyance, or other creditors, have rights which must be safeguarded before the complainant will be granted the relief for which he asks.[81] Thus one who has purchased the property in question in good faith must be reimbursed on account of such part of the price as he has actually paid before a creditor of the grantor can set aside the conveyance.[82] And where a creditor has received the benefits of the alleged fraudulent conveyance he cannot avoid it without restoring such benefits.[83] But if the grantee has participated in the fraudulent intent of the grantor, any consideration which may have been parted with by the grantee need not be restored.[84] And a creditor holding collateral is not bound to surrender it before attacking a conveyance by the debtor as fraudulent.[85]

F. Joinder of Causes of Action.[86] The general rule is that persons concerned in separate transactions may be joined as parties defendant in a suit whenever there is one connected interest among them centering in the point in issue in the case.[87] And this rule applies to an action by a creditor to set aside several distinct conveyances by his debtor of distinct properties,[88] even though they may have been made at different times,[89] and may have been executed to different

79. Robinson *v.* Frankville First M. E. Church, 59 Iowa 717, 12 N. W. 772; Smith *v.* Espy, 160, 167. And see Equity, 16 Cyc. 144. *Compare infra*, XIV, I, 1, text and note 48.

80. See Equity, 16 Cyc. 140.

81. White *v.* Cates, 7 Dana (Ky.) 357; Wise *v.* Jefferis, 51 Fed. 641, 2 C. C. A. 432.

Placing purchaser in statu quo.—Where the whole purchase-money has not been paid in fact or by the giving by the purchaser of an irrevocable obligation for its payment, equity will sometimes, as respects the prior purchaser or creditor as the case may be, treat the sale as fraudulent and void by setting it aside, but at the same time place the honest purchaser *in statu quo* by restoring to him whatever he has paid upon his purchase, or otherwise reinstating him in the possession he occupied before the purchase. Crockett *v.* Phinney, 33 Minn. 157, 22 N. W. 292.

Redemption from mortgage.— A creditor is not obliged to redeem from a mortgage given by the alleged fraudulent grantee, since he has no right to redeem. Ware *v.* Hamilton Brown Shoe Co., 92 Ala. 145, 9 So. 136.

Duty of creditor to reimburse grantee for moneys which he has actually paid out see Van Wyck *v.* Baker, 16 Hun (N. Y.) 168; and *supra*, XIII, A, 4, a, (III).

Rule where the conveyance attacked was made to a creditor.— Where a debtor has deeded certain property to secure the claims of some of his creditors, other creditors, whose claims are unsecured, cannot insist upon a court of equity annulling the deed without offering to pay the secured claims. Anderson *v.* McNeal, 82 Miss. 542, 34 So. 1.

Plaintiff in action indebted to grantee.— But where a deed was held to be fraudulent at the suit of the creditor the fact that the grantee held notes signed by both the debtor and the creditor was not considered to warrant invoking the above principle. Hall *v.* Harrington, 7 Colo. App. 474, 44 Pac. 365.

82. Martin *v.* Matthews, 10 Wash. 176, 38 Pac. 1001. See *supra*, XIII, A, 4, a, (III), (A), (1).

83. Bowden *v.* Spellman, 59 Ark. 251, 27 S. W. 602. See *supra*, IV, G.

84. Miles *v.* Lewis, 115 Pa. St. 580, 10 Atl. 123. See *supra*, XIII, A, 4, a, (III), (A), (2).

85. Alabama Warehouse Co. *v.* Jones, 62 Ala. 550.

86. **Joinder of parties** see *infra*, XIV, H.

87. Morton *v.* Weil, 11 Abb. Pr. (N. Y.) 421.

88. Winslow *v.* Dousman, 18 Wis. 456. Where several conveyances have been made as parts of the same transaction, they may be attacked in one proceeding, although defendants claim different interests. Oakley *v.* Tugwell, 33 Hun (N. Y.) 357. It is not a misjoinder of causes of action to seek in one action to have set aside as fraudulent conveyances by the same grantor to different grantees executed on the same day. Anderson *v.* Anderson, 4 Ky. L. Rep. 579. *Compare* Tucker *v.* Tucker, 29 Mo. 350, in which case it was sought to set aside several transfers made to defeat the right of dower of the widow of the grantor.

89. Winslow *v.* Dousman, 18 Wis. 456. A creditors' action, by several judgment creditors, seeking to set aside several fraudulent conveyances made by the debtor, at various times and to various persons, and to subject the property to the executions of plaintiff, and to render an assignee in trust personally liable, states but one cause of action; and the various transferees may be joined

persons,[90] in pursuance of a common design to defraud creditors, the common point of litigation being the fraudulent transfer of the property,[91] although the several transferees may have no common interest in the several parcels or properties so conveyed,[92] and although no joint fraud in any one transaction may be charged against all of the transferees.[93] So a conveyance made by the debtor and another transaction in which the debtor purchases property in the name of a third person with intent to defraud creditors may be attacked in the same suit.[94] The right to join causes of action is affected in some states by code provisions requiring that the causes of action, in order to be united, must affect all parties to the action.[95]

G. Jurisdiction and Venue[96] — **1. Territorial Jurisdiction.** While it has been held that courts may decree specific performance of contracts respecting land outside of the court's jurisdiction,[97] yet the general rule is that the courts of one state have no jurisdiction to set aside a conveyance of lands situated in another state,[98] although equity may restrain the alienation of lands fraudulently mortgaged, even when situated in another state, and may compel the fraudulent mortgagee to execute and deliver a satisfaction of the mortgage.[99] It has been held that an action to set aside a pledge of mortgage notes may be brought in the state where the pledgor and pledgee are found, although the notes are kept in another state where the pledgee resides.[1]

2. Jurisdiction as Dependent on Amount Involved. The jurisdiction of equity does not depend on the amount of plaintiff's debt.[2]

3. Jurisdiction of the Person. Jurisdiction to set aside a fraudulent convey-

as defendants, although there was no privity between the transferees. Reed *v.* Stryker, 12 Abb. Pr. (N. Y.) 47; Hughes *v.* Tennison, 3 Tenn. Ch. 641.

Fraudulent judgments.—A creditor may in one suit obtain relief against several fraudulent judgments rendered against his debtor in several different courts. Uhlfelder *v.* Levy, 9 Cal. 607.

90. Hughes *v.* Tennison, 3 Tenn. Ch. 641; Winslow *v.* Dousman, 18 Wis. 456. See also *infra*, XIV, H, 2, g.

If defendants have combined and acted in concert in the fraudulent transactions and all have a common interest centering in the point in issue in the cause, they may be joined in one bill. Winslow *v.* Dousman, 18 Wis. 456.

91. Morton *v.* Weil, 11 Abb. Pr. (N. Y.) 421; Jacot *v.* Boyle, 18 How. Pr. (N. Y.) 106, holding that a complainant, in an action brought by a judgment creditor, to set aside as fraudulent and void several and separate conveyances of real estate made to different grantees by defendant, the judgment debtor, so that plaintiff can satisfy his judgment out of such property, contains but one cause of action. Conveyances made to different grantees in pursuance of a common design to defraud creditors of the grantor may be attacked by a judgment creditor in a single action, since the whole foundation of the action is the fraudulent scheme itself. Marx *v.* Tailer, 12 N. Y. Civ. Proc. 226.

A bill by the creditors of a deceased person, to set aside several distinct fraudulent conveyances of real and personal estate, made by him in his lifetime, and to subject property held in secret trust for his benefit by third persons, to the payment of his debts, may be properly maintained against the administrators and heirs of the intestate, and all the persons charged to be implicated in any of the fraudulent transactions. Snodgrass *v.* Andrews, 30 Miss. 472, 64 Am. Dec. 169.

92. Chase *v.* Searles, 45 N. H. 511.

93. Brian *v.* Thomas, 63 Md. 476; Trego *v.* Skinner, 42 Md. 426.

94. North *v.* Bradway, 9 Minn. 183.

95. For example under such a provision a cause of action to set aside a fraudulent conveyance to one defendant cannot be united with a cause relating to a valid encumbrance held by another defendant. Higgins *v.* Chrichton, 63 How. Pr. (N. Y.) 354.

96. **Jurisdiction at law and in equity** see *supra*, XIV, B, C.

97. See Courts, 11 Cyc. 686; Equity, 16 Cyc. 118–120.

98. Cumberland Coal, etc., Co. *v.* Hoffman Steam Coal Co., 30 Barb. (N. Y.) 159, 20 How. Pr. 62; Nicholson *v.* Leavitt, 4 Sandf. (N. Y.) 252; Carpenter *v.* Strange, 141 U. S. 87, 11 S. Ct. 960, 35 L. ed. 640. See Grandin *v.* Chicago First Nat. Bank, (Nebr. 1904) 98 N. W. 70. See also Courts, 11 Cyc. 686; Equity, 16 Cyc. 118–120.

Rule in Canada.— Burns *v.* Davidson, 21 Ont. 547; Clarkson *v.* Dupré, 16 Ont. Pr. 521; Livingstone *v.* Sibbald, 15 Ont. Pr. 315.

99. Kirdadi *v.* Basha, 36 Misc. (N. Y.) 715, 74 N. Y. Suppl. 383.

1. Meyer *v.* Moss, 110 La. 132, 34 So. 332.

2. Lore *v.* Getsinger, 7 N. J. Eq. 191 [*reversed* on grounds not appearing in 7 N. J. Eq. 639], holding that the statute applicable to creditors' suits to discover assets does not apply to suits to set aside fraudulent conveyances); Mebane *v.* Layton, 86 N. C. 571. But see Bailey *v.* Burton, 8 Wend. (N. Y.) 339, based on a statute which has been repealed. See Equity, 16 Cyc. 124.

ance made by a non-resident debtor may be obtained by service of process by publication, and without obtaining jurisdiction of the person,[3] but if the purchaser is a non-resident no decree *in personam* can be rendered against him.[4]

4. Impeaching Judgment of Sister State. A sale of personal property under execution in another state will if fraudulent be set aside where the property has been removed into the state where the action is brought, since a judgment of a sister state may be impeached for fraud and the proceedings under it are subject to the same rule when a claim to specific property is made through such a medium.[5]

5. Particular Courts. The jurisdiction of particular state courts depends on the statutes of the various states.[6] As a general rule the probate court has no jurisdiction.[7]

6. Venue. Although there are authorities to the contrary,[8] the general rule is that an action to set aside a fraudulent conveyance of real estate must be brought in the county in which the land is located,[9] although the judgment was recovered, and the debtor lives, in another county.[10] If the real estate is situated in more than one county, suit may be brought in either county.[11] Distinct suits

3. Riverside First Nat. Bank *v.* Eastman, 144 Cal. 487, 77 Pac. 1043, 103 Am. St. Rep. 95; Quarl *v.* Abbett, 102 Ind. 233, 1 N. E. 476, 52 Am. Rep. 662.

4. Moody *v.* Gay, 15 Gray (Mass.) 457.

5. White *v.* Trotter, 14 Sm. & M. (Miss.) 30, 53 Am. Dec. 112. See, generally, Judgments.

6. *Georgia.*— Manheim *v.* Claflin, 81 Ga. 129, 7 S. E. 284, superior court has exclusive jurisdiction.

Illinois.— Chicago First Nat. Bank *v.* North Wisconsin Lumber Co., 41 Ill. App. 383, holding that the county court has jurisdiction unless the transfer amounts to an assignment for the benefit of creditors.

New Hampshire.— Stone *v.* Anderson, 26 N. H. 506, superior court has jurisdiction.

New York.— People *v.* New York Ct. C. Pl., 18 Abb. Pr. 438, 28 How. Pr. 477, holding that the common pleas (now the "city court of New York") had jurisdiction.

Ohio.— Benedict *v.* Market Nat. Bank, 6 Ohio S. & C. Pl. Dec. 320, 4 Ohio N. P. 231, holding that the common pleas has jurisdiction rather than the court of insolvency where there has been no assignment.

Texas.— Heard *v.* McKinney, 1 Tex. Unrep. Cas. 83, district court has exclusive jurisdiction.

Canada.— See Merchants Bank *v.* Brooker, 8 Ont. Pr. 133, as to power of county court where it directs a trial of the issue in a superior court.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 727.

7. *Illinois.*—Harting *v.* Jockers, 31 Ill. App. 67.

Kansas.— Barker *v.* Battey, 62 Kan. 584, 64 Pac. 75.

Mississippi.— Snodgrass *v.* Andrews, 30 Miss. 472, 64 Am. Dec. 169.

North Carolina.— Green *v.* Cagle, 84 N. C. 385.

Ohio.— Spoors *v.* Coen, 44 Ohio St. 497, 9 N. E. 132; Benedict *v.* Market Nat. Bank, 6 Ohio S. & C. Pl. Dec. 320, 4 Ohio N. P. 231.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 727.

Compare, however, Tyler *v.* Wilkerson, 20 Ind. 473 (holding that both the circuit court and the common pleas court had jurisdiction); Holland *v.* Cruft, 20 Pick. (Mass.) 321 (holding that the probate court had jurisdiction where the question as to the fraudulent character of the conveyance was collateral and incidental to the main question which related to the execution of a trust under a will).

8. *California.*— Beach *v.* Hodgdon, 66 Cal. 187, 5 Pac. 77 [*followed* in Woodbury *v.* Nevada Southern R. Co., 120 Cal. 463, 52 Pac. 730], holding that an action in aid of an execution is not one "to enforce a lien upon real property."

Georgia.— Coleman *v.* Franklin, 26 Ga. 368.

Illinois.— See Johnson *v.* Gibson, 116 Ill. 294, 6 N. E. 205.

New York.— Rawls *v.* Carr, 17 Abb. Pr. 96.

Texas.— Lehmberg *v.* Biberstein, 51 Tex. 457; Vandever *v.* Freeman, 20 Tex. 333, 70 Am. Dec. 391.

9. *Illinois.*— Richards *v.* Hyde, 21 Ill. 640.

Michigan.— Krolik *v.* Bulkley, 58 Mich. 407, 29 N. W. 205.

New York.— Wood *v.* Hollister, 3 Abb. Pr. 14; Starks *v.* Bates, 12 How. Pr. 465; Mairs *v.* Remsen, 3 Code Rep. 133.

Ohio.— Leaf *v.* Marriott, 29 Cinc. L. Bul. 225, 4 Ohio S. & C. Pl. Dec. 402.

South Carolina.— Augusta Sav. Bank *v.* Stelling, 31 S. C. 360, 9 S. E. 1028. But see New Home Sewing Mach. Co. *v.* Wray, 28 S. C. 86, 5 S. E. 603, holding that the rule does not apply where the fraudulent conveyance is a mere incident to the suit and there is no prayer to set aside the conveyance.

10. Marcum *v.* Powers, 9 S. W. 255, 10 Ky. L. Rep. 380.

11. Hunt *v.* Dean, 91 Minn. 96, 37 N. W. 574. See Benton *v.* Collins, 125 N. C. 83, 34 S. E. 242, 47 L. R. A. 33.

need not be brought in each county for land fraudulently conveyed to a single person.[12] If the action is to reach personalty it may be commenced in the county where the debtor resides.[13]

H. Parties[14] **— 1. Plaintiffs — a. In General.** The general rule is that a suit to set aside a fraudulent conveyance should be brought in the name of the party in interest, and a creditor may bring a suit in his own name and for his own benefit, and need not make other creditors standing in the same situation parties.[15] He may likewise file a bill in his own name if he owns the judgment, although it was recovered to the use of a third party.[16] Such a suit may likewise be maintained by the assignee of a judgment, without joining the assignor as a party plaintiff.[17]

b. Suit in Behalf of All Creditors. The rule is well recognized that a creditor may institute suit in his own name to set aside a fraudulent conveyance in behalf of himself and other creditors, all sharing alike whose claims are in the same class.[18]

c. Joinder of Plaintiffs. The right of two or more creditors to unite in an action to set aside a conveyance made by their common debtor in fraud of creditors is well recognized, even where their claims are several and distinct.[19]

2. Defendants — a. In General. The general rule is that all parties interested

12. Lindell Real Estate Co. *v.* Lindell, 133 Mo. 386, 33 S. W. 466.

13. Plattsmouth First Nat. Bank *v.* Gibson, (Nebr. 1903) 94 N. W. 965.

14. See, generally, Creditors' Suits, 12 Cyc. 36, 37; Equity, 16 Cyc. 181; Parties.

15. *Alabama.*— Freeman *v.* Stewart, 119 Ala. 158, 24 So. 31, holding that a bill to set aside a fraudulent conveyance need not make prior mortgagees parties.

California.— Baker *v.* Bartol, 6 Cal. 483.

Illinois.— Mann *v.* Ruby, 102 Ill. 348; Ballentine *v.* Beall, 4 Ill. 263.

Indiana.— See New *v.* New, 127 Ind. 576, 27 N. E. 154.

Massachusetts.— Crompton *v.* Anthony, 13 Allen 33; Silloway *v.* Columbia Ins. Co., 8 Gray 199.

Missouri.— Jackson *v.* Robinson, 64 Mo. 289.

New Jersey.— Annin *v.* Annin, 24 N. J. Eq. 184; Way *v.* Bragaw, 16 N. J. Eq. 213, 84 Am. Dec. 147.

New York.— Lopez *v.* Farmers', etc., Nat. Bank, 18 N. Y. App. Div. 427, 46 N. Y. Suppl. 91; Edmeston *v.* Lyde, 1 Paige 637, 19 Am. Dec. 454.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 738.

16. Postlewait *v.* Howes, 3 Iowa 365; Lewis *v.* Whitten, 112 Mo. 318, 20 S. W. 617.

17. Jones *v.* Smith, 92 Ala. 455, 9 So. 179; Broughton *v.* Mitchell, 64 Ala. 210; Coale *v.* Mildred, 3 Harr. & J. (Md.) 278; Buckingham *v.* Walker, 51 Miss. 491, holding that in a bill to set aside a fraudulent conveyance, the heirs of the deceased judgment creditor are not necessary parties complainant where the judgment was assigned by the father in his lifetime.

18. *Illinois.*— Chicago, etc., Land Co. *v.* Peck, 112 Ill. 408; Beebe *v.* Saulter, 87 Ill. 518.

Indiana.— Carr *v.* Huette, 73 Ind. 378; Barton *v.* Bryant, 2 Ind. 189.

Kentucky.— Baker *v.* Kinnaird, 94 Ky. 5, 21 S. W. 237, 14 Ky. L. Rep. 695.

Maine.— Frost *v.* Libby, 79 Me. 56, 8 Atl. 149.

Maryland.— Birely *v.* Staley, 5 Gill & J. 432, 25 Am. Dec. 303.

New York.— Campbell *v.* Heiland, 55 N. Y. App. Div. 95, 66 N. Y. Suppl. 1116; Louis *v.* Belgard, 17 N. Y. Suppl. 882; Edmeston *v.* Lyde, 1 Paige 637, 19 Am. Dec. 454. See also Hendricks *v.* Robinson, 2 Johns. Ch. 283; Hutchinson *v.* Smith, 7 Paige 26.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 739.

19. *Arkansas.*— Fry *v.* Kruse, 43 Ark. 142.

Indiana.— Armstrong *v.* Dunn, 143 Ind. 433, 41 N. E. 540; Elliott *v.* Pontius, 136 Ind. 641, 35 N. E. 562, 36 N. E. 421; Strong *v.* Taylor School Tp., 79 Ind. 208; Ruffing *v.* Tilton, 12 Ind. 259; Dugan *v.* Vattier, 3 Blackf. 245, 25 Am. Dec. 105.

Iowa.— Gamet *v.* Simmons, 103 Iowa 163, 72 N. W. 444.

Louisiana.— Marx *v.* Meyer, 50 La. Ann. 1229, 23 So. 923; Williams *v.* Hawthorn, 14 La. Ann. 615.

Michigan.— Smith *v.* Rumsey, 33 Mich. 183.

Mississippi.— Buckingham *v.* Walker, 51 Miss. 491.

Missouri.— Brumley *v.* Golden, 27 Mo. App. 160, holding that several attachment creditors might unite in an action where the evidence showed that their levies were upon the same property.

New Jersey.— Morehouse *v.* Kissam, 58 N. J. Eq. 364, 43 Atl. 891; Lore *v.* Getsinger, 7 N. J. Eq. 191 [upholding the above rule, but *reversed* by Getsinger *v.* Lore, 7 N. J. Eq. 639, the reporter stating that he was unable to find the opinion of the court, and the ground of reversal on appeal therefore not appearing].

New York.— White's Bank *v.* Farthing, 101 N. Y. 344, 4 N. E. 734 (holding, how-

in the controversy, or who may be affected by the judgment or decree rendered therein, should be made parties; and all who are nominally or really interested may and should therefore be joined.[20] However, one having no privity in the alleged fraudulent conveyance should not be made a party defendant.[21]

b. Claimants to Interest in Property. The general rule is that all persons claiming a present interest in the property should be made parties defendant in an action to set aside a fraudulent conveyance thereof.[22] Where, however, the

ever, that while such other creditors are proper parties to the bill, they are not necessary parties); Bailey *v.* Burton, 8 Wend. 329; Clarkson *v.* De Peyster, 3 Paige 320; Edmeston *v.* Lyde, 1 Paige 637, 19 Am. Dec. 454; Brinkerhoff *v.* Brown, 6 Johns. Ch. 139.

North Carolina.— Smith *v.* Summerfield, 108 N. C. 284, 12 S. E. 997; Mebane *v.* Layton, 86 N. C. 571.

South Carolina.— Ferst *v.* Powers, 64 S. C. 221, 41 S. E. 974; Bomar *v.* Means, 37 S. C. 520, 16 S. E. 537, 34 Am. St. Rep. 772.

Virginia.—Anderson *v.* Mossy Creek Woolen Mills Co., 100 Va. 420, 41 S. E. 854.

West Virginia.— Crim *v.* Price, 46 W. Va. 374, 33 S. E. 251; Pappenheimer *v.* Roberts, 24 W. Va. 702, holding that other judgment creditors should be made parties.

Wisconsin.— Gates *v.* Boomer, 17 Wis. 455.

Canada.— Ferguson *v.* Kenney, 12 Ont. Pr. 455; Turner *v.* Smith, 26 Grant Ch. (U. C.) 198.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 740.

Simple contract and judgment creditors may, by statutes in Alabama, join in a bill to set aside fraudulent conveyances made by the debtor. Brooks *v.* Lowenstein, 124 Ala. 158, 27 So. 520; Gassenheimer *v.* Kellogg, 121 Ala. 109, 26 So. 29; Steiner Land, etc., Co. *v.* King, 118 Ala. 546, 24 So. 35; Steiner *v.* Parker, 108 Ala. 357, 19 So. 386; Tower Mfg. Co. *v.* Thompson, 90 Ala. 129, 7 So. 530.

20. *Arkansas.*— Thornberry *v.* Baxter, 24 Ark. 76.

California.— Raynor *v.* Mintzer, 67 Cal. 159, 7 Pac. 431.

Florida.— Howse *v.* Moody, 14 Fla. 59.

Georgia.— Kruger *v.* Walker, 111 Ga. 383, 36 S. E. 794.

Indiana.— Doherty *v.* Holliday, 137 Ind. 282, 32 N. E. 315, 36 N. E. 907.

Maine.— American Agriculture Chemical Co. *v.* Huntington, 99 Me. 361, 59 Atl. 515.

Missouri.— Burt *v.* Flournoy, 4 Mo. 116.

New Jersey.— Dunham *v.* Ramsey, 37 N. J. Eq. 388.

New York.— National Broadway Bank *v.* Yuengling, 58 Hun 474, 12 N. Y. Suppl. 762; Hammond *v.* Hudson River Iron, etc., Co., 20 Barb. 378; Watts *v.* Wilcox, 13 N. Y. Suppl. 492, 20 N. Y. Civ. Proc. 164.

Ohio.— Barrett *v.* Reed, Wright 700.

Vermont.— Wilson *v.* Speer, 68 Vt. 145, 34 Atl. 429.

Virginia.— Clough *v.* Thompson, 7 Gratt. 26; Greer *v.* Wright, 6 Gratt. 154, 52 Am. Dec. 111.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 741.

21. *Florida.*— McDonald *v.* Russell, 16 Fla. 260.

Louisiana.— Bronsema *v.* Rind, 2 La. Ann. 959, holding that a creditor who seeks to subject to his debt property paid for as alleged by the debtor, although bought in his minor child's name to screen it, need not make the vendor a party, since he has no interest in the question.

Maine.— Merrill *v.* McLaughlin, 75 Me. 64; Whitmore *v.* Woodward, 28 Me. 392.

Maryland.— Farrow *v.* Teackle, 4 Harr. & J. 271.

New York.— See Metcalf *v.* Del Valle, 64 Hun 245, 19 N. Y. Suppl. 16; Gardner *v.* C. B. Keogh Mfg. Co., 63 Hun 519, 18 N. Y. Suppl. 391, where a complaint to set aside conveyances to a corporation, after setting forth the alleged fraudulent transfer, further alleged that the debtors had also transferred a large amount of stock of the corporation to persons who were not *bona fide* creditors, with like fraudulent intent, and it was held that the latter allegation being made merely to characterize the debtor's action, the assignees of such stock were not necessary parties to the suit.

North Dakota.— Daisy Roller Mills *v.* Ward, 6 N. D. 317, 70 N. W. 271.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 741.

An attorney employed to examine the title of real estate and to prepare a conveyance of it is not a proper party to a creditors' bill to set aside the conveyance as fraudulent, when he is not charged with having any interest in the matter and no relief is sought against him. Davis *v.* Harper, 14 App. Cas. (D. C.) 463.

22. *Alabama.*— Perkins *v.* Brierfield Iron, etc., Co., 77 Ala. 403.

Florida.— Howse *v.* Moody, 14 Fla. 59.

Indiana.— Davis *v.* Chase, 159 Ind. 242, 64 N. E. 88, 853, 95 Am. St. Rep. 294; Fletcher *v.* Mansur, 5 Ind. 267.

Kentucky.— Smiser *v.* Stevens-Wolford Co., 45 S. W. 357, 20 Ky. L. Rep. 501.

Louisiana.— Vandine *v.* Eherman, 26 La. Ann. 388.

Minnesota.— Tatum *v.* Roberts, 59 Minn. 52, 60 N. W. 348.

Missouri.— Judson *v.* Walker, 155 Mo. 166, 55 S. W. 1083.

New Jersey.— Miller *v.* Jamison, 24 N. J. Eq. 41; Williams *v.* Michenor, 11 N. J. Eq. 520.

North Carolina.— Le Duc *v.* Brandt, 110 N. C. 289, 14 S. E. 778.

rights of a person having or claiming an interest in the property are not brought in question or affected by the action, such person is not a necessary although he may be a proper party.[23] Nor can one make himself a necessary party to a litigation by purchasing or otherwise acquiring an interest in its subject-matter *pendente lite*.[24]

c. Debtor — (i) *In General.* There is considerable conflict of authority upon the question as to whether the debtor is a necessary party to an action to vacate a conveyance alleged to have been made by him in fraud of creditors. In many jurisdictions the debtor is held to be an indispensable party to such action.[25]

South Carolina.— Sloan *v.* Hunter, 56 S. C. 385, 34 S. E. 658, 879, 76 Am. St. Rep. 551.

Texas.— Cleveland *v.* People's Nat. Bank, (Civ. App. 1899) 49 S. W. 523.

Virginia.— Clough *v.* Thompson, 7 Gratt. 26. See also Bullock *v.* Gordon, 4 Munf. 450.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 742.

The cestuis que trustent as well as the trustee are necessary parties to a bill to set aside a trust deed as executed in fraud of creditors. Talbott *v.* Leatherbury, 92 Md. 166, 48 Atl. 733; Thomas *v.* Torrance, 1 Ch. Chamb. (U. C.) 46.

23. *Alabama.*— Watts *v.* Burgess, 126 Ala. 170, 27 So. 763; Brooks *v.* Lowenstein, 124 Ala. 158, 27 So. 520; Williams *v.* Spragins, 102 Ala. 424, 15 So. 247.

Colorado.— See Clark *v.* Knox, 32 Colo. 342, 76 Pac. 372.

District of Columbia.— Clark *v.* Bradley Coal, etc., Co., 6 App. Cas. 437, where it was held improper to make the trustees and beneficiaries in an existing deed of trust which was not attacked parties to a bill to set aside a deed as fraudulent.

Illinois.— Kratz *v.* Buck, 111 Ill. 40.

New York.— Briggs *v.* Davis, 20 N. Y. 15, 75 Am. Dec. 363. See also Sprogg *v.* Dichman, 28 Misc. 409, 59 N. Y. Suppl. 966.

United States.— Venable *v.* Bank, 2 Pet. 107, 7 L. ed. 364.

Canada.— Thompson *v.* Dodd, 26 Grant Ch. (U. C.) 381.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 742.

Other creditors.— An action in relief, afforded by the Ohio statute (Rev. St. §§ 6344, 6345) relating to conveyances in fraud of creditors is for the benefit of all creditors, and it is not necessary, although it may be proper, that other creditors be made parties defendant, unless brought in to acquire a preference. Bowlus *v.* Shanabarger, 19 Ohio Cir. Ct. 137, 10 Ohio Cir. Dec. 167.

Parol declaration of trust.— A party claiming an interest in a conveyance under a parol declaration of trust need not be made a party to a suit to set aside a conveyance, as such trust could not be enforced. Whelan *v.* Whelan, 3 Cow. (N. Y.) 537.

24. Johnson *v.* Worthington, 30 Ill. App. 617. See, generally, PARTIES.

25. *Alabama.*— Powe *v.* McLeod, 76 Ala. 418; Harris *v.* Moore, 72 Ala. 507. *Compare* cases cited *infra*, note 30.

Georgia.— Stephens *v.* Whitehead, 75 Ga. 294.

Kentucky.— Bevins *v.* Eisman, 56 S. W. 410, 21 Ky. L. Rep. 1772. See, however, Matthews *v.* Lloyd, 89 Ky. 625, 13 S. W. 106, 11 Ky. L. Rep. 843, holding that the debtor is not a necessary party where he is insolvent.

Louisiana.—Black *v.* Bordelon, 38 La. Ann. 696; Zimmerman *v.* Fitch, 28 La. Ann. 454; Lawrence *v.* Bowman, 6 Rob. 421. To annul a contract for fraud or simulation, the original debtor must be a party to the suit only where the debt has not been previously liquidated by a judgment. Russell *v.* Keefe, 28 La. Ann. 928; Dumas *v.* Lefebvre, 10 Rob. 399; Potier *v.* Harman, 1 Rob. 525; Lambeth *v.* Murray, 15 La. 466; Atwill *v.* Belden, 1 La. 500.

Maine.— See Laughton *v.* Harden, 68 Me. 208, where a creditor, having levied an execution on land which his debtor had previously conveyed to defraud his creditors, filed a bill against the grantee to compel him to release his title, praying also certain rights as attacking creditor to a part of the land so conveyed, but not included in the levy, and it was held that as to the land levied on, the grantor was not a necessary party to the bill, but as to that part of the bill praying relief as to land not levied on he was an indispensable party.

Maryland.— Lovejoy *v.* Irelan, 17 Md. 525, 79 Am. Dec. 667.

New Jersey.— Robinson *v.* Davis, 11 N. J. Eq. 302, 69 Am. Dec. 591; Hunt *v.* Field, 9 N. J. Eq. 36, 57 Am. Dec. 365.

New York.— Miller *v.* Hall, 70 N. Y. 250 [*affirming* 40 N. Y. Super. Ct. 262]; Beardsley Scythe Co. *v.* Foster, 36 N. Y. 561; Lawrence *v.* Bank of Republic, 35 N. Y. 320; Hubbell *v.* Merchants' Nat. Bank, 42 Hun 200; Allison *v.* Weller, 3 Hun 608, 6 Thomps. & C. 291; Shaver *v.* Brainard, 29 Barb. 25; Hammond *v.* Hudson River Iron, etc., Co., 20 Barb. 378; Palen *v.* Bushnell, 18 Abb. Pr. 301; Wallace *v.* Eaton, 5 How. Pr. 99; Fellows *v.* Fellows, 4 Cow. 682, 15 Am. Dec. 412; Boyd *v.* Hoyt, 5 Paige 65; Sewall *v.* Russell, 2 Paige 175.

North Carolina.— Murphy *v.* Jackson, 58 N. C. 11.

Tennessee.— Tyler *v.* Hamblin, 11 Heisk. 152; Harrison *v.* Hallum, 5 Coldw. 525.

Texas.— Birdwell *v.* Butler, 13 Tex. 338.

United States.— Gaylord *v.* Kelshaw, 1 Wall. 81, 17 L. ed. 612.

In other jurisdictions it is held that where property has been transferred merely as security for a debt, the debtor is a necessary party, but where he has parted with his entire interest in the property conveyed, an action to set aside such conveyance is regarded as in the nature of a proceeding *in rem*, and the debtor, while a proper is not a necessary party.[26] In at least one jurisdiction it is held that a judgment debtor is a necessary party to a bill to set aside a fraudulent conveyance, only when the deed of conveyance sought to be avoided contains covenants of warranty.[27]

(II) *INSOLVENT.* Where the debtor becomes bankrupt, he is not a necessary party to a bill filed by the assignee in bankruptcy.[28]

d. Representative of Debtor. There is the same conflict of authority on the question as to whether the personal representative of a debtor is a necessary party to an action to set aside a fraudulent conveyance made by the deceased as there is in the case of the judgment debtor. In a number of jurisdictions the courts hold that such representative is a necessary party;[29] while in others it is held that he is a proper but not a necessary party to the action, and that it is only when the estate in the hands of the personal representative may be affected by the decree that he is a necessary party.[30]

Canada.— Gibbons *v.* Darvill, 12 Ont. Pr. 478. See also Beattie *v.* Wenger, 24 Ont. App. 72. See, however, Scott *v.* Burnham, 19 Grant Ch. (U. C.) 234, holding that to a bill to set aside a conveyance as void against the grantor's creditors, the grantor to whom a small balance was due and who resided in the United States was not a necessary party.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 743.

26. *California.*— Blanc *v.* Paymaster Min. Co., 95 Cal. 524, 30 Pac. 765, 29 Am. St. Rep. 149.

Colorado.— Homestead Min. Co. *v.* Reynolds, 30 Colo. 330, 70 Pac. 422 [*citing* Mulock *v.* Wilson, 19 Colo. 296, 35 Pac. 532]. *Contra,* Allen *v.* Tritch, 5 Colo. 222 [*cited* with approval in McPhee *v.* O'Rourke, 10 Colo. 301, 15 Pac. 420, 13 Am. St. Rep. 579].

Iowa.— Dunn *v.* Wolf, 81 Iowa 688, 47 N. W. 887; Potter *v.* Phillips, 44 Iowa 353. See also Taylor *v.* Branscombe, 74 Iowa 534, 38 N. W. 400. See Cedar Rapids Nat. Bank *v.* Lavery, 110 Iowa 575, 81 N. W. 775, 80 Am. St. Rep. 325, holding that the wife is a proper party in an action to set aside as fraudulent a conveyance by her to her husband.

Kansas.— See Metzger *v.* Burnett, 5 Kan. App. 374, 48 Pac. 599.

Minnesota.— Campbell *v.* Jones, 25 Minn. 155. See also Leonard *v.* Green, 34 Minn. 137, 24 N. W. 915, 30 Minn. 496, 16 N. W. 399.

Mississippi.— Leach *v.* Shelby, 58 Miss. 681; Taylor *v.* Webb, 54 Miss. 36.

Missouri.— Schneider *v.* Patton, 175 Mo. 684, 75 S. W. 155; Jackman *v.* Robinson, 64 Mo. 289; Merry *v.* Fremon, 44 Mo. 518; Wright *v.* Cornelius, 10 Mo. 174, which goes the length of holding that the debtor is not even a proper party.

Nebraska.—Glover *v.* Hargadine-McKittrick Dry-Goods Co., 62 Nebr. 483, 87 N. W. 170. See, however, Plattsmouth First Nat. Bank *v.* Gibson, (Nebr. 1903) 94 N. W. 965.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 743.

Third person as grantor.— In an action to set aside a deed fraudulent as to creditors, a person to whom the alleged fraudulent transaction was made, and who merely conveyed the land by a quitclaim deed, is not a necessary party defendant. Hoffmann *v.* Ackermann, 110 La. 1070, 35 So. 293; Hunt *v.* Dean, 91 Minn. 96, 97 N. W. 574.

27. Quinn *v.* People, 146 Ill. 275, 34 N. E. 148; Johnson *v.* Huber, 134 Ill. 511, 25 N. E. 790; Spear *v.* Campbell, 5 Ill. 424.

28. Buffington *v.* Harvey, 95 U. S. 99, 24 L. ed. 381; Benton *v.* Allen, 2 Fed. 448; Weise *v.* Wardle, L. R. 19 Eq. 171, 23 Wkly. Rep. 208. *Contra,* Verselius *v.* Verselius, 28 Fed. Cas. No. 16,925, 9 Blatchf. 189; Johnson *v.* May, 16 Nat. Bankr. Reg. 425.

29. *California.*— See Bachman *v.* Sepulveda, 39 Cal. 688.

Illinois.— McDowell *v.* Cochran, 11 Ill. 31. See also Johnson *v.* Huber, 134 Ill. 511, 25 N. E. 790 [*reversing* 34 Ill. App. 527], holding that the personal representative is a necessary party where the conveyance was made by a warranty deed.

Indiana.— Hays *v.* Montgomery, 118 Ind. 91, 20 N. E. 646; Vestal *v.* Allen, 94 Ind. 268; Willis *v.* Thompson, 93 Ind. 62; Allen *v.* Vestal, 80 Ind. 245.

Iowa.— Postlewait *v.* Howes, 3 Iowa 365.

Maryland.— Birely *v.* Staley, 5 Gill & J. 432, 25 Am. Dec. 303.

South Carolina.— Brockman *v.* Bowman, 1 Hill Eq. 338; Brock *v.* Bowman, Rich. Eq. Cas. 185.

Vermont.— Peaslee *v.* Barney, 1 D. Chipm. 331, 6 Am. Dec. 743.

Virginia.— See Chamberlayne *v.* Temple, 2 Rand. 384, 14 Am. Dec. 786.

West Virginia.— Boggs *v.* McCoy, 15 W. Va. 344.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 747.

30. *Alabama.*— Tompkins *v.* Levy, 87 Ala. 263, 6 So. 346, 13 Am. St. Rep. 31; Coffey

e. Assignee or Trustee in Bankruptcy or Insolvency. In many jurisdictions it is held that the assignee in bankruptcy, or the trustee of an insolvent debtor, is a necessary party to a bill filed by the creditors to vacate a fraudulent conveyance made by the bankrupt or insolvent prior to the bankruptcy or insolvency proceedings.[31]

f. Heirs. In some jurisdictions the rule is laid down that the debtor's heirs are not necessary parties to an action to set aside a fraudulent conveyance made by the debtor, on the ground that they have no interest in the property.[32]

g. Co-Grantors or Coöbligors. Where a judgment debtor who is part owner of certain property joins with the other owners thereof in a conveyance of such property, the other vendors are not necessary or even proper parties to a bill to set such conveyances aside on the ground of fraud, since the creditor has no rights in or to the interest conveyed by them.[33] Likewise in a suit to set aside as fraudulent a deed executed by one of two joint judgment debtors, the other judgment debtor is not a necessary party thereto.[34]

h. Grantees — (i) *IN GENERAL.* In an action to set aside a fraudulent conveyance or transfer of property, the grantee or transferee is an indispensable party, where he still retains the title to the property;[35] and where there are

v. Norwood, 81 Ala. 512, 8 So. 199; Houston *v.* Blackman, 66 Ala. 559, 41 Am. Rep. 756. *Compare* Powe *v.* McLeod, 76 Ala. 418 (where it is held that the personal representative was a necessary party; one of the grounds for the decision being that the legal title to the property remained in the grantor); Pharis *v.* Leachman, 20 Ala. 662.

Maine.— See Dockray *v.* Mason, 48 Me. 178.

Mississippi.— Taylor *v.* Webb, 54 Miss. 36.

Missouri.— Jackman *v.* Robinson, 64 Mo. 289; Merry *v.* Fremon, 44 Mo. 518. But see Coates *v.* Day, 9 Mo. 304.

New York.— Brooklyn First Nat. Bank *v.* Wright, 38 N. Y. App. Div. 2, 56 N. Y. Suppl. 308; Jackson *v.* Forrest, 2 Barb. Ch. 576.

Tennessee.— McCutchen *v.* Pigue, 4 Heisk. 565.

Texas.— See Heard *v.* McKinney, 1 Tex. Unrep. Cas. 83, holding that the creditor and vendee are the only necessary parties to a suit to set aside as fraudulent toward creditors the deed of one who died without property, and on whose estate no administration has been taken out.

Wisconsin.— Cornell *v.* Radway, 22 Wis. 260.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 744.

31. *Alabama.*— Harris *v.* Moore, 72 Ala. 507.

California.— See Pfister *v.* Dascey, 65 Cal. 403, 4 Pac. 393.

Maryland.— Jamison *v.* Chesnut, 8 Md. 34; Waters *v.* Dashiell, 1 Md. 455; Swan *v.* Dent, 2 Md. Ch. 111. But see Farrow *v.* Teackle, 4 Harr. & J. 271.

New Jersey.— Rankin *v.* Gardner, (Ch. 1896) 34 Atl. 935.

New York.— Ward *v.* Van Bokkelen, 2 Paige 289.

Virginia.— Tabb *v.* Hughes, (1887) 3 S. E. 148.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 744.

Contra.— Oliphant *v.* Hartley, 32 Ark. 465; Mechanics' Nat. Bank *v.* Landauer, 68 Wis. 44, 31 N. W. 160.

32. Freeman *v.* Pullen, 119 Ala. 235, 24 So. 57; Simmons *v.* Ingram, 60 Miss. 886; Taylor *v.* Webb, 54 Miss. 36; Wall *v.* Fairley, 73 N. C. 464; Smith *v.* Grim, 26 Pa. St. 95, 67 Am. Dec. 400; Irwin *v.* Hess, 12 Pa. Super. Ct. 163. *Compare* Hunt *v.* Van Derveer, 43 N. J. Eq. 414, 6 Atl. 20; Walker *v.* Powers, 104 U. S. 245, 26 L. ed. 729.

33. Campbell *v.* Davis, 85 Ala. 56, 4 So. 140, holding, however, that the misjoinder of such other vendors is a defense personal to them, and not available as ground of a demurrer to the grantee.

34. Freeman *v.* Pullen, 119 Ala. 235, 24 So. 57 (holding that under Ala. Code (1896), § 40, permitting a partner or his legal representative to be sued for a firm debt, the others need not be joined in a suit to subject land conveyed to the wife of a deceased partner to such debt); Quinn *v.* People, 146 Ill. 275, 34 N. E. 148 [*affirming* 45 Ill. App. 547]; Johnson *v.* Worthington, 30 Ill. App. 617; Tatum *v.* Roberts, 59 Minn. 52, 60 N. W. 848. See also Jones *v.* Slubey, 5 Harr. & J. (Md.) 372.

Contra.— Pyper *v.* Cameron, 13 Grant Ch. (U. C.) 131, where to a bill by an execution creditor of two joint debtors to set aside conveyances by one of them as fraudulent and void against creditors, the grantor was a defendant, and it was held that if the grantor was a necessary party, his codebtor should be a party also.

35. *Kentucky.*— Ouerbacker *v.* White, 6 Ky. L. Rep. 739.

Louisiana.— Trounstine *v.* Ware, 39 La. Ann. 939, 3 So. 122; Seixas *v.* King, 39 La. Ann. 510, 2 So. 416; Yocum *v.* Bullit, 6 Mart. N. S. 324, 17 Am. Dec. 184.

Maryland.— Lovejoy *v.* Irelan, 17 Md. 525, 79 Am. Dec. 667.

Mississippi.— Stanton *v.* Green, 34 Miss. 576.

New Jersey.— Terhune *v.* Sibbald, 55 N. J.

several grantees or other parties claiming an interest under the conveyance or transfer, they are all necessary parties to the bill.[36]

(II) *INTERMEDIATE GRANTEES.* The general rule is that an intermediate grantee through whom the title to the property passes from the debtor to the ultimate grantee, and whose title and interest in the property has been divested, is not a necessary although he may be a proper party, in an action to set aside such conveyances as fraudulent.[37]

(III) *GRANTEES CLAIMING UNDER SEPARATE CONVEYANCES.* In an action by a creditor to set aside conveyances made by his debtor as fraudulent, it is proper to join several grantees claiming different portions of the property by separate and distinct conveyances.[38]

Eq. 236, 37 Atl. 454; Randolph *v.* Daly, 16 N. J. Eq. 313.

New York.— Gray *v.* Schenck, 4 N. Y. 460; Sage *v.* Mosher, 28 Barb. 287; Miller *v.* Hall, 40 N. Y. Super. Ct. 262.

South Carolina.— Frazer *v.* Legare, Bailey Eq. 389.

Texas.— Waddell *v.* Williams, 37 Tex. 351; O'Neal *v.* Clymer, (Civ. App. 1900) 61 S. W. 545; Archenhold *v.* B. C. Evans Co., 11 Tex. Civ. App. 138, 32 S. W. 795.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 746.

Where the debtor still retains a legal or equitable interest in the property, on a bill by creditors to obtain satisfaction out of the property assigned, the assignee need not be made a party. Edmeston *v.* Lyde, 1 Paige (N. Y.) 637, 19 Am. Dec. 454.

36. *Alabama.*— Smith-Dimmick Lumber Co. *v.* Teague, 119 Ala. 385, 24 So. 4.

Illinois.—Gudgel *v.* Kitterman, 108 Ill. 50.

Kentucky.— Whayne *v.* Morgan, 12 S. W. 128, 11 Ky. L. Rep. 254.

Missouri.— Jackman *v.* Robinson, 64 Mo. 289.

North Carolina.— Le Duc *v.* Brandt, 110 N. C. 289, 14 S. E. 778; Dawson Bank *v.* Harris, 84 N. C. 206.

Wisconsin.— Adkins *v.* Loucks, 107 Wis. 587, 83 N. W. 934; Winslow *v.* Dousman, 18 Wis. 456.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 746.

Conveyance to separate grantees.— To a bill by an execution creditor to set aside as fraudulent against creditors two distinct conveyances executed at different times to two separate grantees, the two transfers having no connection with one another, a demurrer for multifariousness was allowed. Pyper *v.* Cameron, 13 Grant Ch. (U. C.) 131.

37. *Alabama.*— Williams *v.* Spragins, 102 Ala. 424, 15 So. 247; Sides *v.* Scharff, 93 Ala. 106 9 So. 228; Tompkins *v.* Levy, 87 Ala. 263, 6 So. 346, 13 Am. St. Rep. 31.

California.— Blanc *v.* Paymaster Min. Co., 95 Cal. 524, 30 Pac. 765, 29 Am. St. Rep. 149.

Illinois.— Scott *v.* Aultman Co., 211 Ill. 612, 71 N. E. 1112, 10 Am. St. Rep. 215 [*affirming* 113 Ill. App. 581], where, although an intermediate grantee conveyed by a warranty deed, it was held that she was not a necessary party, since her grantee conveyed by a quitclaim deed, and she was thereby released from all liability under her warranty.

Indiana.— Stout *v.* Stout, 77 Ind. 537.

Maryland.— Walter *v.* Riehl, 38 Md. 211.

Minnesota.— Hunt *v.* Dean, 91 Minn. 96, 97 N. W. 574.

Missouri.— Jackman *v.* Robinson, 64 Mo. 289.

New York.— Sprogg *v.* Dichman, 28 Misc. 409, 59 N. Y. Suppl. 966.

South Carolina.— Bomar *v.* Means, 37 S. C. 520, 16 S. E. 537, 34 Am. St. Rep. 772.

Utah.— U. S. *v.* Church of Jesus Christ, etc., 5 Utah 538, 18 Pac. 35.

Vermont.— Wilson *v.* Spear, 68 Vt. 145, 34 Atl. 429.

West Virginia.— Herzog *v.* Weiler, 24 W. Va. 199.

United States.— Pullman *v.* Stebbins, 51 Fed. 10.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 748.

Contra.— Hyde *v.* Craddick, 10 Rob. (La.) 387.

Conveyance with covenant of warranty.— Where, however, such intermediate conveyance is made with a covenant of warranty, such intermediate grantee is a necessary party. Fraser *v.* Passage, 63 Mich. 551, 30 N. W. 334; Pappenheimer *v.* Roberts, 24 W. Va. 702.

38. *Alabama.*—Allen *v.* Montgomery R. Co., 11 Ala. 437.

Florida.— Bauknight *v.* Sloan, etc., Co., 17 Fla. 284.

Maryland.— Brian *v.* Thomas, 63 Md. 476; Trego *v.* Skinner, 42 Md. 426.

Minnesota.— North *v.* Bradway, 9 Minn. 183.

Mississippi.— Waller *v.* Shannon, 53 Miss. 500; Snodgrass *v.* Andress, 30 Miss. 472, 64 Am. Dec. 169; Wright *v.* Shelton, Sm. & M. Ch. 399.

Missouri.— Rinehart *v.* Long, 95 Mo. 396, 8 S. W. 559; Donovan *v.* Dunning, 69 Mo. 436.

New Hampshire.— Chase *v.* Searles, 45 N. H. 511.

New Jersey.— Randolph *v.* Daly, 16 N. J. Eq. 313; Way *v.* Bragaw, 16 N. J. Eq. 213, 84 Am. Dec. 147.

New York.— Reed *v.* Stryker, 4 Abb. Dec. 26, 12 Abb. Pr. 47 [*reversing* 6 Abb. Pr. 109]; Hammond *v.* Hudson River Iron, etc., Co., 20 Barb. 378; Morton *v.* Weil, 11 Abb. Pr. 421; Jacot *v.* Boyle, 18 How. Pr.

i. Purchasers From Grantee. The general rule is that the purchaser from a grantee is a necessary party to an action to set aside a conveyance on the ground of fraud.[39]

j. Preferred Creditors Under Trust Deed. The decisions are not at all uniform upon the question as to whether in an action to set aside as fraudulent a deed of trust made for the purpose of preferring certain creditors, such preferred creditors are necessary parties or not. In many jurisdictions it is held that it is sufficient to make the trustee a party defendant,[40] while in other jurisdictions it is held that such preferred creditors are necessary parties even where the trustee is made a defendant.[41]

3. Intervention. The practice of permitting judgment creditors to come in and make themselves parties to a bill to set aside a fraudulent conveyance, and thereby obtain the benefit, assuming at the same time their portion of the costs and expenses of the litigation, is well settled.[42] In some jurisdictions by special statutory enactment any person claiming an interest in the property may become a party to the action by joining plaintiff in his bill, or by uniting with defendant in resisting the claim of plaintiff.[43]

106; Bank of British North America *v.* Suydan, 6 How. Pr. 379; Boyd *v.* Hoyt, 5 Paige 65; Fellows *v.* Fellows, 4 Cow. 682, 15 Am. Dec. 412.

North Carolina.— Dawson Bank *v.* Harris, 84 N. C. 206.

Tennessee.— Harrison *v.* Hallum, 5 Coldw. 525; Hughes *v.* Tennison, 3 Tenn. Ch. 641.

Wisconsin.— Hamlin *v.* Wright, 23 Wis. 491.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 752.

39. *Alabama.*— Jones *v.* Wilson, 69 Ala. 400.

Arkansas.— Thornberry *v.* Baxter, 24 Ark. 76.

Louisiana.— Blum *v.* Wyly, 111 La. 1092, 36 So. 202.

Missouri.— Potter *v.* Stevens, 40 Mo. 229.

New York.— Gray *v.* Schenck, 4 N. Y. 460; Cook *v.* Lake, 50 N. Y. App. Div. 92, 63 N. Y. Suppl. 818.

Ohio.— Detwiler *v.* Louison, 18 Ohio Cir. Ct. 434, 10 Ohio Cir. Dec. 95.

Tennessee.— Brevard *v.* Summar, 2 Heisk. 97.

Virginia.— Thornton *v.* Gaar, 87 Va. 315, 12 S. E. 753; Henderson *v.* Henderson, 9 Gratt. 394.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 749.

Conveyance pendente lite.— In an action to set aside a fraudulent conveyance it is not necessary to join the persons to whom the land is conveyed *pendente lite* as defendants. Schaferman *v.* O'Brien, 28 Md. 565, 92 Am. Dec. 708.

Personal representative of grantee.— The personal representative of the deceased grantee, who is not a debtor of plaintiff, and who has no control over the lands or the proceeds thereof, is not a necessary party to a suit seeking to set aside the conveyance to such grantee and another on the ground of fraud. Simon *v.* Sabb, 56 S. C. 38, 33 S. E. 799.

40. Scudder *v.* Voorhis, 5 Sandf. (N. Y.) 271; Hancock *v.* Wooten, 107 N. C. 9, 12 S. E. 199, 11 L. R. A. 466. See also Le Duc *v.* Brandt, 110 N. C. 289, 14 S. E. 778.

41. Hudson *v.* Eisenmayer Milling, etc., Co., 79 Tex. 401, 15 S. W. 385; Collins *v.* Sanger, 8 Tex. Civ. App. 69, 27 S. W. 500; Clough *v.* Thompson, 7 Gratt. (Va.) 26.

42. Strike *v.* McDonald, 2 Harr. & G. (Md.) 291; Honegger *v.* Wettstein, 94 N. Y. 252; Lailman *v.* Hovey, 92 Hun (N. Y.) 419, 36 N. Y. Suppl. 662; Parmelee *v.* Egan, 7 Paige (N. Y.) 610 (holding, however, that such intervening creditors must be so circumstanced that they could themselves have filed a similar bill); Edmeston *v.* Lyde, 1 Paige (N. Y.) 637, 19 Am. Dec. 454; Myers *v.* Fenn, 5 Wall. (U. S.) 205, 18 L. ed. 604.

Bringing in new parties.— In order to make a person a party to a suit to set aside a conveyance as being in fraud of creditors, he must have an interest in the property or relief must be prayed against him. Constable *v.* Weser, 8 Ohio Dec. (Reprint) 247, 6 Cinc. L. Bul. 666. See Hinkle *v.* Gale, 11 S. W. 664, 11 Ky. L. Rep. 126.

43. *Arkansas.*— Senter *v.* Williams, 61 Ark. 189, 32 S. W. 490, 54 Am. St. Rep. 200.

Iowa.— Corn Exch. Bank *v.* Applegate, 91 Iowa 411, 59 N. W. 268; Des Moines Ins. Co. *v.* Lent, 75 Iowa 522, 39 N. W. 826, holding, however, that such creditor must strictly comply with the provisions of the statute, in order to avail himself of the right to intervene given by such statute.

Kansas.— See Miller *v.* Wilkinson, 10 Kan. App. 576, 62 Pac. 253.

Kentucky.— Slusher *v.* Simpkinson, 101 Ky. 594, 40 S. W. 570, 43 S. W. 692, 19 Ky. L. Rep. 1184 (holding that an interpleading creditor may file his claim and prosecute the action to judgment even where the original plaintiff has quit the suit); Sawyers *v.* Langford, 5 Bush 539.

Texas.— Nix *v.* Dukes, 58 Tex. 96, holding likewise that after the intervention of such creditor, the complainant cannot affect his right by a compromise with defendant.

I. Defenses[44] — **1. In General.** The fraudulent character of the conveyance having been established, the grantee may sometimes in the action to set aside the conveyance, or in other proceedings in which the conveyance is attacked, show the existence of matters operating to prevent a particular plaintiff or creditor from attacking the conveyance,[45] or that the cause of action has been extinguished by lapse of time[46] or otherwise.[47] Thus, as seen above, a creditor seeking relief in equity should come with clean hands.[48] Defendant may show that the judgment has been paid and therefore has ceased to be operative as a basis of a suit in equity.[49] And since the conveyance as between the parties is valid,[50] although fraudulent as to creditors, if a creditor in pursuing legal process against the property is really acting in the interest of the grantor, the grantee may resist the enforcement of such process.[51] Where the conveyance operates to defeat the legal rights of creditors the defense cannot be asserted against a creditor pursuing the property that the course followed by the debtor may possibly have been the best adapted to conserve the rights of all the creditors.[52] Nor is it a defense that the grantor purposed to compromise with his creditors and to pay them a part of the amount owing to them.[53] Nor is the mere fact that the grantee has made valuable improvements pending the action a defense.[54] In an action by a purchaser at an execution sale of property to set aside an alleged fraudulent conveyance thereof, it is no defense that plaintiff paid an inadequate consideration,[55] if such inadequacy is due to the effect of the conveyance in clouding the title.[56]

2. Impeachment of Creditor's Claim or Judgment — a. In General. Where a party claiming to be a creditor attacks a conveyance by the alleged debtor as in fraud of his rights, the primary fact to be established is the existence of the debt to which the property conveyed would be subject if the conveyance did not stand in the way, obstructing legal remedies to reach it,[57] and the demand of the cred-

Virginia.— Anderson *v.* Mossy Creek Woolen Mills Co., 100 Va. 420, 41 S. E. 854.

West Virginia.— See Cox *v.* Horner, 43 W. Va. 786, 28 S. E. 780.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 753.

Notice of application to intervene must, however, be given to both claimant and grantee under the New Jersey statute. Perrine *v.* Perrine, 63 N. J. Eq. 483, 52 Atl. 627.

Substitution.— After a judgment creditor has filed a bill to reach property fraudulently assigned, the debtor's bail may pay the judgment debt, disclose his interest by petition or any convenient mode the court shall direct, and be let in to prosecute the bill to a final decree. Harris *v.* Carlisle, 12 Ohio 169.

44. Persons who may attack conveyance see *supra*, IV.

Estoppel see *supra*, IV, G.

Bona fide purchasers see *supra*, VII, B; XIII, B, 2.

Payment of consideration see *supra*, VII, C; VIII.

45. Frankfort Deposit Bank *v.* Caffee, 135 Ala. 208, 33 So. 152. See *supra*, IV.

That plaintiff is indebted upon simple contract to the judgment debtor in an amount equal to plaintiff's judgment is a defense. Lashmett *v.* Prall, 2 Nebr. (Unoff.) 284, 96 N. W. 152.

46. See *infra*, XIV, I, 4.

47. Nichols *v.* Nichols, 40 Misc. (N. Y.) 9, 81 N. Y. Suppl. 156.

48. See *supra*, XIV, E, 7. But in an action by a judgment creditor to set aside a conveyance as in fraud of creditors, it was held that a defense that the deed under which plaintiff claimed title to the property for the rent of which her judgment was recovered had itself been set aside as fraudulent was not available, since defendants, not being creditors of the grantor in the latter deed, could not complain of it, the court remarking that the hands of plaintiff were quite as clean as those of a defendant who sought on purely technical grounds to avoid the payment of a debt which he owed to someone. Yetzer *v.* Yetzer, 112 Iowa 162, 83 N. W. 889.

49. Minneapolis Threshing Mach. Co. *v.* Jones, 89 Minn. 184, 94 N. W. 551; Nichols *v.* Nichols, 40 Misc. (N. Y.) 9, 81 N. Y. Suppl. 156.

50. See *supra*, XIII, A.

51. Feagan *v.* Cureton, 19 Ga. 404.

52. Stewart *v.* Lapsley, 7 La. Ann. 456.

53. Fox *v.* Webster, 46 Mo. 181.

54. Grandin *v.* Chicago First Nat. Bank, (Nebr.) 98 N. W. 70, a case in which an action to set aside the conveyance was pending for several years. See *supra*, XIII, A, 4, a, (III), (D); and, generally, Improvements.

55. Bradshaw *v.* Halpin, 180 Mo. 666, 79 S. W. 685; Rinehart *v.* Long, 95 Mo. 396, 8 S. W. 559.

56. Woodard *v.* Mastin, 106 Mo. 324, 17 S. W. 308.

57. Pickett *v.* Pipkin, 64 Ala. 520.

itor must be subject to examination in order to see whether he has a right as such to question the validity of the conveyance.[58] Parties claiming under the conveyance have not only the right to require proof of the debt but have the right to prefer against the claim or demand pleaded any defenses, not merely personal, which the debtor could make in an independent suit upon it.[59]

b. Effect of Judgment Obtained by Creditor. While a judgment against the grantor whether rendered prior or subsequent to the conveyance is competent evidence of a debt owing by the grantor to plaintiff and of the fact that the party in whose favor the judgment is rendered stands in a relation to be injured by the conveyance,[60] it is not conclusive of such relationship as against the grantee,[61] the general rule being that when the right of a third person may be affected collaterally by a judgment procured by fraud or collusion of the parties thereto or where for any reason the judgment is erroneous and void and he cannot procure a reversal by appeal or a writ of error, he may show its invalidity in any proceeding in which it is sought to be used to his prejudice.[62] The grantee in the conveyance therefore, not being a party to the judgment obtained by the creditor, may, in a suit in which the validity of the conveyance is assailed, show a want of jurisdiction in the court which rendered the judgment,[63] or that it was obtained by fraud,[64] or was the result of collusion between the parties to it,[65] and that there was no debt or legal obligation nor any real cause of action to support the judgment,[66] or that the cause of action accrued under such circumstances that the creditor has no right to impeach the conveyance.[67]

c. Effect of Judgment in Absence of Fraud or Collusion. But while it is a general rule that a judgment is not conclusive as to persons not parties or privies, there are some exceptions, and one of the important qualifications of the rule is that where a judgment in a personal action has been rendered in the regular course of judicial proceedings by a court of competent jurisdiction, and it cannot be objected to on the ground that it was obtained by fraud or collusion, it is, whether rendered on default or after contest, conclusive as to the relation of debtor and creditor between the parties and the amount of the indebtedness, and cannot be collaterally impeached by third parties in a subsequent suit in which such relation and indebtedness are called in question.[68] The grantee therefore

58. Miller *v.* Miller, 23 Me. 22, 39 Am. Dec. 597.

59. Frankfort Deposit Bank *v.* Caffee, 135 Ala. 208, 33 So. 152; Pickett *v.* Pipkin, 64 Ala. 520; Hibben *v.* Soyer, 33 Wis. 319. See also *supra*, IV.

60. Pickett *v.* Pipkin, 64 Ala. 520.

61. Inman *v.* Mead, 97 Mass. 310.

Judgments may be fraudulent as well as deeds. It is therefore open to the grantee to show that the recovery of the judgment was by covin or collusion. Carter *v.* Bennett, 4 Fla. 283.

To what time judgment relates.— The judgment is not evidence of an indebtedness existing at any time anterior to its rendition, and if the conveyance is impeached as merely voluntary and the time of rendition is subsequent to the conveyance there must be other evidence than the judgment affords to show the existence of the debt when the conveyance was made. Lawson *v.* Alabama Warehouse Co., 73 Ala. 289; Thomson *v.* Crane, 73 Fed. 327.

In Louisiana the grantee may controvert the demand of plaintiff, although liquidated by judgment in the same manner that the debtor might have done before the judgment. Lopez *v.* Bergel, 12 La. 197.

62. Collinson *v.* Jackson, 14 Fed. 305, 8 Sawy. 357.

Collateral attack see, generally, JUDGMENTS.

63. Lawson *v.* Alabama Warehouse Co., 73 Ala. 289.

64. Faris *v.* Durham, 5 T. B. Mon. (Ky.) 397, 17 Am. Dec. 77; Miller *v.* Miller, 23 Me. 22, 39 Am. Dec. 597.

65. Lawson *v.* Alabama Warehouse Co., 73 Ala. 289; Church *v.* Chapin, 35 Vt. 223.

66. Lawson *v.* Alabama Warehouse Co., 73 Ala. 289.

67. Miller *v.* Miller, 23 Me. 22, 39 Am. Dec. 597; Esty *v.* Long, 41 N. H. 103.

Claim accruing after conveyance.— The grantee may show that the claim upon which the judgment is based accrued after his purchase from the debtor unless the conveyance was merely colorable, so that the beneficial interest was not intended to pass to the grantee or unless the object appears to have been to defraud future as well as prior creditors. Miller *v.* Miller, 23 Me. 22, 39 Am. Dec. 597.

68. *Alabama.*— Pickett *v.* Pipkin, 64 Ala. 520.

Indiana.— Reid *v.* Brown, Wils. 312.

Iowa.— Strong *v.* Lawrence, 58 Iowa 55, 12 N. W. 74.

cannot draw in question mere irregularities which have arisen in the course of the proceedings,[69] or take advantage of errors which the debtor has waived,[70] or set up defenses which the grantor failed to interpose, if such failure was not due to collusion.[71]

3. INCONSISTENT DEFENSES. Where the grantor in an alleged fraudulent conveyance of land denies that the conveyance is fraudulent, but in the alternative asks that if the conveyance shall be adjudged to be fraudulent he may have the privilege of selecting his homestead from the premises conveyed, his answer cannot be objected to on the ground of interposing inconsistent defenses.[72]

4. LIMITATIONS AND LACHES — a. Limitation of Actions[73] — (i) *IN GENERAL.* Various statutory provisions exist in the different jurisdictions prescribing the time within which an action to set aside an alleged fraudulent conveyance or transfer may be brought;[74] and if creditors do not by proper judicial proceed-

Maine.— Sidensparker *v.* Sidensparker, 52 Me. 481, 83 Am. Dec. 527.

Minnesota.— Ferguson *v.* Kumler, 11 Minn. 104.

New Hampshire.— Vogt *v.* Ticknor, 48 N. H. 242, where the court said that it is contrary to common experience for men to make conveyances to defraud their creditors and afterward collude with others to suffer unfounded judgments in order to defeat their prior fraudulent conveyances and that when such an exceptional case arises it will be quite safe to leave the prior grantee to impeach the judgment by showing that it was collusive and not for a genuine debt.

New York.— Decker *v.* Decker, 108 N. Y. 128, 15 N. E. 307; Candee *v.* Lord, 2 N. Y. 269, 51 Am. Dec. 294. *Compare* Voorhees *v.* Seymour, 26 Barb. 569; New York, etc., R. Co. *v.* Kyle, 5 Bosw. 587.

Tennessee.— Mowry *v.* Davenport, 6 Lea 80.

United States.— Alkire Grocery Co. *v.* Richesin, 91 Fed. 79.

69. Lawson *v.* Alabama Warehouse Co., 73 Ala. 289; Taylor *v.* Webb, 54 Miss. 36; and other cases cited in the preceding note. The grantee cannot show error or irregularity in the rendition of the judgment or laches in making defense against it, or that the court was mistaken as to the law and the rights of the parties. Pickett *v.* Pipkin, 64 Ala. 520.

The mere fact that a default judgment is erroneous as to amount or otherwise unjust does not avail defendant, for the reason that such fact of itself would not affect the presumption of good faith on the part of plaintiff in obtaining it. Walters *v.* Walters, 28 Ill. App. 633.

70. Lawson *v.* Alabama Warehouse Co., 73 Ala. 289.

71. Scott *v.* Indianapolis Wagon Works, 48 Ind. 75; Minnesota Thresher Mfg. Co. *v.* Schaack, 10 S. D. 511, 74 N. W. 445. Although a claim at the time of a transfer of property by the debtor is barred by limitation, where the bar is not pleaded by the debtor, and the claim is reduced to judgment, the transferee cannot interpose the defense to a creditors' bill to subject the property to payment of the judgment. McMannomy *v.* Chicago, etc., R. Co., 167 Ill. 497, 47 N. E. 712 [*reversing* 63 Ill. App. 259]. It is not open to the grantee to show that the person in whose name judgment was recovered was not the real party in interest or that the real name of the person recovering judgment was other than that in which the judgment was recovered. Scott *v.* Indianapolis Wagon Works, 48 Ind. 75. Especially will this defense (that the suit was not prosecuted in the name of the real party in interest) not be available to the grantee if the suit was so prosecuted with the consent of the person having the beneficial ownership of the claim. Lawson *v.* Alabama Warehouse Co., 73 Ala. 289. The fraudulent grantee cannot object that the judgment misspelled the name of the debtor, the judgment having been duly recovered. Fuller *v.* Nelson, 35 Minn. 213, 28 N. W. 511.

72. Wilks *v.* Vaughan, (Ark. 1904) 83 S. W. 913; Stubendorf *v.* Hoffman, 23 Nebr. 360, 36 N. W. 581.

73. See, generally, LIMITATIONS OF ACTIONS.

74. *Alabama.*—Washington *v.* Norwood, 128 Ala. 383, 30 So. 405; Stoutz *v.* Huger, 107 Ala. 248, 18 So. 126.

California.— Tully *v.* Tully, 137 Cal. 60, 69 Pac. 700.

Indiana.— State *v.* Osborn, 143 Ind. 671, 42 N. E. 921; De Armond *v.* Ballou, 122 Ind. 398, 23 N. E. 766; Stone *v.* Brown, 116 Ind. 78, 18 N. E. 392; Duncan *v.* Cravens, 55 Ind. 525. See also Vestal *v.* Allen, 94 Ind. 268.

Kentucky.— Dorsey *v.* Phillips, 84 Ky. 420, 1 S. W. 667, 8 Ky. L. Rep. 405; Phillips *v.* Shipp, 81 Ky. 436, 5 Ky. L. Rep. 460; Green *v.* Salmon, 63 S. W. 270, 23 Ky. L. Rep. 517; Poynter *v.* Mallory, 45 S. W. 1042, 20 Ky. L. Rep. 284; Sanders *v.* Wade, 30 S. W. 656, 17 Ky. L. Rep. 205; Cotton *v.* Brown, 4 S. W. 294, 9 Ky. L. Rep. 115.

Louisiana.— Gladney *v.* Manning, 48 La. Ann. 316, 19 So. 276; Mossop *v.* His Creditors, 41 La. Ann. 296, 6 So. 134; St. Germain *v.* Landry, 28 La. Ann. 652; Powell *v.* O'Neil, 24 La. Ann. 522; Brewer *v.* Kelly, 24 La. Ann. 246; Lafitte *v.* Daigre, 24 La. Ann. 123; Decuir *v.* Veazey, 8 La. Ann. 453; Dennistoun *v.* Nutt, 2 La. Ann. 483; Baum's Succession, 11 Rob. 314; Gates *v.* Legendre, 10 Rob. 74; Avart *v.* His Creditors, 8 Mart. N. S. 528.

ings effect the cancellation of the fraudulent grantee's title within the statutory

Michigan.— Daniel *v.* Palmer, 124 Mich. 335, 82 N. W. 1067.

Ohio.— Stivens *v.* Summers, 68 Ohio St. 421, 67 N. E. 884; Boies *v.* Johnson, 25 Ohio Cir. Ct. 331.

Tennessee.— German Bank *v.* Haller, 101 Tenn. 83, 52 S. W. 807; Stacker *v.* Wilson, (Ch. App. 1899) 52 S. W. 709.

Texas.— Grumbles *v.* Sneed, 22 Tex. 565; Rutherford *v.* Carr, (Civ. App. 1905) 84 S. W. 659 (holding that an action to set aside a voidable deed and to recover land is governed by Batts Annot. Civ. St. art. 3358, providing that an action "for the recovery of real estate, for which no limitation is otherwise prescribed, shall be brought within four years after the cause accrued"); Gans *v.* Marx, 25 Tex. Civ. App. 497, 61 S. W. 527.

United States.— Sheldon *v.* Keokuk Northern Line Packet Co., 8 Fed. 769, 10 Biss. 470, construing Wisconsin statute.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 730.

Relief against voluntary conveyances.— In some jurisdictions statutory provisions exist limiting the time within which suit may be brought to avoid a conveyance, assignment, or transfer of the property of a debtor on the ground that it is without consideration deemed valuable in law. Kinney *v.* Craig, 103 Va. 158, 48 S. E. 864; Vashon *v.* Barrett, 99 Va. 344, 38 S. E. 200 (holding that the burden of showing that the transfer took place more than five years before the institution of a suit to set aside by a creditor is upon the party pleading the statute); Welsh *v.* Solenberger, 85 Va. 441, 8 S. E. 91; Scraggs *v.* Hill, 43 W. Va. 162, 27 S. E. 310; McCue *v.* McCue, 41 W. Va. 151, 23 S. E. 689; Humphrey *v.* Spencer, 36 W. Va. 11, 14 S. E. 410; Hutchinson *v.* Boltz, 35 W. Va. 754, 14 S. E. 267; Glascock *v.* Brandon, 35 W. Va. 84, 12 S. E. 1102; Himan *v.* Thorn, 32 W. Va. 507, 9 S. E. 930. It has been held that such statutory limitation is applicable to subsequent as well as existing creditors. Hunter *v.* Hunter, 10 W. Va. 321. But these statutes are held to impose no limitation upon the right of a creditor to institute a suit to attack a transfer as fraudulent in fact. Kinney *v.* Craig, 103 Va. 158, 48 S. E. 864; Flook *v.* Armentrout, 100 Va. 638, 42 S. E. 686; Bumgardner *v.* Harris, 92 Va. 188, 23 S. E. 229; Boggess *v.* Richards, 39 W. Va. 567, 20 S. E. 599, 45 Am. St. Rep. 938, 26 L. R. A. 537; Himan *v.* Thorn, 32 W. Va. 507, 9 S. E. 930; Hunter *v.* Hunter, 10 W. Va. 321. See also Wilson *v.* Buchanan, 7 Gratt. (Va.) 334.

Preferential transfers.— Special statutes have been passed in some jurisdictions limiting the time within which suit may be brought to avoid preferential transfers. Downer *v.* Porter, 116 Ky. 422, 76 S. W. 135, 25 Ky. L. Rep. 571; Montgomery *v.* Allen, 107 Ky. 298, 53 S. W. 813, 21 Ky. L. Rep. 1001; Gladney *v.* Manning, 48 La. Ann. 316, 19 So. 276; Morris *v.* Cain, 39 La. Ann. 712, 1 So. 797, 2 So. 418; Renshaw *v.* Dowty, 39 La. Ann. 608, 2 So. 58; St. Germain *v.* Landry, 28 La. Ann. 652; Lafitte *v.* Daigre, 24 La. Ann. 123; Maas *v.* Miller, 58 Ohio St. 483, 51 N. E. 158 (holding that Ohio Rev. St. § 4982, limiting the time within which certain actions shall be commenced to four years after their accrual, does not apply to an action where the petition therein discloses a right to relief under section 6343, providing that assignments in contemplation of insolvency with the intent to prefer certain creditors shall inure to the benefit of all the creditors); Nuzum *v.* Herron, 52 W. Va. 499, 44 S. E. 257; Kennewig Co. *v.* Moore, 49 W. Va. 323, 38 S. E. 558; Smith *v.* Smith, 48 W. Va. 51, 35 S. E. 876; Herold *v.* Barlow, 47 W. Va. 750, 36 S. E. 8; Casto *v.* Greer, 44 W. Va. 332, 30 S. E. 100. But in Louisiana it is held that the term of one year fixed by law within which a revocatory action may be brought on account of a preferential transfer is not a prescription properly speaking, but a condition attached to the grant of the action; and the course of such term is not interrupted by the causes which suspend or interrupt ordinary prescriptions. Meyer *v.* Moss, 110 La. 132, 34 So. 332.

In Ontario the rule is laid down that a fraudulent deed remains so to the end of time, although it may not be effectively impeachable because of purchasers for value without notice having intervened or because the claims of all creditors have been barred or extinguished by lapse of years. Boyer *v.* Gaffield, 11 Ont. 571; Gillies *v.* How, 19 Grant Ch. (U. C.) 32.

Setting up statute against original debt.— When a bill is filed by a judgment creditor to set aside an alleged fraudulent conveyance, the alleged fraudulent grantee cannot, it is held, interpose the defense of the statute of limitations to the original debt of the complainant against the grantor. Stoutz *v.* Huger, 107 Ala. 248, 18 So. 126. See also Hickox *v.* Elliott, 22 Fed. 13, 10 Sawy. 415.

Effect of appeal in action by creditor against debtor.— In State *v.* Osborn, 143 Ind. 671, 42 N. E. 921, it was held that the running of the statute of limitations against a cause of action to set aside a conveyance as fraudulent against creditors is not interrupted by an appeal in a suit against the debtor in the original cause of action in favor of the creditor, where the appeal did not prevent the commencement of the action to set aside the conveyance.

Suspension of running of statute by nonresidence of grantee.— Applegate *v.* Applegate, 107 Iowa 312, 78 N. W. 34.

The time covered by the pending of a suit to set aside a deed as being in fraud of the rights of the grantor's creditors is not to be taken into account either to create a bar by limitation to such suit or to raise a presumption that the judgment in favor of the creditors on which the suit is founded is

period it becomes final and conclusive.[75] The operation of these statutes cannot be avoided by setting up facts which would make the fraudulent grantee a trustee by legal construction for the grantee's creditors.[76]

(II) *CHARACTER OF ACTION.* The period of limitation to be applied in proceedings for relief against fraudulent conveyances or transfers is frequently dependent upon the character of action in which the relief is sought.[77] Thus a distinction has been drawn in this respect, where the relief was sought in an action to quiet title or to remove a cloud from the complainant's title.[78] So it has been held that where instead of bringing suit to have the fraudulent transfer set aside, a creditor proceeds to sell the property under execution, leaving the validity of the transfer to be determined in an action by the purchaser at such sale to recover possession of the land, the statute of limitations relating to fraudulent transfers was inapplicable.[79] On the other hand it has been held that while a defrauded creditor may cause property fraudulently transferred to be sold on execution against the fraudulent grantor and then maintain ejectment to recover the same, he cannot avoid the statute of limitations by bringing an action in ejectment instead of an action to remove the cloud upon his title.[80]

(III) *COMMENCEMENT OF PERIOD OF LIMITATION* — (A) *In General.* Various provisions are made in the different jurisdictions designating the time when the right of action for relief against a fraudulent transfer shall be deemed to have accrued or otherwise prescribing the time of the commencement of the running of the statute of limitations.[81] The statute in some jurisdictions begins to run from the time the fraudulent transfer is made.[82]

(B) *Discovery of Fraud*[83] — (1) IN GENERAL. In many jurisdictions the rule is laid down, either under or apart from express statutory provision, that the cause of action shall not be deemed to have accrued for the purposes of the running of the statute of limitations, until the discovery of the facts constituting the fraud,[84]

paid. St. Francis Mill Co. *v.* Sugg, 169 Mo. 130, 69 S. W. 359.

Limitations applicable at law followed in equity.— Hickox *v.* Elliott, 22 Fed. 13, 10 Sawy. 415. See also McDowell *v.* Goldsmith, 2 Md. Ch. 370. *Compare* Greenman *v.* Greenman, 107 Ill. 404.

Application of statutes of limitation in equity generally see EQUITY, 16 Cyc. 177 *et seq.*

75. Brasie *v.* Minneapolis Brewing Co., 87 Minn. 456, 92 N. W. 340, 94 Am. St. Rep. 709, 67 L. R. A. 865.

76. Stone *v.* Brown, 116 Ind. 78, 18 N. E. 392; Sims *v.* Gray, 93 Iowa 38, 61 N. W. 171; Brasie *v.* Minneapolis Brewing Co., 87 Minn. 456, 92 N. W. 340, 94 Am. St. Rep. 709, 67 L. R. A. 865. See also Musselman *v.* Kent, 33 Ind. 452; Bobb *v.* Woodward, 50 Mo. 95.

Conveyance in secret trust for grantor.— In O'Neal *v.* Clymer, (Tex. Civ. App. 1900) 61 S. W. 545, it was held that where a debtor conveys his land to his wife to defraud his creditors, and to hold in secret trust for his benefit, the statute of limitations does not run in her favor against the claims of his creditors, since the title never vested in her.

77. Eve *v.* Louis, 91 Ind. 457; Baum's Succession, 11 Rob. (La.) 314.

78. Stewart *v.* Thompson, 32 Cal. 260 [*approved* in Goodnow *v.* Butler, 112 Cal. 437, 44 Pac. 738]; Eve *v.* Louis, 91 Ind. 457.

79. Amaker *v.* New, 33 S. C. 28, 11 S. E. 386, 8 L. R. A. 687.

80. Brasie *v.* Minneapolis Brewing Co., 87 Minn. 456, 92 N. W. 340, 94 Am. St. Rep. 709, 67 L. R. A. 865.

81. See the cases cited *infra,* notes 84 *et seq.*

Preferences and transfers in general.— For cases distinguishing time of accrual of action for relief against undue preferences and actions for relief against fraudulent transfers generally see Planters' Bank *v.* Watson, 9 Rob. (La.) 267; Hill *v.* Barlow, 6 Rob. (La.) 142; Prats *v.* His Creditors, 5 Rob. (La.) 288; New Orleans Gas Light, etc., Co. *v.* Currell, 4 Rob. (La.) 438; Barrett *v.* His Creditors, 4 Rob. (La.) 408; Walker *v.* Vaudry, 4 Rob. (La.) 395; Robinson *v.* Shelton, 2 Rob. (La.) 277; Maurin *v.* Rouquer, 19 La. 594; Brander *v.* Bowmar, 16 La. 370; Stein *v.* Gibbons, 16 La. 103; Caldwell *v.* Atchafalaya Bank, 14 La. 308; Muse *v.* Yarborough, 11 La. 521; Fennessy *v.* Govsoulin, 11 La. 419, 30 Am. Dec. 720; Dixon *v.* Emerson, 9 La. 104; Zacharie *v.* Buckman, 8 La. 305; Brown *v.* Ferguson, 4 La. 257; Petit *v.* His Creditors, 3 La. 26; Rivas *v.* Gill, 8 Mart. N. S. (La.) 674.

82. State *v.* Osborn, 143 Ind. 671, 42 N. E. 921; Himan *v.* Thorn, 32 W. Va. 507, 9 S. E. 930; Hunter *v.* Hunter, 10 W. Va. 321.

83. See, generally, LIMITATIONS OF ACTIONS.

84. *Kentucky.*— Cavanaugh *v.* Britt, 90 Ky. 273, 13 S. W. 922, 12 Ky. L. Rep. 204; Phillips *v.* Shipp, 81 Ky. 436; Green *v.* Salmon, 63 S. W. 270, 23 Ky. L. Rep. 517;

and this, although the complainant's right of action is otherwise perfect at the time.[85] The courts very generally hold the means of discovery to be equivalent to discovery, and the fraud is considered to be discovered when the creditor is in possession of sufficient facts to put a person of ordinary intelligence and prudence on inquiry, which, if pursued, would lead to the discovery,[86] and the burden is held to be upon the party seeking relief to allege[87] and prove the non-discovery of the fraud.[88]

(2) EFFECT OF FILING FOR RECORD. In some jurisdictions a fraudulent conveyance of real estate is conclusively presumed to be discovered when the fraudulent conveyance is filed for record.[89] But in other jurisdictions it is held that

Poynter *v.* Mallory, 45 S. W. 1042, 20 Ky. L. Rep. 284.

Minnesota.— Brasie *v.* Minneapolis Brewing Co., 87 Minn. 456, 92 N. W. 340, 94 Am. St. Rep. 709, 67 L. R. A. 865 (holding that where a creditor levies upon and sells on execution property fraudulently conveyed, the statute of limitations begins to run against him from the date of the sale, unless it be made to appear that the creditor did not discover the fraud until some time later); Duxbury *v.* Boice, 70 Minn. 113, 72 N. W. 838.

Mississippi.— Abbey *v.* Commercial Bank, 31 Miss. 434.

Nebraska.— Gillespie *v.* Cooper, 36 Nebr. 775, 55 N. W. 302.

New York.— Decker *v.* Decker, 108 N. Y. 128, 15 N. E. 307.

Ohio.— Stivens *v.* Summers, 68 Ohio St. 421, 67 N. E. 884; Boies *v.* Johnson, 25 Ohio Cir. Ct. 331.

Texas.— Calhoun *v.* Burton, 64 Tex. 510; Vodrie *v.* Tynan, (Civ. App. 1900) 57 S. W. 680.

United States.— Farrar *v.* Bernheim, 75 Fed. 136, 21 C. C. A. 264, following the Texas decisions. See also Sheldon *v.* Keokuk Northern Line Packet Co., 8 Fed. 769, 10 Biss. 470, construing Wisconsin statute.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 730, 732.

85. Weaver *v.* Haviland, 142 N. Y. 534, 37 N. E. 641, 40 Am. St. Rep. 631 [*affirming* 68 Hun 376, 22 N. Y. Suppl. 1012]; Decker *v.* Decker, 108 N. Y. 128, 15 N. E. 307.

86. *Kansas.*— Donaldson *v.* Jacobitz, 67 Kan. 244, 72 Pac. 846.

Kentucky.— Phillips *v.* Shipp, 81 Ky. 436.

Minnesota.— Duxbury *v.* Boice, 70 Minn. 113, 72 N. W. 838.

Nebraska.— Gillespie *v.* Cooper, 36 Nebr. 775, 55 N. W. 302.

Texas.— Calhoun *v.* Burton, 64 Tex. 510; Vodrie *v.* Tynan, (Civ. App. 1900) 57 S. W. 680.

See, generally, LIMITATIONS OF ACTIONS.

87. Duxbury *v.* Boice, 70 Minn. 113, 72 N. W. 838; Combs *v.* Watson, 32 Ohio St. 228; Boies *v.* Johnson, 25 Ohio Cir. Ct. 331.

88. Brown *v.* Brown, 91 Ky. 639, 11 S. W. 4; Duxbury *v.* Boice, 70 Minn. 113, 72 N. W. 838. And see, generally, LIMITATIONS OF ACTIONS.

89. Brooks *v.* Jones, (Iowa 1900) 82 N. W. 434; Nash *v.* Stevens, 96 Iowa 616, 65 N. W. 825; Sims *v.* Gray, 93 Iowa 38, 61 N. W. 171; Mickel *v.* Walraven, 92 Iowa 423, 60 N. W. 633; Hawley *v.* Page, 77 Iowa 239, 42 N. W. 193, 14 Am. St. Rep. 275; Laird *v.* Kilbourne, 70 Iowa 83, 30 N. W. 9; Rogers *v.* Brown, 61 Mo. 187. See also Gillespie *v.* Cooper, 36 Nebr. 775, 55 N. W. 302.

In Kansas it has been held that an action to set aside a deed to a debtor's wife as fraudulent, and to subject the property to the payment of the debt, is barred in two years from the time the deed was recorded where the creditor knew of the execution of the deed when it was made, but supposed it named his debtor as grantee. Donaldson *v.* Jacobitz, 67 Kan. 244, 72 Pac. 846.

In Kentucky it has been held that an action brought by creditors to set aside a deed as fraudulent, more than five years after it was recorded, is barred by limitation, it appearing that plaintiffs, who resided in the town where the deed was recorded, and who were from time to time becoming the sureties of the grantor, might by reasonable diligence have discovered the deed at any time after it was recorded. Poynter *v.* Mallory, 45 S. W. 1042, 20 Ky. L. Rep. 284. See also Cockrill *v.* Cockrill, 15 S. W. 1119, 13 Ky. L. Rep. 10. *Compare* Ward *v.* Thomas, 81 Ky. 452.

In Virginia it is held that where plaintiff seeks to avoid a conveyance made by his creditor on the ground that it was voluntary the statute of limitations runs as to such action from the date of recording the deed, and not from plaintiff's knowledge that it was without consideration, unless his ignorance of such fact proceeded from the fraud of the grantee. Vashon *v.* Barrett, 99 Va. 344, 38 S. E. 200. Under Va. Code, § 2929, providing that no conveyance shall be avoided, because not given for a valuable consideration, unless suit be brought within five years, and section 2467, providing that when a deed is recorded within twenty days after acknowledgment the record shall be as valid as to creditors as though made on the day of acknowledgment, an action brought by a creditor to set aside a conveyance made by his debtor as voluntary is barred where the deed was acknowledged more than five years before the action was commenced, and recorded within twenty days, although the actual date of record was within the five years. Vashon *v.* Barrett, 99 Va. 344, 38 S. E. 200.

mere constructive notice of the conveyance or transfer by reason of its being filed for record is not notice of the facts constituting the fraud within the meaning of statutes declaring that the cause of action shall not be deemed to have accrued until the discovery of the facts constituting the fraud.[90]

(c) *Prior Establishment of Creditor's Claim.* In some jurisdictions the time when the fraud was committed is not the period from which the limitation is to be computed, but the time when the creditor has placed himself in a position to assail the conveyance, and hence the rule is stated that the period of limitation for bringing actions in the nature of a creditor's bill to set aside a conveyance or transfer, fraudulent as against creditors, begins to run from the recovery of judgment by the complaining creditor and the return of execution unsatisfied;[91] and this although the fraud was discovered prior to the creditor's establishment

90. Rose *v.* Dunklee, 12 Colo. App. 403, 56 Pac. 342; Duxbury *v.* Boice, 70 Minn. 113, 72 N. W. 838 [*citing* Berkey *v.* Judd, 22 Minn. 287]; Stivens *v.* Summers, 68 Ohio St. 421, 67 N. E. 884.

91. *California.*—Watkins *v.* Wilhoit, (1894) 35 Pac. 646.

Colorado.— Rose *v.* Dunklee, 12 Colo. App. 403, 56 Pac. 342.

Iowa.— Mickel *v.* Walraven, 92 Iowa 423, 60 N. W. 633.

Kansas.— Donaldson *v.* Jacobitz, 67 Kan. 244, 72 Pac. 846; Taylor *v.* Lander, 61 Kan. 588, 60 Pac. 320 [*affirming* 5 Kan. App. 621, 46 Pac. 975].

Montana.— Finch *v.* Kent, 24 Mont. 268, 61 Pac. 653.

New York.— Weaver *v.* Haviland, 142 N. Y. 534, 37 N. E. 641, 40 Am. St. Rep. 631 [*affirming* 68 Hun 376, 22 N. Y. Suppl. 1012]; Gates *v.* Andrews, 37 N. Y. 657, 97 Am. Dec. 764.

Oklahoma.— Blackwell *v.* Hatch, 13 Okla. 169, 73 Pac. 933.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 735, 736.

Rule applied to transfers assailed as voluntary.— Newberry Nat. Bank *v.* Kinard, 28 S. C. 101, 5 S. E. 464; Suber *v.* Chandler, 18 S. C. 526 [*overruling* McGowan *v.* Hitt, 16 S. C. 602, 42 Am. Rep. 650]; Verner *v.* Downs, 13 S. C. 449. See also Richardson *v.* Mounce, 19 S. C. 477.

Effect of return of execution prior to maximum period allowed by law.— A creditor's suit to set aside a fraudulent assignment may be maintained on the return of execution *nulla bona*, although the maximum period allowed by law for the return of executions had not expired. Renaud *v.* O'Brien, 35 N. Y. 99 [*reversing* 25 How. Pr. 67].

In Michigan, under Pub. Acts (1867), No. 95, amending Comp. Laws (1857), § 3119, providing that lands fraudulently conveyed by a debtor shall be subject to his debts, and in case of levy on an equitable interest the judgment creditor may before sale institute proceedings to ascertain the rights of his judgment debtor in the land levied on, and in case of sale without having ascertained such interest proceedings shall be begun by the judgment creditor within one year to ascertain his interest, a proceeding to have a conveyance alleged to be in fraud of creditors set aside begun more than one year after levy is too late, although made before sale. Daniel *v.* Palmer, 124 Mich. 335, 82 N. W. 1067.

In Minnesota it has been held that a judgment creditor's right of action to reach real property of his debtor, conveyed by the latter in fraud of the creditor, and to subject it to the payment of the judgment, does not accrue until the judgment has been docketed in the county in which the property is situated, and that the statute of limitations therefore does not begin to run until it is so docketed. Rounds *v.* Green, 29 Minn. 139, 12 N. W. 454.

In Tennessee the statute of limitations does not commence to run in favor of a fraudulent or voluntary grantee until the creditor to be affected by the conveyance has a right of action to test its validity; but the right of action accrues as soon as the original debt becomes due, its reduction to judgment being unnecessary. Howell *v.* Thompson, 95 Tenn. 396, 32 S. W. 309; Mulloy *v.* Paul, 2 Tenn. Ch. 156. For cases prior to this statute see Knight *v.* Jordan, 6 Humphr. (Tenn.) 101 [*disapproving* Marr *v.* Rucker, 1 Humphr. (Tenn.) 348; Jones *v.* Read, 1 Humphr. (Tenn.) 335].

In Virginia it is held that the fact that no settlement has been made between the debtor and creditor and the exact amount due had not been ascertained does not postpone the running of the statute limiting the time within which suits to avoid any voluntary conveyance may be brought. Vashon *v.* Barrett, 99 Va. 344, 38 S. E. 200. *Compare* Wilson *v.* Buchanan, 7 Gratt. 334.

In an action to quiet title it has been held that where land was conveyed to plaintiff by her husband pending an action by defendant against the husband, but before judgment was rendered, and the property was subsequently sold to defendant under execution on the judgment, the statute of limitations did not begin to run against defendant's right to set aside the deed to plaintiff until the execution of the sheriff's deed to defendant, since defendant's right did not accrue until he had caused the property to be sold under execution on his judgment. Chalmers *v.* Sheehy, 132 Cal. 459, 64 Pac. 709, 84 Am. St. Rep. 62 [*following* Stewart *v.* Thompson, 32 Cal. 260].

of his claim by judgment.[92] On the other hand it has been held that the right to relief against a fraudulent conveyance is an accrued right for the purpose of the statute of limitations when the creditor can by any form of action set the courts in motion to relieve him from the fraud.[93] And even in jurisdictions recognizing the general rule that the statute of limitations does not begin to run until the creditor's claim has been reduced to judgment, it has been held that the running of the statute cannot be indefinitely postponed by the delay of the creditor in reducing his claim to judgment;[94] and this on the principle that where a party holds a claim or right of action against another he cannot be allowed to prolong the operation of the statute of limitation by failing or refusing to take the steps which the law requires in order to authorize the maintenance of the action.[95]

b. Laches.[96] Independently of a statute of limitations,[97] or of the expiration of the statutory period,[98] the right to institute a suit for relief against a fraudulent conveyance may be lost in equity by the laches of the complainant.[99] This doctrine has been frequently applied where the granting of the relief sought would work prejudice to defendant, as where the complainant has slept on his rights and allowed defendant to make valuable improvements or make other expenditures in reliance on his title.[1] Laches is not, like limitation, a mere matter of time,[2] and the question as to what constitutes laches must be determined,

92. Weaver *v.* Haviland, 142 N. Y. 534, 37 N. E. 641, 40 Am. St. Rep. 631 [*affirming* 68 Hun 376, 22 N. Y. Suppl. 1012].

93. Gillespie *v.* Cooper, 36 Nebr. 775, 55 N. W. 302, holding that since a creditor is not limited to a creditor's bill in order to obtain relief for a fraudulent conveyance, but may attach the property, the statute of limitations begins to run against the creditor from the time of the discovery of the fraud whether the creditor's claim has been reduced to judgment or not. See also Rogers *v.* Brown, 61 Mo. 187. *Compare* Rose *v.* Dunklee, 12 Colo. App. 403, 56 Pac. 342.

94. Stubblefield *v.* Gadd, 112 Iowa 681, 84 N. W. 917; Mickel *v.* Walraven, 92 Iowa 423, 60 N. W. 633; Donaldson *v.* Jacobitz, 67 Kan. 244, 72 Pac. 846; Atchison First Nat. Bank *v.* King, 60 Kan. 733, 57 Pac. 952. See also Vodrie *v.* Tynan, (Tex. Civ. App. 1900) 57 S. W. 680.

95. Mickel *v.* Walraven, 92 Iowa 423, 60 N. W. 633.

96. See, generally, EQUITY, 16 Cyc. 150 *et seq.*

97. Bumgardner *v.* Harris, 92 Va. 188, 23 S. E. 229.

98. Wall *v.* Beedy, 161 Mo. 625, 61 S. W. 864.

99. *Illinois.*— Merrell *v.* Johnson, 96 Ill. 224; McDowell *v.* Chicago Steel Works, 22 Ill. App. 405 [*affirmed* in 124 Ill. 491, 16 N. E. 854, 7 Am. St. Rep. 381].

Iowa.— Mickle *v.* Walraven, 92 Iowa 423, 60 N. W. 633.

Maine.— Herriman *v.* Townsend, (1886) 5 Atl. 267.

New Jersey.— Kinmouth *v.* Walling, (Ch. 1897) 36 Atl. 891; Frenche *v.* Kitchen, 53 N. J. Eq. 37, 30 Atl. 815; De Grauw *v.* Mechan, 48 N. J. Eq. 219, 21 Atl. 193; Swayze *v.* Swayze, 9 N. J. Eq. 273.

New York.— Bliss *v.* Ball, 9 Johns. 132.

Pennsylvania.— Silliman *v.* Haas, 151 Pa. St. 52, 25 Atl. 72; Ball *v.* Campbell, 134 Pa. St. 602, 19 Atl. 802.

South Carolina.— Eigleberger *v.* Kibler, 1 Hill Eq. 113, 26 Am. Dec. 192; Brock *v.* Bowman, Rich. Eq. Cas. 185.

Texas.— Calhoun *v.* Burton, 64 Tex. 510.

Wisconsin.— Hildebrand *v.* Tarbell, 97 Wis. 446, 73 N. W. 53.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 736, 737.

Rule applied to suit for proceeds of lands.— Where an action by creditors to subject to the payment of their claims land conveyed in fraud of creditors is barred by their laches, they cannot sue to subject thereto the proceeds of such land, or other land purchased by the grantee from such proceeds, or from the profits of such land. Mickel *v.* Walraven, 92 Iowa 423, 60 N. W. 633.

Laches of grantee as precluding attack on creditors' judgment.— In Palen *v.* Bushnell, 13 N. Y. Suppl. 785, it was held that a fraudulent grantee who lived twenty-four years after the commencement of an action to set aside the conveyance was guilty of gross neglect in not pleading a part payment of the judgment alleged to have been made by the judgment debtor shortly after the rendition of the judgment, and that the transferee as executor could not be permitted to set up such things by supplemental answer.

1. *Missouri.*— Wall *v.* Beedy, 161 Mo. 625, 61 S. W. 864; Bobb *v.* Woodward, 50 Mo. 95.

New Jersey.— Coyne *v.* Sayre, 54 N. J. Eq. 702, 36 Atl. 96.

Ohio.— Constable *v.* Weaser, 8 Ohio Dec. (Reprint) 339, 7 Cinc. L. Bul. 113.

Oregon.— Neppach *v.* Jones, 20 Oreg. 491, 26 Pac. 569, 849, 23 Am. St. Rep. 145.

Vermont.— Allen *v.* Knowlton, 47 Vt. 512.

Wisconsin.—Hamilton *v.* Menominee Falls Quarry Co., 106 Wis. 352, 81 N. W. 876.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 736, 737.

2. Neppach *v.* Jones, 20 Oreg. 491, 26 Pac.

not only from the lapse of time, but also from the facts and circumstances of the particular case.[3]

J. Pleadings — 1. The Bill, Complaint, or Petition — a. Allegations of Jurisdictional Facts — (I) *In General.* Facts must be stated from which it can be seen that the aid of a court of equity is required to give the complainant adequate relief.[4]

(II) *Exhaustion of Remedies at Law*[5] — (A) *In General.* Thus it should be alleged that he has exhausted his remedies at law.[6] As a general rule, so long as there is an adequate legal remedy against part of several joint debtors this form of equitable relief will not be granted against another.[7] But if it is obvious from the facts stated that there is no adequate remedy at law, this need not be alleged in terms.[8]

(B) *Return of Execution Nulla Bona*[9] — (1) Suits to Reach Land. It has been held that the creditor must aver not only that he has reduced his claim to judgment, but that he has had a return of an execution thereon unsatisfied in whole or in part, and that the place of such averment cannot be supplied by an allegation of a total want of property. This is put upon the ground that courts of equity are not tribunals for the collection of debts, although resort may be had to them after all legal means have been exhausted.[10] But after all, the fruit-

569, 849, 23 Am. St. Rep. 145; Gay *v.* Havermale, 27 Wash. 390, 67 Pac. 804.

Effect of mere delay short of statutory period.— In Izard *v.* Middleton, Bailey Eq. (S. C.) 228, it was held that no delay short of such lapse of time as will raise the bar of the statute of limitations or the presumption of satisfaction will preclude a creditor from pursuing the property of his debtor in the hands of a voluntary donee. See also Burne *v.* Partridge, 61 N. J. Eq. 434, 48 Atl. 770; Gay *v.* Havermale, 27 Wash. 390, 67 Pac. 804.

3. Neppach *v.* Jones, 20 Oreg. 491, 26 Pac. 569, 849, 23 Am. St. Rep. 145.

Circumstances not amounting to laches.— *Florida.*— Robinson *v.* Springfield Co., 21 Fla. 203.

Illinois.— Murphy *v.* Nilles, 62 Ill. App. 193 [*affirmed* in 166 Ill. 99, 46 N. E. 772].

Iowa.— Applegate *v.* Applegate, 107 Iowa 312, 78 N. W. 34; Brundage *v.* Cheneworth, 101 Iowa 256, 70 N. W. 211, 63 Am. St. Rep. 382.

Kentucky.— Strutton *v.* Young, 25 S. W. 109, 15 Ky. L. Rep. 657; Easum *v.* Pirtle, 5 Ky. L. Rep. 572.

Michigan.—Upton *v.* Dennis, 133 Mich. 238, 94 N. W. 728; Barrett *v.* Lowrey, 77 Mich. 668, 43 N. W. 1065; Reeg *v.* Burnham, 55 Mich. 39, 20 N. W. 708, 21 N. W. 431.

New Jersey.— Burne *v.* Partridge, 61 N. J. Eq. 434, 48 Atl. 770; Red Bank Second Nat. Bank *v.* Farr, (Ch. 1887) 7 Atl. 892.

New York.— Weaver *v.* Haviland, 142 N. Y. 534, 37 N. E. 641, 40 Am. St. Rep. 631; Bridenbecker *v.* Mason, 16 How. Pr. 203.

Rhode Island.— Hammond *v.* Stanton, 4 R. I. 65.

South Carolina.— Charleston Bank *v.* Dowling, 52 S. C. 345, 29 S. E. 788; Newberry Nat. Bank *v.* Kinard, 28 S. C. 101, 5 S. E. 464.

United States.— Lant *v.* Manley, 75 Fed. 627, 21 C. C. A. 457.

Canada.— Currie *v.* Gillespie, 21 Grant Ch. (U. C.) 267.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 735 *et seq.*

4. Taylor *v.* Dwyer, 131 Ala. 91, 32 So. 509; Dunham *v.* Cox, 10 N. J. Eq. 437, 64 Am. Dec. 460.

5. See *supra*, XIV, E.

6. Parrott *v.* Crawford, (Indian Terr. 1904) 82 S. W. 688; Stockton *v.* Lippincott, 37 N. J. Eq. 443.

Lien.— If the complaint does not show that plaintiff has a lien on the property sought to be appropriated it fails to state a cause of action. Wyman *v.* Jensen, 26 Mont. 227, 67 Pac. 114. See *supra*, XIV, E, 4.

Docketing judgment.— The complaint is fatally defective if it does not allege the docketing of the creditors' judgment. Wyman *v.* Jensen, 26 Mont. 227, 67 Pac. 114.

7. Eller *v.* Lacy, 137 Ind. 436, 36 N. E. 1088; Wales *v.* Lawrence, 36 N. J. Eq. 207; Randolph *v.* Daly, 16 N. J. Eq. 313. See *supra*, XIV, E, 6.

8. Botsford *v.* Beers, 11 Conn. 369.

9. See *supra*, XIV, E, 3, c; *infra*, XIV, J, 1, g, (III).

10. Baxter *v.* Moses, 77 Me. 465, 1 Atl. 350; Howe *v.* Whitney, 66 Me. 17; Griffin *v.* Nitcher, 57 Me. 270; Corey *v.* Greene, 51 Me. 114; Dockray *v.* Mason, 48 Me. 178; Dana *v.* Haskell, 41 Me. 25; Hartshorn *v.* Eames, 31 Me. 93; Webster *v.* Clark, 25 Me. 313; Spelman *v.* Freedman, 130 N. Y. 421, 29 N. E. 765; Adsit *v.* Butler, 87 N. Y. 585; Adee *v.* Bigler, 81 N. Y. 349; Estes *v.* Wilcox, 67 N. Y. 264; Allyn *v.* Thurston, 53 N. Y. 622; Beardsley Scythe Co. *v.* Foster, 36 N. Y. 561; Dunlevy *v.* Tallmadge, 32 N. Y. 457; Forbes *v.* Waller, 25 N. Y. 430; Crippen *v.* Hudson, 13 N. Y. 161; McElwain *v.* Willis, 9 Wend. (N. Y.) 548; Corey *v.* Cornelius, 1 Barb. Ch. (N. Y.) 571; Morrow Shoe

less execution, although generally conclusive, is only evidence that the creditor has no adequate remedy at law or that he has exhausted his legal remedy. It is not, however, the only possible means of proof. Ordinarily neither law nor equity requires a meaningless form. Accordingly it has been decided in many cases that a judgment creditor whose judgment would have been a lien on the property but for the fraudulent conveyance may proceed at once to have the conveyance set aside. If he alleges and proves that the debtor is insolvent and that the issuing of an execution would be of no practical utility, he need not show that he has pursued his legal remedy further than to recover and docket his judgment.[11]

Mfg. Co. *v.* New England Shoe Co., 57 Fed. 685, 8 C. C. A. 652, 24 L. R. A. 417.

A complaint which alleges that plaintiff recovered a judgment against defendant grantor in another action; that an execution issued thereon and was returned unsatisfied; that the judgment was still due; that defendant grantor, after the cause of action accrued, transferred his property which was subject to the lien of an execution to defendant grantee; and that such conveyance was without consideration, and with the intent to hinder, delay, and defraud plaintiff, states facts sufficient to constitute a cause of action. Kain *v.* Larkin, 141 N. Y. 144, 36 N. E. 9 [*reversing* 66 Hun 209, 20 N. Y. Suppl. 938].

Against estate of deceased debtor.— N. Y. St. (1897) c. 417, § 7, among other things, provides that "a creditor of a deceased and insolvent debtor having a claim against the estate of such debtor, exceeding in amount the sum of one hundred dollars, may, without obtaining a judgment on such claim, . . . for the benefit of himself and other creditors interested in said estate, disaffirm, treat as void, and resist any act done, or conveyance, transfer or agreement made in fraud of creditors, or maintain an action to set aside such act, conveyance, transfer or agreement." To maintain an action under this statute it is necessary to allege the facts and acts which the statute itself sets forth as authorizing the action. Rosselle *v.* Klein, 42 N. Y. App. Div. 316, 59 N. Y. Suppl. 94.

11. *Alabama.*— Henderson *v.* Farley Nat. Bank, 123 Ala. 547, 26 So. 226, 82 Am. St. Rep. 140; Jones *v.* Smith, 92 Ala. 455, 9 So. 179.

California.— Lee *v.* Orr, 70 Cal. 398, 11 Pac. 745.

Georgia.— Thurmond *v.* Reese, 3 Ga. 449, 46 Am. Dec. 440.

Illinois.— French *v.* Commercial Nat. Bank, 199 Ill. 213, 65 N. E. 252; Andrews *v.* Donnerstag, 171 Ill. 329, 49 N. E. 558; Shufeldt *v.* Boehm, 96 Ill. 560; Weightman *v.* Hatch, 17 Ill. 281; McDowell *v.* Cochran, 11 Ill. 31; Miller *v.* Davidson, 8 Ill. 518, 44 Am. Dec. 715; French *v.* Commercial Nat. Bank, 97 Ill. App. 533; Lapeer First Nat. Bank *v.* Chapman, 77 Ill. App. 105; Quinn *v.* People, 45 Ill. App. 547; Binnie *v.* Walker, 25 Ill. App. 82; Fusze *v.* Stern, 17 Ill. App. 429.

Iowa.— Ticonic Bank *v.* Harvey, 16 Iowa 141; Postlewait *v.* Howes, 3 Iowa 365.

Kentucky.— Campbell *v.* Trosper, 108 Ky. 602, 57 S. W. 245, 22 Ky. L. Rep. 277.

Minnesota.— Scanlan *v.* Murphy, 51 Minn. 536, 53 N. W. 799; Wadsworth *v.* Schisselbauer, 32 Minn. 84, 19 N. W. 390; Rounds *v.* Green, 29 Minn. 139, 12 N. W. 454; Banning *v.* Armstrong, 7 Minn. 40.

Missouri.— Turner *v.* Adams, 46 Mo. 95; Merry *v.* Fremon, 44 Mo. 518.

Montana.— Ryan *v.* Spieth, 18 Mont. 45, 44 Pac. 403.

New Jersey.— Robert *v.* Hodges, 16 N. J. Eq. 299; Dunham *v.* Cox, 10 N. J. Eq. 437, 64 Am. Dec. 460.

Ohio.— Bomberger *v.* Turner, 13 Ohio St. 263, 82 Am. Dec. 438.

Oregon.— Fleischner *v.* McMinnville First Nat. Bank, 36 Oreg. 553, 54 Pac. 884, 60 Pac. 603, 61 Pac. 345.

Rhode Island.— McKenna *v.* Crowley, 16 R. I. 364, 17 Atl. 354.

South Carolina.— Miller *v.* Hughes, 33 S. C. 530, 12 S. E. 419; State *v.* Foot, 27 S. C. 340, 3 S. E. 546; Burch *v.* Brantley, 20 S. C. 503.

Wisconsin.— Level Land Co. No. 3 *v.* Sivyer, 112 Wis. 442, 88 N. W. 317.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 767; and *supra*, XIV, E, 3.

Where one has a judgment which would be a lien on certain land of the debtor, he may bring an action to have a conveyance of such land to a third party set aside; and this whether an execution has been issued and returned unsatisfied or not. Cornell *v.* Radway, 22 Wis. 260. See *supra*, XIV, E, 3, a, (III).

Judgment satisfied.— The action cannot be maintained if it appears affirmatively from the complaint that the judgment on which it is predicated has been satisfied by a sale of personal property under a writ of execution. Minneapolis Threshing Mach. Co. *v.* Jones, 89 Minn. 184, 94 N. W. 551, 99 Am. St. Rep. 606, 62 L. R. A. 757.

In California it was held in some early cases that plaintiff must aver either that he has acquired a lien or that an execution has been returned unsatisfied. Castle *v.* Bader, 23 Cal. 75; Thornburgh *v.* Hand, 7 Cal. 554; Heyneman *v.* Dannenberg, 6 Cal. 376, 65 Am. Dec. 519. But according to a later case this is not necessary where it is averred that the judgment debtor has not and never had any property other than that fraudulently transferred. Lee *v.* Orr, 70 Cal. 398, 11 Pac. 745.

Since a constable has no power to levy an

(2) Suits to Reach Personalty. If it be personal property which the creditor wishes to reach and appropriate, he must show that he has a lien. If it arises from the execution, he must show that one has been issued; or if it arises from a levy of the writ, he must show that such levy has been made.[12]

(3) Suits to Reach Equitable Assets. It is conceded in all cases that a creditor cannot go into a court of equity to subject equitable assets or choses in action not subject to be taken upon execution for the payment of his claim, until he has first obtained a judgment at law, taken out a writ of execution, and had it returned unsatisfied in whole or in part; consequently it is necessary to aver that all this has been done.[13]

(c) *Creditor With Lien or Trust in His Favor.* Whenever a creditor has a trust in his favor or a lien on property for the debt due him, he may go into equity without exhausting his remedy at law.[14] Consequently if he stands in the relation of *cestui que trust* or is able to allege a specific lien on the property sought to be applied to his demand, he may maintain his suit without even alleging the insolvency of the debtor.[15] A *cestui que trust* is not required to establish his claim by an action at law in order to compel an enforcement of the trust or to protect the trust property from unlawful interference.[16]

(d) *Statutory Provisions.* By statute in some of the states a new equitable right is created whereby a simple contract creditor may maintain a suit to set aside a fraudulent conveyance of his debtor without the previous recovery of a judgment at law and may recover his judgment in the very suit in which the equitable relief is sought.[17] A creditor without a lien must aver either that he

execution on real estate, an allegation that an execution had been placed in the hands of a constable and by him returned *nulla bona* is not a sufficient allegation of the debtor's insolvency. Stuckwisch *v.* Holmes, 29 Ind. App. 512, 64 N. E. 894.

12. *California.*— Castle *v.* Bader, 23 Cal. 75.

Illinois.— French *v.* Commercial Nat. Bank, 199 Ill. 213, 65 N. E. 252.

Minnesota.— Wadsworth *v.* Schisselbauer, 32 Minn. 84, 19 N. W. 390.

Mississippi.— Fleming *v.* Grafton, 54 Miss. 79.

New Jersey.— Robert *v.* Hodges, 16 N. J. Eq. 299; Dunham *v.* Cox, 10 N. J. Eq. 437, 64 Am. Dec. 460.

Virginia.— Chamberlayne *v.* Temple, 2 Rand. 384, 14 Am. Dec. 786.

See *supra*, XIV, E, 4.

The general creditors of a mortgagor of chattels have no right to assail a mortgage or other conveyance of property made by him until they have secured a lien thereon by levy under a judgment and execution, or have by some other method acquired a legal or equitable interest in the property. Sullivan *v.* Miller, 106 N. Y. 635, 13 N. E. 772; Southard *v.* Benner, 72 N. Y. 424; Geery *v.* Geery, 63 N. Y. 252. See also McKinley *v.* Bowe, 97 N. Y. 93.

13. *Colorado.*— Burdsall *v.* Waggoner, 4 Colo. 256.

Illinois.— Newman *v.* Willetts, 52 Ill. 98.

Maine.— Baxter *v.* Moses, 77 Me. 465, 1 Atl. 350; Griffin *v.* Nitcher, 57 Me. 270; Hartshorn *v.* Eames, 31 Me. 93.

Minnesota.— Wadsworth *v.* Schisselbauer, 32 Minn. 84, 19 N. W. 390.

Mississippi.— Vasser *v.* Henderson, 40 Miss. 519, 90 Am. Dec. 351; Brown *v.* State Bank, 31 Miss. 454; Farned *v.* Harris, 11 Sm. & M. 366.

New Hampshire.— Tappan *v.* Evans, 11 N. H. 311.

New York.— McElwain *v.* Willis, 9 Wend. 548; Clarkson *v.* De Peyster, 3 Paige 320.

Rhode Island.— McKenna *v.* Crowley, 16 R. I. 364, 17 Atl. 354.

United States.— Van Weel *v.* Winston, 115 U. S. 228, 6 S. Ct. 22, 29 L. ed. 384.

See *supra*, XIV, E. See also Creditors' Suits, 12 Cyc. 9 *et seq.*

When a creditor comes into equity to reach the equitable interest of his debtor in land, he must show a judgment which would, in case the legal title to the property were in the debtor, be a legal lien thereon, and an execution returned unsatisfied. Stockton *v.* Lippincott, 37 N. J. Eq. 443; Bigelow Blue Stone Co. *v.* Magee, 27 N. J. Eq. 392.

14. Holt *v.* Bancroft, 30 Ala. 193; Westheimer *v.* Goodkind, 24 Mont. 90, 60 Pac. 813; Tappan *v.* Evans, 11 N. H. 311; Case *v.* Beauregard, 101 U. S. 688, 25 L. ed. 1004; California Bank *v.* Cowan, 61 Fed. 871. See also *supra*, XIV, E.

15. Emery *v.* Yount, 7 Cal. 107, 1 Pac. 686.

16. Spelman *v.* Freedman, 130 N. Y. 421, 29 N. E. 765.

17. Jones *v.* Smith, 92 Ala. 455, 9 So. 179; Huntington *v.* Jones, 72 Conn. 45, 43 Atl. 564; Vail *v.* Hammond, 60 Conn. 374, 22 Atl. 954, 25 Am. St. Rep. 330; Grunsfeld *v.* Brownell, (N. M. 1904) 76 Pac. 310; Early Times Distilling Co. *v.* Zeiger, 9 N. M. 31, 49 Pac. 723.

In Alabama simple contract creditors and judgment creditors may join in such bill. Steiner Land, etc., Co. *v.* King, 118 Ala. 546.

has prosecuted his claim to judgment at law [18] or that it is due and payable at the time of exhibiting his bill.[19] But notwithstanding the general proposition that new equitable rights created by the states will be enforced, a contract creditor who has not reduced his claim to judgment has no standing in the federal courts, sitting as courts of equity, upon a bill to set aside and vacate a fraudulent conveyance, inasmuch as the constitution of the United States, in its seventh amendment, declares: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." It is well settled that the line of demarcation between equitable and legal remedies in the federal courts cannot be obliterated by state legislation.[20]

b. Complainant's Right to Sue — (I) *STATUS AS CREDITOR* — (A) *In General.* Plaintiff must allege facts showing that he occupies a status, either as creditor or as the representative of creditors, which entitles him to assail the conveyance, for none but creditors or those whom the law recognizes as their representatives can assail it.[21] If he sues as the assignee of a judgment he must allege that the whole judgment has been assigned [22] and that he is the owner of it,[23] but need not state the consideration for the assignment;[24] and he need not allege whether his judgment was recovered before or after the conveyance.[25] In a suit by partnership creditors it need not be alleged that there are no individual creditors, as that is a matter of defense.[26]

(B) *Time of Becoming Such.* Unless the case be one in which the conveyance was made with intent to defraud subsequent creditors,[27] he must allege that

24 So. 35. But before the passage of the statute equity would not interfere to assist a creditor who had not reduced his claim to judgment. Lehman *v.* Meyer, 67 Ala. 396.

In Maryland, by the second section of the act of 1835, chapter 380, a partnership creditor was authorized, without first obtaining judgment on his claim, to proceed in equity to vacate any transfer, assignment, or contract between the partners disposing of partnership effects among themselves, for fraudulent purposes. Sanderson *v.* Stockdale, 11 Md. 563.

18. Ferguson *v.* Bobo, 54 Miss. 121.

19. Gibson *v.* Trowbridge Furniture Co., 93 Ala. 579, 9 So. 370; Jones *v.* Massey, 79 Ala. 370; Ferguson *v.* Bobo, 54 Miss. 121.

20. Hollins *v.* Brierfield Coal, etc., Co., 150 U. S. 371, 14 S. Ct. 127, 37 L. ed. 1113; Cates *v.* Allen, 149 U. S. 451, 13 S. Ct. 883, 977, 37 L. ed. 804; Scott *v.* Neely, 140 U. S. 106, 11 S. Ct. 712, 35 L. ed. 358; Smith *v.* Ft. Scott, etc., R. Co., 99 U. S. 398, 25 L. ed. 437; Hudson *v.* Wood, 119 Fed. 764; Peacock *v.* Williams, 110 Fed. 917; Harrison *v.* Farmers' L. & T. Co., 94 Fed. 728, 36 C. C. A. 443; Hall *v.* Gambrill, 92 Fed. 32, 34 C. C. A. 190; Parkersburg First Nat. Bank *v.* Prager, 91 Fed. 689, 34 C. C. A. 51; D. A. Tompkins Co. *v.* Catawba Mills, 82 Fed. 780; Childs *v.* N. B. Carlstein Co., 76 Fed. 86; England *v.* Russell, 71 Fed. 818; Putney *v.* Whitmire, 66 Fed. 385; Morrow Shoe Mfg. Co. *v.* New England Shoe Co., 57 Fed. 685, 6 C. C. A. 508, 24 L. R. A. 417; U. S. *v.* Ingate, 48 Fed. 251. See *supra*, XIV, E, 2, b.

21. *Alabama.*— Gibson *v.* Trowbridge Furniture Co., 93 Ala. 579, 9 So. 370; Lehman *v.* Van Winkle, 92 Ala. 443, 8 So. 870; Walthall *v.* Rives, 34 Ala. 91.

Arkansas.— Cox *v.* Fraley, 26 Ark. 20.

California.— Riverside First Nat. Bank *v.* Eastman, 144 Cal. 487, 77 Pac. 1043, 103 Am. St. Rep. 95; Fox *v.* Dyer, (1889) 22 Pac. 257; Horn *v.* Volcano Water Co., 13 Cal. 62, 73 Am. Dec. 569.

Indiana.— Eller *v.* Lacy, 137 Ind. 436, 36 N. E. 1088; Robinson *v.* Rogers, 84 Ind. 539.

Kentucky.— Alexander *v.* Quigley, 2 Duv. 399.

Maryland.— Mahaney *v.* Lazier, 16 Md. 69.

Minnesota.— Sawyer *v.* Harrison, 43 Minn. 297, 45 N. W. 434; Dunham *v.* Byrnes, 36 Minn. 106, 30 N. W. 402.

Mississippi.— Ferguson *v.* Bobo, 54 Miss. 121.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 765; and *supra*, IV.

An allegation that goods were sold and delivered of the value of a certain amount which has not been paid is a sufficient averment of indebtedness. Smith *v.* Summerfield, 108 N. C. 284, 12 S. E. 997.

Consideration.— It has been held that he need not state the consideration of the debt. Curry *v.* Glass, 25 N. J. Eq. 108.

22. Strange *v.* Longley, 3 Barb. Ch. (N. Y.) 650.

23. Richardson *v.* Gilbert, 21 Fla. 544.

Where the judgment was recovered in the name of plaintiff for the use of another, it is sufficient to allege that plaintiff is the owner of the judgment at the time of bringing suit. Postlewait *v.* Howes, 3 Iowa 365.

24. Gleason *v.* Gage, 7 Paige (N. Y.) 121.

25. Newman *v.* Van Duyne, 42 N. J. Eq. 485, 7 Atl. 897.

26. Smith *v.* Selz, 114 Ind. 229, 16 N. E. 524.

27. Craft *v.* Wilcox, 102 Ala. 378, 14 So. 653; Emery *v.* Yount, 7 Colo. 107, 1 Pac.

he was a creditor at the time the conveyance was made, and was thus in a position to be injured by it, for a man who has no creditors has a perfect right to give away his property, unless the act be a part of a scheme to defraud future creditors,[28] although it need not be alleged that plaintiff has suffered damage other than that resulting from the fraud.[29]

(II) *DESCRIPTION OF JUDGMENT AT LAW.* The complainant must state facts showing the character and validity of his judgment at law.[30] But the debt for which the judgment was rendered need not be stated with the definiteness required in an action to recover the debt.[31] In pleading the judgment it is enough to allege that it was duly recovered in an action then pending without pleading the jurisdictional facts.[32]

c. The Debtor's Proprietary Interest. The bill should state what proprietary interest the debtor had in the property alleged to have been fraudulently conveyed.[33] Where it is sought to appropriate land of which it is asserted that the debtor owns the equitable title, the pleadings should allege the facts showing that he is such owner. The mere naked assertion is not sufficient.[34]

686; Walsh *v.* Byrnes, 39 Minn. 527, 40 N. W. 831; Holmes *v.* Clark, 48 Barb. (N. Y.) 237. See *supra*, IV, C.

28. *Alabama.*— Wooten *v.* Steele, 109 Ala. 563, 19 So. 972, 55 Am. St. Rep. 947; Donley *v.* McKiernan, 62 Ala. 34.

California.— Fox *v.* Dyer, (1889) 22 Pac. 257.

Colorado.— Emery *v.* Yount, 7 Colo. 107, 1 Pac. 686.

Illinois.— Merrell *v.* Johnson, 96 Ill. 224; Wilson *v.* Derrwaldt, 100 Ill. App. 396; Wagner *v.* Koch, 45 Ill. App. 501; Uhre *v.* Melum, 17 Ill. App. 182.

Indiana.— McCormick *v.* Hartley, 107 Ind. 248, 6 N. E. 357; Bruker *v.* Kelsey, 72 Ind. 51; Bentley *v.* Dunkle, 57 Ind. 374; Harrison *v.* Jaquess, 29 Ind. 208.

Indian Territory.— Parrott *v.* Crawford, (1904) 82 S. W. 688.

Kentucky.— Marcum *v.* Powers, 9 S. W. 255, 10 Ky. L. Rep. 380.

Massachusetts.— Woodbury *v.* Sparrell Print, 187 Mass. 426, 73 N. E. 547.

Minnesota.— Piper *v.* Johnston, 12 Minn. 60.

Pennsylvania.— Palmer *v.* Wyoming Mfg. Co., 1 Lack. Leg. N. 271.

Texas.— Kerr *v.* Hutchins, 36 Tex. 452.

Washington.— West Coast Grocery Co. *v.* Stinson, 13 Wash. 255, 43 Pac. 35.

United States.— Sexton *v.* Wheaton, 8 Wheat. 229, 5 L. ed. 603.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 766.

Showing injury.— The allegations of a complaint attacking a conveyance as fraudulent must show that a debt or legal duty was due from the grantor to plaintiff, the payment or discharge of which is in some way injuriously affected by such conveyance; otherwise the complaint is demurrable. Ullrich *v.* Ullrich, 68 Conn. 580, 37 Atl. 393.

Sufficient allegations.— In an action to set aside an alleged fraudulent transfer of personalty, it appeared that the transfer was made on November 6 of a certain year. The petition charged that in December of the same year plaintiff recovered a judgment against the transferrer for goods sold on credit in September of the same year, and it was held a sufficient allegation that the indebtedness was created prior to the transfer of the property. Chamberlain Banking House *v.* Turner-Frazier Mercantile Co., 66 Nebr. 48, 92 N. W. 172. A complaint which alleged that since a specified date the debtor had been at all times insolvent, that the transfer after that date of property to his wife was without consideration and fraudulent, and made in "fraud of the rights of creditors of" the grantor, and "for the purpose of preventing said creditors from collecting any indebtedness" due from the grantor, and which showed an existing indebtedness in favor of a bank at the time of the transfer, sufficiently alleged the existence of creditors at the time of the transfer as against a general demurrer. Gray *v.* Brunold, 140 Cal. 615, 74 Pac. 303.

Where plaintiff sues as the assignee of a claim which existed against the debtor at the time of the fraudulent transfer he need not allege that he was the owner of it at that time. Aiken *v.* Edrington, 1 Fed. Cas. No. 111.

29. Alden *v.* Gibson, 63 N. H. 12.

30. Eller *v.* Lacy, 137 Ind. 436, 36 N. E. 1088; Alexander *v.* Quigley, 2 Duv. (Ky.) 399.

In Montana, under Code Civ. Proc. § 1197, providing that a judgment becomes a lien on realty from the time it is docketed, a complaint by a judgment creditor to set aside his debtor's conveyance of realty as fraudulent which does not allege the docketing of the creditor's judgme t is insufficient. Wyman *v.* Jensen, 26 Mont. 227, 67 Pac. 114.

31. Scanlan *v.* Murphy, 51 Minn. 536, 53 N. W. 799.

32. Scanlan *v.* Murphy, 51 Minn. 536, 53 N. W. 799.

33. Trent *v.* Edmonds, 32 Ind. App. 432, 70 N. E. 169; Gibbons *v.* Pemberton, 101 Mich. 397, 59 N. W. 663, 45 Am. St. Rep. 417; Manning *v.* Drake, 1 Mich. 34.

34. Bevins *v.* Eisman, 56 S. W. 410, 21 Ky. L. Rep. 1772.

d. Allegation and Description of Transfer. A transfer of the property in question by the debtor or by the holder of the legal title at his direction to the alleged grantee must be averred,[35] and to show this a delivery of the deed must be averred.[36] There must be some description of the instrument by which the alleged fraudulent conveyance was accomplished.[37] But it is not necessary to attach a copy of it as an exhibit. The foundation of the action is the fraud alleged and not the conveyance as such.[38]

e. Description of Property. Where it is sought to set aside transfers of real estate and apply the same to the payment of the debts of the grantor, there must be a definite description and identification of the land sought to be reached; otherwise the bill is bad on demurrer.[39] To create a *lis pendens*, operating as notice, the bill must be so definite in the description of the property that any one reading it can learn thereby what property is intended to be made the subject of litigation.[40]

f. Several Conveyances. If two or more conveyances are attacked the facts attending each conveyance need not be set forth as a separate cause of action. The fraudulent disposition of his property by the debtor constitutes the single cause of action.[41]

g. Insolvency of Debtor — (i) *Alleged in Terms.* It is always safe to allege that the grantor was insolvent at the time of making the conveyance assailed; and according to one line of decisions it is a necessary allegation, the

35. Bright *v.* Bright, 132 Ind. 56, 31 N. E. 470; Smith *v.* Tate, 30 Ind. App. 367, 66 N. E. 88. A bill which charges that the instrument assailed purports to convey the land described and that it was signed by the debtor is sufficient to sustain the action. Little *v.* Sterne, 125 Ala. 609, 27 So. 972. An allegation of a pretense to own and hold property is not equivalent to an averment of a conveyance or transfer. Floyd *v.* Floyd, 77 Ala. 353. An averment that an assignment of stock was made must be construed, on general demurrer, as meaning that it was so made as to divest the assignor of all right to the stock, unless it was void for fraud or want of consideration. Arzbacher *v.* Mayer, 53 Wis. 380, 10 N. W. 440.

36. Doerfler *v.* Schmidt, 64 Cal. 265, 30 Pac. 816.

37. Anderson *v.* Lindberg, 64 Minn. 476, 67 N. W. 538.

Where several grantees are joined as defendants, it must be alleged whether the conveyance was joint or several. Allen *v.* Vestal, 60 Ind. 245.

38. Heckelman *v.* Rupp, 85 Ind. 286; Stout *v.* Stout, 77 Ind. 537; Bray *v.* Hussey, 24 Ind. 228; Smith *v.* Summerfield, 108 N. C. 284, 12 S. E. 997.

39. *Alabama.*— Freeman *v.* Stewart, 119 Ala. 158, 24 So. 31.

California.— Castle *v.* Bader, 23 Cal. 75.

Indiana.— Sheffer *v.* Hines, 149 Ind. 413, 49 N. E. 348; Smith *v.* Tate, 30 Ind. App. 367, 66 N. E. 88.

Montana.— Wyman *v.* Jensen, 26 Mont. 227, 67 Pac. 114.

Pennsylvania.— Harding *v.* Bunnell, 14 Pa. Co. Ct. 417.

Tennessee.— Stacker *v.* Wilson, (Ch. App. 1899) 52 S. W. 709.

United States.— Brown *v.* John V. Farwell Co., 74 Fed. 764.

Sufficient description of part of property.— A bill is not demurrable as a whole for uncertainty of description, where part of the lands are sufficiently described. Little *v.* Sterne, 125 Ala. 609, 27 So. 972.

Section, township, and range.—A complaint is deficient on demurrer where it describes the lands only by numbers of the sections, townships, and ranges, without any reference to the state or county in which they are located or reference to any fixed monument from which their location could be inferred. Sheffer *v.* Hines, 149 Ind. 413, 49 N. E. 348.

Lots.— A bill to set aside a fraudulent conveyance describing lands as "part lots 126 and 127, known as the Stiles Lots" is sufficiently definite where the lots are fractional lots, and the reference is not to parts of them, but to the whole. Freeman *v.* Stewart, 119 Ala. 158, 24 So. 31.

Factory.— Where the property alleged to have been fraudulently conveyed was described as "a tobacco factory in the city of Logansport, situate at the lock foundry, worth, with the fixtures and appurtenances, seven thousand dollars," it was held sufficient on motion in arrest of judgment after a verdict for plaintiff. Alford *v.* Baker, 53 Ind. 279.

40. Miller *v.* Sherry, 2 Wall. (U. S.) 237, 17 L. ed. 827.

41. Armstrong *v.* Dunn, 143 Ind. 433, 41 N. E. 540; Strong *v.* Taylor School Tp., 79 Ind. 208. And if the pleader does describe each of the transfers as a separate cause of action, the court will look to the whole pleading as stating but one cause of action and will not require that each of the so-called causes of action shall stand or fall by itself. Marston *v.* Dresen, 76 Wis. 418, 45 N. W. 110.

Joinder of causes see *supra*, XIV, F.

omission of which cannot be cured by evidence of insolvency.[42] Insolvency may be a sort of conclusion from other facts, but it is also that kind of a collective fact which is a well understood and recognized pecuniary condition and may well be averred in terms, for this is equivalent to averring that the debtor does not own property enough to pay his debts.[43]

(II) *FACTS SHOWING INSOLVENCY* — (A) *At Time of Conveyance.* According to one class of decisions, it must be alleged not only that the grantor had at the time of the conveyance no other property subject to execution sufficient to satisfy the complainant's demand, but also that he has no such property at the time the suit is commenced. A fraudulent purpose is an important element in the case, but it is not the only one; there must be hindrance or delay of creditors which amounts to actual fraud.[44] An allegation that the debtor did not have at

42. *California.*— Gray *v.* Brunold, 140 Cal. 615, 74 Pac. 303; Albertoli *v.* Branham, 80 Cal. 631, 22 Pac. 404, 13 Am. St. Rep. 200.

Colorado.— Emery *v.* Yount, 7 Colo. 107, 1 Pac. 686.

Illinois.— Merrell *v.* Johnson, 96 Ill. 224.

Indiana.— Davis *v.* Chase, 159 Ind. 242, 64 N. E. 88, 853, 95 Am. St. Rep. 294; Slagle *v.* Hoover, 137 Ind. 314, 36 N. E. 1099; Noble *v.* Hines, 72 Ind. 12; Borror *v.* Carrier, 33 Ind. App. 353, 73 N. E. 123.

Maryland.— Goodman *v.* Wineland, 61 Md. 449.

South Carolina.— Miller *v.* Hughes, 33 S. C. 530, 12 S. E. 419. See also State *v.* Foot, 27 S. C. 340, 3 S. E. 546.

Washington.— Cook *v.* Tibbals, 12 Wash. 207, 40 Pac. 935; O'Leary *v.* Duvall, 10 Wash. 666, 39 Pac. 163; Wagner *v.* Law, 3 Wash. 500, 28 Pac. 1109, 29 Pac. 927, 28 Am. St. Rep. 56, 15 L. R. A. 784.

See *supra*, VI.

Contra, under the Utah statute. Ogden State Bank *v.* Barker, 12 Utah 13, 40 Pac. 765.

Sufficiency of allegations.— In an action by an assignee of a certificate of sale of realty under execution to cancel a deed alleged to have been executed to defraud creditors, a complaint averring the issuance of execution and its return by the sheriff with indorsement of inability to find any other property of the debtor, and that such debtor had no other property in the state out of which to make the execution, is a sufficient allegation of the debtor's insolvency at the time of the conveyance, as against a general objection to its sufficiency. Bates *v.* Drake, 28 Wash. 447, 68 Pac. 961. And where the petition states that, at the date of the deeds charged to be fraudulent, defendant was wholly insolvent; that he owed about fourteen thousand dollars; and that his property was wholly inadequate to satisfy his indebtedness, it sufficiently alleges that defendant had no other property out of which the debts could be made. Rinehart *v.* Long, 95 Mo. 396, 8 S. W. 559.

43. Coal City Coal, etc., Co. *v.* Hazard Powder Co., 108 Ala. 218, 19 So. 392; Lammert *v.* Stockings, 27 Ind. App. 619, 61 N. E. 945; Grunsfeld *v.* Brownell, (N. M. 1904) 76 Pac. 310 [*citing* 5 Cyc. 237 note 1]. The complaint is demurrable if it is not alleged that the debtor was insolvent at the time of making the transfer or that the transfer tended to produce insolvency. Fox *v.* Lipe, 14 Colo. App. 258, 59 Pac. 850. If the facts alleged in the bill show that the debtor is insolvent his insolvency need not be alleged in terms. Gassenheimer *v.* Kellogg, 121 Ala. 109, 23 So. 29.

44. Albertoli *v.* Branham, 80 Cal. 631, 22 Pac. 404, 13 Am. St. Rep. 200; Emery *v.* Yount, 7 Colo. 107, 1 Pac. 686; Burdsall *v.* Waggoner, 4 Colo. 256; Thomas *v.* Mackey, 3 Colo. 390; Davis *v.* Chase, 159 Ind. 242, 64 N. E. 88, 853, 95 Am. St. Rep. 294; Vansickle *v.* Shenk, 150 Ind. 413, 50 N. E. 381; Nevers *v.* Hack, 138 Ind. 260, 37 N. E. 791, 46 Am. St. Rep. 380; Petree *v.* Brotherton, 133 Ind. 692, 32 N. E. 300; Crow *v.* Carver, 133 Ind. 260, 32 N. E. 569; Winstandley *v.* Stipp, 132 Ind. 548, 32 N. E. 302; Bright *v.* Bright, 132 Ind. 56, 31 N. E. 470; McConnell *v.* Citizens' State Bank, 130 Ind. 127, 27 N. E. 616; Shew *v.* Hews, 126 Ind. 474, 26 N. E. 483; Sell *v.* Bailey, 119 Ind. 51, 21 N. E. 338; Phelps *v.* Smith, 116 Ind. 387, 17 N. E. 602, 19 N. E. 156; Taylor *v.* Johnson, 113 Ind. 164, 15 N. E. 238; Pfeifer *v.* Snyder, 72 Ind. 78; Bruker *v.* Kelsey, 72 Ind. 51; Noble *v.* Hines, 72 Ind. 12; Wiley *v.* Bradley, 67 Ind. 560; Wedekind *v.* Parsons, 64 Ind. 290; Spaulding *v.* Myers, 64 Ind. 264; Whitesel *v.* Hiney, 62 Ind. 168; Price *v.* Sanders, 60 Ind. 310; Deutsch *v.* Korsmeier, 59 Ind. 373; Romine *v.* Romine, 59 Ind. 346; Bentley *v.* Dunkle, 57 Ind. 374; Evans *v.* Hamilton, 56 Ind. 34; Sherman *v.* Hogland, 54 Ind. 578; Pence *v.* Croan, 51 Ind. 336; Komblith *v.* Collins, 17 Ind. 56; Law *v.* Smith, 4 Ind. 56. The omission of the averment that at the time the suit was brought the debtor had no other property out of which the debt might be collected is fatal. Brumbaugh *v.* Richcreek, 127 Ind. 240, 26 N. E. 664, 22 Am. St. Rep. 649. See also cases cited *infra*, note 46.

Deceased debtor.— The same rule applies in an action by the executor or administrator of a deceased grantor. Wilson *v.* Boone, 136 Ind. 142, 35 N. E. 1096; Bottorff *v.* Covert, 90 Ind. 508; Cox *v.* Hunter, 79 Ind. 590. A complaint to set aside a fraudulent conveyance of a deceased debtor which does not allege that the estate is insolvent is bad on

the time of the conveyance and has not since had up to the time of the commencement of the suit sufficient property subject to execution to pay his debts is a sufficient averment of his insolvency.[45]

(B) *At Commencement of Suit.* In the very nature of things the financial condition of the grantor at the time of making the conveyance is merely an evidential fact bearing on the question of fraud, although his insolvency at the time of the commencement of the suit is generally considered essential to the creditor's right to invoke the aid of a court of equity, and must therefore be pleaded,[46] unless the conveyance was voluntary and tended to delay the creditor in collecting his claim.[47]

demurrer. Willis *v.* Thompson, 93 Ind. 62; Rice *v.* Perry, 61 Me. 145; Wagner *v.* Law, 3 Wash. 500, 28 Pac. 1109, 29 Pac. 927, 28 Am. St. Rep. 56, 15 L. R. A. 784. Where it is sought to set aside a fraudulent conveyance by a debtor since deceased, it is sufficient to allege the insolvency of the estate. It is not necessary to allege that the grantor had no available property from the making of the conveyance until his death. State *v.* Parsons, 147 Ind. 579, 47 N. E. 17, 62 Am. St. Rep. 430; Galentine *v.* Wood, 137 Ind. 532, 35 N. E. 901; Bottorff *v.* Covert, 90 Ind. 508; Cox *v.* Hunter, 79 Ind. 590; Bruker *v.* Kelsey, 72 Ind. 51.

45. Vansickle *v.* Shenk, 150 Ind. 413, 50 N. E. 381; Pierce *v.* Hower, 142 Ind. 626, 42 N. E. 223; York *v.* Rockwood, 132 Ind. 358, 31 N. E. 1110; Simpkins *v.* Smith, 94 Ind. 470; Nugen *v.* Cambridge City First Nat. Bank, 86 Ind. 311; Alford *v.* Baker, 53 Ind. 279. See also Bottorff *v.* Covert, 90 Ind. 508; Ream *v.* Karnes, 90 Ind. 167; Borror *v.* Carrier, 34 Ind. App. 353, 73 N. E. 123; Jackson *v.* Sayler, 30 Ind. App. 72, 63 N. E. 881; Dunsback *v.* Collar, 95 Mich. 611, 55 N. W. 435; Rinehart *v.* Long, 95 Mo. 396, 8 S. W. 559.

Property not subject to execution.— It need not be alleged that the property in controversy was subject to execution. If it was not that is a matter of defense. State *v.* Parsons, 147 Ind. 579, 47 N. E. 17, 62 Am. St. Rep. 430; Slagle *v.* Hoover, 137 Ind. 314, 36 N. E. 1099.

46. *Alabama.*— State Bank *v.* Ellis, 30 Ala. 478.

District of Columbia.— Hess *v.* Horton, 2 App. Cas. 81.

Iowa.— Hill *v.* Denneny, 106 Iowa 726, 77 N. W. 472; Banning *v.* Purinton, 105 Iowa 642, 75 N. W. 639.

Kentucky.— Evans *v.* Reay, 3 Ky. L. Rep. 193.

Louisiana.— Hart *v.* Bowie, 34 La. Ann. 323; Zimmerman *v.* Fitch, 28 La. Ann. 454.

Mississippi.— Miles *v.* Richards, Walk. 477, 12 Am. Dec. 584.

Missouri.— Bird *v.* Bolduc, 1 Mo. 701.

Nebraska.— Dufrene *v.* Anderson, 67 Nebr. 136, 93 N. W. 139.

And see cases cited *supra*, note 44.

Effect of lien.— Where the creditor has obtained a lien on the property transferred this allegation is not necessary. Wadsworth *v.* Schisselbauer, 32 Minn. 84, 19 N. W. 390. See *supra*, XIV, E, 3, a, (III).

Other property subject to execution.— It is not necessary, in order to constitute a cause of action, that the petition state that the debtor at the time of making the fraudulent deed did not have other property subject to execution. Clark *v.* Thias, 173 Mo. 628, 73 S. W. 616.

The controlling inquiry is not as to the extent of the debtor's property when the conveyance was made, but at the time the action to set it aside was begun. Burlington Protestant Hospital Assoc. *v.* Gerlinger, 111 Iowa 293, 82 N. W. 765; Rounds *v.* Green, 29 Minn. 139, 12 N. W. 454.

In Maryland the date of the impeached instrument is held to be the particular time when the sufficiency of the debtor's means is to be inquired into. Goodman *v.* Wineland, 61 Md. 449.

In Ohio the rule is peculiar. There the fact that the debtor retained other property sufficient to satisfy his creditors is a proper subject of inquiry in determining the character of the conveyance; but if the conveyance is found to be fraudulent as to creditors this is no defense. The court puts it on the ground that the creditor may levy upon the land and cause it to be sold for the satisfaction of his judgment irrespective of the other property of his debtor. Under such a rule as this of course it is not necessary to allege that the debtor has no other property subject to execution. Gormley *v.* Potter, 29 Ohio St. 597; Westerman *v.* Westerman, 25 Ohio St. 500.

So in North Carolina under the old practice it was required to be shown that the debtor had no property out of which the debt could be satisfied by legal process which was usually done by a return of the execution *nulla bona*. Wheeler *v.* Taylor, 41 N. C. 225; Brown *v.* Long, 36 N. C. 190, 36 Am. Dec. 43. But now it is said that this rule grew out of the relations of the two courts under the former system, and, as the same court now has jurisdiction of both classes of cases, it is no longer necessary to allege that the debtor has no other property sufficient to satisfy the creditors' claims. Dawson Bank *v.* Harris, 84 N. C. 206.

47. Beall *v.* Lehman Durr Co., 110 Ala. 446, 18 So. 230. See *supra*, VIII, D. A bill by a judgment creditor to set aside a conveyance of his debtor sufficiently sets out facts constituting fraud by alleging that the conveyance was voluntary, and rendered the debtor without means to pay his debts.

(III) *RETURN NULLA BONA.*[48] Whatever may be the rule as to the necessity for the averment, when it is averred that an execution has been issued upon the judgment against defendant and returned no property found, this, if proved, is sufficient to establish the insolvency of the debtor, and to show that the legal remedy has been exhausted.[49]

(IV) *VIEWED AS AN EVIDENTIAL FACT.* When all is said the debtor's insolvency is but an evidential fact which may go to sustain the allegation of fraud.[50]

h. Fraud — (I) *NECESSITY OF PLEADING.* Where fraud is an essential ingredient of the cause of action or defense it must be pleaded and proved; it is never presumed.[51]

(II) *FACTS MUST BE PLEADED* — (A) *In General.* And the rule is that the facts upon which fraud is predicated must be specifically pleaded. A mere general averment of fraud is nothing but the averment of a conclusion and will not suffice. It presents no issue for trial and is bad on demurrer.[52] Such an averment

Dunklee *v.* Rose, 12 Colo. App. 420, 56 Pac. 348.

48. See also *supra*, XIV, J, 3, c.

49. Quinn *v.* People, 146 Ill. 275, 34 N. E. 148; Breitkreutz *v.* Holton Nat. Bank, (Kan. 1905) 79 Pac. 686; Page *v.* Grant, 9 Oreg. 116; Reed *v.* Loney, 22 Wash. 433, 61 Pac. 41. In a creditors' suit brought to set aside a fraudulent conveyance, a return of execution *nulla bona* is conclusive of the question that the creditor has exhausted his legal remedy, and an answer which alleged that the debtor had property subject to levy on execution, in the absence of an allegation of fraud or collusion on the part of the sheriff, does not state a defense. Nebraska Nat. Bank *v.* Hallowell, 63 Nebr. 309, 88 N. W. 556. Since a constable has no power to levy an execution on real estate, an allegation in a complaint to set aside an alleged fraudulent conveyance that an execution had been placed in the hands of the constable, and by him returned *nulla bona*, was an insufficient allegation of defendant's insolvency. Stuckwisch *v.* Holmes, 29 Ind. App. 512, 64 N. E. 894. In an action by an assignee of a certificate of sale of realty under execution to cancel a deed alleged to have been executed to defraud creditors, a complaint averring the issuance of execution, and its return by the sheriff with indorsement of inability to find any other property of the debtor, and that such debtor had no other property in the state out of which to make the execution, is a sufficient allegation of the debtor's insolvency at the time of the conveyance, as against a general objection to its sufficiency. Bates *v.* Drake, 28 Wash. 447, 68 Pac. 961.

50. Breitkreutz *v.* Holton Nat. Bank, (Kan. 1905) 79 Pac. 686. Insolvency, while a fact, is only an evidential fact which need not be alleged. It is involved in the finding of fraud, provided it is necessary to support that finding. Vollkommer *v.* Cody, 177 N. Y. 124, 69 N. E. 277; Kain *v.* Larkin, 141 N. Y. 144, 36 N. E. 9; Citizens' Nat. Bank *v.* Hodges, 80 Hun (N. Y.) 471, 30 N. Y. Suppl. 445; Fuller *v.* Brown, 76 Hun (N. Y.) 557, 28 N. Y. Suppl. 189. The fact of insolvency is important only as it bears on the question whether or not the deed is fraudulent as against the creditor who assails it. Rhead *v.* Hounson, 46 Mich. 243, 9 N. W. 267. Such an allegation, although not essential, may be useful where it is necessary for plaintiff to show actual fraud. Nealis *v.* American Tube, etc., Co., 76 Hun (N. Y.) 220, 27 N. Y. Suppl. 733; Kain *v.* Larkin, 66 Hun (N. Y.) 209, 20 N. Y. Suppl. 938.

51. Wetherly *v.* Straus, 93 Cal. 283, 28 Pac. 1045; Spaulding *v.* Myers, 64 Ind. 264; Lawrence *v.* Bowman, 6 Rob. (La.) 21; Towle *v.* Janvrin, 61 N. H. 605. Fraud is never presumed, and whenever it constitutes an element of a cause of action or of a defense which is of an affirmative nature, and is invoked as conferring a right against the opposite party, it must be alleged. Wetherly *v.* Straus, 93 Cal. 283, 28 Pac. 1045.

52. *Alabama.*— Little *v.* Sterne, 125 Ala. 609, 27 So. 972; Warren *v.* Hunt, 114 Ala. 506, 21 So. 939; Coal City Coal, etc., Co. *v.* Hazard Powder Co., 108 Ala. 218, 19 So. 392; Heinz *v.* White, 105 Ala. 670, 17 So. 185; Curran *v.* Olmstead, 101 Ala. 692, 14 So. 398; Loucheim *v.* Talladega First Nat. Bank, 98 Ala. 521, 13 So. 374; Phœnix Ins. Co. *v.* Moog, 78 Ala. 284, 56 Am. Rep. 31; Pickett *v.* Pipkin, 64 Ala. 520; Flewellen *v.* Crane, 58 Ala. 627.

Arkansas.— Knight *v.* Glasscock, 51 Ark. 390, 11 S. W. 580.

California.— Albertoli *v.* Branham, 80 Cal. 631, 22 Pac. 404, 13 Am. St. Rep. 200; Fox *v.* Dyer, (1899) 22 Pac. 257; Pehrson *v.* Hewitt, 79 Cal. 594, 21 Pac. 950; Castle *v.* Bader, 23 Cal. 75; Oakland *v.* Carpenter, 21 Cal. 642; Harris *v.* Taylor, 15 Cal. 348; Kinder *v.* Macy, 7 Cal. 206.

Colorado.— Brereton *v.* Bennett, 15 Colo. 254, 25 Pac. 310; Burdsall *v.* Waggoner, 4 Colo. 256; Fox *v.* Lipe, 14 Colo. App. 258, 59 Pac. 850.

Georgia.— Rowland *v.* Coleman, 45 Ga. 204.

Illinois.— Klein *v.* Horine, 47 Ill. 430.

Indiana.— Old Nat. Bank *v.* Heckman, 148 Ind. 490, 47 N. E. 953; Fisher *v.* Syfers, 109 Ind. 514, 10 N. E. 306.

Indian Territory.— Hargadine-McKitrick Dry Goods Co. *v.* Bradley, (1902) 69 S. W.

not only renders the bill or complaint demurrable, but it will not even sustain a

862; Cox *v.* Swofford Bros. Dry-Goods Co., 2 Indian Terr. 61, 47 S. W. 303.

Kansas.— Gleason *v.* Wilson, 48 Kan. 500, 29 Pac. 698.

Maine.— Pease *v.* McKusick, 25 Me. 73.

Minnesota.— Morrill *v.* Little Falls Mfg. Co., 53 Minn. 371, 55 N. W. 547, 21 L. R. A. 174.

Mississippi.— McInnis *v.* Wiscassett Mills, 78 Miss. 52, 28 So. 725.

Missouri.— Burnham *v.* Boyd, 167 Mo. 185, 66 S. W. 1088; Reed *v.* Bott, 100 Mo. 62, 12 S. W. 347, 14 S. W. 1089; Wilkinson *v.* Goodin, 71 Mo. App. 394.

Nebraska.— Kemper, etc., Dry-Goods Co. *v.* Renshaw, 58 Nebr. 513, 78 N. W. 1071; Rockford Watch Co. *v.* Manifold, 36 Nebr. 801, 55 N. W. 236.

New Jersey.— Smith *v.* Wood, 42 N. J. Eq. 563, 7 Atl. 881.

New York.— Bodine *v.* Edwards, 10 Paige 504.

North Carolina.— Bryan *v.* Spruill, 57 N. C. 27.

Oregon.—Leasure *v.* Forquer, 27 Oreg. 334, 41 Pac. 665.

Utah.— Wilson *v.* Sullivan, 17 Utah 341, 53 Pac. 994.

Virginia.— Millhiser *v.* McKinley, 98 Va. 207, 35 S. E. 446.

Washington.—Kidder *v.* Beavers, 33 Wash. 635, 74 Pac. 819; West Coast Grocery Co. *v.* Stinson, 13 Wash. 255, 43 Pac. 35.

West Virginia.— Vance Shoe Co. *v.* Haught, 41 W. Va. 275, 23 S. E. 553.

Wisconsin.— Prentice *v.* Madden, 3 Pinn. 376, 4 Chandl. 170.

United States.— Williamson *v.* Beardsley, 137 Fed. 467.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 771 *et seq.*

Facts held sufficient to show fraud.— *Alabama.*— Taylor *v.* Dwyer, 131 Ala. 91, 32 So. 509; Plaster *v.* Throne Franklin Shoe Co., 123 Ala. 360, 26 So. 225; Freeman *v.* Stewart, 119 Ala. 158, 24 So. 31; Steiner Land, etc., Co. *v.* King, 118 Ala. 546, 24 So. 35; Beall *v.* Lehman Durr Co., 110 Ala. 446, 18 So. 230; Echols *v.* Peurrung, 107 Ala. 660, 18 So. 250; Williams *v.* Spragins, 102 Ala. 424, 15 So. 247; Gibson *v.* Trowbridge Furniture Co., 93 Ala. 579, 9 So. 370; Miller *v.* Lehman, 87 Ala. 517, 6 So. 361; Globe Iron Roofing, etc., Co. *v.* Thacher, 87 Ala. 458, 6 So. 366; Pickett *v.* Pipkin, 64 Ala. 520.

California.— Anderson *v.* Lassen County Bank, 140 Cal. 695, 74 Pac. 287.

Georgia.— McKenzie *v.* Thomas, 118 Ga. 728, 45 S. E. 610; Leonard *v.* New England Mortg. Security Co., 102 Ga. 536, 29 S. E. 147.

Illinois.— Andrews *v.* Donnerstag, 171 Ill. 329, 49 N. E. 558; Manchester *v.* McKee, 9 Ill. 511.

Indiana.— Searles *v.* Little, 153 Ind. 432, 55 N. E. 93.

Iowa.— Pratt *v.* Green, 25 Iowa 39.

Kentucky.— Marcum *v.* Powers, 9 S. W. 255, 10 Ky. L. Rep. 380.

Louisiana.— Blum *v.* Wyly, 111 La. 1092, 36 So. 202.

Nebraska.— Chamberlain Banking House *v.* Turner-Frazer Mercantile Co., 66 Nebr. 48, 92 N. W. 172.

New Hampshire.— Alden *v.* Gibson, 63 N. H. 12.

New Jersey.— Bayley *v.* Bayley, 66 N. J. Eq. 84, 57 Atl. 271; Couse *v.* Columbia Powder Mfg. Co., (Ch. 1895) 33 Atl. 297.

New York.— Kain *v.* Larkin, 141 N. Y. 144, 36 N. E. 9; Citizens' Nat. Bank *v.* Hodges, 80 Hun 471, 30 N. Y. Suppl. 445; Beethoven Piano-Organ Co. *v.* C. C. McEwen Co., 59 N. Y. Super. Ct. 7, 12 N. Y. Suppl. 552; Carpenter *v.* Adickes, 34 Misc. 645, 70 N. Y. Suppl. 607; Orange County Nat. Bank *v.* Van Steenburgh, 20 N. Y. Suppl. 35; Weil *v.* Levenson, 8 N. Y. St. 834.

North Dakota.— Paulson *v.* Ward, 4 N. D. 100, 58 N. W. 792.

South Carolina.— Meinhard *v.* Youngblood, 37 S. C. 231, 15 S. E. 950, 16 S. E. 771.

Virginia.—American Net, etc., Co. *v.* Mayo, 97 Va. 182, 33 S. E. 523.

West Virginia.— Zell Guano Co. *v.* Heatherly, 38 W. Va. 409, 18 S. E. 611; Watkins *v.* Wortman, 19 W. Va. 78.

Wisconsin.— Level Land Co. No. 3 *v.* Sivyer, 112 Wis. 442, 88 N. W. 317; Allen *v.* McRae, 91 Wis. 226, 64 N. W. 889; Marston *v.* Dresen, 76 Wis. 418, 45 N. W. 110.

United States.— Kittel *v.* Augusta, etc., R. Co., 65 Fed. 859.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 771 *et seq.*

Facts held insufficient.— Lipperd *v.* Edwards, 39 Ind. 165; Anderson *v.* Lindberg, 64 Minn. 476, 67 N. W. 538; Burr *v.* Davis, (Tex. Civ. App. 1896) 36 S. W. 137. In an action for conversion of corn, alleging that defendant had levied an execution against a third person on property belonging to plaintiff, an answer alleging that the property levied on was the property of the execution debtor, and under his control, and that plaintiff is a brother of such debtor, and that the brothers had conspired to conceal the property of the debtor, and that plaintiff without having any interest in the property had claimed ownership for the purpose of preventing the collection of claims against his brother, does not charge a fraudulent conveyance of the property levied on under execution. Lackner *v.* Sawyer, 5 Nebr. (Unoff.) 257, 98 N. W. 49.

Where the vice of the instrument complained of is inherent in its terms, a general allegation of fraud is not objectionable. Jessup *v.* Hulse, 29 Barb. (N. Y.) 539.

Objection by motion in arrest.— A garnishee having denied an indebtedness, plaintiff alleged that he was indebted to defendant in a certain sum on account of moneys deposited with him by defendant on a certain date in fraud of defendant's creditors, and particularly plaintiff, and for the purpose of

decree.[53] So an allegation of fraud on information and belief is not sufficient unless the facts upon which such belief is founded are set forth.[54] In the case of a general charge of fraud a demurrer is no confession of the fraud, for it admits only facts well pleaded and not conclusions of law or fact.[55] But if the facts be well pleaded a demurrer admits the fraudulent transfer charged.[56] A bill alleging the facts constituting fraud in the alternative is bad on demurrer if either of the alternative statements is insufficient.[57]

(B) *Minute Details Unnecessary.* While a general charge of fraud is insufficient, the rule of certainty in equity pleadings does not require that the facts and circumstances shall be alleged in minute detail, or that a detailed statement of the fraudulent acts be made. These minute details are properly matters of evidence which need not be charged in order to let them in as proof. General averments of facts, from which, unexplained, a conclusion of fraud arises are sufficient.[58]

i. Fraudulent Intent and Knowledge — (I) *OF GRANTOR.* There is a distinction, frequently overlooked, between fraud and the intent to defraud; fraud being, for the purposes of pleading, a conclusion; but the intent to hinder, delay, and defraud creditors is a fact which may well be pleaded *simpliciter* without stating the evidence which goes to substantiate it.[59] But such averment, although sufficient for its legitimate purpose, cannot be relied on as a substitute for the

cheating, defrauding, and delaying plaintiff in the collection of its judgment. The garnishee tendered the issue, and tried the case as one at law. It was held that plaintiff's allegation was sufficient to support a finding of fraud, as against an objection first raised by motion in arrest, although it was defective in failing to allege specific acts of fraud, the garnishee not having been misled. Wilcoxson, etc., Banking House *v.* Darr, 139 Mo. 660, 41 S. W. 227.

53. Leasure *v.* Forquer, 27 Oreg. 334, 41 Pac. 665.

54. Murphy *v.* Murphy, 189 Ill. 360, 59 N. E. 796; Wilkinson *v.* Goodin, 71 Mo. App. 394.

55. Flewellen *v.* Crane, 58 Ala. 627; Bryan *v.* Spruill, 57 N. C. 27. See, generally, PLEADING.

56. Riley *v.* Carter, 76 Md. 581, 25 Atl. 667, 35 Am. St. Rep. 443, 19 L. R. A. 489; Large *v.* Bristol Steam Tow-Boat, etc., Co., 2 Ashm. (Pa.) 394.

57. Mountain *v.* Whitman, 103 Ala. 630, 16 So. 15.

58. *Alabama.*— Gassenheimer *v.* Kellogg, 121 Ala. 109, 23 So. 29; Williams *v.* Spragins, 102 Ala. 424, 15 So. 247; Burford *v.* Steele, 80 Ala. 147; Pickett *v.* Pipkin, 64 Ala. 520; Kennedy *v.* Kennedy, 2 Ala. 571.

California.— Threlkel *v.* Scott, (1893) 34 Pac. 851.

Connecticut.— Mallory *v.* Gallagher, 75 Conn. 665, 55 Atl. 209.

District of Columbia.— Edwards *v.* Entwisle, 2 Mackey 43, holding that it is sufficient in a bill brought to have a conveyance set aside on the ground that it was made with intent to defraud creditors that the complainant state a *prima facie* case, to be afterward established by proof; and that mere matters of evidence on the general question of fraudulent intent need not be made the subject of special averment.

Illinois.— Mitchell *v.* Byrons, 67 Ill. 522.

Michigan.— McMahon *v.* Rooney, 93 Mich. 390, 53 N. W. 539; Reeg *v.* Burnham, 55 Mich. 39, 20 N. W. 708, 21 N. W. 431; Merrill *v.* Allen, 38 Mich. 487; Tong *v.* Marvin, 15 Mich. 60.

New York.— Passavant *v.* Sickle, 14 N. Y. Civ. Proc. 57.

West Virginia.—Vance Shoe Co. *v.* Haught, 41 W. Va. 275, 23 S. E. 553. Where a conveyance of property to a wife is attacked by a subsequent creditor of the husband on the ground of actual fraud, the fact that the transfer is not on a consideration deemed valuable in law may be treated as evidence of the fraud, and need not be alleged in the bill. Miller *v.* Gillespie, 54 W. Va. 450, 46 S. E. 451.

United States.— De Hierapolis *v.* Lawrence, 115 Fed. 761, 763, where it is said: "Good pleading requires that the substantial facts out of which the rights and liabilities sought to be enforced arose should be alleged, but not that the circumstances out of which these facts arise and are to be made to appear should be in detail set forth."

Canada.— Wright *v.* Henderson, 1 U. C. Q. B. O. S. 304.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 771 *et seq.*

59. *California.*— Threlkel *v.* Scott, (1893) 34 Pac. 851.

Iowa.—Burlington Protestant Hospital Assoc. *v.* Gerlinger, 111 Iowa 293, 82 N. W. 765.

Nebraska.— McIntyre *v.* Malone, 3 Nebr. (Unoff.) 159, 91 N. W. 246.

New York.— Fuller *v.* Brown, 76 Hun 557, 28 N. Y. Suppl. 189; National Union Bank *v.* Reed, 12 N. Y. Suppl. 920, 27 Abb. N. Cas. 5; Hastings *v.* Thurston, 18 How. Pr. 530; Bogert *v.* Haight, 9 Paige 297.

North Dakota.— Paulson *v.* Ward, 4 N. D. 100, 58 N. W. 792.

South Dakota.— Probert *v.* McDonald, 2

statement of substantial facts required to show the existence of the alleged covinous intent.[60] Although it is customary and proper to aver in terms that the transfer complained of was made with intent to hinder, delay, and defraud creditors, it has been held that this is not essential; it being sufficient to support a decree if facts and circumstances from which an inference of fraud may be drawn are well pleaded.[61] But other cases hold that it must be alleged in terms, especially where by statute the question of fraudulent intent *vel non* is made a question of fact.[62] It need not be alleged specifically that the conveyance was made with intent to defraud the complainant personally, if it be alleged that it was made with intent to defraud creditors generally.[63] Where it is charged by an existing creditor that a voluntary conveyance has been made by an insolvent debtor the law will draw the conclusion from the facts, and no allegation of the debtor's intent is necessary.[64]

(II) *OF GRANTEE.* In case of a purchase from the debtor for a valuable although inadequate consideration, it should be alleged that the grantee had knowledge of the grantor's failing circumstances, and that he had knowledge of or participated in the grantor's scheme to hinder, delay, and defraud his creditors.[65] But

S. D. 495, 51 N. W. 212, 39 Am. St. Rep. 796.

Wisconsin.— Evans *v.* Williams, 82 Wis. 666, 53 N. W. 32.

Canada.— Sawyer *v.* Linton, 23 Grant Ch. (U. C.) 43.

60. *Alabama.*— Little *v.* Sterne, 125 Ala. 609, 27 So. 972; Warren *v.* Hunt, 114 Ala. 506, 21 So. 939; Heinz *v.* White, 105 Ala. 670, 17 So. 185; Curran *v.* Olmstead, 101 Ala. 692, 14 So. 398.

Colorado.— Burdsall *v.* Waggoner, 4 Colo. 256.

Georgia.— Rowland *v.* Coleman, 45 Ga. 204.

Indiana.— Spaulding *v.* Myers, 64 Ind. 264.

Kansas.— Gleason *v.* Wilson, 48 Kan. 500, 29 Pac. 698.

Missouri.— Mau Chunk First Nat. Bank *v.* Rohrer, 138 Mo. 369, 39 S. W. 1047.

Something more than a fraudulent intent on the part of the grantor is required; want of consideration or knowledge of the fraud on the part of the grantee must be shown, or there must be some secret trust between the parties, or other circumstances which will operate to debar the grantee from protection as a purchaser. Burdsall *v.* Waggoner, 4 Colo. 256. See *supra*, VII, B.

61. Beall *v.* Lehman Durr Co., 110 Ala. 446, 18 So. 230; Coal City Coal, etc., Co. *v.* Hazard Powder Co., 108 Ala. 218, 19 So. 392; Sides *v.* Scharff, 93 Ala. 106, 9 So. 228; O'Kane *v.* Vinnedge, 108 Ky. 34, 55 S. W. 711, 21 Ky. L. Rep. 1551; Whittlesey *v.* Delaney, 73 N. Y. 571; Cohen *v.* Plonsky, 60 Hun (N. Y.) 103, 14 N. Y. Suppl. 234. A complaint which alleges that a deed was made without consideration, with intent to hinder, delay, and defraud the grantor's creditors, and particularly plaintiff, and to prevent plaintiff or any other creditor from levying on it; that the grantor is possessed of no other property out of which plaintiff's demand could be satisfied, sufficiently alleges a fraudulent intent, which is the material fact in the case (2 Rev. St. p. 137, § 4), and it is immaterial that it does not allege that the grantor had no other property at the time of the conveyance. Fuller *v.* Brown, 76 Hun (N. Y.) 557, 28 N. Y. Suppl. 189.

62. *California.*—Wetherly *v.* Straus, 93 Cal. 283, 28 Pac. 1045, holding that as the intent to defraud creditors is a question of fact, and not of law, it is necessary for one who would avail himself of this fact to set aside a completed transfer of property by a debtor, to aver it in his pleading as one of the elements of his cause of action or defense.

Indiana.— National State Bank *v.* Vigo County Nat. Bank, 141 Ind. 352, 40 N. E. 799, 50 Am. St. Rep. 330; Willis *v.* Thompson, 93 Ind. 62; Lockwood *v.* Harding, 79 Ind. 129; Bentley *v.* Dunkle, 57 Ind. 374. Real property conveyed before judgment cannot be subjected to the payment thereof, unless in an action brought for that purpose it is alleged and proved that it was conveyed with intent to put it beyond the reach of the creditor. Hutchinson *v.* Michigan City First Nat. Bank, 133 Ind. 271, 30 N. E. 952, 36 Am. St. Rep. 537.

Kansas.— Van Vliet *v.* Halsey, 37 Kan. 116, 14 Pac. 482.

Massachusetts.— Carpenter *v.* Cushman, 121 Mass. 265.

Mississippi.— Hogan *v.* Burnett, 37 Miss. 617.

Missouri.— Martin *v.* Fox, 40 Mo. App. 664.

North Dakota.— Dalrymple *v.* Security L. & T. Co., 9 N. D. 306, 83 N. W. 245.

A positive denial of fraud in an answer in chancery will not prevail against admissions in the same answer of facts which show that the transaction was fraudulent. Robinson *v.* Stewart, 10 N. Y. 189.

63. Harrison *v.* Jaquess, 29 Ind. 208.

64. Gray *v.* Brunold, 140 Cal. 615, 74 Pac. 303; Catchings *v.* Manlove, 39 Miss. 655.

65. *Alabama.*— Little *v.* Sterne, 125 Ala. 609, 27 So. 972; Beall *v.* Lehman Durr Co., 110 Ala. 446, 18 So. 230; Coal City Coal, etc., Co. *v.* Hazard Powder Co., 108 Ala. 218, 19 So. 392.

where a voluntary conveyance by an insolvent debtor is assailed by existing creditors, it is not necessary to allege in positive terms that the grantee participated in the fraudulent scheme of the grantor, or that he had guilty knowledge or even notice of the fraudulent purpose of the grantor. The averment of the facts is an implied allegation of notice and is sufficient.[66]

(III) *AS TO SUBSEQUENT CREDITORS OR PURCHASERS.* If a creditor assails a conveyance made before the debt was contracted he must as a rule allege and prove that the conveyance was made with the intent to put the property beyond the reach of future creditors with whom the grantor intended to deal upon the faith of his owning the property transferred and that upon that faith he did

Illinois.— Andrews *v.* Donnerstag, 171 Ill. 329, 49 N. E. 558; Powers *v.* Wheeler, 63 Ill. 29.

Indiana.— Wilson *v.* Boone, 136 Ind. 142, 35 N. E. 1096; Seager *v.* Aughe, 97 Ind. 285; Willis *v.* Thompson, 93 Ind. 62; Spaulding *v.* Myers, 64 Ind. 264.

Iowa.— Burlington Protestant Hospital Assoc. *v.* Gerlinger, 111 Iowa 293, 82 N. W. 765.

Louisiana.— New Orleans Gas, etc., Co. *v.* Currell, 4 Rob. 438.

Pennsylvania.— Garis *v.* Fish, 133 Pa. St. 555, 19 Atl. 561.

West Virginia.—Vance Shoe Co. *v.* Haught, 41 W. Va. 275, 23 S. E. 553; Blackshire *v.* Pettit, 35 W. Va. 547, 14 S. E. 133.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 779; and *supra*, VII, B.

Sufficiency of the allegation.— Cohen *v.* Plonsky, 60 Hun (N. Y.) 103, 14 N. Y. Suppl. 234. An allegation that the grantee had notice of the grantor's fraudulent intent is sufficient, notwithstanding the payment of a consideration. State *v.* Parsons, 147 Ind. 579, 47 N. E. 17, 62 Am. St. Rep. 430. A mere allegation that the grantee knew that the grantor was insolvent is not sufficient to show that the grantee had notice of the grantor's fraudulent intent. Albertoli *v.* Branham, 80 Cal. 631, 22 Pac. 404, 13 Am. St. Rep. 200. Where a junior mortgagee alleged that after a sale under a prior mortgage the mortgagors conveyed the property to R to defraud creditors, and that R conveyed to defendant, who took with knowledge of the fraudulent purpose, no invalidity of title in defendant was shown, as the title of R, who was not charged with knowledge of the fraud, was not tainted thereby. Witham *v.* Blood, 124 Iowa 695, 100 N. W. 558. It need not be alleged that there existed a conspiracy to defraud creditors. Alden *v.* Gibson, 63 N. H. 12. Where a judgment creditor sought to subject to the payment of his claim lands conveyed by a debtor on the ground that such conveyance was fraudulent, averments of the bill that the grantees did not pay any consideration for the conveyance, but that, if there was any consideration paid, it was paid with the full knowledge and consent on the part of defendant to dispose of the property, for the purpose of hindering, delaying, or defrauding his creditors, and preventing the collection of their debt, and that the grantee participated in such fraudulent intent, were sufficient. Frey *v.* Fenn, 126 Ala. 291, 28 So. 789. A complaint to set aside a fraudulent conveyance, alleging that the grantee had notice of the grantor's fraudulent intent, is not demurrable because it shows that a consideration was paid, since the allegation of notice is sufficient to avoid the deed, notwithstanding the consideration. State *v.* Parsons, 147 Ind. 579, 47 N. E. 17, 62 Am. St. Rep. 430. See *supra*, VII, C. An amendment to a petition which alleges simply that certain mortgages were made to the relatives of an insolvent mortgagor for the purpose of hindering and delaying his creditors, without alleging any facts, except those of insolvency and relationship, to show that the mortgagees had notice or reasonable grounds to suspect that the mortgages were made for such purpose, is properly refused. Lydia Pinkham Medicine Co. *v.* Gibbs, 108 Ga. 138, 33 S. E. 945.

66. McGhee *v.* Importers', etc., Nat. Bank, 93 Ala. 192, 9 So. 734; State *v.* Parsons, 147 Ind. 579, 47 N. E. 17, 62 Am. St. Rep. 430; Phillips *v.* Kennedy, 139 Ind. 419, 38 N. E. 410, 39 N. E. 147; Wilson *v.* Boone, 136 Ind. 142, 35 N. E. 1096; Rollet *v.* Heiman, 120 Ind. 511, 22 N. E. 666, 16 Am. St. Rep. 340; Spaulding *v.* Blythe, 73 Ind. 93; Bass *v.* Citizens' Trust Co., 32 Ind. App. 583, 70 N. E. 400; Flook *v.* Armentrout, 100 Va. 638, 42 S. E. 686; Reed *v.* Loney, 22 Wash. 433, 61 Pac. 41. See *supra*, VII, B, 1, b.

An allegation that a debtor transferred his property wholly without valuable consideration, leaving nothing with which to pay his debts, is sufficient of itself to show fraud as against existing creditors.

Alabama.— Noble *v.* Gilliam, 136 Ala. 618, 33 So. 861. In Alabama it is not necessary to allege that the grantor was insolvent or that the property conveyed was all he owned, where it is averred that the conveyance was either voluntary or for an inadequate consideration and that the purchaser had knowledge of the fraudulent purpose. Beall *v.* Lehman Durr Co., 110 Ala. 446, 18 So. 230.

Arizona.— Rountree *v.* Marshall, (1899) 59 Pac. 109.

California.— Gray *v.* Brunold, 140 Cal. 615, 74 Pac. 303; Cook *v.* Cockins, 117 Cal. 140, 48 Pac. 1025.

Kentucky.— O'Kane *v.* Vinnedge, 108 Ky. 34, 55 S. W. 711, 21 Ky. L. Rep. 1551.

Louisiana.— Blum *v.* Wyly, 111 La. 1092, 36 So. 202.

contract debts which he did not intend to pay.[67] Even a voluntary conveyance is good as against subsequent creditors, unless executed as a cover for future schemes of fraud.[68] So subsequent purchasers cannot have a conveyance set aside on the ground that it was in fraud of creditors unless they allege and prove that it was intended as a fraud upon subsequent purchasers.[69]

j. Excusing Laches. In covinous transactions of this sort a creditor cannot be deemed guilty of laches while the fraud remains undiscovered, unless by the exercise of ordinary diligence he might sooner have discovered it. It must always be remembered, however, that the means of knowledge are in effect the same thing as knowledge itself,[70] and concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry.[71] Hence a party seeking to avoid the imputation of laches apparent on the face of the bill should set forth specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by defendant fraudulently to keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in his bill.[72]

k. Inviting in Other Creditors. If plaintiff sues on behalf of himself and all other creditors that fact must appear on the face of the bill or complaint. It should be alleged that there are other creditors and stated that the suit is brought

Mississippi.— Catchings *v.* Manlove, 39 Miss. 655.

Wisconsin.— Marston *v.* Dresen, 76 Wis. 418, 45 N. W. 110.

See also Andrews *v.* Donnerstag, 171 Ill. 329, 49 N. E. 558; and *supra*, VII, B, 1, b; VIII, D.

67. Little *v.* Sterne, 125 Ala. 609, 27 So. 972; Heinz *v.* White, 105 Ala. 670, 17 So. 185; Dickson *v.* McLarney, 97 Ala. 383, 12 So. 398; Seals *v.* Robinson, 75 Ala. 363; Petree *v.* Brotherton, 133 Ind. 692, 32 N. E. 300; O'Kane *v.* Vinnedge, 108 Ky. 34, 55 S. W. 711, 21 Ky. L. Rep. 1551. See *supra*, IV, C.

68. *Arkansas.*— Cunningham *v.* Williams, 42 Ark. 170.

Colorado.— Emery *v.* Yount, 7 Colo. 107, 1 Pac. 686.

Illinois.— Moritz *v.* Hoffman, 35 Ill. 553.

Indiana.— Stumph *v.* Bruner, 89 Ind. 556.

New York.— Neuberger *v.* Keim, 134 N. Y. 35, 31 N. E. 268.

United States.—Screyer *v.* Scott, 134 U. S. 405, 10 S. Ct. 579, 33 L. ed. 955; Horbach *v.* Hill, 112 U. S. 144, 5 S. Ct. 81, 28 L. ed. 670; Burton *v.* Platter, 53 Fed. 901, 4 C. C. A. 95.

See *supra*, IV, C; VIII, D, 3.

69. Reynolds *v.* Faust, 179 Mo. 21, 77 S. W. 855; Evans *v.* David, 98 Mo. 405, 11 S. W. 975; Bonney *v.* Taylor, 90 Mo. 63, 1 S. W. 740. See *supra*, IV, H.

70. Washington *v.* Norwood, 128 Ala. 383, 30 So. 405; Lockard *v.* Nash, 64 Ala. 385; Snodgrass *v.* Decatur Branch Bank, 25 Ala. 161, 60 Am. Dec. 505; Erickson *v.* Quinn, 47 N. Y. 410; Rosenthal *v.* Walker, 111 U. S. 185, 4 S. Ct. 382, 28 L. ed. 395; Wood *v.* Carpenter, 101 U. S. 135, 25 L. ed. 807; Bailey *v.* Glover, 21 Wall. (U. S.) 342, 22 L. ed. 636. See *supra*, XIV, I, 4, b.

71. Wood *v.* Carpenter, 101 U. S. 135, 25 L. ed. 807.

72. Fox *v.* Lipe, 14 Colo. App. 258, 59 Pac. 850; Arnett *v.* Coffey, 1 Colo. App. 34, 27 Pac. 614; Pearsall *v.* Smith, 149 U. S. 231, 13 S. Ct. 833, 37 L. ed. 713; Hammond *v.* Hopkins, 143 U. S. 224, 12 S. Ct. 418, 36 L. ed. 134; Wood *v.* Carpenter, 101 U. S. 135, 25 L. ed. 807.

A general allegation of ignorance at one time and of knowledge at another is of no effect. If plaintiff made any particular discovery, it should be stated when it was made, what it was, how it was made, and why it was not made sooner. Hardt *v.* Heidweyer, 152 U. S. 547, 14 S. Ct. 671, 38 L. ed. 548; Wood *v.* Carpenter, 101 U. S. 135, 25 L. ed. 807.

In Colorado, under Gen. St. § 2174, providing that bills for relief on the ground of fraud shall be filed within three years after discovery of the fraud, a bill which alleges that defendant fraudulently conveyed property to his wife at a time stated, which is more than three years prior to the commencement of the action, and which does not allege when the fraud was discovered, nor the facts constituting the fraud, and the circumstances under which it was ascertained, is demurrable. Fox *v.* Lipe, 14 Colo. App. 258, 59 Pac. 850.

In New York, under the ruling of the court of appeals, that the discovery by a creditor of a fraudulent transfer of property by his debtor does not start limitations running against a suit to subject the property, unless the creditor has already obtained judgment and issued execution thereon in the state, but that his right of action accrues only when he has taken such preliminary steps, where sufficient time has not elapsed thereafter to bar his suit, the time, manner, or circumstances of discovering the alleged fraud are immaterial, and need not be alleged; such allegations being necessary only when the ordinary period of limitation is sought to be extended by reason of lack of knowledge of the fraud. Lehman *v.* Crosby, 99 Fed. 542.

for the benefit of plaintiff and such others of the creditors of defendant as may choose to come in and seek relief by and contribute to the expenses of the suit.[73] But the omission of such allegation will not prevent the suit being considered a creditors' suit, where the nature of the case is such as to require the creditors to be called in.[74] In such case the omission may be supplied by amendment before making the decree.[75]

l. Pleading Evidence. In this class of cases, as in all others, it is slovenly pleading to encumber the record with matters of evidence. Facts may be pleaded according to their legal effect without setting forth the particulars that lead to it.[76] But it is not irrelevant or redundant to set out in detail the inceptive steps which culminated in the alleged fraudulent conveyance.[77]

m. Prayer For Relief. In equity the formal relief asked is not always controlling.[78] Under the prayer for general relief plaintiff may have any relief to which the evidence entitles him, without regard to any defect in the prayer for special relief,[79] provided it is founded on and consistent with the allegations in the bill.[80] But no decree can be made on grounds not stated in the bill.[81] A court of equity may adapt its relief to the exigencies of the case, and may award a money judgment against the fraudulent grantor and grantee when that is the only relief needed.[82] It has been held, however, that a conveyance will not be set aside as in fraud of creditors where the bill does not pray for such relief.[83] Alterna-

73. *Maine.*— Crocker *v.* Craig, 46 Me. 327; Fletcher *v.* Holmes, 40 Me. 364; Caswell *v.* Caswell, 28 Me. 232.

New Jersey.— Hunt *v.* Field, 9 N. J. Eq. 36, 42, 57 Am. Dec. 365.

New York.— Elwell *v.* Johnson, 3 Hun 558; Louis *v.* Belgard, 17 N. Y. Suppl. 882; Brown *v.* Ricketts, 3 Johns. Ch. 553.

North Carolina.— Long *v.* Yanceyville Bank, 81 N. C. 42; Wilson *v.* Lexington Bank, 72 N. C. 621.

United States.— Horner *v.* Henning, 93 U. S. 228, 28 L. ed. 879; Pullman *v.* Stebbins, 51 Fed. 10.

England.— Good *v.* Blewitt, 13 Ves. Jr. 397, 33 Eng. Reprint 343.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 770. See also *supra*, XIV, H, 1, b.

74. Hammond *v.* Hammond, 2 Bland (Md.) 306.

75. Hammond *v.* Hammond, 2 Bland (Md.) 306; Good *v.* Blewitt, 13 Ves. Jr. 397, 33 Eng. Reprint 343. See also Atty.-Gen. *v.* Newcombe, 14 Ves. Jr. 1, 33 Eng. Reprint 422.

In Maryland it seems that no amendment is absolutely necessary. The bill may be treated as a creditors' bill in the decree and other proceedings founded on it. Simms *v.* Lloyd, 58 Md. 477; Gibson *v.* McCormick, 10 Gill & J. 65; Birely *v.* Staley, 5 Gill & J. 432, 25 Am. Dec. 303; Strike's Case, 1 Bland 57.

76. Hall *v.* Henderson, 126 Ala. 449, 28 So. 531, 85 Am. St. Rep. 53, 61 L. R. A. 621; Zimmerman *v.* Willard, 114 Ill. 364, 2 N. E. 70. See also Sullivan *v.* Iron Silver Min. Co., 109 U. S. 550, 3 S. Ct. 339, 27 L. ed. 1028.

77. Perkins *v.* Center, 35 Cal. 713.

78. Treadwell *v.* Brown, 44 N. H. 551; Dudley *v.* St. Francis Third Order Congregation, 138 N. Y. 451, 34 N. E. 281; Valentine *v.* Richardt, 126 N. Y. 272, 27 N. E. 255; Bell *v.* Merrifield, 109 N. Y. 202, 16 N. E. 55, 4 Am. St. Rep. 436; Fisher *v.* Moog, 39 Fed. 665.

79. *Illinois.*— Alexander *v.* Tams, 13 Ill. 221.

Kentucky.— Campbell *v.* Trosper, 108 Ky. 602, 57 S. W. 245, 22 Ky. L. Rep. 277.

Missouri.— Schneider *v.* Patton, 175 Mo. 684, 75 S. W. 155.

New Hampshire.— Treadwell *v.* Brown, 44 N. H. 551.

New York.— Donovan *v.* Sheridan, 37 N. Y. Super. Ct. 256; Buswell *v.* Lincks, 8 Daly 518.

South Carolina.— Miller *v.* Hughes, 33 S. C. 530, 12 S. E. 419; Brown *v.* McDonald, 1 Hill Eq. 297.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 760.

80. Schneider *v.* Patton, 175 Mo. 684, 75 S. W. 155.

81. Bailey *v.* Ryder, 10 N. Y. 363; Keneweg Co. *v.* Schilansky, 47 W. Va. 287, 34 S. E. 773. See also Pochelu *v.* Catonnet, 40 La. Ann. 327, 4 So. 74.

Rents and profits.— In a bill to set aside a fraudulent conveyance the complainant may ask for an account of the rents and profits. See *supra*, XIII, A, 4, a, (II), (E), (2). But if he fails to do this he cannot afterward file a bill for this purpose alone. Hadley *v.* Morrison, 39 Ill. 392.

82. Bell *v.* Merrifield, 109 N. Y. 202, 16 N. E. 55, 4 Am. St. Rep. 436; Murtha *v.* Curley, 90 N. Y. 372. But a personal judgment is not authorized where plaintiff has not alleged facts from which it can be inferred on what account, if at all, such judgment could be asked. Schneider *v.* Patton, 175 Mo. 684, 75 S. W. 155. See also *infra*, XIV, M, 1, g.

83. Clark *v.* Krause, 2 Mackey (D. C.) 559; Eastman *v.* Ramsey, 3 Ind. 419.

tive relief may be asked if there be no inconsistency.[84] But if the forms of relief asked are inconsistent the prayer is bad for repugnancy,[85] and it is equally fatal if the prayer for relief is inconsistent with the allegations in the bill.[86] Where it is impossible to determine what relief is sought, the bill is bad on demurrer.[87]

n. Multifariousness. The bill should not be multifarious; and if it is so, it is demurrable, and may be dismissed by the court *sua sponte*, even if not objected to by defendant.[88] This may consist of improperly joining in one bill distinct and independent matters against one defendant,[89] or uniting several matters of a distinct and independent nature against several defendants in one bill.[90] And the misjoinder of parties, plaintiff or defendant, who have no common interest in the matter in litigation is a species of multifariousness which is equally fatal as multifariousness in the subject-matter of the suit.[91] But it is impossible to lay down any general rule as to what constitutes multifariousness. Each case must be governed by its own circumstances, and much must be left to the sound discretion of the court. The question must be determined alone by the averments and relief prayed for in the bill.[92] The objection of multifariousness will not hold where one general right is claimed by plaintiff, although defendants may

84. Crawford *v.* Kirksey, 50 Ala. 590. Where a bill charged that a conveyance to one of defendants for a recited consideration of a certain sum was made to defraud creditors; that the grantor did not owe such sum, or near it; and that defendant held the property as security or for the benefit of the grantor, and prayed that the conveyance be set aside, the property sold, and out of the proceeds defendant's claim be paid and the balance applied on complainant's debts, or, if the conveyance was voluntary, that it might be declared void and the entire proceeds applied to complainants' debts, it was held that relief might be granted under either the special or general prayer, as, although such special prayer was in the alternative, it was certain in its terms. Fisher *v.* Moog, 39 Fed. 665.

85. Caldwell *v.* King, 76 Ala. 149; Moog *v.* Talcott, 72 Ala. 210.

86. Maynard *v.* May, 11 S. W. 806, 11 Ky. L. Rep. 166.

87. Van Vliet *v.* Halsey, 37 Kan. 116, 14 Pac. 482.

88. Walker *v.* Powers, 104 U. S. 245, 26 L. ed. 729; Story Eq. Pl. § 271. And see, generally, EQUITY, 16 Cyc. 239 *et seq.*

89. Robinson *v.* Springfield Co., 21 Fla. 239; Stephens *v.* Whitehead, 75 Ga. 294; Walker *v.* Powers, 104 U. S. 245, 26 L. ed. 729 (where the relief sought involved totally distinct questions, requiring different evidence and leading to different decrees); Story Eq. Pl. § 271.

90. Stephens *v.* Whitehead, 75 Ga. 294; Bobb *v.* Bobb, 8 Mo. App. 257; Story Eq. Pl. § 271. See also Jordan *v.* Liggan, 95 Va. 616, 29 S. E. 330.

A creditors' bill is not multifarious, because based on two several judgments both in favor of complainant and against the same defendant, nor because it attacks as fraudulent a conveyance of property in trust from the judgment defendant to certain of his co-defendants, by which an annuity was reserved to the grantor, and also an assignment of the annuity so reserved to other co-defendants; the relief sought by the bill being in the alternative. De Hierapolis *v.* Lawrence, 115 Fed. 761.

91. U. S. *v.* American Bell Tel. Co., 128 U. S. 315, 352, 9 S. Ct. 90, 32 L. ed. 450, where this is well described by Mr. Justice Miller. A bill is subject to demurrer for multifariousness where one of two complainants has no standing in court. Walker *v.* Powers, 104 U. S. 245, 26 L. ed. 729. Where a bill to set aside a conveyance as fraudulent states no cause of action against certain creditors joined as defendants, and seeks no relief against them except a discovery as to the amount of their claims at the time of the conveyance, the bill is subject to demurrer for multifariousness by reason of misjoinder of parties defendant. Cogwill, etc., Milling Co. *v.* L. M. Nicholson Co., (Miss. 1899) 24 So. 880. *Compare supra*, XIV, F.

92. *Alabama.*— Steiner Land, etc., Co. *v.* King, 118 Ala. 546, 24 So. 35; Hill *v.* Moone, 104 Ala. 353, 16 So. 67; Collins *v.* Stix, 96 Ala. 338, 11 So. 380; Hinds *v.* Hinds, 80 Ala. 225; Lehman *v.* Meyer, 67 Ala. 396.

Connecticut.—De Wolf *v.* A. & W. Sprague Mfg. Co., 49 Conn. 282.

Georgia.— Stephens *v.* Whitehead, 75 Ga. 294.

Virginia.— Jordan *v.* Liggan, 95 Va. 616, 29 S. E. 330.

United States.— Harrison *v.* Perea, 168 U. S. 311, 18 S. Ct. 129, 42 L. ed. 478; Oliver *v.* Piatt, 3 How. 333, 11 L. ed. 622; Gaines *v.* Chew, 2 How. 619, 11 L. ed. 402; McLean *v.* Lafayette Bank, 16 Fed. Cas. No. 8,886, 3 McLean 415.

England.— "To lay down any rule applicable universally, or to say what constitutes multifariousness, as an abstract proposition, is, upon the authorities, utterly impossible." Lord Cottenham, in Campbell *v.* Mackay, 1 Myl. & C. 603, 618, 13 Eng. Ch. 603, 40 Eng. Reprint 507, 7 Sim. 564, 8 Eng. Ch. 564.

See EQUITY, 16 Cyc. 240.

have separate and distinct rights, and distinct grounds of defense.[93] So also the debtor and all persons through whom the title to his property has passed, as well as the present holder, may be joined without the bill being open to the objection of multifariousness.[94]

2. AMENDMENTS.[95] The granting of leave to amend the pleadings in these as in other suits in equity rests in the sound discretion of the court; and unless there is an abuse of discretion the action of the court in this regard will not be the subject of review.[96] An amendment to a bill setting up an alternative

93. Dimmock *v.* Bixby, 20 Pick. (Mass.) 368; Lewis *v.* St. Albans Iron, etc., Works, 50 Vt. 477.

Accordingly it is well settled that if property be fraudulently conveyed and parceled out by the owner to several persons, they and the grantor may be joined in one bill to set aside the transfers, although the grantees may have no common interest in the parcels so conveyed. In such case the object of the suit is single and the attack is made upon the same general scheme to hinder, delay, and defraud creditors, and the grantees may all be joined, although the purchase of each was distinct from and made at a different time from the others, and each vendee is charged only with participating in the fraud concerning his own purchase. It is not necessary to allege a conspiracy among the grantees to defeat the grantor's creditors.

Alabama.— Steiner Land, etc., Co. *v.* King, 118 Ala. 546, 24 So. 35; Craft *v.* Wilcox, 102 Ala. 378, 14 So. 653; Allen *v.* Montgomery R. Co., 11 Ala. 437; Planters', etc., Bank *v.* Walker, 7 Ala. 926. It is well settled that any number of fraudulent grantees of a common grantor may be joined in one bill without rendering the bill multifarious. Gassenheimer *v.* Kellogg, 121 Ala. 109, 23 So. 29; Hall *v.* Henderson, 114 Ala. 601, 21 So. 1020, 62 Am. St. Rep. 141. Such a bill is not multifarious, although the conveyances were of different parts of the debtor's property, executed to different persons, and at different times. Burford *v.* Steele, 80 Ala. 147; Russell *v.* Garrett, 75 Ala. 348; Lehman *v.* Meyer, 67 Ala. 396.

Florida.— Bauknight *v.* Sloan, 17 Fla. 284.

Georgia.— Conley *v.* Buck, 100 Ga. 187, 28 S. E. 97.

Iowa.— Bowers *v.* Keesecher, 9 Iowa 422; Pierson *v.* David, 1 Iowa 23.

Maryland.— Trego *v.* Skinner, 42 Md. 426.

Minnesota.—North *v.* Bradway, 9 Minn. 183.

Mississippi.— Walker *v.* Shannon, 53 Miss. 500; Forniquet *v.* Forstall, 34 Miss. 87; Snodgrass *v.* Andrews, 30 Miss. 472, 64 Am. Dec. 169; Butler *v.* Spann, 27 Miss. 234.

Missouri.— Rinehart *v.* Long, 95 Mo. 396, 8 S. W. 559; Bobb *v.* Bobb, 76 Mo. 419; Donovan *v.* Dunning, 69 Mo. 436; Tucker *v.* Tucker, 29 Mo. 350; Perkins *v.* Baer, 95 Mo. App. 70, 68 S. W. 939.

New Hampshire.— Chase *v.* Searles, 45 N. H. 511.

New Jersey.— Miller *v.* Jamison, 24 N. J. Eq. 41; Randolph *v.* Daly, 16 N. J. Eq. 313; Way *v.* Bragaw, 16 N. J. Eq. 213, 84 Am. Dec. 147.

New York.— Reed *v.* Stryker, 4 Abb. Dec. 26, 12 Abb. Pr. 47; Hammond *v.* Hudson River Iron, etc., Co., 20 Barb. 378; Newbould *v.* Warrin, 14 Abb. Pr. 80; Morton *v.* Weil, 11 Abb. Pr. 421; Jacot *v.* Boyle, 18 How. Pr. 106; Fellows *v.* Fellows, 4 Cow. 682, 15 Am. Dec. 412; Boyd *v.* Hoyt, 5 Paige 65; Brinkerhoff *v.* Brown, 6 Johns. Ch. 139.

North Carolina.— Dawson Bank *v.* Harris, 84 N. C. 206; Vann *v.* Hargett, 22 N. C. 31, 32 Am. Dec. 689.

South Carolina.— State *v.* Foot, 27 S. C. 340, 3 S. E. 546; Williams *v.* Neel, 10 Rich. Eq. 338, 73 Am. Dec. 94.

Tennessee.— Harrison *v.* Hallum, 5 Coldw. 525; Bartee *v.* Tompkins, 4 Sneed 623.

Texas.— Waddell *v.* Williams, 37 Tex. 351.

Virginia.— Com. *v.* Drake, 81 Va. 305; Almond *v.* Wilson, 75 Va. 613; Chamberlayne *v.* Temple, 2 Rand. 384, 14 Am. Dec. 786. *Compare* Jordan *v.* Liggan, 95 Va. 616, 29 S. E. 330.

Wisconsin.— Hamlin *v.* Wright, 23 Wis. 491; Blake *v.* Van Tilborg, 21 Wis. 672.

United States.— Jones *v.* Slauson, 33 Fed. 632; Potts *v.* Hahn, 32 Fed. 660.

England.— Cornish *v.* Clark, L. R. 14 Eq. 184, 42 L. J. Ch. 14, 26 L. T. Rep. N. S. 494, 20 Wkly. Rep. 897; Foley *v.* Carlon, Younge 373.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 758. And see *supra*, XIV, F.

Where an insolvent husband purchases separate parcels of land and has the deeds all made to his wife, all may be attacked in one suit. Rinehart *v.* Long, 95 Mo. 396, 8 S. W. 559.

94. Craft *v.* Wilcox, 102 Ala. 378, 14 So. 653. See also Williams *v.* Spragins, 102 Ala. 424, 15 So. 247.

95. See also EQUITY, 16 Cyc. 335 *et seq.*

96. *Georgia.*— Lydia Pinkham Medicine Co. *v.* Gibbs, 108 Ga. 138, 33 S. E. 945.

Illinois.— Gordon *v.* Reynolds, 114 Ill. 118, 28 N. E. 455; McArtee *v.* Engart, 13 Ill. 242.

Nebraska.— Monroe *v.* Reid, 46 Nebr. 316, 64 N. W. 983.

Virginia.— Kinney *v.* Craig, 103 Va. 158, 48 S. E. 864.

United States.— Smith *v.* Babcock, 22 Fed. Cas. No. 13,008, 3 Sumn. 583.

Homestead.— Where the land charged to have been fraudulently conveyed was the debtor's homestead and he failed to set this up in his answer, he may be permitted to bring it in by amendment. Cincinnati Tobacco Warehouse Co. *v.* Matthews, 74 S. W. 242, 24 Ky. L. Rep. 2445.

ground of relief is always proper, when the matter of amendment might have been stated in the alternative in the bill as originally filed.[97] It is not material when amendments are permitted to be made, except as to the terms the court may impose as a condition thereto.[98] An amendment of a bill is properly allowed on the hearing, in furtherance of justice, to avoid the effects of a variance from the proofs, provided it is not inconsistent with the original theory of the case.[99] But amendments will not be allowed which bring into the case a new and substantive cause of action different from that set out in the original bill, and which the complainant then intended to assert, or set up new defenses inconsistent with that originally relied on.[1] Material matters transpiring after the filing of the original bill may properly be charged in an amended bill.[2]

3. SUPPLEMENTAL BILLS.[3] The rule is that a supplemental bill, when properly before the court, may be considered as part of the original bill, and the whole is to be considered as one bill; and hence, if the complainant is entitled to relief upon the whole bill, it should be decreed to him.[4] Where the complainant must rely for complete relief upon matters transpiring after the filing of his original bill, a supplemental bill should be filed, stating the facts which entitle him to relief.[5] But if a bill be so entirely defective that no decree can be made upon it, it

97. Thus a bill charging a voluntary conveyance from a husband to his wife is properly amended by an additional averment that if complainant is mistaken as to the ground of relief alleged then he alleges as ground for the same relief that such conveyance was made to the wife by a third person at the instance of her husband and that he paid the consideration. Wimberly *v.* Montgomery Fertilizer Co., 132 Ala. 107, 31 So. 524.

98. Gordon *v.* Reynolds, 114 Ill. 118, 28 N. E. 455. Plaintiff having the right to amend the petition at any time before trial if defective, any other creditor has that right after plaintiff has quit the suit, as the suit inures to the benefit of all creditors. Slusher *v.* Simpkinson, 101 Ky. 594, 40 S. W. 570, 43 S. W. 692, 19 Ky. L. Rep. 1184.

99. *Georgia.*— Kruger *v.* Walker, 111 Ga. 383, 36 S. E. 794.

Illinois.— Gordon *v.* Reynolds, 114 Ill. 118, 28 N. E. 455.

Michigan.— Smith *v.* Sherman, 52 Mich. 637, 18 N. W. 394, where plaintiff was allowed to amend at the hearing so as to allege that a levy was made before the filing of the bill.

New Jersey.— Foster *v.* Knowles, 42 N. J. Eq. 226, 7 Atl. 290.

Virginia.— Kinney *v.* Craig, 103 Va. 158, 48 S. E. 864.

United States.— Neale *v.* Neale, 9 Wall. 1, 19 L. ed. 590; Fisher *v.* Campbell, 101 Fed. 156, 41 C. C. A. 256. In Collinson *v.* Jackson, 14 Fed. 305, 8 Sawy. 357, an amendment was allowed to be filed at the final hearing stating that the value of the matter in dispute was more than five hundred dollars.

Canada.— Watson *v.* McCarthy, 10 Grant Ch. (U. C.) 416; Rees *v.* Wittrock, 6 Grant Ch. (U. C.) 418.

1. Davidson *v.* Dishman, 59 S. W. 326, 22 Ky. L. Rep. 940; Kinney *v.* Craig, 103 Va. 158, 48 S. E. 864; Tidball *v.* Shenandoah Nat. Bank, 100 Va. 741, 42 S. E. 867. See also Farwell *v.* Meyer, 67 Mo. App. 566. In an action, brought on the statute, for aiding a debtor in the fraudulent transfer of certain property, an amendment will not be allowed of an additional count alleging a fraudulent transfer of other property under which the damages claimed were not in any part embraced in the first count. Skowhegan Bank *v.* Cutler, 49 Me. 315.

2. Cleveland *v.* Chambliss, 64 Ga. 352; Jamison *v.* Bagot, 106 Mo. 240, 16 S. W. 697; Fidelity L. & T. Co. *v.* Engleby, 99 Va. 168, 37 S. E. 957. But *compare* Lore *v.* Getsinger, 7 N. J. Eq. 191, where it was held that an amendment setting up that after the filing of the bill one of the creditors obtained a judgment at law against defendant would not be permitted. See also McCullough *v.* Colby, 4 Bosw. (N. Y.) 603. In an action to set aside as fraudulent a conveyance of land from husband to wife, proof on the part of plaintiffs that since the commencement of the suit a mortgage had been executed by the husband and wife on said land, and the money raised thereby was invested in other real estate in the wife's name, was inadmissible without a supplemental complaint, setting up the facts, and asking appropriate relief against such other real estate. Pike *v.* Miles, 23 Wis. 164, 99 Am. Dec. 148.

Further allegations of fraud and conspiracy may be brought in by amended and supplemental bill. Parkersburg First Nat. Bank *v.* Prager, 50 W. Va. 660, 41 S. E. 363.

3. See also EQUITY, 16 Cyc. 357 *et seq.*

4. Cunningham *v.* Rogers, 14 Ala. 147; French *v.* Commercial Nat. Bank, 199 Ill. 213, 65 N. E. 252.

Objections on appeal.— An objection that a second complaint, made and served as supplemental, in pursuance of an order of the court, is not in aid of the original complaint, and therefore not supplemental, cannot be raised on appeal from the judgment. Defendant should appeal from the order. Wetmore *v.* Truslow, 51 N. Y. 338.

5. French *v.* Commercial Nat. Bank, 199 Ill. 213, 65 N. E. 252; Edgar *v.* Clevenger, 3 N. J. Eq. 258; Fleischner *v.* McMinnville

will not be aided by a supplemental bill founded on facts that have subsequently taken place.[6] Thus if a creditor files his original bill before he has exhausted his remedy at law, he cannot cure the defect by filing a supplemental bill alleging a subsequent judgment and fruitless execution, where these are essential to the right to proceed in equity.[7] If, however, the bill be sustainable on any ground, even for the purpose of granting temporary relief, the court having possession of the cause may hold it for the more general and important purposes of the bill and permit the complainant to file a supplemental bill.[8]

4. THE DEMURRER.[9] When matter in bar of the relief sought is apparent on the face of the bill defendant may demur.[10] But if the matter of defense is not apparent on the face of the bill defendant, if he means to take advantage of it, must show it either by plea or answer.[11] If he does neither, but answers fully to the merits or demurs on some other ground, he may be deemed to have waived any matter of objection which he might have pleaded.[12] On demurrer to the whole bill, if the bill be good in part the demurrer should be overruled.[13] As a general rule a demurrer is waived by answering to the merits.[14] If a ground for equitable relief is pleaded, irrelevant matter cannot be reached by demurrer. The remedy is a motion to strike it out.[15]

5. CROSS BILL. A defendant may file a cross bill either for discovery or for relief, as where he seeks to impeach the judgment which is the foundation of the complainant's claim.[16]

First Nat. Bank, 36 Oreg. 553, 54 Pac. 884, 60 Pac. 603, 61 Pac. 345; Pike *v.* Miles, 23 Wis. 164, 99 Am. Dec. 148.

6. Edgar *v.* Clevenger, 3 N. J. Eq. 258; Candler *v.* Pettit, 1 Paige (N. Y.) 168, 19 Am. Dec. 399.

7. Morrison *v.* Shuster, 1 Mackey (D. C.) 190; Brown *v.* State Bank, 31 Miss. 454; Edgar *v.* Clevenger, 3 N. J. Eq. 258; McCullough *v.* Colby, 5 Bosw. (N. Y.) 477; Candler *v.* Pettit, 1 Paige (N. Y.) 168, 19 Am. Dec. 399; Butchers, etc., Bank *v.* Willis, 1 Edw. (N. Y.) 645. It has been held that this defect is waived if no objection be made to the supplemental bill on this specific ground. Fleischner *v.* McMinnville First Nat. Bank, 36 Oreg. 553, 54 Pac. 884, 60 Pac. 603, 61 Pac. 345. See also Meacham Arms Co. *v.* Swarts, 2 Wash. Terr. 412, 7 Pac. 859.

8. Edgar *v.* Clevenger, 3 N. J. Eq. 258.

9. See EQUITY, 16 Cyc. 261 *et seq.*

10. Bromberg *v.* Heyer, 69 Ala. 22; Levy *v.* Marx, (Miss. 1895) 18 So. 575; Tappan *v.* Evans, 11 N. H. 311.

Adequate remedy at law.— Where the complaint is evidently framed for the purpose of setting out an equitable cause of action, defendant, upon a written general demurrer, may avail himself of the objection that plaintiff has an adequate remedy at law. Gullickson *v.* Madsen, 87 Wis. 19, 57 N. W. 965.

Assignment for benefit of creditors.—Where a bill to set aside a trust assignment alleged that the instrument was a general assignment, that the delay stipulated for was greater than the law permits, that reservations were made for the benefit of the debtor, that the assignment gave preferences, that the grantors were insolvent, and that the trustee had not given bond, it was held that such allegations raised the question whether the assignment was fraudulent in law, but did not charge fraud in fact, and was therefore properly heard on demurrer. Reed Fertilizer Co. *v.* Thomas, 97 Tenn. 478, 37 S. W. 220.

Multifariousness.— A demurrer to a bill for multifariousness, like a demurrer for a misjoinder at law, goes to the whole bill, and if the demurrer is sustained, the bill will be dismissed as to the party who demurred. Boyd *v.* Hoyt, 5 Paige (N. Y.) 65.

11. Bromberg *v.* Heyer, 69 Ala. 22; Tappan *v.* Evans, 11 N. H. 311; Thomas *v.* McEwen, 11 Paige (N. Y.) 131. See also Walsh *v.* Byrnes, 39 Minn. 527, 40 N. W. 831.

12. *Alabama.*— Mountain *v.* Whitman, 103 Ala. 630, 16 So. 15.

Kentucky.— Barton *v.* Barton, 80 Ky. 212; Shaw *v.* Shaw, 24 S. W. 630, 15 Ky. L. Rep. 592.

Minnesota.— Welch *v.* Bradley, 45 Minn. 540, 48 N. W. 440.

New Hampshire.— Tappan *v.* Evans, 11 N. H. 311.

New York.— Loomis *v.* Tifft, 16 Barb. 541.

A ground of demurrer should be so stated as to apprise the court of the real objection. Kellogg *v.* Hamilton, 43 Mich. 269, 5 N. W. 315.

13. Vanderveer *v.* Stryker, 8 N. J. Eq. 175.

14. Gordon *v.* Reynolds, 114 Ill. 118, 28 N. E. 455.

In Maine defendant may demur and answer at the same time. "Demurrers, pleas, and answers, will be decided on their own merits, and one will not be regarded as overruling another." Chancery Rule 6, 37 Me. 583. See also Smith *v.* Kelley, 56 Me. 64; Hartshorn *v.* Eames, 31 Me. 97.

15. Bank of British North America *v.* Suydam, 6 How. Pr. (N. Y.) 379.

16. Story Eq. Pl. § 389; and EQUITY, 16 Cyc. 324 *et seq.* Where a suit was instituted by judgment creditors to set aside convey-

6. The Plea or Answer[17] **— a. In General.** An answer denying all knowledge and belief of the matters charged in the principal allegations of the bill is not sufficient. The general rule is that to so much of the bill as is material and necessary for defendant to answer, he must speak directly, without evasion, and not by way of negative pregnant. He must not answer the charges merely literally, but must confess or traverse the substance of each charge positively and with certainty; and particular precise charges must be answered particularly and precisely and not in a general manner, even though the general answer may amount to a full denial of the charges. In short there must be specific answers to the sifting inquiries upon the matters charged.[18]

b. Voluntary Conveyance. Where it is charged that a conveyance was wholly without consideration and was made with intent to defraud the grantor's creditors, the grantee, to defend successfully, must allege and prove that there was a valuable consideration and must state affirmatively in what the consideration consisted and when and how it was paid.[19] And he must allege that at the time of

ances by their debtor made fraudulently and with a view to delay creditors, and the debtor attempted to show facts which if established would tend to annul the judgment altogether, or reduce it, and which were discovered since the judgment at law, and when it was too late to obtain a new trial, it was held that the proper means of obtaining such relief was by cross bill; the order of the court permitting cross relief to be given to a defendant against plaintiff applying only where defendant was entitled to some relief growing out of the same transaction as formed the foundation of the suit, and not where the object of the defense was to obtain relief not growing out of such transaction, but against it. Buchanan *v.* Cunningham, 10 Grant Ch. (U. C.) 513.

17. See Equity, 16 Cyc. 286 *et seq.*, 297 *et seq.*

18. *Alabama.*— Noble *v.* Gilliam, 136 Ala. 618, 33 So. 861; Freeman *v.* Stewart, 119 Ala. 158, 24 So. 31.

Colorado.— Stephens *v.* Parvin, (1904) 78 Pac. 688.

Florida.— Barrow *v.* Bailey, 5 Fla. 9; Hunter *v.* Bradford, 3 Fla. 269.

Kentucky.— Aulick *v.* Reed, 104 Ky. 465, 47 S. W. 331, 20 Ky. L. Rep. 653.

Minnesota.— Johnston *v.* Piper, 4 Minn. 192.

Mississippi.— Stanton *v.* Green, 34 Miss. 576.

New York.— Churchill *v.* Bennett, 8 How. Pr. 309; Cunningham *v.* Freeborn, 3 Paige 557; Woods *v.* Morrell, 1 Johns. Ch. 103.

Defective answer.— Where the bill charged that the land conveyed by the debtor to his wife was "all the property of which the said John F. was possessed," and the answer set forth that the debtor "was then in good circumstances, with means enough and more than enough to pay all his debts" it was considered to be bad. Welcker *v.* Price, 2 Lea (Tenn.) 666. An answer denying merely that a mortgage attacked as a preference "was made in contemplation of insolvency, or with the design to prefer one or more creditors" is not good. Aulick *v.* Reed, 104 Ky. 465, 47 S. W. 331, 20 Ky. L. Rep. 653.

Insufficient denial.— A general denial of all the allegations of the complaint not specifically admitted is not a sufficient denial of an allegation that conveyances which the action was brought to set aside were made with intent to defraud creditors. National Wall Paper Co. *v.* McPherson, 19 Mont. 355, 48 Pac. 550.

An answer denying all knowledge and belief of the alleged fraud is not sufficient whereon to dissolve an injunction against an action of ejectment prosecuted on a deed charged to be fraudulent. Apthorpe *v.* Comstock, Hopk. (N. Y.) 143; Roberts *v.* Anderson, 2 Johns. Ch. (N. Y.) 202; Bomberger *v.* Turner, 13 Ohio St. 263, 82 Am. Dec. 438.

The denial of the grantee that she had "full notice" of the intent of the grantor is an admission that she had some notice. Loving *v.* Meyler, 49 S. W. 961, 20 Ky. L. Rep. 1654.

19. Noble *v.* Gilliam, 136 Ala. 618, 33 So. 861; British, etc., Mfg. Co. *v.* Norton, 125 Ala. 522, 28 So. 31; Gamble *v.* Aultman, 125 Ala. 372, 28 So. 30; J. B. Brown Co. *v.* Henderson, 123 Ala. 623, 26 So. 199; Wood *v.* Riley, 121 Ala. 100, 25 So. 723; Freeman *v.* Stewart, 119 Ala. 158, 24 So. 31; Halsey *v.* Connell, 111 Ala. 221, 20 So. 445; Weber *v.* Rothchild, 15 Oreg. 385, 15 Pac. 650, 3 Am. St. Rep. 162. Where a conveyance of land, executed to the wife of a debtor by a third party at the instance of the husband, who paid the purchase-money, is assailed by the husband's creditors, the wife, in order to meet the burden of proving that the consideration did not move from the husband, but was paid with her separate funds, must affirmatively aver in her answer and fully show by her evidence the actual payment of the consideration, in what it consisted, and how it was paid. Watts *v.* Burgess, 131 Ala. 333, 30 So. 868. Where a bill to subject land conveyed to respondents to complainant's judgment against the grantor alleges the conveyance was for a fictitious consideration, with intent to defraud, when the grantor was insolvent, to respondents' knowledge, and the evidence shows the insolvency and respondents' knowledge, averments of the answer that the sale was for the purpose

such payment he had no notice of his grantor's fraudulent design and that he acted in good faith.[20]

c. By Purchaser From Fraudulent Grantee. It is well settled that a party claiming protection as a *bona fide* purchaser, or mortgagee, from the fraudulent grantee of real estate must deny notice of the fraud, although such notice is not charged in the bill. He must deny it positively and not evasively, and he must deny fully and in precise terms every circumstance charged in the bill from which notice could be inferred.[21]

d. Exempt Property.[22] In an action to set aside a fraudulent conveyance, where defendant relies on the fact that the property conveyed was exempt, and that the conveyance therefore was not fraudulent as against creditors, the answer must set forth all the facts necessary to show that the property was exempt.[23] But where plaintiff's title is attacked as obtained in fraud of creditors he may show that the property was exempt without anticipating and avoiding the attack.[24]

e. Removal of Encumbrances. If a fraudulent grantee has removed encumbrances from the land and wishes to be subrogated to the rights of the lien creditors he must plead the facts and ask for that relief.[25]

f. Justifying Seizure. The established practice does not require a pleader to refer specifically to the statutory provisions relating to fraudulent conveyances in an answer justifying the seizure of goods under legal process. It is sufficient to allege that the goods levied upon were the property of the person against whom the process was issued, or that he had a leviable or attachable interest therein.[26]

of paying a debt of the grantor to V on account of his suretyship for P, and that a fair consideration was paid, and the proceeds applied to payment of such debt, are too indefinite, in view of the burden of proof on respondents, to overcome the presumption of unfairness and bad faith. Killian *v.* Cox, 132 Ala. 664, 32 So. 738. And in a suit to set aside a deed from a mother to her daughters, in consideration of love and affection, as fraudulent as to creditors, and to subordinate to the claim of plaintiff a mortgage executed by the daughters, where the mortgagee filed a plea setting up the defense of *bona fide* purchaser for value, in which he alleged that the daughters were in actual or constructive possession when he loaned them money, to secure which the mortgage was given; that prior to making the loan he caused the title records of the county to be examined by an attorney, who reported that the title was in the daughters, and that he had no notice of complainant's rights, and knew of no fact calculated to put him on inquiry, it was held that the plea sufficiently pleaded the facts necessary to be stated in setting up the defense of *bona fide* purchaser. McKee *v.* West, (Ala. 1904) 37 So. 740.

20. Weber *v.* Rothchild, 15 Oreg. 385, 15 Pac. 650, 3 Am. St. Rep. 162.

21. McKee *v.* West, (Ala. 1904) 37 So. 740; Miller *v.* Fraley, 21 Ark. 22; Stanton *v.* Green, 34 Miss. 576; Gallatian *v.* Cunningham, 8 Cow. (N. Y.) 361; Manhattan Co. *v.* Evertson, 6 Paige (N. Y.) 457; Brinckerhoff *v.* Lansing, 4 Johns. Ch. (N. Y.) 65, 8 Am. Dec. 538; Denning *v.* Smith, 3 Johns. Ch. (N. Y.) 332.

22. See *supra*, II, B, 21.

23. In a suit to set aside conveyances made by defendant and to subject the land conveyed to the payment of judgment, where defendant claimed that the property was exempt, it was held that to entitle her to such right she must show that it existed at the time the alleged fraudulent conveyance was made, and an allegation that such right existed at the time the answer was filed was not sufficient. Phenix Ins. Co. *v.* Fielder, 133 Ind. 557, 33 N. E. 270. If defendant fails to set up that the property conveyed was his homestead he may be allowed to amend. Cincinnati Tobacco Warehouse Co. *v.* Matthews, 74 S. W. 242, 24 Ky. L. Rep. 2445. It has been held, however, that the fact that the property conveyed was held by the grantor as a homestead is a defense which may be shown under a general denial. Hibben *v.* Soyer, 33 Wis. 319. And evidence that the property was exempt is admissible to rebut the charge of fraud. Isgrigg *v.* Pauley, 148 Ind. 436, 47 N. E. 821. A creditor's complaint to set aside a fraudulent conveyance of land need not allege that the land was not exempt from execution, such exemption being a matter of defense. State *v.* Parsons, 147 Ind. 579, 47 N. E. 17, 62 Am. St. Rep. 430.

24. Furman *v.* Tenny, 28 Minn. 77, 9 N. W. 172.

25. Campbell *v.* Trosper, 108 Ky. 602, 57 S. W. 245, 22 Ky. L. Rep. 277. See *supra*, XIII, A, 4, a, (III).

26. Dearing *v.* McKinnon Dash, etc., Co., 165 N. Y. 78, 58 N. E. 773, 80 Am. St. Rep. 708. The New York cases which hold that the protection of the statute will be lost unless specially pleaded refer to the statute of frauds and perjuries and not to the provisions of the statute under consideration. Dearing *v.* McKinnon Dash, etc., Co., *supra*; Sanger *v.* French, 157 N. Y. 213, 51 N. E. 979; Matthews *v.* Matthews, 154 N. Y. 288,

g. Redundancy. Although the answer should be full, clear, and specific as to all material charges in the bill, the records of the court should not be stuffed with long recitals, or with long digressions in matters of fact, which are altogether unnecessary and totally immaterial to the matter in question.[27]

h. Answers as Evidence[28]—(i) *In General.* A sworn answer which is responsive to the material allegations contained in the bill must be accepted as true unless it is contradicted by evidence sufficient to overcome its weight, which is generally stated to be the testimony of two witnesses or that of one witness supported by corroborating circumstances.[29] But there are cases where the evidence arising from the circumstances alone is stronger than the testimony of any single witness.[30] And a positive denial of fraud cannot prevail against admissions in the same answer of facts which show that the transaction was fraudulent.[31]

(ii) *Effect of Admissions and Failure to Deny.* The complainant is always entitled to the benefit of any admissions in the answer, even in the face of a general denial. Whether the answer be under oath or not, they stand as admissions of record.[32] And failure to deny a material allegation amounts to an admission and no proof is required.[33]

7. The Replication.[34] If the complainant intends to deny the truth of defendant's answer, it is his duty to do so by filing a replication which will put the cause at issue and then defendant has the right to make out his defense by evidence.[35] But the cause may be set down for hearing by the complainant on bill and answer, which amounts to a demurrer to the answer, and then no testimony is taken on either side.[36] A general replication puts in issue every allegation in the answer not responsive to the bill.[37] And no replication or reply is required where the answer amounts to no more than a denial of plaintiff's allegations.[38]

8. Bills of Particulars.[39] Although neither party will be required to disclose

48 N. E. 531; Crane *v.* Powell, 139 N. Y. 379, 34 N. E. 911.

27. Harrison *v.* Perea, 168 U. S. 311, 18 S. Ct. 129, 42 L. ed. 478; Wood *v.* Mann, 30 Fed. Cas. No. 17,952, 1 Sumn. 578.

28. See Equity, 16 Cyc. 383 *et seq.*

29. *Alabama.*— Birmingham Nat. Bank *v.* Steele, 98 Ala. 85, 12 So. 783; Marshall *v.* Croom, 52 Ala. 554.

Illinois.— Merchants' Nat. Bank *v.* Lyon, 185 Ill. 343, 56 N. E. 1083.

Maine.— Hartshorn *v.* Eames, 31 Me. 93.

Mississippi.— Fulton *v.* Woodman, 54 Miss. 158; Berryman *v.* Sullivan, 13 Sm. & M. 65.

New Jersey.— Platt *v.* McClong, (Ch. 1901) 49 Atl. 1125.

United States.— Seitz *v.* Mitchell, 94 U. S. 580, 24 L. ed. 179; Voorhees *v.* Bonesteel, 16 Wall. 16, 21 L. ed. 268; Tobey *v.* Leonard, 2 Wall. 423, 17 L. ed. 842; Hill *v.* Ryan Grocery Co., 78 Fed. 21, 23 C. C. A. 624.

If a bill avers that a conveyance is fraudulent and the answer denies it, and no evidence is introduced on this issue, it is error for the court to set aside the conveyance. Hambrick *v.* Jones, 64 Miss. 240, 8 So. 176.

Amended answer denied.— In an action to set aside a conveyance as fraudulent, the grantee having by his original answer specifically denied that he had a lien on the property, and alleged that he owned the property, the court properly refused to permit him, after that issue had been decided against him, to file an amended answer asserting a lien. Davidson *v.* Dishman, 59 S. W. 326, 22 Ky. L. Rep. 940.

30. Wilcoxson *v.* Darr, 139 Mo. 660, 41 S. W. 227; Bowden *v.* Johnson, 107 U. S. 251, 2 S. Ct. 246, 27 L. ed. 386; Clark *v.* Van Riemsdyk, 9 Cranch 153, 3 L. ed. 688.

31. Robinson *v.* Stewart, 10 N. Y. 189; Litchfield *v.* Pelton, 6 Barb. (N. Y.) 187; Stephenson *v.* Felton, 106 N. C. 114, 11 S. E. 255. Where an answer admits facts fraudulent *per se* in judgment of law, a general denial of fraud is unavailing. Cunningham *v.* Freeborn, 11 Wend. (N. Y.) 240. A denial by the answer of the existence of fraud will not avail to disprove it, where the answer admits facts from which fraud follows as a natural and legal if not a necessary and unavoidable conclusion. Sayre *v.* Fredericks, 16 N. J. Eq. 205.

32. *Alabama.*— Battle *v.* Reid, 68 Ala. 149.

Illinois.— Miller *v.* Payne, 4 Ill. App. 112.

Kentucky.— Terrill *v.* Jennings, 1 Metc. 450.

New Jersey.— Levi *v.* Welsh, 45 N. J. Eq. 867, 19 Atl. 620.

Tennessee.— Yost *v.* Hudiburg, 2 Lea 627.

33. Clark *v.* Olsen, (Cal. 1893) 33 Pac. 274; Redhead *v.* Pratt, 72 Iowa 99, 33 N. W. 382.

34. See Equity, 16 Cyc. 320 *et seq.*

35. Birdsall *v.* Welch, 6 D. C. 316; Higby *v.* Ayres, 14 Kan. 331.

36. Birdsall *v.* Welch, 6 D. C. 316. See also Demaree *v.* Driskill, 3 Blackf. (Ind.) 115.

37. Humes *v.* Scruggs, 94 U. S. 22, 24 L. ed. 51.

38. Jordan *v.* Buschmeyer, 97 Mo. 94, 10 S. W. 616.

39. See, generally, Pleading.

the evidence by which he intends to establish his cause of action or defense at the trial, plaintiff may be required to furnish a bill of particulars stating what property was fraudulently conveyed or encumbered, when, where, and in what way.[40] And where defendant sets up an affirmative defense he also may be required to furnish a bill of particulars.[41] But a bill of particulars will not be required of matters which the party alleging them would not be permitted to prove,[42] or of matters which are peculiarly within the knowledge of the party demanding the particulars.[43]

9. Venue. An action to set aside a fraudulent conveyance of real estate is a local action and must be tried in the county where the real estate or some portion of it is situated, for where there is an attempt to act directly upon property it is essential that the property be within the territorial jurisdiction of the court.[44] But a court of equity having jurisdiction of the person of a fraudulent grantee may compel him to convey property situated in a foreign jurisdiction. In such case the decree operates on the person of defendant and does not directly affect the property itself.[45]

10. Issues, Proof, and Variance[46] — a. In General. The proof should be addressed to the issues made by the pleadings.[47] Evidence of material facts not pleaded is always properly excluded.[48] If defendant intends to attack plaintiff's title as fraudulent he must plead the fraud, otherwise he will not be permitted to prove it.[49] Where the only issue made by the pleadings is the entire want of consideration for the conveyance evidence of the inadequacy of the consideration is not admissible.[50] Under a general allegation of an intent to hinder, delay, and defraud creditors, evidence of facts showing fraud is not admissible.[51] The debtor's intent in making the transfer complained of is generally a material issue.[52] But where a bill to set aside a voluntary conveyance proceeds solely on the ground of the donor's insolvency, no question of an actual fraudulent intent arises.[53] If it is alleged that the grantee had knowledge of the grantor's failing

40. Claflin *v.* Smith, 13 Abb. N. Cas. (N. Y.) 205; Harding *v.* Bunnell, 14 Pa. Co. Ct. 417.

41. Gilhooly *v.* American Surety Co., 87 Hun (N. Y.) 395, 34 N. Y. Suppl. 347; Byrnes *v.* Lewis, 83 Hun (N. Y.) 310, 31 N. Y. Suppl. 1028.

42. Byrnes *v.* Lewis, 83 Hun (N. Y.) 310, 31 N. Y. Suppl. 1028.

43. Fink *v.* Jetter, 38 Hun (N. Y.) 163; Faxon *v.* Ball, 21 N. Y. Suppl. 737; Passavant *v.* Cantor, 21 Abb. N. Cas. (N. Y.) 259, 1 N. Y. Suppl. 574.

44. Johnson *v.* Gibson, 116 Ill. 294, 6 N. E. 205; Acker *v.* Leland, 96 N. Y. 383; Wyatt *v.* Brooks, 42 Hun (N. Y.) 502. And if the action be brought in another county plaintiff cannot avoid a change of venue by stipulating to abandon that part of the relief which affects the real estate. Wyatt *v.* Brooks, *supra*; Sweetser *v.* Smith, 22 Abb. N. Cas. (N. Y.) 319, 5 N. Y. Suppl. 373.

45. Johnson *v.* Gibson, 116 Ill. 294, 6 N. E. 205.

46. See Equity, 16 Cyc. 370, 403; and, generally, Pleading.

47. Meyer-Marx Co. *v.* Masters, 119 Ala. 186, 24 So. 506; Farmers' Bank *v.* Worthington, 145 Mo. 91, 46 S. W. 745. Where the grantee's answer to a bill to set aside a deed as fraudulent as against creditors alleged that he had paid a full consideration, without intimating that any one else was interested in the conveyance, evidence that the consideration was a debt due by the grantor to a corporation of which defendant grantee was an officer, and which was not a party, was properly excluded as irrelevant. Morgan *v.* Taylor, (Tenn. Ch. App. 1897) 42 S. W. 178. Where, in a suit to set aside a conveyance from a husband to his wife as in fraud of creditors, defendants did not plead a set-off against complainant's claim by a cross bill, evidence to prove such set-off was properly excluded. Noble *v.* Gilliam, 136 Ala. 618, 33 So. 861.

48. Noble *v.* Gilliam, 136 Ala. 618, 33 So. 861; Minzesheimer *v.* Doolittle, 56 N. J. Eq. 206, 39 Atl. 386.

49. Golden State, etc., Iron-Works *v.* Angell, 89 Cal. 643, 27 Pac. 65; Powers *v.* Patten, 71 Me. 583.

50. Millhiser *v.* McKinley, 98 Va. 207, 35 S. E. 446. In replevin, where there is uncontroverted evidence of complainant's ownership of the property, an allegation that the transfer to him was made fraudulently to enable his vendor to defraud creditors is not sustained by showing that the sale was on credit, and no lien was reserved by the vendor. Harper *v.* Trent, (Tenn. Ch. App. 1899) 53 S. W. 245.

51. Meeker *v.* Harris, 19 Cal. 278, 79 Am. Dec. 215; Steeleman *v.* Hoagland, 19 Colo. 231, 34 Pac. 995.

52. Beuerlein *v.* O'Leary, 149 N. Y. 33, 43 N. E. 417; Garahy *v.* Bayley, 25 Tex. Suppl. 294.

53. Cleveland *v.* Chambliss, 64 Ga. 352.

circumstances and fraudulent intent these facts may be proved against him but not otherwise.[54] Whenever a disposition of property is alleged to be fraudulent as to creditors, the actual indebtedness of the grantor to the complainant is not only in issue, but is the primary fact in logical order for the party assailing the conveyance to establish.[55] The value of property included in a conveyance alleged to be fraudulent is a material subject of inquiry.[56] Where a creditor claims the property under a judicial sale the validity of his title is in issue.[57]

b. Under a General Denial. It has been held in a number of cases that in an action of replevin or trover against an officer who has seized property under a writ of attachment or execution defendant cannot show under a general denial that plaintiff claims under a fraudulent transfer from the attachment or judgment debtor. He must plead the facts constituting the alleged fraud.[58] But there are cases holding that where plaintiff has not alleged the source of his title defendant may prove this defense under a denial of plaintiff's title.[59] Where a title is attacked on the ground that the conveyance was in fraud of creditors defendant may under a general denial introduce any evidence tending to show the good faith of the transaction and disprove the charge of fraud.[60] But if he

Evidence relating to the financial condition of the alleged fraudulent grantor is admissible. Johnston *v.* Standard Shoe Co., 5 Tex. Civ. App. 398, 24 S. W. 580.

54. Levyson *v.* Ward, 24 La. Ann. 158; Garesche *v.* MacDonald, 103 Mo. 1, 15 S. W. 379.

55. Miller *v.* Miller, 23 Me. 22, 39 Am. Dec. 597; Inman *v.* Mead, 97 Mass. 310; Cook *v.* Hopper, 23 Mich. 511.

56. Weadock *v.* Kennedy, 80 Wis. 449, 50 N. W. 393; Murray *v.* Shoud, 13 Wash. 33, 42 Pac. 631.

57. Hiney *v.* Thomas, 36 Mo. 377; Tisch *v.* Utz, 142 Pa. St. 186, 21 Atl. 808.

58. *Colorado.*— Seeleman *v.* Hoagland, 19 Colo. 231, 14 Pac. 995; Solomon *v.* Smith, 16 Colo. 293, 26 Pac. 811.

Connecticut.— Greenthal *v.* Lincoln, 67 Conn. 372, 35 Atl. 266.

Iowa.— J. V. Farwell Co. *v.* Zenor, 100 Iowa 640, 65 N. W. 317, 69 N. W. 1030.

Massachusetts.—Thrissell *v.* Page, 11 Gray 391.

Missouri.— Claflin *v.* Sommers, 39 Mo. App. 419.

Montana.— Botcher *v.* Berry, 6 Mont. 448, 13 Pac. 45.

New York.— Van Dewater *v.* Gear, 21 N. Y. App. Div. 201, 47 N. Y. Suppl. 503.

United States.— Wise *v.* Jefferis, 51 Fed. 641, 2 C. C. A. 432.

Under a general denial defendant has no right to prove a defense founded on new matter. Weaver *v.* Barden, 49 N. Y. 286. But the defense in question is available if he pleads the fraud. Beaty *v.* Swarthout, 32 Barb. (N. Y.) 293; Avery *v.* Mead, 12 N. Y. St. 749. But see Carter *v.* Bowe, 41 Hun (N. Y.) 516, where it is said that all that is legally necessary to allege in the answer is that the property belonged to the judgment debtor.

Validity of levy.— Where such defense is set up the validity of the levy is in issue and it is error to exclude evidence on that issue. Chapman *v.* James, 96 Iowa 233, 64 N. W. 795.

Where the instrument of transfer is incorporated in the complaint and is void on its face, defendant may take advantage of that fact without pleading fraud. Dearing *v.* McKinnon Dash, etc., Co., 33 N. Y. App. Div. 31, 53 N. Y. Suppl. 513.

59. *Kansas.*— Miami County Nat. Bank *v.* Barkalow, 53 Kan. 68, 35 Pac. 796.

Louisiana.— Devonshire *v.* Gauthreaux, 32 La. Ann. 1132.

Minnesota.— Furman *v.* Tenny, 28 Minn. 77, 9 N. W. 172; Tupper *v.* Thompson, 26 Minn. 385, 4 N. W. 621.

South Carolina.— Archer *v.* Long, 38 S. C. 272, 16 S. E. 998; Paris *v.* Du Pre, 17 S. C. 282.

Wisconsin.— Welcome *v.* Mitchell, 81 Wis. 566, 51 N. W. 1080, 29 Am. St. Rep. 913; Blakeslee *v.* Rossman, 44 Wis. 553.

In California it is held that defendant may interpose this defense under a denial of plaintiff's title, but if he does proceed to set up the acts of fraud which he charges render plaintiff's title invalid, he must state facts which are sufficient in law to that end, and not aver fraud in general terms. Eaton *v.* Metz, (Cal. 1895) 40 Pac. 947; Mason *v.* Vestel, 88 Cal. 396, 26 Pac. 213, 22 Am. St. Rep. 310.

60. Ray *v.* Teabout, 65 Iowa 157, 21 N. W. 497; Plummer *v.* Rohman, 62 Nebr. 145, 87 N. W. 11. He may show that the property was exempt and could not have been seized upon execution if it had been retained by the grantor. Isgrigg *v.* Pauley, 148 Ind. 436, 47 N. E. 821. See also Furth *v.* March, 101 Mo. App. 329, 74 S. W. 147. It has been held, however, that an answer which merely denies "each and every allegation of the complaint not herein specifically admitted" does not deny the allegations of fraudulent intent set forth in the complaint. National Wall Paper Co. *v.* McPherson, 19 Mont. 355, 48 Pac. 550, where it was held, however, that affirmative allegations in the answer, setting out the conveyances sought to be set aside as in fraud of creditors were made for the purpose of paying just debts of the

has an affirmative defense he must plead it in order to let in his evidence.[61] Where a negative fact forms an essential part of plaintiff's case or defendant's defense it must be alleged in the pleading, no matter where the burden of proof may rest.[62]

c. Confession and Avoidance. The rule in chancery is, if the answer admits a fact but insists on matter by way of avoidance, the complainant need not prove the fact admitted, but defendant must prove the matter in avoidance.[63] In trespass to try title, where defendant relies on his plea of not guilty and pleads nothing specially by way of confession and avoidance, if plaintiff is confronted at the trial by a deed from the person under whom he claims, he may attack it as fraudulent, although fraud has not been alleged in his pleadings.[64]

d. Fatal Variance. To authorize a decree setting aside a fraudulent conveyance the material allegations in the bill and the proof adduced in support of them must be in substantial accord. Otherwise there is a fatal variance, for a party cannot sue on one cause of action and recover on another.[65] But while it is generally true that the case stated in the bill must be sustained by the evidence, this rule will not prevent the court from granting the relief prayed for where the case proved does not materially differ from the case stated.[66]

K. Evidence — 1. Presumptions and Burden of Proof[67] — a. In General. As has already been noticed, presumptions arise that a conveyance is fraudulent on a showing of certain facts, such as that a conveyance by one indebted was volun-

grantor, constitute a sufficient denial of the allegations of fraud in the complaint.

61. Robinson *v.* Moseley, 93 Ala. 70, 9 So. 372; Shaw *v.* Manchester, 84 Iowa 246, 50 N. W. 985; Hart *v.* Schenck, 32 N. J. Eq. 148. See also Wang *v.* Finnerty, 32 La. Ann. 94. Where a want of consideration is charged in the bill, defendant must set out the consideration if he hopes to prove a valuable consideration. Noble *v.* Gilliam, 136 Ala. 618, 33 So. 861; Gorman *v.* Glenn, 78 S. W. 873, 25 Ky. L. Rep. 1755.

62. Meyer-Marx Co. *v.* Masters, 119 Ala. 186, 24 So. 506, want of consideration for conveyance.

63. Yost *v.* Hudibury, 2 Lea (Tenn.) 627; Clements *v.* Nicholson, 6 Wall. (U. S.) 299, 18 L. ed. 786. See also Hart *v.* Ten Eyck, 2 Johns. Ch. (N. Y.) 62; Clarke *v.* White, 12 Pet. (U. S.) 178, 9 L. ed. 1046.

64. McSween *v.* Yett, 60 Tex. 183; Rivers *v.* Foote, 11 Tex. 662; Clardy *v.* Wilson, 27 Tex. Civ. App. 49, 64 S. W. 489. In an action to recover an undivided interest in real property purchased by plaintiff on sale under execution against one of several heirs, where the other heirs, in their answer, set up a conveyance of such interest to them by their coheir in settlement of his indebtedness to the estate of their mother, from whom they inherited, but their answer did not set out certain notes constituting part of such indebtedness, and did not disclose the nature of the transaction in which the notes were given, evidence of fraud in such transaction is admissible under a reply merely denying the existence of the facts alleged in the answer. Matula *v.* Lane, 22 Tex. Civ. App. 391, 55 S. W. 504.

65. *District of Columbia.*— Droop *v.* Ridenour, 11 App. Cas. 224.

Indiana.— Mayer *v.* Feig, 114 Ind. 577, 17 N. E. 159.

Michigan.— Bresnahan *v.* Nugent, 92 Mich. 76, 52 N. W. 735.

Mississippi.— Ferguson *v.* Bobo, 54 Miss. 121.

Missouri.— Reed *v.* Bott, 100 Mo. 62, 12 S. W. 347, 14 S. W. 1089.

Nebraska.— Ayers *v.* Wolcott, 66 Nebr. 712, 92 N. W. 1036, holding that where it is alleged that conveyances of real estate were made to defraud existing creditors, and the proofs show such conveyances were executed and delivered prior to the incurring of the indebtedness, the petition under the proofs will not sustain a decree in favor of plaintiff.

66. *Alabama.*— Moog *v.* Barrow, 101 Ala. 209, 13 So. 665.

Connecticut.— Mallory *v.* Gallagher, 75 Conn. 665, 55 Atl. 209.

Indiana.— Slagel *v.* Hoover, 137 Ind. 314, 36 N. E. 1099, holding that where the complaint alleges that a conveyance was voluntary, and given and accepted with intent to defraud the grantor's creditors, the omission to show a want of consideration is not fatal where the deed on the other allegations in the complaint would be fraudulent even if there were a valuable consideration.

Louisiana.— Mackesy *v.* Schultz, 38 La. Ann. 385.

Missouri.— Erfort *v.* Consalus, 47 Mo. 208.

New York.— Bodine *v.* Edwards, 10 Paige 504.

Virginia.— Campbell *v.* Bowles, 30 Gratt. 652.

West Virginia.— Keneweg Co. *v.* Schilansky, 47 W. Va. 287, 34 S. E. 773.

United States.— Alabama Iron, etc., Co. *v.* Austin, 94 Fed. 897, 36 C. C. A. 536.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 795.

67. See Evidence, 16 Cyc. 938, 1050.

tary,[68] that the consideration for a transfer to one is paid by another,[69] that the relationship between the parties is husband and wife,[70] that the grantor retains possession of the property conveyed,[71] that there are reservations and trusts for the grantor,[72] etc. These presumptions are, however, rebuttable presumptions,[73] and their only effect is to shift the burden of evidence to the party against whom the presumption exists. For instance, where plaintiff shows that there has been no change of possession he makes out a *prima facie* case and may rest, inasmuch as the proof of such fact creates a presumption of fraud, which must be explained by defendant to prevent a judgment for plaintiff. The "burden of proof," strictly speaking, remains on plaintiff because the burden of proof depends on the pleadings and never shifts, but the "burden of evidence" shifts to defendant where plaintiff produces proof which raises a presumption of fraud. This "burden of evidence," even though shifted to defendant, when satisfied, may make a *prima facie* case in favor of defendant, so that the "burden of evidence" will be shifted back to plaintiff.[74]

b. Burden of Proof as Dependent on Pleadings. The general rule is that the burden of proof rests on plaintiff to prove all the allegations of his complaint not admitted by the answer,[75] and that the burden rests on defendant to prove affirmative defenses and matters set up in avoidance in the answer.[76] It has been held that the attacking creditor need not prove a negative, such as a want of consideration,[77] or that a judgment was obtained without evidence,[78] although the general rule of evidence is that whenever an affirmative case requires proof of a material negative allegation, the party alleging it has the burden of proving it.[79] A statement in the answer of matters provable under a general denial does not place on defendant the burden of proving such facts, and hence an answer alleging that the property was purchased by the grantor with the grantee's money, that the former took the title in his name without the latter's consent, and that he made the conveyance merely to discharge his trust does not put the burden of proving such facts on the grantee.[80] Where the complaint anticipates and negatives a defense, such as the defense of a *bona fide* purchaser for value, it seems that the burden of proof is on plaintiff.[81] Where the answer evades the real issue which is as to the possession of other property by the grantor, at the time of the conveyance, the burden of proof as to the retention of such property is on defendant.[82]

c. Fraud in General. Fraud is never to be presumed when the transaction may be fairly reconciled with honesty,[83] especially where it is alleged to have

68. See *supra*, VIII, D.
69. See *supra*, III, A, 3, a.
70. See *supra*, XII, B.
71. See *supra*, IX.
72. See *supra*, X.
73. The presumption of fraudulent intent of one who pays the consideration for a grant to another is not conclusive, but simply casts the burden on the grantee to disprove a fraudulent intent. Wolford *v.* Farnham, 44 Minn. 159, 46 N. W. 295; Reich *v.* Reich, 26 Minn. 97, 1 N. W. 804; Dunlap *v.* Hawkins, 59 N. Y. 342 [*affirming* 2 Thomps. & C. 292]; Lanahan *v.* Caffrey, 40 N. Y. App. Div. 124, 57 N. Y. Suppl. 724.

The statutory presumption of fraud where a sale of part or all of a stock of merchandise is made out of the regular course of business, where no inventory of the goods is made and the purchaser does not make inquiry as to the creditors of the seller, is not a conclusive but a rebuttable presumption. Hart *v.* Roney, 93 Md. 432, 49 Atl. 661.

74. See EVIDENCE, 16 Cyc. 926, 932.
75. Wright *v.* Wheeler, 14 Iowa 8; Farmers' Bank *v.* Worthington, 145 Mo. 91, 46 S. W. 745; Hombs *v.* Corbin, 34 Mo. App. 393 [*overruling* 20 Mo. App. 497]; Maury Nat. Bank *v.* McAdams, 106 Tenn. 404, 61 S. W. 773. See EVIDENCE, 16 Cyc. 930, 931.
76. Connecticut Mut. L. Ins. Co. *v.* Smith, 117 Mo. 261, 22 S. W. 623, 38 Am. St. Rep. 856; Robbins *v.* Armstrong, 84 Va. 810, 6 S. E. 130. See EVIDENCE, 16 Cyc. 930, 931.
77. Fisher *v.* Moore, 12 Rob. (La.) 95.
78. Judson *v.* Connolly, 5 La. Ann. 400; Fox *v.* Fox, 4 La. Ann. 135.
79. Tompkins *v.* Nichols, 53 Ala. 197; Compton *v.* Marshall, 88 Tex. 50, 27 S. W. 121, 28 S. W. 518, 29 S. W. 1059, holding that the allegation that the debt secured by a deed of trust was fictitious must be proved by plaintiff. See EVIDENCE, 16 Cyc. 927 note 15.
80. Bishop *v.* State, 83 Ind. 67.
81. Verner *v.* Verner, 64 Miss. 184, 1 So. 52.
82. Welcker *v.* Price, 2 Lea (Tenn.) 666.
83. Tompkins *v.* Nichols, 53 Ala. 197; Mey *v.* Gulliman, 105 Ill. 272; Thompson *v.* San-

occurred many years before the bringing of suit;[84] and hence the burden of proof, where not governed by statute,[85] is on the attacking creditor to show fraud in the conveyance;[86] but where facts appear which are sufficient to raise a pre-

ders, 6 J. J. Marsh. (Ky.) 94; Dallam *v.* Renshaw, 26 Mo. 533.

Purchase by attorney.— A purchase, by an attorney, of his client's land at execution sale in the proceedings in which the attorney is employed, is not presumptively fraudulent as to the client's creditors. Fisher *v.* McInerney, 137 Cal. 28, 69 Pac. 622, 907, 92 Am. St. Rep. 68.

84. Welton *v.* Baltezore, 25 Nebr. 190, 41 N. W. 146.

85. In Michigan the burden, in suits in aid of an execution, is on defendant to prove the transaction *bona fide*, but this statute applies only where a judgment has been obtained and execution levied. Whelpley *v.* Stoughton, 119 Mich. 314, 78 N. W. 137.

86. *Alabama.*— Smith *v.* Collins, 94 Ala. 394, 10 So. 334.

Arizona.— Rochester *v.* Sullivan, 2 Ariz. 75, 11 Pac. 58.

Arkansas.— Hempstead *v.* Johnston, 18 Ark. 123, 65 Am. Dec. 458.

District of Columbia.— McDaniel *v.* Parish, 4 App. Cas. 213; Birdsall *v.* Welch, 6 D. C. 316.

Georgia.— Colquitt *v.* Thomas, 8 Ga. 258.

Illinois.— Bowman *v.* Ash, 143 Ill. 649, 32 N. E. 486; Schroeder *v.* Walsh, 120 Ill. 403, 11 N. E. 70; Pratt *v.* Pratt, 96 Ill. 184; O'Neal *v.* Boone, 82 Ill. 589; Klein *v.* Horine, 47 Ill. 430; Johnston *v.* Hirschberg, 85 Ill. App. 47; Flynn *v.* Todd, 77 Ill. App. 682; Hanchett *v.* Goetz, 25 Ill. App. 445; Chicago Stamping Co. *v.* Hanchett, 25 Ill. App. 198; Edey *v.* Fath, 4 Ill. App. 275.

Indiana.— American Varnish Co. *v.* Reed, 154 Ind. 88, 55 N. E. 224; Personette *v.* Cronkhite, 140 Ind. 586, 40 N. E. 59; Fulp *v.* Beaver, 136 Ind. 319, 36 N. E. 250; Pennington *v.* Flock, 93 Ind. 378; Morgan *v.* Olvey, 53 Ind. 6; Pence *v.* Croan, 51 Ind. 336; Farmer *v.* Calvert, 44 Ind. 209; Stewart *v.* English, 6 Ind. 176.

Iowa.— Doxsee *v.* Waddick, 122 Iowa 599, 98 N. W. 483; Thompson *v.* Zuckmayer, (1903) 94 N. W. 476; Shaffer *v.* Rhynders, 116 Iowa 472, 89 N. W. 1099; Pidcock *v.* Voorhies, 84 Iowa 705, 42 N. W. 646, 49 N. W. 1038; Adams *v.* Ryan, 61 Iowa 733, 17 N. W. 159; Craig *v.* Fowler, 59 Iowa 200, 13 N. W. 116; Lillie *v.* McMillan, 52 Iowa 463, 3 N. W. 601; Prichard *v.* Hopkins, 52 Iowa 120, 2 N. W. 1028.

Kansas.— Gleason *v.* Wilson, 48 Kan. 500, 29 Pac. 698.

Kentucky.— Casteel *v.* Baugh, 18 S. W. 1023, 13 Ky. L. Rep. 916.

Louisiana.— Chaffe *v.* Lisso, 34 La. Ann. 310; Pierce *v.* Clark, 25 La. Ann. 111; Bridgeford *v.* Simonds, 18 La. Ann. 121; Hubbard *v.* Hobson, 14 La. 453; Gravier *v.* Brandt, 1 Mart. N. S. 165; Kenney *v.* Dow, 10 Mart. 577, 13 Am. Dec. 342.

Maine.— Blaisdell *v.* Cowell, 14 Me. 370; Knight *v.* Kidder, (1885) 1 Atl. 142.

Maryland.— Crooks *v.* Brydon, 93 Md. 640, 49 Atl. 921; Cooke *v.* Cooke, 43 Md. 522; Allein *v.* Sharp, 7 Gill & J. 96.

Massachusetts.— Elliott *v.* Stoddard, 98 Mass. 145; Emmons *v.* Westfield Bank, 97 Mass. 230.

Minnesota.— McMillan *v.* Edfast, 50 Minn. 414, 52 N. W. 907.

Mississippi.— McInnis *v.* Wiscasset Mills, 78 Miss. 52, 28 So. 725; Parkhurst *v.* McGraw, 24 Miss. 134.

Missouri.— Thompson *v.* Cohen, (1894) 24 S. W. 1023; Sedalia Third Nat. Bank *v.* Cramer, 78 Mo. App. 476; Jacob Furth Grocery Co. *v.* May, 78 Mo. App. 323; Halderman *v.* Sillington, 63 Mo. App. 212; Deering *v.* Collins, 38 Mo. App. 73.

Nebraska.— Knapp *v.* Fisher, 58 Nebr. 651, 79 N. W. 553; Landauer *v.* Mack, 39 Nebr. 8, 57 N. W. 555.

New Hampshire.— Jones *v.* Emery, 40 N. H. 348.

New Jersey.— Hemingway *v.* McDevitt, 4 N. J. L. J. 343.

New York.— Remington Paper Co. *v.* O'Dougherty, 36 Hun 79 [*affirmed* in 99 N. Y. 673]; Talman *v.* Smith, 39 Barb. 390.

North Carolina.— Morgan *v.* Bostic, 132 N. C. 743, 44 S. E. 639.

Ohio.— Grote *v.* Meyer, 6 Ohio Dec. (Reprint) 1025, 9 Am. L. Rec. 623.

Pennsylvania.— Natalie Anthracite Coal Co. *v.* Ryon, 188 Pa. St. 138, 41 Atl. 462.

Texas.— Ellis *v.* Valentine, 65 Tex. 532; Martel *v.* Somers, 26 Tex. 551; Edwards *v.* Anderson, 31 Tex. Civ. App. 131, 71 S. W. 555; Kosminsky *v.* Walter, (Civ. App. 1898) 44 S. W. 540; Voorheis *v.* Waller, (Civ. App. 1896) 35 S. W. 807; Reynolds *v.* Weinman, (Civ. App. 1894) 25 S. W. 33; Greathouse *v.* Moore, (Civ. App. 1893) 23 S. W. 226.

Utah.— Wilson *v.* Cunningham, 24 Utah 167, 67 Pac. 118.

Virginia.— Fisher *v.* Dickenson, 84 Va. 318, 4 S. E. 737.

West Virginia.— Butler *v.* Thompson, 45 W. Va. 660, 31 S. E. 960, 72 Am. St. Rep. 838; Cohn *v.* Ward, 32 W. Va. 34, 9 S. E. 41.

Wisconsin.— Rice *v.* Jerenson, 54 Wis. 248, 11 N. W. 549.

United States.—Allen *v.* Smith, 129 U. S. 465, 9 S. Ct. 338, 32 L. ed. 732.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 798.

If the transaction is not fraudulent per se, the burden of showing fraud is on the party alleging it. Roberts *v.* Guernsey, 3 Grant (Pa.) 237.

The rule that fraud must be proved and is never presumed is to be understood as affirming that the contract or conduct, apparently honest and lawful, must be regarded as such until shown to be otherwise by evidence either positive or circumstantial. Burt *v.* Timmons, 29 W. Va. 441, 2 S. E. 780, 6 Am.

sumption that the conveyance is in fraud of the grantor's creditors, the burden of showing good faith is shifted to the parties to such conveyance.[87] It follows that the statement that fraud is never to be presumed, but must be proved like any other fact, is not strictly accurate, inasmuch as proof of the existence of certain facts which have a tendency to establish fraud may be sufficient to warrant the presumption of fraud which must be overcome by the parties to the transaction.[88] The rule that the burden of proof is on the person attacking the conveyance as fraudulent not only applies to independent actions brought to set aside a fraudulent conveyance, but also where the issue arises in some other action, such as an attachment suit,[89] or in a replevin suit,[90] or in any other action by or against an officer who has levied process,[91] although the fraud is relied on as an affirmative defense.

d. As Affected by Relationship of Parties[92] — (i) *In General.* In most of the states the fact that the alleged fraudulent transaction is between relatives does not change the rule as to the burden of proof,[93] although in some jurisdic-

St. Rep. 664; Goshorn *v.* Snodgrass, 17 W. Va. 717.

87. *Arkansas.*— Leach *v.* Fowler, 22 Ark. 143.

Florida.— Neal *v.* Gregory, 19 Fla. 356.

Louisiana.— King *v.* Atkins, 33 La. Ann. 1057.

Maine.— Page *v.* Smith, 25 Me. 256.

Maryland.— Zimmer *v.* Miller, 64 Md. 296, 1 Atl. 858.

Massachusetts.— Widgery *v.* Haskell, 5 Mass. 144, 4 Am. Dec. 41.

Michigan.— Whitney *v.* Rose, 43 Mich. 27, 4 N. W. 557.

Missouri.— State *v.* Smith, 31 Mo. 566.

Nebraska.—Plummer *v.* Rummel, 26 Nebr. 142, 42 N. W. 336; Bartlett *v.* Cheesbrough, 23 Nebr. 767, 37 N. W. 652.

New York.— Randall *v.* Parker, 3 Sandf. 69; Smith *v.* Reid, 11 N. Y. Suppl. 739, 19 N. Y. Civ. Proc. 363.

North Carolina.— Grambling *v.* Dickey, 118 N. C. 986, 24 S. E. 671.

Pennsylvania.— Wilson *v.* Silkman, 97 Pa. St. 509; Redfield, etc., Mfg. Co. *v.* Dysart, 62 Pa. St. 62.

Tennessee.— Hetterman Bros. Co. *v.* Young, (Ch. App. 1898) 52 S. W. 532.

Texas.— Cooper *v.* Friedman, 23 Tex. Civ. App. 585, 57 S. W. 581.

Vermont.— Lyman *v.* Tarbell, 30 Vt. 463.

Virginia.— American Net, etc., Co. *v.* Mayo, 97 Va. 182, 33 S. E. 523.

West Virginia.— Livey *v.* Winton, 30 W. Va. 554, 4 S. E. 451; Goshorn *v.* Snodgrass, 17 W. Va. 717.

Wisconsin.— Fisher *v.* Shelver, 53 Wis. 498, 10 N. W. 681; Horton *v.* Dewey, 53 Wis. 410, 10 N. W. 599.

United States.— Clements *v.* Nicholson, 6 Wall. 299, 18 L. ed. 786, holding that where a creditor shows facts that raise a strong presumption of fraud in a conveyance made by his debtor, the history of which is necessarily known to the debtor only, the burden of proof lies on him to explain it, his estate being insolvent.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 798.

The burden is not shifted by the admission that the conveyance, although apparently absolute, was a mortgage. Fifield *v.* Gaston, 12 Iowa 218.

88. Reed *v.* Noxon, 48 Ill. 323; Kendall *v.* Hughes, 7 B. Mon. (Ky.) 368; Schmick *v.* Noel, 72 Tex. 1, 8 S. W. 83.

89. *Colorado.*—Riéthmann *v.* Godsman, 23 Colo. 202, 46 Pac. 684.

Missouri.— Mansur-Tebbetts Implement Co. *v.* Ritchie, 143 Mo. 587, 45 S. W. 634.

Montana.— Finch *v.* Kent, 24 Mont. 268, 61 Pac. 653.

Pennsylvania.— Briggs *v.* Brown, 23 Pa. Super. Ct. 163.

Texas.— Compton *v.* Marshall, 88 Tex. 50, 27 S. W. 121, 28 S. W. 518, 29 S. W. 1059.

90. Hartman *v.* Hosmer, 65 Kan. 595, 70 Pac. 598; Magee *v.* Hartzell, 7 Kan. App. 489, 54 Pac. 129; Finch *v.* Kent, 24 Mont. 268, 61 Pac. 653; Ferree *v.* Cook, 119 N. C. 161, 25 S. E. 856, holding that the burden is on a party alleging, as a defense to an action of claim and delivery, that the bill of sale under which plaintiff claims is fraudulent, to establish the fraud, unless the instrument is void on its face, or enough appears therein to create a presumption of fraud.

91. Rein *v.* Kendall, 55 Nebr. 583, 75 N. W. 1104 (holding that where an officer levies on mortgaged property, the mortgage being of record, the burden is on him to show that the mortgage is fraudulent as to creditors); Reynolds *v.* Weinman, (Tex. Civ. App. 1897) 40 S. W. 560.

92. See also *supra*, XII.

93. *Illinois.*— American Hoist, etc., Co. *v.* Hall, 208 Ill. 597, 70 N. E. 581; Mathews *v.* Reinhardt, 149 Ill. 635, 37 N. E. 85; Rindskoph *v.* Kuder, 145 Ill. 607, 34 N. E. 484.

Indiana.— Rockland Co. *v.* Summerville, 139 Ind. 695, 39 N. E. 307.

Iowa.— Klay *v.* McKellar, 122 Iowa 163, 97 N. W. 1091.

Kansas.— Gilmore *v.* Swisher, 59 Kan. 172, 52 Pac. 426.

Kentucky.— Redd *v.* Redd, 67 S. W. 367, 23 Ky. L. Rep. 2379.

Maine.— Augusta Sav. Bank *v.* Crossman, (1886) 7 Atl. 396.

tions the fact of such relationship creates a presumption which shifts the burden of proof to defendants.[94] In all cases the burden may be shifted to defendant, as in other cases, where facts tending to show fraud have been proved by plaintiff.[95] For instance, the relationship of the parties in connection with inadequacy of the consideration places the burden of proof on defendant to show his good faith.[96] Under the rule that if minors are not emancipated their earnings belong to their father, the burden to prove emancipation is on defendants, in an action to set aside a transfer of land from a parent to an infant son, where the consideration was alleged to have been the payment by the son of his wages to the parent.[97]

(II) *HUSBAND AND WIFE.*[98] Except where the burden is on plaintiff because of particular allegations in the complaint,[99] the general rule is that in a contest between the creditors of the husband and his wife, if the wife claims ownership of the property by a purchase during coverture, the burden of proof is on the wife to show that the purchase was for a valuable consideration paid by her out of her separate estate or by some person other than the husband,[1] although it

Minnesota.— Shea *v.* Hynes, 89 Minn. 423, 95 N. W. 214.

New York.— Parks *v.* Murray, 2 N. Y. St. 628.

Tennessee.— Williamson *v.* Williams, 11 Lea 355.

Virginia.— Johnson *v.* Lucas, 103 Va. 36, 48 S. E. 497.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 801, 813.

The fact that the transaction shows something out of the usual course of business does not change the burden of proof to those claiming under it. Oberholtzer *v.* Hazen, 92 Iowa 602, 61 N. W. 365.

Preferences.— The fact that the creditor preferred is a relative of the debtor does not cast the burden on him to show his good faith in the transaction. Coan *v.* Morrison, 34 Ill. App. 352.

94. *Alabama.*— Lipscomb *v.* McClellan, 72 Ala. 151.

Kentucky.— Lavelle *v.* Clark, 38 S. W. 481, 18 Ky. L. Rep. 759.

Louisiana.— Pruyn *v.* Young, 51 La. Ann. 320, 25 So. 125.

Nebraska.— Lusk *v.* Riggs, (1904) 97 N. W. 1033; Ayers *v.* Wolcott, 66 Nebr. 712, 92 N. W. 1036, 62 Nebr. 805, 87 N. W. 906; Lusk *v.* Riggs, 65 Nebr. 258, 91 N. W. 243; Boldt *v.* West Point First Nat. Bank, 59 Nebr. 283, 80 N. W. 905; Plummer *v.* Rummel, 26 Nebr. 142, 42 N. W. 336.

North Carolina.— Grambling *v.* Dickey, 118 N. C. 986, 24 S. E. 671; Hinton *v.* Greenleaf, 118 N. C. 7, 23 N. E. 924; Tredwell *v.* Graham, 88 N. C. 208; Reiger *v.* Davis, 67 N. C. 185; Black *v.* Caldwell, 49 N. C. 150; Satterwhite *v.* Hicks, 44 N. C. 105, 57 Am. Dec. 577.

Oregon.— Robson *v.* Hamilton, 41 Oreg. 239, 69 Pac. 651; Brown *v.* Case, 41 Oreg. 221, 69 Pac. 43; Goodale *v.* Wheeler, 41 Oreg. 190, 68 Pac. 753; Mendenhall *v.* Elwert, 36 Oreg. 375, 52 Pac. 22, 59 Pac. 805.

West Virginia.— Moore *v.* Gainer, 53 W. Va. 403, 44 S. E. 458.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 801, 813.

Preferences.—Where a relative is preferred, the burden of proving the existence of the debt which is the basis of the preference, and good faith, is on defendant. Thompson *v.* Tower Mfg. Co., 104 Ala. 140, 16 So. 116; Calhoun *v.* Hannan, 87 Ala. 277, 6 So. 291; Heffley *v.* Hunger, 54 Nebr. 776, 75 N. W. 53; H. T. Clarke Drug Co. *v.* Boardman, 50 Nebr. 687, 70 N. W. 248; National Bank of Commerce *v.* Chapman, 50 Nebr. 484, 70 N. W. 39; Bartlett *v.* Cheesbrough, 23 Nebr. 767, 37 N. W. 652; Marcus *v.* Leake, 4 Nebr. (Unoff.) 354, 94 N. W. 100; Mitchell *v.* Eure, 126 N. C. 77, 35 S. E. 190; Mendenhall *v.* Elwert, 36 Oreg. 375, 52 Pac. 22, 59 Pac. 805; Colfax Bank *v.* Richardson, 34 Oreg. 518, 54 Pac. 359, 75 Am. St. Rep. 664; Stauffer *v.* Kennedy, 47 W. Va. 714, 35 S. E. 892.

95. Bredin *v.* Bredin, 3 Pa. St. 81. See Wilks *v.* Vaughan, (Ark. 1904) 83 S. W. 913, holding that the burden of proof is on defendant where the transfer is of all the debtor's property.

96. Farwell *v.* Meyer, 67 Mo. App. 566.

97. Crary *v.* Hoffman, 115 Iowa 332, 88 N. W. 833; Kubic *v.* Zemke, 105 Iowa 269, 74 N. W. 748; Love *v.* Hudson, 24 Tex. Civ. App. 377, 59 S. W. 1127.

98. See also *supra*, XII, B.

99. Young *v.* Hurst, (Tenn. Ch. App. 1898) 48 S. W. 365; Walters *v.* Brown, (Tenn. Ch. App. 1898) 46 S. W. 777.

1. *Alabama.*— Noble *v.* Gilliam, 136 Ala. 618, 33 So. 861; Collier *v.* Carlisle, 133 Ala. 478, 31 So. 970; Wimberly *v.* Montgomery Fertilizer Co., 132 Ala. 107, 31 So. 524; Watts *v.* Burgess, 131 Ala. 333, 30 So. 868; Southern Home Bldg., etc., Assoc. *v.* Riddle, 129 Ala. 562, 29 So. 667; Elyton Land Co. *v.* Vance, 119 Ala. 315, 24 So. 719; Kelley *v.* Connell, 110 Ala. 543, 18 So. 9; Robinson *v.* Moseley, 93 Ala. 70, 9 So. 372; Wedgworth *v.* Wedgworth, 84 Ala. 274, 4 So. 149; Gordon *v.* Tweedy, 71 Ala. 202.

District of Columbia.— Turner *v.* Gottwals, 15 App. Cas. 43; Smith *v.* Cook, 10 App. Cas. 487.

Florida.— American Freehold Land, etc., Co. *v.* Maxwell, 39 Fla. 489, 22 So. 751; Kahn

has been held that where the wife clearly shows that the conveyance to her from her husband is based on a consideration paid out of her separate estate, or by some

v. Weinlander, 39 Fla. 210, 22 So. 653; Claflin *v.* Ambrose, 37 Fla. 78, 19 So. 628.

Kentucky.— Sikking *v.* Fromn, 112 Ky. 773, 66 S. W. 760, 23 Ky. L. Rep. 2138; Ruggles *v.* Robinson, 57 S. W. 619, 22 Ky. L. Rep. 437. See McKensie *v.* Salyer, 43 S. W. 450, 19 Ky. L. Rep. 1414 (holding that where a husband executed notes for land conveyed to the wife, and made the first payment thereon, but the wife paid six hundred dollars on the land, the burden is on the wife, as against her husband's prior creditors, to sustain her claim to a greater interest in the land than that created by such payment); Treadway *v.* Turner, 10 S. W. 816, 10 Ky. L. Rep. 949.

Maryland.— Manning *v.* Carruthers, 83 Md. 1, 43 Atl. 254; Nicholson *v.* Condon, 71 Md. 620, 18 Atl. 812; Levi *v.* Rothschild, 69 Md. 348, 14 Atl. 535; Hinkle *v.* Wilson, 53 Md. 287.

Minnesota.— Minneapolis Stock-Yards, etc., Co. *v.* Halomen, 56 Minn. 469, 57 N. W. 1135.

Missouri.— Gruner *v.* Scholz, 154 Mo. 415, 55 S. W. 441; Garrett *v.* Wagner, 125 Mo. 450, 28 S. W. 762; Patton *v.* Bragg, 113 Mo. 595, 20 S. W. 1059, 35 Am. St. Rep. 730.

Montana.— Lewis *v.* Lindley, 19 Mont. 422, 48 Pac. 765.

Nebraska.—David Adler, etc., Clothing Co. *v.* Hellman, 55 Nebr. 266, 75 N. W. 877; Schott *v.* Mochamer, 54 Nebr. 514, 74 N. W. 854; Jansen *v.* Lewis, 52 Nebr. 556, 72 N. W. 861; Kirchman *v.* Kratky, 51 Nebr. 191, 70 N. W. 916; Glass *v.* Zutavern, 43 Nebr. 334, 61 N. W. 579, 47 Am. St. Rep. 763; Melick *v.* Varney, 41 Nebr. 105, 59 N. W. 521; Carson *v.* Stevens, 40 Nebr. 112, 58 N. W. 845, 42 Am. St. Rep. 661; Stevens *v.* Carson, 30 Nebr. 544, 46 N. W. 655.

New Jersey.— Ruppert *v.* Hurley, (Ch. 1900) 47 Atl. 280; Post *v.* Stiger, 29 N. J. Eq. 554; Cramer *v.* Reford, 17 N. J. Eq. 367, 90 Am. Dec. 594. See Adoue *v.* Spencer, 62 N. J. Eq. 782, 49 Atl. 10, 90 Am. St. Rep. 484, 56 L. R. A. 817 [*reversing* 59 N. J. Eq. 231, 46 Atl. 543], holding that where a conveyance of land by a husband to his wife by deed through a third party is attacked by creditors as voluntary or fraudulent, the burden is on the wife to establish that her husband took and used her separate estate; but when that fact is established, whether such taking was with or without her consent, the burden then shifts, and those claiming that such taking and use were by gift of the wife must establish such gift to the husband.

New Mexico.— Albuquerque First Nat. Bank *v.* McClellan, 9 N. M. 636, 58 Pac. 347.

New York.— See Ryder *v.* Hulse, 24 N. Y. 372.

North Carolina.— Redmond *v.* Chandley, 119 N. C. 575, 26 S. E. 255; Peeler *v.* Peeler, 109 N. C. 628, 14 S. E. 59; Woodruff *v.* Bowles, 104 N. C. 197, 10 S. E. 482.

Oregon.— Walker *v.* Harold, 44 Oreg. 205, 74 Pac. 705; Wright *v.* Craig, 40 Oreg. 191, 66 Pac. 807, holding that where the deed recited a nominal consideration the burden was on the wife to show good faith and a consideration.

Pennsylvania.— Jack *v.* Kintz, 177 Pa. St. 571, 35 Atl. 867; Billington *v.* Sweeting, 172 Pa. St. 161, 33 Atl. 543; Bollinger *v.* Gallagher, 170 Pa. St. 84, 32 Atl. 569; Evans *v.* Kilgore, 147 Pa. St. 19, 23 Atl. 201; Wilson *v.* Silkman, 97 Pa. St. 509; Seeds *v.* Kahler, 76 Pa. St. 262; Earl *v.* Champion, 65 Pa. St. 191; Keeney *v.* Good, 21 Pa. St. 349; De Frehn *v.* Leitenberger, 2 Leg. Chron. 365, 7 Leg. Gaz. 69. See Parvin *v.* Capewell, 45 Pa. St. 89; Aurand *v.* Schaffer, 43 Pa. St. 363; Taylor *v.* Paul, 6 Pa. Super. Ct. 496. But see Brown *v.* Atkinson, 9 Kulp 164, holding that the presumption that the purchase-money of land conveyed to the wife was furnished by the husband is greatly modified by the act giving a married woman the same power to acquire property, real or personal, as if she were a *feme sole*.

South Dakota.— Smith *v.* Tosini, 1 S. D. 632, 48 N. W. 299.

Tennessee.— See Crump *v.* Johnson, (Ch. App. 1896) 40 S. W. 73, holding that where the wife in her answer not only denies the allegation that the means of the husband paid for the property, but further alleges that the property was paid for out of the proceeds of certain of her separate estate, the burden is on her to show that particular fact as alleged.

Texas.— New England L. & T. Co. *v.* Avery, (Civ. App. 1897) 41 S. W. 673.

Virginia.— Kline *v.* Kline, 103 Va. 263, 48 S. E. 882; Rankin *v.* Goodwin, 103 Va. 81, 48 S. E. 521; Baker *v.* Watts, 101 Va. 702, 44 S. E. 929; Lee *v.* Willis, 101 Va. 188, 43 S. E. 354; Crowder *v.* Garber, 97 Va. 565, 34 S. E. 470; Noyes *v.* Carter, (1895) 23 S. E. 1; Grant *v.* Sutton, 90 Va. 771, 19 S. E. 784; Massey *v.* Yancey, 90 Va. 626, 19 S. E. 184; Yates *v.* Law, 86 Va. 117, 9 S. E. 508; Rixey *v.* Deitrick, 85 Va. 42, 6 S. E. 615; Robbins *v.* Armstrong 84 Va. 810, 6 S. E. 130; Perry *v.* Ruby, 81 Va. 317; Finck *v.* Denny, 75 Va. 663.

Washington.—See Bates *v.* Drake, 28 Wash. 447, 68 Pac. 961, where statute so provides.

West Virginia.— Miller *v.* Gillispie, 54 W. Va. 450, 46 S. E. 451; Harr *v.* Shaffer, 52 W. Va. 207, 43 S. E. 89; Wood *v.* Harmison, 41 W. Va. 376, 23 S. E. 560; Hutchinson *v.* Boltz, 35 W. Va. 754, 14 S. E. 267; Livey *v.* Winton, 30 W. Va. 554, 4 S. E. 451; Burt *v.* Timmons, 29 W. Va. 441, 2 S. E. 780, 6 Am. St. Rep. 664; Maxwell *v.* Hanshaw, 24 W. Va. 405; Herzog *v.* Weiler, 24 W. Va. 199; Stockdale *v.* Harris, 23 W. Va. 499; McMasters *v.* Edgar, 22 W. Va. 673.

Wisconsin.— Le Saulnier *v.* Krueger, 85 Wis. 214, 54 N. W. 774; Gettelmann *v.* Gitz, 78 Wis. 439, 47 N. W. 660; Brickley *v.* Walker, 68 Wis. 563, 32 N. W. 773; Hoey *v.* Pierron, 67 Wis. 262, 30 N. W. 692; Semmens *v.* Walters, 55 Wis. 675, 13 N. W. 889; Fisher

third person for her, the burden of showing fraud shifts to the attacking creditors.[2] So where a husband prefers his wife as a creditor, the burden is on the wife to show that the preference was to pay or secure a subsisting and valid debt.[3] These rules also apply to improvements erected on the wife's land by her husband, where they are sought to be reached by creditors of the husband.[4] They do not apply, however, where the attack is by a subsequent creditor,[5] nor where the purchase is of exempt property,[6] nor, according to some cases, where the property is conveyed to the wife by a person other than her husband.[7] The bur-

v. Shelver, 53 Wis. 498, 10 N. W. 681; Horton *v.* Dewey, 53 Wis. 410, 10 N. W. 599; Stimson *v.* White, 20 Wis. 562; Stanton *v.* Kirsch, 6 Wis. 338. *Compare* Hooser *v.* Hunt, 65 Wis. 71, 26 N. W. 442, holding that the rule does not apply to the grantee of the wife.

United States.— Seitz *v.* Mitchell, 94 U. S. 580, 24 L. ed. 179; Curtis *v.* Wortsman, 25 Fed. 893 (decided under the Georgia code); Simms *v.* Morse, 2 Fed. 325, 4 Hughes 579.

Canada.— Ripstein *v.* British Canadian Loan, etc., Co., 7 Manitoba 119; Osborne *v.* Carey, 5 Manitoba 237; Harris *v.* Rankin, 4 Manitoba 115.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 802, 814.

Contra.— *Connecticut.*— Fishel *v.* Motta, 76 Conn. 197, 56 Atl. 558.

Georgia.— Richardson *v.* Subers, 82 Ga. 427, 9 S. E. 172.

Iowa.— Clark *v.* Ford, 126 Iowa 460, 102 N. W. 421; Meredith *v.* Schaap, (1901) 85 N. W. 628; Stubblefield *v.* Gadd, 112 Iowa 681, 84 N. W. 917; Gilbert *v.* Glenny, 75 Iowa 513, 39 N. W. 818, 1 L. R. A. 479; Stephenson *v.* Cook, 64 Iowa 265, 20 N. W. 182 (holding that the fact that she received nothing from her father's estate is not sufficient basis for a presumption that she never had means sufficient to pay for lands, and that she never promised to pay for such lands, conveyed by her husband to her); Wolf *v.* Chandler, 58 Iowa 569, 12 N. W. 601. *Compare* Baldwin *v.* Tuttle, 23 Iowa 66, where the deed was on its face partly voluntary, and the attacking creditor merely sought to subject to his judgment a small part of the property included in the conveyance, and it was held that the burden was on the wife to show that, as to the property claimed, the deed was made for a valuable consideration.

Louisiana.—Chaffe *v.* De Moss, 37 La. Ann. 186; Farrell *v.* O'Neil, 22 La. Ann. 619.

Maine.— Winslow *v.* Gilbreth, 50 Me. 90 [*explaining* and *distinguishing* Eldridge *v.* Preble, 34 Me. 148, decided under the statute of 1844, which was modified by the statute of 1847].

Mississippi.— Virden *v.* Dwyer, 78 Miss. 763, 30 So. 45. See Mangum *v.* Finucane, 38 Miss. 354.

Tennessee.— Cox *v.* Scott, 9 Baxt. 305.

Virginia.— Stonebraker *v.* Hicks, 94 Va. 618, 27 S. E. 497.

Reason for rule.— "Purchases of either real or personal property made by the wife of an insolvent debtor during coverture are justly regarded with suspicion, unless it clearly appears that the consideration was paid out of her separate estate. Such is the community of interest between husband and wife; such purchases are so often made a cover for a debtor's property; are so frequently resorted to for the purpose of withdrawing his property from the reach of his creditors and preserving it for his own use, and they hold forth such temptations for fraud, that they require close scrutiny. In a contest between the creditors of the husband and the wife there is, and there should be, a presumption against her which she must overcome by affirmative proof." Yates *v.* Law, 86 Va. 117, 120, 9 S. E. 508.

The fact that the wife is in possession of property, claiming it as her own at the time it is claimed by a creditor of her husband, does not relieve her of the burden of proving that the transfer was not made to defraud. Stevens *v.* Carson, 30 Nebr. 544, 46 N. W. 655.

2. Peeler *v.* Peeler, 109 N. C. 628, 14 S. E. 59; Brickley *v.* Walker, 68 Wis. 563, 32 N. W. 773; Evans *v.* Rugee, 57 Wis. 623, 16 N. W. 49; Semmens *v.* Walters, 55 Wis. 675, 13 N. W. 889.

3. *Georgia.*— Cruger *v.* Tucker, 69 Ga. 557.

Louisiana.—Darcy *v.* Labennes, 31 La. Ann. 404; Brassac *v.* Ducros, 4 Rob. 335; Bostwick *v.* Gasquet, 11 La. 534.

Maryland.—Stockslager *v.* Mechanics' Loan, etc., Inst., 87 Md. 232, 39 Atl. 742.

Michigan.— Manhard Hardware Co. *v.* Rothschild, 121 Mich. 657, 80 N. W. 707.

Pennsylvania.— Wilson *v.* Silkman, 97 Pa. St. 509.

Virginia.— Fidelity Loan, etc., Co. *v.* Engleby, 99 Va. 168, 37 S. E. 957; Runkle *v.* Runkle, 98 Va. 663, 37 S. E. 279; Darden *v.* Ferguson, (1897) 27 S. E. 435; Rixey *v.* Deitrick, 85 Va. 42, 6 S. E. 615.

West Virginia.— Livey *v.* Winton, 30 W. Va. 554, 4 S. E. 451.

Wisconsin.— Hoey *v.* Pierron, 67 Wis. 262, 30 N. W. 692.

Canada.— Rice *v.* Rice, 31 Ont. 59.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 802, 814.

Contra.— Rhodes *v.* Wood, 93 Tenn. 702, 28 S. W. 294.

4. Seasongood *v.* Ware, 104 Ala. 212, 16 So. 51; Edwards *v.* Entwisle, 2 Mackey (D. C.) 43.

5. See *infra*, XIV, K, 1, i, (II).

6. Allen *v.* Perry, 56 Wis. 178, 14 N. W. 3. See *supra*, II, B, 21.

7. Rice *v.* Allen, (Nebr. 1903) 95 N. W. 704; Osborne *v.* Wilkes, 108 N. C. 651, 13

den is, in most states, on the attacking creditor to show that the acts of a wife in carrying on a business, or in employing her husband as her agent, were not in good faith.[8] Where a wife invests her husband's income in her separate business and then pays the family expenses out of that business, the burden is upon her, as against his prior creditors, to show affirmatively the amount actually consumed in such expenses.[9]

e. Status of Plaintiff as Creditor. The burden of proof is on the creditor who seeks to set aside a conveyance as fraudulent to show the existence of a subsisting debt against defendant who is alleged to have fraudulently conveyed his property.[10] In the absence of proof the claim of a creditor will not be presumed to have existed at the time of a conveyance attacked as fraudulent.[11]

f. Nature and Value of Property Conveyed. It has been held that the burden is on plaintiff to show that the property alleged to have been fraudulently conveyed was liable to be subjected to the satisfaction of debts, and hence a subject for a conveyance which might be fraudulent as to creditors,[12] but other cases hold that where defendant alleges that the property transferred was exempt as a homestead, the burden is on him to prove such fact[13] and that the value of the property conveyed was not in excess of the homestead exemption.[14] The burden of proving that the property conveyed was of no substantial value is on defendant.[15]

g. Solvency of Grantor. Insolvency once shown to exist will be presumed to have continued,[16] but proof of insolvency some time after a sale will not raise a presumption of insolvency at the time of the sale,[17] since the presumption of continuance does not run backward. Although there are some decisions to the contrary,[18] the general rule is that where a conveyance not purporting to be based on a valuable consideration is attacked by a creditor, whose debt was in existence

S. E. 285; Welsh *v.* Solenberger, 85 Va. 441, 8 S. E. 91; Arndt *v.* Harshaw, 53 Wis. 269, 10 N. W. 390.

8. Coyne *v.* Sayre, 54 N. J. Eq. 702, 36 Atl. 96; Woodworth *v.* Sweet, 51 N. Y. 8. See Kluender *v.* Lynch, 2 Abb. Dec. (N. Y.) 538, 4 Keyes 361. See also *supra*, II, B, 8, b.

9. Trefethen *v.* Lynam, 90 Me. 376, 38 Atl. 335, 60 Am. St. Rep. 271, 38 L. R. A. 190.

10. *Alabama.*— Russell *v.* Davis, 133 Ala. 647, 31 So. 514, 91 Am. St. Rep. 56; Lawson *v.* Alabama Warehouse Co., 73 Ala. 289; Pickett *v.* Pipkin, 64 Ala. 520.

Arkansas.— Clark *v.* Anthony, 31 Ark. 546.

Iowa.— State Ins. Co. *v.* Prestage, 116 Iowa 466, 90 N. W. 62; Pidcock *v.* Voorhies, 84 Iowa 705, 42 N. W. 646, 49 N. W. 1038.

Louisiana.— Hanney *v.* Maxwell, 24 La. Ann. 49; De Young *v.* De Young, 6 La. Ann. 786; Fink *v.* Martin, 1 La. Ann. 117; Lafleur *v.* Hardy, 11 Rob. 493.

Minnesota.— Bloom *v.* Moy, 43 Minn. 397, 45 N. W. 715, 19 Am. St. Rep. 243; Braley *v.* Byrnes, 20 Minn. 435.

Missouri.— Davis *v.* Briscoe, 81 Mo. 27.

New Jersey.—Cocks *v.* Varney, 45 N. J. Eq. 72, 17 Atl. 108.

Texas.— Kerr *v.* Hutchins, 46 Tex. 384.

Wisconsin.— See Bogert *v.* Phelps, 14 Wis. 88.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 796.

Where a substitute note is accepted as satisfaction of a judgment, the presumption is that it was accepted in satisfaction of the debt represented by the judgment so as to validate, as against the judgment, a settlement subsequently made by the judgment debtor on his wife and children. Morriss *v.* Harveys, 75 Va. 726.

11. Tunison *v.* Chamblin, 88 Ill. 378.

12. Furth *v.* March, 101 Mo. App. 329, 74 S. W. 147; Darling *v.* Ricker, 68 Vt. 471, 35 Atl. 376.

13. Pace *v.* Robbins, 67 Ark. 232, 54 S. W. 213; State Ins. Co. *v.* Prestage, 116 Iowa 466, 90 N. W. 62.

14. Pace *v.* Robbins, 67 Ark. 232, 54 S. W. 213.

15. Fryberger *v.* Berven, 88 Minn. 311, 92 N. W. 1125.

16. Adams *v.* State, 87 Ind. 573; Burlington Protestant Hospital Assoc. *v.* Gerlinger, 111 Iowa 293, 82 N. W. 765; Cozzens *v.* Holt, 136 Mass. 237. See also EVIDENCE, 16 Cyc. 1052, 1054 note 26.

17. Nevers *v.* Hack, 138 Ind. 260, 37 N. E. 791, 46 Am. St. Rep. 380; Martin *v.* Fox, 40 Mo. App. 634. *Contra*, Strong *v.* Lawrence, 58 Iowa 55, 12 N. W. 74; Carlisle *v.* Rich, 8 N. H. 44. See also EVIDENCE, 16 Cyc. 1052, 1054 note 26.

18. Nevers *v.* Hack, 138 Ind. 260, 37 N. E. 791, 46 Am. St. Rep. 380; Hogan *v.* Robinson, 94 Ind. 138; Bishop *v.* State, 83 Ind. 67; Kain *v.* Larkin, 131 N. Y. 300, 30 N. E. 133; Lewis *v.* Boardman, 78 N. Y. App. Div. 394, 79 N. Y. Suppl. 1014; Kalish *v.* Higgins, 70 N. Y. App. Div. 192, 75 N. Y. Suppl. 397 [*affirmed* in 175 N. Y. 495, 67 N. E. 1084]; American Forcite Powder Mfg. Co. *v.* Hanna, 31 N. Y. App. Div. 317, 52 N. Y. Suppl. 547; Greer *v.* Richardson Drug Co., 1 Tex. Civ. App. 634, 20 S. W. 1127.

at the time of the transfer, the burden of proving that the transferrer retained sufficient means to pay existing creditors is on defendant.[19] In other words the burden of proving solvency in such a case is on the party seeking to sustain the validity of the transfer. *A fortiori* if the complaint alleges a conveyance of all the grantor's property and the answer not only denies that fact, but also avers that after the delivery of the deed the grantor was seized of real estate, located in certain counties, abundantly sufficient to pay the claims of his creditors, the burden of proof rests on defendant.[20] This rule as to burden of proof does not apply, however, where the attack is made by a subsequent creditor,[21] nor where the conveyance is based on a valuable consideration.[22] The burden of proving that the debts of the donor were afterward paid, as alleged in the answer, is on defendant.[23]

h. Consideration. The general rule is that a creditor whose debt existed at the time of a conveyance by his debtor purporting to be based on a valuable consideration has the burden of proving that the recitals of consideration in the deed are false,[24] and this rule also applies where the conveyance was to pay or secure a preëxisting debt.[25] But in some states the contrary rule prevails, and it

19. *Arkansas.*— Norton *v.* McNutt, 55 Ark. 59, 17 S. W. 362.

Florida.— McKeown *v.* Allen, 37 Fla. 490, 20 So. 556.

Georgia.— Cohen *v.* Parish, 100 Ga. 335, 28 S. E. 122; Cothran *v.* Forsyth, 68 Ga. 560.

Iowa.— Woods *v.* Allen, 109 Iowa 484, 80 N. W. 540; Strong *v.* Lawrence, 58 Iowa 55, 12 N. W. 74; Elwell *v.* Walker, 52 Iowa 256, 3 N. W. 64.

Maryland.— Dawson *v.* Waltemeyer, 91 Md. 328, 46 Atl. 994; Goodman *v.* Wineland, 61 Md. 449; Ellinger *v.* Crowl, 17 Md. 361; Glenn *v.* Grover, 3 Md. 212; Sewell *v.* Baxter, 2 Md. Ch. 447; Atkinson *v.* Phillips, 1 Md. Ch. 507.

Michigan.—Wilcox *v.* Hammond, 128 Mich. 516, 87 N. W. 636.

Mississippi.— Golden *v.* Goode, 76 Miss. 400, 24 So. 905; Ames *v.* Dorroh, 76 Miss. 187, 23 So. 768, 71 Am. St. Rep. 522; Young *v.* White, 25 Miss. 146.

Missouri.— Clark *v.* Thias, 173 Mo. 628, 73 S. W. 616; Hoffman *v.* Nolte, 127 Mo. 120, 29 S. W. 1006; Snyder *v.* Free, 114 Mo. 360, 21 S. W. 847; American Nat. Bank *v.* Thornburrow, 109 Mo. App. 639, 83 S. W. 771.

New Mexico.— Albuquerque First Nat. Bank *v.* McClellan, 9 N. M. 636, 58 Pac. 347.

New York.— Smith *v.* Reid, 134 N. Y. 568, 31 N. E. 1082; Baker *v.* Potts, 73 N. Y. App. Div. 29, 76 N. Y. Suppl. 406; Hyde *v.* Wolf, 31 N. Y. App. Div. 125, 52 N. Y. Suppl. 764; Sands *v.* Hildreth, 14 Johns. 493.

North Carolina.— Ricks *v.* Stancil, 119 N. C. 99, 25 S. E. 721.

Ohio.— Jones *v.* Leeds, 10 Ohio S. & C. Pl. Dec. 173, 7 Ohio N. P. 480.

Pennsylvania.— Woolston's Appeal, 51 Pa. St. 452.

Tennessee.— Carpenter *v.* Scales, (Ch. App. 1897) 48 S. W. 249.

Texas.—Maddox *v.* Summerlin, 92 Tex. 483, 49 S. W. 1033, 50 S. W. 567 [*reversing* (Civ. App. 1898) 47 S. W. 1020].

Virginia.— Taylor *v.* Mallory, 96 Va. 18, 30 S. E. 472.

Wyoming.— Cheyenne First Nat. Bank *v.* Swan, 3 Wyo. 356, 23 Pac. 743.

England.— Mackay *v.* Douglas, L. R. 14 Eq. 106, 41 L. J. Ch. 539, 26 L. T. Rep. N. S. 721, 20 Wkly. Rep. 652; Crossley *v.* Elworthy, L. R. 12 Eq. 158, 40 L. J. Ch. 480, 24 L. T. Rep. N. S. 607, 19 Wkly. Rep. 842.

Canada.—Thompson *v.* Doyle, 16 Can. L. T. (Occ. Notes) 286; Brown *v.* Davidson, 9 Grant Ch. (U. C.) 439.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 799, 804.

20. Birely *v.* Staley, 5 Gill & J. (Md.) 432, 25 Am. Dec. 303.

21. See *infra*, XIV, K, 1, i, (II).

22. Doxsee *v.* Waddick, 122 Iowa 599, 98 N. W. 483.

23. Loeschigk *v.* Addison, 19 Abb. Pr. (N. Y.) 169.

24. *Connecticut.*— Waterbury Lumber, etc., Co. *v.* Hinckley, 75 Conn. 187, 52 Atl. 739.

Maryland.— Thompson *v.* Williams, 100 Md. 195, 60 Atl. 26; Totten *v.* Brady, 54 Md. 170.

Massachusetts.— Foster *v.* Hall, 12 Pick. 89, 22 Am. Dec. 400; Boynton *v.* Rees, 8 Pick. 329, 19 Am. Dec. 326.

Michigan.— Kipp *v.* Lamoreaux, 81 Mich. 299, 45 N. W. 1002.

Nebraska.— Citizens' State Bank *v.* Porter, 4 Nebr. (Unoff.) 73, 93 N. W. 391.

New York.— Columbus Watch Co. *v.* Hodenpyl, 135 N. Y. 430, 32 N. E. 239 [*affirming* 61 Hun 557, 16 N. Y. Suppl. 337].

South Carolina.—Steinmeyer *v.* Steinmeyer, 55 S. C. 9, 33 S. E. 15.

Texas.— Martel *v.* Somers, 26 Tex. 551.

Canada.— Sanders *v.* Malsburg, 1 Ont. 178.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 809.

25. *Kansas.*—Hasie *v.* Connor, 53 Kan. 713, 37 Pac. 128.

Louisiana.— Metropolitan Bank *v.* Blaise, 109 La. 92, 33 So. 95.

Michigan.— Brace *v.* Berdan, 104 Mich. 356, 62 N. W. 568.

is held that where a creditor attacks a conveyance by his debtor, made subsequent to the creation of the debt, the burden is on defendant to show that the consideration of such conveyance was *bona fide* and adequate,[26] and that the rule applies equally well to preferences, so that defendant has the burden of proving the existence of a debt not materially in excess of the value of the property conveyed.[27] The burden of proof, where it is on plaintiff, may be shifted to defendant where plaintiff makes out a *prima facie* case of fraud.[28] For instance, where the vendor remains in possession the burden of proof is on the vendee to rebut the presumption of fraud and show that the sale was made for a valuable consideration.[29] So where the fraudulent intent of the grantor is shown the burden of proving payment of the consideration is shifted to defendant.[30] Where

Mississippi.— Brown *v.* Doe, 18 Miss. 268.

Missouri.— State *v.* Cryts, 87 Mo. App. 440.

New York.— Columbus Watch Co. *v.* Hodenpyl, 135 N. Y. 430, 32 N. E. 239.

Pennsylvania.— Haldeman *v.* Michael, 6 Watts & S. 128, 40 Am. Dec. 546.

Tennessee.— Warren *v.* Hinson, (Ch. App. 1899) 52 S. W. 498.

Texas.— Compton *v.* Marshall, 88 Tex. 50, 27 S. W. 121, 28 S. W. 518, 29 S. W. 1059 [*affirming* (Civ. App. 1894) 25 S. W. 441]; De Ware *v.* Bailey, (Civ. App. 1897) 40 S. W. 323.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 809.

26. *Alabama.*— Murphy *v.* Green, 128 Ala. 486, 30 So. 643; Ezzell *v.* Brown, 121 Ala. 150, 25 So. 832; Freeman *v.* Stewart, 119 Ala. 158, 24 So. 31; Martin *v.* Berry, 116 Ala. 233, 22 So. 493; Bailey *v.* Levy, 115 Ala. 565, 22 So. 449; Wooten *v.* Steele, 109 Ala. 563, 19 So. 972, 55 Am. St. Rep. 947; Miller *v.* Rowan, 108 Ala. 98, 19 So. 9; McTeers *v.* Perkins, 106 Ala. 411, 17 So. 547; Yeend *v.* Weeks, 104 Ala. 331, 16 So. 165, 53 Am. St. Rep. 50; Schall *v.* Weil, 103 Ala. 411, 15 So. 829 (holding that burden is not shifted by denials in the answer that the conveyance was voluntary); Page *v.* Francis, 97 Ala. 379, 11 So. 736; Lehman *v.* Greenhut, 88 Ala. 478, 7 So. 299; Pollak *v.* Searcy, 84 Ala. 259, 4 So. 137; Moog *v.* Farley, 79 Ala. 246; Zelnicker *v.* Brigham, 74 Ala. 598; Bolling *v.* Jones, 67 Ala. 508; Houston *v.* Blackman, 66 Ala. 559, 41 Am. Rep. 756; Hamilton *v.* Blackwell, 60 Ala. 545; Hubbard *v.* Allen, 59 Ala. 283; Pennington *v.* Woodall, 17 Ala. 685; Sparks *v.* Rawls, 17 Ala. 211; Dolin *v.* Gardner, 15 Ala. 758.

New Hampshire.— Prescott *v.* Hayes, 43 N. H. 593; Belknap *v.* Wendell, 21 N. H. 175; Kimball *v.* Fenner, 12 N. H. 248.

North Carolina.— Morgan *v.* Bostic, 132 N. C. 743, 44 S. E. 639; Cox *v.* Wall, 132 N. C. 730, 44 S. E. 635.

Ohio.— See Ferguson *v.* Gilbert, 16 Ohio St. 88.

West Virginia.— Colston *v.* Miller, 55 W. Va. 490, 47 S. E. 268; Knight *v.* Nease, 53 W. Va. 50, 44 S. E. 414; Butler *v.* Thompson, 45 W. Va. 660, 31 S. E. 960, 72 Am. St. Rep. 838; Spence *v.* Smith, 34 W. Va. 697, 12 S. E. 828; Himan *v.* Thorn, 32 W. Va. 507, 9 S. E. 930; Cohn *v.* Ward, 32 W. Va. 34, 9 S. E. 41; Knight *v.* Capito, 23 W. Va. 639.

United States.— Fisher *v.* Moog, 39 Fed. 665.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 809.

The reasons assigned for requiring defendant to prove the existence of a valuable consideration are either (1) that the recitals in a deed are not evidence as to third persons, or (2) that the fact of the consideration is one peculiarly within the knowledge of the parties to the instrument. Where the fact put in issue by the pleadings is peculiarly within the knowledge of defendant, such as the consideration of a conveyance or transfer made by him, the burden of proof is on him to show that fact. Lovell *v.* Payne, 30 La. Ann. 511.

Where plaintiff is a subsequent creditor, the same rule applies. Rogers *v.* Verlander, 30 W. Va. 619, 5 S. E. 847.

27. Norwood *v.* Washington, 136 Ala. 657, 33 So. 869; Penney *v.* McCulloch, 134 Ala. 580, 33 So. 665; Russell *v.* Davis, 133 Ala. 647, 31 So. 514, 91 Am. St. Rep. 56; Reeves *v.* Estes, 124 Ala. 303, 26 So. 935; Wood *v.* Riley, 121 Ala. 100, 25 So. 723; Robert Graves Co. *v.* McDade, 108 Ala. 420, 19 So. 86; Murray *v.* Heard, 103 Ala. 400, 15 So. 565; Howell *v.* Carden, 99 Ala. 100, 10 So. 640; Calhoun *v.* Hannan, 87 Ala. 277, 285, 6 So. 291. See Widgery *v.* Haskell, 5 Mass. 144, 4 Am. Dec. 41.

28. *Arkansas.*— Leonhard *v.* Flood, 68 Ark. 162, 56 S. W. 781; Foster *v.* Haglin, 64 Ark. 505, 43 S. W. 763; Valley Distilling Co. *v.* Atkins, 50 Ark. 289, 7 S. W. 137.

Kentucky.— See Duerrigan *v.* Bewe, 38 S. W. 1089, 18 Ky. L. Rep. 1072.

Louisiana.— Gourdain *v.* Baylies, 10 La. Ann. 691.

New Jersey.— Malcom Brewing Co. *v.* Wagner, (Ch. 1900) 45 Atl. 260.

New York.— Bailey *v.* Fransioli, 101 N. Y. App. Div. 140, 91 N. Y. Suppl. 852.

Ohio.— Ferguson *v.* Gilbert, 16 Ohio St. 88.

Pennsylvania.— Redfield, etc., Mfg. Co. *v.* Dysart, 62 Pa. St. 62, holding that slight evidence of fraud will shift the burden.

29. See *infra*, XIV, K, 1, j.

30. *Arkansas.*— Foster *v.* Haglin, 68 Ark. 621, 58 S. W. 128; Leach *v.* Fowler, 22 Ark. 143.

the consideration is future support and defendant contends that the grantor has received moneys for his support, since the date of the conveyance, equivalent to the value of the land, the burden of proving the payments to the grantor is on defendant.[31] There is no presumption that the price was inadequate merely because the purchaser, after having improved the property, has realized a large profit from the investment.[32] If the consideration is represented by notes, the failure of the purchaser to produce the notes raises no presumption against the validity of the sale.[33] The fact that shares of stock which have been sold are not transferred on the stock books of the company, and new certificates are not issued, does not shift the burden of proving the good faith and consideration for the transfer to defendant.[34]

i. Knowledge and Intent — (1) *In General.* Where no presumption of fraud is raised by any relation between the parties to the transfer,[35] the burden is on plaintiff to show fraudulent intent, where the conveyance is based on a valuable consideration,[36] and that the grantee either had notice of the fraudulent intent of the grantor, or had knowledge of facts which made it his duty to investigate whether such intent really existed,[37] and this rule applies where the transfer is to a creditor to pay or secure his debt, in which case the burden is on plaintiff to

Mississippi.— Richards *v.* Vaccaro, 67 Miss. 516, 7 So. 506, 19 Am. St. Rep. 322.

Montana.— Lewis *v.* Lindley, 19 Mont. 422, 48 Pac. 765.

New York.— Bolton *v.* Jacks, 6 Rob. 166.

Oregon.— Weber *v.* Rothchild, 15 Oreg. 385, 15 Pac. 650, 3 Am. St. Rep. 162.

Texas.— Compton *v.* Marshall, 88 Tex. 50, 27 S. W. 121, 28 S. W. 518, 29 S. W. 1059; Tillman *v.* Heller, 78 Tex. 597, 14 S. W. 700, 22 Am. St. Rep. 77, 11 L. R. A. 628; King *v.* Russell, 40 Tex. 124; Cleveland *v.* Butts, 13 Tex. Civ. App. 272, 35 S. W. 804.

West Virginia.— Blackshire *v.* Pettit, 35 W. Va. 547, 14 S. E. 133.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 811.

31. State Ins. Co. *v.* Prestage, 116 Iowa 466, 90 N. W. 62.

32. Andrews *v.* Jones, 10 Ala. 400.

33. Shealy *v.* Edwards, 78 Ala. 176.

34. Culp *v.* Mulvane, 66 Kan. 143, 71 Pac. 273.

35. See *supra*, XIV, K, 1, d.

36. *Alabama.*— Jordan *v.* Collins, 107 Ala. 572, 18 So. 137; Howell *v.* Carden, 99 Ala. 100, 10 So. 640; Moog *v.* Farley, 79 Ala. 246.

Maryland.— Totten *v.* Brady, 54 Md. 170; Glenn *v.* Grover, 3 Md. Ch. 29.

Massachusetts.— Hatch *v.* Bayley, 12 Cush. 27.

Minnesota.— Leqve *v.* Smith, 63 Minn. 24, 65 N. W. 121.

North Carolina.— Wachovia L. & T. Co. *v.* Forbes, 120 N. C. 355, 27 S. E. 43.

South Dakota.— Probert *v.* McDonald, 2 S. D. 495, 51 N. W. 212, 39 Am. St. Rep. 796.

Texas.— Martin Brown Co. *v.* Cooper, 82 Tex. 242, 17 S. W. 1051; Tillman *v.* Heller, 78 Tex. 597, 14 S. W. 700, 22 Am. St. Rep. 77, 11 L. R. A. 628; Weisiger *v.* Chisholm, 28 Tex. 780.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 805.

Fraud will never be imputed when the facts upon which it is predicated may be consistent with honesty and purity of intention.

Alabama.— Stiles *v.* Lightfoot, 26 Ala. 443.

District of Columbia.— McDaniel *v.* Parish, 4 App. Cas. 213.

Iowa.— Lyman *v.* Cessford, 15 Iowa 229.

Michigan.— Whitfield *v.* Stiles, 57 Mich. 410, 24 N. W. 119.

Missouri.— Rumbolds *v.* Parr, 51 Mo. 592.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 805.

37. *Alabama.*— Allen *v.* Riddle, (1904) 37 So. 680; Kellar *v.* Taylor, 90 Ala. 289, 7 So. 907.

Arkansas.— Stephens *v.* Oppenheimer, 45 Ark. 492.

California.— Casey *v.* Leggett, 125 Cal. 664, 58 Pac. 264.

Colorado.— Smith *v.* Jensen, 13 Colo. 213, 22 Pac. 434.

Connecticut.— Knower *v.* Cadden Clothing Co., 57 Conn. 202, 17 Atl. 580.

Indiana.— American Varnish Co. *v.* Reed, 154 Ind. 88, 55 N. E. 224.

Kansas.— Richolson *v.* Freeman, 56 Kan. 463, 43 Pac. 772.

Kentucky.— See Diamond Coal Co. *v.* Carter Dry Goods Co., 49 S. W. 438, 20 Ky. L. Rep. 1444.

Louisiana.— Lesseps *v.* Wicks, 12 La. Ann. 739; Martin *v.* Drumm, 12 La. Ann. 494.

Maryland.— Crooks *v.* Brydon, 93 Md. 640, 49 Atl. 921.

Minnesota.— Hathaway *v.* Brown, 18 Minn. 414; Derby *v.* Gallup, 5 Minn. 119.

Mississippi.— Verner *v.* Verner, 64 Miss. 184, 1 So. 52.

Missouri.— State *v.* Hope, 102 Mo. 410, 14 S. W. 985; King *v.* Richardson, 94 Mo. App. 670, 68 S. W. 752; Martin *v.* Fox, 40 Mo. App. 664; Pettingill *v.* Jones, 30 Mo. App. 280.

Nebraska.— Blumer *v.* Bennett, 44 Nebr. 873, 63 N. W. 14.

show that the secured creditor not only had notice of the fraudulent intent of the debtor, but also that he actually participated in the fraud.[38] But where facts are shown which should put the purchaser on inquiry, the burden is on him to show that he has used due diligence and failed to discover the fraud.[39] Where the attacking creditor shows the grantor's fraudulent intent, and then the purchaser shows a valuable consideration, the burden of proof again shifts to the attacking creditor to prove that, at the time of paying the consideration, the purchaser had notice of the fraud.[40] Where a mortgagee knows that the mortgagor is insolvent and takes security in excess of his debt, the burden is on him to show good faith and to satisfactorily explain why the excess was thus secured.[41]

(II) *INTENT TO DEFRAUD SUBSEQUENT CREDITORS.* If a conveyance is

New York.— Wilmerding *v.* Jarmulowsky, 28 N. Y. App. Div. 629, 53 N. Y. Suppl. 583.

Pennsylvania.— Miles *v.* Lewis, 115 Pa. St. 580, 10 Atl. 123.

Tennessee.— Hetterman Bros. Co. *v.* Young, (Ch. App. 1898) 52 S. W. 532.

Texas.— Sanger *v.* Colbert, 84 Tex. 668, 19 S. W. 863; Wofford *v.* Farmer, (Civ. App. 1897) 40 S. W. 739.

United States.— Hinds *v.* Keith, 57 Fed. 10, 6 C. C. A. 231. See Thompson *v.* McConnell, 107 Fed. 33, 46 C. C. A. 124, holding that the fact that the wife, shortly after the conveyance of the homestead to her, contracted to exchange it for cattle, does not raise a presumption of fraud.

England.— *In re* Reis, [1904] 2 K. B. 769, 73 L. J. K. B. 929, 91 L. T. Rep. N. S. 592, 11 Manson 229, 20 T. L. R. 547, 53 Wkly. Rep. 122.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 817.

Contra.— After the attacking creditor has shown that the conveyance was made by the grantor with the intent to defraud creditors, the burden is on the grantee to show that he was without notice of such a fraudulent intent. Richards *v.* Vaccaro, 67 Miss. 516, 7 So. 506, 19 Am. St. Rep. 322; Morgan *v.* Bostic, 132 N. C. 743, 44 S. E. 639; Tredwell *v.* Graham, 88 N. C. 208; Worthy *v.* Caddell, 76 N. C. 82; Wade *v.* Saunders, 70 N. C. 270; Blackshire *v.* Pettit, 35 W. Va. 547, 14 S. E. 133.

The buyer's knowledge of the insolvency of the seller does not raise a presumption that he knew of the seller's fraudulent intent. Cannon *v.* Young, 89 N. C. 264.

The fact that a large amount of the purchase-money is not payable for several years does not raise the presumption that the purchaser was aware of the seller's insolvency. Borland *v.* Mayo, 8 Ala. 104.

38. *Illinois.*— Wood *v.* Clark, 121 Ill. 359, 12 N. E. 271.

Indian Territory.— Foster *v.* McAlester, 3 Indian Terr. 307, 58 S. W. 679; Noyes *v.* Tootle, 2 Indian Terr. 144, 48 S. W. 1031.

Iowa.— Smyth *v.* Hall, 126 Iowa 627, 102 N. W. 520.

Kansas.— Bliss *v.* Couch, 46 Kan. 400, 26 Pac. 706.

Missouri.— Wall *v.* Beedy, 161 Mo. 625, 61 S. W. 864.

Nebraska.— Grandin *v.* Chicago First Nat. Bank, (1904) 98 N. W. 70; Steinberg *v.* Buffum, 61 Nebr. 778, 86 N. W. 491.

New York.— Hyde *v.* Bloomingdale, 23 Misc. 728, 51 N. Y. Suppl. 1025.

North Carolina.— Nadal *v.* Britton, 112 N. C. 180, 16 S. E. 914.

Texas.— Reynolds *v.* Weinman, (Civ. App. 1897) 40 S. W. 560.

Wisconsin.— Shores *v.* Doherty, 65 Wis. 153, 26 N. W. 577; Evans *v.* Rugee, 57 Wis. 623, 16 N. W. 49; Semmens *v.* Walters, 55 Wis. 675, 13 N. W. 889; Kalk *v.* Fielding, 50 Wis. 339, 7 N. W. 296; James *v.* Van Duyn, 45 Wis. 512.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 803, 817.

39. Cincinnati Tobacco Warehouse Co. *v.* Matthews, 74 S. W. 242, 24 Ky. L. Rep. 2445; Houston, etc., R. Co. *v.* Shirley, 89 Tex. 95, 31 S. W. 291; Dodd *v.* Gaines, 82 Tex. 429, 18 S. W. 618; Blubaugh *v.* Loomis, 48 W. Va. 666, 37 S. E. 794; Dent *v.* Pickens, 46 W. Va. 378, 33 S. E. 303; Klein *v.* Hoffheimer, 132 U. S. 367, 10 S. Ct. 130, 33 L. ed. 373.

40. *Alabama.*— Jordan *v.* Collins, 107 Ala. 572, 18 So. 137; Moog *v.* Farley, 79 Ala. 246.

Michigan.— Beurmann *v.* Van Buren, 44 Mich. 496, 7 N. W. 67.

Missouri.— Peters-Miller Shoe Co. *v.* Casebeer, 53 Mo. App. 640.

New York.— Starin *v.* Kelly, 88 N. Y. 418; Bailey *v.* Fransioli, 101 N. Y. App. Div. 140, 91 N. Y. Suppl. 852.

North Carolina.— Feimester *v.* McRorie, 34 N. C. 287.

Texas.— Martin Brown Co. *v.* Cooper, 82 Tex. 242, 17 S. W. 1051; Tillman *v.* Heller, 78 Tex. 597, 14 S. W. 700, 22 Am. St. Rep. 77, 11 L. R. A. 628; Talcott *v.* Rose, (Civ. App. 1901) 64 S. W. 1009.

West Virginia.— Butler *v.* Thompson, 45 W. Va. 660, 31 S. E. 960, 72 Am. St. Rep. 838.

Wisconsin.— James *v.* Van Duyn, 45 Wis. 512.

United States.— Bamberger *v.* Schoolfield, 160 U. S. 149, 16 S. Ct. 225, 40 L. ed. 374.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 811.

41. *Arkansas.*— Henry *v.* Harrell, 57 Ark. 569, 22 S. W. 433.

Indian Territory.— See Daugherty *v.* Bogy, 3 Indian Terr. 197, 53 S. W. 542, where the

attacked by a subsequent creditor, the burden is on him to show that it was made in contemplation of future indebtedness with the actual intent to defraud subsequent creditors,[42] and this notwithstanding the fact that the conveyance is from husband to wife.[43] The rule is the same where a subsequent creditor seeks to impress a trust for his benefit upon property conveyed to a third person, the consideration being paid by the debtor.[44]

j. Where There Is No Change of Possession. Where the sale was not followed by a change of possession, the burden of showing good faith[45] and the

rule was laid down as to an equitable garnishee.

Iowa.— Carson *v.* Byers, 67 Iowa 606, 25 N. W. 826; Lombard *v.* Dows, 66 Iowa 243, 23 N. W. 649.

Louisiana.— Worrell *v.* Vickers, 30 La. Ann. 202.

Minnesota.— Heim *v.* Chapel, 62 Minn. 338, 64 N. W. 825.

New Jersey.— Demarest *v.* Terhune, 18 N. J. Eq. 532.

42. *Alabama.*— Stoutz *v.* Huger, 107 Ala. 248, 18 So. 126.

California.— Bush, etc., Co. *v.* Helbing, 134 Cal. 676, 66 Pac. 967.

Connecticut.— State *v.* Martin, 77 Conn. 142, 58 Atl. 745.

Illinois.— Lamont *v.* Regan, 96 Ill. App. 359.

Kentucky.— O'Kane *v.* Vinnedge, 108 Ky. 34, 55 S. W. 711, 21 Ky. L. Rep. 1551.

Mississippi.— Wynne *v.* Mason, 72 Miss. 424, 18 So. 422.

Nebraska.— Ayers *v.* Wolcott, 66 Nebr. 712, 92 N. W. 1036, 62 Nebr. 805, 87 N. W. 906.

New Jersey.— Kinsey *v.* Feller, 64 N. J. Eq. 367, 51 Atl. 485 [*reversing* (Ch. 1901) 50 Atl. 680]; Hagerman *v.* Buchanan, 45 N. J. Eq. 292, 17 Atl. 946, 14 Am. St. Rep. 732; Claflin *v.* Mess, 30 N. J. Eq. 211; Carpenter *v.* Carpenter, 27 N. J. Eq. 502.

New York.— Todd *v.* Nelson, 109 N. Y. 316, 16 N. E. 360; Loeschigk *v.* Addison, 4 Abb. Pr. N. S. 210; U. S. Bank *v.* Housman, 6 Paige 526.

South Carolina.— Gentry *v.* Lanneau, 54 S. C. 514, 32 S. E. 523, 71 Am. St. Rep. 814.

Texas.— Searcy *v.* Gwaltney, 36 Tex. Civ. App. 158, 81 S. W. 576.

West Virginia.— Greer *v.* O'Brien, 36 W. Va. 277, 15 S. E. 74; Rogers *v.* Verlander, 30 W. Va. 619, 5 S. E. 847.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 806.

43. Lyman *v.* Cessford, 15 Iowa 229; Jansen *v.* Lewis, 52 Nebr. 556, 72 N. W. 861; Webb *v.* Roff, 9 Ohio St. 430; O'Neal *v.* Clymer, (Tex. Civ. App. 1900) 61 S. W. 545. But see Ayers *v.* Wolcott, 66 Nebr. 712, 92 N. W. 1036.

44. Chase State Bank *v.* Chatten, 69 Kan. 435, 77 Pac. 96.

45. *Alabama.*— Teague *v.* Bass, 131 Ala. 422, 31 So. 4; Blocker *v.* Burness, 2 Ala. 354.

Arkansas.— Field *v.* Simco, 7 Ark. 269; Cocke *v.* Chapman, 7 Ark. 197, 44 Am. Dec. 536.

Georgia.— Fleming *v.* Townsend, 6 Ga. 103, 50 Am. Dec. 318, holding the rule applicable both to voluntary conveyances and those for a valuable consideration.

Indiana.— Rose *v.* Colter, 76 Ind. 590; Kane *v.* Drake, 27 Ind. 29.

Kansas.— Phillips *v.* Reitz, 16 Kan. 396.

Louisiana.— Baldwin *v.* Bond, 45 La. Ann. 1012, 13 So. 742; Yale *v.* Bond, 45 La. Ann. 997, 13 So. 587; Nieman *v.* Condran, 34 La. Ann. 847; Pruyn *v.* Young, 21 La. Ann. 320, 25 So. 125; Bachemin *v.* Chaperon, 15 La. Ann. 4; Emswiler *v.* Burham, 6 La. Ann. 710; Thibodeaux *v.* Thomasson, 17 La. 353.

Maine.— Hartshorn *v.* Eames, 31 Me. 93.

Michigan.— Angell *v.* Pickard, 61 Mich. 561, 28 N. W. 680; Jackson *v.* Dean, 1 Dougl. 519.

Mississippi.— Comstock *v.* Rayford, 12 Sm. & M. 369.

Missouri.— Albert *v.* Besel, 88 Mo. 150; Hartmann *v.* Vogel, 41 Mo. 570.

Nebraska.— Snyder *v.* Dangler, 44 Nebr. 600, 63 N. W. 20; Miller *v.* Morgan, 11 Nebr. 121, 7 N. W. 755; Densmore *v.* Tomer, 11 Nebr. 118, 7 N. W. 535. See Stevens *v.* Carson, 30 Nebr. 544, 46 N. W. 655, holding that the rule does not apply where there is nothing to show that possession did not follow the title.

New Jersey.— Runyon *v.* Groshon, 12 N. J. Eq. 86.

New York.— Siedenbach *v.* Riley, 111 N. Y. 560, 19 N. E. 275; Carr *v.* Johnson, 12 N. Y. Suppl. 799. But see Talman *v.* Smith, 39 Barb. 390, holding that one purchasing property from a mortgagee and taking possession after forfeiture of the condition of the mortgage, at a time when no creditor of the mortgagor had secured judgment against him, is not bound in the first instance to explain the possession of the mortgagor prior to the breach of the mortgage; but the burden is on the mortgagor's creditor to show that the mortgage was fraudulent.

Tennessee.— Grubbs *v.* Greer, 5 Coldw. 160; Maney *v.* Killough, 7 Yerg. 440; Young *v.* Pate, 4 Yerg. 164; Darwin *v.* Handley, 3 Yerg. 502; Callen *v.* Thompson, 3 Yerg. 475, 24 Am. Dec. 587.

Texas.— Mills *v.* Walton, 19 Tex. 271.

Virginia.— Curd *v.* Miller, 7 Gratt. 185.

West Virginia.— Colston *v.* Miller, 55 W. Va. 490, 47 S. E. 268; Curtin *v.* Isaacsen, 36 W. Va. 391, 15 S. E. 171; Bindley *v.* Martin, 28 W. Va. 773.

Wisconsin.— Kayser *v.* Hartnett, 67 Wis. 250, 30 N. W. 363; Williams *v.* Porter, 41 Wis. 422; Grant *v.* Lewis, 14 Wis. 487, 80

payment of a valuable consideration [46] is on defendant. So the burden is on the wife, as against creditors of the husband, to sustain a conveyance made to her by the husband, when insolvent, of his business which he subsequently carried on ostensibly in his own name.[47] Where there is concurrent possession by the debtor and the purchaser, the burden is on the purchaser to rebut the presumption of fraud arising therefrom.[48] Where the property sold is left in the possession of the seller and the sale is attacked as fraudulent, the burden of proof is sustained by evidence that the sale was *bona fide*, without further showing a reason why the goods remained in the seller's possession.[49]

k. Reservation of Benefits to Debtor. Where an attack is made on a preference by an insolvent debtor and the purchaser has introduced evidence to show a *bona fide* indebtedness not materially less than the reasonable value of the property, the burden is then shifted to the creditor to prove that by the transaction a benefit was reserved to the debtor.[50]

l. Subsequent Purchasers From Grantor. Where there has been no change of possession the burden is on defendant, as against a subsequent purchaser, to show that the transfer was made in good faith on a sufficient consideration, and without intent to defraud.[51] The burden of proof to show the validity of a voluntary conveyance is on the party relying thereon, when it is attacked by a subsequent purchaser for a valuable consideration without actual notice.[52]

m. Subsequent Purchasers From Grantee. In the first instance, the burden of proving that a purchaser from a fraudulent grantee was not a purchaser in good faith is upon the one alleging it.[53] But where it is shown that he claims title under a grantee whose title is fraudulent, the burden is on the purchaser to show that he purchased in good faith and without notice of the fraud.[54]

n. Presumption From Failure to Testify or Produce Evidence. The rule that the failure of a party to testify as to facts material to his case, and as to which he has especially full knowledge, creates an inference that he refrains from testify-

Am. Dec. 785. But see Griswold *v.* Nichols, 117 Wis. 267, 94 N. W. 33, holding that, under the statute providing that a sale of goods without a transfer of possession is presumptively fraudulent as against creditors, and the burden is on the purchaser to rebut that presumption, where the sale is shown to have been made in payment of a *bona fide* debt the presumption is overcome.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 818.

46. *Florida.*— Neal *v.* Gregory, 19 Fla. 356.
Maine.— Hartshorn *v.* Eames, 31 Me. 93.
Missouri.— State *v.* Smith, 31 Mo. 566.
New York.— Groat *v.* Rees, 20 Barb. 26; Randall *v.* Parker, 3 Sandf. 69.
West Virginia.— Bartlett *v.* Cleavenger, 35 W. Va. 719, 14 S. E. 273.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 812.

47. Manning *v.* Carruthers, 83 Md. 1, 34 Atl. 254.

48. Jones *v.* O'Brien, 36 N. Y. Super. Ct. 58.

49. Mitchell *v.* West, 55 N. Y. 107 [*following* Hanford *v.* Artcher, 4 Hill (N. Y.) 271].

50. Morrow *v.* Campbell, 118 Ala. 330, 24 So. 852; Cook *v.* Thornton, 109 Ala. 523, 20 So. 14; Roswald *v.* Hobbie, 85 Ala. 73, 4 So. 177, 7 Am. St. Rep. 23; Bamberger *v.* Schoolfield, 160 U. S. 149, 16 S. Ct. 225, 40 L. ed. 374. *Contra*, see Stanton *v.* Green, 34 Miss. 576.

51. Groat *v.* Rees, 20 Barb. (N. Y.) 26; Brown *v.* Wilmerding, 5 Duer (N. Y.) 220.

52. Brown *v.* Burke, 22 Ga. 574; Enders *v.* Williams, 1 Metc. (Ky.) 346; Cooke *v.* Kell, 13 Md. 469; Footman *v.* Pendergrass, 3 Rich. Eq. (S. C.) 33.

53. Maddox *v.* Reynolds, 69 Ark. 541, 64 S. W. 266; Thornton *v.* Hook, 36 Cal. 223; Saunders *v.* Lee, 101 N. C. 3, 7 S. E. 590.

54. *Colorado.*— Harrington *v.* Johnson, 7 Colo. App. 483, 44 Pac. 368.
Georgia.— Kelly *v.* Simmons, 73 Ga. 716.
Iowa.— Rush *v.* Mitchell, 71 Iowa 333, 42 N. W. 367; Throckmorton *v.* Rider, 42 Iowa 84.
Michigan.— Durrell *v.* Richardson, 119 Mich. 592, 78 N. W. 650; Schaible *v.* Ardner, 98 Mich. 70, 56 N. W. 1105.
Oregon.— McLeod *v.* Lloyd, 43 Oreg. 260, 71 Pac. 795, 74 Pac. 491.
Wisconsin.— Horton *v.* Dewey, 53 Wis. 410, 10 N. W. 599.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 819.

A creditor taking a mortgage on real estate from a grantee of his debtor to secure his debt with knowledge that the land was conveyed to defraud creditors has the burden as against other creditors existing at the time of the fraudulent conveyance, of showing the existence of his debt before such conveyance. Rilling *v.* Schultze, 95 Tex. 372, 67 S. W. 401.

ing because the truth would not aid his contention,[55] applies with particular force to actions to set aside fraudulent conveyances, and it is held that the failure of the parties to the transaction to explain suspicious matters relating thereto,[56] or to produce documentary evidence in their possession,[57] affords strong evidence of the fraud. An unfavorable inference is created from the failure to call a disinterested person, available as a witness, to show the good faith in the transaction.[58]

2. Admissibility[59] — a. General Principles of Relevancy.[60] Where a transfer of property is alleged to have been fraudulent as to creditors of the transferrer, great latitude is allowed in the introduction of evidence to establish the fraud. Every fact and circumstance connected with the transaction and tending to elucidate it or to show the relative positions of the parties, their motives, conduct, and relations to each other, is admissible,[61] notwithstanding that some of

55. See Evidence, 16 Cyc. 1064.

56. *Illinois.*— Schumacher *v.* Bell, 164 Ill. 181, 45 N. E. 428.

Maryland.— Downs *v.* Miller, 95 Md. 602, 53 Atl. 445; Dawson *v.* Waltemeyer, 91 Md. 328, 46 Atl. 994.

Missouri.— Connecticut Mut. L. Ins. Co. *v.* Smith, 117 Mo. 261, 22 So. 623, 38 Am. St. Rep. 656.

South Dakota.— Smith *v.* Tosini, 1 S. D. 632, 48 N. W. 299.

United States.— See Alexander *v.* Todd, 1 Fed. Cas. No. 175, 1 Bond 175.

57. Carter *v.* Richardson, 60 S. W. 397, 22 Ky. L. Rep. 1204; National Bank of Republic *v.* Hobbs, 118 Fed. 626.

58. Fowler *v.* Hendry, 7 U. C. C. P. 350.

59. See Evidence, 16 Cyc. 821 *et seq.*

60. See Evidence, 16 Cyc. 1110 *et seq.*

61. *Alabama.*— Nelms *v.* Steiner, 113 Ala. 562, 22 So. 435. And see Rice *v.* Less, 105 Ala. 298, 16 So. 917; Howell *v.* Carden, 99 Ala. 100, 10 So. 640; Smith *v.* Collins, 94 Ala. 394, 10 So. 334; Moog *v.* Benedicks, 49 Ala. 512.

Arkansas.— Dyer *v.* Taylor, 50 Ark. 314, 7 S. W. 258. And see Hiner *v.* Hawkins, 59 Ark. 303, 27 S. W. 65.

California.— Roberts *v.* Burr, (1898) 54 Pac. 849.

Colorado.— See Kaufman *v.* Burchinell, 15 Colo. App. 520, 63 Pac. 786.

Florida.— Volusia County Bank *v.* Bigelow, (1903) 33 So. 704.

Georgia.— See Cohen *v.* Parish, 105 Ga. 339, 31 S. E. 205; Coulter *v.* Lumpkin, 100 Ga. 784, 28 S. E. 459; Robinson *v.* Woodmansee, 80 Ga. 249, 4 S. E. 497; Trice *v.* Rose, 79 Ga. 75, 3 S. E. 701; Smith *v.* Wellborn, 75 Ga. 799; Woodruff *v.* Wilkinson, 73 Ga. 115.

Idaho.— Ferbrache *v.* Martin, 3 Ida. 573, 32 Pac. 252.

Illinois.— See Anglo-American Packing, etc., Co. *v.* Baier, 31 Ill. App. 653; Huschler *v.* Morris, 31 Ill. App. 545.

Indian Territory.— See Foster *v.* McAlester, 3 Indian Terr. 307, 58 S. W. 679.

Iowa.— See Dunning *v.* Baily, 120 Iowa 729, 95 N. W. 248; Gevers *v.* Farmer, 109 Iowa 468, 80 N. W. 535; Picket *v.* Garrison, 76 Iowa 347, 41 N. W. 38, 14 Am. St. Rep. 220. In a suit by a purchaser from a debtor against an attaching creditor, evidence for defendant that his collector, presenting the claim on the day of the attachment, had been refused payment, is admissible to show the debtor's fraud in making the subsequent sale to plaintiff. Meyer *v.* Baird, 120 Iowa 597, 94 N. W. 1129.

Kansas.— Douglass *v.* Hill, 29 Kan. 527.

Louisiana.— Ray *v.* Harris, 7 La. Ann. 138; Reels *v.* Knight, 8 Mart. N. S. 267, 19 Am. Dec. 184.

Maryland.— Cooke *v.* Cooke, 43 Md. 522. See Main *v.* Lynch, 54 Md. 658.

Massachusetts.— O'Donnell *v.* Hall, 157 Mass. 463, 32 N. E. 666 (evidence that grantee set fire to insured buildings after an auditor's report adverse to him had been filed); Stebbins *v.* Miller, 12 Allen 591. And see Sleeper *v.* Chapman, 121 Mass. 404.

Michigan.— Gumberg *v.* Treusch, 103 Mich. 543, 61 N. W. 872; Angell *v.* Pickard, 61 Mich. 561, 28 N. W. 680; Carew *v.* Mathews, 49 Mich. 302, 13 N. W. 600; Fury *v.* Strohecker, 44 Mich. 337, 6 N. W. 834; Cummings *v.* Fearey, 44 Mich. 39, 6 N. W. 98. And see Rosenthal *v.* Bishop, 98 Mich. 527, 57 N. W. 573. A wide range of inquiry into transactions between the parties is allowed. Gumberg *v.* Treusch, 103 Mich. 543, 61 N. W. 872.

Minnesota.— See Adler *v.* Apt, 31 Minn. 348, 17 N. W. 950.

Missouri.— Erfort *v.* Consalus, 47 Mo. 208; Blue *v.* Penniston, 27 Mo. 272; Field *v.* Liverman, 17 Mo. 218; New York Stove Mercantile Co. *v.* West, 107 Mo. App. 254, 80 S. W. 923 (evidence that at the time of the sale the debtor sent worthless checks to various creditors); Meyberg *v.* Jacobs, 40 Mo. App. 128 (holding that evidence that part of the goods transferred had been purchased by the debtor from the attacking creditor is admissible as tending to show fraud on the part of the debtor).

Nebraska.— Bennett *v.* McDonald, 60 Nebr. 47, 80 N. W. 826, 82 N. W. 110. And see Tolerton, etc., Co. *v.* Wayne First Nat. Bank, 63 Nebr. 674, 88 N. W. 865, several succession mortgages given for the same debt.

New Hampshire.— Blake *v.* White, 13 N. H. 267.

New York.— Beuerlien *v.* O'Leary, 149 N. Y. 33, 43 N. E. 417 [*reversing* 28 N. Y. Suppl. 1133]; Sweeney *v.* Cohen, 23 N. Y. App. Div. 94, 48 N. Y. Suppl. 569. And

such facts and circumstances considered alone might be irrelevant.[62] The only true test of the admissibility of circumstantial evidence is whether the evidence can throw light on the transaction or whether it is altogether irrelevant;[63] and this is a question which the law confides largely to the sound discretion of the trial court,[64] objections on the ground of irrelevancy not being favored.[65] The fraudulent intent may be proved by any kind of evidence by which fraud in any other class of cases may be proved.[66] But while a wide range of investigation is

see McCabe *v.* Brayton, 38 N. Y. 196; Persse, etc., Paper Works *v.* Willett, 1 Rob. 131.

North Carolina.— See Perry *v.* Hardison, 99 N. C. 21, 5 S. E. 230.

Pennsylvania.— Baltimore, etc., R. Co. *v.* Hoge, 34 Pa. St. 214; Garrigues *v.* Harris, 17 Pa. St. 344; Zerbe *v.* Miller, 16 Pa. St. 488, 499, in which the court said: "Fraud assumes so many shapes, disguises, and subterfuges, that courts always afford a latitude of evidence, by admitting any thing at all connected with the transaction in which it is alleged to exist, in order that it may be detected and exposed, for the safety of society and the benefit of morals. This latitude can never injure an honest man. Covin and deceit avoid the light; but fair dealing invites investigation." And see Poundstone *v.* Jones, 182 Pa. St. 574, 38 Atl. 714; Helser *v.* McGrath, 58 Pa. St. 458; Covanhovan *v.* Hart, 21 Pa. St. 495, 60 Am. Dec. 57; Helfrich *v.* Stem, 17 Pa. St. 143.

Rhode Island.— Sarle *v.* Arnold, 7 R. I. 582.

South Carolina.— See Drake *v.* Steadman, 46 S. C. 474, 24 S. E. 458.

Texas.— Cox *v.* Trent, 1 Tex. Civ. App. 639, 20 S. W. 1118. And see Gilmour *v.* Heinze, 85 Tex. 76, 19 S. W. 1075; Miller *v.* Jannett, 63 Tex. 82 (subsequent statement of debtor); Jones *v.* Meyer Bros. Drug Co., 25 Tex. Civ. App. 234, 61 S. W. 553; Wade *v.* Odle, (Civ. App. 1898) 46 S. W. 887, 47 S. W. 407; Wright *v.* Solomon, (Civ. App. 1898) 46 S. W. 58; Moore *v.* Temple Grocer Co., (Civ. App. 1898) 43 S. W. 843; Sonnentheil *v.* Texas Guaranty, etc., Co., 10 Tex. Civ. App. 274, 30 S. W. 945; Solomon *v.* Wright, 8 Tex. Civ. App. 565, 28 S. W. 414.

Vermont.— See Huse *v.* Preston, 51 Vt. 245.

Virginia.— See Hughes *v.* Kelly, (1898) 30 S. E. 387.

Washington.— Dow *v.* Dempsey, 21 Wash. 86, 57 Pac. 355, holding that a partnership between buyer and seller might be proved.

Wisconsin.— Weadock *v.* Kennedy, 80 Wis. 449, 50 N. W. 393; Winner *v.* Hoyt, 66 Wis. 227, 28 N. W. 380, 57 Am. Rep. 257.

United States.— Sonnentheil *v.* Christian Moerlein Brewing Co., 172 U. S. 401, 19 S. Ct. 233, 43 L. ed. 492; Batavia *v.* Wallace, 102 Fed. 240, 42 C. C. A. 310; Brittain *v.* Crowther, 54 Fed. 295, 4 C. C. A. 341.

England.— *In re* Holland, [1902] 2 Ch. 360, 71 L. J. Ch. 518, 86 L. T. Rep. N. S. 542, 9 Manson 259, 50 Wkly. Rep. 575.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 822, 826, 827.

Illustration.— In an action against a railroad company as the purchaser of the road of another company in fraud of plaintiff, a creditor of the latter, where the conveyance is alleged to have been made for the purpose of securing a debt to defendant, evidence as to what the bonds of the grantor company would probably have sold for in the market, had they been issued, is competent to show that there was no necessity for making the conveyance to pay the debt. And to show the probable market value of the bonds great latitude of inquiry into the affairs and prospects of the railroad is allowable, every circumstance which could reasonably be expected to influence investors being admissible. Houston, etc., R. Co. *v.* Shirley, 89 Tex. 95, 31 S. W. 291. *Compare* Persse, etc., Paper Works *v.* Willett, 1 Rob. (N. Y.) 131.

62. *Alabama.*— Nelms *v.* Steiner, 113 Ala. 562, 22 So. 435.

Massachusetts.— Stebbins *v.* Miller, 12 Allen 591, 598, in which the court said: "Upon the trial of almost every issue of fraud, many items of evidence are introduced which, standing detached and alone, would be immaterial, but which in connection with others may tend to illustrate and shed light upon the character of the transaction, to show the position in which the parties stand, and their motives, conduct and relations to each other. All such circumstances are properly submitted to the jury, and inferences are to be drawn from them, not singly, but as a whole."

Missouri.— Blue *v.* Penniston, 27 Mo. 272.

Pennsylvania.— Baltimore, etc., R. Co. *v.* Hoge, 34 Pa. St. 214.

Texas.— Cox *v.* Trent, 1 Tex. Civ. App. 639, 20 S. W. 1118.

It is the bearing, not the independent force, of the particular fact or circumstance upon which its relevancy depends. Nelms *v.* Steiner, 113 Ala. 562, 22 So. 435.

63. Volusia County Bank *v.* Bigelow, (Fla. 1903) 33 So. 704; Cooke *v.* Cooke, 43 Md. 522; Zerbe *v.* Miller, 16 Pa. St. 488.

64. Sweetser *v.* Bates, 117 Mass. 466.

65. Nelms *v.* Steiner, 113 Ala. 562, 22 So. 435; Sarle *v.* Arnold, 7 R. I. 582. And see Blue *v.* Penniston, 27 Mo. 272.

66. McLane *v.* Johnson, 43 Vt. 48.

Parol evidence is admissible to establish fraud, and when fraud is thus proved it renders inoperative the formal transactions which have been adopted by the parties in order to carry out the fraudulent purpose.

permitted as to relevant facts, evidence that is wholly irrelevant is no more admissible in trying questions of fraud than in any other investigation or trial of civil actions at law.[67] The same principles apply in favor of the person charged with the fraud. Such a charge being a serious accusation affecting not only his property but his reputation, reasonable liberality must be allowed to him in his attempt to rebut or disprove it;[68] and he is entitled to introduce evidence of any state of facts inconsistent with a fraudulent intent.[69] But evidence of the grantor's reputation for honesty and fair dealing is inadmissible, according to the

Robinson *v.* Bliss, 121 Mass. 428 (holding parol evidence admissible to prove the real character and amount of a mortgage so that it might appear that the mortgagor had a valuable interest in the mortgaged property); Hills *v.* Eliot, 12 Mass. 26, 7 Am. Dec. 26 (holding parol evidence admissible to establish a secret trust); Harris *v.* Daugherty, 74 Tex. 1, 11 S. W. 921, 15 Am. St. Rep. 812.

67. Wessels *v.* Beeman, 87 Mich. 481, 49 N. W. 483.

For various items of evidence held irrelevant see the following cases:

Arkansas.— Hempstead *v.* Johnston, 18 Ark. 123, 65 Am. Dec. 458.

California.— Casey *v.* Leggett, 125 Cal. 664, 58 Pac. 264; Roberts *v.* Burr, (1898) 54 Pac. 849.

Illinois.— Miner *v.* Phillips, 42 Ill. 123; Nelson *v.* Leiter, 93 Ill. App. 176 [*affirmed* in 190 Ill. 414, 60 N. E. 851, 83 Am. St. Rep. 142].

Kansas.— Gilmore *v.* Butts, 58 Kan. 51, 48 Pac. 590.

Massachusetts.— Jaquith *v.* Rogers, 179 Mass. 192, 60 N. E. 486; Flood *v.* Clemence, 106 Mass. 299.

Michigan.— Long *v.* Evening News Assoc., 113 Mich. 261, 71 N. W. 492; Lewis *v.* Rice, 61 Mich. 97, 27 N. W. 867.

Minnesota.— Derby *v.* Gallup, 5 Minn. 119.

Mississippi.— Wilkerson *v.* Moffett-West Drug Co., (1897) 21 So. 564.

Missouri.— Lillard *v.* Johnson, 148 Mo. 23, 49 S. W. 889.

New York.— Persse, etc., Paper Works *v.* Willett, 1 Rob. 131.

Pennsylvania.— Bell *v.* Throop, 140 Pa. St. 641, 21 Atl. 408.

South Carolina.— Bomar *v.* Means, 53 S. C. 232, 31 S. E. 234, mental competency of third person through whom conveyance was made to grantor's children.

Texas.— Gonzales *v.* Adoue, 94 Tex. 120, 58 S. W. 951 [*reversing* (Civ. App. 1900) 56 S. W. 543]; Freiberg *v.* Freiberg, 74 Tex. 122, 11 S. W. 1123; Searcy *v.* Gwaltney, 36 Tex. Civ. App. 158, 81 S. W. 576, evidence of statements of grantee.

Wisconsin.— Rozek *v.* Redzinski, 87 Wis. 525, 58 N. W. 262, holding that, in an action to set aside fraudulent conveyances of the property of one of several judgment debtors, deeds tending to show that some of the other judgment debtors had made conveyance of their property are inadmissible unless defendant is in some way connected therewith.

United States.— Repauno Chemical Co. *v.* Victor Hardware Co., 101 Fed. 948, 42 C. C. A. 106.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 826, 827.

Evidence of the value of the land in dispute, without specification as to time, or of its value at the time of the trial, the conveyance in question having been made years before, is not admissible. Zerbe *v.* Miller, 16 Pa. St. 488. See also EVIDENCE, 16 Cyc. 1133, 1136.

Judgment in another action.— Where an assignment is attacked as fraudulent, the judgment-roll in an action between other parties, in which the same assignment was found to be fraudulent, is inadmissible. Mower *v.* Hanford, 6 Minn. 535.

68. Angell *v.* Pickard, 61 Mich. 561, 28 N. W. 680; Osborne *v.* Wilkes, 108 N. C. 651, 13 S. E. 285; Heath *v.* Slocum, 115 Pa. St. 549, 9 Atl. 259.

69. Angell *v.* Pickard, 61 Mich. 561, 28 N. W. 680; Mower *v.* Hanford, 6 Minn. 535; Filley *v.* Register, 4 Minn. 391, 77 Am. Dec. 522; Phifer *v.* Erwin, 100 N. C. 59, 6 S. E. 672.

Evidence that the debtor intended to use the proceeds to pay debts is admissible on his behalf to disprove fraudulent intent. Norton *v.* Billings, 4 Fed. 623, 9 Biss. 528. And see Phifer *v.* Erwin, 100 N. C. 59, 6 S. E. 672.

Evidence that the vendor was in poor health and needed a change of climate is admissible to show good faith. Vyn *v.* Keppel, 108 Mich. 244, 65 N. W. 966.

Personal fears of grantor.— In an action involving the good faith of a transfer of goods to a trustee to secure him and others, evidence that when the trustee took charge the grantor stated that he was afraid of his competitors and feared that he and his nephew would be killed, and instructed the trustee to sell the goods, pay the debts, and send the grantor the balance of the proceeds, was admissible to show his motives and object and as a part of the *res gestæ*. Wright *v.* Solomon, (Tex. Civ. App. 1898) 46 S. W. 58. Testimony of one who executed a mortgage, assailed for fraud as against creditors, that he was threatened with personal violence a short time prior to its execution, is admissible as testimony to throw light on the motive prompting the transaction. Wright *v.* Solomon, (Tex. Civ. App. 1898) 46 S. W. 58. But *compare* Solomon *v.* Wright, 8 Tex. Civ. App. 565, 28 S. W. 414, where such evidence was held inadmissible

general rule of evidence excluding proof of character and reputation in civil cases.[70] The court should not exclude evidence which is competent as against the grantor, because it is not competent as against the grantee; but the evidence should be received and its bearing limited and explained to the jury.[71]

b. Of Particular Matters of Evidence — (i) *Financial Condition of Parties.* The financial means and ability of each of the parties shortly before and shortly after the transfer are generally regarded as relevant facts permissible to be proved by evidence otherwise competent.[72] Evidence of the insolvency of a

for the reason that the deed necessarily defrauded other creditors.

Evidence as to renewal of barred judgment. — Where it is sought to be shown that a conveyance was made to defraud a particular creditor, the grantor may show that after the creditor's judgment had been barred by the statute of limitations he voluntarily allowed it to be renewed. Osborne *v.* Wilkes, 108 N. C. 651, 13 S. E. 285.

In an action to declare a trust under Minn. Gen. St. (1878) c. 43, § 8, arising upon a debtor paying the consideration for a conveyance of real estate to another, it is competent, upon the issue of fraudulent intent, to prove facts tending to show that the party so paying the consideration in good faith believed the money to be that of the grantee, and paid it for that reason, and upon no other motive. Wolford *v.* Farnham, 44 Minn. 159, 46 N. W. 295.

Where a conveyance by a husband to his wife was attacked as fraudulent, it was held proper to prove that before the conveyance and before the accrual of plaintiff's claim, the grantor had promised his wife to convey the property to her. Evans *v.* Lewis, 30 Ohio St. 11. And see Fitzpatrick *v.* Fox, 80 N. Y. App. Div. 345, 80 N. Y. Suppl. 677.

For various items of evidence held admissible under the principle of the text see the following cases:

Alabama.— Troy Fertilizer Co. *v.* Norman, 107 Ala. 667, 18 So. 201; Goodgame *v.* Clifton, 13 Ala. 583; Graham *v.* Lockhart, 8 Ala. 9.

California.— Byrne *v.* Reed, 75 Cal. 277, 17 Pac. 201.

Illinois.— Martin *v.* Duncan, 181 Ill. 120, 54 N. E. 908 [*affirming* 79 Ill. App. 527].

Iowa.— Wilson *v.* Hillhouse, 14 Iowa 199.

Michigan.— Angell *v.* Pickard, 61 Mich. 561, 28 N. W. 680.

Minnesota.— Tunell *v.* Larson, 39 Minn. 269, 39 N. W. 628.

New Hampshire.— Smyth *v.* Carlisle, 16 N. H. 464.

New York.— Nugent *v.* Jacobs, 103 N. Y. 125, 8 N. E. 367; Stacy *v.* Deshaw, 7 Hun 449; Persse, etc., Works *v.* Willett, 1 Rob. 131; Ackerman *v.* Salmon, 31 How. Pr. 259.

Pennsylvania.— Helfrich *v.* Stem, 17 Pa. St. 143.

Rhode Island.—Austin *v.* A. & W. Sprague Mfg. Co., 14 R. I. 464.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 822, 826, 827.

For evidence held irrelevant see Wadsworth *v.* Marsh, 9 Conn. 481; Tufts *v.* Bunker, 55 Me. 178, evidence of grantor's previous offer to sell to other persons.

Opinion of attorney.— The testimony of an attorney who drew a bill of sale, to the effect that he regarded the transaction as an honest one, is not admissible on the question of the *bona fides* of the conveyance — that being the ultimate question for the jury. Sweet *v.* Wright, 62 Iowa 215, 17 N. W. 468. But *compare* Dittman *v.* Weiss, (Tex. Civ. App. 1895) 31 S. W. 67, in which testimony of grantor's attorney that he advised the transaction was held admissible.

70. Vansickle *v.* Shenk, 150 Ind. 413, 50 N. E. 381. See Evidence, 16 Cyc. 1263.

71. Smith *v.* Collins, 94 Ala. 394, 10 So. 334; Spaulding *v.* Adams, 63 Iowa 437, 19 N. W. 341; Kalk *v.* Fielding, 50 Wis. 339, 7 N. W. 296. And see Pickett *v.* Garrison, 76 Iowa 347, 41 N. W. 38, 14 Am. St. Rep. 220; Sax *v.* Wilkerson, 6 Kan. App. 203, 51 Pac. 299; Carver *v.* Barker, 73 Hun (N. Y.) 416, 26 N. Y. Suppl. 919 (holding that in an action against a grantor and grantee to set aside a deed as in fraud of creditors, it is not error to admit statements made by the grantor, and evidence of his circumstances, where the court expressly limits the effect thereof to the grantor); Treusch *v.* Ottenburg, 54 Fed. 867, 4 C. C. A. 629. And see *infra*, XIV, K, 2, b, (III); XIV, K, 2, b, (V).

72. *Alabama.*— Smith *v.* Collins, 94 Ala. 394, 10 So. 334.

California.— Willows Bank *v.* Small, 144 Cal. 709, 78 Pac. 263.

Idaho.— Febrache *v.* Martin, 3 Ida. 573, 32 Pac. 252.

Oklahoma.— Marrinan *v.* Knight, 7 Okla. 419, 54 Pac. 656.

Pennsylvania.— Helfrich *v.* Stein, 17 Pa. St. 143; Quigley *v.* Swank, 11 Pa. Super. Ct. 602.

South Carolina. — De Loach *v.* Sarratt, (1899) 33 S. E. 365.

Texas.— Jones *v.* Meyer Bros. Drug Co., 25 Tex. Civ. App. 234, 61 S. W. 553.

United States.— Brittain *v.* Crowther, 54 Fed. 295, 4 C. C. A. 341.

Reputation as to credit and pecuniary responsibility.— On the issue whether the conveyance of a parcel of land was void, as being in fraud of creditors, evidence of the general reputation, as to credit and pecuniary responsibility, of all the parties to the transaction is admissible. Sweetser *v.* Bates, 117 Mass. 466. See also Cook *v.* Mason, 5 Allen (Mass.) 212. But *compare* Freiberg *v.* Freiberg, 74 Tex. 122, 11 S. W. 1123.

debtor at the time he sold his property is admissible as tending to show that the sale was fraudulent,[73] and conversely, evidence of solvency at the time of the conveyance is admissible for the purpose of showing good faith.[74] Evidence of insolvency a considerable time after the conveyance has been held inadmissible,[75] although in some states such evidence has been held to be admissible as tending to show the condition of the grantor at the time the conveyance was made.[76]

(II) *PENDENCY OR THREAT OF SUIT.* For the purpose of showing fraudulent intent, evidence that when the conveyance was made suits against the grantor were pending or threatened is admissible.[77]

(III) *DECLARATIONS OF GRANTOR.* The grantor's acts and declarations at or about the time of the conveyance are admissible, on familiar principles of evidence, to show fraudulent intent,[78] but are excluded when offered in favor of the

But evidence to show the insolvency of a trustee to whom a husband had transferred a note for the benefit of his wife has been held inadmissible. Rowland *v.* Plummer, 50 Ala. 182.

73. Whittle *v.* Bailes, 65 Mich. 640, 32 N. W. 874; White's Bank *v.* Farthing, 10 N. Y. St. 830; Belt *v.* Raquet, 27 Tex. 471; Jack *v.* El Paso Fuel Co., (Tex. Civ. App. 1896) 38 S. W. 1139.

74. Smyth *v.* Carlisle, 16 N. H. 464; McGee *v.* Wells, 52 S. C. 472, 30 S. E. 602; Hinde *v.* Longworth, 11 Wheat. (U. S.) 199, 6 L. ed. 454.

75. Seaman *v.* Bisbee, 163 Ill. 91, 45 N. E. 208; Hathaway *v.* Brown, 18 Minn. 414; Martin *v.* Fox, 40 Mo. App. 664. See Jones *v.* Snyder, 117 Ind. 229, 20 N. E. 140.

Presumptions as to continuing insolvency see *supra*, XIV, K, 1, g.

76. Woolridge *v.* Boardman, 115 Cal. 74, 46 Pac. 868 (holding that subsequent insolvency occurring after the lapse of no great interval of time, when the business had suffered no considerable reverse by flood, fire, or other casualty, was a fact pertinent to the inquiry whether the like condition did not exist at the time of the gift attacked as fraudulent); King *v.* Poole, 61 Ga. 373; Dumangue *v.* Daniels, 154 Mass. 483, 28 N. E. 900. See Lane *v.* Kingsberry, 11 Mo. 402.

77. *California.*— Eppinger *v.* Scott, 112 Cal. 369, 42 Pac. 301, 44 Pac. 723, 53 Am. St. Rep. 220.

Georgia.— Barber *v.* Terrell, 54 Ga. 146, telegram threatening suit.

Indiana.— Evans *v.* Hamilton, 56 Ind. 34, the suit in which the attacking creditor's judgment was recovered.

Massachusetts.— Dumangue *v.* Daniels, 154 Mass. 483, 28 N. E. 900.

Missouri.— Jamison *v.* Bagot, 106 Mo. 240, 16 S. W. 697 (pleadings and decrees in the suit in which the attacking creditor recovered judgment held admissible); Hisey *v.* Goodwin, 90 Mo. 366, 2 S. W. 566.

New York.— Wright *v.* Nostrand, 94 N. Y. 31.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 844. And see *supra*, V, B, 2.

Efforts of the debtor's attorney to delay the recovery of judgment in the pending action are admissible, as it may be fairly presumed that the debtor had notice of the proceedings of his attorney. Wright *v.* Nostrand, 94 N. Y. 31.

Preference pending bankruptcy proceedings. — But since preferences are valid, except when prohibited by statute (see *supra*, XI, A), it has been held that the fact that an insolvent debtor, after the commencement of bankruptcy proceedings against him under the Federal Bankruptcy Act, made a preferential transfer of property in violation of that act, is no evidence of fraud under the state laws, and that evidence of the bankruptcy proceedings and of an order therein restraining the debtor from making any disposition of his property is not admissible in a suit brought by a creditor in a state court to set aside the transfer. Talcott *v.* Harder, 119 N. Y. 536, 23 N. E. 1056.

78. *Colorado.*— Wilcoxen *v.* Morgan, 2 Colo. 473.

Connecticut.— Merrill *v.* Meachum, 5 Day 341.

Georgia.— Cohen *v.* Parish, 105 Ga. 339, 31 S. E. 205.

Kansas.— Burlington Nat. Bank *v.* Beard, 55 Kan. 773, 42 Pac. 320; La Clef *v.* Campbell, 3 Kan. App. 756, 45 Pac. 461.

Louisiana.— Smalley *v.* Lawrence, 9 Rob. 210.

Maryland— McDowell *v.* Goldsmith, 2 Md. Ch. 370.

Michigan.— Buckingham *v.* Tyler, 74 Mich. 101, 41 N. W. 868.

Missouri.— Snyder *v.* Free, 114 Mo. 360, 21 S. W. 847.

New Hampshire.— Badger *v.* Story, 16 N. H. 168.

New York.— Potts *v.* Hart, 99 N. Y. 168, 1 N. E. 605.

North Carolina.— Satterwhite *v.* Hicks, 44 N. C. 105, 57 Am. Dec. 577.

Oregon. — Robson *v.* Hamilton, 41 Oreg. 239, 69 Pac. 651.

Pennsylvania.— See Helfrich *v.* Stem, 17 Pa. St. 143. *Compare* Curry *v.* Curry, 8 Pa. Cas. 247, 11 Atl. 198.

South Carolina.— Paris *v.* Du Pre, 17 S. C. 282.

Texas.— Solomon *v.* Wright, 8 Tex. Civ. App. 565, 28 S. W. 414.

United States.— Freese *v.* Kemplay, 118 Fed. 428, 55 C. C. A. 258.

See 24 Cent. Dig. tit. "Fraudulent Con-

parties charged with the fraud.[79] Declarations made by the vendor before the sale are admissible to show his fraudulent intent notwithstanding that the sale cannot be set aside without evidence connecting the purchaser with the fraud.[80]

(iv) *Statements of Debtor as to Financial Condition.* The debtor's statements as to his financial condition, made for the purpose of obtaining credit for property purchased prior to the conveyance in issue, are admissible to show fraudulent intent on his part,[81] although the statements were not made in the presence of the grantee.[82]

(v) *Other Fraudulent Transactions.* Evidence that the party or parties charged with making a fraudulent disposition of property were engaged at or about the same time in other similar fraudulent transactions is admissible to show fraudulent intent in making the transfer in controversy.[83] To render such

veyances," § 826. And see Evidence, 16 Cyc. 986 *et seq.*, 997 *et seq.*, 1241 *et seq.*

That absolute deed was intended as security.— Declarations by the grantor that a deed absolute on the face of it was in fact intended only as a security are admissible in evidence in favor of creditors to defeat a conveyance on the ground of fraud. Badger *v.* Story, 16 N. H. 168.

Testimony given in supplementary proceedings.—Where an execution was returned *nulla bona*, and in proceedings supplemental to execution defendant was examined as to his property, his testimony so given was held competent against him in a subsequent creditors' suit to set aside a sale of his property as fraudulent, the grounds being that the testimony amounted to declarations of a party to the action, and to statements touching ownership made by the vendor of chattels while in possession after the sale, there being some evidence of such possession. Finch *v.* Kent, 24 Mont. 268, 61 Pac. 653. But such evidence is not admissible as against the grantee where the testimony was given after the transfer of title and possession to the property. Lent *v.* Shear, 160 N. Y. 462, 55 N. E. 2 [*reversing* 20 N. Y. App. Div. 624, 46 N. Y. Suppl. 1095]. See Evidence, 16 Cyc. 999.

79. Gruber *v.* Boyles, 1 Brev. (S. C.) 266, 2 Am. Dec. 665. And see Buckingham *v.* Tyler, 74 Mich. 101, 41 N. W. 868. But *compare* Sanger *v.* Colbert, 84 Tex. 668, 19 S. W. 863.

80. *California.*—Landecker *v.* Houghtaling, 7 Cal. 391.

Connecticut.— Tibbals *v.* Jacobs, 31 Conn. 428.

Iowa.— Spaulding *v.* Adams, 63 Iowa 437, 19 N. W. 341.

Maryland.— See Cooke *v.* Cooke, 43 Md. 522.

Massachusetts.— Bridge *v.* Eggleston, 14 Mass. 245, 7 Am. Dec. 209.

Michigan.— See Heath *v.* Koon, 130 Mich. 54, 89 S. W. 559.

New Hampshire.— Badger *v.* Story, 16 N. H. 168.

Oregon.— Robson *v.* Hamilton, 41 Oreg. 239, 69 Pac. 651.

Pennsylvania.— Painter *v.* Drum, 40 Pa. St. 467.

United States.— Freese *v.* Kemplay, 118 Fed. 428, 55 C. C. A. 258; Foster *v.* McAlester, 114 Fed. 145, 52 C. C. A. 107.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 826; and Evidence, 16 Cyc. 998.

Where the deed of conveyance is antedated, declarations made by the grantor before the actual date of execution, although after the recited date, are admissible to show fraudulent intent. Ward *v.* Saunders, 28 N. C. 382.

Declarations of grantor after transfer see Evidence, 16 Cyc. 999.

81. *Indian Territory.*— Foster *v.* McAlester, 3 Indian Terr. 307, 58 S. W. 679.

Iowa.— Goldstein *v.* Morgan, 122 Iowa 27, 96 N. W. 897. See also Spaulding *v.* Adams, 63 Iowa 437, 19 N. W. 341.

Missouri.— Kramer *v.* Wilson, 22 Mo. App. 173.

New York.— Beuerlien *v.* O'Leary, 149 N. Y. 33, 43 N. E. 417.

Wisconsin.— Kalk *v.* Fielding, 50 Wis. 339, 7 N. W. 296.

United States.— Foster *v.* McAlester, 114 Fed. 145, 52 C. C. A. 107; Treusch *v.* Ottenburg, 54 Fed. 867, 4 C. C. A. 629 (statements made to commercial agency); Brittain *v.* Crowther, 54 Fed. 295, 4 C. C. A. 341.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 845.

82. Treusch *v.* Ottenburg, 54 Fed. 867, 4 C. C. A. 629.

83. *Alabama.*— Davidson *v.* Kahn, 119 Ala. 364, 24 So. 583; Sandlin *v.* Robbins, 62 Ala. 477; Dent *v.* Portwood, 21 Ala. 588.

Arkansas.— Dyer *v.* Taylor, 50 Ark. 314, 7 S. W. 258.

Connecticut.— Thomas *v.* Beck, 39 Conn. 241.

Florida.— Einstein *v.* Munnerlyn, 32 Fla. 381, 13 So. 926.

Georgia.— Smith *v.* Wellborn, 75 Ga. 799; Engraham *v.* Pate, 51 Ga. 537.

Indiana.— Hoffman *v.* Henderson, 145 Ind. 613, 44 N. E. 629; Huntsinger *v.* Hofer, 110 Ind. 390, 11 N. E. 463.

Indian Territory.— Swofford Bros. Dry-Goods Co. *v.* Smith-McCord Dry-Goods Co., 1 Indian Terr. 314, 37 S. W. 103.

Iowa.— Kelliher *v.* Sutton, 115 Iowa 632, 89 N. W. 26; Hamilton Buggy Co. *v.* Iowa Buggy Co., 88 Iowa 364, 55 N. W. 496.

evidence admissible it must of course be shown that the other transactions were fraudulent,[84] and it must appear that they were so connected in point of time and otherwise with the one in issue as to make it apparent that all were carried out in pursuance of a common fraudulent purpose.[85] By the weight of authority, evidence of such other transactions when competent to show a fraudulent intent in the grantor and when offered for that purpose only cannot be excluded because no evidence is then offered to connect the grantee with them or to show his knowledge of the grantor's fraud therein; for while it may be necessary as to the transaction in issue to show a fraudulent intent in the grantor and knowledge thereof or participation therein by the grantee, these facts may be separately established by distinct lines of evidence.[86] If the transfer in controversy is

Kansas.— Wallach *v.* Wylie, 28 Kan. 138.

Maine.— Phinney *v.* Holt, 50 Me. 570; Howe *v.* Reed, 12 Me. 515.

Massachusetts.— Stockwell *v.* Silloway, 113 Mass. 384; Lynde *v.* McGregor, 13 Allen 172, holding also that it is immaterial whether the contemplated fraud was successful. See also Mansir *v.* Crosby, 6 Gray 334.

Michigan.— Krolik *v.* Graham, 64 Mich. 226, 31 N. W. 307.

Minnesota.— See Manwaring *v.* O'Brien, 75 Minn. 542, 78 N. W. 1.

Mississippi.— Bernheim *v.* Dibrell, 66 Miss. 199, 5 So. 693.

Missouri.— Kramer *v.* Wilson, 22 Mo. App. 173.

New Hampshire.— Hills *v.* Hoitt, 18 N. H. 603; Blake *v.* White, 13 N. H. 267.

New York.— Beuerlien *v.* O'Leary, 149 N. Y. 33, 43 N. E. 417 [*reversing* 77 Hun 607, 28 N. Y. Suppl. 1133]; Baldwin *v.* Short, 125 N. Y. 553, 26 N. E. 928 [*affirming* 54 Hun 473, 7 N. Y. Suppl. 717]; Angrave *v.* Stone, 45 Barb. 35, 25 How. Pr. 167; Amsden *v.* Manchester, 40 Barb. 158.

North Carolina.— Brink *v.* Black, 77 N. C. 59.

Pennsylvania.— Deakers *v.* Temple, 41 Pa. St. 234.

Rhode Island.— Sarle *v.* Arnold, 7 R. I. 582.

South Carolina.— McElwee *v.* Sutton, 2 Bailey 128.

Texas.— Day *v.* Stone, 59 Tex. 612; Belt *v.* Raguet, 27 Tex. 471.

United States.— Lincoln *v.* Claflin, 7 Wall. 132, 19 L. ed. 106; Kellogg *v.* Clyne, 54 Fed. 696, 4 C. C. A. 554; Wilson *v.* Prewett, 30 Fed. Cas. No. 17,828, 3 Woods 631 [*reversed* on other grounds in 103 U. S. 22, 26 L. ed. 360].

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 830, 842.

Manner of obtaining and disposing of other goods.— To prove the intent of a debtor in making a sale of goods alleged to have been made with intent to hinder and delay creditors, proof of the manner in which he had recently obtained goods from his creditors is admissible, as well as of the manner in which he disposed of them. Gray *v.* St. John, 35 Ill. 222 [*approved* in Lockwood *v.* Doane, 107 Ill. 235].

Transfer of remaining property to relative. — Where a transfer of property by an insolvent debtor is attacked as being fraudulent toward his creditors, it may be shown that he fraudulently transferred all his remaining property to a relative. Taylor *v.* Robinson, 2 Allen (Mass.) 562.

Acts and declarations of the parties with reference to such other similar transactions are admissible. Lincoln *v.* Claflin, 7 Wall. (U. S.) 132, 19 L. ed. 106; Kellogg *v.* Clyne, 54 Fed. 696, 4 C. C. A. 554. See also Covanhovan *v.* Hart, 21 Pa. St. 495, 60 Am. Dec. 57.

84. Hardy *v.* Moore, 62 Iowa 65, 17 N. W. 200; Farr *v.* Swigart, 13 Utah 150, 44 Pac. 711. And see Sloan *v.* Wherry, 51 Nebr. 703, 71 N. W. 744; McAulay *v.* Earnhart, 46 N. C. 502.

Evidence is admissible in rebuttal to show that the other transactions were not fraudulent. Frost *v.* Rosecrans, 66 Iowa 405, 23 N. W. 895.

85. *Alabama.*— See Moog *v.* Farley, 79 Ala. 246.

Iowa.— Bixby *v.* Carskaddon, 70 Iowa 726, 29 N. W. 626; Clark *v.* Reiniger, 66 Iowa 507, 24 N. W. 16; Hardy *v.* Moore, 62 Iowa 65, 17 N. W. 200.

Maine.— Staples *v.* Smith, 48 Me. 470; Flagg *v.* Willington, 6 Me. 386.

Massachusetts.— Williams *v.* Robbins, 15 Gray 590.

Michigan.— Wessels *v.* Beeman, 87 Mich. 481, 49 N. W. 483.

Mississippi.— See Cocke *v.* Carrington Shoe Co., (1895) 18 So. 683.

Pennsylvania.— Barnhart *v.* Grantham, 197 Pa. St. 502, 47 Atl. 866; Huntsinger *v.* Harper, 44 Pa. St. 204.

South Carolina.— Thorpe *v.* Thorpe, 12 S. C. 154.

Texas.— Boehm *v.* Calisch, (1887) 3 S. W. 293.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 830, 842.

86. Howe *v.* Reed, 12 Me. 515; Foster *v.* Hall, 12 Pick. (Mass.) 89, 22 Am. Dec. 400; Blake *v.* White, 13 N. H. 267; Baldwin *v.* Short, 125 N. Y. 553, 26 N. E. 928 [*affirming* 54 Hun 473, 7 N. Y. Suppl. 717]. But *compare* Schroeder *v.* Walsh, 120 Ill. 403, 11 N. E. 70 [*affirming* 16 Ill. App. 590]; Wessels *v.* Beeman, 87 Mich. 481, 49 N. W. 483. See also *supra*, III, C, 4.

Rule where grantee is to be affected see *infra*, XIV, K, 2, c, (VI).

shown to have been merely the preference of a valid debt, the fact that the grantor at or about the same time made fraudulent dispositions of other property is irrelevant.[87]

(vi) *Subsequent Conduct and Events.* Subsequent conduct may often afford strong evidence of prior intent, and fraudulent conduct of the parties to a conveyance after its execution may be admissible to show fraud in its inception.[88] Thus the use which the parties made of the deed or mortgage attacked may be shown to prove the fraudulent intent with which the instrument was made,[89] although not to show its fraudulent use as an independent fact, for the creditors could not be injured thereby.[90] Similarly evidence of the grantor's subsequent acts may be admissible to disprove fraudulent intent. Thus it may be shown that the entire proceeds of the sale were immediately applied to the payment of the grantor's debts.[91] Subsequent events, however, which are not such as to have been within the contemplation of the parties at the time of the conveyance and are not capable of affording any reasonable inference as to the intent with which the conveyance was made are irrelevant and inadmissible.[92]

(vii) *Testimony of Parties.*[93] As a general rule the grantor in a conveyance alleged to be fraudulent as to his creditors may testify as to his own motives and intent in making the conveyance,[94] provided that the case is one in which his intent is a material element,[95] and the facts do not give rise to a conclusive presumption of fraud.[96] The grantee, however, is not permitted to testify directly

87. Brett *v.* Catlin, 47 Barb. (N. Y.) 404.

88. Kelliher *v.* Sutton, 115 Iowa 632, 89 N. W. 26. And see Main *v.* Lynch, 54 Md. 658; Blue *v.* Penniston, 27 Mo. 272; Sonnentheil *v.* Texas Guaranty, etc., Co., 10 Tex. Civ. App. 274, 30 S. W. 945; Cleveland *v.* Empire Mills, 6 Tex. Civ. App. 479, 25 S. W. 1055.

Refusal to pay debts with proceeds of sale. — Where, in an action to set aside a bill of sale as fraudulent, the intent or purpose of defendant in executing and delivering the bill of sale was the only issue of fact for the jury, evidence that defendant refused to apply any portion of the proceeds of the sale in settlement of plaintiff's claim, and refused to give plaintiff's agent any satisfaction as to the provision he expected to make for his creditors, is admissible, as tending to show that the conveyance was contrived for a fraudulent purpose. Furth Grocery Co. *v.* May, 78 Mo. App. 323.

89. Constantine *v.* Twelves, 29 Ala. 607; Kelliher *v.* Sutton, 115 Iowa 632, 89 N. W. 26; Shipman *v.* Seymour, 40 Mich. 274.

90. Kelliher *v.* Sutton, 115 Iowa 632, 89 N. W. 26.

91. Bedell *v.* Chase, 34 N. Y. 386. And see Sanger *v.* Colbert, 84 Tex. 668, 19 S. W. 863.

92. Sonnenschein *v.* Bantels, 41 Nebr. 703, 60 N. W. 10 [*citing* 1 Greenleaf Ev. 42, 53; May Fraud Conv. 35]. And see Foote *v.* Cobb, 18 Ala. 585; Hempstead *v.* Johnston, 18 Ark. 123, 65 Am. Dec. 458.

93. Grantee's testimony as to his own intent see *infra*, XIV, K, 2, c, (vi), (c).

94. *Colorado.*— Brown *v.* Potter, 13 Colo. App. 512, 58 Pac. 785; Love *v.* Tomlinson, 1 Colo. App. 516, 29 Pac. 666, holding also that his agent who made the sale may likewise testify as to the intent.

Connecticut.— Hallock *v.* Alvord, 61 Conn. 194, 23 Atl. 131, on cross-examination.

Indiana.— Sedgwick *v.* Tucker, 90 Ind. 271.

Kansas.— Bice *v.* Rogers, 52 Kan. 207, 34 Pac. 796; Gardom *v.* Woodward, 44 Kan. 758, 25 Pac. 199, 21 Am. St. Rep. 310.

Massachusetts.— Thacher *v.* Phinney, 7 Allen 146.

Montana.— Finch *v.* Kent, 24 Mont. 268, 61 Pac. 653.

Nebraska.— Campbell *v.* Holland, 22 Nebr. 587, 35 N. W. 871.

New York.— Forbes *v.* Waller, 25 N. Y. 430; Griffin *v.* Marquardt, 21 N. Y. 121; Seymour *v.* Wilson, 14 N. Y. 567; Blaut *v.* Gabler, 8 Daly 48 [*affirmed* in 77 N. Y. 461; Durfee *v.* Bump, 3 N. Y. Suppl. 505].

North Carolina.— Nixon *v.* McKinney, 105 N. C. 23, 11 S. E. 154; Phifer *v.* Erwin, 100 N. C. 59, 6 S. E. 672.

Ohio.— See Pierce *v.* White, 10 Ohio Dec. (Reprint) 552, 22 Cinc. L. Bul. 98.

South Carolina.— McGhee *v.* Wells, 57 S. C. 280, 35 S. E. 529, 76 Am. St. Rep. 567.

Texas.— Robertson *v.* Gourley, 84 Tex. 575, 19 S. W. 1006; Brown *v.* Lessing, 70 Tex. 544, 7 S. W. 783; Dittman *v.* Weiss, (Civ. App. 1895) 31 S. W. 67; Roberts *v.* Miller, (Civ. App. 1895) 30 S. W. 381. See also Sweeney *v.* Conley, 71 Tex. 543, 9 S. W. 548. *Compare* Schmick *v.* Noel, 72 Tex. 1, 8 S. W. 83.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 846.

Form of question.— While grantors may testify as to whether or not they made the conveyance with the intent to hinder, delay, or defraud creditors, a question as to what was their intention in executing the papers is an improper form of inquiry. Vilas Nat. Bank *v.* Newton, 25 N. Y. App. Div. 62, 48 N. Y. Suppl. 1009.

95. Selz *v.* Belden, 48 Iowa 451.

96. See Babcock *v.* Eckler, 24 N. Y. 623; Seymour *v.* Wilson, 14 N. Y. 567; Phifer *v.* Erwin, 100 N. C. 59, 6 S. E. 672.

as to the grantor's intent in making the conveyance, although he may testify to circumstances tending to establish it.[97]

(VIII) *THE INSTRUMENT OF TRANSFER.* While an instrument of transfer void as to creditors of the transferrer is not admissible against them to establish title under it,[98] it may be admissible as indicating the intention of the parties thereto.[99] The rule that recitals of consideration in the instruments of transfer are not evidence against an attacking creditor[1] does not justify the entire exclusion of such instruments; but they are admissible to prove the fact of their existence and the transfer of the property which they purport to convey.[2]

(IX) *PLEADINGS.* In suits in equity to set aside fraudulent transfers of property the admissibility of the pleadings in evidence is governed by the general principles of equity.[3]

c. To Prove Particular Facts — (I) *NATURE OF TRANSACTION.* As before indicated,[4] evidence tending to show the real nature of the transaction alleged to be fraudulent is freely admitted.[5] For the purpose of showing fraud an instrument of transfer absolute on its face may be shown by extrinsic evidence to have been intended to operate merely as a security or mortgage.[6] But such evidence

Illustration.— Where it is shown that an insolvent husband made voluntary conveyances to his wife, his testimony that he did not intend thereby to defraud his creditors is incompetent. Garrett *v.* Wagner, 125 Mo. 450, 28 S. W. 762.

97. Roberts *v.* Miller, (Tex. Civ. App. 1895) 30 S. W. 381; Numsen *v.* Ellis, 3 Tex. App. Civ. Cas. § 134.

98. Baldwin *v.* Flash, 58 Miss. 593; Dewart *v.* Clement, 48 Pa. St. 413.

Where the jury has found that there was no fraud objections to the admission of the instrument, on the ground that it was fraudulently executed, become immaterial. Oliver *v.* Reading Iron Co., 170 Pa. St. 396, 32 Atl. 1088. And see Mix *v.* Ege, 67 Minn. 116, 69 N. W. 703.

99. Baldwin *v.* Flash, 58 Miss. 593.

1. See *infra*, XIV, K, 2, c, (V), (H).

2. Howell *v.* Carden, 99 Ala. 100, 10 So. 640.

3. See EQUITY, 16 Cyc. 382 *et seq.* And see the following cases:

Alabama.— Danner Land, etc., Co. *v.* Stonewall Ins. Co., 77 Ala. 184; Thames *v.* Rembert, 63 Ala. 561.

Illinois.— Clark *v.* Wilson, 127 Ill. 449, 19 N. E. 860, 11 Am. St. Rep. 143 [*affirming* 27 Ill. App. 610].

Michigan.— Whitfield *v.* Stiles, 57 Mich. 410, 24 N. W. 119.

South Dakota.— Smith *v.* Tosini, 1 S. D. 632, 48 N. W. 299, holding that the former rules of equity on this subject have been abrogated by the code of civil procedure.

Virginia.— Yates *v.* Law, 86 Va. 117, 9 S. E. 508; Rixey *v.* Deitrick, 85 Va. 42, 6 S. E. 615; Fink *v.* Denny, 75 Va. 663.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 824.

4. See *supra*, XIV, K, 2, a.

5. Nelms *v.* Steiner, 113 Ala. 562, 22 So. 435; Robinson *v.* Bliss, 121 Mass. 428; Hills *v.* Eliot, 12 Mass. 26, 7 Am. Dec. 26. And see Wade *v.* Odle, (Tex. Civ. App. 1898) 46 S. W. 887, 47 S. W. 407.

Illustrations.— Where a sale of personal property is assailed as fraudulent by attaching creditors, it is competent for the vendor to state whether the contract, although in writing, was an absolute sale and whether there were any reservations outside of it. Angell *v.* Pickard, 61 Mich. 561, 28 N. W. 680. Circumstantial evidence may be given in case of alleged fraud to show that a receipt purporting to be given for one purpose was in reality intended for a different transaction; that it was to operate as a cover of a mere conditional sale. Baltimore, etc., R. Co. *v.* Hoge, 34 Pa. St. 214. On an issue between a wife and levying creditors of the husband as to the ownership of a crop grown on a farm alleged to have been fraudulently transferred to the wife by the husband, it was proper to permit the wife to testify that the crop was grown on that part of the land which was the husband's homestead at the time of the conveyance. Cain *v.* Mead, 66 Minn. 195, 68 N. W. 840.

Employment of vendor at small salary.— Where a partner sold his interest in the firm to his copartners and was afterward employed as clerk in the business, the fact that his salary as clerk was much less than the actual value of his services is relevant as tending to show whether he had some interest in the business aside from his contract of employment, and thus to show the real purposes for which the sale was made. Howard *v.* Stoddardt, 9 N. Y. St. 429.

On the other hand, where a stock of goods is transferred by itemized bill of sale which does not include the good-will of the seller's business, evidence of the value of the good-will is inadmissible. Yoder *v.* Reynolds, 28 Mont. 183, 72 Pac. 417.

6. McCluskey *v.* Cubbison, 8 Kan. App. 857, 57 Pac. 496; Badger *v.* Story, 16 N. H. 168; Harris *v.* Daugherty, 74 Tex. 1, 11 S. W. 921, 15 Am. St. Rep. 812. See *supra*, X, B, 2; and, generally, MORTGAGES.

Illustration.— Where it was claimed that an absolute deed under which defendants claimed title was given to secure a debt, an unregistered deed of defeasance and bonds

while admissible on behalf of the attacking creditor is not admissible on behalf of the grantee.[7] Where defendants offer to prove a state of facts tending to show that the real ownership of the property in question has not been changed, it is error to refuse to consider the evidence.[8]

(II) *STATUS OF PLAINTIFF AS CREDITOR*—(A) *In General.* The judgment obtained by the attacking creditor against the grantor,[9] or a transcript thereof,[10] is admissible to prove that plaintiff is a creditor of the grantor. A mortgage alone, without the production of the notes secured by it, is evidence of title and the mortgage debt, as it is the mortgagor's admission to that effect. Whether sufficient and satisfactory or not depends upon the accompanying circumstances.[11] Plaintiff's ownership of the judgment against the grantor may also be established by the grantor's admissions while he was in possession of the property conveyed.[12] While the note on which plaintiff's judgment was founded may be admissible,[13] if its execution be proved,[14] a note not shown to be connected with the judgment and signed, not by the grantor, but by a firm of which he was a member, is irrelevant.[15] Plaintiff is entitled to prove the particulars of the transaction by which he became a creditor.[16] Where the property in controversy has been attached by the contesting creditor, the writ and other papers in the attachment suit are not evidence in his favor.[17] Where it appears that the debt upon which plaintiff's judgment was recovered was contracted after the conveyance, defendants may prove that the grantor contracted the debt on behalf of another and that he did no business on his own account.[18]

secured thereby, produced by defendants in response to an order of court, were held to be competent evidence of the nature of the transaction, without proof of their execution. Bernhardt *v.* Brown, 122 N. C. 587, 29 S. E. 884, 65 Am. St. Rep. 725. And see Huschle *v.* Morris, 31 Ill. App. 545, holding that a chattel mortgage executed on the same day as the alleged sale and to the same party was admissible as being part of the same transaction and as tending to show that the sale was not absolute.

7. Hartshorn *v.* Williams, 31 Ala. 149.

8. Fitzpatrick *v.* Fox, 80 N. Y. App. Div. 345, 80 N. Y. Suppl. 677, holding that in an action, under N. Y. Code Civ. Proc. § 1871, to reach property alleged to have been transferred by a husband to his wife in fraud of creditors, evidence by defendants that the real property had formerly belonged to the wife, and had been transferred to the husband with the understanding that it should be restored to the wife on demand, and that the transfer sought to be set aside was made in pursuance of this agreement, and that the wife had advanced money to the husband for the purchase of certain personalty also transferred to her, was improperly excluded.

9. Hamilton *v.* Wagner, 2 A. K. Marsh. (Ky.) 331.

Deficiency judgment in foreclosure suit.— Where the suit is founded upon a deficiency judgment in foreclosure proceedings, the judgment-roll in such proceedings is admissible to prove the debt and the exhaustion of plaintiff's legal remedies. Baxter *v.* Hebberd, 5 N. Y. St. 854.

While the allowance of a claim against an estate in an action to which the heirs are not made parties is *prima facie* evidence as against them of the correctness and validity of the claim, in a proceeding to subject the real estate which they have inherited, it is not conclusive; and such allowance is not even *prima facie* evidence against the heirs in a proceeding to subject such property to the payment of the claim on the ground that the decedent in his lifetime conveyed to them the real estate without consideration, and for the purpose of defrauding creditors; for as grantees they are in no way represented by the administrator. Willett *v.* Malli, 65 Iowa 675, 22 N. W. 922.

10. Hunsinger *v.* Hofer, 110 Ind. 390, 11 N. E. 463.

If plaintiff in an execution issued on a justice's judgment wishes to show himself a judgment creditor, for the purpose of contesting the validity of a deed, he must produce the whole transcript of the justice's docket so that it may appear not only that there was an execution but a judgment to warrant the execution, and other previous proceedings to warrant the judgment. Dameron *v.* Williams, 7 Mo. 138.

11. Powers *v.* Patten, 71 Me. 583.

12. Martel *v.* Somers, 26 Tex. 551.

13. Doe *v.* Newland, 2 Blackf. (Ind.) 233.

14. Without proof of its execution the note is not competent evidence against the grantee. Ezzell *v.* Brown, 121 Ala. 150, 25 So. 832.

15. Adams *v.* Hitner, 140 Pa. St. 166, 21 Atl. 260.

16. Holmesly *v.* Hogue, 47 N. C. 391.

17. Smith *v.* Collins, 94 Ala. 394, 10 So. 334 (where the court said, however, that the rule would be different in a statutory claim suit); Braley *v.* Byrnes, 20 Minn. 435 [*distinguishing* Hall *v.* Stryker, 27 N. Y. 596].

18. Teed *v.* Valentine, 65 N. Y. 471. In such a case, since plaintiff can successfully assail the conveyance only by showing that

(B) *To Attack Status of Plaintiff.* It is permissible for the grantee to show under proper allegations in the pleadings that the claim on which plaintiff's judgment is founded was fictitious and was admitted by the grantor collusively for the purpose of defeating the grantee's title.[19] To establish this contention declarations and admissions of each of the parties are admissible and it is not necessary that the other party shall have been present when a particular declaration or admission was made.[20] But except where it is sought to show that the judgment was obtained by fraud and collusion,[21] or was rendered by mistake or has been satisfied,[22] the judgment is conclusive as to the liability of the debtor,[23] and he will not be permitted to show that he did not owe the debt [24] or that the note upon which the judgment was rendered was without consideration.[25]

(C) *To Show Date of Plaintiff's Claim.* The judgment of the attacking creditor is of course admissible to prove the existence of the debt at the date when judgment was rendered.[26] Where the claim of the attacking creditor is evidenced by a note, he is entitled to show that the note was given for a preëxisting debt and to prove the date when the indebtedness accrued.[27] Where the attacking creditor's judgment was rendered after the conveyance in issue the judgment is not admissible as against the grantee to prove the grantor's indebtedness to plaintiff prior to the date when the judgment was rendered, unless other evidence be offered to show that fact.[28] But pleadings and proceedings in the case prior to the judgment or other competent evidence are admissible to show that the debt existed at or prior to the date of the conveyance,[29] and this notwithstanding the objection that as to the grantee such evidence is *res inter alios acta.*[30] Where plaintiff's judgment against the grantor was rendered on a

the grantor made it with a view to continue in business, to create future debts and to save his property from them, or to defraud his future creditors, it is competent for defendants to show that the grantor did not in fact carry on business on his own account or actually contemplate the creation of future debts. Teed *v.* Valentine, *supra.*

19. Pomeroy *v.* Bailey, 43 N. H. 118; Sullivan *v.* Ball, 55 S. C. 343, 33 S. E. 486.

Collateral attack on judgments see, generally, JUDGMENTS.

20. Pomeroy *v.* Bailey, 43 N. H. 118, holding also that previous declarations of the grantor were admissible.

21. Sullivan *v.* Ball, 55 S. C. 343, 33 S. E. 486.

22. See Finch *v.* Kent, 24 Mont. 268, 61 Pac. 653.

23. Finch *v.* Kent, 24 Mont. 268, 61 Pac. 653. See *supra,* XIV, I, 2.

Where plaintiff's judgment was rendered in an action of trespass the right of recovery for the trespass is fixed by the judgment and defendant is not entitled to introduce evidence to prove that he had instructed his employees not to commit the trespass. Cole *v.* Terrell, 71 Tex. 549, 9 S. W. 668.

24. Finch *v.* Kent, 24 Mont. 268, 61 Pac. 653.

25. Suber *v.* Chandler, 36 S. C. 344, 15 S. E. 426 [*following* Fraser *v.* Charleston, 19 S. C. 384].

26. Yeend *v.* Weeks, 104 Ala. 331, 16 So. 165, 53 Am. St. Rep. 50.

27. Stout *v.* Stout, 77 Ind. 537.

Where a suit is commenced by attachment on a promissory note and a person interpleads, claiming the property attached by virtue of a deed executed and recorded before the date of the note sued on, plaintiff may show that the note sued on was given for a debt that existed before the execution of the deed. Blue *v.* Penniston, 27 Mo. 272.

28. Marshall *v.* Croom, 60 Ala. 121; Snodgrass *v.* Decatur Branch Bank, 25 Ala. 161, 60 Am. Dec. 505; Martin *v.* Duncan, 181 Ill. 120, 54 N. E. 908 [*affirming* 79 Ill. App. 527]; Hoerr *v.* Meihofer, 77 Minn. 228, 79 N. W. 964, 77 Am. St. Rep. 666.

Where the ground of attack is actual fraud a judgment recovered by the attacking creditor against the debtor after the execution of the conveyance is competent evidence of the existence of the debt at the time of the rendition of judgment and establishes the creditor's right to attack the conveyance. Yeend *v.* Weeks, 104 Ala. 331, 16 So. 165, 53 Am. St. Rep. 50.

But where the conveyance is alleged to be only voluntary and constructively fraudulent, if the attacking creditor would use the judgment to the prejudice of the grantee there must be independent evidence of facts showing the cause of action which authorized the rendition of the judgment and that the cause of action antedates the conveyance. Yeend *v.* Weeks, 104 Ala. 331, 16 So. 165, 53 Am. St. Rep. 50 [*following* Coles *v.* Allen, 64 Ala. 98].

29. Jamison *v.* Bagot, 106 Mo. 240, 16 S. W. 697; Holladay Case, 27 Fed. 830.

30. Jamison *v.* Bagot, 106 Mo. 240, 253, 16 S. W. 697, in which the court said: "The indebtedness of . . . (the grantor) at the time of the inception of the alleged fraudulent transactions is an issue in the cause. . . . It devolved on plaintiff to prove it.

note, the conveyance having been made after the date of the note and before the rendition of judgment, the note is admissible to show that the debt existed before the conveyance was made.[31]

(III) *INDEBTEDNESS OF GRANTOR.* The financial condition of the grantor at the time of the conveyance being a material fact, evidence of his indebtedness at that time is admissible,[32] and the exclusion of evidence tending to show such indebtedness constitutes reversible error.[33] Any evidence which throws light on his financial condition is admissible;[34] but the evidence offered to prove the indebtedness must have a legitimate tendency to establish the fact.[35] To prove the grantor's indebtedness at the time of the conveyance in issue, his notes due previous to that date are admissible;[36] and so are the records of judgments rendered before and shortly after the conveyance,[37] and the fact that the grantee was not a party to the actions in which the judgments were rendered is immaterial.[38] Conversely, where the attacking creditors' judgment was rendered after the conveyance in issue, evidence that the vendor did not owe plaintiff anything at the date of the conveyance is relevant.[39] Likewise to rebut any inference of fraudulent intent it may be shown that when plaintiff recovered his judgment he was indebted to the grantor to a considerable amount, and this notwithstanding that the grantor did not attempt to set off this indebtedness against plaintiff's demand.[40]

(IV) *SOLVENCY OR INSOLVENCY OF GRANTOR.* Insolvency may be proved by general reputation.[41] It has been said that "every circumstance tending to show the pecuniary condition of the grantor . . . is admissible."[42] The return *nulla bona* of an execution against a grantor or transferrer is admissible for the purpose of showing insolvency.[43] It is also proper to admit for such purpose

How shall he prove it? There is only one way for him to do it, and that is to introduce evidence of *res inter alios acta.*" But *compare* Arnett *v.* Coffey, 1 Colo. App. 34, 27 Pac. 614, holding that where it is alleged that the property was transferred to the debtor's wife in fraud of his creditors, the pleadings in the action in which judgment was rendered against the debtor are not competent evidence against the wife to show when the debt was incurred.

31. Doe *v.* Newland, 2 Blackf. (Md.) 233.

32. Smith *v.* Collins, 94 Ala. 394, 10 So. 334; Stewart *v.* Fenner, 81 Pa. St. 177; Helfrich *v.* Stem, 17 Pa. St. 143; Hamet *v.* Dundass, 4 Pa. St. 178; Mills *v.* Howeth, 19 Tex. 257, 70 Am. Dec. 331; Hinde *v.* Longworth, 11 Wheat. (U. S.) 199, 6 L. ed. 454.

33. Buckingham *v.* Tyler, 74 Mich. 101, 41 N. W. 868.

34. Smith *v.* Collins, 94 Ala. 394, 10 So. 334.

The grantor's liability as accommodation indorser may be used to show indebtedness at the time of the conveyance alleged to be fraudulent, although the note was not then dishonored. Hamet *v.* Dundass, 4 Pa. St. 178.

35. Clark *v.* Chamberlain, 13 Allen (Mass.) 257, holding that evidence that a lawyer held for collection a claim against the grantor is not admissible to prove the grantor's indebtedness.

36. High *v.* Nelms, 14 Ala. 350, 48 Am. Dec. 103.

37. McMichael *v.* McDermott, 17 Pa. St. 353, 55 Am. Dec. 560; Hinde *v.* Longworth, 11 Wheat. (U. S.) 199, 6 L. ed. 454. See also Hardy *v.* Moore, 62 Iowa 65, 17 N. W. 200; Meyberg *v.* Jacobs, 40 Mo. App. 128.

38. Hinde *v.* Longworth, 11 Wheat. (U. S.) 199, 6 L. ed. 454.

39. Finck *v.* Kent, 24 Mont. 268, 61 Pac. 653.

40. Warner *v.* Percy, 22 Vt. 155.

41. Webb *v.* Atkinson, 124 N. C. 447, 32 S. E. 737. And see Sweetser *v.* Bates, 117 Mass. 466; Cook *v.* Mason, 5 Allen (Mass.) 212.

42. Lane *v.* Kingsberry, 11 Mo. 402. See Smith *v.* Collins, 94 Ala. 394, 406, 10 So. 334, where it is said that "whenever the financial condition of the debtor is material, whatever throws light on this question is admissible. To make such testimony available as against the purchaser, there must be additional proof, such as knowledge or notice of the condition of the vendor debtor, or of facts suggesting further inquiry, and which if honestly followed up would lead to a knowledge of his condition. The court should not exclude testimony which is competent against one party, because not competent against another party to the suit. The testimony should be received, and its bearing limited and explained to the jury."

To show the insolvency of a firm, evidence is not admissible to show that the negotiable paper of the firm was in the hands of street brokers, or what it was offered to be sold for, or that such offers induced creditors to recall loans made to the firm. Persse, etc., Paper Works *v.* Willett, 1 Rob. (N. Y.) 131.

43. Fryberger *v.* Berven, 88 Minn. 311, 92 N. W. 1125; Fuller *v.* Brown, 76 Hun (N. Y.) 557, 28 N. Y. Suppl. 189.

the records in attachment suits;[44] the debtor's books of account;[45] tax-lists made out by the debtor;[46] the fact that the checks of the grantor were dishonored by the banks on which they were drawn;[47] the existence of outstanding notes and the rendition of judgment on one of them;[48] the fact that a lawyer who held a claim against the debtor for collection made diligent inquiry but could find no property;[49] the result of an examination of the records by the custodian to ascertain the existence of other property than that conveyed;[50] the sale on judgments of all the debtor's property without satisfying his debts;[51] the entry of judgments for a large amount shortly after the sale for debts due before the sale;[52] the fact that property attached was conveyed pending the attachment;[53] and the petition of the executor of the grantor for a sale of the grantor's real estate on account of an alleged deficiency of personal assets.[54] But evidence is not admissible to show judgments against the grantor recovered after commencement of the action to set aside the alleged fraudulent conveyance.[55] So evidence of the value of a tract of land adjoining that retained by the donor is incompetent to show that he did not retain property fully sufficient and available to satisfy existing debts.[56] Evidence that the grantor obtained extensions of his notes by a statement that he would be unable to pay them at maturity is admissible to show that he knew he was insolvent.[57]

(v) *Consideration*—(a) *In General.* The sufficiency of the consideration to support a transfer attacked as fraudulent may, subject to the limitations imposed by the rules for the admission of evidence generally, be shown by any evidence tending to establish the facts.[58]

(b) *Preëxisting Liability.* So evidence tending to establish or negative a preëxisting liability is admissible when such liability is relied upon as constituting the consideration.[59]

(c) *Assumption or Payment of Liability of Grantor.* In the same way evi-

44. Eureka Iron, etc., Works *v.* Bresnahan, 66 Mich. 489, 33 N. W. 834; Bucks *v.* Moore, 36 Mo. App. 529.

45. Smith *v.* Collins, 94 Ala. 394, 10 So. 334; Kells *v.* McClure, 69 Minn. 60, 71 N. W. 827.

46. Woolridge *v.* Boardman, 115 Cal. 74, 46 Pac. 868; Towns *v.* Smith, 115 Ind. 480, 16 N. E. 811.

47. Hudson *v.* Bauer Grocery Co., 105 Ala. 200, 16 So. 693.

48. Beeson *v.* Wiley, 28 Ala. 575.

49. Clark *v.* Chamberlain, 13 Allen (Mass.) 257.

50. Bristol County Sav. Bank *v.* Keavy, 128 Mass. 298.

51. Helfrich *v.* Stem, 17 Pa. St. 143.

52. Helfrich *v.* Stem, 17 Pa. St. 143.

53. Stamford Bank *v.* Ferris, 17 Conn. 259.

54. Manhattan Co. *v.* Osgood, 15 Johns. (N. Y.) 162 [*reversed* on other grounds in 3 Cow. 612, 15 Am. Dec. 304].

55. Lapham *v.* Marshall, 51 Hun (N. Y.) 36, 3 N. Y. Suppl. 601.

56. Warren *v.* Makely, 85 N. C. 12.

57. Marsh *v.* Hammond, 11 Allen (Mass.) 483.

58. *Alabama.*— McLendon *v.* Grice, 119 Ala. 513, 24 So. 846.

Connecticut.— Lesser *v.* Brown, 75 Conn. 491, 54 Atl. 205.

Indiana.— Fleming *v.* Yost, 137 Ind. 95, 36 N. E. 705. See also Vansickle *v.* Shenk, 150 Ind. 413, 50 N. E. 381.

Iowa.— Price *v.* Mahoney, 24 Iowa 582.

Maryland.— Stockbridge *v.* Fahnestock, 87 Md. 127, 39 Atl. 95.

Massachusetts.— Rogers *v.* Abbott, 128 Mass. 102; Treat *v.* Curtis, 124 Mass. 348.

Michigan.— Ismond *v.* Scougale, 120 Mich. 353, 79 N. W. 489; Jansen *v.* McQueen, 112 Mich. 254, 70 N. W. 552.

Missouri.— Stam *v.* Smith, 183 Mo. 464, 81 S. W. 1217.

Nebraska.— Karll *v.* Kuhn, 38 Nebr. 539, 57 N. W. 379.

New Jersey.— Claflin *v.* Freudenthal, 58 N. J. Eq. 298, 43 Atl. 529 [*affirmed* in 60 N. J. Eq. 483, 46 Atl. 1100].

New York.— Knoch *v.* Bernheim, 14 N. Y. App. Div. 410, 43 N. Y. Suppl. 962; Gilmore *v.* Ham, 10 N. Y. Suppl. 48.

Pennsylvania.— Heath *v.* Slocum, 115 Pa. St. 549, 9 Atl. 259; Baltimore, etc., R. Co. *v.* Hoge, 34 Pa. St. 214.

Texas.— Barnes *v.* Krause, (Civ. App. 1899) 53 S. W. 92.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 849.

Evidence inadmissible to show consideration.— Morse *v.* Powers, 17 N. H. 286; Hinson *v.* Walker, 65 Tex. 103; Voorheis *v.* Waller, (Tex. Civ. App. 1896) 35 S. W. 807.

59. *Alabama.*— Clewis *v.* Malone, 119 Ala. 312, 24 So. 767.

California.— Byrne *v.* Weed, 75 Cal. 277, 17 Pac. 201.

Connecticut.— Trumbull *v.* Hewitt, 65

dence of the assumption or payment by the grantee of an indebtedness or liability on the part of the grantor may be material and admissible for the purpose of establishing a consideration.[60]

(D) *Pecuniary Condition of Grantee.* On an issue as to whether a transfer was made with intent to defraud the grantor's creditors, evidence of the grantee's pecuniary condition at the time of the transfer is admissible as bearing on his ability to make the purchase at a fair price.[61]

Conn. 60, 31 Atl. 492; Cowles *v.* Coe, 21 Conn. 220.

Iowa.— Conry *v.* Benedict, (1898) 76 N. W. 840; Bussard *v.* Bullitt, 95 Iowa 736, 64 N. W. 658.

Maryland.— Stockbridge *v.* Fahnestock, 87 Md. 127, 39 Atl. 95.

Massachusetts.— Knowlton *v.* Moseley, 105 Mass. 136.

Michigan.— Winfield *v.* Adams, 34 Mich. 437; Sweetzer *v.* Mead, 5 Mich. 107.

New Jersey.— Claflin *v.* Freudenthal, 58 N. J. Ch. 298, 43 Atl. 529 [*affirmed* in 60 N. J. Eq. 483, 46 Atl. 1100].

New York.— Knoch *v.* Bernheim, 14 N. Y. App. Div. 410, 43 N. Y. Suppl. 962; Goldenson *v.* Lawrence, 15 Misc. 489, 37 N. Y. Suppl. 194 [*affirmed* in 16 Misc. 570, 38 N. Y. Suppl. 991]; Gilmore *v.* Ham, 10 N. Y. Suppl. 48.

North Carolina.— Allen *v.* McLinden, 113 N. C. 321, 18 S. C. 206.

Pennsylvania.— Connelly *v.* Walker, 45 Pa. St. 449.

Texas.— Barnett *v.* Vincent, 69 Tex. 685, 7 S. W. 525, 5 Am. St. Rep. 98; Cooper *v.* Sawyer, 31 Tex. Civ. App. 620, 73 S. W. 992; Wright *v.* Soloman, (Civ. App. 1898) 46 S. W. 58.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 851.

Exclusion of evidence of indebtedness.— Where evidence of a preëxisting indebtedness is sought to be established by proof that the grantee held the notes of the grantor and other claims against the grantor, it was held proper to exclude the evidence where it nowhere appeared that it was in any way connected with the consideration expressed in the conveyance sought to be set aside. Rousseau *v.* Bleau, 60 Hun (N. Y.) 259, 14 N. Y. Suppl. 712.

Part of claim barred by limitations.— The fact that a portion of an indebtedness from a husband to his wife, in payment of which he conveyed property to her, was barred by limitations, is admissible in evidence in support of a claim that the conveyance was fraudulent, to be considered on the question of good faith. Vansickle *v.* Wells, 105 Fed. 16. See *supra*, XI, J, 2.

60. *Alabama.*— Howell *v.* Carden, 99 Ala. 100, 10 So. 640 (holding that in an action in which a deed of trust is attacked it was not error to admit the testimony of the grantee that he had paid claims against the grantor at his request and that the money so paid constituted a part of the consideration for the deed of trust and accompanying note); Watson *v.* Tool, 36 Ala. 13.

Indiana.— McCormick *v.* Smith, 127 Ind. 230, 26 N. E. 825.

Maryland.— Waters *v.* Riggin, 19 Md. 536, holding that bills obligatory and the record of judgments against the grantor which have been paid by the grantee and assigned to the latter are admissible in support of the contention that the conveyance in controversy was for a stated consideration.

New York.— Merchants' Bank *v.* Thalheimer, 2 N. Y. Suppl. 328.

North Carolina.— Watts *v.* Warren, 108 N. C. 514, 13 S. E. 232.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 850.

61. *Alabama.*— Waxelbaum *v.* Bell, 91 Ala. 331, 8 So. 571; Borland *v.* Mayo, 8 Ala. 104.

Connecticut.— Olmsted *v.* Hoyt, 11 Conn. 376; Cook *v.* Swan, 5 Conn. 140.

Illinois.— Ragland *v.* McFall, 137 Ill. 81, 27 N. E. 75 [*affirming* 36 Ill. App. 135]; Rhoades, etc., Co. *v.* Smith, 43 Ill. App. 400.

Iowa.— Allen *v.* Kirk, 81 Iowa 658, 47 N. W. 906.

Louisiana.— Hyman *v.* Bailey, 13 La. Ann. 450, holding that authentic acts of sales of land and slaves to defendant are admissible in evidence to establish the fact of his solvency and consequent ability to make the purchase of the property in controversy.

Massachusetts.— Stebbins *v.* Miller, 12 Allen 591.

Missouri.— Farmers' Bank *v.* Worthington, 145 Mo. 91, 46 S. W. 745.

New Hampshire.— Demeritt *v.* Miles, 22 N. H. 523, holding that evidence that fifteen months before the date of the mortgage in controversy the mortgagee sold property at a low rate and stated that he was pressed for money is not too remote to be admissible.

New York.— Amsden *v.* Manchester, 40 Barb. 158. See also Raynor *v.* Page, 2 Hun 652.

Pennsylvania.— Hirsh *v.* Wenger, 182 Pa. St. 246, 38 Atl. 135; Hannis *v.* Hazlett, 54 Pa. St. 133.

Texas.— Belt *v.* Raguet, 27 Tex. 471; Hamilton-Brown Shoe Co. *v.* Whitaker, 4 Tex. Civ. App. 380, 23 S. W. 520.

Wisconsin.— Brickley *v.* Walker, 68 Wis. 563, 32 N. W. 773.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 854.

The source from which the purchaser acquired the money with which the property in controversy was bought may be shown. Ragland *v.* McFall, 137 Ill. 81, 27 N. E. 75 [*affirming* 36 Ill. App. 135] (holding that evidence that about the time of the conveyance in controversy the grantee borrowed a large

(E) *Value of Property or Interest Conveyed.* On the question as to the adequacy of the consideration for a transfer, the question of the value of the property transferred is material, and any competent evidence tending to establish this fact is admissible.[62]

(F) *Declarations of Parties.* The declarations of the parties to the transfer are admissible upon the question of the sufficiency of the consideration therefor either as constituting admissions, as forming part of the *res gestæ*, or as falling within some general rule of evidence authorizing their admission.[63]

(G) *Books of Account.* In an action to set aside a conveyance as fraudulent, the grantee may introduce in evidence book entries of various amounts of money paid to the grantor, for the purpose of showing a consideration for the convey-

sum of money from a third person is admissible); Hannis *v.* Hazlett, 54 Pa. St. 133; Hamilton-Brown Shoe Co. *v.* Whitaker, 4 Tex. Civ. App. 380, 23 S. W. 520; Brickley *v.* Walker, 68 Wis. 563, 32 N. W. 773. But where the vendee testified that he obtained money from his brother to pay for the goods sold to him, as alleged, in fraud of creditors, the admission of judgment-rolls in causes against the brother for the purpose of disputing the vendee by showing the brother to have been insolvent, without any explanation or question asked as to whether the judgments were satisfied, was held to be prejudicial error. Rindskopf *v.* Myers, 71 Wis. 639, 38 N. W. 185.

Reputation as to solvency.— In Sanger *v.* Colbert, 84 Tex. 668, 19 S. W. 863, it was held that a person attacking a sale as fraudulent cannot introduce evidence that the purchaser was reputed in the community where he lived to be of small means. *Compare* Stebbins *v.* Miller, 12 Allen (Mass.) 591, holding that to prove that a mortgage is invalid and fraudulent, evidence is competent that the mortgagee in the place where he was born and grew up and where he frequently visited making the mortgagor's house his home was never known to have any property or means or to be engaged in any business. Covanhovan *v.* Hart, 21 Pa. St. 495, 60 Am. Dec. 57.

62. *Alabama.*—Howell *v.* Carden, 99 Ala. 100, 10 So. 640; Borland *v.* Mayo, 8 Ala. 104.

Arkansas.— Bowden *v.* Spellman, 59 Ark. 251, 27 S. W. 602, holding that declarations of the fraudulent seller as to the value of the property sold, made after the sale and while in possession, are admissible against the purchaser.

Illinois.— Welsch *v.* Werschem, 92 Ill. 115.

Iowa.— Goldstein *v.* Morgan, 122 Iowa 27, 96 N. W. 897.

Michigan.— Long *v.* Evening News Assoc., 113 Mich. 261, 71 N. W. 492; Bedford *v.* Penny, 58 Mich. 424, 25 N. W. 381; West *v.* Russell, 48 Mich. 74, 11 N. W. 812.

Minnesota.— Baze *v.* Arper, 6 Minn. 220.

New York.— Bier *v.* Kibbe, 5 N. Y. Suppl. 152.

Texas.— City Nat. Bank *v.* Martin-Brown Co., 20 Tex. Civ. App. 52, 48 S. W. 617, 49 S. W. 523; Harris *v.* Schuttler, (Civ. App. 1893) 24 S. W. 989.

United States.— Walker *v.* Collins, 50 Fed. 737, 1 C. C. A. 642.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 856.

Evidence inadmissible to show value see the following cases:

Alabama.— H. B. Claflin Co. *v.* Rodenberg, 101 Ala. 213, 13 So. 272.

Nebraska.— Rogers *v.* Thurston, 24 Nebr. 326, 38 N. W. 834.

New York.— Commercial Bank *v.* Bolton, 87 Hun 547, 35 N. Y. Suppl. 138.

Pennsylvania.— Zerbe *v.* Miller, 16 Pa. St. 488.

Texas.— Oppenheimer *v.* Halff, 68 Tex. 409, 4 S. W. 562; Goldfrank *v.* Halff, (Civ. App. 1894) 26 S. W. 778, (1899) 49 S. W. 1095.

Wisconsin.— Norwegian Plow Co. *v.* Hanthorn, 71 Wis. 529, 37 N. W. 825.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 856.

63. *Alabama.*— Pearce *v.* Nix, 34 Ala. 183; Goodgame *v.* Cole, 12 Ala. 77.

Indiana.— Fleming *v.* Yost, 137 Ind. 95, 36 N. E. 705; Benjamin *v.* McElwaine-Richards Co., 10 Ind. App. 76, 37 N. E. 362.

Iowa.— Moss *v.* Dearing, 45 Iowa 530.

Mississippi.— English *v.* Friedman, 70 Miss. 457, 12 So. 252.

Missouri.— State *v.* Mason, 112 Mo. 374, 20 S. W. 629, 34 Am. St. Rep. 390.

New York.— Legg *v.* Olney, 1 Den. 202.

Pennsylvania.— Reitanbach *v.* Reitanbach, 1 Rawle 362, 18 Am. Dec. 638.

Texas.— Titus *v.* Johnson, 50 Tex. 224; Cooper *v.* Sawyer, 31 Tex. Civ. App. 620, 73 S. W. 992.

United States.— Shauer *v.* Alterton, 151 U. S. 607, 14 S. Ct. 442, 38 L. ed. 286.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 852.

Declarations held inadmissible.—*Georgia.*— Hicks *v.* Sharp, 89 Ga. 311, 15 S. E. 314.

Illinois.— Meacham *v.* Hahn, 46 Ill. App. 144.

Iowa.— Harwick *v.* Weddington, 73 Iowa 300, 34 N. W. 868.

Michigan.— Blanchard *v.* Moors, 85 Mich. 380, 48 N. W. 542.

New York.— Rousseau *v.* Bleau, 60 Hun 259, 14 N. Y. Suppl. 712; Tifft *v.* Barton, 4 Den. 171.

Texas.— Blair *v.* Finlay, 75 Tex. 210, 12 S. W. 983.

ance, provided the entries are made at the time of payment, such evidence being admissible as part of the *res gestæ*.[64] So where it is claimed that the consideration for a deed is an indebtedness from the grantor to the grantee, it is competent for a creditor attacking the deed to introduce the books of account either of the grantor or grantee, kept in the regular course of business, to show that they contained no entry of the debt.[65]

(H) *Recitals in Instrument of Transfer.* While the authorities are in conflict with regard to the right of a person claiming under a transfer which is attacked as fraudulent to support it by showing a consideration different from that expressed on its face,[66] it seems to be generally conceded that the party attacking the deed may introduce parol evidence to rebut a recital of payment of a valuable consideration,[67] and indeed there are many authorities to the effect that the recital of a consideration in a transfer assailed on the ground of fraud is no evidence whatever against an attacking creditor.[68]

(VI) *KNOWLEDGE AND INTENT OF GRANTEE*—(A) *In General.* Upon the issue of a grantee's knowledge and intent at the time of taking the conveyance, his declarations[69] are admissible, as is also evidence tending to show the use

Virginia.— Thornton *v.* Gaar, 87 Va. 315, 12 S. E. 753; Keagy *v.* Trout, 85 Va. 390, 7 S. E. 329.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 852.

64. Fleming *v.* Yost, 137 Ind. 95, 36 N. E. 705. See also Stockbridge *v.* Fahnestock, 87 Md. 127, 39 Atl. 95 (holding that in an action by a creditor, where it is sought to show that a certain mortgage, which covers a fund of the debtor sought to be held by attachment and garnishment proceedings, is void and fraudulent for want of consideration, it is proper to admit the account kept by the mortgagee, between himself and the mortgagor, as a statement emanating from the mortgagee, tending to establish the indebtedness when the mortgage was given, and the amount of the debt secured); Archer *v.* Long, 38 S. C. 272, 16 S. E. 998.

65. White *v.* Benjamin, 150 N. Y. 258, 44 N. E. 956; Loos *v.* Wilkinson, 110 N. Y. 195, 18 N. E. 99, 1 L. R. A. 250.

66. Carmack *v.* Lovett, 44 Ark. 180.

Parol evidence is held in the following authorities to be admissible to show a consideration different from that recited in the instrument: Leach *v.* Shelby, 58 Miss. 681; Ferguson *v.* Harrison, 41 S. C. 340, 19 S. E. 619; Jackson *v.* Lewis, 32 S. C. 593, 10 S. E. 1074; Featherston *v.* Dagnell, 29 S. C. 45, 6 S. E. 897; Casto *v.* Fry, 33 W. Va. 449, 10 S. E. 799. See also Finn *v.* Krut, 13 Tex. Civ. App. 36, 34 S. W. 1013, holding that it is competent to show a consideration different from that expressed in the deed which is attacked by a creditor for fraud if the consideration expressed is not a contract stipulation. But according to other authorities, a person claiming under a deed which is attacked as fraudulent cannot sustain its validity by parol proof of a consideration other than that expressed in the instrument (Houston *v.* Blackman, 66 Ala. 559, 41 Am. Rep. 756; Carmack *v.* Lovett, 44 Ark. 180; Glenn *v.* McNeal, 3 Md. Ch. 349; Stolz *v.* Vanatta, 32 Cinc. L. Bul. 100; Ogden State Bank *v.* Barker, 12 Utah 13, 40 Pac. 765. See also Diggs *v.* McCullough, 69 Md. 592, 16 Atl. 453), unless at least the two considerations are consistent or of the same character (Gordon *v.* Tweedy, 71 Ala. 202; Hubbard *v.* Allen, 59 Ala. 283; Harris *v.* Alcock, 10 Gill & J. (Md.) 226, 32 Am. Dec. 158; Claggett *v.* Hall, 9 Gill & J. (Md.) 80; Cole *v.* Albers, 1 Gill (Md.) 412; Grote *v.* Meyer, 6 Ohio Dec. (Reprint) 1025, 9 Am. L. Rep. 623. See also Sexton *v.* Anderson, 95 Mo. 373, 8 S. W. 564). And see, generally, EVIDENCE, 17 Cyc. 648 *et seq.*

67. Myers *v.* Peek, 2 Ala. 648; Leach *v.* Shelby, 58 Miss. 681; Amsden *v.* Manchester, 40 Barb. (N. Y.) 158.

68. *Alabama.*— Ezzell *v.* Brown, 121 Ala. 150, 25 So. 832; Schall *v.* Weil, 103 Ala. 411, 15 So. 829; Howell *v.* Carden, 99 Ala. 100, 10 So. 640; Chipman *v.* Glennon, 98 Ala. 263, 13 So. 822; Bolling *v.* Jones, 67 Ala. 508; Houston *v.* Blackman, 66 Ala. 559, 41 Am. Rep. 756; Pool *v.* Cummings, 20 Ala. 563; Decatur Branch Bank *v.* Jones, 5 Ala. 487.

Arkansas.— Valley Distilling Co. *v.* Atkins, 50 Ark. 289, 7 S. W. 137.

New Hampshire.— Vogt *v.* Ticknor, 48 N. H. 242; Prescott *v.* Hayes, 43 N. H. 593.

New York.— Tifft *v.* Barton, 4 Den. 171.

Pennsylvania.— Redfield, etc., Mfg. Co. *v.* Dysart, 62 Pa. St. 62.

Virginia.— Flynn *v.* Jackson, 93 Va. 341, 25 S. E. 1; De Farges *v.* Ryland, 87 Va. 404, 12 S. E. 805, 24 Am. St. Rep. 659.

West Virginia.— Butler *v.* Thompson, 45 W. Va. 660, 31 S. E. 960, 72 Am. St. Rep. 838; Himan *v.* Thorn, 32 W. Va. 507, 9 S. E. 930; Childs *v.* Hurd, 32 W. Va. 66, 9 S. E. 362; Rogers *v.* Verlander, 30 W. Va. 619, 5 S. E. 847.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 855.

69. *Connecticut.*—Lesser *v.* Brown, 75 Conn. 491, 54 Atl. 205.

Indian Territory.— Foster *v.* McAlester, 3 Indian Terr. 307, 58 S. W. 679.

Iowa.— McNorton *v.* Akers, 24 Iowa 369.

which the parties have made of the conveyance,[70] the grantor's condition at the time of the conveyance,[71] that the grantee knew that the property had been invoiced at night,[72] that he acted upon advice of counsel,[73] that he had notice of a suit pending against the grantor,[74] or any other fact which tends to prove or disprove such knowledge or intent, subject to the general rules of evidence.[75] But declarations of the fraudulent grantor are inadmissible for this purpose,[76] unless there is other evidence connecting the grantee with the fraud;[77] nor is evidence of the grantee's good character or of his reputation for honesty and fair dealing admissible.[78] Nor can the grantor testify as to his opinion or conclusion from what had transpired or from conversations by which he gave the grantee to understand that the transaction was for the purpose of defrauding creditors.[79]

(B) *Knowledge of Grantor's Indebtedness or Insolvency.* On the issue whether a conveyance was fraudulent, evidence tending to show that the grantee knew of the grantor's indebtedness or insolvency at the time of the conveyance is admissible;[80] and as tending to show such knowledge evidence of the grantor's

Massachusetts.— Foster *v.* Thompson, 5 Gray 453.

Tennessee.— Harton *v.* Lyons, 97 Tenn. 180, 36 S. W. 851.

Wisconsin.— Gillet *v.* Phelps, 12 Wis. 392.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 857.

70. Constantine *v.* Twelves, 29 Ala. 607.

71. Bendetson *v.* Moody, 100 Mich. 553, 59 N. W. 252, holding that evidence of the seller's intoxication at the time of the sale was competent as bearing on the question of notice to the purchaser that the sale was in fraud of the seller's creditors.

72. Hodges *v.* Coleman, 76 Ala. 103.

73. Brown *v.* Mitchell, 102 N. C. 347, 9 S. E. 702, 11 Am. St. Rep. 748.

Opinion of the grantee's attorney after the conveyance that the title was good does not affect the grantee's good faith as it was then too late to make inquiry. Aultman *v.* Utsey, 34 S. C. 559, 13 S. E. 848.

74. Coulter *v.* Lumpkin, 100 Ga. 784, 28 S. E. 459.

75. *Connecticut.*— Smith *v.* Brockett, 69 Conn. 492, 38 Atl. 57.

Iowa.— McNorton *v.* Akers, 24 Iowa 369, testimony as to grantees selling goods very low and as to conduct of grantor.

Michigan.— Ganong *v.* Green, 71 Mich. 1, 38 N. W. 661.

North Carolina.— Perry *v.* Hardison, 99 N. C. 21, 5 S. E. 230.

Wisconsin.— Kalk *v.* Fielding, 50 Wis. 339, 7 N. W. 296.

United States.— Treusch *v.* Ottenberg, 54 Fed. 867, 4 C. C. A. 629.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 857.

Conduct of third persons alleged to have been parties to the fraud is admissible although the grantee was not connected with them. Pohalski *v.* Ertheiler, 18 Misc. (N. Y.) 33, 41 N. Y. Suppl. 10.

The record of a prior suit against the grantor in which part of the property was attached just after the grantee took possession is inadmissible where it appears that when the attachment was levied the grantee had given his note for the price, and his grantor crediting on such note the value of the property seized. Mix *v.* Ege, 67 Minn. 116, 69 N. W. 703.

76. *Colorado.*— Smith *v.* Jensen, 15 Colo. 213, 22 Pac. 434.

Connecticut.— Tibbals *v.* Jacobs, 31 Conn. 428, declarations previous to conveyance.

Illinois.— Guebert *v.* Zick, 31 Ill. App. 390.

Maine.— Smith *v.* Tarbox, 70 Me. 127.

New York.— Baldwin *v.* Short, 125 N. Y. 553, 26 N. E. 928 [*affirming* 54 Hun 473, 7 N. Y. Suppl. 717]; Spaulding *v.* Keyes, 125 N. Y. 113, 26 N. E. 15; Orr *v.* Gilmore, 7 Lans. 345.

Pennsylvania.— Farren *v.* Mintzer, 10 Pa. Cas. 610, 14 Atl. 267.

Texas.— Ward *v.* Wofford, (Civ. App. 1894) 26 S. W. 321.

Wisconsin.— Bogert *v.* Phelps, 14 Wis. 88.

See also EVIDENCE, 16 Cyc. 998.

77. Lesser *v.* Brown, 75 Conn. 491, 54 Atl. 205; Tibbals *v.* Jacobs, 31 Conn. 428; Bender *v.* Kingman, 64 Nebr. 766, 90 N. W. 886.

78. Simpson *v.* Westenberger, 28 Kan. 756, 42 Am. Rep. 195; Dawkins *v.* Gault, 5 Rich. (S. C.) 151.

79. Blaut *v.* Gabler, 77 N. Y. 461 [*affirming* 8 Daly 48]; Schmick *v.* Noel, 72 Tex. 1, 8 S. W. 83.

80. Hallock *v.* Alvord, 61 Conn. 194, 23 Atl. 131; Robinson *v.* Woodmansee, 80 Ga. 229, 4 S. E. 497; O'Donnell *v.* Hall, 157 Mass. 463, 32 N. E. 666; Sullivan *v.* Langley, 124 Mass. 264; Stadtler *v.* Wood, 24 Tex. 622.

A letter written by a grantee to his grantor suggesting to the latter to make false representations for the purpose of obtaining a fictitious credit and offering to assist therein is competent as tending to show knowledge of the grantor's insolvency. Clark *v.* Finn, 12 Mo. App. 583.

That proceedings in bankruptcy were instituted against both a debtor and creditor a short time after the execution of an assignment and bill of sale from the debtor to the creditor is not admissible to show that at the date of such assignment the creditor knew

general reputation as to pecuniary responsibility,[81] of previous transfers from the grantor to the grantee,[82] or of declarations of the grantee prior to the conveyance[83] is admissible. But evidence of what the grantee was told by his counsel as to his right to take the conveyance is inadmissible.[84]

(c) *Grantee's Testimony as to His Own Knowledge or Intent.* Where a conveyance is alleged to be fraudulent, the grantee may testify as to his own knowledge, good faith, purpose, or intention in taking the conveyance,[85] subject to the exception that such testimony is not competent to vary the terms of the conveyance.[86]

(d) *Participation in Fraudulent Intent.* A wide latitude is generally allowed in the examination of witnesses on the question of fraud, and as a general rule any lawful evidence, other than acts and declarations of the grantor,[87] which tends to establish facts and circumstances which would aid in disclosing the real purpose of the grantee should be admitted.[88] Declarations and admissions

of the debtor's insolvency. Ecker *v.* McAlister, 54 Md. 362.

That a mortgagee loaned money and sold goods to his mortgagor after the execution of the deed of mortgage and took notes for the payment of his debt in semi-monthly instalments was evidence that he did not know his debtor to be insolvent. Cole *v.* Albers, 1 Gill (Md.) 412.

81. Hudson *v.* Bauer Grocery Co., 105 Ala. 200, 16 So. 693; Price *v.* Mazange, 31 Ala. 701; Sweetser *v.* Bates, 117 Mass. 466; Metcalf *v.* Munson, 10 Allen (Mass.) 491; Whitcher *v.* Shattuck, 3 Allen (Mass.) 319; Hahn *v.* Penney, 60 Minn. 487, 62 N. W. 1129; Goldberg *v.* McCracken, (Tex. 1888) 8 S. W. 676; Hooks *v.* Pafford, 34 Tex. Civ. App. 516, 78 S. W. 991.

Testimony of a witness to his belief that it was generally known at the place where the vendor and vendee worked at the time of the purchase that the vendor was in debt is not admissible against the vendee in an action by a creditor of the vendor to reach the property conveyed, since it does not prove fraud on the part of the vendee. Scott *v.* Heilager, 14 Pa. St. 238.

82. Trumbull *v.* Hewitt, 65 Conn. 60, 31 Atl. 492.

83. Hunsinger *v.* Hofer, 110 Ind. 390, 11 N. E. 463; Foster *v.* McAlester, 3 Indian Terr. 307, 58 S. W. 679.

84. Bicknell *v.* Mellett, 160 Mass. 328, 35 N. E. 1130.

85. *California.*—Byrne *v.* Reed, 75 Cal. 277, 17 Pac. 201.

Colorado.— Brown *v.* Potter, 13 Colo. App. 512, 58 Pac. 785.

Indiana.— South Bend Iron-Works Co. *v.* Duddleson, (App. 1891) 27 N. E. 312; Wilson *v.* Clark, 1 Ind. App. 182, 27 N. E. 310.

Iowa.— Frost *v.* Rosencrans, 66 Iowa 405, 23 N. W. 895.

Kansas.— Richolson *v.* Freeman, 56 Kan. 463, 43 Pac. 772; Gentry *v.* Kelley, 49 Kan. 82, 30 Pac. 186.

Massachusetts.— Lincoln *v.* Wilbur, 125 Mass. 249; Snow *v.* Paine, 114 Mass. 520.

Michigan.— Angell *v.* Pickard, 61 Mich. 561, 28 N. W. 680; Bedford *v.* Penny, 58 Mich. 424, 25 N. W. 381.

Minnesota.— Filley *v.* Register, 4 Minn. 391, 77 Am. Dec. 522. See Hathaway *v.* Brown, 18 Minn. 414.

Montana.— Finch *v.* Kent, 24 Mont. 268, 61 Pac. 653.

Nebraska.— Campbell *v.* Holland, 22 Nebr. 587, 45 N. W. 871.

New Hampshire.— Woodman *v.* Clay, 59 N. H. 53.

New York.— Starin *v.* Kelly, 88 N. Y. 418 [*affirming* 47 N. Y. Super. Ct. 288]; Bedell *v.* Chase, 34 N. Y. 386; Sperry *v.* Baldwin, 46 Hun 120; Durfee *v.* Bump, 3 N. Y. Suppl. 505.

North Carolina.— Nixon *v.* McKinney, 105 N. C. 23, 11 S. E. 154.

Texas.— Hamburg *v.* Wood, 66 Tex. 168, 18 S. W. 623; Wright *v.* Solomon, (Civ. App. 1898) 46 S. W. 58; Numsen *v.* Ellis, 3 Tex. App. Civ. Cas. § 134.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 859.

Compare, however, Hinds *v.* Keith, 57 Fed. 10, 6 C. C. A. 231.

A vendee may show by his agent who made the purchase that his purpose in making it was to collect the vendee's demands against the debtor. Blakenship, etc., Co. *v.* Willis, 1 Tex. Civ. App. 657, 20 S. W. 952.

86. Nixon *v.* McKinney, 105 N. C. 23, 11 S. E. 154.

87. Guebert *v.* Zick, 31 Ill. App. 390; Bogert *v.* Hess, 50 N. Y. App. Div. 253, 63 N. Y. Suppl. 977; Cuyler *v.* McCartney, 33 Barb. (N. Y.) 165. But *compare* Bredin *v.* Bredin, 3 Pa. St. 81, conversation of fraudulent grantor with third person.

88. For evidence held admissible to show the grantee's good or bad faith or participation in the fraud see the following cases:

Alabama.— Little *v.* Lichkoff, 98 Ala. 321, 12 So. 429.

Iowa.— Chapman *v.* James, 96 Iowa 233, 64 N. W. 795; Craig *v.* Fowler, 59 Iowa 200, 13 N. W. 116.

Louisiana.— Wolff *v.* Wolff, 47 La. Ann. 548, 17 So. 126.

Minnesota.— Benson *v.* Nash, 75 Minn. 341, 77 N. W. 991, failure to investigate the character of the grantor's title, against which a chattel mortgage was recorded at the time of his conveyance.

of the grantee or transferee tending to show his knowledge or purpose in taking the conveyance or transfer are admissible against him.[89]

(E) *Separate Conveyances or Transactions.* Although evidence of other similar fraudulent transactions by the grantor may be admissible to prove a fraudulent intent in him, without evidence to connect the grantee with such transactions,[90] the rule is otherwise where the evidence is offered to affect the grantee; and evidence of other conveyances or transactions of the grantor is inadmissible as against the grantee except where there is additional evidence to show his knowledge of or connection with the same; in which case they are admissible as tending to show a general fraudulent scheme, and hence throwing light on the transaction in question.[91] But it has been held that the fact that one who has taken property in payment of his debt had previously taken a chattel mortgage, alleged to be fraudulent on its face, on the property to secure his debt, and had made a sale thereunder, is irrelevant.[92]

(VII) *GOOD FAITH OF PURCHASER FROM GRANTEE.* Subject to the general rules of evidence,[93] any evidence tending to prove that a purchaser from a fraudulent grantee had or had not notice of the original fraud is relevant and admissible to show his good faith or intent in taking the conveyance.[94] The purchaser from

New Hampshire.—Lee *v.* Lamprey, 43 N. H. 13.

New York.— McCabe *v.* Brayton, 38 N. Y. 196; Cuyler *v.* McCartney, 33 Barb. 165.

Ohio.— Raymond *v.* Whitney, 5 Ohio St. 201.

Pennsylvania.— Snyder *v.* Berger, 3 Pa. Cas. 318, 6 Atl. 733.

Washington.—Adams *v.* Dempsey, 29 Wash. 155, 69 Pac. 738.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 860.

Letters written to creditors pending a suit by a mortgagee against a levying officer, calculated to influence their action with reference to collection of their claims, and telegrams in answer sent by such creditors are admissible. Concordia First Nat. Bank *v.* Marshall, 56 Kan. 441, 43 Pac. 774.

Letter written by a creditor who was a relative of a fraudulent mortgagee, to the mortgagor, by which the mortgage was obtained, the mortgagee being properly connected therewith, is admissible in an action by the mortgagee against a sheriff for seizing the mortgaged goods. Krolik *v.* Graham, 64 Mich. 226, 31 N. W. 307.

Books of account tending to show that an alleged indebtedness for which a fraudulent mortgage was given did not exist are admissible. Cluett *v.* Rosenthal, 100 Mich. 193, 58 N. W. 1009, 43 Am. St. Rep. 446.

89. Bernard *v.* Guidry, 109 La. 451, 33 So. 558; Field *v.* Liverman, 17 Mo. 218 (holding that in order to show that a judgment confessed by a debtor in favor of one of his creditors, and a stay of proceedings thereon by order of such creditor, were in fraud of other creditors, conversations between a witness and such judgment creditor may be introduced); Altschuler *v.* Coburn, 38 Nebr. 881, 57 N. W. 836 (declarations in disparagement of title).

90. See *supra*, XIV, K, 2, b, (v).

91. *Alabama.*— See Reed *v.* Smith, 14 Ala. 380.

Illinois.— Schroeder *v.* Walsh, 120 Ill. 403, 11 N. E. 70.

Iowa.— Doxsee *v.* Waddick, 122 Iowa 599, 98 N. W. 483; Craig *v.* Fowler, 59 Iowa 200, 13 N. W. 116.

Maine.—Grant *v.* Libby, 71 Me. 427; Glake *v.* Howard, 11 Me. 202.

Michigan.— Wessels *v.* Beeman, 87 Mich. 481, 49 N. W. 483; Burrill *v.* Kimbell, 65 Mich. 217, 31 N. W. 842.

Missouri.— Lane *v.* Kingsberry, 11 Mo. 402.

New Hampshire.— Whittier *v.* Varney, 10 N. H. 291.

New York.— McCabe *v.* Brayton, 38 N. Y. 196; Ford *v.* Williams, 13 N. Y. 577, 67 Am. Dec. 83.

Pennsylvania.— Miller *v.* McAlister, 178 Pa. St. 140, 35 Atl. 594. See Kline *v.* Huntingdon First Nat. Bank, (1888) 15 Atl. 433; Welsh *v.* Cooper, 3 Am. L. J. 30.

Texas.— Cook *v.* Greenberg, (Civ. App. 1896) 34 S. W. 687. See Fant *v.* Willis, (Civ. App.) 23 S. W. 99.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 861.

Evidence that the grantee had purchased other property from the grantor than that in question at the same time is admissible. Lillie *v.* McMillan, 52 Iowa 463, 3 N. W. 601.

92. Ragland *v.* McFall, 137 Ill. 81, 27 N. E. 75 [*affirming* 36 Ill. App. 135].

93. See EVIDENCE, 16 Cyc. 821.

94. Hodges *v.* Coleman, 76 Ala. 103; Rice *v.* Bancroft, 11 Pick. (Mass.) 469; Kichline *v.* Labach, 125 Pa. St. 295, 17 Atl. 432.

The fact that the purchaser had a lien on the property is admissible for the purpose of showing that he acted in good faith and without fraudulent intent in taking a conveyance from the fraudulent grantee. Park *v.* Snyder, 78 Ga. 571, 3 S. E. 557.

To repel an inference of fraud arising from an assignee of a mortgage leaving the mortgage in the mortgagee's possession, the mortgagee's testimony that having contracted the debt, and being acquainted with the mortgagor, he was better able to collect

a fraudulent grantee may himself testify as to his ignorance of any fraud between the original parties.[95]

(VIII) *TITLE TO OR CONTROL OF PROPERTY*—(A) *In General.* In an action to reach property conveyed, as belonging to the grantor, for the purpose of showing or rebutting fraud in the conveyance, evidence of the grantor's conduct or statements while in possession after conveyance tending to explain the character of his possession is admissible;[96] but not such as were made by him before the conveyance.[97]

(B) *Retention or Change of Possession.* Subject to the general rules of evidence[98] any fact tending to show whether or not there has been a change of possession of personal property sold is admissible;[99] or if the vendor has retained possession any fact explaining his possession is admissible to rebut the inference of fraud arising therefrom.[1]

(C) *Apparent Title or Control*—(1) IN GENERAL. As bearing on the *bona fides* of a claimant's title to property which has been or is about to be subjected as belonging to his grantor, any facts or circumstances subject to the general rules of evidence which tend to show which one of them has had the apparent title to or exercised control or management over the property since the conveyance are admissible.[2] Thus evidence is admissible that the grantor subsequently

it, is admissible. Phifer *v.* Erwin, 100 N. C. 59, 6 S. E. 672.

Representations of an agent of the original grantor as to his financial condition are irrelevant and inadmissible where the *bona fides* of the subsequent purchaser is in issue. Rindskopf *v.* Myers, 71 Wis. 639, 38 N. W. 185.

95. Phifer *v.* Erwin, 100 N. C. 59, 6 S. E. 672.

96. Taylor Commission Co. *v.* Bell, 62 Ark. 26, 34 S. W. 80; Loos *v.* Wilkinson, 110 N. Y. 195, 18 N. E. 99, 1 L. R. A. 250; Askew *v.* Reynolds, 18 N. C. 367. *Compare* Demeritt *v.* Miles, 22 N. H. 523. See also ATTACHMENT, 4 Cyc. 745; EVIDENCE, 16 Cyc. 997 *et seq.*

The declarations of the parties to the transfer of the property, made after the contract, and while the party making the transfer is still in possession of it, and before any adverse claim or attachment has intervened, and calculated to give notoriety to the transfer, are competent evidence to repel the suggestion of secrecy and the inference of fraud arising out of such continued possession of the property by the vendor. Walcott *v.* Keith, 22 N. H. 196.

Evidence of conversations between the parties to the conveyance, occurring when the grantor gave to his grantee bonds for the annual rental, are admissible to show the purpose for which the bonds were given and as explanatory of the debtor's continued possession. Waters *v.* Riggin, 19 Md. 536.

97. Taylor Commission Co. *v.* Bell, 62 Ark. 26, 34 S. W. 80.

98. See EVIDENCE, 16 Cyc. 821.

99. Snodgrass *v.* Decatur Branch Bank, 25 Ala. 161, 60 Am. Dec. 505; Springer *v.* Kreeger, 3 Colo. App. 487, 34 Pac. 269, holding that on an issue of change of possession of goods in a warehouse, testimony of the warehouseman of conversations with his predecessors at the time of the transfer of the business to him as to the ownership of the goods, and his books, showing in whose name they stand, are competent evidence.

Evidence of the recording of a brand is admissible to show change of possession of horses branded therewith. Rule *v.* Bolles, 27 Oreg. 368, 41 Pac. 691.

1. Easly *v.* Dye, 14 Ala. 158; Laird *v.* Davidson, 124 Ind. 412, 25 N. E. 7; Foley *v.* Knight, 4 Blackf. (Ind.) 420; Benjamin *v.* McElwaine-Richards Co., 10 Ind. App. 76, 37 N. E. 362; Harrell *v.* Elliott, 1 N. C. 86, that consideration passed.

Admissibility of declarations of grantor see *supra*, XIV, K, 2, c, (VIII), (A).

A contract tending to show that the vendor was in possession of the premises under his own lease, at the time of the alleged fraudulent transfer, is admissible, as, in the absence of explanation as to why no change in the lease was made at that time, it tends to show that there was no change in possession of the goods claimed to have been sold. Benjamin *v.* McElwaine-Richards Co., 10 Ind. App. 76, 37 N. E. 362.

If one who has purchased a stock of goods in a shop occupied by the vendor permit the sign of the vendor to remain over the door, that fact is evidence that the vendor remained in possession after the sale, and is so far evidence of fraud; but it is one which admits of explanation, and evidence that there was a custom or usage to permit signs to remain after such sales is admissible. Seavy *v.* Dearborn, 19 N. H. 351. See *supra*, IX, B, 11.

2. *California.*— Freeman *v.* Hensley, (1892) 30 Pac. 792, holding, however, that evidence that credit was given to the vendor by a third person for whom work was done with the property (horses) in the possession of the vendee, is immaterial in the absence of an offer to show that the credit was given by the vendee's direction.

used, disposed of, or otherwise treated the property as his own;[3] that the grantee did so;[4] or that the grantee replenished the stock of goods conveyed with his own funds or on his own credit.[5]

(2) Assessment For Taxation. As tending to show that the conveyance was fraudulent evidence is admissible that after the conveyance the property was taxed to the vendor with his knowledge and without objection,[6] that it was not taxed to him,[7] or that the grantee did not return it for taxation.[8] But whether or not a grantee of personalty gave in to the assessor the realty on which the personalty was as his property is inadmissible.[9] The payment of taxes by a grantee who previous to the conveyance was under a duty to pay them is not admissible as evidence of the *bona fides* of his conveyance.[10]

3. Weight and Sufficiency — a. General Principles. The general rules which govern in other civil actions in regard to the weight and sufficiency of evidence are applicable to actions to set aside fraudulent conveyances, and a preponderance of evidence showing fraud in the transaction is sufficient; the degree of certainty

Colorado.—Butler *v.* Howell, 15 Colo. 249, 25 Pac. 313.

Kentucky.— Kendall *v.* Hughes, 7 B. Mon. 368.

Minnesota.— Christian *v.* Klein, 77 Minn. 116, 79 N. W. 602 (that the grantor while in possession made permanent improvements on the property, and paid for them with his own money); Laib *v.* Brandenburg, 34 Minn. 367, 25 N. W. 803; Ladd *v.* Newell, 34 Minn. 107, 24 N. W. 366.

New Hampshire.— Blake *v.* White, 13 N. H. 267.

Pennsylvania.— Helfrich *v.* Stem, 17 Pa. St. 143, that vendee has been in entire possession since the sale, and the degree of control exercised by him over the goods.

South Carolina.— Owens *v.* Gentry, 30 S. C. 490, 9 S. E. 525, that the grantor rented a portion of the property in his own name to a third party.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 865.

The exclusion as evidence of certain orders for goods by a debtor after agreeing to transfer his stock of goods to another is harmless error on the question whether such transfer was fraudulent, when no offer was made to show any knowledge thereof by such other. Partlow *v.* Swigart, 90 Mich. 61, 51 N. W. 270.

The vendor's books showing purchases made by him in his own name to replenish the stock sold and charged against the vendee are admissible in behalf of a creditor of the vendor seeking to impeach the transaction. Franklin *v.* Gummersell, 11 Mo. App. 306.

Where a husband conveyed land to his wife by a warranty deed, and afterward managed and controlled the land, such management and control are not evidence against the wife that the conveyance was in trust for the husband's benefit, since he had the right to manage and control her separate property; and his conduct in this particular would be the same whether the land was a *bona fide* donation or not. O'Neal *v.* Clymer, (Tex. Civ. App. 1900) 61 S. W. 545.

3. *Maryland.*— Cecil Bank *v.* Snively, 23 Md. 253, lease by vendee admissible to rebut charge of fraud and show acts of ownership exercised over the property by him.

Missouri.— Blue *v.* Penniston, 27 Mo. 272.

Nebraska.— Cox *v.* Einspahr, 40 Nebr. 411, 58 N. W. 941, subsequent transfer of part of the property by the vendor to a creditor for a debt owing before the transfer.

New York.— Persse, etc., Paper Works *v.* Willett, 1 Rob. 131.

United States.— McClellan *v.* Pyeatt, 50 Fed. 686, 1 C. C. A. 613.

4. Shealy *v.* Edwards, 75 Ala. 411; Martin *v.* Duncan, 181 Ill. 120, 54 N. E. 908 [*affirming* 79 Ill. App. 527].

5. Butler *v.* Howell, 15 Colo. 249, 25 Pac. 313; Helfrich *v.* Stem, 17 Pa. St. 143. *Compare* Flood *v.* Clemence, 106 Mass. 290.

6. Judge *v.* Vogel, 38 Mich. 569; Lamprey *v.* Donacour, 58 N. H. 376. But see Eherke *v.* Hecht, 96 Iowa 96, 64 N. W. 652.

To rebut an inference of fraud arising from the grantor's paying the taxes, the grantee may explain his permission of such taxing, as that it was induced by the grantor's representations. Woodman *v.* Clay, 59 N. H. 53.

Where a husband conveyed land to his wife by a warranty deed, his afterward rendering the land in his name for taxation is not evidence against her that the conveyance was in trust for his benefit, since what he might do or say as to her separate property without her authority could not prejudice her title. O'Neal *v.* Clymer, (Tex. Civ. App. 1900) 61 S. W. 545.

7. Osborn *v.* Ratliff, 53 Iowa 748, 5 N. W. 746.

8. Shober *v.* Wheeler, 113 N. C. 370, 18 S. E. 328, holding that a tax return made by the grantee in which he did not include the property conveyed as his was properly admitted.

9. Asbill *v.* Standley, (Cal. 1892) 31 Pac. 738, stock.

10. Traverso *v.* Tate, 82 Cal. 170, 22 Pac. 1082, holding that the payment of taxes on land by a cotenant in possession is not admissible as evidence of the *bona fides* of a deed from his cotenant for the other half.

demanded in criminal cases not being required.[11] Fraud, however, must be proved as an affirmative fact, and the proof must be of such a positive and definite character as to convince the mind of the court, for it is never presumed, and if the facts shown all comport as well with honesty as with fraud, the transaction should be upheld.[12]

11. *Alabama.*— Skipper *v.* Reeves, 93 Ala. 332, 8 So. 804.

Illinois.— American Hoist, etc., Co. *v.* Hall, 208 Ill. 597, 70 N. E. 581 [*affirming* 110 Ill. App. 463]; Schroeder *v.* Walsh, 120 Ill. 403, 11 N. E. 70 [*affirming* 16 Ill. App. 509]; Carter *v.* Gunnels, 67 Ill. 270.

Indiana.— Laird *v.* Davidson, 124 Ind. 412, 25 N. E. 7 [*distinguishing* Rowell *v.* Klein, 44 Ind. 290, 15 Am. Rep. 235].

Iowa.— Doxsee *v.* Waddick, 122 Iowa 599, 98 N. W. 483; Russell *v.* Huiskamp, 77 Iowa 727, 42 N. W. 525; McCreary *v.* Skinner, 75 Iowa 411, 39 N. W. 674; Bixby *v.* Carskaddon, 55 Iowa 533, 8 N. W. 354.

Louisiana.— Bridgeford *v.* Simonds, 18 La. Ann. 121.

Michigan.— Gumberg *v.* Treusch, 103 Mich. 543, 61 N. W. 872; Hough *v.* Dickinson, 58 Mich. 89, 24 N. W. 809.

Missouri.— Boon County Nat. Bank *v.* Newkirk, 144 Mo. 472, 46 S. W. 606.

New York.— Saugerties Bank *v.* Mack, 35 N. Y. App. Div. 398, 54 N. Y. Suppl. 950; Howe *v.* Sommers, 22 N. Y. App. Div. 417, 48 N. Y. Suppl. 162.

Ohio.— Dougherty *v.* Schlotman, 1 Cinc. Super. Ct. 292.

Pennsylvania.— Meyers *v.* Meyers, 24 Pa. Super. Ct. 603. See also Rine *v.* Hall, 187 Pa. St. 264, 40 Atl. 1088.

South Carolina.— McGee *v.* Wells, 52 S. C. 472, 30 S. E. 602.

Texas.— Schmick *v.* Noel, 72 Tex. 1, 8 S. W. 83.

Washington.—Adams *v.* Dempsey, 22 Wash. 284, 60 Pac. 649, 79 Am. St. Rep. 933.

West Virginia.— Knight *v.* Nease, 53 W. Va. 50, 44 S. E. 414; Vandervort *v.* Fouse, 52 W. Va. 214, 43 S. E. 112.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 867.

Evidence sufficient.— In the following cases the evidence was held to be sufficient to warrant the setting aside of the conveyance on the ground of fraud:

Alabama.— Russell *v.* Davis, 133 Ala. 647, 31 So. 514, 91 Am. St. Rep. 56.

Georgia.— Banks *v.* McCandless, 119 Ga. 793, 47 S. E. 332.

Illinois.— Highley *v.* American Exch. Nat. Bank, 86 Ill. App. 48 [*affirmed* in 185 Ill. 565, 57 N. E. 436].

Indian Territory.— Foster *v.* McAlester, 3 Indian Terr. 307, 58 S. W. 679.

Iowa.— Yetzer *v.* Yetzer, 112 Iowa 162, 83 N. W. 889.

Michigan.— Adams *v.* Bruske, 135 Mich. 339, 97 N. W. 766.

Minnesota.— McCarvel *v.* Wood, 68 Minn. 104, 70 N. W. 871.

Missouri.— Swinford *v.* Teegarden, 159 Mo. 635, 60 S. W. 1089.

Nebraska.— David Adler, etc., Clothing Co. *v.* Hellman, 55 Nebr. 266, 75 N. W. 877.

New Jersey.— Ruppert *v.* Hurley, (Ch. 1900) 47 Atl. 280.

Texas.— Bruce *v.* Koch, (Civ. App. 1900) 58 S. W. 189.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 867.

Evidence insufficient.— In the following cases the evidence was held insufficient to establish fraud in the conveyance:

Alabama.— Steiner *v.* Atlanta Woodenware Co., 127 Ala. 261, 28 So. 527.

Illinois.— Merchants' Nat. Bank *v.* Lyon, 185 Ill. 343, 56 N. E. 1083 [*affirming* 82 Ill. App. 598]; Dobson *v.* More, 171 Ill. 271, 49 N. E. 490 [*affirming* 70 Ill. App. 89].

Kansas.— Bliss *v.* Couch, 46 Kan. 400, 26 Pac. 706.

Missouri.— Holloway *v.* Holloway, 103 Mo. 274, 15 S. W. 536.

Nebraska.— Greenwood *v.* Ingersoll, 61 Nebr. 785, 86 N. W. 476.

New York.— Castleman *v.* Mayer, 55 N. Y. App. Div. 515, 67 N. Y. Suppl. 229.

Oregon.— Sauers *v.* Beechler, 38 Oreg. 228, 63 Pac. 195.

Tennessee.— Walters *v.* Brown, (Ch. App. 1898) 46 S. W. 777.

Washington.— Troy *v.* Bickford, 24 Wash. 159, 64 Pac. 152.

Canada.— Merchants Bank *v.* Clarke, 18 Grant Ch. (U. C.) 594; Atty.-Gen. *v.* Harmer, 16 Grant Ch. (U. C.) 533; Morrison *v.* Steer, 32 U. C. Q. B. 182.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 867.

12. *Alabama.*— Allen *v.* Riddle, (1904) 37 So. 680.

Illinois.—Eickstaedt *v.* Moses, 105 Ill. App. 634.

Indiana.— American Varnish Co. *v.* Reed, 154 Ind. 88, 55 N. E. 224.

Iowa.— Shumaker *v.* Davidson, 116 Iowa 569, 87 N. W. 441; Schofield *v.* Blind, 33 Iowa 175.

Kentucky.— Combs *v.* Davis, 69 S. W. 765, 24 Ky. L. Rep. 648.

Massachusetts.— Hatch *v.* Bayley, 12 Cush. 27.

Minnesota.— Aretz *v.* Kloos, 89 Minn. 432, 95 N. W. 216, 769.

Mississippi.— McInnis *v.* Wiscassett Mills, 78 Miss. 52, 28 So. 725.

Missouri.— Farmers' Bank *v.* Worthington, 145 Mo. 91, 46 S. W. 745; Robinson *v.* Dryden, 118 Mo. 534, 24 S. W. 448; Chapman *v.* McIlwrath, 77 Mo. 38, 46 Am. Rep. 1; Dallam *v.* Renshaw, 26 Mo. 533.

New York.— Huber *v.* Wiman, 18 Misc. 107, 41 N. Y. Suppl. 834.

Virginia.— See Taylor *v.* Mallory, 96 Va. 18, 30 S. E. 472.

b. Circumstantial Evidence. Fraud can rarely be proved by direct evidence. It is most frequently to be deduced from circumstances surrounding the transaction and from the acts of the parties.[13] Thus, where the general bearing of the evidence indicates fraud, although no one distinct fact proves it, a finding that a conveyance was made with intent to defraud the creditors will be sustained.[14] The general rule, however, is that proof of the fraud should be clear and satisfactory;[15] and its existence must not be deduced from mere suspicion, but from evidence sufficient to overcome the presumption of fair dealing.[16]

Washington.— Rohrer *v.* Snyder, 29 Wash. 199, 69 Pac. 748.

Wisconsin.— Shepard *v.* Ostertag, 106 Wis. 82, 81 N. W. 1103.

United States.— Foster *v.* McAlester, 114 Fed. 145, 52 C. C. A. 107.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 870.

13. *Alabama.*— Putney *v.* Wolberg, 127 Ala. 124, 28 So. 741; Skipper *v.* Reeves, 93 Ala. 332, 8 So. 804; Pickett *v.* Pipkin, 64 Ala. 520.

Delaware.— Brown *v.* Dickerson, 2 Marv. 119, 42 Atl. 421.

District of Columbia.— Droop *v.* Ridenour, 11 App. Cas. 224; McDaniel *v.* Parish, 4 App. Cas. 213.

Georgia.— Colquitt *v.* Thomas, 8 Ga. 258.

Illinois.— Bowman *v.* Ash, 143 Ill. 649, 32 N. E. 486; Strauss *v.* Kranert, 56 Ill. 254.

Indiana.—Heaton *v.* Shanklin, 115 Ind. 595, 18 N. E. 172; Wright *v.* Nipple, 92 Ind. 310; Farmer *v.* Calvert, 44 Ind. 209; De Ruiter *v.* De Ruiter, 28 Ind. App. 9, 62 N. E. 100, 91 Am. St. Rep. 107.

Iowa.— Smyth *v.* Hall, 126 Iowa 627, 102 N. W. 520; Turner *v.* Younker, 76 Iowa 258, 41 N. W. 10; McCreary *v.* Skinner, 75 Iowa 411, 39 N. W. 674.

Kentucky.— Bradley *v.* Buford, Ky. Dec. 12, 2 Am. Dec. 703.

Louisiana.— Dickson's Succession, 37 La. Ann. 795; King *v.* Atkins, 33 La. Ann. 1057; Fass *v.* Rice, 30 La. Ann. 1278.

Maryland.— Baltimore High Grade Brick Co. *v.* Amos, 95 Md. 571, 52 Atl. 582, 53 Atl. 148.

Mississippi.— Pope *v.* Andrews, Sm. & M. Ch. 135.

Missouri.— Farmers' Bank *v.* Worthington, 145 Mo. 91, 46 S. W. 745; Gentry *v.* Field, 143 Mo. 399, 45 S. W. 286; New York Store Mercantile Co. *v.* West, 107 Mo. App. 254, 80 S. W. 923; Renney *v.* Williams, 89 Mo. 139, 1 S. W. 227; Burgert *v.* Borchert, 59 Mo. 80; Price *v.* Lederer, 33 Mo. App. 426.

New Hampshire.— McConihe *v.* Sawyer, 12 N. H. 396.

New York.— Ham *v.* Gilmore, 7 Misc. 596, 28 N. Y. Suppl. 126.

Pennsylvania.— Kaine *v.* Weigley, 22 Pa. St. 179.

South Carolina.— McGee *v.* Wells, 52 S. C. 472, 30 S. E. 602; Hudnal *v.* Wilder, 4 McCord 294, 17 Am. Dec. 744.

Texas.— Burch *v.* Smith, 15 Tex. 219, 65 Am. Dec. 154; Briscoe *v.* Bronaugh, 1 Tex. 326, 46 Am. Dec. 108; Jack *v.* El Paso Fuel Co., (Civ. App. 1896) 38 S. W. 1139.

West Virginia.—Knight *v.* Nease, 53 W. Va. 50, 44 S. E. 414; Vandervort *v.* Fouse, 52 W. Va. 214, 43 S. E. 112; Stauffer *v.* Kennedy, 47 W. Va. 714, 35 S. E. 892; Hutchinson *v.* Boltz, 35 W. Va. 754, 14 S. E. 267; Bartlett *v.* Cleavenger, 35 W. Va. 719, 14 S. E. 273; Himan *v.* Thorn, 32 W. Va. 507, 9 S. E. 930; Burt *v.* Timmons, 29 W. Va. 441, 2 S. E. 780, 6 Am. St. Rep. 664; Livesay *v.* Beard, 22 W. Va. 585; Goshorn *v.* Snodgrass, 17 W. Va. 717; Martin *v.* Rexroad, 15 W. Va. 512; Hunter *v.* Hunter, 10 W. Va. 321; Lockhard *v.* Beckley, 10 W. Va. 87.

Wisconsin.— Kaufer *v.* Walsh, 88 Wis. 63, 59 N. W. 460; Breslauer *v.* Geilfuss, 65 Wis. 377, 27 N. W. 47.

United States.— Kempner *v.* Churchill, 8 Wall. 362, 19 L. ed. 461; Thompson *v.* Crane, 73 Fed. 327.

England.— Thompson *v.* Webster, 28 L. J. Ch. 700, 7 Wkly. Rep. 648 [*affirming* 5 Jur. N. S. 668].

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 870.

14. Harwick *v.* Weddington, 73 Iowa 300, 24 N. W. 868; McDaniels *v.* Perkins, 64 Iowa 174, 19 N. W. 902; Lehmer *v.* Herr, 1 Duv. (Ky.) 360.

15. *Alabama.*—Chamberlain *v.* Dorrance, 69 Ala. 40 [*citing* Steele *v.* Kinkle, 3 Ala. 352].

Arizona.— Costello *v.* Friedman, (1903) 71 Pac. 935.

Illinois.— Schroeder *v.* Walsh, 120 Ill. 403, 11 N. E. 70.

Louisiana.— Summers *v.* Clarke, 32 La. Ann. 670.

New York.— Henry *v.* Henry, 8 Barb. 588; Hildreth *v.* Sands, 2 Johns. Ch. 35.

Utah.— Wilson *v.* Cunningham, 24 Utah 167, 67 Pac. 118.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 870.

16. *Alabama.*— Smith *v.* Collins, 94 Ala. 394, 10 So. 334.

District of Columbia.— McDaniel *v.* Parish, 4 App. Cas. 213.

Iowa.— Smyth *v.* Hall, 126 Iowa 627, 102 N. W. 520.

Kentucky.— Thomas *v.* Whitaker, 7 Ky. L. Rep. 43; Walker *v.* Smith, 6 Ky. L. Rep. 457.

Mississippi.— White *v.* Trotter, 14 Sm. & M. 30, 53 Am. Dec. 112.

Missouri.— Farmers' Bank *v.* Worthington, 145 Mo. 91, 46 S. W. 745; Waddington *v.* Loker, 55 Mo. 132, 100 Am. Dec. 260; Ridge *v.* Greenwell, 53 Mo. App. 479.

New Hampshire.—Jones *v.* Emery, 40 N. H. 348.

c. Evidence of Particular Facts, Transactions, and Instruments — (I) *STATUS OF PLAINTIFF AS CREDITOR* — (A) *In General.* Where a party seeks to set aside a conveyance alleged to have been made in fraud of creditors, it is necessary for such claimant to present clear and indisputable proof of the good faith of his claim, in order to enable him to successfully attack such conveyance.[17] In the absence of proof of a judgment,[18] or of the existence of a debt for which judgment is demanded, evidence of an attachment suit and proceedings therein is insufficient to show claimant's right to attack a conveyance alleged to be in fraud of creditors.[19]

(B) *Adjudication of Creditor's Claim.* The general rule is that a judgment or decree is only *prima facie* evidence of the validity of the claimant's debt;[20] and where the conveyance assailed antedates the judgment, the general rule is that such judgment is not even *prima facie* evidence of the debt antecedent to such conveyance.[21]

(II) *PLEADINGS.* Where the complainant sets down the cause for a hearing on bill and answer, or on bill, answer, and exhibits, he thereby admits that every well pleaded averment of the answer, whether responsive to the allegations of the bill or in avoidance, is true; and, unless the rule is changed by statute, where

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 870.

17. *Connecticut.*—Lesser *v.* Brown, 75 Conn. 491, 54 Atl. 205, where the evidence was held sufficient to show that the indebtedness to plaintiff existed prior to the fraudulent conveyance.

Illinois.— Gibson *v.* Gibson, 82 Ill. 61.

Iowa.— State Ins. Co. *v.* Prestage, 116 Iowa 466, 90 N. W. 62.

Mississippi.— Hughston *v.* Cornish, 59 Miss. 372.

Missouri.— Hiney *v.* Thomas, 36 Mo. 377.

Montana.— See Shepherd *v.* Butte First Nat. Bank, 16 Mont. 24, 40 Pac. 67.

New Jersey.— Perrine *v.* Perrine, (Ch. 1901) 50 Atl. 694, where proof of the existence of a judgment which was the basis of the suit to set aside the fraudulent conveyance was held to be sufficient.

New York.— Wright *v.* Douglass, 2 N. Y. 373 [*reversing* 3 Barb. 554]; O'Connor *v.* Docen, 50 N. Y. App. Div. 610, 64 N. Y. Suppl. 206. See Meyer *v.* Mohr, 1 Rob. 333.

Texas.— Lewis *v.* Castleman, 27 Tex. 407.

Virginia.— Waller *v.* Johnson, 82 Va. 966, 7 S. E. 382.

West Virginia.—Adams *v.* Irwin, 44 W. Va. 740, 30 S. E. 59.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 874.

18. Chatterton *v.* Mason, 86 Md. 236, 37 Atl. 960; Wright *v.* Crockett, 7 Mo. 125.

19. *California.*— Brown *v.* Kline, 109 Cal. 156, 41 Pac. 862; Banning *v.* Marleau, 101 Cal. 238, 35 Pac. 772; Sexey *v.* Adkinson, 34 Cal. 346, 91 Am. Dec. 698 [*cited* with approval].

Illinois.— Currier *v.* Ford, 26 Ill. 488.

Kansas.— Morris *v.* Trumbo, 1 Kan. App. 150, 41 Pac. 974.

Kentucky.— Sharp *v.* Wickliffe, 3 Litt. 10, 14 Am. Dec. 37, holding that copies of the execution are not sufficient evidence of the claimant being creditor, and that he must produce also a copy of the judgment.

Massachusetts.— Damon *v.* Bryant, 2 Pick. 411.

Wisconsin.— Jones *v.* Lake, 2 Wis. 210.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 874.

20. *Alabama.*— Lawson *v.* Alabama Warehouse Co., 73 Ala. 289.

Arkansas.— Clark *v.* Anthony, 31 Ark. 546.

California.— Hills *v.* Sherwood, 48 Cal. 386.

Illinois.— Weightman *v.* Hatch, 17 Ill. 281.

Kentucky.— See Alexander *v.* Quigley, 2 Duv. 399; Heiatt *v.* Barnes, 5 Dana 219.

Louisiana.— Dumas *v.* Lefebvre, 10 Rob. 399; Lopez *v.* Bergel, 12 La. 197. See Fink *v.* Martin, 1 La. Ann. 117.

Maine.— Miller *v.* Miller, 23 Me. 22, 39 Am. Dec. 597.

Massachusetts.— Inman *v.* Mead, 97 Mass. 310; Reed *v.* Davis, 5 Pick. 388.

New York.— See Dewey *v.* Moyer, 9 Hun 473; New York, etc., R. Co. *v.* Kyle, 5 Bosw. 587.

North Carolina.— Hafner *v.* Irwin, 26 N. C. 529.

Vermont.— Church *v.* Chapin, 35 Vt. 223.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 875.

Contra.— Faber *v.* Matz, 86 Wis. 370, 67 N. W. 39, holding that a judgment on a debt is conclusive against the debtor in an action by the judgment creditor to set aside a conveyance by the debtor as fraudulent.

21. Lawson *v.* Alabama Warehouse Co., 73 Ala. 289; Means *v.* Hicks, 65 Ala. 241; Marshall *v.* Croom, 60 Ala. 121; Troy *v.* Smith, 33 Ala. 469; Sweet *v.* Dean, 43 Ill. App. 650; Bloom *v.* Moy, 43 Minn. 397, 45 N. W. 715, 19 Am. St. Rep. 243; Hartman *v.* Weiland, 36 Minn. 223, 30 N. W. 815; Olmsted County *v.* Barbour, 31 Minn. 256, 17 N. W. 473, 944; Braley *v.* Byrnes, 20 Minn. 435; Bruggerman *v.* Hoerr, 7 Minn. 337, 82 Am. Dec. 97; Warner *v.* Percy, 22 Vt. 155. See Eddy *v.* Baldwin, 23 Mo. 588.

the answers are responsive to the charges contained in the bill or complaint, they must be taken to be true, unless proven to be false by the evidence.[22]

d. Nature and Circumstances of Transaction — (i) *General Rules.* The fraudulency of a conveyance as to creditors may be established by various circumstances.[23] If for example a debtor whose conveyance is sought to be set

22. *Alabama.*— Pattison *v.* Bragg, 95 Ala. 55, 10 So. 257; Thompkins *v.* Nichols, 53 Ala. 197; Carter *v.* Happel, 49 Ala. 539; Smith *v.* Rogers, 1 Stew. & P. 317.

Illinois.— See also Greenman *v.* Greenman, 107 Ill. 404.

Indiana.— See Shirley *v.* Shields, 8 Blackf. 273, holding that a decree for complainant on no other evidence than the grantor's answer was erroneous.

Iowa.— Culbertson *v.* Luckey, 13 Iowa 12. See Vandall *v.* Vandall, 13 Iowa 247, where it was held that the facts tended to raise such a presumption of fraud as to overcome the answer of defendants.

Kentucky.— Hardin *v.* Baird, Litt. Sel. Cas. 304. See Bradley *v.* Buford, Ky. Dec. 12, 2 Am. Dec. 703.

Maine.— Hartshorn *v.* Eames, 31 Me. 93; Page *v.* Smith, 25 Me. 256.

Mississippi.— Berryman *v.* Sullivan, 13 Sm. & M. 65.

New Jersey.— Evans *v.* Evans, (Ch. 1904) 59 Atl. 564 (where the evidence was considered and held insufficient to overcome the direct and positive sworn answer of defendants in denial of charges of fraud in obtaining the execution of the deed); Stoutenbourgh *v.* Konkle, 15 N. J. Eq. 33.

New York.— Cunningham *v.* Freeborn, 1 Edw. 256, holding, however, that a positive denial of fraud in the answer to a bill to set aside an assignment as fraudulent is not conclusive at a hearing upon the bill and answer, if it plainly appears upon the face of the assignment that it was intended to hinder and delay the creditors of the assignor.

North Carolina.— See Hawkins *v.* Alston, 39 N. C. 137.

Tennessee.—See English *v.* King, 10 Heisk. 666, holding that a deed may be decreed fraudulent over the denial of the maker in his sworn answer.

Virginia.— Keagy *v.* Trout, 85 Va. 390, 7 S. E. 329.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 873. See, generally, Equity, 16 Cyc. 382.

23. *Alabama.*— Murphy *v.* Green, 128 Ala. 486, 30 So. 643.

Georgia.— Banks *v.* McCandless, 119 Ga. 793, 47 S. E. 332; Bigby *v.* Warnock, 115 Ga. 385, 41 S. E. 622, 57 L. R. A. 754; Kea *v.* Epstein, 87 Ga. 115, 13 S. E. 312.

Illinois.—Whitley *v.* Scroggin, 95 Ill. App. 530.

Indiana.— Fitch *v.* Rising Sun First Nat. Bank, 99 Ind. 443.

Iowa.— Jordan *v.* Crickett, 123 Iowa 576, 99 N. W. 163.

Kansas.— Wing *v.* Miller, 40 Kan. 511, 20 Pac. 119.

Kentucky.— Harrison *v.* Calvert, 64 S. W. 521, 23 Ky. L. Rep. 890.

Maryland.— Wise *v.* Pfaff, 98 Md. 576, 56 Atl. 815, holding that where, in a suit to set aside a deed as fraudulent, complainant proved the foreclosure of a mortgage against the grantor, and the entry of a deficiency decree, and a conveyance of the land in question shortly before the foreclosure, complainant had established a *prima facie* case.

Michigan.— Desbecker *v.* Mendelson, 117 Mich. 293, 75 N. W. 621.

Minnesota.— Solberg *v.* Peterson, 27 Minn. 431, 8 N. W. 144.

Missouri.— Bradshaw *v.* Halpin, 180 Mo. 666, 79 S. W. 685; Snell *v.* Harrison, 104 Mo. 158, 16 S. W. 152; Van Raalte *v.* Harrington, 101 Mo. 602, 14 S. W. 710, 20 Am. St. Rep. 626, 11 L. R. A. 424; Hungerford *v.* Greengard, 95 Mo. App. 653, 69 S. W. 602; Dillin *v.* Kincaid, 70 Mo. App. 670; Hamill *v.* England, 57 Mo. App. 106.

Nebraska.— Millard *v.* Parsell, 57 Nebr. 178, 77 N. W. 390; Lewis *v.* Holdrege, 55 Nebr. 173, 75 N. W. 549; Bennett *v.* Warner, 53 Nebr. 780, 74 N. W. 261.

New Jersey.— Levy *v.* Levy, (Ch. 1904) 57 Atl. 1011; Union Square Nat. Bank *v.* Simmons, (Ch. 1899) 42 Atl. 489.

New York.— Robinson *v.* Hawley, 45 N. Y. App. Div. 287, 61 N. Y. Suppl. 138; Iselin *v.* Goldstein, 35 Misc. 489, 71 N. Y. Suppl. 1069; Watson *v.* Dealy, 26 Misc. 20, 55 N. Y. Suppl. 563; Home Bank *v.* J. B. Brewster, 17 Misc. 442, 41 N. Y. Suppl. 203; Angrave *v.* Stone, 25 How. Pr. 167; Hendricks *v.* Robinson, 2 Johns. Ch. 283 [*affirmed* in 17 Johns. 438].

Oregon.— Craig *v.* California Vineyard Co., (1896) 46 Pac. 421.

Pennsylvania.— De Wolf *v.* McNabb, 1 Pa. Cas. 156, 1 Atl. 440.

South Carolina.— Anonymous, 2 Desauss. Eq. 304.

Tennessee.— Berry *v.* Sofge, (Ch. App. 1897) 46 S. W. 456.

Texas.— Hogwood *v.* Brown, (Civ. App. 1898) 45 S. W. 862; Frost *v.* Mason, 17 Tex. Civ. App. 465, 44 S. W. 53.

West Virginia.— Livesay *v.* Beard, 22 W. Va. 585.

Wisconsin.— Sheboygan Boot, etc., Co. *v.* Miller, 99 Wis. 527, 75 N. W. 87.

United States.— McDonald *v.* Kansas City First Nat. Bank, 116 Fed. 129, 53 C. C. A. 533.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 876 *et seq.*

Assignment of book-accounts.— An assignment of a retail firm's ledger and each and every account therein contained, together with the blotters and journals and other books of account of the firm, in connection

aside as fraudulent is a trader, and the conveyance embraces all of his stock in

with testimony that such books were the books of account that the firm formerly had in their business, is sufficient evidence to warrant a finding that such assignment included all the account-books of the firm, and the transfer is *prima facie* fraudulent. Ballou *v.* Andrews Banking Co., 128 Cal. 562, 61 Pac. 102.

Assignment of wages.—Where the evidence shows that the assignor was insolvent and in debt to different persons, who had unsuccessfully tried to garnish his wages, of which the assignee had notice, and that the assignor had been in the habit of "selling his time" a month in advance to the assignee, who advanced to him money during the following month about equal to the wages earned, and where there is no evidence to show the purpose of such sale of time or that there was anything in the circumstances of the assignor requiring him to obtain such advances, the finding of the court that such assignment was made to defraud creditors will be sustained. O'Connor *v.* Meehan, 47 Minn. 247, 49 N. W. 982.

Character of evidence.— If the evidence in support of the transaction is vague, confused, inconsistent, contradictory, or evasive, it is entitled to little if any weight.

Alabama.— Shepherd *v.* Reeves, 114 Ala. 281, 21 So. 956.

Arkansas.— Slayden-Kirksey Woolen Mills *v.* Anderson, 66 Ark. 419, 50 S. W. 994.

Colorado.— Kelly *v.* Atkins, 14 Colo. App. 208, 59 Pac. 841.

Iowa.— Gaar *v.* Stolte, 115 Iowa 139, 88 N. W. 334; Romans *v.* Maddux, 77 Iowa 203, 41 N. W. 763.

Kentucky.— Perkins *v.* Mann, 41 S. W. 1, 19 Ky. L. Rep. 575.

Missouri.— Wilcoxson *v.* Darr, 139 Mo. 660, 41 S. W. 227; Lohmann *v.* Stocke, 94 Mo. 672, 8 S. W. 9; Hamill *v.* England, 57 Mo. App. 106.

Nebraska.— Lewis *v.* Holdrege, 55 Nebr. 173, 75 N. W. 549.

Nevada.— Tegnini *v.* Kyle, 15 Nev. 464.

Tennessee.— Byler *v.* Adams, (Ch. App. 1901) 62 S. W. 21.

Washington.— Budlong *v.* Budlong, 32 Wash. 672, 73 Pac. 783; Bates *v.* Drake, 28 Wash. 447, 68 Pac. 961.

Wyoming.— Stirling *v.* Wagner, 3 Wyo. 5, 31 Pac. 1032.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 876 *et seq.*

Destruction, fabrication, suppression, or non-production of evidence is a fact to be taken into consideration against the party guilty thereof in weighing the evidence.

Alabama.— Martin *v.* Berry, 116 Ala. 233, 22 So. 493. See, however, Elyton Land Co. *v.* Vance, 119 Ala. 315, 24 So. 719; Morrow *v.* Campbell, 118 Ala. 330, 24 So. 852.

Iowa.— Corn Exch. Bank *v.* Applegate, 91 Iowa 411, 59 N. W. 268.

Kentucky.— Pullins *v.* Pullins, 62 S. W. 865, 23 Ky. L. Rep. 333.

Louisiana.— Goothye *v.* Delatour, 111 La. 766, 35 So. 896; Pruyn *v.* Young, 51 La. Ann. 320, 25 So. 125.

Massachusetts.— Smith *v.* Whitman, 6 Allen 562.

Michigan.— Rosenthal *v.* Bishop, 98 Mich. 527, 57 N. W. 573; People *v.* Rice, 79 Mich. 354, 44 N. W. 790.

Missouri.— Wilcoxson *v.* Darr, 139 Mo. 660, 41 S. W. 227.

Nebraska.— Millard *v.* Parsell, 57 Nebr. 178, 77 N. W. 390.

Nevada.— Tognini *v.* Kyle, 15 Nev. 464.

New Jersey.— Gardner *v.* Kleinke, 40 N. J. Eq. 90, 18 Atl. 457.

Oregon.— Walker *v.* Harold, 44 Oreg. 205, 74 Pac. 705.

Pennsylvania.— Lesser *v.* Driesen, 2 Lack. Leg. N. 343.

Tennessee.— Shapira *v.* Paletz, (Ch. App. 1900) 59 S. W. 774; Berry *v.* Sofge, (Ch. App. 1897) 46 S. W. 456.

Washington.— Banner *v.* May, 2 Wash. 221, 26 Pac. 248. See, however, Reckers *v.* Allmond, 29 Wash. 238, 69 Pac. 734.

West Virginia.— Martin *v.* Rexroad, 15 W. Va. 512.

Wyoming.— Stirling *v.* Wagner, 3 Wyo. 5, 31 Pac. 1032.

United States.— McRea *v.* Alabama Branch Bank, 19 How. 376, 15 L. ed. 688.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 876 *et seq.* See *supra*, XIV, K, 1, n.

Failure of the transferee to include the property in his subsequent assessment lists is a suspicious circumstance. Wilcoxson *v.* Darr, 139 Mo. 660, 41 S. W. 227; Boyer *v.* Tucker, 70 Mo. 457; Anonymous, 2 Desauss. Eq. (S. C.) 304.

Failure to make inventory.— The fact that the property was not inventoried, measured, or counted before the transfer is a suspicious circumstance.

Indiana.— Seavey *v.* Walker, 108 Ind. 78, 9 N. E. 347; Fitch *v.* Rising Sun First Nat. Bank, 99 Ind. 443.

Iowa.— Redhead *v.* Pratt, 72 Iowa 99, 33 N. W. 382.

Kansas.— Roberts *v.* Radcliff, 35 Kan. 502, 11 Pac. 406.

Tennessee.— Phillips-Buttorff Mfg. Co. *v.* Williams, (1900) 63 S. W. 185.

Texas.— Blossman *v.* Friske, 33 Tex. Civ. App. 191, 76 S. W. 73.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 876.

Intimacy of parties.— The fact that the parties to the transfer are on terms of intimacy is a fact to be considered in weighing the evidence. Blaut *v.* Gabler, 77 N. Y. 461 [*affirming* 8 Daly 48]; Bardwell's Appeal, 1 Lanc. Bar (Pa.) Dec. 18, 1869. See also *supra*, XII.

Relationship of parties see *infra*, XIV, K, 3, d, (II).

Secrecy is a suspicious circumstance. Bush, etc., Co. *v.* Helbing, 134 Cal. 676, 66 Pac.

trade,[24] or if a debtor, on conveying property, reserves some secret benefit therein,[25] or retains possession or control of the property,[26] and treats it as

967; Shelton *v.* Blake, 115 Ill. 275, 6 N. E. 409. See *supra*, V, B, 5.

Undue haste in closing the transaction is a suspicious circumstance. Roberts *v.* Radcliff, 35 Kan. 502, 11 Pac. 406; Gage *v.* Trawick, 94 Mo. App. 307, 68 S. W. 85; Kempner *v.* Churchill, 8 Wall. (U. S.) 362, 19 L. ed. 461. *Compare*, however, Magruder *v.* Clayton, 29 S. C. 407, 7 S. E. 844. See also *supra*, V, B, 5.

24. *Iowa.*— Redhead *v.* Pratt, 72 Iowa 99, 33 N. W. 382.

Kansas.— Elerck *v.* Braden, 38 Kan. 83, 15 Pac. 887.

Missouri.— Gage *v.* Trawick, 94 Mo. App. 307, 68 S. W. 85.

Pennsylvania.— Lesser *v.* Driesen, 2 Lanc. Leg. N. 343.

Texas.— Blossman *v.* Friske, 33 Tex. Civ. App. 191, 76 S. W. 73.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 876 *et seq.*

Want of notice.— Wis. Rev. St. (1898) § 2317*b*, provides that "the sale of any portion of a stock of merchandise otherwise than in the ordinary course of trade, in the regular and usual prosecution of the seller's business, or the sale of an entire stock of merchandise in bulk, shall be presumed to be fraudulent and void as against the creditors of the seller, unless the seller and purchaser at least five days before the sale notify, or cause to be notified, personally or by registered mail, each of the seller's creditors whom the purchaser has knowledge of, or can, with the exercise of reasonable diligence, acquire knowledge, of said proposed sale." It was held that want of notice to the seller's creditors is only presumptive, and not conclusive evidence of fraud. Fisher *v.* Herrmann, 118 Wis. 424, 427, 95 N. W. 392.

25. Sparks *v.* Mack, 31 Ark. 666; Elerick *v.* Braden, 38 Kan. 83, 15 Pac. 887; Bardwell's Appeal, 1 Lanc. Bar (Pa.) Dec. 18, 1869. However, declarations of the grantor that he still owned the property are not in themselves sufficient to show fraud. Miller *v.* Rowan, 108 Ala. 598, 19 So. 9. And proof that the creditors secured by a deed of trust had purchased a lot of the debtor's personalty which had been sold under an execution, and afterward sold it back to him at cost and interest, and had taken the assignment of a prospective judgment, and out of it paid an execution against the debtor, and credited the balance on a debt he owed them, is insufficient to show a secret trust. Sawyer *v.* Bradshaw, 125 Ill. 440, 17 N. E. 812.

26. *Alabama.*—Mauldin *v.* Mitchell, 14 Ala. 814.

Arkansas.— Bryan-Brown Shoe Co. *v.* Block, 52 Ark. 458, 12 S. W. 1073; Sparks *v.* Mack, 31 Ark. 666.

Colorado.— La Fitte *v.* Rups, 13 Colo. 207, 22 Pac. 309; Vote *v.* Karrick, 13 Colo. App. 388, 58 Pac. 333.

Indiana.— Seavey *v.* Walker, 108 Ind. 78, 9 N. E. 347.

Iowa.— Thomas *v.* McDonald, 102 Iowa 564, 71 N. W. 572.

Kansas.— Elerick *v.* Braden, 38 Kan. 83, 15 Pac. 887; Roberts *v.* Radcliff, 35 Kan. 502, 11 Pac. 406.

Kentucky.— Charles *v.* Matney, 71 S. W. 511, 24 Ky. L. Rep. 1384. See, however, Springfield First Nat. Bank *v.* Lancaster, 14 S. W. 536, 14 Ky. L. Rep. 541.

Louisiana.— Pruyn *v.* Young, 51 La. Ann. 320, 25 So. 125; Nichols *v.* Botts, 6 La. Ann. 437.

Maine.— Rollins *v.* Mooers, 25 Me. 192.

Michigan.— People *v.* Rice, 79 Mich. 354, 44 N. W. 790.

Minnesota.— Ladd *v.* Newell, 34 Minn. 107, 24 N. W. 366.

Missouri.— Frank *v.* Reuter, 116 Mo. 517, 22 S. W. 812; Beyer *v.* Tucker, 70 Mo. 457.

Nebraska.— Steinkraus *v.* Kroth, 44 Nebr. 777, 62 N. W. 1110.

New Hampshire.— Seavy *v.* Dearborn, 19 N. H. 351, holding that if one who has purchased a stock of goods in a shop occupied by the seller permits the sign of the vendor to remain over the door, that fact is some evidence that the seller remained in possession after the sale, and is so far evidence of fraud; but it is one which admits of explanation. See *supra*, IX, B, 11.

New York.— Blaut *v.* Gabler, 77 N. Y. 461 [*affirming* 8 Daly 48]; MacDonald *v.* MacDonald, 57 Hun 594, 11 N. Y. Suppl. 248; Home Bank *v.* Brewster, 17 Misc. 442, 41 N. Y. Suppl. 203; Hildreth *v.* Sands, 2 Johns. Ch. 35.

Pennsylvania.— Fidelity Ins., etc., Co. *v.* Madden, 14 Montg. Co. L. Rep. 210; Bastian *v.* Dougherty, 3 Phila. 30.

Tennessee.— Berry *v.* Sofge, (Ch. App. 1897) 46 S. W. 456.

Texas.— Blossman *v.* Friske, 33 Tex. Civ. App. 191, 76 S. W. 73; Rives *v.* Stephens, (Civ. App. 1894) 28 S. W. 707.

Washington.— Keith *v.* Kreidel, 4 Wash. 544, 30 Pac. 638, 31 Pac. 333; Banner *v.* May, 2 Wash. 221, 26 Pac. 248.

West Virginia.— Hutchinson *v.* Boltz, 35 W. Va. 754, 14 S. E. 267; Himan *v.* Thorn, 32 W. Va. 507, 9 S. E. 930; Hunter *v.* Hunter, 10 W. Va. 321.

United States.— McRea *v.* Alabama Branch Bank, 19 How. 376, 15 L. ed. 688; Venable *v.* U. S. Bank, 2 Pet. 107, 7 L. ed. 364.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 885.

Compare, however, Griffis *v.* Griffis, 89 Ga. 142, 15 S. E. 23; Fuller *v.* Brewster, 53 Md. 358; Magruder *v.* Clayton, 29 S. C. 407, 7 S. E. 844; Fisher *v.* Herrmann, 118 Wis. 424, 95 N. W. 392; Norris *v.* Persons, 49 Wis. 101, 5 N. W. 224.

Evidence held to show a change of possession.— Butler *v.* Howell, 15 Colo. 249, 25 Pac.

his own,[27] or if the transferee fails to record the instrument of transfer or unreasonably delays in recording it,[28] these facts separately or in various combinations are sufficient to establish fraud and justify setting aside the conveyance and subjecting the property to the payment of claims against the debtor. However, the mere fact that the transaction in question is prejudicial to creditors does not defeat it. The evidence must be of such character and degree as will justify reasonable men in arriving at a conclusion that fraud existed; and evidence that merely casts a suspicion on the transaction is not sufficient to vitiate it.[29] The

313; Howe *v.* Keeler, 27 Conn. 538; Martin *v.* Duncan, 47 Ill. App. 84. And see Norse *v.* Velzy, 123 Mich. 532, 82 N. W. 225; Johnson *v.* Lucas, 103 Va. 36, 48 S. E. 497.

However, the absence of acts of ownership or possession by the seller is not conclusive of a change of ownership, where the property apparently remained after the sale under the control of the seller. Boothby *v.* Brown, 40 Iowa 104.

To rebut appearances of fraud the change of possession must be clearly established by direct evidence. Grove *v.* Gilbert, 5 Phila. (Pa.) 135.

Evidence held not to rebut the presumption of fraud arising from retention of possession. — *Alabama.*— Ward *v.* Shirley, 131 Ala. 568, 32 So. 489.

Arkansas.— Valley Distilling Co. *v.* Atkins, 50 Ark. 289, 7 S. W. 137.

Louisiana.— Emswiler *v.* Burham, 6 La. Ann. 710.

New Hampshire.— Cutting *v.* Jackson, 56 N. H. 253.

South Carolina.— Fulmore *v.* Burrows, 2 Rich. Eq. (S. C.) 95.

Wisconsin.—Mayer *v.* Webster, 18 Wis. 393. And see Wallace *v.* Nodine, 57 Hun (N. Y.) 239, 10 N. Y. Suppl. 919.

Presumption held to have been overcome.— Payne *v.* Buford, 106 La. 83, 30 So. 263; Cortland Wagon Co. *v.* Sharvy, 52 Minn. 216, 53 N. W. 1147. And see Houck *v.* Heinzman, 37 Nebr. 463, 55 N. W. 1062; Boltz *v.* Engelke, (Tex. Civ. App. 1897) 43 S. W. 47.

27. *Arkansas.*— May *v.* State Nat. Bank, 59 Ark. 614, 28 S. W. 431; Bryan-Brown Shoe Co. *v.* Block, 52 Ark. 458, 12 S. W. 1073.

Iowa.— Parlin, etc., Co. *v.* Daniels, (1900) 82 N. W. 1015; Maish *v.* Crangle, 80 Iowa 650, 45 N. W. 578; Romans *v.* Maddux, 77 Iowa 203, 41 N. W. 763.

Michigan.— Webber *v.* Jackson, 79 Mich. 175, 44 N. W. 591, 19 Am. St. Rep. 165.

Missouri.— Boyer *v.* Tucker, 70 Mo. 457.

South Carolina.— Anonymous, 2 Desauss. Eq. 304.

Texas.— Rives *v.* Stephens, (Civ. App. 1894) 28 S. W. 707.

Washington.— Banner *v.* May, 2 Wash. 221, 26 Pac. 248.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 885.

Compare, however, Martin *v.* Rexroad, 15 W. Va. 512.

28. *Alabama.*— Yeend *v.* Weeks, 104 Ala. 331, 16 So. 165, 53 Am. St. Rep. 50; Dickson *v.* McLarney, 97 Ala. 383, 12 So. 398.

California.— Bush, etc., Co. *v.* Helbing, 134 Cal. 676, 66 Pac. 967.

Georgia.— Kea *v.* Epstein, 87 Ga. 115, 13 S. E. 312.

Illinois.— Shelton *v.* Blake, 115 Ill. 275, 6 N. E. 409.

Indiana.— Seavey *v.* Walker, 108 Ind. 78, 9 N. E. 347.

Iowa.— Snouffer *v.* Kinley, 96 Iowa 102, 64 N. W. 770.

Missouri.— Snell *v.* Harrison, 104 Mo. 158, 16 S. W. 152.

Texas.— Tinsley *v.* Corbett, 27 Tex. Civ. App. 633, 66 S. W. 910.

Washington.— Keith *v.* Kreidel, 4 Wash. 544, 30 Pac. 638, 31 Pac. 333.

West Virginia.— Hunter *v.* Hunter, 10 W. Va. 321.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 886.

Compare, however, Otis *v.* Rose, 9 Colo. App. 449, 48 Pac. 967.

Intent.— Failure to record does not vitiate the transfer in the absence of a fraudulent intent. Mobile Sav. Bank *v.* McDonnell, 87 Ala. 736, 6 So. 703; Williams *v.* Simons, 70 Fed. 40, 16 C. C. A. 628.

Rebuttal of presumption.— The presumption of fraud arising from the failure to record a conveyance is rebutted by proof that the grantee was a non-resident and ignorant that the law required registration. Tryon *v.* Flournoy, 80 Ala. 321.

Failure to record judgment as evidencing fraud.— Walton *v.* Silverton First Nat. Bank, 13 Colo. 265, 22 Pac. 440, 16 Am. St. Rep. 200, 5 L. R. A. 765.

29. *Alabama.*— Birmingham First Nat. Bank *v.* Steele, 98 Ala. 85, 12 So. 783; Gary *v.* Colgin, 11 Ala. 514.

Arkansas.— Davis *v.* Arkansas F. Ins. Co., 63 Ark. 412, 39 S. W. 258.

Iowa.— Latrobe First Nat. Bank *v.* Garretson, 107 Iowa 196, 77 N. W. 856.

Maryland.— Fuller *v.* Brewster, 53 Md. 358.

Mississippi.— Frank *v.* Stephenson, (1897) 21 So. 778.

Missouri.— Burnham *v.* Boyd, 167 Mo. 185, 66 S. W. 1088; Meyer Bros. Drug Co. *v.* White, 165 Mo. 136, 65 S. W. 295; Parker *v.* Roberts, 116 Mo. 657, 22 S. W. 914; Webb *v.* Darby, 94 Mo. 621, 7 S. W. 577; Baker, etc., Co. *v.* Schneider, 85 Mo. App. 412; Mapes *v.* Burns, 72 Mo. App. 411.

Nebraska.— Farmers', etc., Nat. Bank *v.* Mosher, 63 Nebr. 130, 88 N. W. 552; Blair State Bank *v.* Bunn, 61 Nebr. 464, 85 N. W. 527; McNerney *v.* Hubbard, 3 Nebr. (Unoff.) 104, 91 N. W. 245, transfer by sureties.

New Jersey.— Emerald, etc., Brewing Co. *v.* Sutton, 68 N. J. L. 246, 56 Atl. 302, holding that the refusal of a debtor to apply the

weight and sufficiency of evidence to show that the debtor is conducting his business in the name of another,[30] or that he has bought property in the name of another,[31] for the purpose of hindering, delaying, or defrauding his creditors is governed by the rules applicable to evidence in civil actions generally, and the same is true of evidence offered to show the fraudulency of legal proceedings, sheriff's sales, mortgage sales, and the like.[32]

(II) *TRANSACTIONS BETWEEN RELATIVES.* The mere fact that the parties to

proceeds of a sale of his property to the satisfaction of a particular debt is not enough to justify the conclusion that the sale was made to defraud his creditors.

New York.— Truesdell *v.* Bourke, 145 N. Y. 612, 40 N. E. 83 [*reversing* 80 Hun 55, 29 N. Y. Suppl. 849]; King *v.* Simmons, 36 N. Y. App. Div. 623, 55 N. Y. Suppl. 173.

South Carolina.— Jerkowski *v.* Marco, 57 S. C. 402, 35 S. E. 750; Magruder *v.* Clayton, 29 S. C. 407, 7 S. E. 844. Sale held not to be fraudulent see Magruder *v.* Clayton, 29 S. C. 407, 7 S. E. 844.

Washington.—Reckers *v.* Allmond, 29 Wash. 238, 69 Pac. 734; Straw-Ellsworth Mfg. Co. *v.* Cain, 20 Wash. 351, 55 Pac. 321; Manhattan Trust Co. *v.* Seattle Coal, etc., Co., 19 Wash. 493, 53 Pac. 951.

Wisconsin.— Norris *v.* Persons, 49 Wis. 101, 5 N. W. 224.

United States.— Gottlieb *v.* Thatcher, 151 U. S. 271, 14 S. Ct. 319, 38 L. ed. 157 (holding that the fact that the debtor strongly disliked the creditor does not show fraud); McCartney *v.* Earle, 115 Fed. 462, 53 C. C. A. 392 [*affirming* 112 Fed. 372]; Edward P. Allis Co. *v.* Standard Nat. Bank, 110 Fed. 47; Neal *v.* Foster, 36 Fed. 29 (holding that the fact that the debtor intended to reacquire the property conveyed does not show fraud).

England.— Marlow *v.* Orgill, 8 Jur. N. S. 829 [*affirming* 6 L. T. Rep. N. S. 854].

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 876 *et seq.*

Absence of motive for disguise as a weighty circumstance against simulation. Smith *v.* Hall, 44 S. W. 125, 19 Ky. L. Rep. 1662; Todd *v.* Larkin, 38 La. Ann. 672.

The fact that the grantee's title has long remained unquestioned is a weighty circumstance against simulation. Todd *v.* Larkin, 38 La. Ann. 672; Frank *v.* Stephenson, (Miss. 1897) 21 So. 778.

Preference to creditor held not to be fraudulent.— Priest *v.* Brown, 100 Cal. 626, 35 Pac. 323; Teitig *v.* Boesman, 12 Mont. 404, 31 Pac. 371; Southern Flour Co. *v.* McIver, 109 N. C. 120, 13 S. E. 905.

Evidence held to rebut presumption of fraud arising from a voluntary conveyance.— Howard *v.* Snelling, 32 Ga. 195.

30. Evidence held to show fraud.— Farmers' Bank *v.* Marshall, 35 S. W. 912, 18 Ky. L. Rep. 249; Wedgewood *v.* Withers, 35 Nebr. 583, 53 N. W. 576.

Evidence held not to show fraud.— Oberholtzer *v.* Hazen, 92 Iowa 602, 61 N. W. 365; McCabe *v.* Brayton, 38 N. Y. 196; Kluender *v.* Lynch, 2 Abb. Dec. (N. Y.) 538, 4 Keyes 361.

31. Evidence held to establish a trust in favor of the debtor so as to render the property liable for his debts see the following cases:

Alabama.— Wimberly *v.* Montgomery Fertilizer Co., 132 Ala. 107, 31 So. 524.

Kentucky.— Lewis *v.* Kash, 77 S. W. 697, 25 Ky. L. Rep. 1241; Pullins *v.* Pullins, 62 S. W. 865, 23 Ky. L. Rep. 333; Carroll *v.* Ward, 25 S. W. 6, 15 Ky. L. Rep. 699.

Nebraska.— Kearney County Bank *v.* Dullenty, 4 Nebr. (Unoff.) 735, 96 N. W. 169.

North Carolina.— Stephenson *v.* Felton, 106 N. C. 114, 11 S. E. 255.

South Dakota.— Smith *v.* Tosini, 1 S. D. 632, 48 N. W. 299.

Virginia.— Crowder *v.* Garber, 97 Va. 565, 34 S. E. 470; Brooks *v.* Applegate, 37 W. Va. 373, 16 S. E. 585; Martin *v.* Warner, 34 W. Va. 182, 12 S. E. 477; Burt *v.* Timmons, 29 W. Va. 441, 2 S. E. 780, 6 Am. St. Rep. 664; McMasters *v.* Edgar, 22 W. Va. 673.

Evidence held not to establish a trust.— *Iowa.*— Vandercook *v.* Gere, 69 Iowa 467, 29 N. W. 448; King *v.* Babcock, 40 Iowa 690.

Missouri.— Hoeller *v.* Haffner, 155 Mo. 589, 56 S. W. 312.

Pennsylvania.— Savits *v.* Speck, 21 Pa. Super. Ct. 608.

South Carolina.— De Loach *v.* Sarratt, (1899) 33 S. E. 365.

Virginia.— Kinnier *v.* Woodson, 94 Va. 711, 27 S. E. 457; Terry *v.* Fontaine, 83 Va. 451, 2 S. E. 743.

West Virginia.— Enslow *v.* Sliger, 51 W. Va. 405, 41 S. E. 173.

32. Morrison *v.* Herrington, 120 Mo. 665, 25 S. W. 568 (purchase at sale under distress warrant held to be in fraud of prior mortgagee); Platt-Barber Co. *v.* Groves, 193 Pa. St. 475, 44 Atl. 571 (holding that the presumption of fraud in helping a debtor to hinder other creditors, arising from a stay by an execution creditor of immediate proceedings on his execution, is overcome by evidence showing that the intention to collect was never relinquished, and that the debtor was only indulged as to time to give him opportunity to secure the amount due by loan); Allen *v.* Smith, 129 U. S. 465, 9 S. Ct. 338, 32 L. ed. 732 (holding that the debtor's failure to plead the statute of limitations in an action for the debt does not show that the action was fraudulent as against other creditors).

Attachments held fraudulent as against debtor's other creditors.— H. T. Simon-Gregory Dry Goods Co. *v.* Newman, 50 La. Ann. 338, 23 So. 329; Craig *v.* California Vineyard Co., 30 Oreg. 43, 46 Pac. 421; Zadik *v.* Schafer, 77 Tex. 501, 14 S. W. 153.

a transaction which is prejudicial to creditors are relatives does not show fraud, since a debtor may deal with his relatives the same as with third persons.[33] The fact of relationship, however, may cast suspicion on the transaction and lend credence to the claim that it was the result of a conspiracy by the parties thereto to defraud creditors, since relatives may be presumed to be on terms of intimacy and more likely than third persons to lend aid to each other in case of financial distress; and if a transaction between relatives is attended by circumstances such as are mentioned in the preceding section as tending to show fraud it is sufficient to invalidate the transaction as against creditors.[34] This rule applies to

Attachment held not fraudulent.— Adair *v.* Feder, 133 Ala. 620, 32 So. 165; Cartwright *v.* Bamberger, 99 Ala. 622, 14 So. 477.

Compromising a suit, after obtaining an attachment, for less than was alleged to be due, is no evidence that the prosecution of the attachment was fraudulent as to other creditors of the debtor. Alexander *v.* Hemrich, 4 Wash. 727, 31 Pac. 21.

Judgments held to be fraululent as against other creditors.— Walton *v.* Silverton First Nat. Bank, 13 Colo. 265, 22 Pac. 440, 16 Am. St. Rep. 200, 5 L. R. A. 765; Lesser *v.* Driesen, 2 Lack. Leg. N. 343; Douglass *v.* Ward, 11 Grant Ch. (U. C.) 39. See *supra*, III, A, 4, b.

Judgments held not to be fraudulent.— Sackett *v.* Stone, 115 Ga. 466, 41 S. E. 564; Citizens' F., etc., Ins. Co. *v.* Wallis, 23 Md. 173; Green *v.* Huggins, (Tenn. Ch. App. 1898) 52 S. W. 675; Snowball *v.* Neilson, 16 Can. Sup. Ct. 719; Powell *v.* Boulton, 2 U. C. Q. B. 487. See *supra*, III, A, 4, b.

Mortgage sale held to be fraudulent as against creditors.— Whitley *v.* Scroggin, 95 Ill. App. 530; Woodard *v.* Mastin, 106 Mo. 324, 17 S. W. 308; Snell *v.* Harrison, 104 Mo. 158, 16 S. W. 152. See *supra*, III, A, 4, c.

33. *Alabama.*— Wilkinson *v.* Buster, 115 Ala. 578, 22 So. 34.

Illinois.— Nott *v.* Shutts, 87 Ill. App. 341.

Iowa.— King *v.* Babcock, 40 Iowa 690.

Kentucky.— Warden *v.* Fulkerson, 56 S. W. 717, 22 Ky. L. Rep. 184; Springfield First Nat. Bank *v.* Lancaster, 14 S. W. 536, 12 Ky. L. Rep. 541.

Missouri.— Ettlinger *v.* Kahn, 134 Mo. 492, 36 S. W. 37; Shotwell *v.* McElhinney, 101 Mo. 677, 14 S. W. 754.

New York.— Jackson *v.* Badger, 109 N. Y. 632, 16 N. E. 208; Nichols *v.* Nichols, 40 Misc. 9, 81 N. Y. Suppl. 156.

North Carolina.— Southern Flour Co. *v.* McIver, 109 N. C. 120, 13 S. E. 905.

Virginia.— Terry *v.* Fontaine, 83 Va. 451, 2 S. E. 743.

United States.— Gottlieb *v.* Thatcher, 151 U. S. 271, 14 S. Ct. 319, 38 L. ed. 157.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 887.

No stronger degree of proof of the validity of a transaction between relatives is required than if it was between strangers. Clewis *v.* Malon, 119 Ala. 312, 24 So. 767 [*citing* Teague *v.* Lindsey, 106 Ala. 266, 17 So. 538]. And see *infra*, note 34. *Contra*, Fisher *v.* Moog, 39 Fed. 665.

Presumption of fraud held to have been rebutted.— White *v.* Glover, 23 App. Cas. (D. C.) 389; Miller *v.* Withers, 188 Pa. St. 128, 41 Atl. 300.

34. *Arkansas.*— May *v.* State Nat. Bank, 59 Ark. 614, 28 S. W. 431; Bryan-Brown Shoe Co. *v.* Block, 52 Ark. 458, 12 S. W. 1073; Valley Distilling Co. *v.* Atkins, 50 Ark. 289, 7 S. W. 137.

Colorado.— Walton *v.* Silverton First Nat. Bank, 13 Colo. 265, 22 Pac. 440, 16 Am. St. Rep. 200, 5 L. R. A. 765; La Fitte *v.* Rups, 13 Colo. 207, 22 Pac. 309.

Iowa.— Smith *v.* Bigelow, (1904) 99 N. W. 590; Corn Exch. Bank *v.* Applegate, 91 Iowa 411, 59 N. W. 268; Maish *v.* Crangle, 80 Iowa 650, 14 N. W. 578; King *v.* Arnold, 52 Iowa 712, 2 N. W. 955.

Michigan.— Desbecker *v.* Mendelson, 117 Iowa 293, 75 N. W. 621; People *v.* Rice, 79 Mich. 354, 44 N. W. 790; Webber *v.* Jackson, 79 Mich. 175, 44 N. W. 591, 19 Am. St. Rep. 165.

Minnesota.— Kells *v.* McClure, 69 Minn. 60, 71 N. W. 827.

Missouri.— Baum *v.* Sauer, 117 Mo. 460, 23 S. W. 147; Lohmann *v.* Stocke, 94 Mo. 672, 8 S. W. 9.

Nebraska.— Madison First Nat. Bank *v.* Tompkins, 3 Nebr. (Unoff.) 328, 91 N. W. 551.

New Jersey.— Miller *v.* Jamison, 26 N. J. Eq. 404.

New York.— Evans *v.* Sims, 82 Hun 396, 31 N. Y. Suppl. 259; Fox *v.* Bronson, 35 Misc. 431, 71 N. Y. Suppl. 980; Nichthauser *v.* Lehman, 17 Misc. 336, 39 N. Y. Suppl. 1091.

Pennsylvania.— Lesser *v.* Driesen, 2 Lack. Leg. N. 343; Bastin *v.* Dougherty, 3 Phila. 30.

Tennessee.— Phillips-Buttorf Mfg. Co. *v.* Williams, (1900) 63 S. W. 185.

Texas.— Zadick *v.* Schafer, 77 Tex. 501, 14 S. W. 153; Tinsley *v.* Corbett, 27 Tex. Civ. App. 633, 66 S. W. 910; Matula *v.* Lane, 22 Tex. Civ. App. 391, 55 S. W. 504.

Washington.—Adams *v.* Dempsey, 35 Wash. 80, 76 Pac. 538; Keith *v.* Kreidel, 4 Wash. 544, 30 Pac. 638, 31 Pac. 333.

West Virginia.— Ballard *v.* Chewning, 49 W. Va. 508, 39 S. E. 179; Hutchinson *v.* Boltz, 35 W. Va. 754, 14 S. E. 267; Parker *v.* Valentine, 27 W. Va. 677.

Wyoming.— Stirling *v.* Wagner, 4 Wyo. 5, 31 Pac. 1032, 32 Pac. 1128.

United States.— McRea *v.* Mobile Branch Bank, 19 How. 376, 15 L. ed. 688; Venable *v.* U. S. Bank, 2 Pet. 107, 7 L. ed. 364.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 887.

conveyances or transfers between parent and child,[35] and also those between husband and wife.[36]

e. Indebtedness and Insolvency of Grantor. A party is insolvent within the

35. **Evidence held to show fraud.**— *Alabama.*— Martin *v.* Berry, 116 Ala. 233, 22 So. 493; Dickson *v.* McLarney, 97 Ala. 383, 12 So. 398.

Iowa.— Parlin, etc., Co. *v.* Daniels, 111 Iowa 640, 82 N. W. 1015; Hunt *v.* Johnston, 105 Iowa 311, 75 N. W. 103.

Kentucky.— Zimmerman *v.* McMasters, 76 S. W. 5, 25 Ky. L. Rep. 456; Carroll *v.* Ward, 25 S. W. 6, 15 Ky. L. Rep. 699.

Louisiana.— Pruyn *v.* Young, 51 La. Ann. 320, 25 So. 125.

Maine.— Rollins *v.* Mooers, 25 Me. 192.

Massachusetts.— Smith *v.* Whitman, 6 Allen 562.

Michigan.— Kastl *v.* Arthur, 135 Mich. 278, 97 N. W. 711.

Missouri.— Spratt *v.* Early, 169 Mo. 357, 69 S. W. 13; Glasgow Milling Co. *v.* Burnes, 144 Mo. 192, 45 S. W. 1074; Wilcoxson *v.* Darr, 139 Mo. 660, 41 S. W. 227; Van Raalte *v.* Harrington, 101 Mo. 602, 14 S. W. 710, 20 Am. St. Rep. 626, 11 L. R. A. 424.

Nebraska.— Steinkraus *v.* Korth, 44 Nebr. 777, 62 N. W. 1110.

New Jersey.— Perrine *v.* Perrine, (Ch. 1901) 50 Atl. 694; National State Bank *v.* McCormick, (Ch. 1899) 44 Atl. 706; Gardner *v.* Kleinke, 46 N. J. Eq. 90, 18 Atl. 457.

New York.— Merchants' Nat. Bank *v.* Chapin, 15 N. Y. Suppl. 427; Nichols *v.* Morrow, 11 N. Y. Suppl. 878; McDonald *v.* McDonald, 11 N. Y. Suppl. 248.

North Dakota.— Soly *v.* Aasen, 10 N. D. 108, 86 N. W. 108.

Oregon.— Mendenhall *v.* Elwert, 36 Oreg. 375, 52 Pac. 22, 59 Pac. 805.

Pennsylvania.— Fidelity Ins., etc., Co. *v.* Madden, 14 Montg. Co. Rep. 210.

South Carolina.— Fulmore *v.* Burrows, 2 Rich. Eq. 95.

Virginia.— Hazlewood *v.* Forrer, 94 Va. 703, 27 S. E. 507.

Washington.— Keith *v.* Kreidel, 4 Wash. 544, 30 Pac. 638, 31 Pac. 333.

West Virginia.— Knight *v.* Nease, 53 W. Va. 50, 44 S. E. 414; Himan *v.* Thorn, 32 W. Va. 507, 9 S. E. 930; Livesay *v.* Beard, 22 W. Va. 585.

United States.— Walker *v.* Houghteling, 120 Fed. 928, 57 C. C. A. 218.

Canada.— Douglass *v.* Ward, 11 Grant Ch. (U. C.) 39.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 890.

Evidence held not to show fraud.— *Alabama.*— Morrow *v.* Campbell, 118 Ala. 330, 24 So. 852.

Colorado.— Otis *v.* Rose, 9 Colo. App. 449, 48 Pac. 967.

Connecticut.— Hallock *v.* Alvord, 61 Conn. 194, 23 Atl. 131.

Georgia.— Griffis *v.* Griffis, 89 Ga. 142, 15 S. E. 23.

Iowa.— Walker *v.* Kynett, 36 Iowa 694.

Kentucky.— McMillan *v.* Stephens, 49 S. W. 778, 20 Ky. L. Rep. 1528; Smith *v.* Hall, 44 S. W. 125, 19 Ky. L. Rep. 1662.

Maryland.— Zahn *v.* Smith, (1889) 18 Atl. 865.

Michigan.— Woodhull *v.* Whittle, 63 Mich. 575, 30 N. W. 368; Tarbell *v.* Millard, 63 Mich. 250, 29 N. W. 722.

Missouri.— Gleitz *v.* Schuster, 168 Mo. 298, 67 S. W. 561, 90 Am. St. Rep. 461; Grimes *v.* Russell, 45 Mo. 431.

Montana.— Wilson *v.* Harris, 19 Mont. 69, 47 Pac. 1101, 21 Mont. 374, 54 Pac. 46.

Nebraska.—Houck *v.* Heinzman, 37 Nebr. 463, 55 N. W. 1062.

New York.— Kain *v.* Larkin, 131 N. Y. 300, 30 N. E. 105 [*reversing* 17 N. Y. Suppl. 223]; Parks *v.* Murray, 2 N. Y. St. 628.

North Carolina.— Southern Flour Co. *v.* McIver, 109 N. C. 120, 13 S. E. 905.

Ohio.— Fremont First Nat. Bank *v.* Rice, 22 Ohio Cir. Ct. 183, 12 Ohio Cir. Dec. 121.

Virginia.— Bresee *v.* Bradfield, 99 Va. 331, 38 S. E. 196.

West Virginia.— Piedmont Bank *v.* Bowman, 39 W. Va. 622, 20 S. E. 593; Elliot *v.* Trahern, 35 W. Va. 634, 14 S. E. 223.

United States.— Allen *v.* Smith, 129 U. S. 465, 9 S. Ct. 338, 32 L. ed. 732; Blackmore *v.* Parkes, 81 Fed. 899, 26 C. C. A. 670.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 890.

Evidence held not to show that a child owned property sought to be subjected to claims of creditors see Rose *v.* Dunklee, 12 Colo. App. 403, 56 Pac. 342; Cameron *v.* Savage, 37 Ill. 172; Thayer *v.* Usher, 98 Me. 468, 57 Atl. 839.

36. **Evidence held to show fraud.**— *Alabama.*— Noble *v.* Gilliam, 136 Ala. 618, 33 So. 861; Wimberly *v.* Montgomery Fertilizer Co., 132 Ala. 107, 31 So. 524; Yeend *v.* Weeks, 104 Ala. 331, 16 So. 165, 53 Am. St. Rep. 50.

Arkansas.— Slayden-Kirksey Woolen Mills *v.* Anderson, 66 Ark. 419, 50 S. W. 994.

Colorado.— Kelly *v.* Atkins, 14 Colo. App. 208, 59 Pac. 841.

Georgia.— Gregory *v.* Gray, 88 Ga. 172, 14 S. E. 187.

Illinois.— Torrey *v.* Dickinson, 213 Ill. 36, 72 N. E. 703 [*reversing* 111 Ill. App. 524]; Hauk *v.* Van Ingen, 97 Ill. App. 642 [*affirmed* in 196 Ill. 20, 63 N. E. 705].

Iowa.— Gaar *v.* Stolte, 115 Iowa 139, 88 N. W. 334; Thomas *v.* McDonald, 102 Iowa 564, 71 N. W. 572; Wasson *v.* Millsap, 77 Iowa 762, 42 N. W. 528; Romans *v.* Maddux, 77 Iowa 203, 41 N. W. 763.

Kansas.— Dresher *v.* Corson, 23 Kan. 313.

Kentucky.— Scott *v.* Powers, 78 S. W. 408, 25 Ky. L. Rep. 1640; Pullins *v.* Pullins, 62 S. W. 865, 23 Ky. L. Rep. 333.

Louisiana.— Goothye *v.* Delatour, 111 La. 766, 35 So. 896.

meaning of the statutes aimed against fraudulent conveyances, when he is unable to pay his debts as they mature and become due and payable in the ordinary course of business, and where such a state of affairs is shown to exist by

Maryland.— Downs *v.* Miller, 95 Md. 602, 53 Atl. 445.

Michigan.— Gruner *v.* Brooks, 126 Mich. 465, 85 N. W. 1085.

Minnesota.— Ladd *v.* Newell, 34 Minn. 107, 24 N. W. 366.

Missouri.—Ettlinger *v.* Kahn, 134 Mo. 492, 36 S. W. 37; Snell *v.* Harrison, 104 Mo. 158, 16 S. W. 152.

Nebraska.— Kearney County Bank *v.* Dullenty, (1901) 96 N. W. 169.

New York.— Multz *v.* Price, 91 N. Y. App. Div. 116, 86 N. Y. Suppl. 480; Nichthauser *v.* Lehman, 17 Misc. 336, 39 N. Y. Suppl. 1091.

North Carolina.— Stephenson *v.* Felton, 106 N. C. 114, 11 S. E. 255.

Oklahoma.— Jenks *v.* McGowan, 9 Okla. 306, 60 Pac. 239.

Oregon.— Walker *v.* Harold, 44 Oreg. 205, 74 Pac. 705.

South Carolina.— Mitchell *v.* Mitchell, 42 S. C. 475, 20 S. E. 405.

South Dakota.— Smith *v.* Tosini, 1 S. D. 632, 48 N. W. 299.

Tennessee.— Shapira *v.* Paletz, (Ch. App. 1900) 59 S. W. 774.

Texas.— Rives *v.* Stephens, (Civ. App. 1894) 28 S. W. 707.

Virginia.— Crowder *v.* Garber, 97 Va. 565, 34 S. E. 470; Massey *v.* Yancey, 90 Va. 626, 19 S. E. 184.

Washington.— Bates *v.* Drake, 28 Wash. 447, 68 Pac. 961.

West Virginia.— Brooks *v.* Applegate, 37 W. Va. 373, 16 S. E. 585; Martin *v.* Warner, 34 W. Va. 182, 12 S. E. 477; Burt *v.* Timmons, 29 W. Va. 441, 2 S. E. 780, 6 Am. St. Rep. 664; McMasters *v.* Edgar, 22 W. Va. 673; Hunter *v.* Hunter, 10 W. Va. 321.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 888.

Evidence held not to show fraud.— *Alabama.*— Elyton Land Co. *v.* Yance, 119 Ala. 315, 24 So. 719.

Colorado.— Vote *v.* Karrick, 13 Colo. App. 388, 58 Pac. 333.

Georgia.— Sackett *v.* Stone, 115 Ga. 466, 41 S. E. 564.

Illinois.— Tyberandt *v.* Raucke, 96 Ill. 71; Cooke *v.* Peter, 93 Ill. App. 1.

Iowa.— Pieter *v.* Bales, 126 Iowa 170, 101 N. W. 865; Belden *v.* Younger, 76 Iowa 567, 41 N. W. 317; Wanzer *v.* Brainard, 73 Iowa 723, 36 N. W. 761; Vandercook *v.* Gere, 69 Iowa 467, 29 N. W. 448.

Kentucky.— Berry *v.* Ewen, 85 S. W. 227, 27 Ky. L. Rep. 467.

Michigan.— Lake Linden First Nat. Bank *v.* Condon, 122 Mich. 457, 81 N. W. 341.

Mississippi.— Virden *v.* Dwyer, 78 Miss. 763, 30 So. 45.

Missouri.— Citizens' Bank *v.* Burrus, 178 Mo. 716, 77 S. W. 748; Hoeller *v.* Haffner, 155 Mo. 589, 56 S. W. 312.

Nebraska.— Kimbro *v.* Clark, 17 Nebr. 403, 22 N. W. 788; Westervelt *v.* Filter, 2 Nebr. (Unoff.) 731, 89 N. W. 994.

New York.— Kalish *v.* Higgins, 175 N. Y. 495, 67 N. E. 1084 [*affirming* 70 N. Y. App. Div. 192, 75 N. Y. Suppl. 397]; Wilbur *v.* Fradenburgh, 52 Barb. 474; Glaser *v.* Carroll, 20 N. Y. Suppl. 766.

Oregon.— Wright *v.* Craig, 40 Oreg. 191, 66 Pac. 807.

Pennsylvania.— Moore *v.* Moore, 165 Pa. St. 464, 30 Atl. 932; Savits *v.* Speck, 21 Pa. Super. Ct. 608.

South Carolina.— De Loach *v.* Sarratt, 55 S. C. 254, 33 S. E. 2, 35 S. E. 441; Hairston *v.* Hairston, 35 S. C. 298, 14 S. E. 634.

Texas.— O'Neal *v.* Clymer, (Civ. App. 1900) 61 S. W. 545.

Virginia.— Kinnier *v.* Woodson, 94 Va. 711, 27 S. E. 457.

Washington.— Budlong *v.* Budlong, 32 Wash. 672, 73 Pac. 783.

West Virginia.— Enslow *v.* Sliger, 51 W. Va. 405, 41 S. E. 173.

Canada.— Snowball *v.* Neilson, 16 Can. Sup. Ct. 719.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 888.

Conducting business in wife's name held to be in fraud of husband's creditors see Farmers' Bank *v.* Marshall, 35 S. W. 912, 18 Ky. L. Rep. 249; Wedgewood *v.* Withers, 35 Nebr. 583, 53 N. W. 576. See, however, Kluender *v.* Lynch, 2 Abb. Dec. (N. Y.) 538, 4 Keyes 361. See also *supra*, II, B, 8, b.

If a trust in land held by a husband can be created by parol in favor of his wife, as against his creditors, the declaration creating it should be established by convincing testimony. Kline *v.* Kline, 103 Va. 263, 48 S. E. 882.

Conveyance to wife through third person held fraudulent.—*Alabama.*—Yeend *v.* Weeks, 104 Ala. 331, 16 So. 165, 53 Am. St. Rep. 50; Moog *v.* Barrow, 101 Ala. 209, 13 So. 665.

Illinois.— Frank *v.* King, 121 Ill. 250, 12 N. E. 720.

Iowa.— Shaffer *v.* Mink, 60 Iowa 754, 14 N. W. 126; Ryan *v.* Mullinix, 45 Iowa 631.

Missouri.—Hoffman *v.* Nolte, 127 Mo. 120, 29 S. W. 1006; Frank *v.* Reuter, 116 Mo. 517, 22 S. W. 812.

New York.— Cole *v.* Tyler, 65 N. Y. 73; Simmons *v.* Johnson, 48 Hun (N. Y.) 131; Emmerich *v.* Hefferan, 58 N. Y. Super. Ct. 217, 9 N. Y. Suppl. 801.

Ohio.— Zieverink *v.* Kemper, 10 Ohio Dec. (Reprint) 455, 21 Cinc. L. Bul. 212.

West Virginia.— Hutchinson *v.* Boltz, 35 W. Va. 754, 14 S. E. 267.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 889. See *supra*, III, A, 3, a, b.

Conveyance held valid.— National Brewery Co. *v.* Linsday, 72 Mo. App. 591; Blair State Bank *v.* Bunn, 61 Nebr. 464, 85 N. W. 527; Carter *v.* Meisch, 18 N. Y. Suppl. 804; De Loach *v.* Sarratt, (S. C. 1899) 33 S. E. 365.

a preponderance of evidence in an action to set aside a fraudulent conveyance or transfer, insolvency is sufficiently proven.[37]

f. Consideration. The weight of evidence as to the consideration of a conveyance or transfer alleged to be in fraud of creditors, and the sufficiency of such evidence, are to be tested by the general rules on the subject.[38] The

Indebtedness of husband to wife held not established.— *Alabama.*— Shepherd *v.* Reeves, 114 Ala. 281, 21 So. 956.

Iowa.— Woods *v.* Allen, 109 Iowa 484, 80 N. W. 540.

Tennessee.— Byler *v.* Adams, (Ch. App. 1901) 62 S. W. 21.

Virginia.— Kline *v.* Kline, 103 Va. 263, 48 S. E. 882.

United States.— California Bank *v.* Cowan, 75 Fed. 145, 21 C. C. A. 279.

Indebtedness held established.— McCormick Harvesting Mach. Co. *v.* Griffin, 116 Iowa 397, 90 N. W. 84; Lehman *v.* Coulon, 105 La. 431, 29 So. 879; Ellis *v.* Myers, 4 Silv. Sup. (N. Y.) 323, 8 N. Y. Suppl. 139.

Ownership of wife of property sought to be subjected to payment of husband's debts held not established see American Freehold Land, etc., Co. *v.* Maxwell, 39 Fla. 489, 22 So. 751; Smith *v.* Curd, 72 S. W. 744, 24 Ky. L. Rep. 1960; Perkins *v.* Mann, 41 S. W. 1, 19 Ky. L. Rep. 575; Orchard *v.* Collier, 171 Mo. 390, 71 S. W. 677; Wolfsberger *v.* Mort, 104 Mo. App. 257, 78 S. W. 817; Kinsey *v.* Feller, (N. J. Ch. 1901) 50 Atl. 680 [*reversed* on other grounds in 64 N. J. Eq. 367, 51 Atl. 485]; Kimble *v.* Wotring, 48 W. Va. 412, 37 S. E. 606. See also Gaar *v.* Stolte, 115 Iowa 139, 88 N. W. 334.

Wife's ownership held established.—Reeves *v.* Estes, 124 Ala. 303, 26 So. 935; Mt. Sterling Nat. Bank *v.* Bowen, 43 S. W. 483, 19 Ky. L. Rep. 1416; A. T. Albro Co. *v.* Fountain, 162 N. Y. 498, 57 N. E. 72 [*reversing* 15 N. Y. App. Div. 351, 44 N. Y. Suppl. 150]; Metz *v.* Blackburn, 9 Wyo. 481, 65 Pac. 857.

A preponderance of evidence is all that is necessary to establish the validity, as against creditors, of a conveyance from husband to wife. Stevens *v.* Carson, 30 Nebr. 544, 46 N. W. 655 [*overruling* Woodruff *v.* White, 25 Nebr. 745, 41 N. W. 781; Lipscomb *v.* Lyon, 19 Nebr. 511, 27 N. W. 731; Aultman *v.* Obermeyer, 6 Nebr. 260]; Thompson *v.* Loenig, 13 Nebr. 386, 14 N. W. 168; Evans *v.* Rugee, 57 Wis. 623, 16 N. W. 49. See, however, California Bank *v.* Cowan, 75 Fed. 145, 21 C. C. A. 279. And see *supra*, note 33

37. Chipman *v.* McClellan, 159 Mass. 363, 34 N. E. 379; Cunningham *v.* Norton, 125 U. S. 77, 8 S. Ct. 804, 31 L. ed. 624, holding that when a person is unable to pay his debts, he is understood to be insolvent. See *supra*, VI, B, 3.

Evidence held sufficient to prove insolvency of debtor.— *Alabama.*— Russell *v.* Davis, 133 Ala. 647, 31 So. 514, 91 Am. St. Rep. 56.

California.—Gray *v.* Brunold, 140 Cal. 615, 74 Pac. 303; Los Angeles First Nat. Bank *v.* Maxwell, 123 Cal. 360, 55 Pac. 980, 69 Am. St. Rep. 64; Woolridge *v.* Boardman, 115 Cal. 74, 46 Pac. 868. See Windhaus *v.* Bootz, (1890) 25 Pac. 404, holding that a return of *nulla bona* five years after the alleged fraudulent conveyance is not sufficient to establish insolvency at the time of the conveyance.

Colorado.— Walton *v.* Silverton First Nat. Bank, 13 Colo. 265, 22 Pac. 440, 16 Am. St. Rep. 200, 5 L. R. A. 765.

Indiana.— Towns *v.* Smith, 115 Ind. 480, 16 N. E. 811.

Iowa.— O'Melia *v.* Hoffmeyer, 119 Iowa 444, 93 N. W. 497; Redhead *v.* Pratt, 72 Iowa 99, 33 N. W. 382.

Louisiana.— Thorn *v.* Morgan, 4 Mart. N. S. 292, 16 Am. Dec. 173.

Maryland.— Milholland *v.* Tiffany, 64 Md. 455, 2 Atl. 831; Birely *v.* Staley, 5 Gill & J. 432, 25 Am. Dec. 303.

Michigan.— See Walker *v.* Cady, 106 Mich. 21, 63 N. W. 1005.

Minnesota.— Fryberger *v.* Berven, 88 Minn. 311, 92 N. W. 1125.

New York.— Continental Nat. Bank *v.* Moore, 83 N. Y. App. Div. 419, 82 N. Y. Suppl. 302.

North Carolina.— Mauney *v.* Hamilton, 132 N. C. 295, 43 S. E. 901.

South Carolina.— McGahan *v.* Crawford, 47 S. C. 566, 25 S. E. 123.

Wisconsin.— Mason *v.* Pierron, 69 Wis. 585, 34 N. W. 921.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 891.

Evidence held insufficient to prove insolvency of debtor.—*Colorado.*—Homestead Min. Co. *v.* Reynolds, 30 Colo. 330, 70 Pac. 422.

Illinois.— Ackerman *v.* Arbaugh, 97 Ill. App. 155.

Iowa.— Baxter *v.* Pritchard, 113 Iowa 422, 85 N. W. 633.

Nebraska.— Johnson *v.* Johnson, 36 Nebr. 700, 55 N. W. 217.

New York.— Lewis *v.* Boardman, 78 N. Y. App. Div. 394, 79 N. Y. Suppl. 1014; Clarkson *v.* Dunning, 4 N. Y. Suppl. 430.

Oregon.— Brown *v.* Case, 41 Oreg. 221, 69 Pac. 43.

Wisconsin.—Hamilton *v.* Menominee Falls Quarry Co., 106 Wis. 352, 81 N. W. 876.

United States.— Williams *v.* Simons, 70 Fed. 40, 16 C. C. A. 628.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 891.

Recovery of a judgment by default in an action on dishonored notes and the return of an execution unsatisfied is *prima facie* evidence of insolvency. Tuthill *v.* Skidmore, 124 N. Y. 148, 26 N. E. 348; Maxwell *v.* Conklin, 41 N. Y. App. Div. 211, 58 N. Y. Suppl. 474.

38. See the following cases:

Arkansas.— Morris *v.* Fletcher, 67 Ark.

probative effect of recitals in a conveyance as to the payment of the consideration depends upon these rules.[39] And whether the existence of an antecedent

105, 56 S. W. 1072, 77 Am. St. Rep. 87; Hempstead *v.* Johnston, 18 Ark. 123, 65 Am. Dec. 458.

Indiana.— McConnell *v.* Citizens' State Bank, 130 Ind. 127, 27 N. E. 616.

Iowa.— Banning *v.* Purinton, 105 Iowa 642, 75 N. W. 639.

Maine.— Miller *v.* Hilton, 88 Me. 429, 34 Atl. 266.

Mississippi.— McInnis *v.* Wiscasset Mills, 78 Miss. 52, 28 So. 725; Lowenstien *v.* Abramsohn, 76 Miss. 890, 25 So. 498.

Montana.— Wilson *v.* Harris, 19 Mont. 69, 47 Pac. 1101.

Nebraska.— Selz *v.* Hocknell, 63 Nebr. 503, 88 N. W. 767, 62 Nebr. 101, 86 N. W. 905; Darnell *v.* Mack, 46 Nebr. 740, 65 N. W. 805.

New York.— Kell *v.* Isaacs, 12 N. Y. Suppl. 536.

North Carolina.— Slingluff *v.* Hall, 124 N. C. 397, 32 S. E. 739.

Texas.— Ratto *v.* Bluestein, 84 Tex. 57, 19 S. W. 338.

Virginia.— Merchants' Bank *v.* Belt, (1898) 30 S. E. 467.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 896.

Evidence sufficient to show a consideration. —*Alabama.*— Green *v.* Emens, 135 Ala. 563, 33 So. 540.

Arkansas.— Fly *v.* Screeton, 64 Ark. 184, 41 S. W. 764.

California.— Polk *v.* Boggs, 122 Cal. 114, 54 Pac. 536.

Colorado.— Otis *v.* Rose, 9 Colo. App. 449, 48 Pac. 967.

Illinois.— Oliver *v.* McDowell, 100 Ill. App. 45.

Kentucky.— Com. *v.* Cremeans, 13 S. W. 884, 11 Ky. L. Rep. 985.

Minnesota.— Nichols, etc., Co. *v.* Gerlich, 84 Minn. 483, 87 N. W. 1120.

New Jersey.— Withrow *v.* Warner, 56 N. J. Eq. 795, 35 Atl. 1057, 40 Atl. 721, 67 Am. St. Rep. 501.

Oregon.— Brown *v.* Case, 41 Oreg. 221, 69 Pac. 43.

Pennsylvania.— *In re* Fritz, 160 Pa. St. 156, 28 Atl. 642.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 896.

Evidence insufficient to show a consideration.— *Alabama.*— Sides *v.* Scharff, 93 Ala. 106, 9 So. 228; Pyron *v.* Lemon, 67 Ala. 458.

Georgia.— Kea *v.* Epstein, 87 Ga. 115, 13 S. E. 312.

Illinois.— Croarkin *v.* Hutchinson, 187 Ill. 633, 58 N. E. 678 [*reversing* 87 Ill. App. 557].

Kentucky.— McAdams *v.* Mitchell, 10 S. W. 812, 10 Ky. L. Rep. 856.

Louisiana.— Pressler *v.* Joffrion, 39 La. Ann. 1116, 2 So. 795.

Michigan.— Harrington *v.* Upton, 78 Mich. 28, 43 N. W. 1089.

Missouri.— Johnson *v.* Stebbins-Thompson Realty Co., 177 Mo. 581, 76 S. W. 1021; Johnson *v.* Stebbins-Thompson Realty Co., 167 Mo. 325, 66 S. W. 933.

Nebraska.— Sheldon *v.* Parker, 66 Nebr. 610, 92 N. W. 923, 95 N. W. 1015; Butts *v.* Hunter, 33 Nebr. 119, 49 N. W. 940.

New Jersey.—Malcom Brewing Co. *v.* Wagner, (Ch. 1900) 45 Atl. 260.

New York.— Bailey *v.* Fransioli, 101 N. Y. App. Div. 140, 91 N. Y. Suppl. 852; Multz *v.* Price, 91 N. Y. App. Div. 116, 86 N. Y. Suppl. 480; Partridge *v.* Stokes, 66 Barb. 586; Amgrave *v.* Stone, 25 How. Pr. 167.

Oregon.— Beers *v.* Aylsworth, 41 Oreg. 251, 69 Pac. 1025.

Pennsylvania.— Hammett *v.* Harrison, 1 Phila. 349.

South Carolina.— Anonymous, 2 Desauss. Eq. 304.

Virginia.— Slater *v.* Moore, 86 Va. 26, 9 S. E. 419.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 896.

Weight and sufficiency of evidence as to value of property transferred see Crooks *v.* Brydon, 93 Md. 640, 49 Atl. 921; Jolly *v.* Kyle, 27 Oreg. 95, 39 Pac. 999; Frisk *v.* Reigelman, 75 Wis. 499, 43 N. W. 1117, 44 N. W. 766, 17 Am. St. Rep. 198.

Sufficiency of evidence as to grantee's financial ability see Talkington *v.* Parish, 89 Ind. 202; Billgery *v.* Schnell, 26 La. Ann. 467; Boyer *v.* Tucker, 70 Mo. 457.

39. See the following cases:

Illinois.— Cassell *v.* Vincennes First Nat. Bank, 169 Ill. 380, 48 N. E. 701.

Kentucky.— Whitaker *v.* Garnett, 3 Bush 402; Oldham *v.* McClanahan, 2 Duv. 416.

Maryland.—Stockslager *v.* Mechanics' Loan, etc., Inst., 87 Md. 232, 39 Atl. 742; Stocket *v.* Holliday, 9 Md. 480.

New Hampshire.— Kimball *v.* Fenner, 12 N. H. 248.

New Jersey.— O'Connor *v.* Williams, (Ch. 1902) 53 Atl. 550.

Pennsylvania.— Clark *v.* Depew, 25 Pa. St. 509, 64 Am. Dec. 717; Bardwell's Appeal, 1 Lanc. Bar 18; Depew *v.* Clark, 1 Phila. 432.

Virginia.— Strayer *v.* Long, 86 Va. 557, 10 S. E. 574.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 897.

Insufficiency of recital.— The recital of the payment of the purchase-money, in a conveyance attacked by the grantor's creditors, is not sufficient evidence of consideration. Blackshire *v.* Pettit, 35 W. Va. 547, 14 S. E. 133; Horton *v.* Dewey, 53 Wis. 410, 10 N. W. 599.

The consideration expressed in a deed from husband to wife is not of itself sufficient evidence of a purchase for valuable consideration paid by her or someone in her behalf, as against prior creditors of the husband seeking to set the conveyance aside. Minne-

debt[40] or the fact that the consideration for property which it is sought to subject to the claims of creditors was furnished by a person other than the debtor[41] is sufficiently established are to be determined in accordance therewith. Where indebtedness of a husband to his wife is alleged as the consideration of a conveyance or transfer, if the validity of the debt is questioned by creditors, the proof thereof

apolis Stock-Yards, etc., Co. *v.* Halonen, 56 Minn. 469, 57 N. W. 1135.

Recital of nominal consideration.— The recital in a debtor's deed to his children that it was made for a nominal consideration is conclusive against him in an action by creditors to set aside the deed for fraud. Ogden State Bank *v.* Barker, 12 Utah 13, 40 Pac. 765.

40. Evidence sufficient to establish antecedent debt.— *Alabama.*— Blumenthal *v.* Magnus, 97 Ala. 530, 13 So. 7.

Illinois.— Caldwell *v.* Dvorak, 70 Ill. App. 547.

Michigan.— Smith *v.* Lee, 79 Mich. 465, 44 N. W. 933.

Mississippi.— Taylor *v.* Watkins, (1893) 13 So. 811.

Missouri.— St. Louis Nat. Bank *v.* Field, 154 Mo. 368, 55 S. W. 461; Bangs Milling Co. *v.* Burns, 152 Mo. 350, 53 S. W. 923; Stokes *v.* Burns, 132 Mo. 214, 33 S. W. 460.

New Jersey.—Taylor *v.* Dawes, (Ch. 1888) 13 Atl. 593.

New York.— Merchants' Bank *v.* Thalheimer, 2 N. Y. Suppl. 328.

South Carolina.— Steinmeyer *v.* Steinmeyer, 55 S. C. 9, 33 S. E. 15.

Texas.— Linz *v.* Atchison, 14 Tex. Civ. App. 647, 38 S. W. 640, 47 S. W. 542.

United States.— Libby *v.* Crossley, 31 Fed. 647.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 899.

Evidence insufficient to establish antecedent debt.— *Alabama.*— Thompson *v.* Tower Mfg. Co., 104 Ala. 140, 16 So. 116; Page *v.* Francis, 97 Ala. 379, 11 So. 736; Owens *v.* Hobbie, 82 Ala. 467, 3 So. 145; Gordon *v.* McIlwain, 82 Ala. 247, 2 So. 671.

Arkansas.—Catchings *v.* Harcrow, 49 Ark. 20, 3 S. W. 884.

Iowa.— Blanchard *v.* Glasier, 64 Iowa 675, 21 N. W. 134.

Kansas.— Smith *v.* Parry Mfg. Co., 9 Kan. App. 877, 61 Pac. 966.

Kentucky.— Harrison *v.* Campbell, 6 Dana 263; Seiler *v.* Walz, 29 S. W. 338, 31 S. W. 729, 17 Ky. L. Rep. 301.

Louisiana.— Forstall *v.* Larche, 39 La. Ann. 286, 1 So. 650; Friedlander *v.* Brooks, 35 La. Ann. 741; Carson *v.* Johnson, 11 La. Ann. 757.

Michigan.—Winslow *v.* Putnam, 130 Mich. 359, 90 N. W. 43; St. Johns First Nat. Bank *v.* Tyler, 55 Mich. 297, 21 N. W. 353.

Missouri.— Summers *v.* Akers, 85 Mo. 213.

Nebraska.— Jones *v.* Bivin, 36 Nebr. 821, 55 N. W. 248; Omaha Hardware Co. *v.* Duncan, 31 Nebr. 217, 47 N. W. 846.

New Jersey.—Taylor *v.* Dawes, (Ch. 1888) 13 Atl. 593.

New York.— Gennerich *v.* Voigt, 46 N. Y. App. Div. 622, 61 N. Y. Suppl. 620.

Oregon.— Scoggin *v.* Schloath, 15 Oreg. 380, 15 Pac. 635.

Pennsylvania.— Ditchburn *v.* Jermyn, etc., Co-operative Assoc., 3 Pa. Dist. 635, 13 Pa. Co. Ct. 1.

South Carolina.— Younger *v.* Massey, 39 S. C. 115, 17 S. E. 711.

Tennessee.— Madisonville Bank *v.* McCoy, (Ch. App. 1897) 42 S. W. 814.

Virginia.—Moore *v.* Ullman, 80 Va. 307.

Wisconsin.— Hage *v.* Campbell, 78 Wis. 572, 47 N. W. 179, 23 Am. St. Rep. 422.

United States.— Clay *v.* McCally, 5 Fed. Cas. No. 2,869, 4 Woods 605.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 899.

Sufficiency of evidence as to amount of debt see Buford *v.* Shannon, 95 Ala. 205, 10 So. 263; Bates County Bank *v.* Gailey, 177 Mo. 181, 75 S. W. 646.

41. See the following cases:

District of Columbia.— McDaniel *v.* Parish, 4 App. Cas. 213.

Illinois.— Cassell *v.* Vincennes First Nat. Bank, 169 Ill. 380, 48 N. E. 701.

Iowa.—Iseminger *v.* Criswell, 98 Iowa 382, 67 N. W. 289; Smith *v.* Utesch, 85 Iowa 381, 52 N. W. 343; Stoddard *v.* Rowe, 74 Iowa 670, 38 N. W. 84; Sims *v.* Moore, 74 Iowa 497, 38 N. W. 374; Weed *v.* Harris, 54 Iowa 747, 6 N. W. 138; Connolly *v.* Rogers, 51 Iowa 704, 1 N. W. 700.

Kentucky.— Farmers' Bank *v.* Stapp, 97 Ky. 432, 30 S. W. 1000, 17 Ky. L. Rep. 290; Ashland Coal, etc., R. Co. *v.* McKenzie, 21 S. W. 232, 14 Ky. L. Rep. 636.

Maryland.— Levi *v.* Rothschild, 69 Md. 348, 14 Atl. 535.

Minnesota.— Farnham *v.* Kennedy, 28 Minn. 365, 10 N. W. 20.

Missouri.— Jamison *v.* Bagot, 106 Mo. 240, 16 S. W. 697; Mott *v.* Purcell, 98 Mo. 247, 11 S. W. 564.

Nebraska.— Brownell *v.* Stoddard, 42 Nebr. 177, 60 N. W. 380; Morse *v.* Raben, 27 Nebr. 145, 42 N. W. 901; Wood *v.* O'Hanlon, 26 Nebr. 527, 42 N. W. 733; Thompson *v.* Loenig, 13 Nebr. 386, 14 N. W. 168; Omaha First Nat. Bank *v.* Bartlett, 8 Nebr. 319, 1 N. W. 199.

New Jersey.— Jersey City Second Nat. Bank *v.* O'Rourke, 40 N. J. Eq. 92.

New York.— Kamp *v.* Kamp, 46 How. Pr. 143.

Pennsylvania.— Silliman *v.* Haas, 151 Pa. St. 52, 25 Atl. 72; Conrad *v.* Shomo, 44 Pa. St. 193.

South Carolina.— Jackson *v.* Lewis, 34 S. C. 1, 12 S. E. 560.

Tennessee.— Montgomery *v.* Clark, (Ch. App. 1898) 46 S. W. 466.

must be clear and satisfactory;[42] but it need not be clear, convincing, and indubitable.[43] To sustain the claim of payment of consideration for a conveyance alleged to have been made in fraud of creditors, where the amounts are large, testimony of the grantee, if uncorroborated by documentary evidence, must be clear and consistent with other evidence offered by him.[44] The fact that a mother was indebted to her son at the time of giving him a deed voluntary upon its face is not sufficient in the absence of any other evidence to show that it was given in payment of the debt.[45] On the issue of the validity, as against creditors of the husband, of a post-nuptial settlement alleged to have been made pursuant to an antenuptial agreement, declarations of the husband made during coverture are not sufficient to establish such agreement.[46]

g. Intent of Grantor. It is difficult to lay down a rule as to what amount of evidence is sufficient to show the fraudulent intent of the debtor. It must, however, be satisfactory. In other words it must be sufficiently strong and cogent to satisfy a person of sound judgment of the truth of the charge.[47] Such intent may, however, be gathered from the deed, from the acts of the parties, and

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 898.

42. Rine *v.* Hall, 187 Pa. St. 264, 40 Atl. 1088; Benson *v.* Maxwell, 105 Pa. St. 274.

Evidence sufficient to show indebtedness from husband to wife.— *Alabama.*— Seasongood *v.* Ware, 104 Ala. 212, 16 So. 51; Murray *v.* Heard, 103 Ala. 400, 15 So. 565.

Iowa.— Muir *v.* Miller, 103 Iowa 127, 72 N. W. 409; Gilbert *v.* Glenny, 75 Iowa 513, 39 N. W. 818, 1 L. R. A. 479.

Michigan.— Hicks *v.* McLachlan, 94 Mich. 278, 53 N. W. 1107; Dull *v.* Merrill, 69 Mich. 49, 36 N. W. 677; Allen *v.* Antisdale, 38 Mich. 229.

New Jersey.— Dresser *v.* Zabriskie, (Ch. 1898) 39 Atl. 1066; Minzesheimer *v.* Doolittle, 56 N. J. Eq. 206, 39 Atl. 386.

New York.— Willis *v.* Willis, 79 N. Y. App. Div. 9, 79 N. Y. Suppl. 1028; Birdsall, etc., Mfg. Co. *v.* Schwartz, 26 N. Y. App. Div. 343, 49 N. Y. Suppl. 782; Ellis *v.* Myers, 4 Silv. Sup. 323, 8 N. Y. Suppl. 139.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 900.

Evidence insufficient to show indebtedness from husband to wife.— *Alabama.*— Robert Graves Co. *v.* McDade, 108 Ala. 420, 19 So. 86; Wedgworth *v.* Wedgworth, 84 Ala. 274, 4 So. 149.

Georgia.— Booher *v.* Worrill, 57 Ga. 235.

Illinois.— Wesselhoeft *v.* Cudahy Packing Co., 44 Ill. App. 128.

Iowa.— Letz *v.* Smith, 94 Iowa 301, 62 N. W. 745; Jons *v.* Campbell, 84 Iowa 557, 51 N. W. 37; Iowa City Bank *v.* Weber, 72 Iowa 137, 33 N. W. 606; Eisfeld *v.* Dill, 71 Iowa 442, 32 N. W. 420; Triplett *v.* Graham, 58 Iowa 135, 12 N. W. 143.

Kentucky.— Carter *v.* Strange, 14 S. W. 837, 12 Ky. L. Rep. 642.

Michigan.— Felker *v.* Chubb, 90 Mich. 24, 51 N. W. 110; Keam *v.* Conkwright, 78 Mich. 58, 43 N. W. 1093.

New York.— Clinton Bank *v.* Collignon, 83 Hun 467, 31 N. Y. Suppl. 1116, 24 N. Y. Civ. Proc. 279.

Pennsylvania.— Sweeting *v.* Sweeting, 172 Pa. St. 161, 33 Atl. 543.

Virginia.— McConville *v.* National Valley Bank, 98 Va. 9, 34 S. E. 891.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 900.

Payment of high rate of interest.— Where a conveyance is made by a husband to his wife in payment of an alleged debt, the fact that an unusually high rate of interest is added to the principal sum may be considered by the jury in determining the *bona fides* of the debt (Hollis *v.* Rodgers, 106 Ga. 13, 31 S. E. 783); but the fact that compound interest is added to such a debt according to agreement does not show fraud (Frost *v.* Steele, 46 Minn. 1, 48 N. W. 413).

Corroboration necessary.— As against her husband's creditors seeking to set aside a conveyance to the wife, a debt from him to her cannot be proved by the uncorroborated testimony of the husband and the wife that he agreed to repay her money received from her out of her general estate. Sanford *v.* Allen, (Tenn. Ch. App. 1897) 42 S. W. 183. But *compare* Farmers' Nat. Bank *v.* Warner, 68 Iowa 147, 26 N. W. 47.

43. Rine *v.* Hall, 187 Pa. St. 264, 40 Atl. 1088.

44. Colston *v.* Miller, (W. Va. 1904) 47 S. E. 268; Graham *v.* O'Keefe, 16 Ir. Ch. 1.

45. Jackson *v.* Lewis, 34 S. C. 1, 12 S. E. 560.

46. Satterthwaite *v.* Emley, 4 N. J. Eq. 489, 3 Am. Dec. 618.

47. Bullett *v.* Worthington, 3 Md. Ch. 99 (holding that the indebtedness of a father at the time of the execution of a voluntary conveyance to his son is *prima facie* evidence of a fraudulent intent with respect to the father's prior creditors); Zeliff *v.* Schuster, 31 Mo. App. 493 (holding, however, that stronger evidence of a fraudulent intent is required to avoid a sale alleged to have been made to defraud subsequent creditors than in the case of existing creditors); Vandervort *v.* Fouse, 52 W. Va. 214, 43 S. E. 112 (holding that it is unnecessary that the fraudulent intent be proven beyond doubt, but it is enough if a case of reasonable probability be established, not readily explainable on any other hypothesis).

from the surrounding circumstances, and need not necessarily be proven as an independent fact.[48] While a party may testify as to the intent with which he made an alleged fraudulent transfer, yet such testimony is not conclusive, and does not necessarily outweigh the evidence of facts and circumstances tending to contradict such negative testimony.[49]

Evidence held sufficient.— *Arizona.*—Roundtree *v.* Marshall, (1899) 59 Pac. 109.

California.— Banning *v.* Marleau, 133 Cal. 485, 65 Pac. 964.

Indiana.— Dart *v.* Stewart, 17 Ind. 221; Ruffing *v.* Tilton, 12 Ind. 259.

Iowa.— Kerr *v.* Kennedy, 119 Iowa 239, 93 N. W. 353.

Kentucky.— Arnold *v.* Eastin, 116 Ky. 686, 76 S. W. 855, 25 Ky. L. Rep. 895.

Missouri.— Allen *v.* Berry, 40 Mo. 282; New York Store Mercantile Co. *v.* West, 107 Mo. App. 254, 80 S. W. 923.

Nebraska.— Bokhoof *v.* Stewart, 2 Nebr. (Unoff.) 714, 89 N. W. 759.

New Jersey.— Gardner *v.* Kleinke, 46 N. J. Eq. 90, 18 Atl. 457.

New York.— New York County Nat. Bank *v.* American Surety Co., 174 N. Y. 544, 67 N. E. 1086; Smith *v.* Reid, 134 N. Y. 568, 31 N. E. 1082 [*affirming* 11 N. Y. Suppl. 739, 19 N. Y. Civ. Proc. 363]; Walworth Mfg. Co. *v.* Burton, 82 N. Y. App. Div. 637, 81 N. Y. Suppl. 873; Carver *v.* Barker, 73 Hun 416, 26 N. Y. Suppl. 919.

South Dakota.— Probert *v.* McDonald, 2 S. D. 495, 51 N. W. 212, 39 Am. St. Rep. 796.

United States.— Watson *v.* Bonfils, 116 Fed. 157, 53 C. C. A. 535.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 892.

Evidence held insufficient.— *Arkansas.*— Blass *v.* Goodbar, 65 Ark. 511, 47 S. W. 630; Fly *v.* Screeton, 64 Ark. 184, 41 S. W. 764.

Colorado.— Homestead Min. Co. *v.* Reynolds, 30 Colo. 330, 70 Pac. 422.

Florida.—Alvarez *v.* Bowden, 39 Fla. 450, 22 So. 718.

Georgia.— Rouse *v.* Frank, 84 Ga. 623, 11 S. E. 147.

Illinois.— Martin *v.* Duncan, 47 Ill. App. 84.

Kentucky.— Hanson *v.* Power, 8 Dana 91.

Massachusetts.— Winchester *v.* Charter, 12 Allen 606.

Minnesota.— Donahue *v.* Campbell, 81 Minn. 107, 83 N. W. 469; Lathrop *v.* Clayton, 45 Minn. 124, 47 N. W. 544.

Missouri.— Staed *v.* Mahon, 70 Mo. App. 400.

New Jersey.— Waln *v.* Hance, 53 N. J. Eq. 660, 32 Atl. 169, 35 Atl. 1130.

New York.— Castleman *v.* Mayer, 55 N. Y. App. Div. 515, 67 N. Y. Suppl. 229; Perry *v.* Bedell, 13 N. Y. Suppl. 487.

North Carolina.— Guggenheimer *v.* Brookfield, 90 N. C. 232.

Ohio.— Robinson *v.* Von Dolcke, 3 Ohio S. & C. Pl. Dec. 107, 1 Ohio N. P. 429.

South Carolina.— Sloan *v.* Hunter, 56 S. C. 385, 34 S. E. 658, 879, 76 Am. St. Rep. 551; Gentry *v.* Lanneau, 54 S. C. 514, 32 S. E. 523, 71 Am. St. Rep. 814.

United States.— Micou *v.* Montgomery First Nat. Bank, 104 U. S. 530, 26 L. ed. 834; Atlas Nat. Bank *v.* Abram French Sons Co., 134 Fed. 746.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 892.

Property consumable in use.— Intrinsic evidence of the intention to hinder and delay creditors by a conveyance of property consumable in the use is repelled by the preservation of the rights of the creditors to the property conveyed. Hunter *v.* Foster, 4 Humphr. (Tenn.) 211.

48. *Georgia.*— Cohen *v.* Parish, 100 Ga. 335, 28 S. E. 122.

Illinois.— Bowden *v.* Bowden, 75 Ill. 143.

Iowa.— Doxsee *v.* Waddick, (1904) 98 N. W. 110; Davenport *v.* Cummings, 15 Iowa 219.

Kentucky.— Huffman *v.* Leslie, 66 S. W. 822, 23 Ky. L. Rep. 1981.

Maryland.— Baltimore High Grade Brick Co. *v.* Amos, 95 Md. 571, 52 Atl. 582, 53 Atl. 148; Zimmer *v.* Miller, 64 Md. 296, 1 Atl. 858; Powles *v.* Dilley, 2 Md. Ch. 119; Stewart *v.* Union Bank, 2 Md. Ch. 58.

Michigan.— Scandinavian Sveas Benev. Soc. *v.* Linquist, 133 Mich. 91, 94 N. W. 592; Smith *v.* Brown, 34 Mich. 455.

Minnesota.— Nichols, etc., Co. *v.* Gerlich, 84 Minn. 483, 87 N. W. 1120; Benson *v.* Nash, 75 Minn. 341, 77 N. W. 991; Hicks *v.* Stone, 13 Minn. 434; Blackman *v.* Wheaton, 13 Minn. 326.

Missouri.— State *v.* Manhattan Rubber Mfg. Co., 149 Mo. 181, 50 S. W. 321; Snyder *v.* Free, 114 Mo. 360, 21 S. W. 847; Burgert *v.* Borchert, 59 Mo. 80.

New York.— Continental Nat. Bank *v.* Moore, 83 N. Y. App. Div. 419, 82 N. Y. Suppl. 302; Gould Paper Co. *v.* Frank, 56 N. Y. Suppl. 747.

South Carolina.— Greig *v.* Rice, 66 S. C. 171, 44 S. E. 729; McGee *v.* Wells, 52 S. C. 472, 30 S. E. 602.

Texas.— Weisiger *v.* Chisholm, 28 Tex. 780.

West Virginia.— Vandervort *v.* Fouse, 52 W. Va. 214, 43 S. E. 112; Reynolds *v.* Gorthrop, 37 W. Va. 3, 16 S. E. 364; Livesay *v.* Beard, 22 W. Va. 585 (holding that where the facts and circumstances are such as to make a *prima facie* case of an intent to hinder, delay, or defraud creditors, they are to be taken as conclusive evidence of such intent, unless rebutted by other facts and circumstances); Hunter *v.* Hunter, 10 W. Va. 321; Lockhard *v.* Beckley, 10 W. Va. 87.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 892.

49. Pickett *v.* Pipkin, 64 Ala. 520 (holding that the court will regard professions of good faith and denials of fraud by the par-

h. Knowledge and Intent of Grantee or Purchaser From Grantee. Evidence offered to show that the grantee had knowledge or notice of the grantor's fraudulent intent,[50] or that he participated therein,[51] is subject to the usual rules as to weight and sufficiency; and so is evidence as to the good faith of a purchaser from the grantee.[52] Fraudulent intent in a purchaser of property from a debtor

ties to the transactions impeached "as but their own estimate of their conduct, which cannot relieve them from showing a reasonable and just explanation of the facts"); Chalmers *v.* Sheehy, 132 Cal. 459, 64 Pac. 709, 84 Am. St. Rep. 62; Bleiler *v.* Moore, 99 Wis. 486, 75 N. W. 953. See also Gardner *v.* Kreinke, 46 N. J. Eq. 90 18 Atl. 457. See Kalish *v.* Higgins, 175 N. Y. 495, 67 N. E. 1084 [*affirming* 70 N. Y. App. Div. 192, 75 N. Y. Suppl. 397], holding that the fact that in a suit to set aside a fraudulent conveyance, the testimony of one of defendants who was a party to the conveyance tended to show that it was without fraudulent intent is not believable, is not a circumstance from which such intent can be found.

50. See the following cases:

Alabama.— Allen *v.* Riddle, (1904) 37 So. 680; Norwood *v.* Washington, 136 Ala. 657, 33 So. 869; Mary Lee Coal, etc., Co. *v.* Knox, 110 Ala. 632, 19 So. 67.

Arizona.— Rountree *v.* Marshall, (1899) 59 Pac. 109.

Georgia.— Palmour *v.* Johnson, 84 Ga. 91, 10 S. E. 500.

Idaho.— Hailey First Nat. Bank *v.* Van Ness, 4 Ida. 539, 43 Pac. 59.

Illinois.— Cowling *v.* Estes, 15 Ill. App. 255.

Iowa.— Picket *v.* Garrison, 76 Iowa 347, 41 N. W. 38, 14 Am. St. Rep. 220; Draper *v.* Andrews, 49 Iowa 637; Greeley *v.* Sample, 22 Iowa 338.

Kentucky.— Merrifield *v.* Williams, 29 S. W. 332, 31 S. W. 142, 17 Ky. L. Rep. 8.

Maryland.— Hart *v.* Roney, 93 Md. 432, 49 Atl. 661.

Michigan.— Durrell *v.* Richardson, 119 Mich. 592, 78 N. W. 650.

Minnesota.— Manwaring *v.* O'Brien, 75 Minn. 542, 78 N. W. 1.

Missouri.— Bates County Bank *v.* Gailey, 177 Mo. 181, 75 S. W. 646.

Nebraska.— Coffield *v.* Parmenter, 2 Nebr. (Unoff.) 42, 96 N. W. 283.

New York.— Pollock *v.* Van Camp, 74 Hun 332, 26 N. Y. Suppl. 231.

North Carolina.— Haynes *v.* Rogers, 111 N. C. 228, 16 S. E. 416.

Tennessee.— Overall *v.* Parker, (Ch. App. 1899) 58 S. W. 905.

Texas.— Cooper *v.* Martin-Brown Co., 78 Tex. 219, 14 S. W. 577; Edmundson *v.* Silliman, 50 Tex. 106.

Virginia.— Wheby *v.* Moir, 102 Va. 875, 47 S. E. 1005; Flook *v.* Armentrout, 100 Va. 638, 42 S. E. 686; Alsop *v.* Catlett, 97 Va. 364, 34 S. E. 48.

Wisconsin.— Fisher *v.* Herrmann, 118 Wis. 424, 95 N. W. 392; Frisk *v.* Reigelman, 75 Wis. 499, 43 N. W. 1117, 44 N. W. 766, 17 Am. St. Rep. 198.

United States.— Sonnentheil *v.* Christian Moerlein Brewing Co., 172 U. S. 401, 19 S. Ct. 233, 43 L. ed. 492 [*affirming* 75 Fed. 350, 21 C. C. A. 390]; Erdhouse *v.* Hickenlooper, 9 Fed. Cas. No. 4,509, 2 Bond 392.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 904.

51. See the following cases:

Alabama.— Penney *v.* McCulloch, 134 Ala. 580, 33 So. 665.

Colorado.— Smith *v.* Jensen, 13 Colo. 213, 22 Pac. 434.

Illinois.— American Hoist, etc., Co. *v.* Hall, 208 Ill. 597, 70 N. E. 581 [*affirming* 110 Ill. App. 463]; Treadwell *v.* McEwen, 123 Ill. 253, 13 N. E. 850 [*affirming* 23 Ill. App. 111]; Youngs *v.* Sexton Nat. Bank, 59 Ill. App. 152.

Iowa.— Shaw *v.* Manchester, 84 Iowa 246, 50 N. W. 985; Searing *v.* Berry, 58 Iowa 20, 11 N. W. 708.

Kentucky.— Meyer *v.* Specker, 10 Ky. L. Rep. 116.

Louisiana.— Blanchet *v.* Hellebrant, 4 La. 439.

Maryland.— Hart *v.* Roney, 93 Md. 432, 49 Atl. 661; McDowell *v.* Goldsmith, 6 Md. 319, 61 Am. Dec. 305.

Massachusetts.— Carr *v.* Briggs, 156 Mass. 78, 30 N. E. 470.

Michigan.— Schloss *v.* Estey, 114 Mich. 429, 72 N. W. 264; Showman *v.* Lee, 86 Mich. 556, 49 N. W. 578.

Missouri.— Stokes *v.* Burns, 132 Mo. 214, 33 S. W. 460; Thompson *v.* Cohen, (1894) 24 S. W. 1023.

New York.— Nugent *v.* Jacobs, 103 N. Y. 125, 8 N. E. 367; Devoe *v.* Brandt, 53 N. Y. 462 [*reversing* 58 Barb. 493]; Moyer *v.* Bloomingdale, 38 N. Y. App. Div. 227, 56 N. Y. Suppl. 991; Wallace *v.* Nodine, 57 Hun 239, 10 N. Y. Suppl. 919; Noyes *v.* Morris, 56 Hun 501, 10 N. Y. Suppl. 561; Higgins *v.* Curtis, 17 N. Y. Suppl. 793.

Pennsylvania.— Ferry *v.* McKenna, 9 Pa. Co. Ct. 17.

Tennessee.— Hendly *v.* Hendly, (Ch. App. 1897) 46 S. W. 1016.

Vermont.— Eaton *v.* Cooper, 29 Vt. 444.

Virginia.— Johnson *v.* Lucas, 103 Va. 36, 48 S. E. 497.

West Virginia.— Colston *v.* Miller, 55 W. Va. 490, 47 S. E. 268.

Wisconsin.— Mehlhop *v.* Pettibone, 54 Wis. 652, 11 N. W. 553, 12 N. W. 443.

United States.— Fisher *v.* Moog, 39 Fed. 665; The Holladay Case, 27 Fed. 830.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 905, 906, 907.

52. See Pease *v.* Bridge, 49 Conn. 58; Throckmorton *v.* Rider, 42 Iowa 84; Fults *v.* Paul, 18 N. Y. Suppl. 524; Freiburg *v.* Dreydus, 135 U. S. 478, 10 S. Ct. 716, 34

need not be proved by positive evidence, but may be inferred from facts and circumstances surrounding the transaction;[53] and where the circumstances connected with a conveyance, fraudulent as to the grantor, plainly establish the complicity of the grantee in the fraudulent intent, it is not necessary to show by direct and positive proof notice to the grantee of such intent;[54] but mere suspicion in the minds of the jury that the grantee purchased with knowledge of the grantor's fraudulent intent is not sufficient to justify a verdict against his title, as fraud must always be distinctly proved.[55] In an action to set aside a conveyance as fraudulent, if the grantee testifies positively as to the good faith of the conveyance and there is nothing to overcome his testimony, the conveyance must stand.[56]

L. Trial — 1. Course and Conduct — a. In General. The rules applicable to the course and conduct of trials in civil actions generally usually apply to trials in actions in which it is sought to set aside conveyances on the ground of fraud.[57]

b. Submission of Issues to Jury. The general rule that such issues must be submitted as will afford an opportunity to have the law applicable to any material portions of the testimony fairly presented and passed upon by the jury applies in an action brought to set aside a conveyance as made in fraud of creditors.[58]

L. ed. 206; Weiler *v.* Dreyfus, 26 Fed. 824.

53. *Maryland.*— Dawson *v.* Waltemeyer, 91 Md. 328, 46 Atl. 994; Cooke *v.* Cooke, 43 Md. 522.

Missouri.— Frederick *v.* Allgaier, 88 Mo. 598.

New York.— Gowing *v.* Warner, 30 Misc. 593, 62 N. Y. Suppl. 797.

South Carolina.— Means *v.* Feaster, 4 S. C. 249.

West Virginia.— White *v.* Perry, 14 W. Va. 66; Murdock *v.* Baker, (1899) 32 S. E. 1009.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 905, 906, 907.

54. *Arkansas.*— Mente *v.* Townsend, 68 Ark. 391, 59 S. W. 41.

Illinois.— Hauk *v.* Van Ingen, 196 Ill. 20, 63 N. E. 705 [*affirming* 97 Ill. App. 642].

Iowa.— Doxsee *v.* Waddick, 122 Iowa 599, 98 N. W. 483.

Kentucky.— Huffman *v.* Leslie, 66 S. W. 822, 23 Ky. L. Rep. 1981.

Minnesota.— Benson *v.* Nash, 75 Minn. 341, 77 N. W. 991.

West Virginia.— Reynolds *v.* Gawthrop, 37 W. Va. 3, 16 S. E. 364; Core *v.* Cunningham, 27 W. Va. 206.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 905, 906, 907.

55. Tuteur *v.* Chase, 66 Miss. 476, 6 So. 241, 14 Am. St. Rep. 577, 4 L. R. A. 832; Truesdell *v.* Bourke, 145 N. Y. 612, 40 N. E. 83 [*reversing* 80 Hun 55, 29 N. Y. Suppl. 849]; Hetterman *v.* Young, (Tenn. Ch. App. 1898) 52 S. W. 532; Wilson *v.* Welsh, 41 Fed. 570.

56. Sawyer *v.* Moyer, 109 Ill. 461; De Loach *v.* Sarratt, 55 S. C. 254, 33 S. E. 2, 35 S. E. 441.

57. See, generally, Trial. And see the following cases:

Illinois.— Mathews *v.* Reinhardt, 149 Ill. 635, 37 N. E. 85, holding that in replevin, on an issue whether plaintiff's purchase of the property was in fraud of his vendor's creditors, it is proper to withdraw from the jury evidence that the vendee fraudulently contracted the debts, where there is no evidence connecting the plaintiff in such fraud.

Iowa.— Bixby *v.* Carskaddon, 70 Iowa 726, 29 N. W. 626, right to open and close.

Missouri.— Leeper *v.* Bates, 85 Mo. 224, overruling demurrer to evidence.

New York.— Jackson *v.* Peek, 4 Wend. 300, holding that where the absence of actual fraud is admitted by a party seeking to avoid a conveyance, the court will not look into the question of fraud, even after verdict, and where a case is made subject to the opinion of the court.

Pennsylvania.— Heath *v.* Slocum, 115 Pa. St. 549, 9 Atl. 259.

United States.— U. S. *v.* Griswold, 8 Fed. 556, 7 Sawy. 311.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 920.

Directing inquiry.— Where creditors attempt to reach real estate held for the debtor's wife, and the consideration for the conveyance of which is claimed to have come from her father's estate, the court may direct an inquiry as to whether there was any agreement that the proceeds of the wife's property should be applied to her separate use, and whether it has been so applied. Cronie *v.* Hart, 18 Gratt. (Va.) 739.

Adjournment to secure judgment.— In an action by attachment creditors of an insolvent firm to set aside prior judgments of other creditors entered upon offers to allow judgments, the court will not adjourn the trial to allow plaintiffs first to procure judgments. Columbus Watch Co. *v.* Hodenpyl, 61 Hun (N. Y.) 557, 16 N. Y. Suppl. 337.

58. Clement *v.* Cozart, 112 N. C. 412, 17 S. E. 486.

Form of issue see Miller *v.* Cobb, 19 N. Y. Suppl. 442; Rouse *v.* Bowers, 108 N. C. 182, 12 S. E. 985.

Notwithstanding a statutory provision making the question of fraudulent intent one of fact, a court of equity is competent to pronounce upon it in a case submitted on bill and answer, notwithstanding the denial of such intent in the answer, if the facts of the case be such as to produce the conviction of the fraudulent intent; but in doing so regard will be had only to such facts as are *per se* conclusive evidence of fraud.[59] Where in an action against a husband and wife to set aside an antenuptial deed of marriage settlement, on the ground that the same was given with intent to defraud creditors of the husband, and that the wife had connived at the fraud, the entire testimony showed that the wife before marriage had no knowledge of any fraud in the settlement, the court properly refused a request to direct an issue out of chancery to try the question of fraud and connivance.[60]

c. Reference and Accounting.[61] A court of equity is not compelled in an action to set aside a conveyance as in fraud of creditors always to decide the question of fraud in advance but may if necessary refer the case for the determination of certain facts before decreeing the conveyance to be void.[62] Where it is provided by statute that the question of fraudulent intent shall be deemed one of fact and not of law, a referee to whom has been referred the issue of the good faith of a debtor's transfer of property is to determine such question as if he were a jury, and if there is evidence reasonably tending to support the referee's findings they should not be disturbed.[63] Where it is sought to vacate a conveyance from a husband to his wife who claims that it was made to satisfy a debt due her from her husband, an account is properly taken to ascertain the amount of this debt, although the bill contains no averment or prayer on which to base such accounting.[64] Where a creditors' bill prayed the setting aside of a deed and bond for a deed made in alleged fraud of creditors, and the sale of the property, and the grantee answered, alleging that the two instruments constituted a mortgage securing a *bona fide* debt, a decree holding that the instruments did constitute a mortgage, and that the grantee was entitled to a prior lien on the property, properly directed an accounting to determine the amount due the grantee, although he filed no cross bill.[65]

2. Questions For Jury — a. Questions of Law and Fact — (i) *In General.* Either by statute or by general rule of law, the question of fraudulent intent is usually one of fact to be determined by the jury.[66] Where, however, a convey-

59. Cunningham *v.* Freeborn, 11 Wend. (N. Y.) 240.

60. Noble *v.* Davies, (Va. 1887) 4 S. E. 206.

61. See, generally, References.

62. Cumberland First Nat. Bank *v.* Parsons, 42 W. Va. 137, 24 S. E. 554.

63. Vose *v.* Stickney, 19 Minn. 367.

64. Hester *v.* Thomson, 58 Miss. 108.

65. Callahan *v.* Ball, 197 Ill. 318, 64 N. E. 295.

66. *Alabama.*— Davidson *v.* Kahn, 119 Ala. 364, 24 So. 583; Bank of Commerce *v.* Eureka Brick, etc., Co., 108 Ala. 89, 18 So. 600; Howell *v.* Carden, 99 Ala. 100, 10 So. 640; Johnson *v.* Thweatt, 18 Ala. 741; Thomas *v.* De Graffenreid, 17 Ala. 602; Planters', etc., Bank *v.* Borland, 5 Ala. 531.

California.— Bull *v.* Bray, 89 Cal. 286, 26 Pac. 873, 13 L. R. A. 576; Harris *v.* Burns, 50 Cal. 140; Tully *v.* Harloe, 35 Cal. 302, 95 Am. Dec. 102; Miller *v.* Stewart, 24 Cal. 502. See also Roberts *v.* Burr, (1898) 54 Pac. 849.

Florida.— Gibson *v.* Love, 4 Fla. 217.

Georgia.— Kiser *v.* Dozier, 102 Ga. 429, 30 S. E. 967, 66 Am. St. Rep. 184; Powell *v.* Westmoreland, 60 Ga. 572, 59 Ga. 256; Nicol *v.* Crittenden, 55 Ga. 497; Hobbs *v.* Davis, 50 Ga. 213.

Illinois.— Bushnell *v.* Wood, 85 Ill. 88; Hayes *v.* Bernard, 38 Ill. 297; Hargadine-McKittrick Dry Goods Co. *v.* Belt, 74 Ill. App. 581.

Indiana.— Carnahan *v.* Schwab, 127 Ind. 507, 26 N. E. 67; Citizens' Bank *v.* Bolen, 121 Ind. 301, 23 N. E. 146; Neisler *v.* Harris, 115 Ind. 560, 18 N. E. 39; Jarvis *v.* Banta, 83 Ind. 528; Bishop *v.* State, 83 Ind. 67; Goff *v.* Rogers, 71 Ind. 459; Hardy *v.* Mitchell, 67 Ind. 485; Pence *v.* Croan, 51 Ind. 336; Parton *v.* Yates, 41 Ind. 456; Church *v.* Drummond, 7 Ind. 17; Stewart *v.* English, 6 Ind. 176.

Iowa.— Sweet *v.* Wright, 62 Iowa 215, 17 N. W. 468.

Kansas.— Jones *v.* Johnson, 7 Kan. App. 616, 52 Pac. 464.

Maine.— Whitehouse *v.* Bolster, 95 Me. 458, 50 Atl. 240; Rich *v.* Reed, 22 Me. 28. See also Hall *v.* Sands, 52 Me. 355.

Massachusetts.— Winchester *v.* Charter,

ance is fraudulent on its face,[67] or where there is no dispute as to the facts of a

102 Mass. 272; Marden *v.* Babcock, 2 Metc. 99; Boyd *v.* Brown, 17 Pick. 453; Harrison *v.* Phillips Academy, 12 Mass. 456.

Michigan.— Gordon *v.* Alexander, 122 Mich. 107, 80 N. W. 978; Bedford *v.* Penney, 65 Mich. 667, 32 N. W. 888; Bagg *v.* Jerome, 7 Mich. 145; Oliver *v.* Eaton, 7 Mich. 108.

Minnesota.— Filley *v.* Register, 4 Minn. 391, 77 Am. Dec. 522.

Mississippi.—Wilson *v.* Kohlheim, 46 Miss. 346; Harney *v.* Pack, 4 Sm. & M. 229.

Missouri.— Plattsburg First Nat. Bank *v.* Fry, 168 Mo. 492, 68 S. W. 348; State *v.* Mason, 112 Mo. 374, 20 S. W. 629, 34 Am. St. Rep. 390; State *v.* Merritt, 70 Mo. 275; Potter *v.* McDowell, 31 Mo. 62; Middleton *v.* Hoff, 15 Mo. 415; Lane *v.* Kingsberry, 11 Mo. 402; Hungerford *v.* Greengard, 95 Mo. App. 653, 69 S. W. 602; Sevier *v.* Allen, 80 Mo. App. 187; Graham Paper Co. *v.* St. Joseph Times Printing, etc., Co., 79 Mo. App. 504.

Nebraska.— Bender *v.* Kingman, 64 Nebr. 766, 90 N. W. 886; Boldt *v.* West Point First Nat. Bank, 59 Nebr. 283, 80 N. W. 905; Oak Creek Valley Bank *v.* Helmer, 59 Nebr. 176, 80 N. W. 891; Sloan *v.* Thomas Mfg. Co., 58 Nebr. 713, 79 N. W. 728; Adler *v.* Hellmann, 55 Nebr. 266, 75 N. W. 877; Omaha Coal, etc., Co. *v.* Suess, 54 Nebr. 379, 74 N. W. 620; Harris *v.* Weir-Shugart Co., 51 Nebr. 483, 70 N. W. 1118; Campbell *v.* Farmers', etc., Bank, 49 Nebr. 143, 68 N. W. 344; Goldsmith *v.* Erickson, 48 Nebr. 48, 66 N. W. 1029; Grimes Dry Goods Co. *v.* Shaffer, 41 Nebr. 112, 59 N. W. 741; Hewitt *v.* Commercial Banking Co., 40 Nebr. 820, 59 N. W. 693; Houck *v.* Heinzman, 37 Nebr. 463, 55 N. W. 1062; Connelly *v.* Edgerton, 22 Nebr. 82, 34 N. W. 76.

New York.— Bristol *v.* Hull, 166 N. Y. 59, 59 N. E. 698; Syracuse Chilled Plow Co. *v.* Wing, 85 N. Y. 421; Babcock *v.* Eckler, 24 N. Y. 623; New York County Nat. Bank *v.* American Surety Co., 69 N. Y. App. Div. 153, 74 N. Y. Suppl. 692; Vogedes *v.* Beakes, 38 N. Y. App. Div. 380, 56 N. Y. Suppl. 662; Hurlbut *v.* Hurlbut, 49 Hun 189, 1 N. Y. Suppl. 854; Bennett *v.* McGuire, 58 Barb. 625; Peck *v.* Crouse, 46 Barb. 151; Groat *v.* Rees, 20 Barb. 26; Bishop *v.* Cook, 13 Barb. 326; Brace *v.* Gould, 1 Thomps. & C. 226; Colby *v.* Peabody, 52 N. Y. Super. Ct. 394; Blaut *v.* Gabler, 8 Daly 48 [*affirmed* in 77 N. Y. 461]; Rheinfeldt *v.* Dahlman, 19 Misc. 162, 43 N. Y. Suppl. 281; White's Bank *v.* Farthing, 10 N. Y. St. 830; Hyatt *v.* Dusenbury, 12 N. Y. Civ. Proc. 152; Murray *v.* Burtis, 15 Wend. 212.

North Carolina.— Beasley *v.* Bray, 98 N. C. 266, 3 S. E. 497; Hardy *v.* Simpson, 35 N. C. 132; Leadman *v.* Harris, 14 N. C. 144; Smith *v.* Niel, 8 N. C. 341.

Oregon.— Weaver *v.* Owens, 16 Oreg. 301, 18 Pac. 579.

Pennsylvania.— White *v.* Gunn, 205 Pa. St. 229, 54 Atl. 901; Gray *v.* Trent, (1888) 16 Atl. 107; Barr *v.* Boyles, 96 Pa. St. 31; Ferris *v.* Irons, 83 Pa. St. 179; Mullen *v.* Wilson, 44 Pa. St. 413, 84 Am. Dec. 461; Vallance *v.* Miners L. Ins., etc., Co., 42 Pa. St. 441; Graham *v.* Smith, 25 Pa. St. 323; Avery *v.* Street, 6 Watts 247.

South Carolina.— Perkins *v.* Douglass, 52 S. C. 129, 29 S. E. 400; Pringle *v.* Rhame, 10 Rich. 72, 67 Am. Dec. 560; Hamilton *v.* Greenwood, 1 Bay 173, 1 Am. Dec. 607.

Tennessee.— Charlton *v.* Lay, 5 Humphr. 496; Hoskins *v.* Carroll, 7 Yerg. 505.

Texas.— Van Bibber *v.* Mathis, 52 Tex. 406; Briscoe *v.* Bronaugh, 1 Tex. 326, 46 Am. Dec. 108; Moore *v.* Robinson, (Civ. App. 1903) 75 S. W. 890; Schuster *v.* Farmers', etc., Nat. Bank, 23 Tex. Civ. App. 206, 54 S. W. 777, 55 S. W. 1121, 56 S. W. 93; McGregor *v.* White, 15 Tex. Civ. App. 299, 39 S. W. 1024; Kruschell *v.* Anders, (Civ. App. 1894) 26 S. W. 249.

Vermont.— See Fish *v.* Field, 19 Vt. 141.

Washington.— Adams *v.* Dempsey, 22 Wash. 284, 60 Pac. 649, 79 Am. St. Rep. 933; Ephraim *v.* Kelleher, 4 Wash. 243, 29 Pac. 985, 1 L. R. A. 604.

Wisconsin.— Kaufer *v.* Walsh, 88 Wis. 63, 59 N. W. 460; Hoey *v.* Pierron, 67 Wis. 262, 30 N. W. 692; Hooser *v.* Hunt, 65 Wis. 71, 26 N. W. 442; Evans *v.* Rugee, 63 Wis. 31, 23 N. W. 24; Trowbridge *v.* Sickler, 54 Wis. 306, 11 N. W. 581; Barkow *v.* Sanger, 47 Wis. 500, 3 N. W. 16; Hyde *v.* Chapman, 33 Wis. 391; Bond *v.* Seymour, 2 Pinn. 105, 1 Chandl. 40.

United States.— Warner *v.* Norton, 20 How. 448, 15 L. ed. 950; McLaughlin *v.* Potomac Bank, 7 How. 220, 12 L. ed. 675; Fleischman *v.* Bowser, 62 Fed. 259, 10 C. C. A. 370; Hills *v.* Stockwell, etc., Furniture Co., 23 Fed. 432; Means *v.* Montgomery, 23 Fed. 421; Morse *v.* Riblet, 22 Fed. 501; Howe Mach. Co. *v.* Claybourn, 6 Fed. 438; Sedgwick *v.* Place, 21 Fed. Cas. No. 12,621, 12 Blatchf. 163.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 923.

Whether a voluntary conveyance is fraudulent or not, as against creditors, is in most jurisdictions a question of fact for the jury. French *v.* Holmes, 67 Me. 186; Thacher *v.* Phinney, 7 Allen (Mass.) 146; Pomeroy *v.* Bailey, 43 N. H. 118; Jackson *v.* Timmerman, 7 Wend. (N. Y.) 436. And see *supra*, VIII, D.

Judgment by confession.— It is within the province of the jury to inquire whether, in point of fact, a judgment by confession was fraudulent. Wilhelmi *v.* Leonard, 13 Iowa 330. See *supra*, III, A, 4, b, (II).

67. *Alabama.*—Johnson *v.* Thweatt, 18 Ala. 741.

Maryland.— Green *v.* Treber, 3 Md. 11.

Minnesota.— Burt *v.* McKinstry, 4 Minn. 204, 77 Am. Dec. 507; Chophard *v.* Bayard, 4 Minn. 533.

Missouri.— Bigelow *v.* Stringer, 40 Mo. 195; Jacob Furth Grocery Co. *v.* May, 78 Mo. App. 323.

transfer,[68] fraudulent intent is not a question for the jury. And it has been held that an express statutory provision declaring that the question of fraudulent intent shall be deemed a question of fact and not of law does not interfere with the prerogative of the court to direct a verdict, provided the fraudulent intent is conclusively established on the face of the instrument of transfer, or by the uncontradicted testimony.[69] The question of intent in the case of an alleged fraudulent conveyance or transfer between husband and wife,[70] parent and child,[71] brothers,[72] and others closely related[73] is, as in the case of conveyances or transfers between strangers, generally one of fact for the jury.

(II) *PARTICULAR QUESTIONS* — (A) *Nature and Form of Transaction.* Whether the nature of a transfer is such as to render it fraudulent;[74] whether the instrument is intended to pass title;[75] whether the execution of a bill of sale to property subsequently alleged to have been transferred to defraud creditors was part of the fraudulent scheme;[76] whether two instruments are parts of the same transaction, so that infirmities in one vitiate both;[77] whether the sale is in the ordinary course of business;[78] and whether the reëxecution of an instrument at first illegally executed is made in good faith,[79] have been held to be questions of fact for the consideration of the jury.

(B) *Transfer of Possession to Vendee.* Where the facts are undisputed, the question as to whether there has been a transfer of possession is one of law.[80] If,

New York.— Bulger *v.* Rosa, 119 N. Y. 459, 24 N. E. 853; Edgell *v.* Hart, 9 N. Y. 213, 59 Am. Dec. 532.

Pennsylvania.— Lyon *v.* Hampton, 20 Pa. St. 46.

Texas.— Peiser *v.* Peticolas, 50 Tex. 638, 32 Am. Rep. 621.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 923.

68. *California.*— Chenery *v.* Palmer, 6 Cal. 119, 65 Am. Dec. 493; Billings *v.* Billings, 2 Cal. 107, 56 Am. Dec. 319.

Colorado.— People *v.* Colorado Ct. App., (1901) 65 Pac. 42; Curran *v.* Rothschild, 14 Colo. App. 497, 60 Pac. 1111.

Massachusetts.— Gerrish *v.* Mace, 9 Gray 235.

Michigan.— Edwards *v.* Edwards, 54 Mich. 347, 19 N. W. 164.

Minnesota.— Burt *v.* McKinstry, 4 Minn. 204, 77 Am. Dec. 507.

Nebraska.— Bender *v.* Kingman, 62 Nebr. 469, 87 N. W. 142.

New York.— Jackson *v.* Mather, 7 Cow. 301.

North Carolina.— Rea *v.* Alexander, 27 N. C. 644.

Oklahoma.— Walters *v.* Ratliff, 10 Okla. 262, 61 Pac. 1070.

Texas.— Ellis *v.* Valentine, 65 Tex. 532.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 923.

69. Bulger *v.* Rose, 119 N. Y. 459, 24 N. E. 853 [*citing* Ford *v.* Williams, 24 N. Y. 359; Edgell *v.* Hart, 9 N. Y. 243, 59 Am. Dec. 532].

70. *Indiana.*— Holman *v.* Martin, 12 Ind. 553.

Massachusetts.— See O'Donnell *v.* Hall, 154 Mass. 429, 28 N. E. 349.

Nebraska.— Monteith *v.* Bax, 4 Nebr. 166.

New Jersey.—Reford *v.* Cramer, 30 N. J. L. 250.

New York.—Woodworth *v.* Sweet, 51 N. Y. 8 [*affirming* 44 Barb. 268]; Merritt *v.* Lyon, 3 Barb. 110.

Pennsylvania.— Conley *v.* Bentley, 87 Pa. St. 40.

South Carolina.— Burckmyer *v.* Mairs, Riley 208.

Wisconsin.— See Barker *v.* Lynch, 75 Wis. 624, 44 N. W. 826.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 938.

71. Merrill *v.* Merrill, 105 Ill. App. 5; Chambers *v.* Spencer, 5 Watts (Pa.) 404. See also Chase *v.* Elkins, 2 Vt. 290.

72. Wessels *v.* Beeman, 66 Mich. 343, 33 N. W. 510; Craver *v.* Miller, 65 Pa. St. 456.

73. Heilner *v.* Walsh, 47 N. Y. Super. Ct. 269; Reiger *v.* Davis, 67 N. C. 185.

74. Haynes *v.* Ledyard, 33 Mich. 319; Hine *v.* Bowe, 114 N. Y. 350, 21 N. E. 733; Forsyth *v.* Matthews, 14 Pa. St. 100, 53 Am. Dec. 522; Carter *v.* Acker, (Tex. Civ. App. 1894) 27 S. W. 502.

75. Cole *v.* Call, 79 Mich. 159, 44 N. W. 344.

76. Oliver *v.* Reading Iron Company, 170 Pa. St. 396, 32 Atl. 1088.

77. Bowling *v.* Armourdale Bank, 57 Kan. 174, 45 Pac. 584.

78. Stevens *v.* Pierce, 147 Mass. 510, 18 N. E. 411.

79. Hoffer *v.* Gladden, 75 Ga. 532.

80. *California.*— Hodgkins *v.* Hook, 23 Cal. 581.

Missouri.— Reynolds *v.* Beck, 108 Mo. App. 188, 83 S. W. 292; Knoop *v.* Nelson Distilling Company, 26 Mo. App. 303.

Oklahoma.— Walters *v.* Ratliff, 10 Okla. 262, 61 Pac. 1070.

Pennsylvania.— Garman *v.* Cooper, 72 Pa. St. 32; Milne *v.* Henry, 40 Pa. St. 352; Platt *v.* McQuown, 20 Pa. Co. Ct. 401; Leech *v.* Shantz, 2 Phila. 310.

Vermont.— White *v.* Miller, 46 Vt. 65; Burrows *v.* Stebbins, 26 Vt. 659.

however, the facts as to transfer of possession are doubtful, the question must be passed upon by the jury.[81]

(c) *Retention of Possession by Vendor.* Whether the question of fraudulent intent as based on the debtor's retention of possession of property transferred by him is one of law or fact is fully discussed in a previous section.[82]

(d) *Matters Relating to Consideration.* Whether the consideration for an alleged fraudulent conveyance is *bona fide*,[83] or whether there is such inadequacy as to show a fraudulent intent,[84] is a question of fact for the jury to determine. Where a deed of trust is made to secure an antecedent debt,[85] or where a conveyance of land is in consideration of future maintenance,[86] the question of fraud is for the jury. Where the property transferred exceeds the amount of the claim secured, the good faith of the transaction is a question of fact for the jury.[87] A sale on credit for the greater portion of the purchase-money does not establish fraud

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 930. And see *supra*, IX.

81. *California.*— Hesthal *v.* Myles, 53 Cal. 623; Cahoon *v.* Marshall, 25 Cal. 197; Hodgkins *v.* Hook, 23 Cal. 581.

Connecticut.— Mead *v.* Noyes, 44 Conn. 487; Potter *v.* Mather, 24 Conn. 551.

Idaho.— Rapple *v.* Hughes, (1904) 77 Pac. 722; Simons *v.* Daly, (1903) 72 Pac. 507.

Iowa.— Wessels *v.* McCann, 85 Iowa 424, 52 N. W. 346.

Maine.— Sawyer *v.* Nichols, 40 Me. 212.

Michigan.—McLaughlin *v.* Lange, 42 Mich. 81, 3 N. W. 267.

Missouri.— Reynolds *v.* Beck, 108 Mo. App. 188, 83 S. W. 292; Tennent-Stribling Shoe Co. *v.* Rudy, 53 Mo. App. 196; Simmons Hardware Co. *v.* Pfeil, 35 Mo. App. 256; Leeser *v.* Boekhoff, 33 Mo. App. 223.

Montana.— O'Gara *v.* Lowry, 5 Mont. 427, 5 Pac. 583.

New York.— Menken *v.* Baker, 166 N. Y. 628, 60 N. E. 1116; Bristol *v.* Hull, 166 N. Y. 59, 59 N. E. 698; Tilson *v.* Terwilliger, 56 N. Y. 273; Woodworth *v.* Hodgson, 56 Hun 236, 9 N. Y. Suppl. 750; Schidlower *v.* McCafferty, 85 N. Y. App. Div. 493, 83 N. Y. Suppl. 391.

Pennsylvania.— White *v.* Gunn, 205 Pa. St. 229, 54 Atl. 901; Garretson *v.* Hackenberg, 144 Pa. St. 107, 22 Atl. 875; Pressel *v.* Bice, 142 Pa. St. 263, 21 Atl. 813; Renninger *v.* Spatz, 128 Pa. St. 524, 18 Atl. 405, 15 Am. St. Rep. 692; Gray *v.* Trent, (1888) 16 Atl. 107; Barr *v.* Boyles, 96 Pa. St. 31; Barr *v.* Reitz, 53 Pa. St. 256; Milne *v.* Henry, 40 Pa. St. 352; Chase *v.* Ralston, 30 Pa. St. 539; Forsyth *v.* Matthews, 14 Pa. St. 100, 53 Am. Dec. 522; McAlevy *v.* McElroy, 10 Pa. Cas. 364, 14 Atl. 242; Schwab *v.* Woods, 24 Pa. Super. Ct. 433; Platt *v.* McQuown, 20 Pa. Co. Ct. 401; Staller *v.* Kirkpatrick, 1 Mona. 486.

Vermont.— Rothchild *v.* Rowe, 44 Vt. 389; Burrows *v.* Stebbins, 26 Vt. 659; Stephenson *v.* Clark, 20 Vt. 624; Hall *v.* Parsons, 17 Vt. 271.

Wisconsin.— Tuckwood *v.* Hanthorn, 67 Wis. 326, 30 N. W. 705.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 930.

Where there is no assumption of ownership by the vendee, it is the duty of the court to pronounce a mere symbolical delivery of personalty to be insufficient against creditors of the seller, but where there is evidence of such assumption of control, it is for the jury to say whether it is in good faith or merely colorable, and whether it is enough to give notice to the world. Rex *v.* Jones, 6 Pa. Co. Ct. 401.

"Delivery in a reasonable time."— What is "delivery in a reasonable time" under a statute is ordinarily for the jury to determine. Leeser *v.* Boekhoff, 38 Mo. App. 445; State *v.* Hellman, 20 Mo. App. 304.

82. See *supra*, IX, A, 2, 3.

83. *Georgia.*— Planters', etc., Bank *v.* Willeo Cotton Mills, 60 Ga. 168; Booker *v.* Worrill, 55 Ga. 332; Williams *v.* Kelsey, 6 Ga. 365.

Michigan.— Warner *v.* Littlefield, 89 Mich. 329, 50 N. W. 721.

Mississippi.— Harney *v.* Pack, 4 Sm. & M. 229.

New Hampshire.— Pomeroy *v.* Bailey, 43 N. H. 118.

New York.— Bristol *v.* Hull, 166 N. Y. 59, 59 N. E. 698.

North Carolina.—Doe *v.* Caldwell, 49 N. C. 150.

Pennsylvania.— Ferris *v.* Irons, 83 Pa. St. 179; Keen *v.* Kleckner, 42 Pa. St. 529; King *v.* Besson, 5 Pa. Cas. 59, 8 Atl. 198.

United States.— See Hinchman *v.* Parlin, etc., Co., 81 Fed. 157, 26 C. C. A. 323.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 937.

84. *Georgia.*— Williams *v.* Kelsey, 6 Ga. 365.

Kansas.— Dodson *v.* Cooper, 50 Kan. 680, 32 Pac. 370.

Missouri.— Salomon *v.* Mason, 112 Mo. 374, 20 S. W. 629, 34 Am. St. Rep. 390; Stern, etc., Co. *v.* Mason, 16 Mo. App. 473.

New York.— Gowing *v.* Warner, 30 Misc. 593, 62 N. Y. Suppl. 797.

North Carolina.— Southern L. & T. Co. *v.* Benbow, 135 N. C. 303, 47 S. E. 435.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 937.

85. Harney *v.* Pack, 4 Sm. & M. (Miss.) 229.

86. Hennon *v.* McClane, 88 Pa. St. 219.

87. Birdsall *v.* Welch, 6 D. C. 316; Hand *v.* Hitner, 140 Pa. St. 166, 21 Atl. 260.

as a legal conclusion, but the question of intent must be left to the jury.[88] Although the amount for which a mortgage is executed is materially larger than that due, this is merely a badge of fraud, and the question of fraud is one of fact for the jury.[89] Whether a chattel mortgage given to secure future advances as well as an existing debt is fraudulent as to other creditors is a question of fact, not of law, although the mortgage does not state that the excess above the debt is for future advances.[90] It is a question for the jury whether the presumption of law that a sale of property, the consideration of which was paid by a third person, is fraudulent as against creditors of the person paying the consideration has been rebutted by the evidence in the case.[91]

(E) *Indebtedness and Insolvency.* It is the province of the jury and not of the court to draw the inference of fraud from the indebtedness[92] or insolvency[93] of the grantor or vendor. Under a statute providing that a debtor shall not disable himself from meeting his debts by voluntary alienations of his property the question as to whether the property retained is sufficient is for the jury.[94]

(F) *Participation and Knowledge of Grantee.* The question as to whether the grantee or vendee had knowledge of or participated in the fraudulent intent of the grantor or vendor is one of fact.[95]

(G) *Existence of Creditors.* It is for the law, however, to determine whether there were creditors so as to render the conveyance fraudulent.[96]

(H) *Secrecy.* Whether an unusual degree of secrecy exists in a transfer by an insolvent so as to constitute a badge of fraud,[97] and whether a debtor's secret conveyance is in fraud of creditors are questions of fact for the jury.[98]

(I) *Preferences.* A debtor in failing circumstances has a right to secure or pay in full a portion of his creditors to the exclusion of others, and whether in so doing he is acting with a fraudulent purpose is a question of fact.[99]

(J) *Withholding Instrument From Record.* Where the evidence is conflict-

88. Harris *v.* Burns, 50 Cal. 140. See also Matthews *v.* Rice, 31 N. Y. 457.

89. Wooley *v.* Fry, 30 Ill. 158; Goff *v.* Rogers, 71 Ind. 459.

90. Wood *v.* Franks, 67 Cal. 32, 7 Pac. 50.

91. Foster *v.* Berkey, 8 Minn. 351.

92. Filley *v.* Register, 4 Minn. 391, 77 Am. Dec. 522; Lutton *v.* Hesson, 18 Pa. St. 109; Forsyth *v.* Matthews, 14 Pa. St. 100, 53 Am. Dec. 522; Kerr *v.* Hutchins, 46 Tex. 384.

93. Knox *v.* Moses, 104 Cal. 502, 38 Pac. 318; Bull *v.* Bray, 89 Cal. 286, 26 Pac. 873, 13 L. R. A. 576; McConnell *v.* Brown, Litt. Sel. Cas. (Ky.) 459; Ladnier *v.* Ladnier, 64 Miss. 368, 1 So. 492.

94. Worthy *v.* Brady, 108 N. C. 440, 12 S. E. 1034, 91 N. C. 265.

95. *Alabama.*— Smith *v.* Kaufman, 100 Ala. 408, 14 So. 111; Smith *v.* Collins, 94 Ala. 394, 10 So. 334.

Connecticut.— Knower *v.* Cadden Clothing Co., 57 Conn. 202, 17 Atl. 580.

Georgia.— Planters', etc., Bank *v.* Willeo Cotton Mills, 60 Ga. 168.

Indiana.— Leasure *v.* Coburn, 57 Ind. 274.

Kentucky.— Brown *v.* Foree, 7 B. Mon. 357, 46 Am. Dec. 519.

Louisiana.— Carrollton Bank *v.* Cleveland, 15 La. Ann. 616.

Maryland.— Ecker *v.* McAllister, 45 Md. 290.

Michigan.— Molitor *v.* Robinson, 40 Mich. 200.

Missouri.— Van Raalte *v.* Harrington, 101 Mo. 602, 14 S. W. 710, 20 Am. St. Rep. 626, 11 L. R. A. 424.

New Hampshire.— Martin *v.* Livingston, 68 N. H. 562, 563, 39 Atl. 432.

New York.— New York County Nat. Bank *v.* American Surety Co., 174 N. Y. 544, 67 N. E. 1086 [*affirming* 69 N. Y. App. Div. 153, 74 N. Y. Suppl. 692]; Mahler *v.* Schloss, 7 Daly 291; Greenwald *v.* Wales, 174 N. Y. 140, 66 N. E. 665.

North Carolina.— Osborne *v.* Wilkes, 108 N. C. 651, 13 S. E. 285.

Pennsylvania.— Weber *v.* Aschbacker, 205 Pa. St. 558, 55 Atl. 534; Bredin *v.* Bredin, 3 Pa. St. 81; Helser *v.* McGrath, 58 Pa. St. 458; Snyder *v.* Berger, 3 Pa. Cas. 318, 6 Atl. 733.

South Carolina.— Aultman *v.* Utsey, 34 S. C. 559, 13 S. E. 848.

Texas.— Hines *v.* Perry, 25 Tex. 443.

United States.— Browning *v.* De Ford, 178 U. S. 196, 20 S. Ct. 876, 44 L. ed. 1033; Swofford Bros. Dry Goods Co. *v.* Smith-McCord Dry Goods Co., 85 Fed. 417, 29 C. C. A. 239.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 932.

96. Day *v.* Lown, 51 Iowa 364, 1 N. W. 786.

97. Fishel *v.* Lockard, 52 Ga. 632.

98. Hartley *v.* Millard, 167 Pa. St. 322, 31 Atl. 641.

99. Nelson *v.* Leiter, 190 Ill. 414, 60 N. E. 851, 83 Am. St. Rep. 142 [*affirming* 93 Ill. App. 176]; John V. Farwell Co. *v.* Wright,

ing, the question whether there was an agreement not to record a conveyance is for the jury.[1]

b. Submission of Case to Jury. Cases involving the fraudulency of conveyances or transfers should be submitted to the jury if there are circumstances which are calculated to excite a suspicion in the mind of a reasonable person that the transaction was not entirely fair and honest,[2] and it is error to take the question from them by nonsuit, dismissal, direction of a verdict, or instruction when such circumstances are shown.[3] Where, however, there is no evidence tending to show that the transaction was entered into with intent to defraud creditors, there is no ground on which to submit the case to the jury,[4] and if the evidence of fraud tends to prove merely slight circumstances of suspicion,[5] or is conclusive of the existence or non-existence of fraud,[6] then the question becomes one of law for the court, and should not be submitted to the jury.

38 Nebr. 445, 56 N. W. 984; Kilpatrick-Koch Dry Goods Co. *v.* McPheely, 37 Nebr. 800, 56 N. W. 389; Porter *v.* Stricker, 44 S. C. 183, 21 S. E. 635. And see *supra*, XI.

1. Kohn *v.* Johnston, 97 Iowa 99, 66 N. W. 76.

2. *District of Columbia.*— Bokel, etc., Co. *v.* Costello, 22 App. Cas. 81.

Illinois.— Bradley *v.* Coolbaugh, 91 Ill. 148.

Iowa.— Crawford *v.* Nolan, 70 Iowa 97, 30 N. W. 32.

Kansas.— Schuster *v.* Kurtz, 47 Kan. 255, 27 Pac. 994.

Massachusetts.— Plimpton *v.* Goodell, 143 Mass. 365, 9 N. E. 791; Allen *v.* Wheeler, 4 Gray 123.

Michigan.— Bendetson *v.* Moody, 100 Mich. 553, 59 N. W. 252; Morse *v.* Denton, 77 Mich. 693, 43 N. W. 1075; King *v.* Hubbell, 42 Mich. 597, 4 N. W. 440.

Minnesota.— Heim *v.* Heim, 90 Minn. 497, 97 N. W. 379; Dyer *v.* Rowe, 82 Minn. 223, 84 N. W. 797.

Mississippi.— May *v.* Taylor, 62 Miss. 500.

Missouri.— Mears *v.* Gage, (1904) 80 S. W. 712; Hanna *v.* Finley, 33 Mo. App. 645.

New York.— Bulger *v.* Rosa, 119 N. Y. 459, 24 N. E. 853; Inglehart *v.* Thousand Island Hotel Co., 109 N. Y. 454, 17 N. E. 358; Voss *v.* Smith, 87 N. Y. App. Div. 395, 84 N. Y. Suppl. 471; Milwaukee Harvester Co. *v.* Culver, 89 Hun 598, 35 N. Y. Suppl. 289; Del Valle *v.* Hyland, 15 N. Y. Suppl. 901; Bier *v.* Kibbe, 5 N. Y. Suppl. 152.

North Carolina.— Haynes *v.* Rogers, 111 N. C. 228, 16 S. E. 416, direct evidence of grantee's knowledge not essential to warrant submission.

Pennsylvania.— Snayberger *v.* Fahl, 195 Pa. St. 336, 45 Atl. 1065; Cover *v.* Manaway, 115 Pa. St. 338, 8 Atl. 393, 2 Am. St. Rep. 552; McKibblin *v.* Martin, 64 Pa. St. 352, 3 Am. Rep. 588; Baltimore, etc., R. Co. *v.* Hoge, 34 Pa. St. 214; Snyder *v.* Berger, 3 Pa. Cas. 318, 6 Atl. 733.

Texas.— Haas *v.* Kraus, 75 Tex. 106, 12 S. W. 394; Weaver *v.* Nugent, 72 Tex. 272, 10 S. W. 458, 13 Am. St. Rep. 792; Scott *v.* Alford, 53 Tex. 82; Matula *v.* Lane, (Civ. App. 1900) 56 S. W. 112.

United States.— Batavia *v.* Wallace, 102 Fed. 240, 42 C. C. A. 310.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 933.

Where the evidence is conflicting as to the character of the transaction the case must be submitted to the jury. C. B. Rogers Co. *v.* Meinhardt, 37 Fla. 480, 19 So. 878; Steininger *v.* Donalson, 94 Ga. 514, 20 S. E. 420; Vickers *v.* Woodruff, 78 Iowa 400, 43 N. W. 266; Kerr *v.* Hutchins, 46 Tex. 384.

3. *Florida.*— C. B. Rogers Co. *v.* Meinhardt, 37 Fla. 480, 19 So. 878.

Georgia.— Steininger *v.* Donalson, 94 Ga. 514, 20 S. E. 420.

Massachusetts.— Plimpton *v.* Goodell, 143 Mass. 365, 9 N. E. 791.

New York.— Bulger *v.* Rosa, 119 N. Y. 459, 24 N. E. 853; Del Valle *v.* Hyland, 15 N. Y. Suppl. 901.

North Carolina.— Haynes *v.* Rogers, 111 N. C. 228, 16 S. E. 416.

Texas.— Matula *v.* Lane, (Civ. App. 1900) 56 S. W. 112.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 933.

4. *Michigan.*— Clark *v.* Phelps, 76 Mich. 564, 43 N. W. 591; Folkerts *v.* Standish, 55 Mich. 463, 21 N. W. 891.

New York.— Truesdell *v.* Bourke, 145 N. Y. 612, 40 N. E. 83 [*reversing* 80 Hun 55, 29 N. Y. Suppl. 849].

North Carolina.— Messick *v.* Fries, 128 N. C. 450, 39 S. E. 59.

Pennsylvania.— Snayberger *v.* Fahl, 195 Pa. St. 336, 45 Atl. 1065, 78 Am. St. Rep. 818.

Vermont.— Tinker *v.* Cobb, 39 Vt. 483.

Washington.— Berlin *v.* Van de Vanter, 25 Wash. 465, 65 Pac. 756.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 933.

5. Simmons Clothing Co. *v.* Davis, 3 Indian Terr. 374, 58 S. W. 653; State *v.* O'Neill, 151 Mo. 67, 52 S. W. 240; Baker, etc., Co. *v.* Schneider, 85 Mo. App. 412; Hagy *v.* Poike, 160 Pa. St. 522, 28 Atl. 846 [*affirming* 2 Pa. Dist. 792]; Foster *v.* McAlester, 114 Fed. 145, 52 C. C. A. 107.

6. Fish *v.* McDonnell, 42 Minn. 519, 44 N. W. 535; Prentiss Tool, etc., Co. *v.* Schirmer, 136 N. Y. 305, 32 N. E. 849, 32 Am. St. Rep. 737.

3. INSTRUCTIONS[7] — a. Province of Court and Jury. When it is within the province of the jury to determine whether there was an intent to defraud creditors as it usually is, the court must submit the question to them with proper instructions;[8] they should not be left to determine without direction whether a transaction is fraudulent.[9] The court should not invade the province of the jury by assumptions as to facts,[10] or by instructions in the nature of commentaries on the weight and sufficiency of the evidence.[11] But where the facts are clear and

7. See, generally, TRIAL.

8. *Alabama.*— Bank of Commerce *v.* Eureka Brick, etc., Co., 108 Ala. 89, 18 So. 600; Smith *v.* Collins, 94 Ala. 394, 10 So. 334; Shealy *v.* Edwards, 75 Ala. 411; Carlton *v.* King, 1 Stew. & P. 472, 23 Am. Dec. 295.

Georgia.— Kiser *v.* Dozier, 102 Ga. 429, 30 S. E. 967, 66 Am. St. Rep. 184.

Illinois.— Merrill *v.* Merrill, 105 Ill. App. 5.

Maine.— Weeks *v.* Hill, 88 Me. 111, 33 Atl. 778; Hall *v.* Sands, 52 Me. 355.

Massachusetts.— Jaquith *v.* Rogers, 179 Mass. 192, 60 N. E. 486.

Minnesota.— Walkow *v.* Kingsley, 45 Minn. 283, 47 N. W. 807.

Missouri.— National Bank of Commerce *v.* Brunswick Tobacco Works Co., 155 Mo. 602, 56 S. W. 283; National Tube Works Co. *v.* Ring Refrigerator, etc., Co., 118 Mo. 365, 22 S. W. 947; Blom-Collier Co. *v.* Martin, 98 Mo. App. 596, 73 S. W. 729.

Nebraska.— Thompson *v.* Benner, 33 Nebr. 193, 49 N. W. 1116.

New York.— Frank *v.* Batten, 49 Hun 91, 1 N. Y. Suppl. 705; Cohen *v.* Kelly, 35 N. Y. Super. Ct. 42; Topping *v.* Lynch, 2 Rob. 484.

Pennsylvania.— Montgomery-Webb Co. *v.* Dienelt, 133 Pa. St. 585, 19 Atl. 428, 19 Am. St. Rep. 663; Widdall *v.* Garsed, 125 Pa. St. 358, 17 Atl. 418; Jordan *v.* Frink, 3 Pa. St. 442.

South Carolina.— McGee *v.* Wells, 52 S. C. 472, 30 S. E. 602.

Texas.— Dosche *v.* Nette, 81 Tex. 265, 16 S. W. 1013; Quanah City Nat. Bank *v.* Martin-Brown Co., 20 Tex. Civ. App. 52, 48 S. W. 617, 49 S. W. 523; Blankenship *v.* Willis, 1 Tex. Civ. App. 657, 20 S. W. 952.

Vermont.— Hall *v.* Parsons, 15 Vt. 358.

Washington.— Adams *v.* Dempsey, 22 Wash. 284, 60 Pac. 649, 79 Am. St. Rep. 933.

Wisconsin.— Missinskie *v.* McMurdo, 107 Wis. 578, 83 N. W. 758.

United States.— Norris *v.* McCanna, 29 Fed. 757.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 941.

Withdrawal of question of fraud.— An instruction informing the jury that, as there was no evidence of a conspiracy, the questions relating thereto were withdrawn from their consideration does not withdraw the question of fraud where a fraudulent purpose is alleged in the pleadings. Deere *v.* Wolf, 77 Iowa 115, 41 N. W. 588. An instruction that if defendant, unmindful of his creditors, gave away property under such circumstances and to such an amount that, looking at it at the time as the thing then was, it must have been apparent that his creditors would be defrauded, the transaction would be void, does not withdraw from the jury the question whether the conveyance was fraudulent. Whitehouse *v.* Bolster, 95 Me. 458, 50 Atl. 240.

Fraud in law.— Where the legal effect of a conveyance is to hinder, delay, or defraud creditors, no matter what the actual intention may have been, the court is bound to declare it fraudulent in law. Gibson *v.* Love, 4 Fla. 217.

9. Williams *v.* White, 7 Kan. App. 664, 53 Pac. 890; Potter *v.* McDowell, 31 Mo. 62; Weaver *v.* Nugent, 72 Tex. 272, 10 S. W. 458, 13 Am. St. Rep. 792; Martin-Brown Co. *v.* City Nat. Bank, (Civ. App. 1897) 41 S. W. 524.

10. *Dakota.*— Young *v.* Harris, 4 Dak. 367, 32 N. W. 97.

Michigan.— Hutchinson *v.* Poyer, 78 Mich. 337, 44 N. W. 327.

Missouri.—Plattsburgh First Nat. Bank *v.* Fry, 168 Mo. 492, 68 S. W. 348; Kurtz *v.* Troll, 86 Mo. App. 649.

Nebraska.— Powell *v.* Yeazel, 46 Nebr. 225, 64 N. W. 695.

Nevada.— Tognini *v.* Kyle, 17 Nev. 209, 30 Pac. 829, 45 Am. Rep. 442.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 942.

Assumption as to knowledge and intent of grantee.— Smith *v.* Collins, 94 Ala. 394, 10 So. 334.

Assumption as to nature of transfer.— Schmick *v.* Connellee, (Tex. Civ. App. 1894) 26 S. W. 738.

11. *Alabama.*— Bank of Commerce *v.* Eureka Brick, etc., Co., 108 Ala. 89, 18 So. 600.

Georgia.—Trounstine *v.* Irving, 91 Ga. 92, 16 S. E. 310.

Indiana.— Kane *v.* Drake, 27 Ind. 29.

Mississippi— Alexander *v.* Dulaney, (1894) 16 So. 355.

Missouri.— Mears *v.* Gage, (App. 1904) 80 S. W. 712.

Nebraska.— Davis *v.* Getchell, 32 Nebr. 792, 49 N. W. 776.

New York.— Hoffman *v.* Gundrum, 15 N. Y. Suppl. 98.

Pennsylvania.— Painter *v.* Drum, 40 Pa. St. 467.

Texas.— City Nat. Bank *v.* Martin-Brown Co., 20 Tex. Civ. App. 52, 48 S. W. 617, 49 S. W. 523.

Washington.—Adams *v.* Dempsey, 29 Wash. 155, 69 Pac. 738, 22 Wash. 284, 60 Pac. 649, 79 Am. St. Rep. 933.

Wisconsin.— Rinkskopf *v.* Myers, 87 Wis. 80, 57 N. W. 967.

undisputed, it is not erroneous for the court may charge directly upon them without hypothesis.[12]

b. Form and Sufficiency. The instructions must fully and clearly state and define all the questions to be considered by the jury.[13] They must be applicable to the issues,[14] and to the facts which are admitted or which the evidence tends to prove.[15]

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 943.

Specific mention of suspicious circumstances in a charge and an instruction that the jury may consider them in connection with all other circumstances as bearing on the question of intent is not erroneous. Wolf *v.* Arthur, 118 N. C. 890, 24 S. E. 671.

Instructions summing up the evidence.— Where the jury are instructed that certain circumstances would justify the conclusion that a conveyance was fraudulent in fact, in a case where there is no presumption of law to guide them, this is a summing up of the evidence and not an instruction on a question of law. McDermott *v.* Barnum, 19 Mo. 204.

In the absence of proof or presumption of fraud it is not error to instruct that the matters in proof do not make out a case of fraud. Hopkins *v.* Scott, 20 Ala. 179.

12. Henderson *v.* Mabry, 13 Ala. 713.

13. *Illinois.*— Nelson *v.* Leiter, 190 Ill. 414, 60 N. E. 851, 83 Am. St. Rep. 142; Grieb *v.* Caraker, 57 Ill. App. 678; Kuhlenbeck *v.* Hotz, 53 Ill. App. 675.

Iowa.— See Hall *v.* Carter, 74 Iowa 364, 37 N. W. 956; Bickler *v.* Kendall, 66 Iowa 703, 24 N. W. 518.

Kansas.— Winfield Nat. Bank *v.* Johnson, 8 Kan. App. 830, 57 Pac. 855.

Maine.— See Brown *v.* Osgood, 25 Me. 505.

Michigan.— See Parltow *v.* Swigart, 90 Mich. 61, 51 N. W. 270.

Missouri.— Plattsburgh First Nat. Bank *v.* Fry, 168 Mo. 492, 68 S. W. 348. See also Alberger *v.* White, 117 Mo. 347, 23 S. W. 92; Mott *v.* Coughlan, 68 Mo. App. 229.

Nebraska.— Liming *v.* Kyle, 31 Nebr. 649, 48 N. W. 470; Lewis *v.* Connolly, 29 Nebr. 222, 45 N. W. 622.

Nevada.— Thomas *v.* Sullivan, 13 Nev. 242. See also Tognini *v.* Kyle, 15 Nev. 464.

New Mexico.— Smith *v.* Montoya, 3 N. M. 39, 1 Pac. 175.

Oregon.— Stanley *v.* Smith, 15 Oreg. 505, 16 Pac. 174.

Texas.— Cross *v.* McKinley, 81 Tex. 332, 16 S. W. 1023; Hadock *v.* Hill, 75 Tex. 193, 12 S. W. 974; Jackson *v.* Harby, 70 Tex. 410, 8 S. W. 71; Randolph *v.* Hudson, (Civ. App. 1899) 50 S. W. 128; Baxter *v.* Howell, 7 Tex. Civ. App. 198, 26 S. W. 453. See also Doschl *v.* Nette, 81 Tex. 265, 16 S. W. 1013; Houston, etc., R. Co. *v.* Shirley, (Civ. App. 1894) 24 S. W. 809.

Washington.— Adams *v.* Dempsey, 29 Wash. 155, 69 Pac. 738.

Wisconsin.— Wheeler *v.* Konst, 46 Wis. 398, 1 N. W. 96.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 944.

Designation of the controlling question as being whether a deed is fraudulent as to creditors is proper where, under the pleadings and evidence, such question is the only really debatable one. Sedgwick *v.* Tucker, 90 Ind. 271.

14. *Georgia.*— Hobbs *v.* Greenfield, 103 Ga. 1, 30 S. E. 257.

Illinois.— Anderson *v.* Warner, 5 Ill. App. 416.

New York.— Spieger *v.* Hays, 118 N. Y. 660, 22 N. E. 1105.

Texas.— Blair *v.* Finlay, 75 Tex. 210, 12 S. W. 983.

Vermont.— Smith *v.* Kinne, 19 Vt. 564.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 947.

Where the solvency of the vendor is a material issue in a transaction alleged to have been made to hinder, delay, or defraud creditors, the court may properly inform the jury when a person, within legal contemplation, is deemed insolvent. Friedberg *v.* Elliott, (Tex. 1888) 8 S. W. 322.

Mere abstract propositions unconnected with any suggestion giving them application to the case or to any question of fact requiring the consideration of the jury need not be submitted. Hine *v.* Bowe, 114 N. Y. 350, 21 N. E. 733.

Applicability as to consideration.— Reeves *v.* Skipper, 94 Ala. 407, 10 So. 309; Studebaker Bros. Mfg. Co. *v.* Key, 99 Ga. 144, 25 S. E. 14; Ganong *v.* Greene, 71 Mich. 1, 38 N. W. 661.

Applicability as to knowledge and intent of grantee.— Hall *v.* Carter, 74 Iowa 364, 37 N. W. 956; Plattsburgh First Nat. Bank *v.* Fry, 168 Mo. 492, 68 S. W. 348.

15. *Alabama.*— Cottingham *v.* Greely Barnham Grocery Co., 137 Ala. 149, 34 So. 956.

California.— Ballow *v.* Andrews Banking Co., 128 Cal. 562, 61 Pac. 102.

Georgia.— Hollis *v.* Sales, 103 Ga. 75, 29 S. E. 482.

Indiana.— Ewing *v.* Gray, 12 Ind. 64.

Kansas.— McCluskey *v.* Cubbison, 8 Kan. App. 857, 57 Pac. 496.

Maryland.— Stockridge *v.* Fahnestock, 87 Md. 127, 39 Atl. 95.

Massachusetts.— Stebbins *v.* Miller, 12 Allen 591.

Minnesota.— Cain *v.* Mead, 66 Minn. 195, 68 N. W. 840.

Missouri.— Deere Plow Co. *v.* Sullivan, 158 Mo. 440, 59 S. W. 1005.

New York.— Spiegel *v.* Hays, 118 N. Y. 660, 22 N. E. 1105.

North Carolina.— Southern L. & T. Co. *v.* Benbow, 131 N. C. 413, 42 S. E. 896; Ferree *v.* Cook, 119 N. C. 161, 25 S. E. 856; Glover *v.* Flowers, 101 N. C. 134, 7 S. E. 579.

They must not be argumentative,[16] contradictory,[17] or misleading.[18] The rules of law applicable to the various issues submitted must be correctly

Texas.— Robertson *v.* Gourley, 84 Tex. 575, 19 S. W. 1006; Wallis *v.* Schneider, 79 Tex. 479, 15 S. W. 492; Halff *v.* Goldfrank, (Civ. App. 1899) 49 S. W. 1095.

Wisconsin.— Stevens *v.* Breem, 75 Wis. 595, 44 N. W. 645.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 947.

Conveyance not in usual course of business. — Where a sale is made under circumstances that are a departure from the usual course of business, and is a badge of fraud, an instruction that "a sale made out of the usual course of business is evidence of fraud" is not impertinent or erroneous. Gallober *v.* Martin, 33 Kan. 252, 6 Pac. 267.

In the absence of evidence showing fraud it has been held not error to charge that fraud cannot be presumed as an existing fact (Sedgwick *v.* Tucker, 90 Ind. 271), or that the evidence does not warrant a finding that the conveyance was fraudulent in its inception (Hyde *v.* Shank, 93 Mich. 535, 53 N. W. 787).

An instruction to consider surrounding facts and circumstances, so far as is known by the parties at the time of the conveyance, is not erroneous as giving the jury authority to consider circumstances not in evidence. Ballou *v.* Andrews Banking Co., 128 Cal. 562, 61 Pac. 102.

Where the title to real estate is made a material question by the course which the testimony takes, it is error to refuse an instruction, by which refusal the jury is left to determine unaided the preliminary inquiry as to who owned the real estate. Jansen *v.* McQueen, 105 Mich. 199, 63 N. W. 73.

Applicability as to consideration.—*Colorado.* — Hill *v.* Corcoran, 15 Colo. 270, 25 Pac. 171.

Georgia.— Almond *v.* Gairdner, 76 Ga. 699.

Missouri.— Plattsburgh First Nat. Bank *v.* Fry, 168 Mo. 492, 68 S. W. 348; State *v.* Hope, 102 Mo. 410, 14 S. W. 985; State *v.* Aebly, 9 Mo. App. 55.

Texas.— Willis *v.* Whitsitt, 67 Tex. 673, 4 S. W. 253; Cooper *v.* Friedman, 23 Tex. Civ. App. 585, 57 S. W. 581; Taylor *v.* Missouri Glass Co., 6 Tex. Civ. App. 337, 25 S. W. 466.

Wisconsin.— Pilling *v.* Otis, 13 Wis. 495.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 952.

Applicability as to knowledge and intent of grantee.— Ernest *v.* Merritt, 107 Ga. 61, 32 S. E. 898; Le Page *v.* Slade, 79 Tex. 473, 15 S. W. 496; Weaver *v.* Nugent, 72 Tex. 272, 10 S. W. 458, 13 Am. St. Rep. 792; Edwards *v.* Dickson, 66 Tex. 613, 2 S. W. 718.

Applicability as to indebtedness and insolvency.— New *v.* Driver, 89 Ga. 434, 15 S. E. 535; Heflin *v.* Kiser, 88 Ga. 306, 14 S. E. 585; Saar *v.* Foller, 71 Iowa 425, 32 N. W. 405; Carson *v.* Golden, 36 Kan. 705, 14 Pac. 166.

Applicability as to change of possession.— Reynolds *v.* Weinman, (Tex. Civ. App. 1897) 40 S. W. 560.

Applicability as to relationship of parties. — Goldberg *v.* Cohen, 119 N. C. 59, 25 S. E. 707.

16. Smith *v.* Collins, 94 Ala. 394, 10 So. 334; Murry *v.* Leiter, 190 Ill. 414, 60 N. E. 851, 83 Am. St. Rep. 142.

17. Weber *v.* Mick, 131 Ill. 520, 23 N. E. 646; Gonzales *v.* Adoue, 94 Tex. 120, 58 S. W. 951.

Instructions not contradictory.— Frost *v.* Mason, 17 Tex. Civ. App. 465, 44 S. W. 53 (where it was held that the instructions were not conflicting, since one explained the other); Meyer Bros. Drug Co. *v.* Durham, 35 Tex. Civ. App. 71, 79 S. W. 860 (where an instruction that a seller's insolvency at the time of the sale sought to be set aside as fraudulent was not controverted, and an instruction that if, at the time of the sale, the seller was insolvent, and the sale was made for the purpose of defrauding his creditors, and the buyer had notice of such fraudulent intent, the verdict should be for the plaintiff, were held to be not contradictory).

18. *Arkansas.*— Wallace *v.* Bernheim, 63 Ark. 108, 37 S. W. 712; Norton *v.* McNutt, 55 Ark. 59, 17 S. W. 362.

Illinois.— Dempsey *v.* Bowen, 25 Ill. App. 192.

Iowa.— McCreary *v.* Skinner, 75 Iowa 411, 39 N. W. 674.

Kansas.— Morse *v.* Ryland, 58 Kan. 250, 48 Pac. 957.

Maryland.— Franklin *v.* Claflin, 49 Md. 24.

Massachusetts.— Jaquith *v.* Rogers, 179 Mass. 192, 60 N. E. 486.

Michigan.— Ferris *v.* McQueen, 94 Mich. 367, 54 N. W. 164; Clark *v.* Lee, 78 Mich. 221, 44 N. W. 260; Watkins *v.* Wallace, 19 Mich. 57.

Missouri.— National Bank of Commerce *v.* Brunswick Tobacco Works Co., 155 Mo. 602, 56 S. W. 283; State *v.* Hellman, 20 Mo. App. 304; Erhardt *v.* Estel, 6 Mo. App. 6.

Nevada.— Mendes *v.* Kyle, 16 Nev. 369.

New York.— Griswold *v.* Sheldon, 4 N. Y. 581; Hanford *v.* Artcher, 4 Hill 271.

Oklahoma.— Chandler *v.* Colcord, 1 Okla. 260, 32 Pac. 330.

Pennsylvania.— Connelly *v.* Walker, 45 Pa. St. 449.

South Carolina.— McGhee *v.* Wells, 57 S. C. 280, 35 S. E. 529, 76 Am. St. Rep. 567.

Texas.— Houston, etc., R. Co. *v.* Shirley, 89 Tex. 95, 31 S. W. 291; Panhandle Nat. Bank *v.* Foster, 74 Tex. 514, 12 S. W. 223; Wylie *v.* Posey, 71 Tex. 34, 9 S. W. 87; Mack *v.* Block, (1888) 8 S. W. 495; Wood *v.* Chambers, 20 Tex. 247, 70 Am. Dec. 382; Sonnentheil *v.* Texas Guaranty, etc., Co., 10 Tex. Civ. App. 274, 30 S. W. 945; Weis *v.* Dittman, 4 Tex. Civ. App. 35, 23 S. W. 229; Schmick *v.* Noel, 2 Tex. Civ. App. 90, 20 S. W. 1135.

stated,[19] and an instruction which requires a higher degree of proof than is ordi-

Virginia.— Hughes *v.* Kelly, (1898) 30 S. E. 387.

Wisconsin.— Bleiler *v.* Moore, 99 Wis. 486, 75 N. W. 953; Button *v.* Metcalf, 80 Wis. 193, 49 N. W. 809.

United States.— Foster *v.* McAlester, 114 Fed. 145, 52 C. C. A. 107; Short *v.* Hepburn, 75 Fed. 113, 21 C. C. A. 252.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 946.

Ignoring amount of indebtedness and extent of means.— An instruction that the jury may infer that a bill of sale was fraudulent as to creditors, if the vendor was, at the time of making it, indebted to several persons, is misleading where no question is submitted in regard to the amount of the indebtedness or the vendor's means or circumstances. Dietus *v.* Fuss, 8 Md. 148.

Instructions not misleading.— *Iowa.*— Riegelman *v.* Todd, 77 Iowa 696, 42 N. W. 517; Miller *v.* Bryan, 3 Iowa 58.

Michigan.— Jansen *v.* McQueen, 105 Mich. 199, 63 N. W. 73.

Pennsylvania.— Mulley *v.* Shoemaker, 180 Pa. St. 585, 37 Atl. 94.

Texas.— Ratto *v.* Bluestein, 84 Tex. 57, 19 S. W. 338; McClure *v.* Sheek, 68 Tex. 426, 4 S. W. 552; Gwaltney *v.* Searcy, (Civ. App. 1902) 68 S. W. 304.

Wisconsin.— Norwegian Plow Co. *v.* Hanthorn, 71 Wis. 529, 37 N. W. 825.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 946.

19. McCreary *v.* Skinner, 75 Iowa 411, 39 N. W. 674; Frankenthal *v.* Goldstein, 44 Mo. App. 189; Bruce *v.* Koch, 94 Tex. 192, 59 S. W. 540 [*reversing* (Civ. App. 1900) 58 S. W. 189]; Seligson *v.* Brown, 61 Tex. 180; Nichols *v.* McCormick, (Tex. Civ. App. 1896) 35 S. W. 530; Missinskie *v.* McMurdo, 107 Wis. 578, 83 N. W. 758.

Understanding of vendor as determining ownership.— Where the actual understanding of the buyer and seller upon the title to the property is stated by an instruction, it is proper for the court to inform the jury that the mere understanding of the seller would not determine the question of ownership. Hudson *v.* Willis, (Tex. Civ. App. 1894) 28 S. W. 913.

What would excite suspicion that a transaction was unfair need not be stated to the jury. Hoffer *v.* Gladden, 75 Ga. 532.

A statement of law merely technically incorrect is not prejudicially erroneous where by the use of proper words the legal result would be the same. Masters *v.* Teller, 7 Okla. 668, 56 Pac. 1067.

Duty to define "fraudulent."— The court need not define fraudulent in instructing as to "fraudulent design" and "fraudulent intent." Fearey *v.* O'Neill, 149 Mo. 467, 50 S. W. 918, 73 Am. St. Rep. 440.

Knowledge and intent of grantee.— *Alabama.*— Smith *v.* Collins, 94 Ala. 394, 10 So. 334; Skipper *v.* Reeves, 93 Ala. 332, 8 So. 804; Schaungut *v.* Udell, 93 Ala. 302, 9 So. 550; Harris *v.* Russell, 93 Ala. 59, 9 So. 541.

Dakota.— Young *v.* Harris, 4 Dak. 367, 32 N. W. 97.

Georgia.— Lamkin *v.* Clary, 103 Ga. 631, 30 S. E. 596.

Illinois.— Mathews *v.* Reinhardt, 149 Ill. 635, 37 N. E. 85.

Iowa.— Headington *v.* Langland, 65 Iowa 276, 21 N. W. 650.

Kansas.— Morse *v.* Ryland, 58 Kan. 250, 48 Pac. 957; McCluskey *v.* Cubbison, 8 Kan. App. 857, 57 Pac. 496.

Maine.— King *v.* Ward, 74 Me. 349.

Massachusetts.— Carroll *v.* Hayward, 124 Mass. 120.

Texas.— Houston, etc., R. Co. *v.* Shirley, 89 Tex. 95, 31 S. W. 291; Hargadine *v.* Davis, (Tex. Civ. App. 1894) 26 S. W. 424; Freiberg *v.* Johnson, 71 Tex. 558, 9 S. W. 455; Garahy *v.* Bayley, 25 Tex. Suppl. 294; Koch *v.* Bruce, 20 Tex. Civ. App. 634, 49 S. W. 1101; Cameron *v.* Cates, (Civ. App. 1898) 46 S. W. 398; Traders' Nat. Bank *v.* Day, 7 Tex. Civ. App. 569, 27 S. W. 264.

Washington.— Eicholtz *v.* Holmes, 8 Wash. 71, 35 Pac. 607.

Wisconsin.— Missinskie *v.* McMurdo, 107 Wis. 578, 83 N. W. 758; Kaufer *v.* Walsh, 88 Wis. 63, 59 N. W. 460; Evans *v.* Rugee, 57 Wis. 623, 16 N. W. 49; Oliver *v.* Town, 28 Wis. 328.

United States.— Treusch *v.* Ottenburg, 54 Fed. 867, 4 C. C. A. 629.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 957.

Preference of creditors.— Archer *v.* Long, 38 S. C. 272, 16 S. E. 998; Sonnentheil *v.* Texas Guaranty, etc., Co., 10 Tex. Civ. App. 274, 30 S. W. 945.

Relationship of parties.— *Alabama.*— Smith *v.* Collins, 94 Ala. 394, 10 So. 334.

Arkansas.— Norton *v.* McNutt, 55 Ark. 59, 17 S. W. 362.

Georgia.— Hicks *v.* Sharp, 89 Ga. 311, 15 S. E. 314.

Illinois.— Merrill *v.* Merrill, 105 Ill. App. 5; Rapp *v.* Rush, 96 Ill. App. 356.

Iowa.— Mellinger *v.* Hunt, 94 Iowa 351, 62 N. W. 813; Allen *v.* Kirk, 81 Iowa 658, 47 N. W. 906.

North Carolina.— Brown *v.* Mitchell, 102 N. C. 347, 9 S. E. 702, 11 Am. St. Rep. 748.

United States.— Shauer *v.* Alterton, 151 U. S. 607, 14 S. Ct. 442, 38 L. ed. 286.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 953.

Retention and change of possession.— *Illinois.*— Rapp *v.* Rush, 96 Ill. App. 356.

Michigan.— Hopkins *v.* Bishop, 91 Mich. 328, 51 N. W. 902, 30 Am. St. Rep. 480.

Missouri.— Scully *v.* Albers, 89 Mo. App. 118.

New York.— McCarthy *v.* McQuade, 1 Sweeny 387.

United States.— Shauer *v.* Alterton, 151 U. S. 607, 14 S. Ct. 442, 38 L. ed. 286.

narily required by law is erroneous.[20] A charge defining fraudulent conveyances in the language of the statute is sufficient,[21] and where a transaction falls within a particular paragraph of a statute, the court may not only give such paragraph in its charge to the jury, but may give another paragraph of such statute where one tends to illustrate the other.[22] Instructions are to be construed as a whole, and the fact that one portion of them considered separately might be open to objection does not constitute error, if the charge is correct when taken as a whole.[23] The charge must be construed in connection with the subject-matter to which it relates,[24] and if an instruction has a clear and definite meaning when applied to the only question before the jury it is sufficient.[25]

c. Requests For Instructions. While the parties are entitled to instructions correctly stating the law of the case,[26] the court need not submit a request to

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 956.

Consideration.— Oglesby *v.* Walton, 118 Ga. 203, 44 S. E. 990.

Reservations and trusts for grantor.— Hill *v.* Rutledge, 83 Ala. 162, 4 So. 135.

20. *Alabama.*— Nelms *v.* Steiner, 113 Ala. 562, 22 So. 435; Smith *v.* Kaufman, 94 Ala. 364, 10 So. 229; Skipper *v.* Reeves, 93 Ala. 332, 8 So. 804.

Illinois.— Silvis *v.* Oltmann, 53 Ill. App. 392.

Iowa.— Allen *v.* Kirk, 81 Iowa 658, 47 N. W. 906.

Michigan.— Hopkins *v.* Bishop, 91 Mich. 328, 51 N. W. 902, 30 Am. St. Rep. 480.

Mississippi.—Hirsch *v.* Richardson, (1890) 7 So. 323.

New York.— Newman *v.* Cordell, 43 Barb. 448.

Texas.— Schmick *v.* Noel, 72 Tex. 1, 8 S. W. 83; Sparks *v.* Dawson, 47 Tex. 138; Cook *v.* Greenburg, (Civ. App. 1896) 34 S. W. 687; Rider *v.* Hunt, 6 Tex. Civ. App. 238, 25 S. W. 314; Reynolds *v.* Weinman, (Civ. App. 1894) 25 S. W. 33.

Wisconsin.— Kaufer *v.* Walsh, 88 Wis. 63, 59 N. W. 460.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 945.

Proof of fraud.— It has been held that an instruction that fraud is never presumed but must be proved is correct and will not be reversed because it fails to mention the fraud, like any other fact, may be proved by circumstantial evidence. Baer *v.* Rooks, 50 Fed. 898, 2 C. C. A. 76. On the other hand it has been held erroneous to refuse to charge that fraud may be shown by proof of circumstances from which the inference of fraud is natural and irresistible. Morse *v.* Ryland, 58 Kan. 250, 48 Pac. 957; McCluskey *v.* Cubbison, 8 Kan. App. 857, 57 Pac. 496.

21. Rutledge *v.* Hudson, 80 Ga. 266, 5 S. E. 93; Hoffer *v.* Gladden, 75 Ga. 532. See also Banning *v.* Marleau, 121 Cal. 240, 53 Pac. 692; Hanford *v.* Artcher, 1 Hill (N. Y.) 347.

A charge substantially in the language of the statute is sufficient. Boise *v.* Henney, 32 Ill. 130.

Intent to hinder, delay, or defraud.—Where the statute requires that the intent be to hinder, delay, "or" defraud, an instruction is sufficient which uses the word "defraud" only, without adding "hinder or delay," and the words "his creditors generally," without adding "or any of them." Norwegian Plow Co. *v.* Hawthorn, 71 Wis. 529, 37 N. W. 825. It is erroneous to instruct that the conveyance to be void must be made with intent to cheat, hinder "and" delay (Burgert *v.* Borchert, 59 Mo. 80); or with an intent to delay, hinder, and defraud (Evans *v.* Coleman, 101 Ga. 152, 28 S. E. 645; Coon *v.* McClure, 53 Nebr. 622, 74 N. W. 65; Cook *v.* Greenberg, (Tex. Civ. App. 1896) 34 S. W. 687; Pilling *v.* Otis, 13 Wis. 495). Where, however, the statute provides that a conveyance made to "delay, hinder, and defraud" shall be void, an instruction that a conveyance to hinder, delay, or "defeat" is void is sufficient. Peeler *v.* Peeler, 109 N. C. 628, 14 S. E. 59.

22. Cribb *v.* Bagley, 83 Ga. 105, 10 S. E. 194.

23. *Indian Territory.*— Swofford Bros. Dry-Goods Co. *v.* Smith-McCord Dry-Goods Co., 1 Indian Terr. 314, 37 S. W. 103.

Iowa.— Anderson *v.* Kinley, 90 Iowa 554, 58 N. W. 909; Harrison *v.* Snair, 76 Iowa 558, 41 N. W. 315; Sunberg *v.* Babcock, 66 Iowa 515, 24 N. W. 19.

Missouri.— Mansur-Tebbetts Implement Co. *v.* Ritchie, 143 Mo. 587, 45 S. W. 634; Fearey *v.* O'Neill, 149 Mo. 467, 50 S. W. 918, 73 Am. St. Rep. 440; State *v.* William Barr Dry-Goods Co., 45 Mo. App. 96.

Nevada.— Tognini *v.* Kyle, 15 Nev. 464.

Texas.— Bruce *v.* Koch, (Civ. App. 1900) 58 S. W. 189; Houston, etc., R. Co. *v.* Shirley, (Civ. App. 1894) 24 S. W. 809.

Washington.— Dow *v.* Dempsey, 21 Wash. 86, 57 Pac. 355.

Wisconsin.— Rindskopf *v.* Myers, 87 Wis. 80, 57 N. W. 967; Barkow *v.* Sanger, 47 Wis. 500, 3 N. W. 16.

24. Peck *v.* Carmichael, 9 Yerg. (Tenn.) 325.

25. Lockwood *v.* Nelson, 16 Ala. 294; Lillie *v.* McMillan, 52 Iowa 463, 3 N. W. 601.

26. McCormick *v.* Smith, 127 Ind. 230, 26 N. E. 825; Baltimore *v.* Williams, 6 Md. 235; Warren *v.* Carpenter, 99 Mich. 287, 58 N. W. 308.

Unnecessary instructions.— Where from the

charge that is sufficiently covered by the general instructions.[27] Nor as a general rule need a proper request be given in its exact language. It is sufficient if it is covered by the instruction as given.[28] Where the charge given is correct, it cannot be objected to on the ground that it does not contain a particular instruction unless there has been a request therefor.[29]

4. Verdict and Findings — a. In General. The rules as to verdicts and findings which obtain in civil actions generally apply in actions to set aside transfers by debtors as fraudulent.[30] A verdict finding no intent to defraud but an intent to delay is not void for inconsistency.[31] Where the evidence is insufficient to rebut the statutory presumption of fraud, and the jurors appear to have been too indulgent in their consideration of the transactions of fraudulent debtors, the verdict may be set aside.[32]

b. Special Interrogatories and Findings by Jury. Where such suspicious circumstances surround a whole transaction as to justify the jury in disbelieving the testimony of the interested parties, even as to the existence of the consideration claimed, the court should submit questions sufficient to dispose of the controversy as to consideration, and the absence of any finding on the subject renders a special verdict found by them incomplete.[33] Since a special verdict must find all the facts necessary to support a judgment, the failure to find that the alleged fraudulent grantor had no property subject to execution at the time of the conveyance renders the verdict defective.[34] Where from the instructions the jury could not fail to understand that the material question is whether the conveyance was fraudulent, a special interrogatory is not erroneous in using the word "defeating" instead of "defrauding."[35]

c. Findings by Court. The findings of the court must be applicable to the issues and the evidence.[36] Where there is a special finding of fact in an action to set aside a conveyance by a debtor a fraudulent intent must be found, or the conveyance will not be set aside,[37] as the failure to so find is equivalent to a find-

circumstances of the case a requested instruction is unnecessary the court may refuse to give it. McClure *v.* Sheek, 68 Tex. 426, 4 S. W. 552.

27. Wallis *v.* Schneider, 79 Tex. 479, 15 S. W. 492; Traders' Nat. Bank *v.* Fry, 14 Tex. Civ. App. 403, 37 S. W. 672. See also Reynolds *v.* Weinman, (Tex. Civ. App. 1897) 40 S. W. 560.

28. Winchester *v.* Charter, 102 Mass. 272; State *v.* William Barr Dry-Goods Co., 45 Mo. App. 96.

29. Mayer *v.* Walker, 82 Tex. 222, 17 S. W. 505.

30. See, generally, Trial. And see the following cases:

Georgia.— Cain *v.* Langston, 99 Ga. 89, 24 S. E. 892.

Minnesota.—Forepaugh *v.* Pryor, 30 Minn. 35, 14 N. W. 61.

Pennsylvania.—Oliver *v.* Reading Iron Co., 170 Pa. St. 396, 32 Atl. 1088.

Wisconsin.— Fick *v.* Mulholland, 48 Wis. 310, 4 N. W. 527, judgment not supported where findings in a special verdict are inconsistent and contradictory.

United States.— Doss *v.* Tyack, 14 How. 297, 14 L. ed. 428.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 959, 960.

31. Monroe Mercantile Co. *v.* Arnold, 108 Ga. 449, 34 S. E. 176.

32. Hollacher *v.* O'Brien, 5 Hun (N. Y.) 277.

33. Missinskie *v.* McMurdo, 107 Wis. 578, 83 N. W. 758.

34. Line *v.* State, 131 Ind. 468, 30 N. E. 703; Holman *v.* Elliott, 65 Ind. 78.

35. Nevada First Nat. Bank *v.* Fenn, 75 Iowa 221, 39 N. W. 278.

36. Wallen *v.* Montague, 121 Ala. 287, 25 So. 773; Galentine *v.* Brubaker, 147 Ind. 458, 46 N. E. 903. See also Stephens *v.* Hallstead, 58 Cal. 193; Kells *v.* McClure, 69 Minn. 60, 71 N. W. 827. And see, generally, Trial.

Sufficient findings.— Clow *v.* Brown, (Ind. App. 1904) 72 N. E. 534.

37. *California.*— Bull *v.* Bray, 89 Cal. 286, 26 Pac. 873, 13 L. R. A. 576.

Indiana.— Owens *v.* Gascho, 154 Ind. 225, 56 N. E. 224; Morgan *v.* Worden, 145 Ind. 600, 32 N. E. 783; Sickman *v.* Wilhelm, 130 Ind. 480, 29 N. E. 908; Fletcher *v.* Martin, 126 Ind. 55, 25 N. E. 886; Citizens' Bank *v.* Bolen, 121 Ind. 301, 23 N. E. 146; State Bank *v.* Backus, (App. 1903) 66 N. E. 475, 160 Ind. 682, 67 N. E. 512; Stout *v.* Price, 24 Ind. App. 360, 55 N. E. 964, 56 N. E. 857.

Missouri.— Robinson *v.* McCune, 128 Mo. 577, 30 S. W. 156.

New York.— See Vail *v.* Craig, 13 N. Y. St. 448.

Virginia.— Fisher *v.* Dickenson, 84 Va. 318, 4 S. E. 737.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 961.

ing that there was no such intent.[38] It has been held, however, that the finding is sufficient if the intent necessarily follows from the facts found.[39] The payment of a consideration is fairly negatived by a finding that a husband had his property conveyed to his wife to keep it from his creditors.[40] A finding that a conveyance was not solely in consideration of a preëxisting debt, but chiefly as a gift, is in effect a finding that there was a valuable consideration which was, however, inadequate.[41] A finding that a deed was signed, sealed, and acknowledged, and caused to be recorded, by the grantor, and that the grantee was ignorant of the existence of the deed until several years after it was recorded, is insufficient to support a judgment against the grantee, where there is no finding that the deed was delivered to him.[42] On the other hand a failure to find that the grantor had no property other than that alleged to have been fraudulently conveyed, out of which the creditor's claim might have been met at the time of the conveyance or of the trial, is fatal to a judgment in the creditor's favor.[43] A finding that a mortgage was made in good faith to secure a contemporaneous loan, and without any fraudulent intent, shows that the mortgagee was a *bona fide* purchaser for value.[44] Where by statute the burden is imposed on the purchaser of personal property, unaccompanied by an actual and continued change of possession to show his good faith, a finding of the *bona fides* of such purchaser is necessary to uphold his title in that respect as against a subsequent innocent purchaser.[45] A judgment setting aside an assignment by an insolvent as not made in good faith is not erroneous for want of a specific finding that defendant was insolvent at the date thereof, where his fraudulent intent is found as a fact.[46] A finding that a conveyance, at the time it was made, and at the time of the trial, operated to defraud the creditors of the grantor, will be construed to mean that the grantor was insolvent from the date of the conveyance to the date of the trial.[47]

5. New Trial.[48] A new trial will be granted where the verdict is against the weight of the evidence,[49] or where the jury pronounce a sale to be fair and valid,

Findings sufficient to negative fraud.— Findings that defendant in attachment was indebted to the claimant, who was his son, and that while insolvent, but before the levy of the writ, he transferred the property in payment of the debt; that the value of the property was less than the amount of the debt; and that the son was ignorant of the insolvency will support a judgment for the claimant. Hagadine *v.* Davis, (Tex. Civ. App. 1896) 34 S. W. 342. An issue, under an allegation that a wife's ownership of property attached as that of her husband is fraudulent as against creditors, is fully covered by a finding of the court that the property belonged to her as a sole trader. Fredericks *v.* Clark, 3 Mont. 258.

38. Selz *v.* Mayer, 151 Ind. 422, 51 N. E. 485; State Bank *v.* Backus, (Ind. App. 1903) 66 N. E. 475 [*affirmed* in 160 Ind. 682, 67 N. E. 512].

39. Corbin *v.* Goddard, 94 Ind. 419; Smith *v.* Conkwright, 28 Minn. 23, 8 N. W. 876. See also Jordan *v.* Buschmeyer, 97 Mo. 94, 10 S. W. 616.

Conclusion of law a non sequitur.— Where the fact is found to be that the debtor's intention in making a conveyance was to insure the payment of as much of just indebtedness as possible, there is no fraud, and a conclusion of law that such a conveyance was fraudulent is a *non sequitur*. Jarvis *v.* Banta, 83 Ind. 528. See also Zacharia *v.* Swanson, 34 Tex. Civ. App. 1, 77 S. W. 627.

40. Wilson *v.* Spear, 68 Vt. 145, 34 Atl. 429.

41. Jamison *v.* King, 50 Cal. 132.

42. Holmes *v.* Little, 86 Hun (N. Y.) 226, 33 N. Y. Suppl. 225.

43. Hartlepp *v.* Whiteley, 129 Ind. 576, 28 N. E. 535, 31 N. E. 203.

44. Lewis *v.* Dudley, 70 N. H. 594, 49 Atl. 572. See also White *v.* Wise, 134 Cal. 613, 66 Pac. 959.

45. Flanigan *v.* Pomeroy, 85 Minn. 264, 88 N. W. 761.

46. Vollkommer *v.* Cody, 177 N. Y. 124, 69 N. E. 277 [*reversing* 85 N. Y. App. Div. 57, 82 N. Y. Suppl. 969].

47. Crow *v.* Carver, 133 Ind. 260, 32 N. E. 569.

48. See, generally, New Trial.

49. *Georgia.*— Trice *v.* Rose, 79 Ga. 75, 3 S. E. 701.

Maine.— Eveleth *v.* Harmon, 33 Me. 275.

Montana.— Kendall *v.* O'Neal, 16 Mont. 303, 40 Pac. 599.

New York.— Jackson *v.* Mather, 7 Cow. 301.

North Carolina.— Darden *v.* Skinner, 4 N. C. 259.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 962.

Compare Depew *v.* Clark, 1 Phila. (Pa.) 432.

In Indiana it has been held that a new trial cannot be claimed as a matter of right in an action to set aside a conveyance as

when, by the very terms of a statute relative to fraudulent conveyances, it is a naked fraud,[50] but not where all the facts, taken together, are amply sufficient to support the verdict.[51] Inasmuch as the evidence is usually circumstantial on a question of fraud, the admission of testimony which seems not to have been of much practical importance but which may possibly have a bearing on the question at issue will not warrant the court in granting a new trial.[52]

M. Judgment or Decree and Enforcement — 1. Judgment or Decree — a. In General. The rules which determine whether a judgment or decree, rendered in an action to set aside a conveyance as fraudulent, is valid are the same as those which apply in civil actions generally.[53] A decree declaring conveyances to be void as to creditors is valid, although it does not contain an express proviso as to rights which are protected by statute;[54] and where a judgment creditor brings an action simply to set aside a transfer as fraudulent, it is sufficient that the judgment declares the instrument fraudulent and void as against plaintiff's judgment, as all he can claim in the action is the removal or annulment of the transfer in so far as it obstructs the enforcement of his judgment.[55] Where it is shown that the creditor has not been damaged by the conveyance a judgment in his favor is erroneous.[56] In an action by creditors to set aside a fraudulent conveyance, where judgment is asked for the amount of the creditor's claims against the grantor, the court may enter a general finding against defendants at one term, and assess damages and render the proper decree at a subsequent term.[57]

b. Nature of Relief Granted. Where an action is brought by a judgment creditor to reach real estate fraudulently conveyed, the proper judgment to enter is to direct that the fraudulent conveyance shall be set aside so far as it is an obstruction to plaintiff's judgment, and that he shall be permitted to issue execution and sell the property upon the execution in the usual way; and it should not ordinarily provide for the appointment of a receiver to sell the property fraudulently conveyed.[58] Where, however, an action is brought to reach personal property or equitable assets which have been disposed of with intent to defraud creditors, the appointment of a receiver is not only proper, but necessary, because it is only when a receiver has been appointed and has taken the property into his possession that the creditors acquire an equitable lien upon the assets sought to be reached, and in no other way than by a sale through a receiver can these assets be reduced to money and applied to the payment of the execution.[59] In a pro-

fraudulent toward creditors. Truitt *v.* Truitt, 37 Ind. 514.

50. Stevens *v.* Fisher, 19 Wend. (N. Y.) 181.

51. Schwab *v.* Owens, 11 Mont. 473, 29 Pac. 190; Foy *v.* East Dallas Bank, (Tex. Civ. App. 1894) 28 S. W. 137.

52. Cook *v.* Mason, 5 Allen (Mass.) 212.

In New York by statute the court may disregard an error in the admission of evidence, if substantial justice appears to have been done, and a new trial will not be granted where the fact, to establish which evidence is erroneously admitted, is not seriously disputed. Lapham *v.* Marshall, 51 Hun (N. Y.) 36, 3 N. Y. Suppl. 601.

53. See Equity, 16 Cyc. 471 *et seq.*; and, generally, Judgments. And see the following cases:

Illinois.—Kennedy *v.* Merriam, 70 Ill. 228.

Maryland.— Norberg *v.* Records, 84 Md. 568, 36 Atl. 116.

Mississippi.— Oliver Finnie Grocery Co. *v.* Bodenheimer, 77 Miss. 415, 27 So. 613.

New York.— Wood *v.* Hunt, 38 Barb. 302, interlocutory judgment invalid.

Texas.— Schultze *v.* Schultze, (Civ. App. 1901) 66 S. W. 56.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 963.

54. Mitchell *v.* Sawyer, 115 Ill. 650, 5 N. E. 109, where a decree was held not defective for failing to provide that upon the grantee's satisfying the creditors the conveyance should stand, and for omitting to mention dower and homestead rights.

55. Belgard *v.* McLaughlin, 44 Hun (N. Y.) 557.

56. Jackson *v.* Sayler, 30 Ind. App. 72, 63 N. E. 881.

57. Doherty *v.* Holliday, 137 Ind. 282, 32 N. E. 315, 36 N. E. 907.

58. Bryer *v.* Foerster, 14 N. Y. App. Div. 315, 43 N. Y. Suppl. 801. See also Chautauque County Bank *v.* Risley, 19 N. Y. 369, 75 Am. Dec. 347; Union Nat. Bank *v.* Warner, 12 Hun (N. Y.) 306; Van Wyck *v.* Baker, 10 Hun (N. Y.) 39; McCaffrey *v.* Hickey, 66 Barb. (N. Y.) 489. *Compare infra*, XIV, N, 3.

59. Bryer *v.* Foerster, 14 N. Y. App. Div. 315, 43 N. Y. Suppl. 801. See also Storm

ceeding in equity by a purchaser of land, deriving title under a sheriff's sale, to set aside a prior conveyance by the original owner as fraudulent, the court will only set aside the conveyance impeached and it will not decree a delivery of possession to the purchaser, nor an account of the rents and profits.[60] The court on setting aside a conveyance executed in fraud of a judgment afterward recovered and held by plaintiff may enter a decree in favor of plaintiff for the amount of the judgment with interest and costs, instead of simply declaring the property subject to the judgment and directing that it be enforced by execution.[61] Where the property cannot be reached by execution, a court of equity has power to subject the property fraudulently assigned directly to the payment of the complainant's debt, under its own jurisdiction.[62] The validity of the conveyance will not be determined where a grantor files a bill to secure satisfaction either out of property conveyed by the debtor or out of the grantee's note given in consideration therefor, and afterward consents that a decree be made out of the note, instead of from the property itself.[63] Where an action is brought against the grantee of a deceased debtor to set aside a conveyance on the ground that it was made to hinder and delay creditors, and the representative of the deceased debtor is not a party to the suit, it is error to render a judgment declaring a trust against the grantee and in favor of the debtor's estate.[64] Where a creditor sues the personal representative of his deceased debtor, and the fraudulent mortgagee of the debtor, to set aside the mortgage, judgment should be rendered against the former for the amount of the debt, and a decree against the latter canceling the encumbrance as to so much of the property as, when levied on and sold, will satisfy the judgment.[65] Where a debtor makes no answer to a bill filed by a creditor and the grantee after decree, but during the term, files a disclaimer to the property, a decree in accordance with the prayer of the complainant's bill is properly rendered.[66] Where a bill by a judgment creditor alleges that the judgment debtor has transferred the greater part of his property to various persons in fraud of creditors, and has also for the same purpose made a statutory assignment for the benefit of the creditors, and adds a special prayer for relief that all the transfers, as well as the assignment, may be set aside, the assignment may be retained if such a course is more beneficial to creditors.[67] It has been held that judgment may be entered for the debt, although the fraud charged is not proven.[68] Where after issue is joined in an action in the nature of a creditor's suit against a husband and wife, by the judgment creditor of the husband, to reach real estate claimed to have been fraudulently conveyed to the wife, the wife dies, and no fraud is established by plaintiff, it has been held that he cannot have judgment for the interest in the real estate acquired by the husband upon the death of the wife.[69] Where defendants by a fraudulent combination have made themselves individually answerable to the judgment debtor for certain property sold on execution, the court need not adjust their liabilities among themselves unless requested so to do.[70] Where the court finds that a conveyance was voluntary as to part of the alleged consideration, and requires the grantee to pay that sum into court for the benefit of creditors, it is not error to fix the value of the land at the amount of the alleged consideration, and to permit the grantee to retain the land at that price, it not being shown that it was so inadequate as to constitute fraud.[71] Where the price obtained for property alleged to have been fraudu-

v. Waddell, 2 Sandf. Ch. (N. Y.) 494. See *infra*, XIV, N, 3.

60. Hall *v.* Greenly, 1 Del. Ch. 274.
61. Searing *v.* Berry, 58 Iowa 20, 11 N. W. 708. See also Woodard *v.* Mastin, 106 Mo. 324, 17 S. W. 308.
62. Catchings *v.* Manlove, 39 Miss. 655.
63. Lyman *v.* Place, 26 N. J. Eq. 30.
64. Bachman *v.* Sepulveda, 39 Cal. 688.
65. Kerr *v.* Hutchins, 46 Tex. 384.
66. Roanoke Nat. Bank *v.* Farmer's Nat. Bank, 84 Va. 603, 5 S. E. 682.
67. Davis *v.* White, 49 N. J. Eq. 567, 25 Atl. 936 [*affirming* 48 N. J. Eq. 22, 21 Atl. 187].
68. Pigue *v.* McFerrin, 12 Lea (Tenn.) 645.
69. Curtis *v.* Fox, 47 N. Y. 299.
70. Bruce *v.* Kelly, 39 N. Y. Super. Ct. 27.
71. Stonebraker *v.* Hicks, 94 Va. 618, 27 S. E. 497.

lently transferred was far below the market value of the property, and the grantor only took an active part in defending the transfer, the court will consider the transaction a mortgage, and decree that the complainant may redeem on paying to the transferee the actual sum paid, with interest.[72] Where an absolute deed is held to be a mortgage, a judgment creditor should be adjudged to have a lien upon the premises subject to the mortgage.[73] In a suit to set aside a mortgage as fraudulent, defendant mortgagee is entitled to be repaid sums paid by him for taxes while he held the record title to the property, as a condition on which the relief prayed for should be granted.[74] Where the record does not show what property is claimed to have been covered by a general attachment of all of a debtor's property in a certain county, plaintiff should make a written motion for the judgment desired, particularly describing the property against which such judgment is desired, and which it is claimed is covered by the attachment because conveyed in fraud of creditors, supported by the affidavit of plaintiff or his attorney.[75] In Louisiana under the civil code the judgment in a revocatory action instituted by creditors to set aside a fraudulent conveyance, if the action be successful, is that the conveyance be avoided as to its effect upon the complaining creditors, and that all the property or money taken from the original debtor's estate by virtue thereof, or the value of such property to the amount of the debt, be applied to the payment of the complaining creditors.[76]

c. Conformity to Pleadings — (I) *In General.* In an action to set aside a conveyance by a debtor on the ground of fraud, issues not raised by an averment or prayer cannot be adjudicated.[77]

72. Withrow *v.* Warner, 56 N. J. Eq. 795, 35 Atl. 1057, 40 Atl. 751, 67 Am. St. Rep. 501.

73. Lazarus *v.* Rosenberg, 70 N. Y. App. Div. 105, 75 N. Y. Suppl. 11. See also Fenton *v.* Morgan, 16 Wash. 30, 47 Pac. 214.

74. Lamb *v.* McIntire, 183 Mass. 367, 67 N. E. 320.

75. American Agricultural Chemical Co. *v.* Huntington, 99 Me. 361, 59 Atl. 515.

76. Claflin *v.* Lisso, 27 Fed. 420. See also Stone *v.* Kidder, 6 La. Ann. 552.

77. *Alabama.*— Pattison *v.* Bragg, 95 Ala. 55, 10 So. 257.

Iowa.— Cathcart *v.* Grieve, 104 Iowa 330, 73 N. W. 835; Wheeler, etc., Mfg. Co. *v.* Hasbrouck, 68 Iowa 554, 27 N. W. 738.

Kentucky.— Eskridge *v.* Carter, 29 S. W. 748, 16 Ky. L. Rep. 760.

Maryland.— Chatterton *v.* Mason, 96 Md. 236, 37 Atl. 960.

Missouri.— Schneider *v.* Patton, 175 Mo. 684, 75 S. W. 155; Needles *v.* Ford, 167 Mo. 495, 67 S. W. 240.

New York.—Truesdell *v.* Sarles, 104 N. Y. 164, 10 N. E. 139; Greenough *v.* Greenough, 32 N. Y. App. Div. 631, 53 N. Y. Suppl. 1104 [*affirming* 21 Misc. 727, 47 N. Y. Suppl. 1096]; Tuthill *v.* Myrus, 57 N. Y. App. Div. 37, 68 N. Y. Suppl. 37; Kennedy *v.* Barandon, 67 Barb. 209; Maders *v.* Whallon, 19 N. Y. Suppl. 638 [*affirmed* in 20 N. Y. Suppl. 145]; Hotop *v.* Neidig, 17 Abb. Pr. 332. See also Nicholson *v.* Leavitt, 4 Sandf. 252.

South Carolina.— See Newberry Bank *v.* Kinard, 28 S. C. 101, 5 S. E. 464.

Tennessee.— Dunscomb *v.* Wallace, 105 Tenn. 385, 59 S. W. 1013.

West Virginia.— Hunter *v.* Hunter, 10 W. Va. 321.

Wisconsin.— Erdall *v.* Atwood, 79 Wis. 1, 47 N. W. 1124.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 966.

Compare Doherty *v.* Holliday, 137 Ind. 282, 32 N. E. 315, 36 N. E. 907.

A judgment setting aside conveyances not specified in the petition has been held erroneous, although the petition alleges that other transfers, unknown to plaintiffs, were made in contemplation of insolvency and within six months of the filing of the petition. Bowers *v.* Huntingdon Bank, 97 Ky. 294, 30 S. W. 647, 17 Ky. L. Rep. 322.

In Minnesota it is provided by statute that where no answer is interposed the court cannot grant more relief than is prayed in the complaint. In any other case it may grant any relief consistent with the case made by the complaint and embraced within the issue, and, in a suit to set aside a fraudulent conveyance of land, part of which is to secure a debt to the grantee and a part to be held in trust for the grantor, where the grantee claims to be a *bona fide* purchaser of the whole land, the court may avoid the conveyance as to the whole for actual fraud. Thompson *v.* Bickford, 19 Minn. 17.

Judgments and decrees warranted by the pleadings and evidence.— *California.*— Woodbury *v.* Nevada Southern R. Co., 120 Cal. 463, 52 Pac. 730.

Illinois.— Andrews *v.* Donnerstag, 70 Ill. App. 236.

Iowa.— Stubblefield *v.* Gadd, 112 Iowa 681, 84 N. W. 917.

Massachusetts.— Stratton *v.* Herndon, 154 Mass. 310, 28 N. E. 269.

Tennessee.— Dunscomb *v.* Wallace, 105 Tenn. 385, 59 S. W. 1013.

(11) *Under Prayer For General Relief.* Under a prayer for general relief, the court may decree that on default of payment of the amount found due, the land found to have been fraudulently conveyed may be sold by a master in chancery.[78] The equitable interest of the debtor in property purchased on a conditional sale, and such interest in other property sold as was owned by the debtor, may be condemned.[79] Where the action is to set aside a trust deed given by the debtor, plaintiff is entitled to have a foreclosure of the trust assignment so as to reach the surplus, if any, after the payment of the trust expenses and debts.[80] Where facts are alleged to show that deeds were made without consideration, or in fraud of creditors, the creditors, upon proof of these facts, are entitled to have the deeds canceled, but not to have them treated as mortgages, or to be substituted to the vendor's lien of the debtor for the unpaid purchase-money.[81] Where a trust deed sought to be set aside is held valid, the complainants are entitled to have the surplus proceeds of the trust property, if any, after the satisfaction of the debts secured in the deed, applied in discharge of their demand.[82] And where a creditor recovers judgment against his debtor, without including interest to accrue, and the debtor thereafter makes a fraudulent conveyance of his property to prevent its seizure on execution, the court may set aside such conveyance on the petition of the creditor, and decree interest.[83]

d. Amount of Recovery. Notwithstanding a judgment the court will, where the judgment creditor asks relief against a fraudulent conveyance, look into the original consideration, and give the creditor only what on the whole appears due to him.[84] Where a conveyance is set aside in favor of a plaintiff who has in his hands personal property of the debtor, it is proper to apply the value of such property on his debt.[85] Where a complainant has purchased, under execution, property fraudulently conveyed, at a reduced price, and brings his bill to set aside the conveyance, he should be allowed to annul the sale, and subject the property to the payment of his demand, only upon the terms of surrendering to defendant the remainder not sold.[86]

e. Setting Aside Conveyance. In an action brought by a judgment creditor to set aside conveyances of real property made with a design to defraud, plaintiff is entitled, if successful in his action, to have the conveyances set aside in so far as they obstruct the collection of his judgment, and this is the limit of his right.[87] Where a deed is fraudulent as to creditors but good between the parties, in a suit to subject the land to liens of creditors, it is error to decree the conveyance void *in toto*; it should be declared void only as to the creditors of the grantor.[88] Where an execution is levied on only a part of real estate which was conveyed by a debtor, it is error on decreeing the conveyance to be fraudulent to render a decree canceling the deed as a whole, but it should be canceled only as to the part levied upon.[89] Where a transfer of personal property is valid as between the transferrer and the transferee, the court in an action brought by a creditor to set aside the transfer as fraudulent as to him will in a proper case set the transfer aside only so far as is necessary in order to pay the amount due to plaintiff, as fixed by his judgment, and the expenses of executing it.[90]

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 966.

78. Davidson *v.* Burke, 143 Ill. 139, 32 N. E. 514, 36 Am. St. Rep. 367.
79. Hunter *v.* Austin, 109 Ala. 311, 19 So. 511.
80. Craigmiles *v.* Hays, 7 Lea (Tenn.) 720.
81. Muenks *v.* Bunch, 90 Mo. 500, 3 S. W. 63.
82. Marks *v.* Hill, 15 Gratt. (Va.) 400.
83. Beall *v.* Silver, 2 Rand. (Va.) 401.
84. Bean *v.* Smith, 2 Fed. Cas. No. 1,174, 2 Mason 252.
85. Morris *v.* Morris, 71 Hun (N. Y.) 45, 24 N. Y. Suppl. 579.
86. Payne *v.* Burks, 4 B. Mon. (Ky.) 492.
87. Coons *v.* Lemieu, 58 Minn. 99, 59 N. W. 977.
88. Duncan *v.* Custard, 24 W. Va. 730; Murdock *v.* Welles, 9 W. Va. 552. See also Orr *v.* Gilmore, 7 Lans. (N. Y.) 345.
89. Walters *v.* Cantrell, (Tex. Civ. App. 1902) 66 S. W. 790.
90. Comyns *v.* Riker, 83 Hun (N. Y.) 471, 31 N. Y. Suppl. 1042. See also Ford *v.* Rosenthal, 74 Tex. 28, 11 S. W. 904.

Where there have been several transfers of personal property by a debtor, it is not essential that all of such transfers should be set aside, where the claim of the only creditor seeking relief can be satisfied by making the judgment applicable to a particular transfer of money sufficient to satisfy it.[91] Where the action is to charge lands in the hands of a fraudulent grantee with the payment of a debt due by the equitable owner, it is not necessary that the deed be set aside.[92]

f. Ordering Sale of Property. The decree in behalf of creditors, in an action brought by them to set aside the deed of land transferred by their debtor to avoid his debts, may order a sale of the land, and not remit the complainants to their execution at law.[93] If a judgment debtor has conveyed away land fraudulently, and retains other lands, a court of equity, on setting aside a conveyance at the suit of the attachment creditor, should direct a sale of a moiety of the whole, embracing in the moiety decreed to be sold the land not conveyed by the debtor, and taking only so much of the land conveyed as will, with the land retained by the debtor, constitute a moiety of the aggregate of the whole.[94] Where a bill to subject land fraudulently conveyed by a debtor does not show any interest in the land so conveyed in the fraudulent grantee, he cannot object that the decree directs the whole of the land to be sold, although it is proved that an undivided

91. Fox *v.* Erbe, 100 N. Y. App. Div. 343, 91 N. Y. Suppl. 832.

92. Cheely *v.* Wells, 33 Mo. 106. See also Beeckman *v.* Montgomery, 14 N. J. Eq. 106, 80 Am. Dec. 229.

93. *Arkansas.*— Turner *v.* Vaughan, 33 Ark. 454; Apperson *v.* Burgett, 33 Ark. 328.

Georgia.— Cruger *v.* Tucker, 69 Ga. 557.

Indiana.— Simons *v.* Busby, 119 Ind. 13, 21 N. E. 451; Hadley *v.* Hood, 94 Ind. 119. But *compare* Levy *v.* Chittenden, 120 Ind. 37, 22 N. E. 92.

Kentucky.— See White *v.* Cates, 7 Dana 357. *Compare* Mize *v.* Turner, 22 S. W. 83, 15 Ky. L. Rep. 67.

Mississippi.— Hunt *v.* Knox, 34 Miss. 655.

Ohio.— Sockman *v.* Sockman, 18 Ohio 362.

South Carolina.— Wagener *v.* Mars, 27 S. C. 97, 2 S. E. 844.

Virginia.— Barger *v.* Buckland, 28 Gratt. 850; Greer *v.* Wright, 6 Gratt. 154, 52 Am. Dec. 111.

West Virginia.— Chrislip *v.* Teter, 43 W. Va. 356, 27 S. E. 288.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 969.

But *compare* Dawley *v.* Brown, 65 Barb. (N. Y.) 107; Walker *v.* White, 36 Barb. (N. Y.) 592; Hendrickson *v.* Winne, 3 How. Pr. (N. Y.) 127.

A decree that the debtor and his assignee join in the sale directed by the decree is appropriate and valid, where the fraudulent conveyance was made before judgment was recovered, to prevent its lien attaching. McCalmont *v.* Lawrence, 15 Fed. Cas. No. 8,676, 1 Blatchf. 232.

Amount of property to be sold.— Where the court finds no other fraudulent purpose than that the conveyance was made to hinder plaintiff in the collection of the judgment, and no other creditors intervene or were joined, the decree should not order the sale of more property than would be sufficient to satisfy plaintiff's claim. Martin *v.* Elden, 32 Ohio St. 282.

Prerequisites to order of sale.— The precise amount of the debt should be first ascertained and stated in the decree, and a reasonable time allowed defendant to pay the amount into the office of the court before a sale is ordered. Lewis *v.* Baker, 1 Head (Tenn.) 385. In Virginia, under a statute which forbids a decree of sale unless it appears that the rents and profits of the land subject to the lien will not satisfy the judgment in five years, the court should not set aside a deed as fraudulent toward creditors, before directing an inquiry as to whether plaintiff's debts could not be paid out of the rents and profits of the property conveyed in five years. Cronie *v.* Hart, 18 Gratt. (Va.) 739. In West Virginia it is not required by statute, or by the general law on the subject, that all the creditors shall be convened, and their debts reported, or that it should be ascertained whether the rents will pay off the debts in five years, or in a reasonable time, before there can be a decree of sale. State *v.* Bowen, 38 W. Va. 91, 18 S. C. 375; Burt *v.* Timmons, 29 W. Va. 441, 2 S. E. 780, 6 Am. St. Rep. 664; Core *v.* Cunningham, 27 W. Va. 206.

In Louisiana, under a statute contemplating that a revocatory action shall inure to the benefit of the creditor who has been at the expense and risk of prosecuting it, it has been held that a creditor who has prayed that property fraudulently transferred to his debtor should be sold in satisfaction of the petitioner's judgment is entitled to an amendment of a decree subjecting the property "to the just claims of defendants and creditors," so as to make it correspond to plaintiff's prayer, although the action, being to set aside a simulated sale, was not strictly a revocatory one. Decuir *v.* Veazey, 8 La. Ann. 453.

94. McNew *v.* Smith, 5 Gratt. (Va.) 84.

half only was conveyed.[95] Where a deed void as to creditors is valid as between the parties, in a suit by the grantor's creditors to subject the land to payment of their claims, other property of the grantor in the hands of parties to the suit will be first applied to the payment of the claims.[96] On a bill against fraudulent donees of a deceased person and his heir to subject the lands conveyed and those that have descended, the whole may be decreed to be sold to satisfy plaintiff's debt.[97]

g. Personal Judgment. Where the grantee holds the property fraudulently transferred, the creditor must subject it and cannot ordinarily take a personal money decree for his debt or the value of the property;[98] but a court of equity has the power to adapt its relief to the exigencies of the case and may award a personal judgment,[99] where the specific property conveyed in fraud of creditors cannot be recovered,[1] or where there will be a balance due after subjecting such property.[2] If, however, the only prayer is to have the transfer set aside a money judgment cannot be rendered.[3] On a creditor's bill to set aside a conveyance as fraudulent, it is improper to render a decree making the grantee responsible in damages to the creditor; such damages should be sought by a proceeding at law.[4] Where a husband causes real estate to be conveyed to his wife in fraud of creditors, a judgment *in personam* for its value cannot be taken at the suit of his assignee in bankruptcy against her, nor in case of her death against her personal representative, her estate not having received any actual benefit from the conveyance.[5]

h. Operation and Effect.[6] A decree avoiding a deed as to creditors of the grantor leaves the deed operative between the parties.[7] Such a decree is a decree *sub modo*, and binding only as to such creditors.[8] A judgment which sets aside a conveyance so far as is necessary to secure plaintiff's debt does not affect the validity of the conveyance beyond its terms so far as other creditors who have not asked relief are concerned.[9] The interests of minor children not parties to the suit are not affected by the decree.[10] The purchaser of real estate at a sheriff's sale may obtain a decree setting aside a deed which was made to defraud the judgment creditor, and securing the purchaser's title against any claims under the fraudulent deed; but the decree cannot vest the absolute fee in the complainant.[11] Where a deed conveying land embracing a homestead is set aside as fraudulent, at the suit of a creditor, a provision in the decree that the master in selling the land shall proceed in accordance with the homestead laws does not cause the homestead estate to revert to the grantor, but simply confirms the

95. Ballentine *v.* Beall, 4 Ill. 203.

96. Fones *v.* Rice, 9 Gratt. (Va.) 568.

97. Blow *v.* Maynard, 2 Leigh (Va.) 29.

98. Vance Shoe Co. *v.* Haught, 41 W. Va. 275, 23 S. E. 553. See also Harrison *v.* Obermeyer, etc., Brewing Co., 64 N. Y. App. Div. 499, 72 N. Y. Suppl. 270; Ringold *v.* Suiter, 35 W. Va. 186, 13 S. E. 46; Van Blarcom *v.* Isaac, 92 Wis. 541, 66 N. W. 617.

99. Fox *v.* Erbe, 100 N. Y. App. Div. 343, 91 N. Y. Suppl. 832 [*citing* Baily *v.* Hornthal, 154 N. Y. 648, 49 N. E. 56, 61 Am. St. Rep. 645; Murtha *v.* Curley, 90 N. Y. 372]. See also Varnum *v.* Behn, 63 N. Y. App. Div. 570, 71 N. Y. Suppl. 903; Greer *v.* Wright, 6 Gratt. (Va.) 154, 52 Am. Dec. 111.

1. Thompson *v.* Johnson, 55 Minn. 515, 57 N. W. 223; Solinsky *v.* Lincoln Sav. Bank, 85 Tenn. 368, 4 S. W. 836 [*overruling* Tubb *v.* Williams, 7 Humphr. (Tenn.) 367].

2. Citizens' Mut. Ins. Co. *v.* Ligon, 59 Miss. 305; Hinton *v.* Ellis, 27 W. Va. 422.

3. Carpenter *v.* Knapp, 1 Tex. App. Civ. Cas. § 1111. See also Harrison *v.* Obermeyer, etc., Brewing Co., 64 N. Y. App. Div. 499, 72 N. Y. Suppl. 270.

4. Dunphy *v.* Kleinschmidt, 11 Wall. (U. S.) 610, 20 L. ed. 223.

5. U. S. Trust Co. *v.* Sedgwick, 97 U. S. 304, 24 L. ed. 954; Phipps *v.* Sedgewick, 95 U. S. 3, 24 L. ed. 591.

6. As bar of homestead right see, generally, HOMESTEADS.

As against persons participating in suit see, generally, JUDGMENTS.

As bar to subsequent action see, generally, JUDGMENTS.

7. McDowell *v.* McMurria, 107 Ga. 812, 33 S. E. 709, 73 Am. St. Rep. 155; Schultz's Succession, 39 La. Ann. 505, 2 So. 47; Norton *v.* Norton, 5 Cush. (Mass.) 524; Knapp *v.* Crane, 14 N. Y. App. Div. 120, 73 N. Y. Suppl. 513; Dawley *v.* Brown, 11 N. Y. St. 260.

8. Boggess *v.* Scott, 48 W. Va. 316, 37 S. E. 661.

9. Kerr *v.* Hutchins, 46 Tex. 384.

10. Burns *v.* Bangert, 16 Mo. App. 22.

11. Cooper *v.* Adams, 2 Blackf. (Ind.) 294.

grantee's title thereto.[12] When a conveyance is adjudged to be fraudulent as to creditors, and is declared void, and the property decreed to be sold and the proceeds to be brought into court, such decree is conclusive, and cannot usually be opened and modified in the subsequent proceedings, to ascertain the amount of the debts of the complainants and to distribute the proceeds of the sale.[13] Where judgment is rendered against the creditor denying his right to subject the property in controversy to the payment of his debt, such judgment, until appealed from or reversed, becomes the law of the case, and estops the creditor from further pursuing the property.[14] Where a purchase is made of the grantee of an alleged fraudulent deed, during the pendency of the proceedings properly instituted for the express purpose of testing the validity of such deed, and the deed is adjudged fraudulent, such purchase becomes a nullity as against the title established by such proceedings;[15] but where one of two grantees of a fraudulent grantor has purchased from the other a portion of the land so conveyed for a valuable consideration, and recorded his deed, a decree in a subsequent suit setting aside the conveyance first mentioned will not affect the validity of the last deed, although the grantee of such last deed was a party to the action in which the decree was entered.[16]

i. Persons Entitled to Claim Benefit. As a general rule the judgment or decree in an action to set aside a fraudulent conveyance avails the plaintiff only, and not those who are neither parties nor privies to the proceedings.[17] It has been held, however, that it inures to the benefit of all other creditors of the same class taking advantage thereof in proper time by proper pleadings,[18] but the fact that a conveyance has been declared void as to prior creditors does not necessarily benefit subsequent creditors.[19] Where a conveyance is fraudulent as against creditors, and certain creditors attack and defeat it upon that ground, another creditor is not by that fact required to treat it as void, but may still ratify it and enforce rights given him thereunder.[20]

2. Enforcement and Sales — a. Enforcement of Judgment or Decree. Where judgment creditors have by process in equity had a deed of their debtor set aside as void, their course is either to have a receiver appointed by the court to take conveyance from the debtor and then pass a deed in his own name, or else proceed to levy execution thereon by virtue of their original judgment, the lien whereof is still in force.[21] The vendee in a fraudulent sale may either pay the creditor who sets the sale aside, or surrender the property. If he does neither, execution may issue.[22] Upon an application of the surplus money arising under the sale of real estate fraudulently conveyed, judgment creditors who have not become parties under the decree setting aside the sale cannot enforce their judgments against the real estate until the debtor's personal estate has been first exhausted.[23] Where a conveyance has been declared void as in fraud of creditors, and the property ordered to be sold, an account of the rents and profits of the property sold should be taken.[24] A writ of assistance will be granted where defendant refuses to surrender property under a decree setting aside

12. Quinn *v.* People, 146 Ill. 275, 34 N. E. 148 [*affirming* 45 Ill. App. 547].
13. Strike's Case, 1 Bland (Md.) 57.
14. Shaffer *v.* Knox, 7 Kan. App. 182, 53 Pac. 785.
15. Jackson *v.* Andrews, 7 Wend. (N. Y.) 152, 22 Am. Dec. 574.
16. Applegate *v.* Dowell, 15 Oreg. 513, 16 Pac. 651.
17. Labauve *v.* Boudreau, 9 Rob. (La.) 28; McManus *v.* Jewett, 6 La. 530; Shulze's Appeal, 1 Pa. St. 251, 44 Am. Dec. 126; McCalmont *v.* Lawrence, 15 Fed. Cas. No. 8,676, 1 Blatchf. 232. See also Enger *v.* Lofland, 100 Iowa 303, 69 N. W. 526. *Compare* Adams *v.* Coons, 37 La. Ann. 305, which is to the contrary.
18. Sibley *v.* Stacey, 53 W. Va. 292, 44 S. E. 420.
19. Greer *v.* O'Brien, 36 W. Va. 277, 15 S. E. 74. *Contra,* Trimble *v.* Turner, 13 Sm. & M. (Miss.) 348, 53 Am. Dec. 90.
20. German Nat. Bank *v.* Leonard, 40 Nebr. 676, 59 N. W. 107.
21. Walker *v.* White, 36 Barb. (N. Y.) 592.
22. Atwill *v.* Belden, 1 La. 500.
23. Warden *v.* Browning, 12 Hun (N. Y.) 497.
24. Strike's Case, 1 Bland (Md.) 57.

the conveyance to him as fraudulent.[25] In Indiana the statute which provides that property conveyed by a debtor with intent to hinder, delay, or defraud his creditors shall be sold without appraisement applies to property which the debtor fraudulently procured to be conveyed to himself, as well as to property held in his own name and by him fraudulently conveyed to another.[26] In Kentucky, by statute, the execution plaintiff may file a petition in equity to set aside a fraudulent conveyance, and as the chancellor has jurisdiction of the parties he may grant complete relief while they are before him, by enforcing the execution.[27]

b. Redemption From Execution Sale. A debtor has no equitable interest in property which he has conveyed in fraud of creditors, entitling his judgment creditor to redeem it from an execution sale made at the suit of other creditors who have had the conveyance set aside in a proceeding in equity.[28]

c. Sales and Conveyances Under Order of Court. The court may by its decree direct that the property be sold upon an order of sale instead of an execution.[29] A sale of land by trustees will be adjudged invalid where such sale is not made pursuant to the decree.[30] The sale must be made on the application of one entitled to assert the invalidity of the conveyance in order to convey a valid title to the purchaser.[31] It has been held that where there are valid liens prior to that of plaintiff, and the money secured by them is due and payable, the court should ascertain the amounts and priorities of such liens, and decree a sale to satisfy the same, as well as that of plaintiff.[32] A sale under order of court does not discharge prior liens.[33] A judgment setting aside a sale and conveyance of land as fraudulent as to creditors, and decreeing a sale to pay plaintiff's debt, is void as to a pledgee of the notes executed for the purchase-money, who was not a party to the action, and the sale made thereunder is also void.[34] A judgment setting aside a conveyance of realty as fraudulent and ordering a sale thereof should not be enforced until an execution has been issued on personal property shown on the trial to be owned by the judgment debtor and subject to execution, and the property sold and the proceeds applied on the judgment.[35] The purchaser at a valid sale by a receiver to whom property has been transferred by order of court is vested with all the title of the owner of the property at the time of the transfer to the receiver, as against the lien of a judgment obtained subsequently against the debtor.[36] The right of the holder of a lien or claimant of other interest who is made a party defendant, and the validity of whose claim is made a question and disposed of adversely to him, is subordinate to the title of the receiver's grantee.[37] The title given pursuant to a decree ordering the debtor and his fraudulent grantee to join with the receiver in the suit in executing a conveyance of the land directed by the decree is full and perfect and discharged of all right of redemption.[38] Where, when a wife has joined her husband in a conveyance

25. Pratt *v.* Burr, 22 Fed. Cas. No. 11,372, 5 Biss. 36.

26. Mugge *v.* Helgemeier, 81 Ind. 120. *Compare* Whitehall *v.* Crawford, 37 Ind. 147.

27. Gorman *v.* Glenn, 78 S. W. 873, 25 Ky. L. Rep. 1755.

28. Howland *v.* Knox, 59 Iowa 46, 12 N. W. 777.

29. McNally *v.* White, 154 Ind. 163, 54 N. E. 794, 56 N. E. 214; Benton *v.* Collins, 125 N. C. 83, 34 S. E. 242, 47 L. R. A. 33. See also Teabout *v.* Jaffray, 74 Iowa 28, 36 N. W. 783, 7 Am. St. Rep. 466.

Sale set aside at instance of debtor's wife. — Where a husband conveys property to his wife in fraud of creditors, a decree for the sale of the land, so far as the husband is concerned, will be set aside at the instance of the wife, where by reason of the fraud of the husband she was not made a party to the proceedings. Stillwell *v.* Stillwell, 47 N. J. Eq. 275, 20 Atl. 960, 24 Am. St. Rep. 408 [*reversing* (Ch. 1889) 18 Atl. 679].

30. Quarles *v.* Lacy, 4 Munf. (Va.) 251.

31. George *v.* Williamson, 26 Mo. 190, 72 Am. Dec. 203.

32. Dent *v.* Pickens, 50 W. Va. 382, 40 S. E. 572. See Root-Tea-Na-Herb Co. *v.* Rightmire, 48 W. Va. 222, 36 S. E. 359.

33. Dungan's Appeal, 88 Pa. St. 414.

34. Gunn *v.* Orndorff, 67 S. W. 372, 68 S. W. 461 23 Ky. L. Rep. 2369.

35. Hyatt *v.* Dusenbury, 12 N. Y. Civ. Proc. 152.

36. Chautauque County Bank *v.* White, 6 N. Y. 236, 57 Am. Dec. 442 [*reversing* 6 Barb. 589].

37. Shand *v.* Hanley, 71 N. Y. 319.

38. McCalmont *v.* Lawrence, 15 Fed. Cas. No. 8,676, 1 Blatchf. 232.

of his real estate, and the conveyance is subsequently set aside in an action to which the wife is not a party, as fraudulent as against the husband's creditors, and the land is sold to the creditors at a sheriff's sale in satisfaction of their claims, her inchoate interest becomes vested in her by statute, she may maintain a suit against the purchasers for partition, to which suit the fraudulent grantee is not a necessary party, either plaintiff or defendant.[39]

3. Disposition of Property and Proceeds — a. Satisfaction of Claims of Creditors. Creditors whose claims did not exist until after a fraudulent conveyance was made may, on its being set aside at the instance of preëxisting creditors, share in the benefits of the litigation.[40] But where a transfer of a debtor's property is set aside as fraudulent, creditors who have ratified the transfer or claimed under it should not be allowed to participate in the fund arising therefrom.[41] Although a trust deed is held to be valid in a suit by a judgment creditor to set it aside, the creditor is entitled to reach the surplus after paying the debt secured.[42] Where an assignor gives a fraudulent trust deed, and the judgment creditor by process of garnishment reaches the funds or effects held by the trustee, such creditor is entitled to have all the funds or effects applied to his demand, where there are no other creditors in a position to share in the fund.[43] Where secured creditors prosecute a bill to subject to the satisfaction of their claims property fraudulently conveyed by the debtor, they will be required to account for the security held by them before they can appropriate the property sought to be reached.[44] Where a judgment is obtained after a conveyance by a debtor, if such conveyance is in good faith for full consideration, the creditor has no remedy against the land; if fraudulent as to the creditor, he may sell the grantee's title, which sale will not discharge the prior liens, nor will the proceeds be applied to their payment.[45] Various other questions which have arisen in connection with this subject are referred to in the note below.[46]

b. Costs and Attorney's Fees. The complaining creditor is first entitled to reimbursement out of the fund created by setting aside a fraudulent conveyance

39. Rupe *v.* Hadley, 113 Ind. 416, 16 N. E. 391.

40. O'Brien *v.* Stambach, 101 Iowa 40, 69 N. W. 1133, 63 Am. St. Rep. 368.

Where a voluntary transfer is set aside at the instance of preëxisting creditors, subsequent as well as preëxisting creditors may avail themselves of the property (Thomson *v.* Dougherty, 12 Serg. & R. (Pa.) 448; Brock *v.* Bowman, Rich. Eq. Cas. (S. C.) 185; Iley *v.* Wiswanger, 1 McCord Eq. (S. C.) 518); if there is proof of actual or intentional fraud (Kirksey *v.* Snedecor, 60 Ala. 192).

41. Lore *v.* Dierkes, 16 Abb. N. Cas. (N. Y.) 47; Hancock *v.* Wooten, 107 N. C. 9, 12 S. E. 199, 11 L. R. A. 466. See *supra*, IV, G.

42. Sipe *v.* Earman, 26 Gratt. (Va.) 563.

43. Morris *v.* House, 32 Tex. 492.

44. Barret *v.* Reed, Wright (Ohio) 700.

45. Haak's Appeal, 100 Pa. St. 59.

46. *Indiana.*— Hines *v.* Dresher, 93 Ind. 551, disposition of property conveyed to a *bona fide* mortgagee by a fraudulent grantee.

Kentucky.— Tilford *v.* Burnham, 7 Dana 109 (holding that the assignee of notes given as the apparent consideration of a fraudulent deed cannot have the notes satisfied out of the land in preference to a *bona fide* creditor who has filed his bill to set the conveyance aside); Commonwealth Bank *v.* Allen, 7 Ky. L. Rep. 595 (division of property transferred in part *bona fide*, and part fraudulently, between *bona fide* transferee and attacking creditors).

Massachusetts.—Bernard *v.* Barney Myroleum Co., 147 Mass. 356, 17 N. E. 837, action under Pub. St. c. 151, § 3, giving jurisdiction in equity to reach and apply, in payment of a debt, property fraudulently conveyed.

New York.— Warden *v.* Browning, 12 Hun 497, priority of receiver to whom property conveyed for the purpose of sale, as to the application of surplus money arising under the sale, over judgment creditors who did not become parties plaintiff under a decree providing that any judgment creditor whose execution had been returned unsatisfied might become a party plaintiff.

Pennsylvania.— Henderson *v.* Henderson, 133 Pa. St. 399, 19 Atl. 424, 19 Am. St. Rep. 650 (holding that a creditor whose judgment is entered after a fraudulent conveyance of all the debtor's property, but is a lien prior to that of another creditor under whose execution the property is sold, is entitled to participate in the proceeds only to the extent that the previous conveyance tended to defraud him); Boyle *v.* Thomas, 1 Chest. Co. Rep. 117 (holding that where in a suit in equity by a creditor whose lien attached after an alleged fraudulent conveyance to have the deed declared void, the court sets it aside, it will not order a conveyance of the lands to an assignee to whom defendant

of all his costs and expenses necessarily incurred in prosecuting his suit, although the recovery inures to the benefit of all the debtor's other creditors.[47] Upon a conveyance by a debtor being set aside as fraudulent, at the suit of a creditor, and a sale of the property being ordered, the creditor's attorney may be allowed a fee out of the proceeds;[48] but such fee should be paid out of that part applicable to the demands of creditors, and not out of such balance as may come to the debtor after the liquidation of the debts proven and passed.[49]

c. Mortgages and Other Encumbrances. Where the fraudulent grantee, at the request and to secure debts of the fraudulent grantor then existing, gives mortgages upon the property to creditors ignorant of his pecuniary condition and his intent in making the conveyance, the rights of such mortgagees are superior to those of creditors.[50] Where preferential mortgages are set aside for reasons not involving a charge of fraudulent intent or moral turpitude, at the suit of creditors, the mortgagees will be permitted to share *pari passu* in the fund made out of the mortgaged property.[51] And where it appears that plaintiffs will not be prejudiced, a fraudulent grantee of land, who pays off a mortgage thereon which is prior to the lien of plaintiff's judgment, is entitled to the lien of the mortgage as a prior lien over plaintiff's claims.[52] Where a grantor executes successive deeds of the same property to secure different debts, none of them being given subject to those previously executed, if any of the deeds are subsequently declared void as in fraud of creditors, the proceeds of the property must be applied to the payment of the remaining valid encumbrances according to their priorities before any claims of unsecured creditors of the grantor can be paid.[53] Where a conveyance of a husband's land by husband and wife is set aside as in fraud of creditors, the wife's right to dower therein is subject to a ratable contribution toward the payment of a mortgage on the premises executed by the grantee.[54] It is unnecessary to ascertain the liens existing upon the land before making a distribution of the proceeds of a sale of the land, and the party filing the bill and setting aside the conveyance is entitled to be first satisfied out of such proceeds, unless there are prior liens.[55] Creditors with liens on property fraudulently conveyed, which had attached prior to the conveyance, are entitled to priority in the distribution of the fund arising from a sale of the property under the execution of a later creditor who was defrauded by the conveyance.[56] Where the owner of land encumbered with liens makes a conveyance fraudulent as against creditors, and the land is sold by the sheriff under a judgment subsequently obtained, the liens existing before the conveyance remain encumbrances upon the property, and are therefore not payable out of the proceeds of the sale.[57] In an action by a judgment creditor to set aside as fraudulent conveyances of real estate by the debtor, judgments against him to recover instalments of money are a lien on such real estate, but the court cannot declare other instalments which have not been reduced to judgment liens on such land.[58]

had made an assignment for the benefit of creditors, for by so doing plaintiffs would to a large extent lose the fruits of their victory, as the proceeds would go to general distribution).

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 981.

47. Rains *v.* Rainey, 11 Humphr. (Tenn.) 261. See also Hinton *v.* Ellis, 27 W. Va. 422.

48. Wagener *v.* Mars, 27 S. C. 97, 2 S. E. 844. See also Davis *v.* H. Feltman Co., 112 Ky. 293, 65 S. W. 615, 23 Ky. L. Rep. 1510, 99 Am. St. Rep. 289; Armour Packing Co. *v.* London, 53 S. C. 539, 31 S. E. 500. *Compare* Darby *v.* Gilligan, 37 W. Va. 69, 16 S. E. 507.

49. Wagener *v.* Mars, 27 S. C. 97, 2 S. E. 844.

50. Murphy *v.* Moore, 23 Hun (N. Y.) 95.

51. Lippincott *v.* Shaw Carriage Co., 25 Fed. 577.

52. Garner *v.* Philips, 35 Iowa 597.

53. Lewis *v.* Caperton, 8 Gratt. (Va.) 148. See also Burne *v.* Partridge, 61 N. J. Eq. 434, 48 Atl. 770.

54. McMahon *v.* Specht, 64 N. Y. App. Div. 128, 71 N. Y. Suppl. 806.

55. State *v.* Bowen, 38 W. Va. 91, 18 S. E. 375.

56. Byrod's Appeal, 31 Pa. St. 241.

57. Hoffman's Appeal, 44 Pa. St. 95.

58. Carpenter *v.* Osborn, 102 N. Y. 552, 7 N. E. 823.

d. Liens and Priorities. A creditor who during the life of his debtor brings a suit to set aside as fraudulent a conveyance or transfer made by such debtor acquires a lien on the property covered by such conveyance or transfer, and becomes entitled to the payment of his claim in preference to other creditors,[59] unless it is otherwise provided by statute.[60] A junior judgment creditor who succeeds in having a conveyance or transfer set aside obtains priority over senior judgment creditors.[61] But where a conveyance of a deceased debtor is set aside at the suit of creditors, the court will order the property to be delivered to the executor or administrator, to be applied in due course of administration,[62] and the creditors should all share therein.[63]

e. Rights of Grantee or Purchaser. If the grantee, being also a creditor, participated in the fraudulent intent with which the transfer was made, his rights

59. *Alabama.*— Mathews *v.* Mobile Ins. Co., 75 Ala. 85; Battle *v.* Reid, 68 Ala. 149; Evans *v.* Welch, 63 Ala. 250, lien of simple contract creditor.

Arkansas.— Stix *v.* Chaytor, 55 Ark. 116, 17 S. W. 707.

Delaware.— Newell *v.* Morgan, 2 Harr. 225.

Illinois.— Cole *v.* Marple, 98 Ill. 58, 38 Am. Rep. 83; Rappleye *v.* International Bank, 93 Ill. 396.

Indiana.— U. S. Bank *v.* Burke, 4 Blackf. 141.

Iowa.— Kisterson *v.* Tate, 94 Iowa 665, 63 N. W. 350, 58 Am. St. Rep. 419. See also Clark *v.* Raymond, 97 Iowa 156, 66 N. W. 86.

Kentucky.— Moffat *v.* Ingham, 7 Dana 495; Tilford *v.* Burnham, 7 Dana 109; Scott *v.* Coleman, 5 T. B. Mon. 73.

Louisiana.— Townsend *v.* Miller, 7 La. Ann. 632.

Missouri.— George *v.* Williamson, 26 Mo. 190, 72 Am. Dec. 203. *Compare* St. Louis *v.* O'Neill Lumber Co., 114 Mo. 74, 21 S. W. 484.

New York.— Metcalf *v.* Del Valle, 64 Hun 245, 19 N. Y. Suppl. 16; *In re* Prime, 1 Barb. 296; McDonald *v.* McDonald, 17 N. Y. Suppl. 230.

Texas.— Cassaday *v.* Anderson, 53 Tex. 527.

Virginia.— Noyes *v.* Carter, (1895) 23 S. E. 1; Wallace *v.* Treakle, 27 Gratt. 479. See also Davis *v.* Bonney, 89 Va. 755, 17 S. E. 229.

West Virginia.— Richardson *v.* Ralphsnyder, 40 W. Va. 15, 20 S. E. 854; Witz *v.* Lockridge, 39 W. Va. 463, 19 S. E. 876; Guggenheimer *v.* Lockridge, 39 W. Va. 457, 19 S. E. 874; Cohn *v.* Ward, 36 W. Va. 516, 15 S. E. 140; Clark *v.* Figgins, 31 W. Va. 156, 5 S. E. 643, 13 Am. St. Rep. 860; Sweeny *v.* Grape Sugar Refining Co., 30 W. Va. 443, 4 S. E. 431, 8 Am. St. Rep. 88.

United States.— Neal *v.* Foster, 36 Fed. 29; Johnston *v.* Straus, 26 Fed. 57; Kimberling *v.* Hartly, 1 Fed. 571, 1 McCrary 136.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 985, 986. And see CREDITORS' SUITS, 12 Cyc. 61.

Superiority of lien to attachment see the following cases:

Alabama.— McDermott *v.* Eborn, 90 Ala. 258, 7 So. 751.

Illinois.— McKinney *v.* Farmers' Nat. Bank, 104 Ill. 180.

Louisiana.— Lambert *v.* Saloy, 37 La. Ann. 3.

Mississippi.— Levy *v.* Marx, (1895) 18 So. 575.

Tennessee.— Brooks *v.* Gibson, 7 Lea 271.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 987.

Enforcement of lien.— See Citizens' Mut. Ins. Co. *v.* Ligon, 59 Miss. 305.

60. Stanton *v.* Keyes, 14 Ohio St. 443; Cumberland First Nat. Bank *v.* Parsons, 42 W. Va. 137, 24 S. E. 554; Miner *v.* Lane, 87 Wis. 348, 57 N. W. 1105.

61. Atwater *v.* American Exch. Nat. Bank, 152 Ill. 605, 38 N. E. 1017 [*reversing* 40 Ill. App. 501]; Rappleye *v.* International Bank, 93 Ill. 396; Lyon *v.* Robbins, 46 Ill. 276; Boyle *v.* Maroney, 73 Iowa 70, 35 N. W. 145, 5 Am. St. Rep. 657; Rappleye *v.* International Bank, 1 Ky. L. Rep. 71. But see Jackson *v.* Holbrook, 36 Minn. 494, 32 N. W. 852, 1 Am. St. Rep. 683; Curlee *v.* Rembert, 37 S. C. 214, 15 S. E. 954; Cohn *v.* Ward, 36 W. Va. 516, 15 S. E. 140.

62. Brockman *v.* Bowman, 1 Hill Eq. (S. C.) 338. But *compare* U. S. Bank *v.* Burke, 4 Blackf. (Ind.) 141, holding that if a conveyance of real estate executed by an intestate in his lifetime to defraud his creditors be set aside after his death, by a court of chancery in a suit by his creditors, and the land be sold under the decree in order to pay the debts, neither the administrator of the estate nor the probate court has any control over the proceeds of the sale.

63. *Arkansas.*— Jackson *v.* McNabb, 39 Ark. 111.

District of Columbia.— Gilbert *v.* Washington Ben. Endowment Assoc., 10 App. Cas. 316.

Indiana.— Bottorff *v.* Covert, 90 Ind. 508. See also McNaughtin *v.* Lamb, 2 Ind. 642.

Maryland.— Birely *v.* Staley, 5 Gill & J. 432, 25 Am. Dec. 303; Strike's Case, 1 Bland 57.

Ohio.— Pendery *v.* Allen, 9 Ohio Cir. Ct. 245, 4 Ohio Cir. Dec. 268.

Pennsylvania.— Thomson *v.* Dougherty, 12 Serg. & R. 448.

Tennessee.— Levering *v.* Norvell, 9 Baxt. 176; Rains *v.* Rainey, 11 Humphr. 261.

will be postponed to those of other creditors;[64] but if the conveyance was made without actual fraud, or he did not participate therein, it is otherwise.[65] Creditors who attack a conveyance executed by a debtor to secure certain creditors, and succeed in establishing the fictitious or fraudulent character of some of the claims so secured, are not thereby advanced to the place of the excluded claimants so as to take priority over the *bona fide* creditors named in such conveyance;[66] but such *bona fide* creditors are entitled not only to the *pro-rata* share which would have gone to them respectively if all the claims had been valid, but to their shares of the whole of the property conveyed, up to the full amount of their respective claims.[67] A *bona fide* purchaser of a debtor's land from a fraudulent vendee, without notice of the fraud or the rights of the creditor, acquires an equity superior to that of a creditor who obtained a judgment against the debtor and levied his execution on the land after the date of the fraudulent sale, and prior to the time of the *bona fide* purchase.[68]

f. Rights of Creditors of Grantees. Where the proceeds arising from property fraudulently transferred have been brought into court at the instance of creditors of the transferrer, creditors of the fraudulent transferee will not be permitted to have satisfaction of their claims until all the creditors of the transferrer who have come in are fully satisfied.[69]

g. Application of Payments to Judgment or Execution. In an action by a judgment creditor to reach property fraudulently conveyed payments made by the grantee, although not specially applied to the debt, should be applied upon and deducted from the judgment.[70]

h. Right to Surplus. Where a fraudulent conveyance or transfer is set aside, any surplus therefrom after satisfying the claims of creditors belongs to the grantee.[71]

N. Discovery, Injunction, and Receiver — 1. Discovery. Where the bill points out the property conveyed and specifies the particulars in which the fraud consists the complainant may, as ancillary to the main relief sought, have a discovery as to the property alleged to have been fraudulently concealed or conveyed by the debtor, and the consideration received therefor.[72] But the stating part of the bill must point out specifically the property about which the discovery is sought and state circumstantially the information upon which it is charged that defendant has made a fraudulent disposition of it. The court will not compel a discovery upon a mere "fishing bill" whereby the complainant casts about in a vague and uncertain way in the hope of compelling the disclosure of something

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 981.

64. Baldwin *v.* June, 68 Hun (N. Y.) 284, 22 N. Y. Suppl. 852; Nusbaum's Appeal, 1 Pa. Cas. 109, 1 Atl. 392.

65. Fifield *v.* Gaston, 12 Iowa 218; Zacharie *v.* Buckman, 8 La. 305. See also Peoria First Nat. Bank *v.* Shea, 155 Ill. 434, 40 N. E. 551 [*affirming* 53 Ill. App. 511]; Wilson *v.* Curtis, 13 La. Ann. 601; Brown *v.* Chubb, 135 N. Y. 174, 31 N. E. 1030 [*reversing* 8 N. Y. Suppl. 61]; Nadal *v.* Britton, 112 N. C. 188, 16 S. E. 915.

66. Woodson *v.* Carson, 135 Mo. 521, 35 S. W. 1005, 37 S. W. 197.

67. Tefft *v.* Stern, 73 Fed. 591, 21 C. C. A. 67.

68. Farmers' Nat. Bank *v.* Teeters, 31 Ohio St. 36.

69. Mullanphy Sav. Bank *v.* Lyle, 7 Lea (Tenn.) 431. See also Booth *v.* Bunce, 24 N. Y. 592 [*reversing* 35 Barb. 496]. *Compare* Carter *v.* Carpenter, 7 Bush (Ky.) 257.

70. Kittel *v.* Jones, 11 N. Y. St. 541.

71. *California.*— Emmons *v.* Barton, 109 Cal. 662, 42 Pac. 303.

Iowa.— Mallow *v.* Walker, 115 Iowa 238, 88 N. W. 452, 91 Am. St. Rep. 158.

Massachusetts.— Allen *v.* Ashley School Fund, 102 Mass. 262.

New York.— Wood *v.* Hunt, 38 Barb. 302; Welch *v.* Tobias, 7 N. Y. St. 297.

North Carolina.— Williams *v.* Avent, 40 N. C. 47.

United States.— Lee *v.* Hollister, 5 Fed. 752.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 992.

72. *Alabama.*— Guyton *v.* Terrell, 132 Ala. 66, 31 So. 83; Sweetzer *v.* Buchanan, 94 Ala. 574, 10 So. 552; Lawson *v.* Warren, 89 Ala. 584, 8 So. 141; Floyd *v.* Floyd, 77 Ala. 353.

Connecticut.— Skinner *v.* Judson, 8 Conn. 528, 21 Am. Dec. 691.

Illinois.— Scott *v.* Moore, 4 Ill. 306.

to his advantage.[73] And now that the parties to actions are competent witnesses and can be compelled to answer under oath all relevant interrogatories either at the trial or in proceedings supplementary to execution bills for discovery in aid of executions at law have become almost obsolete,[74] although the remedy still exists where it has not been abolished by statute.[75] Defendant cannot be required to make a discovery of facts which would subject him to a criminal prosecution or a forfeiture and he may claim his privilege in his answer.[76]

2. Injunction — a. To Restrain Fraudulent Conveyance by Debtor. In the absence of a statute permitting it, a general creditor who has not reduced his claim to judgment, or in any other manner acquired a lien upon his debtor's property, is not entitled to an injunction to restrain the debtor from disposing of his property in fraud of creditors.[77] But such an injunction may be issued in favor

Maryland.— McNeal *v.* Glenn, 4 Md. 87.

Massachusetts.— Dix *v.* Cobb, 4 Mass. 508, 511, where it is said: "When an attaching creditor has reason to believe the assignment fraudulent, of which he has knowledge before the suit, he may sue the assignee as a trustee, and compel him to a discovery on oath; or, if he has not notice seasonably to sue the assignee as a trustee, he may, after he has recovered judgment against the principal, sue an action of debt on that judgment, and summon the assignee as a trustee in that action, and compel him to a discovery on oath upon the penalty of paying the debt; and if, on this discovery, the assignment should be fraudulent, the assignee would be adjudged a trustee so far as he had derived any benefit from it." See also Gordon *v.* Webb, 13 Mass. 215.

New York.— Hart *v.* Albright, 18 N. Y. Suppl. 718, 28 Abb. N. Cas. 74; Le Roy *v.* Rogers, 3 Paige 234.

Ohio.— Cadwallader *v.* Granville Alexandrian Soc., 11 Ohio 292; Miers *v.* Zanesville, etc., Turnpike Co., 11 Ohio 273.

Texas.— Cargill *v.* Kountze, 86 Tex. 386, 22 S. W. 1015, 25 S. W. 13, 40 Am. St. Rep. 853, 24 L. R. A. 183.

Virginia.— Saunders *v.* James, 85 Va. 936, 9 S. E. 147.

Wisconsin.— Pierce *v.* Milwaukee Constr. Co., 38 Wis. 253.

United States.— Lanmon *v.* Clark, 14 Fed. Cas. No. 8,071, 4 McLean 18; Verselius *v.* Verselius, 28 Fed. Cas. No. 16,925, 9 Blatchf. 189.

The creditor must have obtained judgment and actually issued execution. Detroit Copper, etc., Rolling Mills *v.* Ledwidge, 162 Ill. 305, 44 N. E. 751; Rambaut *v.* Mayfield, 8 N. C. 85.

Real estate.— Mass. St. (1846) c. 168, § 1, authorizing discovery against any one suspected of having fraudulently received, concealed, embezzled, or conveyed away any of the money, goods, effects, or other estate of an insolvent debtor, extends to fraudulent conveyances of real estate. Harlow *v.* Tufts, 4 Cush. (Mass.) 448.

73. Cortland Wagon Co. *v.* Gordy, 98 Ga. 527, 25 S. E. 574; Verdier *v.* Foster, 4 Rich. Eq. (S. C.) 227; Cargill *v.* Kountze, 86 Tex. 386, 22 S. W. 1015, 25 S. W. 13, 40 Am. St. Rep. 853, 24 L. R. A. 183.

74. *Ex p.* Boyd, 105 U. S. 647, 26 L. ed. 1200; Field *v.* Hastings, etc., Co., 65 Fed. 279; Preston *v.* Smith, 26 Fed. 884.

75. Floyd *v.* Floyd, 77 Ala. 353; Dutton *v.* Cameron, 97 Mich. 93, 56 N. W. 229; Treadwell *v.* Brown, 44 N. H. 551; Hart *v.* Albright, 18 N. Y. Suppl. 718, 28 Abb. N. Cas. 74.

76. Bay State Iron Co. *v.* Goodall, 39 N. H. 223, 75 Am. Dec. 219; Horstman *v.* Kaufman, 97 Pa. St. 147, 39 Am. Rep. 802; Michael *v.* Gay, 1 F. & F. 409.

77. *Florida.*— Barrow *v.* Bailey, 5 Fla. 9.

Georgia.— MacKenzie *v.* Thomas, 118 Ga. 728, 45 S. E. 610; Guilmartin *v.* Middle Georgia, etc., R. Co., 101 Ga. 565, 29 S. E. 189; Mayer *v.* Wood, 56 Ga. 427; Dortic *v.* Dugas, 52 Ga. 231; Peyton *v.* Lamar, 42 Ga. 131.

Illinois.— Bigelow *v.* Andress, 31 Ill. 322.

Maryland.— Balls *v.* Balls, 69 Md. 388, 16 Atl. 18; Rich *v.* Levy, 16 Md. 74; Hubbard *v.* Hubbard, 14 Md. 356; Uhl *v.* Dillon, 10 Md. 500, 69 Am. Dec. 172. *Compare* Sanderson *v.* Stockdale, 11 Md. 563.

Nebraska.— Brumbaugh *v.* Jones, (1904) 98 N. W. 54; Crowell *v.* Horacek, 12 Nebr. 622, 12 N. W. 99; Adams *v.* Miller, 4 Nebr. (Unoff.) 464, 94 N. W. 711.

New Jersey.— Meyers *v.* Wedel, (Ch. 1904) 57 Atl. 1008; Mittnight *v.* Smith, 17 N. J. Eq. 259, 88 Am. Dec. 233; Robert *v.* Hodges, 16 N. J. Eq. 299.

New York.— Reubens *v.* Joel, 13 N. Y. 488; Neustadt *v.* Joel, 2 Duer 530; Brooks *v.* Stone, 11 Abb. Pr. 220, 19 How. Pr. 395; Candler *v.* Pettit, 1 Paige 168, 19 Am. Dec. 399; Wiggins *v.* Armstrong, 2 Johns. Ch. 144.

Ohio.— Marion Deposit Bank *v.* McWilliams, 2 Ohio Dec. (Reprint) 142, 1 West. L. Month. 571.

Virginia.— Rorrer *v.* Guggenheimer, 87 Va. 533, 12 S. E. 1054; Kelso *v.* Blackburn, 3 Leigh 299; Tate *v.* Liggat, 2 Leigh 84; Rhodes *v.* Cousins, 6 Rand. 188, 18 Am. Dec. 715.

Wisconsin.— See Almy *v.* Platt, 16 Wis. 169.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 910.

Exceptions to the rule.— There are certain exceptions to the rule requiring a creditor to obtain judgment before suing for an in-

of a creditor who has a lien by judgment, decree, or otherwise on the property sought to be subjected,[78] and in several states it is provided by statute that an injunction may issue where, during the pendency of an action, defendant therein threatens or is about to dispose of his property with intent to defraud creditors,[79] where the attacking creditor has no adequate remedy at law.[80] The right to such injunction depends on the fact of the pendency of the action,[81] and the existence of the fraudulent intent.[82] Nor will an injunction be granted unless an equitable ground for interference is shown.[83]

junction, but they all turn upon peculiar circumstances giving the complainant an equitable interest in the property he is pursuing. See Heyneman *v.* Dannenberg, 6 Cal. 376, 65 Am. Dec. 519; Cohen *v.* Meyers, 42 Ga. 46.

Partnership creditors are entitled to an injunction to restrain a transfer of partnership property between the partners, alleged to have been fraudulently made, the firm being at the time insolvent. Sanderson *v.* Stockdale, 11 Md. 563.

One summoned as trustee may be enjoined from fraudulently conveying his property so as to defeat the collection of a judgment which he anticipates may be rendered against him as such trustee. Moore *v.* Kidder, 55 N. H. 488.

Injunction lies against a married woman, buying and selling in her own name in a state by the laws of which she is permitted to do so, to restrain her from disposing of goods in fraud of a creditor who has no adequate legal remedy against her. Sands *v.* Marburg, 36 Ga. 534, 91 Am. Dec. 781.

Cautionary judgment.— Where defendant mortgages his property during the pendency of an action, for the purpose of rendering worthless any judgment which may be rendered against him, a petition by plaintiff for a cautionary judgment will be granted. Witmer *v.* Port Treverton Church, 17 Pa. Co. Ct. 33.

78. Conolly *v.* Riley, 25 Md. 402; Candler *v.* Pettit, 1 Paige (N. Y.) 168, 19 Am. Dec. 399; Shainwald *v.* Lewis, 6 Fed. 766, 1 Sawy. 148, holding that where a decree in equity is obtained against a defendant for a sum of money, and execution has been returned unsatisfied, a court of equity has jurisdiction of a bill alleging that defendant has secreted his property, and is disposing of the same with the avowed intent of defrauding the complainant, and depriving him of the fruits of his decree, and praying an injunction and receiver; that it is not necessary in such a bill to particularly describe the assets, whether equitable or not, sought to be reached; and that a court of equity will issue an injunction, appoint a receiver, and compel an assignment of all the property of defendant, when such action is necessary to defeat the fraudulent designs of defendant. See also Heilig *v.* Stokes, 63 N. C. 612.

Effect of other security.— A creditor is not precluded from suing in equity to restrain a fraudulent disposition of property of his debtor by the fact that his claim is secured by a mortgage on other property of the debtor. Robinson *v.* Springfield Co., 21 Fla. 203.

79. Morey *v.* Ball, 90 Ind. 450; Reubens *v.* Joel, 13 N. Y. 488; Mitchell *v.* Bettman, 25 Barb. (N. Y.) 408; Brewster *v.* Hodges, 1 Duer (N. Y.) 609; Perkins *v.* Warren, 6 How. Pr. (N. Y.) 341; Pomeroy *v.* Hindmarsh, 5 How. Pr. (N. Y.) 437.

Injunction before judgment.— Under such a statute, a general creditor before judgment may enjoin his debtor from disposing of his property. Morey *v.* Ball, 90 Ind. 450; Mitchell *v.* Bettman, 25 Barb. (N. Y.) 408.

Several creditors may join in a bill to enjoin a debtor from fraudulently transferring his property (Orr *v.* Moore, 1 Tex. App. Civ. Cas. § 587), and this too under the Indiana statute, although their claims are several, and not in judgment. Field *v.* Holzman, 93 Ind. 205.

One not made a defendant in the cause cannot be enjoined from paying over money due a debtor for property fraudulently transferred. Reed *v.* Baker, 42 Mich. 272, 3 N. W. 959. See also Meyers *v.* Wedel, (N. J. Ch. 1904) 57 Atl. 1008.

80. See, generally, INJUNCTIONS. A court of equity will not issue an injunction to restrain a debtor from transferring property beyond its jurisdiction, if the creditor has a complete remedy at law by judgment, execution, and attachment. Rogers *v.* Michigan, etc., R. Co., 28 Barb. (N. Y.) 539.

81. Pomeroy *v.* Hindmarsh, 5 How. Pr. (N. Y.) 437.

82. Mitchell *v.* Bettman, 25 Barb. (N. Y.) 408; Brewster *v.* Hodges, 1 Duer (N. Y.) 609; Comyns *v.* Riker, 20 N. Y. Suppl. 578; Pomeroy *v.* Hindmarsh, 5 How. Pr. (N. Y.) 437, a mere suspicion of the intent to dispose of property for a fraudulent purpose is not sufficient. And see Baker *v.* Naglee, 82 Va. 876, 1 S. E. 191.

Such remedy is only applicable where the act is threatened, or about to be done, and not where it has been done. Reubens *v.* Joel, 13 N. Y. 488; Perkins *v.* Warren, 6 How. Pr. (N. Y.) 341.

83. Comyns *v.* Riker, 20 N. Y. Suppl. 578 (holding that in an action by a judgment creditor against the debtor to restrain the transfer of promissory notes, an injunction *pendente lite* will not be granted, where it is not shown that the indorsee is insolvent); Perkins *v.* Warren, 6 How. Pr. (N. Y.) 341 (as by showing injury by the threatened fraudulent transfer).

b. To Restrain Disposition of Property by Fraudulent Grantee. To justify an injunction to restrain the further disposition of property conveyed by a debtor in fraud of creditors, it must appear that the suing creditor has obtained a judgment or other lien upon such property;[84] that the vendee is insolvent,[85] and is threatening or is about to dispose of the property;[86] that the creditor has not a complete remedy at law;[87] and that an injunction is necessary to preserve his rights.[88]

c. To Restrain Sale Under Fraudulent Judgment or Mortgage. An injunction will lie in a proper case to restrain the sale of a debtor's property under a judgment which was fraudulently obtained or confessed, or the foreclosure of a fraudulent mortgage. It will be granted at the instance of a creditor who has reduced his claim to judgment, or who has a lien on the property,[89] where the

Where plaintiff's demand is denied on oath, and not supported by any evidence, an injunction *pendente lite* should be refused. Perkins *v.* Warren, 6 How. Pr. (N. Y.) 341. See also Empire Paving, etc., Co. *v.* Robinson, 11 N. Y. Suppl. 540.

84. *Georgia.*— Stillwell *v.* Savannah Grocery Co., 88 Ga. 100, 13 S. E. 963; Mayer *v.* Wood, 56 Ga. 427; Hart *v.* Hart, 52 Ga. 376; Oberholser *v.* Greenfield, 47 Ga. 530; Cubbedge *v.* Adams, 42 Ga. 124.

Illinois.— Bigelow *v.* Andress, 31 Ill. 322.

Missouri.— Spitz *v.* Kerfoot, 42 Mo. App. 77.

New York— Falconer *v.* Freeman, 4 Sandf. Ch. 565.

Wisconsin.— See Almy *v.* Platt, 16 Wis. 169.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 911, 912.

A general creditor without a judgment at law is not entitled to an injunction to prevent the further disposition of property conveyed by the debtor in fraud of creditors, where the only fraud alleged in the first conveyance is its execution without notice to the creditors. Hart *v.* Hart, 52 Ga. 376; Oberholser *v.* Greenfield, 47 Ga. 530; Cubbedge *v.* Adams, 42 Ga. 124.

A lien acquired by attachment is sufficient to justify an injunction to aid its enforcement. Falconer *v.* Freeman, 4 Sandf. Ch. (N. Y.) 565.

The fraudulent grantee of a decedent may be enjoined from further disposing of the property, although the complaining creditor has not reduced his claim to judgment (Fowler's Appeal, 87 Pa. St. 449), or acquired any lien upon the property (Loomis *v.* Tifft, 16 Barb. (N. Y.) 541).

Injunction inures to advantage of complaining creditors only.— Where the further alienation of land held under a conveyance fraudulent and void as to complaining creditors was enjoined until their claims were paid, the quiescent creditors cannot take advantage of the proceedings; and when the complaining creditors are paid the land is released from the injunction. Fowler's Appeal, 87 Pa. St. 449. See also Fuqua *v.* Farmers', etc., Nat. Bank, 35 S. W. 545, 18 Ky. L. Rep. 101.

85. *Florida.*— Fuller *v.* Cason, 26 Fla. 476, 7 So. 870.

Georgia.— Einstein *v.* Lee, 89 Ga. 130, 15 S. E. 27; Stillwell *v.* Savannah Grocery Co., 88 Ga. 100, 13 S. E. 963; Deveney *v.* Hicks, 82 Ga. 240, 8 S. E. 179; Mayer *v.* Wood, 56 Ga. 427.

Illinois.— Bigelow *v.* Andress, 31 Ill. 322.

Maryland.— Connolly *v.* Riley, 25 Md. 402, holding that an allegation that the property of the debtor is beyond the reach of process is as effective as an allegation of insolvency would be.

Washington.— Rockford Watch Co. *v.* Rumpf, 12 Wash. 647, 42 Pac. 213.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 911, 912.

86. Rockford Watch Co. *v.* Rumpf, 12 Wash. 647, 42 Pac. 213.

87. Phelps *v.* Foster, 18 Ill. 309; Spitz *v.* Kerfoot, 42 Mo. App. 77; Brough *v.* Greist, 1 Dauph. Co. Rep. (Pa.) 243; Almy *v.* Platt, 16 Wis. 169.

88. *Georgia.*— Williams *v.* Harris, 95 Ga. 453, 22 S. E. 682.

Iowa.— Joseph *v.* McGill, 52 Iowa 127, 2 N. W. 1007.

New Jersey.— Williams *v.* Michenor, 11 N. J. Eq. 520.

New York.— MacKaye *v.* Soule, 25 N. Y. Suppl. 798.

North Carolina.— Ellett *v.* Newman, 92 N. C. 519.

Pennsylvania.— Fowler's Appeal, 87 Pa. St. 449.

Wisconsin.— Hoxie *v.* Price, 31 Wis. 82.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 912.

89. *Georgia.*— Peyton *v.* Lamar, 42 Ga. 131.

Illinois.— Shufeldt *v.* Boehm, 96 Ill. 560.

New Jersey.— Oakley *v.* Young, 6 N. J. Eq. 453.

New York.— Mills *v.* Block, 30 Barb. 549.

Pennsylvania.— Kelly *v.* Herb, 157 Pa. St. 41, 27 Atl. 559; Artman *v.* Giles, 155 Pa. St. 409, 26 Atl. 668.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 913.

A sale under void chattel mortgages cannot be enjoined by creditors without proof of levy of execution as well as obtaining judgment. Glorieux *v.* Schwartz, 53 N. J. Eq. 231, 28 Atl. 470, 34 Atl. 1134.

Attaching creditors of one whose property has been taken under execution to satisfy a

mortgagee is shown to be insolvent,[90] and where he is not a *bona fide* creditor without notice of the fraud.[91]

d. Violation and Punishment.[92] After the issuance of an injunction on a creditor's bill, any active interference with the property by defendant or his agent constitutes a breach thereof,[93] and the fact that defendant in violating the injunction acts under the erroneous advice of counsel will not protect him.[94] The amount of the fine should be fixed at a sum equal to the value of the lien destroyed by the prohibited act.[95]

3. Receivers — a. At Whose Instance Appointed. While as a general rule equity will not interfere at the instance of a general creditor before judgment to prevent, by the appointment of a receiver, the disposition of property conveyed in fraud of such creditor,[96] there are exceptions to the rule, and a receiver may be appointed whenever the complainant has a lien, or a special right to have the property or funds in controversy applied to the payment of his claim.[97]

b. Circumstances Justifying Appointment. A court of equity, ancillary to its jurisdiction to set aside a fraudulent transfer, may appoint a receiver to preserve the property involved during the pendency of the litigation, where it appears that there is a reasonable probability of success on the part of the complainants in finally subjecting such property to the satisfaction of their lien;[98] that the property is, or its rents and profits are, in danger of being wasted, disposed of, or gotten out of the reach of the court so that the lien cannot be effectuated;[99] and that a receiver is necessary to afford the plaintiff adequate

judgment may, where fraud is alleged in obtaining the judgment, have an injunction to restrain proceedings on the execution, or any disposition of the proceeds of sale till such time as will enable them to obtain judgments. Heyneman *v.* Dannenberg, 6 Cal. 376, 65 Am. Dec. 519; People *v.* Van Buren, 136 N. Y. 252, 32 N. E. 775, 20 L. R. A. 446; Bowe *v.* Arnold, 31 Hun (N. Y.) 256; Bates *v.* Plonsky, 28 Hun (N. Y.) 112; Tannenbaum *v.* Rosswog, 6 N. Y. Suppl. 578, 22 Abb. N. Cas. 346; Keller *v.* Payne, 1 N. Y. Suppl. 148, 22 Abb. N. Cas. 352. *Compare* Artman *v.* Giles, 155 Pa. St. 409, 26 Atl. 668.

A mortgagee of personal property acquires an interest in the property mortgaged for the protection of which he is entitled to an injunction, although the mortgage debt is not yet due. McCormick *v.* Hartley, 107 Ind. 248, 6 N. E. 357.

A court may enjoin the enforcement of its own decree of foreclosure where it is shown in a creditors' suit to be fraudulent as to creditors. Robinson *v.* Springfield Co., 21 Fla. 203.

90. Atlanta Nat. Bank *v.* Fletcher, 80 Ga. 327, 9 S. E. 1072.

91. Putney *v.* Kohler, 84 Ga. 528, 11 S. E. 127.

92. See, generally, Injunctions.

93. Smith *v.* Cook, 39 Ga. 191; *In re* Feeny, 8 Fed. Cas. No. 4,715, 1 Hask. 304.

94. Smith *v.* Cook, 39 Ga. 191.

95. People *v.* Van Buren, 136 N. Y. 252, 32 N. E. 775, 20 L. R. A. 446 [*affirming* 18 N. Y. Suppl. 734].

A mortgagee of chattels, having been enjoined from enforcing his mortgage, is guilty of contempt by replevying the chattels, and should be condemned to a fine equal to the expense he has occasioned the owner of the property. *In re* Feeny, 8 Fed. Cas. No. 4,715, 1 Hask. 304.

96. *Alabama.*— Weis *v.* Goetter, 72 Ala. 259.

District of Columbia.— Clark *v.* Walter T. Bradley Coal, etc., Co., 6 App. Cas. 437.

Georgia.— Oberholser *v.* Greenfield, 47 Ga. 530.

Virginia.— Rorrer *v.* Guggenheimer, 87 Va. 533, 12 S. E. 1054.

United States.— Fechheimer *v.* Baum, 37 Fed. 167.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 917. See *supra*, XIV, M, 1, b, text and note 58.

97. Weis *v.* Goetter, 72 Ala. 259; Clark *v.* Walter T. Bradley Coal, etc., Co., 6 App. Cas. (D. C.) 437; Cohen *v.* Meyers, 42 Ga. 46. See *supra*, XIV, M, 1, b, text and note 59.

In Alabama, under Code, § 3886, giving a contract creditor authority to file a bill to reach and subject property fraudulently conveyed by his debtor, such creditor acquires by his bill and the service of process under it such an interest and lien in and upon the property as entitles him to ask the appointment of a receiver for its preservation. Weis *v.* Goetter, 72 Ala. 259.

In Georgia a statute providing that a creditor of an insolvent trader, whose debt is matured and unpaid, and who has demanded payment and been refused, may ask for a receiver, makes an exception to the rule making the existence of a lien a prerequisite to such an application. Fechheimer *v.* Baum, 37 Fed. 167.

98. Heard *v.* Murray, 93 Ala. 127, 9 So. 514; Waeber *v.* Rosenstein, 6 N. Y. App. Div. 447, 39 N. Y. Suppl. 593. See also Micou *v.* Moses, 72 Ala. 439.

99. *Alabama.*— Heard *v.* Murray, 93 Ala. 127, 9 So. 514.

relief.[1] The appointment of a receiver is a power to be cautiously exercised, and usually only when the grantees are insolvent.[3]

c. Necessity of Notice. By the established practice, independent of statute,

District of Columbia.— Clark *v.* Walter T. Bradley Coal, etc., Co., 6 App. Cas. 437.

Illinois.—Jeffery *v.* J. W. Butler Paper Co., 37 Ill. App. 96, holding, however, that equity cannot require the alleged fraudulent purchaser to deposit with a receiver, in the nature of security for the performance of the final decree, the value of the property.

Indian Territory.— Springfield Grocery Co. *v.* Thomas, 3 Indian Terr. 330, 58 S. W. 557.

Iowa.— Hirsch *v.* Israel, 106 Iowa 498, 76 N. W. 811; Clark *v.* Raymond, 86 Iowa 661, 53 N. W. 354.

Minnesota.— Mower *v.* Hanford, 6 Minn. 535.

New York.— Waeber *v.* Rosenstein, 6 N. Y. App. Div. 447, 39 N. Y. Suppl. 593.

North Carolina.— Ellett *v.* Newman, 92 N. C. 519.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 917.

Danger of waste.— A receiver will be appointed in creditors' suits where the property is in danger of waste, almost as a matter of course. Hirsch *v.* Israel, 106 Iowa 498, 76 N. W. 811.

Although the property is in no danger of being wasted or injured, the probably protracted litigation, the insufficiency of the property of defendant to pay his debts, and the just claim of the creditors to have the rents and profits applied first to keep down the interest, and then to the reduction of the principal, make the case one eminently proper for a receiver. Shannon *v.* Hanks, 88 Va. 338, 13 S. E. 437; Smith *v.* Butcher, 28 Gratt. (Va.) 144.

Action must be pending.— In an action to set aside a fraudulent conveyance, the court has jurisdiction to appoint a receiver of the property involved only after the commencement of an action and while it is pending. Alexandria Gas Co. *v.* Irish, 152 Ind. 535, 53 N. E. 762.

To pay over fund to creditors.— Where creditors filed a bill for a receiver against their debtor, and other creditors, alleging that the latter had obtained a fraudulent bill of sale, it was held error to appoint a receiver to pay over the assets to the creditors holding the bill of sale. Nussbaum *v.* Price, 80 Ga. 205, 5 S. E. 291.

1. *Alabama.*— Pearce *v.* Jennings, 94 Ala. 524, 10 So. 511 (holding that where an attachment at law affords ample redress and protection, a receiver will not be appointed); Heard *v.* Murray, 93 Ala. 127, 9 So. 514.

Iowa.— Clark *v.* Raymond, 86 Iowa 661, 53 N. W. 354.

Michigan.— See Tregaskis *v.* Judge Detroit Super. Ct., 47 Mich. 509, 11 N. W. 293.

New York.— St. John Woodworking Co. *v.* Smith, 82 N. Y. App. Div. 348, 82 N. Y. Suppl. 1025 [*affirmed* in 178 N. Y. 629, 71 N. E. 1139] (holding that where enough money to pay plaintiff's claim has been deposited in court, the appointment of a receiver is not necessary); National Union Bank *v.* Riger, 38 N. Y. App. Div. 123, 56 N. Y. Suppl. 545 (holding that where there is a sufficient equity in the property to satisfy plaintiff's judgment, a receiver cannot be appointed).

United States.— National Bank of Republic *v.* Hobbs, 118 Fed. 626.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 917. See *supra*, XIV, M, 1, b.

Condemnation money.— In an equitable action in aid of execution to have certain conveyances of land by a debtor set aside as fraudulent, where it appears that subsequent to the levy the land was taken in condemnation proceedings, and the money therefor paid to the clerk of the court, it is proper to appoint a receiver to take charge of the condemnation money. Ahlhauser *v.* Doud, 74 Wis. 400, 43 N. W. 169.

The safer and better practice, where a creditor brings action to set aside a transfer of real estate, is to set aside the conveyance so far as it obstructs plaintiff's judgment, and permit him to pursue his remedy on the judgment by the issue of execution, without the appointment of a receiver, unless good reason is made to appear why the rights of plaintiff cannot be properly protected in this way. Harris *v.* Osnowitz, 35 N. Y. App. Div. 594, 55 N. Y. Suppl. 172; Bryer *v.* Foerster, 14 N. Y. App. Div. 315, 43 N. Y. Suppl. 801.

2. Pearce *v.* Jennings, 94 Ala. 524, 10 So. 511; Micou *v.* Moses, 72 Ala. 439; National Union Bank *v.* Riger, 38 N. Y. App. Div. 123, 56 N. Y. Suppl. 545; Shannon *v.* Hanks, 88 Va. 338, 13 S. E. 437; Smith *v.* Butcher, 28 Gratt. (Va.) 144. See *supra*, XIV, M, 1, b.

Where a creditor's bill is taken as confessed, plaintiff is entitled to have a reference to appoint a receiver of the property, but not to a decree directing a sale of the real estate. Hendrickson *v.* Winne, 3 How. Pr. (N. Y.) 127. See also Heyneman *v.* Dannenberg, 6 Cal. 376, 65 Am. Dec. 519.

3. Freeman *v.* Stewart, 119 Ala. 158, 24 So. 31; Heard *v.* Murray, 93 Ala. 127, 9 So. 514; Turnipseed *v.* Kentucky Wagon Co., 97 Ga. 258, 23 S. E. 84; Mills *v.* Webb, 89 Ga. 734, 15 S. E. 635; Stillwell *v.* Savannah Grocery Co., 88 Ga. 100, 13 S. E. 963; Kehler *v.* G. W. Jack Mfg. Co., 55 Ga. 639; Mower *v.* Hanford, 6 Minn. 535; National Union Bank *v.* Riger, 38 N. Y. App. Div. 123, 56 N. Y. Suppl. 545 (where it was held that insolvency was not decisive of the application because of the extent of the plaintiff's equity in the property); Waeber *v.* Rosenstein, 6 N. Y. App. Div. 447, 39 N. Y. Suppl. 593.

Where the evidence is conflicting as to the insolvency of the vendee, it is no abuse of discretion to refuse to appoint a receiver. Sheffield *v.* Parker, 96 Ga. 774, 22 S. E. 450.

courts of equity, being averse to interference *ex parte*, will in ordinary cases sustain an application for the appointment of a receiver only after notice or rule to show cause.[4] The exceptional cases are when some urgent emergency is shown rendering interference, before there is time to give notice, necessary to prevent waste, destruction, or loss,[5] or when notice itself will jeopardize the delivery of the property over which the receivership is extended in obedience to the order of the court.[6]

d. Effect of Appointment. The title to property, in an action to set aside a conveyance as fraudulent, and the rights of creditors in such case, are not affected by the appointment of a receiver.[7]

O. Appeal and Review — 1. In General. The general rule requiring presentation and reservation in the lower court of grounds of review[8] applies in actions to set aside fraudulent conveyances.[9] The usual exceptions to the rule[10] also apply.[11]

2. Scope and Extent of Review — a. Parties Entitled to Allege Error. The general rules in regard to parties entitled to allege error apply.[12] One not prejudiced thereby cannot take advantage of errors committed in the lower court.[13]

4. Gilreath *v.* Union Bank, etc., Co., 121 Ala. 204, 25 So. 581; Thompson *v.* Tower Mfg. Co., 87 Ala. 733, 6 So. 928; Moritz *v.* Miller, 87 Ala. 331, 6 So. 269; Stillwell *v.* Savannah Grocery Co., 88 Ga. 100, 13 S. E. 963 (holding that the grantee should be offered the alternative of giving bond and security in lieu of surrendering the property to a receiver); Ruffner *v.* Mairs, 33 W. Va. 655, 11 S. E. 5.

5. Moritz *v.* Miller, 87 Ala. 331, 6 So. 269; Ruffner *v.* Mairs, 33 W. Va. 655, 11 S. E. 5.

A receiver may be appointed before an answer is filed when the exigency of the case demands it. Micou *v.* Moses, 72 Ala. 439; Weis *v.* Goetter, 72 Ala. 259.

It should be a strong case of emergency and peril, well fortified by affidavits, to authorize the appointment of a receiver without notice to the other party. An allegation, based on information and belief, that notice of application would probably defeat a recovery is not sufficient. The facts on which such belief is based should be stated. Gilreath *v.* Union Bank, etc., Co., 121 Ala. 204, 25 So. 581; Thompson *v.* Tower Mfg. Co., 87 Ala. 733, 6 So. 928; Moritz *v.* Miller, 87 Ala. 331, 6 So. 269.

6. Moritz *v.* Miller, 87 Ala. 331, 6 So. 269.

The insolvency of the vendees or their inability to respond to any decree which may be rendered against them may be a good reason for failure to give notice. Thompson *v.* Tower Mfg. Co., 87 Ala. 733, 6 So. 928; Moritz *v.* Miller, 87 Ala. 331, 6 So. 269; Micou *v.* Moses, 72 Ala. 439; Turnipseed *v.* Kentucky Wagon Co., 97 Ga. 258, 23 S. E. 84. See also Gilreath *v.* Union Bank, etc., Co., 121 Ala. 204, 25 So. 581.

7. Davis *v.* Bonney, 89 Va. 755, 17 S. E. 229. See also Micou *v.* Moses, 72 Ala. 439. *Compare* Chautauque County Bank *v.* Risley, 19 N. Y. 369, 75 Am. Dec. 347 (holding that when a creditor procures the appointment of a receiver, he abandons his judgment lien for the remedy of a sale by the receiver); McDonald *v.* McDonald, 17 N. Y. Suppl. 230. See also National Union Bank *v.* Riger, 38 N. Y. App. Div. 123, 56 N. Y. Suppl. 545; Passavant *v.* Bowdoin, 60 Hun (N. Y.) 433, 15 N. Y. Suppl. 8.

8. See Appeal and Error, 2 Cyc. 660 *et seq.*

9. *Kentucky.*— Hinkle *v.* Gale, 11 S. W. 664, 11 Ky. L. Rep. 126.

Maryland.— Birely *v.* Staley, 5 Gill & J. 432, 25 Am. Dec. 303.

Massachusetts.— Boylen *v.* Leonard, 2 Allen 407.

Missouri.— Renney *v.* Williams, 89 Mo. 139, 1 S. W. 227; Ziekel *v.* Douglass, 88 Mo. 382.

Virginia.— Flynn *v.* Jackson, 93 Va. 341, 25 S. E. 1; McNew *v.* Smith, 5 Gratt. 84.

Wisconsin.— Schuerman *v.* Matthews, 78 Wis. 309, 47 N. W. 423; Manseau *v.* Mueller, 45 Wis. 430.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 993, 994.

No return of nulla bona.— In an action to set aside a fraudulent conveyance, an objection that there is no return of *nulla bona* must be taken in the court below. Barton *v.* Barton, 80 Ky. 212, 3 Ky. L. Rep. 743; Hill *v.* Cannon, 6 Ky. L. Rep. 591.

10. See Appeal and Error, 2 Cyc. 677.

11. Gibbs *v.* Hodge, 65 Ala. 366; Taylor *v.* Johnson, 113 Ind. 164, 15 N. E. 238; Thornton *v.* Gaar, 87 Va. 315, 12 S. E. 753. See also Potter *v.* Stevens, 40 Mo. 229.

12. See Appeal and Error, 3 Cyc. 233 *et seq.*

13. *Illinois.*— Coale *v.* Moline Plow Co., 134 Ill. 350, 25 N. E. 1016, holding that the grantee in a fraudulent conveyance cannot complain on appeal because the conveyance was set aside for the benefit of a single creditor instead of all the creditors.

Michigan.— Manhard Hardware Co. *v.* Rothschild, 121 Mich. 657, 80 N. W. 707.

Missouri.— Meyer Bros. Drug Co. *v.* White, 165 Mo. 136, 65 S. W. 295.

North Carolina.— Allen *v.* McLendon, 113 N. C. 321, 18 S. E. 206.

Virginia.— Price *v.* Thrash, 30 Gratt. 515, holding that in a suit to set aside a fraudulent conveyance, the judgment debtor could

b. Presumptions. Every reasonable presumption will be resolved in favor of the judgment below.[14]

c. Discretion of the Lower Court. The exercise of the trial court's discretion will not be reviewed on appeal, unless it plainly appears that it has been abused.[15]

d. Questions of Fact. The general rules relating to the review of questions of fact on appeal[16] are applicable.[17] The question of fraudulent intent is one of fact which will not be reviewed on appeal.[18]

not question the fraud on appeal, where his grantees did not appeal.

West Virginia.— Silverman *v.* Greaser, 27 W. Va. 550.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 997.

14. Stam *v.* Smith, 183 Mo. 464, 81 S. W. 1217, holding that where the record is silent as to whether a mortgagor retained other property sufficient to pay his existing debts, the court will not presume the want of other property, to enable it to raise a constructive fraud in a mortgage given in consideration of future support.

15. Irwin *v.* McKnight, 76 Ga. 669.

16. See APPEAL AND ERROR, 3 Cyc. 345 *et seq.*

17. *Alabama.*— Robinson *v.* Moseley, 93 Ala. 70, 9 S. W. 372.

California.— Claudius *v.* Aguirre, 89 Cal. 501, 26 Pac. 1077.

Colorado.— Gregory *v.* Filbeck, 12 Colo. 379, 21 Pac. 489.

Connecticut.— Greenthal *v.* Lincoln, 68 Conn. 384, 36 Atl. 813.

Georgia.— Rouse *v.* Frank, 84 Ga. 623, 11 S. E. 147.

Illinois.— Treadwell *v.* McEwen, 123 Ill. 253, 13 N. E. 850 [*affirming* 23 Ill. App. 111]; Powers *v.* Green, 14 Ill. 386.

Indiana.— Elliott *v.* Pontius, 136 Ind. 641, 35 N. E. 562, 36 N. E. 421; Seavey *v.* Walker, 108 Ind. 78, 9 N. E. 347.

Iowa.— Sperry *v.* Cain, 84 Iowa 203, 50 N. W. 945; Saar *v.* Finkin, 79 Iowa 61, 44 N. W. 538; Bener *v.* Edgington, 76 Iowa 105, 40 N. W. 117; Hall *v.* Carter, 74 Iowa 364, 37 N. W. 956.

Kansas.— Johnson *v.* Jones, 6 Kan. App. 755, 50 Pac. 983.

Kentucky.— Marcoffsky *v.* Franks, 43 S. W. 440, 19 Ky. L. Rep. 1377; Lutkenhoff *v.* Lutkenhoff, 17 S. W. 863, 13 Ky. L. Rep. 584; Merritt *v.* Merritt, 11 S. W. 593, 11 Ky. L. Rep. 493; Deshazer *v.* Deshazer, 11 S. W. 772, 11 Ky. L. Rep. 159; Johnson *v.* Skaggs, 2 S. W. 493, 8 Ky. L. Rep. 601.

Louisiana.— Carrollton Bank *v.* Cleveland, 15 La. Ann. 616; Hayes *v.* Clarke, 12 La. Ann. 666.

Michigan.— Heaton *v.* Nelson, 74 Mich. 199, 41 N. W. 895.

Missouri.— Brown *v.* Fickle, 135 Mo. 405, 37 S. W. 107; Pinger *v.* Leach, 70 Mo. 42.

Montana.— Woods *v.* Berry, 7 Mont. 195, 14 Pac. 758.

Nebraska.— Parlin, etc., Co. *v.* Ulrich, 57 Nebr. 780, 78 N. W. 275; Sonnenschein *v.* Bartels, 37 Nebr. 592, 56 N. W. 210; South Omaha Nat. Bank *v.* Chase, 30 Nebr. 444, 46 N. W. 513; Hart *v.* Dogge, 29 Nebr. 237, 45 N. W. 626 [*affirming* 27 Nebr. 256, 42 N. W. 1035]; Bierbower *v.* Singer, 27 Nebr. 414, 43 N. W. 254.

New Jersey.— Stone *v.* Newell, 54 N. J. Eq. 690, 35 Atl. 285.

New York.— Parmenter *v.* Fitzpatrick, 135 N. Y. 190, 31 N. E. 1032 [*reversing* 14 N. Y. Suppl. 748]; Smith *v.* Hahn, 130 N. Y. 694, 30 N. E. 68 [*affirming* 8 N. Y. Suppl. 663]; Buffalo Third Nat. Bank *v.* Cornes, 102 N. Y. 737, 8 N. E. 42; Mullenneaux *v.* Terwilliger, 50 Hun 526, 3 N. Y. Suppl. 442; Donohue *v.* Joyce, 19 N. Y. Suppl. 134; Manchester *v.* Tibbetts, 4 N. Y. Suppl. 23; Marston *v.* Vultee, 12 Abb. Pr. 143.

Pennsylvania.— Stewart *v.* Wilson, 42 Pa. St. 450; Rose *v.* Keystone Shoe Co., 2 Pa. Cas. 243, 4 Atl. 1.

South Carolina.— Mitchell *v.* Mitchell, 42 S. C. 475, 20 S. E. 405; Jackson *v.* Plyler, 38 S. C. 496, 17 S. E. 255, 37 Am. St. Rep. 782; Wagener *v.* Mars, 27 S. C. 97, 2 S. E. 844.

Tennessee.— Farmers', etc., Nat. Bank *v.* Herndon, (Ch. App. 1898) 46 S. W. 550.

Texas.— Hudson *v.* Willis, 87 Tex. 387, 28 S. W. 929; Blum *v.* Light, 81 Tex. 414, 16 S. W. 1090; Moss *v.* Sanger, 75 Tex. 321, 12 S. W. 619; Frieberg *v.* Sanger, (1889) 12 S. W. 1136; Linz *v.* Atchison, 14 Tex. Civ. App. 647, 38 S. W. 640, 47 S. W. 542; Houston, etc., R. Co. *v.* Shirley, (Civ. App. 1894) 24 S. W. 809.

Virginia.— Moore *v.* Butler, 90 Va. 683, 19 S. E. 850.

Washington.— Liebenthal *v.* Price, 8 Wash. 206, 35 Pac. 1078; Eicholtz *v.* Holmes, 8 Wash. 71, 35 Pac. 607; Burt *v.* Agassiz, 6 Wash. 242, 33 Pac. 508.

Wisconsin.— Conkey *v.* Hawthorne, 69 Wis. 199, 33 N. W. 435.

Canada.— Reaume *v.* Guichard, 6 U. C. C. P. 170.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," §§ 1000–1002.

18. *California.*— Poulson *v.* Stanley, 122 Cal. 655, 55 Pac. 605, 68 Am. St. Rep. 73.

Indiana.— Eaken *v.* Thompson, 4 Ind. App. 393, 30 N. E. 1114.

Minnesota.— Vose *v.* Stickney, 19 Minn. 367.

Nebraska.— Schrider *v.* Tighe, 38 Nebr. 394, 56 N. W. 994.

New York.— Bennett *v.* Maguire, 58 Barb. 625; Müller *v.* Abramson, 25 Misc. 520, 54 N. Y. Suppl. 1027; Hastings *v.* Claflin, 14 N. Y. Suppl. 757 [*affirmed* in 133 N. Y. 539, 30 N. E. 1148].

Tennessee.— McQuade *v.* Williams, 101 Tenn. 334, 47 S. W. 427.

3. Determination and Disposition of Cause. The usual practice in determining and disposing of the cause prevails in this class of cases.[19]

XV. Penal Actions and Criminal Prosecutions.

A. Penalties and Actions Therefor — 1. Nature and Extent of Liability — a. Statutory Enactments. In many of the states statutes have been enacted for the more complete discouragement of fraudulent transfers, and designed to inflict certain penalties upon the guilty participants.[20] These statutes are based as a rule upon the statute of 13 Elizabeth, which provided for a *qui tam* action,[21] and have been variously construed as penal,[22] as remedial,[23] and as penal as well as remedial.[24]

b. The Fraudulent Transfer — (I) *What Constitutes.*[25] The taking of a negotiable promissory note by the debtor in concealment of a debt due him on account, even if taken to prevent its attachment on trustee process, is not a transfer within a statute providing for a penalty for aiding a debtor in the fraudulent transfer of his property.[26] To bring a case within this statute, the transfer must be so far consummated as to be valid between the parties, and as against all persons, except on the ground of fraud.[27]

(II) *Property Subject to.*[28] All those kinds of property not expressly exempted from execution and attachment are deemed property for the fraudulent transfer of which the fraudulent transferee is liable within this statute.[29]

(III) *Extent of Forfeiture.* Under a statute imposing a penalty for being a party to a fraudulent note or judgment, the whole amount of such judgment is forfeited, although but part of the consideration was fraudulent.[30]

2. Persons Liable. Any person who knowingly aids or assists a debtor in a fraudulent conveyance, transfer or concealment of his property, for the purpose of securing it from his creditors, and for the purpose of preventing its attachment or seizure on execution, is sometimes made liable for the penalty,[31] and it

19. See Appeal and Error, 3 Cyc. 403 *et seq.* And see the following cases:

Connecticut.— Weeden *v.* Hawes, 10 Conn. 50.

District of Columbia.— Turner *v.* Gottwals, 15 App. Cas. 43.

Kentucky.— Wahl *v.* Murphy, 9 S. W. 375, 10 Ky. L. Rep. 388.

Minnesota.— Heim *v.* Heim, 90 Minn. 497, 97 N. W. 379.

Missouri.— Bradshaw *v.* Halpin, 180 Mo. 666, 79 S. W. 685.

New York.— Metcalf *v.* Moses, 161 N. Y. 587, 56 N. E. 67; Loos *v.* Wilkinson, 113 N. Y. 485, 21 N. E. 392, 10 Am. St. Rep. 495, 4 L. R. A. 353.

See 24 Cent. Dig. tit. "Fraudulent Conveyances," § 1003.

20. See the statutes of the various states. See also *supra*, XIV, B, 5.

Purpose of statutes.— The object of such statutes is to afford a remedy to creditors against any one to whom the property of his debtor, no matter in what it consisted, or how situated, has been fraudulently transferred for the purpose, and with the intent on the part of the debtor transferring, and the individual receiving, such transfer, to conceal the same, so as "to secure it from creditors and prevent its attachment or seizure on execution." Spaulding *v.* Fisher, 57 Me. 411.

21. See 13 Eliz. c. 5; Wilder *v.* Winne, 6 Cow. (N. Y.) 284; Wright *v.* Eldred, 2 Aik. (Vt.) 401.

22. Brooks *v.* Clayes, 10 Vt. 37, holding that the statute is to receive a liberal construction for the purpose of setting aside a conveyance, but must be construed strictly when it inflicts a penalty.

23. Daniel *v.* Vaccaro, 41 Ark. 316; Pulsifer *v.* Waterman, 73 Me. 233; Platt *v.* Jones, 59 Me. 232; Quimby *v.* Carter, 20 Me. 218.

24. Wing *v.* Weeks, 88 Me. 115, 33 Atl. 779. See also Fogg *v.* Lawry, 71 Me. 215; Herrick *v.* Osborne, 39 Me. 231.

25. See also *infra*, XV, B, 1, b, (I).

26. Skowhegan Bank *v.* Cutler, 49 Me. 315.

27. Skowhegan Bank *v.* Cutler, 49 Me. 315.

28. See also *infra*, XV, B, 1, b, (II).

29. Pulsifer *v.* Waterman, 73 Me. 233; Spaulding *v.* Fisher, 57 Me. 411, holding that the fraudulent transfer and concealment of a house purchased with the property of the debtor is within the statute.

Whether property is attachable depends, not upon its situation when plaintiff's action is commenced, but when the relation of debtor and creditor was created. Pulsifer *v.* Waterman, 73 Me. 233.

30. Webb *v.* Long, 17 Vt. 587; Wright *v.* Eldred, 2 Aik. (Vt.) 401.

31. See Warner *v.* Moran, 60 Me. 227; and see the statutes of the various states.

A wife, who knowingly receives a convey-

is not necessary that such person, to be liable for the penalty, should derive any benefit from the conveyance, transfer, or concealment.[32]

3. Necessity For Fraudulent Intent. In order to recover the penalty given by statute for receiving a fraudulent conveyance, the intent to defraud must be shown to have existed in the minds of both parties;[33] but, where either party is composed of two or more persons, the fact that all of such persons did not participate in the corrupt intent will not relieve the rest.[34] If the fraudulent intent exists, the fact that a full consideration was paid for the property will not affect the transferee's liability.[35]

4. Right of Creditors to Enforce Penalty. The right to enforce this statutory liability is given to creditors only.[36] The creditor must be such at the time of the fraudulent transfer or concealment and continue to be such until the commencement of his action.[37] A surety for a grantor is so far a creditor from the date of his suretyship that he is a "party aggrieved," and his right to recover the penalty given by the statute is perfected by his subsequent payment of the debt.[38] One entitled to recover against another in tort is not a creditor within the meaning of the statute.[39] A creditor who has commenced an action to recover the penalty provided may by his subsequent conduct waive his right to further prosecute his suit.[40]

5. Actions — a. When Right of Action Accrues. The right of action for a penalty accrues immediately upon the making of a conveyance to defraud creditors.[41]

b. Conditions Precedent — (i) *Obtaining Judgment.* To entitle a creditor to maintain an action for the statutory penalty for aiding a debtor in the fraudulent concealment it is not necessary that he should first obtain a judgment against his debtor.[42]

(ii) *Conviction of Misdemeanor.* The right of action for a penalty is not dependent on the previous conviction of defendant of a misdemeanor under a statute providing that any person making a conveyance with intent to defraud creditors shall be guilty of a misdemeanor and also liable to a penalty.[43]

(iii) *Rescission and Return of Consideration.* A creditor who has assigned his account to a third person in consideration of a sum less than the whole amount due thereon must rescind the assignment and tender back the consideration received before suing such third person for a penalty under a statute giving a remedy for assisting a debtor in a fraudulent transfer.[44]

c. Limitation of Actions. A general statute of limitations[45] or a statute

ance of property purchased by her husband, for the purpose of hindering and delaying creditors, is within the statute. Warner *v.* Moran, 60 Me. 227; Hart *v.* Leete, 104 Mo. 315, 15 S. W. 976. See also Burns *v.* Brown, 15 Vt. 174.

32. Aiken *v.* Kilbourne, 27 Me. 252.

33. Barnum *v.* Hackett, 35 Vt. 77; Smith *v.* Kinne, 19 Vt. 564; Brooks *v.* Clayes, 10 Vt. 37. See also Meux *v.* Howell, 4 East 1; *In re* Moroney, 21 L. R. Ir. 27.

Intent a question of fact.— Brooks *v.* Clayes, 10 Vt. 37.

Ratification.— If a person is made a party to a fraudulent conveyance without his knowledge, but afterward ratifies the transaction, he is liable, as much as if he had participated in the transfer at its inception. Skowhegan Bank *v.* Cutler, 49 Me. 315; Forbes *v.* Davison, 11 Vt. 660; Wright *v.* Eldred, 2 Aik. (Vt.) 401.

34. Barnum *v.* Hackett, 35 Vt. 77.

35. Colgate *v.* Hill, 20 Vt. 56. See also *supra*, VII, C.

36. Fowler *v.* Frisbie, 3 Conn. 320; Craig *v.* Webber, 36 Me. 504. See also Platt *v.* Jones, 59 Me. 232.

37. Percival *v.* Hichborn, 56 Me. 575; Craig *v.* Webber, 36 Me. 504; Thacher *v.* Jones, 31 Me. 528. But see Forbes *v.* Davison, 11 Vt. 660, holding that the right to sue for the penalty accrues immediately upon the making of the fraudulent conveyance and a subsequent collection or assignment of the debt does not divest the right.

A subsequent creditor cannot maintain an action for the penalty. Pullen *v.* Hutchinson, 25 Me. 249. See also Beach *v.* Boynton, 26 Vt. 725.

38. Beach *v.* Boynton, 26 Vt. 725.

39. Craig *v.* Webber, 36 Me. 504.

40. Fogg *v.* Lawry, 71 Me. 215.

41. Forbes *v.* Davison, 11 Vt. 660.

42. Aiken *v.* Kilburne, 27 Me. 252.

43. Daniel *v.* Vaccaro, 41 Ark. 316.

44. Percival *v.* Hichborn, 56 Me. 575.

45. Wilcox *v.* Fitch, 20 Johns. (N. Y.) 472.

limiting actions for penalties generally[46] does not apply to actions for the penalty for a fraudulent conveyance or concealment of property.

d. Jurisdiction and Venue. An action to recover the penalty for being a party to a fraudulent conveyance may be brought in the county of the residence of either of the parties,[47] but not in a state other than the one in which the conveyance was made.[48]

e. Joinder of Parties. Several creditors having distinct claims cannot join in an action *qui tam* against a debtor to recover a penalty for being a party to a fraudulent transfer or judgment.[49] A joint action against a fraudulent grantor and grantee to recover the statutory penalty cannot be maintained.[50]

f. Pleading. In an action to recover the penalty for knowingly aiding a debtor in the fraudulent transfer of his property, it is necessary to aver that the debtor was possessed of property liable to attachment or execution which was by him fraudulently transferred or concealed for the purpose of defrauding creditors,[51] and that plaintiff was at the time of such fraudulent concealment or transfer, and at the time the action was commenced, a creditor of such debtor.[52] It is also necessary to aver the time when the fraudulent transfer was made,[53] and that defendant did knowingly aid and assist in such fraudulent concealment and transfer.[54] An amendment will not be allowed of an additional count alleging a fraudulent transfer of other property, under which the damages claimed were in no way embraced in the first count.[55] A count alleging several distinct transfers of property, all pertaining to the same demand, is not bad for duplicity.[56]

g. Defenses. It is not a sufficient defense to an action for a penalty that the transfer of certificates of stock was informal, reciting the transfer of the "within share" instead of the "within shares,"[57] or that defendant did not direct the bringing of the suit, where he has ratified such action.[58]

h. Evidence. In an action to recover the penalty for aiding a debtor to make a fraudulent transfer, the debtor is a competent witness for plaintiff.[59] Admissions of the debtor who is not a party to the suit, made previous to the alleged fraudulent sale, are competent to prove the relation of debtor and creditor;[60] but declarations or admissions made by the debtor subsequent to the time of the sale are not admissible.[61] Parol testimony is not admissible to prove the transfer of stock on the books of a bank.[62] In actions to recover the penalty full proof must be given as in criminal cases, and the case must be established beyond a reasonable doubt.[63]

B. Criminal Prosecutions — 1. Statutory Enactments — a. In General. In many of the states statutes have been enacted making it a misdemeanor for any person to convey his property with intent to defraud his creditors.[64]

46. Thacher *v.* Jones, 31 Me. 528; Forbes *v.* Davison, 11 Vt. 660. See also Denton *v.* Crook, Brayt. (Vt.) 188.
47. Slack *v.* Gibbs, 14 Vt. 357.
48. Slack *v.* Gibbs, 14 Vt. 357.
49. Carroll *v.* Aldrich, 17 Vt. 569.
50. Slack *v.* Gibbs, 14 Vt. 357.
51. Platt *v.* Jones, 59 Me. 232; Herrick *v.* Osborne, 39 Me. 231.
52. Platt *v.* Jones, 59 Me. 232; Herrick *v.* Osborne, 39 Me. 231.
53. Platt *v.* Jones, 59 Me. 232.
54. Wing *v.* Weeks, 88 Me. 115, 33 Atl. 779; Herrick *v.* Osborne, 39 Me. 231.
55. Skowhegan Bank *v.* Cutler, 49 Me. 315.
56. Platt *v.* Jones, 59 Me. 232.
57. Skowhegan Bank *v.* Cutler, 52 Me. 509.
58. Forbes *v.* Davison, 11 Vt. 660.
59. Aiken *v.* Kilburne, 27 Me. 252; Philbrook *v.* Handley, 27 Me. 53.
60. Aiken *v.* Peck, 22 Vt. 255.
61. Barnum *v.* Hackett, 35 Vt. 77; Aiken *v.* Peck, 22 Vt. 255.
62. Skowhegan Bank *v.* Cutler, 49 Me. 315.
63. Brooks *v.* Clayes, 10 Vt. 37.

Proof requisite to recovery.— To entitle a creditor to recover in this statutory action, he must show: (1) That he has a just debt; (2) that his debtor has fraudulently transferred his property to defendant; (3) that such property was liable to be taken on execution or attachment; (4) that defendant has knowingly aided the debtor to defeat the right of his creditors; and (5) the amount of plaintiff's damages. Daniel *v.* Vaccaro, 41 Ark. 316; Pulsifer *v.* Waterman, 73 Me. 233; Quimby *v.* Carter, 20 Me. 218.

Where the evidence is insufficient to go to the jury, a nonsuit is properly ordered. Gardiner Nat. Bank *v.* Hagar, 65 Me. 359.

64. See the statutes of the various states. And see the cases cited in the following notes.

The foundation of these statutes is 13 Eliz. c. 5, by which it is made a criminal offense

b. Offenses Provided Against — (i) *Fraudulent Transfers.* A fraudulent transfer of property as used in these statutes includes the secretion, sale, encumbrance, or fraudulent disposition of property, and cannot be limited to the one act of fraudulent sale.[65] In some jurisdictions these statutes are held to apply as well to a fraudulent transfer of real estate as of personal property,[66] while in others it is held that they apply to personal property only.[67] It is not necessary to a conviction that the person defrauded shall have been a judgment creditor. All creditors are within the meaning of the statute.[68] To constitute the statutory offense there must be an actual fraudulent intent to injure and defraud creditors,[69] and the fact that the conveyance is constructively fraudulent is not sufficient.[70] An essential element of a fraudulent transfer is that the possible operation of the conveyance shall be injurious to creditors.[71]

(ii) *Fraudulent Conveyances of Encumbered Property.* In some jurisdictions there are statutes making it a misdemeanor for any person to execute a conveyance of encumbered property without reciting or describing the encumbrance,[72] and if the fraudulent intent exists the fact that no one was actually defrauded by the second conveyance is immaterial.[73]

2. Preliminary Affidavit or Application. An application to a commissioner, under the Fraudulent Debtors Act, for the imprisonment of a debtor who has assigned his property with intent to defraud creditors, must make out a *prima facie* case of fraud.[74] The complaint must set forth such facts and circumstances, within affiant's own knowledge, as will authorize the finding of the state of facts required by the statute;[75] and if plaintiff is not himself personally cognizant of the facts and circumstances relied on, he must procure the affidavit of someone who is personally cognizant of them.[76]

3. Indictment.[77] An indictment for fraudulently conveying or otherwise dis-

to be a party to a conveyance made to hinder, delay, or defraud creditors, and 27 Eliz. c. 26, by which it is also made an offense in all parties concerned to make a conveyance in trust or for uses with a view to defraud creditors. Both of the statutes are in force in Pennsylvania. *Ex p.* Doran, 2 Pars. Eq. Cas. (Pa.) 467.

Fraudulent concealment.— In Alabama under Code (1886), § 3835, providing that "any person who, . . . for the purpose of hindering, delaying, or defrauding any person who has a claim thereto under any . . . lawful or valid claim, verbal or written, . . . buys, receives, or conceals any property, with knowledge of the existence of such claim, must, on conviction, be punished as if he had stolen the same," one who buys and leases property without knowledge of any claim, and then refuses to inform claimant of its location, is not guilty of a concealment. Thomas *v.* State, 92 Ala. 49, 9 So. 540.

65. Herold *v.* State, 21 Nebr. 50, 31 N. W. 258.

66. Costello *v.* Palmer, 20 App. Cas. (D. C.) 210; Durham Fertilizer Co. *v.* Little, 118 N. C. 808, 24 S. E. 664 [*distinguishing* Bridges *v.* Taylor, 102 N. C. 86, 8 S. E. 893, 3 L. R. A. 376].

67. People *v.* Detroit Police Justice, 41 Mich. 224, 2 N. W. 25.

68. People *v.* Underwood, 16 Wend. (N. Y.) 546 (holding that the public offense is complete, although no creditor may be in a condition to question the validity of the transfer in the form of a civil remedy); Reg. *v.* Smith, 6 Cox C. C. 31; Reg. *v.* Henry, 21 Ont. 113.

69. State *v.* Marsh, 36 N. H. 196; Com. *v.* Hickey, 2 Pars. Eq. Cas. (Pa.) 317, 1 Pa. L. J. Rep. 436, 3 Pa. L. J. 86.

Intent inferred.— Where a debtor, on demand of payment of his debt, sells out to his brother to avoid an attachment, and refuses to give any information about the transaction, a fraudulent design may properly be inferred. Smit *v.* People, 15 Mich. 497.

70. Watson *v.* Hinchman, 42 Mich. 27, 3 N. W. 236 (holding that one member of a firm cannot be held for mere constructive fraud by reason of his partnership relation); Com. *v.* Hickey, 2 Pars. Eq. Cas. Pa. 317, 1 Pa. L. J. Rep. 436, 3 Pa. L. J. 86.

71. State *v.* Bragg, 63 Mo. App. 22, holding that the grantor cannot be convicted where the property conveyed is encumbered beyond its value by valid record liens, since creditors are not prejudiced. See also State *v.* Chapman, 68 Me. 477.

72. See Com. *v.* Brown, 15 Gray (Mass.) 189; State *v.* Wilson, 66 Mo. App. 540. And see the statutes of the several states.

73. State *v.* Wilson, 66 Mo. App. 540.

74. *In re* Teachout, 15 Mich. 346.

75. Proctor *v.* Prout, 17 Mich. 473.

76. Proctor *v.* Prout, 17 Mich. 473, holding that the warrant cannot be issued upon hearsay, nor upon any statement, however positive, founded upon hearsay. *Contra,* Costello *v.* Palmer, 20 App. Cas. (D. C.) 210.

77. See, generally, Indictments and Informations.

posing of property with intent to defraud creditors should be sufficiently certain in its allegations to inform defendant of the offense with which he is charged.[78] It is sufficient to charge the offense either in the language of the statute,[79] or in language of equivalent meaning.[80] A fraudulent intent should be averred,[81] but all that is required is that it shall be characterized by appropriate words.[82] An indictment for fraudulently conveying real estate without giving notice of an encumbrance should describe the property in terms sufficiently certain to identify it.[83] The indictment must not be duplicitous.[84] And the evidence offered at the trial must conform to the indictment.[85]

4. Defenses. It is no defense to an indictment for concealing the goods of a debtor that defendant at the time of the concealment held the goods under a fraudulent mortgage from the debtor,[86] or that defendant, previous to the concealment, was summoned as trustee of the debtor in foreign attachment, which was pending at the time of the concealment.[87]

5. Evidence. The general rules relating to the admission of evidence in criminal cases apply to these prosecutions.[88] Any relevant evidence tending to prove material facts in issue is admissible.[89] Declarations of a grantor respect-

78. State *v.* Leslie, 16 N. H. 93 (holding that under a statute providing for the punishment of any person who shall receive any mortgage, pledge, or conveyance of property of the value of one hundred dollars, or shall conceal the property of any debtor of that value, etc., an indictment alleging that defendants did fraudulently receive property belonging to another of the value of one thousand dollars, etc., does not describe the statutory offense, since neither of its elements are set forth); Thomas *v.* People, 19 Wend. (N. Y.) 480; Com. *v.* Gallagher, 2 Pa. L. J. Rep. 297, 4 Pa. L. J. 58. See also Com *v.* Brown, 15 Gray (Mass.) 189.

79. State *v.* Miller, 98 Ind. 70; Respublica *v.* Tryer, 3 Yeates (Pa.) 451. But see Hartman *v.* Com., 5 Pa. St. 60, holding that it is not always sufficient to pursue the very words of the statute unless by doing so you expressly allege the fact in the doing or not doing of which the offense consists. Thus an indictment for a conspiracy to defraud creditors of defendants by removing and secreting goods of quantity and quality unknown should allege the particular circumstances of the removal and secreting, and also the names of the persons intended to be defrauded thereby.

80. State *v.* Miller, 98 Ind. 70.

81. State *v.* Miller, 98 Ind. 70.

82. State *v.* Miller, 98 Ind. 70, holding that it is enough to state facts showing that the conveyance which the accused made was corruptly executed to defraud creditors.

The character of the debt or the manner in which it arose need not be stated in order to support the averment of the indictment that the conveyance was made with intent to defraud creditors. Loomis *v.* People, 19 Hun (N. Y.) 601.

83. Com. *v.* Brown, 15 Gray (Mass.) 189, holding that a description merely as "a certain parcel of real estate situated in Salem, in the county of Essex" was insufficient.

The entire description of the property conveyed by the second deed need not be set forth; a description which identifies the land by lot number is sufficient. State *v.* Wilson, 66 Mo. App. 540.

84. See Com. *v.* Lewis, 6 Pa. Super. Ct. 610, holding that where the substantive offense is the fraudulent removal of a debtor's property beyond the reach of creditors, an indictment including several methods or phases of removal in one count is not bad.

85. Com. *v.* Williams, 127 Mass. 285 (holding that, in an indictment for conveying encumbered real estate without disclosing the encumbrance, the allegation that the consideration for the conveyance was the payment of a certain sum of money is not supported by proof that defendant obtained release from arrest by giving a note for the amount, secured by mortgage); Com. *v.*, Brown, 15 Gray (Mass.) 189 (holding that an indictment for fraudulently conveying "a certain parcel of real estate, by a certain deed of warranty" is not sustained by proof of a conveyance of all defendant's "right, title and interest in certain real estate, subject to one mortgage," with covenants of warranty except as against that mortgage).

86. State *v.* Johnson, 33 N. H. 441.

87. State *v.* Johnson, 33 N. H. 441.

88. See, generally, Criminal Law, 12 Cyc. 379 *et seq.*

89. Com. *v.* Brayman, 136 Mass. 438 (holding that under an indictment for conveying encumbered property without disclosing the encumbrance, evidence tending to show that from loss of memory the grantor might not have been aware of the encumbrance is admissible); Com. *v.* Harriman, 127 Mass. 287 (holding that under an indictment for conveying encumbered property without disclosing the conveyance, evidence is admissible to show that, as to the second conveyance, there was no encumbrance, in law or in fact, by reason of the first conveyance); State *v.* Johnson, 33 N. H. 441 (holding that evidence of other sales and dispositions of his property by the debtor, to defraud his creditors, so connected in time and circumstances as to constitute parts of a general scheme of fraud, is competent to prove that

ing the estate conveyed and tending to prove a fraudulent intention on his part before the conveyance are admissible,[90] but answers given by the debtor in supplementary proceedings cannot be used against him.[91]

6. REVIEW.[92] Where the appellate court has power to hear and finally dispose of cases arising under such statutes it has necessarily the power to order such action as will make its judgment effective.[93]

FRAUDULENT DISPOSITION OF PROPERTY. See ATTACHMENT; FRAUDULENT CONVEYANCES.

FRAUDULENT PREFERENCE. See ASSIGNMENTS FOR BENEFIT OF CREDITORS; BANKRUPTCY; COMPOSITIONS WITH CREDITORS; INSOLVENCY; FRAUDULENT CONVEYANCES.

FRAUDULENT REMOVAL OF PROPERTY. See ATTACHMENT.

FRAUDULENT REPRESENTATIONS. See FRAUD.

FRAUDULENT SALES. See FRAUDULENT CONVEYANCES.

FRAUDULENT TRANSFER. See ATTACHMENT; FRAUDULENT CONVEYANCES.

FRAUS ADSTRINGIT, NON DISSOLVIT, PERJURIAM. A maxim meaning "Fraud does not dissolve, but binds, perjury."[1]

FRAUS ÆQUITATE PRÆJUDICAT. A maxim meaning "Fraud judges from equity."[2]

FRAUS AUCTORIS NON NOCET SUCCESSORI. A maxim meaning "The fraud of the author or ancestor does not injure his successor."[3]

FRAUS EST CELARE FRAUDEM. A maxim meaning "It is fraud to conceal fraud."[4]

FRAUS EST ODIOSA ET NON PRÆSUMENDA. A maxim meaning "Fraud is odious and not to be presumed."[5]

FRAUS ET DOLUS NEMINI PATROCINARI DEBENT. A maxim meaning "Fraud and deceit should excuse no man."[6]

FRAUS ET JUS NUNQUAM COHABITANT. A maxim meaning "Fraud and justice never dwell together."[7]

FRAUS LATET IN GENERALIBUS. A maxim meaning "Fraud lies hid in general expressions."[8]

the transaction immediately in question was fraudulent); Thomas *v.* People, 19 Wend. (N. Y.) 480 (holding that a debtor proceeded against on the ground of having removed his property may show that the removal consisted in taking it with him on changing his residence, and that the intended change was known in the neighborhood). *Compare* Loomis *v.* People, 19 Hun (N. Y.) 601, holding that on the trial of an indictment charging defendant with conveying his property at a particular time, therein specified, with intent to defraud his creditors, debts contracted by him after said time cannot be proved.

90. See Loomis *v.* People, 19 Hun (N. Y.) 601; Reg. *v.* Chapple, 17 Cox C. C. 455, 56 J. P. 360, 66 L. T. Rep. N. S. 124.

91. Loomis *v.* People, 19 Hun (N. Y.) 601, holding that by quoting his answers in the supplementary proceedings and contrasting them with his evidence on the trial of an indictment for conveying property with intent to defraud creditors, and asking him which were true, the answers were used in violation of N. Y. Code Proc. § 292.

92. See, generally, CRIMINAL LAW, 12 Cyc. 792 *et seq.*

93. Smit *v.* People, 15 Mich. 516, holding that where the supreme court affirmed the action of a circuit court commissioner ordering the commitment of a debtor under the Fraudulent Debtors Act, it may order the issuance of a warrant to carry out the judgment.

1. Morgan Leg. Max.

2. Peloubet Leg. Max. [*citing* Halkerstine Max. 49].

3. Trayner Leg. Max.

4. Trayner Leg. Max.

Applied in Lee *v.* Kirkpatrick, 14 N. J. Eq. 264, 267 [*citing* 1 Story Eq. Jur. § 384 *et seq.*]; Arglas *v.* Muschampe, 2 Ch. Rep. 266, 21 Eng. Reprint 675, 1 Vern. Ch. 237, 240, 23 Eng. Reprint 675.

5. Bouvier L. Dict.

Applied in Barber *v.* Benner, 5 Pa. Dist. 63; Crisp *v.* Pratt, Cro. Car. 549, 550.

6. Bouvier L. Dict. [*citing* Broom Leg. Max. 97].

Applied in Benham *v.* Keane, 3 De G. F. & J. 318, 321, 8 Jur. N. S. 604, 31 L. J. Ch. 129, 5 L. T. Rep. N. S. 439, 10 Wkly. Rep. 67, 64 Eng. Ch. 318, 45 Eng. Reprint 901.

7. Wharton L. Lex. [*citing* Wingate Max.].

8. Wharton L. Lex.

FRAUS LEGIBUS INVISISSIMA. A maxim meaning "Fraud is most odious to law."[9]

FRAUS MERETUR FRAUDEM. A maxim meaning "Fraud deserves fraud."[10]

FRAY. See AFFRAY.

FREE.[11] Unconstrained; enjoying full civic rights; open for the public

9. Morgan Leg. Max.

10. Bouvier L. Dict. [*citing* Branch Princ.].

11. As used in connection with other words, the word "free" has often received judicial interpretation; as for instance as used in the following phrases: "Free and clear" (see Porter *v.* Noyes, 2 Me. 22, 25, 11 Am. Dec. 30; Meyer *v.* Madreperla, 68 N. J. L. 258, 266, 53 Atl. 477, 96 Am. St. Rep. 536; Chatfield *v.* Ruston, 3 B. & C. 863, 869, 5 D. & R. 675, 10 E. C. L. 388); "free and equal" (see People *v.* Hoffman, 116 Ill. 587, 600, 5 N. E. 596, 8 N. E. 788, 56 Am. Rep. 793); "free burying ground" (See Antrim *v.* Malsbury, 43 N. J. Eq. 288, 293, 13 Atl. 180); "free commoners" (see Hinman *v.* Chicago, etc., R. Co., 28 Iowa 491, 494; Williams *v.* Michigan Cent. R. Co., 2 Mich. 259, 264, 55 Am. Dec. 59); "free conveyance" (see *Re* Pelly, 80 L. T. Rep. N. S. 45, 46); "free dealer" (see King *v.* Bolling, 75 Ala. 306, 309); "free from all charges or deductions" (see Bispham's Case, 24 Wkly. Notes Cas. (Pa.) 79, 80 [*citing* Barksdale *v.* Gilliat, 1 Swanst. 562, 18 Rev. Rep. 139, 36 Eng. Reprint 506]); "free from all encumbrances" (see Calkins *v.* Copley, 29 Minn. 471, 13 N. W. 904; Chase *v.* Willard, 67 N. H. 369, 370, 39 Atl. 901); "free from average" (see Bargett *v.* Orient Mut. Ins. Co., 3 Bosw. (N. Y.) 385, 396; Judah *v.* Randal, 2 Cai. Cas. (N. Y.) 324, 329); "free from average unless general" (see Aranzamendi *v.* Louisiana Ins. Co., 2 La. 432, 433, 22 Am. Dec. 136; Chadsey *v.* Guion, 97 N. Y. 333, 336; Bryan *v.* New York Ins. Co., 25 Wend. (N. Y.) 617, 619; Wadsworth *v.* Pacific Ins. Co., 4 Wend. (N. Y.) 33, 38; Waln *v.* Thompson, 9 Serg. & R. (Pa.) 115, 120, 11 Am. Dec. 675; Great Western Ins. Co. *v.* Fogarty, 19 Wall. (U. S.) 640, 642, 22 L. ed. 216; Biays *v.* Chesapeake Ins. Co., 7 Cranch (U. S.) 415, 418, 3 L. ed. 389; Hernandez *v.* Sun Mut. Ins. Co., 12 Fed. Cas. No. 6,415, 6 Blatchf. 317, 325); "free from blow-holes and other similar defects" (see Adams *v.* Bridgewater Iron Co., 26 Fed. 324, 327); "free from disease" (see Johnson *v.* Wallower, 15 Minn. 472, 478); "free from fault" (see Johnson *v.* State, 136 Ala. 76, 79, 34 So. 209); "free from incumbrances" (see *In re* Langham, 60 L. J. Ch. 110, 111, 39 Wkly. Rep. 156); "free from knots" (see Rush *v.* Wagner, 12 N. Y. Suppl. 2); "free from overflow" (see Yeates *v.* Pryor, 11 Ark. 58, 68); "free of partial loss" (see Mayo *v.* India Mut. Ins. Co., 152 Mass. 172, 174, 25 N. E. 80, 23 Am. St. Rep. 814, 9 L. R. A. 831); "free from particular average" (see Wallerstein *v.* Columbian Ins. Co., 3 Rob. (N. Y.) 528, 536); "free handicap sweepstakes" (see Stone *v.* Clay, 61 Fed. 889, 890, 10 C. C. A. 147); "free inhabitants" (see Elmondorff *v.* Carmichael, 3 Litt. (Ky.) 472, 477, 14 Am. Dec. 86; Scott *v.* Sandford, 19 How. (U. S.) 393, 418, 15 L. ed. 691); "free land or tenement" (see Dodds *v.* Thompson, L. R. I. C. P. 133, 137, 1 Harr. & R. 319, Hopw. & P. 285, 12 Jur. N. S. 625, 35 L. J. C. P. 97, 14 Wkly. Rep. 476; Dawson *v.* Robins, 2 C. P. D. 38, 41, 2 Hopw. & C. 317, 46 L. J. C. P. 62, 35 L. T. Rep. N. S. 599, 25 Wkly. Rep. 212); "free lands" (see Sioux City, etc., R. Co. *v.* Robinson, 41 Minn. 452, 457, 43 N. W. 326); "free liberty" (see Wickham *v.* Hawker, 7 M. & W. 63, 67); "free navigation" (see Benjamin *v.* Manistee R. Imp. Co., 42 Mich. 628, 632, 4 N. W. 483; Newport, etc., Bridge Co. *v.* U. S., 105 U. S. 470, 496, 26 L. ed. 1143; 7 Cyc. 464 note 84); "free of all charges" (see Dusar *v.* Perit, 4 Binn. (Pa.) 361, 363); "free of all outgoings" (see Parish *v.* Sleeman, 1 De G. F. & J. 326, 331, 6 Jur. N. S. 385, 29 L. J. Ch. 96, 1 L. T. Rep. N. S. 506, 8 Wkly. Rep. 166, 62 Eng. Ch. 250, 45 Eng. Reprint 385); "free of commission" (see Russell *v.* Griffith, 2 F. & F. 118, 120; Phillipps *v.* Briard, 25 L. J. Ex. 233, 235); "free of expense and risk to the ship" (see Wright *v.* New Zealand Shipping Co., 4 Ex. D. 165, 166, 2 Aspin. 118, 40 L. T. Rep. N. S. 413); "free of grace" (see Perkins *v.* Franklin Bank, 21 Pick. (Mass.) 483, 485); "free of legacy duty" (see *In re* Johnston, 26 Ch. D. 538, 554, 53 L. J. Ch. 645, 52 L. T. Rep. N. S. 44, 32 Wkly. Rep. 634); "free of particular average only" (see Wallerstein *v.* Columbian Ins. Co., 44 N. Y. 204, 216, 4 Am. Rep. 664); "free pardon" (see Hay *v.* London Tower Division, 24 Q. B. D. 561, 567, 54 J. P. 500, 59 L. J. Ch. 79, 62 L. T. Rep. N. S. 290, 38 Wkly. Rep. 414); "free public house" (see Jones *v.* Edney, 3 Camp. 285, 288, 13 Rev. Rep. 803); "free rent" or "free value" (see Galloway *v.* Galloway, [1904] A. C. 50, 54, 20 T. L. R. 58); "free school" (see Le Couteulx *v.* Buffalo, 33 N. Y. 333, 339; Atty.-Gen. *v.* Jackson, 2 Keen 541, 551, 15 Eng. Ch. 541, 48 Eng. Reprint 736; "free public school" (*In re* Malone, 21 S. C. 435, 451); "free state" (see Sharpless *v.* Philadelphia, 21 Pa. St. 147, 165, 59 Am. Dec. 759); "free tailings" (see Lincoln *v.* Rodgers, 1 Mont. 217, 223); "free toleration of getting coal" (see Algonquin Coal Co. *v.* Northern Coal, etc., Co., 162 Pa. St. 114, 116, 29 Atl. 402); "free to make" (see Brua's Appeal, 55 Pa. St. 294, 297); "free upon owner's account" (see Mercantile, etc., Bank *v.* Gladstone, L. R. 3 Exch. 233, 240, 37 L. J. Exch. 130, 18 L. T. Rep. N. S. 641, 17 Wkly. Rep. 11); "free usages" (see Northumberland *v.* Houghton, L. R. 5 Exch. 127, 130, 39 L. J. Exch. 66, 22 L. T. Rep. N. S. 49, 18 Wkly. Rep. 495; Cook *v.* Gerrard, 1 Saund. 181, 186*c*; Coward *v.* Larkman, 60 L. T. Rep. N. S. 1, 3); "free white person" (see Scott

use;[12] unincumbered;[13] unobstructed;[14] without compensation;[15] without duty, tax, or toll.[16]

FREE BAPTISTS. A term identical in meaning with "free-will baptists," and used to designate persons of the same religious belief who are members of the same denomination.[17] (See, generally, RELIGIOUS SOCIETIES.)

FREE BENCH. That estate in copyhold lands which the wife hath on the death of her husband for her dower, according to the custom of the manor.[18] (See, generally, DOWER.)

FREEDMEN. A term which refers to that class of persons and their descendants who were emancipated during the war between the American states.[19] (See COLORED PERSONS.)

FREEDOM OF CONSCIENCE.[20] See CONSTITUTIONAL LAW.

FREEDOM OF SPEECH. See CONSTITUTIONAL LAW.

FREEDOM OF THE PRESS. See CONSTITUTIONAL LAW.

FREE FISHERY. See FISH AND GAME.

FREE GOVERNMENT. A government which consists of three departments, each with distinct and independent powers, designed to operate as a check upon those other two coördinate branches.[21] (See, generally, CONSTITUTIONAL LAW.)

FREE GRAMMAR SCHOOL.[22] A school for teaching grammatically the learned languages.[23] (See, generally, SCHOOLS AND SCHOOL-DISTRICTS.)

FREE HANDICAP. As defined by the rules of a racing association, one in which no liability is incurred for entrance money, stake, or forfeit, until acceptance of the weight allotted, either by direct acceptance or through omission to declare out.[24]

v. Sandford, 19 How. (U. S.) 393, 419, 15 L. ed. 691); and "free will and accord" (see Scott *v.* Simons, 70 Ala. 352, 356).

12. Black L. Dict. See also Dugan *v.* Baltimore, 5 Gill & J. (Md.) 357, 375.

13. Black L. Dict. See also Northrup *v.* Cross, 2 N. D. 433, 436, 51 N. W. 718.

14. Black L. Dict. See also Boyd *v.* Bloom, 152 Ind. 152, 155, 52 N. E. 751; Skowhegan Water Power Co. *v.* Weston, 94 Me. 285, 293, 47 Atl. 515; Garland *v.* Furber, 47 N. H. 301, 303; Brill *v.* Brill, 108 N. Y. 511, 514, 15 N. E. 538; Connery *v.* Brooke, 73 Pa. St. 80, 84.

15. Black L. Dict. See also Alabama Great Southern R. Co. *v.* South Alabama, etc., R. Co., 84 Ala. 570, 584, 3 So. 286, 5 Am. St. Rep. 401; Pierce *v.* Milwaukee, etc., R. Co., 23 Wis. 387, 391; Lake Superior, etc., R. Co. *v.* U. S., 12 Ct. Cl. 35, 46.

16. Black L. Dict. See also Osborne *v.* Knife Falls Boom Corp., 32 Minn. 412, 418, 21 N. W. 704, 50 Am. Rep. 590.

17. Park *v.* Chaplin, 96 Iowa 55, 63, 64 N. W. 674, 59 Am. St. Rep. 353, 31 L. R. A. 141.

18. Jacob L. Dict. See also James *v.* Com., 12 Serg. & R. (Pa.) 220, 226; Newis *v.* Lark, Plowd. 403, 411.

19. Fairfield *v.* Lawson, 50 Conn. 501, 513, 47 Am. Rep. 669. See also Jeffries *v.* State, 39 Ala. 655, 658 [*citing* Bouvier L. Dict.].

The terms "freedmen" and "freedwomen" in 13 S. C. St. p. 245, defining persons of color as including all free negroes, mulattoes, and mestizos, all freedmen and all freedwomen, and all descendants through either sex of any of these persons, must be regarded as indicating a class which had been in slavery, in contradistinction to previously free negroes, mulattoes and mestizos. Davenport *v.* Caldwell, 10 S. C. 317, 333.

20. **"Freedom of thought,"** said Lord Auckland, about eighty years since, in his chapter "of crimes relative to religion," "is the prerogative of the human mind." Eden Pen. L. 91 [*cited in* Robertson *v.* Bullions, 9 Barb. (N. Y.) 64, 105].

21. *In re* Davies, 168 N. Y. 89, 93, 61 N. E. 118, 56 L. R. A. 855.

That government can scarcely be deemed to be free where the rights of a party are left to the will of the legislative body, without any restraint. State *v.* Kreutzberg, 114 Wis. 530, 532, 90 N. W. 1098, 58 L. R. A. 748, 91 Am. St. Rep. 934 [*citing* Wilkinson *v.* Leland, 2 Pet. (U. S.) 627, 7 L. ed. 542].

The difference between a free and an arbitrary government is that in the former limits are assigned to those to whom the administration is committed, but the latter depends on the will of the departments, or some of them. Kamper *v.* Hawkins, 1 Va. Cas. 21, 23.

22. **Distinguished from "free school"** see Atty.-Gen. *v.* Jackson, 2 Keen 541, 551, 15 Eng. Ch. 541, 48 Eng. Reprint 736 [*cited* in Atty.-Gen. *v.* Worcester, 9 Hare 328, 358, 16 Jur. 3, 21 L. J. Ch. 25, 41 Eng. Ch. 327].

23. Atty.-Gen. *v.* Whiteley, 11 Ves. Jr. 241, 250, 32 Eng. Reprint 1080 [*citing* Johnson Dict.]. See also *In re* Berkhampstead School, L. R. 1 Eq. 102, 119.

The term has also been held to contemplate a school for instruction according to the doctrine and discipline of the church of England. *In re* Chelmsford Grammar School, 1 Kay & J. 543, 565, 24 L. J. Ch. 742.

24. Stone *v.* Clay, 61 Fed. 889, 890, 10 C. C. A. 147.

FREEHOLD. See ESTATES.

FREEHOLDER.[25] Generally speaking, one who holds lands in fee or for life, or for some indeterminate period;[26] a tenant; one who holds freely;[27] one having title to real estate;[28] a person who has the legal title to real estate;[29] a person who has a freehold estate;[30] one who holds a freehold estate in fee simple, fee tail, or for a term of life;[31] the possessor of the soil by a free name;[32] a term generally used to designate the owner of an estate in fee in land;[33] a person for whose sole benefit an undivided interest in fee is held by another in trust absolute appearing on the conveyance.[34] The term is sometimes used in contradistinction to "householder."[35] (Freeholder: Exemption From Execution, see HOMESTEAD. Immunity From Arrest, see ARREST. Qualifications as Juror, see JURIES. Right to Stay Execution, see EXECUTIONS.)

FREE-LAW. Freedom of civil rights enjoyed by the freeman under the English law.[36] (See FREEMAN.)

FREE LIST. See CUSTOMS DUTIES.

FREELY.[37] Without constraint or compulsion.[38] (See FREE.)

FREEMAN. A word which has had various meanings at different stages of history.[39] In its ordinary sense, a person in the possession and enjoyment of all the civil and political rights accorded to the people under a free government;[40] one in possession of the civil rights enjoyed by the people generally;[41] one born

25. See 8 Cyc. 350 note 54.

26. Cummings *v.* Hyatt, 54 Nebr. 35, 38, 74 N. W. 411 [*citing* Winfield Adjudged Words and Phrases]; State *v.* Ragland, 75 N. C. 12, 13; Bouvier L. Dict. [*quoted* in Harlan *v.* State, 136 Ala. 150, 155, 33 So. 858].

A tenant who held by a free tenure under the feudal system was called a "freeholder.' Turner *v.* Dawson, 80 Va. 841, 844.

27. McCafferty *v.* Guyer, 59 Pa. St. 109, 116.

28. People *v.* Scott, 8 Hun (N. Y.) 566, 567.

That a lessee may by statute be regarded as a freeholder see 16 Cyc. 601 note 13.

29. People *v.* Hynds, 30 N. Y. 470, 472 [*quoted* in Wheldon *v.* Cornett, (Nebr. 1903) 94 N. W. 626, 627].

May include a husband living with his wife on land owned by her, and occupied by them as their homestead. Hughes *v.* Milligan, 42 Kan. 396, 22 Pac. 313. See also Windham *v.* Portland, 4 Mass. 384, 387.

The word "freeholder" cannot be used alone without reference to the words "owning land"; and hence a married woman having no interest in land other than that of a wife in community property is not a freeholder owning lands. Fallbrook Irr. Dist. *v.* Abila, 106 Cal. 355, 365, 39 Pac. 794. *Compare* Cummings *v.* Hyatt, 54 Nebr. 35, 38, 74 N. W. 411, holding that a married woman who holds lands in fee is a freeholder.

30. Bradford *v.* State, 15 Ind. 347, 353; Shively *v.* Lankford, 174 Mo. 535, 548, 74 S. W. 835 [*citing* 2 Minor Inst. 71]; State *v.* Nelson, 57 Wis. 147, 151, 15 N. W. 14 [*citing* Damp *v.* Dane, 29 Wis. 419].

"Freeholders of the county" see Matthews *v.* People, 159 Ill. 399, 404, 42 N. E. 864; Rix *v.* Johnson, 5 N. H. 520, 525, 22 Am. Dec. 472.

31. Bradford *v.* State, 15 Ind. 347, 353.

32. Biggs *v.* Ferrell, 34 N. C. 1, 4, where it was said: "For feudal reasons, anciently, none but freeholders were considered owners of the soil."

33. Fore *v.* Hoke, 48 Mo. App. 254, 261.

34. People *v.* Board of Education, 38 Mich. 95.

35. Bradford *v.* State, 15 Ind. 347, 353; Shively *v.* Lankford, 174 Mo. 535, 538, 75 S. W. 835.

"One may be an extensive freeholder and yet not a householder." Shively *v.* Lankford, 174 Mo. 535, 548, 74 S. W. 835.

36. McCafferty *v.* Guyer, 59 Pa. St. 109, 116 [*citing* 3 Blackstone Comm. 340].

37. As used in connection with other words the word "freely" has often received judicial interpretation; as for instance as used in the following phrases: "Freely and of her own accord" (see Dundas *v.* Hitchcock, 12 How. (U. S.) 256, 269, 13 L. ed. 978); "freely and willingly" (see Belcher *v.* Weaver, 46 Tex. 293, 294, 26 Am. Rep. 267); "freely exercising the right of suffrage" (see U. S. *v.* Souders, 27 Fed. Cas. No. 16,358, 2 Abb. 456, 459); "freely to be enjoyed" (see Campbell *v.* Carson, 12 Serg. & R. (Pa.) 54, 56); "freely to be possessed and enjoyed" (see Wheaton *v.* Andress, 23 Wend. (N. Y.) 452, 453; Burkart *v.* Bucher, 2 Binn. (Pa) 455, 464, 4 Am. Dec. 457; Loveacres *v.* Blight, 1 Cowp. 352, 357; Goodright *v.* Barron, 11 East 220, 223).

38. Dennis *v.* Tarpenny, 20 Barb. (N. Y.) 371, 374. See also Hadley *v.* Geiger, 9 N. J. L. 225, 233; Goldstein *v.* Curtis, 63 N. J. Eq. 454, 461, 52 Atl. 218; Meriam *v.* Harsen, 2 Barb. Ch. (N. Y.) 232, 269.

Defined under a statute regulating acknowledgments by married women see 1 Cyc. 566 note 19.

39. Black L. Dict.

40. Black L. Dict.

"By and with the advice and consent of the freemen" see Hobbs *v.* Fogg, 6 Watts (Pa.) 553, 557.

41. Bouvier L. Dict. [*quoted* in McCafferty *v.* Guyer, 59 Pa. St. 109, 116].

or made free of certain municipal immunities or privileges.[42] In old English law, the word described a freeholder or tenant by free services; one who was not a villein.[43] In feudal law, an allodial proprietor[44] — the opposite of a vassal or a feudal tenant; a free tenant or freeholder, as distinguished from a villein.[45] In the Roman law, it denoted one who was either born free or emancipated, and was the opposite of "slave."[46] In modern legal phraseology, it is the appellation of a member of a city or borough having the right of suffrage, or a member of any municipal corporation invested with full civil rights.[47] (See, generally, CITIZENS; CIVIL RIGHTS; CONSTITUTIONAL LAW; ESTATES.)

FREEMASONS. See ASSOCIATIONS; BENEFICIAL SOCIETIES.

FREE ON BOARD. See F. O. B.

FREE PASS. A term which refers to the privilege of riding over a railroad without payment of the customary fare.[48] (See DEADHEADS; and, generally, CARRIERS.)

FREE PERSON OF COLOR.[49] A person descended from a negro within the fourth degree inclusive, though an ancestor in each intervening generation was white.[50] (See COLORED PERSONS; and, generally, CITIZENS.)

FREE SCHOOL. See FREE GRAMMAR SCHOOL.

FREE SHAREHOLDERS. As applied to a building and loan association subscribers to its capital stock, who were not borrowers from the association.[51] (See, generally, BUILDING AND LOAN SOCIETIES.)

FREE SHIPS. See SHIPPING.

FREE STOCK. As used in reference to the stock of a building association, stock which has not been borrowed upon.[52] (See, generally, BUILDING AND LOAN SOCIETIES.)

FREEZE. To congeal; harden into ice; change from a fluid to a solid form by cold or abstraction of heat.[53]

FREEZER. As used in the cold storage trade, a place for the preservation of meat or poultry, where the temperature is kept below freezing — from zero up to thirty-two degrees.[54]

FREIGHT.[55] A word which in common parlance has several different

"Free-men and free women" used in a statute in opposition to "slaves" or "servants for life" see Respublica *v.* Betsey, 1 Dall. (Pa.) 469, 470, 1 L. ed. 227.

The term does not include the female sex. — Burnham *v.* Launing, 9 Phila. (Pa.) 241, 242.

42. Wharton L. Lex. [*quoted* in McCafferty *v.* Guyer, 59 Pa. St. 109, 116].

43. Black L. Dict.

44. Fry's Election Case, 71 Pa. St. 302, 308, 10 Am. Rep. 698; Wharton L. Lex. [*quoted* in McCafferty *v.* Guyer, 59 Pa. St. 109, 116].

45. Fry's Election Case, 71 Pa. St. 302, 308, 10 Am. Rep. 698.

46. Black L. Dict.

47. Black L. Dict.

48. Perkins *v.* New York Cent. R. Co., 24 N. Y. 196, 203, 82 Am. Dec. 281.

49. Free white persons see Scott *v.* Sandford, 19 How. (U. S.) 393, 418, 419, 15 L. ed. 691.

"Free woman of color" see Heirn *v.* Bridault, 37 Miss. 209, 222.

50. State *v.* Dempsey, 31 N. C. 384, 388. And see Heirn *v.* Bridault, 37 Miss. 209, 231.

51. Steinberger *v.* Independent Loan, etc., Assoc., 84 Md. 625, 634, 36 Atl. 439.

52. Laurel Run Bldg. Assoc. *v.* Sperring, 106 Pa. St. 334, 338.

53. Century Dict.

"Freezing," as used in a bill of lading of a cargo of potatoes, exempting the carrier from liability from freezing, should be construed to mean freezing while the potatoes are being forwarded with reasonable dispatch, and hence does not include a freezing resulting from a delay in transportation. Read *v.* St. Louis, etc., R. Co., 60 Mo. 199, 201.

"Froze" is a term used in the iron trade to designate bundles or bars of iron which are so stuck or run together with rust that no use can be made of them until they are unrolled. The Nith, 36 Fed. 86, 87, 13 Sawy. 368.

54. Allen *v.* Somers, 73 Conn. 355, 357, 47 Atl. 653, 84 Am. St. Rep. 158, 52 L. R. A. 106.

55. "In Saxon, it is called *fracht*, whether it be a compensation for transportation in ships by sea, or carriage by land, either of goods or persons, in gross, or detail." Giles *v.* The Cynthia, 10 Fed. Cas. No. 5,424, 1 Pet. Adm. 203 [*quoted* in The Main *v.* Williams, 152 U. S. 122, 129, 14 S. Ct. 486, 38 L. ed. 381].

Distinguished from the compensation earned by towage and salvage services (see The Battler, 58 Fed. 704); from costs and charges of cargo (see Gibson *v.* Philadelphia Ins. Co., 1 Binn. (Pa.) 405, 414).

It "is a general term" (Noyes *v.* Canfield,

meanings.[56] Properly speaking the term denotes the price,[57] compensation,[58]

27 Vt. 79, 85); and "as used in policies of insurance, [it] has a well settled and distinct meaning" (Minturn *v.* Warren Ins. Co., 2 Allen (Mass.) 86, 91).

"Freight due or to grow due" is a term which includes all the freight for the voyage, whether paid in advance or not. Wilson *v.* Dickson, 2 B. & Ald. 2, 15, 20 Rev. Rep. 331 [*cited* in The Main *v.* Williams, 152 U. S. 122, 14 S. Ct. 486, 38 L. ed. 381].

"Freight money" is a term which has been held to include the money paid both for freight and for storage. Adams *v.* O'Connor, 100 Mass. 515, 517, 1 Am. Rep. 137.

"Freight is the mother of wages"—a maxim applied in Rebetto *v.* How, 44 Mo. 52, 56; Allen *v.* Mackay, 1 Fed. Cas. No. 228, 1 Sprague 219; Denoon *v.* Home, etc., Assur. Co., L. R. 7 C. P. 341, 348, 1 Aspin. 309, 41 L. J. C. P. 162, 26 L. T. Rep. N. S. 628, 20 Wkly. Rep. 970 (referred to as "the now abandoned maxim"); Abernethy *v.* Landale, Dougl. (3d ed.) 539, 542 (where Lord Mansfield added that "the safety of the ship [is] the mother of freight"); Neptune, 1 Hagg. Adm. 227, 231 (where it is said that this is "a maxim well known in our maritime law—indeed much more familiarly there than in any other system"); Anonymous, 2 Show. 283 [*cited* in Watson *v.* Duykinck, 3 Johns. (N. Y.) 335, 340].

As used in connection with other words the word "freight" has often received judicial interpretation; as for instance as used in the following phrases: "Back-freight and expenses" (see Cargo ex Argus, L. R. 5 P. C. 134, 135, 148, 28 L. T. Rep. N. S. 745, 21 Wkly. Rep. 707 [*affirming* 42 L. J. Adm. 1]; "freight . . . and all other conditions as per charter" (see Serraino *v.* Campbell, [1891] 1 Q. B. 283, 288, 7 Aspin. 48, 60 L. J. Q. B. 303, 64 L. T. Rep. N. S. 615, 39 Wkly. Rep. 356); "freight chartered, or as if chartered" (see Brankelow Steamship Co. *v.* Canton Ins. Office, [1899] 2 Q. B. 178, 179, 68 L. J. Q. B. 811, 81 L. T. Rep. N. S. 6, 47 Wkly. Rep. 611); "freight due" (see Wilson *v.* Dickson, 2 B. & Ald. 2, 14, 20 Rev. Rep. 331); "freight for the said goods free upon owners' account" (see Mercantile, etc., Bank *v.* Gladstone, L. R. 3 Exch. 233, 240, 37 L. J. Exch. 130, 18 L. T. Rep. N. S. 641, 17 Wkly. Rep. 11); "freight for said" "payable as per charterparty" (see Fry *v.* Chartered Mercantile Bank, L. R. 1 C. P. 689, 692, 35 L. J. C. P. 306, 14 L. T. Rep. N. S. 709, 14 Wkly. Rep. 920); "freight from the time of the engagement of the goods, or after a shipping order has been issued by the agent or his broker" (see The Copernicus, [1896] P. 237, 241, 8 Aspin. 166, 65 L. J. Adm. 108, 74 L. T. Rep. N. S. 757); "freight . . . to be advanced, less . . . interest and insurance" (see Smith *v.* Pyman, [1891] 1 Q. B. 42, 45 [*reversed* in [1891] 1 Q. B. 742, 7 Aspin. 7, 60 L. J. Q. B. 621, 64 L. T. Rep. N. S. 436, 39 Wkly. Rep. 466]. See also Rodoconachi *v.* Milburn, 17 Q. B. D. 316, 322 [*reversed* in 18 Q. B. D. 67, 6 Aspin. 100, 56 L. J. Q. B. 202, 56 L. T. Rep. N. S. 594, 35 Wkly. Rep. 241]; Jackson *v.* Isaacson, 3 H. & N. 405, 408, 27 L. J. Exch. 392); "freight to be paid, one third in cash . . . two thirds on right delivery of the cargo" (see Paynter *v.* James, L. R. 2 C. P. 348, 353, 15 L. T. Rep. N. S. 660, 15 Wkly. Rep. 493); "from passengers and freight traffic" (see Com. *v.* New York, etc., R. Co., 145 Pa. St. 200, 208, 22 Atl. 807); "hath granted and to freight let, etc." (see Christie *v.* Lewis, 2 B. & B. 410, 442, 5 Moore C. P. 211, 23 Rev. Rep. 483, 6 E. C. L. 206); "looking to them for all freight, dead freight, and demurrage, without recourse to us" (see Lewis *v.* McKee, L. R. 2 Exch. 37, 40, 36 L. J. Exch. 6); "money advanced . . . on account of freight" (see Hall *v.* Janson, 4 E. & B. 500, 508, 82 E. C. L. 500); "paying freight for the said goods as per charterparty" (see Smidt *v.* Tiden, L. R. 9 Q. B. 446, 449); "on freight" (see Outwater *v.* Nelson, 20 Barb. (N. Y.) 29, 31).

Freight and passenger tariffs, act regulating, see 8 Cyc. 1066 note 91.

56. Lord *v.* Neptune Ins. Co., 10 Gray (Mass.) 109, 112; Peisch *v.* Dickinson, 19 Fed. Cas. No. 10,911, 1 Mason 9.

57. *Louisiana.*— Paradise *v.* Sun Mut. Ins. Co., 6 La. Ann. 596, 603.

Massachusetts.— Lord *v.* Neptune Ins. Co., 10 Gray 109, 112; Wolcott *v.* Eagle Ins. Co., 4 Pick. 429, 435; Robinson *v.* Manufacturers' Ins. Co., 1 Metc. 143, 146.

Pennsylvania.—Hagar *v.* Donaldson, 154 Pa. St. 242, 244, 25 Atl. 824; Pennsylvania R. Co. *v.* Sly, 65 Pa. St. 205, 211 [*citing* Johnson Dict.; Webster Dict.]; Gibson *v.* Philadelphia Ins. Co., 1 Binn. 404, 414; Ascherson *v.* Bethlehem Iron Co., 2 Pa. Dist. 597, 598 [*citing* 3 Kent Comm. 219].

United States.—Interstate Commerce Commission *v.* Southern Pac. Co., 132 Fed. 829, 838; Christie *v.* Davis Coal, etc., Co., 95 Fed. 837, 838.

England.— Kerford *v.* Mondel, 5 H. & N. 931, 934.

58. *Louisiana.*— Paradise *v.* Sun Mut. Ins. Co., 6 La. Ann. 596, 603, where the court said: "If he [a ship-owner] carries a cargo belonging to another person, he receives his compensation in the price paid by that person for the carriage. If he carries his own cargo, he may be fairly considered as charging the price of the carriage to the goods, and crediting the ship in account; expecting the goods to reimburse their outlay upon their sale at the port of destination."

Maryland.— Patapsco Ins. Co. *v.* Biscoe, 7 Gill & J. 293, 300, 28 Am. Dec. 319.

Massachusetts.— Clark *v.* Ocean Ins. Co., 16 Pick. 289, 293; Griggs *v.* Austin, 3 Pick. 19, 23, 15 Am. Dec. 175.

New York.— Huth *v.* New York Mut. Ins. Co., 8 Bosw. 538, 552; Watson *v.* Duykinck, 3 Johns. 335, 339 [*quoted* in Ogden *v.* New York Mut. Ins. Co., 35 N. Y. 418, 420].

Pennsylvania.— Ascherson *v.* Bethlehem Iron Co., 2 Pa. Dist. 219.

United States.— The Main *v.* Williams, 152 U. S. 122, 129, 14 S. Ct. 486, 38 L. ed. 381; Palmer *v.* Gracie, 18 Fed. Cas. No. 10,692,

reward,[59] or hire[60] paid for the carriage or transportation of goods, merchandise or other property by a carrier at sea from port to port,[61] or by a carrier on land from place to place[62] (usually a railroad company, not an express company),[63] or on inland streams or lakes;[64] the earnings or profits to be gained or earned[65] by the carriage of goods.[66] The term does not always imply that it is the *naulum*, *merces*, or fare for the transportation of goods;[67] it may also include a passenger's fare,[68] but not when the meaning of the word is otherwise determined by the context, or by statute.[69] It is applied to all rewards, hire, or compensation paid for the use of ships as carriers,[70] either for an entire voyage, one divided into sections, or engaged by

4 Wash. 110, 123, where it is said: "It is in all cases bottomed upon contract, either express or implied."

It may include the compensation derived by the shipowner or the hirer of a ship for the use of it himself or by letting it to others or by carrying goods for others. Minturn *v.* Warren Ins. Co., 2 Allen (Mass.) 86, 91 [*citing* 1 Arnold Ins. 200; 1 Phillips Ins. §§ 327, 469]; The Giles Loring, 48 Fed. 463, 473.

59. Allison *v.* Bristol Mar. Ins. Co., 1 App. Cas. 209, 228, 34 L. T. Rep. N. S. 809, 24 Wkly. Rep. 1039; Edmonstone *v.* Young, 12 U. C. C. P. 437, 442.

60. Lord *v.* Neptune Ins. Co., 10 Gray (Mass.) 109, 112; Robinson *v.* Manufacturers' Ins. Co., 1 Metc. (Mass.) 143, 146; Clark *v.* Ocean Ins. Co., 16 Pick. (Mass.) 289, 293; The Main *v.* Williams, 152 U. S. 122, 129, 14 S. Ct. 486, 38 L. ed. 381; Brittan *v.* Barnaby, 21 How. (U. S.) 527, 533, 16 L. ed. 177; Poland *v.* Spartan, 19 Fed. Cas. No. 11,246, 1 Ware 130; Denoon *v.* Home, etc., Assur. Co., L. R. 7 C. P. 341, 348, 1 Aspin. 309, 41 L. J. C. P. 162, 26 L. T. Rep. N. S. 628, 20 Wkly. Rep. 970.

61. Patapsco Ins. Co. *v.* Biscoe, 7 Gill & J. (Md.) 293, 300, 28 Am. Dec. 319; Brittan *v.* Barnaby, 21 How. (U. S.) 527, 533, 16 L. ed. 177.

It may be paid by a sum in gross, founded upon the whole ship, or the tonnage of part of the ship, or upon the merchandise by measure or weight, to be calculated or valued, as the parties to a contract relating to it may agree. Wolcott *v.* Eagle Ins. Co., 4 Pick. (Mass.) 429, 435.

62. Black L. Dict. See Lake Superior, etc., R. Co. *v.* U. S., 93 U. S. 442, 454, 23 L. ed. 965 (where the term is considered in connection with "toll"); Interstate Commerce Commission *v.* Southern Pac. Co., 132 Fed. 829, 838.

63. Black L. Dict.

64. Black L. Dict.

65. Michael *v.* Prussian Nat. Ins. Co., 171 N. Y. 25, 34, 63 N. E. 810.

Freight "does not accrue until the vessel is loaded and bills of lading are signed by the master, and it is payable when the vessel finishes her voyage and discharges her cargo." Ascherson *v.* Bethlehem Iron Co., 2 Pa. Dist. 597, 598.

It does not comprehend the profit which the owner of a cargo who has no interest in the vessel or earnings, as such, expects to derive from the transportation of his goods to their port of destination. Minturn *v.* Warren Ins. Co., 2 Allen (Mass.) 86, 91.

66. Michael *v.* Prussian Nat. Ins. Co., 171 N. Y. 25, 34, 63 N. E. 810 [*citing* 1 Phillips Ins. § 327].

67. Giles *v.* The Cynthia, 10 Fed. Cas. No. 5,424, 1 Pet. Adm. 203 [*quoted* in The Main *v.* Williams, 152 U. S. 122, 129, 14 S. Ct. 486, 38 L. ed. 381].

68. Brown *v.* Harris, 2 Gray (Mass.) 359, 360 [*citing* Mulloy *v.* Backer, 5 East 316, 1 Smith K. B. 447, 7 Rev. Rep. 704, and *quoted* in The Main *v.* Williams, 152 U. S. 122, 129, 14 S. Ct. 486, 38 L. ed. 381]; Pennsylvania Ins. Co. *v.* Sly, 65 Pa. St. 205, 211; Denoon *v.* Home, etc., Assur. Co., L. R. 7 C. P. 341, 348, 1 Aspin. 309, 41 L. J. C. P. 162, 26 L. T. Rep. N. S. 628, 20 Wkly. Rep. 970. See also Interstate Commerce Commission *v.* Southern Pacific Co., 132 Fed. 829, 838.

"That passengers' fares were regarded as the substantial equivalent of freight is evident from the case of Mulloy *v.* Backer, 5 East 316, 321, 1 Smith K. B. 447, 7 Rev. Rep. 704, in which Lawrence, Judge, remarks that 'foreign writers consider passage money the same as freight;' and Lord Ellenborough adds, 'except for the purpose of lien, it seems the same thing.'" The Main *v.* Williams, 152 U. S. 122, 129, 14 S. Ct. 486, 38 L. ed. 381. See also Watson *v.* Duykinck, 3 Johns. (N. Y.) 335; Howland *v.* The Lavina, 12 Fed. Cas. No. 6,797, 1 Pet. Adm. 123; Lewis *v.* Marshall, 8 Jur. 848, 13 L. J. C. P. 193, 7 M. & G. 729, 8 Scott N. R. 477, 49 E. C. L. 729.

69. Interstate Commerce Commission *v.* Southern Pac. Co., 132 Fed. 829, 838, where the court, in construing a statute which provided that "it shall be unlawful for any common carrier . . . to enter into any contract . . . with any other common carrier . . . for the pooling of freights of different and competing railroads," said: "The word 'freights' was not intended to include passenger traffic. Such traffic, in the nature of things, cannot be pooled, because its routing depends ultimately upon the will of the passenger. Again, passenger traffic is included in the prohibition against the conventional division of earnings; and if the word 'freights' were given the meaning defendant claims for it, then the first prohibition of the section, the one against pooling freights, would be entirely useless, since its purpose would be fully accomplished by the prohibition against division of earnings."

70. Brown *v.* Harris, 2 Gray (Mass.) 359, 360; The Main *v.* Williams, 152 U. S. 122, 130, 14 S. Ct. 486, 38 L. ed. 381 [*citing* 3 Kent Comm. 219]; Christie *v.* Davis Coal, etc., Co., 95 Fed. 837, 838 [*citing* 1 Arnold

the month, or any period.[71] While by the law maritime, it was used to denote, not the thing carried, but the compensation for the carriage of it,[72] the term is now often applied to the goods,[73] commodities,[74] or other property[75] carried or transported by any of the means above specified;[76] it may be co-extensive with the word CARGO[77] (*q. v.*), especially the cargo of a ship[78] or any part the cargo of a ship;[79] and it may apply to the lading[80] of a ship or canal boat,[81] of a car on a railway, or the like,[82] of a railroad car, wagon, etc.;[83] that with which anything is fraught or laden for transportation;[84] and in this sense the term embraces every article of personal property which is capable of transportation, whether live stock or merchandise,[85] whether bulky or compact,[86] whether carried on the deck of a ship or under the deck;[87] and whether transported by measurement or by weight.[88] Nevertheless whether it refers to the thing carried or to the compensation for the carriage must depend upon the sense in which the parties to the contract intended

Ins. 31; Carver Carr. by Sea, § 542]; Giles *v.* The Cynthia, 10 Fed. Cas. No. 5,424, 1 Pet. Adm. 203.

71. Giles *v.* The Cynthia, 10 Fed. Cas. No. 5,424, 1 Pet. Edm. 203 [*quoted* in The Main *v.* Williams, 152 U. S. 128, 129, 14 S. Ct. 486, 38 L. ed. 381].

As used in a bottomry bond pledging the freight for the voyage, it means the freight of the whole voyage, and not the freight for that part of the voyage unperformed at the time of giving the bond. The Zephyr, 30 Fed. Cas. No. 18,210, 3 Mason 341.

72. The Main *v.* Williams, 152 U. S. 122, 129, 14 S. Ct. 486, 38 L. ed. 381; and cases cited *supra*, note 61 *et seq.*

73. Lord *v.* Neptune Ins. Co., 10 Gray (Mass.) 109, 112 (as "a freight of lime" or the like); The Main *v.* Williams, 152 U. S. 122, 130, 131, 14 S. Ct. 486, 38 L. ed. 381; Peisch *v.* Dickson, 19 Fed. Cas. No. 10,911, 1 Mason 9.

74. Interstate Commerce Commission *v.* Southern Pac. Co., 132 Fed. 829, 838.

According to the context or by force of statutory enactment, it may mean the commodities carried, and not the compensation paid for such carriage. Interstate Commerce Commission *v.* Southern Pac. Co., 132 Fed. 829, 838, where the court said: "Thus in the sixth section [of the Interstate Commerce Act] the phrase is 'in every depot . . . of such carrier where passengers or freight, respectively, are received for transportation.' There the word 'freight' in connection with the words 'are received for transportation,' would mean the commodity carried. But in that sense it would not include passengers, and the result would then follow that an agreement for pooling the commodities carried, if 'freight' were so used, would be prohibited, while an agreement for pooling passenger traffic would not be."

75. Cal. Civ. Code (1899), § 2110; Mont. Civ. Code (1895), § 2800; N. D. Rev. Codes (1898), § 4186; Okla. Rev. St. (1903) § 662; S. D. Civ. Code (1903), § 1539.

"In the United States and Canada, in general, [it may mean] anything carried for pay either by water or by land." Century Dict. [*quoted* in Interstate Commerce Commission *v.* Southern Pac. Co., 132 Fed. 829, 838].

76. Black L. Dict.

77. Wolcott *v.* Eagle Ins. Co., 4 Pick. (Mass.) 429, 435; Denoon *v.* Home, etc., Assur. Co., L. R. 7 C. P. 341, 348, 1 Aspin. 309, 41 L. J. C. P. 162, 26 L. T. Rep. N. S. 628, 20 Wkly. Rep. 970; Century Dict. [*quoted* in Interstate Commerce Commission *v.* Southern Pac. Co., 132 Fed. 829, 838]. *Compare* Minturn *v.* Warren Ins. Co., 2 Allen (Mass.) 86, 91.

78. Webster Dict. [*quoted* in Interstate Commerce Commission *v.* Southern Pac. Co., 132 Fed. 829, 838].

79. Century Dict. [*quoted* in Interstate Commerce Commission *v.* Southern Pac. Co., 132 Fed. 829, 838].

80. Interstate Commerce Commission *v.* Southern Pac. Co., 132 Fed. 829, 838 [*quoting* Century Dict.; Webster Dict.].

81. Century Dict. [*quoted* in Interstate Commerce Commission *v.* Southern Pac. Co., 132 Fed. 829, 838].

82. "As, a freight of cotton; a full freight; freight will be paid by the ton." Webster Dict. [*quoted* in Interstate Commerce Commission *v.* Southern Pac. Co., 132 Fed. 829, 838].

83. Century Dict. [*quoted* in Interstate Commerce Commission *v.* Southern Pac. Co., 132 Fed. 829, 838].

84. Pennsylvania R. Co. *v.* Sly, 65 Pa. St. 205, 211 [*citing* Johnson Dict.; Webster Dict.]; Webster Dict. [*quoted* in Interstate Commerce Commission *v.* Southern Pac. Co., 132 Fed. 829, 838].

85. Wolcott *v.* Eagle Ins. Co., 4 Pick. (Mass.) 429, 435; Noyes *v.* Canfield, 27 Vt. 79, 85.

"Cargo and freight" in a policy of marine insurance on cargo and freight includes coin, and the freight of it, put on board by the owner of the ship to be invested by the master in merchandise. Wolcott *v.* Eagle Ins. Co., 4 Pick. (Mass.) 429, 434, 435.

Food for the subsistence of live animals is not included under the term within its ordinary signification. Wolcott *v.* Eagle Ins. Co., 4 Pick. (Mass.) 429, 434.

That freight can be insured under the name of "property" see Wiggin *v.* Mercantile Ins. Co., 7 Pick. (Mass.) 271, 273.

86. Noyes *v.* Canfield, 27 Vt. 79, 85.

87. Wolcott *v.* Eagle Ins. Co., 4 Pick. (Mass.) 429, 435.

88. Noyes *v.* Canfield, 27 Vt. 79, 85, 86 [*citing* 1 Greenleaf Ev. § 288].

to use the term,[89] the circumstances of each particular case and the context of the particular contract.[90] The word has also been used to signify the actual transport from one place to another.[91] (Freight: Generally, see Admiralty; Carriers; Shipping. Rates, Regulation of, see Carriers; Commerce; Constitutional Law; Railroads. Rights and Remedies of Carrier With Respect to, see Carriers; Shipping.)

FREIGHTAGE. The reward, if any, to be paid for the carriage of property.[92]

FREIGHT BILL.[93] See Carriers.

FREIGHT-CAR. A railroad-car for carrying freight commonly called a "box car."[94] (See, generally, Burglary.)

FREIGHT DEPOT.[95] See Railroads.

FREIGHTER. He who loads a vessel under a contract of hire or of freightment.[96] (See Freight.)

FREIGHT PENDING. The amount which the charterers of a ship have agreed to pay to the shipowners for the prolonged use of the vessel after the time limited by the charter;[97] and extends (1) to passage money and (2) to freight prepaid at the port of departure.[98] As used in a statute relating to the limitation of the liability of shipowners, it represents the earnings of the voyage, whether from the carriage of passengers or merchandise.[99] (See Freight.)

FREIGHT SOLICITOR. A term sometimes applied to an officer or employee of a railroad corporation.[1] (See, generally, Railroads.)

FREIGHT TRAIN. A train used for transporting commodities or matter of any kind.[2] (See, generally, Carriers; Railroads.)

89. Peisch *v.* Dickson, 19 Fed. Cas. No. 10,911, 1 Mason 9, where Story, J., said that parol evidence might be given to show the intention of the parties.

90. Interstate Commerce Commission *v.* Southern Pac. Co., 132 Fed. 829, 838; Denoon *v.* Home, etc., Assur. Co., L. R. 7 C. P. 341, 348, 1 Aspin. 309, 41 L. J. C. P. 162, 26 L. T. Rep. N. S. 628, 20 Wkly. Rep. 970 [*cited* in The Main *v.* Williams, 152 U. S. 122, 131, 14 S. Ct. 486, 38 L. ed. 381].

91. Denoon *v.* Home, etc., Assur. Co., L. R. 7 C. P. 341, 348, 1 Aspin. 309, 41 L. J. C. P. 162, 26 L. T. Rep. N. S. 628, 20 Wkly. Rep. 970.

92. Cal. Civ. Code (1899), § 2110; Mont. Civ. Code (1895), § 2800; N. D. Rev. Code (1898), § 4186; S. D. Civ. Code (1903), § 1539.

93. See also Field *v.* Citizens Ins. Co., 11 Mo. 50, 53.

94. Century Dict. [*quoted* in State *v.* Green, 15 Mont. 424, 426, 39 Pac. 322, where the term "box car" is defined].

May include a house see 3 Cyc. 987 note 23.

May include an express car under a statute prescribing punishment of any person who shall break and enter in the daytime any railroad freight car. Nicholls *v.* State, 68 Wis. 416, 423, 32 N. W. 543, 60 Am. Rep. 870. *Contra*, see Cal. Pen. Code (1903), § 392.

95. "Freight and passenger depot" see Murray *v.* Northwestern R. Co., 64 S. C. 520, 534, 42 S. E. 617; and 17 Cyc. 683.

96. Anderson L. Dict. [*citing* Smith *v.* Elder, 3 Johns. (N. Y.) 105; 3 Kent Comm. 173].

97. The Giles Loring, 48 Fed. 463, 473 [*citing* Minturn *v.* Warren Ins. Co., 2 Allen (Mass.) 86, 91; Coggeshall *v.* Read, 5 Pick. (Mass.) 454, 460; Benedict Adm. 286], where the court said: "Though not technically freight, it partakes so much of the same character that it must be held subject to the same rule. It represents the earning of the vessel during the voyage or charter, in the performance of which losses were caused by the misconduct of the owner's agent, the master, for which, but for the limitation of the law, the owners would have been fully liable."

98. The Main *v.* Williams, 152 U. S. 122, 132, 14 S. Ct. 486, 32 L. ed. 381.

"Freight pending, is perhaps a little broader than that of the English statute, freight due or to grow due; and it may fairly cover the increased value of goods conferred on them by their carriage, which is just as real a gain to the owner of the vessel, and just as real a payment by the owner of the goods, in the one case as in the other." Allen *v.* Mackay, 1 Fed. Cas. No. 228, 1 Sprague 219, 224.

"Freight pending" includes freight prepaid for the carriage of merchandise and the passage money, and is not to be taken in a narrow sense, as meaning only freight to be earned by a successful conclusion of the voyage. The Jane Gray, 99 Fed. 582, 591 [*citing* Main *v.* Williams, 152 U. S. 122, 133, 14 S. Ct. 486, 38 L. ed. 381].

Freight pending does not include salvage earned during the voyage. *In re* Meyer, 74 Fed. 881; 7 Cyc. 386 note 35.

99. The Main *v.* Williams, 152 U. S. 122, 132, 14 S. Ct. 486, 38 L. ed. 381. See also *In re* Meyer, 74 Fed. 881, 897 [*citing* Benedict Adm. 169, 170, § 300].

1. Davis *v.* Jacksonville South Eastern Line, 126 Mo. 69, 75, 28 S. W. 965.

2. Chicago, etc., R. Co. *v.* Johnson, 53 Ill. App. 478, 481, holding that the term may in-

FRENCH.[3] The language spoken by the people of France;[4] anciently used in law records.[5] (See English; and, generally, Pleading.)

FRENCH BREAD. See Fancy Bread.

FRENCH CHALK. Steatite or soapstone — a soft magnesian mineral.[6] (See, generally, Mines and Minerals.)

FRENCH POOL.[7] A contrivance used in betting, by which betting money or other thing is or may be won or lost;[8] a contrivance used to make wagers on horse races.[9] (See, generally, Gaming.)

FRENCH SPOILATION CLAIMS. See United States.[10]

FREQUENT.[11] To visit often; to resort to often or habitually.[12] The word is sometimes used in contradistinction to Found,[13] *q. v.* (Frequenting: Disorderly House, see Disorderly Houses. Gaming-House, see Gaming.)

FREQUENTIA ACTÛS MULTUM OPERATUR. A maxim meaning "The frequency of an act operates much."[14]

FRESH. Recent; not old, or stale.[15]

FRESHET.[16] A flood or overflowing of a river by means of rains or melted snow — an inundation.[17] (Freshet: In General, see Waters. As Excuse For

clude a "wrecking train" consisting of an engine, way car, three freight cars, and a dirt car.

A locomotive and cab, when not run for carrying freight, nor intended to be presently used for such carriage, is not a "freight train." McNealy *v.* State, 94 Ga. 592, 21 S. E. 581.

3. "The word 'French' is broadly geographic, indicating its origin." Draper *v.* Skerrett, 116 Fed. 206, 208, where the word is considered in connection with a trade-name.

4. Century Dict.

5. Jacob L. Dict.

6. Jenkins *v.* Johnson, 13 Fed. Cas. No. 7,271, 9 Blatchf. 516.

7. "Also called 'Paris mutual'" see Com. *v.* Simonds, 79 Ky. 618, 619.

8. Com. *v.* Simonds, 79 Ky. 618, 620, where it is said: "This same 'contrivance' was introduced into England a few years since, and it was declared to be an instrument of wagering."

9. Elias *v.* Gill, 92 Ky. 569, 573, 18 S. W. 454, 13 Ky. L. Rep. 798.

It has been described to be a small machine, containing the name of each horse to be run in the particular race, written or printed on the side, and printed numbers placed on the inside of a machine, which can be seen through holes in it. Com. *v.* Simonds, 79 Ky. 618, 619, where the court said: "It is used by the owner or person operating it, and by those engaged in betting on horse-racing, in this way: The owner or operator sells the tickets for five dollars each; they bear numbers corresponding with the number given the horse on the machine, and by turning a crank or screw attached to the machine the betters are shown at once the number of tickets sold on each horse as each of said tickets is sold, so as to enable him to bet more intelligently and safely, and lessen the chances of disaster to himself."

10. See also 11 Cyc. 978.

11. Distinguished from "visit" in Roberts *v.* State, 25 Ind. App. 366, 58 N. E. 203, 204.

12. Webster Dict. [*quoted* in Green *v.* State, 109 Ind. 175, 176, 9 N. E. 781; Roberts *v.* State, 25 Ind. App. 366, 58 N. E. 203, 204; Clark *v.* Reg., 14 Q. B. D. 92, 101, 49 J. P. 246, 54 L. J. M. C. 66, 52 L. T. Rep. N. S. 136, 1 T. L. R. 109, 33 Wkly. Rep. 226.

13. Clark *v.* Reg., 14 Q. B. D. 92, 98, 49 J. P. 246, 54 L. J. M. C. 66, 52 L. T. Rep. N. S. 136, 1 T. L. R. 109, 33 Wkly. Rep. 226.

"A single visit to a place, or once passing through a street, can in no sense be said to be a 'frequenting' that place or street." Clark *v.* Reg., 14 Q. B. D. 92, 98, 49 J. P. 246, 54 L. J. M. C. 66, 52 L. T. Rep. N. S. 136, 1 T. L. R. 109, 33 Wkly. Rep. 226. See also 14 Cyc. 491.

Frequenting a gambling-house means something akin to, or in the nature of, a habit of going to such place. Green *v.* State, 109 Ind. 175, 176, 9 N. E. 781. See also Roberts *v.* State, 25 Ind. App. 366, 58 N. E. 203, 204; State *v.* Ah Sam, 14 Oreg. 347, 349, 13 Pac. 303.

14. Wharton L. Lex.

Applied in Corporations Case, 4 Coke 77*b*, 78*a*.

15. Cochran L. Lex.

"Fresh fish" see Cross *v.* Seeberger, 30 Fed. 427, 428.

Fresh pursuit see People *v.* Pool, 27 Cal. 572, 579; White *v.* State, 70 Miss. 253, 258, 11 So. 632.

Fresh seed.—"'Good, fresh [onion seed], warranted to grow, the product of the preceding year,' when applied to seed of this description, must have reference to its reproductive quality, and must be terms of similar import, well understood by men in the business of raising seed for market." Ferris *v.* Comstock, 33 Conn. 513, 515.

"Fresh taxes" see Watson *v.* Atkins, 3 B. & Ald. 647, 649, 5 E. C. L. 372.

16. Distinguished from storm or tempest in Stover *v.* Insurance Co., 3 Phila. (Pa.) 38, 42.

17. Stover *v.* Insurance Co., 3 Phila. (Pa.) 38, 42.

"The word 'freshet' varies in its meaning in various rivers, in various years, and in various seasons of the year." Harris *v.* Social Mfg. Co., 9 R. I. 99, 101, 11 Am. Rep. 224.

Delay — In Performance of Contract, see CONTRACTS; In Transportation, see CARRIERS. Damages by Failure to Construct Adequate Bridge or Culvert, see BRIDGES. Duty as to Replacing Bridge Destroyed by, see BRIDGES. Liability — For Flooding Lands, see WATERS; Of Carrier For Injuries Caused by, see CARRIERS. See also ACT OF GOD; FLOOD.)

FRESH-WATER FISH. All kinds of fish (other than pollan, trout, and char) which live in fresh water, except those kinds which migrate to and from the open sea.[18] (See, generally, FISH AND GAME.)

FRESH-WATER RIVERS. Rivers where the tide does not ebb and flow, and which are therefore said to be not navigable.[19] (See, generally, NAVIGABLE WATERS; WATERS.)

FRIABLE. Easily crumbled, pulverized, or reduced to powder.[20]

FRIEND.[21] A term sometimes used as synonymous with "relation."[22]

FRIENDLY FIRE. As used in insurance law, a fire built in a stove, which did not spread from the stove, but which caused damage by smoke and soot escaping from a defective stovepipe.[23] (See, generally, FIRE INSURANCE.)

FRIENDLY LOAN. A loan of money or stocks, between brokers, for business purposes.[24]

FRIENDLY SOCIETY. See MUTUAL BENEFIT INSURANCE.

FRIENDLY SUIT. See SUBMISSION OF CONTROVERSY.

FRIENDLY TRIBUNAL. A tribunal which by the consent of both parties sits for the adjustment of mutual differences.[25]

FRIEND OF THE COURT. See AMICUS CURIÆ.

FRIGHT. Sudden and extreme fear; terror caused by the sudden appearance or prospect of danger.[26] (Fright: In General, see THREATS. Affecting Validity of Contract, see CONTRACTS. As Element of Damages, see DAMAGES. In Committing Robbery, see ROBBERY. To Horse — In General, see ANIMALS; On Highway, see RAILROADS; STREET RAILROADS; STREETS AND HIGHWAYS.)

FRIVOLOUS ACTION. See ACTIONS.

FRIVOLOUS APPEAL. See APPEAL AND ERROR.

FRIVOLOUS PLEADING. See PLEADING.

FRM. A well understood abbreviation of FROM,[27] *q. v.*

FROG. A section of a rail, or of several rails combined, at a point where two railways cross, or at the point of a switch from a line to a siding or to another line, and its function is to enable a car or train to be turned from one track to another.[28] (See, generally, RAILROADS.)

FROM.[29] A preposition meaning in consequence of; on account of;

18. St. 41 & 42 Vict. c. 39, § 11. But see 47 & 48 Vict. c. 11, § 6.

Eels are not included within the term. St. 49 § 50 Vict. c. 2, § 1. An eel which is bred and living in a river is a river fish. Woodhouse *v.* Etheridge, L. R. 6 C. P. 570, 574, 24 L. T. Rep. N. S. 709.

19. Shrunk *v.* Schuylkill Nav. Co., 14 Serg. & R. (Pa.) 71, 78.

20. Webster Dict. [*quoted* in Atlantic Dynamite Co. *v.* Climax Powder Mfg. Co., 72 Fed. 925, 934].

21. Alien friend see 2 Cyc. 84 note 7.

"Friends" as beneficiaries see Rindge *v.* New England Mut. Aid Soc., 146 Mass. 286, 289, 15 N. E. 628.

22. Gower *v.* Mainwaring, 2 Ves. 87, 89, 28 Eng. Reprint 57 [*cited* in *Re* Caplin, 2 Dr. & Sm. 527, 531, 11 Jur. N. S. 383, 34 L. J. Ch. 578, 12 L. T. Rep. N. S. 526, 6 New Rep. 17, 13 Wkly. Rep. 646].

23. Cannon *v.* Phœnix Ins. Co., 110 Ga. 563, 567, 35 S. E. 775, 78 Am. St. Rep. 124.

24. Sheppard *v.* Barrett, 17 Phila. (Pa.) 145, 146.

25. Hudson *v.* Slade, 3 F. & F. 390, 410.

26. Century Dict.

"Fright" is included in the term "mental agony." San Antonio, etc., R. Co. *v.* Corley, (Tex. Civ. App. 1894) 26 S. W. 903, 904.

27. Blakeley *v.* Bestor, 13 Ill. 708, 714.

28. Southern Pac. Co. *v.* Seley, 152 U. S. 145, 150, 14 S. Ct. 530, 38 L. ed. 391, where the court said: "In a blocked frog the point of space between the rails, at the point where the car is switched from one track to another, is filled with wood or other material, so that the foot will not be held." See also Craver *v.* Christian, 36 Minn. 413, 415, 31 N. W. 457, 1 Am. St. Rep. 675 [*citing* Sherman *v.* Chicago, etc., R. Co., 34 Minn. 259, 25 N. W. 593], where the court said that "the space between the main and guard rail in a railway track, usually designated as 'the frog,'" etc.

29. **Compared with other terms.**—"From" is the antithesis and correlative of "to"

through.[30] As expressing derivation, origin, source, withdrawal or abstraction, the term means out of.[31] As expressing departure, or point of departure, separation, discrimination, removal,[32] or distance in space,[33] time,[34] condition, etc.,[35] the term means out of the limits, presence,[36] or neighborhood of,[37] or connection with;[38] leaving behind.[39] It is said that, by the general rule, "from" an object excludes the terminus referred to;[40] but if the rule is a general one, it is by no means an universal one.[41] (From: As Construed in Computation of Time, see TIME.)

FROM AND AFTER. A term equivalent to thenceforth.[42]

(Sefton *v.* Prentice, 103 Cal. 670, 673, 37 Pac. 641 [*quoting* Webster Dict.]; Smith *v.* Helmer, 7 Barb. (N. Y.) 416, 420); as "from Milwaukee for Buffalo" (Wahl *v.* Holt, 26 Wis. 703, 707). See also Hazlehurst *v.* Freeman, 52 Ga. 244, 246. It is sometimes used as equivalent to "at," "on," or "on and from." Sidebotham *v.* Holland, [1895] 1 Q. B. 378, 384, 64 L. J. Q. B. 200, 72 L. T. Rep. N. S. 62, 14 Reports 135, 43 Wkly. Rep. 228, per Lindley, L. J. Likewise it is sometimes used in the sense of "according to" (Kimball *v.* Deere, 108 Iowa 676, 683, 77 N. W. 1041) or "in" (People *v.* Klammer, (Mich. 1904) 100 N. W. 600 [*citing* Bailey *v.* State, 99 Ala. 143, 13 So. 566, and *distinguishing* People *v.* Rathbun, 105 Mich. 699, 63 N. W. 973]). Compared with "to" and "by" see Wells *v.* Jackson Iron Mfg. Co., 48 N. H. 491, 538. Distinguished from "in" see Moore *v.* State, 40 Ala. 49, 51 [*citing* State *v.* Chambers, 6 Ala. 855; 1 Bishop Cr. L. §§ 294–306].

30. Century Dict. See also Isitt *v.* Railway Passengers Assur. Co., 22 Q. B. D. 504, 510, 58 L. J. Q. B. 191, 60 L. T. Rep. N. S. 297, 37 Wkly. Rep. 477; and 1 Cyc. 600 note 99.

31. Century Dict. See also Worrell *v.* State, 12 Ala. 732, 733; Sefton *v.* Prentice, 103 Cal. 670, 673, 37 Pac. 641 [*quoting* Webster Dict.]; Hazlehurst *v.* Freeman, 52 Ga. 244, 246; Rockland Water Co. *v.* Camden, etc., Water Co., 80 Me. 544, 567, 15 Atl. 785, 1 L. R. A. 388; Carlisle *v.* Yoder, 69 Miss. 384, 389, 12 So. 255; State *v.* Nelson, 28 S. C. 16, 17, 4 S. E. 792 [*citing* State *v.* Shuler, 19 S. C. 140]; Blair *v.* Adams, 59 Fed. 243, 246.

Descent from a parent does not mean descent through a parent.— Case *v.* Wildridge, 4 Ind. 51, 54; Gardner *v.* Collins, 2 Pet. (U. S.) 58, 7 L. ed. 347.

32. The chief difficulty is to determine exactly where the point of departure, the beginning, or separation, etc., begins. The generic meaning of the word is perfectly simple. Bailey *v.* Love, 67 Md. 592, 600, 11 Atl. 280; Connelly *v.* O'Brien, 166 N. Y. 406, 60 N. E. 20; Ackerman *v.* Gorton, 67 N. Y. 63, 66; Ackerman *v.* Ackerman, 63 N. Y. App. Div. 370, 71 N. Y. Suppl. 780; Canfield *v.* Fallon, 26 Misc. (N. Y.) 345, 57 N. Y. Suppl. 149; Poor *v.* Considine, 6 Wall. (U. S.) 458, 475, 18 L. ed. 869. See also Corse *v.* Chapman, 153 N. Y. 466, 47 N. E. 812.

33. See Salisbury *v.* Powe, 51 U. C. 134, 136; North Eastern R. Co. *v.* Payne, 8 Rich. (S. C.) 177, 178; U. S. *v.* La Coste, 26 Fed. Cas. No. 15,548, 2 Mason 129, 137; Reg. *v.* Oxfordshire, 2 B. & Ald. 203, 204; Lett *v.* Osborne, 51 L. J. Ch. 910, 911, 47 L. T. Rep. N. S. 40.

34. See Graves *v.* Marine Ins. Co., 2 Cai. (N. Y.) 339, 341; Browne *v.* Burton, 17 L. J. Q. B. 49, 5 D. & L. 289, 2 Saund. & C. 220; and 3 Cyc. 826 note 72.

35. Century Dict.

36. Century Dict.

37. Webster Dict. [*quoted* in Sefton *v.* Prentice, 103 Cal. 670, 673, 37 Pac. 641].

38. Century Dict.

"From the person" see People *v.* Beck, 21 Cal. 385, 386; Jackson *v.* State, 114 Ga. 826, 827, 40 S. E. 1001, 88 Am. St. Rep. 60; Stegar *v.* State, 39 Ga. 583, 585, 99 Am. Dec. 472; State *v.* Calhoun, 72 Iowa 432, 435, 34 N. W. 194, 2 Am. St. Rep. 252; State *v.* Eno, 8 Minn. 220; Green *v.* State, 28 Tex. App. 493, 497, 13 S. W. 784; Dukes *v.* State, 22 Tex. App. 192, 193, 2 S. W. 590; Wilson *v.* State, 3 Tex. App. 63, 66.

39. Webster Dict. [*quoted* in Sefton *v.* Prentice, 103 Cal. 670, 673, 37 Pac. 641].

40. State *v.* Bushey, 84 Me. 459, 460, 24 Atl. 940; Bonney *v.* Morrill, 52 Me. 252, 256; Wells *v.* Jackson Iron Mfg. Co., 48 N. H. 491, 538; Jackson *v.* Reeves, 3 Cai. (N. Y.) 293, 298; Rex *v.* Upton-on-Severn, 6 C. & P. 133, 134, 25 E. C. L. 358. See also 5 Cyc. 869 note 4.

"From a street may mean from any part of the street, and does not necessarily mean from its inner or nearest line." Pittsburg *v.* Cluley, 74 Pa. St. 259, 261.

41. Tennessee, etc., R. Co. *v.* Adams, 3 Head (Tenn.) 596, 597. See also McCartney *v.* Chicago, etc., R. Co., 112 Ill. 611, 626; Mason *v.* Brooklyn City, etc., R. Co., 35 Barb. (N. Y.) 373, 377; Western Pennsylvania R. Co.'s Appeal, 99 Pa. St. 155, 161; Union Pac. R. Co. *v.* Hall, 91 U. S. 343, 346, 23 L. ed. 428.

42. Farrer *v.* Billing, 2 B. & Ald. 171, 177. See also Rhodes *v.* Rhodes, 7 App. Cas. 192, 197, 51 L. J. C. P. 53, 46 L. T. Rep. N. S. 463, 30 Wkly. Rep. 709; *In re* Jobson, 44 Ch. D. 154, 157, 59 L. J. Ch. 245, 62 L. T. Rep. N. S. 148; Jull *v.* Jacobs, 3 Ch. D. 703, 711, 35 L. T. Rep. N. S. 153, 24 Wkly. Rep. 947; Andrew *v.* Andrew, 1 Ch. D. 410, 418; Lainson *v.* Lainson, 5 De G. M. & G. 754, 756, 3 Eq. Rep. 43, 1 Jur. N. S. 49, 24 L. J. Ch. 46, 3 Wkly. Rep. 31, 54 Eng. Ch. 592, 43 Eng. Reprint 1063. See also Post *v.* Herbert, 27 N. J. Eq. 540, 543; Corse *v.* Chapman, 153 N. Y. 466, 47 N. E. 812; Manhattan Real Estate, etc., Assoc. *v.* Cudlipp, 80 N. Y. App. Div. 532, 534, 80 N. Y. Suppl. 993; Joyce *v.* Northumberland Miners' Friendly Soc., 4 T. L. R. 525.

FROM DAY TO DAY. Without certainty of continuance, temporarily.[43]

FROM PLACE TO PLACE. From a place in one town to a place in another town.[44]

FROM TIME TO TIME.[45] Occasionally;[46] at intervals; now and then.[47]

FROM TOWN TO TOWN. From a place in one town to a place in another town;[48] from the boundary of one town to the boundary of another town.[49]

FRONT.[50] As a noun, the part or side of anything which seems to look out or to be directed forward; the most forward part or surface;[51] frontage.[52] As a

"From henceforth" see Llewelyn *v.* Williams, Cro. Jac. 258.

"From thenceforth" see Fish *v.* Klein, 2 Meriv. 431, 35 Eng. Reprint 1004.

43. Burns *v.* Lyon, 4 Watts (Pa.) 363, 366 [*citing* Webster Dict.]

Adjournment "from day to day" see 11 Cyc. 729 note 32.

44. Andrews *v.* White, 32 Me. 388, 389 (in a statute regulating hawkers and peddlers traveling from place to place); Com. *v.* Cambridge, 7 Mass. 158, 162 (in a statute relating to the establishment of roads from town to town and from place to place).

45. Bryan *v.* Arthur, 11 A. & E. 108, 116, 39 E. C. L. 81, per Williams J. See also Atty.-Gen. *v.* Sillem, 10 Jur. N. S. 393, 396, 33 L. J. Exch. 209, 10 L. T. Rep. N. S. 835.

46. State *v.* McBride, 29 Wash. 335, 342, 70 Pac. 25; Century Dict. [*quoted* in Upshur *v.* Baltimore, 94 Md. 743, 749, 51 Atl. 953]. See Market Harborough *v.* Kettering Highway Bd., L. R. 8 Q. B. 308, 311, 42 L. J. M. C. 137, 28 L. T. Rep. N. S. 446, 21 Wkly. Rep. 737; Iggulden *v.* May, 2 B. & P. N. R. 449, 7 East 237, 3 Smith K. B. 269, 9 Ves. Jr. 325, 8 Rev. Rep. 623, 32 Eng. Reprint 628; Pybus *v.* Smith, 1 Ves. Jr. 189, 193, 30 Eng. Reprint 294.

Expenses payable "from time to time" see Whitehouse *v.* Wolverhampton, etc., R. Co., L. R. 5 Exch. 6, 11, 39 L. J. Exch. 1, 21 L. T. Rep. N. S. 558, 18 Wkly. Rep. 147.

47. Universal Dict. [*quoted* in Upshur *v.* Baltimore, 94 Md. 743, 749, 51 Atl. 953].

Distinguished from "from term to term" see Fulton *v.* State, (Tex. Cr. App. 1904) 78 S. W. 227; Forbes *v.* State, (Tex. Cr. App. 1894) 25 S. W. 1072.

48. Andrews *v.* White, 32 Me. 388, 389; Harkness *v.* Waldo County Com'rs, 26 Me. 353, 357; New Vineyard *v.* Somerset County, 15 Me. 21, 22; Com. *v.* Cambridge, 7 Mass. 158, 162; Craigie *v.* Mellen, 6 Mass. 7, 13. See also Windham *v.* Cumberland County Com'rs, 26 Me. 406, 409; *In re* Vassalborough, 19 Me. 338, 343.

49. People *v.* Louisville, etc., R. Co., (Ill. 1886) 5 N. E. 379, 382; North Eastern R. Co. *v.* Payne, 8 Rich. (S. C.) 177, 178. See also Com. *v.* Waters, 11 Gray (Mass.) 81, 84.

50. As used in connection with other words the word "front" has often received judicial interpretation; as for instance as used in the following phrases: "Front and rear" buildings (see Monteleone *v.* Royal Ins. Co., 47 La. Ann. 1563, 1574, 18 So. 472, 56 L. R. A. 784); "front main wall" (see Ravensthorpe *v.* Hinchcliffe, 24 Q. B. D. 168, 171, 54 J. P. 421, 59 L. J. M. C. 19, 61 L. T. Rep. N. S. 780; Atty-Gen. *v.* Edwards, [1891] 1 Ch. 194, 201, 63 L. T. Rep. N. S. 639; Warren *v.* Mustard, 56 J. P. 502, 61 L. J. M. C. 18, 20, 66 L. T. Rep. N. S. 26, 8 T. L. R. 65; Leyton Local Bd. *v.* Causton, 9 T. L. R. 180; Reg. *v.* Ormesby Local Bd., 43 Wkly. Rep. 96, 97); "front" of buildings (see Bedford Infirmary *v.* Bedford Imp. Com'rs, 7 Exch. 768, 773, 21 L. J. M. C. 224; Bedfordshire *v.* Bedford Imp. Com'rs, 7 Exch. 658, 666, 21 L. J. M. C. 224); "front to the river" (see La Branch *v.* Montegut, 47 La. Ann. 674, 676, 17 So. 247; Cambre *v.* Kohn, 8 Mart. N. S. (La.) 572, 579; Morgan *v.* Livingston, 6 Mart. (La.) 19, 226); "front part" (see Bedard *v.* Bonville, 57 Wis. 270, 274, 15 N. W. 185); "front street" (see Martin *v.* Heckman, 1 Alaska 165, 171); "front thirty rods" (see Proctor *v.* Maine Cent. R. Co., 96 Me. 458, 468, 52 Atl. 933); "to the front" (see Liverpool *v.* Tomlinson, 7 D. & R. 556, 16 E. C. L. 295, 298).

"Front tooth" as "a member of the body" see High *v.* State, 26 Tex. App. 545, 572, 10 S. W. 238, 8 Am. St. Rep. 488.

51. Century Dict.

"'In front' must by any sensible construction be regarded as equivalent to 'immediately in front,' or 'in front and near to.'" Merrill *v.* Nelson, 18 Minn. 366. See also Tracy *v.* Chicago, 24 Ill. 500, 507.

Front of an acre.—An expression which "has no proper application to a line, and has not a natural or generally acknowledged and received sense. It is too vague to determine the length of the front line of a lot as a basis for a decree for specific performance." Bouvier L. Dict. [*citing* Crockett *v.* Green, 3 Del. Ch. 466].

"Front of lot" is that part of the lot which faces a street or streets. Des Moines *v.* Dorr, 31 Iowa 89, 93, where it is said: "It may front on one street only or it may front on two. What is the front of a lot is a question determinable by its facing upon a public street or streets." A lot standing on a corner, with a street on two sides of it, has two fronts, because its face is opposite to and fronts on two different streets.

52. Bedfordshire *v.* Bedford Imp. Com'rs, 7 Exch. 658, 666, 21 L. J. M. C. 224.

Used in reference to lands or property on lands, it refers to the street frontage or facing, according to the manner in which the property is improved and used. Connecticut Mut. L. Ins. Co. *v.* Jacobson, 75 Minn. 429, 432, 78 N. W. 10.

"Frontage assessments" see Lyon *v.* Tonawanda, 98 Fed. 361, 366.

verb, to stand in front of, or opposed or opposite to, or over against; face.[52] (See Fronting.)

FRONT-FOOT RULE.[54] As used in assessment of taxes for public improvements a rule which is described as follows: The total cost is ascertained, as well as the total frontage of the property chargeable with a special tax, then the former item is divided by the number of feet of frontage, and the rate per foot is thus ascertained; each lot is then assessed by multiplying the rate per foot of cost by the front feet it exhibits, and the total is the assessment against each lot.[55] (See, generally, Municipal Corporations.)

FRONTIER. A tract or country of greater or less width bordering on or contiguous to the line between two countries.[56] (See, generally, Neutrality; War.)

FRONTING. Adjoining,[57] *q. v.* (See Front; and, generally, Adjoining Landowners.)

FROST. Freezing.[58]

FROZEN SNAKE. A term applied to a person who is ungrateful.[59]

FRUCTUS AUGENT HÆREDITATEM. A maxim meaning "The yearly increase enhances an inheritance."[60]

FRUCTUS FUGACES. A term applied to products of the soil which cannot be kept, and, when required to be given in discharge of an obligation, are not to be delivered until the time of growing.[61] (See, generally, Crops.)

FRUCTUS NATURALES.[62] A term used in contradistinction to *fructus industriales*, and includes the fruit of trees, perennial bushes, and grasses growing from perennial roots;[63] crops which are produced by the powers of nature

"Frontager" see Sweet L. Dict. [*citing* Hudson *v.* Tabor, 1 Q. B. D. 225].

53. Century Dict.

A lot of land may be said to "front" on water, but not usually to "front" on another piece of land; it may front on a road. Proctor *v.* Maine Cent. R. Co., 96 Me. 458, 468, 52 Atl. 933.

54. "Front foot" is synonymous with "abutting foot." Bouvier L. Dict. [*citing* Moberly *v.* Hogan, 131 Mo. 19, 25, 32 S. W. 14]. See also Haviland *v.* Columbus, 50 Ohio St. 471, 473, 34 N. E. 679.

55. Mound City Constr. Co. *v.* Macgurn, 97 Mo. App. 403, 407, 71 S. W. 460 [*citing* Farrar *v.* St. Louis, 80 Mo. 379].

56. Stoughton *v.* Mott, 15 Vt. 162, 169, where it is said that the term means something more than a boundary line.

57. See 1 Cyc. 765 note 86.

Distinguished from "bordering" in Erisman *v.* Burlington County, 64 N. J. L. 516, 517, 45 Atl. 998.

"Fronting on the street" see Crane *v.* French, 50 Mo. App. 367, 369.

"Fronting, adjoining, or abutting on" (see Barry, etc., Local Bd. *v.* Parry, [1895] 2 Q. B. 110, 113, 59 J. P. 421, 64 L. J. Q. B. 512, 72 L. T. Rep. N. S. 692, 15 Reports 430, 43 Wkly. Rep. 504; Clacton Local Bd. *v.* Young, [1895] 1 Q. B. 395, 399, 59 J. P. 581, 64 L. J. M. C. 124, 71 L. T. Rep. N. S. 877, 15 Reports 92, 43 Wkly. Rep. 219 [*distinguishing* Wakefield Urban Sanitary Authority *v.* Mander, 5 C. P. D. 248, 44 J. P. 522, 28 Wkly. Rep. 922]; Hornsey Local Bd. *v.* Davis, [1893] 1 Q. B. 756, 767, 57 J. P. 612, 62 L. J. Q. B. 427, 68 L. T. Rep. N. S. 503, 4 Reports 322; Bonella *v.* Twickenham Local Bd. of Health, 20 Q. B. D. 63, 66, 52 J. P. 356, 57 L. J. M. C. 1, 58 L. T. Rep. N. S. 299, 36 Wkly. Rep. 50; Lightbound *v.* Higher Bebington Local Bd., 14 Q. B. D. 849, 852, 54 L. J. M. C. 130 [*affirmed* in 16 Q. B. D. 577, 583, 50 J. P. 500, 55 L. J. M. C. 94, 53 L. T. Rep. N. S. 812, 34 Wkly. Rep. 219]; Williams *v.* Wadsworth, 13 Q. B. D. 211, 213, 48 J. P. 439, 53 L. J. M. C. 187, 32 Wkly. Rep. 908; Newport Urban Sanitary Authority *v.* Graham, 9 Q. B. D. 183, 187, 47 J. P. 133, 47 L. T. Rep. N. S. 98, 31 Wkly. Rep. 121; Wakefield Urban Sanitary Authority *v.* Mander, 5 C. P. D. 248, 251, 44 J. P. 522, 28 Wkly. Rep. 922; Wakefield Local Bd. *v.* Lee, 1 Ex. D. 336, 341, 35 L. T. Rep. N. S. 481.

58. As used in a charter-party see Aalholm *v.* Cargo of Iron Ore, 23 Fed. 620, 623, where the court said that the term "includes any freezing that would hinder or obstruct the loading or unloading of the ship."

59. English L. Dict. See also Hoare *v.* Silverlocke, 12 Q. B. 625, 631, 12 Jur. 695, 17 L. J. Q. B. 306, 64 E. C. L. 624.

60. Wharton L. Lex.

61. Nowery *v.* Connolly, 29 U. C. Q. B. 39, 49 [*citing* Coke Litt. 91*b*, 92*a*, where it is said that there is a difference between corn and roses, for corn will last, and he [an obligor] must deliver the corn presently (reference is here made to the time of paying the fine on the death of the tenant), but roses that are *fructus fugaces* are not deliverable till the time of growing].

62. When not subject to execution see 17 Cyc. 942.

63. Sparrow *v.* Pond, 49 Minn. 412, 418, 52 N. W. 36, 32 Am. St. Rep. 571, 16 L. R. A. 103 [*citing* State *v.* Gemmill, 1 Houst. (Del.) 9; Craddock *v.* Riddlesbarger, 2 Dana (Ky.) 205; Frank *v.* Harrington, 36 Barb. (N. Y.) 415; Rodwell *v.* Phillips, 1 Dowl. P. C. N. S. 885, 11 L. J. Exch. 217, 9 M. & W. 501; 4

alone.[64] (See, generally, Crops; Emblements. See also Landlord and Tenant.)

FRUCTUS PENDENTES PARS FUNDI VIDENTUR. A maxim meaning "Hanging fruits are part of the land."[65]

FRUCTUS PERCEPTOS VILLÆ NON ESSE CONSTAT. A maxim meaning "Gathered fruits do not make a part of the farm."[66]

FRUIT. The seed of plants, or that part of the plant which contains the seed, and especially the juicy, pulpy products of certain plants, covering and containing the seed.[67] (Fruit: In General, see Crops. Adjoining Owner's Right to, see Adjoining Landowners.)

FRUITLESS. When applied to an investigation by Congress, it means that it can result in no valid legislation on the subject to which the inquiry refers.[68]

FRUIT OF THE MEADOW. A term applied to a food product composed of leaf lard and beef fat, bathed in salt ice water to take away the fat and lard odor.[69]

FRUMENTA QUÆ SATA SUNT SOLO CEDERE INTELLIGUNTUR. A maxim meaning "Grain which is sown is understood to form a part of the soil."[70]

FRUSTRA AGIT QUI JUDICIUM PROSEQUI NEQUIT CUM EFFECTU. A maxim meaning "He in vain sues, who cannot prosecute his judgment with effect."[71]

FRUSTRA EXPECTATUR EVENTUS CUJUS EFFECTUS NULLUS SEQUITUR. A maxim meaning "An event is vainly expected from which no effect follows."[72]

FRUSTRA FERUNTUR LEGES NISI SUBDITIS ET OBEDIENTIBUS. A maxim meaning "Laws are made to no purpose except for those that are subject and obedient."[73]

FRUSTRA FIT PER PLURA, QUOD FIERI POTEST PER PAUCIORA. A maxim meaning "That is done to no purpose by many things, which can be done by fewer."[74]

FRUSTRA LEGIS AUXILIUM QUÆRIT QUI IN LEGEM COMMITTIT. A maxim meaning "Vainly does he who offends against the law seek the help of the law."[75]

FRUSTRA PETIS QUOD MOX ES RESTITURUS.[76] A well known maxim of

Bacon Abr. 372, tit. "Emblements;" Freeman Ex. § 113; 4 Kent Comm. 73; 1 Schouler Pers. Prop. § 100] (where the court said: "A possible exception to this classification is the case of hops on the vines, which have been held to be personal chattels, and subject to sale as such. The ground upon which this seems to be held is that, although the roots of hops are perennial, the vines die yearly, and the crop from the new vines is wholly or mainly dependent upon annual cultivation"); 12 Cyc. 976 note 3.

64. See 12 Cyc. 976.

65. Bouvier L. Dict. [*citing* Bouvier Inst. No. 1578].

66. Black L. Dict. [*citing* 2 Bouvier Inst. No. 1578; Dig. 19, 1, 17, 1].

67. Nix *v.* Hedden, 149 U. S. 304, 306, 13 S. Ct. 881, 37 L. ed. 745.

"Fruit" covers a large family, and the adjectives "green," "ripe," or "dried" indicate the three great groups into which that family may be divided. U. S. *v.* Nordlinger, 121 Fed. 690, 691, 58 C. C. A. 438.

In its legal acceptation the word is not confined to the produce of those trees which in popular language are called fruit trees, but applies also to the produce of the oak, elm, and walnut trees. Bullen *v.* Denning, 5 B. & C. 842, 847, 8 D. & R. 657, 4 L. J. K. B. O. S. 314, 29 Rev. Rep. 431, 11 E. C. L. 705.

"Fruit" includes oranges (Humphreys *v.* Union Ins. Co., 12 Fed. Cas. No. 6,871, 3 Mason 428) and dried prunes (De Pau *v.* Jones, 1 Brev. (S. C.) 437, 438).

"Fruit" does not include growing pineapple plants. Long *v.* State, 42 Fla. 509, 515, 28 So. 775. See also Johnson *v.* U. S., 66 Fed. 725, 726.

"Fruits in brine" see Hills Co. *v.* U. S., 113 Fed. 857.

"Fruits preserved in spirits" see Voight *v.* Mihalovitch, 125 Fed. 78, 81.

"Fruits preserved in their own juices" see Johnson *v.* U. S., 66 Fed. 725, 726.

Tomatoes are "vegetables" and not "fruit" within the meaning of a tariff act. See Nix *v.* Hedden, 39 Fed. 109, 110 [*affirmed* in 149 U. S. 304, 13 S. Ct. 881, 37 L. ed. 745, and *cited* in U. S. *v.* Buffalo Natural Gas Fuel Co., 78 Fed. 110, 111, 24 C. C. A. 4].

Possession of fruits of crime see 12 Cyc. 444.

68. Kilbourn *v.* Thompson, 103 U. S. 168, 195, 26 L. ed. 377.

69. Braun *v.* Coyne, 125 Fed. 331, 332.

70. Black L. Dict. [*citing* Inst. 2, 1, 32].

71. Bouvier L. Dict. [*citing* Fleta, lib. 6, c. 37, § 9].

72. Black L. Dict.

73. Burrill L. Dict. [*citing* Branch Princ.].

74. Burrill L. Dict. [*citing* Jenkins Cent. 68].

75. Kent *v.* Judkins, 53 Me. 160, 163, 87 Am. Dec. 544.

76. "Maxim of the civil law."—Jarvis *v.* Rogers, 15 Mass. 389, 407.

the Roman law meaning "In vain you ask that which you will have immediately to restore." [77]

FRUSTRA PETIS QUOD STATIM ALTERI REDDERE COGERIS. A maxim meaning "You seek in vain that which you may be compelled instantly to give back to another." [78]

FRUSTRA PROBATUR QUOD PROBATUM NON RELEVAT. A maxim meaning "It is useless to prove that which, when proved, is not relevant to the question at issue." [79]

FRUSTRA (VANA) EST POTENTIA QUÆ NUNQUAM VENIT IN ACTUM. A maxim meaning "That power is to no purpose which never comes into act, or which is never exercised." [80]

FUDGE. An expression of the utmost contempt, usually bestowed on absurd and lying talkers.[81] (See, generally, LIBEL AND SLANDER.)

FUERO. A use and custom combined which has the force of law.[82] (See, generally, CUSTOMS AND USAGES.)

FUGES. A term said to be the same as rent.[83]

FUGITIVE FROM JUSTICE. See EXTRADITION (INTERNATIONAL); EXTRADITION (INTERSTATE).

FULFIL.[84] To perform what has been promised, commanded or intended; to accomplish; to effect; to complete; to effectuate; to execute.[85]

FULFILLED. Fully performed.[86]

FULL.[87] COMPLETE (*q. v.*), ENTIRE (*q. v.*), without abatement — mature, per-

77. Burrill L. Dict. [*citing* 2 Kames Eq. 104].

Applied in Jarvis *v.* Rogers, 15 Mass. 389, 407. See also Edger *v.* Knapp, 1 D. & L. 73, 5 M. & G. 753, 757, 6 Scott N. R. 707, 44 E. C. L. 393.

78. Trayner Leg. Max.

79. Trayner Leg. Max.

Applied in Farnum *v.* Farnum, 13 Gray (Mass.) 508, 511.

80. Black L. Dict.

Applied in Cholmley's Case, 2 Coke 49*b*, 51*a*.

81. Hunt *v.* Algar, 6 C. & P. 245, 247, 25 E. C. L. 415.

82. Strother *v.* Lucas, 12 Pet. (U. S.) 410, 446, 9 L. ed. 1137.

83. Chasemore *v.* Richards, 7 H. L. Cas. 349, 387, 5 Jur. N. S. 873, 29 L. J. Exch. 81, 7 Wkly. Rep. 685, 11 Eng. Reprint 140.

84. "Fulfilling the will" see Rachfield *v.* Careless, 2 P. Wms. 158, 161, 24 Eng. Reprint 680.

85. Webster Dict. [*cited* in Ætna Ins. Co. *v.* Kittles, 81 Ind. 96, 97].

86. Ætna Ins. Co. *v.* Kittles, 81 Ind. 96, 97, 98.

87. As used in connection with other words the word "full" has often received judicial interpretation; as for instances as used in the following phrases: "Executed in full" (see Blackburn *v.* Jackson, 26 Mo. 308, 310); "full and absolute" (see Pardoe *v.* Pardoe, 16 T. L. R. 373); "full and complete" (see Streeter *v.* Streeter, 43 Ill. 155, 161; Morris *v.* Levison, 1 C. P. D. 155, 156, 45 L. J. C. P. 409, 34 L. T. Rep. N. S. 576, 24 Wkly. Rep. 517; Hunter *v.* Fry, 2 B. & Ald. 421, 426, 21 Rev. Rep. 340; Cuthbert *v.* Cumming, 10 Exch. 809, 814); "full and peaceful" (see Reed *v.* Hazleton, 37 Kan. 321, 325, 15 Pac. 177); "full and reasonable" (see 9 Cyc. 972 note 61); "full and sufficient" (see Agnew *v.* Dorr, 5 Whart. (Pa.) 131, 136, 34 Am. Dec. 539); "full and valuable" (see 51 & 52 Vict. c. 42, § 4 (5); "full annual rent or value" (see Rose *v.* Watson, [1894] 2 Q. B. 90, 92, 58 J. P. 589, 63 L. J. M. C. 108, 70 L. T. Rep. N. S. 906, 10 Reports 255, 42 Wkly. Rep. 523); "full bill of costs and disbursements" (see Bowen *v.* Sweeny, 66 Hun (N. Y.) 42, 45, 20 N. Y. Suppl. 733, 734); "full cargo" (see Ogden *v.* Parsons, 23 How. (U. S.) 167, 169, 16 L. ed. 410); "full compensation" (see Matter of Kenworthy, 63 Hun (N. Y.) 165, 167, 17 N. Y. Suppl. 655; U. S. *v.* Fisher, 109 U. S. 143, 145, 3 S. Ct. 154, 27 L. ed. 885; Baxter *v.* Birkenhead, [1893] 2 Q. B. 77, 79, 62 L. J. M. C. 107, 69 L. T. Rep. N. S. 220, 41 Wkly. Rep. 513 [*affirming* [1893] 1 Q. B. 679]; 5 Cyc. 269 note 72); "full compliance" (see 8 Cyc. 408 note 33); "full confidence" (see Handley *v.* Wrightson, 60 Md. 198, 202; *In re* Pennock, 20 Pa. St. 268, 278, 59 Am. Dec. 718; Coates' Appeal, 2 Pa. St. 129, 133); "full conviction" (Lipscomb *v.* State, 75 Miss. 559, 577, 23 So. 210, 230); "full costs" (see Avery *v.* Wood, [1891] 3 Ch. 115, 118, 65 L. T. Rep. N. S. 122, 39 Wkly. Rep. 577; Irwine *v.* Reddish, 5 B. & Ald. 796, 797, 1 D. & R. 413, 7 E. C. L. 433; Jamison *v.* Trevelyan, 3 C. L. R. 702, 10 Exch. 748, 752, 1 Jur. N. S. 334, 24 L. J. Exch. 74, 28 Eng. L. & Eq. 535, 3 Wkly. Rep. 172); "full costs and expenses" (see Doe *v.* Manchester, 12 C. B. 474, 478, 74 E. C. L. 474); "full covenants" (see Murphy *v.* Lockwood, 21 Ill. 611, 618; Gregg *v.* Von Phul, 1 Wall. (U. S.) 274, 275, 17 L. ed. 536); "full discharge" (see Basham *v.* Smith, 22 Beav. 190, 193, 52 Eng. Reprint 1081); "full enjoyment" (see Atty.-Gen. *v.* Mander, 65 L. J. Q. B. 246, 248, 74 L. T. Rep. N. S. 103, 44 Wkly. Rep. 413); "full explanation" (see 1 Cyc. 567 note 23); "full, fair and impartial trial" (see State *v.* Fitzsimon, 18 R. I. 236,

fect;[88] sufficient.[89] As applied to jurisdiction,[90] the term implies that nothing is reserved.[91]

FULL AGE. See Infants.

FULL BLOOD. See Descent and Distribution; Wills.

FULL COURT.[92] See Courts.

FULLED CLOTH. In common parlance, a term understood to imply woolen fulled cloth.[93]

FULL FAITH AND CREDIT. See Judgments.

FULL INDORSEMENT.[94] An indorsement by which the indorser orders the money to be paid to some particular person by name.[95] (See, generally, Commercial Paper.)

FULL INFORMATION. The best particulars the insured can give.[96] (See, generally, Fire Insurance.)

240, 27 Atl. 446, 49 Am. St. Rep. 766); "full force" (see Dorsey *v.* Sands, 5 J. J. Marsh. (Ky.), 37, 38); "full income" (see McLouth *v.* Hunt, 154 N. Y. 179, 191, 48 N. E. 548, 39 L. R. A. 230); "full interest admitted" (see Berridge *v.* Man On Ins. Co., 18 Q. B. D. 346, 348, 6 Aspin. 104, 56 L. J. Q. B. 223, 53 L. T. Rep. N. S. 375, 35 Wkly. Rep. 343); "full inventory" (see Silver Bow Min., etc., Co. *v.* Lowry, 5 Mont. 618, 621, 6 Pac. 62); "full knowledge" (see Worden *v.* Humeston, etc., R. Co., 72 Iowa 201, 205, 33 N. W. 629); "full measure of care and diligence" (see Western, etc., R. Co. *v.* King, 70 Ga. 261, 263); "full names" (see Gearing *v.* Carroll, 151 Pa. St. 79, 82, 24 Atl. 1045; Lafin, etc., Co. *v.* Steytler, 146 Pa. St. 434, 441, 23 Atl. 215, 14 L. R. A. 690); "full or valuable consideration" (see Redman *v.* Rymer, 5 T. L. R. 287, 289); "full pardon" (see U. S. *v.* Cullerton, 25 Fed. Cas. No. 14,899, 8 Biss. 166); "full payment" (see Finley *v.* Bent, 95 N. Y. 364, 368); "full performance" (see Crumbly *v.* Bardon, 70 Wis. 385, 386, 36 N. W. 19); "full possession" (see Walton *v.* Newsom, 1 Humphr. (Tenn.) 140, 144); "full and free privilege" (see Kirkham *v.* Sharp, 1 Whart. (Pa.) 323, 335, 29 Am. Dec. 57); "full power and authority" (see Hamilton *v.* Hamilton, 98 Ill. 254, 257); "full prosecution" (see Tinsley *v.* Rice, 105 Ga. 285, 288, 31 S. E. 174); "full quorum" (see Halfin *v.* State, 18 Tex. App. 410, 413); "full salary" (see *In re* Marcus, 56 L. J. Ch. 830, 831, 57 L. T. Rep. N. S. 399); "full satisfaction" (see Jones *v.* State, 84 Miss. 194, 196, 36 So. 243); "full supply" (see Kemp *v.* Knickerbocker Ice Co., 69 N. Y. 45, 52); "full term" (see Gorrell *v.* Bier, 15 W. Va. 311, 321); "full, true, and correct" (see Anderson *v.* Ackerman, 88 Ind. 481, 490); "full year" (see Eatontown *v.* Shrewsbury, 49 N. J. L. 188, 190, 6 Atl. 319); "in full and ample manner" (see Newcastle-Upon-Tyne *v.* Atty.-Gen., [1892] A. C. 568, 575, 56 J. P. 836, 62 L. J. Q. B. 72, 67 L. T. Rep. N. S. 728, 1 Reports 31); "in full of all notes," etc. (see Reid *v.* Reid, 13 N. C. 247, 248, 18 Am. Dec. 570); "in full satisfaction" (Coke Litt. 213*a*).

"Full and fair annual value" see 15 & 16 Vict. c. 81, § 6.

"Full cash value" see Mont. Code (1895), § 3680, subs. 6. See also Taxation.

"Fullest confidence" see Cockrill *v.* Armstrong, 31 Ark. 580, 589; Major *v.* Herndon, 78 Ky. 123, 128 [*citing* 1 Perry Trusts, c. 4, § 112].

"Fullest practicable extent" see Newton *v.* Nock, 43 L. T. Rep. N. S. 197, 199.

88. Webster Dict. [*quoted* in Quinn *v.* Donovan, 85 Ill. 194, 195].

Full answer see 8 Cyc. 407 note 20.

"Full copy."—As applied to a bill in chancery, the term includes not only a full transcript of the bill, or answer with all its indorsements, but one including a copy of every exhibit. Finley *v.* Hunter, 2 Strobh. Eq. (S. C.) 208, 210 note.

89. As a "full apology." Lafone *v.* Smith, 3 H. & N. 735, 737, 4 Jur. N. S. 1064, 28 L. J. Exch. 33, 7 Wkly. Rep. 13. See also Risk Allah Bey *v.* Johnstone, 18 L. T. Rep. N. S. 620; 6 & 7 Vict. c. 96, § 2.

"Full cream cheese" as defined by statute, includes all cheese manufactured, sold, or offered for sale in the state at retail or wholesale, made from milk or cream of same, which tests not less than three per cent of butter fat. Mo. Rev. St. (1899) § 4756.

90. "Full jurisdiction" see Farish *v.* State, 4 How. (Miss.) 170, 174.

91. State Bank *v.* Duncan, 52 Miss. 740, 745.

92. As defined by statute in Massachusetts see Mass. Rev. L. (1902) p. 1373, § 2.

93. Wead *v.* Marsh, 14 Vt. 80, 83.

94. Distinguished from "blank indorsement" in Lee *v.* Chillicothe Branch State Bank, 15 Fed. Cas. No. 8,187, 1 Biss. 325.

95. Kilpatrick *v.* Heaton, 3 Brev. (S. C.) 92, 93; Lee *v.* Chillicothe Branch State Bank, 15 Fed. Cas. No. 8,187, 1 Biss. 325.

An indorsement is said to be full when the name of the assignee or transferee is stated, without any words of limitation. The usual form of a full indorsement is "Pay to A B, or order." Lee *v.* Chillicothe Branch State Bank, 15 Fed. Cas. No. 8,187, 1 Biss. 325.

96. Bumstead *v.* Dividend Mut. Ins. Co., 12 N. Y. 81, 95 [*citing* Mason *v.* Harvey, 8 Exch. 819, 820, 22 L. J. Exch. 336], as used in an insurance policy requiring that as a condition precedent to a recovery the insured shall deliver full particulars of the loss or damage together with an inventory of the property destroyed or damaged, etc.

FULL LEGISLATIVE POWERS. Ample, complete, perfect powers, not wanting in any essential quality.[97]

FULL PERFORMANCE. Payment actually made and not an offer or tender merely.[98] (See, generally, MORTGAGES; PAYMENT.)

FULL POSSESSION. Such possession of an office as will enable the incumbent to fulfil all the substantial purposes of such office.[99] (See, generally, OFFICERS.)

FULL PROOF.[1] Evidence which satisfies the minds of the jury of the truth of the fact in dispute to the entire exclusion of every reasonable doubt.[2] (See, generally, EVIDENCE.)

FULL SETTLEMENT. As used in the statement of a receipt of certain money in full settlement of a claim, payment of the claim.[3] (See, generally, ACCORD AND SATISFACTION; COMPOSITIONS WITH CREDITORS; COMPROMISE AND SETTLEMENT; PAYMENT.)

FULL USE OF PROPERTY. The profits of such property.[4] (See, generally, WILLS.)

FULL WAGES. The aggregate amount of wages for the voyage.[5] (See EMPLOYMENT; and, generally, MASTER AND SERVANT; SHIPPING.)

FULLY.[6] Amply, sufficiently, clearly, or distinctly.[7]

FUNCTION.[8] A peculiar or appointed action;[9] DUTY,[10] *q. v.*

FUNCTIONAL DISEASE OF BRAIN. Some disease of that organ which prevents or interferes with its operation.[11] (See DEMENTIA; and, generally, INSANE PERSONS.)

97. Mobile School Com'rs *v.* Putnam, 44 Ala. 506, 537, holding that the term as used in a statute conferring upon a board of commissioners such powers covered the entire field of legislation upon the subject including the officers and agents to be employed, the mode and manner of their election or appointment, the tenure of their respective offices, their duties and compensation, and for what causes and by whom they might be suspended or removed from office.

98. Crumbly *v.* Bardon, 70 Wis. 385, 386, 36 N. W. 19, as used in a statute prescribing a penalty for the refusal to satisfy a mortgage.

99. *Ex p.* Norris, 8 S. C. 408, 473.

1. In civil law see Baines *v.* Ullmann, 71 Tex. 529, 536, 9 S. W. 543.

2. Starkie Ev. 478 [*quoted* in Kane *v.* Hibernia Mut. F. Ins. Co., 38 N. J. L. 441, 450, 20 Am. Rep. 409], where it is also pointed out the distinction between "full proof" and "mere preponderance of evidence."

3. Hoopes *v.* McCan, 19 La. Ann. 201, 202.

4. Land *v.* Otley, 4 Rand. (Va.) 213, 225, so construed as used in a will.

5. That is, the same wages which the mariner would have been entitled to had he served out the whole voyage. Sims *v.* Jackson, 22 Fed. Cas. No. 12,890, 1 Pet. Adm. 157, 1 Wash. 414, within the meaning of a rule of navigation which declared that a sick mariner who was left behind was entitled to his full wages if he recovered, etc.

6. In connection with other words the word "fully" has often received judicial interpretation; as for instance as used in the following phrases: "Fully and permanently cured" (see Wellman *v.* Jones, 124 Ala. 580, 585, 27 So. 416); "fully and plainly" (see Com. *v.* Robertson, 162 Mass. 90, 96, 38 N. E. 25); "fully accounting" (see Read *v.* Bertrand, 20 Fed. Cas. No. 11,602, 4 Wash. 556); "fully administered" (see Ryans *v.* Boogher, 169 Mo. 673, 686, 69 S. W. 1048); "fully cured" (see Featherston *v.* Rounsaville, 73 Ga. 617, 619); "fully determined" (see Ruckman *v.* Palisade Land Co., 1 Fed. 367, 369[*citing* Taylor *v.* Rockefeller, 18 Am. L. Reg. 307]; "fully estated" (see Blake *v.* Peters 1 De G. J. & S. 345, 9 Jur. N. S. 836, 32 L. J. Ch. 200, 9 L. T. Rep. N. S. 247, 1 New Rep. 503, 11 Wkly. Rep. 409, 66 Eng. Ch. 268, 46 Eng. Reprint 139); "fully explained" (see 1 Cyc. 591 note 43, 602 note 10, 603 note 11); "fully indemnify and save harmless" (see Campbell *v.* Roteving, 42 Minn. 115, 116, 43 N. W. 795, 6 L. R. A. 278); "fully paid up shares" (see *In re* Peruvian R. Co., L. R. 4 Ch. 226, 327, 20 L. T. Rep. N. S. 96, 17 Wkly. Rep. 454; Bloomenthal *v.* Ford, [1897] A. C. 156, 161, 66 L. J. Ch. 253, 76 L. T. Rep. N. S. 205, 4 Manson 156, 45 Wkly. Rep. 449); "fully to pay and satisfy his debts" (see Bootle *v.* Blundell, 1 Meriv. 193, 225, 35 Eng. Reprint 646, 19 Ves. Jr. 494, 34 Eng. Reprint 600, 15 Rev. Rep. 93); "fully satisfied" (see State *v.* Sears, 61 N. C. 146, 147); "fully understanding the contents" (see 1 Cyc. 602 note 9).

7. Riley *v.* State, (Miss. 1895) 18 So. 117, 118.

8. "The word is derived from one which signifies to perform." Higbee *v.* Guardian Mut. L. Ins. Co., 66 Barb. (N. Y.) 462, 471.

9. Higbee *v.* Guardian Mut. L. Ins. Co., 66 Barb. (N. Y.) 462, 471.

Functions of court and jury see 16 Cyc. 952.

Function of judge see 17 Cyc. 146; 16 Cyc. 1276.

10. State *v.* Hyde, 121 Ind. 20, 25, 22 N. E. 644.

11. Higbee *v.* Guardian Mut. L. Ins. Co., 66 Barb. (N. Y.) 462, 472.

FUNCTUS OFFICIO. Literally "having discharged his duty." An expression applied to an agent or donee of an authority who has performed the act authorized, so that the authority is exhausted and at an end.[12]

FUND.[13] As a noun,[14] a deposit of resources, or money appropriated as the foundation of some commercial operation, or a store laid up to draw from;[15] a deposit or accumulation of resources from which supplies are drawn, or out of which expenses are provided, or which may be available for the payment of debts or the discharge of liabilities;[16] a name for a collection or an appropriation of money;[17] a stock or capital, a sum of money appropriated as the foundation of some commercial or other operation, undertaken with a view to profit, and by means of which expenses and credits are supported.[18] As a verb, to put into the form of bonds or stocks bearing regular interest, and to provide and appropriate a fund or permanent revenue for the payment of the interest;[19] to capitalize with a view to the production of interest.[20] (See FUNDS, and Cross-references Thereunder.)

FUNDACIO INCIPIENS. See FOUNDATION.

FUNDAMENTAL. Pertaining to the foundations; serving as or being a component part of a foundation or basis.[21] (See FOUNDATION.)

12. Sweet L. Dict. [*citing* Bedwell *v.* Wood, 2 Q. B. D. 626, 46 L. J. Q. B. 725, 36 L. T. Rep. N. S. 213; Chitty Contr. 192]. See also Rice *v.* McCaulley, 7 Houst. (Del.) 226, 240, 31 Atl. 240; Robinson *v.* Nelson, 4 Ida. 567, 570, 43 Pac. 64; Birney *v.* Hann, 3 A. K. Marsh. (Ky.) 322, 324, 13 Am. Dec. 167; Appo *v.* People, 20 N. Y. 531, 543; Sherman *v.* Boyce, 15 Johns. (N. Y.) 443, 446; Filkins *v.* Brockway, 19 Johns. (N. Y.) 170; Halcombe *v.* Loudermilk, 48 N. C. 491, 492; Faull *v.* Cooke, 19 Oreg. 455, 465, 26 Pac. 662, 20 Am. St. Rep. 836; Allen *v.* Long, 80 Tex. 261, 269, 16 S. W. 43, 26 Am. St. Rep. 735; Carpenter *v.* Sawyer, 12 Vt. 674, 677; Morgan *v.* U. S., 113 U. S. 476, 500, 5 S. Ct. 588, 28 L. ed. 1044; *In re* Cook, 49 Fed. 833, 839; Cutts *v.* U. S., 6 Fed. Cas. No. 3,522, 1 Gall. 69, 74; Beardsley *v.* Littell, 21 Fed. Cas. No. 1,185, 2 Ban. & A. 501, 14 Blatchf. 102; 17 Cyc. 1071, 1387; 16 Cyc. 1073; 15 Cyc. 383; 12 Cyc. 299; 5 Cyc. 128 note 43.

13. Distinguished from endowment in New Brunswick First Reformed Dutch Church *v.* Lyon, 32 N. J. L. 360, 361 [*cited* in Nevin *v.* Krollman, 38 N. J. L. 574].

"The term . . . was originally applied to a portion of the national revenue set apart or pledged to the payment of a particular debt." Ketchum *v.* Buffalo, 14 N. Y. 356, 367 [*quoted* in People *v.* Carpenter, 31 N. Y. App. Div. 603, 606, 52 N. Y. Suppl. 781].

Fund in court see 12 Cyc. 29; 4 Cyc. 1009 note 54, 1011 note 73, 1020 note 22.

"All the funded property in my name" see Mangin *v.* Mangin, 16 Beav. 300, 51 Eng. Reprint 794.

"Fund due" see Jasper Dist. Tp. *v.* Sheridan Dist. Tp., 47 Iowa 183, 184.

Produce of fund see 2 Cyc. 465 note 25.

14. It is a word which savors of personalty, and means something that can be invested and reinvested. Bierce *v.* Bierce, 41 Ohio St. 241, 254.

15. Lane *v.* Madgeburg, 81 Wis. 344, 346, 51 N. W. 562, holding that the term in its legal acceptation does not embrace the "proceeds" of a consignment of corn.

16. Jewett *v.* State, 94 Ind. 549, 551, where the court said: "The assets of an estate constitute a fund in the hands of the executor or administrator, which, in certain cases, he may be required to bring into court."

17. It may be nothing but a designation of one branch of the accounts of the state, or of a certain amount of money when collected, to be applied to a particular purpose; it may have no property and represent no investments, and what are called its revenues may include all the moneys appropriated or directed to be paid to it, or for its benefit, or that of the objects it represents. People *v.* New York Cent. R. Co., 34 Barb. (N. Y.) 123, 135.

"A fund or property is said to be appropriated when it is reserved or destined by law for a particular named use or purpose." Galveston, etc., R. Co. *v.* State, 77 Tex. 367, 414, 12 S. W. 988, 13 S. W. 619. See also Shattuck *v.* Kincaid, 31 Oreg. 379, 396, 49 Pac. 758 [*citing* Proll *v.* Dunn, 80 Cal. 226, 22 Pac. 143], holding that the term "fund" is not synonymous with "appropriation."

As used in a provision for the establishment of a perpetual school fund see Galveston, etc., R. Co. *v.* State, 77 Tex. 367, 387, 12 S. W. 988, 13 S. W. 619.

May include a county order paid into the hands of the county clerk under orders of the court. 7 Cyc. 225 note 45.

18. Hence the word is applied to the money which an individual may possess, or the means he can employ for carrying on any enterprise or operation. Webster Dict. [*quoted* in Boulle *v.* Tompkins, 5 Redf. Surr. (N. Y.) 472, 477].

19. Merrill *v.* Monticello, 22 Fed. 589, 596 [*citing* Bouvier L. Dict.; Webster Dict.].

20. Stephen *v.* Milnor, 24 N. J. Eq. 358, 376.

21. Century Dict.

Fundamental changes in the nature and purposes of a corporation see Mower *v.* Staples, 32 Minn. 284, 286, 20 N. W. 225.

"Fundamental error" see Laredo *v.* Russell, 56 Tex. 398, 402 [*quoted* in Hollywood

FUNDATIO PERFICIENS. See Foundation.

FUNDED DEBT.[22] A debt for the payment of the principal or interest of which some fund is appropriated;[23] a debt where provision is to be made for the annual raising by tax of the sum necessary to pay the interest and principal as they respectively mature;[24] a mortgage debt;[25] that part of the national debt for which certain funds are appropriated toward the payment of the interest.[26] (See Fund, and Cross-references Thereunder; and, generally, Municipal Corporations.)

FUNDING.[27] A term frequently applied to the process of collecting together a variety of outstanding debts against corporations, the principal of which was payable at short periods, and borrowing money on the bonds or stocks of the corporation to pay them off; the principal of such bonds or stocks being made payable at periods comparatively remote;[28] and sometimes to the borrowing of a sufficient sum of money to discharge the claims against an estate by creating another debt in lieu thereof.[29] (See Fund, and Cross-references Thereunder;

v. Welhausen, 28 Tex. Civ. App. 541, 544, 68 S. W. 329]. See also Appeal and Error.

22. **The term "has a well defined signification."** Ketchum *v.* Buffalo, 14 N. Y. 356, 378, per Wright, J. [*quoted* in People *v.* Carpenter, 31 N. Y. App. Div. 603, 606, 52 N. Y. Suppl. 781].

Distinguished from "loan" in Ketchum *v.* Buffalo, 21 Barb. (N. Y.) 294, 306.

23. Ketchum *v.* Buffalo, 14 N. Y. 356, 367 [*quoted* in People *v.* Carpenter, 31 N. Y. App. Div. 603, 607, 52 N. Y. Suppl. 781].

As used in a constitution providing that no funded debt should be contracted for a municipal corporation, unless for a specific object, the term should be construed in its proper etymological sense, and means a debt requiring a variety of things to create it, and certain provisions to be made before it can be contracted, which insure the payment of the interest thereon and provide a sinking fund for the redemption of the principal of the debt, if it is protected by a law of the legislature binding on the corporation, or which in effect pledges all the taxable property for the payment of interest and principal. Ketchum *v.* Buffalo, 21 Barb. (N. Y.) 294, 306.

24. People *v.* Carpenter, 31 N. Y. App. Div. 603, 606, 52 N. Y. Suppl. 781.

Within the meaning of a general municipal law of a state relating to the different kinds of debts of a municipality grouped under certain subdivisions, the term includes all municipal indebtedness embraced within or evidenced by a bond, the principal of which is payable at a time beyond the current fiscal year of its issue, with periodical terms for the payment of interest, and where provision is made for payment by raising of the necessary funds by future taxation and the quasi-pledging in advance of the municipal revenue. People *v.* Carpenter, 31 N. Y. App. Div. 603, 608, 52 N. Y. Suppl. 781 [*cited* in Canandaigua *v.* Hayes, 90 N. Y. App. Div. 336, 345, 85 N. Y. Suppl. 488, where the court said: "We have no doubt that the bonds proposed to be issued [by a municipal corporation] constituted a funded debt within the meaning" of the general municipal law of New York].

25. Wells *v.* Wells, 24 N. Y. Suppl. 874, 875, 30 Abb. N. Cas. (N. Y.) 225.

As used in a will directing the payment from the proceeds of the sale of certain property of testator's funded debt, it is not ordinarily used in connection with the debts of an individual, but if so used, must necessarily refer to debts which are embodied in securities of a permanent character and to the payment of which certain property has been applied or pledged. Wells *v.* Wells, 24 N. Y. Suppl. 874, 875, 30 Abb. N. C. 225 [*citing* Ketchum *v.* Buffalo, 14 N. Y. 356; Imperial Dict.; Webster Dict.], where the expression "both funded and otherwise" as used in a will is construed.

26. Bouvier L. Dict. [*quoted* in Ketchum *v.* Buffalo, 14 N. Y. 356, 367 (*quoted* in People *v.* Carpenter, 31 N. Y. App. Div. 603, 606, 52 N. Y. Suppl. 781)].

27. **Funding of warrants** see Union Pac. R. Co. *v.* Buffalo County, 9 Nebr. 449, 453, 4 N. W. 53; 11 Cyc. 543 note 36.

28. Ketchum *v.* Buffalo, 14 N. Y. 356, 367 [*quoted* in People *v.* Carpenter, 31 N. Y. App. Div. 603, 606, 52 N. Y. Suppl. 781], where the court said: "Even in common parlance, the term has ever been made use of to describe an ordinary debt, growing out of a transaction with one individual and represented by a single instrument; as in this case. I think it is essential to the idea of a funded debt, even under the broadest use of that term, that the debt should be divided into parts or shares, represented by different instruments, so that such parts or shares may be readily transferable."

"Funding of a debt" is the pledging of a specific fund to keep down the interest and ultimately discharge the principal. Ketchum *v.* Buffalo, 14 N. Y. 356, 378 [*citing* Bouvier L. Dict.; 1 Encyclopædia Am. 337; 1 McCullough Com. Dict. 689, and *quoted* in People *v.* Carpenter, 31 N. Y. App. Div. 603, 606, 52 N. Y. Suppl. 781]. "The expression, funding a debt has been sometimes incorrectly used to signify the aggregating of numerous floating debts of a municipal corporation, created at different times and upon different considerations, and borrowing money upon bond to pay off the whole." Ketchum *v.* Buffalo, 14 N. Y. 356, 379.

29. Lawrey *v.* Sterling, 41 Oreg. 518, 530, 69 Pac. 460 [*quoting* Ketchum *v.* Buffalo, 14 N. Y. 356, 367].

FUNDED DEBT; FUNDING SYSTEM; and, generally, CORPORATIONS; EXECUTORS AND ADMINISTRATORS.)

FUNDING SYSTEM. A plan which provides that on the creation of a public loan funds shall immediately be formed and secured by law for the payment of the interest, and also for the gradual redemption of the capital itself.[30] (See FUND, and Cross-references Thereunder.)

FUNDS.[31] Includes BANK-NOTES,[32] *q. v.*; bills;[33] bonds;[34] CAPITAL,[35] *q. v.*; CASH,[36] *q. v.*; CERTIFICATES OF DEPOSIT,[37] *q. v.*; checks;[38] drafts;[39] moneys;[40]

30. Merrill *v.* Monticello, 22 Fed. 589, 596 [*citing* Bouvier L. Dict.; Webster Dict.]. "The National debt of England consists of many different loans, all of which are included in the term funds. . . . In America the funding system has been fully developed. The general government, as well as those of all the States, have found it necessary to anticipate their revenue for the promotion of public works and other purposes. The many magnificent works of internal improvement, which have added so much to the wealth of the country, were mainly constructed with money borrowed by the states. The Canals of New York, and many railroads in the Western States, owe their existence to the system. The funding system enables the government to raise money in exigencies, and to spread over many years the taxation which would press too severely on one." Bouvier L. Dict. [*quoted* in Peene *v.* Carpenter, 31 N. Y. App. Div. 603, 609, 52 N. Y. Suppl. 781].

31. "This is not a legal term, with a well settled meaning, but is a term in common use." Perry *v.* Hunter, 2 R. I. 80, 87.

As used in connection with other words the word "funds" has often received judicial interpretation; as for instance as used in the following expressions: "British funds" (see Kerr *v.* Middlesex Hospital, 2 De G. M. & G. 576, 581, 17 Jur. 49, 22 L. J. Ch. 355, 1 Wkly. Rep. 93, 17 Eng. L. & Eq. 66, 51 Eng. Ch. 450, 42 Eng. Reprint 996); "funds of any company incorporated by Act of Parliament" (see Harris *v.* Harris, 29 Beav. 107, 9 Wkly. Rep. 444, 54 Eng. Reprint 567); "government or parliamentary stocks or funds" (see Brown *v.* Brown, 4 Kay & J. 704, 706, 6 Wkly. Rep. 613); "my fortune now standing in the funds" (see Grainger *v.* Slingsby, 8 De G. M. G. 385, 389, 2 Jur. N. S. 276, 25 L. J. Ch. 573, 4 Wkly. Rep. 623, 57 Eng. Ch. 299, 44 Eng. Reprint 438); "settled funds" (Kane *v.* Kane, 16 Ch. D. 207, 50 L. J. Ch. 72, 43 L. T. Rep. N. S. 667, 29 Wkly. Rep. 212); "monies in the public funds" (see Howard *v.* Kay, 27 L. J. Ch. 448, 6 Wkly. Rep. 361); "on the security of the funds or property" (see *Re* British Provident L., etc., Assur. Soc., 33 L. J. Ch. 535, 538, 10 L. T. Rep. N. S. 674, 12 Wkly. Rep. 894); "property in the English funds" (see Johnson *v.* Digby, 8 L. J. Ch. O. S. 38, 41); "public parochial funds" (see Rex *v.* St. Peter, 1 B. & Ad. 916, 922, 20 E. C. L. 743); "stocks or funds of a foreign government" (see Cadett *v.* Earle, 5 Ch. D. 710, 712).

"'Diversion of funds' and 'insufficient funds,' in so far as the meaning of the word 'funds' is concerned, must, it seems to us, be construed to mean precisely the same thing." Miller *v.* Bradish, 69 Iowa 278, 289, 28 N. W. 594.

"Funds invested" used in a statute has been held to mean funds invested in a form like bonds or mortgages. Hartford First Unitarian Soc. *v.* Hartford, 66 Conn. 368, 374, 34 Atl. 89.

32. Hasbrook *v.* Palmer, 11 Fed. Cas. No. 6,188, 2 McLean 10.

33. January *v.* Henry, 3 T. B. Mon. (Ky.) 8; U. S. *v.* Greve, 65 Fed. 488, 490.

34. U. S. *v.* Greve, 65 Fed. 488, 490.

35. Louisville *v.* Werne, 80 S. W. 224, 225, 25 Ky. L. Rep. 2196, tax exemption statute.

In its narrower and more usual sense, it signifies "capital," as opposed to "interest" or "income." Sweet L. Dict.

36. Campbell *v.* Pettengill, 7 Me. 126, 129, 20 Am. Dec. 349 (holding that the term does not include good and available demands until the same are collected); Ayres *v.* Lawrence, 59 N. Y. 192, 198.

May mean more than cash in hand see Miller *v.* Bradish, 69 Iowa 278, 280, 28 N. W. 594.

"Funds in hand," in a will directing the education of testator's children from the proceeds of his plantation and the funds in hand, means cash on hand and money due the estate by bond, note, or other security. Marrow *v.* Marrow, 45 N. C. 148, 156. See Parsons *v.* Armor, 3 Pet. (U. S.) 413, 430, 7 L. ed. 724.

Pay "when in funds" see Gillespie *v.* Mather, 10 Pa. St. 28, 33.

37. Montgomery County *v.* Cochran, 121 Fed. 17, 21, 57 C. C. A 261 [*citing* People *v.* McKinney, 10 Mich. 54; State *v.* Hill, 47 Nebr. 456, 66 N. W. 541; Bork *v.* People, 16 Hun (N. Y.) 476; State *v.* Krug, 12 Wash. 288, 41 Pac. 126; Byrom *v.* Brandreth, L. R. 16 Eq. 475, 477, 42 L. J. Ch. 824, 21 Wkly. Rep. 942].

Funds subject to deposit see 13 Cyc. 817.

38. January *v.* Henry, 3 T. B. Mon. (Ky.) 8; Montgomery County *v.* Cochran, 121 Fed. 17, 21, 57 C. C. A. 261; U. S. *v.* Greve, 65 Fed. 488, 490.

39. Reed *v.* Board of Education, 39 Ohio St. 635, 638; U. S. *v.* Greve, 65 Fed. 488, 490.

40. *Illinois.*— Galena Ins. Co. *v.* Kupfer, 28 Ill. 332, 335, 81 Am. Dec. 284.

Indiana.— Jewett *v.* State, 94 Ind. 549, 551.

Maine.— Hatch *v.* Dexter First Nat. Bank, 94 Me. 348, 351, 47 Atl. 908, 80 Am. St. Rep. 401.

North Dakota.— Capital Bank *v.* School Dist. No. 53, 1 N. D. 479, 492, 48 N. W. 363.

Rhode Island.— Perry *v.* Hunter, 2 R. I.

notes;[41] securities;[42] specie;[43] stocks;[44] stock of a national bank;[45] treasury certificates;[46] evidences of money lent to the government,[47] constituting a national debt,[48] for which interest is paid at prescribed intervals;[49] government securities;[50] government or public resources;[51] the public funded debt of the government;[52] in fact every description of currency which is used in commercial transactions.[53] Nevertheless the word has other meanings;[54] thus, it may mean according to the context,[55] and in its broader signification, property of every kind,[56] property specially

80, 87, where the court said that the term does not mean "a chattel or furniture or the like."

United States.—U. S. *v.* Greve, 65 Fed. 488, 490; Hasbrook *v.* Palmer, 11 Fed. Cas. No. 6,188, 2 McLean 10.

Moneys and funds" as used in an indictment charging embezzlement means moneys and some other species or character of funds. The word "funds" is not used in the alternative as a synonym. It is used in the conjunctive. "Its function is, as no doubt the purpose of its use was, to add something to the term 'moneys.'" U. S. *v.* Greve, 65 Fed. 488, 490.

In an action on a note payable in "Philadelphia funds" it was said that Philadelphia funds were not money, but consisted of notes, checks, or bills upon banks or individuals in Philadelphia, or of other means of procuring money there. January *v.* Henry, 3 T. B. Mon. (Ky.) 8.

The expression "in funds," as used in an acceptance of a bill, to be paid as soon as the acceptor should find himself "in funds," means that he must have had money in hand to pay it, which condition is not fulfilled by his having other property in his hands of greater value than the sum named in the bill. Carlisle *v.* Hooks, 58 Tex. 420, 421 [*citing* Gentry *v.* Owen, 14 Ark. 396, 60 Am. Dec. 549; Nagle *v.* Homer, 8 Cal. 353; Marshall *v.* Clary, 44 Ga. 511, 513; Liggett *v.* Weed, 7 Kan. 273; Gallery *v.* Prindle, 14 Barb. (N. Y.) 186, 190; Rowlett *v.* Lane, 43 Tex. 274; Salinas *v.* Wright, 11 Tex. 572; Mitchell *v.* Clay, 8 Tex. 443, 446; Daniel Neg. Instr. 508, 514].

41. January *v.* Henry, 3 T. B. Mon. (Ky.) 8; U. S. *v.* Greve, 65 Fed. 488, 490.

42. Perry *v.* Hunter, 2 R. I. 80, 87.

43. Hasbrook *v.* Palmer, 11 Fed. Cas. No. 6,188, 2 McLean 10.

An equivalent to "New York funds" is their value; their value in specie or in current paper which passes at a discount. Hasbrook *v.* Palmer, 11 Fed. Cas. No. 6,188, 2 McLean 10.

44. Ayers *v.* Lawrence, 59 N. Y. 192, 198; U. S. *v.* Greve, 65 Fed. 488, 490; Hasbrook *v.* Palmer, 11 Fed. Cas. No. 6,188, 2 McLean 10.

45. Ramsey *v.* Cox, 28 Ark. 366, 368.

46. Ramsey *v.* Cox, 28 Ark. 366, 368.

47. Ramsey *v.* Cox, 28 Ark. 366, 368; Webster Dict. [*cited* in Perry *v.* Hunter, 2 R. I. 80, 87].

48. Webster Dict. [*cited* in Perry *v.* Hunter, 2 R. I. 80, 87].

National debt.—"When a State has a variety of loans at varying rates of interest, it may consolidate them into a single debt at a uniform interest. For example, in 1751 several descriptions of English debt were consolidated into one fund bearing a uniform interest of three per cent, an operation which gave origin to the familiar term 'consols' ('consolidated funds'). In the early days of the English national debt, a special tax or fund was appropriated to the payment of the interest on each particular loan. This was the original meaning of 'funds,' a term which has now come to signify the national debt generally. So, also, the origin of the term 'funded,' as applied to a debt which has been recognized as at least quasi-permanent, and for the payment of the interest on which regular provision is made." Peene *v.* Carpenter, 31 N. Y. App. Div. 603, 608, 52 N. Y. Suppl. 781 [*quoting* Encyclopædia Britt.].

49. Ramsey *v.* Cox, 28 Ark. 366, 368.

50. Perry *v.* Hunter, 2 R. I. 80, 87.

51. Slingsby *v.* Grainger, 7 H. L. Cas. 273, 280, 5 Jur. N. S. 1111, 28 L. J. C. P. 616, 11 Eng. Reprint 109.

"When 'public funds' are referred to, taxes, customs, etc., appropriated by the government to the discharge of its obligations, are understood." Ayers *v.* Lawrence, 59 N. Y. 192, 198.

The term "funds" in the expression "the whole of my fortune now standing in the Funds," as used in a will, can have, in ordinary parlance, but one meaning. "'The Funds' standing alone and without context, mean the funds provided by the various Acts of Parliament for the payment of the annuities granted by the Government, and forming part of the National Debt." Slingsby *v.* Grainger, 7 H. L Cas. 273, 285, 5 Jur. N. S. 1111, 28 L. J. Ch. 616, 11 Eng. Reprint 109.

52. "And in the latter sense a municipal obligation and public debt, created by or in the name of the local or municipal government, may be regarded as technically within the term 'funds' of the corporate body." Ayers *v.* Lawrence, 59 N. Y. 192, 198.

53. Hasbrook *v.* Palmer, 11 Fed. Cas. No. 6,188, 2 McLean 10. To the same effect is Montgomery County *v.* Cochran, 121 Fed. 17, 21, 57 C. C. A. 261.

54. Lacy *v.* Holbrook, 4 Ala. 88, 90.

55. Lacy *v.* Holbrook, 4 Ala. 88, 90; Miller *v.* Bradish, 69 Iowa 278, 280, 28 N. W. 594; Hatch *v.* Dexter First Nat. Bank, 94 Me. 348, 351, 47 Atl. 908, 80 Am. St. Rep. 401.

56. Matter of Tatum, 61 N. Y. App. Div. 513, 516, 70 N. Y. Suppl. 634 [*citing* Miller *v.* Bradish, 69 Iowa 278, 280, 28 N. W. 594; Chamberlain *v* Taylor, 105 N. Y. 185, 191, 11 N. E. 625; Anderson L. Dict.],

contemplated as something to be used or applied in the payment of debts,[57] the proceeds of sales of real and personal estate and the proceeds of any other assets converted into funds,[58] not only property and resources in possession, but the credit and power of taxation and of borrowing money in anticipation of taxation and other processes and means by which the municipal corporation may be charged pecuniarily, or the taxable property within its limits burdened.[59] (Funds: Guaranty, see Insurance Titles. Medium of Payment, see PAYMENT. Of College, see COLLEGES AND UNIVERSITIES. Of County, see COUNTIES. Of Municipal Corporation, see MUNICIPAL CORPORATIONS. Of School or School-District, see SCHOOLS AND SCHOOL-DISTRICTS. Of State, see STATES. Of Town, see TOWNS. Trust, see TRUSTS. See also CREDIT; CURRENCY; DOLLAR; FUND; FUNDED DEBT; FUND HOLDER; FUNDING; FUNDING OF A DEBT; FUNDING SYSTEM.)

FUNERAL. A word used to convey the same meaning as obsequies, a rite or ceremony pertaining to burial.[60] (See, generally, CEMETERIES; DEAD BODIES.)

FUNERAL EXPENSES.[61] See EXECUTORS AND ADMINISTRATORS.

FUR. A term applied to those skins which are chiefly valuable on account of the fur.[62] (See, generally, CUSTOMS DUTIES.)

FURIOSI NULLA VOLUNTAS EST. A maxim meaning "A madman has no free will."[63]

FURIOSUS ABSENTIS LOCO EST. A maxim meaning "A madman is considered as absent."[64]

FURIOSUS NULLUM NEGOTIUM CONTRAHERE (GERERE) POTEST (QUIA NON INTELLIGIT QUOD AGIT). A maxim meaning "A lunatic cannot make a contract."[65]

FURIOSUS NULLUM NEGOTIUM CONTRAHERE POTEST. A maxim meaning "A madman can contract nothing [can make no contract]."[66]

FURIOSUS SOLO FURORE PUNITUR. A maxim meaning "A madman is only punished by his madness."[67]

FURIOSUS STIPULARE NON POTEST NEC ALIQUID NEGOTIUM AGERE, QUI NON INTELLIGIT QUID AGIT. A maxim meaning "A madman who knows not what he does cannot make a bargain, nor transact any business."[68]

FURLONG. As defined by statute, two hundred and twenty imperial standard yards.[69]

FURNACE.[70] A structure used to melt ores in making metals, or to melt metals in working them;[71] an establishment or mechanical contrivance by which iron is made or manufactured from the ore;[72] a structure of which the prominent indispensable concept is some sort of an inclosed combustion chamber with top,

where the term is considered in connection with "invest" and "pay."

57. Miller *v.* Bradish, 69 Iowa 278, 280, 28 N. W. 594 [*citing* Bouvier L. Dict.; Webster Dict.].

58. Doane *v.* Millville Mut. M. & F. Ins. Co., 43 N. J. Eq. 522, 533, 11 Atl. 739.

59. Ayers *v.* Lawrence, 59 N. Y. 192, 198.

60. Graddy *v.* Western Union Tel. Co., 43 S. W. 468, 469, 19 Ky. L. Rep. 1455.

61. See also 9 Cyc. 253 note 61.

62. Astor *v.* Union Ins. Co., 7 Cow. (N. Y.) 202, 214 [*cited* in Seeberger *v.* Schlesinger, 152 U. S. 581, 14 S. Ct. 729, 38 L. ed. 560], distinguishing "fur" from "skins."

Hat bodies, which are made partly of the soft substance which is taken from the skin of rabbits and partly from the wool of sheep, are not "fur," within the meaning of the English Carriers' Act. Mayhew *v.* Nelson, 6 C. & P. 58, 59, 25 E. C. L. 320.

"Fur skins of all kinds not dressed in any manner" see U. S. *v.* Bennet, 66 Fed. 299, 300, 13 C. C. A. 446.

63. Wharton L. Lex.

64. Bouvier L. Dict. [*citing* Dig. 50, 17, 24, 1].

65. Bouvier L. Dict. [*citing* Dig. 50, 17, 5; 1 Story Contr. § 78].

66. Black L. Dict.

67. Broom Leg. Max. [*citing* Coke Litt. 247*b*].

68. Wharton L. Lex.

Applied in Beverley's Case, 4 Coke 123*b*, 126*a*, Fitzh. N. Br. 532.

69. St. 41 & 42 Vict. c. 49, § 11.

70. Distinguished from "forge" in Boston *v.* Sarni, 175 Mass. 357, 358, 56 N. E. 607; Rogers *v.* Danforth, 9 N. J. Eq. 289, 296.

"Furnace plant" as used in a lease see Clifton *v.* Montague, 40 W. Va. 207, 213, 21 S. E. 858, 52 Am. St. Rep. 872, 33 L. R. A. 449.

71. Boston *v.* Sarni, 175 Mass. 357, 358, 56 N. E. 607.

72. Rogers *v.* Danforth, 9 N. J. Eq. 289, 293.

A blast furnace makes cast iron direct from

sides, and bottom, or floor.[73] (See Forge; and, generally, Manufactures; Mines and Minerals.)

FURNISH.[74] To equip or fit out; supply what is necessary or fitting; to fit oneself out;[75] to supply;[76] to supply with anything necessary or needful;[77] to supply or provide;[78] to provide for;[79] to provide for use;[80] to provide, or supply anything wanted by another;[81] to give away;[82] to let one have;[83] to sell;[84] to find;[85] obtain or to procure.[86]

FURNISHED.[87] Fitted with what is appropriate or necessary;[88] ordered for and delivered to.[89]

FURNISHER. One who supplies or fits out,[90] or furnishes or provides supplies of any kind.[91]

FURNISHING. A sample.[92] (See Furnish.)

the ore. Rogers *v.* Danforth, 9 N. J. Eq. 289, 296.

73. Bryce Bros. Co. *v.* National Glass Co., 116 Fed. 186, 190, 53 C. C. A. 611.

"A furnace may have one stack or more, in which case it is sometimes called furnaces, and sometimes a furnace with stacks of a specified number." Negaunee Iron Co. *v.* Iron Cliffs Co., 134 Mich. 264, 285, 96 N. W. 468.

74. "The term . . . is somewhat indefinite." State *v.* Freeman, 27 Vt. 520, 522.

Distinguished from "arm" (*In re* Mexico, 28 Fed. 148, 151); "convey" (9 Cyc. 858 note 9).

"'Equip, furnish,' and 'fit out'" distinguished from "arm" see Atty.-Gen. *v.* Sillem, 2 H. & C. 431, 575.

"Furnish and set up, . . . in complete and first-class working order" see Hawkins *v.* Graham, 149 Mass. 284, 288, 21 N. E. 312, 14 Am. St. Rep. 422.

"Furnishing and completing" the asylum see 9 & 10 Vict. c. 84, § 10.

75. Standard Dict. [*quoted* in Newsome *v.* Oxford County, 28 Ont. 442, 444].

76. Wyatt *v.* Larimer, etc., Irr. Co., 1 Colo. App. 480, 29 Pac. 906, 913; People *v.* McGuire, 27 N. Y. App. Div. 593, 606, 50 N. Y. Suppl. 520; Century Dict. [*quoted* in Southern Express Co. *v.* State, 107 Ga. 670, 673, 33 S. E. 637, 73 Am. St. Rep. 146, 46 L. R. A. 417.

"Furnish evidence against himself" see *In re* Emery, 107 Mass. 172, 181, 9 Am. Rep. 22.

77. *In re* The City of Mexico, 28 Fed. 148, 151.

"To furnish or supply necessarily carries with it the idea of ownership, property in, or dominion over the thing furnished by the one who furnishes." Southern Express Co. *v.* State, 107 Ga. 670, 673, 33 S. E. 637, 73 Am. St. Rep. 146, 46 L. R. A. 417.

78. Delp *v.* Bartholomay Brewing Co., 123 Pa. St. 42, 52, 15 Atl. 871.

"Furnish" a recruit see Roberts *v.* Field, 27 Mich. 337, 346.

"Furnish liquor" as defined by statute see Vt. St. (1894) § 4461.

79. Erskine *v.* Erskine, 13 N. H. 436, 443.

"Furnishes the supply" of water see Southend Waterworks Co. *v.* Howard, 13 Q. B. D. 215, 216, 48 J. P. 469, 53 L. J. Q. B. 354, 32 Wkly. Rep. 923.

"Provide, furnish, or supply" goods for parochial relief see Davies *v.* Harvey, L. R. 9 Q. B. 433, 438, 43 L. J. M. C. 121, 30 L. T. Rep. N. S. 629, 22 Wkly. Rep. 733.

80. Century Dict. [*quoted* in Southern Express Co. *v.* State, 107 Ga. 670, 673, 33 S. E. 637, 73 Am. St. Rep. 146, 46 L. R. A. 417].

Cooking food for men may be included in "furnishes supplies" for them. Winslow *v.* Urquhart, 39 Wis. 260, 268; Young *v.* French, 35 Wis. 111, 118.

"Furnishing and improving" see Delp *v.* Bartholomay Brewing Co., 123 Pa. St. 42, 52, 15 Atl. 871.

81. Francis *v.* State, 21 Tex. 280, 285.

82. Dukes *v.* State, 77 Ga. 738, 739; State *v.* Tague, 76 Vt. 118, 56 Atl. 535; State *v.* Freeman, 27 Vt. 520, 522.

83. People *v.* Neumann, 85 Mich. 98, 102, 48 N. W. 290. See also Siegel *v.* People, 106 Ill. 89.

Furnishing weapons to minors see Ga. Code (1895), § 344.

84. State *v.* Freeman, 27 Vt. 520, 522.

85. Gregory *v.* Tomlinson, 68 Vt. 410, 412, 35 Atl. 350 [*citing* Brown *v.* Burrington, 36 Vt. 40].

86. Feldenheimer *v.* Woodbury County, 56 Iowa 379, 380, 9 N. W. 315.

87. "Furnished or fitted" see 32 & 33 Vict. c. 115, § 9 (1).

88. Standard Dict. [*quoted* in Newsome *v.* Oxford County, 28 Ont. 442, 447].

"Furnished complete" in a contract see Grove *v.* Miles, 58 Ill. 338, 339.

"Material furnished" see McNeal Pipe, etc., Co. *v.* Howland, 111 N. C. 615, 619, 16 S. E. 857, 20 L. R. A. 743.

89. The James H. Prentice, 36 Fed. 777, 782.

"Goods furnished . . . along the line of" a certain railroad contemplates their shipment over such railroad and delivery by it to the purchaser. Silvestri *v.* Missocchi, 165 Mass. 337, 341, 43 N. E. 114.

90. Webster Int. Dict. [*quoted* in Southern Express Co. *v.* State, 107 Ga. 670, 673, 33 S. E. 637, 73 Am. St. Rep. 146, 46 L. R. A. 417].

91. Century Dict. [*quoted* in Southern Express Co. *v.* State, 107 Ga. 670, 673, 33 S. E. 637, 73 Am. St. Rep. 146, 46 L. R. A. 417.

92. Attaway *v.* Hoskinson, 37 Mo. App. 132, 136 [*citing* Worcester Dict.].

FURNITURE.[93] Anything which furnishes,[94] or equips;[95] that which supplies,[96] or fits a house for use,[97] or which furnishes or is added to the interior of a house for use or convenience;[98] that with which anything is furnished,[99] supplied,[1] or fitted out;[2] equipment or outfit;[3] a supply of necessary, convenient, or ornamental articles,[4] for any business or residence,[5] or with which a residence is supplied;[6] specifically, household articles, especially the main movables used in the living apartments, and made chiefly of wood, as chairs, tables and desks;[7] whatever must be supplied to a house, a room, or the like, to make it hospitable, convenient or agreeable; goods, vessels, utensils and other appendages necessary or convenient for housekeeping; whatever is added to the interior of a house or apartment for use or convenience.[8] The term ordinarily relates to movable chattels;[9] personal chattels in the use of a family;[10] and applies to all personal chattels which may contribute to the use or convenience of the householder or the ornament of the house;[11] thus the word has been held to include fixtures,[12] billiard tables,[13] brass knobs, window shutters, etc.,[14] bronzes and statuary,[15] carpets, cookstoves and utensils,[16] china,[17] crockery,[18] curiosities, mineralogical or other speci-

93. "[It] is a comprehensive term" (Rasure *v.* Hart, 18 Kan. 340, 344, 26 Am. St. Rep. 772); and "a word of very broad meaning" (State *v.* Segel, 60 Minn. 507, 509, 62 N. W. 1134; Alsup *v.* Jordan, 69 Tex. 300, 305, 6 S. W. 831, 5 Am. St. Rep. 53).

"Furniture and effects belonging to a prison" see 40 & 41 Vict. c. 21, § 56.

94. Bell *v.* Golding, 27 Ind. 173, 179; Webster Dict. [*quoted* in Crossman *v.* Baldwin, 49 Conn. 490, 491; Allen *v.* Grove Springs Hotel, etc., Co., 85 Hun (N. Y.) 537, 540, 33 N. Y. Suppl. 355].

95. Dayton *v.* Tillou, 1 Rob. (N. Y.) 21, 28.

96. Hoope's Estate, 6 Phila. (Pa.) 364, 365.

97. Ruffin *v.* Ruffin, 112 N. C. 102, 106, 16 S. E. 1021.

98. Iden *v.* Sommers, 61 N. Y. Super. Ct. 177, 179, 18 N. Y. Suppl. 779 [*citing* Crossman *v.* Baldwin, 49 Conn. 490; Bell *v.* Golding, 27 Ind. 173; Shaw *v.* Lenke, 1 Daly (N. Y.) 487; Burrill L. Dict.].

99. Bell *v.* Golding, 27 Ind. 173, 179; Webster Dict. [*quoted* in Crossman *v.* Baldwin, 49 Conn. 490, 491; Allen *v.* Grove Springs Hotel, etc., Co., 85 Hun (N. Y.) 537, 540, 35 N. Y. Suppl. 355]; Standard Dict. [*quoted* in Com. *v.* Gombert, 11 Pa. Dist. 435, 438; Newsome *v.* Oxford County, 28 Ont. 442, 444].

1. Brody *v.* Crittenden, 106 Iowa 524, 527, 76 N. W. 1009 [*citing* Bell *v.* Golding, 27 Ind. 173]; Webster Dict. [*quoted* in Crossman *v.* Baldwin, 49 Conn. 490, 491; Allen *v.* Grove Springs Hotel, etc., Co., 85 Hun (N. Y.) 527, 540, 35 N. Y. Suppl. 355]; Standard Dict. [*quoted* in Com. *v.* Gombert, 11 Pa. Dist. 435, 438; Newsome *v.* Oxford County, 28 Ont. 442, 444].

2. Webster Dict. [*quoted* in Crossman *v.* Baldwin, 49 Conn. 490, 491; Allen *v.* Grove Springs, etc., Hotel Co., 85 Hun (N. Y.) 537, 540, 33 N. Y. Suppl. 355].

3. Standard Dict. [*quoted* in Com. *v.* Gombert, 11 Pa. Dist. 435, 438; Newsome *v.* Oxford County, 28 Ont. 442, 444].

4. Alsup *v.* Jordan, 69 Tex. 300, 305, 6 S. W. 831, 5 Am. St. Rep. 53; Webster Dict. [*quoted* in Crossman *v.* Baldwin, 49 Conn. 490, 491; Allen *v.* Grove Springs Hotel, etc., Co., 85 Hun (N. Y.) 537, 540, 33 N. Y. Suppl. 355].

5. Alsup *v.* Jordan, 69 Tex. 300, 305, 6 S. W. 831, 5 Am. St. Rep. 53; Webster Dict. [*quoted* in Crossman *v.* Baldwin, 49 Conn. 490, 491; Allen *v.* Grove Springs Hotel, etc., Co., 85 Hun (N. Y.) 537, 540, 33 N. Y. Suppl. 355], where the term is also defined as including a supply of intellectual stores or equipments.

6. Alsup *v.* Jordan, 69 Tex. 300, 305, 6 S. W. 831, 5 Am. St. Rep. 53.

7. Standard Dict. [*quoted* in Com. *v.* Gombert, 11 Pa. Dist. 435, 438].

8. Bell *v.* Golding, 27 Ind. 173, 179; Webster Dict. [*quoted* in Com. *v.* Gombert, 11 Pa. Dist. 435, 438].

9. Fore *v.* Hibbard, 63 Ala. 410, 412 [*quoted* in Newsome *v.* Oxford County, 28 Ont. 442, 443].

10. Bouvier L. Dict. [*quoted* in Crossman *v.* Baldwin, 49 Conn. 490, 491; Allen *v.* Grove Springs Hotel, etc., Co., 85 Hun (N. Y.) 537, 540, 35 N. Y. Suppl. 355].

11. Marquam *v.* Sengfelder, 24 Oreg. 2, 13, 32 Pac. 676 [*citing* Roper Legacies, § 269].

Gift of furniture in a particular house means furniture permanently there. Wilkins *v.* Jodrell, 11 Wkly. Rep. 588, 589, where Stuart, V. C., said: "No doubt 'plate' may pass under the description of 'furniture.'"

12. Slanning *v.* Style, 3 P. Wms. 334, 337, 24 Eng. Reprint 1089. See also Vucci *v.* North British, etc., Ins. Co., 88 N. Y. Suppl. 986, 987.

13. See 6 Cyc. 1027 note 42.

14. Iden *v.* Sommers, 61 N. Y. Super. Ct. 177, 179, 18 N. Y. Suppl. 779 [*citing* Worcester Dict.].

15. Patrons' Mut. Aid Soc. *v.* Hall, 19 Ind. App. 118, 49 N. E. 279, 282.

16. Ruffin *v.* Ruffin, 112 N. C. 102, 107, 16 S. E. 1021.

17. Patrons' Mut. Aid Soc. *v.* Hall, 19 Ind. App. 118, 49 N. E. 279, 281; Endicott *v.* Endicott, 41 N. J. Eq. 93, 96, 3 Atl. 157; Hele *v.* Gilbert, 2 Ves. 430, 28 Eng. Reprint 275. *Contra*, Ruffin *v.* Ruffin, 112 N. C. 102, 107, 16 S. E. 1021.

18. See *infra*, note 35.

mens, and even statues, when they are employed in domestic use or as ornaments of a residence,[19] linen,[20] paintings,[21] pianos,[22] pictures,[23] plate used in a family,[24] for it is not confined in its meaning to such things as are necessaries to a family,[25] embracing about everything with which a house or anything else is or can be furnished.[26] Yet on the other hand the word as used in its ordinary signification has been understood not to include silverware, china, glassware, books, or portraits attached to the wall that are not generally essential to the comfort of housekeepers;[27] a library of books though it is a small library;[28] wines, liquors, and groceries;[29] coffee, sugar, and apples;[30] second-hand tools,[31] silver coins, trinkets, and things of that nature;[32] or ornamental articles of great value.[33] The term is very general both in meaning and application; and its meaning changes so as to take the color of, or be in accord with, the subject to which it is applied;[34] thus as

19. Dayton *v.* Tillou, 1 Rob. (N. Y.) 21, 28 [*citing* Bunn *v.* Winthrop, 1 Johns. Ch. (N. Y.) 329; Cole *v.* Fitzgerald, 1 Sim. & S. 189, 1 Eng. Ch. 189 [*affirmed* in 1 L. J. Ch. O. S. 91, 3 Russ. 301, 24 Rev. Rep. 169, 3 Eng. Ch. 301, 38 Eng. Reprint 588].

20. Patrons' Mut. Aid Soc. *v.* Hall, 19 Ind. App. 118, 49 N. E. 279, 282; Endicott *v.* Endicott, 41 N. J. Eq. 93, 96, 3 Atl. 157; Cremorne *v.* Antrobus, 7 L. J. Ch. O. S. 88, 91, 5 Russ. 312, 31 Rev. Rep. 117, 38 Eng. Reprint 1044. And see *infra*, note 35.

21. See 6 Cyc. 1027 note 42.

22. Crossman *v.* Baldwin, 49 Conn. 490, 491; Lee *v.* Gorham, 165 Mass. 130, 131, 42 N. E. 556; Allen *v.* Grove Springs Hotel, etc., Co., 85 Hun (N. Y.) 537, 539, 33 N. Y. Suppl. 355; Alsup *v.* Jordan, 69 Tex. 300, 305, 6 S. W. 831, 5 Am. St. Rep. 53; 6 Cyc. 1027 note 42. *Contra*, Tanner *v.* Billings, 18 Wis. 163, 164, 86 Am. Dec. 755.

"A piano has come to be a part of the furnishing of private dwellings, and especially so of hotels." Allen *v.* Grove Springs Hotel, etc., Co., 85 Hun (N. Y.) 537, 539, 33 N. Y. Suppl. 355 [*citing* Crossman *v.* Baldwin, 49 Conn. 490 (where it is held that a piano is part of the furniture of a hotel, when kept for the use of guests); Browne Ind. Interp. Common Words & Phrases 140].

23. Patrons' Mut. Aid Soc. *v.* Hall, 19 Ind. App. 118, 49 N. E. 279, 282; Endicott *v.* Endicott, 41 N. J. Eq. 93, 96, 3 Atl. 157; Dayton *v.* Tillou, 1 Rob. (N. Y.) 21, 28; Cremorne *v.* Antrobus, 7 L. J. Ch. O. S. 88, 91, 5 Russ. 312, 31 Rev. Rep. 117, 38 Eng. Reprint 1044.

24. Patrons' Mut. Aid Soc. *v.* Hall, 19 Ind. App. 118, 49 N. E. 279, 282; Endicott *v.* Endicott, 41 N. J. Eq. 93, 96, 3 Atl. 157; Dayton *v.* Tillou, 1 Rob. (N. Y.) 21, 28; Bunn *v.* Winthrop, 1 Johns. Ch. (N. Y.) 329, 338 [*citing* 2 Roper Legacies 239, 249, 255]; Cremorne *v.* Antrobus, 7 L. J. Ch. O. S. 88, 91, 5 Russ. 312, 31 Rev. Rep. 117, 38 Eng. Reprint 1044; Wilkins *v.* Jodrell, 11 Wkly. Rep. 588, 589. *Contra*, La. Civ. Code (1900), art. 477.

25. Alsup *v.* Jordan, 69 Tex. 300, 305, 6 S. W. 831, 5 Am. St. Rep. 53.

26. Rasure *v.* Hart, 18 Kan. 340, 344, 26 Am. Rep. 772.

27. Ruffin *v.* Ruffin, 112 N. C. 102, 107, 16 S. E. 1021. *Contra*, as to china see *supra*, note 17.

28. Bridgman *v.* Dove, 3 Atk. 201, 202, 26 Eng. Reprint 917. To same effect see Ruffin *v.* Ruffin, 112 N. C. 102, 107, 16 S. E. 1021; La. Civ. Code (1900), art. 477. *Contra*, Dayton *v.* Tillou, 1 Rob. (N. Y.) 21, 28. See also Kelly *v.* Powlett, Ambl. 605, Dick. 559, 27 Eng. Reprint 393.

29. Marquam *v.* Sengfelder, 24 Oreg. 2, 13, 32 Pac. 676 [*citing* Roper Legacies, § 269]. *Contra*, as to wines see Dayton *v.* Tillou, 1 Rob. (N. Y.) 21, 28.

30. Whitmore *v.* Bowman, 4 Greene (Iowa) 148, 149.

31. State *v.* Segel, 60 Minn. 507, 509, 62 N. W. 1134 [*citing* Endicott *v.* Endicott, 41 N. J. Eq. 93, 3 Atl. 157; Kelly *v.* Powlet, Ambl. 605, Dick. 559, 27 Eng. Reprint 393; Nicholls *v.* Osborn, 2 P. Wms. 419, 24 Eng. Reprint 795; 1 Jarman Wills (758), 713].

32. Cremorne *v.* Antrobus, 7 L. J. Ch. O. S. 88, 91, 5 Russ. 312, 31 Rev. Rep. 117, 38 Eng. Reprint 1044.

33. Southampton Dock Co. *v.* Hill, 14 C. B. 243, 247, 108 E. C. L. 243.

34. Fore *v.* Hibbard, 63 Ala. 410 [*quoted* in Newsome *v.* Oxford County, 28 Ont. 442, 443], where the court said: "Thus, we hear of the furniture of a parlour, of a bedchamber, of a kitchen, of shops of various kinds, of a ship, of a horse, of a plantation, etc."

Thus it may embrace the appliances, implements, etc., used in carrying on a business. Fore *v.* Cooper, (Tex. Civ. App. 1896) 34 S. W. 341, 342 (barber shop); Newsome *v.* Oxford County, 28 Ont. 442, 443 (drug store); 6 Cyc. 1027 note 42 (decorated shoe sign).

Applied to an office, the term must include everything which is necessary for the furnishing of such office for the purpose of transacting such business as may properly be done therein (Newsome *v.* Oxford County, 28 Ont. 442, 444, "pens, ink, and paper"); the equipments of an office or public building; distinguished from furnishings (Standard Dict. [*quoted* in Com. *v.* Gombert, 11 Pa. Dist. 435, 438]).

In a contract for the sale of a drug store, its fixtures, and furniture, it includes movable furnishings in addition to fixtures. Fore *v.* Hibbard, 63 Ala. 410, 412 [*quoted* in Brody *v.* Chittenden, 106 Iowa 524, 527, 76 N. W. 1009; Newsome *v.* Oxford County, 28 Ont. 442, 443]. See also 6 Cyc. 1027 note 41.

applied to hotels, the term must, from the nature of the case, include everything which goes to the furnishing of a hotel for the purpose of using it as a hotel.[35] (Furniture: Exemption From Execution, see Exemptions. Fixtures, see Fixtures. Ships' Furniture, see Furniture of a Ship; Marine Insurance; Shipping. Subject to Chattel Mortgage, see Chattel Mortgages.)

FURNITURE OF A SHIP. A term which includes everything with which a ship requires to be furnished or equipped to make her seaworthy;[36] a ship's masts and rigging; also, her tackle and apparel, including her outfit of provisions.[37] (See Furniture; and, generally, Shipping.)

FUROR CONTRAHI MATRIMONIUM NON SINIT, QUIA CONSENSU OPUS EST. A maxim meaning "Insanity prevents marriage from being contracted, because consent is needed."[38]

FURTHER.[39] Used as an adjective, as an adverb, or as a verb. As an adjective,[40]

In an exemption statute, it means everything with which the residence of the debtor is furnished. Rasure *v.* Hart, 18 Kan. 340, 344, 26 Am. Rep. 772.

In a statute authorizing school trustees to buy furniture for schoolhouses, it embraces only such articles as were generally understood to be in general use in schoolhouses as a part of the furniture of the house, as distinguished from appliances and apparatus that may be used in instructing the scholars. McGee *v.* Franklin Pub. Co., 15 Tex. Civ. App. 216, 222, 39 S. W. 335.

When used in a will the term must always be construed by taking the attendant circumstances into consideration. Ruffin *v.* Ruffin, 112 N. C. 102, 107, 16 S. E. 1021; Fleming *v.* Burrows, 4 L. J. Ch. O. S. 115, 1 Russ. 276, 279, 25 Rev. Rep. 48, 38 Eng. Reprint 107. It is a word of large description, sufficient, if used in a will, to pass furniture of every kind (*Ex p.* Turquand, 14 Q. B. D. 636, 643, per Selborne, L. C. [*citing* Crawcour *v.* Salter, 18 Ch. D. 30, 51 L. J. Ch. 495, 45 L. T. Rep. N. S. 62, 30 Wkly. Rep. 21, and *quoted* in Newsome *v.* Oxford County, 28 Ont. 442, 444]), everything about the house that has been usually enjoyed therewith (Endicott *v.* Endicott, 41 N. J. Eq. 93, 96, 3 Atl. 157 [*citing* 2 Jarman Wills 352]).

"Furniture . . . as is usual to saloons" does not, as used in a fire policy, include a safe. Moriarty *v.* U. S. Fire Ins. Co., 19 Tex. Civ. App. 669, 670, 49 S. W. 132.

35. *Ex p.* Turquand, 14 Q. B. D. 636, 645 [*quoted* in Newsome *v.* Oxford County, 28 Ont. 442, 444], where Brett, M. R., said: "It is said that the custom only applies to such things as sofas, chairs, and tables. I suppose it may at least be said to apply to bedsteads. But what is the use of a bedstead for the purpose of carrying on an hotel if you have not sheets and blankets and counterpanes? What is the use of an hotel if it has not wash-hand basins, and washhand stands? You cannot carry on an hotel unless you have those things. Therefore linen and crockery must come within the custom. What is the use of attempting to carry on an hotel if you have not soup-tureens, wine glasses, and tumblers?"

All furniture in and belonging to a summer house see 6 Cyc. 1027 note 42.

36. Weaver *v.* The S. G. Owens, 29 Fed. Cas. No. 17,310, 1 Wall. Jr. 359 [*citing* Brough *v.* Whitemore, 4 T. R. 206, 2 Rev. Rep. 361, and *cited* in Newsome *v.* Oxford County, 28 Ont. 442, 443].

"Tackle, apparel, and furniture" of a vessel has been construed to include special apparatus or appliances on board a vessel engaged in a particular occupation, which is necessary to the prosecution of the business in which it is engaged. *In re* The Edwin Post, 11 Fed. 602, 606. See also Hoskins *v.* Pickersgill, 3 Dougl. 222, 223, 26 E. C. L. 152.

"Tackle, sails, apparel, furniture, and boats," has been construed to include "everything belonging to the vessel as a 'navigating ship.'" *In re* The Witch Queen, 30 Fed. Cas. No. 17,916, 3 Sawy. 201.

37. Standard Dict. [*quoted* in Newsome *v.* Oxford County, 28 Ont. 442, 444].

The term will include dunnage mats and separating cloths in a grain ship. Hogarth *v.* Walker, [1899] 2 Q. B. 401, 402, 68 L. J. Q. B. 888, 48 Wkly. Rep. 47 [*affirmed* in [1900] 2 Q. B. 283, 5 Com. Cas. 292, 69 L. J. Q. B. 634, 82 L. T. Rep. N. S. 744, 48 Wkly. Rep. 545].

38. Bouvier L. Dict. [*citing* 1 Blackstone Comm. 439].

Applied in Wightman *v.* Wightman, 4 Johns. Ch. (N. Y.) 343, 345 [*citing* 1 Blackstone Comm. 439; Dig. 23, 2, 16, 2]. See also *Ex p.* Turing, 1 Ves. & B. 140, 141, 35 Eng. Rep. 55.

39. **It is not a word of strict legal or technical import.** It may be used to introduce a negation or qualification of some precedent matter. Jones *v.* Creveling, 19 N. J. L. 127, 133 [*citing* Walker Dict.; Webster Dict.].

40. **In connection with other words** as an adjective the word has often received judicial construction; as for instance as used in the following phrases: "Further and other" (see Matter of Bolton, L. R. 5 Exch. 82, 84, 39 L. J. Ch. 51, 21 L. T. Rep. N. S. 720, 18 Wkly. Rep. 351); "further" and "then" (see Porter *v.* Howe, 173 Mass. 521, 528, 54 N. E. 255); "further charge" (see Aylesford *v.* Poulett, [1891] 1 Ch. 248, 258, 60 L. J. Ch. 204, 64 L. T. Rep. N. S. 336, 39 Wkly. Rep. 241; Rushbrook *v.* Hood, 5 C. B. 131, 136, 11 Jur. 931, 17 L. J. C. P. 58, 57 E. C. L. 131); "further civil and criminal jurisdiction" (see Landers *v.* Staten Island

ADDITIONAL,[41] *q. v.*; other;[42] future.[43] As an adverb a word of comparison often used in the sense of ALSO,[44] *q. v.*; likewise;[45] moreover or furthermore; something beyond what has been said.[46] As a verb, to help or assist; to promote; to advance.[47] (Further: Advance, see CHATTEL MORTGAGES; MORTGAGES. Appeal, see APPEAL AND ERROR. Assurance, see COVENANTS; ESTOPPEL. Hearing, see CRIMINAL LAW.)

FURTHER ADVANCES. See FUTURE ADVANCES.

FURTHERANCE. The act of furthering, or helping forward, or promotion, or advancement.[48]

FURTHER APPEAL. See APPEAL AND ERROR.

FURTHER ASSURANCE. See COVENANTS.

FURTHER COMPENSATION. Additional compensation to some compensation before mentioned.[49]

FURTHER HEARING. See CRIMINAL LAW.[50]

FURTUM. A simple theft.[51]

FURTUM EST CONTRECTATIO REI ALIENÆ FRAUDULENTA, CUM ANIMO FURANDI, INVITO ILLO DOMINO CUJUS RES ILLA FUERAT. A maxim meaning "Theft is the fraudulent handling of another's property, with an intention of

R. Co., 53 N. Y. 450, 457); "further conditions" (see Beekman *v.* Third Ave. R. Co., 153 N. Y. 144, 159, 47 N. E. 277); "further consideration money" (see Barrs *v.* Lea, 33 L. J. Ch. 437, 438, 10 L. T. Rep. N. S. 567, 3 New Rep. 635, 12 Wkly. Rep. 525); "further considerations" (see Powell *v.* Powell, L. R. 10 Ch. 130, 134, 44 L. J. Ch. 122, 31 L. T. Rep. N. S. 737, 23 Wkly. Rep. 201); "further enacted" (see Brooke *v.* Clarke, 1 B. & Ald. 396, 403); "further moneys" (see Cochrane *v.* Green, 9 C. B. N. S. 448, 469, 30 L. J. C. P. 97, 3 L. T. Rep. N. S. 475, 9 Wkly. Rep. 124, 99 E. C. L. 448); "further or additional" (see Graham *v.* Wade, 16 East 29, 32); "further proceedings" (see Wolf *v.* Meyer, 12 Ohio St. 431, 432; Root *v.* Sweeney, 17 S. D. 179, 183, 95 N. W. 916; Reg. *v.* Brocklehurst, [1892] 1 Q. B. 566, 570, 17 Cox C. C. 409, 56 J. P. 182, 61 L. J. M. C. 48, 65 L. T. Rep. N. S. 714, 40 Wkly. Rep. 64); "further term" (see Austin *v.* Stevens, 38 Hun (N. Y.) 41, 42); "further time" (see Lewis *v.* Meginiss, 25 Fla. 589, 590, 6 So. 169); "further waste" (see Episcopate Fund *v.* Matteson, 12 N. Y. St. 370, 371); "provided further" (see Grey *v.* Greenville, etc., R. Co., 59 N. J. Eq. 372, 384, 46 Atl. 638); "until further order" (see Peareth *v.* Marriott, 22 Ch. D. 182, 193, 52 L. J. Ch. 221, 48 L. T. Rep. N. S. 170, 31 Wkly. Rep. 68); "without further acknowledgment or evidence" (see Larson *v.* Dickey, 39 Nebr. 463, 475, 58 N. W. 167, 42 Am. St. Rep. 595); "without further demand" (see Fifty Associates *v.* Howland, 5 Cush. (Mass.) 214, 217); "without further notice" (see Mitchell *v.* Milwaukee, 18 Wis. 92, 95).

41. London, etc., Bank *v.* Parrott, 125 Cal. 472, 484, 58 Pac. 164, 73 Am. St. Rep. 64 ("further credit"); Jones *v.* Creveling, 19 N. J. L. 127, 133 [*citing* Walker Dict.; Webster Dict.]; Thompson *v.* Southern R. Co., 116 Fed. 890, 891 ("the further sum of").

"Further development," in a contract providing that if, in making certain developments, more water was made to flow than plaintiff was entitled to, then plaintiff was to have the option of purchasing such excess of water, less the amount actually paid by it in making such further development, referred to the development further or beyond what was necessary to make up the deficiency. Chapea Water Co. *v.* Chapman, 144 Cal. 366, 372, 77 Pac. 990.

42. Pennsylvania L. Ins., etc., Co. *v.* Loughlin, 139 Pa. St. 612, 619, 21 Atl. 163.

43. O'Fallon *v.* Nicholson, 56 Mo. 238, 241, as a release from further liability.

44. Sumner *v.* American Home Missionary Soc., 64 N. H. 321, 322, 10 Atl. 617.

45. Jones *v.* Creveling, 19 N. J. L. 127, 133 [*citing* Walker Dict.; Webster Dict.]; Doe *v.* Turner, 2 D. & R. 398, 16 E. C. L. 96.

46. Jones *v.* Creveling, 19 N. J. L. 127, 133 [*citing* Walker Dict.; Webster Dict.]; Doe *v.* Turner, 2 D. & R. 398, 16 E. C. L. 96.

"The terms 'item,' 'further,' 'moreover,' are commonly used in the beginning of a new devise or bequest, without indicating any particular intention in the disposition of the property" on the part of the testator. Burr *v.* Sim, 1 Whart. (Pa.) 252, 264, 29 Am. Dec. 48 [*citing* Evans *v.* Knorr, 4 Rawle (Pa.) 66, 67]. See also Doe *v.* Turner, 2 D. & R. 398, 16 E. C. L. 96.

47. Century Dict. See also *In re* Moseley, 4 T. L. R. 301.

48. Powers *v.* Com., 70 S. W. 644, 652, 24 Ky. L. Rep. 1007.

49. Hitchings *v.* Van Brunt, 38 N. Y. 335, 338.

50. See also Reg. *v.* Oxley, 6 A. & E. 256, 263, 264, 51 E. C. L. 256.

51. Spinetti *v.* Atlas Steamship Co., 80 N. Y. 71, 78, 79, 36 Am. Rep. 579 [*citing* Taylor *v.* Liverpool, etc., Steamship Co., L. R. 9 Q. B. 546, 43 L. J. Q. B. 205, 30 L. T. Rep. N. S. 714, 23 Wkly. Rep. 752], where the court said: "In such [insurance] policies the word 'thieves' has been held to refer to theft with violence, to '*latrocinium*' as opposed to '*furtum*.'"

stealing, against the will of the proprietor, whose property it was."[52] (See FURTUM; and generally, LARCENY.)

FURTUM NON EST UBI INITIUM HABET DETENTIONIS PER DOMINIUM REI. A maxim meaning "It is not theft where the commencement of the detention arises through the owner of the thing."[53]

FUSE. A piece of wire about six inches in length, made of very soft material, which melts when it comes in contact with a high potential current of electricity;[54] a safety appliance in general use upon cars run by electrical power, and consists of a piece of metallic alloy, similar in nature to soft solder, one or more inches in length, connected at each end with a small circular piece of copper.[55] (See, generally, ELECTRICITY.)

FUSION.[56] In political parlance, the act of coalescing two political parties, or the state of coalescence; used, also, attributively, as a fusion ticket.[57]

FUTURE.[58] That which may be or will be hereafter.[59] (Future: Acquired Property — In General, see ASSIGNMENTS; CHATTEL MORTGAGES; DEEDS; MORT-

52. Wharton L. Lex.

53. Bouvier L. Dict. [*citing* 3 Inst. 107].

54. Chicago Tel. Co. *v.* Northwestern Tel. Co., 199 Ill. 324, 360, 65 N. E. 329.

55. Cassady *v.* Old Colony St. R. Co., 184 Mass. 156, 157, 68 N. E. 10, 63 L. R. A. 285, where it is said: "These pieces of copper are called the terminals, and they are so cut that they can easily be slipped under the thumb screws and clamped in place. The fuse and thumb screws are held in what is called the fuse-box."

"The purpose in using the fuse is to protect the wiring and the motors from an excessive current of electricity. It is constructed to withstand something less than the maximum current which the wires and motors are capable of carrying. When the current of electricity exceeds the maximum strength of the fuse, the metallic alloy melts with more or less of a report and flame and, the electrical path between the trolley wire and motors being thereby broken, the wire and motor are saved from possible harm. As the safety valve in a locomotive engine allows the escape of steam when the pressure is too strong for safety or for the ordinary operation of the engine so in electric cars the fuse is used to protect the electrical mechanism from injury which might otherwise arise from the variations in the electrical current which are practically unavoidable in the operation of the trolley cars." Cassady *v.* Old Colony St. R. Co., 184 Mass. 156, 158, 68 N. E. 10, 63 L. R. A. 285.

56. Fusion of common law with equity see 2 Cyc. 517 note 62.

57. Nicholls *v.* Barrick, 27 Colo. 432, 443, 62 Pac. 202 [*quoting* Standard Dict., and *citing* Century Dict.].

58. In connection with other words the word "future" has often received judicial construction; as for instance as used in the following phrases: "Any Act whether past or future" (see Reg. *v.* London, [1892] 1 Q. B. 664, 667, 61 L. J. M. C. 104, 66 L. T. Rep. N. S. 678, 40 Wkly. Rep. 575, 17 Cox C. C. 526, 56 J. P. 421); "at any future date" (see Houghton *v.* Orgar, 1 T. L. R. 653, 654); "future act" (see 42 & 43 Vict. c. 49, § 49);-"future action" (see Bangor *v.* Brunswick, 33 Me. 352, 355); "future cargo" (see Langton *v.* Horton, 1 Hare 549, 556, 6 Jur. 910, 11 L. J. Ch. 299, 23 Eng. Ch. 549); "future conveyances" (see Day *v.* Bardwell, 97 Mass. 246, 255; Swan *v.* Littlefield, 4 Cush. (Mass.) 574, 576; Weiner *v.* Farnum, 2 Pa. St. 146, 150, 152; Hutchins *v.* Taylor, 12 Fed. Cas. No. 6,953); "future earnings" (see Somers *v.* Keliher, 115 Mass. 165, 167; 10 Cyc. 1088; 6 Cyc. 1082 note 63); "future editions" (see Hone *v.* Kent, 6 N. Y. 390, 395, 396); "future election" (see Oswald *v.* Berwick-Upon-Tweed, 5 H. L. Cas. 856, 868, 2 Jur. N. S. 743, 25 L. J. Q. B. 383, 4 Wkly. Rep. 738, 10 Eng. Reprint 1139); "future estates or interests" (see James *v.* Salter, 3 Bing. N. Cas. 544, 554, 5 L. J. C. P. 112, 4 Scott 168, 32 E. C. L. 253; Doe *v.* Liversedge, 13 L. J. Exch. 61, 63, 11 M. & W. 517); "future extensions or branches" (see Morris, etc., R. Co. *v.* Sussex R. Co., 20 N. J. Eq. 542, 561); "future increase" (see Fightmaster *v.* Beasley, 7 J. J. Marsh. (Ky.) 410, 411; Robinson *v.* Robinson, 2 Bibb (Ky.) 76, 77; Marlin *v.* Marlin, 3 Yerg. (Tenn.) 546, 547; Reno *v.* Davis, 4 Hen. & M. (Va.) 283, 289); "future interests" (see 6 Cyc. 1041, 1043 note 9); "future offenses" (see 8 Cyc. 1034 note 46); "future proceeding" (see *In re* Gates, 26 Hun (N. Y.) 179, 181); "future purchasers" (see 8 Cyc. 664 note 7); "future qualification" (see *In re* La Mancia Irr., etc., Co., L. R. 8 Ch. 548, 554, 42 L. J. Ch. 465, 28 L. T. Rep. N. S. 652, 21 Wkly. Rep. 518); "future real and personal estate" (see *In re* Garnett, 33 Ch. D. 300, 304, 55 L. J. Ch. 773, 779, 55 L. T. Rep. N. S. 562); "future tenancy" (see 44 & 45 Vict. c. 49, § 57); "present and future personal estate" (see Sayer *v.* Dufaur, 11 Q. B. 325, 338, 63 E. C. L. 325); "present or any future husband" (see *Re* Pickup, 1 Johns. & H. 389, 392, 30 L. J. Ch. 278, 4 L. T. Rep. N. S. 85, 9 Wkly. Rep. 251).

A future interest is contingent while the person in whom or the event upon which it is limited to take effect remains uncertain. N. D. Rev. Codes (1899), § 3294; S. D. Civ. Code (1903), § 210.

Contract conditional upon future event see 9 Cyc. 615.

59. Abbott L. Dict.

GAGES; PLEDGES; WILLS; Lien of Judgment on, see JUDGMENTS. Advances,[60] see CHATTEL MORTGAGES; MORTGAGES. Estates — In General, see ESTATES; Assignability of, see ASSIGNMENTS; Restriction on Creation, see PERPETUITIES. See also FURTHER; and, generally, TIME.)

FUTURE ADVANCES. See CHATTEL MORTGAGES; MORTGAGES.

FUTURE DELIVERY. The purchase of a commodity for delivery during a month named in the future, named at the time of the purchase.[61] (See DEALING IN GRAIN; FUTURES; and, generally, GAMING.)

FUTURE ESTATE. See ESTATES.

FUTURES. See GAMING.

FUTURE TIME. See TIME.

GABBERT. A Scotch word meaning a lighter.[62]

GAG. In dramatic language, a word, a sentence, or a passage of two or more sentences, not in a drama as composed by the author, but interpolated, and uttered on the stage by a player.[63]

GAGE. See PAWNBROKERS; PLEDGES.

GAIN.[64] As a noun, ACQUISITION,[65] *q. v.*; that which is acquired or comes as a benefit; profit;[66] ADVANTAGE,[67] *q. v.*; something obtained or acquired; it is not limited to pecuniary gain.[68] Sometimes the term is applied to an indemnity against loss under a contract.[69] (See GAINS.)

GAINS. Profits.[70] (See GAIN.)

60. See 10 Cyc. 804, 1089.

61. Watte *v.* Wickersham, 27 Nebr. 457, 465, 43 N. W. 259.

62. Hunter *v.* McGown, 1 Bligh 573, 581, 4 Eng. Reprint 210, where the term is distinguished from "a ship or vessel, within the intent and meaning of the statute 26 Geo. III. c. 86, § 2."

63. Keene *v.* Wheatley, 14 Fed. Cas. No. 7,644, where the court said: "Gags, in general, are violations of dramatic propriety. But theatrical regulations which prohibit them are not always enforced with strictness, and are sometimes much relaxed as to comedians in public favor. Sometimes gags are sanctioned by the manager's approval at the rehearsal of a play. They are, occasionally, in comedies of the lighter kind, licensed more or less, if not encouraged, by dramatic authors, who attend rehearsals of their own plays."

64. In connection with "extort" see People *v.* Griffin, 2 Barb. (N. Y.) 427, 430; Mann *v.* State, 47 Ohio St. 556, 563, 26 N. E. 226, 11 L. R. A. 656. "Employed for purposes of gain" see Mather *v.* Lawrence, [1899] 1 Q. B. 1000, 1002, 63 J. P. 455, 68 L. J. Q. B. 714, 80 L. T. Rep. N. S. 600, 47 Wkly. Rep. 559.

"Formed for the purpose of gain" see Smith *v.* Anderson, 15 Ch. D. 247, 260, 50 L. J. Ch. 39, 43 L. T. Rep. N. S. 329, 29 Wkly. Rep. 21 [*citing* Sykes *v.* Beadon, 11 Ch. D. 170, 48 L. J. Ch. 522, 40 L. T. Rep. N. S. 243, 27 Wkly. Rep. 464, and *cited* in *In re* Siddall, 29 Ch. D. 1, 7, 54 L. J. Ch. 682, 52 L. T. Rep. N. S. 114, 33 Wkly. Rep. 509; Crowther *v.* Thorley, 48 J. P. 292, 50 L. T. Rep. N. S. 43, 45, 32 Wkly. Rep. 330].

"Gaining a suit" see Moss *v.* Richie, 50 Mo. App. 75, 79.

65. *In re* Arthur Average Assoc., L. R. 10 Ch. 542, 546 note, 44 L. J. Ch. 569, 32 L. T. Rep. N. S. 713, 23 Wkly. Rep. 939.

66. Rex *v.* James, 6 Ont. L. Rep. 35, 38; Century Dict. [*quoted* in Thorn *v.* De Breteuil, 86 N. Y. App. Div. 405, 416, 83 N. Y. Suppl. 849].

67. Rex *v.* James, 6 Ont. L. Rep. 35, 38, where it is said that it may be derived indirectly as well as directly.

68. *In re* Arthur Average Assoc., L. R. 10 Ch. 542, 546 note, 44 L. J. Ch. 569, 32 L. T. Rep. N. S. 713, 23 Wkly. Rep. 939, where Jessel, M. R., said: "We should have to add the word 'pecuniary' so to limit it. And still less is it limited to commercial profits. The word used, it must be observed, is not 'gains,' but 'gain,' in the singular. Commercial profits, no doubt, are gain, but I cannot find anything limiting gain simply to a commercial profit."

69. *In re* Padstow Total Loss, etc., Assur. Assoc., 20 Ch. D. 137, 148, 51 L. J. Ch. 344, 45 L. T. Rep. N. S. 774, 30 Wkly. Rep. 326.

70. Mersey Docks, etc. *v.* Lucas, 8 App. Cas. 891, 905, 48 J. P. 212, 53 L. J. Q. B. 4, 49 L. T. Rep. N. S. 781, 32 Wkly. Rep. 34 [*quoted* in Thorn *v.* De Breteuil, 83 N. Y. Suppl. 849, 86 N. Y. App. Div. 405, 416].

"'Gains' or 'profits' are equipollent with the terms 'interest,' 'income' or 'profits' of personal property. Gains certainly is sufficiently generic to refer to whatever is obtained from the use of that property." Thorn *v.* De Breteuil, 86 N. Y. App. Div. 405, 417, 83 N. Y. Suppl. 849.

"Gains, profits, and income" of every person from any source whatever, as used in a statute providing for the levy and collection of a tax see Gray *v.* Darlington, 15 Wall. (U. S.) 63, 65, 21 L. ed. 45.

"'Profits and gains' is equipollent to 'rents and profits.'" Thorn *v.* De Breteuil, 86 N. Y. App. Div. 405, 415, 83 N. Y. Suppl. 849.

"Gains of a trade" is that which is gained by trading, for whatever purposes it is used,

GALE.[71] A wind blowing at the rate of forty to sixty miles an hour,[72] a wind having a velocity of forty to seventy miles an hour.[73] A right to open a mine or quarry in consideration of a rental or royalty.[74]

GALLANT. Honorable; magnanimous; chivalrous; noble.[75]

GALL CURE. A term descriptive of a medicine.[76] (See TRADE-MARKS AND TRADE-NAMES.)

GALLEIN. A dye which produces blue and purple shades, and is made of two molecules or parts of pyrogallic acid and one molecule or part of phthalic acid.[77]

GALLON.[78] A liquid measure containing two hundred and thirty-one cubic inches, or four quarts;[79] the Winchester wine gallon of two hundred and thirty-one inches;[80] the gallon of commerce, which is the wine gallon;[81] the standard gallon of the United States,[82] and in use in its customs service,[83] and internal revenue.[84] (See, generally, CUSTOMS DUTIES; INTERNAL REVENUE; WEIGHTS AND MEASURES.)

whether it is gained for the benefit of a community, or for the benefit of individuals. Mersey Docks, etc. *v.* Lucas, 8 App. Cas. 891, 905, 48 J. P. 212, 53 L. J. Q. B. 4, 49 L. T. Rep. N. S. 781, 32 Wkly. Rep. 34.

71. **A heavy gale** is defined as a wind having a velocity of eighty miles an hour. Missouri Pac. R. Co. *v.* Columbia, 65 Kan. 390, 401, 69 Pac. 338, 58 L. R. A. 399 [*citing* Webster Dict.].

72. The Snap, 24 Fed. 292, 293, holding that a wind blowing at the rate of twenty-two miles an hour was only a brisk wind, and not a gale.

73. Missouri Pac. R. Co. *v.* Columbia, 65 Kan. 390, 401, 69 Pac. 338, 58 L. R. A. 399 [*citing* Standard Dict.].

74. English L. Dict.

"The term 'galee' or 'galees'" as defined by statute, "shall respectively include all persons holding or having any interest in or under any gale or gales." 34 & 35 Vict. c. 85, § 2.

Declaration of interest conferred on a galee by the grant of a gale see 24 & 25 Vict. c. 40, § 1.

Three gales see James *v.* Reg., 5 Ch. D. 153, 160.

75. Century Dict.

"A gallant or meritorious deed," as used in the expression "on account of any gallant or meritorious deed in the discharge of his [a policeman's] duty, "is a personal specific act; it speaks for itself, and in its nature excludes a competitive examination. 'Meritorious police service' admits of competitive examination, is not specific, and opens the door to favoritism." People *v.* Knox, 166 N. Y. 444, 452, 60 N. E. 17 [*distinguishing* People *v.* Knox, 48 N. Y. App. Div. 477, 62 N. Y. Suppl. 940].

76. Standing alone, it cannot be monopolized as a trade-mark. Bickmore Gall Cure Co. *v.* Karns Mfg. Co., 126 Fed. 573, 574.

77. Pickhardt *v.* U. S., 67 Fed. 111, 112, 14 C. C. A. 341, where the court said: "The source of commercial supply of pyrogallic acid is from nut-galls or other vegetable matter. The present source of commercial supply of phthalic acid is from coal tar."

78. **The expression "gallons of proof spirit"** is not intended to be descriptive of the kind or strength of the spirit distilled, but only of the quantity according to the statute standard. U. S. *v.* Foye, 25 Fed. Cas. No. 15,157, 1 Curt. 364.

79. Bouvier L. Dict. [*quoted* in Nichols *v.* Beard, 15 Fed. 435, 437; 16 Op. Atty.-Gen. 359; 360]; Senate Ex. Doc. No. 27, 34th Cong. 3d Sess.

Of larger quantity than "pint."— In common understanding a charge of a sale of a pint of brandy means a sale of that particular quantity, and not of more. That a pint is less than five gallons is a part of the English language. State *v.* Lavake, 26 Minn. 526, 6 N. W. 339, 37 Am. Rep. 415 [*citing* State *v.* Munch, 22 Minn. 67].

80. Nichols *v.* Beard, 15 Fed. 435, 437 [*citing* Appleton Cyc.]; 16 Op. Atty.-Gen. 359, 360 [*quoting* Appleton Cyc.].

81. Nichols *v.* Beard, 15 Fed. 435, 437.

82. Nichols *v.* Beard, 15 Fed. 435, 437 [*citing* Webster Dict.].

"'The United States standard gallon is to the British imperial standard gallon nearly as 5 is to 6,' which gives our standard gallon as 231 cubic inches." Nichols *v.* Beard, 15 Fed. 435, 437 [*quoting* Heyl U. S. Import Duties, pt. 3, 53].

83. Nichols *v.* Beard, 15 Fed. 435, 437 [*citing* Worcester Dict.]; 16 Op. Atty.-Gen. 359, 360 [*quoting* Worcester Dict.].

"The wine-gallon of 231 cubic inches contains 8,355 pounds avoirdupois of distilled water and is the Government or customs gallon of the United States, and the legal gallon of each State in which no law exists fixing a State or statute gallon." 16 Op. Atty.-Gen. 359, 360 [*quoting* Worcester Dict.].

84. Hollender *v.* Magone, 38 Fed. 912, 914.

As defined by statute wherever used in the internal revenue law, relating to beer, lager beer, ale, porter, and other similar fermented liquors, it shall be held and taken to mean a wine gallon, the liquid measure containing two hundred and thirty-one cubic inches (20 U. S. St. at L. 351 [U. S. Comp. St. (1901) p. 2188] [*quoted* in Hollender *v.* Magone, 38 Fed. 912, 914]); and in all sales of spirits it shall be held to be a gallon of proof-spirit, according to the standard prescribed in the statute establishing a standard of such spirits, set forth and declared for the inspection and gauging of spirits throughout

GALLOON. A narrow, tapelike fabric used for binding hats, shoes, etc.[85] (See, generally, Customs Duties.)

GALLOWS. A beam laid over either one or two posts from which malefactors are hanged.[86] (See, generally, Criminal Law.)

GAMBIA. A term which is synonymous with terra japonica.[87]

GAMBLE.[88] To game or play for money.[89] (See Gambler; and, generally, Disorderly Houses; Gaming.)

GAMBLER.[90] In common parlance a person who follows or practices games of chance or skill with the expectation and purpose of thereby winning money or other property.[91] (See Gamble; and, generally, Disorderly Houses; Gaming.)

GAMBLING. See Gaming.

GAMBLING APPARATUS. An implement or device used for the purpose of gambling.[92] (See Gambling Device; and, generally, Disorderly Houses; Gaming.)

GAMBLING DEN. (See Gambling Place.)

GAMBLING DEVICE.[93] An invention often used to determine the question as to who wins and who loses, that risk their money on a contest or chance of any kind;[94] anything which is used as a means of playing for money or other thing of value, so that the result depends more largely on chance than skill;[95]

the United States (20 U. S. St. at L. 351 [U. S. Comp St. (1901) p. 2108]).

"The standard gallon and its parts," as defined by statute, "are the units or standards of measure of capacity for liquids, from which all other measures of liquids are derived and ascertained." Cal. Pol. Code (1899), § 3216; Mont. Pol. Code (1895), § 3127.

85. U. S. *v.* Graef, 127 Fed. 688, 689, 62 C. C. A. 414, holding that certain woven articles from one to two and one-half inches wide, chiefly used as hat bands for trimming men's hats, are not "galloons," within the meaning of that word as it is used in a tariff act.

86. Wharton L. Lex. See also Wachter *v.* Quenzer, 29 N. Y. 547, 550.

87. Hallett *v.* Smythe, 11 Fed. Cas. No. 5,959.

88. **Derivation.**— The word "gamble" is a derivation from the Anglo-Saxon "gamen," signifying to play. People *v.* Todd, 4 N. Y. Suppl. 25, 28, 6 N. Y. Cr. 203, 224.

89. Buckley *v.* O'Niel, 113 Mass. 193, 18 Am. Rep. 466. See also Bennett *v.* State, 2 Yerg. (Tenn.) 472, 474, holding that it is inclusive of hazarding and betting as well as play.

90. **A common gambler is defined by statute** as one who engages as dealer, gamekeeper, or player in any gambling or banking game, where money or property is dependent upon the result (People *v.* O'Malley, 52 N. Y. App. Div. 46, 47, 64 N. Y. Suppl. 843 [*quoting* N. Y. Pen. Code, § 344]) or, a person who owns a place for gambling, or who hires or allows a room to be used for such purpose, or who engages as dealer, game-keeper or player, in any gambling or banking game (Lyman *v.* Shenandoah Social Club, 39 N. Y. App. Div. 459, 462, 37 N. Y. Suppl. 372 [*citing* N. Y. Pen. Code, § 344]). See also People *v.* McKenna, 62 N. Y. App. Div. 327, 328, 70 N. Y. Suppl. 1057; People *v.* Jerome, 34 Misc. (N. Y.) 575, 577, 70 N. Y. Suppl. 377; People *v.* Dewey, 11 N. Y. Suppl. 602, 603 [*affirmed* in 128 N. Y. 606, 27 N. E. 1017].

91. Buckley *v.* O'Niel, 113 Mass. 193, 18 Am. Rep. 466. See also Stearnes *v.* State, 21 Tex. 692, 694.

The offense of being a common gambler is analogous to the offense of maintaining a nuisance. "[It] consists in having acquired that character by acts of gambling, three or more acts being necessary for conviction." State *v.* Groves, 21 R. I. 252, 254, 43 Atl. 181 [*citing* State *v.* Melville, 11 R. I. 417].

92. Coolidge *v.* Choate, 11 Metc. (Mass.) 79, 83 [*cited* in Com. *v.* Adams, 160 Mass. 310, 311, 35 N. E. 851].

93. **The term has no settled and definite meaning,** and is nowhere defined in the [Oreg.] Code nor by the common law. State *v.* Mann, 2 Oreg. 238, 240.

"Device" defined see 14 Cyc. 283.

94. Lyman *v.* Brucker, 26 Misc. (N. Y.) 594, 598, 56 N. Y. Suppl. 767 [*quoting* Portis *v.* State, 27 Ark. 360, 362; State *v.* Grimes, 49 Minn. 443, 446, 52 N. W. 42], where the court said: "It is evident that gambling devices include all instruments, implements, devices or means which are made and used in unlawful gaming."

In order to constitute a gambling device, there must be some tangible adapted device or design for the purpose of playing a game of chance for money. A game is nothing tangible, and is not adapted nor can it be used in playing a game of chance. The game is the result produced by the use of the device, and the prohibition of the section [Oreg. Code Cr. Proc. § 666] is evidently against the use of the device instead of the result of it. Hence the term does not embrace a game of cards. State *v.* Mann, 2 Oreg. 238, 240.

95. *In re* Lee Tong, 18 Fed. 253, 257, 9 Sawy. 333 [*citing* Wharton Cr. L. § 1465].

"Every game devised and played for the purpose of gaming, and not for amusement or some innocent purpose, 'is a gambling device' within the meaning and intention of the law, and as such indictable, by whatever

a gaming device.[96] (See Gambling Apparatus; and, generally, Disorderly Houses; Gaming.)

GAMBLING PLACE. A place where persons assemble for the purpose of gaming for money.[97] (See, generally, Disorderly Houses; Gaming.)

GAMBLING POLICY. A policy where the persons for whose use it issues have no pecuniary interest in the life insured.[98] (See, generally, Life Insurance.)

GAME. See Animals; Gaming.

name or designation it may be characterized." State *v.* Mann, 13 Tex. 61, 63.

Any table or the device, when necessarily adapted to the use and necessarily used in carrying on any gambling game, is a gambling device in contemplation of law, although such table may have been originally designed for and ordinarily adapted to lawful uses. Jones *v.* Territory, 5 Okl. 536, 541, 49 Pac. 934.

96. State *v.* Nelson, 19 Mo. 393, 395; State *v.* Mohr, 55 Mo. App. 329, 331.

97. Buckley *v.* O'Niel, 113 Mass. 193, 18 Am. Rep. 466.

"Gambling hell" is, by the practice of good writers and by common usage, a more intense and emphatic term applied to a notorious place of promiscuous and public resort for the purpose of gaming; a place devoted to business of that description. Buckley *v.* O'Niel, 113 Mass. 193, 18 Am. Rep. 466.

98. Gambs *v.* Covenant Mut. L. Ins. Co., 50 Mo. 44, 47 [*citing* 3 Kent Comm. 368].

GAMING

By Alexander Stronach, Henry H. Skyles, Frank W. Jones, and Walter H. Michael*

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CROSS-REFERENCES

For Matters Relating to:
Betting on Election as Criminal Offense, see ELECTIONS.
Cheating at Play, see FALSE PRETENSES.
Fines Generally, see FINES.
Gambling on Sunday, see SUNDAY.
Gaming-Houses as Disorderly Houses, see DISORDERLY HOUSES.
Illegal Contracts Generally, see CONTRACTS.
Indictments and Informations Generally, see INDICTMENTS AND INFORMATIONS.
Lotteries, see LOTTERIES.
Penalties Generally, see PENALTIES.
Searches and Seizures Generally, see SEARCHES AND SEIZURES.
Self Incrimination, see WITNESSES.
Wager Policies of Insurance, see INSURANCE.
For General Matters Relating to Criminal Law and Criminal Procedure, see CRIMINAL LAW.

I. DEFINITION.*

"Gaming," which is substantially the same in meaning as "gambling,"[1] has been defined to be a contract between two or more persons by which they agree

1. *Florida.*— McBride *v.* State, 39 Fla. 442, 22 So. 711.
Kansas.— *In re* Smith, 54 Kan. 702, 39 Pac. 707.
Missouri.— State *v.* Nelson, 19 Mo. 393; State *v.* Mohr, 55 Mo. App. 529; State *v.* Dyson, 39 Mo. App. 297.
Nevada.— Evans *v.* Cook, 11 Nev. 69.
Ohio.— State *v.* Lark, 4 Ohio S. & C. Pl. Dec. 241, 3 Ohio N. P. 155.

* By Alexander Stronach.

to play by certain rules at cards, dice, or other contrivance, and that one shall be the loser and the other the winner.[2]

II. CRIMINAL LIABILITY.*

A. Origin of Liability — 1. At Common Law. It was not an indictable offense at common law to play at any game, even though money was wagered

Tennessee.— See Bennett *v.* State, 2 Yerg. 472.

Texas.— State *v.* Crowder, 39 Tex. 47. *Compare* Wolz *v.* State, 33 Tex. 331.

"The word gamble is a derivative of the word *gamen* from the Anglo-Saxon *gamen*, which means, to play." People *v.* Todd, 51 Hun (N. Y.) 446, 451, 4 N. Y. Suppl. 25.

2. Bouvier L. Dict. [*quoted* in Ansley *v.* State, 36 Ark. 67, 68, 38 Am. Rep. 29; People *v.* Todd, 51 Hun (N. Y.) 446, 452, 4 N. Y. Suppl. 25; People *v.* Fuerst, 13 Misc. (N. Y.) 304, 306, 34 N. Y. Suppl. 1115; State *v.* Lark, 4 Ohio S. & C. Pl. Dec. 241, 242, 3 Ohio N. P. 155]. And see Boyce *v.* O'Dell Commission Co., 109 Fed. 758.

Other definitions are: "An agreement between two or more, to risk money on a contest or chance of any kind, where one must be loser and the other gainer." Bell *v.* State, 5 Sneed (Tenn.) 507, 509 [*quoted* in McBride *v.* State, 39 Fla. 442, 447, 22 So. 711; State *v.* Shaw, 39 Minn. 153, 156, 39 N. W. 305]. And see Portis *v.* State, 27 Ark. 360, 362; Swigart *v.* People, 50 Ill. App. 181, 190 [*citing* Anderson L. Dict.; 2 Wharton Cr. L. § 1465]; Mitchell *v.* Orr, 107 Tenn. 534, 537, 64 S. W. 476.

"Anything which induces men to risk their money or property without any other hope of return than to get for nothing any given amount from another." Brua's Appeal, 55 Pa. St. 294, 298 [*quoted* in Justh *v.* Holliday, 2 Mackey (D. C.) 346, 349; McBride *v.* State, 39 Fla. 442, 447, 22 So. 711; Creston First Nat. Bank *v.* Carroll, 80 Iowa 11, 14, 45 N. W. 304, 8 L. R. A. 275].

"Playing for such stakes, as, added to the amusement, made the consequences dangerous to society." State *v.* Records, 4 Harr. (Del.) 554.

Engaging in "a contest of chance or skill, where the party in whose favor the result appears wins or receives something by reason thereof which he would not otherwise have received, and for which he paid no consideration." Cheek *v.* Com., 79 Ky. 359, 361.

"To play for a stake or prize; to use cards, dice, billiards or other instruments, according to certain rules, with a view to win money or other thing waged upon the issue of the contest." Webster Dict. [*quoted* in People *v.* Todd, 51 Hun (N. Y.) 446, 451, 4 N. Y. Suppl. 25]. And see *In re* Stewart, 21 Fed. 398.

"To play at any sport, especially to play for money or any other stake." Worcester Dict. [*quoted* in People *v.* Todd, 51 Hun (N. Y.) 446, 452, 4 N. Y. Suppl. 25]. And see State *v.* Stripling, 113 Ala. 120, 122, 123, 21 So. 409, 36 L. R. A. 81; Desgain *v.* Wessner, 161 Ind. 205, 67 N. E. 991; James *v.* State, 63 Md. 242, 252; State *v.* Fearson, 2 Md. 310, 312; People *v.* Weithoff, 51 Mich. 203, 214, 16 N. W. 442, 47 Am. Rep. 557; Dyson *v.* Mason, 22 Q. B. D. 351, 355, 16 Cox C. C. 575, 53 J. P. 262, 58 L. J. M. C. 55, 60 L. T. Rep. N. S. 265, 5 T. L. R. 231; Bew *v.* Harston, 3 Q. B. D. 454, 456, 47 L. J. M. C. 121, 39 L. T. Rep. N. S. 233, 26 Wkly. Rep. 915; Parsons *v.* Alexander, 5 E. & B. 263, 266, 1 Jur. N. S. 660, 24 L. J. Q. B. 277, 3 Wkly. Rep. 510, 85 E. C. L. 263; Patten *v.* Rhymer, 3 E. & E. 1, 6 Jur. N. S. 1030, 29 L. J. M. C. 189, 2 L. T. Rep. N. S. 352, 8 Wkly. Rep. 496, 107 E. C. L. 1.

"To play at any game of hazard for a stake; risk money or anything of value on the issue of a game of chance by either playing or betting on the play of others." Century Dict. [*quoted* in Lyman *v.* Brucker, 26 Misc. (N. Y.) 594, 598, 56 N. Y. Suppl. 767].

"To play a game, especially a game of chance, for stakes; to risk money or other possession on an event, chance or contingency; pretence to buy or sell depending upon chance variations in prices for gain." Standard Dict. [*quoted* in State *v.* Stripling, 113 Ala. 120, 122, 123, 21 So. 409, 36 L. R. A. 81].

"**To constitute gaming,** there must not only be betting upon the determination of an event, but the course of action to bring about such event, must have been originated and commenced with a view to determine the bet." State *v.* Smith, Meigs (Tenn.) 99, 101, 33 Am. Dec. 132 [*quoted* in Ansley *v.* State, 36 Ark. 67, 68, 38 Am. Rep. 29; Harrison *v.* State, 4 Coldw. (Tenn.) 195, 198].

"Illegal gaming implies gain and loss between the parties by betting, such as would excite a spirit of cupidity." People *v.* Sergeant, 8 Cow. (N. Y.) 139, 141.

"The essence of gaming and wagering is that one party is to win and the other to lose upon a future event, which at the time of the contract is of an uncertain nature — that is to say, if the event turns out one way, A. will lose, but if it turns out the other way he will win." Forget *v.* Ostigny, [1895] A. C. 318, 326, 64 L. J. P. C. 62, 72 L. T. Rep. N. S. 399, 11 Reports 474, 43 Wkly. Rep. 590.

Chance an element.— The term "gaming" implies something which in its nature depends on chance, or in which chance is an element. Dyson *v.* Mason, 22 Q. B. D. 351, 355, 16 Cox C. C. 575, 53 J. P. 262, 58 L. J. M. C. 55, 60 L. T. Rep. N. S. 265, 5 T. L. R. 231; Bew *v.* Harston, 3 Q. B. D. 454, 456, 47 L. J. M. C. 121, 39 L. T. Rep. N. S. 233, 26 Wkly. Rep. 915.

Betting distinguished.— "In the common usage of the two terms 'betting' and

*By Alexander Stronach (except F, 2, *infra*).

upon the result,[3] unless the playing was attended by such circumstances as would in themselves amount to a riot or a nuisance, or to an actual breach of the peace without the playing.[4]

2. By Statute — a. In General. Gaming generally or of certain kinds is now by statute an offense in England,[5] Canada,[6] and the several states of the Union.[7]

b. Validity and Construction of Statutes. It is well settled that state legislatures may enact statutes regulating or prohibiting gaming,[8] and that municipalities may, when duly authorized so to do, pass ordinances for this purpose.[9]

'gaming,' they may sometimes be employed interchangeably but not always. If two persons play at cards for money, they are said to be gambling or gaming; but they are gaming because they lay a wager or make a bet on the result of the game, and therefore to say they are betting is equally appropriate. If two persons lay a wager upon the result of a pending election, it will be said that they are betting, but not that they are gaming. There is no gaming in which the element of the wager is wanting, but there is betting which the term 'gaming' is not commonly made to embrace." People *v.* Weithoff, 51 Mich. 203, 210, 16 N. W. 442, 47 Am. Rep. 557.

3. *Arkansas.*— State *v.* Hawkins, 15 Ark. 259; Norton *v.* State, 15 Ark. 71.

Maryland.— James *v.* State, 63 Md. 242.

Virginia.—Com. *v.* Shelton, 8 Gratt. 592.

United States.— U. S. *v.* Dixon, 25 Fed. Cas. No. 14,970, 4 Cranch C. C. 107; U. S. *v.* Willis, 28 Fed. Cas. No. 16,728, 1 Cranch C. C. 511.

England.—Jenks *v.* Turpin, 13 Q. B. D. 505, 15 Cox C. C. 486, 49 J. P. 20, 53 L. J. M. C. 161, 50 L. T. Rep. N. S. 808; Sherbon *v.* Colebach, 2 Vent. 175; Bacon Abr. tit. "Gaming" (A).

Excessive gaming was not a common-law offense. Jenks *v.* Turpin, 13 Q. B. D. 505, 15 Cox C. C. 486, 49 J. P. 20, 53 L. J. M. C. 161, 50 L. T. Rep. N. S. 808 [*explaining* Rex *v.* Rogier, 1 B. & C. 272, 2 D. & R. 431, 25 Rev. Rep. 393, 8 E. C. L. 117].

4. U. S. *v.* Willis, 28 Fed. Cas. No. 16,728, 1 Cranch C. C. 511.

5. See Rex *v.* Deaville, [1903] 1 K. B. 468, 20 Cox C. C. 389, 67 J. P. 82, 72 L. J. K. B. 272, 88 L. T. Rep. N. S. 32, 51 Wkly. Rep. 604; Reg. *v.* Humphrey, [1898] 1 Q. B. 875, 62 J. P. 409, 67 L. J. Q. B. 534, 78 L. T. Rep. N. S. 360, 46 Wkly. Rep. 543; Powell *v.* Kempton Park Racecourse Co., [1897] 2 Q. B. 242, 18 Cox C. C. 561, 61 J. P. 548, 66 L. J. Q. B. 601, 77 L. T. Rep. N. S. 2, 46 Wkly. Rep. 8; Reg *v.* Davies, [1897] 2 Q. B. 199, 18 Cox C. C. 618, 66 L. J. Q. B. 513, 76 L. T. Rep. N. S. 786; Reg. *v.* Worton, [1895] 1 Q. B. 227, 18 Cox C. C. 70, 64 L. J. M. C. 74, 72 L. T. Rep. N. S. 29, 15 Reports 102; Reg. *v.* Brown, [1895] 1 Q. B. 119, 18 Cox C. C. 81, 59 J. P. 485, 64 L. J. M. C. 1, 72 L. T. Rep. N. S. 22, 15 Reports 59; Jenks *v.* Turpin, 13 Q. B. D. 505, 15 Cox C. C. 486, 49 J. P. 20, 53 L. J. M. C. 161, 50 L. T. Rep. N. S. 808; Reg *v.* Preedy, 17 Cox C. C. 433.

6. See Reg. *v.* Smiley, 22 Ont. 686; Reg. *v.* Dillon, 10 Ont. Pr. 352.

7. See the following cases:

Idaho.— People *v.* Goldman, 1 Ida. 714.

Indiana.— State *v.* Forsythe, 147 Ind. 466, 44 N. E. 593, 33 L. R. A. 221 (statute regulating horse-racing); Hayes *v.* State, 55 Ind. 99; State *v.* Ness, 1 Ind. 64.

Ohio.— Buck *v.* State, 1 Ohio St. 61.

Tennessee.— Fugate *v.* State, 2 Humphr. 397 (construing a statute making it indictable to promote and encourage gaming); Bennett *v.* State, 2 Yerg. 472.

Texas.— Clark *v.* State, (Cr. App. 1904) 81 S. W. 722.

Virginia.— Com. *v.* Pegram, 1 Leigh 569.

West Virginia.— State *v.* Godfrey, 54 W. Va. 54, 46 S. E. 185.

Wisconsin.— State *v.* Lewis, 12 Wis. 434.

Wyoming.— State *v.* Cahill, 12 Wyo. 225, 75 Pac. 433.

United States.— U. S. *v.* Wells, 28 Fed. Cas. No. 16,662, 2 Cranch C. C. 45; U. S. *v.* Willis, 28 Fed. Cas. No. 16,728, 1 Cranch C. C. 511.

See 24 Cent. Dig. tit. "Gaming," § 120. And see the statutes of the several states.

8. *Arkansas.*— Fortenbury *v.* State, 47 Ark. 188, 1 S. W. 58; State *v.* Hanger, 5 Ark. 412.

California.— People *v.* Beatty, 14 Cal. 566.

Indiana.— State *v.* Roby, 142 Ind. 168, 41 N. E. 145, 51 Am. St. Rep. 174, 33 L. R. A. 213, holding that the regulation of horse-racing by statute is a legitimate exercise of the police power of the state.

Missouri.— State *v.* Gritzner, 134 Mo. 512, 36 S. W. 39.

New York.— People *v.* Adams, 176 N. Y. 351, 68 N. E. 636, 63 L. R. A. 406 [*affirming* 85 N. Y. App. Div. 390, 83 N. Y. Suppl. 481, and *affirmed* in 192 U. S. 585, 24 S. Ct. 372, 48 L. ed. 575]; People *v.* Flynn, 37 Misc. 87, 74 N. Y. Suppl. 731 [*affirmed* in 72 N. Y. App. Div. 67, 76 N. Y. Suppl. 293], both holding that the statute against policy gambling is constitutional.

See 24 Cent. Dig. tit. "Gaming," § 120.

9. *California.*— *In re* Ah Cheung, 136 Cal. 678, 69 Pac. 492; *In re* Murphy, 128 Cal. 29, 60 Pac. 465.

Connecticut.— State *v.* Flint, 63 Conn. 248, 28 Atl. 28; State *v.* Carpenter, 60 Conn. 97, 22 Atl. 497.

Illinois.— Berry *v.* People, 36 Ill. 423.

Louisiana.— New Orleans *v.* Collins, 52 La. Ann. 973, 27 So. 532.

United States.— *In re* Lee Tong, 18 Fed. 253, 9 Sawy. 333.

See 24 Cent. Dig. tit. "Gaming," § 120. And see Municipal Corporations.

It is not necessary to the validity of a statute that it shall describe the manner in which the prohibited game is played; it is sufficient if the game is described by name.[10] Statutes as to gaming, like other penal statutes,[11] should be strictly construed,[12] unless it is especially provided that they are remedial in their nature and therefore to be liberally construed.[13] Where general words of prohibition follow an enumeration of particular games or devices which are prohibited, such general words must be construed *ejusdem generis* with the games or devices which are specifically named.[14]

B. Elements of Gaming — 1. Game, Contest, or Event — a. Necessity. One of the necessary elements of gaming is a game, contest, or event upon which a bet or wager may be made.[15]

Unless the charter of a municipality confers upon it authority so to do, the council thereof has no right or power to pass an ordinance to regulate or prohibit gaming or gaming devices, or to prescribe and enforce penalties for a violation of such ordinance. State *v.* Godfrey, 54 W. Va. 54, 46 S. E. 185. See also Breninger *v.* Belvidere, 44 N. J. L. 350.

10. *Connecticut.*— State *v.* Flint, 63 Conn. 248, 28 Atl. 28; State *v.* Carpenter, 60 Conn. 97, 22 Atl. 497.

Louisiana.— State *v.* Hunter, 106 La. 187, 30 So. 261.

Oregon.— State *v.* Carr, 6 Oreg. 133 [*distinguishing* State *v.* Mann, 2 Oreg. 238].

Texas.— Evans *v.* State, (Cr. App. 1893) 22 S. W. 18.

Washington.— See Foster *v.* Territory, 1 Wash. 411, 25 Pac. 459.

See 24 Cent. Dig. tit. "Gaming," § 120.

11. See Statutes.

12. State *v.* Flint, 63 Conn. 248, 28 Atl. 28; Moore *v.* Chicago, 69 Ill. App. 571; Smoot *v.* State, 18 Ind. 18; State *v.* Gritzner, 134 Mo. 512, 36 S. W. 39; Canton *v.* Dawson, 71 Mo. App. 235. See also Gibbons *v.* People, 33 Ill. 442, holding that, although the rule that a penal statute cannot be extended by construction is adhered to, still a statute against gaming should receive such construction as when practically applied will tend to suppress the evil prohibited. *Compare* Randolph *v.* State, 9 Tex. 921, holding that the rule which requires criminal statutes to be construed strictly applies to those only of a highly penal character and not to those creating misdemeanors such as gaming.

13. Cain *v.* State, 13 Sm. & M. (Miss.) 456; Bagley *v.* State, 1 Humphr. (Tenn.) 486; State *v.* Trotter, 5 Yerg. (Tenn.) 184; Shumate *v.* Com., 15 Gratt. (Va.) 653; Com. *v.* Garland, 5 Rand. (Va.) 652. *Compare* Deshazo *v.* State, 4 Humphr. (Tenn.) 275 (holding that betting on elections is not technically gaming, and hence the law for the prevention thereof is not within the provision that requires statutes for the suppression of gaming to be construed remedially); McGowan *v.* State, 9 Yerg. (Tenn.) 184 (holding that the statute making dealers at certain kinds of games guilty of a felony is not, like the ordinary acts of gaming, to be construed remedially).

14. *Illinois.*— Marquis *v.* Chicago, 27 Ill. App. 251, holding that keeping a lottery or policy-shop does not violate an ordinance making it an offense to keep a roly-poly, keno, or faro table, etc., or other instrument, device, or thing for the purpose of gaming.

Kansas.— State *v.* Hardin, 1 Kan. 474.

Kentucky.— Com. *v.* Kammerer, 13 S. W. 108, 11 Ky. L. Rep. 777, holding that a game of oontz played with dice on a table is not a machine or contrivance within the meaning of a statute prohibiting setting up, etc., a keno game, faro-bank, or other machine or contrivance used in betting. *Compare* Vicaro *v.* Com., 5 Dana 504.

Minnesota.— State *v.* Shaw, 39 Minn. 153, 9 N. W. 305.

Missouri.— State *v.* Rosenblatt, 185 Mo. 114, 83 S. W. 975; State *v.* Gilmore, 98 Mo. 206, 11 S. W. 620 (holding that ordinary playing cards are not a gambling device within a statute prohibiting the keeping of a faro-bank, roulette, equality, etc., or any kind of gambling table or gambling device); State *v.* Bryant, 90 Mo. 534, 2 S. W. 836 (holding that a gun and target are not a gambling device within a statute against betting upon faro, roulette, etc., or any other game played by means of them or by any other gambling device). *Compare* State *v.* Villines, 107 Mo. App. 593, 81 S. W. 212; Canton *v.* Dawson, 71 Mo. App. 235.

Texas.— See McElroy *v.* Carmichael, 6 Tex. 454; Crow *v.* State, 6 Tex. 334.

United States.— *In re* Lee Tong, 18 Fed. 253, 9 Sawy. 333.

Table of like character.— A statute against keeping a faro table, roulette table, etc., or other table of like character includes any kind of a table at which people play and bet. Brown *v.* State, 40 Ga. 689.

15. Alexander *v.* State, 99 Ind. 450; Smoot *v.* State, 18 Ind. 18; Mount *v.* State, 7 Ind. 654; People *v.* Weithoff, 51 Mich. 203, 16 N. W. 442, 47 Am. St. Rep. 557; People *v.* Todd, 51 Hun (N. Y.) 446, 4 N. Y. Suppl. 25.

Decision of event or game.— It has been held that to constitute gaming the event upon which the wager depended must have been decided. Bagley *v.* State, 1 Humphr. (Tenn.) 486. See also Dobkins *v.* State, 2 Humphr. (Tenn.) 424. But see State *v.* Welch, 7 Port. (Ala.) 463, holding that the offense of gaming is complete when an offer to bet is made and accepted, although from any cause whatever the game should never be played out and the stake lost or won.

b. What Constitutes. A game has been defined as any sport or amusement, public or private.[16] It includes physical contests, whether of man or beast, when practised for the purpose of deciding wagers, or for the purpose of diversion, as well as games of hazard or skill by means of instruments or devices.[17]

c. Games, Etc., Within Statutes — (i) *In General.* Some statutes against gaming include all games, contests, or events, at which, or by means of which money or property may be lost or won,[18] betting on all games or contests, whether of chance or of skill, being forbidden,[19] while others are directed only against games of chance.[20]

Game played at a distance.— "It is not necessary that persons be present at the place of game or contest in order that they may participate in the mischiefs of gaming. Betting upon a game of billiards which is being played in New York can as readily be carried on in a distant city, in a room appropriated to the purpose, as in the very room where the playing is going on; and if the latter is a gaming-room, so must the other be. Nothing seems more unimportant than that the game — the part that in itself is innocent, and which only furnishes the occasion and gives opportunity for the criminality — is at a distance." People *v.* Weithoff, 51 Mich. 203, 214, 16 N. W. 442, 47 Am. Rep. 557. See also Ames *v.* Kirby, (N. J. Sup. 1904) 59 Atl. 558. But *compare* McQuesten *v.* Steinmetz, (N. H. 1904) 58 Atl. 876; Lescallett *v.* Com., 89 Va. 878, 17 S. E. 546.

16. State *v.* Lark, 4 Ohio S. & C. Pl. Dec. 241, 242, 3 Ohio N. P. 155. See also Desgain *v.* Wessner, 161 Ind. 205, 67 N. E. 991; People *v.* Weithoff, 51 Mich. 203, 214, 16 N. W. 442, 47 Am. Rep. 557.

Other definitions are: "Contest for success or superiority in a trial of chance, skill, or endurance, or any two or all three of these combined." Century Dict. [*quoted* in Desgain *v.* Wessner, 161 Ind. 205, 67 N. E. 991].

"A trial of skill, or of chance, or of skill and chance, between two or more conten[d]ing parties, according to some rule by which each one may succeed or fail in the trial." Stearnes *v.* State, 21 Tex. 692, 694; Toler *v.* State, 41 Tex. Cr. 659, 660, 56 S. W. 917.

"A thing of chance, skill, or trick." Woodcock *v.* McQueen, 11 Ind. 14, 15. See also Boyce *v.* O'Dell Commission Co., 109 Fed. 758, 761.

17. *Arkansas.*— McLain *v.* Huffman, 30 Ark. 428.

Colorado.— Boughner *v.* Meyer, 5 Colo. 71, 40 Am. Rep. 139.

Illinois.— Mosher *v.* Griffin, 51 Ill. 184, 99 Am. Dec. 541; Tatman *v.* Strader, 23 Ill. 493.

Indiana.—Desgain *v.* Wessner, 161 Ind. 205, 67 N. E. 991, wrestling match.

Massachusetts.— Grace *v.* McElroy, 1 Allen 563, dog-fight.

Minnesota.— Wilkinson *v.* Tousley, 16 Minn. 299, 10 Am. Rep. 139.

Missouri.— Boynton *v.* Curle, 4 Mo. 599; Shropshire *v.* Glascock, 4 Mo. 536, 31 Am. Dec. 189.

England.— Batty *v.* Marriott, 5 C. B. 818, 12 Jur. 462, 17 L. J. C. P. 215, 57 E. C. L. 818 (foot-race); Reg. *v.* O'Connor, 15 Cox C. C. 3, 46 J. P. 214, 45 L. T. Rep. N. S. 512 (tossing coins); Eagerton *v.* Furzeman, 1 C. & P. 613, 12 E. C. L. 348 (dog-fight); Daintree *v.* Hutchinson, 6 Jur. 736, 11 L. J. Exch. 397, 10 M. & W. 85 (coursing match); Danford *v.* Taylor, 20 L. T. Rep. N. S. 483 (tenpins and skittles); Goodburn *v.* Marley, 2 Str. 1159.

18. See Roberts *v.* Com., 11 B. Mon. (Ky.) 3; Vicaro *v.* Com., 5 Dana (Ky.) 504; Mitchell *v.* Orr, 107 Tenn. 534, 64 S. W. 476; State *v.* Smith, 2 Yerg. (Tenn.) 272.

19. See Mace *v.* State, 58 Ark. 79, 22 S. W. 1108; Miller *v.* U. S., 6 App. Cas. (D. C.) 6; McBride *v.* State, 39 Fla. 442, 22 So. 711; State *v.* Miller, 53 Iowa 84, 154, 209, 4 N. W. 838, 900, 1083.

20. See the following cases:

Kentucky.— Com. *v.* Branham, 3 Bush 1.

Louisiana.— State *v.* Quaid, 43 La. Ann. 1076, 10 So. 183, 26 Am. St. Rep. 207.

Minnesota.— State *v.* Grimes, 49 Minn. 443, 52 N. W. 42.

North Carolina.— State *v.* De Boy, 117 N. C. 702, 23 S. E. 167; State *v.* Gupton, 30 N. C. 271; State *v.* Bishop, 30 N. C. 266.

Tennessee.— Eubanks *v.* State, 3 Heisk. 488.

United States.— *In re* Lee Tong, 18 Fed. 253, 9 Sawy. 333.

England.— Ridgeway *v.* Farndale, [1892] 2 Q. B. 309, 17 Cox C. C. 561, 56 J. P. 697, 61 L. J. M. C. 199, 67 L. T. Rep. N. S. 318, 41 Wkly. Rep. 128; Jenks *v.* Turpin, 13 Q. B. D. 505, 15 Cox C. C. 486, 49 J. P. 20, 53 L. J. M. C. 161, 50 L. T. Rep. N. S. 808; Pope *v.* St. Leger, 1 Salk. 344.

What are games of chance.— Rondo (Glascock *v.* State, 10 Mo. 508), keno (Portis *v.* State, 27 Ark. 360; Trimble *v.* State, 27 Ark. 355), tan tan (*In re* Lee Tong, 18 Fed. 253, 9 Sawy. 333), a raffle (State *v.* De Boy, 117 N. C. 702, 23 N. E. 167), a game of cards (State *v.* Taylor, 111 N. C. 680, 16 S. E. 168), and a lottery (Bell *v.* State, 5 Sneed (Tenn.) 507), have been said to be games of chance; but billiards (Wortham *v.* State, 59 Miss. 179; People *v.* Forbes, 52 Hun (N. Y.) 30, 4 N. Y. Suppl. 757; State *v.* Gupton, 30 N. C. 271; Bell *v.* State, 5 Sneed (Tenn.) 507. But *compare* State *v.* Jackson, 39 Mo. 420, in which it is intimated that pool played on a billiard table is a game of chance), pin pool (State *v.* Quaid, 43 La. Ann. 1076, 10 So. 183, 26 Am. St. Rep. 207), tenpins (State *v.* King, 113 N. C. 631, 18 S. E. 169; State *v.* Gupton, *supra*), shuffleboard (State *v.* Bishop, 30 N. C. 266), chess (State *v.* Gupton, *supra*), draughts (State

(II) *Banking Games and Gaming Tables and Devices.* In many jurisdictions there are special statutes expressly forbidding setting up, keeping, exhibiting, or betting upon banking games, gaming-tables, and gaming devices.[21] Under certain of such statutes it has been held that an orninary game of craps,

v. Gupton, *supra*), quoits (State *v.* Gupton, *supra*), baseball (Mace *v.* State, 58 Ark. 79, 22 S. W. 1108. But see Miller *v.* U. S., 6 App. Cas. (D. C.) 6), horse-races (Harless *v.* U. S., Morr. (Iowa) 169. See also James *v.* State, 63 Md. 242. *Compare* Tollett *v.* Thomas, L. R. 6 Q. B. 514, 40 L. J. M. C. 209, 24 L. T. Rep. N. S. 508, 19 Wkly. Rep. 890. But see Miller *v.* U. S., 6 App. Cas. (D. C.) 6), dog races (Hirst *v.* Molesbury, L. R. 6 Q. B. 130, 40 L. J. M. C. 76, 23 L. T. Rep. N. S. 55, 19 Wkly. Rep. 246), shooting for beef (State *v.* De Boy, *supra*), and shooting at turkeys (State *v.* De Boy, *supra*), have been said not to be games of chance, but games or trials of skill or speed. It has been said that backgammon is a mixed game of chance and skill. Bell *v.* State, *supra.*

Games of chance and skill distinguished.— "Though our knowledge on such subjects is very limited, yet we believe, that, in the popular mind, the universal acceptation of 'a game of chance' is such a game, as is determined entirely or in part by lot or mere luck, and in which judgment, practice, skill, or adroitness have honestly no office at all, or are thwarted by chance. As intelligible examples, the games with dice, which are determined by throwing only, and those, in which the throw of the dice regulates the play, or the hand at cards depends upon a dealing with the face down, exhibit the [two] classes of games of chance. A game of skill, on the other hand, is one, in which nothing is left to chance; but superior knowledge and attention, or superior strength, agility, and practice, gain the victory. Of this kind of games chess, draughts or chequers, billiards, fives, bowles, and quoits may be cited as examples." State *v.* Gupton, 30 N. C. 271, 273, per Ruffin, C. J. See also Wortham *v.* State, 59 Miss. 179; People *v.* Lavin, 179 N. Y. 164, 71 N. E. 753, 66 L. R. A. 601; People *v.* Fallon, 152 N. Y. 12, 46 N. E. 302, 37 L. R. A. 419; People *v.* Forbes, 52 Hun (N. Y.) 30, 4 N. Y. Suppl. 757.

Games of chance classified.— Games of chance consist of but two kinds or classes — the first, where the chances are equal, all other things being equal; and the second, where, all other things being equal, the chances are notwithstanding unequal — that is, in favor of one side. Com. *v.* Wyatt, 6 Rand. (Va.) 694.

21. See the following cases:

Alabama.— Owens *v.* State, 52 Ala. 213; State *v.* Whitworth, 8 Port. 434.

Arkansas.— Brockway *v.* State, 36 Ark. 629; Whitfield *v.* State, 4 Ark. 171.

California.— *Ex p.* Ah Yem, 53 Cal. 246.

Delaware.—State *v.* Fountain, 1 Marv. 532, 41 Atl. 195.

District of Columbia.— Miller *v.* U. S., 6 App. Cas. 6.

Georgia.— Mims *v.* State, 88 Ga. 458, 14 S. E. 712; Simms *v.* State, 60 Ga. 145.

Kansas.— State *v.* Oswald, 59 Kan. 508, 53 Pac. 525.

Kentucky.— Vowells *v.* Com., 83 Ky. 193, 7 Ky. L. Rep. 176.

Louisiana.— State *v.* Behan, 113 La. 754, 37 So. 714 (faro is a banking game); State *v.* Markham, 15 La. Ann. 498.

Missouri.— Torney *v.* State, 13 Mo. 455 (every distinct act of betting on any gambling device, although at the same sitting, is a separate offense); State *v.* Bates, 10 Mo. 166.

Oklahoma.— Jones *v.* Territory, 5 Okla. 536, 49 Pac. 934.

Pennsylvania.— Com. *v.* Carson, 6 Phila. 381.

South Carolina.— State *v.* Red, 7 Rich. 8.

Tennessee.—State *v.* Douglass, 5 Sneed 608; Hardaway *v.* Lilly, (Ch. App. 1898) 48 S. W. 712.

Texas.— State *v.* Bristow, 41 Tex. 146; Yepperson *v.* State, 39 Tex. 48; Wolz *v.* State, 33 Tex. 331; State *v.* Mann, 13 Tex. 61; Estes *v.* State, 10 Tex. 300; Mayo *v.* State, (Cr. App. 1904) 82 S. W. 515; Carroll *v.* State, (Cr. App. 1904) 81 S. W. 294; Brogden *v.* State, (Cr. App. 1904) 80 S. W. 378; Faucett *v.* State, (Cr. App. 1904) 79 S. W. 548; Blades *v.* State, 43 Tex. Cr. 409, 66 S. W. 565; Gillen *v.* State, (Cr. App. 1900) 55 S. W. 48; Chappell *v.* State, 27 Tex. App. 310, 11 S. W. 411; Askey *v.* State, 20 Tex. App. 443; Kain *v.* State, 16 Tex. App. 282 (the exhibition of a gaming-table is not a continuous offense).

Virginia.— Com. *v.* Wyatt, 6 Rand. 694.

West Virginia.— State *v.* Gaughan, 55 W. Va. 692, 48 S. E. 210.

United States.— U. S. *v.* Smith, 27 Fed. Cas. No. 16,328, 4 Cranch C. C. 629.

See 24 Cent. Dig. tit. "Gaming," § 190.

Gambling device defined see Portis *v.* State, 27 Ark. 360; Crow *v.* State, 6 Tex. 334. See also Gambling Device.

Implement of gaming.— Any article, utensil, or implement ordinarily used in playing an unlawful game, although not indispensable, is an implement of gaming within Mass. Pub. St. c. 99, § 10, as amended by St. (1887) c. 448, § 2, making it an offense to be present in a common gaming-house when gaming implements are found there. Com. *v.* Adams, 160 Mass. 310, 35 N. E. 851.

The machine known as "French pool" or "Paris mutual" used in betting on horse-racing is a contrivance used in betting within Ky. Gen. St. c. 47, art. 1, § 6. Com. *v.* Simonds, 79 Ky. 618.

"The word 'keeping,' certainly, when applied to time, implies duration. Standing alone without limitation, either by express words, or by the nature of the act or thing which it governs, it implies indefinite dura-

where the persons playing bet against each other, and where the owner of the game does not bet against all comers is not a banking game.[22] So it has been held that a table used for, or in connection with, playing rondo,[23] keno,[24] grand raffle,[25] or wheel of fortune,[26] or any table used for gaming, without regard to its appliances or adaptation to any particular game,[27] is a gaming-table; but that a poker table,[28] a billiard-table,[29] or a table on which dice are thrown for drinks or money and on which a game of dominoes is played[30] is not a gaming-table. It has also been held that a slot-machine,[31] a stock clock,[32] a pack of cards,[33] loto,[34] rondo,[35] keno,[36] pico,[37] crack-loo,[38] dice and chips used in a game of craps,[39] a six

tion." U. S. *v.* Smith, 27 Fed. Cas. No. 16,329, 4 Cranch C. C. 659. And see Blades *v.* State, 43 Tex. Cr. 409, 66 S. W. 565.

To constitute the offense of exhibiting a gaming-table or bank, it is not necessary that the dealer or exhibitor have any interest against the betters. Dalton *v.* State, (Tex. Cr. App. 1903) 74 S. W. 25. But *compare* Campbell *v.* State, (Tex. Cr. App. 1903) 72 S. W. 396; Cummings *v.* State, (Tex. Cr. App. 1903) 72 S. W. 395; Hairston *v.* State, 34 Tex. Cr. 346, 30 S. W. 811.

The lending of money to set up a faro-bank, and the receiving of a part of the winnings, is not an offense. O'Blennis *v.* State, 12 Mo. 311.

In Kentucky, under a statute providing that whoever shall keep, carry on, or manage a keno bank, etc., or other machine or contrivance used in betting, shall be fined, it must appear that the table, machine, or contrivance was such as is ordinarily used in gambling for money or property, where it is not such a machine or contrivance as is specially designated. Com. *v.* Schatzman, 82 S. W. 238, 26 Ky. L. Rep. 508. See also Ritte *v.* Com., 18 B. Mon. 35; Com. Kammerer, 13 S. W. 108, 11 Ky. L. Rep. 777.

22. Campbell *v.* State, (Tex. Cr. App. 1903) 72 S. W. 396; Cummings *v.* State, (Tex. Cr. App. 1903) 72 S. W. 395; Chappell *v.* State, 27 Tex. App. 310, 11 S. W. 411. *Compare* Copeland *v.* State, 36 Tex. Cr. App. 576, 38 S. W. 189; Harman *v.* State, (Tex. Cr. App. 1893) 22 S. W. 1038; Bell *v.* State, 32 Tex. Cr. 187, 22 S. W. 687, 21 S. W. 366. But see State *v.* Rosenblatt, 185 Mo. 114, 83 S. W. 975.

23. State *v.* Mann, 13 Tex. 61.

24. Miller *v.* State, 48 Ala. 122; Eslava *v.* State, 44 Ala. 406; Stearnes *v.* State, 21 Tex. 692.

25. Stearnes *v.* State, 21 Tex. 692.

26. Smith *v.* Com., 3 Ky. L. Rep. 249.

27. Bibb *v.* State, 84 Ala. 13, 4 So. 275, 83 Ala. 84, 3 So. 711; Wren *v.* State, 70 Ala. 1; Toney *v.* State, 61 Ala. 1.

28. State *v.* Etchman, 184 Mo. 193, 83 S. W. 978; Lyle *v.* State, 30 Tex. App. 118, 16 S. W. 765, 28 Am. St. Rep. 893; Nuckolls *v.* Com., 32 Gratt. (Va.) 884. But see Wren *v.* State, 70 Ala. 1.

29. People *v.* Forbes, 52 Hun (N. Y.) 30, 4 N. Y. Suppl. 757; Smith *v.* State, 28 Tex. App. 102, 12 S. W. 412. But see People *v.* Harrison, 28 How. Pr. (N. Y.) 247.

Keeping billiard-table for gaming expressly prohibited see State *v.* Hope, 15 Ind. 474; Blanton *v.* State, 5 Blackf. (Ind.) 560.

30. Whitney *v.* State, 10 Tex. App. 377.

31. *Arkansas.*— Jeffries *v.* State, 61 Ark. 308, 32 S. W. 1080.

Georgia.— Kolshorn *v.* State, 97 Ga. 343, 23 S. E. 829.

Illinois.— Bobel *v.* People, 173 Ill. 19, 50 N. E. 322, 64 Am. St. Rep. 64.

New York.— Lyman *v.* Kurtz, 166 N. Y. 274, 59 N. E. 903; Lyman *v.* Brucker, 26 Misc. 594, 56 N. Y. Suppl. 767.

Texas.— Christopher *v.* State, 41 Tex. Cr. 235, 53 S. W. 852.

Gambling with slot machines expressly prohibited see New Orleans *v.* Collins, 52 La. Ann. 973, 27 So. 532; State *v.* Woodman, 26 Mont. 348, 67 Pac. 1118.

Cigar machines.— A slot machine so operated that one putting into it a coin receives in any event a cigar of the value of such coin, and stands to win by chance additional cigars without further payment, is a gambling device (Lang *v.* Merwin, 99 Me. 486, 59 Atl. 1021. *Contra*, Cullinan *v.* Hosmer, 100 N. Y. App. Div. 148, 91 N. Y. Suppl. 607); but if it is so operated that one who puts in a coin receives only one cigar of the value of such coin it is not a gambling device (Heeman *v.* State, 9 Ohio S. & C. Pl. Dec. 274, 6 Ohio N. P. 258).

32. State *v.* Grimes, 49 Minn. 443, 52 N. W. 42.

33. State *v.* Scaggs, 33 Mo. 92; State *v.* Herryford, 19 Mo. 377; State *v.* Bates, 10 Mo. 166; Eubanks *v.* State, 5 Mo. 450; State *v.* Purdom, 3 Mo. 114; State *v.* Torphy, 66 Mo. App. 434; State *v.* Mohr, 55 Mo. App. 329; State *v.* Dyson, 39 Mo. App. 297; State *v.* Trott, 36 Mo. App. 29; Frisbie *v.* State, 1 Oreg. 264. *Compare* State *v.* Lewis, 12 Wis. 434. But see State *v.* Stillwell, 16 Kan. 24; State *v.* Hardin, 1 Kan. 474; State *v.* Gilmore, 98 Mo. 206, 11 S. W. 620 (holding that under a statute against setting up or keeping a table or gaming device commonly called A B C, faro-bank, or any kind of gambling table or device, etc., a pack of cards is not a gambling device); Remmington *v.* State, 1 Oreg. 281.

34. State *v.* Foster, 2 Mo. 210; Lowry *v.* State, 1 Mo. 722.

35. Glascock *v.* State, 10 Mo. 508. But see State *v.* Hawkins, 15 Ark. 259.

36. Euper *v.* State, 35 Ark. 629; Portis *v.* State, 27 Ark. 360; Trimble *v.* State, 27 Ark. 355.

37. Euper *v.* State, 35 Ark. 629.

38. Canton *v.* Dawson, 71 Mo. App. 235.

39. State *v.* Oswald, 59 Kan. 508, 53 Pac. 525.

wheel,[40] lottery,[41] and a table used for playing pool and billiards,[42] are gaming devices; but that a gun and target,[43] tenpins,[44] horse-races,[45] and boards and lists descriptive of such races and the times and places of the running thereof,[46] are not gambling devices.

(III) *Games With Cards.* Betting on the various games played with cards is generally prohibited by gaming statutes.[47]

(IV) *Games With Dice.* Throwing dice for money[48] or for goods, which is generally called raffling,[49] are often made criminal offenses.

(V) *Horse-Races.* According to the weight of authority a horse-race is a game within the meaning of statutes against gaming,[50] but there are decisions to the contrary.[51] It is sometimes made an offense to take or accept a bet on a horse-race.[52] In some jurisdictions betting upon a horse-race is not an indict-

40. Atkins *v.* State, 95 Tenn. 474, 32 S. W. 391.

41. Portland *v.* Yick, 44 Oreg. 439, 75 Pac. 706, 102 Am. St. Rep. 633. See also LOTTERIES.

42. State *v.* Jackson, 39 Mo. 420. But see State *v.* Hope, 15 Ind. 474.

43. State *v.* Bryant, 90 Mo. 534, 2 S. W. 836.

44. Crow *v.* State, 6 Tex. 334.

45. State *v.* Shaw, 39 Minn. 153, 39 N. W. 305; State *v.* Lemon, 46 Mo. 375; State *v.* Hayden, 31 Mo. 35; McElray *v.* Carmichael, 6 Tex. 454. But *compare* Joseph *v.* Miller, 1 N. M. 621.

46. State *v.* Shaw, 39 Minn. 153, 39 N. W. 305.

47. See the following cases:

Alabama.— Harris *v.* State, 31 Ala. 362, 33 Ala. 373, euchre.

Arkansas.— Barkman *v.* State, 13 Ark. 703, poker.

Missouri.— O'Blennis *v.* State, 12 Mo. 311 (faro); Eubanks *v.* State, 5 Mo. 450.

Tennessee.— McGowan *v.* State, 9 Yerg. 184, faro.

Virginia.— Gibboney *v.* Com., 14 Gratt. 582.

Washington.— Foster *v.* Territory, 1 Wash. 411, 25 Pac. 459, faro.

England.— Jenks *v.* Turpin, 13 Q. B. D. 505, 15 Cox C. C. 486, 49 J. P. 20, 53 L. J. M. C. 161, 50 L. T. Rep. N. S. 808, baccarat. But *compare* State *v.* Mann, 2 Oreg. 238.

48. See Jones *v.* State, 26 Ala. 155; State *v.* Robinson, 40 S. C. 553, 18 S. E. 891; Whitney *v.* State, 10 Tex. App. 377.

Craps see Aguar *v.* State, (Tex. Civ. App. 1898) 47 S. W. 464; Williams *v.* State, (Tex. Cr. App. 1898) 43 S. W. 987.

Backgammon.— A statute punishing playing "at any game with cards or dice" in a public place does not warrant an indictment for playing at backgammon, although dice are employed in that game. Wetmore *v.* State, 55 Ala. 198.

49. See the following cases:

Alabama.— Johnson *v.* State, 83 Ala. 65, 3 So. 790; McInnis *v.* State, 51 Ala. 23. But *compare* Hawkins *v.* State, 33 Ala. 433, decided when raffling was licensed.

Massachusetts.— Com. *v.* Coleman, 184 Mass. 198, 68 N. E. 220.

Mississippi.— Kirk *v.* State, 69 Miss. 215, 10 So. 577, holding that it is not unlawful to sell a chance in a raffle.

North Carolina.— State *v.* De Boy, 117 N. C. 702, 23 S. E. 167.

Texas.— Long *v.* State, 22 Tex. App. 194, 2 S. W. 541, 58 Am. Rep. 633, holding that under Pen. Code, art. 353, it does not make any difference whether the raffle is for religious, benevolent, or profane purposes.

Virginia.— Com. *v.* Garland, 5 Rand. 652. See 24 Cent. Dig. tit. "Gaming," § 157. But see Norton *v.* State, 15 Ark. 71.

50. *Georgia.*— Thrower *v.* State, 117 Ga. 753, 45 S. E. 126; Dyer *v.* Benson, 69 Ga. 609.

Illinois.— Swigart *v.* People, 154 Ill. 284, 40 N. E. 432 [*affirming* 50 Ill. App. 181]. See also Garrison *v.* McGregor, 51 Ill. 473; Tatman *v.* Strader, 23 Ill. 493.

Indiana.— Wade *v.* Deming, 9 Ind. 35; Watson *v.* State, 3 Ind. 123; Cheesum *v.* State, 8 Blackf. 332, 44 Am. Dec. 771.

Maine.— See Ellis *v.* Beale, 18 Me. 337, 36 Am. Dec. 726.

Massachusetts.— See Grace *v.* McElroy, 1 Allen 563.

Michigan.— People *v.* Weithoff, 51 Mich. 203, 16 N. W. 442, 47 Am. Rep. 557.

Minnesota.— State *v.* Shaw, 39 Minn. 153, 39 N. W. 305.

Missouri.— Hayden *v.* Little, 35 Mo. 418; Nickerson *v.* Benson, 8 Mo. 8, 40 Am. Dec. 115; Boynton *v.* Curle, 4 Mo. 599; Shropshire *v.* Glascock, 4 Mo. 536, 31 Am. Dec. 189; Swaggard *v.* Hancock, 25 Mo. App. 596.

England.— Blaxton *v.* Pye, 2 Wils. C. P. 309. See also Goodburn *v.* Marley, 2 Str. 1159.

See 24 Cent. Dig. tit. "Gaming," §§ 133, 156.

51. State *v.* Rorie, 23 Ark. 726; Cheek *v.* Com., 100 Ky. 1, 37 S. W. 152, 18 Ky. L. Rep. 515 (holding that a horse-race is not a game, but that to bet on one is to engage in a hazard within the meaning of the statute); Com. *v.* Shelton, 8 Gratt. (Va.) 592.

In Louisiana the statutes against gambling do not include betting on horse-races in any form. Shreveport *v.* Maloney, 107 La. 193, 31 So. 702.

52. See Windsor *v.* State, (Tex. Cr. App. 1904) 79 S. W. 312.

able offense, if the bet is made at a race-course or other place named in the statute.[53]

(VI) *Book-Making and Pool-Selling.* Book-making and pool-selling are prohibited in many jurisdictions.[54]

53. See Shreveport *v.* Maloney, 107 La. 193, 31 So. 702 (in which it is said: "Betting on horse-races, in view of the bettors, within their means, is not unlawful, but, on the contrary, has the law's special sanction"); State *v.* Dycer, 85 Md. 246, 36 Atl. 763; James *v.* State, 63 Md. 242.

In New York under Laws (1895), c. 570, a person who makes or records upon a race-course authorized by or entitled to the benefits of this statute, a bet upon a horse-race taking place thereon, is subject to the exclusive penalty of the forfeiture of the amount of the bet, to be recovered in a civil action by the person or persons with whom such bet is made, or with whom such money or property is deposited, and is not amenable to the criminal law, and the constitutionality of this statute has been upheld by the court of last resort in this state. People *v.* Fallon, 152 N. Y. 1, 46 N. E. 302, 37 L. R. A. 419 [*affirming* 4 N. Y. App. Div. 82, 39 N. Y. Suppl. 865].

In Tennessee under Acts (1891), c. 115, § 2, betting on horse-races is indictable as gaming, unless the race is run within a substantial inclosure, and the bet made within the same inclosure. See Debardelaben *v.* State, 99 Tenn. 649, 42 S. W. 684 (holding this statute to be constitutional); Ransome *v.* State, 91 Tenn. 716, 20 S. W. 310. As to earlier legislation excepting betting on "turf racing" from the penalties of gaming see State *v.* Blackburn, 2 Coldw. 235; Huff *v.* State, 2 Swan 279; State *v.* Posey, 1 Humphr. 384.

54. See the following cases:

Alabama.— State *v.* Stripling, 113 Ala. 120, 21 So. 409, 36 L. R. A. 81.

Connecticut.— State *v.* Falk, 66 Conn. 250, 33 Atl. 913, where the statute prohibits being concerned in the business of transmitting money out of the state by telegraph or other means to be bet and placed on horses and horse-races.

District of Columbia.— Miller *v.* U. S., 6 App. Cas. 6, holding that book-making on a horse-race is a game of chance, or gambling device or contrivance.

Illinois.— Swigart *v.* People, 50 Ill. App. 181.

Indiana.— State *v.* Howard, 9 Ind. App. 635, 37 N. E. 27.

Kentucky.— It has been decided in this state that selling ordinary pools is not within the gaming statutes (Cheek *v.* Com., 79 Ky. 359, 2 Ky. L. Rep. 339; Smith *v.* Com., 3 Ky. L. Rep. 248); but that French pool or Paris mutual is a machine or contrivance used in betting, and that the owner or operator thereof is liable to indictment under the general statute against betting or exhibiting a gambling machine or contrivance (Com. *v.* Simonds, 79 Ky. 618, 3 Ky. L. Rep. 380).

Maryland.— Book-making and pool-selling, except within the ground of agricultural associations or at race-courses, are prohibited. Laws (1904), c. 232. See State *v.* Dycen, 85 Md. 246, 36 Atl. 763. But see James *v.* State, 63 Md. 242, decided before the enactment of this statute.

Michigan.— People *v.* Weithoff, 93 Mich. 631, 53 N. W. 784, 32 Am. St. Rep. 532; People *v.* Weithoff, 51 Mich. 203, 16 N. W. 442, 47 Am. Rep. 557.

Missouri.— State *v.* Villines, 107 Mo. App. 593, 81 S. W. 212; State *v.* Townsend, 50 Mo. App. 690, holding that under a statute prohibiting pool-selling on horse-races without the limits of the state, and making it an offense to become the custodian of any money staked on such races, where it appeared that defendant received money to be staked on a horse-race in New Jersey, and that he gave a receipt therefor, stating that the money was to be transferred by telegraph to a person at St. Paul, Minn., who was to stake the money on the race, the jury was warranted in finding that the telegraph transfer to St. Paul was a mere device to defeat the statute, where it further appeared that defendant was accustomed to pay at his office all bets immediately after the result of the race was declared, and that no settlement was ever had between him and the St. Paul office.

New York.— Book-making and pool-selling are prohibited by statute. Jerome Park Co. *v.* New York Bd. of Police, 11 Abb. N. Cas. 342; Murphy *v.* New York Bd. of Police, 11 Abb. N. Cas. 337, 63 How. Pr. 396; People *v.* Barbour, 5 N. Y. Cr. 381; People *v.* Kelly, 3 N. Y. Cr. 272. See Pen. Code, § 351. But by a special statute (Laws (1895), c. 570), when a book on a horse-race is made at an authorized race-course, the exclusive penalty is a forfeiture of the amount of the bets made, to be recovered in civil actions. People *v.* Fallon, 152 N. Y. 1, 46 N. E. 502, 37 L. R. A. 419 [*affirming* 4 N. Y. App. Div. 76, 39 N. Y. Suppl. 860]. This statute does not exempt persons who make books at other places than such race-courses from prosecution under Pen. Code, § 351. People *v.* Stedeker, 75 N. Y. App. Div. 449, 78 N. Y. Suppl. 316 [*reversed* in 175 N. Y. 57, 67 N. E. 132, on the ground that the indictment was defective]; People *v.* De Bragga, 73 N. Y. App. Div. 579, 77 N. Y. Suppl. 7; People *v.* Levoy, 72 N. Y. App. Div. 55, 76 N. Y. Suppl. 783. The statute commonly known as the "Ives Pool Bill" (Laws (1887), c. 479), in so far as it purports to authorize pool-selling at a horse-race, is void under the constitutional prohibition against lotteries. Irving *v.* Britton, 8 Misc. 201, 28 N. Y. Suppl. 529.

Tennessee.— Under Acts (1891), c. 15, § 2, providing that a bet or wager shall be unlawful gaming, unless the race shall occur within a substantial inclosure, and the bet or wager

(VII) *Cock-Fighting.* It has been held that cock-fighting is gaming,[55] that it is an unlawful game or sport within a statute making it an offense for an innholder to keep or suffer persons resorting thereto to exercise or use any unlawful game or sport,[56] and that keeping a cock-pit is indictable as a nuisance at common law.[57]

(VIII) *Dealing in Futures.* In some jurisdictions by special statute it is an offense to make contracts for the sale of stocks or commodities where there is no intention on the one side to sell or deliver them or on the other to buy or take them, but an intention merely that the difference shall be paid according to the fluctuation on market values.[58]

(IX) *Betting on Elections.* It has been decided that betting on elections is within statutes against gaming,[59] and in many jurisdictions there are special statutes on the subject.[60]

(X) *Other Games, Etc.* Other games, contests, or events which have been themselves prohibited by statute in different jurisdictions or on which betting has been prohibited by express statutory designation, or which have been held to be included within general statutory inhibitions against gaming, are keno,[61]

made within that inclosure, it is unlawful to operate a pool-room anywhere outside of such inclosure (Debardelaben *v.* State, 99 Tenn. 649, 42 S. W. 684; Ransome *v.* State, 91 Tenn. 716, 20 S. W. 310); and a license issued by the authorities of a municipality where such a pool-room is operated affords no protection (Debardelaben *v.* State, *supra*). As to status of book-making and pool-selling under prior statutes see Williams *v.* State, 92 Tenn. 275, 21 S. W. 662; Brown *v.* State, 88 Tenn. 566, 13 S. W. 236; Palmer *v.* State, 88 Tenn. 553, 13 S. W. 233, 8 L. R. A. 280; Edwards *v.* State, 8 Lea (Tenn.) 411.

Texas.— *Ex p.* Hernan, (Cr. App. 1903) 77 S. W. 225.

Virginia.— Lescallett *v.* Com., 89 Va. 878, 17 S. E. 546, holding that where one keeps a house where he posts the names of horses running on a race-track in another state, and telegraphs orders of customers to bet money thereon, which bets are accepted at the track, there is no violation of the statute against betting, pool-selling, or book-making, since the betting is not done in the said house.

See 24 Cent. Dig. tit. "Gaming," §§ 187, 188.

But see Shreveport *v.* Maloney, 107 La. 193, 31 So. 702.

Kinds of pools defined and described see James *v.* State, 63 Md. 242.

The conducting of horse-races by a racing association for premiums or stakes, in the usual way and under the rules generally adopted by racing associations, does not render its officers guilty of either book-making or pool-selling. People *v.* Fallon, 152 N. Y. 12, 46 N. E. 296, 57 Am. St. Rep. 492, 37 L. R. A. 227.

Buying pools on horse-races is included in the term "gambling." Bride *v.* Clark, 161 Mass. 130, 36 N. E. 745.

Validity of municipal ordinances against pool-selling see *Ex p.* Tuttle, 91 Cal. 589, 27 Pac. 933; Odell *v.* Atlanta, 97 Ga. 670, 25 S. E. 173; Louisville *v.* Wehmhoff, 116 Ky. 812, 76 S. W. 876, 79 S. W. 201, 25 Ky. L. Rep. 995, 1924, holding that an ordinance forbidding transmission of telegraphic messages to pool-rooms is not an unconstitutional regulation of interstate commerce, although the telegrams come from another state.

55. Bagley *v.* State, 1 Humphr. (Tenn.) 486. See also Johnson *v.* State, 4 Sneed (Tenn.) 614; Squires *v.* Whisken, 3 Campb. 140; Rex *v.* Howel, 3 Keb. 465.

56. Com. *v.* Tilton, 8 Metc. (Mass.) 232.

57. Rex *v.* Medlor, 2 Show. 36.

58. See the following cases:

Arkansas.— Fortenbury *v.* State, 47 Ark. 188, 1 S. W. 58.

Missouri.— State *v.* Kentner, 178 Mo. 487, 77 S. W. 522; State *v.* Gritzner, 134 Mo. 512, 36 S. W. 39.

New York.— People *v.* Wade, 59 N. Y. Suppl. 846. But *compare* People *v.* Todd, 51 Hun 446, 4 N. Y. Suppl. 25, decided before the enactment of the special statute on the subject (Laws (1889), c. 428), and holding that such a transaction was not a violation of the general statute against gaming (Pen. Code, § 343).

Tennessee.— State *v.* Duncan, 16 Lea 79.

Texas.— Scales *v.* State, (Cr. App. 1904) 81 S. W. 947; Fullerton *v.* State, (Cr. App. 1902) 75 S. W. 534.

Canada.— Reg. *v.* Murphy, 17 Ont. 201; Reg. *v.* Dowd, 17 Quebec Super. Ct. 67.

Intent.— Under such statutes absence of a *bona fide* intent to make or receive delivery of such stocks or commodities is an essential element. Fortenbury *v.* State, 47 Ark. 188, 1 S. W. 58; Reg. *v.* Dowd, 17 Quebec Super. Ct. 67.

59. Frazee *v.* State, 58 Ind. 8 [*overruling* State *v.* Henderson, 47 Ind. 127]; Hizer *v.* State, 12 Ind. 330. *Contra,* see Hickerson *v.* Benson, 8 Mo. 8, 40 Am. Dec. 115.

In Tennessee betting on elections seems to be gaming (Ramsey *v.* State, 5 Sneed 652; State *v.* Trotter, 5 Yerg. 184. See also Mitchell *v.* Orr, 107 Tenn. 534, 64 S. W. 476), but there are decisions to the contrary (Deshazo *v.* State, 4 Humphr. 275; State *v.* Smith, Meigs 99, 33 Am. Dec. 132).

60. See Elections, 15 Cyc. 444.

61. See the following cases:

Alabama.— See Miller *v.* State, 48 Ala. 122; Eslava *v.* State, 44 Ala. 406.

rondo,[62] pico,[63] lotto,[64] equality,[65] chuck-a-luck,[66] tan-tan,[67] ramps,[68] rouge et noir,[69] bagatelle,[70] thimble,[71] plucking matches,[72] crack-loo,[73] lotteries,[74] gift enterprises,[75] coupon competitions,[76] policy,[77] billiards,[78] pool,[79] pin pool,[80] baseball,[81] foot-races,[82] and shooting matches.[83]

d. Change in Name or Modification of Game. A change in the name of or a modification in the method of playing a game will not take it out of the operation of a statute prohibiting it or betting on it, if the principle of the game remains.[84]

2. Bet or Wager — a. Necessity. As a general rule a bet or wager of money or something of value upon the result of a game or event is a necessary element of gaming.[85] Under some statutes, however, it is an offense to play at particular

Arkansas.— Portis *v.* State, 27 Ark. 360; Trimble *v.* State, 27 Ark. 355.

Florida.— Overby *v.* State, 18 Fla. 178.

Georgia.— Brown *v.* State, 40 Ga. 689.

Louisiana.— New Orleans *v.* Miller, 7 La. Ann. 651.

See 24 Cent. Dig. tit. "Gaming," § 150.

Keno described see Miller *v.* State, 48 Ala. 122; Brown *v.* State, 40 Ga. 689.

62. See State *v.* Hawkins, 15 Ark. 259; Barker *v.* State, 12 Tex. 273.

63. See Euper *v.* State, 35 Ark. 629.

64. See Lowry *v.* State, 1 Mo. 722.

65. See U. S. *v.* Speedenn, 27 Fed. Cas. No. 16,366, 1 Cranch C. C. 535.

66. See Archer *v.* State, 69 Ga. 767; Montee *v.* Com., 3 J. J. Marsh. (Ky.) 132.

67. See *In re* Lee Tong, 18 Fed. 253, 9 Sawy. 333.

68. See Bryan *v.* State, 26 Ala. 65.

69. See Rex *v.* Rogier, 1 B. & C. 272, 4 D. & R. 431, 25 Rev. Rep. 393, 8 E. C. L. 117.

70. See Neal *v.* Com., 22 Gratt. (Va.) 917.

71. See State *v.* Red, 7 Rich. (S. C.) 8.

72. See Com. *v.* Short, 11 Ky. L. Rep. 368.

73. See Canton *v.* Dawson, 71 Mo. App. 235; Donathan *v.* State, 43 Tex. Cr. 427, 66 S. W. 781.

74. See *In re* Smith, 54 Kan. 702, 39 Pac. 707; State *v.* Smith, 2 Yerg. (Tenn.) 272. And see Lotteries.

75. See Com. *v.* Emerson, 165 Mass. 146, 42 N. E. 559 (holding that a statute making it a penal offense to sell property on a representation that anything other than what is specifically stated to be the subject of sale is to be delivered refers only to offers of bargains that appeal to the gambling instincts and induce people to buy what they do not want by the gift or promise of a prize, the nature of which is not known at the moment of making the purchase, and that it does not prohibit the sale of tobacco under a promise to give a photograph to each purchaser of a package, although the purchaser is allowed to select his photograph from among a number); State *v.* Bryant, 74 N. C. 207; Eubanks *v.* State, 3 Heisk. (Tenn.) 488; Bell *v.* State, 5 Sneed (Tenn.) 507.

Trading stamps.— Under a statute prohibiting the sale of property on a representation that any other thing than that specifically stated to be the subject of the sale should be delivered, which was subsequently so amended that its provisions apply to the giving of a stamp or coupon entitling the purchaser to other property from other persons, it has been held that the giving of stamps or coupons to a purchaser of an article, entitling the purchaser to go to the store of another where such stamps would be accepted in payment of articles on exhibition there for sale, the number of stamps necessary to purchase each article being indicated or marked on the article, is not prohibited. Com. *v.* Sisson, 178 Mass. 578, 63 N. E. 385.

76. See Reg. *v.* Stoddart, [1901] 1 K. B. 177, 19 Cox C. C. 587, 64 J. P. 774, 70 L. J. K. B. 189, 83 L. T. Rep. N. S. 538, 49 Wkly. Rep. 173.

77. See State *v.* Flint, 63 Conn. 248, 28 Atl. 28; State *v.* Carpenter, 60 Conn. 97, 22 Atl. 497; People *v.* Adams, 176 N. Y. 351, 68 N. E. 636, 98 Am. St. Rep. 675, 63 L. R. A. 406 [*affirming* 85 N. Y. App. Div. 390, 83 N. Y. Suppl. 481, and *affirmed* in 192 U. S. 585, 24 S. Ct. 372, 48 L. ed. 575]; People *v.* Flynn, 72 N. Y. App. Div. 67, 76 N. Y. Suppl. 293 [*affirming* 37 Misc. 87, 74 N. Y. Suppl. 731]. But see State *v.* Lark, 4 Ohio S. & C. Pl. Dec. 241, 3 Ohio N. P. 155.

78. See Vanwey *v.* State, 41 Tex. 639; Tuttle *v.* State, 1 Tex. App. 364.

79. See State *v.* Kelly, 24 Tex. 182; Thompson *v.* State, (Tex. Cr. App. 1894) 28 S. W. 684.

80. See State *v.* Quaid, 43 La. Ann. 1076, 10 So. 183, 26 Am. St. Rep. 207 (describing this game); Cohen *v.* State, 17 Tex. 142.

81. See Mace *v.* State, 58 Ark. 79, 22 S. W. 1108.

82. See Ellis *v.* Beale, 18 Me. 337, 36 Am. Dec. 726; Jones *v.* Cavanaugh, 149 Mass. 124, 21 N. E. 306; Swaggard *v.* Hancock, 25 Mo. App. 596; Brown *v.* Berkeley, Cowp. 281; Lynall *v.* Longbothom, 2 Wils. C. P. 36.

83. See Myers *v.* State, 3 Sneed (Tenn.) 98.

84. People *v.* Gosset, 93 Cal. 641, 29 Pac. 246; State *v.* Maurer, 7 Iowa 406; McGowan *v.* State, 9 Yerg. (Tenn.) 184; Smith *v.* State, 17 Tex. 191. See also State *v.* Kelly, 24 Tex. 182; Stearnes *v.* State, 21 Tex. 692.

In Arkansas the statute expressly provides against such attempted evasions of law. See Barkman *v.* State, 13 Ark. 705; Brown *v.* State, 10 Ark. 607.

85. *Alabama.*— Ford *v.* State, 123 Ala. 81, 26 So. 503; Jackson *v.* State, 117 Ala. 155, 23 So. 47; Bass *v.* State, 37 Ala. 469.

games in particular places,[86] or with particular persons,[87] whether anything is bet or not.

b. What Constitutes — (i) *In General.* The definition of bet or wager which is ordinarily given[88] implies that to every wager there must be two or more contracting parties having mutual or reciprocal rights in respect to the money or other things that are wagered, and usually called the stakes of the bet or wager, and that each of the parties shall jeopardize something, and have the chance to make something or to recover the stakes or thing bet or wagered upon the determination of the contingent or uncertain event in his favor.[89] But according to some decisions it is not essential to a bet that both parties should stand to lose, it being sufficient if one party stands to lose or win.[90] A bet may be made not only expressly but by acts without words,[91] as where without prior agreement the loser in a game pays the table charges or for drinks.[92] It is not necessary that the stakes should be put up.[93] When a proposition to bet is made and accepted the bet is complete,[94] and the fact that the bet is afterward

Arkansas.— Ansley *v.* State, 36 Ark. 67, 38 Am. Rep. 29.

California.— See People *v.* Carroll, 80 Cal. 153, 22 Pac. 129.

Florida.— See Oder *v.* State, 26 Fla. 520, 7 So. 856.

Georgia.— Thrower *v.* State, 117 Ga. 753, 45 S. E. 126; Johnson *v.* State, 8 Ga. 453.

Illinois.— Swigart *v.* People, 50 Ill. App. 181.

Indiana.— Alexander *v.* State, 99 Ind. 450; Williams *v.* Warsaw, 60 Ind. 457; State *v.* Ward, 57 Ind. 537; Mount *v.* State, 7 Ind. 654. See also Carr *v.* State, 50 Ind. 178.

Iowa.— State *v.* Leicht, 17 Iowa 28.

Kansas.— *In re* Smith, 54 Kan. 702, 39 Pac. 707.

Kentucky.— Montfort *v.* Com., 13 Ky. L. Rep. 136.

Massachusetts.— Under Rev. St. c. 50, § 17, it was unlawful to play at certain games if only for amusement (Com. *v.* Pattee, 12 Cush. 501; Com. *v.* Stowell, 9 Metc. 572; Com. *v.* Goding, 3 Metc. 130); but this statute was repealed by St. (1853) c. 399, so far as it related to the keeping of cards, billiards, bowls, etc., for amusement merely, or for any other purpose than for gaming for money or other property (Com. *v.* Pattee, *supra*).

Mississippi.— Martin *v.* State, 71 Miss. 87, 14 So. 530. See also Strawhern *v.* State, 37 Miss. 422.

North Carolina.— State *v.* Norwood, 94 N. C. 935; State *v.* Brannen, 53 N. C. 208; State *v.* Smitherman, 23 N. C. 14.

South Carolina.— See State *v.* Robinson, 40 S. C. 553, 18 S. E. 891; State *v.* Nates, 3 Hill 200.

Tennessee.— Harrison *v.* State, 4 Coldw. 195; Bagley *v.* State, 1 Humphr. 486. See also Bennett *v.* State, 2 Yerg. 472.

Texas.— Johnson *v.* State, 34 Tex. Cr. 227, 29 S. W. 1083.

Virginia.— Lescallett *v.* Com., 89 Va. 878, 17 S. E. 546.

England.— Jenks *v.* Turpin, 13 Q. B. D. 505, 15 Cox C. C. 486, 49 J. P. 20, 53 L. J. M. C. 161, 50 L. T. Rep. N. S. 808; Reg. *v.* Ashton, 1 E. & B. 286, 17 Jur. 50, 22 L. J. M. C. 1, 16 Eng. L. & Eq. 346, 72 E. C. L. 286.

Canada.— Reg. *v.* Wettman, 25 Ont. 459.

See 24 Cent. Dig. tit. "Gaming," § 135.

86. See the statutes of the several states. **Playing cards in a tavern or tippling house without betting** is an offense. Hearn *v.* State, 25 Tex. 336; Chambers *v.* State, 25 Tex. 307; Com. *v.* Terry, 2 Va. Cas. 77. And see *infra*, II, C, 1, a.

87. See the statutes of the several states. **When certain games are played with negroes,** betting is not necessary to constitute the offense of gaming under the South Carolina act of 1834. State *v.* Laney, 4 Rich. (S. C.) 193; State *v.* Nates, 3 Hill (S. C.) 200.

88. See Bouvier L. Dict. [*quoted* in Com. *v.* Helm, 9 Ky. L. Rep. 532, 533; Jordan *v.* Kent, 44 How. Pr. (N. Y.) 206, 207; Misner *v.* Knapp, 13 Oreg. 135, 138, 9 Pac. 65, 59 Am. Rep. 6]. And see Bet, 5 Cyc. 584.

89. Wagner *v.* State, 63 Ind. 250; Jordan *v.* Kent, 44 How. Pr. (N. Y.) 206; Quarles *v.* State, 5 Humphr. (Tenn.) 561.

90. Lang *v.* Merwin, 99 Me. 486, 59 Atl. 1021 (holding that a slot machine so operated that the operator who puts into it a nickel coin receives in any event a cigar of the value of his coin, and also stands to win by chance additional cigars without further payment, is a gambling device); Shumate *v.* Com., 15 Gratt. (Va.) 653.

91. Emmons *v.* State, 34 Tex. Cr. 98, 29 S. W. 474, 475.

92. Hall *v.* State, (Tex. Cr. App. 1896) 34 S. W. 122; Dunbar *v.* State, 34 Tex. Cr. 596, 31 S. W. 401.

93. State *v.* Leicht, 17 Iowa 28.

94. State *v.* Welch, 7 Port. (Ala.) 463; Montfort *v.* Com., 13 Ky. L. Rep. 136; Lescallett *v.* Com., 89 Va. 878, 17 S. E. 546. See also McQuesten *v.* Steinmetz, (N. H. 1904) 58 Atl. 876, holding that the acceptance will not be complete until it is actually or constructively communicated to the party making the offer.

A bet may be made by telegraph, and when an offer to bet is accepted by telegraph the acceptance takes effect when the message of acceptance is delivered to the telegraph company for transmission, and not when it is received by the other party. When an

withdrawn constitutes no defense in a prosecution under the statutes against gaming.[95]

(II) *Playing For Chips, Checks, Counters, or Notes.* Playing for chips, checks, or counters which it is agreed and understood by the parties shall represent money is gaming,[96] and so is playing for notes or instruments understood by the parties to represent value and by virtue of which the winner can obtain value, whether they are collectable by law or not.[97] But where checks or chips are bet or played off with the understanding that they do not represent money, no offense is committed.[98]

(III) *Playing For Drinks, Cigars, Refreshments, or Fees.* Playing for drinks, cigars, lunches, or other refreshments,[99] or the fees for the use of the table, alley, or apparatus on which or with which a game is played[1] is gaming.

(IV) *Competing For Prizes, Purses, or Premiums.* A prize, purse, or premium offered to the successful player in a game or competitor in a contest by persons other than such players or competitors is not a bet or wager;[2] and the

offer to bet is telegraphed by a person in one place to a person in another, and the latter accepts by telegraph, the betting is done in the place where accepted. Lescallett *v.* Com., 89 Va. 878, 17 S. E. 546. See also State *v.* Gritzner, 134 Mo. 512, 36 S. W. 39; McQuesten *v.* Steinmetz, (N. H. 1904) 58 Atl. 876. But *compare* Ames *v.* Kirby, (N. J. Sup. 1904) 59 Atl. 558.

95. Montfort *v.* Com., 13 Ky. L. Rep. 136.

96. *Georgia.*— Robinson *v.* State, 77 Ga. 101; Porter *v.* State, 51 Ga. 300.

Illinois.— Gibbons *v.* People, 33 Ill. 442.

Kentucky.— Ashlock *v.* Com., 7 B. Mon. 44.

Massachusetts.— See Chapin *v.* Haley, 133 Mass. 127.

Texas.— Walton *v.* State, 14 Tex. 381.

See 24 Cent. Dig. tit. "Gaming," § 137.

97. Gibbons *v.* People, 33 Ill. 442.

98. Fagan *v.* State, 21 Ark. 390.

99. *Arkansas.*— State *v.* Wade, 43 Ark. 77, 51 Am. Rep. 560.

Iowa.— State *v.* Bishel, 39 Iowa 42; State *v.* Leicht, 17 Iowa 28; State *v.* Cooster, 10 Iowa 453; State *v.* Maurer, 7 Iowa 406.

Kentucky.— Stahel *v.* Com., 7 Bush 387; McDaniel *v.* Com., 6 Bush 326; Marston *v.* Com., 18 B. Mon. 485.

Massachusetts.— Com. *v.* Gourdier, 14 Gray 390; Com. *v.* Taylor, 14 Gray 26.

Michigan.— See Hay *v.* Reid, 85 Mich. 296, 48 N. W. 507.

New Hampshire.— Lord *v.* State, 16 N. H. 325, 41 Am. Dec. 729.

New Jersey.— Brown *v.* State, 49 N. J. L. 61, 7 Atl. 340.

New York.— Hitchins *v.* People, 39 N. Y. 454; People *v.* Cutler, 28 Hun 465.

Ohio.— Ulsamer *v.* State, 11 Ohio Dec. (Reprint) 889, 30 Cinc. L. Bul. 293.

Tennessee.— Walker *v.* State, 2 Swan 287.

Texas.— Vanwey *v.* State, 41 Tex. 639; Bachellor *v.* State, 10 Tex. 258; Dunbar *v.* State, 34 Tex. Cr. 596, 31 S. W. 401; Humphreys *v.* State, 34 Tex. Cr. 434, 30 S. W. 1066; Stone *v.* State, 3 Tex. App. 675; Tuttle *v.* State, 1 Tex. App. 364.

See 24 Cent. Dig. tit. "Gaming," § 138.

Compare Simmons *v.* State, 106 Ga. 355, 32 S. E. 339, holding that the playing of a game of cards with the agreement that the winner should take the money contributed in equal shares by each of the players and set up a certain drink to each of the players is not gaming, as each player paid for his own drink and nobody was winner and nobody loser.

1. *Delaware.*— State *v.* Records, 4 Harr. 554.

Indiana.— Hamilton *v.* State, 75 Ind. 586; Mount *v.* State, 7 Ind. 654.

Iowa.— State *v.* Miller, 53 Iowa 84, 154, 209, 4 N. W. 838, 900, 1084; State *v.* Book, 41 Iowa 550, 20 Am. Rep. 609; State *v.* Bishel, 39 Iowa 42.

New Hampshire.— State *v.* Leighton, 23 N. H. 167.

New York.— People *v.* Cutler, 28 Hun 465. *Quære* People *v.* Harrison, 28 How. Pr. 247. *Compare* People *v.* Sargeant, 8 Cow. 139, holding that playing the rub to determine which player shall pay for the use of a billiard-table is not gaming so as to support an indictment for maintaining a common-law nuisance.

Ohio.— Ward *v.* State, 17 Ohio St. 32.

Texas.— Vanwey *v.* State, 41 Tex. 639; Mayo *v.* State, (Cr. App. 1904) 82 S. W. 515; Hall *v.* State, (Cr. App. 1896) 34 S. W. 122; Stone *v.* State, 3 Tex. App. 675; Tuttle *v.* State, 1 Tex. App. 364. *Compare* Smith *v.* State, 28 Tex. App. 102, 12 S. W. 412.

See 24 Cent. Dig. tit. "Gaming," § 138.

But see Harbaugh *v.* People, 40 Ill. 294; Wakefield *v.* Com., 7 Ky. L. Rep. 295; Blewett *v.* State, 34 Miss. 606; Breninger *v.* Belvidere, 44 N. J. L. 350; State *v.* Hall, 32 N. J. L. 158.

2. *California.*— Hankins *v.* Ottinger, 115 Cal. 454, 47 Pac. 254, 40 L. R. A. 76.

Indiana.— Alvord *v.* Smith, 63 Ind. 58.

Iowa.— Delier *v.* Plymouth County Agricultural Soc., 57 Iowa 481, 10 N. W. 872.

Maine.— Dion *v.* St. John Baptiste Soc., 82 Me. 319, 19 Atl. 825, prize for the winner of a voting contest.

New York.— People *v.* Fallon, 152 N. Y. 12, 46 N. E. 296, 57 Am. St. Rep. 492, 37 L. R. A. 227 [*affirming* 4 N. Y. App. Div. 82, 39 N. Y. Suppl. 865]; People *v.* Van de Carr, 150 N. Y. 439, 44 N. E. 1040; Harris *v.* White, 81 N. Y. 532.

fact that each player or competitor is required to pay an entrance fee does not make the transaction a bet or a gaming transaction;[3] but when the stake is contributed by the participants alone, and the successful contestant is to have the fund thus created, this does constitute a bet of wager.[4]

(v) *Contingent Payment For Property.* A sale of property for more than its real value, to be paid for or not according to the result of a certain event, is a wager;[5] but it has been held that where the goods are sold for their real value, the transaction is not a wager as it is impossible for one of the parties to lose anything.[6]

C. Kindred Offenses — 1. Playing or Betting in Certain Places — a. In General. There are statutes in many jurisdictions against playing or betting in certain designated places,[7] such as houses or places where spirituous or intoxicating liquors are retailed, sold, or given away;[8] taverns, inns, hotels, or restaurants;[9]

North Carolina.— State *v.* De Boy, 117 N. C. 702, 23 S. E. 167, a prize offered by a hostess to the most successful player at cards or other games is not a bet or wager.

Oregon.— Misner *v.* Knapp, 13 Oreg. 135, 9 Pac. 65, 57 Am. Rep. 6.

Vermont.— Ballard *v.* Brown, 67 Vt. 586, 32 Atl. 485.

Wisconsin.— Porter *v.* Day, 71 Wis. 296, 37 N. W. 259.

England.— Caminada *v.* Hutton, 17 Cox C. C. 307, 55 J. P. 727, 60 L. J. M. C. 116, 64 L. T. Rep. N. S. 572, 39 Wkly. Rep. 540.

But see Bronson Agricultural, etc., Assoc. *v.* Ramsdell, 24 Mich. 441, construing a statute prohibiting the giving of a purse or premium to the winners of horse-races.

Racing for a purse, prize, or premium offered by racing or other associations is not gaming. Delier *v.* Plymouth County Agricultural Soc., 57 Iowa 481, 10 N. W. 872; People *v.* Fallon, 152 N. Y. 12, 46 N. E. 296, 57 Am. St. Rep. 492, 37 L. R. A. 227 [*affirming* 4 N. Y. App. Div. 82, 39 N. Y. Suppl. 865]; People *v.* Van de Carr, 150 N. Y. 439, 44 N. E. 1040; Harris *v.* White, 81 N. Y. 532.

3. People *v.* Fallon, 4 N. Y. App. Div. 82, 39 N. Y. Suppl. 865 [*affirmed* in 152 N. Y. 12, 46 N. E. 296, 57 Am. St. Rep. 492, 37 L. R. A. 227]. See also Hankins *v.* Ottinger, 115 Cal. 454, 47 Pac. 254, 40 L. R. A. 76.

4. People *v.* Fallon, 152 N. Y. 12, 46 N. E. 296, 57 Am. St. Rep. 492, 37 L. R. A. 227 [*affirming* 4 N. Y. App. Div. 82, 39 N. Y. Suppl. 865]; Stoddard *v.* McAuliffe, 81 Hun (N. Y.) 524, 31 N. Y. Suppl. 38 [*affirmed* in 151 N. Y. 671, 46 N. E. 1151]; Dudley *v.* Flushing Jockey Club, 14 Misc. (N. Y.) 58, 35 N. Y. Suppl. 245; Porter *v.* Day, 71 Wis. 296, 37 N. W. 259.

5. Parsons *v.* State, 2 Ind. 499; Somers *v.* State, 5 Sneed (Tenn.) 438. See also Givens *v.* Rogers, 11 Ala. 543; Com. *v.* Shouse, 16 B. Mon. (Ky.) 325, 63 Am. Dec. 551.

6. Wagner *v.* State, 63 Ind. 250; Quarles *v.* State, 5 Humphr. (Tenn.) 561. *Contra,* Com. *v.* Shouse, 16 B. Mon. (Ky.) 325, 63 Am. Dec. 551; Shumate *v.* Com., 15 Gratt. (Va.) 653.

7. See the statutes of the several states.

Want of knowledge of the character of the place, if it be one of those enumerated in the statute, is no excuse. Persons who play at a game with cards must see to it that they do not play in one of the prohibited places. Johnson *v.* State, 75 Ala. 7.

8. See James *v.* State, 133 Ala. 208, 32 So. 237 (holding that the back yard of a house where intoxicating liquor is sold, and the entrance to which is through the back door of the house, is within the prohibition of a statute against gaming at stores where liquor is sold); Kicker *v.* State, 133 Ala. 193, 32 So. 253; Graham *v.* State, 105 Ala. 130, 16 So. 934; Phillips *v.* State, 51 Ala. 20; Ray *v.* State, 50 Ala. 172; Dale *v.* State, 27 Ala. 31; Smith *v.* State, 22 Ala. 54; Johnson *v.* State, 19 Ala. 527; Coleman *v.* State, 13 Ala. 602 (holding that a boat at the bar of which spirituous liquors are retailed is a place where spirituous liquors are retailed); State *v.* Hawkins, 91 N. C. 626; State *v.* Black, 31 N. C. 378; State *v.* Terry, 20 N. C. 289; Galbreath *v.* State, 36 Tex. 200; Johnson *v.* State, 36 Tex. 198; Cherry *v.* State, 30 Tex. 439; Shihagan *v.* State, 9 Tex. 430; Cole *v.* State, 9 Tex. 42; Burke *v.* State, (Tex. Cr. App. 1896) 35 S. W. 659; Winters *v.* State, 33 Tex. Cr. 395, 26 S. W. 839; Stebbins *v.* State, 22 Tex. App. 32, 2 S. W. 617; Early *v.* State, 23 Tex. App. 364, 5 S. W. 122; Watson *v.* State, 13 Tex. App. 160.

The club-room of a society, maintained in connection with a hall, etc., for the usual purposes of such a society, and equipped with periodicals, billiard-tables, and card-tables for the free use of members and their guests, where intoxicants are furnished without profit to members only for fees which are turned into the general fund, and used to keep up the stock of liquors, is not a house for retailing spirituous liquors, or any other public house, within Tex. Pen. Code, art. 355, which prohibits card-playing in such a place. Koenig *v.* State, 33 Tex. Cr. 367, 26 S. W. 835, 47 Am. St. Rep. 35. See also Winters *v.* State, 33 Tex. Cr. 395, 26 S. W. 839.

A house which, at some indefinite period of past time, had been used as a storehouse for retailing spirituous liquors is not within such a statute. Logan *v.* State, 24 Ala. 182.

9. See the following cases:

Alabama.— McCalman *v.* State, 96 Ala. 98, 11 So. 408 (holding that where it is shown that the room in which the gaming occurred

"outhouses where people resort";[10] gaming-houses;[11] highways;[12] and race-fields.[13] Gaming in a public place[14] or public house is also frequently pro-

was the room of a tavern, it is immaterial whether or not it was a private bedroom); Foster *v.* State, 84 Ala. 451, 4 So. 833 (holding that a house at which transient guests as well as regular boarders are entertained is an inn, although not licensed); Russell *v.* State, 72 Ala. 222.

Maryland.— Baker *v.* State, 2 Harr. & J. 5.

New York.— *In re* Cuscadden, 2 City Hall Rec. 53.

North Carolina.— State *v.* Keisler, 51 N. C. 73; State *v.* Mathews, 19 N. C. 424, holding that one who entertains strangers only occasionally, although he receives compensation for it, is not an innkeeper within a statute to prevent excessive gaming.

Texas.— Comer *v.* State, 26 Tex. App. 509, 10 S. W. 106, holding that in statutory parlance, an inn, tavern, or hotel means a place for the general entertainment of all travelers and strangers who apply, paying suitable compensation.

Virginia.— Purcell *v.* Com., 14 Gratt. 679; Farmer *v.* Com., 8 Leigh 741; Com. *v.* Sanders, 5 Leigh 751; Com. *v.* Terry, 2 Va. Cas. 77.

West Virginia.— State *v.* Brast, 31 W. Va. 387, 7 S. E. 11, holding that playing poker in a room in a hotel with the door locked is not a violation of a statute prohibiting gaming at a hotel.

See 24 Cent. Dig. tit. "Gaming," § 176.

10. See McDaniel *v.* State, 35 Ala. 390; Cain *v.* State, 30 Ala. 534; Swallow *v.* State, 20 Ala. 30; State *v.* Faulkener, 2 McCord (S. C.) 438; Stockton *v.* State, (Tex. Cr. App. 1898) 44 S. W. 509.

The term "outhouse" in such statutes is used in its ordinary and popular sense as meaning any house standing out and apart from houses occupied and used as dwelling-houses or business houses and includes an unoccupied dwelling-house. Wheelock *v.* State, 15 Tex. 253, 260. See also Sisk *v.* State, 28 Tex. App. 432, 13 S. W. 647.

"Where people resort."— To be within such a statute the outhouse must be one to which people have resorted on more than one occasion, or one where more persons than those actually engaged in gaming are assembled on the particular occasion when the offense is charged to have been committed. Downey *v.* State, 115 Ala. 108, 22 So. 479, 110 Ala. 99, 20 So. 439; Downey *v.* State, 90 Ala. 644, 8 So. 869; State *v.* Norton, 19 Tex. 102; Wheelock *v.* State, 15 Tex. 257; Hopkins *v.* State, (Tex. Cr. App. 1896) 33 S. W. 975.

11. See Rice *v.* State, 10 Tex. 545; Lockhart *v.* State, 10 Tex. 275; Lafferty *v.* State, 41 Tex. Cr. 606, 56 S. W. 623; Wartelsky *v.* State, (Tex. Cr. App. 1896) 33 S. W. 1079; Reeves *v.* State, 34 Tex. Cr. 147, 29 S. W. 786; Parks *v.* State, (Tex. App. 1889) 12 S. W. 869; Anderson *v.* State, (Tex. App. 1889) 12 S. W. 868 (defining a gaming-house as "a house or part of a house where gaming is carried on as a business"); Reg. *v.* Ah Pow, 1 Brit. Col. 147.

12. See Graham *v.* State, 105 Ala. 130, 16 So. 934; Glass *v.* State, 30 Ala. 529 (holding that a navigable river is not a highway within the statute against gaming); Mills *v.* State, 20 Ala. 86 (the term "highway" as used in the statute against gaming means a public road, one dedicated to and kept up by the public as contradistinguished from a private way or a neighborhood road).

13. See Com. *v.* Wilson, 9 Leigh (Va.) 648.

14. See Bush *v.* State, 18 Ala. 415; Lowrie *v.* State, 43 Tex. 602; Redditt *v.* State, 17 Tex. 610; Harper *v.* State, (Tex. Cr. App. 1899) 51 S. W. 217; White *v.* State, 39 Tex. Cr. 269, 45 S. W. 702, 46 S. W. 825; Lynn *v.* State, 27 Tex. App. 590, 11 S. W. 640.

What is a public place.— It has been said that "'a public place' does not mean a place devoted solely to the uses of the public; but it means a place which is, in point of fact, public, as distinguished from private — a place that is visited by many persons, and usually accessible to the neighboring public. . . . A place may be public during some hours of the day, and private during other hours." Parker *v.* State, 26 Tex. 204, 207 [*quoted* in Gomprecht *v.* State, 36 Tex. Cr. 434, 435, 37 S. W. 734; Comer *v.* State, 26 Tex. App. 509, 513, 10 S. W. 106]. Any place which for the time is made public by the assemblage of people is a public place. Finnem *v.* State, 115 Ala. 106, 22 So. 593; Campbell *v.* State, 17 Ala. 369. See also Mills *v.* State, 20 Ala. 86. Any house to which all who wish can go, night or day, and indulge in gaming, is a public place. Smith *v.* State, 52 Ala. 384; Coleman *v.* State, 20 Ala. 51.

Illustrations.— A steamboat (Coleman *v.* State, 13 Ala. 602), a ferry-boat (Dickey *v.* State, 68 Ala. 508), an infirmary (Flake *v.* State, 19 Ala. 551), an office used for the manufacture of medicine to which the public has access at all times (Williams *v.* State, (Tex. Cr. App. 1896) 34 S. W. 271), a jury-room of a court-house (Wilcox *v.* State, 26 Tex. 145), an old disused building located on a public square and attached to a court-house (Walker *v.* Com., 2 Va. Cas. 515), a licensed eating-house (Neal *v.* Com., 22 Gratt. (Va.) 917), a club-room in a hotel (Goldstein *v.* State, (Tex. Cr. App. 1896) 35 S. W. 289), a back or shed room of a dwelling-house open and used as a resort to those who would indulge in gaming (Nickols *v.* State, 111 Ala. 58, 20 So. 564), a business office during business hours (Gomprecht *v.* State, 36 Tex. Cr. 434, 37 S. W. 734), and a place near to and in sight of a road or path used by the public (Lee *v.* State, 136 Ala. 31, 33 So. 894; Ford *v.* State, 123 Ala. 81, 26 So. 503; Franklin *v.* State, 91 Ala. 23, 8 So. 678; Henderson *v.* State, 59 Ala. 89) have been held to be public places. On the other hand business offices and other places of business after business hours (Graham *v.* State, 105 Ala. 130, 16 So. 934; Sherrod *v.* State, 25 Ala. 78; Burdine *v.* State, 25 Ala. 60; Clarke *v.* State, 12

hibited.[15] Under such statutes playing once in a prohibited place constitutes the offense,[16] and when gaming occurs at such a place, no matter what secrecy may be used or how few the number present, such statutes are violated.[17]

b. In Room or Building Adjacent to or Connected With Prohibited Place. Such statutes may be violated by gaming in a room or building adjacent to or connected with the principal place designated in the statute.[18]

c. At a Private Residence. Statutes on this subject sometimes expressly except from their operation playing at a private residence.[19]

Ala. 492; Com. *v.* Feazle, 8 Gratt. (Va.) 585), the rooms of a commercial club to which only the club members and invited guests are usually admitted (Grant *v.* State, 33 Tex. Cr. 527, 27 S. W. 127), a pasture (Crutcher *v.* State, 39 Tex. Cr. 233, 45 S. W. 594), a secluded spot on top of a mountain and near no house (Gerrells *v.* State, (Tex. Cr. App. 1894) 26 S. W. 394), a place in the woods out of the public view (Smith *v.* State, 23 Ala. 39; Bythwood *v.* State, 20 Ala. 47; Bledsoe *v.* State, 21 Tex. 223; Com. *v.* Vandine, 6 Gratt. (Va.) 689), an unused mill not open to the public (Green *v.* State, (Tex. Cr. App. 1901) 61 S. W. 481), a private house or room in which several persons assemble by invitation, but to which the public have not the right to go (Coleman *v.* State, 20 Ala. 51), and a residence near a saloon but unconnected therewith (Pickens *v.* State, 100 Ala. 127, 14 So. 672) have been held not to be public places.

15. See the statutes of the several states.

What is a public house.— "A public house, as has been said, is one 'which is commonly open to the public, either for business, pleasure, religious worship, the gratification of curiosity or the like.'" Lewis *v.* State, 140 Ala. 126, 130, 37 So. 99. "The term public house is generic in its character, and is intended by the law to include all houses made public by the occupation carried on in them, as inns, taverns, storehouses for retailing liquors, or those made public by the resort of numerous persons, or in any other way." State *v.* Barns, 25 Tex. 654, 655.

Illustrations.— A barber shop (Moore *v.* State, 30 Ala. 550; Cochran *v.* State, 30 Ala. 542), the office of a justice of the peace (Burnett *v.* State, 30 Ala. 19), a school-house (Cole *v.* State, 28 Tex. App. 536, 13 S. W. 859, 19 Am. St. Rep. 856), and a storehouse (Skinner *v.* State, 30 Ala. 524; Windsor *v.* Com., 4 Leigh (Va.) 680) have been held to be public houses. A lawyer's office (McCauley *v.* State, 26 Ala. 135; Smith *v.* State, 37 Ala. 472) and a room in a warehouse used both for the transaction of business and as a sleeping-room for a clerk (Windham *v.* State, 26 Ala. 69) have been held to be public houses, but not public places. An opera-house in which there have been but two performances in six months and which is closed between performances (Galloway *v.* State, (Tex. Cr. App. 1894) 26 S. W. 67) and a club-room of a social organization (Reiffert *v.* State, (Tex. Cr. App. 1894) 26 S. W. 839; Koenig *v.* State, 33 Tex. Cr. 367, 26 S. W. 835, 47 Am. St. Rep. 35) have been held not to be public houses. It has also been held that a quirt shop is not commonly known as a public house (Tummins *v.* State, 18 Tex. App. 13), and that a jail house is not necessarily a public house (State *v.* Alvey, 26 Tex. 155. See also Lewis *v.* State, 140 Ala. 126, 37 So. 99).

16. Nickols *v.* State, 111 Ala. 58, 20 So. 564; Swallow *v.* State, 20 Ala. 30; Cameron *v.* State, 15 Ala. 383.

17. Windham *v.* State, 26 Ala. 69.

18. State *v.* Terry, 20 N. C. 185; Farmer *v.* Com., 8 Leigh (Va.) 741. *Compare* State *v.* Keisler, 51 N. C. 73; Purcell *v.* Com., 14 Gratt. (Va.) 679; Com. *v.* Sanders, 5 Leigh (Va.) 751.

In Alabama the rule is that if gaming takes place in a room which is connected with or constitutes an appendage to a prohibited room, storehouse, or other such place, the statute is violated, but that if a room which, although in the same building with or adjacent to a prohibited place, is occupied for some justifiable private purpose entirely disconnected from the purpose for which the prohibited place is occupied is used for gaming, no offense is committed. Kicker *v.* State, 133 Ala. 193, 32 So. 253; Skinner *v.* State, 87 Ala. 105, 6 So. 399; Phillips *v.* State, 51 Ala. 20; Bentley *v.* State, 32 Ala. 596; Wilson *v.* State, 31 Ala. 371; Moore *v.* State, 30 Ala. 550; Cochran *v.* State, 30 Ala. 542; Burnett *v.* State, 30 Ala. 19; Arnold *v.* State, 29 Ala. 46; Huffman *v.* State, 28 Ala. 48, 29 Ala. 40, 30 Ala. 532; Sweney *v.* State, 28 Ala. 47; Brown *v.* State, 27 Ala. 47; Dale *v.* State, 27 Ala. 31; Roquemore *v.* State, 19 Ala. 528; Johnson *v.* State, 19 Ala. 527.

In Texas in order to bring a separate room in which the playing took place within the inhibition of the law, it is necessary to show that it was used in connection with the business of the principal room. Galbreath *v.* State, 36 Tex. 200; Johnson *v.* State, 36 Tex. 198; Cherry *v.* State, 30 Tex. 439; Holtzclaw *v.* State, 26 Tex. 682; Winters *v.* State, 33 Tex. Cr. 395, 26 S. W. 839; Robinson *v.* State, (Tex. App. 1892) 19 S. W. 894; Stebbins *v.* State, 22 Tex. App. 32, 2 S. W. 617; Watson *v.* State, 13 Tex. App. 160; O'Brien *v.* State, 10 Tex. App. 544.

19. See the statutes of the several states.

In Texas the statute (Act March 12, 1901) excepts playing at "a private residence occupied by a family" (Huse *v.* State, (Cr. App. 1904) 80 S. W. 618; Hipp *v.* State, (Cr. App. 1903) 75 S. W. 28; Wilkerson *v.* State, 44 Tex. Cr. 455, 72 S. W. 850; Williams *v.* State, (Cr. App. 1903) 72 S. W. 192), and under a former statute playing at a private residence was excepted (White *v.*

2. Keeping a Gaming-House — a. In General. The keeping of a common gaming-house was at common law an indictable offense,[20] and in many jurisdictions the keeping of such a house is expressly prohibited by statute.[21] A single or an occasional game played for gain in a place does not constitute it a place kept for gaming,[22] but any place in which games for money are habitually played, or which is kept or maintained for the purpose of gaming, even though it may be put to other uses and even though its principal use is for some lawful object, is a place kept for gaming.[23] The fact that a house is a club-house and its use and the gaming therein are limited to the subscribers and members of the club, and that it is not open to all persons who may be desirous of using the same, will not keep it from being a gaming-house.[24] A club where a part of the sums played for is appropriated to the use of the club by means of a "kitty" or "rake-off" is a gaming-house.[25] A room on the door of which is the name of a club, which contains a blackboard devoted to "policy," and in which all business stops whenever an officer appears, and in which on his visits are found the implements ordinarily used in playing policy, may well be found to be a common gambling place.[26] Under an indictment for keeping a gaming-house, defendant does not relieve himself by showing that he had rented the house to another before the gaming was

State, 39 Tex. Cr. 269, 45 S. W. 702, 46 S. W. 825; Allphin *v.* State, (Cr. App. 1895) 29 S. W. 159; Stewart *v.* State, 34 Tex. Cr. 33, 28 S. W. 806; Rambo *v.* State, (Cr. App. 1894) 24 S. W. 650, 651; Borders *v.* State, 24 Tex. App. 333, 6 S. W. 532.

20. Jenks *v.* Turpin, 13 Q. B. D. 505, 15 Cox C. C. 486, 49 J. P. 20, 53 L. J. M. C. 161, 50 L. T. Rep. N. S. 808. Bacon Abr. tit. "Gaming" (A). And see Disorderly Houses, 14 Cyc. 485.

21. See the following cases:

Colorado.— Chase *v.* People, 2 Colo. 509.

Florida.— Richardson *v.* State, 41 Fla. 303, 25 So. 880, construing a statute making the finding of gambling devices or implements in a house or room *prima facie* evidence that such house or room is kept for the purpose of gambling.

Georgia.— Bryan *v.* State, 120 Ga. 201, 47 S. E. 574; Thrower *v.* State, 117 Ga. 753, 45 S. E. 126.

Illinois.— Swigert *v.* People, 154 Ill. 284, 40 N. E. 432.

Iowa.— State *v.* Cooster, 10 Iowa 453.

Louisiana.— State *v.* Markham, 15 La. Ann. 498.

Maine.— State *v.* Eaton, 85 Me. 237, 27 Atl. 126; State *v.* Currier, 23 Me. 43.

Massachusetts.—Com. *v.* Warren, 161 Mass. 281, 37 N. E. 172; Com. *v.* Hyde, Thach. Cr. Cas. 19.

Minnesota.— State *v.* Grimes, 74 Minn. 257, 77 N. W. 4.

New Jersey.—State *v.* Ackerman, 62 N. J. L. 456, 41 Atl. 697.

New York.— People *v.* Klock, 48 Hun 275.

Canada.— Reg. *v.* Saunders, 3 Can. Cr. Cas. 495, 20 Can. L. T. 213 (Occ. Notes) (house must be kept for gain); Reg. *v.* Petrie, 3 Can. Cr. Cas. 439, 7 Brit. Col. 176; Reg. *v.* Logan, 16 Ont. 335; Reg. *v.* Brady, 10 Quebec Super. Ct. 539.

See 24 Cent. Dig. tit. "Gaming," §§ 199, 200.

"Keeping a gambling house and gambling are distinct offenses. A person guilty of keeping a gambling house may not be guilty of gambling, and one may be guilty of gambling without having any connection with the house. The essence of the former offense is the keeping of the place for the purpose of gambling, or the permission of gambling in a place under the care or control of the accused." State *v.* White, 123 Iowa 425, 98 N. W. 1027.

Boat as a gaming-house.— A boat with a cabin equipped with tables, chairs, and such articles and devices as are necessary to carry on a gambling business is included in the term "house" used in the statute against gaming-houses. State *v.* Metcalf, 65 Mo. App. 681. See also State *v.* Mullen, 35 Iowa 199.

22. Ulsamer *v.* State, 11 Ohio Dec. (Reprint) 889, 30 Cinc. L. Bul. 293; Anderson *v.* State, (Tex. App. 1889) 12 S. W. 868; Reg. *v.* Davies, [1897] 2 Q. B. 199, 18 Cox C. C. 618, 66 L. J. Q. B. 513, 76 L. T. Rep. N. S. 786. But see State *v.* Crogan, 8 Iowa 533 (holding that under a statute which prohibits the keeping of gambling-houses, the offense is as complete if the house is kept for that purpose for one day as if kept for one year); State *v.* Markham, 15 La. Ann. 498.

23. Toll *v.* State, 40 Fla. 169, 23 So. 942; State *v.* Mosby, 53 Mo. App. 571; Ulsamer *v.* State, 11 Ohio Dec. (Reprint) 889, 30 Cinc. L. Bul. 293.

24. Com. *v.* Blankinship, 165 Mass. 40, 42 N. E. 115; Jenks *v.* Turpin, 13 Q. B. D. 505, 15 Cox C. C. 486, 49 J. P. 20, 53 L. J. M. C. 161, 50 L. T. Rep. N. S. 808. *Compare* Downes *v.* Johnson, [1895] 2 Q. B. 203, 59 J. P. 487, 64 L. J. M. C. 238, 72 L. T. Rep. N. S. 728, 15 Reports 466, 43 Wkly. Rep. 556, holding that the statute against keeping betting houses does not apply to a case where members of a *bona fide* club make bets with each other in the club.

25. Cochran *v.* State, 102 Ga. 631, 29 S. E. 438; Reg. *v.* Brady, 10 Quebec Super. Ct. 539.

26. Com. *v.* Adams, 160 Mass. 310, 35 N. E. 851.

done, where it appears that the house was in his possession when the gaming occurred.[27]

b. Pool-Rooms. Keeping a place of public resort for book-making or pool-selling is keeping a gaming-house;[28] and keeping a place for such purposes is sometimes made an offense by express statute.[29]

c. Bucket-Shops. Keeping a place for gambling in stocks and commodities, commonly known as a bucket-shop, is sometimes made an offense by statute.[30]

3. Leasing or Permitting Use of House or Place For Gaming. One who leases a house or place to another to be used for gaming,[31] or who permits or suffers a house or place owned, occupied, or controlled by him to be used for that purpose,[32]

27. Stevenson *v.* State, 83 Ga. 575, 10 S. E. 234; Scott *v.* State, 29 Ga. 263.

28. *Florida.*— McBride *v.* State, 39 Fla. 442, 22 So. 711, holding that the keeping of a house or room for the purpose of betting upon horse-races conducted at a distant point, such bets being made in the form of a sale and purchase of what are known as pools, falls within the prohibition of the statute prohibiting the keeping of a gambling-house.

Georgia.— Jones *v.* State, 120 Ga. 185, 47 S. E. 561; Thrower *v.* State, 117 Ga. 753, 45 S. E. 126.

Illinois.— Swigart *v.* People, 154 Ill. 284, 40 N. E. 432 [*affirming* 50 Ill. App. 181].

Kentucky.— Louisville *v.* Wehmhoff, 116 Ky. 812, 76 S. W. 876, 25 Ky. L. Rep. 995, 1924, 79 S. W. 201; Bollinger *v.* Com., 98 Ky. 574, 35 S. W. 553, 17 Ky. L. Rep. 1122; Cheek *v.* Com., 79 Ky. 359, 2 Ky. L. Rep. 339.

Michigan.— People *v.* Weithoff, 93 Mich. 631, 53 N. W. 784, 32 Am. St. Rep. 532; People *v.* Weithoff, 51 Mich. 203, 16 N. W. 442, 47 Am. Rep. 557.

And see Disorderly Houses, 14 Cyc. 486.

29. See Swigart *v.* People, 154 Ill. 284, 40 N. E. 432 [*affirming* 50 Ill. App. 181]; Com. *v.* Watson, 154 Mass. 135, 27 N. E. 1003; Com. *v.* Ferry, 146 Mass. 203, 15 N. E. 484; Ames *v.* Kirby, (N. J. Sup. 1904) 59 Atl. 558, holding that the statute prohibiting the keeping of a place in the state to which persons may resort for pool-selling, or for betting on any horse-race, or for gambling in any form is violated by keeping a resort for gamblers whose wagers are made by telegraphic communications with persons outside of the state on races run outside of the state, although the latter do not violate their own local laws in accepting such wagers.

A telegraph and telephone company organized for communicating with pool-sellers outside the state, and by which results are made known in the state and money passes, is within the law prohibiting pool-rooms. State *v.* Thompson, 8 Ohio S. & C. Pl. Dec. 682, 15 Ohio N. P. 378. See also Reg. *v.* Osborne, 27 Ont. 185.

30. See Weare Commission Co. *v.* People, 209 Ill. 528, 70 N. E. 1076; Soby *v.* People, 134 Ill. 66, 25 N. E. 109 (holding that it is no defense to a charge of violating such a statute that defendant acted in the matter as an agent for a firm in another town who executed the orders received by him); Caldwell *v.* People, 67 Ill. App. 367.

Intent.— It is unnecessary to show the intention of the keeper of such a place. Soby *v.* People, 134 Ill. 66, 25 N. E. 109; Caldwell *v.* People, 67 Ill. App. 367.

31. See Voght *v.* State, 124 Ind. 358, 24 N. E. 680 (holding that it is not necessary to prove by direct evidence that there was a specific agreement or intent on the part of the lessor and his lessee at the time the room was leased that it was to be used for the purpose of gaming); Morgan *v.* State, 117 Ind. 569, 19 N. E. 154; Fisher *v.* State, 2 Ind. App. 365, 28 N. E. 565; Borchers *v.* State, 31 Tex. Cr. 517, 21 S. W. 192. See also Harris *v.* McDonald, 79 Ill. App. 638.

Conviction of tenant or lessee.— Under a statute making it a penal offense for the owner or proprietor of a house to rent the same for gaming, a conviction may be had against a person who has possession of a house as tenant or lessee. Poteete *v.* State, 72 Ala. 558.

32. See the following cases:

Arkansas.— State *v.* Stillwell, 20 Ark. 96; Stith *v.* State, 13 Ark. 680 [*overruling* State *v.* Mathis, 3 Ark. 84], holding that the owner of a house cannot be indicted for permitting poker or any of the small games of cards to be played in his house, but only for permitting gaming-tables, banks, etc.

Indiana.— Padgett *v.* State, 68 Ind. 46.

Kentucky.— Com. *v.* Watson, 2 Duv. 408; Roberts *v.* Com., 11 B. Mon. 3 (holding that the occupant of premises over which a public road passes is not bound to prevent gambling on that part of the public road within his premises); Calvert *v.* Com., 5 B. Mon. 264; Ervine *v.* Com., 5 Dana 216; Com. *v.* Lampton, 4 Bibb 261; Alexander *v.* Com., 12 Ky. L. Rep. 470 (holding that one may be guilty of suffering gaming on premises "in his occupation or under his control," although he was neither the owner nor the renter of the premises, if he was in control during the playing of a single game and suffered it to go on); Wakefield *v.* Com., 7 Ky. L. Rep. 295; O'Bryan *v.* Com., 7 Ky. L. Rep. 220.

Massachusetts.— Com. *v.* Coleman, 184 Mass. 198, 68 N. E. 220; Com. *v.* Adams, 109 Mass. 344; Com. *v.* Dean, 1 Pick. 387.

Mississippi.— Diebel *v.* State, 68 Miss. 725, 9 So. 354 [*distinguishing* Mount *v.* State, 7 Sm. & M. 277].

Missouri.— State *v.* Ebert, 40 Mo. 186; State *v.* Smith, 19 Mo. 683; State *v.* Fulton, 19 Mo 680; State *v.* Mohr, 55 Mo. App. 329.

Ohio.—Buck *v.* State, 1 Ohio St. 61; Thomp-

or who permits or suffers gaming in certain designated houses or places,[33] in some jurisdictions violates the statute law. It seems that knowledge on the part of the lessor or the person suffering or permitting gaming is an essential element of such offenses.[34] One indicted for permitting gaming must be shown to have been in possession or control of the house or place at the time when the gaming complained of occurred.[35]

4. Visiting or Frequenting Gaming-Houses. In some jurisdictions it is a statutory offense to visit or frequent gaming-houses.[36]

5. Common Gamblers. Statutes have been enacted in some jurisdictions especially directed against common gamblers;[37] and under such statutes it has been held that playing an occasional game of cards upon which money is staked does not constitute the player a common gambler, and so liable to conviction

son *v.* Ackerman, 21 Ohio Cir. Ct. 740, 12 Ohio Cir. Dec. 456.

South Carolina.— Greenville *v.* Kemmis, 58 S. C. 427, 36 S. E. 727, 50 L. R. A. 725.

Texas.— Robinson *v.* State, 24 Tex. 152; Robinson *v.* State, 15 Tex. 311; Harris *v.* State, 5 Tex. 11; Stuart *v.* State, (Cr. App. 1901) 60 S. W. 554; Rankin *v.* State, 42 Tex. Cr. 1, 56 S. W. 929; Kimbrough *v.* State, 25 Tex. App. 397, 8 S. W. 476.

United States.— Washington *v.* Strother, 29 Fed. Cas. No. 17,233, 2 Cranch C. C. 542.

See 24 Cent. Dig. tit. "Gaming," § 202.

Where two or more persons have the joint control or occupancy of premises, one of them may be guilty and his cotenants innocent of the offense of permitting the use of premises for gaming. White *v.* Com., 5 Ky. L. Rep. 318.

33. See the following cases:

Alabama.— Campbell *v.* State, 55 Ala. 89; Wilcox *v.* State, 50 Ala. 142.

Massachusetts.— Com. *v.* Tilton, 8 Metc. 232.

Ohio.— State *v.* Erwin, Tapp. 275.

Texas.— Bennett *v.* State, 30 Tex. 427; Douthit *v.* State, (Cr. App. 1903) 73 S. W. 809; Humphreys *v.* State, 34 Tex. Cr. 434, 30 S. W. 1066; O'Brien *v.* State, 10 Tex App. 544.

Virginia.— Com. *v.* Price, 8 Leigh 757.

See 24 Cent. Dig. tit. "Gaming," § 202.

34. *Alabama.*— Campbell *v.* State, 55 Ala. 89.

Illinois.— See Harris *v.* McDonald, 79 Ill. App. 638.

Indiana.— Padgett *v.* State, 68 Ind. 46. *Compare* Fisher *v.* State, 2 Ind. App. 365, 28 N. E. 565.

Iowa.— State *v.* Cooster, 10 Iowa 453.

Kentucky.— Com. *v.* Watson, 2 Duv. 408. *Compare* Wakefield *v.* Com., 7 Ky. L. Rep. 295, holding that to authorize a conviction for suffering gaming on one's premises, it is unnecessary to prove that the accused had knowledge of the betting, and that one who permits games to be played on his premises must at his peril see that there is no betting.

Maine.— State *v.* Currier, 23 Me. 43.

Massachusetts.— Com. *v.* Coleman, 184 Mass. 198, 68 N. E. 220.

Ohio.— See Thompson *v.* Ackerman, 21 Ohio Cir. Ct. 740, 12 Ohio Cir. Dec. 456.

Texas.— Harris *v.* State, 5 Tex. 11; Stuart *v.* State, (Cr. App. 1901) 60 S. W. 554.

35. Calvert *v.* Com., 5 B. Mon. (Ky.) 264; Diebel *v.* State, 68 Miss. 725, 9 So. 354 [*distinguishing* Mount *v.* State, 7 Sm. & M. (Miss.) 277]; State *v.* Ebert, 40 Mo. 186; Robinson *v.* State, 24 Tex. 152; Borchers *v.* State, 31 Tex. Cr. 517, 21 S. W. 192; Kimbrough *v.* State, 25 Tex. App. 397, 8 S. W. 476. But *compare* Campbell *v.* State, 55 Ala. 89; State *v.* Erwin, Tapp. (Ohio) 275.

36. See *Ex p.* Boswell, 86 Cal. 232, 24 Pac. 1060; *Ex p.* Lane, 76 Cal. 587, 18 Pac. 677; Com. *v.* Blankinship, 165 Mass. 40, 42 N. E. 115; Com. *v.* Warren, 161 Mass. 281, 37 N. E. 172; Com. *v.* Adams, 160 Mass. 310, 35 N. E. 851.

In Indiana under Burns Rev. St. (1894) § 2089, Horner Rev. St. (1897) § 2002, a single visit to a gaming-house is sufficient to constitute the offense (Roberts *v.* State, 25 Ind. App. 266, 58 N. E. 203); but under an earlier statute it was otherwise (see Greene *v.* State, 109 Ind. 175, 9 N. E. 781).

37. See the following cases:

Indiana.— State *v.* Allen, 69 Ind. 124; Howard *v.* State, 64 Ind. 516; Hamilton *v.* State, 25 Ind. 426; Bruce *v.* State, 25 Ind. 424; Bowe *v.* State, 25 Ind. 415; Courtney *v.* State, 5 Ind. App. 356, 32 N. E. 335.

Kentucky.— Com. *v.* Hopkins, 2 Dana 418.

New York.— People *v.* O'Malley, 52 N. Y. App. Div. 46, 64 N. Y. Suppl. 843 (construing Pen. Code, § 344, which provides that a person who engages or plays in any gambling or banking game where money or property is dependent upon the result is a common gambler); Lyman *v.* Shenandoah Social Club, 39 N. Y. App. Div. 459, 57 N. Y. Suppl. 372; People *v.* Flinn, 37 Misc. 87, 74 N. Y. Suppl. 731 [*affirmed* in 72 N. Y. App. Div. 67, 76 N. Y. Suppl. 293] (construing Pen. Code, § 344*a*, which provides that any one who sells or offers to sell what are called "lottery policies" is a common gambler); People *v.* Dewey, 11 N. Y. Suppl. 602 [*affirmed* in 128 N. Y. 606, 27 N. E. 1017]; People *v.* Borges, 6 Abb. Pr. 132.

Pennsylvania.— Com. *v.* Philippi, 6 Pa. Dist. 426.

Rhode Island.— State *v.* Groves, 21 R. I. 252, 43 Atl. 181; State *v.* Melville, 11 R. I. 417.

See 24 Cent. Dig. tit. "Gaming," § 205.

under such statutes, if such playing is not followed as a common business or one means of livelihood.[38]

6. Allowing Minors to Visit or Play in Certain Places — a. In General. In some jurisdictions it is made an offense by statute to allow the presence of minors in places where certain games are played,[39] or to allow them to play at certain games in certain places.[40]

b. Knowledge or Intent. Offenses created by such statutes are of that class where knowledge or guilty intent is not an essential ingredient and need not be proved.[41]

D. Who May Be Liable— 1. In General. The liability of particular persons to prosecution for gaming depends upon the provisions of the various statutes upon the subject.[42] Thus it has been decided that under certain statutes against keeping gaming-houses or exhibiting or operating gaming-tables or devices, both

38. Com. *v.* Hopkins, 2 Dana (Ky.) 418; Com. *v.* Philippi, 6 Pa. Dist. 426. See also Green *v.* State, 109 Ind. 175, 9 N. E. 781; De Haven *v.* State, 2 Ind. App. 376, 28 N. E. 562. But see Roberts *v.* State, 25 Ind. App. 366, 58 N. E. 203; State *v.* Melville, 11 R. I. 417.

39. See State *v.* Probasco, 62 Iowa 400, 17 N. W. 607; Com. *v.* Emmons, 98 Mass. 6.

40. See the following cases:

Alabama.— Sikes *v.* State, 67 Ala. 77.

Arkansas.— Snow *v.* State, 50 Ark. 557, 9 S. W. 306, holding that under a statute making it an offense to permit a minor to play pool in a dram shop or saloon, a place where cider, birch beer, and ginger ale are sold after the manner of a dram shop is a saloon.

Georgia.— Stern *v.* State, 53 Ga. 229, 21 Am. Rep. 266; Conyers *v.* State, 50 Ga. 103, 15 Am. Rep. 686, holding, however, that under a statute prohibiting the owner of a billiard-table from allowing a minor to play billiards without the consent of his parent or guardian, such consent need not be in writing.

Indiana.— Kiley *v.* State, 120 Ind. 65, 22 N. E. 99; Hipes *v.* State, 73 Ind. 39; Williams *v.* Warsaw, 60 Ind. 457; Bond *v.* State, 52 Ind. 457.

Missouri.— State *v.* Mackin, 51 Mo. App. 129.

See 24 Cent. Dig. tit. "Gaming," § 203.

Necessity for game.— To bring a case within a statute prohibiting saloon-keepers from allowing minors to play on billiard-tables in saloons, there must be a game played or begun to be played with the balls and cues or some substitute therefor; mere sport or pastime on the table or playing with the balls is not prohibited. Sikes *v.* State, 67 Ala. 77.

Necessity for wager.— An ordinance prohibiting the owner of a place where intoxicating liquors are sold from allowing a minor to participate there in a game on the result of which a wager depends is not violated where the minor plays billiards at such a place for amusement only (Williams *v.* Warsaw, 60 Ind. 457); but under a statute making it unlawful to permit a minor to play billiards in certain places, proof that something was wagered on the game is not essential to a conviction (Bond *v.* State, 52 Ind. 457).

41. State *v.* Probasco, 62 Iowa 400, 17 N. W. 607; Com. *v.* Emmons, 98 Mass. 6; State *v.* Mackin, 51 Mo. App. 129, where the minor told defendant that he was of age. *Contra*, Stern *v.* State, 53 Ga. 229, 21 Am. Rep. 266.

42. See the following cases:

Alabama.— Jacobi *v.* State, 59 Ala. 71, holding that the managers of a social club whose members alone are permitted to buy spirituous liquors sold in its rooms may be indicted under Rev. Code, § 3625, for permitting gaming on the premises.

Florida.— Murray *v.* State, 9 Fla. 246, holding that a statute making it an offense to keep a gambling-table or room, or to play at a gaming-table or in a gambling-room, did not apply to slaves.

Georgia.— Parmer *v.* State, 91 Ga. 152, 16 S. E. 937, holding that where bystanders bet money on dice thrown for money, they, as well as the throwers of the dice, are guilty of playing and betting under Code, § 4541.

Idaho.— *In re* Rowland, 8 Ida. 595, 70 Pac. 610, holding that a player as well as the dealer in a game of stud-poker is guilty of gaming under the provisions of the act of Feb. 6, 1899.

Indiana.— Iseley *v.* State, 8 Blackf. 403, holding that an indictment for gaming may be sustained against a person who made a bet, although another person furnished the money.

Kentucky.— Com. *v.* Lansdale, 98 Ky. 664, 34 S. W. 17, 17 Ky. L. Rep. 1245, holding that one who furnishes or sells to another a machine ordinarily used for betting, knowing that it is to be used in violation of the law, if it is so used, is indictable under Ky. St. § 1960.

Oregon.— State *v.* McDaniel, 20 Oreg. 523, 26 Pac. 837, holding that a person who bets money at a game of faro dealt by another plays faro within the meaning of Hill Code, § 3526, providing a punishment for each person who shall "deal, play or carry on" a faro game.

Tennessee.— Howlett *v.* State, 5 Yerg. 144, holding that under the statutes all persons encouraging the playing of cards for money or other valuables, although they may not bet, are guilty of gaming.

Texas.— Shaw *v.* State, 35 Tex. Cr. 394, 33 S. W. 1078, holding that a dealer cannot

the keepers, exhibitors, or operators thereof, and their servants, employees, or agents are liable,[43] and that under such statutes one who receives or shares in the profits of such house, table, or device is guilty as well as the person who actually runs the house or operates the table or device.[44] A broker who merely acts as such for two parties, one a buyer and the other a seller, without having any pecuniary interest in the transaction beyond his fixed commission, and without any guilty knowledge on his part of the intention of the contracting parties to gamble in stocks or merchandise, is not liable to prosecution under a statute prohibiting gambling in stocks or futures.[45] Persons who play a game upon which money is bet or wagered by third persons, but who do not themselves, either directly or indirectly, bet or wager money on the game so played, are not guilty of gaming.[46] Mere spectators having no interest in a gaming-house or table, but who afford a momentary or occasional assistance to the proprietor, do not violate statutes against gaming.[47] A corporation may be indicted for gaming when such offense is punishable by a fine.[48] A telegraph company is not indictable as a nuisance for transmitting race news to a gaming-house, although it has knowledge that such news is to be used for gaming and betting purposes.[49]

be convicted of betting at his own banking game.

United States.— U. S. *v.* Lefevre, 26 Fed. Cas. No. 15,591, 1 Cranch C. C. 244, holding that the offense of keeping a faro table could only be committed by a tavern-keeper or retailer of spirituous liquors under Md. Acts (1797), c. 110.

Canada.— Reg. *v.* Cook, 13 Q. B. D. 377, 48 J. P. 694, 51 L. T. Rep. N. S. 21, 32 Wkly. Rep. 796, holding that a person having the care or management of a lawful business is not indictable because bets are made in his place of business by his patrons, where he takes no share or part in such bets.

See 24 Cent. Dig. tit. "Gaming," § 211.

43. *Alabama.*— Bibb *v.* State, 84 Ala. 13, 4 So. 275; Miller *v.* State, 48 Ala. 122 (holding that a person who has a place in a room where the game of keno is exhibited, and sells to the players the cards which are used in playing the game is "interested or concerned in keeping or exhibiting, any table for gaming," within the meaning of Rev. Code, § 3621).

Arkansas.— Portis *v.* State, 27 Ark. 360; Trimble *v.* State, 27 Ark. 355.

Florida.— McBride *v.* State, 39 Fla. 442, 22 So. 711; Wooten *v.* State, 24 Fla. 335, 5 So. 39, 1 L. R. A. 819.

Massachusetts.— Com. *v.* Drew, 3 Cush. 279. But *compare* Com. *v.* Dean, 1 Pick. 387.

Tennessee.— Atkins *v.* State, 95 Tenn. 474, 32 S. W. 391.

Texas.—Buchanan *v.* State, (Cr. App. 1895) 33 S. W. 339; Lettz *v.* State, (Cr. App. 1893) 21 S. W. 371, holding that under a statute providing a penalty for keeping or exhibiting a gaming-table for the purpose of gaming, a conviction can be had, although defendant is not the owner of such table and has no interest therein; exhibiting and not owning or having an interest in such table constitutes the offense.

United States.— U. S. *v.* Conner, 25 Fed. Cas. No. 14,846, 1 Cranch C. C. 102.

See 24 Cent. Dig. tit. "Gaming," §§ 207–209.

But *compare* People *v.* Fallon, 152 N. Y. 1, 46 N. E. 302, 37 L. R. A. 419 [*affirming* 4 N. Y. App. Div. 76, 39 N. Y. Suppl. 860], holding that a clerk who attends his employer at a race-track and records in a book bets which his employer makes on the races is not guilty of violating Pen. Code, § 343, forbidding the keeping of establishments for betting or gaming.

44. State *v.* Fountain, 1 Marv. (Del.) 532, 41 Atl. 195; Com. *v.* Burns, 4 J. J. Marsh. (Ky.) 177; McGowan *v.* State, 9 Yerg. (Tenn.) 184.

45. Reg. *v.* Dowd, 17 Quebec Super. Ct. 67. But see Fortenbury *v.* State, 47 Ark. 188, 14 S. W. 462.

46. Bass *v.* State, 37 Ala. 469; Strawhern *v.* State, 37 Miss. 422. But see Smith *v.* State, 5 Humphr. (Tenn.) 163, holding that if a person plays at a game, knowing that others are betting, he is guilty of gaming under a statute against encouraging or promoting gaming.

47. Vowells *v.* Com., 83 Ky. 193; Com. *v.* Burns, 4 J. J. Marsh. (Ky.) 177. See also Wren *v.* State, 70 Ala. 1. But see State *v.* Marchant, 15 R. I. 539, 9 Atl. 902; Johnson *v.* State, 4 Sneed (Tenn.) 614, holding that spectators who pay admission to see a cock-fight on which money is wagered are indictable for gaming under a statute which makes it an offense to aid, assist, or encourage any game of hazard or address for money or other valuable thing.

48. Com. *v.* Pulaski County Agricultural, etc., Assoc., 92 Ky. 197, 17 S. W. 442, 13 Ky. L. Rep. 468.

A railroad company may be punished for suffering gaming on a moving train under its control, under Ky. St. § 1978, providing for the punishment of any person who shall suffer gaming "in a house, boat or float or on premises in his occupation or under his control." Louisville, etc., R. Co. *v.* Com., 112 Ky. 635, 66 S. W. 505, 23 Ky. L. Rep. 1900.

49. Com. *v.* Western Union Tel. Co., 112 Ky. 355, 67 S. W. 59, 23 Ky. L. Rep. 1633, 99 Am. St. Rep. 299, 57 L. R. A. 614.

2. Accessaries and Accomplices. All who participate in gaming are principals, there being no accessaries in misdemeanors.[50] Whether one who participates in gaming is an accomplice of the other participants is discussed elsewhere.[51]

E. License as a Defense. When particular games or forms of gaming are licensed by the legislature,[52] or by a municipality having power to grant such a license,[53] persons who participate therein are protected against criminal prosecution; but an unauthorized license affords no protection.[54]

F. Prosecution and Punishment — 1. Jurisdiction. The constitutional and statutory provisions of the several states determine what courts have jurisdiction of gaming and kindred offenses.[55]

2. Indictment and Information*— a. General Requisites — (i) *General Rule.* In an indictment charging the offense of gaming, where no precise form is prescribed by the statute, every material fact which is an essential and necessary ingredient in the offense must be clearly stated.[56] It is not necessary, however,

50. *Kentucky.*— Com. *v.* McAtee, 8 Dana 28; Com. *v.* Burns, 4 J. J. Marsh. 177.

New York.— People *v.* Trainor, 57 N. Y. App. Div. 422, 68 N. Y. Suppl. 263, 15 N. Y. Cr. 333.

North Carolina.— State *v.* De Boy, 117 N. C. 702, 23 S. E. 167.

Pennsylvania.— Com. *v.* Pease, 6 Lack. Leg. N. 213, 14 York Leg. Rec. 94.

Tennessee.— Atkins *v.* State, 95 Tenn. 474, 32 S. W. 391; State *v.* Smith, 2 Yerg. 272.

And see Criminal Law, 12 Cyc. 183.

One who keeps watch for the purpose of guarding against detection of others who are playing cards in a public place is himself a principal in the offense. Earp *v.* State, (Tex. App. 1890) 13 S. W. 888.

51. See Criminal Law, 12 Cyc. 448.

52. Hawkins *v.* State, 33 Ala. 433; Jones *v.* State, 26 Ala. 155; Rodgers *v.* State, 26 Ala. 76 (holding that a license to keep a billiard-table does not authorize its use for a game of pool); State *v.* Allaire, 14 Ala. 435; State *v.* Moseley, 14 Ala. 390; Overby *v.* State, 18 Fla. 178; State *v.* Duncan, 16 Lea (Tenn.) 79; Houghton *v.* State, 41 Tex. 136 [*overruling* Wolz *v.* State, 33 Tex. 345]; Harris *v.* State, (Tex. Cr. App. 1902) 66 S. W. 565; Hill *v.* State, (Tex. Cr. App. 1902) 66 S. W. 554; Rutherford *v.* State, 39 Tex. Cr. 137, 45 S. W. 579 [*distinguishing* Reeves *v.* State, 12 Tex. App. 199, where it was held that under a statute providing for the levy of a tax on gaming-tables, and further providing that such levy should not exempt from punishment under the laws in force against gaming, the payment of a license-tax could not be pleaded in bar to a prosecution for keeping a gaming-table]; Harris *v.* State, 9 Tex. App. 308; Chiles *v.* State, 1 Tex. App. 27.

53. Berry *v.* People, 36 Ill. 423.

54. Schuster *v.* State, 48 Ala. 199; Goetler *v.* State, 45 Ark. 454; State *v.* Lindsay, 34 Ark. 372; State *v.* Caldwell, 3 La. Ann. 435; Debardelaben *v.* State, 99 Tenn. 649, 42 S. W. 684; Atkins *v.* State, 95 Tenn. 474, 32 S. W. 391; Brown *v.* State, 88 Tenn. 566, 13 S. W. 236; Palmer *v.* State, 88 Tenn. 553, 13 S. W. 233, 8 L. R. A. 280.

55. See the following cases:

Arkansas.— *Ex p.* Tucker, 25 Ark. 567.

California.— People *v.* Wong Wang, 92 Cal. 277, 28 Pac. 270; *Ex p.* Lane, 76 Cal. 587, 18 Pac. 677.

Idaho.— *In re* Rowland, 8 Ida. 595, 70 Pac. 610.

Illinois.— Truitt *v.* People, 88 Ill. 518.

Indiana.— State *v.* Albertson, 2 Blackf. 251.

New York.— People *v.* Dewey, 11 N. Y. Suppl. 602.

See 24 Cent. Dig. tit. "Gaming," § 218. And see Criminal Law, 12 Cyc. 196.

56. *Alabama.*— Dreyfus *v.* State, 83 Ala. 54, 3 So. 430; Covy *v.* State, 4 Port. 186.

Florida.— Montgomery *v.* State, 40 Fla. 174, 24 So. 68.

Missouri.— State *v.* Burke, 151 Mo. 136, 52 S. W. 226.

New Jersey.— State *v.* Spear, 63 N. J. L. 179, 42 Atl. 840.

New York.— People *v.* Stedeker, 175 N. Y. 57, 67 N. E. 132; People *v.* Klock, 48 Hun 275.

Rhode Island.— State *v.* Melville, 11 R. I. 417.

Texas.— Meyers *v.* State, 41 Tex. Cr. 508, 55 S. W. 818; Cothran *v.* State, 36 Tex. Cr. 196, 36 S. W. 273; Goldstein *v.* State, 36 Tex. Cr. 193, 36 S. W. 278, where an indictment for unlawfully dealing in futures was held to be insufficient in that it failed to allege that the futures were bought or sold with no intention that the thing should be delivered, and for want of a designation of the particular thing bought or sold.

Vermont.— State *v.* McMillan, 69 Vt. 105, 37 Atl. 278.

England.— Rex *v.* Taylor, 3 B. & C. 502, 10 E. C. L. 231.

See 24 Cent. Dig. tit. "Gaming," § 222.

Frequenting house or place.— An information charging the offense of being present where gaming implements are found, created by Mass. St. (1895) c. 419, § 9, must allege that the place was unlawfully used as and for a common gaming-house. Com. *v.* Smith, 166 Mass. 370, 44 N. E. 503. See also State *v.* Allen, 69 Ind. 124, decided under a similar statute.

* By Frank W. Jones.

to follow the precise words of the statute, and allegations substantially charging a violation of the provisions of the statute are sufficient.[57] In several jurisdictions it is provided by statute that no complaint, information, or indictment for violating the law relative to any form of gaming shall be quashed, if sufficient to enable defendant to understand the charge and to prepare his defense.[58]

(II) *Certainty and Particularity.* The offense charged in an indictment for gaming should be stated in a clear, distinct, direct manner, and it should likewise be stated with particularity and certainty to a certain intent in general, in order that defendant may know the offense which he is called upon to answer; that the jury may appear to be warranted in their verdict, and that the court may properly apply the punishment which the law prescribes.[59]

57. *Alabama.*— Napier *v.* State, 50 Ala. 168; Cochran *v.* State, 30 Ala. 542 (holding that an indictment for gaming is sufficient where it charges that defendant played "at a game of cards or dice," etc., instead of "at a game with cards or dice," as the form given in the code prescribes); Burnett *v.* State, 30 Ala. 19; Rodgers *v.* State, 26 Ala. 76; Coggins *v.* State, 7 Port. 263; Holland *v.* State, 3 Port. 292 (holding that an indictment alleging that defendants "played at cards" under the statute of 1828, prohibiting "playing at a game with cards," is sufficient).

California.— *Ex p.* Lane, 76 Cal. 587, 18 Pac. 677.

Florida.— McBride *v.* State, 39 Fla. 442, 22 So. 711.

Indiana.— Middaugh *v.* State, 103 Ind. 78, 2 N. E. 292.

Kansas.—State *v.* Williamson, 58 Kan. 699, 50 Pac. 890.

Missouri.— State *v.* Kentner, 178 Mo. 487, 77 S. W. 522; State *v.* Ragan, 22 Mo. 459; State *v.* Nelson, 19 Mo. 393.

Oklahoma.— Sweitzer *v.* Territory, 5 Okla. 297, 47 Pac. 1094.

Oregon.— State *v.* Carr, 6 Oreg. 133, holding that the indictment is sufficient if it is as explicit in describing the offense as the statute is which creates it.

Rhode Island.— State *v.* Melville, 11 R. I. 417.

Tennessee.— Bennett *v.* State, 2 Yerg. 472.

Texas.— State *v.* Shult, 41 Tex. 548; State *v.* Burton, 25 Tex. 420; McGaffey *v.* State, 4 Tex. 156; Drummond *v.* Republic, 2 Tex. 156; Griffin *v.* State, 43 Tex. Cr. 428, 66 S. W. 782; Christopher *v.* State, 41 Tex. Cr. 235, 53 S. W. 852; Thompson *v.* State, (Cr. App. 1894) 28 S. W. 684, holding that an indictment against one for gaming which charges him with betting "at a game called 'pool,'" instead of "at a game of pool" is sufficient. See also White *v.* State, (Cr. App. 1895) 30 S. W. 556.

Vermont.—State *v.* Corcoran, 73 Vt. 404, 50 Atl. 1110.

Virginia.— See Com. *v.* Tiernan, 4 Gratt. 545.

See 24 Cent. Dig. tit. "Gaming," § 222.

A gaming device and a gambling device are in the sense of the statute one and the same thing, hence where the statute reads "any gaming device" and the indictment uses the words "gambling device," an objection that it is on that account insufficient is not well taken. State *v.* Mohr, 55 Mo. App. 329 [*citing* State *v.* Dyson, 39 Mo. App. 297].

For form of indictment see People *v.* Beatty, 14 Cal. 566.

58. See Com. *v.* Coleman, 184 Mass. 198, 68 N. E. 220; Lawrence *v.* Com., 86 Va. 573, 10 S. E. 840.

59. *Alabama.*— Tolbert *v.* State, 87 Ala. 27, 6 So. 284; Ward *v.* State, 22 Ala. 16.

Florida.— Montgomery *v.* State, 40 Fla. 174, 24 So. 68; Tuberson *v.* State, 26 Fla. 472, 7 So. 858.

Georgia.— Brand *v.* State, 112 Ga. 25, 37 S. E. 100.

Indiana.— Myers *v.* State, 1 Ind. 251; Bickel *v.* State, 32 Ind. App. 656, 70 N. E. 548, holding that under the statute defining a common gambler as one who, "for the purpose of gaming with cards or otherwise," does certain acts, an indictment for being a common gambler should charge the kind of gaming indulged in.

Kentucky.— Brooks *v.* Com., 98 Ky. 143, 32 S. W. 403, 17 Ky. L. Rep. 698; Com. *v.* Perrigo, 3 Metc. 5 (holding that an indictment must set forth the offense with such certainty as to apprise defendant of the nature of the accusation upon which he is to be tried, and to constitute a bar to any subsequent proceedings for the same offense); Perry *v.* Com., 5 Ky. L. Rep. 611, 6 Ky. L. Rep. 134.

Maryland.— Stearns *v.* State, 81 Md. 341, 32 Atl. 282.

Mississippi.— Seal *v.* State, 13 Sm. & M. 286, holding that the laws against gaming are by statute declared to be remedial and not penal, and therefore reasonable certainty in the proceedings is all that the law requires.

Missouri.— State *v.* Burke, 151 Mo. 136, 52 S. W. 226; State *v.* Howell, 83 Mo. App. 198.

Ohio.— Carper *v.* State, 27 Ohio St. 572, where the indictment was held to be sufficient after a plea of guilty by defendant.

Tennessee.— Dobkins *v.* State, 2 Humphr. 424.

Texas.— Hale *v.* State, 8 Tex. 171; McKissick *v.* State, 2 Tex. 356; Fullerton *v.* State, (Cr. App. 1902) 75 S. W. 533, holding, however, that an indictment charging defendant with dealing in futures need not allege the specific sales or contracts on which the prosecution is based, it being sufficient under Pen. Code, art. 377, making it a misdemeanor to carry on such business, and providing that each day the business is carried on shall constitute a separate offense. See also Thomp-

(III) *Disjunctive and Alternative Allegations.* Applying the rule that where offenses are of the same character and subject to the same punishment, defendant may be charged with the commission of either in the same count in the alternative,[60] if a gaming offense may be committed by the use of different means, the indictment may allege the means in the alternative.[61]

(IV) *Intent.* If the statute creating the offense is silent as to the intent with which the act was committed, no allegation as to the intent is necessary in the indictment;[62] but where the statute either expressly or by implication makes the intent an essential element of the offense, such intent must be expressly averred.[63]

(V) *Locus In Quo.* The general rule is that an indictment is sufficient which charges the facts constituting the offense, and describing the place where it was committed as within the jurisdiction of the court.[64]

(VI) *Language of Statute.* Where the statute prescribes the ingredients

son *v.* State, 31 Tex. Cr. 227, 38 S. W. 785, 39 S. W. 298.

Vermont.— See State *v.* Corcoran, 73 Vt. 404, 50 Atl. 1110.

Virginia.— Bishop *v.* Com., 13 Gratt. 785.

England.— Rex *v.* Horne, Cowp. 672; Rex *v.* Knight, 1 Salk. 375.

See 24 Cent. Dig. tit. "Gaming," § 223.

Surplusage.— In an indictment charging an inn-holder with suffering persons "to play at cards and other unlawful games," the words "unlawful games" may be rejected as surplusage. Com. *v.* Bolkom, 3 Pick. (Mass.) 281. See also Lord *v.* State, 16 N. H. 325, 41 Am. Dec. 729.

60. Ford *v.* State, 123 Ala. 81, 26 So. 503; Burdine *v.* State, 25 Ala. 60. See also Wingard *v.* State, 13 Ga. 396; Hart *v.* State, 2 Tex. App. 39. See, however, Stearns *v.* State, 81 Md. 341, 32 Atl. 282; Bishop *v.* Com., 13 Gratt. (Va.) 785.

61. State *v.* Hester, 48 Ark. 40, 2 S. W. 339; State *v.* Carr, 6 Oreg. 133, holding, however, that where the statute makes it a crime to do this or that, mentioning several things disjunctively, the indictment should use the conjunctive "and" where "or" occurs in the statute, else it will be defective for uncertainty. See, however, Com. *v.* Perrigo, 3 Metc. (Ky.) 5.

62. *Arkansas.*— State *v.* Holland, 22 Ark. 242.

Kentucky.— Linebaugh *v.* Com., 7 Ky. L. Rep. 295, 7 Cr. L. Mag. 385, holding that an indictment for suffering gaming on one's premises need not allege that defendant had knowledge of the betting.

Massachusetts.— Com. *v.* Smith, 166 Mass. 370, 44 N. E. 503.

Missouri.— State *v.* Kentner, 178 Mo. 487, 77 S. W. 522.

New York.— See People *v.* Adams, 176 N. Y. 351, 68 N. E. 636 [*affirming* 85 N. Y. App. Div. 390, 83 N. Y. Suppl. 481].

Texas.— Otto *v.* State, (Cr. App. 1894) 25 S. W. 285; Stringfellow *v.* State, (Cr. App. 1893) 23 S. W. 893.

See 24 Cent. Dig. tit. "Gaming," § 225.

63. *Connecticut.*— State *v.* Falk, 66 Conn. 250, 33 Atl. 913; State *v.* Carpenter, 60 Conn. 97, 22 Atl. 497, holding that an indictment charging the keeping of a place where policy playing "was carried on" contrary, etc., must charge defendant's knowledge specially.

Indiana.— Emperly *v.* State, 13 Ind. App. 393, 41 N. E. 840.

Iowa.— State *v.* Cure, 7 Iowa 479.

Vermont.— State *v.* Corcoran, 73 Vt. 404, 50 Atl. 1110, holding that an indictment charging that defendant did "then and there" conduct and permit the pretended buying and selling of stocks, bonds, provisions, etc., without any intention of receiving and paying for the property, was not defective because of the failure to repeat the words "then and there" in alleging the absence of intention.

United States.— Washington *v.* Cooly, 29 Fed. Cas. No. 17,226, 4 Cranch C. C. 103. See also Pettibone *v.* U. S., 148 U. S. 197 13 S. Ct. 542, 37 L. ed. 417.

See 24 Cent. Dig. tit. "Gaming," § 224.

64. *Florida.*— Parkhill *v.* People, (1904) 36 So. 170; Groner *v.* State, 6 Fla. 39, holding that the place is sufficiently designated in alleging that it was "in the County of Leon, at a certain gaming table."

Illinois.— Bobel *v.* People, 173 Ill. 19, 50 N. E. 322, 64 Am. St. Rep. 64.

Indiana.— Keith *v.* State, 90 Ind. 89; App *v.* State, 90 Ind. 73.

Kansas.— State *v.* Oswald, 59 Kan. 508, 53 Pac. 525.

Missouri.— State *v.* Kyle, 10 Mo. 389. And see State *v.* Burke, 151 Mo. 136, 52 S. W. 226.

New York.— People *v.* Stedeker, 175 N. Y. 57, 67 N. E. 132, 17 N. Y. Cr. 326 [*reversing* 75 N. Y. App. Div. 449, 78 N. Y. Suppl. 316]; People *v.* Buddensieck, 103 N. Y. 487, 9 N. E. 44, 57 Am. Rep. 766.

South Carolina.— State *v.* Fant, 2 Brev. 487, holding that the indictment need not state any particular place where the offense was committed, and if it is laid to have been committed in the district where the indictment was found, it is sufficient.

Texas.— Woodman *v.* State, 32 Tex. 772 (holding that it is sufficient to lay the venue in the proper county); Aguar *v.* State, (Cr. App. 1898) 47 S. W. 464; Eylar *v.* State, 37 Tex. Cr. 257, 39 S. W. 665 (where, however, the indictment was held to be defective in failing to allege that the house was situated in the county where the offense was charged to have been committed).

Virginia.— Leath *v.* Com., 32 Gratt. 873.

of an offense and lays down a form of indictment for that offense, that form, *mutatis mutandis*, is equivalent to an indictment which alleges the existence of the ingredients of the offense and of the facts in the doing or not doing whereof the offense consists, and where an indictment for gaming follows the language of the statute *in totidem verbis*, it is as a general rule sufficient.[65] However, even where an indictment for a statutory offense is in the language of the statute, it is essential, in determining its sufficiency, to inquire whether its allegations are such as will inform defendant with reasonable certainty of the offense with which he is charged, and enable him to plead the judgment in bar of a second prosecution.[66]

(VII) *NEGATIVING EXCEPTIONS.* The general rule is that an exception incorporated in the statutory description of the offense must be negatived in the indictment, while a proviso need not be.[67]

(VIII) *NAMES OF PARTICIPANTS IN GAME.* As to whether or not it is essential for the indictment to state the names of the persons participating in the game with defendant depends very largely upon the provisions of the statute under which the indictment is drawn;[68] but, in the absence of a statutory provision, where the transaction is otherwise identified, or where the playing is not of the

65. *Alabama.*— Harris *v.* State, 31 Ala. 362; Burnett *v.* State, 30 Ala. 19; Clark *v.* State, 19 Ala. 552.

Arkansas.— Fortenbury *v.* State, 47 Ark. 188, 1 S. W. 58.

Illinois.— Bobel *v.* People, 173 Ill. 19, 50 N. E. 322, 64 Am. St. Rep. 64.

Missouri.— State *v.* Stogsdale, 67 Mo. 630; State *v.* Austin, 12 Mo. 576; State *v.* Kesslering, 12 Mo. 565; State *v.* Bates, 10 Mo. 166; Spratt *v.* State, 8 Mo. 247. See also State *v.* Flack, 24 Mo. 378; State *v.* Ragan, 22 Mo. 459; Glascock *v.* State, 10 Mo. 508; State *v.* Palmer, 4 Mo. 453.

New York.— People *v.* Adams, 176 N. Y. 351, 68 N. E. 636, 98 Am. St. Rep. 675, 63 L. R. A. 406 [*affirming* 85 N. Y. App. Div. 390, 83 N. Y. Suppl. 831]; People *v.* Corbalis, 86 N. Y. App. Div. 531, 83 N. Y. Suppl. 782; People *v.* Kelley, 3 N. Y. Cr. 272.

Ohio.— Davis *v.* State, 32 Ohio St. 24.

Oregon.— State *v.* Carr, 6 Oreg. 133; Frisbie *v.* State, 1 Oreg. 264.

See 24 Cent. Dig. tit. "Gaming," § 226.

66. State *v.* Kentner, 178 Mo. 487, 77 S. W. 522; State *v.* Corcoran, 73 Vt. 404, 50 Atl. 1110; State *v.* McMillan, 69 Vt. 105, 37 Atl. 278.

67. *Alabama.*— Clark *v.* State, 19 Ala. 552.

Indiana.— State *v.* Dupies, 91 Ind. 233.

Iowa.— See Romp *v.* State, 3 Greene 276.

Kentucky.— See Holt *v.* Com., 2 Bush 33.

Maryland.— Stearns *v.* State, 81 Md. 341, 32 Atl. 282. See, however, State *v.* Price, 12 Gill & J. 260, 37 Am. Dec. 81.

New York.— People *v.* Stedeker, 175 N. Y. 57, 67 N. E. 132; Jefferson *v.* People, 101 N. Y. 19, 22, 3 N. E. 797, where the court, by Danforth, J., said: "It is well settled that if exceptions are stated in the enacting clause, it would be necessary to negative them in order that the description of the crime may correspond with the statute, but if there be an exception in a subsequent clause or subsequent statute, that is matter of defense, and is to be shown by the defendant." See also Rowell *v.* Janvrin, 151 N. Y. 60, 45 N. E. 398; Fleming *v.* People, 27 N. Y. 329.

South Carolina.— State *v.* Reynolds, 2 Nott & M. 365.

Tennessee.— State *v.* Posey, 1 Humphr. 384.

Texas.— Russell *v.* State, 44 Tex. Cr. 465, 72 S. W. 190; Borders *v.* State, (Cr. App. 1902) 66 S. W. 1102 (where an information which failed to negative the fact that the gaming was at a private residence was held to be bad); Colchell *v.* State, 23 Tex. App. 584, 5 S. W. 139.

Vermont.— See State *v.* Corcoran, 73 Vt. 404, 50 Atl. 1110.

See 24 Cent. Dig. tit. "Gaming," § 227; and see INDICTMENTS AND INFORMATIONS.

68. See Jester *v.* State, 14 Ark. 552; Barkman *v.* State, 13 Ark. 703 (holding that it is necessary to state the names of the persons by whom the game was played by way of identifying the offense); Moffatt *v.* State, 11 Ark. 169; Parrot *v.* State, 10 Ark. 574; Sharp *v.* State, 28 Fla. 257, 9 So. 651; Groner *v.* State, 6 Fla. 39 (holding that in an indictment for gaming, the name of the person with or against whom defendant played or bet must be stated, or alleged to be unknown); Com. *v.* Lampton, 4 Bibb (Ky.) 261 (holding, however, that in an indictment for permitting gaming, the omission of the christian name of one of those who was charged to have been engaged in the games suffered by defendant did not vitiate the indictment); Moore *v.* State, (Nebr. 1903) 96 N. W. 196 (holding that an information under Nebr. Code Cr. Proc. (1901) § 217, for allowing parties to play games in the saloon of which the accused was proprietor, must set out the names of the parties if known, or allege that they are unknown). And see Bishop St. Cr. (2d ed.) p. 515, § 894.

In Indiana an indictment for gaming must state the name of the person with whom defendant played, or allege his name to be unknown (State *v.* Stallings, 3 Ind. 531; State *v.* Little, 6 Blackf. 267; Butler *v.* State, 5 Blackf. 280]; but where it is alleged that the name of the person with whom the bet was

essence of the offense, failure to state the names of the players will not invalidate the indictment.[69]

(IX) *JOINDER OF PARTIES.* As a general rule several persons may be joined in an indictment under a statute prohibiting gaming,[70] and a part of them may be convicted under such indictment and the others acquitted.[71]

(X) *JOINDER OF COUNTS.* Counts under a statute against gaming and counts for keeping and maintaining such a common gambling-house as to constitute a nuisance at common law may be properly joined in the same indictment.[72]

(XI) *ELECTION.* Where distinct offenses are charged in the same indictment, such indictment will as a rule be quashed on demurrer, unless the prosecution will elect for which offense it will prosecute.[73]

(XII) *DUPLICITY.* Where several ways are set forth in the same statute by which the offense of gaming or playing with cards or other gambling devices may be committed,[74] or by means of which the offense of keeping a gaming-house

made is unknown, it is not necessary to state the name of the person (Alexander *v.* State, 48 Ind. 394; State *v.* Maxwell, 5 Blackf. 230. See also State *v.* Irvin, 5 Blackf. 343).

69. *Arkansas.*— Goodman *v.* State, 41 Ark. 228; Orr *v.* State, 18 Ark. 540; Drew *v.* State, 10 Ark. 82.

Colorado.— Chase *v.* People, 2 Colo. 509.

Georgia.— Hinton *v.* State, 68 Ga. 322. The rule was formerly otherwise. Davis *v.* State, 22 Ga. 101.

Illinois.— Green *v.* State, 21 Ill. 125.

Iowa.— Romp *v.* State, 3 Greene 276.

Massachusetts.— Com. *v.* Coleman, 184 Mass. 198, 68 N. E. 220; Com. *v.* Swain, 160 Mass. 354, 35 N. E. 862.

Minnesota.— State *v.* Crummey, 17 Minn. 72.

Ohio.— Roberts *v.* State, 32 Ohio St. 171; Carper *v.* State, 27 Ohio St. 572.

Oklahoma.— Sweitzer *v.* Territory, 5 Okla. 297, 47 Pac. 1094.

Oregon.— State *v.* Light, 17 Oreg. 358, 21 Pac. 132.

Tennessee.— State *v.* McBride, 8 Humphr. 66.

Texas.— Johnson *v.* State, 36 Tex. 198; Day *v.* State, 27 Tex. App. 143, 11 S. W. 36.

Washington.— State *v.* Wilson, 9 Wash. 16, 36 Pac. 967; Foster *v.* Territory, 1 Wash. 411, 25 Pac. 459.

See 24 Cent. Dig. tit. "Gaming," § 229.

70. *Alabama.*— Lindsey *v.* State, 48 Ala. 169 (holding, however, that only those can be joined in one indictment for playing cards at a public place who participate in the same game); Swallow *v.* State, 22 Ala. 20; Ward *v.* State, 22 Ala. 16; Covy *v.* State, 4 Port. 186.

Arkansas.— Johnson *v.* State, 13 Ark. 684, holding, however, that the court will not encourage the joinder of persons severally committing the same species of offense, as it produces inconvenience.

Massachusetts.— Com. *v.* Smith, 166 Mass. 370, 44 N. E. 503.

Mississippi.— Howard *v.* State, 83 Miss. 378, 35 So. 653, holding, however, that an indictment charging a number of defendants with individual offenses is bad.

South Carolina.—See State *v.* Fant, 2 Brev. 487, holding that the offense of permitting others to play at one's house at prohibited games and the playing therein are separate and distinct, and the persons cannot be jointly indicted therefor.

Tennessee.— Brown *v.* State, 5 Yerg. 367.

Virginia.— Com. *v.* McGuire, 1 Va. Cas. 119.

See 24 Cent. Dig. tit. "Gaming," § 231.

71. Ward *v.* State, 22 Ala. 16; Covy *v.* State, 4 Port. (Ala.) 186.

72. *Arkansas.*— State *v.* Rhea, 38 Ark. 555 (holding, however, that an indictment for gaming containing several counts and not indicating that they are all intended to charge but one offense is bad on demurrer); State *v.* Holland, 22 Ark. 242 (holding that counts for exhibiting a faro-bank and for betting at the game may be properly joined in the same indictment).

Indiana.— Bickel *v.* State, 32 Ind. App. 656, 70 N. E. 548, holding that all the acts mentioned disjunctively in the statute may be charged conjunctively in a single count for an indictment as constituting a single offense.

Iowa.— State *v.* Bitting, 13 Iowa 600; State *v.* Cooster, 10 Iowa 453.

Maryland.— Wheeler *v.* State, 42 Md. 563.

New York.— People *v.* Emerson, 53 Hun 437, 6 N. Y. Suppl. 274, 7 N. Y. Cr. 97 [*affirming* 5 N. Y. Suppl. 374, 6 N. Y. Cr. 157].

North Carolina.— State *v.* Morgan, 133 N. C. 743, 45 S. E. 1033, holding that where the offenses charged in the indictment, although distinct, are of the same nature, and a similar judgment might be passed in each case, there can be no objection to the indictment setting forth the offenses in different counts.

See 24 Cent. Dig. tit. "Gaming," § 233.

See, however, State *v.* Fant, 2 Brev. 487, where several were jointly indicted, one for permitting the others to play at a prohibited game in his house, and the others for playing such game contrary to the statute and after conviction the judgment was arrested on the ground that the offenses were distinct and could not be joined in one indictment.

73. Nuckols *v.* State, 109 Ala. 2, 19 So. 504; State *v.* Morris, 45 Ark. 62. See also State *v.* Groves, 21 R. I. 252, 43 Atl. 181. *Compare* Hinton *v.* State, 68 Ga. 322.

74. Wickard *v.* State, 109 Ala. 45, 19 So. 491; Clayborne *v.* State, 103 Ala. 53, 15 So.

or permitting gaming at a certain house may be committed, and all are embraced in the same general definition and made punishable in the same manner, they are not distinct offenses, and a count which charges them conjunctively is not open to the objection of duplicity.[75]

b. Under Particular Statutes — (I) *Playing or Wagering on Game* — (A) *Description of Game or Device* — (1) Necessity in General. Where the playing of a game is in express terms prohibited by the statute, the general rule is that a statement of the name of such prohibited game in the indictment is sufficient, and that it is not necessary to give any description of the game in detail or the means by which the same is played,[76] although under some statutes an

842; Johnson *v.* State, 75 Ala. 7; Ward *v.* State, 22 Ala. 16 (holding that betting and being concerned in betting at a faro-bank are different grades of the same offense, and may be charged in the same count); State *v.* Hester, 48 Ark. 40, 2 S. W. 339; Bickel *v.* State, 32 Ind. App. 656, 70 N. E. 548; Harvell *v.* State, (Tex. Civ. App. 1899) 53 S. W. 622 (holding that an indictment charging the accused with unlawfully playing at a game with cards at a house used for retailing spirituous liquors and at a gaming-house is not bad for duplicity or uncertainty, since the words "and at a gaming house" may be rejected as surplusage).

75. *Alabama.*—Rosson *v.* State, 92 Ala. 76, 9 So. 357.

California.— People *v.* Gosset, 93 Cal. 641, 29 Pac. 246.

Connecticut.— State *v.* Falk, 66 Conn. 250, 33 Atl. 913.

Indiana.— Davis *v.* State, 100 Ind. 154; Crawford *v.* State, 33 Ind. 304; State *v.* Alsop, 4 Ind. 141; State *v.* Ryman, 2 Ind. 370; Dormer *v.* State, 2 Ind. 308, holding that an indictment for keeping a gaming-house is not bad, which charges that defendant kept and suffered his house to be used for gaming, etc., but it is otherwise if the allegations were used in the disjunctive.

Kentucky.— Vowells *v.* Com., 84 Ky. 52; Hinkle *v.* Com., 4 Dana 518 (holding that setting up a gaming-table may be an entire offense, and keeping a gaming-table and inducing others to bet on it may also constitute a distinct offense, and for either a separate indictment would lie; but where both are perpetrated by the same person at the same time, they constitute but one offense, for which one count is sufficient and for which but one penalty can be inflicted); Miller *v.* Com., 77 S. W. 682, 25 Ky. L. Rep. 1236; Perry *v.* Com., 5 Ky. L. Rep. 611, 6 Ky. L. Rep. 134.

Massachusetts.— Com. *v.* Ferry, 146 Mass. 203, 15 N. E. 484; Com. *v.* Moody, 143 Mass. 177, 9 N. E. 511.

Missouri.—State *v.* Pate, 67 Mo. 488; State *v.* Fletcher, 18 Mo. 425; State *v.* Ames, 10 Mo. 743.

New Hampshire.— State *v.* Prescott, 33 N. H. 212.

New Mexico.— Territory *v.* Copely, 1 N. M. 571.

Pennsylvania.— Com. *v.* Carson, 6 Phila. 381.

Texas.— Lancaster *v.* State, 43 Tex. 519; Stuart *v.* State, (Cr. App. 1901) 60 S. W. 554.

Virginia.— Com. *v.* Tiernan, 4 Gratt. 545. See 24 Cent. Dig. tit. "Gaming," § 232.

See, however, State *v.* Howe, 1 Rich. 260, holding that an indictment under the act of 1816 to prevent gaming, which charges defendant with gaming and keeping a public place or house used as a place for gaming, is bad for duplicity.

76. *Alabama.*— Ward *v.* State, 22 Ala. 16.

Arkansas.— Orr *v.* State, 18 Ark. 540 (holding likewise that it is not necessary to charge that the game of cards named is a game of hazard or skill, but if so charged it will be considered as surplusage and need not be proved); Warren *v.* State, 18 Ark. 195; Barkman *v.* State, 13 Ark. 703. But see State *v.* Grider, 18 Ark. 297.

California.— People *v.* Gosset, 93 Cal. 641, 29 Pac. 246 (holding that dealing or conducting faro being forbidden by the code whether a banking game or not, an indictment therefor need not state that faro is a banking game); People *v.* Beatty, 14 Cal. 566.

Connecticut.— State *v.* Carpenter, 60 Conn. 97, 22 Atl. 497.

Georgia.— Woody *v.* State, 113 Ga. 927, 39 S. E. 297; Kolshorn *v.* State, 97 Ga. 343, 23 S. E. 829; Wingard *v.* State, 13 Ga. 396.

Kentucky.— Com. *v.* Schatzman, 82 S. W. 238, 26 Ky. L. Rep. 508.

Minnesota.— State *v.* Briggs, 84 Minn. 357, 87 N. W. 935, holding that the indictment sufficiently describes the gambling device, where it alleges that it is a nickel-in-the-slot machine, a more particular description of which is to the jury unknown.

Missouri.— State *v.* Maupin, 71 Mo. App. 54, holding that it is not necessary to allege in the information that cards and dice specifically mentioned in the statute are a device which may be adapted to or used in playing a game of chance.

New York.— People *v.* Corbalis, 86 N. Y. App. Div. 531, 83 N. Y. Suppl. 782.

Tennessee.— Bagley *v.* State, 1 Humphr. 486.

Washington.— State *v.* Wilson, 9 Wash. 16, 36 Pac. 967. See, however, Harland *v.* Territory, 3 Wash. Terr. 131, 13 Pac. 453, holding that an indictment charging defendant with carrying on a swindling game of "21" or top and bottom dice, and not describing the game further than by such names, is too indefinite.

indictment which designates the name of the game, but fails to state that it is played on a gaming-table or with a gambling device, is held to be insufficient.[77]

(2) Name of Game or Device. In a large majority of jurisdictions it is not necessary in an indictment for a violation of a statute against gaming to state the name of the game or to minutely describe the device by which it is played.[78] However, in some jurisdictions, the indictment must allege the name of the game if known, and, if unknown to the grand jurors, it should so allege.[79]

(B) *Description of Bet or Stake.* Unless the wording of the statute requires such allegation,[80] it is not necessary for the indictment to specify the thing bet, nor to state its value.[81]

Wisconsin.— State *v.* Lewis, 12 Wis. 434, holding that Gen. Laws (1858), c. 117, § 4, fixes upon cards the character of being a "gambling device" within its meaning, and in an indictment under this section they need not be specially averred to be such.

See 24 Cent. Dig. tit. "Gaming," § 237.

77. State *v.* Stillwell, 16 Kan. 24; Rice *v.* State, 3 Kan. 141; Com. *v.* Shauer, 4 Ky. L. Rep. 342; State *v.* Bristow, 41 Tex. 146; State *v.* Blair, 41 Tex. 30; Tate *v.* State, 21 Tex. 202; Griffin *v.* State, 43 Tex. Cr. 428, 66 S. W. 782; Gerstenkorn *v.* State, (Tex. Cr. App. 1902) 66 S. W. 568; Doyle *v.* State, 19 Tex. App. 410 (holding that describing a table in an indictment as a gaming-table is not tantamount to an allegation that it was kept or exhibited for the purpose of gaming); Anderson *v.* State, 9 Tex. App. 177; Ben *v.* State, 9 Tex. App. 107. See also State *v.* Hardin, 1 Kan. 474. See, however, State *v.* Mann, 13 Tex. 61 (holding that an averment in an indictment that defendant bet money "at a certain gambling device called 'rondeau'" is sufficient without alleging that "rondeau" is a gambling-table, since the game is brought before the court so frequently that it will judicially notice it to be a gaming-table without special averment); Rutherford *v.* State, 39 Tex. Cr. 137, 45 S. W. 579; Short *v.* State, 23 Tex. App. 312, 4 S. W. 903.

78. *California.*— People *v.* Carroll, 80 Cal. 153, 22 Pac. 129.

Florida.— Jackson *v.* State, 26 Fla. 510, 7 So. 862; Groner *v.* State, 6 Fla. 39.

Indiana.— Webster *v.* State, 8 Blackf. 400; State *v.* Ross, 7 Blackf. 322; State *v.* Maxwell, 5 Blackf. 230; State *v.* Bougher, 3 Blackf. 307; State *v.* Dole, 3 Blackf. 294, holding that while an indictment for gaming need not state the name of the game played, yet there should be in it some description of the game, as that it was with cards, dice, etc.

Kentucky.— Com. *v.* Carter, 14 Ky. L. Rep. 301; Perry *v.* Com., 5 Ky. L. Rep. 611, 6 Ky. L. Rep. 134.

Massachusetts.— Com. *v.* Ferry, 146 Mass. 203, 15 N. E. 484.

Mississippi.— Johnston *v.* State, 7 Sm. & M. 58.

Missouri.— State *v.* Flack, 24 Mo. 378; State *v.* Ames, 1 Mo. 524; State *v.* Trott, 36 Mo. App. 29.

North Carolina.— State *v.* Taylor, 111 N. C. 680, 16 S. E. 168; State *v.* Ritchie, 19 N. C. 29.

Oregon.— State *v.* Gitt Lee, 6 Oreg. 425, 427, where the court said: "If it were essential either in a statute defining the offense of gambling, or in an indictment for the violation of such statute, to give the name of the game or of the device by which it is played, it would always be easy to evade the statute by changing the name of either the device or the game."

South Carolina.— State *v.* Laney, 4 Rich. 193. See also State *v.* Reynolds, 2 Nott & M. 365.

Tennessee.— State *v.* McBride, 8 Humphr. 66; Dean *v.* State, Mart. & Y. 127.

See 24 Cent. Dig. tit. "Gaming," §§ 235–236.

79. State *v.* Jeffrey, 33 Ark. 136; Booth *v.* State, 26 Tex. 203, holding that an indictment charging that the accused "did bet at and upon a gaming-table" without describing the gaming-table as kept for the purpose of gaming or specifying faro, monte, rondo, or any other game named in the statute, is insufficient. And see Blair *v.* State, 32 Tex. 474; State *v.* Prewitt, 10 Tex. 310; Estes *v.* State, 10 Tex. 300; State *v.* Wilson, 9 Wash. 16, 36 Pac. 967.

80. Long *v.* State, 13 Ind. 566 (holding that in an information for gaming, the amount lost or won should be set forth with certainty, in order that the amount of the fine may be determined in accordance with the statute, this fact determining the question of jurisdiction); State *v.* Kilgore, 6 Humphr. (Tenn.) 44; Anthony *v.* State, 4 Humphr. (Tenn.) 83 (holding that a charge in an indictment for gaming that defendant bet certain "valuable things" is too vague, and that it must set forth and describe the valuable things). See, however, State *v.* McBride, 8 Humphr. (Tenn.) 66, holding that in an indictment for gaming on cards, the amount bet need not be stated.

81. *Alabama.*— Collins *v.* State, 70 Ala. 19; Mitchell *v.* State, 55 Ala. 160; Jacobson *v.* State, 55 Ala. 151.

Arkansas.— Moffatt *v.* State, 11 Ark. 169; Graham *v.* State, 1 Ark. 171.

California.— People *v.* Carroll, 80 Cal. 153, 22 Pac. 129, holding, however, that it is necessary to allege that the game was "played for money, checks, credit, or any other representative of value."

Georgia.— Grant *v.* State, 89 Ga. 393, 15 S. E. 488; Archer *v.* State, 69 Ga. 767 (holding that an indictment for playing and betting at "chuck-luck" need not allege whether

(c) *Description of House or Place*—(1) Allegation as to Publicity. Where a statute prohibiting gaming at a public place specifically mentions certain places as public, it is only necessary for the indictment to allege that the gaming occurred at such a place, naming it, without any allegation as to the nature thereof.[82] But where the gaming is alleged to have occurred at a place not specifically designated in the statute as a public place, it is necessary that the indictment should allege such facts and circumstances as will show that such place is public, within the purview of the statute.[83]

(2) Allegation as to Ownership of Building. The general rule is that the indictment need not allege to whom the building belongs in which the gaming is charged to have been committed.[84]

the money bet was gold, silver, or bank-note); Hinton *v.* State, 68 Ga. 322.

Iowa.— Romp *v.* State, 3 Greene 276.

Missouri.— State *v.* Bridges, 24 Mo. 353.

Texas.— Harrison *v.* State, 15 Tex. 239; Reeves *v.* State, 9 Tex. 447; State *v.* Ward, 9 Tex. 370; Long *v.* State, 22 Tex. App. 194, 2 S. W. 541, 58 Am. Rep. 633.

See 24 Cent. Dig. tit. "Gaming," §§ 241, 242, 243.

82. *Alabama.*— Rosson *v.* State, 92 Ala. 76, 9 So. 357; Dreyfus *v.* State, 83 Ala. 54, 3 So. 430; Rodgers *v.* State, 26 Ala. 76; State *v.* Atkyns, 1 Ala. 180.

Indiana.— State *v.* Armstrong, 3 Ind. 139; State *v.* Brown, 1 Ind. 532; State *v.* Burgett, 1 Ind. 479.

Massachusetts.— Com. *v.* Coleman, 184 Mass. 198, 68 N. E. 220.

Texas.— State *v.* Norton, 19 Tex. 102; Hodges *v.* State, 44 Tex. Cr. 444, 72 S. W. 179; Lafferty *v.* State, 41 Tex. Cr. 606, 56 S. W. 623; Metzer *v.* State, 31 Tex. Cr. 11, 19 S. W. 254; Early *v.* State, 23 Tex. App. 364, 5 S. W. 122.

Virginia.— Linkous *v.* Com., 9 Leigh 608.

See 24 Cent. Dig. tit. "Gaming," §§ 245–248.

83. *Alabama.*— Russ *v.* State, 132 Ala. 20, 31 So. 550; Perez *v.* State, 48 Ala. 356. See, however, Flake *v.* State, 19 Ala. 551; Roquemore *v.* State, 19 Ala. 528.

California.— See People *v.* Saviers, 14 Cal. 29.

New York.— People *v.* Stedeker, 175 N. Y. 57, 67 N. E. 132, 17 N. Y. Cr. 326 [*reversing* 75 N. Y. App. Div. 449, 78 N. Y. Suppl. 316].

North Carolina.— State *v.* Langford, 25 N. C. 354.

Tennessee.— State *v.* Bess, 5 Coldw. 55.

Texas.— Elsberry *v.* State, 41 Tex. 158; State *v.* Mansker, 36 Tex. 364; State *v.* Stewart, 35 Tex. 499; State *v.* Jurgins, 31 Tex. 588; State *v.* Fuller, 31 Tex. 559; Millican *v.* State, 25 Tex. 664; State *v.* Barns, 25 Tex. 654; State *v.* Lopez, 18 Tex. 33; Shihagan *v.* State, 9 Tex. 430; Osborn *v.* State, (Cr. App. 1903) 72 S. W. 592; Mohan *v.* State, 42 Tex. Cr. 410, 60 S. W. 552; Williams *v.* State, 42 Tex. Cr. 368, 60 S. W. 248; McCarley *v.* State, (Cr. App. 1899) 51 S. W. 373; Nail *v.* State, (Cr. App. 1899) 50 S. W. 704; Crutcher *v.* State, 39 Tex. Cr. 233, 45 S. W. 594; Turbeville *v.* State, 37 Tex. Cr. 145, 38 S. W. 1010; Goldstein *v.* State, (Cr. App. 1896) 35 S. W. 289; Grant *v.* State, 33 Tex. Cr. 527, 27 S. W. 127; Duffy *v.* State, (Cr. App. 1893) 22 S. W. 37; Metzer *v.* State, 31 Tex. Cr. 11, 19 S. W. 254; Dailey *v.* State, 27 Tex. App. 569, 11 S. W. 636; Bacchus *v.* State, 18 Tex. App. 15; Bowman *v.* State, 16 Tex. App. 513; Weiss *v.* State, 16 Tex. App. 431; Fossett *v.* State, 16 Tex. App. 375 (holding that an averment that the playing was in a livery stable is not sufficient); Jackson *v.* State, 16 Tex. App. 373; Askey *v.* State, 15 Tex. App. 558; Wallace *v.* State, 12 Tex. App. 479; Sheppard *v.* State, 1 Tex. App. 304, 28 Am. Rep. 422. See also State *v.* Arnold, 37 Tex. 409. See, however, Sublett *v.* State, 9 Tex. 53; Hankins *v.* State, (Cr. App. 1903) 72 S. W. 191; Russell *v.* State, 44 Tex. Cr. 465, 72 S. W. 190 (holding that in a prosecution for playing cards under White Annot. Pen. Code, art. 379, as amended, punishing any one playing at cards elsewhere than at a private residence occupied by a family, it is sufficient to allege that the game was not played at such a private residence, without specifying the place where it was played); Watson *v.* State, 13 Tex. App. 160 (holding that the indictment need not allege that the house is a public place).

Virginia.— Bishop *v.* Com., 13 Gratt. 785; Roberts *v.* Com., 10 Leigh 686; Hord *v.* Com., 4 Leigh 674, 26 Am. Dec. 340; Wortham *v.* Com., 5 Rand. 669.

West Virginia.— State *v.* Kyer, 55 W. Va. 46, 46 S. E. 694.

See 24 Cent. Dig. tit. "Gaming," §§ 245–248.

Allegation that place was a dram-shop.— In Alabama an indictment for playing cards in a storehouse where spirituous liquors are retailed must allege that they were there retailed at the time when the playing took place, and it is not sufficient to allege that such was its character at the time when the indictment was found. State *v.* Coleman, 3 Ala. 14. In Texas, however, it is sufficient to allege in the indictment that defendant played at a game of cards "in a certain house for retailing spirituous liquors" without averring that the house was at the time used for that purpose. Royal *v.* State, 9 Tex. 449; Miller *v.* State, 35 Tex. Cr. 650, 34 S. W. 959.

84. State *v.* Atkyns, 1 Ala. 180; Wilson *v.* State, 5 Tex. 21; Prior *v.* State, 4 Tex. 383. See also Eylar *v.* State, 37 Tex. Cr. 257, 39 S. W. 665.

(II) *Keeping or Exhibiting Table or Device*—(A) *In General.* In many jurisdictions, under statutes aimed against the keeping or exhibition of gaming-tables or gambling devices, an indictment charging that defendant did then and there unlawfully keep and exhibit for the purpose of gaming a gaming-table and bank, etc., is held to be sufficient.[85] And under such statutes an indictment for exhibiting a certain gambling or gaming device need not give the particular name of the device.[86] Under several statutes, however, an indictment for keeping a gaming device, even where such device is named, which fails to allege it to be a common gaming-table, is bad.[87]

(B) *Language of Statute.* The general rule is that an indictment for keeping, setting up, or exhibiting a gaming-table or other gambling device is sufficient if it follows the language of the statute.[88] But where the indictment alleges the keeping of other implements or gambling devices than those named in the act, they should be sufficiently described to show them to be gambling-tables or devices within the purview of the statute.[89]

85. Ranirez *v.* State, (Tex. Cr. App. 1897) 40 S. W. 278; Rabby *v.* State, (Tex. Cr. App. 1896) 37 S. W. 741; Perkins *v.* State, (Tex. Cr. App. 1895) 33 S. W. 341; Adams *v.* State, (Tex. Cr. App. 1895) 29 S. W. 384; Parker *v.* State, 13 Tex. App. 213; State *v.* Wilson, 9 Wash. 16, 36 Pac. 967, holding likewise that in an indictment for conducting a faro game, the name of the person with whom it was played need not be alleged. See also People *v.* Sam Lung, 70 Cal. 515, 11 Pac. 673 (holding that it is not necessary to state whether the person accused was an employee or owner of the game); Rawls *v.* State, 70 Miss. 739, 12 So. 584 (where the indictment failed to state the purpose for which the table was kept or the use to which it was put, and it was held to be bad on demurrer). See, however, Stearnes *v.* State, 21 Tex. 705, holding that an indictment found under Pen. Code, art. 412, charging defendant with having "kept a gambling device for the purpose of gaming" does not give a sufficient description of the offense.

Aiding in setting up machine.— Under Ky. St. § 1960, creating the separate offense of aiding and assisting in setting up a machine ordinarily used for betting, it is essential that the indictment clearly avers facts showing that the machine was set up and the principal offense committed. Com. *v.* Lansdale, 98 Ky. 664, 34 S. W. 17, 17 Ky. L. Rep. 1245.

86. Bibb *v.* State, 83 Ala. 84, 3 So. 711; People *v.* Wambole, 1 Dak. 301, 46 N. W. 463; People *v.* Sponsler, 1 Dak. 289, 46 N. W. 459; Pemberton *v.* State, 85 Ind. 507.

87. U. S. *v.* Cooly, 25 Fed. Cas. No. 14,859, 4 Cranch C. C. 707; U. S. *v.* McCormick, 26 Fed. Cas. No. 15,661, 4 Cranch C. C. 104; U. S. *v.* Milburn, 26 Fed. Cas. No. 15,768, 5 Cranch C. C. 390; U. S. *v.* Smith, 27 Fed. Cas. No. 16,328, 4 Cranch C. C. 629. See, however, Marcus *v.* U. S., 16 Fed. Cas. No. 9,062*a*, 2 Hayw. & H. 347 [*distinguishing* U. S. *v.* Ringgold, 27 Fed. Cas. No. 16,167, 5 Cranch C. C. 378].

88. *Arkansas.*— Portis *v.* State, 27 Ark. 360; Brown *v.* State, 10 Ark. 607, holding, however, that the rule is otherwise where the indictment charges the keeping of a "common gaming table," not giving it any name.

Kansas.— Rice *v.* State, 3 Kan. 141.

Kentucky.— Waddell *v.* Com., 84 Ky. 276, 1 S. W. 480; Com. *v.* Monarch, 6 Bush 301; Montee *v.* Com., 3 J. J. Marsh. 132.

Maryland.— Wheeler *v.* State, 42 Md. 563.

Texas.— Kinney *v.* State, (Cr. App. 1905) 84 S. W. 590; Jefferson *v.* State, (Cr. App. 1893) 22 S. W. 148; Campbell *v.* State, 2 Tex. App. 187.

Virginia.— Leath *v.* Com., 32 Gratt. 873.

See 24 Cent. Dig. tit. "Gaming," §§ 250, 251.

See, however, Rawls *v.* State, 70 Miss. 739, 12 So. 584, holding that sometimes it is not sufficient to charge the offense in the language of the statute, and holding in this case that the indictment was defective in that it did not state the acts of the accused which rendered the keeping of the gaming-table unlawful.

89. *Delaware.*— State *v.* Norton, 9 Houst. 586, 33 Atl. 438.

Indiana.— See Carr *v.* State, 50 Ind. 178.

Kansas.— Rice *v.* State, 3 Kan. 141.

Kentucky.— Com. *v.* Monarch, 6 Bush 298; Jones *v.* Com., 8 Ky. L. Rep. 698, 3 S. W. 128; Com. *v.* Weirand, 8 Ky. L. Rep. 784.

Missouri.— State *v.* Etchman, 184 Mo. 193, 83 S. W. 978, holding that an indictment charging defendant with setting up a roulette wheel was insufficient, under the statute making it an offense to set up a roulette table.

Texas.— Kramer *v.* State, 18 Tex. App. 13. See also Longworth *v.* State, 41 Tex. 508; State *v.* Kelly, 24 Tex. 182.

United States.— U. S. *v.* Ringgold, 27 Fed. Cas. No. 16,167, 5 Cranch C. C. 378.

See 24 Cent. Dig. tit. "Gaming," §§ 250–251.

In Missouri, Rev. St. (1899) § 2194, making it a felony for one to set up or keep, and to entice or permit any person to play on, any table or gambling device "commonly called A B C, faro bank, E O, roulette, equality, keno or any kind of gambling table or gambling device" adapted for the purpose of playing games of chance, it is not necessary for an indictment charging the setting up of a chuck-a-luck table and a crap table to al-

(III) *Keeping House or Place*—(A) *In General.* An indictment under a statute prohibiting any person from keeping a building, tenement, booth, shed, etc., to be used in gaming is as a general rule sufficient, where drawn substantially in the words of the statute.[90]

(B) *Locus In Quo.* The *locus in quo* of the house charged to be kept for gaming purposes should be correctly alleged, but it need not be alleged with any great particularity as to the exact location; a statement that it is in the county or in the jurisdiction of the court being sufficient.[91]

(C) *Actual Use of House, Names of Participants, Etc.* In an indictment charging a person with keeping a house to be used or occupied for gaming, it is not necessary to aver that gaming actually took place there; the intention is a matter of proof, and if that can be established it is immaterial whether the prohibited establishment shall find customers or not.[92] Nor is it necessary for the indictment to state the names of the parties who played at the place in question,[93] to designate the kind or nature of illegal gaming,[94] to specify the amount won or

lege that they are gambling devices of a like kind as A B C, faro-bank, E O, roulette, keno, and equality. State *v.* Rosenblatt, 185 Mo. 114, 83 S. W. 975.

90. *Indiana.*— Hamilton *v.* State, 75 Ind. 586; Padgett *v.* State, 68 Ind. 46; Enwright *v.* State, 58 Ind. 567; State *v.* Hubbard, 3 Ind. 530 (where the indictment charged that defendant kept "a" house instead of "his" house for gaming, the term "his" being used by the statute); Christ *v.* State, (App. 1903) 69 N. E. 269; Emperly *v.* State, 13 Ind. App. 393, 41 N. E. 840.

Iowa.— State *v.* Crogan, 8 Iowa 523.

Kentucky.— Louis *v.* Com., 16 Ky. L. Rep. 284.

Louisiana.— State *v.* Behan, 113 La. 754, 37 So. 714.

Maryland.— Wheeler *v.* State, 42 Md. 563.

Minnesota.— State *v.* Crummey, 17 Minn. 72, holding likewise that averments that the keeping was done "feloniously" as well as "unlawfully" and against the form of the statute may be rejected as surplusage, and does not render the indictment bad.

Missouri.— State *v.* Ellis, 4 Mo. 474, holding that in an indictment for keeping a gaming-house, it is not necessary to allege by whose permission the gaming was done, the proprietor of the house being responsible.

Montana.— See State *v.* Gray, 19 Mont. 206, 47 Pac. 900.

New Hampshire.— State *v.* Noyes, 30 N. H. 279.

New Jersey.— See State *v.* Ackerman, 62 N. J. L. 456, 41 Atl. 697.

Rhode Island.— State *v.* Marchant, 15 R. I. 539, 9 Atl. 902.

See 24 Cent. Dig. tit. "Gaming," § 256.

Compare Richardson *v.* State, 41 Fla. 303, 25 So. 880; Com. *v.* Stahl, 7 Allen (Mass.) 304; Com. *v.* Bolkom, 3 Pick. (Mass.) 281; State *v.* Bullion, 42 Tex. 77.

Allegation as to occupation.— An indictment for permitting a gaming device to be set up in a certain building "occupied" by defendant does not show that the building was under his control, where other counts of the indictment negative such facts. State *v.* Mohr, 55 Mo. App. 325.

Pool-selling.— An indictment under N. Y. Pen. Code, § 351, for keeping a room or recording bets and selling pools on results of horse-races and other contingent event is insufficient where it fails to allege that defendant kept and occupied a room with books, papers, apparatus, or paraphernalia for the purpose of recording bets, and selling pools, as the statute makes the presence of the books or apparatus an essential ingredient of the felony defined. People *v.* Stedeker, 175 N. Y. 57, 17 N. Y. Cr. 326, 67 N. E. 132 [*reversing* 75 N. Y. App. Div. 449, 78 N. Y. Suppl. 316].

As to sufficiency of common-law indictment see Disorderly Houses, 14 Cyc. 499.

91. Parkhill *v.* State, (Fla. 1904) 36 So. 170; Dohme *v.* State, 68 Ga. 339; State *v.* Prescott, 33 N. H. 212. See also Com. *v.* Edds, 14 Gray (Mass.) 406.

92. Chase *v.* People, 2 Colo. 509; Ward *v.* People, 23 Ill. App. 510; State *v.* Miller, 5 Blackf. (Ind.) 502; Com. *v.* Stowell, 9 Metc. (Mass.) 572. See, however, Com. *v.* Crupper, 3 Dana (Ky.) 466, holding that the indictment must charge in direct terms that gaming was permitted by defendant.

93. *Colorado.*— Chase *v.* People, 2 Colo. 509.

Indiana.— State *v.* Pancake, 74 Ind. 15 (holding, however, that such averment, where made, does not render the indictment bad); Carpenter *v.* State, 14 Ind. 109; Dormer *v.* State, 2 Ind. 308.

Kentucky.— Com. *v.* Crupper, 3 Dana 466.

Minnesota.— State *v.* Crummey, 17 Minn. 72, holding that it is not necessary to state the names of the players, or allege that they are unknown.

New Hampshire.— State *v.* Prescott, 33 N. H. 212.

See 24 Cent. Dig. tit. "Gaming," § 258.

Contra.— Buck *v.* State, 1 Ohio St. 61, holding that an indictment under the Ohio act of March 12, 1831, prohibiting the commission of gaming in a house is defective, unless it sets forth the names of the person or persons prohibited to gamble, or avers that their names are unknown.

94. *Kentucky.*— Com. *v.* Crupper, 3 Dana 466.

Massachusetts.— Com. *v.* Clancy, 154 Mass.

lost,[95] to allege an actual wagering at which money was won or lost,[96] or to make any allegation as to the ownership of the building.[97]

(iv) *Permitting Use of House or Place*—(a) *In General.* Under a statute prohibiting the permitting of the use of premises for gaming or the renting or leasing of such premises for such purpose, it is sufficient for the indictment or information to allege a violation of the statute substantially in the language thereof.[98]

(b) *Description of House or Place.* An indictment for permitting or allowing gaming to be carried on in certain designated places must sufficiently describe the place to show that it is one of the places within the inhibition of the statute.[99] Where, however, the place is clearly alleged to be one within the inhibition of the statute, it is sufficient to designate the *locus in quo* as within the jurisdiction of the court.[1]

(c) *Allegation That House Is Dram-Shop or Other Licensed Place.* An indictment under a statute prohibiting a retailer of spirituous liquors or keeper of other licensed place from permitting gaming on his premises should charge

128, 27 N. E. 1001; Com. *v.* Ferry, 146 Mass. 203, 15 N. E. 484; Com. *v.* Edds, 14 Gray 406.

New Hampshire.— State *v.* Prescott, 33 N. H. 212.

North Carolina.— State *v.* Black, 94 N. C. 809.

Washington.— Schilling *v.* Territory, 2 Wash. Terr. 283, 5 Pac. 926.

See 24 Cent. Dig. tit. "Gaming," § 258.

95. Buford *v.* Com., 14 B. Mon. (Ky.) 24; Com. *v.* Crupper, 3 Dana (Ky.) 466; State *v.* Prescott, 33 N. H. 212.

96. *Indiana.*— State *v.* Thomas, 50 Ind. 292, holding that no article of value need be won, nor is it even necessary that the apparatus be used.

Kentucky.— Waddell *v.* Com., 84 Ky. 276, 1 S. W. 480, 8 Ky. L. Rep. 249; Montee *v.* Com., 3 J. J. Marsh. 132; Pusey *v.* Com., (1886) 1 S. W. 482; Waddell *v.* Com., 8 Ky. L. Rep. 58.

Massachusetts.— Com. *v.* Colton, 8 Gray 488, holding that it is not necessary to allege that the offense was committed for gain.

North Carolina.— State *v.* Morgan, 133 N. C. 743, 45 S. E. 1033, holding that it is not necessary to allege that the games played were games of chance, or that they were played at a place or table where games of chance were played.

Virginia.— See Leath *v.* Com., 32 Gratt. 873, holding that it need not be charged that the games were exhibited for gain.

See 24 Cent. Dig. tit. "Gaming," § 258.

97. State *v.* Grimes, 74 Minn. 257, 77 N. W. 4.

98. *Alabama.*— Covy *v.* State, 4 Port. 186.

Illinois.— Stoltz *v.* People, 5 Ill. 168.

Indiana.— State *v.* Johnson, 115 Ind. 467, 17 N. E. 910; State *v.* Staker, 3 Ind. 570; State *v.* Darroch, 12 Ind. App. 527, 40 N. E. 639.

Iowa.— State *v.* Kaufman, 59 Iowa 273, 13 N. W. 292; State *v.* Middleton, 11 Iowa 246; State *v.* Cure, 7 Iowa 479.

Kentucky.— Com. *v.* Fraize, 5 Bush 325; Com. *v.* Branham, 3 Bush 1; Com. *v.* Schatzman, 82 S. W. 238, 26 Ky. L. Rep. 508.

Massachusetts.— Com. *v.* Smith, 166 Mass. 370, 44 N. E. 503.

Missouri.— State *v.* Mohr, 55 Mo. App. 329 (holding that an indictment of a person for permitting a gaming device to be used on his premises is not fatally defective because it alleges the device was "called" instead of "was" a pack of cards); State *v.* Dyson, 39 Mo. App. 297.

New York.— People *v.* Wyatt, 81 N. Y. App. Div. 51, 80 N. Y. Suppl. 816 [*reversing* on another point 39 Misc. 456, 80 N. Y. Suppl. 198].

Texas.—McGaffey *v.* State, 4 Tex. 156 (holding that an indictment need not use the exact words of the statute where the statute forbade an owner to allow any one to play cards in his house, a charge that he allowed cards to be played in his storeroom being sufficient); Borchers *v.* State, 31 Tex. Cr. 517, 21 S. W. 192. See also Jones *v.* State, (App. 1892) 19 S. W. 677.

See 24 Cent. Dig. tit. "Gaming," § 263.

Hire or gain.— Howell Annot. St. Mich. § 2029, provides that any person who shall "for hire, gain or reward" keep a gaming-room or table, or who shall knowingly suffer a gaming-room or table to be kept on the premises, shall be guilty of a misdemeanor; and under this statute an indictment charging one with suffering a gaming-room and table to be kept on his premises must charge that it was done for hire, gain, or reward. People *v.* Weithoff, 100 Mich. 393, 58 N. W. 1115.

99. Perez *v.* State, 48 Ala. 356; Ballentine *v.* State, 48 Ark. 45, 2 S. W. 340; Farmer *v.* State, 45 Ark. 95 (holding that an indictment which, in the language of the statute, charges defendant with "permitting gaming in his dram-shop" describes the building with sufficient certainty); Floeckinger *v.* State, (Tex. Cr. App. 1903) 75 S. W. 303. See also Kleespies *v.* State, 106 Ind. 383, 7 N. E. 186.

1. Kleespies *v.* State, 106 Ind. 383, 7 N. E. 186; State *v.* Fant, 2 Brev. (S. C.) 487; McGaffey *v.* State, 4 Tex. 156; Eylar *v.* State, 37 Tex. Cr. 257, 39 S. W. 665.

that defendant was duly licensed, as well as the commission of the gaming; otherwise it is defective.[2]

(D) *Names of Players.* In some jurisdictions it is held not to be necessary for the indictment to state the names of the players,[3] while in other jurisdictions it is held to be essential that the indictment should give the names of the players or allege that they are unknown.[4]

(E) *Description of Game or Device.* A general description of the game alleged to have been played or the gambling device used will as a rule suffice.[5]

(F) *Allegations as to Actual Gaming.* It is not necessary for the indictment for permitting a gambling device to be used for the purpose of gaming in the house of defendant to aver the actual using of the device by persons engaged in playing for money or other thing of value.[6]

(G) *Allegations as to Wagers.* The general rule is that in an indictment for permitting gaming in one's house it is not necessary to allege that money or other thing of value was wagered.[7]

(V) *Permitting Minors to Frequent or Play.* An indictment under a statute making it a misdemeanor for any person owning certain designated tables or games to allow, suffer, or permit any minor to play upon such tables or at such games must charge that a game was played by the minor and name the person with whom it was played or give a sufficient reason why such party is not named.[8] The indictment must likewise aver that defendant is the owner or keeper of such table or game.[9] It is not necessary, however, to allege that the

2. State *v.* Kennedy, 1 Ala. 31; Com. *v.* Arnold, 4 Pick. (Mass.) 251; Com. *v.* Bolkom, 3 Pick. (Mass.) 281, holding, moreover, that it is not sufficient to allege that defendant was duly licensed, and that he allowed persons to play in his den, but it must be directly averred that he actually kept an inn. See, however, Buford *v.* Com., 14 B. Mon. (Ky.) 24, holding that an averment that defendant was a coffee-house keeper in an indictment for permitting gambling is sufficient, without an averment that he was licensed.

In Texas it is sufficient to charge that defendant permitted gaming upon his premises, such premises being a house for retailing spirituous liquors, without any allegation as to his being duly licensed. Williams *v.* State, 35 Tex. Cr. 391, 33 S. W. 1080; Otto *v.* State, (Cr. App. 1894) 25 S. W. 285; Ballew *v.* State, 26 Tex. App. 483, 9 S. W. 765; Robinson *v.* State, 24 Tex. App. 4, 5 S. W. 509.

3. Clark *v.* State, 19 Ala. 552; Horan *v.* State, 24 Tex. 161; McGaffey *v.* State, 4 Tex. 156; Foster *v.* Territory, 1 Wash. 411, 25 Pac. 459.

4. State *v.* Noland, 29 Ind. 212; Sowle *v.* State, 11 Ind. 491; Ball *v.* State, 7 Blackf. (Ind.) 242; Davis *v.* State, 7 Ohio 204. See, however, Kleespies *v.* State, 106 Ind. 383, 7 N. E. 186; Fisher *v.* State, 2 Ind. App. 365, 28 N. E. 565, both holding that in an indictment charging defendant with renting a house to another to be used and occupied for gaming, it is not necessary to allege the name of the person to whom the room was rented.

5. State *v.* Foster, 2 Mo. 210; State *v.* Flores, 33 Tex. 444; Horan *v.* State, 24 Tex. 161; State *v.* Ake, 9 Tex. 322; McGaffey *v.* State, 4 Tex. 156; Foster *v.* Territory, 1 Wash. 411, 25 Pac. 459; State *v.* Lewis, 12 Wis. 434, holding that an indictment under Wis. Gen. Laws (1858), c. 117, § 4, charging that defendant suffered games at cards "to be played by means of cards, then and there used as a gaming device," etc., is sufficient.

6. State *v.* Scaggs, 33 Mo. 92; State *v.* Brice, 2 Brev. (S. C.) 66; Bosshard *v.* State, 25 Tex. Suppl. 207. *Compare* Eylar *v.* State, 37 Tex. Cr. 257, 39 S. W. 665 (holding that an allegation that the banking and table games were kept and exhibited for the purpose of gaming is essential); Johnson *v.* State, 34 Tex. Cr. 227, 29 S. W. 1083. *Contra,* Com. *v.* McCarty, 74 S. W. 1046, 25 Ky. L. Rep. 294.

7. McGaffey *v.* State, 4 Tex. 156; Bosshard *v.* State, 25 Tex. Suppl. 207. See also Com. *v.* Colton, 8 Gray (Mass.) 488. But see Davis *v.* State, 7 Ohio 204, holding that the indictment must specify that the playing was for money or other valuable thing.

8. Faber *v.* State, 66 Ind. 600; Donniger *v.* State, 52 Ind. 326; Zook *v.* State, 47 Ind. 463. See also Sikes *v.* State, 67 Ala. 77; Kiley *v.* State, 120 Ind. 65, 22 N. E. 99.

9. Hipes *v.* State, 73 Ind. 39; Manheim *v.* State, 66 Ind. 65; State *v.* Ward, 57 Ind. 537; Hanrahan *v.* State, 57 Ind. 527 (holding that an indictment charging defendant with having the management and control of the saloon in which billiard-tables were kept, etc., is insufficient, as the management of the saloon and the management of the tables might be in two different persons); Gallagher *v.* State, 26 Wis. 423 (holding that a complaint alleging that E P is a minor, and that at a certain time and place he "did play a game of billiards on a billiard table kept" at that place by defendant for profit, and that defendant "did, on that day, and at divers other days since that time, . . . permit, for pay, the said E. P., a minor

game was played for a wager, since gambling is not an element of this statutory offense.[10]

c. Issues, Proof, and Variance — (i) *In General.* The rule is well settled that the allegations in the indictment or information must correspond with the proof;[11] but this rule does not require that there shall be literal proof of non-essential allegations.[12] While an indictment for gaming charging several distinct offenses in the alternative confines the prosecution on the trial to evidence of a single offense,[13] yet it is not necessary to prove the precise time at which the offense is alleged to have been committed.[14]

(ii) *Place or House.* The *locus in quo* and the character of the place, where that is an essential element of the offense, as laid in the indictment, must be supported by the evidence with reasonable certainty.[15]

as aforesaid, to play billiards on his said table kept for profit as aforesaid," sufficiently charges defendant with being the "keeper" of the table, although that word found in the statute is not used).

10. Ready *v.* State, 62 Ind. 1; State *v.* Ward, 57 Ind. 537; Green *v.* Com., 5 Bush (Ky.) 327. *Compare* Williams *v.* Warsaw, 60 Ind. 457.

11. *Arkansas.*— Dudney *v.* State, 22 Ark. 251; Barkman *v.* State, 13 Ark. 703; Johnson *v.* State, 13 Ark. 684.

Georgia.— Pullen *v.* State, 116 Ga. 555, 42 S. E. 774.

Indiana.— Bruce *v.* State, 25 Ind. 424; Bowe *v.* State, 25 Ind. 415; Jessup *v.* State, 14 Ind. App. 230, 42 N. E. 948.

Iowa.— State *v.* Crogan, 8 Iowa 523.

Mississippi.— Gamble *v.* State, 35 Miss. 222.

Tennessee.— Fugate *v.* State, 2 Humphr. 397.

Texas.— Jenkins *v.* State, 36 Tex. 345; Crain *v.* State, 14 Tex. 634; Ramay *v.* State, 14 Tex. 409; Reeves *v.* State, 9 Tex. 447; Thorp *v.* State, 42 Tex. Cr. 231, 59 S. W. 43; Metzer *v.* State, 31 Tex. Cr. 11, 19 S. W. 254; Early *v.* State, 23 Tex. App. 364, 5 S. W. 122; Withers *v.* State, 21 Tex. App. 210, 17 S. W. 725; Nairn *v.* State, 18 Tex. App. 260 (holding that one indicted for one offense against the law prohibiting gaming cannot be convicted of a distinct offense made such under another provision of the law); Webb *v.* State, 17 Tex. App. 205. See also Campbell *v.* State, 2 Tex. App. 187.

Virginia.— Windsor *v.* Com., 4 Leigh 680.

Wyoming.— Fields *v.* Territory, 1 Wyo. 78.

See 24 Cent. Dig. tit. "Gaming," §§ 274–276.

12. *Arkansas.*— Medlock *v.* State, 18 Ark. 363.

Indiana.— Voght *v.* State, 124 Ind. 358, 24 N. E. 680; Alexander *v.* State, 99 Ind. 450; Watson *v.* State, 3 Ind. 123; Parsons *v.* State, 2 Ind. 499; Dormer *v.* State, 2 Ind. 308.

Iowa.— See State *v.* Cooster, 10 Iowa 453.

Massachusetts.— Com. *v.* Coleman, 184 Mass. 198, 68 N. E. 220; Com. *v.* Hogarty, 141 Mass. 106, 4 N. E. 831; Com. *v.* Edds, 14 Gray 406.

Oregon.— See State *v.* Carr, 6 Oreg. 133.

Pennsylvania.— Com. *v.* Carson, 6 Phila. 381.

See 24 Cent. Dig. tit. "Gaming," § 274.

13. Cochran *v.* State, 30 Ala. 542; Fields *v.* Territory, 1 Wyo. 78.

14. State *v.* Czarnikow, 20 Ark. 160; Grant *v.* State, 89 Ga. 393, 15 S. E. 488; Robinson *v.* State, 77 Ga. 101 (holding that the state is not confined to a particular day charged in an accusation for gambling, but may prove that the offense was committed at any time within two years); People *v.* Emerson, 6 N. Y. Cr. 157, 5 N. Y. Suppl. 374; Wartelsky *v.* State, (Tex. Cr. App. 1896) 33 S. W. 1079. See also State *v.* Howery, 41 Tex. 506.

15. *Alabama.*— Johnson *v.* State, 74 Ala. 537 (holding that under Code (1876), § 4212, punishing the allowing of gaming on board by captains of steamboats "navigating in the rivers in the state," conviction could not be had under an indictment for so allowing, while navigating in Mobile river, on proof that the gaming took place while navigating in Mobile bay); Mitchell *v.* State, 55 Ala. 160; Napier *v.* State, 50 Ala. 168; Windham *v.* State, 26 Ala. 69; Logan *v.* State, 24 Ala. 182 (holding that under a count in an indictment for gaming, charging defendant with playing cards "at a store-house then and there for retailing spirituous liquors," no conviction can be had upon proof that the playing took place near a house formerly used for retailing, but which was not then so used); Smith *v.* State, 23 Ala. 39.

Illinois.— O'Leary *v.* State, 88 Ill. App. 60.

Indiana.— McAlpin *v.* State, 3 Ind. 567; Watson *v.* State, 3 Ind. 123.

New York.— People *v.* Trainor, 57 N. Y. App. Div. 422, 68 N. Y. Suppl. 263, 15 N. Y. Cr. 333.

Texas.— Gomprecht *v.* State, 36 Tex. Cr. 434, 37 S. W. 734; Springfield *v.* State, (App. 1890) 13 S. W. 752; Dailey *v.* State, 27 Tex. App. 569, 11 S. W. 636; Ballew *v.* State, 26 Tex. App. 483, 9 S. W. 765; Borders *v.* State, 24 Tex. App. 333, 6 S. W. 532; Withers *v.* State, 21 Tex. App. 210, 17 S. W. 725; Fossett *v.* State, 18 Tex. App. 330 (holding that a conviction for gaming in a public place cannot be sustained where the publicity of the place is not shown); Harcrow *v.* State, 2

(III) *Persons Playing or Betting.* Since only those persons who participated in the same game should be joined in one indictment, proof that parties jointly united were guilty of gaming on different occasions or in separate games is insufficient to warrant a conviction;[16] but where the gravamen of the offense is the permitting of gaming, it is not necessary, according to the better rule, that the proof shall correspond with the allegation in the indictment as to the names of the persons who were permitted to play.[17]

(IV) *Money or Property Wagered.* Under some statutes an indictment charging that defendant bet money is not sustained by proof that he bet property, since the betting of property is made a distinct offense.[18] However, since the amount of money won is immaterial under the law, a variance between the indictment and the proof in this respect is of no importance.[19]

(V) *Game Played or Device Exhibited.* Where the game played or the device exhibited is described with sufficient accuracy in the indictment, proof of substantially the same game or device will suffice.[20] But where the indictment describes one game or device, and the proof is of an entirely or essentially different game, the variance is fatal.[21]

(VI) *Time of Commission of Offense.* The general rule is that an indict-

Tex. App. 511. See also Blum *v.* State, (Cr. App. 1898) 47 S. W. 1002; Wartelsky *v.* State, (Cr. App. 1896) 33 S. W. 1079.

Virginia.—Windsor *v.* Com., 4 Leigh 680. See also Com. *v.* Butts, 2 Va. Cas. 18.

West Virginia.— State *v.* Brast, 31 W. Va. 380, 7 S. E. 11.

See 24 Cent. Dig. tit. "Gaming," § 277.

16. *Alabama.*— Lindsay *v.* State, 48 Ala. 169; Elliott *v.* State, 26 Ala. 78.

Arkansas.— Hany *v.* State, 9 Ark. 193.

Georgia.— See Archer *v.* State, 69 Ga. 767, holding that an indictment charging that defendants played and bet with each other is sustained by proof that they played at the same game, although they all bet against the man who presided at the game.

Indiana.— See Wilcox *v.* State, 7 Blackf. 456.

South Carolina.— State *v.* Rushing, 2 Nott & M. 560.

Texas.— State *v.* Homan, 41 Tex. 155; Herron *v.* State, 36 Tex. 285; Galbreath *v.* State, 36 Tex. 200; State *v.* Roderica, 35 Tex. 507; Parker *v.* State, 26 Tex. 204; Lewellen *v.* State, 18 Tex. 538.

See 24 Cent. Dig. tit. "Gaming," § 278.

By parity of reasoning a charge in an information that A alone lost upon a game of cards, etc., is not supported by proof that A with another jointly lost, etc. Jackson *v.* State, 4 Ind. 560.

17. Com. *v.* Price, 8 Leigh (Va.) 757. See also State *v.* Wagster, 75 Mo. 107, holding that an indictment for running a horse-race in a public road will be supported by proof that defendant procured another to ride his horse in the race. *Compare* Sumner *v.* State, 74 Ind. 52; Moore *v.* State, 65 Ind. 213; Iseley *v.* State, 8 Blackf. (Ind.) 403.

18. Horton *v.* State, 13 Ark. 62; Tate *v.* State, 5 Blackf. (Ind.) 174; Williams *v.* State, 12 Sm. & M. (Miss.) 58 (holding that an indictment for betting for money is not sustained by proof of betting with United States treasury warrants); Hale *v.* State, 8 Tex. 171. See also Flynn *v.* State, 34 Ark. 441, holding that a verdict of guilty on an indictment for betting money on a game played with cards called "poker" is sustained by evidence that defendant bet chips or checks which represented money on a game played with cards called "stud" or "stud-poker." See, however, Perry *v.* Com., 5 Ky. L. Rep. 611, 6 Ky. L. Rep. 134, holding that under an indictment charging defendant with suffering games of chance in his house, on which both money and property were bet, lost, and won at the game, it is sufficient to prove that either money or property was bet, lost, and won.

Bank-notes.— Under decisions holding that bank-notes are not money, it has been held that proof of playing for bank-notes will not sustain an indictment for playing at a game for money. Pryor *v.* Com., 2 Dana (Ky.) 298; Johnston *v.* State, Mart. & Y. (Tenn.) 129.

19. Medlock *v.* State, 18 Ark. 363; Alexander *v.* State, 99 Ind. 450; Hamilton *v.* State, 75 Ind. 586; Mount *v.* State, 7 Ind. 654; Com. *v.* Garland, 3 Metc. (Ky.) 478; Com. *v.* McAtee, 8 Dana (Ky.) 28. See, however, Carr *v.* State, 50 Ind. 178.

20. Flynn *v.* State, 34 Ark. 441; Barkman *v.* State, 13 Ark. 703; Gibboney *v.* Com., 14 Gratt. (Va.) 582, holding that an indictment for unlawful playing with cards is supported by proof that defendant did bet at the game of faro, at the time and place charged.

21. State *v.* Grider, 18 Ark. 297; Woody *v.* State, 113 Ga. 927, 39 S. E. 297 (holding that an accusation for gaming for money with cards and dice is not supported by evidence showing that the only games at which anything was hazarded were played with dice only); Squier *v.* State, 66 Ind. 317, 604 (holding that an indictment for allowing a minor to play billiards is not supported by proof that he played fifteen-ball pool, although pool is played on a table with billiard balls); Bartender *v.* State, 51 Ind. 73, 76; Averheart *v.* State, 30 Tex. App. 651, 18 S. W. 416.

ment under the various gaming statutes charging the offense to have been committed on a specified date is sustained by proof of the offense committed on any day prior to the finding of the indictment, within the period of limitation.[22]

(VII) *Conviction of Offense Other Than That Charged.* Where defendant is indicted for one offense under a statute against gaming, he cannot be convicted of another and different offense for which he was not indicted.[23]

3. Evidence — a. Burden of Proof. In accordance with the general rules on the subject,[24] in prosecutions for gaming and kindred offenses, it is for the state to prove all the facts which are essential to the guilt of the accused,[25] and for the accused to prove facts material only to the defense.[26]

b. Judicial Notice. Applying the general rule that courts take judicial notice of all matters occurring within their jurisdiction which are of such general and public notoriety that every person of ordinary intelligence may be fairly presumed to know them,[27] it has been held that the court will take judicial notice of what is meant by a gift enterprise,[28] and that a game of cards is a game of chance;[29]

Animals running in race.— In Indiana an indictment charging that defendant suffered his mare to be run in a certain race is not supported by evidence that the animal run was a horse (Thrasher *v.* State, 6 Blackf. (Ind.) 460); and where the indictment charges defendant with suffering his horse to be run in a horse-race, and proof is that defendant rode a horse not his own in the race, the variance is fatal (Robb *v.* State, 52 Ind. 216). However, in Tennessee an indictment for horse-racing has been held to be sustained by evidence that mules were raced. Goldsmith *v.* State, 1 Head (Tenn.) 154.

22. *Arkansas.*— Cohen *v.* State, 32 Ark. 226.

Indiana.— State *v.* Noland, 29 Ind. 212 (holding, however, that an indictment for gaming charging the offense to have been committed at a date subsequent to the finding of the indictment is invalid); Courtney *v.* State, 5 Ind. App. 356, 32 N. E. 335.

Massachusetts.— Com. *v.* Hyde, Thach. Cr. Cas. 19.

Missouri.— State *v.* Mosby, 53 Mo. App. 571.

New York.— See People *v.* Shannon, 87 N. Y. App. Div. 32, 83 N. Y. Suppl. 1061, 17 N. Y. Cr. 532.

Tennessee.— Anthony *v.* State, 4 Humphr. 83.

Texas.— Young *v.* State, (Cr. App. 1901) 60 S. W. 767; Washington *v.* State, (Cr. App. 1899) 50 S. W. 341.

See 24 Cent. Dig. tit. "Gaming," § 281.

23. Ford *v.* State, 123 Ala. 181, 26 So. 503; Clayborne *v.* State, 103 Ala. 53, 15 So. 842; Chambers *v.* State, 77 Ala. 80 (holding that one cannot be convicted of playing a game of cards under an indictment for betting at a game of cards); State *v.* Martin, 22 Ark. 420; Oerter *v.* State, 57 Nebr. 135, 77 N. W. 367 (where defendant is indicted for keeping gaming-tables he cannot be convicted on evidence that he aided and abetted another in so doing); Patterson *v.* State, 12 Tex. App. 222. *Compare* Bell *v.* State, 92 Ga. 49, 18 S. E. 186, where the indictment charged not only the keeping of a gaming-house, but also that defendant knowingly permitted persons to play for money at prohibited games in a house or room occupied by him, and the evidence disclosed a single instance of gaming, but no more than one, and it was held that a conviction could be had.

24. See Criminal Law, 12 Cyc. 379 *et seq.*

25. Bone *v.* State, 63 Ala. 185 (proof of betting money or something else of value); Conyers *v.* State, 50 Ga. 103, 15 Am. Rep. 686 (proof of want of consent of minor's parent or guardian to his playing a certain game); Rodifer *v.* State, 74 Ind. 21 (holding that to sustain an indictment for renting a building to be used for gaming, the state must show that the accused rented it to be used for that purpose); Scales *v.* State, (Tex. Cr. App. 1904) 81 S. W. 947 (holding that in a prosecution for selling futures, the burden is on the state to show that both parties contemplated a wagering contest, and that neither intended an actual delivery). But *compare* Wilcox *v.* State, 26 Tex. 145, holding that where, under an indictment for playing cards in a public place, upon which money was bet, the state proves the playing, defendant, to obtain an acquittal, must show affirmatively that nothing was bet or dependent upon the game.

Time of committing offense.— It is for the state to prove that the offense was committed prior to the finding of the indictment (Winans *v.* State, (Tex. App. 1892) 19 S. W. 676; Lynn *v.* State, 27 Tex. App. 590, 11 S. W. 640); and within the statutory period of limitations (State *v.* Waters, 1 Strobh. (S. C.) 59; Manning *v.* State, 35 Tex. 723; Winans *v.* State, *supra*. See also Chapman *v.* State, 18 Ga. 736). And see Criminal Law, 12 Cyc. 382.

To make out the offense of keeping a gaming-house, it is not necessary for the state to show that gaming took place in the house. McAlpin *v.* State, 3 Ind. 567; State *v.* Miller, 5 Blackf. (Ind.) 502.

26. Johnson *v.* State, 36 Tex. 198.

27. State *v.* Taylor, 111 N. C. 680, 16 S. E. 168. And see Evidence, 16 Cyc. 849, 874.

28. Lohman *v.* State, 81 Ind. 15.

29. State *v.* Taylor, 111 N. C. 680, 16 S. E. 168.

but that it does not judicially know that chuck-a-luck,[30] "drawing" and "Kentucky drawing,"[31] policy,[32] and pigeon-hole[33] are games of chance; or that policy is a species of lottery,[34] or how the game of keno is played, or that it is a percentage game.[35] The court judicially knows that faro is a gaming-table or bank kept for the purpose of gaming, where it is one of the games enumerated by statute, and by its terms comprehended in the list of examples of prohibited banks or games.[36]

c. Admissibility. The general rules governing the admissibility of evidence in criminal prosecutions[37] ordinarily determine whether evidence offered in prosecutions for gaming and kindred offenses is admissible.[38] Thus evidence as to the nature of the game or device involved in the prosecution and describing it,[39] evidence that the accused remained silent when one arrested with him made statements in his hearing charging him with the commission of the offense for

30. Montee *v.* Com., 3 J. J. Marsh. (Ky.) 132.
31. State *v.* Bruner, 17 Mo. App. 274.
32. State *v.* Russell, 17 Mo. App. 16.
33. Com. *v.* Branham, 3 Bush (Ky.) 1.
34. State *v.* Sellner, 17 Mo. App. 39.
35. *In re* Murphy, 128 Cal. 29, 60 Pac. 465.
36. State *v.* Burton, 25 Tex. 420.
37. See CRIMINAL LAW, 12 Cyc. 390.
38. See cases *infra*, this note.

Admissible evidence.—*Alabama.*— Dennis *v.* State, 139 Ala. 109, 35 So. 651; Wilson *v.* State, 113 Ala. 104, 21 So. 487; Johnson *v.* State, 74 Ala. 537.

Illinois.— Soby *v.* People, 134 Ill. 66, 25 N. E. 109 [*affirming* 31 Ill. App. 242].

Kentucky.— Brand *v.* Com., 110 Ky. 980, 63 S. W. 31, 23 Ky. L. Rep. 416.

New York.— People *v.* Adams, 85 N. Y. App. Div. 390, 83 N. Y. Suppl. 481 [*affirmed* in 176 N. Y. 351, 68 N. E. 636, 98 Am. St. Rep. 675, 63 L. R. A. 406].

Texas.— Washington *v.* State, (Cr. App. 1899) 50 S. W. 341.

Washington.— State *v.* Wilson, 9 Wash. 16, 36 Pac. 967.

See 24 Cent. Dig. tit. "Gaming," § 286.

Inadmissible evidence.—*Alabama.*—Lewis *v.* State, 140 Ala. 126, 37 So. 99; James *v.* State, 133 Ala. 208, 32 So. 237; Schuster *v.* State, 48 Ala. 199.

California.— People *v.* Gosset, 93 Cal. 641, 29 Pac. 246; People *v.* Ah Own, 85 Cal. 580, 24 Pac. 780.

Indiana.— Conway *v.* State, 4 Ind. 94.

Louisiana.— State *v.* Caldwell, 3 La. Ann. 435.

Missouri.— State *v.* Gritzner, 134 Mo. 512, 36 S. W. 39.

Texas.— Crain *v.* State, 14 Tex. 634; Alexander *v.* State, (Cr. App. 1902) 67 S. W. 319; Lafferty *v.* State, 41 Tex. Cr. 606, 56 S. W. 623.

See 24 Cent. Dig. tit. "Gaming," § 286.

As to keeping gaming-house see the following cases:

Georgia.— Rivers *v.* State, 118 Ga. 42, 44 S. E. 859.

Indiana.— Roberts *v.* State, 25 Ind. App. 366, 58 N. E. 203.

Kentucky.— Greer *v.* Com., 3 Ky. L. Rep. 394.

Missouri.— State *v.* Mosby, 53 Mo. App. 571.

Texas.— Ah Kee *v.* State, (Cr. App. 1896) 34 S. W. 269.

As to playing or betting in prohibited place see Thompson *v.* State, 99 Ala. 173, 13 So. 753; Franklin *v.* State, 91 Ala. 23, 8 So. 678; Goldstein *v.* State, (Tex. Cr. App. 1896) 35 S. W. 289; Moore *v.* State, 35 Tex. Cr. 74, 31 S. W. 649; Parks *v.* State, (Tex. App. 1889) 12 S. W. 869; Anderson *v.* State, (Tex. App. 1889) 12 S. W. 868.

As to permitting use of house or place for gaming see Com. *v.* Garrison, 5 Ky. L. Rep. 254; Crippen *v.* State, (Tex. Cr. App. 1904) 80 S. W. 372; Humphreys *v.* State, 34 Tex. Cr. 434, 30 S. W. 1066; Biles *v.* State, 25 Tex. App. 441, 8 S. W. 650.

As to keeping or setting up gaming-table or bank see Bibb *v.* State, 83 Ala. 84, 3 So. 711; Miller *v.* Com., 79 S. W. 250, 77 S. W. 682, 25 Ky. L. Rep. 1236, 1931.

As to common gamblers see Com. *v.* Hopkins, 2 Dana (Ky.) 418 (holding that evidence that defendant was and is by reputation a common gambler is inadmissible); Grundy *v.* Com., 8 Ky. L. Rep. 876 (holding that evidence that defendant played cards in other states is admissible).

39. State *v.* Behan, 113 La. 701, 37 So. 607; Com. *v.* Watson, 154 Mass. 135, 27 N. E. 1003; People *v.* Emerson, 5 N. Y. Suppl. 374, 6 N. Y. Cr. 157 [*affirmed* in 53 Hun 437, 6 N. Y. Suppl. 274, 7 N. Y. Cr. 97].

Expert evidence as to the mode of playing a game has been held admissible. Com. *v.* Adams, 160 Mass. 310, 35 N. E. 851. But see People *v.* Gosset, 93 Cal. 641, 29 Pac. 246; People *v.* Rose, 85 Cal. 378, 24 Pac. 817; People *v.* Carroll, 80 Cal. 153, 22 Pac. 129 [*overruling* People *v.* Sam Lund, 70 Cal. 515, 11 Pac. 673).

Articles used in carrying on and conducting a game are a part of the *res gestæ*, and are admissible in evidence in illustrations of the nature of the game. People *v.* Sam Lund, 70 Cal. 515, 11 Pac. 673. *Compare* People *v.* Ebel, 98 N. Y. App. Div. 270, 90 N. Y. Suppl. 628, holding that placards which are not shown to be similar in character to the placards which were alleged to have been on the walls of a pool-room when defendant committed the offense charged, and as to

which he is being tried,[40] and statements admitting guilt made by the accused on a former trial or inquiry[41] are admissible; but statements and declarations of the accused in his own favor are generally inadmissible.[42] Evidence of gaming at other times than that charged is sometimes admissible.[43]

d. Weight and Sufficiency — (i) *In General.* Questions as to the weight and sufficiency of evidence in prosecutions for gaming and kindred offenses are determined in accordance with the rules applicable in criminal prosecutions in general.[44] These rules have been applied to evidence as to playing or betting,[45] as to gaming in certain prohibited places,[46] as to book-making and pool-selling,[47] as to keeping and exhibiting gaming tables or devices,[48] as to keeping a house or place for gaming,[49] as to permitting the use of a house or place for

which there is no explanatory proof given are inadmissible.

40. Lowe *v.* State, 86 Ala. 47, 5 So. 435. And see CRIMINAL LAW, 12 Cyc. 421.

41. Bibb *v.* State, 83 Ala. 84, 3 So. 711. And see CRIMINAL LAW, 12 Cyc. 424.

42. Com. *v.* Hyde, Thach. Cr. Cas. (Mass.) 19. And see CRIMINAL LAW, 12 Cyc. 426.

43. Chase *v.* People, 2 Colo. 509 (holding that upon an information for keeping a gambling-room, evidence is admissible to show that gambling was carried on in the room prior to the time alleged in the information, for the purpose of explaining the character of the house and the purpose for which it was kept); State *v.* Behan, 113 La. 701, 37 So. 607 (holding that in a prosecution for keeping a banking house and banking game, the state may show that defendant participated in the dealing of faro in the same place, within two weeks immediately preceding the date charged in the information, for the purpose at least of showing the character of the house and the guilty knowledge of defendant); State *v.* Agudo, 5 La. Ann. 185.

44. *Alabama.*—State *v.* Whitworth, 8 Port. 434.

Georgia.— Arnold *v.* State, 117 Ga. 706, 45 S. E. 59.

Illinois.— Robbins *v.* People, 95 Ill. 175.

Michigan.— People *v.* Hess, 85 Mich. 128, 48 N. W. 181, running a policy shop.

Missouri.— State *v.* Gritzner, 134 Mo. 512, 36 S. W. 39, dealing in futures.

New York.— People *v.* Adams, 85 N. Y. App. Div. 390, 83 N. Y. Suppl. 481 [*affirmed* in 176 N. Y. 351, 68 N. E. 636], knowingly having in possession papers used in playing policy.

Ohio.— Heeman *v.* State, 9 Ohio S. & C. Pl. Dec. 274, 6 Ohio N. P. 258.

Texas.— Berry *v.* State, (Cr. App. 1905) 85 S. W. 14; Harnage *v.* State, (Cr. App. 1904) 82 S. W. 512; Simmons *v.* State, (Cr. App. 1903) 72 S. W. 586; Williams *v.* State, 42 Tex. Cr. 368, 60 S. W. 248.

See 24 Cent. Dig. tit. "Gaming," § 291. And see CRIMINAL LAW, 12 Cyc. 485 *et seq.*

45. *Alabama.*— Jackson *v.* State, 117 Ala. 155, 23 So. 47; Thompson *v.* State, 99 Ala. 173, 13 So. 753; Ward *v.* State, 37 Ala. 158.

Arkansas.— Stevens *v.* State, 3 Ark. 66.

Florida.— Tatum *v.* State, 33 Fla. 311, 14 So. 586; Oder *v.* State, 26 Fla. 520, 7 So. 856.

Georgia.— Frost *v.* State, 120 Ga. 311, 47 S. E. 901; Harmon *v.* State, 120 Ga. 197, 47 S. E. 547.

Indiana.— Middaugh *v.* State, 103 Ind. 78, 2 N. E. 292; Branscum *v.* State, 7 Ind. 593.

Missouri.— State *v.* Andrews, 43 Mo. 470; State *v.* Douglass, 1 Mo. 527; State *v.* Brooks, 94 Mo. App. 57, 67 S. W. 942; St. Louis *v.* Sullivan, 8 Mo. App. 455.

Texas.— Rice *v.* State, 10 Tex. 545.

See 24 Cent. Dig. tit. "Gaming," § 292.

46. Dennis *v.* State, (Ala. 1903) 35 So. 651; Russ *v.* State, 132 Ala. 20, 31 So. 550; Cartiledge *v.* State, 132 Ala. 17, 31 So. 553; Floeckinger *v.* State, 45 Tex. Cr. 199, 75 S. W. 303; Thorp *v.* State, 42 Tex. Cr. 231, 59 S. W. 43; Harvell *v.* State, (Tex. Cr. App. 1899) 53 S. W. 622; White *v.* State, 39 Tex. Cr. 269, 45 S. W. 702, 46 S. W. 825; Robinson *v.* State, (Tex. Cr. App. 1897) 39 S. W. 662; Turbeville *v.* State, 37 Tex. Cr. 145, 38 S. W. 1010; Gomprecht *v.* State, 36 Tex. Cr. 434, 37 S. W. 734; Armstrong *v.* State, 34 Tex. Cr. 645, 31 S. W. 664; Robinson *v.* State, (Tex. App. 1892) 19 S. W. 894; Tucker *v.* State, 25 Tex. App. 653, 8 S. W. 813.

47. Com. *v.* Healey, 157 Mass. 455, 32 N. E. 656; Com. *v.* Clancy, 154 Mass. 128, 27 N. E. 1001; People *v.* McCue, 87 N. Y. App. Div. 72, 83 N. Y. Suppl. 1088 [*affirmed* in 178 N. Y. 579, 70 N. E. 1104]; People *v.* Shannon, 87 N. Y. App. Div. 32, 83 N. Y. Suppl. 1061; People *v.* Fisher, 17 N. Y. Suppl. 162; People *v.* Wynn, 12 N. Y. Suppl. 379 [*affirmed* in 128 N. Y. 599, 28 N. E. 251].

48. St. Louis *v.* Wiley, 8 Mo. App. 597; Meeks *v.* State, (Tex. Cr. App. 1903) 74 S. W. 910; Dalton *v.* State, (Tex. Cr. App. 1903) 74 S. W. 25; Smith *v.* State, (Tex. Cr. App. 1896) 33 S. W. 871; Polly *v.* State, 33 Tex. Cr. 410, 26 S. W. 727; Jackson *v.* State, (Tex. Cr. App. 1894) 25 S. W. 773; Ramey *v.* State, (Tex. App. 1892) 18 S. W. 417.

49. *Florida.*— Ransom *v.* State, 26 Fla. 364, 7 So. 860; Wooten *v.* State, 24 Fla. 335, 5 So. 39, 1 L. R. A. 819.

Georgia.— White *v.* State, 115 Ga. 570, 41 S. E. 986; Driver *v.* State, 112 Ga. 229, 37 S. E. 400; Cox *v.* State, 95 Ga. 502, 20 S. E. 269; Pacetti *v.* State, 82 Ga. 297, 7 S. E. 867; State *v.* Worth, R. M. Charlt. 5.

Illinois.— O'Leary *v.* People, 188 Ill. 226, 58 N. E. 939 [*affirming* 88 Ill. App. 270]; Stevens *v.* People, 67 Ill. 587.

gaming,[50] and as to the knowledge or intent of the accused where intent is an element of the offense.[51]

(II) *Testimony of Accomplice.* Whether or not participants in gaming are accomplices is discussed elsewhere.[52] Where they are so regarded, a statute forbidding a conviction upon the uncorroborated testimony of an accomplice applies.[53] Such statutes, however, sometimes do not apply to misdemeanors, and in that case, as gaming is usually a misdemeanor, the uncorroborated testimony of an accomplice is sufficient to warrant a conviction.[54] It is sometimes expressly provided that in prosecutions for gaming a conviction may be had upon the unsupported evidence of an accomplice.[55]

4. Trial[56] — a. Questions of Law and Fact. The general rule that questions of law are for the court and questions of fact for the jury[57] applies in prosecutions for gaming and kindred offenses.[58]

Indiana.— Neeld *v.* State, 25 Ind. App. 603, 58 N. E. 734.

Iowa.— State *v.* Boyer, 79 Iowa 330, 44 N. W. 558.

Kentucky.— Harper *v.* Com., 93 Ky. 290, 19 S. W. 737, 14 Ky. L. Rep. 163.

Missouri.— State *v.* Logan, 84 Mo. App. 584.

New York.— People *v.* Trainor, 57 N. Y. App. Div. 422, 68 N. Y. Suppl. 263, 15 N. Y. Cr. 333; People *v.* Mitchell, 21 N. Y. Suppl. 166.

Texas.— Morgan *v.* State, 42 Tex. Cr. 422, 60 S. W. 763.

United States.— U. S. *v.* Miller, 26 Fed. Cas. No. 15,773, 4 Cranch C. C. 104.

See 24 Cent. Dig. tit. "Gaming," § 295.

50. Ward *v.* People, 23 Ill. App. 510; Morgan *v.* State, 117 Ind. 569, 19 N. E. 154; Barnaby *v.* State, 106 Ind. 539, 7 N. E. 231; Harris *v.* State, 5 Tex. 11; Hodges *v.* State, 44 Tex. Cr. 444, 72 S. W. 179; Mohan *v.* State, 42 Tex. Cr. 410, 60 S. W. 552; Ballew *v.* State, 26 Tex. App. 483, 9 S. W. 765.

51. *Illinois.*— Soby *v.* People, 134 Ill. 66, 25 N. E. 109 [*affirming* 31 Ill. App. 242].

Indiana.— Voght *v.* State, 124 Ind. 358, 24 N. E. 680; Taylor *v.* State, 107 Ind. 483, 8 N. E. 450; Hamilton *v.* State, 75 Ind. 586; Crawford *v.* State, 33 Ind. 304; Winemiller *v.* State, 11 Ind. 516.

Iowa.— State *v.* Cooster, 10 Iowa 453.

Pennsylvania.— Com. *v.* Pease, 6 Lack. Leg. N. 213, 14 York Leg. Rec. 94.

Texas.— Harris *v.* State, 5 Tex. 11; Erwin *v.* State, 25 Tex. App. 330, 8 S. W. 276; Wells *v.* State, 22 Tex. App. 18, 2 S. W. 609.

See 24 Cent. Dig. tit. "Gaming," § 297.

52. See Criminal Law, 12 Cyc. 448.

53. State *v.* Light, 17 Oreg. 358, 21 Pac. 132. See also Cain *v.* Com., 6 Ky. L. Rep. 517; Green *v.* Com., 6 Ky. L. Rep. 217. And see Criminal Law, 12 Cyc. 454.

54. Grant *v.* State, 89 Ga. 393, 15 S. E. 488.

55. See Wright *v.* State, 23 Tex. App. 313, 5 S. W. 117, holding that such a statute is constitutional.

56. See Criminal Law, 12 Cyc. 504 *et seq.*

57. See Criminal Law, 12 Cyc. 589.

58. Harris *v.* State, 33 Ala. 373, 31 Ala. 362; People *v.* Ah Oon, 56 Cal. 188; Com. *v.* Montedonico, 5 Ky. L. Rep. 852.

Questions of law.— Under a statute prohibiting banking games, whether the game played is such a game (People *v.* Carroll, 80 Cal. 153, 22 Pac. 129), and under a statute making it unlawful to keep or employ certain tables or any "other table of like character," the question of "like character" (Mims *v.* State, 88 Ga. 458, 14 S. E. 712) are for the court to determine.

Questions of fact.— It is for the jury to determine whether checks and chips played for are things of value (Hamilton *v.* State, 75 Ind. 586); whether when the playing of a certain game is alleged the game proved to have been played is such alleged game (State *v.* Gray, 19 Mont. 206, 47 Pac. 900); whether under a statute against keeping and maintaining a tenement for illegal gaming, policy is a form of illegal gaming (Com. *v.* Baker, 155 Mass. 287, 29 N. E. 512); whether persons handling cards in a certain manner were playing at a game of cards (Henderson *v.* State, 59 Ala. 89); whether a certain game is one of chance (Glascock *v.* State, 10 Mo. 508; State *v.* Bishop, 30 N. C. 266); whether under a statute prohibiting gaming in a drinking establishment, a room in which cards were played is a part of such establishment (Cherry *v.* State, 30 Tex. 439); whether under a statute prohibiting gaming at "an outhouse where people resort" a certain place is such an outhouse (Downey *v.* State, 110 Ala. 99, 10 So. 439); whether under a statute prohibiting gaming in certain designated places and in public places generally, a place not specially designated is a public place (Lewis *v.* State, 140 Ala. 126, 37 So. 99; Jackson *v.* State, 117 Ala. 155, 23 So. 47; Parker *v.* State, 26 Tex. 204; State *v.* Alvey, 26 Tex. 155; Gomprecht *v.* State, 36 Tex. Cr. 434, 37 S. W. 734; Sisk *v.* State, 35 Tex. Cr. 462, 34 S. W. 277; Comer *v.* State, 26 Tex. App. 509, 10 S. W. 106. See also Shihagan *v.* State, 9 Tex. 430); and whether under a statute against permitting gaming, there has been a renting of the premises to another in good faith (O'Bryan *v.* Com., 7 Ky. L. Rep. 220; Robinson *v.* State, 24 Tex. 152).

Weight and sufficiency of evidence are questions for the jury. Gaylor *v.* McHenry, 15 Ind. 383; Armstrong *v.* State, 4 Blackf. (Ind.) 247; Clark *v.* State, (Tex. Cr. App.

b. Instructions. The general rules as to instructions in criminal prosecutions[59] apply to prosecutions for gaming and kindred offenses. Thus it has been held that the court should instruct the jury upon the law of the case,[60] but that it should not in its instructions invade the province of the jury to determine the facts of the case;[61] that it is not error to omit to give particular instructions which are not requested, especially if the instructions as given fairly present the facts and law of the case;[62] that it is not error to refuse to give an instruction when the substance of it is contained in the charge already given;[63] that a refusal to give an instruction when asked by defendant is cured by the court's subsequently giving the same instruction of its own motion;[64] that where defendant is tried upon several counts, appropriate instructions as to each should be given;[65] that an instruction should not be given which unduly singles out or emphasizes a specific item of evidence;[66] that where the commission of the offense is shown by direct testimony, it is not the duty of the court to give in its charge the law governing circumstantial evidence, although there may also be such evidence tending to corroborate the other;[67] that an instruction which is not applicable to the evidence should not be given;[68] that where instructions state the law with substantial accuracy, a new trial will not be granted because of slight verbal inaccuracies;[69] that the accused is always entitled to an instruction on the presumption of his innocence;[70] and that while it is the safer practice for the court not to set out the different means by which an offense can be committed, as defined by statute, still where it has been done it is not reversible error if, in applying the law to the facts, the jury is limited to the particular allegations in the indictment.[71]

5. Appeal and Error.[72] Such general rules as that questions not raised at the trial will not ordinarily be reviewed on appeal,[73] that when there is no evidence to support a conviction,[74] or where the sentence imposed exceeds the statutory limits,[75] the judgment will be reversed, and that a judgment will not be reversed for error without prejudice to the accused,[76] apply to prosecutions for gaming and kindred offenses. The jurisdiction of particular courts to entertain appeals in

1904) 80 S. W. 617. See also Stevenson *v.* State, 83 Ga. 575, 10 S. E. 234. And see Criminal Law, 12 Cyc. 592.

59. See Criminal Law, 12 Cyc. 611.

60. See Montee *v.* Com., 3 J. J. Marsh. (Ky.) 132. And see Criminal Law, 12 Cyc. 611.

61. Henderson *v.* State, 59 Ala. 89. See also Jeffries *v.* State, 61 Ark. 308, 32 S. W. 1080. And see Criminal Law, 12 Cyc. 596.

62. Cameron *v.* State, 15 Ala. 383; King *v.* People, 83 N. Y. 587 [*affirming* 23 Hun 148]; State *v.* Robinson, 40 S. C. 553, 18 S. E. 891. See also People *v.* Levoy, 72 N. Y. App. Div. 55, 76 N. Y. Suppl. 783. And see Criminal Law, 12 Cyc. 658.

63. Toll *v.* State, 40 Fla. 169, 23 So. 942; Wooten *v.* State, 24 Fla. 335, 5 So. 39, 1 L. R. A. 819; Rice *v.* State, 3 Kan. 141; Com. *v.* Watson, 154 Mass. 135, 27 N. E. 1003; Thompson *v.* State, 37 Tex. Cr. 227, 38 S. W. 785, 39 S. W. 298; Copeland *v.* State, 36 Tex. Cr. 576, 38 S. W. 189. See Criminal Law, 12 Cyc. 662.

64. Barkman *v.* State, 13 Ark. 705. See Criminal Law, 12 Cyc. 656.

65. Jones *v.* State, 80 Miss. 181, 31 So. 581. See also Dougherty *v.* State, (Tex. Cr. App. 1896) 35 S. W. 666. And see Criminal Law, 12 Cyc. 614.

66. O'Leary *v.* People, 88 Ill. App. 60. And see Criminal Law, 12 Cyc. 649.

67. Moore *v.* State, 97 Ga. 759, 25 S. E. 362. And see Criminal Law, 12 Cyc. 634.

68. People *v.* Gosset, 93 Cal. 641, 29 Pac. 246; Moore *v.* State, 65 Ind. 213; Borders *v.* State, 24 Tex. App. 333, 6 S. W. 532. And see Criminal Law, 12 Cyc. 651.

69. Com. *v.* Ferry, 146 Mass. 203, 15 N. E. 484. See also Gilmore *v.* State, (Tex. Cr. App. 1895) 29 S. W. 477. And see Criminal Law, 12 Cyc. 654.

70. Houston *v.* State, 24 Fla. 356, 5 So. 48; Wooten *v.* State, 24 Fla. 335, 5 So. 39, 1 L. R. A. 819. And see Criminal Law, 12 Cyc. 621.

71. Harvell *v.* State, (Tex. Cr. App. 1899) 53 S. W. 622. And see Criminal Law, 12 Cyc. 614.

72. See Criminal Law, 12 Cyc. 792.

73. Robinson *v.* State, 24 Tex. 152; Pierce *v.* State, 12 Tex. 210. And see Criminal Law, 12 Cyc. 808.

74. Gatlin *v.* State, (Tex. App. 1890) 13 S. W. 993. And see Criminal Law, 12 Cyc. 907.

75. Ashlock *v.* Com., 7 B. Mon. (Ky.) 44. And see Criminal Law, 12 Cyc. 905.

76. Ransom *v.* State, 26 Fla. 364, 7 So. 860. See also People *v.* Ah Own, 85 Cal. 580, 24 Pac. 780; O'Leary *v.* People, 88 Ill. App. 60. And see Criminal Law, 12 Cyc. 910.

prosecutions for gaming and kindred offenses depends upon varying constitutional and statutory provisions.[77]

6. PUNISHMENT. The punishment for gaming and kindred offenses depends upon various statutory provisions[78] and is generally a fine[79] or imprisonment,[80] or both.[81]

III. PENALTIES AND FORFEITURES.*

A. In General. For the purpose of suppressing and punishing gambling the legislatures of various states have prescribed punishments other than by indictment; and these statutes have generally been held constitutional.[82] Thus a forfeiture of the amount won[83] or wagered,[84] or of the property or implements used in gambling,[85] or its value[86] is sometimes prescribed. These statutes being penal are strictly construed,[87] and apply only to gaming transactions within the state.[88]

B. Recovery of Loss.[89] Under some statutes if the loser at gambling does not, without covin or collusion,[90] sue to recover back his loss within the time prescribed by statute, any person may recover treble the amount lost[91] at

77. See People *v.* Stewart, 7 Cal. 140; Rice *v.* State, 3 Kan. 141; State *v.* Tolls, 5 Yerg. (Tenn.) 363; Philpott *v.* State, (Tex. Cr. App. 1901) 62 S. W. 921. And see COURTS, 11 Cyc. 633.

78. See the statutes of the several states. And see CRIMINAL LAW, 12 Cyc. 593.

Gaming punishable as a misdemeanor see State *v.* Shaw, 39 Minn. 153, 39 N. W. 305; State *v.* Sanford, 6 N. J. L. J. 92.

Disqualification to vote or hold public office see Harper *v.* Com., 93 Ky. 290, 19 S. W. 737, 14 Ky. L. Rep. 163; Vowells *v.* Com., 84 Ky. 52, 8 Ky. L. Rep. 74; State *v.* Smith, 2 Yerg. (Tenn.) 272.

Forfeiture of license of keeper of dram-shop or tavern see Ballentine *v.* State, 48 Ark. 45, 2 So. 340; Com. *v.* Price, 8 Leigh (Va.) 757.

Forfeiture of money or thing wagered upon an election see State *v.* Snider, 34 W. Va. 83, 11 S. E. 742; State *v.* Griggs, 34 W. Va. 78, 11 S. E. 740.

79. See the following cases:

Arkansas.— Ballentyne *v.* State, 48 Ark. 45, 2 S. W. 340.

California.— People *v.* Markham, 7 Cal. 208.

Idaho.— *In re* Rowland, 8 Ida. 595, 70 Pac. 610.

Illinois.— Larned *v.* Tiernan, 110 Ill. 173; Hankins *v.* People, 106 Ill. 628.

Kentucky.— Bollinger *v.* Com., 98 Ky. 574, 35 S. W. 553; Faris *v.* Com., 3 B. Mon. 79; Canada *v.* Com., 9 Dana 304; Ervine *v.* Com., 5 Dana 216.

Texas.— Porter *v.* State, 36 Tex. 104.

See 24 Cent. Dig. tit. "Gaming," § 305.

Whether fine excessive see Bollinger *v.* Com., 98 Ky. 574, 35 S. W. 553; State *v.* Miller, 94 N. C. 904.

Imprisonment for non-payment of fine see *Ex p.* Harrison, 63 Cal. 299; Herron *v.* Com., 79 Ky. 38; Faris *v.* Com., 3 B. Mon. (Ky.) 79; Fuller *v.* State, 83 Miss. 30, 35 So. 214. And see FINES, 19 Cyc. 551.

80. See *In re* Rowland, 8 Ida. 595, 70 Pac. 610; Herron *v.* Com., 79 Ky. 38.

81. See Bibb *v.* State, 83 Ala. 84, 3 So. 711; Herron *v.* Com., 79 Ky. 38; State *v.* Carr, 6 Oreg. 133; Ford *v.* State, 23 Tex. App. 520, 5 S. W. 145; Wright *v.* State, 23 Tex. App. 313, 5 S. W. 117; Hunt *v.* State, 22 Tex. App. 396, 3 S. W. 323.

82. See Dardem *v.* State, 44 Fla. 418, 32 So. 924; Larned *v.* Tiernan, 110 Ill. 173; People *v.* Fallon, 152 N. Y. 1, 46 N. E. 302, 37 L. R. A. 419 [*affirming* 4 N. Y. App. Div. 76, 39 N. Y. Suppl. 860]. See CONSTITUTIONAL LAW, 8 Cyc. 870.

83. Larned *v.* Tiernan, 110 Ill. 173; Gardner *v.* Ballard, 114 Ky. 93, 70 S. W. 196, 24 Ky. L. Rep. 880. And see *infra*, III, B.

A loser's demand from the stakeholder of the amount deposited revokes the bet, and the receipt of the money thereafter by the winner cannot be considered as of money won so as to be forfeited. Gardner *v.* Ballard, 114 Ky. 93, 70 S. W. 196, 24 Ky. L. Rep. 880.

84. Doyle *v.* Baltimore County Com'rs, 12 Gill & J. (Md.) 484 (bet on election); Forscht *v.* Green, 53 Pa. St. 138 (forfeiture to directors of the poor of money bet on election).

85. See *infra*, III, E.

86. Van Valkenburgh *v.* Torrey, 7 Cow. (N. Y.) 252, holding, however, that a statute providing for the forfeiture of the value of a horse used in racing on bet does not apply to a horse trotting on bet.

87. Jacob *v.* Clark, 115 Ky. 255, 72 S. W. 1095, 24 Ky. L. Rep. 2120; Forscht *v.* Green, 53 Pa. St. 138. See, generally, STATUTES.

88. Jacob *v.* Clark, 115 Ky. 255, 72 S. W. 1095, 24 Ky. L. Rep. 2120.

89. Recovery by loser see *infra*, IV, B, 1, a, (III), (B), (1), (b).

90. Kizer *v.* Walden, 198 Ill. 274, 65 N. E. 116 [*reversing* 96 Ill. App. 593]; Cole *v.* Applebury, 136 Mass. 525, both of which hold that the "covin and collusion" refers to collusion between the winner and loser by which a collusive suit is brought against the former for the purpose of preventing a suit by a third person for treble the amount of the loss.

91. Kizer *v.* Walden, 198 Ill. 274, 65 N. E. 116; Johnson *v.* McGregor, 157 Ill. 359, 41

* By Henry H. Skyles.

one time or sitting,[92] this statutory right being conferred for the purpose of suppressing and punishing gambling.

C. Defenses. It is a good defense to an action by a third person for treble the amount lost that the winner has in good faith refunded his winnings to the loser,[93] or that the amount won has not been paid;[94] but it is no defense that the loser is to receive some benefit from the action under an agreement between him and plaintiff made after the right of action had accrued to plaintiff,[95] unless there had been covin or collusion between them by which the suit was delayed by the loser, and the suit by the third person is actually in the interest of the loser.[96]

D. Actions — 1. In General. Under some statutes the proper remedy for recovering the penalty prescribed is by an action of debt,[97] or tort,[98] and an indictment will not lie.[99] Under other statutes, however, the proper remedy is a *qui tam* action,[1] or indictment.[2] An action by a third person after the loser's right of action has expired, being penal in its nature, must be brought within the time limited for the bringing of penal actions generally.[3]

2. Pleading and Parties. A *qui tam* action by an informer for the recovery of money or chattels lost by gaming should be brought in the name and for the benefit of the informer and the county, commonwealth, or other party who shares

N. E. 558 [*affirming* 55 Ill. App. 530]; Jacob *v.* Clark, 115 Ky. 255, 72 S. W. 1095, 24 Ky. L. Rep. 2120; Parrit *v.* Crouch, 5 Bush (Ky.) 199; Schooler *v.* Turner, 14 S. W. 360, 12 Ky. L. Rep. 362; Cole *v.* Applebury, 136 Mass. 525.

A loser's wife may sue for treble the amount lost by her husband. Johnson *v.* McGregor, 157 Ill. 350, 41 N. E. 558 [*affirming* 55 Ill. App. 530]; Condon *v.* State, 113 Ind. 73, 14 N. E. 705 (suit by prosecuting attorney for benefit of loser's wife); Read *v.* Stewart, 128 Mass. 407. But see Moore *v.* Settle, 82 Ky. 187, 56 Am. Rep. 889 [*reversing* 4 Ky. L. Rep. 972].

A guardian may sue to recover treble the amount lost by his minor ward upon the latter's failure to sue within the prescribed time. French *v.* Marshall, 136 Mass. 564.

Computation of the penalty of treble the value of any money or valuable thing lost as provided for under some statutes is based upon each "time" or "sitting" mentioned by the statute and not upon the net loss sustained in the whole period of gambling transaction. Johnson *v.* McGregor, 157 Ill. 350, 41 N. E. 558 [*affirming* 55 Ill. App. 530].

A demand is not necessary in order to maintain a suit under such a statute. Johnson *v.* McGregor, 157 Ill. 350, 41 N. E. 558 [*affirming* 55 Ill. App. 530].

The recovery should be distributed in the manner prescribed by the statute. Barnes *v.* Turner, 4 Metc. (Ky.) 114; Conner *v.* Ragland, 15 B. Mon. (Ky.) 634.

Venue.— A suit to recover treble the amount of money lost by gambling must be brought in the county where the gambling was done and the money lost. Staninger *v.* Tabor, 103 Ill. App. 330.

92. Johnson *v.* McGregor, 157 Ill. 350, 41 N. E. 538 [*affirming* 55 Ill. App. 530]. And see cases cited *supra*, note 91.

93. Barnes *v.* Turner, 4 Metc. (Ky.) 114; Schooler *v.* Turner, 14 S. W. 360, 12 Ky. L. Rep. 362.

94. See Jacob *v.* Clark, 115 Ky. 255, 72 S. W. 1095, 24 Ky. L. Rep. 2120; English *v.* Cannon, 17 Ill. App. 475.

95. Morris *v.* Farrington, 133 Mass. 466.

96. Kizer *v.* Walden, 198 Ill. 274, 65 N. E. 116 [*reversing* 96 Ill. App. 593]; Staninger *v.* Tabor, 103 Ill. App. 330; Morris *v.* Farrington, 133 Mass. 466.

Proof of such fact is admissible under the general issue. Staninger *v.* Tabor, 103 Ill. App. 330.

97. *Illinois.*— Larned *v.* Tiernan, 110 Ill. 173.

New York.— People *v.* Fallon, 152 N. Y. 1, 46 N. E. 302, 37 L. R. A. 419 [*affirming* 4 N. Y. App. Div. 76, 39 N. Y. Suppl. 860]; Cole *v.* Smith, 4 Johns. 193.

Pennsylvania.— Com. *v.* Conrad, 25 Pa. Co. Ct. 32.

United States.— U. S. *v.* Ellis, 25 Fed. Cas. No. 15,046, 1 Cranch C. C. 125; U. S. *v.* Gadsby, 25 Fed. Cas. No. 15,180, 1 Cranch C. C. 55.

Canada.— Reg. *v.* Matheson, 4 Ont. 559.

See 24 Cent. Dig. tit. "Gaming," § 114.

98. Read *v.* Stewart, 129 Mass. 407.

99. Com. *v.* Conrad, 25 Pa. Co. Ct. 32; Com. *v.* Richards, 1 Va. Cas. 133; U. S. *v.* Ellis, 25 Fed. Cas. No. 15,046, 1 Cranch C. C. 125; U. S. *v.* Gadsby, 25 Fed. Cas. No. 15,180, 1 Cranch C. C. 55.

1. Graves *v.* Ford, 3 B. Mon. (Ky.) 113; Faris *v.* Kirtley, 5 Dana (Ky.) 460; Hickman *v.* Littlepage, 2 Dana (Ky.) 344; Davidson *v.* Blunt, Litt. Sel. Cas. (Ky.) 128; Prior *v.* Lucas, 1 A. K. Marsh. (Ky.) 305; Beals *v.* Thurlow, 63 Me. 9; Trumbo *v.* Finley, 18 S. C. 305.

2. Pardee *v.* Smith, 27 Mich. 33; State *v.* Carr, 6 Oreg. 133; U. S. *v.* Evans, 25 Fed. Cas. No. 15,065, 4 Cranch C. C. 105, recovery of penalty for violating Md. Acts (1797), c. 110.

3. Estill *v.* Fox, 7 T. B. Mon. (Ky.) 552, 18 Am. Dec. 213; Gilmore *v.* Woodcock, 70 Me. 494; Beals *v.* Thurlow, 63 Me. 9; Cole *v.*

the recovery with him.[4] The declaration should be in debt,[5] and should state clearly and distinctly all facts necessary to show that the case is within the statute.[6] A plea of *actio non* for that defendant was not indebted to plaintiff is improper in a *qui tam* action, since defendant could not have been indebted to plaintiff before the commencement of the action.[7]

3. Evidence. The admissibility[8] and weight and sufficiency[9] of evidence in actions for penalties for gambling are regulated by the general rules of evidence.

4. Verdict and Judgment. A verdict in an action for money lost at gaming showing the amount actually lost and defendant's liability is in the nature of a special finding and authorizes the court to render judgment accordingly.[10] In an action to recover a deposit of money as a wager as forfeited, the jury may award damages according to the value of the money forfeited.[11]

E. Seizure of Gaming Implements[12] — **1. In General.** Under statutes authorizing the seizure and destruction of implements used in gambling,[13] a proper judge or justice[14] may, upon an affidavit or complaint,[15] or upon his own information and belief,[16] issue a warrant for the detection and seizure of gaming implements and property being unlawfully used for gaming,[17] and for the arrest

Groves, 134 Mass. 417. And see, generally, Limitations of Actions.

4. Perrit *v.* Crouch, 5 Bush (Ky.) 199; Davidson *v.* Blunt, Litt. Sel. Cas. (Ky.) 128; Prior *v.* Lucas, 1 A. K. Marsh. (Ky.) 305.

Pleading the general issue and going to trial on the merits is not a waiver of defendant's right to except to a prosecution in plaintiff's name alone. Davidson *v.* Blunt, Litt. Sel. Cas. (Ky.) 128.

5. Cole *v.* Smith, 4 Johns. (N. Y.) 193, holding also that a declaration in assumpsit for money had and received is insufficient.

6. Fitzgerald *v.* Schloss, 62 N. J. L. 472, 41 Atl. 677; Cole *v.* Smith, 4 Johns. (N. Y.) 193; Trumbo *v.* Finley, 18 S. C. 305 (holding that a complaint alleging that the money was won on or about a certain day named does not state a cause of action under a statute prescribing a penalty where it is won at one sitting); Frederick *v.* Lookup, 4 Burr. 2018.

That the transaction occurred within the state must be averred. Jacob *v.* Clark, 115 Ky. 255, 72 S. W. 1095, 24 Ky. L. Rep. 2120.

The amount lost as the net result of continuous gaming at one sitting of mixed losses and gains or continuous losses may be declared for in one count as a single loss. Hogle *v.* Connell, 134 Mass. 150.

7. Estill *v.* Fox, 7 T. B. Mon. (Ky.) 552, 18 Am. Dec. 213.

8. See, generally, Evidence.

9. Faris *v.* Kirtley, 5 Dana (Ky.) 460, judgment of nonsuit held proper where there was no evidence to show in what county the money was taken or lost. See, generally, Evidence.

10. Meyers *v.* Dillon, 39 Oreg. 581, 65 Pac. 867, 66 Pac. 814.

11. Doyle *v.* Baltimone County Com'rs, 12 Gill & J. (Md.) 484.

12. Constitutionality of statutes authorizing searches and seizure of gaming devices as deprivation of property without due process of law see Constitutional Law, 8 Cyc. 1106.

13. See Newman *v.* People, 23 Colo. 300, 42 Pac. 278.

A statute authorizing the arrest, etc., of a person keeping a gaming-house does not, without a specific provision therefor, authorize the seizure and destruction of gaming implements. Ridgeway *v.* West, 60 Ind. 371.

14. Furth *v.* State, (Ark. 1904) 78 S. W. 759 (judges of supreme and circuit courts and justices of the peace); Com. *v.* Watts, 84 Ky. 537, 2 S. W. 123, 8 Ky. L. Rep. 571 (any judge); Hastings *v.* Haug, 85 Mich. 87, 48 N. W. 294 (magistrate).

An appeal does not lie from a judgment of a justice condemning and ordering a certain Klondike machine seized to be destroyed, under Vt. Acts (1898), p. 92, No. 121, § 2. State *v.* Klondike Mach., 76 Vt. 426, 57 Atl. 994.

15. State *v.* Robbins, 124 Ind. 308, 24 N. E. 978, 8 L. R. A. 438; Hastings *v.* Haug, 85 Mich. 87, 48 N. W. 294. See Garland Novelty Co. *v.* State, 71 Ark. 138, 71 S. W. 257; O'Neil *v.* Atty.-Gen., 26 Can. Sup. Ct. 122, upon report of chief constable or deputy chief constable or of one exercising such functions.

Description of premises and property in complaint sufficient to authorize search warrant see Frost *v.* People, 193 Ill. 635, 61 N. E. 1054, 86 Am. St. Rep. 352; Com. *v.* Gaming Implements, 119 Mass. 332; Hastings *v.* Haug, 85 Mich. 87, 48 N. W. 294, holding that it is not necessary that complainant should be able to give an accurate description of the articles.

16. Furth *v.* State, (Ark. 1904) 78 S. W. 759.

The propriety of a warrant issued on the court's own motion does not arise where the officer executing the warrant makes no search and the owner of the gambling device makes no complaint of any search. Garland Novelty Co. *v.* State, 71 Ark. 138, 71 S. W. 257.

17. Furth *v.* State, (Ark. 1904) 78 S. W. 759; Com. *v.* Watts, 84 Ky. 537, 2 S. W. 123, 8 Ky. L. Rep. 571; Com. *v.* Gaming Implements, 119 Mass. 332, holding that under a warrant authorizing the officer to seize "all the furniture, fixtures and personal property found in" a gaming-house he is not limited

of the offender.[18] Such property or implements may also be seized even without a search warrant, where upon the arrest of an offender the officer making the arrest knows or has good reason to believe that it is being used for gambling,[19] or where it is in a room open to the public.[20] Under some statutes if the property or implements are intended to be used in violation of the law and are of such a character that they can be used for no legitimate purpose, they are subject to summary seizure under the police power of the state.[21] But articles or property that may or may not be used for legal purposes cannot be seized until it has first been properly established that the article was procured, held, or used for an illegal purpose;[22] and in order to properly establish that fact there must be a proceeding in a court of criminal jurisdiction and the guilt of the owner of the property or the person who uses it be there established.[23]

2. Disposition of Property Seized. Under most statutes gaming apparatus seized as kept and used for gambling should be retained by the police authorities as evidence against the accused, subject to the order of the court or justice trying him,[24] and upon his conviction in a proper proceeding should be ordered destroyed, if it is such as is of no substantial or practical use or value except in connection with gambling or if the use to which it is customarily devoted is gambling,[25] even

in his right to seize merely the personal property liable to condemnation.

Description in warrant of property to be seized see Frost *v.* People, 193 Ill. 635, 61 N. E. 1054, 86 Am. St. Rep. 352.

The execution of an order to enter a house reported to be a common gaming-house must be within a reasonable time after making the complaint. Reg. *v.* Ah Sing, 2 Brit. Col. 167.

Tables manufactured and used for gambling purposes come clearly within a statute providing for the seizure and destruction of gaming apparatus or instruments made and kept and provided to be used in unlawful gaming, etc. Hastings *v.* Haug, 85 Mich. 87, 48 N. W. 294.

Game-cocks are not implements of gaming within the meaning of such a statute, and cannot be lawfully seized on a warrant commanding the seizure of such implements. Coolidge *v.* Choate, 11 Metc. (Mass.) 79.

18. Com. *v.* Watts, 84 Ky. 537, 2 S. W. 123, 8 Ky. L. Rep. 571.

19. State *v.* Robbins, 124 Ind. 308, 24 N. E. 978, 8 L. R. A. 438.

20. People *v.* Hess, 85 Mich. 128, 48 N. W. 181, holding that police may invade without a warrant a room open to the public and seize material for running a policy shop prohibited by law.

21. Wagner *v.* Upshur, 95 Md. 519, 52 Atl. 509, 93 Am. St. Rep. 412; Baltimore Police Com'rs *v.* Wagner, 93 Md. 182, 48 Atl. 455, 86 Am. St. Rep. 423, 52 L. R. A. 775.

22. Wagner *v.* Upshur, 95 Md. 519, 52 Atl. 509, 93 Am. St. Rep. 412; Baltimore Police Com'rs *v.* Wagner, 93 Md. 182, 48 Atl. 455, 86 Am. St. Rep. 423, 52 L. R. A. 775.

23. Wagner *v.* Upshur, 95 Md. 519, 52 Atl. 509, 93 Am. St. Rep. 412; Baltimore Police Com'rs *v.* Wagner, 93 Md. 182, 48 Atl. 455, 86 Am. St. Rep. 423, 52 L. R. A. 775; Woods *v.* Cottrell, 55 W. Va. 476, 47 S. E. 275, 104 Am. St. Rep. 1004, 65 L. R. A. 616.

24. State *v.* Robbins, 124 Ind. 308, 24 N. E. 978, 8 L. R. A. 438; Wagner *v.* Upshur, 95 Md. 519, 52 Atl. 509, 93 Am. St. Rep. 412; Oppenheimer *v.* Lalor, 36 Misc. (N. Y.) 546, 73 N. Y. Suppl. 948; Willis *v.* Warren, 1 Hilt. (N. Y.) 590, 17 How. Pr. 100.

Property so retained is in custodia legis, and no action can be maintained for its recovery. Willis *v.* Warren, 1 Hilt. (N. Y.) 590, 17 How. Pr. 100.

Replevin will not lie to recover such property. Baltimore Police Com'rs *v.* Wagner, 93 Md. 182, 48 Atl. 455, 86 Am. St. Rep. 423, 52 L. R. A. 775; Oppenheimer *v.* Lalor, 36 Misc. (N. Y.) 546, 73 N. Y. Suppl. 948. See, generally, Replevin.

25. *Kansas.*— Rice *v.* State, 1 Kan. 650, only the property used for gambling should be destroyed.

Kentucky.— Debo *v.* Com., 12 S. W. 266, 11 Ky. L. Rep. 413, summary proceeding.

New York.— Willis *v.* Warren, 1 Hilt. 590, 17 How. Pr. 100; Oppenheimer *v.* Lalor, 36 Misc. 546, 73 N. Y. Suppl. 948.

Pennsylvania.— *In re* Gambler's Paraphernalia, 1 Lack. Leg. N. 17.

Washington.— Way *v.* Territory, 1 Wash. 415, 25 Pac. 461.

West Virginia.— Woods *v.* Cottrell, 55 W. Va. 476, 47 S. E. 275, 104 Am. St. Rep. 1004, 65 L. R. A. 616, only trial court after conviction can order destruction; the justice cannot.

See 24 Cent. Dig. tit. "Gaming," § 118.

An order for the destruction of gaming devices seized must be made at or before the judgment is pronounced. State *v.* Robbins, 124 Ind. 308, 24 N. E. 978, 8 L. R. A. 438.

Reasonable notice and an opportunity to be heard should be given to parties interested before the apparatus and implements should be ordered destroyed. Com. *v.* Gaming Implements, 119 Mass. 332 (publication of notice in public papers not necessary where other sufficient notice is given); Atty-Gen. *v.* Justices Boston Municipal Ct., 103 Mass. 456.

Evidence that rooms in which gaming implements are found were resorted to for unlawful gaming at times previous to the day of the seizure of such implements tends to

though the actual owner of the property did not consent to or know of its unlawful use;[26] or it should be returned to its proper owner if the alleged offender is discharged.[27] Some statutes authorize the court upon proper information to issue a warrant or order for the summary seizure and destruction of such apparatus kept and used for gaming purposes, if it is of such a character that it can be put to no legitimate use and that the law will not recognize it as property entitled to its protection under any circumstances;[28] but if they are not of such character, they cannot be destroyed without affording the owner an opportunity to be heard upon the subject of their lawful use and to show whether or not they are intrinsically useful or valuable for some lawful purpose.[29]

IV. GAMBLING TRANSACTIONS.

A. Nature and Validity* — 1. DEFINITIONS. Gambling according to the common use and understanding of that word is a generic term, and includes within its meaning every act, game, and contrivance by which one intentionally exposes money or other thing of value to the risk or hazard of loss by chance.[30] Gambling and gaming are frequently treated as synonymous,[31] although gaming commonly applies to playing with stakes at cards, dice, or other contrivance to determine which shall be the winner and which the loser.[32] A wager is a contract by which two or more parties agree that a certain sum of money or other thing of value shall be paid or delivered to one of them upon the happening of an uncertain event;[33] it implies that each of the parties shall jeopardize something and have a chance to gain something or to recover the stakes or thing bet or wagered upon the determining of the contingent or uncertain event in his favor,[34] and hence is a form of gambling.

2. VALIDITY IN GENERAL — a. At Common Law. Wagering contracts were not

prove that on that day the implements were kept for use in unlawful gaming and is competent. Com. *v.* Certain Gaming Implements, 141 Mass. 114, 5 N. E. 475.

That the articles are inanimate or harmless in themselves is no ground of objection to their destruction. Hastings *v.* Haug, 85 Mich. 87, 48 N. W. 294.

26. Kite *v.* People, 32 Colo. 5, 74 Pac. 886; State *v.* Soucie's Hotel, 95 Me. 518, 50 Atl. 709; Com. *v.* Gaming Implements, 155 Mass. 165, 29 N. E. 468; Oppenheimer *v.* Lalor, 36 Misc. (N. Y.) 546, 73 N. Y. Suppl. 948.

27. State *v.* Robbins, 124 Ind. 308, 24 N. E. 978, 8 L. R. A. 438; Oppenheimer *v.* Lalor, 36 Misc. (N. Y.) 546, 73 N. Y. Suppl. 948.

28. Furth *v.* State, (Ark. 1904) 78 S. W. 759; Garland Novelty Co. *v.* State, 71 Ark. 138, 71 S. W. 257 (holding also that the court issuing a warrant for the seizure and destruction of such apparatus may institute a trial to determine the character of the machine before ordering its destruction); Frost *v.* People, 193 Ill. 635, 61 N. E. 1054, 86 Am. St. Rep. 352; State *v.* Robbins, 124 Ind. 308, 24 N. E. 978, 8 L. R. A. 438.

A summary process for the destruction of gambling devices without a hearing must show upon its face the existence of all the facts requisite to authorize its issuance. McCoy *v.* Zane, 65 Mo. 11. See Lowry *v.* Rainwater, 70 Mo. 152, 35 Am. Rep. 420, where such a provision was held unconstitutional.

29. State *v.* Robbins, 124 Ind. 308, 24 N. E. 978, 8 L. R. A. 438. And see cases cited *supra*, III, E, *passim*.

30. Bowen *v.* Lynn, (Nebr. 1905) 102 N. W. 460.

31. Evans *v.* Cook, 11 Nev. 69.

32. Hay *v.* Reid, 85 Mich. 296, 48 N. W. 507; Shaw *v.* Clark, 49 Mich. 384, 13 N. W. 786, 43 Am. Rep. 474.

33. Merchants' Sav. L. & T. Co. *v.* Goodrich, 75 Ill. 554.

A bet is a form of wager. See BET, 5 Cyc. 684.

34. Harris *v.* White, 81 N. Y. 532; Jordan *v.* Kent, 44 How. Pr. (N. Y.) 206.

Under the Maine statute it is not necessary that both parties should stand to lose as well as to win; to constitute gambling it is enough that one party stands to win only or to lose only. Lang *v.* Merwin, 99 Me. 486, 59 Atl. 1021, 105 Am. St. Rep. 293.

Playing billiards or pool, the loser to pay for the use of the table, is not gambling. Steuer *v.* Royal Cigar Co., 17 Ohio Cir. Ct. 82, 9 Ohio Cir. Dec. 456.

Consideration.— It has been said that there is no mutuality in a gambling contract; no opportunity for both sides to make gains; no consideration to be paid by one and received by the other. One must gain and the other must lose. Hence there is necessarily a failure of consideration on one side. Rehberg *v.* Tontine Surety Co., 131 Mich. 135, 91 N. W. 132; Harding *v.* Walker, 11 Fed. Cas. No. 6,050*a*, Hempst. 53; Walker *v.* Walker, 5 Mod. 13.

* By Walter H. Michael.

void *per se* at common law. They were in fact enforced by the courts without any objection on the score of their being dependent upon a chance or casualty,[35] and this was true, although the parties had no other interest in the subject of the wager than that which was created by the wager itself.[36] But the courts did refuse to enforce such contracts where they violated any rule of public decency or morality,[37] were offensive to the feelings or injurious to the interests of third persons,[38] or violated any recognized principle of sound public policy or public duty.[39] In some of the states, however, it has been held without the aid of a statute that all contracts in the nature of wagers are illegal and cannot be enforced.[40]

b. By Statute. In modern times in England[41] and many of the states of the

35. *Illinois.*— Beadles *v.* Bless, 27 Ill. 320, 81 Am. Dec. 231.

New Jersey.— Trenton Mut. L., etc., Ins. Co. *v.* Johnson, 24 N. J. L. 576.

New York.— Zeltner *v.* Irwin, 25 N. Y. App. Div. 228, 49 N. Y. Suppl. 337; Bunn *v.* Riker, 4 Johns. 426, 4 Am. Dec. 292.

Pennsylvania.— Morgan *v.* Richards, 1 Browne 171.

Texas.— Smith *v.* Brown, 3 Tex. 360, 49 Am. Dec. 748.

United States.— Harding *v.* Walker, 11 Fed. Cas. No. 6,050*a*, Hempst. 53.

England.— Mortimer *v.* Salkeld, 4 Campb. 42; Dalby *v.* India L. Assur. Co., 15 C. B. 365, 3 C. L. R. 61, 18 Jur. 1024, 24 L. J. C. P. 2, 3 Wkly. Rep. 116, 80 E. C. L. 365; Johnson *v.* Lansley, 12 C. B. 468, 74 E. C. L. 468; Pettamberdass *v.* Thackoorseydass, 15 Jur. 257, 5 Moore Indian App. 109, 18 Eng. Reprint 836, 7 Moore P. C. 239, 13 Eng. Reprint 873; Thackoorseydass *v.* Dhondmull, 12 Jur. 315, 4 Moore Indian App. 339, 18 Eng. Reprint 729, 6 Moore P. C. 300, 13 Eng. Reprint 699; Emery *v.* Richards, 15 L. J. Exch. 49, 14 M. & W. 728; Sherbon *v.* Colebach, 2 Vent. 175.

See 24 Cent. Dig. tit. "Gaming," § 1.

In Louisiana the court has no right *ex officio* to declare a bet excessive on its face without any proof indicating the pecuniary standing of the parties to the bet. Under Civ. Code, art. 2952, the presumption is that a bet is valid until the contrary is shown. St. Ceran *v.* Sherman, 18 La. Ann. 520.

36. Bunn *v.* Riker, 4 Johns. (N. Y.) 426, 4 Am. Dec. 292; Fleming *v.* Foy, 9 Fed. Cas. No. 4,862, 4 Cranch C. C. 423; Thackoorseydass *v.* Dhondmull, 12 Jur. 315, 4 Moore Indian App. 339, 18 Eng. Reprint 729, 6 Moore P. C. 300, 13 Eng. Reprint 699.

37. *Arkansas.*— Jeffrey *v.* Ficklin, 3 Ark. 227, 36 Am. Dec. 456.

Delaware.— Griffith *v.* Pearce, 4 Houst. 209.

New York.— Mount *v.* Waite, 7 Johns. 434; Bunn *v.* Riker, 4 Johns. 426, 4 Am. Dec. 292.

Pennsylvania.— See Morgan *v.* Richards, 1 Browne 171, holding that wagers, unless founded on immoral, indecent, or illegal transactions, are valid.

United States.— Harding *v.* Walker, 11 Fed. Cas. No. 6,050*a*, Hempst. 53.

England.— Allport *v.* Nutt, 1 C. B. 974, 3 D. & L. 233, 9 Jur. 900, 14 L. J. C. P. 272, 50 E. C. L. 974.

See 24 Cent. Dig. tit. "Gaming," § 1.

38. James *v.* Jellison, 94 Ind. 292, 48 Am. Rep. 151; Chalfant *v.* Payton, 91 Ind. 202, 46 Am. Rep. 586 (holding that a mere speculation upon the probability that one of the parties will marry a person named on or before a certain day is against public policy and void); Phillips *v.* Ives, 1 Rawle (Pa.) 36 (holding that since no wager concerning any human being is recoverable in a court of justice, a wager that Napoleon Bonaparte would, within a specified time, be removed or escape from St. Helena is illegal and void); Da Costa *v.* Jones, Cowp. 729.

39. Jeffrey *v.* Ficklin, 3 Ark. 227, 36 Am. Dec. 456; Griffith *v.* Pearce, 4 Houst. (Del.) 209; Bunn *v.* Riker, 4 Johns. (N. Y.) 426, 4 Am. Dec. 292; Tappenden *v.* Randall, 2 B. & P. 467, 5 Rev. Rep. 662; Shirley *v.* Sankey, 2 B. & P. 130; Da Costa *v.* Jones, Cowp. 729; Jones *v.* Randall, Cowp. 37; Hartley *v.* Rice, 10 East 22, 10 Rev. Rep. 228; Evans *v.* Jones, 2 H. & H. 67, 3 Jur. 318, 8 L. J. Exch. 173, 5 M. & W. 77; Atherfold *v.* Beard, 2 T. R. 610, 1 Rev. Rep. 556.

Wagers, although recoverable at common law, if not on subjects contrary to public policy, afford no ground of action when entered into simply to obtain a judicial opinion upon an abstract question of law. Smith *v.* Brown, 3 Tex. 360, 49 Am. Dec. 748.

40. *Colorado.*— Boughner *v.* Meyer, 5 Colo. 71, 40 Am. Rep. 139; Eldred *v.* Malloy, 2 Colo. 320, 20 Am. Rep. 752.

Massachusetts.— Love *v.* Harvey, 114 Mass. 80; Ball *v.* Gilbert, 12 Metc. 397.

New Hampshire.— Winchester *v.* Nutter, 52 N. H. 507, 13 Am. Rep. 93; Hoit *v.* Hodge, 6 N. H. 104, 25 Am. Dec. 451; Perkins *v.* Eaton, 3 N. H. 152.

Oregon.— Bernard *v.* Taylor, 23 Oreg. 416, 31 Pac. 968, 37 Am. St. Rep. 693, 18 L. R. A. 859.

Pennsylvania.— Waugh *v.* Beck, 114 Pa. St. 422, 6 Atl. 923, 60 Am. Rep. 354; Brua's Appeal, 55 Pa. St. 294.

South Carolina.— Rice *v.* Gist, 1 Strobh. 82 [*overruling dictum* in Wootan *v.* Hasket, 1 Nott & M. 180].

Vermont.— Noyes *v.* Spaulding, 27 Vt 420; Collamer *v.* Day, 2 Vt. 144.

United States.— Harding *v.* Walker, 11 Fed. Cas. No. 6,050*a*, Hempst. 53.

See 24 Cent. Dig. tit. "Gaming," § 1.

41. St. 8 & 9 Vict. c. 109, § 18.

American Union[42] gambling transactions have been either expressly or impliedly prohibited by statute, and hence are void.[43]

c. What Law Governs. As a general rule the validity of a purely personal contract depends upon the law of the place where it is made.[44] With stronger reason a contract made and to be performed in one jurisdiction will be enforced by the courts of another in accordance with the law of the former, although it might not be susceptible of enforcement if controlled entirely by the *lex fori*.[45] If the contract is to be partly performed where it is made and partly in other countries or states, the *lex loci contractus* will govern, unless a clear mutual intention is manifested that some other law shall control.[46] If, however, the contract is made in one place and is to be wholly performed in another, then as a general rule the law of the place of performance controls, for upon that law the validity of the consideration depends.[47] So where a broker is ordered by his

Legality.— Although gaming and wagering contracts cannot be enforced in England they are not illegal. Thacker *v.* Hardy, 4 Q. B. D. 685, 48 L. J. Q. B. 289, 39 L. T. Rep. N. S. 595, 27 Wkly. Rep. 158; Fitch *v.* Jones, 5 E. & B. 238, 1 Jur. N. S. 854, 24 L. J. Q. B. 293, 3 Wkly. Rep. 507, 85 E. C. L. 238.

42. See the statutes of the different states.

43. See cases cited *infra*, this note; and see *infra*, IV, A, B.

Express and implied prohibition.— The statute may either expressly prohibit or enjoin an act or it may impliedly prohibit or enjoin it by affixing a penalty to the performance or omission thereof. It makes no difference whether the prohibition be expressed or implied, a penalty implies a prohibition. In either case a contract in violation of its provisions is void. Nash *v.* Monheimer, 20 Ill. 215; Kansas Sav. Bank *v.* National Bank of Commerce, 38 Fed. 800.

A statute removing the penal inhibition against betting on certain occasions does not suspend civil statutes declaring all gambling contracts void. Ludington *v.* Dudley, 9 Misc. (N. Y.) 700, 30 N. Y. Suppl. 221; Tuckett *v.* Herdic, 5 Tex. Civ. App. 690, 24 S. W. 992.

A statute authorizing the licensing of gambling houses only protects the keepers from prosecution and does not confer on them the right to sue for gaming debts. Carrier *v.* Brannan, 3 Cal. 328; Bryant *v.* Mead, 1 Cal. 441; Scott *v.* Courtney, 7 Nev. 419. So the game of tenpins is a licensed game, but it is not licensed for the purpose of gambling, and a note given for money lost by betting on that game cannot be recovered upon. Monroe *v.* Smelly, 25 Tex. 586, 78 Am. Dec. 541.

The granting of a charter for a race-course does not legalize betting on the races. Cain *v.* McHarry, 2 Bush (Ky.) 263.

By N. Y. Laws (1887), c. 479, taxing racing associations on their receipts, and declaring that "such racing and all pool selling in this State shall be confined to the period between the fifteenth day of May and the fifteenth day of October, in each year, and all pool selling shall be confined to the tracks where the races take place, and on the days when the races take place," it was the intention of the legislature to sanction pool selling at the times and places fixed by the statute, and a purchaser of a pool ticket at such a time and place may sue for his share in the pool. Brennan *v.* Brighton Beach Racing Assoc., 56 Hun 188, 191, 9 N. Y. Suppl. 220, 24 Abb. N. Cas. 305.

44. Bartlett *v.* Collins, 109 Wis. 477, 85 N. W. 703, 83 Am. St. Rep. 928. See also Evans *v.* Kittrell, 33 Ala. 449; Stacy *v.* Baker, 2 Ill. 417; Bond *v.* Cummings, 70 Me. 125; Hill *v.* Spear, 50 N. H. 253, 9 Am. Rep. 205.

Money loaned in another country to pay a gambling debt, if not illegal there, may be recovered back. Quarrier *v.* Colston, 6 Jur. 959, 12 L. J. Ch. 57, 1 Phil. 147, 41 Eng. Reprint 587; King *v.* Kemp, 8 L. T. Rep. N. S. 255.

45. *Georgia.*— Champion *v.* Wilson, 64 Ga. 184.

Illinois.— Pope *v.* Hanke, 52 Ill. App. 453; Postal Tel.-Cable Co. *v.* Lathrop, 33 Ill. App. 400.

Indiana.— Sondheim *v.* Gilbert, 117 Ind. 71, 18 N. E. 687, 10 Am. St. Rep. 23, 5 L. R. A, 432.

Kentucky.— Collins *v.* Merrell, 2 Metc. 163; Thomas *v.* Davis, 7 B. Mon. 227.

Missouri.— Gaylord *v.* Duryea, 95 Mo. App. 574, 69 S. W. 607.

New York.— Harris *v.* White, 81 N. Y. 532.

North Carolina.— Williams *v.* Carr, 80 N. C. 294.

Pennsylvania.— Scott *v.* Duffy, 14 Pa. St. 18.

Rhode Island.— Winward *v.* Lincoln, 23 R. I. 476, 51 Atl. 106, 64 L. R. A. 160.

Vermont.— See Flanagan *v.* Packard, 41 Vt. 561, holding that if by the law of the place where a wagering contract is made and executed, the losing party may maintain an action for the money paid, the action is transitory and may be maintained in any forum which obtains jurisdiction of the parties.

United States.— Lehman *v.* Feld, 37 Fed. 852; Ward *v.* Vosburgh, 31 Fed. 12; Melchert *v.* American Union Tel. Co., 11 Fed. 193, 3 McCrary 521.

See 24 Cent. Dig. tit. "Gaming," § 2.

46. Bartlett *v.* Collins, 109 Wis. 477, 85 N. W. 703, 83 Am. St. Rep. 928.

47. Hubbard *v.* Sayre, 105 Ala. 440, 17 So. 17; Bartlett *v.* Collins, 109 Wis. 477, 85 N. W. 703, 83 Am. St. Rep. 928, this rule

principal living in another jurisdiction to buy or sell stocks or produce for future delivery, the validity of the transaction is to be determined by the law of the jurisdiction where the broker makes the purchase or sale.[48] However, a contract, although valid where it is made and is to be enforced, will not be treated as valid by the courts of another jurisdiction whose laws expressly declare such a contract to be void or make it a crime to engage in such a transaction, since the courts of no state will uphold contracts which are deemed to be injurious to the public rights of its people, offensive to their morals, or in contravention of public law.[49]

3. Validity of Particular Transactions — a. Contest For Purse, Prize, or Premium. A purse, prize, or premium is ordinarily some valuable thing offered for a contest into the strife for which the person offering it does not enter, and the contest therefore does not become a wager.[50] The mere fact that the contestants are required to pay an entrance fee does not make the contest a wager, where the entrance fee does not specifically make up the purse or premium contested for;[51] but where each party contributes money or some valuable thing

being founded on the idea that in making a personal contract to be fully performed in another place the parties must have had the law of that place in contemplation.

Contracts with reference to foreign markets.—The fact that wagering contracts, such as dealings in futures, are made with reference to markets in foreign cities, and beyond the control of the parties to such wagers, does not affect the validity or invalidity of such contracts. Dunn *v.* Bell, 85 Tenn. 581, 4 S. W. 41.

48. Peet *v.* Hatcher, 112 Ala. 514, 21 So. 711, 57 Am. St. Rep. 45; Hawley *v.* Bibb, 69 Ala. 52; Bartlett *v.* Collins, 109 Wis. 477, 85 N. W. 703, 83 Am. St. Rep. 928; Lehman *v.* Feld, 37 Fed. 852; Ward *v.* Vosburg, 31 Fed. 12.

49. *Illinois.*— Thomas *v.* Belleville First Nat. Bank, 213 Ill. 261, 72 N. E. 801; Pope *v.* Hanke, 52 Ill. App. 453 [*affirmed* in 155 Ill. 617, 40 N. E. 839, 28 L. R. A. 568].

Maryland.—Spies *v.* Rosenstock, 87 Md. 14, 39 Atl. 268.

Mississippi.— White *v.* Eason, (1894) 15 So. 66; Lemonius *v.* Mayer, 71 Miss. 514, 14 So. 33.

New Jersey.— Minzesheimer *v.* Doolittle, 60 N. J. Eq. 394, 45 Atl. 611 (holding that a New Jersey court of equity will not aid judgment creditors to enforce a judgment for debts growing out of wagering contracts, although the contracts were made in another state, where they were legal, and although defendants in the bill were non-residents of New Jersey, and have not in their answer set up the character of the contracts as a defense); Flagg *v.* Baldwin, 38 N. J. Eq. 219, 48 Am. Rep. 308 (contract made in New York for speculation in stocks on margins).

North Carolina.— Gooch *v.* Faucett, 122 N. C. 270, 29 S. E. 362, 39 L. R. A. 835, holding that comity between states as to the recognition of the laws of one by another is the voluntary act of the state offering it, but it is not admissible when contrary to its policy or prejudicial to its interests.

Rhode Island.— Winward *v.* Lincoln, 23 R. I. 476, 51 Atl. 106, 64 L. R. A. 160.

South Carolina.— Harvey *v.* Doty, 54 S. C. 382, 32 S. E. 501; Gist *v.* Western Union Tel. Co., 45 S. C. 344, 23 So. 143, 55 Am. St. Rep. 763.

Wisconsin.— Bartlett *v.* Collins, 109 Wis. 477, 85 N. W. 703, 83 Am. St. Rep. 928.

United States.— Kansas Sav. Bank *v.* National Bank of Commerce, 38 Fed. 800.

See 24 Cent. Dig. tit. "Gaming," § 2.

Evasion of law of forum.— Where two resident citizens of Vermont went into Canada for the purpose of making a wager in reference to the result of a presidential election in the United States, it was held that the contract must be treated as illegal by the courts of the state the same as it would have been if made within the state. Tarleton *v.* Baker, 18 Vt. 9, 44 Am. Dec. 358.

50. *Indiana.*— Alvord *v.* Smith, 63 Ind. 58.

Kentucky.— Applegate *v.* Berry, 8 Ky. L. Rep. 432. So the business of breeding, training, and racing horses for purses is legal. Central Trust, etc., Co. *v.* Respass, 112 Ky. 606, 66 S. W. 421, 23 Ky. L. Rep. 1905, 99 Am. St. Rep. 317, 56 L. R. A. 479.

Maine.— Dion *v.* St. John Baptiste Soc., 82 Me. 319, 19 Atl. 825.

Massachusetts.— Wilkinson *v.* Stitt, 175 Mass. 581, 56 N. E. 830.

Montana.— Morrison *v.* Bennett, 20 Mont. 560, 52 Pac. 553, 40 L. R. A. 158.

New York.— People *v.* Fallon, 152 N. Y. 12, 46 N. E. 296, 57 Am. St. Rep. 492, 37 L. R. A. 227; Harris *v.* White, 81 N. Y. 532.

North Carolina.—State *v.* De Boy, 117 N. C. 702, 23 S. E. 167.

Oregon.— Misner *v.* Knapp, 13 Oreg. 135, 9 Pac. 65, 57 Am. Rep. 6.

Vermont.— Ballard *v.* Brown, 67 Vt. 586, 32 Atl. 485.

Wisconsin.— Moshier *v.* La Crosse County Agricultural Soc., 90 Wis. 37, 62 N. W. 932; Porter *v.* Day, 71 Wis. 296, 37 N. W. 259.

England.— Applegarth *v.* Colley, 7 Jur. 18, 12 L. J. Exch. 34, 10 M. & W. 723.

See 24 Cent. Dig. tit. "Gaming," § 16.

51. Wilson *v.* Conlin, 3 Ill. App. 517; People *v.* Fallon, 152 N. Y. 12, 46 N. E. 296, 57 Am. St. Rep. 492, 37 L. R. A. 227; Harris *v.* White, 81 N. Y. 532.

termed the stake, getting a chance to gain a portion of that put in by the others and taking a chance to lose that contributed by himself, the transaction is a wager.[52]

b. Deposit of Forfeits. The deposit of forfeits to insure the performance of a valid contract by the parties is not a wager but a valid agreement providing for stipulated damages.[53]

c. Election Bets. In both England and America betting on elections in which the parties are entitled to participate has been considered against public policy.[54]

But where the entrance fees go to help make up the stake, the validity of the transaction is to say the least doubtful. West *v.* Carter, 129 Ill. 249, 21 N. E. 782; Bronson Agricultural, etc., Assoc. *v.* Ramsdell, 24 Mich. 441; Comly *v.* Hillegass, 94 Pa. St. 132, 39 Am. Rep. 774.

52. Harris *v.* White, 81 N. Y. 532; Stoddard *v.* McAuliffe, 81 Hun 524, 31 N. Y. Suppl. 38; Dudley *v.* Flushing Jockey Club, 14 Misc. 58, 35 N. Y. Suppl. 245; Gibbons *v.* Gouverneur, 1 Den. (N. Y.) 170, holding that a contract by several who agree among themselves that each shall provide a horse and run a race called a "sweep-stakes," each unsuccessful competitor to pay a sum of money, and any party to the agreement who does not finally compete to pay a less sum, the whole to belong to the winner, is void in all its parts, and an action by the winner for the forfeit against the party who declines to compete cannot be sustained.

Under the English statute this depends upon whether or not the participants are engaged in an unlawful game. Games held to be lawful see Batty *v.* Marriott, 5 C. B. 818, 12 Jur. 462, 17 L. J. C. P. 215, 57 E. C. L. 818 (foot-race); Challand *v.* Bray, 1 Dowl. P. C. N. S. 783, 6 Jur. 626, 11 L. J. Q. B. 204 (horse-race); Evans *v.* Pratt, 1 Dowl. P. C. N. S. 505, 6 Jur. N. S. 652, 11 L. J. C. P. 87, 3 M. & G. 759, 4 Scott N. R. 378, 42 E. C. L. 396 (steeple-chase). Games held to be unlawful see Jenks *v.* Turpin, 13 Q. B. D. 505, 15 Cox C. C. 486, 49 J. P. 20, 53 L. J. M. C. 161, 50 L. T. Rep. N. S. 808 (baccarat); Martin *v.* Hewson, 10 Exch. 737, 1 Jur. N. S. 214, 24 L. J. Exch. 174 (cock-fighting); Fairtlough *v.* Whitmore, 64 L. J. Ch. 386, 72 L. T. Rep. N. S. 354, 13 Reports 402, 43 Wkly. Rep. 421 (chemin de fer). This proviso of the statute, however, includes only subscriptions or contributions or agreements to subscribe or contribute for or toward any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise. The enacting part of the statute applies to all gaming or wagering, whether on lawful or unlawful games. Trimble *v.* Hill, 5 App. Cas. 342, 49 L. J. P. C. 49, 42 L. T. Rep. N. S. 103, 28 Wkly. Rep. 479; Hampden *v.* Walsh, 1 Q. B. D. 189, 45 L. J. Q. B. 238, 33 L. T. Rep. N. S. 852, 24 Wkly. Rep. 607; Higginson *v.* Simpson, 2 C. P. D. 76, 46 L. J. C. P. 192, 36 L. T. Rep. N. S. 17, 25 Wkly. Rep. 303; Batson *v.* Newman, 1 C. P. D. 573, 25 Wkly. Rep. 85; Diggle *v.* Higgs, 2 Ex. D. 422, 46 L. J. Exch. 721, 37 L. T. Rep. N. S. 27, 25 Wkly. Rep. 777; Parsons *v.* Alexander, 5 E. & B. 263, 1 Jur. N. S. 660, 24 L. J. Q. B. 277, 3 Wkly. Rep. 510, 85 E. C. L. 263; Wilson *v.* Cole, 36 L. T. Rep. N. S. 703. St. 9 Anne, c. 14, § 5, which has been repealed, applied to all games, whether of skill or of chance; it was the playing for money which made them unlawful. Gatty *v.* Field, 9 Q. B. 431, 10 Jur. 980, 15 L. J. Q. B. 408, 58 E. C. L. 431; Brogden *v.* Marriott, 3 Bing. N. Cas. 88, 2 Hodges 136, 5 L. J. C. P. 302, 2 Scott 712, 32 E. C. L. 49; Whaley *v.* Pajot, 2 B. & P. 51; Ximenes *v.* Jaques, 1 Esp. 311, 6 T. R. 499; Daintree *v.* Hutchinson, 6 Jur. 736, 11 L. J. Exch. 397, 10 M. & W. 85; Sigel *v.* Jebb, 3 Stark. 1 and note, 3 E. C. L. 569; Parker *v.* Alcock, 1 Younge 361.

53. Thornhill *v.* O'Rear, 108 Ala. 299, 19 So. 382, 31 L. R. A. 792; Parsons *v.* Taylor, 12 Hun (N. Y.) 252; Wheeler *v.* Friend, 22 Tex. 683; Pierce *v.* Randolph, 12 Tex. 290; Crump *v.* Secrest, 9 Tex. 260; Kirkland *v.* Random, 8 Tex. 10, 58 Am. Dec. 94. *Compare* Brown *v.* Watson, 6 B. Mon. (Ky.) 588; Bailes *v.* Williams, 15 Tex. 318.

54. *Alabama.*— Givens *v.* Rogers, 11 Ala. 543; Foreman *v.* Hardwick, 10 Ala. 316.

Arkansas.— Jeffrey *v.* Ficklin, 3 Ark. 227, 36 Am. Dec. 456.

California.— Hill *v.* Kidd, 43 Cal. 615; Johnston *v.* Russell, 37 Cal. 670.

Connecticut.—Wheeler *v.* Spencer, 15 Conn. 28.

Delaware.— Porter *v.* Sawyer, 1 Harr. 517.

Georgia.— McLennan *v.* Whiddon, 120 Ga. 666, 48 S. E. 201.

Illinois.— Petillon *v.* Hipple, 90 Ill. 420, 32 Am. Rep. 31; Gregory *v.* King, 58 Ill. 169, 11 Am. Rep. 56; Guyman *v.* Burlingame, 36 Ill. 201; McClurken *v.* Detrich, 33 Ill. 349; Stevens *v.* Sharp, 26 Ill. 404; Gordon *v.* Casey, 23 Ill. 70; Lockhart *v.* Hullinger, 2 Ill. App. 465. However, the act of 1839 to prohibit betting on elections applies only to elections in this state. Therefore a wager upon the vote of Kentucky for president is recoverable. Morgan *v.* Pettit, 4 Ill. 529. And a wager on the result of a presidential election in another state, made after the vote has been cast, is not against public policy. Smith *v.* Smith, 21 Ill. 244, 74 Am. Dec. 100.

Indiana.— Davis *v.* Leonard, 69 Ind. 213; Nudd *v.* Burnett, 14 Ind. 25; Worthington *v.* Black, 13 Ind. 344; Hizer *v.* State, 12 Ind. 330.

Iowa.— Craig *v.* Andrews, 7 Iowa 17; Sipe *v.* Finarty, 6 Iowa 394; David *v.* Ransom, 1 Greene 383.

Kentucky.—Todd *v.* Caplinger, 4 Bush 139;

d. Horse-Racing Bets. A wager upon a horse-race is a gaming contract within the intent of a statute declaring all gaming contracts void.[55] But a wager on a horse-race is not illegal unless forbidden by statute; it does not belong to any of the classes of wagers inhibited by the common law.[56]

e. Speculative Transactions — (i) *Dealings in Futures in General.* In the absence of some constitutional or statutory provision to the contrary,[57] a con-

Com. *v.* Shouse, 16 B. Mon. 325, 63 Am. Dec. 551; Conner *v.* Ragland, 15 B. Mon. 634; Bevil *v.* Hix, 12 B. Mon. 140.

Maryland.— Wroth *v.* Johnson, 4 Harr. & M. 284.

Massachusetts.— Ball *v.* Gilbert, 12 Metc. 397.

Minnesota.— Bates *v.* Clifford, 22 Minn. 52; Cooper *v.* Brewster, 1 Minn. 94.

Mississippi.— Terrall *v.* Adams, 23 Miss. 570.

Missouri.— Sisk *v.* Evans, 8 Mo. 52; Hickerson *v.* Benson, 8 Mo. 8, 40 Am. Dec. 115; Woolfolk *v.* Duncan, 80 Mo. App. 421.

New Hampshire.—Winchester *v.* Nutter, 52 N. H. 507, 13 Am. Rep. 93; Clark *v.* Gibson, 12 N. H. 386.

New York.— Like *v.* Thompson, 9 Barb. 315; Brush *v.* Keeler, 5 Wend. 250; Rust *v.* Gott, 9 Cow. 169, 18 Am. Dec. 497; Bunn *v.* Riker, 4 Johns. 426, 4 Am. Dec. 292.

North Carolina.— Bettis *v.* Reynolds, 34 N. C. 344, 55 Am. Dec. 417, holding that a bond given for money lost upon a wager on the result of a public election is void, although neither of the parties was a voter.

Ohio.— Cooper *v.* Rowley, 29 Ohio St. 547.

Pennsylvania.— Columbia Bank, etc., Co. *v.* Haldeman, 7 Watts & S. 233, 42 Am. Dec. 229; Wagonseller *v.* Snyder, 7 Watts 343; Lloyd *v.* Leisenring, 7 Watts 294; Smyth *v.* McMasters, 2 Browne 182.

Rhode Island.— Stoddard *v.* Martin, 1 R. I. 1, 19 Am. Dec. 643.

South Carolina.— Laval *v.* Myers, 1 Bailey 486.

Tennessee.— Russell *v.* Pyland, 2 Humphr. 131, 36 Am. Dec. 307; Somers *v.* State, 5 Sneed 438.

Texas.— Thompson *v.* Harrison, Dall. 466; Donnelly *v.* Citizens' Bank, 3 Tex. App. Civ. Cas. § 169.

Vermont.— Danforth *v.* Evans, 16 Vt. 538.

Wisconsin.— Murdock *v.* Kilbourn, 6 Wis. 468.

United States.— Denney *v.* Elkins, 7 Fed. Cas. No. 3,790, 4 Cranch C. C. 161.

England.— Allen *v.* Hearn, 1 T. R. 56, 1 Rev. Rep. 149.

See 24 Cent. Dig. tit. "Gaming," § 13. And see *infra*, IV, A, 3, f, g, (I).

55. *Arkansas.*— McLain *v.* Huffman, 30 Ark. 428.

California.— Gridley *v.* Dorn, 57 Cal. 78, 40 Am. Rep. 110.

Colorado.— Corson *v.* Neatheny, 9 Colo. 212, 11 Pac. 82.

Georgia.— Dyer *v.* Benson, 69 Ga. 609.

Illinois.— Garrison *v.* McGregor, 51 Ill. 473; Tatman *v.* Strader, 23 Ill. 493.

Minnesota.— Wilkinson *v.* Tousley, 16 Minn. 209, 10 Am. Rep. 139.

Missouri.— St. Louis Fair Assoc. *v.* Carmody, 151 Mo. 566, 52 S. W. 365, 74 Am. St. Rep. 571; Boynton *v.* Curle, 4 Mo. 599; Shropshire *v.* Glascock, 4 Mo. 536, 31 Am. Dec. 189.

New Hampshire.— Barker *v.* Mosher, 60 N. H. 73.

New Jersey.— Huncke *v.* Francis, 27 N. J. L. 55. However, a promise, on sufficient consideration, to pay the owner of the foal of the promisee's mare by the promisor's stallion a certain sum of money if such foal is the first of the get of such stallion that trots a mile in a certain time is not prohibited by the statute against the offering of purses for running, pacing, or trotting. Whitehead *v.* Burgess, 61 N. J. L. 75, 38 Atl. 802.

New York.— Haley *v.* Cridge, 1 N. Y. City Ct. 433.

North Carolina.— Sharp *v.* Murphey, 1 N. C. 568.

England.— Coombes *v.* Dibble, L. R. 1 Exch. 248, 4 H. & C. 375, 12 Jur. N. S. 456, 35 L. J. Ch. 167, 14 L. T. Rep. N. S. 415, 14 Wkly. Rep. 676; Daintree *v.* Hutchinson, 6 Jur. 736, 11 L. J. Exch. 397, 10 M. & W. 85. See also Bentinck *v.* Connop, 5 Q. B. 693, Dav. & M. 538, 8 Jur. 336, 13 L. J. Q. B. 125, 48 E. C. L. 693.

See 24 Cent. Dig. tit. "Gaming," § 14.

56. Barret *v.* Hampton, 2 Brev. (S. C.) 226; Walker *v.* Armstrong, 54 Tex. 609; Armstrong *v.* Parahman, 42 Tex. 185; McElroy *v.* Carmichael, 6 Tex. 454; Dunman *v.* Strother, 1 Tex. 89, 46 Am. Dec. 97.

A wager on a horse-race out of the jurisdiction of the state is not illegal. Ross *v.* Green, 4 Harr. (Del.) 308.

A contract to run a horse-race is not prohibited by law. Grayson *v.* Whatley, 15 La. Ann. 525.

57. See the statutes of the different states.

In California, Const. art. 4, § 26, provides that all contracts for the sale of corporate shares for future delivery shall be void. See Sheehy *v.* Shinn, 103 Cal. 325, 37 Pac. 393.

In Illinois the statute makes void all contracts for the future sale of grain or railroad stock, whether such contracts are to be settled by paying differences or not. Schneider *v.* Turner, 130 Ill. 28, 22 N. E. 497, 6 L. R. A. 164 [*affirming* 27 Ill. App. 220].

In Massachusetts, Rev. Laws (1902), c. 74, § 7, provides that every contract for the sale of corporate shares shall be void, unless the party contracting to sell the same is at the time of making the contract the owner or assignee thereof or is authorized by the owner or assignee or his agent to sell the same. See, generally, Meehan *v.* Sharp, 151 Mass.

tract for the sale of stocks or other commodity to be delivered at a future day is valid, even though the seller has not the goods and has no other means of getting them than to go into the market and buy them before the day of delivery, provided that the parties really intend that the goods are to be delivered by the seller and that the price is to be paid by the buyer.[58] And where stocks or commodities

564, 24 N. E. 907; Duchemin *v.* Kendall, 149 Mass. 171, 21 N. E. 242, 3 L. R. A. 784; Brown *v.* Phelps, 103 Mass. 313; Barrett *v.* Mead, 10 Allen 337. An agreement to share equally in the profits and losses resulting from the purchase and sale of stock already owned by one of the parties, he having bought it through a broker on margin, is not within the statute. Bullard *v.* Smith, 139 Mass. 492, 2 N. E. 86. So an agreement to purchase stocks for another person, sell them again within a certain time, share the profits, and individually bear any losses is not invalid. Barrett *v.* Hyde, 7 Gray 160. The statute does not require the delivery of the same shares owned by the seller, as the contract can be performed by the delivery of any other shares of the same stock; and a contract entitling the holder of certain notes to exchange them for stock at a certain date, and at no other time, which stock was held by the company contracting, does not vest the title of the stock in said party prior to the exercise of the option. Pratt *v.* American Bell Tel. Co., 141 Mass. 225, 5 N. E. 307, 55 Am. Rep. 465. The statute deprives the contracts mentioned of the protection of the law, but it does not punish the parties thereto or forbid the performance thereof. Jones *v.* Ames, 135 Mass. 431.

In New York, under a statute providing that all contracts for the sale of any corporate share should be absolutely void, unless the party contracting to sell should at the time of making the contract be in actual possession of the certificate or other evidence of such share, or be otherwise entitled in his own right or be duly authorized by some person so entitled to sell it, it was held that an agreement to transfer stock at a future date, the vendee advancing money on it, having no intention to take a transfer but merely to speculate upon the rise and fall of stocks in market, is not void as against public policy; and that a contract to sell stock for future delivery is not void because, before the time for transfer, the seller sells a part of the stock. Frost *v.* Clarkson, 7 Cow. 24. A contract for the sale of stock by one who has previously pledged it, the pawnee holding the certificate but the pawnor being authorized by the pawnee to sell whenever he has an opportunity, is not within this statute (Thompson *v.* Alger, 12 Metc. (Mass.) 428); but a contract for the sale of stocks to be transferred at a future day is absolutely void if the party contracting for such sale, although in possession of the certificate at the time of the contract, is then already under obligation for the sale of an equal or greater number of shares of the same stock (Stebbins *v.* Leowolf, 3 Cush. (Mass.) 137). See, generally, Staples *v.* Gould, 9 N. Y. 520 [*affirming* 5 Sandf. 411]; Ward *v.* Van Duzer, 2 Hall (N. Y.) 162; Vaupell *v.* Woodward, 2 Sandf. Ch. (N. Y.) 143.

In South Carolina, Rev. St. (1893) §§ 1859, 1860, provides that contracts for the sale of cotton for future delivery are void unless it is affirmatively shown that at the time of the contract the seller was the owner or assignee of the cotton, or the authorized agent of the owner or assignee, or that at the time of the contract it was the *bona fide* intention of both parties that the cotton should be actually delivered and received. See Riordan *v.* Doty, 50 S. C. 537, 27 S. E. 939.

58. *Alabama.*— Hubbard *v.* Sayre, 105 Ala. 440, 17 So. 17; Hawley *v.* Bibb, 69 Ala. 52.

Arkansas.— Johnston *v.* Miller, 67 Ark. 172, 53 S. W. 1052.

Georgia.— Forsyth Mfg. Co. *v.* Castlen, 112 Ga. 199, 37 S. E. 485; Phillips *v.* Ocmulgee Mills, 55 Ga. 633; Swift *v.* Powell, 44 Ga. 123.

Illinois.— Cole *v.* Milmine, 88 Ill. 349; Logan *v.* Musick, 81 Ill. 415; Wolcott *v.* Heath, 78 Ill. 433; Sanborn *v.* Benedict, 78 Ill. 309; Barnett *v.* Baxter, 64 Ill. App. 544; Warren *v.* Scanlan, 59 Ill. App. 138; Fox *v.* Steever, 55 Ill. App. 255; Miles *v.* Andrews, 40 Ill. App. 155; King *v.* Luckey, 21 Ill. App. 132; Webster *v.* Sturges, 7 Ill. App. 560.

Indiana.— Sondheim *v.* Gilbert, 117 Ind. 71, 18 N. E. 687, 10 Am. St. Rep. 23, 5 L. R. A. 432; Shipp *v.* Bowen, 25 Ind. 44; Fisher *v.* Fisher, 8 Ind. App. 665, 36 N. E. 296.

Iowa.— Douglas *v.* Smith, 74 Iowa 468, 38 N. W. 163; Gregory *v.* Wattowa, 58 Iowa 711, 12 N. W. 726.

Louisiana.— Conner *v.* Robertson, 37 La. Ann. 814, 55 Am. Rep. 521.

Maine.— Rumsey *v.* Berry, 65 Me. 170.

Maryland.— Appleman *v.* Fisher, 34 Md. 540.

Massachusetts.— Farnum *v.* Whitman, 187 Mass. 391, 73 N. E. 473.

Michigan.— Gregory *v.* Wendell, 39 Mich. 337, 33 Am. Rep. 390, 40 Mich. 432.

Minnesota.— Mohr *v.* Miesen, 47 Minn. 228, 49 N. W. 862.

Missouri.— Lane *v.* Logan Grain Co., 105 Mo. App. 215, 79 S. W. 722; Deierling *v.* Sloop, 67 Mo. App. 446; Jones *v.* Shale, 34 Mo. App. 302.

Nebraska.— Rogers *v.* Marriott, 59 Nebr. 759, 82 N. W. 21; Morrissey *v.* Broomal, 37 Nebr. 766, 56 N. W. 383.

New York.— Fletcher *v.* Jacob Dold Packing Co., 169 N. Y. 571, 61 N. E. 1129; Kingsbury *v.* Kirwin, 43 N. Y. Super. Ct. 451 [*affirmed* in 77 N. Y. 612]; Tyler *v.* Barrows, 6 Rob. 104; McIlvaine *v.* Egerton, 2 Rob. 422; Cassard *v.* Hinman, 1 Bosw. 207; Stanton *v.* Small, 3 Sandf. 230.

are bought and sold, although upon speculation and on margin, it is not a gambling transaction if it is understood by the parties that they are to be delivered and paid for.[59] If, however, under the guise of a contract of sale the real intent

Ohio.— Kahn *v.* Walton, 46 Ohio St. 195, 20 N. E. 203; Bradley *v.* Western Union Tel. Co., 8 Ohio Dec. (Reprint) 707, 9 Cinc. L. Bul. 223.

Pennsylvania.— Scofield *v.* Blackmarr, 2 Pa. Cas. 544, 4 Atl. 208; Bonsall *v.* Kirkpatrick, 22 Pittsb. Leg. J. 69.

United States.— Clewes *v.* Jamieson, 182 U. S. 461, 21 S. Ct. 845, 45 L. ed. 1183; Bibb *v.* Allen, 149 U. S. 481, 13 S. Ct. 950, 37 L. ed. 819; Pearce *v.* Rice, 142 U. S. 28, 12 S. Ct. 130, 35 L. ed. 925; Embrey *v.* Jemison, 131 U. S. 336, 9 S. Ct. 776, 33 L. ed. 172; Irwin *v.* Williar, 110 U. S. 499, 4 S. Ct. 160, 28 L. ed. 225; Chicago Bd. of Trade *v.* Kinsey, 130 Fed. 507, 64 C. C. A. 650 [*reversing* 125 Fed. 72]; Ponder *v.* Jerome Hill Cotton Co., 100 Fed. 373, 40 C. C. A. 416; Hill *v.* Levy, 98 Fed. 94; Sampson *v.* Camperdown Cotton Mills, 82 Fed. 833; Kirkpatrick *v.* Adams, 20 Fed. 287; Bartlett *v.* Smith, 13 Fed. 263, 4 McCrary 388.

England.— Mortimer *v.* McCalln, 4 Jur. 172, 9 L. J. Exch. 73, 6 M. & W. 58; Hibblewhite *v.* McMorine, 8 L. J. Exch. 271, 5 M. & W. 462 [*overruling* by implication Bryan *v.* Lewis, R. & M. 386, 21 E. C. L. 775].

See 24 Cent. Dig. tit. "Gaming," § 22.

Intent of purchaser to resell.— A contract for the sale of goods to be delivered at a future day is not invalidated by the circumstance that, at the time of making the contract, the purchaser intends to resell before the time appointed for the delivery. Sawyer *v.* Taggart, 14 Bush (Ky.) 727.

If present delivery is contemplated sales and purchases of stock, following each other rapidly, are not prohibited dealings in futures. Western Union Tel. Co. *v.* Littlejohn, 72 Miss. 1025, 18 So. 418.

59. *Connecticut.*—Ling *v.* Malcom, 77 Conn. 517, 59 Atl. 698.

Florida.— Hocker *v.* Western Union Tel. Co., (1903) 34 So. 901.

Illinois.— Taylor *v.* Bailey, 169 Ill. 181, 48 N. E. 200.

Louisiana.— See Wheeless *v.* Fisk, 28 La. Ann. 731, holding that the fact that a buyer of gold advanced only a part of the price to one whom he ordered to buy the gold does not render the contract to pay for the advances made for the gold and for commissions void as being immoral.

Maryland.— Ridgley *v.* Riggs, 4 Harr. & J. 358.

Massachusetts.— Post *v.* Leland, 184 Mass. 601, 69 N. E. 361; Rice *v.* Winslow, 180 Mass. 500, 62 N. E. 1057, holding that the fact that the principal did not intend to pay for the securities or take possession of them does not invalidate the transaction, where he understood that the securities were to be actually bought and sold by the broker.

Michigan.— Carland *v.* Western Union Tel. Co., 118 Mich. 369, 76 N. W. 762, 74 Am. St. Rep. 394, 43 L. R. A. 280; Shaw *v.* Clark, 49 Mich. 384, 13 N. W. 786, 43 Am. Rep. 474.

New Jersey.— Thompson *v.* Williamson, (Ch. 1904) 58 Atl. 602; Pratt *v.* Boody, 55 N. J. Eq. 175, 35 Atl. 1113.

Ohio.— Goodhart *v.* Rostert, 10 Ohio S. & C. Pl. Dec. 40, 7 Ohio N. P. 534.

Pennsylvania.— MacDonald *v.* Gessler, 208 Pa. St. 177, 57 Atl. 361; *In re* Taylor, 192 Pa. St. 309, 43 Atl. 975 (holding that if the customer intends to buy and not merely to settle on differences, dealing in stock on margins is not gambling; and this regardless of the number of the transactions and the length of time the customer holds his purchases); Wagner *v.* Hildebrand, 187 Pa. St. 136, 41 Atl. 34; Hopkins *v.* O'Kane, 169 Pa. St. 478, 32 Atl. 421 (holding that real purchases and sales of stocks on margin are not gambling transactions, although they are done wholly or in part on credit); Peters *v.* Grim, 149 Pa. St. 163, 24 Atl. 192, 34 Am. St. Rep. 599; Stewart *v.* Parnell, 147 Pa. St. 523, 23 Atl. 838; Smith *v.* Bouvier, 70 Pa. St. 325; Gilchreest *v.* Pollock, 2 Yeates 18; Hirst *v.* Maag, 13 Pa. Super. Ct. 4.

Rhode Island.— Winward *v.* Lincoln, 23 R. I. 476, 51 Atl. 106, 64 L. R. A. 160; Thompson *v.* Ide, 6 R. I. 217.

Texas.— Drouilhet *v.* Pinckard, (Civ. App. 1897) 42 S. W. 135.

Vermont.— Noyes *v.* Spaulding, 27 Vt. 420.

Wisconsin.— See Wall *v.* Schneider, 59 Wis. 352, 18 N. W. 443, 48 Am. Rep. 520, holding that a contract for the future delivery of grain is not invalidated by the fact that it authorizes the seller to require the purchaser to put up margins as security.

United States.— Sampson *v.* Camperdown Cotton Mills, 82 Fed. 833.

See 24 Cent. Dig. tit. "Gaming," § 23.

In California, Const. art. 4, § 26, invalidates all contracts for the sale of corporate shares on margins. This provision is not in conflict with the fourteenth amendment of the federal constitution. Otis *v.* Parker, 187 U. S. 606, 23 S. Ct. 168, 47 L. ed. 323 [*affirming* 130 Cal. 322, 62 Pac. 571, 927, 92 Am. St. Rep. 56].

If the stocks are actually bought and sold, a contract to deal in stocks on margin is not illegal. Hatch *v.* Douglas, 48 Conn. 116, 40 Am. Rep. 154; Pratt *v.* Boody, 55 N. J. Eq. 175, 35 Atl. 1113; Maxton *v.* Gheen, 75 Pa. St. 166. So there is no gambling where the broker buys what he is ordered to buy and sells what he is told to sell, although there is no delivery to his principal, the stocks and bonds being kept by the broker and delivered on a resale to the person then buying (Eggleston *v.* Rumble, 20 N. Y. Suppl. 819; Young *v.* Glendinning, 194 Pa. St. 550, 45 Atl. 364; Winward *v.* Lincoln, 23 R. I. 476, 51 Atl. 106, 64 L. R. A. 160. See also Kendall *v.* Fries, 71 N. J. L. 401, 58 Atl. 1090), or where the broker keeps command of suffi-

of both parties is merely to speculate in the rise or fall of prices, and the property is not to be delivered, but at the time fixed for delivery one party is to pay to the other the difference between the contract price and the market price, the whole transaction is a wager and invalid.[60] If this unlawful intent is entertained by only one of the parties, the transaction is not illegal, in the absence of statute

cient stock to make delivery on demand, and at the end of the last deal actually transfers the remaining stock to the customer's order (Dillaway *v.* Alden, 88 Me. 230, 33 Atl. 981; Mann *v.* Bishop, 136 Mass. 495). The pecuniary inability of the principals, who avail themselves of the broker's credit and facilities for borrowing on the stocks themselves, and the retention of the stocks by the broker or their deposit by him to obtain loans does not show that the transaction is a wager. Winward *v.* Lincoln, *supra*. It is a legitimate transaction where a person not owning stock employs a broker to sell stock for him at a named price, to be delivered at a particular day, and the broker borrows stock to meet the engagement, and afterward buys at a higher rate, pursuant to instructions, to replace the stock borrowed. Smith *v.* Bouvier, 70 Pa. St. 325.

Settlement by payment of differences.— The mere fact that the parties close out a transaction or a series of transactions by an adjustment of differences does not stamp it as a wager; it must appear that there was an understanding between the parties from the beginning that the deal should be so settled.

Illinois.— Riebe *v.* Hellman, 69 Ill. App. 19; Dillon *v.* McCrea, 59 Ill. App. 505; Fox *v.* Steever, 55 Ill. App. 255; Ware *v.* Jordan, 25 Ill. App. 534.

Iowa.— Tomblin *v.* Callen, 69 Iowa 229, 28 N. W. 573.

Louisiana.— Conner *v.* Robertson, 37 La. Ann. 814, 55 Am. Rep. 521.

Missouri.—Taylor *v.* Penquite, 35 Mo. App. 389.

Pennsylvania.— See Young *v.* Glendinning, 194 Pa. St. 550, 45 Atl. 364.

Rhode Island.— Winward *v.* Lincoln, 23 R. I. 476, 51 Atl. 106, 64 L. R. A. 160.

United States.— See Gilbert *v.* Gaugar, 10 Fed. Cas. No. 5,412, 8 Biss. 214, holding that if a person makes a contract to deliver grain during a future month at a fixed price, and by reason of the adverse aspect of the market directs his broker to settle with the purchasers before the maturity of the contract, it does not render the contract void.

See 24 Cent. Dig. tit. "Gaming," § 26.

60. *Alabama.*— Hawley *v.* Bibb, 69 Ala. 52.

California.— Cashman *v.* Root, 39 Cal. 373, 26 Pac. 883, 23 Am. St. Rep. 482, 12 L. R. A. 511.

District of Columbia.— Justh *v.* Holliday, 2 Mackey 346.

Georgia.— Forsyth Mfg. Co. *v.* Castlen, 112 Ga. 199, 37 S. E. 485; Moss *v.* Macon Exch. Bank, (1898) 30 S. E. 267; Thompson *v.* Cummings, 68 Ga. 124; Branch *v.* Palmer, 65 Ga. 210; Warren *v.* Hewitt, 45 Ga. 501.

Illinois.— Central Stock, etc., Exch. *v.* Chicago Bd. of Trade, 196 Ill. 396, 63 N. E. 740 [*affirming* 98 Ill. App. 212]; Pardridge *v.* Cutler, 168 Ill. 504, 48 N. E. 195; Cothran *v.* Ellis, 125 Ill. 496, 16 N. E. 646; Lyon *v.* Culbertson, 83 Ill. 33, 25 Am. Rep. 349; Pickering *v.* Cease, 79 Ill. 328; Jones *v.* Jones, 103 Ill. App. 382; Illinois Trust, etc., Bank *v.* La Touche, 101 Ill. App. 341; Calumet Grain, etc., Co. *v.* Williams, 97 Ill. App. 36; Walker *v.* Johnson, 59 Ill. App. 448; Miles *v.* Andrews, 40 Ill. App. 155; McCormick *v.* Nichols, 19 Ill. App. 334.

Indiana.— Pearce *v.* Dill, 149 Ind. 136, 48 N. E. 788; Plank *v.* Jackson, 128 Ind. 424, 26 N. E. 568, 27 N. E. 1117; Davis *v.* Davis, 119 Ind. 511, 21 N. E. 1112; Sondheim *v.* Gilbert, 117 Ind. 71, 18 N. E. 687, 10 Am. St. Rep. 23, 5 L. R. A. 432; Whitesides *v.* Hunt, 97 Ind. 191, 49 Am. Rep. 441; Nave *v.* Wilson, 12 Ind. App. 38, 38 N. E. 876.

Iowa.— Lyons First Nat. Bank *v.* Oskaloosa Packing Co., 66 Iowa 41, 23 N. W. 255; Lowe *v.* Young, 59 Iowa 364, 13 N. W. 329.

Kentucky.— Lyons *v.* Hogden, 90 Ky. 280, 13 S. W. 1076, 12 Ky. L. Rep. 211; Beadles *v.* McElrath, 85 Ky. 230, 3 S. W. 152, 8 Ky. L. Rep. 848; Boyd Commission Co. *v.* Coates, 69 S. W. 1090, 24 Ky. L. Rep. 730.

Louisiana.— E. O. Standard Milling Co. *v.* Flower, 46 La. Ann. 315, 15 So. 16; Condon's Succession, McGloin 351.

Maine.— Morris *v.* Western Union Tel. Co., 94 Me. 423, 47 Atl. 926; Rumsey *v.* Berry, 65 Me. 570.

Maryland.— Cover *v.* Smith, 82 Md. 586, 34 Atl. 465; Billingslea *v.* Smith, 77 Md. 504, 26 Atl. 1077; Burt *v.* Myer, 71 Md. 467, 18 Atl. 796.

Massachusetts.— Barnes *v.* Smith, 159 Mass. 344, 34 N. E. 403.

Minnesota.— McCarthy *v.* Weare Commission Co., 87 Minn. 11, 91 N. W. 33; Mohr *v.* Miesen, 47 Minn. 228, 49 N. W. 862.

Missouri.— Connor *v.* Black, 119 Mo. 126, 24 S. W. 184, 132 Mo. 150, 33 S. W. 783; Crawford *v.* Spencer, 92 Mo. 498, 4 S. W. 713, 1 Am. St. Rep. 745; Cockrell *v.* Thompson, 85 Mo. 510; Scott *v.* Brown, 54 Mo. App. 606; Hill *v.* Johnson, 38 Mo. App. 383; Buckingham *v.* Fitch, 18 Mo. App. 91; Van Blarcom *v.* Donovan, 16 Mo. App. 535; Ream *v.* Hamilton, 15 Mo. App. 577; Williams *v.* Tiedemann, 6 Mo. App. 269.

Nebraska.— Mendel *v.* Boyd, (1902) 91 N. W. 860; Rogers *v.* Marriott, 59 Nebr. 759, 82 N. W. 21; Sprague *v.* Warren, 26 Nebr. 326, 41 N. W. 1113, 3 L. R. A. 679; Rudolf *v.* Winters, 7 Nebr. 125.

New Hampshire.— Wheeler *v.* Metropolitan Stock Exch., 72 N. H. 315, 56 Atl. 754.

New Jersey.— Sharp *v.* Stalker, 63 N. J. Eq. 596, 52 Atl. 1120; Minzesheimer *v.* Doo-

to the contrary.[61] The true test of the validity of a contract for future delivery is whether it could be settled only in money and in no other way, or whether the party selling could tender and compel the acceptance of the particular commodity

little, 60 N. J. Eq. 394, 45 Atl. 611; Tantum *v.* Arnold, 42 N. J. Eq. 60, 6 Atl. 316; Flagg *v.* Baldwin, 38 N. J. Eq. 219, 48 Am. Rep. 308.

New York.—Kingsbury *v.* Kirwan, 77 N. Y. 612; Bigelow *v.* Benedict, 70 N. Y. 202, 26 Am. Rep. 573; West *v.* Wright, 86 Hun 436, 33 N. Y. Suppl. 898; Peck *v.* Doran, etc., Co., 46 Hun 454; Lu Gar *v.* Carey, 12 N. Y. St. 171; Rockwood *v.* Oakfield, 2 N. Y. St. 331; Ball *v.* Davis, 1 N. Y. St. 517.

Ohio.—Pickering *v.* Chase, 7 Ohio Dec. (Reprint) 156, 1 Cinc. L. Bul. 186.

Pennsylvania.—Wagner *v.* Hildebrand, 187 Pa. St. 136, 41 Atl. 34; Peters *v.* Grim, 149 Pa. St. 163, 24 Atl. 192, 34 Am. St. Rep. 599; Waugh *v.* Beck, 114 Pa. St. 422, 6 Atl. 923, 60 Am. Rep. 354; Dickson *v.* Thomas, 97 Pa. St. 278; North *v.* Phillips, 89 Pa. St. 250; Maxton *v.* Gheen, 75 Pa. St. 166; Brua's Appeal, 55 Pa. St. 294; Taft *v.* Riesenman, 7 Pa. Dist. 496; Thompson's Estate, 15 Phila. 532; Moss *v.* Kay, 2 Wkly. Notes Cas. 336.

Rhode Island.—Winward *v.* Lincoln, 23 R. I. 476, 51 Atl. 106, 64 L. R. A. 160; Flagg *v.* Gilpin, 17 R. I. 10, 19 Atl. 1084.

South Dakota.—Waite *v.* Frank, 14 S. D. 626, 86 N. W. 645.

Tennessee.—Allen *v.* Dunham, 92 Tenn. 257, 21 S. W. 898; Snoddy *v.* American Nat. Bank, 88 Tenn. 573, 13 S. W. 127, 17 Am. St. Rep. 918, 7 L. R. A. 705; Dunn *v.* Bell, 85 Tenn. 581, 4 S. W. 41; McGrew *v.* City Produce Exch., 85 Tenn. 572, 4 S. W. 38, 4 Am. St. Rep. 771; Mechanics' Sav. Bank, etc., Co. *v.* Duncan, (Ch. App. 1896) 36 S. W. 887.

Texas.—Oliphant *v.* Markham, 79 Tex. 543, 15 S. W. 569, 23 Am. St. Rep. 363; Floyd *v.* Patterson, 72 Tex. 202, 10 S. W. 526, 13 Am. St. Rep. 787; Beer *v.* Landman, (Civ. App.) 30 S. W. 726; Henson *v.* Flannigan, 1 Tex. App. Civ. Cas. § 566.

Vermont.—Noyes *v.* Spaulding, 27 Vt. 420.

Wisconsin.—Atwater *v.* Manville, 106 Wis. 64, 81 N. W. 985; Wall *v.* Schneider, 59 Wis. 352, 18 N. W. 443, 48 Am. Rep. 520; Lowry *v.* Dillman, 59 Wis. 197, 18 N. W. 4; Barnard *v.* Backhaus, 52 Wis. 593, 6 N. W. 252, 9 N. W. 595.

United States.—Pearce *v.* Rice, 142 U. S. 28, 12 S. Ct. 130, 35 L. ed. 925; Embrey *v.* Jemison, 131 U. S. 336, 9 S. Ct. 776, 33 L. ed. 172; Irwin *v.* Williar, 110 U. S. 499, 4 S. Ct. 160, 28 L. ed. 225; Metropolitan Nat. Bank *v.* Jansen, 108 Fed. 572, 47 C. C. A. 497; Ponder *v.* Jerome Hill Cotton Co., 100 Fed. 373, 40 C. C. A. 416; Hill *v.* Levy, 98 Fed. 94; Waldron *v.* Johnston, 86 Fed. 757; Morris *v.* Norton, 75 Fed. 912, 21 C. C. A. 553; Boyd *v.* Hanson, 41 Fed. 174; Ward *v.* Vosburg, 31 Fed. 12; New York Mut. L. Ins. Co. *v.* Watson, 30 Fed. 653; *In re* Hunt, 26 Fed. 739; Kirkpatrick *v.* Adams, 20 Fed. 287; Bryant *v.* Western Union Tel. Co., 17 Fed. 825; Cobb *v.* Prell, 15 Fed. 774, 5 McCrary 80; Bartlett *v.* Smith, 13 Fed. 263, 4 McCrary 388; *In re* Green, 10 Fed. Cas. No. 5,751, 7 Biss. 338; *Ex p.* Young, 30 Fed. Cas. No. 18,145, 6 Biss. 53.

England.—*In re* Gieve, [1899] 1 Q. B. 794, 68 L. J. Q. B. 509, 80 L. T. Rep. N. S. 438, 6 Manson 136, 47 Wkly. Rep. 441; Strachan *v.* Universal Stock Exch., [1895] 2 Q. B. 697, 59 J. P. 789, 65 L. J. Q. B. 178, 73 L. T. Rep. N. S. 492, 44 Wkly. Rep. 90; Thacker *v.* Hardy, 4 Q. B. D. 685, 48 L. J. Q. B. 289, 39 L. T. Rep. N. S. 595, 27 Wkly. Rep. 158; Grizewood *v.* Blane, 11 C. B. 526, 73 E. C. L. 526; Barry *v.* Croskey, 2 Johns. & H. 1.

See 24 Cent. Dig. tit. "Gaming," § 25.

Knowledge of unlawful intent.—By statute in some jurisdictions if one of the parties to a sale for future delivery does not intend to receive or deliver the property sold, and the other party is aware of this, the contract cannot be enforced. Schreiner *v.* Orr, 55 Mo. App. 406; Mulford *v.* Cæsar, 53 Mo. App. 263.

Cornering market.—Whoever corners the market or attempts to do so in relation to any commodity is deemed in Illinois to be engaged in a gambling enterprise. Wright *v.* Cudahy, 168 Ill. 86, 48 N. E. 39; Samuels *v.* Oliver, 130 Ill. 73, 22 N. E. 499. See also *Ex p.* Young, 30 Fed. Cas. No. 18,145, 6 Biss. 53.

A subsequent agreement for an actual sale and purchase will make the transaction valid, although it originated in an intention merely to wager. Taylor's Estate, 192 Pa. St. 304, 43 Atl. 973, 73 Am. St. Rep. 812; Anthony *v.* Unangst, 174 Pa. St. 10, 34 Atl. 284. And see Young *v.* Glendinning, 194 Pa. St. 550, 45 Atl. 364.

61. *Illinois.*—Pixley *v.* Boynton, 79 Ill. 351; Staninger *v.* Tabor, 103 Ill. App. 330; Warren *v.* Scanlan, 59 Ill. App. 138; Miles *v.* Andrews, 40 Ill. App. 155; Benson *v.* Morgan, 26 Ill. App. 22; Griswold *v.* Gregg, 24 Ill. App. 384.

Indiana.—Whitesides *v.* Hunt, 97 Ind. 191, 49 Am. Rep. 441; Wright *v.* Crobbs, 78 Ind. 487.

Iowa.—Counselman *v.* Reichart, 103 Iowa 430, 72 N. W. 490; Lyons First Nat. Bank *v.* Oskaloosa Packing Co., 66 Iowa 41, 23 N. W. 255; Murray *v.* Ocheltree, 59 Iowa 435, 13 N. W. 411.

Maine.—Rumsey *v.* Berry, 65 Me. 570.

Massachusetts.—Farnum *v.* Whitman, 187 Mass. 381, 73 N. E. 473; Post *v.* Leland, 184 Mass. 601, 69 N. E. 361.

Michigan.—Donovan *v.* Daiber, 124 Mich. 49, 82 N. W. 848; Gregory *v.* Wendell, 40 Mich. 432.

Minnesota.—McCarthy *v.* Weare Commission Co., 87 Minn. 11, 91 N. W. 33.

Missouri.—Edwards Brokerage Co. *v.* Stevenson, 160 Mo. 516, 61 S. W. 617; Gaylord *v.* Duryea, 95 Mo. App. 574, 69 S. W. 607; Taylor *v.* Penquite, 35 Mo. App. 389; Jones *v.* Shale, 34 Mo. App. 302; Williams *v.* Tiedemann, 6 Mo. App. 269.

sold or the party buying could compel the delivery of the commodity purchased.[62] The mere form of the transaction is of but little consequence; otherwise statutes against wagers could be easily evaded; the essential inquiry in every case is as to the necessary effect of the contract and the real intention of the parties.[63]

(II) *Dealings in Options.* Option contracts usually take the form of "puts," which are defined to be the privilege, for an agreed consideration, of delivering or not delivering the commodity sold; or "calls," defined to be a similar privilege of calling or not calling for the delivery of the same within a limited time.[64] But frequently they partake of the nature of both, whereby one party buys the privi-

Nebraska.— Rogers *v.* Marriott, 59 Nebr. 759, 82 N. W. 21.

New York.— Kingsbury *v.* Kirwin, 43 N. Y. Super. Ct. 451 [*affirmed* in 77 N. Y. 612]; Hentz *v.* Miner, 18 N. Y. Suppl. 880.

Ohio.— Goodhart *v.* Rastert, 10 Ohio S. & C. Pl. Dec. 40, 7 Ohio N. P. 534.

Wisconsin.— Wall *v.* Schneider, 59 Wis. 352, 18 N. W. 443, 48 Am. Rep. 520.

United States.— Bibb *v.* Allen, 149 U. S. 481, 13 S. Ct. 950, 37 L. ed. 819; Irwin *v.* Williar, 110 U. S. 499, 4 S. Ct. 160, 28 L. ed. 225; Hill *v.* Levy, 98 Fed. 94; Boyd *v.* Hanson, 41 Fed. 174; Edwards *v.* Hoeffinghoff, 38 Fed. 635; Lehman *v.* Feld, 37 Fed. 852; Ward *v.* Vosburgh, 31 Fed. 12; Bangs *v.* Hornick, 30 Fed. 97; Bennett *v.* Covington, 22 Fed. 816; Hentz *v.* Jewell, 20 Fed. 592, 4 Woods 656; Kirkpatrick *v.* Adams, 20 Fed. 287; Clarke *v.* Foss, 5 Fed. Cas. No. 2,852, 7 Biss. 540; Lehman *v.* Strassberger, 15 Fed. Cas. No. 8,216, 2 Woods 554.

England.— Ashton *v.* Dakin, 4 H. & N. 867.

See 24 Cent. Dig. tit. "Gaming," § 20.

Statutes to the contrary have been enacted in some states. Singleton *v.* Monticello Bank, 113 Ga. 527, 38 S. E. 947; Moss *v.* Macon Exch. Bank, 102 Ga. 808, 30 S. E. 267; Benson *v.* Dublin Warehouse Co., 99 Ga. 303, 25 S. E. 645; Alexander *v.* State, 86 Ga. 246, 12 S. E. 408, 10 L. R. A. 859; Lawton *v.* Blitch, 83 Ga. 663, 10 S. E. 353; Cothran *v.* Western Union Tel. Co., 83 Ga. 25, 9 S. E. 836; Dancy *v.* Phelan, 82 Ga. 243, 10 S. E. 205; Walters *v.* Comer, 79 Ga. 796, 5 S. E. 292, Clarke *v.* Brown, 77 Ga. 606, 4 Am. St. Rep. 98; Augusta Nat. Bank *v.* Cunningham, 75 Ga. 366, 71 Ga. 400, 51 Am. Rep. 266; Porter *v.* Massengale, 68 Ga. 296; Thompson *v.* Cummings, 68 Ga. 124; Branch *v.* Palmer, 65 Ga. 210; Riordan *v.* Doty, 50 S. C. 537, 27 S. E. 939 (where the statute relates to cotton futures); McGrew *v.* City Produce Exch., 85 Tenn. 572, 4 S. W. 38, 4 Am. St. Rep. 771.

62. Sampson *v.* Camperdown Cotton Mills, 82 Fed. 833.

63. Justh *v.* Holliday, 2 Mackey (D. C.) 346; Gruner *v.* Stucken, 39 La. Ann. 1076, 3 So. 338; Sharp *v.* Stalker, 63 N. J. Eq. 596, 52 Atl. 1120; Embrey *v.* Jemison, 131 U. S. 336, 9 S. Ct. 776, 33 L. ed. 172; Irwin *v.* Williar, 110 U. S. 499, 4 S. Ct. 160, 28 L. ed. 225; Edwards *v.* Hoeffinghoff, 38 Fed. 635.

64. Bouvier L. Dict.; Dewey Contr. Fut. Deliv. 27. And see Pearce *v.* Foote, 113 Ill. 228, 55 Am. Rep. 414; Pixley *v.* Boynton, 79 Ill. 351; *Ex p.* Young, 30 Fed. Cas. No. 18,145, 6 Biss. 53.

An option is not created by a contract whereby the owner of a coal mine agrees to give to a dealer the exclusive control of its output in a certain district for a specified time at a set price, and not to make any future contracts that would interfere with the rights of the dealer thereunder, the dealer agreeing to use his best efforts to dispose of the output of the mine, and not to handle any other coal when he can sell that of the mine owner. McClure *v.* Spellman, 50 Ill. App. 50. So a contract wherein plaintiff gave defendant the exclusive right of manufacturing a patented article, defendant agreeing to pay a royalty amounting to a certain sum in a year, and agreeing that if it did not amount to such sum plaintiff could cancel the contract, is not within Rev. St. (1893) c. 38, § 130, forbidding contracts to give options to sell or buy any commodity at a future time. Preston *v.* Smith, 156 Ill. 359, 40 N. E. 949 [*affirming* 57 Ill. App. 132].

Conditional sales distinguished.— A sale of stocks coupled with an agreement by the seller to take them back at a stipulated price after the expiration of a certain time at the option of the buyer amounts to nothing more than a conditional sale and is not a gambling contract. Maurer *v.* King, 127 Cal. 114, 59 Pac. 290; Ubben *v.* Binnian, 182 Ill. 508, 55 N. E. 552 [*reversing* 78 Ill. App. 330]; Wolf *v.* State Nat. Bank, 178 Ill. 85, 52 N. E. 896 [*reversing* 77 Ill. App. 325]. And see Rehberg *v.* Tontine Surety Co., 132 Mich. 135, 91 N. W. 132; Richter *v.* Frank, 41 Fed. 859. So an agreement to repurchase at a stipulated price any commodity sold, upon notice from the purchaser, is not a gambling transaction. Loeb *v.* Stern, 198 Ill. 371, 64 N. E. 1043 [*affirming* 99 Ill. App. 637].

Offer to sell distinguished.— A contract for the sale of sample barley providing that after that sold has been received and found satisfactory, the buyer has the privilege of ordering 10,000 bushels more of each grade, at the same price, before a certain date, does not constitute a prohibited contract for an option in grain, but is merely an offer to sell, the acceptance of which within the time prescribed constitutes a valid contract (Schlee *v.* Guckenheimer, 179 Ill. 593, 54 N. E. 302); and the same is true of a contract giving a person an option to purchase a business within a certain time (Seymour *v.* Howard, 51 Ill. App. 384).

lege of either selling to or buying from the other at a stipulated price and within a limited time; and such a transaction is called a "straddle" or "spread eagle."[65] There is no inherent vice in an option contract to buy or to sell property at a specified price on a future day, although the parties may not have the property at the time,[66] where the contract is made in good faith and the only option is as to the time of delivery.[67] However, contracts of this kind may be mere disguises for gambling, and where there is no intention on the one side to sell or deliver the property or on the other to buy or receive it, but merely an intention that the differences shall be paid according to the fluctuation in market values, the contract is a wager and void;[68] and there are statutes aimed specifically at these transactions and designed to put an end to such dealings altogether.[69]

Sale of option distinguished.— The sale of an option to purchase certain lands at stated prices is a valid contract. Hanna *v.* Ingrain, 93 Ala. 482, 9 So. 621.

65. Bouvier L. Dict. "Option;" Dewey Contr. Fut. Deliv. 27.

Validity.—A "straddle" or agreement, for a valuable consideration, to buy from or sell to another, at the latter's option, certain shares of stock within a limited time at a specified price is not *per se* a gaming contract, unless the parties were merely speculating on the fluctuations in the price of the stock without any intent for the former to deliver or accept, but simply to pay differences. Story *v.* Salomon, 71 N. Y. 420 [*affirming* 6 Daly 531].

66. *Connecticut.*— Wiggin *v.* Federal Stock, etc., Co., 77 Conn. 507, 59 Atl. 607.

Illinois.— Osgood *v.* Skinner, 211 Ill. 229, 71 N. E. 869; Pixley *v.* Boynton, 79 Ill. 351.

Maine.— Rumsey *v.* Berry, 65 Me. 570.

New Jersey.— Kendall *v.* Fries, 71 N. J. L. 401, 58 Atl. 1090, holding that the fact that a person buys options on cotton does not show that the contract is a gambling transaction.

New York.— Story *v.* Salomon, 71 N. Y. 420; Bigelow *v.* Benedict, 70 N. Y. 202, 26 Am. Rep. 573; Brown *v.* Hall, 5 Lans. 177.

Pennsylvania.— Kirkpatrick *v.* Bonsall, 72 Pa. St. 155.

See 24 Cent. Dig. tit. "Gaming," § 24.

67. *Alabama.*—Perryman *v.* Wolffe, 93 Ala. 290, 9 So. 148.

Illinois.— Logan *v.* Musick, 81 Ill. 415; Barnett *v.* Baxter, 64 Ill. App. 544, holding that the options prohibited are mere options to buy by which the purchaser is under no obligation to take the commodity at all but may pay the difference in price and thus be discharged.

Missouri.— Crawford *v.* Spencer, 92 Mo. 498, 4 S. W. 713, 1 Am. St. Rep. 745.

Wisconsin.— Wall *v.* Schneider, 59 Wis. 352, 18 N. W. 443, 48 Am. Rep. 520, holding that the legal effect of the agreement is that delivery must be made within a limited period.

United States.— White *v.* Barber, 123 U. S. 392, 8 S. Ct. 221, 31 L. ed. 243; Jackson *v.* Foote, 12 Fed. 37, 11 Biss. 223; Gilbert *v.* Gaugar, 10 Fed. Cas. No. 5,412, 8 Biss. 214.

See 24 Cent. Dig. tit. "Gaming," § 24.

68. *Illinois.*— Pearce *v.* Foote, 113 Ill. 228, 55 Am. Rep. 414; Tenney *v.* Foote, 95 Ill. 99 [*affirming* 4 Ill. App. 594].

Indiana.— Pearce *v.* Dill, 149 Ind. 136, 48 N. E. 788; Davis *v.* Davis, 119 Ind. 511, 21 N. E. 1112.

Iowa.— Counselman *v.* Reichart, 103 Iowa 430, 72 N. W. 490.

Michigan.— Shaw *v.* Clark, 49 Mich. 384, 13 N. W. 786, 43 Am. Rep. 474; Gregory *v.* Wendell, 39 Mich. 337, 33 Am. Rep. 390, 40 Mich. 432.

Nebraska.— Sprague *v.* Warren, 26 Nebr. 326, 41 N. W. 1113, 3 L. R. A. 679.

New York.— Kingsbury *v.* Kirwan, 77 N. Y. 612; Story *v.* Salomon, 71 N. Y. 420; Bigelow *v.* Benedict, 70 N. Y. 202, 26 Am. Rep. 573.

Ohio.— Lester *v.* Buel, 49 Ohio St. 240, 30 N. E. 821, 34 Am. St. Rep. 556; Bradley *v.* Western Union Tel. Co., 8 Ohio Dec. (Reprint) 707, 9 Cinc. L. Bul. 223; Pickering *v.* Chase, 7 Ohio Dec. (Reprint) 156, 1 Cinc. L. Bul. 186; Johnson *v.* Brown, 2 Cinc. Super. Ct. 83.

Pennsylvania.— Bonsall *v.* Kirkpatrick, 22 Pittsb. Leg. J. 69.

United States.— Embrey *v.* Jemison, 131 U. S. 336, 9 S. Ct. 776, 27 L. ed. 172; Melchert *v.* American Union Tel. Co., 11 Fed. 193, 3 McCrary 521.

England.— Grizewood *v.* Blane, 11 C. B. 526, 73 E. C. L. 526; Rourke *v.* Short, 5 E. & B. 904, 2 Jur. N. S. 352, 25 L. J. Q. B. 196, 4 Wkly. Rep. 247, 85 E. C. L. 904.

See 24 Cent. Dig. tit. "Gaming," § 24.

69. Minnesota Lumber Co. *v.* Whitebreast Coal Co., 160 Ill. 85, 43 N. E. 774, 31 L. R. A. 529; Pearce *v.* Foote, 113 Ill. 228, 55 Am. Rep. 414; Wolsey *v.* Neeley, 62 Ill. App. 141; Locke *v.* Towler, 41 Ill. App. 66; Webster *v.* Sturges, 7 Ill. App. 560; Osgood *v.* Bauder, 75 Iowa 550, 39 N. W. 887, 1 L. R. A. 665, 82 Iowa 171, 47 N. W. 1001. And see the statutes of the different states.

The form of the contract on its face as a sale for future delivery is not conclusive. If the real intention of the parties is to deal only in options to be subsequently settled upon the basis of the differences in the market price, and not by delivery of the commodity sold, the transaction is a gambling contract within the statute. Coffman *v.* Young, 20 Ill. App. 76.

The term "commodity" as used in Ill. Cr. Code, div. 1, § 130, prohibiting the purchase and sale of options and commodities, includes everything movable which is bought and sold, the subject of trade and acquisition, and hence includes corporate bonds. Peterson *v.* Currier, 62 Ill. App. 163.

f. Wagers in Form of Note. A promissory note made payable on the event of an election and without other consideration is void as a wagering contract.[70]

g. Wagers in Form of Sale — (i) *In General.* A contract for the sale of property is invalid as a wager where the price is to be paid only on the happening of an uncertain event which has no relation to the transaction and in which the parties have no interest other than that created by the agreement, the determination of the event being the sole condition of the contract.[71] The wagering element of such a contract is especially apparent where the parties fix a price out of all proportion to the value of the property.[72] The transaction is a wager also where the amount of the price is to be determined by the happening of an uncertain event having no bearing on either the value of the property or the purchasing power of money.[73]

Illustrations of prohibited options see Corcoran *v.* Lehigh, etc., Coal Co., 138 Ill. 390, 28 N. E. 759 (contract that if plaintiff should purchase certain goods he should have the right to purchase all other amounts required during the season at a certain price); Schneider *v.* Turner, 130 Ill. 28, 22 N. E. 497, 6 L. R. A. 164 [*affirming* 27 Ill. App. 220] (contract to sell "in consideration of one dollar, receipt of which is acknowledged," certain railway stock at a stated price, "if taken on or before" a certain day); Bensinger *v.* Kantzler, 112 Ill. App. 293 (contract containing a provision by which the parties agree, for a valuable consideration, that at the expiration of a specified period they will or will not sell certain corporate stock as they may see fit); Kerting *v.* Hilton, 51 Ill. App. 437 (agreement providing for the employment of a party in a manufacturing business, and giving him the privilege of buying the plant on or before a day mentioned, but containing no promise on his part to buy it). An illegal option contract is "one that may be settled without actual delivery and payment for the grain purchased, by adjusting the differences between the contract price and the market price at the date of delivery, as the party having the option may elect, in lieu of the actual delivery of and payment for it at the price at which it was purchased. It is a mode adopted for speculating in differences in market values, of grain or other commodity." Miles *v.* Andrews, 40 Ill. App. 155, 171.

Lawful transactions distinguished see *supra*, note 64.

70. *Illinois.*— Guyman *v.* Burlingame, 36 Ill. 201; Lockhart *v.* Hullinger, 2 Ill. App. 465.

Indiana.— Nudd *v.* Burnett, 14 Ind. 25.

Iowa.— Sipe *v.* Finarty, 6 Iowa 394, holding that evidence is not admissible to show a valuable consideration.

Louisiana.— See Barham *v.* Livingston, 12 La. Ann. 618.

Minnesota.— Cooper *v.* Brewster, 1 Minn. 94.

Vermont.— See Danforth *v.* Evans, 16 Vt. 538.

See 24 Cent. Dig. tit "Gaming," § 8.

71. *Illinois.*— Merchants' Sav., etc., Co. *v.* Goodrich, 75 Ill. 554. See, however, Williams *v.* Smith, 4 Ill. 524.

Indiana.— Hizer *v.* State, 12 Ind. 330.

Iowa.— Craig *v.* Andrews, 7 Iowa 17.

Kentucky.— Todd *v.* Coplinger, 4 Bush 139; Com. *v.* Shouse, 16 B. Mon. 325, 63 Am. Dec. 551.

Louisiana.— Barham *v.* Livingston, 12 La. Ann. 618.

New York.— See Hall *v.* Bergen, 19 Barb. 122, where the price was to be refunded or not according to whether the event happened.

Ohio.— Harper *v.* Crain, 36 Ohio St. 338, 38 Am. Rep. 589 [*overruling* by implication Rapp *v.* Wilkerson, 1 Ohio Dec. (Reprint) 177, 3 West. L. J. 220 (*affirmed* in 1 Ohio Dec. (Reprint) 178, 3 West. L. J. 471)]. See, however, Clyde *v.* Mohn, 4 Ohio Cir. Ct. 537, 2 Ohio Cir. Dec. 694 [*affirmed* in 32 Cinc. L. Bul. 407], where a person advanced in years conveyed land for a price to be paid at a future date, provided that the grantor should then be living, otherwise not at all, the grantor to pay annually a high rate of interest on the price until that date, and the transaction was upheld as being in effect not a wager but a contract for the grantor's support.

See 24 Cent. Dig. tit. "Gaming," § 7.

See, however, Edson *v.* Pawlet, 22 Vt. 291, where a contract between a physician and a town by which he was to furnish services to a pauper, and the town was to pay him only in case it succeeded in establishing the pauper's settlement in another town, was upheld.

72. *Alabama.*— Givens *v.* Rogers, 11 Ala. 543.

Indiana.— Davis *v.* Leonard, 69 Ind. 213.

Kentucky.— Com. *v.* Shouse, 16 B. Mon. 325, 63 Am. Dec. 551.

Ohio.— Lucas *v.* Harper, 24 Ohio St. 328.

Tennessee.— Somers *v.* State, 5 Sneed 438.

Vermont.— Danforth *v.* Evans, 16 Vt. 538.

See 24 Cent. Dig. tit. "Gaming," § 7.

73. Bates *v.* Clifford, 22 Minn. 52. See, however, Treacy *v.* Chinn, 79 Mo. App. 648 (where plaintiff sold defendant a horse, part of the consideration for which was paid in cash and the balance represented by a note conditioned to be payable when the horse "should win a race," and it was held that the condition was not of itself illegal); Ferguson *v.* Coleman, 3 Rich. (S. C.) 99, 45 Am. Dec. 761 (where the amount of the price was to be governed by the price of cotton in the following autumn).

(II) *Bohemian Oats Transaction.* A contract whereby a person buys a certain number of bushels of grain at a grossly extortionate price and the seller agrees to sell for the buyer double the number of bushels at the same price per bushel within a specified time has been held not to be a gambling transaction.[74]

4. Contracts and Conveyances Collateral to Gambling Transaction — a. Contracts in Furtherance of Gambling in General — (I) *General Rule.* Collateral contracts in promotion of a gambling scheme are tainted with the vice of the main enterprise and are invalid.[75]

(II) *Agreements Between Buyers as to Which Shall Pay Price.* It has been held that where two persons make a wager and then buy property from a third person, the loser to pay for it, the seller may recover from the loser.[76]

(III) *Contracts in Promotion of Racing.* A contract in direct promotion of illegal racing is also illegal and cannot be enforced.[77] However, the sale of a race-horse or an interest in it is a good consideration for a note given for the price.[78]

(IV) *Contracts to Furnish Market Reports.* A telegraph company is not bound as a common carrier to supply a ticker and furnish reports of the market prices of stocks and produce to a bucket-shop, even though it has contracted to do so.[79]

74. Ebersole *v.* Morrison First Nat. Bank, 36 Ill. App. 267; Shipley *v.* Reasoner, 80 Iowa 548, 45 N. W. 1077; Merrill *v.* Packer, 80 Iowa 542, 45 N. W. 1076; Hanks *v.* Brown, 79 Iowa 560, 44 N. W. 811; Watson *v.* Blosscm, 4 N. Y. Suppl. 489; Stewart *v.* Simpson, 2 Ohio Cir. Ct. 415, 1 Ohio Cir. Dec. 562. *Contra,* Schmueckle *v.* Waters, 125 Ind. 265, 25 N. E. 281; McNamara *v.* Gargett, 68 Mich. 454, 36 N. W. 218, 13 Am. St. Rep. 355; Williams *v.* Keel, 9 Ohio Dec. (Reprint) 746, 17 Cinc. L. Bul. 118.

However, such contracts are void as tending to work a fraud on third persons. See Contracts, 9 Cyc. 469.

75. Corey *v.* Griffin, 181 Mass. 229, 63 N. E. 420; Badgley *v.* Beale, 3 Watts (Pa.) 263, holding that a marker at an illicit billiard table who keeps the score and receives the money betted by the players is not entitled to recover wages from the owner of the table. And see cases cited *infra,* note 76 *et seq.*

Where, however, A was indebted to B fifty dollars for so much money won at cards, and B was indebted to C twenty-five dollars for goods sold and delivered to him previous to that time, and B offered to give A a discharge from the debt on condition that he would pay C the amount due him, upon which C accepted A's note and discharged B, A could not in an action by C upon this note set up the original illegality of the consideration between him and B as a defense. Bowen *v.* Doggett, 2 Nott & M. (S. C.) 127.

76. Lurton *v.* Gilliam, 2 Ill. 577, 33 Am. Dec. 430; Heironimus *v.* Harris, 14 B. Mon. (Ky.) 313. See also Maulsby *v.* Wolf, 14 Ind. 457, holding that where two persons gave notes for goods sold to both, and without the payee's knowledge they bet on an election as to who should pay the notes, his right of action was not thereby affected. *Contra,* Duncan *v.* Cox, 6 Blackf. (Ind.) 270.

77. St. Louis Fair Assoc. *v.* Carmody, 151 Mo. 566, 52 S. W. 365, 74 Am. St. Rep. 571, holding that where plaintiff, in addition to conducting legal races, had arranged booths and appliances for betting, a contract with defendant whereby he was to furnish refreshments, thus increasing the attraction and promoting the gambling, is void.

Contracts relating to race-horses.— Where betting on horse-races is illegal, it has been held that no recovery can be had for training a horse to race for a wager (Mosher *v.* Griffin, 51 Ill. 184, 99 Am. Dec. 541; Maddox *v.* Thornton, 16 Fed. Cas. No. 8,935, 2 Cranch C. C. 260) or for driving it in such a race (Harris *v.* White, 81 N. Y. 532, holding, however, that defendant had failed to show that the race was to be for a wager). But money laid out for shoeing and feeding the horse while under training may be recovered, for this is not necessarily a part of the gaming transaction (Mosher *v.* Griffin, *supra*); and the trainer has a lien for the expense and skill bestowed upon a horse delivered to him to be trained for running races for bets and wagers; the law will not assist the owner to obtain possession of the horse without paying the trainer for his services under the executed contract (Harris *v.* Woodruff, 124 Mass. 205, 26 Am. Rep. 658; Forth *v.* Simpson, 13 Q. B. 680, 13 Jur. 1024, 18 L. J. Q. B. 263, 66 E. C. L. 680; Bevan *v.* Waters, 3 C. & P. 520, 14 E. C. L. 693, M. & M. 235, 22 E. C. L. 515). If, however, by usage or contract the owner may send the horse to run at any race he chooses and may select the jockey, the trainer has no continuing right of possession and consequently no lien. Forth *v.* Simpson, *supra.*

78. Biegler *v.* Merchants' L. & T. Co., 164 Ill. 197, 45 N. E. 512 [*affirming* 62 Ill. App. 560]; Cummings *v.* Henry, 10 Ind. 109, so holding, although the payee knows that the maker intends to run the horse for a wager in a race.

79. Smith *v.* Western Union Tel. Co., 84 Ky. 664, 2 S. W. 483, 8 Ky. L. Rep. 672. See also Bryant *v.* Western Union Tel. Co.,

(v) *Gambling Partnerships.* Partnerships entered into for the purpose of engaging in gaming transactions are illegal.[80]

(vi) *Leasing and Building of Gambling Rooms.* Where premises are leased with the intent on the part of the lessor that they shall be used for illegal gambling, no rent can be recovered;[81] but in an action for work and labor done and materials furnished in fitting up a building, it is no defense that plaintiff knew at the time that the house was to be used for gambling purposes.[82]

(vii) *Sales of Gambling Devices.* To invalidate a sale on the ground that the article sold is a gambling device something more is required than the mere knowledge of the seller that the buyer intends to use it for gambling; the seller must do something to promote the buyer's unlawful scheme.[83]

b. Obligations and Securities For Gambling Consideration — (i) *In General.* By 9 Anne, c. 14, all securities given for gambling considerations were declared to be void, and this is the rule in most of the American states.[84]

(ii) *Commercial Paper* — (a) *As Between the Parties.* Where by statute

17 Fed. 825, holding that equity will not compel a telegraph company to supply a ticker for a bucket-shop, even though the proprietors are members of the board of trade.

Injunction against removal.— A bucket-shop keeper has no right to an injunction to prevent the removal from his rooms of a ticker belonging to a telegraph company. Bradley *v.* Western Union Tel. Co., 8 Ohio Dec. (Reprint) 707, 9 Cinc. L. Bul. 223; Griffin *v.* Western Union Tel. Co., 8 Ohio Dec. (Reprint) 572, 9 Cinc. L. Bul. 22.

80. Whitesides *v.* McGrath, 15 La. Ann. 401; Spies *v.* Rosenstock, 87 Md. 14, 39 Atl. 268. And see Whipley *v.* Flower, 6 Cal. 630. See, however, Watson *v.* Fletcher, 7 Gratt. (Va.) 1, holding that where a house was purchased and furnished by partners in gambling, for which one had paid the whole consideration, and the house was used for gambling purposes, the house and furniture were not to be regarded as unlawful property, and the partner who paid the whole price was entitled to be reimbursed from the estate of the other deceased partner.

81. Updike *v.* Campbell, 4 E. D. Smith (N. Y.) 570.

However, to establish a defense that the lease is void by the statute against gaming, it must be shown that the landlord was a party to the illegal intent, and let the premises in furtherance thereof; and where a landlord let premises for a certain term to be used for gambling, and before the end of the term the tenant surrendered the premises to a third person, who agreed with the landlord to complete the term, such agreement is not necessarily illegal. Gibson *v.* Pearsall, 1 E. D. Smith (N. Y.) 90.

82. Michael *v.* Bacon, 49 Mo. 474, 8 Am. Rep. 138. See also Watson *v.* Fletcher, 7 Gratt. (Va.) 1.

The builder of an unlawful gambling device cannot recover therefor. See *infra*, note 83.

83. Rose *v.* Mitchell, 6 Colo. 102, 45 Am. Rep. 520; Bickel *v.* Sheets, 24 Ind. 1; Brunswick, etc., Co. *v.* Valleau, 50 Iowa 120, 32 Am. Rep. 119 (holding that it constitutes no defense to an action for the price of a billiard table that it may be used for the purpose of gambling, and knowledge that it will be so used cannot be inferred from the fact that the table is accompanied with a pool set and rules for playing the game); Dorsey *v.* Langworthy, 3 Greene (Iowa) 341.

However, if a seller of slot machines to be used as gambling devices goes beyond the act and purpose of making a sale, and in making it actively and purposely participates in the promotion of the illegal use, he becomes *particeps criminis*, and cannot recover on the contract of sale (Kuhl *v.* M. Gally Universal Press Co., 123 Ala. 452, 26 So. 535, 82 Am. St. Rep. 135), and under a city ordinance providing that no person shall, for the purpose of gaming, bring into the city or have in possession any device whereon or with which money or anything of value may be played, a contract for the sale of a slot machine to a person in the city is unlawful (Price *v.* Burns, 101 Ill. App. 418). Since keeping a ninepin alley in a town by the keeper of a public house is unlawful, the builder of such an alley cannot recover therefor upon a general assumpsit. Spurgeon *v.* McElwain, 6 Ohio 442, 27 Am. Dec. 266.

84. *Maryland.*— Gough *v.* Pratt, 9 Md. 526.

Nevada.— Evans *v.* Cook, 11 Nev. 69.

North Carolina.— Turner *v.* Peacock, 13 N. C. 303, holding that a bond taken on the compromise of an action upon a gaming contract is void if money won at an illegal game is part of the consideration.

Tennessee.— Haley *v.* Long, Peck 93, holding that a bond given on an award made in pursuance of an order of court in an action founded on a bond given for a gaming consideration is void.

England.— Applegarth *v.* Colley, 7 Jur. 18, 12 L. J. Exch. 34, 10 M. & W. 723.

See 24 Cent. Dig. tit. "Gaming," § 39.

See, however, Jacob *v.* Hill, 65 S. W. 21, 23 Ky. L. Rep. 1529, where it is held that a statute providing that every contract for the consideration of money won or lost at gaming shall be void does not invalidate a supersedeas bond given on appeal from a judgment for money won at gaming.

betting is illegal, negotiable paper given for a wagering consideration is void as between the original parties and in the hands of purchasers with notice.[85]

85. *Alabama.*— Hawley *v.* Bibb, 69 Ala. 52; Finn *v.* Barclay, 15 Ala. 626; Trammell *v.* Gordon, 11 Ala. 656.

California.— Fuller *v.* Hutchings, 10 Cal. 523, 70 Am. Dec. 746.

Colorado.— Boughner *v.* Meyer, 5 Colo. 71, 40 Am. Rep. 139.

District of Columbia.—Justh *v.* Holliday, 2 Mackey 346.

Illinois.— Treat *v.* Snydecker, 92 Ill. App. 458; International Bank *v.* Vankirk, 39 Ill. App. 23; Brown *v.* Alexander, 29 Ill. App. 626.

Indiana.— Davis *v.* Davis, 119 Ind. 511, 21 N. E. 1112; Sondheim *v.* Gilbert, 117 Ind. 71, 18 N. E. 687, 10 Am. St. Rep. 23, 5 L. R. A. 432.

Kentucky.— Brittain *v.* Duling, 15 B. Mon. 138; Bevil *v.* Hix, 12 B. Mon. 140; Standeford *v.* Shultz, 5 B. Mon. 581; Thompson *v.* Moore, 4 T. B. Mon. 79; Chambers *v.* Simpson, 1 T. B. Mon. 112.

Maryland.— Spies *v.* Rosenstock, 87 Md. 14, 39 Atl. 268.

Massachusetts.— Bride *v.* Clark, 161 Mass. 130, 36 N. E. 745; Murphy *v.* Rogers, 151 Mass. 118, 24 N. E. 35.

Mississippi.— Virden *v.* Murphy, 78 Miss. 515, 28 So. 851; Violett *v.* Mangold, (1900) 27 So. 875; Crawford *v.* Storms, 41 Miss. 540; McAuley *v.* Mardis, Walk. 307, holding that a note given for a gambling consideration may be declared void either at law or in equity.

Missouri.— Woolfolk *v.* Duncan, 80 Mo. App. 421. However, a statutory provision rendering void all notes given in consideration of money "won at any game or gambling device" does not apply to a note the consideration of which is a wager on the future price of grain. Third Nat. Bank *v.* Tinsley, 11 Mo. App. 498.

Nebraska.— Mendel *v.* Boyd, (1902) 91 N. W. 860; Sprague *v.* Warren, 26 Nebr. 326, 41 N. W. 1113, 3 L. R. A. 679.

Nevada.— Evans *v.* Cook, 11 Nev. 69.

New Mexico.— Joseph *v.* Miller, 1 N. M. 621.

New York.— Hollingsworth *v.* Moulton, 53 Hun 91, 6 N. Y. Suppl. 362; Denniston *v.* Cook, 12 Johns. 376; Lansing *v.* Lansing, 8 Johns. 454. See, however, Northrop *v.* Minturn, 13 Johns. 85.

North Carolina.— Gooch *v.* Faucett, 122 N. C. 270, 29 S. E. 362, 39 L. R. A. 835.

Ohio.— Lagonda Nat. Bank *v.* Portner, 46 Ohio St. 381, 21 N. E. 634; Rogers *v.* Corre, 10 Ohio Cir. Ct. 346, 6 Ohio Cir. Dec. 602.

Pennsylvania.— Farrira *v.* Gabell, 4 Wkly. Notes Cas. 572.

Rhode Island.— Winward *v.* Lincoln, 23 R. I. 476, 51 Atl. 106, 64 L. R. A. 160; Atwood *v.* Weeden, 12 R. I. 293.

Tennessee.—Snoddy *v.* American Nat. Bank, 88 Tenn. 573, 13 S. W. 127, 17 Am. St. Rep. 918, 7 L. R. A. 705; Giddens *v.* Lea, 3 Humphr. 133; Mechanics' Sav. Bank, etc., Co. *v.* Duncan, (Ch. App. 1896) 36 S. W. 887.

Texas.— Oliphant *v.* Markham, 79 Tex. 543, 15 S. W. 569, 23 Am. St. Rep. 363; Seeligson *v.* Lewis, 65 Tex. 215, 57 Am. Rep. 593; Connor *v.* Mackey, 20 Tex. 747; Beer *v.* Landman, (Civ. App. 1895) 30 S. W. 726; Donnelly *v.* Citizens' Nat. Bank, 3 Tex. App. Civ. Cas. § 169.

Wisconsin.— Barnard *v.* Backhaus, 52 Wis. 593, 6 N. W. 252, 9 N. W. 595.

United States.— Morris *v.* Norton, 75 Fed. 912, 21 C. C. A. 553; Shain *v.* Goodwin, 46 Fed. 564; *In re* Green, 10 Fed. Cas. No. 5,751, 7 Biss. 338.

England.— Hay *v.* Ayling, 16 Q. B. 423, 15 Jur. 605, 20 L. J. Q. B. 171, 71 E. C. L. 423; Hitchcock *v.* Way, 6 A. & E. 943, 6 L. J. K. B. 215, 2 N. & P. 72, W. W. & D. 491, 33 E. C. L. 490; St. Croix *v.* Morris, 1 Cab. & E. 485; Parsons *v.* Alexander, 5 E. & B. 263, 1 Jur. N. S. 660, 24 L. J. 277, 3 Wkly. Rep. 510, 85 E. C. L. 263. If, however, the wager is merely void and not illegal, and two persons make the bet jointly and win, a check given by one to the other for his share of the profits may be recovered on. Beeston *v.* Beeston, 1 Ex. D. 13, 45 L. J. Exch. 230, 33 L. T. Rep. N. S. 700, 24 Wkly. Rep. 96.

See 24 Cent. Dig. tit. "Gaming," § 39 *et seq.* And see COMMERCIAL PAPER, 8 Cyc. 45.

Notes given for commissions and advances. — Where the consideration for promissory notes is money advanced under contracts for future delivery of cotton, and commissions thereon, the notes are valid. Hentz *v.* Jewell, 20 Fed. 592, 4 Woods 656.

Where money lost in gambling is returned to the loser under the pretense of a promise to repay it, and a note is given for the amount, the transaction amounts to a peaceable recapture of the money, which the loser may retain, and the note is not collectable; and this is especially true where the statute permits a loser to recover property lost at gaming. Stanford *v.* Howard, 103 Tenn. 24, 52 S. W. 140, 76 Am. St. Rep. 635. See, however, Roberts *v.* Blair, 11 Colo. 64, 16 Pac. 717, holding that where a person buys chips and loses them at poker, and at the close of the game the winner loans him a less sum, a note given therefor is valid.

Notes given on repurchase of property lost. — Where a person lost a horse by a bet on a horse-race and delivered the horse to the winner, and afterward repurchased it, executing his note for the price, he could not, when sued on the note, defeat the action by proving the illegality of the transaction by which plaintiff acquired the horse. Windham *v.* Childress, 7 Ala. 357. *Contra*, Brown *v.* Watson, 6 B. Mon. (Ky.) 588.

Estoppel to assert illegality.— The mere recognition of negotiable paper by partial payments and promises to pay the balance will not relieve it from its illegality or estop the maker from setting it up as a defense. Treat *v.* Snydecker, 92 Ill. App. 458.

Renewal note see COMMERCIAL PAPER, 7 Cyc. 881 note 98.

(B) *As Against Innocent Holder.* In the absence of statute to the contrary,[86] negotiable paper is valid and enforceable in the hand of an innocent purchaser for value before maturity, no matter how illegal the consideration may be.[87]

(C) *Indorsement and Transfer by Loser.* An indorsement and delivery of negotiable paper to pay a gambling debt does not make the indorsee a holder in due course, and no title passes between the immediate parties;[88] but if such paper

86. *Alabama.*— Hawley *v.* Bibb, 69 Ala. 52; Brewer *v.* Morgan, 13 Ala. 551; Manning *v.* Manning, 8 Ala. 138. So if a sale is made in furtherance of gambling, notes given for the price are invalid even in the hands of an innocent holder. Kuhl *v.* M. Gully Universal Press Co., 123 Ala. 452, 26 So. 535, 82 Am. St. Rep. 135. And where a note made upon a gaming consideration is transferred in payment of a debt, an action may be maintained on the consideration of the original debt without proof of any diligence to recover the amount of the note from the maker. Lake *v.* Gilchrist, 7 Ala. 955.

Connecticut.— Conklin *v.* Roberts, 36 Conn. 461.

District of Columbia.—Lulley *v.* Morgan, 21 D. C. 88; Thompson *v.* Bowie, 6 D. C. 91 [*reversed* on other grounds in 4 Wall. (U. S.) 463, 18 L. ed. 423].

Georgia.— Augusta Nat. Bank *v.* Cunningham, 75 Ga. 366, 71 Ga. 400, 51 Am. Rep. 266.

Illinois.— Pope *v.* Hanke, 155 Ill. 617, 40 N. E. 839, 28 L. R. A. 568 [*affirming* 52 Ill. App. 453].

Iowa.— Traders' Bank *v.* Alsop, 64 Iowa 97, 19 N. W. 863.

Kentucky.— Pace *v.* Martin, 2 Duv. 522.

Ohio.— Lagonda Nat. Bank *v.* Portner, 46 Ohio St. 381, 21 N. E. 634.

Pennsylvania.— Harper *v.* Young, 112 Pa. St. 419, 3 Atl. 670 (where two persons entered into a scheme to defraud another by means of a game of chance, and the loser, in order to pay his loss, gave his check to one of the winners, who settled with the other and negotiated the check to a *bona fide* holder for value, and it was held that no recovery could be had on the check); Unger *v.* Boas, 13 Pa. St. 601; Durr *v.* Barclay, 8 Pa. Co. Ct. 285.

South Carolina.— Mordecai *v.* Dawkins, 9 Rich. 262; Tidmore *v.* Boyce, 2 Mill 200.

West Virginia.— Hurlburt *v.* Straub, 54 W. Va. 303, 46 S. E. 163.

United States.— Thompson *v.* Bowie, 4 Wall. 463, 18 L. ed. 423; Lloyd *v.* Scott, 4 Pet. 205, 7 L. ed. 833; Root *v.* Merriam, 27 Fed. 909.

England.— Lowe *v.* Waller, 2 Dougl. 708; Bowyer *v.* Bampton, 2 Str. 1155.

See 24 Cent. Dig. tit. "Gaming," § 44. And see the statutes of the different states.

87. *California.*— Fuller *v.* Hutchings, 10 Cal. 523, 70 Am. Dec. 746; Haight *v.* Joyce, 2 Cal. 64, 56 Am. Dec. 311.

Colorado.— Boughner *v.* Meyer, 5 Colo. 71, 40 Am. Rep. 139; Sullivan *v.* German Nat. Bank, 18 Colo. App. 99, 70 Pac. 162.

Illinois.— Biegler *v.* Merchants' L. & T. Co., 164 Ill. 197, 45 N. E. 512 [*affirming* 62 Ill. App. 560]; Eagle *v.* Kohn, 84 Ill. 292; Shirley *v.* Howard, 53 Ill. 455; Adams *v.* Wooldridge, 4 Ill. 255.

Indiana.— Sondheim *v.* Gilbert, 117 Ind. 71, 18 N. E. 687, 10 Am. St. Rep. 23, 5 L. R. A. 432.

Missouri.— Crawford *v.* Spencer, 92 Mo. 498, 4 S. W. 713, 1 Am. St. Rep. 745; Third Nat. Bank *v.* Tinsley, 11 Mo. App. 498.

Pennsylvania.— Northern Nat. Bank *v.* Arnold, 187 Pa. St. 356, 40 Atl. 794.

Texas.— Cavenah *v.* Somervill, Dall. 532.

United States.— Pearce *v.* Rice, 142 U. S. 28, 12 S. Ct. 130, 35 L. ed. 925; St. Louis Third Nat. Bank *v.* Harrison, 10 Fed. 243, 3 McCrary 316; Hatch *v.* Burroughs, 11 Fed. Cas. No. 6,203, 1 Woods 439.

England.— Edwards *v.* Dick, 4 B. & Ald. 212, 23 Rev. Rep. 255, 6 E. C. L. 455; Day *v.* Stuart, 6 Bing. 109, 3 M. & P. 334, 19 E. C. L. 57; Fitch *v.* Jones, 5 E. & B. 238, 1 Jur. N. S. 854, 24 L. J. Q. B. 293, 3 Wkly. Rep. 507, 85 E. C. L. 238; Hawker *v.* Hallewell, 2 Jur. N. S. 794, 25 L. J. Ch. 558, 4 Wkly. Rep. 631; Lilley *v.* Rankin, 56 L. J. Q. B. 248, 55 L. T. Rep. N. S. 814.

See 24 Cent. Dig. tit. "Gaming," § 44. And see COMMERCIAL PAPER, 8 Cyc. 45 *et seq.*

A note in renewal of a former note of the maker for money won at cards, given to one who is indorsee of such former note for value and without notice, is not affected by the gaming consideration. Calvert *v.* Williams, 64 N. C. 168. And see Wooldridge *v.* Cates, 2 J. J. Marsh. (Ky.) 221.

A bond founded on a gaming consideration is void in the hands of an assignee for value, unless he took it without notice and on the promise of the obligor to pay it. Pettit *v.* Jennings, 2 Rob. (Va.) 676. So where an infant lost at gaming, and after coming of age gave his bond for the debt and assured a prospective assignee that there was no defense to it, and that he would pay it, it will be enforced. Buckner *v.* Smith, 1 Wash. (Va.) 296, 1 Am. Dec. 463.

88. *Alabama.*— Whitlock *v.* Heard, 16 Ala. 336; Whitlock *v.* Stewart, 15 Ala. 601, 13 Ala. 790; Ivey *v.* Nicks, 14 Ala. 564; Foreman *v.* Hardwick, 10 Ala. 316; Roberts *v.* Taylor, 7 Port. 251.

Illinois.— Pearce *v.* Foote, 113 Ill. 228, 55 Am. Rep. 414; Commercial Nat. Bank *v.* Spaids, 8 Ill. App. 493.

Kentucky.— Reed *v.* Reeves, 13 Bush 447.

Missouri.— Wiliams *v.* Wall, 60 Mo. 318.

North Dakota.— Drinkall *v.* Movius State Bank, 11 N. D. 10, 88 N. W. 724, 95 Am. St. Rep. 693, 57 L. R. A. 341, holding that the rule that courts of law and equity will leave the parties to prohibited transactions where their lawful acts have placed them, so far as

finds its way into the hands of an innocent holder for value before maturity, it is too late to set up the illegality of the indorsement and transfer.[89]

(III) *JUDGMENTS.* By statute in some jurisdictions even judgments rendered on securities given for a gambling consideration are void.[90]

c. Conveyances For Gambling Consideration — (I) *REAL ESTATE.* A conveyance of land made on a gaming consideration is void;[91] but this rule is subject to some exceptions in favor of a *bona fide* purchaser.[92] Under some of the statutes a deed or mortgage made on a wagering consideration vests no title in the grantee or mortgagee, but works a forfeiture to the persons who would have been the heirs of the grantor or mortgagor had he died immediately upon the execution of the instrument.[93]

(II) *CHATTELS.* A bill of sale of goods lost at gaming is absolutely void,[94]

the same are executed, does not authorize an indorsee who has procured the indorsement of a negotiable instrument in a gambling transaction to rely on the indorsement so procured, either against the indorser or the maker of the instrument; and that neither will prevent the payee of the instrument which has been so indorsed from enforcing payment against the maker.

Pennsylvania.— Dempsey *v.* Harm, 20 Wkly. Notes Cas. 266.

Wyoming.— Kinney *v.* Hynds, 7 Wyo. 22, 49 Pac. 403, 52 Pac. 1081.

United States.— Pearce *v.* Rice, 142 U. S. 28, 12 S. Ct. 130, 35 L. ed. 925; Kansas Sav. Bank *v.* National Bank of Commerce, 38 Fed. 800; McGunnigle *v.* Simmes, 16 Fed. Cas. No. 8,817, 1 Hayw. & H. 285.

See 24 Cent Dig. tit. "Gaming," § 41.

See, however, Poorman *v.* Mills, 39 Cal. 345, 2 Am. Rep. 451, holding that the fact that a negotiable instrument is assigned by the payee to the proprietor of a gaming-house, in the rooms devoted to gaming, the payee receiving chips therefor, will not of itself make the indorsement void, but it must further appear that the consideration of the assignment was money lost by the payee, and won by the indorsee or some other person, at some prohibited game.

Rights of maker.— The maker of a note need not pay it to one who won it of the payee at cards, as the illegal consideration gives him no title. Holmann *v.* Ringo, 36 Miss. 690. *Contra,* Lee *v.* Ware, 1 Hill (S. C.) 313.

89. Tindall *v.* Childress, 2 Stew. & P. (Ala.) 250.

It is otherwise if it has passed into the hands of a transferee without value (Pearce *v.* Foote, 113 Ill. 228, 55 Am. Rep. 414), or to a person who was cognizant of the facts (Williams *v.* Wall, 60 Mo. 318); and in some states the statute declares the paper void in the hands of all holders (Chapin *v.* Dake, 57 Ill. 295, 11 Am. Rep. 15).

90. Butler *v.* Nohe, 98 Ill. App. 624; Gough *v.* Pratt, 9 Md. 526; Campbell *v.* New Orleans Nat. Bank, 74 Miss. 526, 21 So. 400, 23 So. 25. See, however, Holland *v.* Pirtle, 10 Humphr. (Tenn.) 167, holding that the statute making void all contracts founded on a gaming consideration does not render invalid a judgment rendered on such contract, where the party failed to make defense.

An action upon the judgment may be defended by showing the illegality of the original transaction. Campbell *v.* New Orleans Nat. Bank, 74 Miss. 526, 21 So. 400, 23 So. 25.

No execution can be issued on such a judgment. Butler *v.* Nohe, 98 Ill. App. 624.

The statute applies only to judgments by confession in some states. Wilkerson *v.* Whitney, 7 Mo. 295; Teague *v.* Perry, 64 N. C. 39; Welford *v.* Gilham, 29 Fed. Cas. No. 17,376, 2 Cranch C. C. 556; Lane *v.* Chapman, 11 A. & E. 966, 39 E. C. L. 507 [*affirmed* in 11 A. & E. 980, 1 G. & D. 523, 10 L. J. Exch. 543, 39 E. C. L. 514].

Estoppel of obligor.— If a man be induced by the obligor to purchase a bond given for a gaming consideration, not knowing the circumstances, equity will not relieve against a judgment obtained upon it. Hoomes *v.* Smock, 1 Wash. (Va.) 389.

Rights of assignee of judgment.— A judgment entered on a bond with warrant of attorney, originally given to cover margins in a stock-gambling transaction, will not be enforced in the hands of an assignee. Griffiths' Appeal, 16 Wkly. Notes Cas. (Pa.) 249.

91. Trammell *v.* Gordon, 11 Ala. 656; Thomas *v.* Cronise, 16 Ohio 54; Johnson *v.* Cooper, 2 Yerg. (Tenn.) 524, 24 Am. Dec. 502; Barnard *v.* Backhaus, 52 Wis. 593, 6 N. W. 252, 9 N. W. 595.

A bond for the conveyance of land given on a gaming consideration imposes no duty on the obligor. Chiles *v.* Coleman, 2 A. K. Marsh. (Ky.) 296, 12 Am. Dec. 396.

Damages for refusal to assign warrant.— The transferee of the winner of a land warrant cannot recover damages from the loser for his refusal to assign the warrant. Blair *v.* Brabson, 3 Hayw. (Tenn.) 18.

92. Fenno *v.* Sayre, 3 Ala. 458; Chiles *v.* Coleman, 2 A. K. Marsh. (Ky.) 296, 12 Am. Dec. 396.

A trust deed to secure a note given for a gambling consideration is void, although the note has passed into the hands of an innocent holder for value. International Bank *v.* Vankirk, 39 Ill. App. 23.

93. Boatright *v.* Porter, 32 Ga. 130; Reed *v.* Harrod, Ky. Dec. 164; Luetchford *v.* Lord, 132 N. Y. 465, 30 N. E. 859 [*reversing* 57 Hun 572, 11 N. Y. Suppl. 597]. And see Bond *v.* Swearingen, 1 Ohio 395.

94. Willis *v.* Hockaday, 1 Speers (S. C.) 379, 40 Am. Dec. 606.

and its assignment without actual delivery of the goods is no consideration for a note or check;[95] but the loser of goods at gaming cannot recover them or their value from a *bona fide* purchaser to whom possession has been delivered by the winner.[96]

d. Loans — (I) *For Gambling Purposes* — (A) *General Rules.* By the weight of authority money loaned for the express purpose of gaming in a manner prohibited by law cannot be recovered back.[97] But according to another line of decisions the mere knowledge of the lender that the borrower intends to use the money for gambling will not prevent its recovery back;[98] in order to defeat a recovery it must appear that the lender did something to aid the borrower in carrying into effect his unlawful design, in addition to loaning the money, in which case the lender cannot recover.[99] Whatever the rule may be the lender's

95. Willis *v.* Hockaday, 1 Speers (S. C.) 379, 40 Am. Dec. 606, holding, however, that if possession of the goods is actually delivered and there is a new contract untainted by gaming, it is a good consideration for a note or check.

96. Willis *v.* Hockaday, 1 Speers (S. C.) 379, 40 Am. Dec. 606.

97. *Colorado.*— Longnecker *v.* Shields, 1 Colo. App. 264, 28 Pac. 659, holding, however, that money loaned for the purpose of starting a faro-bank is not within Gen. St. (1883) § 850, declaring void all promises to pay gaming losses or money "advanced at the time or place of such play to any persons so gaming or betting."

Illinois.— Shaffner *v.* Pinchback, 133 Ill. 410, 24 N. E. 867, 23 Am. St. Rep. 624 [*affirming* 30 Ill. App. 355].

Kentucky.—Alfriend *v.* Hughes, 4 Bush 40. And see Levy *v.* Perkins, 4 Bibb 505, holding that the statute prohibiting gaming extends to property loaned or advanced to be bet on a game as well as to money, and renders the promise or contract founded thereon void.

Massachusetts.—White *v.* Buss, 3 Cush. 448.

Michigan.— Raymond *v.* Leavitt, 46 Mich. 447, 9 N. W. 525, 41 Am. Rep. 170.

Mississippi.— Terrall *v.* Adams, 23 Miss. 570.

Missouri.— Williamson *v.* Baley, 78 Mo. 636.

New Hampshire.—Cutler *v.* Welsh, 43 N. H. 497.

New York.—Ransom *v.* Vermilyea, 11 N. Y. St. 683; Ruckmann *v.* Bryan, 3 Den. 340; Peck *v.* Briggs, 3 Den. 107.

South Carolina.— Mordecai *v.* Dawkins, 9 Rich. 262 [*overruling* Carsan *v.* Rambert, 2 Bay 560].

Tennessee.— Bates *v.* Watson, 1 Sneed 376. However, in order to render void a loan made at the time and place of an unlawful gaming, it must appear to have been made to some player or better, and in some way connected with the illegal act. Smith *v.* Harris, 3 Sneed 453.

Virginia.— Machir *v.* Moore, 2 Gratt. 257.

England.— Carney *v.* Plimmer, [1893] 1 Q. B. 634, 61 J. P. 324, 66 L. J. Q. B. 415, 76 L. T. Rep. N. S. 374, 45 Wkly. Rep. 385; Cannan *v.* Bryce, 3 B. & Ald. 179, 22 Rev. Rep. 342, 5 E. C. L. 111; De Begins *v.* Armistead, 10 Bing. 107, 2 L. J. C. P. 214, 3 Moore & S. 511, 25 E. C. L. 58; Gas Light, etc., Co. *v.* Turner, 5 Bing. N. Cas. 666, 9 L. J. C. P. 75, 7 Scott 779, 35 E. C. L. 357; McKinnell *v.* Robinson, 1 H. & H. 146, 2 Jur. 595, 7 L. J. Exch. 149, 3 M. & W. 434; Langton *v.* Hughes, 1 M. & S. 593.

See 24 Cent. Dig. tit. "Gaming," § 36 *et seq.* See also CONTRACTS, 9 Cyc. 574.

Rights of borrower's creditors.— Although the statute will not authorize the pursuit by a creditor of funds paid in good faith by his debtor to cancel a debt of money loaned him to gamble with, yet where the lender lent him the money in furtherance of a combination with others to obtain his property, the creditor can subject notes transferred to such lender to the payment of his debt. Chiles *v.* Anderson, 3 B. Mon. (Ky.) 30.

98. *California.*— Corbin *v.* Wachhorst, 73 Cal. 411, 15 Pac. 22.

Georgia.— Singleton *v.* Monticello Bank, 113 Ga. 527, 38 S. E. 947.

Indiana.— Plank *v.* Jackson, 128 Ind. 424, 26 N. E. 568, 27 N. E. 1117; Jackson *v.* Goshen City Nat. Bank, 125 Ind. 347, 25 N. E. 430, 9 L. R. A. 657.

Maine.— Tyler *v.* Carlisle, 79 Me. 210, 9 Atl. 356, 1 Am. St. Rep. 301.

Pennsylvania.—Waugh *v.* Beck, 114 Pa. St. 422, 6 Atl. 923, 60 Am. Rep. 354.

Vermont.— Gaylord *v.* Soragen, 32 Vt. 110, 76 Am. Dec. 154.

Wyoming.— Kinney *v.* Hynds, 7 Wyo. 22, 49 Pac. 403, 52 Pac. 1081.

See 24 Cent. Dig. tit. "Gaming," § 36 *et seq.*

99. *Georgia.*—Singleton *v.* Monticello Bank, 113 Ga. 527, 38 S. E. 947.

Indiana.— Plank *v.* Jackson, 128 Ind. 424, 26 N. E. 568, 27 N. E. 1117; Jackson *v.* Goshen City Nat. Bank, 125 Ind. 347, 25 N. E. 430, 9 L. R. A. 657.

Mississippi.— Virden *v.* Murphy, 78 Miss. 515, 28 So. 851, holding that where money is advanced to the operator of a gambling bucket-shop business under a contract that the person so advancing the money and who knows the nature of the business shall be repaid from the profits of such business, he cannot recover the sum so advanced.

Ohio.— Corre *v.* Rogers, 9 Ohio Cir. Dec. 854, 10 Ohio Cir. Ct. 346, 6 Ohio Cir. Dec. 602.

ignorance of the borrower's gambling intent will relieve the contract of this particular vice.[1]

(B) *Securities Given For Loan.* In those jurisdictions where money loaned to be used in gambling cannot be recovered,[2] securities given therefor are void.[3]

(II) *To Pay Losses*—(A) *General Rules.* Ordinarily money loaned to the loser to pay his losses may be recovered back, although the lender knew for what purpose the money was to be used;[4] but in some jurisdictions this is prohibited by statute.[5]

(B) *Money Paid at Loser's Request.* Moneys paid out at the request of the loser in discharge of a gambling debt may ordinarily be recovered by the payer,[6]

Pennsylvania.— Waugh *v.* Beck, 114 Pa. St. 422, 6 Atl. 923, 60 Am. Rep. 354.

Vermont.— Gaylord *v.* Soragen, 32 Vt. 110, 76 Am. Dec. 154.

See 24 Cent. Dig. tit. "Gaming," § 37.

However, even if the lender participates in the purposes of the borrower, he may recover the money of the borrower, if demanded before it has been actually used. Tyler *v.* Carlisle, 79 Me. 210, 9 Atl. 356, 1 Am. St. Rep. 301.

1. Armstrong *v.* American Exch. Nat. Bank, 133 U. S. 433, 10 S. Ct. 450, 33 L. ed. 747.

2. See *supra*, IV, A, 4, d, (I), (A).

3. *Kentucky.*— Colyer *v.* Ransom, 4 Bibb 552.

Maryland.— Spies *v.* Rosenstock, 87 Md. 14, 39 Atl. 268; Emerson *v.* Townsend, 73 Md. 224, 20 Atl. 284.

New Hampshire.— Cutler *v.* Welsh, 43 N. H. 497.

Texas.— Jones *v.* Akin, (Civ. App. 1904) 80 S. W. 385.

England.— Hay *v.* Ayling, 16 Q. B. 423, 15 Jur. 605, 20 L. J. Q. B. 171, 3 Eng. L. & Eq. 416, 71 E. C. L. 423.

See 24 Cent. Dig. tit. "Gaming," § 36 *et seq.*

See also Lee *v.* Boyd, 86 Ala. 283, 5 So. 489 (holding that where one transfers certain bonds in his possession but of which he is not the owner to obtain money for the purpose of buying cotton futures, and the transferee advances the money with knowledge of the purpose for which it is to be used, he cannot hold the bonds as against the real owner, although he has no notice of the defect in the title of his assignor); Plank *v.* Jackson, 128 Ind. 424, 26 N. E. 568, 27 N. E. 1117 (holding that a note given for money borrowed to be used by the parties jointly in gambling contracts, and in paying losses sustained on account of such contracts is not enforceable); Marden *v.* Phillips, 103 Fed. 196 (holding that a bill of sale intended as security for a loan of money to be used in dealing in differences in the profits of which the vendee is to participate is invalid as against the trustee in bankruptcy of the seller).

This is not the rule in all jurisdictions. Corbin *v.* Wachhorst, 73 Cal. 411, 15 Pac. 22. And see *supra*, IV, A, 4, d, (I), (A).

A note given in renewal of one made to secure a loan of money to be used in gaming is also void. Cutler *v.* Welsh, 43 N. H. 497.

A bona fide holder for value may collect the note in some states. Higginbotham *v.* McGready, 183 Mo. 96, 81 S. W. 883, 105 Am. St. Rep. 461.

4. *Illinois.*— Charleston State Bank *v.* Edman, 99 Ill. App. 235.

Kentucky.— English *v.* Young, 10 B. Mon. 141; Jones *v.* Sevier, 1 Litt. 50, 13 Am. Dec. 218.

Massachusetts.— Wyman *v.* Fiske, 3 Allen 238, 80 Am. Dec. 66.

Missouri.— Searles *v.* Lum, 89 Mo. App. 235.

North Carolina.— Ballard *v.* Green, 118 N. C. 390, 24 S. E. 777.

Pennsylvania.— Folwell *v.* Stuart, 4 Pa. Co. Ct. 80.

Tennessee.— See Coffee *v.* Ruffin, 4 Coldw. 487.

Virginia.— Krake *v.* Alexander, 86 Va. 206, 9 S. E. 991.

West Virginia.— Hurlburt *v.* Straub, 54 W. Va. 303, 46 S. E. 163.

England.— *Ex. p.* Pyke, 8 Ch. D. 754, 47 L. J. Bankr. 100, 38 L. T. Rep. N. S. 923, 26 Wkly. Rep. 806.

See 24 Cent. Dig. tit. "Gaming," § 47.

Contra.— Sampson *v.* Whitney, 27 La. Ann. 294.

Effect of participation in gaming transaction. — Where plaintiff in an action to recover a loan made to discharge a gambling contract was directly connected with the transaction, he cannot recover, no matter in what form the loan was made. Jacoby *v.* Heidelberg, 33 Misc. (N. Y.) 111, 67 N. Y. Suppl. 146.

5. See the statutes of the different states. And see Scollans *v.* Flynn, 120 Mass. 271; Schoenberg *v.* Adler, 105 Wis. 645, 81 N. W. 1055.

6. Greathouse *v.* Throckmorton, 7 J. J. Marsh. (Ky.) 16; Williams *v.* Carr, 80 N. C. 294; Mooring *v.* Stanton, 3 N. C. 49; Hussey *v.* Crickett, 3 Campb. 168 (where the winner of a dinner settled the score and was permitted to recover the amount from the loser); Rosewarne *v.* Billing, 15 C. B. N. S. 316, 10 Jur. N. S. 496, 33 L. J. C. P. 55, 9 L. T. Rep. N. S. 441, 12 Wkly. Rep. 104, 109 E. C. L. 316; Jessop *v.* Lutwyche, 2 C. L. R. 359, 10 Exch. 614, 24 L. J. Exch. 65. And see Stewart *v.* Miller, 3 Tex. App. Civ. Cas. § 292, holding that, although the law will not imply an assumpsit by a losing gambler to reimburse one who advances the amount lost to the winner, yet it will enforce the gambler's express promise to reimburse for such advancement when made at his request. See, however, Central Trust, etc., Co. *v.* Respass,

and securities given by the loser to the payer are accordingly enforceable by the latter.[7]

B. Rights and Liabilities Under Gambling Transactions*— 1. At Law — a. Under Gambling Transactions Generally — (I) *In General.* The rights of parties to gaming contracts which are allowed at common law or by statute depend upon the performance or non-performance of the terms and conditions of the contract,[8] the happening or non-happening of the contingency upon which the bet or wager is made,[9] compliance with the rules of law prescribed for such contracts,[10] and upon the customs peculiar thereto.[11]

(II) *Cheating and Fraud.* If the event on which money is staked is con-

112 Ky. 606, 66 S. W. 421, 23 Ky. L. Rep. 1905, 99 Am. St. Rep. 317, 56 L. R. A. 479, holding that a partner in the business of racing horses is not entitled, in a settlement, to credit by money lost and paid by him on a bet made for the firm.

Novation.— Where defendant, being indebted to one who was indebted to plaintiff, requested plaintiff to pay his creditor for him, which plaintiff did by discharging so much of the debt owing to him as would equal defendant's debt to the third person, and plaintiff sued defendant for money paid to his use, the fact that the debts were both debts for money won at faro is no defense, it being no concern of plaintiff's what sort of a debt it was that defendant wanted paid, and no concern of defendant's what sort of funds plaintiff paid it in. Greathouse *v.* Throckmorton, 7 J. J. Marsh. (Ky.) 16.

Operation of statute.— In Knight *v.* Lee, [1893] 1 Q. B. 41, 57 J. P. 117, 62 L. J. Q. B. 28, 67 L. T. Rep. N. S. 688, 5 Reports 54, 41 Wkly. Rep. 125, it was held that the Gaming Act, passed May 20, 1892, was not retrospective, and therefore no bar to an action to recover money invested by a turf commission agent for his principal prior to that date. But see Cohen *v.* Kittell, 22 Q. B. D. 680, 53 J. P. 469, 58 L. J. Q. B. 241, 60 L. T. Rep. N. S. 932, 37 Wkly. Rep. 400.

A request to pay may be inferred in England from an authority to bet as the loser's agent (Bubb *v.* Yelverton, L. R. 9 Eq. 471, 22 L. T. Rep. N. S. 258, 39 L. J. Ch. 428, 18 Wkly. Rep. 512; Beeston *v.* Beeston, 1 Exch. Div. 13, 45 L. J. Ch. 230, 33 L. T. Rep. N. S. 700, 24 Wkly. Rep. 96; Oldham *v.* Ramsden, 44 L. J. C. P. 309, 32 L. T. Rep. N. S. 825; Read *v.* Anderson, 48 L. T. Rep. N. S. 74; Lynch *v.* Goodwin, 26 Sol. J. 509), unless the agent lays illegal bets (Clayton *v.* Dilly, 4 Taunt. 165).

7. *Alabama.*— White *v.* Yarbrough, 16 Ala. 109, promissory note.

Illinois.— Brooks *v.* Brady, 53 Ill. App. 155, promissory note.

Massachusetts.— Wyman *v.* Fiske, 3 Allen 238, 80 Am. Dec. 66, promissory note.

Texas.— Boggess *v.* Lilly, 18 Tex. 200, promissory note.

England.— Oulds *v.* Harrison, 3 C. L. R. 353, 10 Exch. 572, 24 L. J. Exch. 66, 3 Wkly. Rep. 160, bill of exchange.

See 24 Cent. Dig. tit. "Gaming," § 48.

8. Hunter *v.* Parker, 3 N. C. 178, holding that the failure of one party to give a bond for his bet at a specified time as agreed entitles the other party to declare the bet off.

Rights and liabilities under horse-racing contracts see Critcher *v.* Pannell, 5 N. C. 22; Hunter *v.* Jackson, 4 N. C. 21; Farrell *v.* Patterson, 3 N. C. 362; Hunter *v.* Bynum, 3 N. C. 354; Wilson *v.* Lorane, 15 Tex. 492, holding that where one party does not appear and the other appears and runs his horse around the track, he is entitled to the forfeit.

Accidental or overpowering force does not excuse performance of an aleatory contract. Moore *v.* Johnson, 8 La. Ann. 488; Henderson *v.* State, 1 Mart. N. S. (La.) 639 (holding that where two persons agree to run their horses, and one horse dies before the race, his owner is liable for the amount bet); McKenzie *v.* Ashe, 2 N. C. 502, 3 N. C. 161 (lameness and death of horse).

9. Hizer *v.* State, 12 Ind. 330 (holding that the contingency of an election bet is determined when the popular vote is cast, although perfect evidence of the result as shown by the official count cannot be had until later); Montillet *v.* Shiff, 4 Mart. N. S. (La.) 83 (holding that where a bet is made on an election to be determined by the returns of all the parishes in the state and two parishes make no return the bet is drawn).

A decision of the judges of a horse-race in the absence of fraud should be treated as final. Sweeney *v.* Snow, 1 Tex. App. Civ. Cas. § 728.

10. Arrington *v.* Culpepper, 5 N. C. 297, holding also that the loser is not precluded from asserting that the contract is invalid for not being in writing, as required by statute by the fact that he directed the stakeholder to deliver his obligation to the winner.

Necessity of writing.— Under an old statute in North Carolina a horse-racing contract was required to be in writing, and parol evidence would not be admitted to vary it. Arrington *v.* Culpepper, 5 N. C. 297; Moore *v.* Parker, 5 N. C. 37; Critcher *v.* Pannell, 5 N. C. 22; Cotton *v.* Beasley, 4 N. C. 19, 6 N. C. 259; Brown *v.* Brady, 4 N. C. 12, 6 N. C. 117; Farrell *v.* Patteson, 3 N. C. 362; Jackson *v.* Anderson, 3 N. C. 355, 5 N. C. 137; Hunter *v.* Bynum, 3 N. C. 354; Shark *v.* Murphy, 1 N. C. 568.

11. Tinnen *v.* Allison, 4 N. C. 205, holding that when nothing is said as to the time of payment, money bet on a horse-race is payable on the day of the race.

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ducted in a fraudulent manner, the winner acquires no rights thereby and the loser loses none.[12]

(III) *Right to Recover Back Money or Property* — (A) *Before Wager Decided.* It is well established that either party to a gaming contract or transaction may repudiate the same and recover back money or property deposited thereunder, either from the opposite party or from the stakeholder, at any time before the happening of the event upon which the wager was to be decided,[13] or where by the happening of other events the wager can never be decided.[14] A depositor's creditors cannot rescind the wager without his assent, unless he be insolvent or in embarrassed circumstances.[15]

(B) *After Wager Decided* — (1) From Opposite Party — (a) By Winner. The winner of an illegal wager can maintain no action against the loser to recover the amount won.[16] So if a person loses specific property at gaming, and afterward peaceably regains possession of it, he may retain it against the winner.[17]

12. Warden *v.* Plummer, 49 N. C. 524 (where A at a game of cards unfairly played won a judgment from B, and took from defendants in the judgment a bond for the amount payable to himself, on which he brought suit, to which the statute against gaming was pleaded, and it was held that he could not recover); Bass *v.* Peevey, 22 Tex. 295 (holding that in a suit to enforce a bet on a horse-race, the loser can defend if there was fraud in running the race, although plaintiff was ignorant of the fraud); Rector *v.* Hudson, 20 Tex. 234 (holding that one who wins a bond by fraud practised at a horse-race cannot recover thereon against the loser, he being the obligor).

The assignee of a note won at play from the payee by fraud and cheating, after being notified of the fact, cannot recover thereon where the maker has paid the amount to the payee. Bledsoe *v.* Adams, 2 A. K. Marsh. (Ky.) 45.

Amount of recovery see *infra*, IV, B, 1, a, (III), (B), (5), (a).

Right of loser to recover back money or property see *infra*, IV, B, 1, a, (III), (B), (1), (b), aa.

13. *Alabama.*— Shackleford *v.* Ward, 3 Ala. 37, 36 Am. Dec. 435; Wood *v.* Duncan, 9 Port. 227.

Arkansas.— Jeffrey *v.* Ficklin, 3 Ark. 227, 36 Am. Dec. 456.

California.— Wise *v.* Rose, 110 Cal. 159, 42 Pac. 569; Gridley *v.* Dorn, 57 Cal. 78, 40 Am. Rep. 110; Johnston *v.* Russell, 37 Cal. 670; Hardy *v.* Hunt, 11 Cal. 343, 70 Am. Dec. 787.

Delaware.— Jacobs *v.* Walton, 1 Harr. 496.

Georgia.— Alford *v.* Burke, 21 Ga. 46, 68 Am. Dec. 449.

Illinois.— Stevens *v.* Sharp, 26 Ill. 404; Brewer *v.* Gobble, 32 Ill. App. 115, so holding, although the stakeholder has turned the property or money over to the other party.

Indiana.— Taylor *v.* Moore, 20 Ind. App. 654, 50 N. E. 770.

Kansas.— Cleveland *v.* Wolff, 7 Kan. 184.

Missouri.— Humphreys *v.* Magee, 13 Mo. 435; Hickerson *v.* Benson, 8 Mo. 8, 40 Am. Dec. 115, 8 Mo. 11, 40 Am. Dec. 118; Cutshall *v.* McGowan, 98 Mo. App. 702, 73 S. W. 933.

New York.— Like *v.* Thompson, 9 Barb. 315; Liebman *v.* Miller, 20 Misc. 705, 46 N. Y. Suppl. 532.

Oklahoma.— Dunn *v.* Drummond, 4 Okla. 461, 51 Pac. 656.

Oregon.— Bernard *v.* Taylor, 23 Oreg. 416, 31 Pac. 968, 37 Am. St. Rep. 693, 18 L. R. A. 859; Willis *v.* Hoover, 9 Oreg. 418, money deposited with opposite party.

Vermont.— Tarleton *v.* Baker, 18 Vt. 9, 44 Am. Dec. 358.

United States.— Wright *v.* Stewart, 130 Fed. 905.

England.— Aubert *v.* Walsh, 3 Taunt. 277, 12 Rev. Rep. 651.

Canada.— Battersby *v.* Odell, 23 U. C. Q. B. 482.

See also Contracts, 9 Cyc. 554 note 78.

In Louisiana, betting on elections being a criminal offense, no action will lie to recover from a stakeholder an amount deposited with him as a bet on an election. Davis *v.* Holbrook, 1 La. Ann. 176.

In New Jersey, under a statute (act 1846) making a stakeholder a *particeps criminis*, it has been held that one who has deposited money with a stakeholder cannot recover it, although the event has not occurred. Sutphin *v.* Crozer, 32 N. J. L. 462 [*reversing* 30 N. J. L. 257]. See Hensler *v.* Jennings, 62 N. J. L. 209, 41 Atl. 918.

14. *Georgia.*— Alford *v.* Burke, 21 Ga. 46, 68 Am. Dec. 449.

Illinois.— Parmelee *v.* Rogers, 26 Ill. 56.

Louisiana.— Montillet *v.* Shiff, 4 Mart. N. S. 83, holding that where from accidents not within the control of either party an aleatory contract can never be determined, it stands a drawn bet, and either party has a right to withdraw the stake.

Ohio.— Barrett *v.* Neill, Wright 472, where parties abandon horse-race.

Pennsylvania.— Conklin *v.* Conway, 18 Pa. St. 329.

Texas.— Shain *v.* Searcy, 20 Tex. 122 (dead heat); Jackson *v.* Nelson, (Civ. App. 1897) 39 S. W. 315 (drawn race).

15. Clark *v.* Gibson, 12 N. H. 386.

16. Johnston *v.* Russell, 37 Cal. 670; Ball *v.* Gilbert, 12 Metc. (Mass.) 397.

17. Stanford *v.* Howard, 103 Tenn. 24, 52 S. W. 140, 76 Am. St. Rep. 635; Garret *v.* Vaughan, 1 Baxt. (Tenn.) 113; Collomb *v.*

(b) By Loser — aa. *At Common Law.* At common law the parties to a gaming transaction stand *in pari delicto*, and money or property lost and paid over by the loser cannot be recovered from the winner,[18] unless it was unfairly turned over to the winner after notice to the stakeholder not to pay it over and notice to the winner not to receive it,[19] or unless it was won by cheating and paid by the loser without knowledge of the fraud.[20]

bb. *By Statute*[21] — (aa) In General. By statute in some jurisdictions the amount of property lost at any one time or sitting[22] may be recovered from the winner[23]

Taylor, 9 Humphr. (Tenn.) 689; Neely *v.* Lyon, 10 Yerg. (Tenn.) 473; Kegler *v.* Miles, Mart. & Y. (Tenn.) 426, 17 Am. Dec. 819; Hutchison *v.* Edwards, Mart. & Y. (Tenn.) 262.

18. *Alabama.*—Tindall *v.* Childress, 2 Stew. & P. 250. See, however, Trammell *v.* Gordon, 11 Ala. 656, where it is said that land lost on a bet may be recovered by an appropriate action.

California.— Gridley *v.* Dorn, 57 Cal. 78, 40 Am. Rep. 110; Carrier *v.* Brannan, 3 Cal. 328.

Georgia.— See Higdon *v.* Heard, 14 Ga. 255.

Illinois.— Gregory *v.* King, 58 Ill. 169, 11 Am. Rep. 56.

Indiana.— Chalfant *v.* Payton, 91 Ind. 202, 46 Am. Rep. 586; Davis *v.* Leonard, 69 Ind. 213; Morris *v.* Philpot, 11 Ind. 447; Frybarger *v.* Simpson, 11 Ind. 59.

Iowa.— Thrift *v.* Redman, 13 Iowa 25.

Kentucky.— Gill *v.* Webb, 2 T. B. Mon. 4; Downs *v.* Quarles, Litt. Sel. Cas. 489, 12 Am. Dec. 337; Jeff *v.* Wade, 4 Bibb 322; Castleman *v.* Yocum, Ky. Dec. 261.

Louisiana.— See Bingaman *v.* Cocks, 16 La. Ann. 249.

Massachusetts.— Patterson *v.* Clark, 126 Mass. 531; Ball *v.* Gilbert, 12 Metc. 397; Babcock *v.* Thompson, 3 Pick. 446, 15 Am. Dec. 235.

New Hampshire.—Welsh *v.* Cutler, 44 N. H. 561; Perkins *v.* Eaton, 3 N. H. 152.

New York.—Weyburn *v.* White, 22 Barb. 82; Rockwood *v.* Oakfield, 2 N. Y. St. 331; McCullum *v.* Gourlay, 8 Johns. 147.

Pennsylvania.— Frick *v.* Hammond, 3 Pa. L. J. 413.

South Carolina.— Wootan *v.* Livingston, 1 Nott & M. 178. See Whelloch *v.* Bobo, Harp. 421.

Tennessee.— Whiteside *v.* Tabb, Cooke 383. See Allen *v.* Dodd, 4 Humphr. 131, 40 Am. Dec. 632.

Vermont.— West *v.* Holmes, 26 Vt. 530; Danforth *v.* Evans, 16 Vt. 538.

Wyoming.— Kinney *v.* Hynds, 7 Wyo. 22, 49 Pac. 403, 52 Pac. 1081, holding that as there is no statute authorizing the recovery by the loser of money lost at gaming, losses at a licensed game cannot be recovered back.

United States.— Grant *v.* Hamilton, 10 Fed. Cas. No. 5,695, 3 McLean 100; Harding *v.* Walker, 11 Fed. Cas. No. 6,050*a*, Hempst. 53.

England.— Howson *v.* Hancock, 8 T. R. 575.

Canada.— Davis *v.* Hewitt, 9 Ont. 435; Seely *v.* Dalton, 36 N. Brunsw. 442.

See 24 Cent. Dig. tit. "Gaming," § 57.

19. Morris *v.* Philpot, 11 Ind. 447; Love *v.* Harvey, 114 Mass. 80; McKee *v.* Manice, 11 Cush. (Mass.) 357; West *v.* Holmes, 26 Vt. 530. See Frick *v.* Hammond, 3 Pa. L. J. 413.

20. *California.*— Abbe *v.* Marr, 14 Cal. 210, holding that where plaintiff, to recoup a loss on a simulated horse-race, entered into a fraudulent combination to beat his former adversary, and his confederates deceived him and allowed his adversary to win, he has no standing in court to recover the sum lost.

Kansas.— Jones *v.* Inness, 32 Kan. 177, 4 Pac. 95, holding that where one procures a person to drink drugged liquor and then induces him to bet on cards and so obtains his money, the latter may recover the money so lost.

Louisiana.— Criswell *v.* Gaster, 5 Mart. N. S. 129.

New York.— Hodge *v.* Sexton, 1 Hun 576, 4 Thomps. & C. 54, holding that no title passes to property won on a bet by cheating, although delivered by the stakeholder.

North Carolina.— Webb *v.* Fulchire, 25 N. C. 485, 40 Am. Dec. 419.

See 24 Cent. Dig. tit. "Gaming," § 28.

But see Babcock *v.* Thompson, 3 Pick. (Mass.) 446, 15 Am. Dec. 235.

Voluntary payments.— Money won unfairly at gaming and afterward voluntarily paid by the loser with knowledge of the facts cannot be recovered back at common law. Whiteside *v.* Tabb, Cooke (Tenn.) 383.

21. **Amount of recovery** see *infra*, IV, B, 1, a, (III), (B), (5), (a).

22. Jacob *v.* Clark, 115 Ky. 255, 72 S. W. 1095, 24 Ky. L. Rep. 2120; Trumbo *v.* Finley, 18 S. C. 305.

To lose at one sitting is to lose in course of play where the company never parts, although the person may not be actually gaming the whole time, as where a dinner intervenes. Zellers *v.* White, 208 Ill. 518, 70 N. E. 669, 100 Am. St. Rep. 243; Bones *v.* Booth, 2 W. Bl. 1226.

That the loser was winner at a subsequent sitting does not affect his right to recover for money lost at a previous one, nor can his subsequent winnings be set off against his former loss. Johnson *v.* McGregor, 157 Ill. 350, 41 N. E. 558 [*affirming* 55 Ill. App. 530]; Caldwell *v.* Caldwell, 2 Bush (Ky.) 446.

23. Triplett *v.* Seelbach, 91 Ky. 30, 14 S. W. 948, 12 Ky. L. Rep. 661.

A winner within such statutes is one who has won more than he has lost during a "sitting" (Zellers *v.* White, 208 Ill. 518, 70 N. E. 669, 100 Am. St. Rep. 243), and in-

by the loser or his representative or creditor, provided that he sues within the time prescribed by the statute giving him such right,[24] and such statutes have generally been held constitutional.[25] The right of recovery is sometimes limited to particular kinds of property,[26] and to money or property lost in particular kinds of gambling transactions.[27] Thus in some jurisdictions the statute does not apply to money or property lost and paid on an election bet;[28] but the

cludes the proprietor of a gambling house at which the money is lost (Zellers *v.* White, *supra;* Condon *v.* State, 113 Ind. 73, 14 N. E. 705; Triplett *v.* Seelbach, 91 Ky. 30, 14 S. W. 948, 12 Ky. L. Rep. 661, where a certain per cent of a patron's winning is taken by the house), although the money was lost in his absence in play with his employee (Condon *v.* State, *supra*); or in such case the employee may be sued (Zellers *v.* White, *supra*).

Persons liable see also *infra,* IV, B, 1, a, (III), (B), (1), (b), bb, (cc).

24. *Alabama.*— Harris *v.* Brooks, 56 Ala. 388, money lost at roulette.

Georgia.— Quillian *v.* Johnson, 122 Ga. 49, 49 S. E. 801 (holding that suit must be brought within six months); Higdon *v.* Heard, 14 Ga. 255.

Illinois.— Kizer *v.* Walden, 198 Ill. 274, 65 N. E. 116 [*reversing* 96 Ill. App. 593]; Richardson *v.* Kelly, 85 Ill. 491.

Kentucky.— Jacob *v.* Clark, 115 Ky. 255, 72 S. W. 1095, 24 Ky. L. Rep. 2120, 66 S. W. 37; Elias *v.* Gill, 92 Ky. 569, 18 S. W. 454, 13 Ky. L. Rep. 798; Triplett *v.* Seelbach, 91 Ky. 30, 14 S. W. 948, 12 Ky. L. Rep. 661; Boner *v.* Montgomery, 9 B. Mon. 123; Morgan *v.* Lewis, 7 B. Mon. 243.

Massachusetts.— Marks *v.* Metropolitan Stock Exch., 181 Mass. 251, 63 N. E. 410; Grace *v.* McElroy, 1 Allen 563.

Michigan.— Lassen *v.* Karrer, 117 Mich. 512, 76 N. W. 73.

Mississippi.— Campbell *v.* New Orleans Nat. Bank, 74 Miss. 526, 21 So. 400, 23 So. 25; Shinn *v.* Wimberly, (1893) 12 So. 333.

Missouri.— See *v.* Runzi, 105 Mo. App. 435, 79 S. W. 992.

Nebraska.— Bowen *v.* Lynn, 102 N. W. 460.

New Hampshire.— Watts *v.* Lynch, 64 N. H. 96, 5 Atl. 458, money paid on election bet.

New York.— Meech *v.* Stoner, 19 N. Y. 26; Liebman *v.* Miller, 20 Misc. 705, 46 N. Y. Suppl. 532; Rockwood *v.* Oakfield, 2 N. Y. St. 331; Phillips *v.* Sture, 1 Code Rep. 58; Lewis *v.* Miner, 3 Den. 103. See People *v.* Fallon, 152 N. Y. 1, 46 N. E. 302, 37 L. R. A. 419 [*affirming* 4 N. Y. App. Div. 76, 39 N. Y. Suppl. 860]. *Compare* Ransom *v.* Vermilyea, 11 N. Y. St. 683, where amount lost to winner cannot be determined.

Ohio.— Vincent *v.* Taylor, 60 Ohio St. 309, 54 N. E. 264; Veach *v.* Elliott, 1 Ohio St. 139, betting on election.

Oregon.—Meyers *v.* Dillon, 39 Oreg. 581, 65 Pac. 867, 66 Pac. 841.

Tennessee.— Smith *v.* Stephens, 5 Sneed 253; Allen *v.* Todd, 4 Humphr. 131, 40 Am. Dec. 632. See Stanford *v.* Howard, 103 Tenn. 24, 52 S. W. 140, 76 Am. St. Rep. 635. However, Acts (1799), c. 8, § 4, authorizing a recovery of money paid on a gaming contract which was rendered void by the act applies only to money paid without suit. Holland *v.* Pirtle, 10 Humphr. 167.

Vermont.— West *v.* Holmes, 26 Vt. 530.

See 24 Cent. Dig. tit. "Gaming," § 57.

A loser within such statute is one who has lost more than he has won during a sitting. Zellers *v.* White, 208 Ill. 518, 70 N. E. 669, 100 Am. St. Rep. 243.

Where ivory chips or markers issued by the keeper of a gaming establishment as representatives of money deposited with him by the player are won by him, the amount of money they represent may be recovered of him by the loser. Zellers *v.* White, 208 Ill. 518, 70 N. E. 669, 100 Am. St. Rep. 243; Meecher *v.* Stoner, 19 N. Y. 26; Vincent *v.* Taylor, 60 Ohio St. 309, 54 N. E. 264.

Money paid to hire or procure another to make a bet cannot be recovered back under such statute. Johnson *v.* Ferris, 49 N. H. 66.

Persons entitled to recover see also *infra,* IV, B, 1, a, (III), (B), (1), (b), bb, (bb).

Time to sue see also *infra,* IV, C, 3.

25. Cofer *v.* Riseling, 153 Mo. 633, 55 S. W. 235. And see cases cited *supra,* note 24; *infra,* note 37.

26. Dunn *v.* Holloway, 16 N. C. 322; Hudspeth *v.* Wilson, 13 N. C. 372, 21 Am. Dec. 344; Hodges *v.* Pitman, 4 N. C. 276; Stowell *v.* Guthrie, 3 N. C. 297; Anonymous, 3 N. C. 231; Mooring *v.* Stanton, 3 N. C. 49, all holding that N. C. Acts (1788), c. 5, making void "every transfer of slaves or other personal estate to satisfy money won," does not enable a loser at gaming to recover money, notes, or other articles paid to the winner.

27. Bowen *v.* Lynn, (Nebr. 1905) 102 N. W. 460; Merriam *v.* Public Grain, etc., Exch., 1 Pa. Co. Ct. 478 (holding that under the Pennsylvania act of April 22, 1894, allowing a recovery of money lost and paid in gaming, money paid in settlement of differences in stock is not recoverable, although it was a gambling transaction); West *v.* Holmes, 26 Vt. 530 (holding that money lost on an ordinary wager does not come within Vt. Comp. St. c. 110, § 12, providing for the recovery of money lost at a "game or sport").

28. *Indiana.*— Schlosser *v.* Smith, 93 Ind. 83; Woodcock *v.* McQueen, 11 Ind. 14; McHatton *v.* Bates, 4, Blackf. 63.

Kentucky.—Love *v.* Harris, 18 B. Mon. 122; Graves *v.* Ford, 3 B. Mon. 113; Hickman *v.* Littlepage, 2 Dana 344.

Michigan.— Lassen *v.* Karrer, 117 Mich. 512, 76 N. W. 73.

New York.— Liebman *v.* Miller, 20 Misc. 705, 46 N. Y. Suppl. 532.

Pennsylvania.— Speise *v.* McCoy, 6 Watts & S. 485, 40 Am. Dec. 579.

statutes seem to apply in all jurisdictions to money or property lost and paid on horse-races.[29]

(bb) Persons Entitled.[30] The person entitled to recover money or property so lost under the various statutes is ordinarily the actual better or loser of the money or property,[31] or his assignee,[32] personal representative,[33] or creditor;[34] or if any

Tennessee.— Mitchell *v.* Orr, 107 Tenn. 534, 64 S. W. 476; Williams *v.* Talliaferro, 1 Coldw. 37. The earlier cases were to the contrary. Allen *v.* Dodd, 4 Humphr. 431, 40 Am. Dec. 632; Smith *v.* Stephens, 5 Sneed 253.

See 24 Cent. Dig. tit. "Gaming," § 58.

It is otherwise in New Hampshire and Ohio. See *supra*, note 24.

29. *Alabama.*— Samuels *v.* Ainsworth, 13 Ala. 366.

Georgia.— Doyle *v.* McIntyre, 71 Ga. 673; Dyer *v.* Benson, 69 Ga. 609.

Illinois.— Garrison *v.* McGregor, 51 Ill. 473; Tatman *v.* Strader, 23 Ill. 493. See Swigart *v.* People, 154 Ill. 284, 40 N. E. 432.

Indiana.— Little *v.* Brannenburgh, 4 Ind. 35.

Maine.— Ellis *v.* Beale, 18 Me. 337, 36 Am. Dec. 726.

Missouri.— Boynton *v.* Curle, 4 Mo. 599; Shropshire *v.* Glascock, 4 Mo. 536, 31 Am. Dec. 189; Swaggard *v.* Hancock, 25 Mo. App. 596.

New York.— Weyburn *v.* White, 22 Barb. 82. The right of the loser in a bet on a horse-race is not affected by Laws (1895), c. 570, § 17, imposing an exclusive penalty on a person making a bet on certain race-courses. Mendoza *v.* Rose, 44 Misc. 241, 88 N. Y. Suppl. 938.

Ohio.— Pratt *v.* McIntosh, Wright 356.

South Carolina.— Atchison *v.* Gee, 4 McCord 211. See Whelloch *v.* Bobo, Harp. 421.

Tennessee.— Hutchinson *v.* Edwards, Mart. & Y. 262, holding that suit therefor must be brought within ninety days from the time the money was lost, or if within the period the loser peaceably regains possession of it he may retain it against the winner.

United States.— Grant *v.* Hamilton, 10 Fed. Cas. No. 5,695, 3 McLean 100. See Stone *v.* Clay, 61 Fed. 889, 10 C. C. A. 147.

See 24 Cent. Dig. tit. "Gaming," § 59.

30. See also *supra*, IV, B, 1, a, (III), (B), (1), (b), bb, (aa).

Parties plaintiff see *infra*, IV, C, 4, a.

31. Harris *v.* Brooks, 56 Ala. 388 (holding that a husband may recover in his own name money lost by him in gaming, although it belonged to the *corpus* of his wife's statutory separate estate); Faris *v.* Kirtley, 5 Dana (Ky.) 460; Hews *v.* Hollister, 7 N. Y. Leg. Obs. 11; Swaggerty *v.* Stokely, 1 Swan (Tenn.) 38 (holding that under the Tennessee act of 1799 none other than the person who made the bet and to whom the money belonged can maintain an action for the recovery thereof).

That the wager or bet was made by a third person does not preclude the actual owner for whom it was bet from recovering the amount lost from the winner. Doyle *v.* McIntyre, 71 Ga. 673; Ruckman *v.* Pitcher, 20 N. Y. 9; Pulver *v.* Burke, 56 Barb. (N. Y.) 390; Mead *v.* McGraw, 19 Ohio St. 55. So where a person loses money on a horse-race, whether bet by himself or another person for him, he may sue for and recover the same from the winner, notwithstanding the winner may not have known the owner of the money, and may have believed that the person with whom he actually bet was the person to whom the money belonged (Doyle *v.* McIntyre, 71 Ga. 673), and notwithstanding the loser went to the race-course with the intention of betting on the race and suing for a recovery of his money if he lost (Moulton *v.* Westchester Racing Assoc., 42 Misc. (N. Y.) 487, 84 N. Y. Suppl. 871 [*affirmed* in 95 N. Y. App. Div. 276, 88 N. Y. Suppl. 695]). However, a person whose employee embezzles money from him and bets and loses it on his own account cannot recover the money so lost under a statute providing that any person who has lost money gaming in a dram-shop may have an action on the bond of the keeper of the shop for the recovery thereof. Grant *v.* Owens, 55 Ark. 49, 17 S. W. 338. Right of principal to recover money or property lost by agent in gaming see PRINCIPAL AND AGENT.

Any one of several losers at an unlawful game may, after the lapse of six months, sue for and recover the property lost. Morgan *v.* Lewis, 7 B. Mon. (Ky.) 243.

32. Van Peet *v.* Schauble, 68 N. J. L. 638, 54 Atl. 437; Meech *v.* Stoner, 19 N. Y. 26; McDougall *v.* Walling, 48 Barb. (N. Y.) 364; Hendrickson *v.* Beers, 6 Bosw. (N. Y.) 639; Allen *v.* Dunham, 92 Tenn. 257, 21 S. W. 898. See also ASSIGNMENTS, 4 Cyc. 26 note 50. *Contra*, Weyburn *v.* White, 22 Barb. (N. Y.) 82.

33. Faris *v.* Kirtley, 5 Dana (Ky.) 460; Meech *v.* Stoner, 19 N. Y. 26.

34. Jacob *v.* Clark, 115 Ky. 255, 72 S. W. 1095, 24 Ky. L. Rep. 2120, 66 S. W. 37; Triplett *v.* Seelbach, 91 Ky. 30, 14 S. W. 948, 12 Ky. L. Rep. 594; Caldwell *v.* Caldwell, 2 Bush (Ky.) 446; Cofer *v.* Riseling, 153 Mo. 633, 55 S. W. 235, holding also that a creditor of the loser need not obtain judgment against the loser before suing to recover from the winner money lost by him in gambling. But where money bet on election and actually paid over by the loser cannot be recovered back by him, his creditor can occupy no better position; and hence foreign attachment will not reach such a fund. Speise *v.* McCoy, 6 Watts & S. (Pa.) 485, 40 Am. Dec. 579.

Trustees of a fraternal society are creditors within such a statute who may recover money bet by the society's treasurer on the result of an election. Cofer *v.* Riseling, 153 Mo. 633, 55 S. W. 235.

of these fail to sue within the prescribed time, any person is authorized to sue therefor[35] for the use of the loser's wife and children or next of kin;[36] or the state may sue for the benefit of his wife and minor children.[37] Such statutes, however, cannot be invoked by a proprietor or conductor of a gambling machine or game in an original action by him for the purpose of recovering back money won from him,[38] although he may set off the amount won from him against an action by the winner to recover money or property lost by him within the same period.[39] Under some statutes the loser cannot sue in his own right, but it must be for the benefit of his wife and children.[40]

(cc) Persons Liable.[41] Recovery under the statutes must generally be from the person who actually won and received the money or property lost,[42] or his personal representative,[43] or assignee or transferee with notice;[44] but recovery cannot be had from an innocent third person who purchases from the winner.[45] Under some statutes all who participated in the unlawful game are jointly and severally liable for the loss.[46] Where several persons confederate together to win another's money they are jointly and severally liable for the loss.[47] The owners or occupants of property wherein gambling is carried on are liable for the loss under some statutes.[48]

An alleged creditor's suit may be defeated by showing that plaintiffs are not in fact creditors of the loser. Cofer *v.* Riseling, 153 Mo. 633, 55 S. W. 235.

35. Faris *v.* Kirtley, 5 Dana (Ky.) 460.

36. Davis *v.* Orme, 36 Ala. 540, holding that it is no defense to such an action that the husband made the bet through another person, and that defendant was informed and believed that he was dealing with such person, and that he refused to bet with the husband.

37. Ervin *v.* State, 150 Ind. 332, 48 N. E. 249, holding also that such provision is not unconstitutional as depriving the loser of his property without just compensation, since the property is lost to him by his failure to sue within the prescribed time. See also as to constitutionality of these statutes *supra*, IV, B, 1, a, (III), (B), (1), (b), bb, (aa).

38. Brown *v.* Thompson, 14 Bush (Ky.) 538, 29 Am. Rep. 416 (holding that if one who sets up or is interested in setting up a faro-bank loses money to those who bet against the bank, he cannot recover it back); Stapp *v.* Mason, 114 Ky. 900, 72 S. W. 11, 24 Ky. L. Rep. 1680; Elias *v.* Gill, 92 Ky. 569, 18 S. W. 454, 13 Ky. L. Rep. 798 (professional pool seller on a horse-race).

39. Elias *v.* Gill, 92 Ky. 569, 18 S. W. 454, 13 Ky. L. Rep. 798. But see Lyons *v.* Coe, 177 Mass. 382, 59 N. E. 59, as to broker's right of set-off in action by customer for margins.

Set-off of losses and gains at one sitting see *supra*, note 22; and *infra*, note 80.

40. Higdon *v.* Heard, 14 Ga. 255; Forrest *v.* Grant, 11 Lea (Tenn.) 305.

In other jurisdictions the suit is for his own benefit. Barnes *v.* Turner, 4 Metc. (Ky.) 114; Conner *v.* Ragland, 15 B. Mon. (Ky.) 634.

41. See also *supra*, IV, B, 1, a, (III), (B), (1), (b), bb, (aa).

Parties defendant see *infra*, IV, C, 4, b.

42. Wilson *v.* Gardner, 28 Ind. 188 (notwithstanding a third person was interested with the winner in the bet); Laytham *v.* Agnew, 70 Mo. 48; Crooks *v.* McMahon, 48 Mo. App. 48; Armstrong *v.* Aragon, (N. M. 1905) 79 Pac. 291; McGrew *v.* City Produce Exch., 85 Tenn. 572, 4 S. W. 38, 4 Am. St. Rep. 771 (although received through an agent); Woodson *v.* Gordon, Peck (Tenn.) 196, 14 Am. Dec. 743. See Thomas *v.* Griffin, 1 Ind. App. 457, 27 N. E. 754.

That defendant was in partnership with others who gambled, won, and received the property is not sufficient to render him liable. State M. & F. Ins. Bank *v.* Megar, Dudley (Ga.) 83.

43. State M. & F. Ins. Bank *v.* Megar, Dudley (Ga.) 83, holding, however, that actual receipt of money by intestate must be shown.

44. Swaggard *v.* Hancock, 25 Mo. App. 596; Revier *v.* Hill, 1 Sneed (Tenn.) 405.

45. Nelson *v.* Waters, 18 Ark. 570.

46. Deaver *v.* Bennett, 29 Nebr. 812, 46 N. W. 161, 26 Am. St. Rep. 415; Riddle *v.* Perry, 19 Nebr. 505, 27 N. W. 721, both holding, however, that such a statute does not apply to a stakeholder.

47. Laytham *v.* Agnew, 70 Mo. 48; Dunn *v.* Bell, 85 Tenn. 581, 4 S. W. 41; Preston *v.* Hutchinson, 29 Vt. 144.

48. Low *v.* Blanchard, 116 Mass. 272; Binder *v.* Finkbone, 25 Ohio St. 103; Bobb *v.* Hetsch, 8 Ohio Dec. (Reprint) 245, 6 Cinc. L. Bul. 636.

This right of action accrues only after the rendition of the judgment for the recovery of the money won. Trout *v.* Marvin, 24 Ohio Cir. Ct. 333; Bobb *v.* Hetsch, 8 Ohio Dec. (Reprint) 245, 6 Cinc. L. Bul. 636.

One who has recovered judgment for his loss against the winner may maintain a civil action under the code against the owner of the building wherein the money was lost, to enforce the statutory lien of the judgment by ordering a sale of the property. Binder *v.* Finkbone, 25 Ohio St. 103.

(dd) Demand. A demand of the winner to return to the loser the amount won from him is not necessary in order to maintain a suit under the statutes for the recovery of the amount lost.[49]

(2) From Stakeholders — (a) Rights and Liabilities of Stakeholder in General. Unless the loser has repudiated his bet and notified the stakeholder not to pay over the money, the stakeholder is authorized on the determination of the wager to pay over the stakes to the winner;[50] but where the property staked is not placed in the stakeholder's hands, he cannot take it from the loser and deliver it to the winner unless authorized by the loser otherwise than by the bet.[51] Unless some other mode of deciding a wager is expressly provided, the stakeholder is a proper person to decide who has won, and *prima facie* his decision settles the right of the parties.[52]

(b) Recovery by Winner. As a general rule money or property won on an illegal wager cannot be recovered by the winner from the stakeholder,[53] unless the winner can establish his right of recovery without the aid of the illegal transaction;[54] and the same is true of money or property forfeited.[55] But he may recover from the stakeholder the amount of his individual deposit,[56] unless precluded by statute[57] or estopped by his own acts.[58]

(c) Recovery by Loser — aa. *Before Payment to Winner.* By the weight of authority a loser may repudiate the transaction at any time before the stakes are actually turned over to the winner, even after the happening of the contingency on which the wager was made, by notice to the stakeholder not to pay over, and after a refusal he may recover the amount of his deposit from the stakeholder.[59] In

Forfeiture of rent by landlord who leases premises for gambling purposes see Landlord and Tenant.

49. Peyret *v.* Coffee, 48 Me. 319; Mendoza *v.* Levy, 98 N. Y. App. Div. 326, 90 N. Y. Suppl. 748.

50. McLean *v.* Wilson, 36 Ill. App. 657; Okerson *v.* Crittenden, 62 Iowa 297, 17 N. W. 528. See *infra*, IV, B, 1, a, (III), (B), (2), (c), bb.

51. Franklin *v.* Stoddart, 34 Minn. 247, 35 N. W. 400.

52. Smith *v.* Smith, 21 Ill. 244, 74 Am. Dec. 100. But see Sutphin *v.* Crozer, 30 N. J. L. 257, holding that the decision of a stakeholder is not binding on the betters.

53. *Arkansas.*— McLain *v.* Huffman, 30 Ark. 428.

Missouri.— Hayden *v.* Little, 35 Mo. 418.

New York.— Rust *v.* Gott, 9 Cow. 169, 18 Am. Dec. 497.

Pennsylvania.— Sheerer *v.* Nickins, 2 Pa. L. J. Rep. 128, 3 Pa. L. J. 388.

Canada.— Marcotte *v.* Perras, 6 Quebec Q. B. 400, holding that the deposit of the amount of a bet in the hands of a stakeholder is not equivalent to a conditional payment, and when the bet is decided in favor of one of the parties the money does not become his property, and an action by him against the stakeholder claiming the amount of the bet will not be sustained.

See 24 Cent. Dig. tit. "Gaming," § 65.

Compare Dauterive *v.* Broussard, 5 Rob. (La.) 516, 39 Am. Dec. 550.

54. Allgear *v.* Walsh, 24 Mo. App. 134, holding that where the stakeholder promises to hold the money or property won until the winner should call for it, which promise he subsequently refuses to comply with on demand, the winner may recover the property in an action of trover on the new bailment made by the stakeholder's promise.

55. Corley *v.* Berry, 1 Bailey (S. C.) 593.

56. McLain *v.* Huffman, 30 Ark. 428; Simmons *v.* Bradley, 27 Wis. 689; Bate *v.* Cartwright, 7 Price 540. But see Murdock *v.* Kilbourn, 6 Wis. 468.

57. Sheerer *v.* Nickins, 2 Pa. L. J. Rep. 128, 3 Pa. L. J. 388, election wager.

58. Jordan *v.* McKenney, 48 Me. 104.

59. *Alabama.*— Lewis *v.* Brunton, 74 Ala. 317, 59 Am. Rep. 816; Ivey *v.* Phifer, 11 Ala. 535; Shackleford *v.* Ward, 3 Ala. 37, 36 Am. Dec. 435; Wood *v.* Duncan, 9 Port. 227.

California.— Johnston *v.* Russell, 37 Cal. 670; Hardy *v.* Hunt, 11 Cal. 343, 70 Am. Dec. 787.

Colorado.— Corson *v.* Neatheny, 9 Colo. 212, 11 Pac. 82.

Connecticut.— Hale *v.* Sherwood, 40 Conn. 332, 16 Am. Rep. 37.

Delaware.— Dewees *v.* Miller, 5 Harr. 347.

Indiana.— Burroughs *v.* Hunt, 13 Ind. 178; Frybarger *v.* Simpson, 11 Ind. 59; Alexander *v.* Mount, 10 Ind. 161; Taylor *v.* Moore, 20 Ind. App. 654, 50 N. E. 770.

Iowa.— Shannon *v.* Baumer, 10 Iowa 210.

Kansas.— Pollock *v.* Agner, 54 Kan. 618, 38 Pac. 781; Jennings *v.* Reynolds, 4 Kan. 110; Reynolds *v.* McKinney, 4 Kan. 94, 89 Am. Dec. 602, holding that the same right exists in his legally attaching creditors.

Kentucky.— Hutchings *v.* Stilwell, 18 B. Mon. 776; Conner *v.* Ragland, 15 B. Mon. 634.

Maine.— Gilmore *v.* Woodcock, 69 Me. 118, 31 Am. Rep. 255.

Massachusetts.— Morgan *v.* Beaumont, 121 Mass. 7, holding also that the fact that de-

some cases, however, it has been held that the loser cannot recover of the stakeholder after the event has happened and he has lost his money, unless he gave notice not to pay it over before the happening of the event,[60] or before the value of the risk has been greatly altered and the event can be foreseen.[61]

bb. *After Payment to Winner.* After the money or property deposited has been in good faith turned over to the winner by the stakeholder, the latter is not responsible to the loser for the amount of his deposit,[62] unless the transaction was repudiated and the stakeholder was notified before turning over the money

fendant knew of and promoted the wager does not put the parties *in pari delicto* so as to bar plaintiff's right.

Michigan.— Whitwell *v.* Carter, 4 Mich. 329.

Nebraska.— Deaver *v.* Bennett, 29 Nebr. 812, 46 N. W. 161, 26 Am. St. Rep. 415; Riddle *v.* Parry, 19 Nebr. 505, 27 N. W. 721.

New Hampshire.— Perkins *v.* Eaton, 3 N. H. 152.

New Jersey.— Huncke *v.* Francis, 27 N. J. L. 55; Moore *v.* Trippe, 20 N. J. L. 263.

Oregon.—Willis *v.* Hoover, 9 Oreg. 418.

Pennsylvania.— Dauler *v.* Hartley, 178 Pa. St. 23, 35 Atl. 857; Forscht *v.* Green, 53 Pa. St. 138; Conklin *v.* Conway, 18 Pa. St. 329; App *v.* Coryell, 3 Penr. & W. 494; McAllister *v.* Gallaher, 3 Penr. & W. 468; McAllister *v.* Hoffman, 16 Serg. & R. 147, 16 Am. Dec. 556; Siegel *v.* Funk, 3 Pittsb. 28.

South Carolina.— Bledsoe *v.* Thompson, 6 Rich. 44, 57 Am. Dec. 777.

Tennessee.— Guthman *v.* Parker, 3 Head 233; Bates *v.* Lancaster, 10 Humphr. 134, 51 Am. Dec. 696.

Texas.—Lewy *v.* Crawford, 5 Tex. Civ. App. 293, 23 S. W. 1041.

Vermont.—West *v.* Holmes, 26 Vt. 530; Tarleton *v.* Baker, 18 Vt. 9, 44 Am. Dec. 358.

England.— Trimble *v.* Hill, 5 App. Cas. 342, 49 L. J. P. C. 49, 42 L. T. Rep. N. S. 103, 28 Wkly. Rep. 479; Burge *v.* Ashley, [1900] 1 Q. B. 744, 69 L. J. Q. B. 538, 82 L. T. Rep. N. S. 518, 48 Wkly. Rep. 438; O'Sullivan *v.* Thomas, [1895] 1 Q. B. 698, 59 J. P. 134, 64 L. J. Q. B. 398, 72 L. T. Rep. N. S. 285, 15 Reports 253, 43 Wkly. Rep. 269; Hampden *v.* Walsh, 1 Q. B. D. 189, 45 L. J. Q. B. 238, 33 L. T. Rep. N. S. 852, 24 Wkly. Rep. 607; Batson *v.* Newman, 1 C. P. D. 573, 25 Wkly. Rep. 85; Diggle *v.* Higgs, 2 Ex. D. 422, 46 L. J. Exch. 721, 37 L. T. Rep. N. S. 27, 15 Wkly. Rep. 777; Varney *v.* Hickman, 5 C. B. 271, 5 D. & R. 364, 17 L. J. C. P. 102, 57 E. C. L. 271; Lacaussade *v.* White, 2 Esp. 629, 7 T. R. 535; Graham *v.* Thompson, Ir. R. 2 C. L. 64, 16 Wkly. Rep. 206; Smith *v.* Bickmore, 4 Taunt. 474; Aubert *v.* Walsh, 3 Taunt. 277, 12 Rev. Rep. 651; Cotton *v.* Thurland, 5 T. R. 405.

Canada.— Davis *v.* Hewitt, 9 Ont. 435.

See 24 Cent. Dig. tit. "Gaming," § 63. And see 2 Smith Lead. Cas. (8th ed.) pt. 1, p. 319; and CONTRACTS, 9 Cyc. 554 note 78.

Where a statute forfeits certain bets to the directors of the poor and they fail to claim the forfeiture within the time prescribed by statute, the bet stands as to ownership as it did before the enactment of the statute, and the persons losing may recover the same or their proportion from the stakeholder on the ground that the money was paid on a contract which was void. Gilmore *v.* Woodcock, 69 Me. 118, 31 Am. Rep. 255; Forscht *v.* Green, 53 Pa. St. 138.

Demand and notice see *infra*, IV, B, 1, a, (III), (B), (2), (C), cc.

60. Dooley *v.* Jackson, 104 Mo. App. 21, 78 S. W. 330; Cutshall *v.* McGowan, 98 Mo. App. 702, 73 S. W. 933; White *v.* Gilleland, 93 Mo. App. 310; Like *v.* Thompson, 9 Barb. (N. Y.) 315; Fowler *v.* Van Surdam, 1 Den. (N. Y.) 557; Yates *v.* Foot, 12 Johns. (N. Y.) 1 [*reversing* 11 Johns. 28]. See Lowry *v.* Bourdieu, 2 Dougl. 451; Aubert *v.* Walsh, 3 Taunt. 277, 12 Rev. Rep. 651. But see Weaver *v.* Harlan, 48 Mo. App. 319; Allen *v.* Ehle, 7 Cow. (N. Y.) 496.

Where a stakeholder is summoned as garnishee of the winner, and the wager was determined without any demand on the garnishee by the loser for the money deposited by him, and he makes no claim, judgment will be given against the garnishee for the whole sum in his hands. Wimer *v.* Pritchartt, 16 Mo. 252.

61. Hickerson *v.* Benson, 8 Mo. 11, 40 Am. Dec. 118; Cutshall *v.* McGowan, 98 Mo. App. 702, 73 S. W. 933; Ryan *v.* Judy, 7 Mo. App. 74.

62. *Illinois.*— Oberne *v.* Bunn, 39 Ill. App. 122; McLean *v.* Wilson, 36 Ill. App. 657.

Indiana.— Morris *v.* Philpot, 11 Ind. 447; Frybarger *v.* Simpson, 11 Ind. 59.

Massachusetts.— Ball *v.* Gilbert, 12 Metc. 397.

Nebraska.— Deaver *v.* Bennett, 29 Nebr. 812, 46 N. W. 161, 26 Am. St. Rep. 415; Riddle *v.* Perry, 19 Nebr. 505, 27 N. W. 721.

Pennsylvania.— McAllister *v.* Gallaher, 3 Penr. & W. 468; Siegel *v.* Funk, 3 Pittsb. 28.

Tennessee.—Bates *v.* Lancaster, 10 Humphr. 134, 51 Am. Dec. 696; Lillard *v.* Mitchell, (Ch. App. 1896) 37 S. W. 702.

Canada.— Walsh *v.* Trebilcock, 23 Can. Sup. Ct. 695.

See 24 Cent. Dig. tit. "Gaming," § 64. And see cases cited *infra*, note 63.

A statute authorizing recovery from the winner does not apply to a stakeholder who has paid over the money to the winner. Goldberg *v.* Feiga, 170 Mass. 146, 48 N. E. 1073.

A minor may not, after the result is known and after instructing the winner to take his money, recover from the stakeholder after it has been paid over. McLean *v.* Wilson, 36 Ill. App. 657.

or property not to do so, in which case he is responsible.[63] Under some statutes, however, a depositor may recover from the stakeholder the amount of his deposit even though the latter paid over the money or property to the winner without notice not to do so.[64]

cc. *Demand and Notice* — (aa) Necessity.[65] Before a stakeholder can be held liable by a party to a wager for the amount of his deposit, a notice or demand therefor must have been made by the depositor,[66] unless not required under the particular statute,[67] or unless the stakeholder pays over the money or property to the win-

63. *Alabama.*— Lewis *v.* Bruton, 74 Ala. 317, 49 Am. Rep. 816; Ivey *v.* Phifer, 13 Ala. 821, holding that the effect of the notice given by a party to a wager on a horse-race cannot be countervailed in an action against a stakeholder by a proof of the rules of racing or of the rules of the jockey club.

Arkansas.— Jeffrey *v.* Ficklin, 3 Ark. 227, 36 Am. Dec. 456.

California.— Wise *v.* Rose, 110 Cal. 159, 42 Pac. 569.

Colorado.— Maher *v.* Van Horn, 15 Colo. App. 14, 60 Pac. 949.

Georgia.— McLennan *v.* Whidden, 120 Ga. 666, 48 S. E. 201 [*distinguishing* Colson *v.* Meyers, 80 Ga. 499, 5 S. E. 504].

Indiana.— Burroughs *v.* Hunt, 13 Ind. 178; Morris *v.* Philpot, 11 Ind. 447; Alexander *v.* Mount, 10 Ind. 161.

Iowa.— Trenery *v.* Goudie, 106 Iowa 693, 77 N. W. 467; Okerson *v.* Crittenden, 62 Iowa 297, 17 N. W. 528; Adkins *v.* Flemming, 29 Iowa 122.

Kentucky.— Turner *v.* Thompson, 107 Ky. 647, 55 S. W. 210, 21 Ky. L. Rep. 1414.

Massachusetts.— Fisher *v.* Hildreth, 117 Mass. 558; Ball *v.* Gilbert, 12 Metc. 397.

Michigan.— Whitwell *v.* Carter, 4 Mich. 329.

Minnesota.— Pabst Brewing Co. *v.* Liston, 80 Minn. 473, 83 N. W. 448, 81 Am. St. Rep. 275; Wilkinson *v.* Tousley, 16 Minn. 299, 10 Am. Rep. 139.

Missouri.— Vandolah *v.* McKee, 99 Mo. App. 342, 73 S. W. 233; Weaver *v.* Harlan, 48 Mo. App. 319.

New Hampshire.—Perkins *v.* Eaton, 3 N. H. 152.

North Carolina.— Forrest *v.* Hart, 7 N. C. 458; Wood *v.* Wood, 7 N. C. 172.

Oregon.— Willis *v.* Hoover, 9 Oreg. 418.

Pennsylvania.— Conklin *v.* Conway, 18 Pa. St. 329; McAllister *v.* Hoffman, 16 Serg. & R. 147, 16 Am. Dec. 556.

Rhode Island.— McGrath *v.* Kennedy, 15 R. I. 209, 2 Atl. 438.

South Carolina.— Wootan *v.* Livingston, 1 Nott & M. 178.

Tennessee.— Perkins *v.* Hyde, 6 Yerg. 288; Lillard *v.* Michell, (Ch. App. 1896) 37 S. W. 702.

Vermont.— West *v.* Holmes, 26 Vt. 530.

United States.— Wright *v.* Stewart, 130 Fed. 905.

England.— Hastelow *v.* Jackson, 8 B. & C. 221, 6 L. J. K. B. O. S. 318, 2 M. & R. 209, 15 E. C. L. 117.

Canada.— Davis *v.* Hewitt, 9 Ont. 435; Sheldon *v.* Law, 3 U. C. Q. B. O. S. 85.

See 24 Cent. Dig. tit. "Gaming," § 68.

Payment before determination of wager.— A payment by a stakeholder after the result of the election was generally known but before a certificate was issued to the party elected is no defense to an action by the loser, who after the payment but before the issue of the certificate notified the stakeholder not to pay. Lewis *v.* Bruton, 74 Ala. 317, 49 Am. Rep. 816.

Demand and notice see *infra*, IV, B, 1, a, (III), (B), (2), (c), cc.

64. Hensler *v.* Jennings, 62 N. J. L. 209, 41 Atl. 918; Storey *v.* Brennan, 15 N. Y. 524, 69 Am. Dec. 629; Ruckman *v.* Pitcher, 1 N. Y. 392, 20 N. E. 9 (holding that under 1 N. Y. Rev. St. p. 662, §§ 8, 9, 16, the losing party in an illegal wager may recover from the stakeholder the sum deposited by him, although the stakeholder by his direction, given immediately after the wager is determined, has paid the money over to the winner); Mahony *v.* O'Callaghan, 38 N. Y. Super. Ct. 461; Simmons *v.* Borland, 10 Johns. (N. Y.) 468.

65. See also *supra*, IV, B, 1, a, (III), (B), (2), (c), aa, bb.

66. *Alabama.*—Shackleford *v.* Ward, 3 Ala. 37, 36 Am. Dec. 435.

Delaware.— Jacobs *v.* Walton, 1 Harr. 496.

Georgia.— Dancy *v.* Phelan, 82 Ga. 243, 10 S. E. 205.

Indiana.— Frybarger *v.* Simpson, 11 Ind. 59.

Iowa.— Trenery *v.* Goudie, 106 Iowa 693, 76 N. W. 467; Okerson *v.* Crittenden, 62 Iowa 297, 17 N. W. 528.

Massachusetts.— Jones *v.* Cavanaugh, 149 Mass. 124, 21 N. E. 306.

Missouri.— Vandolah *v.* McKee, (App. 1903) 73 S. W. 233.

Ohio.— Ward *v.* Ritt, 6 Ohio Dec. (Reprint) 1129, 11 Am. L. Rec. 567, said, however, to have been reversed by the supreme court commission without report. See 13 Cinc. L. Bul. 138.

England.— Savage *v.* Madder, 36 L. J. Exch. 178, 16 L. T. Rep. N. S. 600, 16 Wkly. Rep. 910.

See 24 Cent. Dig. tit. "Gaming," § 87.

A demand is not dispensed with by a fraudulent execution of the illegal trust or a false and fraudulent account of the result. Dancy *v.* Phelan, 82 Ga. 243, 10 S. E. 205.

67. See the statutes of the different states.

Under the New York statutes it has been held that an action to recover money deposited on an illegal wager may be maintained against a stakeholder without demand. Ruckman *v.* Pitcher, 1 N. Y. 392, 20 N. Y. 9; O'Maley *v.* Reese, 6 Barb. 658. *Compare* Like

ning party after notice by the other party not to do so,[68] or notifies the loser that he will not pay to either party.[69]

(bb) Sufficiency. Notice to a stakeholder not to pay over money or property deposited in his hands in an illegal wager must come from the owner of the money or property.[70] No particular form of words is necessary in such notice; any words that clearly inform the stakeholder that the wager is not to be carried out and that he must not pay over the money to any person other than depositor is sufficient.[71]

(d) Who May Sue.[72] The right of action to recover money or property deposited with a stakeholder is in the actual owner of the money or property, although it was deposited for him by another and in the latter's own name.[73] If a person acts both for himself and as agent for others in depositing in his own name with a stakeholder the amount of a wager, in an action against the stakeholder therefor he can recover only the amount actually deposited by himself.[74]

(3) Recovery From Agent, Bailee, or Partner. When a wagering contract has been executed and its fruits paid to the agent or partner of the winner, the recipient of the fund cannot shield himself by setting up the vice of the original transaction.[75] Neither is it any affair of a bailee of such money or property that the parties have been gambling or intend to gamble; the invalidity of their proceedings does not affect his contract as bailee.[76]

(4) Recovery by Third Person.[77] One whose property has been wrongfully

v. Thompson, 9 Barb. 315, action not brought under the statute.

68. Ivey *v.* Phifer, 11 Ala. 535; Shackleford *v.* Ward, 3 Ala. 37, 36 Am. Dec. 435; Pearce *v.* Provost, 4 Houst. (Del.) 467; Jacobs *v.* Walter, 1 Harr. (Del.) 496; Alexander *v.* Mount, 10 Ind. 161; Pabst Brewing Co. *v.* Liston, 80 Minn. 473, 83 N. W. 448, 81 Am. St. Rep. 275. And see *supra*, IV, B, 1, a, (III), (B), (2), (c), aa, bb.

69. Turner *v.* Thompson, 107 Ky. 647, 55 S. W. 210, 21 Ky. L. Rep. 1414.

70. Reichly *v.* Maclay, 2 Watts & S. (Pa.) 59, holding that it is not sufficient that it came from the owner's agent, who made the bet and deposited the money.

71. *Alabama.*— Ivey *v.* Phifer, 11 Ala. 535.

Colorado.— Maher *v.* Van Horn, 15 Colo. App. 14, 60 Pac. 949.

Kentucky.— Turner *v.* Thompson, 107 Ky. 647, 55 S. W. 210, 21 Ky. L. Rep. 1414, holding that notice to return the money to the loser is not necessary.

Minnesota.— Pabst Brewing Co. *v.* Liston, 80 Minn. 473, 83 N. W. 448, 81 Am. St. Rep. 275, holding that notice given by one of the parties to a stakeholder the day after an election and before money wagered thereon is paid over not to so pay it is sufficient to arrest it in the hands of the stakeholder, and is a repudiation of the wager.

Missouri.—Vandolah *v.* McKee, (App. 1903) 73 S. W. 233.

See 24 Cent. Dig. tit. "Gaming," § 68.

A demand of a stakeholder for the whole sum in his hands is a good demand for the amount deposited by plaintiff. Hale *v.* Sherwood, 40 Conn. 332, 16 Am. Rep. 37; Willis *v.* Hoover, 9 Oreg. 418; Perkins *v.* Hyde, 6 Yerg. (Tenn.) 288.

Notice held to be insufficient see Frybarger *v.* Simpson, 11 Ind. 59 (request by loser to stakeholder to delay payment to winner until loser could see winner to arrange a particular mode of payment); Okerson *v.* Crittenden, 62 Iowa 297, 17 N. W. 528 (holding that a demand from stakeholder on the ground that the person making the demand has won the wager cannot be regarded as a renunciation of the wager, nor as notice to the stakeholder not to pay over the stakes); Trenery *v.* Goudie, 106 Iowa 693, 76 N. W. 467 (notice not to pay until further notice).

72. **Parties plaintiff** see *infra*, IV, C, 4, a.

73. Hardy *v.* Hunt, 11 Cal. 343, 70 Am. Dec. 787; Donahue *v.* McDonald, 12 Ky. L. Rep. 636.

74. Toney *v.* Snyder, 50 Iowa 73; Ruckman *v.* Pitcher, 20 N. Y. 9 [*affirming* 13 Barb. 556]; App *v.* Coryell, 3 Penr. & W. (Pa.) 494.

75. Whipley *v.* Flower, 6 Cal. 630; Willson *v.* Owen, 30 Mich. 474; Russell *v.* Kidd, (Tex. Civ. App. 1904) 84 S. W. 273; Floyd *v.* Patterson, 72 Tex. 205, 10 S. W. 526, 13 Am. St. Rep. 787; Martin *v.* Smith, 1 Arn. 194, 4 Bing. N. Cas. 436, 6 Dowl. P. C. 639, 2 Jur. 376, 7 L. J. C. P. 201, 6 Scott 268, 33 E. C. L. 792; Johnson *v.* Lansley, 12 C. B. 468, 74 E. C. L. 468; De Mattos *v.* Benjamin, 63 L. J. Q. B. 248, 70 L. T. Rep. N. S. 560, 10 Reports 103, 42 Wkly. Rep. 284. See also Peters *v.* Grim, 149 Pa. St. 163, 24 Atl. 192, 34 Am. St. Rep. 599, in which Mitchell, J., comments on the harshness of some of the other Pennsylvania decisions. See, however, Central Trust, etc., Co. *v.* Respass, 112 Ky. 606, 66 S. W. 421, 23 Ky. L. Rep. 1905, 99 Am. St. Rep. 317, 56 L. R. A. 479.

Duty of agent to account see also Principal and Agent.

Recovery from broker see *infra*, IV, B, 1, b, (I).

76. Perkins *v.* Clemm, 23 Ark. 221; Woolf *v.* Bernero, 14 Mo. App. 518.

77. See also *supra*, IV, B, 1, a, (III), (B), (1), (b), bb, (bb).

used and lost by another in gambling without his consent may recover the same or its value either from the winner[78] or from the stakeholder who wrongfully turned it over to the winner after notice and demand not to do so.[79]

(5) Amount of Recovery — (a) From Winner. The measure of the winner's liability to the loser under statutes permitting money or property lost in gaming to be recovered back is in some states the net amount of his winning from such loser at the particular time or sitting,[80] with interest from the time it was wrongfully turned over to him.[81] In case the money was won by fraud the loser may recover back the amount thereof but not an additional sum which might have been won if the transaction had been a fair one.[82] In some states the loser may recover double the amount lost.[83] The value of the property lost cannot be recovered unless the property itself cannot be restored.[84]

(b) From Stakeholder. The amount of recovery against a stakeholder who has wrongfully paid over the stake to the winner is usually the property or its value at the time of bringing the action,[85] with interest from the time of demanding it or of bringing action.[86]

b. Under Speculative Transactions — (i) *Recovery of Money or Property.* As a general rule money or property deposited as a margin or paid for losses in an illegal speculative or stock transaction cannot be recovered back either by way of set-off or otherwise,[87] unless permitted by statute, as is the case

78. Pierson *v.* Fuhrmann, 1 Colo. App. 187, 27 Pac. 1015; Pollock *v.* Agner, 54 Kan. 618, 38 Pac. 781. See, however, *supra*, note 31.

79. Pollock *v.* Agner, 54 Kan. 618, 38 Pac. 781.

80. Zellers *v.* White, 208 Ill. 518, 70 N. E. 669, 100 Am. St. Rep. 243; Johnson *v.* McGregor, 157 Ill. 350, 41 N. E. 558 [*affirming* 55 Ill. App. 530]; Zielly *v.* Warren, 17 Johns. (N. Y.) 192. See also *supra*, IV, B, 1, a, (III), (B), (1), (b), bb, (aa).

Set-off of losses and winnings.— The amount won from the winner by the loser at the same time should be deducted from the amount of his losses (Follett *v.* Savier, 8 Ohio S. & C. Pl. Dec. 669), but not the amount won by him from other persons at the same time (Johnson *v.* McGregor, 157 Ill. 350, 41 N. E. 558 [*affirming* 55 Ill. App. 530]. See also *supra*, IV, B, 1, a, (III), (B), (1), (b), bb, (bb).

81. Jackson *v.* Nelson, (Tex. Civ. App. 1897) 39 S. W. 315.

82. Criswell *v.* Gaster, 5 Mart. N. S. (La.) 129.

Where several persons played with another at cards under a secret agreement to divide the money won from him, the latter may recover from either of the winners, not only that which was won by and paid to such a winner, but also that which was won by and paid to such winner's confederates, since they would be liable as joint tort-feasors. Preston *v.* Hutchinson, 29 Vt. 144.

83. Meyers *v.* Dillon, 39 Oreg. 581, 65 Pac. 867, 66 Pac. 814.

Recovery of treble amount lost as a penalty see *supra*, III, B.

84. Morgan *v.* Lewis, 7 B. Mon. (Ky.) 243.

85. Fowler *v.* Van Surdam, 1 Den. (N. Y.) 557, holding that where the deposit was made in the bills of a bank which failed before a suit brought, and no demand was made on the stakeholder, and there was no evidence that he had parted with the bills, he is liable only for the value of them at the time of bringing the action.

86. House *v.* McKenney, 46 Me. 94; Ruckman *v.* Pitcher, 20 N. Y. 9 [*affirming* 13 Barb. 556]. But see Doxey *v.* Miller, 2 Ill. App. 30.

87. *Georgia.*— Thompson *v.* Cummings, 68 Ga. 124.

Maine.— O'Brien *v.* Luques, 81 Me. 46, 16 Atl. 304.

Maryland.— Baxter *v.* Deneen, 98 Md. 181, 57 Atl. 601, 64 L. R. A. 949.

Massachusetts.— Northrup *v.* Buffington, 171 Mass. 468, 51 N. E. 7 (holding this rule to apply also to profits earned); Wyman *v.* Fiske, 3 Allen 238, 80 Am. Dec. 66.

Michigan.— Gregory *v.* Wendell, 39 Mich. 337, 33 Am. Rep. 390.

Missouri.— Connor *v.* Black, 132 Mo. 150, 33 S. W. 783.

New York.— Staples *v.* Gould, 9 N. Y. 520 [*affirming* 5 Sandf. 411]; Crummey *v.* Mills, 40 Hun 370. But see Gram *v.* Stebbins, 6 Paige 124.

North Dakota.— Dows *v.* Glaspel, 4 N. D. 251, 60 N. W. 60.

Pennsylvania.— Albertson *v.* Laughlin, 173 Pa. St. 525, 34 Atl. 216, 51 Am. St. Rep. 777; Ruchizky *v.* De Haven, 97 Pa. St. 202.

Texas.— Cunningham *v.* Fairchild, (Civ. App. 1897) 43 S. W. 32.

Vermont.— Sowles *v.* Welden Nat. Bank, 61 Vt. 375, 17 Atl. 791.

United States.— Higgins *v.* McCrea, 116 U. S. 671, 6 S. Ct. 557, 29 L. ed. 764 [*modifying* 23 Fed. 782]. See White *v.* Barber, 123 U. S. 392, 8 S. Ct. 221, 31 L. ed. 243.

Promissory notes given as a margin to cover a rise or a fall in the price of stocks not actually paid for and delivered are the instruments of a wager and cannot be recovered. Swartz's Appeal, 3 Brewst. (Pa.) 131.

in several states.[88] Money or property, however, to which plaintiff may establish his right without the aid of the illegal transaction may be recovered,[89] as where the illegal transaction has been closed and money or property belonging to the customer is admitted or shown to be in the broker's hands,[90] or where the person making the deposit acts in good faith and is not a party to the illegal intent of the broker,[91] or where the illegal contract is never carried out.[92]

(II) *Recovery of Commissions or Advances.* A broker or commission merchant who is privy to his principal's unlawful intent in a speculative transaction is *particeps criminis*, and cannot recover for services rendered, losses

Money or property deposited by a minor, however, may be recovered. Ruchizky *v.* De Haven, 97 Pa. St. 202. *Compare* Crummey *v.* Mills, 40 Hun (N. Y.) 370.

88. *California.*— Parker *v.* Otis, 130 Cal. 322, 62 Pac. 571, 927, 92 Am. St. Rep. 56; Wetmore *v.* Barrett, 103 Cal. 246, 37 Pac. 140; Cashman *v.* Root, 89 Cal. 373, 26 Pac. 883, 23 Am. St. Rep. 482, 12 L. R. A. 511.

Illinois.— Kruse *v.* Kennett, 181 Ill. 199, 54 N. E. 965 [*reversing* 69 Ill. App. 566]; Jamieson *v.* Wallace, 167 Ill. 388, 47 N. E. 762, 59 Am. St. Rep. 302 [*affirming* 60 Ill. App. 618]; Pearce *v.* Foote, 113 Ill. 228, 55 Am. Rep. 414; Elder *v.* Talcott, 43 Ill. App. 439; New York, etc., Grain, etc., Exch. *v.* Mellen, 27 Ill. App. 556; Kennedy *v.* Stout, 26 Ill. App. 133.

Massachusetts.— Davy *v.* Bangs, 174 Mass. 238, 54 N. E. 536, holding that a recovery may be had under St. (1890) c. 437, if plaintiff proves that he did not intend to perform, and that defendant had reasonable cause to believe that no intention to actually perform existed, but he cannot recover unless he proves both these facts. Under this statute a defendant who contracts to carry stocks on a margin in his own name solely as an accommodation and without compensation is not liable for payments made to him on the contract. Bingham *v.* Scott, 177 Mass. 208, 58 N. E. 687.

New Jersey.— Van Pelt *v.* Schauble, 68 N. J. L. 638, 54 Atl. 437.

Ohio.— Lester *v.* Buel, 49 Ohio St. 240, 30 N. E. 821, 34 Am. St. Rep. 556; Rogers *v.* Edmund, 21 Ohio Cir. Ct. 675, 12 Ohio Cir. Dec. 291, holding that one who furnishes a telegraphic wire and instruments and market quotations, and has an interest in the commissions made, is liable under the statute to one whose money is placed or lost in such transactions.

South Carolina.— Saunders *v.* A. C. Phelps Co., 53 S. C. 173, 31 S. E. 54.

Character of contract made by broker.— This right depends wholly upon the character of the contract between such party and his broker, without reference to the character of any contract made between a broker and third persons. Kennedy *v.* Stout, 26 Ill. App. 133.

General statutory provisions permitting a loser to recover the amount of his loss from the winner apply in some jurisdictions to losses sustained in speculative transactions with brokers, and allow a recovery (Kruse *v.* Kennett, 181 Ill. 199, 54 N. E. 965 [*reversing* 69 Ill. App. 566]; Jamieson *v.* Wallace, 167 Ill. 388, 47 N. E. 762, 59 Am. St. Rep. 302 [*affirming* 60 Ill. App. 618]; Pearce *v.* Foote, 113 Ill. 228, 55 Am. Rep. 414; New York, etc., Grain, etc., Exch. *v.* Mellen, 27 Ill. App. 556; Lester *v.* Buel, 49 Ohio St. 240, 30 N. E. 821, 34 Am. St. Rep. 556; McGrew *v.* City Produce Exch., 85 Tenn. 572, 4 S. W. 38, 4 Am. St. Rep. 771. *Compare* White *v.* Barber, 123 U. S. 392, 8 S. Ct. 221, 31 L. ed. 243), unless the money so lost has been paid out by the broker under the direction of the loser (Roulstone *v.* Moore, 10 Ohio Dec. (Reprint) 275, 19 Cinc. L. Bul. 387); but in other jurisdictions it is held otherwise (Sondheim *v.* Gilbert, 117 Ind. 71, 18 N. E. 687, 10 Am. St. Rep. 23, 5 L. R. A. 432; Lancaster *v.* McKinley, 33 Ind. App. 448, 67 N. E. 947; Connor *v.* Black, 132 Mo. 150, 33 S. W. 783; See *v.* Runzi, 105 Mo. App. 435, 79 S. W. 992; Boyce *v.* O'Dell Commission Co., 109 Fed. 758, construing Indiana statute. See Staples *v.* Gould, 9 N. Y. 520 [*affirming* 5 Sandf. 411]).

Interest from the commencement of an action to recovery of judgment cannot be allowed in an action to recover moneys paid to purchase stocks on margin. Parker *v.* Otis, 130 Cal. 322, 62 Pac. 571, 927, 92 Am. St. Rep. 56; Baldwin *v.* Zadig, 104 Cal. 594, 34 Pac. 363, 722.

89. Clarke *v.* Brown, 77 Ga. 606, 4 Am. St. Rep. 98; Floyd *v.* Patterson, 72 Tex. 202, 10 S. W. 526, 13 Am. St. Rep. 787, 18 S. W. 654, holding that although a contract for the future delivery of wheat intended only as a speculation on the probable difference in price is illegal, yet a sum representing the margin deposited and the profits realized in the deal paid over by one of the parties to the broker to be by him paid to the other party can be recovered in an action by the latter against the broker.

90. J. C. McNaughton Co. *v.* Haldeman, 160 Pa. St. 144, 28 Atl. 647; Repplier *v.* Jacobs, 149 Pa. St. 167, 24 Atl. 194; Peters *v.* Grim, 149 Pa. St. 163, 24 Atl. 192, 34 Am. St. Rep. 599; Overholt *v.* Burbridge, 28 Utah 408, 79 Pac. 561, holding that a broker when sued by one of the parties for his profits cannot set up the illegality of the transaction between the original parties.

91. Munns *v.* Donovan Commission Co., 117 Iowa 516, 91 N. W. 789; Gregory *v.* Wendell, 39 Mich. 337, 33 Am. Rep. 390.

92. Munns *v.* Donovan Commission Co., 117 Iowa 516, 91 N. W. 789.

incurred, or advances made by himself on behalf of his principal in forwarding the transaction.[93] It is otherwise, however, where the broker has no knowledge

93. *Arkansas.*— Phelps *v.* Holderness, 56 Ark. 300, 19 S. W. 921.

Georgia.— Lawton *v.* Blitch, 83 Ga. 663, 10 S. E. 353; Walters *v.* Comer, 79 Ga. 796, 5 S. E. 292; Augusta Nat. Bank *v.* Cunningham, 75 Ga. 366 [*overruling* Warren *v.* Hewitt, 45 Ga. 501, so far as it conflicts with this rule]; Porter *v.* Massengale, 68 Ga. 296. *Compare* Heard *v.* Russell, 59 Ga. 25.

Illinois.— Pope *v.* Hanke, 155 Ill. 617, 40 N. E. 839, 28 L. R. A. 568 [*affirming* 52 Ill. App. 453]; Cothran *v.* Ellis, 125 Ill. 496, 16 N. E. 646; Wheeler *v.* McDermid, 36 Ill. App. 179; Carroll *v.* Holmes, 24 Ill. App. 453; Coffman *v.* Young, 20 Ill. App. 76.

Maryland.— Stewart *v.* Schall, 65 Md. 289, 4 Atl. 399, 57 Am. Rep. 327.

Massachusetts.— Harvey *v.* Merrill, 150 Mass. 1, 22 N. E. 49, 15 Am. St. Rep. 159, 5 L. R. A. 200. See, however, Jones *v.* Ames, 135 Mass. 431; Brown *v.* Phelps, 103 Mass. 313; Durant *v.* Burt, 98 Mass. 161.

Minnesota.— Mohr *v.* Miesen, 47 Minn. 228, 49 N. W. 862.

Missouri.— Connor *v.* Black, 119 Mo. 126, 24 S. W. 184, 132 Mo. 150, 33 S. W. 783; Crawford *v.* Spencer, 92 Mo. 498, 4 S. W. 713, 1 Am. St. Rep. 745; Buckingham *v.* Fitch, 18 Mo. App. 91; Ream *v.* Hamilton, 15 Mo. App. 577; McLean *v.* Stuve, 15 Mo. App. 317.

Nebraska.— Rogers *v.* Marriott, 59 Nebr. 759, 82 N. W. 21; Sprague *v.* Warren, 26 Nebr. 326, 41 N. W. 1113, 3 L. R. A. 679.

New York.— Dwight *v.* Badgley, 75 Hun 174, 27 N. Y. Suppl. 107.

North Carolina.— Garseed *v.* Sternberger, 135 N. C. 501, 47 S. E. 603; Williams *v.* Carr, 80 N. C. 294.

North Dakota.— Dows *v.* Glaspel, 4 N. D. 251, 60 N. W. 60.

Ohio.— Kahn *v.* Walton, 46 Ohio St. 195, 20 N. E. 203.

Pennsylvania.— Wagner *v.* Hildebrand, 187 Pa. St. 136, 41 Atl. 34; Dickson *v.* Thomas, 97 Pa. St. 278; Fareira *v.* Gabell, 89 Pa. St. 89; McGrew *v.* McGregor, 4 Pennyp. 100. See Potts *v.* Dunlap, 110 Pa. St. 177, 20 Atl. 413.

South Carolina.— Riordan *v.* Doty, 50 S. C. 537, 27 S. E. 939.

Tennessee.— Beadles *v.* Ownby, 16 Lea 424. See, however, Marshall *v.* Thruston, 3 Lea 740.

Texas.— Seeligson *v.* Lewis, 65 Tex. 215, 57 Am. Rep. 593; Street *v.* Houston Ice, etc., Co., (Civ. App. 1900) 55 S. W. 516.

United States.— Embrey *v.* Jemison, 131 U. S. 336, 9 S. Ct. 776, 33 L. ed. 172; Irwin *v.* Williar, 110 U. S. 499, 4 S. Ct. 160, 28 L. ed. 225; Kirkpatrick *v.* Adams, 20 Fed. 287; Bartlett *v.* Smith, 13 Fed. 263, 4 McCrary 388; *In re* Green, 10 Fed. Cas. No. 5,751, 7 Biss. 338.

See 24 Cent. Dig. tit. "Gaming," § 75.

In England the rule is otherwise, since wagers are not illegal there, but merely void. Thacker *v.* Hardy, 4 Q. B. D. 685, 48 L. J. Q. B. 289, 39 L. T. Rep. N. S. 595, 27 Wkly. Rep. 158; Knight *v.* Fitch, 15 C. B. 566, 3 C. L. R. 567, 1 Jur. N. S. 526, 24 L. J. C. P. 122, 80 E. C. L. 565; Knight *v.* Chambers, 15 C. B. 562, 3 C. L. R. 565, 1 Jur. N. S. 525, 24 L. J. C. P. 121, 80 E. C. L. 561; Jessopp *v.* Lutwyche, 3 C. L. R. 359, 10 Exch. 614, 24 L. J. Exch. 65; Ashton *v.* Dakin, 4 H. & N. 867; Lyne *v.* Siesfield, 1 H. & N. 278; Rosewarne *v.* Billing, 15 C. B. N. S. 316, 10 Jur. N. S. 496, 33 L. J. C. P. 55, 9 L. T. Rep. N. S. 441, 12 Wkly. Rep. 104, 109 E. C. L. 316.

A negotiable instrument given for advances and commissions is not a binding obligation even though the principal had knowledge of the illegality at the time of giving it.

District of Columbia.— Justh *v.* Holliday, 2 Mackey 246.

Georgia.— Augusta Nat. Bank *v.* Cunningham, 75 Ga. 366; Thompson *v.* Cummings, 68 Ga. 124.

Illinois.— Pope *v.* Hanke, 155 Ill. 617, 49 N. E. 839, 28 L. R. A. 568 [*affirming* 52 Ill. App. 453].

Iowa.— Lyons First Nat. Bank *v.* Oskaloosa Packing Co., 66 Iowa 41, 23 N. W. 255.

Ohio.— Kahn *v.* Walton, 46 Ohio St. 195, 29 N. E. 203.

Wisconsin.— Barnard *v.* Backhaus, 52 Wis. 593, 6 N. W. 252, 9 N. W. 595.

United States.— Embrey *v.* Jemison, 131 U. S. 336, 9 S. Ct. 776, 33 L. ed. 172.

Assessments paid by a broker on stock purchased for a customer who put up only a margin, the stock being held as security, cannot be set off in an action by the customer to recover such margins. Wetmore *v.* Barrett, 103 Cal. 246, 37 Pac. 140.

Mere knowledge of the unlawful character of the transaction has been held sufficient to preclude the broker from recovering his commissions or advances. Kahn *v.* Walton, 46 Ohio St. 195, 20 N. E. 203. *Contra*, Kent *v.* Miltenberger, 13 Mo. App. 503.

The test is, in an action by grain brokers, whether the intention was that the principal should become the actual buyer of grain through the agency of the brokers or whether they expressly or impliedly agreed to act as the principal's brokers in gambling purchases of grain which the principal had no intention of receiving. Rogers *v.* Marriott, 59 Nebr. 759, 82 N. W. 21.

Accommodation advances.— Where a cotton factor, without charging any commission and merely to oblige customers, deals in cotton futures on their account by buying and selling cotton contracts and remitting margins to brokers in another state for that purpose, and keeps the account in the name of the customers at their request, there is nothing in the transaction of a gambling nature, so as to avoid the liability of the customers to the factor for money paid for them on that account. Thompson *v.* Maddux, 117 Ala. 468, 23 So. 157.

of or is not privy to the principal's illegal intent, since in this event he is not a party to the illegality.[94]

2. In Equity — a. Against Opposite Party — (i) *In General.* Ordinarily, the parties to a gambling transaction being *in pari delicto*, a court of equity will not grant relief to either of them.[95] But in some jurisdictions the loser in a gambling transaction may obtain relief in equity [96] by maintaining a bill to enjoin the collection of notes, bonds, deeds, etc., given by him for a gambling consideration,[97] or to have them delivered up and canceled,[98] or to restrain their transfer and the

94. *Illinois.*— Scanlon *v.* Warren, 169 Ill. 142, 48 N. E. 410.

Indiana.— Whitesides *v.* Hunt, 97 Ind. 191, 49 Am. Rep. 441; Wright *v.* Crabbs, 78 Ind. 487.

Iowa.— Counselman *v.* Reichart, 103 Iowa 430, 72 N. W. 490.

Maine.— Rumsey *v.* Berry, 65 Me. 570.

Michigan.— Donovan *v.* Daiber, 124 Mich. 49, 83 N. W. 848.

Missouri.— Crane *v.* Whittemore, 4 Mo. App. 510.

New York.— Amsden *v.* Jacobs, 75 Hun 311, 26 N. Y. Suppl. 1000.

Rhode Island.— Winward *v.* Lincoln, 23 R. I. 476, 51 Atl. 106, 64 L. R. A. 160, decided under a Massachusetts statute.

Wisconsin.— Lowry *v.* Dillman, 59 Wis. 197, 18 N. W. 4.

United States.— Roundtree *v.* Smith, 108 U. S. 269, 2 S. Ct. 630, 27 L. ed. 722; Parker *v.* Moore, 125 Fed. 807, 115 Fed. 799 [*reversing* 111 Fed. 470]; Lehman *v.* Feld, 37 Fed. 852; Bangs *v.* Hornick, 30 Fed. 97; Kirkpatrick *v.* Adams, 20 Fed. 287; Bartlett *v.* Smith, 13 Fed. 263, 4 McCrary 416; Lehman *v.* Strassberger, 15 Fed. Cas. No. 8,216, 2 Woods 554.

See 24 Cent. Dig. tit. "Gaming," § 75.

A negotiable instrument given for advances or commissions in such a case is a binding obligation. Lehman *v.* Strassberger, 15 Fed. Cas. No. 8,216, 2 Woods 554.

95. Central Trust, etc., Co. *v.* Respass, 112 Ky. 606, 66 S. W. 421, 23 Ky. L. Rep. 1905, 56 L. R. A. 479 (holding that a court of equity will not entertain a bill for an accounting of profits in the case of a partnership in the business of making wagers on horse-races); McKinney *v.* Pope, 3 B. Mon. (Ky.) 93; Lyon *v.* Respass, 1 Litt. (Ky.) 133 (both holding that a court of equity will not rescind a contract to restore money loaned for the purpose of gaming); Baxter *v.* Deneen, 98 Md. 181, 57 Atl. 601, 64 L. R. A. 949 (holding that a party to a stock gambling contract is not entitled to the aid of a court of equity in recovering back money deposited as margins); Rees *v.* Fernie, 4 New Rep. 539.

Equitable rights under contract to supply market reports see *supra*, IV, A, 4, a, (IV).

96. Higdon *v.* Heard, 14 Ga. 255, by statute.

A conveyance of land may be set aside in equity if based on a gaming consideration. Johnson *v.* Cooper, 2 Yerg. (Tenn.) 524, 24 Am. Dec. 502. *Contra*, Thomas *v.* Cronise, 16 Ohio 54. So where a bill is filed to foreclose a mortgage given to secure notes founded on a gambling contract, a cross bill to have the notes and mortgage declared void and unenforceable may be maintained. Kuhl *v.* M. Gally Universal Press Co., 123 Ala. 452, 26 So. 535, 82 Am. St. Rep. 135.

Persons entitled to relief.— The fact that the consideration for the assignment of a mortgage was a gambling debt will not aid the mortgagor in foreclosure proceedings. Reed *v.* Bond, 96 Mich. 134, 55 N. W. 619.

97. Finn *v.* Barclay, 15 Ala. 626; Roberts *v.* Taylor, 7 Port. (Ala.) 251; Rice *v.* Winslow, 182 Mass. 273, 65 N. E. 366; Portarlington *v.* Soulby, 3 Myl. & K. 104, 10 Eng. Ch. 102, 40 Eng. Reprint 40.

The return of money or other thing received when the note was executed is not a condition precedent to equitable relief against the payment of such a note. Finn *v.* Barclay, 15 Ala. 626. See Schmueckle *v.* Waters, 125 Ind. 265, 25 N. E. 281.

98. *Kentucky.*— Davidson *v.* Givins, 2 Bibb 200, 4 Am. Dec. 695.

Massachusetts.—Rice *v.* Winslow, 182 Mass. 273, 65 N. E. 366, note and mortgage security for margins.

New Jersey.— Tantum *v.* Arnold, 42 N. J. Eq. 60, 6 Atl. 316.

Tennessee.— Rucker *v.* Wynne, 2 Head 617, holding that Acts (1789), c. 8, § 1, making all gaming contracts and securities void at law and in equity, does not interfere with the power of courts of equity to compel gaming securities to be delivered up and canceled.

England.— Rawden *v.* Shadwell, Ambl. 269, 27 Eng. Reprint 179 (chancellor decreeing that bond be delivered up and part paid thereon be refunded); Osbaldeston *v.* Simpson, 7 Jur. 734, 13 Sim. 513, 36 Eng. Ch. 513; Wynne *v.* Callander, 1 Russ. 293, 46 Eng. Ch. 259, 38 Eng. Reprint 113; Woodroffe *v.* Farnham, 2 Vern. Ch. 291, 23 Eng. Reprint 788.

A receipt given on a gaming consideration is considered as an executed contract, and a bill to compel the surrender of the same should not be sustained. Smith *v.* Davidson, 6 J. J. Marsh. (Ky.) 539.

An assignment of a mortgage being an executed contract transferring the title to the assignee, equity will not cancel the same because it was made to secure a gambling debt. Smith *v.* Kammerer, 152 Pa. St. 98, 25 Atl. 165.

Partial invalidity.— Where part of a bond is on a gaming consideration, and part on a lawful one, equity will relieve against the

prosecution of suits on them,[99] or under some statutes to recover money or property lost and paid.[1]

(II) *Relief Against Judgment.* A judgment on a note, bond, or other contract founded on a gaming consideration may be relieved against in equity by being perpetually enjoined or set aside,[2] although it was obtained by default[3] or by confession,[4] and in some jurisdictions notwithstanding that the illegality of the contract which would have constituted a good defense to the action in which the judgment was recovered was not pleaded there.[5] This relief may be obtained by the person executing such contract or his personal representative, or by any creditor, heir, devisee, purchaser, or other person interested therein;[6] and under some

part that is vicious, and sustain that which is good. Skipwith *v.* Strother, 3 Rand. (Va.) 214; Woodson *v.* Barrett, 2 Hen. & M. (Va.) 80, 3 Am. Dec. 612.

99. Barker *v.* Callihan, 5 Ala. 708 (holding that the loser of notes at gaming may maintain such a bill whether he indorsed them or passed them by delivery merely, and whether they remain in the hands of the winner or have been transferred to a third person with notice); Milltown *v.* Stewart, 6 L. J. Ch. 298, 3 Myl. & C. 18, 14 Eng. Ch. 18, 40 Eng. Reprint 830, 8 Sim. 371, 8 Eng. Ch. 371.

1. Boner *v.* Montgomery, 9 B, Mon. (Ky.) 123; Lyle *v.* Lindsey, 5 B. Mon. (Ky.) 123; McKinney *v.* Pope, 3 B. Mon. (Ky.) 93 [*distinguishing* Downs *v.* Quarles, Litt. Sel. Cas. (Ky.) 489, 12 Am. Dec. 337].

In Illinois, under Cr. Code, § 133, a bill in equity may be maintained to subject property which the owner knowingly permitted to be used for gambling purposes to the payment of the judgment against the winner for money lost. Gaby *v.* Hankins, 86 Ill. App. 529.

2. *Alabama.*— Cheatham *v.* Young, 5 Ala. 353.

Illinois.— West *v.* Carter, 129 Ill. 249, 21 N. E. 782 (holding that this rule applies as well to judgments rendered in contested actions as to judgments on confession); Lucas *v.* Nichols, 66 Ill. 41; Mallett *v.* Butcher, 41 Ill. 382. A judgment recovered upon a lease of property for use in a gambling-house may be set aside in equity under Cr. Code, §§ 127, 135. Boddie *v.* Brewer, etc., Brewing Co., 204 Ill. 352, 68 N. E. 394 [*affirming* 107 Ill. App. 357]; Harris *v.* McDonald, 194 Ill. 75, 62 N. E. 310 [*affirming* 93 Ill. App. 191], judgment on contract of guaranty indorsed on such lease. But in a suit to avoid such judgment equity will not decree repayment of former rents collected by enforcing former judgments therefor. Boddie *v.* Brewer, etc., Brewing Co., *supra.*

Kentucky.— Gill *v.* Webb, 2 T. B. Mon. 4, perpetual injunction of judgment obtained by a holder of a note with notice of the true consideration.

Mississippi.— Smither *v.* Keys, 30 Miss. 179 (holding that, although the court will not vacate such a judgment except on the objection of one of the original parties, they will not permit a creditor to enforce it against trust property of the debtor validly conveyed prior to the judgment); Martin *v.* Terrell, 12 Sm. & M. 571; Lucas *v.* Waul, 12 Sm. & M. 157.

Virginia.— White *v.* Washington, 5 Gratt. 645 (holding that where defendant is surprised in the testimony of the only witness in a suit on a note founded on a gaming consideration and the judgment goes against him, he may come into equity for relief, although he made no motion for a new trial in the lower court); Skipwith *v.* Strother, 3 Rand. 214; Woodson *v.* Barrett, 2 Hen. & M. 80, 3 Am. Dec. 612.

See 24 Cent. Dig. tit. "Gaming," § 86.

3. Paulding *v.* Watson, 21 Ala. 279; Clay *v.* Fry, 3 Bibb (Ky.) 248, 6 Am. Dec. 654.

4. West *v.* Carter, 129 Ill. 249, 21 N. E. 782; Everitt *v.* Knapp, 6 Johns. (N. Y.) 331.

5. *Alabama.*— Cheatham *v.* Young, 5 Ala. 353.

Illinois.— West *v.* Carter, 129 Ill. 249, 21 N. E. 782; Lucas *v.* Nichols, 66 Ill. 41; Mallett *v.* Butcher, 41 Ill. 382 [*overruling* Abrams *v.* Camp, 4 Ill. 290]; Patterson *v.* Scott, 33 Ill. App. 348. An exception to the above rule exists in this state in reference to a judgment for money bet on the result of an election. Lucas *v.* Nichols, *supra.*

Kentucky.— Clay *v.* Fry, 3 Bibb 248, 6 Am. Dec. 654. But after an ineffectual attempt to defend at law against the collection of a gambling debt equity will not interfere. Moffett *v.* White, 1 Litt. 324; Davidson *v.* Givins, 2 Bibb 200, 4 Am. Dec. 695.

Maryland.— Gough *v.* Pratt, 9 Md. 526.

Mississippi.— Lucas *v.* Waul, 12 Sm. & M. 157.

Virginia.— Skipwith *v.* Strother, 3 Rand. 214.

See 24 Cent. Dig. tit. "Gaming," § 86.

Contra.— Weakley *v.* Watkins, 7 Humphr. (Tenn.) 356; Giddens *v.* Lea, 3 Humphr. (Tenn.) 133.

In North Carolina under the construction given to act of 1788, it has been held that equity will not interpose to restrain the collection of such a judgment where it was not obtained by fraud and no resistance was made at law to prevent the judgment. Dunn *v.* Holloway, 16 N. C. 322; Jones *v.* Jones, 4 N. C. 547.

6. West *v.* Carter, 129 Ill. 249, 21 N. E. 782. See Martin *v.* Terrell, 12 Sm. & M. (Miss.) 571.

A surety on a replevin bond given to secure the judgment on a note given in payment of a gambling debt may be relieved in equity from payment for that cause (Lyle *v.* Lindsey,

statutes it may be obtained even against a *bona fide* holder for value without notice.[7]

b. Against Stakeholder. A bill in equity may be maintained to restrain a stakeholder from paying over money or property deposited with him and to compel its return.[8]

C. Procedure*— 1. Nature and Form of Remedy — a. Against Opposite Party.[9] An action to recover back money or property lost in a gambling transaction must be brought in the manner prescribed, if any, by the statute permitting such recovery.[10] The usual remedy to recover money lost and paid is an action of debt,[11] or assumpsit.[12] If the thing lost be property the recovery may be by trover,[13] detinue,[14] or an action on the case when by reason of any act beyond the mere winning and recovering of the property damages may be recovered;[15] but replevin[16] or an action in the nature of assumpsit will not lie.[17] Under some statutes recovery may be by way of counterclaim.[18] Under statutes giving a loser's creditors the same remedy as the loser himself the creditors' remedy is statutory and a creditors' bill is not necessary.[19] Separate actions should be brought by a loser for amounts lost on different occasions.[20]

b. Against Stakeholder. Assumpsit is the usual remedy for recovering back money deposited with a stakeholder;[21] but for property deposited the proper

5 B. Mon. (Ky.) 123); but a surety on an appeal-bond given on an appeal from such a judgment is not a person interested therein and cannot maintain a bill to set it aside (West *v.* Carter, 129 Ill. 249, 21 N. E. 782).

7. Gough *v.* Pratt, 9 Md. 526; Lucas *v.* Waul, 12 Sm. & M. (Miss.) 157, the statute in this state making the contract void. But see Hoomes *v.* Smock, 1 Wash. (Va.) 389.

8. Petillon *v.* Hipple, 90 Ill. 420, 32 Am. Rep. 31.

9. Qui tam action see *supra*, III, D, 1.

10. Nealy *v.* Powell, 20 Ark. 163; Schmitt *v.* Howell, 10 Daly (N. Y.) 290; Haywood *v.* Sheldon, 13 Johns. (N. Y.) 88; Rockwood *v.* Oakfield, 2 N. Y. St. 331; Nichols *v.* Lumpkin, 7 N. Y. Civ. Proc. 1; Com. *v.* Robbins, 26 Pa. St. 165; Rucker *v.* Wynne, 2 Head (Tenn.) 617.

11. Nealy *v.* Powell, 20 Ark. 163; Little *v.* Brannenburgh, 4 Ind. 35; Morgan *v.* Lewis, 7 B. Mon. (Ky.) 243; McKeon *v.* Catherty, 1 Hall (N. Y.) 300; Moulton *v.* Westchester Racing Assoc., 42 Misc. (N. Y.) 487, 84 N. Y. Suppl. 871.

12. *Georgia.*— Smith *v.* Ray, 89 Ga. 838, 16 S. E. 90, holding that this action does not rest upon the statute but upon the common law.

Maine.— Marean *v.* Longley, 21 Me. 26.

Maryland.— Hook *v.* Boteter, 3 Harr. & M. 348.

Massachusetts.— Crandell *v.* White, 164 Mass. 54, 41 N. E. 204; Love *v.* Harvey, 114 Mass. 80; Grace *v.* McElroy, 1 Allen 563; Mason *v.* Waite, 17 Mass. 560.

New York.— Causidiere *v.* Beers, 1 Abb. Dec. 333, 2 Keyes 198; Phillips *v.* Sture, 1 Code Rep. 58 (holding assumpsit proper remedy when no form of action is prescribed); Cole *v.* Smith, 4 Johns. 193.

Vermont.— Preston *v.* Hutchinson, 29 Vt. 144, holding that, although assumpsit was the proper form of action against several parties who confederated together to play at cards with another and divide the winnings between them, it was in fact a recovery for a tort, and the rules applicable to a recovery in actions of tort would apply.

See 24 Cent. Dig. tit. "Gaming," §§ 77, 78.

An action for money had and received is an action of contract within Mass. St. (1890) c. 437, allowing one who has lost money in dealing in margins to recover the same "in an action of contract." Crandell *v.* White, 164 Mass. 54, 41 N. E. 204.

13. Nealy *v.* Powell, 20 Ark. 163; Leverett *v.* Stegall, 23 Ga. 257 (promissory note of third person paid to winner after notice to stakeholder not to do so); Marean *v.* Longley, 21 Me. 26.

14. Nealy *v.* Powell, 20 Ark. 163; Morgan *v.* Lewis, 7 B. Mon. (Ky.) 243.

15. Morgan *v.* Lewis, 7 B. Mon. (Ky.) 243; Marean *v.* Longley, 21 Me. 26.

The mere refusal to restore property won at gaming will not authorize an action on the case for its value. Morgan *v.* Lewis, 7 B. Mon. (Ky.) 243.

16. Nealy *v.* Powell, 20 Ark. 163.

17. The Carrie Converse *v.* Feitig, 27 La. Ann. 117. *Contra,* Hook *v.* Boteter, 3 Harr. & M. (Md.) 348, holding that under the statute of Anne against gaming an action for money had and received lies for money lost at gaming, although the winner was paid in goods.

18. McDougall *v.* Walling, 48 Barb. (N. Y.) 364; Ennis *v.* Ross, 37 Misc. (N. Y.) 160, 74 N. Y. Suppl. 806. *Compare* Bevins *v.* Reed, 2 Sandf. (N. Y.) 436, holding that in an action to recover from a stakeholder money deposited by plaintiff on a wager, defendant cannot set off a deposit made by him with plaintiff on another wager of a similar character.

19. Cofer *v.* Riseling, 153 Mo. 633, 55 S. W. 235.

20. Betts *v.* Hillman, 15 Abb. Pr. (N. Y.) 184.

21. *Illinois.*— Parmelee *v.* Rogers, 26 Ill. 56, where a stakeholder promised to pay one of the parties the amount of his deposit.

* By Henry H. Skyles (except 6, c, and 7 and 8 *infra*).

remedy is trover.[22] Garnishment proceedings may be maintained against the stakeholder by a creditor of the depositor.[23]

2. Defenses — a. In Action Against Opposite Party — (I) *By Winner.* In an action on a note, bond, or other contract founded on a gaming consideration defendant may set up the illegality of the contract,[24] but such defense must be pleaded at the proper time.[25] Defendant is not bound, as a condition precedent to his right to set up such defense, to return what he received under the contract,[26] or to give notice to the other party of his intention to repudiate the contract.[27]

(II) *By Loser.* In an action under the statute to recover money or property lost and paid, defendant cannot plead the illegality of the transaction as a defense,[28] or that plaintiff was *particeps criminis*,[29] or that some of the property claimed belonged to a person other than plaintiff;[30] nor can he set up a void statute under which he was authorized to gamble.[31] But a former judgment recovered or compromised[32] and payments made in good faith[33] are good defenses to subsequent actions for the same cause of action to the extent of such payments.[34]

b. In Actions Against Stakeholder. In an action against a stakeholder for the recovery of a deposit he, not being a party to the contract, cannot set up its illegality as a defense,[35] nor assume the position of a party to the wager and ask the court to recognize the contract.[36] Neither can he set off the amount of a deposit made by him with plaintiff on another wager of a similar character,[37] or

New Hampshire.— Perkins *v.* Eaton, 3 N. H. 152.

New Jersey.— Van Pelt *v.* Schauble, 68 N. J. L. 638, 54 Atl. 437; Huncke *v.* Francis, 27 N. J. L. 55.

New York.— O'Maley *v.* Reese, 6 Barb. 658. But see McKeon *v.* Caherty, 1 Hall 300 [*affirmed* in 3 Wend. 494], holding that at common law debt and not assumpsit is the proper remedy to recover money deposited in the hands of a stakeholder upon the event of a horse-race.

Pennsylvania.— Siegel *v.* Funk, 3 Pittsb. 28.

Vermont.— Tarleton *v.* Baker, 18 Vt. 9, 44 Am. Dec. 358.

See 24 Cent. Dig. tit. "Gaming," §§ 77, 78.

22. Porter *v.* Sawyer, 1 Harr. (Del.) 517 (check deposited and not converted into money); Doxey *v.* Spaids, 8 Ill. App. 549 (trover will lie to recover property deposited as a margin on a grain gambling contract).

23. Pabst Brewing Co. *v.* Liston, 80 Minn. 473, 83 N. W. 448, 81 Am. St. Rep. 275, holding also that such proceedings may be maintained without demand for payment where the stakeholder has parted with the money wagered after notice not to pay it over.

A creditor of a bailee with whom the money had been deposited for the purpose of betting cannot garnish it in the hands of the stakeholder as against the right of the bailor to recover it from the stakeholder. Hardy *v.* Hunt, 11 Cal. 343, 70 Am. Dec. 787.

24. Schmueckle *v.* Waters, 125 Ind. 265, 25 N. E. 281; Roff *v.* Harmon, (Indian Terr. 1901) 64 S. W. 755. And see cases cited *supra*, IV, B, *passim*.

25. Van Dusen-Harrington Co. *v.* Jungeblut, 75 Minn. 298, 77 N. W. 790, 74 Am. St. Rep. 463; Cowton *v.* Anderson, 1 How. Pr. (N. Y.) 145, holding also that a judgment by default on a note will not be set aside on motion because the note was given for a gambling debt.

26. Schmueckle *v.* Waters, 125 Ind. 265, 25 N. E. 281.

27. Merrill *v.* Garver, 4 Nebr. (Unoff.) 830, 96 N. W. 619.

28. Lear *v.* McMillan, 17 Ohio St. 464. See Bryan *v.* Lamson, 88 Ill. App. 261, as to right of third person to make such defense.

29. Watts *v.* Lynch, 64 N. H. 96, 5 Atl. 458. And see cases cited *supra*, IV, B, 1, a, (III), (B), (1), (b), bb.

30. Jackson *v.* Nelson, (Tex. Civ. App. 1897) 39 S. W. 315.

31. Harris *v.* Brooks, 56 Ala. 388.

32. Caldwell *v.* Caldwell, 2 Bush (Ky.) 446.

A recovery by the loser's creditor bars a recovery by the loser from the winner. Cofer *v.* Riseling, 153 Mo. 633, 55 S. W. 235.

An unsatisfied judgment against one of several persons who conspired together to play at cards and divide the winnings is no bar to a recovery against any of the others. Preston *v.* Hutchinson, 29 Vt. 144.

33. Caldwell *v.* Caldwell, 2 Bush (Ky.) 446, holding that payments to loser are a bar to an action by a creditor of the loser.

34. Caldwell *v.* Caldwell, 2 Bush (Ky.) 446.

A receipt by the loser to the winner for a given amount does not bar a suit to recover any balance of the sum lost which may still remain unpaid. Hendrickson *v.* Beers, 6 Bosw. (N. Y.) 639.

35. Alford *v.* Burke, 21 Ga. 46, 68 Am. Dec. 449.

A forfeiture to the people of the sum bet cannot be set up by the stakeholder as a defense to an action against him for the amount of the deposit, as a forfeiture is enforceable by the people only. French *v.* Matteson, 34 Misc. (N. Y.) 425, 69 N. Y. Suppl. 869.

36. Alford *v.* Burke, 21 Ga. 46, 68 Am. Dec. 449.

37. Bevins *v.* Reed, 2 Sandf. (N. Y.) 436.

expenses incurred by him in respect to the gambling transaction.[38] Nor is it a defense to the stakeholder that after demand he paid or delivered the money or property to the winner,[39] or to another to whom it was forfeited, in the absence of suit by the latter.[40] A payment before demand or notice, however, will be a good defense.[41]

3. Time to Sue and Limitations.[42] The statutes giving a right of action for money or property lost and paid also generally require that the action therefor must be brought by the loser, his creditor, etc., within a prescribed time after payment or delivery.[43] Under some statutes suing within the prescribed time is regarded as a condition precedent to the loser's right of action,[44] and if not brought within that time defendant need not plead that fact in order to set it up as a defense.[45] Under other statutes, however, although he has an exclusive right of suing for a given length of time and no other person can sue until after the expiration of that time,[46] it does not preclude him thereafter, if no other person has commenced suit, from privately settling in good faith with the winner,[47] or from suing for the amount of his loss.[48] The time within which a deposit may be recovered from a stakeholder is regulated in some jurisdictions by special statutes;[49] but in others the statutes governing the institution of actions against a winner have been held to apply.[50]

4. Parties[51] — a. Plaintiffs.[52] An action by a loser may under some statutes

38. Morgan *v.* Beaumont, 121 Mass. 7, expenses in securing race ground.

39. McDonough *v.* Webster, 68 Me. 530. And see *supra*, IV, B, 1, a, (III), (B), (2), (c), bb.

40. Gilmore *v.* Woodcock, 70 Me. 494.

41. See *supra*, IV, B, 1, a, (III), (B), (2), (c), bb.

42. See, generally, Limitations of Actions. And see *supra*, IV, B, 1, a, (III), (B), (1), (b), bb, (aa).

43. *Alabama.*— Samuels *v.* Ainsworth, 13 Ala. 366.

Indiana.— Ervin *v.* State, 150 Ind. 332, 58 N. E. 249.

Kentucky.— Faris *v.* Kirtley, 5 Dana 460; Estill *v.* Fox, 7 T. B. Mon. 552, 18 Am. Dec. 213.

Maine.— Marean *v.* Longley, 21 Me. 26.

Massachusetts.— Cole *v.* Groves, 134 Mass. 471; Low *v.* Blanchard, 116 Mass. 272 (holding that under Gen. St. c. 85, § 2, a loser at gaming can recover from the occupant of the house only such sums as are sued for within three months after their loss); Plummer *v.* Gray, 8 Gray 243.

Missouri.— Connor *v.* Black, 132 Mo. 150, 33 S. W. 783.

South Carolina.— Atchison *v.* McGee, 4 McCord 211.

Tennessee.— Nichol *v.* Batton, 3 Yerg. 469; Johnson *v.* Cooper, 2 Yerg. 524, 24 Am. Dec. 502; Hutchison *v.* Edwards, Mart. & Y. 262.

See 24 Cent. Dig. tit. "Gaming," § 91.

Actions brought after disaffirmance of wager.— Where defendant receives a wager after the contract is disaffirmed and notice is given to the stakeholder not to deliver it the limitation does not apply. Guthman *v.* Parker, 3 Head (Tenn.) 233.

Suits in equity.— This limitation applies only to actions at law and not to a suit in equity to declare void a conveyance in payment of a loss at gambling. Johnson *v.* Cooper, 2 Yerg. (Tenn.) 524, 24 Am. Dec. 502.

Application of statute to defenses.— The defense of illegality may be set up, although it is in effect an attempt to recover property lost and is filed after the expiration of the time allowed for bringing an action to recover such loss. Roff *v.* Harmon, (Indian Terr. 1901) 64 S. W. 755.

In computing the time expired the time of defendant's absence from the state is to be deducted. Peyret *v.* Coffee, 48 Me. 319. But see Cook *v.* Barnett, 25 Ga. 664.

In California an action to recover money paid for the price of stocks on margin is subject to the statute of limitations governing actions for money had and received and not to the statute for the recovery of a penalty or forfeiture. Parker *v.* Otis, 130 Cal. 322, 62 Pac. 571, 927, 92 Am. St. Rep. 56.

44. Paulk *v.* Jasper Land Co., 116 Ala. 178, 22 So. 495; Samuels *v.* Ainsworth, 13 Ala. 366; Holland *v.* Swain, 94 Ill. 154; Plummer *v.* Gray, 8 Gray (Mass.) 243; Forscht *v.* Green, 53 Pa. St. 138.

45. Paulk *v.* Jasper Land Co., 116 Ala. 178, 22 So. 495; Samuels *v.* Ainsworth, 13 Ala. 366; Forscht *v.* Green, 53 Pa. St. 138.

46. Ervin *v.* State, 150 Ind. 332, 48 N. E. 249, action by state not permitted within six months allowed to loser.

47. Barnes *v.* Turner, 4 Metc. (Ky.) 114.

48. Cooper *v.* Rowley, 29 Ohio St. 547; Hoss *v.* Layton, 3 Ohio St. 352.

49. Cutshall *v.* McGowan, 98 Mo. App. 702, 73 S. W. 933.

50. McKeon *v.* Caherty, 2 Hall (N. Y.) 299. But see Perkins *v.* Hyde, 6 Yerg. (Tenn.) 288.

51. See, generally, Parties.

52. **Persons entitled to sue** see *supra*, IV, B, 1, a, (III), (B), (1), (b), bb, (bb); IV, B, 1, a, (III), (B), (2), (d).

be in his own name for his own use and benefit,[53] but under others it must be for the benefit of his wife and children.[54] If several persons join or are interested in the wager each must sue separately for his portion lost and paid.[55] An action by a third person to recover the money or property lost should be in the name of the person authorized by statute,[56] and in such case it is not necessary to join as plaintiff the real party in interest for whose benefit the action is brought.[57] In an action by a creditor of the loser against the winner the loser is not a necessary party.[58] The proper party plaintiff in an action against a stakeholder for the recovery of a deposit is the real depositor, although the deposit was made for him in the name of another,[59] and although others are interested in the bet or wager.[60]

b. Defendants.[61] In an action to recover money or property lost plaintiff may join as defendants all the adverse betters[62] and the stakeholders,[63] provided that no person is joined whose bet is less than the amount necessary to give the court jurisdiction.[64] But one who is merely the owner of the building in which the gaming was conducted cannot be joined as defendant in such an action with those concerned in the game;[65] nor in an action under a statute allowing recovery against the owners of such building can the owners of separate buildings in which separate sums were lost be joined as defendants.[66]

5. Pleading[67] **— a. Declaration, Complaint, or Petition**[68] **—** (i) *In Action Against Opposite Party.* A declaration, complaint, or petition in an action under the statute for the recovery of money or property lost at gaming should set forth with certainty[69] all the substantive facts necessary to a recovery under

53. Harris *v.* Brooks, 56 Ala. 388; Faris *v.* Kirtley, 5 Dana (Ky.) 460. See Haywood *v.* Sheldon, 13 Johns. (N. Y.) 88.

All the members of a firm are proper parties plaintiff to recover the value of property of the firm lost on a wager by one of the partners, under Ohio Rev. St. tit. 5, c. 5. Cannon *v.* Cheney, 8 Ohio Cir. Ct. 143, 4 Ohio Cir. Dec. 335.

54. See *supra*, IV, B, 1, a, (III), (B), (1), (b), bb, (bb).

55. Davis *v.* Orme, 36 Ala. 540; Pulver *v.* Burke, 56 Barb. (N. Y.) 390; Wood *v.* Owens, 2 Swan (Tenn.) 146; Lillard *v.* Mitchell, (Tenn. Ch. App. 1896) 37 S. W. 702. *Compare* Cato *v.* Hutson, 7 Mo. 142.

56. Ervin *v.* State, 150 Ind. 332, 48 N. E. 249.

In Indiana, under Rev. St. (1894) § 6678, an action for the benefit of the loser's wife may be prosecuted in the name of the state as sole plaintiff, and the wife is not a proper party plaintiff, although named as relator; but where it was a wife's money or property that was lost by her husband, an action by the state for her benefit cannot be maintained, for if the money was lost without her knowledge she would have a common-law right of action against the winner as a trustee *de son tort*, and if it was with her knowledge and consent the action would be in her own name under section 6676. Ervin *v.* State, 150 Ind. 332, 48 N. E. 249.

57. Ervin *v.* State, 150 Ind. 332, 48 N. E. 249.

58. Cofer *v.* Riseling, 153 Mo. 633, 55 S. W. 235.

59. Ruckman *v.* Pitcher, 1 N. Y. 392, 20 N. Y. 9.

The principal is the proper party to sue for a deposit made by his agent, who has no other interest in it. Donahoe *v.* McDonald, 92 Ky. 123, 17 S. W. 195, 13 Ky. L. Rep. 413.

Where the loser acts for himself and another jointly in making a bet and depositing the money, both may unite in the action against the stakeholder. Turner *v.* Thompson, 107 Ky. 647, 55 S. W. 210, 21 Ky. L. Rep. 1414.

60. Humphreys *v.* Magee, 13 Mo. 435, holding that it is not necessary for such others to join in the suit.

A joint action to recover money deposited on an election wager cannot be maintained against the stakeholder by several contributors. Nytinger *v.* Springer, 3 Watts & S. (Pa.) 405, 38 Am. Dec. 774.

61. Persons liable see *supra*, IV, B, 1, a, (III), (B), (1), (b), bb, (cc).

62. Galbreath *v.* Atkinson, 15 Tex. 21.

63. Galbreath *v.* Atkinson, 15 Tex. 21; Jackson *v.* Nelson, (Tex. Civ. App. 1897) 39 S. W. 315, holding that stakeholders are proper parties defendant in an action to recover property wagered by plaintiff with defendant and which the stakeholders have paid over to defendant against plaintiff's objection.

64. Galbreath *v.* Atkinson, 15 Tex. 21.

65. Smith *v.* Wyatt, 2 Cinc. Super. Ct. 12

66. Bobb *v.* Hetsch, 8 Ohio Dec. (Reprint) 245, 6 Cinc. L. Bul. 636.

67. See, generally, Pleading.

68. For forms of declaration see Smith *v.* Ray, 89 Ga. 838, 16 S. E. 90; Binder *v.* Finkbone, 25 Ohio St. 103.

69. Wehmhoff *v.* Rutherford, 98 Ky. 91, 32 S. W. 288, 17 Ky. L. Rep. 659.

Mode of objection to uncertainty.— Any indefinite allegations in the pleadings may

the particular statute;[70] but it is unnecessary and improper to set forth the circumstances from which such facts may be deduced.[71] An immaterial allegation showing the relation of the parties at the time the money was lost will not be stricken out.[72] A continuous transaction covering a period of several months but for a single and continuous purpose running through the entire transaction may be pleaded in a single count.[73] Plaintiff may in a proper case be put to an election between counts.[74] If defendant pleads to the declaration he thereby waives any formal defect or omission therein,[75] but not a defect for not stating facts sufficient to constitute a cause of action.[76]

(II) *In Action Against Stakeholder.* A declaration, complaint, or petition against a stakeholder for the recovery of money or property deposited should state all the facts necessary to bring the case within the statute against gaming, such as the nature of the wager, the fact of deposit with the stakeholder, and a demand and refusal before suit.[77] Although it should refer to the statute an omission to do so is at most only a formal defect and can be objected to only by special demurrer.[78]

b. Plea or Answer.[79] A plea or answer setting up the defense of gambling must not be ambiguous[80] or contain inconsistent statements,[81] but it must state with certainty all facts necessary to show that the transactions with defendant out

be corrected and made more definite by motion only and not by demurrer. Deaver *v.* Bennett, 29 Nebr. 812, 46 N. W. 161, 26 Am. St. Rep. 415; Betts *v.* Bache, 9 Bosw. (N. Y.) 615, 23 How. Pr. 197.

70. *Illinois.*— Zellers *v.* White, 208 Ill. 518, 70 N. E. 669, 100 Am. St. Rep. 243 [*affirming* 106 Ill. App. 183] (holding, however, that a declaration consisting of the common counts without reference to the criminal code authorizing the suit is sufficient after verdict); Winchester *v.* Rounds, 55 Ill. 451 (holding that in an action of trover under 2 Rev. St. (1845) p. 263, to recover money lost at gaming it was not essential, in order to give the court jurisdiction of the subject-matter, that the declaration should set forth the special matter or so refer to the statute as to show that the action was under its provisions; but that it should conclude "whereby an action hath accrued to the plaintiff, according to the form of the statute" against gaming).

Indiana.— Ervin *v.* State, 150 Ind. 332, 48 N. E. 249.

Kentucky.— Bess *v.* Shepherd, 2 Bibb 255; Bliss *v.* Townsend, Ky. Dec. 15.

Massachusetts.— Ballou *v.* Willey, 180 Mass. 562, 62 N. E. 1064, complaint in action to recover money paid broker in illegal stock transaction.

New York.— Mendoza *v.* Levy, 98 N. Y. App. Div. 326, 90 N. Y. Suppl. 748 (complaint to recover money bet on horse-race); Stannard *v.* Eytinge, 5 Rob. 90, 3 Abb. Pr. N. S. 42, 33 How. Pr. 262; Betts *v.* Bache, 9 Bosw. 614, 23 How. Pr. 197; Copley *v.* Doran, 1 N. Y. Suppl. 888 (illegal stock transaction); Gilpin *v.* Daly, 24 Abb. N. Cas. 216, 11 N. Y. Suppl. 6; Moran *v.* Morrissey, 18 Abb. Pr. 131, 28 How. Pr. 100; Arrieta *v.* Morrissey, 1 Abb. Pr. N. S. 439; Langworthy *v.* Broomley, 29 How. Pr. 92 (allegation of amount lost). See Collins *v.* Ragrew, 15 Johns. 5.

Ohio.— Vincent *v.* Taylor, 60 Ohio St. 309, 54 N. E. 264, petition by loser's wife under Rev. St. § 4271.

Tennessee.— Lillard *v.* Mitchell, (Ch. App. 1896) 37 S. W. 702, bill not fatally defective for not stating that complainant was owner of money wagered.

See 24 Cent. Dig. tit. "Gaming," § 96.

71. Ballou *v.* Willey, 180 Mass. 562, 62 N. E. 1064.

72. Gilpin *v.* Daly, 11 N. Y. Suppl. 6, 24 Abb. N. Cas. (N. Y.) 216.

73. Boyce *v.* Odell Commission Co., 107 Fed. 58.

74. Wehmhoff *v.* Rutherford, 98 Ky. 91, 32 S. W. 288, 17 Ky. L. Rep. 659, holding that where plaintiff in one paragraph seeks to recover on the ground that defendant induced him to go where the game was carried on at which he lost the amount sued for, and in another seeks to recover on the ground that defendant was the winner, he should be required to elect which cause of action he will prosecute.

75. Winchester *v.* Rounds, 55 Ill. 451.

76. Stannard *v.* Eytinge, 5 Rob. (N. Y.) 90, 3 Abb. Pr. N. S. 42, 33 How. Pr. 262.

77. O'Maley *v.* Reese, 6 Barb. (N. Y.) 658; Eggers *v.* Klussmann, 16 Abb. N. Cas. (N. Y.) 226.

A bill to restrain a stakeholder from paying over complainant's deposit and to compel a return thereof to complainant must allege that the money or property is still in the stakeholder's hands and that he refuses to return it after demand. Petillon *v.* Hipple, 90 Ill. 420, 32 Am. Rep. 31.

For form of special count against stakeholder to recover back a deposit see O'Maley *v.* Reese, 6 Barb. (N. Y.) 658.

78. O'Maley *v.* Reese, 6 Barb. (N. Y.) 658.

79. Pleading limitations see *supra*, IV, C, 3.

80. Prentiss *v.* Press, 63 Ill. App. 430.

81. Elias *v.* Gill, 92 Ky. 569, 18 S. W. 454, 13 Ky. L. Rep. 798, holding, however,

of which the alleged cause of action arose were in violation of a particular gaming statute.[82] A plea or answer setting up that a note, etc., upon which an action is brought was given for a gaming consideration must state clearly and fully all facts constituting the consideration and which rendered it illegal.[83] Where such plea or answer is to an action by an assignee, it need not allege that the note was overdue when assigned.[84] A stakeholder's plea or answer should contain a sufficient denial of all material facts averred in the complaint, and an evasive answer is insufficient.[85]

c. Reply. The sufficiency of a reply to a plea or answer setting up gambling as a defense is governed by the general rules regulating replies in civil actions.[86]

d. Issues and Proof. The parties to an action growing out of a gaming transaction may introduce evidence only of facts alleged in the pleadings or within the issues made thereby,[87] and unless they do introduce evidence on such issues they are liable to an adverse decision.[88] Evidence that a note or other contract was given for a gaming consideration has been held admissible upon

that an answer contains no inconsistent statements by reason of its denial that plaintiff lost anything to defendant and its allegation that at the time and in the transactions mentioned by plaintiff defendant had lost to him.

82. Sybert *v.* Jones, 19 Mo. 86; Ennis *v.* Ross, 37 Misc. (N. Y.) 160, 74 N. Y. Suppl. 860 (holding that an alleged defense that plaintiffs, during the times mentioned in the complaint, dealt on margins with different persons, but not stating that the dealings with defendant were such is bad on demurrer); Burr *v.* Davis, (Tex. Civ. App. 1894) 27 S. W. 589; Knight *v.* Fitch, 15 C. B. 566, 3 C. L. R. 567, 1 Jur. N. S. 506, 24 L. J. C. P. 122, 80 E. C. L. 566 (plea of fictitious sales of stocks under 8 & 9 Vict. c. 109). See, however, Cassard *v.* Hinman, 1 Bosw. (N. Y.) 207, where the plea was sustained.

83. Prentiss *v.* Press, 63 Ill. App. 430 (plea of gambling in stocks); Fisher *v.* Fisher, 113 Ind. 474, 15 N. E. 832; Ensley *v.* Patterson, 19 Ind. 95 (holding that where, in a suit on a note for money loaned to be wagered, the maker relies on the illegality of the consideration, he must aver in his answer that the money was loaned at the time of such wager); Glass *v.* Murphy, 4 Ind. App. 540, 30 N. E. 1097, 31 N. E. 545; Kain *v.* Bare, 4 Ind. App. 440, 31 N. E. 205; Welford *v.* Gilham, 29 Fed. Cas. No. 17,376, 2 Cranch 556.

However, the kind of game at which the money was lost need not be stated (Jordan *v.* Locke, Minor (Ala.) 254); and a plea that the note sued on was given in settlement of illegal stock-gambling speculations on margins states a sufficient defense (Nichols *v.* Lumpkin, 51 N. Y. Super. Ct. 88).

84. Williams *v.* Judy, 8 Ill. 282, 44 Am. Dec. 699.

85. Wise *v.* Rose, 110 Cal. 159, 42 Pac. 569, holding that where plaintiff alleged a repudiation of the wager and notice thereof to defendant, an answer admitting all the material facts except that he denied on information and belief the repudiation and notice, and alleging that he could not "positively say" whether the notice was received before the event is insufficient.

86. See, generally, PLEADING.

For example where the answer in a suit upon a note sets up that the note was given for money due on a gambling transaction in options, that in such transaction there is a balance from plaintiff to defendant greater than the amount of such note, that the note was given without consideration, and that it has been paid, a reply which alleges that the note was given for money lent, separate and apart from any other transaction, and that defendant's share of the profit arising from the option transaction had been fully paid to him, leaving said note unpaid, is good; but a reply to such a defense alleging the settlement of all matters of business between the parties except the note in suit is insufficient. Davis *v.* Davis, 119 Ind. 511, 21 N. E. 1112.

87. May *v.* Burras, 13 Abb. N. Cas. (N. Y.) 384 (holding that evidence that a check was given in settlement of a gaming transaction is inadmissible under an answer setting up merely want of consideration); Haywood *v.* Sheldon, 13 Johns, (N. Y.) 88, 89 (holding that a cause of action arising under the act to prevent horse-racing may be proved under an allegation that the action had accrued "according to the form, and as is provided in . . . the act entitled an act to prevent excessive and deceitful gaming").

Where the statute contains an exception, one seeking to avoid a contract under such statute must allege and prove that the transaction was not one coming within the exception. Harris *v.* White, 81 N. Y. 532.

Evidence that a note given for money won was given in another jurisdiction where such a note is valid is not admissible unless the fact has been pleaded. Norvell *v.* Oury, 13 Tex. 31.

88. Jacobs *v.* Cohn, 46 Misc. (N. Y.) 115, 91 N. Y. Suppl. 339, holding that where in an action by a broker's assignee for reimbursement defendant alleged that the whole transaction was a mere "bucket-shop" affair, it was necessary for plaintiff, to warrant the denial of a motion to dismiss, to introduce some competent evidence of a genuine purchase and sale by plaintiff's assignor and a consequent loss.

the plea of non-assumpsit;[89] but on the other hand it has been held that since a note or contract is presumed to be valid the fact of a gaming consideration must be specially pleaded or evidence of that fact will be precluded.[90] In an action to recover money lost at gaming, evidence of matters arising subsequent to the filing of the plea cannot be introduced under the general issue.[91]

6. Evidence[92]— a. Burden of Proof and Presumptions.[93] Since the law usually presumes a lawful purpose until the contrary is proved,[94] the burden of proving that a contract or transaction is a gambling one is on the party asserting it,[95] and this fact should be made out by testimony in chief.[96] Thus the burden is ordinarily on the one asserting it to prove that dealings in futures were gambling transactions.[97] Races for premiums not being prohibited by the common law, it will not be presumed that the laws of another state prohibit such races.[98] In an action to recover money or property lost at gaming, the burden is on plaintiff to prove all facts necessary to bring his case within the statute under which he sues.[99]

b. Admissibility. The general rules governing the admissibility of evidence

89. Price *v.* Burns, 101 Ill. App. 418; Jones *v.* Pryor, 1 Bibb (Ky.) 614; Herd *v.* Vincent, 1 Overt. (Tenn.) 369.

90. Sybert *v.* Jones, 19 Mo. 86 (where defense to an action on a promissory note is that it was given for a bet on election the answer must state the particulars of the transaction such as what election, between whom pending, etc.); Cummiskey *v.* Williams, 20 Mo. App. 606 (evidence that a contract for the sale of grain for future delivery is a wagering contract held inadmissible under a general denial); Story *v.* Salomon, 71 N. Y. 420 [*affirming* 6 Daly 531].

91. Cato *v.* Hutson, 7 Mo. 142.

92. See, generally, Evidence.

93. **Burden of proof as to illegal consideration of commercial paper** see Commercial Paper, 8 Cyc. 236.

94. Conner *v.* Robertson, 37 La. Ann. 814, 55 Am. Rep. 521; Wroth *v.* Johnson, 4 Harr. & M. (Md.) 284; Rockwood *v.* Oakfield, 2 N. Y. St. 331.

95. *Illinois.*— Barnett *v.* Baxter, 64 Ill. App. 544.

Louisiana.— Conner *v.* Robertson, 37 La. Ann. 814, 55 Am. Rep. 521.

Mississippi.— Clay *v.* Allen, 63 Miss. 426.

New Jersey.— Thompson *v.* Williamson, (Ch. 1904) 58 Atl. 602.

United States.— Bangs *v.* Hornick, 30 Fed. 97 (burden on defendant to show that promissory note was given for a gambling transaction); Bennett *v.* Covington, 22 Fed. 816.

See 24 Cent. Dig. tit. "Gaming," § 100.

96. Barnett *v.* Baxter, 64 Ill. App. 544.

97. *Alabama.*— Western Union Tel. Co. *v.* Chamblee, 122 Ala. 428, 25 So. 232, 82 Am. St. Rep. 89.

Georgia.— Forsyth Mfg. Co. *v.* Castlen, 112 Ga. 199, 37 S. E. 485, 81 Am. St. Rep. 28.

Illinois.— Marvel *v.* Marvel, 96 Ill. App. 609; Barnett *v.* Baxter, 64 Ill. App. 544; Benson *v.* Morgan, 26 Ill. App. 522. *Compare* Wheeler *v.* McDermid, 36 Ill. App. 179.

Minnesota.— Mohr *v.* Miesen, 47 Minn. 228, 49 N. W. 862.

Mississippi.— Clay *v.* Allen, 63 Miss. 426, holding that the presumption is in favor of a contract for delivery of cotton.

Missouri.— Crawford *v.* Spencer, 92 Mo. 498, 4 S. W. 713, 1 Am. St. Rep. 745; Teasdale *v.* McPike, 25 Mo. App. 341.

New Jersey.— Pratt *v.* Boody, 55 N. J. Eq. 175, 33 Atl. 1113.

New York.— Dykers *v.* Townsend, 24 N. Y. 57 (holding that it will be presumed that the seller had sufficient stock to fulfil his contracts); Genin *v.* Isaacson, 6 N. Y. Leg. Obs. 213 (holding that a broker is not required to show affirmatively that those from whom he purchased stock on defendant's order were in actual possession at the time of the sale).

South Carolina.—Williams *v.* Connor, 14 S. C. 621.

United States.—Boyle *v.* Henning, 121 Fed. 376; Hill *v.* Levy, 98 Fed. 94; Sampson *v.* Camperdown Cotton Mills, 82 Fed. 833; Boyd *v.* Hanson, 41 Fed. 174.

Canada.— Rice *v.* Gunn, 4 Ont. 579.

See 24 Cent. Dig. tit. "Gaming," § 100.

However, it is the duty of the courts to scrutinize such transactions very closely, and if the circumstances are such as to throw doubt on the question of the intention of the parties, it is the duty of the party claiming under it to make it affirmatively appear that the transaction was made with the actual view to the delivery and receipt of the commodity. Sprague *v.* Warren, 26 Nebr. 326, 41 N. W. 1113, 3 L. R. A. 679; Bartlett *v.* Collins, 109 Wis. 477, 85 N. W. 703, 83 Am. St. Rep. 928; Barnard *v.* Backhaus, 52 Wis. 593, 6 N. W. 252, 9 N. W. 595; Cobb *v.* Prell, 15 Fed. 774, 5 McCrary 80. Thus where a minor of limited means embarks in stock transactions to a large amount on margin, the court will, even in the absence of direct evidence that he did not intend to receive or deliver the stock, infer that such was not his intent, and will therefore stamp the contract as a wagering contract and void *ab initio*. Ruchizky *v.* De Haven, 97 Pa. St. 202.

98. Harris *v.* White, 81 N. Y. 532.

99. Elias *v.* Gill, 12 Ky. L. Rep. 892; Jones *v.* Cavanaugh, 149 Mass. 124, 21 N. E. 306 (holding that under Pub. St. c. 99, § 1, plaintiff must show that he put his money on the race, lost his bet, and that defendant acting by himself or another was the winner); Perry *v.* Gross, 25 Nebr. 826, 41

in civil cases apply to civil actions arising out of gaming transactions.[1] These rules apply to the admissibility of evidence in determining whether dealings in futures were gambling transactions,[2] and in determining whether or not a broker or commission merchant was expressly or impliedly cognizant of the illegality of

N. W. 799 (holding that it need not be shown that the money lost by plaintiff on a wager with defendant was actually turned over to the latter).

Under a statute providing that the loss shall be a certain amount or more at any time or sitting, it is incumbent upon plaintiff to prove that the losses at any one sitting amounted to such sum. Ranney *v.* Flinn, 60 Ill. App. 104.

1. See Kizer *v.* Walden, 96 Ill. App. 593; Meyers *v.* Dillon, 39 Oreg. 581, 65 Pac. 867, 66 Pac. 814 (holding that under Hill Annot. Laws Oreg. § 776, subd. 12, evidence that defendant was commonly reputed to be the proprietor of a game at which plaintiff lost his money is admissible in an action to recover the same); Rector *v.* Hudson, 20 Tex. 234 (declarations).

Answers to interrogatories propounded to plaintiff by defendant may be read in evidence by defendant. Cook *v.* Barnett, 25 Ga. 664.

On the question of the intention or understanding of the parties the party who is sued is competent to testify as to his intention. Lyons First Nat. Bank *v.* Oskaloosa Packing Co., 66 Iowa 41, 23 N. W. 255. And see *infra*, notes 2, 3.

On an issue whether a negotiable instrument was given for a gambling consideration see Thompson *v.* Bowie, 4 Wall. (U. S.) 463, 18 L. ed. 423 [*reversing* 6 D. C. 91]. That the payee was a gambler is admissible. Chambers *v.* Simpson, 3 Litt. (Ky.) 290; Fowler *v.* Chapman, 1 Tex. App. Civ. Cas. § 963. Declarations of the payee are admissible. Sharp *v.* Smith, 7 Rich. (S. C.) 3.

Issue of knowledge.— For the purpose of proving defendant's knowledge that his premises were used for gambling purposes it is competent to show that the general reputation in the neighborhood where the premises are located and in which defendant lives is that such premises are kept and used by the lessors thereof as a place for gaming. Trout *v.* Marvin, 24 Ohio Cir. Ct. 333.

In an action by the loser against the stakeholder, the fact that defendant paid over the money under bond of indemnity is admissible in evidence for plaintiffs to confirm other testimony introduced by them; and one who is jointly interested with the loser and united with him in the action is a proper witness to prove that he notified defendant of his interest in the stake and demanded that the money should not be paid over. Turner *v.* Thompson, 107 Ky. 647, 55 S. W. 210, 21 Ky. L. Rep. 1414. In an action to recover money deposited with a stakeholder, evidence in his behalf that part of the money was counterfeit is admissible, although it is not produced on the trial. App *v.* Coryell, 3 Penr. & W. (Pa.) 494.

2. *Georgia.*— Forsyth Mfg. Co. *v.* Castlen, 112 Ga. 199, 37 S. E. 485, 81 Am. St. Rep. 28.

Illinois.— Roche *v.* Day, 20 Ill. App. 417.

Maryland.— Stewart *v.* Schall, 65 Md. 289, 4 Atl. 399, 57 Am. Rep. 327, holding that it is competent to show that, although the transactions were in form perfectly legal, the form was a mere guise under which gambling might be conducted.

Massachusetts.— Farnum *v.* Whitman, 187 Mass. 381, 73 N. E. 473; Post *v.* Leland, 184 Mass. 601, 69 N. E. 361; Allen *v.* Fuller, 182 Mass. 202, 65 N. E. 31.

Pennsylvania.— McDonald *v.* Gessler, 208 Pa. St. 177, 57 Atl. 361; Scofield *v.* Blackmarr, 17 Wkly. Notes Cas. 518.

South Dakota.— Waite *v.* Frank, 14 S. D. 626, 86 N. W. 645.

See 24 Cent. Dig. tit. "Gaming," § 101.

On an issue of wager in a contract for the sale of wheat, testimony that there was no agreement between the sellers and the buyer that the contract should be settled by payment of the differences is admissible, and warehouse receipts are admissible, although no question is raised as to their sufficiency in showing the ownership of the wheat which they purport to represent. Farnum *v.* Whitman, 187 Mass. 381, 73 N. E. 473.

The intention or understanding of parties to a contract for the purchase or sale of a commodity may be gathered from the attending circumstances (Mohr *v.* Miesen, 47 Minn. 228, 49 N. E. 862; Schreiner *v.* Orr, 55 Mo. App. 406), and for this purpose evidence may be introduced as to their acts and declarations (Brand *v.* Henderson, 107 Ill. 141; Lyons First Nat. Bank *v.* Oskaloosa, 66 Iowa 41, 21 N. W. 255; Cassard *v.* Hinman, 6 Bosw. (N. Y.) 8) as to similar transactions between the same parties (Crandell *v.* White, 164 Mass. 54, 41 N. E. 204), but not those between one of the parties and a third person (Pardridge *v.* Cutler, 168 Ill. 504, 48 N. E. 125 [*reversing* 68 Ill. App. 569]. And see *infra*, note 3); as to the course of dealing between plaintiff and his agent in whose name the contract was made (Kenyon *v.* Luther, 4 N. Y. Suppl. 498); and a party himself may testify as to his intention in respect to receiving or delivering a commodity (Yerkes *v.* Salomon, 11 Hun (N. Y.) 471; Waite *v.* Frank, 14 S. D. 626, 86 N. W. 645. And see *supra*, note 1, and *infra*, note 3.

Rules of a board of trade are admissible where it is apparent that the parties intended the contract to be made pursuant thereto. Bartlett *v.* Collins, 109 Wis. 477, 85 N. W. 703, 83 Am. St. Rep. 928. See Farnum *v.* Whitman, 187 Mass. 381, 73 N. E. 473. *Compare* Pardridge *v.* Cutler, 168 Ill. 504, 48 N. E. 125 [*reversing* 68 Ill. App. 569].

the transaction and therefore whether or not he could recover for his commissions or advances.[3]

c. Weight and Sufficiency.* Questions as to the weight and sufficiency of evidence in actions involving gaming transactions are to be determined by the general rules applicable in civil cases,[4] and this is true of actions in which the validity of dealings in futures is questioned.[5]

3. See cases cited *infra*, this note.

Illustrations.— To show that the broker or commission merchant is cognizant of the illegality of the transaction, evidence of defendant's occupation, residence, financial ability; that he never delivered or received, or proposed to deliver or receive any commodity; and that the orders to purchase were made without reference to, or in excess of, his ability to pay for, and other material facts of like character may be received.

Illinois.— Jamieson *v.* Wallace, 167 Ill. 388, 47 N. E. 762, 59 Am. St. Rep. 302 [*affirming* 60 Ill. App. 618]; Carroll *v.* Owens, 24 Ill. App. 453.

Minnesota.— Mohr *v.* Miesen, 47 Minn. 228, 49 N. W. 862.

Missouri.— Hill *v.* Johnson, 38 Mo. App. 383.

Nebraska.—Watte *v.* Wickersham, 27 Nebr. 457, 43 N. W. 259; Sprague *v.* Warren, 26 Nebr. 326, 41 N. W. 1113, 3 L. R. A. 679; Merrill *v.* Garver, 4 Nebr. (Unoff.) 830, 96 N. W. 619.

New York.— Mackey *v.* Rausch, 60 Hun 583, 15 N. Y. Suppl. 4; Hentz *v.* Miner, 58 Hun 428, 12 N. Y. Suppl. 474.

Pennsylvania.—Myers *v.* Tobias, (1889) 16 Atl. 641.

Wisconsin.— Lowry *v.* Gillman, 59 Wis. 199, 18 N. W. 4.

United States.— Cobb *v.* Prell, 15 Fed. 774, 5 McCrary 80.

See 24 Cent. Dig. tit. "Gaming," § 101.

Evidence of intention.— Testimony of the defendant in an action for such advances or commissions as to his intention and understanding that none of the property should be delivered to him, but that the difference in the market price should be adjusted between the parties is admissible (Dwight *v.* Badgley, 60 Hun (N. Y.) 144, 14 N. Y. Suppl. 498; Kenyon *v.* Luther, 4 N. Y. Suppl. 498), except where he states that he does not expect to prove that his intention was known to plaintiff at the time (Anderson *v.* Jacobs, 75 Hun (N. Y.) 311, 26 N. Y. Suppl. 1000). And see *supra*, notes 1, 2.

Evidence of similar transactions.— Evidence that other transactions in which plaintiff had purchased stocks for other persons were gambling transactions is inadmissible in an action for advances made by a broker by a *bona fide* purchase of stock. Dwight *v.* Badgley, 60 Hun (N. Y.) 144, 14 N. Y. Suppl. 498; Potts *v.* Dunlap, 110 Pa. St. 177, 20 Atl. 413. And see *supra*, note 2.

4. *Maine.*— Wormell *v.* Eustis, 45 Me. 357.

Michigan.— Buckley *v.* Saxe, 10 Mich. 328.

New Mexico.—Armstrong *v.* Aragon, (1905) 79 Pac. 291.

New York.— Moulton *v.* Winchester Racing Assoc., 95 N. Y. App. Div. 276, 88 N. Y. Suppl. 695.

North Dakota.— Drinkall *v.* Movius State Bank, 11 N. D. 10, 88 N. W. 724, 95 Am. St. Rep. 693, 57 L. R. A. 341.

Ohio.— Lear *v.* McMillen, 17 Ohio St. 464.

West Virginia.— Cramer *v.* Pomeroy, 47 W. Va. 56, 34 S. E. 762.

See 24 Cent. Dig. tit. "Gaming," § 102. And see EVIDENCE, 17 Cyc. 753 *et seq.*

Where a gaming act is pleaded as a defense the proof must be clear and strong. Johnson *v.* Godden, 33 Ark. 600.

5. *Arkansas.*—Phelps *v.* Holderness, 56 Ark. 300, 19 S. W. 921.

California.— Parker *v.* Otis, 130 Cal. 322, 62 Pac. 571, 927, 92 Am. St. Rep. 56; Kullman *v.* Simmens, 104 Cal. 595, 38 Pac. 362.

Illinois.— Broderick *v.* O'Leary, 112 Ill. App. 658; West *v.* Marquart, 78 Ill. App. 61; Curtis *v.* Wright, 40 Ill. App. 491; Watte *v.* Costello, 40 Ill. App. 307; Brown *v.* Alexander, 29 Ill. App. 626.

Iowa.— Counselman *v.* Reichart, 103 Iowa 430, 72 N. W. 490; Press *v.* Duncan, 100 Iowa 355, 69 N. W. 543; Mandt *v.* Garfield, 46 Iowa 707.

Kentucky.— Beadles *v.* McElrath, 85 Ky. 230, 3 S. W. 152, 8 Ky. L. Rep. 848.

Massachusetts.— Thompson *v.* Brady, 182 Mass. 321, 65 N. E. 419; Ballou *v.* Willey, 180 Mass. 562, 62 N. E. 1064; Rice *v.* Winslow, 180 Mass. 500, 62 N. E. 1057.

Michigan.— Donovan *v.* Daiber, 124 Mich. 49, 82 N. W. 848.

Minnesota.— Askegaard *v.* Dalen, 93 Minn. 354, 101 N. W. 503.

Missouri.— Ream *v.* Hamilton, 15 Mo. App. 577.

Nebraska.— Watte *v.* Wickersham, 27 Nebr. 457, 43 N. W. 259; Sprague *v.* Warren, 26 Nebr. 326, 41 N. W. 1113, 3 L. R. A. 679; Pieronnet *v.* Lull, 10 Nebr. 457, 6 N. W. 759.

New York.— Peck *v.* Doran, etc., Co. 57 Hun 343, 10 N. Y. Suppl. 401.

Ohio.— Goodheart *v.* Rastert, 10 Ohio S. & C. Pl. Dec. 40, 7 Ohio N. P. 534.

South Dakota.— Waite *v.* Frank, 14 S. D. 626, 86 N. W. 645.

Texas.— Floyd *v.* Patterson, 72 Tex. 202, 10 S. W. 526, 13 Am. St. Rep. 787; Cleveland *v.* Heidenheimer, (Civ. App. 1898) 44 S. W. 551; Burr *v.* Davis, (Civ. App. 1894) 27 S. W. 589.

United States.— Bibb *v.* Allen, 149 U. S. 481, 13 S. Ct. 950, 37 L. ed. 819; Roundtree *v.* Smith, 108 U. S. 269, 2 S. Ct. 630, 27 L. ed. 722; Boyd *v.* Hanson, 41 Fed. 174; Bennett *v.* Covington, 22 Fed. 816.

See 24 Cent. Dig. tit. "Gaming," § 102.

*By Alexander Stronach.

7. Trial*[6] — a. Questions of Law and Fact. The general rule is that questions of law are for the court and questions of fact for the jury.[7] Thus in cases of uncertainty the question whether transactions for the purchase and sale of stocks or commodities are *bona fide* sales and purchases or mere gambling contracts is one for the jury to be determined by a consideration of all the evidence.[8]

b. Instructions. The rules which obtain generally as to instructions in civil actions are applicable in actions based upon or otherwise involving gaming transactions.[9]

Illustrations.— If the parties were in the habit of closing out stock transactions by settling differences, it may be inferred that there was an understanding from the beginning that there was to be no actual purchase and sale. Bradley *v.* Western Union Tel. Co., 8 Ohio Dec. (Reprint) 707, 9 Cinc. L. Bul. 223. The ledger of a broker showed a purchase of stocks on the principal's account at various times, and payments therefor and dividends received; and the journal showed that such items were entered from day to day in the regular course of business. The broker's bookkeeper had no suspicion that the entries did not represent real transactions, and there was correspondence between the broker and his principal in reference to the purchase of certain stocks. The record of the sale of certain stocks showed that portions thereof were sold at different prices at different times on the same day. The books of the broker were corroborated by those of his New York correspondent, and the bookkeeper of the latter testified that stock certificates were forwarded to him by the broker in some instances. It was held sufficient to show an actual purchase and sale of the stocks by the broker, and not such a fictitious transaction as under the statute would invalidate the note received from the principal. Winward *v.* Lincoln, 23 R. I. 476, 51 Atl. 106, 64 L. R. A. 160. S. C. Rev. St. (1893) §§ 1859, 1860, provide that contracts for the sale of cotton for future delivery are void unless it is affirmatively shown that at the time of the contract the seller was the owner or assignee of the cotton or authorized agent of the owner or assignee, or that at the time of the contract it was the *bona fide* intention of both parties that the cotton should be actually delivered and received. It was held that proof that cotton bought for future delivery was actually delivered is not a sufficient showing to meet the statutory requirements. Riordan *v.* Doty, 50 S. C. 537, 27 S. E. 939. Evidence that an alleged debt was a balance resulting from dealings on the board of trade in margins on wheat is not sufficient to prove the transaction a gambling one. Preston *v.* Cincinnati, etc., R. Co., 36 Fed. 54, 1 L. R. A. 140.

6. See, generally, Trial.

7. See Inman *v.* Swift, 89 Ga. 356, 15 S. E. 484; Jeff *v.* Wade, 4 Bibb (Ky.) 322; Cleveland *v.* Heidenheimer, (Tex. Civ. App. 1898) 44 S. W. 551.

In an action by a loser to recover of the stakeholder money which has been already paid over to the winner, where the evidence is conflicting as to whether a demand was made on defendant for the money and whether such demand was made before payment to the winner, these questions should be submitted to the jury. Colson *v.* Myers, 80 Ga. 499, 5 S. E. 504. So where the evidence is conflicting as to what part of the money deposited with the stakeholder belonged to the person for whose benefit the suit is brought, that question should be submitted to the jury. Harnden *v.* Melby, 90 Wis. 5, 62 N. W. 535.

Whether or not money has been lost is a question for the jury. Kizer *v.* Walden, 198 Ill. 274, 65 N. E. 116 [*reversing* 96 Ill. App. 293].

8. *California.*— Kullman *v.* Simmens, 104 Cal. 595, 38 Pac. 362.

Illinois.— Pope *v.* Hanke, 155 Ill. 617, 40 N. E. 839, 28 L. R. A. 568 [*affirming* 52 Ill. App. 453]; Brand *v.* Lock, 48 Ill. App. 390. See also Hitchcock *v.* Corn Exch. Bank, 40 Ill. App. 414.

Kansas.— Washer *v.* Bond, 40 Kan. 84, 19 Pac. 323.

Michigan.— Gregory *v.* Wendell, 39 Mich. 337, 33 Am. Rep. 390.

Missouri.— Ream *v.* Hamilton, 15 Mo. App. 577. *Compare* Cummiskey *v.* Williams, 20 Mo. App. 606, holding that it is error to submit to the jury the question whether a contract for the sale of grain for future delivery is a wager, in the absence of any testimony tending to show an understanding or agreement between the parties that there should be no delivery.

New York.— See Mackey *v.* Rausch, 15 N. Y. Suppl. 4.

North Carolina.— See Cantwell *v.* Boykin, 127 N. C. 64, 37 S. E. 72.

Pennsylvania.— Gaw *v.* Bennett, 153 Pa. St. 247, 25 Atl. 1114, 34 Am. St. Rep. 699; Thompson *v.* Reiber, 123 Pa. St. 457, 16 Atl. 793; Dunlap *v.* Potts, 1 Lanc. L. Rev. 171.

South Carolina.— Harvey *v.* Doty, 50 S. C. 548, 27 S. E. 943.

Texas.— Heidenheimer *v.* Cleveland, (1891) 17 S. W. 524.

United States.— Parker *v.* Moore, 115 F. 799, 53 C. C. A. 369 [*reversing* on other grounds 111 F. 470].

See 24 Cent. Dig. tit. "Gaming," § 103.

9. Ripley *v.* Vorslowsky, 109 Ill. App. 659 (holding that legal terms should be explained by the court); Schooler *v.* Turner, 14 S. W. 360, 12 Ky. L. Rep. 362 (holding that a requested instruction is properly refused when it is included in one already given); Post *v.* Leland, 184 Mass. 601, 69 N. E. 361 (holding that an instruction need not be given in the

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8. JUDGMENT.* [10] In an action against two persons to recover money lost at gaming, where only one defendant is served, judgment may be taken against him without amendment.[11] In an action of debt under a statute authorizing a recovery of money or goods lost at gaming and paid or delivered, the judgment should be for the property lost if it is to be had, and if not then for its value.[12] In an action to recover specific property the judgment for the value of the property should allow defendant to return any portion of the property in satisfaction *pro tanto* of the judgment.[13] By statute in some jurisdictions premises used for keeping a gaming-house or which the owner knowingly permits to be used for gaming may be sold to pay a judgment for money lost at gaming.[14]

9. COSTS.[15] A stakeholder admitting liability is not bound to offer to pay the fund into court as a condition of being exonerated from costs, where a suit on the same cause of action is pending against him in another state.[16] Costs in a suit to enjoin a judgment on a note given for a gaming consideration will be taxed against complainant if he delays for an unreasonable time before filing his bill.[17]

10. REVIEW. The general rules relating to appeal and error apply in actions involving gaming transactions.[18]

GAMING DEVICE. See GAMING.

GAMING-HOUSE. See DISORDERLY HOUSES; GAMING.

GAMING-ROOM. Any room in which games for money are habitually played, or which is kept or maintained for the purpose of gaming, even though the room

exact language of the request; also that the judge may, as a part of his instructions, read to the jury from a decision containing a correct statement of the law as to the case on trial); Bartlett *v.* Collins, 109 Wis. 477, 85 N. W. 703, 83 Am. St. Rep. 928 (holding that where a case is submitted to the jury for a special verdict, it is error to give instructions applicable only to a general verdict).

The instructions must be applicable to the evidence. Allen *v.* Fuller, 182 Mass. 202, 65 N. E. 31; Marx *v.* Elsworth, 2 Tex. Unrep. Cas. 23. See also Taylor *v.* Bailey, 169 Ill. 181, 48 N. E. 200 [*affirming* 68 Ill. App. 622]; Storey *v.* Brennan, 15 N. Y. 524, 69 Am. Dec. 629.

Misleading instructions must not be given. Powell *v.* McCord, 121 Ill. 330, 12 N. E. 262 [*affirming* 20 Ill. App. 660]; Post *v.* Leland, 184 Mass. 601, 69 N. E. 361.

Instructions should be considered as a whole, and if, taken together, they fairly and fully present the law, they are not objectionable. Powell *v.* McCord, 121 Ill. 330, 12 N. E. 262 [*affirming* 20 Ill. App. 660]; Paducah Commission Co. *v.* Boswell, 83 S. W. 144, 26 Ky. L. Rep. 1062; Oliphant *v.* Markham, 79 Tex. 543, 15 S. W. 569, 23 Am. St. Rep. 363.

10. See, generally, JUDGMENTS.

11. Betts *v.* Hillman, 15 Abb. Pr. (N. Y.) 184.

12. Bess *v.* Shepherd, 2 Bibb (Ky.) 225.

13. Jackson *v.* Nelson, (Tex. Civ. App. 1897) 39 S. W. 315.

14. See the statutes of the different states. And see Gaby *v.* Hankins, 86 Ill. App. 529; Trout *v.* Marvin, 62 Ohio St. 132, 56 N. E. 655; Bobb *v.* Hetsch, 8 Ohio Dec. (Reprint) 245, 6 Cinc. L. Bul. 636, holding that a judgment must be obtained before the premises become liable, however.

Conclusiveness of judgment.— In a proceeding to subject the premises, the judgment, when not impeached for fraud or collusion, is conclusive as to the following facts: (1) That the money lost and winning secured which caused plaintiff's injury was won by defendant in the judgment; (2) that the same was lost and won in violation of law; and (3) that plaintiff in consequence thereof sustained damage to the amount of the judgment. But the judgment does not tend to show, as against defendant, either of the following facts: (1) That he was the owner of the premises described in the petition; (2) that the premises were used and occupied for the purposes of gaming; or (3) that the premises were leased by him to the lessees for the purpose of gaming therein, or that he knowingly permitted them to be used for that purpose. As to these facts the burden of proof is on plaintiff. Trout *v.* Marvin, 24 Ohio Cir. Ct. 333.

15. See, generally, COSTS.

16. Barry *v.* Equitable L. Ins. Co., 14 Abb. Pr. N. S. (N. Y.) 385.

17. Paulding *v.* Watson, 21 Ala. 279, delay of seven years.

18. See, generally, APPEAL AND ERROR.

Non-prejudicial error is no ground for reversing a judgment. Mackey *v.* Rausch, 15 N. Y. Suppl. 4. And see APPEAL AND ERROR, 3 Cyc. 383. **So errors committed** against one who is clearly not entitled to succeed in his contention are no grounds for a reversal. Quillian *v.* Johnson, 122 Ga. 49, 49 S. E. 801 (admission of irrelevant evidence); Taylor *v.* Bailey, 68 Ill. App. 622 [*affirming* 169 Ill. 181, 48 N. E. 200] (erroneous instruction).

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may be put to other uses, and though such other uses are for some other and lawful object than a gaming-room.[1] (See, generally, Disorderly Houses; Gaming.)

GAMING-TABLE. A term which is synonymous with "gaming house,"[2] and means a house, hall, or room kept for the purpose of gambling, and supplied with materials for that purpose;[3] and within the purview of a statute relative to gaming, the term may include any sort of machine[4] or contrivance used in betting or other game of chance.[5] (See, generally, Gaming.)

GANANCIAL PROPERTY. In the Spanish law, all property that is increased or multiplied during marriage,[6] or which husband and wife, living together, acquire during matrimony by a common title, lucrative or onerous, or that which husband and wife or either acquire by purchase or by their labor and industry; as also the fruits (*frutos*) of the separate property which each brings to the matrimony or acquires by lucrative title during the continuance of the partnership.[7] (See, generally, Husband and Wife.)

GANG.[8] A word sometimes used to describe a body of men associated together for purposes entirely proper,[9] but is commonly used to describe a body of men banded together for improper or unlawful purposes.[10]

GANGWAY. A passageway or avenue into or out of any inclosed place.[11] (See Entry; Exits.)

GAOL. See Jail.

GAOL LIBERTIES. See Jail Liberties.

GAOL LIMITS. See Jail Limits.

GARBAGE. That which is purged or cleansed away;[12] originally the entrails of fowls, and afterwards of any animal; now, offal or refuse organic matter in general;[13] the bowels of an animal; refuse parts of flesh; offal;[14] any worthless,

The court will presume that the writ was not sued out in time where the declaration shows the loss to have occurred more than a year previously (the statutory period of limitation), and the writ is not in the record. Owens *v.* Pennebaker, Ky. Dec. 286.

1. Toll *v.* State, 40 Fla. 169, 174, 23 So. 942.

As used in a statute the term has been held to include a room where pools are sold on the result of base ball games and horse races for profit and gain. People *v.* Weithoff, 93 Mich. 631, 633, 53 N. W. 784, 32 Am. St. Rep. 532.

2. See 14 Cyc. 485.

3. Hardaway *v.* Lilly, (Tenn. Ch. App. 1898) 48 S. W. 712, 717.

The use to which the table is appropriated, and not its character, determines whether it is a gaming table or not. Toney *v.* State, 61 Ala. 1, 3; Estes *v.* State, 10 Tex. 300, 308 [*quoted* in Chappell *v.* State, 27 Tex. App. 310, 312, 11 S. W. 411]. *Compare* Whitney *v.* State, 10 Tex. App. 377, 378.

4. **Machine defined** see Fairbank *v.* Cincinnati, etc., R. Co., 66 Fed. 471, 475.

5. Smith *v.* Com., 3 Ky. L. Rep. 249. And see Bell *v.* State, 32 Tex. Cr. 187, 191, 22 S. W. 687 [*distinguishing* Chappell *v.* State, 27 Tex. Cr. 310, 11 S. W. 411].

The leading elements characterizing a gaming-table or bank are deduced and declared to be: 1. It is a game. 2. It has a keeper, dealer, or exhibiter. 3. It is based on the principle of one against the many — the keeper, dealer, or exhibiter against the betters directly or indirectly. 4. It must be exhibited, that is, displayed, for the purpose of obtaining betters. Stearnes *v.* State, 21 Tex. 692, 698 [*quoted* in Chappell *v.* State, 27 Tex. App. 310, 313, 11 S. W. 411]. To the same effect is Mayo *v.* State, (Tex. Cr. App. 1904) 82 S. W. 515, 516.

6. Inst. Civ. L. of Spain, bk. 1, tit. 7, c. 5 [*quoted* in Cutter *v.* Waddingham, 22 Mo. 206, 255].

7. Cartwright *v.* Cartwright, 18 Tex. 626, 634.

8. **Under a coal-whipper's act** see 14 & 15 Vict. c. 78, § 46.

Gang-master see 30 & 31 Vict. c. 130, § 3.

9. Hatch *v.* Matthews, 83 Hun (N. Y.) 349, 352, 31 N. Y. Suppl. 926, as a "gang of laborers."

10. Hatch *v.* Matthews, 83 Hun (N. Y.) 349, 352, 31 N. Y. Suppl. 926, as a "gang of thieves," or a "gang of robbers."

11. Webster Dict. [*quoted* in Sangamon Coal Min. Co. *v.* Wiggerhaus, 122 Ill. 279, 284, 13 N. E. 648].

12. Webster Dict. [*quoted* in *In re* Lowe, 54 Kan. 757, 763, 39 Pac. 710, 27 L. R. A. 545].

13. Century Dict. [*quoted* in St. Louis *v.* Robinson, 135 Mo. 460, 469, 37 S. W. 110 (holding that the trimmed heads, feet, and bones of beef cattle, from which the flesh and skin have been removed, and which are fresh and clean, and do not emit an offensive odor, do not come within the meaning of the term "garbage" as used in an ordinance regulating the hauling of the same through the public streets); St. Louis *v.* Weitzel, 130 Mo. 600, 617, 31 S. W. 1045].

14. Webster Dict. [*quoted* in *In re* Lowe, 54 Kan. 757, 763, 39 Pac. 710, 27 L. R. A. 545].

In an ordinance prohibiting the deposit of

offensive matter;[15] the refuse animal and vegetable matter from a kitchen.[16] (Garbage: Removal of, see HEALTH.)

GARDEN.[17] A piece of ground appropriated to the cultivation of herbs or plants, fruits or flowers, usually a small plot of ground near a dwelling house, and used in connection therewith;[18] a piece of ground enclosed and cultivated for herbs or fruits for food, or laid out for pleasure.[19] (Garden: As Part of Homestead, see HOMESTEADS. See also CURTILAGE.)

GARDEN SEEDS. In common speech seeds used either for planting or sowing in the gardens adjacent to dwelling houses, small spaces of land, and in the large spaces of land called market gardens, lying about cities or other large places of numerous and condensed population; those seeds from which are raised, in the growing season of the year, the vegetable products, which, before complete maturity, are used upon the table as part of the customary food of mankind, in distinction from those seeds which, sowed or planted on a broader scale in the fields, produce the vegetables which are stored for winter use as food.[20]

GARDER AVEC LUI. An expression which has been held to include board and lodging.[21]

GARNETTED WASTE. The product of a garnett machine, which tears and ravels out the twist in thread, thus reducing it back to the original purified wool, by reason of taking out the twist which is originally given to the wool to make it yarn or thread.[22]

GARNISH. See GARNISHMENT.

GARNISHEE. See GARNISHMENT.

GARNISHEE PROCEEDING. See GARNISHMENT.

garbage or offal in certain places, the words "garbage" and "offal" were defined to include every refuse accumulation of animal, fruit, or vegetable matter, liquid or otherwise, that attends preparation, use, cooking, dealing in or storing of meat, fish, fowl, fruit, or vegetables. Grand Rapids *v.* De Vries, 123 Mich. 570, 572, 82 N. W. 269; Iler *v.* Ross, 64 Nebr. 710, 717, 90 N. W. 869, 97 Am. St. Rep. 676, 57 L. R. A. 895.

15. Century Dict. [*quoted* in St. Louis *v.* Robinson, 135 Mo. 460, 469, 37 S. W. 110]; Webster Dict. [*cited* in Dupont *v.* District of Columbia, 20 App. Cas. (D. C.) 477, 486].

16. Dupont *v.* District of Columbia, 20 App. Cas. (D. C.) 477, 486, 488 [*citing* Webster Dict.], where the court, in construing an act of congress which defined the word "garbage" in substantially the same words, and provided for its disposition, said: "Both from the word itself, and the official definition, the ordinary mind would understand the regulation as applying to matter which is in fact noisome, and to that also which has been rejected as worthless and mingled with it. . . . [It] is necessarily composed largely of matter noisome even before its deposit in the receptacles provided for it, and other matter mingled with it must necessarily partake of its offensive character. Moreover, it is a thing of almost hourly accumulation in every occupied house of a large city, and is therefore a constant menace to the health and comfort of thousands of people."

17. "Garden square," marked on a square in a town plat, does not necessarily imply a dedication of it to the public. Pella *v.* Scholte, 24 Iowa 283, 288, 95 Am. Dec. 729.

Used in descriptions of land see Bettisworth's Case, 2 Coke 31*a*, 32*a*; Rex *v.* Hodges, M. & M. 341, 22 E. C. L. 541.

18. People *v.* Greenburgh, 57 N. Y. 549, 550.

Under a statute relative to laying out roads through gardens which have been cultivated for four years land merely inclosed in a garden, but not cultivated, is not included. People *v.* Greenburgh, 57 N. Y. 549, 550.

Whether a garden is always a field or not, it may be in a field. Com. *v.* Josselyn, 97 Mass. 411, 412.

Within an exemption of statute, that one who cultivates a garden is not engaged in agriculture see Simons *v.* Lowell, 7 Heisk. (Tenn.) 510, 515.

19. Cooper *v.* Pearse, [1896] 1 Q. B. 562, 566, 60 J. P. 282, 65 L. J. M. C. 95, 74 L. T. Rep. N. S. 495, 44 Wkly. Rep. 494.

20. As the word is used in a tariff act, it would include beans and sugar beet seeds. Ferry *v.* Livingston, 115 U. S. 542, 545, 6 S. Ct. 175, 29 L. ed. 489 [*cited* in Clay *v.* Magone, 40 Fed. 230, 232], where the question was whether certain seeds then under consideration were to be considered as "garden seeds" or as "agricultural seeds" and the rule there laid down was that it would not be sufficient to show that seeds were not garden seeds to show that they were used both in the garden and in the field; but, if it appeared that the seeds in question belonged to a variety not intended to be used to be consumed by man, then they could not be regarded as garden seeds.

21. Lévesque *v.* Garon, 10 Quebec Super. Ct. 514, 519, where the court said: "I understand the word *garder* to be synonymous with the word keep, and I should have no hesitation in saying that the word keep implies the idea of to feed as well as to lodge."

22. Standard Varnish Works *v.* U. S., 59 Fed. 456, 458, 8 C. C. A. 178.

GARNISHMENT

By Frank W. Jones *

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* Author of "Conversion," 9 Cyc. 822; "Dead Bodies," 13 Cyc. 266; "Drains," 14 Cyc. 1018; and joint author of "Champerty and Maintenance," 6 Cyc. 847; "Death," 13 Cyc. 290; etc.

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I. DEFINITION.

A. In General. Garnishment[1] is a proceeding by which plaintiff in an action seeks to reach the rights and effects of defendant by calling into court some third party, who has such effects in his possession or who is indebted to defendant.[2]

B. Trustee Process. In some of the New England states garnishment proceedings are denominated a trustee process, which is in substance an equitable proceeding to determine the ownership of the fund in dispute.[3]

C. Factorizing Process. In Connecticut the proceedings are denominated a factorizing process.[4]

D. Attachment Execution. In Pennsylvania the garnishment is styled attachment execution.[5]

II. NATURE AND GROUNDS.

A. Nature and Purpose of Remedy — 1. Statutory Remedy. In the United States garnishment is regarded as essentially a statutory remedy; although derived, it is said, from the custom of London, it is not a common-law remedy, and would not, in the absence of statutes authorizing it, exist in this country.[6]

2. Compared With Attachment and Execution. While a garnishment proceeding accomplishes the same purposes as an attachment or execution, it is in no sense a levy on property, but is a judicial proceeding by which a new judgment is obtained.[7]

1. The word "garnish" is derived from the Norman French word "garnir," meaning "to warn" (Teutonic, warnôn). Britton 50*a*; Littré Dict.

2. Jeary *v.* American Exch. Bank, 2 Nebr. (Unoff.) 657, 89 N. W. 771.

Other definitions are: "Notice to the party in actual possession of the goods or choses in action of a debtor that an attachment has been issued against the debtor, and that the debtor's property in the hands of the party receiving the notice is to be held subject to the attachment." Mathews *v.* Smith, 13 Nebr. 178, 188, 12 N. W. 821.

A warning to any one for his appearance in a cause in which he is "not a party, for the information of the court and explaining a cause." Bouvier L. Dict. [*cited* with approval in Mathews *v.* Smith, 13 Nebr. 178, 188, 12 N. W. 821].

"Attachment in the hands of a third person, and thereby is a species of seizure by notice." Beamer *v.* Winter, 41 Kan. 596, 597, 21 Pac. 1078 [*citing* with approval Reed *v.* Fletcher, 24 Nebr. 435, 39 N. W. 437; Drake Attachm. § 251; Waples Attachm. § 341]. See also Western R. Co. *v.* Thornton, 60 Ga. 300, 306, holding that garnishment is a seizure where there is anything subject to be seized at the time the officer of the law performs his function.

For still other definitions see Steiner *v.* Birmingham First Nat. Bank, 115 Ala. 379, 384, 22 So. 30; Skelly *v.* Westminster School Dist., 103 Cal. 652, 659, 37 Pac. 643; Wilmington, etc., Nat. Bank *v.* Furtick, 2 Marv. (Del.) 35, 52, 42 Atl. 479, 115 Am. St. Rep. 99, 44 L. R. A. 115; Davis Mill Co. *v.* Bangs, 6 Kan. App. 38, 49 Pac. 628, 629; Morawetz *v.* Sun Ins. Office, 96 Wis. 175, 178, 71 N. W. 803, 65 Am. St. Rep. 43.

Purpose of remedy see *infra*, II, A, 5.

3. This is true in Maine (Harlow *v.* Bartlett, 96 Me. 294, 52 Atl. 638, 90 Am. St. Rep. 346; Donnell *v.* Portland, etc., R. Co., 73 Me. 567), in Massachusetts (Strong *v.* Schmidt, 1 Metc. 476; Ray *v.* Underwood, 3 Pick. 302), in New Hampshire (Quigg *v.* Kittredge, 18 N. H. 137), and in Vermont (Corey *v.* Powers, 18 Vt. 587; Baxter *v.* Vincent, 6 Vt. 614). See also Picquet *v.* Swan, 22 Fed. Cas. No. 11,133, 4 Mason 443.

4. Bray *v.* Wallingford, 20 Conn. 416.

5. Gochenaur *v.* Hostetter, 18 Pa. St. 414; Baldy *v.* Brady, 15 Pa. St. 103. See also Straley's Appeal, 43 Pa. St. 89.

6. *Alabama.*— White *v.* Simpson, 107 Ala. 386, 18 So. 151.

Illinois.— Baltimore, etc., R. Co. *v.* McDonald, 112 Ill. App. 391.

Pennsylvania.— Shilling *v.* Beidler, 2 Woodw. 160.

Rhode Island.— Godding *v.* Pierce, 13 R. I. 532.

United States.— Tunstall *v.* Worthington, 24 Fed. Cas. No. 14,239, Hempst. 662, construing an Arkansas statute.

See 24 Cent. Dig. tit. "Garnishment," § 1.

See, however, Cahoon *v.* Levy, 5 Cal. 294, holding that, although partially regulated by statute, garnishment is a common-law proceeding.

7. Savage *v.* Gregg, 150 Ill. 161, 37 N. E. 312 [*affirming* 51 Ill. App. 281] (holding that the garnishment creates no lien on anything, but holds the garnishee to a personal liability); Illinois Glass Co. *v.* Holman, 19 Ill. App. 30. *Compare* Shilling *v.* Beidler, 2 Woodw. (Pa.) 160, holding that unlike a common-law execution, the attachment execution becomes a substantive action, of which defendant, as well as garnishee, is affected with notice.

In Arkansas by statute garnishment is said

3. Auxiliary Remedy. Garnishment is in no sense a new suit, but is a special auxiliary remedy for more effectually reaching defendant's credits, and is always ancillary to the main action under which it is brought.[8]

4. Legal Not Equitable Remedy. Garnishment proceedings are usually regarded as strictly legal and not equitable in their nature.[9] In several jurisdictions, however, they are treated as partaking of an equitable character.[10]

5. Purpose of Remedy. The office of a garnishment is to apply the debt due by a third person to defendant in judgment to the extinguishment of the judgment, or to appropriate effects belonging to defendant in the hands of a third person to its payment.[11]

B. Actions in Which Remedy Is Authorized[12] — **1. In General.** In many jurisdictions garnishment proceedings may be had in all personal actions arising *ex contractu* but not in actions arising in tort.[13] In other jurisdictions, however, the statutes seem to draw no distinction between actions *ex contractu* and *ex delicto*, but specify the various actions in which a writ of garnishment may issue.[14]

to be in every respect a suit and not a process or execution. Tunstall *v.* Worthington, 24 Fed. Cas. No. 14,239, Hempst. 662.

The difference between an attachment of personal property and a garnishment is very great, in the former the property attached is actually taken into possession by the officer holding the writ, and is under his custody and control, while in garnishment proceedings the property is left in the hands of the garnishee. Santa Fé, etc., R. Co. *v.* Bossut, 10 N. M. 322, 62 Pac. 977.

8. Newland *v.* Wayne County Cir. Judge, 85 Mich. 151, 48 N. W. 544; Willson *v.* Pennoyer, 93 Minn. 348, 101 N. W. 502; Banning *v.* Sibley, 3 Minn. 389; Tinsley *v.* Savage, 50 Mo. 141; La Crosse Nat. Bank *v.* Wilson, 74 Wis. 391, 43 N. W. 153. But *compare* Tunstall *v.* Worthington, 24 Fed. Cas. No. 14,239, Hempst. 662.

9. *Alabama.*— Toomer *v.* Randolph, 60 Ala. 356; Thomas *v.* Hopper, 5 Ala. 442.

Maryland.— Peoples' Bank *v.* Shryock, 48 Md. 427, 30 Am. Rep. 476.

Missouri.— Sheedy *v.* Second Nat. Bank, 62 Mo. 17, 21 Am. Rep. 407; Lackland *v.* Garesche, 56 Mo. 267.

Oregon.— Case *v.* Noyes, 16 Oreg. 329, 19 Pac. 104.

Texas.— Galveston, etc., R. Co. *v.* McDonald, 53 Tex. 510.

See 24 Cent. Dig. tit. "Garnishment," § 1.

10. *Georgia.*—Dugas *v.* Mathews, 9 Ga. 510, 54 Am. Dec. 361.

Kentucky.— Wolf *v.* Tappan, 5 Dana 361.

Maine.— Stedman *v.* Vickery, 42 Me. 132.

New Hampshire.—Boardman *v.* Cushing, 12 N. H. 105.

Pennsylvania.— See Reed *v.* Penrose, 2 Grant 472, holding that an attachment is an equitable assignment of the thing attached, a substitution of the creditor for the debtor, and to the latter's rights against the garnishee.

United States.— See Tunstall *v.* Worthington, 24 Fed. Cas. No. 14,239, Hempst. 662, holding that garnishment by statute in Arkansas is partly legal and partly equitable in its nature.

See 24 Cent. Dig. tit. "Garnishment," § 1. See also *infra*, II, B, 3.

11. Strickland *v.* Maddox, 4 Ga. 393. See also *supra*, I.

The purpose of a garnishment is to compel the garnishee to pay to plaintiff the debt he owed defendant; and the operation and effect of the judgment of condemnation is the substitution of plaintiff as the creditor, in the stead and place of defendant. Payment to him extinguishes the debt as fully as payment to defendant would have extinguished it, if made before the issue and notice of the garnishment. The change of creditors works no change in the obligation or incidents of the debt. These follow the debt, as they would follow, if the change had been wrought by the convention or agreement of plaintiff and defendant, instead of by the compulsory process of the law. White *v.* Simpson, 107 Ala. 386, 18 So. 151.

12. In admiralty proceedings see Admiralty.

13. *Maine.*— Woodworth *v.* Grenier, 70 Me. 242. See, however, Linscott *v.* Fuller, 57 Me. 406, holding that trespass *quare clausum fregit* may be commenced by trustee process.

Massachusetts.— Rothschild *v.* Knight, 176 Mass. 48, 57 N. E. 337 (holding that an insolvent assignee's action against a creditor to recover a fraudulent preference may be begun by trustee process); Hicks *v.* Chapman, 92 Mass. 463 (holding that the debt of a spendthrift under guardianship may be recovered by trustee process).

Michigan.— Wattles *v.* Wayne Cir. Judge, 117 Mich. 662, 76 N. W. 115, 72 Am. St. Rep. 590. See also Foster *v.* Kent Cir. Judge, 116 Mich. 285, 74 N. W. 480.

Pennsylvania.— Porter *v.* Hildebrand, 14 Pa. St. 129; Jacoby *v.* Gogell, 5 Serg. & R. 450; Smith *v.* Dingus, 2 Pa. Dist. 710; Piscataqua Bank *v.* Turnley, 1 Miles 312.

Vermont.— Graves *v.* Severens, 37 Vt. 651; Elwell *v.* Martin, 32 Vt. 217 (holding, however, that the expression "founded on any contract" relates solely to the form of the action); Ferris *v.* Ferris, 25 Vt. 110.

See 24 Cent. Dig. tit. "Garnishment." § 3.

14. *Georgia.*— Bridges *v.* North, 22 Ga. 52, garnishment may issue in a suit founded on a dormant judgment.

Indiana.— Martin *v.* Holland, 87 Ind. 105,

2. Attachment Pending. Where an attachment is pending, most of the statutes provide that a garnishment may be issued and served upon a debtor of defendant therein.[15]

3. Suit in Equity. A proceeding in the nature of an equitable garnishment is provided for by statute in some jurisdictions to reach funds which cannot be reached on execution or by garnishment under the statute.[16]

C. Judgments and Executions on Which Remedy Is Authorized — 1. In General. A writ of garnishment may issue upon a money decree of a court of equity;[17] likewise on a judgment on an infant's civil contract.[18]

2. Necessity For Judgment.[19] The general rule is that garnishment proceedings cannot be maintained prior to the rendition of a judgment against the original debtor.[20]

3. Nature and Validity of Judgment. To authorize a valid garnishment the

garnishment may issue in a suit to foreclose a mortgage where a personal judgment may be rendered.

Missouri.— Clark *v.* Haydock, 44 Mo. App. 367, lien of a boarding-house keeper may be enforced by garnishment. See, however, Hodo *v.* Benecke, 11 Mo. App. 393; Rischert *v.* Kunz, 9 Mo. App. 283, holding that the lien given by statute to innkeepers on the wages of guests cannot be enforced by garnishment.

Rhode Island.— See McNally *v.* Wilkinson, 20 R. I. 315, 38 Atl. 1053.

Wisconsin.— Everdell *v.* Sheboygan, etc., Co., 41 Wis. 395.

See 24 Cent. Dig. tit. "Garnishment," § 3.

A statutory lien given on a criminal's estate to the person injured by the crime cannot before conviction be enforced by garnishment against money deposited by the prisoner to indemnify a surety on his bail-bond. Holker *v.* Hennessy, 143 Mo. 80, 44 S. W. 794, 65 Am. St. Rep. 642.

Proceedings by distress warrant.— Garnishment cannot issue in proceedings by a distress warrant, as the process in such proceedings is itself final, under which the property of the tenant may be levied on and sold in satisfaction as in cases of other executions. Smith *v.* Green, 34 Ga. 178.

15. *Georgia.*— Steers *v.* Morgan, 66 Ga. 552.

Illinois.— Bigelow *v.* Andress, 31 Ill. 322.

Iowa.— Kenosha Stove Co. *v.* Shedd, 82 Iowa 540, 48 N. W. 933 (holding, however, that it is irregular to issue and serve the garnishment before the attachment is issued); Vanfossen *v.* Anderson, 8 Iowa 251.

Massachusetts.— Brown *v.* Neale, 85 Mass. 74, 80 Am. Dec. 53.

Pennsylvania.— Talhelm *v.* Hoover, 4 Pa. Co. Ct. 172.

Texas.— E. L. Wilson Hardware Co. *v.* Anderson Knife, etc., Co., 22 Tex. Civ. App. 229, 54 S. W. 928, holding that it is not necessary that the attachment should have been returned before garnishment.

See 24 Cent. Dig. tit. "Garnishment," § 4.

16. Phœnix Ins. Co. *v.* Abbott, 127 Mass. 558 (holding that, under the Massachusetts statute, the proceeding is in the nature of an equitable trustee process, as distinguishable from a creditor's bill, where some person other than plaintiff's debtor is a defendant as between the holder of property sought to be reached); Pendleton *v.* Perkins, 49 Mo. 565 (where a debtor had absconded, leaving no property in the state subject to attachment, but had money in the city treasury, and it was held that this fund might be reached by garnishment in equity without a previous judgment at law); Pickens *v.* Dorris, 20 Mo. App. 1. See also St. Louis *v.* O'Neil Lumber Co., 114 Mo. 74, 21 S. W. 484; Westwater *v.* Ferguson, 22 Pa. Co. Ct. 582 (holding that on a decree in equity for the payment of a specific sum of money, an attachment execution may be issued to collect the amount specified in the decree).

A proceeding to enforce a laborer's lien on cord-wood given by the Wisconsin statute is a legal and not an equitable action, and garnishment process may therefore be resorted to in aid of the action. O'Reilly *v.* Milwaukee, etc., R. Co., 68 Wis. 212, 31 N. W. 485.

17. Reynolds *v.* Smith, 7 Mackey (D. C.) 27; Thorn *v.* Wallace, 88 Ill. App. 562.

18. Dial *v.* Wood, 9 Baxt. (Tenn.) 296.

19. **Judgment against defendant** before judgment against garnishee see *infra*, IX, K, 2, c.

20. *Arkansas.*— Leingardt *v.* Deitz, 30 Ark. 224 (holding that garnishment can be had before judgment is obtained in cases of attachment only); King *v.* Payan, 18 Ark. 583.

Illinois.— Siegel *v.* Schueck, 60 Ill. App. 429.

Louisiana.— Featherston'h *v.* Compton, 3 La. Ann. 380; Lynch *v.* Burr, 10 Rob. 136; Brode *v.* Firemen's Ins. Co., 8 Rob. 244.

Mississippi.— Buckingham *v.* Bailey, 4 Sm. & M. 538.

Pennsylvania.— Steinhauer *v.* Hill, 2 Kulp 333; Heermans *v.* Griffin, 3 Luz. Leg. Reg. 223, holding that an attachment execution can issue only on a personal judgment against defendant.

Tennessee.— Walton *v.* Sharp, 11 Lea 578 (holding that where the record in a garnishment process shows the existence of neither judgment nor execution in plaintiff's favor against defendant, the proceedings are fatally defective); Alley *v.* Myers, 2 Tenn. Ch. 206.

Texas.— Bassett *v.* Hammond, 1 Tex. App. Civ. Cas. § 108.

judgment or decree upon which it issues must be final,[21] and must be *in personam* and not *in rem*.[22] A valid judgment in the principal action against defendant is essential to the validity of garnishment proceedings and of the judgment against the garnishee;[23] and while irregularities which render the judgment voidable only and not void will not always invalidate a garnishment proceeding,[24] yet irregularities, such as the issuance of garnishment upon a dormant judgment, have been held to render the proceedings invalid.[25]

4. Transcript of Judgment of Inferior Court. The general rule is that where a judgment is rendered in an inferior court and a transcript of such judgment is filed in the superior court, a writ of garnishment cannot issue from the latter court.[26]

5. Issuance and Return of Execution Unsatisfied. In a number of jurisdictions the judgment creditor is not entitled to institute and maintain garnishment proceedings upon his judgment or decree before issuing an execution thereon;[27] some of the courts requiring in addition that there shall be a return of the execution "no property found" in order to maintain a garnishment.[28] In other juris-

Vermont.— Washburn *v.* New York, etc., Min. Co., 41 Vt. 50.

See 24 Cent. Dig. tit. "Garnishment," § 7.

21. Swasey *v.* Antram, 24 Ohio St. 87.

22. Gilcreest *v.* Savage, 44 Ill. 56.

23. Hinds *v.* Miller, 52 Miss. 845; Palmer *v.* Hohman, 30 Pittsb. Leg. J. (Pa.) 96; Beaupre *v.* Brigham, 79 Wis. 436, 48 N. W. 596 (holding that an invalid judgment against an original debtor in garnishment proceedings is not rendered valid by the fact that he subsequently appeared and testified for the garnishees in the proceedings against them); Frisk *v.* Reigelman, 75 Wis. 499, 43 N. W. 1117, 44 N. W. 766, 17 Am. St. Rep. 198.

A confession of judgment by defendant in a foreign attachment and before the third term is a sufficient judgment as the basis of garnishment proceedings. Welsh *v.* Buckner, 2 Miles (Pa.) 96.

Tax execution.— It has been held in Georgia that, where a tax execution has been transferred by the tax-collector to a private person, such transferee cannot base thereon a garnishment proceeding against a debtor of defendant in execution. Davis *v.* Millen, 111 Ga. 451, 36 S. E. 803.

24. *Georgia.*— Artope *v.* Macon, etc., R. Co., 110 Ga. 346, 35 S. E. 657.

Louisiana.— Burke *v.* Taylor, 15 La. 236.

Mississippi.— See Dyson *v.* Baker, 54 Miss. 24.

Texas.— Patterson *v.* Seeton, 19 Tex. Civ. App. 430, 47 S. W. 732, holding likewise that the garnishee cannot attack the judgment in the principal suit for irregularities not rendering it void.

Wisconsin.— Mead *v.* Doe, 18 Wis. 31.

See 24 Cent. Dig. tit. "Garnishment," § 8.

25. Pierce *v.* Wade, 19 Ill. App. 185; Sweeting *v.* Wanamaker, 4 Pa. Dist. 246, 16 Pa. Co. Ct. 270, 36 Wkly. Notes Cas. 279, holding that under the act of May 19, 1887, an attachment execution on a judgment more than five years old must be accompanied with a scire facias to revive the judgment or attachment will be dismissed. See Heebner *v.* Chave, 5 Pa. St. 115; Brock *v.* Driebelbies, 2 Leg. Chron. (Pa.) 317; Todd *v.* Lowe, 14 Wkly. Notes Cas. (Pa.) 550. *Compare* Bohan *v.* Reap, 9 Kulp (Pa.) 217, holding that an attachment execution may issue on a judgment which has lost its lien upon real estate without issue of scire facias to revive the judgment.

Revival of a dormant judgment will not save the lien of a garnishment issued while it was dormant. Friedman *v.* Early Grocery Co., 22 Tex. Civ. App. 285, 54 S. W. 278.

26. Thompson *v.* Kirkpatrick, 18 Ark. 580; Hughes *v.* Ft. Dearborn Nat. Bank, 47 Ill. App. 567; Weimeister *v.* Singer, 44 Mich. 406, 6 N. W. 858.

The rule in Pennsylvania is that an attachment execution may issue on a justice's judgment when a transcript of such judgment is filed in the court of common pleas, provided execution has previously issued from the justice's court and been returned *nulla bona*. Hitchcock *v.* Long, 2 Watts & S. 169; Clevenstine *v.* Law, 3 Pa. L. J. Rep. 417, 5 Pa. L. J. 459; Hood *v.* Brown, 4 Leg. Gaz. 83; Brechemin *v.* McDowell, 1 Phila. 368.

27. See Smith *v.* Gower, 3 Metc. (Ky.) 171; Pollock *v.* Williams, 9 La. Ann. 460; Featherston'h *v.* Compton, 3 La. Ann. 380; Brode *v.* Firemen's Ins. Co., 8 Rob. 244. See also Shaughnessy *v.* Fogg, 15 La. Ann. 330; Timm *v.* Stegman, 6 Wash. 13, 32 Pac. 1004; Logan *v.* Goodwin, 104 Fed. 490, 43 C. C. A. 658.

28. Gunn *v.* Howell, 27 Ala. 663, 62 Am. Dec. 785 (construing a Georgia statute); Michigan Cent. R. Co. *v.* Keohane, 31 Ill. 144; Farnum *v.* North Chicago Safety Deposit Vault Co., 97 Ill. App. 439 (return of "no part satisfied" insufficient to authorize a judgment against a defendant in garnishment proceedings); Bank of Commerce *v.* Franklin, 90 Ill. App. 91; Davis *v.* Siegel, 80 Ill. App. 278; Clark *v.* Earlville First Nat. Bank, 71 Ill. App. 601; Pecos Irr., etc., Co. *v.* Olson, 63 Ill. App. 313; Dearborn Laundry Co. *v.* Chicago, etc., R. Co., 55 Ill. App. 438; Dunderdale *v.* Westinghouse Electric Co., 51 Ill. App. 407 (return by order of a judgment creditor's attorney of an execution unsatisfied will not support garnishment pro-

dictions, however, it is held to be merely irregular to issue a writ of garnishment before a return of *nulla bona* on execution, and does not avoid the proceedings, although it may be a cause for setting aside the writ on an application in season before judgment.[29]

D. Existence or Resort to Other Remedy. The general rule is that where a common-law remedy is open to the creditor by which the redress sought may be obtained, he should not resort to proceedings by garnishment.[30] Likewise it has been held that garnishment proceedings should not be resorted to where the property of defendant can be reached by execution or attachment.[31]

E. Persons Entitled. The process of garnishment may be employed by any person not expressly denied the remedy by the statute itself, or by estoppel.[32] Thus it may be employed by the government of the United States[33] or of any one of the United States.[34] Again it may be employed by a transferee of a negotiable instrument,[35] and by a non-resident creditor against a non-resident debtor.[36]

ceedings); Gibbon *v.* Bryan, 3 Ill. App. 298; Gockal *v.* Weighaus, 8 Ky. L. Rep. 784; Shackleton *v.* Carsen, 7 Ky. L. Rep. 668. See also Chanute *v.* Martin, 25 Ill. 63; Lewis *v.* Quinker, 2 Metc. (Ky.) 284.

29. Sessions *v.* Stevens, 1 Fla. 233, 46 Am. Dec. 339; Hoffman *v.* Hinnershitz, 4 Pa. Co. Ct. 207; Clevenstine *v.* Law, 3 Pa. L. J. Rep. 417, 5 Pa. L. J. 459; Moore *v.* Risden, 3 Pa. L. J. Rep. 408, 5 Pa. L. J. 429; Dunn *v.* Fries, 3 Pa. L. J. Rep. 113, 4 Pa. L. J. 473. See also Faulkner *v.* Chandler, 11 Ala. 725.

30. Iron Cliff Co. *v.* Lahais, 52 Mich. 394, 18 N. W. 121; Weimeister *v.* Manville, 44 Mich. 408, 6 N. W. 859; Sievers *v.* Woodburn Sarven Wheel Co., 43 Mich. 275, 5 N. W. 311; Maynards *v.* Cornwell, 3 Mich. 309; Thurston *v.* Prentiss, 1 Mich. 193; Carter *v.* Koshland, (Oreg. 1886) 11 Pac. 292. *Compare* Webster *v.* Randall, 19 Pick. (Mass.) 13, holding that one summoned as trustee may be charged, notwithstanding a subsequent arrest of the principal defendant in a suit for the same cause of action.

If while trustee process is pending judgment be obtained and execution issued against the principal defendant in the same suit the execution will be valid so long as it remains on record and is acquiesced in by the other parties. Spring *v.* Ayer, 23 Vt. 516.

Pending an alias fieri facias on which no levy has been made, it has been held that an attachment execution might issue in favor of plaintiff. Tamms *v.* Wardle, 5 Watts & S. (Pa.) 222.

Where garnishees fail to answer.— It has been held in Kentucky that where garnishees are summoned who are alleged to owe more than sufficient to pay plaintiff's debt, and they fail to answer, no sale of real estate should be ordered to pay the debt until the amount garnished has been first applied to its payment. Anderson *v.* Sutton, 2 Duv. (Ky.) 480.

31. *California.*— Johnson *v.* Gorham, 6 Cal. 195, 65 Am. Dec. 501.

Kentucky.— Jenkins *v.* Jackson, 8 Bush 373.

Massachusetts.— Allen *v.* Megguire, 15 Mass. 490.

Pennsylvania.— Hall *v.* Filter Mfg. Co., 10 Phila. 370.

Wisconsin.— German American Bank *v.* Butler-Mueller Co., 87 Wis. 467, 58 N. W. 746. See, however, Malley *v.* Altman, 14 Wis. 22.

See 24 Cent. Dig. tit. "Garnishment," § 14.

Property may sometimes be in such situation that a person may be charged as trustee on account of it, where at the same time a direct attachment of the property might have been made. Balkham *v.* Lowe, 20 Me. 369; Burlingame *v.* Bell, 16 Mass. 318.

32. Leinkauff *v.* Forcheimer, 87 Ala. 258, 6 So. 149; Esler *v.* Adsit, 108 Mich. 543, 66 N. W. 485. See also Ferry *v.* Home Sav. Bank, 114 Mich. 321, 72 N. W. 181, 68 Am. St. Rep. 487; Brown *v.* Black, 96 Pa. St. 482; Canal St., etc., R. Co. *v.* Hart, 114 U. S. 654, 5 S. Ct. 1127, 29 L. ed. 226.

A firm debtor is not garnishable by the creditor of one partner, although the firm existed merely for gambling purposes. Crescent Ins. Co. *v.* Bear, 23 Fla. 50, 1 So. 318, 11 Am. St. Rep. 331.

Alien.— Under the Maryland act of 1795, one who is not a citizen of the United States cannot maintain garnishment. Shivers *v.* Wilson, 5 Harr. & J. 130, 9 Am. Dec. 497.

Decedent.— The Pennsylvania act of June 16, 1836, authorizing the attachment of a debt due to defendant, has been held to authorize an attachment by a creditor of the decedent of a debt due to the decedent. Gottshall *v.* Knipe, 16 Pa. Co. Ct. 543, 8 Kulp 73, 11 Montg. Co. Rep. 159.

Surety.— Where a surety pays his judgment rendered against him and his principal and takes an assignment of it to himself, he may assert either at law or in equity any lien or right which might have been asserted by plaintiff, and may therefore sue out a garnishment on the judgment and resist a claim of exemption which was not available against plaintiff. Giddens *v.* Williamson, 65 Ala. 439.

33. U. S. *v.* Graff, 67 Barb. (N. Y.) 304.

34. People *v.* Johnson, 14 Ill. 342.

35. Dugas *v.* Mathews, 9 Ga. 510, 54 Am. Dec. 361.

36. *Alabama.*— Woodley *v.* Shirley, Minor 14.

Delaware.— Burrows *v.* Dumphy, 2 Harr. 308.

And either a municipal or a private corporation may invoke the process to impound the credits or effects of its debtors.[37]

F. Simultaneous and Successive Writs — 1. SIMULTANEOUS WRITS. An alias writ against the same garnishee issued while the former writ is in force will be quashed on motion, unless plaintiff discontinues the former writ.[38]

2. SUCCESSIVE WRITS. After the issuance and service of the writ of garnishment, alias writs may issue from time to time before trial.[39] However, a creditor will not be permitted to initiate a series of garnishments and thus tie up in the hands of a garnishee separate amounts of money so as to collect the claim in instalments.[40]

III. EXISTENCE OF RIGHT OF ACTION BY DEFENDANT AGAINST GARNISHEE.

A. Necessity For. In order that a creditor may maintain garnishment proceedings there must be a subsisting right of action at law by defendant in his own name, and for his own use, against the garnishee.[41] The rule is some-

Illinois.— Missouri Pac. R. Co. *v.* Flannigan, 47 Ill. App. 322.

Michigan.— Newland *v.* Wayne County Cir. Judge, 85 Mich. 151, 48 N. W. 544.

New Jersey.— Hartford Nat. F. Ins. Co. *v.* Chambers, 53 N. J. Eq. 468, 32 Atl. 663.

Rhode Island.— Cross *v.* Brown, 19 R. I. 220, 33 Atl. 147.

Vermont.— Ward *v.* Morrison, 25 Vt. 593.

See 24 Cent. Dig. tit. "Garnishment," § 18.

Contra.— Webb *v.* Lea, 6 Yerg. (Tenn.) 473.

37. Gordon *v.* Baltimore, 5 Gill (Md.) 231.

38. Hawk *v.* Rock, 3 Pa. Dist. 374, 14 Pa. Co. Ct. 490; Tripp *v.* Miller, 4 Kulp (Pa.) 515 (holding that, where an attachment execution and a fieri facias are issued and in force at the same time, the attachment, being the execution process, is under the control of the court so far as to see that it is not used wrongfully); Rutter *v.* Ely, 4 Kulp (Pa.) 348.

A foreign attachment may be laid on property in the hands of plaintiff in the attachment, and in such case no special process is necessary. Graighle *v.* Notnagle, 10 Fed. Cas. No. 5,679, Pet. C. C. 245.

39. Ahrens, etc., Mfg. Co. *v.* Patton Sash, etc., Co., 94 Ga. 247, 21 S. E. 523; Pratt *v.* Young, 90 Ga. 39, 15 S. E. 630; Stewart *v.* Dobbs, 39 Ga. 82; Importers', etc., Nat. Bank *v.* Lyons, 8 Pa. Dist. 675. See also Marsh *v.* Phillips, 77 Ga. 436; Houston *v.* Howard, 39 Vt. 54.

After judgment against defendant in attachment, however, no further garnishment can issue on the same attachment, although an issue be pending between plaintiff and a former garnishee as to the truth of the answer made by such garnishee. Ahrens, etc., Mfg. Co. *v.* Patton Sash, etc., Co., 94 Ga. 247, 21 S. E. 523.

No abandonment of first writ.— The service of a second writ on the same garnishee is not as a matter of law an abandonment of the first, as plaintiff may thus acquire additional security. Lawrence *v.* Security Co., 56 Conn. 423, 15 Atl. 406, 1 L. R. A. 342.

40. Collins *v.* Chase, 71 Me. 434; Rustad *v.* Bishop, 80 Minn. 497, 83 N. W. 449, 81 Am. St. Rep. 282, 50 L. R. A. 168; Coyne *v.* Slane, 6 Lack. Leg. N. (Pa.) 217.

41. *Alabama.*—Jefferson County Sav. Bank *v.* Nathan, 138 Ala. 342, 35 So. 355; Roman *v.* Dimmick, 123 Ala. 366, 26 So. 214; Jones *v.* Crews, 64 Ala. 368; Henry *v.* Murphy, 54 Ala. 246; Godden *v.* Pierson, 42 Ala. 370; Harrell *v.* Whitman, 19 Ala. 135; McGehee *v.* Walke, 15 Ala. 183.

Arkansas.— St. Louis Southwestern R. Co. *v.* Gate City Co-operative Grocery Co., 70 Ark. 10, 65 S. W. 706.

California.—Early *v.* Redwood City, 57 Cal. 193.

Colorado.— Hallowell *v.* Leafgreen, 3 Colo. App. 22, 32 Pac. 79.

Delaware.— Netter *v.* Stoeckle, 4 Pennew. 345, 56 Atl. 604.

Georgia.— Willingham Sash, etc., Co. *v.* Drew, 117 Ga. 850, 45 S. E. 237.

Illinois.— Richardson *v.* Lester, 83 Ill. 55; Webster *v.* Steele, 75 Ill. 544; Lorenson *v.* Rusk, 67 Ill. App. 532; Chatroop *v.* Borgard, 40 Ill. App. 279; Sangamon Coal Min. Co. *v.* Richardson, 33 Ill. App. 277.

Maine.— McGlinchy *v.* Winchell, 63 Me. 31.

Maryland.— Odend'hal *v.* Devlin, 48 Md. 439; Baltimore, etc., R. Co. *v.* Wheeler, 18 Md. 372. See also Cockey *v.* Leister, 12 Md. 124, 71 Am. Dec. 588.

Massachusetts.— Mayhew *v.* Scott, 10 Pick. 54; Hooper *v.* Hills, 9 Pick. 435; Lupton *v.* Cutter, 8 Pick. 298; Brigden *v.* Gill, 16 Mass. 522; White *v.* Jenkins, 16 Mass. 62; Clark *v.* Brown, 14 Mass. 271; Maine F. & M. Ins. Co. *v.* Weeks, 7 Mass. 438; Webster *v.* Gage, 2 Mass. 503.

Michigan.— Farwell *v.* Chambers, 62 Mich. 316, 28 N. W. 859.

Minnesota.— Pabst Brewing Co. *v.* Liston, 80 Minn. 473, 83 N. W. 448, 81 Am. St. Rep. 275.

Missouri.— McPherson *v.* Atlantic, etc., R. Co., 66 Mo. 103.

Nebraska.— Edney *v.* Willis, 23 Nebr. 56, 36 N. W. 300.

New Hampshire.—Proctor *v.* Lane, 62 N. H. 457; Forist *v.* Bellows, 59 N. H. 229; Getchell *v.* Chase, 37 N. H. 106; Haven *v.* Wentworth, 2 N. H. 93.

times stated thus, that to constitute the relation of garnishee there must be a privity of contract express or implied between the principal debtor and the garnishee, or that the former must have intrusted and deposited goods or effects with the latter.[42] A garnishee cannot be held liable unless it is shown that he is indebted to defendant at the time of the institution of the garnishment proceedings; the establishment of his liability afterward is not enough.[43]

Oregon.— Oregon R., etc., Co. *v.* Gates, 10 Oreg. 514.

Pennsylvania.— Develin *v.* Ford, 19 Pa. Super. Ct. 381.

Rhode Island.— Smith *v.* Millett, 11 R. I. 528.

Vermont.— Kettle *v.* Harvey, 21 Vt. 301; Weller *v.* Weller, 18 Vt. 55; Hoyt *v.* Swift, 13 Vt. 129, 37 Am. Dec. 586.

West Virginia.— Swann *v.* Summers, 19 W. Va. 115.

Wisconsin.— Smith *v.* Davis, 1 Wis. 447, 60 Am. Dec. 390.

See 24 Cent. Dig. tit. "Garnishment," § 21.

While this is one of the usual tests to determine whether one is a trustee or not it has been said that this test is not in all cases necessarily decided, there being exceptions to its application. Whitney *v.* Munroe, 19 Me. 42, 36 Am. Dec. 732.

Even where the attachment debtor has released all claims against him, an attachment creditor can compel a garnishee to account for collaterals held by him. Merchants', etc., Nat. Bank *v.* William A. Baeder Glue Co., 164 Pa. St. 1, 30 Atl. 290.

Where the law precludes an action for the price of an article unlawfully sold, as intoxicating liquors, a trustee is not chargeable for moneys due under such illegal sale; otherwise a seller could always evade the law through the name of some friendly creditor. McGlinchy *v.* Winchell, 63 Me. 31.

Rule in Mississippi.— To authorize proceedings by attachment in garnishment, the debtor of complainant must be a non-resident of the state and have either lands or tenements within the same or some other person within the state who is indebted to him or who has effects belonging to him in his hands. McNeill *v.* Roache, 49 Miss. 436.

42. Skowhegan Bank *v.* Farrar, 46 Me. 293.

To render a person liabile as garnishee he must have in his possession belonging to defendant property, money, credits, or effects, or he must be indebted to defendant. Smith *v.* Davis, 1 Wis. 447, 60 Am. Dec. 390.

"Creditor" defined see 11 Cyc. 1193.

"Debtor" defined see 13 Cyc. 425.

The relationship of debtor and creditor existed between defendant and the garnishee, and therefore garnishment proceedings were maintainable in the following cases:

Maine.— Wadleigh *v.* Jordan, 74 Me. 483.

Massachusetts.—Howland *v.* Wilson, 9 Pick. 18; Williams *v.* Reed, 5 Pick. 480; Watkins *v.* Otis, 2 Pick. 88.

New Hampshire.— Head *v.* Richardson, 16 N. H. 454.

Ohio.— Swasey *v.* Antram, 24 Ohio St. 87.

Vermont.— Chapman *v.* Mears, 56 Vt. 389; Corey *v.* Powers, 18 Vt. 587.

Virginia.— Kelly *v.* Linkenhoger, 8 Gratt. 104.

United States.— Taylor *v.* Gardner, 23 Fed. Cas. No. 13,791, 2 Wash. 488.

The relationship of debtor and creditor did not exist in the following cases:

Alabama.— Hinson *v.* Gamble, 65 Ala. 605; Lovely *v.* Caldwell, 4 Ala. 684.

California.— Redondo Beach Co. *v.* Brewer, 101 Cal. 322, 35 Pac. 896; Hartman *v.* Olvera, 54 Cal. 61.

Colorado.— Union Pac. R. Co. *v.* Gibson, 15 Colo. 299, 25 Pac. 300; Sanders *v.* Page, 11 Colo. 518, 19 Pac. 468.

Connecticut.— Bigelow *v.* Lawrence, 16 Conn. 207; Starr *v.* Carrington, 3 Conn. 278.

Georgia.— Baer *v.* English, 84 Ga. 403, 11 S. E. 453, 20 Am. St. Rep. 372; Morgan *v.* Stokes, 54 Ga. 518.

Illinois.—Thompson *v.* Conover, 12 Ill. App. 300.

Indiana.— Hunt *v.* Coon, 9 Ind. 537.

Iowa.— McArthur *v.* Garman, 71 Iowa 34, 32 N. W. 14; Hyde *v.* Minneapolis Lumber Co., 53 Iowa 243, 1 N. W. 740, 5 N. W. 126.

Kansas.— Center *v.* McQuesten, 24 Kan. 480.

Maine.— Granite Nat. Bank *v.* Neal, 71 Me. 125; Flagg v. Bates, 65 Me. 364; Homestead *v.* Loomis, 53 Me. 549; Wood *v.* Estes, 35 Me. 145; Knight *v.* Gorham, 4 Me. 492.

Maryland.— Baltimore, etc., R. Co. *v.* Wheeler, 18 Md. 372.

Massachusetts.— Wart *v.* Mann, 124 Mass. 586; Bennett *v.* Caswell, 7 Gray 153; Macomber *v.* Weeks, 3 Metc. 512; Willard *v.* Butler, 14 Pick. 550; Mayhew *v.* Scott, 10 Pick. 54; Upham *v.* Naylor, 9 Mass. 490.

Michigan.— Cogswell *v.* Mitts, 90 Mich. 353, 51 N. W. 514; Case *v.* Dewey, 55 Mich. 116, 20 N. W. 817, 21 N. W. 911; Botsford *v.* Simmons, 32 Mich. 352.

Mississippi.— Hoover *v.* Chambers, 27 Miss. 606.

Missouri.—Lessing *v.* Vertrees, 32 Mo. 431; Fenton *v.* Block, 10 Mo. App. 536.

New Hampshire.—Brown *v.* Heath, 45 N. H. 168; Getchell *v.* Chase, 37 N. H. 106; Bean *v.* Bean, 33 N. H. 279; Leach *v.* Pillsbury, 15 N. H. 137.

Pennsylvania.— Dowdall *v.* Wisher, 167 Pa. St. 475, 31 Atl. 749; Nellis *v.* Coleman, 98 Pa. St. 465; Allen *v.* Erie City Bank, 57 Pa. St. 129.

Vermont.— Morey *v.* Sheltus, 47 Vt. 342; Smith *v.* Sharpe, 45 Vt. 545; Cobb *v.* Bishop, 27 Vt. 624.

Wisconsin.— Goode *v.* Barr, 64 Wis. 659, 26 N. W. 114.

See 24 Cent. Dig. tit. "Garnishment," § 22.

43. *Connecticut.*—Elmer *v.* Welsh, 47 Conn. 56.

B. Payment by Garnishee Before Service of Writ — 1. General Rule. Where prior to the service of the writ a garnishee makes payment to defendant, or to one of his creditors at his request,[44] or where at the time of the service of the writ defendant, in the employ of the garnishee, is indebted to him for advances,[45] there is no subsisting debt or demand which can be reached by process of garnishment, and a judgment against the garnishee should be set aside.

2. Payment by Check or Note. The above rule is applicable even where the indebtedness is liquidated by a check, or by a note falling due after the service of the writ of garnishment.[46]

Georgia.— American Nat. Bank *v.* Brunswick Light, etc., Co., 100 Ga. 92, 26 S. E. 473; Mott *v.* Semmes, 24 Ga. 540. See also Watkins *v.* Pope, 38 Ga. 514.

Illinois.— See South Chicago City R. Co. *v.* Workman, 64 Ill. App. 383.

Louisiana.— See J. A. Fay, etc., Co. *v.* Ouachita Excelsior Saw, etc., Mills, 50 La. Ann. 205, 23 So. 312.

Massachusetts.— Wyman *v.* Hichborn, 6 Cush. 264. See also Tucker *v.* Clisby, 12 Pick. 22.

Michigan.— Hopson *v.* Dinan, 48 Mich. 612, 12 N. Y. 879; Hitchcock *v.* Miller, 48 Mich. 603, 12 N. W. 871; Martz *v.* Detroit F. & M. Ins. Co., 28 Mich. 201.

Missouri.— Parks *v.* Heman, 7 Mo. App. 14.

Texas.— Darlington Miller Lumber Co. *v.* National Surety Co., (Civ. App. 1904) 80 S. W. 238.

Vermont.— Scofield *v.* White, 29 Vt. 330.

Virginia.— Buck *v.* Guarantors' Liability Indemnity Co., 97 Va. 719, 34 S. E. 950.

See 24 Cent. Dig. tit. "Garnishment," § 21.

Before acceptance of an order on a person who is not a debtor of the drawer, the drawee is not indebted to the payee, so as to be subject to garnishment in a suit against the latter. Stone *v.* Darring, 119 Mich. 476, 78 N. W. 549.

The extent of recovery from the garnishee is limited to the amount which the principal debtor himself could have recovered. South Chicago City R. Co. *v.* Workman, 64 Ill. App. 383.

44. *Alabama.*— Cook *v.* Walthall, 20 Ala. 334.

Georgia.— Kimball *v.* Moody, 97 Ga. 549, 25 S. E. 338.

Illinois.— Beardsley *v.* Beardsley, 23 Ill. App. 317 (holding that a garnishee who has agreed to pay other debts of the judgment debtor to the extent of his own debt is not liable in garnishment proceedings); Hughes *v.* Sprague, 4 Ill. App. 301.

Indiana.— Wiles *v.* Lee, 4 Ind. App. 579, 31 N. E. 474.

Iowa.— Huntington *v.* Risdon, 43 Iowa 517.

Kentucky.— See Curle *v.* Jones, 38 S. W. 677, 18 Ky. L. Rep. 785.

Maine.— Harris *v.* Somerset, etc., R. Co., 47 Me. 298; Wood *v.* Estes, 35 Me. 145.

Massachusetts.—Cooke *v.* Hallett, 119 Mass. 148; Robinson *v.* Hall, 3 Metc. 301; Wood *v.* Bodwell, 12 Pick. 268; Williams *v.* Marston, 3 Pick. 65, upholding the above rule, even where the debtor suspected when he made payment that his creditor was demanding same from the apprehension that a trustee process might be instituted. See, however, Sturtevant *v.* Robinson, 18 Pick. 175, holding that where money owing defendant was paid over to one of his creditors without any authority, and the party was then summoned as trustee of defendant, who thereupon ratified the payment, such ratification was ineffective and the party summoned was charged.

New Hampshire.— See Russell *v.* Convers, 7 N. H. 343.

Ohio.— Finnell *v.* Burt, 2 Handy 202, 12 Ohio Dec. (Reprint) 403.

Texas.— Duble *v.* Batts, 38 Tex. 312; Austin Nat. Bank *v.* Bergen, (Civ. App. 1899) 48 S. W. 743, (1898) 47 S. W. 1037, holding that before garnishment the garnishee can pay over money due the debtor, even though he had been garnished for the same money in a suit against the wrong debtor.

Vermont.— Fletcher *v.* Pillsbury, 35 Vt. 16; Weller *v.* Weller, 18 Vt. 55.

See 24 Cent. Dig. tit. "Garnishment," § 23.

Wages of wife.— It has been held in Maine that the income of the wife's labor inures to the benefit of the husband, and the payment of wages to the wife does not exonerate the debtor but he remains liable in foreign attachment to the creditor of the husband. Bradbury *v.* Andrews, 37 Me. 199.

Where the payee of a check deposits it in a bank and according to a custom assented to by him, it is credited on his bank-book as so much cash, the title to the check vests in the bank and the drawer cannot be garnished as debtor of the payee in respect to the debt for which the check was given. National Park Bank *v.* Levy, 17 R. I. 746, 24 Atl. 777, 19 L. R. A. 475.

45. Steiner *v.* Montgomery Bank, 115 Ala. 575, 22 So. 72; Odum *v.* Macon, etc., R. Co., 118 Ga. 792, 45 S. E. 619; McKee *v.* Georgia Cotton Oil Co., 99 Ga. 107, 24 S. E. 961; Standard Wagon Co. *v.* Lowry, 94 Ga. 614, 19 S. E. 989; Boyd *v.* Brown, 120 Ind. 393, 22 N. E. 249; Warner *v.* Perkins, 8 Cush. (Mass.) 518; Harris *v.* Aiken, 3 Pick. (Mass.) 1.

46. *Massachusetts.*— Getchell *v.* Chase, 124 Mass. 366; Dole *v.* Boutwell, 1 Allen 286; Barnard *v.* Graves, 16 Pick. 41; Wood *v.* Bodwell, 12 Pick. 268. See, however, Dennie *v.* Hart, 2 Pick. 204.

Missouri.— Prewitt *v.* Brown, 101 Mo. 254, 73 S. W. 897.

Tennessee.— See Crudgington *v.* Hogan, 105 Tenn. 448, 58 S. W. 642.

C. Payment of Indebtedness After Garnishment. A garnishee or trustee is not justified in paying the debt to the principal defendant or to a third person after service of the writ or trustee process, and where he does so he is liable to the garnishor for the amount so paid.[47]

IV. Persons Subject to Garnishment.

A. Plaintiff in Principal Action. The rule is well settled that plaintiff in an action can neither summon nor charge himself as garnishee or trustee in garnishment proceedings.[48]

B. Defendant in Principal Action. The rule is laid down in some jurisdictions that garnishment proceedings cannot be maintained against an executor or administrator where he is defendant in the principal action.[49] In other jurisdictions, however, it has been held that garnishment on a judgment may be issued against a personal representative in his official capacity, although the judgment is against him personally.[50]

C. Persons Under Disability. A married woman authorized to trade as a *feme sole* may be charged as a garnishee or trustee;[51] likewise a minor may be

Vermont.— Sibley *v.* Frost, 23 Vt. 352.

United States.— Simpson *v.* Dall, 3 Wall. 460, 18 L. ed. 265; Foster *v.* Swasey, 9 Fed. Cas. No. 4,985, 2 Woodb. & M. 364.

Canada.— Thomas *v.* Smith, 16 Quebec Super. Ct. 354.

See 24 Cent. Dig. tit. "Garnishment," § 24.

See, however, Binkley *v.* Clay, 112 Ill. App. 332 (where a garnishee, just prior to the service of the writ upon it, had money in its possession belonging to the debtor, and had, just prior to such service, drawn its check for such amount and delivered it to its bank with a request for a draft for the amount thereof and for delivery of such draft to a certain bank, being the Chicago correspondent of a foreign bank to whom remittance had been requested by the debtor, and where the garnishee had ample time after the service of such writ to have stopped delivery of such draft to such Chicago correspondent, then the issue in garnishment should have been decided adversely to the garnishee); Donnell *v.* Portland, etc., R. Co., 76 Me. 33.

47. *Illinois.*— Lake Shore, etc., R. Co. *v.* Scott, 67 Ill. App. 92.

Massachusetts.— Choquette *v.* Ford, 178 Mass. 6, 59 N. E. 454, holding, however, that a garnishee is justified in paying to the principal defendant the amount of his exemption after service of the writ.

Michigan.— See Sykes *v.* City Sav. Bank, 115 Mich. 321, 73 N. W. 369, 69 Am. St. Rep. 562.

New Hampshire.— Bixby *v.* Whitcomb, 69 N. H. 646, 46 Atl. 1049.

Vermont.— Dow *v.* Taylor, 71 Vt. 337, 45 Atl. 220, 76 Am. St. Rep. 775 (the fact that a trustee had no notice of the fraudulent action of an assignment of a claim owed by him is no justification for him in paying the debt to the assignee after service of trustee process upon him); Garfield *v.* Rutland Ins. Co., 69 Vt. 549, 38 Atl. 235 (a trustee cannot reduce his liability under trustee process by pleading payments made for his creditor under contracts which were unenforceable because within the statute of frauds).

Wisconsin.— See Smith, etc., Co. *v.* Mutual F. Ins. Co., 110 Wis. 602, 86 N. W. 241.

48. *Kansas.*— Ft. Scott First Nat. Bank *v.* Elliott, 62 Kan. 764, 64 Pac. 623, 55 L. R. A. 353.

Massachusetts.— Belknap *v.* Gibbens, 13 Metc. 471, holding, however, that the identity of plaintiff and trustee should be pleaded in abatement in order that it may be traversed and tried as a question of fact.

New Hampshire.— Hoag *v.* Hoag, 55 N. H. 172; Blaisdell *v.* Ladd, 14 N. H. 129.

Ohio.— Cleveland Sierra Min. Co. *v.* Sears Union Water Co., 4 Ohio Dec. (Reprint) 208, 1 Clev. L. Rep. 117.

Rhode Island.— Knight *v.* Clyde, 12 R. I. 119.

Vermont.— See Lyman *v.* Wood, 42 Vt. 113, holding that it is immaterial that the debt due is in the hands of a co-plaintiff.

United States.— Rice *v.* Sharpleigh Hardware Co., 85 Fed. 559.

See 24 Cent. Dig. tit. "Garnishment," § 26.

See, however, Boyd *v.* Bayless, 23 Tenn. 386, holding that the creditor of a non-resident may reach a fund in his own hands on a sum of money due from him to such non-resident, where the note is in the hands of the non-resident's agent, within the jurisdiction of the court.

49. Shepherd *v.* Bridenstine, 80 Iowa 225, 45 N. W. 746; Richardson *v.* Lacey, 27 La. Ann. 62; Bailey *v.* Lacey, 27 La. Ann. 39.

50. Dudley *v.* Falkner, 49 Ala. 148; Union Nat. Bank *v.* Fagan, 34 Wkly. Notes Cas. (Pa.) 20. See, however, Adams' Appeal, 47 Pa. St. 94, holding that the commissions of an executor are not attachable at the suit of his judgment creditors in his own hands or those of his co-executor.

51. Cavanaugh *v.* Fried, 6 Ky. L. Rep. 219; Crockett *v.* Ross, 5 Me. 443. See Delacroix *v.* Hart, 23 La. Ann. 192, holding that judgment against the wife as garnishee cannot be entered on interrogatories served on her, unless she be authorized to appear and answer by her husband or by the judge. See also Husband and Wife.

summoned as a garnishee for any indebtedness to the principal debtor for necessaries, or for any specific goods and chattels of the principal debtor in his hands.[52]

D. Private Corporations. In practically every state in the Union, by express statutory provision, or construction of statute, garnishment proceedings may be maintained against private domestic corporations.[53]

E. Officers, Agents, or Employees of Corporation — 1. In General. The officers and employees of corporations with whom money is deposited in their official capacity are not liable to garnishment in a suit against the creditors of such corporations.[54]

2. Where the Corporation Is Defendant. According to the better rule, an officer, agent, or employee of a private corporation, holding funds of such corporation in his official capacity, cannot be garnished by a creditor of such corporation.[55] In several jurisdictions, however, it is held that a proceeding in gar-

52. Scofield *v.* White, 29 Vt. 330; Wilder *v.* Eldridge, 17 Vt. 226. See also Infants.

53. *Alabama.*— *Ex p.* Cincinnati, etc., R. Co., 78 Ala. 258.

Connecticut.— Knox *v.* Protection Ins. Co., 9 Conn. 430, 25 Am. Dec. 33.

Georgia.— Rives *v.* Boulware, 1 Dudley 153.

Illinois.— Toledo, etc., R. Co. *v.* Reynolds, 72 Ill. 487; Glover *v.* Wells, 40 Ill. App. 350.

Iowa.— Buchanan County Bank *v.* Cedar Rapids, etc., R. Co., 62 Iowa 494, 17 N. W. 737; Burton *v.* Warren Dist. Tp., 11 Iowa 166; Taylor *v.* Burlington, etc., R. Co., 5 Iowa 114; Wales *v.* Muscatine, 4 Iowa 302.

Maryland.— Myer *v.* Liverpool, etc., Ins. Co., 40 Md. 595; Boyd *v.* Chesapeake, etc., Canal Co., 17 Md. 195, 79 Am. Dec. 646.

Massachusetts.— New England Mar. Ins. Co. *v.* Chandler, 16 Mass. 275; Union Turnpike Road *v.* Jenkins, 2 Mass. 37. See Callaghan *v.* Pocasset Mfg. Co., 119 Mass. 173.

Michigan.— Ferry *v.* Home Sav. Bank, 114 Mich. 321, 72 N. W. 181, 68 Am. St. Rep. 487.

Missouri.— St. Louis Perpetual Ins. Co. *v.* Cohen, 9 Mo. 421.

Nebraska.— Farmers', etc., Nat. Bank *v.* Mosher, 63 Nebr. 130, 88 N. W. 552.

Ohio.— Rocke *v.* Raney, 9 Ohio Dec. (Reprint) 617, 15 Cinc. L. Bul. 333.

Pennsylvania.— Conway *v.* Chestnut St. Nat. Bank, 189 Pa. St. 610, 42 Atl. 303; Com. *v.* Chestnut St. Nat. Bank, 189 Pa. St. 606, 42 Atl. 300; McDowell *v.* Smith, 21 Wkly. Notes Cas. 558; Quinton *v.* Railroad Co., 1 Pa. L. J. Rep. 8, 1 Pa. L. J. 17.

Tennessee.— Adams *v.* Memphis, 3 Tenn. Cas. 392. See Crudgington *v.* Hogan, 105 Tenn. 448, 58 S. W. 642.

Texas.— Landa *v.* Lattin, 19 Tex. Civ. App. 246, 46 S. W. 48.

Virginia.—Chesapeake, etc., R. Co. *v.* Paine, 29 Gratt. 502; Baltimore, etc., R. Co. *v.* Gallahue, 12 Gratt. 655, 65 Am. Dec. 254.

Wisconsin.— Everdell *v.* Sheboygan, etc., R. Co., 41 Wis. 395.

United States.—Ashley *v.* Quintard, 90 Fed. 84, holding, however, that such statutes apply only to debts due from the corporation generally, and that a corporation is not a debtor of the stock-holders in such a sense that it may be garnished as such.

See 24 Cent. Dig. tit. "Garnishment," § 29.

Contra.— Holland *v.* Leslie, 2 Harr. (Del.) 306.

Common carrier.— It has been held in Illinois that, although the statute regulating garnishment provides that "any person," etc., may be garnished, it must be taken in a restricted sense, and does not apply to a common carrier when such application would interefere with the proper discharge of the carrier's public duties. Michigan Cent. R. Co. *v.* Chicago, etc., R. Co., 1 Ill. App. 399.

Before a charter has been granted to a corporation, a summons in garnishment cannot issue against such corporation. Bartram *v.* Collins Mfg. Co., 69 Ga. 751.

Corporation dissolved.— A foreign attachment will not lie against a corporation which was dissolved before the writ issued, where plaintiff was a member of the corporation, knew of its status, and had been restrained by decree of dissolution from interfering with its assets. Hintermeister *v.* Ithaca Organ, etc., Co., 1 Pa. Co. Ct. 466.

National bank.— The fact that an insolvent national bank has gone into voluntary liquidation does not absolve it from liability to garnishment proceedings. Birmingham Nat. Bank *v.* Mayer, 104 Ala. 634, 16 So. 520. See Banks and Banking, 5 Cyc. 600 note 19.

54. *Georgia.*— Dobbins *v.* Orange, etc., R. Co., 37 Ga. 240.

Michigan.— See Lake Shore, etc., R. Co. *v.* Hunt, 39 Mich. 469.

Missouri.— Neuer *v.* O'Fallon, 18 Mo. 277, 59 Am. Dec. 313.

Wisconsin.— See Burlander *v.* Milwaukee, etc., R. Co., 26 Wis. 76.

United States.— Lewis *v.* Smith, 15 Fed. Cas. No. 8,332, 2 Cranch C. C. 571.

See 24 Cent. Dig. tit. "Garnishment," § 30.

Compare Reed *v.* Penrose, 2 Grant (Pa.) 472.

The "general or special agent" of a corporation on whom garnishment may be served is an agent having a general or special controlling authority. Lake Shore, etc., R. Co. *v.* Hunt, 39 Mich. 469.

55. *Georgia.*— Macon Nav. Co. *v.* Schofield, 111 Ga. 881, 36 S. E. 965.

Kentucky.— Wilder *v.* Shea, 13 Bush 128.

Maine.— Donnell *v.* Portland, etc., R. Co., 73 Me. 567; Bowker *v.* Hill, 60 Me. 172; Sprague *v.* Steam Nav. Co., 52 Me. 592; Pet-

nishment may be maintained against an officer or agent of a corporation by a creditor of such corporation, where such officer or agent has money or property of the corporation in his possession.[56]

F. Debtor of Private Corporation. The general rule is that a debtor of a private domestic corporation is liable in garnishment proceedings.[57]

G. Municipal Corporations — 1. General Rule. In well nigh every jurisdiction, in the absence of express statutory provisions to the contrary, upon the ground of public policy, all municipal corporations,[58] such as cities,[59] counties,[60]

tingill *v.* Androscoggin R. Co., 51 Me. 370.

Missouri.— Neuer *v.* O'Fallon, 18 Mo. 277, 59 Am. Dec. 313; Mueth *v.* Schardin, 4 Mo. App. 403.

Pennsylvania.— Fowler *v.* Pittsburgh, etc., R. Co., 35 Pa. St. 22; Johnson City First Nat. Bank *v.* Bristol Iron, etc., Co., 12 Pa. Co. Ct. 176; Muhlenberg *v.* Eiler, 1 Leg. Chron. 248; Muhlenberg *v.* Epler, 2 Woodw. 17. *Compare* Penrose *v.* Canal Co., 7 Am. L. Reg. 126.

Tennessee.— McGraw *v.* Memphis, etc., R. Co., 5 Coldw. 434.

See 24 Cent. Dig. tit. "Garnishment," § 31. And see *infra*, V, N, 7, a, (II).

Compare State *v.* Curran, 12 Ark. 321.

56. Central Plank-Road Co. *v.* Sammons, 27 Ala. 380; Littleton Nat. Bank *v.* Portland, etc., R. Co., 58 N. H. 104; Mayo *v.* Hansen, 94 Wis. 610, 69 N. W. 344, 59 Am. St. Rep. 919, 36 L. R. A. 561; Everdell *v.* Sheboygan, etc., R. Co., 41 Wis. 395. *Compare* Galena, etc., R. Co. *v.* Stahl, 103 Ill. 67.

57. De Mony *v.* Johnston, 7 Ala. 51; Penrose *v.* Erie Canal Co., 3 Phila. (Pa.) 198; Field *v.* Haines, 28 Fed. 919. See Monongahela Nav. Co. *v.* Ledlie, 1 Pa. L. J. Rep. 498, 3 Pa. L. J. 179. *Compare* Swann *v.* Summers, 19 W. Va. 115.

58. *Connecticut.*— Stillman *v.* Isham, 11 Conn. 124.

District of Columbia.— Columbia Brick Co. *v.* District of Columbia, 1 App. Cas. 351.

Georgia.— Leake *v.* Lacey, 95 Ga. 747, 22 S. E. 655, 51 Am. St. Rep. 112; Born *v.* Williams, 81 Ga. 796, 7 S. E. 868.

Iowa.— Jenks *v.* Osceola Tp., 45 Iowa 554.

Mississippi.— McBain *v.* Rodgers, (1901) 29 So. 91; Dollar *v.* Allen-West Commission Co., 78 Miss. 274, 28 So. 876.

Missouri.— Pendleton *v.* Perkins, 49 Mo. 565 (holding, however, that, although money in a municipal treasury is not liable to statutory garnishment, it may be reached by garnishment in equity); Sheppard *v.* Cape Girardeau County, (1886) 1 S. W. 305 [*following* Hawthorn *v.* St. Louis, 11 Mo. 59, 47 Am. Dec. 141].

New York.— Emes *v.* Fowler, 43 Misc. 603, 89 N. Y. Suppl. 685.

Pennsylvania.— Laughlin *v.* Neveling, 1 Pa. Co. Ct. 370, 17 Wkly. Notes Cas. 268; Van Volkenburgh *v.* Earley, 1 Kulp 216.

Tennessee.— Parsons *v.* McGavock, 2 Tenn. Ch. 581.

See 24 Cent. Dig. tit. "Garnishment," § 32.

But see Portsmouth Gas Co. *v.* Sanford, 97 Va. 124, 33 S. E. 516, 75 Am. St. Rep. 778, 45 L. R. A. 246.

59. *Alabama.*— Skewes *v.* Tennessee Coal, etc., Co., 124 Ala. 629, 27 So. 435, 82 Am. St. Rep. 214; Porter, etc., Hardware Co. *v.* Perdue, 105 Ala. 293, 16 So. 713, 53 Am. St. Rep. 124 (upholding the above rule even where officers and agents of a city appear without objection and admit indebtedness); Mobile *v.* Rowland, 26 Ala. 498.

Georgia.— Southwestern Georgia Bank *v.* Americus, 92 Ga. 361, 17 S. E. 287.

Illinois.— Merwin *v.* Chicago, 45 Ill. 133, 92 Am. Dec. 204.

Kansas.— Ottawa First Nat. Bank *v.* Ottawa, 43 Kan. 294, 23 Pac. 485; Switzer *v.* Wellington, 40 Kan. 250, 19 Pac. 620, 10 Am. St. Rep. 196.

Maryland.— Baltimore *v.* Root, 8 Md. 95, 63 Am. Dec. 696.

Massachusetts.— Fellows *v.* Duncan, 54 Mass. 332. See also Shepard *v.* Turner, 13 Allen 92.

Missouri.— Fortune *v.* St. Louis, 23 Mo. 239; Hawthorn *v.* St. Louis, 11 Mo. 59, 47 Am. Dec. 141.

Nebraska.— People *v.* Omaha, 2 Nebr. 166.

Ohio.— Columbus *v.* Dunnick, 41 Ohio St. 602.

Pennsylvania.— Erie *v.* Knapp, 29 Pa. St. 173.

Tennessee.— Memphis *v.* Laski, 9 Heisk. 511, 24 Am. Rep. 327.

Wisconsin.— Buffham *v.* Racine, 26 Wis. 449; Burnham *v.* Fond du Lac, 15 Wis. 193, 82 Am. Dec. 668.

United States.— Pringle *v.* Guild, 118 Fed. 655.

See 24 Cent. Dig. tit. "Garnishment," § 32.

Contra.— Denver *v.* Brown, 11 Colo. 337, 18 Pac. 214; Wales *v.* Muscatine, 4 Iowa 302; State *v.* Horton, 38 N. J. L. 88; Wilson *v.* Lewis, 10 R. I. 285. And see Laredo *v.* Nalle, 65 Tex. 359, holding that a city may be made a garnishee for moneys already earned and due a contractor for erecting a public building.

60. *Alabama.*— Edmondson *v.* De Kalb County, 51 Ala. 103.

Arkansas.— Boone County *v.* Keck, 31 Ark. 387.

Colorado.— Lewis *v.* San Miguel County, 14 Colo. 371, 23 Pac. 338; Gann *v.* Mineral County, 6 Colo. App. 484, 41 Pac. 829; Mesa County *v.* Brown, 6 Colo. App. 43, 39 Pac. 989; Stermer *v.* La Plata County, 5 Colo. App. 379, 38 Pac. 839.

Connecticut.— Ward *v.* Hartford County, 12 Conn. 404.

Florida.— Duval County *v.* Charleston Lumber, etc., Co., (1903) 33 So. 531.

Georgia.— Morgan *v.* Rust, 100 Ga. 346,

townships,[61] school-districts,[62] and school-boards,[63] are exempt from the process of garnishment.

2. WAIVER OF EXEMPTION. A municipal corporation may, however, by appearing and defending in garnishment proceedings waive its statutory exemption.[64] However, such privilege of exemption on the part of a municipal corporation is not waived by delay on its part in interposing objection to jurisdiction.[65]

H. Municipal Officer or Agent. By parity of reasoning, a municipal officer or agent is not subject to the process of garnishment where he holds funds or property of the corporation in his official capacity, since he is an integral part of such municipality or public corporation.[66]

28 S. E. 419; Dotterer *v.* Bowe, 84 Ga. 769, 11 S. E. 896.

Illinois.— Fast *v.* Wolf, 38 Ill. App. 27.

Indiana.— See Wallace *v.* Lawyer, 54 Ind. 501, 23 Am. Rep. 661.

Iowa.— Des Moines County *v.* Hinkley, 62 Iowa 637, 17 N. W. 915.

Kentucky.— Webb *v.* McCauley, 4 Bush 8.

Maine.— Clark *v.* Clark, 62 Me. 255.

Massachusetts.— Williams *v.* Boardman, 9 Allen 570.

Minnesota.—McDougal *v.* Hennepin County, 4 Minn. 184.

Nebraska.— State *v.* Eberly, 12 Nebr. 616, 12 N. W. 96.

Ohio.— Boalt *v.* Williams County Com'rs, 18 Ohio 13.

Pennsylvania.— Pettebone *v.* Beardslee, 1 Kulp 180.

Texas.— Sherman *v.* Shobe, 94 Tex. 126, 58 S. W. 949, 86 Am. St. Rep. 825; Herring-Hall-Marvin Co. *v.* Kroeger, 23 Tex. Civ. App. 672, 57 S. W. 980.

Washington.—State *v.* Tyler, 14 Wash. 495, 45 Pac. 31, 53 Am. St. Rep. 878, 37 L. R. A. 207; Eureka Sandstone Co. *v.* Pierce County, 8 Wash. 236, 35 Pac. 1081.

Wisconsin.— Merrell *v.* Campbell, 49 Wis. 535, 5 N. W. 912, 35 Am. Rep. 785.

See 24 Cent. Dig. tit. "Garnishment," § 32.

Contra.— Waterbury *v.* Deer Lodge County, 10 Mont. 515, 26 Pac. 1002, 24 Am. St. Rep. 67.

Jurors' fees due from a county are not included in "goods, effects, or credits" under the Maine statute of 1873, making all corporations liable to trustee process. Clark *v.* Clark, 62 Me. 255.

61. Bradley *v.* Richmond, 6 Vt. 121. *Contra,* Bray *v.* Wallingford, 20 Conn. 416; Weeks *v.* Hill, 38 N. H. 199; Whidden *v.* Drake, 5 N. H. 13.

62. Skelly *v.* Westminster School Dist., 103 Cal. 652, 37 Pac. 643; Marathon Tp. School Dist. No. 4 *v.* Gage, 39 Mich. 484, 33 Am. Rep. 421; Kein *v.* Carthage School Dist., 42 Mo. App. 460. *Contra,* Whalen *v.* Harrison, 11 Mont. 63, 27 Pac. 384.

63. Dollman *v.* Moore, 70 Miss. 267, 12 So. 23, 19 L. R. A. 222; Taylor *v.* Knipe, 4 Leg. Op. (Pa.) 428; Chamberlain *v.* Watters, 10 Utah 298, 37 Pac. 566.

64. Las Anamas County *v.* Bond, 3 Colo. 411; Clapp *v.* Walker, 25 Iowa 315; Baird *v.* Rogers, 95 Tenn. 492, 32 S. W. 630. *Contra,* Van Cott *v.* Pratt, 11 Utah 209, 39 Pac. 827.

65. Mitchell *v.* Gipple, 2 Pearson (Pa.) 276; Taylor *v.* Knipe, 2 Pearson (Pa.) 151. See also Stermer *v.* La Plata County, 5 Colo. App. 379, 38 Pac. 839.

66. *Alabama.*— Edmondson *v.* De Kalb County, 51 Ala. 103; Clark *v.* Mobile School Com'rs, 36 Ala. 621. See also Underhill *v.* Calhoun, 63 Ala. 216 [*overruling* Smoot *v.* Hart, 33 Ala. 69].

Connecticut.— Stillman *v.* Isham, 11 Conn. 124; Spalding *v.* Imlay, 1 Root 551.

Delaware.— Rossell *v.* Bartram, 1 Pennew. 242, 40 Atl. 242.

Georgia.— Connolly *v.* Thurber Whyland Co., 92 Ga. 651, 18 S. E. 1004.

Illinois.— Triebel *v.* Colburn, 64 Ill. 376; Fast *v.* Wolf, 38 Ill. App. 27; Smith *v.* Finlen, 23 Ill. App. 156; Smith *v.* Woolsey, 22 Ill. App. 185.

Louisiana.— Droz *v.* East Baton Rouge Parish, 36 La. Ann. 340.

Maine.— Clark *v.* Clark, 62 Me. 255.

Massachusetts.— Burnham *v.* Beal, 14 Allen 217; Brooks *v.* Cook, 8 Mass. 246; Chealy *v.* Brewer, 7 Mass. 259.

Michigan.— Bay City Brewing Co. *v.* McDonell, 106 Mich. 172, 64 N. W. 12.

New Hampshire.— Weeks *v.* Hill, 38 N. H. 199; Wendell *v.* Pierce, 13 N. H. 502 (holding, however, that an agent of a town appointed to distribute a sum of money among the inhabitants is not a public officer within the rule prohibiting garnishment of public funds); Ross *v.* Allen, 10 N. H. 96.

Pennsylvania.— Bulkley *v.* Eckert, 3 Pa. St. 368, 45 Am. Dec. 650; Fairbanks Co. *v.* Kirk, 8 Pa. Dist. 44, 22 Pa. Co. Ct. 57; Laughlin *v.* Neveling, 1 Pa. Co. Ct. 370, 17 Wkly. Notes Cas. 268; Schwartz *v.* Kyner, 40 Leg. Int. 272.

Rhode Island.— Allen *v.* Gerard, 21 R. I. 467, 44 Atl. 592, 79 Am. St. Rep. 816, 49 L. R. A. 351.

Tennessee.— St. Francis Levee Dist. *v.* Bodkin, 108 Tenn. 700, 69 S. W. 270; Moore *v.* Chattanooga, 8 Heisk. 850.

Texas.— See Dallas *v.* Western Electric Co., 83 Tex. 243, 18 S. W. 552.

Virginia.— Buck *v.* Guarantors' Liability Indemnity Co., 97 Va. 719, 34 S. E. 950; Rollo *v.* Andes Ins. Co., 23 Gratt. 509, 14 Am. Rep. 147.

West Virginia.— Aumann *v.* Black, 15 W. Va. 773.

Wisconsin.— See Merrell *v.* Campbell, 49 Wis. 535, 5 N. W. 912, 35 Am. Rep. 785.

I. United States or State Government or Officer. Likewise on the grounds of public policy the government of the United States and officers and agents thereof,[67] and the governments of the individual states and their officers and agents,[68] are exempt from the process of garnishment.

V. PROPERTY OR INTEREST SUBJECT TO GARNISHMENT.

A. Realty and Interests Therein. In the absence of express statutory provision a process of garnishment is not available to a creditor seeking to subject real estate of his debtor in the hands of a third person to the payment of his debt.[69]

B. Corporate Stock or Dividends. In the absence of express statutory provision[70] stock owned by an individual in a corporation cannot be reached by

United States.—Providence, etc., Steamship Co. *v.* Virginia F. & M. Ins. Co., 11 Fed. 284, 20 Blatchf. 405.

See 24 Cent. Dig. tit. "Garnishment," §§ 33, 34.

A watchman employed by a private corporation to police its own property, who is paid by the employing company, and who is subject to discharge by his employer, is not a municipal officer whose wages are exempt from garnishment, notwithstanding he is clothed with the power to make arrests and is subject to the supervision and control of the city police department. Tabb *v.* Mallette, 120 Ga. 97, 47 S. E. 587, 102 Am. St. Rep. 78.

67. Wilson *v.* Louisiana Bank, 55 Ga. 98; Mechanics', etc., Bank *v.* Hodge, 3 Rob. (La.) 373; Foley *v.* Shriver, 81 Va. 568; Buchanan *v.* Alexander, 4 How. (U. S.) 20, 11 L. ed. 857; Fischer *v.* Daudistal, 9 Fed. 145; Averill *v.* Tucker, 2 Fed. Cas. No. 670, 2 Cranch C. C. 544. See also McCann *v.* Randall, 147 Mass. 81, 17 N. E. 75, 9 Am. St. Rep. 666.

Commissioners of the District of Columbia are exempt. Brown *v.* Finley, 3 MacArthur 77; Pottier, etc., Mfg. Co. *v.* Taylor, 3 MacArthur 4; Derr *v.* Lubey, 1 MacArthur 187.

National bank as subject to garnishment see BANKS AND BANKING, 5 Cyc. 600 note 19.

68. *Delaware.*— Farmers' Bank *v.* Ball, 2 Pennew. 374, 46 Atl. 751.

Georgia.— O'Neill *v.* Sewall, 85 Ga. 481, 11 S. E. 831.

Kentucky.— Tracy *v.* Hornbuckle, 8 Bush 336; Divine *v.* Harvie, 7 T. B. Mon. 439, 18 Am. Dec. 194.

Massachusetts.— Train *v.* Herrick, 4 Gray 534.

New Hampshire.— Ladd *v.* Gale, 57 N. H. 210.

New Jersey.— Lodor *v.* Baker, 39 N. J. L. 49.

Oregon.— Keene *v.* Smith, 44 Oreg. 525, 75 Pac. 1065.

Pennsylvania.— Pierson *v.* McCormick, 1 Pa. L. J. Rep. 260, 2 Pa. L. J. 201; Morrel *v.* Commonwealth Bank, 2 Phila. 61.

Virginia.— Buck *v.* Guarantors' Liability Indemnity Co., 97 Va. 719, 34 S. E. 950; Rollo *v.* Andes Ins. Co., 23 Gratt. 509, 14 Am. Rep. 147.

See 24 Cent. Dig. tit. "Garnishment," § 35.

69. *Georgia.*— Wilkenson *v.* Chew, 54 Ga. 602.

Illinois.— Dressor *v.* McCord, 96 Ill. 389.

Iowa.— Seymour *v.* Kramer, 5 Iowa 285.

Maine.— Plumber *v.* Rundlett, 42 Me. 365.

Massachusetts.— Guild *v.* Holbrook, 28 Mass. 101.

New Hampshire.— Wright *v.* Bosworth, 7 N. H. 590.

Pennsylvania.— Hayes *v.* Gillespie, 35 Pa. St. 155; Tripp *v.* Miller, 4 Kulp 515. See also Lancaster County Bank *v.* Stauffer, 10 Pa. St. 398.

Vermont.— Smith *v.* Hyde, 36 Vt. 303.

See 24 Cent. Dig. tit. "Garnishment," § 43.

Proceeds of sale.— A trustee, however, may be charged for the proceeds of a sale of real estate held in trust by him, where the sale was made for the benefit of the principal debtor. Russell *v.* Lewis, 15 Mass. 127.

Rent due from land is regarded as a personal debt, and, as such, subject to attachment execution. Wells *v.* Tuck, 1 Kulp (Pa.) 154; Derham *v.* Berry, 5 Phila. (Pa.) 475; Foulke *v.* Cox, 21 Wkly. Notes Cas. (Pa.) 153; Rowell *v.* Felker, 54 Vt. 536, a lessee may be chargeable as trustee for future rent.

70. *Arkansas.*— Deutschman *v.* Byrne, 64 Ark. 111, 40 S. W. 780.

Illinois.— Union Nat. Bank *v.* Bryan, 131 Ill. 92, 22 N. E. 842; Thompson *v.* Wells, 57 Ill. App. 436; Illinois Anglo-American Storage Battery Co. *v.* Long, 41 Ill. App. 333 (holding that shares of stock for which certificates have not been issued may be garnished in the hands of the corporation in a suit against the owner of the stock, and their issuance and disposition controlled by the court); Netter *v.* Chicago Board of Trade, 12 Ill. App. 607.

Kentucky.— Rhodes *v.* Cox, 9 Ky. L. Rep. 895. And see Johnson *v.* Louisville City Nat. Bank, 56 S. W. 710, 22 Ky. L. Rep. 118.

Massachusetts.— Hussey *v.* Manufacturers', etc., Bank, 10 Pick. 415.

Michigan.— Old Second Nat. Bank *v.* Williams, 112 Mich. 564, 71 N. W. 150; Van Norman *v.* Jackson Cir. Judge, 45 Mich. 204, 7 N. W. 796.

Minnesota.— Puget Sound Nat. Bank *v.* Mather, 60 Minn. 362, 62 N. W. 396.

Nebraska.— Farmers', etc., Nat. Bank *v.* Mosher, 63 Nebr. 130, 88 N. W. 552, holding that the real and not the apparent interest of a stock-holder in the property of a cor-

garnishment proceedings against such corporation.[71] The rule seems to be otherwise, however, in regard to dividends due to such stock-holder.[72]

C. Property Pledged. While property is placed in the hands of a party as a pledge for a debt, it cannot be reached by garnishment proceedings until the debt to the pledgee is liquidated.[73] In several jurisdictions, however, it is held that garnishment proceedings will lie against property held by the garnishee as collateral security for a loan.[74]

poration, represented by shares of stock in his name, may be reached by garnishment proceedings served on the corporation.

New Hampshire.— Abbott *v.* Kimball, 68 N. H. 303, 38 Atl. 1051.

Ohio.— Norton *v.* Norton, 43 Ohio St. 509, 3 N. E. 348; New London Nat. Bank *v.* Lake Shore, etc., R. Co., 21 Ohio St. 221.

Pennsylvania.— Jagode *v.* Smalley, 10 Pa. Super. Ct. 320, 44 Wkly. Notes Cas. 543 (holding, however, that creditors of a corporation can reach stock assessments by foreign attachment, assessable only in the event of the insolvency of the company, only after a decree of insolvency and the appointment of a receiver and assessment by him); Pittsburgh First Nat. Bank *v.* Kountz, 6 Pa. Co. Ct. 249.

Wisconsin.— Barthell *v.* Hencke, 99 Wis. 660, 75 N. W. 952.

See 24 Cent. Dig. tit. "Garnishment," § 46.

71. *Alabama.*— Planters', etc., Bank *v.* Leavens, 4 Ala. 753.

Georgia.— Ross *v.* Ross, 25 Ga. 297.

Indiana.— Smith *v.* Downey, 8 Ind. App. 179, 34 N. E. 823, 35 N. E. 568, 52 Am. St. Rep. 476.

Missouri.— Armour Bros. Banking Co. *v.* St. Louis Nat. Bank, 113 Mo. 12, 20 S. W. 690, 35 Am. St. Rep. 691 (holding, however, that by statute stock of domestic corporations may be reached by garnishment process); Foster *v.* Potter, 37 Mo. 525.

North Carolina.— Evans *v.* Monot, 57 N. C. 227.

Rhode Island.— See Ireland *v.* Globe Milling, etc., Co., 19 R. I. 180, 32 Atl. 921, 61 Am. St. Rep. 756, 29 L. R. A. 429, holding that stock cannot be reached by garnishment, where it is stock of a foreign corporation owned by a non-resident and is not present in the state.

Tennessee.— Nashville Bank *v.* Ragsdale, Peck 296.

72. Ross *v.* Ross, 25 Ga. 297; Montidonico *v.* Page, 10 Heisk. (Tenn.) 443.

73. *Alabama.*— Gusdorf *v.* Ikelheimer, 75 Ala. 148.

Arkansas.— Patterson *v.* Harland, 12 Ark. 158.

California.— See Deering *v.* Richardson-Kimball Co., 109 Cal. 73, 41 Pac. 801 [*citing* Gow *v.* Marshall, 90 Cal. 565, 27 Pac. 422; Robinson *v.* Tevis, 38 Cal. 611], holding that a note payable to defendant and deposited with a bank as collateral is subject to garnishment and the lien so acquired extends to the amount collected thereon by the garnishee.

Connecticut.— Winslow *v.* Fletcher, 53 Conn. 390, 4 Atl. 250, 55 Am. Rep. 122.

Georgia.— Long *v.* Johnson, 74 Ga. 4; Hall *v.* Page, 4 Ga. 428, 48 Am. Dec. 235.

Maine.— Bowker *v.* Hill, 60 Me. 172; Smith *v.* Kennebec, etc., R. Co., 45 Me. 547; Howard *v.* Card, 6 Me. 353.

Maryland.— Poe *v.* St. Mary's College, 4 Gill 499.

Massachusetts.— Taft *v.* Bowker, 132 Mass. 277; Cramer *v.* Flint, 18 Pick. 140; Andrews *v.* Ludlow, 5 Pick. 28. See Swett *v.* Brown, 5 Pick. 178, holding that chattels delivered to an agent or creditor and removed to his house without authority from the owner, in pledge for a debt, may be attached under trustee process.

New Hampshire.—Proctor *v.* Lane, 62 N. H. 457; Chapman *v.* Gale, 32 N. H. 141 (holding, however, that a pledgee of property is answerable for the balance remaining in his hands after satisfying his legal and equitable claims); Hudson *v.* Hunt, 5 N. H. 538.

Vermont.— Downer *v.* Tarbell, 32 Vt. 22; Blake *v.* Hatch, 25 Vt. 555 (holding, however, that property pawned or mortgaged may be attached on trustee process, by paying the amount for which the property is so held as security); Goddard *v.* Hapgood, 25 Vt. 351, 60 Am. Dec. 272; Sargeant *v.* Leland, 2 Vt. 277. See also Ellis *v.* Goodnow, 40 Vt. 237.

Wisconsin.— Mershon *v.* Moors, 76 Wis. 502, 45 N. W. 95; St. Louis *v.* Regenfuss, 28 Wis. 144.

United States.— Picquet *v.* Swan, 19 Fed. Cas. No. 11,133, 4 Mason 443.

See 24 Cent. Dig. tit. "Garnishment," § 47.

Compare Evans *v.* Darlington, 5 Blackf. (Ind.) 320.

See, however, Williams *v.* Gallick, 11 Oreg. 337, 3 Pac. 469, holding that a pledge of personal property to secure an indorser with power to sell the same and apply the proceeds in satisfaction of the notes indorsed leaves the legal title in the pledgors and their interest therein subject to garnishment.

74. Weaver *v.* Huntington, etc., R., etc., Co., 50 Pa. St. 314; Chown *v.* Russell, 1 Del. Co. (Pa.) 16; Stœver *v.* Stœver, 3 Wkly. Notes Cas. (Pa.) 169. See also Taylor *v.* Huey, 166 Pa. St. 518, 31 Atl. 199 (a mortgage debt cannot be garnished by proceedings against one who holds the mortgage as collateral security); Lamb *v.* Vansciver, 1 Phila. (Pa.) 29; Smith *v.* Traders' Nat. Bank, 74 Tex. 457, 12 S. W. 113. See Coombs *v.* Davis, 2 Wash. Terr. 466, 7 Pac. 860, holding that, where a garnishee admits holding notes as collateral security for a loan to defendant, the court should require the gar-

D. Mortgaged Property. A mortgagee in possession or a trustee is not liable to garnishment proceedings at the instance of a creditor of the mortgagor or *cestui que trust*,[75] in the absence of evidence that a surplus will result after the payment of the debt secured by the mortgage, or the fulfilment of the terms of the trust, and the expenses thereof.[76] This has been held to be the rule even where a mortgage was voidable on account of irregularity, such as lack of acknowledgment, or failure to record same,[77] in the absence of evidence of fraud or collusion on the part of the mortgagor and mortgagee.[78] Where, however, the property of a debtor is conveyed to a creditor as security, the surplus remaining after the payment of the debts secured or the satisfaction of the mortgage may be subjected to garnishment proceedings.[79]

nishee to turn them over to the sheriff on being paid the sum for which they were held as security.

75. *Illinois.*— Galena, etc., R. Co. *v.* Menzies, 26 Ill. 121.

Iowa.— McConnell *v.* Denham, 72 Iowa 494, 34 N. W. 298; Newton First Nat. Bank *v.* Perry, 29 Iowa 266, holding that a garnishee should be discharged where his answer shows that he is a mortgagee of chattels in the debtor's possession and the value of the chattels is not shown.

Kansas.— Bradley *v.* Byerley, 3 Kan. App. 357, 42 Pac. 930.

Maine.— Skowhegan Bank *v.* Farrar, 46 Me. 293 (one who holds mortgaged property as the agent of the mortgagee cannot be held as trustee of the mortgagor); Stedman *v.* Vickery, 42 Me. 132.

Massachusetts.— Sanford *v.* Bliss, 12 Pick. 116; Tucker *v.* Clisby, 12 Pick. 22; Bissell *v.* Strong, 9 Pick. 562; Richards *v.* Allen, 8 Pick. 405; Lupton *v.* Cutter, 8 Pick. 298. See Rogers *v.* Abbott, 128 Mass. 102; Wood *v.* Partridge, 11 Mass. 488, holding that a trustee will be charged for proceeds of the sale of an estate held as security for a debt if the sale is made for the benefit of the principal.

Missouri.— McCord, etc., Mercantile Co. *v.* Bettles, 58 Mo. App. 384; Winborn *v.* Kansas City, etc., R. Co., 56 Mo. App. 299; Beckham *v.* Carter, 19 Mo. App. 596.

New Hampshire.— Briggs *v.* Walker, 21 N. H. 72. See also Cotta *v.* O'Neal, 58 N. H. 572.

New Mexico.— Garland *v.* Sperling, 6 N. M. 623, 30 Pac. 925, 7 N. M. 121, 32 Pac. 499.

Vermont.— McGregor *v.* Chase, 37 Vt. 225.

Wisconsin.— Farwell *v.* Wilmarth, 65 Wis. 160, 26 N. W. 548.

United States.— Younkin *v.* Collier, 47 Fed. 571.

See 24 Cent. Dig. tit. "Garnishment," § 48. See also *infra*, V, E, 3; V, N, 3.

A mortgagee of chattels, according to the Massachusetts rule, is subject to trustee process even where the mortgage is to secure the performance of some other condition than the payment of money. Johnson *v.* Sumner, 1 Metc. (Mass.) 172.

76. Witherell *v.* Milliken, 13 Me. 428; Smith *v.* Eastern R. Co., 124 Mass. 154; Porter *v.* Warren, 119 Mass. 535 (holding, however, that Mass. Gen. St. c. 123, § 67, applies only where the attached property is in the possession of the mortgagor); Capen *v.* Alden, 5 Metc. (Mass.) 268; Russell *v.* Lewis, 15 Mass. 127; Burnham *v.* Doolittle, 14 Nebr. 214, 15 N. W. 606; Faulkner *v.* Meyers, 6 Nebr. 414; Nolen *v.* Crook, 5 Humphr. (Tenn.) 312. See also Martin *v.* Copeland, 77 Ga. 374, 3 S. E. 256.

77. Center *v.* McQuesten, 24 Kan. 480; Bennett *v.* Wolcott, 19 Mo. 654; Spitz *v.* Tripp, 86 Wis. 25, 56 N. W. 330. See also Reggio *v.* Day, 37 Me. 314.

78. Hall *v.* Heydon, 41 Ala. 242; Hazard *v.* Franklin, 2 Ala. 349; Thompson *v.* Pennell, 67 Me. 159.

79. *Alabama.*— Price *v.* Masterson, 35 Ala. 483. See, however, Toomer *v.* Randolph, 60 Ala. 356, holding that garnishment, being an action at law, is not a method by which a second mortgagee can compel the first mortgagee as debtor of the mortgagor to apply the rents and profits received by him in excess of his debt to the second mortgage.

Illinois.— Glass *v.* Doane, 15 Ill. App. 66.

Iowa.— Buck-Reiner Co. *v.* Beatty, 82 Iowa 353, 48 N. W. 96; Booth *v.* Gish, 75 Iowa 451, 39 N. W. 704; Witter *v.* Little, 66 Iowa 431, 23 N. W. 909; Davis *v.* Wilson, 52 Iowa 187, 3 N. W. 52; Doane *v.* Garretson, 24 Iowa 351. See also Grow *v.* Crittenden, 66 Iowa 277, 23 N. W. 667.

Kansas.— Bragunier *v.* Beck, etc., Iron Co., 41 Kan. 542, 21 Pac. 640. See also Kansas Invest. Co. *v.* Jones, 2 Kan. App. 638, 42 Pac. 935.

Maine.— Barker *v.* Osborne, 71 Me. 69; Arnold *v.* Elwell, 13 Me. 261.

Massachusetts.— Giles *v.* Ash, 123 Mass. 353; Warren *v.* Sullivan, 123 Mass. 283; Darling *v.* Andrews, 9 Allen 106; Rice *v.* Brown, 9 Cush. 308; Curtis *v.* Norris, 8 Pick. 280; New England Mar. Ins. Co. *v.* Chandler, 16 Mass. 275; Hyde *v.* Cross, 4 Mass. 404; Pierson *v.* Weller, 3 Mass. 564. See also Donnels *v.* Edwards, 2 Pick. 617.

Missouri.— McGuire *v.* Wilkinson, 72 Mo. 199.

Nebraska.— Ætna Ins. Co. *v.* Wilcox Bank, 48 Nebr. 544, 67 N. W. 449.

New Hampshire.— Mitchell *v.* Green, 62 N. H. 588; Smith *v.* Packard, 19 N. H. 575; Aldrich *v.* Woodcock, 10 N. H. 99.

North Carolina.— Peace *v.* Jones, 7 N. C. 256.

Ohio.— Root *v.* Davis, 51 Ohio St. 29, 36 N. E. 669, 23 L. R. A. 445.

E. Equitable Estates and Interests — 1. In General. Under the various garnishment statutes the general rule is that only the legal rights of the principal debtor can be reached by such proceedings, and that equitable claims or interests which could not be enforced in an action at law cannot be thus subjected.[80]

2. Property Fraudulently Transferred. In several jurisdictions it is held that the property transferred by the principal debtor in fraud of creditors may be reached by the creditors by process of garnishment, even where defendant could not recover himself.[81]

3. Trust Estates. The general rule is that a trustee cannot be made a garnishee at the instance of a creditor of a *cestui que trust*.[82] However a trustee is

Tennessee.— Nolen *v.* Crook, 5 Humphr. 312; Hearn *v.* Crutcher, 4 Yerg. 461.

Vermont.— Sargent *v.* Wood, 51 Vt. 597; Downer *v.* Tarbell, 32 Vt. 22. See McGregor *v.* Chase, 37 Vt. 225, holding that a mortgagee cannot be held as trustee for the surplus which may remain in his hands after the payment of the debts secured by the mortgage unless plaintiff redeems the property by paying the debt.

Wisconsin.— McCown *v.* Russell, 84 Wis. 122, 54 N. W. 31; Warder *v.* Baker, 67 Wis. 409, 30 N. W. 932.

See 24 Cent. Dig. tit. "Garnishment," § 50.

Assignment of surplus.— Where the holder of an insurance policy assigned it to one creditor as collateral security, and afterward the residue thereof to another, it was held that the surplus in the hands of the first creditor after the payment of his debt could not be reached by garnishment by a third creditor. Doggett, etc., Co. *v.* Bates, 26 Ill. App. 369. See Dieter *v.* Smith, 70 Ill. 168.

80. *Alabama.*— Harris *v.* Miller, 71 Ala. 26; Roby *v.* Labuzan, 21 Ala. 60, 56 Am. Dec. 237.

Illinois.— Webster *v.* Steele, 75 Ill. 544; Hodson *v.* McConnel, 12 Ill. 170.

Massachusetts.— Chase *v.* Thompson, 153 Mass. 14, 26 N. E. 137; Massachusetts Nat. Bank *v.* Bullock, 120 Mass. 86.

Mississippi.— Williams *v.* Gage, 49 Miss. 777.

Missouri.— Coleman *v.* American F. Ins. Co., 74 Mo. App. 663.

New Jersey.— Osborne *v.* Edwards, 11 N. J. Eq. 73.

West Virginia.— Swann *v.* Summers, 19 W. Va. 115.

See 24 Cent. Dig. tit. "Garnishment," § 51.

Contra.— Finnell *v.* Burt, 2 Handy (Ohio) 202, 12 Ohio Dec. (Reprint) 403.

Equitable choses in action are not subject to garnishment process, as, under the Illinois statute, legal rights only can be garnished. May *v.* Baker, 15 Ill. 89.

81. Van Ness *v.* McLeod, 3 Ida. 439, 31 Pac. 798; Gumberg *v.* Treusch, 103 Mich. 543, 61 N. W. 872. *Compare* National Union Bank *v.* Brainerd, 65 Vt. 291, 26 Atl. 723. See Fraudulent Conveyances, *ante*, p. ——.

82. *Delaware.*— Plunkett *v.* Le Huray, 4 Harr. 436.

Massachusetts.— Carson *v.* Carson, 6 Allen 397; Hinckley *v.* Williams, 1 Cush. 490, 48 Am. Dec. 642; Vincent *v.* Gorham, 3 Metc. 343; Stevens *v.* Goodell, 3 Metc. 34; Tucker *v.* Clisby, 12 Pick. 22; Gore *v.* Clisby, 8 Pick. 555; Dickinson *v.* Strong, 4 Pick. 57; Brigden *v.* Gill, 16 Mass. 522; White *v.* Jenkins, 16 Mass. 62; Maine F. & M. Ins. Co. *v.* Weeks, 7 Mass. 438.

Michigan.— Peninsular Sav. Bank *v.* Union Trust Co., 127 Mich. 355, 86 N. W. 798.

Missouri.— Lackland *v.* Garesche, 56 Mo. 267; McIlvaine *v.* Lancaster, 42 Mo. 96; Miller *v.* Richardson, 1 Mo. 310; Odessa Bank *v.* Barnett, 98 Mo. App. 477, 72 S. W. 727; Sands *v.* Berkley, 83 Mo. App. 259.

New Hampshire.— Chase *v.* Currier, 63 N. H. 90; Banfield *v.* Wiggin, 58 N. H. 155; Richards *v.* Merrimack, etc., R. Co., 44 N. H. 127; Pickering *v.* Wendell, 20 N. H. 222; Clement *v.* Clement, 19 N. H. 460.

Pennsylvania.— Keyser *v.* Mitchell, 67 Pa. St. 473; Prentice *v.* Pleasonton, 6 Pa. Cas. 90, 8 Atl. 842; Sheetz *v.* Leech, 2 Wkly. Notes Cas. 291; Lloyd *v.* Brisben, 1 Wkly. Notes Cas. 230. See, however, Andress *v.* Lewis, 1 Pa. Co. Ct. 293; Paxson *v.* Sanderson, 3 Phila. 303, holding that attachment execution will lie against trust money of an agent or trustee when deposited to his own account in the bank.

Texas.— Galveston, etc., R. Co. *v.* McDonald, 53 Tex. 510. *Compare* McDonald *v.* Moore, 34 Tex. 384, holding that the trustee of an express trust may be required to account for the funds in his hands under a garnishment process.

Vermont.— Doane *v.* Doane, 46 Vt. 485; White *v.* White, 30 Vt. 338. See, however, Piper *v.* Hanley, 48 Vt. 479.

United States.— Mutual Reserve Fund L. Assoc. *v.* Phelps, 103 Fed. 515; Hitchcock *v.* Galveston Wharf Co., 50 Fed. 263; Lackett *v.* Rumbaugh, 45 Fed. 23. See also Fidelity Trust Co. *v.* New York Finance Co., 125 Fed. 275, 60 C. C. A. 189.

See 24 Cent. Dig. tit. "Garnishment," § 53.

See, however, Stockbridge *v.* Fahnestock, 87 Md. 127, 39 Atl. 95. See also *supra*, V, D.

Contra.— Grieves *v.* Keane, 23 R. I. 136, 49 Atl. 501.

An income for life from a trust estate is the absolute property of the beneficiary, and is therefore subject to garnishment by his creditors. Girard L. Ins., etc., Co. *v.* Chambers, 46 Pa. St. 485, 86 Am. Dec. 513.

Trust revocable by will.— Money held for the use of a married woman on a trust revocable at her will and to recover which she

liable in garnishment proceedings where a surplus remains in his hands after the execution of the trust.[83]

F. Interests Under Contracts — 1. In General. Applying the well recognized rule that under no circumstances can a garnishee be placed in a worse condition by operation of the garnishment proceedings against him than he would have been had defendant's claim against him been enforced by defendant personally,[84] a garnishee cannot be held liable in such a manner as to deprive him of any *bona fide* rights growing out of his contractual relationship with defendant.[85] However, where a party is or may be indebted to the principal defendant by reason of contracts entered into between them, plaintiff in the principal action may, by garnishment proceedings, be subrogated to the rights of defendant in such contracts and recover just what defendant could recover in a separate action brought by him against the garnishee.[86]

2. Contract of Employment. Where the party sought to be made garnishee has employed the principal defendant under a contract by the terms of which nothing is to become due until the completion of such contract, the employer cannot be held as garnishee prior to the completion of the contract.[87] Funds due under a contract of employment are not subject to garnishment where the prop-

can bring an action in her own name is subject to foreign attachment in the hands of the trustee. Estabrook *v.* Earle, 97 Mass. 302.

83. Easterly *v.* Keney, 36 Conn. 18; Haskell *v.* Haskell, 8 Metc. (Mass.) 545; Harrison *v.* McCana, 11 Wkly. Notes Cas. (Pa.) 239; McLaughlin *v.* Swann, 18 How. (U. S.) 217, 15 L. ed. 357. See also Davis *v.* Drew, 6 N. H. 399, 25 Am. Dec. 467; Kinney *v.* Hemphill, 2 Wkly. Notes Cas. (Pa.) 323.

84. *Colorado.*— Sauer *v.* Nevadaville, 14 Colo. 54, 23 Pac. 87.

Florida.— Howe *v.* Hyer, 36 Fla. 12, 17 So. 925.

Iowa.— Henry *v.* Wilson, 85 Iowa 60, 51 N. W. 1157.

Massachusetts.— Nutter *v.* Framingham, etc., R. Co., 132 Mass. 427.

Michigan.— Rice *v.* Third Nat. Bank, 97 Mich. 414, 56 N. W. 776.

Wisconsin.— Gage *v.* Chesebro, 49 Wis. 486, 5 N. W. 881.

85. *Alabama.*— Mobile St. R. Co. *v.* Turner, 91 Ala. 213, 8 So. 684.

Illinois.— Truitt *v.* Griffin, 61 Ill. 26.

Iowa.— Willard *v.* Sturm, 96 Iowa 555, 65 N. W. 847.

Michigan.— Daggett *v.* McClintock, 51 Mich. 51, 22 N. W. 105.

Mississippi.— Chamberlin-Hunt Academy *v.* Port Gibson Brick, etc., Co., 80 Miss. 517, 32 So. 116, 484.

New Hampshire.— New Hampshire Iron Factory Co. *v.* Platt, 5 N. H. 193.

Texas.— Mensing *v.* Engelke, 67 Tex. 532, 4 S. W. 202.

Vermont.— Carr *v.* Sevene, 47 Vt. 574; Johnson *v.* Howard, 41 Vt. 122, 98 Am. Dec. 568; Overman *v.* Sanborn, 27 Vt. 54; Barker *v.* Esty, 19 Vt. 131.

Wisconsin.— Singer *v.* Townsend, 53 Wis. 126, 10 N. W. 365, holding that one who contracts to pay for his board by the week is indebted to his landlord before the close of the week (if at all) only for that part of the week which has expired, so as to be liable as garnishee therefor.

See 24 Cent. Dig. tit. "Garnishment," § 54.

86. *Connecticut.*— Goodman *v.* Meriden Britannia Co., 50 Conn. 139; Todd *v.* Hall, 10 Conn. 544.

Illinois.— Moeller *v.* Quarrier, 14 Ill. 280, holding that an agreement for a consideration to pay all the expenses incurred by one while on a journey is such an interest as can be reached by garnishment.

Maine.— Balkham *v.* Lowe, 20 Me. 369.

Maryland.— Baltimore, etc., R. Co. *v.* Wheeler, 18 Md. 372.

Massachusetts.— Sabin *v.* Cooper, 15 Gray 532; Davis *v.* Marston, 5 Mass. 199. See also Chapin *v.* Connecticut River R. Co., 82 Mass. 69.

Pennsylvania.— Davis *v.* Tingley, 116 Pa. St. 113, 9 Atl. 32; Megee *v.* Birne, 39 Pa. St. 50. See also Morris *v.* Turner, 3 Pa. L. J. Rep. 423, 5 Pa. L. J. 465.

Wisconsin.— Healey *v.* Butler, 66 Wis. 9, 27 N. W. 822.

See 24 Cent. Dig. tit. "Garnishment," § 54.

87. *California.*— Earley *v.* Redwood City, 57 Cal. 193; Hassie *v.* God is with us Congregation, 35 Cal. 378.

Maine.— Otis *v.* Ford, 54 Me. 104.

Massachusetts.— Potter *v.* Cain, 117 Mass. 238. See Wrigley *v.* Geyer, 4 Mass. 102, holding that a promise to perform labor for another to a certain amount is not a credit attachable until the promise is broken, but thereafter it seems the agreed value of the labor is attachable.

Minnesota.— Wheeler *v.* Day, 23 Minn. 545.

New Hampshire.— Carter *v.* Webster, etc., Paper Co., 65 N. H. 17, 17 Atl. 978.

New Mexico.— Garland *v.* Sperling, 6 N. M. 623, 30 Pac. 925, 7 N. M. 121, 32 Pac. 499.

North Carolina.— Gastonia *v.* McEntee-Peterson Engineering Co., 131 N. C. 359, 42 S. E. 857.

Virginia.— Baltimore, etc., R. Co. *v.* Gallahue, 14 Gratt. 563.

erty upon which the contract is being performed is subject to a lien of laborers employed to execute the contract, but may be retained to satisfy such lien.[88] Immature claims of indebtedness accruing to a defendant which spring from contracts in existence when the lien of the garnishment process attaches may be subjected thereto.[89]

3. Contract of Sale. Under a contract of sale for cash on delivery, neither the vendor nor the vendee can be charged as the garnishee of the other, since in such case the delivery and payment are to be concurrent acts, and upon failure to deliver the goods or to make the stipulated payment, there is a breach of the contract.[90]

4. Obligations Not Payable in Money. When the demand which the principal debtor has against a party is by its terms payable in a commodity, the rule has been laid down that such party cannot be charged in garnishment proceedings, unless at the time of the service of process such demand has been converted into a money demand by the failure of the garnishee to fulfil the terms of his contract.[91]

Wisconsin.— Edwards *v.* Roepke, 74 Wis. 571, 43 N. W. 554; Bishop *v.* Young, 17 Wis. 46; Smith *v.* Davis, 1 Wis. 447, 60 Am. Dec. 390.

See 24 Cent. Dig. tit. "Garnishment," § 55.

Compare White *v.* Hobert, 90 Ala. 368, 7 So. 807, holding that when a garnishee admits an indebtedness, to fall due at a future time, and not subject to any contingency, judgment may be rendered against him with a stay of execution until the maturity of the debt; but when the admitted indebtedness is contingent, as "when he completes my house according to contract," it has nothing to support a judgment against the garnishee with stay of execution.

Contract stipulating for payment in advance.— Where the principal debtor is in the employ of the garnishee under a contract stipulating for the payment for his services in advance, there is no liability which can be reached by the process of garnishment (Alexander *v.* Pollock, 72 Ala. 137), unless the debtor has failed to actually draw the consideration stipulated for in advance, in which case any portion of such compensation remaining due at the time of the service of the process would be subject to garnishment (Gray *v.* Perry Hardware Co., 111 Ala. 532, 20 So. 368).

88. *Massachusetts.*— Hitchcock *v.* Lancto, 127 Mass. 514.

North Carolina.— Gastonia *v.* McEntee-Peterson Engineering Co., 131 N. C. 359, 42 S. E. 857.

Pennsylvania.— Schotts *v.* Bell, 18 Pa. Co. Ct. 427.

Vermont.— Joslyn *v.* Merrow, 25 Vt. 185.

Wisconsin.— Drake *v.* Leighton, 69 Wis. 99, 33 N. W. 81, 2 Am. St. Rep. 717; Balliet *v.* Scott, 32 Wis. 174.

See 24 Cent. Dig. tit. "Garnishment," § 55.

89. Henry *v.* McNamara, 124 Ala. 412, 26 So. 907, 82 Am. St. Rep. 183, holding, however, that an indebtedness, contingent upon the making of a new contract, or the renewal of an existing one, is not within the terms or meaning of the statute. See also Miller *v.* Scoville, 35 Ill. App. 385, holding that the condition in a contract for labor and material that ten per cent of the price shall be retained until the contractor's engineer shall certify in writing as to the completion of the contract does not render the debt so uncertain as that it cannot be garnished by a creditor of the contractor after completion of the contract and before the certificate is given.

90. Briggs *v.* McEwen, 77 Iowa 303, 42 N. W. 303 (where the property sold is delivered to the purchaser he owes the seller no debt when by their contract the title does not pass to the purchaser until payment); Paul *v.* Reid, 52 N. H. 136; Sarvi *v.* Brazier, 1 Phila. (Pa.) 214 (where the grantor of land receives a consideration therefor, at the time of delivering the deed, there is no debt due from the grantee to the grantor subject to garnishment); Seymour *v.* Cooper, 25 Vt. 141. See also Caldwell *v.* Stewart, 30 Iowa 379; Murphy *v.* Marland, 8 Cush. (Mass.) 575.

91. *Alabama.*— Jones *v.* Crews, 64 Ala. 368; Nesbitt *v.* Ware, 30 Ala. 68; Blair *v.* Rhodes, 5 Ala. 648; Mims *v.* Parker, 1 Ala. 421; Smith *v.* Chapman, 6 Port. 365. See Coleman *v.* Hatcher, 77 Ala. 217, holding that where the purchaser of goods agrees at the time of the sale to pay the purchase-price by satisfying debts due by the vendor to third persons, a creditor of the vendor cannot, by garnishment sued out before their acceptance of the terms, intercept the money as belonging to his debtor.

Kentucky.— Blackburn *v.* Davidson, 7 B. Mon. 101, holding that where the garnishee has failed to pay for property according to his contract, and rendered himself liable for the value thereof, he may be directed to pay such value to the complainant.

Massachusetts.— Fuller *v.* O'Brien, 121 Mass. 422; Clark *v.* Brewer, 6 Gray 320; Willard *v.* Butler, 14 Pick. 550; Wrigley *v.* Geyer, 4 Mass. 102; Clark *v.* King, 2 Mass. 524. *Compare* Comstock *v.* Farnum, 2 Mass. 96.

Missouri.— Weil *v.* Tyler, 38 Mo. 545, 90 Am. Dec. 441, 43 Mo. 581.

5. Obligation For Life Support of Another. Where a party has obligated himself to pay certain sums at fixed periods during each year for the support of another during his natural life, he cannot be charged in garnishment proceedings for anything not then actually due and payable, all future payments being contingent, depending on the life of the obligee.[92] He may, however, be charged in such proceedings for all sums due and payable at the time of the service of process.[93]

6. Interests Under Insurance Policies — a. Fire Insurance — (i) *In General.* The general rule is that where a loss has been sustained under a fire-insurance policy, where the proof of loss has been established, the claim of the insured against the insurer under such policy is a proper subject of garnishment.[94] Where, however, the insurer, under the terms of the policy, has the option of replacing the property destroyed or paying the ascertained loss, he cannot be subjected to garnishment proceedings prior to the exercise of such option.[95]

(ii) *Proof of Loss.* According to the better rule, where the liability of the

New Hampshire.— Aldrich *v.* Brooks, 25 N. H. 241.

North Carolina.— Cherry *v.* Hooper, 52 N. C. 82 (where one contracted with a dentist for a set of artificial teeth for his wife and paid him the full consideration, the husband afterward absconded before the teeth were furnished, and it was held that the dentist was not liable as garnishee to a creditor for the value of the teeth); Deaver *v.* Keith, 27 N. C. 374.

Pennsylvania.— Peebles *v.* Meeds, 96 Pa. St. 150. See, however, Gill *v.* Snyder, 2 Wkly. Notes Cas. 155; Collum *v.* Mason, 1 Wkly. Notes Cas. 298.

Tennessee.— Miller *v.* McClain, 10 Yerg. 245; McMinn *v.* Hall, 2 Overt. 328.

Vermont.— Dickinson *v.* Dickinson, 59 Vt. 678, 10 Atl. 821; Briggs *v.* Beach, 18 Vt. 115. See also Wakefield *v.* Crossman, 25 Vt. 298.

Wisconsin.— Smith *v.* Davis, 1 Wis. 447, 60 Am. Dec. 390.

See 24 Cent. Dig. tit. "Garnishment," § 57.

See, however, Lounderman *v.* Wilson, 2 Harr. & J. (Md.) 379, holding that a sum of money due which by express contract was to be paid by work and labor is a credit that may be attached.

Attorney's fees.— Money paid by a debtor to his attorneys for services to be rendered by them in defending an action against him is not subject to garnishment in a proceeding ancillary to the main action. Boyd *v.* Brown, 120 Ind. 393, 22 N. E. 249.

92. Sayward *v.* Drew, 6 Me. 263; Briggs *v.* Beach, 18 Vt. 115.

93. Sabin *v.* Cooper, 15 Gray (Mass.) 532 (on a promise to pay a certain sum on a given day each year as long as the promisee should live, and at the same rate for any part of a year, the promisor may be charged as trustee of the promisee for the proportion of a yearly payment which the portion of the year that had elapsed when the writ was served bore to the whole year); Dickinson *v.* Dickinson, 59 Vt. 678, 10 Atl. 821 (where the obligor of a bond for support has failed to furnish support, and the person to be supported has been awarded a specific sum because of such failure, said award is a debt subject to attachment by trustee process).

94. *Illinois.*— Henderson *v.* Schaas, 35 Ill. App. 155.

Maine.— City Bank *v.* Adams, 45 Me. 455.

Massachusetts.— See Field *v.* Crawford, 6 Gray 116, where the insurance company was held not to be liable to trustee process.

Minnesota.— See Mansfield *v.* Stevens, 31 Minn. 40, 16 N. W. 455.

Mississippi.— Meridian Land, etc., Co. *v.* Ormond, 82 Miss. 758, 35 So. 179.

Missouri.— Home Mut. Ins. Co. *v.* Gamble, 14 Mo. 407, holding that where the law applicable to an insurance company provided that an execution should not issue against it until three months after judgment, an execution issued before the expiration of the three months will not defeat a garnishment against the company.

Pennsylvania.— Schroeder *v.* Keystone Ins. Co., 2 Phila. 286. See also Hays *v.* Lycoming F. Ins. Co., 98 Pa. St. 184 [*reversing* 10 Wkly. Notes Cas. 31].

See 24 Cent. Dig. tit. "Garnishment," § 59.

Insurance payable in another state.— It has been held in Nebraska that an insurance company cannot be garnished in one state on account of insurance money payable by it in another state. American Cent. Ins. Co. *v.* Hettler, 37 Nebr. 849, 56 N. W. 711, 40 Am. St. Rep. 522.

Homestead.— Money due from an insurance company to the owners of land for loss sustained by fire and the destruction of a homestead is not subject to garnishment by one holding an unsatisfied mechanic's lien on such homestead. Cameron *v.* Fay, 55 Tex. 58.

Policy in name of third person.— Where one person takes out a policy of insurance on the goods of another, the policy is the property of him to whom it is issued, and cannot be subjected to garnishment as a liability on the part of the company, in case of loss, to the owner of the goods. Tim *v.* Franklin, 87 Ga. 93, 13 S. E. 259. See also Rice *v.* Brown, 63 Mass. 308.

95. *Alabama.*— Hurst *v.* Home Protection F. Ins. Co., 81 Ala. 174, 1 So. 209, holding that an insurance company cannot be garnished for the amount of a loss agreed on with the insured, where the policy gives an

insurer to pay a loss under its policy is conditioned upon the insured making satisfactory proof of loss, the insurer cannot be charged as garnishee of the insured until the requisite proof of such loss has been made.[96]

(III) *Adjustment of Loss.* In some jurisdictions the rule is laid down that the liability of the insurer on his policy is not garnishable until the loss has been adjusted, because, until such adjustment, the amount of the loss is unliquidated.[97] In other jurisdictions, however, it is held that after a loss has been sustained under an insurance policy, the insurance company is subject to garnishment process as the debtor of the insured, even before the adjustment of the loss.[98]

b. Life Insurance. In some jurisdictions the rule is laid down that, where a person insures his life for the benefit of a designated party, upon the death of the insured the interest of the beneficiary in such policy cannot be subjected to garnishment proceedings, there being no privity between the beneficiary and the insurer.[99] Where, however, the policy has an ascertained cash surrender value, or the insured is entitled to a paid-up policy, the insurance company may be garnished by a creditor of the insured.[1]

option to rebuild, and the company elects so to do.

Maryland.— Stone *v.* Montgomery County Mut. F. Ins. Co., 74 Md. 579, 22 Atl. 1051, 14 L. R. A. 684.

Massachusetts.— Godfrey *v.* Macomber, 128 Mass. 188.

Michigan.— Martz *v.* Detroit F. & M. Ins. Co., 28 Mich. 201.

Wisconsin.— Dowling *v.* Lancashire Ins. Co., 89 Wis. 96, 61 N. W. 76.

See 24 Cent. Dig. tit. "Garnishment," § 59.

96. *Connecticut.*— Harris *v.* Phœnix Ins. Co., 35 Conn. 310.

Maine.— Nickerson *v.* Nickerson, 80 Me. 100, 12 Atl. 880 (holding, however, that such proof of loss may be waived by the insurer); Davis *v.* Davis, 49 Me. 282.

Massachusetts.— See Meacham *v.* McCorbitt, 2 Metc. 352.

Minnesota.— Gies *v.* Bechtner, 12 Minn. 279.

Wisconsin.—Dowling *v.* Lancashire Ins. Co., 89 Wis. 96, 61 N. W. 76.

See 24 Cent. Dig. tit. "Garnishment," § 60.

See, however, Phenix Ins. Co. *v.* Willis, 70 Tex. 12, 6 S. W. 825, 8 Am. St. Rep. 566 (holding that a process served on an insurance company, for the amount due on a policy, after loss, although before proof of loss, is not premature); Lovejoy *v.* Hartford F. Ins. Co., 11 Fed. 63 (holding that the insurance company may waive proofs of loss).

97. Katz *v.* Sorsby, 34 La. Ann. 588; Bucklin *v.* Powell, 60 N. H. 119; McKean *v.* Turner, 45 N. H. 203. See also Gove *v.* Varrell, 58 N. H. 78 (where the loss was adjusted between the service of the writ and the disclosure, by agreement between the principal defendant and the trustee insurance company, and it was held that the latter was chargeable); Swamscot Mach. Co. *v.* Partridge, 25 N. H. 369; Douglas *v.* Phenix Ins. Co., 63 Hun (N. Y.) 393, 18 N. Y. Suppl. 259.

98. This line of decisions is generally placed on the ground that the contract of insurance itself contains the standard by which the amount of the loss may be accurately determined.

Connecticut.— Knox *v.* Protection Ins. Co., 9 Conn. 430, 25 Am. Dec. 33.

Illinois.— Glens Falls Ins. Co. *v.* Hite, 83 Ill. App. 549; Hanover F. Ins. Co. *v.* Connor, 20 Ill. App. 297.

Kentucky.— Northwestern Ins. Co. *v.* Atkins, 3 Bush 328, 96 Am. Dec. 239.

Mississippi.— Crescent Ins. Co. *v.* Moore, 63 Miss. 419.

North Carolina.—Sexton *v.* Phœnix Ins. Co., 132 N. C. 1, 43 S. E. 479.

Pennsylvania.— Hays *v.* Lycoming F. Ins. Co., 99 Pa. St. 621; Girard F. & M. Ins. Co. *v.* Field, 45 Pa. St. 129; Franklin F. Ins. Co. *v.* West, 8 Watts & S. 350; West *v.* Franklin F. Ins. Co., 2 Pa. L. J. Rep. 70, 3 Pa. L. J. 299; Field *v.* Insurance Co., 4 Phila. 286. See also Boyle *v.* Franklin F. Ins. Co., 7 Watts & S. 76.

United States.— See Fisher *v.* Consequa, 9 Fed. Cas. No. 4,816, 2 Wash. 382.

See 24 Cent. Dig. tit. "Garnishment," § 60.

99. Martin *v.* Martin, 187 Ill. 200, 58 N. E. 230 [*affirming* 87 Ill. App. 365] (where the money has been collected from the insurance company, and is in the possession of the agent of the beneficiary, it is subject to garnishment for the beneficiary's debts); Nims *v.* Ford, 159 Mass. 575, 35 N. E. 100; Kinsloe *v.* Davis, 167 Pa. St. 519, 31 Atl. 934, 935, 46 Am. St. Rep. 689. See Day *v.* New England L. Ins. Co., 111 Pa. St. 507, 4 Atl. 748, 56 Am. Rep. 297 (holding that an attachment execution will not lie against a fund in the hands of a life-insurance company, payable to the legal representatives of the insured under the terms of the policy, by reason of the death of the beneficiary named therein, on a judgment obtained against the insured during his lifetime); Grace *v.* Koch, 1 Tex. App. Civ. Cas. § 1062 (decided on the ground that a policy of insurance is a chose in action which is not subject to garnishment). See also Levy *v.* Van Hagen, 69 Ala. 17.

1. Tradesmen's Nat. Bank *v.* Cresson, 10 Pa. Co. Ct. 57. See also Fritchie *v.* Miller's Pennsylvania Extract Co., 197 Pa. St. 401, 47 Atl. 351; Hoven *v.* Employers' Liability Assur. Corp., 93 Wis. 201, 67 N. W. 46, 32

G. Interests of Heirs or Distributees — 1. In General. The rule seems to be well settled that in the absence of express statutory provision subjecting a personal representative to the process of garnishment, he cannot be summoned as a garnishee or trustee in respect to funds of the estate in his hands.[2]

2. Effect of Order of Distribution or Want Thereof. The rule is well settled that after an order of distribution of the decedent's estate has been decreed,[3] or, where the estate has been settled, property in the hands of the administrator belonging to a distributee is subject to garnishment by a creditor of the latter.[4] The courts are divided upon the question as to whether a personal representative is subject to garnishment by the creditor of an heir or distributee before the final order is entered for the distribution of the estate; the rule in some jurisdictions being that he is not subject to garnishment proceedings before the final order for distribution is entered,[5] while in other jurisdictions it is held that the distributive

L. R. A. 388. And *compare* Columbia Bank *v.* Equitable L. Assur. Soc., 79 N. Y. App. Div. 601, 80 N. Y. Suppl. 428.

The withdrawal value of a premium on a perpetual policy of insurance which provides for the return to the insured at a certain percentage of the premium paid in case of cancellation is not subject to attachment execution on a judgment against the holder of the policy while the policy continues in force. Association *v.* Laib, 13 Pa. Co. Ct. 658.

2. *Arkansas.*— Gill *v.* Middleton, 60 Ark. 213, 29 S. W. 465; Thorn *v.* Woodruff, 5 Ark. 55.

Delaware.— Marvel *v.* Houston, 2 Harr. 249.

Georgia.— Brown *v.* Wiley, 107 Ga. 85, 32 S. E. 905.

Iowa.— Boyer *v.* Hawkins, 86 Iowa 40, 52 N. W. 659.

Louisiana.— See Halpin *v.* Barringer, 26 La. Ann. 170.

Maine.— Kimball *v.* Woodman, 19 Me. 200.

Massachusetts.— Chase *v.* Thompson, 153 Mass. 14, 26 N. E. 137; Wheeler *v.* Bowen, 20 Pick. 563; Holbrook *v.* Waters, 19 Pick. 354; Brooks *v.* Cook, 8 Mass. 246.

Missouri.— Curling *v.* Hyde, 10 Mo. 374.

North Carolina.— Elliott *v.* Newby, 9 N. C. 22.

Oregon.—Harrington *v.* La Rocque, 13 Oreg. 344, 10 Pac. 498.

Pennsylvania.— Pringle *v.* Black, 2 Dall. 97, 1 L. ed. 305; Ryon *v.* Marcy, 1 Kulp 360; Williamson *v.* Beck, 8 Phila. 269.

Texas.— Weekes *v.* Galveston Gas Co., 22 Tex. Civ. App. 245, 54 S. W. 620, the property of the decedent is not subject to garnishment, even where the writ is served before an administrator is appointed. See Truehart *v.* Savings, etc., Co., (Civ. App. 1901) 64 S. W. 1003.

Vermont.— Parks *v.* Cushman, 9 Vt. 320.

Virginia.—Whitehead *v.* Coleman, 31 Gratt. 784,

West Virginia.— Brewer *v.* Hutton, 45 W. Va. 106, 30 S. E. 81, 72 Am. St. Rep. 804, on the ground that the property is *in custodia legis.*

See 24 Cent. Dig. tit. "Garnishment," § 61.

French spoliation claims.— It has been held that under the act of congress of March 3, 1899, making appropriation for the payment of French spoliation claims, a fund derived from this source in the possession of the administrator to be distributed to the next of kin of the claimant, is not subject to garnishment for the debts of the next of kin. Thurston *v.* Wilmer, 94 Md. 455, 51 Atl. 96, 89 Am. St. Rep. 438.

3. *In re* Nerac, 35 Cal. 392, 95 Am. Dec. 111; Fitchett *v.* Dolbee, 3 Harr. (Del.) 267; Bartell *v.* Bauman, 12 Ill. App. 450; Godman *v.* Gordon, 61 Mo. App. 685.

4. *Georgia.*— Brown *v.* Wiley, 107 Ga. 85, 32 S. E. 905, where it was held that the debtor as the individual and the same person as administrator ought to be treated as different and distinct persons.

Mississippi.— Holman *v.* Fisher, 49 Miss. 472, holding that the distributive share of the creditor of an insolvent estate may be reached by garnishment.

Missouri.— Richards *v.* Griggs, 16 Mo. 416, 57 Am. Dec. 240.

New Hampshire.— Palmer *v.* Noyes, 45 N. H. 174.

Pennsylvania.— Fenton *v.* Fisher, 106 Pa. St. 418; Straley's Appeal, 43 Pa. St. 89; Philadelphia *v.* Brennan, 5 Pa. Dist. 116.

Vermont.— Hoyt *v.* Christie, 51 Vt. 48, holding that where an estate has been settled, and the administrator holds funds in his hands belonging thereto, he is chargeable as trustee of one entitled to share therein, in trustee process which summons him in his personal and not in his representative capacity.

See 24 Cent. Dig. tit. "Garnishment," § 62.

Compare Moore *v.* Stainton, 22 Ala. 831 (holding that process of garnishment may be sued out against an administrator as the debtor of a distributee, before the lapse of six months from the grant of letters; but no judgment can be rendered against him as such until the estate is finally settled); Jolls *v.* Keegan, 4 Pennew. (Del.) 21, 55 Atl. 340; Crawford *v.* Elliott, 1 Houst. (Del.) 465 (holding that a debt due a non-resident heir at law on a recognizance in the orphans' court may be garnished in a suit against the heir).

5. *Alabama.*— Mock *v.* King, 15 Ala. 66, holding that the undivided interest of one of

share of an heir is liable in garnishment proceedings in the hands of the administrator prior to the decree of distribution, even where the amount of such distributive share is uncertain.[6]

H. Interests of Devisees or Legatees — 1. In General. In the absence of express statutory provisions, a legacy or devise in the hands of an executor is not subject to garnishment by a creditor of the legatee or devisee.[7] Now, however, by statute, in well nigh every jurisdiction, a legacy or devise may be reached by garnishment process in the hands of the executor at the instance of a creditor of the legatee or devisee.[8]

2. Effect of Order of Distribution or Want Thereof. In many jurisdictions

several distributees of an estate in the hands of an administrator *de bonis non* is not subject to the process of garnishment.

District of Columbia.— Graham *v.* Fitch, 13 App. Cas. 569.

Illinois.—Crownover *v.* Bamburg, 2 Ill. App. 162.

Kentucky.— Beaven *v.* Beaven, 7 Ky. L. Rep. 365.

Maryland.— See also Cockey *v.* Leister, 12 Md. 124, 71 Am. Dec. 588.

Ohio.— Bentley *v.* Strathers, 8 Ohio Dec. (Reprint) 44, 5 Cinc. L. Bul. 288.

Pennsylvania.— McCreary *v.* Topper, 10 Pa. St. 419; Chester Bank *v.* Ralston, 7 Pa. St. 482.

Vermont.— Short *v.* Moore, 10 Vt. 446.

Wisconsin.— J. I. Case Threshing Mach. Co. *v.* Miracle, 54 Wis. 295, 11 N. W. 580.

See 24 Cent. Dig. tit. "Garnishment," § 62.

Funds in the hands of third person.— The funds of an intestate's estate in the hands of a third person are not subject to attachment in an action against an heir of such funds, as the funds will first go to the administrator for the satisfaction of the decedent's debt. Ruth *v.* Loos, 2 Woodw. (Pa.) 308.

6. Stratton *v.* Ham, 8 Ind. 84, 65 Am. Dec. 754; Mechanics' Sav. Bank *v.* Waite, 150 Mass. 234, 22 N. E. 915 (holding that such share is liable even before the property comes into the hands of the administrator); Wheeler *v.* Bowen, 20 Pick. (Mass.) 563. See Beverstock *v.* Brown, 157 Mass. 565, 32 N. E. 901.

7. *Connecticut.*— Easterly *v.* Keney, 36 Conn. 18; Winchell *v.* Allen, 1 Conn. 385; Benton *v.* Dutcher, 3 Day 436. See Stanton *v.* Holmes, 4 Day 87.

Massachusetts.— Barnes *v.* Treat, 7 Mass. 271.

New Hampshire.— Chase *v.* Currier, 63 N. H. 90.

New Jersey.— See Woodward *v.* Woodward, 9 N. J. L. 115, 17 Am. Dec. 462, holding that while a mere personal legacy is not attachable, yet if charged on realty it may be attached in the devisee's hands for the debt of the legatee.

Pennsylvania.—Barnett *v.* Weaver, 2 Whart. 418; Shewell *v.* Keen, 2 Whart. 332, 30 Am. Dec. 266; Robinson *v.* Woelpper, 1 Whart. 179, 29 Am. Dec. 44; Dennison *v.* Nigh, 2 Watts 90.

South Carolina.— Young *v.* Young, 2 Hill 425.

Tennessee.— Staub *v.* Williams, 5 Lea 458.

Virginia.—Whitehead *v.* Coleman, 31 Gratt. 784.

United States.— Picquet *v.* Swan, 19 Fed. Cas. No. 11,133, 4 Mason, 443 where the garnishee set up a claim adverse to the principal debtor.

See 24 Cent. Dig. tit. "Garnishment," § 63.

8. *Connecticut.*— Johnes *v.* Jackson, 67 Conn. 81, 34 Atl. 709, a legacy being garnishable even before probate of will.

Indiana.— Simonds *v.* Harris, 92 Ind. 505; Stratton *v.* Ham, 8 Ind. 84, 65 Am. Dec. 754.

Iowa.— See Meek *v.* Briggs, 87 Iowa 610, 54 N. W. 456, 43 Am. St. Rep. 410.

Maine.— Cummings *v.* Garvin, 65 Me. 301; Cutter *v.* Perkins, 47 Me. 557.

Massachusetts.— Vantine *v.* Morse, 104 Mass. 275; Hoar *v.* Marshall, 2 Gray 251 (an executor is chargeable in trustee process served on him within a year after his appointment for the amount of a legacy in his hands at the time of the service, and which he has since paid to the legatee before it was payable by the terms of the will); Strong *v.* Smith, 1 Metc. 476; Wheeler *v.* Bowen, 20 Pick. 563; Holbrook *v.* Waters, 19 Pick. 354. See Stills *v.* Harmon, 7 Cush. 406, holding that an executor is not liable by trustee process as trustee of the heir of the deceased legatee for the amount of the legacy in his hands which was due to the legatee at the time of his decease.

New Hampshire.— Piper *v.* Piper, 2 N. H. 439.

Ohio.— Sampsell *v.* Sampsell, 17 Ohio Cir. Ct. 455, 9 Ohio Cir. Dec. 510.

Pennsylvania.—Bouslough *v.* Bouslough, 68 Pa. St. 495; Neely *v.* Grantham, 58 Pa. St. 433; Zimmerman *v.* Briner, 50 Pa. St. 535; Strong *v.* Bass, 35 Pa. St. 333; Sinnickson *v.* Painter, 32 Pa. St. 384; Baldy *v.* Brady, 15 Pa. St. 103; Ross *v.* Cowden, 7 Watts & S. 376; Weeter's Estate, 21 Pa. Super. Ct. 241 (an interest in an estate under a will which vests at the testator's death, subject to the life-estate of the widow, is subject to attachment in the hands of the executors); Gruver *v.* Edinger, 13 Pa. Co. Ct. 307; Cleary *v.* Evans, 6 Pa. Co. Ct. 39; Detwiler *v.* Grubb, 1 Chest. Co. Rep. 272; Stover *v.* Stover, 3 Del. Co. 290. See, however, Beck's Estate, 133 Pa. St. 51, 19 Atl. 302, 19 Am. St. Rep. 623, holding that where a legacy is given on condition that it "shall not be liable to be attached or sued for the debts" of the legatee, it is not attachable while in the

the rule is that the process of garnishment cannot be sued out against an executor as the debtor of a legatee or devisee, before the entry of an order of distribution.[9] In other jurisdictions, however, it is held that an executor may be garnished before the settlement and distribution of the estate for a legacy or devise due a judgment defendant.[10]

I. Rights of Action — 1. In General. The rule is well established that in the absence of fraud only such demands can be subjected by the process of garnishment as defendant in his own name could recover from the garnishee in an action of debt or *indebitatus assumpsit*.[11]

hands of the executor at the suit of the legatee's creditor.

United States.— Picquet *v.* Swan, 19 Fed. Cas. No. 11,133, 4 Mason 443, holding, however, that the executor cannot be charged as garnishee before probate of the will.

See 24 Cent. Dig. tit. "Garnishment," § 63.

Legatee indebted to testator.— An administrator *cum testamento annexo* is not chargeable in foreign attachment process as trustee for a pecuniary legacy retained in payment of a debt due the testator from the legatee Nickerson *v.* Chase, 122 Mass. 296. See also Cady *v.* Comey, 10 Metc. (Mass.) 459.

Where executor failed to qualify.— Where a party was made a beneficiary under the will, likewise the executor of the will, and he accepted the bequest made to him but declined the trust of executor, it was held that he could not be made trustee in an action against a legatee under the will. Green *v.* Nelson, 12 Metc. (Mass.) 567.

9. *California.*— *In re* Nerac, 35 Cal. 392, 95 Am. Dec. 111; *In re* Sime, Myr. Prob. 100.

Delaware.— Fitchett *v.* Dolbee, 3 Harr. 267, holding that a distributive share may be attached in an executor's hands after distribution, although he may require a refunding bond from the attaching creditor to meet outstanding claims.

Florida.— Post *v.* Love, 19 Fla. 634.

Louisiana.— Deblieux *v.* Hotard, 31 La. Ann. 194.

Michigan.— Hudson *v.* Wilber, 114 Mich. 116, 72 N. W. 162, 68 Am. St. Rep. 465, 47 L. R. A. 345.

Missouri.— Godman *v.* Gordon, 61 Mo. App. 685.

Nevada.— Norton *v.* Clark, 18 Nev. 247, 2 Pac. 529.

New Hampshire.— See Palmer *v.* Noyes, 45 N. H. 174.

Oregon.—Harrington *v.* La Rocque, 13 Oreg. 344, 10 Pac. 498.

Wisconsin.— J. I. Case Threshing Mach. Co. *v.* Miracle, 54 Wis. 295, 11 N. W. 580.

See 24 Cent. Dig. tit. "Garnishment," § 65.

Compare Moore *v.* Stainton, 22 Ala. 831, holding that such process may be sued out against an executor before the lapse of six months from the grant of letters, but that no judgment can be rendered against him as such until the estate is finally settled.

10. Boyer *v.* Hawkins, 86 Iowa 40, 52 N. W. 659; Cutter *v.* Perkins, 47 Me. 557; Holbrook *v.* Waters, 19 Pick. (Mass.) 354. See Stills *v.* Harmon, 7 Cush. (Mass.) 406 (holding that an executor is not liable under trustee process as a trustee of the heir of the deceased legatee for his amount of the legacy in his hands which was due to the legatee at the time of the decease); Lorenz *v.* King, 38 Pa. St. 93; Sinnickson *v.* Painter, 32 Pa. St. 384; Baldy *v.* Brady, 15 Pa. St. 103; Hess *v.* Shorb, 7 Pa. St. 231; Rhodes *v.* Kemble, 12 Pa. Co. Ct. 470; Adams *v.* Harland, 7 Wkly. Notes Cas. (Pa.) 129. See Brown *v.* Brown, 3 Phila. (Pa.) 359, where an attachment execution was laid on a fund bequeathed by will, which, although vested in interest, was subject to a power of appointment, and therefore liable to be divested at any moment by the exercise of the power, and it was held that, although the death of the holder after issue, but before trial, removed the uncertainty, yet it came too late to aid plaintiff.

Money in hands of third person.— It has been held in Pennsylvania that where there are no debts of the testator and his administrator with the will annexed has filed an account showing money in hand for distribution, an attachment will lie against the purchase-money of land sold by the administrator in the hands of the purchaser at the suit of a creditor of one of the legatees of the proceeds of the land. Brady *v.* Grant, 11 Pa. St. 361.

11. *Alabama.*— Avery *v.* Lockhard, 75 Ala. 530; Henry *v.* Murphy, 54 Ala. 246; Powell *v.* Sammons, 31 Ala. 552; Nesbitt *v.* Ware, 30 Ala. 68; Cook *v.* Walthall, 20 Ala. 334; Walke *v.* McGehee, 11 Ala. 273.

Arkansas.— See Danley *v.* State Bank, 15 Ark. 16, holding that the act providing that no person indebted to the state bank shall be garnished by any person having a claim against the bank, applies to proceedings at law and in equity.

California.—Hassie *v.* God Is With Us Congregation, 35 Cal. 378.

Connecticut.— See Apthorp *v.* Lockwood, 1 Root 198.

Illinois.— Capes *v.* Burgess, 135 Ill. 61, 25 N. E. 1000 [*affirming* 32 Ill. App. 372]. See also Stahl *v.* Webster, 11 Ill. 511.

Iowa.— Victor *v.* Hartford F. Ins. Co., 33 Iowa 210.

Maine.— Clark *v.* Viles, 32 Me. 32, holding that the holder of a chose in action belonging to defendant cannot be charged as trustee. See also Weymouth *v.* Penobscot Log Driving Co., 75 Me. 41.

Missouri.— McPherson *v.* Atlantic, etc., R. Co., 66 Mo. 103. See Scales *v.* Southern

2. Breach of Contract. The process of garnishment will lie for such damages, resulting from breach of contract, as may be reduced to a certainty by a definite standard;[12] but not for such damages as are speculative or unliquidated.[13]

3. Right to Recover Usury Paid. The right of a party who has paid a usurious rate of interest to recover the excess above the legal rate cannot be subjected to garnishment proceedings, the remedy for the recovery of the money so paid being rather a statutory redress for a virtual wrong, and, as such, under the administration of the police power.[14]

4. Liability of Stock-Holder For Unpaid Instalments on Subscription For Stock — a. General Rule. By statutory enactment in practically every jurisdiction, where a subscriber for stock in a corporation is indebted to such corporation for assessments due on such shares, or is in default for instalments for which calls have been made, he occupies the same position as any other debtor of the corporation, and may be charged therefor in garnishment proceedings by a creditor of the corporation.[15]

Hotel Co., 37 Mo. 520, holding that an indebtedness is not liable to garnishment unless absolutely due as a money demand, unaffected by liens, or prior encumbrances, or conditions of contract.

North Carolina.—Patton *v.* Smith, 29 N. C. 438.

See 24 Cent. Dig. tit. "Garnishment," § 66.

12. New Haven Steam Saw-Mill Co. *v.* Fowler, 28 Conn. 103; Carland *v.* Cunningham, 37 Pa. St. 228; Fleming *v.* Pringle, 21 Tex. Civ. App. 225, 51 S. W. 553, holding that the measure of damages for the breach of a warranty deed is the purchase-money and the interest from the time of the ouster, which is sufficiently certain to support garnishment.

13. Capes *v.* Burgess, 135 Ill. 61, 25 N. E. 1000 [*affirming* 32 Ill. App. 372]; Smith *v.* Wallace, 82 Ill. App. 145; Carland *v.* Cunningham, 37 Pa. St. 228. See Leefe *v.* Walker, 18 La. 1, holding that a claim for damages *ex contractu* held by defendant, where he does not himself complain, cannot be attached.

Breach of official duty.— Thus a public or quasi-public officer cannot be charged in garnishment proceedings for his breach of official duty. Eddy *v.* Heath, 31 Mo. 141; Grimm *v.* Sarmiento, 18 Phila. (Pa.) 318; Hemmenway *v.* Pratt, 23 Vt. 332.

14. Graham *v.* Moore, 7 B. Mon. (Ky.) 53; Boardman *v.* Roe, 13 Mass. 104; Griebel *v.* Imboden, 158 Mo. 632, 59 S. W. 957; Ransom *v.* Hays, 39 Mo. 445; Fish *v.* Field, 19 Vt. 141; Barker *v.* Esty, 19 Vt. 131. See Church *v.* Simpson, 25 Iowa 408; Upton *v.* Johnston, 84 Wis. 8, 54 N. W. 266.

15. *Alabama.*— Wooldridge *v.* Holmes, 78 Ala. 568; Curry *v.* Woodward, 53 Ala. 371 (decided under a statute providing that all corporations dissolved for any cause shall exist as bodies corporate for five years thereafter for the purpose of settling their business, etc., and it was held that stock-holders are liable to garnishment for their unpaid subscriptions, although the corporation was not then engaged in business and had no president or directors); Bingham *v.* Rushing, 5 Ala. 403 (holding that the statute of 1841, authorizing the process of garnishment to issue against stock-holders in actions against corporations, applies to actions commenced before the passage of the act); Joseph *v.* Davis, (1892) 10 So. 830; Davis *v.* Montgomery Furnace, etc., Co., (1890) 8 So. 496. See Nicrosi *v.* Irvine, 102 Ala. 648, 15 So. 429, 48 Am. St. Rep. 92 (holding that stock-holders of a corporation who have paid for their stock in property at an agreed fictitious value are not liable to garnishment by a judgment creditor of the corporation for the difference between the face value of the stock and the value of the property payment); De Mony *v.* Johnston, 7 Ala. 51 (holding that unpaid stock subscribers cannot be reached by garnishment process issued prior to act 1841, authorizing such debts to be so attached).

Illinois.— Coalfield Co. *v.* Peck, 98 Ill. 139 [*reversing* 3 Ill. App. 619]; Meints *v.* East St. Louis Co-operative Rail Mill Co., 89 Ill. 48; Pease *v.* Underwriters' Union, 1 Ill. App. 287.

Iowa.— Langford *v.* Ottumwa Water Power Co., 59 Iowa 283, 13 N. W. 303.

Louisiana.— Brode *v.* Firemens' Ins. Co., 8 Rob. 244, 10 Rob. 440; Cucullu *v.* Union Ins. Co., 2 Rob. 571.

Mississippi.— Scott *v.* Windham, 73 Miss. 76, 16 So. 206; King *v.* Elliott, 5 Sm. & M. 428.

Missouri.— Simpson *v.* Reynolds, 71 Mo. 594; Hannah *v.* Moberly Bank, 67 Mo. 678.

Pennsylvania.— Hays *v.* Lycoming F. Ins. Co., 98 Pa. St. 184; Peterson *v.* Sinclair, 83 Pa. St. 250; Malone Nat. Bank *v.* Lycoming F. Ins. Co., 12 Wkly. Notes Cas. 321.

United States.— Faull *v.* Alaska Gold, etc., Min. Co., 14 Fed. 657, 8 Sawy. 420.

See 24 Cent. Dig. tit. "Garnishment," § 70.

Where no liability to pay unpaid portion of subscription exists.— A judgment creditor of a corporation cannot reach by garnishment the unpaid portion of subscriptions to the capital stock where, as between the corporation and subscribing shareholder, no liability by the latter to pay anything more exists, until after the agreement to that end shall have been set aside by a bill in equity,

b. Before Call For Instalments. The courts are divided upon the question as to whether a stock-holder can be held in garnishment proceedings for unpaid instalments of stock for which the corporation would not have a right of action because no call or demand had been made therefor. In some jurisdictions it is held that the stock-holder cannot be made garnishee therefor, for the reason that the creditor occupies as against the stock-holder the position of the principal defendant and acquires his rights only.[16] In several jurisdictions, however, unpaid subscriptions to the capital stock of a corporation which has become insolvent may be reached by garnishment proceedings, although no assessment or call has been made by the proper officers of the corporation, this ruling being generally based on the ground that the obligation of the stock-holder arises out of the act of subscribing and continues from that time and not from the call.[17]

5. Pendency of Action by Defendant Against Garnishee. The rule now seems to be well settled that a debt due the principal defendant may be reached by garnishment proceedings at the instance of a creditor of the latter, even where an action to enforce such debt or claim is pending, provided the garnishment proceedings are in the same court in which the action is pending, or the court has jurisdiction of such action.[18] In some jurisdictions the rule is, that where an action is pending by the principal debtor against the garnishee, the latter cannot be held in garnishment proceedings if the litigation has passed the stage in which he could set up the garnishment proceedings, by plea or otherwise, to prevent the rendition of judgment against him for the debt garnished.[19] But the better rule seems to be that a debtor of the principal defendant may be charged as garnishee at any stage of the proceedings in the first action, either before or

since the garnishing creditor has no greater right to recover the property garnished than the execution debtor. Gasch *v.* World's Fair Excursion, etc., Boat Co., 59 Ill. App. 391; Sangamon Coal Min. Co. *v.* Richardson, 33 Ill. App. 277.

Certificate of stock.— The Wisconsin statute enabling a creditor to reach property of his debtor in the possession of a garnishee does not enable him to reach corporate stock owned by his debtor, by garnishment of the person in possession of the certificate of such stock, such certificate being the mere evidence of title of stock. O. L. Packard Mach. Co. *v.* Laev, 100 Wis. 644, 76 N. W. 596.

16. *Alabama.*—Teague *v.* Le Grand, 85 Ala. 493, 5 So. 287, 7 Am. St. Rep. 64; Paschall *v.* Whitsett, 11 Ala. 472; Bingham *v.* Rushing, 5 Ala. 403.

Colorado.— Universal F. Ins. Co. *v.* Tabor, 16 Colo. 531, 27 Pac. 890.

Louisiana.— Brown *v.* Union Ins. Co., 3 La. Ann. 177.

Nevada.— McKelvey *v.* Crockett, 18 Nev. 238, 2 Pac. 386.

New York.— See also Seymour *v.* Sturgess, 26 N. Y. 134.

Pennsylvania.— Lane's Appeal, 105 Pa. St. 49, 51 Am. Rep. 166. See Malone Nat. Bank *v.* Lycoming F. Ins. Co., 12 Wkly. Notes Cas. 321, holding that unpaid assessments due an insolvent mutual insurance company in the hands of a former member thereof are subject to attachment execution, where the assessment was properly made while the member was in good standing.

See 24 Cent. Dig. tit. "Garnishment," § 70.

17. Scott *v.* Windham, 73 Miss. 76, 16 So. 206; *In re* Glen Iron Works, 20 Fed. 674.

In Illinois provision is made for garnishment proceedings in such cases by statute. Coalfield *v.* Peck, 98 Ill. 139.

18. *Alabama.*— Hitt *v.* Lacey, 3 Ala. 104, 36 Am. Dec. 440.

Maine.—McAllister *v.* Furlong, 36 Me. 307; Smith *v.* Barker, 10 Me. 458.

Massachusetts.— See Locke *v.* Tippets, 7 Mass. 149.

Missouri.—Lieber *v.* St. Louis Agricultural, etc., Assoc., 36 Mo. 382.

New Hampshire.— Foster *v.* Dudley, 30 N. H. 463.

Pennsylvania.— Sweeney *v.* Allen, 1 Pa. St. 380.

Rhode Island.— Smith *v.* Carroll, 17 R. I. 125, 21 Atl. 343, 12 L. R. A. 301.

Tennessee.— Huff *v.* Mills, 7 Yerg. 42.

Vermont.— Trombly *v.* Clark, 13 Vt. 118. See also Spicer *v.* Spicer, 23 Vt. 678.

See 24 Cent. Dig. tit. "Garnishment," § 71.

Contra.— Gridley *v.* Harraden, 14 Mass. 497; Burnham *v.* Folsom, 5 N. H. 566, both holding that a person cannot be chargeable as trustee for a debt for the recovery of which an action commenced before the service of the trustee process on him is pending between the principal and himself.

19. Holt *v.* Kirby, 39 Me. 164. See Smith *v.* Barker, 10 Me. 458 (holding that while the fact of issue being joined in an action pending will not *per se* prevent defendant being summoned as trustee of plaintiff, he should, however, have an opportunity in the first suit of availing himself of the commencement and pendency of the trustee suit); McCaffrey *v.* Moore, 18 Pick. (Mass.) 492 (holding that as defendant had no opportunity to plead the attachment in bar of the

after the rendition of the judgment.[20] However, defendant in a pending action cannot be summoned in another jurisdiction as garnishee of plaintiff therein.[21]

6. Liability For Torts. A party cannot be charged in garnishment proceedings where the principal defendant has only a right of action against him sounding in tort, since the damages in such case are unliquidated.[22]

J. Instruments and Securities For Payment of Money — 1. What Law Governs. A promissory note, executed in and made payable to a citizen of one state, although the maker resides in another state, is not subject to garnishment process in the latter state, where it is by the law of the place of contract exempt from such process.[23]

2. Bills and Notes[24] — a. Negotiable Paper. In many jurisdictions it is provided by statute that no person shall be adjudged garnishee or trustee by reason

first action, he was not chargeable as trustee); Kidd *v.* Shepherd, 4 Mass. 238; Howell *v.* Freeman, 3 Mass. 121; Thayer *v.* Pratt, 47 N. H. 470; Foster *v.* Dudley, 30 N. H. 463; Wadsworth *v.* Clark, 14 Vt. 139.

20. Burt *v.* Wayne Cir. Judge, 82 Mich. 251, 46 N. W. 308; Grosslight *v.* Crisup, 58 Mich. 531, 25 N. W. 505; Thrasher *v.* Buckingham, 40 Miss. 67. See also Ulrich *v.* Hower, 156 Pa. St. 414, 27 Atl. 243.

21. *Alabama.*— Bingham *v.* Smith, 5 Ala. 651.

Louisiana.— But see Smith *v.* Durbridge, 26 La. Ann. 531.

Massachusetts.— American Bank *v.* Rollins, 99 Mass. 313.

Michigan.— Custer *v.* White, 49 Mich. 262, 13 N. W. 583.

South Carolina.— Burrill *v.* Letson, 2 Speers 378.

Tennessee.— Clodfelter *v.* Cox, 1 Sneed 330, 60 Am. Dec. 157, holding that a judgment debt in a court of record is not subject to garnishment in a suit in a justice's court. But see Huff *v.* Mills, 7 Yerg. 42.

Texas.—Miller *v.* Taylor, 14 Tex. 538, holding that upon the principle that a debtor should not be compelled to pay his debt twice, where he is in such a position that if charged as garnishee he cannot defend himself against a second payment to his creditor, he should not be charged.

Compare Luton *v.* Hoehn, 72 Ill. 81, holding that defendant in an action pending in a circuit court may be garnisheed on process issued by a justice of the peace.

See 24 Cent. Dig. tit. "Garnishment," § 71.

But see McCarty *v.* Emlen, 2 Dall. (Pa.) 277, 1 L. ed. 380.

22. *Alabama.*— Cunningham *v.* Baker, 104 Ala. 160, 16 So. 68, 53 Am. St. Rep. 27; Lewis *v.* Dubose, 29 Ala. 291, holding likewise that the statutory right to waive the tort and sue in assumpsit is personal and cannot be claimed by garnishment.

Connecticut.— Holcomb *v.* Winchester, 52 Conn. 447, 52 Am. Rep. 609.

Georgia.— Gamble *v.* Central R., etc., Co., 80 Ga. 595, 7 S. E. 315, 12 Am. St. Rep. 276 (holding that defendant in an action for tort is not subject to garnishment prior to the entry of judgment, although verdict has been rendered); Bates *v.* Forsyth, 69 Ga. 365 (holding that, although A may have a right of action against B for deceit, B is not subject to garnishment at the instance of a creditor of A).

Louisiana.— Peet *v.* McDaniel, 27 La. Ann. 455.

Maine.— Rundlet *v.* Jordan, 3 Me. 47.

Massachusetts.— Thayer *v.* Southwick, 8 Gray 229.

Michigan.—Detroit Post, etc., Co. *v.* Reilly, 46 Mich. 459, 9 N. W. 492, holding that in such case the claim cannot be reached by garnishment until after entry of judgment.

Mississippi.— Dibrell *v.* Neely, 61 Miss. 218.

Missouri.— Eddy *v.* Heath, 31 Mo. 141. See Schubert *v.* Herzberg, 65 Mo. App. 578, holding that a notice of garnishment served on defendant in a pending suit for a personal tort by a judgment creditor of plaintiff therein is effective as to the judgment thereafter obtained, if the garnishee does not file his answer prior to its rendition.

New Hampshire.— Getchell *v.* Chase, 37 N. H. 106; Foster *v.* Dudley, 30 N. H. 463; Packets Despatch Line *v.* Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203; Paul *v.* Paul, 10 N. H. 117.

New Jersey.— Lomerson *v.* Huffman, 25 N. J. L. 625.

Ohio.— Squair *v.* Shea, 7 Ohio Dec. (Reprint) 71, 1 Cinc. L. Bul. 99.

Pennsylvania.— Boyer *v.* Bullard, 102 Pa. St. 555; Selheimer *v.* Elder, 98 Pa. St. 154. See also Isett *v.* Binder, 2 Chest. Co. Rep. 430, holding that the act of May 15, 1874, authorizing the issuing of foreign attachment in an action *ex delicto* does not embrace actions for breach of marriage promise.

Texas.— Kreisle *v.* Campbell, (Civ. App. 1895) 32 S. W. 581.

Vermont.— Hemmenway *v.* Pratt, 23 Vt. 332; Hutchinson *v.* Lamb, Brayt. 234.

Wisconsin.— St. Joseph Mfg. Co. *v.* Miller, 69 Wis. 389, 34 N. W. 235; Keyes *v.* Milwaukee, etc., R. Co., 25 Wis. 691.

See 24 Cent. Dig. tit. "Garnishment," § 72.

23. Smith *v.* Blatchford, 2 Ind. 184, 52 Am. Dec. 504; Hull *v.* Blake, 13 Mass. 153; Worden *v.* Nourse, 36 Vt. 756; Emerson *v.* Patridge, 27 Vt. 8, 63 Am. Dec. 617; Chase *v.* Haughton, 16 Vt. 594; Baylies *v.* Houghton, 15 Vt. 626. See also Green *v.* Gillet, 5 Day (Conn.) 485.

24. See *infra*, V, K, 2; V, L, 2.

of his having made, given, indorsed, negotiated, or accepted any negotiable security whatever, and under such statutes the maker of a negotiable note or the drawer of a negotiable bill of exchange cannot be made the garnishee or trustee of the holder thereof.[25]

b. Non-Negotiable Paper. In jurisdictions in which the maker or drawer of a non-negotiable paper may set up against the transferee of such paper any defense arising before notice of the transfer or assignment which he could set up against such paper in the hands of the payee, the maker of such paper can be charged as the garnishee or trustee of the last known holder, since payment of the garnishment judgment will be a good defense against any previous assignment thereof.[26] In jurisdictions, however, in which an assignment of a non-negotiable instrument is complete without notice to the maker thereof, the latter

25. *Alabama.*—Cottingham *v.* Greely Barnham Grocery Co., 129 Ala. 200, 30 So. 560, 87 Am. St. Rep. 58; Levisohn *v.* Waganer, 76 Ala. 412; Marston *v.* Carr, 16 Ala. 325; Jones *v.* Norris, 2 Ala. 526.

Georgia.— Dibble *v.* Gaston, R. M. Charlt. 444. See, however, King *v.* Carhart, 18 Ga. 650, holding that a debt secured by a negotiable paper is the subject of garnishment, unless such paper has been previously transferred as collateral security.

Illinois.— Auten *v.* Crahan, 81 Ill. App. 502.

Kansas.— Diefendorf *v.* Oliver, 8 Kan. 365.

Louisiana.— Denham *v.* Pogue, 20 La. Ann. 195. See, however, Kane *v.* Robertson, 26 La. Ann. 335, where defendant drew two drafts which were accepted verbally by the garnishee to be paid as far as possible out of the sale of defendant's cotton then in his hands, and it was held that the acceptance was good, rendering the garnishee liable to the extent of the proceeds of such cotton.

Maine.— Woodman *v.* Carter, 90 Me. 302, 38 Atl. 169, holding, however, that Rev. St. c. 86, § 55, does not apply to a case where the note is effectually controlled by the maker and is divested of its negotiable character by reason of its being deposited in the hands of a third person under a written agreement entered into by the parties thereto.

Massachusetts.— Cushman *v.* Haynes, 20 Pick. 132 (decided under St. (1794) c. 65, § 12, holding that the instrument in this case, however, was not a negotiable security); Williams *v.* Marston, 3 Pick. 65; Perry *v.* Coates, 9 Mass. 537; Maine F. & M. Ins. Co. *v.* Weeks, 7 Mass. 438; Eunson *v.* Healy, 2 Mass. 32. See also Jones *v.* Gorham, 2 Mass. 375. *Compare* Grant *v.* Shaw, 16 Mass. 341, 8 Am. Dec. 142.

New Hampshire.— Stone *v.* Dean, 5 N. H. 502. See also Leland *v.* Sabin, 27 N. H. 74.

Ohio.— Howe *v.* Hartness, 11 Ohio St. 449, 78 Am. Dec. 312.

South Carolina.— Gaffney *v.* Bradford, 2 Bailey 441. See also McBride *v.* Floyd, 2 Bailey 209.

Tennessee.— Kimbrough *v.* Hornsby, (Sup. 1905) 84 S. W. 613, holding that a debt due by a negotiable or an assignable paper is not subject to garnishment under the statute, unless such paper is delivered to the garnishee, completely exonerated or indemnified from all liability thereon after he may have satisfied the judgment or decree. See also Turner *v.* Armstrong, 9 Yerg. 412. *Compare* Chicago Sugar-Refining Co. *v.* Jackson Brewing Co., (Ch. App. 1898) 48 S. W. 275, holding that one is not prevented from attaching a debt due his debtor by the fact that he is a surety on the obligation attached.

Texas.—Bassett *v.* Garthwaite, 22 Tex. 230, 73 Am. Dec. 257 (holding that the maker of a negotiable note cannot be charged as garnishee of the payee, even after maturity, unless it affirmatively appears that the payee owned the note at the time of the service of the writ); Wybrants *v.* Rice, 3 Tex. 458; Hutcheson *v.* King, (Civ. App. 1904) 83 S. W. 215.

Wisconsin.— Davis *v.* Pawlette, 3 Wis. 300, 62 Am. Dec. 690.

See 24 Cent. Dig. tit. "Garnishment," § 74.

Contra.— Colcord *v.* Daggett, 18 Mo. 557; Quarles *v.* Porter, 12 Mo. 76, holding that a debt revived by a negotiable note may be attached under garnishment process in the hands of the maker of the note.

Government voucher.— A defendant's interest in a negotiable treasury certificate issued in payment of an award can be attached in the hands of the garnishee. Stratton *v.* Young, 23 Fed. Cas. No. 13,528, 1 Hayw. & H. 229. Likewise a voucher or certificate of indebtedness given by the United States for personal services, not official, rendered the United States, is, in the hands of a third person, a subject of garnishment. Leighton *v.* Heagerty, 21 Minn. 42.

26. *Alabama.*— Dore *v.* Dawson, 6 Ala. 712.

Delaware.— Robinson *v.* Mitchell, 1 Harr. 365.

Indiana.— Elston *v.* Gillis, 69 Ind. 128; Canaday *v.* Detrick, 63 Ind. 485; Shetler *v.* Thomas, 16 Ind. 223; Junction R. Co. *v.* Cleneay, 13 Ind. 161; Covert *v.* Nelson, 8 Blackf. 265.

Iowa.— Yocum *v.* White, 36 Iowa 288.

Maine.— Marrett *v.* Equitable Ins. Co., 54 Me. 537.

Massachusetts.—Scott *v.* Hawkins, 99 Mass. 550; Clark *v.* King, 2 Mass. 524; Comstock *v.* Farnum, 2 Mass. 96.

New Hampshire.— See Wiggin *v.* Lewis, 19 N. H. 548.

cannot be charged as garnishee or trustee of the last known holder, in the absence of proof that he was the actual holder at the time of the garnishment.[27]

c. In Hands of Third Person. The general rule is that a party holding a promissory note, bank-check, or chose in action belonging to a defendant cannot be charged for the same in garnishment proceedings, since they cannot be regarded as money and may never be paid.[28] In several states, however, by statute, a party holding negotiable notes or other choses in action due to the principal debtor, in pledge, or as collateral security, may be summoned as garnishee or trustee and a receiver appointed for such effects;[29] and in at least one jurisdiction a negotiable paper is subject to trustee process unless the same has been negotiated and notice thereof given to the maker or indorser prior to the service of process upon him.[30]

3. Stocks, Bonds, Etc. Under the statutes providing that property or effects in the hands of a third person belonging to the principal defendant shall be subject to garnishment or trustee process, railroad or municipal bonds may be reached under garnishment proceedings.[31]

K. Debts or Demands Not Matured or Liquidated — 1. General Rule. The general rule is that a party can only be held as garnishee for the amount

Texas.— See Moursund *v.* Priess, 84 Tex. 554, 19 S. W. 775.

See 24 Cent. Dig. tit. "Garnishment," § 74.

A negotiable note not indorsed before its maturity may be the subject of garnishment at the suit of creditors of the payee so long as the latter remains the proprietor, or if indorsed when past due until the maker has notice of the transfer. Mills *v.* Stewart, 12 Ala. 90.

27. Speight *v.* Brock, Freem. (Miss.) 389; St. Louis Perpetual Ins. Co. *v.* Cohen, 9 Mo. 421.

28. Smith *v.* Kennebec, etc., R. Co., 45 Me. 547; Rundlet *v.* Jordan, 3 Me. 47 (a note deposited in another's hands and not collected is not the subject of a foreign attachment, even though a judgment has been collected on it in the name of the trustee); Hanaford *v.* Hawkins, 18 R. I. 432, 28 Atl. 605; Price *v.* Brady, 21 Tex. 614 (since, in the absence of statute, choses in action are not subject to seizure or forced sale, a party in possession of promissory notes belonging to the principal defendant cannot be charged as a garnishee therefor). See also Hancock *v.* Colyer, 99 Mass. 187, 96 Am. Dec. 730. *Compare* Stortenbaker *v.* Pullman, 112 Iowa 569, 84 N. W. 716.

29. Woodworth *v.* Lemmerman, 9 La. Ann. 524; Fling *v.* Goodall, 40 N. H. 208 (the term "personal property" as used in the New Hampshire statute relating to trustee process includes notes and other choses in action such as are enumerated in section 15 of the act); La Crosse Nat. Bank *v.* Wilson, 74 Wis. 391, 43 N. W. 153; Storm *v.* Cotzhausen, 38 Wis. 139.

Under the Vermont statute of 1841, a negotiable paper can be charged by trustee process as the property of the payee, unless notice of its transfer has been given to the maker previous to the service of the trustee process. Sargent *v.* Wood, 51 Vt. 597; Ayott *v.* Smith, 40 Vt. 532, 94 Am. Dec. 429; Seward *v.* Garlin, 33 Vt. 583; Kimball *v.* Gay, 16 Vt. 131. See also Camp *v.* Scott, 14 Vt. 387; Hutchins *v.* Evans, 13 Vt. 541; Little *v.* Hale, 11 Vt. 482; Britton *v.* Preston, 9 Vt. 257, all holding, prior to the passage of the act above referred to, that the interest of the holder of a negotiable note while it is still current is not attachable by trustee process.

Any debt due by a resident to a non-resident whether by note, acceptance of a bill, indorsement, or otherwise will, under the Louisiana statute, support an attachment, and payment by the garnishee under a judgment against him will protect him from any demand by his non-resident creditor. Bean *v.* Mississippi Union Bank, 5 Rob. (La.) 333.

Negotiable paper held by bank.—Under Vt. Gen. St. c. 34, § 47, a negotiable paper transferred to a bank as collateral security is exempt from attachment or trustee process, but this exemption applies only so far as is necessary for the security of the bank and not to the balance. Sargent *v.* Wood, 51 Vt. 597.

30. Woodward *v.* Laporte, 70 Vt. 399, 41 Atl. 443.

31. *Maryland.*— Williams *v.* Jones, 38 Md. 555.

Minnesota.—Kidder *v.* Sibley, 3 Minn. 406; Banning *v.* Sibley, 3 Minn. 389.

Pennsylvania.— King *v.* Hyatt, 41 Pa. St. 229.

Texas.— Holloway Seed Co. *v.* City Nat. Bank, (Civ. App. 1898) 47 S. W. 77; Marble Falls Ferry Co. *v.* Spitler, 7 Tex. Civ. App. 82, 25 S. W. 985. See, however, Obenchain *v.* Reekes, 1 Tex. App. Civ. Cas. § 970, holding that city bonds being negotiable are not subject to a writ of garnishment.

Vermont.— See Downer *v.* Topliff, 19 Vt. 399, holding that indebtedness evidenced by a bond given to indemnify an officer for having attached property of doubtful ownership may be attached by trustee process as the property of the officer after judgment has been recovered against such officer by a third person for taking the property.

See 24 Cent. Dig. tit. "Garnishment," § 75.

due the principal defendant at the time the process is served upon him,[32] and where a party is indebted to the principal defendant in an amount which is increased after the service of process and before he files his answer, he is liable to a judgment only for the amount due at the time of the service of process.[33]

2. Commercial Paper Before Maturity.[34] The general rule is that the maker or indorser of commercial paper cannot be made a garnishee in an action against the payee or holder thereof prior to the maturity of such paper.[35] In several jurisdictions, however, the rule is laid down that the maker or indorser of a negotiable instrument may be garnished before maturity thereof in an action against the payee, provided such paper has not passed into the hands of a *bona fide* holder for value, without notice of the service of the garnishment process.[36] Commercial

32. *California.*— Early *v.* Redwood City, 57 Cal. 193.

Colorado.— Universal F. Ins. Co. *v.* Tabor, 16 Colo. 531, 27 Pac. 890.

Connecticut.— Cunningham Lumber Co. *v.* New York, etc., R. Co., 77 Conn. 628, 60 Atl. 107.

Georgia.— Hall *v.* Armour Packing Co., 102 Ga. 586, 29 S. E. 139.

Kansas.— Kellogg *v.* Hazlett, 2 Kan. App. 525, 43 Pac. 987.

Maine.— Stowe *v.* Phinney, 78 Me. 244, 3 Atl. 914, 57 Am. Rep. 796. *Compare* Smith *v.* Cahoon, 37 Me. 281.

Massachusetts.— Fuller *v.* O'Brien, 121 Mass. 422; Hancock *v.* Colyer, 99 Mass. 187, 96 Am. Dec. 730.

Michigan.— Serviss *v.* Washtenaw Cir. Judge, 116 Mich. 101, 74 N. W. 310, 72 Am. St. Rep. 507.

Missouri.— McCord, etc., Mercantile Co. *v.* Bettles, 58 Mo. App. 384 (holding that existing legal credits which are due or to become due by the efflux of time may be impounded by garnishment, but equitable debts cannot be so reached); McQuarry *v.* Geyer, 57 Mo. App. 213; Heege *v.* Fruin, 18 Mo. App. 139.

Nevada.— McKelvey *v.* Crockett, 18 Nev. 238, 2 Pac. 386.

Pennsylvania.— Cany *v.* Day, 2 Miles 412.

Rhode Island.— Perry *v.* Thornton, 7 R. I. 15. See, however, Cross *v.* Brown, 19 R. I. 220, 33 Atl. 147.

Tennessee.— Childress *v.* Dickins, 8 Yerg. 113.

Texas.— Brown *v.* Chancellor, 61 Tex. 437.

Vermont.— Jenks *v.* Silloway, 30 Vt. 687.

England.— Barnett *v.* Eastman, 67 L. J. Q. B. 517.

See 24 Cent. Dig. tit. "Garnishment," § 78.

See, however, Lancashire Ins. Co. *v.* Corbett, 62 Ill. App. 236 (holding that it is not necessary that the garnishee's indebtedness should be due at the time of the commencement of the proceedings against him, and that it is sufficient if the debt is owing without uncertainty or contingency at the time he files his answer); Williamson *v.* Bowie, 6 Munf. (Va.) 176.

A debt due in præsenti, although payable *in futuro*, is in Massachusetts held to be attachable. Tucker *v.* Clisby, 12 Pick. 22; Clark *v.* Brown, 14 Mass. 271; Wood *v.* Partridge, 11 Mass. 488; Frothingham *v.* Haley, 3 Mass. 68.

33. Mobile Branch Bank *v.* Poe, 1 Ala. 396; Palmer *v.* Noyes, 45 N. H. 174.

34. See *supra*, V, J, 2; *infra*, V, L, 2.

35. *California.*— Gregory *v.* Higgins, 10 Cal. 339.

Kentucky.— Greer *v.* Powell, 1 Bush 489.

Michigan.— Littlefield *v.* Hodge, 6 Mich. 326.

Minnesota.— Hubbard *v.* Williams, 1 Minn. 54, 55 Am. Dec. 66.

Tennessee.— Matheny *v.* Hughes, 10 Heisk. 401.

Texas.— Willis *v.* Heath, 75 Tex. 124, 12 S. W. 971, 16 Am. St. Rep. 876; Kapp *v.* Teel, 33 Tex. 811; Bassett *v.* Garthwaite, 22 Tex. 230, 73 Am. Dec. 257; Iglehart *v.* Moore, 21 Tex. 501. See, however, Taylor *v.* Fryar, 18 Tex. Civ. App. 266, 44 S. W. 183, holding that under Rev. St. (1895) art. 217, providing for writs of garnishment in attachment proceedings, a garnishment proceeding under an attachment in an action on a note before the maturity thereof is not void.

Washington.— Timm *v.* Stegman, 6 Wash. 13, 32 Pac. 1004.

Wisconsin.— Carson *v.* Allen, 2 Pinn. 457, 2 Chandl. 123, 54 Am. Dec. 148.

See 24 Cent. Dig. tit. "Garnishment," § 79.

36. *Connecticut.*— Enos *v.* Tuttle, 3 Conn. 27.

Indiana.—King *v.* Vance, 46 Ind. 246; Pursell *v.* Pappenheimer, 11 Ind. 327.

Louisiana.— See Lassiter *v.* Bussy, 14 La. Ann. 699.

Massachusetts.— Knight *v.* Bowley, 117 Mass. 551; Hopkins *v.* Ray, 1 Metc. 79.

Ohio.— Secor *v.* Witter, 39 Ohio St. 218, holding that such paper is the subject of garnishment in the hands of defendant, and as against him and those claiming through him, with actual notice of the attachment, the right of plaintiff is paramount, but such right is liable to be defeated by one who, before due, without such notice, becomes the *bona fide* holder.

Pennsylvania.— Day *v.* Zimmerman, 68 Pa. St. 72, 8 Am. Rep. 157; Hill *v.* Kroft, 29 Pa. St. 186 (an attachment is worthless as against a holder to whom the note was negotiated before its maturity without actual notice of the attachment, even where the attachment preceded the indorsement); Kieffer

paper may be reached by garnishment proceedings after its maturity, provided the principal defendant is then the owner thereof.[37]

3. Rents to Accrue. Rent which has not yet accrued cannot be reached in garnishment proceedings prior to the date on which it becomes actually due and payable.[38]

4. Wages or Salary to Become Due. Under statutes permitting garnishment of salary or wages of employees,[39] the rule is well recognized that wages or salary not earned or due at the time of the service of process cannot be reached.[40] Thus the wages of a seaman cannot be reached by garnishment or trustee process before the voyage on which they are earned is terminated.[41]

5. Unliquidated Damages. Unliquidated damages for a breach of contract are not subject to garnishment or trustee process.[42]

L. Contingent Liabilities — 1. General Rule. A debt which is uncertain and contingent, and may never become due and payable, is not subject to garnishment; it is only indebtedness that is in its nature absolute and payable at some time without contingency, that can be reached by such process.[43] In some juris-

v. Ehler, 18 Pa. St. 388; Fulweiler *v.* Hughes, 17 Pa. St. 440 (a check, although not due and payable, may be attached under an attachment execution issued pursuant to the act of June 16, 1846). See Kistler *v.* Thompson, 3 Lack. Jur. 341.

See 24 Cent. Dig. tit. "Garnishment," § 79.

Compare Gatchell *v.* Foster, 94 Ala. 622, 10 So. 434.

37. Snider *v.* Ridgeway, 49 Ill. 522 (under the Married Woman's Act of 1861 a note payable to a married woman and actually belonging to her husband is after maturity liable to the judgment in garnishment brought by his judgment creditors, although the proceedings were commenced before maturity); Jefferson County Com'rs *v.* Fox, Morr. (Iowa) 48; Somers *v.* Losey, 48 Mich. 294, 12 N. W. 188.

38. *Illinois.*— Buxbaum *v.* Dunham, 51 Ill. App. 240.

Massachusetts.— Wood *v.* Partridge, 11 Mass. 488.

Michigan.— Thorp *v.* Preston, 42 Mich. 511, 4 N. W. 227.

Rhode Island.— Ordway *v.* Remington, 12 R. I. 319, 34 Am. Rep. 646.

Vermont.— See Rowell *v.* Felker, 54 Vt. 526, holding that a tenant absolutely not contingently liable for future rent may be held as a trustee.

Virginia.— Haffey *v.* Miller, 6 Gratt. 454.

See 24 Cent. Dig. tit. "Garnishment," § 80.

39. See *supra*, V, F, 2.

40. *Connecticut.*— Coburn *v.* Hartford, 38 Conn. 290.

Iowa.— Thomas *v.* Gibbons, 61 Iowa 50, 15 N. W. 593.

Massachusetts.— Hadley *v.* Peabody, 13 Gray 200; Robinson *v.* Hall, 3 Metc. 301.

Missouri.— Reinhart *v.* Empire Soap Co., 33 Mo. App. 24.

Pennsylvania.— Excelsior Brick, etc., Co. *v.* Haines, 5 Pa. Co. Ct. 631.

Wisconsin.— Foster *v.* Singer, 69 Wis. 392, 34 N. W. 395, 2 Am. St. Rep. 745.

See 24 Cent. Dig. tit. "Garnishment," § 81.

Compare Ely *v.* Blacker, 112 Ala. 311, 20 So. 570, holding, however, that the moment the salary or any part of it has been earned and thus accrued it becomes liable to the writ, although it is not yet due and payable, and continues subject thereto, notwithstanding that it is all paid before any part of it becomes due.

41. Taber *v.* Nye, 12 Pick. (Mass.) 105; Wentworth *v.* Whittemore, 1 Mass. 471. See also White *v.* Dunn, 134 Mass. 271. *Compare* Telles *v.* Lynde, 47 Fed. 912, holding, however, that, where the wages of a fisherman are to be paid "within" thirty days after the arrival of the vessel in port, they are not exempt from garnishment after the arrival and before the expiration of that time.

42. *Illinois.*— Capes *v.* Burgess, 135 Ill. 61, 25 N. E. 1000 [*affirming* 32 Ill. App. 372].

Louisiana.— Peet *v.* McDaniel, 27 La. Ann. 455.

Minnesota.—Durling *v.* Peck, 41 Minn. 317, 43 N. W. 65. See, however, Trunkey *v.* Crosby, 33 Minn. 464, 23 N. W. 846, holding that where a garnishee has a lien on defendant's property in his hands, the fact that the amount of it is unliquidated will not defeat the garnishment.

Missouri.— Ransom *v.* Hays, 39 Mo. 445.

New Hampshire.— Eastman *v.* Thayer, 60 N. H. 575; Gove *v.* Varrell, 58 N. H. 78; Rand *v.* White Mountains R. Co., 40 N. H. 79; Getchell *v.* Chase, 37 N. H. 106; Foster *v.* Dudley, 30 N. H. 463.

North Carolina.— Hugg *v.* Booth, 24 N. C. 282.

Texas.— Waples-Platter Grocer Co. *v.* Texas, etc., R. Co., 95 Tex. 486, 68 S. W. 265.

Vermont.—See Crampton *v.* McBain, 71 Vt. 242, 42 Atl. 611.

Contra.— New Haven Steam Saw-Mill Co. *v.* Fowler, 28 Conn. 103, holding that a person having a claim against another for unliquidated damages accruing out of the breach of a contract is to be regarded as a creditor, and the other party as a debtor, within the intent of the Connecticut statute.

See 24 Cent. Dig. tit. "Garnishment," § 82.

43. *Connecticut.*— Smith *v.* Gilbert, 71 Conn. 149, 41 Atl. 284, 71 Am. St. Rep. 163; Curtis *v.* Alvord, 45 Conn. 569.

dictions, however, it is held that to prevent a party being liable as garnishee or trustee, the contingency must be such as to affect the debt itself which is claimed to be due, and not simply the liability of the garnishee or trustee to have the effects or credits called out of his hands in a particular manner.[44]

2. Bills or Notes.[45] Applying the above rule, where a bill or note is not made payable absolutely, but upon conditions or on a contingency, it cannot be reached by garnishment or trustee process prior to the fulfilment of the condition or the happening of the contingency.[46] Likewise the rule is that an unaccepted

Illinois.— Goodman *v.* Boyd, 44 Ill. App. 249; Hanover F. Ins. Co. *v.* Connor, 20 Ill. App. 297.

Iowa.— Williams *v.* Young, 46 Iowa 140; Leighton *v.* Hosmer, 39 Iowa 594; Caldwell *v.* Stewart, 30 Iowa 379.

Louisiana.— Maduel *v.* Mousseaux, 29 La. Ann. 228.

Maine.— Jordan *v.* Jordan, 75 Me. 100; Webber *v.* Doran, 70 Me. 140; Libby *v.* Brainard, 63 Me. 65; Bryant *v.* Erskine, 50 Me. 296; Cutter *v.* Perkins, 47 Me. 557 (holding, however, that the "contingency" which may prevent the principal from having any claim on the trustee, or right to call on him to account, is not one which, although the principal may require the trustee to account, may show, on settlement made, that there is nothing due); Williams *v.* Androscoggin, etc., R. Co., 36 Me. 201, 8 Am. Dec. 742; Wilson *v.* Wood, 34 Me. 123; Rundlet *v.* Jordan, 3 Me. 47. See also Dwinel *v.* Stone, 30 Me. 384; Lyford *v.* Holway, 27 Me. 296.

Massachusetts.— Carson *v.* Carson, 6 Allen 397; Rich *v.* Waters, 22 Pick. 563; Shearer *v.* Handy, 22 Pick. 417; Tucker *v.* Clisby, 12 Pick. 22; Faulkner *v.* Waters, 11 Pick. 473; Guild *v.* Holbrook, 11 Pick. 101; Wood *v.* Partridge, 11 Mass. 488; Willard *v.* Sheafe, 4 Mass. 235; Frothingham *v.* Haley, 3 Mass. 68.

Minnesota.—Wheeler *v.* Day, 23 Minn. 545; Gies *v.* Bechtner, 12 Minn. 279.

Missouri.— State *v.* McCullough, 85 Mo. App. 68; McCord, etc., Mercantile Co. *v.* Bettles, 58 Mo. App. 384. See also Stevenson *v.* McFarland, 162 Mo. 159, 62 S. W. 695.

Montana.— Cowell *v.* May, 26 Mont. 163, 66 Pac. 843.

New Hampshire.— Haven *v.* Wentworth, 2 N. H. 93.

Oregon.—See Barr *v.* Warner, 38 Oreg. 109, 62 Pac. 899.

Vermont.— Senna *v.* Kennedy, 68 Vt. 172, 34 Atl. 691.

Washington.— Eureka Sandstone Co. *v.* Pierce County, 8 Wash. 236, 35 Pac. 1081.

Wisconsin.— Grimsrud *v.* Linley, 109 Wis. 632, 85 N. W. 410; Evans *v.* Rector, 107 Wis. 286, 83 N. W. 292 [*citing* Marvin *v.* Hawley, 9 Mo. 382, 43 Am. Dec. 547; Oswego First Nat. Bank *v.* Dunn, 97 N. Y. 149, 49 Am. Rep. 517; Bulkley *v.* Eckert, 3 Pa. St. 368, 45 Am. Dec. 650; Bowden *v.* Schatzell, Bailey Eq. (S. C.) 360, 23 Am. Dec. 170; Gore *v.* Brucker, 94 Wis. 65, 68 N. W. 396; Blum *v.* Van Vechten, 92 Wis. 378, 66 N. W. 507; Vollmer *v.* Chicago, etc., R. Co., 86 Wis. 305, 56 N. W. 919; Spitz *v.* Tripp, 86 Wis. 25, 56 N. W. 330; Edwards *v.* Roepke, 74 Wis. 571, 43 N. W. 554; Case Threshing Mach. Co. *v.* Miracle, 54 Wis. 295, 11 N. W. 580].

United States.— Dent *v.* Radmann, 1 Fed. 882. See also Younkin *v.* Collier, 47 Fed. 571.

See 24 Cent. Dig. tit. "Garnishment," § 83.

A grantor's interest in the sale of land, the consideration of which was that the grantee should cultivate the same, and deliver certain portions of the crops to the grantor for a fixed period, it was held in Nevada, is, as to the crops to be thereafter raised, uncertain and contingent, and not susceptible of garnishment. Reinhart *v.* Hardesty, 17 Nev. 141, 30 Pac. 694.

44. Stone *v.* Hodges, 14 Pick. (Mass.) 81; Guild *v.* Holbrook, 11 Pick. (Mass.) 101; Hills *v.* Eliot, 12 Mass. 26, 7 Am. Dec. 26; Downer *v.* Curtis, 25 Vt. 650; Downer *v.* Topliff, 19 Vt. 399 (a debt which is certain as to liability, and uncertain only as to amount, is not contingent, within the meaning of the statute, but may be taken by trustee process); Webster Wagon Co. *v.* Home Ins. Co., 27 W. Va. 314 (a debt not really contingent but only apparently can be garnished). See also Thorndike *v.* De Wolf, 6 Pick. (Mass.) 120; Ferry *v.* Home Sav. Bank, 114 Mich. 321, 72 N. W. 181, 68 Am. St. Rep. 487.

Annuity.— It has been held in Kentucky that a fixed sum payable to the debtor annually for life is subject to garnishment, although the aggregate amount which will be payable is uncertain and contingent. Keiser *v.* Shaw, 104 Ky. 119, 46 S. W. 524, 20 Ky. L. Rep. 568, 84 Am. St. Rep. 450.

45. See *supra*, V, J, 2; V, K, 2.

46. Greenway *v.* Wilmarth, 12 Metc. (Mass.) 12; Morse *v.* Colley, 17 N. H. 490; Bell *v.* Jones, 17 N. H. 307; Cleveland *v.* Williams, 1 Tex. App. Civ. Cas. § 443; Keyes *v.* Rines, 37 Vt. 260, 86 Am. Dec. 707; Burke *v.* Whitcomb, 13 Vt. 421. See, however, Fay *v.* Smith, 25 Vt. 610.

Indorsement of note.— As to the liability of a party to be held in trustee process by reason of the indorsement of a note of the principal defendant see Larrabee *v.* Walker, 71 Me. 441. See also Commercial Bank *v.* Neally, 39 Me. 402, holding that one for whom the principal defendant in a trustee process has become surety on a note cannot be held as trustee of such defendant, if nothing has been paid on account of the suretyship, even though the estate of the surety has been attached in a suit upon the note.

draft or order drawn on a debtor does not create any liability which is subject to garnishment.[47]

3. INCOMPLETE CONTRACT. Since a debt to be garnishable must be due absolutely and beyond contingency at the time the garnishment or trustee process is served,[48] where, under the terms of the contract, the debt is not to become due and payable until the completion thereof, it cannot be reached by garnishment or trustee process until the terms of the contract are fulfilled and the indebtedness actually due and payable.[49]

M. Judgments. In a majority of jurisdictions a debt evidenced by a final judgment may be reached by garnishment or trustee process by a judgment creditor of plaintiff in the first action.[50] In some jurisdictions, by construction

47. Tabor *v.* Van Vranken, 39 Mich. 793; Franklin *v.* State Bank, 12 Mo. 589; Janney *v.* State Bank, 12 Mo. 583. *Compare* Brazier *v.* Chappell, 2 Brev. (S. C). 107. See, however, Storm *v.* Cotzhausen, 38 Wis. 139.

48. See *supra*, III, A; V, L, 1, 2.

49. *Connecticut.*— Sand Blast File Sharpening Co. *v.* Parsons, 54 Conn. 310, 7 Atl. 716. *Compare* Goodman *v.* Meriden Britannia Co., 50 Conn. 139.

Iowa.— Streeter *v.* Gleason, 120 Iowa 703, 95 N. W. 242.

Kansas.— Rock Island Lumber, etc., Co. *v.* Equitable Trust, etc., Co., 54 Kan. 124, 37 Pac. 983.

Massachusetts.— Fellows *v.* Smith, 131 Mass. 363; Potter *v.* Cain, 117 Mass. 238; Wood *v.* Buxton, 108 Mass. 102 (where the contract provided that the work to be done under it should not be paid for until it was returned and accepted by the employer, and it was held that the latter could not be held as trustee for the workman, although the work was completed at the time of the service of the process, if it had not been returned and accepted); Daily *v.* Jordan, 2 Cush. 390; Williams *v.* Marston, 3 Pick. 65. See Fitzsimmons *v.* Carroll, 128 Mass. 401, where under the facts of the case it was held to be no error to charge the trustee.

Mississippi.— Russell *v.* Clingan, 33 Miss. 535.

Montana.—Cowell *v.* May, 26 Mont. 163, 66 Pac. 843.

New Hampshire.— Carter *v.* Webster, etc., Paper Co., 65 N. H. 17, 17 Atl. 978.

Ohio.— Whitney *v.* Ott, 7 Ohio Dec. (Reprint) 231, 1 Cinc. L. Bul. 353.

Pennsylvania.— American Forcite Powder Mfg. Co. *v.* Malone, 166 Pa. St. 289, 31 Atl. 90; Excelsior Brick, etc., Co. *v.* Haines, 19 Phila. 470.

Texas.— Eikel *v.* Frelich, 1 Tex. App. Civ. Cas. § 1117.

West Virginia.— Strauss *v.* Chesapeake, etc., R. Co., 7 W. Va. 368.

Wisconsin.— Mundt *v.* Shabow, 120 Wis. 303, 97 N. W. 897; Becker *v.* Becker, 112 Wis. 24, 87 N. W. 830; Vollmer *v.* Chicago, etc., R. Co., 86 Wis. 305, 56 N. W. 919; Edwards *v.* Roepke, 74 Wis. 571, 43 N. W. 554.

United States.— See The Pioneer, 19 Fed. Cas. No. 11,176, Deady 58.

See 24 Cent. Dig. tit. "Garnishment," § 88.

Compare Ware *v.* Gowen, 65 Me. 534, holding that when labor contracted for is performed, and there remains only to fix its amount and value, the fact that by the contract the payment is to be made on an estimate and certificate of a third person does not constitute a contingency, within the meaning of Me. Rev. St. c. 86, § 65, providing that no trustee shall be charged "by reason of any money or other thing due from him to the principal defendant, unless at the time of the service of the writ upon him, it is due absolutely and not on any contingency."

In Michigan garnishment process cannot reach sums that will not become due until the performance of the contract at some future time; and claims for the payment of such moneys are not "contingent" within the reason of Mich. Act (1879), 256, permitting contingent claims to be garnished. Kiely *v.* Bertrand, 67 Mich. 332, 34 N. W. 674; Webber *v.* Bolte, 51 Mich. 113, 16 N. W. 257; Hopson *v.* Dinan, 48 Mich. 612, 12 N. W. 875.

Advances already due to defendant under a contract for the erection of buildings may be attached by a judgment creditor of defendant, in the hands of the vendor of the land, although the buildings have not been completed. Kelly *v.* Snyder, 5 Wkly. Notes Cas. (Pa.) 39.

50. *Alabama.*— Skipper *v.* Foster, 29 Ala. 330, 65 Am. Dec. 405.

Connecticut.— Gager *v.* Watson, 11 Conn. 168.

Delaware.— Webster *v.* McDaniel, 2 Del. Ch. 297.

Illinois.— Lutton *v.* Hoehn, 72 Ill. 81; Minard *v.* Lawler, 26 Ill. 301.

Indiana.— Halbert *v.* Stinson, 6 Blackf. 398.

Iowa.— Ochiltree *v.* Missouri, etc., R. Co., 49 Iowa 150; Phillips *v.* Germon, 43 Iowa 101 (holding this to be the case even where the judgment has been appealed from, provided no supersedeas bond has been filed); Osborn *v.* Cloud, 23 Iowa 104, 92 Am. Dec. 413. See also Allison *v.* Chicago, etc., R. Co., 76 Iowa 209, 40 N. W. 813. *Compare* Howe *v.* Jones, 57 Iowa 130, 8 N. W. 451, 10 N. W. 299.

Mississippi.— O'Brien *v.* Liddell, 10 Sm. & M. 371; Gray *v.* Henby, 1 Sm. & M. 598.

New Hampshire.— Isabelle *v.* La Blanc, 68 N. H. 406, 39 Atl. 436, holding that a judg-

of statute, it is held that a debtor cannot be chargeable in garnishment or trustee proceedings for a debt due on a judgment rendered before the service of the process upon him, and on which he is liable to an execution.[51] The better rule seems to be that a judgment debtor cannot be summoned in another jurisdiction as the garnishee of his judgment creditor.[52] Yet in several jurisdictions the rule has been held to be otherwise.[53]

N. Ownership or Possession of Property or Right — 1. In General. The question whether a person is liable in garnishment proceedings for property in his possession hinges upon the determination of the question of the actual ownership of such property, and where it is ascertained that the principal defendant is the actual owner thereof, the garnishee may be charged, even where the property seemingly belongs to and is claimed by a third person, or by the garnishee himself.[54]

2. Possession of Garnishee. The general rule is that a party in order to be

ment debt may be the subject of trustee process where it is possible to protect the trustee from double liability.

Pennsylvania.— Woodward *v.* Carson, 86 Pa. St. 176; Winternitz's Appeal, 40 Pa. St. 490; Monongahela Nav. Co. *v.* Ledlie, 3 Pa. L. J. 179; Pike County *v.* Quick, 1 C. Pl. 29; Baur *v.* Williams, 5 Leg. Gaz. 197, 30 Leg. Int. 241; Crabb *v.* Jones, 2 Miles 130.

Tennessee.—Penniman *v.* Smith, 5 Lea 130; Hoard *v.* Casey, 4 Sneed 178; Clodfelter *v.* Cox, 1 Sneed 330, 60 Am. Dec. 157.

Texas.—Waples-Platter Grocer Co. *v.* Texas, etc., R. Co., 95 Tex. 486, 68 S. W. 265 (holding, however, that a judgment for unliquidated damages is not subject to garnishment pending an appeal from such judgment); Raley *v.* Hancock, (Civ. App. 1903) 77 S. W. 658 (holding that where a judgment as affirmed by the court of civil appeals was a fixed demand in the nature of an indebtedness, it is sufficient to form a basis for a writ of garnishment, although the time within which a petition for rehearing in the court of civil appeals might have been filed had not expired when the writ was issued).

Wisconsin.— See St. Joseph Mfg. Co. *v.* Miller, 69 Wis. 389, 34 N. W. 235.

See 24 Cent. Dig. tit. "Garnishment," § 90.

Garnishment by creditor of nominal plaintiff.— After a judgment is obtained in the name of one person for the use of another, a judgment debtor cannot be garnished by creditors of the nominal plaintiff. Hodson *v.* McConnel, 12 Ill. 170; Hutmacher *v.* Anheuser-Busch Brewing Assoc., 71 Ill. App. 154; Beaver Valley Bank *v.* Cousins, 67 Iowa 310, 25 N. W. 258.

Jurisdiction of justice's court see Justices of the Peace.

51. *Arkansas.*— Tunstall *v.* Means, 5 Ark. 700; Trowbridge *v.* Means, 5 Ark. 135, 39 Am. Dec. 368.

Massachusetts.— Sabin *v.* Cooper, 15 Gray 532; Prescott *v.* Parker, 4 Mass. 170; Howell *v.* Freeman, 3 Mass. 121; Sharp *v.* Clark, 2 Mass. 91.

Montana.— Perkins *v.* Guy, 2 Mont. 15.

New Jersey.— Shinn *v.* Zimmerman, 23 N. J. L. 150, 55 Am. Dec. 260.

Oregon.— Despain *v.* Crow, 14 Oreg. 404, 12 Pac. 806; Norton *v.* Winter, 1 Oreg. 47, 12 Am. Dec. 297.

United States.— Franklin *v.* Ward, 9 Fed. Cas. No. 5,055, 3 Mason 136; Ashley *v.* Maddox, 30 Fed. Cas. No. 18,227, Hempst. 217.

See 24 Cent. Dig. tit. "Garnishment," § 90.

Verdict.— In several jurisdictions it is held that after verdict rendered in an action by a creditor against a debtor for the debt, the debtor cannot be held as trustee in attachment proceedings against the creditor by a third person. Holt *v.* Kirby, 39 Me. 164; Wilde *v.* Mahaney, 183 Mass. 455, 67 N. E. 337, 62 L. R. A. 813; Kidd *v.* Shepherd, 4 Mass. 238; Eunson *v.* Healy, 2 Mass. 32.

52. *Colorado.*— Hamill *v.* Peck, 11 Colo. App. 1, 52 Pac. 216.

Kansas.— Keith *v.* Harris, 9 Kan. 386.

Rhode Island.— American Bank *v.* Snow, 9 R. I. 11, 98 Am. Dec. 364.

South Carolina.— Burrill *v.* Letson, 2 Speers 378.

Tennessee.— Clodfelter *v.* Cox, 1 Sneed 330, 60 Am. Dec. 157.

Texas.— Haflin *v.* Nix, 3 Tex. App. Civ. Cas. § 203.

United States.— Wabash R. Co. *v.* Tourville, 179 U. S. 322, 21 S. Ct. 113, 45 L. ed. 210 [*affirming* 148 Mo. 614, 50 S. W. 300, 71 Am. St. Rep. 650]; Henry *v.* Gold Park Min. Co., 15 Fed. 649, 5 McCrary 70; Thomas *v.* Wooldridge, 23 Fed. Cas. No. 13,918, 2 Woods 667.

See 24 Cent. Dig. tit. "Garnishment," § 90.

53. Calhoun *v.* Whittle, 56 Ala. 138; Luton *v.* Hoehn, 72 Ill. 81; Knebelkamp *v.* Fogg, 55 Ill. App. 563; Jones *v.* St. Onge, 67 Wis. 520, 30 N. W. 927. See, however, Renier *v.* Hurlbut, 81 Wis. 24, 50 N. W. 783, 29 Am. St. Rep. 850, 14 L. R. A. 562.

54. *Alabama.*— Smith *v.* Taylor, 9 Ala. 633.

Florida.— Lathrop *v.* Snell, 6 Fla. 750.

Georgia.— Cox *v.* Reeves, 78 Ga. 543, 3 S. E. 620.

Illinois.— See Galena, etc., R. Co. *v.* Stahl, 103 Ill. 67.

Louisiana.— Cryer *v.* Drewry, 22 La. Ann. 384.

Maine.— Chase *v.* Bradley, 26 Me. 531;

charged as garnishee or trustee must have actual possession or control of the property or effects of defendant with which he is sought to be charged;[55] although it has been held that a party having the equitable right to the custody of the fund, but not the actual possession thereof, may be garnished in relation thereto for the debt of the equitable owner of the fund.[56]

3. Possession of Mortgagee. A mortgagee cannot be charged in garnishment proceedings for the value of property mortgaged above his lien thereon, where such property is not in his possession but is in the actual possession of the mortgagor.[57]

4. Possession For Particular Purpose. The better rule is that where a party

Emery *v.* Davis, 17 Me. 252, holding that if goods are sold on conditions precedent to be performed by the purchaser, and he receives the goods into his possession but fails to perform such conditions, he may be charged in trustee process as trustee of the owner of the goods.

Maryland.— Baltimore First Nat. Bank *v.* Jaggers, 31 Md. 38, 100 Am. Dec. 53.

Massachusetts.—Chick *v.* Agnew, 111 Mass. 266; Macomber *v.* Doane, 2 Allen 541; Wildes *v.* Nahant Bank, 20 Pick. 352; Howland *v.* Wilson, 9 Pick. 18; Wells *v.* Banister, 4 Mass. 514.

Missouri.—Lessing *v.* Vertrees, 32 Mo. 431 [*overruling* Lacompte *v.* Seargent, 7 Mo. 351; Thomas *v.* Relfe, 9 Mo. 377].

Nebraska.— See Pundt *v.* Clary, 13 Nebr. 406, 14 N. W. 167, holding that money in the hands of a city treasurer, paid for license to sell intoxicating liquors, cannot be garnished by an execution creditor of the licensee on the ground that the license was void, since the license cannot be collaterally attacked.

Pennsylvania.— Balliet *v.* Brown, 103 Pa. St. 546.

Tennessee.—Montidonico *v.* Page, 10 Heisk. 443; Hoard *v.* Casey, 4 Sneed 178.

Texas.— Miller *v.* State, (Civ. App. 1905) 84 S. W. 844.

Vermont.— Stevens *v.* Kirk, 37 Vt. 204.

Wisconsin.— Lehigh Coal, etc., Co. *v.* West Superior Iron, etc., Co., 91 Wis. 221, 64 N. W. 746; Huntley *v.* Stone, 4 Wis. 91.

See 24 Cent. Dig. tit. "Garnishment," § 91.

55. That is, the mere constructive possession or the *jus disponendi* of property of defendant is not sufficient to charge the garnishee.

Iowa.— Kiggins *v.* Woodke, 78 Iowa 34, 34 N. W. 789, 42 N. W. 576; Smalley *v.* Miller, 71 Iowa 90, 32 N. W. 187, holding that if a garnishee has only a right of possession, or constructive possession, he may possibly be required to make a demand for the property, but he cannot be required to commence an action to recover it; and an action to recover property on the sole ground that plaintiff has been garnished in a suit against the owner of it cannot be maintained.

Maine.— Lewis *v.* Ross, 37 Me. 230, 59 Am. Dec. 49; Foster *v.* Libby, 24 Me. 448.

Massachusetts.— Nickerson *v.* Chase, 122 Mass. 296; Andrews *v.* Ludlow, 5 Pick. 28; Grant *v.* Shaw, 16 Mass. 341, 8 Am. Dec. 142.

Pennsylvania.— See Lieberman *v.* Hoffman, 102 Pa. St. 590, holding that money which has passed from the hands of a garnishee before service of the writ cannot be reached thereby, no fraud being shown.

Rhode Island.— Clarke *v.* Farnum, 7 R. I. 174.

See 24 Cent. Dig. tit. "Garnishment," § 92.

In Vermont one cannot be charged as trustee on the ground of having mere security for money in his hands belonging to the principal debtor. Van Arnee *v.* Jackson, 35 Vt. 173; Scofield *v.* White, 29 Vt. 330; Hitchcock *v.* Egerton, 8 Vt. 202.

56. Des Moines County *v.* Hinckley, 62 Iowa 637, 17 N. W. 915; Peabody *v.* Maguire, 79 Me. 572, 12 Atl. 630; Lane *v.* Nowell, 15 Me. 86; Glenn *v.* Boston, etc., Glass Co., 7 Md. 287.

Where money is deposited by the judgment debtor with an agent to be paid to certain designated creditors, and such money is garnished in the hands of the agent prior to the payment to the parties designated, in the absence of evidence that the deposit was made by defendant with the knowledge of such parties, or of any agreements between them and the agent, either before or after the deposit was made, the money so deposited is the property of defendant, subject to garnishment at the suit of plaintiff. Blumenthal *v.* Silverman, 113 Ga. 132, 38 S. E. 344; Nicholson *v.* Crook, 56 Md. 55; Glenn *v.* Boston, etc., Glass Co., 7 Md. 387; Strayhorn *v.* Webb, 47 N. C. 199, 64 Am. Dec. 580. See Hungerford *v.* Greengard, 95 Mo. App. 653, 69 S. W. 602, holding that funds in the hands of a trustee for the benefit of certain preferred creditors can be reached by garnishment where the deed under which the trustee claims is fraudulent as to creditors not embraced within its terms.

57. Letts *v.* McMaster, 83 Iowa 449, 49 N. W. 1035; Fountain *v.* Smith, 70 Iowa 282, 30 N. W. 635; Curtis *v.* Raymond, 29 Iowa 52 (a mortgagee of personal property who has never had actual possession is not bound after garnishment by a creditor of the mortgagor to take possession of the property for the benefit of such creditor); Emmons *v.* Bradley, 56 Me. 333 (holding likewise that the presentment of a claim under a chattel mortgage on the part of the mortgagees to an attaching officer cannot be considered as equivalent to the actual taking possession by the mortgagees, so as to make them chargeable as trustees of the mortgaged goods, unless they thereupon go into actual uncontrolled possession); Callender *v.* Furbish, 46 Me. 226; Stedman *v.* Vickery, 42 Me. 132; Reggio *v.* Day, 37 Me. 314; Mace *v.* Heald, 36

holds funds or property of the principal debtor for a particular purpose, such as indemnity for suretyship, or for the payment of a designated class of creditors with the knowledge and consent of such creditors, he cannot be held as garnishee in respect to such funds until the claims specified are paid.[58]

5. Possession Wrongfully Obtained or Held. It is not necessary that there should be any privity of contract between the garnishee and defendant, and where a party wrongfully obtains possession of or withholds funds or property of defendant, he may be charged in garnishment proceedings.[59] It has been held, however, that one who obtains the possession of funds or property of a debtor by trespass is not subject to garnishment or trustee proceedings at the instance of a creditor of such defendant.[60]

6. Conveyance or Assignment Before Garnishment — a. In General. Where the principal defendant has made a valid assignment of the garnishee's indebtedness, or conveyance of the property in his possession belonging to such defendant, before the service of the summons upon the garnishee, the latter cannot be charged on account of such debt or property.[61]

Me. 136; Wood *v.* Estes, 35 Me. 145; Pierce *v.* Henries, 35 Me. 57; Central Bank *v.* Prentice, 18 Pick. (Mass.) 396; Badlam *v.* Tucker, 1 Pick. (Mass.) 389, 11 Am. Dec. 202; Lyon *v.* Ballantine, 63 Mich. 97, 29 N. W. 837, 6 Am. St. Rep. 284. See also Mississippi Valley, etc., R. Co. *v.* U. S. Express Co., 81 Ill. 534. See *supra*, V, D.

58. *Connecticut.*— Grosvenor *v.* Farmers', etc., Bank, 13 Conn. 104, holding that a negotiable note indorsed in blank by the payee and delivered to a creditor as security is not subject to foreign attachment against the payee before it is paid or made payable.

Georgia.— Prescott *v.* King, 52 Ga. 50.

Iowa.— Dryden *v.* Adams, 29 Iowa 195. See also Commercial Exch. Bank *v.* McLeod, 65 Iowa 665, 19 N. W. 329, 22 N. W. 919, 54 Am. Rep. 36.

Louisiana.— Dolsen *v.* Brown, 13 La. Ann. 551. See Burke *v.* Taylor, 15 La. 536, holding that a promise by garnishees to pay defendant's bills could give them no right on his funds coming into their hands, and before actual payment, so as to prevent garnishment of the balance in their hands.

Massachusetts.— See Maine F. & M. Ins. Co. *v.* Weekes, 7 Mass. 438. *Compare* Watkins *v.* Otis, 2 Pick. 88.

Missouri.— Whitside *v.* Longacre, 88 Mo. App. 168.

New Hampshire.— Brimblecom *v.* O'Brien, 69 N. H. 370, 46 Atl. 187; Haven *v.* Wentworth, 2 N. H. 93. See Chesley *v.* Coombs, 58 N. H. 142, holding that when money is placed in the hands of one of two sureties as security for both, the bailee and he alone may be chargeable as trustee of the principal upon their release from liability as sureties.

Pennsylvania.— Baltimore, etc., R. Co. *v.* Kensington Land Co., 175 Pa. St. 95, 34 Atl. 345. See also Landsdale First Nat. Bank *v.* Beaver, 3 Lack. Jur. 403.

Texas.— See Richardson *v.* Anderson, (App. 1892) 18 S. W. 195.

United States.— See Plattsburgh First Nat. Bank *v.* Brainerd, 28 Fed. 917, where, while recognizing the above rule, it was held that the facts did not bring the case within the rule.

See 24 Cent. Dig. tit. "Garnishment," § 94.

59. *Iowa.*— Citizens' State Bank *v.* Council Bluffs Fuel Co., 89 Iowa 618, 57 N. W. 444; Long *v.* Emsley, 57 Iowa 11, 10 N. W. 280.

Maine.— See Foster *v.* Libby, 24 Me. 448, holding that if money comes into the hands of a person wrongfully, as the consideration of real estate supposed to be conveyed by him to another where no title passes, he cannot for that cause be chargeable as the trustee of one who had deeded the same estate to him without consideration and without passing title.

Massachusetts.— Allen *v.* Hall, 46 Mass. 263.

Michigan.— Connor *v.* Detroit Third Nat. Bank, 90 Mich. 328, 51 N. W. 523.

Minnesota.— De Graff *v.* Thompson, 24 Minn. 452.

Missouri.— Johnson *v.* Mason, 16 Mo. App. 271.

New Hampshire.— Little *v.* New Hampshire Press Assoc., 71 N. H. 426, 52 Atl. 851, holding that, where a principal to avoid attachment against an association of which he was treasurer transferred the funds of his individual account, he was estopped from denying his liability therefor as against trustee process.

Vermont.— Jackson *v.* Walton, 28 Vt. 43.

See 24 Cent. Dig. tit. "Garnishment," § 95.

60. Packets Despatch Line *v.* Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203; Lovejoy *v.* Lee, 35 Vt. 430 (holding, however, that the garnishee cannot urge the defense that he is a trespasser, where defendant has acquiesced); Wooding *v.* Puget Sound Nat. Bank, 11 Wash. 527, 40 Pac. 223.

61. *Alabama.*— Harrison *v.* Louisville, etc., R. Co., 120 Ala. 42, 23 So. 790; Jones *v.* Lowery Banking Co., 104 Ala. 252, 16 So. 11.

California.— Handley *v.* Pfister, 39 Cal. 283, 2 Am. Rep. 449; Walling *v.* Miller, 15 Cal. 38.

Georgia.— Daniels *v.* Meinhard, 53 Ga. 359.

Illinois.— Cairo, etc., R. Co. *v.* Killenberg, 82 Ill. 295; Carr *v.* Waugh, 28 Ill. 418; Hodson *v.* McConnel, 12 Ill. 170; Commercial

b. Bills and Notes. The above rule is especially applicable to bills of exchange, promissory notes, and other evidences of indebtedness, and where such paper is assigned or transferred in good faith before the drawer, maker, or indorser thereof is served in garnishment proceedings by a creditor of the payee, or of the last holder thereof, the rights of the assignee or transferee are not affected by such proceedings.[62]

Nat. Bank *v.* Kirkwood, 68 Ill. App. 116; Horn *v.* Booth, 22 Ill. App. 385.

Iowa.— Kerr *v.* Kennedy, 119 Iowa 239, 93 N. W. 353; McGuire *v.* Pitts, 42 Iowa 535.

Kansas.— Ives *v.* Addison, 39 Kan. 172, 17 Pac. 797.

Maine.— Harlow *v.* Bartlett, 96 Me. 294, 52 Atl. 638, 90 Am. St. Rep. 346; Boston Nat. Exch. Bank *v.* McLoon, 73 Me. 498, 40 Am. Rep. 388; Littlefield *v.* Smith, 17 Me. 327.

Massachusetts.— Allen *v.* Mayers, 184 Mass. 486, 69 N. E. 220; Com. *v.* Scituate Sav. Bank, 137 Mass. 301; Dix *v.* Cobb, 4 Mass. 508; Wakefield *v.* Martin, 3 Mass. 558; Warren *v.* Copelin, 4 Metc. 594. See also Grocers' Bank *v.* Simmons, 12 Gray 440.

Michigan.— Merchants' Nat. Bank *v.* Barrett, 122 Mich. 650, 81 N. W. 579; Blumenthal *v.* Simons, 110 Mich. 42, 67 N. W. 1102; Smith *v.* Holland, 81 Mich. 471, 45 N. W. 1017; Thomas *v.* Sprague, 12 Mich. 120. See also Seitz *v.* Starks, (1904) 98 N. W. 852.

Minnesota.— McMahon *v.* Merrick, 33 Minn. 262, 22 N. W. 543; Lewis *v.* Bush, 30 Minn. 244, 15 N. W. 113; Williams *v.* Pomeroy, 27 Minn. 85, 6 N. W. 445; MacDonald *v.* Kneeland, 5 Minn. 352; Banning *v.* Sibly, 3 Minn. 389.

Mississippi.— Schoolfield *v.* Hirsh, 71 Miss. 55, 14 So. 528, 42 Am. St. Rep. 450; Swisher *v.* Fitch, 1 Sm. & M. 541.

Missouri.— Calumet Paper Co. *v.* Haskell Show Printing Co., 144 Mo. 331, 45 S. W. 1115, 66 Am. St. Rep. 425; Whiteside *v.* Longacre, 88 Mo. App. 168.

Montana.— See Wilson *v.* Harris, 21 Mont. 374, 54 Pac. 46 [*reversing* 19 Mont. 69, 46 Pac. 1101], upholding the above rule, even where the transfer was made under a conveyance fraudulent as to creditors.

Nebraska.— Coleman *v.* Scott, 27 Nebr. 77, 42 N. W. 896.

New Hampshire.— Glauber Brass Mfg. Co. *v.* Voter, 71 N. H. 68, 51 Atl. 270; Wallace *v.* Glasgow Inv. Co., 68 N. H. 188, 44 Atl. 175; Langley *v.* Berry, 14 N. H. 82, holding, however, that an order for an assignment of a chose in action, to be valid as against foreign attachment by creditors of the consignor, must be *bona fide*, and on a sufficient consideration. See also Brimblecom *v.* O'Brien, 69 N. H. 370, 46 Atl. 187.

New Jersey.— Board of Education *v.* Duparquet, 50 N. J. Eq. 234, 24 Atl. 922.

New York.— Williams *v.* Ingersoll, 89 N. Y. 508; Greentree *v.* Rosenstock, 61 N. Y. 583.

Pennsylvania.— Lex's Appeal, 97 Pa. St. 289; Noble *v.* Thompson Oil Co., 79 Pa. St. 354, 21 Am. Rep. 66; U. S. *v.* Vaughan, 3 Binn. 394, 5 Am. Dec. 375; Landey *v.* Hefley, 11 Wkly. Notes Cas. 238. See also Speise *v.* McCoy, 6 Watts & S. 485, 40 Am. Dec. 579.

Rhode Island.— Westminster Bank *v.* Atherton, 24 R. I. 324, 53 Atl. 58; Chase *v.* Duby, 20 R. I. 463, 40 Atl. 100; Abbott *v.* Davidson, 18 R. I. 91, 25 Atl. 839.

South Carolina.— Brown *v.* Minis, 1 McCord 80.

Tennessee.— Montidonico *v.* Page, 10 Heisk. 443; Cottrell *v.* Cloud, (Ch. 1896) 42 S. W. 67.

Texas.— New York L. Ins. Co. *v.* Patterson, (Civ. App. 1904) 80 S. W. 1058; Smith *v.* Texas, etc., R. Co., (Civ. App. 1897) 39 S. W. 969.

Vermont.— Boutwell *v.* McClure, 33 Vt. 127.

Virginia.— Mack Mfg. Co. *v.* Smoot, 102 Va. 724, 47 S. E. 859.

Wisconsin.— Gilbert Paper Co. *v.* Whiting Paper Co., (1905) 102 N. W. 20; Beck *v.* Cole, 16 Wis. 95; Mowry *v.* Crocker, 6 Wis. 326.

See 24 Cent. Dig. tit. "Garnishment," § 97.

The assignee of a contract to deliver goods cannot be charged on trustee process. Andrews *v.* Ludlow, 5 Pick. (Mass.) 28.

An assignment of future wages does not include, so as to defeat trustee process, wages earned under a contract not then existing, but made subsequent to the assignment. Herbert *v.* Bronson, 125 Mass. 475.

62. *Alabama.*— Connoley *v.* Cheesborough, 21 Ala. 166.

Georgia.— Howard *v.* Porter, 99 Ga. 649, 27 S. E. 725.

Illinois.— Cairo, etc., R. Co. *v.* Killenberg, 82 Ill. 295; Warne *v.* Kendall, 78 Ill. 598.

Iowa.— Clark *v.* Shrader, 41 Iowa 491; Fowler *v.* Doyle, 16 Iowa 534. See also Dyer *v.* McHenry, 13 Iowa 527.

Louisiana.— Kimball *v.* Plant, 14 La. 511; Sheets *v.* Culver, 14 La. 449, 33 Am. Dec. 593; Gibson *v.* Huie, 14 La. 129; Miller *v.* Streeder, 18 La. Ann. 56; Reynolds *v.* Horn, 4 La. Ann. 187; Erwin *v.* Commercial, etc., Bank, 3 La. Ann. 186, 48 Am. Dec. 447.

Maine.— Hardy *v.* Colby, 42 Me. 381.

Massachusetts.— See Decoster *v.* Livermore, 4 Mass. 101, where the payee of a note proved his demand in bankruptcy proceedings against the maker on a dividend declared, and it was held that the assignee of the bankrupt was liable to trustee process as trustee of the payee, although the note afterward appeared to have been negotiated to a third person.

Missouri.— Davis *v.* Carson, 69 Mo. 609; Walden *v.* Valiant, 15 Mo. 409.

Nebraska.— Edney *v.* Willis, 23 Nebr. 56, 36 N. W. 300.

New Hampshire.— See Beckwith *v.* Baxter, 3 N. H. 67.

Ohio.— Finnell *v.* Burt, 2 Handy 202, 12 Ohio Dec. (Reprint) 403.

c. Sufficiency of Transfer or Assignment — (i) *In General.* In the absence of statutory provision prescribing the mode of assignment,[63] no particular mode or form is necessary to effect a valid assignment of property, claims, or debts so as to defeat garnishment proceedings by a creditor of the assignor.[64] If the intent of the parties to effect an assignment be clearly established, that is sufficient, and the assignment may be in the form of an agreement or order or any other instrument which the parties may see fit to use for that purpose.[65] In

Pennsylvania.— Jackson *v.* Lutz, 5 Pa. Super. Ct. 378.

Vermont.— Way *v.* Pierce, 51 Vt. 326; Perrin *v.* Russell, 33 Vt. 44; Hutchins *v.* Hawley, 9 Vt. 295. See, however, Safford Cotton, etc., Co. *v.* Hull, Brayt. 331, holding that the court will not protect the interest of an assignee of a note not negotiable against an attaching creditor in trustee process.

Virginia.— Howe *v.* Ould, 28 Gratt. 1.

Wisconsin.— See Gleason *v.* South Milwaukee Nat. Bank, 89 Wis. 534, 62 N. W. 519.

United States.— Tucker *v.* Marsteller, 24 Fed. Cas. No. 14,222, 1 Cranch C. C. 254.

See 24 Cent. Dig. tit. "Garnishment," § 98.

Assignment of portion of note.— It has been held in Vermont that a negotiable note with the condition that the maker is at his option to pay the principal while paying the interest annually is subject to trustee process, nor will the assignment of a portion of such note prevent an attachment of the remainder, but the trustee cannot be compelled to pay it before the time appointed in the contract. Fay *v.* Smith, 25 Vt. 610.

Non-negotiable note.— The maker of a note not negotiable cannot be held as garnishee of the payee if it be *bona fide* assigned to a third person and notice of transfer be given to the maker before the process is served. Newell *v.* Adams, 1 D. Chipm. (Vt.) 346, 12 Am. Dec. 690.

Voluntary or fraudulent transfer.— In Nebraska a negotiable note transferred before maturity, voluntarily or fraudulently, for the purpose of protecting the debt from the creditors of the payee, renders the maker subject to garnishment while the note remains in the hands of the indorsee. Clough *v.* Buck, 6 Nebr. 343.

63. Tex. Rev. St. (1894) arts. 46, 47, provides that a sale of a judgment, whether assignable at law and equity or not, shall be evidenced by a written transfer, which when duly acknowledged, filed, and noted by the clerk of the court, shall be full notice to all persons subsequently dealing with reference to said judgment. It has been held under this statute, however, that an equitable assignment of a judgment made prior to the service of garnishment on a judgment debtor, but not filed and noted on the minute book as required by the statute, is valid as against the garnishment. Smith *v.* Texas, etc., R. Co., (Civ. App. 1897) 39 S. W. 969.

64. See ASSIGNMENTS, 4 Cyc. 29 *et seq.*

65. Moore *v.* Lowrey, 25 Iowa 336, 95 Am. Dec. 790; Gray *v.* Trafton, 12 Mart. (La.) 702; Miller *v.* Hubbard, 17 Fed. Cas. No. 9,574, 4 Cranch C. C. 451.

The assignment was held to be sufficient to defeat garnishment proceedings subsequently instituted in the following cases:

Connecticut.— Harrop *v.* Landers, etc., Co., 45 Conn. 561; Hawley *v.* Bristol, 39 Conn. 26.

Iowa.— Weire *v.* Davenport, 11 Iowa 49, 77 Am. Dec. 132.

Maine.— Howe *v.* Howe, 97 Me. 422, 54 Atl. 908; Stinson *v.* Caswell, 71 Me. 510; Rogers *v.* Hogan, 58 Me. 305.

Massachusetts.— O'Connor *v.* Cavan, 126 Mass. 117; Schofield *v.* McConnell, 119 Mass. 368; Brackett *v.* Blake, 48 Mass. 335, 41 Am. Dec. 442. See Osborne *v.* Jordan, 3 Gray 277.

Missouri.— Edgell *v.* Tucker, 40 Mo. 523; Alexander *v.* Wade, 106 Mo. App. 141, 80 S. W. 19; State Nat. Bank *v.* Staley, 9 Mo. App. 146.

New Hampshire.— Smith *v.* Foster, 41 N. H. 215.

Wisconsin.— Southwestern Land Co. *v.* Ellis, 104 Wis. 445, 80 N. W. 749.

See 24 Cent. Dig. tit. "Garnishment," § 99.

The assignment was held to be invalid as against garnishment proceedings subsequently instituted by a creditor of the assignor in the following cases:

Alabama.— Sterritt *v.* Miles, 87 Ala. 472, 6 So. 356.

Georgia.— Greenwood *v.* Boyd, etc., Furniture Factory, 86 Ga. 582, 13 S. E. 128.

Louisiana.— Dunbar *v.* Dinkgrave, 10 La. Ann. 545.

Massachusetts.— Eagan *v.* Luby, 133 Mass. 543; White *v.* Coleman, 127 Mass. 34; Mansard *v.* Daley, 114 Mass. 408; Bullard *v.* Randall, 1 Gray 605, 61 Am. Dec. 433; Walker *v.* Russell, 17 Pick. 280.

Mississippi.— Hart *v.* Forbes, 60 Miss. 745.

Missouri.— Keithley *v.* Pitman, 40 Mo. App. 596; Nicholson *v.* Walker, 25 Mo. App. 368.

New Hampshire.— Wheeler *v.* Emerson, 44 N. H. 182.

Pennsylvania.— Burger *v.* Burger, 135 Pa. St. 499, 19 Atl. 1073; Childs *v.* Digby, 24 Pa. St. 23.

Rhode Island.— Card *v.* Ahearn, 18 R. I. 765, 30 Atl. 850.

Texas.— Hutcheson *v.* King, (Civ. App. 1904) 83 S. W. 215.

Vermont.— Burt *v.* Hurlburt, 16 Vt. 292.

See 24 Cent. Dig. tit. "Garnishment," § 99.

Ground of equitable assignment.— It has been held in Georgia that in order to defeat garnishment on the ground that the debtor had made an equitable assignment of the fund before garnishment was served, it must appear that an equity had arisen sufficient to support the assignment, and that the parties contemplated an immediate change of

the absence of statute to the contrary it is not necessary that the assignment should be in writing.[66]

(II) *Assignment of Future Wages.* In many jurisdictions it is provided by statute that the assignment of wages to be earned in the future under an existing contract of employment is valid as against a subsequent garnishment.[67] However, some of the statutes provide that an assignment of future wages or future earnings must be in writing, accepted by the employer, and recorded in the office designated by the statute, in order to defeat the garnishment thereof by a creditor of the assignor.[68]

(III) *Transfer by Order or Draft.* An order or draft drawn by the principal defendant on one indebted to him generally, and not on a particular fund, will not, before acceptance of the order or draft by the drawee, operate as an assignment of moneys due from the drawee to the drawer, so as to defeat the garnishment of such debt by a creditor of the principal defendant.[69]

ownership in regard to the fund garnished. Jones *v.* Glover, 93 Ga. 484, 21 S. E. 50.

Failure to transfer legal title.— The assignment of an account which does not transfer the legal title will not prevent garnishment of the account debtor by creditors of the assignor, but the assignee may interplead and assert his equities in the fund. Pitridge *v.* Slack, 67 Ill. App. 128.

66. Reeves *v.* People, 78 Ill. App. 407; Moore *v.* Lowrey, 25 Iowa 336, 95 Am. Dec. 790; Hutchins *v.* Watts, 35 Vt. 360; Noyes *v.* Brown, 33 Vt. 431; Wilt *v.* Huffman, 46 W. Va. 473, 33 S. E. 279.

Effect of statute of frauds see FRAUDS, STATUTE OF.

67. Warren *v.* Sullivan, 123 Mass. 283 (holding, however, that where defendant executed to a third person an assignment of wages due and to become due for a certain term from the garnishee as security for goods furnished and to be furnished by such third person from time to time during the term but to no specified amount, the excess due from the garnishee at any time over and above the amount then due from defendant to such third person may be held on trustee process in favor of a creditor of defendant); Hartey *v.* Tapley, 2 Gray (Mass.) 565 (holding that future wages to be earned under an existing contract are capable of being assigned so as to defeat trustee process, although the workman works by the piece and his wages per month vary); Kane *v.* Clough, 36 Mich. 436, 24 Am. Rep. 599 (holding this to be true even though the employment be piece-work).

68. Harlow *v.* Bartlett, 96 Me. 294, 52 Atl. 638, 90 Am. St. Rep. 346; Wright *v.* Smith, 74 Me. 495; Allen *v.* Mayers, 184 Mass. 486, 69 N. E. 220 (holding, however, that the contract in this case was substantially performed and hence the balance due at the time of the assignment was not "future earnings" within the Massachusetts statute requiring an assignment of such earnings to be recorded in order to be valid as against attachment by trustee process); O'Connor *v.* Cavan, 126 Mass. 117; Ouimet *v.* Sirois, 124 Mass. 162; Giles *v.* Ash, 123 Mass. 353; Murphy *v.* Murphy, 121 Mass. 167; Somers *v.* Keliher, 115 Mass. 165 (holding that money to become due for labor and materials furnished under contract is "future earnings" within the purview of the statute); Mansard *v.* Daley, 114 Mass. 408; Fuller *v.* Cunningham, 105 Mass. 442; Knowlton *v.* Cooley, 102 Mass. 233; Allen *v.* Pickett, 61 N. H. 641; Runnells *v.* Bosquet, etc., Co., 60 N. H. 38; Thompson *v.* Smith, 57 N. H. 306; Chase *v.* Duby, 20 R. I. 463, 40 Atl. 100. See also Chester *v.* McDonald, 185 Mass. 54, 69 N. E. 1075 (holding that the price to be paid under the contract was not "future earnings," an assignment of which is required to be recorded in order to be valid against attachment by trustee process); Kendall *v.* Kingsley, 120 Mass. 94 (holding that rents payable under a lease which requires no personal service on the part of the lessor are not "earnings" within the Massachusetts statute declaring an unrecorded assignment of future earnings invalid against a trustee process).

69. *Alabama.*— Sands *v.* Matthews, 27 Ala. 399.

Colorado.— Lewis *v.* San Miguel County, 14 Colo. 371, 23 Pac. 338; Chamberlin *v.* Gilman, 10 Colo. 94, 14 Pac. 107 (transaction held to constitute an equitable assignment so as to defeat garnishment proceedings by a creditor of the principal defendant); Denver, etc., R. Co. *v.* Smooton, 2 Colo. App. 126, 29 Pac. 815.

Illinois.— Ray *v.* Faulkner, 73 Ill. 469.

Massachusetts.— Lannan *v.* Smith, 7 Gray 150 (holding, however, that a written order given for a valuable consideration and addressed by a workman to his employer, requesting him to pay his wages for the ensuing three months as they become due to a third person is, upon its acceptance by the employer, a good assignment of the wages, as against a subsequent attachment by the trustee process); Taylor *v.* Lynch, 5 Gray 49; Weed *v.* Jewett, 2 Metc. 608, 37 Am. Dec. 115.

Missouri.— Rice *v.* Dudley, 34 Mo. App. 383.

Pennsylvania.— See Nesmith *v.* Drum, 8 Watts & S. 9, 42 Am. Dec. 260 (holding that a draft on a fund in the hands of an attorney for collection is an assignment of the amount of the draft, and although not accepted by the attorney, it is not afterward subject to

d. Notice to Garnishee of Assignment[70]—(i) *General Rule.* The rule is sometimes broadly stated that an assignment is not complete so as to defeat proceedings in garnishment until the garnishee is notified thereof;[71] however, this rule seems to be subject to limitations; thus as between assignor and assignee, it is not necessary to the validity of an assignment that the garnishee be notified thereof;[72] and the assignment will likewise be complete as against creditors of

attachment for the debts of the drawer); Kuhn *v.* Warren Sav. Bank, 7 Pa. Cas. 432, 11 Atl. 440 (holding that the giving of a check on a bank for money to a third person is not such transfer of the money as to prevent the bank from being held as garnishee of the depositor). See, however, Akers *v.* Jefferson County Sav. Bank, 120 Ga. 1066, 48 S. E. 424.

See 24 Cent. Dig. tit. "Garnishment," § 99.

If the drawee of a bill of exchange declines to pay on the ground that since the drawing of the bill the funds have been attached in his hands, and the payee fails or omits to have the bill protested, then the payee cannot be considered as having abandoned his equitable right to the fund, and should be preferred to the attaching creditor in a contest at law. Connoley *v.* Cheesborough, 21 Ala. 166.

70. Notice to debtor of assignment of debt in general see ASSIGNMENTS, 4 Cyc. 32.

71. *Connecticut.*— Adams *v.* Willimantic Linen Co., 46 Conn. 320; Woodbridge *v.* Perkins, 3 Day 364.

Iowa.— McGuire *v.* Pitts, 42 Iowa 535.

Louisiana.— Golsan *v.* Powell, 32 La. Ann. 521; Hill *v.* Hanney, 15 La. Ann. 654; Hazard *v.* Mississippi Agricultural Bank, 11 Rob. 326; Alabama Branch Bank *v.* Kraft, 18 La. 565; Cox *v.* White, 2 La. 422; Badnal *v.* Moore, 9 Mart. 403.

Massachusetts.— See Corbett *v.* Fitchburg R. Co., 110 Mass. 204.

Mississippi.— See Oldham *v.* Ledbetter, 1 How. 43, 26 Am. Dec. 690, holding that, although payment of a note by the maker to the payee after assignment of the note without notice is a good defense to an action against him by the assignee, the maker cannot be held in process of garnishment as a garnishee of the payee after such assignment.

Pennsylvania.— Barker *v.* Johnson, 2 Pa. Co. Ct. 414; Miner *v.* Kosek, 7 Kulp 72. *Compare* Jarecki Mfg. Co. *v.* Hart, 5 Pa. Super. Ct. 422.

Tennessee.— Penniman *v.* Smith, 5 Lea 130; Miller *v.* O'Bannon, 4 Lea 398; Lambreth *v.* Clarke, 10 Heisk. 32.

Vermont.— Austin *v.* Ryan, 51 Vt. 110; Thompson *v.* Downing, 48 Vt. 646 (notice held insufficient, in that it was not given to the proper party); Dale *v.* Kimpton, 46 Vt. 76; Crozier *v.* Shants, 43 Vt. 478; Ayott *v.* Smith, 40 Vt. 532, 94 Am. Dec. 429 (notice to a joint and several maker of a note, where there are two or more, is such notice to all as satisfies Gen. St. c. 34, § 47, and protects the debt from attachment by trustee process when in the hands of a *bona fide* assignee); Worden *v.* Nourse, 36 Vt. 756; Martin *v.* Potter, 34 Vt. 87; Noyes *v.* Brown, 33 Vt. 431; Williams *v.* Shepherd, 33 Vt. 164; Brickett *v.* Nichols, 30 Vt. 743; Stearns *v.* Wrisley, 30 Vt. 661 (the statute requiring a notice of transfer to be given to the maker of a note in order to protect it against trustee process is not satisfied by merely recording in the town clerk's office an assignment of the note and the mortgage securing it); Ward *v.* Morrison, 25 Vt. 593; Brown *v.* Millington, 25 Vt. 242 (notice to the administrator of the deceased debtor held sufficient); Peck *v.* Walton, 25 Vt. 33; Downer *v.* Topliff, 19 Vt. 399; Barney *v.* Douglass, 19 Vt. 98.

See 24 Cent. Dig. tit. "Garnishment," § 100.

See, however, Walton *v.* Horkan, 112 Ga. 814, 38 S. E. 105, 81 Am. St. Rep. 77.

Contra.— Knisely *v.* Evans, 34 Ohio St. 158; Lorain *v.* Lorain Sav., etc., Co., 4 Ohio S. & C. Pl. Dec. 84, 2 Ohio N. P. 108.

Notice to a majority of the selectmen of a town or to the town treasurer of the assignment of a town order is sufficient to prevent its attachment by creditors of the assignor by trustee process. Thayer *v.* Lyman, 35 Vt. 646.

Sufficiency of notice.— It has been held in Vermont that it is not necessary that the assignee of a note should in express terms inform the maker that it has been assigned to him; that it is sufficient notice that such conversation takes place between them on the subject of the note as would naturally and reasonably satisfy the maker of the fact of the transfer to the assignee. Hutchins *v.* Watts, 35 Vt. 360; Seward *v.* Garlin, 33 Vt. 583.

Recordation constructive notice.— An assignment of future wages by acceptance of the employer, indorsed on the face instead of on the back of the instrument, which is filed with the town clerk, is good as against creditors of the assignee who seek to reach the fund by trustee process. Lewis *v.* Lougee, 63 N. H. 287. See, however, Williams *v.* Pomeroy, 27 Minn. 85, 6 N. W. 445.

Verbal notice by defendant to the garnishee to the effect that he had left the money in his hands to be paid to another does not warrant the garnishee to deny that he has money belonging to defendant or enable him to answer that he has received legal notice of the transfer of the same. Miner *v.* Kosek, 2 Pa. Dist. 638.

72. *Colorado.*— Jackson *v.* Hamm, 14 Colo. 58, 23 Pac. 88.

Connecticut.— Bishop *v.* Holcomb, 10 Conn. 444.

Illinois.— Savage *v.* Gregg, 150 Ill. 161, 37 N. E. 312 [*affirming* 51 Ill. App. 281].

Missouri.— See Smith *v.* Sterritt, 24 Mo. 260.

the assignor instituting garnishment proceedings after assignment and before notice of the assignment to the garnishee, provided that notice of the assignment be given to the garnishee in time to permit him to disclose the assignment in his answer to the garnishee process.[73]

(11) *By Whom Given.* It has been held that the notice of assignment required by statute to be given to the debtor in order to defeat garnishment or trustee proceedings must be given by or on behalf of the assignee or one claiming to own the debt or demand through such assignment.[74]

e. Effect of Invalidity of Transfer or Assignment. According to the better rule transfers or assignments of property or evidences of debt which are fraudulent as to the creditors of the assignor are treated as void both at law and in equity, and an assignee having knowledge of such fraud may be charged in garnishment or trustee proceedings by reason of the possession of property held under a fraudulent transfer or assignment; and, where he has disposed of the property, he may be held as garnishee for the proceeds thereof.[75] In some jurisdictions, however, the rule is laid down that an assignee cannot be charged as garnishee at the instance of creditors of the assignor by reason of the possession of property under a transfer which is fraudulent as to such creditors, upon the

New Hampshire.— Marsh *v.* Garney, 69 N. H. 236, 45 Atl. 745.

See 24 Cent. Dig. tit. "Garnishment," § 100.

73. *Alabama.*— Rowland *v.* Plummer, 50 Ala. 182; Foster *v.* White, 9 Port. 221; King *v.* Murphy, 1 Stew. 228.

California.— Walling *v.* Miller, 15 Cal. 38.

Connecticut.— Fanton *v.* Fairchild County Bank, 23 Conn. 485; Foster *v.* Mix, 20 Conn. 395; Green *v.* Gillet, 5 Day 485.

Illinois.— Woodward *v.* Brooks, 18 Ill. App. 150.

Iowa.— McCoid *v.* Beatty, 12 Iowa 299. See also Walker *v.* Washington Ins. Co., 1 Iowa 404, 63 Am. Dec. 451.

Maine.— Howe *v.* Howe, 97 Me. 422, 54 Atl. 908; McAllister *v.* Brooks, 22 Me. 80, 38 Am. Dec. 282; Littlefield *v.* Smith, 17 Me. 327.

Massachusetts.— Martin *v.* Potter, 11 Gray 37, 71 Am. Dec. 689; Providence County Bank *v.* Benson, 24 Pick. 204; Gardner *v.* Hoeg, 18 Pick. 168; Ammidown *v.* Wheelock, 8 Pick. 470.

Michigan.— Tabor *v.* Van Vranken, 39 Mich. 793.

Missouri.— See Smith *v.* Sterritt, 24 Mo. 260.

New Hampshire.— Pollard *v.* Pollard, 68 N. H. 356, 39 Atl. 329.

Ohio.— Mitchell *v.* Chase, 1 Ohio Dec. (Reprint) 58, 1 West L. J. 397.

Pennsylvania.— Pellman *v.* Hart, 1 Pa. St. 263; Stevens *v.* Stevens, 1 Ashm. 190.

Rhode Island.— Tiernay *v.* McGarity, 14 R. I. 231; Northan *v.* Cartright, 10 R. I. 19; Noble *v.* Smith, 6 R. I. 446.

Texas.— Smith *v.* Texas, etc., R. Co., (Civ. App. 1897) 39 S. W. 969.

Vermont.— Denison *v.* Petrie, 18 Vt. 42.

Wisconsin.— Mowry *v.* Crocker, 6 Wis. 326, holding that mere delay in giving notice of the assignment to the debtor does not prejudice the rights of the assignee where the relations of the parties are otherwise unchanged.

See 24 Cent. Dig. tit. "Garnishment," § 100.

Notice to creditor.— It has been held in Connecticut that where a non-negotiable note is assigned without notice to the maker, a creditor of the payee who has notice of the assignment cannot hold the maker as garnishee of the payee. Bishop *v.* Holcomb, 10 Conn. 444.

74. Barron *v.* Porter, 44 Vt. 587; Worden *v.* Nourse, 36 Vt. 756; Farmers', etc., Bank *v.* Drury, 35 Vt. 469; Perrin *v.* Russell, 33 Vt. 44; Webster *v.* Moranville, 30 Vt. 701.

75. *Iowa.*— Dunning *v.* Baily, 120 Iowa 729, 95 N. W. 248.

Maine.— Johnson *v.* Hersey, 70 Me. 74, 35 Am. Rep. 303; Whitney *v.* Kelley, 67 Me. 377; Blodgett *v.* Chaplin, 48 Me. 322.

Maryland.— See Troxall *v.* Applegarth, 24 Md. 163.

Michigan.— Fearey *v.* Cummings, 41 Mich. 376, 1 N. W. 946.

Missouri.— Lee *v.* Tabor, 8 Mo. 322. See also Valentine *v.* Landecker, 20 Mo. App. 60 [*following* Claflin *v.* Landecker, 17 Mo. App. 615].

Pennsylvania.— Stewart *v.* McMinn, 5 Watts & S. 100, 39 Am. Dec. 114 [*distinguished* in Raiguel *v.* O'Connell, 25 Pa. St. 362].

Wisconsin.— Stannard *v.* Youmans, 100 Wis. 275, 75 N. W. 1002; Jones *v.* Alford, 98 Wis. 245, 73 N. W. 1012; Prentiss *v.* Danaher, 20 Wis. 311.

United States.— Rothschild *v.* Hasbrouck, 65 Fed. 283; Treusch *v.* Ottenburg, 54 Fed. 867, 4 C. C. A. 629; Perego *v.* Bonesteel, 19 Fed. Cas. No. 10,977, 5 Biss. 69.

See 24 Cent. Dig. tit. "Garnishment," § 101.

Property capable of manual delivery.— It has been held in Montana that a transferee of property capable of manual delivery cannot be subjected to garnishment proceedings in respect thereto under a conveyance fraudulent as to creditors of the transferrer. Wilson *v.* Harris, 21 Mont. 374, 54 Pac. 46.

ground that such creditor can have no better right to recover from a garnishee than the principal defendant would have.[76]

7. Property or Funds in Hands of Agent, Broker, or Attorney — a. In Hands of Agent or Broker — (I) *In General.* The general rule is that, where a garnishee is in possession by his agent or broker, he may properly be charged just as if he were in personal possession;[77] or such agent may himself be charged as garnishee.[78] Where property or funds of the principal debtor are in the hands of his agent, such property or funds may be reached by garnishment proceedings,[79] unless the property has been turned over to such agent for the payment of designated creditors of defendant who have been notified of such disposition of the property and acquiesced therein.[80] The general rule is that notes or other

76. Himstedt *v.* German Bank, 46 Ark. 537; Chatroop *v.* Boegard, 40 Ill. App. 279; Gregory *v.* Harrington, 33 Vt. 241; Baxter *v.* Currier, 13 Vt. 615; Hutchins *v.* Hawley, 9 Vt. 295. See also Risley *v.* Welles, 5 Conn. 431, holding that the value of land held under a fraudulent conveyance is not recoverable on a scire facias under the act relating to foreign attachments. See, however, Stickney *v.* Crane, 35 Vt. 89, holding that if an assignment for creditors be fraudulent and void as to any particular creditor, such creditor may attach and hold the personal property and funds in the hands of the assignee by trustee process.

77. Farrell *v.* Pearson, 26 Ill. 463; Bullitt *v.* Walker, 12 La. Ann. 276; McDonald *v.* Gillett, 69 Me. 271; Childs *v.* Digby, 24 Pa. St. 23. See Voorhies *v.* Denver Hardware Co., 4 Colo. App. 428, 36 Pac. 65, decided under a statute limiting the liability of a garnishee to debts, property, or insurance in an action for which he would otherwise be liable to defendant. And *compare* Campbell *v.* Hanney, 19 R. I. 300, 33 Atl. 444, where an insurance company, in consideration of a surrender by defendant of his policy, agreed to send to its agent, for defendant, a cashier's check for a certain sum payable to defendant's order, and it was held that the insurance agent became agent for defendant, so that the mailing of the check to him was a delivery to defendant, and that the amount thereof could not be reached by a subsequent garnishment against the company.

78. Citizens' State Bank *v.* Council Bluffs Fuel Co., 89 Iowa 618, 57 N. W. 444 (holding that the creditors of a chattel mortgage may test the validity of the mortgage by the garnishment of one who is in possession of the mortgaged property as the agent of the mortgagee); Bragunier *v.* Beck, etc., Iron Co., 41 Kan. 542, 21 Pac. 640; Mathews *v.* Smith, 13 Nebr. 178, 12 N. W. 821; Gochenaur *v.* Hostetter, 18 Pa. St. 414; Wile *v.* Cohn, 63 Fed. 759. See Wells *v.* Greene, 8 Mass. 504, holding that an agent of a fire-insurance company established in a foreign country, having executed a policy on which a supposed loss has arisen, is not on account the trustee of the assured. See, however, Atwood *v.* Hale, 17 Mo. App. 81, holding that one having possession of mortgaged chattels as the mortgagee's agent cannot be charged as garnishee of the mortgagor.

79. *Indiana.*—Fogleman *v.* Shively, 4 Ind. App. 197, 30 N. E. 909, 51 Am. St. Rep. 213 [*overruling* (1891) 27 N. E. 873].

Kansas.— Center *v.* McQuesten, 18 Kan. 476.

Louisiana.— Carter *v.* Calloway, 36 La. Ann. 730; Conery *v.* Webb, 12 La. Ann. 282; Gaty *v.* Franklin M. & F. Ins. Co., 12 La. Ann. 272, holding that when funds are placed in the hands of an agent "for the purpose of liquidating" until notice to third persons interested in the dedication of the funds, creditors may attach.

Maine.— McDonald *v.* Gillett, 69 Me. 271.

Missouri.— Ridge *v.* Olmstead, 73 Mo. 578; Briggs *v.* Block, 18 Mo. 281. See Pratte *v.* Scott, 19 Mo. 625, holding that a factor having in his possession goods consigned to him for sale is not liable to be garnished on execution as a debtor of the owner, as, under the Missouri statute, the relation of creditor and debtor must necessarily exist when a party is garnished on execution.

Pennsylvania.— Burger *v.* Burger, 135 Pa. St. 499, 19 Atl. 1073, holding that one with whom a debtor has deposited money to be used in paying some of his creditors, without specifying which creditors are to be paid, holds the money for the debtor and is, while he holds it, subject to garnishment on a judgment against such debtor.

Rhode Island.— Jepson *v.* International Fraternal Alliance, 17 R. I. 471, 23 Atl. 15.

Vermont.— Smith *v.* Wiley, 41 Vt. 19; Edson *v.* Trask, 22 Vt. 18.

Wisconsin.— Felch *v.* Eau Plaine Lumber Co., 58 Wis. 431, 17 N. W. 397. See Hussa *v.* Sikorski, 101 Wis. 131, 76 N. W. 1117, holding that since, under the Wisconsin statute, makers of a negotiable paper or other securities are not subject to garnishment, the agent of a mortgagor cannot be garnished at the instance of creditors of the mortgagee.

See 24 Cent. Dig. tit. "Garnishment," § 102.

Claim for wages.— It has been held in Massachusetts that an agent is not chargeable as trustee in foreign attachment for wages due from his principal to defendant. Casey *v.* Davis, 100 Mass. 124.

A certificate of stock in a bank in another state sent to a broker in Pennsylvania with directions to sell it at a price limited is not subject to foreign attachment. Christmas *v.* Biddle, 13 Pa. St. 223.

80. *Georgia.*— Walton *v.* Bethune, 37 Ga. 319.

choses in action placed in the hands of an agent for collection cannot be reached by garnishment proceedings prior to the collection of the amount thereof by such agent.[81]

(II) *Agents of Corporations.* The authorities are by no means agreed upon the question as to whether officers and agents of corporations having property of such corporations in their custody can be charged as garnishees by the creditors of such corporations. One line of authorities lays down the rule that only third persons can be subjected to garnishment proceedings, and that the officers and agents of corporations, when acting in that capacity, are not third persons but the very corporation itself, and therefore cannot be made garnishees.[82] Another line of authorities holds that an officer or agent of a corporation having property or evidences of indebtedness of such corporation in his possession is to be regarded as an individual possessing property of or

Illinois.— Johnson *v.* Pace, 78 Ill. 143.

Iowa.— Van Winkle *v.* Iowa Iron, etc., Fence Co., 56 Iowa 245, 9 N. W. 211; Smith *v.* Clarke, 9 Iowa 241; Taylor *v.* Burlington, etc., R. Co., 5 Iowa 114; Tevis *v.* Foster, 3 Greene 71.

Louisiana.— Burnside *v.* McKinley, 12 La. Ann. 505; Williams *v.* Piner, 10 La. Ann. 277; Hopkins *v.* Pratt, 7 La. Ann. 336; Oliver *v.* Lake, 3 La. Ann. 78; Cutters *v.* Baker, 2 La. Ann. 572.

Maine.— Mayhew *v.* Paine, 42 Me. 296.

Massachusetts.— See Collins *v.* Smith, 78 Mass. 431; Willard *v.* Sheafe, 4 Mass. 235, where an agent for joint owners of a cargo delivered the same to a merchant, taking his receipt therefor, to be sold on his account, and received the proceeds, to be held subject to his order, and it was held that such agent was not chargeable as trustee of his principal after the delivery and before he had received any proceeds.

New Hampshire.—Wright *v.* Foord, 5 N. H. 178.

Texas.— Hearn *v.* Foster, 21 Tex. 401.

See 24 Cent. Dig. tit. "Garnishment," § 102.

Notes in the hands of defendant's agent and due to defendant are not subject to garnishment. Fuller *v.* Jewett, 37 Vt. 473; Ellison *v.* Tuttle, 26 Tex. 283; Tirrell *v.* Canada, 25 Tex. 455.

81. *Iowa.*— Smith *v.* Clarke, 9 Iowa 241; Wilson *v.* Albright, 2 Greene 125.

Kentucky.— Hobbs *v.* Merrifields, 6 Ky. L. Rep. 660.

Massachusetts.— Frothingham *v.* Haley, 3 Mass. 68. See also Davis *v.* Werden, 13 Gray 305.

Mississippi.— Mayes *v.* Phillips, 60 Miss. 547.

New Hampshire.— Howland *v.* Spencer, 14 N. H. 580 (holding likewise that payment of a note to the agent after action brought does not make him liable in such action as trustee of defendant); Stone *v.* Dean, 5 N. H. 502. See Mitchell *v.* Green, 60 N. H. 582.

Pennsylvania.— Gilmore *v.* Carnahan, 81* Pa. St. 217.

South Carolina.— Smith *v.* Posey, 2 Hill 471.

Tennessee.— Moore *v.* Pillow, 3 Humphr. 448.

Texas.— Womack *v.* Stokes, 12 Tex. Civ. App. 648, 35 S. W. 82.

Vermont.— Hurlburt *v.* Hicks, 17 Vt. 193, 44 Am. Dec. 329 (holding, however, that an attorney who has a demand in his hands for collection at the time of the service of the trustee process upon him may be held as trustee of his client if he collects the money on the demand after such service but previous to the making of his disclosure); Hitchcock *v.* Edgerton, 8 Vt. 202. See Hale *v.* Foley, 47 Vt. 260.

Wisconsin.— See John R. Davis Lumber Co. *v.* Milwaukee First Nat. Bank, 90 Wis. 464, 63 N. W. 1018; Beck *v.* Cole, 16 Wis. 95; State *v.* La Crosse County Ct. Judge, 11 Wis. 50.

See 24 Cent. Dig. tit. "Garnishment," § 104.

Compare Clark *v.* Cilley, 36 Ala. 652, 76 Am. Dec. 343.

82. *Kentucky.*— Wilder *v.* Shea, 13 Bush 128.

Maine.— Bowker *v.* Hill, 60 Me. 172; Sprague *v.* Steam Nav. Co., 52 Me. 592; Pettingill *v.* Androscoggin R. Co., 51 Me. 370.

Missouri.— Mueth *v.* Schardin, 4 Mo. App. 403.

Pennsylvania.— Fowler *v.* Pittsburgh, etc., R. Co., 35 Pa. St. 22.

Tennessee.— McGraw *v.* Memphis, etc., R. Co., 5 Coldw. 434.

United States.— Lewis *v.* Smith, 15 Fed. Cas. No. 8,332, 2 Cranch C. C. 571.

See 24 Cent. Dig. tit. "Garnishment," § 102; and *supra*, IV, E.

Compare Nolte *v.* Von Gassy, 15 Ill. App. 230, which case, while recognizing the above rule, held that a clerk having in his custody funds and notes of a banker who had absconded, might be garnished upon the ground that the banker by his action had severed the relationship of principal and agent formerly subsisting between them.

In New Hampshire by statute [see Drake Attachm. § 465*a* note] no clerk, cashier, or other employee of a corporation can be made a trustee on account of funds received and held by him in the ordinary course of his employment, although formerly such employee might be held as trustee. Littleton Nat. Bank *v.* Portland, etc., R. Co., 58 N. H. 104.

being indebted to such corporation, and therefore answerable in garnishment proceedings.[83]

b. In Hands of Attorney. Applying the above rule it is well settled that an attorney having property of his client in his possession may be subjected to garnishment proceedings at the instance of a creditor of such client.[84]

8. Property in Possession of Bailee — a. General Rule. Property in possession of a bailee may be reached by garnishment proceedings at the instance of a creditor of the bailor.[85]

83. Central Plank-Road Co. *v.* Sammons, 27 Ala. 380 (where a toll-gate keeper was charged in garnishment proceedings for funds of a turnpike company); Davenport First Nat. Bank *v.* Davenport, etc., R. Co., 45 Iowa 120 (where the president of a railroad was made garnishee); Littleton Nat. Bank *v.* Portland, etc., R. Co., 58 N. H. 104; Everdell *v.* Sheboygan, etc., R. Co., 41 Wis. 395 (where the paymaster of a railroad was held as garnishee); Ballston Spa Bank *v.* Marine Bank, 18 Wis. 490 (where the president of a bank was charged as garnishee).

84. *Alabama.*—Mann *v.* Buford, 3 Ala. 312, 37 Am. Dec. 691.

Georgia.— Carr *v.* Benedict, 48 Ga. 431 (where an attorney summoned in garnishment proceedings by a judgment creditor answered that he had a sum of money belonging to defendant which, before he was served with the summons, he had decided to appropriate toward the satisfaction of other judgments than that on which the garnishment was brought, but had not actually done so, and the court ordered that the fund be paid to the oldest execution); Tucker *v.* Butts, 6 Ga. 580.

Illinois.— Crain *v.* Gould, 46 Ill. 293, holding that money delivered to an attorney as security for fees to become due in any business in which the attorney may thereafter be employed by the owner will be liable to creditors on garnishment process, except as to so much thereof as is due for fees when the process is served.

Louisiana.— Daigle *v.* Bird, 22 La. Ann. 138; White *v.* Bird, 20 La. Ann. 188, 96 Am. Dec. 393; Connely *v.* Harrison, 16 La. Ann. 41; Comstock *v.* Paie, 18 La. 479.

Maine.— Abbott *v.* Stinchford, 71 Me. 213; Burnell *v.* Weld, 59 Me. 423; Staples *v.* Staples, 4 Me. 532.

Massachusetts.— Thayer *v.* Sherman, 12 Mass. 441; Coburn *v.* Ansart, 3 Mass. 319. See Marvel *v.* Babbitt, 143 Mass. 226, 9 N. E. 566; Wheelock *v.* Tuttle, 10 Cush. 123, where an attorney summoned as trustee answered that his client had placed in his hands money to the amount of one hundred dollars for services performed, and engaged to be performed, and that such sum was no more than sufficient for the agreed purpose, and the court held that he was entitled to be discharged upon such answer.

New Hampshire.— Narramore *v.* Clark, 63 N. H. 166.

Pennsylvania.— Riley *v.* Hirst, 2 Pa. St. 346; Board of Health *v.* Potts, 2 Pa. L. J. Rep. 52, 3 Pa. L. J. 268.

Wisconsin.— See Southwestern Land Co. *v.* Ellis, 104 Wis. 445, 80 N. W. 749, where, however, money in the attorney's hands was held to be his own property by virtue of advances made and services rendered by him.

See 24 Cent. Dig. tit. "Garnishment," § 103.

See, however, Johns *v.* Allen, 5 Harr. (Del.) 419.

85. *Alabama.*— Johnston *v.* Riddle, 70 Ala. 219; Hall *v.* Baldwin, 31 Ala. 509.

Louisiana.— Scholefield *v.* Bradlee, 8 Mart. 495.

Massachusetts.— Clark *v.* Brown, 14 Mass. 271. See also Staniels *v.* Raymond, 4 Cush. 314.

Michigan.— Elser *v.* Rommel, 98 Mich. 74, 56 N. W. 1107.

Minnesota.—Farmers', etc., Bank *v.* Welles, 23 Minn. 475.

Missouri.— Collins *v.* Kammann, 55 Mo. App. 464.

New Hampshire.— Canning *v.* Knights, 71 N. H. 404, 52 Atl. 443. See also Cram *v.* Shackleton, 64 N. H. 44, 5 Atl. 715. *Compare* Pickering *v.* Wendell, 20 N. H. 222 (holding that one cannot be charged as trustee by reason of holding funds of persons indebted to the principal defendant, on which funds he has a lien, or which he has a power of attorney to receive); Stickney *v.* Batchelder, 18 N. H. 40 (where the relationship of bailor and bailee was held to have terminated, and therefore the latter could not be held in trustee process).

Texas.— Vance *v.* Geib, 27 Tex. 272.

Vermont.— Brown *v.* Davis, 18 Vt. 211.

Washington.— Trowbridge *v.* Spinning, 23 Wash. 48, 62 Pac. 125, 83 Am. St. Rep. 306, 54 L. R. A. 204.

West Virginia.— See Wall *v.* Norfolk, etc., R. Co., 52 W. Va. 485, 44 S. E. 294, 94 Am. St. Rep. 948, 64 L. R. A. 501, holding that the right of a garnisher as to the garnishee does not rise higher than the right of defendant as to the garnishee; that when the right of such defendant is subject to a right of the garnishee under a contract between them, the right of the garnisher is likewise subject to the right of the garnishee.

See 24 Cent. Dig. tit. "Garnishment," § 105.

An auctioneer selling goods by an order from a sheriff and receiving the money for them is accountable only to the sheriff, and he cannot be held as trustee of those who have claims on the sheriff for the proceeds. Penniman *v.* Ruggles, 6 Mass. 166. See also Pratte *v.* Scott, 19 Mo. 625.

Depositary as garnishee see DEPOSITARIES, 13 Cyc. 820.

b. Property In Transitu. According to the better doctrine property in the hands of a common carrier in actual transit cannot be reached by garnishment proceedings by summoning the common carrier as garnishee.[86] Where, however, property has been delivered to a common carrier for shipment, but it is not in actual transit at the time of the service of the garnishment process upon the carrier, according to the weight of authority, such property is liable and the carrier may be held as garnishee or trustee.[87]

c. Deposits in Bank. A deposit in bank continues as property of the depositor until the bailee has paid or promised to pay the person for whose use such deposit is made, and during the interim such deposit can be reached by garnishment proceedings at the instance of a creditor of the depositor.[88] Where, how-

By construction of the Pennsylvania statute, in order for goods to be liable to execution attachment, the person in whose possession they are must have such a fixed title or interest therein that they cannot be taken from him; thus it is held that horses and carriages kept in a livery stable are not subject to attachment execution against the livery-stable people; Hall *v.* Filter Mfg. Co., 10 Phila. 370; Buckner *v.* Croissant, 3 Phila. 219; likewise it has been held that goods of defendant left for storage with warehousemen at a stipulated sum per month cannot be made subject of an attachment execution (Lennig's Appeal, 9 Wkly. Notes Cas. 503; Good *v.* Obertauffer, 1 Tr. & H. Pr. 947), the object of the process in Pennsylvania being to reach effects which cannot be levied on under a fieri facias and not those which are liable to that form of execution.

86. *Georgia.*— Western R. Co. *v.* Thornton, 60 Ga. 300.

Illinois.— Illinois Cent. R. Co. *v.* Cobb, 48 Ill. 402; Michigan Cent. R. Co. *v.* Chicago, etc., R. Co., 1 Ill. App. 399.

Indiana.— Pittsburg, etc., R. Co. *v.* Cox, (App. 1905) 73 N. E. 120.

Iowa.— Montrose Pickle Co. *v.* Dodson, etc., Mfg. Co., 76 Iowa 172, 40 N. W. 705, 14 Am. St. Rep. 213, 2 L. R. A. 417.

Michigan.— Walker *v.* Detroit, etc., R. Co., 49 Mich. 446, 13 N. W. 812.

Minnesota.— Stevenot *v.* Eastern R. Co., 61 Minn. 104, 63 N. W. 256, 28 L. R. A. 600.

Pennsylvania.— Pennsylvania R. Co. *v.* Pennock, 51 Pa. St. 244; Bingham *v.* Lamping, 26 Pa. St. 340, 67 Am. Dec. 418, holding that a carrier who receives goods under an agreement to forward them to the consignee cannot hold them to answer an attachment at the suit of a creditor of the consignor previously served on him.

Wisconsin.— Bates *v.* Chicago, etc., R. Co., 60 Wis. 296, 19 N. W. 72, 50 Am. Rep. 369.

See 24 Cent. Dig. tit. "Garnishment," § 108. See also CARRIERS, 6 Cyc. 433 note 92, 463.

Contra.—Adams *v.* Scott, 104 Mass. 164.

Private carriers.—The rule exempting common carriers from liability to garnishment has no application to private carriers. Elser *v.* Rommel, 98 Mich. 74, 56 N. W. 1107.

Railroad car.— A railroad company having in its possession a car loaded with freight from another state in the process of carrying on interstate commerce is not liable to garnishment by reason of its possession received from another railroad company against which an attachment has been issued. It would be in violation of the commerce clause of the national constitution and the interstate commerce act of congress. Wall *v.* Norfolk, etc., R. Co., 52 W. Va. 485, 44 S. E. 294, 94 Am. St. Rep. 948, 64 L. R. A. 501.

87. Union Mut. L. Ins. Co. *v.* Holbrook, 4 Gray (Mass.) 235; Cooley *v.* Minnesota Transfer R. Co., 53 Minn. 327, 55 N. W. 141, 39 Am. St. Rep. 609 (a railway company, after transporting property to its destination and while holding the same as warehouseman, is liable to garnishment in respect to such property); Landa *v.* Holck, 129 Mo. 663, 31 S. W. 900, 50 Am. St. Rep. 459 (where a consignment of merchandise has been removed from the consignor's place of business and is in the carrier's yards awaiting shipment, it is not in transit so as to prevent garnishment thereof).

88. *Alabama.*— Murphree *v.* Mobile, 108 Ala. 663, 18 So. 740 (where land owned by a city but not used for municipal purposes was sold, and the money derived therefrom was deposited in a bank, said money was subject to garnishment against the city, as a bank is only a depository, under Acts (1886–1887), p. 247, of such funds as are collected for taxes, licenses, fines, penalties and forfeitures); National Commercial Bank *v.* Miller, 77 Ala. 168, 54 Am. Rep. 50 (the liability under which a bank rests to one of its depositors on a check left with it by him "for deposit" and which it has had certified by the bank on which it is drawn may be reached by process of garnishment).

Georgia.— Howard College *v.* Pace, 15 Ga. 486.

Massachusetts.— Maloney *v.* Casey, 164 Mass. 124, 41 N. E. 104; Clapp *v.* Hancock Bank, 1 Allen 394. See also Atwood *v.* Dumas, 149 Mass. 167, 21 N. E. 236, 3 L. R. A. 416.

Pennsylvania.— Farmers', etc., Nat. Bank *v.* Ryan, 64 Pa. St. 236; Schram *v.* Cartwright, 4 Pa. Dist. 632.

Rhode Island.— Nichols *v.* Schofield, 2 R. I. 123.

Tennessee.— Adams *v.* Memphis, 3 Tenn. Cas. 392.

United States.— See Foster *v.* Swasey, 9 Fed. Cas. No. 4,985, 3 Woodb. & M. 364.

See 24 Cent. Dig. tit. "Garnishment," § 110.

ever, the principal defendant deposits drafts with a bank, such depositary cannot be held as garnishee prior to the collection of such drafts.[89] Money deposited in a bank by a party as agent of the principal defendant cannot be reached by garnishment proceedings by a creditor of such agent,[90] although it may be reached by a creditor of the principal defendant.[91]

d. Property Deposited With Safety Deposit Company. According to the weight of authority property or funds deposited with a safety deposit company cannot be reached by garnishment proceedings.[92]

O. Property In Custodia Legis — 1. General Rule. Money or property *in custodia legis* cannot be reached by garnishment proceedings, in the absence of express statutory authority,[93] since this would invade the jurisdiction of the

The exceptions to the above rule are special cases, as where the person to whom the money is ordered to be paid is interested in the consideration, or has himself procured, directed, or agreed that the deposit shall be made for his benefit; and in such cases the depositor may be considered only as the agent of the party at interest in making the deposit and in contracting with the bailee for its delivery or payment to the true owner or beneficiary, and he, the depositor, loses control over the fund immediately on its deposit. In fact it is not his deposit at all in such case, but left for the true owner by him as agent. Mayer *v.* Chattahoochee Nat. Bank, 51 Ga. 325.

A certificate of deposit payable on demand to order is, after presentment and refusal of payment, past due and non-negotiable, and the debt evidenced thereby is subject to garnishment. Eldorado Exch. Bank *v.* Gulick, 24 Kan. 359.

89. Moors *v.* Goddard, 147 Mass. 287, 17 N. E. 532; Rice *v.* Third Nat. Bank, 97 Mich. 414, 56 N. W. 776. See Akers *v.* Jefferson County Sav. Bank, 120 Ga. 1066, 48 S. E. 424 (where a customer of a bank deposited a draft indorsed for a deposit to his credit, and it was so entered and forwarded to another bank for collection, the drawer by course of dealing having a right to check against the deposit, and it was held that the title to the draft passed to the first bank, and when collected the proceeds were not subject to garnishment by a creditor of the drawer); Terry *v.* Wisconsin M. & F. Ins. Co. Bank, 18 Wis. 87. See, however, McCalla *v.* Brennan, 14 Wkly. Notes Cas. (Pa.) 513, where a draft was placed in the hands of a bank for collection and the bank allowed a cash credit to the depositor and it was held that the money was no longer in course of transmission and was subject to garnishment.

90. *Iowa.*— Des Moines Cotton Mill Co. *v.* Cooper, 93 Iowa 654, 61 N. W. 1084; Klocow *v.* Patten, 93 Iowa 432, 61 N. W. 926.

Kansas.—Morrill *v.* Raymond, 28 Kan. 415, 42 Am. Rep. 167, holding that money held in a fiduciary capacity, but deposited by the holder to his general account in the bank, still belongs to the other party, and cannot be garnished or attached for the depositor's debt occurring before such deposit.

Massachusetts.— See Randall *v.* Way, 111 Mass. 506.

Minnesota.— Ingersoll *v.* First Nat. Bank, 10 Minn. 396.

Pennsylvania.—Jones *v.* Northern Liberties Bank, 44 Pa. St. 253. *Compare* Jackson *v.* U. S. Bank, 10 Pa. St. 61.

Rhode Island.— See Proctor *v.* Greene, 14 R. I. 42, where a bank garnished for a deposit answered that the deposit was in the name of defendant's "agent," that it knew nothing of any principal for whom defendant was agent, and that no principal had ever claimed the deposit, either before or after the garnishment, and it was held that the bank could be charged as garnishee of defendant.

Washington.— Marx *v.* Parker, 9 Wash. 473, 37 Pac. 675, 43 Am. St. Rep. 849.

See 24 Cent. Dig. tit. "Garnishment," § 111.

Compare Pettey *v.* Dunlap Hardware Co., 99 Ga. 300, 25 S. E. 697.

91. Simmons *v.* Almy, 100 Mass. 239; Raynes *v.* Lowell Irish Benev. Soc., 4 Cush. (Mass.) 343; Gregg *v.* Farmers', etc., Bank, 80 Mo. 251.

92. Bottom *v.* Clarke, 7 Cush. (Mass.) 487; Wood *v.* Edgar, 13 Mo. 451 (holding that a special depositary of coin is not such a debtor of the depositor as to subject him to garnishment on execution against the depositor); Gregg *v.* Hilson, 8 Phila. (Pa.) 91. *Compare* Rozelle *v.* Rhodes, 116 Pa. St. 129, 9 Atl. 160, 2 Am. St. Rep. 591. See Hooper *v.* Day, 19 Me. 56, 36 Am. Dec. 734, holding that goods contained in boxes securely fastened so that their character is entirely concealed when deposited with a third person are not liable to attachment by ordinary process, but may be reached by process against the depositor as trustee.

Stakeholder.— It has been held in Massachusetts that where the parties to a wager on the event of an election place money in the hands of a third person as stakeholder, such person became immediately liable in trustee process to a creditor of either of them. Ball *v.* Gilbert, 12 Metc. 397. And in Missouri it has been held that a stakeholder in a wager is liable as garnishee of the winner for the whole amount deposited in his hands, where the wager has been determined without any demand or claim being made by the loser for any portion of the stakes deposited by him. Wimer *v.* Pritchartt, 16 Mo. 252.

93. Patterson *v.* Pratt, 19 Iowa 358; Andrews *v.* Steele City Bank, 57 Nebr. 173, 77

court. Where property is so situated, the officer holding it is the mere hand of the court.[94]

2. **Funds Deposited in Court.** Thus the rule is well recognized that funds deposited with the clerk of court by an order of a court having jurisdiction thereof cannot be reached by garnishment proceedings by a creditor of a claimant to such funds.[95] In some jurisdictions, however, the rule is laid down that

N. W. 342; Burrill *v.* Letson, 2 Speers (S. C.) 378. See also Russell *v.* Millett, 20 Wash. 212, 55 Pac. 44.

In Washington by statute a sheriff or constable may be garnished for money in his hands, and the statute was not repealed by Sess. Laws (1893), p. 259, which related to and simplified only the procedure in attachment and garnishment, and was not inconsistent with the prior act, in so far as it defines the persons subject to garnishment. Pierce *v.* Commercial Invest. Co., 30 Wash. 272, 70 Pac. 496.

94. His possession is the possession of the court and to interfere with his possession is to invade the jurisdiction of the court itself, and an officer so situated is bound by the orders and judgments of the court, whose mere agent he is, and he can make no disposition of it without the consent of his own court, express or implied. Swinnerton *v.* Oregon Pac. R. Co., 123 Cal. 417, 56 Pac. 40; Phelps *v.* Winters, 59 Iowa 561, 13 N. W. 729; Missouri Pac. R. Co. *v.* Love, 61 Kan. 433, 59 Pac. 1072; McKinney *v.* Purcell, 28 Kan. 446; Wilson *v.* Ridgely, 46 Md. 235; Bentley *v.* Shrieve, 4 Md. Ch. 412; Brooks *v.* Cook, 8 Mass. 246; Robinson *v.* Howard, 7 Cush. (Mass.) 257; Gridley *v.* Harraden, 14 Mass. 497 (bringing of a suit places the debt quasi *in custodia legis* and it cannot thereafter be attached by trustee process); B. F. Sturtevant Co. *v.* Bohn Sash, etc., Co., 59 Nebr. 82, 80 N. W. 273 (money about to be paid to the clerk of the district court to be distributed under a decree is not subject to garnishment); Baker *v.* Peterson, 57 Nebr. 375, 77 N. W. 774; Anheuser-Busch Brewing Assoc. *v.* Hier, 52 Nebr. 424, 426, 72 N. W. 558 ("the rule that personal property *in custodia legis* is not subject to attachment or garnishment was adopted for the protection of the officer, and to avoid collision of authority and conflict of title"); Scott *v.* Rohman, 43 Nebr. 618, 62 N. W. 46, 47 Am. St. Rep. 767; Shinn *v.* Zimmerman, 23 N. J. L. 150, 55 Am. Dec. 260; Killdrew *v.* Elliott, 8 Humphr. (Tenn.) 515; Curtis *v.* Ford, 78 Tex. 262, 14 S. W. 614, 10 L. R. A. 529; Sweetzer *v.* Claflin, 74 Tex. 667, 12 S. W. 395; Edwards *v.* Norton, 55 Tex. 405; Taylor *v.* Gillean, 23 Tex. 508; Richardson *v.* Anderson, (App. 1892) 18 S. W. 195; Loftus *v.* Williams, 24 Tex. Civ. App. 393, 59 S. W. 291; *In re* Chisholm, 4 Fed. 526; *In re* Cunningham, 6 Fed. Cas. No. 3,478. *Compare* Tyler *v.* Winslow, 46 Me. 348, holding, however, that a sheriff from whom a debtor has by receipt recovered the attached property is not exempt from trustee process as being a "public officer," within Rev. St. (1857) c. 86, § 55, exempting public officers from trustee process for funds and property coming into their hands for which they are officially accountable. See Dawson *v.* Dewan, 12 Rich. (S. C.) 499 (holding that service of attachment on a garnishee is not equivalent to a seizure by the sheriff within the meaning of the rule that property seized by a sheriff is in the custody of the law); Reid *v.* Walsh, (Tex. Civ. App. 1901) 63 S. W. 940 (holding that where funds in the possession of a clerk are not held by him in his official capacity they are not exempt from garnishment as being *in custodia legis*); Lovejoy *v.* Lee, 35 Vt. 430 (holding that where money attached was unlawfully retained by an officer on dissolution of the attachment as a reward, and the owner had elected to avoid the agreement by which it was retained, it might be attached in a suit against him by trusteeing the officer).

Where the judgment in attachment was procured by fraudulent collusion between the debtor and the attaching creditor, and the debtor has no other property, the judgment creditor can by garnishment subject money in the hands of the sheriff as the proceeds of such attachment, since judgment in attachment is void under Ala. Code, § 2156, which provides that a suit commenced with intent to defraud the creditors shall be void. Stern *v.* Butler, 123 Ala. 606, 26 So. 359, 82 Am. St. Rep. 146.

95. *Indiana.*— Hooks *v.* York, 4 Ind. 636; Sibert *v.* Humphries, 4 Ind. 481.

Maine.— Lord *v.* Collins, 79 Me. 227, 9 Atl. 611.

Massachusetts.— Chase *v.* Thompson, 153 Mass. 14, 26 N. E. 137.

Michigan.— Voorhees *v.* Sessions, 34 Mich. 99.

Nebraska.— B. F. Sturtevant Co. *v.* Bohn Sash, etc., Co., 57 Nebr. 671, 78 N. W. 265; Baker *v.* Peterson, 57 Nebr. 375, 77 N. W. 774. See Weaver *v.* Cressman, 21 Nebr. 675, 33 N. W. 478, holding that while the general rule is that funds in the hands of a clerk of the court are not subject to garnishment in an action at law, yet, in a proper case, a court of equity may subject such funds to the payment of the claims of a creditor.

North Carolina.— Hunt *v.* Stevens, 25 N. C. 365; Overton *v.* Hill, 5 N. C. 47; Alston *v.* Clay, 3 N. C. 171. *Contra*, Gaither *v.* Ballew, 49 N. C. 488, 69 Am. Dec. 763.

Pennsylvania.— Ross *v.* Clarke, 1 Dall. 354, 1 L. ed. 173; Mantua Hall, etc., Co. *v.* Brookes, 4 Pa. Dist. 5, 15 Pa. Co. Ct. 601; Rockey *v.* Carson, 4 Pa. Co. Ct. 543; Atkinson *v.* Hines, 5 Phila. 16; Hays *v.* Mantua Hall, etc., Co., 35 Wkly. Notes Cas. 198.

Rhode Island.— Allen *v.* Gerard, 21 R. I.

after the right to a fund in the hands of the clerk or other officer of the court has been fixed by decree or judgment it is garnishable.[96] Of course where a clerk or other officer of the court holds funds in his private capacity, and not by order of the court or by statutory provision, such fund is garnishable in his hands.[97]

3. FUNDS RAISED UNDER JUDICIAL PROCESS. Funds collected by an officer by a sale of property levied upon under execution are not subject to garnishment in the hands of such officer by a creditor of the execution plaintiff,[98] in the absence of a statute providing therefor.[99] In many jurisdictions, however, the courts have held

467, 44 Atl. 592, 79 Am. St. Rep. 816, 49 L. R. A. 351.

South Carolina.— Bowden *v.* Schatzell, Bailey Eq. 360, 23 Am. Dec. 170. See also Young *v.* Young, 2 Hill 425.

Tennessee.—Drane *v.* McGavock, 7 Humphr. 132. See, however, Tucker *v.* Atkinson, 1 Humphr. 300, 34 Am. Dec. 650, holding that surplus moneys in the hands of a sheriff after satisfaction of an execution is subject to attachment by a creditor of the execution debtor.

Texas.— Curtis *v.* Ford, 78 Tex. 262, 14 S. W. 614, 10 L. R. A. 529; Sweetzer *v.* Claflin, 74 Tex. 667, 12 S. W. 395; Pace *v.* Smith, 57 Tex. 555. *Contra,* Leroux *v.* Baldus, (1890) 13 S. W. 1019.

United States.— *In re* Forsyth, 78 Fed. 296.

See 24 Cent. Dig. tit. "Garnishment," § 114.

96. *Alabama.*— Clark *v.* Boggs, 6 Ala. 809, 41 Am. Dec. 85; Langdon *v.* Lockett, 6 Ala. 727, 41 Am. Dec. 78. See, however, Falconer *v.* Head, 31 Ala. 513; Lewis *v.* Dubose, 29 Ala. 219.

California.— Dunsmoor *v.* Furstenfeldt, 88 Cal. 522, 26 Pac. 518, 22 Am. St. Rep. 331, 12 L. R. A. 508, holding that where an order of distribution has been made and the rights of the respective creditors become in effect a debt due to each of them by the clerk of the court, a creditor of one of the creditors may levy upon such fund by garnishment. See also Kimball *v.* Richardson-Kimball Co., 111 Cal. 386, 43 Pac. 1111, where plaintiff in a bill of interpleader deposited the money in dispute with the clerk without any order of the court permitting him to do so, and it was held that such money was not in the custody of the law so as to render unavailable a subsequent garnishment of plaintiff by the party entitled thereto. See, however, Swinnerton *v.* Oregon Pac. R. Co., 123 Cal. 417, 56 Pac. 40.

Maryland.— Williams *v.* Jones, 38 Md. 555; Cockey *v.* Leister, 12 Md. 124, 71 Am. Dec. 588.

Mississippi.— Fearing *v.* Shafner, 62 Miss. 791.

Pennsylvania.— Piper *v.* Piper, 7 Pa. Dist. 135, 20 Pa. Co. Ct. 372.

Vermont.— Wilbur *v.* Flannery, 60 Vt. 581, 15 Atl. 203.

See 24 Cent. Dig. tit. "Garnishment," §§ 113, 114.

A draft or note filed in a suit may in Louisiana, by garnishment and interrogatories served on the clerk of the court in whose custody it is, be attached in a suit instituted in another court. Mille *v.* Hebert, 19 La. Ann. 58; Ealer *v.* McAllister, 14 La. Ann. 821.

97. Weaver *v.* Davis, 47 Ill. 235; Duluth Mar. Nat. Bank *v.* Whiteman Paper Mills, 49 Minn. 133, 51 N. W. 665. See also Morse *v.* Holt, 22 Me. 180.

A trustee appointed to make a sale in partition is not a public officer, and the interest of a party in the proceeds in the hands of such trustee is subject to attachment execution. Fenton *v.* Fisher, 106 Pa. St. 418.

98. *California.*— Clymer *v.* Willis, 3 Cal. 363, 58 Am. Dec. 414.

Illinois.— Millison *v.* Fisk, 43 Ill. 112 [*distinguishing* Pierce *v.* Carleton, 12 Ill. 358, 54 Am. Dec. 405]; Reddick *v.* Smith, 4 Ill. 451.

Indiana.— Winton *v.* State, 4 Ind. 321.

Maryland.— Mattingly *v.* Grimes, 48 Md. 102; Wilson *v.* Ridgely, 46 Md. 235.

Massachusetts.— Thompson *v.* Brown, 17 Pick. 462; Barnes *v.* Treat, 7 Mass. 271; Pollard *v.* Ross, 5 Mass. 319; Watson *v.* Todd, 5 Mass. 271; Wilder *v.* Bailey, 3 Mass. 289; Sharp *v.* Clark, 2 Mass. 91.

Missouri.— Marvin *v.* Hawley, 9 Mo. 382, 43 Am. Dec. 547.

Ohio.— Dawson *v.* Holcomb, 1 Ohio 275, 13 Am. Dec. 618.

Pennsylvania.— Fretz *v.* Heller, 2 Watts & S. 397. See also Silverman *v.* Tyson, 4 Pa. Co. Ct. 186.

South Carolina.— Blair *v.* Cantey, 2 Speers 34, 42 Am. Dec. 360.

Tennessee.— Pawley *v.* Gains, 1 Overt. 208.

Wisconsin.— Hill *v.* La Crosse, etc., R. Co., 14 Wis. 291, 80 Am. Dec. 783. See also Storm *v.* Adams, 56 Wis. 137, 14 N. W. 69.

See 24 Cent. Dig. tit. "Garnishment," § 115.

99. *Connecticut.*— New Haven Steam Saw-Mill Co. *v.* Fowler, 28 Conn. 103.

Georgia.— Gray *v.* Maxwell, 50 Ga. 108.

Mississippi.— Burleson *v.* Milan, 56 Miss. 399.

Nebraska.— Oppenheimer *v.* Marr, 31 Nebr. 811, 48 N. W. 818, 28 Am. St. Rep. 539.

New Hampshire.— Woodbridge *v.* Morse, 5 N. H. 519. See Sleeper *v.* Weymouth, 26 N. H. 34, holding that where an officer sells on execution to a creditor's agent who is the highest bidder and who informs the officer that he is bidding for the creditor and not for himself, such officer's liability is discharged and he cannot be charged as the creditor's trustee.

New Jersey.— See Davis *v.* Mahany, 38

that a surplus remaining in the officer's hands after the satisfaction of the writ under which the sale was had is not strictly speaking *in custodia legis*, and may therefore be reached by garnishment proceedings at the instance of a creditor of the execution defendant.[1]

4. Property Taken From Person of Prisoner. The better rule seems to be that money or other property taken from the person of a prisoner at the time of his arrest by an officer, upon the belief that it is connected with the crime charged, or might be used by the prisoner in effecting his escape, is subject to garnishment in the hands of such officer.[2] Where, however, the arrest is not made in good faith, or the property taken from the prisoner is not connected with or used as evidence in proving the crime charged, or is taken simply for the purpose of safe-keeping, the possession of the officer is regarded as the possession of the prisoner, and the property is not subject to garnishment.[3]

N. J. L. 104; Crane *v.* Freese, 16 N. J. L. 305; Conover *v.* Ruckman, 33 N. J. Eq. 303.

Vermont.— Lovejoy *v.* Lee, 35 Vt. 430; Hurlburt *v.* Hicks, 17 Vt. 193, 44 Am. Dec. 329. See Stebbins *v.* Peeler, 29 Vt. 289, holding that money collected on an execution in an action of trespass for taking on mesne process property exempt from attachment belonging to defendant cannot be trusteed in the officer's hands.

See 24 Cent. Dig. tit. "Garnishment," § 115.

Compare Ayer *v.* Brown, 77 Me. 195, holding that the wages of a seaman when collected by and remaining in the hands of his attorney as proctor in admiralty are not for that reason exempt from trustee process.

1. *Alabama.*— Clark *v.* Boggs, 6 Ala. 809, 41 Am. Dec. 85; Langdon *v.* Lockett, 6 Ala. 727, 41 Am. Dec. 78; King *v.* Moore, 6 Ala. 160, 41 Am. Dec. 44.

Delaware.—Jaquett *v.* Palmer, 2 Harr. 144.

Georgia.— Anthanissen *v.* Brunswick, etc., Steam Towing, etc., Co., 92 Ga. 409, 17 S. E. 951.

Illinois.— Triebel *v.* Colburn, 64 Ill. 376; Weaver *v.* Davis, 47 Ill. 237; Lightner *v.* Steinagel, 33 Ill. 510, 85 Am. Dec. 292; Pierce *v.* Carleton, 12 Ill. 358, 54 Am. Dec. 405; Self *v.* Schoenfield, 60 Ill. App. 65.

Iowa.— Hoffman *v.* Wetherell, 42 Iowa 89, holding that the balance of the proceeds remaining in the hands of the sheriff on a sale under a chattel mortgage after satisfaction of the mortgage is subject to garnishment and is the property of the mortgagor.

Massachusetts.— Watson *v.* Todd, 5 Mass. 271.

South Carolina.—Day *v.* Becher, 1 McMull. 92; Dickison *v.* Palmer, 2 Rich. Eq. 407.

Vermont.— Harrington *v.* Hill, 51 Vt. 44; Adams *v.* Lane, 38 Vt. 640. See also Tilton *v.* Miller, 34 Vt. 576.

See 24 Cent. Dig. tit. "Garnishment," § 115.

Compare Graham *v.* Endicott, 7 Cal. 144 (holding that a sheriff who at the expiration of his office has a balance belonging to an execution debtor can only be made liable as a private person, and not on his official bond, where a garnishment was served after the expiration of his office); Turner *v.* Armstrong, 9 Yerg. (Tenn.) 412 (holding that where property levied on was sold for more than the judgment, the constable had no authority to receive the bidder's note for the excess, and, unless the debtor agreed to accept the note, the bidder could not be garnished as his debtor).

Contra.— Bentley *v.* Clegg, 1 Pa. L. J. Rep. 411, 3 Pa. L. J. 62; Crossen *v.* McAllister, 1 Pa. L. J. Rep. 257, 2 Pa. L. J. 199.

Where a mortgagee replevies the mortgaged property from a constable levying thereon, and sells it under the mortgage, he is not liable to garnishment by creditors of the mortgagor, since the property replevied is in the custody of the law, and not subject to a second seizure until its ownership is determined, and, if the mortgagee was not entitled to hold it, he may be ordered to account therefor to the constable. Nicholson *v.* Mitchell, 16 Ill. App. 647.

2. *Ex p.* Hurn, 92 Ala. 102, 9 So. 515, 25 Am. St. Rep. 23, 13 L. R. A. 120; Reifsnyder *v.* Lee, 44 Iowa 101, 24 Am. St. Rep. 733; Patterson *v.* Pratt, 19 Iowa 358; Closson *v.* Morrison, 47 N. H. 482, 93 Am. Dec. 459. See Coffee *v.* Haynes, 124 Cal. 561, 57 Pac. 482, 71 Am. St. Rep. 99, where the garnishee, a chief of the police, by search made under a prisoner's direction, came into possession of money belonging to such prisoner with his consent, such money not being taken at the time of arrest, or from the person of the prisoner, and having no connection with the cause of arrest, and it was held that the money was not *in custodia legis* so as to be exempt from garnishment.

3. *Alabama.*— Cunningham *v.* Baker, 104 Ala. 160, 16 So. 68, 53 Am. St. Rep. 27; *Ex p.* Hurn, 92 Ala. 102, 9 So. 515, 25 Am. St. Rep. 23, 13 L. R. A. 120.

Georgia.— Connolly *v.* Thurber Whyland Co., 92 Ga. 651, 18 S. E. 1004, holding that for reasons of public policy neither the chief nor any member of the municipal police of a city or town is subject to garnishment for effects which come into his hands by color of his official authority and without the consent of the owner, whether he obtains them lawfully or unlawfully.

Iowa.— Commercial Exch. Bank *v.* McLeod, 65 Iowa 665, 19 N. W. 329, 22 N. W. 919, 54 Am. Rep. 36 (where a sheriff took from the prisoner whom he had arrested on a

5. Property in Hands of Receiver. Applying the above rule, independently of statute,[4] property in the hands of a receiver is not subject to garnishment, except by consent of the court appointing such receiver.[5] Nevertheless a receiver appointed to wind up the affairs of a corporation or partnership may be charged as garnishee or trustee in respect to any balance remaining in his hands after the accomplishment of the ends for which the receivership was created.[6]

6. Property Assigned For Benefit of Creditors. The rule is well recognized that property held by an assignee under a valid assignment for the benefit of creditors cannot be reached by garnishment proceedings by creditors of the assignor,[7]

criminal charge two watches and some money without resistance, and these articles were in no way connected with the crime charged and were not needed as evidence, and it was held that the possession of the sheriff was that of the prisoner and the articles were not liable to garnishment in the hands of the sheriff); Pomroy *v.* Parmlee, 9 Iowa 140, 74 Am. Dec. 328.

Massachusetts.— Morris *v.* Penniman, 14 Gray 220, 74 Am. Dec. 675; Robinson *v.* Howard, 7 Cush. 257; Ilsley *v.* Nichols, 12 Pick. 270, 22 Am. Dec. 425.

Michigan.— Hubbard *v.* Garner, 115 Mich. 406, 73 N. W. 390, 69 Am. St. Rep. 580, holding that money wrongfully taken from a prisoner and held by a jailer cannot be reached by creditors of the prisoner by garnishment.

Missouri.— Holker *v.* Hennessey, 141 Mo. 527, 42 S. W. 1090, 64 Am. St. Rep. 524, 39 L. R. A. 165.

Oregon.— Dahms *v.* Sears, 13 Oreg. 47, 11 Pac. 891.

Pennsylvania.— Davies *v.* Gallagher, 17 Phila. 229.

Tennessee.— Hill *v.* Hatch, 99 Tenn. 39, 41 S. W. 349, 63 Am. St. Rep. 822.

Texas.— Richardson *v.* Anderson, (App. 1892) 18 S. W. 195.

See 24 Cent. Dig. tit. "Garnishment," § 116.

4. Van Bianchi *v.* Wayne Cir. Judge, 124 Mich. 462, 83 N. W. 26; Irwin *v.* McKechnie, 58 Minn. 145, 59 N. W. 987, 49 Am. St. Rep. 495, 26 L. R. A. 218, holding that under the Judiciary Act of March 3, 1887, as corrected by the act of Aug. 13, 1888, receivers of a railway company appointed by a court of the United States may be garnished in the state court without leave of the appointing court. See, however, Central Trust Co. *v.* East Tennessee, etc., R. Co., 59 Fed. 523; Comer *v.* Felton, 61 Fed. 731, 10 C. C. A. 28, both holding that garnishment proceedings are not within the terms of the above act. And *compare* Greene *v.* Williams, 22 R. I. 547, 48 Atl. 798.

5. *California.*— Yuba County *v.* Allens, 7 Cal. 35.

District of Columbia.— Van Riswick *v.* Lamon, 2 MacArthur 172, holding, however, that where a trustee is appointed in equity to sell land, and the trust has been performed, a balance remaining in his hands due the principal defendant is subject to garnishment.

Georgia.— Field *v.* Jones, 11 Ga. 413.

Illinois.— See Hibernian Banking Assoc. *v.* Morrison, 188 Ill. 279, 58 N. E. 960 [*affirming* 88 Ill. App. 230].

Iowa.— McGowen *v.* Myers, 66 Iowa 99, 23 N. W. 282; Martin *v.* Davis, 21 Iowa 535.

Kentucky.— Newport, etc., Bridge Co. *v.* Douglass, 75 Ky. 673.

Maryland.— Mattingly *v.* Grimes, 48 Md. 102; Bentley *v.* Shrieve, 4 Md. Ch. 412.

Massachusetts.— Com. *v.* Hide, etc., Ins. Co., 119 Mass. 155; Columbian Book Co. *v.* De Golyer, 115 Mass. 67.

Michigan.— Campau *v.* Detroit Driving Club, 135 Mich. 575, 98 N. W. 267; People *v.* Brooks, 40 Mich. 333, 29 Am. Rep. 534. See also Cohnen *v.* Sweenie, 105 Mich. 643, 63 N. W. 641.

Nebraska.— Veith *v.* Ress, 60 Nebr. 52, 82 N. W. 116; Yeiser *v.* Cathers, (1903) 97 N. W. 840, holding that a receiver can be garnished by leave of the court which appointed him.

Pennsylvania.— Milliken *v.* Aughinbaugh, 1 Penr. & W. 117, holding that a debt due to one who is an applicant for the insolvent laws of Maryland, and for whom a provisional trustee has been there appointed, is not subject to a foreign attachment in Pennsylvania, it being *in gremio legis*.

Texas.— Kreisle *v.* Campbell, 89 Tex. 104, 33 S. W. 852; Taylor *v.* Gillean, 23 Tex. 508; Ash *v.* Akin, 2 Tex. Civ. App. 83, 21 S. W. 618.

United States.— Central Trust Co. *v.* Chattanooga, etc., R. Co., 68 Fed. 685, holding, however, that a state law exempting a receiver appointed by a court of equity from garnishment applies to state courts only, and has no extraterritorial force. *Compare* St. Johnsbury First Nat. Bank *v.* Portland, etc., R. Co., 2 Fed. 831.

See 24 Cent. Dig. tit. "Garnishment," § 117.

See, however, Phelan *v.* Ganebin, 5 Colo. 14.

6. Smith *v.* People, 93 Ill. App. 135 (while ordinarily it is contempt of the authority and process of the court to interfere with the possession of property in the hands of a receiver, yet after final order or decree of distribution, or where nothing remains to be done except to pay the money, such money is subject to garnishment in the hands of the receiver); Willard *v.* Decatur, 59 N. H. 137.

7. *Alabama.*—Belser *v.* Tuscumbia Banking Co., 105 Ala. 514, 17 So. 40; Avery *v.* Lockhard, 75 Ala. 530. See Stuckey *v.* McKibbon, 92 Ala. 622, 8 So. 379, where an assignee for the benefit of the creditors was removed by the chancery court for failure to give bond

unless a dividend has been declared and the assignee has been directed to pay it over to the respective creditors.[8]

7. Property in Hands of Personal Representative or Guardian — a. In General. In the absence of statute to the contrary,[9] garnishment proceedings will not lie to attach property in the hands of an executor or administrator,[10] or

as required by the statute, and another assignee was appointed, and it was held that the amount in the hands of the latter which the former assignee was entitled to claim as compensation for services rendered in the matter of the assignment was subject to garnishment. *Compare* Hazard *v.* Franklin, 2 Ala. 349.

Colorado.— West *v.* Hanson Produce Co., 6 Colo. App. 467, 41 Pac. 829.

District of Columbia.— Webster *v.* Harkness, 3 Mackey 220.

Illinois.— Dehner *v.* Helmbacher Forge, etc., 7 Ill. App. 47.

Iowa.— Cleveland Co-Operative Stove Co. *v.* Wilson, 80 Iowa 697, 45 N. W. 897.

Massachusetts.— Thayer *v.* Tyler, 5 Allen 94; Dewing *v.* Wentworth, 11 Cush. 499; Colby *v.* Coates, 6 Cush. 558; Borden *v.* Sumner, 4 Pick. 265, 16 Am. Dec. 338, holding, however, that an assignee summoned as trustee of an insolvent debtor must show that the property attached is wanted to answer the valid purposes of the attachment or he will be charged. See also Bowles *v.* Graves, 4 Gray 117; Small *v.* Sproat, 3 Metc. 303.

Minnesota.— Lord *v.* Meachem, 32 Minn. 66, 19 N. W. 346; Simon *v.* Mann, 32 Minn. 65, 19 N. W. 347; *In re* Mann, 32 Minn. 60, 19 N. W. 347.

Nebraska.— Schlueter *v.* Raymond, 7 Nebr. 281.

New Hampshire.—Tucker *v.* Chick, 67 N. H. 77, 37 Atl. 672. See Fellows *v.* Greenleaf, 43 N. H. 421, holding that an assignee of an individual partner who receives property belonging to the firm of which such partner is a member will be chargeable for such partnership property if summoned as trustee of the firm.

Pennsylvania.— Evans *v.* Hamrick, 61 Pa. St. 19, 100 Am. Dec. 595; Truby's Appeal, 43 Leg. Int. 252. See also McDaniel, etc., Co.'s Estate, 180 Pa. St. 52, 36 Atl. 567, holding that after an assignment for the benefit of creditors the funds in the hands of the assignee cannot be bound by process of foreign attachment served upon the assignor as garnishee.

United States.— Beach *v.* Viles, 2 Pet. 675, 7 L. ed. 559; *In re* Cunningham, 6 Fed. Cas. No. 3,478; Haust *v.* Burgess, 11 Fed. Cas. No. 6,225*a*, 4 Hughes 560.

See 24 Cent. Dig. tit. "Garnishment," § 118.

Under Me. Laws (1878), c. 74, repealing Rev. St. c. 70, an assignee for the benefit of creditors may be charged under trustee process. Lewis *v.* Latner, 72 Me. 487. See also Fogler *v.* Marston, 83 Me. 396, 22 Atl. 249.

8. Decoster *v.* Livermore, 4 Mass. 101; Jones *v.* Gorham, 2 Mass. 375; Cross *v.* Brown, 19 R. I. 220, 33 Atl. 147; Winslett *v.* Randle, 1 Tex. App. Civ. Cas. § 1189. See also West *v.* Hanson Produce Co., 6 Colo. App. 467, 41 Pac. 829; U. S. *v.* Langton, 26 Fed. Cas. No. 15,560, 5 Mason 280.

Property held under invalid assignment.— Where the property of a corporation was taken possession of by an assignee under an invalid assignment, and the creditor attached and garnished the assignee, but the property was not seized in attachment, and the garnishee did not discharge himself as required by statute by paying the property into court or giving bond to retain it, it was held that such property did not become *in custodia legis.* Calumet Paper Co. *v.* Haskell Show Printing Co., 144 Mo. 331, 45 S. W. 1115, 66 Am. St. Rep. 425.

9. See *infra*, V, O, 7, c.

10. *Alabama.*— Mock *v.* King, 15 Ala. 66, holding that an undivided interest of one of several heirs or distributees of an estate in the hands of an administrator *de bonis non* cannot be reached by the process of garnishment. See also Presnall *v.* Mabry, 3 Port. 105, holding that an administrator cannot within six months after the grant of letters be summoned as a garnishee and judgment rendered against him thereon.

Arkansas.— Gill *v.* Middleton, 60 Ark. 213, 29 S. W. 465; Fowler *v.* McClelland, 5 Ark. 188; Thorn *v.* Woodruff, 5 Ark. 55.

Delaware.— Fitchett *v.* Dolbee, 3 Harr. 267; Marvel *v.* Houston, 2 Harr. 349.

District of Columbia.—Graham *v.* Fitch, 13 App. Cas. 569.

Kansas.— Nelson *v.* Stull, 65 Kan. 585, 68 Pac. 617, 70 Pac. 590.

Louisiana.— Levy *v.* Cowan, 27 La. Ann. 556; Thornhill *v.* Christmas, 11 Rob. 201.

Maine.— Kimball *v.* Woodman, 19 Me. 200; Waite *v.* Osborne, 11 Me. 185.

Massachusetts.— Brooks *v.* Cook, 8 Mass. 246; Chealy *v.* Brewer, 7 Mass. 259.

Michigan.— Hudson *v.* Wilber, 114 Mich. 116, 72 N. W. 162, 68 Am. St. Rep. 465, 47 L. R. A. 345.

Missouri.— Curling *v.* Hyde, 10 Mo. 374; State *v.* Netherton, 26 Mo. App. 414.

New Hampshire.— Beckwith *v.* Baxter, 3 N. H. 67.

North Carolina.— Welch *v.* Gurley, 3 N. C. 334.

Pennsylvania.— Pringle *v.* Black, 2 Dall. 97, 1 L. ed. 305; McCoombe *v.* Dunch, 2 Dall. 73, 1 L. ed. 294; Ryon *v.* Marcy, 1 Kulp 360; Yeakel *v.* Brand, 7 Northam. Co. Rep. 35, 13 York Leg. Rec. 72; Williamson *v.* Beck, 8 Phila. 269; Reisky *v.* Clayton, 2 Phila. 101.

Rhode Island.— Bryant *v.* Fussel, 11 R. I. 286; Conway *v.* Armington, 11 R. I. 116.

Tennessee.— Fay *v.* Reager, 2 Sneed 200.

a guardian,[11] in his official capacity, prior to the settlement of the accounts of the estate represented by him.

b. After Decree of Distribution. However, where an estate has been fully administered by the probate court, the share of each distributee finally and definitely ascertained, and a decree of distribution has been entered, an executor or administrator may be made garnishee in respect to funds or other property which he has been directed to turn over to the principal defendant.[12]

c. By Statute. Now, however, by special statutory enactment,[13] or by judicial construction of general statutes relating to garnishment or trustee process, in a number of jurisdictions property in the hands of executors or administrators is made subject to garnishment proceedings prior to a final decree for the distribution of the estate.[14]

P. Joint or Several Property or Rights — 1. Debt or Property Belonging to Part of Defendants. In some jurisdictions where there are several defendants, the rule is that the credits or property attached may be owned jointly or severally, and the garnishees may be one or all indebted to one or all of defendants, and proof of indebtedness as to any one of defendants will entitle plaintiff to judgment against the garnishee so indebted.[15] In other jurisdictions, however, the rule is laid down that a judgment creditor of two joint judgment debtors

Virginia.—Bickle *v.* Chrisman, 76 Va. 678; Whitehead *v.* Coleman, 31 Gratt. 784.

Wisconsin.— Machine Co. *v.* Miracle, 54 Wis. 295, 11 N. W. 580.

See 24 Cent. Dig. tit. "Garnishment," § 119.

11. Vierheller *v.* Brutto, 6 Ill. App. 95; Hanson *v.* Butler, 48 Me. 81; Gassett *v.* Grout, 4 Metc. (Mass.) 486. See, however, Williams *v.* Reed, 5 Pick. (Mass.) 480. *Contra,* Dial *v.* Wood, 9 Baxt. (Tenn.) 296.

A trustee appointed by the orphans' court to make partition is not a public officer in whose hands the interest of any party to the proceedings is not subject to attachment. Fenton *v.* Fisher, 106 Pa. St. 418.

12. *California.*— *In re* Nerac, 35 Cal. 392, 95 Am. Dec. 111.

Delaware.— Fitchett *v.* Dolbee, 3 Harr. 267.

Illinois.— Bartell *v.* Bauman, 12 Ill. App. 450.

Iowa.— Boyer *v.* Hawkins, 86 Iowa 40, 52 N. W. 659.

Missouri.— Richards *v.* Griggs, 16 Mo. 416, 57 Am. Dec. 240; Godman *v.* Gordon, 61 Mo. App. 685.

New Hampshire.— Adams *v.* Barrett, 2 N. H. 374.

Oregon.— Harrington *v.* La Rocque, 13 Oreg. 344, 10 Pac. 498.

Vermont.— Hoyt *v.* Christie, 51 Vt. 48.

See 24 Cent. Dig. tit. "Garnishment," § 119.

13. *Indiana.*— Simonds *v.* Harris, 92 Ind. 505; Lewis *v.* Reed, 11 Ind. 239.

Iowa.— Boyer *v.* Hawkins, 86 Iowa 40, 52 N. W. 659.

Maine.— Cutter *v.* Perkins, 47 Me. 557; Kimball *v.* Woodman, 19 Me. 200.

Massachusetts.— Boston Bank *v.* Minot, 3 Metc. 507; Holbrook *v.* Waters, 19 Pick. 354; Wheeler *v.* Bowen, 20 Pick. 563; Stills *v.* Harmon, 7 Cush. 406. See also Guptill *v.* Ayer, 149 Mass. 49, 20 N. E. 449.

Mississippi.— Holman *v.* Fisher, 49 Miss. 472; Thrasher *v.* Buckingham, 40 Miss. 67.

Pennsylvania.— Chambers *v.* Baugh, 26 Pa. St. 105; Gochenaur *v.* Hostetter, 18 Pa. St. 414; Baldy *v.* Brady, 15 Pa. St. 103; Strouse *v.* Lawrence, 13 Pa. Co. Ct. 131. See also Maurer *v.* Kerper, 102 Pa. St. 444; Harper *v.* Valentine, 4 Wkly. Notes Cas. 38.

Vermont.— Husted *v.* Stone, 69 Vt. 149, 37 Atl. 253, holding, however, that St. § 1307, making executors liable to trustee process, does not render liable an executor carrying out a testamentary trust to pay the income of certain property to a legatee for life, where there has been no order for payment or termination of the trust, and he has not stated an account with the beneficiary or promised to pay him so as to be liable to an action by the beneficiary for the trust funds.

See 24 Cent. Dig. tit. "Garnishment," § 119.

14. Sapp *v.* McArdle, 41 Ga. 628 (holding that an administrator may be summoned in garnishment within twelve months from his appointment, but the necessity of his answer will be postponed until he is enabled from the administration of the estate to make answer); Radeke Brewing Co. *v.* Granger, 101 Ill. App. 599; Hardesty *v.* Campbell, 29 Md. 533; Quigg *v.* Kittredge, 18 N. H. 137. See also Groome *v.* Lewis, 23 Md. 137, 87 Am. Dec. 563. *Compare* Selman *v.* Milliken, 28 Ga. 366, holding that garnishment is not a legal remedy against an administrator within twelve months after his appointment, whatever it may be afterward.

Guardian.— The right to garnish property of a debtor in the hands of "any person" under Ohio Rev. St. § 5530, has been held to include the right to garnish funds in the hands of defendant's guardian. Arbaugh *v.* Myers, 8 Ohio Dec. (Reprint) 617, 9 Cinc. L. Bul. 64.

15. Thompson *v.* Taylor, 13 Me. 420; Parker *v.* Guillow, 10 N. H. 103; Stone *v.* Dean, 5 N. H. 502; Caignett *v.* Gilbaud, 2 Yeates (Pa.) 35.

cannot maintain garnishment to reach a debt owing to one of the joint judgment debtors individually.[16]

2. Liability of Firm Property For Debt of Member. According to the weight of authority, partnership credits can in no case be taken by garnishment to pay the individual debt of a member of the firm;[17] at least while the partnership is a continuing one, and there has been no adjustment between the partners.[18]

3. Liability of Individual Property For Firm Debts. The courts are divided upon the question as to whether a judgment creditor of a partnership can maintain garnishment proceedings based on his judgment to reach a debt due an individual member of a firm, one line of authorities holding that such property or debts due cannot be reached in this manner;[19] while in other jurisdictions it is

16. McBride *v.* Protection Ins. Co., 22 Conn. 248; Chicago, etc., R. Co. *v.* Scott, 174 Ill. 413, 51 N. E. 580 [*following* Siegel *v.* Schueck, 167 Ill. 522, 47 N. E. 855, 59 Am. St. Rep. 309, and *reversing* Lake Shore, etc., R. Co. *v.* Scott, 67 Ill. App. 92]; Arnold *v.* Hunt, 81 Ill. App. 430; Zembal *v.* Hasterlik, 80 Ill. App. 141; Farwell *v.* Chambers, 62 Mich. 316, 28 N. W. 859; Ford *v.* Detroit Dry Dock Co., 50 Mich. 358, 15 N. W. 509.

17. *Alabama.*— Winston *v.* Ewing, 1 Ala. 129, 34 Am. Dec. 768.

California.— See Robinson *v.* Tevis, 38 Cal. 611, holding that while partnership credits may be attached for the debt of one of the partners, yet they cannot be subjected to the payment of his debt, unless it appears that upon the settlement of the partnership affairs there will be something due the partner against whom the attachment is made.

Connecticut.—Church *v.* Knox, 2 Conn. 514.

District of Columbia.— Rich *v.* Solari, 6 Mackey 371.

Florida.— Crescent Ins. Co. *v.* Bear, 23 Fla. 50, 1 So. 318, 11 Am. St. Rep. 331.

Illinois.— Ripley *v.* People's Sav. Bank, 18 Ill. App. 430.

Iowa.— See George *v.* Wamsley, 64 Iowa 175, 20 N. W. 1; Switzer *v.* Smith, 35 Iowa 269.

Kansas.— Trickett *v.* Moore, 34 Kan. 755, 10 Pac. 147.

Louisiana.— Ursuline Nuns *v.* Connelly, 22 La. Ann. 51; Thomas *v.* Lusk, 13 La. Ann. 277; Carvin *v.* Bates, 10 La. Ann. 756; Smith *v.* McMicken, 3 La. Ann. 319.

Maryland.— People's Bank *v.* Shyrock, 48 Md. 427, 30 Am. Rep. 476 [*overruling* Wallace *v.* Patterson, 2 Harr. & M. 463].

Massachusetts.— Stillings *v.* Young, 161 Mass. 287, 37 N. E. 175; Bulfinch *v.* Winchenbach, 3 Allen 161; Hawes *v.* Waltham, 18 Pick. 451.

Mississippi.— Williams *v.* Gage, 49 Miss. 177; Mobley *v.* Lonbat, 7 How. 318.

Missouri.— Sheedy *v.* Second Nat. Bank, 62 Mo. 17, 21 Am. Rep. 407; Pullis *v.* Fox, 37 Mo. App. 592; Birtwhistle *v.* Woodward, 17 Mo. App. 277.

New Hampshire.— Atkins *v.* Prescott, 10 N. H. 120.

North Carolina.— Cook *v.* Arthur, 33 N. C. 407.

Ohio.— Myers *v.* Smith, 29 Ohio St. 120; Olcott *v.* Guerinck, 19 Ohio Cir. Ct. 32, 10 Ohio Cir. Dec. 131; Buchanan *v.* Mitchell, 8 Ohio Dec. (Reprint) 437, 8 Cinc. L. Bul. 8.

Pennsylvania.— McCoombe *v.* Dunch, 2 Dall. 73, 1 L. ed. 294; Lewis *v.* Paine, 1 Leg. Gaz. 508; Alter *v.* Brooke, 9 Phila. 258.

Rhode Island.— Sweet *v.* Read, 12 R. I. 121.

Tennessee.— Johnson *v.* King, 6 Humphr. 233.

Vermont.— McNeal Pipe, etc., Co. *v.* Inman, 69 Vt. 181, 37 Atl. 284; Bartlett *v.* Woodward, 46 Vt. 100; Towne *v.* Leach, 32 Vt. 747.

United States.— Lyndon *v.* Gorham, 15 Fed. Cas. No. 8,640, 1 Gall. 367.

See 24 Cent. Dig. tit. "Garnishment," § 121.

Compare Johnson *v.* Hersey, 73 Me. 291 (holding that the funds of an insolvent firm paid by one partner on his private debt without the consent of the copartner may be attached in the hands of the private creditor by trustee process in behalf of the firm creditor, the former knowing when he received the funds that they belonged to the firm); Thompson *v.* Lewis, 34 Me. 167 (holding that the debtor of a firm can be held as trustee of one of the partners in an action in which that partner is the principal defendant, if neither a creditor of the firm nor any other partner interpose).

Contra.— Wallace *v.* Hull, 28 Ga. 68, holding that a separate creditor may subject by garnishment the interest of his debtor in a debt due the firm.

On a sale of partnership property and a division of the amount due therefor between the partners, the individual creditors of the partners may, in Georgia, trustee the money due in the debtor's hands. Marlin *v.* Kirksey, 23 Ga. 164.

18. Henderson *v.* Cashman, 85 Me. 437, 27 Atl. 344; People's Bank *v.* Shryock, 48 Md. 427, 30 Am. Dec. 476; Fisk *v.* Herrick, 6 Mass. 271; McCarty *v.* Emlen, 2 Yeates 190, 2 Dall. 277, 1 L. ed. 380. *Compare* Brenner *v.* Hirsh, 69 Miss. 309, 13 So. 730, holding that where, after the death of the member of the firm, the other partner continues the business in the firm-name, it is the individual business of such partner, and a credit represented by a note taken by him in the firm-name in payment for the stock is subject to garnishment for his individual debts.

19. Wyman *v.* Stewart, 42 Ala. 163; Commercial Nat. Bank *v.* Kirkwood, 184 Ill. 139,

held that the individual property of or debts due to a member of a firm may be reached by garnishment proceedings, just as in the case of property belonging to part of the defendants in other instances where no partnership relationship exists.[20]

4. Property Belonging to Defendant and Others Jointly. The general rule is that where property owned in common is in the possession of a third person, or where debts are due to the principal defendant and third persons jointly, such property or debts are not subject to garnishment proceedings to reach a debt due by the principal defendant alone.[21]

5. Unliquidated Claims by One Partner Against Another. Where partnership accounts remain unsettled, a claim by one partner against another cannot be reached by garnishment by a creditor of the former.[22]

Q. Salaries of Public Officers or Employees — 1. In General. In the absence of special statutory enactment, the general rule is that the salaries of public officers or employees, such as officers or employees of towns,[23] cities, villages,[24]

56 N. E. 405 [*affirming* 85 Ill. App. 235]; Siegel *v.* Schueck, 167 Ill. 522, 47 N. E. 855, 59 Am. St. Rep. 309 [*reversing* 67 Ill. App. 602]; Fidler *v.* Blow, 1 Ohio Dec. (Reprint) 245, 5 West. L. J. 405; Winchester *v.* Pierson, 1 Ohio Dec. (Reprint) 169, 3 West. L. J. 131. *Compare* Pearce *v.* Shorter, 50 Ala. 318, holding that in an action against a partnership commenced by attachment and founded on a partnership debt money in the hands of a garnishee belonging to one of the partners individually may be subjected, but a chose in action cannot.

20. Stevens *v.* Perry, 113 Mass. 380; Bowker *v.* Smith, 48 N. H. 111, 2 Am. Rep. 189; Caignett *v.* Gilbaud, 2 Yeates (Pa.) 35; Atlantic Ins. Co. *v.* Sinker, 1 Tex. App. Civ. Cas. § 954. See also Burnell *v.* Weld, 59 Me. 423; Smith *v.* Cahoon, 37 Me. 281.

21. *Illinois.*— Ullman *v.* Eggert, 30 Ill. App. 310.

Maine.— Denny *v.* Metcalf, 28 Me. 389. *Compare* Whitney *v.* Munroe, 19 Me. 42, 36 Am. Dec. 732.

Massachusetts.— Hawes *v.* Waltham, 18 Pick. 451.

Michigan.— Van Bianchi *v.* Wayne Cir. Judge, 124 Mich. 462, 83 N. W. 26; Markham *v.* Gehan, 42 Mich. 74, 3 N. W. 262.

Mississippi.— Mobley *v.* Lonbat, 7 How. 318. But see Fewell *v.* American Surety Co., (1900) 28 So. 755, decided under an interpleader statute (Miss. Code (1892), § 2143).

Missouri.— Macks *v.* Columbia Theatre Co., 86 Mo. App. 224.

New Hampshire.— Hanson *v.* Davis, 19 N. H. 133 (holding that a promisor in a note payable to two persons cannot be charged on the note as the trustee of one of the payees in a suit against that one only); French *v.* Rogers, 16 N. H. 177.

Rhode Island.— Brown *v.* Collins, 18 R. I. 242, 27 Atl. 329.

Vermont.— Willard *v.* Wing, 70 Vt. 123, 39 Atl. 632, 67 Am. St. Rep. 657; Fairchild *v.* Lampson, 37 Vt. 407; Towne *v.* Leach, 32 Vt. 747. See, however, Bartlett *v.* Wood, 32 Vt. 372.

Wisconsin.— Badger Lumber Co. *v.* Stern, 123 Wis. 618, 101 N. W. 1093; Singer *v.* Townsend, 53 Wis. 126, 10 N. W. 365.

See 24 Cent. Dig. tit. "Garnishment," § 122.

Contra.— Robinson *v.* Moriarty, 2 Greene (Iowa) 497; Perry *v.* Blatch, 2 Kan. App. 522, 43 Pac. 989; Moore *v.* Gilmore, 16 Wash. 123, 47 Pac. 239, 58 Am. St. Rep. 20, holding that a joint claim is subject to garnishment to the extent of the interest of a joint claimant to satisfy his individual debt.

22. Church *v.* Knox, 2 Conn. 514; Birtwhistle *v.* Woodward, 95 Mo. 113, 7 S. W. 465; Burnham *v.* Hopkinson, 17 N. H. 259; Ryon *v.* Wynkoop, 148 Pa. St. 188, 23 Atl. 1002; Knerr *v.* Hoffman, 65 Pa. St. 126. *Compare* Berry *v.* Harris, 22 Md. 30, 85 Am. Dec. 639; Knox *v.* Schepler, 2 Hill (S. C.) 595, holding that the interest of one partner in partnership effects may be taken in garnishment at the suit of a separate creditor of that partner, although there be some difference in the case as to the manner in which that interest shall be made liable.

23. Walker *v.* Cook, 129 Mass. 577; Morse *v.* Towns, 45 N. H. 185, holding, however, that after money has been paid by a town to a volunteer as a bounty, under the act to encourage enlistment, it is no longer exempt from attachment by trustee process but may be reached like any other money.

24. *Alabama.*— Craft *v.* Summersell, 93 Ala. 430, 9 So. 593; Montgomery *v.* Van Dorn, 41 Ala. 505; Mobile *v.* Rowland, 26 Ala. 498.

Colorado.— Troy Laundry, etc., Co. *v.* Denver, 11 Colo. App. 368, 53 Pac. 256; Lewis *v.* Denver, 9 Colo. App. 328, 48 Pac. 317.

Georgia.— McLellan *v.* Young, 54 Ga. 399, 21 Am. Rep. 276; Holt *v.* Experience, 26 Ga. 113.

Illinois.— Triebel *v.* Colburn, 64 Ill. 376, holding that the salary of a city policeman cannot be reached by garnishment served on the city treasury, although the salary has been audited and allowed, and nothing remains to be done but the payment of the money.

Louisiana.— Chaudet *v.* De Jong, 16 La. Ann. 399; Pitard *v.* Carey, McGloin 289, holding, however, that under Civ. Code, art. 1992, exempting money due for the salary of an office, the compensation due

counties,[25] or of a state or the national government[26] cannot be reached by garnishment or trustee process, on the ground of public policy.

2. SCHOOL-TEACHERS AND SUPERINTENDENTS. In conformity with the above rule, the better doctrine seems to be that salaries due to teachers and superintendents of public schools cannot be reached by garnishment or trustee process in the hands of school trustees or the county or municipal treasury.[27]

one working on a public building under a contract is not exempted.

Maryland.—Baltimore *v.* Root, 8 Md. 95, 63 Am. Dec. 696.

Missouri.— Sheppard *v.* Cape Girardeau County, (Sup. 1886) 1 S. W. 305; Hawthorn *v.* St. Louis, 11 Mo. 59, 47 Am. Dec. 141.

Pennsylvania.—Greer *v.* Rowley, 1 Pittsb. 1.

Texas.— Sanger *v.* Waco, 15 Tex. Civ. App. 424, 40 S. W. 549; Highland *v.* Galveston, 1 Tex. App. Civ. Cas. § 623.

See 24 Cent. Dig. tit. "Garnishment," § 128; and EXEMPTIONS, 18 Cyc. 1434.

See, however, Wilcox *v.* Busiee, 70 N. H. 626, 47 Atl. 703, holding that money due a fireman from the city for services performed by a substitute is not exempt from attachment by trustee process.

In Kentucky the amount due by a municipal corporation to one of its officers for services performed, or set apart for such officer so that he has a right to demand it, is held to be a proper subject of garnishment, but wages or salary not due at the commencement of the suit is not so subject. Rodman *v.* Musselman, 12 Bush 354, 23 Am. Rep. 724; Bridgeford *v.* Keenehan, 8 Ky. L. Rep. 268. See also Kennedy *v.* Aldridge, 5 B. Mon. 141.

In Ohio, under Code Civ. Proc. § 458, it has been held that due and unpaid salaries of officers of incorporated cities may be subjected by judgment creditors of such officers to the payment of their judgments. Newark *v.* Funk, 15 Ohio St. 462.

25. *Alabama.*— Pruitt *v.* Armstrong, 56 Ala. 306.

Kentucky.— Webb *v.* McCauley, 4 Bush 8 [*distinguishing* Kennedy *v.* Aldridge, 5 B. Mon. 141].

Louisiana.— Dunbar *v.* Dinkgrave, 10 La. Ann. 545.

Maryland.— Robertson *v.* Beall, 10 Md. 125, holding, however, that money in the hands of an ex-sheriff, consisting of fees collected by him for an ex-register of wills, may properly be made the subject of trustee process for the debt of the ex-register, the official relation of the parties being at an end.

Montana.— Waterbury *v.* Deer Lodge County, 10 Mont. 515, 26 Pac. 1002, 24 Am. St. Rep. 67.

Pennsylvania.— Hutchinson *v.* Gormley, 48 Pa. St. 270.

Tennessee.— Oliver *v.* Athey, 11 Lea 149.

See 24 Cent. Dig. tit. "Garnishment," § 128.

Contra.— Adams *v.* Tyler, 121 Mass. 380 [*distinguishing* Williams *v.* Boardman, 9 Allen 570].

Jurors.— The prevailing rule seems to be that the compensation of a juror ordered by a court to be paid by the county cannot be reached by garnishment or trustee process. Clark *v.* Clark, 62 Me. 255; Williams *v.* Boardman, 9 Allen (Mass.) 570; Simons *v.* Whartenaby, 2 Pa. L. J. Rep. 438, 4 Pa. L. J. 226. Jurors' fees which have not been allowed by the court are not subject to trustee process in foreign attachment. Geer *v.* Chapel, 11 Gray (Mass.) 18. See, however, Wardell *v.* Jones, 58 N. H. 305, holding that the fees of a juror under the New Hampshire statute are attachable on trustee process.

26. *Arkansas.*— McMeekin *v.* State, 9 Ark. 553.

District of Columbia.— Brown *v.* Finley, 3 MacArthur 77; Pottier, etc., Mfg. Co. *v.* Taylor, 3 MacArthur 4; Derr *v.* Lubey, 1 MacArthur 187.

Louisiana.— Wild *v.* Ferguson, 23 La. Ann. 752.

Massachusetts.— Dewey *v.* Garvey, 130 Mass. 86.

Minnesota.— Sexton *v.* Brown, 72 Minn. 371, 75 N. W. 600.

Pennsylvania.— Rundle *v.* Scheetz, 2 Miles 330.

Tennessee.— State Bank *v.* Dibrell, 3 Sneed 379.

See 24 Cent. Dig. tit. "Garnishment," § 128.

Compare Thompson *v.* Cullers, (Tex. Civ. App. 1896) 35 S. W. 412, holding that the garnishment of earned fees of a public officer is not contrary to public policy.

Commissioners appointed to liquidate and settle the affairs of an insolvent bank are not public officers within the meaning of La. Code Pr. art. 647, exempting from seizure for payment of debts all sums of money due for "salaries of office." Conrey *v.* Copland, 4 La. Ann. 307.

In California, however, by statutory provision a transcript of a judgment may be filed with the controller of the state or auditor of any municipal corporation from which money is owing to the judgment debtor, whereon the controller or auditor should draw his warrant in favor of the creditor, or pay so much money into court as will cancel the judgment. This statute has been held to apply to legislative officers, making their salary subject to the payment of their debts. Ruperich *v.* Baehr, 142 Cal. 190, 75 Pac. 782.

27. *Georgia.*— Hightower *v.* Slaton, 54 Ga. 108, 21 Am. Rep. 273. *Compare* Bates *v.* Bates, 74 Ga. 105, holding that a decree for alimony stands upon a different basis from an ordinary debt, and that debts due by the garnishee to the principal defendant would be liable to process of garnishment founded on such a claim.

VI. PROCEEDINGS TO PROCURE.

A. Mode and Form of Procedure — 1. In General. Garnishment proceedings are instituted by the service of a writ of summons or notice upon the garnishee,[28] and, since they are purely of statutory origin, the statute authorizing the proceedings must be strictly complied with in order to give validity thereto.[29]

2. Allowance of Writ. In some jurisdictions the statute does not require a formal order of court in order for the writ or summons in garnishment to be issued therefrom.[30] In other jurisdictions the statute requires a formal rule or order to issue from the court.[31]

B. Jurisdiction and Venue — 1. In General. Garnishment proceedings being in derogation of the common law, jurisdiction thereof is special and limited, and courts cannot entertain such proceedings unless expressly empowered by statute so to do.[32] The general rule is that garnishment cannot be maintained in one court on a judgment of another court;[33] and, where none of the parties are inhabitants of the state in which such proceedings are instituted, the courts thereof cannot acquire jurisdiction so as to charge the garnishee, except upon a contract or promise to be performed within the state.[34]

Illinois.— Bivens *v.* Harper, 59 Ill. 21; Millison *v.* Fisk, 43 Ill. 112.

Kentucky.— Heilbronner *v.* Posey, 103 Ky. 462, 45 S. W. 505, 20 Ky. L. Rep. 156; Allen *v.* Russell, 78 Ky. 105.

Maine.— See Norton *v.* Soule, 75 Me. 385, holding that the wages of a school-teacher employed for a definite time until the expiration of which he is not by the contract entitled to receive any part of his pay cannot be held by trustee process until he has completed his term, or so long as there is a contingency as to his right to receive pay.

Rhode Island.— Spencer *v.* Warwick School Dist. No. 17, 11 R. I. 537.

Utah.— Chamberlain *v.* Watters, 10 Utah 298, 37 Pac. 566.

See 24 Cent. Dig. tit. "Garnishment," § 131.

But see Seymour *v.* Over-River School Dist., 53 Conn. 502, 3 Atl. 552, holding that where a teacher's salary has been earned it may be attached, although it is payable at a future date.

28. Parmenter *v.* Childs, 12 Iowa 22 (holding likewise that it is not necessary under the Iowa statute that a writ of attachment should issue against the principal debtor before the writ of garnishment); Hanna *v.* Bry, 5 La. Ann. 651, 52 Am. Dec. 606; Wiggins *v.* Anderson, 1 Tex. 73; Orton *v.* Noonan, 27 Wis. 572. See also Ingraham *v.* Olcock, 14 N. H. 243.

29. Columbus Iron Work Co. *v.* Pou, 98 Ga. 516, 25 S. E. 571; Iron Cliffs Co. *v.* Lahais, 52 Mich. 394, 18 N. W. 121; Eaton *v.* Badger, 33 N. H. 228.

30. The duty to issue being regarded rather as a ministerial than a judicial one. Elder *v.* Rogers, 11 La. Ann. 606; Parmely *v.* Bradbury, 13 La. 351; Hinkley *v.* St. Anthony Falls Water Power Co., 9 Minn. 55 (the attorney for plaintiff may issue a summons in garnishee process, on filing the affidavit required by law, without its being allowed by a judicial officer); Burnham *v.* Doolittle, 14 Nebr. 214, 15 N. W. 606. See also McCoy *v.* Boyle, 10 Md. 391.

31. But the court may prescribe a standing order that such rule issue as of course upon the filing of a proper motion in the clerk's office. Sweeney *v.* Schlessinger, 18 Mont. 326, 45 Pac. 213 (holding, however, that such order is not a part of the cause of action, and where such action has been brought without it, the court may in a proper case manifest its consent by a retroactive order); Dougherty *v.* Thayer, 78 Pa. St. 172; Ringwalt *v.* Brindle, 59 Pa. St. 51.

32. Scott *v.* Rohman, 43 Nebr. 618, 62 N. W. 46, 47 Am. St. Rep. 767; Lewis *v.* Sercomb, 1 Wis. 394. See also Dew *v.* State Bank, 9 Ala. 323.

33. *Alabama.*—Gadsden First Nat. Bank *v.* Dunn, 102 Ala. 204, 14 So. 559; Hopper *v.* Todd, 8 Ala. 121. See also Skipper *v.* Foster, 29 Ala. 330, 65 Am. Dec. 405, holding that a debt due on a judgment may be subjected by proceedings in garnishment issuing from the same court.

Nebraska.— Scott *v.* Rohman, 43 Nebr. 618, 62 N. W. 46, 47 Am. St. Rep. 767.

Texas.— Townsend *v.* Fleming, (Civ. App. 1901) 64 S. W. 1006.

Virginia.— See Withers *v.* Fuller, 30 Gratt. 547.

Wisconsin.— Lewis *v.* Sercomb, 1 Wis. 394. See Prentiss *v.* Danaher, 20 Wis. 311, holding that the provisions of Laws (1864), c. 200, authorizing garnishment actions in a circuit court are applicable to the county court of Milwaukee county.

34. *Delaware.*—Wilmington, etc., Nat. Bank *v.* Furtick, 2 Marv. 35, 42 Atl. 479, 69 Am. St. Rep. 99, 44 L. R. A. 115.

Georgia.—Georgia Cent. R. Co. *v.* Brinson, 109 Ga. 354, 34 S. E. 597, 77 Am. St. Rep. 382.

Illinois.— Lord *v.* Babel, 16 Ill. App. 434.

Massachusetts.— Tingley *v.* Bateman, 10 Mass. 343.

2. Amount in Controversy. Where a court is by a statute limited in its jurisdiction as to the amount in controversy, such statute will apply to garnishment proceedings.[35] However, the jurisdiction of the court is not determined by the amount admitted in the answer of the garnishee, but by that which under plaintiff's writ is sought to be collected from him.[36]

3. Jurisdiction in Principal Action — a. In General. It is necessary for the court to have jurisdiction of the principal action in order to give it jurisdiction in garnishment proceedings.[37]

b. Person of Defendant. Where a court has failed to acquire jurisdiction of defendant in the principal action by any of the methods authorized by statute, garnishment proceedings based on the principal action are void;[38] and where the

Minnesota.— McKinney *v.* Mills, 80 Minn. 478, 83 N. W. 452, 81 Am. St. Rep. 278.

Missouri.— Dinkins *v.* Crunden-Martin Woodenware Co., 99 Mo. App. 310, 73 S. W. 246; McCord, etc., Mercantile Co. *v.* Bettles, 58 Mo. App. 384.

New Hampshire.— Carleton *v.* Washington Ins. Co., 35 N. H. 162; Eaton *v.* Badder, 33 N. H. 228; King *v.* Holmes, 27 N. H. 266 (a trustee process may be commenced against a non-resident defendant by attaching property in the hands of the trustee within the state and afterward notifying defendant by publication under an order of court); Sawyer *v.* Thompson, 24 N. H. 510; Jones *v.* Winchester, 6 N. H. 497.

North Carolina.— Balk *v.* Harris, 122 N. C. 64, 30 S. E. 318, 124 N. C. 467, 32 S. E. 799, 70 Am. St. Rep. 606, 45 L. R. A. 257. See also Deaver *v.* Keith, 27 N. C. 374.

Ohio.— R. A. Kelley Co. *v.* Garvin Mach. Co., 4 Ohio S. & C. Pl. Dec. 374, 6 Ohio N. P. 350.

Pennsylvania.— Opdyke *v.* Murphy Iron Works, 10 Pa. Dist. 68.

Rhode Island.— See Bryant *v.* Fussel, 11 R. I. 286.

Tennessee.— Webb *v.* Lea, 6 Yerg. 473.

West Virginia.— Pennsylvania R. Co. *v.* Rogers, 52 W. Va. 450, 44 S. E. 300, 62 L. R. A. 178.

United States.— Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565. See also Zerega *v.* McDonald, 30 Fed. Cas. No. 18,212, 1 Woods 496.

Canada.— Goodhue *v.* O'Leary, 17 Quebec Super. Ct. 201.

See 24 Cent. Dig. tit. "Garnishment," § 139.

In order to give a federal court jurisdiction in garnishment proceedings, the judgment creditor and garnishee must be citizens of different states, and such fact must appear by the pleadings or the record. Tunstall *v.* Worthington, 24 Fed. Cas. No. 14,239, Hempst. 662.

35. Carr *v.* Fairbanks, 28 Vt. 806; Dix *v.* Nicholls, 7 Fed. Cas. No. 3,926, 2 Cranch C. C. 581. *Contra*, Moore *v.* Kelley, 47 Ark. 219, 1 S. W. 97 (holding that under the Arkansas statute making it the duty of courts to order a garnishee to pay the amount of his debt into court to be applied on a judgment, the jurisdiction of the court over the funds in the hands of the garnishee is not dependent on the amount of his indebtedness to the attaching creditor. However prior to the adoption of the code of civil procedure the rule in that state was as stated in the text); Woodruff *v.* Griffith, 5 Ark. 354; More *v.* Woodruff, 5 Ark. 214.

36. Haines *v.* O'Conner, 5 Ill. App. 213; Pace *v.* J. S. Merrill Drug Co., 2 Indian Terr. 218, 48 S. W. 1061; Carroll *v.* Wallace, McGloin (La.) 316.

37. *Alabama.*— Matthews *v.* Sands, 29 Ala. 136; Dew *v.* State Bank, 9 Ala. 323, holding that without a valid judgment against the principal defendant there is no jurisdiction of the garnishee. See Jennings *v.* Pearce, 101 Ala. 538, 14 So. 319.

Iowa.— Morris *v.* Union Pac. R. Co., 56 Iowa 135, 8 N. W. 804.

Louisiana.— Rochereau *v.* Guidry, 24 La. Ann. 311.

Maine.— Lovejoy *v.* Albee, 33 Me. 414, 54 Am. Dec. 630.

Massachusetts.— Tingley *v.* Bateman, 10 Mass. 343.

Michigan.— Axtell *v.* Gibbs, 52 Mich. 639, 18 N. W. 595; Iron Cliffs Co. *v.* Lahais, 52 Mich. 394, 18 N. W. 121.

Minnesota.— Willson *v.* Pennoyer, 93 Minn. 348, 101 N. W. 502.

Tennessee.— Nashville, etc., R. Co. *v.* Todd, 11 Heisk. 549; Woodfolk *v.* Whitworth, 5 Coldw. 561.

Wisconsin.— See Keep *v.* Sanderson, 12 Wis. 352.

See 24 Cent. Dig. tit. "Garnishment," § 140.

Change of venue.— The fact that a plaintiff obtains a change of venue does not affect the jurisdiction in the principal case. Martin *v.* Chicago, etc., R. Co., 50 Mo. App. 428.

38. *Alabama.*— Louisville, etc., R. Co. *v.* Dooley, 78 Ala. 524. See also Bratton *v.* McGlothlen, 20 Ala. 146.

Colorado.— Atchison, etc., R. Co. *v.* Maggard, 6 Colo. App. 85, 39 Pac. 985.

Indiana.— Johnson *v.* Johnson, 26 Ind. 441; Schoppenhast *v.* Bollman, 21 Ind. 280.

Kansas.— Wheat *v.* Platte City, etc., R. Co., 4 Kan. 370.

Louisiana.— Leverich *v.* Dulin, 23 La. Ann. 505; Oliver *v.* Gwin, 17 La. 28; Schlater *v.* Broaddus, 3 Mart. N. S. 321; Woodward *v.* Braynard, 6 Mart. 572.

Massachusetts.— See Burlingham *v.* Cole, 13 Gray 271.

Michigan.— Coe *v.* Hinkley, 109 Mich. 608, 67 N. W. 915.

proceeding is not commenced by attachment, garnishment pending judgment in the principal action is void.[39]

c. Appearance by Defendant — (I) *In Principal Action.* The general rule is that if the principal defendant appears generally in the principal action he waives objections to the jurisdiction of the person, such as defective service or failure of service of summons, and the garnishee cannot thereafter raise the objection.[40]

(II) *In Garnishment Proceedings.* Where defendant has not been served either personally or by publication, his appearance in garnishment proceedings as a witness or otherwise has been held to confer no jurisdiction to render judgment against him in the principal action.[41]

4. Jurisdiction of Person of Garnishee — a. In General. In some jurisdictions[42] an order of garnishment cannot issue to a county other than that in which the principal action is brought, and if so issued the court acquires no jurisdiction of the garnishee.[43]

Mississippi.—Comstock *v.* Rayford, 1 Sm. & M. 423, 40 Am. Dec. 102. See also Dyson *v.* Baker, 54 Miss. 24.

Missouri.— Moses P. Johnson Machinery Co. *v.* Watson, 57 Mo. App. 629.

Nebraska.—Hoagland *v.* Wilcox, 42 Nebr. 138, 60 N. W. 376.

See 24 Cent. Dig. tit. "Garnishment," § 141.

Jurisdiction subsequently acquired.— See Coe *v.* Hinkley, 109 Mich. 608, 67 N. W. 915 [*distinguishing* Iron Cliffs Co. *v.* Lahais, 52 Mich. 394, 18 N. W. 121], holding that failure to obtain jurisdiction of a non-resident principal defendant within the time required by the statute does not, where jurisdiction is subsequently acquired, prevent judgment from being taken against the garnishee, the garnishment proceedings not having been dismissed previous to the time the jurisdiction was acquired over the principal defendant.

39. Littlejohn *v.* Lewis, 32 Ark. 423; Iron Cliffs Co. *v.* Lahais, 52 Mich. 394, 18 N. W. 121.

40. *Indiana.*— Baltimore, etc., R. Co. *v.* Taylor, 81 Ind. 24; Ohio, etc., R. Co. *v.* Alvey, 43 Ind. 180.

Iowa.— Hamilton Buggy Co. *v.* Iowa Buggy Co., 88 Iowa 364, 55 N. W. 496.

Kansas.— Kansas City, etc., R. Co. *v.* Cunningham, 7 Kan. App. 47, 51 Pac. 972, holding that an appearance by the principal defendant in garnishment proceedings to have his money adjudged exempt is general, and gives the court jurisdiction of both his person and the subject-matter of the garnishment.

Louisiana.— Featherstone *v.* Compton, 3 La. Ann. 380.

Massachusetts.— Brown *v.* Webber, 6 Cush. 560.

Mississippi.—Dyson *v.* Baker, 54 Miss. 24.

Missouri.— Orear *v.* Clough, 52 Mo. 55.

New Hampshire.— Young *v.* Ross, 31 N. H. 201.

North Carolina.— See Parks *v.* Adams, 113 N. C. 473, 18 S. E. 665.

Vermont.— Washburn *v.* New York, etc., Min. Co., 41 Vt. 50.

West Virginia.— Mahany *v.* Kephart, 15 W. Va. 609.

See 24 Cent. Dig. tit. "Garnishment," § 142.

See, however, Iron Cliffs Co. *v.* Lahais, 52 Mich. 394, 18 N. W. 121, where there was an appearance by the attorney of the principal defendant and he was not served with process, and it was held that such appearance after the garnishee's disclosure did not cure the defect in the original proceedings so as to validate the proceedings against the garnishee. *Compare* Wannamaker *v.* Stevens, 1 Pa. Co. Ct. 317 (holding that a mere appearance by the principal defendant, where he does not plead, does not preclude him from disputing the sufficiency of the service of a writ of foreign attachment); Melloy *v.* Burtis, 1 Pa. Co. Ct. 316 (upholding the rule laid down in the text where defendant has both appeared and pleaded).

41. State *v.* Cordes, 87 Wis. 373, 58 N. W. 771; Beaupre *v.* Brigham, 79 Wis. 436, 48 N. W. 596. See Everdell *v.* Sheboygan, etc., R. Co., 41 Wis. 395 (where defendant appeared by attorney at the examination of the garnishee and did not object to the proceedings on the ground that he had not been notified thereof, and it was held that he thereby waived his right to such notice); Healey *v.* Butler, 66 Wis. 9, 27 N. W. 822.

42. **Under the statutes** in some of the states, however, process of garnishment may be issued by any court having jurisdiction of the original cause of action and sent to any county in the state and served upon the garnishee wherever he may be found. Sherwood *v.* Stevenson, 25 Conn. 431; Toledo, etc., R. Co. *v.* Reynolds, 72 Ill. 487; Tourville *v.* Wabash R. Co., 61 Mo. App. 527.

Rule in Indiana.— Under the provisions of the Indiana statute, to authorize a judgment against a garnishee served by process in, and being a resident of, another county than that in which a writ of attachment was issued, it is necessary that the property of the principal defendant should have been attached, or a garnishee served with process in the latter county. Becknell *v.* Becknell, 110 Ind. 42, 10 N. E. 414; Reinhard *v.* Keith, 3 Ind. 137.

43. *Kentucky.*— Robertson *v.* Roberts, 1 A. K. Marsh. 247.

Louisiana.— Harrisson *v.* Hornsheim, 28 La. Ann. 881, holding that jurisdiction is not

b. Non-Residents — (I) *Natural Persons.* The rule is well recognized that, in the absence of express statutory provision, a non-resident of a state cannot be summoned in garnishment proceedings whether the principal debtor be a resident or non-resident,[44] at least unless he is in possession of property within the state belonging to the principal debtor, or is indebted to him, and such debt is, by the terms of the contract, to be liquidated within the state.[45]

(II) *Corporations.* In the absence of express statutory provision, foreign corporations, like natural persons, cannot be subjected to garnishment or trustee process for a debt due or property belonging to a resident or non-resident of the state where the principal action is brought.[46] Now, however, in many jurisdictions statutes have been enacted rendering a foreign corporation liable to garnishment proceedings where such corporation is doing business within the state, or has a usual place of business therein.[47]

acquired of a garnishee where he resides out of the judicial district where the proceedings are pending.

Maine.— Biddeford Sav. Bank *v.* Mosher, 79 Me. 242, 9 Atl. 614.

Nebraska.— South Omaha Nat. Bank *v.* Farmers', etc., Nat. Bank, 45 Nebr. 29, 63 N. W. 128.

Ohio.— Conahan *v.* Cullin, 2 Disn. 1.

See 24 Cent. Dig. tit. "Garnishment," § 143.

44. Smith *v.* Eaton, 36 Me. 298, 58 Am. Dec. 746; Columbus Ins. Co. *v.* Eaton, 35 Me. 391; Allen *v.* Wright, 136 Mass. 193, 134 Mass. 347; Nye *v.* Liscombe, 21 Pick. (Mass.) 263; Hart *v.* Anthony, 15 Pick. (Mass) 445; Ray *v.* Underwood, 3 Pick. (Mass.) 302; Rindge *v.* Green, 52 Vt. 204 (holding likewise that the objection of non-residence is not personal to a trustee and cannot be waived); Blair *v.* Bemis, 3 Fed. Cas. No. 1,484; Peters *v.* Rogers, 19 Fed. Cas. No. 11,033, 5 Mason 555. See also Barrows *v.* Rose, 7 Gray (Mass.) 282. And *compare* Marqueze *v.* Le Blanc, 29 La. Ann. 194.

45. Bush *v.* Nance, 61 Miss. 237; Lawrence *v.* Smith, 45 N. H. 533, 86 Am. Dec. 183 (holding, however, that if an inhabitant of another state is duly served with the process of foreign attachment within the state, he must appear and answer or judgment will be rendered against him on his default); Jones *v.* Winchester, 6 N. H. 497; Chase *v.* Haughton, 16 Vt. 594.

Members of a partnership, part of whom reside in one state and part in another state, who formed their partnership and carried on their partnership business in the former state, can be held chargeable as the trustees of one to whom they are indebted in the former state. Parker *v.* Danforth, 16 Mass. 299; Peck *v.* Barnum, 24 Vt. 75.

46. Wilmington, etc., Nat. Bank *v.* Furtick, 2 Marv. (Del.) 35, 42 Atl. 479, 69 Am. St. Rep. 99, 44 L. R. A. 115; Schmidlapp *v.* La Confiance Ins. Co., 71 Ga. 246; Gold *v.* Housatonic R. Co., 1 Gray (Mass.) 424; Danforth *v.* Penny, 3 Metc. (Mass.) 564; Northwestern Life, etc., Co. *v.* Gippe, 92 Minn. 36, 99 N. W. 364 (where all the parties to an action are non-residents, and process is served only on a non-resident garnishee temporarily in the state, the court acquires no jurisdiction of the action by such service); Atlantic Ins. Co. *v.* Sinker, 1 Tex. App. Civ. Cas. § 954.

47. *Alabama.*—Georgia, etc., R. Co. *v.* Stollenwerck, 122 Ala. 539, 25 So. 258.

Arkansas.— Kansas City, etc., R. Co. *v.* Parker, 69 Ark. 401, 63 S. W. 996, 86 Am. St. Rep. 205.

Kentucky.— Pittsburg, etc., R. Co. *v.* Bartels, 108 Ky. 216, 56 S. W. 152, 21 Ky. L. Rep. 1670.

Massachusetts.— National Bank of Commerce *v.* Huntington, 129 Mass. 444.

Missouri.— McAllister *v.* Pennsylvania Ins. Co., 28 Mo. 214.

North Carolina.— Goodwin *v.* Claytor, 137 N. C. 224, 49 S. E. 173, 67 L. R. A. 209.

Ohio.— Riter-Conley Mfg. Co. *v.* Mzik, 23 Ohio Cir. Ct. 164; Rocke *v.* Raney, 9 Ohio Dec. (Reprint) 617, 15 Cinc. L. Bul. 333.

Tennessee.— Mobile, etc., R. Co. *v.* Barnhill, 91 Tenn. 395, 19 S. W. 21, 30 Am. St. Rep. 889; Holland *v.* Mobile, etc., R. Co., 16 Lea 414.

West Virginia.— Pennsylvania R. Co. *v.* Rogers, 52 W. Va. 450, 44 S. E. 300, 62 L. R. A. 178; Mahany *v.* Kephart, 15 W. Va. 609.

Wisconsin.— Brauser *v.* New England F. Ins. Co., 21 Wis. 506.

United States.— Mooney *v.* Buford, etc., Mfg. Co., 72 Fed. 32, 18 C. C. A. 421.

See 24 Cent. Dig. tit. "Garnishment," § 144.

In Vermont the statute provides that no person shall be summoned as trustee unless at the time of the service of the writ he resides in the state. Craig *v.* Dunn, 67 Vt. 92, 30 Atl. 860, 27 L. R. A. 511; Towle *v.* Wilder, 57 Vt. 622. However, the statute further provides that debts due and owing from a person resident without the state, or from a number of persons part or all of whom reside without the state, having an authorized agent resident in the state, may be attached and held by trustee process, and service of such process made upon such agent as provided for in service of writs of summons shall be a sufficient notice to such trustees as reside without the state. Holt *v.* Ladd, 71 Vt. 204, 44 Atl. 69; Weed Sewing Mach. Co. *v.* Boutelle, 56 Vt. 570, 48 Am. Rep. 821.

5. Jurisdiction of Property or Debt Sought to Be Subjected — a. In General. Where there is no personal service upon defendant the court must have jurisdiction of the property or debt sought to be subjected to process of garnishment, and in order to warrant a judgment against a garnishee it is absolutely essential that at the time of the service of process he should have property of defendant in his possession within the state, or be indebted to him in an amount certain, payable therein.[48]

b. Situs of Property or Debt Due — (i) *In General.* There seems to be a hopeless conflict of opinion in the adjudged cases as to the *situs*, for the purpose of jurisdiction, of intangible property, such as choses in action, debts growing out of contractual relations, etc. In some of the courts the general rule applied in cases of taxation, distribution, etc., is adhered to, and it is held that the *situs* of such debts in garnishment proceedings is the domicile of the principal defendant,[49] while another line of decisions holds that the *situs* of such debts as applied

48. *Alabama.*— Louisville, etc., R. Co. *v.* Steiner, 128 Ala. 353, 30 So. 741; Louisville, etc., R. Co. *v.* Nash, 118 Ala. 477, 23 So. 825, 72 Am. St. Rep. 181, 41 L. R. A. 331; Alabama Great Southern R. Co. *v.* Chumley, 92 Ala. 317, 9 So. 286; Louisville, etc., R. Co. *v.* Dooley, 78 Ala. 524. *Compare* East Tennessee, etc., R. Co. *v.* Kennedy, 83 Ala. 462, 3 So. 852, 3 Am. St. Rep. 755.

Connecticut.—G. M. Williams Co. *v.* Mairs, 72 Conn. 430, 44 Atl. 729.

Georgia.— Georgia Cent. R. Co. *v.* Brinson, 109 Ga. 354, 34 S. E. 597, 77 Am. St. Rep. 382.

Illinois.— Bowen *v.* Pope, 125 Ill. 28, 17 N. E. 64, 8 Am. St. Rep. 330; Chicago State Bank *v.* Thweatt, 111 Ill. App. 599.

Iowa.—Montrose Pickle Co. *v.* Dodson, etc., Mfg. Co., 76 Iowa 172, 40 N. W. 705, 14 Am. St. Rep. 213, 2 L. R. A. 417.

Nebraska.— American Cent. Ins. Co. *v.* Hettler, 37 Nebr. 849, 56 N. W. 711, 40 Am. St. Rep. 522.

New York.— Ward *v.* Boyce, 152 N. Y. 191, 46 N. E. 180, 36 L. R. A. 549, holding that a debt due by a resident in Vermont, which was represented by a note payable to a resident in New York, who has it in his possession, cannot be attached in Vermont on trustee process so as to preclude a subsequent recovery on it by the payee in New York.

Ohio.— Buckeye Pipe Line Co. *v.* Fee, 62 Ohio St. 543, 57 N. E. 446, 78 Am. St. Rep. 743, holding likewise that a court has no power to require a garnishee having property of defendant in his possession without the state to surrender the same into the custody of the court.

Pennsylvania.—Noble *v.* Thompson Oil Co., 79 Pa. St. 354, 21 Am. Rep. 66; Pennsylvania R. Co. *v.* Pennock, 51 Pa. St. 244 [*criticizing* Childs *v.* Digby, 24 Pa. St. 23].

Rhode Island.— Taft *v.* Mills, 5 R. I. 393.

Texas.— See Insurance Co. of North America *v.* Friedman, 74 Tex. 56, 11 S. W. 1046.

Wisconsin.— Bates *v.* Chicago, etc., R. Co., 60 Wis. 296, 19 N. W. 72, 50 Am. Rep. 369.

United States.— New York Cent. Trust Co. *v.* Chattanooga, etc., R. Co., 68 Fed. 685.

See 24 Cent. Dig. tit. "Garnishment," § 145.

Property of foreign corporation.— It has been held in Massachusetts that the property of a corporation, incorporated by any other state, in that state may be attached by trustee process. Ocean Ins. Co. *v.* Portsmouth Mar. R. Co., 3 Metc. 420.

49. *Alabama.*— Louisville, etc., R. Co. *v.* Nash, 118 Ala. 477, 23 So. 825, 72 Am. St. Rep. 181, 41 L. R. A. 331; Alabama Great Southern R. Co. *v.* Chumley, 92 Ala. 317, 9 So. 286.

Connecticut.— Green *v.* Farmers', etc., Bank, 25 Conn. 452.

Georgia.— Beasley *v.* Lennox-Haldeman Co., 116 Ga. 13, 42 S. E. 385; Johnson *v.* Southern R. Co., 110 Ga. 303, 34 S. E. 1002; Georgia Cent. R. Co. *v.* Brinson, 109 Ga. 354, 34 S. E. 597, 77 Am. St. Rep. 382. Since the decision of the above cases, the rule has been changed by statute, and when an attachment is levied by service of garnishment, the *situs* of any debt due by the garnishee to defendant has been declared to be the residence of the garnishee in Georgia, and not that of the non-resident creditor. Nashville Produce Co. *v.* Sewell, 121 Ga. 278, 48 S. E. 945.

Minnesota.—Boyle *v.* Musser-Sauntry Land, etc., Co., 88 Minn. 456, 93 N. W. 520, 97 Am. St. Rep. 538; Swedish-American Nat. Bank *v.* Bleecker, 72 Minn. 383, 75 N. W. 740, 71 Am. St. Rep. 492, 42 L. R. A. 283, holding, however, that the debt may for the purpose of garnishment be given by statute a *situs* also at the domicile of the debtor.

Mississippi.— Bush *v.* Nance, 61 Miss. 237. See also Illinois Cent. R. Co. *v.* Smith, 70 Miss. 344, 12 So. 461, 35 Am. St. Rep. 651, 19 L. R. A. 577.

New York.— Douglass *v.* Phœnix Ins. Co., 138 N. Y. 209, 33 N. E. 938, 34 Am. St. Rep. 448, 20 L. R. A. 118 (holding, however, that the creditor of a non-resident may attach a non-negotiable debt or credit owing or due to him by a person within the jurisdiction where attachment issues); Williams *v.* Ingersoll, 89 N. Y. 508; Osgood *v.* Maguire, 61 N. Y. 524; O'Neil *v.* Nagle, 14 Daly 492, 15 N. Y. St. 358 (holding that under general jurisprudence a debt has its *situs* at the domicile of the creditor, but that the laws of New Jersey having fixed the *situs* of the debt for the purpose of the attachment at the domicile of the debtor, it

to garnishment proceedings is the domicile of the garnishee.[50] In yet other jurisdictions the rule is laid down generally that the *situs* of a debt is at the domicile of the debtor, or wherever the latter may be found and sued by the creditor.[51]

(II) *Place of Payment as Affecting Situs.* In many jurisdictions it is held that the *situs* of a debt is controlled by the place of payment, where the contract expressly stipulated for payment at a designated place, and that such place is the *situs* of the debt, regardless of the domicile of the creditor or debtor.[52] In some jurisdictions, however, the fact that a debt is made payable at

can be effectually attached against a nonresident creditor, and that compulsory payment under the attachment will protect the debtor everywhere against an action by the creditor for the recovery of the same debt).

United States.— Mason *v.* Beebee, 44 Fed. 556.

See 24 Cent. Dig. tit. "Garnishment," § 146.

50. *Arkansas.*— Kansas City, etc., R. Co. *v.* Parker, 69 Ark. 401, 63 S. W. 996, 86 Am. St. Rep. 205, holding that the *situs* of a debt for the purpose of garnishment is not only the domicile of the debtor, but in any state in which the garnishee may be found, provided the law of that state permits the debtor to be garnished, and the court acquires jurisdiction over the garnishee through his voluntary appearance or actual service of process upon him within the state.

Illinois.— Lancashire Ins. Co. *v.* Corbett, 62 Ill. App. 236. See also Bowen *v.* Pope, 125 Ill. 28, 17 N. E. 64, 8 Am. St. Rep. 330 [*affirming* 26 Ill. App. 233].

Kansas.—Burlington, etc., R. Co. *v.* Thompson, 31 Kan. 180, 1 Pac. 622, 41 Am. Rep. 497.

Louisiana.— See Bean *v.* Mississippi Union Bank, 5 Rob. 333.

Massachusetts.— Rothschild *v.* Knight, 176 Mass. 48, 57 N. E. 337, holding that the *situs* of a debt for the purpose of trustee process is the debtor's domicile, or the place where the debtor is amenable to suit.

North Carolina.— Sexton *v.* Phœnix Ins. Co., 132 N. C. 1, 43 S. E. 479; Strause *v.* Ætna F. Ins. Co., 126 N. C. 223, 35 S. E. 471, 48 L. R. A. 452; Balk *v.* Harris, 124 N. C. 467, 32 S. E. 799, 70 Am. St. Rep. 606, 45 L. R. A. 257.

Ohio.— Simmons Hardware Co. *v.* Stokes, 16 Ohio Cir. Ct. 145, 8 Ohio Cir. Dec. 776; Buckeye Pipe Line Co. *v.* Fee, 15 Ohio Cir. Ct. 637, 8 Ohio Cir. Dec. 727; Barbour *v.* Boyce, 9 Ohio S. & C. Pl. Dec. 332, 7 Ohio N. P. 504, 10 Ohio S. & C. Pl. Dec. 428. See also R. A. Kelley Co. *v.* Garvin Mach. Co., 4 Ohio S. & C. Pl. Dec. 374, 6 Ohio N. P. 350.

Pennsylvania.—Merchants', etc., Nat. Bank *v.* William A. Baeder Glue Co., 164 Pa. St. 1, 30 Atl. 290; Morgan *v.* Neville, 74 Pa. St. 52; Chase *v.* New York Ninth Nat. Bank, 56 Pa. St. 355, holding likewise that a resident of another state who has an agent or clerk at his place of business in this state is liable to the process of foreign attachment.

Tennessee.— Mobile, etc., R. Co. *v.* Barnhill, 91 Tenn. 395, 19 S. W. 21, 30 Am. St. Rep. 889 [*following* Holland *v.* Mobile, etc., R. Co., 16 Lea 414].

Texas.— Strauss *v.* Hernsheim, 3 Tex. App. Civ. Cas. § 408.

Utah.— Losee *v.* McCarty, 5 Utah 528, 17 Pac. 452.

Vermont.— Nichols *v.* Hooper, 61 Vt. 295, 17 Atl. 134; Ward *v.* Morrison, 25 Vt. 593.

West Virginia.— See also Pennsylvania R. Co. *v.* Rogers, 52 W. Va. 450, 44 S. E. 300, 62 L. R. A. 178.

Wisconsin.— Bragg *v.* Gaynor, 85 Wis. 468, 55 N. W. 919, 21 L. R. A. 161. See also Renier *v.* Hurlbut, 81 Wis. 24, 50 N. W. 783, 29 Am. St. Rep. 850, 14 L. R. A. 562.

United States.—See Reimers *v.* Seatco Mfg. Co., 70 Fed. 573, 17 C. C. A. 228, 30 L. R. A. 364.

See 24 Cent. Dig. tit. "Garnishment," § 146.

51. *Arizona.*—National F. Ins. Co. *v.* Ming, (1900) 60 Pac. 720.

Iowa.— German Bank *v.* American F. Ins. Co., 83 Iowa 491, 50 N. W. 53, 32 Am. St. Rep. 316; Mooney *v.* Union Pac. R. Co., 60 Iowa 346, 14 N. W. 343.

Minnesota.— Harvey *v.* Great Northern R. Co., 50 Minn. 405, 52 N. W. 905, 17 L. R. A. 84.

Missouri.— Howland *v.* Chicago, etc., R. Co., 134 Mo. 474, 36 S. W. 29; Wyeth Hardware, etc., Co. *v.* Lang, 127 Mo. 242, 29 S. W. 1010, 48 Am. St. Rep. 626, 27 L. R. A. 651. See Fielder *v.* Jessup, 24 Mo. App. 91; Green's Bank *v.* Wickham, 23 Mo. App. 663, both holding that the *situs* of the debt is where the debtor resides, unless the debt, by the terms of the contract created, is payable elsewhere.

New Jersey.— Hartford Nat. F. Ins. Co. *v.* Chambers, 53 N. J. Eq. 468, 32 Atl. 663.

Rhode Island.— Cross *v.* Brown, 19 R. I. 220, 33 Atl. 147.

Washington.— Neufelder *v.* German American Ins. Co., 6 Wash. 336, 33 Pac. 870, 36 Am. St. Rep. 166, 22 L. R. A. 287.

United States.— Chicago, etc., R. Co. *v.* Sturm, 174 U. S. 710, 19 S. Ct. 797, 43 L. ed. 1144 [*reversing* 58 Kan. 818, 51 Pac. 1100]; Tootle *v.* Coleman, 107 Fed. 41, 46 C. C. A. 132, 57 L. R. A. 120.

See 24 Cent. Dig. tit. "Garnishment," § 146.

52. *Alabama.*— Louisville, etc., R. Co. *v.* Nash, 118 Ala. 477, 23 So. 825, 72 Am. St. Rep. 181, 41 L. R. A. 331; Alabama Great Southern R. Co. *v.* Chumley, 92 Ala. 317, 9 So. 286; Louisville, etc., R. Co. *v.* Dooley, 78 Ala. 524.

Georgia.—Beasley *v.* Lennox-Haldeman Co., 116 Ga. 13, 42 S. E. 385.

Indian Territory.— McBee *v.* Purcell Nat. Bank, 1 Indian Terr. 288, 37 S. W. 55.

a designated place is held not to fix the *situs* of the debt so as to prevent the garnishment thereof at the domicile of the principal defendant, or the garnishee, where such garnishment would be otherwise allowed.[53]

6. Venue — a. General Rule. In some jurisdictions the courts have held that statutes providing that suits must be brought in the county where one of the parties thereto resides are not applicable in garnishment proceedings, and that such suits may be instituted at any place where the garnishee may be found, and where service can be had upon him under a writ or summons issuing from a court having jurisdiction of the principal action.[54] In other jurisdictions the rule is that trustee proceedings must be brought in the county where the garnishee or trustee resides, regardless of the residence of plaintiff or defendant in the principal action.[55]

Kansas.— Missouri Pac. R. Co. *v.* Maltby, 34 Kan. 125, 8 Pac. 235.

Michigan.— Hamilton *v.* Rogers, 67 Mich. 135, 34 N. W. 278.

Mississippi.— Bucy *v.* Kansas City, etc., R. Co., (1896) 22 So. 296; Bush *v.* Nance, 61 Miss. 237.

Missouri.— Walker *v.* Fairbanks, 55 Mo. App. 478; Keating *v.* American Refrigerator Co., 32 Mo. App. 293. See Fielder *v.* Jessup, 24 Mo. App. 91, holding that where the debtor, creditor, and garnishee are non-residents, and their debts are not by the terms of the contract payable within the state, garnishment cannot be sustained.

Nebraska.—Bullard *v.* Chaffee, 61 Nebr. 83, 84 N. W. 604, 51 L. R. A. 715.

New Hampshire.— Carbee *v.* Mason, 64 N. H. 10, 4 Atl. 791; Chadbourn *v.* Gilman, 63 N. H. 353; Orcutt *v.* Hough, 54 N. H. 472 (holding that a negotiable instrument made in New Hampshire and payable generally without designating any place of payment is "made or payable in this state," within the meaning of the provision of Gen. St. c. 230, § 31, providing that the trustee may be charged for "any negotiable promissory note, or other instrument on which he is liable, made and payable in this state"); Kibling *v.* Burley, 20 N. H. 359.

New York.— Douglass *v.* Phœnix Ins. Co., 138 N. Y. 209, 33 N. E. 938, 34 Am. St. Rep. 448, 20 L. R. A. 118 [*affirming* 63 Hun 393, 18 N. Y. Suppl. 259]; Williams *v.* Ingersoll, 89 N. Y. 508.

Ohio.— R. A. Kelley Co. *v.* Garvin Mach. Co., 4 Ohio S. & C. Pl. Dec. 374, 6 Ohio N. P. 350.

United States.— Central Trust Co. *v.* Chattanooga, etc., R. Co., 68 Fed. 685. See also Connor *v.* Hanover Ins. Co., 28 Fed. 549.

See 24 Cent. Dig. tit. "Garnishment," § 147.

53. *Illinois.*— Pomeroy *v.* Rand, 157 Ill. 176, 41 N. E. 636; Lancashire Ins. Co. *v.* Corbett, 62 Ill. App. 236.

Massachusetts.—Sturtevant *v.* Robinson, 18 Pick. 175; Blake *v.* Williams, 6 Pick. 286, 17 Am. Dec. 372.

Minnesota.— See Harvey *v.* Great Northern R. Co., 50 Minn. 405, 52 N. W. 905, 17 L. R. A. 84.

Rhode Island.— Cross *v.* Brown, 19 R. I. 220, 33 Atl. 147.

Vermont.— Nichols *v.* Hooper, 61 Vt. 295, 17 Atl. 134.

Wisconsin.— Commercial Nat. Bank *v.* Chicago, etc., R. Co., 45 Wis. 172.

See 24 Cent. Dig. tit. "Garnishment," § 147.

54. *Alabama.*— McPhillips *v.* Hubbard, 97 Ala. 512, 12 So. 711.

Arkansas.— Hancock *v.* Gibson, (1904) 79 S. W. 1061, holding, however, that the statute providing that an action may be prosecuted in any county in which a garnishee who is indebted to defendant is served with process applies only to garnishments on the grounds enumerated in Civ. Code, § 216, relating to non-residence or fraud by defendant. And see Pike *v.* Lytle, 6 Ark. 212, holding that a suit commenced by a writ of garnishment is a transitory action and the writ cannot run out of the county within which it is issued.

Connecticut.— Sherwood *v.* Stevenson, 25 Conn. 431.

Illinois.— Toledo, etc., R. Co. *v.* Reynolds, 72 Ill. 487. See also Lancashire Ins. Co. *v.* Corbett, 62 Ill. App. 236.

Indiana.— Becknell *v.* Becknell, 110 Ind. 42, 10 N. E. 414.

Louisiana.— See Smith *v.* Durbridge, 26 La. Ann. 531.

Washington.— Title Guaranty, etc., Co. *v.* Northwestern Theatrical Assoc., 23 Wash. 517, 63 Pac. 212, holding that the statute providing that actions shall be tried in the county of defendant's residence does not apply to garnishment proceedings.

See 24 Cent. Dig. tit. "Garnishment," § 148.

55. *Georgia.*— West *v.* Harvey, 81 Ga. 711, 8 S. E. 449; Clark *v.* Chapman, 45 Ga. 486. *Compare* Huron *v.* Huron, T. U. P. Charlt. 160.

Kentucky.— Roberts *v.* Walker, 7 B. Mon. 75.

Maine.— Cooper *v.* Bailey, 52 Me. 230; Greenwood *v.* Fales, 6 Me. 405.

Massachusetts.— Way *v.* Dame, 11 Allen 357; Lewis *v.* Denney, 4 Cush. 588 (if trustee process is brought in the wrong county as to the trustee, the action will be dismissed on motion of the trustee or of the principal defendant); Hooper *v.* Jellison, 22 Pick. 250; Jacobs *v.* Mellen, 14 Mass. 132; Davis *v.* Marston, 5 Mass. 199; Wilcox *v.* Mills, 4 Mass. 218; Barker *v.* Taber, 4 Mass. 81.

Michigan.— Stern *v.* Frazer, 105 Mich. 685, 63 N. W. 968.

Mississippi.— Smith *v.* Mulhern, 57 Miss.

b. Change of Venue. Where an action is brought in one county and the garnishee lives in another county, he may move for a change of venue to the county of his residence,[56] but where the garnishee makes no motion for a change of venue and files his answer, a change of venue cannot be had without his consent.[57]

C. Parties — 1. In General. The general rule is that all parties liable jointly or jointly and severally to the principal defendant should be summoned as garnishees or trustees.[58] All parties having or claiming an interest in the debt or property due or held by the garnishee should be made parties to the garnishment proceedings, in order that the judgment obtained against the garnishee may be a complete defense in his behalf to subsequent actions to recover the same debt or property.[59]

2. Garnishees Holding Distinct Property or Interests. It has been held in several jurisdictions that several garnishees cannot be joined in the same writ of

591; O'Brien *v.* Liddell, 10 Sm. & M. 371, holding that a summons of garnishment issuing on a judgment in one county against a garnishee of another county should be made returnable in the county where the garnishee resides.

Pennsylvania.— Cowden *v.* West Branch Bank, 7 Watts & S. 432.

Texas.— Moore *v.* Blum, (Civ. App. 1897) 40 S. W. 511.

See 24 Cent. Dig. tit. "Garnishment," § 149.

But see Trombly *v.* Clark, 13 Vt. 118, holding that the residence of plaintiff or a principal debtor under a trustee process determines the place where the suit is to be brought and not the residence of the trustee. And *compare* South Omaha Nat. Bank *v.* Farmers', etc., Nat. Bank, 45 Nebr. 29, 63 N. W. 128, holding that an order of garnishment cannot issue to any county other than that in which the principal action is pending.

56. McCloud *v.* McCullers, 84 Miss. 20, 36 So. 65; Jones *v.* Cummins, 17 Tex. Civ. App. 661, 43 S. W. 854.

57. Cross *v.* Spillman, 93 Ala. 170, 9 So. 362. See also Miller *v.* Mason, 51 Iowa 239, 1 N. W. 483.

58. *Arkansas.*— Frizzell *v.* Willard, 37 Ark. 478; Moreland *v.* Pelham, 7 Ark. 338.

Colorado.— Jones *v.* Langhorne, 19 Colo. 206, 34 Pac. 997.

Connecticut.— See Hawley *v.* Atherton, 39 Conn. 309.

Iowa.— Wilson *v.* Albright, 2 Greene 125.

Louisiana.— See First Natchez Bank *v.* Moss, 52 La. Ann. 170, 26 So. 828.

Maine.— Hutchinson *v.* Eddy, 29 Me. 91. See also Manufacturer's Bank *v.* Osgood, 12 Me. 117.

Massachusetts.— Sabin *v.* Cooper, 15 Gray 532 (holding, however, that a non-joinder of joint debtors as trustees in foreign attachment can be pleaded in abatement only)'; Warner *v.* Perkins, 8 Cush. 518.

Michigan.— Ferry *v.* Cincinnati Underwriters, 111 Mich. 261, 69 N. W. 483.

Minnesota.— Northwestern Fuel Co. *v.* Kofod, 74 Minn. 448, 77 N. W. 206.

New Hampshire.— Treadwell *v.* Brown, 41 N. H. 12; Ladd *v.* Baker, 26 N. H. 76, 57 Am. Dec. 355; Barker *v.* Garland, 22 N. H. 103; Hudson *v.* Hunt, 5 N. H. 538; Rix *v.* Elliot, 1 N. H. 184.

Pennsylvania.— Raiguel *v.* McConnell, 25 Pa. St. 362, holding likewise that the process should issue against the debtor of defendant and not against him who merely holds evidences of the debt.

Vermont.— Marsh *v.* Davis, 24 Vt. 363.

Washington.— See Moore *v.* Gilmore, 16 Wash. 123, 47 Pac. 239.

West Virginia.— Lipscomb *v.* Condon, 56 W. Va. 416, 49 S. E. 392, 67 L. R. A. 670. See Lanham *v.* Lanham, 30 W. Va. 222, 4 S. E. 273, holding that a party claiming that a garnishee is indebted to him and not to the judgment debtor is not a proper party to the proceeding.

See 24 Cent. Dig. tit. "Garnishment," §§ 150, 152.

Stranger to record.— An order adding the name of a stranger to the record as garnishee in an execution attachment without an alias writ and without prior rule or notice to him is irregular, and such order and all subsequent proceedings against such added party will be reversed and set aside. Echols' Appeal, 129 Pa. St. 554, 18 Atl. 559.

On the death of a joint defendant process of garnishment cannot issue against a joint debtor of defendants until the deceased's estate is represented. Rawson *v.* Cochran, 17 Ga. 80.

59. Field *v.* Malone, 102 Ind. 251, 1 N. E. 507; Coleman *v.* American F. Ins. Co., 74 Mo. App. 663, holding that the insured is a necessary party to the proceedings in garnishment to reach a mortgagee's interest in the proceeds of an insurance policy.

Ancillary garnishment.— Where the garnishment proceeding is purely ancillary, garnishee need not be added as defendants, nor named in the caption of the petition in the principal action. Barbour *v.* Boyce, 8 Ohio S. & C. Pl. Dec. 548.

Plaintiff of record.— Although the affidavit should be made by the real owner, and although the garnishment is the institution of a suit, the process must be sued out, and the judgment on the answer taken in the name of plaintiff of record in the principal action, and not in the name of the real owner of

garnishment, unless a joint liability or indebtedness is sought to be reached by the writ.[60]

D. Petition or Affidavit — 1. Necessity of, and Time For, Filing. The various garnishment statutes provide that in order to give the court jurisdiction in garnishment proceedings, and before garnishment process can issue, there must be filed a petition or affidavit by plaintiff in the principal action, setting up the statutory facts which entitle him to the issuance of the writ.[61]

2. Form and Sufficiency — a. In General. It is not necessary that the affidavit follow the language of the statute, although it must contain every substantial averment required, and these averments must be so clearly and positively stated that perjury can be assigned upon them.[62]

b. Necessary Recitals — (i) *Averments in General.* The statutes usually require the affidavit to state the residence of the garnishee, and if a corporation, whether domestic or foreign, in order to show whether the garnishee named is subject to the jurisdiction of the court;[63] and some of the statutes require an

the judgment. Jackson *v.* Shipman, 28 Ala. 488.

60. Cincinnati, etc., Slate Co. *v.* Bridge, 17 Ark. 364; Thorn *v.* Woodruff, 5 Ark. 55; Ball *v.* Young, 52 Mich. 476, 18 N. W. 225; Atkinson *v.* Minor, 1 Tyler (Vt.) 122. *Contra,* Curry *v.* Woodward, 50 Ala. 258, holding that any number of persons may be joined in a writ of garnishment, whether they are liable or indebted to defendant jointly or severally, and such joinder does not make the writ subject to a plea in abatement.

61. *Alabama.*— Cooper *v.* Frederick, 9 Ala. 738; Clark *v.* Gaither, 6 Ala. 139.

Illinois.— Gibbon *v.* Bryan, 3 Ill. App. 298.

Indiana.— Hart *v.* O'Rourke, 151 Ind. 205, 51 N. E. 330; Whitaker *v.* Coleman, 25 Ind. 374, holding that the statute does not require a separate complaint to be filed against a person summoned as garnishee, and that the affidavit required to procure the summons is all that is necessary.

Minnesota.— Black *v.* Brisbin, 3 Minn. 360, 74 Am. Dec. 762.

Mississippi.— Hoffman *v.* Simon, 52 Miss. 302; Ford *v.* Woodward, 2 Sm. & M. 260.

Nebraska.— State *v.* Duncan, 37 Nebr. 631, 56 N. W. 214.

Pennsylvania.—Woodstown First Nat. Bank *v.* Trainer, 209 Pa. St. 387, 58 Atl. 816.

Texas.— Godfrey *v.* Newby, (Civ. App. 1897) 39 S. W. 594; Harrington *v.* Edrington, (Civ. App. 1896) 38 S. W. 246.

See 24 Cent. Dig. tit. "Garnishment," § 155.

In Arkansas no formal affidavit is required, although the statute provides for the filing of allegations and interrogatories in writing with the clerk and justice issuing the writ upon which plaintiff may be desirous of obtaining the answer of the garnishee, but the failure to file such allegations and interrogatories, although irregular, will not avoid the writ. Little Rock Traction, etc., Co. *v.* Wilson, 66 Ark. 582, 53 S. W. 43.

62. *Indiana.*— Hart *v.* O'Rourke, 151 Ind. 205, 51 N. E. 330; Pomeroy *v.* Beach, 149 Ind. 511, 49 N. E. 370.

Kansas.— Walker *v.* Columbus State Bank, 64 Kan. 884, 67 Pac. 552, holding likewise that since the statute does not require that an affidavit for a writ of garnishment, where execution against the principal defendant has been returned unsatisfied, shall aver that the execution was so returned, the absence of such averment in the affidavit is immaterial.

Rhode Island.— Greene *v.* Tripp, 11 R. I. 424.

Texas.— Scurlock *v.* Gulf, etc., R. Co., 77 Tex. 478, 14 S. W. 148; Willis *v.* Lyman, 22 Tex. 268; Godfrey *v.* Newby, (Civ. App. 1897) 39 S. W. 594; Carter *v.* Wise County Coal Co., 2 Tex. App. Civ. Cas. § 213.

West Virginia.— Pennsylvania R. Co. *v.* Rogers, 52 W. Va. 450, 44 S. E. 300, 62 L. R. A. 178.

Wisconsin.— Sanger *v.* Guenther, 73 Wis. 354, 41 N. W. 436; Russell *v.* Ralph, 53 Wis. 328, 10 N. W. 518 (holding that an affidavit for garnishment is not bad because it states that the affiant "verily believes," instead of the statutory form "has good reason to believe," the former being the stronger form, and perjury being assignable upon it); Rasmussen *v.* McCabe, 46 Wis. 600, 1 N. W. 196.

See 24 Cent. Dig. tit. "Garnishment," § 156.

Compare Smoot *v.* Hart, 33 Ala. 69; Talhem *v.* Hoover, 4 Pa. Co. Ct. 172.

Verification.— In Illinois in garnishment proceedings on a judgment of the circuit court, it is not necessary that the affidavit on which the process is issued be sworn to before the clerk of the court, and the same may be properly subscribed and sworn to before a justice of the peace. Horat *v.* Jackel, 59 Ill. 139. In Georgia, prior to March 24, 1866, there was no provision at law allowing garnishment to issue on an affidavit made before a justice of the inferior court. Greshan *v.* De Launay, 34 Ga. 442.

63. *Georgia.*— Harris *v.* Kittle, 119 Ga. 29, 45 S. E. 729. *Compare* Owsley *v.* Woolhopter, 14 Ga. 124, holding that the law does not require that the affidavit should state against whom summons of garnishment is desired.

Michigan.— Ettelsohn *v.* Fireman's Fund Ins. Co., 64 Mich. 331, 31 N. E. 201.

Nebraska.— Metcalf *v.* Bockoven, 1 Nebr. (Unoff.) 822, 96 N. W. 406.

Pennsylvania.— See Bentley *v.* Kaufman, 12 Phila. 435.

averment in the affidavit that plaintiff or affiant is justly apprehensive of the loss of the debt, unless a writ of garnishment issue to the garnishee named.[64]

(II) *Capacity of Affiant.* An affidavit for a writ of garnishment may be made by plaintiff's attorney or agent,[65] and it is not necessary to state affirmatively the character of the affiant, the use of the word "agent," or "attorney," by way of recital or description being sufficient.[66]

(III) *Capacity of Garnishee.* In the absence of statutory prohibition a garnishee may be charged as the debtor of the principal debtor, and also as a custodian of property belonging to him in the same affidavit.[67] Likewise the same affidavit may be the basis for issuing several writs of garnishment to garnishees liable severally only.[68]

Texas.— Morton *v.* Hull, 77 Tex. 80, 13 S. W. 849, 8 L. R. A. 722; Johnson *v.* McCutchings, 43 Tex. 553; Lash *v.* Morris County Bank, (Civ. App. 1899) 54 S. W. 806; Smith *v.* Wallis, 18 Tex. Civ. App. 402, 45 S. W. 820 (holding that under the statute requiring an application of garnishment to set out the name and residence of a garnishee, an affidavit for garnishment setting out the name of a mercantile firm without giving the names of the persons who compose it is insufficient); Harrington *v.* Edrington, (Civ. App. 1896) 38 S. W. 246.

Vermont.— Chaffee *v.* Rutland R. Co., 55 Vt. 110, holding, however, that if the affidavit alleges that the corporation has an authorized agent resident within the state, the allegation is sufficient to give the court jurisdiction when legal service has been made.

Wisconsin.— See Brauser *v.* New England F. Ins. Co., 21 Wis. 506.

See 24 Cent. Dig. tit. "Garnishment," § 160.

See, however, Howland *v.* Jeuel, 55 Minn. 102, 56 N. W. 581, holding that it is not necessary that an affidavit of garnishment should state that the garnishee is a corporation.

Residence of plaintiff.— The total omission in the affidavit for garnishment of the averment of plaintiff's citizenship is not fatal, it being sufficient to aver that he is a resident of the United States. McCoy *v.* Boyle, 10 Md. 391.

Residence of defendant.— Under the Kentucky statute an allegation that the principal defendant is a non-resident is sufficient to give the court jurisdiction without alleging that defendant is absent from the state. Clark *v.* Arnold, 9 Dana (Ky.) 305. In Pennsylvania it is sufficient for the affidavit to show that defendant is absent from the county or state at the time of suit without showing that he has gained a residence elsewhere. Eberly *v.* Rowland, 1 Pearson 312.

64. Under such statutes it has been held that an affidavit made by an attorney or agent of plaintiff alleging that plaintiff had such apprehension was insufficient, since the affiant could not know such fact. Harris *v.* Kittle, 119 Ga. 29, 45 S. E. 729; Knox *v.* Summers, 66 Ga. 256; Weimeister *v.* Manville, 44 Mich. 408, 6 N. W. 859. See Williams *v.* International Grain, etc., Bd., 99 Mich. 80, 57 N. W. 1089, holding that an affidavit for garnishment made by one of plaintiffs is not defective for stating that plaintiffs are apprehensive of loss unless a writ issue, as it will be presumed that he has personal knowledge of such apprehension. *Compare* Seaton *v.* Brooking, 1 Tex. App. Civ. Cas. § 1041, holding that where the affidavit is made by plaintiff's attorney, he is not required to swear to his client's belief of the facts, but that it is sufficient if he states that he (the attorney) has reason to believe, and does believe, etc.

65. Moline, etc., Co. *v.* Curtis, 38 Nebr. 520, 57 N. W. 161; Metcalf *v.* Bockoven, 1 Nebr. (Unoff.) 822, 96 N. W. 406; E. L. Wilson Hardware Co. *v.* Anderson Knife, etc., Co., 22 Tex. Civ. App. 229, 54 S. W. 928; Carter *v.* Wise County Coal Co., 2 Tex. App. Civ. Cas. § 213; Marx *v.* Epstein, 1 Tex. App. Civ. Cas. § 1317; Erwin *v.* Austin, 1 Tex. App. Civ. Cas. § 1037. See also Carroll *v.* Sheehan, 12 R. I. 218.

66. Wetherwax *v.* Paine, 2 Mich. 555; Godman *v.* Gordon, 61 Mo. App. 685; Willis *v.* Lyman, 22 Tex. 268; Simon *v.* Greer, (Tex. Civ. App. 1896) 34 S. W. 343, holding that the failure of an affidavit in garnishment made by an agent of plaintiff to disclose in what capacity affiant was acting was cured by recitals in the record of the main action disclosing an agency. *Compare* Jeary *v.* American Exch. Bank, (Nebr. 1902) 89 N. W. 771, holding that, in an affidavit for garnishment, the fact of agency must be sworn to by the affiant, and not set out by recital merely.

67. Peninsular Stove Co. *v.* Wayne County Cir. Judge, 85 Mich. 400, 48 N. W. 549; Aultman *v.* Markley, 61 Minn. 404, 63 N. W. 1078. See, however, Prince *v.* Heenan, 5 Minn. 347, holding that an affidavit for garnishment under Minn. Laws (1860), c. 70, § 2, must state in what capacity the garnishee is sought to be held, whether as a debtor of the principal defendant or as holding his property; but a garnishee summoned in only one of these capacities may be questioned in both.

68. Detroit State Sav. Bank *v.* Wayne County Cir. Judge, 95 Mich. 100, 54 N. W. 632; Northwestern Fuel Co. *v.* Kofod, 77 Minn. 448, 77 N. W. 206; Ingraham *v.* Olcock, 14 N. H. 243; Carper *v.* Richards, 13 Ohio St. 219.

(iv) *Averments as to Debt or Liability of Defendant.* The affidavit for garnishment process should state the amount of the judgment recovered against the principal defendant, or the nature and the amount of his indebtedness on which attachment issued.[69]

(v) *Averments as to Property of Defendant.* In several jurisdictions the statute requires the judgment creditor to aver in his affidavit for the writ of garnishment that defendant has no property within the state sufficient to satisfy his judgment.[70]

(vi) *Averments as to Debt or Obligation of Garnishee.* An affidavit for a writ of garnishment should state that the garnishee has property, money, goods, credits, or effects in his possession or under his control belonging to the principal defendant.[71] Some of the cases, however, hold that plaintiff is not required to describe with great accuracy the obligations subsisting between the principal debtor and the garnishee.[72]

69. *Connecticut.*—Treadway *v.* Andrews, 20 Conn. 384, where allegations as to the indebtedness of a principal defendant were held sufficient.

Illinois.— Stickley *v.* Little, 29 Ill. 315.

Kentucky.—Cockrill *v.* Mize, 12 S. W. 1040, 11 Ky. L. Rep. 637, where the allegations as to defendant's indebtedness were held sufficient.

Michigan.— Detroit State Sav. Bank *v.* Wayne County Cir. Judge, 95 Mich. 100, 54 N. W. 632 (holding, however, that the affidavit need not show that the debt on which the principal action was brought was due at the time of the commencement of the garnishment proceedings); Weimeister *v.* Manville, 44 Mich. 408, 6 N. W. 859. See Union Nat. Bank *v.* Muskegon Cir. Judge, 117 Mich. 678, 76 N. W. 116; Millard *v.* Lenawee Cir. Judge, 107 Mich. 134, 64 N. W. 1046.

Ohio.— Squair *v.* Shea, 7 Ohio Dec. (Reprint) 71, 1 Cinc. L. Bul. 99.

Pennsylvania.— Sagee *v.* Rudderow, 1 Pa. Co. Ct. 373.

Texas.— Sullivan *v.* King, (Civ. App. 1904) 80 S. W. 1048 (an affidavit stating that the amount claimed in the suit was two thousand one hundred and twenty-four dollars and thirty-eight cents, interest and attorney's fees, with no statement of the rate of interest, the date from which it began to run, or the amount of the attorney's fees, was not sufficiently certain); Jeffries *v.* Smith, 31 Tex. Civ. App. 582, 73 S. W. 48; Hutcheson *v.* Clipper, 2 Tex. Unrep. Cas. 549. See Curtis *v.* Ford, 78 Tex. 262, 14 S. W. 614, 10 L. R. A. 529.

Virginia.— Barksdale *v.* Hendree, 2 Patt. & H. 43, holding that the affidavit must show that the debt on which the action was based is such as comes within the meaning of the statute.

Wisconsin.— See Orton *v.* Noonan, 27 Wis. 572, holding that the affiant is not required to allege the fact, amount, and nature of defendant's indebtedness to him.

See 24 Cent. Dig. tit. "Garnishment," § 161.

70. Corbin *v.* Goddard, 94 Ind. 419 (holding, however, that an averment that defendant was notoriously insolvent, and that all his property subject to execution had been sold on execution, was sufficient, on motion in arrest of judgment); Willis *v.* Lyman, 22 Tex. 268 (the affidavit must allege that defendant has no property within the jurisdiction of the court, an allegation of none within the county merely being insufficient); Sullivan *v.* King, (Tex. Civ. App. 1904) 80 S. W. 1048; Orton *v.* Noonan, 27 Wis. 572; Booth *v.* Denike, 65 Fed. 43.

71. *Alabama.*— Godden *v.* Pierson, 42 Ala. 370.

Arkansas.— Frizzell *v.* Willard, 37 Ark. 478, holding that if the writ be against a single individual, allegations in the affidavit of his joint indebtedness with another to defendant, and interrogatories pursuant thereto, are demurrable.

Connecticut.— Treadway *v.* Andrews, 20 Conn. 384.

Michigan.— Conner *v.* Detroit Third Nat. Bank, 90 Mich. 328, 51 N. W. 523.

Minnesota.— Aultman *v.* Markley, 61 Minn. 404, 63 N. W. 1078; Prince *v.* Hoonan, 5 Minn. 347, holding that under Gen. St. c. 66, tit. x, § 147, providing that on filing an affidavit that a person has property belonging to defendant, or is indebted to him, etc., a summons shall be issued, etc., an affidavit in the alternative stating that the party sought to be charged is indebted or has property is insufficient.

Virginia.— See Baltimore, etc., R. Co. *v.* McCullough, 12 Gratt. 595.

See 24 Cent. Dig. tit. "Garnishment," § 163.

To authorize a personal judgment against a garnishee it is necessary to state the cause of action against him with the same particularity as if he were being sued by defendant. Stanford Nat. Bank *v.* Bruce, 10 Ky. L. Rep. 79; Grider *v.* Peeble, 7 Ky. L. Rep. 669; Beavan *v.* Beavan, 7 Ky. L. Rep. 97; Owensboro Sav. Bank *v.* Mattingly, 6 Ky. L. Rep. 517; Murphy *v.* Nelson County Ct., 5 Ky. L. Rep. 514; Frankfort *v.* Weitzel, 5 Ky. L. Rep. 254; Koester *v.* McNamara, 4 Ky. L. Rep. 443, 525.

72. For the reason that in many instances he is not in possession of the necessary information upon which to base such allegations.

Kentucky.— Donaldson *v.* Lexington Security Trust, etc., Co., 56 S. W. 424, 21 Ky. L. Rep. 1796, holding that it is not necessary

c. Amendment. In some jurisdictions a plaintiff may by amendment correct clerical mistakes in his affidavit for garnishment, such as mistakes in names, dates, or amounts.[73] In other jurisdictions, however, it is held that an affidavit for garnishment cannot be amended,[74] or a supplementary affidavit filed, even with leave of court.[75]

d. Waiver of Objections. Where the court has jurisdiction of defendant, a voluntary appearance of a garnishee waives, as to him, any defects in the affidavit of garnishment.[76]

3. Security — a. Necessity of. In many jurisdictions the statute requires that plaintiff should file a sufficient bond as a prerequisite to the issuance of a writ of garnishment or garnishment summons, and, where such writ or summons issues without the statutory bond being filed, the same should be quashed.[77]

for the affidavit to state the precise amount due from the garnishee to the principal debtor.

Louisiana.— Bean *v.* Mississippi Union Bank, 5 Rob. 333.

Nebraska.— Burnham *v.* Doolittle, 14 Nebr. 214, 15 N. W. 606, holding that under Code Civ. Proc. § 244, which provides that an affidavit in garnishment proceedings shall state that the judgment creditor "has good reason to and does believe" that any person who has property of or is indebted to the judgment debtor, a statement of mere belief as to such indebtedness in the affidavit is sufficient, without setting forth any fact as to the grounds of such belief.

Texas.— White *v.* Lynch, 26 Tex. 195 (holding that an affidavit alleging that the garnishee "is indebted to said defendant, or has in his hands effects of said defendant" and excepted to as double and in the alternative, is sufficient); Simon *v.* Greer, (Civ. App. 1896) 34 S. W. 343; Carter *v.* Wise County Coal Co., 2 Tex. App. Civ. Cas. § 213. See Curtis *v.* Henrietta Nat. Bank, 78 Tex. 260, 14 S. W. 614, holding that an affidavit for a writ of garnishment is not invalid as to the garnishee because it states that another person besides the garnishee is indebted to defendant.

Wisconsin.— Russell *v.* Ralph, 53 Wis. 328, 10 N. W. 518; Everdell *v.* Sheboygan, etc., R. Co., 41 Wis. 395; Beck *v.* Cole, 16 Wis. 95.

See 24 Cent. Dig. tit. "Garnishment," § 163.

Agent of corporation.— It has been held in Texas that in garnishment proceedings against a corporation, an affidavit for the writ which alleges that the agent of the corporation is indebted to defendant is insufficient to confer jurisdiction of the corporation. Bowers *v.* Continental Ins. Co., 65 Tex. 51.

73. Union Nat. Bank *v.* Muskegon Cir. Judge, 117 Mich. 678, 76 N. W. 116 (amendment allowed to correct a clerical error in the date, whereby the affidavit appeared to have been made and sworn to the day before the writ issued); Wattles *v.* Wayne Cir. Judge, 117 Mich. 662, 76 N. W. 115, 72 Am. St. Rep. 590; Millard *v.* Lenawee Cir. Judge, 107 Mich. 134, 64 N. W. 1046; Hackney *v.* Williams, 3 Mo. 455; Bushnell *v.* Allen, 48 Wis. 460, 4 N. W. 599 (misnomer of the garnishees in the affidavit was allowed to be corrected by amendment of the affidavit); Booth *v.* Denike, 65 Fed. 43 (an affidavit for garnishment may be amended in the United States courts, although not allowable by the courts in the state where the action is tried). See Heller *v.* People's Sav. Bank, (Mich. 1904) 101 N. W. 226 (where the affidavit was held to be so fatally defective as not to be amendable); Conway *v.* Ionia Cir. Judge, 46 Mich. 28, 8 N. W. 588 (which seems to hold by implication that an affidavit which fails to state jurisdictional facts cannot be cured by amendment).

74. Scurlock *v.* Gulf, etc., R. Co., 77 Tex. 478, 14 S. W. 148; Smith *v.* Wallis, 18 Tex. Civ. App. 402, 45 S. W. 820. See, however, Broyles *v.* Jerrells, 14 Tex. Civ. App. 374, 37 S. W. 377, holding that a clerical error in stating in an affidavit of garnishment that the writ was not sued out to injure either defendant "of" garnishees is no ground for quashing the writ.

75. Talhelm *v.* Hoover, 4 Pa. Co. Ct. 172.

76. McKinney *v.* Mills, 80 Minn. 478, 83 N. W. 452, 81 Am. St. Rep. 278; Aultman *v.* Markley, 61 Minn. 404, 63 N. W. 1078; Goll *v.* Hubbell, 61 Wis. 293, 20 N. W. 674, 21 N. W. 288, where, instead of objecting that plaintiff's affidavit in garnishment proceedings did not charge a joint liability, the garnishees answered and admitted a joint liability, and it was held that they could not afterward object to the affidavit. See also Becknell *v.* Becknell, 110 Ind. 42, 10 N. E. 414. See, however, Prince *v.* Heenan, 5 Minn. 347, holding that in garnishment proceedings objection to the affidavit for insufficiency may be made after the appearance of the garnishee, appointment of referee, disclosure taken, and report filed.

77. *Georgia.*— Rich *v.* Kiser, 61 Ga. 370.

Kansas.— Kellogg *v.* Hazlett, 2 Kan. App. 525, 43 Pac. 987.

Louisiana.— Cox *v.* Bradley, 15 La. Ann. 529.

Mississippi.— Ford *v.* Hurd, 4 Sm. & M. 683; Ford *v.* Woodward, 2 Sm. & M. 260.

New Hampshire.— Fling *v.* Goodall, 40 N. H. 208; Brown *v.* Dudley, 33 N. H. 511, holding, however, that the bond provided for in trustee process is intended solely for the protection of the trustee, and may be regarded as waived if the trustee appears and discloses, and judgment be rendered against him without objection.

b. Sufficiency of. The statutes requiring the filing of a bond prior to the issuance of the writ or summons usually prescribe the kind of bond required and the form and requisites thereof, and such statutes should be closely followed in executing the bond.[78]

VII. WRIT OR SUMMONS AND NOTICE, SERVICE AND RETURN.

A. Writ or Summons — 1. Issuance — a. Authority to Issue. The statutes usually provide that after the filing of a proper affidavit and the execution of a bond, where the statute requires a bond, the writ or summons in garnishment issues as a matter of course, it being a ministerial and not a judicial act.[79]

b. Writ Running to Another County. In many jurisdictions where a writ of attachment issues or judgment is rendered against the principal defendant of one county, a writ of garnishment may issue directly to any other county in the state to subject property or debts due defendant in such county.[80]

Pennsylvania.— Betts *v.* Towanda Gas, etc., Co., 97 Pa. St. 367, holding, however, that the provisions of the act of June 16, 1836, requiring plaintiff to file an affidavit and enter into a recognizance, were intended to apply only to those cases where there is a claimant disputing defendant's title and not to cases where defendant's title is conceded.

Vermont.— Griswold *v.* Bell, 2 Aik. 355.

See 24 Cent. Dig. tit. "Garnishment," § 167.

78. Maddox *v.* Heard, 64 Ga. 448 (variance between the requirements of the statute and the recitals in the bond was held to be fatal); Ford *v.* Hurd, 4 Sm. & M. (Miss.) 683 (bond signed by a person neither plaintiff nor his agent or attorney not sufficient); Rothermel *v.* Marr, 98 Pa. St. 285.

In Alabama a conditional garnishment bond given under Rev. Code, § 2892, is to prosecute such suit to effect and pay defendant all such damages as he may sustain on the wrongful or vexatious issuing out of such garnishment, and the damages for which the bond is intended to provide an indemnity are thus sustained by defendant to the suit and not by the garnishee. Hays *v.* Anderson, 57 Ala. 374; Pounds *v.* Hamner, 57 Ala. 342.

Substantial compliance with the statute, however, is generally held to be sufficient, and, in the absence of express statutory provision, the omission as to requirements which are not jurisdictional or mandatory, and constitute mere irregularities, may be waived or cured by amendment. Smith *v.* Wellborn, 73 Ga. 131; Burton *v.* Wynne, 55 Ga. 615; Janes *v.* Tomlinson, 30 Ga. 540; Barnes *v.* Webster, 16 Mo. 258, 57 Am. Dec. 232; Corey *v.* Gale, 13 Vt. 639; Logan *v.* Goodwin, 104 Fed. 490, 43 C. C. A. 658. See also Barker *v.* Johnson, 2 Pa. Co. Ct. 414.

New or further bond.— Where a bond was given and garnishment issued in a pending case, it was held that the magistrate had authority to afterward order a sufficient bond, the first being insufficient, and then, in case of default, to dismiss the garnishment. Gregory *v.* Clark, 73 Ga. 542.

79. Hinkley *v.* St. Anthony Falls Water Power Co., 9 Minn. 55 (holding that a garnishee summons may be issued by the attorney in the case, and need not be allowed by a judicial officer); C. C. Kelly Banking Co. *v.* J. M. Robinson-Norton Co., 71 Miss. 141, 13 So. 932 (holding likewise that where the clerk applied to for an alias writ issues a writ of garnishment, omitting the alias writ of attachment, it is defective but not void); Mosher *v.* Bartholow's Banking House, 6 Mo. App. 599; Epstein *v.* Salorgne, 6 Mo. App. 352. See Stephenson *v.* Campbell, 30 Ga. 159 (nolding that, under the Georgia act of 1856, process of garnishment must be issued by a magistrate who is capable of issuing an attachment, and by no other person, and hence a summons issued by a sheriff is void); Middleton Paper Co. *v.* Rock River Paper Co., 19 Fed. 252 (holding that the summons in a garnishee proceeding is "process," within the meaning of the statute prescribing the manner in which processes shall issue from federal courts, and that a process issued by an attorney when it should have been issued by the clerk of the court is no process at all, and cannot be amended as in the case of an irregularity).

In Michigan the statute authorizes the issuance of the writ of garnishment "at the time of or after the commencement of suit" in the principal action and such suit is regarded as "commenced" when the declaration is filed. McDonald *v.* Alanson Mfg. Co., 107 Mich. 10, 64 N. W. 730.

In Mississippi no process is required to be issued against a garnishee in an action commenced by attachment, but the sheriff is required on suggestion that a party is indebted to defendant in attachment, or has goods, effects, etc., in his hands, to summon him as garnishee to appear at the court to which the attachment is returnable, to answer on oath concerning his indebtedness to defendant. Ezelle *v.* Simpson, 42 Miss. 515.

Alias writ.— When a garnishee named in the original writ of foreign attachment has not been served, an alias writ may be issued for the purpose of carrying on the proceedings against the property which has already been indicated as its object; but plaintiff cannot, by virtue of the alias writ, take any property of defendant which was not bound by the original writ. Glenny *v.* Boyd, 26 Pa. Super. Ct. 380.

80. *Arkansas.*—Cross *v.* Haldeman, 15 Ark. 200.

c. Time For. Where a suit is commenced by attachment, a writ of garnishment cannot issue until after the service of the writ of attachment upon the principal defendant;[81] and in other cases such writ cannot issue until after judgment against the principal defendant.[82]

2. Form[83] and Requisites — a. In General. Form and requisites of a writ or summons in garnishment are regulated purely by statutory provisions, and such provisions should be strictly followed in drawing the writ or summons.[84]

b. Style of Writ. In some jurisdictions a writ of garnishment is regarded as process, by the service of which the state reaches the person and property of the garnishee, and therefore the writ or summons must run in the name of the state.[85] A writ or summons should be directed to the officer designated by the statute,[86] but the omission to insert the proper direction, if the writ be served by the proper officer, is not fatal to the proceedings.[87]

Delaware.— Tyler *v.* Fidelity Bldg., etc., Assoc., 4 Pennew. 281, 55 Atl. 714.

Illinois.— Toledo, etc., R. Co. *v.* Reynolds, 72 Ill. 487.

Iowa.— See Vanfossen *v.* Anderson, 8 Iowa 251, holding that where an action is commenced by attachment and the attachment served, the summons in garnishment cannot issue to another county, without also issuing an attachment to such other county.

Missouri.—Tinsley *v.* Savage, 50 Mo. 141.

New Hampshire.— See Carroll County Bank *v.* Goodall, 41 N. H. 81, holding that where service is made on the principal defendant in one county, service on a trustee cannot be made by sending to a sheriff of another county where the trustee resides an attested copy of the original writ.

Ohio.— Finnell *v.* Burt, 2 Handy 202, 12 Ohio Dec. (Reprint) 403.

See 24 Cent. Dig. tit. "Garnishment," § 172.

In Indiana, in a proceeding in foreign attachment, property of the absconding debtor must have been attached in the county where the writ was issued, or a person in that county summoned as garnishee before process can issue under the statute to another county against a garnishee resident therein. Reinhard *v.* Keith, 3 Ind. 137.

81. Donald *v.* Nelson, 95 Ala. 111, 10 So. 317; Littlejohn *v.* Lewis, 32 Ark. 423; Alston *v.* Dunning, 35 Ga. 229.

82. *Alabama.*— Faulkner *v.* Chandler, 11 Ala. 725, holding, however, that after judgment a writ of garnishment may issue, although no writ of execution has been issued and levied. See Merrill *v.* Vaughan, 118 Ala. 438, 24 So. 580 (holding that the fact that a writ of garnishment was issued before the pleadings were filed, or summons issued in the case, but on the same day, does not render the writ void but voidable only); Thompson *v.* Wallace, 3 Ala. 132.

Florida.— Sessions *v.* Stevens, 1 Fla. 223, 46 Am. Dec. 339, holding likewise that a garnishment sued out before a return of *nulla bona* on the execution is irregular, and on proper application will be set aside.

Maryland.— Boyd *v.* Talbott, 7 Md. 404, holding likewise that a writ cannot issue more than three years after judgment without scire facias.

Montana.— See Sweeney *v.* Schlessinger, 18 Mont. 326, 45 Pac. 213.

Nebraska.— Whitcomb *v.* Atkins, 40 Nebr. 549, 59 N. W. 86.

See 24 Cent. Dig. tit. "Garnishment," § 173.

83. **Form of writ authorized by statute** see Curtis *v.* Henrietta Nat. Bank, 78 Tex. 260, 14 S. W. 614.

84. Acme Lumber Co. *v.* Frances Vandergrift Shoe Co., 70 Miss. 91, 11 So. 657; Western Homestead, etc., Co. *v.* Albuquerque First Nat. Bank, 9 N. M. 1, 47 Pac. 721; Sawyer *v.* Howard, 22 Vt. 538; Jones *v.* Kemper, 13 Fed. Cas. No. 7,472, 2 Cranch C. C. 535. See Divoll *v.* Nichols, 70 Vt. 537, 41 Atl. 972 (holding that the Vermont statute does not authorize the combination of a capias and trustee summons in the same process); Kennedy *v.* Brent, 6 Cranch (U. S.) 187, 3 L. ed. 194. *Compare* Moore *v.* Stainton, 22 Ala. 831, where it was held that it is not necessary that the notice served on the garnishee should be signed by any one.

Contents of affidavit.— It has been held in Michigan that the writ need not recite the contents of the affidavit upon which it was issued, the statute not requiring it; nor need it state that the garnishee is a foreign corporation. Williams *v.* International Grain, etc., Bd., 99 Mich. 80, 57 N. W. 1089.

85. Hinkley *v.* St. Anthony Falls Water Power Co., 9 Minn. 55; Middleton Paper Co. *v.* Rock River Paper Co., 19 Fed. 252 (holding that a writ of garnishment issued from a federal court should run in the name of the president of the United States, and bear teste of the chief justice of the supreme court of the United States); Manville *v.* Battle Mountain Smelting Co., 17 Fed. 126, 5 McCrary 328. See, however, Finch *v.* Alexander County Nat. Bank, 65 Ill. App. 337 (holding that a writ of garnishment should run in the name of the judgment debtor, for the use of the judgment creditor as plaintiff against the garnishee as defendant); Wile *v.* Cohn, 63 Fed. 759 (holding that a notice to a garnishee in an action in the United States courts in Iowa is properly signed by the marshal, and need not bear the seal of such court, or the teste of the chief justice of the United States supreme court).

86. Fayette *v.* Buckner, 1 Litt. (Ky.) 126; Nashville First Nat. Bank *v.* Tupelo First Nat. Bank, 72 Miss. 258, 16 So. 904.

87. Brown *v.* Dudley, 33 N. H. 511.

c. Description of Parties. A writ or summons must state correctly the christian, middle name, and surname of the principal defendant, and where the writ fails in this respect the garnishee is totally unaffected by the service of the writ upon him, and cannot be charged if he subsequently pays the debt or delivers the property to the principal defendant, without actual knowledge of the identity of the principal defendant and the party named in the writ.[88] Likewise the full name of the garnishee should be correctly recited in the writ,[89] and the capacity in which he is sought to be charged as garnishee.[90] In several jurisdictions, however, the statutes permit service of garnishment upon persons supposed to be indebted to or in possession of property of the principal defendant, although they are not named in the writ.[91] In some jurisdictions it is held that a writ or summons in garnishment is void where it is addressed to a partnership without giving the names of the persons composing the firm.[92] In other jurisdictions, however, it is held to be sufficient that the garnishees be described in the writ by their firm-name.[93]

d. Description of Debt or Obligation. The general rule seems to be that it is

88. German Nat. Bank *v.* National State Bank, 5 Colo. App. 427, 39 Pac. 71, 3 Colo. App. 17, 31 Pac. 122; White *v.* Springfield Sav. Inst., 134 Mass. 232 (where the garnishee, a bank, had deposits in the name of "James Shay" and "James Shea," and it was held that the questions as to whether Shay and Shea are different names, and whether the garnishee knew or ought to have known that the writ served upon it, naming one, was intended to garnish the account of the other, were questions of fact, and that the burden of proof was on plaintiff to show that the garnishee should be charged); Terry *v.* Sisson, 125 Mass. 560 (where a savings bank after being summoned as trustee on a writ made out against "Sarah Sisson" paid to "Sarah F. Sisson" a fund deposited by her, and the bank was held not to be chargeable as trustee, although the writ was in fact served on this depositor, and, after payment, was amended accordingly, it not being shown that the bank had knowledge that "Sarah F. Sisson" was the party intended to be sued). *Compare* Paul *v.* Johnson, 9 Phila. (Pa.) 32, holding that the omission in a garnishment summons of the middle initial letter in judgment defendant's name does not relieve from responsibility to plaintiff the garnishees, who paid the debt to defendant after service.

89. Pratt *v.* Sanborn, 63 N. H. 115. See Treadway *v.* Andrews, 20 Conn. 384; Bartram *v.* Collins Mfg. Co., 69 Ga. 751, where a summons in garnishment was directed to a corporation before the corporation charter was granted, and it was held that the members of the corporation could not be required to answer as partners.

A misnomer as to the christian name of a trustee in a trustee process does not invalidate the process, but is merely ground for abatement. American Bank *v.* Doolittle, 14 Pick. (Mass.) 123. See also Donohoe-Kelly Banking Co. *v.* Southern Pac. Co., 138 Cal. 183, 71 Pac. 93, 94 Am. St. Rep. 28, holding that where a notice of garnishment was served on the Donohoe-Kelly Banking Co., the fact that the notice described the garnishee as the Donohoe-Kelly Co. did not invalidate the same. See also Bentley *v.* Kaufman, 12 Phila. (Pa.) 435, where garnishees were described as trustees under the will of Mary Ann Kaufman, while the fact was that they were trustees under the will of Hannah Ann Kaufman, and it was held that the validity of the attachment was not affected by the misnomer, the trustees not having been misled.

90. *Alabama.*— Tillinghast *v.* Johnson, 5 Ala. 514, holding that in order to charge a garnishee as executor he must be summoned in that capacity, and it is not sufficient that his answer shows an indebtedness of his testator remaining unsatisfied.

Connecticut.— See Hewitt *v.* Wheeler, 23 Conn. 284.

Georgia.— Flournoy *v.* Rutledge, 73 Ga. 735.

Iowa.— Claflin *v.* Iowa City, 12 Iowa 284.

Texas.— See Insurance Co. of North America *v.* Friedman, 74 Tex. 56, 11 S. W. 1046, holding that a writ demanding the officer to summon a person named as agent of a corporation sought to be charged as garnishee, but not directing the corporation itself to be summoned, is fatally defective.

See 24 Cent. Dig. tit. "Garnishment," § 177.

91. Badlam *v.* Tucker, 1 Pick. (Mass.) 389, 11 Am. Dec. 202; Briggs *v.* Block, 18 Mo. 281. See also Lindell *v.* Benton, 6 Mo. 361; Judge *v.* Reinhart, 3 Pa. Dist. 202.

Under the Pennsylvania act which does not require that the names of garnishees shall be inserted in an attachment, but simply that the property shall be attached, "in whose hands or possession soever the same may be," plaintiff may add the names of garnishees after the writ has been tested and issued. McCampbridge *v.* Barry, 29 Wkly. Notes Cas. (Pa.) 92.

92. Reid *v.* McLeod, 20 Ala. 576; Sheffield *v.* Barber, 14 R. I. 263, where this rule was adhered to, although the person served answered, disclosing property and identifying himself with the firm-name.

93. U. S. Express Co. *v.* Bedbury, 34 Ill. 459; Voorhees *v.* Hoagland, 6 Blackf. (Ind.)

not necessary that the writ or summons in garnishment should describe the debt or obligation sought to be reached by the process, or state the amount thereof.[94]

e. Directions For Return. The directions for the return of the writ or summons in garnishment are governed entirely by statute, and the return should be made in the manner and within the time prescribed by the statute, and if directed to any other time the court acquires no jurisdiction.[95] The direction as to the time that the garnishee must appear and make answer is likewise regulated by statute and must strictly conform thereto.[96]

3. Service and Levy — a. Necessity For Actual Service. The service of a writ

232; Hinds *v.* Miller, 52 Miss. 845; Whitman *v.* Keith, 18 Ohio St. 134.

94. *Arkansas.*— Smith *v.* Butler, (1904) 80 S. W. 580.

Kentucky.— Bell *v.* Wood, 7 S. W. 550, 9 Ky. L. Rep. 917 [*overruling* Menderson *v.* Specker, 79 Ky. 509]. *Contra,* Gockal *v.* Weighaus, 8 Ky. L. Rep. 784; Robinson *v.* Basham, 5 Ky. L. Rep. 765; City Nat. Bank *v.* Gardner, 5 Ky. L. Rep. 689.

Michigan.— See Botsford *v.* Simmons, 32 Mich. 352, holding that as the two grounds under the Michigan statute for the issuance of garnishment process are separate and distinct, the garnishee is never to be charged and held on one when the process is confined to the other.

Nebraska.— Clark *v.* Foxworthy, 14 Nebr. 241, 15 N. W. 342.

Texas.— Curtis *v.* Henrietta Nat. Bank, 78 Tex. 260, 14 S. W. 614.

Virginia.— Moore *v.* Holt, 10 Gratt. 284.

See 24 Cent. Dig. tit. "Garnishment," § 178.

Compare Weaver *v.* Russell, 18 Ohio 497, holding that in a capias against a garnishee in attachment the amount sworn to be due must be indorsed on the writ.

Joint writ of garnishment.— It has been held in Arkansas that it is error to issue a joint writ of garnishment against several, with allegations of a several instead of a joint indebtedness. Bender *v.* Bridge, 18 Ark. 291; Cincinnati, etc., Slate Co. *v.* Bridge, 17 Ark. 364 [*following* Thorn *v.* Woodruff, 5 Ark. 55; Moreland *v.* Pelham, 7 Ark. 338].

95. *Illinois.*— Schmitt *v.* Devine, 164 Ill. 537, 45 N. E. 974 [*reversing* 63 Ill. App. 289], holding that the statute providing that garnishment process shall be made returnable at the next term means the next term to begin in not less than ten days from the time of issuance.

Maryland.— See Harden *v.* Moores, 7 Harr. & J. 4, holding that an attachment on a judgment cannot be issued from one county court and made returnable to another county court.

Missouri.—Abeles *v.* Friedberg, 84 Mo. App. 667.

Pennsylvania.— Schober *v.* Mather, 49 Pa. St. 21; Sheaffer *v.* Wilson, 1 Chest. Co. Rep. 161.

West Virginia.— Miller *v.* Whitescarver, 23 W. Va. 10.

Wisconsin.— Edler *v.* Hasche, 67 Wis. 653, 31 N. W. 57; McDonald *v.* Vinette, 58 Wis. 619, 17 N. W. 319, holding that under Rev. St. § 3700, a garnishment summons does not confer jurisdiction, unless it is made returnable on the return-day of the execution.

United States.— Manville *v.* Battle Mountain Smelting Co., 17 Fed. 126, 5 McCrary 328.

See 24 Cent. Dig. tit. "Garnishment," § 179.

96. *Iowa.*— Padden *v.* Moore, 58 Iowa 703, 12 N. W. 724. See Gilmore *v.* Cohn, 102 Iowa 254, 71 N. W. 244, holding that where written notice was served on a garnishee as provided by statute, the garnishment was valid, although the notice through mistake did not require the garnishee, as provided by section 2979 of the code, to appear on the first day of the next term to answer interrogatories to be propounded.

Kentucky.— Griswold *v.* Popham, 1 Duv. 170 (holding that a personal judgment cannot be rendered against a garnishee who is cited only by serving on him the attachment against the principal defendant, and who did not appear, nor was required to appear to disclose facts); Fayette *v.* Buckner, 1 Litt. 126.

Minnesota.— Northwestern Fuel Co. *v.* Kofod, 74 Minn. 448, 77 N. W. 206, where the direction to the garnishee in the summons was held to be sufficient.

Mississippi.— Acme Lumber Co. *v.* Frances Vandergrift Shoe Co., 70 Miss. 91, 11 So. 657.

Missouri.— Dinkins *v.* Grunden-Martin Woodenware Co., 90 Mo. App. 639.

Texas.— Johnson *v.* McCutchings, 43 Tex. 553; Caspary *v.* Greely-Burnham Grocer Co., 3 Tex. App. Civ. Cas. § 175.

Vermont.— See Sawyer *v.* Howard, 22 Vt. 538.

United States.— Manville *v.* Battle Mountain Smelting Co., 17 Fed. 126, 5 McCrary 328, where a garnishee, being entitled under the statute to ten days in which to appear and answer, was served with a summons which was made returnable within ten days from the date of service, and such return was held to be fatally defective. See Wile *v.* Cohn, 63 Fed. 759, holding that a judgment against a garnishee in Iowa is not void because the notice to him required him to appear at a date prior to the first day of the next term of the court, instead of on such first day, as required by Code, § 2970.

See 24 Cent. Dig. tit. "Garnishment," § 179.

Compare Varnell *v.* Speer, 55 Ga. 132. See, however, Hearn *v.* Adamson, 64 Ga. 608, holding that it is immaterial that the summons in garnishment fails to specify the time within which the garnishee must answer.

or summons in garnishment is regulated entirely by statute, which must be strictly followed in order to confer jurisdiction upon the court, and in the majority of jurisdictions actual service upon the garnishee is required,[97] and failure to comply with the statute in respect to service is not waived by the voluntary appearance of the garnishee so as to confer jurisdiction upon the court.[98] However, the garnishee's appearance and answer without objection will cure all defects in the service of the writ or summons which are not jurisdictional in their nature.[99]

b. Time of Service. Since there must be a sufficient period of time between the service of the writ or summons and the appearance of the garnishee to permit him to prepare any defense he may have to make, the statutes usually require that the process shall be served at least a specified number of days before the return-day of the writ.[1]

97. *Alabama.*— Lawrence *v.* Ware, 1 Stew. 33.

Louisiana.— Phelps *v.* Boughton, 27 La. Ann. 592; Cockfield *v.* Tourres, 24 La. Ann. 168. See also Grieff *v.* Bettleton, 18 La. Ann. 349.

Mississippi.— Cooper *v.* Ingraham, 45 Miss. 198.

Missouri.— Masterson *v.* Missouri Pac. R. Co., 20 Mo. App. 653; Mosher *v.* Bartholow, etc., Banking House, 6 Mo. App. 599; Epstein *v.* Selorgne, 6 Mo. App. 352.

Pennsylvania.— Brock *v.* Brock, 1 Pa. Co. Ct. 232, 18 Wkly. Notes Cas. 123.

South Carolina.— *Ex p.* Alston, 2 Brev. 87.

Tennessee.— Illinois Cent. R. Co. *v.* Brooks, 90 Tenn. 161, 16 S. W. 77, 25 Am. St. Rep. 673.

Wisconsin.— Kneeland *v.* Cowles, 3 Pinn. 316, 4 Chandl. 46.

See 24 Cent. Dig. tit. "Garnishment," §§ 181, 182.

Actual knowledge by the garnishee of the issuance of a writ of garnishment against him will not dispense with service of notice on him. Harrell *v.* Mexico Cattle Co., 73 Tex. 612, 11 S. W. 863.

98. *District of Columbia.*— Reynolds *v.* Smith, 7 Mackey 27, holding that a personal corporation cannot voluntarily become a garnishee.

Louisiana.— Phelps *v.* Boughton, 27 La. Ann. 592; Schindler *v.* Smith, 18 La. Ann. 476.

Maine.— Hathorn *v.* Robinson, 98 Me. 334, 56 Atl. 1057.

Missouri.— Masterson *v.* Missouri Pac. R. Co., 20 Mo. App. 653.

New Hampshire.— Nelson *v.* Sanborn, 64 N. H. 310, 9 Atl. 721 (holding that in foreign attachment the trustee's acceptance of service of the writ is not an attachment on which he can be charged against defendant's objection); Clark *v.* Wilson, 15 N. H. 150 (holding that a firm all of whose members are non-residents of the state cannot be summoned as trustees by one of the members coming into the state and acknowledging service under the partnership names).

Pennsylvania.— See Silva *v.* Greenwald, 2 Pa. Co. Ct. 131.

See 24 Cent. Dig. tit. "Garnishment," § 182.

See, however, Freeman *v.* Miller, 51 Tex. 443, holding that, where no rights of opposing creditors are involved, the garnishee may waive or accept service, and voluntarily appear and relieve himself by answer. *Compare* Cahoon *v.* Morgan, 38 Vt. 234.

99. *Alabama.*— Reynolds *v.* Collins, 78 Ala. 94.

Illinois.— Truitt *v.* Griffin, 61 Ill. 26.

Kansas.— Axman *v.* Dueker, 45 Kan. 745, 26 Pac. 946.

Minnesota.— Howland *v.* Jeuel, 55 Minn. 102, 56 N. W. 581; Hinkley *v.* St. Anthony Falls Water Power Co., 9 Minn. 55.

Pennsylvania.— Mulhollan *v.* Mix, 24 Pa. Co. Ct. 143.

Washington.— Dittenhœfer *v.* Cœur d'Alene Clothing Co., 4 Wash. 519, 30 Pac. 660.

Wisconsin.— Wickham *v.* South Shore Lumber Co., 89 Wis. 23, 61 N. W. 287; Garland *v.* McKittrick, 52 Wis. 261, 9 N. W. 160.

1. *Georgia.*— Liverpool, etc., Ins. Co. *v.* Savannah Grocery Co., 97 Ga. 746, 25 S. E. 828.

Illinois.— See Tennent-Stribbling Shoe Co. *v.* Hargardine-McKitrick Dry Goods Co., 58 Ill. App. 368.

Iowa.— Phillips *v.* Germon, 43 Iowa 101.

Louisiana.— Cockfield *v.* Tourres, 24 La. Ann. 168.

Massachusetts.— Harris *v.* Doherty, 119 Mass. 142.

Mississippi.— Alexander *v.* Lloyd, 70 Miss. 662, 14 So. 22; Alexander *v.* Equitable F. Ins. Co., (1893) 12 So. 706.

Missouri.—Southern Bank *v.* McDonald, 46 Mo. 31.

New Jersey.—Paul *v.* Bird, 25 N. J. L. 559.

Pennsylvania.— McGraph *v.* Dorfeuille, 2 Browne 101. See Struemple *v.* Sausser, 8 Pa. Dist. 53, holding that the act of June 16, 1836, does not require that the writ shall be served ten days prior to the return-day as required in the service of the summons, but only relates to the manner of such service, and under section 35 of such act the time of appearance of the garnishee is left to the discretion of the court.

See 24 Cent. Dig. tit. "Garnishment," § 183.

Service on return-day.— It has been held in Arkansas that a writ of garnishment may be served on its return-day, and in such case the garnishee is entitled to a continuance. Moreland *v.* Pelham, 7 Ark. 338.

c. Persons Authorized to Make Service. In the absence of express statutory provision, service of the writ or summons of garnishment may be made by any person authorized to serve any other process in a personal action, and the service is governed by the statutes regulating the service of process generally.[2]

d. Persons to Be Served — (i) *Corporations.* Where the statutes do not provide any special mode of service, the writ or summons may be made upon corporations in the manner provided by statute for the service of process upon such corporations in ordinary actions, which is usually by service upon the president, secretary, or managing agent of the corporation within the jurisdiction.[3] Where, however, the statute giving the remedy by garnishment prescribes the manner in which the writ or summons shall be served, it must be served in that manner, and upon the person designated in the statute as the proper party to receive service.[4]

Where garnishment proceedings are resorted to after judgment to give validity to the proceedings, there must be a valid execution, issued and outstanding, on the judgment at the time of the issuance and service of the summons in garnishment. Hutchinson *v.* Nelson, 63 Kan. 327, 65 Pac. 670.

2. Menderson *v.* Specker, 3 Ky. L. Rep. 421 (an attachment in garnishment directed to the sheriff cannot be served by a constable); Mangold *v.* Dooley, 89 Mo. 111, 1 S. W. 126; Fletcher *v.* Wear, 81 Mo. 524; Coleman *v.* American F. Ins. Co., 74 Mo. App. 663 (under Mo. Rev. St. (1889) § 4899, regulating the service of process, a notice of garnishment directed to the sheriff of the county can be served by the sheriff, or his deputy, only within the bounds of such sheriff's bailiwick); Vail *v.* Rowell, 53 Vt. 109. See also Tate *v.* People, 6 Colo. App. 202, 40 Pac. 471; Conable *v.* Hylton, 10 Iowa 593.

The magistrate issuing the writ may specially authorize or designate a person to serve the same. McKenzie *v.* Ransom, 22 Vt. 324.

Where sheriff or deputy is a party.— Under Mass. Rev. St. c. 14, § 97, all writs, where the sheriff or any of his deputies is a party to the same, shall be served by the coroner, and the party summoned as trustee may in his own name plead in abatement a defect in the service of the writ as respects himself, although he has not answered. Thayer *v.* Ray, 17 Pick. (Mass.) 166.

3. *California.*— Kennedy *v.* Hibernia Sav., etc., Soc., 38 Cal. 151.

Georgia.— Holbrook *v.* Evansville, etc., R. Co., 114 Ga. 1, 39 S. E. 937; Southern R. Co. *v.* Hagan, 103 Ga. 564, 29 S. E. 760; Brigham *v.* Port Royal, etc., R. Co., 74 Ga. 365; Steiner *v.* Central R. Co., 60 Ga. 552; Clark *v.* Chapman, 45 Ga. 486, holding that service of garnishment on a domestic corporation must be made on the president.

Kentucky.— Lancashire Ins. Co *v.* Utterback, 15 Ky. L. Rep. 702.

Maryland.— Northern Cent. R. Co. *v.* Rider, 45 Md. 24, holding that an attorney for a corporation, not being one of its officers, cannot accept service so as to bind the corporation.

New Jersey.— Franklyn *v.* Taylor Hydraulic Air Compressing Co., 68 N. J. L. 113, 52 Atl. 714.

Pennsylvania.— Reynolds *v.* Lochiel Iron, etc., Works, 11 Pa. Co. Ct. 33; State F. & M. Ins. Co. *v.* Oglesby, 1 Pearson 152; Rineheimer *v.* Weiss, 4 Kulp 279, holding that personal service, if made on the principal officer of a domestic corporation, need not be made at the usual place of business of the officer, or at the office of the corporation. See also McDonald *v.* Stear, 7 Pa. Dist. 190; National Starch Co. *v.* Morse Wool-Scouring Co., 11 Pa. Co. Ct. 192; Smith, etc., Co. *v.* Morse Wool Scouring Co., 10 Pa. Co. Ct. 624.

Tennessee.— Irvine *v.* Dean, 93 Tenn. 346, 27 S. W. 666 (holding that in proceedings to attach a fund on deposit in a bank which has assigned, service of the garnishment attachment on the trustees under the assignment is sufficient); Lambreth *v.* Clarke, 10 Heisk. 32.

Vermont.— Holt *v.* Ladd, 71 Vt. 204, 44 Atl. 69.

United States.— Davidson *v.* Donovan, 7 Fed. Cas. No. 3,603, 4 Cranch C. C. 578.

See 24 Cent. Dig. tit. "Garnishment," § 185.

Receiver.— An attachment against a corporation in the hands of a receiver is properly served upon the receiver, and such service entitles plaintiff in the attachment to a dividend in the receiver's hands when declared. Merchants' Nat. Bank *v.* Binder, 6 Pa. Dist. 633.

Service on an estate.— Under the Rhode Island statute authorizing the service of a writ of attachment on the personal estate of defendant in the hands of or possession of any person, copartnership, or corporation, as his trustee, it has been held that an estate is not a person, copartnership, or corporation within the meaning of the act, and is incapable of having any service made upon it. Duke *v.* Morreau, 19 R. I. 722, 36 Atl. 839.

4. Kirby Carpenter Co. *v.* Trombley, 101 Mich. 447, 59 N. W. 809; Detroit First Nat. Bank *v.* Burch, 76 Mich. 608, 43 N. W. 453; Pettit *v.* Muskegon Booming Co., 74 Mich. 214, 41 N. W. 900; Hebel *v.* Amazon Ins. Co., 33 Mich. 400 (exceptional modes of service must be confined to the cases, and exercised in the way precisely indicated by the statute); Haley *v.* Hannibal, etc., R. Co., 80 Mo. 112; Mangold *v.* Dooley, 89 Mo. 111, 1 S. W. 126 (under Mo. Rev. St. (1879) § 2521, service of the summons of garnish-

(II) *Partnerships.* The general rule is that in garnishment proceedings against a partnership, service of summons on one partner is sufficient to justify a judgment which will bind the joint property of the firm.[5]

e. Mode of Service and Levy. In some jurisdictions it is held that service of garnishment process on persons in possession of specific chattels creates no lien thereon, in the absence of an actual levy.[6] In the majority of jurisdictions the statutes prescribing the mode of service of garnishment process usually require the officer to leave a copy of the writ with the garnishee, and to declare in the presence of one or more credible witnesses that he attaches the goods, credits, and effects of defendant in the hands of the garnishee.[7]

f. Sufficiency of Service. Since proceedings by garnishment are purely statutory, it is essential to the validity of the service of garnishment process that it conform in every respect to the mode prescribed by the statute under which it issues; and the true test of the sufficiency of the service of the process in any

ment on a railroad company must be served on the nearest station or freight agent); Rosenberg *v.* Texarkana First Nat. Bank, (Tex. Civ. App. 1894) 27 S. W. 897; Thompkins Mach., etc., Co. *v.* Schmidt, (Tex. App. 1890) 16 S. W. 174.

5. *Connecticut.*— Flagg *v.* Platt, 32 Conn. 216.

Illinois.— Sherburne *v.* Hyde, 185 Ill. 580, 57 N. E. 776 [*reversing* 82 Ill. App. 83].

Minnesota.— Hinkley *v.* St. Anthony Falls Water Power Co., 9 Minn. 55.

Missouri.— See Huffman *v.* Sisk, 62 Mo. App. 398, holding that in a suit to charge a partnership as garnishee, service of summons on one who acted as manager for the firm is insufficient to support a judgment against the garnishee.

New Hampshire.— Shelters *v.* Boudreau, 66 N. H. 576, 32 Atl. 151, holding that service of the writ in trustee process on one member of the partnership is sufficient as against a claimant.

Pennsylvania.— Riley *v.* Phillips, 7 Pa. Dist. 398, holding, however, that service not upon any member of the firm, but upon its bookkeeper, is insufficient.

See 24 Cent. Dig. tit. "Garnishment," § 185.

Limited partnership association.— Under the Pennsylvania act designating on what officer of a limited partnership association service of process may be made, service on any other officer is illegal. Bank *v.* Vandusen, 2 Leg. Rec. (Pa.) 7.

Non-resident firm.— It has been held in Nebraska that since the statute does not provide the mode of service upon a non-resident firm, service on an agent of the firm having effects of the debtor in his possession is sufficient service on such firm. Mathews *v.* Smith, 13 Nebr. 178, 12 N. W. 821. The personal service of a warrant of attachment on a non-resident partner of a foreign limited partnership for a debt due to a foreign corporation and having a foreign *situs* is invalid, the partner being temporarily in the state. National Broadway Bank *v.* Sampson, 179 N. Y. 213, 71 N. E. 766, 66 L. R. A. 606, 103 Am. St. Rep. 851 [*affirming* 85 N. Y. App. Div. 320, 83 N. Y. Suppl. 426].

6. *Iowa.*—McDonald *v.* Moore, 65 Iowa 171, 21 N. W. 504.

Missouri.— Epstein *v.* Salorgne, 6 Mo. App. 352.

Montana.— Wyman *v.* Jensen, 26 Mont. 227, 67 Pac. 114.

Pennsylvania.— Pennsylvania R. Co. *v.* Pennock, 51 Pa. St. 244.

United States.— Maish *v.* Bird, 48 Fed. 607.

See 24 Cent. Dig. tit. "Garnishment," § 187.

Compare Tennent-Stribbling Co. *v.* Hargadine-McKitrick Dry Goods Co., 58 Ill. App. 368.

7. *Arkansas.*— Pike *v.* Lytle, 6 Ark. 212; Richmond *v.* Duncan, 4 Ark. 197; Desha *v.* Baker, 3 Ark. 509.

Massachusetts.— See Touro *v.* Coates, 10 Mass. 25.

Michigan.— Faul *v.* Beucus, 124 Mich. 25, 82 N. W. 659.

Missouri.— Anderson *v.* Scott, 2 Mo. 15; Fee *v.* Kansas City, etc., R. Co., 58 Mo. App. 90; Swallow *v.* Duncan, 18 Mo. App. 622.

North Carolina.— Parker *v.* Scott, 64 N. C. 118, holding that the statute contemplates personal and not constructive service on the garnishee.

Oklahoma.— Theison *v.* Brown, 11 Okla. 118, 65 Pac. 925, holding likewise that the service is good where a copy of the summons is left at the garnishee's usual place of residence at any time before the return-day of the writ.

Pennsylvania.— Vandergrift's Appeal, 83 Pa. St. 126; Landis *v.* Lyon, 71 Pa. St. 473; Purves *v.* Lex, 6 Pa. Cas. 194, 9 Atl. 167; Mesker *v.* Frothingham, 1 Pa. Dist. 120; Atlas Steamship Co. *v.* U. S. Foreign, etc., Fruit Co., 2 Pa. Co. Ct. 123 (holding, however, that service of foreign attachment will not be set aside, after appearance and plea, for want of a declaration of the attachment in the presence of credible witnesses); Wanamaker *v.* Stevens, 1 Pa. Co. Ct. 317; Kennedy *v.* Winton, 12 Lanc. Bar 11; Huber *v.* Ritter, 1 Lehigh Val. L. Rep. 165. See Davis *v.* Mayer, 6 Lanc. L. Rev. 105 (holding that where only a debt is attached in foreign attachment, it is not necessary that the sheriff should make attachment in the presence of one or more credible persons of the neighborhood); Brock *v.* Brock, 18 Wkly. Notes Cas. 123.

particular case is proof of a substantial compliance with the provisions of the statute in this respect.[8]

4. Return — a. In General. Since the return to a writ of garnishment is the officer's report of his action under and by virtue of the writ, it should be indorsed upon the writ or embodied in a paper annexed thereto, and where there is no return to the writ the garnishee is properly discharged.[9]

South Carolina.— State *v.* Berry, Dudley 215, holding likewise that the sheriff in attaching property in the hands of a garnishee is not justified in taking it out of his possession, where the garnishee claims it either in his own right or the right of another.

Virginia.— See Moore *v.* Holt, 10 Gratt. 284.

Wisconsin.— Kneeland *v.* Cowles, 3 Pinn. 316, 4 Chandl. 46.

See 24 Cent. Dig. tit. "Garnishment," § 187.

Demand for property or funds before service.— In Connecticut the statute requires that the officer shall make a demand upon the garnishee for the property of or the debts due to defendant before service of the writ. Mitchell *v.* Shelton, 35 Conn. 1. In Illinois, however, a demand before service of the writ of garnishment is not necessary, although the debt attached be in the form of a certificate of deposit, payable to the order of the debtor "on demand." Ham *v.* Peery, 39 Ill. App. 341.

8. *Arkansas.*— Desha *v.* Baker, 3 Ark. 509.

Connecticut.— McGuire *v.* Church, 49 Conn. 248.

Georgia.— West *v.* Harvey, 81 Ga. 711, 8 S. E. 449.

Indiana.— Hite *v.* Fisher, 76 Ind. 231.

Michigan.— Hebel *v.* Amazon Ins. Co., 33 Mich. 400.

Pennsylvania.— Hunter *v.* Clarke, 16 Wkly. Notes Cas. 558.

Tennessee.— Nashville, etc., R Co. *v.* Todd, 11 Heisk. 549.

Texas.— Insurance Co. of North America *v.* Friedman, 74 Tex. 56, 11 S. W. 1046; Harrell *v.* Mexico Cattle Co., 73 Tex. 612, 11 S. W. 863, holding that actual knowledge by the garnishee that a writ has been issued against him will not aid a defective service of the writ.

Wisconsin.— Kneeland *v.* Cowles, 3 Pinn. 316, 4 Chandl. 46.

See 24 Cent. Dig. tit. "Garnishment," § 188.

The service was held a sufficient compliance with the statute in the following cases:

Louisiana.— Dwight *v.* Mason, 12 La. Ann. 846.

Maryland.— Anderson *v.* Graff, 41 Md. 601; Windwart *v.* Allen, 13 Md. 196.

Missouri.— Marx *v.* Hart, 166 Mo. 503, 66 S. W. 260, 89 Am. St. Rep. 715; Quarles *v.* Porter, 12 Mo. 76 (where five executions were in the hands of the sheriff in favor of different plaintiffs against one defendant, and it was held that one notice to his garnishee was sufficient); Reid *v.* Mercurio, 91 Mo. App. 673.

New Mexico.— Western Homestead, etc., Co. *v.* Albuquerque First Nat. Bank, 9 N. M. 1, 47 Pac. 721.

Oregon.— Parr *v.* Warner, 38 Oreg. 109, 62 Pac. 899.

Pennsylvania.—Cheston *v.* Fitler, 13 Wkly. Notes Cas. 78.

Virginia.— Smith *v.* Jenny, 4 Hen. & M. 440.

Wisconsin.— Brauser *v.* New England F. Ins. Co., 21 Wis. 506.

See 24 Cent. Dig. tit. "Garnishment," § 188.

The service was held to be defective in that it failed to comply with the provisions of the statute in the following cases:

Colorado.— Leadville First Nat. Bank *v.* Leppel, 9 Colo. 594, 13 Pac. 776; Henkle *v.* Bi-Metallic Bank, 13 Colo. App. 410, 58 Pac. 336.

Connecticut.— Green *v.* Farmers', etc., Bank, 25 Conn. 452.

Georgia.— Holbrook *v.* Evansville, etc., R. Co., 114 Ga. 4, 39 S. E. 938.

Louisiana.— Cox *v.* Bradley, 15 La. Ann. 529.

Maine.— Lyon *v.* Russell, 72 Me. 519.

Massachusetts.— Brown *v.* Neale, 3 Allen 74, 80 Am. Dec. 53.

Michigan.— Hebel *v.* Amazon Ins. Co., 33 Mich. 400, where the summons was served upon and accepted for the corporation by its attorney, and there was nothing to show the authority of such attorney to so act.

Mississippi.— Work *v.* Waggoner, 82 Miss. 591, 35 So. 137, 338.

Missouri.— Anderson *v.* Scott, 2 Mo. 15.

New Hampshire.— Foster *v.* Hadduck, 6 N. H. 317.

Pennsylvania.— Pennsylvania R. Co. *v.* Pennock, 51 Pa. St. 244; Shriver *v.* Harbaugh, 37 Pa. St. 399.

Tennessee.— Illinois Cent. R. Co. *v.* Brooks, 90 Tenn. 161, 16 S. W. 77, 25 Am. St. Rep. 673.

Texas.— Sun Mut. Ins. Co. *v.* Seeligson, 59 Tex. 3.

See 24 Cent. Dig. tit. "Garnishment," § 188.

9. *Alabama.*— Stephens *v.* Cox, 124 Ala. 448, 26 So. 981, holding likewise that a return on a writ of garnishment, signed in the name of a constable by his deputy, is proper, where the appointment of a deputy to execute the writ was authorized.

Iowa.— Rock *v.* Singmaster, 62 Iowa 511, 17 N. W. 744.

Missouri.— Hackett *v.* Gihl, 63 Mo. App. 447, holding that, where a garnishment is made under attachment, the return should be indorsed on the attachment writ.

New Jersey.— See Guarantee Trust, etc., Co. *v.* Nebeker, 68 N. J. L. 561, 53 Atl. 558,

b. Recitals — (i) *Fact and Manner of Service or Levy.* The return of the officer must show that he has served the writ upon the garnishee in the manner prescribed by the statute,[10] or that he has made levy upon property in the hands of the garnishee as required by the statute.[11] And while as a rule it is sufficient if it is shown that there has been a substantial compliance with the statute,[12] yet it is usually necessary that the return recite the acts done by the officer and the manner in which the writ was executed, in order that the court may itself judge of its sufficiency.[13]

holding that a writ of foreign attachment having been duly executed does not become void by failure of the sheriff to return it upon the return-day, as plaintiff, if not guilty of laches, has the right to compel the sheriff to return it at any time.

Vermont.— McKenzie *v.* Ransom, 22 Vt. 324, holding, however, that when suit is commenced by trustee process, the writ itself designates the property to be attached, and the delivery of a copy of the writ to the trustee is notice to him of a sequestration of the property in his hands, and sufficiently makes him a party to the proceedings to render the attachment effectual, as against those subsequently acquiring title to the property, although the officer's return may not be indorsed on the writ.

Wisconsin.— See Bushnell *v.* Allen, 48 Wis. 460, 4 N. W. 599.

See 24 Cent. Dig. tit. "Garnishment," § 189 *et seq.*

10. Burnett *v.* Georgia Cent. R. Co., 117 Ga. 521, 43 S. E. 854, 97 Am. St. Rep. 175; Ezelle *v.* Simpson, 42 Miss. 515 (a return of service on the garnishee must state the manner of service, and that it is not sufficient in stating "executed on" a person named "as garnishee"); Crizer *v.* Gorren, 41 Miss. 563; Roy *v.* Heard, 38 Miss. 544; Jefferies *v.* Harvie, 38 Miss. 97; Pennsylvania R. Co. *v.* Rogers, 52 W. Va. 450, 44 S. E. 300, 62 L. R. A. 178) where omission to show in the return of service of attachment on a foreign corporation as garnishee that the agent on whom service was made resided in the county in which he was served was held to render the service invalid). See, however, Bryan *v.* Lashley, 13 Sm. & M. (Miss.) 284, (holding that the sheriff need not return how he has executed an attachment, and that it is sufficient if he return it generally "executed," or "summoned" as to the garnishee); Donner *v.* Mercy, 81 N. Y. App. Div. 181, 80 N. Y. Suppl. 1030 (holding that an allegation contained in an affidavit made by a deputy sheriff that he "duly effected service of such warrant of attachment on said Lazar Jacobsohn at No. 260 Grand street, borough of Manhattan, city of New York, between two and three o'clock in the afternoon of Friday, January 2d, 1903," is an allegation of fact and sufficiently avers the service of the warrant).

11. Norvell *v.* Porter, 62 Mo. 309; Maulsby *v.* Farr, 3 Mo. 438; Anderson *v.* Scott, 2 Mo. 15; Decker *v.* St. Louis, etc., R. Co., 92 Mo. App. 50; Todd *v.* Missouri Pac. R. Co., 33 Mo. App. 110; Dilger *v.* Wachholz, 12 Mo. App. 581; Fenglein *v.* Cairo, etc., R. Co., 6 Mo. App. 580.

12. *Alabama.*— Lowry *v.* Clements, 9 Ala. 422; Burt *v.* Parish, 9 Ala. 211; Harris *v.* Clapp, Minor 328.

Arkansas.— See Read *v.* Kirkwood, 19 Ark. 332.

District of Columbia.— Reynolds *v.* Smith, 18 D. C. 27.

Maryland.— Friedenrich *v.* Moore, 24 Md. 295 (where the return was held to be sufficient); McCoy *v.* Boyle, 10 Md. 391; Van Brunt *v.* Pike, 4 Gill 270, 45 Am. Dec. 126.

Mississippi.— Benson *v.* Holloway, 59 Miss. 358; Martin *v.* Harvey, 54 Miss. 685; Bryan *v.* Lashley, 13 Sm. & M. 284.

New Jersey.— Castner *v.* Styer, 23 N. J. L. 236.

Pennsylvania.— Jaffray's Appeal, 101 Pa. St. 583; Brock *v.* Brock, 1 Pa. Co. Ct. 232, 18 Wkly. Notes Cas. 123; Thompson *v.* Owen, 8 Kulp 36. See Layman *v.* Beam, 6 Whart. 181, holding that it is no error that the sheriff returns that he has summoned defendant as well as garnishee, as this will be regarded as no more than a surplusage.

Vermont.— Barlow *v.* Hunt, 10 Vt. 129, holding that the return of service of a writ on the principal defendant by leaving a copy at his last and usual place of residence within the state is sufficient without stating with whom the copy was left.

See 24 Cent. Dig. tit. "Garnishment," § 190.

13. *Georgia.*— Brigham *v.* Port Royal, etc., R. Co., 74 Ga. 365; Steiner *v.* Central R. Co., 60 Ga. 552, in both of which cases omission of legal excuse for failure to serve the proper officer of the corporation was held to invalidate the return.

Maryland.— Northern Cent. R. Co. *v.* Rider, 45 Md. 24, holding that the return of a summons in garnishment served on a corporation should designate the person and official character on whom service was made.

Minnesota.— See Allis *v.* Day, 13 Minn. 199, holding that an officer's return that he has attached all indebtedness due from A to B will not cover debts due from A to a firm of which B is a member, not parties to the action.

Mississippi.—Semmes *v.* Patterson, 65 Miss. 6, 3 So. 35; Mitchell *v.* Greenwald, 43 Miss. 167 (a sheriff's return on a garnishment which merely states that the process was served on the firm of "M. & Bro." is defective in not showing who composed that firm); Ezelle *v.* Simpson, 42 Miss. 515. See also Faison *v.* Wolf, 63 Miss. 24.

Missouri.—Kansas, etc., Coal Co. *v.* Adams, 99 Mo. App. 474, 74 S. W. 158 (where the constable made two returns, one on the exe-

(II) *Conclusiveness of Return as to Recitals.* The officer's return of service of the writ of garnishment is generally[14] conclusive upon the parties to the process, and upon their privies, as to matters necessary to be included therein, and cannot be controverted for the purpose of defeating any rights acquired thereunder.[15]

c. Amendment. It is within the discretion of the court to permit an amendment of the officer's return, so as to make the recitals in the return conform to the facts in the case.[16]

cution, which showed a valid garnishment, and another on a notice to the garnishee, which was insufficient for failure to show the making of the declaration to the garnishee required by Rev. St. (1899) § 388, subd. 5, and it was held that the return on the execution would control); Gregor Grocer Co. *v.* Carlson, 67 Mo. App. 179 (the officer must declare to the debtor of defendant that he attaches the debt, and if his return fails to show this the court is without jurisdiction); Hackett *v.* Gihl, 63 Mo. App. 447; Dunn *v.* Missouri Pac. R. Co., 45 Mo. App. 29; Werries *v.* Missouri Pac. R. Co., 19 Mo. App. 398; Swallow *v.* Duncan, 18 Mo. App. 622; Connor *v.* Pope, 18 Mo. App. 86. See also Cabeen *v.* Douglass, 1 Mo. 336, where the return omitted to recite the names of the persons in whose presence the property was attached and the garnishee was summoned, and the service was held insufficient.

Pennsylvania.— Bryan *v.* Trout, 90 Pa. St. 492; Falk *v.* Wurzburger, 3 Kulp 321; Hains *v.* Viereck, 2 Phila. 40, holding that a return of *non est inventus* as to defendant in an attachment execution is not sufficient to show service so as to give the court jurisdiction.

See 24 Cent. Dig. tit. "Garnishment," § 190.

Tenant in possession.— Where a foreign attachment is levied on real estate, and the tenant in possession is summoned as garnishee, it must appear by the sheriff's return that the latter holds under defendant in the attachment. Hayes *v.* Gillespie, 35 Pa. St. 155.

14. American Bank *v.* Doolittle, 14 Pick. (Mass.) 123, holding that an officer's return in a trustee suit which stated that the person named in the writ as trustee was not to be found, but made no mention of any service on the assignee as trustee, is not conclusive, and parol evidence is admissible on the part of plaintiff, who is not a party or privy to the trustee suit, to prove that the trustee writ had been properly served.

The burden of proof is on the person assailing the return, where the return in garnishment of "summoned" by the officer is disputed, and it is necessary that such person should show by satisfactory evidence that he was not legally summoned. Abell *v.* Simon, 49 Md. 318.

15. *Alabama.*— Stephens *v.* Cox, 124 Ala. 448, 26 So. 981, holding that, in the absence of proof to the contrary, it will be presumed that a person named in an officer's return on a writ of garnishment as "Stephens" is the same Stephens who is mentioned in the writ.

Georgia.— O'Neill Mfg. Co. *v.* Ahrens, etc., Mfg. Co., 110 Ga. 656, 36 S. E. 66.

Illinois.— Kemp *v.* Northern Trust Co., 108 Ill. App. 242.

Indiana.— Hite *v.* Fisher, 76 Ind. 231.

Maine.— Bunker *v.* Gilmore, 40 Me. 88.

Massachusetts.— Pullen *v.* Haynes, 11 Gray 379; Woodworth *v.* Ranzehousen, 7 Cush. 430.

Minnesota.— Peterson *v.* Lake Tetonka Park Co., 72 Minn. 263, 75 N. W. 375.

Mississippi.— Sadler *v.* Prairie Lodge, 59 Miss. 572.

Missouri.— Brecht *v.* Corby, 7 Mo. App. 300.

New Jersey.— Castner *v.* Styer, 23 N. J. L. 236.

See 24 Cent. Dig. tit. "Garnishment," § 193.

In Pennsylvania, where the return to the writ shows a defective service, the proper practice is to move to set aside the return or service, and not to move for dissolution of the attachment (Falk *v.* Wurzburger, 3 Kulp 321); and the application therefor should be made before or concurrently with the filing of answers to the interrogatories (Kohler *v.* Thorn, 154 Pa. St. 180, 26 Atl. 255).

16. *Georgia.*—Mayer *v.* Chattahoochee Nat. Bank, 46 Ga. 606.

Iowa.— See Rock *v.* Singmaster, 62 Iowa 511, 17 N. W. 744, holding that if the officer fails to make a return the court may doubtless direct him to do so.

Maine.— Ware *v.* Bucksport, etc., R. Co., 69 Me. 97.

Maryland.— O'Connell *v.* Ackerman, 62 Md. 337; Main *v.* Lynch, 54 Md. 658, holding that the right of the parties interested to have the officer amend his return is a common-law right, and in no way dependent on the provisions of the statute.

Minnesota.— Hinkley *v.* St. Anthony Falls Water Power Co., 9 Minn. 55.

Missouri.— Mangold *v.* Dooley, 89 Mo. 111, 1 S. W. 126; Norvell *v.* Porter, 62 Mo. 309; State *v.* McCullough, 85 Mo. App. 68; Maze *v.* Griffin, 65 Mo. App. 377; St. Louis Brokerage Co. *v.* Cronin, 14 Mo. App. 587; Brecht *v.* Corby, 7 Mo. App. 300. See also Gregor Grocer Co. *v.* Carlson, 67 Mo. App. 179.

New Hampshire.— Brown *v.* Ellsworth, 72 N. H. 186, 55 Atl. 356. *Compare* Carroll County Bank *v.* Goodall, 41 N. H. 81, where the service was held so defective that it could not be cured by amending the return.

Pennsylvania.— Haskins *v.* Dill, 7 Wkly. Notes Cas. 258.

5. Errors and Irregularities in Writ — a. Manner of Taking Advantage of. Where a writ of garnishment is regarded as mere process,[17] a demurrer will not lie for defects therein, but such defects, if available at all, can be reached only by motion to quash or by plea in abatement.[18]

b. Amendment. Unless the writ is absolutely void or so defective that it fails to confer jurisdiction,[19] the court may in its discretion permit the error to be cured by amendment of the writ.[20] Such amendments, however, cannot be allowed so as to give priority over the rights of third persons subsequently acquired.[21]

B. Notice to Defendant — 1. Necessity of. Whether or not it is necessary to serve the principal defendant with notice of garnishment proceedings seems to depend upon the fact as to whether the court has previously acquired jurisdiction of such defendant or not, and where no jurisdiction of defendant has been previously acquired, notice, either actual or constructive, must be given to him in

South Carolina.— Hunter *v.* Andrews, 2 Speers 73.

Texas.— Fleming *v.* Pringle, 21 Tex. Civ. App. 225, 51 S. W. 553.

Wisconsin.— Bushnell *v.* Allen, 48 Wis. 460, 4 N. W. 599.

See 24 Cent. Dig. tit. "Garnishment," § 195.

Amendment of name of garnishee.— It has been held in Rhode Island that since an amendment in the name of the garnishee, as it appears in the writ of attachment, would, in the absence of consent, necessitate further service of process, and as the same result is attainable under R. I. Gen. Laws (1896), c. 252, § 17, by issuing the writ of mesne process therein authorized, leave for such amendment was properly denied. King *v.* McElroy, 25 R. I. 222, 55 Atl. 638.

17. See *supra*, VII, A, 2, b.

Writ possessing dual nature.— In Arkansas a writ of garnishment possesses the dual nature of a writ and of a declaration, and a demurrer to the writ will lie, such demurrer going to so much of the writ as answers the purpose of a declaration and extending to the allegations and interrogatories. McMeekin *v.* State, 9 Ark. 533.

18. Donald *v.* Nelson, 95 Ala. 111, 10 So. 317; Curry *v.* Woodward, 50 Ala. 258; Mansur *v.* Coffin, 54 Me. 314. See also Coda *v.* Thompson, 39 W. Va. 67, 19 S. E. 548.

A claimant of a fund in the hands of a garnishee cannot, in a collateral proceeding, question the writ of garnishment for mere irregularity, when such irregularity has been waived by the garnishee. Merrill *v.* Vaughan, 118 Ala. 438, 24 So. 580.

Defective affidavit.— If an affidavit of garnishment process is insufficient, the garnishee should move to quash, and if he does not do so but answers on the merits he will be considered as having waived the objection of sufficiency of the affidavit. Stevens *v.* Dillman, 86 Ill. 233.

Delay in raising objection.— On the trial of an attachment execution, it is too late after a plea of *nulla bona*, joined in by both plaintiffs and garnishee, to question the regularity of the process, as the plea is a waiver. Woodstown First Nat. Bank *v.* Trainer, 209 Pa. St. 387, 58 Atl. 816; Neely *v.* Grantham, 58 Pa. St. 433; Poor *v.* Colburn, 57 Pa. St. 415. And service of foreign attachment on the garnishee will not, after judgment against him, be set aside for irregularity at the instance of defendant, who is duly served. Huber *v.* Ritter, 1 Pa. Co. Ct. 323.

19. *Massachusetts.*— Hooper *v.* Jellison, 22 Pick. 250.

Missouri.— See Abeles *v.* Friedberg, 84 Mo. App. 667.

Pennsylvania.— Steel *v.* Goodwin, 113 Pa. St. 288, 6 Atl. 49; Crawford *v.* Stewart, 38 Pa. St. 34.

Vermont.— See Knapp *v.* Levanway, 27 Vt. 298, holding that where trustee process has been served on a party as an individual, and not as a member of the firm, process cannot be amended after return into court so as to reach a firm debt.

West Virginia.— Coda *v.* Thompson, 39 W. Va. 67, 19 S. E. 548.

See 24 Cent. Dig. tit. "Garnishment," § 198.

20. *Georgia.*— Branch *v.* Adam, 51 Ga. 113.

Kentucky.— Louisville Banking Co. *v.* Ethridge Mfg. Co., 43 S. W. 169, 19 Ky. L. Rep. 908.

Maine.— Peabody *v.* Maguire, 79 Me. 572, 12 Atl. 630.

Maryland.— McCoy *v.* Boyle, 10 Md. 391.

Massachusetts.— Sullivan *v.* Langley, 128 Mass. 235 (holding likewise that the amendment will date back to the date of the service); West *v.* Platt, 116 Mass. 308; Barry *v.* Hogan, 110 Mass. 209; Vermilyea *v.* Roberts, 103 Mass. 410; Nash *v.* Brophy, 13 Metc. 476.

Michigan.— Millard *v.* Lenawee Cir. Judge, 107 Mich. 134, 64 N. W. 1046; Wellover *v.* Soule, 30 Mich. 481.

New Hampshire.— Johnson *v.* Abbott, 60 N. H. 150; Fullerton *v.* Hayes, 32 N. H. 212.

New Jersey.— Franklyn *v.* Taylor Hydraulic Air Compressing Co., 68 N. J. L. 113, 52 Atl. 714.

Pennsylvania.— Canfield *v.* Breneman, 13 Wkly. Notes Cas. 551.

Wisconsin.— Frisk *v.* Reigelman, 75 Wis. 499, 43 N. W. 1117, 44 N. W. 766, 17 Am. St. Rep. 198.

See 24 Cent. Dig. tit. "Garnishment," § 198.

21. Moore *v.* Graham, 58 Mich. 25, 24 N. W. 670; Kittredge *v.* Gifford, 62 N. H. 134.

order to bind his property, credits, or effects in the hands of the garnishee.[22] But where defendant has been served with process in the principal action, or has voluntarily appeared and submitted to the jurisdiction of the court, it is not necessary to serve him with notice of garnishment proceedings,[23] in the absence of express statutory enactment requiring such notice.[24]

2. Service of — a. General Rule. Where the statute requires notice of gar-

22. *Illinois.*— Cariker *v.* Anderson, 27 Ill. 358.

Kentucky.— Cockrill *v.* Cockrill, 15 S. W. 1119, 13 Ky. L. Rep. 10.

Massachusetts.— Kent *v.* Lee, 9 Gray 45.

Michigan.—Williams *v.* International Grain, etc., Co., 99 Mich. 80, 57 N. W. 1089; People *v.* Judge Wayne Cir. Ct., 26 Mich. 100.

Missouri.— Gates *v.* Tusten, 89 Mo. 13, 14 S. W. 827.

New York.— Martin *v.* Central Vermont R. Co., 50 Hun 347, 3 N. Y. Suppl. 82, construing Vermont statute.

Pennsylvania.— Weaver *v.* Manville, 21 Pa. Co. Ct. 318, 14 Montg. Co. Rep. 162.

Tennessee.— Kittrell *v.* Perry Lumber Co., 107 Tenn. 148, 64 S. W. 48, where notice was held to be insufficient.

Vermont.— Washburn *v.* New York, etc., Min. Co., 41 Vt. 50.

Virginia.— Dorr *v.* Rohr, 82 Va. 359, 3 Am. St. Rep. 106.

Wisconsin.— Globe Milling Co. *v.* Boynton, 87 Wis. 619, 59 N. W. 132.

United States.— Central Trust Co. *v.* Chattanooga, etc., R. Co., 68 Fed. 685.

See 24 Cent. Dig. tit. "Garnishment," § 200.

Compare Sheppard *v.* Powers, 50 Ala. 377, holding that when a garnishment is sued out in aid of a pending suit, and the record shows that the summons is not signed by the clerk, a judgment by default against the original defendant is void, and a judgment by default against the garnishee is also void.

23. *Louisiana.*— De St. Romes *v.* Levee Steam Cotton Press, 21 La. Ann. 291; Walker *v.* Creevy, 6 La. Ann. 535. See, however, Campbell *v.* Myers, 16 La. Ann. 362.

Maine.— Thompson *v.* Taylor, 13 Me. 420, holding that where the judgment debtor is in prison on an execution issued on a judgment, notice of trustee process need not be given to the debtor personally.

Maryland.— Hagerstown First Nat. Bank *v.* Weckler, 52 Md. 30; Anderson *v.* Graff, 41 Md. 601.

Michigan.— Ketcham *v.* Grove, 115 Mich. 60, 72 N. W. 1110.

Nebraska.— Union Pac. R. Co. *v.* Smersh, 22 Nebr. 751, 36 N. W. 139, 3 Am. St. Rep. 290, holding, however, that while the statute in proceedings in garnishment after judgment does not require notice to the judgment debtor, yet the courts may require such notice before the garnishee files his answer, in order that the debtor may have an opportunity to plead exemption.

New Hampshire.— Jones *v.* Roberts, 60 N. H. 216; Morrison *v.* Barker, 50 N. H. 529.

New Mexico.— New Mexico Nat. Bank *v.* Brooks, 9 N. M. 113, 49 Pac. 947, where defendant had actual notice of the garnishment proceedings.

Wisconsin.— Everdell *v.* Sheboygan, etc., R. Co., 41 Wis. 395.

See 24 Cent. Dig. tit. "Garnishment," § 200.

Absconding debtor.—In North Carolina in a process of garnishment against an absconding debtor, no advertisement or notice in writing is necessary. Parker *v.* Gilreath, 29 N. C. 400.

Non-resident defendant.— In Ohio, in an action against a non-resident defendant, the credits of such defendant may be attached by serving the process of garnishment on his debtor without personal service on defendant. Goebel *v.* Kanawha Valley Bank, 4 Ohio S. & C. Pl. Dec. 127, 3 Ohio N. P. 109.

Attachment issued more than three years after judgment.— Where an attachment by way of execution is issued more than three years after the date of the judgment, a clause of scire facias in the writ as to the judgment defendant, and notice to him, are necessary. Johnson *v.* Lemmon, 37 Md. 336 [*explained* in Hagerstown First Nat. Bank *v.* Weckler, 52 Md. 30].

24. Georgia, etc., R. Co. *v.* Stollenwerck, 122 Ala. 539, 25 So. 258 (holding, however, that the statute (Ala. Code (1896), § 2176) requiring notice to defendant in judgment before judgment against the garnishee does not apply to a non-resident defendant, since the only object of the service is to give defendant a right to claim his exemptions, which right is not given to a non-resident); Ammerman *v.* Vosburg, 101 Iowa 472, 70 N. W. 620 (where a notice of suit in a justice's court stating that an attachment had been issued, and a railroad named had been attached as garnishee, was held to be sufficient); Wise *v.* Rothschild, 67 Iowa 84, 24 N. W. 603. See also Bryant *v.* State Bank, (Cal. 1885) 8 Pac. 644, holding that the law purporting to authorize a judge by order to permit the judgment creditor to institute and maintain an action against a debtor of the judgment debtor is unconstitutional and void, as no notice of such proceeding to the judgment debtor is provided for. But see Phillips *v.* Germon, 43 Iowa 101, decided under a former Iowa statute, holding that in a proceeding by garnishment process may be served on the garnishee without notice to the principal defendant.

Voluntary appearance of principal defendant.— Where the principal defendant in a garnishment proceeding voluntarily appears in the case, the court has full jurisdiction to try the issues in which he is interested, without service upon him of the notice required by Iowa Code, § 2975. Hamilton

nishment to be served upon the principal defendant, it must be served in the manner[25] and within the time[26] prescribed by such statute.

b. By Publication. In many jurisdictions the statute provides that where the principal defendant is a non-resident, or for any reason service cannot be had upon him within the state, he may be served by publication in a newspaper or newspapers designated by the statute for a prescribed period prior to the trial in the garnishment proceedings.[27]

C. Appearance of Garnishee — 1. Special Appearance. The appearance of a garnishee to question the jurisdiction of the court or to raise objection to

Buggy Co. *v.* Iowa Buggy Co., 88 Iowa 364, 55 N. W. 496.

25. *Connecticut.*—Fuller *v.* Foote, 56 Conn. 341, 15 Atl. 760, holding that service of process by foreign attachment on a garnishee is sufficient notice to defendant, if the latter be a non-resident.

Massachusetts.— Kent *v.* Lee, 9 Gray 45.

New Hampshire.— Bell *v.* Somerby, 8 N. H. 64, holding that the process must be served on defendant whose property is attached by leaving with him a copy of the writ, and not a summons.

New York.— See Martin *v.* Central Vermont R. Co., 50 Hun 347, 3 N. Y. Suppl. 82, construing the Vermont statute and holding that service of process by mere service on defendant's debtor in attaching the debt is not sufficient where defendant is a non-resident, and that there must be personal service upon him outside of the state.

Rhode Island.— Leonhard *v.* John Hope, etc., Mfg. Co., 21 R. I. 449, 44 Atl. 305.

Texas.— Patterson *v.* Seeton, 19 Tex. Civ. App. 430, 47 S. W. 732, holding that where all members of a firm are parties to the main action, personal service of the garnishment notice on one of them is sufficient.

Vermont.— Morse *v.* Nash, 30 Vt. 76, holding that where defendant is a non-resident, service may be had upon him by leaving a copy of the writ with the trustee. See also Corey *v.* Gale, 13 Vt. 639.

Wisconsin.— Winner *v.* Hoyt, 68 Wis. 278, 32 N. W. 128.

See 24 Cent. Dig. tit. "Garnishment," §§ 202, 203, 206.

Joint defendants.— It has been held in Michigan that where one of the non-resident principal defendants in a garnishment case has not been served within sixty days after service on the garnishee defendant, as prescribed by Howell Annot. St. § 8087, none of the principal debtors being within the jurisdiction, the case is not within the letter or spirit of Howell Annot. St. c. 268, which allows a recovery where process has been issued against all, but served on one only of two or more joint debtors. Hamilton *v.* Rogers, 67 Mich. 135, 34 N. W. 278.

Insufficient service of notice upon the principal defendant to support a judgment against the garnishee see Roos *v.* Merchants' Mut. Ins. Co., 28 La. Ann. 319; Wires *v.* Griswold, 26 Vt. 97; Huntington *v.* Bishop, 3 Vt. 515; Dorr *v.* Rohr, 82 Va. 359, 3 Am. St. Rep. 106; State *v.* Cordes, 87 Wis. 373, 58 N. W. 771.

26. Kenosha Stove Co. *v.* Shedd, 82 Iowa 540, 48 N. W. 933; Williams *v.* Williams, 61 Iowa 612, 16 N. W. 718 (service must be had upon the principal defendant ten days before trial, or, where there is no issue, ten days before judgment, and without such notice the court has no jurisdiction); Axtell *v.* Gibbs, 52 Mich. 639, 640, 18 N. W. 395, 396.

27. *Arkansas.*— Johnson *v.* Foster, 69 Ark. 617, 65 S. W. 105.

Indiana.— Terre Haute, etc., R. Co. *v.* Baker, 122 Ind. 433, 24 N. E. 83 [*affirming* 4 Ind. App. 66, 30 N. E. 431] (holding that under Rev. St. § 473, providing that when a person cannot be summoned, and his property has been attached, the court may make an order requiring plaintiff to give him notice by advertisement, such a service does not confer jurisdiction where the only attachment is by garnishment of wages, which are exempt by the laws of Indiana and Missouri; and that a judgment suffered by the garnishee in Missouri is no protection therefore in an action for such wages in Indiana); Andrews *v.* Powell, 27 Ind. 303.

Kansas.— Chicago, etc., R. Co. *v.* Campbell, 5 Kan. App. 423, 49 Pac. 321, holding, however, that the publication notice must be preceded by an affidavit filed in the case by plaintiff that service of summons cannot be made in the state. See Searing *v.* Benton, 41 Kan. 758, 21 Pac. 800, holding that before service can be had on a non-resident of the state by publication, where one is served with attachment in garnishee process, it must appear that the party garnished has property of defendant in his control or is indebted to him.

Minnesota.— Broome *v.* Galena, etc., Packet Co., 9 Minn. 239.

Ohio.— Vallette *v.* Kentucky Trust Co. Bank, 2 Handy 1, 12 Ohio Dec. (Reprint) 299.

Texas.— Berry *v.* Davis, 77 Tex. 191, 13 S. W. 978, 19 Am. St. Rep. 748.

Virginia.— See Dorr *v.* Rohr, 82 Va. 359, 3 Am. St. Rep. 106, where a judgment was rendered against a garnishee in Virginia in 1862, the principal defendant, a resident of New York, having been served by publication. and it was held that, as there was a state of war between the Confederate states and the United States, the publication was without legal effect, and no notice, actual or constructive, to the principal debtor; and that the judgment against the garnishee was void for want of jurisdiction.

Washington.— Holford *v.* Trewella, 36 Wash. 654, 79 Pac. 308.

defective proceedings in garnishment does not amount to a general appearance, and he waives none of his rights thereby, nor does such appearance confer jurisdiction on the court.[28]

2. General Appearance. In the majority of jurisdictions the rule is laid down that a voluntary general appearance on the part of the garnishee waives all irregularities in garnishment proceedings, such as defects in the writ or summons, or in its service,[29] at least in so far as the rights of the garnishee are thereby affected.[30] In some jurisdictions, however, it is held that while a garnishee may

See 24 Cent. Dig. tit. "Garnishment," § 207.

28. Grace *v.* Casey-Grimshaw Marble Co., 62 Ill. App. 149; Padden *v.* Moore, 58 Iowa 703, 12 N. W. 724; South Omaha Nat. Bank *v.* Farmers', etc., Nat. Bank, 45 Nebr. 29, 63 N. W. 128. See also McDonald *v.* Moore, 65 Iowa 171, 21 N. W. 504.

29. *Alabama.*— Betancourt *v.* Eberlin, 71 Ala. 461; Curry *v.* Woodward, 53 Ala. 371; Pearce *v.* Winter Iron-Works, 32 Ala. 68; Daniel *v.* Hopper, 6 Ala. 296; Smith *v.* Chapman, 6 Port. 365. See also Tillinghast *v.* Johnson, 5 Ala. 514; Fortune *v.* State Bank, 4 Ala. 385.

California.— Coffee *v.* Haynes, 124 Cal. 561, 57 Pac. 482, 71 Am. St. Rep. 99.

Delaware.— Moreland *v.* Every Evening Pub. Co., 6 Houst. 343; Carey *v.* Brinton, 6 Houst. 340.

District of Columbia.— Reynolds *v.* Smith, 7 Mackey 27.

Florida.— Mercer *v.* Booby, 6 Fla. 723.

Georgia.— Dooly *v.* Miles, 101 Ga. 797, 29 S. E. 118; Flournoy *v.* Rutledge, 73 Ga. 735; Phillips *v.* Thurber, 56 Ga. 393. See, however, Ahrens, etc., Mfg. Co. *v.* Patten Sash, etc., Co., 94 Ga. 247, 21 S. E. 523.

Illinois.— National Bank of Commerce *v.* Tittsworth, 73 Ill. 591; Phelps *v.* Reeder, 39 Ill. 172; Tennent-Stribling Shoe Co. *v.* Hargardine-McKittrick Dry Goods Co., 58 Ill. App. 368; Carter *v.* Lockwood, 15 Ill. App. 73.

Indiana.— Baltimore, etc., R. Co. *v.* Taylor, 81 Ind. 24; Whitney *v.* Lehmer, 26 Ind. 503; Alberts *v.* Baker, 21 Ind. App. 373, 52 N. E. 469.

Kentucky.— Roberts *v.* Walker, 7 B. Mon. 75; Paducah Lumber Co. *v.* Langstaff, 6 Ky. L. Rep. 445; City Nat. Bank *v.* Gardner, 5 Ky. L. Rep. 689.

Maryland.— Peters *v.* League, 13 Md. 58, 71 Am. Dec. 622. See, however, Cromwell *v.* Royal Canadian Ins. Co., 49 Md. 366, 33 Am. Rep. 258, holding that a garnishee may move to quash the garnishment after having appeared and confessed assets, and expressed a willingness to abide by the order of the court.

Massachusetts.— Dole *v.* Boutwell, 1 Allen 286; Nash *v.* Brophy, 13 Metc. 476.

Minnesota.— Howland *v.* Jeuel, 55 Minn. 102, 56 N. W. 581; Hinkley *v.* St. Anthony Falls Water Power Co., 9 Minn. 55.

Mississippi.— Roy *v.* Heard, 38 Miss. 544; McGill *v.* Bone, 13 Sm. & M. 592.

Oklahoma.— Phœnix Bridge Co. *v.* Street, 9 Okla. 422, 60 Pac. 221, holding, however, that where the proceedings are absolutely void, an appearance and answer by the garnishee will not waive the defects therein.

Oregon.— Altona *v.* Dabney, 37 Oreg. 334, 62 Pac. 521 (holding, however, that the garnishee cannot waive service of the original writ); Carter *v.* Koshland, 12 Oreg. 492, 8 Pac. 556.

Pennsylvania.— Wisecarver *v.* Braden, 146 Pa. St. 42, 23 Atl. 393; Lupton *v.* Moore, 101 Pa. St. 318; Schober *v.* Mather, 49 Pa. St. 21; Commonwealth Title Ins., etc., Co. *v.* Brown, 11 Pa. Co. Ct. 542; Silva *v.* Greenwald, 2 Pa. Co. Ct. 131; Keck *v.* Porter, 8 Kulp 475; Fairchild *v.* Mensch, 1 Kulp 13.

Tennessee.— Miller *v.* O'Bannon, 4 Lea 398; Moody *v.* Alter, 12 Heisk. 142; Woodfolk *v.* Whitworth, 5 Coldw. 561; Hearn *v.* Crutcher, 4 Yerg. 461.

Texas.— Wood Mowing, etc., Mach. Co. *v.* Edwards, 9 Tex. Civ. App. 537, 29 S. W. 418.

Vermont.— McKenzie *v.* Ransom, 22 Vt. 324.

Virginia.— Pulliam *v.* Aler, 15 Gratt. 54.

Washington.— Ward *v.* Ward, 14 Wash. 640, 45 Pac. 312; Dittenhœfer *v.* Cœur d'Alene Clothing Co., 4 Wash. 519, 30 Pac. 660.

Wisconsin.— Wickham *v.* South Shore Lumber Co., 89 Wis. 23, 61 N. W. 287; Carrington *v.* Eastman, 1 Pinn. 650.

See 24 Cent. Dig. tit. "Garnishment," § 213.

30. Critchell *v.* Cook, 7 Ohio Dec. (Reprint) 314, 2 Cinc. L. Bul. 97; Selman *v.* Orr, 75 Tex. 528, 12 S. W. 697.

Where creditors' rights have attached.— A garnishee by answer does not waive a defective service of attachment so as to affect creditors whose rights have already attached. Robinson *v.* Basham, 6 Ky. L. Rep. 445. It is otherwise, however, if he does so before other attaching creditors acquire a lien on the funds in his hands. Caldwell *v.* James, 9 Ky. L. Rep. 893.

Effect of failure to appear.— Where final judgment by default is rendered against a garnishee, after regular proceedings, he cannot assign as ground for reversing the judgment errors in the proceedings against the principal defendant, such as want of requisite notice. Erwin *v.* Heath, 50 Miss. 795. However, if there be no appearance by the principal debtor, or garnishee, or other proceeding at the return term of the writ of garnishment, the attachment is discontinued. Washington Bank *v.* Brent, 2 Fed. Cas. No. 948, 2 Cranch C. C. 538.

The refusal of a garnishee to appear to a summons executed is a contempt for which

waive a defect in proceedings affecting himself alone, and thus confer jurisdiction upon the court as to such garnishee, he cannot thus affect the rights of the principal defendant, or of third parties claiming an interest, as defendant has the right to insist that, if his property is taken away from him, it shall be done strictly in accordance with the law,[31] some of the cases going to the extent of holding that a voluntary appearance of the garnishee does not waive defects in garnishment proceedings, even as to the garnishee personally.[32]

VIII. LIEN OF GARNISHMENT AND LIABILITY OF GARNISHEE.

A. Creation and Nature of — 1. In General. By the service of a writ of garnishment a lien upon the property of the principal defendant in the hands of the garnishee or upon the indebtedness of the garnishee to such defendant is thereby fixed, and no subsequent transfer of such property, or subsequent arrangement or cancellation of the indebtedness between the garnishee and defendant, can destroy the lien or affect the rights of plaintiff.[33] However, garnishment cre-

an attachment will issue. Jackson *v.* Harrison County Justices, 1 Va. Cas. 314.

31. *Connecticut.*— Raymond *v.* Rockland County, 40 Conn. 401. See also McGuire *v.* Church, 49 Conn. 248, holding that where, in garnishment proceedings, the writ served on the garnishee is invalid, defendant's appearance without objection, although a waiver of summons on him personally, does not validate the attachment.

Michigan.— Segar *v.* Muskegon Shingle, etc., Co., 81 Mich. 344, 45 N. W. 982; Lake Shore, etc., R. Co. *v.* Hunt, 39 Mich. 469. See, however, Keppel *v.* Moore, 66 Mich. 292, 33 N. W. 499 (holding that where the garnishee has full power to bind the principal defendant, he has power to waive formalities in the proceedings for him, as well as for himself); Wellover *v.* Soule, 30 Mich. 481 (holding that a mere clerical error as to the month in the return-day of a garnishment summons is waived by appearance and answer on the day intended, and is not fatal to the proceedings).

Missouri.— Mosher *v.* Bartholow Banking House, 6 Mo. App. 599; Epstein *v.* Salorgne, 6 Mo. App. 352. See Hackett *v.* Gihl, 63 Mo. App. 447, holding that the appearance of the garnishee waives any defect in the service, but does not give validity to an otherwise invalid garnishment.

Nebraska.— State *v.* Duncan, 37 Nebr. 631, 56 N. W. 214.

New Hampshire.— Nelson *v.* Sanborn, 64 N. H. 310, 9 Atl. 721.

Ohio.— Squair *v.* Shea, 26 Ohio St. 645.

West Virginia.— Pennsylvania R. Co. *v.* Rogers, 52 W. Va. 450, 44 S. E. 300, 62 L. R. A. 178. See also Joseph *v.* Pyle, 2 W. Va. 449.

See 24 Cent. Dig. tit. "Garnishment," § 213.

32. McDonald *v.* Moore, 65 Iowa 171, 21 N. W. 504; Haley *v.* Hannibal, etc., R. Co., 80 Mo. 112; Coleman *v.* American F. Ins. Co., 74 Mo. App. 663; Masterson *v.* Missouri Pac. R. Co., 20 Mo. App. 653, holding that one cannot be held as garnishee, unless he has been legally garnished, even though he appears and answers interrogatories. See, however, Marx *v.* Hart, 166 Mo. 503, 66 S. W. 260, 89 Am. St. Rep. 715, holding that where a partner having all the property in his possession is served with garnishment process, it is competent for the other partner, by his voluntary appearance, to waive service of process on him, and give jurisdiction of himself personally.

33. *Arkansas.*—Martin *v.* Foreman, 18 Ark. 249; Watkins *v.* Field, 6 Ark. 391; Desha *v.* Baker, 3 Ark. 509.

California.— Kimball *v.* Richardson-Kimball Co., 111 Cal. 386, 43 Pac. 1111; Johnson *v.* Carry, 2 Cal. 33. See also Gow *v.* Marshall, 90 Cal. 565, 27 Pac. 422.

Georgia.— Armour Packing Co. *v.* Wynn, 119 Ga. 683, 46 S. E. 865.

Iowa.— Minthorn *v.* Hemphill, 73 Iowa 257, 34 N. W. 844.

Kansas.— Davis Mill Co. *v.* Bangs, 6 Kan. App. 38, 49 Pac. 628.

Louisiana.— Harris *v.* Andrews, 20 La. Ann. 561.

Maryland.— Steuart *v.* West, 1 Harr. & J. 536.

Minnesota.— North Star Boot, etc., Co. *v.* Ladd, 32 Minn. 381, 383, 20 N. W. 334, where the court said: "The garnishment is, in effect, an attachment of the 'indebtedness' of the garnishee to the defendant. Though, technically speaking, it may not give a 'specific lien' upon such indebtedness, its effect in conferring upon the plaintiff a specific right (over and above that of a mere general creditor) to the indebtedness for the payment of his claim, is substantially analogous to that acquired by an attachment of tangible property."

South Carolina.— McBride *v.* Floyd, 2 Bailey 209; Renneker *v.* Davis, 10 Rich. Eq. 289. See, however, Parker *v.* Parker, 2 Hill Eq. 35.

Vermont.— Cahoon *v.* Morgan, 38 Vt. 234.

Wisconsin.— Maxwell *v.* New Richmond Bank, 101 Wis. 286, 77 N. W. 149, 70 Am. St. Rep. 926.

Canada.— Gauthier *v.* Huot, 16 Quebec Super. Ct. 242.

See 24 Cent. Dig. tit. "Garnishment," § 214.

ates only an inchoate lien upon the property of or debts due to the principal defendant, which lien must be perfected by judgment against the garnishee.[34] The service of a writ of garnishment creates no lien in favor of plaintiff upon defendant's property capable of manual delivery.[35] In several jurisdictions, however, it is held that while the service of a writ of garnishment is an attachment of the effects of the debtor in the hands of the garnishee, yet it creates no lien upon anything, and only holds the garnishee to a personal liability.[36]

2. COMMENCEMENT OF LIEN. The general rule is that the lien of garnishment attaches from the date of the service of the writ of garnishment or notice of garnishment proceedings.[37] In many jurisdictions the statute provides that the lien of garnishment shall attach to any debt owing at the time of the service of the writ,

Garnishment of vendee before completion of sale.— Service of a writ of garnishment by a creditor of the vendor on the vendee before completion of the sale by delivery of chattels sold creates no lien on the purchase-price. Maier *v.* Freeman, 112 Cal. 8, 44 Pac. 357, 53 Am. St. Rep. 151.

Garnishment summons served on one in his individual capacity does not bind any property or money of the principal defendant held by him as a receiver. Fleming *v.* Gillespie, 7 Okla. 430, 54 Pac. 653.

34. *Maryland.*— Buschman *v.* Hanna, 72 Md. 1, 18 Atl. 962; Cooke *v.* Cooke, 43 Md. 522; Rhodes *v.* Amsinck, 38 Md. 345. See also Ohio Brass Co. *v.* Clark, 86 Md. 344, 37 Atl. 899.

Minnesota.— Langon *v.* Thompson, 25 Minn. 509.

Montana.— Montana Nat. Bank *v.* Merchants' Nat. Bank, 19 Mont. 586, 49 Pac. 149, 61 Am. St. Rep. 532, holding that, by garnishment of a debt due defendant, plaintiff acquires an inchoate right to a lien as to the garnishee's property, but where the other creditors of the garnishee subsequently levy upon such property, the right of plaintiff in garnishment proceedings to a lien is limited to the *pro-rata* interest he would be entitled to receive had the garnishee made a general assignment for the benefit of the creditors.

North Carolina.— Carmer *v.* Evers, 80 N. C. 55, holding that the warrant of attachment served on the garnishee is merely a security for such sum as plaintiff may recover in his action, and does not subject a garnishee to judgment against him in the pending cause, but only to a separate action for its recovery.

Pennsylvania.— Parker *v.* Farr, 2 Browne 331, holding that the foreign attachment creates no lien upon the real or personal estate of the garnishee.

Vermont.— Wilder *v.* Weatherhead, 32 Vt. 765.

See 24 Cent. Dig. tit. "Garnishment," § 214 *et seq.*

35. *California.*— Johnson *v.* Gorham, 6 Cal. 195, 65 Am. Dec. 501.

Illinois.— Gregg *v.* Savage, 51 Ill. App. 281.

Iowa.— McConnell *v.* Denham, 72 Iowa 494, 34 N. W. 298; Mooar *v.* Walker, 46 Iowa 164.

Louisiana.— Dennistoun *v.* New York Croton, etc., Co., 6 La. Ann. 782.

Missouri.— McGarry *v.* Lewis Coal Co., 93 Mo. 237, 6 S. W. 81, 3 Am. St. Rep. 522.

Montana.— Wilson *v.* Harris, 21 Mont. 374, 54 Pac. 46, 19 Mont. 69, 47 Pac. 1101.

Pennsylvania.— Parker *v.* Farr, 2 Browne 331.

See 24 Cent. Dig. tit. "Garnishment," § 214.

36. *Illinois.*— Bigelow *v.* Andress, 31 Ill. 322; McElwee *v.* Wilce, 80 Ill. App. 338; Gregg *v.* Savage, 51 Ill. App. 281. See also Montreal Bank *v.* Clark, 108 Ill. App. 163; Ham *v.* Peery, 39 Ill. App. 341. But see Smith *v.* Clinton Bridge Co., 13 Ill. App. 572.

Missouri.— Marx *v.* Hart, 166 Mo. 503, 66 S. W. 260, 89 Am. St. Rep. 715.

Nebraska.— Benedict *v.* T. L. V. Land, etc., Co., 66 Nebr. 236, 92 N. W. 210, holding that plaintiff in garnishment proceedings does not acquire a fair and full lien upon the specific property in the possession of the garnishee, but acquires only such a lien as gives him the right to hold the garnishee personally liable for the property or its value.

Nevada.— Hulley *v.* Chedic, 22 Nev. 127, 36 Pac. 783, 58 Am. St. Rep. 729.

New Hampshire.— Corning *v.* Records, 69 N. H. 390, 46 Atl. 462, 76 Am. St. Rep. 178.

See 24 Cent. Dig. tit. "Garnishment," § 214 *et seq.*

37. *Illinois.*— McCoy *v.* Williams, 6 Ill. 584.

Kansas.— Davis Mill Co. *v.* Bangs, 6 Kan. App. 38, 49 Pac. 628.

Kentucky.— Webb *v.* Read, 3 B. Mon. 119.

Louisiana.— Marchand *v.* Bell, 21 La. Ann. 33; Rightor *v.* Phelps, 16 La. Ann. 105; Slatter *v.* Tiernan, 12 La. Ann. 375.

Missouri.— Farmer *v.* Medcap, 19 Mo. App. 250.

Nebraska.— Northfield Knife Co. *v.* Shapleigh, 24 Nebr. 635, 39 N. W. 788, 8 Am. St. Rep. 224.

Pennsylvania.— Peterson *v.* Russell, 9 Pa. Super. Ct. 332, 43 Wkly. Notes Cas. 396; Stone *v.* Rohner, 7 Pa. Dist. 313, 21 Pa. Co. Ct. 61.

Texas.— Harrell *v.* Mexico Cattle Co., 73 Tex. 612, 11 S. W. 863.

Virginia.— Williamson *v.* Bowie, 6 Munf. 176.

United States.— King *v.* Gorsline, 14 Fed. Cas. No. 7,796, 4 Cranch C. C. 150, holding that money in the hands of a garnishee must be applied to drafts drawn on it by the debtor before service of the attachment, although the

or at the time of the answer, or becoming due at any time between the service and the answer or the contest thereof, or due in the future under a contract existing at the time of the service or answer.[38] However, the lien of garnishment does not attach to any debt becoming due to the principal defendant after the garnishee has made answer, or to any property of such defendant in the hands of the garnishee, the possession of which was thereafter acquired.[39]

3. NATURE OF RIGHT ACQUIRED. Plaintiff seeking to subject a debt due to the principal defendant acquires no greater right by the service of a writ of garnishment than that which defendant could have asserted and enforced in an action against the garnishee, and the fact that garnishment process has been served on the garnishee places him in no worse position and under no greater liability than he would have been in or under had an action at law been brought against him by defendant.[40] By the service and writ of garnishment, property of the principal defendant in the hands of the garnishee is placed practically *in custodia legis*, and the garnishee becomes the custodian of the property and entitled to

garnishee had no notice of the drafts until afterward.

See 24 Cent. Dig. tit. "Garnishment," § 215.

38. *Alabama.*— Henry *v.* McNamara, 114 Ala. 107, 22 So. 428.

Iowa.—Thomas *v.* McDonald, 102 Iowa 564, 71 N. W. 572.

Massachusetts.— Jewett *v.* Morrison, 175 Mass. 161, 55 N. E. 890.

Nebraska.— Pawnee City First Nat. Bank *v.* Manning, 2 Nebr. (Unoff.) 3, 95 N. W. 1128.

Pennsylvania.— Lemon *v.* McCurdy, 30 Pittsb. Leg. J. 343.

Tennessee.— Lockett *v.* Beaver, 97 Tenn. 396, 37 S. W. 140; Davis *v.* King, (Ch. App. 1899) 56 S. W. 1041.

Texas.— Gause *v.* Cohen, 73 Tex. 239, 11 S. W. 162; Holloway Seed Co. *v.* City Nat. Bank, (Civ. App. 1898) 47 S. W. 77, where a garnishee sold part of the attached goods and invested the proceeds in other goods of like character, and wilfully mingled them with the attached goods, the value of the entire stock remaining the same, and it was held that the garnishment lien extended to both the old and the new goods.

West Virginia.— Lipscomb *v.* Condon, 56 W. Va. 416, 49 S. E. 392, 67 L. R. A. 670.

See 24 Cent. Dig. tit. "Garnishment," § 215.

Under Minn. Gen. St. (1894) § 5309, the garnishee cannot be held for property coming into his possession or control after the service of the summons in the proceedings against him. McLean *v.* Sworts, 69 Minn. 469, 71 N. W. 925, 65 Am. St. Rep. 556.

39. Henry *v.* McNamara, 114 Ala. 107, 22 So. 428; Daniels *v.* Meinhard, 53 Ga. 359; German Sav., etc., Bank *v.* Braddock Union Planing Mill Co., 19 Pa. Co. Ct. 18; Planters', etc., Bank *v.* Floeck, 17 Tex. Civ. App. 418, 43 S. W. 589.

40. *Alabama.*— Locket *v.* Child, 11 Ala. 640, holding, however, that where one is summoned as garnishee of joint judgment debtors, the service of the garnishment operates as the attachment of debts due to defendants severally.

Connecticut.— Fuller *v.* Foote, 56 Conn. 341, 15 Atl. 760.

Delaware.— Netter *v.* Stoeckle, 4 Pennew. 345, 56 Atl. 604.

Georgia.— Hoskins *v.* Johnson, 24 Ga. 625.

Illinois.— South Chicago City R. Co. *v.* Workman, 64 Ill. App. 383.

Iowa.— Henry *v.* Wilson, 85 Iowa 60, 51 N. W. 1157.

Kentucky.— Kaufman *v.* Loventhal, 8 Ky. L. Rep. 62.

Louisiana.— Oakey *v.* Sheriff, 13 La. Ann. 273; Davis *v.* Bastos, 9 La. Ann. 359.

Massachusetts.— Burlingame *v.* Bell, 16 Mass. 318 (holding that every attachment by trustee process is subject to whatever lien the trustee may have as bailee, factor, or creditor); Allen *v.* Megguire, 15 Mass. 490.

Missouri.— McPherson *v.* Atlantic, etc., R. Co., 66 Mo. 103; Weil *v.* Tyler, 38 Mo. 545.

Nebraska.— Cahn *v.* Carpless Co., 61 Nebr. 512, 85 N. W. 538; Chamberlain Banking House *v.* Reliance Ins. Co., 59 Nebr. 195, 80 N. W. 822 (holding likewise that no after-agreement between the principal defendant and the garnishee can essentially change the rights of plaintiff which have attached by the service of the writ of garnishment); Chicago, etc., R. Co. *v.* Van Cleave, 52 Nebr. 67, 71 N. W. 971.

New Mexico.— Field *v.* Sammis, (1903) 73 Pac. 617.

North Carolina.— Goodwin *v.* Claytor, 137 N. C. 224, 49 S. E. 173, 67 L. R. A. 209.

Pennsylvania.— Reed *v.* Penrose, 2 Grant 472.

Vermont.— Edson *v.* Sprout, 33 Vt. 77.

United States.— Fidelity Trust Co. *v.* New York Finance Co., 125 Fed. 275, 60 C. C. A. 189.

See 24 Cent. Dig. tit. "Garnishment," § 216.

Subrogation.— Where the trustee in foreign attachment dies pending the suit, and his estate is represented insolvent, plaintiff, by virtue of the lien acquired by trustee process, is entitled to present the claim in favor of the principal defendant on account of which the trustee was summoned, to the com-

hold it not only against defendant and those claiming under him,[41] but even against the real owner of such property who is a stranger to the suit.[42]

B. Priorities — 1. Between Garnishments. Where several writs of garnishment are issued against the same garnishee, at the instance of different creditors, to subject the same property or fund, the rule is that they take priority in the direct order of the time of the service of the writ or summons upon the garnishee, and not according to the order of the issuance of the writ.[43] In several jurisdictions, however, it has been held that the first writ placed in the officer's hands is entitled to priority of lien over a second writ which is first served on the garnishee.[44]

missioner of insolvency for allowance. Rollins *v.* Robinson, 35 N. H. 381.

41. *Louisiana.*— Dwight *v.* Mason, 12 La. Ann. 846; Dennistoun *v.* New York Croton, etc., Co., 6 La. Ann. 782.

Nebraska.— Reed *v.* Fletcher, 24 Nebr. 435, 39 N. W. 437.

New Hampshire.— Walcott *v.* Keith, 22 N. H. 196.

Oklahoma.—Barton *v.* Spencer, 3 Okla. 270, 41 Pac. 605.

Pennsylvania.— Ege *v.* Koontz, 3 Pa. St. 109.

Tennessee.— Beaumont *v.* Eason, 12 Heisk. 417; State *v.* Linaweaver, 3 Head 51, 75 Am. Dec. 757.

Vermont.— Deno *v.* Thomas, 64 Vt. 358, 24 Atl. 140.

Virginia.— Erskine *v.* Staley, 12 Leigh 406.

United States.— See Brashear *v.* West, 7 Pet. 608, 8 L. ed. 801.

England.— Yates *v.* Terry, [1901] 1 K. B. 102, 70 L. J. K. B. 24, 83 L. T. Rep. N. S. 415, 49 Wkly. Rep. 112.

See 24 Cent. Dig. tit. "Garnishment," § 216.

42. Van Ness *v.* McLeod, 3 Ida. 439, 31 Pac. 798; Cooley *v.* Minnesota Transfer R. Co., 53 Minn. 327, 55 N. W. 141, 39 Am. St. Rep. 609; Stiles *v.* Davis, 1 Black (U. S.) 101, 17 L. ed. 33. See also Ash *v.* Akin, 2 Tex. Civ. App. 83, 21 S. W. 618.

Mortgaged property.— Under Iowa Code, § 1927, providing that, in the absence of stipulations to the contrary, the mortgagee of personal property is entitled to the possession, it has been held that the agent of the mortgagor in charge, who has been served with garnishee process in an action against the latter, cannot prevent the mortgagee from taking possession of the property, and is properly discharged in the garnishee proceeding. Booth *v.* Gish, 75 Iowa 451, 39 N. W. 704.

43. *Georgia.*— Willis *v.* Parsons, 13 Ga. 335.

Kansas.— Fullam *v.* Abrahams, 29 Kan. 725; Davis Mill Co. *v.* Bangs, 6 Kan. App. 38, 49 Pac. 628.

Kentucky.— See Robertson *v.* Stewart, 2 B. Mon. 321.

Maryland.— Wallace *v.* Forrest, 2 Harr. & M. 261.

Mississippi.— Boone *v.* McIntosh, 62 Miss. 744.

Missouri.— Talbot *v.* Harding, 10 Mo. 350

New Hampshire.— Brown *v.* Ellsworth, 72 N. H. 186, 55 Atl. 356. See Gay *v.* Johnson, 32 N. H. 167, where there were several successive attachments of partnership property in suits for debts of the firm, and in some of the suits one of the two partners was discharged on his plea of infancy, and in the others he allowed a joint judgment to be rendered against him and his partner, and it was held that subsequent attachments in the actions, in which the judgments were against both parties, would be preferred to prior attachments in actions where the judgment was against the adult partner alone.

Ohio.— Norton *v.* Norton, 43 Ohio St. 509, 3 N. E. 348.

Texas.— Harrell *v.* Mexico Cattle Co., 73 Tex. 612, 11 S. W. 863.

Virginia.— Straus *v.* Kerngood, 21 Gratt. 584; Moore *v.* Holt, 10 Gratt. 284.

United States.— McCobb *v.* Tyler, 15 Fed. Cas. No. 8,705, 2 Cranch C. C. 199 (holding that the attachment first served on the garnishee binds the effects in his hands, although the marshal had other and prior attachments in his hands at the time of such service); Rudd *v.* Paine, 20 Fed. Cas. No. 12,108, 2 Cranch C. C. 9.

See 24 Cent. Dig. tit. "Garnishment," §§ 217, 219.

Expenses of garnisher.— Under Ga. Rev. Code, § 3489, which provides that all money raised by garnishment shall be paid over to the creditors of defendant according to priorities, "the expenses of the moving creditors being first paid," a junior judgment creditor who brings money into court by process of garnishment *pendente lite* is entitled to his expenses in garnishment, and also his expenses in obtaining judgment against defendant before a senior judgment creditor is entitled to the fund. Whaley *v.* Cunningham, 41 Ga. 320.

Simultaneous writs.— Where an officer having several trustee writs to serve delivered all the copies thereof to the trustees at the same time, it was held that the attachments thereby made were simultaneous, and the several plaintiffs therein were respectively entitled to an aliquot part of the proceeds of the goods so attached. Rockwood *v.* Varnum, 17 Pick. (Mass.) 289.

44. Fourth St. Nat. Bank *v.* Hunter, 6 Pa. Co. Ct. 357; Philadelphia Nat. Bank *v.* Hilgert, 3 Pennyp. (Pa.) 437 (where three writs of attachment came into the hands of the sheriff for service on the same day, but they were not served on the garnishee

2. Between Garnishments and Other Liens or Claims. By unanimous opinion the general rule is that a person who has acquired a lien upon the property of the principal defendant in the hands of the garnishee, or upon debts due from such garnishee, by virtue of the service of a writ of garnishment, occupies no better position as regards subsisting adverse claims to such property or debt than does a purchaser or assignee with notice;[45] and a plaintiff causing a writ of garnishment to be served upon the debtor of the principal defendant acquires a lien upon the property of, or debts due to, the principal defendant, subject to prior valid rights and liens against such property or debt, such as a *bona fide* assignment thereof,[46] or an attachment previously levied on the property,[47] or the

in the order in which they came into the sheriff's hands, and, upon plaintiff's claim that priority of lien should be determined by the time of service, it was held that the lien dated from the time the writs were issued and came into the hands of the proper officer for service); Callahan *v.* Hallowell, 2 Bay (S. C.) 8.

Writs served on same day.— In Pennsylvania, where writs of attachment execution have been served on the same day, no preference can be given, and the distribution of the fund in the hands of the garnishee must be made *pro rata*. Baldwin's Appeal, 86 Pa. St. 483; Long's Appeal, 23 Pa. St. 297. See, however, Jones *v.* Bonsall, 11 Phila. (Pa.) 561, holding that writs of attachment execution served on the same day have priority in the order in which they are actually served.

Under Ill. St. (1874) p. 152, § 37, all judgments in attachment against the same defendant returnable at the same time, and all judgments against such defendant recovered at the same time, or at the term wherein judgment in the first attachment is rendered, should share *pro rata* in the proceeds of the property attached, either in the hands of the garnishee or otherwise. National Bank of America *v.* Indiana Banking Co., 114 Ill. 483, 2 N. E. 401; Reeve *v.* Smith, 113 Ill. 47.

45. *Alabama.*— Butler *v.* Savannah Guano Co., 122 Ala. 326, 25 So. 241; Jones *v.* Lowery Banking Co., 104 Ala. 252, 16 So. 11.

Colorado.— American Nat. Bank *v.* Barnard, 15 Colo. App. 110, 61 Pac. 200.

Illinois.— Cairo, etc., R. Co. *v.* Killenberg, 82 Ill. 295; Hodson *v.* McConnel, 12 Ill. 170.

Kansas.— Ives *v.* Addison, 39 Kan. 172, 17 Pac. 797.

Minnesota.— Williams *v.* Pomeroy, 27 Minn. 85, 6 N. W. 445; MacDonald *v.* Kneeland, 5 Minn. 352.

Mississippi.— Schoolfield *v.* Hirsh, 71 Miss. 55, 14 So. 528, 42 Am. St. Rep. 450.

New Hampshire.— Newport First Nat. Bank *v.* Hunter, 69 N. H. 509, 45 Atl. 351.

Oregon.— Meier *v.* Hess, 23 Oreg. 599, 32 Pac. 755.

Wisconsin.— Beck *v.* Cole, 16 Wis. 95.

See 24 Cent. Dig. tit. "Garnishment," § 220.

46. *California.*— Walling *v.* Miller, 15 Cal. 38.

Colorado.— Hendrie, etc., Mfg. Co. *v.* Collins, 29 Colo. 102, 67 Pac. 164.

Connecticut.— Adams *v.* Lewis, 31 Conn. 501.

Georgia.— Hargett *v.* McCadden, 107 Ga. 773, 33 S. E. 666.

Illinois.— Glover *v.* Lee, 140 Ill. 102, 29 N. E. 680 [*affirming* 40 Ill. App. 350]; Price *v.* German Exch. Bank, 60 Ill. App. 418.

Iowa.— Sioux City First Nat. Bank *v.* Stone, (1902) 91 N. W. 1076; Ruthven *v.* Clarke, 109 Iowa 25, 79 N. W. 454; Deere *v.* Young, 39 Iowa 588.

Kentucky.— Newby *v.* Hill, 2 Metc. 530, holding that attaching creditors acquire only a lien on, or equitable right to, the debt in the hands of the garnishee, and that this equity is subordinate to that of one for whose indemnity as surety of defendant the latter made a parol assignment or appropriation of the debt before commencement of the action by the attaching creditor.

Louisiana.— Caseaux *v.* His Creditors, 6 Rob. 268.

Missouri.— Hendrickson *v.* Trenton Nat. Bank, 81 Mo. App. 332.

New Hampshire.— Bullock *v.* Foster, 44 N. H. 38; White *v.* Richardson, 12 N. H. 93.

North Dakota.— See Roberts *v.* Fargo First Nat. Bank, 8 N. D. 474, 79 N. W. 993.

Pennsylvania.— Noble *v.* Thompson Oil Co., 79 Pa. St. 354, 21 Am. Rep. 66; Vincent *v.* Watson, 18 Pa. St. 96. See also Parker *v.* Farr, 2 Browne 331.

South Carolina.— Matheson *v.* Rutledge, 12 Rich. 41.

Texas.— Mensing *v.* Engolke, 67 Tex. 532, 4 S. W. 202; Arthur *v.* Batte, 42 Tex. 159.

United States.— King *v.* Gorsline, 14 Fed. Cas. No. 7,796, 4 Cranch C. C. 150; Miller *v.* Hubbard, 17 Fed. Cas. No. 9,574, 4 Cranch C. C. 451.

England.— Yates *v.* Terry, [1902] 1 K. B. 527, 71 L. J. K. B. 282, 86 L. T. Rep. N. S. 133, 50 Wkly. Rep. 293.

See 24 Cent. Dig. tit. "Garnishment," § 220.

Sureties have the right in equity to be subrogated to the lien that the judgment creditor has on the debtor's land, upon the payment by them of the debt for which they are secured, although such payment be voluntary, and they are preferred to a creditor who acquires a lien upon the land by a foreign attachment, sued out in chancery after the entry of such judgment, although no elegit or execution was issued thereon. Watts *v.* Kinney, 3 Leigh (Va.) 272, 23 Am. Dec. 266.

47. *Alabama.*— Johnson *v.* Burnett, 12 Ala. 743.

lien of a pledgee,[48] trustee in a deed of trust,[49] or a mortgagee[50] upon such property. On the other hand the rule is that the service of a writ of garnishment upon a debtor of the principal defendant creates a lien on the property of such defendant, or upon a debt due him by the garnishee, superior to any lien or privilege subsequently acquired against such property or debt.[51]

Maryland.— Farmers' Bank *v.* Beaston, 7 Gill & J. 421, 28 Am. Dec. 226.

Ohio.— McCombs *v.* Howard, 18 Ohio St. 422.

Tennessee.—English *v.* King, 10 Heisk. 666.

United States.— Wooldridge *v.* Mississippi Valley Bank, 36 Fed. 97.

See 24 Cent. Dig. tit. "Garnishment," § 222.

48. *Minnesota.*—Cooley *v.* Minnesota Transfer R. Co., 53 Minn. 327, 55 N. W. 141, 39 Am. St. Rep. 609.

Nebraska.— Farmers', etc., Nat. Bank *v.* Mosher, (1904) 100 N. W. 133, (1903) 94 N. W. 1003, 63 Nebr. 130, 88 N. W. 552, holding that, where a debtor has pledged his stock in good faith before the levy, the rights of the parties will not be affected by the levy, although on the books of the corporation the stock appears to be the property of the debtor.

New Hampshire.— Chapman *v.* Gale, 32 N. H. 141; Hills *v.* Smith, 28 N. H. 369; Walcott *v.* Keith, 22 N. H. 196.

Ohio.— Norton *v.* Norton, 43 Ohio St. 509, 2 N. E. 348.

Pennsylvania.— Baugh *v.* Kirkpatrick, 54 Pa. St. 84, 93 Am. Dec. 675.

Texas.— Mensing *v.* Engelke, 67 Tex. 532, 4 S. W. 202.

See 24 Cent. Dig. tit. "Garnishment," § 224.

49. Woodman *v.* York, etc., R. Co., 45 Me. 207; Keppel *v.* Moore, 66 Mich. 292, 33 N. W. 499; Wilson *v.* Cleburne Nat. Bank, 27 Tex. Civ. App. 54, 63 S. W. 1067.

50. *Iowa.*— Booth *v.* Gish, 75 Iowa 451, 39 N. W. 704.

Massachusetts.— See Banard *v.* Moore, 8 Allen 273.

Michigan.— Daggert, etc., Co. *v.* McClintoch, 56 Mich. 51, 22 N. W. 105.

Minnesota.— Coykendall *v.* Ladd, 32 Minn. 529, 21 N. W. 733.

Tennessee.— Jackson *v.* Coffman, 110 Tenn. 271, 75 S. W. 718.

See 24 Cent. Dig. tit. "Garnishment," § 225.

51. *California.*—Donohoe-Kelly Banking Co. *v.* Southern Pac. R. Co., 138 Cal. 183, 71 Pac. 93, 94 Am. St. Rep. 28, holding that an attachment on a deposit will take precedence of an unpresented check for a part only of the sum on deposit, as the check does not operate at the time of delivery as an equitable assignment *pro tanto*.

Illinois.— Nesbitt *v.* Dickover, 22 Ill. App. 140.

Iowa.— Shaver Wagon, etc., Co. *v.* Halsted, 78 Iowa 730, 43 N. W. 623.

Kentucky.— Maggard *v.* Asher, 82 S. W. 1002, 26 Ky. L. Rep. 965; Shaw *v.* Carrick, 6 Ky. L. Rep. 653.

Louisiana.— Schollfield *v.* Bradlee, 8 Mart. 495.

Massachusetts.— Rockwood *v.* Varnum, 17 Pick. 289; Platt *v.* Brown, 16 Pick. 553; Bradford *v.* Tappan, 11 Pick. 76; Burlingame *v.* Bell, 16 Mass. 318.

Mississippi.—Herrin *v.* Warren, 61 Miss. 509.

Missouri.— Pritchard *v.* Toole, 53 Mo. 356. See also St. Louis *v.* O'Neil Lumber Co., 42 Mo. App. 586.

Nebraska.— Nebraska Moline Plow Co. *v.* Fuehring, 60 Nebr. 316, 83 N. W. 69; Northfield Knife Co. *v.* Sharpleigh, 24 Nebr. 635, 35 N. W. 788, 8 Am. St. Rep. 224, holding that proceedings in garnishment bind the garnishee from the time of the service of the notice, and the property in his hands is not thereafter subject to levy and sale on process against the debtor during the continuance of the attachment.

New Jersey.— National F. Ins. Co. *v.* Chambers, 53 N. J. Eq. 468, 32 Atl. 663.

Oklahoma.— Barton *v.* Spencer, 3 Okla. 270, 41 Pac. 605.

Pennsylvania.— Fletcher *v.* Evans, 12 Pa. Co. Ct. 440.

South Carolina.— See Ayres *v.* Depras, 2 Speers 367.

Tennessee.— Robertson *v.* Baker, 10 Lea 300; De Liquero *v.* Munson, 11 Heisk. 15; Eddington *v.* Matthews, (Ch. App. 1899) 53 S. W. 1099.

Texas.— Focke *v.* Blum, 82 Tex. 436, 17 S. W. 770; Gause *v.* Cone, 73 Tex. 239, 11 S. W. 162. See also Bell *v.* Stewart, 18 Tex. Civ. App. 64, 44 S. W. 925.

Vermont.— Middlebury Bank *v.* Edgerton, 30 Vt. 182.

Virginia.— See Smith *v.* Smith, 19 Gratt. 545.

United States.— McLaughlin *v.* Swann, 18 How. 217, 15 L. ed. 357.

England.— Yates *v.* Terry, [1901] 1 K. B. 102, 70 L. J. K. B. 24, 83 L. T. Rep. N. S. 415, 49 Wkly. Rep. 112.

See 24 Cent. Dig. tit. "Garnishment," § 220.

Foreign receiver.— Where plaintiff, a citizen of Kentucky, attached funds of defendant, a citizen of Tennessee, in the hands of a citizen of Pennsylvania, and prior to the issuance of the attachment in Pennsylvania a receiver had been appointed in Tennessee of the effects of defendant, it was held that the attaching creditor was entitled to the money in preference to the receiver, since the receiver was but an appointee of the court from which he derived his authority, and as receiver he had no extraterritorial rights of action. Warren *v.* Union Nat. Bank, 7 Phila. (Pa.) 156.

Claims of the United States.— Under acts of the United States, providing that where any person indebted to the United States shall become insolvent, such debts shall be first satisfied, claims of the United States

C. Transfer of Property or Rights Pending Garnishment — 1. General Rule. The general rule is that after the service of the writ of garnishment upon the debtor of the principal defendant, the general right of property of the principal defendant still remains, and he may transfer or assign the subject-matter; but the purchaser or assignee will take title subordinate to the lien or appropriation of indebtedness.[52] And after service of the writ, the garnishee cannot relieve himself from liability by transferring the property or paying the debt to the principal defendant or to a third person.[53]

2. Transfer of Note. In the absence of special legislative enactment to the contrary,[54] the rights of a *bona fide* indorsee of a negotiable note cannot be impaired by any previous garnishment of the debt thereby represented, of which such indorsee had no notice.[55] The assignee or indorsee of a note may always be charged as garnishee where such instrument has lost its negotiable character by becoming overdue.[56] In several states, however, it is held that a negotiable instrument does not entirely lose its negotiable character after maturity, and that the transfer of such instrument will bind the maker thereof without notice, so as to deprive him of the defense of payment by garnishment in a suit against the payee after the transfer, but before receiving notice of it.[57]

D. Scope and Extent of Garnishee's Liability — 1. General Rule. A garnishee can be held in garnishment proceedings by plaintiff in garnishment only

against the insolvent have priority to a fund raised by garnishment of a debtor of such insolvent. Schmidt *v.* Selma First Nat. Bank, 22 La. Ann. 314; Willing *v.* Bleeker, 2 Serg. & R. (Pa.) 221. See, however, Watkins *v.* Odis, 2 Pick. (Mass.) 88, holding that such statutes do not apply to or create a priority in cases of trustee process.

Agreement.— An agreement to purchase property, as distinguished from an actual purchase thereof, will not defeat a writ of garnishment served after such agreement was made. Roberts *v.* Fargo First Nat. Bank, 8 N. D. 474, 79 N. W. 993.

52. Reeve *v.* Smith, 113 Ill. 47 (where property attached by garnishment is subsequently assigned by the debtor as security, the assignee's rights are inferior to those of both the prior and subsequent attaching creditors who obtained judgments at the same term of court); Smith *v.* Clinton Bridge Co., 13 Ill. App. 572; Dockham *v.* New Orleans, 26 La. Ann. 302; Dennistoun *v.* New York Croton, etc., Co., 6 La. Ann. 782; Kimball *v.* Plant, 14 La. 10; Wells *v.* Tuck, 1 Kulp (Pa.) 154; Brunswick-Balke Collender Co. *v.* Brown, 19 Phila. (Pa.) 455; Sandidge *v.* Graves, 1 Patt. & H. (Va.) 101.

Disclaimer by defendant.— One who by judgment in a liquor prosecution has become entitled to half the fine cannot by disclaimer defeat an attachment by trustee process thereon by his creditors. Fisk *v.* Aldrich, 59 N. H. 113.

53. *Kentucky.*—Maggard *v.* Asher, 82 S. W. 1002, 26 Ky. L. Rep. 965.

Maine.— Stedman *v.* Vickery, 42 Me. 132; Brunswick Bank *v.* Sewall, 34 Me. 202.

New Hampshire.— Brown *v.* Silsby, 10 N. H. 521.

Pennsylvania.— Humphrey *v.* O'Donnell, 165 Pa. St. 411, 30 Atl. 992; Stover *v.* Stover, 6 Pa. Co. Ct. 614.

Texas.— Houston Drug Co. *v.* Kirchhain, (Civ. App. 1902) 71 S. W. 608.

Washington.—Eidemiller *v.* Elder, 32 Wash. 605, 73 Pac. 687.

See 24 Cent. Dig. tit. "Garnishment," § 227.

Compare Cook *v.* Coleman, 167 Mass. 414, 45 N. E. 913, 57 Am. St. Rep. 465.

54. Cox *v.* Severance, 70 N. H. 86, 46 Atl. 739, 85 Am. St. Rep. 602; Amoskeag Mfg. Co. *v.* Bidd, 28 N. H. 316; Peck *v.* Maynard, 20 N. H. 183; Hacker *v.* Stevens, 11 Fed. Cas. No. 5,887, 4 McLean 535.

55. *Alabama.*—Mayberry *v.* Morris, 62 Ala. 113. See, however, Dore *v.* Dawson, 6 Ala. 712.

Iowa.— Gillam *v.* Huber, 4 Greene 155.

Kentucky.— Robinson *v.* Manchester Bank, 62 S. W. 1024, 23 Ky. L. Rep. 337.

Maryland.— Cruett *v.* Jenkins, 53 Md. 217.

Pennsylvania.— Ludlow *v.* Bingham, 4 Dall. 47, 1 L. ed. 736.

Vermont.— Newbury Nat. Bank *v.* Webster, 47 Vt. 43; Hall *v.* Bowker, 44 Vt. 77.

See 24 Cent. Dig. tit. "Garnishment," § 228.

56. *Alabama.*—Mills *v.* Stewart, 12 Ala. 90.

Arkansas.— Smith *v.* Butler, (1904) 80 S. W. 580.

Connecticut.— Culver *v.* Parish, 21 Conn. 408.

Illinois.— Patton *v.* Gates, 67 Ill. 164; Snider *v.* Ridgeway, 49 Ill. 522.

Indiana.— Simpson *v.* Potter, 18 Ind. 429. See also Indianapolis First Nat. Bank *v.* Armstrong, 101 Ind. 244; Stetson *v.* Cleneay, 14 Ind. 453.

Iowa.— Stevens *v.* Pugh, 12 Iowa 430; McCoid *v.* Beatty, 12 Iowa 299.

Texas.— Thompson *v.* Gainesville Nat. Bank, 66 Tex. 156, 18 S. W. 350.

Vermont.— Austin *v.* Ryan, 51 Vt. 110. See also Root *v.* Barnes, 27 Vt. 274.

See 24 Cent. Dig. tit. "Garnishment," § 228.

57. Edney *v.* Willis, 23 Nebr. 56, 36 N. W. 300; Shuler *v.* Bryson, 65 N. C. 201; Knisely *v.* Evans, 34 Ohio St. 158.

to the extent of the judgment debtor's claim against the garnishee;[58] and whether a person is to be charged as garnishee or trustee depends on the state of facts existing at the time when service was made.[59] The service of the writ likewise fixes the lien on any indebtedness of the garnishee due defendant or any property of defendant so held by the garnishee, and no subsequent cancellation of the indebtedness or arrangement with respect to the property can destroy such lien.[60]

2. Property or Rights Acquired or Accruing After Service of Writ. The statutes are by no means uniform upon the question of the liability of the garnishee

58. *Arkansas.*— Collier *v.* Hershey, 21 Ark. 482.

Connecticut.— King *v.* Housatonic R. Co., 45 Conn. 226.

Kentucky.— Talbott *v.* Tarlton, 5 J. J. Marsh. 641.

Louisiana.— Peet *v.* Whitmore, 16 La. Ann. 48.

Maine.— Copeland *v.* Weld, 8 Me. 411.

Maryland.— Myer *v.* Liverpool, etc., Ins. Co., 40 Md. 595.

Massachusetts.— Boston Bank *v.* Minot, 3 Metc. 507.

Michigan.—Strong *v.* Hollon, 39 Mich. 411.

Missouri.— State Bank *v.* Bredow, 31 Mo. 523; Jewell Pure Water Co. *v.* Harkness, 49 Mo. App. 357.

New Hampshire.— Eastman *v.* Newman, 59 N. H. 581; Bufford *v.* Sides, 42 N. H. 495.

Pennsylvania.— Derham *v.* Berry, 5 Phila. 475; Baltz Co. *v.* Livingston, 14 Wkly. Notes Cas. 143; Hays *v.* Lycoming F. Ins. Co., 11 Wkly. Notes Cas. 538.

Texas.— Grace *v.* Koch, 1 Tex. App. Civ. Cas. § 1062; Bassett *v.* Hammond, 1 Tex. App. Civ. Cas. § 108.

Vermont.— Rowell *v.* Felker, 54 Vt. 526; Stickney *v.* Crane, 35 Vt. 89.

Wisconsin.— Ward *v.* Milwaukee, etc., R. Co., 29 Wis. 144.

See 24 Cent. Dig. tit. "Garnishment," § 230.

59. *Louisiana.*— Clark *v.* Powell, 17 La. Ann. 177, holding that garnishees are required to pay plaintiff only such sum as may be due defendant on a final settlement of their account.

Maine.— Bridges *v.* Sprague, 57 Me. 543, 99 Am. Dec. 788; Mace *v.* Heald, 36 Me. 136.

Maryland.— Early *v.* Dorsett, 45 Md. 462.

Massachusetts.— O'Brien *v.* Collins, 124 Mass. 98; Sturtevant *v.* Robinson, 35 Mass. 175, holding that where, by a contract between defendant and trustee, money is made payable by the latter to the former in another state, the rate of exchange at the time the money was payable should be taken into account.

New Hampshire.— Seward *v.* Harrington, 67 N. H. 264, 34 Atl. 671; Kaley *v.* Abbot, 14 N. H. 359.

Pennsylvania.— Dennison Tp. *v.* Dempsey, 4 Kulp 377.

South Dakota.— Bedford *v.* Kissick, 8 S. D. 586, 67 N. W. 609.

Texas.— Mensing *v.* Engelke, 67 Tex. 532, 4 S. W. 202.

Vermont.— See National Union Bank *v.* Brainerd, 65 Vt. 291, 26 Atl. 723.

Virginia.— Farmers' Bank *v.* Day, 6 Gratt. 360.

Wisconsin.— Schuerman *v.* Foster, 82 Wis. 319, 52 N. W. 311.

See 24 Cent. Dig. tit. "Garnishment," § 230.

60. *Arkansas.*— Martin *v.* Foreman, 18 Ark. 249.

California.— Roberts *v.* Landecker, 9 Cal. 262, holding, however, that where a party sues out an attachment, and gives the necessary notice to the garnishee that the property is attached, and the garnishee disposes of it fraudulently, such party has a right, if he elects so to do, to waive his lien and bring a suit for the value of the property against the garnishee.

Indiana.— Ryan *v.* Burkam, 42 Ind. 507, holding that a writ of garnishment, issued and served under an original attachment, holds all money or property belonging to the attachment defendant in the hands of the garnishee at the time the writ was served, not only for the original plaintiff, but for all creditors who file claims under the original proceeding before the final adjustment thereof.

Kentucky.— Bell *v.* Wood, 87 Ky. 56, 7 S. W. 550, 9 Ky. L. Rep. 917.

New Hampshire.— Bufford *v.* Sides, 42 N. H. 495, holding that where the trustee, after service of the writ upon him, pays the whole note to defendant, or where he and defendant fraudulently agree that the note and mortgage given to secure the same should be given up to the trustees in the mortgage, to be canceled without payment, or by payment of a portion of the note, it will not affect the lien.

Pennsylvania.— Humphrey *v.* O'Donnell, 165 Pa. St. 411, 30 Atl. 992; Judge *v.* Reinhart, 3 Pa. Dist. 202 (service of a writ on a person garnished binds moneys due not only by him, but by a partnership of which he is a member); Spring City Nat. Bank *v.* Pottstown Nat. Bank, 11 Montg. Co. Rep. 64.

Vermont.— Bishop *v.* Catlin, 28 Vt. 71.

See 24 Cent. Dig. tit. "Garnishment," § 230.

Subsequent dealings between garnishee and debtor.— If there be a subsisting contract between the garnishee and the debtor for a definite time, which by its terms is not dissolvable at the option of one or both of them, no subsequent change or modification thereof, although valid as between themselves, can affect the intervening rights of the attaching creditor. Archer *v.* People's Sav. Bank, 88 Ala. 249, 7 So. 53.

for property of the judgment debtor acquired, or debts accruing to him after the service of the process of garnishment. In many jurisdictions the statute provides that the liability of the garnishee is to be determined as of the time of the service of the writ of garnishment, and that he is not chargeable with anything that may come into his hands after service, and before answer,[61] while in many other jurisdictions the statutes provide that all credits or property of the judgment debtor in the hands of the garnishee at the time of the service of the writ, or in his hands at any time thereafter up to the trial of the issue, are subject to the lien of the writ.[62]

3. Liability as to Contracts With Defendant. The liability of a garnishee

61. *California.*— Norris *v.* Burgoyne, 4 Cal. 409.

Colorado.— Fleming *v.* Baxter, 20 Colo. 238, 38 Pac. 57.

Connecticut.— Easterly *v.* Keney, 36 Conn. 18.

Georgia.— Burrus *v.* Moore, 63 Ga. 405; Daniel *v.* Meinhard, 53 Ga. 359.

Iowa.— Thomas *v.* Gibbons, 61 Iowa 50, 15 N. W. 593; Morris *v.* Union Pac. R. Co., 56 Iowa 135, 8 N. W. 804.

Kansas.— Gillette *v.* Cooper, 48 Kan. 632, 30 Pac. 13; Burlington, etc., R. Co. *v.* Thompson, 31 Kan. 180, 1 Pac. 622, 47 Am. Rep. 497 (where at the time of service of the writ defendant is in the employ of the garnishee, and so continues, proceedings bind only the amount due at the date of service); Phelps *v.* Atchison, etc., R. Co., 28 Kan. 165.

Louisiana.— Murphy *v.* Thielen, 6 Rob. 288; Bean *v.* Mississippi Union Bank, 5 Rob. 333.

Maine.— Ormsby *v.* Anson, 21 Me. 23.

Michigan.— Cogswell *v.* Mitts, 90 Mich. 353, 51 N. W. 514; Bethel *v.* Judge Super. Ct., 57 Mich. 379, 24 N. W. 112; Hopson *v.* Dinan, 48 Mich. 612, 12 N. W. 875; Hitchcock *v.* Miller, 48 Mich. 603, 12 N. W. 871.

Minnesota.— Nash *v.* Gale, 2 Minn. 310.

North Carolina.— Arrington *v.* Screws, 31 N. C. 42, 49 Am. Dec. 408.

Ohio.— Ohio Auxiliary Fire Alarm Co. *v.* Heisley, 7 Ohio Cir. Ct. 483, 4 Ohio Cir. Dec. 691. See, however, Norton *v.* Norton, 43 Ohio St. 509, 5 N. E. 348, holding that dividends made by a corporation, remaining in its hands after process of attachment has been served on it to recover a debt due from a stock-holder, follow the stock, and are subject to the same order of distribution.

South Carolina.— See Smith *v.* Posey, 2 Hill 471, holding that the garnishee is not liable for failing to keep property coming into his hands and belonging to the debtor after making his return, even though it is received before he pleads to the suggestion controverting the truth of the return.

Tennessee.— See Davenport *v.* Swan, 9 Humphr. 186.

Texas.— Eikel *v.* Frelich, 1 Tex. App. Civ. Cas. § 1117.

Wisconsin.— Wood *v.* Wall, 24 Wis. 647.

See 24 Cent. Dig. tit. "Garnishment," § 231.

62. *Alabama.*— Lady Ensley Furnace Co. *v.* Rogan, 95 Ala. 594, 11 So. 188; Archer *v.* People's Sav. Bank, 88 Ala. 249, 7 So. 53. Under a former statute in Alabama the rule was otherwise. Roby *v.* Labuzan, 21 Ala. 60, 56 Am. Dec. 237; Hazzard *v.* Franklin, 2 Ala. 349.

Arkansas.— Dunnegan *v.* Byers, 17 Ark. 492, holding that the Arkansas statute is broad enough to cover the debts due after issuance and service of the writ, and if not due at the time the garnishee answers, the court has power to continue the case until maturity of the debt, or render judgment with stay of execution.

Illinois.— Young *v.* Cairo First Nat. Bank, 51 Ill. 73.

Maryland.— Glenn *v.* Boston, etc., Glass Co., 7 Md. 287.

Massachusetts.— Capen *v.* Duggan, 136 Mass. 501; Boston Bank *v.* Minot, 3 Metc. 507.

Missouri.— Dinkins *v.* Crunden-Martin Woodenware Co., 99 Mo. App. 310, 73 S. W. 246; McCord, etc., Mercantile Co. *v.* Bettles, 58 Mo. App. 384.

New Hampshire.— Palmer *v.* Noyes, 45 N. H. 174; Smith *v.* Boston, etc., R. Co., 33 N. H. 337; Brown *v.* Silsby, 10 N. H. 521.

North Carolina.— Goodwin *v.* Claytor, 137 N. C. 224, 49 S. E. 173, 67 L. R. A. 209.

Pennsylvania.— Bremer *v.* Mohn, 169 Pa. St. 91, 32 Atl. 90; Sheets *v.* Hobensack, 20 Pa. St. 412; Franklin F. Ins. Co. *v.* West, 8 Watts & S. 350; Silverwood *v.* Bellas, 8 Watts 420; Griffith *v.* Gillardon, 1 Chest. Co. Rep. 194; Rutter *v.* Ely, 4 Kulp 348; Wells *v.* Tuck, 1 Kulp 154; Benners *v.* Buckingham, 5 Phila. 68; Excelsior Brick Co. *v.* Gibson, 21 Wkly. Notes Cas. 32; Mullen *v.* Maguire, 1 Wkly. Notes Cas. 577.

Vermont.— Seymour *v.* Cooper, 25 Vt. 141; Spring *v.* Ayer, 23 Vt. 516.

West Virginia.— Ringold *v.* Suiter, 35 W. Va. 186, 13 S. E. 46.

See 24 Cent. Dig. tit. "Garnishment," § 231.

Distinct parcels of goods coming into the hands of the garnishee after service of the attachment are not by the Pennsylvania statute bound thereby. Pennsylvania R. Co. *v.* Pennock, 51 Pa. St. 244. See also Fidelity Ins. Trust, etc., Co. *v.* Shenandoah Valley R. Co., 33 W. Va. 761, 11 S. E. 58, construing Pennsylvania statute.

Exchange of property.— A garnishee who, after service of the writ, purchases land of the principal debtor, giving in exchange therefor a horse and wagon, is not liable to the creditor for the value of such horse and wagon. Seymour *v.* Cooper, 25 Vt. 141.

is usually determined by his accountability to defendant,[63] and if before service of the writ of garnishment a *bona fide* contract between the garnishee and the judgment debtor has affected this accountability, the garnishment also will be affected and rendered subordinate to this contract.[64]

4. Liability For Interest. The decisions are by no means uniform upon the question of the liability of the garnishee for interest upon money, credits, or effects of the principal debtor in his hands during the pendency of the garnishment proceedings, although the rule seems to be well settled that where there was no contract of the garnishee to pay interest, he cannot be charged with it, since plaintiff can hold him no more than defendant could.[65] Where the interest accrues by way of damages for a wrongful detention of the principal sum by the debtor, the rule seems to be almost as equally well settled that he cannot be charged therewith, for the reason that he has been restrained by garnishment proceedings from paying his debt, and there is therefore no wrongful detention, and hence no liability for damages.[66] The rule, however, that a garnishee is not chargeable with interest while he is by garnishment restrained from making payment applies only where he is a mere stakeholder, ready and willing to pay to whomsoever the court directs, and not where he assumes the attitude of a litigant.[67] In many jurisdictions the presumption [68] is indulged that the garnishee,

Labor performed after service.—Under N. H. Gen. Laws, c. 249, § 40, a garnishee cannot be charged for services performed by defendant subsequent to the service of process. Sanborn *v.* Ward, 64 N. H. 611, 6 Atl. 27. Earnings of a bar-keeper accrued since the service of the writ of attachment on his employer is not bound by the writ. Tracy *v.* Bridges, 2 Miles (Pa.) 352.

In Illinois the garnishee process will not reach any wages that the debtor may earn after the service and before the filing of interrogatories and answers. Bliss *v.* Smith, 78 Ill. 359.

63. Cottingham *v.* Greely Barnham Grocery Co., 137 Ala. 149, 34 So. 956; Lady Ensley Furnace Co. *v.* Rogan, 95 Ala. 594, 11 So. 188; Leslie *v.* Merrill, 58 Ala. 322; Fowler *v.* Williamson, 52 Ala. 16 (a garnishee cannot escape liability under garnishment by rescinding a contract by which he became indebted to defendant); Rowell *v.* Felker, 54 Vt. 526; Edgerton *v.* Martin, 35 Vt. 116.

64. *Illinois.*— Bank of Commerce *v.* Franklin, 90 Ill. App. 91.

Iowa.— Spencer *v.* Moran, 80 Iowa 374, 45 N. W. 902.

Kentucky.— Blackburn *v.* Davidson, 7 B. Mon. 101. See also Citizens' Gen. Electric Co. *v.* American Electrical Works, 55 S. W. 1078, 21 Ky. L. Rep. 1723.

Maryland.— Troxall *v.* Applegarth, 24 Md. 163; Baltimore, etc., R. Co. *v.* Wheeler, 18 Md. 372.

Massachusetts.— O'Brien *v.* Collins, 124 Mass. 98; Doyle *v.* Gray, 110 Mass. 206.

Michigan.— Dawson *v.* Iron Range, etc., R. Co., 97 Mich. 33, 56 N. W. 106; Kiely *v.* Bertrand, 67 Mich. 332, 34 N. W. 674.

Nebraska.— Fitzgerald *v.* Hollingsworth, 14 Nebr. 188, 15 N. W. 345, where it appeared that the garnishee had paid out funds belonging to the attachment debtor to such debtor's employees, as he was authorized to do by contract, and it was held that attachment against the garnishee for the funds so paid out was erroneously entered.

Wisconsin.— Putney *v.* Farnham, 27 Wis. 187, 9 Am. Rep. 459.

See 24 Cent. Dig. tit. "Garnishment," § 232.

65. *Maine.*— Abbott *v.* Stinchfield, 71 Me. 213.

Massachusetts.— Adams *v.* Cordis, 8 Pick. 260.

New Hampshire.— Quigg *v.* Kittredge, 18 N. H. 137.

Vermont.— Baker *v.* Central Vermont R. Co., 56 Vt. 302 (holding, however, that one summoned as trustee is liable to pay interest where the demand is on interest at the time the process is served); Lyman *v.* Orr, 26 Vt. 119.

Virginia.— George *v.* Blue, 3 Call 455.

See 24 Cent. Dig. tit. "Garnishment," § 234.

66. Abbott *v.* Stinchfield, 71 Me. 213; Smith *v.* Flanders, 129 Mass. 322; Prescott *v.* Parker, 4 Mass. 170; Adams *v.* Cordis, 8 Pick. (Mass.) 260; Swamscott Mach. Co. *v.* Partridge, 25 N. H. 369; Irwin *v.* Pittsburgh, etc., R. Co., 43 Pa. St. 488.

67. *Alabama.*—Hollingsworth *v.* Hammond, 30 Ala. 668.

Georgia.— Georgia Ins., etc., Co. *v.* Oliver, 1 Ga. 38.

Maryland.— Chase *v.* Manhardt, 1 Bland 333.

Minnesota.— Ray *v.* Lewis, 67 Minn. 365, 69 N. W. 1100.

Pennsylvania.— Rushton *v.* Rowe, 64 Pa. St. 63; Merchants', etc., Nat. Bank *v.* Kern, 8 Pa. Dist. 75.

See 24 Cent. Dig. tit. "Garnishment," § 234.

68. This presumption, however, is rebuttable, and may be overcome, either by evidence of the course pursued by the garnishee in denying the indebtedness and assuming the role of litigant, or by any other competent

from the date of the service of the writ, has set apart the money or effects of the principal defendant in his hands, awaiting the order or direction of the court in the garnishment proceedings, and is therefore not liable for interest.[69] In several jurisdictions the garnishee can only avoid liability for interest by depositing the money in court.[70] In yet other jurisdictions the burden is on the garnishee to show that he has not used the money for his own benefit, and that at all times he had it ready to satisfy any judgment which might be obtained against him.[71]

5. Surrender of Property or Rights to Defendant or Third Persons After Garnishment. The rule is well recognized that the garnishee after service of the writ must retain possession of all property and effects of the principal debtor then in his actual custody, and upon his failure so to do he may be held liable for the value of the same.[72]

evidence, and he is then chargeable with interest.

Alabama.—Hollingsworth *v.* Hammond, 30 Ala. 668.

Connecticut.— Woodruff *v.* Bacon, 35 Conn. 97.

Iowa.— Moore *v.* Lowrey, 25 Iowa 336, 95 Am. Dec. 790.

Louisiana.— Rightor *v.* Slidell, 3 Rob. 375.

Maine.— Blodgett *v.* Gardiner, 45 Me. 542; Norris *v.* Hall, 18 Me. 332.

Missouri.— Stevens *v.* Gwathmey, 9 Mo. 636.

Pennsylvania.— Jones *v.* Manufacturers' Nat. Bank, 99 Pa. St. 317 (where the garnishee pleaded *nulla bona*); Rushton *v.* Rowe, 64 Pa. St. 63; Mackey *v.* Hodgson, 9 Pa. St. 468; Updegraff *v.* Spring, 11 Serg. & R. 188; Fitzgerald *v.* Caldwell, 1 Yeates 274, 2 Dall. 215, 1 L. ed. 354.

United States.— Mattingly *v.* Boyd, 20 How. 128, 15 L. ed. 845.

See 24 Cent. Dig. tit. "Garnishment," § 234.

Plaintiff as garnishee.— Where a vendee sued out a foreign attachment against his vendor for breach of warranty, and attached the amount due the vendor in his own hands, he is liable for interest on the sum the vendor ultimately recovers, during the pendency of the attachment. Willings *v.* Consequa, 30 Fed. Cas. No. 17,767, Pet. C. C. 301.

69. *Connecticut.*— Candee *v.* Skinner, 40 Conn. 464.

Iowa.— Moore *v.* Lowrey, 25 Iowa 336, 95 Am. Dec. 790.

Louisiana.— Clark *v.* Powell, 17 La. Ann. 177.

Maine.— Norris *v.* Hall, 18 Me. 332.

Missouri.— Cohen *v.* St. Louis Perpetual Ins. Co., 11 Mo. 374; Stevens *v.* Gwathmey, 9 Mo. 636.

New Jersey.— Blair *v.* Porter, 13 N. J. Eq. 267.

Pennsylvania.— Barnes *v.* Bamberger, 196 Pa. St. 123, 46 Atl. 303; Irwin *v.* Pittsburgh, etc., R. Co., 43 Pa. St. 488; Mackey *v.* Hodgson, 9 Pa. St. 468; Updegraff *v.* Spring, 11 Serg. & R. 188; Fitzgerald *v.* Caldwell, 1 Yeates 274, 2 Dall. 215, 1 L. ed. 354; Kelly *v.* Downs, 3 Luz. Leg. Reg. 232.

United States.— Bridges *v.* Sheldon, 7 Fed. 17, 18 Blatchf. 295, 507.

See 24 Cent. Dig. tit. "Garnishment," § 234.

70. Long *v.* Johnson, 74 Ga. 4 (payment of, and not simply tendering money into court is necessary to stop interest against a garnishee); Little *v.* Owen, 32 Ga. 20 (holding, however, that where no provision was made by statute for a garnishee to discharge himself by paying into court the money which he owes defendant, interest against him is suspended during garnishment); Smith *v.* German Bank, 60 Miss. 69; Work *v.* Glaskins, 33 Miss. 539; Cross *v.* Brown, 19 R. I. 220, 33 Atl. 147; Templeton *v.* Fauntleroy, 3 Rand. (Va.) 434; Ross *v.* Austin, 4 Hen. & M. (Va.) 502; Tazewell *v.* Barrett, 4 Hen. & M. (Va.) 259. See also Hawkins *v.* Georgia Nat. Bank, 61 Ga. 106.

71. Kirkman *v.* Vanlier, 7 Ala. 217; Prescott *v.* Parker, 4 Mass. 170; Adams *v.* Cordis, 8 Pick. (Mass.) 260; Candee *v.* Webster, 9 Ohio St. 452; Cincinnati, etc., R. Co. *v.* Wood, 2 Ohio S. & C. Pl. Dec. 144, 1 Ohio N. P. 198.

Suspension of interest pending litigation in general see Interest.

72. *Alabama.*— Saller *v.* Insurance Co. of North America, 62 Ala. 221. See Steiner *v.* Birmingham First Nat. Bank, 127 Ala. 595, 29 So. 65.

Arkansas.— Adams *v.* Penzell, 40 Ark. 531, holding that a garnishee cannot pay out assets after service of garnishment for attorneys to defend the attachment suit.

Connecticut.— Cole *v.* Wooster, 2 Conn. 203.

Georgia.— Loyless *v.* Hodges, 44 Ga. 647; Smith *v.* Picket, 7 Ga. 104, 50 Am. Dec. 383.

Illinois.— Stevens *v.* Dillman, 86 Ill. 233.

Indiana.— Ryan *v.* Burkam, 42 Ind. 507, applying this rule where the garnishment proceedings had been compromised and dismissed, and the garnishee was nevertheless held liable to another creditor of defendant, who had commenced proceedings by filing under the original suit, although the garnishee had no actual notice of such filing.

Iowa.— Smalley *v.* Miller, 71 Iowa 90, 32 N. W. 187 (holding, however, that the custody referred to in Code (1873), § 2975, is actual and not constructive, and that where the garnishee has temporarily parted with the possession to another, he is not in duty bound to sue to recover possession in order

6. Property or Funds Taken by Legal Process. The general rule is that, where property or funds of the principal debtor in the hands of the garnishee are taken from him by legal process after service of the writ, he is not chargeable in garnishment proceedings therefor,[73] although in several cases he has been held liable where such payment or surrender was made in pursuance of an order or judgment of a court of foreign jurisdiction.[74]

7. Payment of Indebtedness After Garnishment. The rule is well settled that a garnishee who, before his discharge in garnishment proceedings, settles his indebtedness to the principal defendant does so at his peril,[75] and the fact that

to exonerate himself under garnishment, even though he may be entitled to recover the possession); Davenport First Nat. Bank *v.* Davenport, etc., R. Co., 45 Iowa 120.

Michigan.— Weaver *v.* Irons, 129 Mich. 368, 88 N. W. 873.

Missouri.— Westheimer *v.* Giller, 84 Mo. App. 122.

Nebraska.— Farmers', etc., Nat. Bank *v.* Mosher, (1903) 94 N. W. 1003; Blue Hill First Nat. Bank *v.* Turner, 30 Nebr. 80, 46 N. W. 290.

New Hampshire.—Packets Despatch Line *v.* Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203, holding that where the property is taken away from a trustee by a wrong-doer, this will not discharge him as trustee, although it may furnish grounds for delaying the proceedings until he can recover damages from the trespasser. See also Mitchell *v.* Green, 62 N. H. 588.

Texas.— Galveston Dry-Goods Co. *v.* Blum, 23 Tex. Civ. App. 703, 57 S. W. 1121, holding that, where the garnishee had received property of the debtor under a trust deed in favor of certain creditors, it was his duty to use such care in its preservation and disposition as a man of ordinary care would use in his own affairs.

Wisconsin.— Storm *v.* Cotzhausen, 38 Wis. 139.

United States.—Younkin *v.* Collier, 47 Fed. 571.

See 24 Cent. Dig. tit. "Garnishment," § 235.

Where a garnishee was discharged, and there was no order continuing the lien on the property pending an appeal, and before a reversal of the case the garnishee had disposed of part of the property, he should be charged on the new trial only with the property which remained in his hands at the time of the reversal. Stannard *v.* Youmans, 110 Wis. 375, 85 N. W. 967.

Legal control unnecessary.— Whether or not a garnishee had legal control of the funds of the debtor in attachment, he is liable to the seizing creditor if, in point of fact, he did control such funds and dispose of them after notice of garnishment. Buddig *v.* Simpson, 33 La. Ann. 375.

Where service was made too late.— Where a railroad company was served with garnishment summons at five A. M., and two and one-half hours later the property of defendant was delivered at a place one hundred miles distant to the parties entitled to receive it, it was held that service was not made in time to give the party served an opportunity to prevent the delivery of the property by the exercise of reasonable diligence, and the company was not liable as garnishee. Bates *v.* Chicago, etc., R. Co., 60 Wis. 296, 19 N. W. 72, 50 Am. St. Rep. 369.

Rescission of contract by minor.— A minor, previous to the service of trustee process on him, purchased a horse of the principal debtor and gave his note therefor, but under an agreement that if the horse proved unsound he might return it and receive back the note. After the service of the trustee process, and before he became of age, the minor rescinded the contract and delivered the horse to the principal debtor, and after becoming of age he made a disclosure setting forth these facts, and it was held that he was not chargeable as trustee. Wilder *v.* Eldridge, 17 Vt. 226.

73. *Connecticut.*— Hooper *v.* Benson, 1 Root 545.

Iowa.— Booth *v.* Gish, 75 Iowa 451, 39 N. W. 704.

Massachusetts.—Eddy *v.* O'Hara, 132 Mass. 56; Garity *v.* Gigie, 130 Mass. 184. *Compare* Locke *v.* Tippets, 7 Mass. 149.

Vermont.— Goddard *v.* Hapgood, 25 Vt. 351, 60 Am. Dec. 272.

Virginia.— Virginia F. & M. Ins. Co. *v.* New York Carousal Mfg. Co., 95 Va. 515, 28 S. E. 888, 40 L. R. A. 237.

See 24 Cent. Dig. tit. "Garnishment," § 236.

Property taken by execution or attachment. — Where the property is taken from the possession of the garnishee on an attachment or execution subsequently issued against defendant, he will be relieved from liability. Platt *v.* Brown, 16 Pick. (Mass.) 553; Burlingame *v.* Bell, 16 Mass. 318. See, however, Rockwood *v.* Varnum, 17 Pick. (Mass.) 289; Parker *v.* Kinsman, 8 Mass. 486.

Delivery to the receiver in another action. — Where a garnishee, after service of process on him, delivered property of the principal debtor to a receiver subsequently appointed in another action to take charge of all the property of such debtor, it was held that he did so at his peril, but would have the right to show that the receiver was entitled to the possession of the property as against plaintiff in garnishment. Crerar *v.* Milwaukee, etc., R. Co., 35 Wis. 67.

74. Mobile, etc., R. Co. *v.* Whitney, 39 Ala. 468; Watkins *v.* Field, 6 Ark. 391.

75. *Connecticut.*— Edwards *v.* Baldwin, 2 Root 23.

Georgia.— Smith *v.* Wellborn, 73 Ga. 131 (where the answer of the garnishee was that

he made such payment under the misapprehension that the garnishment proceedings had been dismissed or abandoned,[76] or that such indebtedness was exempt from garnishment process,[77] will not release him from liability to plaintiff in the principal action. However, the service of garnishment process does not constitute a prohibition of all commercial or business transactions between the garnishee and the judgment or attachment defendant, and where the indebtedness of the garnishee arises after the service of the writ, and under such circumstances that the writ creates no lien thereon, then the subsequent liquidation of such indebtedness will not render the garnishee liable to plaintiff in the principal action.[78] Likewise payment in good faith and without knowledge of the service of garnishment or trustee process will discharge the trustee, although legal service upon him was made previous to such payment.[79]

IX. PROCEEDINGS TO SUPPORT OR ENFORCE.

A. In General — 1. Prosecution of Principal Action. Garnishment proceedings, being incident to the main action, depend on it, and where the main action falls, the proceedings in garnishment fall with it;[80] and where plaintiff in the principal action fails to recover judgment against defendant therein, it is deemed a discontinuance of all proceedings against the garnishee,[81] since a valid judg-

defendant had a note against him, but that he did not know in whose hands it was, and it was held that he was not discharged by such answer so as afterward to settle with defendant, and thus bar the garnishment proceeding); Burton *v.* Wynne, 55 Ga. 615.

Illinois.— National Bank of America *v.* Indiana Banking Co., 114 Ill. 483, 2 N. E. 401; Wilcus *v.* Kling, 87 Ill. 107.

Indiana.— Cleneay *v.* Junction R. Co., 26 Ind. 375.

Iowa.— Hughes *v.* Monty, 24 Iowa 499; Kesler *v.* St. John, 22 Iowa 565.

Kentucky.— Biggs *v.* Kouns, 7 Dana 405, holding that where a garnishee, after service of process on him, makes a new contract with the debtor in which the attached debts are merged, he becomes liable for the full amount thereof.

Louisiana.— Citizens' Bank *v.* Payne, 21 La. Ann. 380; Bean *v.* Mississippi Union Bank, 5 Rob. 333; Burke *v.* Taylor, 15 La. 236.

Maine.— Jordan *v.* Jordan, 75 Me. 100.

Massachusetts.— Williams *v.* Kenney, 98 Mass. 142; Spooner *v.* Rowland, 4 Allen 485.

New Hampshire.— Cowdry *v.* Walker, 59 N. H. 533, holding that one is chargeable for a note given to the principal defendant in advance for board for the purpose of defeating trustee process already served. See also French *v.* Lovejoy, 12 N. H. 458.

North Carolina.— Tindell *v.* Wall, 44 N. C. 3.

Pennsylvania.— Frederick *v.* Easton, 40 Pa. St. 419.

Tennessee.— State *v.* Linaweaver, 3 Head 51, 75 Am. Dec. 757.

See 24 Cent. Dig. tit. "Garnishment," § 237.

76. Bryan *v.* Duncan, 19 D. C. 379; Puff *v.* Huchter, 78 Ky. 146; West *v.* Platt, 116 Mass. 308; Vermilyea *v.* Roberts, 103 Mass. 410; Webster *v.* Randall, 19 Pick. (Mass.) 13; Gibbon *v.* Dougherty, 10 Ohio St. 365. See, however, Rogers *v.* Moore, 40 Ga. 386.

77. Ely *v.* Blacker, 112 Ala. 311, 20 So. 570; Spengler *v.* Kaufman, 43 Mo. App. 5.

78. *Alabama.*— Howard-Harrison Iron Co. *v.* Tillman, 103 Ala. 121, 15 So. 456. See also Buford *v.* Welborn, 6 Ala. 818.

Illinois.— Chicago, etc., R. Co. *v.* Blagden, 33 Ill. App. 254.

Iowa.— Victor *v.* Hartford F. Ins. Co., 33 Iowa 210.

Mississippi.— Dibrell *v.* Neely, 61 Miss. 218.

Missouri.— Davis *v.* Meredith, 48 Mo. 263.

Tennessee.— Van Vleet *v.* Stratton, 91 Tenn. 473, 19 S. W. 428.

Texas.— Thompson *v.* Gainesville Nat. Bank, 66 Tex. 156, 18 S. W. 350.

Vermont.— Worthington *v.* Jones, 23 Vt. 546.

Wisconsin.— Smith *v.* Davis, 1 Wis. 447, 60 Am. Dec. 390, holding that a garnishee may make a *bona fide* advance or loan to defendant after service of garnishment.

See 24 Cent. Dig. tit. "Garnishment," § 237.

79. Williams *v.* Kenney, 98 Mass. 142; Porter *v.* Stevens, 9 Cush. (Mass.) 530; Williams *v.* Marston, 3 Pick. (Mass.) 65; Landry *v.* Chayret, 58 N. H. 89.

80. *Illinois.*— Pick *v.* Mutual L. Ins. Co., 94 Ill. App. 483 [*affirmed* in 192 Ill. 157, 61 N. E. 455].

Indiana.— Newman *v.* Manning, 89 Ind. 422; Robbins *v.* Alley, 38 Ind. 553.

Louisiana.— Lefevre *v.* Landry, 24 La. Ann. 82.

New Hampshire.— See Collins *v.* Brigham, 11 N. H. 420.

United States.— McGillin *v.* Claflin, 52 Fed. 657.

See 24 Cent. Dig. tit. "Garnishment," § 238.

81. *Indiana.*— Matheney *v.* Earl, 75 Ind. 531.

Louisiana.— Hoey *v.* Pepper, 5 Rob. 119.

Michigan.— Erickson *v.* Duluth, etc., R. Co., 105 Mich. 415, 63 N. W. 420; Iron Cliffs

ment against the principal defendant is essential to sustain a final judgment against the garnishee.[82] Where, however, plaintiff in the principal action has appealed from a judgment in favor of defendant, garnishment proceedings are not discontinued.[83]

2. Mode and Form of Procedure in General. A proceeding by garnishment is generally regarded as the institution of a suit by the judgment or attaching creditor against the debtor of his debtor, and is governed by the general rules applicable to other suits adapted to the relative positions of the parties.[84]

3. Equitable Remedies in Aid of Garnishment. The general rule is that none of the parties to garnishment proceedings can invoke the aid of a court of equity to enforce his rights, or obtain relief from garnishment proceedings, in the absence of any showing that he has exhausted his remedy at law, or that he is without any legal remedy.[85] However, plaintiff may invoke the aid of a court of equity to prevent the garnishee from fraudulently disposing of the property or effects of the principal defendant in his hands.[86]

Co. *v.* Lahais, 52 Mich. 394, 18 N. W. 121.

Mississippi.— Erwin *v.* Heath, 50 Miss. 795.

Montana.— Marden *v.* Wheelock, 1 Mont. 49.

Nebraska.— Dolby *v.* Tingley, 9 Nebr. 412, 2 N. W. 866.

New Hampshire.— Bruce *v.* Cloutman, 45 N. H. 37, 84 Am. Dec. 111; Carleton *v.* Washington Ins. Co., 35 N. H. 162.

United States.— Logan *v.* Goodwin, 101 Fed. 654, 41 C. C. A. 573, holding, however, that the rendition of judgment in favor of one of several defendants in an attachment suit does not operate to terminate the proceedings against a garnishee who, by his answer, denied indebtedness to any except such defendant, where plaintiff claims his indebtedness to other defendants against whom judgment was rendered, and has taken proper steps to join issue upon the garnishee's answer.

See 24 Cent. Dig. tit. "Garnishment," § 238.

82. *Alabama.*—Curry *v.* Woodward, 44 Ala. 305.

Illinois.— State Bank *v.* Thweatt, 111 Ill. App. 599.

Missouri.— Hauptman *v.* Richards, 85 Mo. App. 188, holding likewise that the burden is on plaintiff to show such judgment.

New Hampshire.— Bruce *v.* Cloutman, 45 N. H. 37, 84 Am. Dec. 111.

Texas.— Haggerty *v.* Ward, 25 Tex. 144.

Virginia.— See Gibson *v.* White, 3 Munf. 94.

Wisconsin.— Streissguth *v.* Reigelman, 75 Wis. 212, 43 N. W. 1116; Bushnell *v.* Allen, 48 Wis. 460, 4 N. W. 599, holding, however, that the record in a garnishment proceeding on an attachment or summons need not show that a judgment has been rendered against the principal debtor, but the record in that and the principal suit are to be read together to establish the fact.

83. Erickson *v.* Duluth, etc., R. Co., 105 Mich. 415, 63 N. W. 420; Dolby *v.* Tingley, 9 Nebr. 412, 2 N. W. 866.

84. Travis *v.* Tartt, 8 Ala. 574; McCain *v.* Wood, 4 Ala. 258 (holding that the act of 1840, authorizing the mode of proceeding on the answer of a garnishee, extends to a garnishee process on a judgment, as well as original and judicial attachment); Walsh *v.* Horine, 36 Ill. 238 (holding that a proceeding in garnishment should be conducted in the name of defendant, for the use of plaintiff against the garnishee); Petway *v.* Goodin, 12 Rob. (La.) 445 (holding likewise that in proceedings under the Louisiana statute the formalities must, as in cases of attachment, be strictly complied with, under penalty of nullity); Everdell *v.* Sheboygan, etc., R. Co., 41 Wis. 395 (holding that an affidavit for garnishment performs the office of the complaint in an ordinary civil action, and should be tested by the same rules rather than by those which are applied to attachments and other harsh proceedings); Platt *v.* Sauk County Bank, 17 Wis. 222.

85. *Arkansas.*— Hicks *v.* Hogan, 36 Ark. 298.

Connecticut.— Gager *v.* Watson, 11 Conn. 168; Judah *v.* Judd, 1 Conn. 309.

Georgia.— Carr *v.* Lee, 44 Ga. 376, holding that plaintiff cannot obtain an injunction against the principal defendant in aid of garnishment proceedings.

Indiana.— St. John *v.* Harrington, 8 Ind. 28.

Kansas.— Van Natta-Lynds Drug Co. *v.* Gerson, 43 Kan. 660, 23 Pac. 1071.

Kentucky.— Wolf *v.* Tappan, 5 Dana 361.

Maryland.— Morton *v.* Grafflin, 68 Md. 545, 13 Atl. 341, 15 Atl. 298.

Michigan.— Baldwin *v.* Wayne County Cir. Judge, 101 Mich. 432, 59 N. W. 669.

New Jersey.— Kimball *v.* Lee, 43 N. J. Eq. 277, 10 Atl. 285; Egbert *v.* Hawk, 12 N. J. Eq. 80.

Texas.— Arthur *v.* Batte, 42 Tex. 159.

See 24 Cent. Dig. tit. "Garnishment," § 241.

86. Candee *v.* Penniman, 32 Conn. 228; Moore *v.* Kidder, 55 N. H. 488; Secor *v.* Witter, 39 Ohio St. 218; Almy *v.* Platt, 16 Wis. 169; Malley *v.* Altman, 14 Wis. 22. See also Smith *v.* Chapman, 6 Port. (Ala.) 365; Norton *v.* Norton, 43 Ohio St. 509, 3 N. E. 348. *Compare* Crowe *v.* Davis, 33 Wkly. Notes

4. Appointment of Receiver. In several jurisdictions the statutes provide under certain circumstances,[87] as where the garnishee is in possession of evidences of indebtedness of defendant upon which he claims a lien, for the appointment of a receiver, upon proper application, to take charge of such property or effects, awaiting the determination of garnishment proceedings.[88]

5. Duty of Garnishee to Make Disclosure — a. General Rule. It is the duty of a garnishee to answer all interrogatories material to a correct decision of the case, even though they may tend to prove that he was a party to a fraudulent transaction, provided the disclosure will not charge him criminally,[89] and provided that such disclosure does not disparage or impeach his title to real estate.[90]

b. Upon Non-Payment of Fees as Witness. Where the garnishee has not been paid or tendered in advance the fees provided by statute, judgment by default cannot be taken against him upon his failure to appear in obedience to the writ.[91] However, after service of the writ, the garnishee is not discharged from his obligation to retain in his possession all property or effects of defendant under his control, and withhold the payment of any sum he may owe him, by reason of the failure to receive his statutory fees, as his fees may be afterward tendered him, and he is then required to answer on the original service;[92] and, where he appears without demanding his fees in advance, he thereby waives his right to demand them before answering.[93]

Cas. (Pa.) 552, holding that an action in foreign attachment may be changed to a bill in equity.

87. Currier *v.* Janvrin, 58 N. H. 374.

Where the garnishee abandons the property of the debtor in his hands after notice served, the court may appoint a suitable person to take charge of, and, if necessary, dispose of the property. Northfield Knife Co. *v.* Shapleigh, 24 Nebr. 635, 39 N. W. 788, 8 Am. St. Rep. 224.

88. Gary *v.* Brown, 33 Ill. App. 435; Fling *v.* Goodall, 40 N. H. 208; Kieffer *v.* Ehler, 18 Pa. St. 388. See Bufford *v.* Sides, 42 N. H. 495, holding that if any arrangement is made between the trustee and defendant after service of process on the trustee, by which the note and mortgage in the trustee's hands are given up to the trustee, whether fully paid or otherwise, this will not authorize the appointment of a receiver.

89. *Louisiana.*—Roquest *v.* The B. E. Clark, 13 La. Ann. 210. See also Laville *v.* Hebrard, 1 Rob. 435, holding that facts appearing from interrogatories which a party had no right to propound will not be noticed.

Maine.— Bunker *v.* Gilmore, 40 Me. 88.

Massachusetts.— Neally *v.* Ambrose, 21 Pick. 185; Devoll *v.* Brownell, 5 Pick. 448.

Michigan.— See Banner Cigar Co. *v.* Treusch, 125 Mich. 265, 84 N. W. 131.

Missouri.— St. Louis Brokerage Co. *v.* Cronin, 14 Mo. App. 587.

New Hampshire.— Bell *v.* Kendrick, 8 N. H. 520.

Pennsylvania.— Rhine *v.* Danville, etc., R. Co., 10 Phila. 336, holding, however, that a garnishee in attachment execution is not bound to answer irrelevant interrogatories.

United States.— Oberteuffer *v.* Harwood, 6 Fed. 828, 2 McCrary 415.

See 24 Cent. Dig. tit. "Garnishment," § 23.

Surrender of property.— It has been held in Louisiana that if the garnishee surrenders all the property attached, he is not obliged to answer. Brown *v.* Richardson, 1 Mart. N. S. (La.) 210.

Administrator.— It has been held in North Carolina that an administrator is not liable to answer a garnishee whether or not his intestate was indebted to defendant in the attachment, since he cannot be presumed enough conusant of the transaction to answer. Gee *v.* Warwick, 3 N. C. 354; Welch *v.* Curley, 3 N. C. 334.

Usurious transaction.—An attachment trustee is not bound to disclose a usurious transaction with the principal defendant, since he cannot disclose the same without incriminating himself. Boardman *v.* Roe, 13 Mass. 104.

90. Moor *v.* Towle, 38 Me. 133; Russell *v.* Lewis, 15 Mass. 127; St. Louis Brokerage Co. *v.* Cronin, 14 Mo. App. 587. *Compare* Bell *v.* Kendrick, 8 N. H. 520, holding that the trustee is bound to answer such questions, although his answers may tend to impeach or impair his title to real estate.

91. *In re* Truxton, 2 Marv. (Del.) 373, 43 Atl. 257 (holding, however, that the statutory fee to be paid before requiring the garnishee to answer does not include mileage); Westphal *v.* Clark, 42 Iowa 371. See, however, Goodrich *v.* Hopkins, 10 Minn. 162.

92. Westphal *v.* Clark, 42 Iowa 371; Chicago, etc., R. Co. *v.* Van Cleave, 52 Nebr. 67, 71 N. W. 971; Walsh *v.* Timlin, 98 Wis. 333, 73 N. W. 1003, holding, however, that where a garnishee's fees have been paid for attendance in one proceeding, a justice can require him to appear and answer in another garnishment against him, made returnable before the same justice, at the same time, without tendering fees in the second proceeding. See, however, Kauffman *v.* Jacobs, 49 Iowa 432.

93. Stockberger *v.* Lindsey, 65 Iowa 471, 21 N. W. 782; Pope *v.* Kingman, 2 Nebr. (Unoff.) 184, 96 N. W. 519.

6. INTERROGATORIES. The general rule is that interrogatories should be filed by plaintiff for the garnishee to answer before a judgment by default can be rendered against him.[94] However, where the statute fixes the time within which interrogatories should be filed, it is within the sound discretion of the court, on proper application, to extend the time within which they may be filed.[95] The garnishment process is a method of seizure, and not a bill of discovery, and original interrogatories should be limited to questions concerning the indebtedness of the garnishee to the judgment debtor, and his relation or transactions with third persons cannot be inquired into.[96]

B. Grounds of Objections and Defenses by Garnishee — 1. IN GENERAL. The general rule is that any defense which the garnishee might interpose in an action against him by the principal defendant is available to him against plaintiff in the garnishment proceedings;[97] and the garnishee can never be charged so as to subject him to a double liability, or in any case, unless through his own fault, where judgment against him as such would not discharge his obligation *pro*

94. Bender *v.* Bridge, 18 Ark. 593; Stickley *v.* Little, 29 Ill. 315; Smith *v.* Conrad, 23 Oreg. 206, 31 Pac. 398; Case *v.* Noyes, 16 Oreg. 329, 19 Pac. 104. See also Yerkes *v.* Craig, 1 Wkly. Notes Cas. (Pa.) 157. *Contra,* Noble *v.* Childs, 12 Iowa 22, holding that on failure of the garnishee to appear, a default may be entered against him, although no interrogatories have been filed, as it is not necessary, under the Iowa statute, to submit such interrogatories before the garnishee's appearance.

95. *Arkansas.*— Bender *v.* Bridge, 18 Ark. 593; Lawrence *v.* Sturdivent, 10 Ark. 130; Ashley *v.* Dunn, 4 Ark. 516. See also Moreland *v.* Pelham, 7 Ark. 338, holding that allegations and interrogatories of the garnishee may be filed any time after the writ is issued, but they need not appear of record.

Illinois.— World's Fair Excursion, etc., Boat Co. *v.* Gasch, 162 Ill. 402, 44 N. E. 724.

Maryland.— See Boyd *v.* Chesapeake, etc., Canal Co., 17 Md. 195, 79 Am. Dec. 646.

Missouri.— Briggs *v.* Block, 18 Mo. 281, holding that the supreme court will not interfere with the discretion exercised by inferior courts in respect to allowing allegations and interrogatories to garnishees to be filed after the regular time is passed but before the end of the term.

Pennsylvania.— See Philadelphia Textile Machinery Co *v.* Ætna F. Ins. Co., 9 Pa. Dist. 44; Klett *v.* Craig, 1 Wkly. Notes Cas. 129.

See 24 Cent. Dig. tit. "Garnishment," § 246.

New or additional interrogatories.— Additional interrogatories may be propounded to the garnishee after the first interrogatories have been answered, without going through the formalities of traversing the answers to the first interrogatories. Ober *v.* Matthews, 24 La. Ann. 90. And where a trustee in foreign attachment has put in his general answer, and filed answers and interrogatories, and the court allows him to file a new and additional answer, without further interrogatory, plaintiff should be allowed to file new interrogatories. Hovey *v.* Crane, 12 Pick. (Mass.) 167.

96. First Natchez Bank *v.* Moss, 52 La. Ann. 170, 26 So. 828; State Nat. Bank *v.* Boatner, 39 La. Ann. 843, 2 So. 589; Crossman *v.* Crossman, 21 Pick. (Mass.) 21 (holding that plaintiff has no right to propound interrogatories for the purpose of discrediting the garnishee's disclosure, and that hence he is not entitled to the privilege of a cross-examination, and that what the trustee may have told other persons, or said on former occasions, is immaterial and not a proper subject of inquiry); Corbin *v.* Bollman, 4 Watts & S. (Pa.) 342; Struber *v.* Klein, 17 Phila. (Pa.) 12. *Compare* Devries *v.* Buchanan, 10 Md. 210, holding that proceedings by interrogatory and answer are in the nature of a discovery, and the answer is to be regarded as evidence, and not as part of the pleadings.

97. *Iowa.*— Daniels *v.* Clark, 38 Iowa 556; Fairfield *v.* McNany, 37 Iowa 75.

Massachusetts.— Crossman *v.* Crossman, 21 Pick. 21.

Mississippi.— Webb *v.* Miller, 24 Misc. 638, 57 Am. Dec. 189.

Missouri.— Sheedy *v.* Second Nat. Bank, 62 Mo. 17, 21 Am. Rep. 407; McDermott *v.* Donegan, 44 Mo. 85; Reid *v.* Mercurio, 91 Mo. App. 673, holding that while money due on an insurance policy is garnishable, yet the company is entitled to show that there were no proofs of loss served on it by the assured.

North Carolina.— Russell *v.* Hinton, 5 N. C. 468.

South Carolina.— Mathis *v.* Clark, 2 Mill 456, 12 Am. Dec. 688.

Texas.— Ellison *v.* Tuttle, 26 Tex. 283.

Virginia.— Glassell *v.* Thomas, 3 Leigh 113.

United States.— Schuler *v.* Israel, 120 U. S. 506, 7 S. Ct. 648, 30 L. ed. 707; McLaughlin *v.* Swann, 18 How. 217, 15 L. ed. 357; Fidelity Trust Co. *v.* New York Finance Co., 125 Fed. 275, 60 C. C. A. 189; Lackett *v.* Rumbaugh, 45 Fed. 23.

See 24 Cent. Dig. tit. "Garnishment," § 248.

See, however, Kase *v.* Kase, 34 Pa. St. 128.

Joint trustees.— Where trustees in foreign attachment are not expressly declared against as joint trustees, each is entitled to every legal defense to which he would by law be entitled if he were alone declared against. Ingraham *v.* Olcock, 14 N. H. 243.

tanto.[98] Thus a garnishee can set up the statute of limitations as a defense to his indebtedness to the principal defendant.[99] However, extraneous matters having no relation to the question of the garnishee's indebtedness to the principal defendant cannot be set up by the former as a matter of defense.[1] Thus the general rule is that the garnishee cannot raise any question as to the ownership of the judgment in the principal action, as he has no interest in that question.[2] The mere statement of a person to plaintiff that he is indebted to the principal defendant does not estop him from denying his indebtedness to defendant in a garnishment proceeding instituted thereafter.[3]

2. **Defects in Proceedings in Principal Action.** Since a garnishee will not be protected in the payment of a judgment against himself based on void proceedings against the execution defendant or defendant in attachment, he may inquire into the regularity of the proceedings in the principal action, and may set up as a defense that the judgment against defendant is void for want of jurisdiction.[4]

98. *Alabama*.— New Orleans, etc., R. Co. *v.* Long, 50 Ala. 498.

Illinois.— Galena, etc., R. Co. *v.* Menzies, 26 Ill. 121; May *v.* Baker, 15 Ill. 89; Pierce *v.* Carleton, 12 Ill. 358, 54 Am. Dec. 405.

Iowa.— Burton *v.* Warren Dist. Tp., 11 Iowa 166; Walters *v.* Washington Ins. Co., 1 Iowa 404, 63 Am. Dec. 451.

Michigan.— Hamilton *v.* Rogers, 67 Mich. 135, 34 N. W. 278; Hewitt *v.* Wagar Lumber Co., 38 Mich. 701.

Ohio.— Secor *v.* Witter, 39 Ohio St. 218.

See 24 Cent. Dig. tit. "Garnishment," § 248.

99. *California*.—Carter *v.* Los Angeles Nat. Bank, 116 Cal. 370, 48 Pac. 332, holding that a garnishee may plead the statute of limitations, if he is entitled to the plea as against the principal defendant, but that the statute does not run in his favor as to the liability created by the garnishment itself.

Louisiana.— James *v.* Fellowes, 20 La. Ann. 116.

Missouri.— Benton *v.* Lindell, 10 Mo. 557.

New Hampshire.— Chapman *v.* Gala, 32 N. H. 141.

Tennessee.— Hinkle *v.* Currin, 2 Humphr. 137.

Washington.— See Wooding *v.* Puget Sound Nat. Bank, 11 Wash. 527, 40 Pac. 223, holding that a party who for over two years failed to prosecute proceedings commenced against the garnishee thereby loses his rights under the writ of garnishment, regardless of whether such final action was barred by the statute of limitations.

See 24 Cent. Dig. tit. "Garnishment," § 253.

1. Wabash R. Co. *v.* Dougan, 41 Ill. App. 543 (holding that a garnishee cannot interpose as a defense the fact that the note was given by one of its employees for a usurious loan; it is for the maker to do this); Campbell *v.* Myers, 16 La. Ann. 362; Hazard *v.* Agricultural Bank, 11 Rob. (La.) 326; Brode *v.* Firemen's Ins. Co., 8 Rob. (La.) 244; Bean *v.* Mississippi Union Bank, 5 Rob. (La.) 333; Frazier *v.* Wilcox, 4 Rob. (La.) 517; Lee *v.* Palmer, 18 La. 405; Kimball *v.* Plant, 14 La. 511; Hanna *v.* Lauring, 10 Mart. (La.) 568, 13 Am. Dec. 339; Jones *v.* Tracy, 75 Pa. St. 417; Fox *v.* Reed, 3 Grant (Pa.) 81, holding that a garnishee cannot set up as a defense to a judgment against him matters which only interest defendant, and do not interest him as garnishee.

2. Jackson *v.* Shipman, 28 Ala. 488; Connally *v.* Rice, 77 Ga. 312. See also Frasier *v.* Banks, 11 La. Ann. 31; Braynard *v.* Burpee, 27 Vt. 616, holding that a trustee in a suit has no such interest in the judgment as will enable him to avoid a release by defendant as complainant in *audita querela*. *Contra*, Cox *v.* Palmer, 60 Miss. 793, holding that the garnishee may move to dismiss the garnishment on the ground that plaintiff, claiming to be the owner by assignment of the judgment on which the writ issued, is not in fact the owner thereof.

3. Henderson *v.* McMahill, 75 Iowa 217, 39 N. W. 276, 9 Am. St. Rep. 472; Starry *v.* Korab, 65 Iowa 267, 21 N. W. 600 (where a party declared that he was indebted to another, and promised a creditor of the latter to retain the money until he had an opportunity to garnish it, and it was held that he was not estopped from denying his indebtedness in a garnishment proceeding instituted some time later, it not appearing that his declaration was actually false when he made it); Phillipsburgh Bank *v.* Fulmer, 31 N. J. L. 52, 86 Am. Dec. 193; Warden *v.* Baker, 54 Wis. 49, 11 N. W. 342. See, however, Ashworth *v.* Brown, 15 Phila. (Pa.) 207 (where the garnishee promised to make no payment to defendant if plaintiff would delay service until notified by the garnishee, and, after receiving notice, the writ was served on the garnishee, who meanwhile had paid defendant in full, and it was held that he was estopped from setting up the defense); Austin *v.* Erwin, 2 Tex. App. Civ. Cas. § 290 (where it was held that the garnishee was estopped to deny liability on the ground that the debt did not exist, where he had paid the same to defendant on order after service of the writ of garnishment).

4. *Alabama*.— Flash *v.* Paul, 29 Ala. 141; Lowry *v.* Clements, 9 Ala. 422.

Illinois.— Iroquois Furnace Bank *v.* Wilkin Mfg. Co., 181 Ill. 582, 54 N. E. 987 [*reversing* 77 Ill. App. 59]; Dennison *v.* Taylor, 142 Ill. 45, 31 N. E. 148 [*affirming* 37 Ill. App. 385]; Empire Car-roofing Co.

Where, however, the court has obtained jurisdiction of the action, the garnishee cannot avail himself of mere irregularities or defects rendering the judgment against defendant voidable at the election of the latter, since, where such judgment is not void, the garnishee will be protected from any further demand of defendant upon the payment of any judgment plaintiff may obtain against him.[5]

3. Defects in Garnishment Proceedings. The garnishee may as a rule set up as a defense any defects in the garnishment proceedings which render such proceedings voidable or void.[6]

4. Pendency of Other Proceedings. According to the better rule, the pen-

v. Macey, 115 Ill. 390, 3 N. E. 417; Pierce *v.* Carleton, 12 Ill. 358, 54 Am. Dec. 405; Chicago State Bank *v.* Thweatt, 111 Ill. App. 599; London Guarantee, etc., Co. *v.* Mosness, 98 Ill. App. 651; Lake Shore, etc., R. Co. *v.* Scott, 67 Ill. App. 92; Hinman *v.* Andrews Opera Co., 49 Ill. App. 135; Pierce *v.* Wade, 19 Ill. App. 185.

Indiana.— Ohio, etc., R. Co. *v.* Alvey, 43 Ind. 180, holding that where defendant in attachment is not personally before the court, the garnishee is required to examine and know that the court has jurisdiction of the subject of the action.

Louisiana.— Featherstonh *v.* Compton, 8 La. Ann. 285.

Maine.— Cota *v.* Ross, 66 Me. 161.

Maryland.— Barr *v.* Perry, 3 Gill 313; Bruce *v.* Cook, 6 Gill & J. 345; Wever *v.* Baltzell, 6 Gill & J. 335.

Massachusetts.— Blake *v.* Jones, 7 Mass. 28.

Mississippi.— McKey *v.* Cobb, 33 Miss. 533.

Missouri.— Hedrix *v.* Hedrix, 103 Mo. App. 40, 77 S. W. 495; Simmons *v.* Missouri Pac. R. Co., 19 Mo. App. 542.

New Mexico.— Smith *v.* Montoya, 3 N. M. 39, 1 Pac. 175.

Pennsylvania.— Farmers', etc., Bank *v.* Little, 8 Watts & S. 207, 42 Am. Dec. 293.

Rhode Island.— Remington *v.* Hazard, 23 R. I. 142, 49 Atl. 497.

Wisconsin.— Beaupre *v.* Brigham, 79 Wis. 436, 48 N. W. 596; Streissguth *v.* Reigelman, 75 Wis. 212, 43 N. W. 1116.

See 24 Cent. Dig. tit. "Garnishment," § 249.

5. *Alabama.*— Security Loan Assoc. *v.* Weems, 69 Ala. 584; Lehman *v.* Warner, 61 Ala. 455; Gunn *v.* Howell, 35 Ala. 144, 73 Am. Dec. 484; Flash *v.* Paul, 29 Ala. 141; Smith *v.* Chapman, 6 Port. 365.

Connecticut.— Minor *v.* Cook, Kirby 157.

Illinois.— Empire Car-roofing Co. *v.* Macey, 115 Ill. 390, 3 N. E. 417; Lake Shore, etc., R. Co. *v.* Scott, 67 Ill. App. 92; Schmitt *v.* Devine, 63 Ill. App. 289; American Cent. Ins. Co. *v.* Hettler, 46 Ill. App. 416; Dennison *v.* Blumenthal, 37 Ill. App. 385.

Indiana.— Baltimore, etc., R. Co. *v.* Taylor, 81 Ind. 24; Ohio, etc., R. Co. *v.* Alvey, 43 Ind. 180; Schoppenhast *v.* Bollman, 21 Ind. 280, holding that where defendant in the main action was personally served with process, the garnishment is not the foundation of the jurisdiction, and in such case if the garnishment illegally issues it is the privilege of defendant alone to take advantage of it.

Iowa.— Henny Buggy Co. *v.* Patt, 73 Iowa 485, 35 N. E. 587.

Maryland.— Bartlett *v.* Wilbur, 53 Md. 485.

Mississippi.— Field *v.* McKinney, 60 Miss. 763; Sadler *v.* Prairie Lodge, 59 Miss. 572; Benson *v.* Holloway, 59 Miss. 358.

Missouri.— St. Louis Perpetual Ins. Co. *v.* Cohen, 9 Mo. 421; Reid *v.* Mercurio, 91 Mo. App. 673.

New Jersey.— Lomerson *v.* Hoffman, 24 N. J. L. 674; Welsh *v.* Blackwell, 15 N. J. L. 55.

North Carolina.— See Goodwin *v.* Claytor, 137 N. C. 224, 49 S. E. 173, 67 L. R. A. 209.

Pennsylvania.— Black *v.* Nease, 37 Pa. St. 433; Northern Liberties Bank *v.* Munford, 3 Grant 232; Pike County *v.* Quick, 1 C. Pl. 29; Gill *v.* Joaquin, 2 Wkly. Notes Cas. 139.

South Carolina.— Camberford *v.* Hall, 3 McCord 345; Foster *v.* Jones, 1 McCord 116.

Tennessee.— Illinois Cent. R. Co. *v.* Brooks, 90 Tenn. 161, 16 S. W. 77, 25 Am. St. Rep. 673; Cowan *v.* Lowry, 7 Lea 620.

Texas.— Douglass *v.* Neil, 37 Tex. 528; White *v.* Casey, 25 Tex. 552; Seaton *v.* Brooking, 1 Tex. App. Civ. Cas. § 1041.

Virginia.— Shand *v.* Grove, 26 Gratt. 652.

Wisconsin.— Frisk *v.* Reigelman, 75 Wis. 499, 43 N. W. 1117, 44 N. W. 766, 17 Am. St. Rep. 198.

See 24 Cent. Dig. tit. "Garnishment," § 249.

6. *Alabama.*— Donald *v.* Nelson, 95 Ala. 111, 10 So. 317, holding that such defects may be pleaded in abatement by the garnishee.

Delaware.— Johnson *v.* Layton, 5 Harr. 252.

Maryland.— Johnson *v.* Lemmon, 37 Md. 336.

Massachusetts.— Thayer *v.* Ray, 17 Pick. 166; Blake *v.* Jones, 7 Mass. 28.

Rhode Island.— Greene *v.* Tripp, 11 R. I. 424.

Wisconsin.— Bushnell *v.* Allen, 48 Wis. 460, 4 N. W. 599, holding, however, that where the irregularity or defect may be cured by amendment, it is not necessary for the garnishee to interpose objection to the same in order to plead the judgment in the garnishment proceedings as a bar to a subsequent action by defendant.

See 24 Cent. Dig. tit. "Garnishment," § 250.

But see Brealsford *v.* Meade, 1 Yeates (Pa.) 488; Bolling *v.* Anderson, 1 Tenn. Ch. 127. *Compare* Phenix Ins. Co. *v.* Jacobs, 23 Ind. App. 509, 55 N. E. 778.

dency of an action by a creditor against the debtor is no defense to garnishment proceedings to reach the same debt,[7] provided the garnishment proceedings can be pleaded in bar of the pending action.[8] However, in many jurisdictions a plea *puis darrein continuance* is held to be sufficient to stay the garnishment proceedings until the first suit is determined.[9] Conversely the fact that the debtor has been served with garnishment process in a pending action is no defense to an action by the principal defendant against the garnishee for the same property or debt,[10] although the court will usually grant a stay in the second action pending the determination of the first action and the garnishment proceedings therein.[11] In some jurisdictions the rule is laid down that the pendency of an action or pre-

A garnishee cannot take advantage of his own wrong, and where in foreign attachment he prevented the officer from getting the property in his hands, thus making the service defective, he cannot set up such defective service as a defense. Pennsylvania R. Co. *v.* Pennock, 51 Pa. St. 244.

Waiver.— Where there is a variance between an affidavit for garnishment and a record offered in evidence, and on the trial no issue of either law or fact is raised as to the affidavit, the garnishee, by voluntarily answering to the merits, raising no objections to the sufficiency of the affidavit, and by failing to traverse or in any manner raise an issue of fact upon it, admits its statements, so far as they affect him, to be true. Ihorn *v.* Wallace, 88 Ill. App. 562. See also May *v.* Disconto Gesellschaft, 211 Ill. 310, 71 N. E. 1001 [*affirming* 113 Ill. App. 415]; McAnaney *v.* Quigley, 105 Ill. App. 611, where the garnishee was held to have waived defects in the service in the failure to tender her the statutory fees and mileage, where she was afterward by the service of scire facias given an opportunity to appear and show that the statute had not been complied with.

7. *Illinois.*— Roche *v.* Rhode Island Ins. Assoc., 2 Ill. App. 360. See also Brickey *v.* Davis, 9 Ill. App. 362, holding that where a garnishee has already been summoned in a pending suit by another party for the same indebtedness, the last suit should be stayed to await the termination of the first.

Iowa.— Barton *v.* Smith, 7 Iowa 85.

Massachusetts.— Hooton *v.* Gamage, 11 Allen 354; Thorndike *v.* De Wolf, 6 Pick. 120; Kidd *v.* Shepherd, 4 Mass. 238, holding, however, that a debtor against whom an action is pending cannot be held as trustee of his creditor in foreign attachment after issue joined in the action and before verdict.

Mississippi.— Thrasher *v.* Buckingham, 40 Miss. 67.

New Hampshire.— Foster *v.* Dudley, 30 N. H. 463.

Pennsylvania.— Datz *v.* Chambers, 3 Pa. Dist. 353; Buffalo Coal Co. *v.* Rochester, etc., R. Co., 8 Wkly. Notes Cas. 126.

Vermont.— Jones *v.* Wood, 30 Vt. 268; Trombly *v.* Clark, 13 Vt. 118. See also Hazelton *v.* Page, 4 Vt. 49, holding that a trustee is not protected by a previous judgment against him as trustee, when such judgment is to be satisfied in specific property, and cannot be enforced until a future time, and what is in his hands is due immediately.

Wisconsin.— Prentiss *v.* Danaher, 20 Wis. 311, holding that a pending garnishment is not a bar to a second garnishment to reach the same indebtedness, but on the commencement of the second action the garnishee should move to stay proceedings therein until the former proceedings are terminated.

United States.— See McCarty *v.* New Bedford, 4 Fed. 818, holding that a garnishee cannot plead a judgment of a state court, void for want of jurisdiction, in bar, where it does not appear that execution has been ordered against him, or that he has been called on or compelled to pay the same.

See 24 Cent. Dig. tit. "Garnishment," § 251.

8. Garity *v.* Gigie, 130 Mass. 184 (where a final judgment and payment of the execution thereon issued in trustee proceedings instituted in another state and prosecuted to judgment after a full disclosure by the trustee of all the facts in regard to a like proceeding against him instituted in Massachusetts were held to be a bar to his being charged anew in proceedings in the latter state); American Bank *v.* Rollins, 99 Mass. 313; Thayer *v.* Pratt, 47 N. H. 470; Wadsworth *v.* Clark, 14 Vt. 139.

9. Hitt *v.* Macey, 3 Ala. 104, 36 Am. Dec. 440; Smith *v.* Carroll, 17 R. I. 125, 21 Atl. 343, 12 L. R. A. 301; Prichard *v.* Critchlow, 56 W. Va. 547, 49 S. E. 453, holding that proceedings on junior attachments against the garnishee should be stayed until proceedings on senior attachments against the same garnishee are determined, unless the amount garnished is sufficient to satisfy both attachments. See, however, Wallace *v.* McConnell, 13 Pet. (U. S.) 136, 10 L. ed. 95, where the action and the attachment were in courts of different jurisdictions, and it was held that the plea was bad on demurrer.

10. Hall *v.* Hunt, 180 Mass. 380, 62 N. E. 397; Clark *v.* Great Barrington, 11 Pick. (Mass.) 260.

11. *Alabama.*—Montgomery Gaslight Co. *v.* Merrick, 61 Ala. 534; Crawford *v.* Slade, 9 Ala. 887, 44 Am. Dec. 463.

Georgia.— Shealy *v.* Toole, 56 Ga. 210.

Louisiana.— Carrol *v.* McDonogh, 10 Mart. 609. See also Oakey *v.* Mississippi, etc., R. Co., 13 La. 567.

Massachusetts.— Hall *v.* Hunt, 180 Mass. 380, 62 N. E. 397; Winthrop *v.* Carlton, 8 Mass. 456.

Vermont.— Jones *v.* Wood, 30 Vt. 268; Spicer *v.* Spicer, 23 Vt. 678; Morton *v.* Webb, 7 Vt. 123.

ceedings in garnishment in another state against the garnishee concerning the same property or funds may be set up as a defense to the garnishment.[12] Where a lien has attached by virtue of the service of garnishment process, it cannot be defeated by the subsequent bankruptcy of the debtor, or by the fact that a receiver has been appointed for the property, effects, and credits of such debtor.[13]

5. Claim to Property by Garnishee. Where a garnishee has property of the principal defendant in his possession on which he has a lien,[14] or which he is holding to indemnify himself for becoming the surety of defendant,[15] he may hold such property until his lien is discharged, or he is released from liability as surety, and such lien is a good defense in garnishment proceedings where properly pleaded.

6. Set-Off or Counter-Claim — a. General Rule. The principle is well settled that the garnishee or trustee may retain in his hands, out of the funds of the principal defendant, an amount equal to all sums of which he might legally avail himself by way of set-off, by any of the modes allowed either by the common or statute law if the action were brought by defendant himself against such garnishee or trustee.[16] The claim or debt which the garnishee seeks to set off

United States.— Lynch *v.* Hartford F. Ins. Co., 17 Fed. 627.

See 24 Cent. Dig. tit. "Garnishment," § 251.

12. Carrol *v.* McDonogh, 10 Mart. (La.) 609; Sims *v.* Talbot, 27 Miss. 487. *Compare* Atkinson *v.* Mackey, 3 Pa. Dist. 634, holding that a plea that defendant has been summoned as garnishee in foreign attachment against plaintiff is no defense, but that such fact will be considered by the court in its judgment for the protection of defendant.

Garnishment in foreign jurisdiction.— Where a Virginia corporation was sued in South Carolina, and by way of defense sought to show that it had been garnished in Virginia in a suit there instituted against plaintiff, it was held that the refusal of the judge to admit in evidence a certified copy of the proceedings in Virginia for the purpose of showing this fact was error. Mars *v.* Virginia Home Ins. Co., 17 S. C. 514.

13. Bartlett *v.* Wilbur, 53 Md. 485; Wells *v.* Brander, 10 Sm. & M. (Miss.) 348 (applying this rule even where the petition in bankruptcy was filed prior to the garnishment); Graham *v.* O'Neil, 24 Wis. 34. See also Ege *v.* Koontz, 3 Pa. St. 109.

Participation in bankruptcy proceedings.— It has been held in Louisiana to be a good defense by a garnishee that plaintiff in garnishment had made proof before a register of the United States district court of a judgment obtained by him against defendant, and filed his proof with the assignee in bankruptcy, thereby making himself a party to the bankruptcy proceedings, and abandoning all other rights. Camutz *v.* State Bank, 26 La. Ann. 354.

14. *Indiana.*— Chapin *v.* Jackson, 45 Ind. 153.

Iowa.— Smith *v.* Clarke, 9 Iowa 241.

Louisiana.— Gardiner *v.* Smith, 12 La. 370 (holding that while the garnishees cannot claim a privilege on goods in their hands, where they have not made advances on the identical goods attached, yet, where they are creditors of a firm whose property is attached in their hands by a creditor of an individual partner, they will be preferred to him); McRae *v.* Austin, 9 La. Ann. 360.

Maine.— Doe *v.* Monson, 33 Me. 430.

Massachusetts.— Com. *v.* Parker, 2 Cush. 212.

Michigan.— Gregg *v.* Durand First Nat. Bank, 135 Mich. 285, 97 N. W. 713.

Pennsylvania.— Martin *v.* Throckmorton, 15 Pa. Super. Ct. 632. See also Farmers', etc., Nat. Bank *v.* King, 57 Pa. St. 202, 98 Am. Dec. 215.

South Carolina.— State Bank *v.* Levy, 1 McMull 431.

Virginia.— Williamson *v.* Gayle, 7 Gratt. 152.

See 24 Cent. Dig. tit. "Garnishment," § 254.

Compare Harris *v.* Clapp, Minor (Ala.) 328, holding, however, that where the garnishee claims the property levied on as his own, such defense should be set up by answer, and is not a valid objection to a judgment by default.

15. Kergin *v.* Dawson, 6 Ill. 86; Ingalls *v.* Dennet, 6 Me. 79. See, however, Yongue *v.* Linton, 6 Rich. (S. C.) 275, holding that a garnishee having, at the time of the service of the attachment, property in his hands of the principal debtor, and being also a surety for him on a bond, which he afterward paid, cannot claim to hold the property as creditor in possession.

16. *Alabama.*—Jefferson County Sav. Bank *v.* Nathan, 138 Ala. 342, 35 So. 355; Henry *v.* McNamara, 124 Ala. 412, 26 So. 907, 82 Am. St. Rep. 183; Mobile St. R. Co. *v.* Turner, 91 Ala. 213, 8 So. 684; Powell *v.* Sammons, 31 Ala. 552.

Arkansas.— See Field *v.* Watkins, 5 Ark. 672.

Colorado.— Sauer *v.* Nevadaville, 14 Colo. 54, 23 Pac. 87.

Florida.— Howe *v.* Hyer, 36 Fla. 12, 17 So. 925.

Georgia.— Story *v.* Kemp. 55 Ga. 276, holding, however, that if a garnishee by his answer pleads a set-off against all plaintiffs, and admits at the trial, without amending his answer, that his set-off is against some

against his indebtedness to the principal defendant must, however, be due in the same right as his indebtedness to defendant. Thus a garnishee cannot in garnishment proceedings against him personally set off a claim he has as the personal representative of a third person against defendant;[17] nor can a personal representative summoned as garnishee in his representative capacity set up as a defense a debt due him personally by the principal defendant.[18] Nor can he set off against a debt which he individually owes to defendant a debt due from the defendant to himself and another jointly.[19] A claim against defendant upon which the garnishee relies as a set-off must be one arising *ex contractu*.[20]

of plaintiffs only, the set-off will not be allowed.

Illinois.— Rankin *v.* Simonds, 27 Ill. 352; McCoy *v.* Williams, 6 Ill. 584; Finch *v.* Alexander County Nat. Bank, 65 Ill. App. 337.

Louisiana.— Thompson *v.* Allison, 28 La. Ann. 733; Blanchard *v.* Vargas, 18 La. 486.

Maine.— Stedman *v.* Vickery, 42 Me. 132; Robinson *v.* Furbush, 34 Me. 509; Manufacturers' Bank *v.* Osgood, 12 Me. 117.

Maryland.— Peters *v.* Cunningham, 10 Md. 554.

Massachusetts.— Nutter *v.* Framingham, etc., R. Co., 132 Mass. 427; Brown *v.* Coggeshall, 14 Gray 134; Swett *v.* Ordway, 23 Pick. 266; Lamb *v.* Stone, 11 Pick. 527; Guild *v.* Holbrook, 11 Pick. 101. See also Allen *v.* Hall, 5 Metc. 263, where, however, the set-off claimed was not allowed.

Missouri.— Royer *v.* Fleming, 58 Mo. 438 (where the garnishee set up as a counterclaim that he had been called on to pay certain debts of defendant, and compromised them at fifty cents on the dollar, and it was held that he could set off against his debt due defendant only the amount actually paid on such compromise); Firebaugh *v.* Stone, 36 Mo. 111; Ashby *v.* Watson, 9 Mo. 236; Simon *v.* Norton, 66 Mo. App. 178; Steele *v.* Thomason, 38 Mo. App. 312 (holding that where one summoned as garnishee of a defendant to whom he has sold property, out of the proceeds of which defendant was entitled to a certain sum as exempt from levy, all the commissions to which the garnishee is entitled for selling the property should be allowed out of the balance of the proceeds after paying the exemption).

Nebraska.— Nesbitt *v.* Campbell, 5 Nebr. 429.

New Hampshire.— Brown *v.* Brown, 55 N. H. 74; Wheeler *v.* Emerson, 45 N. H. 526; Brown *v.* Warren, 43 N. H. 430; Swanscott Mach. Co. *v.* Partridge, 25 N. H. 369; Emerson *v.* Wallace, 20 N. H. 567; Sampson *v.* Hyde, 16 N. H. 492; Boardman *v.* Cushing, 12 N. H. 105.

Ohio.— Secor *v.* Witter, 39 Ohio St. 218.

Pennsylvania.— Myers *v.* Baltzell, 37 Pa. St. 491; Strong *v.* Bass, 35 Pa. St. 333. See, however, Jones *v.* Manufacturers' Nat. Bank, 99 Pa. St. 317, where the garnishee was held not to be entitled to the set-off claimed.

Tennessee.— Mowry *v.* Davenport, 6 Lea 80; Nashville *v.* Potomac Ins. Co., 2 Baxt. 296; Arledge *v.* White, 1 Head 241.

Vermont.— Strong *v.* Mitchell, 19 Vt. 644, holding, however, that a trustee cannot deduct from funds in his hands the amount of a note due from the principal defendant to a third person, which he had promised to pay for the principal defendant prior to the service of the trustee process, but which promise was void by the statute of frauds.

Wisconsin.— Gage *v.* Cheseboro, 49 Wis. 486, 5 N. W. 881; Keyes *v.* Milwaukee, etc., R. Co., 25 Wis. 691.

United States.— Mattingly *v.* Boyd, 20 How. 128, 15 L. ed. 845; Beach *v.* Viles, 2 Pet. 675, 7 L. ed. 559; Daugherty *v.* Bogy, 104 Fed. 938, 44 C. C. A. 266; Picquet *v.* Swan, 19 Fed. Cas. No. 11,133, 4 Mason 443.

See 24 Cent. Dig. tit. "Garnishment," § 255.

A garnishee must specially plead the set-off in order to be entitled to set off against the money sought to be charged a debt due him by defendant. Kling *v.* Tunstall, 109 Ala. 608, 19 So. 907.

An equitable demand cannot be set off by a garnishee against his indebtedness to defendant, in a court of law. Loftin *v.* Schackelfield, 17 Ala. 455; Weller *v.* Weller, 18 Vt. 55. *Contra*, Wanzer *v.* Truly, 17 How. (U. S.) 584, 15 L. ed. 216.

Set-off against plaintiff.— In Wisconsin it is held that the garnishee cannot set off claims or debts he may have against plaintiff in garnishment. Steen *v.* Norton, 45 Wis. 412.

17. Thomas *v.* Hopper, 5 Ala. 442; Blanchard *v.* Cole, 8 La. 160; Woodward *v.* Tupper, 58 N. H. 577.

18. Howe *v.* Howe, 97 Me. 422, 54 Atl. 908; Wadleigh *v.* Jordan, 74 Me. 483; Lorenz *v.* King, 38 Pa. St. 93. *Compare* Henshaw *v.* Whitney, 11 Gray (Mass.) 223, holding that an administrator summoned as trustee may set off a debt due to himself from such distributee.

19. Gray *v.* Badgett, 5 Ark. 16; National Bank of Commerce *v.* Titsworth, 73 Ill. 591 (holding that claims against defendants and others jointly cannot be set off); Norcross *v.* Benton, 38 Pa. St. 217; Wells *v.* Mace, 17 Vt. 503. See, however, Brown *v.* Warren, 43 N. H. 430, holding that where, under trustee process, two trustees are indebted to the principal defendant jointly, they may offset not only their joint claims but the several claims which each trustee may have against such debtor, and will be chargeable only for the balance in their hands after deducting their joint and several claims. And *compare* Hathaway *v.* Russell, 16 Mass. 473, to the same effect.

20. Hibbard *v.* Clark, 56 N. H. 155, 22 Am. Rep. 442 (holding that a town summoned as

b. Claims Acquired or Debts Incurred After Service of Writ. The general rule is that the debt due or the claim in the possession of the garnishee which he seeks to set off against his liability to the principal defendant must have been a debt due, or a claim in his possession, at the time of the service of the writ of garnishment.[21] In several jurisdictions, however, the rule is laid down that if the principal defendant before final answer becomes indebted to the garnishee on any contract entered into or liability incurred before garnishment, the garnishee's right of set-off exists.[22]

c. Demands Not Liquidated. A garnishee can set off as against the garnishing creditor claims for unliquidated damages for the principal debtor's breach of contract.[23]

7. Right of Exemption of Defendant. In practically every jurisdiction the garnishee is allowed to interpose a claim of exemption in behalf of the principal defendant as a defense to the garnishment proceedings;[24] and in some jurisdic-

trustee of an individual cannot set off the taxes against such individual by such town against the amount due from the town to such individual); Thayer *v.* Partridge, 47 Vt. 423; Johnson *v.* Howard, 41 Vt. 122, 98 Am. Dec. 568; Noyes *v.* Hickok, 27 Vt. 36.

21. *Alabama.*— Warfield *v.* Campbell, 38 Ala. 527, 82 Am. Dec. 724; Self *v.* Kirkland, 24 Ala. 275.

Arkansas.— Watkins *v.* Field, 6 Ark. 391; Field *v.* Watkins, 5 Ark. 672.

Connecticut.— Parsons *v.* Root, 41 Conn. 161.

Delaware.— Edwards *v.* Delaplaine, 2 Harr. 322, holding that a note not due at the time of the attachment cannot be set off, although due before pleading.

Illinois.— Crain *v.* Gould, 46 Ill. 293.

Louisiana.— Burke *v.* Taylor, 15 La. 236.

Maine.— Ingalls *v.* Dennett, 6 Me. 79.

Minnesota.— Milliken *v.* Mannheimer, 49 Minn. 521, 52 N. W. 139.

Missouri.— Clark *v.* Kinealy, 13 Mo. App. 104.

Pennsylvania.— Roig *v.* Timm, 103 Pa. St. 115; Pennell *v.* Grubb, 13 Pa. St. 552 (holding that there is no presumption that the garnishee acquired the set-off claimed prior to the garnishment, but that the garnishee alleging the existence of such set-off before the garnishment must support his allegation by proof); Crammond *v.* U. S. Bank, 4 Dall. 291, 1 L. ed. 838; Crall *v.* Ford, 28 Wkly. Notes Cas. 366.

South Carolina.— Martin *v.* Solomons, 10 Rich. 533, holding that the garnishee cannot claim to be allowed for a mere liability as indorser for defendant, and that the payment of the note before it has become due, and before his disclosure, does not give him such claim.

West Virginia.— Farmers' Bank *v.* Gettinger, 4 W. Va. 305.

United States.— Taylor *v.* Gardner, 23 Fed. Cas. No. 13,791, 2 Wash. 488.

Canada.— Gauthier *v.* Huot, 16 Quebec Super. Ct. 242.

See 24 Cent. Dig. tit. "Garnishment," § 258.

22. *Maryland.*— Farmers', etc., Bank *v.* Franklyn Bank, 31 Md. 404.

Massachusetts.— Lannan *v.* Walter, 149 Mass. 14, 20 N. E. 196; Eddy *v.* O'Hara, 132 Mass. 56; Allen *v.* Hall, 5 Metc. 263; Smith *v.* Stearns, 19 Pick. 20; Boston Type, etc., Foundery Co. *v.* Mortimer, 7 Pick. 166, 19 Am. Dec. 266. See also Greenough *v.* Walker, 5 Mass. 214.

New Hampshire.— Boston, etc., R. Co. *v.* Oliver, 32 N. H. 172 (holding that a trustee is entitled to set off or retain any money due to him at the time of the disclosure upon a contract existing prior to the action, however contingent or uncertain might have been the liability, upon which the money has since become due at the time the trustee's suit was brought); Boardman *v.* Cushing, 12 N. H. 105. See, however, Wheeler *v.* Emerson, 45 N. H. 526, holding that trustee cannot be permitted to purchase with the funds in his hands at the time of the service of plaintiff's writ on him, or accruing any time before his disclosure, any outstanding claim against the principal debtor to the prejudice of the attaching creditor.

Vermont.— Lynde *v.* Watson, 52 Vt. 648; Strong *v.* Mitchell, 19 Vt. 644. See, however, Husted *v.* Stone, 69 Vt. 149, 37 Atl. 253.

United States.— Schuler *v.* Israel, 120 U. S. 506, 7 S. Ct. 648, 30 L. ed. 707.

See 24 Cent. Dig. tit. "Garnishment," § 258.

23. *Maine.*— Cota *v.* Mishow, 62 Me. 124.

Massachusetts.— Doyle *v.* Gray, 110 Mass. 206; Hathaway *v.* Russell, 16 Mass. 473, holding, however, that a trustee cannot set off against the claim of the principal defendant any claims for unliquidated damages for mere torts.

Missouri.—Johnson *v.* Geneva Pub. Co., 122 Mo. 102, 26 S. W. 676.

New Hampshire.— Boston, etc., R. Co. *v.* Oliver, 32 N. H. 172.

United States.—North Chicago Rolling-Mill Co. *v.* St. Louis Ore, etc., Co., 152 U. S. 596, 14 S. Ct. 710, 38 L. ed. 565 [*reversing* 39 Fed. 308].

See 24 Cent. Dig. tit. "Garnishment," § 259.

24. *Georgia.*— Emmons *v.* Southern Bell Tel., etc., Co., 80 Ga. 760, 7 S. E. 232; Smith *v.* Johnston, 71 Ga. 748.

Illinois.— McNeill *v.* Donohue, 44 Ill. App.

tions it is held to be the garnishee's duty to make such defense, and where he fails to do so and allows a judgment to be taken against him he is liable to the principal defendant for the amount thus lost to him.[25] In a few jurisdictions it has been held that the exemption of personal property from execution is a personal privilege which can be claimed only by defendant, and that the garnishee cannot assert it for him by way of defense.[26]

8. Claim to Property by Third Person. A garnishee may set up as a defense in garnishment proceedings that the property or fund sought to be reached belongs to a third person, by virtue of an assignment or otherwise, and it is then for plaintiff to contest the fact of the assignment by a proper issue.[27]

42; Chicago, etc., R. Co. *v.* Mason, 11 Ill. App. 525.

Iowa.— Leiber *v.* Union Pac. R. Co., 49 Iowa 688 (holding, however, that exemptions from garnishment in another state, where the debtor resides, cannot be pleaded by a garnishee in Iowa, unless the amount due the debtor from the garnishee was also exempted by the Iowa statutes); Jenks *v.* Osceola Tp., 45 Iowa 554.

Kansas.— Missouri Pac. R. Co. *v.* Sharitt, 43 Kan. 375, 23 Pac. 430, 19 Am. St. Rep. 143, 8 L. R. A. 385, 389; Mull *v.* Jones, 33 Kan. 112, 5 Pac. 388.

Missouri.— Tourville *v.* Wabash R. Co., 61 Mo. App. 527. See also Day *v.* Burnham, 82 Mo. App. 538. *Contra,* Osborne *v.* Schutt, 67 Mo. 712 [*followed* in Dinkins *v.* Crunden-Martin Woodenware Co., 99 Mo. App. 310, 73 S. W. 246], holding that the right of exemption being a personal privilege which can be claimed only by defendant, the garnishee cannot assert it for him by way of defense.

Nebraska.— Union Pac. R. Co. *v.* Smersh, 22 Nebr. 751, 36 N. W. 139, 3 Am. St. Rep. 290; Turner *v.* Sioux City, etc., R. Co., 19 Nebr. 241, 27 N. W. 103; Wright *v.* Chicago, etc., R. Co., 19 Nebr. 175, 27 N. W. 90, 56 Am. Rep. 747. See also Mace *v.* Heath, 34 Nebr. 54, 51 N. W. 317.

Texas.— Davis *v.* McComack, 2 Tex. App. Civ. Cas. § 628, holding, however, that such defense cannot be made unless pleaded.

Vermont.— Clark *v.* Averill, 31 Vt. 512, 76 Am. Dec. 131.

Wisconsin.—Winterfield *v.* Milwaukee, etc., R. Co., 29 Wis. 589.

United States.— Hitchcock *v.* Galveston Wharf Co., 50 Fed. 263.

See 24 Cent. Dig. tit. "Garnishment," § 260.

Waiver of right.— Where a garnishee, after service, pays money to defendant, he cannot interpose the defense in the garnishment proceedings that the fund sought to be reached is exempt as wages, if it is shown that defendant had waived his right of exemption, although no notice of waiver had been given. Bibb *v.* Janney, 45 Ala. 329.

25. *Illinois.*— Chicago, etc., R. Co. *v.* Ragland, 84 Ill. 375; Welker *v.* Hinze, 16 Ill. App. 326.

Maine.— Lock *v.* Johnson, 36 Me. 464.

Massachusetts.— Burns *v.* Marland Mfg. Co., 14 Gray 487.

Texas.— Missouri Pac. R. Co. *v.* Whipsker, 77 Tex. 14, 13 S. W. 639, 19 Am. St. Rep. 734, 8 L. R. A. 321, holding that where the principal defendant has not voluntarily appeared, and has not been formally cited to appear in the garnishment proceeding, the garnishee is bound to disclose the facts showing the exemption. *Compare* Lalonde *v.* Sun Mut. Ins. Co., 2 Tex. App. Civ. Cas. § 55, holding that Rev. St. §§ 186, 188, 192, only requires the garnishee to make answer to the matters inquired of in the writ, and does not require him to set up any defense or exemption which the debtor may have.

Wisconsin.— Pierce *v.* Chicago, etc., R. Co., 36 Wis. 283; Winterfield *v.* Milwaukee, etc., R. Co., 29 Wis. 589.

See 24 Cent. Dig. tit. "Garnishment," § 260.

The exemption law has no extraterritorial effect, and a garnishee in an action in Tennessee is not obliged to set up that the debt, being for services performed in Alabama, is exempt under the Alabama laws. East Tennessee, etc., R. Co. *v.* Kennedy, 83 Ala. 462, 3 So. 852, 3 Am. St. Rep. 755. See also Moore *v.* Chicago, etc., R. Co., 43 Iowa 385, to the same effect.

26. Conley *v.* Chilcote, 25 Ohio St. 320; Jones *v.* Tracy, 75 Pa. St. 417; Reed *v.* Penrose, 36 Pa. St. 214, 2 Grant 472. See also Uhrich *v.* Gockley, 2 Pa. Dist. 350 (holding that a garnishee is not bound to make any claim for exemption on behalf of the debtor when the latter has himself been served with the attachment and has appeared); Pugh *v.* Bresnahan, 4 Kulp (Pa.) 311 (holding that a claim of the benefits of the exemption law by a garnishee not made until the filing of his answer and interrogatories, is too late).

27. *Alabama.*— Curtis *v.* Parker, 136 Ala. 217, 33 So. 935; Kimbrough *v.* Davis, 34 Ala. 583 (holding that if at any time prior to judgment the garnishee becomes aware of an assignment which may override the process, he should bring the fact to the notice of court and let the assignee appear, or he may be held to pay the debt twice); Myatt *v.* Lockhart, 9 Ala. 91; Foster *v.* Walker, 2 Ala. 177; Stubblefield *v.* Hagerty, 1 Ala. 38; Foster *v.* White, 9 Port. 221; Colvin *v.* Rich, 3 Port. 175. See also National Commercial Bank *v.* Miller, 77 Ala. 168, 54 Am. Rep. 50.

C. Bringing in New Parties. Since, to entitle the garnishing creditor to a judgment against the garnishee, it must appear that there is a debt due from the garnishee to defendant, or property in the possession of the garnishee belonging to defendant, where the answer discloses that the debt or property was assigned before the service of the garnishment process, or is claimed by a third person, then no judgment can be rendered against the garnishee without bringing in such assignee or claimant to contest his right thereto.[28] In some jurisdictions plaintiff cannot suggest for the garnishee that a third person claims the funds or property in his hands, but this must be done by garnishee, which requirement is a condition precedent to such person becoming a party.[29]

D. Answer or Disclosure — 1. Who May Make. Where a natural person is summoned as a garnishee, the general rule is that the answer or disclosure in response to interrogatories must be made by the garnishee in person, and an answer by his agent is insufficient.[30] Where a firm is summoned as garnishees, the general rule is that the answer of one member of the firm is sufficient, and his admissions will bind the firm.[31] Where a corporation is summoned as gar-

Arkansas.— Cross *v.* Haldeman, 15 Ark. 200.

Iowa.— Bailey *v.* Union Pac. R. Co., 62 Iowa 354, 17 N. W. 567.

Kansas.— Rock Island Lumber, etc., Co. *v.* Wichita Fourth Nat. Bank, 63 Kan. 768, 66 Pac. 1024, holding, however, that where the garnishee files an answer denying liability as garnishee, without disclosing notice of the claim of the third party to the fund, he will not be permitted to defend, or escape liability, on the ground that some third person is entitled to the fund.

Missouri.— Gates *v.* Kerby, 13 Mo. 157.

Oregon.— Phipps *v.* Rieley, 15 Oreg. 494, 16 Pac. 185, holding that while the garnishee is entirely indifferent to the parties, and can properly do nothing to aid either party to the litigation, yet he must act for his own protection and plead that the debt attempted to be garnished had been assigned whenever he has notice of such fact.

Pennsylvania.— Peterson *v.* Sinclair, 83 Pa. St. 250.

Vermont.— Hawley *v.* Hurd, 72 Vt. 122, 47 Atl. 401, 82 Am. St. Rep. 922, 52 L. R. A. 195; Downer *v.* Marsh, 28 Vt. 558.

United States.— Picquet *v.* Swan, 19 Fed. Cas. No. 11,133, 4 Mason 443.

See 24 Cent. Dig. tit. "Garnishment," § 261.

But see Decoster *v.* Livermore, 4 Mass. 101; Seitz *v.* Starks, (Mich. 1904) 98 N. W. 852.

28. *Alabama.*— Donald *v.* Nelson, 95 Ala. 111, 10 So. 317; Easton *v.* Lowery, 29 Ala. 454; Andrews *v.* Union Bank, 21 Ala. 576; Connoley *v.* Cheesborough, 21 Ala. 166. See also Saunders *v.* Garrett, 33 Ala. 454.

Kentucky.— Phœnix Ins. Co. *v.* Angel, 38 S. W. 1067, 18 Ky. L. Rep. 1034, holding, however, that an order to compel plaintiff to make a third person to whom the debtor has assigned a part of his claim against the garnishee, a party, the garnishee must have made his answer a cross-petition against the assignee, showing him to be a necessary party.

Michigan.— Kennedy *v.* McLellan, 76 Mich. 598, 43 N. W. 641.

Mississippi.— Fewell *v.* American Surety Co., 80 Miss. 782, 28 So. 755, 92 Am. St. Rep. 625.

Missouri.— McKittrick *v.* Clemens, 52 Mo. 160.

Pennsylvania.— Eckels *v.* Smyser, 180 Pa. St. 66, 36 Atl. 408; Stone *v.* Rohner, 7 Pa. Dist. 313, 21 Pa. Co. Ct. 61.

Texas.— Smith *v.* Texas, etc., R. Co., (Civ. App. 1897) 39 S. W. 969.

Virginia.—Chesapeake, etc., R. Co. *v.* Paine, 29 Gratt. 502.

West Virginia.— See O'Brien *v.* Camden, 3 W. Va. 20.

See 24 Cent. Dig. tit. "Garnishment," § 262.

But see Bean *v.* Mississippi Union Bank, 5 Rob. (La.) 333, holding that a suggestion by the garnishee that third persons be made parties to the proceedings comes too late after issue joined.

29. Capital City Bank *v.* Wakefield, 83 Iowa 46, 48 N. W. 1059; People's Bank *v.* Smith, 75 Miss. 753, 23 So. 428, 65 Am. St. Rep. 618; Porter *v.* West, 64 Miss. 548, 8 So. 207; State *v.* King County Super. Ct., 15 Wash. 500, 46 Pac. 1031. See also Reeves *v.* Harrington, 85 Iowa 741, 52 N. W. 517; Hawley *v.* Hurd, 72 Vt. 122, 47 Atl. 401, 82 Am. St. Rep. 922, 52 L. R. A. 195; Marx *v.* Parker, 9 Wash. 473, 37 Pac. 675, 43 Am. St. Rep. 849, holding that in garnishment of a city fund deposited by the city marshal to satisfy an individual judgment against him, it is error for the court on its own motion to require the city to intervene, although it was a proper case for an interpleader on the motion of the garnishee.

30. Cornell *v.* Payne, 115 Ill. 63, 3 N. E. 718; Lewis *v.* Franks, 18 La. Ann. 564; Dickson *v.* Morgan, 7 La. Ann. 490 (holding that the garnishee cannot confer authority on an agent to answer for him); Marshall *v.* Gray, 26 R. I. 517, 59 Atl. 744; Mensing *v.* Axer, 2 Tex. Unrep. Cas. 268. See also Dickson *v.* Morgan, 6 La. Ann. 562.

31. Travis *v.* Tartt, 8 Ala. 574 (holding that when one of the firm is garnished, the creditor must be considered as electing to

nishee, the answer or disclosure should be made by its officers or agents;[32] but since not every officer or agent of a corporation is authorized to answer for it, or can bind it by his answer, the proper person to make answer usually depends upon the statute regulating the proceeding, or upon a special authority conferred on such officer by the corporation, through its board of directors or otherwise.[33]

2. TIME FOR MAKING. The answer of the garnishee should be filed at the time designated therefor in the writ of garnishment, and where the time for answering is not designated in the writ, the answer should nevertheless be filed within the time allowed by the statute,[34] which is usually at the return-term of the writ, or at the first term after the service of the writ.[35] Upon failure of the garnishee to answer at the time designated in the writ, or fixed by the statute, judgment by default may be taken against him.[36] The court, however, may, in the exercise of

proceed against him solely, and on his answer admitting the indebtedness of the firm is entitled to have judgment against him); Dupierris *v.* Hallisay, 27 La. Ann. 132 (holding that if a separate answer of each member be desired, citation must be addressed to and served on each member); Ferguson *v.* Murphy, 10 La. Ann. 53; Anderson *v.* Wanzer, 5 How. (Miss.) 587, 35 Am. Dec. 170. But see Bean *v.* Barney, 10 Iowa 498, holding that an answer of a party garnished who is not notified as a member of the firm in which he is a partner will not bind the firm.

32. Head *v.* Merrill, 34 Me. 586 (holding that a corporation summoned as trustee may answer by attorney, and such attorney need not be a member of the corporation, or its general business agent); Duke *v.* Rhode Island Locomotive Works, 11 R. I. 599; Callahan *v.* Hallowell, 2 Bay (S. C.) 8.

33. *Alabama.*— Decatur, etc., R. Co. *v.* Crass, 97 Ala. 519, 12 So. 43; Montgomery *v.* Van Dorn, 41 Ala. 505; Planters', etc., Bank *v.* Leavens, 4 Ala. 753; Mobile Branch Bank *v.* Poe, 1 Ala. 396.

Illinois.— Chicago, etc., R. Co. *v.* Mason, 11 Ill. App. 525.

Indiana.— Sturgis *v.* Rogers, 26 Ind. 1, holding that under the general banking law the president of a bank is the only proper person to answer for the bank on process of garnishment.

Iowa.— Bailey *v.* Union Pac. R. Co., 62 Iowa 354, 17 N. W. 567.

Michigan.— Whitworth *v.* Pelton, 81 Mich. 98, 45 N. W. 500; Karp *v.* Citizens' Nat. Bank, 76 Mich. 679, 43 N. W. 680.

Vermont.— Udall *v.* Hartford School Dist. No. 4, 48 Vt. 588, holding that a disclosure of a school-district as trustee made by the clerk in the presence and with the assistance of a prudential committee binds the district.

Virginia.— Baltimore, etc., R. Co. *v.* Gallahue, 12 Gratt. 655, 65 Am. Dec. 254.

See 24 Cent. Dig. tit. "Garnishment," § 266.

Affidavit of authority.— Under the Alabama statute the party answering on behalf of the corporation must make affidavit showing his authority as agent for making such answer, and an answer filed without such affidavit is not one such as the court can predicate any order or judgment on. Friedman *v.* Cullman Bldg., etc., Assoc., 124 Ala. 344, 27 So. 332; Steiner *v.* Birmingham First Nat. Bank, 115 Ala. 379, 22 So. 30.

34. *Alabama.*— Foster *v.* White, 9 Port. 221.

Georgia.—Bearden *v.* Metropolitan St. R. Co., 82 Ga. 605, 9 S. E. 603; Hearn *v.* Adamson, 64 Ga. 608; Emanuel *v.* Smith, 38 Ga. 602.

Iowa.— Thomas *v.* Hoffman, 62 Iowa 125, 17 N. W. 431, holding that a commissioner appointed to take the answer of a garnishee may fix a time and place for that purpose, in default of action by the court in that respect.

New Hampshire.—Niel *v.* Perkins, 53 N. H. 429.

Pennsylvania.—Wiener *v.* Davis, 4 Pa. L. J. Rep. 91, 6 Pa. L. J. 567.

United States.— Hartshorn *v.* Allison, 11 Fed. Cas. No. 6,165, 1 Cranch C. C. 199.

See 24 Cent. Dig. tit. "Garnishment," § 267.

35. *Alabama.*— Randolph *v.* Peck, 4 Ala. 389; Robinson *v.* Starr, 3 Stew. 90, holding, however, in foreign attachment, where it is necessary to serve defendant by publication, the garnishee may answer at either the first or second term after service.

Georgia.— Averback *v.* Spivey, 122 Ga. 18, 49 S. E. 748 (holding that under the statute (Civ. Code (1895), §§ 4551, 4709), the garnishee in all cases has until the first day of the second term after service of summons in garnishment in which to answer); Jones *v.* Bibb Brick Co., 120 Ga. 321, 48 S. E. 25. Under a former Georgia statute the answer was required to be made on the first day of the second term after service of the writ. Sanders *v.* Miller, 60 Ga. 554.

Maine.— Warren *v.* Gibbs, 29 Me. 464.

Mississippi.— Thrasher *v.* Buckingham, 40 Miss. 67.

Rhode Island.— Phetteplace *v.* Lincoln, 1 R. I. 287, holding that the garnishee has the whole of the term next after the service of the attachment to come in and make affidavit.

See 24 Cent. Dig. tit. "Garnishment," § 267.

36. *District of Columbia.*—Banville *v.* Sullivan, 11 App. Cas. 23, holding, however, that a garnishee in default in answering may answer the interrogatories at any time before proceedings are had upon his default, and leave of court is not necessary to enable him

its discretion, upon good cause shown, grant the garnishee additional time for filing his answer,[37] or, in the proper exercise of its discretion, it may refuse him further time.[38] A garnishee should not answer before the return-day of the writ;[39] but where the answer is premature, it should not on that account be treated as insufficient, unless excepted to, and in that event the court may in its discretion permit an amendment.[40]

3. Form and Requisites. The statutes of the different states usually require that the answer of the garnishee shall be under oath,[41] and that it shall be in

to do so, especially where the writ is in aid of the execution of the decree in equity.

Georgia.— Bearden *v.* Metropolitan St. R. Co., 82 Ga. 605, 9 S. E. 603; Farley *v.* Bloodworth, 66 Ga. 349.

Iowa.— Scamahorn *v.* Scott, 42 Iowa 529.

Massachusetts.— Woods *v.* Rice, 4 Metc. 481.

Rhode Island.— Marshall *v.* Gray, 26 R. I. 517, 59 Atl. 744.

See 24 Cent. Dig. tit. "Garnishment," § 268.

See, however, Proseus *v.* Mason, 12 La. 16, holding that a garnishee, although ordered to answer within a given time, may answer thereafter, if no steps be taken in the meantime to fix his responsibility; he may answer at any time before the cause is at issue against defendant.

37. *Alabama.*— Talladega Mercantile Co. *v.* McDonald, 97 Ala. 508, 12 So. 34.

Georgia.— Atlanta Journal *v.* Brunswick Pub. Co., 111 Ga. 718, 36 S. E. 929; McCallum *v.* Brandt, 48 Ga. 439; Clark *v.* Chapman, 45 Ga. 486; Wall *v.* Shippard, 30 Ga. 923. See also Curry *v.* Augusta Nat. Bank, 53 Ga. 28.

Iowa.— See Boyer *v.* Hawkins, 86 Iowa 40, 52 N. W. 659.

Kansas.— Potter *v.* Northrop Banking Co., 59 Kan. 455, 53 Pac. 520, holding that an order of court made by agreement with the parties indefinitely extending the statutory time allowed the garnishee for filing answers does not deprive the court of jurisdiction.

South Carolina.— Swann *v.* Lee, 15 Rich. 164 (holding that after default a disclosure may be made *nunc pro tunc* by leave of court); Horsey *v.* Palmer, 9 Rich. 124; Caldwell *v.* Wilson, 2 Speers 75; Hunter *v.* Andrews, 2 Speers 73; Green *v.* McDonnell, 1 Bailey 304; Creagh *v.* Delane, 1 Nott & M. 189.

See 24 Cent. Dig. tit. "Garnishment," § 267.

38. Lehman *v.* Hudmon, 85 Ala. 135, 4 So. 741; O'Neill Mfg. Co. *v.* Ahrens, etc., Mfg. Co., 110 Ga. 656, 36 S. E. 66. See also Jones *v.* Bibb Brick Co., 120 Ga. 321, 48 S. E. 25 (holding that under Civ. Code (1895), § 4709, requiring the garnishee to answer at the first term, after the second term the court has no discretion, but can only allow the answer to be filed for some reason legally sufficient to excuse the failure); Willet *v.* Price, 32 Ga. 115 (where, after entry of judgment by default against the garnishee, and on the same day, the garnishee filed an answer denying that he had in his hands any effects of the principal defendant, and it was held that the answer came too late to benefit the garnishee, and the judgment against him could not be set aside).

39. Crammond *v.* U. S. Bank, 4 Serg. & R. (Pa.) 147; Haupt *v.* O'Mally, 2 Leg. Rec. (Pa.) 386; Gallagher *v.* Pugh, (Tex. Civ. App. 1902) 66 S. W. 118 (where a garnishee answers before the return-day, denying the indebtedness, it is error to refuse to require him to also answer on the return-day); Kneeland *v.* Cowles, 3 Pinn. (Wis.) 316, 4 Chandl. 46 (holding likewise that it is not necessary that the garnishee shall answer before judgment against the principal defendant, although the court acquired jurisdiction of the principal defendant solely through the garnishment proceedings). And see Ladd *v.* Franklin L. & T. Co., 24 R. I. 311, 53 Atl. 59.

40. Plant *v.* Mutual L. Ins. Co., 92 Ga. 636, 19 S. C. 719; Burrus *v.* Moore, 63 Ga. 405; Columbus Ins., etc., Co. *v.* Hirsh, 61 Miss. 74.

41. *Georgia.*—Burrus *v.* Moore, 63 Ga. 405.

Illinois.—Empire Car-roofing Co. *v.* Macey, 115 Ill. 390, 3 N. E. 417; Cornell *v.* Payne, 115 Ill. 63, 3 N. E. 718; Oliver *v.* Chicago, etc., R. Co., 17 Ill. 587.

Massachusetts.— Porter *v.* Stevens, 9 Cush. 530. But see Chapman *v.* Phillips, 8 Pick. 25, holding that it is not necessary that a general answer made by a trustee at the first term should be under oath.

Rhode Island.— Eddy *v.* Providence Mach. Co., 15 R. I. 7, 22 Atl. 1116, holding that where the trustee filed an affidavit properly describing the case to which it referred, the insertion of an erroneous date in the margin did not invalidate the affidavit.

South Carolina.— Callahan *v.* Hallowell, 2 Bay 18.

Tennessee.— Taylor *v.* Kain, 8 Baxt. 35.

Texas.— Cordes *v.* Kauffman, 29 Tex. 179.

Virginia.— Baltimore, etc., R. Co. *v.* Gallahue, 12 Gratt. 655, 65 Am. Dec. 254.

West Virginia.— Seamon *v.* Berkeley Bank, 4 W. Va. 339.

United States.— Faull *v.* Alaska Gold, etc., Min. Co., 14 Fed. 657, 8 Sawy. 420.

See 24 Cent. Dig. tit. "Garnishment," § 268.

But see Sutherland *v.* Burrill, 82 Mich. 13, 45 N. W. 1122, holding that a garnishee's answer in the justice's court need not be under oath, unless so required by plaintiff.

Answer of corporation.— In some jurisdictions the statute requires the answer of a corporation to be sworn to, as well as signed by the proper officer (Empire Car-roofing Co. *v.* Macey, 115 Ill. 390, 3 N. E. 417; Oliver *v.* Chicago, etc., R. Co., 17 Ill. 587), while in

writing;[42] and where the statute provides for an oral examination, the answer must be reduced to writing by the officer conducting the examination,[43] and signed by the garnishee.[44]

4. Sufficiency of. There must be a clear admission of goods, effects, or credits, not disputed or controverted by the garnishee, or trustee, in order to charge him as such on his answer or disclosure; and while in all doubtful cases the garnishee's answer must be construed most strongly against him, inferences cannot be drawn from any supposed discrepancies in his answer against the fair and natural import of the language taken altogether.[45] It is not necessary, however, that the answer should distinctly acknowledge an indebtedness to defendant,

other jurisdictions the answer is not required to be under the corporate seal (Montgomery *v.* Van Dorn, 41 Ala. 505).

Waiver of oath.— It has been held in California that the privilege of examination on oath is for the security of plaintiff, and not of the garnishee, and may be waived by the former. Roberts *v.* Landecker, 9 Cal. 262.

Agreed statement.— It has been held in Massachusetts that a statement of facts agreed to by plaintiff, defendant, and trustees in an action of foreign attachment is not admissible to charge the trustees, their sworn answers to the interrogatories being necessary. Barker *v.* Taber, 4 Mass. 81.

42. Easton *v.* Lowery, 29 Ala. 454; Roberts *v.* Barry, 42 Miss. 260; Eddy *v.* Providence Mach. Co., 15 R. I. 7, 22 Atl. 1116.

43. Pickler *v.* Rainey, 4 Heisk. (Tenn.) 335; Foster *v.* Saffell, 1 Swan (Tenn.) 90.

In New Hampshire under a former statute, however, the garnishee had the right to retire and prepare his answer, and to have the assistance of counsel in drawing the same. Boston, etc., R. Co. *v.* Salmon Falls Bank, 27 N. H. 455; Whitney *v.* Cilley, 18 N. H. 334. Under the present statute, the answers of trustees are to be written by the magistrate, as in the case of other depositions, and they cannot insist upon the right to retire with their counsel and prepare their answers. Morrison *v.* Annis, 48 N. H. 286.

44. Bell *v.* Short, 25 La. Ann. 312.

45. *Alabama.*—Mobile, etc., R. Co. *v.* Whitney, 39 Ala. 468; Lightfoot *v.* Rupert, 38 Ala. 666; Powell *v.* Sammons, 31 Ala. 552; Price *v.* Thomason, 11 Ala. 875; Mims *v.* Parker, 1 Ala. 421; Smith *v.* Chapman, 6 Port. 365 (where the garnishee admitted a debt to defendant of a certain sum, to be paid in "store accounts," for which he could not be held as garnishee under the attachment laws, and it was held that the court could not change his liability into a money demand, so as to bring it within the terms of the law authorizing a judgment against him); Presnall *v.* Mabry, 3 Port. 105.

Colorado.— Bragdon *v.* Bradt, 16 Colo. App. 65, 64 Pac. 248.

Georgia.— Bridges *v.* North, 22 Ga. 52.

Illinois.— People *v.* Johnson, 14 Ill. 342.

Indiana.— Thompson *v.* Shewalter, 17 Ind. App. 290, 46 N. E. 601.

Iowa.— Kiggins *v.* Woodke, 78 Iowa 34, 34 N. W. 789, 42 N. W. 576; Church *v.* Simpson, 25 Iowa 408; Morse *v.* Marshall, 22 Iowa 290.

Maine.— Rich *v.* Reed, 22 Me. 28.

Massachusetts.—Driscoll *v.* Hoyt, 77 Mass. 404; Lane *v.* Felt, 7 Gray 491; Kelly *v.* Bowman, 12 Pick. 383.

Michigan.— Lyon *v.* Kneeland, 58 Mich. 570, 25 N. W. 518; Sexton *v.* Amis, 39 Mich. 695.

Mississippi.— Williams *v.* Jones, 42 Miss. 270; Roy *v.* Head, 38 Miss. 544; Smith *v.* Bruner, 23 Miss. 508. But see Frost *v.* Patrick, 3 Sm. & M. 783, holding that where a narrative of facts in the answer of a garnishee does not disclose an indebtedness, and it does not appear that the truth of the answer was questioned, final judgment cannot be entered against the garnishee, but judgment should be entered *nisi* and a scire facias ordered.

New Hampshire.— Bean *v.* Bean, 33 N. H. 279.

Pennsylvania.— Allegheny Sav. Bank *v.* Meyer, 59 Pa. St. 361; Bell *v.* Philadelphia Binding, etc., Co., 10 Pa. Super. Ct. 38, 44 Wkly. Notes Cas. 48 (holding that answers of a garnishee to interrogatories filed in support of an attachment execution are not to be with the same strictness as an affidavit of defense); Wetherill *v.* Flanagan, 2 Miles 243; Wilson *v.* Merwine, 20 Pa. Co. Ct. 171; Fithian *v.* Brooks, 11 Am. L. J. 276; Kerr *v.* Diehl, 4 Pa. L. J. 112.

Rhode Island.— Browning *v.* Parker, 17 R. I. 183, 20 Atl. 835; Carpenter *v.* Gay, 12 R. I. 306.

South Carolina.— Burrell *v.* Letson, 1 Strobh. 239.

Tennessee.— Brown *v.* Slate, 7 Humphr. 112; Daniel *v.* Rawlings, 6 Humphr. 403; Moore *v.* Green, 4 Humphr. 299; Cheatham *v.* Trotter, Peck 198.

Texas.— Montague First Nat. Bank *v.* Robertson, (Sup. 1892) 19 S. W. 1069.

Vermont.— McDaniels *v.* Morton, 34 Vt. 101; Worthington *v.* Jones, 23 Vt. 546.

Washington.— Timm *v.* Stegman, 6 Wash. 13, 32 Pac. 1004.

United States.— Picquet *v.* Swan, 19 Fed. Cas. No. 11,133, 4 Mason 443.

See 24 Cent. Dig. tit. "Garnishment," § 269.

The answer of the garnishee was held to be sufficient to show that he was not indebted to the principal defendant, and that he was entitled to his discharge in the following cases: Hall *v.* Magee, 27 Ala. 414; Lundie *v.* Bradford, 26 Ala. 512; Junction R. Co. *v.* Cleneay, 13 Ind. 161; Hibbard *v.* Everett, 65 Iowa 372, 21 N. W. 683; Stanford Nat. Bank *v.* Bruce, 10 Ky. L. Rep. 79; Larche *v.* Kent,

if it states facts from which an indebtedness for a specific sum can be adjudged by the court.[46] The answer of the garnishee should state every fact tending to show that he is not liable in the garnishment proceedings, and where he discloses all that is necessary to inform plaintiff as to what he is entitled to, and to enable the court to determine the question of right in the property or debt disclosed, his answer is sufficient;[47] and he is not confined to facts which he can swear to of

10 La. Ann. 146; Hatheway *v.* Reed, 127 Mass. 136; Crossman *v.* Crossman, 21 Pick. (Mass.) 21; Smith *v.* Holland, 81 Mich. 471, 45 N. W. 1017; Weirich *v.* Scribner, 44 Mich. 73, 6 N. W. 91; Spears *v.* Chapman, 43 Mich. 541, 5 N. W. 1038; Vanderhoof *v.* Holloway, 41 Minn. 498, 43 N. W. 331; Cole *v.* Sater, 5 Minn. 468; Chase *v.* North, 4 Minn. 381; Pioneer Printing Co. *v.* Sanborn, 3 Minn. 413; Kidder *v.* Sibley, 3 Minn. 406; Banning *v.* Sibley, 3 Minn. 389; Harney *v.* Ellis, 11 Sm. & M. (Miss.) 348; Thompson *v.* Shelby, 3 Sm. & M. (Miss.) 296; Swisher *v.* Fitch, 1 Sm. & M. (Miss.) 541; Heywood *v.* Brooks, 47 N. H. 231; Houpt *v.* Lewis, 2 Kulp (Pa.) 337; Northam *v.* Cartright, 10 R. I. 19; Van Vleet *v.* Stratton, 91 Tenn. 473, 19 S. W. 428; Davenport *v.* Swan, 9 Humphr. (Tenn.) 186; Turner *v.* Armstrong, 9 Yerg. (Tenn.) 412; Capital City Bank *v.* Anderson Transfer Co., (Tenn. Ch. App. 1896) 36 S. W. 964; Huff *v.* Mills, 7 Yerg. (Tenn.) 42; Mason *v.* Beebee, 44 Fed. 556.

The answer was held to sufficiently disclose an indebtedness to warrant a judgment charging the garnishee in the following cases: Gould *v.* Meyer, 36 Ala. 565; Self *v.* Kirkland, 24 Ala. 275; Baker *v.* Moody, 1 Ala. 315; Commercial Nat. Bank *v.* Manufacturers Equitable Assoc., 20 Ill. App. 133; Smith *v.* Chicago, etc., R. Co., 60 Iowa 312, 14 N. W. 335; Morgan *v.* McLaren, 4 Greene (Iowa) 536; Brown *v.* Preston, 48 S. W. 974, 20 Ky. L. Rep. 1103; Lock *v.* Johnson, 36 Me. 464; Gage *v.* Coombs, 7 Me. 394; Sullivan *v.* Langley, 128 Mass. 235; Sears *v.* Columbian Ins. Co., 12 Allen (Mass.) 367; Morse *v.* Bebee, 2 Allen (Mass.) 466; Shaw *v.* Bunker, 2 Metc. (Mass.) 376; Graves *v.* Walker, 21 Pick. (Mass.) 160; Thorndike *v.* De Wolf, 6 Pick. (Mass.) 120; Sebor *v.* Armstrong, 4 Mass. 206; Allen *v.* Hazen, 26 Mich. 142; Sweeney *v.* Schlessinger, 18 Mont. 326, 45 Pac. 213; Goodman *v.* Henley, 80 Tex. 499, 16 S. W. 432; Melton *v.* Lewis, 74 Tex. 411, 12 S. W. 93.

46. *Alabama.*—Jefferson County Sav. Bank *v.* Nathan, 138 Ala. 342, 35 So. 355; Stephens *v.* Cox, 124 Ala. 448, 26 So. 981; White *v.* Kahn, 103 Ala. 308, 15 So. 595; Perine *v.* George, 5 Ala. 641 (holding that, although the answer of a garnishee may deny indebtedness to defendant, if he states circumstances and facts which show an indebtedness, he may be charged on his answer); Mann *v.* Buford, 3 Ala. 312, 37 Am. Dec. 691. See also Security Loan Assoc. *v.* Weems, 69 Ala. 584. But see Fortune *v.* State Bank, 4 Ala. 385.

Delaware.— See Mann *v.* Peer, 4 Pennew. 279, 55 Atl. 335.

Kansas.— Harwi Hardware Co. *v.* Klippert, 67 Kan. 743, 74 Pac. 254, holding that where the answer shows an indebtedness on a note, and does not show that such note is negotiable, a judgment against the garnishee is not void.

Maine.—Lamb *v.* Franklin Mfg. Co., 18 Me. 187.

Michigan.— Grinnell *v.* Niagara F. Ins. Co., 127 Mich. 19, 86 N. W. 435.

Minnesota.— Milliken *v.* Mannheimer, 49 Minn. 521, 52 N. W. 139; Donnelly *v.* O'Connor, 22 Minn. 309.

Nebraska.— Cornish *v.* Russell, 32 Nebr. 397, 49 N. W. 379.

New Hampshire.— Fogg *v.* Worster, 49 N. H. 503.

Ohio.— New London Nat. Bank *v.* Lake Shore, etc., R. Co., 21 Ohio St. 221.

Pennsylvania.—Lennig *v.* Fischer, 12 Wkly. Notes Cas. 338.

Vermont.— Newell *v.* Ferris, 16 Vt. 135.

See 24 Cent. Dig. tit. "Garnishment," § 269.

47. *Colorado.*— Troy Laundry, etc., Co. *v.* Denver, 11 Colo. App. 368, 53 Pac. 256, where the answer was held sufficient to raise the garnishee's privilege of exemption.

Kansas.— Harwi Hardware Co. *v.* Klippert, 67 Kan. 743, 74 Pac. 254.

Louisiana.— Maduel *v.* Mousseau, 28 La. Ann. 691 (holding that where an interrogatory is not explicitly answered, but is sufficiently answered in the same connection by answers to other interrogatories, the answer is sufficient); Bell *v.* Short, 25 La. Ann. 312; Lewis *v.* Homer, 23 La. Ann. 254; Taylor *v.* McGee, 19 La. Ann. 374 (holding, however, that the garnishee is not required to answer categorically every question asked in the interrogatories; it is sufficient if his answers negative every fact inquired of in the interrogatories); Carroll *v.* Wallace, McGloin 316.

Michigan.— Drake *v.* Lake Shore, etc., R. Co., 69 Mich. 168, 37 N. W. 70, 13 Am. St. Rep. 382.

Minnesota.— McLean *v.* Sworts, 69 Minn. 128, 71 N. W. 925, 65 Am. St. Rep. 556; Prince *v.* Heenan, 5 Minn. 347, holding that under the statute requiring the garnishee to "answer touching his indebtedness to the defendant, and any property, money, or effects of the defendant in his possession or under his control," he may be questioned in both respects, although the affidavit may only state one of the grounds as the basis for issuing the summons.

Missouri.— Ronan *v.* Dewes, 17 Mo. App. 306.

Pennsylvania.— McCallum *v.* Lockhart, 179 Pa. St. 427, 36 Atl. 231, holding that the garnishee need not set forth specifically and

his own knowledge, but he may state upon information and belief matters that he has heard from the claimants or other persons, affecting the question;[48] and he may likewise incorporate into, and make a part of his answer, the affidavit of a third person, or any document or letter which he is willing to swear that he believes to be true, and which, in his opinion, is likely to affect his liability.[49]

5. Matter Pleaded in Defense. Where, however, the garnishee answers admitting an indebtedness to defendant, but at the same time setting up some matter of defense — such as the assignment of the debt, its exemption from garnishment, or set-off or counter-claim — no judgment should be rendered against the garnishee on such answer, but an issue should be tendered by plaintiff, and submitted to a jury.[50] Where the answer of the garnishee discloses that he may in a certain contingency have money in his hands belonging to defendant, it is error to discharge him, and the proceedings should be continued for further disclosure.[51]

at length the nature and character of his defense, but only such facts as are material to the admission or denial of indebtedness to defendant.

Texas.— Adams *v.* McCown, 15 Tex. 349, holding that where the answer of the garnishee is coextensive with the matters propounded in the commission to take it, it is sufficient.

Wisconsin.— John R. Davis Lumber Co. *v.* Milwaukee First Nat. Bank, 84 Wis. 1, 54 N. W. 108.

See 24 Cent. Dig. tit. "Garnishment," § 269.

General answer.— In Maine where a trustee in his general answer denies his liability as trustee of the principal defendant, this denial is merely in the nature of a plea, which must be sustained by a full and satisfactory disclosure in answer to plaintiff's interrogatories before the trustee can be discharged. Toothaker *v.* Allen, 41 Me. 324.

In Michigan a garnishee cannot be required to disclose concerning matters not alleged in the affidavit for the writ of garnishment (Mack *v.* Brown, 20 Mich. 335); and an admission by the garnishee of an indebtedness to the principal defendant is not within the scope of a claim that he holds or controls property, money, etc., belonging to the principal defendant, nor will it authorize a judgment on such claim (Botsford *v.* Simmons, 32 Mich. 352).

48. Fay *v.* Sears, 111 Mass. 154; Hawes *v.* Langton, 8 Pick. (Mass.) 67 (holding, however, that the trustee is not obliged to disclose any facts which may have been communicated to him by others of which he has no personal knowledge); Shaw *v.* Bunker, 2 Metc. (Mass.) 376; Crossman *v.* Crossman, 21 Pick. (Mass.) 21; Crisp *v.* Ft. Wayne, etc., R. Co., 98 Mich. 648, 57 N. W. 1050, 22 L. R. A. 732; Drake *v.* Lake Shore, etc., R. Co., 69 Mich. 168, 37 N. W. 70, 13 Am. St. Rep. 382; Sexton *v.* Amos, 39 Mich. 605. See Bean *v.* Barney, 10 Iowa 498, holding that a garnishee may be required to disclose what he knows in reference to persons other than himself who may have property or credits of the debtor under their control. See, however, Plant *v.* New York Mut. L. Ins. Co., 92 Ga. 636, 19 S. E. 719, holding that an answer sworn to by an agent "to the best of his knowledge and belief" is insufficient, without a further statement pointing out what facts he knows, and what facts he believes, together with the grounds of his belief.

49. Chase *v.* Bradley, 17 Me. 89; Kelly *v.* Bowman, 12 Pick. (Mass.) 383; Willard *v.* Sturtevant, 7 Pick. (Mass.) 194; Bell *v.* Jones, 17 N. H. 307. See also Lea *v.* Musser, 2 Pa. L. J. Rep. 306, 4 Pa. L. J. 87, holding, however, that the garnishee is not required to annex to his answer articles of correspondence between him and defendant.

50. *Alabama.*— Wicks *v.* Mobile Branch Bank, 12 Ala. 594; Allen *v.* Morgan, 1 Stew. 9.

Arkansas.— Patterson *v.* Harland, 12 Ark. 158.

Georgia.— Curry *v.* Augusta Nat. Bank, 53 Ga. 28; Thompson *v.* Fischesser, 45 Ga. 369.

Illinois.— Truitt *v.* Griffin, 61 Ill. 26; Wilhelmi *v.* Haffner, 52 Ill. 222; Horn *v.* Booth, 22 Ill. App. 385.

Massachusetts.—Cahill *v.* Bigelow, 18 Pick. 369; Foster *v.* Sinkler, 4 Mass. 450. See also Willard *v.* Sturtevant, 7 Pick. 194; Webster *v.* Gage, 2 Mass. 503.

Michigan.— Hobson *v.* Kelly, 87 Mich. 187, 49 N. W. 533.

Mississippi.— Little *v.* Nelson, 61 Miss. 672.

Missouri.— McCause *v.* McClure, 38 Mo. 410. See also Hopkins *v.* Huff, 67 Mo. App. 394.

Oregon.— Robertson *v.* Robertson, 37 Oreg. 339, 62 Pac. 377, 82 Am. St. Rep. 756.

Tennessee.— Vertrees *v.* Hicks, 4 Baxt. 380; Cooley *v.* Young, 8 Heisk. 852 note.

See 24 Cent. Dig. tit. "Garnishment," §§ 269, 270.

Compare McCallum *v.* Lockhart, 179 Pa. St. 427, 36 Atl. 231.

51. South Alabama, etc., R. Co. *v.* Falkner, 49 Ala. 115; Cutter *v.* Perkins, 47 Me. 557; Zimmer *v.* Davis, 35 Mich. 39; Weil *v.* Posten, 77 Mo. 284. See also Watkins *v.* Field, 6 Ark. 391.

Where the answer of the garnishee is not satisfactory to plaintiff, he is entitled to examine the garnishee orally in presence of the court, or he may make affidavit that he believes the answer to be untrue, and have an issue made up for trial. Wright *v.* Swanson, 46 Ala. 708.

6. Oral Examination. In some jurisdictions the statutes provide for the oral examination of the garnishee in the presence of the court, where plaintiff so elects,[52] upon proper notice to the garnishee.[53]

7. Objections and Exceptions. Where the answer of the garnishee fails to fully state all the facts necessary to a full disclosure, plaintiff may except to the sufficiency of the answer, file interrogatories, and demand a trial on the disclosure.[54]

8. Further Disclosure. Where the garnishee denies any indebtedness to defendant, or the possession or control of any money or effects belonging to him, and plaintiff desires a further disclosure by the garnishee, the usual method of procedure is for him to file a supplemental complaint or petition, setting forth the matters concerning which such further disclosure is desired.[55] In some jurisdic-

52. *Ex p.* Cincinnati, etc., R. Co., 78 Ala. 258; Wright *v.* Swanson, 46 Ala. 708; Elwood *v.* Crowley, 64 Iowa 68, 19 N. W. 857, holding that under Iowa Code (1873), § 2982, plaintiff has no absolute unrestricted right to examine the garnishee, but the court may require the questions to be submitted in writing, to be passed on by it before being answered. See also Whitman *v.* Keith, 18 Ohio St. 134, holding that where a special examination of the garnishee is ordered, it is proper for the court to appoint a commissioner to take the same, as it is not necessary that the examination be had in open court.

In New York, Code Civ. Proc. § 651, provides that if a person served with warrant of attachment issued in an action against a third person refuses to give a certificate as to the property, if any, in his hands belonging to defendant, the court may require him to submit to an examination under oath concerning the same. To secure an order for this examination it is not necessary to show that the person so served with the attachment warrant has in his hands property belonging to defendant, but an affidavit by the sheriff that such person failed to furnish a certificate that he did not hold any property belonging to defendant or for his benefit will not justify an order for his examination, as the affidavit would be true if the person sought to be examined had given a certificate specifying what property he held belonging to defendant. Donner *v.* Mercy, 81 N. Y. App. Div. 181, 80 N. Y. Suppl. 1030.

Waiver.— If plaintiff consents to receive the answer of the garnishee filed by him in court, he thereby waives his right to have an examination in open court. Stubblefield *v.* Hagerty, 1 Ala. 38; Scales *v.* Swan, 9 Port. (Ala.) 163.

53. Dwight *v.* Webster, 7 La. Ann. 538; Petway *v.* Goodin, 12 Rob. (La.) 445.

54. *Alabama.*—Wright *v.* Swanson, 46 Ala. 708.

Georgia.— Burrus *v.* Moore, 63 Ga. 405, holding that where the garnishee's answer is neither traversed nor excepted to, plaintiff cannot have it stricken from the record on motion, or have judgment for insufficiency of the answer, as his remedy for a defective answer is by traverse or exceptions.

Indiana.— Becknell *v.* Becknell, 110 Ind. 42, 10 N. E. 414.

Maine.— Whitney *v.* Kelley, 67 Me. 377; Dexter *v.* Field, 32 Me. 174.

Massachusetts.—Graves *v.* Walker, 21 Pick. 160. See also Hennessey *v.* Farrell, 4 Cush. 267.

Nebraska.— Pope *v.* Kingman, 2 Nebr. (Unoff.) 184, 96 N. W. 519, holding that issuance of execution against attachment debtor, and return thereof unsatisfied, are not required before proceedings against the garnishee for an unsatisfactory answer, under Code Civ. Proc. § 225. See also Lau *v.* W. B. Grimes Dry-Goods Co., 38 Nebr. 215, 56 N. W. 954.

New Hampshire.— See Sampson *v.* Hyde, 16 N. H. 492 (holding that a trustee's disclosure when ambiguous must be construed against him, although not to the extent of contradicting the plain meaning of the language used); Young *v.* Bride, 25 N. H. 482 (holding that the question of the liability of a trustee is triable by a jury, even where no disclosure has been made).

Ohio.— Pennsylvania R. Co. *v.* Peoples, 31 Ohio St. 537; Myers *v.* Smith, 29 Ohio St. 120; Martin *v.* Gayle, 2 Disn. 86.

Oregon.— Dawson *v.* Maria, 15 Oreg. 556, 16 Pac. 413, where the answer was held to be frivolous and insufficient.

Pennsylvania.— Lanback *v.* Black, 1 Wkly. Notes Cas. 314.

Texas.— Jemison *v.* Scarborough, 56 Tex. 358; Galveston Dry Goods Co. *v.* Blum, 23 Tex. Civ. App. 703, 57 S. W. 1121; Cullers *v.* Sherman City Bank, (Civ. App. 1894) 27 S. W. 900.

Canada.— Menard *v.* Brouillet, 16 Quebec Super. Ct. 148.

See 24 Cent. Dig. tit. "Garnishment," § 273.

55. Security Loan Assoc. *v.* Weems, 69 Ala. 584 (holding that a garnishee after answering remains before the court for the purpose of receiving its judgment; and notice of application for an order for a further answer, and of the order itself, will be imputed to him); Donaldson *v.* Security Trust, etc., Co., 56 S. W. 424, 21 Ky. L. Rep. 1796; Lee *v.* Walston, 8 Ky. L. Rep. 129; People *v.* Cass Cir. Judge, 39 Mich. 407; Mahoney *v.* McLean, 28 Minn. 63, 9 N. W. 76 (holding, however, that where plaintiff, after a full disclosure by the garnishee, has submitted the matter to the court, and the court has decided it, it is too late to move for leave to file a supplemental complaint, as that would give a second trial as to the garnishee's liability); Ingersoll *v.* First Nat. Bank, 10

tions, however, the court may in its discretion compel the garnishee to make further disclosure, upon the filing of additional interrogatories by plaintiff.[56] However, a garnishee will not be ordered to make further disclosure where the interrogatories propounded relate entirely to immaterial or irrelevant matters.[57]

9. Amended or Supplemental Answer. The court in which a garnishment proceeding is pending may in its discretion permit the garnishee to amend his answer, or permit him to file an additional or supplemental answer;[58] and it

Minn. 396. See also Farmers', etc., Bank *v.* Welles, 23 Minn. 475.

Application.— In Minnesota in proceedings in garnishment, notice of an application for leave to serve a supplemental complaint, and such complaint itself, may be served on defendant by service on his attorney, such notice not being in the nature of an original process which must be served on defendant himself. Trunkey *v.* Crosby, 33 Minn. 464, 23 N. W. 846. See also Johnson *v.* Bergman, 80 Minn. 73, 82 N. W. 1108; Gallagher's Estate, 8 Pa. Dist. 699; Tiers *v.* Woodruff, 16 Montg. Co. L. Rep. (Pa.) 36.

56. Brennan *v.* McInnis, 173 Mass. 471, 53 N. E. 896; Nutter *v.* Framingham, etc., R. Co., 131 Mass. 231; Boynton *v.* Foster, 7 Metc. (Mass.) 415; Smith *v.* Stearns, 20 Pick. (Mass.) 20; Hazen *v.* Emerson, 9 Pick. (Mass.) 144; Grauer *v.* Watson, 3 Pa. Dist. 641; Parmer *v.* Allen, 14 Wkly. Notes Cas. (Pa.) 211; Biddle *v.* Gaffney, 12 Wkly. Notes Cas. (Pa.) 534; Moore *v.* Green, 4 Humphr. (Tenn.) 299; Seamon *v.* Berkeley Bank, 4 W. Va. 339. See Wyler *v.* Blevins, (Tenn. 1904) 82 S. W. 829, holding that the proper practice, where the amount in controversy is less than one thousand dollars, and the answer of the garnishee is indeterminate, is to summon the garnishee for a new examination, in which case other evidence than his answer may be heard, and not to move to set aside such answer. *Compare* Wilks *v.* Mobile Branch Bank, 12 Ala. 594; Columbus Ins., etc., Co. *v.* Hirsh, 61 Miss. 74; Lusk *v.* Galloway, 52 Wis. 164, 8 N. W. 608.

Where plaintiff takes judgment against the garnishee on his answers to interrogatories, he cannot afterward require answers to additional interrogatories, but must issue a fresh attachment. Sweeting *v.* Wanamaker, 4 Pa. Dist. 245, 16 Pa. Co. Ct. 268, 36 Wkly. Notes Cas. 279.

57. State Nat. Bank *v.* Boatner, 39 La. Ann. 843, 2 So. 589; Callender *v.* Furbish, 46 Me. 226; Humphrey *v.* Warren, 45 Me. 216; Warner *v.* Perkins, 8 Cush. (Mass.) 518; Rollin *v.* Blyler, 12 Wkly. Notes Cas. (Pa.) 519 (holding that in attachment execution on a judgment, where the answer of the garnishee stated that defendant never had an account with it, the garnishee will not be required to set forth the state of its account with the firm of which defendant is a partner); Rhine *v.* Danville, etc., R. Co., 10 Phila. (Pa.) 336. See also Carrique *v.* Sidebottom, 3 Metc. (Mass.) 297, holding that after a trustee has answered an interrogatory fully and intelligently, the court will not require him to answer further on his being again asked to answer the interrogatory distinctly.

58. *Alabama.*— Buford *v.* Welborn, 6 Ala. 818.

California.— Smith *v.* Brown, 5 Cal. 118.

Georgia.— Plant *v.* New York Mut. L. Ins. Co., 92 Ga. 636, 19 S. E. 719.

Illinois.— Fanning *v.* Smith, 84 Ill. App. 77.

Iowa.— Battell *v.* Lowery, 46 Iowa 49. See also Stockton *v.* Burlington, 4 Greene 84.

Louisiana.— Tapp *v.* Green, 22 La. Ann. 42; Davis *v.* Oakford, 11 La. Ann. 379, holding that where the answer of the garnishee is responsive to the questions, although it might be more comprehensive, it is proper to allow the garnishee to answer more fully, but where it is evasive, amendment should not be permitted. See also Rochereau *v.* Bringier, 22 La. Ann. 129. *Contra*, Deblanc *v.* Webb, 5 La. 82.

Maine.— Stedman *v.* Vickery, 42 Me. 132. But see American Buttonhole, etc., Mach. Co. *v.* Burgess, 75 Me. 52, holding that one summoned as trustee has no right to disclose further, while his exceptions to the ruling of the court charging him are pending.

Massachusetts.— Winsted Bank *v.* Adams, 97 Mass. 110; Collins *v.* Smith, 12 Gray 431; Carrique *v.* Sidebottom, 3 Metc. 297; Shaw *v.* Bunker, 2 Metc. 376; Hovey *v.* Crane, 12 Pick. 167; Parker *v.* Danforth, 16 Mass. 299; Sebor *v.* Armstrong, 4 Mass. 206.

Michigan.— Gerow *v.* Hyde, 131 Mich. 442, 91 N. W. 615; Dunn *v.* Detroit Sav. Bank, 118 Mich. 547, 77 N. W. 6; Drake *v.* Lake Shore, etc., R. Co., 69 Mich. 168, 37 N. W. 70, 13 Am. St. Rep. 382; Newell *v.* Blair, 7 Mich. 103.

Mississippi.— Webb *v.* Miller, 24 Miss. 638, 57 Am. Dec. 189.

Missouri.— Bell *v.* Strow, 59 Mo. 118.

Oregon.— See Adamson *v.* Frazier, 40 Oreg. 273, 66 Pac. 810, 67 Pac. 300.

Pennsylvania.—Mullen *v.* Maguire, 1 Wkly. Notes Cas. 577.

Rhode Island.— Cross *v.* Brown, 19 R. I. 220, 33 Atl. 147 (holding that it is within the discretion of the court to allow the garnishee to make a supplemental disclosure, even though it appear on the face thereof that it is made at the instance of, and in collusion with, the claimant of the fund garnished); Gracy *v.* McCarty, 12 R. I. 168.

South Carolina.— Murrell *v.* Johnson, 3 Hill 12.

Texas.— Simon *v.* Ash, 1 Tex. Civ. App. 202, 20 S. W. 719.

Wisconsin.— Rock *v.* Collins, 99 Wis. 630,

may likewise in its discretion refuse to permit such amendment or additional or supplemental answer.[59]

10. Conclusiveness of — a. General Rule. The general rule is that where no issue is raised on the answers of the garnishee or trustee, they must be taken as true, and the rights of the parties are determined by the facts therein disclosed.[60] This rule applies even where the matter contained in the answer is stated on information and belief.[61] In some jurisdictions the statutes provide that the answers and statements sworn to by the garnishee or trustee shall be considered as true, in deciding how far he is chargeable, but either party may allege and prove any facts not stated or denied by the garnishee or trustee that may be material in deciding that question.[62] In other jurisdictions, however, the answer

75 N. W. 426, 67 Am. St. Rep. 885; Crerar *v.* Milwaukee, etc., R. Co., 35 Wis. 67.

See 24 Cent. Dig. tit. "Garnishment," § 274.

59. Gould *v.* Meyer, 36 Ala. 565; Soule *v.* Kennebec Maine Ice Co., 85 Me. 166, 27 Atl. 92; Milliken *v.* Mannheimer, 49 Minn. 521, 52 N. W. 139; Atlantic Ins. Co. *v.* Sinker, 1 Tex. App. Civ. Cas. § 954.

60. *Alabama.*— Robinson *v.* Rapelye, 2 Stew. 86.

Georgia.— See Stover *v.* Adams, 114 Ga. 171, 39 S. E. 864.

Illinois.— Payne *v.* Chicago, etc., Co., 170 Ill. 607, 48 N. E. 1053; Cairo, etc., R. Co. *v.* Killenberg, 82 Ill. 295; Illinois Cent. R. Co. *v.* Cobb, 48 Ill. 402; Rankin *v.* Simonds, 27 Ill. 352; Pierce *v.* Carleton, 12 Ill. 358, 54 Am. Dec. 405; McCoy *v.* Williams, 6 Ill. 584; Deffenbaugh *v.* Andrew, 91 Ill. App. 142; Manowsky *v.* Conroy, 33 Ill. App. 141. See, however, Kergin *v.* Dawson, 6 Ill. 86.

Iowa.— Bean *v.* Barney, 10 Iowa 498; Meeker *v.* Sanders, 6 Iowa 61.

Louisiana.—Henry *v.* Bew, 43 La. Ann. 476, 9 So. 101; Flash *v.* Norris, 27 La. Ann. 93; Coleman *v.* Fennimore, 16 La. Ann. 253; Barnes *v.* Wayland, 14 La. Ann. 791; Helme *v.* Pollard, 14 La. Ann. 306; Oakey *v.* Mississippi, etc., R. Co., 13 La. 567. See also Citizen's Bank *v.* Bringier, 22 La. Ann. 118.

Maine.— Steinfieldt *v.* Jodrie, 89 Me. 65, 35 Atl. 1008; Hamilton *v.* Hill, 86 Me. 137, 29 Atl. 956; Plummer *v.* Rundlett, 42 Me. 365; Fletcher *v.* Clarke, 29 Me. 485; Lamb *v.* Franklyn Mfg. Co., 18 Me. 187 (holding, however, that where the trustee sets up rights, or draws conclusions arising out of or resulting from the facts stated, such rights or conclusions are subject to the revision of the court); Chase *v.* Bradley, 17 Me. 89.

Massachusetts.— Smith *v.* Stearns, 19 Pick. 20 (holding, however, that a judgment recovered by the trustee against the principal defendant after the service of the trustee process, and which he claims to set off against the debt, is not conclusive in his favor, and therefore he may be interrogated about it); Kelly *v.* Bowman, 12 Pick. 383; Hawes *v.* Langton, 8 Pick. 67; Hatch *v.* Smith, 5 Mass. 42; Whitman *v.* Hunt, 4 Mass. 272; Stackpole *v.* Newman, 4 Mass. 85; Barker *v.* Taber, 4 Mass. 81.

Mississippi.— Williams *v.* Jones, 42 Miss. 270; Swisher *v.* Fitch, 1 Sm. & M. 541.

Missouri.— McEvoy *v.* Lane, 9 Mo. 48; Davis *v.* Knapp, 8 Mo. 657; Hopkins *v.* Huff, 67 Mo. App. 394 (holding, however, that the above rule does not apply where the answer sets forth mere conclusions, and not issuable facts); Reinhart *v.* Empire Soap Co., 33 Mo. App. 24; Ronan *v.* Dewes, 17 Mo. App. 306.

New Hampshire.— Sise *v.* Drew, 18 N. H. 409.

Ohio.— Buchanan *v.* Mitchell, 8 Ohio Dec. (Reprint) 437, 8 Cinc. L. Bul. 8.

Oregon.—Batchellor *v.* Richardson, 17 Oreg. 334, 21 Pac. 392.

Tennessee.— Walton *v.* Sharp, 11 Lea 578; Moore *v.* Green, 4 Humphr. 299; Cheatham *v.* Trotter, Peck 198.

Wisconsin.— Davis *v.* Pawlette, 3 Wis. 300, 62 Am. Dec. 690.

United States.— Central L. & T. Co. *v.* Campbell Commission Co., 173 U. S. 84, 19 S. Ct. 346, 43 L. ed. 623 [*reversing* 5 Okla. 396, 49 Pac. 48].

See 24 Cent. Dig. tit. "Garnishment," § 275.

In garnishment proceedings against several garnishees, the disclosures cannot be taken in aid or explanation of each other, but each garnishee is held liable or discharged on his own disclosure only. Rundlet *v.* Jordan, 3 Me. 47.

Garnishee's answer as constituting account stated see Accounts and Accounting, 1 Cyc. 373 note 92.

61. Paschall *v.* Whitsett, 11 Ala. 472; Emery *v.* Bidwell, 140 Mass. 271, 3 N. E. 24; Clinton First Nat. Bank *v.* Bright, 126 Mass. 535; Fay *v.* Sears, 111 Mass. 154; Burnham *v.* Dunn, 35 N. H. 556; Picquet *v.* Swan, 19 Fed. Cas. No. 11,133, 4 Mason 443. See, however, Jackson *v.* Shipman, 28 Ala. 488, holding that the garnishee's mere statement that he "is advised and believes" the judgment has been satisfied is not an averment that such fact exists.

62. *Kentucky.*— Wilder *v.* Shea, 13 Bush 128, holding that the answer of a garnishee denying his liability determines the case so far as he is concerned, and the court cannot hear proof tending to deny the truth of the answer.

Maine.— Schwartz *v.* Flaherty, 99 Me. 463, 59 Atl. 737, holding that a trustee's disclosure is taken to be true as to the amount with which he is chargeable, and a judgment on it is conclusive on plaintiff and defendant unless

of the garnishee is *prima facie* evidence only of the truth of the facts therein stated, and they may be rebutted or disproved by other competent evidence.[63]

b. As to Garnishee. The answer of the garnishee in all doubtful cases — for instance where it is vague or evasive — will be construed most strongly against him;[64] and where the garnishee has by his answer acknowledged an indebtedness to defendant, he cannot afterward file another set of answers, the effect of which is to release himself from any judgment, where he had knowledge of such facts at the time of making his first answer, the doctrine of estoppel operating in favor of plaintiff.[65]

c. Disclosure of No Property or Indebtedness. Where the garnishee by his answer denies any indebtedness to the principal defendant or the possession of any property belonging to him, the court cannot direct judgment against the

they contest the truth of the disclosure by alleging and proving facts to the contrary.

Massachusetts.— Phillips *v.* Meagher, 166 Mass. 152, 44 N. E. 136; Stillings *v.* Young, 161 Mass. 287, 37 N. E. 175; Bostwick *v.* Bass, 99 Mass. 469; Gough *v.* Tolman, 10 Cush. 104, holding that neither party can allege and prove any other facts, except such as are not stated or denied by the supposed trustee. See also Kelly *v.* Bauman, 12 Pick. 383; Hawes *v.* Langton, 8 Pick. 67; Willard *v.* Sturtevant, 7 Pick. 194; Wood *v.* Partridge, 11 Mass. 488; Minchin *v.* Moore, 11 Mass. 90; Hatch *v.* Smith, 5 Mass. 42; Whitman *v.* Hunt, 4 Mass. 272; Stackpole *v.* Newton, 4 Mass. 85; Barker *v.* Tabor, 4 Mass. 81; Comstock *v.* Farnum, 2 Mass. 96.

Michigan.— Lorman *v.* Phœnix Ins. Co., 33 Mich. 65; Wellover *v.* Soule, 30 Mich. 481; Allen *v.* Hazen, 26 Mich. 142; Mack *v.* Brown, 20 Mich. 335; Thomas *v.* Sprague, 12 Mich. 120; Newell *v.* Blair, 7 Mich. 103; Maynards *v.* Cornwell, 3 Mich. 309. But see Fearey *v.* Cummings, 41 Mich. 376, 1 N. W. 946, holding that the denial of the garnishees of possession or control of property belonging to defendant, or of indebtedness to him, is not conclusive on plaintiff, where the garnishees have claimed the statutory issue under Comp. Laws, § 6475, "for the trial of the garnishees' liability to plaintiffs."

Minnesota.— Vanderhoof *v.* Holloway, 41 Minn. 498, 43 N. W. 331; Cole *v.* Sater, 5 Minn. 468; Chase *v.* North, 4 Minn. 381 (holding that the garnishee becomes a witness of plaintiff, who is bound by his answers and can take further testimony only to corroborate them); Banning *v.* Sibley, 3 Minn. 389. See also Leighton *v.* Heagerty, 21 Minn. 42.

Pennsylvania.— Cole *v.* Bowden, 5 Wkly. Notes Cas. 296 (holding that in attachment execution defendant will not be permitted to come in and contradict the statement of the garnishee); Dennison Tp. *v.* Dempsey, 4 Kulp 377. But see Houpt *v.* Lewis, 2 Kulp 337.

See 24 Cent. Dig. tit. "Garnishment," § 275.

63. *Arkansas.*— Mason *v.* McCampbell, 2 Ark. 506.

California.— Hartman *v.* Olvera, 51 Cal. 501.

Connecticut.— Thompson *v.* Stewart, 3 Conn. 171, 8 Am. Dec. 168; Dewit *v.* Baldwin, 1 Root 138.

Missouri.— Holton *v.* South. Pac. R. Co., 50 Mo. 151.

New Hampshire.— See Giddings *v.* Coleman, 12 N. H. 153.

New Mexico.— New Mexico Nat. Bank *v.* Brooks, 9 N. M. 113, 49 Pac. 947; Zanz *v.* Stover, 2 N. M. 29.

Ohio.— Myers *v.* Smith, 29 Ohio St. 120.

Vermont.— Huntington *v.* Bishop, 5 Vt. 186.

See 24 Cent. Dig. tit. "Garnishment," § 275.

64. *Illinois.*— Crain *v.* Gould, 46 Ill. 293.

Maryland.— Matthews *v.* Dare, 20 Md. 248.

Massachusetts.—Scott *v.* Ray, 18 Pick. 360; Cleveland *v.* Clap, 5 Mass. 201.

New Hampshire.— Wingate *v.* Nutter, 17 N. H. 256, where the answer disclosed that the trustee had given negotiable notes to the principal to cover an indebtedness, and it was held that he could not afterward come in and defend as a *bona fide* holder of the same notes, where he had failed to disclose in his answer how they had returned to his hands.

Rhode Island.— Ormsbee *v.* Davis, 5 R. I. 442.

65. Cleneay *v.* Junction R. Co., 26 Ind. 375; Thomas *v.* Fuller, 26 La. Ann. 625; Baker's Appeal, 2 Pa. Cas. 162, 3 Atl. 766 [*affirming* 17 Phila. 510]. See also Holden *v.* Brown, 19 N. H. 163 (holding that a trustee, who appears by his disclosure to have received funds of the debtor, cannot prove by the affidavit of an interested witness a fact necessary to exonerate him); Mitchell *v.* Northwestern Mfg., etc., Co., 26 Ill. App. 295 (holding that where a garnishee has answered admitting an indebtedness due defendant, he cannot maintain a bill of interpleader, although he has incurred a liability by mistake). But see Seymour *v.* Seymour, 31 Ill. App. 227 (holding that where a garnishee has made a general statement as to the sum in his hands before suit, he will not be thereby estopped from showing the correct amount on the trial); Klauber *v.* Wright, 52 Wis. 303, 8 N. W. 893.

Mistake in minutes.— It has been held in Michigan that the garnishee may show that a disclosure made by him as taken down in the minutes and signed by him was not the

garnishee on such answer,[66] and where the answer is not disproved, the garnishee is entitled to be discharged.[67]

E. Failure to Answer or False or Defective Answer — 1. In General. Where the garnishee after proper service of the writ fails to file an answer within the time prescribed by the statute,[68] or where he fails to make a full disclosure, or files a false or evasive answer, judgment may be rendered against

disclosure actually made, the minutes not importing absolute verity. Southerland *v.* Burrill, 82 Mich. 13, 45 N. W. 1122.

66. *Colorado.*— Denver, etc., R. Co. *v.* Smeeton, 2 Colo. App. 126, 29 Pac. 815.

Idaho.— Lindenthal *v.* Burke, 2 Ida. (Hasb.) 571, 21 Pac. 419.

New Hampshire.— Burnham *v.* Dunn, 35 N. H. 556.

Pennsylvania.— Moore *v.* Moore, 12 Phila. 173.

Washington.— Everton *v.* Parker, 3 Wash. 331, 28 Pac. 536, holding that in such case the court should order the judgment debtor to bring an action against the garnishee to determine the facts.

Wisconsin.— Platt *v.* Sauk County Bank, 17 Wis. 222.

See 24 Cent. Dig. tit. "Garnishment," § 279.

67. *Alabama.*— Jones *v.* Howell, 16 Ala. 695.

Illinois.— Laschear *v.* White, 88 Ill. 43; Illinois Cent. R. Co. *v.* Cobb, 48 Ill. 402.

Kentucky.— Wilder *v.* Shea, 13 Bush 128.

Louisiana.— Coleman *v.* Fennimore, 16 La. Ann. 253; Rose *v.* Whaley, 14 La. Ann. 374.

Maine.— Moore *v.* Towle, 38 Me. 133; Macomber *v.* Wright, 35 Me. 156.

Michigan.— Ball *v.* Young, 52 Mich. 476, 18 N. W. 225.

Ohio.— Buchanan *v.* Mitchell, 8 Ohio Dec. (Reprint) 437, 8 Cinc. L. Bul. 8.

South Carolina.— Chambers *v.* McKee, 1 Hill 229; Martin *v.* Parham, 1 Hill 213.

Wisconsin.— Phillips *v.* Wilson, 1 Pinn. 513.

United States.— U. S. *v.* Langton, 26 Fed. Cas. No. 15,560, 5 Mason 280.

See 24 Cent. Dig. tit. "Garnishment," § 280.

68. *Louisiana.*— Henry *v.* Bryce, 11 La. Ann. 691; Elder *v.* Rogers, 11 La. Ann. 606; Copley *v.* Dosson, 3 La. Ann. 651 (holding, however, that upon the failure of the garnishee to appear at the proper time to answer interrogatories, they cannot be taken *pro confesso*, so as to cut off any objections to the proceedings, without an order of court to that effect); Sturges *v.* Kendall, 2 La. Ann. 565; Poole *v.* Brooks, 12 Rob. 484; Petway *v.* Goodin, 12 Rob. 445; Blanchard *v.* Vargas, 18 La. 486; Burke *v.* Taylor, 15 La. 236; Parmely *v.* Bradbury, 13 La. 351; Deblanc *v.* Webb, 5 La. 82; Brown *v.* Richardson, 1 Mart. N. S. 202.

Maryland.— Sarlouis *v.* Firemen's Ins. Co., 45 Md. 241.

Mississippi.— Matheny *v.* Galloway, 12 Sm. & M. 475.

Nebraska.— Chicago, etc., R. Co. *v.* Van Cleave, 52 Nebr. 67, 71 N. W. 97, holding, however, that the garnishee is not liable for a failure to appear and answer, where the requisite amount of fees has not been tendered him.

Rhode Island.— See Falk *v.* Flint, 12 R. I. 14.

South Carolina.— Richardson *v.* Whitfield, 1 McCord 403.

Vermont.— Harmon *v.* Harwood, 35 Vt. 211; Worthington *v.* Jones, 23 Vt. 546.

See 24 Cent. Dig. tit. "Garnishment," § 280.

Compare Brotherton *v.* Anderson, 6 Mo. 388 (holding that because the garnishee fails to appear and answer, plaintiff is not therefore entitled to judgment against him for the full amount of defendant's indebtedness; that the indebtedness of the garnishee to defendant must be established by proof); Amoskeag Mfg. Co. *v.* Gibbs, 28 N. H. 316. But see Penyan *v.* Berry, 52 Ark. 130, 12 S. W. 241; Sawyer *v.* Webb, 5 Iowa 315 (holding that it is error to render judgment against a garnishee on the ground of his refusal to answer an interrogatory as being impertinent, where he has not been required by the court to answer it, and has offered to do so whenever the question should be adjudged by the court to be a proper one); Mawson *v.* Goldstone, 9 Phila. (Pa.) 30 (holding that a general judgment against a garnishee for want of an appearance will be stricken off as informal); Wood *v.* Wall, 24 Wis. 647 (decided under a statute confining the liability of a garnishee to indebtedness existing, or property possessed at the time of the service of notice to appear, and holding that it is error to render judgment against the garnishee for refusing to answer whether he had received any property of the judgment debtor after service of the summons).

Contra.— Smith *v.* Clayton, 10 Ky. L. Rep. 360; Brevard *v.* Stephens, 2 Ky. L. Rep. 226.

Refusal under advice of counsel to answer interrogatories on the ground that they are immaterial does not warrant judgment against the garnishee. McCallum *v.* Lockhart, 179 Pa. St. 427, 36 Atl. 231.

Failure of defendant to answer.— Under statutes providing for the examination of the principal defendant under certain circumstances, upon the refusal of such defendant to appear and answer interrogatories when duly cited, he may be proceeded against as for contempt. Barnes *v.* Wayne Cir. Judge, 81 Mich. 374, 45 N. W. 1016.

Effect of failure to reply.— A statement made in the denial of the garnishee's answer that a call for payment for corporate stock

him for the amount claimed in the writ of garnishment.[69] In several jurisdictions, however, where the garnishee fails to answer, or makes unsatisfactory or evasive answers, plaintiff may proceed against him in an action in his own name, as in other cases.[70]

2. Liability to Third Persons. Where a garnishee who has notice of the transfer or assignment of property or a debt to third persons fails to disclose such facts in his answer, he is liable in an action by the assignee for the value of the property or the amount of the debt.[71]

F. Delivery of Property, or Payment of Debt to Officer, or Into Court

— 1. Delivery or Payment to Officer. In some jurisdictions the statutes provide that a garnishee may protect himself from liability, by payment of the indebtedness, or delivery of the property of defendant in his possession, to the officer serving the writ.[72] In some jurisdictions, where the garnishee has property or evidences of indebtedness in his possession belonging to the principal defendant,

had been made on the stock-holder is not admitted by failure to reply. Parks *v.* Heman, 7 Mo. App. 14.

69. *Alabama.*— Wyman *v.* Stewart, 42 Ala. 163.

California.— Parker *v.* Page, 38 Cal. 522.

Kentucky.— Keel *v.* Ogden, 5 T. B. Mon. 362.

Louisiana.— Vason *v.* Clarke, 4 La. Ann. 581. See also Hart *v.* Dahlgreen, 16 La. 559, holding that where the answers are not responsive, and, on a rule to take them as confessed, the garnishee fails to render them more explicit, the rule will be made absolute. But see Ullmeyer *v.* Ehrmann, 24 La. Ann. 32, holding that a rule against the garnishee to show cause why an interrogatory should not be taken as confessed will be dismissed, if the answer of the garnishee to the interrogatory shows that he has answered the questions asked categorically.

Maine.— See Smith *v.* Cahoon, 37 Me. 281. But see Lyman *v.* Parker, 33 Me. 31.

Massachusetts.— Shaw *v.* Bunker, 2 Metc. 376; Graves *v.* Walker, 21 Pick. 160; Winchester *v.* Titcomb, 17 Pick. 435.

Minnesota.—Peterson *v.* Lake Tetonka Park Co., 72 Minn. 263, 75 N. W. 375, where the garnishee appeared by attorney on the return-day of the summons, and offered to file an *ex parte* affidavit denying in general terms its liability, but did not offer to appear and answer in any other manner, and it was held that judgment was properly entered against him for failure to make disclosure.

Pennsylvania.— Fithian *v.* Brooks, 5 Pa. L. J. Rep. 121.

Texas.— Melton *v.* Lewis, 74 Tex. 411, 12 S. W. 93.

See 24 Cent. Dig. tit. "Garnishment," § 280.

In Pennsylvania a rule on a garnishee to show cause why judgment should not be entered against him by not making more specific answers is the correct practice. Henwood *v.* A. L. of H., 2 Pa. Dist. 170.

70. *Arkansas.*—Adler-Goldman Commission Co. *v.* Bloom, 62 Ark. 616, 37 S. W. 305.

Indian Territory.— Pace *v.* J. S. Merrill Drug Co., 2 Indian Terr. 218, 48 S. W. 1061.

Kentucky.— Asher *v.* Nicholson, 37 S. W. 262, 18 Ky. L. Rep. 573; Noe *v.* Owens, 13 Ky. L. Rep. 496; Wearen *v.* Matheney, 3 Ky. L. Rep. 710.

Massachusetts.— Moseley *v.* Washburn, 167 Mass. 345, 45 N. E. 753; Laughran *v.* Kelly, 8 Cush. 199; Hawes *v.* Langton, 8 Pick. 67; Forseth *v.* Shaw, 10 Mass. 253; Hatch *v.* Smith, 5 Mass. 42; Whitman *v.* Hunt, 4 Mass. 272.

Nebraska.— Pope *v.* Kingman, 2 Nebr. (Unoff.) 184, 96 N. W. 519. See also Work *v.* Brown, 38 Nebr. 498, 56 N. W. 1082.

South Dakota.— Black Hills Tel., etc., Co. *v.* Mitchell, 11 S. D. 615, 79 N. W. 999, 74 Am. St. Rep. 830.

See 24 Cent. Dig. tit. "Garnishment," § 281.

In West Virginia the garnishee having been regularly summoned to answer the summons, and having been served more than twenty days previously, his failure to answer entitles plaintiff to require his answer by rule. O'Brien *v.* Camden, 3 W. Va. 20.

Where no jurisdiction is acquired against defendant in attachment, a garnishee in the case is not liable to an action, under Ohio Code Civ. Proc. § 218, for failure to answer as such garnishee. Pope *v.* Hibernia Ins. Co., 24 Ohio St. 481.

71. Large *v.* Moore, 17 Iowa 258; Milliken *v.* Loring, 37 Me. 408; Enright *v.* Beaumond, 68 Vt. 249, 35 Atl. 57; Parker *v.* Wilson, 61 Vt. 116, 17 Atl. 747; Marsh *v.* Davis, 24 Vt. 363. See also Edler *v.* Hasche, 67 Wis. 653, 31 N. W. 57.

72. Skelly *v.* Westminster School Dist., 103 Cal. 652, 37 Pac. 643; Ryan *v.* Burkam, 42 Ind. 507; Burlington, etc., R. Co. *v.* Hall, 37 Iowa 620 (holding, however, that the Iowa statute does not apply where judgment has been rendered against the garnishee, although erroneously, from which he has neglected seasonably to appeal); Randolph *v.* Heaslip, 11 Iowa 37; Smith *v.* Clarke, 9 Iowa 241 (holding, however, that garnishees having a lien on property in their hands are not bound to place it in the hands of the sheriff, and absolute judgment on their failure to make such delivery is erroneous); Shriver *v.* Harbaugh, 2 Pittsb. (Pa.) 109. *Compare* Smith *v.* Smith, 52 Ga. 472. See also Kramer *v.* Adams, 94 Iowa 489, 63 N. W. 180; Buckham *v.* Wolf, 58 Iowa 601, 12 N. W. 623.

the court may, on proper application, order the garnishee to deliver such property to the sheriff.[73]

2. Delivery or Payment Into Court. The statutes usually provide that a garnishee may relieve himself from liability both to plaintiff and the principal defendant by paying the money, or delivering the property into court after he has been served with the writ of garnishment.[74] Some of the statutes provide that the court may order the money or property to be deposited in court, where the disclosure shows that the garnishee is possessed of property of or is indebted to the principal defendant.[75]

G. Traverse of Answer, and Issues Thereon — 1. In General. The statutes usually provide that plaintiff may, at his option, traverse the answer of the garnishee, and have an issue made up for trial by a jury.[76]

73. Woods *v.* Cooke, 58 Me. 282; Stedman *v.* Vickery, 42 Me. 132; Finnell *v.* Burt, 2 Handy (Ohio) 202, 12 Ohio Dec. (Reprint) 403; Wilson *v.* Dandridge, 30 Fed. Cas. No. 17,801, 1 Cranch C. C. 160. See also Shreve *v.* Fenno, 49 Me. 78.

Delivery to plaintiff.— In Mississippi the statute provided for the delivery of the property to plaintiff, upon his giving proper security therefor. Trotter *v.* White, 10 Sm. & M. 607.

74. *Arkansas.*— Walker *v.* Bradley, 2 Ark. 578.

California.— See Ruperich *v.* Baehr, 142 Cal. 190, 75 Pac. 782.

Georgia.—Lampkin *v.* Northington, 115 Ga. 989, 42 S. E. 369; Hall *v.* Daniel, 62 Ga. 620.

Indiana.— Ryan *v.* Burkam, 42 Ind. 507.

Iowa.— Howe *v.* Jones, 57 Iowa 130, 8 N. W. 451, 10 N. W. 299.

Michigan.—Stephens *v.* Pennsylvania Casualty Co., 135 Mich. 189, 97 N. W. 686; Barber *v.* Howd, 85 Mich. 221, 48 N. W. 539; Somers *v.* Losey, 48 Mich. 294, 12 N. W. 188.

Pennsylvania.— Stockham *v.* Pancoast, 1 Pa. Dist. 135; Brooks *v.* Salin, 14 Wkly. Notes Cas. 390; Fuller *v.* Bleim, 9 Wkly. Notes Cas. 574; Singerly *v.* Woodward, 8 Wkly. Notes Cas. 339.

See 24 Cent. Dig. tit. "Garnishment," § 287.

Compare Lewis *v.* Sheffield, 1 Ala. 134. But see Edler *v.* Hasche, 67 Wis. 653, 31 N. W. 57, where the purchaser of property, subject to a mortgage, on being garnished by a creditor of the mortgagee, failed to make a full disclosure of the facts, which made it at least doubtful whether he owed anything to the mortgagee, but admitted an absolute indebtedness to the amount of the mortgage, and paid the money into court, and it was held that such payment did not operate as a bar to the right of the mortgagee to foreclose.

75. Smith *v.* Gower, 3 Metc. (Ky.) 171; Rice *v.* Whitney, 12 Ohio St. 358; Martin *v.* Gayle, 2 Disn. (Ohio) 86; Wilson *v.* Mayhew, 6 Phila. (Pa.) 273; Johann *v.* Rufener, 32 Wis. 195. See also Cunningham *v.* O'Keefe, 19 Wkly. Notes Cas. (Pa.) 575. *Contra,* Smith *v.* Brown, 5 Cal. 118, holding that an order to the garnishee to pay into court the amount found due may be considered as improper.

76. *Alabama.*—Jefferson County Sav. Bank *v.* Nathan, 138 Ala. 342, 35 So. 355; Wright *v.* Swanson, 46 Ala. 708; Twelves *v.* Lodano, 15 Ala. 732. See also Jones *v.* Lowers Banking Co., 104 Ala. 252, 16 So. 11; Locket *v.* Child, 11 Ala. 640.

Arkansas.— Walker *v.* Bradley, 2 Ark. 578.

Illinois.— McCoy *v.* Williams, 6 Ill. 584, holding, however, that if plaintiff alleges that the garnishee has not disclosed the true amount of debts due from him to defendant, the court will direct, without the formality of pleading, the impaneling of a jury to inquire as to the true amount.

Iowa.— Bebb *v.* Preston, 3 Iowa 325. And see Sears *v.* Thompson, 72 Iowa 61, 33 N. W. 364, holding that garnishment is, in substance and fact, a proceeding *in rem,* and the trial must be by ordinary proceedings, and equitable issues cannot be injected.

Louisiana.— Blanchard *v.* Vargas, 18 La. 486; Burke *v.* Taylor, 15 La. 236; Deblanc *v.* Webb, 5 La. 82; Abat *v.* Holmes, 3 La. 351; Brown *v.* Richardson, 1 Mart. N. S. 202.

Maryland.— Barr *v.* Perry, 3 Gill 313.

Pennsylvania.— Carter *v.* Wallace, 1 Wkly. Notes Cas. 63. And see Cunningham *v.* O'Keefe, 3 Pa. Co. Ct. 471, holding that where the garnishee by his answer admits a sum to be due defendant, and defendant files a plea that the same is due for wages, plaintiff is not entitled to an issue to determine the matter, but must reply to the plea.

Wisconsin.— Adams *v.* Filer, 7 Wis. 306, 73 Am. Dec. 410.

United States.— See Central L. & T. Co. *v.* Campbell Commission Co., 173 U. S. 84, 19 S. Ct. 346, 43 L. ed. 623 [*reversing* 5 Okla. 396, 49 Pac. 48] (where a traverse of the answer was held to be unnecessary); Hatcher *v.* Hendrie, etc., Mfg., etc., Co., 133 Fed. 267 (holding that a statement in the answer of a garnishee under an attachment that it was "informed" that the property, which it admitted having received from defendant, belonged to a third person, does not need to be traversed by plaintiff, where the property has been surrendered by the garnishee to the officer holding the attachment).

See 24 Cent. Dig. tit. "Garnishment," § 288.

But see Hax *v.* Acme Cement Plaster Co.,

2. Proper Parties to Contest Answer. The proper party to contest the answer of the garnishee is plaintiff, or his agent or attorney.[77]

3. Time For Making Contest. Statutes usually provide that a traverse of the answer shall be made at the term in which the answer is filed;[78] the court, however, may in its discretion allow tender of issue to be filed at a subsequent term.[79]

4. Form and Requisites. In some jurisdictions the proper method of contesting the garnishee's answer is for plaintiff to file an affidavit stating that he believes the answer to be untrue.[80] In other jurisdictions a demurrer by plaintiff to the

82 Mo. App. 447 (holding that in garnishment the denial of the answer by plaintiff stands in the place of the petition in an ordinary action, and that no issues are raised by the interrogatories and answer); Cowles *v.* Oaks, 14 N. C. 96 (holding that it is unnecessary for plaintiff to reply to the answer, where the garnishee admits the possession of property received from defendant, but alleges that he received it in discharge of a debt to himself).

77. Faulks *v.* Heard, 31 Ala. 516; Graves *v.* Cooper, 8 Ala. 811 (holding likewise that the principal defendant may contest the garnishee's answer, where it is done at the term when the answer is filed, or where an order is then made for that purpose); Creasap *v.* Bower, 41 Iowa 210 (holding likewise that the garnishee's answer may be contested by co-garnishees, whose liability will be increased in the event of his discharge); Ferguson-McKinney Dry Goods Co. *v.* Colorado City Nat. Bank, (Tex. Civ. App. 1904) 78 S. W. 265; Givens *v.* Taylor, 6 Tex. 315 (holding, however, that the affidavit required to put the answer in issue must be made by plaintiff personally, and not by his agent or attorney).

78. Friedman *v.* Cullman Bldg., etc., Assoc., 124 Ala. 344, 27 So. 332; McDaniel *v.* Reed, 12 Ala. 615 (holding that the garnishee may object to joining in an issue tendered at a term subsequent to the filing of his answer, unless he has expressly, or by implication, waived his right to a discharge); Lockhart *v.* Johnson, 9 Ala. 223; Consumers' Ice Co. *v.* Cook Well Co., 71 Miss. 886, 16 So. 259. See also Marston *v.* Carr, 16 Ala. 325, holding that if the garnishee voluntarily joins issue and goes to trial, it is a waiver of any previous irregularity in the proceedings as to traverse of the answer.

Under the Louisiana statute all proceedings to traverse the answer of the garnishee should be taken within twenty days after the answer is filed. David *v.* Rode, 35 La. Ann. 961; Garcia y Leon *v.* Louisiana Mut. Ins. Co., 31 La. Ann. 546.

79. Brake *v.* Curd Sinton Mfg. Co., 102 Ala. 339, 14 So. 773; Lindsay *v.* Morris, 100 Ala. 546, 13 So. 619; Gross *v.* Sloan, 58 Ill. App. 302. See also Banks *v.* Hunt, 70 Ga. 741, holding that plaintiff may traverse the answer of the garnishee, even at a subsequent term, if before an order taken discharging the garnishee.

Notice.—Under the Iowa statute, if issue is not taken on the answer at the same term it is filed, the garnishee is thereafter entitled to notice; but such notice is unnecessary where he voluntarily appears in person or by attorney. Kienne *v.* Anderson, 13 Iowa 565.

In Louisiana a garnishee's answer cannot be disproved without giving him notice, which must appear of record. Woodruff *v.* French, 6 La. Ann. 62; Rockwell *v.* Smith, 1 La. 228; Allyn *v.* Wright, 9 Mart. 271.

In South Carolina plaintiff may file his suggestion contesting the answer of the garnishee either at the term to which the writ is returnable or at any time previous to or during the next term, and where he fails to do so, it can be filed afterward only on leave of court obtained on cause being shown. Burrell *v.* Letson, 1 Strobh. 239; Martin *v.* Parham, 1 Hill 213.

80. Brake *v.* Curd Sinton Mfg. Co., 102 Ala. 339, 14 So. 773; Mansfield *v.* Honduras Co., 66 Ill. App. 558 (holding that while in garnishment proceedings plaintiff is relieved from the necessity of making a formal pleading, yet a written traverse is required in a court of record alleging that the garnishee has not truly disclosed, etc.); Swearingen *v.* Wilson, 2 Tex. Civ. App. 157, 21 S. W. 74 (holding, however, that where plaintiff does not claim the answer of the garnishee to be false, but only that the facts alleged therein show him to be indebted to the principal defendant, instead of to a third person, as claimed by him, plaintiff need file no controverting affidavit); Stoddard *v.* Martin, 3 Tex. App. Civ. Cas. § 85; Davis *v.* McComack, 2 Tex. App. Civ. Cas. § 628. See also Adkins *v.* Watson, 12 Tex. 199. *Compare* Empire Car-roofing Co. *v.* Macey, 115 Ill. 390, 3 N. E. 417 (holding that matter pleaded by the garnishee in avoidance of liability is put in issue by the statutory replication that the garnishee has not truly discovered the lands, tenements, chattels, etc.); Tavel *v.* Barre, 2 McCord (S. C.) 201 (holding that the attaching creditor should make his exceptions to the garnishee's return by suggestions, and not file a declaration against him as if no return had been made).

An unverified traverse of the garnishee's answer must be treated as a nullity, under the Texas statute (Rev. St. § 95, art. 245) which provides that a garnishee's answer must be controverted by an affidavit, signed by plaintiff, stating the particular grounds for his belief that the answer was incorrect. Blum *v.* Moore, 91 Tex. 273, 42 S. W. 856 [*affirming* (Civ. App. 1897) 40 S. W. 511].

garnishee's answer is held to be the proper form of bringing a case to a hearing on the answer.[81]

5. SUFFICIENCY. In some jurisdictions it is necessary for plaintiff, in forming an issue, to state in what respects the answer of the garnishee is untrue.[82] In other jurisdictions, however, a general traverse of the garnishee's answer is held to be sufficient;[83] while in yet other jurisdictions the traverse is held to be sufficient if it states a cause of action under the rules applicable to a complaint or petition.[84]

6. SCOPE OF ISSUES. The general rule is that plaintiff cannot select a part of the answer on which to take issue, but that the only proper issue is that of indebtedness *vel non*,[85] or whether the garnishee is indebted in a larger amount than that admitted by his answer.[86] However, plaintiff[87] or garnishee[88] may prove any other facts, not stated or denied by the garnishee in his answer, which

81. Fox *v.* Reed, 3 Grant (Pa.) 81. But see Beer *v.* Hooper, 32 Miss. 246, holding that it is not necessary to demur to the answer; that a motion for judgment on the answer is sufficient.

82. *Alabama.*— Donald *v.* Nelson, 95 Ala. 111, 10 So. 317; Lehman *v.* Hudmon, 79 Ala. 532; Hodges *v.* Coleman, 76 Ala. 103. And see Harrell *v.* Whitman, 19 Ala. 135; Marston *v.* Carr, 16 Ala. 325; Foster *v.* Walker, 2 Ala. 177; Thompson *v.* Allen, 4 Stew. & P. 184.

Georgia.— Russell *v.* Brunswick Grocery Co., 120 Ga. 38, 47 S. E. 528 (where it was held that the traverse submitted an issue of fact, and that the court properly refuse to strike the same, on the ground that it formed no issue); Wiley *v.* Planters', etc., Bank, Ga. Dec. 187, Pt. II.

Illinois.—Truitt *v.* Griffin, 61 Ill. 26 (where a replication alleging that the matters contained in the answers "are wholly except in so far as the said respondent charges himself with" a particular fund, without adding "false" or "untrue," or some other word necessary to complete the denial, was held to be no traverse, and that the answer stood admitted); Finch *v.* Alexander County Nat. Bank, 65 Ill. App. 337 (holding that as the only effect of a plea by a garnishee of the pendency of a garnishment proceeding against him by another creditor is a stay of proceeding, a reply that the other suit has been dismissed is good).

Iowa.— Goddard *v.* Guittar, 80 Iowa 129, 45 N. W. 729.

Maine.— Stedman *v.* Vickery, 42 Me. 132; Pease *v.* McKusick, 25 Me. 73.

Texas.— Holloway Seed Co. *v.* City Nat. Bank, (Civ. App. 1898) 47 S. W. 77 (holding likewise that plaintiff may controvert the garnishee's answer as to any matter concerning which the writ requires a disclosure, and is not confined to the ground stated in the controverting affidavit); Blum *v.* Moore, 91 Tex. 273, 42 S. W. 856 [*affirming* (Civ. App. 1897) 40 S. W. 511].

Washington.— McDaniels *v.* J. J. Connelly Shoe Co., 30 Wash. 549, 71 Pac. 37, 94 Am. St. Rep. 889, 60 L. R. A. 947.

See 24 Cent. Dig. tit. "Garnishment," § 293.

83. Turner *v.* Rosseau, 21 Ga. 240; Roberts *v.* Barry, 42 Miss. 260 (holding, however, that no issue between plaintiff and garnishee can be properly submitted to the jury unless the answer and contest thereof appear in the record); Hills *v.* Smith, 19 N. H. 381. See also Sanders *v.* Miller, 60 Ga. 554, holding, however, that argumentative, vague, and desultory averments, presenting no direct issue on the truth of an answer, are insufficient as a traverse, and should be stricken out on motion.

84. Whitehill *v.* Keen, 79 Mo. App. 125; Groschke *v.* Bardenheimer, 15 Mo. App. 353. See also Logan *v.* Goodwin, 104 Fed. 490, 43 C. C. A. 658.

85. Myatt *v.* Lockhart, 9 Ala. 91; Chicago First Baptist Church *v.* Hyde, 40 Ill. 150 (holding that where a garnishee in his answer denies an indebtedness to defendant, he cannot rely on the allegation of an alleged equitable assignment of his own indebtedness to a third person as a defense, because a defense thus relied on is not only different from that alleged, but repugnant thereto); Raymond *v.* Narragansett Tinware Co., 14 R. I. 310 (holding that a creditor cannot supplement a garnishee's affidavit by extrinsic testimony to recover partly on the affidavit and partly on the testimony).

86. Jefferson County Sav. Bank *v.* Nathan, 138 Ala. 342, 35 So. 355 (holding that on oral examination of garnishee, it is error to exclude the garnishee's statement that his liability to the judgment debtor is less than the amount of a note due from the judgment debtor to the garnishee, on the ground that such statement was not the best evidence, inasmuch as the answer is in the nature of a pleading, and not subject to the rules of evidence); Nesbitt *v.* Ware, 30 Ala. 68.

87. Fletcher *v.* Clarke, 29 Me. 485; Holloway Seed Co. *v.* City Nat. Bank, 92 Tex. 187, 47 S. W. 95, 516 [*reversing* (Civ. App. 1898) 47 S. W. 77], holding that an affidavit in garnishment, by alleging only that the garnishee is indebted to defendant, does not preclude a trial on the issue as to whether the garnishee has effects of defendant in his possession.

88. Stockbridge *v.* Franklin Bank, 86 Md. 189, 37 Atl. 645 (holding that under the plea of *nulla bona* the garnishee may show the assignment of the assets by defendant before the garnishment); Ashby *v.* Watson,

may be material to the case. In some jurisdictions, however, it is held that the issue made up ought to be as broad as the evidence offered to prove the matter put in issue, and that matter not properly pleaded cannot be proven under such issue.[89]

7. Waiver of Defects and Amendments. A joinder in issue between plaintiff and garnishee on the truth of the garnishee's answer is a waiver of any previous irregularities, and such irregularities will not be examined into on appeal;[90] and where plaintiff's traverse is defective, the court will allow an amendment of the same, if the application is made in proper time.[91]

8. Variance. The *allegata* and *probata* must agree, and where the defense set up in the answer and that shown by the proof are repugnant, the variance is fatal, and the defense cannot be allowed.[92]

H. Evidence as Between Plaintiff and Garnishee — 1. Answer. The general rule is that on issue joined between plaintiff and the garnishee, the garnishee's answer, properly authenticated, is admissible in evidence;[93] and such answers are

9 Mo. 236; Hugus *v.* Dithridge Glass Co., 96 Pa. St. 160. And see Sawyer *v.* Thompson, 24 N. H. 510, holding that where the writ described the trustee as an inhabitant of the state, evidence was admissible to show that at the time of the commencement of the suit he was not an inhabitant of the state, nor indebted to defendant on any contract to be performed in the state.

Set-off.— Where the garnishee puts in a plea of *nulla bona* he cannot set off an indebtedness from the principal defendant to himself, but such set-off should be specially pleaded. Reed *v.* Penrose, 36 Pa. St. 214, 2 Grant 472.

89. *Iowa.*—Freese *v.* Co-operative Coal Co., 67 Iowa 42, 24 N. W. 583, holding that, although in garnishment proceedings a formal reply to the garnishee's answer may not be necessary in order to enable plaintiff to dispute the truth of the statement made therein, yet a reply, if filed, limits the issuance to those pleaded therein.

Missouri.— Wilson *v.* Hempstead, 73 Mo. App. 656 (holding that a denial of the answer of the garnishee forms the office of a petition at law, and where such denial treats two garnishees as joint debtors, a recovery against them is only authorized upon evidence of their joint liability); Kingsley *v.* Missouri Fire Co., 14 Mo. 465.

New Hampshire.— Currier *v.* Taylor, 19 N. H. 189, holding that a trustee's disclosure cannot be admitted as evidence to vary and control the written effect of contract to which he was a party with the principal debtor, the effect of such evidence being to exonerate himself as trustee.

Pennsylvania.— Githens *v.* Chester Grocery Co., 2 Del. Co. 452.

South Carolina.— Gage *v.* Wilburn, 2 Brev. 485.

Wisconsin.— John R. Davis Lumber Co. *v.* Milwaukee First Nat. Bank, 84 Wis. 1, 54 N. W. 108, holding that where the garnishee in his answer sets up that the check in his possession, alleged to be the property of the defendant, had been transferred by defendant to A before the garnishment, it is reversible error to permit the garnishee to show on the trial that the check had been assigned to B before garnishment.

See 24 Cent. Dig. tit. "Garnishment," § 294.

90. *Alabama.*— Birmingham Nat. Bank *v.* Mayer, 104 Ala. 634, 16 So. 520; Betts *v.* Brown, 5 Ala. 414.

Iowa.— Henny Buggy Co. *v.* Patt, 73 Iowa 485, 35 N. W. 587.

Louisiana.— Liminet *v.* Fourchy, 51 La. Ann. 1299, 26 So. 87.

Missouri.— Union Bank *v.* Dillon, 75 Mo. 380.

Wisconsin.— Rock *v.* Collins, 99 Wis. 630, 75 N. W. 426, 67 Am. St. Rep. 885.

91. Curtis *v.* Parker, 136 Ala. 217, 33 So. 935; Bates *v.* Forsyth, 64 Ga. 232; Coffman *v.* Ford, 56 Iowa 185, 9 N. W. 118; Winner *v.* Weems, 77 Miss. 662, 27 So. 618. See also Lindsay *v.* Morris, 100 Ala. 546, 13 So. 619.

92. Chicago First Baptist Church *v.* Hyde, 40 Ill. 150; Raymond *v.* Narragansett Tinware Co., 14 R. I. 310; Sweet *v.* Read, 12 R. I. 121 (holding that a creditor cannot supplement a garnishee's affidavit by extrinsic testimony and recover partly on the affidavit and partly on the testimony); John R. Davis Lumber Co. *v.* Milwaukee First Nat. Bank, 84 Wis. 1, 54 N. W. 108 (where the garnishee in his answer set up that the check in his possession, alleged to be the property of defendant, had been transferred by defendant to A before garnishment, and it was held to be reversible error to permit the garnishee to show on trial that the check had been assigned to B before garnishment); Baker *v.* Mix, 2 Fed. Cas. No. 775, 3 Cranch C. C. 1. See also Ashby *v.* Watson, 9 Mo. 236.

Variance between petition and writ.—A petition in an action for breach of warranty, aided by garnishment, alleged a stated liability, with six per cent interest from a certain date, and the application for garnishment and the writ claimed the principal and interest. The evidence showed that the consideration of the warranty was properly worth the sum sued for, and it was held that there was no variance between the petition and the writ. Fleming *v.* Pringle, 21 Tex. Civ. App. 225, 51 S. W. 553.

93. *Arkansas.*— Britt *v.* Bradshaw, 18 Ark. 530.

to be weighed and their effect determined by the general principles on which conclusions are to be drawn from any other lawful evidence.[94] In several jurisdictions, however, the answer of the garnishee is regarded as a pleading, and where controverted by plaintiff it may be read in evidence by plaintiff, but not by or on behalf of the garnishee.[95]

2. PRESUMPTIONS AND BURDEN OF PROOF — a. General Rule. The law indulges no presumption that the garnishee is liable, and his liability must be made affirmatively to appear in order to justify a judgment against him;[96] and the

Illinois.— Schwab *v.* Gingerick, 13 Ill. 697.

Iowa.— Brainard *v.* Simmons, 58 Iowa 464, 9 N. W. 382, 12 N. W. 484 (holding that the garnishee's answer is not in the nature of a pleading, but must be regarded as evidence); Fairfield *v.* McNany, 37 Iowa 75.

Maine.— Morrell *v.* Rogers, 1 Me. 328, holding that on issue joined to try the validity of an assignment, where the assignee has become a party, the disclosure of the trustee may be read in evidence to the jury. See also Ormsby *v.* Anson, 21 Me. 23.

Maryland.— Devries *v.* Buchanan, 10 Md. 210, holding that the answer of a trustee must be regarded not merely as a pleading, but as evidence, and when used on a trial of issues, must be read in its entirety, and not merely that part which charges the trustee.

Michigan.— Lorman *v.* Phœnix Ins. Co., 33 Mich. 65; Allen *v.* Hazen, 26 Mich. 142.

Missouri.— Black *v.* Paul, 10 Mo. 103, 45 Am. Dec. 353; Stevens *v.* Gwathmey, 9 Mo. 636; Davis *v.* Knapp, 8 Mo. 657. See, however, Smith *v.* Heidecker, 39 Mo. 157, holding that under Rev. Code (1855), p. 528, § 69, the answer of the garnishee will have no greater effect as evidence than the answer to an ordinary petition.

New Hampshire.— Smith *v.* Brown, 43 N. H. 44, holding, however, that where plaintiff elects to try the garnishee's liability by a jury, he is not required to put his disclosure in evidence on trial.

New Mexico.—Perea *v.* Colorado Nat. Bank, 6 N. M. 1, 27 Pac. 322.

Pennsylvania.— Erskine *v.* Sangston, 7 Watts 150.

Vermont.— Downer *v.* Topliff, 19 Vt. 399, holding, however, that the disclosure of one trustee cannot ordinarily be treated as evidence against another person who is also summoned as trustee in the same suit, disclosures of the trustees being analogous in this respect to answers in chancery.

See 24 Cent. Dig. tit. "Garnishment," § 299.

Affidavits of disinterested persons, appended to and made parcel of the disclosure of a trustee, stating facts within the knowledge of those making the affidavits, are held in New Hampshire to furnish competent evidence to be considered by the court, in connection with the disclosure, upon the question of the liability of the trustee. Giddings *v.* Coleman, 12 N. H. 153.

Where the answer of the garnishee is not under oath, it is not evidence to prove the facts therein stated. Empire Car-roofing Co. *v.* Macey, 115 Ill. 390, 3 N. E. 417.

94. Kergin *v.* Dawson, 6 Ill. 86; Drake *v.* Buck, 35 Iowa 472 (the weight of the answer is for the jury, and not for the court); Bebb *v.* Preston, 1 Iowa 460; Kelley *v.* Weymouth, 68 Me. 197; Moore *v.* Blum, (Tex. Civ. App. 1897) 40 S. W. 511.

95. Jefferson County Sav. Bank *v.* Nathan, 138 Ala. 342, 35 So. 355; Godden *v.* Pierson, 42 Ala. 370; Sevier *v.* Throckmorton, 33 Ala. 512; Price *v.* Mazange, 31 Ala. 701 (the garnishee's answer being excluded as evidence for him for the same reason that excludes all admissions as evidence for the party making them); Scott *v.* Stallsworth, 12 Ala. 25; Myatt *v.* Lockhart, 9 Ala. 91; Lasley *v.* Sisloff, 7 How. (Miss.) 157; Dawkins *v.* Gault, 5 Rich. (S. C.) 151; Prentiss *v.* Danaher, 20 Wis. 311 (plaintiff may read in evidence any part of the answer, and contest the remainder, if not admitted by the pleadings); Beck *v.* Cole, 16 Wis. 95; Keep *v.* Sanderson, 12 Wis. 352. See also McClellan *v.* Young, 17 Ala. 498. And see Pollock *v.* Jones, 96 Ala. 492, 11 So. 529, where the record showed that the garnishees were proceeded against jointly, one summons having issued against both, one motion for judgment against both having been made, and one judgment entered, and it was held that they would be regarded as joint defendants, and the answer of one would be evidence for both on the trial, where such answer was not contested.

96. *Colorado.*— Fleming *v.* Baxter, 20 Colo. 238, 38 Pac. 57; Union Pac. R. Co. *v.* Gibson, 15 Colo. 299, 25 Pac. 300; Voorhies *v.* Denver Hardware Co., 4 Colo. App. 428, 36 Pac. 65.

Iowa.— Morse *v.* Marshall, 22 Iowa 290, holding likewise that, if it be left in reasonable doubt whether the garnishee is chargeable or not, he is entitled to a judgment in his favor.

Massachusetts.— Richards *v.* Stephenson, 99 Mass. 311.

Nebraska.— Edney *v.* Willis, 23 Nebr. 56, 36 N. W. 300.

Pennsylvania.— Taylor *v.* Huey, 166 Pa. St. 518, 31 Atl. 199.

See 24 Cent. Dig. tit. "Garnishment," § 300.

Compare Timm *v.* Stegman, 6 Wash. 13, 32 Pac. 1004.

Deposit of money as bail.— Where F deposited with a justice of the peace money in lieu of bail for appearance of B, and the justice receipted therefor to F, it was held that the presumption, in garnishment by B's creditors, was that it was F's money. McAlmond *v.* Bevington, 23 Wash. 315, 63 Pac. 251, 53 L. R. A. 597.

uncontradicted answer or disclosure of the garnishee upon which no issue has been taken is presumed to be absolutely true, and where such answer or disclosure shows no liability on his part he is entitled to a discharge.[97]

b. Where Plaintiff Contests Answer. Where plaintiff in garnishment contests the answer of the garnishee as untrue, the burden of showing an indebtedness on the part of the garnishee to the debtor rests on plaintiff.[98] Where plaintiff in garnishment proceedings, instead of taking judgment for the amount admitted by the garnishee's answer, takes issue thereon and goes to trial, the burden is upon him to show that there was due defendant from the garnishee more than the amount admitted by the latter.[99] In some jurisdictions, where the

97. *Alabama.*— White *v.* Kahn, 103 Ala. 308, 15 So. 595; White *v.* Hobart, 90 Ala. 368, 7 So. 807; Hurst *v.* Home Protection F. Ins. Co., 81 Ala. 174, 1 So. 209; Robinson *v.* Rapelye, 2 Stew. 86.

Illinois.— Truitt *v.* Griffin, 61 Ill. 26; Illinois Cent. R. Co. *v.* Cobb, 48 Ill. 402; Rankin *v.* Simonds, 27 Ill. 352; McCoy *v.* Williams, 6 Ill. 584.

Iowa.— Bolton *v.* Bailey, 122 Iowa 729, 98 N. W. 560, (1903) 93 N. W. 596 (holding that where plaintiff tenders no issue on the answer of the garnishee, it is to be considered the sole and only test of his liability); Kerr *v.* Edgington, 106 Iowa 68, 75 N. W. 669; Bean *v.* Barney, 10 Iowa 498; Meeker *v.* Sanders, 6 Iowa 61; Williams *v.* Housel, 2 Iowa 154 (holding that no presumption arises against the garnishee, unless he fails to answer clearly and fully as to matters within his knowledge).

Louisiana.— Helme *v.* Pollard, 14 La. Ann. 306, holding that the answer of the garnishee, when categorical, is conclusive, unless disproved.

Maine.— Hamilton *v.* Hill, 86 Me. 137, 29 Atl. 956.

Minnesota.— Vanderhoof *v.* Holloway, 41 Minn. 498, 43 N. W. 331.

Mississippi.— Williams *v.* Jones, 42 Miss. 270.

Missouri.— Davis *v.* Knapp, 8 Mo. 657; Tuttle *v.* Gordon, 8 Mo. 152.

Wisconsin.— Davis *v.* Pawlette, 3 Wis. 300, 62 Am. Dec. 690.

See 24 Cent. Dig. tit. "Garnishment," § 300.

98. *Alabama.*—Jefferson County Sav. Bank *v.* Nathan, 138 Ala. 342, 35 So. 355; Curtis *v.* Parker, 136 Ala. 217, 33 So. 935 (holding that plaintiff must show the existence of a debt from the garnishee to defendant, for which the latter could maintain an action of debt or *indebitatus assumpsit*); Sevier *v.* Throckmorton, 33 Ala. 512.

Delaware.— Netter *v.* Stoeckle, 4 Pennew. 345, 56 Atl. 604.

Georgia.— Sanders *v.* Miller, 60 Ga. 554.

Illinois.— Payne *v.* Chicago, etc., R. Co., 170 Ill. 607, 48 N. E. 1053 [*affirming* 69 Ill. App. 38]; Rippen *v.* Schoen, 92 Ill. 229; Montreal Bank *v.* Taylor, 86 Ill. App. 388; Choate *v.* Blackford, 26 Ill. App. 656.

Indiana.— Field *v.* Malone, 102 Ind. 251, 1 N. E. 507.

Iowa.— Farwell *v.* Howard, 26 Iowa 381.

Massachusetts.— Cardany *v.* New England Furniture Co., 107 Mass. 116.

Mississippi.— Berryman *v.* Sullivan, 13 Sm. & M. 65.

Missouri.— Reagan *v.* Pacific R. Co., 21 Mo. 30; Reid *v.* Mercurio, 91 Mo. App. 673 (in garnishment against an insurance company, it must be shown that defendant owned the goods covered by the policy of insurance, in order to hold the company); Whiteside *v.* Longacre, 88 Mo. App. 168 (holding, however, that where the garnishee's defense is in the nature of a confession and avoidance, the burden is on him); Hax *v.* Acme Cement Plaster Co., 82 Mo. App. 447.

Pennsylvania.— Caldwell *v.* Coates, 78 Pa. St. 312.

Tennessee.— Nashville *v.* Potomac Ins. Co., 2 Baxt. 296.

Texas.— East Line, etc., R. Co. *v.* Terry, 50 Tex. 129; Smith *v.* Merchants', etc., Nat. Bank, (Civ. App. 1897) 40 S. W. 1038; Scheuber *v.* Simmons, 2 Tex. Civ. App. 672, 22 S. W. 72; Schneider *v.* Bullard, 1 Tex. App. Civ. Cas. § 1185.

See 24 Cent. Dig. tit. "Garnishment," § 300.

Conditional promise.— In order to render the garnishee liable on a conditional promise, plaintiff must show both the promise and the fulfilment of the condition. Caldwell *v.* Silva, 23 Mo. App. 417.

Proof of judgment.— In several jurisdictions, where the garnishee's answer is controverted, upon the joining of issues, the burden is upon plaintiff to prove the existence of the judgment on which the proceeding is based. Bradley Fertilizer Co. *v.* Pollock, 104 Ala. 402, 16 So. 138 (holding, however, that where the judgment is described in the garnishment, the implied admission of its existence by answering the garnishment supplies the want of proof to that effect); Jackson *v.* Shipman, 28 Ala. 488; Blair *v.* Rhodes, 5 Ala. 648; Miller *v.* Wilson, 86 Tenn. 495, 7 S. W. 638; Kelly *v.* Gibbs, 84 Tex. 143, 19 S. W. 380, 563. See, however, Lasley *v.* Sisloff, 7 How. (Miss.) 157.

Proof of citizenship.— Under an old Maryland statute, it was necessary for plaintiff to prove on the trial that he was a citizen of Maryland or some other of the United States, at the time of the suing out of the writ of attachment. Barr *v.* Perry, 3 Gill (Md.) 313; Mandeville *v.* Jarrett, 6 Harr. & J. (Md.) 497; Shivers *v.* Wilson, 5 Harr. & J. (Md.) 130, 9 Am. Dec. 497.

99. Walker *v.* Fairbanks, 55 Mo. App. 478; Bunker *v.* Hibler, 49 Mo. App. 536 (holding this to be true, even where it appeared that

garnishee's answer admits an indebtedness, but leaves it in doubt as to whether he is indebted to defendant or some other person, as where a transfer or assignment of the debt is claimed, the garnishee is entitled to be discharged, unless plaintiff shows *aliunde* facts sufficient to hold him liable;[1] and where such assignment or transfer is attacked on the ground of fraud, the burden of proof is upon plaintiff.[2] And where the debt sought to be reached is evidenced by a negotiable paper, the burden is upon plaintiff to show that such paper had matured, and that at the time of maturity it was held by the principal defendant, or at least it was not in the hands of a *bona fide* holder.[3] In other jurisdictions, where the answer of the garnishee shows a *prima facie* liability, as where it admits possession of funds or goods of defendant, and seeks to avoid liability by showing a discharge, transfer, or assignment of such funds or goods prior to the service of the writ, the burden of proof is upon the garnishee to establish such facts pleaded in avoidance.[4] Thus where the garnishee by his answer admits all the allegations of the complaint except the indebtedness, and affirmatively alleges payment thereof, upon the issue of payment, the burden of proof is upon the garnishee.[5]

3. ADMISSIBILITY. The same general rules as to the admissibility of evidence apply in garnishment proceedings as are applicable in other civil actions. Accordingly the evidence must be confined to the issue joined,[6] and be in conformity with

a short time before garnishment, the garnishee had received, as defendant's agent, a sum greater than he admitted in his answer); Erbs *v.* Weimer, 32 Wkly. Notes Cas. (Pa.) 204.

1. *Illinois.*— Williams *v.* West Chicago St. R. Co., 199 Ill. 57, 64 N. E. 1024 [*affirming* 101 Ill. App. 291]; Pierce *v.* Carleton, 12 Ill. 358, 54 Am. Dec. 405.

Iowa.— Morse *v.* Marshall, 22 Iowa 290.

Michigan.— Bethel *v.* Linn, 63 Mich. 464, 30 N. W. 84; Spears *v.* Chapman, 43 Mich. 541, 5 N. W. 1038; Hewitt *v.* Wagar Lumber Co., 38 Mich. 701.

Minnesota.— Pioneer Printing Co. *v.* Sanborn, 3 Minn. 413.

Missouri.— Lindsay *v.* Continental Nat. Bank, 82 Mo. App. 301.

See 24 Cent. Dig. tit. "Garnishment," § 300.

2. Sheldon *v.* Hinton, 6 Ill. App. 216; Thomas *v.* Sturges, 32 Miss. 261; Hax *v.* Acme Cement Plaster Co., 82 Mo. App. 447.

3. Mims *v.* West, 38 Ga. 18, 95 Am. Dec. 379; Cleneay *v.* Junction R. Co., 26 Ind. 375; Peel *v.* Farmers', etc., Bank, 1 Tex. App. Civ. Cas. § 180. See, however, Gibson *v.* Huie, 14 La. 129, holding that defendant, who alleges that a note held by him was transferred at the time it was attached in the maker's hands, must prove it or he will be considered as having been in possession, and so before the court.

4. *Georgia.*— Pupke *v.* Meador, 72 Ga. 230.

Illinois.— McCoy *v.* Williams, 6 Ill. 584.

Iowa.— Hoops *v.* Culbertson, 17 Iowa 305.

Louisiana.— Gaty *v.* Franklin M. & F. Ins. Co., 12 La. Ann. 272.

Maine.— Barker *v.* Osborne, 71 Me. 69.

Missouri.— Sands *v.* Berkley, 88 Mo. App. 54; Boatmen's Sav. Bank *v.* Overall, 16 Mo. App. 510; Frank *v.* Frank, 6 Mo. App. 589.

Vermont.— Lyman *v.* Tarbell, 30 Vt. 463.

United States.— Williams *v.* Hill, 19 How. 246, 15 L. ed. 570, holding that a garnishee who claims property of the debtor in his hands, by virtue of a title derived from the debtor after the origin of a creditor's demand, has the burden of proving the *bona fides* of his claim.

See 24 Cent. Dig. tit. "Garnishment," § 300.

Compare Weems *v.* Miles, 1 Tex. App. Civ. Cas. § 1207.

Claim of exemption.— It has been held in Iowa that in garnishment to subject the earnings of the debtor for the payment of a debt, a garnishee or defendant has the burden to establish that the amount due from the garnishee is exempted. Oakes *v.* Marquardt, 49 Iowa 643.

5. Harley *v.* Harley, 67 Ill. App. 138 (payments on a debt are affirmative facts to be proved by the person claiming the benefit thereof); Baird *v.* Dietz, 11 Ky. L. Rep. 759; O'Brien *v.* Liddell, 10 Sm. & M. (Miss.) 371 (where a judgment debtor is garnished, the judgment is *prima facie* evidence of his liability, and if he has discharged it the burden is on him to show it); Willis *v.* Holmes, 28 Oreg. 265, 42 Pac. 989. See also Offutt *v.* Scribner, 10 La. Ann. 639; Harris *v.* Somerset, etc., R. Co., 47 Me. 298 (officer's return on a trustee writ showed that it was served on the trustee at a stated hour, and it was held that payment made by the trustee to his principal on the same day was to be regarded as subsequent to the service of the writ, in the absence of proof to the contrary); Fessler *v.* Ellis, 40 Pa. St. 248. *Compare* Gee *v.* Cumming, 3 N. C. 398.

Cross demand.— The burden is on a garnishee setting up a cross demand against defendant to show that such demand was complete before service of attachment. Pennell *v.* Grubb, 13 Pa. St. 552.

6. *Alabama.*— Gray *v.* Perry Hardware Co., 111 Ala. 532, 20 So. 368; Kling *v.* Tunstall,

the pleadings;[7] and, where no issue has been regularly taken upon the garnishee's answer, it is error to allow evidence to be given to contradict it.[8]

4. SUFFICIENCY. Likewise the same rules control in garnishment proceedings in regard to the sufficiency of evidence as in other civil actions, and the question as to whether the garnishee or trustee is chargeable is to be decided on the rule

109 Ala. 608, 19 So. 907; Harrell *v.* Whitman, 20 Ala. 519.

Arkansas.—Britt *v.* Bradshaw, 18 Ark. 530.

California.—Coffee *v.* Haynes, 124 Cal. 561, 57 Pac. 482, 71 Am. St. Rep. 99.

Georgia.— Strupper *v.* King, 49 Ga. 328; Dugas *v.* Mathews, 9 Ga. 510, 54 Am. Dec. 361.

Illinois.— Young *v.* Cairo First Nat. Bank, 51 Ill. 73.

Iowa.— Bolton *v.* Bailey, 122 Iowa 729, 98 N. W. 560, (1903) 93 N. W. 596; Spencer *v.* Moran, 80 Iowa 374, 45 N. W. 902.

Massachusetts.— Gleason *v.* Gage, 2 Allen 410.

Minnesota.—Davis *v.* Mendenhall, 19 Minn. 149.

Missouri.— St. Joseph Iron Co. *v.* Halverson, 48 Mo. App. 383; Spengler *v.* Kaufman, 43 Mo. App. 5.

Montana.— Cowell *v.* May, 26 Mont. 163, 66 Pac. 843.

New Hampshire.— Clark *v.* Robinson, 37 N. H. 579; Brown *v.* Dudley, 33 N. H. 511.

Pennsylvania.— Good *v.* Grant, 76 Pa. St. 52; Allen *v.* Erie City Bank, 57 Pa. St. 129; Custer *v.* Nice, 12 Wkly. Notes Cas. 268.

See 24 Cent. Dig. tit. "Garnishment," § 301. And see EVIDENCE, 16 Cyc. 821.

Ownership of property.— On issue joined between a creditor and a garnishee, the former may show any fact tending to prove that the property in the hands of the garnishee belongs to the debtor (Reese *v.* Platt, 4 Kan. App. 801, 44 Pac. 31, 46 Pac. 990; Baltimore First Nat. Bank *v.* Jaggers, 31 Md. 38, 100 Am. Dec. 53; Krementz *v.* Howard, 109 Mich. 466, 67 N. W. 526; Ferguson-McKinney Dry Goods Co. *v.* City Nat. Bank, 31 Tex. Civ. App. 238, 71 S. W. 604), and the principal debtor is a competent witness upon the trial of such issue (Amoskeag Mfg. Co. *v.* Gibbs, 28 N. H. 316). Evidence as to ownership may likewise be introduced on behalf of the garnishee. Enos *v.* Tuttle, 3 Conn. 247; King *v.* Bird, 85 Iowa 535, 52 N. W. 494; McDougall *v.* Lamb, 113 Mich. 69, 71 N. W. 458; Brown *v.* Gummersell, 30 Mo. App. 341.

Transfer or assignment.— Where the garnishee sets up in his answer a transfer or assignment of the property or funds prior to garnishment, evidence may be introduced in support of (Williams *v.* West Chicago St. R. Co., 199 Ill. 57, 64 N. E. 1024; Hodges *v.* Graham, 25 La. Ann. 365; Newell *v.* Blair, 7 Mich. 103; Seitz *v.* Starks, (Mich. 1904) 98 N. W. 852; Byars *v.* Griffin, 31 Miss. 603; Hilliard *v.* Enders, 196 Pa. St. 587, 46 Atl. 839) or to discredit the validity of such transfer or assignment (Rowland *v.* Slate, 58 Pa. St. 196; Millar *v.* Plass, 11 Wash. 237, 39 Pac. 956. See also Stockbridge *v.* Fahnestock, 87 Md. 127, 39 Atl. 95. See, however, Case *v.* Ingersoll, 7 Kan. 367, holding that, where the garnishee's answer alleges the prior assignment of property for the benefit of creditors, evidence that such assignment was fraudulent is inadmissible).

Admissions or declarations of garnishee.— Where the answer of the garnishee is controverted, his admissions or declarations made before or after the service of the writ are admissible to contradict the answer. Trunkey *v.* Crosby, 33 Minn. 464, 23 N. W. 846; Stevens *v.* Gwathmey, 9 Mo. 636; Watson *v.* Montgomery, (Tex. App. 1890) 16 S. W. 546; Ellis *v.* Goodnow, 40 Vt. 237. See also Keppel *v.* Moore, 66 Mich. 292, 33 N. W. 499. But see Quinn *v.* Blanck, 55 Mich. 269, 21 N. W. 307.

Declarations of defendant.— However, the declarations of the principal defendant cannot be received as evidence against the garnishee. Enos *v.* Tuttle, 3 Conn. 247; Perkins *v.* Barnes, 118 Mass. 484; Cahoon *v.* Ellis, 18 Vt. 500. Likewise payment by garnishee of his debt to defendant cannot be proved against plaintiff by statements of defendant made after service of the garnishment. Willis *v.* Holmes, 28 Oreg. 265, 42 Pac. 989.

Conspiracy.—There being evidence that the transactions of defendant and garnishee were collusive, defendant's testimony is admissible against the garnishee, as in a case of conspiracy. Gumberg *v.* Treusch, 103 Mich. 543, 61 N. W. 872.

Waiver of proof of loss.— When money due on an insurance policy was garnished, plaintiff in garnishment may show that the company waived proofs of loss. Reid *v.* Mercurio, 91 Mo. App. 673.

Deed of trust.— It has been held in Texas that evidence cannot be heard to determine the validity of a trust deed for creditors, under which the garnishee alleges that he holds defendant's property, but the validity thereof must be determined from the deed itself, and the facts alleged by the garnishee which are to be taken as true as against him. Moore *v.* Blum, (Tex. Civ. App. 1897) 40 S. W. 511.

7. Harvey *v.* Mix, 24 Conn. 406; Woodbridge *v.* Windthrop, 1 Root (Conn.) 557; Freese *v.* Co-operative Coal Co., 67 Iowa 42, 24 N. W. 583; Weil *v.* Posten, 77 Mo. 284; Wingate *v.* Nutter, 17 N. H. 256. See also Childress *v.* Franks, (Tex. Civ. App. 1898) 44 S. W. 868.

8. Wildner *v.* Ferguson, 42 Minn. 112, 43 N. W. 794, 18 Am. St. Rep. 495, 6 L. R. A. 338 (holding likewise that when a case is submitted on a disclosure alone, the court cannot make a finding of fact outside of it); Williams *v.* Jones, 42 Miss. 270. See also Cairo, etc., R. Co. *v.* Killenberg, 82 Ill. 295; Dieter *v.* Smith, 70 Ill. 168.

of the preponderance of evidence applicable in such actions;[9] and since, to charge the garnishee, his liability must clearly appear, where plaintiff fails to prove by a preponderance of evidence all the facts upon which he relies to charge the garnishee, the latter is entitled to be discharged.[10]

I. Discharge of Garnishee Before Trial — 1. In General. Where the garnishee by his answer admits an indebtedness to defendant, the refusal of the court to grant a motion for judgment on the answer does not *per se* discharge the garnishee.[11] Where, however, the garnishee's uncontroverted answer fails to show any liability, the court may of its own motion discharge him.[12]

2. Where Third Person Is Claimant. Where the garnishee's answer discloses that the property or debt is claimed by a third person, and plaintiff fails to have claimant cited to litigate such claim, the garnishee is entitled to his discharge.[13]

9. Peterson *v.* Poignard, 8 B. Mon. (Ky.) 309; Kelley *v.* Weymouth, 68 Me. 197; Smith *v.* Stearns, 19 Pick. (Mass.) 20; Boatmen's Sav. Bank *v.* Overall, 90 Mo. 410, 3 S. W. 64. See also Wightman *v.* Kruger, 23 R. I. 78, 49 Atl. 395, holding that a garnishee cannot be charged on oral testimony. See Evidence, 16 Cyc. 821.

Evidence was held to be sufficient to hold the garnishee liable in Myatt *v.* Lockhart, 9 Ala. 91; Howe *v.* Hyer, 36 Fla. 12, 17 So. 925; McKee *v.* Anderson, 35 Ind. 17; Dunning *v.* Baily, 120 Iowa 729, 95 N. W. 248; Butman *v.* Hobbs, 35 Me. 227; Farrington *v.* Sexton, 43 Mich. 454, 5 N. W. 654; Colcord *v.* Daggett, 18 Mo. 557; Spengler *v.* Kaufman, 46 Mo. App. 644; Geurinck *v.* Alcott, 66 Ohio St. 94, 63 N. E. 714; Altona *v.* Dabney, 37 Oreg. 334, 62 Pac. 521; Southern Maryland R. Co. *v.* Moyer, 125 Pa. St. 506, 17 Atl. 461; Fessler *v.* Ellis, 40 Pa. St. 248; Lansdale Trust, etc., Co. *v.* Smith, 19 Pa. Super. Ct. 235; Martin *v.* Throckmorton, 15 Pa. Super. Ct. 632; Nicholson *v.* Hose Co., 14 Leg. Int. (Pa.) 124; Miller *v.* Wilson, 86 Tenn. 495, 7 S. W. 638; Hardin *v.* White Swan Mining, etc., Co., 26 Wash. 583, 67 Pac. 236; Aschermann *v.* Hart, 109 Wis. 38, 85 N. W. 121: Clasgens Co. *v.* Silber, 93 Wis. 579, 67 N. W. 1122; Williams *v.* Hill, 19 How. (U. S.) 246, 15 L. ed. 570.

Production of writ.— It has been held in Texas, on the trial of an issue between plaintiff and garnishee, that the production of the writ of garnishment is not essential to plaintiff's recovery, where the garnishee has answered. Jones *v.* Cummins, 17 Tex. Civ. App. 661, 43 S. W. 854.

10. *Alabama.*— Curtis *v.* Parker, 136 Ala. 217, 33 So. 935; Young *v.* Louisville, etc., R. Co., 95 Ala. 454, 11 So. 121.

Georgia.— Americus Grocery Co. *v.* Link, 116 Ga. 813, 43 S. E. 49; Abbott *v.* Danewood, 115 Ga. 651, 42 S. E. 67.

Iowa.— Streeter *v.* Gleason, 120 Iowa 703, 95 N. W. 242; Kerr *v.* Edgington, 106 Iowa 68, 75 N. W. 669; Smith *v.* Clarke, 9 Iowa 241.

Louisiana.—Marks *v.* Reinberg, 16 La. Ann. 348.

Massachusetts.— Porter *v.* Stevens, 9 Cush. 530.

Michigan.— Dawson *v.* Iron Range, etc., R. Co., 97 Mich. 33, 56 N. W. 106; Hewitt *v.* Wagar Lumber Co., 38 Mich. 701.

Minnesota.— Schafer *v.* Vizena, 30 Minn. 387, 15 N. W. 675.

Missouri.— Stagl *v.* Holland Bldg. Co., 81 Mo. App. 620; Herboth Mercantile Co. *v.* Marre, 74 Mo. App. 564.

Evidence was held to be insufficient to charge the garnishee in German Nat. Bank *v.* National State Bank, 5 Colo. App. 427, 39 Pac. 71; Hewitt *v.* Wheeler, 23 Conn. 284; Armand *v.* Burrum, 69 Ga. 758; Cairo, etc., R. Co. *v.* Killenberg, 92 Ill. 142; Boston L. & T. Co. *v.* Organ, 53 Kan. 386, 36 Pac. 733; Bigelow *v.* York, etc., R. Co., 37 Me. 320; Coates *v.* Sangston, 5 Md. 121; Ruhl *v.* A. Ruoff Brewing Co., 113 Mich. 291, 71 N. W. 526; Dietz *v.* Bignall, 86 Mich. 292, 49 N. W. 148; Gordin *v.* Moore, 62 Miss. 493; Swanger *v.* Snyder, 50 Pa. St. 218; Howard *v.* Crawford, 21 Tex. 399.

11. Bostwick *v.* Beach, 18 Ala. 80; Halbert *v.* Stinson, 6 Blackf. (Ind.) 398; Johann *v.* Rufener, 30 Wis. 671. See also Waco State Bank *v.* Stephenson Mfg. Co., 4 Tex. Civ. App. 137, 23 S. W. 234.

12. Sabin *v.* Cooper, 15 Gray (Mass.) 532; Tuttle *v.* Gordon, 8 Mo. 152. See also Hanson *v.* McCann, (Colo. App. 1904) 76 Pac. 983; Sprague *v.* Auffmordt, 183 Mass. 7, 66 N. E. 416; Demeritt *v.* Estes, 56 N. H. 313.

Failure of principal action.— A judgment for defendant in the principal action necessarily discharges the garnishee. Commercial Mfg. Co. *v.* Conrad, 9 Phila. (Pa.) 24. See also Axtell *v.* Gibbs, 52 Mich. 639, 640, 18 N. W. 395, 396.

Failure to proceed with examination.— Where a party is garnished to answer on a certain day, and appears, and plaintiff declines or is not prepared to take his answer, and the term elapses without any action on the garnishment, the garnishee is entitled to a discharge. Ogden *v.* Mills, 3 Cal. 253. See also Kronck *v.* Storm, 93 Mo. App. 410, 67 S. W. 668.

Motion by defendant.— Under Wis. Rev. St. (1898) § 2765, providing that defendant may defend the garnishment proceedings, it has been held that defendant is authorized to appear and move for the dismissal of the atcion against the garnishee. Schomberg Hardwood Lumber Co. *v.* Engel, 114 Wis. 273, 90 N. W. 177.

13. Donald *v.* Nelson, 95 Ala. 111, 10 So. 317; Brunswick Gas Light Co. *v.* Flanagan,

3. On Security. In several jurisdictions the statutes provide that a third person or the principal defendant may have the garnishment discharged by filing a bond conditioned for the payment of any judgment that may be rendered thereon.[14]

J. Trial of Issues Between Plaintiff and Garnishee — 1. Scope of Inquiry. Upon issue joined between plaintiff and the garnishee, the question of indebtedness from defendant to plaintiff is not involved,[15] and the question as to the liability of the garnishee must be determined from the facts as they are found to exist at the date of service of the writ of garnishment.[16] Where the garnishee sets up his title to property in opposition to that of defendant, its validity and sufficiency can only be attacked by direct action instituted for that purpose, and cannot be raised in garnishment proceedings.[17] In some jurisdictions where the garnishee

88 Me. 420, 34 Atl. 263; Look *v.* Brackett, 74 Me. 347; Jordan *v.* Harmon, 73 Me. 259; Mansfield *v.* Stevens, 31 Minn. 40, 16 N. W. 455; Cram *v.* Shackleton, 64 N. H. 44, 5 Atl. 715, holding likewise that the fact that the claimant of the funds in the possession of the trustee refused to appear under the terms imposed and leave granted by the court does not prevent the discharge of the trustee. See also Hawes *v.* Waltham, 18 Pick. (Mass.) 451. *Compare* Galena Nat. Bank *v.* Chase, 71 Iowa 120, 32 N. W. 202; Hanaford *v.* Hawkins, 18 R. I. 432, 28 Atl. 605.

Non-resident claimant.— It has been held in Missouri that the courts of that state have no authority in actions of garnishment to order non-residents to appear, interplead, and litigate their respective rights to the fund attached. Sheedy *v.* Second Nat. Bank, 62 Mo. 17, 21 Am. Rep. 407.

14. Warlick *v.* Neal Loan, etc., Co., 120 Ga. 1070, 48 S. E. 402; Woodbridge *v.* Drought, 118 Ga. 671, 45 S. E. 266; Beasley *v.* Lennos-Haldeman Co., 116 Ga. 13, 42 S. E. 385; Henry *v.* Lennox-Haldeman Co., 116 Ga. 9, 42 S. E. 383 (holding, however, that the giving a bond to dissolve the garnishment does not authorize a judgment *in personam* against the debtor); Garden *v.* Crutchfield, 112 Ga. 274, 37 S. E. 368 (holding, however, that the garnishee is required for the information of the court to file his answer, notwithstanding the dissolution of the garnishment); Maddox *v.* American Trust, etc., Co., 109 Ga. 787, 35 S. E. 155; American Cigar Co. *v.* Mayer, 68 Ohio St. 623, 67 N. E. 1063 (holding, however, that the undertaking to discharge the garnishment must contain the condition that the obligors will perform any judgment which the court may render, and that it is error to discharge the garnishee if such condition is not contained in the undertaking); Santee River Co. *v.* Webster, 23 R. I. 599, 51 Atl. 218 (holding that the bond should run to the officer serving the writ); Tinsley *v.* Ardrey, 26 Tex. Civ. App. 561, 64 S. W. 803.

15. Jones *v.* Pope, 6 Ala. 154; Perry *v.* Blatch, 2 Kan. App. 522, 43 Pac. 989 (holding, however, that where the debtor's interest in a debt owed to him and another, but not as partners, is garnished, and the garnishee pays the amount thereof into court, and all parties interested appear, the court should determine the interest of the debtor, and hold it subject to garnishment); Perea *v.* Colorado Nat. Bank, 6 N. M. 1, 27 Pac. 322.

16. *Georgia.*— Shorter *v.* Moore, 41 Ga. 691, holding likewise that the priority of judgment creditors' liens on the fund in the hands of the garnishee may be inquired into, on his affidavit setting up payment to one, and alleging illegality in the proceedings of another.

Kansas.— U. S. National Bank *v.* Pomeroy, 4 Kan. App. 44, 45 Pac. 720.

Michigan.— Fearey *v.* Cummings, 41 Mich. 376, 1 N. W. 946, holding, however, that plaintiff may show that the garnishee is chargeable by reason of the facts denied, or not mentioned in the disclosure.

Nebraska.— State *v.* Duncan, 37 Nebr. 631, 56 N. W. 214, holding likewise that a justice of the peace has authority to determine the amount and priority of several writs of garnishment, as well when the validity of some of them is disputed as when their validity is unquestioned.

Pennsylvania.— Good *v.* Grant, 76 Pa. St. 52.

Wisconsin.— Southwestern Land Co. *v.* Ellis, 104 Wis. 445, 80 N. W. 749, holding likewise that plaintiff cannot litigate in the garnishment proceedings an independent cause of action against the garnishee.

See 24 Cent. Dig. tit. "Garnishment," § 308.

Compare Smith *v.* Boston, etc., R. Co., 33 N. H. 337, holding that the liability of a trustee is determined by the state of facts existing at the time his disclosure is made and therein set forth.

The uncontroverted answer of the garnishee, alleging that he holds defendant's property under a deed of trust for creditors, brings the effect of such deed before the court for determination. Moore *v.* Blum, (Tex. Civ. App. 1897) 40 S. W. 511.

17. Sears *v.* Thompson, 72 Iowa 61, 33 N. W. 364; Ivens *v.* Ivens, 30 La. Ann. 249. See also Cole *v.* Sater, 5 Minn. 468; Riley *v.* Rennick Milling Co., 44 Mo. App. 519, holding that contract rights resulting from an agreement between plaintiff and garnishee cannot be enforced in garnishment proceedings, but only by direct action between the parties. See, however, Grainger *v.* Sutton First Nat. Bank, 63 Nebr. 46, 88 N. W. 121, holding that the validity of a chattel mort-

sets up in his answer an assignment of the debt or property prior to the service of the writ, an issue may be made to determine the question of the validity of such assignment.[18]

2. Time For Trial. In some jurisdictions the statutes provide that if the principal defendant does not, within a stipulated time after judgment, serve upon the garnishee notice of motion for a new trial or his intention to appeal the case, the issue against the garnishee shall stand for trial at the same term.[19] The court, however, may in its discretion continue the case to a subsequent term.[20] Where an appeal is taken in the principal action, garnishment proceedings should be continued until the principal action is decided on appeal.[21]

3. Mode and Conduct of. Under some statutes, after a contest of the answer, an issue is made up under the direction of the court, in which plaintiff must allege in what respect the answer is untrue, and it is in the nature of a complaint in the cause;[22] and the statutes usually provide that either party, at his option, is entitled to a trial by jury,[23] and, on the trial of the issue, plaintiff may examine

gage asserted by the garnishee, under which he has taken possession of the mortgaged property, may be contested by the judgment creditor.

18. Davis *v.* Mendenhall, 19 Minn. 149; Whitney Holmes Organ Co. *v.* Petitt, 34 Mo. App. 536; St. Louis Brokerage Co. *v.* Cronin, 14 Mo. App. 587; Doggett *v.* St. Louis M. & F. Ins. Co., 19 Mo. 201; Lee *v.* Tabor, 8 Mo. 322. See also Peoples' Bank *v.* Smith, 75 Miss. 753, 23 So. 428, 65 Am. St. Rep. 618. See, however, Sayers *v.* Kent, 1 Pa. Cas. 97, 1 Atl. 442; Cross *v.* Brown, 19 R. I. 220, 33 Atl. 147, holding that it is improper to admit evidence in support of allegations and interrogatories filed which would in effect be to try in the action rights of prior attaching creditors. *Contra*, Simpson *v.* Tippin, 5 Stew. & P. (Ala.) 208.

Upon the issue of nulla bona, the garnishee cannot prove the assignment of the debt by defendant to a third person, but such matter must be specially pleaded. Baker *v.* Mix, 2 Fed. Cas. No. 775, 3 Cranch C. C. 1.

Fraud in law.— It has been held in New Hampshire that as against the trustee a plaintiff in foreign attachment cannot raise the question whether an assignment of future earnings by defendant is fraudulent as a matter of law. Dole *v.* Farwell, 72 N. H. 183, 55 Atl. 553.

19. Roman *v.* Dimmick, 123 Ala. 366, 26 So. 214 (no contest of the answer is allowable at a term subsequent to the filing thereof, unless further time is granted, or the garnishee waives plaintiff's right to contest); Cluett *v.* Rosenthal, 100 Mich. 193, 58 N. W. 1009, 43 Am. St. Rep. 446 (holding, however, that the garnishee waives his right to an issue at the same term that judgment is rendered against the principal defendant, by noticing the case for a later term); Elser *v.* Rommel, 98 Mich. 74, 56 N. W. 1107; Crippen *v.* Fletcher, 56 Mich. 386, 23 N. W. 56 (holding, however, that the issue of garnishment can be tried on the same day with the principal suit, if the garnishee is willing); Poulson's Estate, 11 Phila. (Pa.) 151 (holding, however, that it is error to make an award to an attaching creditor of a legatee prior to final judgment against the executor and garnishee). See also Smith *v.* Boston, etc., R. Co., 33 N. H. 337, holding that after disclosure showing a contingent liability on the part of the trustee for the principal defendant, the court will not direct the suit to be continued to await the result of such contingent liability.

On a trial de novo in the circuit court, on appeal from a justice's court, where the garnishee fails to appear and support the truth of his answer, plaintiff is entitled to a judgment by default. Lehman *v.* Hudmon, 85 Ala. 135, 4 So. 741.

In Pennsylvania, where, in an action by foreign attachment, the writ is served by garnishment and defendant makes a default, the garnishee is not entitled to be heard on a defense going to his own liability until judgment has been entered and a writ of scire facias issued against him. Greevy *v.* Jacob Tome Inst., 132 Fed. 408.

20. Cottingham *v.* Greely Barnham Grocery Co., 129 Ala. 200, 30 So. 560, 87 Am. St. Rep. 58; Lindsay *v.* Morris, 100 Ala. 546, 13 So. 619; Beckert *v.* Whitlock, 83 Ala. 123, 3 So. 545; *Ex p.* Opdyke, 62 Ala. 68. See also Carter *v.* Bush, 79 Tex. 29, 15 S. W. 167.

21. Bank of Commerce *v.* Franklin, 88 Ill. App. 198; Roberts *v.* Drinkard, 3 Metc. (Ky.) 309; Wattles *v.* Lillibridge, 119 Mich. 356, 78 N. W. 123; Thompson *v.* Burnham, 1 Tex. App. Civ. Cas. § 1058.

22. Cottingham *v.* Greely Barnham Grocery Co., 129 Ala. 200, 30 So. 560, 87 Am. St. Rep. 58; Lindsay *v.* Morris, 100 Ala. 546, 13 So. 619; Lehman *v.* Hudmon, 85 Ala. 135, 4 So. 741; Title Guaranty, etc., Co. *v.* Northwestern Theatrical Assoc., 23 Wash. 517, 63 Pac. 212, holding that under Wash. Laws (1893), p. 95, § 22, where the answer of the garnishee is controverted, the question shall be tried as in other cases. See Warne *v.* Kendall, 78 Ill. 598, holding that it is irregular to make up and try an issue between the garnishee and the attaching creditor; the issue should be between defendant in attachment and the garnishee.

23. *California.*— Cahoon *v.* Lavy, 5 Cal. 294.

the garnishee, if he so desires.[24] Where, however, the statute is silent on the subject, it is held that the garnishee is not entitled to a trial by a jury as a matter of law.[25] In some jurisdictions the original judgment must be produced and read in evidence before any testimony can be introduced to establish the indebtedness of the garnishee.[26]

4. QUESTIONS FOR JURY. Where the answer of the garnishee, or the evidence submitted, present facts which plaintiff attempts to disprove, it is a proper case for the jury;[27] but where the question is purely one of law, relating to the sufficiency of the answer or the testimony introduced, and the legal inferences deducible therefrom, the court should decide the matter without submission to the jury.[28]

5. INSTRUCTIONS. The instructions to the jury should be applicable to the case in which they are given, and it is error to direct the attention of the jury to

Georgia.— Boozer *v.* Fuller, 88 Ga. 295, 14 S. E. 615.

Iowa.— Kelly *v.* Andrews, 94 Iowa 484, 62 N. W. 853; Henny Buggy Co. *v.* Patt, 73 Iowa 485, 35 N. W. 587, holding, however, that the garnishee may waive his right to a jury trial, where he is so entitled.

Mississippi.— Roberts *v.* Barry, 42 Miss. 260, holding, however, that an issue between plaintiff and defendant, and a contest between plaintiff and garnishee on the latter's answers, are separate and distinct, and should not be submitted to the jury at the same time.

New Hampshire.— Hills *v.* Smith, 19 N. H. 381; Wiggin *v.* Lewis, 16 N. H. 52. See also Clark *v.* Robinson, 37 N. H. 579. And *compare* Hills *v.* Smith, 28 N. H. 369.

New Mexico.— Perea *v.* Colorado Nat. Bank, 6 N. M. 1, 27 Pac. 322.

Oregon.— Case *v.* Noyes, 16 Oreg. 329, 19 Pac. 104.

Washington.— Everton *v.* Parker, 3 Wash. 331, 28 Pac. 536.

Wisconsin.— Beck *v.* Cole, 16 Wis. 95.

See 24 Cent. Dig. tit. "Garnishment," §§ 311, 312.

24. Jefferson County Sav. Bank *v.* Nathan, 138 Ala. 342, 35 So. 355; Roman *v.* Baldwin, 119 Ala. 257, 24 So. 360; Raniville *v.* Grove, 118 Mich. 196, 76 N. W. 307, holding, however, that a non-resident garnishee cannot be required to submit to an oral examination on a notice of from three to ten days. See also Hadden *v.* Linville, 86 Md. 210, 38 Atl. 37, 900. See, however, Kelley *v.* Andrews, 102 Iowa 119, 71 N. W. 251, holding that plaintiff's motion for leave to further examine the garnishee, made on a jury trial of issues joined on the garnishee's examination, is properly denied, since new issues might thereby be opened and the examination of the garnishee is not a matter for the jury.

25. Weibeler *v.* Ford, 61 Minn. 398, 63 N. W. 1074; Huntington *v.* Bishop, 5 Vt. 186; Delaney *v.* Hartwig, 91 Wis. 412, 64 N. W. 1035; La Crosse Nat. Bank *v.* Wilson, 74 Wis. 391, 43 N. W. 153.

26. Patterson *v.* Harland, 12 Ark. 158 (holding, however, that if the garnishee permits plaintiff to proceed with other testimony without requiring the production of the judgment, objection is waived and cannot be raised on a motion for a new trial); Lieberman *v.* Hoffman, 2 Pennyp. (Pa.) 211.

27. *Connecticut.*— Fitch *v.* Waite, 5 Conn. 117.

Georgia.— Emmons *v.* Southern Bell Tel., etc., Co., 80 Ga. 760, 7 S. E. 232.

Iowa.— Drake *v.* Buck, 35 Iowa 472, holding that the weight and credit to be given to a garnishee's answer is for the jury alone, and that the court is not authorized to charge with reference thereto in the trial of an issue taken thereon.

Louisiana.— Denouvion *v.* McNight, 26 La. Ann. 74; Burke *v.* Taylor, 15 La. 236.

Maryland.— Odend'hal *v.* Devlin, 48 Md. 439; Harding *v.* Hull, 5 Harr. & J. 478.

Michigan.— Ferry *v.* Home Sav. Bank, 114 Mich. 321, 72 N. W. 181, 68 Am. St. Rep. 487; Gumberg *v.* Treusch, 110 Mich. 451, 60 N. W. 236; Bethel *v.* Linn, 63 Mich. 464, 30 N. W. 84.

Pennsylvania.— Hagy *v.* Hardin, 186 Pa. St. 428, 40 Atl. 804; Conshohocken Tube Co. *v.* Iron Car Equipment Co., 181 Pa. St. 122, 37 Atl. 190; Krehmer *v.* Smith, 1 Walk. 310; Numbers *v.* Shelly, 3 Lanc. Bar April 20, 1872. See also Klein *v.* Cohen, 25 Pa. Super. Ct. 621, holding that on the trial of an issue raised in an attachment execution, where the testimony of the garnishee leaves it doubtful whether he had or had not moneys of defendant in his hands at the date of the service of the writ, the case must be submitted to the jury, and it is error for the court to enter a compulsory nonsuit.

See 24 Cent. Dig. tit. "Garnishment," § 312.

28. *Illinois.*— Dieter *v.* Smith, 70 Ill. 168; Wolf *v.* Shannon, 50 Ill. App. 396.

Louisiana.— Burke *v.* Taylor, 15 La. 236.

Pennsylvania.— Fox *v.* Reed, 3 Grant 81; Lehigh Valley R. Co. *v.* Beatty, 26 Wkly. Notes Cas. 118. See also Bouslough *v.* Bouslough, 68 Pa. St. 495.

Texas.—Ferguson-McKinney Dry Goods Co. *v.* City Nat. Bank, 31 Tex. Civ. App. 238, 71 S. W. 604.

Wisconsin.—Wilson *v.* Groelle, 83 Wis. 530, 53 N. W. 900.

See 24 Cent. Dig. tit. "Garnishment," § 312.

issues not involved in the litigation,[29] or to ignore uncontroverted evidence which has been adduced.[30]

6. Verdict and Findings. The verdict and findings should be responsive to the issues joined, and in accordance with the weight of evidence.[31] The jury, however, may in their discretion render a general or a special verdict.[32] In several jurisdictions the statutes require the jury to ascertain by their verdict what property of the principal defendant was in the garnishee's possession at the time of the service of the writ, and likewise what was the value of such property.[33]

K. Judgment Against Garnishee[34] — **1. Nature and Requisites — a. In General.** In several jurisdictions it is held that the judgment against the garnishee should be made in the name of the original defendant for the use of the original plaintiff.[35] Some of the statutes provide that the garnishee may at any time after answer exonerate himself from further responsibility, by paying over to the officer the amount owing by him to defendant, and by placing at the offi-

29. Harrell *v.* Whitman, 20 Ala. 519; Wolf *v.* Shannon, 50 Ill. App. 396; Stein *v.* Seaton, 51 Iowa 18, 50 N. W. 576; Krementz *v.* Howard, 109 Mich. 466, 67 N. W. 526. See also Bray *v.* Wheeler, 29 Vt. 514.

Garnishment of note past due.— Since, under the Iowa statute, the garnishment of the maker of a negotiable note past due will not render him liable, unless the note is delivered, or he is completely exonerated or indemnified from all liability thereon, it is error to instruct the jury to find for plaintiff the amount due on such a note held by defendant against the garnishee after garnishment. Hughes *v.* Monty, 24 Iowa 499.

30. Kenosha Stove Co. *v.* Shedd, 82 Iowa 540, 48 N. W. 933 (holding, however, that it is not error for the court to tell the jury that the garnishee had been garnished by attaching creditors, and had appeared and answered as such, where these facts appeared of record in the case); Coates *v.* Sangston, 5 Md. 121. See also Archer *v.* Peoples' Sav. Bank, 88 Ala. 249, 7 So. 53; Sloman *v.* Goehel Brewing Co., 118 Mich. 442, 76 N. W. 975.

31. *Illinois.*— Gross *v.* Sloan, 58 Ill. App. 302.

Louisiana.—Marks *v.* Reinberg, 16 La. Ann. 348, holding that where the answer of the garnishee is successfully contradicted and falsified, the verdict should be for the amount proved against him, and not for the amount claimed, should it exceed the amount proved.

New Mexico.—Perea *v.* Colorado Nat. Bank, 6 N. M. 1, 27 Pac. 322, holding that where the issue was not only as to the facts of indebtedness and fraud, but also as to the amount of indebtedness, a verdict to the effect that the answer of the garnishee was not true was a finding only upon a part of the issue, and therefore insufficient to support a judgment.

Oklahoma.— Williamson *v.* Oklahoma Nat. Bank, 7 Okla. 621, 56 Pac. 1064, holding that where the evidence showed that the garnishee had property of defendant in his possession, the jury could not return a money verdict.

Pennsylvania.— Poor *v.* Colburn, 57 Pa. St. 415.

Rhode Island.— Stevens *v.* Hargraves, 22 R. I. 235, 47 Atl. 311.

Virginia.— Baltimore, etc., R. Co. *v.* Gallahue, 12 Gratt. 655, 65 Am. Dec. 254, where the garnishee's answer denied any indebtedness to defendant at the time of attachment, and it was held that a verdict finding an indebtedness after that time is too defective to pronounce any judgment thereon.

United States.— Wichita Citizens' Bank *v.* Farwell, 63 Fed. 117, 11 C. C. A. 108.

See 24 Cent. Dig. tit. "Garnishment," § 314.

Compare Ellison *v.* Straw, 119 Wis. 502, 97 N. W. 168.

32. Dieter *v.* Smith, 70 Ill. 168; Shadbolt, etc., Iron Co. *v.* Camp, 80 Iowa 539, 45 N. W. 1062 (holding that it is reversible error in the court to direct the jury to return special findings only, although upon such findings no other judgment could have been rendered, and no general verdict could have changed the result); Hills *v.* Smith, 19 N. H. 381 (holding that on the issue "whether chargeable," it is proper for the jury to return a special verdict, finding the mode of the trustee's liability, as that he had in his possession the property of the principal debtor held as security). See also Hoxie *v.* Sutter, 76 Iowa 764, 40 N. W. 723; Marx *v.* Hart, 166 Mo. 503, 66 S. W. 260, 89 Am. St. Rep. 715.

33. Bethel *v.* Linn, 63 Mich. 464, 30 N. W. 84; Perea *v.* Colorado Nat. Bank, 6 N. M. 1, 27 Pac. 322; Bonnaffon *v.* Thompson, 83 Pa. St. 460; Poor *v.* Colburn, 57 Pa. St. 415; Hampton *v.* Matthews, 14 Pa. St. 105; Sherman *v.* Barrett, 1 Rich. (S. C.) 457; Devall *v.* Taylor, Cheves (S. C.) 5. But see Krehmer *v.* Smith, 1 Walk. (Pa.) 310, holding that where a debt due defendant is attached by execution, it is unnecessary for the verdict to find what goods are in the hands of the garnishee, and their value.

34. Judgment generally see Judgments.

Form of judgment see McLaughlin *v.* McKee, 29 Pittsb. Leg. J. (Pa.) 337.

35. National Bank of America *v.* Indiana Banking Co., 114 Ill. 483, 2 N. E. 401; Webster *v.* Steele, 75 Ill. 544; Towner *v.* George, 53 Ill. 168; Walsh *v.* Horine, 36 Ill. 238; Cariker *v.* Anderson, 27 Ill. 358; Rankin *v.* Simonds, 27 Ill. 352; Farrell *v.* Pearson, 26 Ill. 463; Gillilan *v.* Nixon, 26 Ill. 50; Finch *v.* Alexander County Nat. Bank, 65 Ill. App. 337; Boddie *v.* Tudor Boiler Mfg. Co., 51 Ill. App. 302; Ham *v.* Peery, 39 Ill. App. 341;

cer's disposal property of defendant in his possession, and where he refuses or neglects to make his election in this respect, judgment should be entered against him for a sum certain, and in money.[36]

b. Certainty. As a general rule judgment against the garnishee must be for a specific sum, and cannot be rendered for an uncertain amount to be ascertained by subsequent proceedings.[37]

c. Recital of Judgment Against Principal Defendant. In some jurisdictions the judgment against the garnishee should recite the fact of the rendition of judgment against the principal defendant, and the amount thereof, and the omission of these recitals renders the judgment defective.[38]

d. Joint Garnishees. The general rule is that where several persons are summoned as garnishees or trustees, and are not declared against as jointly liable, the judgment should be several, and a joint judgment against them is void.[39] How-

Chicago, etc., R. Co. *v.* Mason, 11 Ill. App. 525; Gibbon *v.* Bryan, 3 Ill. App. 298. See, however, Home Ins. Co. *v.* Kirk, 23 Ill. App. 19, holding that, although it is good practice, the statute does not require a suit or judgment in garnishment to be entered as in favor of the judgment debtor for the use of the judgment creditor.

36. Patterson *v.* Harland, 12 Ark. 158; Dunning *v.* Baily, 120 Iowa 729, 95 N. W. 248 (holding, however, that where, after notice of garnishment, the garnishee converted a note belonging to defendant by substituting another note therefor, he was not entitled to exoneration on offering to deliver the substituted note to the sheriff, but was liable to judgment for plaintiff's debt which was less than the value of the note converted); Stadler *v.* Parmlee, 14 Iowa 175; Houston *v.* Walcott, 1 Iowa 86; Brown *v.* Pace, (Tenn. Ch. App. 1898) 49 S. W. 355, holding, however, that after payment of the money into court, a decree directing any balance remaining after payment of the attaching creditor's claim and costs to be returned to the garnishee is erroneous. See also Smith *v.* Gower, 3 Metc. (Ky.) 171, holding that where plaintiff proceeds against the garnishee as defendant, he may have final judgment, but where he proceeds against him as garnishee, he is only entitled to such order as the court is expressly empowered, by Ky. Civ. Code, § 476, to render, and any other order, as a final judgment, will be set aside. See, however, Jagode *v.* Smalley, 10 Pa. Super. Ct. 320, 44 Wkly. Notes Cas. 543, holding that a garnishee by voluntarily paying the money into court does not affect the rights of the debtor.

An order in the original suit adjudging that the garnishee is liable for the amount of the judgment in that suit is not valid, since a garnishment proceeding is in Wisconsin a separate suit against the garnishee. Atchison *v.* Rosalip, 3 Pinn. (Wis.) 288, 4 Chandl. 12.

Prior to judgment against principal defendant.— In Georgia, where the court acquires no jurisdiction to render judgment against the principal defendant, the garnishee cannot relieve himself of liability to defendant by paying the debt into court under a summons in garnishment based on the principal suit, since Civ. Code, § 4726, provides that plaintiff shall not have judgment against the garnishee until he has obtained judgment against defendant. Southern R. Co. *v.* Newton, 106 Ga. 566, 32 S. E. 658, 71 Am. St. Rep. 279.

37. Randolph *v.* Little, 62 Ala. 396; Drane *v.* King, 21 Ala. 556 (holding, however, that the judgment in this case was not void for uncertainty); Dickerson *v.* Walker, 1 Ala. 48 (this rule applies to a judgment *nisi*, as well as to a final judgment); Berry *v.* Anderson, 2 How. (Miss.) 649 (a judgment against a garnishee "for the amount of his answer, or so much thereof as will satisfy plaintiff's debt and costs" is void for uncertainty). See also Beeber *v.* Lowry, 17 Wkly. Notes Cas. (Pa.) 157.

Judgment by default.— It has been held in Missouri that a judgment against a garnishee by default fixes his liability, although it may be for an uncertain amount, till evidence is adduced on the subject, proceedings subsequent to the default relating merely to the measure of damages. Laughlin *v.* January, 59 Mo. 383.

38. Brake *v.* Curd Sinton Mfg. Co., 102 Ala. 339, 14 So. 773; Gatchell *v.* Foster, 94 Ala. 622, 10 So. 434 (holding, however, that the failure to recite the amount of judgment against the principal defendant is an irregularity not affecting the validity of the judgment on collateral attack, where it appeared to have been a clerical omission); Whorley *v.* Memphis, etc., R. Co., 72 Ala. 20; Chambers *v.* Yarnell, 37 Ala. 400; Faulks *v.* Heard, 31 Ala. 516; Gunn *v.* Howell, 27 Ala. 663, 62 Am. Dec. 785; Sun Mut. Ins. Co. *v.* Seeligson, 59 Tex. 3. See also Boyd *v.* Rutledge, 25 Iowa 271; Canan *v.* Carryell, 1 N. J. L. 3; Littell *v.* Scranton Gas, etc., Co., 42 Pa. St. 500. See, however, Baker *v.* Belvin, 122 N. C. 190, 30 S. E. 337, holding that it is not necessary, since the enactment of N. C. Code, §§ 364, 366, to bring a separate action to procure a judgment against a garnishee, but such judgment, where warranted, may be rendered in an action in which the garnishment is had, and will remain as security for any judgment plaintiff may recover.

39. McKinbrough *v.* Castle, 19 La. Ann. 128; Proctor *v.* Lewis, 50 Mich. 329, 15 N. W. 495; Sleeper *v.* Weymouth, 26 N. H. 34; Pringle *v.* Carter, 1 Hill (S. C.) 53. See,

ever, where two or more persons are declared against jointly as garnishees, judgment may be entered against one of them who appears and admits the indebtedness, the other one failing to answer.[40]

e. Amount. The general rule is that a judgment against the garnishee in favor of the judgment creditor should be limited in amount to the judgment creditor's recovery in the principal action, with interest and costs,[41] provided it does not exceed the established liability of the garnishee.[42] In no case, however, is plaintiff entitled to judgment for an amount greater than that sought to be recovered in his affidavit for and writ of garnishment.[43] In several jurisdictions, however, it is held that the judgment rendered against the garnishee must be for the whole amount of the debt due defendant, and not merely for an amount sufficient to pay plaintiff.[44]

f. Where Indebtedness Is Not Due. Where the answer of the garnishee dis-

however, Boyd *v.* Rutledge, 25 Iowa 271, holding that a judgment in garnishment will not be reversed because rendered jointly against different garnishees who answered separately, where the reply was to all such answers, and it was not shown but that the evidence established the joint liability of the garnishees.

A joint judgment cannot be rendered against defendant in attachment and the garnishee. Dent *v.* Dent, 118 Ga. 853, 45 S. E. 680; Cincinnati Fourth Nat. Bank *v.* Mayer, 89 Ga. 108, 14 S. W. 891. See, however, Shaffer *v.* Watkins, 7 Watts & S. (Pa.) 219, holding that when defendant and garnishee are brought into court by scire facias, and interrogatories filed and answered, the court, if fraud is discovered, may render a joint judgment against the original defendant and the garnishee.

40. St. Louis Coffin Co. *v.* Rubelman, 15 Mo. App. 280 (a judgment rendered against R on a verdict against R & Co. where, R and another being partners as R & Co., R alone was summoned to answer as garnishee, was proper, no funds being attached except in his hands); Speak *v.* Kinsey, 17 Tex. 301. See also Meeker *v.* Sanders, 6 Iowa 61 (where two were garnished and it appeared on the answers that one was merely the agent of the other, and judgment charging them both was held to be erroneous); Cleburne First Nat. Bank *v.* Graham, (Tex. App. 1889) 22 S. W. 1102.

41. *Alabama.*— Randolph *v.* Little, 62 Ala. 396 (holding, however, that the judgment is not informal because it fails to set forth *in numero* the amount of costs adjudged); Hall *v.* Baldwin, 31 Ala. 509.

Florida.— Turner *v.* Adams, 39 Fla. 86, 21 So. 575.

Iowa.— Timmons *v.* Johnson, 15 Iowa 23; Williams *v.* Housel, 2 Iowa 154, holding that the judgment may be for the debts and costs, provided the garnishee has funds sufficient for both. See also Myers *v.* McHugh, 16 Iowa 335.

Michigan.— Strong *v.* Hollon, 39 Mich. 411.

Pennsylvania.— Longwell *v.* Hartwell, 164 Pa. St. 533, 30 Atl. 495; McGlynn *v.* McGlynn, 4 Kulp 8; Bohlen *v.* Stockdale, 27 Pittsb. Leg. J. 198.

Texas.— Freeman *v.* Miller, 51 Tex. 443; Plowman *v.* Easton, 15 Tex. Civ. App. 304, 39 S. W. 171.

Virginia.— Templeton *v.* Fauntleroy, 3 Rand. 434, holding, however, that the court, after satisfying plaintiff's claim, may decree any balance due to the absent defendant, if evidence to support such decree arises on the pleadings and proof between plaintiff and defendant.

See 24 Cent. Dig. tit. "Garnishment," § 320.

42. *Alabama.*— Hall *v.* Baldwin, 31 Ala. 509.

Georgia.— Burrus *v.* Moore, 63 Ga. 405.

Kentucky.— Talbott *v.* Tarlton, 5 J. J. Marsh. 641.

Massachusetts.— Wilcox *v.* Mills, 4 Mass. 218.

New Hampshire.— See Brown *v.* Silsby, 10 N. H. 521.

Texas.— Moursund *v.* Priess, 84 Tex. 554, 19 S. W. 775.

See 24 Cent. Dig. tit. "Garnishment," § 320.

43. Carroll *v.* Milner, 93 Ala. 301, 9 So. 221; Hoffman *v.* Simon, 52 Miss. 302 (where in fact the original judgment was for a much greater sum than that stated in the writ); Masters *v.* Turner, 10 Phila. (Pa.) 482; George *v.* Blue, 3 Call (Va.) 455 (holding that the judgment should not include interest, if such demand was not included in the attachment). See also Lovell *v.* Cartwright, 17 La. 547.

44. Kern *v.* Chicago Co-operative Brewery Assoc., 140 Ill. 371, 29 N. E. 1035 [*affirming* 40 Ill. App. 356]; National Bank of America *v.* Indiana Banking Co., 114 Ill. 483, 2 N. E. 401; Webster *v.* Steele, 75 Ill. 544; Cariker *v.* Anderson, 27 Ill. 358; Rankin *v.* Simonds, 27 Ill. 352 (holding that if there is more due than will pay the attaching creditor, the creditor of the garnishee can control it); Scott *v.* Hill, 3 Mo. 88, 22 Am. Dec. 462; Young *v.* Delaware, etc., R. Co., 38 N. J. L. 502; Lomerson *v.* Hoffman, 24 N. J. L. 674 (holding that it is not error that the judgment is for a greater amount than plaintiff's claim, since the recovery is for the benefit of all applying creditors). See also Lake Shore, etc., R. Co. *v.* Scott, 67 Ill. App. 92; Dinkins *v.* Crunden-Martin Wood-

closes an indebtedness under a contract payable at a future date, judgment may be rendered against him on such answer, with stay of execution until the maturity of the debt.[45]

g. Directions as to Enforcement or Satisfaction. Some of the statutes provide that if the garnishee is liable for the delivery of personal property, or for the payment of money, which may be discharged by the delivery of personal property, the value of the property must be ascertained, and a judgment rendered against the garnishee, requiring him to deliver the property to the proper officer by a day fixed by the court, or to pay the value thereof, or the sum of money which was payable thereon.[46] Upon the well recognized principle that the garnishee is in no case to be placed in a worse position than if sued by the original defendant, where his disclosure shows that he has property of defendant in his possession, held as collateral security, an absolute money judgment should not be entered against him, but he should be directed to satisfy his own claim out of the property and hold the surplus subject to the further order of the court.[47]

enware Co., 99 Mo. App. 310, 73 S. W. 246. See, however, Hitchcock *v.* Watson, 18 Ill. 289.

45. New Orleans, etc., R. Co. *v.* Long, 50 Ala. 498; Central Plank-Road Co. *v.* Sammons, 27 Ala. 380; Cottrell *v.* Varnum, 5 Ala. 229, 39 Am. Dec. 323; Mobile Branch Bank *v.* Poe, 1 Ala. 396; Anderson *v.* Wanzer, 5 How. (Miss.) 587, 37 Am. Dec. 170; Montanye *v.* Husted, 3 Kulp (Pa.) 325; Kapp *v.* Teel, 33 Tex. 811 (holding that an injunction will lie to stay execution on a judgment against a garnishee whose answer showed that his indebtedness was represented by a note not yet due); Marble Falls Ferry Co. *v.* Spitler, 7 Tex. Civ. App. 82, 25 S. W. 985 (holding that where a holder of bonds is garnished, plaintiff is entitled to judgment with a right of execution on the interest each year, and on the principal when payable). See also Pursell *v.* Pappenheimer, 11 Ind. 327 (holding that judgment against a trustee indebted on a note not yet due should not be that execution issue on non-payment at maturity, since there may be a failure of consideration before that time, but that it should forbid the transfer or payment until maturity, or further order); Woods *v.* Cooke, 58 Me. 282; Dolby *v.* Tingley, 9 Nebr. 412, 2 N. W. 866; Goodwin *v.* Claytor, 137 N. C. 224, 49 S. E. 173, 67 L. R. A. 209.

Rent to become due under lease.— It has been held in Texas that judgment cannot be rendered against a garnishee for rent covenanted to become due on a lease from the debtor, and which was not actually due when the garnishee disclosed it. Blankenship, etc., Co. *v.* Moore, (Tex. App. 1890) 16 S. W. 780.

46. *Alabama.*— Stephens *v.* Cox, 124 Ala. 448, 26 So. 981, holding, however, that where defendant was in the garnishee's employ, under an agreement that his family was "to get groceries each day during the month" to the extent of forty dollars a month of his wages, the garnishee did not have the absolute right to pay any part of the wages in goods, and a judgment in form as prescribed by Civ. Code, § 2192, providing for judgment in cases where the demand garnished is payable in goods, was unnecessary.

Delaware.— Maybin *v.* Williamson, 4 Harr. 434.

Iowa.— Stadler *v.* Parmlee, 14 Iowa 175.

Kentucky.— Cavanaugh *v.* Fried, 3 Ky. L. Rep. 253.

Mississippi.— Jennings *v.* Summers, 7 How. 453.

Oregon.— Carter *v.* Koshland, 13 Oreg. 615, 12 Pac. 58, 12 Oreg. 492, 8 Pac. 556.

Pennsylvania.— King *v.* Hyatt, 41 Pa. St. 229; Gill *v.* Snyder, 2 Wkly. Notes Cas. 155, holding that judgment against the garnishee may be entered on his answer admitting an indebtedness for a given amount payable in work.

Tennessee.— Barrett *v.* Thomas, 1 Tenn. Cas. 43, Thomps. Cas. 67.

Texas.— Holloway Seed Co. *v.* Dallas City Nat. Bank, 92 Tex. 187, 47 S. W. 95, 516 [*reversing* (Civ. App. 1898) 47 S. W. 77], holding, however, that in order to warrant a judgment against the garnishee for the value of goods of defendant in his possession, if the goods themselves are not delivered to plaintiff, the facts justifying a money judgment must be pleaded, since under Rev. St. (1895) art. 240, the only judgment provided for is a delivery of the goods themselves, and article 241 provides that failure or refusal to deliver shall make the garnishee liable for contempt.

Vermont.— National Union Bank *v.* Brainerd, 65 Vt. 291, 26 Atl. 723; Bartlett *v.* Wood, 32 Vt. 372.

Wisconsin.—Rasmussen *v.* McCabe, 43 Wis. 471.

See 24 Cent. Dig. tit. "Garnishment," § 322.

See also Arthur *v.* Hale, 6 Kan. 161 (while it is proper for the court to direct the garnishee to pay money in his hands as such garnishee into the hands of the clerk of court, it is error to direct an execution to issue against the garnishee for collecting money in case of default in making such payment); Marshall *v.* Grand Gulf R., etc., Co., 5 La. Ann. 360; Campbell *v.* Simpson, 10 Wash. 160, 38 Pac. 1039.

47. Hawthorn *v.* Unthank, 52 Iowa 507, 3 N. W. 518; Cox *v.* Russell, 44 Iowa 556;

h. Delivery or Payment Into Court. Under some of the statutes, where the disclosure shows an indebtedness from the garnishee to defendant, plaintiff is entitled to a judgment directing the payment of the amount so ascertained into court,[48] or direct to plaintiff.[49]

i. Personal Judgment. The general rule is that where the disclosure of the garnishee shows that he has personal property or effects of defendant in his possession, it is error to render a personal money judgment against him,[50] some of the courts holding that a personal judgment can be rendered against the garnishee only after he has been duly summoned, and upon trial had.[51]

j. Protection or Indemnity to Garnishee. The interests of the garnishee should be so safeguarded as to prevent his incurring a double liability for his indebtedness to defendant,[52] and the judgment against him for the amount admitted in his answer or proven to be due should provide that it should operate, when paid, as a satisfaction *pro tanto* of the debt due from him to the defendant.[53] Where a

Bier *v.* Gautier, 35 La. Ann. 206; Pooley *v.* Snow, 12 La. Ann. 814; Chesapeake Guano Co. *v.* Sparks, 18 Fed. 281. See also Seals *v.* Wright, 37 Iowa 171.

48. *Georgia.*— Southern R. Co. *v.* Newton, 106 Ga. 566, 32 S. E. 658, 71 Am. St. Rep. 279.

Indian Territory.— Pace *v.* J. S. Merrill Drug Co., 2 Indian Terr. 218, 48 S. W. 1061.

Iowa.— Stetson *v.* Northern Inv. Co., 101 Iowa 435, 70 N. W. 595; McDonald *v.* Creager, 96 Iowa 659, 65 N. W. 1021, holding, however, that the garnishee cannot be required by the court to account for, or pay into court, more than is necessary to satisfy plaintiff's claim.

Kansas.— Arthur *v.* Hale, 6 Kan. 161.

Kentucky.— Cavanaugh *v.* Fried, 3 Ky. L. Rep. 253.

Nebraska.— Peterson *v.* Kingman, 59 Nebr. 667, 81 N. W. 847; Burnham *v.* Ramge, 47 Nebr. 175, 66 N. W. 277; Wilson *v.* Burney, 8 Nebr. 39.

Ohio.— Barbour *v.* Boyce, 9 Ohio S. & C. Pl. Dec. 332, 6 Ohio N. P. 425, holding likewise that it is not a condition precedent to the entry of such order that a judgment be recovered against defendant.

United States.— Prentice *v.* U. S., etc., Steamship Co., 78 Fed. 106.

See 24 Cent. Dig. tit. "Garnishment," § 323.

Compare Irwin *v.* Pittsburgh, etc., R. Co., 43 Pa. St. 488.

49. Board of Education *v.* Scoville, 13 Kan. 17; Webster Wagon Co. *v.* Home Ins. Co., 27 W. Va. 314. See, however, Brummagim *v.* Boucher, 6 Cal. 16, holding that it is the duty of the court simply to render judgment against the garnishee for the amount found due by him to the judgment debtor, and that an order that the garnishee pay the money to the sheriff is improper.

50. *Alabama.*— Blair *v.* Rhodes, 5 Ala. 648; Smith *v.* Chapman, 6 Port. 365.

Iowa.— Ransom *v.* Stanberry, 22 Iowa 334.

Louisiana.— Pooley *v.* Snow, 12 La. Ann. 814.

Nebraska.— Tingley *v.* Dolby, 13 Nebr. 371, 14 N. W. 146.

Pennsylvania.— Lorenz *v.* King, 38 Pa. St. 93, holding that where administrators are garnishees, it is error to render judgment against them *de bonis propriis*.

Tennessee.— Bryn *v.* Blackman, 94 Tenn. 569, 29 S. W. 961; Barrett *v.* Thomas, 1 Tenn. Cas. 43, Thomps. Cas. 67.

Wisconsin.— Rector *v.* Drury, 3 Pinn. 298, 4 Chandl. 24, holding, however, that such judgment is not void, but voidable only. See Maxwell *v.* New Richmond Bank, 101 Wis. 286, 77 N. W. 149, 70 Am. St. Rep. 926, holding that if plaintiff elect to take a mere money judgment against the garnishee, such election operates to discharge the property from the equitable lien thereon.

See 24 Cent. Dig. tit. "Garnishment," § 324.

51. Wingfield *v.* McLure, 48 Ark. 510, 3 S. W. 439; St. Louis, etc., R. Co. *v.* Richter, 48 Ark. 349, 3 S. W. 56; Clark *v.* Foxworthy, 14 Nebr. 241, 15 N. W. 342. See also Marx *v.* Hart, 166 Mo. 503, 66 S. W. 260, 89 Am. St. Rep. 715. See, however, Joseph *v.* Pyle, 2 W. Va. 449, holding that a judgment against the garnishee personally may be sustained, where his indebtedness to defendant in the attachment suit is established, and it appears that judgment has been recovered by plaintiff against such defendant, and that the judgment against the garnishee is no greater in amount than that against defendant.

52. *Illinois.*— Finch *v.* Alexander County Nat. Bank, 65 Ill. App. 337; Hamburg-Bremen F. Ins. Co. *v.* Kennedy, 57 Ill. App. 136.

Kentucky.— Brockman *v.* Hanks, 5 J. J. Marsh. 252.

Louisiana.— Broadnax *v.* Thomason, 1 La. Ann. 382.

Massachusetts.— Cady *v.* Comey, 10 Metc. 459.

Pennsylvania.— Ross *v.* McKinny, 2 Rawle 227; Jones *v.* Hill, 2 Miles 75; Roudebush *v.* Hollis, 21 Pa. Co. Ct. 324; Seipe's Estate, 11 Pa. Co. Ct. 27.

Vermont.— Stearns *v.* Wrisley, 30 Vt. 661.

See 24 Cent. Dig. tit. "Garnishment," § 325.

Compare Daniel *v.* Daniels, 62 Miss. 352.

53. Atcheson *v.* Smith, 3 B. Mon. (Ky.) 502; Speak *v.* Kinsey, 17 Tex. 301.

party whose debt is evidenced by a negotiable paper is summoned as garnishee, judgment cannot be rendered against him in the garnishment proceedings, unless such paper is delivered up to him or he is exonerated from or indemnified against future liability thereon.[54]

2. Time For Rendition — a. In General. The statutes vary greatly in specifying the proper time to enter judgment against the garnishee, although they usually require that judgment shall not be entered until the expiration of a designated period after the return-day of the writ or summons in garnishment.[55]

b. Prior to Maturity of Debt. Judgment should not be rendered against a garnishee prior to the maturity of the liability for which he is garnished,[56] unless there is an accompanying order for a stay of execution.[57]

c. Judgment Against Principal Defendant Condition Precedent. The general rule is that a final judgment cannot be entered against a garnishee until after judgment has been obtained against the principal defendant.[58]

54. Yocum *v.* White, 36 Iowa 288; Shuler *v.* Bryson, 65 N. C. 201; Bell *v.* Philadelphia Binding, etc., Co., 10 Pa. Super. Ct. 38, 44 Wkly. Notes Cas. 48; Hughes *v.* Powers, 99 Tenn. 480, 42 S. W. 1. See also Dalhoff *v.* Coffman, 37 Iowa 283.

55. *Alabama.*— Leigh *v.* Smith, 5 Ala. 583, holding that judgment may be entered against the garnishee on his answer at a term subsequent to that at which judgment is rendered against defendant.

Connecticut.— Potter *v.* Sanborn, 49 Conn. 452, holding that where the principal defendant in foreign attachment is a non-resident, and does not appear, an adjournment of the cause for not less than three or more than nine months must be had.

Delaware.— Shannon *v.* Allen, 4 Harr. 326.

Georgia.— Scott *v.* Patrick, 44 Ga. 188.

Maryland.— Carrollton Sav., etc., Assoc. *v.* Kerngood, 51 Md. 416; Northern Cent. R. Co. *v.* Rider, 45 Md. 24.

Massachusetts.— Bullard *v.* Brackett, 2 Pick. 85.

Pennsylvania.— Latshaw *v.* Robinson, 2 Ches. Co. Rep. 312.

See 24 Cent. Dig. tit. "Garnishment," § 326.

See also Crandall *v.* Birge, 61 Ill. App. 234; Thompson *v.* Silvers, 59 Iowa 670, 30 N. W. 854, holding that where plaintiff obtains an order for the further examination of the garnishee, no judgment can be entered against him pending such examination.

After death of trustee.— In New Hampshire, where a trustee has answered, and the cause is continued, and the trustee dies before judgment is rendered, judgment may be rendered against the trustee as of the date when he answered. Hall *v.* Harvey, 3 N. H. 61. However, in South Carolina it is held that a judgment against the garnishee rendered after his death is irregular, and cannot operate to give priority to the judgment creditor over other creditors of the garnishee, any more than a judgment against the executors. Parker *v.* Parker, 2 Hill Eq. (S. C.) 35.

Special bail.— Where the garnishee was taken and held to special bail under Md. Acts (1795), c. 56, § 6, no judgment could be rendered against him until he had appeared. Jones *v.* Kemper, 13 Fed. Cas. No. 7,472, 2 Cranch C. C. 535.

Laches.— In Louisiana plaintiff is not entitled to a judgment against the garnishee on his answer, where the judgment was not asked for more than six years after the answer was made. Slatter *v.* Tiernan, 6 La. Ann. 567.

Where action is pending against garnishee.— It has been held in Pennsylvania that plaintiff is not entitled to take judgment against the garnishee for the amount admitted to be due, until defendant's pending action against the garnishee is determined. Ditman *v.* Oeser, 16 Wkly. Notes Cas. (Pa.) 98.

56. Johnes *v.* Jackson, 67 Conn. 81, 34 Atl. 709 (holding that where a legacy has been garnished in the hands of the executor judgment cannot be rendered against him before the time when it would be his duty, had the garnishment not been made, to deliver the legacy to the legatee); Wilson *v.* Albright, 2 Greene (Iowa) 125; Hobson *v.* Kelly, 87 Mich. 187, 49 N. W. 533; Secor *v.* Witter, 39 Ohio St. 218. See also Palmer *v.* Noyes, 45 N. H. 174.

57. Cottrell *v.* Varnum, 5 Ala. 229, 39 Am. Dec. 323; Red *v.* Powers, 69 Miss. 242, 13 So. 586; Anderson *v.* Wanzer, 5 How. (Miss.) 587, 35 Am. Dec. 170; Berry *v.* Anderson, 2 How. (Miss.) 649; Marble Falls Ferry Co. *v.* Spitler, 7 Tex. Civ. App. 82, 25 S. W. 985.

58. *Alabama.*— Southern R. Co. *v.* Ward, 123 Ala. 400, 26 So. 234 (where the judgment against the principal defendant was void for want of jurisdiction); Lee *v.* Ryall, 68 Ala. 354; Curry *v.* Woodward, 44 Ala. 305; Flash *v.* Paul, 29 Ala. 141; Case *v.* Moore, 21 Ala. 758; Lowry *v.* Clements, 9 Ala. 422; Leigh *v.* Smith, 5 Ala. 583; Gaines *v.* Beirne, 3 Ala. 114; Zurcher *v.* Magee, 2 Ala. 253; Robinson *v.* Starr, 3 Stew. 90.

Arkansas.— Norman *v.* Poole, 70 Ark. 127, 66 S. W. 433.

Delaware.— Burton *v.* Frame, (Super. Ct. 1904) 58 Atl. 804.

Georgia.— Dent *v.* Dent, 118 Ga. 853, 45 S. E. 680; Southern R. Co. *v.* Newton, 106 Ga. 566, 32 S. E. 658, 71 Am. St. Rep. 279;

3. By Default[59] — a. General Rule. The general rule is that judgment by default may be taken against a garnishee for want of appearance, or failure to answer, as in other actions.[60] Where, however, the statutory requirements in the matter of perfecting proof of claim and proper notice upon the garnishee are not strictly complied with, a judgment by default against the garnishee cannot be sustained.[61]

Arnold *v.* Gullatt, 68 Ga. 810; Bryan *v.* Dean, 63 Ga. 317; Emanuel *v.* Smith, 38 Ga. 602 (holding that Rev. Code, § 3491, declaring that plaintiff shall not have judgment against the garnishee unless he has obtained judgment against defendant means final judgment against defendant); Housmans *v.* Heilbron, 23 Ga. 186.

Illinois.— Merchant *v.* Howland, 46 Ill. App. 458.

Iowa.— Capital City Bank *v.* Wakefield, 83 Iowa 46, 48 N. W. 1059 (holding, however, that where a judgment against the principal defendant is rendered, but not entered until after judgment against the garnishee, entry may be made *nunc pro tunc*); O'Rourke *v.* Chicago, etc., R. Co., 55 Iowa 332, 7 N. W. 582; Toll *v.* Knight, 15 Iowa 370; Bean *v.* Barney, 10 Iowa 498.

Kansas.— Levis-Zukoski Mercantile Co. *v.* Exchange Nat. Bank, 63 Kan. 550, 66 Pac. 638.

Kentucky.— Hamilton *v.* Reike, 9 Ky. L. Rep. 197.

Louisiana.— Collins *v.* Friend, 21 La. Ann. 7; Lynch *v.* Burr, 10 Rob. 136; Proseus *v.* Mason, 12 La. 16; Caldwell *v.* Townsend, 5 Mart. N. S. 307; Carroll *v.* Wallace, McGloin 316.

Mississippi.— Kellogg *v.* Freeman, 50 Miss. 127; Metcalf *v.* Steele, 42 Miss. 511; Roberts *v.* Barry, 42 Miss. 260.

Missouri.— Miller *v.* Anderson, 19 Mo. App. 71.

New Jersey.— Brackon *v.* Ballentine, 16 N. J. L. 484.

Ohio.— Carper *v.* Richards, 13 Ohio St. 219 (holding, however, that entering judgment against the garnishee on his answer confessing his indebtedness, on his appearance at the return of the summons and before judgment against defendant, is to be regarded after judgment as only a clerical error, and no cause for reversing the judgment so rendered against the judgment debtor); Vallette *v.* Kentucky Trust Co. Bank, 2 Handy 1, 12 Ohio Dec. (Reprint) 299; Olcott *v.* Guerinck, 19 Ohio Cir. Ct. 32, 10 Ohio Cir. Dec. 131.

Tennessee.— Seawell *v.* Murphy, Cooke 478.

Texas.— Haggerty *v.* Ward, 25 Tex. 144; Edrington *v.* Allsbrooks, 21 Tex. 186.

Virginia.—Withers *v.* Fuller, 30 Gratt. 547.

See 24 Cent. Dig. tit. "Garnishment," § 327.

Compare Johnson *v.* Lemmon, 37 Md. 336.

Liability in prior garnishment proceedings.— It has been held in Rhode Island that judgment cannot be rendered against the garnishee, where it appears that he is liable as garnishee in prior suits not yet determined. Cross *v.* Brown, 19 R. I. 220, 33 Atl. 147.

Where judgment is entered against two of three principal defendants, judgment against one garnished as the debtor of all such defendants is not defective because the third defendant is not served with process. Schmitt *v.* Devine, 164 Ill. 537, 45 N. E. 974 [*reversing* 63 Ill. App. 289].

59. Judgment by default generally see Judgments.

Form of judgment: By default see Evans *v.* Zane, 13 Montg. Co. Rep. (Pa.) 47. For want of appearance by the garnishee and a claim of exemptions by defendant see Jones *v.* Tracy, 75 Pa. St. 417.

60. *Georgia.*— O'Neill Mfg. Co. *v.* Ahrens, etc., Mfg. Co., 110 Ga. 656, 36 S. E. 66; Bearden *v.* Metropolitan St. R. Co., 82 Ga. 605, 9 S. E. 603.

Illinois.— Whiteside *v.* Tunstall, 17 Ill. 258.

Louisiana.— McKinbrough *v.* Castle, 19 La. Ann. 128, holding that no evidence is necessary to authorize the taking of interrogatories for confessed against the garnishee, other than his failure to answer.

Maryland.— Johnson *v.* Lemmon, 37 Md. 336.

Massachusetts.— Bickford *v.* Boston, etc., R. Corp., 21 Pick. 109.

South Carolina.— Hunter *v.* Andrews, 2 Speers 73 (holding that where the garnishee has nothing in his hands at the time of the service, but omits to make a return of the fact, it is within the discretion of the court, under circumstances appearing on evidence, to allow or refuse judgment against him); Gracy *v.* Coates, 2 McCord 224.

Texas.— Gay Ranch Co. *v.* Pemberton, 23 Tex. Civ. App. 418, 57 S. W. 71; McDowell *v.* Bell, (Civ. App. 1898) 46 S. W. 400.

See 24 Cent. Dig. tit. "Garnishment," § 329.

But see Hibernia Sav., etc., Soc. *v.* Inyo County Super. Ct., 56 Cal. 265.

Return nunc pro tunc.— Judgment cannot be entered against the garnishee by default, except on failure to make the required return, and where a return *nunc pro tunc* is filed by a garnishee by leave of court, after receiving notice of motion to enter up judgment against him, such return cures the default. Swann *v.* Lee, 15 Rich. (S. C.) 164.

61. *Alabama.*— Montgomery, etc., R. Co. *v.* Hartwell, 43 Ala. 508; Reid *v.* McLeod, 20 Ala. 576.

Arkansas.— Wingfield *v.* McLure, 48 Ark. 510, 3 S. W. 439; Lewis *v.* Faul, 29 Ark. 470.

Georgia.— West *v.* Harvey, 81 Ga. 711, 8 S. E. 449.

Illinois.— Michigan Cent. R. Co. *v.* Keohane, 31 Ill. 144.

b. What Constitutes Default. The failure of the garnishee to appear and answer in response to a writ of garnishment,[62] or to appear and support the truth of his answer where it is contested,[63] or his failure to answer fully and explicitly the interrogatories propounded by plaintiff,[64] constitute a default on his part, entitling plaintiff to enter judgment against him.

4. Conditional Judgment and Scire Facias — a. In General. In some jurisdictions, where the garnishee fails to appear and answer, a conditional judgment

Kentucky.— Griswold *v.* Peckenpaugh, 1 Bush 220.

Mississippi.— Work *v.* Waggoner, 82 Miss. 591, 35 So. 137, 338.

Pennsylvania.— Melloy *v.* Burtis, 124 Pa. St. 161, 16 Atl. 747.

Wisconsin.— Townsend *v.* Seelig, 113 Wis. 31, 88 N. W. 908 (a justice cannot enter judgment against a garnishee on his failure to appear, where the return of service fails to show payment of the garnishee's witness' fees); Flanegan *v.* Earnest, 2 Pinn. 196, 1 Chandl. 149 (evidence should be given to show the indebtedness of the garnishee to defendant, and without such proof judgment against him would be erroneous, even where he fails to appear).

See 24 Cent. Dig. tit. "Garnishment," § 329.

62. *Alabama.*— Robinson *v.* Starr, 3 Stew. 90.

Arkansas.— Wilson *v.* Phillips, 5 Ark. 183.

Georgia.— Arnold *v.* Gullatt, 68 Ga. 810, holding, however, that at any time before final judgment is obtained against the principal defendant, the garnishee may appear and answer, and thus be in time to prevent a judgment against him by default. See Averback *v.* Spivey, 122 Ga. 18, 49 S. E. 748, holding that while a motion to set aside a judgment against the garnishee as erroneously entered is under consideration by the judge, the garnishee is not in default for failing to answer during such time.

Kentucky.— Bowen *v.* Emmerson, 4 Bush 345.

Louisiana.— Henry *v.* Bryce, 11 La. Ann. 691; Sturges *v.* Kendall, 2 La. Ann. 565.

New Hampshire.— Niel *v.* Perkins, 53 N. H. 429, holding, however, that the failure of the trustee to appear must be intentional, and he is not chargeable where his non-appearance was caused by mistake.

Pennsylvania.—Corbyn *v.* Bollman, 4 Watts & S. 342; Bloom *v.* Alexander, 5 Kulp 131; Rineheimer *v.* Weiss, 4 Kulp 279.

Rhode Island.— Eddy *v.* Providence Mach. Co., 15 R. I. 7, 22 Atl. 1116, holding, however, that the garnishee in default may show in an action on the case that he duly filed his affidavit of defense and should not have been charged.

See 24 Cent. Dig. tit. "Garnishment," § 330.

Continuance.— Where the garnishee appears, and a continuance is had by mutual consent, judgment by default cannot be taken against the garnishee for failure to answer interrogatories in the interim. Hueskamp *v.* Van Leuven, 56 Iowa 653, 10 N. W. 240; Laflin, etc., Powder Co. *v.* Baltimore, etc., R. Co., 63 Md. 76.

Effect of non-residence.— In Texas, where the garnishee resides in another county than the one in which the suit is instituted, judgment by default cannot be rendered against him on his failure to answer the writ, but a commission must be sued out to secure the answer of the garnishee in the county of his residence. Cohn *v.* Tillman, 66 Tex. 98, 18 S. W. 111.

63. Lehman *v.* Hudmon, 85 Ala. 135, 4 So. 741; Penn *v.* Pelan, 52 Iowa 535, 3 N. W. 540 (holding that in such case the answer should be stricken from the file and judgment entered as for default); Carter *v.* Koshland, 12 Oreg. 492, 8 Pac. 556 (holding, however, that where the court orders the garnishee to appear and be examined under oath, service of such order on the attorney of the garnishee is not sufficient to authorize a judgment against the garnishee, unless he and his attorney were present in court when the motion for judgment was made).

64. *Arkansas.*— Richardson *v.* White, 19 Ark. 241.

Illinois.— Carter *v.* Lockwood, 15 Ill. App. 73.

Iowa.— Chase *v.* Foster, 9 Iowa 429.

Massachusetts.— Brennan *v.* McInnis, 173 Mass. 471, 53 N. E. 896.

Pennsylvania.— Henwood *v.* A. L. of H., 2 Pa. Dist. 170.

Texas.— Freeman *v.* Miller, 51 Tex. 443, holding that where the garnishee without excuse therefor, shown on the record, fails to answer one or more of the statutory questions, the court may proceed as though no answer at all had been made, and render judgment accordingly.

See 24 Cent. Dig. tit. "Garnishment," § 330.

Compare Marks *v.* Reinberg, 16 La. Ann. 348, holding that where a garnishee has answered categorically all the questions propounded to him, the penalty imposed by La. Code Pr. arts. 263, 349, that the interrogatories be taken as confessed, cannot be applied to him.

Impertinent questions.— Garnishees have the right to except to impertinent questions, and to withhold answers thereto until such exception has been ruled on, and where such exception has been taken, failure to answer before ruling thereon cannot be ground for judgment *pro confesso.* State Nat. Bank *v.* Boatner, 39 La. Ann. 843, 2 So. 589.

Where issue is joined.— A motion for judgment by default against a garnishee will not be sustained, where his answer and the de-

must be rendered against him for the amount of plaintiff's claim, to be made absolute, unless he appears and answers within a designated period.[65]

b. Scire Facias[66] or Notice — (i) *Necessity For.* Where a conditional judgment is entered, the issuance and service upon the garnishee of a scire facias or notice is likewise a prerequisite to the entry of a final judgment, the office of the scire facias being to make known to the garnishee that a conditional judgment has been rendered against him and that he must show cause why the judgment should not be made final.[67] Where, however, the garnishee has appeared and answered, admitting an indebtedness in a certain amount to the judgment debtor, the general rule is that he is not entitled to any notice of an application for judgment against him.[68]

(ii) *Time For Issuance.* A scire facias or notice to a garnishee must be issued within the time prescribed by the statute, and it is equally defective when prematurely issued,[69] as when issued after the expiration of the designated statutory period.[70]

nial thereof make an issue for trial. Wolff *v.* Bank of Commerce, 10 Mo. App. 586.

65. O'Connor *v.* Levystein, 136 Ala. 440, 34 So. 925; Bonner *v.* Martin, 37 Ala. 83; Armstrong *v.* Dargan, 11 Ala. 506; Dickerson *v.* Walker, 1 Ala. 48 (holding likewise that such judgment must be for a sum certain, as a final judgment for want of an answer is a mere confirmation of the conditional judgment); Toledo, etc., R. Co. *v.* Reynolds, 72 Ill. 487; Grace *v.* Casey-Grimshaw Marble Co., 62 Ill. App. 149.

66. Scire facias generally see SCIRE FACIAS.

67. *Alabama.*— Decatur, etc., R. Co. *v.* Crass, 97 Ala. 519, 12 So. 43; Goode *v.* Holcombe, 37 Ala. 94; Wood *v.* Russell, 22 Ala. 645; Lowry *v.* Clements, 9 Ala. 422; Dew *v.* State Bank, 9 Ala. 323. See also Leigh *v.* Smith, 5 Ala. 583.

Illinois.— Toledo, etc., R. Co. *v.* Reynolds, 72 Ill. 487; Horat *v.* Jackel, 59 Ill. 139; Cariker *v.* Anderson, 27 Ill. 358; Williams *v.* Vanmetre, 19 Ill. 293; Howe *v.* Meikle, 96 Ill. App. 284, holding likewise that a final judgment cannot be for a greater sum than the amount of a conditional judgment.

Iowa.— Langford *v.* Ottumwa Water Power Co., 53 Iowa 415, 5 N. W. 574.

Louisiana.— Estill *v.* Goodloe, 6 La. Ann. 122. See also Kirkman *v.* Hills, 16 La. 523.

Michigan.— Hyde *v.* Chadwick, 132 Mich. 270, 93 N. W. 616; Iron Cliffs Co. *v.* Lahais, 52 Mich. 394, 18 N. W. 121.

New Jersey.— Brackon *v.* Ballentine, 16 N. J. L. 484.

Pennsylvania.— Longwell *v.* Hartwell, 164 Pa. St. 533, 30 Atl. 495; Thornton *v.* Bonham, 2 Pa. St. 102 (holding, however, that damages must be assessed under a writ of inquiry, before scire facias can issue); Welsh *v.* Buckner, 2 Miles 96; Tredway *v.* Stanton, 1 Miles 388; Finch *v.* Bullock, 10 Phila. 318 (holding that the court may compel plaintiff to issue scire facias on application of the garnishee); Shaffer *v.* Raymond, 1 Phila. 91. See also Rushton *v.* Rowe, 64 Pa. St. 63.

Texas.— Culbertson *v.* Ellison, 20 Tex. 101; Lockhart *v.* Bowles, 1 Tex. App. Civ. Cas. § 344.

See 24 Cent. Dig. tit. "Garnishment," § 336.

Second default.— Where a default entered against the garnishee for failure to appear is set aside, and a second default is entered against him for failure to answer, such garnishee is not entitled to the benefits of Iowa Acts (1873), § 2985, providing that for mere failure to appear, the garnishee is not liable to pay the amount of plaintiff's judgment, unless he has had an opportunity to show cause against the issuance of an execution, and it is not an abuse of discretion for the court to refuse to set aside the second default. McDonald *v.* Finney, 87 Iowa 529, 54 N. W. 476.

68. Leigh *v.* Smith, 5 Ala. 583; Mead *v.* Doe, 18 Wis. 31. See also Relf *v.* Boro, 17 La. Ann. 258, holding that a garnishee, who has acknowledged that he had at one time in his hands funds belonging to defendant, which, by direction of defendant, he transferred to a third party without any acceptance thereof by the transferee, is not entitled to notice before judgment is given against him, no valid transfer being shown.

69. Adams *v.* Cummiskey, 4 Cush. (Mass.) 420; Patterson *v.* Patten, 15 Mass. 473 (scire facias will not lie against one adjudged trustee, until execution has been issued against the principal debtor and returned unsatisfied); Whitehead *v.* Henderson, 4 Sm. & M. (Miss.) 704 (scire facias cannot issue until a judgment *nisi* has first been taken); Pancake *v.* Harris, 10 Serg. & R. (Pa.) 109. See also Anonymous *v.* Galbraith, 2 Dall. (Pa.) 78, 1 L. ed. 297 (holding that a rule for taking depositions of witnesses may be granted before the return of the scire facias or a notice to the garnishee); Welsh *v.* Buckner, 2 Miles (Pa.) 96. *Compare* Goodell *v.* Williams, 21 Conn. 419, holding that it is not necessary to show a return of the execution against an absconding debtor before the commencement of a scire facias against the garnishee.

70. Schmitt *v.* Devine, 164 Ill. 537, 45 N. E. 974 [*reversing* 63 Ill. App. 289]; Cariker *v.* Anderson, 27 Ill. 358; McAllister *v.* Furlong, 36 Me. 307; Heritage *v.* Armstrong,

(III) *Service of.* Personal service of a scire facias or notice on the garnishee is necessary in order to authorize the entry of a final judgment against him,[71] and where the statute does not fix the length of the notice a reasonable notice is all that is required.[72]

(IV) *New or Amended Answer.* The general rule is that, upon the return of a scire facias, the court may in its discretion permit the garnishee to file a new or amended answer to the interrogatories originally served upon him.[73]

(V) *Defenses.* The garnishee or trustee is generally permitted on the return of a scire facias to plead and prove any matter that may be necessary or proper for his defense in a suit on the scire facias,[74] but he is not allowed to plead matters in abatement of the original suit;[75] nor can the garnishee on a scire facias against him set up as a defense the irregularity of the proceedings had between plaintiff and defendant.[76]

101 Mich. 85, 59 N. W. 439; Bujac *v.* Phillips, 2 Miles (Pa.) 71; Barton *v.* Henson, 5 Kulp (Pa.) 415, holding, however, that where plaintiff was a non-resident, and ignorant of the rule requiring the issuance of scire facias within six months after the judgment, and his counsel was drafted as a soldier in the army, a delay of five days over the six months in suing out the scire facias was excusable. See, however, Lomerson *v.* Hoffman, 24 N. J. L. 674, holding that it is not necessary that scire facias against a garnishee should issue the next term after the judgment, and that the statute in this respect is directory and not mandatory.

71. Morris *v.* Russell, 20 Ala. 357 (holding that such notice must be sent to the county in which the garnishee was served, or in which the garnishee resided, and be returned by the sheriff of that county); Flagg *v.* Platt, 32 Conn. 216 (holding that where a scire facias is against a copartnership, one member of which is a non-resident, service upon the resident member is sufficient); McCourtie *v.* Davis, 7 Ill. 298; Schmitt *v.* Devine, 63 Ill. App. 289.

Joint garnishees.— Several garnishees cannot be joined in one scire facias (Boardman *v.* Stewart, 1 Root (Conn.) 473) unless they are jointly liable (Ellmaker *v.* U. S. Bank, 3 Pa. L. J. Rep. 504, 6 Pa. L. J. 97).

72. Langford *v.* Ottumwa Water Power Co., 53 Iowa 415, 5 N. W. 574 (where a notice of more than ten days was given, and it was held to be sufficient); McGraph *v.* Dorfeuille, 2 Browne (Pa.) 101 (where seven days' notice was held to be insufficient).

73. *Connecticut.*— Byard *v.* Stewart, 1 Root 149.

Iowa.— Fifield *v.* Wood, 9 Iowa 249, holding, however, that such answer will not be heard until the default is set aside.

Louisiana.— Hennen *v.* Forget, 27 La. Ann. 381.

Maine.— McMillan *v.* Hobson, 46 Me. 91, 41 Me. 131.

Massachusetts.— Burnside *v.* Newton, 1 Metc. 426; Bickford *v.* Boston, etc., R. Corp., 21 Pick. 109.

See 24 Cent. Dig. tit. "Garnishment," § 341.

Compare Mallet *v.* London, 3 N. C. 158, holding that the garnishee may be examined after judgment as to matters left unfinished on his first examination.

Contra.— Taylor *v.* Day, 7 Me. 129, decided under a former statute expressly forbidding such supplementary examination.

74. *Connecticut.*— Woodbridge *v.* Winthrop, 1 Root 557; Fowler *v.* Spelman, 1 Root 295, 353; Hubbard *v.* Brown, 1 Root 276.

Iowa.— Fifield *v.* Wood, 9 Iowa 249.

Louisiana.— Allard *v.* De Brot, 15 La. 253.

Massachusetts.— Varian *v.* New England Mut. Acc. Assoc., 156 Mass. 1, 30 N. E. 368; Tryon *v.* Merrill, 116 Mass. 299; Fay *v.* Sears, 111 Mass. 154; Pratt *v.* Cunliff, 9 Allen 90; Hulbert *v.* Branning, 15 Gray 534; Thayer *v.* Tyler, 10 Gray 164; Thompson *v.* Lowell Mach. Shop, 4 Cush. 431; Burnside *v.* Newton, 1 Metc. 426. See also Brown *v.* Tweed, 2 Allen 566.

New Jersey.— Welsh *v.* Blackwell, 15 N. J. L. 55.

Pennsylvania.— Thornton *v.* Bonham, 2 Pa. St. 102; Seymour *v.* Fulton, 9 Pa. Dist. 611, holding that where in an action in foreign attachment a judgment was rendered in favor of plaintiff by default, the garnishee, on the issuance of a scire facias by plaintiff, might appear thereafter and contest the validity of the judgment, on the ground that it was not rendered in accordance with the statute governing foreign attachment.

See 24 Cent. Dig. tit. "Garnishment," § 341.

75. Harvey *v.* Mix, 24 Conn. 406; Hoyt *v.* Robinson, 10 Gray (Mass.) 371; Hathaway *v.* Russell, 16 Mass. 473; Wilcox *v.* Mills, 4 Mass. 218.

76. White *v.* Simpson, 107 Ala. 386, 18 So. 151 (mere defects in the process or in the judgment against a defendant in attachment are not available to a garnishee, unless such process and judgment are void for want of jurisdiction apparent on the face of the record); Stebbins *v.* Fitch, 1 Stew. (Ala.) 180; Minor *v.* Cook, Kirby (Conn.) 157; Lomerson *v.* Hoffman, 24 N. J. L. 674; O'Connor *v.* O'Connor, 2 Grant (Pa.) 245; Cross *v.* Standard Granite Co., 9 Pa. Dist. 557 (holding that, on a rule to show cause why judgment should not be entered against the garnishee for a sum admitted to be due defendant in the garnishee's answer, he has no

(vi) *Evidence.*[77] In a trial upon a scire facias, the same general rules of evidence are applicable as to admissibility and sufficiency, as upon the hearing of the original garnishment proceedings.[78] The evidence must be confined to the issue joined,[79] and plaintiff must prove by a preponderance of evidence all the facts relied upon to charge the garnishee.[80]

(vii) *Judgment.*[81] Where the garnishee fails to appear and answer within the statutory time after service of the writ of scire facias upon him, or after two notices are returned "not found" by a sheriff of the county in which the garnishment was executed,[82] or where, upon issue joined on the scire facias, such issue is found against the garnishee, the judgment should be made absolute against the garnishee for the amount found to be due by the conditional judgment.[83]

5. On Answer — a. In General. Under some statutes judgment may be entered against the garnishee where his answer discloses property of or debts due to defendant, without resort to a scire facias, or an order to show cause.[84]

right to question the validity of plaintiff's judgment). See also Coit *v.* Haven, 30 Conn. 190, 79 Am. Dec. 244, holding that in an action of scire facias, the garnishees have no right to attack the original judgment beyond that which the original defendant would have.

77. Evidence generally see Evidence.

78. See *supra*, IX, H, 3, 4.

79. Smyth *v.* Ripley, 33 Conn. 306; Hewitt *v.* Wheeler, 23 Conn. 284; Beach *v.* Swift, 2 Conn. 269; Dewit *v.* Baldwin, 1 Root (Conn.) 138 (holding that the garnishee may give in evidence the confessions of his principal to disprove his indebtedness to him); Allen *v.* Erie City Bank, 57 Pa. St. 129 (holding that the plea of *nulla bona*, without notice of special matter, puts in issue only the question of goods and effects in the hands of the garnishee); Adlum *v.* Yard, 1 Rawle (Pa.) 163, 18 Am. Dec. 608. See also Vaughn *v.* Sherwood, 1 Root (Conn.) 507.

80. Witter *v.* Latham, 12 Conn. 392 (where a verdict for plaintiff was held to be manifestly against the weight of evidence); Lomerson *v.* Hoffman, 24 N. J. L. 674 (where the evidence was held sufficient to sustain a scire facias against the garnishee); Welsh *v.* Blackwell, 14 N. J. L. 344 (holding that the garnishee is entitled to judgment unless it appears on the scire facias in whose hands the property was attached, and of what it consisted).

81. Judgment generally see Judgments.

82. Goode *v.* Holcombe, 37 Ala. 94; Wood *v.* Russell, 22 Ala. 645; Langford *v.* Ottumwa Water Power Co., 53 Iowa 415, 5 N. W. 574. See also Mc Courtie *v.* Davis, 7 Ill. 298 (holding that a writ of scire facias must be executed, like any other ordinary process, by personal service on the parties, and that two returns of nihil are not sufficient to charge the garnishee with the debt and costs recovered against the principal defendant); Duncan *v.* Sugauro F. Ins. Co., 35 Iowa 20. See, however, Washington Park Club *v.* Baldwin, 59 Ill. App. 61, holding that a garnishee, against whom a conditional judgment has been entered and who has been served with a scire facias to appear and show cause why it should not be made final is not in default for want of answer, where he has filed a motion to set aside the conditional judgment, which has not been disposed of.

83. Walker *v.* Bradley, 2 Ark. 578; Slatter *v.* Tiernan, 12 La. Ann. 375. See also Crawford *v.* Barry, 1 Binn. (Pa.) 481; Walker *v.* Gibbs, 1 Yeates (Pa.) 255, 2 Dall. 211, 1 L. ed. 352. See, however, Coe *v.* Rocha, 22 La. Ann. 590, holding that a judgment against a garnishee on a rule to show cause why he should not be condemned on his answers filed to pay the amount of plaintiff's demand is erroneous, where the answers do not admit an indebtedness and the rule contains no averments under which proof is introduced and no proof was introduced traversing the answers.

84. Bigalow *v.* Barre, 30 Mich. 1; Wildner *v.* Ferguson, 42 Minn. 112, 43 N. W. 794, 18 Am. St. Rep. 495, 6 L. R. A. 338 (holding that where a garnishment proceeding is determined on the disclosure alone, no supplemental complaint being filed and no complaint made by a third person, the statute does not contemplate any findings of fact; Donnelly *v.* O'Connor, 22 Minn. 309; Kelley *v.* Tibbals, 53 Pa. St. 408; Martin *v.* Throckmorton, 15 Pa. Super. Ct. 632; Cross *v.* Standard Granite Co. Quarries, 9 Pa. Dist. 557; Mullen *v.* Maguire, 10 Phila. (Pa.) 435; Andress *v.* Lewis, 17 Wkly. Notes Cas. (Pa.) 270; Lively *v.* Southern Bldg., etc., Assoc., 46 W. Va. 180, 33 S. E. 93. See Broadway Ins. Co. *v.* Wolters, 128 Cal. 162, 60 Pac. 766 (holding that judgment cannot be entered on the return of the sheriff, where the garnishee has never appeared, or otherwise been made a party to the action); Hess *v.* Shorb, 7 Pa. St. 231 (holding that it is improper to render judgment for a garnishee on his answer, plaintiff being entitled to a trial on proofs *aliunde*).

Future liability.— It has been held in Colorado that judgment cannot be had against a garnishee merely on his statement that money would be payable to defendant on his completing a contract, without proof that the contract was completed. Voorhies *v.* Denver Hardware Co., 4 Colo. App. 428, 36 Pac. 65.

Second or further answer.— Where a garnishee, after reinstatement of a judgment

b. Sufficiency of Answer. It is the province of the court to decide whether the uncontested answer of the garnishee sufficiently discloses a liability on his part as to entitle plaintiff to a judgment on such answer;[85] and where the answer of the garnishee fails to disclose any liability, or leaves it doubtful as to whether he is indebted to defendant, judgment should not be entered against him on his answer.[86]

6. Entry and Record.[87] A judgment entry should recite the necessary jurisdictional facts, and should show that all the statutory prerequisites for the rendition of judgment have been complied with.[88] While the docket entries should be made at the time of the garnishment proceedings, yet failure to make

which was erroneously marked "set aside," voluntarily answered new interrogatories, it was held that he resubmitted himself to the jurisdiction of the court, and judgment might be rendered against him for the amount admitted by his answers to be due defendant. American Exch. Nat. Bank *v.* Moxley, 50 Ill. App. 314. Where the trustee had disclosed in an unsatisfactory manner, and a further examination was ordered to which the trustee refused to submit, and before the next term he died, it was held that judgment was properly entered against him. Patterson *v.* Buckminster, 14 Mass. 144.

85. *Alabama.*— South, etc., R. Co. *v.* Falkner, 49 Ala. 115, where the garnishee's answer was held to disclose sufficient liability to charge him.

Arkansas.— Walker *v.* Bradley, 2 Ark. 578.

Illinois.— Cairo, etc., R. Co. *v.* Killenberg, 82 Ill. 295.

Maine.— Thompson *v.* Pennell, 67 Me. 159; Mansfield *v.* New England Express Co., 58 Me. 35.

Massachusetts.— Winchester *v.* Titcomb, 17 Pick. 435, holding that where it appears by the trustee's answer that he is chargeable in some amount at all events, he is to be adjudged trustee, and the question as to what amount is to be determined on a scire facias, in case he does not pay over on the execution against the effects in his hands so much as plaintiff considers him liable for.

Missouri.— Fretwell *v.* Laffoon, 77 Mo. 26, where the answer of the garnishee admitted the execution of a note to defendant, but failed to show that the note was negotiable or had been assigned, and it was held that plaintiff was entitled to judgment on the answer for the amount of the note.

New Hampshire.— Drew *v.* Towle, 27 N. H. 412, 59 Am. Dec. 380.

Texas.— Selman *v.* Orr, 75 Tex. 528, 12 S. W. 697; Simmons *v.* Carmichael, (Civ. App. 1894) 28 S. W. 690.

Wisconsin.— Grever *v.* Culver, 84 Wis. 295, 54 N. W. 585; Platt *v.* Sauk County Bank, 17 Wis. 222, holding that a motion by plaintiff for judgment on a garnishee's answer raises an issue of law, like a demurrer to the answer in an ordinary action.

United States.— Boston, etc., R. Co. *v.* Wade, 87 Fed. 792, 31 C. C. A. 324.

See 24 Cent. Dig. tit. "Garnishment," § 352.

Compare Cahoon *v.* Legor, 4 Cal. 243.

86. *Alabama.*— White *v.* Hobart, 90 Ala. 368, 7 So. 807.

Illinois.— Pierce *v.* Carleton, 12 Ill. 358, 54 Am. Dec. 405.

Michigan.— Hackley *v.* Kanitz, 39 Mich. 398.

Mississippi.— Liverpool, etc., Ins. Co. *v.* Threefoot, 71 Miss. 392, 15 So. 120.

Pennsylvania.— Moore *v.* Moore, 12 Phila. 173; Fithian *v.* Brooks, 1 Phila. 260; Ferguson *v.* Craig, 1 Wkly. Notes Cas. 153.

Garnishee's answer did not sufficiently disclose a liability to warrant a judgment against him thereon in Cairo, etc., R. Co. *v.* Hindman, 85 Ill. 521; Smith *v.* Clarke, 9 Iowa 241; Driscoll *v.* Hoyt, 11 Gray (Mass.) 404; McNeill *v.* Roache, 49 Miss. 436; Weil *v.* Tyler, 38 Mo. 558, 90 Am. Dec. 441; Importers', etc., Nat. Bank *v.* Lyons, 195 Pa. St. 479, 46 Atl. 70; Kerr *v.* Diehl, 2 Pa. L. J. Rep. 325, 4 Pa. L. J. 112; McDowell *v.* Bell, (Tex. Civ. App. 1898) 46 S. W. 400.

Stay of proceedings.— Where a garnishee answers that he has been garnished for the same debt in another state by the same plaintiff, and others, an absolute judgment cannot be rendered against him *ex parte*, but a reasonable stay of proceedings will be ordered. Woodruff *v.* French, 6 La. Ann. 62.

87. Form of record of judgment held to be sufficient see Rasmussen *v.* McCabe, 43 Wis. 471.

88. Chambers *v.* Yarnell, 37 Ala. 400; Gould *v.* Meyer, 36 Ala. 565; Faulks *v.* Heard, 31 Ala. 516; Gunn *v.* Howell, 27 Ala. 663, 62 Am. Dec. 785; Jones *v.* Hart, 2 Ala. 73 (a judgment against a garnishee who has not answered cannot be sustained where the record does not show either that the garnishee was summoned, or that judgment *nisi* was rendered against him, or a scire facias made known, or any other proceeding equivalent to a service); Wells *v.* American Express Co., 55 Wis. 23, 11 N. W. 537, 12 N. W. 441, 42 Am. Rep. 695 (holding that the record must affirmatively show that the statutory affidavit required as the foundation of garnishment proceedings was filed). See also Stadler *v.* Parmlee, 14 Iowa, 175, holding that, although the legal effect of a judgment against a garnishee condemning the property or debt in his hands is to satisfy, to the extent thereof, the indebtedness between the garnishee and the principal debtor, a judgment entry in the garnishment suit need not in terms express such satisfaction. *Compare* Leffler *v.* Union Compress Co., 121 Ga. 40, 48 S. E. 710, holding that a declaration in attachment, and the judgment rendered thereon, constitute no part of the record or pleadings in garnishment based on the attachment.

such entries until the rendition of a final judgment does not affect the validity of the judgment against the garnishee.[89] A garnishment proceeding should be docketed as a separate suit, but a failure to do so is not such an irregularity as will affect the validity of the judgment.[90]

7. Amendment and Correction. It is a familiar doctrine that a court has control over its records to alter or amend them, and where irregularities occur in the judgment, they may be amended or corrected upon motion made in due season.[91]

8. Opening and Vacating[92] — a. In General. The rule is broadly laid down in some jurisdictions that to support a motion to open or vacate a judgment against a garnishee after the term at which it was entered, there must be clear proof of fraud or surprise;[93] and where the garnishee has been guilty of laches, the court will not entertain a motion to open or vacate the judgment.[94] Where a judgment is invalid on account of irregularity, the garnishment proceedings will be set aside upon motion made at the proper time.[95]

89. Iliff *v.* Arnott, 31 Kan. 672, 3 Pac. 525; Bushnell *v.* Allen, 48 Wis. 460, 4 N. W. 599. See, however, Carrollton Sav., etc., Assoc. *v.* Kerngood, 51 Md. 416, holding that judgments of condemnation *nisi* in cases on the appearance docket, where there is no appearance entered for the garnishee, should be entered on the docket by the clerk on the call of the appearance docket, on appearance day, in open court, in the presence of the judge.

90. Fasquelle *v.* Kennedy, 55 Mich. 305, 21 N. W. 347; Sun Mut. Ins. Co. *v.* Seeligson, 59 Tex. 3; Atchison *v.* Rosalip, 3 Pinn. (Wis.) 288, 4 Chandl. 12. See also Cohn *v.* Tillman, 66 Tex. 98, 18 S. W. 111, holding that where there are several garnishees in a suit, the failure to docket the garnishment against each of them, although an irregularity, does not invalidate the judgment. And *compare* Benedict *v.* T. L. V. Land, etc., Co., 66 Nebr. 236, 92 N. W. 210, holding that an order of garnishment is an instrument which the statute does not recognize as one that should be recorded.

91. Gatchell *v.* Foster, 94 Ala. 622, 10 So. 434 (holding that omission in a judgment against the garnishee to recite the amount of the judgment against the principal debtor is a mere irregularity which may be corrected on motion); Randolph *v.* Little, 62 Ala. 396; Hitchcock *v.* Watson, 18 Ill. 289; Stahl *v.* Webster, 11 Ill. 511; Alleman *v.* Kight, 19 W. Va. 201.

92. **Mode of reviewing judgment against garnishee** see Appeal and Error.

93. *Kansas.*— A. J. Harwi Hardware Co. *v.* Klippert, 67 Kan. 743, 74 Pac. 254.

Maryland.— Gibbons *v.* Cherry, 53 Md. 144; Abell *v.* Simon, 49 Md. 318; Anderson *v.* Graff, 41 Md. 601.

Oregon.— Oregon R., etc., Co. *v.* Gates, 10 Oreg. 514.

Rhode Island.— Atlantic F. & M. Ins. Co. *v.* Wilson, 5 R. I. 479.

Texas.— Marx *v.* Epstein, 1 Tex. App. Civ. Cas. § 1317.

United States.—Homans *v.* Coombe, 12 Fed. Cas. No. 6,653, 2 Cranch C. C. 681.

See 24 Cent. Dig. tit. "Garnishment," § 359.

Compare Tweedy *v.* Nichols, 27 Conn. 518 (holding that the finding of a court as to the indebtedness of the garnishee on his disclosure on original process is not a final determination to which a motion for a new trial on the ground of errors in the rulings of the judge on the hearing will be entertained); Warlick *v.* Neal Loan, etc., Co., 120 Ga. 1070, 48 S. E. 402.

In North Carolina, where defendant in an original attachment appears and pleads, a judgment previously obtained against a garnishee should be set aside. Stephenson *v.* Todd, 63 N. C. 368.

Party to make motion.— In Georgia, where the principal defendant has not been made a party to the case by any order of court, and the garnishee acquiesces in a verdict, the debtor has no right to a new trial on his own motion (Foster *v.* Haynes, 88 Ga. 240, 14 S. E. 570), while in Vermont, where one summoned as trustee is adjudged such, the principal debtor in the case may file and prosecute exceptions to such decision (Hurlburt *v.* Hicks, 17 Vt. 193, 44 Am. Dec. 329), and the trustee cannot maintain a petition to vacate a judgment rendered against him (Denison *v.* True, 22 Vt. 42).

94. Dunnegan *v.* Byers, 17 Ark. 492 (a garnishee will not be allowed a new trial after judgment of garnishment rendered against him, when he has had reasonable time to ascertain whether his creditor still holds the evidence of indebtedness against him, without proof of due diligence on his part); Lawton *v.* Branch, 62 Ga. 350.

95. *Georgia.*—Liverpool, etc., Ins. Co. *v.* Savannah Grocery Co., 97 Ga. 746, 25 S. E. 828.

Missouri.— Southern Bank *v.* McDonald, 46 Mo. 31.

Oklahoma.— Phœnix Bridge Co. *v.* Street, 9 Okla. 422, 60 Pac. 221.

Pennsylvania.— Melloy *v.* Burtis, 124 Pa. St. 161, 16 Atl. 747.

South Carolina.— Parker *v.* Parker, 2 Hill Eq. 35, holding that a judgment against the garnishee rendered after his death is irregular and may be set aside, although entered with the consent of his executors.

b. Default. Where judgment is taken by default against the garnishee, upon a motion to set aside such judgment, he must rebut the presumption of indebtedness, and at the same time set up a sufficient excuse for the default.[96]

c. Discretion of Court. The power of a court of record over its judgments during the term at which they were rendered is very large, if not unlimited, and it rests within the sound discretion of the court to set them aside, when satisfied that injustice has been done, or that they have been inadvertently or improvidently entered.[97]

d. Time For Moving. The garnishee is generally required to move to open or vacate a judgment at the term at which it is entered,[98] although under some circumstances such motion is permissible at a subsequent term.[99] However, laches and unreasonable delay are fatal to motions of this character.[1]

See 24 Cent. Dig. tit. "Garnishment," § 359.

96. *Connecticut.*— Day *v.* Welles, 31 Conn. 344.

Georgia.— Averback *v.* Spivey, 122 Ga. 18, 49 S. E. 748 (where a judgment by default was erroneously entered, and it was held to have been properly set aside with permission to the garnishee to answer); Jones *v.* Bibb Brick Co., 120 Ga. 321, 48 S. E. 25; Clarke *v.* Fox, 113 Ga. 1053, 39 S. E. 479.

Iowa.— Thomas *v.* Hoffman, 62 Iowa 125, 17 N. W. 431 (holding that failure to give notice to the garnishee of the hearing is sufficient to warrant the setting aside of a judgment by default against him); Fanning *v.* Minnesota R. Co., 37 Iowa 379 (holding that were the garnishee's answer and other proof offered showed that he was indebted to defendant, a judgment by default in the circuit court will not be disturbed merely because the notice required him to appear and answer in the district court); Parmenter *v.* Childs, 12 Iowa 22. See also Fifield *v.* Wood, 9 Iowa 249.

Kentucky.— Coburn *v.* Currens, 1 Bush 242, where the grounds were held to be insufficient to warrant the vacation of the judgment.

Louisiana.— Warren *v.* Copp, 48 La. Ann. 810, 19 So. 746. See Rose *v.* Whaley, 14 La. Ann. 374, holding that the garnishee has the right, even after the interrogatories have been taken *pro confesso*, to ask the court, at any time before judgment, that the order taking the interrogatories for confessed may be set aside and he be allowed to answer.

Mississippi.— Miller *v.* Port Gibson Brick, etc., Co., 78 Miss. 170, 28 So. 807.

Missouri.—O'Fallon *v.* Davis, 38 Mo. 269.

New Hampshire.— Rigney *v.* Hutchins, 9 N. H. 257.

Pennsylvania.— Potts *v.* Harmer, 19 Pa. Super. Ct. 252; Montayne *v.* Husted, 3 Kulp 325 (holding that to warrant the opening of a judgment by default against the garnishee where there has been gross neglect, there should be evidence sufficient to satisfy the court that on the trial no recovery ought to be had against the garnishee, or that the debt attached is not presently demandable); Nicholson *v.* Fitzpatrick, 2 Phila. 205.

Texas.— Heath *v.* Jordt, 31 Tex. Civ. App. 535, 72 S. W. 1022.

See 24 Cent. Dig. tit. "Garnishment," § 360.

Compare Durant *v.* Staggers, 2 Nott & M. (S. C.) 488, where it was held that the motion to vacate the judgment was made too late.

The sickness of the garnishee justifies his failure to appear and answer, and constitutes a sufficient ground for vacating a default and setting aside a judgment which had been rendered against him. Westphal *v.* Clark, 46 Iowa 262.

Condition precedent.— Under R. I. Gen. Laws, c. 256, § 21, requiring a garnishee, as a condition precedent to relief from a default, to deliver to the officer executing the default judgment against him all property in his hands belonging to defendant, requires him to so deliver the property which came into his possession as receiver for defendant, where the court appointing him receiver was without jurisdiction. Greene *v.* Williams, 21 R. I. 100, 41 Atl. 1005.

97. Talladega Mercantile Co. *v.* McDonald, 97 Ala. 508, 12 So. 34 (holding likewise that the exercise of this discretion is not revisable); Russell *v.* Freedman's Sav. Bank, 50 Ga. 575; Parmenter *v.* Childs, 12 Iowa 22 (it is not error to refuse to set aside a default against the garnishee for failure to appear, based on the unsupported affidavit of the garnishee, showing that he was at the time in court, ready to answer); Dill *v.* Wilbur, 79 Me. 561, 12 Atl. 545.

98. Scamahorn *v.* Scott, 42 Iowa 529; Abell *v.* Simon, 49 Md. 318; Sarlouis *v.* Firemen's Ins. Co., 45 Md. 241 (a judgment of condemnation in attachment will not be disturbed at a subsequent term, without clear proof of fraud, surprise, or irregularity); Johnson *v.* Lemmon, 37 Md. 336; Hills *v.* Smith, 19 N. H. 381.

99. Corbitt *v.* Pynes, 45 Ala. 258 (a judgment against a garnishee rendered on his answer alone, and not warranted by it, may be set aside at a subsequent term, if the answer has become a part of the record); Thomas *v.* Hoffman, 62 Iowa 125, 17 N. W. 431 (judgment by default against the garnishee not notified of the time and place of answering is invalid, and a motion to vacate may be made after the judgment term).

1. Post *v.* Bowen, 35 Md. 232, where the garnishee failed, for two years after judg-

e. Stay of Execution. Where a judgment is obtained against a garnishee through fraud or surprise, a court of equity will, upon proper application, grant an injunction to stay execution on the judgment so obtained.[2]

L. Enforcement of Judgment — 1. Execution.[3] Upon the entry of a final judgment against the garnishee, the statutes usually provide that such judgment may be enforced by execution as in other cases.[4] In several jurisdictions, however, the statutes do not allow a judgment to be rendered against the garnishee, but authorize the court to make an order directing the garnishee to pay the money, or deliver the property into court, or to plaintiff, and upon such order no execution can issue.[5]

ment against him, to appear and object to a clerical error in the writ of attachment, all the other proceedings being regular, and it was held that a motion by him to strike out the judgment came too late.

2. *Alabama.*— Hayes *v.* O'Connell, 9 Ala. 488. See Tillis *v.* Prestwood, 107 Ala. 618, 18 So. 134, where a judgment *nisi* was rendered against a garnishee in 1888, on personal service, and made absolute in 1890, and subsequently affirmed on appeal, and it was held that the judgment would not be set aside in equity because plaintiff therein failed to serve notice of the judgment *nisi*, as required by statute, especially in the absence of fraud preventing the garnishee from making his defense at the proper time.

Illinois.— Wierich *v.* De Zoya, 7 Ill. 385.

Kansas.— Missouri Pac. R. Co. *v.* Reid, 34 Kan. 410, 8 Pac. 846.

Mississippi.— Cannon *v.* Kinney, Sm. & M. Ch. 555, where an administrator of a mortgagor had been charged as garnishee of the mortgagee, and afterward discovered that the mortgagee had assigned the debt and the mortgage, and it was held that judgment should be enjoined until it was ascertained whether the assignment was made before or after the judgment.

Texas.— Dobbin *v.* Wybrants, 3 Tex. 457.

United States.— Baker *v.* Glover, 2 Fed. Cas. No. 769, 2 Cranch C. C. 682.

See 24 Cent. Dig. tit. "Garnishment," § 363.

Compare Richmond Enquirer Co. *v.* Robinson, 24 Gratt. (Va.) 548.

In Maine a judgment against a trustee in a process of foreign attachment is a collateral judgment incident to a suit at common law, and can be vacated or avoided only by the same process which would reverse the principal judgment. Todd *v.* Darling, 11 Me. 34.

3. **Execution** generally see Executions.

4. *Illinois.*—Illinois Cent. R. Co. *v.* Weaver, 54 Ill. 319.

Kansas.— A. J. Harwi Hardware Co. *v.* Klippert, 67 Kan. 743, 74 Pac. 254. See, however, Missouri Pac. R. Co. *v.* Reid, 34 Kan. 410, 8 Pac. 846; Arthur *v.* Hale, 6 Kan. 161, both decided under a former statute.

Louisiana.— Kirkman *v.* Hills, 16 La. 523.

Michigan.— Bigalow *v.* Barre, 30 Mich. 1.

Mississippi.— Hiller *v.* Cotten, 54 Miss. 551.

Oregon.— De Witt *v.* Kelly, 18 Oreg. 557, 23 Pac. 666. See also Batchellor *v.* Richardson, 17 Oreg. 334, 21 Pac. 392.

Pennsylvania.—Masters *v.* Turner, 10 Phila. 482. See Ellwanger *v.* Moore, 206 Pa. St. 234, 55 Atl. 966, where it was held that plaintiff must pursue his proper remedy in the orphans' court.

Vermont.— Passumpsic Bank *v.* Beattie, 32 Vt. 315; Hapgood *v.* Goddard, 26 Vt. 401 (holding, however, that the proceedings are not ended until disposed of both as to defendant and trustee, and execution should not issue until the day after the final determination); Spring *v.* Ayer, 23 Vt. 516; Rider *v.* Alexander, 1 D. Chipm. 267 (holding, however, that a single execution against the principal debtor and the trustee is irregular and void).

United States.— Allen *v.* Croghan, 1 Fed. Cas. No. 220, 5 Cranch C. C. 517.

See 24 Cent. Dig. tit. "Garnishment," § 366.

Compare Seals *v.* Holloway, 77 Ala. 344; Todd *v.* Darling, 11 Me. 34; Sherman *v.* Barrett, 1 Rich. (S. C.) 457.

Judgment against receiver.— Where a receiver is summoned as garnishee and a judgment is rendered against him execution cannot issue thereon, but the judgment must be enforced by order of the court appointing the receiver, since the enforcement of the judgment by execution would interfere with the exclusive control of the appointing court. Irwin *v.* McKechnie, 58 Minn. 145, 59 N. W. 987, 49 Am. St. Rep. 495, 26 L. R. A. 218.

Pledged securities.— In Pennsylvania the mode of procedure on a judgment in attachment execution to sell pledged securities is to award a fieri facias to sell the right, title, and interest of defendant in the specific property pledged. Freeman *v.* Simons, 7 Phila. (Pa.) 307; Lamb *v.* Vansciver, 1 Phila. (Pa.) 29.

Arrest of garnishee.— Under an old Louisiana act, upon a judgment against defendant to be satisfied out of funds in the garnishee's hands, the latter might be arrested and held to bail, and after the usual proceedings recovery might be had against the bail, unless before his responsibility was fixed he surrendered his principal. Kirkman *v.* Hills, 16 La. 523.

5. Rosenberger *v.* Rosenberger, 12 Ky. L. Rep. 985 (a proceeding by rule is the proper mode of enforcing payment by the garnishee); Secor *v.* Witter, 39 Ohio St. 218; Rice *v.* Whitney, 12 Ohio St. 358. See also Conover *v.* Conover, 17 N. J. L. 187.

2. Scire Facias.[6] In some jurisdictions, notably in the New England states, where a person adjudged trustee in the original action does not, on demand of the officer holding the execution, pay over and deliver to him the goods, effects, and credits in his hands, and the execution is returned unsatisfied, plaintiff may sue out a writ of scire facias against such trustee from the court or justice rendering the judgment, to show cause why judgment and execution should not be awarded against him for the sum remaining due on the judgment against the principal defendant.[7] The writ, however, cannot lawfully issue before the return-day of the execution against the principal defendant.[8]

3. Garnishment. Upon principle it would seem that the process of garnishment will not lie against the debtor of a garnishee against whom an execution has been returned *nulla bona*;[9] although in at least one jurisdiction it is held that it will.[10]

4. Action Against Garnishee. Some of the statutes provide that where the garnishee claims an interest in the property adverse to the debtor, or denies the debt, the court may authorize the judgment creditor to institute an action against the garnishee for the recovery of such interest or debt.[11]

Mont. Code Civ. Proc. § 3507, authorizes the issuance of an execution on an order requiring a garnishee to pay over money found due defendant by such proceeding. Sperling *v.* Calfee, 7 Mont. 514, 19 Pac. 204.

Nebr. Code Civ. Proc. § 249, contains a provision similar to that in Montana. Burlington, etc., R. Co. *v.* Chicago Lumber Co., 18 Nebr. 303, 25 N. W. 94.

Where the garnishee has uncollected securities of the debtor in his hands which the court orders him to account for when collected, supplemental proceedings may be had in the matter, on his failure to account, and the court may make further orders. McDonald *v.* Creager, 96 Iowa 659, 65 N. W. 1021.

Order of probate court.— It has been held in Iowa that where judgment has been obtained in the district court against a guardian as garnishee, on a judgment against the ward, which the guardian fails to pay, plaintiff may obtain from the same court, acting as a probate court, an order directing the guardian to pay. Coffin *v.* Eisiminger, 75 Iowa 30, 39 N. W. 124.

Attachment for contempt.— Under an old South Carolina statute an order that the garnishee pay over the sum found to be in his hands subject to garnishment might be enforced by an attachment for contempt. Sherman *v.* Cohen, 2 Strobh. (S. C.) 553.

6. Scire facias generally see Scire Facias.

7. Danbury Sav. Bank *v.* Downs, 74 Conn. 87, 49 Atl. 913; Sherwood *v.* Stevenson, 25 Conn. 431; Bowker Fertilizing Co. *v.* Spaulding, 93 Me. 96, 44 Atl. 371; Ware *v.* Bucksport, etc., R. Co., 69 Me. 97; Tyler *v.* Winslow, 46 Me. 348; Page *v.* Smith, 25 Me. 256; Adams *v.* Rowe, 11 Me. 89, 25 Am. Dec. 266; Todd *v.* Darling, 11 Me. 34 (holding likewise that the scire facias is not an original action, but an incident to, and continuation of, the former suit); Brown *v.* Tweed, 2 Allen (Mass.) 566; Murphy *v.* Merrill, 12 Cush. (Mass.) 284; Cheney *v.* Whitely, 9 Cush. (Mass.) 289; Patterson *v.* Patten, 15 Mass. 473 (holding that a scire facias lies against one adjudged trustee, or his executor or administrator, notwithstanding the death of the principal after judgment against him, unless his estate be represented insolvent). See also Sawyer *v.* Lawrence, 40 Me. 256.

In Vermont scire facias is not the proper remedy to enforce a judgment against a trustee, but a motion should be made for a rule on the trustee to show cause why execution should not issue against his proper goods and estate. Rice *v.* Talmadge, 20 Vt. 378; Aldis *v.* Hull, 1 D. Chipm. 309.

8. Cota *v.* Ross, 66 Me. 161; Austin *v.* Goodale, 58 Me. 109 (holding that the return of "unsatisfied" made before the return-day of the execution against the principal defendant will not authorize the issuing of a writ of scire facias after the return-day against the person adjudged trustee); Roberts *v.* Knight, 48 Me. 171; Adams *v.* Cummiskey, 4 Cush. (Mass.) 420.

9. Illinois Cent. R. Co. *v.* Weaver, 54 Ill. 319 (assigning as a reason of this that there is no privity between the judgment debtor and the debtor of the garnishee); Wolf *v.* Tappan, 5 Dana (Ky.) 361.

10. Sperling *v.* Calfee, 7 Mont. 514, 19 Pac. 204.

11. *California.*— Deering *v.* Richardson-Kimball Co., 109 Cal. 73, 41 Pac. 801; Herrlich *v.* Kaufmann, 99 Cal. 271, 33 Pac. 857, 37 Am. St. Rep. 50; Bryant *v.* State Bank, (1885) 7 Pac. 128 (in such case plaintiff must aver and prove the existence of the order of court, and of the proceedings on which the order was founded); Roberts *v.* Landecker, 9 Cal. 262. See also Hecht *v.* Green, 61 Cal. 269.

Kansas.— Becker *v.* Hulme, 53 Kan. 574, 36 Pac. 986 (holding, however, that in this case the action was barred by the statute of limitations, being filed more than three years after the cause of action accrued); Shahan *v.* Tallman, 39 Kan. 185, 17 Pac. 823; Linder *v.* Murdy, 37 Kan. 152, 14 Pac. 447; Eldorado Exch. Bank *v.* Gulick, 24 Kan. 359.

Nebraska.— Cornish *v.* Russell, 32 Nebr. 397, 49 N. W. 379; Hollingsworth *v.* Fitz-

5. Distribution of Proceeds. Where money is paid into court pending garnishment proceedings, the court may, on rendering judgment therein, apply the money so paid into court to the discharge of judgments or executions against the debtor, according to the priority of their respective liens as established by law.[12]

M. Costs[13] **— 1. Right of Garnishee to — a. In General.** The general rule is that where the garnishee is discharged upon issue joined,[14] and where upon issue joined judgment is rendered against him for no more than the amount he admitted to be due, he is entitled to costs;[15] and where, upon his disclosure, made

gerald, 16 Nebr. 492, 20 N. W. 836 [*distinguishing* Wilson *v.* Burney, 8 Nebr. 39].

Ohio.— Chilcote *v.* Conley, 36 Ohio St. 545, 25 Ohio St. 320; Rice *v.* Whitney, 12 Ohio St. 358; Straub Mill Co. *v.* Fanger, 8 Ohio Dec. (Reprint) 71, 5 Cinc. L. Bul. 441. See also Critchell *v.* Cook, 7 Ohio Dec. (Reprint) 314, 2 Cinc. L. Bul. 97; Gaughan *v.* Squires, 7 Ohio Dec. (Reprint) 289, 2 Cinc. L. Bul. 76.

Rhode Island.— Grant *v.* New York L. Ins. Co., 24 R. I. 11, 51 Atl. 1046, holding, however, that an action against the garnishee, who had failed to file an account, before the return-day of the execution against the principal defendant was premature.

United States.— Allen-West Commission Co. *v.* Grumbles, 129 Fed. 287, 63 C. C. A. 401.

See 24 Cent. Dig. tit. "Garnishment," § 370.

12. Garrard *v.* Moffett, 51 Ga. 93; Gilmer *v.* Warren, 17 Ga. 426; Stahl *v.* Webster, 11 Ill. 511; People *v.* Potter, 27 Mich. 166; Fitzsimmons' Appeal, 4 Pa. St. 248. See Brakke *v.* Hoskins, 98 Iowa 233, 67 N. W. 235 (where a judgment against a garnishee provided that it should be satisfied by the garnishee's turning over to the constable all property in his hands or under his control after satisfying his own liens thereon, and it was held that plaintiff had no right to enforce the judgment where nothing remained to turn over after the garnishee's claims were satisfied out of the property); Rome R. Co. *v.* Richmond, etc., Co., 60 Fed. 43 (holding that the Georgia act of Oct. 15, 1885, providing a method for the distribution of garnishment, refers only to garnishment at common law, not to garnishment by attachment). See, however, Kennedy *v.* Wikoff, 21 Ill. App. 277, holding that Ill. Attachm. Act, § 37, does not apply to garnishee proceedings under Ill. Rev. St. c. 62, and a creditor who recovers upon garnishee process under said chapter is not required to share the proceeds with other creditors.

Where two trustee processes are served at the same time, and judgment is recovered in each for a sum greater than the amount in the hands of the trustee, each of the creditors is entitled to one half of the fund, although their several judgments are for unequal amounts. Davis *v.* Davis, 2 Cush. (Mass.) 111.

Judgments obtained at same term.—Where atachments were issued and a garnishee summoned by different creditors, and judgments were obtained at the same term, executions issued, and the money collected, it was held that the money should be applied to the executions *pro rata,* without regard to the priority of time in issuing the attachments and summoning the garnishee. Freeman *v.* Grist, 18 N. C. 217.

13. Costs generally see Costs.

14. *Georgia.*—Curry *v.* Augusta Nat. Bank, 53 Ga. 28.

Illinois.— McCoy *v.* Williams, 6 Ill. 584; Buckingham *v.* Shoyer, 86 Ill. App. 364.

Maine.— McMillan *v.* Hobson, 46 Me. 91.

Massachusetts.— Penniman *v.* Mathews, 3 Cush. 341; Crocker *v.* Baker, 18 Pick. 407; Brown *v.* Seymour, 1 Pick. 32; Wilcox *v.* Mills, 4 Mass. 507, holding that while a garnishee is not entitled to costs after appearing and pleading an insufficient plea in abatement, yet he is entitled to costs for coming in at a subsequent term and submitting to an examination on which he is discharged. See, however, Lee *v.* Babcock, 5 Mass. 212, holding that where one summoned as trustee appeared at the first term, submitted to an examination, and was rightly adjudged trustee on the facts disclosed, but on appeal, and a subsequent disclosure of new facts, was discharged, he was not entitled to costs.

Minnesota.— Mahoney *v.* McLean, 28 Minn. 63, 9 N. W. 76.

Missouri.— Shotwell *v.* Wren, 85 Mo. App. 151.

New Hampshire.— Kent *v.* Hutchins, 50 N. H. 92; Hills *v.* Smith, 28 N. H. 369; Drew *v.* Towle, 27 N. H. 412, 59 Am. Dec. 380; Deming *v.* Goodall, 18 N. H. 251.

Pennsylvania.— Barnes *v.* Bamberger, 196 Pa. St. 123, 46 Atl. 303; Irwin *v.* Pittsburgh, etc., R. Co., 43 Pa. St. 488; Hall *v.* Knapp, 1 Pa. St. 213; Beatty *v.* Duffy, 24 Pa. Co. Ct. 559; McKinney *v.* Tingley, 2 Kulp 454.

Texas.— Friedman *v.* Early Grocery Co., 22 Tex. Civ. App. 285, 54 S. W. 278.

Vermont.— Decker *v.* Fisher, 25 Vt. 533, holding that the trustees' claim for costs in such case is a matter of absolute right of which they cannot be deprived except by their own consent, and the courts have no discretionary power in the matter.

Wisconsin.—Phillips *v.* Wilson, 1 Pinn. 513.

United States.— Rome R. Co. *v.* Richmond, etc., Co., 60 Fed. 43.

See 24 Cent. Dig. tit. "Garnishment," § 373.

Witness' fees for defendant.— A defendant who is required by order of court to answer interrogatories relative to a note disclosed by a trustee is entitled to fees as a witness. Hurd *v.* Fogg, 22 N. H. 98.

15. Walker *v.* Wallace, 2 Dall. (Pa.) 113, 1 L. ed. 311; Dowling *v.* Philadelphia Fire

at the proper time, he is charged as garnishee, he is entitled to retain out of the funds or effects in his hands his proper costs and expenses,[16] and where such funds or effects in his hands are not sufficient to liquidate his costs, he is entitled to judgment against plaintiff for the excess.[17] In several jurisdictions, however, where the garnishee puts in an answer, it is within the discretion of the court to allow or deny costs to the garnishee.[18]

b. Amount and Items — (i) *In General.* The general rule is that the garnishee is entitled to have taxed as costs all expenses incurred by him in making answer or defending the garnishment proceedings,[19] such as traveling expenses,[20]

Assoc., 102 Wis. 383, 78 N. W. 581. See also Prout *v.* Prout, 72 Ill. 456.

16. *Maine.*— Warren *v.* Gibbs, 29 Me. 464, holding, however, that a trustee is not entitled to costs arising after his appearance, unless he comes in and makes a disclosure at the first term at which the process is returnable.

Massachusetts.— Gerry *v.* Gerry, 10 Allen 160 (holding, however, that persons summoned as copartners are entitled to but one bill of costs, although the writ does not describe them as partners and they each filed answers); Touro *v.* Coates, 10 Mass. 25. See, however, Foster *v.* Jones, 15 Mass. 185.

Mississippi.—Jennings *v.* Summers, 7 How. 453.

Nebraska.— Cornish *v.* Russell, 32 Nebr. 397, 49 N. W. 379.

Texas.— Speak *v.* Kinsey, 17 Tex. 301.

Vermont.— National Union Bank *v.* Brainerd, 65 Vt. 291, 26 Atl. 723; Porter *v.* Russell, 1 Tyler 35.

Wisconsin.— Cotzhausen *v.* H. W. Johns Mfg. Co., 107 Wis. 59, 82 N. W. 716.

See 24 Cent. Dig. tit. "Garnishment," § 373.

Compare Barber *v.* Andrews, 2 Root (Conn.) 250; Mitchell *v.* Gipple, 2 Pearson (Pa.) 276. But see Mackey *v.* Hodgson, 9 Pa. St. 468.

On appeal.— In Massachusetts, where a trustee has been charged in one court and appeals to another, and is there also charged, he is not allowed costs after the date of the judgment from which he has appealed. O'Donnell *v.* McIntire, 99 Mass. 551; Kellogg *v.* Waite, 99 Mass. 501; Ball *v.* Gilbert, 12 Metc. (Mass.) 397. In Pennsylvania it has been held that where plaintiff on appeal failed to recover from the garnishee more than was admitted to be in his hands, the garnishee is entitled to costs. Chambers *v.* Smith, 2 Chest. Co. Rep. (Pa.) 516.

Notice to plaintiff's attorney.— In Maine it is necessary for the garnishee to notify plaintiff's attorney of his readiness to submit to an examination, in order to entitle him to costs on his disclosure. Continental Mills *v.* Dow, 59 Me. 426; Butler *v.* Starrett, 52 Me. 281.

Upon the death of defendant pending trustee proceedings, where his estate is administered as insolvent, the attachment is thereby discontinued, and no judgment for costs can be rendered for or against the trustee summoned in the cause. Farnsworth *v.* Page, 17 N. H. 334.

Laches.— Under Mass. St. (1852) c. 312, § 56, a trustee who files his answer without leave of court after the expiration of the first four days of the return-term is not entitled to costs, although plaintiff does not move for a default. Phillips *v.* Flanders, 14 Gray (Mass.) 453.

17. Miller *v.* Carrier, 11 Gray (Mass.) 19; Oglethorpe Steam Saw Mill Co. *v.* Perkins, 10 Metc. (Mass.) 580. Prior to Mass. St. (1845) c. 188, however, the garnishee was without remedy for his costs and expenses, where the effects in his hands belonging to the principal defendant were insufficient to discharge them.

18. Wolff *v.* Bank of Commerce, 10 Mo. App. 586.

Issue of fact.— In Massachusetts, where an issue of fact is tried between plaintiff and an alleged trustee, costs may be awarded to either party in the discretion of the court. Kellogg *v.* Waite, 99 Mass. 501.

19. *Georgia.*— Moore *v.* Read, 84 Ga. 658, 11 S. E. 558; Sulter *v.* Brooks, 74 Ga. 401.

Maine.— Callender *v.* Furbish, 46 Me. 226.

Michigan.— U. S. Life Ins. Co. *v.* Muskegon Cir. Judge, 117 Mich. 319, 75 N. W. 618.

Missouri.— Bain *v.* Chrisman, 27 Mo. 293 (holding that the garnishee is entitled to recover a sum sufficient to indemnify him for his expenses, etc., although he does not appear); Ellison *v.* Ralston, 19 Mo. App. 537.

Texas.— Hamburg-Bremen F. Ins. Co. *v.* Bailey, (Civ. App. 1903) 77 S. W. 294.

Wisconsin.—Selz *v.* Ft. Atkinson First Nat. Bank, 55 Wis. 225, 12 N. W. 433, holding, however, that a garnishee who appears and answers, on which answer no issue is taken or application for judgment in his favor made by plaintiff, is not entitled to costs as in an ordinary action on his formal motion to dismiss the proceedings, but only to the costs of the motion and his statutory allowance of three dollars for his answer.

See 24 Cent. Dig. tit. "Garnishment," § 374.

Expenses for stenographers' services in garnishment proceedings are not as a matter of law necessary expenses of trial, and are not recoverable without some showing that they were necessary. State *v.* McHale, 16 Mo. App. 478. See also Mechanics', etc., Bank *v.* Glaser, 40 Mo. App. 371.

20. Mathieson *v.* Thompson, 31 Ala. 500 (a garnishee whose answer is not controverted is entitled to mileage as well as *per diem* compensation in each case in which he is sum-

and expenses incurred in preserving the property pending the determination of the garnishment proceedings.[21] However, where the garnishee appears and answers at the first term, and the suit is continued and litigated between the principal parties, he is entitled to his legal taxable costs for the first term only, if he is not afterward examined or put to any additional trouble or expense.[22]

(II) *Counsel Fees.* Where the garnishee is entitled to costs, a reasonable counsel fee fixed by the court is generally allowed as a part of such costs.[23] Some

moned by a different plaintiff, although the garnishments are all returnable to the same term); Morrison *v.* McDermott, 88 Mass. 122; Hunt *v.* Miles, 42 Vt. 533 (a trustee is entitled as costs, to actual travel only, and not to travel to those terms of the court where he appeared by attorney only).

21. McDonald *v.* Creager, 96 Iowa 659, 65 N. W. 1021 (where a garnishee is required by order of court to account for the proceeds of securities in his hands after their collection, he is entitled to credit for all proper expenses of collection); U. S. Manufacturing Co. *v.* Clark, 119 Mass. 163; Hills *v.* Smith, 19 N. H. 381; Moody *v.* Carroll, 71 Tex. 143, 8 S. W. 510, 10 Am. St. Rep. 734. See also Daigle *v.* Bird, 22 La. Ann. 138.

22. Hawkins *v.* Graham, 128 Mass. 20; Wasson *v.* Bowman, 117 Mass. 91; Hoyt *v.* Sprague, 12 Pick. (Mass.) 407; Stewart *v.* Anderson, 19 Mo. 478.

23. *Georgia.*— Darnell *v.* Wood, 82 Ga. 556, 9 S. E. 282, holding, however, that the statute does not authorize an allowance for counsel fees incurred for the purpose of upholding the garnishee's answer against a traverse, although the finding of the jury be against the traverse.

Illinois.— Buckingham *v.* Shoyer, 86 Ill. App. 364.

Massachusetts.— Hawkins *v.* Graham, 128 Mass. 20 (a trustee is not entitled to any allowance for counsel fees, except at the discretion of the court, and the exercise of such discretion by the superior court cannot be revised by the supreme judicial court on appeal by the trustee from the taxation of costs); Holbrook *v.* Waters, 19 Pick. 354 (holding likewise that the fact that one of the trustees summoned was a counselor of the court and appeared for them can make no difference in the allowance of counsel fees).

Michigan.— U. S. Life Ins. Co. *v.* Muskegon Cir. Judge, 117 Mich. 319, 75 N. W. 618.

Mississippi.—Bernheim *v.* Brogan, 66 Miss. 184, 6 So. 649, holding, however, that a garnishee is not entitled to an allowance for attorney's fees necessitated by having to defend an issue taken on his answer.

Missouri.—McQuarry *v.* Geyer, 57 Mo. App. 213; O'Reilly *v.* Cleary, 8 Mo. App. 186. See, however, Stewart *v.* Anderson, 19 Mo. 478, holding that under the act of 1847, a garnishee is not entitled to an allowance for an attorney's fee, but only for his own time and trouble in answering.

New Hampshire.— Heywood *v.* Brooks, 47 N. H. 231.

Pennsylvania.—Lummis *v.* Big Sandy Land, etc., Co., 188 Pa. St. 27, 41 Atl. 319; Swoope *v.* Brown, 22 Pa. Co. Ct. 531 (holding, however, that the garnishee is not entitled to counsel fee until the attachment has been discontinued or finally disposed of); Wengert *v.* Bowers, 8 Pa. Co. Ct. 290 (holding, however, that the garnishee is not entitled to a counsel fee where plaintiff abandons the attachment proceeding because defendant claimed as his exemption the whole of the property in the hands of the garnishee); Enke *v.* Stine, 6 Pa. Co. Ct. 23 (holding, however, that the garnishee is not entitled to said fee when the attachment is by process issued by an alderman); Grimm *v.* Sarmiento, 18 Phila. 318; Griffiths *v.* Stockmuller, 14 Phila. 236; Vandusen *v.* Schrader, 14 Phila. 132; Schwartz *v.* Hall, 21 Wkly. Notes Cas. 406; Joseph *v.* Risley, 17 Wkly. Notes Cas. 348.

Texas.— Willis *v.* Heath, 75 Tex. 124, 12 S. W. 971, 16 Am. St. Rep. 876; Johnson *v.* Blanks, 68 Tex. 495, 4 S. W. 557; Fields *v.* Rust, (Civ. App. 1904) 82 S. W. 331 (the allowance to a garnishee of attorney's fees cannot exceed the amount prayed for in the garnishee's pleadings); Fife *v.* Netherlands F. Ins. Co., (Civ. App. 1901) 61 S. W. 160; Smith *v.* Texas, etc., R. Co., (Civ. App. 1897) 39 S. W. 969 (holding, however, that a judgment in favor of the garnishee's attorney for his fee is incorrect in form, and should be in favor of the garnishee for costs including attorney's fees); Llano Imp., etc., Co. *v.* Castanola, (Civ. App. 1893) 23 S. W. 1016 (the garnishee is entitled to recover an attorney's fee only when the garnishee is discharged on his answer, and not where such answer admits an indebtedness to the principal defendant). See, however, Reid *v.* Walsh, (Civ. App. 1901) 63 S. W. 940; Patterson *v.* Seeton, 19 Tex. Civ. App. 430, 47 S. W. 732, both holding that where the garnishee is unsuccessful in the litigation of a liability, he is not entitled to an attorney's fee for defending the suit.

United States.— New York Finance Co. *v.* Potter, 126 Fed. 432.

See 24 Cent. Dig. tit. "Garnishment," § 376.

In Pennsylvania the garnishee is not entitled to an allowance for counsel fee, where the record shows no appearance of counsel, no interrogatory filed, and no answer prepared by the garnishee. Green *v.* Harris, 5 Pa. Co. Ct. 220 (where the garnishee caused appearance to be entered for him, but no further proceedings were had, and it was held that he was not entitled to a counsel fee); Hoover *v.* Landis, 10 Lanc. Bar 15;

of the statutes, however, do not leave the amount of such fees to the discretion of the court, but arbitrarily fix the amount thereof.[24]

2. Liability of Garnishee For. In order to prevent garnishees from consuming the funds in their hands by useless litigation, the statutes usually provide that where a garnishee denies his indebtedness, and on an issue formed is found to be liable, the costs of the proceedings may be taxed against him.[25] Where, however, a garnishee appears and answers fully, and judgment is taken upon such answer for an amount not exceeding the disclosure, it is erroneous to tax costs against him.[26] Where a garnishee allows judgment to be taken against him by default, the courts are divided as to whether the garnishee can be taxed with costs, some of the courts holding that he cannot be made liable beyond the funds or property in his hands,[27] while others hold that he is personally liable for costs under such circumstances.[28] In several jurisdictions, by statutory construction, the taxation of costs does not depend upon the fact of the trustee being charged or discharged, by an inflexible rule, but depends upon a full view of the equities and justice of the case, and is a matter largely within the discretion of the court.[29]

3. Liability of Fund. The general rule is that where costs are awarded to the

Raub *v.* Eakin, 2 Leg. Chron. 25. See also Wengert *v.* Bowers, 8 Pa. Co. Ct. 290.

24. Henry *v.* Murphy, 54 Ala. 246; Bradley *v.* Byerley, 3 Kan. App. 357, 42 Pac. 930.

25. *Alabama.*— Thompson *v.* Allen, 4 Stew. & P. 184.

Illinois.— Hannibal, etc., R. Co. *v.* Crane, 102 Ill. 249, 40 Am. Rep. 581; Lucas *v.* Campbell, 88 Ill. 447; Prout *v.* Grout, 72 Ill. 456.

Louisiana.—Scooler *v.* Alstrom, 38 La. Ann. 907.

Michigan.— Jackson *v.* Leelanaw Cir. Judge, 107 Mich. 332, 65 N. W. 230; Strong *v.* Hollon, 39 Mich. 411.

New Hampshire.— Conant *v.* Burns, 66 N. H. 99, 19 Atl. 11, holding, however, that, where it appears that the greater amount found by the jury was caused by the lapse of time between the making of the garnishee's deposition and the trial, the trustee is not chargeable with costs.

Pennsylvania.— Newlin *v.* Scott, 26 Pa. St. 102; Hall *v.* Knapp, 1 Pa. St. 213; Walker *v.* Wallace, 2 Dall. 113, 1 L. ed. 311; Herring *v.* Johnson, 5 Phila. 443; Foyle *v.* Foyle, 1 Phila. 182.

South Carolina.—Westmorland *v.* Trippens, 1 Bailey 514.

Texas.— Kelly *v.* Gibbs, 84 Tex. 143, 19 S. W. 380, 563; Kotham *v.* Faseler, (Civ. App. 1904) 84 S. W. 390. See also Berry *v.* Davis, 77 Tex. 191, 13 S. W. 978, 19 Am. St. Rep. 748.

Vermont.— Goddard *v.* Collins, 25 Vt. 712.

West Virginia.— Webster Wagon Co. *v.* Home Ins. Co., 27 W. Va. 314.

United States.— Jenkins *v.* Eldredge, 13 Fed. Cas. No. 7,268, 3 Story 325.

See 24 Cent. Dig. tit. "Garnishment," § 377.

Costs against absent debtor.— The garnishee is not liable for costs recovered against an absent debtor, unless he has funds in his hands sufficient to cover the same. Gracy *v.* Coates, 2 McCord (S. C.) 224.

26. Geist *v.* Hartman, 11 Pa. Co. Ct. 40; McGlynn *v.* McGlynn, 4 Kulp (Pa.) 8; Little Wolf River Imp. Co. *v.* Jackson, 66 Wis. 42, 27 N. W. 625.

27. Herring *v.* Johnson, 5 Phila. (Pa.) 443 (under such circumstances, if the fund in the garnishee's hands is not sufficient to pay costs, they should be regarded as costs in the original cause and enforced against defendant); Foyle *v.* Foyle, 1 Phila. (Pa.) 182. See also Witherspoon *v.* Barber, 3 Stew. (Ala.) 335, holding that the garnishee is not chargeable with costs of the original proceedings against him after his default, upon removal of the case by certiorari.

28. Randolph *v.* Heaslip, 11 Iowa 37 (holding, however, that the garnishee is not chargeable with costs for failure to pay the money or property attached in his hands into court); Johnson *v.* Delbridge, 35 Mich. 436; Wearne *v.* Haynes, 13 Nev. 103. See also Nylan *v.* Renhard, 10 Colo. App. 46, 49 Pac. 266.

29. Brainard *v.* Shannon, 60 Me. 342; Burnside *v.* Newton, 1 Metc. (Mass.) 426 (where a trustee files an additional answer at a late period, and after costs have accumulated, he should be required to pay costs, and take none as the ultimately prevailing party); Thompson *v.* Lowell Mach. Shop, 4 Cush. (Mass.) 431; Rivers *v.* Smith, 1 Pick. (Mass.) 164; Jewett *v.* Bacon, 6 Mass. 60 (where the trustee fails to appear and submit to an examination he is liable for costs, although he is subsequently discharged as trustee).

In New Hampshire it is provided by statute that where the trustee receives property of the principal defendant, or does any act in relation thereto, with intent to aid such defendant in defrauding or delaying his creditors, such trustee will be charged with costs, even though he be ultimately discharged. Kent *v.* Hutchins, 50 N. H. 92; Smith *v.* Brown, 43 N. H. 44; Hills *v.* Smith, 28 N. H. 369; Sise *v.* Drew, 18 N. H. 409. See, however, Bell *v.* Glazier, 13 N. H. 134, holding that a trustee who is discharged cannot be liable for costs under a statute imposing costs for fraudulent acts, if the acts alleged are committed prior to the passage of the statute.

prevailing party, such costs should be paid out of the funds or property in the garnishee's hands, or by him turned over to the court.[30]

4. Allowance or Taxation. The garnishee should have his costs taxed at the time of the rendition of a final judgment in the proceeding, and the court has no power to allow or tax such costs after the term at which such judgment is rendered.[31]

X. Quashal, Vacation, or Dissolution.

A. Grounds For — 1. In General. Upon a proper showing to the court that the garnishment process has been improperly or improvidently issued,[32] as where

30. *Kentucky.*— Tuck *v.* Deweese, 15 Ky. L. Rep. 62.

Maine.— Norris *v.* Hall, 18 Me. 332, holding, however, that the garnishee cannot deduct his costs from property in his hands without their prior allowance and taxation by the court.

Mississippi.— Clark *v.* Gresham, 67 Miss. 203, 7 So. 223; Senior *v.* Brogan, 66 Miss. 178, 6 So. 649, holding, however, that such deduction cannot be made from the fund where the good faith of the garnishee is in question.

New Hampshire.— Swamscot Mach. Co. *v.* Partridge, 25 N. H. 369; Hills *v.* Smith, 19 N. H. 381.

Pennsylvania.— Maule *v.* Boyd, 18 Phila. 326 (holding, however, that where the garnishee's indebtedness to defendant is much greater than plaintiff's claim, the garnishee's counsel fee will not be paid out of the sum awarded to plaintiff, but out of the surplus in the garnishee's hands after the payment of plaintiff's claim); Foyle *v.* Foyle, 1 Phila. 182; Jones *v.* Hill, 2 Miles 75 (holding, however, that the garnishee is not entitled to retain his costs and expenses in subsequent writs of foreign attachment, scire facias, and replevin, in relation to the same property).

Tennessee.— Merrill *v.* Elam, 4 Baxt. 235.

Vermont.— Jones *v.* Spear, 21 Vt. 426. See also Brown *v.* Davis, 19 Vt. 603.

Wisconsin.— Baker *v.* Lancashire Ins. Co., 52 Wis. 193, 8 N. W. 611.

See 24 Cent. Dig. tit. "Garnishment," § 378.

Formerly in Massachusetts a trustee could not retain out of the funds in his hands a sum to indemnify himself for the general expenses of the suit in which he was summoned. Guild *v.* Holbrook, 11 Pick. 101; Adams *v.* Cordis, 8 Pick. 260.

The costs of a suit against a principal debtor do not constitute any part of the costs against the garnishee, but become part of the debt, and as such are recoverable, if the garnishee is indebted in a sufficient sum to cover them, as well as the principal debt. Locket *v.* Child, 11 Ala. 640.

31. *Alabama.*— Randolph *v.* Little, 62 Ala. 396, holding that the costs to which the garnishee is entitled may be taxed at the time of the rendition of a final judgment.

Maine.— Norris *v.* Hall, 18 Me. 332.

Massachusetts.— McLaughlin *v.* Western R. Corp., 12 Cush. 131. See also Duffee *v.* Call, 123 Mass. 318.

Michigan.— Kaufman *v.* Hude, 37 Mich. 123, holding that an order which is made a month after the discontinuance of garnishment proceedings and which allows costs to the garnishee, to be deducted from the amount due to plaintiff, without notice to the latter, is void.

Minnesota.—Schwerin *v.* De Graff, 19 Minn. 414, holding that a claim to an allowance of costs cannot be set up as a counter-claim in an action against the garnishee by his creditor.

Missouri.— Keating *v.* American Refrigerator Co., 32 Mo. App. 293 (holding that a motion by a garnishee for an allowance for fees and expenses cannot be entertained after the cause has been submitted to the court of appeal); Ladd *v.* Couzins, 52 Mo. 454.

Wisconsin.—Selz *v.* Ft. Atkinson First Nat. Bank, 60 Wis. 246, 19 N. W. 43.

See 24 Cent. Dig. tit. "Garnishment," § 379.

32. *Alabama.*— Murphree *v.* Mobile, 108 Ala. 663, 18 So. 740; Thompson *v.* Wallace, 3 Ala. 132, where the garnishment process issued after an execution for the debt had been returned satisfied.

Colorado.— Burton *v.* Snyder, 21 Colo. 292, 40 Pac. 451.

Illinois.— Chanute *v.* Martin, 25 Ill. 63; Pierce *v.* Wade, 19 Ill. App. 185.

Kansas.— Cox Mfg. Co. *v.* August, 51 Kan. 59, 32 Pac. 636.

Minnesota.— Lord *v.* Meachem, 32 Minn. 66, 19 N. W. 346.

Pennsylvania.— Farmers', etc., Bank *v.* Little, 8 Watts & S. 207, 42 Am. Dec. 293 (a garnishee of a corporation, after judgment against the corporation by default, may obtain his discharge by proof that the corporation's charter had been forfeited by order of the court prior to the rendition of the judgment against him); Webb *v.* Kellogg, etc., Co., 3 Pa. Dist. 825, 15 Pa. Co. Ct. 481; Groff *v.* Barings, 13 Lanc. Bar 143 (where it is obvious to the court that foreign attachment will only interfere with the rights of previous lien creditors, it will, on rule to show cause, be dissolved). But see Pontius *v.* Nesbit, 40 Pa. St. 309; Darlington *v.* Fleischner, 10 Wkly. Notes Cas. 483.

Tennessee.—Baldwin *v.* Merrill, 8 Humphr. 132.

Texas.— Cleveland *v.* Spencer, (Civ. App. 1899) 50 S. W. 405.

Vermont.— Hill *v.* Whitney, 16 Vt. 461. See also Strong *v.* Allen, 1 Brayt. 232.

the necessary steps to give the court jurisdiction of the proceedings have not been taken,[33] or where other statutory prerequisites have not been complied with,[34] the garnishment proceedings will be dismissed.

2. DELAY. The court in which the garnishment proceedings are pending, in cases of undue delay on the part of plaintiff, where the continuance of the proceedings as against the garnishee is unjust and in effect an abuse of the process of the court, may in its discretion discharge the garnishee.[35] A garnishee, however, may, by his own express assent or acquiescence in the continuance, waive his right to have the proceedings dismissed on account of delay.[36]

B. Nature and Form of Remedy — 1. IN GENERAL. The proper mode of procedure to vacate and dissolve proceedings in garnishment is either a motion to quash the proceedings,[37] or a rule to show cause why they should not be

Wisconsin.— Thoen *v.* Harnstrom, 98 Wis. 231, 73 N. W. 1011; Orton *v.* Noonan, 27 Wis. 572, 586, holding, however, that the affidavit in support of motion to set aside the garnishment proceedings on the ground that defendant has sufficient property subject to execution to satisfy any judgment recovered against him must specify the property.

See 24 Cent. Dig. tit. "Garnishment," § 381.

But see Eagle, etc., Mfg. Co. *v.* White, 50 Ga. 82; Bethel *v.* Judge Super. Ct., 57 Mich. 379, 24 N. W. 112.

Trustee as attorney for plaintiff.— It has been held in New Hampshire that the fact that a writ of foreign attachment was made, indorsed, and entered by the trustee as attorney for plaintiff, no wrong being intended, is not a cause for discharging the trustee on motion of defendant, although such practice is irregular. Kelley *v.* McMinniman, 58 N. H. 288.

33. Carter *v.* Lockwood, 15 Ill. App. 73 (holding, however, that the fact that plaintiff's counsel admitted on the hearing that the garnishee was a non-resident is not evidence that he was a non-resident when the writ was served, and a motion to dismiss for want of jurisdiction was properly overruled); Conway *v.* Ionia Cir. Judge, 46 Mich. 28, 8 N. W. 588; Pottsville Bank *v.* Vandusen, 2 Leg. Rec. (Pa.) 7.

A federal court will, of its own motion, where it appears that plaintiff in judgment and the garnishee were citizens of the same state, dismiss the case for want of jurisdiction. Tunstall *v.* Worthington, 24 Fed. Cas. No. 14,239, Hempst. 662.

34. *Iowa.*— Greaves *v.* Posner, 111 Iowa 651, 82 N. W. 1022, holding that defendant is entitled to claim a discharge of the garnishment on the ground that the property was exempt, that the garnishee was never served with notice, and that the *situs* of the debt was in another state.

Maryland.— Johnson *v.* Lemmon, 37 Md. 336; Stone *v.* Magruder, 10 Gill & J. 383, 32 Am. Dec. 177.

Massachusetts.— Bowles *v.* Palmer, 180 Mass. 169, 61 N. E. 971.

Pennsylvania.— Glenny *v.* Boyd, 26 Pa. Super. Ct. 380; Reed *v.* Buck, 32 Wkly. Notes Cas. 204, holding, however, that an attachment execution will not be dissolved except for irregularities in the issuance of the writ. But see Webber *v.* Carter, 1 Phila. 221, holding that the court will not dissolve foreign attachment on the sole ground that plaintiff has neglected to sue out a scire facias against the garnishee.

Texas.— Ball *v.* Bennett, 21 Tex. Civ. App. 399, 52 S. W. 618; Hamblen *v.* Tuck, (Civ. App. 1898) 45 S. W. 175.

Wisconsin.—Schlitz *v.* Meyer, 61 Wis. 418, 21 N. W. 243 (the affidavit upon which the garnishment proceedings were founded was held to be fatally defective); Orton *v.* Noonan, 31 Wis. 90.

See 24 Cent. Dig. tit. "Garnishment," §§ 381, 382.

But see Carr *v.* Roney, 118 Ga. 634, 45 N. E. 464 (where the dismissal of the garnishment proceedings was held to be erroneous); Chambers *v.* McKee, 1 Hill (S. C.) 229 (holding that the garnishee is not entitled to move to quash the attachment on the ground that no attachment bond was given).

35. Noble *v.* Bourke, 44 Mich. 193, 6 N. W. 237; Dunham *v.* Murphy, (Tex. Civ. App. 1894) 28 S. W. 132, where plaintiff continued the case over one term, and it was not set for trial at a subsequent term, and the garnishees filed an answer disclaiming any indebtedness, upon which there was no contest, and it was held that the garnishees were properly discharged.

36. Whitaker *v.* Coleman, 25 Ind. 374; Meigs *v.* Weller, 90 Mich. 629, 51 N. W. 681; Kiely *v.* Bertrand, 67 Mich. 332, 34 N. W. 674; Webber *v.* Bolte, 51 Mich. 113, 16 N. W. 257. See also Vincent *v.* Wellington, 18 Wis. 159, holding that if neither party moves for a trial at the next term after judgment is obtained against the principal debtor, the garnishee is not entitled thereupon to have the action dismissed.

37. *Alabama.*— Murphree *v.* Mobile, 108 Ala. 663, 18 So. 740; Planters', etc., Bank *v.* Andrews, 8 Port. 404.

Iowa.— Greaves *v.* Posner, 111 Iowa 651, 82 N. W. 1022.

Maine.— Jacobs *v.* Copeland, 54 Me. 503, holding, however, that the court will not entertain a motion for the dismissal of the action in a trustee suit made by the attorney of defendants, where the trustees have

quashed,[38] and in some cases, where fraud or surprise is alleged, a court of equity will intervene to protect the garnishee and defendant.[39]

2. TIME FOR MOVING. A motion to quash garnishment proceedings must be made within the time designated by the statute, or within a reasonable time, in order to be available.[40]

C. Discharge of Garnishee on Security. In many jurisdictions the statutes provide that the principal defendant may have the garnishment discharged, and the property or debt in the hands of the garnishee released on filing with the proper officer, or with the clerk of the court where the suit is pending and judgment is obtained, a bond with sufficient security, payable to plaintiff.[41] In several jurisdictions statutes authorizing the release of property seized under attach-

counsel therein who have prepared their disclosure.

Maryland.— Farrall *v.* Farnan, (1886) 5 Atl. 622, holding likewise that a garnishee who has elected to try his case before the court on motion to quash may dismiss his motion after the evidence has been partly taken, and file a plea to try the same question before a jury.

Nebraska.—Lenhoff *v.* Fisher, 32 Nebr. 107, 48 N. W. 821, holding likewise that a motion to discharge the garnishee which is sworn to positively by defendant and is treated without objection on the hearing as an affidavit is available as evidence to support a discharge.

Pennsylvania.— Dempsey *v.* Petersburg Sav., etc., Co., 26 Pa. Super. Ct. 633 (holding, however, that the court has no power to quash on a motion based on the garnishee's affidavit that defendant does not owe the debt demanded); Hintermeister *v.* Ithaca Organ, etc., Co., 3 C. Pl. 65; Barnes *v.* Anchor Line, 19 Phila. 299.

See 24 Cent. Dig. tit. "Garnishment," § 380.

See, however, Wise *v.* Hull, 32 Mo. 209, holding that the defense by a garnishee that the assets of a judgment debtor have been transferred by his conviction for crime, and being sentenced to the penitentiary, if a defense at all, cannot be brought forward by a motion to dismiss; it should be presented by plea.

38. Lindsley *v.* Malone, 23 Pa. St. 24 (holding, however, that defendant cannot raise the question of residence by a special plea accompanying other pleas in bar, after an ineffectual motion to quash the writ for the same cause); Brock *v.* Brock, 1 Pa. Co. Ct. 232 (holding, however, that service of a writ in foreign attachment will not be set aside at the instance of a defendant who has not appeared). See Dayton *v.* Wagner, 2 Leg. Rec. (Pa.) 162, holding that defendant in attachment execution cannot raise the question of the validity of the judgment in the attachment, in an audit to distribute the proceeds of the garnishee's estate.

39. Pelham *v.* Moreland, 11 Ark. 442; Tomkins *v.* Tomkins, 11 N. J. Eq. 512.

40. Steward *v.* Walker, 58 Me. 299; Abell *v.* Simon, 49 Md. 318; Robbins *v.* Hill, 12 Pick. (Mass.) 569 (where the plea in abatement was held to be filed in time); Backer *v.* Saurman, 9 Wkly. Notes Cas. (Pa.) 403 (a motion to dissolve an attachment execution is too late after the filing of a plea); Morris *v.* Turner, 3 Pa. L. J. Rep. 423, 5 Pa. L. J. 465 (where the rule was held to be taken in time). See also Merchants', etc., Nat. Bank *v.* Haiman, 80 Ga. 624, 5 S. E. 795 (where the motion to dismiss was held to have been prematurely made); Iselin *v.* Simon, 62 Minn. 128, 64 N. W. 143.

A motion to dismiss an action of trespass on the case, not founded on a contract, because commenced by trustee process, will prevail as well at any subsequent term as at the first. Tarbell *v.* Bradley, 27 Vt. 535.

41. *Alabama.*— Balkum *v.* Reeves, 98 Ala. 460, 13 So. 524.

Georgia.— Ware *v.* Laird, 93 Ga. 342, 20 S. E. 635; Moore *v.* Allen, 55 Ga. 67, holding, however, that only the bond authorized by statute will dissolve the garnishment.

Illinois.— People *v.* Cameron, 7 Ill. 468.

Maryland.— Wilson *v.* Starr, 1 Harr. & J. 491. *Compare* Barr *v.* Perry, 3 Gill 313.

Massachusetts.— Atwood *v.* West Roxbury Co-operative Bank, 156 Mass. 166, 30 N. E. 558, holding that under Pub. St. c. 183, § 71, giving any person having an interest by assignment or otherwise in the money or credits attached by trustee process in an action against another the right at any time before final judgment to dissolve such attachment by giving a bond conditioned to pay the money for which the trustee may be charged, not exceeding the value of the property in his hands, does not apply to defendant in such action, but defendant must give bond for the entire amount recovered as provided by c. 161, § 122.

Ohio.— Myers *v.* Smith, 29 Ohio St. 120, holding likewise that garnishees who appear and answer after defendant has given the undertaking required by statute may on application of defendant be discharged.

Wisconsin.— Thoen *v.* Harnstrom, 98 Wis. 231, 73 N. W. 1011; Sutro *v.* Bigelow, 31 Wis. 527.

See 24 Cent. Dig. tit. "Garnishment," § 385.

Under the Pennsylvania act of June 13, 1836, when goods are seized under foreign attachment, a bond may be given by the garnishee conditioned for the return of the goods attached or the payment of the debt, and

ment upon the filing of a proper bond have been held applicable to the case of property attached by garnishment.[42]

D. Dissolution From Subsequent Causes — 1. In General. Garnishment proceedings may be dissolved by innumerable causes arising after the institution of such proceedings,[43] which causes by their own force or by virtue of statute entitle the garnishee and defendant to the dismissal of the proceedings. Illustrations of such causes are the reversal of the judgment against the principal defendant,[44] from which there is no appeal taken;[45] the satisfaction of the original

such bond must be given to the sheriff, and not to plaintiff. Jackson's Appeal, 2 Grant 407; Reis *v.* Junker, 9 Wkly. Notes Cas. 296.

42. Woodward *v.* Adams, 9 Iowa 474; Lecesne *v.* Cottin, 10 Mart. (La.) 174. *Contra,* Henry *v.* Gold Park Min. Co., 10 Fed. 11, 3 McCrary 390, holding that the Colorado code providing for the release of property attached by executing an undertaking to redeliver on demand if plaintiff recover judgment does not provide for discharging garnishees by giving the bond therein specified.

43. Mitchell *v.* Greenwald, 43 Miss. 167 (an action, commenced against a partnership, was dismissed as to one of two persons composing the firm, and judgment taken against the other alone, and it was held that this operated to discharge the garnishee, who was indebted alone to the defendant dismissed); Baldwin *v.* Merrill, 8 Humphr. (Tenn.) 132 (where defendant is entitled to have an execution against him quashed, he is also entitled to have quashed garnishment proceedings based on such execution).

There was not sufficient ground to warrant the discontinuance of garnishment proceedings in Willard *v.* Sturm, 96 Iowa 555, 65 N. W. 847 (garnishment proceedings commenced in Iowa against a railroad company for wages due an employee are not abated by the commencement of an action in another state by the employee against the railroad for such wages); Stadler *v.* Parmlee, 14 Iowa 175 (where a motion to quash an attachment because of the defect in the petition was sustained, and plaintiff cured the defect by amendment, and it was held that the garnishee was not discharged by the order quashing the writ); Dockham *v.* New Orleans, 26 La. Ann. 302 (a seizure under garnishment process does not lapse because the sheriff detained the fieri facias on which the process issued in his hands beyond seventy days); Stevens *v.* Perry, 113 Mass. 380 (where a debt due one partner individually was attached by trustee process in a suit against the partnership, and the same debt was subsequently attached by an individual creditor of the partner); Pierce *v.* Wagner, 64 Minn. 265, 66 N. W. 977, 67 N. W. 537 (where on execution money enough was garnished to pay part of the judgment, and subsequently a levy of the execution was made on property more than sufficient to pay the whole judgment); Trunkey *v.* Crosby, 33 Minn. 464, 23 N. W. 846 (where after garnishment of a note, the garnishee brought suit thereon in his own name in another court, and filed the note therein); Engle *v.* Ermish, 1 Kulp (Pa.) 36 (where a rule to open judgment, stating all proceedings, was discharged, and it was held that an attachment execution issued before the rule was taken would not be set aside).

Property subject to attachment or execution.—Where plaintiff, after service of trustee process, attaches property of the principal defendant in the trustee's hands, such attachment will discharge the trustee (Clapp *v.* Rogers, 38 N. H. 435); and land taken and indorsed on an execution discharges the garnishee *pro tanto,* although it finally proves not to be the property of the absconding debtor (Fowler *v.* Spelman, 1 Root (Conn.) 295).

Repeal of the statute under which the garnishment proceeding is founded, before answer, puts an end to the proceeding, since the service of the writ on the garnishee is not the commencement of the action against them. Wooding *v.* Puget Sound Nat. Bank, 11 Wash. 527, 40 Pac. 223.

Issuance of execution against the debtor in a process of foreign attachment discharges the trustee. Esty *v.* Flanders, 16 N. H. 218.

44. Peterson *v.* Hays, 85 Iowa 14, 51 N. W. 1143 (where plaintiff failed to perfect an appeal from an order discharging the attachment); Rowlett *v.* Lane, 43 Tex. 274; Edrington *v.* Allsbrooks, 21 Tex. 186. See also Zorn *v.* Wheatley, 61 Ga. 437 (where plaintiff in garnishment proceedings filed a bill, and had himself appointed receiver of the fund, and, after getting possession of it, dismissed the garnishment, and it was held that the court might, after a decree dismissing his bill, compel him by rule or order to surrender the fund); Karr *v.* Schade, 7 Lea (Tenn.) 294 (where an instanter execution had issued on affidavit on the judgment, and judgment was taken against the garnishee, and it was held that appeal from the judgment against the principal debtor vacated the judgment against the garnishee).

After an attachment was quashed and the cause dismissed for want of jurisdiction, an ancillary garnishment proceeding could not be continued on the ground that the dismissal of the original cause had been appealed from. Holek *v.* Phœnix Ins. Co., 63 Tex. 66. See also Mitchell *v.* Watson, 9 Fla. 160, holding that the dissolution of an attachment on which a writ of garnishment is issued after plea pleaded annuls a judgment against the garnishee.

45. Blumenthal *v.* Taylor, 44 Ill. App. 139, where judgment for plaintiffs was reversed on appeal, and thereafter garnishment was

judgment;[46] the dissolution of a corporation pending garnishment proceedings against it;[47] and the dissolution by agreement of all the parties.[48]

2. Death of Principal Defendant. The general rule is that the death of the principal defendant prior to the rendition of judgment against him thereby dissolves the garnishment proceedings.[49] However, the death of the principal defendant after the entry of a final judgment against him will not entitle the garnishee to his discharge.[50]

3. Death of Garnishee. Where the garnishee dies before answering a summons, the garnishment proceedings should be discontinued.[51] However, it is otherwise where the garnishee has made disclosure prior to his death.[52]

4. Abandonment. Where the garnishee appears, and is prepared to make a disclosure, and plaintiff declines, or is not prepared to take his answer, and an unreasonable time elapses without any action on the garnishment,[53] or where plaintiff fails to contest the answer of the garnishee, he is presumed to have abandoned the garnishment proceedings, and the garnishee is entitled to be discharged.[54]

commenced against the same defendants for the same cause of action, and after the commencement of the latter suit a writ of error to the supreme court was sued out on the judgment of reversal, and it was held that defendants were not entitled on motion to an order dismissing the garnishment, as the proper practice in such a case is to apply for a stay of proceedings until the writ of error is disposed of.

46. McFadden *v.* O'Donnell, 18 Cal. 160; Thorn *v.* Wallace, 88 Ill. App. 562.

47. Farmers', etc., Bank *v.* Little, 8 Watts & S. (Pa.) 207, 42 Am. Dec. 293; Walters *v.* Western, etc., R. Co., 69 Fed. 679. See, however, Pickersgill *v.* Myers, 99 Pa. St. 602, holding that where an attachment execution is issued against an insurance company, and such company is subsequently dissolved and a receiver appointed, this does not necessarily dissolve the attachment.

48. Platen *v.* Byck, 50 Ga. 245. See also Griel *v.* Loftin, 65 Ala. 591 (plaintiff having sued out a garnishment on a judgment may dismiss the proceeding after answer filed denying any indebtedness, against the objection of the garnishee); Ripley *v.* Severance, 6 Pick. (Mass.) 474, 17 Am. Dec. 397.

49. *Alabama.*— Seals *v.* Halloway, 77 Ala. 344.

Delaware.— Reynolds *v.* Howell, 1 Marv. 52, 31 Atl. 875.

Maine.— Martin *v.* Abbott, 1 Me. 333.

Massachusetts.—Wilmarth *v.* Richmond, 11 Cush. 463.

New Hampshire.— Farnsworth *v.* Page, 17 N. H. 334.

North Carolina.— Bryan *v.* Green, 38 N. C. 167.

Pennsylvania.— Farmers', etc., Bank *v.* Little, 8 Watts & S. 207, 42 Am. Dec. 42; Reynolds *v.* Nesbitt, 10 Kulp 113.

Rhode Island.— Bliss *v.* Pearce, 3 R. I. 126.

South Carolina.— Crocker *v.* Radcliffe, 3 Brev. 23.

Vermont.— Dow *v.* Batchelder, 45 Vt. 60.

See 24 Cent. Dig. tit. "Garnishment," § 388.

50. Allard *v.* De Brot, 15 La. 253; Tyler *v.* Winslow, 46 Me. 348; Patterson *v.* Buckminster, 14 Mass. 144; Miller *v.* Williams, 30 Vt. 386. And see Abatement and Revival, 1 Cyc. 54.

Attachment execution.— In several jurisdictions it is held that after the service of attachment execution on the garnishee, the action is not abated by defendant's subsequent death, but plaintiff may proceed to judgment against the garnishee. Holman *v.* Fisher, 49 Miss. 472; Etting *v.* Moses, 1 Phila. (Pa.) 399; Bieber *v.* Weiser, 1 Woodw. (Pa.) 473.

51. Reynolds *v.* Howell, 1 Marv. (Del.) 52, 31 Atl. 875; Wootten *v.* Harris, 5 Harr. (Del.) 254; Guptill *v.* Ayer, 149 Mass. 49, 20 N. E. 449; Tate *v.* Morehead, 65 N. C. 681; Parker *v.* Parker, 2 Hill Eq. (S. C.) 35. And see Abatement and Revival, 1 Cyc. 54.

52. Patterson *v.* Patten, 15 Mass. 473; Patterson *v.* Buckminster, 14 Mass. 144; Hall *v.* Harvey, 3 N. H. 61. See also Harris *v.* Hutcheson, 65 Miss. 9, 3 So. 34.

53. Ogden *v.* Mills, 3 Cal. 253; Blake *v.* Hubbard, 45 Mich. 1, 7 N. W. 204 (where there was a delay of two years after taking out garnishment process before any other action was taken, and there was no formal continuance or any action equivalent to consent by the garnishee); Johnson *v.* Dexter, 38 Mich. 695; Hoobaugh's Appeal, 122 Pa. St. 88, 15 Atl. 669. See also Egana *v.* Bringier, 24 La. Ann. 164; Barnes *v.* Shelburne Falls Sav. Bank, 186 Mass. 574, 72 N. E. 85; Rector *v.* Drury, 3 Pinn. (Wis.) 298, 4 Chandl. 24, holding that the fact that judgment is rendered against the principal defendant before an examination of the garnishee has been had does not work a discontinuance of the suit as to the latter, and, although irregular if the garnishee does not object at the trial, it is a waiver of the irregularity.

54. Mock *v.* King, 15 Ala. 66; Hitchcock *v.* Miller, 48 Mich. 603, 12 N. W. 871; Biddle *v.* Girard Bank, 41 Leg. Int. (Pa.) 15; Beaumont *v.* Eason, 12 Heisk. (Tenn.) 417, holding that where the creditor, after service of garnishment under an execution, takes out an alias or pluries execution, he thereby aban-

XI. THIRD PERSONS AS CLAIMANTS.

A. In General — 1. Right to Intervene. Where a third person claims an interest in or lien upon the property or debt sought to be reached by garnishment proceedings, the statutes usually provide that he may intervene in such proceedings for the purpose of asserting his right;[55] and the issue is then between plaintiff and the intervener.[56]

dons the garnishment. See also Wilder *v.* Weatherhead, 32 Vt. 765, holding that where garnishment proceedings are not prosecuted to judgment, the trustee settles with plaintiff at his peril. See, however, Reed *v.* Fletcher, 24 Nebr. 435, 39 N. W. 437; Wilkinson's Estate, 30 Pittsb. Leg. J. (Pa.) 401, holding that the lien obtained by service of an execution attachment continues until the attachment is dissolved, and that while there might be cases in which an abandonment of the attachment would be implied from delay, yet, if even great delay is satisfactorily explained, it will not have that effect.

55. *Georgia.*— Haas *v.* Old Nat. Bank, 91 Ga. 307, 18 S. E. 188.

Illinois.— Springer *v.* Bigford, 160 Ill. 495, 43 N. E. 751 [*affirming* 55 Ill. App. 198]; Meadowcroft *v.* Agnew, 89 Ill. 469 (where a sheriff has deposited money belonging to various execution creditors in a bank in his official capacity, and the bank is garnished for his individual debt, the sheriff may interplead as trustee for such creditors, showing the facts of the case, and thereby protect the fund for those entitled to it); Harley *v.* Harley, 67 Ill. App. 138; People *v.* Stitt, 7 Ill. App. 294 (a statute allowing third persons to intervene as claimants does not require a judgment to be obtained against defendant before the claims of such third persons can be introduced).

Iowa.— Edwards *v.* Cosgro, 71 Iowa 296, 32 N. W. 350 (the claimant may intervene at any time before the money is paid over to plaintiff, although the amount garnished may have been credited by the court on a judgment); Howe *v.* Jones, 57 Iowa 130, 8 N. W. 451, 10 N. W. 299 (an intervener claiming a fund attached by garnishment may complain of the appointment in vacation and without notice to him of a receiver of such fund); Easley *v.* Gibbs, 29 Iowa 129.

Maine.— Jenness *v.* Wharff, 87 Me. 307, 32 Atl. 908; Horne *v.* Stevens, 79 Me. 262, 9 Atl. 616, holding that a claimant may intervene where he claims only part of the fund.

Maryland.— Kean *v.* Doerner, 62 Md. 465, holding that a claimant has the same right to prove his claim where money is attached as where specific property is attached.

Massachusetts.— Ammidown *v.* Wheelock, 8 Pick. 470, holding that it is not necessary for a party claiming an interest by assignment to offer the trustee any evidence of the assignment beyond his own statement, and that it is sufficient if he gives the trustee before his answer notice of what appears to be a valid assignment.

Minnesota.— Smith *v.* Barclay, 54 Minn. 47, 55 N. W. 827; McMahon *v.* Merrick, 33 Minn. 262, 22 N. W. 543 (an order denying a motion to discharge the garnishee, made after his disclosure, does not conclude a claimant subsequently allowed to intervene, from moving to discharge the garnishee); Gage *v.* Stimson, 26 Minn. 64, 1 N. W. 806; Crone *v.* Braun, 23 Minn. 239.

New Hampshire.— Davis *v.* Fogg, 58 N. H. 159.

New Mexico.— Field *v.* Sammis, (1903) 73 Pac. 617.

Texas.— Taylor *v.* Gillean, 23 Tex. 508; Medley *v.* American Radiator Co., 27 Tex. Civ. App. 384, 66 S. W. 86; Ragsdale *v.* Groos, (Civ. App. 1899) 51 S. W. 256; Turner *v.* Wade, (Civ. App. 1898) 48 S. W. 542; Kelley Grain Co. *v.* English, (Civ. App. 1896) 34 S. W. 651.

Vermont.— Davis *v.* Willey, 57 Vt. 125; Boutwell *v.* McClure, 33 Vt. 127.

See 24 Cent. Dig. tit. "Garnishment," § 394 *et seq.*

Compare Reynolds *v.* Smith, 7 Mackey (D. C.) 27.

See, however, Schloredt *v.* Boyden, 9 Wyo. 392, 64 Pac. 225, holding that a claimant of money garnished cannot intervene in garnishment proceedings to obtain an adjudication of his claim therein, since there is no authority therefor under Wyo. Rev. St. §§ 3943, 3951, 3952, regulating such proceedings, and that such party can always protect himself by notifying the garnishee of his claim.

Contra.— Simpson *v.* Harry, 18 N. C. 202, holding that no claim can be interposed by third persons to a debt attached in the hands of the garnishee, as only tangible property can be claimed by third persons by interpleader.

A subsequent attaching creditor is authorized by the Vermont statute to appear and defend against prior attaching creditors, where property is attached under a trustee process. Harding *v.* Harding, 25 Vt. 487.

The Missouri statute makes a distinction between garnishment on an execution and garnishment on attachment, and allows a claimant to credits attached in the hands of the garnishee to interplead (Wolff *v.* Vette, 17 Mo. App. 36); but denies him the right to interplead to claim assets in the hands of the garnishee on an execution (Wimer *v.* Pritchartt, 16 Mo. 252).

56. *Alabama.*— Louisville, etc., R. Co. *v.* Sharp, 131 Ala. 623, 31 So. 609.

Iowa.— Easley *v.* Gibbs, 29 Iowa 129.

Mississippi.— Lamb *v.* Russell, 81 Miss. 382, 32 So. 916 (where, however, the trial of the claim between plaintiff and claimant

2. Disclosure of Claims by Garnishee. Where the garnishee has received notice of the claims of third persons to the property or fund sought to be reached by garnishment proceedings, it is his duty for his own protection to make disclosure of such fact before final judgment is entered against him,[57] as otherwise a judgment against him as garnishee will be no defense to an action against him by the claimant for the same property or debt.[58]

3. Proceedings to Make Claimant Party to Garnishment — a. In General. Where the answer of the garnishee discloses that he has received notice that a third person claims an interest in the property or debt by transfer or otherwise, the statutes usually provide that the court shall cause a notice to be issued to the person claiming such interest requiring him to come in and contest with plaintiff the validity of his claim;[59] and in some jurisdictions the duty devolves

was held to be premature in that there had been no service upon the principal defendant); Tupper *v.* Cassell, 45 Miss. 352.

Missouri.— Ladd *v.* Couzins, 35 Mo. 513 (holding likewise that the issue upon the interpleader must be determined before the trial of the issue between plaintiff and the garnishee); Schawacker *v.* Luddington, 83 Mo. App. 342. See also Wolff *v.* Vette, 17 Mo. App. 36.

New Hampshire.— Davis *v.* Fogg, 58 N. H. 159.

Pennsylvania.— Fish *v.* Keeney, 91 Pa. St. 138, holding that a garnishee admitting the money to be in his hands and his readiness to pay it over to plaintiff or claimant should not be made a party to a feigned issue.

Vermont.— Downer *v.* Tarbell, 32 Vt. 22.

See 24 Cent. Dig. tit. "Garnishment," § 394.

57. *Alabama.*— Foster *v.* White, 9 Port. 221; Oliver *v.* Atkinson, 2 Port. 546.

Illinois.— Chott *v.* Tivoli Amusement Co., 82 Ill. App. 244.

Iowa.— Seymour *v.* Aultman, 109 Iowa 297, 80 N. W. 401.

Kansas.— Rock Island Lumber, etc., Mfg. Co. *v.* Wichita Fourth Nat. Bank, 63 Kan. 768, 66 Pac. 1024.

Pennsylvania.— Thistle Mills *v.* Watson, 2 Pa. Co. Ct. 271.

See 24 Cent. Dig. tit. "Garnishment," § 397.

Compare King *v.* Carhart, 18 Ga. 650; Parker *v.* Parker, 71 Vt. 387, 45 Atl. 756, where the notice by the assignee to the trustee was held to be sufficient.

58. *Alabama.*— Woodlawn *v.* Purvis, 108 Ala. 511, 18 So. 530.

Illinois.— Radzinski *v.* Fry, 111 Ill. App. 645; Greenwich Ins. Co. *v.* Columbia Mfg. Co., 73 Ill. App. 560, holding this to be so, notwithstanding claimant may have had knowledge of the pendency of the garnishment proceedings.

Kansas.— Rock Island Lumber, etc., Mfg. Co. *v.* Wichita Fourth Nat. Bank, 63 Kan. 768, 66 Pac. 1024. See also Le Roy Bank *v.* Harding, 1 Kan. App. 389, 41 Pac. 680, holding that an order to the garnishee to pay money into court, not being a judgment, it is no defense to an action against the garnishee by a claimant of the money that the money was paid out first in pursuance of such order.

Oregon.— Mullaney *v.* Evans, 33 Oreg. 330, 54 Pac. 886.

Wisconsin.—Wilson *v.* Groelle, 83 Wis. 530, 53 N. W. 900.

59. *Alabama.*— Brooks *v.* Hildreth, 22 Ala. 469; Hodges *v.* White, 16 Ala. 335; Marston *v.* Carr, 16 Ala. 325; Moore *v.* Jones, 13 Ala. 296; Johnson *v.* Burnett, 12 Ala. 743 (a person claiming an interest by attachment is a proper party to contest with plaintiff); Payne *v.* Mobile, 4 Ala. 333, 37 Am. Dec. 744.

Illinois.— Bartlett *v.* Willis Mfg. Co., 106 Ill. App. 248.

Kentucky.— Forepaugh *v.* Appold, 17 B. Mon. 625.

Maine.— Legro *v.* Staples, 16 Me. 252.

Michigan.— Bryant *v.* Wilcox, (1904) 100 N. W. 918; Marx *v.* Wayne Cir. Judge, 119 Mich. 19, 77 N. W. 449; King *v.* Carroll-Porter Boiler, etc., Co., (1898) 77 N. W. 409.

Mississippi.— Kellogg *v.* Freeman, 50 Miss. 127.

Missouri.— Schawacker *v.* Luddington, 83 Mo. App. 342.

New Hampshire.— Dyer *v.* Webster, 18 N. H. 417.

Pennsylvania.— Stern *v.* Jones, 7 Kulp 19. See also Conshohocken Tube Co. *v.* Iron Car Equipment Co., 167 Pa. St. 592, 31 Atl. 949; Lancaster County Bank *v.* Gross, 50 Pa. St. 224.

Rhode Island.— Hanaford *v.* Hawkins, 18 R. I. 432, 28 Atl. 605.

Texas.— Missouri Pac. R. Co. *v.* Whipsker, 77 Tex. 14, 13 S. W. 639, 19 Am. St. Rep. 734, 8 L. R. A. 321; Iglehart *v.* Moore, 21 Tex. 501; Kelley Grain Co. *v.* English, (Civ. App. 1896) 34 S. W. 651.

Vermont.— Rowell *v.* Felker, 54 Vt. 526, holding, however, that claimant has no standing in court, unless under an order of court, and where a commissioner is appointed, he is without authority to allow the appearance of a claimant.

Wisconsin.— John R. Davis Lumber Co. *v.* Milwaukee First Nat. Bank, 87 Wis. 435, 58 N. W. 743, holding, however, that the garnishee's answer must allege that a third person "claims" the indebtedness or property, and that it is not sufficient to allege that a third person "owns" "or has the right to," etc.

upon the garnishee or plaintiff to cause such notice to be served upon the claimant.[60]

b. Mode of Service of Notice. The notice required to be given to claimant should be by personal service within the state, and should strictly conform to the statutory requirements.[61] Where the claimant is a non-resident, the statutes usually provide for service of the notice by publication.[62]

c. Effect of Failure to Give Notice. The rights of a claimant to the debt or property attached cannot be barred or affected by a judgment against the garnishee, unless he is summoned and made a party to the proceeding;[63] nor is his right to appear and contest with plaintiff affected by the garnishee's failure to suggest the interest of such claimant in his disclosure,[64] or by the default of the

See 24 Cent. Dig. tit. "Garnishment," § 397.

But see Sensheimer *v.* Huttenbauer, 2 Cinc. Super. Ct. 56 (holding that where the garnishees answer that defendant held their note, but had transferred it to a third person, which plaintiff denied, plaintiff cannot on motion have such alleged transferee made a party, but his remedy is, under Ohio Code, § 218, giving plaintiff an action against a garnishee whose answer is unsatisfactory); Goldthwaite *v.* Bryant, 1 McMull. (S. C.) 451.

Insufficient disclosure.— Where an indebtedness to defendant on an account was admitted in the disclosure of the trustee, but it was also stated that the agent of certain persons claiming to be the assignees of the proper debtor had informed the trustee of the fact of the assignment of a portion of said account to them, but it appeared that the trustee had no other knowledge of the fact of the assignment than that derived from the statement of the agent, it was held that the trustee was nevertheless chargeable, since the evidence furnished by the disclosure to show the fact of the validity of the assignment was merely hearsay. Geddings *v.* Coleman, 12 N. H. 153.

In Pennsylvania where a number of independent claimants to a fund are so large that their several rights cannot be satisfactorily tried in an issue at law, an order to interplead will not be made, but the court will remit the garnishee to his remedy in equity, which is expressly secured to him by the act of June 16, 1836. Wilbraham *v.* Horrocks, 14 Phila. 191.

60. *Illinois.*— Wilhelmi *v.* Haffner, 52 Ill. 222.

Indiana.— Cadwalader *v.* Hartley, 17 Ind. 520.

Maine.— Burnell *v.* Weld, 59 Me. 423, holding that where property is claimed by a third person, before plaintiff can have the trustee charged, he must, unless the claimant voluntarily appears, have written notice served upon him.

Mississippi.— Morin *v.* Bailey, 55 Miss. 570, holding that the remedy of a garnishee from whom property in his hands has been replevied by a claimant before any judgment has been rendered affecting it is to have the claimant summoned to contest the right.

Pennsylvania.— Wilcock *v.* Neel, 1 Phila. 129.

Texas.— Alamo Ice Co. *v.* Yancey, 66 Tex. 187, 18 S. W. 499.

Wisconsin.— Adams *v.* Filer, 7 Wis. 306, 73 Am. Dec. 410.

See 24 Cent. Dig. tit. "Garnishment," § 397.

61. Evans *v.* Norman, 14 Ala. 662 (holding likewise that where the garnishee by his answer discloses that there were two indorsees on the note on which he was garnished, it is not sufficient to cite the last indorsee, but both should be summoned before judgment can be rendered against the garnishee); Goodwin *v.* Brooks, 6 Ala. 836; Levy *v.* Miller, 38 Minn. 526, 38 N. W. 700, 8 Am. St. Rep. 691 (personal service without the state will not confer jurisdiction over an absent non-resident claimant or assignee of a debt); Thompson *v.* Carroll, 36 N. H. 21; Horn *v.* Thompson, 31 N. H. 562. See also Camp *v.* Hatter, 11 Ala. 151, holding that since the notice to the transferee may be ordered at any time after the coming in of the answer and before the cause is ended by the termination of the suit, an order at the same term when final judgment is rendered against the debtor is regular and sufficient to continue the cause against the transferee.

Two or more persons may be summoned by the same notice to appear and contest plaintiff's right to condemn a demand, where the garnishee suggests that it has been transferred to another or to others. Blackman *v.* Smith, 8 Ala. 203.

Waiver.— Where a claimant has knowledge of the garnishment and intervenes in the action, he thereby waives the irregularity of want of notice, and the garnishee is relieved of his obligation to serve the notice required by statute. Swearingen Lumber Co. *v.* Washington School Tp., 125 Iowa 283, 99 N. W. 730.

62. Sheppard *v.* Buford, 7 Ala. 90; Thompson *v.* Carroll, 36 N. H. 21.

63. Simmons *v.* Guyon, 57 Ala. 111; Boyd *v.* Cobbs, 50 Ala. 82; Molton *v.* Escott, 50 Ala. 77; Marston *v.* Carr, 16 Ala. 325; Levy *v.* Miller, 38 Minn. 526, 38 N. W. 700, 8 Am. St. Rep. 691.

64. Bessemer Sav. Bank *v.* Anderson, 134 Ala. 343, 32 So. 716, 92 Am. St. Rep. 38 (where a garnishee was notified that the moneys in his hands belonged to a third person, and failed to aver such notice in his answer, a subsequent payment of the fund to

garnishee,[65] or by the discharge of the garnishee upon a deposit of the property or money in court.[66]

d. Effect of Failure of Claimant to Appear. A claimant should appear at the term of court at which he is cited and propound his claim,[67] and where the claimant after due notice fails to appear until after judgment against the garnishee, a petition for intervention filed by him thereafter will be dismissed,[68] and he is concluded by the judgment rendered in the proceedings, and the satisfaction thereof, in regard to his claim.[69]

4. Security by Claimant. In some jurisdictions it is provided by statute that where property or debt sought to be subjected by garnishment proceedings is claimed by any person not a party to the garnishment proceedings, such claimant may dissolve the garnishment by filing with the proper officer a bond with sufficient security, and approved by the proper officer, conditioned to pay to plaintiff any sum that may be found due to defendant upon the trial of any issue formed

the justice is no defense in an action by the third person); Boylen *v.* Young, 6 Allen (Mass.) 582; Dennis *v.* Twitchell, 10 Metc. (Mass.) 180; Webster *v.* Farnum, 60 N. H. 288. See also Creed *v.* Gilman, 169 Mass. 562, 48 N. E. 778. See, however, Cahoon *v.* Levy, 4 Cal. 243 (holding that unless the answer of a garnishee discloses liens having priority of claim on the fund in his hands, leave to file a bill of interpleader will not be granted); Porter *v.* West, 64 Miss. 548, 8 So. 207 (holding that a garnishee having answered admitting his indebtedness to defendant without disclosing that he has been notified of an assignment, the assignee cannot intervene in the suit and have his right to the debt determined therein).

65. Boylen *v.* Young, 6 Allen (Mass.) 582; Knights *v.* Paul, 11 Gray (Mass.) 225, holding that under Mass. Rev. St. c. 109, § 17, a claimant of a fund in the hands of a trustee in foreign attachment may be admitted as a party for the first time on scire facias against a defaulted trustee.

66. Howe *v.* Jones, 57 Iowa 130, 8 N. W. 451, 10 N. W. 299; Le Roy Bank *v.* Harding, 1 Kan. App. 389, 41 Pac. 680; Kellogg *v.* Freeman, 50 Miss. 127.

67. *Ex p.* Opdyke, 62 Ala. 68 (holding, however, that the court may, in the exercise of sound discretion, enlarge the time for propounding the claim); Wilcock *v.* Neel, 1 Phila. (Pa.) 129.

Where a claimant appears and is treated by the court and parties as a party to the end of the proceedings, he cannot, after judgment against the garnishee, object that he was not formally made a party. Williams *v.* Pomeroy, 27 Minn. 85, 6 N. W. 445; Cornish *v.* Russell, 32 Nebr. 397, 49 N. W. 379.

68. *Alabama.*—Heyward *v.* Phillips-Buttoff Mfg. Co., 97 Ala. 533, 11 So. 837.

Maine.— Dill *v.* Wilbur, 79 Me. 561, 12 Atl. 545, holding that where allegations under Rev. St. c. 86, § 30, are not filed until after the court has passed upon a disclosure and adjudged the trustee chargeable, it is then in the discretion of the court whether it will allow the entry charging the trustee to be stricken off, and open up the case anew for examination and consideration. See also Johnson *v.* Thayer, 17 Me. 401, holding that where the answer of a trustee discloses an assignment, and the case has been argued and presented to the court for a final decision on the disclosure alone, it is too late for a motion to summon in the assignee to try the validity of the assignment.

Maryland.— Lawrence Bank *v.* Raney, etc., Iron Co., 77 Md. 321, 26 Atl. 119.

Missouri.— Swartz *v.* Riner, 66 Mo. App. 476, holding that where claimant enters an appearance, but neglects to interplead or take any further steps, judgment against the garnishee is properly rendered.

Pennsylvania.— Shultz *v.* Hoffman, 13 Pa. Co. Ct. 90.

See 24 Cent. Dig. tit. "Garnishment," § 398.

Compare Edwards *v.* Cosgro, 71 Iowa 296, 32 N. W. 350, holding that claimant may intervene at any time before the money is paid over to plaintiff.

69. *Alabama.*— Saller *v.* Insurance Co. of North America, 62 Ala. 221; Burdine *v.* Maltbie, 3 Stew. & P. 417. See also Evans *v.* Norman, 14 Ala. 662, holding that where the transferee fails to appear after being summoned, or where the summons is returned not found, the court may cause a default to be entered of record, and proceed as if nothing was claimed by the supposed transferee.

Colorado.— Drennon *v.* Ross, 2 Colo. App. 181, 29 Pac. 1041.

Illinois.— Born *v.* Staaden, 24 Ill. 320; Radzinski *v.* Fry, 111 Ill. App. 645; Bartlett *v.* Willis Mfg. Co., 106 Ill. App. 248.

Massachusetts.— Randall *v.* Way, 111 Mass. 506; Boston *v.* Worthington, 10 Gray 496, 71 Am. Dec. 678.

Michigan.— Bryant *v.* Wilcox, (1904) 100 N. W. 918, where this was held to be so, even where the garnishee had colluded with defendant's creditors to institute garnishment proceedings.

Compare Emery *v.* Davis, 17 Me. 252; Howard *v.* McLaughlin, 98 Pa. St. 440.

Disclaimer.—A third person cited to appear and contest plaintiff's right may appear and disclaim any interest in the property or debt in controversy, and the garnishee may then be charged upon his answer. Mortland *v.* Little, 137 Mass. 339; Pollard *v.* Mobile Sav. Bank, 60 Miss. 946.

upon the answer of the garnishee, or that may be admitted to be due in said answer, if untraversed.[70]

B. Proceedings For Determination of Claims — 1. In General. Where claimants of the debt or property have been summoned and made parties to the garnishment proceedings, their rights are then litigated the same as in any other action, and the issue as to whether the debt or property belongs to them or to the principal defendant should be tried on the evidence produced by the respective parties.[71]

2. Pleadings.[72] The affirmative in maintaining his right is on the claimant, and it is his duty to serve the first pleading in the nature of a complaint in intervention setting up his claim, to which, if necessary, plaintiff may answer;[73] and where a claimant claims the property or debt by transfer, he should allege in his complaint the validity of the transfer.[74]

70. Russell *v.* Brunswick Grocery Co., 120 Ga. 38, 47 S. E 528 (where the bond was held to sufficiently conform to the requirements of the statute); Gordon *v.* Wilson, 99 Ga. 354, 27 S. E. 762 (holding likewise that if no traverse is filed to the garnishee's answer plaintiff may, at the first term after such answer is filed, if he has obtained judgment against the principal defendant, move for a judgment upon the claim bond; but claimant may, at any time before judgment is entered in favor of plaintiff upon such bond, traverse under oath the answer of the garnishee, and cause an issue to be made thereon); Horton *v.* Summers, 62 Ga. 302; Phillips *v.* Thurber, 56 Ga. 393; Branch *v.* Adam, 51 Ga. 113 (where a firm was held to have made themselves parties to a garnishment proceeding by filing the statutory bond); Barndollar *v.* Fogarty, 203 Pa. St. 617, 53 Atl. 492. See also Wilson *v.* Wilson, 1 Hen. & M. (Va.) 15.

In Alabama where a garnishee answers alleging an indebtedness to a certain amount, and a claimant appears and propounds his claim in writing, verified as required by Code (1886), § 2985, this is all that is necessary to give the court jurisdiction of claimant's suit, the statute requiring no bond. Butler *v.* Savannah Guano Co., 122 Ala. 326, 25 So. 241.

71. *Ex p.* Opdyke, 62 Ala. 68; Winslow *v.* Bracken, 57 Ala. 368; Brooks *v.* Hildreth, 22 Ala. 469; Legro *v.* Staples, 16 Me. 252; Muncey *v.* Sun Ins. Office, 109 Mich. 542, 67 N. W. 562; Leslie *v.* Godfrey, 55 Minn. 231, 56 N. W. 818.

72. Pleading generally see Pleading.

73. *Alabama.*— Goodwin *v.* Brooks, 6 Ala. 836. See, however, Grady *v.* Hammond, 21 Ala. 427, holding that upon an issue framed between plaintiff and claimant, plaintiff is entitled to open and close the argument of the case, although the issue is so framed that claimant is made to affirm the fairness and good faith of the alleged transfer.

Illinois.— Meadowcroft *v.* Agnew, 89 Ill. 469 (where no issue is taken on an interpleader, but a demurrer is filed to the same, the facts alleged in the interpleader are admitted); Williams *v.* Vanmetre, 19 Ill. 293 (an interpleader claiming the property in dispute, if unanswered, must be taken as true).

Michigan.— Muncey *v.* Sun Ins. Office, 109 Mich. 542, 67 N. W. 562, holding likewise that a demand for a trial of issues against a garnishee is unnecessary where a third person who claims property or funds voluntarily intervenes.

Minnesota.— Leslie *v.* Godfrey, 55 Minn. 231, 56 N. W. 818; Smith *v.* Barclay, 54 Minn. 47, 55 N. W. 827. See also McMahon *v.* Merrick, 33 Minn. 262, 22 N. W. 543.

Nebraska.— Cornish *v.* Russell, 32 Nebr. 397, 49 N. W. 379.

Vermont.— Carpenter *v.* McClure, 37 Vt. 127; Russell *v.* Thayer, 30 Vt. 525; McKenzie *v.* Ransom, 22 Vt. 324, holding likewise that one who is admitted to enter as claimant in a suit commenced by trustee process cannot plead in abatement.

See 24 Cent. Dig. tit. "Garnishment," § 408.

Amendment.— If a statement filed by the claimant in foreign attachment is defective, he may cure the defect by amendment. Barndollar *v.* Fogarty, 203 Pa. St. 617, 53 Atl. 492.

74. *Alabama.*— Scott *v.* Stallsworth, 12 Ala. 25; Camp *v.* Hatter, 11 Ala. 151. See also Woodlawn *v.* Purvis, 108 Ala. 511, 18 So. 530 (holding that an answer by a debtor in a suit by the assignee of the creditor, setting up a payment as garnishee in an action against the creditor, must allege a want of notice of the assignment at the time his answer in garnishment was filed); Reynolds *v.* Collins, 78 Ala. 94 (holding that where the debt of the attaching creditor was antecedent to the assignment for the benefit of the creditors, the existence of debts must be shown by the assignee by evidence other than the recitals of the assignment, and the existence of other debts than that of the attaching creditor must be proved).

Maine.— Meserve *v.* Nason, 96 Me. 412, 52 Atl. 907.

Massachusetts.— Bassett *v.* Parsons, 140 Mass. 169, 3 N. E. 547.

Minnesota.—McMahon *v.* Merrick, 33 Minn. 262, 22 N. W. 543.

New Hampshire.— Amoskeag Mfg. Co. *v.* Gibbs, 28 N. H. 316, where the plea of claimant was held to be bad in failing to allege any transfer before service of trustee process.

3. Issues and Questions Considered. On the interposition of a claim by a third person in garnishment proceedings, such claimant must rely upon the strength of his own title,[75] and cannot urge or avail himself of defects or irregularities in the garnishment proceedings, or contest the garnishee's liability.[76] It is not necessary for plaintiff in his answer to claimant's complaint to allege, what has already been alleged or appears in the action, that he is a creditor of defendant and has attached the property by garnishment.[77]

4. Parties.[78] Since the garnishee is not interested in the issue between the creditor and the claimant, he is not a necessary or proper party to the issue between them and should not be joined.[79]

5. Presumptions and Burden of Proof.[80] Where issue is joined between plaintiff and the claimant, the general rule is that upon the trial thereof the burden is upon the claimant to prove the validity of his assignment or the superiority of his title.[81]

Texas.— Wynne *v.* Ft. Worth State Nat. Bank, 82 Tex. 378, 17 S. W. 918.

See 24 Cent. Dig. tit. "Garnishment," § 408.

Compare Smith *v.* Wright, 6 Blackf. (Ind.) 550 (where the replications of plaintiff were held to be insufficient); Towanda First Nat. Bank *v.* Ladd, 126 Pa. St. 188, 17 Atl. 750 (holding that where an assignment was made subject to a previous assignment, a separate issue is not necessary as to the second assignment).

Exempt property.— In New Hampshire, in a suit for garnishment of plaintiff's wages, when less than twenty dollars is held, and it does not appear that plaintiff's claim is for necessaries, the question of the validity of defendant's assignment of his wages to a third person is immaterial. Abbott *v.* Smith, 64 N. H. 615, 10 Atl. 817.

75. *Alabama.*— Norwood *v.* Voorhees, 129 Ala. 314, 29 So. 680 (the issue arising between a garnishing creditor and a claimant to a fund in the hands of the garnishee is whether claimant, by transfer or otherwise, has a right to the fund superior to that of the garnishing creditor derived from the process); Clark *v.* Few, 62 Ala. 243; Blackman *v.* Smith, 8 Ala. 203.

Iowa.—Galena Nat. Bank *v.* Chase, 71 Iowa 120, 32 N. W. 202.

Massachusetts.— Sheehan *v.* Marston, 132 Mass. 161, holding that where the garnishee answers that he owes the principal defendant a certain sum for labor, a claimant of such fund may show that the principal defendant acted in the matter merely as his agent.

New Hampshire.— Davis *v.* Fogg, 58 N. H. 159.

Vermont.— Carpenter *v.* McClure, 37 Vt. 127.

See 24 Cent. Dig. tit. "Garnishment," § 410.

76. Reynolds *v.* Collins, 78 Ala. 94; McMullen *v.* Lockard, 64 Ala. 56; Winslow *v.* Bracken, 57 Ala. 368 (the only issue is whether claimant has a transfer of or right to the demand superior to the right of plaintiff derived under the process); Blackman *v.* Smith, 8 Ala. 203; Dalton *v.* Dalton, 48 Me. 42; Teichman Commission Co. *v.* American Bank, 27 Mo. App. 676 (holding that the primary question is not whether the property is that of defendant in execution, but rather whether it is that of the interpleader); Hewitt *v.* Follett, 51 Wis. 264, 8 N. W. 177. See also Moore *v.* Jones, 13 Ala. 296 (holding that where plaintiff controverts the answer of the garnishee or the right of the transferee to the debt, an issue will be sufficient if it reasserts that the garnishee is indebted, or, conceding the answer to be true, denies that the assignee has any adverse right); Tone *v.* Shankland, 110 Iowa 525, 81 N. W. 789 (holding that under Iowa Code, § 3936, providing that a municipal corporation cannot be garnished, only the municipal corporation can plead the exemption).

In Massachusetts, however, the rule is laid down that a claimant intervening in trustee process may go into the question as to whether the fund due by the principal defendant is one which can be reached by trustee process. Wilde *v.* Mahaney, 183 Mass. 455, 67 N. E. 337, 62 L. R. A. 813 [*overruling* Butler *v.* Butler, 162 Mass. 524, 39 N. E. 182; Moors *v.* Goddard, 147 Mass. 287, 17 N. E. 532; Clark *v.* Gardner, 123 Mass. 358, and *following* Webster *v.* Lowell, 2 Allen 123].

77. Smith *v.* Meyer, 84 Minn. 455, 87 N. W. 1122; Smith *v.* Barclay, 54 Minn. 47, 55 N. W. 827.

78. Parties generally see Parties.

79. O'Melia *v.* Hoffmeyer, 119 Iowa 444, 93 N. W. 497; Fish *v.* Kenney, 91 Pa. St. 138; Carpenter *v.* McClure, 37 Vt. 127; Hewitt *v.* Follett, 51 Wis. 264, 8 N. W. 177. See also Segee *v.* Downes, 143 Mass. 240, 9 N. E. 565.

80. Presumption and burden of proof generally see Evidence.

81. *Alabama.*— Clark *v.* Few, 62 Ala. 243; Winslow *v.* Bracken, 57 Ala. 368; Scott *v.* Stallsworth, 12 Ala. 25; Camp *v.* Hatter, 11 Ala. 151.

Arkansas.— Bergman *v.* Sells, 39 Ark. 97, holding that if it appears that process was served on the garnishee on the same day that the debt was assigned, and it does not appear which occurred first, the debt will be held by the garnishment process.

6. Evidence.[82] Upon the trial of an issue between plaintiff and claimant, the same rules as to the admissibility and sufficiency of evidence apply as in the trial of ordinary cases.[83] Thus, under a simple issue of ownership, plaintiff may prove any facts tending to impeach the validity, as to him as creditor, of any transfer of the debt or property from defendant to claimant,[84] or show that such transfer

Georgia.— French *v.* Campbell, 25 Ga. 600. *Compare* Harvey *v.* Mason, 20 Ga. 477.

Iowa.— Poole *v.* Carhart, 71 Iowa 37, 32 N. W. 16.

Maine.— Meserve *v.* Nason, 96 Me. 412, 52 Atl. 907; Haynes *v.* Thompson, 80 Me. 125, 13 Atl. 276; Thompson *v.* Reed, 77 Me. 425, 1 Atl. 241.

Michigan.— Jackson *v.* People's Sav. Bank, 120 Mich. 702, 79 N. W. 908; Burnham *v.* Home Ins. Co., 119 Mich. 588, 78 N. W. 653.

Minnesota.— Conroy *v.* Ferree, 68 Minn. 325, 71 N. W. 383; North Star Boot, etc., Co. *v.* Ladd, 32 Minn. 381, 20 N. W. 334; Donnelly *v.* O'Connor, 22 Minn. 309.

Nebraska.—Racek *v.* North Bend First Nat. Bank, 62 Nebr. 669, 87 N. W. 542, holding that where the intervener's claim is adverse to both original parties, he must establish his right by a preponderance of evidence.

Pennsylvania.— Northampton County Nat. Bank *v.* Hay, 5 Pa. Co. Ct. 232.

See 24 Cent. Dig. tit. "Garnishment," § 411.

Compare Michener *v.* Fransham, 29 Mont. 240, 74 Pac. 448.

Contra.— Wilhelmi *v.* Haffner, 52 Ill. 222, holding that in a contest between plaintiff and transferee of a note, the burden is on plaintiff to show that the transfer was not made in good faith.

Assignment as collateral security.— It has been held in Maine that where the trustee has been discharged by the assignment of a debt due the principal defendant as collateral security, it is not necessary for the assignee to show further that he has not received the amount of the debt secured, but the burden is on plaintiff in the trustee process to show such fact, in order to charge the trustee. Porter *v.* Bullard, 26 Me. 448.

Possession of negotiable note.— In Texas, where it is sought to charge the maker of a negotiable note as garnishee of the payee, and third persons in possession of the note intervene, claiming it as their note, the inference of ownership raised by such possession must be rebutted by proof. Bassett *v.* Garthwaite, 22 Tex. 230, 73 Am. Dec. 257.

82. Evidence generally see Evidence.

83. *Colorado.*— Campbell *v.* Poudre Valley Bank, 7 Colo. App. 359, 43 Pac. 449.

Illinois.— Springer *v.* Bigford, 160 Ill. 495, 43 N. E. 751 [*affirming* 55 Ill. App. 198], holding that upon the trial between an intervening claimant of attached property and plaintiff in attachment, judgment obtained against defendant in the attachment suit is no evidence against intervener of any debt from defendant to plaintiff before the entry of the judgment, or of the truth of any of the averments in the declaration, since intervener, standing in the attitude of a stranger to the record, is chargeable with no notice of the attaching creditor's right.

Iowa.— Bolter *v.* Girton, 94 Iowa 721, 61 N. W. 919, where the evidence was held to be sufficient to warrant a judgment for plaintiff for one half of the debt in controversy.

Michigan.— Bullard *v.* Avery, 126 Mich. 711, 86 N. W. 144, where the evidence was held to be sufficient to establish the right of claimant.

Minnesota.— Peterson *v.* Knuutila, (1905) 102 N. W. 368, where the evidence was held sufficient to sustain an order for judgment in favor of claimant, as well as against plaintiff for costs.

See 24 Cent. Dig. tit. "Garnishment," § 412.

The disclosure of the garnishee is not competent evidence either to prove or to disprove the right of claimant to the debt or property in controversy. Scott *v.* Stallsworth, 12 Ala. 25; Minchin *v.* Moore, 11 Mass. 90; Garthwaite *v.* Hart, 24 Tex. 314; Bassett *v.* Garthwaite, 22 Tex. 230, 73 Am. Dec. 257. See also Wilson *v.* Hanson, 20 N. H. 375. See, however, Reynolds *v.* Collins, 78 Ala. 94 (holding that admission in evidence of the garnishee's answer admitting a fund in his hands, on trial of a contest with a claimant of the fund, could not have injured claimant); Bradley *v.* Thorne, 67 Minn. 281, 69 N. W. 909 (holding that the disclosure of the garnishee is competent in favor of a claimant and against plaintiff to identify the property in which claimant asserts a right).

Declarations of the garnishee made out of court are not competent evidence in favor of or against claimant (Hendrie, etc., Mfg. Co. *v.* Collins, 29 Colo. 102, 67 Pac. 164; Phillips *v.* Thurber, 56 Ga. 393); nor are such declarations of the principal debtor admissible (Chamberlin *v.* Gilman, 10 Colo. 94, 14 Pac. 107).

84. *Alabama.*— Louisville, etc., R. Co. *v.* Sharp, 131 Ala. 623, 31 So. 609; Clark *v.* Few, 62 Ala. 243.

Louisiana.— Maher *v.* Brown, 2 La. 492.

Minnesota.— Smith *v.* Barclay, 54 Minn. 47, 55 N. W. 827.

Ohio.— Moore *v.* Rees, 7 Ohio Dec. (Reprint) 633, 4 Cinc. L. Bul. 475.

Vermont.— Dow *v.* Taylor, 71 Vt. 337, 45 Atl. 220, 76 Am. St. Rep. 775.

See 24 Cent. Dig. tit. "Garnishment," § 412.

Compare Hart *v.* Rafter, 78 Ga. 478, 3 S. E. 699; Stockbridge *v.* Fahnestock, 87 Md. 127, 39 Atl. 95.

Testimony as to the insolvency of the principal defendant in a garnishment proceeding is immaterial, where the only question is whether the claim was assigned for a sufficient consideration before garnishment.

or assignment was procured through collusion or fraud.[85] Likewise it is competent and proper for the claimant to show that the title to the debt or property covered by the garnishment vested in him by assignment or otherwise prior to the service of garnishment process, and any evidence which tends to establish this fact is admissible for the claimant.[86]

7. Questions For Jury.[87] Where an issue is made up between plaintiff and claimant, the only question for the jury to decide is whether plaintiff or claimant is entitled to the debt or property covered by the garnishment.[88]

8. Judgment.[89] The general rule is that a judgment in garnishment proceedings in favor of the claimant does not determine what, if anything, is due the claimant from the garnishee; he cannot, except in the matter of costs, have judgment in his own name against plaintiff, defendant, or garnishee, and is left to pursue his remedy just as though no garnishment proceedings had been instituted.[90]

Childs *v.* Nordella, 116 Mich. 511, 74 N. W. 713.

85. *Alabama.*— Butler *v.* Feeder, 130 Ala. 604, 31 So. 799, holding that evidence that one of the attaching defendants left his home, stating that he was going to where the attaching creditors resided; that early in the morning of the day the attachment was issued he went to the residence of the attaching creditors' attorney; and that he requested witness not to tell a certain person that he had gone to see the attorney, was admissible on the issue of whether or not the attachment was collusively issued.

Iowa.— Spielman *v.* Dorf, (1900) 82 N. W. 489.

Massachusetts.— Sullivan *v.* Langley, 124 Mass. 264.

Michigan.— Cummings *v.* Fearey, 44 Mich. 39, 6 N. W. 98, holding that the entire antecedents of the dealings between the principal defendant and the garnishee and their agents, and all transactions regarding the property in its disposal, are admissible in evidence where fraudulent dealings with the garnishee, as against the principal defendant's creditors, are in question.

Minnesota.— North Star Boot, etc., Co. *v.* Ladd, 32 Minn. 381, 20 N. W. 334.

Pennsylvania.— Sommer *v.* Gilmore, 160 Pa. St. 129, 28 Atl. 654.

Texas.— Houston Drug Co. *v.* Kirchhain, (Civ. App. 1902) 71 S. W. 608.

Wisconsin.—Bloodgood *v.* Meissner, 84 Wis. 452, 54 N. W. 772.

See 24 Cent. Dig. tit. "Garnishment," § 412.

86. *Alabama.*— Brooks *v.* Hildreth, 22 Ala. 469.

Colorado.— Chamberlin *v.* Gilman, 10 Colo. 94, 14 Pac. 107; Campbell *v.* Poudre Valley Bank, 7 Colo. App. 359, 43 Pac. 449.

Illinois.— Ripley *v.* People's Sav. Bank, 119 Ill. 341, 9 N. E. 894 (on trial of an intervening claim, an agreement between intervener and the garnishee, antedating the suit, by which intervener gave the garnishee possession of certain property which the latter agreed to sell and devote the proceeds, which constitute the fund garnished, to certain purposes is irrelevant); Harley *v.* Harley, 67 Ill. App. 138.

Iowa.— King *v.* Bird, 85 Iowa 535, 52 N. W. 494.

Pennsylvania.— Bohner *v.* Cummings, 91 Pa. St. 55.

Rhode Island.— Cross *v.* Brown, 19 R. I. 220, 33 Atl. 147.

Wyoming.— Schloredt *v.* Boyden, 9 Wyo. 392, 64 Pac. 225, where the evidence was held sufficient to sustain a finding that the money in controversy belonged to claimant.

See 24 Cent. Dig. tit. "Garnishment," § 412.

87. Questions of law and fact generally see Trial.

88. Johnson *v.* Thayer, 17 Me. 401; Tupper *v.* Cassell, 45 Miss. 352; Maze *v.* Griffin, 65 Mo. App. 377; Bohner *v.* Cummings, 91 Pa. St. 55, where judgments standing in the name of defendant were attached as belonging to him, and it was claimed by defendant's wife that she was the owner of the judgments, and that he obtained them as her agent, and it was held that the question for the jury to decide was as to the agency of the husband.

89. Judgment generally see Judgments.

90. *Florida.*— Florida Cent. R. Co. *v.* Carstens, (1904) 37 So. 566.

Illinois.— Commercial Nat. Bank *v.* Payne, 60 Ill. App. 346 (there should not be a judgment in form for or against a third person who interpleads in garnishment, except for costs); Glover *v.* Wells, 40 Ill. App. 350 (where the court finds for the interpleader, it is error to render judgment in his favor for the amount due him, and for the attaching creditor for the balance; that the proper practice in such case is to discharge the garnishee upon payment to plaintiff of the sum last named); Walton *v.* Detroit Copper, etc., Rolling Mills, 37 Ill. App. 264.

Massachusetts.— Gifford *v.* Rockett, 119 Mass. 71.

Michigan.— Port Huron First Nat. Bank *v.* Mellen, 45 Mich. 413, 8 N. W. 80.

Mississippi.— Tupper *v.* Cassell, 45 Miss. 352.

Vermont.— Carpenter *v.* McClure, 37 Vt. 127.

See 24 Cent. Dig. tit. "Garnishment," § 418.

Compare Norwood *v.* Voorhees, 129 Ala.

9. Appeal and Review.[91] The general rule is that in a contest between plaintiff in garnishment proceedings and a claimant of the debt or property therein attached either party has the right to appeal from the judgment entered therein, where such appeal is perfected by compliance with the statutory requirements.[92]

10. Costs.[93] In the absence of statute costs are discretionary with the court in a contest between plaintiff and claimant in garnishment proceedings,[94] although they are usually allowed to the successful party therein,[95] some of the cases going the length of holding that the successful party is entitled to costs as of right.[96]

C. Operation and Effect of Determination — 1. Where Claimant Is Successful. Where, upon the intervention of a claimant, plaintiff abandons all rights to the fund or property attached in the hands of the garnishee or trustee, or where the findings are against him, the conflicting rights of defendants, the

314, 29 So. 680; Hewitt *v.* Follett, 51 Wis. 264, 8 N. W. 177. See, however, Whalen *v.* McMahon, 16 Colo. 373, 26 Pac. 583, holding that where an intervener claims the garnished fund by assignment from the debtor, and it appears by the assignment that it was not absolute but only as security for what indebtedness the assignor might incur to the assignee, judgment should be given for intervener for only so much of the fund as is necessary to satisfy his debt, and for plaintiff for the balance.

91. Appeal and review generally see Appeal and Error.

92. *Alabama.*— House *v.* West, 108 Ala. 355, 19 So. 913 (holding, however, that the affidavit and bond required by a claimant in a claim suit are jurisdictional, and that his appeal will be dismissed for want of them); Union India Rubber Co. *v.* Mitchell, 37 Ala. 314 (holding, however, that plaintiff in garnishment cannot complain of any error in allowing a set-off by the garnishee against the debt garnished, where a third person made a claim for such debt which he sustained on an issue between him and plaintiff); Johnson *v.* Burnett, 12 Ala. 743.

Illinois.— Commercial Nat. Bank *v.* Payne, 60 Ill. App. 346, where judgment in favor of claimant failed to award costs.

Iowa.— O'Melia *v.* Hoffmeyer, 119 Iowa 444, 93 N. W. 497; Edwards *v.* Cosgro, 71 Iowa 296, 32 N. W. 350; Galena Nat. Bank *v.* Chase, 71 Iowa 120, 32 N. W. 202; Kimpson *v.* Hunt, 4 Iowa 340.

Maine.— Walcott *v.* Richman, 94 Me. 364, 47 Atl. 901. See also Meserve *v.* Nason, 96 Me. 412, 52 Atl. 907.

Massachusetts.—Fuller *v.* Storer, 111 Mass. 281, holding that a claimant of funds in the hands of trustees may, after appearance and judgment for plaintiff, bring a writ of review in the name of the trustees, on giving them a bond of indemnity.

Minncsota.— Peterson *v.* Knuutila, (1905) 102 N. W. 368; Williams *v.* Pomeroy, 27 Minn. 85, 6 N. W. 445.

New Hampshire.— Barker *v.* Garland, 22 N. H. 103.

North Carolina.— Parks *v.* Adams, 113 N. C. 473, 18 S. E. 665.

Vermont.— Hutchinson *v.* Bigelow, 23 Vt. 504. See also Towne *v.* Leach, 32 Vt. 747.

See 24 Cent. Dig. tit. "Garnishment," § 419.

Compare Gates *v.* Tusten, 89 Mo. 13, 14 S. W. 827.

93. Costs generally see Costs.

94. Peabody *v.* Maguire, 79 Me. 572, 12 Atl. 630; White *v.* Kilgore, 78 Me. 323, 5 Atl. 70; Wilde *v.* Mahaney, 183 Mass. 455, 67 N. E. 337, 62 L. R. A. 813; Laclair *v.* Reynolds, 50 Vt. 418; Hubbard *v.* U. S. Bank, 12 Fed. Cas. No. 6,815. See also Tupper *v.* Cassell, 45 Miss. 352, holding that the garnishee is not liable for the costs of the issue between the creditor and a third person as to who has the right to the debt in the hands of the garnishee.

Where transferee defaults.—Where a transferee is properly summoned and fails to appear, or where the summons is returned not found, the court cannot direct an issue to be made up between plaintiff and such transferee, and on verdict for plaintiff render a judgment for costs against the transferee. Evans *v.* Norman, 14 Ala. 662.

95. Meserve *v.* Nason, 96 Me. 412, 52 Atl. 907; Twohy Mercantile Co. *v.* Melbye, 83 Minn. 394, 86 N. W. 411 (the successful party is entitled to damages in the shape of interest); Hunt *v.* Miles, 42 Vt. 533 (a successful claimant is entitled to costs for his actual travel, and not for travel at those terms of court when he appears only by attorney); Kirby *v.* Corning, 54 Wis. 599, 12 N. W. 69. See also Winne *v.* Lenawee Cir. Judge, 74 Mich. 329, 42 N. W. 279.

Costs in favor of trustee.— In Massachusetts a person summoned as trustee is entitled to costs while attending a trial in order to contest the validity of an intervening claim. Washburn *v.* Clarkson, 123 Mass. 319; Croxford *v.* Massachusetts Cotton Mills, 15 Gray (Mass.) 70.

96. Chambers *v.* Yarnell, 37 Ala. 400 (holding that where claimant was unsuccessful, the costs of the contest should be taxed against him and not against the garnishee); Blackman *v.* Smith, 8 Ala. 203; Commercial Nat. Bank *v.* Payne, 60 Ill. App. 346 (where a judgment in favor of claimant was reversed

trustee, and claimants cannot be settled in the suit, and the only judgment that can be rendered is that discharging the trustee.[97]

2. WHERE PLAINTIFF IS SUCCESSFUL. Where the question of the ownership of the debt or property in dispute in a contest between plaintiff and claimant is finally determined against the interpleading claimant, it is *res judicata* as to those who take part in the adjudication, and is conclusive alike upon the claimant[98] and the garnishee.[99]

XII. OPERATION AND EFFECT OF GARNISHMENT, JUDGMENT, OR PAYMENT.

A. Effect as Between Plaintiff and Defendant — 1. AS ASSIGNMENT OF DEBT. The general rule is that where a judgment is obtained against a garnishee, it operates as a statutory assignment of the debt or property in the hands of the garnishee, and plaintiff in garnishment becomes clothed with all the debtor's rights as to the debt or property in question.[1]

2. RIGHT OF DEFENDANT TO DISPUTE LIABILITY OF GARNISHEE. In some jurisdictions it is held that the principal defendant has the right to show that no debt or property belonging to him was attached in the garnishee's hands, and to obtain dismissal of the action on the ground of want of jurisdiction, where he was not served with process.[2]

on his appeal for failure to award him costs). See also Tearney *v.* Fleming, 48 Ill. App. 507.

97. *California.*— Deering *v.* Richardson-Kimball Co., 109 Cal. 73, 41 Pac. 801.

Massachusetts.— Peck *v.* Stratton, 118 Mass. 406. See also Taylor *v.* Collins, 5 Gray 50 note.

Rhode Island.— Cross *v.* Brown, 19 R. I. 220, 33 Atl. 147.

South Carolina.— West *v.* Tupper, 1 Bailey 193.

Vermont.— Carpenter *v.* McClure, 37 Vt. 127; Shattuck *v.* Smith, 16 Vt. 132.

See 24 Cent. Dig. tit. "Garnishment," §§ 421, 422.

See, however, Jore *v.* New Orleans Commercial Library Soc., 12 Rob. (La.) 311; Lockett *v.* Rumbough, 40 Fed. 523, holding that where the proceedings are in review before a court of equity, the court may adjudicate the rights of all parties concerned in one decree.

Collateral attack.— A judgment that a debt attached by trustee process is due claimant cannot be collaterally attacked, although rendered "without prejudice" to plaintiff's rights. Fisher *v.* Williams, 56 Vt. 586.

98. *Illinois.*—Austin *v.* Austin, 43 Ill. App. 488.

Kentucky.— Thomas *v.* Clark County Nat. Bank, 103 Ky. 335, 45 S. W. 73, 20 Ky. L. Rep. 36.

Maine.— Fisk *v.* Weston, 5 Me. 410.

Michigan.— Coe *v.* Hinkley, 109 Mich. 608, 67 N. W. 915; Pecard *v.* Home, 91 Mich. 346, 51 N. W. 891, holding that the claimant was concluded by a judgment against him from recovering from the garnishee, but that he could not be made liable to a money judgment in favor of plaintiff.

Missouri.— Richardson *v.* Jones, 16 Mo. 177, where a judgment was entered against claimant from which he took no appeal, but he afterward withdrew the note which was the subject of the claim and brought suit thereon against the maker, and it was held that the judgment on the claim was a bar to the action.

Rhode Island.— Providence Sav. Inst. *v.* Barr, 17 R. I. 131, 20 Atl. 245.

See 24 Cent. Dig. tit. "Garnishment," § 422.

99. Wichita *v.* Rock Island Lumber, etc., Co., 68 Kan. 445, 75 Pac. 463; Fisk *v.* Weston, 5 Me. 410; Providence Sav. Inst. *v.* Barr, 17 R. I. 131, 20 Atl. 245.

1. Smith *v.* Butler, (Ark. 1904) 80 S. W. 580 (holding that the garnishment of a note for a debt of the payee, and the securing of a judgment against the maker as garnishee, vests in plaintiff the complete right to the indebtedness of the maker evidenced by the note, together with all the rights and remedies possessed by the payee for the collection of the same, including the enforcement of a lien reserved in deeds to land as security for the note); Kellogg *v.* Freeman, 50 Miss. 127; Alsdorf *v.* Reed, 45 Ohio St. 653, 17 N. E. 73; Secor *v.* Witter, 39 Ohio St. 218 (holding, however, that under the Ohio statute the garnishee is not a party to the action, and an order that he pay a certain sum on a note when due is not a judgment charging him or determining the ultimate rights of the parties, but is in effect only an assignment of defendant's right in the claim to plaintiff, to authorize him to sue thereon if the order be not complied with); Ficken's Estate, 16 Phila. (Pa.) 269. See also Campbell *v.* Nesbitt, 7 Nebr. 300.

2. Oliver *v.* Gwin, 17 La. 28.

In Connecticut, however, it is held that an absconding debtor cannot plead that the garnishee had none of his effects. Doty *v.* Reed, 2 Root 81; Bacon *v.* Masters, 2 Root 43.

Under Wis. Rev. St. § 2753, there can be no garnishment where, to the knowledge of

3. Effect of Payment. The general rule is that upon the payment of the garnishment judgment the principal defendant is entitled to the cancellation of the judgment in the main action.[3]

B. Effect as Between Plaintiff and Garnishee. The general rule is that a judgment against the garnishee duly entered is as to him conclusive evidence of the fact that plaintiff has previously obtained a valid judgment against the principal defendant.[4]

C. Effect as Between Defendant and Garnishee — 1. Pendency of Garnishment Proceedings — a. In General. In an action by the original creditor against his debtor, upon a suggestion by the latter of pending garnishment proceedings for the same debt or property, the court will as a rule stay such action pending the termination of the garnishment proceedings.[5] In many jurisdictions the pendency of garnishment proceedings to reach the same debt or property can

plaintiff, defendant has property liable to execution sufficient to satisfy plaintiff's demand; and where, having such knowledge, he nevertheless sues out the writ, defendant may move to set aside the garnishment as an abuse of the process. German American Bank *v.* Butler-Mueller Co., 87 Wis. 467, 58 N. W. 746.

3. Bowen *v.* Port Huron Engine, etc., Co., 109 Iowa 255, 80 N. W. 345, 77 Am. St. Rep. 539, 47 L. R. A. 131 (where the garnishee at the time plaintiff took his garnishment judgment was solvent, and it was held that defendant, on paying the difference between the amount of the judgments against the garnishee and the judgment in the main action, was entitled to have the main judgment canceled); Carter *v.* Smith, 23 Wis. 497 (an attaching creditor who recovers judgment in garnishment proceedings against the purchaser of property for a portion of the purchase-money still owing to principal defendant cannot thereafter treat the sale as void and attach the property). See also Doughty *v.* Meek, 105 Iowa 16, 74 N. W. 744, 67 Am. St. Rep. 282 (holding that an execution creditor must credit the judgment by the amount which a garnishee had answered that he was indebted to the debtor, where the garnishee has never been released); Brashear *v.* West, 7 Pet. (U. S.) 608, 8 L. ed. 801 (where property attached was left in the hands of the garnishee, who sold the same with the assent of the attaching creditors, and the value thereof was thereby lost, and it was held that the attaching creditors were liable to the debtor for the value thereof). See, however, Noble *v.* Merrill, 48 Me. 140; Dickinson *v.* Clement, 87 Va. 41, 12 S. E. 105, where judgment creditors failed to realize anything from the garnishment proceedings, and it was held that the debtor was not entitled to have the judgments reduced by the amount of bonds previously given him by the garnishee.

4. Holbrook *v.* Evansville, etc., R. Co., 114 Ga. 1, 39 S. E. 937; Heffernan *v.* Grymes, 2 Leigh (Va.) 512.

Res judicata.— Where no action is taken by the principal debtor to review the justice's decision holding his wages not exempt from garnishment, the question is *res judicata* in an action by the judgment creditor against the garnishee to recover the amount admitted to be due. Cunningham *v.* Kansas City, etc., R. Co., 60 Kan. 268, 56 Pac. 502.

5. *Alabama.*— Crawford *v.* Slade, 9 Ala. 887, 44 Am. Dec. 463; Crawford *v.* Clute, 7 Ala. 157, 41 Am. Dec. 92.

California.— McKeon *v.* McDermott, 22 Cal. 667, 83 Am. Dec. 86; Pierson *v.* McCahill, 21 Cal. 122 (an attachment in behalf of a third person against plaintiff issued and levied on the effects or credits sued on cannot be availed of by defendant as a bar to the suit, but simply authorizes a suspension of proceedings); McFadden *v.* O'Donnell, 18 Cal. 160. See also Glugermovich *v.* Zicovich, 113 Cal. 64, 45 Pac. 174.

Idaho.— Van Ness *v.* McLeod, 3 Ida. 439, 31 Pac. 798.

Kansas.— Ferguson *v.* Kansas City Bank, 25 Kan. 333. See also McDonald *v.* Carney, 8 Kan. 20.

Minnesota.— Blair *v.* Hilgedick, 45 Minn. 23, 47 N. W. 310; Nash *v.* Gale, 2 Minn. 310.

Mississippi.— Yazoo, etc., R. Co. *v.* Fulton, 71 Miss. 385, 14 So. 271. See also Robinson *v.* Thompson, Sm. & M. Ch. 454.

New Hampshire.—Drew *v.* Towle, 27 N. H. 412, 59 Am. Dec. 380; Wadleigh *v.* Pillsbury, 14 N. H. 373. See also Haselton *v.* Monroe, 18 N. H. 598.

Pennsylvania.— Brown *v.* Scott, 51 Pa. St. 357; Cotton's Estate, 6 Pa. Dist. 268, 13 Montg. Co. Rep. 156; Datz *v.* Chambers, 14 Pa. Co. Ct. 643; Hepburn *v.* Mans, 31 Leg. Int. 356; Tunis *v.* Baker, 3 Wkly. Notes Cas. 368; Hicks *v.* Brinkworth, 1 Wkly. Notes Cas. 90; Selfridge *v.* Dickinson, 1 Wkly. Notes Cas. 158. See, however, Kase *v.* Kase, 34 Pa. St. 128.

United States.— Lynch *v.* Hartford F. Ins. Co., 17 Fed. 627, holding that while under such circumstances a plea in abatement is not available, yet a continuance *ex comitate* should be granted, in order that plaintiffs in trustee process may have an opportunity to make their attachments available.

See 24 Cent. Dig. tit. "Garnishment," § 436.

The non-payment of moneys during the pendency of a trustee process in which the obligee is defendant and the obligor is summoned as trustee is no breach of an obli-

be pleaded in abatement[6] or in bar of an action therefor by the original creditor,[7] or by his assignee.[8] In several jurisdictions, however, it is held that the pendency of garnishment proceedings is not a good plea, either in abatement or in bar of a suit against the garnishee by his own creditor, but that the rights of the parties can be equitably adjusted in framing the judgment.[9]

b. In Foreign Jurisdiction. Likewise the pendency of garnishment proceedings in a foreign jurisdiction may be pleaded in abatement,[10] or in bar, of an action

gation to pay the money. Erskine *v.* Erskine, 13 N. H. 436.

6. Brown *v.* Somerville, 8 Md. 444; Grosslight *v.* Crisup, 58 Mich. 531, 25 N. W. 505 (holding, however, that garnishment proceedings are not an absolute bar to an action by the principal defendant against the garnishee, unless judgment has been obtained against the garnishee in the principal suit); Near *v.* Mitchell, 23 Mich. 382 (the pendency of another suit should be pleaded in abatement, and not in bar, when the pending suit is a proceeding in garnishment); Fitzsimmons' Appeal, 4 Pa. St. 248 (an attachment in execution is pleadable in abatement only by the garnishee, until satisfaction, when it is a bar *pro tanto*); Irvine *v.* Lumbermen's Bank, 2 Watts & S. (Pa.) 190; Philadelphia Sav. Inst. *v.* Smethurst, 2 Miles (Pa.) 439; Derham *v.* Berry, 5 Phila. (Pa.) 475; Navigation Co. *v.* Navigation Co., 3 Phila. (Pa.) 214. See also Burt *v.* Wayne Cir. Judge, 82 Mich. 251, 46 N. W. 380; Scott *v.* Hudson, 4 Ohio Dec. (Reprint) 392, 2 Clev. L. Rep. 97, holding that a plea that the amount sued for has been garnished in another action without denial of the merits of the claim is a plea in abatement, and should aver the readiness to pay what was demanded. See, however, Cole *v.* Flitcraft, 47 Md. 312 (holding that the mere pendency of an attachment against defendant is no defense to an action brought by his creditor for the same debt, and that to make a plea of attachment a bar, it is necessary that there should have been a judgment of condemnation and execution made); Hugg *v.* Brown, 6 Whart. (Pa.) 468 (holding that a scire facias on a judgment is not abated by the pendency of a foreign attachment based on the same judgment).

Joint debt.— The pendency of a garnishment proceeding cannot be pleaded in abatement to an action to recover a joint debt, where there has been service in the garnishment proceeding on only one of the debtors. Hirth *v.* Pfeifle, 42 Mich. 31, 3 N. W. 239.

7. Phleger *v.* Ivins, 5 Harr. (Del.) 118 (a plea that the debt has been attached must show judgment and execution to sustain the bar); Wilson *v.* Murphy, 45 Mo. 409 (in an action on a bill or note, a pending suit in attachment may be pleaded in bar, if facts are set forth in addition sufficient to constitute a bar, as that the note is in fact still the property of the attachment debtor, and not simply charged by the creditor as his property); Fitzgerald *v.* Sweet, 7 Ohio Dec. (Reprint) 305, 2 Cinc. L. Bul. 94; Maynard *v.* Nekervis, 9 Pa. St. 81 (an attachment execution against plaintiff's funds in the hands of defendant must be pleaded specially and in bar); Pratt *v.* Mosser, 1 Lehigh Val. L. Rep. (Pa.) 178; Hampton *v.* Laverty, 1 Wkly. Notes Cas. (Pa.) 49; Howe *v.* Tefft, 15 R. I. 477, 8 Atl. 707. See also Updegraff *v.* Spring, 11 Serg. & R. (Pa.) 188, holding that foreign attachment may be pleaded in bar, although the garnishee has not paid the money and the attachment has been discontinued, for the purpose of showing that defendant ought not to be charged with interest during the pendency of the attachment.

8. Clise *v.* Freeborne, 27 Iowa 280; Brown *v.* Somerville, 8 Md. 444; Peck *v.* Maynard, 20 N. H. 183, all being pleas in abatement.

9. *Georgia.*— Shealy *v.* Toole, 56 Ga. 210.

Maine.— Ladd *v.* Jacobs, 64 Me. 347; Southard *v.* Smyth, 19 Me. 458, holding that the mere pendency of a trustee proceeding, without disclosure or judgment, is no defense in an action by defendant against the garnishee on the debt sought to be garnished. See also Huntress *v.* Hurd, 72 Me. 450; Codman *v.* Strout, 22 Me. 292; Norris *v.* Hall, 18 Me. 332; Seaver *v.* Dingley, 4 Me. 306.

Massachusetts.— Winthrop *v.* Carlton, 8 Mass. 456. See also Creed *v.* Creed, 161 Mass. 107, 36 N. E. 749 (holding that in an action on a contract the fact that defendants had been summoned in another action as trustees in respect to the money sued for is immaterial to the question whether plaintiff is entitled to a verdict); Fuller *v.* Rice, 4 Gray 343.

Texas.— Westmoreland *v.* Miller, 8 Tex. 168.

Vermont.— Jones *v.* Wood, 30 Vt. 268; Hicks *v.* Gleason, 20 Vt. 139; Morton *v.* Webb, 7 Vt. 123.

Washington.— Conner *v.* Scott, 16 Wash. 371, 47 Pac. 761, holding that the pendency of garnishment proceedings is not a good plea where it is shown that defendant has not answered to the writ of garnishment.

See 24 Cent. Dig. tit. "Garnishment," § 436.

Compare Brande *v.* Bond, 63 Wis. 140, 23 N. W. 101.

10. Scott *v.* Coleman, 5 Litt. (Ky.) 349, 15 Am. Dec. 71; O'Neil *v.* Nagle, 14 Daly (N. Y.) 492, 15 N. Y. St. 358; Dealing *v.* New York, etc., R. Co., 8 N. Y. St. 386; Embree *v.* Hanna, 5 Johns. (N. Y.) 101; Engle *v.* Nelson, 1 Penr. & W. (Pa.) 442. See also Craig Silver Co. *v.* Smith, 163 Mass. 262, 39 N. E. 1116, holding, however, that a defense

upon the same cause.[11] In several jurisdictions the proper procedure under such circumstances is held to be to render judgment against defendant, and award a stay of execution until the entry of judgment in the garnishment action.[12]

2. Effect of Judgment — a. In General. In many jurisdictions the rule is laid down that the rendition of a judgment against a garnishee in garnishment proceedings cannot be pleaded in bar of an action for the same cause by the principal defendant, where such judgment remains unsatisfied.[13] Nor does judgment against the garnishee for the amount admitted by his answer to be due defendant amount to *res judicata* as between him and defendant, so as to preclude the latter from showing in an action against the garnishee an indebtedness beyond the amount admitted by such answer.[14] In other jurisdictions, however, it

on this ground even when seasonably pleaded is not an absolute one, the object being to protect defendants in Massachusetts from double liability, and where such liability has ceased in a foreign jurisdiction, the defense on that ground will not avail in Massachusetts. See, however, Douglas *v.* Phenix Ins. Co., 63 Hun (N. Y.) 393, 18 N. Y. Suppl. 259 [*affirmed* in 138 N. Y. 209, 33 N. E. 938, 34 Am. St. Rep. 448, 20 L. R. A. 118] (holding that the answer was fatally defective in failing to allege an actual seizure under attachment in a foreign jurisdiction, or other steps divesting plaintiff of control over the debt, and in failing to allege that the claim had any existence in the foreign jurisdiction); Douglass Furnace Co. *v.* Oil Well Supply Co., 179 Pa. St. 643, 36 Atl. 293. *Contra,* Continental Ins. Co. *v.* Chase, (Tex. Civ. App. 1895) 33 S. W. 602, holding that it was no defense to an action on an insurance policy that the money due on the policy was, prior to the filing of the suit in the claim, garnished in a court of another state, since such court was without jurisdiction of the fund.

Exempt wages.— Where an employee and resident of Kansas performed labor there for a railway company, a corporation of another state but also doing business in Kansas, and the wages of such employee were exempt in both states, in an action by the employee to recover such wages in Kansas, it was held that the fact that the corporation had been garnished in such other state by a creditor of such employee before the bringing of the action in Kansas, where service of summons was obtained on such employee only by publication, was no defense to such an action. Missouri Pac. R. Co. *v.* Sharitt, 43 Kan. 375, 387, 23 Pac. 430, 19 Am. St. Rep. 143, 8 L. R. A. 385, 389.

11. Harvey *v.* Great Northern R. Co., 50 Minn. 405, 52 N. W. 905, 17 L. R. A. 84 (where a debt has been attached in another state and the debtor garnished, the pendency of the action is a bar to a suit in Minnesota by the principal defendant to recover the same debt); Baltimore, etc., R. Co. *v.* May, 25 Ohio St. 347.

12. Howland *v.* Chicago, etc., R. Co., 134 Mo. 474, 36 S. W. 29; Hixon *v.* Schooley, 26 N. J. L. 461.

13. *Alabama.*—Sharpe *v.* Wharton, 85 Ala. 225, 3 So. 787; Cook *v.* Field, 3 Ala. 53, 55, 36 Am. Dec. 436, where the court said: "If an unexecuted judgment against the garnishee would be a bar to a suit against him by the original creditor, it might happen that he would not be compelled to pay the debt at all, as the judgment of the attaching creditor might never be enforced." See also Lewis *v.* Robertson, 100 Ala. 246, 14 So. 166. *Compare* Gildersleeve *v.* Caraway, 19 Ala. 246. See, however, Tubb *v.* Madding, Minor 129.

Georgia.— Brannan *v.* Noble, 8 Ga. 549.

Maryland.— Brown *v.* Somerville, 8 Md. 444.

Massachusetts.— Meriam *v.* Rundlett, 13 Pick. 511, holding, however, that such judgment is a good ground for a stay of proceedings. *Contra,* Hull *v.* Blake, 13 Mass. 153; Stevens *v.* Gaylord, 11 Mass. 256; Perkins *v.* Parker, 1 Mass. 117.

Mississippi.— Yazoo, etc., R. Co. *v.* Fulton, 71 Miss. 385, 14 So. 271.

New Hampshire.— Puffer *v.* Graves, 26 N. H. 256.

Pennsylvania.— Campbell's Appeal, 32 Pa. St. 88.

Texas.— McRee *v.* Brown, 45 Tex. 503; Farmer *v.* Simpson, 6 Tex. 303.

Vermont.— Spicer *v.* Spicer, 23 Vt. 678, holding, however, that the court will order a stay of execution in such action until defendant be released from trustee suit.

United States.— McCarty *v.* The City of New Bedford, 4 Fed. 818.

See 24 Cent. Dig. tit. "Garnishment," § 438.

Compare Adams *v.* Filer, 7 Wis. 306, 73 Am. Dec. 410.

A judgment by default against a garnishee who fails to appear and answer constitutes no bar to a subsequent action against him on the debt for which he was garnished by one claiming the same under an assignment from defendant prior to the garnishment. McPhail *v.* Hyatt, 29 Iowa 137.

14. *Alabama.*— Cameron *v.* Stollenwek, 6 Ala. 704. See also Jones *v.* Kolisenski, 11 Ala. 607, holding that in an action between the garnishee and the original creditor the entire garnishment proceedings were *res inter alios acta.*

Indiana.—Barton *v.* Allbright, 29 Ind. 489, holding that in an action by an attachment defendant against the garnishee, judgment on the garnishment is not a bar, but only a good credit to the amount paid.

Louisiana.— Robeson *v.* Carpenter, 7 Mart. N. S. 30.

is held that a judgment against a garnishee or trustee, although not satisfied, is a bar to an action upon the same debt by the principal defendant, but that such protection cannot extend beyond the amount due upon the judgment.[15]

b. Failure of Garnishee to Make Available Defense. In the majority of jurisdictions the rule is laid down that where the garnishee is cognizant of a defense which he might interpose in garnishment proceedings and fails to do so, he cannot set up a judgment against him in such proceedings, as a bar to an action against him by the original creditor.[16] In several jurisdictions, however, it is held that the garnishee is not required to set up any defense which the debtor may have, nor to plead any exemption on his behalf, and that a judgment in garnishment proceedings, and satisfaction thereof, may be pleaded in bar of an action by the debtor for the same cause, even where the debtor had a good defense to the garnishment proceedings.[17]

Maine.— Noble *v.* Merrill, 48 Me. 140.

New Hampshire.— Brown *v.* Dudley, 33 N. H. 511.

Pennsylvania.— Ruff *v.* Ruff, 85 Pa. St. 333.

Vermont.— Baxter *v.* Vincent, 6 Vt. 614.

See 24 Cent. Dig. tit. "Garnishment," § 438.

15. Sessions *v.* Stevens, 1 Fla. 233, 46 Am. Dec. 339 (a judgment against a garnishee is *prima facie* a bar to an action for the same debt by the principal defendant); Canaday *v.* Detrick, 63 Ind. 485 (a judgment against the garnishee is *pro tanto* a good defense to an action against him by the attachment defendant on the same cause of action); Cornwell *v.* Hungate, 1 Ind. 156 (holding, however, that the garnishee must allege that the judgment in garnishment was for the same debt, or a part thereof, for which the present action is brought); Townsend *v.* Libbey, 70 Me. 162 (holding, however, that a judgment by default against a trustee only makes out a *prima facie* case of indebtedness); Noble *v.* Merrill, 48 Me. 140; McAllister *v.* Brooks, 22 Me. 80, 38 Am. Dec. 282; Norris *v.* Hall, 18 Me. 332; Matthews *v.* Houghton, 11 Me. 377; Sargeant *v.* Andrews, 3 Me. 199 (holding, however, that it must be a final judgment, and not a judgment by default merely); McDaniel *v.* Hughes, 3 East 367; Savage's Case, 1 Salk. 291; Turbill's Case, 1 Saund. 67. *Compare* Stadler *v.* Parmlee, 14 Iowa 175; Bachelder *v.* Merriman, 34 Me. 69, holding that a judgment in trustee proceedings will discharge the trustee only from demands of the principal defendant for all goods, etc., paid, delivered, or accounted for by the trustee by enforcement of the judgment. See, however, Wise *v.* Hilton, 4 Me. 435.

16. *Arkansas.*— Campbell *v.* Sneed, 9 Ark. 118.

Georgia.— Taylor *v.* Jarrell, 104 Ga. 169, 30 S. E. 675. See also Smith *v.* Johnston, 71 Ga. 748.

Illinois.— Rumbold *v.* Supreme Council R. L., 206 Ill. 513, 69 N. E. 590 [*reversing* on another point 103 Ill. App. 596]; Chicago, etc., R. Co. *v.* Raglan, 84 Ill. 375; Baltimore, etc., R. Co. *v.* McDonald, 112 Ill. App. 391. See also Chicago, etc., Coal Co. *v.* Balmer, 45 Ill. App. 59, holding that a garnishee who, failing to set up the fact that the judgments aggregated more than the amount due his creditor, is compelled to pay more than such amount cannot set up such excess in an action by his creditor to recover a debt subsequently accrued.

Maine.— Lock *v.* Johnson, 36 Me. 464.

Massachusetts.—Wilkinson *v.* Hall, 6 Gray 568.

Michigan.— Crisp *v.* Ft. Wayne, etc., R. Co., 98 Mich. 648, 57 N. W. 1050, 22 L. R. A. 732.

Minnesota.— See Segog *v.* Engle, 43 Minn. 191, 45 N. W. 427, holding that where a garnishee suffers judgment by default, his remedy must be taken in the same proceedings; and, where he pays the judgment, he cannot recover the amount paid from the principal defendant on the ground that he did not in fact owe the latter anything.

Mississippi.— Laurel *v.* Turner, 80 Miss. 530, 31 So. 965.

Nebraska.— Mace *v.* Heath, 34 Nebr. 790, 52 N. W. 822; Coleman *v.* Scott, 27 Nebr. 77, 42 N. W. 896; Smith *v.* Ainscow, 11 Nebr. 476, 9 N. W. 646. See also Turner *v.* Sioux City, etc., R. Co., 19 Nebr. 241, 27 N. W. 103.

New York.— Prescott *v.* Hull, 17 Johns. 284.

Ohio.— Crumb *v.* Treiber, 4 Cinc. L. Bul. 616, 4 Ohio Dec. (Reprint) 492, 2 Clev. L. Rep. 257.

Pennsylvania.— Evans *v.* Zane, 13 Montg. Co. Rep. 47.

West Virginia.— Stewart *v.* Northern Assur. Co., 45 W. Va. 734, 32 S. E. 218, 44 L. R. A. 101.

Wisconsin.— Frels *v.* Little Black Farmers' Mut. Ins. Co., 120 Wis. 590, 98 N. W. 522; Pierce *v.* Chicago, etc., R. Co., 36 Wis. 283.

United States.— *In re* Beals, 116 Fed. 530.

See 24 Cent. Dig. tit. "Garnishment," § 440.

17. Moore *v.* Chicago, etc., R. Co., 43 Iowa 385; Wigwall *v.* Union Coal, etc., Co., 37 Iowa 129; Walters *v.* Washington Ins. Co., 1 Iowa 404, 63 Am. Dec. 451; Carson *v.* Memphis, etc., R. Co., 88 Tenn. 646, 13 S. W. 588, 17 Am. St. Rep. 921, 8 L. R. A. 412 (holding that a railroad company garnished

3. PAYMENT OF JUDGMENT — a. General Rule. Where a judgment against a garnishee rendered by a court having jurisdiction of the parties and the action has been satisfied by the garnishee, such payment is an effectual bar, either complete or *pro tanto*, to a subsequent action by defendant or his privies for the same cause of action.[18] However, the garnishee must show in an action against

in another state for a debt owing by one of its employees residing in Tennessee is under no obligation to claim for him his statutory exemption, as exemption laws have no extra-territorial force, and the debtor himself could not have successfully set up the exemption law as a defense to the garnishment proceedings in another state, and consequently the garnishee was not liable for his failure to do so); Lalonde *v.* Sun Mut. Ins. Co., 2 Tex. App. Civ. Cas. § 55. See also Swearingen Lumber Co. *v.* Washington School Tp., 125 Iowa 283, 99 N. W. 730 (holding that where both parties claiming the fund in controversy appear in court, and both are fully informed of the exact situation of the account between the garnishee and his creditor, it is not the duty of the garnishee to take up or carry on the contest in favor of either claimant); Blincoe *v.* Head, 103 Ky. 106, 44 S. W. 374, 19 Ky. L. Rep. 1742. *Compare* Smith *v.* Dickson, 58 Iowa 444, 10 N. W. 850, where the garnishee, knowing the funds in his hands were exempt, procured a garnishment against himself and failed to plead the exemption or notify the judgment debtor, and it was held that such judgment was procured in bad faith and would be no shield or defense to an action for the same funds. And see Hannah *v.* Farnsworth, 2 Tenn. Cas. 371. See, however, Burke *v.* Hance, 76 Tex. 76, 13 S. W. 163, 18 Am. St. Rep. 28.

18. *Alabama.*— Gunn *v.* Howell, 35 Ala. 144, 73 Am. Dec. 484; Hagadon *v.* Campbell, 24 Ala. 375; Smoot *v.* Eslava, 23 Ala. 659, 68 Am. Dec. 310; Mills *v.* Stewart, 12 Ala. 90; Huie *v.* Garrett, 10 Ala. 298 (after a debt due by judgment is condemned in the hands of the garnishee, the attaching creditor may compound with him and release the judgment, provided his judgment against the attaching creditor remains in force and is credited with the sum recovered by him from the garnishee); Chandler *v.* Faulkner, 5 Ala. 567; Hitt *v.* Lacey, 3 Ala. 104, 36 Am. Dec. 440; Cook *v.* Field, 3 Ala. 53, 36 Am. Dec. 436; Duncan *v.* Ware, 5 Stew. & P. 119, 24 Am. Dec. 772; Parmer *v.* Ballard, 3 Stew. 326.

Connecticut.— Culver *v.* Hall, 20 Conn. 409. See also Cutler *v.* Baker, 2 Day 498, where the payment was held to be sufficient to protect the garnishee.

Georgia.— Carroll *v.* McCoy, 35 Ga. 278; Westbrooks *v.* McDowell, Ga. Dec. 133.

Illinois.— Allen *v.* Watt, 79 Ill. 284 (holding, however, that where the garnishee has been served with garnishment process, and before judgment is rendered in that suit the creditor of the garnishee prosecutes his debt to judgment, and afterward judgment is rendered against the garnishee as such for the same debt, and he pays it, his only remedy against the judgment in favor of the original creditor is in equity, where the collection thereof will be enjoined); Minard *v.* Lawler, 26 Ill. 301.

Indiana.— Greenman *v.* Fox, 54 Ind. 267.

Iowa.— Long *v.* Emsley, 57 Iowa 11, 10 N. W. 280; Wigwall *v.* Union Coal, etc., Co., 37 Iowa 129.

Kansas.— Spencer *v.* Iowa Mortg. Co., 6 Kan. App. 378, 50 Pac. 1094, holding, however, that it is necessary for the garnishee to show that the court obtained jurisdiction of all the necessary parties and that he was compelled to pay by due process of law.

Kentucky.— Pendleton *v.* Tackett, 60 S. W. 846, 22 Ky. L. Rep. 1572.

Louisiana.— Bean *v.* Mississippi Union Bank, 5 Rob. 333.

Maine.— Goodwin *v.* Bethel Steam Mill Co., 76 Me. 468; Killsa *v.* Lermond, 6 Me. 116.

Michigan.— Harris *v.* Chamberlain, 126 Mich. 280, 85 N. W. 728, holding, however, that where defendant in an action for the price of a stock of goods alleged that he had paid the price in garnishment proceedings, it was competent to show that the money alleged to have been paid over in the garnishment proceedings was still within defendant's control.

Minnesota.— Troyer *v.* Schweizer, 15 Minn. 241, holding that payment by a garnishee on demand of plaintiff's attorney without waiting for the issuance of execution operates to acquit and discharge the garnishee from any further liability, although subsequently the judgment in favor of plaintiff is set aside and judgment rendered for defendant.

Mississippi.— Reed *v.* Cage, 4 How. 253, holding that a plea of former payment on garnishment must show that defendant answered an oath and admitted his indebtedness, and that his answer was based on the debt in controversy.

Missouri.— Quarles *v.* Porter, 12 Mo. 76.

Nebraska.— Turner *v.* Sioux City, etc., R. Co., 19 Nebr. 241, 27 N. W. 103; Campbell *v.* Nesbitt, 7 Nebr. 300.

New Hampshire.— Woods *v.* Milford F. C. Sav. Inst., 58 N. H. 184; Drew *v.* Towle, 30 N. H. 531, 64 Am. Dec. 309; Nevins *v.* Rockingham Mut. F. Ins. Co., 25 N. H. 22; Melven *v.* Darling, Smith 74.

Pennsylvania.— Beatty *v.* Lehigh Valley R. Co., 134 Pa. St. 294, 19 Atl. 745; Irvine *v.* Lumbermen's Bank, 2 Watts & S. 190.

Rhode Island.—Carpenter *v.* Phœnix Electric Light, etc., Co., 21 R. I. 145, 43 Atl. 539.

South Carolina.— Harris *v.* McNinch, 10 Rich. 35.

Texas.— Houghton *v.* Marshall, 31 Tex.

him by his creditor that the debt sued on and that for which he was charged as garnishee were one and the same.[19]

b. Foreign Judgment. Where a judgment has been rendered against a garnishee in one state upon a regular proceeding had in a court invested with jurisdiction of the cause and the parties, and without any collusion between plaintiff and the garnishee, such judgment, when satisfied, is binding and conclusive in every other state, and constitutes a complete defense to the garnishee when sued for the same debt by his original creditor.[20]

c. Voluntary or Premature Payment. In order to afford the garnishee protection from a second payment of the same debt or liability, payment under the garnishment proceedings must not have been voluntary;[21] in some jurisdictions

196; Lalonde *v.* Sun Mut. Ins. Co., 2 Tex. App. Civ. Cas. § 55.

Vermont.— Dickinson *v.* Dickinson, 59 Vt. 678, 10 Atl. 821. See also Deno *v.* Thomas, 64 Vt. 358, 24 Atl. 140.

United States.— Lynch *v.* Hartford F. Ins. Co., 17 Fed. 627.

See 24 Cent. Dig. tit. "Garnishment," § 441.

Compare Taney *v.* Vollenweider, 28 Mont. 147, 72 Pac. 415.

Reversal of judgment.— Where the amount recovered against a garnishee is justly due by him to defendant and by the latter to plaintiff in garnishee, it cannot be recovered in assumpsit on the reversal of the judgment in favor of plaintiff in garnishment for mere irregularity. Duncan *v.* Ware, 5 Stew. & P. (Ala.) 119, 24 Am. Dec. 772.

Payment of order.— In Nebraska an order against the garnishee for the payment of the money in court for the benefit of the execution creditor, as provided by Code, § 249, is enforceable by execution, and a garnishee acting in good faith will be protected from further liability to the same extent as if such order were a judgment against him. Peterson *v.* Kingman, 59 Nebr. 667, 81 N. W. 847.

Taking indemnity bond.— The fact that the garnishee takes a bond of indemnity on paying off an execution in a factorizing suit will not in any way affect the character of the demand in respect to other parties. Hawley *v.* Atherton, 39 Conn. 309.

19. Sangster *v.* Butt, 17 Ind. 354; Dirlam *v.* Wenger, 14 Mo. 548.

20. *Alabama.*— Gunn *v.* Howell, 35 Ala. 144, 73 Am. Dec. 484.

Illinois.— Lancashire Ins. Co. *v.* Corbetts, 165 Ill. 592, 46 N. E. 631, 56 Am. St. Rep. 275, 36 L. R. A. 640 [*reversing* 62 Ill. App. 236]; Allen *v.* Watt, 79 Ill. 284; S. Dwight Eaton Co. *v.* Kelly, 45 Ill. App. 533.

Indiana.—Baltimore, etc., R. Co. *v.* Adams, 159 Ind. 688, 66 N. E. 43, 60 L. R. A. 396, holding that the fact that after a debtor has been garnished in a sister state but before judgment there the creditor has obtained a domestic judgment will not prevent the payment of the foreign garnishment judgment from operating as a protection to the debtor.

Kentucky.— Scott *v.* Coleman, 5 Litt. 349, 15 Am. Dec. 71, holding that a garnishee who pays a judgment against him without execution will be protected, in the absence of any showing that the judgment was not conclusive under the laws of the state where rendered until execution was issued.

Maryland.— Taylor *v.* Phelps, 1 Harr. & G. 492.

Massachusetts.— Wheeler *v.* Aldrich, 13 Gray 51; Barrow *v.* West, 23 Pick. 270.

Nebraska.—Chicago, etc., R. Co. *v.* Moore, 31 Nebr. 629, 48 N. W. 475, 28 Am. St. Rep. 534.

New York.— Robarge *v.* Central Vermont R. Co., 18 Abb. N. Cas. 363; Gray *v.* Delaware, etc., Canal Co., 5 Abb. N. Cas. 131; Donovan *v.* Hunt, 7 Abb. Pr. 29; Cochran *v.* Fitch, 1 Sandf. Ch. 142. See, however, Osgood *v.* Maguire, 61 N. Y. 524 [*affirming* 61 Barb. 54].

Pennsylvania.—Batchelor *v.* Green, 7 Lanc. Bar 29; Gilbert *v.* Black, 1 Leg. Chron. 132.

See 24 Cent. Dig. tit. "Garnishment," §§ 439, 442.

Compare Pintard *v.* Deyris, 3 Mart. N. S. (La.) 32.

Claim of exemption.— It has been held in Kansas that it is not a bar to an action for wages in that state, where wages are exempt, that a judgment for such wages had been rendered against defendant as garnishee of plaintiff in a state where wages are not exempt. Chicago, etc., R. Co. *v.* Sturm, 5 Kan. App. 427, 49 Pac. 337 [*overruling* in effect Union Pac. R. Co. *v.* Baker, 5 Kan. App. 253, 47 Pac. 563].

Judgment obtained by collusion.— Payment of an execution issued on a judgment in an action in another state charging a trustee in foreign attachment is no bar to an action previously commenced against him in Massachusetts by the principal defendant, in which he had appeared, where the judgment in the other state was collusively obtained by his wilful default. Whipple *v.* Robbins, 97 Mass. 107, 93 Am. Dec. 64.

21. *Alabama.*— Bessemer Sav. Bank *v.* Anderson, 134 Ala. 343, 32 So. 716, 92 Am. St. Rep. 38; Louisville, etc., R. Co. *v.* Nash, 118 Ala. 477, 23 So. 825, 72 Am. St. Rep. 181, 41 L. R. A. 331 (payment by the garnishee of a judgment rendered for a debt against a non-resident without personal service within the state of the forum or his voluntary appearance constitutes no defense to a subse-

any payment not made under execution is regarded as voluntary, and therefore is no protection to the garnishee.[22] Where payment is made under a judgment which is void by reason of the court not having jurisdiction of the subject-matter of the parties, such payment is regarded as voluntary, and will not be available to the garnishee as a defense.[23]

d. Invalidity or Irregularity in Proceedings. The payment of a judgment by a garnishee which is regular upon its face will not subject the garnishee to the liability of a second payment upon the same debt, for the reason that the proceedings upon which such judgment was founded were irregular, and that the judgment might have been reversed upon appeal.[24] Where, however, the judg-

quent suit by the judgment debtor against the garnishee); Mason *v.* Crabtree, 71 Ala. 479.

Georgia.—Fitzgerald Military Band *v.* Colony Bank, 115 Ga. 790, 42 S. E. 7, holding that if a bond given to dissolve a garnishment is fatally defective, the garnishee is not protected where he pays defendant.

Indiana.— Toledo, etc., R. Co. *v.* McNulty, 34 Ind. 531.

Michigan.— Crisp *v.* Fort Wayne, etc., R. Co., 98 Mich. 648, 57 N. W. 1050, 22 L. R. A. 732.

North Carolina.— Balk *v.* Harris, 122 N. C. 64, 30 S. E. 318, 45 L. R. A. 257.

Pennsylvania.— Myers *v.* Urich, 1 Binn. 25.

West Virginia.— Brewer *v.* Hutton, 45 W. Va. 106, 30 S. E. 81, 72 Am. St. Rep. 804.

United States.— McDonald *v.* Cabot, 16 Fed. Cas. No. 8,759, Newb. Adm. 348.

See 24 Cent. Dig. tit. "Garnishment," § 443.

Compare Slaughter *v.* Buck, 1 Tex. App. Civ. Cas. § 104.

Failure to take bond.— In Mississippi, where a garnishee discharges a judgment against defendant by a payment in satisfaction, without taking the bond required by statute to secure defendant for the amount of the property or debt attached, payment by the garnishee is in his own wrong and his liability to defendant is not discharged. Murdock *v.* Daniel, 58 Miss. 411; Grissom *v.* Reynolds, 1 How. (Miss.) 570; Oldham *v.* Ledbetter, 1 How. (Miss.) 43, 26 Am. Dec. 690.

Consent judgment.— Where it appears that a judgment against a garnishee was a consent judgment, and that there was no fieri facias in the sheriff's hands when the interrogatories were answered, satisfaction thereof by the garnishee was no defense to an action for the debt by the principal defendant. Matthews *v.* Crescent City Mut. Ins. Co., 26 La. Ann. 386. See also Wise *v.* Falkner, 45 Ala. 471.

Payment into court.— Under statutes providing for the payment of money into court by the garnishee, such payment is not regarded as voluntary, and will protect the garnishee from a subsequent action for the same debt. Dooley *v.* Missouri Pac. R. Co., 45 Mo. App. 308; Scott *v.* Kirschbaum, 47 Nebr. 331, 66 N. W. 443.

Order in aid of execution.— Under Kan. Civ. Code, § 490, an order in aid of an execution, directing a garnishee to pay to the judgment creditor money which he owed the debtor, is not a judgment determining finally the liability of the garnishee, but only an assignment of the claim. Atlantic, etc., R. Co. *v.* Hopkins, 94 U. S. 11, 24 L. ed. 48.

22. Burnap *v.* Campbell, 6 Gray (Mass.) 241; Home Mut. Ins. Co. *v.* Gamble, 14 Mo. 407; Wetter *v.* Rucker, 1 B. & B. 491, 4 Moore C. P. 172, 21 Rev. Rep. 690, 5 E. C. L. 759.

23. *Illinois.*—Lawrence *v.* Lane, 9 Ill. 354.

Indiana.— Richardson *v.* Hickman, 22 Ind. 244; Harmon *v.* Birchard, 8 Blackf. 418.

Kansas.— Borden *v.* Noble, 26 Kan. 599.

Kentucky.— Robertson *v.* Roberts, 1 A. K. Marsh. 247.

Massachusetts.— Stimpson *v.* Malden, 109 Mass. 313.

Michigan.— Dutcher *v.* Grand Rapids F. Ins. Co., 131 Mich. 671, 92 N. W. 345 (where there was no valid affidavit necessary to give the court jurisdiction in attachment proceedings, and the principal defendant had not waived this by a general appearance); Laidlaw *v.* Morrow, 44 Mich. 547, 7 N. W. 191; Hebel *v.* Amazon Ins. Co., 33 Mich. 400.

Mississippi.— Berry *v.* Anderson, 2 How. 649; Ford *v.* Hurd, 4 Sm. & M. 683.

Missouri.— McCord, etc., Mercantile Co. *v.* Bettles, 58 Mo. App. 384.

Texas.— Schoemaker *v.* Pace, (Civ. App. 1897) 41 S. W. 498.

Wisconsin.— Wells *v.* American Express Co., 55 Wis. 23, 11 N. W. 537, 12 N. W. 441, 42 Am. Rep. 695. See also Huntley *v.* Stone, 4 Wis. 91.

See 24 Cent. Dig. tit. "Garnishment," § 443.

24. *Alabama.*—Gildersleeve *v.* Caraway, 19 Ala. 246.

Connecticut.— Witter *v.* Latham, 12 Conn. 392.

Indiana.— Oppenheim *v.* Pittsburg, etc., R. Co., 85 Ind. 471; Ohio, etc., R. Co. *v.* Alvey, 43 Ind. 180; Richardson *v.* Hickman, 22 Ind. 244; Schoppenhast *v.* Bollman, 21 Ind. 280.

Kentucky.— Atcheson *v.* Smith, 3 B. Mon. 502.

Louisiana.— Guidry *v.* Jeanneaud, 25 La. Ann. 634.

Massachusetts.— Leonard *v.* New Bedford Five Cents Sav. Bank, 116 Mass. 210; Webster *v.* Lowell, 2 Allen 123; Dole *v.* Boutwell, 1 Allen 286; Morrison *v.* New Bedford Sav. Inst., 7 Gray 269.

ment against the principal defendant is void, or where the garnishment proceedings are not founded upon any judgment against the principal defendant, payment by the garnishee will be no defense to an action against him by his original creditor.[25]

D. Effect as Between Garnishee and Third Persons — 1. In General. The interests of third persons cannot be affected by garnishment proceedings of which they had no notice, and to which they were not made parties.[26]

2. Effect of Judgment. This rule applies as well to judgments in garnishment as to the mere pendency of the proceedings.[27] Conversely, where a third party claiming an interest in the debt or property in controversy has due notice of the garnishment proceedings, a judgment therein against such garnishee may be

New Jersey.— Russell *v.* Work, 35 N. J. L. 316.

Pennsylvania.—Bolton *v.* Pennsylvania Co., 88 Pa. St. 261; Swanger *v.* Snyder, 50 Pa. St. 218.

Texas.— Gamble *v.* Talbot, 2 Tex. App. Civ. Cas. § 729.

United States.— Telles *v.* Lynde, 47 Fed. 912.

See 24 Cent. Dig. tit. "Garnishment," § 444.

25. *Colorado.*— McPhee *v.* Gomer, 6 Colo. App. 461, 41 Pac. 836.

Illinois.— Pierce *v.* Carleton, 12 Ill. 358, 54 Am. Dec. 405.

Indiana.— Debs *v.* Dalton, 7 Ind. App. 84, 34 N. E. 236; Louisville, etc., R. Co. *v.* Lake, 5 Ind. App. 450, 32 N. E. 590.

Nebraska.— Whitcomb *v.* Atkins, 40 Nebr. 549, 59 N. W. 86.

New York.— Martin *v.* Central Vermont R. Co., 50 Hun 347, 3 N. Y. Suppl. 82.

Texas.— Schmidt *v.* Stern, 2 Tex. App. Civ. Cas. § 91.

Wyoming.— Garbanati *v.* Beckwith, 2 Wyo. 213.

See 24 Cent. Dig. tit. "Garnishment," § 444.

Compare Flower *v.* Parker, 9 Fed. Cas. No. 4,891, 3 Mason 247, holding that judgment in a trustee process against defendant as garnishee of plaintiff is no defense in a suit for the debt, if plaintiff in the original process has by his neglect to comply with the statute put his judgment in a state of suspension, so that execution can no longer issue on it, and it cannot be revived by scire facias.

Garnishment after death of principal defendant.— A judgment against a trustee in a process of foreign attachment commenced after the death of the principal defendant, and payment of the amount thereof on execution by the trustee, are no bar to a suit against him by an administrator of decedent. Loring *v.* Folger, 7 Gray (Mass.) 505.

26. *Massachusetts.*—Hawes *v.* Waltham, 18 Pick. 451, holding that where judgment is rendered against a trustee who merely discloses that he was indebted to defendant and to a third person jointly, the joint creditors may recover the full amount of their claims against him without any deduction on account of such judgment.

Michigan.— McAuliffe *v.* Farmer, 27 Mich. 76.

Pennsylvania.— Day *v.* Zimmerman, 68 Pa. St. 72, 8 Am. Rep. 157 (a *bona fide* holder of a note transferred before maturity is not affected by a prior garnishment of the maker by a creditor of the payee, unless such holder had actual notice of the garnishment at the time of the transfer); Ege *v.* Koontz, 3 Pa. St. 109; Adams *v.* Avery, 2 Pittsb. Leg. J. 77; Bank *v.* Marquis, 2 Wkly. Notes Cas. 439; Shiedt *v.* Laverty, 1 Wkly. Notes Cas. 62. See also Noble *v.* Thompson Oil Co., 69 Pa. St. 409. See, however, Hughes *v.* Cummings, 1 Wkly. Notes Cas. 345.

South Carolina.— Olin *v.* Figeroux, 1 McMull. 203.

Texas.— North British Mercantile Ins. Co. *v.* Tyler First Nat. Bank, 3 Tex. Civ. App. 293, 22 S. W. 992; Levy *v.* Du Bose, 3 Tex. Civ. App. 68, 21 S. W. 932.

Wisconsin.— Mason *v.* Noonan, 7 Wis. 609.

United States.— Hunt *v.* Mercantile Ins. Co., 22 Fed. 503.

See 24 Cent. Dig. tit. "Garnishment," §§ 445, 446.

Compare Rickman *v.* Miller, 39 Kan. 362, 18 Pac. 304; Robertson *v.* Roberts, 1 A. K. Marsh. (Ky.) 247; Anniston Nat. Bank *v.* Durham School Committee, 118 N. C. 383, 24 S. E. 792.

27. *Arkansas.*— Head *v.* Cole, 53 Ark. 523, 14 S. W. 898.

Illinois.— Cooper *v.* McClun, 16 Ill. 435; Lowy *v.* Andreas, 20 Ill. App. 521.

Minnesota.— MacDonald *v.* Kneeland, 5 Minn. 352; Hubbard *v.* Williams, 1 Minn. 54, 55 Am. Dec. 66.

Missouri.— Weil *v.* Tyler, 38 Mo. 558, 90 Am. Dec. 441. See, however, Wolf *v.* Cozzens, 4 Mo. 431.

North Carolina.— Myers *v.* Beeman, 31 N. C. 116.

Tennessee.— Brittain *v.* Anderson, 8 Baxt. 316; Montague *v.* Myers, 11 Heisk. 539; Conner *v.* Allen, 3 Head 418.

See 24 Cent. Dig. tit. "Garnishment," § 447.

Compare Simon *v.* Huot, 8 Hun (N. Y.) 378.

Erroneous judgment against a garnishee is no bar to a suit against him for the same cause of action by one not a party to the first suit. Stockton *v.* Hall, Hard. (Ky.) 160. See, however, Anderson *v.* Young, 21 Pa. St. 443 (going to the extent of holding that a garnishee holding a note which is attached is protected by the judgment against all claim to it on the part of the assignee, although the latter was not a party to the

pleaded by him in bar of the original cause of action.[28] In several jurisdictions the question turns upon the point of notice to the garnishee, and where he is without notice of the transfer or assignment of the debt, he can set up against the transferee or assignee the judgment in garnishment.[29]

3. Payment of Debt or Judgment — a. Of Judgment. *A fortiori* the payment of a judgment by a garnishee will protect him from liability for a second payment of the debt under a transfer or assignment of which he had no notice at the time of such payment.[30] Where, however, the garnishee has notice of the transfer or assignment of the debt prior to the rendition of the garnishment judgment, a subsequent payment of such judgment will afford him no protection in a subsequent action for the same debt.[31]

b. Of Debt Without Valid Judgment or Order. Any payment by a garnishee not based upon a valid judgment or a final order of court will be deemed voluntary on his part, and will afford him no protection in an action against him by his original creditor or those claiming under him.[32]

proceeding and had no actual notice of it, the statute only requiring that he shall in good faith see that the money is recovered from him in due course of law); Yerkes *v.* Cole, 7 Phila. (Pa.) 189; Cottle *v.* American Screw Co., 13 R. I. 627.

28. Glanton *v.* Griggs, 5 Ga. 424; Rock Island Lumber, etc., Co. *v.* Wichita Fourth Nat. Bank, 63 Kan. 768, 66 Pac. 1024; Coates *v.* Roberts, 4 Rawle (Pa.) 100; Spafford *v.* Page, 15 Vt. 490.

29. *Georgia.*— Churchman *v.* Robinson, 99 Ga. 786, 27 S. E. 164.

Indiana.— Elston *v.* Gillis, 69 Ind. 128; King *v.* Vance, 46 Ind. 246; Shetler *v.* Thomas, 16 Ind. 223; Covert *v.* Nelson, 8 Blackf. 265; Alberts *v.* Baker, 21 Ind. App. 373, 52 N. E. 469.

Kansas.— Rock Island Lumber, etc., Co. *v.* Wichita Fourth Nat. Bank, 63 Kan. 768, 66 Pac. 1024.

Kentucky.— Coburn *v.* Currens, 1 Bush 242.

Massachusetts.— Wood *v.* Partridge, 11 Mass. 488; Perkins *v.* Parker, 1 Mass. 117. See also Parker *v.* Danforth, 16 Mass. 299; Hull *v.* Blake, 13 Mass. 153.

Oregon.— Mullaney *v.* Evans, 33 Oreg. 330, 54 Pac. 886.

Texas.— Miller *v.* Goodman, 91 Tex. 41, 40 S. W. 718. See also Rotzein *v.* Cox, 22 Tex. 62.

Vermont.— Evarts *v.* Gove, 10 Vt. 161.

See 24 Cent. Dig. tit. "Garnishment," § 447.

30. *Alabama.*— Ross *v.* Pitts, 39 Ala. 606; Mills *v.* Stewart, 12 Ala. 90; Herndon *v.* Swearingen, 1 Port. 192, 26 Am. Dec. 359.

Connecticut.— Palmer *v.* Woodward, 28 Conn. 248.

Georgia.— Long *v.* Johnson, 74 Ga. 4.

Illinois.— Himrod *v.* Baugh, 85 Ill. 435.

Indiana.— Newman *v.* Manning, 79 Ind. 218 (in an action by the assignee against the maker of a note, it is a good defense that defendant had settled the same by payment of a judgment against him as garnishee of the payee, although he had notice of the assignment before making the payment); Harmon *v.* Birchard, 8 Blackf. 418 (holding, however, that the garnishee should show that the debt paid by him as garnishee was the same debt for which he is sued); Alberts *v.* Baker, 13 Ind. App. 399, 40 N. E. 1119 (holding, however, that the answer of the garnishee which fails to allege that a writ of attachment issued in the action against the assignor, and that judgment was rendered against him therein is insufficient).

Iowa.— Burton *v.* Warren Dist. Tp., 11 Iowa 166.

Kansas.— Center *v.* McQuesten, 18 Kan. 476.

Maine.— Wentworth *v.* Weymouth, 11 Me. 446.

Maryland.— Guttrue *v.* Langton, 3 Harr. & M. 178.

Massachusetts.— Corbett *v.* Fitchburg R. Co., 110 Mass. 204; Reed *v.* Parsons, 11 Cush. 255; Warren *v.* Copelin, 4 Metc. 594.

North Carolina.— Boyd *v.* Royal Ins. Co., 111 N. C. 372, 16 S. E. 389.

Pennsylvania.— Mitchell *v.* Gipple, 2 Pearson 276. See also Howard *v.* McLaughlin, 98 Pa. St. 440; Noble *v.* Thompson Oil Co., 69 Pa. St. 409. See, however, Noble *v.* Thompson Oil Co., 79 Pa. St. 354, 21 Am. Rep. 66.

See 24 Cent. Dig. tit. "Garnishment," § 448.

31. Edwards *v.* Levinshon, 80 Ala. 447, 2 So. 161; Daggett *v.* Flanagan, 78 Ind. 253. See also Darrow *v.* Adams Express Co., 41 Conn. 525; O'Rourke *v.* Chicago, etc., R. Co., 55 Iowa 332, 7 N. W. 582, where judgment against the assignor in a foreign jurisdiction was shown by matter *de hors* the record to have been without jurisdiction.

Negotiable paper.— In several jurisdictions it is held that where negotiable paper is transferred by the payee before the institution of garnishment proceedings, the fact that the garnishee had no notice of such transfer will not protect him from an action on such note, even where he has paid the garnishment judgment on the same note. Speight *v.* Brock, Freem. (Miss.) 389; Knisely *v.* Evans, 34 Ohio St. 158.

32. *Alabama.*— Johns *v.* Field, 5 Ala. 484, holding that a garnishee cannot plead, in bar of a recovery of a suit brought against him

4. Failure to Make Adequate Defense or Disclosure. Where a garnishee has due notice or knowledge of a defense available to the principal defendant,[33] or where he has notice or knowledge of a transfer or assignment of the debt or property in controversy, his payment of the garnishment judgment will not avail him as a defense in a subsequent action by the transferee or assignee for the same debt or liability.[34]

E. Effect of Judgment For Garnishee.[35] The effect of a judgment in favor of the garnishee is to discharge him from liability in the garnishment pro-

by the assignee of a note, that judgment *nisi* has been rendered against him as the debtor of the payee and that he has paid the same, there not appearing to have been any scire facias issued or a final judgment rendered.

California.— Brown *v.* Ayres, 33 Cal. 525, 91 Am. Dec. 655.

Massachusetts.— Butler *v.* Mullen, 100 Mass. 453; Hawes *v.* Waltham, 18 Pick. 451.

Michigan.— Union Bank *v.* Hanish, 97 Mich. 404, 56 N. W. 768; Button *v.* Trader, 75 Mich. 295, 42 N. W. 834.

Nebraska.— Whitcomb *v.* Atkins, 40 Nebr. 549, 59 N. W. 86; Commercial State Bank *v.* Rowley, 2 Nebr. (Unoff.) 645, 89 N. W. 765.

North Carolina.—Ormond *v.* Moye, 33 N. C. 564.

Pennsylvania.— Stoner *v.* Com., 16 Pa. St. 387. See also Osner *v.* Dieterle, 5 Pa. Cas. 231, 10 Atl. 43.

See 24 Cent. Dig. tit. "Garnishment," § 451.

See, however, Sandburg *v.* Papineau, 81 Ill. 446, holding that a garnishee is entitled to a credit as against his creditor, the principal debtor, for the amount paid through misapprehension on a conditional judgment before made absolute.

Compare Cottle *v.* American Screw Co., 13 R. I. 627.

Default judgment.— This rule likewise applies to the payment of a judgment obtained by the garnishee's default, where he might have interposed adequate defense or has allowed such judgment to be taken by collusion. Hutchinson *v.* Eddy, 29 Me. 91; Wardle *v.* Briggs, 131 Mass. 518; Horton *v.* Grant, 56 Miss. 404.

33. *Alabama.*— Kimbrough *v.* Davis, 34 Ala. 583.

Louisiana.— Nugent *v.* Opdyke, 9 Rob. 453.

Nebraska.— Coleman *v.* Scott, 27 Nebr. 77, 42 N. W. 896; Smith *v.* Ainscow, 11 Nebr. 476, 9 N. W. 646.

Pennsylvania.— Schempp *v.* Fry, 165 Pa. St. 510, 30 Atl. 941.

Tennessee.— Conner *v.* Allen, 3 Head 418.

Vermont.— Seward *v.* Heflin, 20 Vt. 144.

See 24 Cent. Dig. tit. "Garnishment," § 452.

Compare Flanagan *v.* Cutler, 121 Mass. 96.

34. *Alabama.*— Smoot *v.* Eslava, 23 Ala. 659, 58 Am. Dec. 310 (holding, however, that where the transferee, upon being notified of the garnishment proceedings, fails to appear and assert his rights, he is estopped from thereafter setting up his claim against the garnishee); Crayton *v.* Clark, 11 Ala. 787; Colvin *v.* Rich, 3 Port. 175.

California.— Hardy *v.* Hunt, 11 Cal. 343, 70 Am. Dec. 787.

Georgia.— Rutherford *v.* Fullerton, 89 Ga. 353, 15 S. E. 471.

Indiana.— Daggett *v.* Flanagan, 78 Ind. 253.

Kansas.— Muse *v.* Lehman, 30 Kan. 514, 1 Pac. 804.

Kentucky.— Bibb *v.* Tomberlin, 1 Duv. 186.

Maine.— Larrabee *v.* Knight, 69 Me. 320.

Michigan.— Hosley *v.* Scott, 59 Mich. 420, 26 N. W. 659; Kimball *v.* Macomber, 50 Mich. 362, 15 N. W. 511; Tabor *v.* Van Vranken, 39 Mich. 793.

Minnesota.— Black *v.* Brisbin, 3 Minn. 360, 74 Am. Dec. 762.

Mississippi.— Field *v.* McKinney, 60 Miss. 763; Lewis *v.* Dunlop, 57 Miss. 130, holding that where the garnishee receives notice of an assignment after answer but before judgment, it is his duty to amend his answer and thus include the allegation of the assignment.

Missouri.— Leahey *v.* Dugdale, 41 Mo. 517; Funkhouser *v.* How, 24 Mo. 44.

New Hampshire.— Page *v.* Thompson, 43 N. H. 373.

North Carolina.—Shuler *v.* Bryson, 65 N. C. 201.

North Dakota.—Purcell *v.* St. Paul F. & M. Ins. Co., 5 N. D. 100, 64 N. W. 943.

Oregon.— Phipps *v.* Rieley, 15 Oreg. 494, 16 Pac. 185.

See 24 Cent. Dig. tit. "Garnishment," § 452.

Compare Houston *v.* Wolcott, 7 Iowa 173, holding that a garnishee who has been compelled to pay to plaintiff, after having already paid his debt to an assignee, cannot have relief in equity, if he failed to use proper care and diligence to protect himself as he might have done in the garnishment proceedings.

Where garnishee had no notice.— The payment of a judgment on garnishment process in which the garnishee does not set up an assignment of which he had no notice will be a good defense in a subsequent suit thereon by the assignee. Dodd *v.* Brott, 1 Minn. 270, 66 Am. Dec. 541.

35. In Massachusetts, where plaintiff sues out a writ of foreign attachment and attaches the property of the principal defendant, he may proceed with the suit against him, although the trustees are discharged, provided statutory service of the process was had upon defendant. Simmons *v.* Woods, 144 Mass. 385, 11 N. E. 659 (where mortgaged chattels in the possession of the mortgagor were attached and the mortgagee sum-

ceedings, but is not a bar to an action against him by the principal defendant for the same debt or demand;[36] nor is it a bar to a recovery by another creditor of the same defendant.[37]

XIII. LIABILITY ON BONDS AND UNDERTAKINGS.[38]

A. Bond to Procure Garnishment.[39] A garnishment sued out after suit commenced is auxiliary to the original suit, and defendant in the original suit may maintain an action on the garnishment bond at any time before, as well as after, the determination of the main cause,[40] and a nonsuit taken in the garnishment suit may amount to a breach of the bond.[41] The extent of liability on such bond is the actual damage caused by its issuance,[42] including interest on the money attached.[43]

B. Bond to Dissolve Garnishment. In many jurisdictions, upon the filing of a bond substantially complying with the conditions and terms of the statute providing therefor, the garnishee is entitled to be discharged.[44] Under some statutes the condition of the bond is to pay whatever judgment plaintiff may recover in the principal suit.[45] While other statutes provide that persons

moned as the trustee of the mortgagor); Lucas *v.* Nichols, 5 Gray 309; Belknap *v.* Gibbens, 13 Metc. 471.

Mortgaged personal property.— The discharge of the trustee in an action under Mass. St. (1844) c. 148, § 2, in which the mortgaged personal property is attached, and the mortgagee summoned as trustee, vacates the attachment of the property, and entitles the mortgagee to possession thereof. Goulding *v.* Hair, 133 Mass. 78; Martin *v.* Bayley, 1 Allen (Mass.) 381. See also Hayward *v.* George, 13 Allen (Mass.) 66.

36. Finch *v.* Alexander County Nat. Bank, 65 Ill. App. 337; Ruff *v.* Ruff, 85 Pa. St. 333; Hukill *v.* Yoder, 29 Pittsb. Leg. J. (Pa.) 94; Hilliard *v.* Burlington Shoe Co., 76 Vt. 57, 56 Atl. 283; Laport *v.* Bacon, 48 Vt. 176. See also Fulton *v.* Gesterding, (Fla. 1904) 36 So. 56, holding that the *prima facie* effect of a judgment in favor of a garnishee on a traverse of his answer denying indebtedness to and possession of property of defendant is merely that the garnishee was not, at the service of the writ or time of filing his answer or of any period between those dates, indebted to defendant so as to be liable to a writ of garnishment, and that he did not at such time have any chattels or property in his hands subject to garnishment.

37. Hamilton Nat. Bank *v.* Horton, 68 N. H. 235, 44 Atl. 296 (holding likewise that plaintiff can, in the absence of fraud, hold defendant's wages attached in a second suit on another cause of action after the discharge of the trustee in a prior action, just as a third person can); Lewis *v.* Tams, 4 Phila. (Pa.) 276.

38. Bonds generally see BONDS, 5 Cyc. 721 *et seq.*

Undertaking generally see UNDERTAKINGS.

39. Bond to procure attachment see ATTACHMENT, 4 Cyc. 521 *et seq.*

40. Barber *v.* Ferrill, 57 Ala. 446; Pounds *v.* Hammer, 57 Ala. 342.

41. Alabama State Land Co. *v.* Reed, 99 Ala. 19, 10 So. 238. See also Hill *v.* Culan, 1 Grant (Pa.) 463.

42. Hays *v.* Anderson, 57 Ala. 374. See also State *v.* Bick, 36 Mo. App. 114.

Expenses of original suit.— The obligors on a garnishment bond are not, however, liable for costs of the original suit or for expenses incurred in its defense. Heimsoth *v.* Le Suer, (Tex. Civ. App. 1894) 26 S. W. 522.

43. State *v.* McHale, 16 Mo. App. 478.

44. *Alabama.*—May *v.* Alabama Nat. Bank, 111 Ala. 510, 20 So. 459.

Georgia.— Farmers' Co-operative Mfg. Co. *v.* Middle Georgia Mfg., etc., Co., 94 Ga. 673, 20 S. E. 117; Moore *v.* Allen, 55 Ga. 67, holding that only a statutory bond will dissolve the garnishment.

Illinois.— People *v.* Cameron, 7 Ill. 468.

Kansas.—Washer *v.* Campbell, 40 Kan. 747, 21 Pac. 671.

Michigan.— Burt *v.* Wayne Cir. Judge, 82 Mich. 251, 46 N. W. 380.

Ohio.— Myers *v.* Smith, 29 Ohio St. 120.

Texas.— Dallas *v.* Western Electric Co., 83 Tex. 243, 18 S. W. 552; Heimsoth *v.* Le Suer, (Civ. App. 1894) 26 S. W. 522, holding, however, that the obligors in a garnishment bond are not liable for costs of the original suit or for expenses incurred in its defense.

Vermont.— Rich *v.* Soles, 65 Vt. 135, 26 Atl. 585.

Wisconsin.— Sutro *v.* Bigelow, 31 Wis. 527.

United States.— Rome R. Co. *v.* Richmond, etc., Co., 60 Fed. 43.

See 24 Cent. Dig. tit. "Garnishment," § 457.

45. *Illinois.*— People *v.* Cameron, 7 Ill. 468, holding that when the bond is given the case ceases to be a proceeding in rem, the property is restored, the garnishee discharged, and the suit proceeds in the same manner as if originally commenced by summons, the giving of the bond being regarded as an appearance.

Kansas.— Washer *v.* Campbell, 40 Kan. 747, 21 Pac. 671.

Michigan.— Burt *v.* Wayne Cir. Judge, 82 Mich. 251, 46 N. W. 380; Grosslight *v.* Crisup, 58 Mich. 531, 25 N. W. 505.

Ohio.— Myers *v.* Smith, 29 Ohio St. 120;

executing a bond or undertaking for the dissolution of garnishment proceedings shall be bound to the same extent as the garnishee discharged from liability by virtue of it would have been bound,[46] such statutes usually providing that there can be no recovery on the garnishment bond until judgment has been rendered in the garnishment proceedings.[47]

C. Enforcement of Liabilities — 1. In General. The method of enforcing the liability on a bond given to procure, or to dissolve, garnishment proceedings, is governed entirely by statute, and where the statute fails to provide a summary remedy,[48] plaintiff must sue upon the bond, and show the breach of its conditions.[49]

2. Defenses. In an action on a garnishment bond the principal and sureties thereon cannot raise any issue that was determined by the judgment rendered in the garnishment proceedings.[50]

Pritz *v.* Drake, 6 Ohio Dec. (Reprint) 1127, 10 Am. L. Rec. 565.

Vermont.— Rich *v.* Soles, 65 Vt. 135, 26 Atl. 585.

Wisconsin.— Sutro *v.* Bigelow, 31 Wis. 527, holding that the person executing the undertaking shall be bound to the same extent as the garnishee discharged from liability by virtue thereof.

See 24 Cent. Dig. tit. "Garnishment," § 457.

Compare Greengard *v.* Fretz, 64 Minn. 10, 65 N. W. 949, holding that if the obligors in the bond failed to identify the property garnished and show the amount and value thereof they must be held liable for the whole amount of the judgment obtained by plaintiff against defendant in the original action.

46. Guilford *v.* Reeves, 103 Ala. 301, 15 So. 661; May *v.* Alabama Nat. Bank, 111 Ala. 510, 20 So. 459; Collins *v.* Baldwin, 109 Ala. 402, 19 So. 862 (holding that a judgment rendered against the sureties upon a dissolution bond without regard to the actual liability of the garnishee is unauthorized); Balkum *v.* Strauss, 100 Ala. 207, 14 So. 53; Farmers' Co-operative Mfg. Co. *v.* Middle Georgia Mfg., etc., Co., 94 Ga. 673, 20 S. E. 117 (where the bond was executed with condition to pay whatever judgment plaintiff might recover in the main action, and it was held that recovery could only be had for the amount for which the garnishee is chargeable); Everett *v.* Westmoreland, 92 Ga. 670, 19 S. E. 37; Whitehead *v.* Patterson, 88 Ga. 748, 16 S. E. 66; Dallas *v.* Western Electric Co., 83 Tex. 243, 18 S. W. 552; Sullivan *v.* King, (Civ. App. 1904) 80 S. W. 1048; Rome R. Co. *v.* Richmond, etc., Co., 60 Fed. 43. See also Nevin *v.* Fouché, 77 Ga. 47.

47. Yeager *v.* Self, 121 Ala. 265, 25 So. 777; Guilford *v.* Reeves, 103 Ala. 301, 15 So. 661 (judgment cannot be rendered on a bond until claims under previous garnishments have been adjudicated, and then only for the amount remaining in the hands of the garnishee after satisfaction of such claim); Cunningham *v.* Hogan, 136 Mass. 407; Sullivan *v.* King, (Tex. Civ. App. 1904) 80 S. W. 1048. See Porter *v.* Giles, 129 Mass. 589, holding that under Mass. St. (1867) c. 97, no action can be maintained on a bond given to dissolve the attachment if the trustee has been discharged. See, however, Everett *v.* Westmoreland, 92 Ga. 670, 19 S. E. 37, holding that there can be no judgment on the bond until after judgment is rendered in the main action against defendant.

48. Harvely *v.* Daly, 112 Ga. 822, 38 S. E. 41; Davis *v.* Pringle, 108 Ga. 93, 33 S. E. 815; Small *v.* Mendel, 96 Ga. 532, 23 S. E. 834; Whitehead *v.* Patterson, 88 Ga. 748, 16 S. E. 66; Linder *v.* Benson, 78 Ga. 116 (decided under a statute authorizing plaintiff to enter judgment on the bond against the principal and sureties whenever judgment is obtained against the property or fund against which the garnishment was issued); People *v.* Judge Wayne Cir. Ct., 26 Mich. 186 (holding that the statute authorizing the court, upon application after the rendering of judgment against the principal defendant, to order execution to issue against the sureties on the garnishment bond as well as defendant, is not open to the objection that it deprives such sureties of their right to be heard and to contest their liability); Seinsheimer *v.* Flanagan, 17 Tex. Civ. App. 427, 44 S. W. 30. *Compare* Klock *v.* Peck, 112 Mich. 670, 71 N. W. 461. See, however, Plowman *v.* Easton, 15 Tex. Civ. App. 304, 39 S. W. 171, holding that summary judgment cannot be entered against the sureties on a bond given by defendant in garnishment when they were not made parties.

49. Guilford *v.* Reeves, 103 Ala. 301, 15 So. 661 (holding that plaintiff could not recover upon a bond without showing that he could have recovered against the garnishee); Alabama State Land Co. *v.* Reed, 99 Ala. 19, 10 So. 238; Schradsky *v.* Dunklee, 9 Colo. App. 394, 48 Pac. 666; McNamara *v.* Mattei, 74 Conn. 170, 50 Atl. 35; Sutro *v.* Bigelow, 31 Wis. 527.

50. Alabama State Land Co. *v.* Reed, 99 Ala. 19, 10 So. 238 (while an honest belief that the writ was necessary might furnish a defense against a recovery for a vexatious suing out of the writ, it was no answer to a claim for a wrongful suing out of the writ); Schradsky *v.* Dunklee, 9 Colo. App. 394, 48 Pac. 666 (where the garnished funds are released by an undertaking given for that purpose, the sureties cannot question its validity on the ground that no statute authorizes such release); McCoslin *v.* David, 22 Tex. Civ. App. 53, 54 S. W. 404; Wilkinson

XIV. WRONGFUL GARNISHMENT.[51]

A. In General. In some jurisdictions where a debt or property is wrongfully garnished, the owner thereof has his remedy over against plaintiff in the garnishment proceedings for damages therefor.[52] In several jurisdictions, however, an action on the case will not lie for suing out a writ of garnishment, unless it is sued out maliciously, and without probable cause, as well as wrongfully.[53]

B. Measure of Damages.[54] If the garnishment be merely wrongful, the measure of damages will be the actual injury sustained;[55] but where the writ was issued both wrongfully and vexatiously exemplary damages may be recovered.[56]

GARNISHMENT BILL. See CORPORATIONS.[1]

GARTH. As used in the north of England, a well-known term meaning an orchard.[2] (See CURTILAGE.)

v. U. S. Fidelity, etc., Co., 119 Wis. 226, 96 N. W. 560. See also McNamara *v.* Mattei, 74 Conn. 170, 50 Atl. 35 (holding that in an action on a bond given to release a garnishment, defendants cannot show that in entering into the recognizance they supposed they were giving a bond to protect the garnishee against loss); Davis *v.* Bickel, 25 Ind. App. 378, 58 N. E. 207.

Where garnishment proceedings are void.— Where the proceedings in garnishment are void and illegal, plaintiff is not entitled to judgment on the garnishment bond, and the principal and sureties thereon may set up illegality as a defense to a recovery thereon. Morgan *v.* Latham, 111 Ga. 835, 36 S. E. 99.

51. Wrongful attachment see ATTACHMENT, 4 Cyc. 831 *et seq.*

Wrongful execution see EXECUTIONS, 17 Cyc. 1570 *et seq.*

52. *Alabama.*— Mobile Furniture Commission Co. *v.* Little, 108 Ala. 399, 19 So. 443; Alabama State Land Co. *v.* Reed, 99 Ala. 19, 10 So. 238; Marx *v.* Leinkauff, 93 Ala. 453, 9 So. 818; Hays *v.* Anderson, 57 Ala. 374. See, however, Benson *v.* McCoy, 36 Ala. 710; McKellar *v.* Couch, 34 Ala. 336.

Iowa.— Insel *v.* Kennedy, 120 Iowa 234, 94 N. W. 456. *Compare* Heath *v.* Halfhill, 106 Iowa 131, 76 N. W. 522.

Mississippi.— McLaurin *v.* Baum, (1893) 12 So. 594.

Nebraska.— Schaller *v.* Kurtz, 25 Nebr. 655, 41 N. W. 462, holding that where by garnishee process a creditor has obtained money of his debtor which was exempt from execution, a cause of action thereby arises in favor of the debtor against the creditor.

New Hampshire.— Davis *v.* Clough, 8 N. H. 157.

Pennsylvania.— Kelly *v.* Downs, 3 Luz. Leg. Reg. 232.

Texas.— Biering *v.* Galveston First Nat. Bank, 69 Tex. 599, 7 S. W. 90 (holding, however, that in an action for wrongful attachment and garnishment, the attachment writ not having been levied, it is immaterial whether the latter was sued out maliciously; and the inquiry as to malice should be confined to the garnishment proceedings); Barr *v.* Cardiff, 32 Tex. Civ. App. 495, 75 S. W. 341; Coursey *v.* Cornwell, (Civ. App. 1901) 65 S. W. 73; Girard *v.* Moore, (Civ. App. 1894) 24 S. W. 652.

See 24 Cent. Dig. tit. "Garnishment," § 470.

Compare Kestler *v.* Kern, 2 Ind. App. 488, 28 N. E. 726; Hobson *v.* Woolfolk, 23 La. Ann. 384.

Time to sue.— Where mortgaged chattels have been attached and the mortgagee summoned as trustee, he cannot commence an action as for wrongful attachment during the pendency against him of the action, although the property has not been restored or the amount due tendered or paid on demand, and although the property has been sold as perishable property. Jackson *v.* Colcord, 114 Mass. 60.

53. Gundermann *v.* Buschner, 73 Ill. App. 180; Veitch *v.* Cebell, 105 Wis. 260, 81 N. W. 411, 76 Am. St. Rep. 914.

54. Damages generally see DAMAGES, 13 Cyc. 1 *et seq.*

55. Pounds *v.* Hamner, 57 Ala. 342; Fleming *v.* Gillespie, 7 Okla. 430, 54 Pac. 653 (holding that the damages for which a surety on a bond in garnishment proceedings is liable are such damages as directly and necessarily arise from the wrongful seizure of the property, and they cannot be recovered if remote or speculative); Moore *v.* Thompson, 9 Phila. (Pa.) 164; Biering *v.* Galveston First Nat. Bank, 69 Tex. 599, 7 S. W. 90 (where in an action for damages for the detention of money by writs of garnishment unlawfully issued the verdict was for interest at eight per cent on the money detained during the period of detention, and it was held that there should be added to the verdict interest on the damages found from the date the detention ceased to the day of trial). See also Giraud *v.* Moore, 86 Tex. 675, 26 S. W. 945.

56. Pounds *v.* Hamner, 57 Ala. 342; Waugh *v.* Dabney, 12 Tex. Civ. App. 290, 33 S. W. 753. See also Schumann *v.* Torbett, 86 Ga. 25, 12 S. E. 185.

1. See 10 Cyc. 672, 736 note 20.

2. Layng *v.* Yarborough, 4 Price 383, 393 [*citing* Cunningham Dict.].

GAS

By Frank J. Morley

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CROSS-REFERENCES

For Matters Relating to:
Commerce, see COMMERCE.
Constitutional Law, see CONSTITUTIONAL LAW.
Corporations, see CORPORATIONS.
Eminent Domain, see EMINENT DOMAIN.
Fixtures, see FIXTURES.
Mines and Minerals, see MINES AND MINERALS.
Municipal Corporations, see MUNICIPAL CORPORATIONS.

I. RIGHT TO CONSTRUCT AND OPERATE GAS-WORKS.

A. Necessity of Legislative Grant. The business of manufacturing and selling illuminating gas is not a prerogative of government, but like the manufacture and sale of any other ordinary article of traffic it is open to all, and may be carried on by any person without legislative authority.[1] But the right to dig up streets and other public ways and place therein pipes and mains for the distribution of gas for public and private use is a franchise, the privilege of exercising which can only be granted by the state,[2] or by a municipality or some other local agency acting under legislative authority.[3]

1. Jersey City Gas Co. *v.* Dwight, 29 N. J. Eq. 242.

2. *Illinois.*— People *v.* Chicago Gas Trust Co., 130 Ill. 268, 22 N. E. 798, 17 Am. St. Rep. 319, 8 L. R. A. 497; Chicago Gas-Light, etc., Co. *v.* People's Gas-Light, etc., Co., 121 Ill. 530, 13 N. E. 169, 2 Am. St. Rep. 124.

Kentucky.— Newport *v.* Newport Light Co., 84 Ky. 166.

Maine.— Twin Village Water Co. *v.* Damariscotta Gas Light Co., 98 Me. 325, 56 Atl. 1112 (where it is said: "Such franchises, of course, can be acquired only by authority of the legislature, either general or special"); Brunswick Gas Light Co. *v.* United Gas, etc., Co., 85 Me. 532, 27 Atl. 525, 35 Am. St. Rep. 385.

Massachusetts.— See Boston *v.* Richardson, 13 Allen 146.

New Jersey.—Richards *v.* Dover, 61 N. J. L. 400, 39 Atl. 705; Jersey City Gas Co. *v.* Dwight, 29 N. J. Eq. 242.

New York.— People *v.* Deehan, 153 N. Y. 528, 47 N. E. 787 [*reversing* 11 N. Y. App. Div. 175, 42 N. Y. Suppl. 1071].

Ohio.— State *v.* Cincinnati Gas Light, etc., Co., 18 Ohio St. 262, 291, where it is said: "The right to use the streets of a city for the purpose of laying pipes to convey gas, whether in the hands of a private corporation or a natural person, is a franchise, and as such can only emanate directly or indirectly from the sovereign power of the State."

United States.—New Orleans Gas-Light Co. *v.* Louisiana Light, etc., Producing, etc., Co., 115 U. S. 650, 6 S. Ct. 252, 29 L. ed. 516.

3. Ghee *v.* Northern Union Gas Co., 158 N. Y. 510, 513, 53 N. E. 692 (where it was said: "The legal effect of the consent which the municipal authorities are authorized [by statute] to give, . . . operates to create a franchise by which is vested in the corporation receiving it a perpetual and indefeasible interest in the land constituting the streets of the municipality"); Brooklyn *v.* Jourdan, 7 Abb. N. Cas. (N. Y.) 23; New Orleans Gas-Light Co. *v.* Louisiana Light, etc., Producing, etc., Co., 115 U. S. 650, 6 S. Ct. 252, 29 L. ed. 516. *Compare* People *v.* Detroit Mut. Gaslight Co., 38 Mich. 154, holding that the right of a gas company to lay pipes in a street, under permission of the municipal government, is not a state franchise but a local casement resting in contract or license.

Such a franchise is property that cannot be destroyed or taken from it or rendered use-

B. Power of Legislature to Make Grant. The supply of gas to consumers generally, being a business of a public nature, it is competent for the legislature, subject to constitutional restrictions, to grant the use of streets and public highways for this purpose.[4] The state may grant gas privileges directly to the grantee without the consent of the local municipal or county authorities.[5] Frequently, however, the legislature grants the right to gas companies to use the streets subject to the condition of obtaining the consent of the local authorities.[6]

less by the arbitrary act of the village authorities in refusing the permit to place the conductors under the streets. People *v.* Deehan, 153 N. Y. 528, 47 N. E. 787; People *v.* O'Brien, 111 N. Y. 1, 18 N. E. 692, 7 Am. St. Rep. 684, 2 L. R. A. 255; Brooklyn *v.* Jourdan, 7 Abb. N. Cas. (N. Y.) 23.

Power of municipal corporations to grant and regulate franchises see MUNICIPAL CORPORATIONS.

Power of municipal corporations to operate gas-works see MUNICIPAL CORPORATIONS.

4. La Harpe *v.* Elm Tp. Gas, etc., Co., 69 Kan. 97, 76 Pac. 448; New Orleans Gas-Light Co. *v.* Louisiana Light, etc., Producing, etc., Co., 115 U. S. 650, 6 S. Ct. 252, 29 L. ed. 516.

Judicial supervision of location of mains.— Under a statute in Pennsylvania it has been held that the court of common pleas has jurisdiction to entertain and act upon the petition of the township authorities for a decree requiring a gas company to bury its pipes below the surface of the roads upon which they are laid. Kiskiminetas Tp. *v.* Conemaugh Gas Co., 14 Pa. Super. Ct. 67. So it has been held that if a water company has its pipes laid in a highway, the courts will supervise the location of the pipes of a gas company, upon application and proper cause shown before the pipes of the gas company are laid. Springfield Water Co. *v.* Suburban Gas Co., 8 Del. Co. (Pa.) 130. But it has been held that a general decree requiring a gas company to lay its pipes on one side of the highways throughout all of the territory covered by its charter, without regard to circumstances, would be an improper exercise of the power of the court. Springfield Water Co. *v.* Suburban Gas Co., 8 Del. Co. (Pa.) 130.

Gas mains as constituting additional burdens requiring compensation to abutting owners see EMINENT DOMAIN, 15 Cyc. 600 text and note 52 *et seq.*

5. *California.*— *In re* Johnston, 137 Cal. 115, 69 Pac. 973.

Georgia.— Atlanta *v.* Gate City Gas Light Co., 71 Ga. 106.

Indiana.— See Consumers' Gas Trust Co. *v.* Huntsinger, (App. 1895) 39 N. E. 423, where the statute authorized the construction of pipe lines across highways without the consent of the board of county commissioners.

Kansas.— La Harpe *v.* Elm Tp. Gas, etc., Co., 69 Kan. 97, 76 Pac. 448.

Maryland.— Consolidated Gas Co. *v.* Baltimore County, 98 Md. 689, 57 Atl. 29.

New York.— Ghee *v.* Northern Union Gas Co., 158 N. Y. 510, 53 N. E. 692 [*reversing* 34 N. Y. App. Div. 551, 56 N. Y. Suppl. 450]; People *v.* Gilroy, 67 Hun 323, 22 N. Y. Suppl. 271.

See 24 Cent. Dig. tit. "Gas," § 1.

Validity of statute failing to provide for compensation to city.— A statute granting a privilege to gas companies to lay pipes in the streets, alleys, and public grounds of a city is not invalid by reason of the fact that no provision is made for the payment of compensation to the city. La Harpe *v.* Elm Tp. Gas, etc., Co., 69 Kan. 97, 76 Pac. 448.

6. Hamilton County *v.* Indianapolis Natural Gas Co., 134 Ind. 209, 33 N. E. 972; Consumers' Gas Trust Co. *v.* Huntsinger, (Ind. App. 1895) 39 N. E. 423; Traverse City Gas Co. *v.* Traverse City, 130 Mich. 17, 89 N. W. 574; People *v.* Detroit Mut. Gaslight Co., 38 Mich. 154; Ghee *v.* Northern Union Gas Co., 158 N. Y. 510, 513, 53 N. E. 692 [*reversing* 34 N. Y. App. Div. 551, 56 N. Y. Suppl. 450] (where it is said: "The tendency of later years, which is well grounded in reason, is for the state to confer upon the local municipal authorities the right to represent it in the matter of granting franchises [to gas companies] to the extent that the final act necessary to the creation of the franchises must be exercised by such authorities"); People *v.* Deehan, 153 N. Y. 528, 47 N. E. 787; Philadelphia Co. *v.* Freeport Borough, 167 Pa. St. 279, 31 Atl. 571.

In Maine, prior to 1895, no general franchise rights, such as the right to dig up the streets to lay pipes for gas, existed in any person or company except by special legislative authority, the legislature reserving to itself the right, in each instance, to determine whether the public good demanded that such franchises should be granted at all to any one, and in case such franchises were already lawfully exercised in a given place or had previously been granted, to determine whether or not it would be for the public good to permit indiscriminate or destructive competition. Twin Village Water Co. *v.* Damariscotta Gas Light Co., 98 Me. 325, 56 Atl. 1112. By Pub. Laws (1895), c. 102, the policy of the legislature was modified to this extent: In towns where no gas or electric company is supplying, or is authorized to supply, gas or electric light, new corporations, organized under that chapter, can supply either gas or electricity, or both, and use the streets therefor, by first obtaining the statutory permit from the municipal officers, and without special legislative authority. But in towns where a gas or electric company is supplying, or is authorized to supply, either or both kinds of light, another corporation, organized under the general law,

C. Construction of Grant — 1. In General. The general rule[7] that a grant of a franchise, in so far as it is ambiguous, is to be strictly construed against the grantee and in favor of the public, and that nothing will pass unless it is granted in clear and explicit terms, is applicable to grants made to gas companies.[8]

2. Grant of Particular Part of Streets Not Implied. A company to which is granted authority to lay mains and pipes in the streets without any particular streets or particular parts of streets being designated does not thereby acquire any vested right to occupy any particular part of the streets, but takes the risk of

cannot operate until the legislature has determined whether the public good requires it, and has authorized it, just as it did prior to 1895. Twin Village Water Co. *v.* Damariscotta Gas Light Co., 98 Me. 325, 56 Atl. 1112.

If a portion of the town for which consent was granted is thereafter incorporated into a village, the change from town to village government does not change the rights of the gas-light company; and its franchise cannot be destroyed or taken from it by the arbitrary act of the village authorities in refusing to permit the company to lay its conductors in a street within the village limits, opened subsequently to the grant. People *v.* Deehan, 153 N. Y. 528, 47 N. E. 787.

Suit to cancel voidable permit.— When a board of county commissioners seeks to cancel a permit by them to a natural gas company to use a highway for its pipe-line, it is incumbent on plaintiffs to allege and prove facts entitling it to a rescission, and if plaintiffs fail to show that defendant has not acted upon the permit in good faith, such failure is fatal to the action, even if the order was voidable. Hamilton County *v.* Indianapolis Natural Gas Co., 134 Ind. 209, 33 N. E. 972.

Presumption of consent to user.— Under a statute in New York authorizing a gas corporation organized thereunder to lay conduits in the streets of a village, city, or town, with the consent of the municipal authorities, it was held that where the highway commissioners of a town acquiesced without objection in the acts of a gas company incorporated under such acts, in laying its conduits in the streets for nearly half a century, it would be presumed that they had given their consent to the gas company's use of the streets. People *v.* Cromwell, 89 N. Y. App. Div. 291, 85 N. Y. Suppl. 878.

Power of municipal corporations to grant franchises and to regulate use of streets see Municipal Corporations.

7. See Franchises, 19 Cyc. 1451.

8. Traverse City Gas Co. *v.* Traverse City, 130 Mich. 17, 89 N. W. 574; Jersey City Gas-light Co. *v.* Consumers Gas Co., 40 N. J. Eq. 427, 2 Atl. 922; People *v.* Deehan, 153 N. Y. 528, 47 N. E. 787; Hamilton Gaslight, etc., Co. *v.* Hamilton, 146 U. S. 258, 13 S. Ct. 90, 36 L. ed. 963. See Corporations, 10 Cyc. 195 text and note 54 *et seq.*; 1088 text and note 90 *et seq.* And see *infra*, I, D, 3.

Authority to maintain telegraph or telephone line along right of way.— In Woods *v.* Greensboro Natural Gas Co., 204 Pa. St. 606, 54 Atl. 470, it was held that the right of a natural gas company incorporated and doing business under the act of May 29, 1885, to locate and appropriate a right of way for laying and maintaining a pipe-line for the transportation and distribution of natural gas does not include the incidental right to construct and maintain on the same right of way a telegraph or telephone line to be used only in the necessary operation of the pipe-line.

Authority to borrow money on note and mortgage.— In Hays *v.* Galion Gas Light, etc., Co., 29 Ohio St. 330, it was held that a corporation organized under the general corporation act of May 1, 1852, for the purpose of manufacturing and supplying gas to the inhabitants of a city or village, and authorized by that act to make contracts generally, may borrow money to enable it to accomplish the legitimate object of its creation and secure payment of the same by note and mortgage of the corporate property.

Power of gas company to operate electric light plant.— In *In re* Conshohocken Gas Light Co., 5 Pa. Co. Ct. 585, it was held that an incorporated gas company may have electric light franchises added, by amendment of its charter, under the act of June 2, 1887, but not unless the charter or amendment specifically defines the territory to be supplied, as required by the act of 1887. Under the provisions of N. Y. Laws (1890), c. 566, § 60, authorizing the formation of corporations "for manufacturing and supplying gas for lighting . . . or for manufacturing electricity for producing light, heat or power," a corporation is not limited to one of the purposes stated, but both may be combined in the same certificate. People *v.* Rice, 138 N. Y. 151, 155, 33 N. E. 846.

Power of electric light company to operate gas plant.— It has been held that as no corporation can engage in any business not authorized by its charter, a corporation whose business is limited by its charter to supply a city and its inhabitants "with light and motive power generated by electricity, steam, or other artificial means, and to the furnishing and supplying either said light, power, or heat," has no power to purchase or operate a gas plant. Covington Gas Light Co. *v.* Covington, 58 S. W. 805, 22 Ky. L. Rep. 796.

Authority to deal in appliances for consumption of gas.— In Malone *v.* Lancaster Gas Light, etc., Co., 182 Pa. St. 309, 37 Atl. 932, it was held that a corporation organized for the purpose of "manufacturing and supplying illuminating and heating gas" may not only supply the gas itself but may also inci-

location and may be required to make such changes as public convenience or security requires, and this at its own expense.[9]

3. Extension of Franchise to Streets Subsequently Opened. When the right to use streets has once been granted in general terms to a corporation engaged in supplying gas for public and private use, such grant necessarily contemplates that new streets are to be opened and old ones extended from time to time, and hence the privilege may be exercised in the new as well as in the old streets.[10]

D. Exclusiveness of Privilege or Franchise[11] — 1. In General. Frequently gas privileges and franchises are made exclusive by the express terms of the grant,[12] and the constitutionality of such legislation has generally been upheld.[13]

2. Power of Municipal Corporation to Make Exclusive Grants. Apart from statutory authority it is not within the power of a municipal corporation to grant to any person or corporation engaged in supplying gas to consumers a monopoly of its streets.[14]

3. Construction of Grant. It is a well established general rule that a grant of an exclusive privilege to a gas company will not be implied, nor will such

dentally deal in such appliances and conveniences as will induce new customers to use gas, or old ones to use more.

9. New Orleans Gaslight Co. *v.* New Orleans Drainage Commission, 111 La. 838, 35 So. 929; *In re* Deering, 93 N. Y. 361.

Use of street subject to change of grade.— *In re* Deering, 93 N. Y. 361; Columbus Gaslight, etc., Co. *v.* Columbus, 50 Ohio St. 65, 33 N. E. 292, 40 Am. St. Rep. 648, 19 L. R. A. 510.

Reservation in ordinance of right to designate streets to be used.— In Kalamazoo *v.* Kalamazoo Heat, etc., Co., 124 Mich. 74, 82 N. W. 811, it was held that a city ordinance authorizing a gas company to lay pipes in the streets is not void because it fails to reserve the right to the city to say what streets shall be so used, and the city is bound by its terms. But in Traverse City Gas Co. *v.* Traverse City, 130 Mich. 17, 89 N. W. 574, it was held that where a city in granting the use of the streets reserves the right to have the pipes laid in the alleys, whenever practicable, the reservation will be upheld by the courts.

10. People *v.* Deehan, 153 N. Y. 528, 47 N. E. 787 [*reversing* 11 N. Y. App. Div. 175, 42 N. Y. Suppl. 1071]; People *v.* Cromwell, 89 N. Y. App. Div. 291, 85 N. Y. Suppl. 878.

11. Franchises generally see Franchises.

12. See Kentucky Heating Co. *v.* Louisville Gas Co., 63 S. W. 751, 23 Ky. L. Rep. 730; Twin Village Water Co. *v.* Damariscotta Gas Light Co., 98 Me. 325, 56 Atl. 1112; State *v.* Columbus Gas Light, etc., Co., 34 Ohio St. 572, 32 Am. Rep. 390; State *v.* Milwaukee Gaslight Co., 29 Wis. 454, 9 Am. Rep. 598.

13. See Constitutional Law, 8 Cyc. 1039 note 93; Corporations, 10 Cyc. 192 note 37, 193 note 43; Monopolies.

14. *Indiana.*— Rushville *v.* Rushville Natural Gas Co., 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321; Crowder *v.* Sullivan, 128 Ind. 486, 28 N. E. 94, 13 L. R. A. 647; Citizens' Gas, etc., Co. *v.* Elwood, 114 Ind. 332, 16 N. E. 624.

Kansas.— Coffeyville Min., etc., Co. *v.* Citizens' Natural Gas, etc., Co., 55 Kan. 173, 40 Pac. 326.

New York.— Richmond County Gas-Light Co. *v.* Middletown, 59 N. Y. 228.

Ohio.— Cincinnati Gas-light, etc., Co. *v.* Avondale, 43 Ohio St. 257, 1 N. E. 527; State *v.* Cincinnati Gas Light, etc., Co., 18 Ohio St. 262.

West Virginia.— Parkersburg Gas Co. *v.* Parkersburg, 30 W. Va. 435, 4 S. E. 650.

United States.— Saginaw Gas-Light Co. *v.* Saginaw, 28 Fed. 529.

Compare Newport *v.* Newport Light Co., 8 Ky. L. Rep. 22.

Statute limiting duration of grant.— Under a statute forbidding a city to grant any franchise for a longer period than twenty years, an ordinance granting a franchise for twenty years from the date of its taking effect is not rendered invalid by the fact that it was passed several months before that date. State *v.* Excelsior Coke, etc., Co., 69 Kan. 45, 76 Pac. 447.

Suit to enjoin ordinance infringing exclusive franchise.— In Des Moines Gas Co. *v.* Des Moines, 44 Iowa 505, 24 Am. Rep. 756, it was held that the fact that a city has chartered a gas company, giving it the exclusive right to lay pipes through its streets and light the streets for a specified compensation, is not a ground for injunction to restrain the city from granting a charter to another company and conferring upon it similar rights and privileges, before the first franchise shall have expired, but the remedy is to resort to the courts, after the passage of the ordinance, for the purpose of testing its legality.

Municipal grant construed as license and not exclusive franchise.— An ordinance which specifically and by name grants to a natural gas company the right to use its streets, etc., for the purpose of laying pipes, has been held merely to grant a license or permission to the particular company to use the streets for the purpose designated, and not a special and exclusive franchise. Rushville *v.* Rushville Natural Gas Co., 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321. See also Vin-

privilege when legally granted be extended beyond its obvious meaning.[15] A grant of an exclusive privilege to one company to supply manufactured gas is not infringed by the grant of the right to another company to supply the same consumers with natural gas.[16] Nor will the grant of an exclusive privilege to one company, of lighting a city with gas, prevent a subsequent grant to another company of the right to light the city with electricity.[17]

E. Transfer of Gas Franchises and Privileges. A gas company cannot as a general rule sell or lease its franchises without legislative authority, since this would involve an abandonment of the duty which it has assumed toward the public.[18] But a gas company may surrender its right to exclude all competition,

cennes *v.* Citizens' Gas Light Co., 132 Ind. 114, 31 N. E. 573, 16 L. R. A. 485; Crowder *v.* Sullivan, 128 Ind. 486, 28 N. E. 94, 13 L. R. A. 647; Meadville Fuel Gas Co. *v.* Meadville Natural Gas Co., 2 Pa. Cas. 549, 4 Atl. 733.

15. *Maryland.*— Consolidated Gas Co. *v.* Baltimore County Com'rs, 99 Md. 403, 58 Atl. 214.

Ohio.— Circleville Light, etc., Co. *v.* Buckeye Gas Co., 69 Ohio St. 259, 69 N. E. 436; State *v.* Hamilton, 47 Ohio St. 52, 23 N. E. 935.

Pennsylvania.— Warren Gas Light Co. *v.* Pennsylvania Gas Co., 161 Pa. St. 510, 29 Atl. 101; Scranton Electric Light, etc., Co.'s Appeal, 122 Pa. St. 154, 15 Atl. 446, 9 Am. St. Rep. 79, 1 L. R. A. 285 [*affirming* 3 Pa. Co. Ct. 628]; Hagan *v.* Fayette Gas-Fuel Co., 21 Pa. Co. Ct. 503.

Tennessee.— Memphis Gayoso Gas Co. *v.* Williamson, 9 Heisk. 314.

West Virginia.— Parkersburg Gas Co. *v.* Parkersburg, 30 W. Va. 435, 4 S. E. 650.

United States.— See Memphis *v.* Dean, 8 Wall. 64, 19 L. ed. 326.

In New Jersey the rule has been laid down that the granting of a franchise to place gas-pipes in the streets of a city is, by its own intrinsic force and without express words, exclusive against all persons except the state, and that any attempt to exercise like rights and privileges without legislative authority is a fraud and an unwarrantable usurpation of power which a court of equity will enjoin. Jersey City Gas Co. *v.* Dwight, 29 N. J. Eq. 242. *Compare* Norwich Gas Light Co. *v.* Norwich City Gas Co., 25 Conn. 19.

16. Circleville Light, etc., Co. *v.* Buckeye Gas Co., 69 Ohio St. 259, 69 N. E. 436; Warren Gas Light Co. *v.* Pennsylvania Gas Co., 161 Pa. St. 510, 29 Atl. 101; Emerson *v.* Com., 108 Pa. St. 111; Hagan *v.* Fayette Gas-Fuel Co., 21 Pa. Co. Ct. 503. See also Findlay Gaslight Co. *v.* Findlay, 2 Ohio Cir. Ct. 237, 1 Ohio Cir. Dec. 463.

17. Scranton Electric Light, etc., Co.'s Appeal, 122 Pa. St. 154, 15 Atl. 446, 9 Am. St. Rep. 79, 1 L. R. A. 285 [*affirming* 3 Pa. Co. Ct. 628]; Parkersburg Gas Co. *v.* Parkersburg, 30 W. Va. 435, 4 S. E. 650; Saginaw Gas-Light Co. *v.* Saginaw, 28 Fed. 529.

18. Chicago Gas-Light, etc., Co. *v.* People's Gas-Light, etc., Co., 121 Ill. 530, 13 N. E. 169, 2 Am. St. Rep. 124; Brunswick Gas Light Co. *v.* United Gas, etc., Co., 85 Me. 532, 27 Atl. 525, 35 Am. St. Rep. 385; Bath Gas Light Co. *v.* Claffy, 74 Hun (N. Y.) 638, 26 N. Y. Suppl. 287. See Brooklyn *v.* Fulton Municipal Gas Co., 7 Abb. N. Cas. (N. Y.) 19. And see CORPORATIONS, 10 Cyc. 1090 note 96 *et seq.*, 1092 note 6 *et seq.* *Compare* Detroit *v.* Mutual Gaslight Co., 43 Mich. 594, 5 N. W. 1039 (holding that when a corporation is regularly organized under the laws of Michigan, and acquires rights, property, and franchises thereunder, such rights, property, and franchises may be mortgaged or conveyed in the same manner as property of an individual, subject only to such restrictions as the legislature may have imposed); Lawrence *v.* Hennessy, 165 Mo. 659, 65 S. W. 717; Brooklyn *v.* Jourdan, 7 Abb. N. Cas. (N. Y.) 23.

Arrangement held not to amount to contract with third person to carry on works.— In Marlborough Gas Light Co. *v.* Neal, 166 Mass. 217, 44 N. E. 139, it was held that an arrangement by which a gas company undertook to make, at the risk and expense of certain persons, a full and fair trial of the latter's process for manufacturing gas while carrying on its own works, and not an arrangement under which the gas-works were to be carried on by the owners of the new process, was not a contract within the meaning of the statute in Massachusetts providing that no gas company shall transfer a franchise, lease its works, or contract with any person, association, or corporation to carry on its works without the authority of the legislature.

Transfer of privileges and appurtenances construed.— Where the purchaser at a foreclosure sale of a valid franchise to a gas company from a city to use the streets for its pipes and mains by deed conveyed all the property "with all and singular the rights, privileges and appurtenances and immunities thereto belonging or in any way appertaining," it was held that the right to use the streets for pipes and mains was a necessary appurtenance to the gas business and therefore passed by the deed; and the grantor was entitled to recover the contract price of the property sold; and further, that where the city, at the time the ordinance granting the franchise was made, had the authority to pass the ordinance without the consent of the voters, the fact that no such consent was given was no defense to the action, although a subsequent statute required such consent. Lawrence *v.* Hennessy, 165 Mo. 659, 65 S. W. 717.

where it reserves to itself the right and duty to meet any demand which may lawfully be made upon it by the public.[19]

F. Effect of Consolidation of Gas Companies. Where two or more gas companies exercising franchises are consolidated by statute, the consolidated company, as a general rule, becomes vested with all the rights, privileges, and franchises of the constituent companies, except in so far as it is otherwise provided by the act under which the consolidation takes place, or by other applicatory constitutional or legislative provisions.[20] On the other hand it is a general rule that a special statutory exemption, such as the exemption of a gas company from the right of regulation of the price of gas, does not pass to a new corporation succeeding others by consolidation or purchase, in the absence of express direction to that effect in the statute; and this rule has been held applicable where the constituent companies are merely owned and operated by one of them as authorized by the legislature.[21]

G. Enjoining Interference With Exercise of Privileges.[22] Injunction is a proper remedy to prevent interference with the exercise of privileges and franchises granted to a gas company.[23] The fact that the interference and obstruction to some extent takes the form of criminal arrest and proceedings will not defeat a court of equity in the exercise of its jurisdiction to protect property and property rights.[24]

H. Public Character of Business. The manufacture and distribution of gas for light, fuel, or power, by means of pipes or conduits placed under legislative authority in streets or other public ways, is a business of a public character;[25] and the franchise for supplying it not only confers a privilege, but as a considera-

Authority of gas company to purchase stock in another company.— Where a charter in express terms confers upon a corporation power to maintain and operate works for the manufacture and sale of gas, it is not a necessary implication therefrom that the power to purchase stock in other gas companies should also exist, even though such power is specified in its articles of incorporation. People *v.* Chicago Gas Trust Co., 130 Ill. 268, 22 N. E. 798, 17 Am. St. Rep. 319, 8 L. R. A. 497.

19. St. Louis *v.* St. Louis Gaslight Co., 70 Mo. 69. See also Chicago Gas-Light, etc., Co. *v.* People's Gas-Light, etc., Co., 121 Ill. 530, 13 N. E. 169, 2 Am. St. Rep. 124.

20. Fee *v.* New Orleans Gas Light Co., 35 La. Ann. 413; Baltimore City Consol. Gas Co. *v.* Baltimore County, 98 Md. 689, 57 Atl. 29; People's Gas Light, etc., Co. *v.* Hale, 94 Ill. App. 406. See also CORPORATIONS, 10 Cyc. 303 *et seq.*

Restriction to powers exercised by constituent companies.— Where a corporation is created by the consolidation of several distinct corporations, the charter of the new corporation conferring upon it merely the franchises of the several constituent corporations, the new corporation has no power that was not enjoyed by at least one of the separate corporations. Covington Gas Light Co. *v.* Covington, 58 S. W. 805, 22 Ky. L. Rep. 796.

Legislative authority to consolidate see Fee *v.* New Orleans Gas Light Co., 35 La. Ann. 413; New Orleans Gas-Light Co. *v.* Louisiana Light, etc., Producing, etc., Co., 115 U. S. 650, 6 S. Ct. 252, 29 L. ed. 516. See also CORPORATIONS, 10 Cyc. 288 *et seq.*

21. People's Gas Light, etc., Co. *v.* Chicago, 194 U. S. 1, 24 S. Ct. 520, 48 L. ed. 851.

22. **Injunctions** generally see INJUNCTIONS.

23. Newport *v.* Newport Light Co., 84 Ky. 166; Jersey City Gas Co. *v.* Dwight, 29 N. J. Eq. 242.

24. Atlanta *v.* Gate City Gas Light Co., 71 Ga. 106; La Harpe *v.* Elm Tp. Gas, etc., Co., 69 Kan. 97, 76 Pac. 448.

25. People *v.* Chicago Gas Trust Co., 130 Ill. 268, 22 N. E. 798, 17 Am. St. Rep. 319, 8 L. R. A. 497; Chicago Gas-Light, etc., Co. *v.* People's Gas-Light, etc., Co., 121 Ill. 530, 13 N. E. 169, 2 Am. St. Rep. 124; La Harpe *v.* Elm Tp. Gas, etc., Co., 69 Kan. 97, 76 Pac. 448; Gibbs *v.* Baltimore City Consol. Gas Co., 130 U. S. 396, 9 S. Ct. 553, 32 L. ed. 979; New Orleans Gas-Light Co. *v.* Louisiana Light, etc., Producing, etc., Co., 115 U. S. 650, 6 S. Ct. 252, 29 L. ed. 516.

Gas company a corporation of a public nature.— Gas companies are generally regarded as public corporations or corporations of a public character.

Indiana.— Portland Natural Gas, etc., Co. *v.* State, 135 Ind. 54, 34 N. E. 818, 21 L. R. A. 639.

Maine.— Twin Village Water Co. *v.* Damariscotta Gas Light Co., 98 Me. 325, 56 Atl. 1112.

Michigan.— Williams *v.* Mutual Gas. Co., 52 Mich. 499, 18 N. W. 236, 50 Am. Rep. 266.

New York.—Schmeer *v.* Syracuse Gas Light Co., 147 N. Y. 529, 42 N. E. 202, 30 L. R. A. 653. *Compare* New York Cent., etc., R. Co. *v.* Metropolitan Gaslight Co., 63 N. Y. 326.

Pennsylvania.— Pittsburgh's Appeal, 123 Pa. St. 374, 16 Atl. 621.

tion for this privilege imposes an obligation upon the grantee to serve the public in a reasonable way.[26] The performance of this obligation may be enforced by the courts,[27] and a gas company cannot disable itself by contract from making such performance.[28]

II. SUPPLY OF GAS TO CONSUMERS.

A. Duty to Supply — 1. In General. In some jurisdictions the rule has been laid down that, in the absence of a contract or any provision in the charter of a gas company on the subject, the company is under no greater obligation to supply consumers than the manufacturers and vendors of other commodities.[29] But the weight of authority under statute[30] and apart from statute[31] is in favor of the general rule that in return for the right of laying its mains and pipes in the

Compare Com. *v.* Lowell Gas Light Co., 12 Allen (Mass.) 75.

26. Williams *v.* Mutual Gas Co., 52 Mich. 499, 18 N. W. 236, 50 Am. Rep. 266; Woodhaven Gas Light Co. *v.* People, 153 N. Y. 528, 47 N. E. 787. See also Chicago Gas-Light, etc., Co. *v.* People's Gas-Light, etc., Co., 121 Ill. 530, 13 N. E. 169, 2 Am. St. Rep. 124.

Where a municipal corporation grants by ordinance the privilege of laying pipes in its streets, by a gas company, and imposes conditions and duties upon the right to exercise the privilege, the acceptance of the rights and privileges under the grant, by the gas company, necessarily amounts to a contract to observe the conditions and perform the duties called for by the grant. Allegheny *v.* People's Natural Gas, etc., Co., 172 Pa. St. 632, 33 Atl. 704; Freeport Borough School Dist. *v.* Enterprise Natural Gas Co., 18 Pa. Super. Ct. 73; Sandy Lake Borough *v.* Sandy Lake, etc., Gas Co., 16 Pa. Super. Ct. 234; Sewickley Borough *v.* Ohio Valley Gas Co., 6 Pa. Co. Ct. 99.

27. Brunswick Gas Light Co. *v.* United Gas, etc., Co., 85 Me. 532, 27 Atl. 525, 35 Am. St. Rep. 385.

28. Chicago Gas-Light, etc., Co. *v.* People's Gas-Light, etc., Co., 121 Ill. 530, 13 N. E. 169, 2 Am. St. Rep. 124; Gibbs *v.* Baltimore City Consol. Gas Co., 130 U. S. 396, 9 S. Ct. 553, 32 L. ed. 979. See also *supra*, I, E.

29. McCune *v.* Norwich City Gas Co., 30 Conn. 521, 79 Am. Dec. 278; Com. *v.* Lowell Gas Light Co., 12 Allen (Mass.) 75; Hoddesdon Gas, etc., Co. *v.* Haselwood, 6 C. B. N. S. 239, 5 Jur. N. S. 1013, 28 L. J. C. P. 268, 7 Wkly. Rep. 415, 95 E. C. L. 239.

30. Gallagher *v.* Equitable Gas Light Co., 141 Cal. 699, 75 Pac. 329; Smith *v.* Capital Gas Co., 132 Cal. 209, 64 Pac. 258, 54 L. R. A. 767; Schmeer *v.* Syracuse Gas Light Co., 147 N. Y. 529, 42 N. E. 202, 30 L. R. A. 653; Jones *v.* Rochester Gas, etc., Co., 7 N. Y. App. Div. 474, 39 N. Y. Suppl. 1110 [*affirmed* in 158 N. Y. 678]; Jones *v.* Rochester Gas, etc., Co., 7 N. Y. App. Div. 465, 39 N. Y. Suppl. 1105; People *v.* Manhattan Gas Light Co., 45 Barb. (N. Y.) 136; Ferguson *v.* Metropolitan Gas Light Co., 37 How. Pr. (N. Y.) 189.

Consent to removal of meter as affecting subsequent right to demand gas see Jones *v.* Rochester Gas, etc., Co., 7 N. Y. App. Div. 474, 39 N. Y. Suppl. 1110 [*affirmed* in 158 N. Y. 678, 52 N. E. 1124].

Statute authorizing requirement of deposit by consumer see Bennett *v.* Eastchester Gaslight Co., 40 N. Y. App. Div. 169, 57 N. Y. Suppl. 847.

Sufficiency of form and service of application required by statute see Jones *v.* Rochester Gas, etc., Co., 7 N. Y. App. Div. 465, 39 N. Y. Suppl. 1105.

Location of premises as affecting duty under statute to supply gas see Jones *v.* Rochester Gas, etc., Co., 7 N. Y. App. Div. 465, 39 N. Y. Suppl. 1105.

31. *Illinois.*— People's Gas Light, etc., Co. *v.* Hale, 94 Ill. App. 406.

Indiana.— Indiana Natural Gas, etc., Co. *v.* State, 162 Ind. 690, 71 N. E. 133; Indiana Natural, etc., Gas Co. *v.* State, 158 Ind. 516, 63 N. E. 220, 57 L. R. A. 761; State *v.* Consumers' Gas Trust Co., 157 Ind. 345, 61 N. E. 674, 55 L. R. A. 245; Coy *v.* Indianapolis Gas Co., 146 Ind. 655, 46 N. E. 17, 36 L. R. A. 535; Portland Natural Gas, etc., Co. *v.* State, 135 Ind. 54, 34 N. E. 818, 21 L. R. A. 639; Rushville *v.* Rushville Natural Gas Co., 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321.

Louisiana.— State *v.* New Orleans Gaslight Co., 108 La. 67, 32 So. 179; New Orleans Gas Light, etc., Co. *v.* Paulding, 12 Rob. 378.

Maine.— See Brunswick Gas Light Co. *v.* United Gas, etc., Co., 85 Me. 532, 27 Atl. 525, 35 Am. St. Rep. 385.

Michigan.— Williams *v.* Mutual Gas Co., 52 Mich. 499, 18 N. W. 236, 50 Am. Rep. 266.

New Jersey.— See Public Service Corp. *v.* American Lighting Co., (Ch. 1904) 57 Atl. 482; Olmsted *v.* Morris Aqueduct, 47 N. J. L. 311. *Compare* Paterson Gas Light Co. *v.* Brady, 27 N. J. L. 245, 72 Am. Dec. 360.

Ohio.— Toledo *v.* Northwestern Ohio Natural Gas Co., 8 Ohio S. & C. Pl. Dec. 277, 6 Ohio N. P. 531.

Oregon.— Haugan *v.* Albina Light, etc., Co., 21 Oreg. 411, 28 Pac. 244, 14 L. R. A. 424.

Pennsylvania.— See Hoehle *v.* Allegheny Heating Co., 5 Pa. Super. Ct. 21. *Compare* Com. *v.* Wilkes-Barre Gas Co., 2 Kulp 499.

West Virginia.— Charleston Natural Gas Co. *v.* Lowe, 52 W. Va. 662, 44 S. E. 410.

Wisconsin.— Shepard *v.* Milwaukee Gaslight Co., 6 Wis. 539, 70 Am. Dec. 479.

See 24 Cent. Dig. tit. "Gas," § 7.

public streets and highways, a gas company assumes the duty to furnish gas to all persons who have made the necessary arrangements to receive it and applied therefor, and who pay or offer to pay the price and abide by all the reasonable rules and regulations of the company. A foreign corporation, however, having no franchise within the state, and being neither a citizen nor householder of the municipality in which the gas-works are established, has no standing in its own right to demand and receive a supply of gas from a domestic corporation, for any purpose whatever.[32]

2. Effect of Non-Payment of Arrearages. It is a general rule both under statute[33] and apart from statute[34] that a gas company may refuse to furnish a consumer with a further supply of gas because of the non-payment of arrearages for

Charter provisions requiring supply of gas see Miller *v.* Wilkes-Barre Gas Co., 206 Pa. St. 254, 55 Atl. 974; Corbet *v.* Oil City Fuel Supply Co., 21 Pa. Super. Ct. 80; Com. *v.* Wilkes-Barre Gas Co., 2 Kulp (Pa.) 499.

Validity of ordinance requiring supply of gas to consumers.— A provision that natural gas companies shall supply all individuals along their lines requiring it, on payment of reasonable security, is valid, and within the power of a city to impose by ordinance. Rushville *v.* Rushville Natural Gas Co., 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321.

Removing mixer by consumer as affecting company's right to discontinue supply see Indiana Natural, etc., Gas Co. *v.* Anthony, 26 Ind. App. 307, 58 N. E. 868.

Statute forbidding interference with pipes of another company as constituting no defense see Portland Natural Gas, etc., Co. *v.* State, 135 Ind. 54, 34 N. E. 818, 21 L. R. A. 639.

Deficiency in production as excuse for failure to supply gas.— In Indiana Natural, etc., Gas Co. *v.* Anthony, 26 Ind. App. 307, 58 N. E. 868, it was held that it is no defense to an action for the failure to supply gas to a customer for the gas company to prove that it had no gas, or that it furnished all the gas it had, so long as it retained the money received in advance for the payment of gas. And in State *v.* Consumers' Gas Trust Co., 157 Ind. 345, 61 N. E. 674, 55 L. R. A. 245, it was held that a gas company enjoying franchises in the use of the streets of a municipality cannot refuse to furnish gas to a citizen in front of whose premises the company's pipes were laid, on the ground that there was an unavoidable deficiency in the amount of gas produced by it, and that if it furnished gas to such citizen it would inconvenience other patrons.

Introduction into premises of other means of lighting a defense.— Fleming *v.* Montgomery Light Co., 100 Ala. 657, 13 So. 618; Adams Express Co. *v.* Cincinnati Gas Light, etc., Co., 10 Ohio Dec. (Reprint) 389, 21 Cinc. L. Bul. 18.

Contracts for supply construed see Harlan *v.* Logansport Natural Gas Co., 133 Ind. 323, 32 N. E. 930; Graves *v.* Key City Gas Co., 93 Iowa 470, 61 N. W. 937; People's Natural Gas Co. *v.* Braddock Wire Co., 155 Pa. St. 22, 25 Atl. 749; Crescent Steel Co. *v.* Equitable Gas Co., 40 Pittsb. Leg. J. (Pa.) 316; Bridgewater Gas Co. *v.* Home Gas Fuel Co., 59 Fed. 40, 7 C. C. A. 652.

32. Public Service Corp. *v.* American Lighting Co., (N. J. Ch. 1904) 57 Atl. 482; American Lighting Co. *v.* Public Service Corp., 132 Fed. 794.

33. People *v.* Manhattan Gas Light Co., 45 Barb. (N. Y.) 136 (where it is said: "If at any time the party is so indebted, the company may refuse to furnish, and more especially should this be so when the relator avows his insolvency and his inability to pay for gas furnished previously"); Morey *v.* Metropolitan Gas Light Co., 38 N. Y. Super. Ct. 185; Gas Light, etc., Co. *v.* Cannon Brewery Co., [1903] 1 K. B. 593, 67 J. P. 192, 72 L. J. K. B. 308, 88 L. T. Rep. N. S. 314, 51 Wkly. Rep. 565; *In re* Smith, [1893] 1 Q. B. 323, 57 J. P. 72, 67 L. T. Rep. N. S. 596, 9 Morr. Bankr. Cas. 304.

Where a dispute arises as to the amount of gas consumed and the consequent indebtedness to the company, and the evidence on this question is conflicting, it has been held that the consumer is entitled to an injunction to prevent the cutting off of the supply of gas until the cause can be tried. Sickles *v.* Manhattan Gas-Light Co., 66 How. Pr. (N. Y.) 314, 64 How. Pr. 33. See also Matter of Canada Commercial Bank, 20 U. C. Q. B. 233, holding that a statute authorizing a gas company to discontinue the supply of gas until the payment of unsettled amounts for gas already consumed did not apply to a charge made for a special service about the price of which there might be some dispute.

Whether consumer is in arrears a question for the jury.— Bennett *v.* Eastchester Gaslight Co., 40 N. Y. App. Div. 169, 57 N. Y. Suppl. 847; Morey *v.* Metropolitan Gas Light Co., 38 N. Y. Super. Ct. 185.

Right to refuse supply not waived by prior indulgence of consumer for definite period.— Where a person applies to a gas company for gas and it is furnished to him for a period, without objection on account of a former indebtedness, this will not deprive the company of a right to reject the second application on the ground of such indebtedness. People *v.* Manhattan Gas Light Co., 45 Barb. (N. Y.) 136.

34. Detroit Gas Co. *v.* Moreton Truck, etc., Co., 111 Mich. 401, 69 N. W. 659. See also Hitchcock *v.* Essex, etc., Gas Co., 70 N. J.

gas already consumed; and if the meter on the consumer's premises belongs to the gas company it may remove the same.[35] But a gas company has no right to require the owner or occupant of a building to pay arrearages due by a former owner or occupant, as a condition of further supplying gas,[36] at least in the absence of a rule of the company to this effect, which has been brought to the notice of the consumer by resolution or otherwise.[37] The rule that a gas company has the right to discontinue the supply of gas to a customer at one set of premises until payment shall be made of a delinquent bill for gas furnished him at another has been laid down in some jurisdictions under statute,[38] and apart from statute, where this course was in accordance with the rules of the gas company at the time the contract with the consumer was made.[39] But in other jurisdictions under the particular terms of the contract in controversy a different rule has been laid down.[40]

3. Rules and Regulations. A gas company may, in the discharge of its duties to the consumer, govern its action by reasonable rules and regulations, and when it has done so all persons dealing with it, as well as the company itself, must yield obedience thereto.[41] Since, however, the business of supplying gas to con-

L. 492, 57 Atl. 135; Miller *v.* Wilkes-Barre Gas Co., 206 Pa. St. 254, 55 Atl. 974.

Rule applied to city operating gas-works.— Bellaire Goblet Co. *v.* Findlay, 5 Ohio Cir. Ct. 418, 3 Ohio Cir. Dec. 205.

Solvency of consumer immaterial.— Bellaire Goblet Co. *v.* Findlay, 5 Ohio Cir. Ct. 418, 3 Ohio Cir. Dec. 205.

Rule applied to non-payment of cost of piping and making connections.— Detroit Gas Co. *v.* Moreton Truck, etc., Co., 111 Mich. 401, 69 N. W. 659, holding that a gas company, under a contract to place pipes in a building and furnish gas, has the right to remove its meter from the building on refusal of the owner to pay under such contract the cost of furnishing and laying the pipes, the same as for a breach of the contract by non-payment of a bill for gas, and may maintain replevin for it.

Reasonableness of regulation requiring payment of arrearages see *infra*, II, A, 3.

35. Detroit Gas Co. *v.* Moreton Truck, etc., Co., 111 Mich. 401, 69 N. W. 656.

Removal of meter in pursuance of agreement no ground for action for damages.— Hitchcock *v.* Essex, etc., Gas Co., 70 N. J. L. 492, 57 Atl. 135.

36. New Orleans Gas Light, etc., Co. *v.* Paulding, 12 Rob. (La.) 378.

Rule applied under statute in New York see Morey *v.* Metropolitan Gas Light Co., 38 N. Y. Super. Ct. 185.

Different rule under statute in England see Gas Light, etc., Co. *v.* Cannon Brewery Co., [1903] 1 K. B. 593, 67 J. P. 192, 72 L. J. K. B. 308, 88 L. T. Rep. N. S. 314, 51 Wkly. Rep. 565 [*overruling* Gas Light, etc., Co. *v.* Mead, 45 L. J. M. C. 71, 33 L. T. Rep. N. S. 729]; *In re* Smith, [1893] 1 Q. B. 323, 57 J. P. 72, 67 L. T. Rep. N. S. 596, 9 Morr. Bankr. Cas. 304, 41 Wkly. Rep. 159.

Agreement to pay arrearages of predecessor under threats held invalid.— New Orleans Gas Light, etc., Co. *v.* Paulding, 12 Rob. (La.) 378.

37. Miller *v.* Wilkes-Barre Gas Co., 206 Pa. St. 254, 55 Atl. 974.

Provision in ordinance of municipality supplying gas operating as notice.— Com *v.* Philadelphia, 132 Pa. St. 288, 19 Atl. 136.

38. Bennett *v.* Eastchester Gaslight Co., 40 N. Y. App. Div. 169, 57 N. Y. Suppl. 847; People *v.* Manhattan Gas Light Co., 45 Barb. (N. Y.) 136; Montreal Gas Co. *v.* Cadieux, [1899] A. C. 589, 68 L. J. P. C. 126, 81 L. T. Rep. N. S. 274 [*reversing* 28 Can. Sup. Ct. 382]. *Compare* Smith *v.* London Gas Co., 7 Grant Ch. (U. C.) 112.

39. Mackin *v.* Portland Gas Co., 38 Oreg. 120, 61 Pac. 134, 62 Pac. 20, 49 L. R. A. 596.

40. Lloyd *v.* Washington Gaslight Co., 1 Mackey (D. C.) 331; Baltimore Gaslight Co. Co. *v.* Colliday, 25 Md. 1.

41. *Maryland.*— Blondell *v.* Baltimore City Consol. Gas Co., 89 Md. 732, 43 Atl. 817, 46 L. R. A. 187.

Michigan.— Williams *v.* Mutual Gas Co., 52 Mich. 499, 18 N. W. 236, 50 Am. Rep. 266.

Missouri.— State *v.* Sedalia Gas Light Co., 34 Mo. App. 501, 506, where it is said that a gas company may "adopt and enforce such reasonable and just rules and regulations as may be necessary to protect its interests and further the designs of its incorporation."

Pennsylvania.— Foster *v.* Philadelphia Gas Works, 12 Phila. 511.

Wisconsin.— Shepard *v.* Milwaukee Gas Light Co., 6 Wis. 539, 548, where it is said: "They have a right to make all such needful rules and regulations for their own and the convenience and security of the public, as are reasonable and just, and to exact a promise of conformity thereto."

See 24 Cent. Dig. tit. "Gas," § 6.

Regulations held reasonable.— It has been held reasonable for a gas company to adopt and enforce a regulation requiring applications to be made in writing (Shepard *v.* Milwaukee Gas Light Co., 15 Wis. 318, 82 Am. Dec. 679, 11 Wis. 234, 6 Wis. 539, 70 Am. Dec. 479), or requiring a deposit or security for the payment of gas to be consumed (Owensboro Gaslight Co. *v.* Hildebrand, 42 S. W. 351, 19 Ky. L. Rep. 983; Williams *v.*

sumers as generally conducted is effected with a public interest, the rules and regulations of a gas company must be applicable to all consumers alike.[42]

4. Duty to Furnish Meters. In the absence of statute[43] it has been held that the obligation of a gas company to supply a dwelling or tenement with gas, and for that purpose to lay down a supply pipe and set a meter, is subject to the limitation that there shall exist a reasonable expectation that the consumption of gas shall be sufficient to warrant the necessary preliminary expenditure.[44]

B. Remedies For Failure or Refusal to Supply Gas — 1. In General. A gas company will be liable to an action for damages for wrongfully refusing or failing to discharge its duty in supplying a consumer with gas.[45] And, although

Mutual Gas Co., 52 Mich. 499, 18 N. W. 236, 50 Am. Rep. 266; Shepard *v.* Milwaukee Gaslight Co., 6 Wis. 539, 70 Am. Dec. 479. See also Bennett *v.* Eastchester Gaslight Co., 40 N. Y. App. Div. 169, 57 N. Y. Suppl. 847), the payment of reasonable rental for meters (State *v.* Sedalia Gas Light Co., 34 Mo. App. 501), or payment of arrearages whether owing by the tenant in possession (Mackin *v.* Portland Gas Co., 38 Oreg. 120, 61 Pac. 134, 62 Pac. 20, 49 L. R. A. 596), or by a predecessor (Miller *v.* Wilkes-Barre Gas Co., 206 Pa. St. 254, 55 Atl. 974), or requiring that all governors shall be connected with the gas-pipe at least one foot from the meter (Foster *v.* Philadelphia Gas Works, 12 Phila. (Pa.) 511. See also Blondell *v.* Baltimore City Consol. Gas Co., 89 Md. 732, 43 Atl. 817, 46 L. R. A. 187).

Regulations held unreasonable.— It has been held unreasonable for a gas company to make a rule authorizing the company, by their inspector, to have free access at all times to buildings and dwellings to examine the whole apparatus and for the removal of the meter and service pipe (Shepard *v.* Milwaukee Gas Light Co., 6 Wis. 539, 70 Am. Dec. 479); or reserving to the company the right at any time to cut off communication of the service pipe, if they shall find it necessary to do so to protect the works against abuse or fraud (Shepard *v.* Milwaukee Gas Light Co., *supra*); or providing that after the admission of gas into the fittings, they must not be disconnected or opened, either for alterations or repairs, or extension, without a permit of the company which may be obtained at their office free of expense; and any gas fitter or other person who may violate this regulation shall be held liable to pay treble the amount of damages occasioned thereby (Shepard *v.* Milwaukee Gas Light Co., *supra*).

Waiver of rules.— Citizens' Gas, etc., Min. Co. *v.* Whipple, 32 Ind. App. 203, 69 N. E. 557; Shepard *v.* Milwaukee Gas Light Co., 15 Wis. 318, 82 Am. Dec. 679, 11 Wis. 234. *Compare* Blondell *v.* Baltimore City Consol. Gas Co., 89 Md. 732, 43 Atl. 817, 46 L. R. A. 187.

Burden of proof.— In the absence of proof, and unless the requirement is unreasonable on its face, the presumption is that it is reasonable, and plaintiff must overcome the presumption either by argument from the requirement itself or by affirmative proof extrinsic of it. Bennett *v.* Eastchester Gaslight Co., 40 N. Y. App. Div. 169, 57 N. Y. Suppl. 847.

42. Owensboro Gaslight Co. *v.* Hildebrand, 42 S. W. 351, 19 Ky. L. Rep. 983.

43. By statute gas companies are sometimes required to place upon the premises of every consumer an apparatus or meter for registering the consumption of gas. Blondell *v.* Baltimore City Consol. Gas Co., 89 Md. 732, 43 Atl. 817, 46 L. R. A. 187.

44. Public Service Corp. *v.* American Lighting Co., (N. J. Ch. 1904) 57 Atl. 482. See also Smith *v.* Capital Gas Co., 132 Cal. 209, 64 Pac. 258, 54 L. R. A. 769.

Duty to furnish separate meters for different floors.— In Ferguson *v.* Metropolitan Gaslight Co., 37 How. Pr. (N. Y.) 189, it was held that a gas company is not bound to furnish a separate meter for each floor of a house, unless the owner or occupant puts in separate and independent service pipes to connect with the meter.

Use of electricity by consumer as ground for removal of gas meter.— It has been held that a gas company which has been granted the exclusive privilege of supplying gas in a city for a certain number of years under an agreement that at all times it would supply the citizens for private use with a sufficient quantity of gas need not leave a gas meter in the house of a citizen who is using electric light, furnished by another company, so that in case of accident to the electric light he may use the gas. Fleming *v.* Montgomery Light Co., 100 Ala. 657, 13 So. 618. See also Adams Express Co. *v.* Cincinnati Gas Light, etc., Co., 10 Ohio Dec. (Reprint) 389, 21 Cinc. L. Bul. 18.

45. Coy *v.* Indianapolis Gas Co., 146 Ind. 655, 46 N. E. 17, 36 L. R. A. 535; Indiana Natural, etc., Gas Co. *v.* Anthony, 26 Ind. App. 307, 58 N. E. 868; Hoehle *v.* Allegheny Heating Co., 5 Pa. Super. Ct. 21; Matter of Canada Commercial Bank, 20 U. C. Q. B. 233. *Compare* McCune *v.* Norwich City Gas Co., 30 Conn. 521, 79 Am. Dec. 278.

Amount and measure of damages see Coy *v.* Indianapolis Gas Co., 146 Ind. 655, 46 N. E. 17, 36 L. R. A. 535; Baltimore Gaslight Co. *v.* Colliday, 25 Md. 1; Detroit Gas Co. *v.* Moreton Truck, etc., Co., 111 Mich. 401, 69 N. W. 659; Morey *v.* Metropolitan Gas Light Co., 38 N. Y. Super. Ct. 185; Miller *v.* Wilkes-Barre Gas Co., 206 Pa. St. 254, 55 Atl. 974; Boal *v.* Citizens' Nat. Gas Co., 23 Pa. Super.

it may at the same time be guilty of a breach of contract in failing to furnish gas, it will be liable to an action in tort[46] as well as on the contract,[47] since in such case the contract is but a statement of the reasonable conditions under which the company is required to perform its duty.[48] So the consumer has a remedy by mandamus where the supply has not yet been commenced,[49] or in equity where the supply is being furnished to enjoin its stoppage.[50]

2. Action to Enforce Statutory Penalty. In some of the states penalties are imposed by statute for the failure or refusal on the part of a gas company to supply consumers with gas under prescribed conditions.[51] To render a gas company liable in an action for a penalty, the cause of action as in the case of other penal

Ct. 339; Shepard *v.* Milwaukee Gas Light Co., 15 Wis. 318, 82 Am. Dec. 679.

46. Coy *v.* Indianapolis Gas Co., 146 Ind. 655, 46 N. E. 17, 36 L. R. A. 535; Indiana Natural, etc., Gas Co. *v.* Anthony, 26 Ind. App. 307, 58 N. E. 868; Hoehle *v.* Allegheny Heating Co., 5 Pa. Super. Ct. 21.

47. Lloyd *v.* Washington Gaslight Co., 1 Mackey (D. C.) 331; Baltimore Gaslight Co. *v.* Colliday, 25 Md. 1.

48. Coy *v.* Indianapolis Gas Co., 146 Ind. 655, 46 N. E. 17, 36 L. R. A. 535; Indiana Natural, etc., Gas Co. *v.* Anthony, 26 Ind. App. 307, 58 N. E. 868.

49. *Indiana.*— State *v.* Consumers' Gas Trust Co., 157 Ind. 345, 61 N. E. 674, 55 L. R. A. 245; Portland Natural Gas, etc., Co. *v.* State, 135 Ind. 54, 34 N. E. 818, 21 L. R. A. 639.

New Jersey.—Public Service Corp. *v.* American Lighting Co., (Ch. 1904) 57 Atl. 482; Johnson *v.* Atlantic City Gas, etc., Co., 65 N. J. Eq. 129, 56 Atl. 550.

New York.— People *v.* Manhattan Gas Light Co., 45 Barb. 136.

Oregon.— Mackin *v.* Portland Gas Co., 38 Oreg. 120, 61 Pac. 134, 62 Pac. 20, 49 L. R. A. 596.

Pennsylvania.— Miller *v.* Wilkes-Barre Gas Co., 206 Pa. St. 254, 55 Atl. 974; Com. *v.* Wilkes-Barre Gas Co., 2 Kulp 499. See also Com. *v.* Philadelphia, 132 Pa. St. 288, 19 Atl. 136.

Compare Matter of Canada Commercial Bank, 20 U. C. Q. B. 233.

Mandamus generally see Mandamus.

50. Public Service Corp. *v.* American Lighting Co., (N. J. Ch. 1904) 57 Atl. 482; Sickles *v.* Manhattan Gas-Light Co., 66 How. Pr. (N. Y.) 314; Corbet *v.* Oil City Fuel Supply Co., 21 Pa. Super. Ct. 80.

Injunctions generally see Injunctions.

Specific performance of contract to supply gas see Conemaugh Gas Co. *v.* Jackson Farm Gas Co., 186 Pa. St. 443, 40 Atl. 1000, 65 Am. St. Rep. 865.

51. Smith *v.* Capital Gas Co., 132 Cal. 209, 64 Pac. 258, 54 L. R. A. 769; Wilson *v.* Tennent, 179 N. Y. 546, 71 N. E. 1142; Bennett *v.* Eastchester Gaslight Co., 54 N. Y. App. Div. 74, 66 N. Y. Suppl. 292; Ferguson *v.* Metropolitan Gaslight Co., 37 How. Pr. (N. Y.) 189; Clegg *v.* Earby Gas Co., [1896] 1 Q. B. 592; *In re* Richmond Gas Co., [1893] 1 Q. B. 56, 56 J. P. 776, 62 L. J. Q. B. 172, 67 L. T. Rep. N. S. 554, 41 Wkly. Rep. 41; Commercial Gas Co. *v.* Scott, L. R. 10 Q. B. 400, 44 L. J. M. C. 171, 32 L. T. Rep. N. S. 765, 23 Wkly. Rep. 874.

Penalty for failure to give continuous supply of gas see Meiers *v.* Metropolitan Gas Light Co., 11 Daly (N. Y.) 119; Commercial Gas Co. *v.* Scott, L. R. 10 Q. B. 400, 44 L. J. M. C. 171, 32 L. T. Rep. N. S. 765, 23 Wkly. Rep. 874.

Inapplicability of statutory penalty to natural gas company.—Wilson *v.* Tennent, 179 N. Y. 546, 71 N. E. 1142 [*affirming* 61 N. Y. App. Div. 100, 70 N. Y. Suppl. 2], holding that N. Y. Laws (1890), c. 566, §§ 60, 65, 66, authorizing the formation of corporations for manufacturing and supplying gas for lighting streets and for buildings, and providing a penalty for such companies' refusal to supply gas to consumers on application, do not apply to a natural gas company incorporated under Laws (1875), c. 611, known as a "business corporation law," and the acts amendatory thereof.

Sufficiency of application for gas to give rise to penalty see Smith *v.* Capital Gas Co., 132 Cal. 209, 64 Pac. 258, 54 L. R. A. 769; Bennett *v.* Eastchester Gaslight Co., 54 N. Y. App. Div. 74, 66 N. Y. Suppl. 292; Jones *v.* Rochester Gas, etc., Co., 7 N. Y. App. Div. 465, 39 N. Y. Suppl. 1105.

Burden of proof as to unreasonableness of deposit exacted see Bennett *v.* Eastchester Gaslight Co., 54 N. Y. App. Div. 74, 66 N. Y. Suppl. 292, 40 N. Y. App. Div. 169, 57 N. Y. Suppl. 847.

Sufficiency of tender of prior indebtedness see Baker *v.* San Francisco Gas, etc., Co., (Cal. 1904) 75 Pac. 342.

Obtaining gas from another source no defense.— Jones *v.* Rochester Gas, etc., Co., 168 N. Y. 65, 60 N. E. 1044.

Successive actions for penalties see Jones *v.* Rochester Gas, etc., Co., 168 N. Y. 65, 60 N. E. 1044 [*reversing* 64 N. Y. Suppl. 1138]; Jones *v.* Rochester Gas, etc., Co., 158 N. Y. 678, 52 N. E. 1124 [*affirming* 7 N. Y. App. Div. 474, 39 N. Y. Suppl. 1110].

Action for penalty not exclusive.— In Indiana Natural, etc., Gas Co. *v.* Anthony, 26 Ind. App. 307, 58 N. E. 868, it was held that a city ordinance providing a penalty for the failure of a gas company to comply with its conditions in regard to the supply of gas to consumers does not interfere with the right of a person aggrieved to maintain an action in his own behalf and to recover such damages as he may have suffered from the wrongful act of the company.

actions must be strictly proved and every material fact necessary to bring the case within the statute must be affirmatively shown.[52]

C. Charges — 1. Duty of Gas Company. A gas company is bound to furnish gas to all consumers on equal terms[53] and at reasonable rates.[54] In the absence of statutory regulation of the question, it is for the courts to decide what is a reasonable price.[55]

2. Liability of Consumer — a. In General. When a gas company performs its contract by delivering gas to a consumer, it becomes entitled to the stipulated purchase-price if the price is expressly agreed upon,[56] or in the absence of express agreement as to the price to the reasonable value of the gas.[57] Delivery of gas takes place when the gas passes through the company's meter into the consumer's pipes, assuming of course that the meter is not defective so as to register an excessive amount.[58] If, without the company's connivance or fault, gas delivered to a consumer is subsequently diverted from the consumer's premises so that a third person in fact obtains the use thereof, the gas company is not answerable for the loss.[59] A gas company's meter, even after being tested and inspected according to law, is not conclusive on the question of the quantity of gas consumed and charged for, but may be contested by other reliable testimony.[60]

b. Municipality. A municipal corporation will be liable for the stipulated price of gas furnished if the price is expressly agreed upon,[61] or for a reasonable compensation on an implied assumpsit, in the absence of a specific agreement as

52. Smith *v.* Capital Gas Co., 132 Cal. 209, 64 Pac. 258, 54 L. R. A. 769; Bennett *v.* Eastchester Gaslight Co., 40 N. Y. App. Div. 169, 57 N. Y. Suppl. 847.

53. People's Gas Light, etc., Co. *v.* Hale, 94 Ill. App. 406.

Discrimination in price in favor of particular use of gas see Richmond Natural Gas Co. *v.* Clawson, 155 Ind. 659, 58 N. E. 1049, 51 L. R. A. 744; Baily *v.* Fayette Gas-Fuel Co., 193 Pa. St. 175, 44 Atl. 251.

Contract preferring majority stock-holders of gas company see Crescent Steel Co. *v.* Equitable Gas Co., 40 Pittsb. Leg. J. (Pa.) 316.

Discrimination by municipal corporation operating gas plant see Dalzell, etc., Co. *v.* Findlay, 5 Ohio Cir. Ct. 435, 3 Ohio Cir. Dec. 214; Bellaire Goblet Co. *v.* Findlay, 5 Ohio Cir. Ct. 418, 3 Ohio Cir. Dec. 205.

54. *Illinois.*— People's Gas Light, etc., Co. *v.* Hale, 94 Ill. App. 406.

Indiana.— Richmond Natural Gas Co. *v.* Clawson, 155 Ind. 659, 58 N. E. 1049, 51 L. R. A. 744.

Kentucky.— Louisville Gas Co. *v.* Dulaney, 100 Ky. 405, 38 S. W. 703, 36 L. R. A. 125.

Missouri.— State *v.* Sedalia Gas Light Co., 34 Mo. App. 501.

Ohio.— Toledo *v.* Northwestern Ohio Natural Gas Co., 8 Ohio S. & C. Pl. Dec. 277, 6 Ohio N. P. 531.

Pennsylvania.— Waddington *v.* Allegheny Heating Co., 6 Pa. Co. Ct. 96.

Burden on consumer to show exorbitant charges by municipal corporation.— Bellaire Goblet Co. *v.* Findlay, 5 Ohio Cir. Ct. 418, 3 Ohio Cir. Dec. 205.

Supply to municipality.— Where a gas company, having a franchise and virtual monopoly, demands of a city an unreasonable price for gas, the city may offer a reasonable price; and if the gas company refuses to furnish gas at that price the city may obtain a mandamus, if the supply has not been commenced, or may sue in equity to enjoin the stoppage of a supply already being furnished. Public Service Corp. *v.* American Lighting Co., (N. J. Ch. 1904) 57 Atl. 482. But the company is not required to furnish gas at any fixed sum for each lamp supplied; it has a right to demand that the gas be measured. Public Service Corp. *v.* American Lighting Co., (N. J. Ch. 1904) 57 Atl. 482.

55. People's Gas Light, etc., Co. *v.* Hale, 94 Ill. App. 406.

56. Chouteau *v.* St. Louis Gas-Light Co., 47 Mo. App. 326.

Liability of surety see Manhattan Gas Light Co. *v.* Ely, 39 Barb. (N. Y.) 174.

57. Williams *v.* Mutual Gas Co., 52 Mich. 499, 18 N. W. 236, 50 Am. Rep. 266; Chamberlain *v.* Summit Gas Co., 3 Pennyp. (Pa.) 261; London Gas-Light, etc., Co. *v.* Nicholls, 2 C. & P. 365, 12 E. C. L. 620.

58. Chouteau *v.* St. Louis Gas-Light Co., 47 Mo. App. 326.

59. Chouteau *v.* St. Louis Gas-Light Co., 47 Mo. App. 326.

60. Tarrytown, etc., Union Gaslight Co. *v.* Byrd, 19 N. Y. Suppl. 988 (holding that, in an action to recover for illuminating gas, defendants may show that the gas went out by air passing through the tubes, as affecting both the quantity and the quality of the gas consumed); Sickles *v.* Manhattan Gas-Light Co., 66 How. Pr. (N. Y.) 314. *Compare* St. John Gas-Light Co. *v.* Clerk, 17 N. Brunsw. 307.

61. Decatur Gaslight, etc., Co. *v.* Decatur, 24 Ill. App. 544 [*affirmed* in 120 Ill. 67, 11 N. E. 406], holding that an ordinance providing that a gas company shall supply gas "at rates as favorable" as those of another com-

to the price to be paid,[62] provided the liability is one which the municipality is authorized by law to incur.[63] If the contract prescribes the price to be paid during a particular year, it has been held that this price will govern during that year but not during a subsequent year.[64]

3. Municipal Control. In the absence of charter authority or other statutory or constitutional provisions delegating the power in express terms or by necessary implication, it is the rule that a municipal corporation has no power to fix by ordinance the price at which a gas company shall supply its consumers.[65] But the state has power to fix and regulate the price of gas, and this power may

pany in a neighboring city precludes a charge in excess of that charged at the same time by the other company. See also Davenport Gaslight, etc., Co. *v.* Davenport, 15 Iowa 6 (holding that upon the repudiation of the contract by the city, the gas company might withhold the gas and recover the difference between the cost of furnishing and its value by the terms of the contract); Nebraska City *v.* Nebraska City Hydraulic Gas Light, etc., Co., 9 Nebr. 339, 2 N. W. 870.

Act of municipality not amounting to rescission.— In Nebraska City *v.* Nebraska City Hydraulic Gas Light, etc., Co., 9 Nebr. 339, 2 N. W. 870, it was held that a declaration on behalf of the municipality to the effect that it rescinds the contract made by it with the gas company, followed by a refusal on the city's part to perform the contract, but not acquiesced in by the gas company, does not amount to a rescission but simply a breach of the contract for which the gas company in a proper action would be entitled to recover adequate damages. See also Davenport Gaslight, etc., Co. *v.* Davenport, 15 Iowa 6; Davenport Gas Light, etc., Co. *v.* Davenport, 13 Iowa 229.

Inability of municipality to pay immaterial. Davenport Gas Light, etc., Co. *v.* Davenport, 13 Iowa 229.

Effect of illegal promise as to particular fund from which payment is to be made.— In Nebraska City *v.* Nebraska City Hydraulic Gas Light, etc., Co., 9 Nebr. 339, 2 N. W. 870, it was held that, where a city is authorized to contract therefor, it cannot resist payment for gas light furnished because of illegal promises as to the particular fund from which payment would be made, since the consideration of such promises being legal the price would be payable, if not otherwise, out of the general fund.

Nuisance created by gas-works as defense. — In Davenport Gas Light, etc., Co. *v.* Davenport, 13 Iowa 229, it was held that a municipal corporation cannot appropriate for its own use gas furnished by a company and avoid payment therefor on the ground that the works at which it is manufactured are a nuisance, when such works have never been in the proper manner declared a nuisance.

Gas furnished "free of charge."— In some instances the companies are bound by charter or contract to furnish gas to the municipality free of charge in consideration of the privilege of using the streets. Virginia City Gas Co. v. Virginia City, 3 Nev. 320; Saltsburg Gas Co. *v.* Saltsburg, 138 Pa. St. 250, 20 Atl. 844, 10 L. R. A. 193; Pittsburgh Gas Co. *v.* Pittsburgh, 101 U. S. 219, 25 L. ed. 789. See also Sandy Lake Borough *v.* Sandy Lake, etc., Gas Co., 16 Pa. Super. Ct. 234.

Liability of municipality for the amount of federal tax.— In St. Louis Gas Light Co. *v.* St. Louis, 84 Mo. 202 [*affirming* 11 Mo. App. 55], it was held that under a federal statute imposing a tax upon illuminating gas a gas company is authorized to charge against a municipality to which gas is furnished the tax imposed in addition to the contract price. To the same effect see Harlem Gaslight Co. *v.* New York, 33 N. Y. 309. But in Pittsburgh Gas Co. *v.* Pittsburgh, 101 U. S. 219, 25 L. ed. 789, it was held that the statute does not make a municipal corporation liable to the tax in a case where a gas company has for a valuable consideration contracted to furnish the corporation with gas "free of charge."

62. Harlem Gaslight Co. *v.* New York, 33 N. Y. 309.

Implied assumpsit for gas furnished in absence of ordinance see San Francisco Gas Co. *v.* San Francisco, 9 Cal. 453.

Gas furnished under invalid contract.— Cincinnati Gas-Light, etc., Co. *v.* Avondale, 43 Ohio St. 257, 1 N. E. 527.

63. Harlem Gaslight Co. *v.* New York, 33 N. Y. 309.

Power of municipality to make a contract for lighting the city see Municipal Corporations.

Particular contracts with municipalities construed.— Davenport Gaslight, etc., Co. *v.* Davenport, 15 Iowa 6; Davenport Gas Light, etc., Co. *v.* Davenport, 13 Iowa 229; Winfield *v.* Winfield Gas Co., 37 Kan. 24, 14 Pac. 499; St. Paul Gaslight Co. *v.* St. Paul, 91 Minn. 521, 98 N. W. 868, 78 Minn. 39, 80 N. W. 774, 877; St. Louis Gaslight Co. *v.* St. Louis, 46 Mo. 121; Virginia City Gas Co. *v.* Virginia City, 3 Nev. 320; Cincinnati *v.* Cincinnati Gaslight, etc., Co., 53 Ohio St. 278, 41 N. E. 239.

64. Harlem Gaslight Co. *v.* New York, 33 N. Y. 309. *Compare* Taylor *v.* Lambertville, 43 N. J. Eq. 107, 10 Atl. 809.

65. Noblesville *v.* Noblesville Gas, etc., Co., 157 Ind. 162, 60 N. E. 1032; Lewisville Natural Gas Co. *v.* State, 135 Ind. 49, 34 N. E. 702, 21 L. R. A. 734 [*overruling* Rushville *v.* Rushville Natural Gas Co., 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321]; *In re* Pryor, 55 Kan. 724, 41 Pac. 958, 49 Am. St. Rep. 280, 29 L. R. A. 398.

be conferred upon municipal corporations,[66] unless the exercise of such power would have the effect of abrogating or interfering with the charter rights of the company, or any contract otherwise made with the state or a municipality acting under statutory authority.[67] Neither the legislature nor municipality authorized by statute to fix the price of gas can exercise the power arbitrarily; and a statute

66. *Illinois.*—Chicago Municipal Gas Light, etc., Co. *v.* Lake, 27 Ill. App. 346 [*affirming* 130 Ill. 42, 22 N. E. 616].

Indiana.— Muncie Natural Gas Co. *v.* Muncie, 160 Ind. 97, 66 N. E. 436, 60 L. R. A. 822; Noblesville *v.* Noblesville Gas, etc., Co., 157 Ind. 162, 60 N. E. 1032; Westfield Gas, etc., Co. *v.* Mendenhall, 142 Ind. 538, 41 N. E. 1033.

Kansas.— *In re* Pryor, 55 Kan. 724, 41 Pac. 958, 49 Am. St. Rep. 280, 29 L. R. A. 398.

Nebraska.— Sharp *v.* South Omaha, 53 Nebr. 700, 74 N. W. 76.

New York.— See Bath Gaslight Co. *v.* Claffy, 26 N. Y. Suppl. 285.

Ohio.— Logan Natural Gas, etc., Co. *v.* Chillicothe, 60 Ohio St. 186, 62 N. E. 122; State *v.* Ironton Gas Co., 37 Ohio St. 45; State *v.* Columbus Gas Light, etc., Co., 34 Ohio St. 572, 32 Am. Rep. 390; State *v.* Cincinnati Gas Light, etc., Co., 18 Ohio St. 262; Toledo *v.* Northwestern Ohio Nat. Gas Co., 5 Ohio Cir. Ct. 557, 3 Ohio Cir. Dec. 273 [*affirmed* in 8 Ohio S. & C. Pl. Dec. 277, 6 Ohio N. P. 531].

United States.— Logansport, etc., Gas Co. *v.* Peru, 89 Fed. 185.

See 24 Cent. Dig. tit. "Gas," § 10½.

Statutory provisions authorizing city to fix price construed.— Zanesville *v.* Zanesville Gas Light Co., 47 Ohio St. 1, 23 N. E. 55; Cincinnati Gas Light, etc., Co. *v.* Avondale, 43 Ohio St. 257, 1 N. E. 527; State *v.* Cincinnati Gas Light, etc., Co., 18 Ohio St. 262; Foster *v.* Findley, 5 Ohio Cir. Ct. 455, 3 Ohio Cir. Dec. 224; State *v.* Cleveland Gas Light, etc., Co., 3 Ohio Cir. Ct. 251, 2 Ohio Cir. Dec. 142; Toledo *v.* Northwestern Ohio Natural Gas Co., 5 Ohio Cir. Ct. 557, 3 Ohio Cir. Dec. 273 [*affirming* 8 Ohio S. & C. Pl. Dec. 277, 6 Ohio N. P. 531]; Chillicothe *v.* Logan Natural Gas, etc., Co., 11 Ohio S. & C. Pl. Dec. 24, 8 Ohio N. P. 88.

Constitutional provisions authorizing municipal regulation of charges.— Denninger *v.* Pomona Recorders' Ct., 145 Cal. 629, 79 Pac. 360.

Municipal ordinances and contracts fixing price of gas construed.— Muncie Natural Gas Co. *v.* Muncie, 160 Ind. 97, 66 N. E. 436, 60 L. R. A. 822; Thistlethwait *v.* State, 149 Ind. 319, 49 N. E. 156; Logansport, etc., Gas Co. *v.* Ott, 30 Ind. App. 93, 65 N. E. 549; Worcester Gas Light Co. *v.* Worcester, 110 Mass. 353; Pingree *v.* Mutual Gas Co., 107 Mich. 156, 65 N. W. 6; Logan Natural Gas, etc., Co. *v.* Chillicothe, 60 Ohio St. 186, 62 N. E. 122; Cincinnati Gas Light, etc., Co. *v.* Avondale, 43 Ohio St. 257, 1 N. E. 527; State *v.* Ironton Gas Co., 37 Ohio St. 45; State *v.* Cincinnati Gas Light, etc., Co., 18 Ohio St. 262; Toledo *v.* Northwestern Ohio Natural Gas Co., 5 Ohio Cir. Ct. 557, 3 Ohio Cir. Dec. 273 [*affirming* 8 Ohio S. & C. Pl. Dec. 277, 6 Ohio N. P. 531]; Chillicothe *v.* Logan Natural Gas, etc., Co., 11 Ohio S. & C. Pl. Dec. 24, 8 Ohio N. P. 88; Logansport, etc., Gas Co. *v.* Peru, 89 Fed. 185; Manhattan Trust Co. *v.* Dayton Natural Gas Co., 55 Fed. 181 [*affirmed* in 59 Fed. 327, 8 C. C. A. 140].

Recovery back of amount paid in excess of rate prescribed by ordinance.— Where an ordinance provides that a gas company shall not charge consumers more than an average of the rates charged in certain cities, payment of a charge in excess of such rate is not voluntary, where made in ignorance of the fact that it is excessive, even though the consumer be negligent in not ascertaining the fact. Pingree *v.* Mutual Gas Co., 107 Mich. 156, 65 N. W. 6. Charges involuntarily paid to a gas company by a private consumer in excess of the rates prescribed by the ordinance under which the company is operating may be recovered back, although a right of action therefor is not expressly conferred by the ordinance. Pingree *v.* Mutual Gas Co., *supra*. But where by an act extending the powers of the respondent company, certain duties and obligations were imposed on it for the benefit of its customers with a view to the reduction of the price of gas contingent on the amount of surplus net profit, but no pecuniary penalty was imposed for default and no right of action given to persons aggrieved, provision, however, being made for its accounts being audited by direction of the mayor of the corporation with whose assent the company was originally established, it was held that no individual customer had a right of action against the company for noncompliance with the provisions of the act. Johnston *v.* Consumers' Gas Co., [1898] A. C. 447, 67 L. J. P. C. 33, 78 L. T. Rep. N. S. 270.

67. Rushville *v.* Rushville Natural Gas Co., 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321; State *v.* Laclede Gaslight Co., 102 Mo. 472, 14 S. W. 974, 15 S. W. 383, 22 Am. St. Rep. 789; Toledo *v.* Northwestern Ohio Natural Gas Co., 5 Ohio Cir. Ct. 557, 3 Ohio Cir. Dec. 273; New Memphis Gas, etc., Co. *v.* Memphis, 72 Fed. 952 (where it is said that, when a corporation is chartered under the general incorporation law with the right to manufacture and sell gas, the right to charge a reasonable rate for all gas furnished is a right implied and one that forms a part of the charter contract of the state, which cannot be impaired by legislation); Cleveland Gaslight, etc., Co. *v.* Cleveland, 71 Fed. 610.

Right of gas company to fix price of gas implied from charter power to make and vend gas.— In State *v.* Laclede Gaslight Co., 102

or ordinance fixing the rates so low as to amount to a taking of the company's property without just compensation, or to a denial of due process of law, or a violation in any other respect of constitutional inhibitions, is invalid.[68] A court of competent jurisdiction is authorized to hear and determine whether the rates which have been established by statute or municipal ordinance are reasonable. The court, however, has no power to fix rates, and may not declare what rates would be reasonable and by decree establish those rates as the rates to be charged.[69]

4. Rent of Meter. Where the gas company furnishes gas meters, it has the right ordinarily to charge a reasonable rental therefor,[70] provided such charge is not discriminatory[71] and is not violative of any statute or contract, for example a statute or contract fixing a maximum price of gas.[72]

III. Property Rights in Mains and Appliances.

A gas company has a property right in the mains and pipes and other appli-

Mo. 472, 14 S. W. 974, 15 S. W. 383, 22 Am. St. Rep. 789, it was held that the power conferred by charter to make and vend gas carries with it as an inevitable incident the right to fix the price of the gas thus made and sold and that this right cannot be impaired by subsequent legislative action, state or municipal. *Compare* Zanesville *v.* Zanesville Gas-Light Co., 47 Ohio St. 1, 23 N. E. 55; State *v.* Columbus Gas Light, etc., Co., 34 Ohio St. 572, 32 Am. Rep. 390.

Effect of agreement unauthorized by law.— An agreement between a city and a gas company for the supply of gas for a period beyond that authorized by law will not affect the authority of the city to regulate the price of gas, although the agreement has been performed by both parties for the period for which it was legally authorized. State *v.* Ironton Gas Co., 37 Ohio St. 45.

68. People's Gas Light, etc., Co. *v.* Hale, 94 Ill. App. 406; New Memphis Gas, etc., Co. *v.* Memphis, 72 Fed. 952; Capital City Gaslight Co. *v.* Des Moines, 72 Fed. 829; Capital City Gas Co. *v.* Des Moines, 72 Fed. 818; Cleveland Gaslight, etc., Co. *v.* Cleveland, 71 Fed. 610. See also Logan Natural Gas, etc., Co. *v.* Chillicothe, 65 Ohio St. 186, 62 N. E. 122; Toledo *v.* Northwestern Ohio Natural Gas Co., 5 Ohio Cir. Ct. 557, 3 Ohio Cir. Dec. 273. *Compare* State *v.* Ironton Gas Co., 37 Ohio St. 45 (holding that in the absence of facts showing fraud or bad faith on the part of the municipal authorities, the inadequacy of the price of gas, as fixed by ordinance, is not the subject of inquiry); Logansport, etc., Gas Co. *v.* Peru, 89 Fed. 185.

Good faith of municipal authorities in passing ordinance.— It is competent for the courts to inquire into the motives and good faith of the municipal authorities in passing an ordinance fixing the price of gas. State *v.* Cincinnati Gas Light, etc., Co., 18 Ohio St. 262. See also State *v.* Ironton Gas Co., 37 Ohio St. 45.

Burden of proof as to reasonableness of price.— The rates fixed in the statute or ordinance are *prima facie* reasonable. On the party alleging that the rates are not reasonable is cast the burden of proving that fact. Capital City Gas Co. *v.* Des Moines, 72 Fed. 818.

69. Its powers are exhausted on this point when it has duly passed on the reasonableness of the rates as fixed by statute or ordinance. People's Gas Light, etc., Co. *v.* Hale, 94 Ill. App. 406; Capital City Gas Co. *v.* Des Moines, 72 Fed. 818.

70. Smith *v.* Capital Gas Co., 132 Cal. 209, 64 Pac. 258, 54 L. R. A. 769; State *v.* Sedalia Gas Light Co., 34 Mo. App. 501.

Statutory provisions regulating meter rentals see Buffalo *v.* Buffalo Gas Co., 81 N. Y. App. Div. 505, 80 N. Y. Suppl. 1093; State *v.* Columbus Gas Light, etc., Co., 34 Ohio St. 572, 32 Am. Rep. 390.

71. Smith *v.* Capital Gas Co., 132 Cal. 209, 64 Pac. 258, 54 L. R. A. 769; State *v.* Sedalia Gas Light Co., 34 Mo. App. 501.

Burden of proof as to discrimination.— Where a consumer sets up the defense that the gas company in charging him with rent for the use of a gas meter was guilty of discrimination against him, the burden rests upon him to allege and prove facts showing such discrimination. Smith *v.* Capital Gas Co., 132 Cal. 209, 64 Pac. 258, 54 L. R. A. 769.

72. Louisville Gas Co. *v.* Dulaney, 100 Ky. 405, 38 S. W. 703, 18 Ky. L. Rep. 849, 36 L. R. A. 125; Capital Gas, etc., Co. *v.* Gaines, 49 S. W. 462, 20 Ky. L. Rep. 1464.

Inadmissibility of evidence of usage as to meter rental.— It has been held that where a gas company contracts to deliver gas at a stipulated price, it is in contravention of the terms of the contract, as evidenced by a writing, to prove a usage which would require the payment of a sum for meter rent in addition to the stipulated price. Capital Gas, etc., Co. *v.* Gaines, 49 S. W. 462, 20 Ky. L. Rep. 1464.

Recovery back of money paid by mistake. — It has been held that money paid to a gas company as meter rent, under a mistake of law, may be recovered although the payment was voluntary. Capital Gas, etc., Co. *v.* Gaines, 49 S. W. 462, 20 Ky. L. Rep. 1464.

ances placed in the public streets under the authority of law,[73] and sometimes in appliances placed on the premises of the consumer,[74] and a gas company may maintain an action of trespass for an unauthorized interference with or injury to such property,[75] or it may apply to a court of equity for an injunction in a proper case for equitable interference.[76] The consumer cannot be compelled to continue his connection with the company against his will, but he cannot interfere with the company's property by turning the stop-cocks, removing curb boxes and cutting the service pipes located in the streets and not in the consumer's possession, without first giving the company the opportunity of severing the connection. If after reasonable notice the company neglects or refuses to shut off the gas from his premises, the consumer may do so himself if he uses due care not to injure the company's property.[77] And it has been held that the consumer may remove the meters and mixers from his premises at his own pleasure, provided he does not injure the company's property, but that he cannot disconnect them without having first shut off the gas.[78]

73. *District of Columbia.*— District of Columbia *v.* Washington Gas Light Co., 20 D. C. 39 [*affirmed* in 161 U. S. 316, 16 S. Ct. 564, 40 L. ed. 712], gas boxes.

Louisiana.— New Orleans Gaslight Co. *v.* New Orleans Drainage Commission, 111 La. 838, 35 So. 929.

New Jersey.—Public Service Corp. *v.* American Lighting Co., (Ch. 1904) 57 Atl. 482, Welsbach burners attached to company's pipes and encased in lamp-posts erected by city.

New York.— *In re* Deering, 93 N. Y. 361.

Wisconsin.— Roche *v.* Milwaukee Gaslight Co., 5 Wis. 55, lamp-posts erected by company.

See 24 Cent. Dig. tit. "Gas," § 3.

74. Blondell *v.* Baltimore City Consol. Gas Co., 89 Md. 732, 43 Atl. 817, 46 L. R. A. 187 (decided under statute requiring gas company to place a meter on the premises of every consumer); Poughkeepsie Gas Co. *v.* Citizens' Gas Co., 89 N. Y. 493 [*affirming* 20 Hun 214]; Kohler Brick Co. *v.* Northwestern Ohio Natural Gas Co., 11 Ohio Cir. Ct. 319, 5 Ohio Cir. Dec. 379.

Consumer held not a bailee of company's meter.— Blondell *v.* Baltimore City Consol. Gas Co., 89 Md. 732, 43 Atl. 817, 46 L. R. A. 187.

Gas fixtures see FIXTURES.

75. *Maryland.*— Blondell *v.* Baltimore City Consol. Gas Co., 89 Md. 732, 43 Atl. 817, 46 L. R. A. 187.

Ohio.— Kohler Brick Co. *v.* Northwestern Ohio Natural Gas Co., 11 Ohio Cir. Ct. 319, 5 Ohio Cir. Dec. 379.

Pennsylvania.— Pennsylvania Gas Co. *v.* Warren, etc., Gas Co., 3 Pa. Dist. 67.

Wisconsin.— Roche *v.* Milwaukee Gaslight Co., 5 Wis. 55. See also Milwaukee Gaslight Co. *v.* The Gamecock, 23 Wis. 144, 99 Am. Dec. 138.

England.— Gas Light, etc., Co. *v.* St. Mary Abbott's, 15 Q. B. D. 1, 49 J. P. 469, 54 L. J. Q. B. 414, 53 L. T. Rep. N. S. 457, 33 Wkly. Rep. 892; Imperial Gas Light, etc., Co. *v.* London Gas Light Co., 2 C. L. R. 1230, 10 Exch. 39, 18 Jur. 497, 23 L. J. Exch. 303, 2 Wkly. Rep. 527; Normanton Gas Co. *v.* Pope, 52 L. J. Q. B. 629, 49 L. T. Rep. N. S. 798, 32 Wkly. Rep. 134.

Bad condition of street as defense.— In an action by a gas company, brought for an injury done to one of its lamp-posts, it was held that the bad condition of the street by reason whereof defendant's wagon unavoidably slipped against the post and broke it is a good defense; and is equally valid against the company, as it would be against the city, were the latter the owner of the post and the plaintiff in the action. Roche *v.* Milwaukee Gaslight Co., 5 Wis. 55.

76. Blondell *v.* Baltimore City Consol. Gas Co., 89 Md. 732, 43 Atl. 817; Poughkeepsie Gas Co. *v.* Citizens' Gas Co., 89 N. Y. 493 [*affirming* 20 Hun 214]; Pennsylvania Gas Co. *v.* Warren, etc., Gas Co., 3 Pa. Dist. 67; Gas Light, etc., Co. *v.* St. Mary Abbott's, 15 Q. B. D. 1, 49 J. P. 469, 54 L. J. Q. B. 414, 53 L. T. Rep. N. S. 457, 33 Wkly. Rep. 892. See also Coffeyville Min., etc., Co. *v.* Citizens' Natural Gas, etc., Co., 55 Kan. 173, 40 Pac. 326.

77. Pennsylvania Gas Co. *v.* Warren, etc., Gas Co., 3 Pa. Dist. 67.

78. Pennsylvania Gas Co. *v.* Warren, etc., Gas Co., 3 Pa. Dist. 67. *Compare* Blondell *v.* Baltimore City Consol. Gas Co., 89 Md. 732, 43 Atl. 817, 46 L. R. A. 187, holding that where the meter and its connections are the property of the company, or where, whether this be so or not, the law gives to the company the sole control and management of the meter and its connections, neither the consumer nor a third person with or without the consumer's consent, has the right to disturb or interfere with the meter for the purpose of connecting therewith a governor, or for any other purpose, without the consent of the gas company.

Right to attach governor to consumer's pipes.— It seems that a consumer or owner of a house owning the gas-pipes therein has a right to attach to the end of such pipe nearest the gas company's meter or any part of the pipe a governor for regulating the pressure of gas, under such reasonable regulations as may be made by the gas company and the company putting in the governors.

IV. Injuries Incident to Construction or Operation of Gas-Works.

A. In General. The obligation resting upon a gas company requires the exercise of ordinary care and prudence in the construction of its works and in the conduct of its entire business, so as not to endanger life and property.[79]

B. Escape or Explosion of Gas — 1. In General. A gas company is not liable as an insurer for injuries sustained by reason of the escape or explosion of its gas,[80] but is held to a degree of care that is commensurate with the dangerous character of the substance handled.[81] If a gas company fails to exercise this degree of care and injury results from such negligence it is liable,[82] provided the

Blondell *v.* Baltimore City Consol. Gas Co., 89 Md. 732, 43 Atl. 817, 46 L. R. A. 187.

79. Rockford Gas Light, etc., Co. *v.* Ernst, 68 Ill. App. 300; Mississinewa Min. Co. *v.* Patton, 129 Ind. 472, 28 N. E. 1113, 28 Am. St. Rep. 203; Alexandria Min., etc., Co. *v.* Irish, 16 Ind. App. 534, 44 N. E. 680; Hutchinson *v.* Boston Gas Light Co., 122 Mass. 219; Holly *v.* Boston Gaslight Co., 8 Gray (Mass.) 123, 69 Am. Dec. 233; Siebrecht *v.* East River Gas Co., 21 N. Y. App. Div. 110, 47 N. Y. Suppl. 262. See also Corporations, 10 Cyc. 1223 note 89.

80. *District of Columbia.*—Washington Gas Light Co. *v.* Eckloff, 4 App. Cas. 174.

Illinois.— Peoples' Gas Light, etc., Co. *v.* Porter, 102 Ill. App. 461; People's Gas Light, etc., Co. *v.* Amphlett, 93 Ill. App. 194.

Kentucky.— Triple State Natural Gas, etc., Co. *v.* Wellman, 114 Ky. 79, 70 S. W. 49, 24 Ky. L. Rep. 851.

Maryland.—State *v.* Baltimore City Consol. Gas Co., 85 Md. 637, 37 Atl. 263.

Massachusetts.—Greaney *v.* Holyoke Water-Power Co., 174 Mass. 437, 54 N. E. 880; Hutchinson *v.* Boston Gas Light Co., 122 Mass. 219, 221, where it is said: "But there is no rule of law which requires individuals or corporations to provide against an overwhelming calamity which, in the exercise of ordinary prudence, could not have been foreseen. There must be an omission to do something which a reasonable man, acting upon considerations which ordinarily regulate the conduct of human affairs, would do, or the doing something which such a man would not do. Probability of danger is to be taken into account, but not that which arises when the elements, with unprecedented power, overcome all ordinary restraints."

New York.— Littman *v.* New York, 159 N. Y. 559, 54 N. E. 1093 [*affirming* 36 N. Y. App. Div. 189, 55 N. Y. Suppl. 383]; Schaum *v.* Equitable Gas Light Co., 15 N. Y. App. Div. 74, 44 N. Y. Suppl. 284.

Pennsylvania.— Hartman *v.* Citizens' Natural Gas Co., 210 Pa. St. 19, 59 Atl. 315.

In Ohio it has been held under the statute that a duty was imposed upon a gas company of keeping under its control natural gas while it is transporting the same, and that if damages should result to others without their fault, by its explosion while being thus transported, the gas company will be liable, although not shown to be negligent. Gas-Fuel Co. *v.* Andrews, 50 Ohio St. 695, 35 N. E. 1059.

81. *Arkansas.*— Pine Bluff Water, etc., Co. *v.* Schneider, 62 Ark. 109, 34 S. W. 547, 33 L. R. A. 366.

Colorado.— United Oil Co. *v.* Roseberry, 30 Colo. 177, 69 Pac. 588.

Georgia.— Chisholm *v.* Atlanta Gas-Light Co., 57 Ga. 28.

Illinois.— Baudler *v.* People's Gas-Light, etc., Co., 108 Ill. App. 187; Rockford Gas Light, etc., Co. *v.* Ernst, 68 Ill. App. 300.

Indiana.— Citizens' Gas, etc., Min. Co. *v.* Whipple, 32 Ind. App. 203, 69 N. E. 557.

Kansas.— Wichita Gas, etc., Co. *v.* Wright, 9 Kan. App. 730, 59 Pac. 1085.

Kentucky.— Triple-State Natural Gas, etc., Co. *v.* Wellman, 114 Ky. 79, 70 S. W. 49, 24 Ky. L. Rep. 851.

Maryland.—Baltimore City Consol. Gas Co. *v.* Crocker, 82 Md. 113, 33 Atl. 423, 31 L. R. A. 785.

Massachusetts.—Greaney *v.* Holyoke Water-Power Co., 174 Mass. 437, 54 N. E. 880; Hutchinson *v.* Boston Gas Light Co., 122 Mass. 219; Holly *v.* Boston Gaslight Co., 8 Gray 123, 69 Am. Dec. 233.

New York.— Beyer *v.* New York Consol. Gas Co., 44 N. Y. App. Div. 158, 60 N. Y. Suppl. 628; German-American Ins. Co. *v.* Standard Gaslight Co., 34 Misc. 594, 70 N. Y. Suppl. 384 [*affirmed* in 67 N. Y. App. Div. 539, 73 N. Y. Suppl. 973].

West Virginia.— Barrickman *v.* Marion Oil Co., 45 W. Va. 634, 32 S. E. 327, 44 L. R. A. 92.

See 24 Cent. Dig. tit. "Gas," § 13.

82. *Colorado.*— United Oil Co. *v.* Roseberry, 30 Colo. 177, 69 Pac. 588.

Indiana.— Richmond Gas Co. *v.* Baker, 146 Ind. 600, 45 N. E. 1049, 36 L. R. A. 683; Lebanon Light, etc., Co. *v.* Leap, 139 Ind. 443, 39 N. E. 57, 29 L. R. A. 342; Indiana Natural, etc., Gas Co. *v.* McMath, 26 Ind. App. 154, 57 N. E. 593, 59 N. E. 287; Ibach *v.* Huntington Light, etc., Co., 23 Ind. App. 281, 55 N. E. 249; Alexandria Min., etc., Co. *v.* Irish, 16 Ind. App. 534, 44 N. E. 680.

Massachusetts.— Ferguson *v.* Boston Gas Light Co., 170 Mass. 182, 49 N. E. 115.

New Hampshire.— See Dow *v.* Winnipesaukee Gas, etc., Co., 69 N. H. 312, 41 Atl. 288, 76 Am. St. Rep. 173, 42 L. R. A. 569.

New York.— Lanigan *v.* New York Gaslight Co., 71 N. Y. 29; Beyer *v.* New York Consol. Gas Co., 44 N. Y. App. Div. 158, 60 N. Y. Suppl. 628; Bastain *v.* Keystone Gas Co., 27 N. Y. App. Div. 584, 50 N. Y. Suppl. 537; German-American Ins. Co. *v.* Standard

person injured is free from fault contributing to the injury,[83] and this even though there may have been other intervening agencies which have also contributed to the injury.[84]

Gaslight Co., 34 Misc. 594, 70 N. Y. Suppl. 384 [*affirmed* in 67 N. Y. App. Div. 539, 73 N. Y. Suppl. 973].

West Virginia.— Barrickman *v.* Marion Oil Co., 45 W. Va. 634, 32 S. E. 327, 44 L. R. A. 92.

Personal injury from explosion.— Baudler *v.* People's Gas Light, etc., Co., 108 Ill. App. 187; Lebanon Light, etc., Co. *v.* Leap, 139 Ind. 443, 39 N. E. 57, 29 L. R. A. 342; Indiana Natural, etc., Gas Co. *v.* McMath, 26 Ind. App. 154, 57 N. E. 593, 59 N. E. 287.

Death by explosion see Alexandria Min., etc., Co. *v.* Irish, 16 Ind. App. 534, 44 N. E. 680. And see DEATH, 13 Cyc. 290.

Injury to property.— Pine Bluff Water, etc., Co. *v.* Schneider, 62 Ark. 109, 34 S. W. 547, 33 L. R. A. 366 (injury to goods); Aurora Gaslight Co. *v.* Bishop, 81 Ill. App. 493 (injury to building); Rockford Gas Light, etc., Co. *v.* Ernst, 68 Ill. App. 300 (injury to shade trees); Consumers' Gas Trust Co. *v.* Corbaley, 14 Ind. App. 549, 43 N. E. 237 (injury to house); Wichita Gas, etc., Co. *v.* Wright, 9 Kan. App. 730, 59 Pac. 1085 (injury to vegetation); Baltimore City Consol. Gas Co. *v.* Crocker, 82 Md. 113, 33 Atl. 423, 31 L. R. A. 785 (injury to building); Dow *v.* Winnipesaukee Gas, etc., Co., 69 N. H. 312, 41 Atl. 288, 76 Am. St. Rep. 173, 42 L. R. A. 569 (injury to plants); Evans *v.* Keystone Gas Co., 148 N. Y. 112, 42 N. E. 513, 51 Am. St. Rep. 681, 30 L. R. A. 651 (injury to shade trees); Siebrecht *v.* East River Gas Co., 21 N. Y. App. Div. 110, 47 N. Y. Suppl. 262 (injury to plants); Armbruster *v.* Auburn Gas Light Co., 18 N. Y. App. Div. 447, 46 N. Y. Suppl. 158 [*affirmed* in 162 N. Y. 655, 57 N. E. 1103] (injury to plants and flowers); Hartman *v.* Citizens' Natural Gas Co., 210 Pa. St. 19, 59 Atl. 315 (house and personal property); Butcher *v.* Providence Gas Co., 12 R. I. 149, 34 Am. Rep. 626 (injury to plants).

Negligence resulting from violation of statutory regulation.— Under a statute declaring it to be the duty of gas companies to conduct natural gas only through sound, wrought, or cast-iron pipes or casings, tested to a pressure of at least four hundred pounds to the square inch, and that they shall not convey natural gas through such pipes and casings at a pressure exceeding three hundred pounds per square inch, it has been held that failure to apply a test of pressure of more than one hundred pounds is negligence making the company liable for a resulting injury. Alexandria Min., etc., Co. *v.* Irish, 16 Ind. App. 534, 44 N. E. 680.

Liability for injuries to inspector in employment of city.— It has been held that where an inspector of water meters in the employment of a municipality becomes injured by an explosion of gas while inspecting a meter on premises of the gas-light company, whose contract duty to the municipality is to keep the meters in good condition and subject to inspection, the contract with the municipality, while giving rise to no privity between the inspector and the company, creates a right which affords him protection against the negligence or want of reasonable care of the company and entitles him to maintain an action for such injuries if negligence is shown. Washington Gas Light Co. *v.* Eckloff, 4 App. Cas. (D. C.) 174.

Liability of company for acts of servant see CORPORATIONS, 10 Cyc. 1203 text and note 63 *et seq.*

Liability for negligence of independent contractor see, generally, MASTER AND SERVANT.

83. Pine Bluff Water, etc., Co. *v.* Schneider, 62 Ark. 109, 34 S. W. 547, 33 L. R. A. 366; Baltimore City Consol. Gas Co. *v.* Getty, 96 Md. 683, 54 Atl. 660, 94 Am. St, Rep. 603. See also *infra*, IV, B, 6.

84. *Arkansas.*— Pine Bluff Water, etc., Co. *v.* McCain, 62 Ark. 118, 34 S. W. 549.

Illinois.— Rockford Gas Light, etc., Co. *v.* Ernst, 68 Ill. App. 300.

Indiana.— Alexandria Min., etc., Co. *v.* Irish, 16 Ind. App. 534, 44 N. E. 680.

Kentucky.— Louisville Gas Co. *v.* Gutenkuntz, 82 Ky. 432.

Maryland.— Consolidated Gas Co. *v.* Getty, 96 Md. 683, 54 Atl. 660, 94 Am. St. Rep. 603.

Massachusetts.—Koplan *v.* Boston Gaslight Co., 177 Mass. 15, 58 N. E. 183 (holding that, in an action for injuries from an explosion of gas leaking from street mains and collecting in an excavation underneath the street, the gas company is liable if a substantial part of the exploded gas escaped from its own mains, and hence an instruction that, in order to charge the company, the jury must find that "the gas which exploded was its gas," is properly modified to express such measure of liability); Hunt *v.* Lowell Gas Light Co., 8 Allen 169, 172, 85 Am. Dec. 697 (where it is said: "If, through the negligence of the defendants, a current of their gas was set in motion, and in its course through the sewer and drain it took up other gases which were noxious and carried them into the house, and the plaintiffs were made sick thereby, the defendants' negligence was as much the proximate cause of the injury as if their own gas had occasioned it"); Sherman *v.* Fall River Iron Works Co., 5 Allen 213.

New York.— Schermerhorn *v.* Metropolitan Gas Light Co., 5 Daly 144; Brown *v.* New York Gas Light Co., Anth. N. P. 351, holding that gas-light companies in lighting a city are bound to supply pipes of sufficient strength to stand all lawful uses which may be made of the public streets through which they pass, and are responsible for all damages resulting from the breaking of the pipes in consequence of such use.

Pennsylvania.— Oil City Gas Co. *v.* Robinson, 99 Pa. St. 1.

2. Duty of Inspection. The foregoing rule requires not only a careful laying of sound pipes, but also requires an efficient system of inspection, oversight, and superintendence;[85] the company must use due and reasonable care in the inspection of its pipes, and must repair defects in the same, whether caused by its own fault or not.[86] But it is not required that the company shall keep up a constant inspection all along its lines, without reference to the existence or non-existence of probable cause for the occurrence of leaks or escape of gas.[87]

3. Notice of Defects in Pipes or Mains. If leaks or defects in the company's pipes occur because of faulty construction or otherwise through the company's fault, it is liable without notice for any resulting injury to person or property.[88] But where the defect or break in the pipe is caused, not by the negligence of the gas company, but by the act of a third person or through natural causes and where the company has used due care in inspecting its pipes to discover defects therein, it is allowed a reasonable time after notice of such defect, in which to make repairs before liability attaches.[89] It is immaterial how, or through whom,

England.— Burrows *v.* March Gas, etc., Co., L. R. 5 Exch. 67.

Leaking gas ignited by third person.—If a gas company negligently suffers gas to leak from its street mains and accumulate in an excavation underneath the street, it is liable for the ignition and explosion of the gas by any cause which should have been foreseen as a probability (Koplan *v.* Boston Gaslight Co., 177 Mass. 15, 58 N. E. 183); and this, although a third person causing the ignition may also be chargeable with negligence (Koplan *v.* Boston Gaslight Co., 177 Mass. 15, 58 N. E. 183). A gas company which fails to use due care in discovering and repairing a leak in its pipes is jointly liable with one who negligently lights a match in endeavoring to locate the leak, for damages caused by the resulting explosion. Pine Bluff Water, etc., Co. *v.* McCain, 62 Ark. 118, 34 S. W. 549. To the same effect see Baltimore City Consol. Gas Co. *v.* Getty, 96 Md. 683, 54 Atl. 660, 94 Am. St. Rep. 603; Schermerhorn *v.* Metropolitan Gas Light Co., 5 Daly (N. Y.) 144; Koelsch *v.* Philadelphia Co., 152 Pa. St. 355, 25 Atl. 522, 34 Am. St. Rep. 653, 18 L. R. A. 759.

Effect of unauthorized interference with company's apparatus.—A gas company is not liable to a consumer for injuries occasioned by an explosion of gas, where it is directly caused by the gas being introduced into his dwelling by another company's employee, who, mistaking the line for that of his employer, opened a by-pass, which was properly protected, without defendant's knowledge, and which connected its low and high pressure lines. McKenna *v.* Bridgewater Gas Co., 193 Pa. St. 633, 45 Atl. 52, 47 L. R. A. 790.

85. Wichita Gas, etc., Co. *v.* Wright, 9 Kan. App. 730, 59 Pac. 1085; Holly *v.* Boston Gaslight Co., 8 Gray (Mass.) 123, 69 Am. Dec. 233; Siebrecht *v.* East River Gas Co., 21 N. Y. App. Div. 110, 47 N. Y. Suppl. 262.

86. *Arkansas.*— Pine Bluff Water, etc., Co. *v.* Schneider, 62 Ark. 109, 34 S. W. 547, 33 L. R. A. 366.

Illinois.— Rockford Gas Light, etc., Co. *v.* Ernst, 68 Ill. App. 300.

Indiana.— Consumers' Gas Trust Co. *v.* Corbaley, 14 Ind. App. 549, 43 N. E. 237.

Maryland.— Baltimore City Consol. Gas Co. *v.* Crocker, 82 Md. 113, 33 Atl. 423, 31 L. R. A. 785.

Massachusetts.— See Hunt *v.* Lowell Gas Light Co., 1 Allen 343.

New York.— Siebrecht *v.* East River Gas Co., 21 N. Y. App. Div. 110, 47 N. Y. Suppl. 262.

Pennsylvania.— Hartman *v.* Citizens' Natural Gas Co., 210 Pa. St. 19, 59 Atl. 315.

Rhode Island.— Butcher *v.* Providence Gas Co., 12 R. I. 149, 152, 34 Am. Rep. 626, where it is said: "The defendant, in managing a dangerous element, was bound not only to due care on the part of itself and its servants, but also to due care in preventing injury from the careless or wrongful meddling with its works on the part of others."

87. United Oil Co. *v.* Roseberry, 30 Colo. 177, 69 Pac. 588; State *v.* Baltimore City Consol. Gas Co., 85 Md. 637, 37 Atl. 263; Baltimore City Consol. Gas Co. *v.* Crocker, 82 Md. 113, 33 Atl. 423, 31 L. R. A. 785; Koelsch *v.* Philadelphia Co., 152 Pa. St. 355, 25 Atl. 522, 34 Am. St. Rep. 653, 18 L. R. A. 759.

88. Pine Bluff Water, etc., Co. *v.* Schneider, 62 Ark. 109, 34 S. W. 547, 33 L. R. A. 366; Baudler *v.* People's Gas Light, etc., Co., 108 Ill. App. 187; Rockford Gas Light, etc., Co. *v.* Ernst, 68 Ill. App. 300; Evans *v.* Keystone Gas Co., 148 N. Y. 112, 42 N. E. 513, 51 Am. St. Rep. 681, 30 L. R. A. 651. See also Consumers' Gas Trust Co. *v.* Perrego, 144 Ind. 350, 43 N. E. 306, 32 L. R. A. 146; Brown *v.* New York Gas Light Co., Anth. N. P. (N. Y.) 351.

Ignorance of dangerous effect of inhalation of gas held immaterial.— Emerson *v.* Lowell Gas Light Co., 3 Allen (Mass.) 410.

89. *Arkansas.*— Pine Bluff Water, etc., Co. *v.* Schneider, 62 Ark. 109, 34 S. W. 547, 33 L. R. A. 366.

Illinois.— Baudler *v.* People's Gas Light Co., 108 Ill. App. 187; Aurora Gaslight Co. *v.* Bishop, 81 Ill. App. 493; Rockford Gas Light, etc., Co. *v.* Ernst, 68 Ill. App. 300.

Indiana.— Alexandria Min., etc., Co. *v.* Irish, 16 Ind. App. 534, 44 N. E. 680; Consumers' Gas Trust Co. *v.* Corbaley, 14 Ind. App. 549, 43 N. E. 237.

a gas company obtains information, it being sufficient that they have by any means been made acquainted with the fact that their pipes had become imperfect and that gas was escaping therefrom.[90]

4. NEGLIGENCE AS PROXIMATE CAUSE. The negligence of a gas company must be the proximate cause of the injury,[91] and if the evidence in this respect is so inconclusive that no well constituted mind can reasonably draw the inference therefrom, it becomes the duty of the court, when requested, to instruct the jury that the evidence is insufficient.[92]

5. ESCAPE OR EXPLOSION ON CONSUMER'S PREMISES. The general rule requiring the use of ordinary care and diligence on the part of a gas company applies to its delivery of gas into the residence or other building of the consumer.[93] The rule has been laid down, however, that, in the absence of any fact upon which to base an inference of duty, the failure of a gas company, on introducing gas into a dwelling upon application, to inspect pipes which were placed therein by the owner and over which the company has no control is not negligence.[94] But

Maryland.—Baltimore City Consol. Gas Co. *v.* Crocker, 82 Md. 113, 33 Atl. 423, 31 L. R. A. 785.

Massachusetts.— See Hunt *v.* Lowell Gas Light Co., 1 Allen 343.

New York.— Brown *v.* New York Gas Light Co., Anth. N. P. 351.

Pennsylvania.— Hartman *v.* Citizens' Natural Gas Co., 210 Pa. St. 19, 59 Atl. 315.

Notice to company's employees as notice to company see Alexandria Min., etc., Co. *v.* Irish, 16 Ind. App. 534, 44 N. E. 680; Baltimore City Consol. Gas Co. *v.* Crocker, 82 Md. 113, 32 Atl. 423, 31 L. R. A. 785.

90. Hunt *v.* Lowell Gas Light Co., 3 Allen (Mass.) 418, holding that any inmate of plaintiff's family was competent and had a right to communicate to the gas company the fact that gas was escaping from some leak in their pipes, into plaintiff's house.

91. McGahan *v.* Indianapolis Natural Gas Co., 140 Ind. 335, 37 N. E. 601, 49 Am. St. Rep. 199, 29 L. R. A. 355; Alexandria Min., etc., Co. *v.* Irish, 16 Ind. App. 534, 44 N. E. 680; McKenna *v.* Bridgewater Gas Co., 193 Pa. St. 633, 45 Atl. 52, 47 L. R. A. 790. See also Lodge *v.* United Gas Imp. Co., 209 Pa. St. 553, 58 Atl. 925; Barrickman *v.* Marion Oil Co., 45 W. Va. 634, 32 S. E. 327, 44 L. R. A. 92.

Immediate cause.— The negligence charged, however, may be the proximate, although not the immediate, cause, and it is enough if it be the efficient cause which set in motion the chain of circumstances leading up to the injury. Alexandria Min., etc., Co. *v.* Irish, 16 Ind. App. 534, 44 N. E. 680.

92. State *v.* Baltimore City Consol. Gas Co., 85 Md. 637, 37 Atl. 263.

93. Richmond Gas Co. *v.* Baker, 146 Ind. 600, 45 N. E. 1049, 36 L. R. A. 683.

Gas company not an insurer.— United Oil Co. *v.* Roseberry, 30 Colo. 177, 69 Pac. 588; Schmeer *v.* Syracuse Gas Light Co., 147 N. Y. 529, 42 N. E. 202, 30 L. R. A. 653; Beyer *v.* New York Consol. Gas Co., 44 N. Y. App. Div. 158, 60 N. Y. Suppl. 628; Barrickman *v.* Marion Oil Co., 45 W. Va. 634, 32 S. E. 327, 44 L. R. A. 92.

Furnishing improper pressure of gas.— A person or corporation who furnishes gas to consumers and negligently increases the pressure of gas in a consumer's pipe so beyond the accustomed pressure that it overheats the stove of the consumer, and without his fault sets fire to his property and destroys it, is liable for the damages occasioned thereby. Indiana Natural, etc., Gas Co. *v.* New Hampshire F. Ins. Co., 23 Ind. App. 298, 53 N. E. 485; Alexandria Min., etc., Co. *v.* Painter, 1 Ind. App. 587, 28 N. E. 113; Barrickman *v.* Marion Oil Co., 45 W. Va. 634, 32 S. E. 327, 44 L. R. A. 92.

Failure to provide night watchman to control the supply of gas see Indiana Natural, etc., Gas Co. *v.* Long, 27 Ind. App. 219, 59 N. E. 410; Indiana Natural, etc., Gas Co. *v.* New Hampshire F. Ins. Co., 23 Ind. App. 298, 53 N. E. 485.

Construction of provision in application exempting company from liability see Bastain *v.* Keystone Gas Co., 27 N. Y. App. Div. 584, 50 N. Y. Suppl. 537.

The fact that a person is using gas in his house when he is in arrears to the gas company and liable to have his gas supply cut off by the company does not make him a trespasser in the use of such gas. Alexandria Min., etc., Co. *v.* Painter, 1 Ind. App. 587, 28 N. E. 113.

94. Smith *v.* Pawtucket Gas Co., 24 R. I. 292, 52 Atl. 1078, 96 Am. St. Rep. 713. See also Schmeer *v.* Syracuse Gas Light Co., 147 N. Y. 529, 42 N. E. 202, 30 L. R. A. 653; King *v.* New York Consol. Gas Co., 90 N. Y. App. Div. 166, 85 N. Y. Suppl. 728; Holden *v.* Liverpool New Gas, etc., Co., 3 C. B. 1, 10 Jur. 883, 15 L. J. C. P. 301, 54 E. C. L. 1; Tremaine *v.* Halifax Gas Light Co., 11 Nova Scotia 394; Tremaine *v.* Halifax Gas Co., 9 Nova Scotia 360; Dodge *v.* Halifax Gas Co., 9 Nova Scotia 325.

Injury arising from negligence of agent of consumer.— A gas-light company, which has no charge of the pipes or fixtures inside of the meters in the buildings to which it furnishes gas, is not made responsible in damages for an injury caused by an explosion of gas in a room into which it has escaped

where the gas company insists upon making all gas connections between house mains and pipes, and assumes that duty, it is bound to exercise due care in performing it.[95] So if a gas company, upon being notified of a leak of gas or defect in the pipes or appliances in a private house, sends an employee to ascertain the defect or the location of the leak and to make repairs, it will be liable for any injury resulting from the negligence of the employee.[96] So the company is liable for the negligent manner in which its servant sent to turn off the gas from a dwelling performed his duty.[97]

6. CONTRIBUTORY NEGLIGENCE — a. In General. Contributory negligence on the part of the person injured will defeat a recovery by him for damages sustained

by reason of negligence in letting it on, before the end of a gas-pipe leading into the room was closed, merely by having uniformly permitted without objection the person employed by gas consumers to put in such pipe and fixtures to let on the gas after so doing; and such permission is not sufficient to constitute such person an agent of the company, for whose acts it is responsible. Flint *v.* Gloucester Gas Light Co., 3 Allen (Mass.) 343.

A distinction has been drawn in this respect between the duty owed to an applicant for gas, and the duty when supplying gas to an applicant to protect other tenants in the same building, who had not applied for it. Schmeer *v.* Syracuse Gas Light Co., 147 N. Y. 529, 42 N. E. 202, 30 L. R. A. 653 [*reversing* 65 Hun 378, 20 N. Y. Suppl. 168], holding that where it was the custom for gas-light companies owning mains in the streets and service pipes running from them to the cellars of buildings to be supplied with gas not to connect the piping in a building until the owner or lessee had applied for gas and furnished plans of the piping in the building, but when such application was made and the plans furnished, the company relying on such plans as equivalent to a certificate that the piping was in good condition would deliver meters leaving them to be connected with its supply pipe by some plumber employed by applicant, without making any examination, and where it further appeared that the lessee of a certain store-room having been furnished with a meter, engaged a plumber to connect it with the company's supply pipe, and gas escaped from an uncapped pipe running into an apartment above the store, occupied by tenants who had not applied for gas, and exploded, killing plaintiff's intestate, the question whether the gas company used reasonable precaution before permitting the gas to be turned on was for the jury to determine. *Compare* Tremaine *v.* Halifax Gas Light Co., 11 Nova Scotia 394.

95. Bastain *v.* Keystone Gas Co., 27 N. Y. App. Div. 584, 50 N. Y. Suppl. 537.

Where a gas company, in connecting a house with its main, used a cracked elbow which it was often called upon to repair, it was held to be liable for injuries resulting from an explosion of gas leaking through such elbow, where it had failed to remove the elbow or to close the crack known to exist therein. Richmond Gas Co. *v.* Baker, 146 Ind. 600, 45 N. E. 1049, 36 L. R. A. 683.

96. United Oil Co. *v.* Roseberry, 30 Colo. 177, 69 Pac. 588; Ferguson *v.* Boston Gas Light Co., 170 Mass. 182, 49 N. E. 115; Lannen *v.* Albany Gaslight Co., 44 N. Y. 459.

Interference with flow of gas.— Where the servants of a company are sent to the house of a consumer for the purpose of interfering with the flow of gas through the pipes, it is their duty to use proper care to see that the occupants of the house have an opportunity to protect themselves against results of such interference. Beyer *v.* New York Consol. Gas Co., 44 N. Y. App. Div. 158, 60 N. Y. Suppl. 628.

Notice to landlord as notice to occupants. — A gas company, in making repairs to pipes in a private boarding-house, is not guilty of negligence in failing to notify each occupant of its intention to turn off the gas, and will not be liable for an injury sustained by an occupant if it gives proper notice to the landlord. Skogland *v.* St. Paul Gaslight Co., 89 Minn. 1, 93 N. W. 668.

Exercise of care in warning inmates a question for the jury.— Beyer *v.* New York Consol. Gas Co., 44 N. Y. App. Div. 158, 60 N. Y. Suppl. 628.

97. Louisville Gas Co. *v.* Gutenkuntz, 82 Ky. 432; Lanigan *v.* New York Gaslight Co., 71 N. Y. 29, holding that if a gas company, upon discontinuing its supply of gas to a customer and removing its meter, fails to close the service pipe so as to effectually exclude the gas from the building, it is guilty of an omission of duty and is liable for any damages caused solely by such neglect. See also Creel *v.* Charleston Natural Gas Co., 51 W. Va. 129, 41 S. E. 174, 90 Am. St. Rep. 772.

Shutting off gas by means of stop-cock in supply pipe.— It has been held not to be negligence *per se* for a gas company to leave a supply pipe in the cellar of a house where gas is no longer used, with merely a stop-cock in the riser shutting off the gas, and that if the company has no notice of any defect or leak in the pipe, it is not negligence on its part not to make examination of the premises. Baltimore City Consol. Gas Co. *v.* Getty, 96 Md. 683, 54 Atl. 660, 94 Am. St. Rep. 603; Brady *v.* Baltimore City Consol. Gas Co., 85 Md. 637, 37 Atl. 263. See also Holden *v.* Liverpool New Gas, etc., Co., 3 C. B. 1, 10 Jur. 883, 15 L. J. C. P. 301, 54 E. C. L. 1.

by reason of the escape or explosion of gas.[98] The question whether the person injured has been guilty of contributory negligence is generally one for the jury.[99] And to justify a court in pronouncing a given act such an act of contributory neg-

98. Alexandria Min., etc., Co. *v.* Painter, 1 Ind. App. 587, 28 N. E. 113; Lanigan *v.* New York Gaslight Co., 71 N. Y. 29. See also Brown *v.* Illius, 27 Conn. 84, 71 Am. Dec. 49; Sherman *v.* Fall River Iron Works Co., 2 Allen (Mass.) 524, 79 Am. Dec. 799.

Failure of applicant for gas to see that house pipes are in good condition.— A person applying for gas is charged with duty to see that the gas-pipes in the house are in good condition, and his failure of duty in this respect will amount to contributory negligence. Smith *v.* Pawtucket Gas Co., 24 R. I. 292, 52 Atl. 1078, 96 Am. St. Rep. 713.

Failure to inspect vacant house.— It is not negligence contributing to the injury to a vacant house, by a leakage and consequent explosion of gas, that the owner and his agent left the premises without inspection for a period of about a month. Baltimore City Consol. Gas Co. *v.* Getty, 96 Md. 683, 54 Atl. 660, 94 Am. St. Rep. 603.

No duty to be on watch for injury.— A person upon his own property is under no obligation to watch lest he be injured by the unlawful act of a person who floods his premises with an explosive gas. Baudler *v.* People's Gas Light, etc., Co., 108 Ill. App. 187.

Effect of plaintiff's acting on advice of company's agent.— Where a gas company, being notified of a leak in a pipe connecting a house with the main, sends one of its agents to repair the leak, and he assures the family that all is safe, and that the smell of gas in the house comes from a leak in the street, and a member of the family remaining in the house is injured by an explosion of gas, such person is not guilty of contributory negligence. Richmond Gas Co. *v.* Baker, 146 Ind. 600, 45 N. E. 1049, 36 L. R. A. 683. But it has been held that a plaintiff in order to prove due care on his part may not show that the company's agent advised the occupant of a neighboring house into which the gas had escaped from the same leak, what to do to avoid the ill consequences from it, and that he had done the same things so advised, if such agent also gave directions to plaintiff respecting the matter. Emerson *v.* Lowell Gas Light Co., 3 Allen (Mass.) 410.

When act of infant not contributory negligence see Lebanon Light, etc., Co. *v.* Griffin, 139 Ind. 476, 39 N. E. 62.

99. *Indiana.*— Indiana Natural, etc., Gas Co. *v.* McMath, 26 Ind. App. 154, 57 N. E. 593, 59 N. E. 287.

Massachusetts.— Ferguson *v.* Boston Gas Light Co., 170 Mass. 182, 49 N. E. 115.

New York.— Lee *v.* Troy Citizens' Gas-Light Co., 98 N. Y. 115.

Pennsylvania.—Kibele *v.* Philadelphia, 105 Pa. St. 41.

Virginia.— Richmond *v.* Gay, 103 Va. 320, 49 S. E. 482.

Searching for leak with lighted candle, lamp, etc.— The rule has been laid down that, when large quantities of gas have escaped into a building and have commingled with the air therein and thus formed a highly explosive compound, and this condition is known to a person entering such building, it is negligence as a matter of law to enter with a lighted candle or lamp, or to strike a match after entering. Baltimore City Consol. Gas Co. *v.* Crocker, 82 Md. 113, 33 Atl. 423, 31 L. R. A. 785; Oil City Gas Co. *v.* Robinson, 99 Pa. St. 1, holding that if it was probable that gas escaping from a leak in the pipes of a gas company would find its way into a sewer, in quantities sufficient to cause an explosion, plaintiff who was a civil engineer and was presumed to have had some knowledge of the qualities of illuminating gas ought to have anticipated the result of his act in entering the sewer with a lighted lamp, and was guilty of such contributory negligence as to preclude his recovery. See also McGahan *v.* Indianapolis Natural Gas Co., 140 Ind. 335, 37 N. E. 601, 49 Am. St. Rep. 199, 29 L. R. A. 355; Lanigan *v.* New York Gaslight Co., 71 N. Y. 29. But the general rule is that the use of a lighted candle, match, etc., in searching for a leak or examining apparatus for defects is not contributory negligence as matter of law, but the question is one for the jury to determine. Pine Bluff Water, etc., Co. *v.* Schneider, 62 Ark. 109, 34 S. W. 547, 33 L. R. A. 366; Washington Gas Light Co. *v.* Eckloff, 7 App. Cas. (D. C.) 372; Baudler *v.* People's Gas Light, etc., Co., 108 Ill. App. 187; People's Gas Light, etc., Co. *v.* Amphlett, 93 Ill. App. 194 (where the person injured, the occupant of a flat, entered an adjoining apartment without permission and lighted a match to ascertain the source of escaping gas); Tipton Light, etc., Co. *v.* Newcomer, (Ind. App. 1903) 67 N. E. 548; Louisville Gas Co. *v.* Gutenkuntz, 82 Ky. 432; Baltimore City Consol. Gas Co. *v.* Crocker, 82 Md. 113, 33 Atl. 423, 31 L. R. A. 785; Bartlett *v.* Boston Gas Light Co., 122 Mass. 209; Schmeer *v.* Syracuse Gas Light Co., 147 N. Y. 529, 42 N. E. 202, 30 L. R. A. 653; Lanigan *v.* New York Gaslight Co., 71 N. Y. 29 (a finding of a referee); Plonk *v.* Jessop, 178 Pa. St. 71, 35 Atl. 851. See also Brown *v.* New York Gas Light Co., Anth. N. P. (N. Y.) 351.

Failure to notify company or to take other precautions.— It may be laid down as a general proposition that if the owner or occupant of a building knows of the escape of gas from the company's pipes or mains into the building, it is his duty to give the company notice of the fact or withdraw from the premises, or to use other reasonable efforts to avoid or prevent the danger. Hunt *v.* Lowell Gas Light Co., 1 Allen (Mass.) 343; Kibele *v.* Philadelphia, 105 Pa. St. 41.

ligence as to defeat a recovery, it must be a distinct, prominent, and decisive fact about which ordinary minds would not differ.[1]

b. Imputable Negligence — (i) *In General.* The contributory negligence which will defeat the right to recover is the negligence, either of the injured party himself, or of some other individual whose negligence may be legally imputed to the injured party. The negligence of a third party who is an entire stranger to the person injured cannot legally be imputed to the latter.[2]

(ii) *Effect on Landlord of Negligence by Tenant.* The owner of a house cannot maintain an action against a gas company for permitting gas to escape into the house, if the immediate cause of the explosion by which the house is damaged is the negligence of the tenant in possession.[3]

(iii) *Negligence of Parent or Member of Family.* So it has been held that the want of care on the part of a parent in protecting his minor child, as for instance, in failing to adopt suitable precaution against the hurtful effects of gas, after it was discovered to be penetrating and pervading the house where they resided, is attributable to the latter in the same degree as if the latter were only acting for himself.[4] But the negligence of a third person will not be imputed to plaintiff merely because plaintiff and such third person are members of the same family and reside in the same house.[5]

(iv) *Negligence of Servant.* The person injured will be chargeable with the negligence of his servant contributing to the injury, if the servant is acting within the scope of his authority.[6]

(v) *Negligence of Independent Contractor.* A person sustaining injuries from an explosion will not be responsible for the negligence of independent contractors, such as plumbers or gas fitters, so as to make their negligence contributory negligence on his part.[7]

See also Aurora Gaslight Co. *v.* Bishop, 81 Ill. App. 493. The question, however, of the contributory negligence of a person who remains in a building after the discovery of escaping gas in the vicinity or even in the building is generally one for the jury, to be considered in connection with the other circumstances of the case. Richmond Gas Co. *v.* Baker, 146 Ind. 600, 45 N. E. 1049, 36 L. R. A. 683; Smith *v.* Boston Gaslight Co., 129 Mass. 318; Holly *v.* Boston Gaslight Co., 8 Gray (Mass.) 123, 69 Am. Dec. 233; Apfelbach *v.* Consolidated Gas Co., 204 Pa. St. 570, 54 Atl. 359; Richmond *v.* Gray, 103 Va. 320, 49 S. E. 482. The mere failure to notify the company of a leak in its pipes or mains will not amount to contributory negligence, when the injury sustained could not have reasonably been anticipated as a result of the leak. Aurora Gaslight Co. *v.* Bishop, 81 Ill. App. 493. In an action for personal injuries caused by an explosion of natural gas which, leaking from a sleeve in defendant's pipes, percolated through the ground and accumulated in plaintiff's cellar, ninety feet distant, it was held that where it appeared that plaintiff's house was supplied with gas by another company, the failure of plaintiff to notify defendant of the leak, even if she knew of its existence, did not constitute contributory negligence. Consumers' Gas Trust Co. *v.* Perrego Co., 144 Ind. 350, 43 N. E. 306, 32 L. R. A. 146. Whether the person injured knew of the escape of gas is a question for the jury. Kibele *v.* Philadelphia, 105 Pa. St. 41.

Leaving gas burning at night.— It is not, as a matter of law, negligent to leave a natural gas stove burning at night, if proper care and caution are used in turning down and adjusting the key valve, and looking after the service pipes and appliances so as to properly regulate the flow of gas at a safe pressure. Citizens' Gas, etc., Min. Co. *v.* Whipple, 32 Ind. App. 203, 69 N. E. 557.

Whether, person injured turned on gas without authority a question for the jury. — Kohler Brick Co. *v.* Northwestern Ohio Natural Gas Co., 11 Ohio Cir. Ct. 319, 5 Ohio Cir. Dec. 379.

1. Baltimore City Consol. Gas Co. *v.* Crocker, 82 Md. 113, 33 Atl. 423, 31 L. R. A. 785.

2. Baltimore City Consol. Gas Co. *v.* Getty, 96 Md. 683, 54 Atl. 660, 94 Am. St. Rep. 603.

3. Bartlett *v.* Boston Gas Light Co., 122 Mass. 209, 117 Mass. 533, 19 Am. Rep. 421; Smith *v.* Pawtucket Gas Co., 24 R. I. 292, 52 Atl. 1078, 96 Am. St. Rep. 713; Creel *v.* Charleston Natural Gas Co., 51 W. Va. 429, 41 S. E. 174, 90 Am. St. Rep. 772.

4. Holly *v.* Boston Gaslight Co., 8 Gray (Mass.) 123, 69 Am. Dec. 233.

5. Richmond Gas Co. *v.* Baker, 146 Ind. 600, 45 N. E. 1049, 36 L. R. A. 683.

6. Pine Bluff Water, etc., Co. *v.* Schneider, 62 Ark. 109, 34 S. W. 547, 33 L. R. A. 366.

7. Schermerhorn *v.* Metropolitan Gas Light Co., 5 Daly (N. Y.) 144; Burrows *v.* March Gas, etc., Co., L. R. 5 Exch. 67.

c. Burden of Proof. The burden is upon plaintiff to show that he was in the exercise of due care in respect to the occurrence from which the injury arose; that his own negligence did not cause or contribute to the injury.[8]

7. Province of Court and Jury in Determining Question of Negligence. While the fact of negligence or no negligence may be so obvious as to justify the court in ruling upon the question as a matter of law,[9] the general rule is that the question whether a gas company has used proper skill and diligence to prevent the escape or explosion of gas is a question of fact for the jury.[10]

8. Evidence — a. In General. In actions against gas companies for injuries sustained by the escape or explosion of gas, the ordinary rules of evidence are applicable, and as a general rule any evidence tending to establish or negative the company's negligence and its connection with the injury in controversy

8. Smith *v.* Boston Gaslight Co., 129 Mass. 318, 319 (where it was said, however: "But this . . . although, in form, a proposition to be established affirmatively, need not be proved by affirmative testimony addressed directly to its support. It may be shown by evidence which excludes fault"); Holly *v.* Boston Gaslight Co., 8 Gray (Mass.) 123, 69 Am. Dec. 233; Lee *v.* Troy Citizens' Gas-Light Co., 98 N. Y. 115.

9. *Kansas.*— Maxwell *v.* Coffeyville Min., etc., Co., 68 Kan. 821, 75 Pac. 1047, holding that evidence merely that defendant maintained a gas well fifty feet from plaintiff's premises, and that gas accumulated in plaintiff's cellar, causing an explosion, and that gas was found in water wells within a radius of two hundred feet of the gas well, is insufficient to warrant a conclusion that the gas came from defendant's well, or that defendant was negligent.

Maryland.— State *v.* Baltimore City Consol. Gas Co., 85 Md. 637, 37 Atl. 263.

Massachusetts.—Hutchinson *v.* Boston Gas Light Co., 122 Mass. 219.

New York.— Krzywoszynski *v.* New York Consol. Gas Co., 4 N. Y. App. Div. 161, 38 N. Y. Suppl. 929. See Schaum *v.* Equitable Gas Light Co., 15 N. Y. App. Div. 74, 44 N. Y. Suppl. 284.

Pennsylvania.— Lodge *v.* United Gas Imp. Co., 209 Pa. St. 553, 58 Atl. 925; Benson *v.* Alleghany Heating Co., 188 Pa. St. 614, 41 Atl. 729.

10. *Arkansas.*— Pine Bluff Water, etc., Co. *v.* Schneider, 62 Ark. 109, 34 S. W. 547, 33 L. R. A. 366, holding that whether a gas company has used due care in discovering and repairing a break in its pipe is a question for the jury.

Georgia.— Chisholm *v.* Atlanta Gas-Light Co., 57 Ga. 28.

Indiana.—Lebanon Light, etc., Co. *v.* Leap, 139 Ind. 443, 39 N. E. 57, 29 L. R. A. 342.

Maryland.— Baltimore City Consol. Gas Co. *v.* Getty, 96 Md. 683, 54 Atl. 660, 94 Am. St. Rep. 603; Baltimore City Consol. Gas Co. *v.* Crocker, 82 Md. 113, 33 Atl. 423, 31 L. R. A. 785.

Massachusetts.— Koplan *v.* Boston Gaslight Co., 177 Mass. 15, 58 N. E. 183 (holding that in an action for injuries from an explosion of gas leaking from street mains, the question of the gas company's negligence in not providing an inspector for its pipes within the line of construction of a subway, in the process of building which the pipes were displaced, is for the jury, and hence an instruction that it was not the company's duty to provide such inspector is properly refused); Greaney *v.* Holyoke Water-Power Co., 174 Mass. 437, 54 N. E. 880; Ferguson *v.* Boston Gas Light Co., 170 Mass. 182, 49 N. E. 115.

New York.— Evans *v.* Keystone Gas Co., 148 N. Y. 112, 42 N. E. 513, 51 Am. St. Rep. 681, 30 L. R. A. 651; Schmeer *v.* Syracuse Gas Light Co., 147 N. Y. 529, 42 N. E. 202, 30 L. R. A. 653; Tiehr *v.* New York Consol. Gas Co., 51 N. Y. App. Div. 446, 65 N. Y. Suppl. 10; Beyer *v.* New York Consol. Gas Co., 44 N. Y. App. Div. 158, 60 N. Y. Suppl. 628 (holding that whether a gas company's servant used proper care to warn the inmates of a house of its interference with the flow of gas, for the purpose of repairing the pipes, was a question of fact for the jury); Bastain *v.* Keystone Gas Co., 27 N. Y. App. Div. 584, 50 N. Y. Suppl. 537; Siebricht *v.* East River Gas Co., 21 N. Y. App. Div. 110, 47 N. Y. Suppl. 262.

Pennsylvania.— Olive Stove Works *v.* Ft. Pitt Gas Co., 210 Pa. St. 141, 59 Atl. 819; Hartman *v.* Citizens' Natural Gas Co., 210 Pa. St. 19, 59 Atl. 315; Heh *v.* Baltimore City Consol. Gas Co., 201 Pa. St. 443, 50 Atl. 994, 84 Am. St. Rep. 819; Henderson *v.* Alleghany Heating Co., 179 Pa. St. 513, 36 Atl. 312; Pritchard *v.* Consolidated Gas Co., 2 Pa. Super. Ct. 179, 39 Wkly. Notes Cas. 28.

Rhode Island.— Butcher *v.* Providence Gas Co., 12 R. I. 149, 34 Am. Rep. 626.

Breaking of gas-pipe and escape of gas as evidence of negligence.— The breaking of a gas-pipe and the escape of gas are circumstances from which the jury may find negligence, but it is for them to say whether they will do so or not; and if there are other circumstances bearing on the question they must weigh all. Carmody *v.* Boston Gas Light Co., 162 Mass. 539, 39 N. E. 184. See also United Oil Co. *v.* Miller, (Colo. App. 1903) 73 Pac. 627; Greaney *v.* Holyoke Water-Power Co., 174 Mass. 437, 54 N. E. 880; Finnegan *v.* Fall River Gas Works Co., 159 Mass. 311, 34 N. E. 523; Smith *v.* Boston Gaslight Co., 129 Mass. 318.

is admissible, subject to the limitations and restrictions imposed by the law governing the admissibility of evidence generally.[11]

b. Burden of Proof. The burden is on plaintiff to establish the negligence of the gas company, and to show further that such negligence directly contributed to the result.[12]

9. Actions — a. Form of Action. It has been said that if a gas company negligently suffers its gas to escape, it is liable therefor to other parties for all consequential damages, and may be proceeded against for the recovery of compensation, in an action in the nature of an action of the case, but not as a trespasser in an action of trespass.[13]

11. See cases cited *infra*, this note.

Evidence of other defects in company's pipes to show general condition see Alexandria Min., etc., Co. *v.* Irish, 16 Ind. App. 534, 44 N. E. 680.

Evidence of other explosion in same pipeline see Alexandria Min., etc., Co. *v.* Irish, 16 Ind. App. 534, 44 N. E. 680.

Repairs in same locality to show knowledge of local conditions see Lewis *v.* Boston Gas Light Co., 165 Mass. 411, 43 N. E. 178.

Holes and depressions in street to show knowledge of broken main see Lewis *v.* Boston Gas Light Co., 165 Mass. 411, 43 N. E. 178.

Evidence of odor of escaping gas on prior occasions see Koplan *v.* Boston Gaslight Co., 177 Mass. 15, 58 N. E. 183; Emerson *v.* Lowell Gas Light Co., 3 Allen (Mass.) 410; Hartman *v.* Citizens' Natural Gas Co., 210 Pa. St. 19, 59 Atl. 315; Werner *v.* Ashland Lighting Co., 84 Wis. 652, 54 N. W. 996.

Condition and pressure of gas in neighboring houses see Indiana Natural, etc., Gas Co. *v.* Long, 27 Ind. App. 219, 59 N. E. 410; Barrickman *v.* Marion Oil Co., 45 W. Va. 634, 32 S. E. 327, 44 L. R. A. 92.

Inadmissibility of evidence of usual amount of pressure furnished by other gas company see Barrickman v. Maron Oil Co., 45 W. Va. 634, 32 S. E. 327, 44 L. R. A. 92.

Destruction of other trees or plants in immediate vicinity see Eagle *v.* Troupe, 68 Ill. App. 302; Evans *v.* Keystone Gas Co., 148 N. Y. 112, 42 N. E. 513, 51 Am. St. Rep. 681, 30 L. R. A. 651; Butcher *v.* Providence Gas Co., 12 R. I. 149, 34 Am. Rep. 626.

Evidence of growth of damaged vegetation coincident with stoppage of leak.— It has been held that, where the death of shade trees was coincident with the leakage of a large amount of gas from a main in an adjacent street, and after the main was recalked there was renewed growth of vegetation, such facts could be regarded by the jury, in view of all the evidence, as leading to the conclusion that the effect of the gas escaping in the earth and in the air was to cause the death of such shade trees, and that a verdict for plaintiff was not to be deemed the result of conjecture merely. Wichita Gas, etc., Co. *v.* Wright, 9 Kan. App. 730, 59 Pac. 1085; Evans *v.* Keystone Gas Co., 148 N. Y. 112, 42 N. E. 513, 51 Am. St. Rep. 681, 30 L. R. A. 651.

Evidence of the effect of gas on health of other occupants of same house admitted. — Hunt *v.* Lowell Gas Light Co., 8 Allen (Mass.) 169, 85 Am. Dec. 697; Hunt *v.* Lowell Gas Light Co., 3 Allen (Mass.) 418, 1 Allen 343. *Compare* Emerson *v.* Lowell Gas Light Co., 3 Allen (Mass.) 410, holding that evidence that the inmates of another house were made sick in consequence of inhaling gas that escaped into their house from the same defect in defendant's pipes was inadmissible.

Evidence of general system and manner of doing business in company's defense see Powers *v.* Boston Gas Light Co., 158 Mass. 257, 33 N. E. 523; Bartlett *v.* Boston Gas Light Co., 117 Mass. 533, 19 Am. Rep. 421; Emerson *v.* Lowell Gas Light Co., 3 Allen (Mass.) 410; Hunt *v.* Lowell Gas Light Co., 1 Allen (Mass.) 343; Holly *v.* Boston Gaslight Co., 8 Gray (Mass.) 123, 69 Am. Dec. 233.

Evidence of delay in making claim against company for damages see Emerson *v.* Lowell Gas Light Co., 3 Allen (Mass.) 410.

Expert and opinion evidence see United Oil Co. *v.* Roseberry, 30 Colo. 177, 69 Pac. 588; Koplan *v.* Boston Gaslight Co., 177 Mass. 15, 58 N. E. 183. And see Evidence, 17 Cyc. 25 *et seq.*

12. *District of Columbia.*—Washington Gas Light Co. *v.* Eckloff, 4 App. Cas. 174.

Kansas.— Maxwell *v.* Coffeyville Min., etc., Co., (Sup. 1904) 75 Pac. 1047.

Maryland.— State *v.* Baltimore City Consol. Gas Co., 85 Md. 637, 37 Atl. 263.

Massachusetts.— Hutchinson *v.* Boston Gas Light Co., 122 Mass. 219; Holly *v.* Boston Gaslight Co., 8 Gray 123, 69 Am. Dec. 233.

New York.—Littman *v.* New York, 36 N. Y. App. Div. 189, 55 N. Y. Suppl. 383 [*affirmed* in 159 N. Y. 559, 54 N. E. 1093]; Schaum *v.* Equitable Gas Light Co., 15 N. Y. App. Div. 74, 44 N. Y. Suppl. 284. See also Krzywoszynski *v.* New York Consol. Gas Co., 4 N. Y. App. Div. 161, 38 N. Y. Suppl. 929.

West Virginia.— Barrickman *v.* Marion Oil Co., 45 W. Va. 634, 32 S. E. 327, 44 L. R. A. 92.

The escape of gas from the company's pipes or mains is, it has been held, however, in the absence of any exculpatory explanation, some evidence of neglect. Smith *v.* Boston Gaslight Co., 129 Mass. 318; Koelsch *v.* Philadelphia Co., 152 Pa. St. 355, 25 Atl. 522, 34 Am. St. Rep. 653, 18 L. R. A. 759. See also Baudler *v.* People's Gas Light, etc., Co., 108 Ill. App. 187.

13. Holly *v.* Boston Gaslight Co., 8 Gray (Mass.) 123, 69 Am. Dec. 233.

b. Pleading. The complaint in an action for injuries sustained by the explosion of gas must aver facts showing that the injury was due to the company's negligence, operating as the proximate cause.[14] But it has been held not to be essential that the complaint should allege absence of contributory negligence on the part of plaintiff, since this allegation is always involved in the averment that the injury set out was occasioned by the negligence of the gas company.[15]

c. Measure of Damages. As a general rule it may be stated that in cases of negligence without special aggravation, where the conduct of the gas company cannot be considered so morally wrong or grossly negligent as to give a right to exemplary or vindictive damages, the extent of plaintiff's remuneration is restricted to such damages as are the legal and natural consequence of the company's wrongful acts.[16]

C. Obstructions on Highway. The use of a street or highway by a gas company in constructing and operating its works must be consistent with the continued use thereof as a passageway by all persons exercising ordinary care; and for any injury resulting from its negligence to a traveler on such street or highway the company will as a general rule be liable.[17] And the fact that the proper public officials have approved of and accepted imperfect work on a street will not relieve the company from liability for injuries arising therefrom.[18]

14. McGahan *v.* Indianapolis Natural Gas Co., 140 Ind. 335, 37 N. E. 601, 49 Am. St. Rep. 199, 29 L. R. A. 355.

Complaints held sufficient under this rule see Mississinewa Min. Co. *v.* Patton, 129 Ind. 472, 28 N. E. 1113, 28 Am. St. Rep. 203; Citizens' Gas, etc., Min. Co. *v.* Whipple, 32 Ind. App. 203, 69 N. E. 557; Indiana Natural, etc., Gas Co. *v.* McMath, 26 Ind. App. 154, 57 N. E. 593, 59 N. E. 287; Indiana Natural, etc., Gas Co. *v.* New Hampshire F. Ins. Co., 23 Ind. App. 298, 53 N. E. 485; Alexandria Min., etc., Co. *v.* Irish, 16 Ind. App. 534, 44 N. E. 680; Alexandria Min., etc., Co. *v.* Painter, 1 Ind. App. 587, 28 N. E. 113; Richmond *v.* Gay, 103 Va. 320, 49 S. E. 482.

Complaints held insufficient see McGahan *v.* Indianapolis Natural Gas Co., 140 Ind. 335, 37 N. E. 601, 49 Am. St. Rep. 199, 29 L. R. A. 355; Ibach *v.* Huntington Light, etc., Co., 23 Ind. App. 281, 55 N. E. 249; Smith *v.* Pawtucket Gas Co., 24 R. I. 292, 52 Atl. 1078, 96 Am. St. Rep. 713.

15. Lee *v.* Troy Citizens' Gas-Light Co., 98 N. Y. 115. See also Blenkiron *v.* Great Cent. Gas Consumers Co., 3 L. T. Rep. N. S. 317.

Allegation of freedom from contributory negligence held sufficient see Alexandria Min., etc., Co. *v.* Irish, 16 Ind. App. 534, 44 N. E. 680.

16. Dow *v.* Winnipesaukee Gas, etc., Co., 69 N. H. 312, 41 Atl. 288, 76 Am. St. Rep. 173, 42 L. R. A. 569. See also Ranck *v.* Cedar Rapids Gas Co., 116 Iowa 11, 89 N. W. 88.

In an action for injuries to a house due to the explosion of gas, the measure of damages is the reasonable cost of restoring the house to its condition before the explosion. Baltimore City Consol. Gas Co. *v.* Getty, 96 Md. 683, 54 Atl. 660, 94 Am. St. Rep. 603.

Destruction of shade trees.— The rule of damages to be applied in an action to recover for the destruction of shade trees is the difference between the value of the land before and after the injury. Wichita Gas, etc., Co. *v.* Wright, 9 Kan. App. 730, 59 Pac. 1085; Evans *v.* Keystone Gas Co., 148 N. Y. 112, 42 N. E. 513, 51 Am. St. Rep. 681, 30 L. R. A. 651.

Shortening of life.— In an action to recover for personal injuries caused by the explosion of gas, the fact that plaintiff's life has been shortened thereby may be considered in determining the extent of the injury, the consequent disability to make a living, and the bodily and mental suffering which will result, but cannot be considered as an element which of itself is to be taken into account in awarding damages. Richmond Gas Co. *v.* Baker, 146 Ind. 600, 45 N. E. 1049, 36 L. R. A. 683.

Remoteness of damage to reputation of owner of greenhouse whose plants were injured see Dow *v.* Winnipesaukee Gas, etc., Co., 69 N. H. 312, 41 Atl. 288, 76 Am. St. Rep. 173, 42 L. R. A. 569.

17. Dillon *v.* Washington Gas Light Co., 1 MacArthur (D. C.) 626 (holding that a gas company is liable to a person sustaining an injury by falling into a trench dug in a street by the company, and imperfectly filled up); Lebanon Light, etc., Co. *v.* Leap, 139 Ind. 443, 39 N. E. 57, 29 L. R. A. 342; Indiana Natural, etc., Gas Co. *v.* McMath, 26 Ind. App. 154, 57 N. E. 593, 59 N. E. 287; Washington Gaslight Co. *v.* District of Columbia, 161 U. S. 316, 16 S. Ct. 564, 40 L. ed. 712 [*affirming* 20 D. C. 39] (holding that where by the terms and charter of a gas company it was made the duty of the company to supervise and keep in order gas boxes placed in the sidewalks and used for making a connection between the street mains and abutting dwellings, the company was liable for an injury to a person traveling on the sidewalk, resulting from the defective condition of one of its boxes).

18. Dillon *v.* Washington Gas Light Co., 1 MacArthur (D. C.) 626, holding that where

D. Nuisances.[19] While gas-works are not a nuisance *per se*,[20] it has been held that they are to be placed in the class of erections which are not within the ordinary and usual purposes to which real estate is applied, and although operated under statutory authorization are, whenever they create a special injury, to be regarded as a nuisance for which an action will lie in respect to the special injury;[21] and negligence is not essential to the right of recovery.[22]

V. Offenses Incident to Supply or Use of Gas.

At common law illuminating gas may be the subject of larceny,[23] and special offenses relating to the interference with the pipes and appliances of gas companies,[24] or to the failure of natural gas companies to take prescribed precautions against the escape of gas from their wells,[25] have been provided for by statute in some jurisdictions.

GASOLINE. The most volatile of the different oils composing crude petroleum, and consequently the most explosive, and, in the process of distillation of petroleum, is the oil driven off at the lowest temperature.[1] (See, generally, Explosives; Fire Insurance.)

GASOMETER. A huge, air-tight reservoir used for the storage of gas, and the pressure which is necessary to force the gas through the mains to the consumer.[2]

GATE.[3] A part of a fence;[4] a contrivance for passing through a fence; a

an individual had received an injury by falling into a trench dug in a traveled street, and imperfectly filled up, the company will not be relieved from liability therefor, although the work has been approved of and accepted by the officers of the District of Columbia.

19. Nuisance generally see Nuisances.

20. Dow *v.* Winnipesaukee Gas, etc., Co., 69 N. H. 312, 41 Atl. 288, 76 Am. St. Rep. 173, 42 L. R. A. 569.

21. Armbuster *v.* Auburn Gas Light Co., 18 N. Y. App. Div. 447, 46 N. Y. Suppl. 158 [*affirmed* in 162 N. Y. 655, 57 N. E. 1103]; Hutchins *v.* Smith, 63 Barb. (N. Y.) 251; Carhart *v.* Auburn Gas Light Co., 22 Barb. (N. Y.) 297. See also Brown *v.* Illius, 27 Conn. 84, 93, 71 Am. Dec. 49, where it is said: "Gas-works, supposing the smell from them to affect injuriously the health or comfort of those living in their vicinity, would become an actionable nuisance."

Pollution of well see Sherman *v.* Fall River Iron Works Co., 5 Allen (Mass.) 213, 2 Allen 524, 79 Am. Dec. 799; Shuter *v.* Philadelphia, 3 Phila. (Pa.) 228.

22. Bohan *v.* Port Jervis Gas-Light Co., 122 N. Y. 18, 25 N. E. 246, 9 L. R. A. 711; Pottstown Gas Light Co. *v.* Murphy, 39 Pa. St. 257. *Compare* Strawbridge *v.* Philadelphia, 2 Pennyp. (Pa.) 419 [*affirming* 13 Phila. 173], gas plant operated by municipal corporation.

23. See, generally, Larceny.

24. State *v.* Moore, 27 Ind. App. 83, 60 N. E. 955; People *v.* Wilber, 4 Park. Cr. (N. Y.) 19, holding that in an indictment under N. Y. Laws (1854), c. 109, § 1, entitled, "An act for the protection of gaslight companies," it is not sufficient to charge that defendant defrauded a gas-light company in the words of the statute, but the means by which the fraud was perpetrated must be alleged; and an indictment in the words of the statute that defendant connected certain pipes with intent to defraud, and containing no allegation that the company supplied the gas consumed, was defective. See also Reg. *v.* White, 3 C. & K. 363, 6 Cox C. C. 213, Dears. C. C. 203, 17 Jur. 536, 22 L. J. M. C. 123, 1 Wkly. Rep. 418, 20 Eng. L. & Eq. 585; Wood *v.* West Ham Gas Co., 49 J. P. 662, 52 L. T. Rep. N. S. 817, 33 Wkly. Rep. 799.

25. Bailey *v.* State, (Ind. Sup. 1904) 71 N. E. 655.

1. Kings County F. Ins. Co. *v.* Swigert, 11 Ill. App. 590, 598.

Puroline and gasoline, as sold and used for illuminating purposes, are both petroleum products, and both are gas-generating fluids. In both, the danger is not from explosion while burning in lamps, but from handling in the proximity of a light, on account of the gas which they liberate and generate from packages which are not air-tight, and which gas is inflammable. Socola *v.* Chess-Carley Co., 39 La. Ann. 344, 350, 1 S. 824.

2. It works automatically, and rises or falls according to the supply and consumption of gas. Consolidated Gas Co. *v.* Baltimore, 62 Md. 588, 590, 50 Am. Rep. 237.

3. "Gateway" into Oxford street see Reilly *v.* Booth, 44 Ch. D. 12, 21, 62 L. T. Rep. N. S. 378, 38 Wkly. Rep. 484.

4. *Illinois.*— Wabash R. Co. *v.* Kime, 42 Ill. App. 272, 274. See Jones *v.* Chicago, etc., R. Co., 68 Ill. 380.

Iowa.— Payne *v.* Kansas City, etc., R. Co., 72 Iowa 214, 217, 33 N. W. 633; Mackie *v.* Central R. Co., 54 Iowa 540, 541, 6 N. W. 723.

Maine.— Estes *v.* Atlantic, etc., R. Co., 63 Me. 308, 310.

protection.[5] (Gate: As Part of Fence, see Fences. At Railroad Crossing, see Railroads. On or Across — Easement, see Easements; Highway, see Streets and Highways. On Toll Road, see Toll Roads. See also Beast Gate; Cattle Gate.)

Gather. To collect into one place or into one aggregate body; bring together.[6] (See Collect.)

Gauffre. See Gopher.

Gavelet. See Distress.

Gavelkind. In England, the tenure by which all land in the county of Kent is presumed to be held until the contrary is proved.[7] (See, generally, Estates.)

Gazette. A term which refers in England to the London Gazette published by the government,[8] in Ireland to the Dublin Gazette,[9] and in Scotland to the Edinburgh Gazette.[10] (See Gazetted; and, generally, Newspapers.)

Gazetted. In England a term meaning published in the London Gazette.[11]

Gelding.[12] A eunuch or castrated animal;[13] a castrated male horse;[14] a fully castrated horse;[15] a Gelt,[16] *q. v.*; in common parlance a horse.[17] (Gelding: Larceny of, see Larceny. See also Colt; Filly; Gilding; and, generally, Animals.)

Gelt. A eunuch or castrated animal.[18] (See Gelding.)

Gem.[19] A valuable stone kept for curiosity only.[20]

Gender. A property of certain words whereby they indicate the sex or lack of sex which they represent.[21]

Genealogy. History of the succession of families; enumeration of descent

Missouri.— West *v.* Missouri Pac. R. Co., 26 Mo. App. 344, 348.

Nebraska.— Fremont, etc., R. Co. *v.* Pounder, 36 Nebr. 247, 54 N. W. 509.

New York.— Poler *v.* New York Cent. R. Co., 16 N. Y. 476, 480.

5. Mackie *v.* Central, etc., R. Co., 54 Iowa 540, 541, 6 N. W. 723.

6. Standard Dict.

"Gather" and "getting" corn see State *v.* Raymond, 20 Iowa 582, 585.

"Gather the crop" see Stoddard *v.* Waters, 30 Ark. 156, 159.

"Gathered or growing crops" see Carnagy *v.* Woodcock, 2 Munf. (Va.) 234, 239, 5 Am. Dec. 470.

7. Sweet L. Dict.

"'In gavel-kinde;' that is, gave all kinde: for this custome giveth to all the sons alike." Coke Litt. 140*a*.

8. Rex *v.* Holt, 5 T. R. 436, 439; 59 & 60 Vict. c. 25, § 106; 56 & 57 Vict. c. 39, § 79; 39 & 40 Vict. c. 45, § 3; 31 & 32 Vict. c. 37, § 5; 30 & 31 Vict. c. 127, § 3. See also Lancashire, etc., R. Co. *v.* Bolton Union, 15 App. Cas. 323, 327, 54 J. P. 532, 60 L. J. Q. B. 118, 63 L. T. Rep. N. S. 358.

9. St. 59 & 60 Vict. c. 25, § 106; 56 & 57 Vict. c. 39, § 79; 39 & 40 Vict. c. 45, § 3; 31 & 32 Vict. c. 37, § 5; 30 & 31 Vict. c. 127, § 3.

10. St. 59 & 60 Vict. c. 25, § 106; 56 & 57 Vict. c. 39, § 79; 39 & 40 Vict. c. 45, § 3; 31 & 32 Vict. c. 37, § 5; 19 & 20 Vict. c. 79, § 4.

11. St. 46 & 47 Vict. c. 52, § 168.

12. Distinguished from "ridgling" (see Brisco *v.* State, 4 Tex. App. 219, 221, 30 Am. Rep. 162); from "stallion" (see State *v.* McDonald, 10 Mont. 21, 22, 24 Pac. 628, 24 Am. St. Rep. 25); from a mule (see Com. *v.* Davidson, 4 Pa. Dist. 172, 173. See also State *v.* McDonald, 10 Mont. 21, 22, 24 Pac. 628, 24 Am. St. Rep. 25).

13. Jordt *v.* State, 31 Tex. 571, 572, 98 Am. Dec. 550; Brisco *v.* State, 4 Tex. App. 219, 221, 30 Am. Rep. 162 [*citing* Webster Dict.].

14. State *v.* Royster, 65 N. C. 539.

15. State *v.* McDonald, 10 Mont. 21, 22, 24 Pac. 628, 24 Am. St. Rep. 25.

16. Brisco *v.* State, 4 Tex. App. 219, 221, 30 Am. Rep. 162.

17. Baldwin *v.* People, 2 Ill. 304; State *v.* Ingram, 16 Kan. 14, 19; State *v.* Donnegan, 34 Mo. 67, 68; People *v.* Butler, 2 Utah 504, 505. And see Turley *v.* State, 3 Humphr. (Tenn.) 323, 324, holding that the term "horse" includes a gelding. But *compare* State *v.* Plunket, 2 Stew. (Ala.) 11, 12; State *v.* Buckles, 26 Kan. 237, 241; Hooker *v.* State, 4 Ohio 348, 349; Jordt *v.* State, 31 Tex. 571, 572, 98 Am. Dec. 550; Johnson *v.* State, 16 Tex. App. 402, 409; Brisco *v.* State, 4 Tex. App. 219, 221, 30 Am. Rep. 162; Thomas *v.* State, 2 Tex. App. 293, 294. See also Larceny.

18. Brisco *v.* State, 4 Tex. App. 219, 221, 30 Am. Rep. 162 [*citing* Webster Dict.].

19. Used as a trade-name see *In re* Arbenz, 35 Ch. D. 248, 263, 56 L. J. Ch. 524, 56 L. T. Rep. N. S. 252, 35 Wkly. Rep. 527.

20. Cavendish *v.* Cavendish, 1 Bro. Ch. 467, 28 Eng. Reprint 1244, 1 Cox Ch. 77, 29 Eng. Reprint 1070, where the term is distinguished from "jewels."

21. Standard Dict. See Atchison *v.* Lucas, 83 Ky. 451, 464, where illustrations of words importing the masculine gender are given.

As defined by statute, words importing the masculine gender may include females. Ind. St. (1897) § 1319; 52 & 53 Vict. c. 63, § 1.

in order of succession.[22] (Genealogy: Determination of Right of Inheritance, see Descent and Distribution. Evidence of Pedigree, Birth, or Relationship, see Evidence.)

General.[23] Relating to a genus or kind; pertaining to a whole class or order;[24] belonging to a whole rather than to a part;[25] that which comprehends all, the whole;[26] having a relation to all; common to the whole;[27] common to many,[28] or to the greatest number;[29] that which pertains to a majority of the individuals which compose a genus or whole;[30] widely spread; prevalent;[31] extensive, though not universal;[32] not restrained or limited to a precise or detailed import;[33] not particularized,[34] opposed to particular,[35] and special;[36] not specific;[37] vague, indefinite,[38] lax in signification.[39] Sometimes the word is used as synonymous with "public," meaning merely that which concerns a multitude of persons.[40] (General: Acceptance, see Commercial Paper. Act, see Statutes.

22. Wharton L. Lex.

23. **The word comes from "genus."** Brooks *v.* Hyde, 37 Cal. 366, 376; Puget Sound Pub. Co. *v.* Times Printing Co., 33 Wash. 551, 559, 74 Pac. 802, 804.

Distinguished from "separate."—The words "joint" and "general" import unity, as distinguished from the word "separate," which implies division and distribution. Merrill *v.* Pepperdine, 9 Ind. App. 416, 36 N. E. 921, 922.

"Newspaper of general circulation" see Lynn *v.* Allen, 145 Ind. 584, 585, 44 N. E. 646, 57 Am. St. Rep. 223, 33 L. R. A. 779 [*cited* in Puget Sound Pub. Co. *v.* Times Printing Co., 33 Wash. 551, 559].

24. Brooks *v.* Hyde, 37 Cal. 366, 376; Puget Sound Pub. Co. *v.* Times Printing Co., 33 Wash. 551, 559, 74 Pac. 802; Webster Dict. [*quoted* in Joost *v.* Sullivan, 111 Cal. 286, 295, 43 Pac. 896].

25. Webster Dict. [*quoted* in Joost *v.* Sullivan, 111 Cal. 286, 295, 43 Pac. 896].

26. Burrill L. Dict. [*quoted* in Baltimore, etc., R. Co. *v.* Marshall County Sup'rs, 3 W. Va. 319, 333]; Webster Dict. [*quoted* in Gracie *v.* Freeland, 1 N. Y. 228, 232].

27. Webster Dict. [*quoted* in Koen *v.* State, 35 Nebr. 676, 678, 53 N. W. 595, 17 L. R. A. 821].

28. McCorkendale *v.* McCorkendale, 111 Iowa 314, 316, 82 N. W. 754; Webster Dict. [*quoted* in Watson *v.* Richardson, 110 Iowa 673, 691, 80 N. W. 407; Koen *v.* State, 35 Nebr. 676, 678, 53 N. W. 595, 17 L. R. A. 821; Platt *v.* Craig, 66 Ohio St. 75, 78, 63 N. E. 594; Puget Sound Pub. Co. *v.* Times Printing Co., 33 Wash. 551, 558, 74 Pac. 802].

29. McCorkendale *v.* McCorkendale, 111 Iowa 314, 316, 82 N. W. 754; Webster Dict. [*quoted* in Watson *v.* Richardson, 110 Iowa 673, 691, 80 N. W. 407; Koen *v.* State, 35 Nebr. 676, 678, 53 N. W. 595, 17 L. R. A. 821; Platt *v.* Craig, 66 Ohio St. 75, 78, 63 N. E. 594].

30. Koen *v.* State, 35 Nebr. 676, 678, 53 N. W. 595, 17 L. R. A. 821 [*quoting* Webster Dict., where it is said that the word is stronger than "common"].

31. Webster Dict. [*quoted* in Watson *v.* Richardson, 110 Iowa 673, 691, 80 N. W. 407; Koen *v.* State, 35 Nebr. 676, 678, 53 N. W. 595, 17 L. R. A. 821; Platt *v.* Craig, 66 Ohio St. 75, 78, 63 N. E. 594].

32. McCorkendale *v.* McCorkendale, 111 Iowa 314, 316, 82 N. W. 754; Van Horn *v.* Van Horn, 107 Iowa 247, 250, 77 N. W. 846, 45 L. R. A. 93; Webster Dict. [*quoted* in Watson *v.* Richardson, 110 Iowa 673, 691, 80 N. W. 407; Blair *v.* Howell, 68 Iowa 619, 621, 28 N. W. 199; Koen *v.* State, 35 Nebr. 676, 678, 53 N. W. 595, 17 L. R. A. 821; Platt *v.* Craig, 66 Ohio St. 75, 78, 63 N. E. 594; Puget Sound Pub. Co. *v.* Times Printing Co., 33 Wash. 551, 559, 74 Pac. 802].

Distinguished from "universal" in Van Horn *v.* Van Horn, 107 Iowa 247, 250, 77 N. W. 846, 45 L. R. A. 93; Blair *v.* Howell, 68 Iowa 619, 621, 28 N. W. 199 [*quoted* in Puget Sound Pub. Co. *v.* Times Printing Co., 33 Wash. 551, 558, 74 Pac. 802].

33. Webster Dict. [*quoted* in Joost *v.* Sullivan, 111 Cal. 286, 295, 43 Pac. 896].

34. Black L. Dict. [*quoted* in Joost *v.* Sullivan, 111 Cal. 286, 295, 43 Pac. 896].

35. Cribbs *v.* Benedict, 64 Ark. 555, 566, 44 S. W. 707.

36. Platt *v.* Craig, 66 Ohio St. 75, 78, 63 N. E. 594; Black L. Dict. [*quoted* in Joost *v.* Sullivan, 111 Cal. 286, 295, 43 Pac. 896].

37. Webster Dict. [*quoted* in Cribbs *v.* Benedict, 64 Ark. 555, 566, 44 S. W. 707; Joost *v.* Sullivan, 111 Cal. 286, 295, 43 Pac. 896].

38. Webster Unabr. Dict. [*quoted* in Cribbs *v.* Benedict, 64 Ark. 555, 566, 44 S. W. 707].

39. Webster Dict. [*quoted* in Joost *v.* Sullivan, 111 Cal. 286, 295, 43 Pac. 896].

40. Stockton *v.* Williams, 1 Dougl. (Mich.) 546, 570 [*citing* Greenleaf Ev. 152].

"A general or public act" see Youngs *v.* Hall, 9 Nev. 212, 218 [*citing* 1 Blackstone Comm. 86].

In connection with other words, the word "general" has often received judicial interpretation; as for instance as used in the following phrases: "All general tenancies" (see Brown *v.* Bragg, 22 Ind. 122, 123); described "in a general manner" (see *In re* Wilkinson, L. R. 8 Eq. 487, 489; Hawthorn *v.* Shedden, 2 Jur. N. S. 749, 752, 25 L. J. Ch. 833, 3 Smale & G. 293; *In re* Hartley, 69 L. J. Ch. 79, 80, 81 L. T. Rep. N. S. 804, 48 Wkly. Rep. 245); "general and quarter sessions" (see Reg. *v.* Middlesex, 4 C. B. 807, 810, 45 E. C. L. 807); "general charge" (see Baker *v.* State, 49 Ala. 350, 352); "general expenses" (see Lancashire, etc., R. Co. *v.* Bolton Union, 15 App. Cas. 323, 327, 54 J. P.

Administrator, see Executors and Administrators. Affirmative Charge, see Criminal Law; Trial. Agency, see Principal and Agent. Agent, see Principal and Agent. Appearance, see Appearances. Appraiser, see Customs Duties. Assembly, see States. Assignment, see Assignments For Benefit of Creditors. Average, see Admiralty; Marine Insurance; Shipping. Benefits, see Eminent Domain. Bequest, see Wills. Business Manager, see Corporations. Challenge, see Grand Juries; Juries. Charge, see Criminal Law; Trial. Circulation, see Newspapers. Contractor, see Mechanics' Liens. Custom, see Customs and Usages. Damages, see Damages. Demurrer, see Equity; Pleading. Denial, see Pleading. Deposit, see Banks and Banking. Devise, see Wills. Election, see Elections. Execution, see Executions. Executor, see Executors and Administrators. Fund, see Funds; General Fund. Guaranty, see Guaranty. Guardian, see Guardian and Ward. Imparlance, see General Imparlance. Issue, see Pleading. Judgment, see Judgments. Jurisdiction, see Courts. Land-Office, see Public Lands. Law, see Statutes. Legacy, see Wills. Letter of Credit, see Banks and Banking. Liability Policy, see Employers' Liability Insurance. Lien, see Liens. Manager, see Corporations. Mortgage, see General Mortgage. Officer, see General Officers. Office, see General Offices. Orders, see General Orders; Courts. Restraint of Trade, see Contracts; Monopolies. Rules, see General Orders; Courts. Retainer, see Attorney and Client. Statute, see Statutes. Term, see Courts. Traverse, see Pleading. Usage, see Customs and Usages. Verdict, see Criminal Law; Trial. Warranty, see Covenants.)

GENERAL COUNT. A count which states in a general way the plaintiff's claim.[41] (See Count; and, generally, Pleading.)

532, 60 L. J. Q. B. 118, 63 L. T. Rep. N. S. 358; Jersey *v.* Uxbridge Rural Sanitary Authority, [1891] 13 Ch. 183, 194, 60 L. J. Ch. 833, 64 L. T. Rep. N. S. 858); "general jurisdiction" (see Gracie *v.* Freeland, 1 N. Y. 228, 232); "general line of buildings" (see Barlow *v.* St. Mary Abbott's Kensington Parish, 11 App. Cas. 257, 260, 50 J. P. 691, 55 L. J. Ch. 680, 55 L. T. Rep. N. S. 221, 34 Wkly. Rep. 521; Spackman *v.* Plumstead Dist., 10 App. Cas. 229, 235, 49 J. P. 420, 54 L. J. M. C. 81, 53 L. T. Rep. N. S. 157, 33 Wkly. Rep. 661; Allen *v.* London County Council, [1895] 2 Q. B. 587, 592, 59 J. P. 644, 64 L. J. M. C. 228, 73 L. T. Rep. N. S. 101, 14 Reports 749, 43 Wkly. Rep. 674; Newhaven Local Bd. *v.* Newhaven School Bd., 30 Ch. D. 350, 361, 53 L. T. Rep. N. S. 571, 34 Wkly. Rep. 172; Tear *v.* Freebody, 4 C. B. 228, 257, 6 Wkly. Rep. 520, 93 E. C. L. 227; London County Council *v.* Cross, 56 J. P. 550, 61 L. J. M. C. 160, 166; Paddington *v.* Snow, 46 J. P. 87, 45 L. T. Rep. N. S. 475, 477, 30 Wkly. Rep. 46; Gilbert *v.* Wandsworth, 5 T. L. R. 31, 32); "general meeting" (see Wilkins *v.* Roebuck, 4 Drew. 281, 286, 6 Wkly. Rep. 644); "general or public interest" (see Reg. *v.* London Court, 18 Q. B. D. 105, 106 note, 56 L. J. Q. B. 79, 55 L. T. Rep. N. S. 736, 35 Wkly. Rep. 123); "general purposes rate" (see Burrup *v.* London, etc., R. Co., 64 L. T. Rep. N. S. 112, 113); "general term" (see Gracie *v.* Freeland, 1 N. Y. 228, 232); "general utility" (see Kendall *v.* Granger, 5 Beav. 300, 303, 6 Jur. 919, 11 L. J. Ch. 405, 49 Eng. Reprint 593); "general welfare clause" (see Heilbron *v.* Cuthbert, 96 Ga. 312, 315, 23 S. E. 206); "general words" (see Glynn *v.* Margetson, [1893] A. C. 351, 359, 7 Aspin. 366, 62 L. J. Q. B. 466, 69 L. T. Rep. N. S. 1, 1 Reports 193; Godwin *v.* Schweppes, [1902] 1 Ch. 926, 932, 71 L. J. Ch. 438, 86 L. T. Rep. N. S. 377, 50 Wkly. Rep. 409; Birmingham, etc., Banking Co. *v.* Ross, 38 Ch. D. 295, 308, 57 L. J. Ch. 601, 59 L. T. Rep. N. S. 609, 36 Wkly. Rep. 914; Broomfield *v.* Williams, [1897] 1 Ch. 602, 615, 66 L. J. Ch. 305, 76 L. T. Rep. N. S. 243, 45 Wkly. Rep. 469; Baring *v.* Abingdon, [1892] 2 Ch. 374, 62 L. J. Ch. 105, 67 L. T. Rep. N. S. 6, 41 Wkly. Rep. 22; Willis *v.* Watney, 51 L. J. Ch. 181, 182, 45 L. T. Rep. N. S. 739, 30 Wkly. Rep. 424); "in general terms" (see Merrill *v.* Everett, 38 Conn. 40, 48); "one general contract" (see Menzel *v.* Tubbs, 51 Minn. 364, 369, 53 N. W. 653, 1017, 17 L. R. A. 815).

Statutory clauses or phrases containing this word have often been defined by statute, for example: "General annual licensing meeting" (see 53 & 54 Vict. c. 59, § 12, subs. 9. See also Reg. *v.* Anglesey, [1892] 1 Q. B. 850, 852, 56 J. P. 440, 61 L. J. M. C. 149); "general council" see 41 & 42 Vict. c. 33, § 2); "general county account" (see 51 & 52 Vict. c. 68, subs. 2); "general county purposes" (see 51 & 52 Vict. c. 41, § 68. See also Reg. *v.* Dolby, [1892] 2 Q. B. 736, 744, 61 L. J. Q. B. 826, 67 L. T. Rep. N. S. 619); "general police acts" (see 55 & 56 Vict. c. 55, § 4, subs. 12); "general rule" (see 10 & 11 Vict. c. 109, § 15); "general rules" (see 54 & 55 Vict. c. 66, § 95; 38 & 39 Vict. c. 87, § 4); "general valuation" (see 15 & 16 Vict. c. 63, § 34); "general supply" of electricity (see 62 & 63 Vict. c. 19, sch. 1); "the general limits" (48 & 49 Vict. c. 18).

41. Wertheim *v.* Fidelity, etc., Co., 72 Vt.

GENERAL COURT. A term used in Massachusetts to designate the legislative body of the commonwealth.[42]

GENERALE DICTUM GENERALITER EST INTERPRETANDUM. A maxim meaning "A general expression is to be construed generally."[43]

GENERALE TANTUM VALET IN GENERALIBUS, QUANTUM SINGULARE IN SINGULIS. A maxim meaning "What is general prevails (or is worth as much) among things general, as what is particular among things particular."[44]

GENERAL FUND.[45] As applied — to a city, a miscellaneous sum for the payment of claims which will arise, and for which it is impossible to remit the exact amount which will be required;[46] to a county, as its name applies, a sum devoted to a variety of uses;[47] to a fraternal order, a sum raised in each lodge by contributions from its members, or donations made thereto, from which are paid the general expenses of the lodge, and benefits which the lodge may by its by-laws prescribe to be paid to members disabled by sickness or other disability from following their usual business or occupation;[48] to a state, a sum created for the purpose of paying the salaries of state officers and defraying the general expenses of the state government;[49] the collective designation of all the assets of the state which furnish the means for the support of the government and the defraying the discretionary appropriations of the legislature; in other words, the necessary and contingent expenses of the government.[50] (See FUND; FUNDS, and Cross-References Thereunder.)

GENERALIA SPECIALIBUS NON DEROGANT. A maxim meaning "Things general do not derogate from things special."[51]

GENERALIA SUNT PRÆPONENDA SINGULARIBUS. A maxim meaning "General things are to be put before particular things."[52]

GENERALIA VERBA SUNT GENERALITER INTELLIGENDA. A maxim meaning "What is generally spoken shall be generally understood."[53]

GENERALIBUS SPECIALIA DEROGANT.[54] A maxim meaning "Things special lessen the effect of things general."[55]

GENERAL IMPARLANCE. At common law, the time allowed by a party for pleading upon an application, in which no right of exception was reserved;[56] and in pleading a prayer for time to plead, without reserving special exceptions.[57] (See, generally, PLEADING.)

GENERAL IMPROVEMENT. As applied to municipal corporations, ordinary improvement — that is, improvement, which ordinarily recurs — but does not

326, 328, 47 Atl. 1071 [*citing* Beach *v.* Dorwin, 12 Vt. 139].

42. Citizens' Sav., etc., Assoc. *v.* Topeka, 20 Wall. (U. S.) 655, 666, 22 L. ed. 455.

43. Bouvier L. Dict.

44. Bouvier L. Dict.

45. "General fund of my estate" see Coughlin *v.* Fay, 14 N. Y. App. Div. 376, 379, 43 N. Y. Suppl. 875.

46. Kelly *v.* Broadwell, 3 Nebr. (Unoff.) 617, 92 N. W. 643, 645.

47. Kansas City, etc., R. Co. *v.* Scammon, 45 Kan. 481, 483, 25 Pac. 858 [*citing* State *v.* Lawrence Bridge Co., 22 Kan. 438]; Burlington, etc., R. Co. *v.* Lancaster County, 12 Nebr. 324, 327, 11 N. W. 332.

48. Lady Lincoln Lodge *v.* Faist, 52 N. J. Eq. 510, 512, 28 Atl. 555.

49. State *v.* Bartley, 39 Nebr. 353, 357, 58 N. W. 172, 23 L. R. A. 67.

50. People *v.* Orange County, 27 Barb. (N. Y.) 575, 588.

51. Bouvier L. Dict. [*citing* Jenkins Cent.].

Applied in Vancouver *v.* Bailey, 25 Can. Sup. Ct. 62, 67.

52. Bouvier L. Dict.

53. "Unless it is qualified by some subsequent words." Serrill's Estate, 15 Wkly. Notes Cas. (Pa.) 470, 471 [*citing* Alden's Appeal, 93 Pa. St. 182; Waugh *v.* Waugh, 84 Pa. St. 350, 24 Am. Rep. 191; Pittsburg, etc., R. Co. *v.* Pittsburg, 80 Pa. St. 72; Broom Leg. Max. 619–620].

54. "The maxim of law."— McLea *v.* Walker, 1 Bligh 535, 556, 4 Eng. Reprint 196.

55. Bouvier L. Dict.

Applied in State University *v.* Auditor-Gen., 109 Mich. 134, 137, 66 N. W. 956 [*citing* Crane *v.* Reeder, 22 Mich. 322; River Thames *v.* Hall, L. R. 3 C. P. 415, 419, 37 L. J. C. P. 163, 18 L. T. Rep. N. S. 361, 16 Wkly. Rep. 971; Kidston *v.* Empire Mar. Ins. Co., L. R. 1 C. P. 535, 546; Derby *v.* Berry Imp. Com'rs, L. R. 4 Exch. 222, 226, 38 L. J. Exch. 100, 20 L. T. Rep. N. S. 927, 17 Wkly. Rep. 772]; McLea *v.* Walker, 1 Bligh 535, 556, 4 Eng. Reprint 196; Vancouver *v.* Bailey, 25 Can. Sup. Ct. 62, 67.

56. Mack *v.* Lewis, 67 Vt. 383, 385, 31 Atl. 888 [*citing* Pollard *v.* Wilder, 17 Vt. 48; Gould Pl. §§ 16, 17].

57. Colby *v.* Knapp, 13 N. H. 175, 177 [*citing* Bacon Abr. tit. "Pleas" G; 1 Chitty Pl. 420; Comyns Dig. tit. "Abatement"].

include all improvements of every character, so as to cover the expenses of the city for every purpose.[58]

GENERALIS CLAUSULA NON PORRIGITUR AD EA QUÆ ANTEA SUNT COMPREHENSA. A maxim meaning "A general clause is not extended to those things which have been previously narrated or described."[59]

GENERALIS GRATIA PRODITIONEM ET HOMICIDUM NON EXCIPIT PŒNA. A maxim meaning "General favor does not exempt treason and homicide from punishment."[60]

GENERALIS REGULA GENERALITER EST INTELLIGENDA. A maxim meaning "A general rule is to be understood generally."[61]

GENERALITER, QUOTIENS ALIQUID SIT AD NOCUMENTUM REGII TENEMENTI, VEL REGIÆ VIÆ, VEL CIVITATIS, PLACITUM INDE AD CORONAM DOMINI REGIS PERTINET. A maxim meaning "In general, as often as there is anything (e. g. any purpresture) to the injury of the royal domain or royal road or state, the plea thence belongs to the crown."[62]

GENERALITY.[63] The state of being general; the quality of including species or particulars.[64] (See GENERAL; GENERALLY.)

GENERAL LEGATEE. A legatee who has a bequest of a specific quantity, payable out of the personal assets generally.[65] (See, generally, WILLS.)

GENERAL LIABILITY POLICY. See EMPLOYERS' LIABILITY INSURANCE.

GENERALLY. In general; commonly; extensively, though not universally; most frequently.[66] (See COMMON; GENERAL; GENERALITY.)

GENERAL MORTGAGE. A mortgage which binds all property, present or future of the debtor.[67] (See, generally, MORTGAGES.)

GENERAL OFFICERS. As applied to a railroad company, the president, vice-president, general manager, secretary, and treasurer, selected by the corporation through its board of directors.[68] (See, generally, RAILROADS.)

GENERAL OFFICES. As applied to a railroad company, the main offices used for the purpose of operating a railroad.[69] (See, generally, RAILROADS.)

GENERAL ORDER. As used in connection with the collection of the customs revenue, an order whereby the collector of customs allows the unlading of goods and the taking of possession of them before any entry of them is made by the individual owners or consignees.[70] (See, generally, CUSTOMS DUTIES.)

GENERAL ORDERS or RULES. A phrase which designates orders or rules of court, promulgated for the guidance of practitioners and the regulation of pro-

58. Austin *v.* Nalle, 85 Tex. 520, 541, 22 S. W. 668.

59. Trayner Leg. Max.

Applied in Altham's Case, 8 Coke 150*b*, 154*b*.

60. Morgan Leg. Max.

61. Bouvier L. Dict.

62. Morgan Leg. Max.

63. Distinguished from "comprehensiveness" in Walsh *v.* Trevanion, 15 Q. B. 733, 14 Jur. 1134, 19 L. J. Q. B. 458, 461, 69 E. C. L. 733.

64. Webster Int. Dict.

"Glittering generality" see Brooks *v.* Hyde, 37 Cal. 366, 377.

65. Matter of Goggin, 43 Misc. (N. Y.) 233, 237, 88 N. Y. Suppl. 557.

66. Webster Int. Dict.

In connection with other words this word has often received judicial interpretation; as for instance as used in the following phrases: "Creditors generally" (see Hedges *v.* Preston, 80 L. T. Rep. N. S. 847, 848); "generally do all acts to his property" (see Board of Trade *v.* Block, 13 App. Cas. 570, 575, 53 J. P. 164, 58 L. J. Q. B. 113, 59 L. T. Rep. N. S. 734, 37 Wkly. Rep. 259; *In re* Betts, 56 L. J. Q. B. 370, 371); "generally" in an assignment for benefit of creditors (see Hadley *v.* Beedom, [1895] 1 Q. B. 646, 651, 64 L. J. Q. B. 240, 72 L. T. Rep. N. S. 493, 2 Manson 47, 15 Reports 183, 43 Wkly. Rep. 218); "generally improve the property" (see Naye *v.* Noezel, 50 N. J. L. 523, 14 Atl. 750); "generally known" (see Taylor *v.* Com., 20 Gratt. (Va.) 825, 831); "generally said" (see State *v.* Brandenburg, 118 Mo. 181, 185, 23 S. W. 1080, 40 Am. St. Rep. 362); "his creditors generally" (see *In re* Phillips, [1900] 2 Q. B. 329, 332, 69 L. J. Q. B. 604, 82 L. T. Rep. N. S. 691, 7 Manson 277, 49 Wkly. Rep. 16 [*citing* Tomlin *v.* Dutton, 3 Q. B. D. 466; *Ex p.* Glen, L. R. 2 Ch. 670]; "woodland generally" (see Dale *v.* Smith, 1 Del. Ch. 1, 10, 12 Am. Dec. 64).

67. Barnard *v.* Erwin, 2 Rob. (La.) 407, 415.

68. Bedford Belt R. Co. *v.* McDonald, 17 Ind App. 492, 46 N. E. 1022, 60 Am. St. Rep. 154.

69. State *v.* Minneapolis, 32 Minn. 501, 506, 507, 21 N. W. 722.

70. *In re* The Egypt, 25 Fed. 320, 331, 332, also defining "granting of the general order."

cedure in cases of a class, or falling under some head of jurisdiction, as all bankruptcy cases; in distinction from orders or rules made in a particular cause.[71] (General Orders: Rules of Court, see COURTS.)

GENERAL SHIP. A ship in which the masters or owners engage separately with a number of persons unconnected with each other to convey their respective goods to the place of the ship's destination.[72] (See, generally, SHIPPING.)

GENERAL WELFARE. When applied to the right of a municipal corporation to provide by ordinance for the general welfare, a term synonymous with corporate purposes.[73]

GENERATION. Succession,[74] a single succession of living beings in natural descent.[75]

GENERIC. Pertaining to, of the nature of, or forming a mark of a genus, or a kind of group of similar things; comprehending a number of like things without specifying them; opposed to specific.[76] (See GENERAL.)

GENTLE. Docile, tractable, and quiet.[77]

GENTLEMAN.[78] In ordinary usage, a man raised above the vulgar by his character or post.[79] In English law, a person above yeoman,[80] of superior birth,[81] whom blood or race doth make known, who, without any title, bears a coat of arms, or whose ancestors have been freemen.[82] The term may, according to the

71. Abbott L. Dict.

72. Ward *v.* Green, 6 Cow. (N. Y.) 173, 176, 16 Am. Dec. 437.

73. Red Wing *v.* Chicago, etc., R. Co., 72 Minn. 240, 244, 75 N. W. 223, 71 Am. St. Rep. 482 [*citing* Horr & Bemis Mun. Pol. Ord. § 27]. See CORPORATE PURPOSES, Cyc. Ann.

74. McMillan *v.* School Dist. No. 4, 107 N. C. 609, 615, 616, 12 S. E. 330, 10 L. R. A. 823, where the court in construing a statute providing separate schools for Indians, from which all negroes to the fourth generation are to be excluded said: "As the word 'generation' has no technical meaning, we must consider it as used in the sense of a succession — its ordinary import — rather than a degree of removal in computing descents."

75. Century Dict.

76. Century Dict.

"The words 'generic' and 'specific' are relative words. The name which is said, by comparison with some other name, to be 'specific,' is so said because the definition given of the name alleged to be specific limits the subject under consideration more or further than the definition which is assigned to that name which is called 'generic.'" Curiel *v.* Beard, 44 Fed. 551, 553.

Generic terms are terms which pertain to a class of related things, and which are of general application. Continental Ins. Co. *v.* Continental Fire Assoc., 96 Fed. 846, 848.

77. But as applied to a horse it does not, in its ordinary legal sense, import that the horse has received any particular training or teaching. Bodurtha *v.* Phelon, 2 Allen (Mass.) 347, 348.

78. A word which is vague (*In re* Dodsworth, [1891] 1 Ch. 657, 658, 60 L. J. Ch. 768, 64 L. T. Rep. N. S. 282, 39 Wkly. Rep. 362; Smith *v.* Cheese, 1 C. P. D. 60, 61, 45 L. J. C. P. 156, 33 L. T. Rep. N. S. 670, 24 Wkly. Rep. 368); the "vaguest of vague descriptions" (*In re* European Bank, L. R. 7 Ch. 292, 300, 41 L. J. Ch. 501, 26 L. T. Rep. N. S. 269, 20 Wkly. Rep. 499); and "gives but little information as to the position of the person thus designated" (Smith *v.* Cheese, 1 C. P. D. 60, 45 L. J. Q. B. 156, 157, 33 L. T. Rep. N. S. 670, 24 Wkly. Rep. 368).

This word, like the French gentilhomme, originally signified a man of gentle blood, although he might be unable to read and write, and might be of bad character; but the meaning has somewhat changed, and it is now used for the designation of men of various positions in society, and comprehends all those from the upper classes down to the lowest verge of the middle. Smith *v.* Cheese, 1 C. P. D. 60, 45 L. J. Q. B. 156, 158, 33 L. T. Rep. N. S. 670, 24 Wkly. Rep. 368. See also 11 Can. L. J. N. S. 93.

"Gentleman of the law of known abilities," has been held to include a judge of the supreme court or a judge of the court of common pleas. Com. *v.* Judges Ct. of C. Pl., 1 Serg. & R. (Pa.) 187, 192.

79. Cresson *v.* Cresson, 6 Fed. Cas. No. 3,389 [*quoting* Johnson Dict.].

80. Wharton L. Lex.

81. Black L. Dict.

82. Jacob L. Dict. See also 1 Blackstone Comm. 406.

"The gentry may be divided into three classes: (I) They who derive their stock with arms from their ancestors, are gentlemen of blood and coat-armour: . . . (II) They who are ennobled, by knighthood or otherwise, with the grant of a coat-of-arms, are gentlemen of coat-armour, and give gentility to their posterity: . . . (III) They who, by the exercise of a liberal profession or by holding some office, are gentlemen by reputation, although their ancestors were ignoble, as their posterity remains after them." Wharton L. Lex. [*citing* 2 Stephen Comm. iv, ix].

The term does not apply under a bills of sale act, to the following persons: An attorney or an attorney's clerk Tuton *v.* Sanoner, 3 H. & N. 280, 281, 4 Jur. N. S. 365, 27 L. J. Exch. 293, 6 Wkly. Rep. 545. See also Broderick *v.* Scale, L. R. 6 C. P. 98,

context, comprehend a person who has never actually engaged in any trade or occupation,[83] one who has nothing to do, and can live idly,[84] a person who has no occupation,[85] although a sleeping partner in more than one concern;[86] and in this sense may include a coal agent,[87] a journeyman butcher or meat salesman,[88] a medical student,[89] a proctor's clerk,[90] or a schoolmaster.[91]

GENIUS. A light of intelligence, of truth and of all manfulness.[92]

GENUINE. Not false, fictitious, simulated, spurious, counterfeit.[93] (See, generally, COUNTERFEITING.)

GENUS. A class embracing many species.[94]

GEO. A well-known abbreviation for "George."[95] (See, generally, NAMES.)

GEOGRAPHICAL FACTS. See EVIDENCE.

GEOGRAPHICAL NAME. See TRADE-MARKS AND TRADE-NAMES.

GEREUS DATUM. Literally "bearing date."[96]

GERMAN. See COUSINS-GERMAN.

GERMANE. Literally, AKIN (*q. v.*), closely allied.[97]

100, 40 L. J. C. P. 130, 23 L. T. Rep. N. S. 864, 19 Wkly. Rep. 386; Dryden *v.* Hope, 3 L. T. Rep. N. S. 280, 9 Wkly. Rep. 18); a clerk in an audit office (Allen *v.* Thomson, 1 H. & N. 15, 18, 2 Jur. N. S. 451, 25 L. J. Exch. 249, 4 Wkly. Rep. 506 [*cited* in Tuton *v.* Sanoner, 3 H. & N. 280, 281, 4 Jur. N. S. 365, 27 L. J. Ch. 293, 6 Wkly. Rep. 545]); a solicitor's clerk out of regular employment, but engaged in making out bills for a firm of solicitors (Beales *v.* Tennant, 6 Jur. N. S. 628, 29 L. J. Q. B. 188, 1 L. T. Rep. N. S. 295); a buyer of silks (Adams *v.* Graham, 10 Jur. N. S. 356, 357, 33 L. J. Q. B. 71, 9 L. T. Rep. N. S. 606, 12 Wkly. Rep. 282); one who solicits orders on commission (Matthews *v.* Buchanan, 5 L. T. Rep. N. S. 373).

To describe a person making an affidavit of the fitness of a new trustee merely as a "gentleman" is not sufficient (*In re* Orde, 24 Ch. D. 271, 272, 52 L. J. Ch. 832, 49 L. T. Rep. N. S. 430, 31 Wkly. Rep. 801; *Re* Horwood, 55 L. T. Rep. N. S. 373 [*distinguished* in *In re* Dodsworth, [1891] 1 Ch. 657, 658, 60 L. J. Ch. 768, 64 L. T. Rep. N. S. 282, 39 Wkly. Rep. 362].

83. Gray *v.* Jones, 14 C. B. 743, 746, 108 E. C. L. 743.

84. Allen *v.* Thomson, 1 H. & N. 15, 18, 2 Jur. N. S. 451, 25 L. J. Exch. 249, 4 Wkly. Rep. 506.

85. Brodrick *v.* Scale, L. R. 6 C. P. 98, 100, 40 L. J. C. P. 130, 23 L. T. Rep. N. S. 864, 19 Wkly. Rep. 386; London, etc., Loan, etc., Co. *v.* Chase, 12 C. B. N. S. 730, 738, 9 Jur. N. S. 412, 31 L. J. Ch. 314, 6 L. T. Rep. N. S. 781, 10 Wkly. Rep. 698, 104 E. C. L. 730.

In a humorous way a gentleman has been defined as a person "having no visible means of support." And it was observed "that if a man had been 'this, that, and the other,' the description of 'no occupation' would do." Smith *v.* Cheese, 11 Can. L. J. N. S. 93.

86. Feast *v.* Robinson, 63 L. J. Ch. 321, 322, 70 L. T. Rep. N. S. 168, 8 Reports 531.

87. Morewood *v.* South Yorkshire R., etc., Co., 3 H. & N. 798, 800, 28 L. J. Exch. 114 [*cited* in Smith *v.* Cheese, 1 C. P. D. 60, 61, 45 L. J. C. P. 156, 33 L. T. Rep. N. S. 670, 24 Wkly. Rep. 368]. *Compare* London, etc., Loan, etc., Co. *v.* Chase, 12 C. B. N. S. 730, 738, 9 Jur. N. S. 412, 31 L. J. Ch. 314, 6 L. T. Rep. N. S. 781, 10 Wkly. Rep. 698, 104 E. C. L. 730.

88. *In re* European Bank, L. R. 7 Ch. 292, 295, 41 L. J. Ch. 501, 26 L. T. Rep. N. S. 269, 20 Wkly. Rep. 499.

89. Bath *v.* Sutton, 27 L. J. Exch. 388, 389 [*cited* in Smith *v.* Cheese, 1 C. P. D. 60, 61, 45 L. J. C. P. 156, 33 L. T. Rep. N. S. 670, 24 Wkly. Rep. 368].

90. Smith *v.* Cheese, 1 C. P. D. 60, 61, 45 L. J. C. P. 156, 33 L. T. Rep. N. S. 670, 24 Wkly. Rep. 368.

A clerk in a mercantile house, described in the notice of justification by the addition of "gentleman," rejected as bail see Moss *v.* Heavyside, 7 D. & R. 772, 16 E. C. L. 321.

91. —— *v.* Pasman, 5 Taunt. 759, 1 E. C. L. 389.

92. Carlyle [*quoted* in 88 Ala. xi].

93. Baldwin *v.* Van Deusen, 37 N. Y. 487, 492. See also Dow *v.* Spenny, 29 Mo. 386, 390.

"Genuine and regularly issued" does not merely mean that the bonds are not forgeries and were not issued without consideration, and that they were ordered by the proper officers, but means that they are not subject to any defense founded on a want of legal form in the signature or seals. Smeltzer *v.* White, 92 U. S. 390, 392, 23 L. ed. 508.

"Genuineness" as used in an instruction to a jury see Cox *v.* Northwestern Stage Co., 1 Ida. 376, 379; Corn Exchange Bank *v.* American Dock, etc., Co., 149 N. Y. 174, 182, 43 N. E. 915.

94. Webster Prim. Dict. [*quoted* in Smythe *v.* State, 17 Tex. App. 244, 251].

Genus generalissimum as applied to an estate "comprehends both the land and the inheritance." Lambert *v.* Paine, 3 Cranch (U. S.) 96, 134, 2 L. ed. 377.

95. People *v.* Ferguson, 8 Cow. (N. Y.) 102, 106.

96. Black L. Dict. See also Cromwell *v.* Grumsden, 1 Ld. Raym. 335, 336.

97. Dolese *v.* Pierce, 124 Ill. 140, 147, 16 N. E. 218, where the court said: "It is only applicable to persons who are united to each other by the common tie of blood or marriage. When applied to inanimate things, it is, of course, used in a metaphorical sense, but still the idea of a common tie is always

GERMAN EDUCATION. An education acquired through the medium of the German language.[98] (See ENGLISH EDUCATION.)

GERRYMANDER. As a noun, the unsavory but expressive name for a method of creating civil divisions of the state for improper purposes.[99] As a verb, to alter the election districts so that they are unfairly arranged for the benefit of a particular party or candidate.[1] (See, generally, ELECTIONS.)

GESTATION.[2] See BASTARDS.[3]

GET.[4] In its common and ordinary sense, to procure, to obtain;[5] to win;[6] to exert effort upon or in regard to; effect movement of or about.[7] It may also mean to seize by force, where the context will justify the meaning.[8] (See ACQUIRE.)

GIANT POWDER. A kind of dynamite.[9] (See generally, EXPLOSIVES.)

GIANT UMBRELLAS. Many-colored, fantastically decorated articles imported from Japan and China, of huge size, the frames of which are covered with paper.[10]

GIFT ENTERPRISE. In common parlance, a scheme for the distribution of certain articles of property, to be determined by chance, among those who have taken shares in the scheme.[11] (See, generally, LOTTERIES.)

present. Thus, when properly applied to a legislative provision, the common tie is found in the tendency of the provision to promote the object and purpose of the act to which it belongs. Any provision not having this tendency, which introduces a new subject-matter into the act," is not germane to it.

98. Powell *v.* Board of Education, 97 Ill. 375, 380, 37 Am. Rep. 123.

99. As, for instance, creating school districts, so that children of certain religious beliefs or of the same nationality should be brought within one district, and those of a different nationality or different religion brought within another. State *v.* Whitford, 54 Wis. 150, 158, 11 N. W. 424.

1. English L. Dict.

2. **Period of gestation** of a cow, sow, etc. see Thorpe *v.* Cowles, 55 Iowa 408, 410, 7 N. W. 677.

3. See 5 Cyc. 665. See also 17 Cyc. 75 note 20.

4. "**Gotten**" (past participle of "get") **distinguished from "found"** as used in a conveyance of coals see Jawitt *v.* Spencer, 1 Exch. 647, 649, 17 L. J. Exch. 367. See also FOUND.

"**Getting out**" a boat as used in a statute is broad enough to cover all those services or expenses which might be necessary to put the boat afloat when finished, and to place her in a situation that would enable her to begin her business of navigating the river. They are not necessarily confined to building or repairing. Madison County Coal Co. *v.* The Colona, 36 Mo. 446, 449. See also Gibbons *v.* The Fancy Barker, 40 Mo. 253, 254.

5. McClurg *v.* Ross, 5 Binn. (Pa.) 218, 222 [*citing* Johnson Dict.].

"**Get certified**" see Payne *v.* Des Moines, etc., R. Co., 71 Iowa 758, 759, 32 N. W. 255.

"**Mineral gotten**" see Netherseal Colliery Co. *v.* Bourne, 14 App. Cas. 228, 237, 59 L. J. Q. B. 66, 61 L. T. Rep. N. S. 125; Kearney *v.* Whitehaven Colliery Co., [1893] 1 Q. B. 700, 703 note, 707, 57 J. P. 645, 62 L. J. M. C. 129, 68 L. T. Rep. N. S. 690, 4 Reports 388, 41 Wkly. Rep. 594; Brace *v.* Abercarn Colliery Co., [1891] 2 Q. B. 699, 703, 56 J. P. 20, 60 L. J. Q. B. 706, 65 L. T. Rep. N. S. 694, 40 Wkly. Rep. 3.

6. Ramsden *v.* Yeates, 6 Q. B. D. 583, 585, 45 J. P. 538, 50 L. J. M. C. 135, 44 L. T. Rep. N. S. 612, 29 Wkly. Rep. 628.

7. Century Dict.

"**Get up the mortgages**" **and mortgage notes** see Robbins *v.* Packard, 31 Vt. 570, 574, 76 Am. Dec. 134.

"**Got back again** on the firm foundation of reason and common sense" see Parsons *v.* Loucks, 48 N. Y. 17, 22, 8 Am. Rep. 517.

The phrase "get off quickly," as used by the conductor of a railroad train to a party who assisted another on to the train, which started before he could alight, were words of advice, and did not constitute a requirement to leave the train. Evansville, etc., R. Co. *v.* Athon, 6 Ind. App. 295, 33 N. E. 469, 472, 51 Am. St. Rep. 303 *citing* Lindsley *v.* Chicago, etc., R. Co., 64 Iowa 407, 20 N. W. 737. See also Butler *v.* St. Paul, etc., R. Co., 59 Minn. 138, 141, 60 N. W. 1090.

8. McClurg *v.* Ross, 5 Binn. (Pa.) 218, 222.

9. Standard Dict. See also Sperry *v.* Springfield F., etc., Ins. Co., 26 Fed. 234, 235.

10. U. S. *v.* China, etc., Trading Co., 71 Fed. 864, 865, 18 C. C. A. 335, where the court said: "It resembles the ordinary umbrella, substantially as the miniature ones similarly made and imported from the same countries, which are used by women for hair-pins, resemble parasols."

11. Lohman *v.* State, 81 Ind. 15, 17 (where the court said that this definition corresponds substantially with that which has been attached to it by statute); Winston *v.* Beeson, 135 N. C. 271, 279, 47 S. E. 457, 65 L. R. A. 167 [*citing* Anderson L. Dict.; Black L. Dict.; Bouvier L. Dict.]. See also State *v.* Shugart, 138 Ala. 86, 91, 35 So. 28, 100 Am. St. Rep. 17, trading stamps.

GIFTS

By Frank W. Jones* and Walter H. Michael†

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† Author of "Convicts," 9 Cyc. 869; "Coroners," 9 Cyc. 980; "Elections," 15 Cyc. 268; and joint author of "Easements," 14 Cyc. 1134, etc.

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For Matters Relating to:
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- Adverse Possession by Donor or Donee, see Adverse Possession.
- Charitable Gift, see Charities.
- Deed of Gift, see Deeds.
- Gift:
  - Affecting Inheritance, see Descent and Distribution.
  - By Deed, see Deeds.
  - Constitutionality of Statute Relating to, see Constitutional Law.
  - Enforcement of, see Specific Performance.
  - For Charity, see Charities.
  - In Trust, see Trusts.
  - Of Exempt Property, see Exemptions.
- Marriage Settlement, see Husband and Wife.

I. DEFINITION.

A gift is the act by which the owner of a thing voluntarily transfers the title and possession of the same from himself to another person without any consideration.[1] Gifts are of two kinds: (1) Gifts *inter vivos*,[2] and (2) gifts *causa mortis*.[3]

II. INTER VIVOS.

A. Definition. A gift *inter vivos* is a contract which takes place by the mutual consent of the giver, who divests himself of the thing given in order to transmit the title of it to the donee gratuitously, and the donee who accepts and acquires the legal title to it. It operates, if at all, in the donor's lifetime, immediately and irrevocably; it is a gift executed; no further act of parties, no contingency of death or otherwise, is needed to give it effect.[4]

1. Seymour *v.* Seymour, 28 N. Y. App. Div. 495, 497, 51 N. Y. Suppl. 130 [*citing* Bouvier L. Dict.].

A gift is a voluntary transfer of his property by one to another without any consideration or compensation therefor. Ingram *v.* Colgan, 106 Cal. 113, 124, 38 Pac. 315, 39 Pac. 437, 46 Am. St. Rep. 221, 28 L. R. A. 187 [*citing* Gray *v.* Barton, 55 N. Y. 68, 14 Am. Rep. 181; 2 Blackstone Comm. 440; 2 Kent Comm. 437; 2 Stephen Comm. 102].

A gift is a contract executed. The act of execution is the delivery of possession. Without delivery it is only a contract to give, not binding for want of consideration. Scott *v.* Lauman, 104 Pa. St. 593, 595; Zimmerman *v.* Streeper, 75 Pa. St. 147; *In re* Trough, 75 Pa. St. 115, 117; Kidder *v.* Kidder, 33 Pa. St. 268, 269; Withers *v.* Weaver, 10 Pa. St. 391, 393; *In re* Campbell, 7 Pa. St. 100, 101, 47 Am. Dec. 503. See also Williamson *v.* Johnson, 62 Vt. 378, 381, 20 Atl. 279, 22 Am. St. Rep. 117, 9 L. R. A. 277 [*cited* in Martin *v.* Martin, 202 Ill. 382, 67 N. E. 1], where the court said: "All the definitions come to this: That to constitute a valid gift it must be voluntary, gratuitous and absolute."

A gift is more than a purpose to give, however clear and well settled the purpose may be. It is a purpose executed. It may be defined as the voluntary transfer of a chattel completed by the delivery of possession. It is the fact of delivery that converts the unexecuted and revocable purpose into an executed and therefore irrevocable contract. Walsh's Appeal, 122 Pa. St. 177, 15 Atl. 470, 9 Am. St. Rep. 83, 1 L. R. A. 535 [*cited* in Baltimore Trust, etc., Co. *v.* Bauernschmidt, 97 Md. 35, 54 Atl. 637].

As defined by the civil law, a donation is a contract whereby a person gratuitously dispossesses himself of something by transferring it to another to be his property, who accepts it. Browne Rom. L. 119 [*cited* with approval in Fisk *v.* Flores, 43 Tex. 340, 343].

It differs from a grant, sale, or bargain in this: That in each of these cases there must be a consideration, and a gift, as the definition states, must be without consideration. Seymour *v.* Seymour, 28 N. Y. App. Div. 495, 51 N. Y. Suppl. 130 [*citing* Bouvier L. Dict.].

2. **Gifts inter vivos** see *infra*, II.

3. **Gifts causa mortis** see *infra*, III.

4. Bouvier L. Dict. See also Robson *v.* Robson, 3 Del. Ch. 51, 62.

A donation inter vivos is: An act by which one gives to another irrevocably and gratuitously some property of which he becomes the immediate owner. Schmidt Civ. L. 201 [*cited* with approval in Fisk *v.* Flores, 43 Tex. 340, 343]. An act by which the donor divests himself at present and irrev-

B. What Law Governs. The rule is well settled that the validity of a gift depends upon the laws of the state where it was made,[5] which were in force at the time of the making of the gift.[6]

C. Essential Elements — 1. Requisites in General. To constitute a valid gift *inter vivos*, the purpose of the donor to make the gift must be clearly and satisfactorily established, and the gift must be complete by actual, constructive, or symbolical delivery, without power of revocation.[7] It is sometimes provided by statute that a gift, in order to be valid as such, must be executed before a notary public, in the presence of at least two witnesses.[8]

2. Parties — a. Capacity to Make Gift. Any person of legal age,[9] having the mental capacity to understand the nature of the transaction,[10] may be the

ocable of the thing given in favor of the donee who accepts it. La. Civ. Code (Merrick Rev. 1900) art. 1468.

Donatio inter vivos is either relata or simplex; that is, *absoluta*, and this latter may be said to be *remuneratoria* or *modalis sub modo*. Thus, what is given with reference to some service done is called *relata*, if out of pure liberality, without any reason being assigned, *simplex* or *absoluta*; but should the object be given by way of reward for service done it is called *remuneratoria*; lastly, if anything be given to a person with the view that he first do something that shall benefit himself alone, it is termed *donatio modalis*, or *sub modo*. 2 Colquhoun Rom. Civ. L. 109 [*cited* with approval in Fisk *v.* Flores, 43 Tex. 340, 344].

5. Burt *v.* Kimbell, 5 Port. (Ala.) 137; Weatherby *v.* Covington, 3 Strobh. (S. C.) 27, 49 Am. Dec. 623.

6. Tarlton *v.* Briscoe, 4 Bibb (Ky.) 73; Moultrie *v.* Jennings, 2 McMull. (S. C.) 508; Breithaupt *v.* Bauskett, 1 Rich. Eq. (S. C.) 465.

7. *Alabama.*— Thompson *v.* Hudgins, 116 Ala. 93, 22 So. 632.

Georgia.— Mims *v.* Ross, 42 Ga. 121.

Illinois.— Dehm *v.* Dehm, 86 Ill. App. 479.

Indiana.— Daubenspeck *v.* Biggs, 71 Ind. 255, where it was held that the gift could not be sustained.

Iowa.— Garner *v.* Fry, 104 Iowa 515, 73 N. W. 1079.

Kansas.— Bruce *v.* Squires, 68 Kan. 199, 74 Pac. 1102; Calvin *v.* Free, 66 Kan. 466, 71 Pac. 823.

Kentucky.— Merritt *v.* Merritt, 9 Ky. L. Rep. 721.

Louisiana.— See Woolverton *v.* Stevenson, 52 La. Ann. 1147, 27 So. 674.

Maine.— Bickford *v.* Mattocks, 95 Me. 547, 50 Atl. 894; Dole *v.* Lincoln, 31 Me. 422.

Maryland.— Bauernschmidt *v.* Bauernschmidt, 97 Md. 35, 54 Atl. 637.

Massachusetts.— Grover *v.* Grover, 24 Pick. 261, 35 Am. Dec. 319.

Michigan.— Snyder *v.* Snyder, 131 Mich. 658, 92 N. W. 353.

Missouri.— *In re* Soulard, 141 Mo. 642, 43 S. W. 617.

North Carolina.— Newman *v.* Bost, 122 N. C. 524, 29 S. E. 848.

Pennsylvania.— Waynesburg College's Appeal, 111 Pa. St. 130, 3 Atl. 19, 56 Am. Rep. 252; Michener *v.* Dale, 23 Pa. St. 59; Hafer *v.* McKelvey, 23 Pa. Super. Ct. 202. See also Evans' Estate, 6 Pa. Co. Ct. 437.

Tennessee.— Long *v.* Hall, (Ch. App. 1898) 46 S. W. 343.

Texas.— Doyle *v.* Wamego First Nat. Bank, (Civ. App. 1899) 50 S. W. 480.

United States.— Allen-West Commission Co. *v.* Grumbles, 129 Fed. 287, 63 C. C. A. 401.

See 24 Cent. Dig. tit. "Gifts," § 3.

Onerous contract.— In Louisiana a donation *inter vivos* cannot be made in the form of an onerous contract. Cole *v.* Cole, 7 Mart. N. S. (La.) 414.

Reciprocal donations.— Parties cannot, by the same act *inter vivos*, make to each other any reciprocal donations. Frederic *v.* Frederic, 10 Mart. (La.) 188.

Verbal donations of movable property by a person since deceased, when proved to the satisfaction of the court, will be sustained. Alexander's Succession, 110 La. 1027, 35 So. 273.

8. Lambert *v.* Penn Mut. L. Ins. Co., 50 La. Ann. 1027, 24 So. 16; Kirkpatrick *v.* Finney, 30 La. Ann. 223; Burke *v.* Bishop, 27 La. Ann. 465, 21 Am. Rep. 567 (holding, however, that this provision does not apply to the indorsement of a check to a donee); Farrar *v.* Michoud, 22 La. Ann. 358; Soileau *v.* Rougeau, 2 La. Ann. 766 (holding, however, that no other form of nullity will be recognized); Miller *v.* Andrus, 1 La. Ann. 237; Packwood *v.* Dorsey, 6 Rob. (La.) 329; Brittain *v.* Richardson, 3 Rob. (La.) 78; Flores *v.* Lemee, 16 La. 271; Duplessis *v.* Kennedy, 6 La. 231 (holding, however, that this provision does not require both parties to give their consent by the same notarial act); Jardela *v.* Abat, 8 Mart. N. S. (La.) 126. See, however, Hale's Succession, 26 La. Ann. 195; Trahan *v.* McMannus, 2 La. 209, holding that a donation, made in money in the form of a manual gift, is valid without the formality of a notarial act of transfer.

Bonds payable to bearer, and title to which is transmissible by simple delivery, may be the subject of a manual gift, and need not be donated by authentic act. Moore's Succession, 40 La. Ann. 531, 4 So. 460.

9. Capacity of infants to make gift see Infants.

10. See Insane Persons.

donor of property of which he is the legal or equitable owner;[11] and where the donor has sufficient mental capacity, neither age, physical weakness and debility, nor disease of the body will affect his capacity to make a valid gift *inter vivos*.[12] In the absence of constitutional or statutory prohibition,[13] the United States or a state may, through its legislative body, make a gift of its property either to an individual or to a corporation.[14]

b. Capacity to Take. The rule may be broadly stated that any person has the capacity to accept a gift where it is manifestly for his benefit.[15]

3. INTENT. A clear and unmistakable intention on the part of the donor to

11. *Illinois.*— Crum *v.* Thornley, 47 Ill. 192.

Indiana.— Thorne *v.* Cosand, 160 Ind. 566, 67 N. E. 257.

Missouri.— Richardson *v.* Smart, 65 Mo. App. 14.

New Jersey.— Wilkinson *v.* Sherman, 45 N. J. Eq. 413, 18 Atl. 228.

New York.— Riggs *v.* American Tract Soc., 95 N. Y. 503 (where the gift was held invalid on account of the mental condition of the donor); Riggs *v.* American Home Missionary Soc., 35 Hun 656 (holding that an insane delusion, to render a gift void, must arise from a belief in facts, the existence of which no sane person would believe).

Oklahoma.— Farrell *v.* Puthoff, 13 Okla. 159, 74 Pac. 96.

Pennsylvania.— See also Polt *v.* Polt, 205 Pa. St. 139, 54 Atl. 577.

Rhode Island.—Stone *v.* Engstrom, 19 R. I. 201, 32 Atl. 916.

South Carolina.— Cummings *v.* Coleman, 7 Rich. Eq. 509, 62 Am. Dec. 402, where it was held that the donor had sufficient title to make the gift without his consummation of title, which when afterward acquired inured to the benefit of the donee.

Wisconsin.— Henschel *v.* Maurer, 69 Wis. 576, 34 N. W. 926, 2 Am. St. Rep. 757, holding that the donor's mental capacity need not amount to testamentary capacity.

See 24 Cent. Dig. tit. "Gifts," § 11.

City officers.— The officers of a municipal corporation have no right to make gifts of city property, and where made such act will be annulled. Terre Haute *v.* Terre Haute Waterworks Co., 94 Ind. 305.

Capacity of married woman to make gift see HUSBAND AND WIFE.

12. *Iowa.*— Galer *v.* Galer, 108 Iowa 496, 79 N. W. 257.

Mississippi.— Wilson *v.* Jourdan, 79 Miss. 133, 29 So. 823, where an otherwise perfected gift *inter vivos* was held not to be invalidated by the fact that the donor was *in extremis* and expected to die of his illness, and did die within a short time thereafter.

Missouri.— Reed *v.* Carroll, 82 Mo. App. 102, holding that the fact that the donor was weak in body, a cripple, and far advanced in years, was not sufficient to show that his mind was so impaired as to incapacitate him from making a valid gift.

Washington.— Simpson *v.* Holbrook, 21 Wash. 410, 58 Pac. 207, holding that a gift will be sustained, although made while the donor was suffering from an illness from which he died, where he was fully competent to transact business, and there was no fraud or undue influence.

United States.— Meyer *v.* Jacobs, 123 Fed. 900 [*citing* Bowdoin College *v.* Merritt, 75 Fed. 480].

13. Bourn *v.* Hart, 93 Cal. 321, 28 Pac. 951, 27 Am. St. Rep. 203, 15 L. R. A. 431 (holding that the legislature cannot make a gift to a person injured in the service of the state); Yosemite Stage, etc., Co. *v.* Dunn, 83 Cal. 264, 23 Pac. 369 (holding that to constitute a gift by the legislature within the inhibition of section 31, article 4, of the constitution, there must be a gratuitous transfer of the property of the state, made voluntarily, and without consideration); Robinson *v.* Dunn, 77 Cal. 473, 19 Pac. 878, 11 Am. St. Rep. 297 (holding that pay for extra services performed by employees of the legislature is a gift within the prohibition of the state constitution). See also Cutting *v.* Taylor, 3 S. D. 11, 51 N. W. 949, 15 L. R. A. 691.

14. See STATES; UNITED STATES.

15. *Connecticut.*—Hamden *v.* Rice, 24 Conn. 350.

Iowa.— Miller *v.* Chittenden, 2 Iowa 315.

Kentucky.— Malone *v.* Lebus, 116 Ky. 975, 77 S. W. 180, 25 Ky. L. Rep. 1146, holding likewise that where the donee is of unsound mind the law will presume an acceptance.

Louisiana.— Williams *v.* Western Star Lodge No. 24 F. & A. M., 38 La. Ann. 620. See, however, Cole *v.* Lucas, 2 La. Ann. 946, holding that a slave could receive nothing by donation, since whatever ostensibly belonged to him was really the property of his master.

Maryland.— Vansant *v.* Roberts, 3 Md. 119.

Massachusetts.— Dunbar *v.* Soule, 129 Mass. 284; Baker *v.* Clark Institute, 110 Mass. 88; French *v.* Quincy, 3 Allen 9; Sutton First Parish *v.* Cole, 3 Pick. 232; Worcester *v.* Eaton, 13 Mass. 371, 7 Am. Dec. 155.

New Hampshire.— Sargent *v.* Cornish, 54 N. H. 18.

New Jersey.— De Camp *v.* Dobbins, 31 N. J. Eq. 671.

New York.— Jackson *v.* Pike, 9 Cow. 69; Coggeshall *v.* Pelton, 7 Johns. Ch. 292.

Vermont.— Castleton *v.* Langdon, 19 Vt. 210.

United States.— McDonogh *v.* Murdock, 15 How. 367, 14 L. ed. 732.

Capacity of husband to take by gift from his wife see HUSBAND AND WIFE.

make a gift of his property is an essential requisite of a gift *inter vivos*.[16] However, such intention need not necessarily be made known by a verbal expression, but may be gathered from the acts of the donor, when accompanied by other *indicia* of a gift.[17]

4. Delivery — a. Necessity of. A mere promise or declaration of an intention to give, however clear and positive, is not enough to constitute a valid gift *inter vivos*. The intention must be consummated, and carried into effect, by those acts which the law requires to divest the donor, and invest the donee with the right of property. Complete and unconditional delivery is essential to the perfection of such a gift; for where the donor retains dominion over the property, or where a *locus penitentiæ* remains to him, there can be no legal and perfect donation.[18] And this rule has been held to be particularly applicable to parol

16. *Iowa.*—McKenna *v.* Kelso, 52 Iowa 727, 3 N. W. 152.

Maine.— Brown *v.* Crafts, 98 Me. 40, 56 Atl. 213.

Massachusetts.— Scott *v.* Berkshire County Sav. Bank, 140 Mass. 157, 2 N. E. 925. See Morse *v.* Meston, 152 Mass. 5, 24 N. E. 916, holding that where the question as to the intent to give is doubtful, if it is consistent with any other theory, the gift is void.

Michigan.— Bigelow *v.* Paton, 4 Mich. 170.

Missouri.— Spencer *v.* Vance, 57 Mo. 427, holding that mere words, signifying an intent to transfer in the future, are insufficient to constitute a valid parol gift.

New Jersey.—Taylor *v.* Coriell, (Ch. 1904) 57 Atl. 810, holding that, in order to make a gift effective, the evidence should show an intention on the part of the donor to divest himself of the possession and control of his property, and should be inconsistent with any other intention.

New York.— Pickslay *v.* Starr, 149 N. Y. 432, 44 N. E. 163, 52 Am. St. Rep. 740, 32 L. R. A. 703 [*affirming* 72 Hun 10, 27 N. Y. Suppl. 616]; Lehr *v.* Jones, 74 N. Y. App. Div. 54, 77 N. Y. Suppl. 213; Schwind *v.* Ibert, 60 N. Y. App. Div. 378, 69 N. Y. Suppl. 921; Stevens *v.* Stevens, 2 Redf. Surr. 265; Matter of Ward, 2 Redf. Surr. 251.

South Carolina.— Martin *v.* Jennings, 52 S. C. 371, 29 S. E. 807.

Tennessee.— Sheegog *v.* Perkins, 4 Baxt. 273.

Canada.— Sisenwain *v.* Roque, 23 Quebec Super. Ct. 115 [*approving* Lighthall *v.* O'Brien, Quebec Super. Ct. 159].

See 24 Cent. Dig. tit. "Gifts," § 14.

17. *Alabama.*— Sewall *v.* Glidden, 1 Ala. 52, holding that, although a deed of personal property may not have been regularly proved and recorded, it may be regarded as equivalent to a parol declaration of the donor's wishes, and if the constituents of a gift *inter vivos* are shown, the donee's right becomes complete.

Mississippi.— Slack *v.* Slack, 26 Miss. 287. See also Wheatley *v.* Abbott, 32 Miss. 343.

Missouri.— See also Richardson *v.* Smart, 65 Mo. App. 14, holding that a gift cannot be annulled, merely because it appears to have been made without adequate motive.

New Jersey.— Farlee *v.* Field, (Ch. 1897) 36 Atl. 945.

North Carolina.— Morisey *v.* Bunting, 12 N. C. 3.

South Carolina.— McCluney *v.* Lockhart, 4 McCord 251 (holding that where a parent suffers property to go and remain in possession of a married child, a parol gift is presumed); Edings *v.* Whaley, 1 Rich. Eq. 301.

See 24 Cent. Dig. tit. "Gifts," § 14.

Permitting a donee to deal with the property in his possession as his own is evidence of the intention of the donor to make a gift of his property. Chachere *v.* Dumartrait, 2 La. 38; Cutter *v.* Butler, 25 N. H. 343, 57 Am. Dec. 330; Wirt *v.* Cannon, 4 Coldw. (Tenn.) 121. See also Frazier *v.* Perkins, 62 N. H. 69.

18. *Alabama.*— Walker *v.* Crews, 73 Ala. 412; Huddleston *v.* Huey, 73 Ala. 215; Hunley *v.* Hunley, 15 Ala. 91; Blakey *v.* Blakey, 9 Ala. 391; Myers *v.* Peek, 2 Ala. 648; Frisbie *v.* McCarty, 1 Stew. & P. 56.

California.— Richardson *v.* McNulty, 24 Cal. 339.

Delaware.— Wilkins *v.* Wilson, 1 Marv. 404, 41 Atl. 76.

Florida.— Ross *v.* Walker, 44 Fla. 704, 32 So. 934.

Georgia.— Carswell *v.* Ware, 30 Ga. 267.

Kansas.— Calvin *v.* Free, 66 Kan. 466, 71 Pac. 823.

Kentucky.— Rodemer *v.* Rettig, 114 Ky. 634, 71 S. W. 869, 24 Ky. L. Rep. 1474; Duncan *v.* Duncan, 5 Litt. 12; Gable *v.* Gable, 12 Ky. L. Rep. 358; Merritt *v.* Merritt, 9 Ky. L. Rep. 721.

Louisiana.— Johnson *v.* Stevens, 22 La. Ann. 144.

Maryland.— Nickerson *v.* Nickerson, 28 Md. 327.

Massachusetts.— Gerry *v.* Howe, 130 Mass. 350.

Mississippi.— Carradine *v.* Collins, 7 Sm. & M. 428.

New Hampshire.— Blasdel *v.* Locke, 52 N. H. 238; Reed *v.* Spaulding, 42 N. H. 114.

New York.— Gannon *v.* McGuire, 160 N. Y. 476, 55 N. E. 7, 73 Am. St. Rep. 694; Priester *v.* Hohloch, 70 N. Y. App. Div. 256, 75 N. Y. Suppl. 405; Woodruff *v.* Cook, 25 Barb. 505; Hunter *v.* Hunter, 19 Barb. 631; Huntington *v.* Gilmore, 14 Barb. 243; Fink *v.* Cox, 18 Johns. 145, 9 Am. Dec. 191; Grangiac *v.* Arden, 10 Johns. 293; Pearson *v.* Pearson, 7 Johns. 26; Noble *v.* Smith, 2

gifts,[19] and is founded upon grounds of public policy and convenience, to prevent mistake, imposition, and perjury.[20]

b. What Constitutes — (i) *In General.* Delivery to be effectual must be according to the nature and character of the thing given, and hence may be actual or constructive according to the circumstances.[21] There must, however, be a parting by the donor with all present and future legal power and dominion over the property.[22]

Johns. 52, 3 Am. Dec. 399; Minchin *v.* Merrill, 2 Edw. 333; Taylor *v.* New York City Fire Dept., 1 Edw. 294.

North Carolina.— Downey *v.* Smith, 17 N. C. 535; Bullock *v.* Tinnen, 4 N. C. 251, 6 Am. Dec. 562, holding that delivery is essential to complete the gift of a chattel, except where it is granted by deed, or is incapable of manual delivery. See, however, Arrington *v.* Arrington, 2 N. C. 1, holding that, where the identity of the subject of the gift can be proved, delivery is not necessary.

Pennsylvania.— Mechling's Appeal, 2 Grant 157.

Vermont.— Carpenter *v.* Dodge, 20 Vt. 595.

Wisconsin.— Wells *v.* Collins, 74 Wis. 341, 43 N. W. 160, 5 L. R. A. 531.

England.— Cochrane *v.* Moore, 25 Q. B. D. 57, 54 J. P. 408. 59 L. J. Q. B. 377, 63 L. T. Rep. N. S. 153, 6 T. L. R. 296, 38 Wkly. Rep. 588; Taylor *v.* Lendey, 9 East 49; Bunn *v.* Markham, Holt N. P. 352, 3 E. C. L. 143, 2 Marsh. 532, 7 Taunt. 224, 2 E. C. L. 336, 17 Rev. Rep. 497; Cotteen *v.* Missing, 1 Madd. 176; Antrobus *v.* Smith, 12 Ves. Jr. 39, 8 Rev. Rep. 278, '33 Eng. Reprint 16; Tate *v.* Hilbert, 2 Ves. Jr. 111, 2 Rev. Rep. 175, 30 Eng. Reprint 548.

See 24 Cent. Dig. tit. "Gifts," § 29 *et seq.*

19. *Alabama.*— Thomas *v.* Degraffenreid, 17 Ala. 602; Bryant *v.* Ingraham, 16 Ala. 116; Sewall *v.* Glidden, 1 Ala. 52.

Arkansas.— Danley *v.* Rector, 10 Ark. 211, 50 Am. Dec. 242; Hynson *v.* Terry, 1 Ark. 83.

Georgia.— Evans *v.* Lipscomb, 31 Ga. 71; Anderson *v.* Baker, 1 Ga. 595.

Illinois.— Carpenter *v.* Davis, 71 Ill. 395 (holding, however, that where the donor permits the donee to sell the gift, and the donee with the proceeds of such sale purchases from the donor other property, the title to such property is perfect); People *v.* Johnson, 14 Ill. 342.

Louisiana.— Hart *v.* Clark, 5 Mart. 614.

Maryland.—Conser *v.* Snowden, 54 Md. 175, 39 Am. Rep. 368; Bradley *v.* Hunt, 5 Gill & J. 54, 23 Am. Dec. 597; Pennington *v.* Gittings, 2 Gill & J. 208.

New York.— Matter of Small, 27 N. Y. App. Div. 438, 50 N. Y. Suppl. 341; Huntington *v.* Gilmore, 14 Barb. 243; Brink *v.* Gould, 7 Lans. 425; Noble *v.* Smith, 2 Johns. 52, 3 Am. Dec. 399.

South Carolina.— Fowler *v.* Stuart, 1 McCord 504; Reid *v.* Colcock, 1 Nott & M. 592, 9 Am. Dec. 729; Murdock *v.* McDowell, 1 Nott & M. 237, 9 Am. Dec. 684; Baker *v.* Avant, 1 Nott & M. 218.

Texas.— Peeler *v.* Guilkey, 27 Tex. 355; Chevallier *v.* Wilson, 1 Tex. 161.

Virginia.— Ewing *v.* Ewing, 2 Leigh 337.

England.— Cochrane *v.* Moore, 25 Q. B. D. 57, 54 J. P. 804, 59 L. J. Q. B. 377, 63 L. T. Rep. N. S. 153, 6 T. L. R. 296, 38 Wkly. Rep. 588; Irons *v.* Smallpiece, 2 B. & Ald. 551, 21 Rev. Rep. 395.

See 24 Cent. Dig. tit. "Gifts," § 29 *et seq.*

A remainder in personal property cannot be created by a parol gift. Ragsdale *v.* Norwood, 38 Ala. 21, 79 Am. Dec. 79.

20. Harris *v.* Clark, 3 N. Y. 93, 51 Am. Dec. 352; Noble *v.* Smith, 2 Johns. (N. Y.) 52, 3 Am. Dec. 399; Brinckerhoff *v.* Lawrence, 2 Sandf. Ch. (N. Y.) 400; Delmotte *v.* Taylor, 1 Redf. Surr. (N. Y.) 417; Chevallier *v.* Wilson, 1 Tex. 161; Dickeschied *v.* Exchange Bank, 28 W. Va. 340.

Estoppel.— Although a gift is not complete without delivery, an acknowledgment by a party under his hand and seal that a delivery was made will estop him from denying the delivery. Newell *v.* Newell, 34 Miss. 385.

21. *Arkansas.*— Prater *v.* Frazier, 11 Ark. 249. See also Rowland *v.* Phillips, (Ark. 1890) 13 S. W. 1101.

Georgia.— Poullain *v.* Poullain, 79 Ga. 11, 4 S. E. 81, holding that any act which indicates a renunciation of dominion by the donor and transfer of dominion to the donee is sufficient delivery, under Code, § 2660, relating to gifts, and at common law.

Kentucky.— Stephenson *v.* King, 81 Ky. 425, 50 Am. Rep. 173.

Maryland.— Taylor *v.* Henry, 48 Md. 550, 30 Am. Rep. 486; Nickerson *v.* Nickerson, 28 Md. 327; Pennington *v.* Gittings, 2 Gill & J. 208; Hitch *v.* Davis, 3 Md. Ch. 266.

Ohio.— Gano *v.* Fisk, 43 Ohio St. 462, 3 N. E. 532.

South Carolina.— Caldwell *v.* Wilson, 2 Speers 75 (holding that delivery is a transfer of possession, either by actual tradition from hand to hand, or by an expression of the donor's willingness that the donee should take when the chattel was present, and in a situation to be taken by either party); Reid *v.* Colcock, 1 Nott & M. 592, 9 Am. Dec. 729.

See 24 Cent. Dig. tit. "Gifts," § 28 *et seq.*

22. *Alabama.*— Montgomery First Nat. Bank *v.* Taylor, (1904) 37 So. 695; Bates *v.* Vary, 40 Ala. 421 (holding that, where delivery is constructive merely, the donor's intention to part with the title and dominion of the subject of the gift in favor of the donee must be clearly manifested); Stallings *v.* Finch, 25 Ala. 518; Bryant *v.* Ingraham, 16 Ala. 116; Sims *v.* Sims, 2 Ala. 117.

Georgia.— Burt *v.* Andrews, 112 Ga. 465, 37 S. E. 726; Evans *v.* Lipscomb, 31 Ga. 71.

Illinois.— Taylor *v.* Harmison, 79 Ill. App. 380; Roberts *v.* Draper, 18 Ill. App. 167.

(II) *Where Evidenced by Writing.* The general rule is that a gift of property evidenced by a written instrument executed by the donor is valid without a manual delivery of the property.[23] However, there must be a delivery of the instrument declaring the gift in order to make such gift valid.[24]

(III) *Property in Possession of Donee.* Where property is at the time of the gift in the possession of the donee, as agent for the donor or otherwise, it is not necessary that the donee should surrender to the donor his actual possession in order that the latter may redeliver the same to him in execution of the gift, but a relinquishment by the donor of all dominion over the property, and recognition of the possession of the donee as being in his own right is sufficient to perfect the gift.[25] However, where the donor and donee reside together at the time of the gift, the general rule is that possession by the donee at the place of

Indiana.— See Richards *v.* Reeves, 149 Ind. 427, 49 N. E. 348.

Iowa.— Willey *v.* Backus, 52 Iowa 401, 3 N. W. 431.

Kansas.— Calvin *v.* Free, 66 Kan. 466, 71 Pac. 823 (holding, however, that where, on delivery of property in a gift *inter vivos*, the donor obtains some control over it, the donor need not, in order to complete it, retake the property and again deliver it, but may make the gift complete by surrender of his control); Gallagher *v.* Donahy, 65 Kan. 341, 69 Pac. 330.

Maine.—Bath Sav. Inst. *v.* Hathorn, 88 Me. 122, 33 Atl. 836, 51 Am. St. Rep. 382, 32 L. R. A. 377; Dole *v.* Lincoln, 31 Me. 422; Allen *v.* Polereczky, 31 Me. 338.

Maryland.— Pennington *v.* Gittings, 2 Gill & J. 208; Hitch *v.* Davis, 3 Md. Ch. 266.

Mississippi.— Wheatley *v.* Abbott, 32 Miss. 343.

Missouri.— Gartside *v.* Pahlman, 45 Mo. App. 160.

New Jersey.— Matthews *v.* Hoagland, 48 N. J. Eq. 455, 21 Atl. 1054; Schick *v.* Grote, 42 N. J. Eq. 352, 7 Atl. 852; Dilts *v.* Stevenson, 17 N. J. Eq. 407.

New York.— Gannon *v.* McGuire, 160 N. Y. 476, 55 N. E. 7, 73 Am. St. Rep. 694; Jackson *v.* Twenty-Third St. R. Co., 88 N. Y. 520 [*reversing* 47 N. Y. Super. Ct. 85]; Young *v.* Young, 80 N. Y. 422, 36 Am. Rep. 634; Gray *v.* Barton, 55 N. Y. 68, 14 Am. Rep. 181; Little *v.* Willets, 55 Barb. 125, 37 How. Pr. 481.

Ohio.—Flanders *v.* Blandy, 45 Ohio St. 108, 12 N. E. 321.

Oregon.— Liebe *v.* Battmann, 33 Oreg. 241, 54 Pac. 179, 72 Am. St. Rep. 705, holding that the title must so completely pass to the donee that if the donor again resumes control over it without consent of the donee, he becomes liable as a trespasser.

Pennsylvania.— Funston *v.* Twining, 202 Pa. St. 88, 51 Atl. 736.

South Carolina.— Busby *v.* Byrd, 4 Rich. Eq. 9; Gilmore *v.* Whitesides, Dudley Eq. 14, 31 Am. Dec. 563.

England.— Douglas *v.* Douglas, 22 L. T. Rep. N. S. 127; Hooper *v.* Goodwin, 1 Swanst. 486, 36 Eng. Reprint 475, 1 Wils. Ch. 212, 37 Eng. Reprint 92, 18 Rev. Rep. 125.

See 24 Cent. Dig. tit. "Gifts," § 29 *et seq.*

23. *Alabama.*— Connor *v.* Trawick, 37 Ala. 289, 79 Am. Dec. 58 (holding, however, that the instrument of conveyance must be under seal in order to validate the gift, where the donor retains possession thereof); McCutchen *v.* McCutchen, 9 Port. 650.

Connecticut.— McCarthy *v.* McCarthy, 36 Conn. 177.

District of Columbia.— Tierney *v.* Corbett, 2 Mackey 264.

Florida.— Horn *v.* Gartman, 1 Fla. 63.

Georgia.— Blalock *v.* Miland, 87 Ga. 573, 13 S. E. 551; Ball *v.* Wallace, 32 Ga. 170; Wyche *v.* Greene, 11 Ga. 159.

Louisiana.— Holmes *v.* Patterson, 5 Mart. 693.

New Jersey.— Tarbox *v.* Grant, 56 N. J. Eq. 199, 39 Atl. 378.

North Carolina.— Gordon *v.* Wilson, 49 N. C. 64.

Tennessee.—Green *v.* Goodall, 1 Coldw. 404; McEwen *v.* Troost, 1 Sneed 186.

Texas.— Lohff *v.* Germer, 37 Tex. 578.

England.— Irons *v.* Smallpiece, 2 B. & Ald. 551, 21 Rev. Rep. 395.

See 24 Cent. Dig. tit. "Gifts," § 31.

24. *California.*— *In re* Cronan, Myr. Prob. 72.

Illinois.— Williams *v.* Chamberlain, 165 Ill. 210, 46 N. E. 250 [*reversing* 62 Ill. App. 423].

Kentucky.— Payne *v.* Powell, 5 Bush 248; Gordon *v.* Young, 10 Ky. L. Rep. 681.

Michigan.— Clay *v.* Layton, 134 Mich. 317, 96 N. W. 458.

New York.— Matter of Clark, 16 Misc. 405, 39 N. Y. Suppl. 722. See also Williams *v.* Guile, 117 N. Y. 343, 22 N. E. 1071, 6 L. R. A. 366.

North Carolina.— *Ex p.* McBee, 63 N. C. 332.

Pennsylvania.— Tozer *v.* Jackson, 164 Pa. St. 373, 30 Atl. 400.

Tennessee.— Taylor *v.* Taylor, 2 Humphr. 597, where the instrument was not delivered to the donee, and it was held that it could not be set up as a deed of gift, but that the court would permit the cause to be continued to allow the parties to attempt to set it up as a testamentary paper.

United States.— Wright *v.* Bragg, 106 Fed. 25, 45 C. C. A. 204.

See 24 Cent. Dig. tit. "Gifts," § 32.

Deed of gift generally see DEEDS, 13 Cyc. 505.

25. *Illinois.*— Eden *v.* Bohling, 69 Ill. App. 307, holding that the possession and use by

their residence is not sufficient to make the gift valid,[26] in the absence of other proof of a perfected gift.[27]

(iv) *To Third Person For Donee.* The rule is well settled, however, that delivery need not be made to the donee personally, but may be made to a third person as agent or trustee, for the use of the donee, and under such circumstances as indicate that the donor relinquishes all right to the possession or control of the property, and intends to vest a present title in the donee.[28]

a housekeeper in her own room in the house of her employer of articles of furniture given by him to her is a sufficient delivery.

Indiana.— Tenbrook *v.* Brown, 17 Ind. 410.

New York.— Allen *v.* Cowan, 23 N. Y. 502, 80 Am. Dec. 316 [*reversing* 28 Barb. 99].

North Carolina.— Newman *v.* Bost, 122 N. C. 524, 29 S. E. 848. See, however, Davis *v.* Boyd, 51 N. C. 249.

South Carolina.— Esswein *v.* Seigling, 2 Hill Eq. 600, where defendant was the executor of the estate and in possession of the assets, and the legatees wrote him to retain a specified sum out of the funds in his hands as a present, and he accepted the same, the gift was held to be valid.

Texas.— Patterson *v.* Patterson, (Civ. App. 1904) 27 S. W. 837.

West Virginia.— Miller *v.* Neff, 33 W. Va. 197, 10 S. E. 378, 6 L. R. A. 515.

England.— Kilpin *v.* Ratley, [1892] 1 Q. B. 582, 56 J. P. 565, 66 L. T. Rep. N. S. 797, 40 Wkly. Rep. 479; Winter *v.* Winter, 4 L. T. Rep. N. S. 639, 9 Wkly. Rep. 747. See also *Re* Alderson, 64 L. T. Rep. N. S. 645, holding that delivery first, and gift afterward, of a chattel capable of delivery is as effectual as gift first and delivery afterward. See, however, Shower *v.* Pilck, 4 Exch. 478, 19 L. J. Exch. 113; Smith *v.* Smith, 2 Str. 955, both holding that a mere verbal gift of a chattel to a person in possession does not pass the property to the intended donee.

See 24 Cent. Dig. tit. "Gifts," § 35.

26. *Kentucky.*—Overfield *v.* Sutton, 1 Metc. 621.

Nebraska.— Filley *v.* Norton, 17 Nebr. 472, 23 N. W. 347.

New York.— Brink *v.* Gould, 7 Lans. 425.

North Carolina.— Kelly *v.* Maness, 123 N. C. 236, 31 S. E. 490.

Virginia.— Rowe *v.* Marchant, 86 Va. 177, 9 S. E. 995.

West Virginia.— Blankenship *v.* Kanawha, etc., R. Co., 43 W. Va. 135, 27 S. E. 355.

See 24 Cent. Dig. tit. "Gifts," § 35.

27. De Graffenreid *v.* Thomas, 14 Ala. 681; Colby *v.* Portman, 115 Mich. 95, 72 N. W. 1098 (where a piano was given to a daughter-in-law living with the donor in his house, and it was held that there was sufficient possession to complete the gift, where the piano was bought for the donee and brought into the house); Bennett *v.* Cook, 23 S. C. 353, 6 S. E. 28.

Delivery of gift from husband to wife or from wife to husband see Husband and Wife.

Delivery of gift from parent to child see Parent and Child.

28. *Alabama.*—Arrington *v.* Arrington, 122 Ala. 510, 26 So. 152; Easly *v.* Dye, 14 Ala. 158; Pope *v.* Randolph, 13 Ala. 214; Smith *v.* Wiggins, 3 Stew. 221.

Arkansas.— Smith *v.* Youngblood, 68 Ark. 255, 58 S. W. 42; Williams *v.* Smith, 66 Ark. 299, 50 S. W. 513; Straughan *v.* Tucker, 59 Ark. 93, 26 S. W. 384; Nolen *v.* Harden, 43 Ark. 307, 51 Am. Rep. 563.

California.— Ruiz *v.* Dow, 113 Cal. 490, 45 Pac. 867.

Georgia.— Poullain *v.* Poullain, 79 Ga. 11, 4 S. E. 81. See also Perkins *v.* Keith, 33 Ga. 525.

Indiana.— Devol *v.* Dye, 123 Ind. 321, 24 N. E. 246, 7 L. R. A. 439 [*citing* Farquharson *v.* Cave, 2 Coll. 356, 10 Jur. 63, 15 L. J. Ch. 137, 33 Eng. Ch. 356]; Goelz *v.* People's Sav. Bank, 31 Ind. App. 67, 67 N. E. 232.

Kentucky.— Reynolds *v.* Reynolds, 92 Ky. 556, 18 S. W. 517, 13 Ky. L. Rep. 793; Forsyth *v.* Kreakbaum, 7 T. B. Mon. 97; Burge *v.* Burge, 76 S. W. 873, 25 Ky. L. Rep. 979.

Louisiana.— O'Neill *v.* Leinicke, 49 La. Ann. 3, 21 So. 113; Crawford *v.* Puckett, 14 La. Ann. 639.

Maine.— Bickford *v.* Mattocks, 95 Me. 547, 50 Atl. 894.

Maryland.—Sprigg *v.* Negro Presly, 3 Harr. & J. 493.

Massachusetts.—See Duryea *v.* Harvey, 183 Mass. 429, 67 N. E. 351.

Michigan.—Holmes *v.* McDonald, 119 Mich. 563, 78 N. W. 647, 75 Am. St. Rep. 430.

Mississippi.— Conner *v.* Hull, 36 Miss. 424.

New York.— Scallan *v.* Brooks, 54 N. Y. App. Div. 248, 66 N. Y. Suppl. 591; Bump *v.* Pratt, 84 Hun 201, 32 N. Y. Suppl. 538; Taylor *v.* Kelly, 5 Hun 115; Hunter *v.* Hunter, 19 Barb. 631; Smith *v.* Lee, 2 Thomps. & C. 591; Minchin *v.* Merrill, 2 Edw. 333.

North Dakota.— See Luther *v.* Hunter, 7 N. D. 544, 75 N. W. 916, where an assignment of a claim to administrator's fees was forwarded to the judge of probate without any instructions to deliver the same to the party named therein as assignee, and such assignee had no knowledge of the assignment, and it was held that this did not constitute a delivery of the property.

Pennsylvania.— Osmond's Estate, 161 Pa. St. 543, 29 Atl. 266; Hawn *v.* Stoler, 22 Pa. Super. Ct. 307.

South Carolina.— Harten *v.* Gibson, 4 Desauss. 139.

Texas.— Thompson *v.* Caruthers, 92 Tex. 530, 50 S. W. 331; Lewis *v.* Castleman, 27 Tex. 407; Jarrell *v.* Crow, 30 Tex. Civ. App. 629, 71 S. W. 397; Thompson *v.* Caruthers, (Civ. App. 1899) 51 S. W. 1093.

Where, however, such third person holds the property as the agent of the donor and not the donee, the gift is revocable at the donor's pleasure, and therefore it is not a valid gift *inter vivos*.[29]

(v) *Donor as Trustee.* The donor may likewise constitute himself a trustee for the donee in an expressed trust, and in that case no further delivery of the gift is necessary to its validity.[30]

(vi) *Constructive Delivery.* The trend of modern decisions is toward a modification of the early English rule requiring an actual, manual delivery of the property in all cases, to constitute a valid gift *inter vivos*,[31] and the substitution therefor of a symbolic or constructive delivery, where the circumstances of the case require it. Now, according to the better doctrine, an unequivocal declaration of gift, accompanied by a delivery of the only means by which possession of the thing given can be obtained, is sufficient.[32]

Wisconsin.—Citizens' L. & T. Co. *v.* Holmes, 116 Wis. 220, 93 N. W. 39.

See 24 Cent. Dig. tit. "Gifts," § 36.

29. *Indiana.*— Devol *v.* Dye, 123 Ind. 321, 24 N. E. 246, 7 L. R. A. 439; Smith *v.* Ferguson, 90 Ind. 229, 46 Am. Rep. 216.

Kentucky.— Duncan *v.* Duncan, 5 Litt. 12.

Maine.— Bickford *v.* Mattocks, 95 Me. 547, 50 Atl. 894; Augusta Sav. Bank *v.* Fogg, 82 Me. 538, 20 Atl. 92.

Maryland.— Thompson *v.* Dorsey, 4 Md. Ch. 149.

Massachusetts.— Duryea *v.* Harvey, 183 Mass. 429, 67 N. E. 351.

Missouri.— Tomlinson *v.* Ellison, 104 Mo. 105, 16 S. W. 201.

New Hampshire.— Craig *v.* Kittredge, 46 N. H. 57.

New York.— Guy *v.* Langdon, 84 Hun 218, 32 N. Y. Suppl. 531; Taylor *v.* New York Fire Dept., 1 Edw. 294. See also Augsbury *v.* Shurtliff, 180 N. Y. 138, 72 N. E. 927.

North Carolina.— Picot *v.* Sanderson, 12 N. C. 309.

Pennsylvania.— Fross' Appeal, 105 Pa. St. 258.

Utah.— Peck *v.* Rees, 7 Utah 467, 27 Pac. 581, 13 L. R. A. 714.

30. *Alabama.*— Sewall *v.* Glidden, 1 Ala. 52.

Illinois.—Yokem *v.* Hicks, 93 Ill. App. 667.

Iowa.— Pierson *v.* Heisey, 19 Iowa 114.

Maryland.— Sanderson *v.* Marks, 1 Harr. & G. 252.

New York.— Martin *v.* Funk, 75 N. Y. 134, 31 Am. Rep. 446; Taylor *v.* Kelly, 5 Hun 115; Crouse *v.* Judson, 41 Misc. 338, 84 N. Y. Suppl. 755.

31. Pennington *v.* Gittings, 2 Gill & J. (Md.) 208 (holding that if the property donated is incapable of delivery, there can be no gift made of it); Noble *v.* Smith, 2 Johns. (N. Y.) 52, 3 Am. Dec. 399 (where the donor said to the donee: "I will give you the corn growing in that field," pointing to an unharvested crop, and it was held that the gift was insufficient, in that there was no delivery; Chancellor Kent adding that he doubted if there could be any delivery without putting the donee "into possession of the soil"); Adams *v.* Hayes, 24 N. C. 361.

32. *Alabama.*— Brantley *v.* Cameron, 78 Ala. 72; Bates *v.* Vary, 40 Ala. 421; Phillips *v.* McGrew, 13 Ala. 255; Blakey *v.* Blakey, 9 Ala. 391.

California.— Driscoll *v.* Driscoll, 143 Cal. 528, 77 Pac. 471.

Georgia.— McMullen *v.* Stripling, 120 Ga. 658, 48 S. E. 115; Burt *v.* Andrews, 112 Ga. 465, 37 S. E. 726, holding that under Ga. Civ. Code, § 3567, manual delivery is not essential to the validity of a gift, and any act which indicates a renunciation of dominion by the donor and the transfer of dominion to the donee is a good constructive delivery.

Illinois.— People *v.* Benson, 99 Ill. App. 325; Hagemann *v.* Hagemann, 90 Ill. App. 251.

Indiana.— Gammon Theological Seminary *v.* Robbins, 128 Ind. 85, 27 N. E. 341, 12 L. R. A. 506 (holding that if the article given be too bulky to admit of a manual delivery, but there is a surrender of the property under control by the donor to the donee, with a clear expression of intention of the donor to give, and the donee accepts the gift, and assumes control of the property, it is sufficient); Devol *v.* Dye, 123 Ind. 321, 24 N. E. 246, 7 L. R. A. 439.

Iowa.— See McKenna *v.* Kelso, 52 Iowa 727, 3 N. W. 152, holding that a delivery cannot be inferred from the mere fact that title to the property was taken in the name of the alleged donee.

Kentucky.— Brown *v.* Brown, 4 B. Mon. 535; Malone *v.* Lebus, 77 S. W. 180, 25 Ky. L. Rep. 1146 (where a deed recited that part of the consideration was a note, with interest payable annually, for the use of a certain person during her life, and it was held that there was a valid gift of the interest, although the note was not delivered to the party); Roche *v.* George, 13 Ky. L. Rep. 493.

Maine.— Carleton *v.* Lovejoy, 54 Me. 445.

Massachusetts.— Coleman *v.* Parker, 114 Mass. 30; Grover *v.* Grover, 24 Pick. 261, 35 Am. Dec. 319.

Michigan.— Ebel *v.* Piehl, 134 Mich. 64, 95 N. W. 1004; Holmes *v.* McDonald, 119 Mich. 563, 78 N. W. 647, 75 Am. St. Rep. 430.

Mississippi.— Carradine *v.* Collins, 7 Sm. & M. 428.

Missouri.— Doering *v.* Kenamore, 86 Mo. 588.

(VII) *Redelivery to Donor or His Representative.* After a gift is made complete by delivery, it is not necessary that the donee shall retain possession of the property, and it may be redelivered to the donor as the agent or trustee of the donee for safekeeping, or other purpose.[33] However, mere custody of the property by the donor after a complete gift *in præsenti* has been made is subject to explanation, and its chief importance is its bearing upon the question as to whether there was an executed gift.[34]

(VIII) *Parol Gift of Land* — (A) *General Rule.* The general rule is that a parol gift of land is wholly invalid and vests no right to the donee, either legal or equitable, since the donor still has the power to consummate the gift or not, at his option;[35] and this is true even where the gift is accompanied by posses-

North Carolina.—Kelly *v.* Maness, 123 N. C. 236, 31 S. E. 490; Newman *v.* Bost, 122 N. C. 524, 29 S. E. 848; Lavender *v.* Pritchard, 3 N. C. 337.

Oregon.— Waite *v.* Grubbe, 43 Oreg. 406, 73 Pac. 206, 99 Am. St. Rep. 764.

Pennsylvania.— See *In re* Conway, 18 Lanc. L. Rev. 129, holding that where the intention to make a delivery is clear, and the assignment to carry out that intention is fully and properly executed, the mere fact that the actual delivery is frustrated, against the will of both parties, by an unsurmountable obstacle, will not invalidate the gift.

South Carolina.—Pitts *v.* Mangum, 2 Bailey 588.

Texas.— Hillebrant *v.* Brewer, 6 Tex. 45, 55 Am. Dec. 757, where a father procured a brand to be recorded in the name of his child and branded certain cattle with the brand so recorded, with the avowed object of making a gift of the cattle to the child, and it was held that there was a sufficient delivery to consummate the gift. See, however, Love *v.* Hudson, 24 Tex. Civ. App. 377, 59 S. W. 1127, where the father failed to have the brand recorded, and it was held, under Tex. Rev. St. (1895) art. 4930, providing that no unrecorded brand shall be evidence of ownership of cattle on which it is used, that such branding did not constitute a delivery of the cattle.

See 24 Cent. Dig. tit. "Gifts," § 37.

Delivery of a key of a trunk or chest, with words of gift of such trunk or chest and its contents, is a good delivery to pass the property to the donee. Marsh *v.* Fuller, 18 N. H. 360; Gilkinson *v.* Third Ave. R. Co., 47 N. Y. App. Div. 472, 63 N. Y. Suppl. 792; Cooper *v.* Burr, 45 Barb. (N. Y.) 9. Where, however, the donor likewise retains a key to the receptacle, it has been held that this does not constitute a completed gift under the rule that there must have been such a delivery as to divest the donor of dominion and control of the property. Bauernschmidt *v.* Bauernschmidt, 97 Md. 35, 54 Atl. 637; Sheegog *v.* Perkins, 4 Baxt. (Tenn.) 273; Chambers *v.* McCreery, 98 Fed. 783.

33. *Alabama.*—Ivey *v.* Owens, 28 Ala. 641; Easly *v.* Dye, 14 Ala. 158; Sewall *v.* Glidden, 1 Ala. 52.

California.— Driscoll *v.* Driscoll, 143 Cal. 528, 77 Pac. 471.

Indiana.— Rinker *v.* Rinker, 20 Ind. 185.

Kansas.— Whitford *v.* Horn, 18 Kan. 455.

Massachusetts.— Grover *v.* Grover, 24 Pick. 261, 35 Am. Dec. 319.

Michigan.— Crittenden *v.* Phœnix Mut. L. Ins. Co., 41 Mich. 442, 2 N. W. 657.

Mississippi.— Conner *v.* Hull, 36 Miss. 424.

New Hampshire.— Marston *v.* Marston, 64 N. H. 146, 5 Atl. 713.

New York.— Gannon *v.* McGuire, 160 N. Y. 476, 55 N. E. 7, 73 Am. St. Rep. 694; Matter of Brandreth, 58 N. Y. App. Div. 575, 69 N. Y. Suppl. 142. See also Farleigh *v.* Cadman, 159 N. Y. 169, 53 N. E. 808.

South Carolina.— Bennett *v.* Cook, 28 S. C. 353, 6 S. E. 28; Madden *v.* Day, 1 Bailey 587.

Tennessee.—Royston *v.* McCulley, (Ch. App. 1900) 59 S. W. 725.

Wisconsin.— McNally *v.* McAndrew, 98 Wis. 62, 73 N. W. 315.

Canada.— Watson *v.* Bradshaw, 6 Ont. App. 666.

See 24 Cent. Dig. tit. "Gifts," § 42.

Delivery to donor's executor.— The right of the donee to property received from the donor is not affected by delivery of it to donor's executor on his demanding it, donor not having admitted the executor's right to it. Clinton *v.* McKeown, 39 S. C. 21, 17 S. E. 504.

34. Ivey *v.* Owens, 28 Ala. 641; Mims *v.* Sturtevant, 18 Ala. 359; Durett *v.* Sewall, 2 Ala. 669 (where the subsequent possession of the property by the donor was held to be of such a character as to show a revocation of an incomplete gift); Gannon *v.* McGuire, 160 N. Y. 476, 55 N. E. 7, 73 Am. St. Rep. 694; McNally *v.* McAndrew, 98 Wis. 62, 73 N. W. 315. See also Sanderlin *v.* Sanderlin, 24 Ga. 583, holding that by a redelivery, especially accompanied by evidence tending to show it, the jury may infer a rescinding of the gift.

35. *Georgia.*— Thaggard *v.* Crawford, 112 Ga. 326, 37 S. E. 367.

Kansas.— Hamilton *v.* Ogee, 10 Kan. App. 241, 62 Pac. 708, holding that a parol gift of land, unaccompanied by possession or improvements during the life of the donor, conveys no title.

Kentucky.— Rucker *v.* Abell, 8 B. Mon. 566, 48 Am. Dec. 406.

Louisiana.— See Lynch *v.* Lynch, 23 La. Ann. 242, holding that a gift between the living of the usufruct of immovable property must be in writing to be operative.

sion,[36] unless such possession is adverse as against the donor, and continues without interruption for the statutory period.[37]

(B) *Improvements by Donee.* According to the better doctrine, a parol gift of land, accompanied by possession by the donee, will be enforced in equity as a valid gift, where the donee has been induced by the promise of the gift to make valuable improvements on the land of a permanent nature, and to such an extent as to render a revocation of the gift unjust, inequitable, and a fraud upon the donee.[38] However, to sustain such gift it is necessary that the terms and

Maryland.— Duckett *v.* Duckett, 71 Md. 357, 18 Atl. 535.

New York.— Jackson *v.* Rogers, 2 Cai. Cas. 314, holding that parol gift of land creates only a tenancy at will.

Wisconsin.— Sipes *v.* Decker, 102 Wis. 588, 78 N. W. 769.

See 24 Cent. Dig. tit. "Gifts," §§ 43, 46.

36. *Alabama.*— Collins *v.* Johnson, 57 Ala. 304 (holding that a parol gift of land creates a mere tenancy at will which may be revoked or reaffirmed by the donor); Conn *v.* Prewitt, 48 Ala. 636 (holding that equity will not enforce the specific execution of a parol gift of land, even where accompanied by delivery of possession); Pinckard *v.* Pinckard, 23 Ala. 649; Evans *v.* Battle, 19 Ala. 398.

Georgia.— Thompson *v.* Ray, 92 Ga. 285, 18 S. E. 59, holding that a parol gift of land accompanied by possession, based on a consideration meritorious, and to some extent valuable, is not of itself sufficient to pass title to the donee.

Kentucky.— Glass *v.* Gaines, 15 S. W. 877, 17 S. W. 161, 13 Ky. L. Rep. 277. See, however, Ford *v.* Ellingwood, 3 Metc. 359, holding that a parol gift of land, although not enforceable, is not illegal or void, and that it may suffice, especially when backed by possession of the donee, to estop a claim in equity brought by the donor or his representatives.

Maine.— Bigelow *v.* Bigelow, 93 Me. 439, 45 Atl. 513.

Michigan.— Buhler *v.* Trombly, (1905) 102 N. W. 647.

Pennsylvania.— Collins *v.* Collins, 2 Grant 117.

South Carolina.— Caldwell *v.* Williams, Bailey Eq. 175.

Tennessee.— Brown *v.* Watkins, 98 Tenn. 454, 40 S. W. 480, holding that an occupant of land under a gift by parol has a mere possessory right without color of title, and is available only as a defense to an action for possession and is lost whenever possession is surrendered to the holder of the legal title.

Virginia.— Clarke *v.* McClure, 10 Gratt. 305.

West Virginia.— Crim *v.* England, 46 W. Va. 480, 33 S. E. 310, 76 Am. St. Rep. 826.

Wisconsin.— See Sipes *v.* Decker, 102 Wis. 588, 78 N. W. 769.

See 24 Cent. Dig. tit. "Gifts," §§ 43, 46.

37. Collins *v.* Johnson, 57 Ala. 304; Potter *v.* Smith, 68 Mich. 212, 35 N. W. 916. See Brown *v.* Watkins, 98 Tenn. 454, 40 S. W. 480.

Adverse possession by the donee against the donor see ADVERSE POSSESSION, 1 Cyc. 1043.

38. *Alabama.*— Evans *v.* Battle, 19 Ala. 398, holding that under such circumstances equity will not allow the donor to reclaim the possession without making compensation to the donee for the improvements.

Arkansas.— Guynn *v.* McCauley, 32 Ark. 97.

California.— Burris *v.* Landers, 114 Cal. 310, 46 Pac. 162.

Colorado.— Baca *v.* Wootton, 8 Colo. App. 94, 44 Pac. 850.

Georgia.— Hadaway *v.* Smedley, 119 Ga. 264, 46 S. E. 96; Ogden *v.* Dodge County, 97 Ga. 461, 25 S. E. 321; Poullain *v.* Poullain, 76 Ga. 420, 4 S. E. 92. See also Heidt *v.* Heidt, 115 Ga. 965, 42 S. E. 263.

Maine.— Bigelow *v.* Bigelow, 93 Me. 439, 45 Atl. 513, holding, however, that slight and temporary erections for the tenant's own convenience will give no equity.

Maryland.— Hardesty *v.* Richardson, 44 Md. 617, 22 Am. Rep. 57.

Nebraska.— Wylie *v.* Charlton, 43 Nebr. 840, 62 N. W. 220; Dawson *v.* McFaddin, 22 Nebr. 131, 34 N. W. 338.

New Hampshire.— Seavey *v.* Drake, 62 N. H. 393.

Pennsylvania.— Allison *v.* Burns, 107 Pa. St. 50; Burns *v.* Sutherland, 7 Pa. St. 103; Caldwell *v.* Caldwell, 24 Pa. Super. Ct. 230; Syler *v.* Eckhart, 1 Binn. 378.

Texas.— Wootters *v.* Hale, 83 Tex. 563, 19 S. W. 134; Shannon *v.* Marchbanks, (Tex. Civ. App. 1904) 80 S. W. 860; Samuelson *v.* Bridges, 6 Tex Civ. App. 425, 25 S. W. 636; Shepard *v.* Galveston, etc., R. Co., 2 Tex. Civ. App. 535, 22 S. W. 267.

Utah.— Coske *v.* Young, 2 Utah 254.

Virginia.— Halsey *v.* Peters, 79 Va. 60; Burkholder *v.* Ludlan, 30 Gratt. 255, 32 Am. Rep. 668.

West Virginia.— Crim *v.* England, 46 W. Va. 480, 33 S. E. 310, 76 Am. St. Rep. 826; Harrison *v.* Harrison, 36 W. Va. 556, 15 S. E. 87; Frame *v.* Frame, 32 W. Va. 463, 9 S. E. 901, 5 L. R. A. 323.

United States.— Neale *v.* Neale, 9 Wall. 1, 19 L. ed. 590.

England.— See Ungley *v.* Ungley, 4 Ch. D. 73; Surcome *v.* Pinniger, 3 De G. M. & G. 571, 17 Jur. 196, 22 L. J. Ch. 419, 52 Eng. Ch. 444, 43 Eng. Reprint 224.

See 24 Cent. Dig. tit. "Gifts," § 47.

conditions of the gift be clear and free from ambiguity, and it must likewise clearly appear that the possession was taken and improvements made by the donee on the strength of the gift.[39]

(IX) *Choses in Action and Particular Kinds of Property*— (A) *Rights of Action in General.* According to the weight of authority, in order to make a valid gift *inter vivos* of a chose in action not evidenced by a written instrument, there must be a written assignment or some equivalent instrument, and the transfer must be actually executed.[40] Where the chose in action is evidenced by a written instrument, the general rule is that a valid gift thereof may be made by a mere delivery of the instrument, where the present intention of the donor to make such transfer is shown.[41]

(B) *Corporate Stock.* It is the universally accepted rule that a delivery to the donee of a certificate of stock of a corporation, accompanied by a proper transfer of such stock upon the books of the corporation, constitutes a valid gift *inter vivos* of such stock, where the other essential elements of such gift are present.[42] However, where there has been no proper transfer of such stock, the decisions are by no means uniform as to the effect of this omission upon the validity of the gift. In a majority of jurisdictions in the United States, the rule is that where an actual delivery of the certificate of stock is made to the donee,[43] or

Contra.—Adamson *v.* Lamb, 3 Blackf. (Ind.) 446.

Rule in Virginia.—Under the Virginia statute, Code (1887), § 2413, no right to a conveyance of an estate of inheritance of freehold or for a term for more than five years in lands can accrue to the donee of the land or those claiming under him under a gift not in writing, although such gift be followed by possession thereunder and improvement of the land by the donee or those claiming under him. Nicholas *v.* Nicholas, 100 Va. 660, 42 S. E. 669, 866.

Improvements by child on land of parent as indicating gift see PARENT AND CHILD.

39. *Georgia.*— Roberts *v.* Mullinder, 94 Ga. 493, 20 S. E. 350; Thompson *v.* Ray, 92 Ga. 285, 18 S. E. 59; Howell *v.* Ellsberry, 79 Ga. 475, 5 S. E. 96, holding that the proper remedy of the donee in such case is a bill in equity for specific performance.

Iowa.— Truman *v.* Truman, 79 Iowa 506, 44 N. W. 721.

Kentucky.— See Hamilton *v.* Hamilton, 5 Litt. 28, holding that the donor should account to the donee for the value of the improvements on taking the land again.

Maine.— Bigelow *v.* Bigelow, 93 Me. 439, 45 Atl. 513.

Michigan.— Jones *v.* Tyler, 6 Mich. 364.

Pennsylvania.— Allison *v.* Burns, 107 Pa. St. 50.

Texas.— Montgomery *v.* Carlton, 56 Tex. 361; Murphy *v.* Stell, 43 Tex. 123. See also Wooldridge *v.* Hancock, 70 Tex. 18, 6 S. W. 818, holding that where one attempts to make a parol gift of land, and the purchaser enters and makes improvements, not exceeding the value of the rent, persons who inherit from the donor are not estopped to sue to recover the land.

West Virginia.— Harrison *v.* Harrison, 36 W. Va. 556, 15 S. E. 87.

See 24 Cent. Dig. tit. "Gifts," § 47.

40. Sprague *v.* Walton, 145 Cal. 228, 78 Pac. 645; Sanborn *v.* Goodhue, 28 N. H. 48, 59 Am. Dec. 398; Matson *v.* Abbey, 141 N. Y. 179, 36 N. E. 11 [*modifying* and *affirming* 70 Hun 475, 24 N. Y. Suppl. 284]; Bond *v.* Bunting, 78 Pa. St. 210, 218 [*citing* 2 Kent Comm. 439], where the court, after laying down the above rule, said: "To hold otherwise would be in effect to decide that the owner of a chose in action not evidenced by a note, bond or other instrument, could not make a gift of it, which would be an unreasonable limitation of his right of property." See also Cook *v.* Lum, 55 N. J. L. 373, 26 Atl. 803. See, however, Crittenden *v.* Canfield, 87 Mich. 152, 49 N. W. 554, holding that, where one has an equitable right to a reconveyance of land, he may relinquish such equity by parol and direct a reconveyance of the legal title to be made to his wife as a gift.

41. *Connecticut.*—Camp's Appeal, 36 Conn. 88, 4 Am. Rep. 39.

Illinois.— Martin *v.* Martin, 174 Ill. 371, 51 N. E. 691, 66 Am. St. Rep. 290 [*affirming* 74 Ill. App. 215].

Maine.— Wing *v.* Merchant, 57 Me. 383.

Massachusetts.— Grover *v.* Grover, 24 Pick. 261, 35 Am. Dec. 319.

New Jersey.— See, however, Dilts *v.* Stevenson, 17 N. J. Eq. 407.

New York.— Hackney *v.* Vrooman, 62 Barb. 650.

Pennsylvania.— Com. *v.* Compton, 137 Pa. St. 138, 20 Atl. 417; Licey *v.* Licey, 7 Pa. St. 251, 47 Am. Dec. 513; Malone's Estate, 13 Phila. 313.

See, however, Hill *v.* Sheibley, 64 Ga. 529, holding that a gift of a non-negotiable instrument cannot be proved by proof of delivery merely.

See 24 Cent. Dig. tit. "Gifts," § 49.

42. Adams *v.* Brackett, 5 Metc. (Mass.) 280.

43. *Connecticut.*— Reed *v.* Copeland, 50 Conn. 472, 47 Am. Rep. 663.

where, by a valid declaration of trust, the donor has made himself trustee of the donee, the gift is perfected, even where there has been no transfer of the stock upon the books of the corporation;[44] and a court of equity then has the power to compel the transfer of such stock on the books of the corporation.[45] In several jurisdictions, however, following the English rule,[46] it is held that the delivery of a certificate of stock without its actual transfer, or something held to be equivalent thereto, does not constitute a valid gift *inter vivos*.[47] However, the delivery of a written assignment of corporate stock,[48] or its transfer on the books of the corporation, is ineffectual to perfect the gift, where the donor retains the certificate, unless he constitutes himself the trustee for the donee.[49]

(c) *Insurance Policy.* In a majority of jurisdictions a parol gift of an insurance policy, accompanied by a delivery of the policy, is sufficient to constitute a valid gift *inter vivos*, and no written assignment thereof is necessary.[50] There

Kentucky.— Denunzio *v.* Scholtz, 77 S. W. 715, 25 Ky. L. Rep. 1294.

New Hampshire.— Bond *v.* Bean, 72 N. H. 444, 57 Atl. 340.

New York.— Allerton *v.* Lang, 10 Bosw. 362; Kernochan *v.* Russell, 36 Misc. 817, 74 N. Y. Suppl. 841 [*affirming* 34 Misc. 824, 71 N. Y. Suppl. 1139]; De Caumont *v.* Morgan, 5 N. Y. St. 541 [*affirmed* in 36 Hun 382]; Duigan *v.* McCormack, 53 How. Pr. 411; Stevens *v.* Stevens, 2 Redf. Surr. 265.

Virginia.— Richmond First Nat. Bank *v.* Holland, 99 Va. 495, 39 S. E. 126, 88 Am. St. Rep. 898, 55 L. R. A. 155.

44. Mize *v.* Bates County Nat. Bank, 60 Mo. App. 358.

45. Gilkinson *v.* Third Ave. R. Co., 47 N. Y. App. Div. 472, 63 N. Y. Suppl. 792.

46. Heartley *v.* Nicholson, L. R. 19 Eq. 233, 44 L. J. Ch. 277, 13 L. T. Rep. N. S. 821, 23 Wkly. Rep. 374; Lambert *v.* Overton, 11 L. T. Rep. N. S. 503, 13 Wkly. Rep. 227; Milroy *v.* Lord, 4 De G. F. & J. 264, 8 Jur. N. S. 806, 31 L. J. Ch. 798, 7 L. T. Rep. N. S. 178, 65 Eng. Ch. 204, 45 Eng. Reprint 1185; Beech *v.* Keep, 18 Beav. 285, 18 Jur. 971, 23 L. J. Ch. 539, 2 Wkly. Rep. 316, 52 Eng. Reprint 113; Weale *v.* Ollive, 17 Beav. 252, 51 Eng. Reprint 1030; Bridge *v.* Bridge, 16 Beav. 315, 16 Jur. 1031, 51 Eng. Reprint 800 (holding that if the legal owner of stock executes a declaration of trust in favor of a volunteer equity will compel the execution of the trust, but if he merely assigns the stock and makes no transfer, the court will afford no assistance); Dillon *v.* Coppin, 4 Jur. 427, 9 L. J. Ch. 87, 4 Myl. & C. 647, 18 Eng. Ch. 647, 41 Eng. Reprint 249. See also Donaldson *v.* Donaldson, Kay 711, 23 L. J. Ch. 788, 2 Wkly. Rep. 691. *Compare* Beecher *v.* Major, 13 L. T. Rep. N. S. 54, 13 Wkly. Rep. 1054.

Specialty debt.—In England a gift of a specialty may be good at law, although there is no legal transfer of the debt or property of which it is a security. Barton *v.* Gainer, 3 H. & M. 387, 4 Jur. N. S. 715, 27 L. J. Exch. 390, 6 Wkly. Rep. 624.

47. *In re* Bauernschmidt, 97 Md. 35, 54 Atl. 637; Baltimore Retort, etc., Co. *v.* Mali, 65 Md. 93, 3 Atl. 286, 57 Am. Rep. 304 (holding likewise that an order to transfer stock standing on the books of the corporation to another as a gift cannot be enforced after the donor's death); Pennington *v.* Gittings, 2 Gill & J. (Md.) 208; Matthews *v.* Hoagland, 48 N. J. Eq. 455, 21 Atl. 1054. And see Smith *v.* Burnet, 34 N. J. Eq. 219 [*affirmed* in 35 N. J. Eq. 314].

In California the indorsement and delivery of a stock certificate constitutes a valid gift as between the parties, but not as to third persons, until such transfer is entered on the books of the corporation. Calkins *v.* Equitable, etc., Assoc., 126 Cal. 531, 59 Pac. 30.

48. Allen-West Commission Co. *v.* Grumbles, 129 Fed. 287, 63 C. C. A. 401.

49. *Iowa.*— Casteel *v.* Flint, 112 Iowa 92, 83 N. W. 796.

Maine.— Getchell *v.* Biddeford Sav. Bank, 94 Me. 452, 47 Atl. 895, 80 Am. St. Rep. 408.

Massachusetts.— Cummings *v.* Bramhall, 120 Mass. 552.

New York.— Jackson *v.* Twenty-Third St. R. Co., 88 N. Y. 520 [*reversing* 47 N. Y. Super. Ct. 85]; Johnson *v.* Williams, 63 How. Pr. 233.

Pennsylvania.— Roberts' Appeal, 85 Pa. St. 84.

See 24 Cent. Dig. tit. "Gifts," § 50.

50. McGlynn *v.* Curry, 82 N. Y. App. Div. 431, 81 N. Y. Suppl. 855; Phipard *v.* Phipard, 55 Hun (N. Y.) 433, 8 N. Y. Suppl. 728; Matter of Dunn, 8 N. Y. St. 766; Hani *v.* Germania L. Ins. Co., 197 Pa. St. 276, 47 Atl. 200, 80 Am. St. Rep. 819; Madeira's Appeal, (1886) 4 Atl. 908; Hallstead's Estate, 2 Kulp 508; Lord *v.* New York L. Ins. Co., 27 Tex. Civ. App. 139, 65 S. W. 699. See also Crittenden *v.* Phœnix Mut. L. Ins. Co., 41 Mich. 442, 2 N. E. 657, holding that a gift of an insurance policy is sufficiently perfected by delivery, if the policy is handed over to the donee and transmitted to the insurance company, with the donor's order to make it payable according to the donee's wishes. See, however, Bond *v.* Bunting, 78 Pa. St. 210. *Contra*, Steele *v.* Gatlin, 115 Ga. 929, 42 S. E. 253, holding that a mere delivery of a policy is not sufficient, and that a written assignment is necessary to perfect the gift.

must, however, be either a delivery of the policy, or a duly executed assignment thereof, to perfect the gift.[51]

(D) *Deposits in Bank* — (1) In Name Of or in Trust For Donee. Where the donor deposits money in the name of the donee and delivers to him, or to a third person for him, a pass-book therefor,[52] or where he, by an express declaration of trust, constitutes himself a trustee of the donee in respect to such fund, the transaction is a valid gift *inter vivos*.[53] However, the mere fact of the deposit of money in the name of a third party, without the delivery of the pass-book, or other evidence of intention to make a gift, will not constitute a valid gift *inter vivos*.[54]

51. Weaver *v.* Weaver, 182 Ill. 287, 55 N. E. 338, 74 Am. St. Rep. 173 (where an assignment of the policy was duly executed, but never delivered to the donee); *In re* Trough, 75 Pa. St. 115 [*reversing* 8 Phila. 214].

52. *Alabama.*—Montgomery First Nat. Bank *v.* Taylor, (1904) 37 So. 695.

California.— Russell *v.* Langford, 135 Cal. 356, 67 Pac. 331.

Connecticut.— Burton *v.* Bridgeport Sav. Bank, 52 Conn. 398, 52 Am. Rep. 602; Kerrigan *v.* Rautigan, 43 Conn. 17.

Illinois.— Telford *v.* Patton, 144 Ill. 611, 33 N. E. 1119 [*reversing* 43 Ill. App. 151].

Massachusetts.— Davis *v.* Ney, 125 Mass. 590, 28 Am. Rep. 272; Sheedy *v.* Roach, 124 Mass. 472, 26 Am. Rep. 680, where the delivery of the book was accompanied by a written assignment.

New York.— *In re* Crawford, 113 N. Y. 560, 21 N. E. 692, 5 L. R. A. 71. See also Matter of Rembe, 23 Misc. 44, 51 N. Y. Suppl. 507. See, however, *In re* Bolin, 136 N. Y. 177, 32 N. E. 626 [*affirming* 20 N. Y. Suppl. 16].

See 24 Cent. Dig. tit. "Gifts," § 53.

Joint account.— Where a wife deposited money, her separate property, in a bank, the account being open in the names of the husband and wife, "payable to either," it was held that that fact alone did not import a gift to the husband, there being no delivery of the pass-book, or other evidence tending to show a purpose or intention on the wife's part to pass the title. Denigan *v.* San Francisco Sav. Union, 127 Cal. 142, 59 Pac. 390, 78 Am. St. Rep. 35.

53. *Connecticut.*—Buckingham's Appeal, 60 Conn. 143, 22 Atl. 509; Minor *v.* Rogers, 40 Conn. 512, 16 Am. Rep. 69.

Iowa.— See Schollmier *v.* Schoendelen, 78 Iowa 426, 43 N. W. 282, 16 Am. St. Rep. 455.

Maine.— Hallowell Sav. Inst. *v.* Titcomb, 96 Me. 62, 51 Atl. 249; Barker *v.* Frye, 75 Me. 29.

Maryland.— Gardner *v.* Merritt, 32 Md. 78, 3 Am. Rep. 115.

Massachusetts.— Scott *v.* Berkshire County Sav. Bank, 140 Mass. 157, 2 N. E. 925; Eastman *v.* Woronoco Sav. Bank, 136 Mass. 208.

New Hampshire.— Smith *v.* Ossipee Valley Ten Cents Sav. Bank, 64 N. H. 228, 9 Atl. 792, 10 Am. St. Rep. 400.

New York.— Martin *v.* Funk, 75 N. Y. 134, 31 Am. Rep. 446; Decker *v.* Union Dime Sav. Inst., 15 N. Y. App. Div. 553, 44 N. Y. Suppl. 521; Matter of Reichert, 38 Misc. 228, 77 N. Y. Suppl. 654; Barker *v.* Harbeck, 2 N. Y. Suppl. 425; Millspaugh *v.* Putnam, 16 Abb. Pr. 380; Witzel *v.* Chapin, 3 Bradf. Surr. 386.

Vermont.— Howard *v.* Windham County Sav. Bank, 40 Vt. 597.

United States.— Miller *v.* Clark, 40 Fed. 15.

See 24 Cent. Dig. tit. "Gifts," § 53.

Deposit of husband's money by wife in her own name see Husband and Wife.

54. *Connecticut.*— Main's Appeal, 73 Conn. 638, 48 Atl. 965.

Indiana.— Goelz *v.* People's Sav. Bank, 31 Ind. App. 67, 67 N. E. 232.

Louisiana.— Cooney *v.* Ryter, etc., Nat. Bank, 46 La. Ann. 883, 15 So. 382.

Maine.— Fairfield Sav. Bank *v.* Small, 90 Me. 546, 38 Atl. 551 (holding that the fact that a wife had access to her husband's papers, and took therefrom into her personal custody, without his knowledge, a deposit book showing deposits made by him in her name in a savings bank, does not show a delivery so as to pass to her the ownership of the fund); Northrop *v.* Hale, 73 Me. 66, 71; Robinson *v.* Ring, 72 Me. 140, 39 Am. Rep. 308.

Maryland.— Dougherty *v.* Moore, 71 Md. 248, 18 Atl. 35, 17 Am. St. Rep. 524.

Massachusetts.— Booth *v.* Bristol County Sav. Bank, 162 Mass. 455, 38 N. E. 1120; Walker *v.* Welsh, (1887) 11 N. E. 727; Nutt *v.* Morse, 142 Mass. 1, 6 N. E. 763; Sherman *v.* New Bedford Five Cents Sav. Bank, 138 Mass. 581; Clark *v.* Clark, 108 Mass. 522; Brabrook *v.* Boston Five Cents Sav. Bank, 104 Mass. 228, 6 Am. Rep. 222.

Michigan.— Peninsular Sav. Bank *v.* Wineman, 123 Mich. 257, 81 N. W. 1091.

Missouri.— Tygard *v.* McComb, 54 Mo. App. 85.

New Hampshire.— Marcy *v.* Amazeen, 61 N. H. 131, 60 Am. Rep. 320.

New Jersey.— Smith *v.* Speer, 34 N. J. Eq. 336.

New York.— Cunningham *v.* Davenport, 147 N. Y. 43, 41 N. E. 412, 49 Am. St. Rep. 641, 32 L. R. A. 373 [*reversing* 74 Hun 53, 26 N. Y. Suppl. 322, and *distinguishing* Mabie *v.* Bailey, 95 N. Y. 206; Willis *v.* Smyth, 91 N. Y. 297; Martin *v.* Funk, 75 N. Y. 134, 31 Am. Rep. 446]; Beaver *v.* Beaver, 137 N. Y. 59, 32 N. E. 998 [*reversing* 62 Hun 194, 16

(2) Delivery or Possession of Bank Pass-Book. The general rule is that the delivery of a bank pass-book is not a sufficient delivery to sustain a gift *inter vivos* of money in a bank of issue, discount, and deposit, as the money can only be withdrawn from the bank by the production of the depositor's check, and not by the production of the pass-book.[55] The rule, however, is otherwise, in regard to a deposit book of a safety deposit bank, and where the other essential elements of a gift *inter vivos* are present, mere delivery of the book is sufficient to pass the fund.[56]

(3) Deposits Jointly For Donor and Donee. Since, in order to constitute a valid gift *inter vivos*, it is necessary for the donor to surrender dominion over the property, a deposit by the donor in a bank to the joint account of the donor and the donee does not constitute a valid gift, where the donor retains the possession of the pass-book,[57] particularly where the donee has no knowledge of such deposit until after the donor's death.[58]

(4) Checks or Certificates of Deposit. The general rule is that an indorsement and delivery of a check or certificate of deposit by the owner or payee thereof will constitute a valid gift of the fund represented by such check

N. Y. Suppl. 476, 746]; Beaver *v.* Beaver, 117 N. Y. 421, 22 N. E. 940, 15 Am. St. Rep. 531, 6 L. R. A. 403 [*reversing* 53 Hun 258, 6 N. Y. Suppl. 586]; Farleigh *v.* Cadman, 11 N. Y. App. Div. 628, 41 N. Y. Suppl. 981; Orr *v.* McGregor, 43 Hun 528; Geary *v.* Page, 9 Bosw. 290; Krummel *v.* Thomas, 5 Misc. 535, 25 N. Y. Suppl. 833; Hoar *v.* Hoar, 5 Redf. Surr. 637; Matter of Ward, 2 Redf. Surr. 251. See also Matter of Rose, 35 Misc. 21, 71 N. Y. Suppl. 172.

Vermont.— Pope *v.* Burlington Sav. Bank, 56 Vt. 284, 48 Am. Rep. 781.

55. *Alabama.*— Jones *v.* Weakley, 99 Ala. 441, 12 So. 420, 42 Am. St. Rep. 84, 19 L. R. A. 700.

Kentucky.— Ashbrook *v.* Ryon, 2 Bush 228, 92 Am. Dec. 481.

New York.— Dinley *v.* McCullagh, 92 Hun 454, 36 N. Y. Suppl. 1007.

North Carolina.— Wilson *v.* Featherston, 122 N. C. 747, 30 S. E. 325, holding that the delivery of a deposit book by a father to his daughter with the intention expressed at the time to give her the money and bonds, a memorandum of which is kept in the deposit book, is not a delivery of the money and bonds.

Virginia.— Thomas *v.* Lewis, 89 Va. 1, 15 S. E. 389, 37 Am. St. Rep. 848, 18 L. R. A. 170.

England.— *In re* Beak, L. R. 13 Eq. 489, 41 L. J. Ch. 470, 26 L. T. Rep. N. S. 281; McGonnell *v.* Murray, Ir. R. 3 Eq. 460.

See 24 Cent. Dig. tit. "Gifts," § 55.

56. *Connecticut.*—Guinan's Appeal, 70 Conn. 342, 39 Atl. 482; Camp's Appeal, 36 Conn. 88, 4 Am. Rep. 39. See also McNamara *v.* McDonald, 69 Conn. 484, 38 Atl. 54, 61 Am. St. Rep. 48.

Maine.— Hill *v.* Stevenson, 63 Me. 364, 18 Am. Rep. 231. See also Augusta Sav. Bank *v.* Fogg, 82 Me. 538, 20 Atl. 92.

Maryland.— See Conser *v.* Snowden, 54 Md. 175, 39 Am. Rep. 368. See, however, Murray *v.* Cannon, 41 Md. 466.

Massachusetts.—Sheedy *v.* Roach, 124 Mass. 472, 26 Am. Rep. 680; Foss *v.* Lowell Five Cents Sav. Bank, 111 Mass. 285; Kimball *v.* Leland, 110 Mass. 325. See also Weatherbee *v.* Litchfield, 186 Mass. 399, 71 N. E. 796.

New York.— Ridden *v.* Thrall, 125 N. Y. 572, 26 N. E. 627, 21 Am. St. Rep. 758, 11 L. R. A. 684 [*affirming* 55 Hun 185, 7 N. Y. Suppl. 822, 24 Abb. N. Cas. 52]; Brown *v.* Brown, 40 Hun 418; Penfield *v.* Thayer, 2 E. D. Smith 305; Hannan *v.* Sheehan, 3 Misc. 267, 22 N. Y. Suppl. 935 [*affirming* 19 N. Y. Suppl. 698]. See also Hallenbeck *v.* Hallenbeck, 103 N. Y. App. Div. 107, 93 N. Y. Suppl. 73 [*reversing* 44 Misc. 109, 89 N. Y. Suppl. 780].

Ohio.— Polley *v.* Hicks, 58 Ohio St. 218, 50 N. E. 809, 41 L. R. A. 858.

Rhode Island.—Industrial Trust Co. *v.* Scanlon, 26 R. I. 228, 58 Atl. 786; Providence Sav. Inst. *v.* Taft, 14 R. I. 502.

Vermont.— Watson *v.* Watson, 69 Vt. 243, 39 Atl. 201.

See 24 Cent. Dig. tit. "Gifts," § 55.

57. Taylor *v.* Henry, 48 Md. 550, 30 Am. Rep. 486; Skillman *v.* Wiegand, 54 N. J. Eq. 198, 33 Atl. 929; Schick *v.* Grote, 42 N. J. Eq. 352, 7 Atl. 852; *In re* Bolin, 136 N. Y. 177, 32 N. E. 626 [*affirming* 20 N. Y. Suppl. 16]; Kelly *v.* Home Sav. Bank, 44 Misc. 102, 89 N. Y. Suppl. 776; Brown *v.* Brown, 23 Barb. 565; Matter of Ward, 51 How. Pr. (N. Y.) 316; Flanagan *v.* Nash, 185 Pa. St. 41, 39 Atl. 818. See, however, *In re* Meehan, 59 N. Y. App. Div. 156, 69 N. Y. Suppl. 9; McElroy *v.* Albany Sav. Bank, 8 N. Y. App. Div. 46, 40 N. Y. Suppl. 422; *In re* Griffiths, 1 Lack. Leg. N. (Pa.) 311.

58. *Maine.*— Norway Sav. Bank *v.* Merriam, 88 Me. 146, 33 Atl. 840.

Maryland.— Gorman *v.* Gorman, 87 Md. 338, 39 Atl. 1038.

Massachusetts.—Noyes *v.* Newburyport Sav. Inst., 164 Mass. 583, 42 N. E. 103, 49 Am. St. Rep. 484.

Michigan.— Peninsular Sav. Bank *v.* Wineman, 123 Mich. 257, 81 N. W. 1091.

Rhode Island.— Woonsocket Sav. Inst. *v.* Heffernan, 20 R. I. 308, 38 Atl. 949.

See 24 Cent. Dig. tit. "Gifts," § 56.

or certificate.[59] The rule, however, in regard to the donor's personal check or note is otherwise, and the mere delivery thereof does not constitute a perfected gift, since it is revocable at any time prior to its presentation and payment,[60] and is *ipso facto* revoked by the death of the donor.[61]

(E) *Negotiable Instruments.* Gifts *inter vivos* of unindorsed negotiable notes of a third person may be made by a simple delivery of the notes, the equitable interest therein vesting in the donee by the delivery and acceptance.[62]

Deposit by a married woman jointly for herself and husband see HUSBAND AND WIFE.

59. *Alabama.*— Wheeler *v.* Glasgow, 97 Ala. 700, 11 So. 758.

California.— Field *v.* Shorb, 99 Cal. 661, 34 Pac. 504; Beals *v.* Crowley, 59 Cal. 665.

Illinois.— Farmers', etc., State Bank *v.* Gleason, 75 Ill. App. 251.

Louisiana.— Burke *v.* Bishop, 27 La. Ann. 465, 21 Am. Rep. 567.

Pennsylvania.—Taylor's Estate, 154 Pa. St. 183, 25 Atl. 1061, 18 L. R. A. 855; Scott *v.* Lauman, 104 Pa. St. 593 (where the certificate was properly indorsed, but it was held that there was not a sufficient delivery to constitute a valid gift); Rhodes *v.* Childs, 64 Pa. St. 18; Withers *v.* Weaver, 10 Pa. St. 391.

Tennessee.— Shugart *v.* Shugart, 111 Tenn. 179, 76 S. W. 821, 102 Am. St. Rep. 777, holding, however, that delivery of a certificate of deposit made out in the donor's name, without indorsement, does not show a delivery of the money as a gift.

Texas.— See Cowen *v.* Brownsville First Nat. Bank, 94 Tex. 547, 63 S. W. 532, 64 S. W. 778, holding that a gift of certificates of deposit by assignment in writing, not under seal, gave the donee a valid title thereto.

Wisconsin.— See Crook *v.* Baraboo First Nat. Bank, 83 Wis. 31, 52 N. W. 1131, 35 Am. St. Rep. 17.

England.— *In re* Griffin, [1899] 1 Ch. 408, 68 L. J. Ch. 220, 79 L. T. Rep. N. S. 442. See also Jones *v.* Lock, L. R. 1 Ch. 25, 11 Jur. N. S. 913, 35 L. J. Ch. 117, 13 L. T. Rep. N. S. 514, 14 Wkly. Rep. 149.

See 24 Cent. Dig. tit. "Gifts," § 55.

Power of attorney.— Where a mother having money in the bank expressed a purpose to give it to her daughter, and the method by which it was to be transferred was left to the cashier of the bank, and the latter drew a power of attorney from the mother to the daughter, authorizing her to draw the money in the mother's name, and the daughter drew checks signing her mother's name by her as agent, and appropriated such sums to her own use, and it was held sufficient to support a finding that there was an executed gift from the mother to the daughter. Murphy *v.* Bordwell, 83 Minn. 54, 85 N. W. 915, 52 L. R. A. 849.

60. *California.*— Tracey *v.* Alvord, 118 Cal. 654, 50 Pac. 757.

Connecticut.— Thresher *v.* Dyer, 69 Conn. 404, 37 Atl. 979.

Louisiana.— Stauffer *v.* Morgan, 39 La. Ann. 632, 2 So. 98. See also Rabasse's Succession, 49 La. Ann. 1405, 22 So. 767.

Michigan.— Conrad *v.* Manning, 125 Mich. 77, 83 N. W. 1038.

New York.— Pickslay *v.* Starr, 149 N. Y. 432, 44 N. E. 163, 52 Am. St. Rep. 740, 32 L. R. A. 703 [*affirming* 76 Hun 10, 27 N. Y. Suppl. 616] (holding that in such case the gift only becomes complete upon the presentation and payment of the check); Cloyes *v.* Cloyes, 36 Hun 145.

Vermont.— Montpelier Seminary *v.* Smith, 69 Vt. 382, 38 Atl. 66.

See 24 Cent. Dig. tit. "Gifts," § 55.

Note under seal.— It has been held in Pennsylvania that a present voluntary note under seal, payable at the maker's death and future delivery, is irrevocable, since the seal imports a consideration. Mack's Appeal, 68 Pa. St. 231.

61. *California.*— Pullen *v.* Placer County Bank, 138 Cal. 169, 71 Pac. 83, (1901) 66 Pac. 740, 94 Am. St. Rep. 19.

Illinois.— Martin *v.* Martin, 89 Ill. App. 147.

Ohio.— Simmons *v.* Cincinnati Sav. Soc., 31 Ohio St. 457, 27 Am. Rep. 521.

Pennsylvania.— Kern's Estate, 171 Pa. St. 55, 33 Atl. 129, where the note was not under seal.

England.— Tate *v.* Hilbert, 4 Bro. Ch. 286, 2 Ves. Jr. 111. See Bromley *v.* Brunton, L. R. 6 Eq. 275, 37 L. J. Ch. 902, 18 L. T. Rep. N. S. 628, 16 Wkly. Rep. 1006, where a gift of the donor's check was held valid, although not paid before his death, where it had been presented and payment delayed merely to ascertain the genuineness of the signature.

See 24 Cent. Dig. tit. "Gifts," § 55.

Letters of credit.— Where a husband gave his wife letters of credit to pay the expenses for herself and daughter on a trip abroad, for which he gave his note, providing for the payment of so much of the letters as should be used, and the wife was called home by the death of her husband, having expended but a small portion of the letters of credit, and it was held that the facts failed to establish a gift of the unused portion to the wife. Stevens *v.* Stevens, 2 Redf. Surr. (N. Y.) 265.

62. *Alabama.*— Walker *v.* Crews, 73 Ala. 412.

Arkansas.— Hatcher *v.* Buford, 60 Ark. 169, 29 S. W. 641, 27 L. R. A. 507.

Connecticut.— Camp's Appeal, 36 Conn. 88, 4 Am. Rep. 39.

Illinois.— Hagemann *v.* Hagemann, 90 Ill. App. 251.

Indiana.— Bingham *v.* Stage, 123 Ind. 281, 23 N. E. 756; Rinker *v.* Rinker, 20 Ind. 185.

However, in such case an actual delivery of the instrument in the lifetime of the donor is essential to perfect the gift.[63] Although delivery to a third person as trustee or agent of the donee is as effectual to make the gift valid as delivery to the donee personally.[64]

Kentucky.— Miller *v.* Owen, 11 Ky. L. Rep. 440.

Maine.— Brown *v.* Crafts, 98 Me. 40, 56 Atl. 213; Wing *v.* Merchant, 57 Me. 383.

Massachusetts.— Chase *v.* Redding, 13 Gray 418; Grover *v.* Grover, 24 Pick. 261, 35 Am. Dec. 319.

Michigan.— Letts *v.* Letts, 73 Mich. 138, 41 N. W. 99.

Minnesota.— Stewart *v.* Hidden, 13 Minn. 43.

New Hampshire.— Blazo *v.* Cochrane, 71 N. H. 585, 53 Atl. 1026; Marston *v.* Marston, 21 N. H. 491; Marsh *v.* Fuller, 18 N. H. 360.

New Jersey.— Corle *v.* Monkhouse, 50 N. J. Eq. 537, 25 Atl. 157; Matthews *v.* Hoagland, 48 N. J. Eq. 455, 21 Atl. 1054.

New York.— Pink *v.* Church, 60 Hun 580, 14 N. Y. Suppl. 337; Mack *v.* Mack, 5 Thomps. & C. 528; Hackney *v.* Vrooman, 62 Barb. 650; Montgomery *v.* Miller, 3 Redf. Surr. 154. See also McGavic *v.* Cossum, 72 N. Y. App. Div. 35, 76 N. Y. Suppl. 305; Fulton *v.* Fulton, 48 Barb. 581.

North Carolina.— See Flanner *v.* Butler, 131 N. C. 151, 42 S. E. 557, 92 Am. St. Rep. 773. See, however, Brickhouse *v.* Brickhouse, 33 N. C. 404; Fairly *v.* McLean, 33 N. C. 158, holding that the interest in a bond payable to A, or to A or order, can only be transferred at law by indorsement.

Ohio.— Rote *v.* Warner, 17 Ohio Cir. Ct. 350, 9 Ohio Cir. Dec. 540.

Rhode Island.— Hopkins *v.* Manchester, 16 R. I. 663, 19 Atl. 243, 7 L. R. A. 387.

South Carolina.— Clinton *v.* McKeown, 39 S. C. 21, 17 S. E. 504.

Virginia.— Thomas *v.* Lewis, 89 Va. 1, 15 S. E. 389, 37 Am. St. Rep. 848, 18 L. R. A. 170; Dunbar *v.* Woodcock, 10 Leigh 628. See also Elam *v.* Keen, 4 Leigh 333, 26 Am. Dec. 322.

England.— Ekemberg *v.* Mousseau, 19 Quebec Super. Ct. 289, holding, however, that a valid donation *inter vivos* of unindorsed promissory notes is not established by evidence that the donor, two or three days before his death, said to the donee: "I give you the notes in case I die."

See 24 Cent. Dig. tit. "Gifts," § 58.

In Louisiana parol proof that a note to the donor's order, and by him indorsed in blank, was delivered to plaintiff as a gift, will not enable the latter to hold it as a gratuitous donation, as such a donation must, by the Louisiana statute, be by an act before a notary, in the presence of two witnesses. Morres *v.* Compton, 12 Rob. 76. The rule is held to be otherwise, however, in regard to the donor's personal check for money in bank, and mere delivery thereof is held to be sufficient to perfect the gift. De Pouilly's Succession, 22 La. Ann. 97.

63. *Alabama.*— McHugh *v.* O'Connor, 91 Ala. 243, 9 So. 165, holding that parol gift of a claim evidenced by a note and mortgage fails, where there is delivery only of the mortgage but not of the note.

California.— Giselman *v.* Starr, 106 Cal. 651, 40 Pac. 81.

Georgia.— Harrell *v.* Nicholson, 119 Ga. 458, 46 S. E. 623.

Illinois.— Fanning *v.* Russell, 94 Ill. 386.

Indiana.— Bingham *v.* Stage, 123 Ind. 281, 23 N. E. 756; Foglesong *v.* Wickard, 75 Ind. 358.

Iowa.— Donover *v.* Argo, 79 Iowa 574, 44 N. W. 818; Peters *v.* Ft. Madison Constr. Co., 72 Iowa 405, 34 N. W. 190.

Kansas.— Gallagher *v.* Donahy, 65 Kan. 341, 69 Pac. 330; Johnson *v.* Eaton, 51 Kan. 708, 33 Pac. 597.

Kentucky.— Burge *v.* Burge, 76 S. W. 873, 25 Ky. L. Rep. 979; Myer *v.* Bosley, 4 Ky. L. Rep. 351.

Maine.— Goulding *v.* Horbury, 85 Me. 227, 27 Atl. 127, 35 Am. St. Rep. 357; Hatch *v.* Atkinson, 56 Me. 324, 96 Am. Dec. 464.

Maryland.— Cox *v.* Hill, 6 Md. 274; Hitch *v.* Davis, 3 Md. Ch. 266.

Michigan.— Bellis *v.* Lyons, 97 Mich. 398, 56 N. W. 770.

Missouri.— Henderson *v.* Henderson, 21 Mo. 379. See also Brandon *v.* Dawson, 51 Mo. App. 237.

Nebraska.— Oelke *v.* Theis, (1903) 97 N. W. 588.

New York.— *In re* Crawford, 113 N. Y. 560, 21 N. E. 692, 5 L. R. A. 71; Young *v.* Young, 80 N. Y. 422, 36 Am. Rep. 634; Trow *v.* Shannon, 78 N. Y. 446 [*affirming* 8 Daly 239]. See also Fowler *v.* Lockwood, 3 Redf. Surr. 465. But see Matter of Townsend, 5 Dem. Surr. 147.

Ohio.— Flanders *v.* Blandy, 45 Ohio St. 108, 12 N. E. 321; Phipps *v.* Hope, 16 Ohio St. 586; McCammon *v.* Dillaby, 11 Ohio Dec. (Reprint) 824, 30 Cinc. L. Bul. 89.

Pennsylvania.— Zimmerman *v.* Streeter, 75 Pa. St. 147.

Tennessee.— Royston *v.* McCulley, (Ch. App. 1900) 59 S. W. 725, 52 L. R. A. 899.

Virginia.— Rowe *v.* Marchant, 86 Va. 177, 9 S. E. 995; Yancy *v.* Field, 85 Va. 756, 8 S. E. 721.

West Virginia.— Seabright *v.* Seabright, 28 W. Va. 412.

Wisconsin.— Wilson *v.* Carpenter, 17 Wis. 512.

See 24 Cent. Dig. tit. "Gifts," §§ 58, 60.

64. *Alabama.*—Jones *v.* Deyer, 16 Ala. 221.

Arkansas.— Ammon *v.* Martin, 59 Ark. 191, 26 S. W. 826.

Illinois.— Seavey *v.* Seavey, 30 Ill. App. 625. See Barnum *v.* Reed, 136 Ill. 388, 26 N. E. 572 [*reversing* 36 Ill. App. 525], where the transaction was held not to constitute a gift to the alleged donee, or a trust for her benefit.

Indiana.— Martin *v.* McCullough, 136 Ind.

(F) *Forgiveness of Donee's Debt.* A debt due from the donor to the donee may be forgiven as a gift, and when the transaction is complete, the debt is extinguished and cannot be enforced afterward.[65] A promise by an obligee or payee to forgive a debt, the promisor being under no legal obligation to do so, is but an executory gift, and so long as the transaction remains executory, and the promisor retains the evidences of indebtedness, the gift is not a perfected one and no equity passes to the promisee thereby.[66] The usual method of making a gift of a debt is for the donor to cancel and deliver to his obligor the evidences of his indebtedness, thereby indicating a forgiveness thereof,[67] or a destruction thereof by the obligee with intent to release.[68] However, a gift of a debt due by parol can be made only by the creditor's execution of a release in writing, or

331, 34 N. E. 819; Wyble *v.* McPheters, 52 Ind. 393; Rinker *v.* Rinker, 20 Ind. 185.

Kentucky.—Meriwether *v.* Morrison, 78 Ky. 572; Rollins *v.* Lawrence, 31 S. W. 273, 17 Ky. L. Rep. 379; Weddington *v.* Meade, 11 Ky. L. Rep. 862.

Michigan.— Haggerman *v.* Wigent, 108 Mich. 192, 65 N. W. 756.

New Hampshire.— Marston *v.* Marston, 21 N. H. 491.

New Jersey.— Green *v.* Tulane, 52 N. J. Eq. 169, 28 Atl. 9.

New York.— Hunter *v.* Hunter, 19 Barb. 631; Gilchrist *v.* Stevenson, 9 Barb. 9; Langworthy *v.* Crissey, 36 N. Y. Suppl. 1127 [*affirming* 10 Misc. 450, 31 N. Y. Suppl. 85].

Pennsylvania.— Wagoner's Estate, 174 Pa. St. 558, 34 Atl. 114, 52 Am. St. Rep. 828, 32 L. R. A. 766.

West Virginia.— Fleshman *v.* Hoylman, 27 W. Va. 728.

Wisconsin.— Beloit Second Nat. Bank *v.* Merrill, 81 Wis. 142, 50 N. W. 503, 29 Am. St. Rep. 870.

See 24 Cent. Dig. tit. "Gifts," § 61.

65. *Illinois.*—Morey *v.* Wiley, 100 Ill. App. 75.

Indiana.—See also Sebrell *v.* Couch, 55 Ind. 122.

Kentucky.— See also Knott *v.* Hogan, 4 Metc. 99; Brown *v.* Brown, 4 B. Mon. 535.

Maryland.— Albert *v.* Albert, 74 Md. 526, 22 Atl. 408.

Michigan.— Holmes *v.* Holmes, 129 Mich. 412, 89 N. W. 47, 95 Am. St. Rep. 444.

New Jersey.— Leddel *v.* Starr, 20 N. J. Eq. 274.

Pennsylvania.— Adams *v.* Cook, 200 Pa. St. 258, 49 Atl. 954.

See 24 Cent. Dig. tit. "Gifts," § 66.

66. *Delaware.*— Robson *v.* Jones, 3 Del. Ch. 51.

Florida.— Ross *v.* Walker, 44 Fla. 704, 32 So. 934.

Illinois.— May *v.* May, 36 Ill. App. 77. See also Richardson *v.* Clow, 8 Ill. App. 91.

Iowa.— Gray *v.* Nelson, 77 Iowa 63, 41 N. W. 566.

Kentucky.— Rodemer *v.* Rettig, 114 Ky. 634, 71 S. W. 869, 24 Ky. L. Rep. 1474.

Maine.— Donnell *v.* Wylie, 85 Me. 143, 26 Atl. 1092.

Massachusetts.— Buswell *v.* Fuller, 156 Mass. 309, 31 N. E. 294; Hayden *v.* Hayden, 142 Mass. 448, 8 N. E. 437.

New York.— Matter of Timerson, 39 Misc. 675, 80 N. Y. Suppl. 639.

Pennsylvania.— Kidder *v.* Kidder, 33 Pa. St. 268; Roland *v.* Schrack, 29 Pa. St. 125; McGuire *v.* Adams, 8 Pa. St. 286; Horner's Appeal, 2 Pennyp. 289.

See 24 Cent. Dig. tit. "Gifts," § 66.

Compare Collins *v.* Maude, 144 Cal. 289, 77 Pac. 945, where the instrument delivered to the donee was held on its face not to import a gift or an intention to forgive the debt.

67. *Massachusetts.*—Hale *v.* Rice, 124 Mass. 292, holding that it is not essential to the validity of a gift of a note by the payee to the maker that the payee should indorse it.

Minnesota.— See Lamprey *v.* Lamprey, 29 Minn. 151, 12 N. W. 514.

New Jersey.— Parret *v.* Craig, 56 N. J. Eq. 280, 38 Atl. 305; Vanderbeck *v.* Vanderbeck, 30 N. J. Eq. 265.

New York.— Larkin *v.* Hardenbrook, 90 N. Y. 333, 43 Am. Rep. 176; Ferry *v.* Stephens, 66 N. Y. 321 [*affirming* 5 Hun 109]; Gray *v.* Barton, 55 N. Y. 68, 14 Am. Rep. 181 [*reversing* 1 Alb. L. J. 122]; Thomas *v.* Fuller, 68 Hun 361, 22 N. Y. Suppl. 862. See also Carpenter *v.* Soule, 88 N. Y. 251, 42 Am. Rep. 248.

North Carolina.— Vann *v.* Edwards, 135 N. C. 661, 47 S. E. 784, 67 L. R. A. 461.

Pennsylvania.— Licey *v.* Licey, 7 Pa. St. 251, 47 Am. Dec. 513.

Tennessee.—Trowell *v.* Carraway, 10 Heisk. 104.

Texas.— Deussen *v.* Moegelin, 24 Tex. Civ. App. 339, 59 S. W. 51.

Wisconsin.— Henschel *v.* Maurer, 69 Wis. 576, 34 N. W. 926, 2 Am. St. Rep. 757.

See 24 Cent. Dig. tit. "Gifts," § 66.

Forgiveness of part of debt.— Indorsements of part payments on a mortgage by the mortgagee, with the intention of making the amounts expressed a gift to the mortgagor, are an extinguishment or forgiving of the mortgage debt to that extent. Where the gift is made to the debtor himself and does not admit of a technical delivery, the intention of the donor will not be defeated on that ground. Green *v.* Langdon, 28 Mich. 221.

68. Denunzio *v.* Scholtz, 77 S. W. 715, 25 Ky. L. Rep. 1294; Beach *v.* Endress, 51 Barb. (N. Y.) 570; Doty *v.* Wilson, 5 Lans. (N. Y.) 7.

the performance of some act by which the debt is placed beyond his legal control.[69]

5. Acceptance. An unmistakable and unconditional acceptance on the part of the donee is an essential element to the validity of a gift *inter vivos*.[70] The acceptance of a gift, however, need not be contemporaneous with its delivery, and may be made at any time before attempted revocation, where the donor has by his act placed the property out of his own control.[71]

6. Ratification. A transaction lacking some of the elements necessary to make a valid gift *inter vivos* may be made such by subsequent ratification by the donor.[72]

7. Time of Taking Effect. Gifts *inter vivos*, when perfected by actual delivery and acceptance, unlike those *causa mortis*, go into immediate and absolute effect,[73] and the gift of property to take effect at some future

69. Wilson *v.* Keller, 9 Ill. App. 347; Young *v.* Power, 41 Miss. 197; Gray *v.* Barton, 55 N. Y. 68, 14 Am. Rep. 181 [*reversing* 1 Alb. L. J. 122]; Maclay *v.* Robinson, 91 Hun (N. Y.) 630, 36 N. Y. Suppl. 530; Doty *v.* Wilson, 5 Lans. (N. Y.) 7; Matter of Gregg, 11 Misc. (N. Y.) 153, 32 N. Y. Suppl. 1103. See also Fassett's Appeal, 167 Pa. St. 448, 31 Atl. 686.

70. *California.*— De Levillain *v.* Evans, 39 Cal. 120; Richardson *v.* McNulty, 24 Cal. 339.

Indiana.— Goelz *v.* People's Sav. Bank, 31 Ind. App. 67, 67 N. E. 232, holding that, where a mother deposits cash in a savings bank as a gift to her son, its acceptance will be presumed.

Kansas.— Sullivan *v.* Corbett, 3 Kan. App. 390, 42 Pac. 1105.

Kentucky.— Malone *v.* Lebus, 116 Ky. 975, 77 S. W. 180, 25 Ky. L. Rep. 1146 (holding that, where the donee is of unsound mind, the law will presume an acceptance); Payne *v.* Powell, 5 Bush 248.

Louisiana.— Lawrence *v.* Jefferson Parish Police Jury, 35 La. Ann. 601 (where the donation was held to be sufficiently accepted); Farrar *v.* Michoud, 22 La. Ann. 358; Packwood *v.* Dorsey, 6 Rob. 329 (holding that the acceptance must be in express terms by the donee during the donor's lifetime). See Barnebe *v.* Suaer, 18 La. Ann. 148 (holding that acceptance by an unauthorized person is a relative nullity and not absolute); Fuselier *v.* Masse, 4 La. 423 (holding that by the Spanish law acceptance was not necessary, and that it was only necessary to deprive the donor of the power of revocation, in order to validate a gift *inter vivos*, where delivery did not follow the gift).

Massachusetts.— Scott *v.* Berkshire County Sav. Bank, 140 Mass. 157, 2 N. E. 925.

New Hampshire.— Peirce *v.* Burroughs, 58 N. H. 302; Blasdel *v.* Locke, 52 N. H. 238.

New York.— Brink *v.* Gould, 7 Lans. 425; Allen *v.* Cowan, 28 Barb. 99, holding likewise that a mere claim by the donee does not constitute an acceptance of the gift.

England.— Hill *v.* Wilson, L. R. 8 Ch. 888, 42 L. J. Ch. 817, 29 L. T. Rep. N. S. 238, 21 Wkly. Rep. 757; Siggers *v.* Evans, 3 C. L. R. 1209, 5 E. & B. 367, 1 Jur. N. S. 851, 24 L. J. Q. B. 305, 85 E. C. L. 367; Thompson *v.* Leach, 2 Vent. 198; Smith *v.* Wheeler, 1 Vent. 128.

Canada.— Turgeon *v.* Guay, 15 Quebec Super. Ct. 332; Roy *v.* Garneau, 15 Quebec Super. Ct. 181.

See 24 Cent. Dig. tit. "Gifts," § 18.

71. Goelz *v.* People's Sav. Bank, 31 Ind. App. 67, 67 N. E. 232 (where the acts of the donee were held to show a sufficient acceptance of the gift); Pecquet *v.* Pecquet, 17 La. Ann. 204 (holding likewise that if the donor has executed the donation by putting the donee into corporeal possession of the effects given, the donation, although not accepted in express terms, has full effect); Love *v.* Francis, 63 Mich. 181, 29 N. W. 843, 6 Am. St. Rep. 290; Robitaille *v.* Troudel, 16 Quebec Super. Ct. 39 (holding that a donation can be accepted even by the heir of the donee after the death of the donor and the donee).

72. Daniel *v.* Frost, 62 Ga. 697; Gillispie *v.* Day, 19 La. 263; Quigley *v.* New York Mut. L. Ins. Co., 20 Fed. Cas. No. 11,511; Judd *v.* Esty, 6 L. C. Rep. 12, 4 R. J. R. Q. 472. See also Brown *v.* Niethammer, 141 Pa. St. 114, 21 Atl. 521.

In Louisiana by statute the donor cannot, by any confirmative act, supply the defects of a donation *inter vivos* null in form. Lazare *v.* Jacques, 15 La. Ann. 599; Deschapelles *v.* Labarre, 3 La. Ann. 522; Packwood *v.* Dorsey, 6 Rob. 329. However, it has been held in that state that an informal and invalid donation may be confirmed and ratified by the heirs of the donor. Ventress *v.* Brown, 34 La. Ann. 448.

73. *California.*— Pullen *v.* Placer County Bank, 138 Cal. 169, 66 Pac. 740, 71 Pac. 83, 94 Am. St. Rep. 19 (where a party delivered a negotiable check on a bank to another, and requested that it be not presented for payment until after his death, and it was held that the payee gained such possession and control of the thing to be given, as to constitute a completed and perfected gift); Williams *v.* Tam, 131 Cal. 64, 63 Pac. 133.

Michigan.— Ebel *v.* Piehl, 134 Mich. 64, 95 N. W. 1004.

New Hampshire.— Reed *v.* Spaulding, 42 N. H. 114.

New York.—Dimon *v.* Keery, 54 N. Y. App. Div. 318, 66 N. Y. Suppl. 817 [*affirming* 31 Misc. 231, 64 N. Y. Suppl. 1091].

date,[74] or, by some statutes, a gift of property with reservation of the usufruct to the donor, is void.[75] Delivery, however, need not be made at the time of the declaration of the gift, but may be made at any time before the revocation thereof by the donor, and will then take effect immediately upon delivery.[76]

D. Conditional Gift — 1. In General. A condition attached to delivery would invalidate a gift *inter vivos*, but a promise of the donee, or a condition imposed upon the donee, not constituting a condition of delivery or title, but consistent with it, will not have that effect.[77] Thus a gift upon condition that the donee shall give a part of the property to a designated third person is a valid gift.[78]

Oregon.— Waite *v.* Grubbe, 43 Oreg. 406, 73 Pac. 206, 99 Am. St. Rep. 764.

See 24 Cent. Dig. tit. "Gifts," § 9.

74. *California.*— Zeller *v.* Jordan, 105 Cal. 143, 38 Pac. 640.

Illinois.— Taylor *v.* Harmison, 179 Ill. 137, 53 N. E. 584 [*affirming* 79 Ill. App. 380]; Graves *v.* Safford, 41 Ill. App. 659.

Kansas.— Bruce *v.* Squires, 68 Kan. 199, 74 Pac. 1102; Rogers *v.* Richards, 67 Kan. 706, 74 Pac. 255.

Maine.— Hallowell Sav. Ins. *v.* Titcomb, 96 Me. 62, 51 Atl. 249; Dole *v.* Lincoln, 31 Me. 422; Allen *v.* Polereczky, 31 Me. 338.

Missouri.— Vogel *v.* Gast, 20 Mo. App. 104.

New York.— Holmes *v.* Roper, 141 N. Y. 64, 36 N. E. 180; Curry *v.* Powers, 70 N. Y. 212, 26 Am. Rep. 577; Matter of Somerville, 20 N. Y. Suppl. 76, 2 Connoly Surr. 86.

North Carolina.— Hunt *v.* Davis, 20 N. C. 36 (holding that a gift of a slave made to take effect after a life-estate in the donor passes no interest to the donee at common law); Sutton *v.* Hollowell, 13 N. C. 185.

Ohio.— Hamor *v.* Moore, 8 Ohio St. 239.

Pennsylvania.— Clapper *v.* Frederick, 199 Pa. St. 609, 49 Atl. 218; Walsh's Appeal, 122 Pa. St. 177, 15 Atl. 470, 9 Am. St. Rep. 83, 1 L. R. A. 535 (holding that in every valid gift the present title must vest in the donee, irrevocable in the case of a gift *inter vivos*); Waynesburg College's Appeal, 111 Pa. St. 130, 3 Atl. 19, 56 Am. Rep. 252; *In re* Trough, 75 Pa. St. 115; Stockham's Estate, 6 Pa. Dist. 196. See, however, House's Estate, 3 Pa. Dist. 359, holding that the consideration of blood is sufficient to support a gift of a fixed sum, vesting immediately in interest, although not taking effect in possession until the death of the donor.

South Carolina.— Busby *v.* Byrd, 4 Rich. Eq. 9.

Texas.— Chevallier *v.* Wilson, 1 Tex. 161.

Vermont.—Frost *v.* Frost, 33 Vt. 639. See, however, Blanchard *v.* Sheldon, 43 Vt. 512.

Virginia.— Barker *v.* Barker, 2 Gratt. 344.

England.— Desrochers *v.* Roy, 18 Quebec Super. Ct. 70.

Contra.— Banks *v.* Marksberry, 3 Litt. 275, holding that a gift of slaves to take effect after the death of the donor and wife, and not until then, is valid.

See 24 Cent. Dig. tit. "Gifts," § 9.

See, however, Carradine *v.* Carradine, 58 Miss. 286, 38 Am. Rep. 324.

75. Fontenot *v.* Manuel, 46 La. Ann. 1373, 16 So. 182; Strausse *v.* Sheriff, 43 La. Ann. 501, 9 So. 102 (holding, however, that under the Louisiana statute the donor is permitted to dispose, for the advantage of any other person, of the enjoyment or usufruct of the immovable property given, although he cannot reserve it for himself); Martin *v.* Martin, 15 La. Ann. 585; Tillman *v.* Mosely, 14 La. Ann. 710; Carmouche *v.* Carmouche, 12 La. Ann. 721; Brown *v.* Crafts, 98 Me. 40, 56 Atl. 213; Anderson *v.* Thompson, 11 Leigh (Va.) 439.

76. *Alabama.*— Gillespie *v.* Burleson, 28 Ala. 551.

Georgia.— Evans *v.* Lipscomb, 31 Ga. 71.

Louisiana.— Dupuy *v.* Dupont, 11 La. Ann. 226.

Maine.— Wing *v.* Merchant, 57 Me. 383.

Mississippi.— Carradine *v.* Carradine, 58 Miss. 286, 38 Am. Rep. 324.

New York.— Whiting *v.* Barrett, 7 Lans. 106.

United States.— King *v.* Smith, 110 Fed. 95, 49 C. C. A. 46, 54 L. R. A. 708.

England.— Grant *v.* Grant, 34 Beav. 623, 11 Jur. N. S. 787, 34 L. J. Ch. 641, 13 L. T. Rep. N. S. 721, 13 Wkly. Rep. 1057, 55 Eng. Reprint 776; *Re* Anderson, 64 L. T. Rep. N. S. 645.

See 24 Cent. Dig. tit. "Gifts," § 9.

77. *Illinois.*— Beatty *v.* Western College, 177 Ill. 280, 52 N. E. 432, 69 Am. St. Rep. 242, 42 L. R. A. 797 [*affirming* 71 Ill. App. 587].

New York.— Doty *v.* Willson, 47 N. Y. 580; Matter of Hicks, 14 N. Y. St. 320, holding that the fact that a son agreed to pay interest on a gift of money from his father did not invalidate it as a gift. See also Flint *v.* Ruthrauff, 163 N. Y. 588, 57 N. E. 1109 [*affirming* 26 N. Y. App. Div. 624, 53 N. Y. Suppl. 206].

Pennsylvania.— Reigel *v.* Wooley, 3 Leg. Chron. 98. See also Fassett's Appeal, 167 Pa. St. 448, 31 Atl. 686.

Rhode Island.—Pierce *v.* Brown University, 21 R. I. 392, 43 Atl. 878.

South Carolina.— Bennett *v.* Cook, 28 S. C. 353, 6 S. E. 28; Brummet *v.* Barber, 2 Hill 543; Allen *v.* Frazier, 1 Bailey 144; McKane *v.* Bonner, 1 Bailey 113.

Vermont.— Hackett *v.* Moxley, 65 Vt. 71, 25 Atl. 898.

England.— Blount *v.* Burrow, 4 Bro. Ch. 72, 29 Eng. Reprint 784, 1 Ves. Jr. 546, 30 Eng. Reprint 481; Hills *v.* Hills, 5 Jur. 1185, 10 L. J. Exch. 440, 8 M. & W. 401.

See 24 Cent. Dig. tit. "Gifts," § 68.

78. Gilchrist *v.* Stevenson, 9 Barb. (N. Y.) 9; Swihart *v.* Shaum, 24 Ohio St. 432; Lines *v.* Lines, 142 Pa. St. 149, 21 Atl. 809, 24 Am. St. Rep. 487; Riegel *v.* Wooley, 81* Pa. St.

2. On Death of Donor. A delivery of property subject to be reclaimed by the donor at any time prior to his death, or where full control or power over the property or fund vests in the donee only after the death of the donor, does not constitute a valid gift *inter vivos*.[79]

E. Property Which May Be Subject of — 1. In General. Every species of property, real[80] and personal,[81] incorporeal as well as corporeal,[82] may be the subject of a gift *inter vivos*.

2. Choses in Action. Thus, promissory notes, bonds, or other choses in action may be the subject of disposal as gifts *inter vivos*;[83] but a promissory note cannot be the subject of a gift from the maker to the payee thereof,[84] since

227; Scot *v.* Haughton, 2 Vern. Ch. 560, 23 Eng. Reprint 963.

79. *Alabama.*—Shaw *v.* White, 28 Ala. 637.

Illinois.— Olney *v.* Howe, 89 Ill. 556, 31 Am. Rep. 105. See, however, Virgin *v.* Gaither, 42 Ill. 39.

Indiana.— Smith *v.* Dorsey, 38 Ind. 451, 10 Am. Rep. 118. See, however, Baker *v.* Williams, 34 Ind. 547.

Kentucky.— Walden *v.* Dixon, 5 T. B. Mon. 170.

Massachusetts.— Warren *v.* Durfee, 126 Mass. 338.

New York.— Trow *v.* Shannon, 78 N. Y. 446 [*affirming* 8 Daly 239]; Tyrrel *v.* Emigrant Industrial Sav. Bank, 77 N. Y. App. Div. 131, 79 N. Y. Suppl. 49; Irish *v.* Nutting, 47 Barb. 370.

Pennsylvania.— Linsenbigler *v.* Gourley, 56 Pa. St. 166, 94 Am. Dec. 51; Hafer *v.* McKelvey, 23 Pa. Super. Ct. 202.

Virginia.— Sterling *v.* Wilkinson, 83 Va. 791, 3 S. E. 533.

See 24 Cent. Dig. tit. "Gifts," § 69.

Gift under contract of redelivery.— A delivery of bonds under a written contract of redelivery "whenever called for" cannot be an absolute gift, even though the party delivering them may have accepted never to call for a redelivery. Selleck *v.* Selleck, 107 Ill. 389.

Waiver of rights by donor.—Where a widow gave several slaves to her children and delivered possession, preserving to herself the right to reclaim the slaves during her life, and subsequently at her procurement the slaves were purchased from her children, it was held that her act in procuring the purchaser to buy the slaves was a waiver of her right to the claim. Johnson *v.* Johnson, 1 Coldw. (Tenn.) 626.

80. Jones *v.* Moore, 102 Ky. 591, 44 S. W. 126, 19 Ky. L. Rep. 1640; Rhodes *v.* Rhodes, 10 La. 85.

81. Bogan *v.* Finlay, 19 La. Ann. 94; McGlynn *v.* Curry, 82 N. Y. App. Div. 431, 81 N. Y. Suppl. 855 (holding that a life-insurance policy is personal property within the statutory construction law, and may therefore be made the proper subject of a gift by the insured during her lifetime); Nicholson *v.* Thomas, 8 Wkly. Notes Cas. (Pa.) 195 (holding that a valid gift can be made of articles to which a party has only an inchoate title, conditional on the payment of a certain sum); Hesse *v.* Hemberger, (Tenn. Ch. App. 1896) 39 S. W. 1063.

Property in adverse possession.— It has been held in Missouri that where the personal property is in the adverse possession of another, there can be no delivery and hence no gift. Doering *v.* Kenamore, 86 Mo. 588.

82. Hester *v.* Hester, 13 Lea (Tenn.) 189, holding that a gift to a creditor by his debtor of the equity of redemption in the land mortgaged to secure a debt will be sustained, if it appears that by relationship or otherwise the donee was the proper object of the donor's bounty.

The right to repudiate a contract is not the subject of a gift, and where a father gives his minor son a contract of purchase of land previously made by him in the name of the son without his knowledge, the latter cannot recover back from the vendor payment made by the father on the contract. Armitage *v.* Widoe, 36 Mich. 124.

Gift of entire estate.—Under La. Rev. Civ. Code, art. 1497, where a person makes a donation of all his property without reserving enough in the act of donation for his support, the act is null and void. Harris *v.* Wafer, 113 La. Ann. 822, 37 So. 768; Beaulieu *v.* Monin, 50 La. Ann. 732, 23 So. 937; Boggs *v.* Hays, 44 La. Ann. 859, 11 So. 222; Dopler *v.* Feigel, 40 La. Ann. 848, 6 So. 106; Lagrange *v.* Barré, 11 Rob. (La.) 302.

In Ohio a person is under no legal constraint from giving away his property to such an extent as to render himself destitute. Sievert *v.* Muller, 3 Ohio S. & C. Pl. Dec. 707, 3 Ohio N. P. 316.

83. *Alabama.*— Jones *v.* Deyer, 16 Ala. 221.

Connecticut.— Camp's Appeal, 36 Conn. 88, 4 Am. Rep. 39.

Louisiana.— See Farrar *v.* Michoud, 22 La. Ann. 358, holding that a donation given in the form of a written instrument, in the handwriting of the donee, not in the form required to give it validity as a donation *inter vivos*, payable five years after the death of the donor, cannot be enforced.

New Jersey.— Aller *v.* Aller, 40 N. J. L. 446.

Pennsylvania.— Mack's Appeal, 68 Pa. St. 231; Handy *v.* Philadelphia, etc., R. Co., 1 Phila. 31.

Tennessee.— Brunson *v.* Brunson, Meigs 630.

See 24 Cent. Dig. tit. "Gifts," § 7.

84. *Illinois.*— Blanchard *v.* Williamson, 70 Ill. 647; Forbes *v.* Williams, 13 Ill. App. 280 (holding that if a note is originally a gift in

natural love and affection is an insufficient consideration to support a promissory note.[85]

3. Property Not In Esse. The general rule is that in order for a gift to take effect as a gift *inter vivos*, the property must be *in esse* at the time of the attempted donation.[86]

F. Revocation — 1. General Rule. The rule is universally recognized that where a gift *inter vivos* has been perfected, that is, where nothing more is to be done to vest the title in the donee, such gift can no more be revoked by the donor than a sale, or any other executed contract.[87]

whole or in part, it will *pro tanto* be void as between the parties); Arnold *v.* Franklin, 3 Ill. App. 141.

Kentucky.— Callender *v.* Callender, 70 S. W. 844, 24 Ky. L. Rep. 1145.

Massachusetts.— *In re* Bartlett, 163 Mass. 509, 40 N. E. 899; Hill *v.* Buckminster, 5 Pick. 391.

New Hampshire.— Copp *v.* Sawyer, 6 N. H. 386.

New Jersey.— Smith *v.* Smith, 30 N. J. Eq. 564.

New York.— Dodge *v.* Pond, 23 N. Y. 69; Phelps *v.* Phelps, 28 Barb. 121; Pearson *v.* Pearson, 7 Johns. 26.

Ohio.— Starr *v.* Starr, 9 Ohio St. 74; Prior *v.* Reynolds, 1 Ohio Dec. (Reprint) 366, 8 West. L. J. 325.

Pennsylvania.— Kern's Estate, 171 Pa. St. 55, 33 Atl. 129.

Tennessee.— Shugart *v.* Shugart, 111 Tenn. 179, 76 S. W. 821, 102 Am. St. Rep. 777.

Vermont.— Rogers *v.* Rogers, 55 Vt. 73.

See 24 Cent. Dig. tit. "Gifts," § 7.

85. *Illinois.*— Williams *v.* Forbes, 114 Ill. 167, 28 N. E. 463; Kirkpatrick *v.* Taylor, 43 Ill. 207; Illinois Christian Convention *v.* Hall, 48 Ill. App. 536; Graves *v.* Safford, 41 Ill. App. 659.

Indiana.— West *v.* Cavins, 74 Ind. 265 [*criticizing* Mallet *v.* Page, 8 Ind. 364].

Iowa.— See Ashworth *v.* Grubbs, 47 Iowa 353, holding that to constitute natural love and affection a good consideration for a promissory note there must be a relationship between the parties.

New York.— Phelps *v.* Phelps, 28 Barb. 121; Hadley *v.* Reed, 12 N. Y. Suppl. 163; Fink *v.* Cox, 18 Johns. 145, 9 Am. Dec. 191.

Ohio.— Prior *v.* Reynolds, 1 Ohio Dec. (Reprint) 366, 8 West. L. J. 325.

Pennsylvania.— See Walsh *v.* Kenedy, 9 Phila. 178, 2 Wkly. Notes Cas. 437.

South Carolina.— Hall *v.* Howard, 1 Rice 310, 33 Am. Dec. 115.

Vermont.— Smith *v.* Kittridge, 21 Vt. 238; Holley *v.* Adams, 16 Vt. 206, 42 Am. Dec. 508.

See 24 Cent. Dig. tit. "Gifts," § 7.

86. Boyett *v.* Potter, 80 Ala. 476, 2 So. 534 (where a husband agreed to give a crop to be planted and grown on the land to his wife and minor son, and it was held that the gift did not take effect, as there was no crop in existence at the time capable of delivery to the donees); Hynson *v.* Terry, 1 Ark. 83 (where A, by parol, gave to B a female slave, with the express understanding that the first child she should have should be the property of C, and it was held that the gift to C was invalid). See, however, Whiting *v.* Barrett, 7 Lans. (N. Y.) 106, holding that when the owner of personal property makes a verbal gift of it, the donee acquires a perfect title if he obtains possession of the property before revocation of the gift by the donor, although it was not present, or even *in esse*, when the gift was made.

87. *Alabama.*—Shaw *v.* White, 28 Ala. 637. See also Mims *v.* Sturdevant, 16 Ala. 154.

Arkansas.— Williams *v.* Smith, 66 Ark. 299, 50 S. W. 513; Ryburn *v.* Pryor, 14 Ark. 505.

California.— Soberanes *v.* Soberanes, 97 Cal. 140, 31 Pac. 910.

Connecticut.— McCarthy *v.* McCarthy, 36 Conn. 177.

Georgia.— Gordon *v.* Green, 10 Ga. 534.

Illinois.— Welsch *v.* Belleville Sav. Bank, 94 Ill. 191; Cranz *v.* Kroger, 22 Ill. 74.

Indiana.— Martin *v.* McCullough, 136 Ind. 331, 34 N. E. 819.

Kentucky.— Gault *v.* Trumbo, 17 B. Mon. 682; Duncan *v.* Duncan, 5 Litt. 12; Miller *v.* Owen, 11 Ky. L. Rep. 440; Strelow *v.* Vonderhide, 3 Ky. L. Rep. 472.

Louisiana.— Monatt *v.* Parker, 30 La. Ann. 585, 31 Am. Rep. 229 (holding that one who has made a donation *inter vivos* to his concubine cannot, on her death, recover the property on the ground that the donation violated a prohibitory law, and was opposed to good morals); Giannoni *v.* Gunny, 14 La. Ann. 632.

Maine.— Wing *v.* Merchant, 57 Me. 383.

Maryland.— Albert *v.* Albert, 74 Md. 526, 22 Atl. 408; McNulty *v.* Cooper, 3 Gill & J. 214.

Michigan.— Richmond *v.* Nye, 126 Mich. 602, 85 N. W. 1120; Holmes *v.* McDonald, 119 Mich. 563, 78 N. W. 647, 75 Am. St. Rep. 430.

New Hampshire.— Sanborn *v.* Goodhue, 28 N. H. 48, 59 Am. Dec. 398; Marston *v.* Marston, 21 N. H. 491.

New Jersey.— Walker *v.* Joseph Dixon Crucible Co., 47 N. J. Eq. 342, 20 Atl. 885.

New York.— Pickslay *v.* Starr, 149 N. Y. 432, 44 N. E. 163, 52 Am. St. Rep. 740, 32 L. R. A. 703 [*affirming* 76 Hun 10, 27 N. Y. Suppl. 616]; Mace *v.* Thayer, 51 N. Y. App. Div. 121, 64 N. Y. Suppl. 315; Adee *v.* Hallett, 3 N. Y. App. Div. 308, 38 N. Y. Suppl. 273 (holding that where every step is taken which is essential to the creation of a valid

2. Repossession by Donor. A perfected gift is not revoked by the mere fact of its subsequently coming into the donor's possession again.[88]

3. Imperfect Gift — a. In General. Where, however, some essential element necessary to make a perfected gift *inter vivos* such as delivery to or acceptance by the donee is lacking, the donor may revoke the gift at any time before it is perfected.[89]

b. On Death of Donor. Where the donor delivers property to a third person for the donee, with authority to deliver it to the latter, until the authority is executed and the article delivered, such depositary is the agent of the donor, and the latter may revoke the gift and reclaim the property, and where such delivery does not take place in the donor's lifetime, his death revokes the agency, and no delivery thereafter is valid.[90]

4. Conditional Gift. Where a party makes a gift upon certain conditions,

gift *inter vivos*, its effect cannot be defeated by the subsequent conduct of the parties); Luce *v.* Gray, 92 Hun 599, 36 N. Y. Suppl. 1065; Rosenburg *v.* Rosenburg, 40 Hun 91 (holding that a grant of property which may be revoked at the pleasure of the grantor is not a valid gift *inter vivos*); Van Slooten *v.* Wheeler, 21 N. Y. Suppl. 336, 15 N. Y. Suppl. 591.

North Carolina.— Parker *v.* Ricks, 53 N. C. 447.

Pennsylvania.— *In re* Greenfield, 14 Pa. St. 489; Nicholas *v.* Adams, 2 Whart. 17; *In re* Burns, 12 Pittsb. Leg. J. 282. See also McCombs *v.* Stahl, 31 Pittsb. Leg. J. 287.

South Carolina.— Thompson *v.* Gordon, 3 Strobh. 196; Harten *v.* Gibson, 4 Desauss. 139; Taylor *v.* James, 4 Desauss. 1.

Texas.— Thompson *v.* Caruthers, 92 Tex. 530, 50 S. W. 331.

Vermont.— Williamson *v.* Johnson, 62 Vt. 378, 20 Atl. 279, 22 Am. St. Rep. 117, 9 L. R. A. 277.

Virginia.— Brown *v.* Handley, 7 Leigh 119.

West Virginia.— Fleshman *v.* Hoylman, 27 W. Va. 728.

United States.— McDonald *v.* Donaldson, 47 Fed. 765.

See 24 Cent. Dig. tit. "Gifts," § 20.

88. *Alabama.*— Ivey *v.* Owens, 28 Ala. 641; Easly *v.* Dye, 14 Ala. 158.

Connecticut.— Whiting *v.* Ralph, 75 Conn. 41, 52 Atl. 406.

Kansas.— Whitford *v.* Horn, 18 Kan. 455.

Massachusetts.— Grover *v.* Grover, 41 Mass. 261, 35 Am. Dec. 319.

New York.— Matter of Wachter, 16 Misc. 137, 38 N. Y. Suppl. 941.

Tennessee.— See Marshall *v.* Russell, 93 Tenn. 261, 25 S. W. 1070.

Vermont.— Allen *v.* Knowlton, 47 Vt. 512.

See 24 Cent. Dig. tit. "Gifts," § 20.

89. *Alabama.*— Boyett *v.* Potter, 80 Ala. 476, 2 So. 534.

Georgia.— Smith *v.* Peacock, 114 Ga. 691, 40 S. E. 757, 88 Am. St. Rep. 53; Chandler *v.* Chandler, 62 Ga. 612.

Illinois.— Cranz *v.* Kroger, 22 Ill. 74; Martin *v.* Martin, 101 Ill. App. 640, holding that since a gift is revocable until executed, a check intended as such from the drawer to the payee is in reality merely a promise to make a gift, and such gift is not executed until the check is paid.

Louisiana.— Johnson *v.* Stevens, 22 La. Ann. 144; Dismukes *v.* Musgrove, 2 La. 335.

Maryland.— Cox *v.* Hill, 6 Md. 274; Dugan *v.* Gittings, 3 Gill 138, 43 Am. Dec. 306.

Massachusetts.— See Sessions *v.* Moseley, 4 Cush. 87.

Pennsylvania.— Walsh's Appeal, 122 Pa. St. 177, 15 Atl. 470, 9 Am. St. Rep. 83, 1 L. R. A. 535; Rick's Appeal, 105 Pa. St. 528; Adams *v.* Nicholas, 1 Miles 90.

South Carolina.— Breithaupt *v.* Bauskett, 1 Rich. Eq. 465 (holding, however, that the right of a wife and legitimate children of a donor to elect to avoid a gift to the donor's mistress or illegitimate children is personal, and cannot be exercised by their representative after their decease); Ford *v.* McElray, 1 Rich. Eq. 474, to the same effect.

Virginia.— Applebury *v.* Anthony, 1 Wash. 287.

United States.— Lee *v.* Luther, 15 Fed. Cas. No. 8,196, 3 Woodb. & M. 519.

See 24 Cent. Dig. tit. "Gifts," § 20.

Revocation on account of ingratitude.— Under the Louisiana code, revocation of a gift *inter vivos* on account of ingratitude can take place in the three following cases: (1) If the donee has attempted to take the life of the donor; (2) if he has been guilty toward him of cruel treatment, crime, or grievous injuries; and (3) if he has refused him food when in distress. La. Civ. Code, § 560. Under the Quebec statute a donation may be revoked for ingratitude when the donee, under obligation to the donor, uses low and insulting terms respecting the latter, or otherwise maltreats him. Rousseau *v.* Majeur, 18 Quebec Super. Ct. 447. See also Dépatie *v.* Charbonneau, 22 Quebec Super. Ct. 80, where the donee had one of the donors who was old and sick imprisoned on a judgment against him for slander, thus separating him from his wife, the other donor, who was also sick, and it was held that the donee was guilty of such ingratitude as to justify the cancellation of the gift.

90. *Illinois.*— Jennings *v.* Nevill, 180 Ill. 270, 54 N. E. 202 [*modifying* 75 Ill. App. 503]; Taylor *v.* Harmison, 179 Ill. 137, 53 N. E. 584 [*affirming* 79 Ill. App. 380].

and the donee violates the conditions or refuses to perform them, the donor may revoke the gift upon such violation or refusal on the part of the donee.[91]

G. Distinguished From Other Transactions — 1. In General. Where the donor's intention to make a gift is clear and manifest, and where he has done everything in his power to effectuate the object, and places the *jus disponendi* beyond his power to recall, such transaction will be upheld as a valid gift, and not as a trust for the donor's estate.[92]

2. Promise of Gift. A mere promise or executory agreement to make a gift of property does not amount to a gift *inter vivos* and is not enforceable as such.[93]

Iowa.— Furenes *v.* Eide, 109 Iowa 511, 80 N. W. 539, 77 Am. St. Rep. 545.

Massachusetts.— Sessions *v.* Moseley, 4 Cush. 87.

Pennsylvania.— Clapper *v.* Frederick, 199 Pa. St. 609, 49 Atl. 218. See also Fross' Appeal, 105 Pa. St. 258.

West Virginia.— Dickeschied *v.* Exchange Bank, 28 W. Va. 340.

See 24 Cent. Dig. tit. "Gifts," § 69.

See, however, King *v.* Smith, 110 Fed. 95, 49 C. C. A. 46, 54 L. R. A. 708, holding that delivery need not be made at the time of the gift, and that it is immaterial if delivery to the donee is made while the donor is unconscious, he having, while capable of transacting business, and for the purpose of consummating the gift, directed the delivery to be made.

91. *Illinois.*— Conkling *v.* Springfield, 39 Ill. 98.

Iowa.— Berry *v.* Berry, 31 Iowa 415, where a father gave his son certain personal property upon the condition that he should keep sober and attend to business, and it was held that, to entitle the donee to claim that the gift was irrevocable and invested him with a right to the property, it must be shown that he had complied with the conditions on which the gift was made.

Louisiana.— Eskridge *v.* Farrar, 30 La. Ann. 718.

Missouri.— Halbert *v.* Halbert, 21 Mo. 277.

Pennsylvania.— Lyon *v.* Marclay, 1 Watts 271; Houser *v.* Singiser, 1 Leg. Chron. 145. See also Fritz *v.* Brustle, 17 Phila. 227.

Vermont.— Williamson *v.* Johnson, 62 Vt. 378, 20 Atl. 279, 22 Am. St. Rep. 117, 9 L. R. A. 277.

United States.— The Lucy Anne, 15 Fed. Cas. No. 8,596, 3 Ware 253.

See 24 Cent. Dig. tit. "Gifts," § 20.

Contra.—Gaunt *v.* Tucker, 18 Ala. 27, where a gift by deed of a slave on condition that the donee should emancipate him was held to vest the title absolute in the donee, and that the donor could no more revoke it than he could a gift to which no condition was attached.

Gift in contemplation of marriage.—Where plaintiff, being engaged to defendant, sent her money with which to buy her wedding outfit, and bear her expenses to the place of marriage, it was held that he might recover these sums, in an action of assumpsit, if she, without cause, refused to fulfil the engagement. Williamson *v.* Johnson, 62 Vt. 378, 20 Atl. 279, 22 Am. St. Rep. 117, 9 L. R. A. 277. See also Young *v.* Burrell, Cary 54, 21 Eng. Reprint 29. And see 14 Vin. Abr. tit. "Gifts," pl. 7.

Reversion.— La. Code, art. 1521, provides that the donor has the right of reversion in case he survives the donee "alone," or "the donee and her descendants." Article 1522 provides that the effect of the right of return is that it cancels all the alienations of the property given, made by the donee or his descendants, as it has been held that the right of reversion does not accrue as long as any one of the donee's descendants is living. Seghers *v.* Schmidt, 12 La. 207.

92. *California.*— Stevens' Estate, 83 Cal. 322, 23 Pac. 379, 17 Am. St. Rep. 252.

Indiana.— Robbins *v.* Swain, 7 Ind. App. 486, 34 N. E. 670, (1892) 32 N. E. 792.

Louisiana.— Crawford *v.* Puckett, 14 La. Ann. 639.

Michigan.— Love *v.* Francis, 63 Mich. 181, 29 N. W. 843, 6 Am. St. Rep. 290.

New Jersey.— Dixon *v.* Tower, (Err. & App. 1893) 26 Atl. 341.

New York.— Pickslay *v.* Starr, 149 N. Y. 432, 44 N. E. 163, 52 Am. St. Rep. 740, 32 L. R. A. 703 [*affirming* 76 Hun 10, 27 N. Y. Suppl. 616]; Matter of Sproule, 42 Misc. 448, 87 N. Y. Suppl. 432. See also Waldron *v.* Waldron, 4 Bradf. Surr. 114.

Pennsylvania.— See Mahon *v.* Baker, 26 Pa. St. 519, where a lease for nominal rent was, under the circumstances, held to constitute a perfect gift to the lessee by the lessor. And see Cocker's Estate, 11 Pa. Co. Ct. 243.

See 24 Cent. Dig. tit. "Gifts," § 22.

The transaction did not amount to a perfected gift *inter vivos* in Pratt *v.* Griffin, 184 Ill. 514, 56 N. E. 819; Selleck *v.* Selleck, 107 Ill. 389; *In re* Haaf, 52 La. Ann. 249, 26 So. 834; Maduel *v.* Tuyes, 31 La. Ann. 483; Knapp *v.* Knapp, (Mo. 1894) 27 S. W. 334; Livingston *v.* Livingston, 29 Nebr. 167, 45 N. W. 233; Prickett *v.* Prickett, 20 N. J. Eq. 478; Hodge *v.* Hoppock, 75 N. Y. 491; Gilman *v.* McArdle, 49 N. Y. Super. Ct. 463; Brown *v.* Brown, 38 S. C. 173, 17 S. E. 452; Myers *v.* U. S., 24 Ct. Cl. 448.

A gift is analogous to an assignment. In fact it is an assignment perfected by delivery, and the difference between the two rests solely in the method of proof, and in all other particulars an assignment without valuable consideration and a gift are alike. Bond *v.* Bunting, 78 Pa. St. 210; *In re* Gray, 1 Pa. St. 327; Madeira's Appeal, (1886) 4 Atl. 980.

93. *Alabama.*— Walker *v.* Crews, 73 Ala. 412.

3. Loan. The question as to whether a transaction having all the other requisites of a gift *inter vivos* is really a gift or a loan is determined by the intention of the donor, which must be gathered from all of the facts and circumstances attending the transfer of the property.[94]

4. Sale. In a transaction purporting to be a sale of property, where the consideration expressed is out of all proportion to the value of the property, such transaction will be upheld as a gift *inter vivos*, where all of the formalities required for the validity of such a gift are observed.[95]

5. Testamentary Disposition. Where a gift is made effective in the lifetime of the decedent and he has divested himself of all power to recall it, such transaction is a gift *inter vivos*, and not testamentary in its nature.[96]

6. Gifts Causa Mortis. A gift *inter vivos*, as distinguished from a gift *causa mortis*, does not require actual delivery, and it is sufficient to complete a gift *inter vivos* that the conduct of the parties should show that the ownership of the property had been changed.[97] Another difference to be noted to gifts *inter vivos* and *causa mortis* is that the former is made without the expectation of death as a moving cause.[98]

Illinois.— Richardson *v.* Hadsall, 106 Ill. 476; Walton *v.* Walton, 70 Ill. 142.

Indiana.— Gammon Theological Seminary *v.* Robbins, 128 Ind. 85, 27 N. E. 341, 12 L. R. A. 506; Johnston *v.* Griest, 85 Ind. 503; Harmon *v.* James, 7 Ind. 263.

New York.— Hamer *v.* Sidway, 124 N. Y. 538, 27 N. E. 256, 21 Am. St. Rep. 693, 12 L. R. A. 463 [*reversing* 57 Hun 229, 11 N. Y. Suppl. 182].

Vermont.— Morse *v.* Low, 44 Vt. 561.

United States.— Williamson *v.* Colcord, 30 Fed. Cas. No. 17,752, 1 Hask. 620.

See 24 Cent. Dig. tit. "Gifts," § 23.

94. *California.*— Helm *v.* Martin, 59 Cal. 57.

Georgia.— Booth *v.* Terrell, 18 Ga. 570.

Maryland.— Snowden *v.* Reid, 67 Md. 130, 8 Atl. 661, 10 Atl. 175.

Mississippi.— Moseby *v.* Williams, 5 How. 520.

Pennsylvania.— Richardson's Estate, 13 Phila. 241 (holding that a remittance of money unexplained will be presumed to be a loan and not a gift, even though a letter written after the remittance states that the borrower may have it as long as he wants); Rivina's Appeal, 37 Leg. Int. 466 (holding that a loan of money by a brother to a sister, in accordance with her request, is not changed from a loan to a gift by a permission to retain it as long as she might want to).

Virginia.— Mahon *v.* Johnston, 7 Leigh 317.

See 24 Cent. Dig. tit. "Garnishment," § 25.

Transfer of property from parent to child as constituting a loan or a gift see Parent and Child.

95. Kinnebrew *v.* Kinnebrew, 35 Ala. 628; Reinerth *v.* Rhody, 52 La. Ann. 2029, 28 So. 277 (holding that a sale without a price fixed and determined by the parties, not binding as a sale, may yet be binding as a donation, provided it contains nothing contrary to public order and no injury results to others); Spanier *v.* De Voe, 52 La. Ann. 581, 27 So. 174 (where the consideration expressed in a deed for the sale of land was only five dollars and the deed was regarded as a donation, and not a sale); Harper *v.* Pierce, 15 La. Ann. 666; Haggerty *v.* Corri, 5 La. Ann. 433; Van Deusen *v.* Rowley, 8 N. Y. 358; Pearl *v.* Hansborough, 9 Humphr. (Tenn.) 426, where A conveyed five slaves to his daughter, B, upon the consideration of natural love and affection, and of one hundred dollars, and it was held that as the consideration of one hundred dollars was insufficient to support a sale of the slaves, the transaction amounted to a gift, and not a sale. See Lee *v.* Wrixon, (Wash. 1905) 79 Pac. 489, where the transaction was held to constitute a sale for a valuable consideration, and not a gift.

96. *Connecticut.*— Reed *v.* Copeland, 50 Conn. 472, 47 Am. Rep. 663.

New York.— Ranken *v.* Donovan, 166 N. Y. 626, 60 N. E. 1119 [*affirming* 46 N. Y. App. Div. 225, 61 N. Y. Suppl. 542].

North Carolina.— Branch *v.* Eyrd, 15 N. C. 142, holding that the appointment of a guardian to the donee does not give a testamentary character to a deed of gift, neither does the reservation to the donor of a life-interest in a slave.

Ohio.— Brodt *v.* Rannells, 9 Ohio S. & C. Pl. Dec. 503, 7 Ohio N. P. 79, holding that a gift made by a father to his daughter in his last sickness, in order that he might die intestate, and thereby defeat his wife in sharing in the property, was not a testamentary devise.

Texas.— Millican *v.* Millican, 24 Tex. 426.

See 24 Cent. Dig. tit. "Gifts," § 27.

97. Poullain *v.* Poullain, 79 Ga. 11, 4 S. E. 81; Flory *v.* Denny, 7 Exch. 581, 21 L. J. Exch. 223; Ward *v.* Audland, 16 M. & W. 862.

A gift inter vivos is an immediate, voluntary, and gratuitous transfer of personal property by one to another. Flanders *v.* Blandy, 45 Ohio St. 108, 12 N. E. 321.

98. Taylor *v.* Harmison, 79 Ill. App. 380.

A donatio causa mortis differs from a gift inter vivos because it is ambulatory and revocable during the donor's life, because it

H. Operation and Effect — 1. Between Parties. A gift *inter vivos* when perfected, unless obtained by fraud, duress, or undue influence, operates as a complete transfer of the subject thereof from the donor to the donee, and the title thereby acquired by the donee is as good as between the parties, and those claiming under them, as a title acquired by deed or purchase.[99]

2. Upon Purchasers and Encumbrancers. The general rule is that the donee of a valid gift *inter vivos* has a title superior to that of a subsequent purchaser or encumbrancer with notice claiming under the donor.[1] On the other hand it has been said that where such purchaser or encumbrancer is without notice, actual or constructive, of the gift, his title or lien is usually superior to that of the donee.[2]

may be made to the wife of the donor, and because it is liable for his debts. It must be made in the conceived approach of death. Sheegog *v.* Perkins, 4 Baxt. (Tenn.) 273.

"A donatio mortis causa must be completely executed, precisely as required in the case of gifts *inter vivos*, subject to be divested by the happening of any of the conditions subsequent, that is, upon actual revocation by the donor, or by the donor's surviving the apprehended peril, or outliving the donee, or by the occurrence of a deficiency of assets necessary to pay the debts of the deceased donor. These conditions are the only qualifications that distinguish gifts *mortis causa* and *inter vivos*. On the other hand, if the gift does not take effect as an executed and complete transfer to the donee of possession and title, either legal or equitable, during the life of the donor, it is a testamentary disposition, good only if made and proved as a will." Basket *v.* Hassell, 107 U. S. 602, 609, 2 S. Ct. 415, 27 L. ed. 500.

The transfer of shares of stock during the owner's last sickness, in order to carry out the terms of an instrument of trust executed years before, by which such stock was conveyed in trust to the assignee in consideration of certain obligations therein imposed, is a gift *inter vivos* and not *donatio causa mortis*. Coffey *v.* Coffey, 179 Ill. 283, 53 N. E. 590 [*affirming* 74 Ill. App. 241].

99. *Alabama.*— Sims *v.* Sims, 8 Port. 449, 33 Am. Dec. 293.

Arkansas.— Cribbs *v.* Walker, (1905) 85 S. W. 244.

Colorado.— Bourke *v.* Whiting, 19 Colo. 1, 34 Pac. 172.

Georgia.— Walker *v.* Neil, 117 Ga. 733, 45 S. E. 387; Tucker *v.* Adams, 14 Ga. 548.

Illinois.— Hagemann *v.* Hagemann, 90 Ill. App. 251. See also Miller *v.* Western College, 71 Ill. App. 587.

Indiana.— Hunt *v.* Beeson, 18 Ind. 380; Fredericks *v.* Sault, 19 Ind. App. 604, 49 N. E. 909.

Louisiana.— Burton *v.* Burton, 14 La. 352.

Maine.— McLean *v.* Weeks, 61 Me. 277.

Maryland.— Dorsey *v.* Smithson, 6 Harr. & J. 61.

Massachusetts.— Faxon *v.* Durant, 9 Metc. 339; Grover *v.* Grover, 24 Pick. 261, 35 Am. Dec. 319.

Missouri.— Blatz *v.* Lester, 54 Mo. App. 283, holding likewise that the fact that the donee fails in what the donor hoped and expected to induce him to do by the gift cannot affect its validity.

New Hampshire.— Hatch *v.* Lamos, 65 N. H. 1, 17 Atl. 979, 4 L. R. A. 404; Abbott *v.* Tenney, 18 N. H. 109.

New Jersey.— Corle *v.* Monkhouse, 50 N. J. Eq. 537, 25 Atl. 157.

North Carolina.— Cutlar *v.* Spiller, 3 N. C. 130.

Pennsylvania.— Fassett's Appeal, 167 Pa. St. 448, 31 Atl. 686.

South Carolina.— Martin *v.* Jennings, 52 S. C. 371, 29 S. E. 807 (holding that every perfected gift is an executed contract founded on the consent of parties and cannot afterward be converted into a debt or charged against the donee); Francis *v.* Lehre, 1 Rich. Eq. 271. See also McMeekin *v.* Brummet, 2 Hill Eq. 638; Brummet *v.* Barber, 2 Hill 543.

Texas.— Hawkins *v.* Lee, 22 Tex. 544.

See 24 Cent. Dig. tit. "Gifts," § 76.

In Louisiana donations *inter vivos* cannot exceed a certain amount, a certain portion of the estate of the donor being reserved for the benefit of the "forced heirs" of the donor. Tessier *v.* Roussel, 41 La. Ann. 474, 6 So. 542, 824, holding that if at the death of the donor the donation shall prove to be in excess of the disposable portion as then ascertained, the donation will be resolved to the extent of such excess. And where the donor divests himself of all his property by a donation *inter vivos*, the donation is null for the whole. Harris *v.* Wafer, 113 La. 822, 37 So. 768; Beaulieu *v.* Monin, 50 La. Ann. 732, 23 So. 937 (holding that the prohibition of the statute is not removed by the promise or engagement of the agent to support the donor during life); Bernard *v.* Noel, 45 La. Ann. 1135, 13 So. 737; Cole *v.* Lucas, 2 La. Ann. 946 (holding that a concubine can receive, as a donation from her paramour in movables, but one tenth of the value of his estate); Lagrange *v.* Barré, 11 Rob. 302.

1. Jennings *v.* Blocker, 25 Ala. 415; Black *v.* Thornton, 31 Ga. 641; Cummings *v.* Coleman, 7 Rich. Eq. (S. C.) 509, 62 Am. Dec. 402; Moultrie *v.* Jennings, 2 McMull (S. C.) 508. See Beaulieu *v.* Monin, 50 La. Ann. 732, 23 So. 937, where the gift was held to be void on its face because violative of the statute. And see Betts *v.* Francis, 30 N. J. L. 152.

2. Bell *v.* McCawley, 29 Ga. 355 (holding, however, that this rule only applies to a case where the two conflicting titles are de-

3. Effect of Mistake, Fraud, Duress, or Undue Influence. The rule is well recognized that a gift procured through means of fraud, duress, or undue influence brought to bear upon the donor is void.[3] The above rule is particularly applicable where confidential relations exist, as between parent and child,[4] guardian and ward,[5] attorney and client,[6] principal and agent,[7] patient and physician,[8] and in such cases the law not only watches over the transactions of the parties with great and jealous scrutiny, but it often declares such transactions absolutely void, where, between other parties, they would be open to no exception.[9] However, advice or even persuasion to make a particular gift is not *per se* fraudulent; there must be something more, something that amounts to imposition, a species of moral constraint that takes away the free agency of the donor,[10]

rived from the same source); Crozier *v.* Bryant, 4 Bibb (Ky.) 174 (holding, however, that where defendant held under a purchase from a third person, it was necessary for him, in order to avoid the gift, to show that he derived title from plaintiff's donor as the original vendor); Jones *v.* Tyler, 6 Mich. 364; Dolan *v.* Kelly, 9 Pa. Cas. 17, 11 Atl. 680. *Contra,* Steel *v.* McKnight, 1 Bay (S. C.) 64.

Creditors of donor.— Under La. Civ. Code, art. 1539, the universal donee is bound to pay the debts of the donor existing at the time of the donation, but he can discharge himself therefrom by abondoning the property given. Porche *v.* Moore, 14 La. Ann. 241.

3. *Indiana.*— See Norris *v.* Norris, 3 Ind. App. 500, 28 N. E. 1014, holding that gifts obtained by fraud or imposition as a rule are voidable only, and by one especially injured.

Nebraska.— Gibson *v.* Hammang, 63 Nebr. 349, 88 N. W. 500.

New Hampshire.— Sanborn *v.* Goodhue, 28 N. H. 48, 59 Am. Dec. 398.

North Carolina.— Harris *v.* Delamar, 38 N. C. 219.

Pennsylvania.— Osthaus *v.* McAndrew, 5 Pa. Cas. 344, 8 Atl. 436.

Canada.— Trusts, etc., Co. *v.* Hart, 2 Ont. L. Rep. 251.

See 24 Cent. Dig. tit. "Gifts," § 74.

A collusive and illegal agreement between the donor and another person, whereby a gift is made to a third person, will not affect the donee's title. McCarthy *v.* McCarthy, 36 Conn. 177.

4. See Parent and Child.

5. See Guardian and Ward.

6. See Attorney and Client.

7. See Principal and Agent.

8. See Physicians and Surgeons.

9. Caspari *v.* New Jerusalem First German Church, 82 Mo. 649 [*affirming* 12 Mo. App. 293] (where a widow seventy-two years old, infirm in body and feeble in mind, was induced by the persuasions of her pastor to give the church a note of four thousand dollars, an amount disproportionate to her means. She had no other advice on the transaction, and it was held, at her suit, that the gift should be canceled); Ford *v.* Hennessy, 70 Mo. 580; Yosti *v.* Laughran, 49 Mo. 594; Reed *v.* Carroll, 82 Mo. App. 102; Matter of Rogers, 10 N. Y. App. Div. 593, 42 N. Y. Suppl. 133. See also June *v.* Willis, 30 Fed. 11.

In England it is essential to the validity of a gift to a person sustaining a confidential relation to the donor that the donor had competent and independent advice upon the subject of such donation. Liles *v.* Terry, [1895] 2 Q. B. 679, 65 L. J. Q. B. 34, 73 L. T. Rep. N. S. 428, 44 Wkly. Rep. 116; Mitchell *v.* Homfray, 8 Q. B. D. 587, 50 L. J. Q. B. 460, 45 L. T. Rep. N. S. 694, 29 Wkly. Rep. 558; Rhodes *v.* Bate, L. R. 1 Ch. 252, 12 Jur. N. S. 178, 35 L. J. Ch. 267, 13 L. T. Rep. N. S. 778, 14 Wkly. Rep. 292 (holding likewise that where a confidential relation is established, the court will presume its continuance, unless there is distinct evidence of its termination); Morgan *v.* Minett, 6 Ch. D. 638, 36 L. T. Rep. N. S. 948, 25 Wkly. Rep. 744; Wright *v.* Vanderplank, 8 De G. M. & G. 133, 2 Jur. N. S. 599, 2 Kay & J. 1, 25 L. J. Ch. 753, 4 Wkly. Rep. 410, 57 Eng. Ch. 104, 44 Eng. Reprint 340; *Re* Holmes, 3 Giff. 337; Tyars *v.* Alsop, 53 J. P. 212, 61 L. T. Rep. N. S. 8, 37 Wkly. Rep. 339; Griffiths *v.* Robins, 3 Madd. 191; Goddard *v.* Carlisle, 9 Price 169, 23 Rev. Rep. 654; Huguenin *v.* Baseley, 14 Ves. Jr. 273, 2 White & T. Lead. Cas. Eq. 597, 33 Eng. Reprint 526; Hatch *v.* Hatch, 1 Smith K. B. 226, 9 Ves. Jr. 292, 7 Rev. Rep. 195, 32 Eng. Reprint 615; Gibson *v.* Jeyes, 6 Ves. Jr. 266, 5 Rev. Rep. 295, 31 Eng. Reprint 1044.

10. *California.*—Soberanes *v.* Soberanes, 97 Cal. 140, 31 Pac. 910.

Indiana.— Slayback *v.* Witt, 151 Ind. 376, 50 N. E. 389.

Iowa.— Muir *v.* Miller, 72 Iowa 585, 34 N. W. 429.

Kentucky.— Couchman *v.* Couchman, 98 Ky. 109, 32 S. W. 283, 17 Ky. L. Rep. 674; Ford *v.* Ellis, 56 S. W. 512, 21 Ky. L. Rep. 1837.

Maryland.— Eakle *v.* Reynolds, 54 Md. 305.

Minnesota.—Hooper *v.* Vanstrum, 92 Minn. 406, 100 N. W. 229.

New Jersey.— Wilkinson *v.* Scudder, 47 N. J. Eq. 324, 21 Atl. 955; Wilkinson *v.* Sherman, 45 N. J. Eq. 413, 18 Atl. 228.

New York.— Nesbit *v.* Lockman, 34 N. Y. 167 (where an aged lady made to her confidential friend who is the clerk of her attorney an assignment of securities to the

and substitutes therefor the will of the donee, or of a third party, before such transaction will be set aside.[11] Where the donor has been induced through a mistake of fact, or false representations, to make a gift, equity will intervene to set the same aside.[12]

I. Actions — 1. In General. Where the conditions of a gift *inter vivos* have not been complied with, it may be recovered by the donor or his representatives or heirs by an action to revoke,[13] or by an action of assumpsit;[14] or trover will lie upon a donee's refusal to return an incomplete gift.[15] If the gift has been obtained by fraud or undue influence, a bill to set it aside may be maintained.[16] A donee may maintain assumpsit against a third party to whom the donor has delivered the gift on his promise to deliver it to the donee which he refuses to do,[17] but he cannot maintain an action against the donor or his representatives or heirs to enforce a gift unless it is fully completed.[18]

2. Parties.[19] The general rule that all parties interested in a cause of action should be made plaintiffs or defendants applies to actions respecting gifts.[20] For example heirs of a decedent are proper and necessary parties to an action to revoke or set aside a gift of property in which they are interested,[21] and the proper party to be sued in such an action is the party who without consideration receives the benefit of the gift.[22] An action against a savings bank by a donee to recover a deposit given to him must be in the name of the donor or his personal representatives,[23] unless the bank expressly promised to pay the amount of the deposit

amount of ten thousand dollars, and there was nothing in the evidence on the transaction itself to imply undue influence or fraud on the part of the donee, and it was held that it was a good and valid gift in law); Adee *v.* Hallett, 3 N. Y. App. Div. 308, 38 N. Y. Suppl. 273; Snook *v.* Sullivan, 25 Misc. 578, 55 N. Y. Suppl. 1073.

Pennsylvania.— Longenecker *v.* Zion Evangelical Lutheran Church, 200 Pa. St. 567, 50 Atl. 244; Yeakel *v.* McAtee, 156 Pa. St. 500, 27 Atl. 277. See also Nace *v.* Boyer, 30 Pa. St. 110; Graham *v.* Pancoast, 30 Pa. St. 89.

Tennessee.— Hesse *v.* Hemberger, (Ch. App. 1896) 39 S. W. 1063.

United States.— Towson *v.* Moore, 173 U. S. 17, 19 S. Ct. 332, 43 L. ed. 597; Ralston *v.* Turpin, 25 Fed. 7.

England.—Phillipson *v.* Kerry, 32 Beav. 628, 55 Eng. Reprint 247; Huguenin *v.* Baseley, 14 Ves. Jr. 273, 287, 2 White & T. Lead. Cas. Eq. 597, 33 Eng. Reprint 526.

See 24 Cent. Dig. tit. "Gifts," § 74.

11. Seward *v.* Seward, 59 Kan. 387, 53 Pac. 63; Prescott *v.* Johnson, 91 Minn. 273, 97 N. W. 891.

12. Boyd *v.* De la Montagnie, 73 N. Y. 498, 29 Am. Rep. 197 (holding that a mutual misapprehension or mistake is sufficient to warrant the intervention of equity); *In re* Glubb, [1900] 1 Ch. 354, 69 L. J. Ch. 278, 82 L. T. Rep. N. S. 412 (holding that a voluntary subscription to a charitable institution, given in response to an appeal which innocently misrepresented the construction of the will of a testator, could be recovered by a subscriber who had given his subscription on the faith of such representation, when it was subsequently discovered to be untrue). See Yeakel *v.* McAtee, 156 Pa. St. 600, 27 Atl. 277, where it was held that the information withheld from the donor was not sufficient to invalidate the gift, where it appeared that she knew the nature and effect of her action.

13. See Thibodeaux *v.* Comeau, 30 La. Ann. 1119.

14. Williamson *v.* Johnson, 12 Ky. L. Rep. 295, holding that gifts made in anticipation of marriage can be recovered in an action for money had and received on refusal of the donee, without good cause, to perform her engagement.

15. Trover will lie to recover an oral gift of a negotiable instrument which can be transferred only by indorsement, although the gift be accompanied by delivery. Brickhouse *v.* Brickhouse, 33 N. C. 404; Fairly *v.* McLean, 33 N. C. 158.

16. Petty *v.* Webb, 6 B. Mon. (Ky.) 468.

17. Miller *v.* Billingsly, 41 Ind. 489.

18. Beatty *v.* Western College, 177 Ill. 280, 52 N. E. 432, 69 Am. St. Rep. 242, 42 L. R. A. 797. See Specific Performance.

19. Parties generally see Parties.

20. Petty *v.* Webb, 6 B. Mon. (Ky.) 468, holding that a bill to set aside a gift obtained by fraud may be maintained by the widow of the deceased donor.

21. Thibodeaux *v.* Comeau, 30 La. Ann. 1119; Ford *v.* Hennessy, 70 Mo. 580, holding that heirs and not the administrator are the proper parties to a suit to set aside a gift made by the deceased while *in extremis* as having been obtained by undue influence.

22. Ford *v.* Hennessy, 70 Mo. 580, holding also that one who merely received the gift for delivery to such beneficiary is not a proper party. See Jacob *v.* Klein, 3 Quebec Pr. 519, holding that it is not necessary to bring into the cause one of the donees who has transferred all his right to his co-donee, defendant.

23. Foss *v.* Lowell Five Cents Sav. Bank, 111 Mass. 285.

to the donee, in which case it has been held that the latter can sue in his own name.[24]

3. PLEADING.[25] A plea of *non est factum* is not necessary to the right to dispute the validity of a gift by a written instrument.[26]

4. EVIDENCE[27] — a. Presumptions and Burden of Proof — (I) *IN GENERAL.* The general rule that the burden of proof is on the one having the affirmative of an issue[28] applies to actions in respect to gifts.[29] The burden of proof is on one claiming to be the donee of property to establish all facts essential to the validity of such gift.[30]

(II) *FRAUD OR UNDUE INFLUENCE.* In the absence of evidence raising a suspicion of fraud or undue influence on the part of the donee, the fairness of a gift will be presumed,[31] and the burden is on one attacking the validity of the gift on that ground to show clearly that it was not the voluntary act of the donor.[32] But where the circumstances are such as to raise a suspicion of fraud or undue influence, as where one of the parties is enfeebled by sickness or old age and the relation between the parties is one of special trust and confidence, the burden is upon the donee to show by clear, convincing, and satisfactory evidence that the gift was the voluntary and intelligent act of the donor.[33]

24. Foss *v.* Lowell Five Cents Sav. Bank, 111 Mass. 285.

25. Pleading generally see PLEADING.

26. Cowen *v.* Brownsville First Nat. Bank, 94 Tex. 547, 63 S. W. 532, 64 S. W. 778.

27. Evidence generally see EVIDENCE.

28. See EVIDENCE, 16 Cyc. 926 *et seq.*

29. See Teal *v.* Sevier, 26 Tex. 516, burden is on one attacking a gift as in excess of the amount allowed by statute.

30. *Alabama.*— Wheeler *v.* Glasgow, 97 Ala. 700, 11 So. 758.

California.— See Freese *v.* Odd Fellows' Sav. Bank, 136 Cal. 662, 69 Pac. 493.

Illinois.— Selleck *v.* Selleck, 107 Ill. 389 (holding that one claiming that a loan to him was afterward changed into an absolute gift has the burden of proving that fact); Boudreau *v.* Boudreau, 45 Ill. 480.

Iowa.— Wilson *v.* Wilson, 99 Iowa 688, 68 N. W. 910; Samson *v.* Samson, 67 Iowa 253, 25 N. W. 233.

Kentucky.— Buckel *v.* Smith, 82 S. W. 235, 26 Ky. L. Rep. 494.

Missouri.— Jones *v.* Falls, 101 Mo. App. 536, 73 S. W. 903.

New Hampshire.— Bean *v.* Bean, 71 N. H. 538, 53 Atl. 907.

New Jersey.— Parker *v.* Parker, 45 N. J. Eq. 224, 16 Atl. 537.

New York.— In this state the rule is stated that while there is no presumption of law or fact either for or against a gift, he who claims title to property through a gift must establish it. Lewis *v.* Merritt, 113 N. Y. 386, 21 N. E. 141 [*reversing* 42 Hun 161]; Jones *v.* Perkins, 29 N. Y. App. Div. 37, 51 N. Y. Suppl. 380; Farian *v.* Wiegel, 76 Hun 462, 28 N. Y. Suppl. 95, 31 Abb. N. Cas. 159; Scoville *v.* Post, 3 Edw. 203. See Cook *v.* Dowling, 6 Misc. 271, 26 N. Y. Suppl. 764.

North Carolina.— Duckworth *v.* Orr, 126 N. C. 674, 36 S. E. 150, holding that the burden is on a claimant of money by gift to prove both the gift and the delivery of the moneys before the death of the donor.

Pennsylvania.— See Hasel *v.* Beilstein, 179 Pa. St. 560, 36 Atl. 336.

See 24 Cent. Dig. tit. "Gifts," § 81.

Property sent home with a newly married couple by parents is presumed to be a gift, unless at the time a less estate is declared or limited. Olds *v.* Powell, 7 Ala. 652, 42 Am. Dec. 605; Smith *v.* Montgomery, 5 T. B. Mon. (Ky.) 502; De Graffenreid *v.* Mitchell, 3 McCord (S. C.) 506, 15 Am. Dec. 648. See also PARENT AND CHILD.

31. Wendt's Estate, 14 Pa. Super. Ct. 644.

A relation par amour carries no presumption of the exertion of undue influence by the mistress to invalidate a gift to her. Schwalber *v.* Erman, 62 N. J. Eq. 314, 49 Atl. 1085. See Platt *v.* Elias, 44 Misc. (N. Y.) 401, 89 N. Y. Suppl. 1015.

32. Towson *v.* Moore, 173 U. S. 17, 19 S. Ct. 322, 43 L. ed. 597.

33. *Alabama.*—Shipman *v.* Furniss, 69 Ala. 555, 44 Am. Rep. 528.

Indiana.— Teegarden *v.* Lewis, 145 Ind. 98, 40 N. E. 1047, 44 N. E. 9.

Louisiana.— See Rauxet *v.* Rauxet, 38 La. Ann. 669.

Maryland.— Todd *v.* Grove, 33 Md. 188.

Missouri.— Richardson *v.* Smart, 152 Mo. 623, 54 S. W. 542, 75 Am. St. Rep. 488; Hall *v.* Knappenberger, 97 Mo. 509, 11 S. W. 239, 10 Am. St. Rep. 337; Gay *v.* Gillilan, 92 Mo. 250, 5 S. W. 7, 1 Am. St. Rep. 712; Yosti *v.* Laughram, 49 Mo. 594; Reed *v.* Carroll, 82 Mo. App. 102.

New Jersey.— Coffey *v.* Sullivan, 63 N. J. Eq. 296, 49 Atl. 520; Parker *v.* Parker, 45 N. J. Eq. 224, 16 Atl. 537; Haydock *v.* Haydock, 34 N. J. Eq. 570, 38 Am. Rep. 385 (holding this rule to especially apply where it is obvious that the gift was intended to operate as a testamentary disposition); Slack *v.* Rees, (Err. & App. 1904) 59 Atl. 466. See White *v.* White, 60 N. J. Eq. 104, 45 Atl. 767.

New York.— Nesbit *v.* Lockman, 34 N. Y. 167; Snook *v.* Sullivan, 53 N. Y. App. Div. 602, 66 N. Y. Suppl. 24; Matter of Man-

(III) *Capacity to Make or Take Gift.* The burden of proving a donor's incapacity to make a gift is on the one challenging the validity of the gift on that ground,[34] notwithstanding the donor is insane, if his insanity is merely of an intermittent or temporary nature.[35] Where a person previously incapacitated claims a gift it is incumbent upon him to show that the gift was made subsequent to the removal of his incapacity.[36]

(IV) *Relations of Parties.* Close relationship between the parties, such as husband and wife, parent and child, and the like, creates a presumption that a delivery of property from one to the other, without explanatory words, was intended as a gift.[37] This presumption, however, does not arise unless there was a delivery of the property,[38] or unless, in case of a gift of lands, it is followed by actual and unequivocal possession and improvements.[39]

(V) *Delivery and Acceptance.* The acceptance of a gift, beneficial to the donee and otherwise complete, will be presumed unless the contrary is made to appear,[40] even though the donee did not know of the gift at the time it was

hardt, 17 N. Y. App. Div. 1, 44 N. Y. Suppl. 336; Chalker *v.* Chalker, 5 Redf. Surr. 480.

Ohio.— Keck *v.* Sayre, 4 Ohio S. & C. Pl. Dec. 195, 3 Ohio N. P. 45.

Pennsylvania.— Funston *v.* Twining, 202 Pa. St. 88, 51 Atl. 736; Hasel *v.* Beilstein, 179 Pa. St. 560, 36 Atl. 336; Clark *v.* Clark, 174 Pa. St. 309, 34 Atl. 610, 619; Wendt's Estate, 14 Pa. Super. Ct. 644.

Tennessee.— Graves *v.* White, 4 Baxt. 38.

Wisconsin.— Davis *v.* Dean, 66 Wis. 100, 26 N. W. 737.

England.— Hunter *v.* Atkins, 3 Myl. & K. 113, 10 Eng. Ch. 113, 40 Eng. Reprint 43. See Parfitt *v.* Lawless, L. R. 2 P. & D. 462, 41 L. J. P. & M. 68, 27 L. T. Rep. N. S. 215, 21 Wkly. Rep. 200.

Canada.— Trusts, etc., Co. *v.* Hart, 32 Can. Sup. Ct. 553.

See 24 Cent. Dig. tit. "Gifts," § 86.

Where one person obtains by voluntary donation a large pecuniary donation from another, the burden of proving that the transaction is righteous is upon the person taking the benefit. Clark *v.* Clark, 174 Pa. St. 309, 34 Atl. 610, 619; Hoghton *v.* Hoghton, 15 Beav. 278, 17 Jur. 99, 21 L. J. Ch. 482, 51 Eng. Reprint 545; Cooke *v.* Lamotte, 15 Beav. 234, 21 L. J. Ch. 371, 51 Eng. Reprint 527.

A gift by an aged, weak, and infirm patient to his physician raises a presumption of undue influence, which the physician must rebut in order to uphold the transaction. Woodbury *v.* Woodbury, 141 Mass. 329, 5 N. E. 275, 55 Am. Rep. 479; Cadwallader *v.* West, 48 Mo. 483; Gibson *v.* Russell, 7 Jur. 875, 2 Y. & Coll. 104, 21 Eng. Ch. 104. But see Audenreid's Appeal, 89 Pa. St. 114, 33 Am. Rep. 731.

Mere relationship, such as parent and child, brother and sister, and the like, is not sufficient to raise a suspicion of fraud or undue influence, in the absence of circumstances showing a relation of trust and confidence. Richardson *v.* Smart, 152 Mo. 623, 54 S. W. 542, 75 Am. St. Rep. 488 (half sister); Funston *v.* Twining, 202 Pa. St. 88, 51 Atl. 736. And see Husband and Wife; Parent and Child; etc.

34. Teegarden *v.* Lewis, 145 Ind. 98, 40 N. E. 1047, 44 N. E. 9; Richardson *v.* Smart, 152 Mo. 623, 54 S. W. 542, 75 Am. St. Rep. 488 (holding that it must be shown that he was incompetent at the time the gift was made); Wendt's Estate, 14 Pa. Super. Ct. 644.

Evidence of incompetency to transact business does not necessarily imply incapacity to make a gift. Weddington *v.* Meade, 11 Ky. L. Rep. 862.

35. Teegarden *v.* Lewis, 145 Ind. 98, 40 N. E. 1047, 44 N. E. 9; Richardson *v.* Smart, 152 Mo. 623, 54 S. W. 542, 75 Am. St. Rep. 488 [*reversing* 65 Mo. App. 14].

36. Cole *v.* Lucas, 2 La. Ann. 946, slave claiming gift after emancipation.

Mere possession of the subject of the gift is no evidence of the time when it was delivered. Cole *v.* Lucas, 2 La. Ann. 946.

37. Smith *v.* Montgomery, 5 T. B. Mon. (Ky.) 502; Getchell *v.* Biddeford Sav. Bank, 94 Me. 452, 47 Atl. 895, 80 Am. St. Rep. 408; Doane *v.* Dunham, 64 Nebr. 135, 89 N. W. 640; Veeder *v.* McKinley-Lanning L. & T. Co., 61 Nebr. 892, 86 N. W. 982; Kobarg *v.* Greeder, 51 Nebr. 365, 70 N. W. 921; Selover *v.* Selover, 62 N. J. Eq. 761, 48 Atl. 522, 90 Am. St. Rep. 478. See also Husband and Wife; Parent and Child.

Proof that the donor on previous occasions had made similar gifts will strengthen this presumption. Smith *v.* Montgomery, 5 T. B. Mon. (Ky.) 502.

38. Getchell *v.* Biddeford Sav. Bank, 94 Me. 452, 47 Atl. 895, 80 Am. St. Rep. 408.

39. Wiener *v.* Stephani, 45 Mo. 565; Atwell *v.* Watkins, 13 Tex. Civ. App. 668, 36 S. W. 103, holding that where one purchases and pays for land, no presumption arises from the fact of his having the deed made to his brother that he intended it as a gift.

40. *Alabama.*— Olds *v.* Powell, 7 Ala. 652, 42 Am. Dec. 605.

Indiana.— Goelz *v.* People's Sav. Bank, 31 Ind. App. 67, 67 N. E. 232. See Richards *v.* Reeves, 149 Ind. 427, 49 N. E. 348.

Kansas.— Jones *v.* Kerr, 59 Kan. 179, 52 Pac. 429.

Kentucky.— Malone *v.* Lebus, 77 S. W. 180, 25 Ky. L. Rep. 1146 (holding that the law

made.[41] Delivery, however, is an element which must be proven, by the donee or one claiming through him,[42] although this proof need not be by witnesses who actually saw the delivery made, but it may be inferred from facts and circumstances.[43]

b. Admissibility — (i) *In General.* The admissibility of evidence to establish the fact or validity of a gift *inter vivos* is ordinarily governed by the general rules regulating the admissibility of evidence in civil actions.[44] Parol evidence is admissible to prove the manual gift of movables.[45] Upon the issue of undue influence acts of the donee and his dealings and representations with the donor for many years before the gift are competent proof, as showing the donee's influence over the donor.[46] Evidence that the alleged donor had previously made

will presume an acceptance where the donee is of unsound mind); Pennington *v.* Lawson, 65 S. W. 120, 23 Ky. L. Rep. 1340.

Louisiana.— Larendon's Succession, 39 La. Ann. 952, 3 So. 319, stating law of Georgia.

Michigan.— Holmes *v.* McDonald, 119 Mich. 563, 78 N. W. 647, 75 Am. St. Rep. 430; Dunlap *v.* Dunlap, 94 Mich. 11, 53 N. W. 788; Higman *v.* Stewart, 38 Mich. 513; Green *v.* Langdon, 28 Mich. 221.

Mississippi.— Wall *v.* Wall, 30 Miss. 91, 64 Am. Dec. 147.

Missouri.— Tygard *v.* McComb, 54 Mo. App. 85.

New Hampshire.— Frazier *v.* Perkins, 62 N. H. 69.

New York.— Beaver *v.* Beaver, 117 N. Y. 421, 22 N. E. 940, 15 Am. St. Rep. 531, 6 L. R. A. 403; Matson *v.* Abbey, 70 Hun 475, 24 N. Y. Suppl. 284, holding that where a gift of money held by a third person is made by a written assignment under a seal and the assignment is delivered to the assignee, an acceptance will be presumed.

Pennsylvania.— Sparks *v.* Hurley, 208 Pa. St. 166, 57 Atl. 364, 101 Am. St. Rep. 926.

Tennessee.— Davis *v.* Garrett, 91 Tenn. 147, 18 S. W. 113; Goss *v.* Singleton, 2 Head 67.

England.— Standing *v.* Bowring, 31 Ch. D. 282, 55 L. J. Ch. 218, 54 L. T. Rep. N. S. 191, 34 Wkly. Rep. 204.

See 24 Cent. Dig. tit. "Gifts," § 84.

41. Dunlap *v.* Dunlap, 94 Mich. 11, 53 N. W. 788 (holding this to be true, even though the person to whom it is given had no knowledge of it until after the decease of the donor); Sparks *v.* Hurley, 208 Pa. St. 166, 57 Atl. 364, 101 Am. St. Rep. 926.

42. Hanson *v.* Millett, 55 Me. 184; Resch *v.* Senn, 28 Wis. 286; Wright *v.* Bragg, 106 Fed. 25, 45 C. C. A. 204.

If delivery of a note by the donor is relied on to establish a gift, the burden is on the donee to clearly establish that the delivery was made with the intention, and for the purpose, of making the gift. Watson *v.* Carman, 7 Ky. L. Rep. 521.

A devise of land which had previously been conveyed by a deed of gift to the devisee creates no presumption that the deed had never been delivered or that it was considered a valid instrument by the parties. Lewis *v.* Ames, 44 Tex. 319.

43. Morey *v.* Wiley, 100 Ill. App. 75; Isaac *v.* Williams, 3 Gill (Md.) 278; Hitch *v.* Davis, 3 Md. Ch. 266.

Where the intent of the donor is proved by a writing under his hand a delivery will be presumed from slight circumstances. Brinckerhoff *v.* Lawrence, 2 Sandf. Ch. (N. Y.) 400.

44. *Alabama.*— See Stallings *v.* Finch, 25 Ala. 518; Olds *v.* Powell, 7 Ala. 652, 42 Am. Dec. 605, evidence that a son-in-law paid taxes on property placed in his hands is inadmissible as showing a gift.

California.— Russell *v.* Langford, 135 Cal. 356, 67 Pac. 331, holding that on the issue whether money deposited was a gift or loan, evidence that donor had no children or parents to provide for is admissible.

Connecticut.— Brown *v.* Butler, 71 Conn. 576, 42 Atl. 654.

Massachusetts.— West Springfield Fourth Parish *v.* Root, 18 Pick. 318.

Wisconsin.— General circumstances of the family are admissible to corroborate a donee's testimony that a certain gift to her had been made by her brother, a minor. Wambold *v.* Vick, 50 Wis. 456, 7 N. W. 438.

United States.— Fitzpatrick *v.* Graham, 122 Fed. 401, 58 C. C. A. 619, testimony as to other disposition of property at same time admissible.

See 24 Cent. Dig. tit. "Gifts," § 87.

Where evidence on the issue of mental incapacity of the donor is so conflicting that a satisfactory result cannot be reached by that test, evidence of the transaction itself may be introduced; and it will be upheld if rational and just, and overturned if irrational and unjust. Carrington *v.* Fogg, 7 Ky. L. Rep. 596.

Proof of friendly relations is inadmissible to show a gift unless there is testimony directly tending to show that such gift had been made. Fredericks *v.* Sault, 19 Ind. App. 604, 49 N. E. 909; Moore *v.* Machen, 124 Mich. 216, 82 N. W. 892.

Evidence that a gift was made without stating the manner and form thereof is not admissible to prove the gift. Carter *v.* Buchannon, 3 Ga. 513.

Evidence that a donee bought a piece of land which was needed to make a gift to him most beneficial is admissible on the question of his intention to accept and comply with the conditions of the gift. Pierce *v.* Brown University, 21 R. I. 392, 43 Atl. 878.

45. Maillot *v.* Wesley, 11 La. Ann. 467.

46. Reeme *v.* Parthemere, 8 Pa. St. 460.

gifts of similar property or to parties similarly situated with the alleged donee is not of itself admissible on the issue whether a particular delivery of property was a gift.[47] But evidence of the penurious and miserly habits of an old man is admissible on the question whether or not a transfer of all his property to an intimate acquaintance is a gift.[48]

(II) *Possession or Control of Property.* Evidence of the possession or control of the subject of a gift,[49] or of an assertion of right thereto,[50] by one or the other of the parties is admissible to prove or disprove the fact of a completed gift.

(III) *Motive and Intent.* Evidence as to an alleged donor's motives, reasons, or inducements in making the gift is admissible for the purpose of sustaining the probability that the gift was in fact made.[51] The record of a suit to annul a conveyance by the donor is admissible as evidence of an intention to revoke a gift made thereby.[52]

(IV) *Declarations and Admissions.*[53] The declarations and admissions of a donor, either before or after the alleged gift, unless too remote[54] or unless equally consistent with an intent not to give,[55] are admissible, as bearing on his intention, for the purpose of establishing the gift.[56] Prior or contemporaneous declarations of the alleged donor are also admissible to show that a certain transaction was not

47. See Nelson *v.* Iverson, 24 Ala. 9, 60 Am. Dec. 442; Sherman *v.* Sherman, 75 Iowa 136, 39 N. W. 232.

48. Hasel *v.* Beilstein, 179 Pa. St. 560, 36 Atl. 336.

49. Nelson *v.* Iverson, 24 Ala. 9, 60 Am. Dec. 442; Fontenot *v.* Manuel, 46 La. Ann. 1373, 16 So. 182; Whitaker *v.* Marsh, 62 N. H. 477; Patterson *v.* Dushane, 137 Pa. St. 23, 20 Atl. 538, holding that evidence that certain bonds were found deposited in the alleged donor's name at the time of his death is admissible as inferential proof that they were so deposited during his lifetime and were not given to the alleged donee. See Mason *v.* Willhite, (Tenn. Ch. App. 1900) 61 S. W. 298.

Evidence of improvements made by a donee under a parol gift, after the commencement of a controversy as to the fact of the gift, is inadmissible. Aurand *v.* Wilt, 9 Pa. St. 54.

50. Love *v.* Francis, 63 Mich. 181, 29 N. W. 843, 6 Am. St. Rep. 290; Mason *v.* Willhite, (Tenn. Ch. App. 1900) 61 S. W. 298.

51. Nelson *v.* Iverson, 17 Ala. 216; Olds *v.* Powell, 7 Ala. 652, 42 Am. Dec. 605; Gilham *v.* French, 6 Colo. 196; Fairfield Sav. Bank *v.* Small, 90 Me. 546, 38 Atl. 551; Fikes *v.* Bouck, 45 Hun (N. Y.) 504, 10 N. Y. St. 132; Hurlburt *v.* Hurlburt, 2 N. Y. Suppl. 317.

Evidence showing donor's affection and regard for donee is admissible. Rhodes *v.* Childs, 64 Pa. St. 18.

Proof of a fact tending to show a moral consideration for a gift is not irrelevant, especially when it is attempted to be shown by the opposite party that the declarations of the alleged donor, by which the gift is sought to be established, were made in jest. Nelson *v.* Iverson, 17 Ala. 216.

To rebut the natural presumption that the donor would have given his estate to his own kindred instead of to the donee, a stranger, evidence that the latter had rendered great services for the donor, had saved his life, and that the parties were strongly attached to each other is admissible. Smith *v.* Maine, 25 Barb. (N. Y.) 33.

52. Dismukes *v.* Musgrove, 8 Mart. N. S. (La.) 375.

53. Declarations as to gift as part of res gestæ see, generally, Evidence.

54. Ward *v.* Edge, 100 Ky. 757, 39 S. W. 440, 19 Ky. L. Rep. 59, declarations twenty-five years before too remote.

55. Wright *v.* Bragg, 106 Fed. 25, 45 C. C. A. 204.

56. *California.*— Ruiz *v.* Dow, 113 Cal. 490, 45 Pac. 867.

Connecticut.— Guinan's Appeal, 70 Conn. 342, 39 Atl. 482; Meriden Sav. Bank *v.* Wellington, 64 Conn. 553, 30 Atl. 774.

Georgia.— Burney *v.* Ball, 24 Ga. 505.

Illinois.— Weaver *v.* Weaver, 73 Ill. App. 301.

Iowa.— Olson *v.* Gifford, 96 Iowa 734, 65 N. W. 294; Sherman *v.* Sherman, 75 Iowa 136, 39 N. W. 232.

Kentucky.— Gordon *v.* Young, 10 Ky. L. Rep. 681.

Minnesota.— Furman *v.* Tenny, 28 Minn. 77, 9 N. W. 172.

Missouri.— Jones *v.* Falls, 101 Mo. App. 536, 73 S. W. 903, holding, however, that such declarations are not admissible upon the issue as to whether a certain transaction was an outright gift.

New York.— Hurlburt *v.* Hurlburt, 2 N. Y. Suppl. 317.

North Carolina.— Gross *v.* Smith, 132 N. C. 604, 44 S. E. 111.

Ohio.— Larimore *v.* Wells, 29 Ohio St. 13.

Pennsylvania.— Matthews *v.* Matthews, 11 Pa. Super. Ct. 381.

South Carolina.— Sprouse *v.* Littlejohn, 22 S. C. 358; Reid *v.* Colcock, 1 Nott & M. 592, 9 Am. Dec. 729.

Texas.— Shannon *v.* Marchbanks, (Civ. App. 1904) 80 S. W. 860.

Vermont.— Dean *v.* Dean, 43 Vt. 337.

intended as a gift;[57] but when the gift is once established his subsequent declarations are inadmissible to invalidate it.[58] The declaration of a donee in possession to the effect that he claims the property by gift is inadmissible as substantive evidence of the gift;[59] but is admissible as tending to show claim of ownership,[60] or to rebut any inference of an admission against his ownership, arising from his production of the property upon the request of another.[61]

(v) *Documentary Evidence.* In order that a particular writing may be admissible upon the fact or validity of a gift, it must be properly connected with the matter in issue,[62] relevant,[63] and in conformity with the general rules of documentary evidence.[64]

c. Weight and Sufficiency — (i) *In General.* As a general rule to establish a gift *inter vivos* there must be a preponderance[65] of clear, explicit, and convincing evidence in support of every element needed to constitute a valid gift.[66] It is

Wisconsin.— Pritchard *v.* Pritchard, 69 Wis. 373, 34 N. W. 506.

See 24 Cent. Dig. tit. "Gifts," § 91. And see Evidence, 16 Cyc. 990.

That such declarations were made two or three years before the donor's death does not render them incompetent but goes merely to their weight. Meridan Sav. Bank *v.* Wellington, 64 Conn. 553, 30 Atl. 774.

Upon the issue of undue influence evidence of the donor's knowledge and expressions, as showing her state of mind or intention, is admissible, as bearing upon the unreasonableness and injustice of the gift. Woodbury *v.* Woodbury, 141 Mass. 329, 5 N. E. 275, 55 Am. Rep. 479.

Delivery of a gift may be evidenced by declarations of the donor. Gordon *v.* Young, 10 Ky. L. Rep. 681; Carradine *v.* Collins, 7 Sm. & M. (Miss.) 428; Sprouse *v.* Littlejohn, 22 S. C. 358; and other cases cited *supra*, this note.

57. Sherman *v.* Sherman, 75 Iowa 136, 39 N. W. 232; Smith *v.* Montgomery, 5 T. B. Mon. (Ky.) 502; Moore *v.* Gwyn, 26 N. C. 275; Collier *v.* Poe, 16 N. C. 55.

58. Stallings *v.* Finch, 25 Ala. 518. See Evidence, 16 Cyc. 990.

59. Harris *v.* Cable, 113 Mich. 192, 21 N. W. 531.

60. Martin *v.* Martin, 174 Ill. 371, 51 N. E. 691, 66 Am. St. Rep. 290 [*affirming* 74 Ill. App. 215].

61. Harris *v.* Cable, 113 Mich. 192, 21 N. W. 531.

62. An indorsement on an envelope, in which a note and mortgage is placed, that they are to be delivered to the assignee or his heirs in case of the death of the assignor, is not admissible as evidence tending to show delivery for the purpose of establishing a gift, where there is no evidence showing when the indorsement was made or whether with the knowledge or assent of the assignor. Wright *v.* Bragg, 106 Fed. 25, 45 C. C. A. 204.

63. Frank *v.* Morley, 106 Mich. 635, 64 N. W. 577 (a letter in which the alleged donor promised to give claimant a lump sum of money is not competent to show a gift of a like sum eleven years previous); Lark *v.* Cunningham, 7 Rich. (S. C.) 57 (a letter from wife promising to return certain property when called for was held admissible against husband in an action by him to recover such property as a gift); Crawford *v.* McElvy, 2 Speers (S. C.) 225 (a letter from the donor to the donee stating that "all she had was for him [the donee] at her death, as a compensation for taking care of her," held admissible); Jones *v.* Falls, 101 Mo. App. 536, 73 S. W. 903 (a letter written by an alleged donee threatening to present a claim against the alleged donor's estate for services, etc., in case he was pressed for a certain sum of money (claimed by him as a gift from the deceased donor), but making no claim to it as donee in such letter, is admissible against him).

Where the issue is whether donor had parted with his dominion in behalf of the donee with whom he had left the subject of the gift, a letter subsequently written by him to the latter is admissible for the purpose of showing that the latter was holding as bailee merely. Stallings *v.* Finch, 25 Ala. 518.

The official appraisement of testator's estate is not admissible on the question whether he had, many years before his death, made a parol gift of land to one of his children. Rives *v.* Lamar, 94 Ga. 186, 21 S. E. 294.

In rebuttal of testimony that the donor had grandchildren who were poor and who were in need of the donor's bounty, a conveyance of other property to these grandchildren is admissible. Hughes *v.* Debnam, 53 N. C. 127.

Evidence of statute making particular gifts invalid is inadmissible to invalidate a gift consummated prior to the enactment of such statute. Thomas *v.* De Graffenreid, 27 Ala. 651.

64. See, generally, Evidence.

65. Wylie *v.* Charlton, 43 Nebr. 840, 62 N. W. 220.

A preponderance of evidence is sufficient to establish a parol gift of land and it need not be established "beyond a doubt." Wylie *v.* Charlton, 43 Nebr. 840, 62 N. W. 220.

66. *District of Columbia.*— Hall *v.* Kimball, 5 App. Cas. 475.

Illinois.— Peirce *v.* Giles, 93 Ill. App. 524; Marsh *v.* Prentiss, 48 Ill. App. 74.

Iowa.— Wilson *v.* Wilson, 99 Iowa 688, 68 N. W. 910.

necessary to establish by this kind of evidence competency of donor,[67] delivery,[68]

Kentucky.— Buckel *v.* Smith, 82 S. W. 235, 26 Ky. L. Rep. 494.

Maryland.— Polk *v.* Clark, 92 Md. 372, 48 Atl. 67; Whalen *v.* Milholland, 89 Md. 199, 43 Atl. 45, 44 L. R. A. 208; Hardesty *v.* Richardson, 44 Md. 617, 22 Am. Rep. 57.

Massachusetts.— See West Springfield Fourth Parish *v.* Root, 18 Pick, 318.

Mississippi.— Dees *v.* Moss Point Baptist Church, (1895) 17 So. 1.

Nevada.— Simpson *v.* Harris, 21 Nev. 353, 31 Pac. 1009.

New Hampshire.— Bond *v.* Bean, 72 N. H. 444, 57 Atl. 340, 101 Am. St. Rep. 686; Bean *v.* Bean, 71 N. H. 538, 53 Atl. 907.

New Jersey.— Parker *v.* Parker, 45 N. J. Eq. 224, 16 Atl. 537.

New York.— Bray *v.* O'Rourke, 89 N. Y. App. Div. 400, 85 N. Y. Suppl. 907; Farian *v.* Wiegel, 76 Hun 462, 28 N. Y. Suppl. 95, 31 Abb. N. Cas. 159.

North Carolina.— Parker *v.* Hinson, 36 N. C. 381.

Ohio.— Ringemann *v.* Broxtermann, 21 Ohio Cir. Ct. 776, 11 Ohio Cir. Dec. 368.

Pennsylvania.— Scott *v.* Reed, 153 Pa. St. 14, 25 Atl. 604; Miller *v.* Hartle, 53 Pa. St. 108; Dunning *v.* Reese, 7 Kulp 201; Stockham's Estate, 6 Pa. Dist. 196; Madeira's Appeal, 1 Pa. Cas. 443, 5 Atl. 257.

Virginia.— Brock *v.* Brock, 92 Va. 173, 23 S. E. 224.

See 24 Cent. Dig. tit. "Gifts," § 95.

Evidence held sufficient to establish a gift: Moore *v.* Cline, 115 Ga. 405, 41 S. E. 614; Carter *v.* Buchannon, 3 Ga. 513; Samson *v.* Samson, 67 Iowa 253, 25 N.W. 233; Bidwell's Succession, 51 La. Ann. 1970, 26 So. 692; Falconer *v.* Holland, 5 Sm. & M. (Miss.) 689 (review on appeal); Gilkinson *v.* Third Ave. R. Co., 47 N. Y. App. Div. 472, 63 N. Y. Suppl. 792 (uncorroborated testimony of donee's aunt); Walker *v.* Hargear, 36 Wash. 672, 79 Pac. 472. See Space *v.* Guest, (N. J. Sup. 1887) 10 Atl. 152. Of deposit in bank. Scrivens *v.* North Easton Sav. Bank, 166 Mass. 255, 44 N. E. 251 (review on appeal); Barefield *v.* Rosell, 177 N. Y. 387, 69 N. E. 732, 101 Am. St. Rep. 806 [*reversing* 82 N. Y. App. Div. 463, 81 N. Y. Suppl. 843]; Barker *v.* Harbeck, 2 N. Y. Suppl. 425. Of land. Schwindt *v.* Schwindt, 61 Kan. 377, 59 Pac. 647; Wootters *v.* Hale, 83 Tex. 563, 19 S. W. 134; Kelley *v.* Crawford, 112 Wis. 368, 88 N. W. 296. Of mortgage. Matter of Reickert, 38 Misc. (N. Y.) 228, 77 N. Y. Suppl. 654. Of notes. Hagemann *v.* Hagemann, 204 Ill. 378, 68 N. E. 381 [*affirming* 102 Ill. App. 479]; Broaddus *v.* Broaddus, 27 S. W. 989, 16 Ky. L. Rep. 330; Meriwether *v.* Morrison, 1 Ky. L. Rep. 254; Meyer *v.* Koehring, 129 Mo. 15, 31 S. W. 449 (review on appeal); Mason *v.* Willhite, (Tenn. Ch. App. 1900) 61 S. W. 298.

Evidence held insufficient to establish a gift: Belknap *v.* Belknap, (Iowa 1904) 100 N. W. 115; Comstock *v.* McDonald, 126 Mich. 142, 85 N. W. 579; *In re* Bayley, (N. J. Prerog. 1904) 59 Atl. 215; Beaver *v.* Beaver, 117 N. Y. 421, 22 N. E. 940, 15 Am. St. Rep. 531, 6 L. R. A. 403; Matter of O'Connell, 33 N. Y. App. Div. 483, 53 N. Y. Suppl. 748; Rhodenhizer *v.* Bolliver, 31 Nova Scotia 236; Shaw *v.* Shaw, 27 Nova Scotia 171. Of bonds. Rotherburg *v.* Vierath, 87 Md. 634, 40 Atl. 655; *In re* Crawford, 113 N. Y. 560, 21 N. E. 692, 5 L. R. A. 71; Bray *v.* O'Rourke, 89 N. Y. App. Div. 400, 85 N. Y. Suppl. 907. Of deposit in bank. Cogswell *v.* Newburyport Sav. Inst., 165 Mass. 524, 43 N. E. 296; Barefield *v.* Rosell, 177 N. Y. 387, 69 N. E. 732, 101 Am. St. Rep. 814 [*reversing* 82 N. Y. App. Div. 463, 81 N. Y. Suppl. 843]. Of mortgage. Thompson *v.* West, 56 N. J. Eq. 660, 40 Atl. 197. Of land. Schoonmaker *v.* Plummer, 139 Ill. 612, 29 N. E. 1114 (review on appeal); Rowe *v.* Henderson, (Indian Terr. 1903) 76 S. W. 250; Wilson *v.* Wilson, 99 Iowa 688, 68 N. W. 910; Polk *v.* Clark, 92 Md. 372, 48 Atl. 67; Moross *v.* Moross, 131 Mich. 339, 91 N. W. 631; Stephens *v.* Murray, 132 Mo. 468, 34 S. W. 56; Wiley *v.* Wiley, 45 Nebr. 585, 63 N. W. 844 (review on appeal). See Reed *v.* Litsy, 33 S. W. 827, 17 Ky. L. Rep. 1125. Of notes. Merritt *v.* Merritt, 9 Ky. L. Rep. 721; Chaddock *v.* Chaddock, 134 Mich. 48, 95 N. W. 972; Hall *v.* Knappenberger, 97 Mo. 509, 11 S. W. 239, 10 Am. St. Rep. 337.

Evidence pointing to the creation of a trust will not sustain a gift *inter vivos.* Bray *v.* O'Rourke, 89 N. Y. App. Div. 400, 85 N. Y. Suppl. 907; Stewart's Estate, 137 Pa. St. 175, 20 Atl. 554.

Drawing interest on a deposit in bank is not of itself sufficient evidence of a gift of the deposit. Dodge *v.* Lunt, 181 Mass. 320, 63 N. E. 891.

A written order for the possession of personal property does not establish a gift. *In re* Rathgeb, 125 Cal. 302, 57 Pac. 1010.

67. Field *v.* Shorb, 99 Cal. 661, 34 Pac. 504 (evidence held insufficient to sustain finding of insanity); Spencer *v.* Spruell, 196 Ill. 119, 63 N. E. 621; Reed *v.* Carroll, 82 Mo. App. 102.

Evidence of improvidence alone will not supply the place of proof of insanity of a donor. Richardson *v.* Smart, 65 Mo. App. 14.

68. *In re* Crawford, 113 N. Y. 560, 21 N. E. 692, 5 L. R. A. 71; Opitz *v.* Karel, 118 Wis. 527, 95 N. W. 948, 99 Am. St. Rep. 1004, 62 L. R. A. 982, evidence held sufficient to show a complete delivery of a life-insurance policy. See also cases cited in preceding notes.

Evidence insufficient to show delivery: Montgomery *v.* Miller, 3 Redf. Surr. (N. Y.) 154; Delmotte *v.* Taylor, 1 Redf. Surr. (N. Y.) 417. Of certificates of stock. Buschian *v.* Hughart, 28 Ind. 449; Morse *v.* Meston, 152 Mass. 5, 24 N. E. 916. Of notes. Yokem *v.* Hicks, 93 Ill. App. 667; Callendar *v.* Callendar, 70 S. W. 844, 24 Ky. L. Rep. 1145; Merritt *v.* Merritt, 9 Ky. L. Rep. 721; *In re* Lyon, 1 Misc. (N. Y.) 447, 23 N. Y. Suppl. 146, Pow. Surr. 411; Wright *v.* Bragg, 106 Fed. 25, 45 C. C. A. 204.

acceptance,[69] and the parting by the owner with his control or right of dominion over the subject of the gift.[70] This rule is especially applicable where the gift is not asserted until after the donor's death,[71] and where a confidential relation existed between the parties,[72] some decisions holding that in such cases the evidence must be as clear as that required to sustain a gift *causa mortis*,[73] and must be so cogent as to leave no reasonable doubt in the mind of an unbiased person that the demand is a proper one.[74]

(II) *Declarations and Admissions.* Declarations and admissions of an alleged donor in respect to a gift are not in themselves sufficient evidence to establish the gift,[75] especially where his acts are inconsistent with his having parted with possession and control of the property;[76] nor are they sufficient to disprove

Evidence held sufficient to sustain finding of delivery.—Breier *v.* Weier, 33 Ill. App. 386 (of note); Phenix *v.* Gilfillan, 47 Ill. App. 220; Olson *v.* Gifford, 96 Iowa 734, 65 N. W. 294; Goulding *v.* Horbury, 85 Me. 227, 27 Atl. 127, 35 Am. St. Rep. 357.

The possession of certain keys by a donee will not be presumed in the absence of proof to be the keys which gave access to certain goods, a gift of which is claimed. *In re* Somerville, 20 N. Y. Suppl. 76, 2 Connoly Surr. 86.

69. A demand and endeavor to obtain possession of the subject of the gift by the donee is sufficient evidence of his acceptance. Mallett *v.* Page, 8 Ind. 364 (suit); Hunter *v.* Hunter, 19 Barb. (N. Y.) 631.

70. *Alabama.*— Stallings *v.* Finch, 25 Ala. 518.

Iowa.— *In re* Brown, 113 Iowa 351, 85 N. W. 617.

Michigan.—Duncombe *v.* Richards, 46 Mich. 166, 9 N. W. 149.

Minnesota.— Winslow *v.* McHenry, 93 Minn. 507, 101 N. W. 799.

New Jersey.— Taylor *v.* Coriell, (Ch. 1904) 57 Atl. 810.

New York.— Tyrrel *v.* Emigrant Industrial Sav. Bank, 77 N. Y. App. Div. 131, 79 N. Y. Suppl. 49; Adler *v.* Davis, 31 Misc. 120, 63 N. Y. Suppl. 875; Montgomery *v.* Miller, 3 Redf. Surr. 154.

Ohio.— McCammon *v.* Dillaby, 11 Ohio Dec. (Reprint) 824, 30 Cinc. L. Bul. 89.

Pennsylvania.— *In re* Donaldson, 158 Pa. St. 292, 27 Atl. 959.

West Virginia.—Martin *v.* Smith, 25 W. Va. 579.

See 24 Cent. Dig. tit. "Gifts," § 95.

71. *California.*— Freese *v.* Odd Fellows' Sav. Bank, 136 Cal. 662, 69 Pac. 493, uncorroborated deposition of claimant insufficient, although uncontradicted.

Missouri.— Jones *v.* Falls, 101 Mo. App. 536, 73 S. W. 903.

New York.— Robinson *v.* Carpenter, 77 N. Y. App. Div. 520, 79 N. Y. Suppl. 283; De Puy *v.* Stevens, 37 N. Y. App. Div. 289, 55 N. Y. Suppl. 810; Jones *v.* Perkins, 29 N. Y. App. Div. 37, 51 N. Y. Suppl. 380; Matter of Manhardt, 17 N. Y. App. Div. 1, 44 N. Y. Suppl. 836; Matter of Rogers, 10 N. Y. App. Div. 593, 42 N. Y. Suppl. 133; Adler *v.* Davis, 31 Misc. 120, 63 N. Y. Suppl. 875; Matter of Taber, 30 Misc. 172, 63 N. Y. Suppl. 728; Scoville *v.* Post, 3 Edw. 203.

Pennsylvania.— Fiscus' Estate, 13 Pa. Super. Ct. 615.

United States.—Fitzpatrick *v.* Graham, 122 Fed. 401, 58 C. C. A. 619.

See 24 Cent. Dig. tit. "Gifts," § 95. See also cases cited in preceding notes.

72. Matter of Manhardt, 17 N. Y. App. Div. 1, 44 N. Y. Suppl. 836; Chalker *v.* Chalker, 5 Redf. Surr. (N. Y.) 480.

73. Bray *v.* O'Rourke, 89 N. Y. App. Div. 400, 85 N. Y. Suppl. 907; Matter of Manhardt, 17 N. Y. App. Div. 1, 44 N. Y. Suppl. 836. And see *infra*, III, K.

74. Adler *v.* Davis, 31 Misc. (N. Y.) 120, 63 N. Y. Suppl. 875.

75. *California.*— Collins *v.* Maude, 144 Cal. 289, 77 Pac. 945.

Georgia.— Burney *v.* Ball, 24 Ga. 505.

Illinois.— Myers *v.* Malcom, 20 Ill. 621.

Iowa.— Wilson *v.* Wilson, 99 Iowa 688, 68 N. W. 910.

Massachusetts.— Blake *v.* Pegram, 109 Mass. 541, review on appeal.

Mississippi.— Wheatley *v.* Abbott, 32 Miss. 343.

New Hampshire.— Bean *v.* Bean, 71 N. H. 538, 53 Atl. 907.

New York.— Cowee *v.* Cornell, 75 N. Y. 91, 31 Am. Rep. 428; Matter of Munson, 25 Misc. 586, 56 N. Y. Suppl. 151.

Pennsylvania.— Schiehl's Estate, 179 Pa. St. 308, 36 Atl. 181. See Huber's Estate, 21 Pa. Super. Ct. 34.

Tennessee.— Taylor *v.* Taylor, 1 Lea 83.

Texas.—Harvey *v.* Carroll, 5 Tex. Civ. App. 324, 23 S. W. 713; Zallmanzig *v.* Zallmanzig, (Civ. App. 1894) 24 S. W. 944.

Vermont.— Rooney *v.* Minor, 56 Vt. 527.

Virginia.— Eaves *v.* Vial, 98 Va. 134, 34 S. E. 978.

See 24 Cent. Dig. tit. "Gifts," § 96.

Loose declarations of a father without explanation are not sufficient evidence of a gift to his son. Geer *v.* Goudy, 174 Ill. 514, 51 N. E. 623; Hugus *v.* Walker, 12 Pa. St. 173; Holsberry *v.* Harris, 56 W. Va. 320, 49 S. E. 404; Harrison *v.* Harrison, 36 W. Va. 556, 15 S. E. 87.

A written declaration of a gift by a donor and possession by the donee subsequent to the donor's death are not sufficient to prove the act of delivery essential to the validity of a gift. Bean *v.* Bean, 71 N. H. 538, 53 Atl. 907.

76. Roseberry *v.* Roseberry, 31 Ga. 122; Wheatley *v.* Abbott, 32 Miss. 343; Tyrrel *v.*

a gift otherwise shown to have been made.[77] But since they are admissible as evidence of his intention,[78] they are to be weighed by the jury and, when considered together with other corroborative evidence showing a delivery of possession and an absolute parting of all dominion or interest in the subject of the gift, may be sufficient to establish the gift.[79] A donee's declarations and acts are not in themselves sufficient evidence to show a gift.[80]

(III) *Undue Influence.* To establish the fact that a gift was obtained by undue influence the evidence must show that a relation of trust and confidence existed between the parties, and that the gift was not the voluntary and intelligent act of the donor.[81]

Emigrant Industrial Sav. Bank, 77 N. Y. App. Div. 131, 79 N. Y. Suppl. 49; Eaves *v.* Vial, 98 Va. 134, 34 S. E. 978. See also cases cited in preceding note.

77. See Westcott *v.* Westcott, 75 Iowa 628, 35 N. W. 649.

Evidence of a statement of the donor that a gift had been rescinded and a loan substituted in its place is sufficient to authorize a jury to infer that everything took place necessary to make the rescission and substitution good. Sanderlin *v.* Sanderlin, 24 Ga. 583.

78. See *supra*, II, I, 4, b, (IV).

79. *Alabama.*—Wheeler *v.* Glasgow, 97 Ala. 700, 11 So. 758.

California.— Helm *v.* Martin, 59 Cal. 57.

Illinois.— Peirce *v.* Giles, 93 Ill. App. 524; Evans *v.* Evans, 46 Ill. App. 208.

Kentucky— Brown *v.* Brown, 4 B. Mon. 535; Scollard *v.* Scollard, 56 S. W. 648, 22 Ky. L. Rep. 33.

Massachusetts.— Alger *v.* North End Sav. Bank, 146 Mass. 418, 15 N. E. 916, 4 Am. St. Rep. 331, review on appeal.

Michigan.—Harris *v.* Hopkins, 43 Mich. 272, 5 N. W. 318, 38 Am. Rep. 180.

Mississippi.—Wheatley *v.* Abbott, 32 Miss. 343.

New Hampshire.— Liscomb *v.* Manchester, etc., R. Co., 70 N. H. 312, 48 Atl. 284.

New York.— Doty *v.* Willson, 47 N. Y. 580; Rix *v.* Hunt, 16 N. Y. App. Div. 540, 44 N. Y. Suppl. 988; Grangiac *v.* Arden, 10 Johns. 293.

Oregon.—Waite *v.* Grubbe, 43 Oreg. 406, 73 Pac. 206, 99 Am. St. Rep. 764.

Pennsylvania.— *In re* Wise, 182 Pa. St. 168, 37 Atl. 936; Kern *v.* Howell, 180 Pa. St. 315, 36 Atl. 872, 57 Am. St. Rep. 641; Buck *v.* Henderson, 3 Pa. Cas. 111, 6 Atl. 155; Roberts *v.* Riker, 2 Leg. Gaz. 131.

South Carolina.— Barron *v.* Williams, 58 S. C. 280, 36 S. E. 561, 79 Am. St. Rep. 840; McCluney *v.* Lockhart, 1 Bailey 117.

Tennessee.—Taylor *v.* Chase, (Ch. App. 1899) 55 S. W. 1070.

Texas.— Lord *v.* New York L. Ins. Co., 27 Tex. Civ. App. 139, 65 S. W. 699.

Vermont.— Rooney *v.* Minor, 56 Vt. 527.

See 24 Cent. Dig. tit. "Gifts," § 96.

Repeated declarations or admissions subsequent to the time of the alleged gift that the gift had been made may be sufficient for the jury to infer a gift, even though there had been no actual delivery of the property. Alger *v.* North End Sav. Bank, 146 Mass. 418, 15 N. E. 916, 4 Am. St. Rep. 331; Caldwell *v.* Wilson, 2 Speers (S. C.) 75; Reid *v.* Colcock, 1 Nott & M. (S. C.) 592, 9 Am. Dec. 729; Blake *v.* Jones, Bailey Eq. (S. C.) 141, 21 Am. Dec. 530. See Malone's Estate, 13 Phila. (Pa.) 313.

A donor's declarations concerning a parol gift of land corroborated by evidence showing that the donee had possession and had made improvements on the land will be sufficient to establish the gift. Poullain *v.* Poullain, 79 Ga. 11, 4 S. E. 81; Evans *v.* Evans, 46 Ill. App. 208; Loney *v.* Loney, 86 Md. 652, 38 Atl. 1071; Haines *v.* Haines, 6 Md. 435 (review on appeal); Caldwell *v.* Caldwell, 24 Pa. Super. Ct. 230. See Hubbard *v.* Hubbard, 140 Mo. 300, 41 S. W. 749.

Declarations of a donor not made in the presence of the donee to establish a parol gift of land must not be of an equivocal character, but must have such clearness and directness as will leave no doubt as to their meaning and purpose. Dunning *v.* Reese, 7 Kulp (Pa.) 201.

80. Smith *v.* Jones, 8 Ark. 109; *In re* Rathgeb, 125 Cal. 302, 57 Pac. 1010.

81. Spencer *v.* Spruell, 196 Ill. 119, 63 N. E. 621 (evidence held sufficient to support finding that a decedent's consent to an ante-mortem division and transfer of his property was induced by undue influence); Woodbury *v.* Woodbury, 141 Mass. 829, 5 N. E. 275, 55 Am. Rep. 479 (holding that the fact of undue influence is often gathered from all the circumstances surrounding the donor; his health, age, and and mental condition; how far he was dependent upon and subject to the control of the person benefited; the opportunity which the latter had to exercise his influence; and the disposition of the donor to be subject to it).

Evidence insufficient to show undue influence. See Prescott *v.* Johnson, 91 Minn. 273, 97 N. W. 891; Hamilton *v.* Armstrong, (Mo. Sup. 1892) 20 S. W. 1054; Donnell *v.* Donnell, 1 Head (Tenn.) 267. See Reed *v.* Carroll, 82 Mo. App. 102.

Proof and rebuttal.— Proof of a confidential relation between the donor and donee is sufficient to raise an inference of undue influence; but this fact may be rebutted by clear, convincing, and affirmative proof that the gift was made without any fraud, deceit, or undue influence on the part of the donee and that it was the voluntary and intelligent act of the donor. Rickman *v.* Meier, 213 Ill. 507, 72 N. E. 1121; Nesbit *v.* Lockman, 34 N. Y. 167; Snook *v.* Sullivan, 53 N. Y.

5. Trial[82] **— a. Questions of Law and Fact.** Whether or not there is sufficient evidence to be submitted to the jury on the question of a gift *inter vivos* is for the court.[83] But where there is evidence for the jury whether or not it establishes a completed gift is a question for them, under proper instructions,[84] including the question of intent,[85] delivery,[86] undue influence,[87] revocation and redelivery,[88] and the terms of the gift.[89]

b. Instructions. The court should properly instruct the jury as to the law,[90]

App. Div. 602, 66 N. Y. Suppl. 24 [*affirmed* in 167 N. Y. 536, 60 N. E. 1120] (evidence insufficient to support gift); Clark *v.* Clark, 174 Pa. St. 309, 34 Atl. 610, 619; Stewart's Estate, 137 Pa. St. 175, 20 Atl. 554; Corson's Estate, 137 Pa. St. 160, 20 Atl. 588; Graves *v.* White, 4 Baxt. (Tenn.) 38; Hoghton *v.* Hoghton, 15 Beav. 278, 17 Jur. 99, 21 L. J. Ch. 482, 51 Eng. Reprint 545. *Compare* Citizens' L. & T. Co. *v.* Holmes, 116 Wis. 220, 93 N. W. 39. See also cases cited *supra*, I, I, 4, a, (II).

Where the fact of influence of a donee over a donor has been established, it is not necessary to show by absolute evidence that this influence was exercised by the donee at the time of making the gift but it must be exercised in relation to the gift. Woodbury *v.* Woodbury, 141 Mass. 229, 5 N. E. 275, 55 Am. Rep. 479.

82. Trial generally see Trial.

83. Scott *v.* Reed, 153 Pa. St. 14, 25 Atl. 604 (evidence held to require a peremptory instruction to find against the establishment of a gift); Miller *v.* Hartle, 53 Pa. St. 108. See Casserly *v.* Casserly, 123 Mich. 44, 81 N. W. 930; Teal *v.* Sevier, 26 Tex. 516. And see cases cited in following notes.

84. *Alabama.*— Nelson *v.* Iverson, 24 Ala. 9, 60 Am. Dec. 442, 19 Ala. 95.

Iowa.— Stroup *v.* Bridger, 124 Iowa 401, 100 N. W. 113.

Maryland.— Isaac *v.* Williams, 3 Gill 278.

Massachusetts.— Scollard *v.* Brooks, 170 Mass. 445, 49 N. E. 741.

Michigan.— Harris *v.* Cable, 113 Mich. 192, 71 N. W. 531.

New York.— Trow *v.* Shannon, 78 N. Y. 446 [*affirming* 8 Daly 239].

Pennsylvania.— Jacques *v.* Fourthman, 137 Pa. St. 428, 20 Atl. 802; Erie, etc., R. Co. *v.* Knowles, 117 Pa. St. 77, 11 Atl. 250; Flanigan *v.* Flanigan, 115 Pa. St. 233, 9 Atl. 157; Miller *v.* Hartle, 53 Pa. St. 108; Burns *v.* Sutherland, 7 Pa. St. 103; Swab *v.* Miller, 7 Pa. Cas. 23, 9 Atl. 667; Osthaus *v.* McAndrew, 5 Pa. Cas. 344, 8 Atl. 436.

South Carolina.— Sprouse *v.* Littlejohn, 22 S. C. 358; Caldwell *v.* Wilson, 2 Speers 75.

Texas.— Gilkey *v.* Peeler, 22 Tex. 663.

Vermont.— See Frost *v.* Frost, 33 Vt. 639.

United States.— Fitzpatrick *v.* Graham, 122 Fed. 401, 58 C. C. A. 619.

See 24 Cent. Dig. tit. "Gifts," § 101.

85. *California.*— Ruiz *v.* Dow, 113 Cal. 490, 45 Pac. 867; Helm *v.* Martin, 59 Cal. 57.

Georgia.— Respass *v.* Young, 11 Ga. 114.

Iowa.— Stroup *v.* Bridger, 124 Iowa 401, 100 N. W. 113.

Kentucky.— Jones *v.* Jones, 102 Ky. 450, 43 S. W. 412, 19 Ky. L. Rep. 1516; Hartman *v.* Hartman, 15 Ky. L. Rep. 368.

Massachusetts.— Buswell *v.* Fuller, 161 Mass. 220, 36 N. E. 753.

Michigan.— Sparling *v.* Smeltzer, 133 Mich. 454, 95 N. W. 571.

New Hampshire.— French *v.* Smith, 58 N. H. 323.

New York.— McMurray *v.* Ennis, 12 N. Y. Suppl. 904.

North Carolina.— Vann *v.* Edwards, 135 N. C. 661, 47 S. E. 784, 67 L. R. A. 461.

Pennsylvania.— Keeney *v.* Handrick, 148 Pa. St. 223, 23 Atl. 1068, 1069; Horn *v.* Buck, 5 Pa. Cas. 480, 8 Atl. 609; Hawn *v.* Stoler, 22 Pa. Super. Ct. 307.

South Carolina.— Martin *v.* Jennings, 52 S. C. 371, 29 S. E. 807; McGinney *v.* Wallace, 3 Hill 254, Riley 290; De Veaux *v.* De Veaux, 1 Strobh. Eq. 283.

See 24 Cent. Dig. tit. "Gifts," § 101. See also cases cited in preceding note.

86. *Massachusetts.*— Hunt *v.* Hunt, 119 Mass. 474.

Mississippi.— Carradine *v.* Collins, 7 Sm. & M. 428.

New York.— Porter *v.* Gardner, 60 Hun 571, 15 N. Y. Suppl 398.

North Carolina.— Gross *v.* Smith, 132 N. C. 604, 44 S. E. 111.

Pennsylvania.—Kulp *v.* March, 181 Pa. St. 627, 37 Atl. 913, 59 Am. St. Rep. 687; Swab *v.* Miller, 7 Pa. Cas. 23, 9 Atl. 667.

See 24 Cent. Dig. tit. "Gifts," § 101.

87. Woodbury *v.* Woodbury, 141 Mass. 329, 5 N. E. 275, 55 Am. Rep. 479; Osthaus *v.* McAndrew, 5 Pa. Cas. 344, 8 Atl. 436.

88. Sanderlin *v.* Sanderlin, 24 Ga. 583.

89. Ide *v.* Pierce, 134 Mass. 260 (to whom given); Halbert *v.* Halbert, 21 Mo. 277 (whether conditional or absolute).

90. See Nye *v.* Chace, 139 Mass. 379, 31 N. E. 736 (instruction on question whether a note was intended as a gift or in settlement of a claim); Morisey *v.* Bunting, 12 N. C. 3; Wright *v.* Bragg, 106 Fed. 25, 45 C. C. A. 204 (erroneous instruction as to shifting of burden of proof of delivery of a note and mortgage).

Misleading instruction.— Dixon *v.* Labry, 29 S. W. 21, 16 Ky. L. Rep. 522, as to possession of alleged gift.

Refusal to give requested instruction on question of delivery fully covered by an instruction given is not error. Tenbrook *v.* Brown, 17 Ind. 410; Richardson *v.* Colburn, 77 Minn. 412, 80 N. W. 356, 784. See, generally, Trial.

Where the evidence is conflicting as to whether a certain transaction was a gift or loan, the court should instruct the jury as to

in accordance with the evidence,[91] and should caution them as to the nature of the evidence and the degree of confidence with which they can rely upon it;[92] but should not express an opinion as to the weight of any portion of the evidence,[93] or instruct on one view of the case only, ignoring pleadings or evidence on another view.[94]

c. Verdict and Findings. A finding or verdict sufficient to support a judgment must be responsive to the issues raised,[95] and must be warranted by the evidence.[96] A finding that an absolute gift has been made implies such a delivery as would constitute a valid gift,[97] but it does not authorize an inference of the actual and continued possession of property, the continued possession of which, except in case of a conveyance by deed or will, is essential to a valid title.[98] A special verdict must find facts, and not the evidence of facts.[99]

III. CAUSA MORTIS.

A. Definition — 1. In General. A gift *causa mortis* is defined to be a gift of personal property made by a person in expectation of death then imminent, and upon an essential condition that the property shall belong fully to the donee, in case the donor dies as anticipated, leaving the donee surviving him, and the gift is not in the meantime revoked, but not otherwise.[1]

what the law required to constitute a valid gift and also as to what the law denominated a loan. Respass *v.* Young, 11 Ga. 114.

91. Landrum *v.* Russell, 29 Ga. 405; Isaac *v.* Williams, 3 Gill (Md.) 278; Casserly *v.* Casserly, 123 Mich. 44, 81 N. W. 930.

92. Burns *v.* Sutherland, 7 Pa. St. 103.

93. Respass *v.* Young, 11 Ga. 114, as to whether it proved a gift or a loan. See Jones *v.* Falls, 101 Mo. App. 536, 73 S. W. 903.

94. Couch *v.* Couch, (Ala. 1904) 37 So. 405; Ellis *v.* Mathews, 19 Tex. 390, 70 Am. Dec. 353, instruction erroneous for excluding question of fraud.

95. Marra *v.* Bigelow, 180 Mass. 48, 61 N. E. 275. See, generally, TRIAL.

96. See Marra *v.* Bigelow, 180 Mass. 48, 61 N. E. 275.

97. Anglin *v.* Bottom, 3 Gratt. (Va.) 1.

98. Anglin *v.* Bottom, 3 Gratt. (Va.) 1, slaves.

99. Teegarden *v.* Lewis, 145 Ind. 98, 40 N. E. 1047, 44 N. E. 9, holding that on the issue as to whether a donor had sufficient mental capacity to make a valid gift *inter vivos*, a finding in a special verdict that the donor was of unsound mind is a mere conclusion of law and not such a statement of facts as that the court could apply the proper legal conclusions and render judgment. See, generally, TRIAL.

1. 2 Schouler Pers. Prop. § 135 [*cited* with approval in Reed *v.* Barnum, 36 Ill. App. 525, 535; Roberts *v.* Draper, 18 Ill. App. 167, 171]. Definitions in general accord with this are to be found in Hatcher *v.* Buford, 60 Ark. 169, 172, 29 S. W. 641, 27 L. R. A. 507; Newton *v.* Snyder, 44 Ark. 42, 45, 51 Am. Rep. 587; Daniel *v.* Smith, 64 Cal. 346, 349, 30 Pac. 575; Raymond *v.* Sellick, 10 Conn. 480, 484; Kilby *v.* Godwin, 2 Del. Ch. 61, 69; Taylor *v.* Harmison, 79 Ill. App. 380, 382; Devol *v.* Dye, 123 Ind. 321, 324, 24 N. E. 246, 7 L. R. A. 439; Smith *v.* Ferguson, 90 Ind. 229, 233, 46 Am. Rep. 216; Calvin *v.* Free, 66 Kan. 466, 469, 71 Pac. 823; Dole *v.* Lincoln, 31 Me. 422, 428; Taylor *v.* Henry, 48 Md. 550, 559, 30 Am. Rep. 486; Hebb *v.* Hebb, 5 Gill (Md.) 506, 511; Kenistons *v.* Sceva, 54 N. H. 24, 37; Overton *v.* Sawyer, 52 N. C. 6, 7, 75 Am. Dec. 444; Gourley *v.* Linsenbigler, 51 Pa. St. 345, 350; Michener *v.* Dale, 23 Pa. St. 59, 63; Priester *v.* Priester, Rich. Eq. Cas. (S. C.) 26, 35, 18 Am. Dec. 191; French *v.* Raymond, 39 Vt. 623, 625; Claytor *v.* Pierson, 55 W. Va. 167, 172, 46 S. E. 935; Dickeschied *v.* Wheeling Exch. Bank, 28 W. Va. 340, 360; Crook *v.* Baraboo First Nat. Bank, 83 Wis. 31, 36, 52 N. W. 1131, 35 Am. St. Rep. 17; Henschel *v.* Maurer, 69 Wis. 576, 580, 34 N. W. 926, 2 Am. St. Rep. 757.

Blackstone's definition.— In Sheegog *v.* Perkins, 4 Baxt. (Tenn) 273, 280, the court following Blackstone defines it as "a gift made by a person in sickness who, apprehending his dissolution near, delivers, or causes to be delivered to another, the possession of any personal goods, to keep as his own in case of the donor's decease."

Redfield defines such a gift as "a gift of personal estate made in prospect of death at no very remote period, and which is dependent upon the condition of death occurring substantially as expected by the donor, and that the same be not revoked before death. 3 Redfield Wills 322 [*quoted* in Royston *v.* McCulley, (Tenn. Ch. App. 1900) 59 S. W. 725, 733, 52 L. R. A. 899].

Story observes that by our law there can be no valid donation *mortis causa*: (1) Unless the gift be with a view to the donor's death; (2) unless it be conditioned to take effect only on the donor's death by his existing disorder or in his existing illness; and (3) unless there be an actual delivery of the subject of the donation. 1 Story Eq. Jur. § 607*a*.

2. Justinian's Definition. A donation *mortis causa* is that which is made to meet the case of death, as when anything is given upon condition that if any final accident befalls the donor, the person to whom it is given shall have it as his own; but if the donor should survive, or if he should repent of having made the gift, or if the person to whom it has been given should die before the donor, then the donor shall receive back the thing given.[2]

B. Source of the Doctrine. This species of donation has been handed to us from the civil lawyers[3] who themselves borrowed it from the Greeks,[4] and the law on the subject has been introduced into and made a part of the common law.[5]

Statutory definitions.— A gift in view of death is one which is made in contemplation, fear, or peril of death and with intent that it shall take effect only in case of the death of the giver. Cal. Civ. Code (1903), § 1149. A donation *mortis causa* (in prospect of death) is an act to take effect when the donor shall no longer exist by which he disposes of the whole or part of his property and which is revocable. La. Civ. Code (1900), art. 1469. See Johnson *v.* Waters, 111 U. S. 640, 4 S. Ct. 619, 28 L. ed. 547.

A donatio mortis causa is when a person in his last sickness, apprehending his dissolution near, delivers or causes to be delivered to another the possession of any personal goods to keep in case of his decease. Glynn *v.* Seaman's Sav. Bank, 9 N. Y. St. 499.

A gift causa mortis is a gift of personalty made by a party in contemplation of the approach of death, subject to the following implied conditions which are attached by the law, and the occurring of any one of which will operate as a defeasance of the gift: (1) If the danger of death passes without the donor dying; (2) if the donor revoke the gift before death; and (3) if the donee die before the donor. Seabright *v.* Seabright, 28 W. Va. 412.

To constitute a donatio causa mortis there must be three attributes: (1) The gift must be with a view to the donor's death; (2) it must be conditioned to take effect only on the death of the donor by his existing disorder; and (3) there must be a delivery of the subject of donation. Kiff *v.* Weaver, 94 N. C. 274, 55 Am. Rep. 601. See *infra*, III, D.

No particular form of words is necessary to give effect to a gift *causa mortis* if the evidence of that which was said and done establishes the requisities of its validity. Kenistons *v.* Sceva, 54 N. H. 24; Devlin *v.* Farmer, 16 Daly (N. Y.) 98, 9 N. Y. Suppl. 530. Thus where a person *in extremis* takes a package of bonds from beneath his pillow and hands it to the donee saying in substance: "These bonds are for you," an intention to give is sufficiently manifested to constitute a valid gift *causa mortis*. Vandor *v.* Roach, 73 Cal. 614, 15 Pac. 354.

2. Sandar Inst. Justinian 147 [*quoted* in Leyson *v.* Davis, 17 Mont. 220, 263, 42 Pac. 775, 31 L. R. A. 429, as translated by Professor Hammond]. See also Thornton Gifts, § 17. In Nicholas *v.* Adams, 2 Whart. (Pa.) 17, 22, Gibson, C. J., said: "Perhaps the best definition of this species of donation in the books of the civil law, and the one which best corresponds to the best impressions the subject has received from the Anglo-Saxon jurists, who seem to be returning to the point from which they started — is, that which is found in Justinian's Institutes, lib. 2. tit. 7: '*Mortis causa donatio est, quæ propter mortis fit suspicionem; cum quis ita donat, ut si quid humanitus ei contigisset, haberet is qui accepit; sin autem supervixesset, is qui donavit reciperet, vel si eum donationis pœnituisset, aut prior decesseret is cui donatium sit.*'" In Staniland *v.* Willott, 3 Macn. & G. 664, 674, 49 Eng. Ch. 512, Lord Truro said: "Swinburne referring to the Digest lib. xxxix, tit. 6, notices three kinds of *donatio mortis causâ*; first, where a person not terrified by the apprehension of any present peril, but moved by the general consideration of man's mortality, makes a gift; secondly, where a person, moved by imminent danger, gives in such a manner that the subject is immediately made his to whom it is given; and, thirdly, where a person being in peril of death, gives something, yet not so that it should be presently his who received it, but in case only the giver die. These definitions will also be found stated by Mr. Roper in his treatise on the Laws of Legacies, vol. 1, p. 2; he there says: 'It appears that the third alone is the proper donation *mortis causâ*, the other two being nothing more than pure irrevocable gifts *inter vivos*. This also is apparent from the definition of a donation *mortis causâ* given by Justinian after the contest which prevailed upon the subject had subsided.' Remarks to the same effect were made by Lord Loughborough in Tate *v.* Hilbert, 2 Ves. Jr. 111, 2 Rev. Rep. 175, 30 Eng. Reprint 548."

3. Raymond *v.* Sellick, 10 Conn. 480; Newman *v.* Bost, 122 N. C. 524, 29 S. E. 848.

4. 2 Blackstone Comm. 514. In the note it is said: "There is a very complete *donatio mortis causa*, in the Odyssey, B. 17, v. 78, made by Telemachus to his friend Piræus; and another by Hercules in the Alcestes of Euripides, v. 1020."

5. Raymond *v.* Sellick, 10 Conn. 480.

It is said that "the commencement of the cases upon this head seems to have been the effect of that part of the English statute of frauds, which relates to nuncupative wills, and a struggle to support, in courts of equity, claims, which, but for that statute, would have been brought forward in the spiritual courts." Raymond *v.* Sellick, 10 Conn. 480, 485. It is also said that the

C. Distinguished From Other Transactions — 1. GIFTS INTER VIVOS. The only differences between these and other gifts are: (1) A donation *causa mortis* must be made in contemplation of the near approach of death with the implied condition that it take effect absolutely only upon the death of the donor, caused by a disorder from which he is then suffering, or a peril which is then impending; whereas by a gift *inter vivos*, completed by delivery, the property vests immediately and irrevocably in the donee and the donor has no more right or control over it than any other person;[6] and (2) at common law a man might thus, and only thus, transfer property directly to his wife.[7]

2. LEGACIES. A gift *causa mortis* resembles a legacy in that it is made in contemplation of death, is ambulatory, incomplete, and revocable at the option of the donor at any time during his life.[8] On the other hand it differs from a legacy in several important particulars. Possession must be delivered to the donee and retained by him during the life of the donor, whereas in case of a legacy the possession remains with the testator until his decease; the claim need not be proved in a court of probate; the title of the donee becomes by relation complete and absolute from the time of delivery; no consent or other act on the part of the personal representative is necessary to perfect the title of the donee. It is a claim against the personal representative; a legacy is a claim from and through him.[9]

English law and equity reports are silent on the subject until the case of Jones *v.* Selby, Prec. Ch. 300, 24 Eng. Reprint 143.

6. *Connecticut.*—Guinan's Appeal, 70 Conn. 343, 39 Atl. 482; Raymond *v.* Sellick, 10 Conn. 480.

Illinois.— Hagemann *v.* Hagemann, 188 Ill. 363, 58 N. E. 950; Barnum *v.* Reed, 136 Ill. 388, 26 N. E. 572; Taylor *v.* Harmison, 79 Ill. App. 380.

Indiana.— Devol *v.* Sye, 123 Ind. 321, 24 N. E. 246; Smith *v.* Dorsey, 38 Ind. 451, 10 Am. Rep. 118.

Maine.— Dole *v.* Lincoln, 31 Me. 422.

Maryland.— Conser *v.* Snowden, 54 Md. 175, 39 Am. Rep. 368; Taylor *v.* Henry, 48 Md. 550, 30 Am. Rep. 486.

Massachusetts.— Sessions *v.* Moseley, 4 Cush. 87.

New Hampshire.— Blazo *v.* Cochrane, 71 N. H. 585, 53 Atl. 1026; Gale *v.* Drake, 51 N. H. 78.

New Jersey.— Buecker *v.* Carr, 60 N. J. Eq. 300, 47 Atl. 34.

New York.— Williams *v.* Guile, 117 N. Y. 343, 22 N. E. 1071, 6 L. R. A. 366; O'Brien *v.* Elmira Sav. Bank, 99 N. Y. App. Div. 76, 91 N. Y. Suppl. 364; Partridge *v.* Kearns, 32 N. Y. App. Div. 483, 53 N. Y. Suppl. 154; Johnson *v.* Spies, 5 Hun 468; Lewis *v.* Jones, 50 Barb. 645; Collins *v.* Collins, 11 Misc. 28, 31 N. Y. Suppl. 1017; Dexheimer *v.* Gautier, 34 How. Pr. 472; Delmotte *v.* Taylor, 1 Redf. Surr. 417.

Oregon.— Deneff *v.* Helms, 42 Oreg. 161, 70 Pac. 390.

Pennsylvania.— Gourley *v.* Linsenbigler, 51 Pa. St. 345; Wells *v.* Tucker, 3 Binn. 366; Matter of Parthimer, 1 Pearson 433.

Tennessee.— Sheegog *v.* Perkins, 4 Baxt. 273.

Vermont.— Holley *v.* Adams, 16 Vt. 206, 42 Am. Dec. 508.

Virginia.— Thomas *v.* Lewis, 89 Va. 1, 15 S. E. 389, 37 Am. St. Rep. 848, 18 L. R. A. 170.

West Virginia.— Dickeschied *v.* Wheeling Exch. Bank, 28 W. Va. 340.

See 24 Cent. Dig. tit. "Gifts," § 120.

7. Raymond *v.* Sellick, 10 Conn. 480; Brief of Chas. O'Conor in Harris *v.* Clark, 3 N. Y. 93, 107, 51 Am. Dec. 352 [*citing* 9 London L. Mag. 334]. "It seems never to have been regarded as any objection to a gift, *mortis causa*, that it was made by the husband directly to the wife." Meach *v.* Meach, 24 Vt. 591, 596, per Redfield, C. J.

8. *Connecticut.*— Raymond *v.* Sellick, 10 Conn. 480.

District of Columbia.— Dawson *v.* Waggaman, 23 App. Cas. 428.

New Hampshire.— Baker *v.* Smith, 66 N. H. 422, 23 Atl. 82.

Pennsylvania.— Rhodes *v.* Childs, 64 Pa. St. 18; Wells *v.* Tucker, 3 Binn. 366.

Tennessee.— Gass *v.* Simpson, 4 Coldw. 288.

See 24 Cent. Dig. tit. "Gifts," § 121.

Compared with legacy.—"These donations *mortis causa* are now placed in all respects on the footings of legacies. It was much doubted by the juries whether they ought to be considered as a gift or a legacy, partaking as they did in some respects of the nature of both; and some were of the opinion that they belonged to the one head and others that they belonged to the other. We have decided by a constitution that they shall be in almost every respect reckoned amongst legacies and shall be made in accordance with the forms our constitution provides. In short, it is the donation *mortis causa* when the donor wishes that the thing given should belong to himself rather than to the person to whom he gives it, and to that person rather than to his own heir. Sandar Inst. Justinian 147, cited *supra*, note 2.

9. *Connecticut.*— Raymond *v.* Sellick, 10 Conn. 480.

Maine.— Dole *v.* Lincoln, 31 Me. 422.

Massachusetts.— Marshall *v.* Berry, 13 Allen 43.

New Hampshire.— Emery *v.* Clough, 63

D. Essential Requisites of Transaction — 1. Delivery of the Subject-Matter — a. In General. Gifts *causa mortis* cannot be consummated by mere parol. There can be no such gift without an intention to give and a delivery, either actual or constructive, of the thing given.[10] Where the donor intended to give property as a whole a delivery of a part of it only will not suffice and the whole gift must fail.[11] On the other hand a delivery of more than was intended

N. H. 552, 4 Atl. 796, 56 Am. Rep. 543; Cutting *v.* Gilman, 41 N. H. 147.

North Dakota.— Seybold *v.* Grand Forks Nat. Bank, 5 N. D. 460, 67 N. W. 682.

Tennessee.— Gass *v.* Simpson, 4 Coldw. 288.

United States.— Basket *v.* Hassell, 107 U. S. 602, 2 S. Ct. 415, 27 L. ed. 500.

Although the donor has made a will disposing of all his personal property a donation of this sort is good. Drury *v.* Smith, 1 P. Wms. 404, 24 Eng. Reprint 446.

10. The intention may be declared either orally or in writing, and it must be executed by the actual delivery to the donee or to someone for his benefit, of the thing given or of the means of getting possession and enjoyment of it. It is the fact of delivery that converts the unexecuted purpose into an executed and complete gift.

Alabama.— Jones *v.* Deyer, 16 Ala. 221.

Arkansas.— Ragan *v.* Hill, (1904) 80 S. W. 150; Ammon *v.* Martin, 59 Ark. 191, 26 S. W. 826; Newton *v.* Snyder, 44 Ark. 42, 51 Am. Rep. 587.

California.— Noble *v.* Garden, (1905) 79 Pac. 883; Pullen *v.* Placer County Bank, 138 Cal. 169, 66 Pac. 740, 71 Pac. 83, 94 Am. St. Rep. 19; Kimball *v.* Tripp, 136 Cal. 631, 69 Pac. 428; Knight *v.* Tripp, 121 Cal. 674, 54 Pac. 267; Daniel *v.* Smith, 75 Cal. 548, 17 Pac. 683, 64 Cal. 346, 30 Pac. 575.

Connecticut.— McMahon *v.* Newton Sav. Bank, 67 Conn. 78, 34 Atl. 709.

Delaware.— Robson *v.* Robson, 3 Del. Ch. 51; Kilby *v.* Godwin, 2 Del. Ch. 61; Wilkins *v.* Wilson, 1 Marv. 404, 41 Atl. 76.

Georgia.— McKenzie *v.* Downing, 25 Ga. 669; Singleton *v.* Cotton, 23 Ga. 261.

Illinois.— Williams *v.* Chamberlain, 165 Ill. 210, 46 N. E. 250; Telford *v.* Patton, 144 Ill. 611, 33 N. E. 1119; Hagemann *v.* Hagemann, 90 Ill. App. 251.

Indiana.— Smith *v.* Ferguson, 90 Ind. 229, 46 Am. Rep. 216.

Iowa.— Stokes *v.* Sprague, 110 Iowa 89, 81 N. W. 195; Donover *v.* Argo, 79 Iowa 574, 44 N. W. 818.

Kentucky.— Duncan *v.* Duncan, 5 Litt. 12; Roche *v.* George, 13 Ky. L. Rep. 493.

Maine.— Lamson *v.* Monroe, (1886) 5 Atl. 313; Hatch *v.* Atkinson, 56 Me. 324, 96 Am. Dec. 464; Carleton *v.* Lovejoy, 54 Me. 445; Dole *v.* Lincoln, 31 Me. 422.

Maryland.— Conser *v.* Snowden, 54 Md. 175, 39 Am. Rep. 368; Taylor *v.* Henry, 48 Md. 550, 30 Am. Rep. 486; Bradley *v.* Hunt, 5 Gill & J. 54, 23 Am. Dec. 597; Pennington *v.* Gittings, 2 Gill & J. 208.

Massachusetts.— Fearing *v.* Jones, 149 Mass. 12, 20 N. E. 199, 14 Am. St. Rep. 392; Coleman *v.* Parker, 114 Mass. 30; Rockwood *v.* Wiggin, 16 Gray 402; Bowers *v.* Hurd, 10 Mass. 427.

Minnesota.— Winslow *v.* McHenry, 93 Minn. 507, 101 N. W. 799.

Missouri.— McCord *v.* McCord, 77 Mo. 166, 46 Am. Rep. 9; Hamilton *v.* Clark, 25 Mo. App. 428.

New Hampshire.— Kenistons *v.* Sceva, 54 N. H. 24; Cutting *v.* Gilman, 41 N. H. 147.

New Jersey.— Roberts *v.* Wills, 20 N. J. L. 591; Corle *v.* Monkhouse, 50 N. J. Eq. 537, 25 Atl. 157; Egerton *v.* Egerton, 17 N. J. Eq. 419.

New York.— Young *v.* Young, 80 N. Y. 422, 36 Am. Rep. 634; Grymes *v.* Hone, 49 N. Y. 17, 10 Am. Rep. 313; O'Brien *v.* Elmira Sav. Bank, 99 N. Y. App. Div. 76, 91 N. Y. Suppl. 364; Plasterstein *v.* Hoes, 37 N. Y. App. Div. 421, 56 N. Y. Suppl. 103; Partridge *v.* Kearns, 32 N. Y. App. Div. 483, 53 N. Y. Suppl. 154; Loucks *v.* Johnson, 70 Hun 565, 24 N. Y. Suppl. 267; Turner *v.* Brown, 6 Hun 331; Stevens *v.* Stevens, 2 Hun 470; Huntington *v.* Gilmore, 14 Barb. 243. See also Champlin *v.* Seeber, 56 How. Pr. 46.

North Carolina.— Newman *v.* Bost, 122 N. C. 524, 29 S. E. 848.

Oregon.— Deneff *v.* Helms, 42 Oreg. 161, 70 Pac. 390; Liebe *v.* Battmann, 33 Oreg. 241, 54 Pac. 179, 72 Am. St. Rep. 705.

Pennsylvania.— Hawn *v.* Stoler, 208 Pa. St. 610, 57 Atl. 1115, 65 L. R. A. 813; Flanagan *v.* Nash, 185 Pa. St. 41, 39 Atl. 818; Walsh's Appeal, 122 Pa. St. 177, 15 Atl. 470, 9 Am. St. Rep. 83, 1 L. R. A. 535; Fross' Appeal, 105 Pa. St. 258; Michener *v.* Dale, 23 Pa. St. 59.

Rhode Island.— Case *v.* Dennison, 9 R. I. 88, 11 Am. Rep. 222.

South Carolina.— Trenholm *v* Morgan, 28 S. C. 268, 5 S. E. 721; Murdock *v.* McDowell, 1 Nott & M. 237, 9 Am. Dec. 684.

Tennessee.— Royston *v.* McCulley, (Ch. App. 1900) 59 S. W. 725.

Texas.— Chevallier *v.* Wilson, 1 Tex. 161.

Vermont.— Carpenter *v.* Dodge, 20 Vt. 595.

Virginia.— Yancy *v.* Field, 85 Va. 756, 8 S. E. 721; Miller *v.* Jeffress, 4 Gratt. 472.

West Virginia.— Smith *v.* Zumbro, 41 W. Va. 623, 24 S. E. 653; Dickeschied *v.* Wheeling Exch. Bank, 28 W. Va. 340.

Wisconsin.— Wilcox *v.* Matteson, 53 Wis. 23, 9 N. W. 814, 40 Am. Rep. 754.

United States.— Basket *v.* Hassell, 107 U. S. 602, 2 S. Ct. 415, 27 L. ed. 500; Castle *v.* Persons, 117 Fed. 835, 54 C. C. A. 133; Chambers *v.* McCreery, 106 Fed. 364, 45 C. C. A. 322.

England.— Riddell *v.* Dobree, 3 Jur. 722, 10 Sim. 244, 16 Eng. Ch. 244; Ward *v.* Turner, 2 Ves. 431, 28 Eng. Reprint 275.

See 24 Cent. Dig. tit. "Gifts." § 123.

11. Knight *v.* Tripp, 121 Cal. 674, 54 Pac. 267; McGrath *v.* Reynolds, 116 Mass. 566.

to be given cannot overrule the donor's declared intention, and the donee can take only so much as was intended to be given.[12]

b. Surrender of Complete Control. And the donor must part with all dominion over the property, so that no further act is required of him or his personal representative, to vest the title perfectly in the donee, if it be not reclaimed by the donor during his life.[13] If the possession of the donee does not continue the gift is at an end. He must take and retain possession until the donor's death.[14]

c. Delivery to Third Person — (i) *As Trustee For Donee.* It is well settled that the delivery need not be made to the donee personally, but may be made to another as his agent or trustee, and that without his knowledge at the time of making the gift. This is essentially a delivery, not to an agent of the donor, but to a trustee for the donee.[15] So also a gift providing for a division of the prop-

12. Beals *v.* Crowley, 59 Cal. 665.

Delivery of more than was intended.— Where donor, sick unto death, expressed a desire to reward an old family servant by a gift of five hundred dollars, and the next morning, in order to complete his gift, certificates of bank stock of the aggregate value of four thousand five hundred dollars were procured and by him indorsed to the servant, it was held that the latter could take five hundred dollars only, the donor intending to give no more than that sum. Crippen *v.* Adams, 132 Mich. 31, 92 N. W. 496.

13. *Maine.*— Hatch *v.* Atkinson, 56 Me. 324, 96 Am. Dec. 464; Dole *v.* Lincoln, 31 Me. 422.

Maryland.— Conser *v.* Snowden, 54 Md. 175, 39 Am. Rep. 368; Taylor *v.* Henry, 48 Md. 550, 30 Am. Rep. 486; Bradley *v.* Hunt, 5 Gill & J. 54, 23 Am. Dec. 597.

Minnesota.— Logenfiel *v.* Richter, 60 Minn. 49, 61 N. W. 826.

New York.— Ridden *v.* Thrall, 125 N. Y. 572, 26 N. E. 627, 21 Am. St. Rep. 758, 11 L. R. A. 684; Young *v.* Young, 80 N. Y. 422, 36 Am. Rep. 634; Curry *v.* Powers, 70 N. Y. 212, 26 Am. Rep. 577; Kirk *v.* McCusker, 3 Misc. 277, 22 N. Y. Suppl. 780; Gescheidt *v.* Drier, 20 N. Y. Suppl. 11; Matter of O'Gara, 15 N. Y. St. 737.

Pennsylvania.— Hawn *v.* Stoler, 208 Pa. St. 610, 57 Atl. 1115, 65 L. R. A. 813; Hemphill's Estate, 180 Pa. St. 87, 36 Atl. 406; Fross' Appeal, 105 Pa. St. 258.

West Virginia.— Dickeschied *v.* Wheeling Exch. Bank, 28 W. Va. 340.

England.— Bunn *v.* Markham, Holt 352, 2 Marsh. 532, 7 Taunt. 224, 17 Rev. Rep. 497, 3 E. C. L. 143.

See 24 Cent. Dig. tit. "Gifts," § 126.

For example where donor and donee were sisters, living together, and at donor's request donee took a package from a desk, which was in their common bedroom, and which was used by both for their valuable papers, and donor took the package, and handed it to donee with a declaration of its contents, saying that she gave them to donee to do with as she saw fit, and donee returned the package to the desk, locking it, and retaining the key, there was a sufficient delivery of the contents as a gift *causa mortis.* Matter of Swade, 65 N. Y. App. Div. 592, 72 N. Y. Suppl. 1030.

Delivery not such as would have made an effective gift inter vivos will be insufficient to perfect an attempted gift *causa mortis.* Conser *v.* Snowden, 54 Md. 175, 39 Am. Rep. 368; Taylor *v.* Henry, 48 Md. 550, 30 Am. Rep. 486; Hebb *v.* Hebb, 5 Gill (Md.) 506; Bradley *v.* Hunt, 5 Gill & J. (Md.) 54, 23 Am. Dec. 597; Pennington *v.* Gittings, 2 Gill & J. (Md.) 208; Ward *v.* Bradley, 1 Ont. L. Rep. 118.

14. Dunbar *v.* Dunbar, 80 Me. 152, 13 Atl. 578, 6 Am. St. Rep. 166; Hatch *v.* Atkinson, 56 Me. 324, 96 Am. Dec. 464; Kirk *v.* McCusker, 3 Misc. (N. Y.) 277, 22 N. Y. Suppl. 780; Craig *v.* Craig, 3 Barb. Ch. (N. Y.) 76; Bunn *v.* Markham, Holt 352, 2 Marsh. 532, 7 Taunt. 224, 17 Rev. Rep. 497, 3 E. C. L. 143; Ward *v.* Turner, 2 Ves. 431, 28 Eng. Reprint 275.

15. *Alabama.*—Jones *v.* Deyer, 16 Ala. 221.

Arkansas.—Ammon *v.* Martin, 59 Ark. 191, 26 S. W. 826; Newton *v.* Snyder, 44 Ark. 42, 51 Am. Rep. 587.

Colorado.— Conner *v.* Root, 11 Colo. 183, 17 Pac. 773.

Delaware.— Kilby *v.* Godwin, 2 Del. Ch. 61.

Georgia.— Sorrells *v.* Collins, 110 Ga. 518, 36 S. E. 74.

Illinois.— Barnum *v.* Reed, 136 Ill. 388, 26 N. E. 572; Woodburn *v.* Woodburn, 123 Ill. 608, 14 N. E. 58, 16 N. E. 209.

Indiana.— Devol *v.* Dye, 123 Ind. 321, 24 N. E. 246, 7 L. R. A. 439.

Iowa.— Hogan *v.* Sullivan, 114 Iowa 456, 87 N. W. 447.

Maine.— Dresser *v.* Dresser, 46 Me. 48; Dole *v.* Lincoln, 31 Me. 422; Borneman *v.* Sidlinger, 15 Me. 429, 33 Am. Dec. 626.

Maryland.— Waring *v.* Edmonds, 11 Md. 424.

Massachusetts.—Sheedy *v.* Roach, 124 Mass. 472, 26 Am. Rep. 680; Clough *v.* Clough, 117 Mass. 83; Marshall *v.* Berry, 13 Allen 43; Sessions *v.* Moseley, 4 Cush. 87; Parish *v.* Stone, 14 Pick. 198, 25 Am. Dec. 378.

Missouri.— Shackleford *v.* Brown, 89 Mo. 546, 1 S. W. 390.

New Hampshire.— Emery *v.* Clough, 63 N. H. 552, 4 Atl. 796, 56 Am. Rep. 543; Marston *v.* Marston, 21 N. H. 491.

New York.— Williams *v.* Guile, 117 N. Y. 343, 22 N. E. 1071, 6 L. R. A. 366; Grymes *v.* Hone, 49 N. Y. 17, 10 Am. Rep. 313; Mat-

erty among specified persons after the payment of bills and funeral expenses is a valid gift *causa mortis*.[16]

(II) *As Agent or Bailee of Donor.* But where a person delivers property to his own agent or bailee and, without absolutely surrendering dominion over it, directs that in the event of his death it shall be delivered to an intended donee, the transaction is regarded as an attempted testamentary disposition, without the necessary formality of a valid will and is therefore nugatory for the purpose designed. The authority of the agent is revoked by the death of the donor and the property remains a part of his estate subject to administration.[17]

d. Constructive Delivery — (I) *In General.* There are many things of which actual manual tradition cannot be made, either from their nature or their situation at the time. It is not the intention of the law to take from the owner the power of giving these; it merely requires that he shall do that which, under the circumstances, will in reason be considered equivalent to an actual delivery. In such cases the delivery may be constructive, although in all cases it must be as nearly perfect and complete as the nature of the property and the attendant circumstances and conditions will permit.[18]

ter of Hall, 16 Misc. 174, 38 N. Y. Suppl. 1135; Coutant *v.* Schuyler, 1 Paige 316.

Oregon.— Deneff *v.* Helms, 42 Oreg. 161, 70 Pac. 390.

Pennsylvania.—Michener *v.* Dale, 23 Pa. St. 59; Wells *v.* Tucker, 3 Binn. 366; Barclay's Estate, 11 Phila. 123.

Tennessee.— Gass *v.* Simpson, 4 Coldw. 288.

Vermont.— Darling *v.* Emery, 74 Vt. 167, 52 Atl. 517; Caldwell *v.* Renfrew, 33 Vt. 213.

Virginia.— Johnson *v.* Colley, 101 Va. 414, 44 S. E. 721, 99 Am. St. Rep. 884.

England.— Bouts *v.* Ellis, 17 Beav. 121, 51 Eng. Reprint 978.

Canada.— McDonald *v.* McDonald, 35 Nova Scotia 205.

See 24 Cent. Dig. tit. "Gifts," § 129.

Such an alienation of property cannot be supported in law, if it be intended, not for the benefit of the donee, but as a trust fund to be dispensed for benevolent uses at the entire and unlimited discretion of the donee. Dole *v.* Lincoln, 31 Me. 422.

16. Pierce *v.* Boston Five Cents Sav. Bank, 129 Mass. 425, 37 Am. Rep. 371; Loucks *v.* Johnson, 70 Hun (N. Y.) 565, 24 N. Y. Suppl. 267.

17. *Arkansas.*— Ragan *v.* Hill, (1904) 80 S. W. 150; Newton *v.* Snyder, 44 Ark. 42, 51 Am. Rep. 587.

California.— Noble *v.* Garden, (1905) 79 Pac. 883; Knight *v.* Tripp, 121 Cal. 674, 54 Pac. 267; Hart *v.* Ketchum, 121 Cal. 426, 53 Pac. 931; Daniel *v.* Smith, 75 Cal. 548, 17 Pac. 683.

Illinois.— Taylor *v.* Harmison, 79 Ill. App. 380; Barnes *v.* People, 25 Ill. App. 136.

Indiana.— Smith *v.* Ferguson, 90 Ind. 229, 46 Am. Rep. 216.

Maryland.—Thompson *v.* Dorsey, 4 Md. Ch. 149.

Missouri.—Dunn *v.* German-American Bank, 109 Mo. 90, 18 S. W. 1139; Tomlinson *v.* Ellison, 104 Mo. 105, 16 S. W. 201; Shackleford *v.* Brown, 89 Mo. 546, 1 S. W. 390; McCord *v.* McCord, 77 Mo. 166, 46 Am. Rep. 9; Walter *v.* Ford, 74 Mo. 195, 41 Am. Rep. 312; Bieber *v.* Boeckmann, 70 Mo. App. 503.

New York.— Johnson *v.* Williams, 63 How. Pr. 233.

North Carolina.— Windows *v.* Mitchell, 5 N. C. 127.

Ohio.— Hamor *v.* Moore, 8 Ohio St. 239.

Oregon.— Deneff *v.* Helms, 42 Oreg. 161, 70 Pac. 390.

Pennsylvania.— Walsh's Appeal, 122 Pa. St. 177, 15 Atl. 470, 9 Am. St. Rep. 83, 1 L. R. A. 535; Fross' Appeal, 105 Pa. St. 258; McCarven's Estate, 7 Wkly. Notes Cas. 261.

South Carolina.— Trenholm *v.* Morgan, 28 S. C. 268, 5 S. E. 721.

Tennessee.— Sims *v.* Walker, 8 Humphr. 503.

Utah.— Peck *v.* Rees, 7 Utah 467, 27 Pac. 581, 13 L. R. A. 714.

United States.—Basket *v.* Hassell, 107 U. S. 602, 2 S. Ct. 415, 27 L. ed. 500.

England.— Treasury Solicitor *v.* Lewis, [1900] 2 Ch. 812, 69 L. J. Ch. 833, 83 L. T. Rep. N. S. 139, 48 Wkly. Rep. 694.

Canada.—Foster *v.* Walker, 32 Nova Scotia 156.

See 24 Cent. Dig. tit. "Gifts," § 123 *et seq.*

The presumption, in the absence of countervailing circumstances, is that the person to whom the delivery is made takes the property as the trustee of the intended donee and not merely as the agent of the donor. Devol *v.* Dye, 123 Ind. 321, 24 N. E. 246, 7 L. R. A. 439.

18. Hitch *v.* Davis, 3 Md. Ch. 266; Newman *v.* Bost, 122 N. C. 524, 29 S. E. 848. Thus where a man in his last illness accompanied his daughter to a place where he had buried a quantity of money in the earth, declared that he gave it to her, pointed out the spot where it was buried, and told her to remove it and use it when she needed it, it was held that the delivery was sufficient to support the gift. Waite *v.* Grubbe, 43 Oreg. 406, 63 Pac. 206, 99 Am. St. Rep. 764. So where the donor in his last illness called the members of his family about him and in their presence gave to his daughter a carriage situated in an outhouse, calling upon all to wit-

(II) *Delivery of Key to Receptacle.* Property kept in a bureau, chest, or trunk not readily accessible, and ponderous or bulky articles kept in a warehouse, may be delivered by delivering the key to the receptacle with the intent to pass title to the property therein contained.[19] But the delivery of the key to a receptacle which is near at hand and contains property which might easily be removed and an actual delivery made is not sufficient as it is not the best delivery possible under the circumstances.[20]

e. Delivery Alio Intuitu. It is not the possession of the donee but the delivery to him by the donor that is material.[21] An after-acquired possession by the donee will not supply the want of a delivery at the time of the attempted gift.[22] It has been held that the delivery must be made for the express purpose of consummating the gift, and that a previous and continued possession by the donee will not suffice;[23] but no reason can be seen why the law should require a vain thing, such as the surrender of the property by the donee that it may be redelivered to him by the donor, and it has accordingly been held that an antecedent delivery of the chattel *alio intuitu* to the donee is sufficient to support the gift.[24]

f. Delivery of Written Transfer. It has not been settled in a satisfactory manner whether a written instrument of transfer which is delivered is sufficient

ness the gift, it was held that under the circumstances a surrender and acceptance of dominion over the property was sufficient. Fletcher *v.* Fletcher, 55 Vt. 325.

19. *Illinois.*—People *v.* Benson, 99 Ill. App. 325.

Kentucky.— Stephenson *v.* King, 81 Ky. 425, 50 Am. Rep. 173.

Massachusetts.— Debinson *v.* Emmons, 158 Mass. 592, 33 N. E. 706.

Michigan.— Ellis *v.* Secor, 31 Mich. 185, 18 Am. Rep. 178.

New Jersey.— Keepers *v.* Fidelity Title, etc., Co., 56 N. J. L. 302, 28 Atl. 585, 44 Am. St. Rep. 397.

New York.— Westerlo *v.* De Witt, 36 N. Y. 340, 93 Am. Dec. 517; Turner *v.* Brown, 6 Hun 331; Cooper *v.* Burr, 45 Barb. 9; Penfield *v.* Thayer, 2 E. D. Smith 305; Reynolds *v.* Reynolds, 20 Misc. 254, 45 N. Y. Suppl. 338. *Compare* Matter of Swade, 65 N. Y. App. Div. 592, 72 N. Y. Suppl. 1030.

Virginia.— Thomas *v.* Lewis, 89 Va. 1, 15 S. E. 389, 37 Am. St. Rep. 848, 18 L. R. A. 170; Elam *v.* Keen, 4 Leigh 333, 26 Am. Dec. 322.

England.— Ward *v.* Turner, 2 Ves. 431, 28 Eng. Reprint 275.

20. *California.*— Knight *v.* Tripp, 121 Cal. 674, 54 Pac. 267.

Maine.— Goulding *v.* Horbury, 85 Me. 227, 27 Atl. 127, 35 Am. St. Rep. 357; Hatch *v.* Atkinson, 56 Me. 324, 96 Am. Dec. 464.

Massachusetts.— Coleman *v.* Parker, 114 Mass. 30.

New Jersey.—Dunn *v.* Houghton, (Ch. 1902) 51 Atl. 71; Keepers *v.* Fidelity Title, etc., Co., 56 N. J. L. 302, 28 Atl. 585, 44 Am. St. Rep. 397, 23 L. R. A. 184.

Ohio.— Gano *v.* Fisk, 43 Ohio St. 462, 3 N. E. 532, 54 Am. Rep. 819.

Tennessee.— Sheegog *v.* Perkins, 4 Baxt. 273.

England.—Powell *v.* Hellicar, 26 Beav. 261, 5 Jur. N. S. 232, 28 L. J. Ch. 355, 7 Wkly. Rep. 171, 53 Eng. Reprint 898.

Insurance policy.— Where a donor in his last illness delivered to the donee the keys to a bureau in the room saying: "What property is in this house is yours," it was held that it was a constructive delivery of the bureau, but not of a policy of life insurance in a drawer of the bureau, since the policy was capable of manual delivery. Newman *v.* Bost, 122 N. C. 524, 29 S. E. 848.

21. Podmore *v.* Dime Sav. Bank, 29 Misc. (N. Y.) 393, 60 N. Y. Suppl. 533; Delmotte *v.* Taylor, 1 Redf. Surr. (N. Y.) 417; Smith *v.* Zumbro, 41 W. Va. 623, 24 S. E. 653.

22. Cutting *v.* Gilman, 41 N. H. 147; Miller *v.* Jeffress, 4 Gratt. (Va.) 472; Smith *v.* Zumbro, 41 W. Va. 623, 24 S. E. 653; Dickeschied *v.* Wheeling Exch. Bank, 28 W. Va. 340.

23. *Maine.*— Drew *v.* Hagerty, 81 Me. 231, 17 Atl. 63, 10 Am. St. Rep. 255, 3 L. R. A. 230.

Missouri.— McCord *v.* McCord, 77 Mo. 166, 46 Am. Rep. 9.

New Hampshire.— Cutting *v.* Gilman, 41 N. H. 147.

Vermont.— French *v.* Raymond, 39 Vt. 623.

Virginia.— Yancy *v.* Field, 85 Va. 756, 8 S. E. 721; Miller *v.* Jeffress, 4 Gratt. 472.

West Virginia.— Smith *v.* Zumbro, 41 W. Va. 623, 24 S. E. 653; Dickeschied *v.* Wheeling Exch. Bank, 28 W. Va. 340.

Compare Allen *v.* Allen, 75 Minn. 116, 77 N. W. 567, 74 Am. St. Rep. 442, which seems to support this rule, but an examination of the case reveals that no delivery was made at all either before or after the attempted gift. See a later decision by the same court cited *infra*, note 24.

24. Tenbrook *v.* Brown, 17 Ind. 410; Caylor *v.* Caylor, 22 Ind. App. 666, 52 N. E. 465, 72 Am. St. Rep. 331; Davis *v.* Kuck, 93 Minn. 262, 101 N. W. 165; Cain *v.* Moon, [1896] 2 Q. B. 283, 65 L. J. Q. B. 587, 74 L. T. Rep. N. S. 728. In Champney *v.* Blanchard, 39 N. Y. 111, a return of the property to the donor that it might be redelivered to the donee was characterized as "an idle and unmeaning ceremony."

as a substitute for actual delivery of the property, but the judicial mind has been inclined to the affirmative where the instrument is under seal.[25]

2. Acceptance by Donee. Technically there must be an acceptance by the donee as well as a delivery by the donor;[26] but this is a matter of slight practical importance, for where the gift is beneficial to the donee an acceptance will be presumed.[27]

3. In Contemplation of Death — a. In General. It is essential to the validity of a gift *causa mortis* that it be made under apprehension of death from some existing disease or other impending peril.[28]

25. Jones *v.* Deyer, 16 Ala. 221; Newman *v.* James, 12 Ala. 29; McRae *v.* Peques, 4 Ala. 158; Ellis *v.* Secor, 31 Mich. 185, 18 Am. Rep. 178; Kenistons *v.* Sceva, 54 N. H. 24; Tate *v.* Hilbert, 2 Ves. Jr. 111, 2 Rev. Rep. 175, 30 Eng. Reprint 548. In Powell *v.* Leonard, 9 Fla. 359, it was held that where a female slave was in the chamber of her master who was lying *in extremis*, and he directed a deed to be drawn up giving her and her children to a person present at the time, this was a good delivery *causa mortis* of the mother and her children, although the children were absent from the chamber at the time of the gift. On the other hand, Gibson, C. J., in Nicholas *v.* Adams, 2 Whart. (Pa.) 17, was doubtful, saying that, although it may obviate an objection to want of consideration, it amounts, without delivery, only to a covenant which passes no title to any specific thing.

Delivery of an instrument in form of bill of sale, intended as a gift *causa mortis* of articles present and capable of delivery, is not a sufficient delivery. Knight *v.* Tripp, 121 Cal. 674, 54 Pac. 267. A *donatio mortis causa* cannot be by deed, without a delivery of the property given. Smith *v.* Downey, 38 N. C. 268.

26. *Arkansas.*— Ammon *v.* Martin, 59 Ark. 191, 26 S. W. 826.

Minnesota.— Allen *v.* Allen, 75 Minn. 116, 77 N. W. 567, 74 Am. St. Rep. 442.

New York.— Delmotte *v.* Taylor, 1 Redf. Surr. 417.

Tennessee.— Royston *v.* McCulley, (Ch. App. 1900) 59 S. W. 725.

Virginia.— Yancy *v.* Field, 85 Va. 756, 8 S. E. 721.

By the Spanish law donations *mortis causa* did not require acceptance, and, in those *inter vivos*, it was only requisite to deprive the donor of the power of revocation, where delivery did not follow the gift. Fuselier *v.* Masse, 4 La. 423.

27. *Arkansas.*— Ammon *v.* Martin, 59 Ark. 191, 26 S. W. 826.

California.— De Levillain *v.* Evans, 39 Cal. 120.

Illinois.— Forbes *v.* Jason, 6 Ill. App. 395.

Indiana.— Devol *v.* Dye, 123 Ind. 321, 24 N. E. 246, 7 L. R. A. 439.

Iowa.— Darland *v.* Taylor, 52 Iowa 503, 3 N. W. 510, 35 Am. Rep. 285.

New Hampshire.— Blazo *v.* Cochrane, 71 N. H. 585, 53 Atl. 1026.

28. *California.*— Driscoll *v.* Driscoll, 143 Cal. 528, 77 Pac. 471; Zeller *v.* Jordan, 105 Cal. 143, 38 Pac. 640.

Connecticut.— New Haven First Nat. Bank *v.* Balcom, 35 Conn. 351.

Delaware.— Robson *v.* Robson, 3 Del. Ch. 51.

Illinois.— Williams *v.* Chamberlain, 165 Ill. 210, 46 N. E. 250; Telford *v.* Patton, 144 Ill. 611, 33 N. E. 1119; Hagemann *v.* Hagemann, 90 Ill. App. 251.

Indiana.— Brunson *v.* Henry, 140 Ind. 455, 39 N. E. 256; Smith *v.* Ferguson, 90 Ind. 229, 46 Am. Rep. 216; Jacobs *v.* Jolley, 29 Ind. App. 25, 62 N. E. 1028.

Kansas.— Rogers *v.* Richards, 67 Kan. 706, 74 Pac. 255; Calvin *v.* Free, 66 Kan. 466, 71 Pac. 823.

Kentucky.— Knott *v.* Hogan, 4 Metc. 99.

Maine.— Larrabee *v.* Hascall, 88 Me. 511, 34 Atl. 408, 51 Am. St. Rep. 440; Parcher *v.* Saco, etc., Sav. Inst., 78 Me. 470, 7 Atl. 266; Dole *v.* Lincoln, 31 Me. 422; Weston *v.* Hight, 17 Me. 287, 35 Am. Dec. 250.

Minnesota.—Winslow *v.* McHenry, 93 Minn. 507, 101 N. W. 799; Allen *v.* Allen, 75 Minn. 116, 77 N. W. 567, 74 Am. St. Rep. 442.

Missouri.—Keyl *v.* Westerhaus, 42 Mo. App. 49; Nelson *v.* Sudiek, 40 Mo. App. 341.

New Jersey.— Crue *v.* Caldwell, 52 N. J. L. 215, 19 Atl. 188; Snyder *v.* Harris, 61 N. J. Eq. 480, 48 Atl. 329.

New York.— Ridden *v.* Thrall, 125 N. Y. 572, 26 N. E. 627, 31 Am. St. Rep. 758, 11 L. R. A. 684; Williams *v.* Guile, 117 N. Y. 343, 22 N. E. 1071, 6 L. R. A. 366; Grymes *v.* Hone, 49 N. Y. 17, 10 Am. Rep. 313; O'Brien *v.* Elmira Sav. Bank, 99 N. Y. App. Div. 76, 91 N. Y. Suppl. 364; Matter of Cornell, 66 N. Y. App. Div. 162, 73 N. Y. Suppl. 32; Dimon *v.* Keery, 54 N. Y. App. Div. 318, 66 N. Y. Suppl. 817; Irish *v.* Nutting, 47 Barb. 370; Harris *v.* Clark, 2 Barb. 94; Reynolds *v.* Reynolds, 20 Misc. 254, 45 N. Y. Suppl. 338; Langworthy *v.* Crissey, 10 Misc. 450, 31 N. Y. Suppl. 85; Kirk *v.* McCusker, 3 Misc. 277, 22 N. Y. Suppl. 780; Alsop *v.* Southold Sav. Bank, 21 N. Y. Suppl. 300; Champlin *v.* Seeber, 56 How. Pr. 46.

North Carolina.— Kiff *v.* Weaver, 94 N. C. 274, 55 Am. Rep. 601; Shirley *v.* Whitehead, 36 N. C. 130.

Ohio.— Flanders *v.* Blandy, 45 Ohio St. 108, 12 N. E. 321.

Pennsylvania.— Rhodes *v.* Childs, 64 Pa. St. 18; Nicholas *v.* Adams, 2 Whart. 17.

Tennessee.— Gass *v.* Simpson, 4 Coldw. 288; Royston *v.* McCulley, (Ch. App. 1900) 59 S. W. 725.

b. Vague and General Apprehension Not Sufficient. A vague and general apprehension of death from the mortality of man will not suffice, there must be an apprehension arising from some particular sickness, peril, or danger.[29]

c. Donor Need Not Be In Extremis. It is not necessary, however, that the gift be made when the donor is *in extremis* or moved by the apprehension of immediate death when there is no time or opportunity to make a will, or that he should at the time be confined to his bed or to his room.[30] Neither is there any specific limit of time within which the donor must die to make such a gift valid, provided he does not recover from the disease from which he apprehended death or escape the peril which threatened him.[31]

d. Whether Donor Must Die of That Very Disease or Peril. It has been considered essential to the validity of the gift that the donor should die of the very malady from which death was apprehended at the time of making the gift;[32] but the better opinion is that while it is not a legal requisite that he should die of the very disease or peril from which he apprehended death, yet there must be no intervening recovery and it is essential that his death ensue as a result of some disease or peril existing or impending at the time the gift was made.[33]

e. A Soldier Ordered to Seat of War. According to the weight of authority a soldier ordered to the seat of war is not in such imminent peril as will justify his

Texas.— Thompson *v.* Thompson, 12 Tex. 327.

Vermont.— Darling *v.* Emery, 74 Vt. 167, 52 Atl. 517; Smith *v.* Kittridge, 21 Vt. 238.

Virginia.— Barker *v.* Barker, 2 Gratt. 344.

West Virginia.— Dickeschied *v.* Wheeling Exch. Bank, 28 W. Va. 340.

United States.— Grattan *v.* Appleton, 10 Fed. Cas. No. 5,707, 3 Story 755.

England.— Edwards *v.* Jones, 5 L. J. Ch. 194, 1 Myl. & C. 226, 13 Eng. Ch. 226, 40 Eng. Reprint 361; Cosnahan *v.* Grice, 7 L. T. Rep. N. S. 82, 15 Moore P. C. 215, 15 Eng. Reprint 476.

See 24 Cent. Dig. tit. "Gifts," § 108.

Rule applied.— If personal property be delivered by the owner to another for a third person, with the intention of making a *donatio causa mortis*, at the time when the donor is not in his last illness, this, without more, would not be sufficient to effectuate the gift; but if the donor, while in his last illness and conscious of the approach of death, reaffirms the gift, and requests the person receiving the property to retain possession and deliver it to the intended donee after the donor's death, this would be the equivalent of a new delivery, taking effect from the time such request was made. Sorrells *v.* Collins, 110 Ga. 518, 36 S. E. 74.

Death from a surgical operation made necessary by a present disease is death from the disease, and this, although the decedent voluntarily submitted himself to the operation. Ridden *v.* Thrall, 125 N. Y. 572, 26 N. E. 627, 21 Am. St. Rep. 758, 11 L. R. A. 684.

29. ***Delaware.***— Robson *v.* Robson, 3 Del. Ch. 51.

Illinois.— Taylor *v.* Harmison, 79 Ill. App. 380.

New York.— Irish *v.* Nutting, 47 Barb. 370; Van Fleet *v.* McCarn, 2 N. Y. Suppl. 675.

Tennessee.— Sheegog *v.* Perkins, 4 Baxt. 273; Gass *v.* Simpson, 4 Coldw. 288.

Vermont.— Smith *v.* Kittridge, 21 Vt. 238.

See 24 Cent. Dig. tit. "Gifts," § 108.

30. *Maine.*— Larrabee *v.* Hascall, 88 Me. 511, 34 Atl. 408, 51 Am. St. Rep. 440.

New York.— Williams *v.* Guile, 117 N. Y. 343, 22 N. E. 1071, 6 L. R. A. 366; Grymes *v.* Hone, 49 N. Y. 17, 10 Am. Rep. 313. In Ridden *v.* Thrall, 125 N. Y. 572, 579, 26 N. E. 627, 21 Am. St. Rep. 758, 11 L. R. A. 684, Earl, J., said: "In many of the reported cases the gift was made weeks, and even months, before the death of the donor when there was abundant time and opportunity for him to have made a will."

Pennsylvania.— Nicholas *v.* Adams, 2 Whart. 17.

Tennessee.— Gass *v.* Simpson, 4 Coldw. 288.

England.— Merideth *v.* Watson, 17 Jur. 1063, 23 Eng. L. & Eq. 250.

"**Contested death-bed donations** are of such occurrence in the courts, as to have superseded all others, and to have grown, in the apprehension of the judges, from a species to a genus; and hence the notion that they are referable exclusively to death-bed sickness. If made in sickness, it must necessarily be the last sickness, for the contingency happens adversely to the donee, where the donor is restored to health. But this notion seems to be yielding to more comprehensive principles." Nicholas *v.* Adams, 2 Whart. (Pa.) 17, 22, per Gibson, C. J.

31. Larrabee *v.* Hascall, 88 Me. 511, 34 Atl. 408, 51 Am. St. Rep. 440; Ridden *v.* Thrall, 125 N. Y. 572, 26 N. E. 627, 21 Am. St. Rep. 758, 11 L. R. A. 684.

32. Williams *v.* Chamberlain, 165 Ill. 210, 46 N. E. 250; Telford *v.* Patton, 144 Ill. 611, 33 N. E. 1119; Conser *v.* Snowden, 54 Md. 175, 39 Am. Rep. 368; Royston *v.* McCulley, (Tenn. Ch. App. 1900) 59 S. W. 725.

33. Larrabee *v.* Hascall, 88 Me. 511, 34 Atl. 408, 51 Am. St. Rep. 440; Parcher *v.* Saco, etc., Sav. Inst., 78 Me. 470, 7 Atl. 266;

making a gift *causa mortis*;[34] but there are cases holding such gifts valid where the donor never returned alive but fell in battle or died in camp.[35]

f. Contemplation of Suicide. It seems that a gift made in contemplation of suicide is utterly void as against public policy.[36]

4. Mental Competency of Donor. The same degree of mental competency is required to make a gift *causa mortis* as is required to make a will.[37]

E. The Subject-Matter of the Gift— 1. What May Be Given — a. Choses in Action Generally. It is now well settled[38] that any chose in action, whether negotiable or not, whether simple contract or specialty, if it be the contract or promise of some person other than the donor, and do not impose any obligation on him may, by mere delivery, constitute a good gift *causa mortis*. It is not at all essential that the legal title pass. The equitable title passes by delivery with intent to make the gift.[39] Where a chose in action is not evidenced by note, bond, bill, or

Weston *v.* Hight, 17 Me. 287, 35 Am. Dec. 250; Peck *v.* Scofield, 186 Mass. 108, 71 N. E. 109; Blazo *v.* Cochrane, 71 N. H. 585, 53 Atl. 1026; Kenistons *v.* Sceva, 54 N. H. 24; Cutting *v.* Gilman, 41 N. H. 147; Ridden *v.* Thrall, 125 N. Y. 572, 26 N. E. 627, 21 Am. St. Rep. 758, 11 L. R. A. 684; Williams *v.* Guile, 117 N. Y. 343, 22 N. E. 1071, 6 L. R. A. 366; Grymes *v.* Hone, 49 N. Y. 17, 10 Am. Rep. 313; O'Brien *v.* Elmira Sav. Bank, 99 N. Y. App. Div. 76, 91 N. Y. Suppl. 364; Irish *v.* Nutting, 47 Barb. 370; Langworthy *v.* Crissey, 10 Misc. 450, 31 N. Y. Suppl. 85. In Ridden *v.* Thrall, 125 N. Y. 572, 580, 26 N. E. 627, 21 Am. St. Rep. 758, 11 L. R. A. 684, Earl, J., said: "The doctrine meant to be laid down was that the donor must not recover from the disease from which he apprehended death. I am quite sure that no case can be found in which it was decided that death must ensue from the same disease, and not from some other disease existing at the time, but not known."

Partial recovery.— It has been held error to charge that as matter of law the donor's partial recovery operated as a revocation of the gift. Castle *v.* Persons, 117 Fed. 835, 54 C. C. A. 133.

34. Smith *v.* Dorsey, 38 Ind. 451, 10 Am. Rep. 118; Sheldon *v.* Button, 5 Hun (N. Y.) 110; Irish *v.* Nutting, 47 Barb. (N. Y.) 370; Dexheimer *v.* Gautier, 34 How. Pr. (N. Y.) 472; Linsenbigler *v.* Gourley, 56 Pa. St. 166, 94 Am. Dec. 51, 51 Pa. St. 345.

35. Virgin *v.* Gaither, 42 Ill. 39; Gass *v.* Simpson, 4 Coldw. (Tenn.) 288. And why not? "Homer tells us that when Telemachus was about to engage in a conflict with the suitors of Penelope, he gave certain treasures, in case he should fall, to his friend [Piræus]." Odyssey, bk. 17, v. 78 [*quoted* in dissenting opinion of Barbour, J., in Dexheimer *v.* Gautier, 34 How. Pr. (N. Y.) 472, 476]. See also 2 Blackstone Comm. 514.

According to Bryant's translation of the Odyssey, as quoted by Mr. Thornton (Thornton Gifts, § 17, note 1): "And then discreet Telemachus replied: "We know not yet, Piraeus, what may be the event; and if the suitors privily should slay me in the palace, and divide the inheritance among them, I prefer that thou, instead of them, shouldst have the gifts; but should they meet the fate which I have planned, and be cut off, then shalt thou gladly bring the treasures, which I gladly will receive." Bk. 17, l. 93–100.

36. It is fundamentally opposed to the first principles of any law which treats suicide as a crime, that legal rights should be created to take effect upon the self-destruction of the donor. Agnew *v.* Belfast Banking Co., [1896] 2 Ir. 204. In Duryea *v.* Harvey, 183 Mass. 429, 434, 67 N. E. 351, the statement of facts shows that the donor did commit suicide, but as there was no valid delivery of the property, the case went off on that point, Hammond, J., saying: "In view of the want of delivery necessary to create a gift *mortis causa*, it becomes unnecessary to consider whether the other objections raised by the defendant, namely, that the property was not the subject of such a gift, and further that such a gift cannot be lawfully made in contemplation of suicide, are well founded." Allen *v.* Allen, 75 Minn. 116, 77 N. W. 567, 74 Am. St. Rep. 442, and Liebe *v.* Battmann, 33 Oreg. 241, 54 Pac. 179, 72 Am. St. Rep. 705, are both cases in which the donor committed suicide, but like the Massachusetts case, the gifts failed for want of delivery, the courts not deciding the legal effect of the donor's self-destruction.

37. Sass *v.* McCormack, 62 Minn. 234, 64 N. W. 385; Matter of Hall, 16 Misc. (N. Y.) 174, 38 N. Y. Suppl. 1135. See also Wills.

But the burden of proof in the absence of circumstances tending to create a suspicion of wrong does not rest on the donee to show that the donor was of sound and disposing mind at the time of making the gift. Vandor *v.* Roach, 73 Cal. 614, 15 Pac. 354.

38. The reluctance of the early courts to sustain gifts *causa mortis* of choses in action arose from the fact that they were not assignable, but under the equitable doctrine that they may be assigned by delivery there is no reason why they should not be the subject of gift the same as other chattels. Ellis *v.* Secor, 31 Mich. 185, 18 Am. Rep. 178.

39. *California.*— Druke *v.* Heiken, 61 Cal. 346, 44 Am. Rep. 553.

Kentucky.— Stephenson *v.* King, 81 Ky. 425, 50 Am. Rep. 173.

other instrument in writing, which can be delivered,[40] but is merely a claim against a third person which must be established by parol, a written assignment of the demand by the donor to the donee is essential to complete the delivery.[41]

b. Bonds and Mortgages. It is also well settled[42] now that the giving of a bond debt due the donor, by delivering the bond, or the giving of any other debt due him, by delivering the instrument by which it is secured, is a valid gift *causa mortis*, without indorsement or written assignment.[43] Where a bond secured by mortgage is given as a *donatio causa mortis* the mortgage goes with the bond, although it be not formally transferred.[44]

c. Bank Deposits — (i) *By Delivery of Certificate.* The delivery of a certificate of deposit is a valid gift of the money deposited, and this is held to be

Maine.— Parker *v.* Marston, 27 Me. 196; Borneman *v.* Sidlinger, 15 Me. 429, 33 Am. Dec. 626.

Maryland.— Waring *v.* Edmonds, 11 Md. 424.

Massachusetts.—Sessions *v.* Moseley, 4 Cush. 87; Grover *v.* Grover, 24 Pick. 261, 35 Am. Dec. 319; Parish *v.* Stone, 14 Pick. 198, 25 Am. Dec. 378.

Michigan.— Ellis *v.* Secor, 31 Mich. 185, 18 Am. Rep. 178.

New Hampshire.— Blazo *v.* Cochrane, 71 N. H. 585, 53 Atl. 1026.

New York.— Ridden *v.* Thrall, 125 N. Y. 572, 26 N. E. 627, 21 Am. St. Rep. 758, 11 L. R. A. 684; Westerlo *v.* De Witt, 36 N. Y. 340, 93 Am. Dec. 517; Matter of Swade, 65 N. Y. App. Div. 592, 72 N. Y. Suppl. 1030; Coutant *v.* Schuyler, 1 Paige, 316.

Pennsylvania.— Gourley *v.* Linsenbigler, 51 Pa. St. 345; Wells *v.* Tucker, 3 Binn. 366.

Rhode Island.— Tillinghast *v.* Wheaton, 8 R. I. 536, 94 Am. Dec. 126, 5 Am. Rep. 621.

Tennessee.— Brunson *v.* Brunson, Meigs 630.

Vermont.— Meach *v.* Meach, 24 Vt. 591; Smith *v.* Kittridge, 21 Vt. 238; Holley *v.* Adams, 16 Vt. 206, 42 Am. Dec. 508.

West Virginia.— Seabright *v.* Seabright, 28 W. Va. 412.

United States.— Chaney *v.* Basket, 5 Fed. Cas. No. 2,595.

England.— Veal *v.* Veal, 27 Beav. 303, 6 Jur. N. S. 527, 29 L. J. Ch. 321, 2 L. T. Rep. N. S. 228, 8 Wkly. Rep. 2, 54 Eng. Reprint 118.

See 24 Cent. Dig. tit. "Gifts," § 133 *et seq.*

40. See *infra*, III, E, 1, b.

41. Any oral disposition of it in contemplation of death could be sustained only as a nuncupative will, and in the manner and with the limitations provided for such wills. Drew *v.* Hagerty, 81 Me. 231, 17 Atl. 63, 10 Am. St. Rep. 255, 3 L. R. A. 230; Hawn *v.* Stoler, 208 Pa. St. 610, 57 Atl. 1115, 65 L. R. A. 813. See also Hooper *v.* Goodwin, 1 Swanst. 485, 36 Eng. Reprint 475, 1 Wils. Ch. 212, 37 Eng. Reprint 92, 18 Rev. Rep. 125. But see Castle *v.* Persons, 117 Fed. 835, 54 C. C. A. 133, in which, however, the dissenting opinion of Thayer, J., is in line with the weight of authority.

Sufficiency of memorandum.— Where a decedent in his lifetime takes his son-in-law to a bank, and deposits a sum of money, having the certificate made payable to the son-in-law, and some two years afterward, just prior to his death, gives a written memorandum to the son-in-law directing the disposition of the fund among certain beneficiaries, there is a sufficient delivery in trust for the beneficiaries to constitute a valid gift *causa mortis*. Hogan *v.* Sullivan, 114 Iowa 456, 87 N. W. 447.

42. **Formerly** it was held that evidences of debt, the legal title to which would not pass by mere delivery, could not be the subject of gift *causa mortis* without indorsement or written assignment. Bradley *v.* Hunt, 5 Gill & J. (Md.) 54, 23 Am. Dec. 597; Overton *v.* Sawyer, 52 N. C. 6, 75 Am. Dec. 444; Miller *v.* Miller, 3 P. Wms. 356, 24 Eng. Reprint 1099.

43. *Delaware.*— Robson *v.* Jones, 3 Del. Ch. 51.

Maine.— Hill *v.* Stevenson, 63 Me. 364, 18 Am. Rep. 231; Borneman *v.* Sidlinger, 18 Me. 225.

Maryland.— Waring *v.* Edmonds, 11 Md. 424.

New York.— *In re* Essex, 20 N. Y. Suppl. 62.

North Carolina.— Kiff *v.* Weaver, 94 N. C. 274, 55 Am. Rep. 601.

Pennsylvania.— Wells *v.* Tucker, 3 Binn. 366.

Vermont.— Meach *v.* Meach, 24 Vt. 591.

Virginia.— Lee *v.* Boak, 11 Gratt. 182.

United States.— Castle *v.* Persons, 117 Fed. 835, 54 C. C. A. 133.

England.— Snellgrove *v.* Baily, 3 Atk. 214, 26 Eng. Reprint 924; Duffield *v.* Elwes, 1 Bligh N. S. 497, 1 Dowl. P. C. N. S. 1, 30 Rev. Rep. 69, 4 Eng. Reprint 959; Gardner *v.* Parker, 3 Madd. 184; Ward *v.* Turner, 2 Ves. 431, 28 Eng. Reprint 275.

See 24 Cent. Dig. tit. "Gifts," § 139.

Coupon bonds are the subject of a valid gift *causa mortis*. Walsh *v.* Sexton, 55 Barb. (N. Y.) 251.

44. Druke *v.* Heiken, 61 Cal. 346, 44 Am. Rep. 553; Brown *v.* Brown, 18 Conn. 410, 46 Am. Dec. 328; Kiff *v.* Weaver, 94 N. C. 274, 55 Am. Rep. 601.

Where the mortgage, but not the bond, was delivered, it was held to be a question of fact whether the donor intended also to deliver the bond. Caufield *v.* Davenport, 75 Hun (N. Y.) 541, 27 N. Y. Suppl. 494.

so although the certificate is payable to the donor's order and has not been indorsed.[45]

(II) *By Delivery of Pass-Book.* So a valid gift of the money deposited may be effected by the delivery of a depositor's pass-book issued by a savings-bank with intent to give the donee the deposits represented by it, for such book is the record of the depositor's account, and its production authorizes control of the deposit;[46] but the rule is otherwise in the case of a commercial bank of dis-

45. *Colorado.*— Conner *v.* Root, 11 Colo. 183, 17 Pac. 773.

New York.— Westerlo *v.* De Witt, 36 N. Y. 340, 93 Am. Dec. 517; *In re* Hall, 16 Misc. 174, 38 N. Y. Suppl. 1135; Dickinson *v.* Hoes, 84 N. Y. Suppl. 152, 33 N. Y. Civ. Proc. 101.

Oregon.— Deneff *v.* Helms, 42 Oreg. 161, 70 Pac. 390.

Pennsylvania.— McCabe's Estate, 6 Pa. Co. Ct. 42.

South Carolina.—Brooks *v.* Brooks, 12 S. C. 422.

United States.— Basket *v.* Hassell, 107 U. S. 602, 2 S. Ct. 415, 27 L. ed. 500; Chaney *v.* Basket, 5 Fed. Cas. No. 2,595.

England.— Moore *v.* Moore, L. R. 18 Eq. 474; *In re* Dillon, 44 Ch. D. 76, 59 L. J. Ch. 420, 62 L. T. Rep. N. S. 614, 38 Wkly. Rep. 369; Porter *v.* Walsh, [1896] 1 Ir. 148 [*affirming* [1895] 1 Ir. 284]; Cassidy *v.* Belfast Banking Co., 22 L. R. Ir. 68.

Canada.— McDonald *v.* McDonald, 35 Nova Scotia 205.

See 24 Cent. Dig. tit. "Gifts," § 135 *et seq.*

46. *Alabama.*— Jones *v.* Weakley, 99 Ala. 441, 12 So. 420, 42 Am. St. Rep. 84, 19 L. R. A. 700.

Connecticut.— Guinan's Appeal, 70 Conn. 342, 39 Atl. 482; Camp's Appeal, 36 Conn. 88, 4 Am. Rep. 39.

Maine.— Curtis *v.* Portland Sav. Bank, 77 Me. 151, 52 Am. Rep. 750; Hill *v.* Stevenson, 63 Me. 364, 18 Am. Rep. 231.

Maryland.— Whalen *v.* Milholland, 89 Md. 199, 43 Atl. 45, 44 L. R. A. 208.

Massachusetts.— Debinson *v.* Emmons, 158 Mass. 592, 33 N. E. 706; Pierce *v.* Boston Five Cents Sav. Bank, 129 Mass. 425, 37 Am. Rep. 371; Sheedy *v.* Roach, 124 Mass. 472, 26 Am. Dec. 680; Clough *v.* Clough, 117 Mass. 83; Grover *v.* Grover, 24 Pick. 261, 35 Am. Dec. 319.

New Jersey.— Dennin *v.* Hilton, (Ch. 1901) 50 Atl. 600.

New York.— Ridden *v.* Thrall, 125 N. Y. 572, 26 N. E. 627, 21 Am. St. Rep. 758, 11 L. R. A. 684; Mahon *v.* Dime Sav. Bank, 92 N. Y. App. Div. 506, 87 N. Y. Suppl. 258; Podmore *v.* South Brooklyn Sav. Inst., 48 N. Y. App. Div. 218, 62 N. Y. Suppl. 961; Callahan *v.* Clement, 32 N. Y. App. Div. 631, 53 N. Y. Suppl. 1101 [*affirmed* in 162 N. Y. 618, 57 N. E. 1105]; Loucks *v.* Johnson, 70 Hun 565, 24 N. Y. Suppl. 267; Walsh *v.* Bowery Sav. Bank, 15 Daly 403, 7 N. Y. Suppl. 669, 8 N. Y. Suppl. 344; Cosgriff *v.* Hudson City Sav. Inst., 24 Misc. 4, 52 N. Y. Suppl. 189; Reynolds *v.* Reynolds, 20 Misc. 254, 45 N. Y. Suppl. 338; Glynn *v.* Seaman's Sav. Bank, 9 N. Y. St. 499; Vandermark *v.* Vandermark, 55 How. Pr. 408.

Ohio.— Polley *v.* Hicks, 58 Ohio St. 218, 50 N. E. 809, 41 L. R. A. 858.

Pennsylvania.— Tyrrell's Estate, 3 Pa. Co. Ct. 228. *Contra*, Walsh's Appeal, 122 Pa. St. 177, 15 Atl. 470, 9 Am. St. Rep. 83, 1 L. R. A. 535.

Rhode Island.— Tillinghast *v.* Wheaton, 8 R. I. 536, 94 Am. Dec. 126, 5 Am. Rep. 621.

Vermont.— Watson *v.* Watson, 69 Vt. 243, 39 Atl. 201; Hackett *v.* Moxley, 65 Vt. 71, 25 Atl. 898.

England.— *In re* Weston, [1902] 1 Ch. D. 680, 71 L. J. Ch. 343, 86 L. T. Rep. N. S. 551, 50 Wkly. Rep. 294. *Contra*, McGonnell *v.* Murray, Ir. R. 3 Eq. 460.

Canada.— Brown *v.* Toronto Gen. Trusts Corp., 32 Ont. 319; Thorne *v.* Perry, 2 N. Brunsw. Eq. 146.

See 24 Cent. Dig. tit. "Gifts," § 136.

Rule in Kentucky.— In Ashbrook *v.* Ryon, 2 Bush 228, 92 Am. Dec. 481, it was held that the delivery of the pass-book did not give the right to the money in bank. In a later case, alluding to this one, the court said: "Why it did not is not stated, but if equivalent to a certificate of deposit, we see no reason why it should not have been a complete gift." Stephenson *v.* King, 81 Ky. 425, 433, 50 Am. Rep. 173.

A deposit in the joint names of donor and donee payable to the survivor or to the order of either during life is not of itself sufficient to constitute a gift of the money to the donee as survivor, but a delivery of the pass-book completes the gift. Whalen *v.* Milholland, 89 Md. 199, 43 Atl. 45, 44 L. R. A. 208; Gorman *v.* Gorman, 87 Md. 338, 39 Atl. 1038; Taylor *v.* Henry, 48 Md. 550, 30 Am. Rep. 486; Dennin *v.* Hilton, (N. J. Ch. 1901) 50 Atl. 600. See also Winslow *v.* McHenry, 93 Minn. 507, 101 N. W. 799. Where money is deposited in the joint names of the owners neither can make a valid gift of more than his share. Wetherow *v.* Lord, 41 N. Y. App. Div. 413, 58 N. Y. Suppl. 778.

Deposit in sole name of another.— Where the donor deposited money in the sole name of another and afterward gave him written instructions as to the disposition of the fund among certain beneficiaries, it was held that there was a sufficient delivery of the fund in trust for beneficiaries to constitute a valid gift *causa mortis*. Hogan *v.* Sullivan, 114 Iowa 456, 87 N. W. 447. *Compare* Vandermark *v.* Vandermark, 55 How. Pr. (N. Y.) 408.

A by-law of the bank printed in the pass-

count and deposit, for there the money can be withdrawn, not by the production of the pass-book, but on the check of the depositor.[47]

d. Corporate Stock. Similarly corporate stock will pass by a delivery of the certificates without assignment or indorsement.[48]

e. Negotiable Paper. Bank-notes and promissory notes payable to bearer pass by delivery and constitute valid donations when delivered.[49] And it is now well settled that negotiable paper payable to order is the subject of donation *causa mortis* whether it be indorsed by the payee or not.[50]

f. Debt Due From Donee. A debt due from the donee to the donor may be the subject of gift *causa mortis*, and is completed by the delivery of the instrument evidencing it with intent to forgive the debt.[51]

2. What May Not Be Given — a. Donor's Executory Obligation. No mere contract imposing an obligation on the donor can be the subject of a gift *causa*

book requiring an order or power of attorney to authorize any one other than the depositor to draw out the deposits does not alter the case. Ridden *v.* Thrall, 125 N. Y. 572, 26 N. E. 627, 21 Am. St. Rep. 758, 11 L. R. A. 684.

A written order for a portion of the fund accompanied by a delivery of the pass-book is good for the amount represented by the order. Larrabee *v.* Hascall, 88 Me. 511, 34 Atl. 408, 51 Am. St. Rep. 440.

47. Jones *v.* Weakley, 99 Ala. 441, 12 So. 420, 42 Am. St. Rep. 84, 19 L. R. A. 700; Ashbrook *v.* Ryon, 2 Bush (Ky.) 228, 92 Am. Dec. 481; Van Fleet *v.* McCarn, 2 N. Y. Suppl. 675; Thomas *v.* Lewis, 89 Va. 1, 15 S. E. 389, 37 Am. St. Rep. 848, 18 L. R. A. 170.

48. Leyson *v.* Davis, 17 Mont. 220, 42 Pac. 775, 31 L. R. A. 429; Walsh *v.* Sexton, 55 Barb. (N. Y.) 251; O'Donnell *v.* Gaffney, 22 Pa. Super. Ct. 316.

Rule applied.—Deceased, being on his death-bed, unable to transact any business, directed his agent to buy bank stock in the name of his sister, and the stock was issued and delivered to her. It was held that the delivery of the stock was a gift *causa mortis*. Hatcher *v.* Buford, 60 Ark. 169, 29 S. W. 641, 27 L. R. A. 507. Defendant's testator, being the owner of one hundred and twenty shares of bank stock in one certificate, made an absolute assignment in writing of twenty shares to plaintiff, which he handed to his wife, to be delivered to plaintiff on his death. It was held that this constituted a valid gift *causa mortis*. Grymes *v.* Hone, 49 N. Y. 17, 10 Am. Rep. 313.

In England it has been held that railway stock cannot be the subject of gift *causa mortis*. Moore *v.* Moore, L. R. 18 Eq. 474. And so of certificates of investment shares in a building society which might at any time be withdrawn. *In re* Weston, [1902] 1 Ch. 680, 71 L. J. Ch. 343, 86 L. T. Rep. N. S. 551, 50 Wkly. Rep. 294.

49. Bradley *v.* Hunt, 5 Gill & J. (Md.) 54, 23 Am. Dec. 597.

50. *Alabama.*—Jones *v.* Deyer, 16 Ala. 221.

California.— Edwards *v.* Wagner, 121 Cal. 376, 53 Pac. 821; Vandor *v.* Roach, 73 Cal. 614, 15 Pac. 354; Druke *v.* Heiken, 61 Cal. 346, 44 Am. Rep. 553.

Connecticut.— Brown *v.* Brown, 18 Conn. 410, 46 Am. Dec. 328.

Kentucky.— Southerland *v.* Southerland, 5 Bush 591; Ashbrook *v.* Ryon, 2 Bush 228, 92 Am. Dec. 481; Turpin *v.* Thompson, 2 Metc. 420; Watson *v.* Carmon, 6 S. W. 450, 10 Ky. L. Rep. 288.

Massachusetts.—Chase *v.* Redding, 13 Gray 418; Bates *v.* Kempton, 7 Gray 382; Sessions *v.* Moseley, 4 Cush. 87; Grover *v.* Grover, 24 Pick. 261, 35 Am. Dec. 319.

Minnesota.— Johnson *v.* Holst, 86 Minn. 496, 90 N. W. 1115.

New Hampshire.— Blazo *v.* Cochrane, 71 N. H. 585, 53 Atl. 1026.

New Jersey.— Varick *v.* Hitt, (Ch. 1903) 55 Atl. 139; Corle *v.* Monkhouse, 50 N. J. Eq. 537, 25 Atl. 157.

New York.— Ridden *v.* Thrall, 125 N. Y. 572, 26 N. E. 627, 21 Am. St. Rep. 758, 11 L. R. A. 684; Westerlo *v.* De Witt, 36 N. Y. 340, 93 Am. Dec. 517; Bedell *v.* Carll, 33 N. Y. 581; Cornell *v.* Cornell, 12 Hun 312; House *v.* Grant, 4 Lans. 296; Coutant *v.* Schuyler, 1 Paige 316.

North Carolina.— Kiff *v.* Weaver, 94 N. C. 274, 55 Am. Rep. 601.

Pennsylvania.— Gourley *v.* Linsenbigler, 51 Pa. St. 345.

Vermont.—Caldwell *v.* Renfrew, 33 Vt. 213; McConnell *v.* McConnell, 11 Vt. 290.

West Virginia.— Claytor *v.* Pierson, 55 W. Va. 167, 46 S. E. 935.

England.— Clement *v.* Cheesman, 27 Ch. D. 631, 54 L. J. Ch. 158, 33 Wkly. Rep. 40; *In re* Mead, 15 Ch. D. 651, 50 L. J. Ch. 30, 43 L. T. Rep. N. S. 117, 28 Wkly. Rep. 891.

See 24 Cent. Dig. tit. "Gifts," § 139.

51. *Illinois.*— Woodburn *v.* Woodburn, 123 Ill. 608, 14 N. E. 58, 16 N. E. 209 [*reversing* 23 Ill. App. 289].

Kentucky.— Nelson *v.* Cartmel, 6 Dana 7.

New Jersey.— Craig *v.* Parret, 56 N. J. Eq. 848, 42 Atl. 1117 [*affirming* 56 N. J. Eq. 280, 38 Atl. 305].

New York.— Champney *v.* Blanchard, 39 N. Y. 111; Brinckerhoff *v.* Lawrence, 2 Sandf. Ch. 400.

Pennsylvania.— *In re* Campbell, 7 Pa. St. 100, 47 Am. Dec. 503.

Tennessee.— Richardson *v.* Adams, 10 Yerg. 273.

Virginia.— Lee *v.* Boak, 11 Gratt. 182.

mortis;[52] as for example the donor's draft,[53] the donor's check,[54] or the donor's promissory note executed in his last illness and delivered to the payee without valuable consideration.[55]

England.— Moore *v.* Darton, 4 De G. & Sm. 517, 20 L. J. Ch. 626; Merideth *v.* Watson, 17 Jur. 1063, 23 Eng. L. & Eq. 250.

See 24 Cent. Dig. tit. "Gifts," § 146.

Destruction of evidence of debt.— Where the holder of certain promissory notes, apprehending the near approach of death, destroyed them, declaring that in the event of her death she did not wish the maker to be obliged to pay them, it was held to be a complete and valid gift *causa mortis*. Darland *v.* Taylor, 52 Iowa 503, 3 N. W. 510, 35 Am. Rep. 285. To the same effect see Gardner *v.* Gardner, 22 Wend. (N. Y.) 526, 34 Am. Dec. 340.

52. Detroit Second Nat. Bank *v.* Williams, 13 Mich. 282; Meach *v.* Meach, 24 Vt. 591; Holley *v.* Adams, 16 Vt. 206, 42 Am. Dec. 508.

53. **Donor's draft** upon a third party in favor of the donee is not valid as a gift *causa mortis*, and the donee cannot maintain an action upon it against the donor's representatives. Harris *v.* Clark, 3 N. Y. 93, 51 Am. Dec. 352 [*overruling* Wright *v.* Wright, 1 Cow. (N. Y.) 598].

54. **Donor's check** which is not presented and accepted or paid before his death (Thresher *v.* Dyer, 69 Conn. 404, 37 Atl. 979; McKenzie *v.* Downing, 25 Ga. 669; Gerry *v.* Howe, 130 Mass. 350; Detroit Second Nat. Bank *v.* Williams, 13 Mich. 282; *In re* Smither, 30 Hun (N. Y.) 632; Simmons *v.* Cincinnati Sav. Soc., 31 Ohio St. 457, 27 Am. Rep. 521; Rhodes *v.* Childs, 64 Pa. St. 18; *In re* Beaumont, [1902] 1 Ch. 889, 71 L. J. Ch. 478, 86 L. T. Rep. N. S. 410, 50 Wkly. Rep. 389; *In re* Mead, 15 Ch. D. 651, 50 L. J. Ch. 30, 43 L. T. Rep. N. S. 117, 28 Wkly. Rep. 891; *In re* Beak, L. R. 13 Eq. 489, 41 L. J. Ch. 470, 26 L. T. Rep. N. S. 281; Hewitt *v.* Kaye, L. R. 6 Eq. 198, 37 L. J. Ch. 633, 16 Wkly. Rep. 835; *Re* Davis, 86 L. T. Rep. N. S. 889; Tate *v.* Hilbert, 2 Ves. Jr. 111, 2 Rev. Rep. 175, 30 Eng. Reprint 548. *Contra*, Phinney *v.* State, 36 Wash. 236, 78 Pac. 927, 68 L. R. A. 119); and *a fortiori* a check made payable in the future after the death of the donor (Pullen *v.* Placer County Bank, 138 Cal. 169, 66 Pac. 140, 71 Pac. 83, 94 Am. St. Rep. 19; Whitehouse *v.* Whitehouse, 90 Me. 468, 30 Atl. 374, 60 Am. St. Rep. 278; Curry *v.* Powers, 70 N. Y. 212, 26 Am. Rep. 577; Waynesburg College Appeal, 111 Pa. St. 130, 3 Atl. 19, 56 Am. Rep. 252), is not good as a gift *causa mortis*. But the doctrine that the donor's own check may not be the subject of a *donatio causa mortis* does not apply when such check is given for a valuable consideration received by the donor in his lifetime. In such case there is a contract as well as a trust. Whitehouse *v.* Whitehouse, 90 Me. 468, 38 Atl. 374, 60 Am. St. Rep. 278.

Check the only mode of disposing of special fund.— Where an administrator was entitled, as distributee, to certain funds of the estate which were deposited under an agreement that he might draw a certain amount each month by his check, countersigned by the surety on his bond as administrator, he could make a valid gift *causa mortis* of said fund. Dickinson *v.* Hoes, 84 N. Y. Suppl. 152, 33 N. Y. Civ. Proc. 101. The case of Lawson *v.* Lawson, 1 P. Wms. 441, 24 Eng. Reprint 463, seems also to be contrary to the doctrine here stated. There the testator on his death-bed drew a bill upon his goldsmith for £100 payable to his wife and declared in a note in his own handwriting on the bill that the money was to buy her mourning and maintain her until her jointure should become due. The master of the rolls held that it was a valid gift of the money and might operate as an appointment or direction to the executor. Of this case Lord Loughborough said that the decision was right, but that the report in P. Williams is inaccurate and does not show the *ratio decidendi*. See Tate *v.* Hilbert, 2 Ves. Jr. 111, 2 Rev. Rep. 175, 30 Eng. Reprint 548.

Where the check had been deposited in a foreign bank against the amount of which the donee drew it was held a good gift, although the check was not presented for payment at the bank on which it was drawn until after the donor's death. Rolls *v.* Pearce, 5 Ch. D. 730, 46 L. J. Ch. 791, 36 L. T. Rep. N. S. 438, 25 Wkly. Rep. 899.

55. *Connecticut.*— Raymond *v.* Sellick, 10 Conn. 480.

Illinois.— Illinois Christian Missionary Convention *v.* Hall, 48 Ill. App. 536.

Louisiana.— Barriere *v.* Gladding, 17 La. 144.

Massachusetts.— Mason *v.* Gardner, 186 Mass. 515, 71 N. E. 952; Carr *v.* Silloway, 111 Mass. 24; Parish *v.* Stone, 14 Pick. 198, 25 Am. Dec. 378.

New Hampshire.— Sanborn *v.* Sanborn, 65 N. H. 172, 18 Atl. 233; Flint *v.* Pattee, 33 N. H. 520, 66 Am. Dec. 742; Copp *v.* Sawyer, 6 N. H. 386.

New Jersey.— Egerton *v.* Egerton, 17 N. J. Eq. 419.

New York.— Harris *v.* Clark, 3 N. Y. 93, 51 Am. Dec. 352 [*overruling* Wright *v.* Wright, 1 Cow. 598]; Fink *v.* Cox, 18 Johns. 145, 9 Am. Dec. 191; Craig *v.* Craig, 3 Barb. Ch. 76.

Ohio.— Hamor *v.* Moore, 8 Ohio St. 239; Prior *v.* Reynolds, 1 Ohio Dec. (Reprint) 366, 8 West. L. J. 325.

Pennsylvania.— Luebbe's Estate, 179 Pa. St. 447, 36 Atl. 322.

South Carolina.— Hall *v.* Howard, 1 Rice 310, 33 Am. Dec. 115; Priester *v.* Priester, Rich. Eq. Cas. 26, 18 Am. Dec. 191.

Tennessee.— Brown *v.* Moore, 3 Head 671.

Vermont.— Caldwell *v.* Renfrew, 33 Vt. 213; Smith *v.* Kittridge, 21 Vt. 238; Holley *v.* Adams, 16 Vt. 206, 42 Am. Dec. 508.

b. Real Estate. Real estate, in the very nature of things, cannot be the subject of gift *causa mortis*. That species of gift is confined strictly to personal property.[56]

3. Limitation of Amount — a. In General. Efforts have sometimes been made to limit the amount of property that may be disposed of in this way.[57] It has been held that this mode of transmission can apply only to certain specific articles capable of passing by delivery, and that, if the gift assumes the province of a will and purports to be a disposition of the donor's whole estate, it is void;[58] but according to other cases there is no limit to the amount or kind of personal property that may be disposed of in this way. Subject to the rights of creditors the donor may give away the whole of his personal estate.[59]

b. To Prevent Fraud on Marital Rights. Although a husband may have absolute control of his property during his life, to give and dispose of it as he sees fit, yet the better opinion is that he may not in expectation of death gratuitously dispose of it with a view to defeat the widow's statutory rights therein, known as the widow's statutory dower or distributive portion in the deceased husband's personal estate.[60] A married woman cannot, by gift *causa mortis*, so dispose of her estate as to deprive her husband of his statutory distributive share therein,[61] although under the statute she is under no disability to make a gift *causa mortis* of specific articles of her separate personal property.[62]

England.— Tate *v.* Hilbert, 2 Ves. Jr. 111, 2 Rev. Rep. 175, 30 Eng. Reprint 548.
See 24 Cent. Dig. tit. "Gifts," § 105.

56. *Delaware.*—Kilby *v.* Godwin, 2 Del. Ch. 61.
Illinois.— See McCarty *v.* Kearnan, 86 Ill. 291.
Iowa.— Reeves *v.* Howard, 118 Iowa 121, 91 N. W. 896.
Maine.— Wentworth *v.* Shibles, 89 Me. 167, 36 Atl. 108.
New York.— Houghton *v.* Houghton, 34 Hun 212; White *v.* Wager, 32 Barb. 250. In Curtiss *v.* Barrus, 38 Hun 165, it was held that a deed executed and delivered when the grantor was apparently at the point of death was a gift *causa mortis*, and was revoked by the grantor's recovery. But this is not law. See the remarks of Mr. Freeman in his note to Johnson *v.* Colley, 99 Am. St. Rep. 884, 908. The case is directly in conflict with Houghton *v.* Houghton, 34 Hun 212, where it is held that a court of equity has power in such case to set aside the conveyance as made under a mutual mistake of fact. There is a *dictum* of Judge Redfield to the same effect in Meach *v.* Meach, 24 Vt. 591.
South Carolina.— Gilmore *v.* Whitesides, Dudley Eq. 14, 31 Am. Dec. 563.
Utah.— See Peck *v.* Rees, 7 Utah 467, 27 Pac. 581, 13 L. R. A. 714.
Vermont.— Meach *v.* Meach, 24 Vt. 591.
United States.— Basket *v.* Hassell, 107 U. S. 602, 2 S. Ct. 415, 27 L. ed. 500.

57. As far back as the time of Justinian such gifts were required to be made in the presence of five witnesses and were subjected to the operation of the *lex Falcidia* by which one was prohibited from disposing of more than three fourths of his estate to the prejudice of his heir. Per Redfield, C. J., in note to Meach *v.* Meach, 24 Vt. 591, 600.

58. Marshall *v.* Berry, 13 Allen (Mass.) 43; Headley *v.* Kirby, 18 Pa. St. 326. Although the property which is the subject of the gift be the principal part of the donor's estate, the gift is not on that account invalid. Michener *v.* Dale, 23 Pa. St. 59. Where a person on her death-bed delivers to another the keys of her trunk, which is in the room, and declares that the trunk and its contents are the latter's property, but such declarations leave it doubtful whether all her property is in the trunk, or whether all that is in the trunk is her property, a finding by the lower court in favor of the validity of the gift will not be disturbed on appeal on the ground that a gift *causa mortis* of the donor's entire estate is invalid. Debinson *v.* Emmons, 158 Mass. 592, 33 N. E. 706.

59. Hatch *v.* Atkinson, 56 Me. 324, 96 Am. Dec. 464; Meach *v.* Meach. 24 Vt. 591; Thomas *v.* Lewis, 89 Va. 1, 15 S. E. 389, 37 Am. St. Rep. 848, 18 L. R. A. 170.

60. Hatcher *v.* Buford, 60 Ark. 169, 29 S. W. 641, 27 L. R. A. 507; Manikee *v.* Beard, 85 Ky. 20, 2 S. W. 545, 8 Ky. L. Rep. 736; Dunn *v.* German-American Bank, 109 Mo. 90, 18 S. W. 1139; Straat *v.* O'Neil, 84 Mo. 68; Tucker *v.* Tucker, 32 Mo. 464; Tucker *v.* Tucker, 29 Mo. 350; Stone *v.* Stone, 18 Mo. 389.
Nevertheless it has been held that the widow's right is to the property of which the husband died seized or possessed, and as these gifts have their full effect in the life time of the donor and the property is not in his possession at the time of his decease, it is not subject to administration. Chase *v.* Redding, 13 Gray (Mass.) 418; Cranson *v.* Cranson, 4 Mich. 230, 66 Am. Dec. 534.

61. Baker *v.* Smith, 66 N. H. 422, 23 Atl. 82; Jones *v.* Brown, 34 N. H. 439.

62. Conner *v.* Root, 11 Colo. 183, 17 Pac. 773.
Under the Massachusetts statutes a married woman has power to make a valid disposition of specific articles of her separate personal property by a gift *causa mortis* without her husband's consent. Marshall *v.* Berry, 13 Allen 43.

F. Qualified or Conditional Gifts. It is no objection to a gift *causa mortis* that it is coupled with a trust or condition contemporaneously declared.[63]

G. When Title Passes. According to weight of authority, title to the property passes to the donee upon its delivery to him, but remains subject to defeasance while the donor lives.[64]

H. Rights of Creditors. A gift of this nature cannot avail against creditors and the donee takes subject to the right of the personal representative to reclaim it if necessary for the payment of the debts of the deceased, for no man who is unable to pay his debts may give away his property.[65] But the mere fact that there are creditors is not sufficient to defeat the gift, a deficiency of assets must be shown.[66]

I. What Law Governs. The validity of a gift *causa mortis* is to be determined by the law of the place where it was made, without reference to the domicile of the donor.[67]

J. Revocation — 1. At Option of Donor. A gift *causa mortis* has this distinguishing feature that it is revocable at any time during the life of the donor at his option and without regard to the state of his health.[68]

63. Davis *v.* Ney, 125 Mass. 590, 28 Am. Rep. 272; Dunne *v.* Boyd, Ir. R. 8 Eq. 609.

For example the donor may well couple the gift with the trust that the donee shall provide for the funeral expenses of the donor. Curtis *v.* Portland Sav. Bank, 77 Me. 151, 52 Am. Rep. 750; Pierce *v.* Boston Five Cents Sav. Bank, 129 Mass. 425, 37 Am. Rep. 371; Clough *v.* Clough, 117 Mass. 83; Podmore *v.* South Brooklyn Sav. Inst., 48 N. Y. App. Div. 218, 62 N. Y. Suppl. 961; Loucks *v.* Johnson, 70 Hun (N. Y.) 565, 24 N. Y. Suppl. 267; Dickinson *v.* Hoes, 84 N. Y. Suppl. 152, 33 N. Y. Civ. Proc. 101; Hills *v.* Hills, 5 Jur. 1185, 10 L. J. Exch. 440, 8 M. & W. 401. So also a gift made on condition that the donee shall not contest the donor's will is good if the donee refrain from from contesting the will. Woodburn *v.* Woodburn, 123 Ill. 608, 14 N. E. 58, 16 N. E. 209. But he must account for the gift if he overturns the testator's disposal of the estate and comes in for his share. Currie *v.* Steele, 2 Sandf. (N. Y.) 543.

64. *California.*— Daniel *v.* Smith, 64 Cal. 346, 30 Pac. 575.

Kentucky.— Duncan *v.* Duncan, 5 Litt. 12.

Maine.— Dole *v.* Lincoln, 31 Me. 422.

Massachusetts.— Marshall *v.* Berry, 13 Allen 43; Chase *v.* Redding, 13 Gray 418.

New Hampshire.— Blazo *v.* Cochrane, 71 N. H. 585, 53 Atl. 1026; Emery *v.* Clough, 63 N. H. 552, 4 Atl. 796, 56 Am. Rep. 543; Jones *v.* Brown, 34 N. H. 439.

North Dakota.— Seybold *v.* Grand Forks Nat. Bank, 5 N. D. 460, 67 N. W. 682.

Oregon.— Deneff *v.* Helms, 42 Oreg. 161, 70 Pac. 390.

Pennsylvania.— Matter of Parthimer, 1 Pearson 433; Nicholas *v.* Adams, 2 Whart. 17.

United States.— Basket *v.* Hassell, 107 U. S. 602, 2 S. Ct. 415, 27 L. ed. 500.

See 24 Cent. Dig. tit. "Gifts," § 106.

But there is another line of decisions, more in accord with Justinian's definition, in which it is held that the whole transaction is conditional so long as the donor lives and that his apprehended death is a condition precedent to the vesting of the title to the thing given in the donee. Otherwise, it is contended, it would be a gift *inter vivos.* Raymond *v.* Sellick, 10 Conn. 480; Buecker *v.* Carr, 60 N. J. Eq. 300, 47 Atl. 34; Gass *v.* Simpson, 4 Coldw. (Tenn.) 288; Edwards *v.* Jones, 5 L. J. Ch. 194, 1 Myl. & C. 226, 13 Eng. Ch. 226, 40 Eng. Reprint 361; Staniland *v.* Willott, 3 Macn. & G. 664, 49 Eng. Ch. 512; Tate *v.* Hilbert, 2 Ves. Jr. 111, 2 Rev. Rep. 175, 30 Eng. Reprint 548.

65. *Maine.*— Larrabee *v.* Hascall, 88 Me. 511, 34 Atl. 408, 51 Am. St. Rep. 440; Borneman *v.* Sidlinger, 15 Me. 429, 33 Am. Dec. 626.

Massachusetts.—Chase *v.* Redding, 13 Gray 418; Mitchell *v.* Pease, 7 Cush. 350.

Missouri.— Dunn *v.* German-American Bank, 109 Mo. 90, 18 S. W. 1139.

New York.— Huntington *v.* Gilmore, 14 Barb. 243; House *v.* Grant, 4 Lans. 296.

Tennessee.— Gass *v.* Simpson, 4 Coldw. 288.

Virginia.— Yancy *v.* Field, 85 Va. 756, 8 S. E. 721.

If there be a residuum of the gift after the payment of the debts, it goes to the donee and not to the decedent's estate. Kiff *v.* Weaver, 94 N. C. 274, 55 Am. Rep. 601.

66. Seybold *v.* Grand Forks Nat. Bank, 5 N. D. 460, 67 N. W. 682; Michener *v.* Dale, 23 Pa. St. 59. See also Pierce *v.* Boston Five Cents Sav. Bank, 129 Mass. 425, 37 Am. Rep. 371.

67. Emery *v.* Clough, 63 N. H. 552, 4 Atl. 796, 56 Am. Rep. 543. When a party in a suit in North Carolina avers that a certain bond was given him in South Carolina as a *donatio mortis causa,* he must show that his right accrues under some special law of South Carolina; otherwise the gift comes within the provision of the common or canon law, and there must be an express or implied delivery, and that title will be dependent upon the death of the donor. McCraw *v.* Edwards, 41 N. C. 202.

68. *California.*— Doran *v.* Doran, 99 Cal. 311, 33 Pac. 929.

2. By Recovery of Donor or Death of Donee. A gift *causa mortis* may be defeated by operation of law if the donor recovers from his illness, escapes the impending peril, or survives the donee. This condition is implied and need not be expressed in words.[69] These are conditions, implied though they be, which are attendant upon such a gift and do not render the transaction testamentary, or the disposition a legacy, and therefore nugatory, because not executed as a will.[70]

Connecticut.—Raymond *v.* Sellick, 10 Conn. 480.

Maine.— Bickford *v.* Mattocks, 95 Me. 547, 50 Atl. 894; Dole *v.* Lincoln, 31 Me. 422; Parker *v.* Marston, 27 Me. 196.

Maryland.— Conser *v.* Snowden, 54 Md. 175, 39 Am. Rep. 368.

Michigan.— Crips *v.* Towsley, 73 Mich. 395, 41 N. W. 332.

Missouri.— Bieber *v.* Boeckmann, 70 Mo. App. 503.

New Hampshire.— Blazo *v.* Cochrane, 71 N. H. 585, 53 Atl. 1026; Baker *v.* Smith, 66 N. H. 422, 23 Atl. 82; Emery *v.* Clough, 63 N. H. 552, 4 Atl. 796, 56 Am. Rep. 543.

New York.— Matter of Manhardt, 17 N. Y. App. Div. 1, 44 N. Y. Suppl. 836; Bliss *v.* Fosdick, 86 Hun 162, 33 N. Y. Suppl. 317 [*affirmed* in 151 N. Y. 625, 45 N. E. 1131]; Collins *v.* Collins, 11 Misc. 28, 31 N. Y. Suppl. 1047; Merchant *v.* Merchant, 2 Bradf. Surr. 432. The donor may at any time resume possession and annul the gift. Bedell *v.* Carll, 33 N. Y. 581.

Pennsylvania.— Wells *v.* Tucker, 3 Binn. 366; Nicholas *v.* Adams, 2 Whart. 17.

Tennessee.— Gass *v.* Simpson, 4 Coldw. 288.

Virginia.— Johnson *v.* Colley, 101 Va. 414, 44 S. E. 721, 99 Am. St. Rep. 884.

Wisconsin.— Crook *v.* Baraboo First Nat. Bank, 83 Wis. 31, 52 N. W. 1131, 35 Am. St. Rep. 17.

England.— Bunn *v.* Markham, Holt 352, 2 Marsh. 532, 7 Taunt. 224, 17 Rev. Rep. 497, 3 E. C. L. 143.

See 24 Cent. Dig. tit. "Gifts," § 115.

The commencement and prosecution of a suit for that purpose is sufficient to revoke the gift, although the donor dies before it proceeds to judgment. It is not essential to a revocation that the donor should during his life reacquire actual possession of the property. Adams *v.* Atherton, 132 Cal. 164, 64 Pac. 283.

69. *Illinois.*— Roberts *v.* Draper, 18 Ill. App. 167.

Kentucky.— Lisle *v.* Tribble, 92 Ky. 304, 17 S. W. 742, 13 Ky. L. Rep. 595.

Maine.— Weston *v.* Hight, 17 Me. 287, 35 Am. Dec. 250.

Maryland.— Conser *v.* Snowden, 54 Md. 175, 39 Am. Rep. 368.

Massachusetts.— Peck *v.* Scofield, 186 Mass. 108, 71 N. E. 109.

New Hampshire.— Emery *v.* Clough, 63 N. H. 552, 4 Atl. 796, 56 Am. Rep. 543.

New York.— Ridden *v.* Thrall, 125 N. Y. 572, 26 N. E. 627, 21 Am. St. Rep. 758, 11 L. R. A. 684; Grymes *v.* Hone, 49 N. Y. 17, 10 Am. Rep. 313; Merchant *v.* Merchant, 2 Bradf. Surr. 432.

Pennsylvania.— Rhodes *v.* Childs, 64 Pa. St. 18; *In re* Stockham's Estate, 6 Pa. Dist. 422.

Texas.— Thompson *v.* Thompson, 12 Tex. 327.

Virginia.— Johnson *v.* Colley, 101 Va. 414, 44 S. E. 721, 99 Am. St. Rep. 884; Thomas *v.* Lewis, 89 Va. 1, 15 S. E. 389, 37 Am. St. Rep. 848, 18 L. R. A. 170.

Wisconsin.— Crook *v.* Baraboo First Nat. Bank, 83 Wis. 31, 52 N. W. 1131, 35 Am. St. Rep. 17.

England.— Staniland *v.* Willott, 3 Macn. & G. 664, 49 Eng. Ch. 512.

See 24 Cent. Dig. tit. "Gifts," § 115 *et seq.*

Extent of rule.— If a gift is made in expectation of death, there is an implied condition that it is to be held only in the event of the donor's death. Gardner *v.* Parker, 3 Madd. 184; Jones *v.* Selby, Prec. Ch. 300, 24 Eng. Reprint 143; Miller *v.* Miller, 3 P. Wms. 356, 24 Eng. Reprint 1099; Lawson *v.* Lawson, 1 P. Wms. 441, 24 Eng. Reprint 463. And it follows that it is not necessary that the donor should declare the condition. Blazo *v.* Cochrane, 71 N. H. 585, 53 Atl. 1026; Williams *v.* Guile, 117 N. Y. 343, 22 N. E. 1071, 6 L. R. A. 366. And if he does do so it does not make the gift a testamentary disposition. Thomas *v.* Lewis, 89 Va. 1, 15 S. E. 389, 37 Am. St. Rep. 848, 18 L. R. A. 170.

Mere delay to demand the thing, short of the statutory period of limitation, will not deprive the donor of his right to reclaim it after his recovery. Lisle *v.* Tribble, 92 Ky. 304, 17 S. W. 742, 13 Ky. L. Rep. 595.

Partial recovery of donor.— Where the evidence showed that a donor eighty-four years of age, when seriously ill and in expectation of death, made a gift to his wife *causa mortis*, that he partially recovered and lived for nearly a year thereafter, being able to walk during part of the time for a distance of half a mile, but did not disclose the nature of his illness, it was held that it was error to charge as a matter of law that the donor's partial recovery operated as a revocation of the gift. Castle *v.* Persons, 117 Fed. 835, 54 C. C. A. 133.

70. *Indiana.*— Devol *v.* Dye, 123 Ind. 321, 24 N. E. 246, 7 L. R. A. 439.

Massachusetts.— Pierce *v.* Boston Five Cents Sav. Bank, 129 Mass. 425, 37 Am. Rep. 371; Sessions *v.* Moseley, 4 Cush. 87.

New York.— Grymes *v.* Hone, 49 N. Y. 17, 10 Am. Rep. 313.

Oregon.— Deneff *v.* Helmes, 42 Oreg. 161, 70 Pac. 390.

Pennsylvania.— Wells *v.* Tucker, 3 Binn. 366.

See 24 Cent. Dig. tit. "Gifts," § 115 *et seq.*

3. Effect of Subsequent Will. A will does not revoke a gift *causa mortis*, because the will does not speak until the testator's death, the very moment when the gift has become absolute.[71] It has been held, however, that a will subsequently made, disposing of the property given, unmistakably shows the donor's intention to revoke the gift.[72]

4. Birth of Child. Where by law a will would be revoked by the subsequent birth of a child it seems that a gift *causa mortis* would be revoked under the same circumstances.[73]

5. Subsequent Acts of Ownership. Subsequent acts of dominion over the property by the donor whether they show an ineffectual delivery or a revocation are equally fatal to the validity of the gift.[74]

K. Evidence[75] **— 1. Competency of Witnesses.** The rule that no party to an action or person directly interested in the event thereof may, on his own motion, testify to transactions or conversations with a person whose lips have since been closed by death, in a judicial controversy with his personal representative, necessarily applies to the establishment of gifts *causa mortis*.[76]

2. Number of Witnesses Required. The common law does not require all the formalities demanded by the Roman law with respect to the proof and establishment of gifts,[77] and, in the absence of statutory regulation, no particular number of witnesses is required to establish the gift.[78]

In Louisiana donations *causa mortis* are not authorized by law. Property can neither be acquired nor disposed of gratuitously, unless by donations *inter vivos* or *mortis causa*, that is, by last will and testament. Sinnot *v.* Hibernia Nat. Bank, 105 La. 705, 30 So. 233.

71. Brunson *v.* Henry, 140 Ind. 455, 39 N. E. 256; Hoehn *v.* Struttmann, 71 Mo. App. 599; Emery *v.* Clough, 63 N. H. 552, 4 Atl. 796, 56 Am. Rep. 543; Merchant *v.* Merchant, 2 Redf. Surr. (N. Y.) 432. One in expectancy of death delivered certain bonds to her lawyer, instructing him to give them to certain children after her death. After the delivery had been made, the lawyer suggested that she make a will to this effect, which she did. The will proved defective. It was held that a finding that there was a *donatio mortis causa* was justified, as the two acts were not inconsistent either in fact or in law. Darling *v.* Emery, 74 Vt. 167, 52 Atl. 517.

72. Jayne *v.* Murphy, 31 Ill. App. 28. Where, at the time of making a gift *causa mortis*, the sickness of the donor was such as to cause him to believe he was near death, and had no time to dispose of his property, a valid will subsequently made is conclusive evidence that he had escaped from the peril of impending death at the time of the gift, and invalidates it as a gift *causa mortis*. Adams *v.* Nicholas, 1 Miles (Pa.) 90.

73. Bloomer *v.* Bloomer, 2 Bradf. Surr. (N. Y.) 339.

74. Adams *v.* Atherton, 132 Cal. 164, 64 Pac. 283; Doran *v.* Doran, 99 Cal. 311, 33 Pac. 929; Hagemann *v.* Hagemann, 188 Ill. 363, 58 N. E. 950; Kirk *v.* McCusker, 3 Misc. (N. Y.) 277, 22 N. Y. Suppl. 780; Wigle *v.* Wigle, 6 Watts (Pa.) 522.

75. Evidence generally see Evidence.

Witnesses generally see Witnesses.

76. Hubbard *v.* Cox, 76 Tex. 239, 13 S. W. 170. In an action between the administrator of a deceased woman and one claiming certain property as a gift *causa mortis* from her, the subject of litigation being the validity of the gift, the husband and heir of the deceased is not a competent witness on behalf of the administrator as to matters occurring before his wife's death. Conner *v.* Root, 11 Colo. 183, 17 Pac. 773.

A widow cannot testify for herself to establish a gift from her deceased husband. Albro *v.* Albro, 65 S. W. 592, 23 Ky. L. Rep. 1555.

77. **In the Roman law,** from which the doctrine of such gifts found its way into the common law, unusual solemnities were required as a security against fraud. It was requisite that both the donor and donee should be present at the time of the gift and that it should be made in the presence of five witnesses. Hatch *v.* Atkinson, 56 Me. 324, 96 Am. Dec. 464; Delmotte *v.* Taylor, 1 Redf. Surr. (N. Y.) 417; Ward *v.* Turner, 2 Ves. 431, 438, 28 Eng. Reprint 275 (in which Lord Hardwicke expressed his regret that the statute of frauds had not prohibited such gifts altogether); Code, lib. 8, tit. 37; Dig. lib. 39, tit. 6; Strahan Domat, pt. ii, bk. iv, tit. 1.

78. Delmotte *v.* Taylor, 1 Redf. Surr. (N. Y.) 417; Walsh *v.* Studdert, 2 C. & L. 423, 4 Dr. & War. 159, 6 Ir. Eq. 161; McGonnell *v.* Murray, Ir. R. 3 Eq. 460; Cosnahan *v.* Grice, 7 L. T. Rep. N. S. 82, 15 Moore P. C. 215, 15 Eng. Reprint 476; Ward *v.* Turner, 2 Ves. 431, 28 Eng. Reprint 275. In Hatch *v.* Atkinson, 56 Me. 324, 327, 96 Am. Dec. 464, Walton, J., after referring to the precautions against fraud adopted by Justinian, observed: "Unfortunately the common law has not adopted any of these precautions. It does not require the gift to be executed in the presence of any stated number of witnesses; nor does it limit the amount of property that may be thus disposed of."

3. Burden of Proof. One who claims to hold property by gift *causa mortis* has the burden of proving the fact of the gift and that it had the characteristics of such a donation.[79] Mere possession of the subject-matter by the supposed donee will not of itself establish such gift.[80] But he establishes a *prima facie* case when he shows that the disposition has been attended by all the requisites which the law prescribes to give it validity.[81]

4. Clear and Satisfactory Evidence Required. Donations not made in conformity to the statutes of wills and of frauds, but rather in contravention of them, are not favored by the law and are admitted with great caution.[82] Such gifts are necessarily open to the objection of uncertainty and great strictness, and clear and satisfactory proof is therefore necessary to establish them, and they can be upheld only where the intention of the donor is made clear and definite and such intention has been carried out by execution as fully and completely as the nature of the property and the circumstances will permit.[83] But the rule is not

One competent and credible witness is sufficient. Thomas *v.* Lewis, 89 Va. 1, 15 S. E. 389, 37 Am. St. Rep. 848, 18 L. R. A. 170; Walsh *v.* Studdert, 2 C. & L. 423, 4 Dr. & War. 159, 6 Ir. Eq. 161.

Evidence of donee alone has been thought to be sufficient to sustain a gift (McGonnell *v.* Murray, Ir. R. 3 Eq. 460), if the court considers that evidence trustworthy (*Re* Farman, 57 L. J. Ch. 637, 58 L. T. Rep. N. S. 12); but it would be a dangerous precedent to hold such a gift valid on the naked evidence of the donee, uncorroborated by any circumstances (Kenney *v.* Public Administrator, 2 Bradf. Surr. (N. Y.) 319).

By statute in New Hampshire the delivery of the property is required to be proved by two indifferent witnesses. Blazo *v.* Cochrane, 71 N. H. 585, 53 Atl. 1026. But the proof of the other attributes of the gift is not defined or limited by the statute. Kenistons *v.* Sceva, 54 N. H. 24.

79. *Illinois.*—Barnum *v.* Reed, 136 Ill. 388, 26 N. E. 572.

Michigan.— People's Sav. Bank *v.* Look, 95 Mich. 7, 54 N. W. 629.

New Jersey.— Varick *v.* Hitt, (Ch. 1903) 55 Atl. 139; Buecker *v.* Carr, 60 N. J. Eq. 300, 47 Atl. 34.

New York.— Lehr *v.* Jones, 74 N. Y. App. Div. 54, 77 N. Y. Suppl. 213; Conklin *v.* Conklin, 20 Hun 278.

West Virginia.— Seabright *v.* Seabright, 28 W. Va. 412; Dickeschied *v.* Wheeling Exch. Bank, 28 W. Va. 340.

See 24 Cent. Dig. tit. "Gifts," § 152.

Reason for rule.— The burden of proof is necessarily on the donee, as in the first place so many opportunities and such strong temptations present themselves to unscrupulous persons to pretend death-bed donations that there is always danger of having an entirely fabricated case set up; and secondly, without any imputation of fraudulent contrivances it is so easy to mistake the meaning of a person languishing in mortal illness by a slight change of words to convert the expressions of intended benefit into an actual gift of property. Cosnahan *v.* Grice, 7 L. T. Rep. N. S. 82, 15 Moore P. C. 215, 15 Eng. Reprint 476.

80. Varick *v.* Hitt, (N. J. Ch. 1903) 55 Atl. 139; Buecker *v.* Carr, 60 N. J. Eq. 300, 47 Atl. 34.

81. He cannot be required to negative matters of defense by showing the absence of fraud or undue influence or that the donor was of sound and disposing mind at the time of the gift, and the like. Vandor *v.* Roach, 73 Cal. 614, 15 Pac. 354; Bedell *v.* Carll, 33 N. Y. 581.

82. The reason which has been assigned for this is that this mode of disposition permits property without limit of value to be transferred by mere delivery and the proof thereof to be made after death has closed the lips of the supposed donor and the perpetration of fraud has thus been rendered an easy matter.

Indiana.— Devol *v.* Dye, 123 Ind. 321, 24 N. E. 246, 7 L. R. A. 439; Caylor *v.* Caylor, 22 Ind. App. 666, 52 N. E. 465, 72 Am. St. Rep. 331.

Kentucky.— Albro *v.* Albro, 65 S. W. 592, 23 Ky. L. Rep. 1555.

Maine.— Dole *v.* Lincoln, 31 Me. 422.

Massachusetts.— Rockwood *v.* Wiggin, 16 Gray 402.

New Jersey.— Buecker *v.* Carr, 60 N. J. Eq. 300, 47 Atl. 34.

New York.— Farian *v.* Wiegel, 76 Hun 462, 28 N. Y. Suppl. 95; Fiero *v.* Fiero, 2 Hun 600; Delmotte *v.* Taylor, 1 Redf. Surr. 417; Kenney *v.* Public Administrator, 2 Bradf. Surr. 319.

Ohio.— Gano *v.* Fisk, 43 Ohio St. 462, 3 N. E. 532, 54 Am. Rep. 819.

Tennessee.— Gass *v.* Simpson, 4 Coldw. 288.

See 24 Cent. Dig. tit. "Gifts," § 154.

83. *Alabama.*—Bromberg *v.* Bates, 112 Ala. 363, 20 So. 786.

Illinois.— Barnum *v.* Reed, 136 Ill. 388, 26 N. E. 572; Woodburn *v.* Woodburn, 23 Ill. App. 289.

Kentucky.— Albro *v.* Albro, 65 S. W. 592, 23 Ky. L. Rep. 1555.

Maine.— Goulding *v.* Horbury, 85 Me. 227, 27 Atl. 127, 35 Am. St. Rep. 357; Lamson *v.* Monroe, (1886) 5 Atl. 313; Hatch *v.* Atkinson, 56 Me. 324, 96 Am. Dec. 464.

Maryland.—Whalen *v.* Milholland, 89 Md. 199, 43 Atl. 45, 44 L. R. A. 208; Hebb *v.* Hebb, 5 Gill 506.

carried to the extent of holding that the presumption of law is against such gifts. Indeed there is no presumption of law or fact against them or in favor of them.[84] And the law does not require that they shall be proved beyond suspicion or beyond a reasonable doubt.[85] The true rule is that the supposed donee, being in possession of the property, is not required to prove the gift by more than a fair preponderance of evidence.[86]

5. To Show Motive or Reason. Where there is a controversy as to the fact of making a gift of this kind evidence tending to show a motive and reason for making it is always admissible.[87]

6. Declarations of the Parties — a. Of Donor — (i) *In General.* Evidence of prior declarations of the donor showing an intent to give the property in dispute to the donee is admissible as tending to show *quo animo* the act was done, and as corroborative evidence of a gift.[88] Subsequent declarations of

Massachusetts.— Scollard *v.* Brooks, 170 Mass. 445, 49 N. E. 741.

Michigan.— People's Sav. Bank *v.* Look, 95 Mich. 7, 54 N. W. 629; Ellis *v.* Secor, 31 Mich. 185, 18 Am. Rep. 178.

New Jersey.— Snyder *v.* Harris, 61 N. J. Eq. 480, 48 Atl. 329; Buecker *v.* Carr, 60 N. J. Eq. 300, 47 Atl. 34.

New York.— Devlin *v.* Greenwich Sav. Bank, 125 N. Y. 756, 26 N. E. 744; Ridden *v.* Thrall, 125 N. Y. 572, 26 N. E. 627, 21 Am. St. Rep. 758, 11 L. R. A. 684; Lewis *v.* Merritt, 113 N. Y. 383, 21 N. E. 141; Grymes *v.* Hone, 49 N. Y. 17, 10 Am. Rep. 313; Grey *v.* Grey, 47 N. Y. 552; Westerlo *v.* De Witt, 36 N. Y. 340, 93 Am. Dec. 517; Harris *v.* Clark, 3 N. Y. 93, 51 Am. Dec. 352; Telford *v.* Savings Bank, 31 N. Y. App. Div. 565, 52 N. Y. Suppl. 142; Gilman *v.* McArdle, 49 N. Y. Super. Ct. 463; Delmotte *v.* Taylor, 1 Redf. Surr. 417; Kenney *v.* Public Administrator, 2 Bradf. Surr. 319.

North Carolina.— Shirley *v.* Whitehead, 36 N. C. 130.

Rhode Island.— Citizens Savings Bank *v.* Mitchell, 18 R. I. 739, 30 Atl. 636.

Tennessee.— Gass *v.* Simpson, 4 Coldw. 288; Royston *v.* McCulley, (Ch. App. 1900) 59 S. W. 725.

Texas.— Thompson *v.* Thompson, 12 Tex. 327.

Virginia.— Smith *v.* Smith, 92 Va. 696, 24 S. E. 280.

England.— Thompson *v.* Heffernan, 4 Dr. & War. 285; Dunne *v.* Boyd, Ir. R. 8 Eq. 609.

See 24 Cent. Dig. tit. "Gifts," § 154; Evidence, 17 Cyc. 778.

84. Devlin *v.* Greenwich Sav. Bank, 125 N. Y. 756, 26 N. E. 744; Ridden *v.* Thrall, 125 N. Y. 572, 26 N. E. 627, 21 Am. St. Rep. 758, 11 L. R. A. 684; Lewis *v.* Merritt, 113 N. Y. 386, 21 N. E. 141; Farian *v.* Weigel, 76 Hun (N. Y.) 462, 28 N. Y. Suppl. 95; Reynolds *v.* Reynolds, 20 Misc. (N. Y.) 254, 45 N. Y. Suppl. 338; *In re* Hall, 16 Misc. (N. Y.) 174, 38 N. Y. Suppl. 1135.

85. Lewis *v.* Merritt, 113 N. Y. 386, 21 N. E. 141 [*reversing* 42 Hun 161].

86. Gibbs *v.* Carnahan, 4 Misc. (N. Y.) 564, 25 N. Y. Suppl. 786; Kiff *v.* Weaver, 94 N. C. 274, 55 Am. Rep. 601.

Compared with proof of gift inter vivos.— It seems that no other or different proof is required to establish a gift *causa mortis* than one *inter vivos*. It is essential to the validity of both that there should be an expression of purpose to make the gift, and an actual delivery of the subject thereof to the donee, and, when these facts are shown, a *prima facie* case is made out. Bedell *v.* Carll, 33 N. Y. 581.

87. Rhodes *v.* Childs, 64 Pa. St. 18.

Husband's ill-treatment.— Where there is evidence that a married woman made a gift *causa mortis* to a person other than her husband, evidence that her illness was caused by her husband's ill-treatment of her is admissible as tending to show a motive and reason for making the gift, and so preventing the property from passing to her husband at her death. Conner *v.* Root, 11 Colo. 183, 17 Pac. 773.

Services rendered by donee.—The fact that the donor of an alleged gift *causa mortis* considered that the donee had by his careful nursing saved the donor's life, and that he had rendered him valuable services besides, is admissible to explain ambiguities in the declarations constituting the gift. Smith *v.* Maine, 25 Barb. (N. Y.) 33.

88. Matter of Swade, 65 N. Y. App. Div. 592, 72 N. Y. Suppl. 1030; Rhodes *v.* Childs, 64 Pa. St. 18; Citizens' Sav. Bank *v.* Mitchell, 18 R. I. 739, 30 Atl. 626; Royston *v.* McCulley, (Tenn. Ch. App. 1900) 59 S. W. 725.

The judicial confidence is strengthened by proof that the intention to give existed for a long time before the act of giving. Goulding *v.* Horburg, 85 Me. 227, 27 Atl. 127, 35 Am. St. Rep. 357.

Ambiguity in donor's language.—Where the language used by the donor in making an alleged gift *causa mortis* is ambiguous, the ambiguity may be explained by evidence of his previous declarations of a purpose to make the gift alleged. Smith *v.* Maine, 25 Barb. (N. Y.) 33.

Res gestæ.— Evidence of the donor's declarations at the time as to the contents of a package is admissible as a part of the *res gestæ*. Matter of Swade, 65 N. Y. App. Div. 592, 72 N. Y. Suppl. 1030.

Where the contest was between two alleged donees the court rejected such evidence on the part of plaintiff. Parker *v.* Marston, 27 Me. 196.

the donor in the nature of admissions against interest are admissible in evidence as tending to show that he had given the property in question to the donee.[89]

(II) *To Show Delivery.* It has been held that an admission of the donor that he had delivered the property to the donee is competent evidence on the question of delivery;[90] but the delivery of the property cannot be established by proof of such admissions alone.[91] The fact of delivery must be proved by other evidence than the mere declarations of the donor to a person not connected with the transaction.[92]

b. Of Donee. Gifts *causa mortis* cannot be proved by mere hearsay declarations of the alleged donee.[93]

7. Presumption Arising From Mortal Illness. The fact that the donor was in his last illness at the time of making a gift raises a presumption that it was intended as a gift *causa mortis*,[94] but this presumption is not controlling and may be rebutted.[95]

L. Questions of Law and Fact. The question whether the facts attending a gift show such a confidential or fiduciary relation between donor and donee as will give rise to a presumption of fraud or undue influence is a question of law for the court.[96] In cases of this sort all questions regarding the fact of delivery as well as of the capacity in which the person who receives the property holds it are questions of fact for the determination of the jury under the instructions

Relations between parties.— The only matter in controversy upon the second trial of an action of replevin being whether plaintiff's intestate delivered a note and mortgage to one B as a gift *causa mortis* to defendant, evidence as to the relations existing between B and the intestate, and how far she had been dependent on the bounty of the latter, is inadmissible, although upon the former trial B had been a real party in interest, as claiming to be the owner of other property for which the action was brought, but which was in no way involved on the second trial. Barker *v.* Buhre, 61 Wis. 487, 21 N. W. 613.

Sufficiency of evidence.— Testimony of a witness that he heard decedent say, in her last illness, that she wanted to know whether it was necessary to make a will, and that her husband "had so much trouble with her she wished to will him her property," etc., was insufficient evidence of a gift *causa mortis*, although it appeared that the husband, on making inquiry, was told that a will was not necessary. Meyer *v.* Shaney, 1 Ohio Dec. (Reprint) 98, 2 West. L. J. 183.

89. Darland *v.* Taylor, 52 Iowa 503, 3 N. W. 510, 35 Am. Rep. 285; Smith *v.* Maine, 25 Barb. (N. Y.) 33.

While a letter addressed to the donee by the donor may not alone be sufficient to establish a gift, it is competent as corroborating evidence that the gift was consummated by a delivery of the property. Ridden *v.* Thrall, 125 N. Y. 572, 26 N. E. 627, 21 Am. St. Rep. 758, 11 L. R. A. 684.

90. Kenistons *v.* Sceva, 54 N. H. 24.

91. Rockwood *v.* Wiggin, 16 Gray (Mass.) 402.

92. Hebb *v.* Hebb, 5 Gill (Md.) 506; Rockwood *v.* Wiggin, 16 Gray (Mass.) 402.

93. Buecker *v.* Carr, 60 N. J. Eq. 300, 47 Atl. 34.

While of course the self-servient declarations of the donee are not admissible to prove the gift, yet where an attempt has been made to show that he never claimed the property until after the death of the donor, they may be admitted in rebuttal. Thomas *v.* Lewis, 89 Va. 1, 15 S. E. 389, 37 Am. St. Rep. 848, 18 L. R. A. 170.

94. *California.*— Knight *v.* Tripp, 121 Cal. 674, 54 Pac. 267.

New York.— Merchant *v.* Merchant, 2 Bradf. Surr. 432; Delmotte *v.* Taylor, 1 Redf. Surr. 417.

Tennessee.— Sheegog *v.* Perkins, 4 Baxt. 273.

West Virginia.— Seabright *v.* Seabright, 28 W. Va. 412.

Wisconsin.— Henschel *v.* Maurer, 69 Wis. 576, 34 N. W. 926, 2 Am. St. Rep. 757.

See 24 Cent. Dig. tit. "Gifts," § 152.

95. There is no reason either at law or in equity why a person of perfect mental capacity who is sick of mortal illness may not make a perfect and irrevocable gift *inter vivos*. Hatcher *v.* Buford, 60 Ark. 169, 29 S. W. 641, 27 L. R. A. 507; Carty *v.* Connolly, 91 Cal. 15, 27 Pac. 599; Gilligan *v.* Lord, 51 Conn. 562; Wilson *v.* Jourdan, 79 Miss. 133, 29 So. 823.

A gift made with intent that it should take effect immediately and irrevocably and fully executed by a complete and unconditional delivery is a valid gift *inter vivos*, and this is so even though the donor is *in extremis* and dies soon after. Henschel *v.* Maurer, 69 Wis. 576, 34 N. W. 926, 2 Am. St. Rep. 757.

Death is rather the cause or consideration of the gift than the mere occasion of its being made. Meach *v.* Meach, 24 Vt. 591.

96. Frantz *v.* Porter, 132 Cal. 49, 64 Pac. 92.

given by the court, according to the course of the trial, just as other questions of fact are determined.[97]

GILDA MERCATORIA. A mercantile meeting or assembly.[1]

GILDING. A Danish word signifying a castrated animal.[2] (See GELDING.)

GILL. A liquid measure of one-eighth of a quart.[3] (See, generally, WEIGHTS AND MEASURES.)

GILLING TWINE. Twine that is made and used for gilling — such as salmon twine.[4]

GILL-NET. A flat net so suspended in the water that its meshes allow the heads of fish to pass, but catch in the gills when they seek to extricate themselves;[5] a net which catches fish by the gills.[6] (See, generally, FISH AND GAME.)

GIN. A kind of ardent spirits originally manufactured in Holland from rye and malted bigg (barley) and flavored with juniper berries;[7] a spirit made from malt, rye, &c., flavored with juniper berries, turpentine, cardamon seeds, &c.;[8] a kind of malt spirit flavored with the essential oil of juniper;[9] an intoxicating liquor.[10] Also a term used to designate a machine for separating the seeds from

97. Jones *v.* Deyer, 16 Ala. 221; Scollard *v.* Brooks, 170 Mass. 445, 49 N. E. 741; Hunt *v.* Hunt, 119 Mass. 474; Clough *v.* Clough, 117 Mass. 83; Dunn *v.* German-American Bank, 109 Mo. 90, 18 S. W. 1139; Crue *v.* Caldwell, 52 N. J. L. 215, 19 Atl. 188. A man having upon his death-bed delivered to his priest a promissory note of which he was payee for certain purposes alleged, it was for the jury, in a case growing out of the transaction, to decide from all the circumstances the disposition intended by the dying man to be made of the note. Malone *v.* Doyle, 56 Mich. 222, 23 N. W. 26. Where there was evidence that decedent had made a valid gift *causa mortis* of certain books, but there was no evidence that such books were bank pass-books as alleged by defendant, except the statement of a witness, and she was a party in interest, whether there was a valid gift of the pass-book was for the jury. Podmore *v.* South Brooklyn Sav. Inst., 48 N. Y. App. Div. 218, 62 N. Y. Suppl. 961. Where a bond and mortgage are claimed as a gift *causa mortis* and it appears that there was a delivery of the mortgage but there was no evidence of the delivery of the bond, it is a question of fact whether donor intended to give the bond as well as the mortgage. Caufield *v.* Davenport, 75 Hun (N. Y.) 541, 27 N. Y. Suppl. 494.

1. Wharton L. Lex. See Winton *v.* Wilks, 2 Ld. Raym. 1129, 1134 [*citing* Sutton's Hospital Case, 10 Coke 22*b*, 30*a*, 30*b*], where it was said these words "signify a corporation."

2. "A reference to Mr. Webster's Unabridged Dictionary shows the noun gelding, as used in our language, to be synonymous with the word gilding, as used in the Danish language, and, in all probability, its meaning was derived from that word, which signifies a castrated animal, rather than from the word gelding, which is of Icelandish origin, and means castration." Thomas *v.* State, 2 Tex. App. 293, 294.

3. In the United States, 7.219 cubic inches. Standard Dict.

While a gill is less than a quart, an averment in an indictment under the law which makes it an offense to sell liquor to a minor in less quantities than a quart at one time that the defendant sold a gill of liquor to a minor is not good as an averment that he sold less than a quart. Arbintrode *v.* State, 67 Ind. 267, 270, 33 Am. Rep. 86.

4. American Net, etc., Co. *v.* Worthington, 33 Fed. 826, 829, where the court said: "[It] does not mean linen thread, although one of the minor uses of the latter is for gilling."

5. Webster Dict. [*quoted* in State *v.* Lewis, 134 Ind. 250, 252, 33 N. E. 1024, 20 L. R. A. 52].

6. Century Dict. [*quoted* in State *v.* Lewis, 134 Ind. 250, 252, 33 N. E. 1024, 20 L. R. A. 52].

7. Worcester Dict. [*quoted* in Winning *v.* Gow, 32 U. C. Q. B. 528, 534]. *Compare* Gage *v.* Elsey, 10 Q. B. D. 518, 520, 47 J. P. 391, 52 L. J. M. C. 44, 48 L. T. Rep. N. S. 226, 31 Wkly. Rep. 500; Webb *v.* Knight, 2 Q. B. D. 530, 535, 46 L. J. M. C. 264, 36 L. T. Rep. N. S. 791, 26 Wkly. Rep. 14.

Rum, brandy, and gin are different species of spirituous liquors, and the words in and of themselves import them to be spirituous liquors. State *v.* Munger, 15 Vt. 290, 293.

8. Winning *v.* Gow, 32 U. C. Q. B. 528, 534.

Gin and water.— In considering an indictment charging the mixing of cantharides with gin and water, which was objected to on the ground of ambiguity, the court said: "The court, jury and accused, must have known that gin and water is drink. That is the usual acceptation and meaning of those words, and in that sense they must be taken." Madden *v.* State, 1 Kan. 340, 350.

9. Encycl. Britt. [*quoted* in Winning *v.* Gow, 32 U. C. Q. B. 528, 535], where it is said: "The inferior spirit, sold as gin, is said to be flavored with turpentine, and rendered biting to the palate by caustic potash."

10. Snider *v.* State, 81 Ga. 753, 755, 7 S. E. 631, 12 Am. St. Rep. 350. To the same

cotton.[11] In mining, a windlass fixed in the ground, and worked by a horse for the purpose of drawing materials from the mine.[12] (Gin: Regulation and Use of, see Intoxicating Liquors. Taxation of, see Internal Revenue. See also Alcohol; Brandy; Distilled Spirits.)

GINGER. The pungent, spicy rootstock of the tropical plant *Zingiber Officinale*, either whole or pulverized; used in medicine or cookery.[13]

GINGER ALE. A temperance drink prepared from sugar and water, flavored with ginger, and colored.[14]

GIN-HOUSE. A building where cotton is ginned;[15] an edifice which, like a barn, is of a permanent and substantial kind, and is well known in communities where cotton is grown as a building to which seed cotton is carried from the field, and where the seeds are separated by the machine called a "gin" from the lint or wool.[16] (See Gin.)

GINSENG. A plant of the genus *Aralia* (*Pauax*); also, the root of this plant, which is highly valued as a tonic and stimulant by the Chinese.[17] (See, generally, Intoxicating Liquors.)

GIRDLAND. The Saxon name for yard-land.[18]

GIRDLE. The cutting off of a ring of bark around the trunk of the tree.[19]

GIRL. A generic term which embraces female children of all ages, both over and under ten years;[20] a female child;[21] a female child or young woman;[22] a young woman or child;[23] a female under the age of sixteen years.[24] (See Boy; Child; Gender.)

GIST. The main point of a question; the point on which the action rests; the pith of the matter; as a gist of a question.[25] (See Cause; Cause of Action; and, generally, Pleading.)

effect is Com. *v.* Peckham, 2 Gray (Mass.) 514, 515.

11. Century Dict. See Gin-House.

A gin and its band, and the rollers thereof, are not fixtures, and therefore may be removed by the owner of land after the sale thereof. Gresham *v.* Taylor, 51 Ala. 505, 507.

12. Stroud Jud. Dict.

13. Standard Dict.

"Ginger root, unground" as used in a tariff act see German *v.* U. S., 128 Fed. 467, 468.

14. Lincoln Center *v.* Linker, 7 Kan. App. 282, 53 Pac. 787, 788.

15. Givins *v.* State, 40 Fla. 200, 202, 23 So. 850, where it is said not to be in any sense a "storehouse."

16. Stone *v.* State, 63 Ala. 115, 119.

"Cotton house" may be a "gin-house." See 11 Cyc. 295 note 28.

17. Century Dict. See also Wadsworth *v.* Dunnam, 98 Ala. 610, 612, 13 So. 597 [*citing* Carl *v.* State, 87 Ala. 17, 6 So. 118, 4 L. R. A. 380; Intoxicating Liquor Cases, 25 Kan. 701, 37 Am. Rep. 284; Black Intox. Liq. § 8], where the court said: "Ginseng Cordial is not what is generally known as intoxicating liquor, such as whisky, brandy, gin and the like, nor, on the other hand, is it what is generally and properly known as medicine, or as a toilet or culinary article recognized as such in standard authority, . . . such as tincture of gentian, paregoric, bay rum, cologne, essence of lemon, and the like, which, though containing alcohol and capable of producing intoxication, are not intoxicating liquors, bitters or beverages within prohibitory statutes."

18. Stroud Jud. Dict. [*citing* Coke Litt. 5*a*, where it is said that "the Saxons called it *girdland*, and now the *g* is turned to a *y*"].

19. State *v.* Towle, 62 N. H. 373, 374.

20. State *v.* Bill, 8 Rob. (La.) 527, 528.

21. South. J. M. C., etc., Dict. [*quoted* in State *v.* Bill, 8 Rob. (La.) 527, 528].

22. Webster Dict. [*quoted* in State *v.* Bill, 8 Rob. (La.) 527, 528].

23. Walker Dict. [*quoted* in State *v.* Bill, 8 Rob. (La.) 527, 528].

24. St. 50 & 51 Vict. c. 58, § 75.

"Any unmarried girl, being under the age of sixteen, out of the possession of her father." See Reg. *v.* Prince, L. R. 2 C. C. 154, 170, 13 Cox C. C. 138, 44 L. J. M. C. 122, 32 L. T. Rep. N. S. 700, 24 Wkly. Rep. 76.

25. Webster Unabr. Dict. [*quoted* in Hoffman *v.* Knight, 127 Ala. 149, 156, 28 So. 593].

Thus the gist of an action is the cause for which an action will lie; the ground or foundation of a suit (Kitson *v.* Farwell, 132 Ill. 327, 338, 23 N. E. 1024 [*quoted* in Beckman *v.* Menge, 82 Ill. App. 228, 230]; Flora First Nat. Bank *v.* Burkett, 101 Ill. 391, 394, 40 Am. Rep. 209), the essential ground or principal subject-matter, without which the action could not be maintained (Jernberg *v.* Mix, 199 Ill. 254, 256, 65 N. E. 242); and there is no cause of action (Kitson *v.* Farwell, 132 Ill. 327, 338, 23 N. E. 1024 [*quoted* in Beckman *v.* Menge, 82 Ill. App. 228, 230]; Flora First Nat. Bank *v.* Burkett, 101 Ill. 391, 394, 40 Am. Rep. 209; Tarbell *v.* Tarbell, 60 Vt. 486, 489, 15 Atl. 104). See also Frazier *v.* Georgia R., etc., Co., 101 Ga. 70, 28 S. E. 684.

GIT. The foundation or ground; the point.[26] (See GIST.)

GIVE.[27] In its strict and primary sense, to confer or transfer without any price or reward; to bestow;[28] to transfer gratuitously, without an equivalent.[29] But the word sometimes has a much broader meaning;[30] and according to the context[31] the word has been construed to be used as meaning to pass from one to another;[32] to deliver;[33] to yield possession of, to deliver over as property in exchange;[34] to supply;[35] to furnish;[36] to furnish with; to afford;[37] to publish;[38] to convey;[39] to pay;[40] to serve;[41] to leave.[42] In connection with other words this verb has often received judicial interpretation; as for instance as used in the following phrases: "Give away";[43] "give and bequeath";[44] "give, bequeath and

In an action for a penalty for failure to satisfy a chattel mortgage on the record, the gist of the action is the failure to satisfy the record after notice in writing. Hoffman *v.* Knight, 127 Ala. 149, 156, 28 So. 593.

"The escape is the gist of the action" see Waytes *v.* Briggs, 5 Mod. 8, 9.

"When malice is not the gist of the action" see *In re* Murphy, 109 Ill. 31, 33.

26. English L. Dict.

Thus "git of the offence" is a term sometimes used as expressing the main or distinguishing point of an offence. State *v.* Gibbons, 4 N. J. L. 45, 60, giving as illustrations: "The *git* of the offence was well stated in that indictment. The *git* of the offence under our statute is challenging to fight a duel with some dangerous weapon."

"The undertaking to carry is the git of the action" see Robinson *v.* Green, 1 Str. 574.

27. Distinguished from "grant" (see Frost *v.* Raymond, 2 Cai. (N. Y.) 188, 194, 2 Am. Dec. 228); from "let and sell" (see Siegel *v.* People, 106 Ill. 89. See also Parkinson *v.* State, 14 Md. 184, 190, 74 Am. Dec. 522); from "record" (see Asbury Park Bldg., etc., Assoc. *v.* Shepherd, (N. J. Ch. 1901) 50 Atl. 65, 67); from "sell" (see Parkinson *v.* State, 14 Md. 184, 197, 74 Am. Dec. 522).

As used in a will it is a word of the largest signification and is as applicable to real as to personal estate. Hooper *v.* Hooper, 9 Cush. (Mass.) 122, 129.

The word may imply a contract (see Norton *v.* Woodruff, 2 N. Y. 153, 155), or a personal warranty (see Grannis *v.* Clark, 8 Cow. (N. Y.) 36, 40).

Immediate gift imported.— The operative word "give," as used in a written instrument, is appropriate to either a deed or will, but, standing alone, would seem to indicate a direct and immediate gift, rather than a testamentary bequest. Ferguson *v.* Ferguson, 27 Tex. 339, 344.

28. Com. *v.* Davis, 12 Bush (Ky.) 240, 241.

29. Parkinson *v.* State, 14 Md. 184, 197, 74 Am. Dec. 522; Hainer *v.* Sidway, 57 Hun (N. Y.) 229, 232, 11 N. Y. Suppl. 182; Anderson L. Dict.; Black L. Dict. See also Pierson *v.* Armstrong, 1 Iowa 282, 292, 63 Am. Dec. 440.

30. Galloway *v.* Jenkins, 63 N. C. 147, 154.

"The word 'give' does not always signify a mere gratuitous act; at all events it is not one of those words which have a fixed and unalterable meaning. In business affairs we frequently find embodied in propositions from one contracting party to another such expressions as, 'I will give you such a price for such an article,' or 'I will give you so much rent for such a parcel of land;' in these cases, and very many like them, no one would take the meaning of 'give' to be that the person making the proposal meant to do what he proposed out of mere generosity." Johnston *v.* Griest, 85 Ind. 503, 504.

31. Smock *v.* Smock, 37 Mo. App. 56, 67 (where it is said: "This word must be taken in the connection in which it was used"); Smith *v.* Burnet, 35 N. J. Eq. 314, 324. See also cases cited *infra*, note 32 *et seq.*

32. Galloway *v.* Jenkins, 63 N. C. 147, 154, the idea of its being done for or without a consideration not being involved. And see Krider *v.* Lafferty, 1 Whart. (Pa.) 303, 315, 316.

33. Polite *v.* Bero, 63 S. C. 209, 211, 41 S. E. 305.

34. Webster Dict. [*quoted* in Smock *v.* Smock, 37 Mo. App. 56, 67].

Transfer of title may not be imported by the use of this word. Smith *v.* Burnet, 35 N. J. Eq. 314, 324.

35. Daugherty *v.* Rogers, 119 Ind. 254, 262, 20 N. E. 779, 3 L. R. A. 847 [*citing* Anderson L. Dict.; Encycl. Dict.]; Com. *v.* Davis, 12 Bush (Ky.) 240, 241.

36. Com. *v.* Davis, 12 Bush (Ky.) 240, 241.

37. Daugherty *v.* Rogers, 119 Ind. 254, 262, 20 N. E. 779, 3 L. R. A. 847 [*citing* Anderson L. Dict.; Encycl. Dict.].

38. *In re* Devlin, 7 Fed. Cas. No. 3,841, 1 Ben. 335.

39. Carter *v.* Alexander, 71 Mo. 585, 588, as when used with respect to real estate.

40. Carter *v.* Alexander, 71 Mo. 585, 588.

41. *In re* Devlin, 7 Fed. Cas. No. 3,841, 1 Ben. 335.

42. Especially when used in a will without qualifying or restraining words. Carr *v.* Effinger, 78 Va. 197, 203.

43. Walton *v.* State, 62 Ala. 197, 200; State *v.* Ball, 27 Nebr. 601, 603, 43 N. W. 398; Campbell *v.* Schlesinger, 48 Hun (N. Y.) 428, 430, 1 N. Y. Suppl. 220; O'Neil *v.* Vermont, 144 U. S. 323, 325, 12 S. Ct. 693, 36 L. ed. 450.

44. "Give and bequeath," as used in a testamentary paper, are words which import a benefit in point of right, to take effect upon the decease of the testator and proof of the will. Eldridge *v.* Eldridge, 9 Cush. (Mass.) 516, 519 [*quoted* in Dale *v.* White, 33 Conn. 294, 297]. They import an absolute gift, to

convey";[45] "give and grant";[46] "give, grant and convey";[47] "give, devise and bequeath";[48] "giving time";[49] "giving way";[50] etc.[51] (See Convey; Deeds; Do; Gifts; Wills.)

Glanders. A term used to indicate a certain contagious or infectious disease of the mucous membrane of the nostrils of a horse, with a vitiated secretion.[52]

take effect upon the decease of the testator. Smith *v.* Jackman, 115 Mich. 192, 194, 73 N. W. 228. The words are strictly more applicable to personal than real estate. Delafield *v.* Barlow, 107 N. Y. 535, 540, 14 N. E. 498. The word "devise" should be added to the other words if real estate is also included in the gift. Scholle *v.* Scholle, 113 N. Y. 261, 272, 21 N. E. 84. But see *In re* Barrett, 111 Iowa 570, 571, 82 N. W. 998. See also Bowker *v.* Bowker, 9 Cush. (Mass.) 519; Jones *v.* Jones, 46 N. J. Eq. 554, 556, 21 Atl. 950; O'Toole *v.* Browne, 3 E. & B. 572, 584, 77 E. C. L. 572.

45. **"Give, bequeath, and convey,"** as used in an instrument reciting that in consideration of past services, etc., the person executing the instrument does hereby "give, bequeath and convey" certain real estate, is sufficient to constitute the instrument a conveyance, and not a will. Campbell *v.* Morgan, 68 Hun (N. Y.) 490, 493, 22 N. Y. Suppl. 1001.

46. **"Give and grant"** are appropriate words used in conveyancing. Cheney *v.* Watkins, 1 Harr. & J. (Md.) 527, 532, 2 Am. Dec. 530. "In old conveyances 'give and grant' is used in place of *dedi et concessi*." Galloway *v.* Jenkins, 63 N. C. 147, 154. "'Give and grant' enure sometimes as a grant, sometimes as a covenant, sometimes as a release; and must be taken in that sense which will best support the intent of the party." Scudamore *v.* Crossing, 1 Mod. 175, 178. "Give and grant a rent-charge" see Taylor *v.* Vale, 1 Cro. Eliz. 166.

47. **"Give, grant and convey"** in conveyancing, are apt and comprehensive words used to convey legal title, and efficient in law to transfer the title. Young *v.* Ringo, 1 T. B. Mon. (Ky.) 30, 31. See also Bates *v.* Foster, 59 Me. 157, 159, 8 Am. Rep. 406; Harrison *v.* Austin, 3 Mod. 237.

48. Bunch *v.* Hurst, 3 Desauss (S. C.) 273, 287, 5 Am. Dec. 551.

49. **"Giving time"** means extending the period at which, by the contract between them, the principal debtor was originally liable to pay the creditor and extending it by a new and valid contract between the creditor and the principal debtor, to which the surety does not assent. Howell *v.* Jones, 1 C. M. & R. 97, 107, 3 L. J. Exch. 255, 4 Tyrw. 548 [*quoted* in Shipman *v.* Kelley, 9 N. Y. App. Div. 316, 324, 41 N. Y. Suppl. 328]. The term may embrace both past and future credit, and may be applied to whichever may be found to exist. Edwards *v.* Jevons, 8 C. B. 436, 445, 14 Jur. 131, 19 L. J. C. P. 50, 65 E. C. L. 436. See also 9 Cyc. 319 note 70, 338; 2 Cyc. 461 note 9. "Time given" as used in a contract see California Powder Works *v.* Blue Text Gold Mines, (Cal. 1899) 22 Pac. 391, 392 [*citing* Hills *v.* Ohilg, 63 Cal. 104] See Credit.

50. **"Giving way"** within the meaning of maritime regulations requiring steam vessels to give way to sailing vessels is a term which does not mean the putting the helm to port under all circumstances, but porting or starboarding the helm as the exigencies may require. Lockwood *v.* Lashell, 19 Pa. St. 344, 350.

51. **"Give."**—"Covenant and agree to give" (see Roberts *v.* Roberts, 22 Wend. (N. Y.) 140, 146); "give a deed of" (see Ketchum *v.* Evertson, 13 Johns. (N. Y.) 359, 363, 7 Am. Dec. 384); "give information, directly or indirectly" (see U. S. *v.* Whittier, 28 Fed. Cas. No. 16,688, 5 Dill. 35); "give other security" (see Governor *v.* Organ, 5 Humphr. (Tenn.) 161, 162); "give, ratify and confirm" (see Cole *v.* Rawlinson, 2 Ld. Raym. 831, 832).

"Given."—"Allotted for, and given to" (see Rutherford *v.* Greene, 2 Wheat. (U. S.) 196, 198, 4 L. ed. 218); "credit given" (see Broom *v.* Batchelor, 1 H. & N. 255, 264, 25 L. J. Exch. 299, 4 Wkly. Rep. 712); "duly given or made" (see Los Angeles *v.* Mellus, 59 Cal. 444, 451); "given bail" (see Tex. Code Cr. Proc. (1895) art. 307); "given for a patent right" (see Hunter *v.* Henninger, 93 Pa. St. 373, 375 [*quoted* in Brown *v.* Pegram, 125 Fed. 577, 581, 60 C. C. A. 383]); "given in parochial relief" (see Davies *v.* Harvey, L. R. 9 Q. B. 433, 439, 43 L. J. M. C. 121, 30 L. T. Rep. N. S. 629, 22 Wkly. Rep. 733); "given in the absence of the defendant" (see Bartow *v.* Smyth, 14 N. J. L. 286, 287); "given or devised by such entailment" (see Den *v.* Dubois, 16 N. J. L. 285, 292); "given to, and be vested in" (see Ivins' Appeal, 106 Pa. St. 176, 183, 51 Am. Rep. 516); "hath given" (see Den *v.* Gifford, 1 N. J. L. 197, 198); "have given" (see Lord *v.* New York Ins. Co., 95 Tex. 216, 222, 66 S. W. 290, 93 Am. St. Rep. 827); "hereby given" (see Bonner *v.* Bonner, 13 Ves. Jr. 379, 381, 33 Eng. Reprint 336); "hereinbefore given" (see Daly *v.* James, 8 Wheat. (U. S.) 495, 538, 5 L. ed. 670); "judgments . . . being given" (see Schuster *v.* Rader, 13 Colo. 329, 334, 22 Pac. 505); "then to be given" (see Loving *v.* Hunter, 8 Yerg. (Tenn.) 4, 31); "there is given" (see Meehan *v.* Jones, 70 Fed. 453, 455).

"Giving."—"Giving notice" (see City Nat. Bank *v.* Williams, 122 Mass. 534, 535); "giving out of the machinery" (see Beard *v.* Skeldon, 113 Ill. 584, 588 [*affirming* 13 Ill. App. 54]).

"Gave."—"Gave the engineer the signals" (see Cambron *v.* Omaha, etc., R. Co., 165 Mo. 543, 65 S. W. 745); "gave written notice to the indorser" (see O'Neil *v.* Dickson, 11 Ind. 253, 254).

52. Wirth *v.* State, 63 Wis. 51, 55, 22 N. W. 860 [*citing* Oliphant Horses 82], where

(See Contagion; Contagious; Contagious Disease; Disease; Farcy; Horse; and, generally, Animals.[53])

GLARING. A word sometimes used synonymously with "open" and "manifest."[54]

GLASS. A hard, brittle, translucent, and commonly transparent substance, white or colored, having a conchoidal fracture; and made by fusing together sand or silica with lime, potash, soda, or lead oxide,[55] by melting mixtures of sand and alkali in crucibles.[56] (See Cut-Glass Tumblers; and, generally, Customs Duties; Carriers.)

GLAZED. Covered with a glaze or glassy coating.[57]

GLEBE. The dowry of a church.[58]

GLONOIN. A name given to concentrated nitro-glycerine.[59] (See, generally, Explosives.)

GLOSSA VIPERINA EST QUÆ CORRODIT VISCERA TEXTUS. A maxim meaning "That is a poisonous gloss which eats out the vitals of the text."[60]

GLOVE CONTEST. A mere exhibition of skill in sparring with gloves, not calculated to do great bodily injury.[61] (See, generally, Prize-Fighting.)

GLUCOSE. A substance which is commercially synonymous with "corn syrup."[62] (See Corn.)

GO. To move, to pass, to proceed;[63] to descend.[64] And the term is some-

it is said that the disease is "certainly contagious."

53. "Glandered horses" see Wharton L. Lex.; 41 & 42 Vict. c. 74; 32 & 33 Vict. c. 70, §§ 57–58.

54. Chicago, etc., R. Co. *v.* Lee, 29 Ind. App. 480, 64 N. E. 675, 679, where it is said: "It is . . . a stronger word than 'apparent.'"

55. Webster Int. Dict.

56. Benjamin *v.* Chambers, etc., Glass Co., 59 Fed. 151, 155, 8 C. C. A. 6, where the court said: "For many years the crucibles have consisted of large tanks; and the contents been subjected to continuous heat on the surface. As the ingredients melt they gradually form a mixture of glass more or less perfect, sand, etc."

"Glass" as used in a carrier's act would include such articles as smelling bottles and glass flagons, though some ornaments were superadded. Bernstein *v.* Baxendale, 6 C. B. N. S. 251, 260, 5 Jur. N. S. 1056, 28 L. J. C. P. 265, 7 Wkly. Rep. 396, 95 E. C. L. 251.

"Glass" used in connection with certain other words see "glass beads, loose, unthreaded, or unstrung" (*In re* Steiner, 66 Fed. 726, 727); "glass tumblers plain, moulded, or pressed, 'not cut or punted'" (Binns *v.* Lawrence, 12 How. (U. S.) 9, 18, 13 L. ed. 871); "glass — with care — this side up" (Hastings *v.* Pepper, 11 Pick. (Mass.) 41, 43); "manufactures, articles, vessels, and wares of glass" (Roosevelt *v.* Maxwell, 20 Fed. Cas. No. 12,034, 3 Blatchf. 391, 394); "pebbles for spectacles and all manufactures of which glass shall be a component material" (Arthur *v.* Sussfield, 96 U. S. 128, 130, 24 L. ed. 772); "window glass" (U. S. *v.* Bache, 59 Fed. 762, 764, 8 C. C. A. 258).

"Race-glasses" see Glover *v.* London, etc., R. Co., L. R. 3 Q. B. 25, 29, 37 L. J. Q. B. 57, 17 L. T. Rep. N. S. 139.

"Glass works," as defined by statute, is "any premises in which the manufacture of glass is carried on." Mass. Rev. Laws (1902), p. 916, c. 106, § 8.

57. Standard Dict.

"Magnesic brick, glazed," and not known in commerce as "fire-brick" see Fleming *v.* U. S., 124 Fed. 1014, 1015.

58. Pawlet *v.* Clark, 9 Cranch (U. S.) 292, 329, 3 L. ed. 735. See Claughton *v.* Macnaughton, 2 Munf. (Va.) 513, 515.

As defined by statute the term includes any manor, land, or tenement forming the endowment or part of the endowment of a benefice. St. 51 & 52 Vict. c. 20, § 12. See also *In re* Randell, 38 Ch. D. 213, 216, 57 L. J. Ch. 899, 58 L. T. Rep. N. S. 626, 36 Wkly. Rep. 543; 39 Vict. c. 11, § 2; 38 & 39 Vict. c. 42, § 8; 33 & 34 Vict. c. 112, § 2; 31 & 32 Vict. c. 96, § 1; 29 & 30 Vict. c. 71, § 2.

"Glebe-house," as defined by statute, is "a house of residence belonging to any benefice [enumerated in the act]." 32 & 33 Vict. c. 42, § 72.

59. Century Dict. And see Sperry *v.* Springfield F. & M. Ins. Co., 26 Fed. 234, 236.

60. Bouvier L. Dict.

Applied in Powlter's Case, 11 Coke 29*a*, 34*a*.

61. State *v.* Olympic Club, 46 La. Ann. 935, 947, 15 So. 190, 24 L. R. A. 452, instead of a contest continued until one of the contestants succumbs from exhaustion or injuries received, thus distinguishing it from a "prize-fight."

62. People *v.* Harris, 135 Mich. 136, 139, 97 N. W. 402, where it is said: "A prejudice exists against the term 'glucose,' because that material can be manufactured from many substances, including sawdust. In Europe it is made mainly of potatoes."

63. Century Dict. [*quoted* in Matter of Hitchins, 43 Misc. (N. Y.) 485, 492, 89 N. Y. Suppl. 472].

64. Ivins' Appeal, 106 Pa. St. 176, 181, 51 Am. Rep. 516 [*citing* Haldeman *v.* Haldeman,

times used as meaning to vest,[65] or to belong.[66] According to the context,[67] the term may mean to run with, or to herd with.[68] In practice, the term means to be dismissed from a court; to issue from a court.[69]

GOAT. See Animals.

GOAT-HAIR GOODS. Fabrics manufactured of cotton and the hair of the angora or other goat; the warp being cotton and the woof being goat's hair.[70]

GOD. See Act of God.

GOD AND MY COUNTRY. The answer made by a prisoner, when arraigned, in answer to the question, "How will you be tried." [71]

GODLY. Pious; Charitable,[72] *q. v.* (See Eleemosynary; and, generally, Charities.)

GOD'S LAW. In England, a term used in statutes in which marriages within certain degrees of consanguinity are prohibited.[73] (See, generally, Marriage.)

GOGEN-STOOL. See Cucking-Stool.

GO HENCE. An expression sometimes used as synonymous with "go home." [74] (See, generally, Judgments.)

GOING BEFORE THE WIND. In navigation, when the wind is free, comes from

40 Pa. St. 29, 35; Gibbons *v.* Fairlamb, 26 Pa. St. 217].

65. Plass *v.* Plass, 121 Cal. 131, 135, 53 Pac. 448 [*citing* Broad *v.* Broad, 40 Cal. 490, 496]. See also *In re* Dunphy, (Cal. 1905) 81 Pac. 315, 317; Matter of Hitchins, 43 Misc. (N. Y.) 485, 492, 89 N. Y. Suppl. 472.

66. Jackson County *v.* Derrick, 117 Ala. 348, 361, 23 So. 193.

67. "Go" used in connection with other words see the following phrases: "Go ahead" (Giles Lithographic, etc., Co. *v.* Chase, 149 Mass. 459, 462, 21 N. E. 765, 14 Am. St. Rep. 439, 4 L. R. A. 480; Brennan *v.* Pennsylvania R. Co., (N. J. Sup. 1905) 62 Atl. 177); "go at large" (Com. *v.* Dow, 10 Metc. (Mass.) 382, 385); "go beyond the contract in search of its meaning" (Gregory *v.* North Pac. Lumbering Co., 15 Oreg. 447, 455, 17 Pac. 143); "go beyond the prison limits" (Randolph *v.* Simon, 29 Kan. 406, 409); "go in evidence" (Protection L. Ins. Co. *v.* Palmer, 81 Ill. 88, 91); "go into close confinement" (Rollins *v.* Dow, 24 Me. 123, 124); "go on, you are all right" (McLaughlin *v.* Pryor, C. & M. 354, 41 E. C. L. 196, 11 L. J. C. P. 169, 4 M. & G. 48, 50, 43 E. C. L. 34, 4 Scott N. R. 655); and "go short" (Angus *v.* Noble, 73 Conn. 56, 61, 46 Atl. 278).

Going to pasture.— The turnpike act, exempting from tolls horses and cattle "going to or returning from pasture" and horses attending cattle returning from pasture, does not include a horse ridden by the owner of the cattle at pasture in order to fetch them therefrom. Harrison *v.* Brough, 6 T. R. 706, 707.

"Gone to sea" see Jacobs *v.* Featherstone, 6 Watts & S. (Pa.) 346, 349.

68. Rex *v.* Nacton, 3 B. & Ad. 543, 547, 548, 23 E. C. L. 242; Rex *v.* Thornham, 6 B. & C. 733, 737, 13 E. C. L. 328.

69. Black L. Dict. As that "a mandamus must go" (see Rex *v.* Ingram, 1 W. Bl. 50): "the mandamus ought not to go" (see Rex *v.* Pembrokeshire, 2 East 213, 220).

"Let a supersedeas go, quia erronice" see Coot *v.* Lynch, 5 Mod. 421.

70. Arthur *v.* Butterfield, 125 U. S. 70, 72, 8 S. Ct. 714, 31 L. ed. 643, where it is said their chief use is for women's dresses, and they are known in the trade under such specific names as "brilliantines," "lustrines," "alpacas," and "mohairs." They are composed of about eighty per cent goat's hair and twenty per cent cotton.

71. Black L. Dict. See also 11 Cyc. 616 note 10.

72. Income Tax Com'rs *v.* Pemsel, [1891] A. C. 531, 558, 559, 55 J. P. 805, 61 L. J. Q. B. 265, 65 L. T. Rep. N. S. 621, where Lord Watson said that the terms "'godly' and 'pious' as applied to trusts or uses, had, in early times much the same significance in Scotland as in England. Their meaning was not limited to objects of a religious or eleemosynary character, but embraced all objects which a well-disposed person might promote from motives of philanthropy."

"Instruct, teach, . . . in all Godly learning and knowledge" see Baker *v.* Lee, 8 H. L. Cas. 495, 505, 7 Jur. N. S. 1, 30 L. J. Ch. 625, 11 Eng. Reprint 522.

"Godly preachers" was a term applied in England to "the different classes of Protestant dissenters from the Established Church." Atty.-Gen. *v.* Shore, 9 Cl. & F. 355, 558, 572, 9 Eng. Reprint 450, 11 Sim. 592, 34 Eng. Ch. 592. See also Atty.-Gen. *v.* Clifton, 32 Beav. 596, 597, 9 Jur. N. S. 939, 9 L. T. Rep. N. S. 136, 55 Eng. Reprint 234; Drummond *v.* Atty.-Gen., 2 H. L. Cas. 837, 857, 14 Jur. 137, 9 Eng. Reprint 1312; Atty.-Gen. *v.* Pearson, 3 Meriv. 353, 410, 17 Rev. Rep. 100, 36 Eng. Reprint 135.

73. Stroud Jud. Dict. See also Reg. *v.* Chedwick, 11 Q. B. 173, 180, 2 Cox C. C. 381, 12 Jur. 174, 17 L. J. M. C. 33, 63 E. C. L. 173 [*citing* Hill *v.* Good, Vaugh. 302].

74. As used in a judgment that the defendant go hence without day, and recover his costs, etc., "go hence" is synonymous with and has the same force as "go home" in respect to constituting the judgment a final judgment for the purposes of review in the supreme court. Hiatt *v.* Kinkaid, 40 Nebr. 178, 185, 58 N. W. 700.

the stern, and the ship's yards are braced square across.[75] (See Going Free; Going Off Large.)

GOING BUSINESS or ESTABLISHMENT. A term applied to a corporation which is still prosecuting its business with the prospect and expectation of continuing to do so, even though its assets are insufficient to pay its debts.[76]

GOING CONCERN. Some enterprise which is being carried on as a whole, and with some particular object in view;[77] a concern which is solvent.[78]

GOING ESTABLISHMENT. See Going Concern.

GOING FREE. In navigation, a term applied to a vessel when she has a fair wind, and her yards braced in.[79] (See, generally, Admiralty; Shipping.)

GOING OFF LARGE. In navigation, having the wind free on either tack;[80] when the wind blows from some point abaft the beam, or over the quarter of the ship.[81] (See Going Before the Wind;[82] Going Free.)

GOING PRICE. As applied to the sale of a commodity the market value of the same at the place and time of delivery.[83]

GOING RATE. As to freight, like "market price" for produce, a fixed and established price for the time.[84]

GOING VALUE. The value which arises from having an established going business.[85]

GOLD.[86] A metallic element having a characteristic yellow color very heavy, very soft, and the most ductile and malleable of metals.[87] Also one form of that medium of exchange by the instrumentality of which a traffic in commodities is effected.[88] (See Bank-Notes; Coin; Currency; Current Money; Digging Gold; Gold and Silver Coin; and, generally, Payment.)

75. Hall *v.* The Buffalo, 11 Fed. Cas. No. 5,927.

76. Corey *v.* Wadsworth, 99 Ala. 68, 78, 11 So. 350, 42 Am. St. Rep. 29, 23 L. R. A. 618.

77. Oliver *v.* Lansing, 59 Nebr. 219, 227, 80 N. W. 529.

78. Polhemus *v.* Fitchburg R. Co., 123 N. Y. 502, 507, 26 N. E. 31.

When applied to a corporation the term means that it continues to transact its ordinary business; the corporate life continues and the power of the directors is unaltered, even though the corporation is embarrassed or even insolvent. White, etc., Mfg. Co. *v.* Pettes Importing Co., 30 Fed. 864, 865. See also Going Business.

79. The Queen Elizabeth, 100 Fed. 874, 876 [*citing* Seaman's Manual].

80. Ward *v.* The Fashion, 29 Fed. Cas. No. 17,154, 6 McLean 152.

81. Hall *v.* The Buffalo, 11 Fed. Cas. No. 5,927.

82. Distinguished from "[going] before the wind."—"There is, in nautical technicality, a difference between 'going off large' and going 'before the wind.'" Hall *v.* The Buffalo, 11 Fed. Cas. No. 5,927.

83. Kelsea *v.* Haines, 41 N. H. 246, 254.

84. Barrett *v.* The Waconsta, 2 Fed. Cas. No. 1,050, 1 Flipp. 517, where the court said: "A rate for freight. It cannot be established by a mere offer of a shipper or demand of a carrier. It can only be done by an actual contract having been made in the port, and the last one so made for the same port, would fix the rate."

85. So applied to a waterworks corporation employed to furnish water to a city and its inhabitants. Cedar Rapids Water Co. *v.* Cedar Rapids, 118 Iowa 234, 262, 91 N. W. 1081, where the court said: "While [the term is] not the exact equivalent of 'good will,' as applied to ordinary business, it is of a somewhat similar nature, and attaches to the business, rather than to the property employed in such business. The fact that the business is established is, of course, a material fact in ascertaining the value of the plant, and especially is this true where the property is being estimated for the purposes of sale or condemnation; but as a basis for estimating profits its significance is less apparent."

86. Gold and silver as standards of value see Wilson *v.* Morgan, 4 Rob. (N. Y.) 58, 68.

87. Standard Dict.

Pure gold is not always implied by the use of the term. Young *v.* Cook, 3 Ex. D. 101, 106, 47 L. J. M. C. 28, 37 L. T. Rep. N. S. 536, 26 Wkly. Rep. 100.

88. Gist *v.* Alexander, 15 Rich. (S. C.) 50, 51.

Used in connection with other words see the following phrases: "For weighing gold" (Knox *v.* Lee, 12 Wall. (U. S.) 457, 601, 20 L. ed. 287); "gold coins, to wit" (Knox *v.* Lee, 12 Wall. (U. S.) 457, 593, 20 L. ed. 287); "gold dollars" (Hittson *v.* Davenport, 4 Colo. 169, 175; Chrysler *v.* Renois, 43 N. Y. 209, 213); "gold or silver lawful money of the United States" (Rankin *v.* Demott, 61 Pa. St. 263, 264); "in gold coin" (Woodruff *v.* State, 66 Miss. 298, 309, 6 So. 235 [*affirmed* in 162 U. S. 291, 306, 16 S. Ct. 820, 40 L. ed. 973]); "in gold coin of the United States of America, of the present standard weight and fineness" (Judson *v.* Bessemer, 87 Ala. 240, 244, 6 So. 267, 4 L. R. A. 742); "in gold and specie" (Independent Ins. Co. *v.* Thomas, 104 Mass. 192); "in silver or gold dollars" (Wilson *v.* Morgan, 4 Rob. (N. Y.) 58, 68); "in United States gold

GONG. A stationary bell in the form of a shallow bowl, which is struck with a hammer.[89]

GOOD. A word very comprehensive in its meanings.[90] As a noun,[91] welfare, prosperity, happiness.[92] As an adjective,[93] according to the context and with due regard to the connection in which and the circumstances under which it is used the word may mean adapted to the exigency of the case;[94] EFFECTUAL,[95] *q. v.*; lawful;[96] legal;[97] orderly;[98] proper;[99] reasonable;[1] reasonably sound and suitable;[2] sufficient;[3] legally sufficient;[4] suitable;[5] unobjectionable;[6] valid, valuable;[7] or whatever promotes the general welfare of society.[8] Applied to physical condition, having qualities that are useful, or that can be made productive of comfort, satisfaction, and enjoyment.[9] Applied to commercial status, responsible;[10] solvent;[11] able to pay an amount specified.[12] Applied to commercial paper, paper of a value corresponding with its terms;[13] importing that the paper is genuine,[14] collectible,[15] that the maker is solvent,[16] or that the amount can be collected by due course of law.[17] Applied to a certificate of entry upon real

coin" (Belford *v.* Woodward, 158 Ill. 122, 127, 41 N. E. 1097, 29 L. R. A. 593); "pure gold" (Dewing *v.* Sears, 11 Wall. (U. S.) 379, 380, 20 L. ed. 189 [*quoted* in Phillips *v.* Dugan, 21 Ohio St. 466, 471, 8 Am. Rep. 66]); "four ounces, two pennyweights and twelve grains of pure gold, in coined money" (see Sears *v.* Dewing, 14 Allen (Mass.) 413, 416 [*quoted* in Cushing *v.* Wells, 98 Mass. 550, 552]).

Silver as used in the statute punishing counterfeiting and diminishing value of current coin means any piece of gold or silver of which one of these metals is the principal component part, and which passes as money in the United States, either by law or usage, whether the same be of the coinage of the United States or of any foreign country. Tex. Pen. Code (1895), art. 564.

89. Century Dict.

"The words, 'a gong carried by the frame of a bicycle or other velocipede,' are not fairly applicable to a gong carried upon one end of a lever attached to the frame of a bicycle." Nutter *v.* Mossberg, 128 Fed. 55, 57.

90. Parks *v.* O'Connor, 70 Tex. 377, 390, 8 S. W. 104.

91. As a noun it also means "a valuable possession or piece of property." Webster Dict. [*quoted* in St. Joseph Hydraulic Co. *v.* Wilson, 133 Ind. 465, 472, 33 N. E. 113]. But the term is rarely used in this sense in the singular. Burrill L. Dict. [*citing* 2 Blackstone Comm. 424, 425]. See GOODS.

92. Anderson L. Dict. See also Lowell *v.* Boston, 111 Mass. 454, 470, 15 Am. Rep. 39.

93. Distinguished from "fine" in Hutchison *v.* Bowker, 9 L. J. Exch. 24, 25, 5 M. & W. 535.

94. Parker *v.* Bridgeport Ins. Co., 10 Gray (Mass.) 302, 304.

95. Burrill L. Dict.

96. Graham *v.* Adams, 5 Ark. 261, 262.

97. Wheeler *v.* Pullman Iron, etc., Co., 143 Ill. 197, 207, 32 N. E. 420, 17 L. R. A. 818.

98. Anderson L. Dict.

99. Parker *v.* Bridgeport Ins. Co., 10 Gray (Mass.) 302, 304.

1. Cyclopedic L. Dict.

2. Cyclopedic L. Dict. See also Bloomingdale *v.* Du Rell, 1 Ida. 33, 41.

3. Atchison, etc., R. Co. *v.* Yates, 21 Kan. 613, 620; Atchison, etc., R. Co. *v.* Jones, 20 Kan. 527, 529; Kendall *v.* Briley, 86 N. C. 56, 58; McClellan *v.* Harris, 7 S. D. 447, 449, 64 N. W. 522.

4. See 9 Cyc. 313.

5. Parker *v.* Bridgeport Ins. Co., 10 Gray (Mass.) 302, 304.

6. Burrill L. Dict.

7. Anderson L. Dict. See Emerson *v.* Knapp, 75 Mo. App. 92, 97; Sager *v.* Summers, 49 Nebr. 459, 461, 68 N. W. 614. And see 9 Cyc. 311, 312.

8. Anderson L. Dict.

9. Standard Dict.

As used in the words "good health," in an insurance policy, "the epithet 'good' is comparative. It does not require absolute perfection." Peacock *v.* New York L. Ins. Co., 20 N. Y. 293, 296.

Applied to cattle bought for purposes of breeding and sale, the term imports freedom from existing disease. Parks *v.* O'Connor, 70 Tex. 377, 389, 390, 8 S. W. 104, construing the term "good and merchantable cattle."

10. See Fairmont Coal Co. *v.* Jones, etc., Co., 134 Fed. 711, 714, 67 C. C. A. 265.

11. "Solvent" defined see Marsh *v.* Dunckel, 25 Hun (N. Y.) 167, 170.

12. Weil *v.* Schwartz, 21 Mo. App. 372, 380. See also Einstein *v.* Marshall, 58 Ala. 153, 164, 29 Am. Rep. 729.

13. Black L. Dict. See also Warden *v.* Whitall, 1 N. J. L. 84.

14. Com. *v.* Stone, 4 Metc. (Mass.) 43, 48.

15. Cowles *v.* Pick, 55 Conn. 251, 253, 10 Atl. 569, 3 Am. St. Rep. 44; Marsh *v.* Day, 18 Pick. (Mass.) 321, 322; Du Flon *v.* Powers, 14 Abb. Pr. N. S. (N. Y.) 391, 395. See also Polk *v.* Frash, 61 Ind. 206, 210, 28 Am. Rep. 669; Moakley *v.* Riggs, 19 Johns. (N. Y.) 69, 71, 10 Am. Dec. 196; Dana *v.* Conant, 30 Vt. 246, 253.

16. Weil *v.* Schwartz, 21 Mo. App. 372, 380; Cook *v.* Nathan, 16 Barb. (N. Y.) 342, 344; Curtis *v.* Smallman, 14 Wend. (N. Y.) 231, 232; Weeks *v.* Burton, 7 Vt. 67, 71 [*distinguishing* Barrett *v.* Hall, 1 Aik. (Vt.) 269, "where the word 'good' was made use of as applicable to an article of merchandise. As applied to a note, it has a different meaning"].

17. Weil *v.* Schwartz, 21 Mo. App. 372, 380.

estate, a certificate which is good in law in contradistinction to such as are deemed fraudulent and void.[18] Applied to a mortgage, adequate or available as a security upon which the amount could be realized.[19] In pleading a technical term used to express soundness or validity.[20] The word is often used in connection with other words;[21] and among the many phrases in which it has been used and been interpreted are the following: "Good and collectible";[22] "good and lawful";[23] "good and marketable";[24] "good and merchantable";[25] "good and perfect";[26] "good and satisfactory";[27] "good and serviceable";[28] "good and sufficient";[29]

As applied to a check, the word indicates that the drawer has funds to meet it and that it will be paid on presentation for that purpose. Black L. Dict. See also Mussey *v.* Eagle Bank, 9 Metc. (Mass.) 306, 311; Irving Bank *v.* Wetherald, 36 N. Y. 335, 337, 2 Transcr. App. 120; Farmers', etc., Bank *v.* Butchers', etc., Bank, 28 N. Y. 425, 431; Meads *v.* Merchants' Bank, 25 N. Y. 143, 147, 82 Am. Dec. 331; Willets *v.* Phœnix Bank, 2 Duer (N. Y.) 121, 133; Girard Bank *v.* Penn Tp. Bank, 39 Pa. St. 92, 80 Am. Dec. 507; Espy *v.* Cincinnati First Nat. Bank, 18 Wall. (U. S.) 604, 622, 21 L. ed. 947; Merchants' Nat. Bank *v.* State Nat. Bank, 10 Wall. (U. S.) 604, 648, 19 L. ed. 1008, Swayne, J., delivering the opinion of the court.

18. Howard *v.* Perry, 7 Tex. 259, 268, per Swayne, J.

19. Craig *v.* Ward, 1 Abb. Dec. (N. Y.) 454, 457, 3 Keyes 387, 2 Transcr. App. 281, 3 Abb. Pr. N. S. 235; Du Flon *v.* Powers, 14 Abb. Pr. N. S. (N. Y.) 391, 395.

20. Wharton L. Lex.

21. **Used with other words.**— "Allowed to be good" (see Townsend *v.* Hargraves, 118 Mass. 325, 334); "good barley" (see Hutchison *v.* Bowker, 9 L. J. Exch. 24, 25, 5 M. & W. 535); "good character" (see Leader *v.* Yell, 16 C. B. N. S. 584, 591, 10 Jur. N. S. 731, 33 L. J. M. C. 231, 10 L. T. Rep. N. S. 532, 12 Wkly. Rep. 915, 111 E. C. L. 584); "good coarse salt" (see Goss *v.* Turner, 21 Vt. 437, 441); "good fine wine" (see Hogins *v.* Plympton, 11 Pick. (Mass.) 97, 99); "good certificate" (see Lord *v.* New York L. Ins. Co., 95 Tex. 216, 222, 66 S. W. 290, 93 Am. St. Rep. 827); "good drawer" in the harness (see Colther *v.* Puncheon, 2 D. & R. 10, 1 L. J. K. B. O. S. 2, 16 E. C. L. 65); "good habits" (see Galbraith *v.* Arlington Mut. L. Ins. Co., 12 Bush (Ky.) 29, 39); "good hunter" (see 29 Alb. L. J. 25); "[good] moral character" (see Wieman *v.* Mabee, 45 Mich. 484, 486, 9 N. W. 71, 40 Am. Rep. 477; *In re* O——, 73 Wis. 602, 618, 42 N. W. 221; *In re* Spencer, 22 Fed. Cas. No. 13,234); "good obligations" (see Corbet *v.* Evans, 25 Pa. St. 310, 311); "good opportunity" (see Clouse's Appeal, 192 Pa. St. 108, 109, 43 Atl. 413); "good seed-rice" (see Reiger *v.* Worth Co., 130 N. C. 268, 269, 41 S. E. 377, 89 Am. St. Rep. 868 [*citing* Love *v.* Miller, 104 N. C. 582, 10 S. E. 685]); "good state stocks" (see Griggs *v.* Veghte, 47 N. J. Eq. 179, 188, 19 Atl. 867); "good team" (see Ganson *v.* Madigan, 15 Wis. 144, 153, 82 Am. Dec. 659); "good warranty deed" (see Parker *v.* Parmele, 20 Johns. (N. Y.) 130, 135, 11 Am. Dec. 253; Joslyn *v.* Taylor, 33 Vt. 470, 474); "good white marble" (see Viall *v.* Hubbard, 37 Vt. 114, 117); "good work" (see Carter *v.* Adams, Wright (Ohio) 471, 472; Stillwell, etc., Mfg. Co. *v.* Phelps, 130 U. S. 520, 526, 9 S. Ct. 601, 32 L. ed. 1035).

"**Good sea-boat**" has been defined to be "a vessel that bears the sea firmly, without labouring heavily, or straining her masts and rigging." Falconer Mar. Dict. [*quoted* in Tisdell *v.* Combe, 7 A. & E. 788, 792, 2 Jur. 32, 7 L. J. M. C. 48, 3 N. & P. 29, 1 W. W. & H. 5, 34 E. C. L. 412].

"**Good ship**" has been defined to be a vessel which is seaworthy; and the word "means not only that the vessel is tight, staunch and sufficiently found in stores, &c., but is provided also with a competent master and crew." Small *v.* Gibson, 20 L. J. Q. B. 152, 156 [*citing* Hildyard Treat. Pr. L. Mar. Ins. 95].

"**Good steam saw-mill,**" as ordinarily understood, means "a mill capable of doing such work, and to such amount, as is ordinarily done by good mills" of this character. Fraley *v.* Bentley, 1 Dak. 25, 46 N. W. 506, 508.

22. "**Good and collectible**" see Lemmon *v.* Strong, 55 Conn. 443, 447, 13 Atl. 140; Marsh *v.* Day, 18 Pick. (Mass.) 321, 322; Bull *v.* Bliss, 30 Vt. 127, 131; Wheeler *v.* Lewis, 11 Vt. 255, 267.

23. "**Good and lawful.**"— Leonard *v.* Blair, 59 Ind. 510, 514; Jerry *v.* State, 1 Blackf. (Ind.) 395, 396; State *v.* Price, 11 N. J. L. 203, 209; Withers *v.* Baird, 7 Watts (Pa.) 227, 229, 32 Am. Dec. 754; Bonds *v.* State, Mart. & Y. (Tenn.) 143, 146, 17 Am. Dec. 795; Day *v.* Roberts, 8 Vt. 413.

24. "**Good and marketable**" see Batley *v.* Foerderer, 162 Pa. St. 460, 465, 29 Atl. 868.

25. "**Good and merchantable**" see Goulding *v.* Skinner, 1 Pick. (Mass.) 162, 164; Parks *v.* O'Connor, 70 Tex. 377, 389, 8 S. W. 104.

"**Good, merchantable shipping tax**" see Fitch *v.* Carpenter, 43 Barb. (N. Y.) 40, 42.

26. "**Good and perfect**" see Peckham *v.* Stewart, 97 Cal. 147, 153, 31 Pac. 928; Warner *v.* Middlesex Mut. Assur. Co., 21 Conn. 444, 449; Greenwood *v.* Ligon, 10 Sm. & M. (Miss.) 615, 617, 48 Am. Dec. 775.

27. "**Good and satisfactory**" see Oakey *v.* Cook, 41 N. J. Eq. 350, 363, 7 Atl. 495.

28. "**Good and serviceable**" see Reg. *v.* Epsom Union, 11 Wkly. Rep. 593 [*cited* in Meader *v.* West Cowes Local Bd., [1892] 3 Ch. 18, 27, 61 L. J. Ch. 561, 67 L. T. Rep. N. S. 454, 40 Wkly. Rep. 676].

29. "**Good and sufficient.**"—Louisville, etc., R. Co. *v.* Shepard, 126 Ala. 416, 423, 28 So. 202; Brown *v.* Covillaud, 6 Cal. 566, 573; Whicker *v.* Hurshaw, 159 Ind. 1, 2, 64 N. E. 460; Stoner *v.* Bitters, 151 Ind. 575, 576, 52

"good cause";[30] "good condition";[31] "good conduct";[32] "good excuse";[33] "good for any day or time";[34] "good in part, bad in part," as of an instru-

N. E. 149; Fleming *v.* Harrison, 2 Bibb (Ky.) 171, 174, 4 Am. Dec. 691; State *v.* King, 109 La. 799, 33 So. 776; Tinney *v.* Ashley, 15 Pick. (Mass.) 546, 552, 26 Am. Dec. 620; Summer *v.* Williams, 8 Mass. 162, 181, 5 Am. Dec. 83; Aiken *v.* Sanford, 5 Mass. 494, 499; Armstrong *v.* Andrews, 109 Mich. 537, 539, 67 N. W. 567; Fleckten *v.* Spicer, 63 Minn. 454, 457, 65 N. W. 926; Cogan *v.* Cook, 22 Minn. 137, 138; Greenwood *v.* Ligon, 10 Sm. & M. (Miss.) 615, 617, 48 Am. Dec. 775; Tindall *v.* Conover, 21 N. J. L. 651, 654; Barrow *v.* Bispham, 11 N. J. L. 110, 118; Jacobus *v.* Jacobus, 20 N. J. Eq. 49, 53; New Barbadoes Toll Bridge Co. *v.* Veerland, 4 N. J. Eq. 157, 162; Bowen *v.* Vickers, 2 N. J. Eq. 520, 526, 35 Am. Dec. 516; Story *v.* Conger, 36 N. Y. 673, 675, 3 Transcr. App. 211, 93 Am. Dec. 546; Burwell *v.* Jackson, 9 N. Y. 535, 540; Carpenter *v.* Bailey, 17 Wend. (N. Y.) 244, 246; Harris *v.* Knickerbacker, 5 Wend. (N. Y.) 638, 654; Parker *v.* Parmele, 20 Johns. (N. Y.) 130, 132, 11 Am. Dec. 253; Gazley *v.* Price, 16 Johns. (N. Y.) 267, 269; Jackson *v.* De Long, 9 Johns. (N. Y.) 43, 44, 60 Am. Dec. 253; Clute *v.* Robison, 2 Johns. (N. Y.) 595, 613; Foote *v.* West, 1 Den. (N. Y.) 544, 547; Tremain *v.* Liming, Wright (Ohio) 644; Bash *v.* Cascade Min. Co., 29 Wash. 50, 51, 69 Pac. 402, 70 Pac. 487; Bateman *v.* Johnson, 10 Wis. 1, 2; May *v.* May, 167 U. S. 310, 312, 17 S. Ct. 824, 42 L. ed. 179; The Crimdon, [1900] P. 171, 176, 69 L. J. P. 103, 82 L. T. Rep. N. S. 660, 48 Wkly. Rep. 623; Bridewell Hospital *v.* Fawkner, 8 T. L. R. 637; Chowdry *v.* Roy, 8 Wkly. Rep. 29, 31; Troup *v.* East India Co., 6 Wkly. Rep. 373.

30. **"Good cause."**— *Ex p.* Bull, 42 Cal. 196, 199; Central Pac. R. Co. *v.* Pearson, 35 Cal. 247, 259; Wheeler *v.* Pullman Iron, etc., Co., 143 Ill. 197, 207, 32 N. E. 420, 17 L. R. A. 818; Frazee *v.* Nelson, 179 Mass. 456, 462, 61 N. E. 40, 88 Am. St. Rep. 391; Whelpley *v.* Nash, 46 Mich. 25, 27, 8 N. W. 570; Cummer *v.* Butts, 40 Mich. 322, 325, 29 Am. Dec. 530; Granse *v.* Frings, 46 Minn. 352, 353, 49 N. W. 60; Lord *v.* Hawkins, 39 Minn. 73, 76, 38 N. W. 689; State *v.* Bechdel, 38 Minn. 278, 280, 37 N. W. 338; Green *v.* Goodloe, 7 Mo. 25, 27; *Ex p.* Isbell, 11 Nev. 295, 298; Virginia, etc., R. Co. *v.* Henry, 8 Nev. 165, 176; Virginia, etc., R. Co. *v.* Elliott, 5 Nev. 358, 365; Whitcher *v.* Benton, 50 N. H. 25, 27; Vanwickle *v.* Camden, etc., R., etc., Co., 14 N. J. L. 162, 167; Bennet *v.* Camden, etc., R., etc., Co., 14 N. J. L. 145, 150; Armijo *v.* Abeytia, 5 N. M. 533, 540, 25 Pac. 777; Colton *v.* Raymond, 41 Misc. (N. Y.) 580, 585, 85 N. Y. Suppl. 210; People *v.* Clark, 15 N. Y. Suppl. 79, 80; People *v.* Sessions, 62 How. Pr. (N. Y.) 415, 420; Kendall *v.* Briley, 86 N. C. 56, 58; Mayer *v.* Mayer, 27 Oreg. 133, 134, 39 Pac. 1002; Kerchner *v.* Singletary, 15 S. C. 535, 539; McClellan *v.* Harris, 7 S. D. 447, 449, 64 N. W. 522; Cain *v.* Jennings, 3 Tenn. Ch. 131, 133; Roller *v.* Ried, (Tex. Civ. App. 1894) 24 S. W. 655, 656; Christensen *v.* Anderson, 24 Tex. Civ. App. 345, 347, 58 S. W. 962; Hubbard *v.* Yocum, 30 W. Va. 740, 758, 5 S. E. 867; Ruffner *v.* Love, 24 W. Va. 181, 184, 185; Milwaukee County *v.* Pabst, 64 Wis. 244, 248, 25 N. W. 11; Huxley *v.* West London Extension R. Co., 14 App. Cas. 26, 31, 58 L. J. Q. B. 305, 60 L. T. Rep. N. S. 642, 37 Wkly. Rep. 625 [*cited* in Roberts *v.* Jones, [1891] 2 Q. B. 194, 197, 60 L. J. Q. B. 441]; Bostock *v.* Ramsey Urban Dist. Council, [1900] 2 Q. B. 616, 622, 64 J. P. 660, 69 L. J. Q. B. 945, 83 L. T. Rep. N. S. 358; Forster *v.* Farquhar, [1893] 1 Q. B. 564, 567, 62 L. J. Q. B. 296, 68 L. T. Rep. N. S. 308, 4 Reports 346, 41 Wkly. Rep. 425; Roberts *v.* Jones, [1891] 2 Q. B. 194, 196, 60 L. J. Q. B. 441; Walker *v.* Wilsher, 23 Q. B. D. 335, 337, 54 J. P. 213, 58 L. J. Q. B. 501, 37 Wkly. Rep. 723; Jones *v.* Curling, 13 Q. B. D. 262, 272, 53 L. J. Q. B. 373, 50 L. T. Rep. N. S. 349, 32 Wkly. Rep. 651 [*quoted* in Forster *v.* Farquhar, [1893] 1 Q. B. 564, 568, 62 L. J. Q. B. 296, 68 L. T. Rep. N. S. 308, 4 Reports 346, 41 Wkly. Rep. 425]; Walter *v.* Steinkopff, [1892] 3 Ch. 489, 500, 61 L. J. Ch. 521, 67 L. T. Rep. N. S. 184, 40 Wkly. Rep. 599; *In re* Laxon, [1892] 3 Ch. 31, 36, 62 L. J. Ch. 79, 67 L. T. Rep. N. S. 584, 2 Reports 7, 40 Wkly. Rep. 614; Harnett *v.* Vise, 5 Ex. D. 307, 310, 43 L. T. Rep. N. S. 645, 29 Wkly. Rep. 7; Williams *v.* Ward, 55 L. J. Q. B. 566, 567; Wood *v.* Cox, 5 T. L. R. 272, 273; Barnes *v.* Maltby, 5 T. L. R. 207; Wilts, etc., Dairy Supply Assoc. Bank *v.* Hammond, 5 T. L. R. 196, 197; Beckett *v.* Stiles, 5 T. L. R. 88; Myers *v.* Financial News, 5 T. L. R. 42, 43; Moore *v.* Gill, 4 T. L. R. 738, 739; Macgregor *v.* Clay, 4 T. L. R. 715, 716; Rooke *v.* Czarnikow, 4 T. L. R. 669, 670; Pearman *v.* Burdett-Coutts, 3 T. L. R. 719, 720; Sutcliffe *v.* Smith, 2 T. L. R. 881, 883; Pool *v.* Crawcour, 1 T. L. R. 165; Felix *v.* Gordon, 1 T. L. R. 96, 97; Farquhar *v.* Robertson, 9 Can. L. T. 341, 342.

31. **"Good condition."**— Stuart *v.* La Salle County, 83 Ill. 341, 346, 25 Am. Rep. 397; The Missouri *v.* Webb, 9 Mo. 193, 195; Bath *v.* Houston, etc., R. Co., 34 Tex. Civ. App. 234, 237, 78 S. W. 993; The Oriflamme, 18 Fed. Cas. No. 10,571, 1 Sawy. 176, opinion of Deady, J.

32. **"Good conduct."**— Reed *v.* Reed, 39 Mo. App. 473, 477.

33. **"Good excuse."**— Austine *v.* People, 110 Ill. 248, 254.

34. **"Good for any day or time"** see Boice *v.* Hudson River R. Co., 61 Barb. (N. Y.) 611, 614.

"Good for one continuous passage" see Texas, etc., R. Co. *v.* Powell, 13 Tex. Civ. App. 212, 213, 35 S. W. 841.

"Good for one first-class passage" see Hamilton *v.* New York Cent., etc., R. Co., 51 N. Y. 100, 101; Shedd *v.* Troy, etc., R. Co., 40 Vt. 88, 93.

"Good for this day and train only" see Duling *v.* Philadelphia, etc., R. Co., 66 Md.

ment ;[35] "good order" ;[36] "good order and condition" ;[37] "good repair" ;[38] "good right" ;[39] etc.[40] (Good: Conscience, see EQUITY. Consideration, see CONTRACTS. Discretion, see DISCRETION. Fence, see FENCES. Health, see HEALTH; LIFE INSURANCE; MUTUAL BENEFIT INSURANCE. See also BAD; BONUS; GOOD BEHAVIOR; GOOD CAUSE OF ACTION; GOOD CURRENCY; GOOD CURRENT BANK-NOTES; GOOD CURRENT MONEY; GOOD FAITH; GOOD REPUTE; GOOD STANDING; GOOD TITLE.)

GOOD BEHAVIOR. Conduct authorized by law.[41] (Good Behavior: Security For, see BREACH OF THE PEACE.)

GOOD CAUSE OF ACTION. A term which is synonymous with CAUSE OF ACTION,[42] *q. v.*, and means that a party must make out a cause in which he would probably be successful.[43] (See, generally, ACTIONS.)

GOOD CURRENCY. A term which means nothing more than a lawful cur-

120, 126, 6 Atl. 592; Shedd *v.* Troy, etc., R. Co., 40 Vt. 88, 93.

"Good this date only" see Elmore *v.* Sands, 54 N. Y. 512, 515, 13 Am. Rep. 617.

"Good this trip only" see Pier *v.* Finch, 24 Barb. (N. Y.) 514, 516.

35. Burrill L. Dict. [*citing* Kerrison *v.* Cole, 8 East 231, 236].

36. "Good order."— Polhemus *v.* Heiman, 50 Cal. 438, 441; Denver *v.* Moewes, 15 Colo. App. 28, 60 Pac. 986, 987; King *v.* Nelson, 36 Iowa 509, 512; West *v.* The Berlin, 3 Iowa 532, 542; Carson *v.* Harris, 4 Greene (Iowa) 516, 517; Barrett *v.* Rogers, 7 Mass. 297, 300, 5 Am. Dec. 45; Ellis *v.* Willard, 9 N. Y. 529, 530; Tierney *v.* New York Cent., etc., R. Co., 10 Hun (N. Y.) 569, 570; Bath *v.* Houston, etc., R. Co., 34 Tex. Civ. App. 234, 237, 78 S. W. 993; Clark *v.* Barnwell, 12 How. (U. S.) 272, 283, 13 L. ed. 985; Choate *v.* Crowninshield, 5 Fed. Cas. No. 2,691, 3 Cliff. 184.

"Like good order."— Gowdy *v.* Lyon, 9 B. Mon. (Ky.) 112.

"Good working order."— Randolph *v.* Halden, 44 Iowa 327, 329.

37. "Good order and condition."— Bond *v.* Frost, 6 La. Ann. 801, 802; The Peter der Grosse, 3 Aspin. 195, 8 L. T. Rep. N. S. 749, 751.

"Like good order and condition."— The Surrey, 26 Fed. 791, 795.

"Good order and well conditioned."— Keith *v.* Amende, 1 Bush (Ky.) 455, 459; Gowdy *v.* Lyon, 9 B. Mon. (Ky.) 112, 114; Price *v.* Powell, 3 N. Y. 322, 325; Clark *v.* Barnwell, 12 How. (U. S.) 272, 283, 13 L. ed. 985; The Olbers, 18 Fed. Cas. No. 10,477, 3 Ben. 148; Vaughan *v.* Six Hundred and Thirty Casks Sherry Wine, 28 Fed. Cas. No. 16,900, 7 Ben. 506; Bradstreet *v.* Heran, 3 Fed. Cas. No. 1,792*a*, 2 Blatchf. 116, 118; The California, 4 Fed. Cas. No. 2,314, 2 Sawy. 12; The Columbo, 6 Fed. Cas. No. 3,040, 3 Blatchf. 521.

38. "Good repair."— Cooke *v.* Cholmondeley, 4 Drew. 326, 328, 4 Jur. N. S. 827, 27 L. J. Ch. 826, 6 Wkly. Rep. 802. See also Sun Ins. Office *v.* Varble, 103 Ky. 758, 761, 46 S. W. 486, 20 Ky. L. Rep. 556, 41 L. R. A. 792; Thorndike *v.* Burrage, 111 Mass. 531, 532; Com. *v.* Central Bridge Corp., 12 Cush. (Mass.) 242, 244; Gerhauser *v.* North British, etc., Ins. Co., 7 Nev. 174, 177; Sauer *v.* Bilton, 7 Ch. D. 815, 821, 47 L. J. Ch. 267, 38 L. T. Rep. N. S. 281, 26 Wkly. Rep. 394; and 16 Cyc. 458 note 83.

"Good tenantable repair."— Thorndike *v.* Burrage, 111 Mass. 531, 532.

39. "Good right."— Raymond *v.* Raymond, 10 Cush. (Mass.) 134, 140; Hesse *v.* Stevenson, 3 B. & P. 565, 573.

40. Other phrases.— "Good and authentic" (see Whitcomb *v.* Preston, 13 Vt. 53, 56); "good and comfortable" (see Conant *v.* Stratton, 107 Mass. 474, 484); "good and convenient" (see Allgood *v.* Hill, 54 Miss. 666, 667); "good and effectual" (see Lyon *v.* Hunt, 11 Ala. 295, 315, 46 Am. Dec. 216); "good and general" (see Kirkendall *v.* Mitchell, 14 Fed. Cas. No. 7,841, 3 McLean 144); "good [and] ordinary" (see Clark Civ. Tp. *v.* Brookshire, 114 Ind. 437, 442, 16 N. E. 132); "good and substantial" (see Dashwood *v.* Magniac, [1891] 3 Ch. 306, 310, 60 L. J. Ch. 809, 64 L. T. Rep. N. S. 99, 65 L. T. Rep. N. S. 811); "good and workmanlike" (see Fitzgerald *v.* La Porte, 64 Ark. 34, 36, 40 S. W. 261); "good as gold and silver" (see Koch *v.* Melhorn, 25 Pa. St. 89, 92, 64 Am. Dec. 685); "good, clear, and sufficient" (see Feemster *v.* May, 13 Sm. & M. (Miss.) 275, 277, 53 Am. Dec. 83); "good fair" (see Waddell *v.* Glassell, 18 Ala. 561, 54 Am. Dec. 170); "good, safe, and passable" (see Com. *v.* Central Bridge Corp., 12 Cush. (Mass.) 242, 244); "good safety" (see Lidgett *v.* Secretan, L. R. 5 C. P. 190, 197); "good, sound, substantial, and serviceable" (see Gray *v.* Cox, 4 B. & C. 108, 115, 10 E. C. L. 502, 1 C. & P. 184, 12 E. C. L. 115, 6 D. & R. 200, 28 Rev. Rep. 769).

41. *In re* Spenser, 22 Fed. Cas. No. 13,234 [*citing* 2 Blackstone Comm. 251, 256; Bouvier L. Dict.]. See also Hyser *v.* Com., 116 Ky. 410, 76 S. W. 174, 175, 25 Ky. L. Rep. 608; Respublica *v.* Donagan, 2 Yeates (Pa.) 437, 438.

"Breach of good behavior" see Com. *v.* Williams, 79 Ky. 42, 47, 42 Am. Rep. 204 [*citing* Com. *v.* Chambers, 1 J. J. Marsh. (Ky.) 108; Com. *v.* Barry, Hard. (Ky.) 229]; State *v.* Bell, 2 Mart. N. S. (La.) 683, 699.

42. Parker *v.* Enslow, 102 Ill. 272, 277, 40 Am. Rep. 588.

43. Strauss *v.* Goldschmid, 8 T. L. R. 512, 513.

rency, that is the current coin of the United States.[44] (See Currency; and, generally, Commercial Paper.)

GOOD CURRENT BANK-NOTES. Bank-notes which circulate currently as money.[45] (See Currency; Current Bank-Notes; and, generally, Commercial Paper.)

GOOD CURRENT MONEY. As used in a contract, the coin of the constitution, or foreign coins made current by act of congress.[46] (See Currency; Current Money.)

GOOD FAITH.[47] Honesty[48] of intention;[49] honest[50] lawful intent;[51] an honest purpose as contrasted with collusion;[52] the opposite of fraud,[53] and of bad faith;[54] the absence of bad faith — of *mala fides*;[55] a term synonymous with Conscience,[56] *q. v.*; without knowledge of fraud, and without intent to assist in a fraudulent or otherwise unlawful scheme;[57] an honest intention to abstain from taking any unconscientious advantage[58] of another, together with an absence of all information or belief of facts which would render the transaction unconscientious;[59] freedom from knowledge of circumstances which ought to put a person upon

44. Graham *v.* Adams, 5 Ark. 261, 262. See also Chicago Mar. Bank *v.* Rushmore, 28 Ill. 463; Trowbridge *v.* Seaman, 21 Ill. 101; Moore *v.* Morris, 20 Ill. 255; Black *v.* Ward, 27 Mich. 191, 194, 198, 15 Am. Rep. 162.

45. English *v.* Turney, 2 Heisk. (Tenn.) 617, 618.

46. Unless it appears from the context that the terms have a different local signification by reason of the usage of trade. Moore *v.* Morris, 20 Ill. 255, 259 [*cited* in Parks *v.* O'Connor, 70 Tex. 377, 390, 8 S. W. 104].

47. "The term . . . has a well-defined meaning." Redewill *v.* Gillen, 4 N. M. 78, 79, 12 Pac. 872.

"The terms good faith and bona fide purchasers are borrowed from equity jurisprudence, and it is said must be interpreted accordingly." Cardenas *v.* Miller, 108 Cal. 250, 257, 39 Pac. 783, 41 Pac. 472, 49 Am. St. Rep. 84.

Pleading good faith see Scotten *v.* Randolph, 96 Ind. 581, 585 [*cited* in Bunting *v.* Mick, 5 Ind. App. 289, 31 N. E. 378, 380, 1055].

48. "Honesty" defined see Wachstetter *v.* State, 99 Ind. 290, 297, 50 Am. Rep. 94; State *v.* Snover, 63 N. J. L. 382, 384, 43 Atl. 1059.

By statute "good faith" has been defined to be "the doing of a thing honestly." St. 45 & 46 Vict. c. 61, § 90 [*cited* in Tatam *v.* Haslar, 23 Q. B. D. 345, 349, 58 L. J. Q. B. 432, 38 Wkly Rep. 109]. See also 56 & 57 Vict. c. 71, § 62, subs. 1.

49. Cochran *v.* Fox Chase Bank, 209 Pa. St. 34, 39, 58 Atl. 117, 103 Am. St. Rep. 976.

"Good faith, or the want of it, is not a visible, tangible fact that can be seen and touched, but rather a state or condition of mind which can only be judged of by actual or fancied tokens and signs." Wilder *v.* Gilman, 55 Vt. 504, 505. See also Pinkerton Bros. Co. *v.* Bromley, 119 Mich. 8, 10, 77 N. W. 307.

50. See Davidson *v.* State, 104 Ga. 761, 762, 30 S. E. 946.

51. Crouch *v.* Chicago First Nat. Bank, 156 Ill. 342, 357, 40 N. E. 974.

A want of that caution and diligence which an honest man of ordinary prudence is accustomed to exercise in making purchases is, in judgment of law, a want of good faith. Pringle *v.* Phillips, 5 Sandf. (N. Y.) 157, 165.

Good faith and diligence are not always the same. Lack of diligence does not necessarily involve absence of good faith. Stufflebeam *v.* De Lashmutt, 101 Fed. 367, 370.

52. Lucas *v.* Dicker, 5 C. P. D. 150, 155.

53. McConnell *v.* Street, 17 Ill. 253, 254. See Fraud.

54. McConnell *v.* Street, 17 Ill. 253, 254; Tolbert *v.* Horton, 31 Minn. 518, 524, 18 N. W. 647 [*citing* Thornton *v.* Bledsoe, 46 Ala. 73; Sanders *v.* McAffee, 42 Ga. 250]; Cole *v.* Johnson, 53 Miss. 94, 99. See Bona Fides.

55. Mogridge *v.* Clapp, [1892] 3 Ch. 382, 391, 61 L. J. Ch. 534, 67 L. T. Rep. N. S. 100, 40 Wkly. Rep. 663. See also Lenhart *v.* Ponder, 64 S. C. 354, 364, 42 S. E. 169.

56. Riederer *v.* Pfaff, 61 Fed. 872, 873.

57. Anderson L. Dict. [*quoted* in Crouch *v.* Chicago First Nat. Bank, 156 Ill. 342, 357, 40 N. E. 974]. See also Butcher *v.* Stead, L. R. 7 H. L. 839, 847, 44 L. J. Bankr. 129, 33 L. T. Rep. N. S. 541, 24 Wkly. Rep. 463.

58. See Advantage.

59. *California.*— Cardenas *v.* Miller, 108 Cal. 250, 257, 39 Pac. 783, 41 Pac. 472, 49 Am. St. Rep. 84.

Dakota.— Gress *v.* Evans, 1 Dak. 387, 46 N. W. 1132, 1134.

Louisiana.—Breaux-Renoudet Cypress-Lumber Co. *v.* Shadel, 52 La. Ann. 2094, 2098, 28 So. 292.

North Dakota.— N. D. Rev. Codes (1899), § 5114 [*quoted* in Hunter *v.* Coe, 12 N. D. 505, 511, 97 N. W. 869].

Oklahoma.— Okla. Rev. St. (1903) § 674.

South Dakota.— S. D. Comp. L. § 4739 [*quoted* in Friedrich *v.* Fergen, 15 S. D. 541, 547, 91 N. W. 328]; Wood *v.* Conrad, 2 S. D. 334, 342, 50 N. W. 95; Thompson *v.* Sioux Falls Nat. Bank, 150 U. S. 231, 240, 14 S. Ct. 94, 37 L. ed. 1063; S. D. Civ. Code (1903), § 2446.

inquiry.[60] Although in its original and popular sense the term denotes honesty of purpose, absence of bad faith,[61] yet it is popularly used to denote the actual existing state of the mind, without regard to what it should be from given standards of law and reason.[62] The term is used in law to qualify many different kinds of actions;[63] thus it embraces those obligations which are imposed upon one in dealing with property by the circumstances attending it at the time;[64] when used to qualify the action of a purchaser, it means a purchase made honestly,[65] for a valuable consideration,[66] and without notice of adverse[67] claims to the property by others;[68] in the creation or acquisition of color of title, it denotes a freedom from a design to defraud the person having the better title;[69] and within the rule that a prescription of ten years, based on good faith, will give title to land, it consists in the well-settled opinion that the possessor has acquired the

60. Cochran *v.* Fox Chase Bank, 209 Pa. St. 34, 39, 58 Atl. 117, 103 Am. St. Rep. 976.

61. Pfefferle *v.* Wieland, 55 Minn. 202, 210, 56 N. W. 824. See *supra*, notes 48 *et seq.*

62. Woodward *v.* Blanchard, 16 Ill. 424, 432, 433 [*quoted* in Seymour *v.* Cleveland, 9 S. D. 94, 100, 68 N. W. 171; Searl *v.* Lake County School-Dist. No. 2, 133 U. S. 553, 563, 10 S. Ct. 374, 33 L. ed. 740; Wright *v.* Mattison, 18 How. (U. S.) 50, 59, 15 L. ed. 280].

63. Walraven *v.* Farmers', etc., Nat. Bank, 96 Tex. 331, 338, 74 S. W. 530.

"Dealing in good faith with a tenant for life" see Sutherland *v.* Sutherland, [1893] 3 Ch. 169, 193, 62 L. J. Ch. 946, 69 L. T. Rep. N. S. 186, 3 Reports 650, 42 Wkly. Rep. 13; Mogridge *v.* Clapp, [1892] 3 Ch. 382, 390, 61 L. J. Ch. 534, 67 L. T. Rep. N. S. 100, 40 Wkly. Rep. 663.

In the interpretation of language, "good faith" means "that we conscientiously desire to arrive at the truth, that we honestly use all means to do so, and that we strictly adhere to it, when known to us . . . the shunning of subterfuges, quibbles, and political shuffling . . . that we take the words fairly as they were meant." Leiber Herm. 80 [*quoted* in Hilleary *v.* Skookum Root Hair Grower Co., 4 Misc. (N. Y.) 127, 130, 23 N. Y. Suppl. 1016].

As used in a statute, the word "must receive a practical, common sense construction." Winters *v.* Haines, 84 Ill. 585, 588. See also Merrell *v.* State, 42 Tex. Cr. 19, 24, 57 S. W. 289.

Payment "in good faith" under a bankruptcy act see *Ex p.* Blackburn, L. R. 12 Eq. 358, 365, 40 L. J. Bankr. 79, 25 L. T. Rep. N. S. 76, 19 Wkly. Rep. 973.

64. Riederer *v.* Pfaff, 61 Fed. 872, 873.

"Good faith requires that what [a person] represents as fact shall be true, or, that, from a proper knowledge of the surroundings, he is justified in having an intelligent belief that what he asserts is true." Einstein *v.* Marshall, 58 Ala. 153, 163, 29 Am. Rep. 729.

"True" and "in good faith" used in connection with testimony are necessarily convertible terms. Carleton *v.* State, 43 Nebr. 373, 416, 61 N. W. 699.

65. Redewill *v.* Gillen, 4 N. M. 78, 79, 12 Pac. 872 [*citing* Burrill L. Dict.]. See Bona Fide Purchaser.

Sales open and in good faith see Graham *v.* Carr, 130 N. C. 271, 273, 41 S. E. 379.

66. Good and valuable consideration distinguished see 9 Cyc. 319.

67. See Adverse Possession.

68. *California.*— Cardenas *v.* Miller, 108 Cal. 250, 258, 39 Pac. 783, 41 Pac. 472, 49 Am. St. Rep. 84 [*citing* Black L. Dict.].

Colorado.— McKee *v.* Bassick Min. Co., 8 Colo. 392, 395, 8 Pac. 561; Burchinell *v.* Gorsline, 11 Colo. App. 22, 52 Pac. 413, 415.

Dakota.— Hawke *v.* Defferbach, 4 Dak. 20, 22 N. W. 480, 490.

Kentucky.— Kellar *v.* Stanley, 86 Ky. 240, 246, 5 S. W. 477, 9 Ky. L. Rep. 388 [*quoted* in Bracka *v.* Fish, 23 Wash. 646, 653, 63 Pac. 561]; Keller *v.* Stanley, (1887) 4 S. W. 807, 809.

Michigan.— Kohl *v.* Lynn, 34 Mich. 360, 361.

Minnesota.— Wright *v.* Larson, 51 Minn. 321, 53 N. W. 712, 38 Am. St. Rep. 504.

New Jersey.— Meding *v.* Roe, (Ch. 1894) 30 Atl. 587, 589.

New Mexico.— Redewill *v.* Gillen, 4 N. M. 78, 79, 12 Pac. 872 [*citing* Burrill L. Dict.; Wade Notice, § 67].

Oklahoma.— Strahorn-Hutton-Evans Commission Co. *v.* Florer, 7 Okla. 499, 509, 54 Pac. 710.

Washington.— Dormitzer *v.* German Sav., etc., Soc., 23 Wash. 132, 193, 62 Pac. 862.

United States.— People's Sav. Bank *v.* Bates, 120 U. S. 556, 564, 7 S. Ct. 679, 30 L. ed. 754; Riederer *v.* Pfaff, 61 Fed. 872, 873 [*cited* in Burchinell *v.* Gorsline, 11 Colo. App. 22, 52 Pac. 413, 415].

"To say that a man takes in good faith, when he acts with notice, and of course under conscious hostility to another who has before taken a similar title, would be a legal solecism." Gregory *v.* Thomas, 20 Wend. (N. Y.) 17, 19.

In a more restricted sense, it may mean that the purchaser took the property, and paid for it, intending that the title should pass to him without any interest being reserved to his vendor. Redewill *v.* Gillen, 4 N. M. 78, 79, 12 Pac. 872.

69. McCagg *v.* Heacock, 34 Ill. 476, 479, 85 Am. Dec. 327 [*quoted* in Searl *v.* Lake County School Dist. No. 2, 133 U. S. 553, 564, 10 S. Ct. 374, 33 L. ed. 740]. See Pillow *v.* Roberts, 13 How. (U. S.) 472, 14 L. ed. 228; Ewing *v.* Burnet, 11 Pet. (U. S.) 41, 9 L. ed. 624. See also Adverse Possession.

property which is in his possession.[70] (Good Faith: As Affecting Liability of Executor, see Executors and Administrators. As Defense in Action on Attachment Bond, see Attachment. As Excuse For Violation of Injunction, see Injunctions. As Mitigation of Damages, see False Imprisonment. Evidence of in General, see Evidence. In Instituting Civil or Criminal Proceeding, see Malicious Prosecution. In Procuring Arrest, see False Imprisonment. Of Applicant For: Cancellation, see Cancellation of Instruments; Continuance, see Continuances; Patent, see Patents; Reformation, see Reformation of Instruments; Of Assignor and Assignee, see Assignments For Benefit of Creditors. Of Claim Affecting Validity of Agreement For Compromise and Settlement, see Compromise and Settlement. Of Improvements on Land, see Ejectment; Improvements; Trespass to Try Title. Of Party Seeking Equitable Relief, see Equity; Specific Performance. Of Possessor in Case of Adverse Possession, see Adverse Possession. Of Purchaser of — Bill of Lading, see Carriers; Bill or Note, see Commercial Paper; Bond, see Bonds; Goods, see Sales; Lands, see Vendor and Purchaser; Mortgage, see Chattel Mortgages; Mortgages; Property Fraudulently Conveyed, see Fraudulent Conveyances; Stock, see Corporations. Of Settler on or Claimant of Public Land, see Public Lands. See also Bona Fide; Bona Fide Possessor; Bona Fide Purchaser; Bona Fides.)

GOOD REPUTE. Good reputation.[71] (See Character; Chaste; Chastity; and, generally, Seduction.)

GOODS.[72] The plural of Good,[73] *q. v.*; a word which has a very extensive meaning,[74] and is of large signification.[75] It is generally understood to mean personal estate as distinguished from realty,[76] and to embrace every species of prop-

70. Marmion *v.* McPeak, 51 La. Ann. 1631, 1636, 26 So. 376.

See Bona Fide Possessor.

"Possession in good faith . . . involves not only honest belief in the possessor's title, but the absence of all knowledge on his part of any facts or circumstances which ought to put him upon inquiry, or tend to render his possession unconscientious." Lindt *v.* Uihlein, 116 Iowa 48, 55, 89 N. W. 214 [*citing* Deffeback *v.* Hawke, 115 U. S. 392, 6 S. Ct. 95, 26 L. ed. 423; Black L. Dict.; Bouvier L. Dict.].

"Possessor in good faith" see Merrick La. Civ. Code (1900), art. 3451.

71. State *v.* Sharp, 132 Mo. 165, 170, 33 S. W. 795 [*citing* State *v.* McCaskey, 104 Mo. 644, 16 S. W. 511; State *v.* Hill, 91 Mo. 423, 4 S. W. 121; Zabriskie *v.* State, 43 N. J. L. 640, 39 Am. Rep. 610]; State *v.* Wheeler, 108 Mo. 658, 665, 18 S. W. 924 [*citing* Com. *v.* McCarty, 2 Pa. L. J. Rep. 351, and *distinguishing* State *v.* Reeves, 97 Mo. 668, 10 S. W. 841, 10 Am. St. Rep. 349; State *v.* Patterson, 88 Mo. 88, 57 Am. Rep. 374]. See also State *v.* Brassfield, 81 Mo. 151, 51 Am. Rep. 325; Zabriskie *v.* State, 43 N. J. L. 640, 647, 39 Am. Rep. 610.

"That reputation may . . . be called good which no slanderer has ever ventured to even so much as question. A blameless life oftentimes, though not always, gives origin to such a reputation." State *v.* Grate, 68 Mo. 22, 27 [*quoted* in State *v.* Brandenburg, 118 Mo. 181, 185, 23 S. W. 1080, 1084, 40 Am. St. Rep. 362].

"A good name is rather to be chosen than great riches, and loving favor rather than silver and gold." Proverbs, c. 22, v. 21 [*quoted* in Koen *v.* State, 35 Nebr. 676, 678, 53 N. W. 595, 17 L. R. A. 821].

72. The corresponding Norman French term is *biens*. McCaffrey *v.* Woodin, 65 N. Y. 459, 468, 22 Am. Rep. 644 [*citing* Bouvier L. Dict., and *quoted* in State *v.* Fontenot, 112 La. 628, 634, 36 So. 630].

It has the same signification as the word "bona" in the civil law, under which name is comprehended almost every species of personal property. U. S. *v.* Candace, 5 Fed. Cas. No. 2,379.

"Future goods" means goods to be manufactured or acquired by the seller after the making of the contract of sale. St. 56 & 57 Vict. c. 71, § 62.

"Goods . . . of a person" means goods in which he has the property. Guy *v.* Rankin, 23 N. Brunsw. 49, 61.

73. Webster Int. Dict.

74. Epping *v.* Robinson, 21 Fla. 36, 52; State *v.* Fontenot, 112 La. 628, 632, 36 So. 620; Keyser *v.* Sunapee School Dist. No. 8, 35 N. H. 477, 483. *Compare Ex p.* Leland, 1 Nott & M. (S. C.) 460, 462.

75. Baldwin *v.* Williams, 3 Metc. (Mass.) 365, 367; Tisdale *v.* Harris, 20 Pick. (Mass.) 9, 13; Citizens' Bank *v.* Nantucket Steamboat Co., 5 Fed. Cas. No. 2,730, 2 Story 16, 52.

76. Bouvier L. Dict. [*cited* in Chamberlain *v.* Western Transp. Co., 44 N. Y. 305, 310, 4 Am. Rep. 681].

"According to its natural grammatical and ordinary meaning, the word 'goods' does not include lands." Farish *v.* Cook, 78 Mo. 212, 218, 47 Am. Rep. 107. To the same effect is Bailey *v.* Duncan, 2 T. B. Mon. (Ky.) 20, 22. See *infra*, note 92.

Land is not included within the phrase "goods, effects, nor credits" (Gore *v.* Chisby, 8 Pick. (Mass.) 555, 558; Hunter *v.* Case,

erty which is not real estate or freehold.[77] When used in contradistinction to real estate, it may include every article of tangible[78] personal property,[79] including personal effects,[80] personal estate,[81] personal or movable estate,[82] personal or movable property of all kinds,[83] movable personal property,[84] including movable effects,[85] movable estate,[86] movables,[87] movables in a house,[88] articles of trade,[89] articles of portable property as distinguished from money, lands, buildings, ships, rights in action, etc.,[90] articles of merchandise of a trader,[91] effects,[92] merchandise,[93]

20 Vt. 195, 197); or "goods and effects" (Meier *v.* Lee, 106 Iowa 303, 308, 76 N. W. 712).

77. Gay *v.* U. S., 13 Wall. (U. S.) 358, 362, 20 L. ed. 606 [*citing* 2 Kent Comm. 342].

78. Knapp *v.* McCaffrey, 178 Ill. 107, 112, 52 N. E. 898, 69 Am. St. Rep. 290 [*affirming* 74 Ill. App. 80, 85].

79. *Illinois.*— Knapp *v.* McCaffrey, 178 Ill. 107, 112, 52 N. E. 898, 69 Am. St. Rep. 290 [*affirming* 74 Ill. App. 80, 85].

Indiana.— St. Joseph Hydraulic Co. *v.* Wilson, 133 Ind. 465, 472, 33 N. E. 113.

Iowa.— Van Patten *v.* Leonard, 55 Iowa 520, 526, 8 N. W. 334.

Louisiana.— State *v.* Fontenot, 112 La. 628, 634, 36 So. 630 [*citing* Standard Dict.]; Thompson *v.* Chauvenau, 7 Mart. N. S. 331, 18 Am. Dec. 246 [*citing* Johnson Dict.].

Michigan.— Curtis *v.* Phillips, 5 Mich. 112, 113.

Missouri.— Farish *v.* Cook, 78 Mo. 212, 219, 47 Am. Rep. 107.

South Carolina.— *Ex p.* Leland, 1 Nott & M. 460, 462.

Tennessee.— See Shannon Code (1896), § 6556.

80. Bouvier L. Dict. [*cited* in Wilson *v.* Rybolt, 17 Ind. 391, 394, 77 Am. Dec. 486; Chamberlain *v.* Western Transp. Co., 44 N. Y. 305, 310, 4 Am. Rep. 681].

81. Worcester Dict. [*quoted* in Vawter *v.* Griffin, 40 Ind. 593, 600].

82. Johnson Dict. [*quoted* in Passaic Mfg. Co. *v.* Hoffman, 3 Daly (N. Y.) 495, 512]; Webster Dict. [*quoted* in State *v.* Ward, 49 Conn. 429, 442; Vawter *v.* Griffin, 40 Ind. 593, 600; Chamberlain *v.* Western Transp. Co., 44 N. Y. 305, 310, 4 Am. Rep. 681; Eddy *v.* Davis, 35 Vt. 247, 248, and *cited* in Wilson *v.* Rybolt, 17 Ind. 391, 394, 79 Am. Dec. 484]; Worcester Dict. [*quoted* in Vawter *v.* Griffin, 40 Ind. 593, 600].

83. Curtis *v.* Phillips, 5 Mich. 112, 113 [*quoted* in St. Joseph Hydraulic Co. *v.* Wilson, 133 Ind. 465, 472, 33 N. E. 113; Van Patten *v.* Leonard, 55 Iowa 520, 526, 8 N. W. 334; State *v.* Fontenot, 112 La. 628, 634, 36 So. 630].

84. Knapp *v.* McCaffrey, 178 Ill. 107, 112, 52 N. E. 898, 69 Am. St. Rep. 290 [*affirming* 74 Ill. App. 80, 85]; St. Joseph Hydraulic Co. *v.* Wilson, 133 Ind. 465, 472, 33 N. E. 113; Van Patten *v.* Leonard, 55 Iowa 520, 526, 8 N. W. 334; State *v.* Fontenot, 112 La. 628, 634, 36 So. 630; Curtis *v.* Phillips, 5 Mich. 112, 113.

85. Century Dict. [*quoted* in State *v.* Fontenot, 112 La. 628, 631, 36 So. 630].

86. Eddy *v.* Davis, 35 Vt. 247, 248; Worcester Dict. [*quoted* in Vawter *v.* Griffin, 40 Ind. 593, 600].

87. Meier *v.* Lee, 106 Iowa 303, 308, 76 N. W. 712; U. S. *v.* Moulton, 27 Fed. Cas. No. 15,827, 5 Mason 537, 551; Webster Dict. [*quoted* in Vawter *v.* Griffin, 40 Ind. 593, 600; Wilson *v.* Rybolt, 17 Ind. 391, 394, 79 Am. Dec. 486; Eddy *v.* Davis, 35 Vt. 247, 248].

88. Johnson Dict. [*quoted* in Passaic Mfg. Co. *v.* Hoffman, 3 Daly (N. Y.) 495, 512]; Walker Dict. [*cited* in Wilson *v.* Rybolt, 17 Ind. 391, 394, 79 Am. Dec. 486].

"By the Code Napoleon, art. 534, the words goods movable (*meubles meublants*) only comprehend movables destined for the use and ornament of an apartment, as tapestries, beds, &c." Penniman *v.* French, 17 Pick. (Mass.) 404, 406, 28 Am. Dec. 309.

89. Century Dict. [*quoted* in State *v.* Fontenot, 112 La. 628, 631, 36 So. 630]; *In re* Surety, etc., Co., 9 Am. Bankr. Rep. 129, 132.

90. Century Dict. [*quoted* in State *v.* Fontenot, 112 La. 628, 631, 36 So. 630].

91. Worcester Dict. [*quoted* in Vawter *v.* Griffin, 40 Ind. 593, 601].

92. State *v.* Fontenot, 112 La. 628, 632, 36 So. 630; Worcester Dict. [*quoted* in Vawter *v.* Griffin, 40 Ind. 593, 600].

The term "goods" has as extensive a legal signification as effects, and has even been applied in the civil law to real estate, though it has no such application in our law. Hafley *v.* Patterson, 47 Ala. 271, 272 [*quoted* in State *v.* Fontenot, 112 La. 628, 634, 36 So. 630].

The words "goods and effects" are free from all ambiguity or doubt, whether used in the popular, lexicographical, or legal sense. Vandergrift's Appeal, 83 Pa. St. 126, 129.

"Goods and effects" include a debt. Minor *v.* Gurley, 39 Misc. (N. Y.) 662, 663, 80 N. Y. Suppl. 596; Neely *v.* Grantham, 58 Pa. St. 433, 440 [*citing* Bouvier L. Dict.].

"Goods and effects" do not embrace leaseholds of lands and buildings on leaseholds. Vandergrift's Appeal, 83 Pa. St. 126, 129.

"Goods, effects, or credits" do not include choses in action (Lupton *v.* Cutter, 8 Pick. (Mass.) 298, 300; Perry *v.* Coates, 9 Mass. 537); an execution (Sharp *v.* Clark, 2 Mass. 91, 93) or notes of a banking company (Perry *v.* Coates, 9 Mass. 537).

93. *Indiana.*— Vawter *v.* Griffin, 40 Ind. 593, 600 [*quoting* Webster Dict.]; Wilson *v.* Rybolt, 17 Ind. 391, 394, 79 Am. Dec. 486 [*citing* Bailey Dict.; Walker Dict.; Webster Dict.].

Louisiana.— State *v.* Fontenot, 112 La. 628, 631, 36 So. 630 [*quoting* Century Dict.].

New York.— Passaic Mfg. Co. *v.* Hoffman, 3 Daly 495, 512 [*citing* Bailey Dict.; Johnson Dict.].

wares,[94] a manufacturer's wares,[95] or a valuable possession or piece of property.[96] This being a word of extensive meaning,[97] it may embrace a great variety of subjects;[98] but how extensive the meaning of the word is to be understood in any instance must depend on the subject-matter and the context;[99] thus it may embrace, for instance, BAGGAGE,[1] *q. v.*; a building;[2] BULLION,[3] *q. v.*; cloth of any kind; a piece of dry goods; a textile fabric;[4] COIN,[5] *q. v.*, whether it be domestic,[6] or foreign;[7] commodities;[8] commodities bought and sold,[9] by merchants and traders,[10] or dealt in by merchants;[11] EMBLEMENTS,[12] *q. v.*; farming utensils;[13]

South Carolina.— *Ex p.* Leland, 1 Nott & M. 460, 462.

United States.—*In re* Surety, etc., Co., 9 Am. Bankr. Rep. 129, 132.

England.— Freeman *v.* Appleyard, 32 L. J. Exch. 175, 7 L. T. Rep. N. S. 282, 1 New Rep. 30.

Merchandise may be insured against sea risks under a general description of it as "goods" or "merchandise." Chicago, etc., R. Co. *v.* Thompson, 19 Ill. 578, 585 [*citing* 1 Arnould Ins. 214, 216]. So an insurance "on goods" was held sufficient to cover the interest of carriers in the property under their charge. Crowley *v.* Cohen, 3 B. & Ad. 478, 486, 1 L. J. K. B. 158, 33 E. C. L. 214; Mackenzie *v.* Whitworth, 1 Ex. D. 36, 40, 2 Aspin. 490, 45 L. J. Exch. 233, 33 L. T. Rep. N. S. 655, 24 Wkly. Rep. 287.

94. *Indiana.*— St. Joseph Hydraulic Co. *v.* Wilson, 133 Ind. 465, 472, 33 N. E. 113 [*quoting* Webster Dict.]; Vawter *v.* Griffin, 40 Ind. 593, 600 [*quoting* Webster Dict.]; Wilson *v.* Rybolt, 17 Ind. 391, 394, 79 Am. Dec. 486 [*citing* Bailey Dict.; Walker Dict.; Webster Dict.].

Iowa.— Meier *v.* Lee, 106 Iowa 303, 308, 76 N. W. 712 [*quoting* Webster Dict.].

Kansas.— Campbell *v.* Anthony, 40 Kan. 652, 654, 20 Pac. 492.

Louisiana.— State *v.* Fontenot, 112 La. 628, 631, 36 So. 630 [*quoting* Century Dict.; Standard Dict.].

New York.— Passaic Mfg. Co. *v.* Hoffman, 3 Daly 495, 512 [*quoting* Johnson Dict.].

Pennsylvania.— Vandergrift's Appeal, 83 Pa. St. 126, 129.

South Carolina.— *Ex p.* Leland, 1 Nott & M. 460, 462.

United States.— *In re* Surety, etc., Co., 9 Am. Bankr. Rep. 129, 132.

England.— Freeman *v.* Appleyard, 32 L. J. Exch. 175, 7 L. T. Rep. N. S. 282, 1 New Rep. 30.

As defined by statute the word includes "every description of wares and merchandise" (57 & 58 Vict. c. 60, § 492; 10 & 11 Vict. c. 27, § 3); "anything which is the subject of trade, manufacture, or merchandise" (50 & 51 Vict. c. 28, § 3, subs. (1) (e)); "Wares, and Merchandise exported in the Way of Trade" (23 & 24 Vict. c. 22, § 24).

95. Worcester Dict. [*quoted* in Vawter *v.* Griffin, 40 Ind. 593, 601].

96. Webster Dict. [*quoted* in Meier *v.* Lee, 106 Iowa 303, 308, 76 N. W. 712]. See GOOD.

97. See *supra*, text and note 74.

98. See *infra*, note 1 *et seq.*

99. Gibbs *v.* Usher, 10 Fed. Cas. No. 5,387, Holmes 348, 351. See also State *v.* Fontenot, 112 La. 628, 639, 36 So. 630.

1. Chamberlain *v.* Western Transp. Co., 44 N. Y. 305, 310, 4 Am. Rep. 681. *Compare* Vasse *v.* Ball, 2 Yeates (Pa.) 178, 182; Reg. *v.* London Court, 12 Q. B. D. 115, 116, 5 Aspin. 283, 53 L. J. Q. B. 28, 51 L. T. Rep. N. S. 197, 32 Wkly. Rep. 291 (holding that the term "carriage of goods on any ship" is confined to claims respecting merchandise, and does not include claims respecting personal luggage).

2. Keyser *v.* Sunapee School Dist. No. 8, 35 N. H. 477, 483, 484, where it is said: "The term 'goods' in its legal sense is broad enough to include a building standing on land of another; and we think the price of such a building may be recovered in an action for goods sold and delivered."

3. Chicago, etc., R. Co. *v.* Thompson, 19 Ill. 578, 585.

4. Century Dict. [*quoted* in State *v.* Fontenot, 112 La. 628, 631, 36 So. 630].

5. The Elizabeth & Jane, 8 Fed. Cas. No. 4,355, 2 Mason 407; U. S. *v.* Moulton, 27 Fed. Cas. No. 15,827, 5 Mason 537, 551. See also The Candace, 5 Fed. Cas. No. 2,379, 1 Lowell 126.

6. U. S. *v.* Moulton, 27 Fed. Cas. No. 15,827, 5 Mason 537, 544.

7. The Elizabeth & Jane, 8 Fed. Cas. No. 4,355, 2 Mason 407 [*quoted* in Patton *v.* Brady, 184 U. S. 608, 613, 22 S. Ct. 493, 46 L. ed. 713]; U. S. *v.* Moulton, 27 Fed. Cas. No. 15,827, 5 Mason 537, 544.

8. *Indiana.*— St. Joseph Hydraulic Co. *v.* Wilson, 133 Ind. 465, 472, 33 N. E. 113 [*quoting* Webster Dict.]; Vawter *v.* Griffin, 40 Ind. 593, 600 [*quoting* Worcester Dict.].

Iowa.— Meier *v.* Lee, 106 Iowa 303, 308, 76 N. W. 712 [*quoting* Webster Dict.].

Kansas.— Campbell *v.* Anthony, 40 Kan. 652, 654, 20 Pac. 492.

Louisiana.— State *v.* Fontenot, 112 La. 628, 632, 36 So. 630 [*quoting* Century Dict.].

Pennsylvania.— Vandergrift's Appeal, 83 Pa. St. 126, 129.

United States.— *In re* Surety, etc., Co., 9 Am. Bankr. Rep. 129, 132.

England.— See 53 & 54 Vict. c. 21, § 39.

Commodity defined see 8 Cyc. 338.

9. Standard Dict. [*quoted* in State *v.* Fontenot, 112 La. 628, 632, 36 So. 630].

10. Webster Dict. [*quoted* in Vawter *v.* Griffin, 40 Ind. 593, 600, and *cited* in Wilson *v.* Rybolt, 17 Ind. 391, 394, 79 Am. Dec. 486].

11. State *v.* Fontenot, 112 La. 628, 632, 36 So. 630.

12. St. 56 & 57 Vict. c. 71, § 62, subs. 1.

13. Pippin *v.* Ellison, 34 N. C. 61, 63, 55

flour not prepared or in a state capable of immediate delivery;[14] foreign ships;[15] FREIGHT,[16] *q. v.*; FURNITURE,[17] *q. v.*; household furniture;[18] implements of husbandry, etc.;[19] jewelry;[20] money;[21] plate;[22] spirits of turpentine and gunpowder.[23] The term is even broad enough to cover FIXTURES,[24] *q. v.*; or fixtures and machinery.[25] In a strict sense, as the word is understood in the construction of penal statutes, it is limited to movables belonging to the property of some person, which have an intrinsic value, and does not include securities, which are not valuable in themselves, but merely represent value.[26] In a more large and liberal sense, the term may embrace movables not having any intrinsic value;[27] choses in action,[28] as well as those in possession,[29] bank-bills,[30] and notes;[31] BONDS,[32] *q. v.*;

Am. Dec. 403 [*quoted* in Vaughan *v.* Murfreesboro, 96 N. C. 317, 320, 2 S. E. 676, 60 Am. Rep. 413].

14. Garbutt *v.* Watson, 5 B. & Ald. 613, 614, 7 E. C. L. 335.

15. The Hercules, 11 P. D. 10, 11, 5 Aspin. 545, 54 L. T. Rep. N. S. 273, 34 Wkly. Rep. 400. But see 27 & 28 Vict. c. 25, § 2.

16. Vawter *v.* Griffin, 40 Ind. 593, 600; Johnson Dict. [*quoted* in Passaic Mfg. Co. *v.* Hoffman, 3 Daly (N. Y.) 495, 512]; Walker Dict. [*cited* in Wilson *v.* Rybolt, 17 Ind. 391, 394, 79 Am. Dec. 486].

17. Pippin *v.* Ellison, 34 N. C. 61, 63, 55 Am. Dec. 403 [*quoted* in Vaughan *v.* Murfreesboro, 96 N. C. 317, 320, 2 S. E. 676, 60 Am. Rep. 413]; *In re* Reimer, 159 Pa. St. 212, 220, 28 Atl. 186; Dowdel *v.* Hamm, 2 Watts (Pa.) 61, 65; Com. *v.* Keller, 9 Pa. Co. Ct. 253, 255; Worcester Dict. [*quoted* in Vawter *v.* Griffin, 40 Ind. 593, 600].

18. Webster Dict. [*quoted* in Vawter *v.* Griffin, 40 Ind. 593, 600; Eddy *v.* Davis, 35 Vt. 247, 248, and *cited* in Wilson *v.* Rybolt, 17 Ind. 391, 394, 79 Am. Dec. 486]. But *compare Ex p.* Leland, 1 Nott & M. (S. C.) 460, 462.

19. Worcester Dict. [*quoted* in Vawter *v.* Griffin, 40 Ind. 593, 600].

20. Chicago, etc., R. Co. *v.* Thompson, 19 Ill. 578, 585.

21. *Illinois.*— Chicago, etc., R. Co. *v.* Thompson, 19 Ill. 578, 584 [*citing* Coke Litt.]; Cass *v.* Yale University, 107 Ill. App. 518, 521 [*citing* Bouvier L. Dict.].

Indiana.— Wilson *v.* Rybolt, 17 Ind. 391, 394, 79 Am. Dec. 486 [*citing* Bouvier L. Dict.].

New York.— Chamberlain *v.* Western Transp. Co., 44 N. Y. 305, 310, 4 Am. Rep. 681 [*citing* Bouvier L. Dict.].

Pennsylvania.— *In re* Reimer, 159 Pa. St. 212, 220, 28 Atl. 186; Com. *v.* Keller, 9 Pa. Co. Ct. 253, 255 [*quoting* Dowdel *v.* Hamm, 2 Watts (Pa.) 61].

Tennessee.— See Shannon Code (1896), § 6556.

United States.— Citizens' Bank *v.* Nantucket Steamboat Co., 5 Fed. Cas. No. 2,730, 2 Story 16, 53; The Elizabeth & Jane, 8 Fed. Cas. No. 4,355, 2 Mason 407 [*quoted* in Patton *v.* Brady, 184 U. S. 608, 613, 22 S. Ct. 493, 46 L. ed. 713]; U. S. *v.* Moulton, 27 Fed. Cas. No. 15,827, 5 Mason 537, 551. But see 56 & 57 Vict. c. 71, § 62, subs. 1.

British or foreign money is not included within the term. Howard's Case, Foster 77, 79; Rex *v.* Leigh, 1 Leach C. C. 62.

"**Goods and credits**" do not include money. Morrill *v.* Brown, 15 Pick. (Mass.) 173, 176.

22. *In re* Reimer, 159 Pa. St. 212, 220, 28 Atl. 186; Com. *v.* Keller, 9 Pa. Co. Ct. 253, 255 [*quoting* Dowdel *v.* Hamm, 2 Watts (Pa.) 61]. But *compare Ex p.* Leland, 1 Nott & M. (S. C.) 460, 462.

23. Pindar *v.* Kings County F. Ins. Co., 36 N. Y. 648, 649, 93 Am. Dec. 544.

24. St. Joseph Hydraulic Co. *v.* Wilson, 133 Ind. 465, 471, 33 N. E. 113. *Contra*, Dowdel *v.* Hamm, 2 Watts (Pa.) 61, 65 [*quoted* in *In re* Reimer, 159 Pa. St. 212, 220, 28 Atl. 186]. *Compare* Buxton *v.* Bedall, 3 East 303, 305.

25. St. Joseph Hydraulic Co. *v.* Wilson, 133 Ind. 465, 471, 33 N. E. 113.

26. Keyser *v.* Sunapee School Dist. No. 8, 35 N. H. 477, 483.

27. U. S. *v.* Moulton, 27 Fed. Cas. No. 15,827, 5 Mason 537, 544.

28. Epping *v.* Robinson, 21 Fla. 36, 52; Dowdel *v.* Hamm, 2 Watts (Pa.) 61, 65; Gibbs *v.* Usher, 10 Fed. Cas. No. 5,387, Holmes 348, 351 [*citing* U. S. *v.* Moulton, 27 Fed. Cas. No. 15,827, 5 Mason 537, 544]; Ryal *v.* Rowles, 1 Atk. 165, 26 Eng. Reprint 107, 1 Ves. 348, 27 Eng. Reprint 1074; Ford's Case, 12 Coke 1. But see Kirkland *v.* Brune, 31 Gratt. (Va.) 126, 133; 56 & 57 Vict. c. 71, § 62, subs. 1.

29. Dowdel *v.* Hamm, 2 Watts (Pa.) 61, 65.

30. Chicago, etc., R. Co. *v.* Thompson, 19 Ill. 578, 585; Citizens' Bank *v.* Nantucket Steamboat Co., 5 Fed. Cas. No. 2,730, 2 Story 16, 52, where Story, J., said: "I agree that the word 'goods' may in some connections (certainly not in all) include bank bills."

In connection with insurance policies, and transportation by land or water, bank-bills are not regarded as goods. Chicago, etc., R. Co. *v.* Thompson, 19 Ill. 578, 584 [*citing* 1 Arnould Ins. 214].

31. U. S. *v.* Moulton, 27 Fed. Cas. No. 15,827, 5 Mason 537, 551. See also Shannon Code Tenn. (1896) § 6556.

32. Cass *v.* Yale University, 107 Ill. App. 518, 521 [*citing* Bouvier L. Dict.]; *In re* Reimer, 159 Pa. St. 212, 220, 28 Atl. 186; Jackson *v.* Robinson, 1 Yeates (Pa.) 101, 102, 1 Am. Dec. 293; Com. *v.* Keller, 9 Pa. Co. Ct. 253, 255 [*quoting* Dowdel *v.* Hamm, 2 Watts (Pa.) 61]; U. S. *v.* Moulton, 27 Fed. Cas. No. 15,827, 5 Mason 537, 544; Anonymous, 1 P. Wms. 267, 24 Eng. Reprint 384 [*cited* in

bonds and mortgages;[33] bills;[34] a debt by bond;[35] evidences of debt,[36] and money due from debtors;[37] a deed;[38] foreign bonds;[39] moneyed securities;[40] notes;[41] personal actions;[42] private papers;[43] profits;[44] stocks in the funds;[45] shares[46] or certificates of stock;[47] and valuable securities.[48] It is said that, strictly, this term seems to be applicable only to inanimate movables,[49] being in this respect less comprehensive than chattels;[50] yet it is now held to embrace chattels[51] both personal,[52] as well as real,[53] especially portable chattels,[54] and although the term is commonly

Penniman *v.* French, 17 Pick. (Mass.) 404, 406, 28 Am. Dec. 309].

33. Terhune *v.* Bray, 16 N. J. L. 53 [*cited* in Greenwood *v.* Law, 55 N. J. L. 168, 176, 26 Atl. 134, 19 L. R. A. 688].

34. Epping *v.* Robinson, 21 Fla. 36, 52; Curtis *v.* Phillips, 5 Mich. 112, 113 [*quoted* in St. Joseph Hydraulic Co. *v.* Wilson, 133 Ind. 465, 472, 33 N. E. 113; Van Patten *v.* Leonard, 55 Iowa 520, 526, 8 N. W. 334]; State *v.* Fontenot, 112 La. 628, 634, 36 So. 630.

35. Anonymous, 1 P. Wms. 267, 24 Eng. Reprint 384.

36. Epping *v.* Robinson, 21 Fla. 36, 52; U. S. *v.* Moulton, 27 Fed. Cas. No. 15,827, 5 Mason 537, 544.

37. Epping *v.* Robinson, 21 Fla. 36, 52.

38. Mills *v.* Gore, 20 Pick. (Mass.) 28, 36 [*cited* in Baldwin *v.* Williams, 3 Metc. (Mass.) 365, 368]. See also Clapp *v.* Shephard, 23 Pick. (Mass.) 228, 230. But see Wilson *v.* Rybolt, 17 Ind. 391, 394, 79 Am. Dec. 486.

39. Coddington *v.* Jacksonville, etc., R. Co., 39 L. T. Rep. N. S. 12.

40. U. S. *v.* Moulton, 27 Fed. Cas. No. 15,827, 5 Mason 537, 544.

41. Epping *v.* Robinson, 21 Fla. 36, 52; Cass *v.* Yale University, 107 Ill. App. 518, 521 [*citing* Bouvier L. Dict.]; Baldwin *v.* Williams, 3 Metc. (Mass.) 365, 367; Curtis *v.* Phillips, 5 Mich. 112 [*quoted* in Van Patten *v.* Leonard, 55 Iowa 520, 526, 8 N. W. 334]; *In re* Reimer, 159 Pa. St. 212, 220, 28 Atl. 186; Com. *v.* Keller, 9 Pa. Co. Ct. 253, 255 [*quoting* Dowdel *v.* Hamm, 2 Watts (Pa.) 61]; U. S. *v.* Moulton, 27 Fed. Cas. No. 15,827, 5 Mason 537, 544. *Compare* Perry *v.* Coates, 9 Mass. 537; Humble *v.* Mitchell, 11 A. & E. 205, 208, 9 L. J. Q. B. 29, 3 P. & D. 141, 2 R. & Can. Cas. 70, 39 E. C. L. 130.

42. Ford's Case, 12 Coke 1, 2 [*cited* in Ryall *v.* Rolle, 1 Atk. 165, 182, 26 Eng. Reprint 107, 1 Ves. 348, 27 Eng. Reprint 1074].

43. Gibbs *v.* Usher, 10 Fed. Cas. No. 5,387, Holmes 348, 351.

44. Pritchet *v.* Ins. Co. of North America, 3 Yeates (Pa.) 458, 461, 464.

45. Bouvier L. Dict. [*cited* in State *v.* Bartlett, 55 Me. 200, 210; Chamberlain *v.* Western Transp. Co., 44 N. Y. 305, 310, 44 Am. Rep. 681].

46. Cass *v.* Yale University, 107 Ill. App. 518, 521 [*citing* Bouvier L. Dict.]; Tisdale *v.* Harris, 20 Pick. (Mass.) 9, 13 [*cited* in Citizens' Bank *v.* Nantucket Steamboat Co., 5 Fed. Cas. No. 2,730, 2 Story 16, 53]; *In re* Reimer, 159 Pa. St. 212, 220, 28 Atl. 186; Evans *v.* Davies, [1893] 2 Ch. 216, 220, 62 L. J. Ch. 661, 68 L. T. Rep. N. S. 244, 3 Reports 360, 41 Wkly. Rep. 687.

47. Curtis *v.* Phillips, 5 Mich. 112 [*quoted* in Van Patten *v.* Leonard, 55 Iowa 520, 526, 8 N. W. 334].

The term does not include certificates of railway stock within the Factors Act. Freeman *v.* Appleyard, 32 L. J. Exch. 175, 7 L. T. Rep. N. S. 282, 1 New Rep. 30.

48. Wilson *v.* Rybolt, 17 Ind. 391, 394, 79 Am. Dec. 486 [*citing* Bouvier L. Dict.]; Chamberlain *v.* Western Transp. Co., 44 N. Y. 305, 310, 44 Am. Rep. 681.

49. Burrill L. Dict. [*quoted* in St. Joseph Hydraulic Co. *v.* Wilson, 133 Ind. 465, 472, 33 N. E. 113, and *cited* in Van Patten *v.* Leonard, 55 Iowa 520, 525, 8 N. W. 334].

50. Chicago, etc., R. Co. *v.* Thompson, 19 Ill. 578, 584; Smith *v.* Wilcox, 24 N. Y. 353, 358, 82 Am. Dec. 302; Burrill L. Dict. [*quoted* in St. Joseph Hydraulic Co. *v.* Wilson, 133 Ind. 465, 472, 33 N. E. 113, and *cited* in Van Patten *v.* Marks, 55 Iowa 520, 525, 8 N. W. 334].

Bouvier says the term "goods" is not as wide as "chattels," for it applies to inanimate objects, and does not include animals. Bouvier L. Dict. [*quoted* in Knapp *v.* North Wales Mut. Live Stock Ins. Co., 11 Montg. Co. Rep. (Pa.) 119, 121].

51. *Alabama.*— Pickett *v.* State, 60 Ala. 77, 78.

Indiana.— St. Joseph Hydraulic Co. *v.* Wilson, 133 Ind. 465, 472, 33 N. E. 112 [*quoting* Webster Dict.]; Vawter *v.* Griffin, 40 Ind. 593, 600 [*quoting* Worcester Dict.].

Iowa.— Meier *v.* Lee, 106 Iowa 303, 308, 76 N. W. 712 [*quoting* Webster Dict.].

Kansas.—Campbell *v.* Anthony, 40 Kan. 652, 654, 20 Pac. 492.

Louisiana.— State *v.* Fontenot, 112 La. 628, 632, 36 So. 630.

England.— See 53 & 54 Vict. c. 21, § 39; 14 & 15 Vict. c. 93, § 44, c. 90, § 18.

Distinguished from "chattels" in Pearce *v.* Augusta, 37 Ga. 597, 599 [*citing* Bouvier L. Dict.].

"Goods, biens, bona, includes all chattels, as well reall as personall." Coke Litt. 118*b*.

"In Jacobs' law dictionary, and also in Tomlins', it [goods] seems to be held synonymous with chattels." Chamberlain *v.* Western Transp. Co., 44 N. Y. 305, 310, 4 Am. Rep. 681.

52. Allen *v.* Sewall, 2 Wend. (N. Y.) 327, 339; Vandergrift's Appeal, 83 Pa. St. 126, 129; Century Dict. [*quoted* in State *v.* Fontenot, 112 La. 628, 639, 36 So. 630]. See also 46 & 47 Vict. c. 52, § 168.

In Great Britain under statutory enactment the term includes all chattels personal other than things in action and money, and in Scotland all corporeal movables except money. St. 56 & 57 Vict. c. 71, § 62, subs. 1.

53. State *v.* Fontenot, 112 La. 628, 634, 36 So. 630 [*quoting* Coke Litt. 1180, and *citing* Williams Real Prop. 2].

54. Standard Dict. [*quoted* in State *v.* Fontenot, 112 La. 628, 631, 36 So. 630].

applied to inanimate movables,[55] things inanimate,[56] or inanimate movable property,[57] yet its full signification, especially in its legal sense, has a larger or more extensive application;[58] thus the term has often been construed to cover animate property,[59] as, for instance, CATTLE,[60] *q. v.*, a dog,[61] horses,[62] or oxen.[63] The word is often susceptible of a specific meaning,[64] and in construing agreements its application is often restricted;[65] thus, when applied to carriers by water, it means only such articles as the officers of the boat have power to contract for the transportation of;[66] as used in a chattel mortgage, it does not include a safe kept in a store, not for sale, but the owner's own private use;[67] in the law of marine insurance, it means only such articles as are merchantable,[68] that is to say, the cargo put on board for the purposes of trade — technically, *merces*.[69] In wills, in common parlance, the word means articles or effects only, and not the whole personal estate;[70] yet it is called *nomen generalissimum*,[71] and when construed in the abtract will comprehend all the personal estate of the testator,[72] including every-

55. Eddy *v.* Davis, 35 Vt. 247, 248.

56. Pippin *v.* Ellison, 34 N. C. 61, 63, 55 Am. Dec. 403 [*quoted* in Vaughan *v.* Murfreesboro, 96 N. C. 317, 320, 2 S. E. 676, 60 Am. Rep. 413].

57. Eddy *v.* Davis, 35 Vt. 247, 248.

58. Eddy *v.* Davis, 35 Vt. 247, 248.

59. Pilcher *v.* Faircloth, 135 Ala. 311, 33 So. 545.

60. Richmond Hill Steamship Co. *v.* Trinity House Corp., [1896] 2 Q. B. 134, 140, 8 Aspin. 164, 65 L. J. Q. B. 561, 75 L. T. Rep. N. S. 8, 45 Wkly. Rep. 6; Worcester Dict. [*quoted* in Vawter *v.* Griffin, 40 Ind. 593, 600]. But see *Ex p.* Leland, 1 Nott & M. (S. C.) 460, 462.

Although the word may in some instances include animals, yet such is not the case where the context or the particular enumeration of articles would seem to exclude them. Knapp *v.* North Wales Mut. Live Stock Ins. Co., 11 Montg. Co. Rep. (Pa.) 119, 121.

61. Reg. *v.* Slade, 21 Q. B. D. 433, 435, 16 Cox C. C. 496, 52 J. P. 599, 57 L. J. M. C. 120, 59 L. T. Rep. N. S. 640, 37 Wkly. Rep. 141. *Compare* Reg. *v.* Robinson, Bell C. C. 34, 38, 8 Cox C. C. 115, 5 Jur. N. S. 203, 28 L. J. M. C. 58, 7 Wkly. Rep. 203.

62. Richmond Hill Steamship Co. *v.* Trinity House Corp., [1896] 2 Q. B. 134, 140, 8 Aspin. 164, 65 L. J. Q. B. 561, 72 L. T. Rep. N. S. 8, 45 Wkly. Rep. 6; Webster Dict. [*quoted* in State *v.* Ward, 49 Conn. 429, 442]. But see *Ex p.* Leland, 1 Nott & M. (S. C.) 460, 462.

63. Weston *v.* McDowell, 20 Mich. 353, 357.

64. "As in the phrase 'a stock of goods,' where it means articles of movable property which are being held for sale." State *v.* Fontenot, 112 La. 628, 639, 36 So. 630.

65. Keyser *v.* Sunapee School Dist. No. 8, 35 N. H. 477, 483.

66. Pumphry *v.* Steamboat Parkersburgh, 2 Ohio Dec. (Reprint) 356, 357, 2 West. L. Month. 491 [*distinguishing* Hall *v.* State, 3 Ohio St. 575; Turner *v.* State, 1 Ohio St. 422].

67. Curtis *v.* Phillips, 5 Mich. 112, 113 [*quoted* in Van Patten *v.* Leonard, 55 Iowa 520, 526, 8 N. W. 334], where the court said: "When a merchant speaks of the goods in his store he must generally be understood to have reference only to the merchandise and commodities kept on hand for the purpose of sale, unless there be some particular reason . . . to give the term a broader signification. This certainly is the popular sense of the term in this country when we speak of a merchant's goods in his store."

68. Chicago, etc., R. Co. *v.* Thompson, 19 Ill. 578, 585; Vasse *v.* Ball, 2 Yeates (Pa.) 178, 182, holding that the term does not include baggage. See *supra*, text and note 1.

69. Chicago, etc., R. Co. *v.* Thompson, 19 Ill. 578, 585 [*citing* Whiton *v.* Old Colony Ins. Co., 2 Metc. (Mass.) 1; Brown *v.* Stapyleton, 4 Bing. 119, 121, 2 L. J. C. P. O. S. 121, 12 Moore C. P. 334, 29 Rev. Rep. 524, 13 E. C. L. 428; French *v.* Patten, 1 Campb. 72, 73, 8 East 373, 9 Rev. Rep. 469.

70. Crichton *v.* Symes, 3 Atk. 61, 62, 26 Eng. Reprint 838.

71. Epping *v.* Robinson, 21 Fla. 36, 52; Keyser *v.* Sunapee School Dist. No. 8, 35 N. H. 477, 483; *In re* Reimer, 159 Pa. St. 212, 28 Atl. 186; Dowdel *v.* Hamm, 2 Watts (Pa.) 61, 65 [*citing* Crichton *v.* Symes, 3 Atk. 61, 62, 26 Eng. Reprint 838; Ryall *v.* Rolle, 1 Atk. 165, 182, 26 Eng. Reprint 107, 1 Ves. 348, 27 Eng. Reprint 1074; Moore *v.* Moore, 1 Bro. Ch. C. 127, 28 Eng. Reprint 1030]; Com. *v.* Keller, 9 Pa. Co. Ct. 253, 255.

72. *Florida.*— Epping *v.* Robinson, 21 Fla. 36, 52.

Kentucky.— Bailey *v.* Duncan, 2 T. B. Mon. 20, 22.

Maine.— State *v.* Bartlett, 55 Me. 200, 210 [*citing* Bouvier L. Dict.].

New Hampshire.—Keyser *v.* Sunapee School Dist. No. 8, 35 N. H. 477, 483 [*citing* 1 Jarman Wills 692].

New York.— Chamberlain *v.* Western Transp. Co., 44 N. Y. 305, 310, 4 Am. Rep. 681 [*citing* Bouvier L. Dict.].

Pennsylvania.— *In re* Reimer, 159 Pa. St. 212, 220, 28 Atl. 186; Com. *v.* Keller, 9 Pa. Co. Ct. 253, 255.

"With all my worldly goods I thee endow," etc. Eddy *v.* Davis, 35 Vt. 247, 248, where it is said: "This larger sense of the term has always been adopted in the construction of wills, whenever necessary to carry into effect the intent of the testator." See also State *v.* Fontenot, 112 La. 628, 632, 36 So. 630; Evans *v.* Davies, [1893] 2 Ch. 216, 220, 62 L. J. Ch. 661, 68 L. T. Rep. N. S. 244, 3 Reports 360, 41 Wkly. Rep. 687.

thing but what descends to the heir.[73] (Goods: In General, see Property. Bailment of, see Bailments. Confusion of, see Confusion of Goods. Hiring of, see Bailments. Mortgage of, see Chattel Mortgages. Ownership of by Alien, see Aliens. Pledge of, see Pledges. Sale of, see Sales. Title by Accession, see Accession.)

GOODS AND CHATTELS.[74] Words of extensive meaning,[75] and words which are very commonly used to designate personal property[76] of every kind, as distinguished from real property,[77] comprehending every species of personalty which may, under the statute, be made the subject of levy and sale under execution issued under a judgment at law;[78] such personal things as may be taken in execution;[79] personal goods;[80] personal estate;[81] personal property in possession;[82] personal and movable property;[83] property which is visible,[84] tangible, or movable;[85] all personal estate and personal property whatsoever;[86] and the word applies as well to property which is tangible as to property which is not tangible;[87] to *effets*,

The term relates only to the testator's household effects and furniture, and does not extend to articles in the way of a person's trade, or his supplies as a contractor for the government. Pratt *v.* Jackson, 1 Bro. P. C. 222, 224, 1 Eng. Reprint 528, 2 P. Wms. 302, 24 Eng. Reprint 740 [*cited* in Crichton *v.* Symes, 3 Atk. 61, 63, 26 Eng. Reprint 838].

Sometimes leases for years will pass under this term. Brewster *v.* Hill, 1 N. H. 350, 352; Portman *v.* Willis, Cro. Eliz. 386, 387.

By the canon law this word taken simply and without qualification will comprise the whole personal estate of every description. Kendall *v.* Kendall, 6 L. J. Ch. O. S. 111, 115, 4 Russ. 360, 28 Rev. Rep. 125, 4 Eng. Ch. 360, 38 Eng. Reprint 841 [*citing* 3 Swinburne 930]. To the same effect is Dowdel *v.* Hamm, 2 Watts (Pa.) 61, 65.

73. Gibbs *v.* Usher, 10 Fed. Cas. No. 5,387, Holmes 348, 351.

Used in connection with other words see the following phrases: "All goods on hand" (Cumpston *v.* Haight, 2 Bing. N. Cas. 449, 454, 1 Hodges 373, 5 L. J. C. P. 99, 2 Scott 684, 29 E. C. L. 613); "any goods, materials, or provisions for the use of any workhouse" (Barber *v.* Waite, 1 A. & E. 514, 516, 3 L. J. M. C. 101, 3 N. & M. 611, 28 E. C. L. 248); "as to what worldly goods it has pleased God to give me" (Wyatt *v.* Sadler, 1 Munf. (Va.) 537, 545); "conveyance of any goods or burden in the course of trade" (Speak *v.* Powell, L. R. 9 Exch. 25, 28, 43 L. J. M. C. 19, 29 L. T. Rep. N. S. 434); "goods or moveables" (Jackson *v.* Robinson, 1 Yeates (Pa.) 101, 102, 1 Am. Dec. 293); "goods held on storage" (Continental Ins. Co. *v.* Pruitt, 65 Tex. 125, 129); "goods in the store" (Curtis *v.* Phillips, 5 Mich. 112, 113); "goods laden or to be laden" (Cottam *v.* Mechanics,' etc., Ins. Co., 40 La. Ann. 259, 261, 4 So. 510); "goods of a debtor" (Colonial Bank *v.* Whinney, 11 App. Cas. 426, 447, 56 L. J. Ch. 43, 55 L. T. Rep. N. S. 362, 3 Morr. Bankr. Cas. 207, 34 Wkly. Rep. 705; *In re* Mackenzie, [1899] 2 Q. B. 566, 577, 68 L. J. Q. B. 1003, 81 L. T. Rep. N. S. 214); "goods, specie, and effects" (Gregory *v.* Christie, 3 Dougl. 419, 420, 26 E. C. L. 274); "goods supplied to him by you in his business" (Hoad *v.* Grace, 7 H. & N. 494, 497, 8 Jur. N. S. 43, 31 L. J. Exch. 98, 5 L. T. Rep. N. S. 359, 10 Wkly. Rep. 85); "goods . . . usually kept in country stores" (Pindar *v.* Kings County F. Ins. Co., 36 N. Y. 648, 649, 3 Transcr. App. 330, 93 Am. Dec. 544.

74. **Used in the old books.**— The two words "goods and chattels" are generally used together, to denote personal property, especially in the old books, and in old forms which have survived. Sweet L. Dict.

The words "bona et catalla," are as used in our ancient statutes and by law writers. Bullock *v.* Dodds, 2 B. & Ald. 258, 276, 20 Rev. Rep. 420.

"Goods and chattels . . . are bona notabilia, and therefore property." Terhune *v.* Bray, 16 N. J. L. 53, 54.

"All goods, chattels or other property" see Misch *v.* Russell, 136 Ill. 22, 26 N. E. 528, 12 L. R. A. 125 [*cited* in Adams *v.* Akerlund, 168 Ill. 632, 637, 48 N. E. 454].

"All my goods and chattels" see Jepson *v.* Key, 2 H. & C. 873, 878, 10 Jur. N. S. 392, 10 L. T. Rep. N. S. 68, 12 Wkly. Rep. 621.

75. Hertford *v.* Lowther, 7 Beav. 1, 7, 7 Jur. 1167, 13 L. J. Ch. 41, 29 Eng. Ch. 1, 49 Eng. Reprint 962.

76. *Illinois.*— Loeber *v.* Leininger, 175 Ill. 484, 487, 51 N. E. 703.

Nebraska.— State *v.* Moores, 56 Nebr. 1, 19, 76 N. W. 530.

Tennessee.— State *v.* Brown, 9 Baxt. 53, 55, 40 Am. Rep. 81.

West Virginia.—Tingle *v.* Fisher, 20 W. Va. 497, 511.

England.— Bullock *v.* Dodds, 2 B. & Ald. 258, 276, 20 Rev. Rep. 420.

77. Bullock *v.* Dodds, 2 B. & Ald. 258, 276, 20 Rev. Rep. 420.

78. Loeber *v.* Leininger, 175 Ill. 484, 487, 51 N. E. 703.

79. Sims *v.* Thomas, 12 A. & E. 550, 554, 40 E. C. L. 275.

80. Garfield *v.* State, 74 Ind. 60, 65.

81. Stuart *v.* Bute, 11 Ves. Jr. 657, 666, 8 Rev. Rep. 266, 32 Eng. Reprint 1243.

82. State *v.* Bartlett, 55 Me. 200, 211.

83. Putnam *v.* Westcott, 19 Johns. (N. Y.) 73, 76.

84. See Colonial Bank *v.* Whinney, 55 L. J. Ch. 585, 590.

85. Tingle *v.* Fisher, 20 W. Va. 497, 511 [*citing* Kirkland *v.* Brune, 31 Gratt. (Va.) 126].

86. St. 7 & 8 Vict. c. 94, § 7.

87. *Ex p.* Foss, 2 De G. & J. 230, 240, 4

meubles;[83] and to effects and chattels personal, and not real.[89] In the construction of contracts, statutes, etc., the terms have been applied to various subjects; as, for instance, a BANK-NOTE,[90] *q. v.*; halves of country bank-notes;[91] bank-bills;[92] bills of exchange;[93] a bond;[94] bond and mortgage;[95] choses in action[96] as well as those in possession;[97] CHATTELS,[98] *q. v.*; chattels real;[99] COIN,[1] *q. v.*; the copyright in a newspaper;[2] corporate stock;[3] a crop of corn and the profit of the stubble afterwards;[4]

Jur. N. S. 522, 27 L. J. Bankr. 17, 6 Wkly. Rep. 417, 59 Eng. Ch. 184, 44 Eng. Reprint 977, per Turner, L. J. *Compare* Richmond First Nat. Bank *v.* Holland, 99 Va. 495, 505, 39 S. E. 126, 86 Am. St. Rep. 898, 55 L. R. A. 155.

88. Thompson *v.* Chauveau, 7 Mart. N. S. (La.) 331, 333, 18 Am. Dec. 246.

Goods and movable effects (in a will) means utensils and goods *ejusdem generis*. Sutton *v.* Sharp, 1 Russ. 146, 150, 25 Rev. Rep. 19, 16 Eng. Ch. 128, 38 Eng. Reprint 57.

89. Putman *v.* Westcott, 19 Johns (N. Y.) 73, 76.

90. Turner *v.* State, 1 Ohio St. 422, 426 [*citing* 2 Blackstone Comm. 16, and *distinguished* in Pumphry *v.* Steamboat Parkersburgh, 2 Ohio Dec. (Reprint) 356, 357, 2 West. L. Month. 491]. *Contra*, Eastman *v.* Com., 4 Gray (Mass.) 416, 418; State *v.* Calvin, 22 N. J. L. 207, 208; Rex *v.* Dean, 2 Leach C. C. 798, 799 [*cited* in U. S. *v.* Moulton, 27 Fed. Cas. No. 15,827, 5 Mason 537, 551]. *Compare* Com. *v.* Richards, 1 Mass. 337, 339; Com. *v.* Boyer, 1 Binn. (Pa.) 201, 205, 208; People *v.* Holbrook, 13 Johns. (N. Y.) 90, 94; Hertford *v.* Lowther, 7 Beav. 1, 9, 7 Jur. 1167, 13 L. J. Ch. 41, 29 Eng. Ch. 1, 49 Eng. Reprint 962; Rex *v.* Morris, 2 Leach C. C. 525, 530; Chapman *v.* Hart, 1 Ves. 271, 273, 27 Eng. Reprint 1026.

Bank-notes are usually treated in the common business of life as money and cash, and not as goods and chattels, or securities for money. Miller *v.* Race, 1 Burr. 452, 457 [*cited* in U. S. *v.* Moulton, 27 Fed. Cas. No. 15,827, 5 Mason 537, 549].

91. Rex *v.* Mead, 4 C. & P. 535, 19 E. C. L. 637.

92. Garfield *v.* State, 74 Ind. 60, 65; Handy *v.* Dobbin, 12 Johns. (N. Y.) 220 [*cited* in Allen *v.* Sewall, 2 Wend. (N. Y.) 327, 339]. *Compare* Chicago, etc., R. Co. *v.* Thompson, 19 Ill. 578, 585.

93. Cumming *v.* Baily, 6 Bing. 363, 372, 4 M. & P. 36, 31 Rev. Rep. 438, 19 E. C. L. 169.

94. Cook *v.* Bosinger, 4 Mod. 157. *Contra*, Moore *v.* Moore, 1 Bro. Ch. 127, 129, 28 Eng. Reprint 1030 [*cited* in Rex *v.* Capper, 5 Price 217, 265, 19 Rev. Rep. 568].

95. Terhune *v.* Bray, 16 N. J. L. 53, 54.

96. *Florida.*— Epping *v.* Robinson, 21 Fla. 36, 52 [*citing* Bouvier L. Dict.].

Maine.— State *v.* Bartlett, 55 Me. 200, 211 [*citing* Ryall *v.* Rolle, 1 Atk. 165, 182; 26 Eng. Reprint 107, 1 Ves. 348, 7 Eng. Reprint 1074; Ford's Case, 12 Coke 1].

Nebraska.— State *v.* Moores, 56 Nebr. 1, 9, 76 N. W. 530.

New Hampshire.—Pinkerton *v.* Manchester, etc., R. Co., 42 N. H. 424, 451 [*citing* 2 Blackstone Comm. 384 note 1].

Pennsylvania.— *In re* Reimer, 159 Pa. St. 212, 220, 28 Atl. 186; Dowdel *v.* Hamm, 2 Watts 61, 65.

England.— Ryall *v.* Rolle, 1 Atk. 165, 182, 26 Eng. Reprint 107, 1 Ves. 348, 27 Eng. Reprint 1074 [*citing* Ford's Case, 12 Coke 1]. *Contra*, Hertford *v.* Lowther, 7 Beav. 1, 9, 7 Jur. 1167, 13 L. J. Ch. 41, 29 Eng. Ch. 1, 49 Eng. Reprint 962; Reg. *v.* Powell, 5 Cox C. C. 396, 397, 16 Jur. 177, 21 L. J. M. C. 78. *Compare* Colonial Bank *v.* Whinney, 55 L. J. Ch. 585, 595.

Contra.— National Hudson River Bank *v.* Chaskin, 28 N. Y. App. Div. 311, 315, 51 N. Y. Suppl. 64; Cowen *v.* Brownsville First Nat. Bank, 94 Tex. 547, 552, 63 S. W. 532, 64 S. W. 778; Richmond First Nat. Bank *v.* Holland, 99 Va. 495, 505, 39 S. E. 126, 86 Am. St. Rep. 898, 55 L. R. A. 155 [*citing* Kirkland *v.* Brune, 31 Gratt. (Va.) 126] (holding that "goods and chattels," under a statute, mean visible, tangible, personal property only); Tingle *v.* Fisher, 20 W. Va. 497, 511.

97. State *v.* Bartlett, 55 Me. 200, 211; Pinkerton *v.* Manchester, etc., R. Co., 42 N. H. 424, 451; *In re* Reimer, 159 Pa. St. 212, 220, 28 Atl. 186; Dowdel *v.* Hamm, 2 Watts (Pa.) 61, 65.

98. *In re* Reimer, 159 Pa. St. 212, 220, 28 Atl. 186 [*quoting* 2 Williams Exrs. 1015]. *Compare* Missouri Loan Bank *v.* How, 56 Mo. 53, 58.

The word "chattels" serves to extend application of the term "goods and chattels" to subjects which the word "goods" would not embrace. Burrill L. Dict.

"Goods and chattels permanently located" include the stock in trade of a partnership doing business in a city, which remains there until sold in the course of business. Hopkins *v.* Baker, 78 Md. 363, 374, 28 Atl. 284, 22 L. R. A. 477.

99. Epping *v.* Robinson, 21 Fla. 36, 52 [*citing* Ford's Case, 12 Coke 1; Bouvier L. Dict.].

"Goods, or chattels, are either personall or reall.— Personall, as horse and other beasts, household stuffe, bowes, weapons and such like, called personall, because for the most part they belong to the person of a man, or else for that they are to be recovered by personall actions. Reall, because they concerne the reality, as tearmes for yeares of lands or tenements, wardships, the interest of tenant by statute staple, by statute merchant, by *elegit*, and such like." Coke Litt. 118*b*.

1. Hall *v.* State, 3 Ohio St. 575, 576 [*cited* in State *v.* Bartlett, 55 Me. 200, 210].

2. *Ex p.* Foss, 2 De G. & J. 230, 240, 4 Jur. N. S. 522, 27 L. J. Bankr. 17, 6 Wkly. Rep. 417, 59 Eng. Ch. 184, 44 Eng. Reprint 977.

3. Curtis *v.* Steever, 36 N. J. L. 304, 306, 307.

4. Jones *v.* Flint, 10 A. & E. 753, 759, 9 L. J. Q. B. 252, 2 P. & D. 594, 37 E. C. L. 396.

a dog;[5] guineas;[6] growing potatoes;[7] money;[8] notes;[9] shares of a company;[10] a conveyance of a share in a trading concern by one of the partners;[11] current silver coin;[12] treasury notes;[13] or a quantity of turnip seed.[14] On the other hand, the term has been held not to embrace advancements;[15] a bond conditioned for the payment of an annuity to an insolvent;[16] a debt;[17] fixtures;[18] growing crops;[19] a leasehold;[20] leases for years;[21] mortgage of leasehold interest;[22] a mortgage of capital stock of a corporation;[23] a steam engine erected for the purpose of working a colliery;[24] stills, vats, and utensils used in a distillery;[25] or stock, and money in the funds.[26] The terms are also said to mean such effects and such things, whereof larceny could be committed at common law.[27] Although the terms do not, of their proper nature, extend to charters and evidences concerning freehold, or inheritance, or obligations, or other deeds or specialties, being things in action,[28] yet in the case of an innkeeper's liability, they do extend to such obligations.[29] In contracts, the terms include not only personal property in possession,

5. Com. *v.* Hazelwood, 84 Ky. 681, 684, 2 S. W. 489, 8 Ky. L. Rep. 586; Rockwell *v.* Oakland Cir. Judge, 133 Mich. 11, 14, 94 N. W. 378. See also Hamby *v.* Samson, 105 Iowa 112, 113, 74 N. W. 918, 67 Am. St. Rep. 285, 40 L. R. A. 508.

6. U. S. *v.* Moulton, 27 Fed. Cas. No. 15,827, 5 Mason 527, 548.

7. Evans *v.* Roberts, 5 B. & C. 829, 830, 8 D. & R. 611, 4 L. J. K. B. O. S. 313, 11 E. C. L. 700 [*cited* in Jones *v.* Flint, 10 A. & E. 753, 759, 9 L. J. Q. B. 252, 2 P. & D. 594, 37 E. C. L. 396]. *Compare* Emmerson *v.* Heelis, 2 Taunt. 38, 47, 11 Rev. Rep. 520.

8. Chicago, etc., R. Co. *v.* Thompson, 19 Ill. 578, 584 [*citing* Coke Litt.]; Garfield *v.* State, 74 Ind. 60, 65; Handy *v.* Dobbin, 12 Johns. (N. Y.) 220 [*cited* in Allen *v.* Sewall, 2 Wend. (N. Y.) 327, 339]; Hall *v.* State, 3 Ohio St. 575, 576 [*distinguished* in Pumphry *v.* Steamboat Parkersburgh, 2 Ohio Dec. (Reprint) 356, 357, 2 West. L. Month. 491]. *Contra*, Leinkauf *v.* Barnes, 66 Miss. 207, 214, 5 So. 402. *Compare* Reg. *v.* Radley, 2 C. & K. 974, 975, 3 Cox C. C. 460, 1 Den. C. C. 450, 13 Jur. 544, 18 L. J. M. C. 184, 3 New Sess. Cas. 651, T. & M. 144, 61 E. C. L. 974; Rex *v.* Becall, 1 C. & P. 310, 314, 454, 12 E. C. L. 186 [*cited* in Citizens' Bank *v.* Nantucket Steamboat Co., 5 Fed. Cas. No. 2,730, 2 Story 16, 53]; Gordon *v.* East India Co., 7 T. R. 228, 235, 4 Rev. Rep. 423.

9. Clapp *v.* Shephard, 23 Pick (Mass.) 228, 230 [*citing* Mills *v.* Gore, 20 Pick. (Mass.) 28; Gibbens *v.* Peeler, 8 Pick. (Mass.) 254].

10. Robinson *v.* Jenkins, 24 Q. B. D. 275, 278, 59 L. J. Q. B. 147, 62 L. T. Rep. N. S. 439, 38 Wkly. Rep. 360. See also Lawton *v.* Hickman, 9 Q. B. 563, 586, 587, 10 Jur. 543, 16 L. J. Q. B. 20, 4 R. & Can. Cas. 336, 58 E. C. L. 563, 586.

11. Ryall *v.* Rolle, 1 Atk. 165, 182, 26 Eng. Reprint 107, 1 Ves. 348, 27 Eng. Reprint 1074 [*cited* in Pinkerton *v.* Manchester, etc., R. Co., 42 N. H. 424, 451].

12. Reg. *v.* Radley, 2 C. & K. 974, 975, 3 Cox C. C. 460, 1 Den. C. C. 450, 13 Jur. 544, 18 L. J. M. C. 184, 3 New Sess. Cas. 651, T. & M. 144, 61 E. C. L. 974.

13. Collins *v.* People, 39 Ill. 233, 239 [*citing* Chicago, etc., R. Co. *v.* Thompson, 19 Ill. 578].

14. Under a contract to raise a crop therefrom. Watts *v.* Friend, 10 B. & C. 446, 448, 8 L. J. K. B. O. S. 181, 21 E. C. L. 192 [*citing* Smith *v.* Surman, 9 B. & C. 561, 7 L. J. K. B. O. S. 296, 4 M. & R. 455, 17 E. C. L. 253]. *Compare* Emmerson *v.* Heelis, 2 Taunt. 38, 46, 11 Rev. Rep. 520.

15. Knight *v.* Oliver, 12 Gratt. (Va.) 33, 37.

16. Sims *v.* Thomas, 12 A. & E. 536, 550, 552, 9 L. J. Q. B. 399, 4 P. & D. 233, 40 E. C. L. 268, 275.

17. Chapman *v.* Hart, 1 Ves. 271, 273, 27 Eng. Reprint 1026 [*cited* in Rex *v.* Capper, 5 Price 217, 263, 19 Rev. Rep. 568].

In a royal grant "goods and chattels" will not pass the debts of a felon. Ford's Case, 12 Coke 1, 2; Rex *v.* Sutton, 1 Saund. 273, 275 [*cited* in Colonial Bank *v.* Whinney, 55 L. J. Ch. 585, 592; Rex *v.* Capper, 5 Price 217, 263, 19 Rev. Rep. 568].

18. Joliet First Nat. Bank *v.* Adam, 138 Ill. 483, 500, 28 N. E. 955 [*cited* in Adams *v.* Akerlund, 168 Ill. 632, 637, 48 N. E. 454]; Coombs *v.* Beaumont, 5 B. & Ad. 72, 76, 2 L. J. K. B. 190, 2 N. & M. 235, 27 E. C. L. 40; Lee *v.* Risdon, 2 Marsh. 495, 496, 7 Taunt. 188, 17 Rev. Rep. 484, 2 E. C. L. 320. *Compare* Pitt *v.* Shew, 4 B. & Ald. 206, 6 E. C. L. 453.

19. Davis *v.* McFarlane, 37 Cal. 634, 638, 99 Am. Dec. 340. *Contra*, Glover *v.* Coles, 1 Bing. 6, 9, 7 Moore C. P. 231, 8 E. C. L. 375.

20. Putman *v.* Westcott, 19 Johns. (N. Y.) 73, 76.

21. Brewster *v.* Hill, 1 N. H. 350, 352.

22. State Trust Co. *v.* Casino Co., 18 Misc. (N. Y.) 327, 329, 41 N. Y. Suppl. 1.

23. Williamson *v.* New Jersey South R. Co., 26 N. J. Eq. 398, 403.

24. Coombs *v.* Beaumont, 5 B. & Ad. 72, 77, 2 L. J. K. B. 190, 2 N. & M. 235, 27 E. C. L. 40.

25. Horn *v.* Baker, 9 East 215, 240, 241, 242, 9 Rev. Rep. 541.

26. Rex *v.* Capper, 5 Price 217, 263, 19 Rev. Rep. 568 [*quoting* Chapman *v.* Hart, 1 Ves. 271, 273, 27 Eng. Reprint 1026].

27. U. S. *v.* Moulton, 27 Fed. Cas. No. 15,827, 5 Mason 537, 548 [*distinguishing* Rex *v.* Guy, 1 Leach C. C. 276].

28. Allen *v.* Sewall, 2 Wend. (N. Y.) 327, 339.

29. Allen *v.* Sewall, 2 Wend. (N. Y.) 327, 339, where it is said: "And if one brings a

but written instruments of value relating to business matters.[30] In wills, the words are the most comprehensive terms of description for passing personal property yet they may be restricted by the context;[31] thus the term may include a copyhold in fee,[32] and running horses.[33] The extent to which the terms are applicable, however, must depend upon the subject-matter and the context.[34] (See Goods; Goods and Merchandise; Goods, Wares, and Merchandise.)

GOODS AND COMMODITIES. Words which are very much akin to Goods, Wares, and Merchandise,[35] *q. v.* (See Goods.)

GOODS AND MERCHANDISE. A phrase used to designate personal property.[36] (See Goods; Goods and Chattels; Goods, Wares, and Merchandise.)

GOODS OF SIMILAR DESCRIPTION. As the term is used in tariff acts, a similarity in product, in uses, and in adaptation to uses, and not in appearance or in process of manufacture.[37] (See, generally, Customs Duties.)

GOOD STANDING.[38] As applied to a member of a beneficial or fraternal order, good conduct, that is, freedom from the violation of those requirements which indicate the benevolent purposes of the society, or express its intention to insist upon a high standard of character among its members;[39] a term which not only implies that a party is a member of the society, but that he has a good reputation

bag or chest of evidences into the inn, or obligations, deeds, or other specialties, and by default of the innkeeper they are taken away, the innkeeper shall answer for them and the writ shall be *bona et catalla* generally, and the declaration shall be special."

30. Epping *v.* Robinson, 21 Fla. 36, 52. See *supra*, text and note 28.

31. Foxall *v.* McKenney, 9 Fed. Cas. No. 5,016, 3 Cranch C. C. 206 [*citing* Crichton *v.* Lymes, 3 Atk. 61, 26 Eng. Reprint 838; Woolcomb *v.* Woolcomb, 3 P. Wms. 112, 24 Eng. Reprint 990].

A bequest of "furniture, goods and chattels" construed in Manton *v.* Tabois, 30 Ch. D. 92, 97, 54 L. J. Ch. 1008, 53 L. T. Rep. N. S. 289, 33 Wkly. Rep. 832. See also Gibbs *v.* Lawrence, 7 Jur. N. S. 137, 30 L. J. Ch. 170, 3 L. T. Rep. N. S. 367, 9 Wkly. Rep. 93; Stuart *v.* Bute, 11 Ves. Jr. 657, 666, 8 Rev. Rep. 266, 32 Eng. Reprint 1243.

32. Roe *v.* Bird, 2 W. Bl. 1301, 1306, 1307, where Blackstone, J., said: "'My goods, chattels, securities for money, and personal estate,' will as clearly comprehend a mortgage term, if such was the intent of the testator."

33. Gower *v.* Gower, Ambl. 612, 27 Eng. Reprint 397, 2 Eden 201, 28 Eng. Reprint 875.

34. Gibbs *v.* Usher, 10 Fed. Cas. No. 5,387, Holmes 348, 351.

35. *In re* Cleland, L. R. 3 Ch. 466, 477, 36 L. J. Bankr. 33, 16 L. T. Rep. N. S. 403, 15 Wkly. Rep. 681, per Cairns, L. J.

"[They] are technical words" "goods, wares, and mechandize," as used in the statute of frauds are "certainly as comprehensive and extensive as the words 'goods or commodities.'" *In re* Cleland, L. R. 2 Ch. 466, 477, 36 L. J. Bankr. 33, 16 L. T. Rep. N. S. 403, 15 Wkly. Rep. 681, per Cairns, L. J.

36. Burrill L. Dict. See also Sheppard *v.* Gosnold, Vaugh. 159, 170.

Under the term "goods and merchandise," specie dollars, the proceeds of the sale of the goods covered by the policy of insurance, were held to be included. American Ins. Co. *v.* Griswold, 14 Wend. (N. Y.) 399, 458 [*cited* in Chicago, etc., R. Co. *v.* Thompson, 19 Ill. 578, 585].

37. Greenleaf *v.* Goodrich, 101 U. S. 278, 283, 25 L. ed. 845 [*cited* in Schmieder *v.* Barney, 113 U. S. 645, 646, 5 S. Ct. 624, 28 L. ed. 1130; White *v.* Barney, 43 Fed. 474, 477 (where the court in construing the expression "On all delaines, cashmere delaines, muslin delaines, barege delaines, composed wholly or in part of wool, . . . and on all other . . . goods of similar description" as used in a tariff act said: "By 'goods of similar description' in this act was meant completed fabrics, composed wholly or in part of worsted, wool, mohair, or goat's hair, and used for dress goods, which also, as completed fabrics, possess qualities of general appearance, character, and texture like unto, or nearly corresponding to, or generally resembling, the qualities which distinguish delaines, or cashmere delaines, or barege delaines, or muslin delaines")].

See also Bister *v.* U. S., 59 Fed. 452, 453, 8 C. C. A. 175.

"The words 'of similar description' constitute a common and familiar phrase in the ordinary use of English words. Sometimes, however, the usage of trade gives to words of ordinary every-day speech particular and technical trade meanings; and therefore, although in a former case (Greenleaf *v.* Goodrich, 101 U. S. 278, 283, 25 L. ed. 845) it has been held by the supreme court that the phrase 'of similar description' is not a commercial phrase, yet that court has held in the case of Schmieder *v.* Barney, 113 U. S. 645, 646, 5 S. Ct. 624, 28 L. ed. 1130, that the plaintiff might introduce, if he could find it, testimony to show that that phrase has acquired a particular and specific trade meaning other and different from its meaning in ordinary speech and conversation." White *v.* Barney, 43 Fed. 474, 476.

38. **"Good standing and reputation"** see Loeser *v.* Humphrey, 41 Ohio St. 378, 382, 52 Am. Rep. 86.

39. Royal Circle *v.* Achterrath, 204 Ill. 549, 564, 68 N. E. 492, 98 Am. St. Rep. 224, 63 L. R. A. 452 [*citing* Supreme Council R. T. of T. *v.* Curd, 111 Ill. 284]; High Court I. O. of F. *v.* Zak, 136 Ill. 185, 188, 26 N. E. 593, 29 Am. St. Rep. 318.

therein;[40] that he has complied with the laws, rules, usages and regulations of the order;[41] and that he is not at the time of his death in arrears for dues and assessments, the time for collection of which had fully expired.[42] (See, generally, MUTUAL BENEFIT INSURANCE.)

GOODS, WARES, AND MERCHANDISE.[43] Words constantly used in legal and common parlance[44] to designate whatever species of property is not embraced by the phrase "lands, tenements, and hereditaments";[45] every species of property which is not real estate or freehold;[46] personal property;[47] corporeal movable property;[48] all movable property that is ordinarily bought and sold;[49] the commodities bought and sold in trade and commerce,[50] or by merchants and traders;[51] articles[52] of trade and commerce;[53] in popular acceptance, articles such as are usually kept in stock for sale by merchants or dealers;[54] articles which are sold or kept for sale by a merchant; that which is sold by a merchant in the course of his business;[55] or any personal property of which a larceny may be committed, and not those effects and things only which are offered for sale.[56] As used in contracts, statutes, etc., the terms have been applied to various subjects; as, for instance, anchors and chains of a vessel;[57] a BANK-NOTE,[58] *q. v.*; a curricle;[59] FRUCTUS INDUSTRIALES,[60] *q. v.*; gravel;[61] a lottery ticket;[62] music;[63] a newspaper which is made the subject of sale;[64] oil, catchings, or other products of a marine adventure;[65] an iron safe;[66] silver dollars;[67] shares of corporate

40. Supreme Council R. T. of T. *v.* Curd, 111 Ill. 284, 289 [*quoted* in Smith *v.* K. of F. M., 36 Mo. App. 184, 192].

41. Royal Circle *v.* Achterrath, 204 Ill. 549, 564, 68 N. E. 492, 98 Am. St. Rep. 224, 63 L. R. A. 452.

42. Puhr *v.* Grand Lodge, G. O. of H., 77 Mo. App. 47, 63 [*citing* Bacon Ben. Soc. § 414]. See also Supreme Lodge K. of H. of W. *v.* Johnson, 78 Ind. 110, 115; Mulroy *v.* Supreme Lodge K. of H., 28 Mo. App. 463, 467; McMurry *v.* Supreme Lodge K. of H., 20 Fed. 107, 109.

43. **A term superseded by "merchandise."** —"In the earlier duty-laws of the United States, the expression 'goods, wares and merchandise' was scrupulously used to comprehend all subjects of duty collectively. But in the revised statutes, merchandise alone is used as the equivalent of goods, wares and merchandise." Com. *v.* Keller, 9 Pa. Co. Ct. 253, 254 [*citing* Abbott L. Dict.].

Unloading of "goods, wares, and merchandize" before entry at port subjects vessel to forfeiture see Phile *v.* The Anna, 1 Dall. (Pa.) 197, 201, 1 L. ed. 98.

Distinguished from "baggage" in Chamberlain *v.* Western Transp. Co., 45 Barb. (N. Y.) 218, 223.

44. Com. *v.* Keller, 9 Pa. Co. Ct. 253, 255.

45. French *v.* Schoonmaker, 69 N. J. L. 6, 8, 54 Atl. 225; Greenwood *v.* Law, 55 N. J. L. 168, 175, 26 Atl. 134, 19 L. R. A. 688. See also Allen *v.* Sewall, 2 Wend. (N. Y.) 327, 339.

46. Gay *v.* U. S., 13 Wall. (U. S.) 358, 362, 20 L. ed. 606.

47. French *v.* Schoonmaker, 69 N. J. L. 6, 8, 54 Atl. 225; Greenwood *v.* Law, 55 N. J. L. 168, 176, 26 Atl. 134, 19 L. R. A. 688; Com. *v.* Keller, 9 Pa. Co. Ct. 253, 255. See also Allen *v.* Sewall, 2 Wend. (N. Y.) 327, 339.

48. Webb *v.* Baltimore, etc., R. Co., 77 Md. 92, 98, 26 Atl. 113, 39 Am. St. Rep. 396; Com. *v.* Keller, 9 Pa. Co. Ct. 253, 254 [*citing* Benjamin Sales, § 111, p. 99].

A word of less extensive import than property see Whiton *v.* Old Colony Ins. Co., 2 Metc. (Mass.) 1, 15 [*cited* in Chicago, etc., R. Co. *v.* Thompson, 19 Ill. 578, 585].

49. Smith *v.* Wilcox, 24 N. Y. 353, 358, 82 Am. Dec. 302.

50. Passaic Mfg. Co. *v.* Hoffman, 3 Daly (N. Y.) 495, 513.

51. Chamberlain *v.* Western Transp. Co., 45 Barb. (N. Y.) 218, 223.

52. As used in a tariff act. The Conqueror, 166 U. S. 110, 114, 17 S. Ct. 510, 41 L. ed. 937.

53. Com. *v.* Keller, 9 Pa. Co. Ct. 253, 255.

54. State *v.* Fontenot, 112 La. 628, 635, 36 So. 630.

55. Dyott *v.* Letcher, 6 J. J. Marsh. (Ky.) 541, 543, where it is said: "That which, if sold by a merchant, in the course of his business as such, may, with propriety, be termed merchandize, could not be truly so styled, if sold by a farmer. The linsey or linen of a farmer, which he sells, are not merchandize."

56. State *v.* Brooks, 4 Conn. 446, 449.

57. Weld *v.* Maxwell, 29 Fed. Cas. No. 17,374, 4 Blatchf. 136, 139.

58. U. S. *v.* Moulton, 27 Fed. Cas. No. 15,827, 3 Mason 537.

59. Duplanty *v.* Commercial Ins. Co., Anth. N. P. (N. Y.) 157, 158.

60. See FRAUDS, STATUTE OF, *ante*, 244 note 88.

61. Coulton *v.* Ambler, 14 L. J. Exch. 10, 18, 13 M. & W. 403, 3 R. & Can. Cas. 724 note.

62. Yohe *v.* Robertson, 2 Whart. (Pa.) 155, 162 [*cited* in Com. *v.* Keller, 9 Pa. Co. Ct. 253, 255].

63. That is, sheet music. Com. *v.* Nax, 13 Gratt. (Va.) 789, 791.

64. Smith *v.* Wilcox, 24 N. Y. 353, 358, 82 Am. Dec. 302.

65. Paddock *v.* Franklin Ins. Co., 11 Pick. (Mass.) 227, 230.

66. Rankin *v.* Vandiver, 78 Ala. 562, 566.

67. The Elizabeth & Jane, 8 Fed. Cas. No. 4,355, 2 Mason 407, 408.

stock,[68] stock, or shares in joint stock companies,[69] and other securities which are the subject of common barter and sale, and which are given visible and palpable form by means of certificates, bonds, or other evidences of indebtedness;[70] a team of mules or horses used for the removal of spirits with intent to defraud the government;[71] or trees under a contract of sale of lumber.[72] On the other hand, the term has been held not to apply to certain subjects; as, for instance, ALCOHOL,[73] *q. v.*; bank-bills;[74] dredges and scows;[75] farm products in the hands of farmers,[76] or property and produce sold by a farmer;[77] FRUCTUS NATURALES,[78] *q. v.*; horses;[79] a license to use a patent furnace;[80] money in bank;[81] railway scrip shares;[82] a subscription for shares of stock;[83] teams and wagons used by a lessee in delivering goods to his customers, or notes and accounts due him and kept in the building;[84] a set of artificial teeth;[85] United States treasury checks;[86] or to a pleasure yacht built in a foreign country, and purchased there by an American citizen, after her entering port in this country.[87] (See GOODS; GOODS AND CHATTELS; GOODS AND MERCHANDISE; and, generally, FRAUDS, STATUTE OF.)

GOOD TITLE. A term which means, not merely a title valid in fact, but a marketable title[88] which can again be sold to a reasonable purchaser, or mortgaged to a person of reasonable prudence as a security for the loan of money;[89] a title which a person of reasonable prudence and caution would purchase or accept as security

68. Ayres *v.* French, 41 Conn. 142, 151; Banta *v.* Chicago, 172 Ill. 204, 218, 50 N. E. 233, 40 L. R. A. 611. *Contra*, Richmond First Nat. Bank *v.* Holland, 99 Va. 495, 504, 505, 506, 39 S. E. 126, 86 Am. St. Rep. 898, 55 L. R. A. 155.

Shares of a company and public stock see Weightman *v.* Caldwell, 4 Wheat. (U. S.) 85, 89 note, 4 L. ed. 520.

69. Pray *v.* Mitchell, 60 Me. 430, 435.

70. Banta *v.* Chicago, 172 Ill. 204, 218, 50 N. E. 233, 40 L. R. A. 611 [*citing* Pray *v.* Mitchell, 60 Me. 430; Baldwin *v.* Williams, 3 Metc. (Mass.) 365; Tisdale *v.* Harris, 20 Pick. (Mass.) 9; Dowdel *v.* Hamm, 2 Watts (Pa.) 61; Jackson *v.* Robinson, 1 Yeates (Pa.) 101 1 Am. Dec. 293; Moore *v.* Moore, 1 Bro. Ch. 127, 128, 28 Eng. Reprint 1030; Anderson L. Dict; Bouvier L. Dict.].

71. Pilcher *v.* Faircloth, 135 Ala. 311, 314, 33 So. 545 [*citing* Hafley *v.* Patterson, 47 Ala. 271; Weston *v.* McDowell, 20 Mich. 353; Rapalje & L. L. Dict.].

"All goods, wares, merchandise," if found in possession of any person in fraud of the internal revenue laws, etc., is applicable to distilled spirits. Harrington *v.* U. S., 11 Wall. (U. S.) 356, 364, 20 L. ed. 167.

72. Smith *v.* Surman, 9 B. & C. 561, 568, 7 L. J. K. B. O. S. 296, 4 M. & R. 455, 17 E. C. L. 253 [*citing* Garbutt *v.* Watson, 5 B. & Ald. 613, 7 E. C. L. 335].

73. Bridges *v.* State, 37 Ark. 224, 228.

74. Sewall *v.* Allen, 6 Wend. (N. Y.) 335, 341 [*cited* in Pumphry *v.* Steamboat Parkersburgh, 2 Ohio Dec. (Reprint) 356, 357, 2 West. L. Month. 491]; Citizens' Bank *v.* Nantucket Steamboat Co., 5 Fed. Cas. No. 2,730, 2 Story 16, 55. See also 2 Kent Comm. 698 note.

75. The International, 83 Fed. 840.

76. Com. *v.* Gardner, 133 Pa. St. 284, 289, 19 Atl. 550, 19 Am. St. Rep. 645, 7 L. R. A. 666.

77. Dyott *v.* Letcher, 6 J. J. Marsh. (Ky.) 541, 543.

78. See FRAUDS, STATUTE OF, *ante*, 244.

79. Knapp *v.* North Wales Mut. Live Stock Ins. Co., 11 Montg. Co. Rep. (Pa.) 119, 120 [*citing* Bouvier L. Dict.].

80. Chanter *v.* Dickinson, 2 Dowl. P. C. N. S. 838, 844, 7 Jur. 89, 12 L. J. C. P. 147, 5 M. & G. 253, 6 Scott N. R. 182, 44 E. C. L. 140.

81. Boston Inv. Co. *v.* Boston, 158 Mass. 461, 463, 33 N. E. 580.

82. Knight *v.* Barber, 2 C. & K. 333, 334, 10 Jur. 929, 16 L. J. Q. B. 18, 16 M. & W. 66, 61 E. C. L. 333 [*citing* Humble *v.* Mitchell, 11 A. & E. 205, 9 L. J. Q. B. 29, 3 P. & D. 141, 2 R. & Can. Cas. 70, 39 E. C. L. 130].

83. Webb *v.* Baltimore, etc., R. Co., 77 Md. 92, 98, 26 Atl. 113, 39 Am. St. Rep. 396.

84. Van Patten *v.* Leonard, 55 Iowa 520, 527, 8 N. W. 334.

85. Passaic Mfg. Co. *v.* Hoffman, 3 Daly (N. Y.) 495, 513. But see Lee *v.* Griffin, 1 B. & S. 272, 278, 7 Jur. N. S. 1302, 30 L. J. Q. B. 252, 4 L. T. Rep. N. S. 546, 9 Wkly. Rep. 702, 101 E. C. L. 272.

86. Beers *v.* Crowell, Dudley (Ga.) 28, 29.

87. The Conqueror, 166 U. S. 110, 121, 17 S. Ct. 510, 41 L. ed. 937.

Appurtenances or equipments of a ship, as a chain cable, or other articles, purchased *bona fide* for the use of the ship, are not "goods, wares, or merchandise." U. S. *v.* Chain Cable, 25 Fed. Cas. No. 14,776, 2 Sumn. 362, 365.

88. "A title open to a reasonable doubt is not a marketable title." Fleming *v.* Burnham, 100 N. Y. 1, 10, 2 N. E. 905 [*quoted* in Irving *v.* Campbell, 121 N. Y. 353, 358, 24 N. E. 821, 8 L. R. A. 620; Kullman *v.* Cox, 26 N. Y. App. Div. 158, 163, 49 N. Y. Suppl. 908; Jay *v.* Wilson, 91 Hun (N. Y.) 391, 396, 36 N. Y. Suppl. 186].

89. Moore *v.* Williams, 115 N. Y. 586, 592, 22 N. E. 233, 12 Am. St. Rep. 844, 5 L. R. A. 654 [*quoted* in Irving *v.* Campbell, 121 N. Y. 353, 357, 24 N. E. 821, 8 L. R. A. 620; Kullman *v.* Cox, 26 N. Y. App. Div. 158, 49 N. Y. Suppl. 908; Jay *v.* Wilson, 91 Hun (N. Y.) 391, 396, 36 N. Y. Suppl. 186; Emens *v.* St.

for the payment of money loaned;[90] a title which is clear,[91] free from litigation, palpable defects, and grave doubts, which consists of both legal and equitable titles, and can be fairly deducible of record,[92] and which conveys the legal estate in fee, free and clear of all valid claims, liens and encumbrances whatsoever;[93] nothing less than a legal estate in fee, an estate indefeasible.[94] (Good Title: In General, see DEEDS; MORTGAGES. Of Vendor — see VENDOR AND PURCHASER; To Sustain Action For Specific Performance, see SPECIFIC PERFORMANCE. See also CONVEY; CONVEYANCE.)

John, 79 Hun (N. Y.) 99, 102, 29 N. Y. Suppl. 655]. See also Kyle *v.* Kavanagh, 103 Mass. 356, 358, 4 Am. Rep. 560; Conover *v.* Tindall, 20 N. J. L. 513, 519, 520; Easton *v.* Pickersgill, 55 N. Y. 310, 318; Howell *v.* Richards, 11 East 633, 643, 11 Rev. Rep. 287; Jeakes *v.* White, 6 Exch. 873, 880, 21 L. J. Exch. 265.

90. Seidelbach *v.* Knaggs, 44 N. Y. App. Div. 169, 172, 60 N. Y. Suppl. 774.

91. Oakey *v.* Cook, 41 N. J. Eq. 350, 364, 7 Atl. 495. See also CLEAR.

"Showing a good and clear title, free from defects" see Kane *v.* Rippey, 24 Oreg. 338, 339, 33 Pac. 936.

92. Reynolds *v.* Borel, 86 Cal. 538, 542, 25 Pac. 67.

"Good title" does not necessarily mean one perfect of record. Block *v.* Ryan, 4 App. Cas. (D. C.) 283, 287.

"Good and perfect title" see Peckham *v.* Stewart, 97 Cal. 147, 153, 31 Pac. 928.

"Good and perfect unincumbered title" see Warren *v.* Middlesex Mut. Assur. Co., 21 Conn. 444, 447.

93. Jones *v.* Gardner, 10 Johns. (N. Y.) 266, 269.

94. Gillespie *v.* Broas, 23 Barb. (N. Y.) 370, 381.

GOOD-WILL

EDITED BY SAMUEL B. ADAMS*

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CROSS-REFERENCES

For Matters Relating to:
Contract in Restraint of Trade, see CONTRACTS.
Good-Will:
Of Partnership, see PARTNERSHIP.
Taxation of, see TAXATION.
Trade-Mark or Trade-Name, see TRADE-MARKS and TRADE-NAMES.

I. DEFINITION.

According to Mr. Story, good-will may properly enough be described to be the advantage or benefit which is acquired by an establishment, beyond the mere value of the capital stock, funds, or property employed therein in consequence of the general public patronage and encouragement which it receives from constant or habitual customers on account of its local position or common celebrity or reputation for skill, affluence, punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices.[1]

1. Story Partn. § 99 [*cited* with approval in Bell *v.* Ellis, 33 Cal. 620; Millspaugh Laundry Co. *v.* Sioux City First Nat. Bank, 120 Iowa 1, 94 N. W. 262; Vonderbank *v.* Schmidt, 44 La. Ann. 264, 10 So. 616, 32 Am. St. Rep. 336, 15 L. R. A. 462; Boon *v.* Moss, 70 N. Y. 465; Costello *v.* Eddy, 12 N. Y. Suppl. 236; Metropolitan Nat. Bank *v.* St. Louis Dispatch Co., 36 Fed. 722].

The good-will of a business is the benefit which arises from its having been carried on for some time in a particular place or by a

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II. NATURE OF PROPERTY.

A. In General. The good-will of a business is an important and valuable interest which the law recognizes and will protect.[2] It must always rest upon some principal and tangible thing, such as an established business.[3] This incorporeal right may adhere to or spring out of corporeal property, or a tangible locality or establishment.[4]

B. Not Purely Local. Good-will has been declared in some cases to be purely local; that is, so attached to the premises wherein the business is carried on as to pass by a lease or conveyance of the same;[5] but in most cases this is too narrow, as good-will does not mean simply the advantage of occupying particular premises.[6] But while it is not necessarily connected with the premises on which the business is conducted, it must of necessity be connected with the enterprise.[7]

C. Of Decedent's Business. The good-will of a decedent's business which is continued after his death as a going concern is an asset of the estate and should be distributed accordingly.[8]

particular person, or from the use of a particular trade-mark, and its value consists in the probability that the customers of the old firm will continue the customers of the new. Potter *v.* Wait, 15 Ky. L. Rep. 60. Good-will is the favor which the management of a business wins from the public and the probability that old customers will continue their patronage. Vonderbank *v.* Schmidt, 44 La. Ann. 264, 10 So. 616, 32 Am. St. Rep. 336, 15 L. R. A. 462; Chittenden *v.* Whitbeck, 50 Mich. 401, 15 N. W. 526. "The good-will, which has been the subject of sale, is nothing more than the probability, that the old customers will resort to the old place." Lord Eldon in Cruttwell *v.* Lye, 17 Ves. Jr. 335, 346, 7 Rev. Rep. 210, 34 Eng. Reprint 129. See also Chissum *v.* Dewes, 5 Russ. 29, 29 Rev. Rep. 10, 5 Eng. Ch. 29, 38 Eng. Reprint 938.

2. Bell *v.* Ellis, 33 Cal. 620; Buckingham *v.* Waters, 14 Cal. 146; Angier *v.* Webber, 14 Allen (Mass.) 211, 92 Am. Dec. 748; Boon *v.* Moss, 70 N. Y. 465; Glen, etc., Mfg. Co. *v.* Hall, 61 N. Y. 226, 19 Am. Rep. 278; Congress, etc., Spring Co. *v.* High Rock Congress Spring Co., 45 N. Y. 291, 6 Am. Rep. 82; Williams *v.* Wilson, 4 Sandf. Ch. (N. Y.) 379; Musselman's Appeal, 62 Pa. St. 81, 1 Am. Rep. 382.

The good-will of a stall or stand in a public market place is something independent of the stand itself and belongs to the party who leases the stand. Journe's Succession, 21 La. Ann. 391.

A good-will which rests only on the voluntary and unconstrained forbearance of those who are engaged in a particular trade is not property in any sense known to the law. Sheldon *v.* Houghton, 21 Fed. Cas. No. 12,748, 5 Blatchf. 285.

3. Lane *v.* Smythe, 46 N. J. Eq. 443, 19 Atl. 199; Musselman's Appeal, 62 Pa. St. 81, 1 Am. Rep. 382; Sheldon *v.* Houghton, 21 Fed. Cas. No. 12,748, 5 Blatchf. 285.

The route of a newspaper carrier may be the subject of sale the same as the good-will of a trading establishment or the ride of a physician. Hathaway *v.* Bennett, 10 N. Y. 108, 61 Am. Dec. 739.

4. Sheldon *v.* Houghton, 21 Fed. Cas. No. 12,748, 5 Blatchf. 285.

Good-will as property is intangible, and merely an incident of other property. Rawson *v.* Pratt, 91 Ind. 9.

But it would be new doctrine to hold the reverse, and treat the material property as an incident to the good-will. Sheldon *v.* Houghton, 21 Fed. Cas. No. 12,748, 5 Blatchf. 285.

5. Chissum *v.* Dewes, 5 Russ. 29, 29 Rev. Rep. 10, 5 Eng. Ch. 29, 38 Eng. Reprint 938. As a general rule it is not an incident of a stock of merchandise, but of locality or place, of the store-room or place of business. Rawson *v.* Pratt, 91 Ind. 9.

This may be due to the nature of the business. Thus the good-will of an inn or tavern is local and does not exist apart from the house in which it is kept. Elliot's Appeal, 60 Pa. St. 161.

6. Glen, etc., Mfg. Co. *v.* Hall, 61 N. Y. 226, 19 Am. Rep. 278; Churton *v.* Douglas, Johns. 174, 188, 5 Jur. N. S. 887, 28 L. J. Ch. 841, 7 Wkly. Rep. 365, where Vice-Chancellor Sir W. Page Wood said: "'Good-will,' I apprehend, must mean every advantage — every positive advantage, if I may so express it, as contrasted with the negative advantage of the late partner not carrying on the business himself — that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the business."

7. Millspaugh Laundry *v.* Sioux City First Nat. Bank, 120 Iowa 1, 94 N. W. 262.

8. Wedderburn *v.* Wedderburn, 22 Beav. 84, 2 Jur. N. S. 674, 25 L. J. Ch. 710, 52 Eng. Reprint 1039; Gibblett *v.* Read, 9 Mod. 459.

The book of a land and tax-paying agent containing the names and addresses of his correspondents constitutes the good-will of his business, and his administrator may be

D. Of Partnership Business. It has been held that the good-will of a trade carried on in partnership without articles survives, and is not partnership stock upon the dissolution of the firm by the death of a copartner;[9] but according to the better opinion the good-will does not survive but is partnership property.[10]

III. Sale or Other Transfer.

A. Of Business Enterprises Generally. The good-will of an established business is incorporeal property which may be mortgaged, sold, or leased in connection with the business;[11] but it cannot be sold by judicial decree or otherwise unless it be in connection with a sale of the business on which it depends, and of which it is a mere incident.[12]

B. Of Professional Men or Firms. It has been doubted whether the good-will of professional men or firms, which is supposed to be entirely personal, depending upon the trust and confidence, which persons may repose in their integrity and ability, is the subject of sale and transfer.[13] Yet it is not unusual

required to return it as an asset of the estate. Thompson *v.* Winnebago County, 48 Iowa 155.

If a lessee of a market stall or stand dies, the property in the good-will of the stand falls into his succession. Journe's Succession, 21 La. Ann. 391.

9. Hammond *v.* Douglas, 5 Ves. Jr. 539, 31 Eng. Reprint 726.

10. Neither the court nor the executor can compel the continuing partners to take it at a valuation. It must be sold as other partnership effects. Dougherty *v.* Van Nostrand, Hoffm. (N. Y.) 70; Smith *v.* Everett, 27 Beav. 446, 29 L. J. Ch. 236, 7 Wkly. Rep. 605, 54 Eng. Reprint 175. In Crawshay *v.* Collins, 15 Ves. Jr. 218, 227, 10 Rev. Rep. 61, 33 Eng. Reprint 736, Lord Eldon said: "The executor has a right to have the value ascertained in the way, in which it can be best ascertained, by sale." See also note to Hammond *v.* Douglas, 5 Ves. Jr. 539, 31 Eng. Reprint 726.

11. *California.*— Cruess *v.* Fessler, 39 Cal. 336.

Indiana.—Vinall *v.* Hendricks, (App. 1904) 71 N. E. 682.

Missouri.— Beebe *v.* Hatfield, 67 Mo. App. 609.

New York.— Lewis *v.* Seabury, 74 N. Y. 409, 30 Am. Rep. 311; Boon *v.* Moss, 70 N. Y. 465.

United States.— Metropolitan Nat. Bank *v.* St. Louis Dispatch Co., 36 Fed. 722.

England.— Austen *v.* Boys, 2 De G. & J. 626, 4 Jur. N. S. 719, 27 L. J. Ch. 714, 6 Wkly. Rep. 729, 44 Eng. Reprint 1133; Chissum *v.* Dewes, 5 Russ, 29, 29 Rev. Rep. 10, 5 Eng. Ch. 29, 38 Eng. Reprint 938.

See 24 Cent. Dig. tit. "Good Will," § 2.

Recovery back of purchase-money.— One who buys the good-will of a mercantile house cannot recover back the purchase-money on the theory that such good-will is not vendible, although he may have been worsted in the bargain. Buckingham *v.* Waters, 14 Cal. 146.

Right to letters and telegrams.—Where one purchases the good-will and firm-name of a business, he is entitled to receive letters and telegrams thereafter addressed to that firm-name and to have the advantages of business transactions therein proposed by the customers of the old firm. J. G. Mattingly Co. *v.* Mattingly, 96 Ky. 430, 27 S. W. 985, 31 S. W. 279, 17 Ky. L. Rep. 1.

The sale of a mere chance which vests in the purchaser nothing but the possibility that a preference which has been usually extended to those whose rights he acquires will be extended to him has been enforced in equity and recognized at law as effectual between the parties to the contract. Barber *v.* Connecticut Mut. L. Ins. Co., 15 Fed. 312.

12. Metropolitan Nat. Bank *v.* St. Louis Dispatch Co., 36 Fed. 722.

If the business be such that there is no plant or stock in trade, such as the right to freight ships for a certain port, the good-will may be sold without any transfer of tangible property. Brett *v.* Ebel, 29 N. Y. App. Div. 256, 51 N. Y. Suppl. 573.

13. Whittaker *v.* Howe, 3 Beav. 383, 49 Eng. Reprint 150; Austen *v.* Boys, 2 De G. & J. 626, 4 Jur. N. S. 719, 27 L. J. Ch. 714, 6 Wkly. Rep. 729, 44 Eng. Reprint 1133; Thornbury *v.* Bevill, 6 Jur. 407, 1 Y. & Coll. 554, 20 Eng. Ch. 554. In Rakestraw *v.* Lanier, 104 Ga. 188, it is held that "a distinction exists between that class of contracts binding one to desist from the practice of a learned profession, and those which bind one who has sold out a mercantile or other kind of business, and the good-will connected therewith, not to again engage in that business. In the former class there should be a reasonable limit as to time, so as to prevent the contract from operating with unnecessary harshness against the person who is to abstain for practising his profession at a time when his so doing could in no way benefit the other contracting party. In the latter class such limit is not essential to the validity of the contract, but the restraint may be indefinite. In Sheldon *v.* Houghton, 21 Fed. Cas. No. 12,748, 5 Blatchf. 285, it was said that good-will can never arise as an asset of a partnership where the members contribute as capital only their professional skill and reputation, however intrinsically valuable these may be.

for lawyers and physicians to sell their practice or to sell an interest in the business to younger members of their respective professions who are taken into partnership and thus given an opportunity to gain the confidence of patrons, and the validity of such agreements is now well settled.[14]

C. Right to Use Name[15] — **1. In General.** The sale of the stock, property, and good-will of a business carried on under a fictitious name or a trade-name carries with it the exclusive right to use the fictitious or trade-name and such trade-marks as have been in use in the business, and their continued use by the vendor may be enjoined.[16] A sale of the good-will of an established business with the right to the exclusive use of the proprietary name is not necessarily a fraud upon the public and such agreement may be enforced in equity.[17]

2. Vendor's Own Name. The sale, however, of a business which the vendor has carried on in his own name will not authorize the vendee to continue the business in the name of the vendor.[18] But a surname may become impersonal when it is attached to an article of manufacture and becomes the name by which such article is known to the market. In such case a sale of the right to manufacture the article passes the right to use the name also.[19]

3. Where Partner Sells to Other Partners.[20] Unless there is some statutory

14. *Arkansas.*— Webster *v.* Williams, 62 Ark. 101, 34 S. W. 537.

Illinois.— Tichenor *v.* Newman, 186 Ill. 264, 57 N. E. 826.

Massachusetts.— Dwight *v.* Hamilton, 113 Mass. 175.

Michigan.— Doty *v.* Martin, 32 Mich. 462.

Rhode Island.— French *v.* Parker, 16 R. I. 219, 14 Atl. 870, 27 Am. St. Rep. 733.

Vermont.— Butler *v.* Burleson, 16 Vt. 176.

England.— Bunn *v.* Guy, 4 East 190, 1 Smith K. B. 1, 7 Rev. Rep. 560.

Canada.— Snider *v.* McKelvey, 27 Ont. App. 339.

See 24 Cent. Dig. tit. "Good Will," § 2.

15. See also Trade-Marks and Trade-Names.

16. Williams *v.* Ferrand, 88 Mich. 473, 50 N. W. 446, 14 L. R. A. 161; Grow *v.* Seligman, 47 Mich. 607, 11 N. W. 404, 41 Am. Rep. 737.

Similar name.— So too one who has sold out the good-will of his business may be enjoined from carrying on a rival establishment under a name so similar to that of the first as to mislead the public and draw off business. It was so held where partners sold out their interest in the good-will of a business carried on under the name of the Kalamazoo Wagon Company and set up a rival concern under the name of the Kalamazoo Buggy Company. Myers *v.* Kalamazoo Buggy Co., 54 Mich. 215, 19 N. W. 961, 20 N. W. 545, 52 Am. Rep. 811. See also Dodge Stationery Co. *v.* Dodge, 145 Cal. 380, 78 Pac. 879.

17. Grow *v.* Seligman, 47 Mich. 607, 11 N. W. 404, 41 Am. Rep. 737.

18. Williams *v.* Farrand, 88 Mich. 473, 50 N. W. 446, 14 L. R. A. 161; Howe *v.* Searing, 6 Bosw. (N. Y.) 354.

The intention of the seller of a business to divest himself of the right to use his own name in the business and to transfer it to another must be clearly proved. Ranft *v.* Reimers, 200 Ill. 386, 65 N. E. 720, 60 L. R. A. 291.

The only restraint which the grant of good-will imposes upon the grantor in this respect is to prevent his subsequent use of his own name in such a way as to deceive and mislead the public. Dodge Stationery Co. *v.* Dodge, 145 Cal. 380, 78 Pac. 879; Vonderbank *v.* Schmidt, 44 La. Ann. 264, 10 So. 616, 32 Am. St. Rep. 336, 15 L. R. A. 462; Caswell *v.* Hazard, 121 N. Y. 484, 24 N. E. 707, 18 Am. St. Rep. 833 [*affirming* 50 Hun 230, 2 N. Y. Suppl. 783]; Knoedler *v.* Glaenzer, 55 Fed 895, 5 C. C. A. 305, 20 L. R. A. 733.

Purchaser changing name of business.— In the absence of any agreement by the seller of a business not to reëngage in the business or use the same name which consists in part of his own name, the purchaser who has changed the name of the business cannot enjoin the seller from using the old name upon reëngaging in the business. Ranft *v.* Reimers, 200 Ill. 386, 65 N. E. 720, 60 L. R. A. 291.

19. *Louisiana.*—Vonderbank *v.* Schmidt, 44 La. Ann. 264, 10 So. 616, 32 Am. St. Rep. 336, 15 L. R. A. 462.

Massachusetts.— Russia Cement Co. *v.* Le Page, 147 Mass. 206, 17 N. E. 304, 9 Am. St. Rep. 685.

Michigan.— Williams *v.* Farrand, 88 Mich. 473, 50 N. W. 446, 14 L. R. A. 161.

England.— Hall *v.* Barrows, 4 De G. J. & S. 150, 10 Jur. N. S. 55, 33 L. J. Ch. 204, 9 L. T. Rep. N. S. 561, 12 Wkly. Rep. 322, 69 Eng. Ch. 116, 46 Eng. Reprint 873.

Canada.— Gage *v.* Canada Pub. Co., 11 Ont. App. 402.

The trade-marks "A. N. Hoxie's Mineral Soap" and "A. N. Hoxie's Pumice Soap" are assignable, and if the assignee uses them to denote soaps made according to the formulas of A. N. Hoxie, and not to denote that they are made by said Hoxie, he may maintain a bill in equity to restrain an infringement of the trade-marks. Hoxie *v.* Chaney, 143 Mass. 592, 10 N. E. 713, 58 Am. Rep. 149.

20. **Good-will of old firm on retirement of partner see also** Partnership.

inhibition,[21] a firm from which a partner retires, disposing of his interest in the good-will to the remaining members, may continue to transact business under the name and style of the old firm,[22] and the retiring partner may be enjoined from carrying on a rival establishment under the name of the firm from which he has retired.[23]

IV. RESUMPTION OF BUSINESS BY VENDOR.

A. Absence of Stipulation on Subject — 1. In General. Good faith requires of a party who has sold the good-will of a business that he shall do nothing which tends to deprive the purchaser of its benefits and advantages.[24]

2. Setting Up Similar Business. Upon a sale of the good-will of a business, without more, the vendor is not precluded from setting up a precisely similar business in the vicinity.[25] Upon the authorities it is settled that, if the purchaser wishes to prevent this step from being taken, he must see to it that provisions to that effect are inserted in the written contract.[26]

3. Soliciting Business. It is clear that he has the right to solicit business in a public and general way, even though it may have the effect of diminishing the trade of the purchaser;[27] but his right to solicit old customers directly is not

Right of partners to use firm-name upon: Dissolution see PARTNERSHIP. Upon retirement of one partner see also PARTNERSHIP.

21. In Massachusetts there is a statute forbidding any person to assume or continue to use in his business the name of any person formerly connected with him in partnership, or the name of any other person without written consent. But this does not prevent the new concern from advertising itself as successor to the old. Martin *v.* Bowker, 163 Mass. 461, 40 N. E. 766.

22. Williams *v.* Farrand, 88 Mich. 473, 50 N. W. 446, 14 L. R. A. 161; O'Keefe *v.* Curran, 17 Can. Sup. Ct. 596. In Caswell *v.* Hazard, 121 N. Y. 484, 24 N. E. 707, 18 Am. St. Rep. 833 [*affirming* 50 Hun 230, 2 N. Y. Suppl. 783], the court refused to enjoin defendants from transacting business under the firm-name of Caswell, Hazard & Co. after Caswell had disposed of his interest to defendants and retired from the firm.

A corporation to which a stock-holder has given the use of his name may continue in the business in that corporate name after he has disposed of his stock and ceased to be interested in the corporation. Dodge Stationery Co. *v.* Dodge, 145 Cal. 380, 78 Pac. 879.

23. In Churton *v.* Douglas, Johns. 174, 5 Jur. N. S. 887, 28 L. J. Ch. 841, 7 Wkly. Rep. 365, John Douglas was enjoined from carrying on a rival business under the firm-name and style of John Douglas & Co., that being the name of the firm from which he had retired.

24. Munsey *v.* Butterfield, 133 Mass. 492; Holl's Appeal, 60 Pa. St. 458, 100 Am. Dec. 584; Foulke *v.* Harding, 13 Pa. St. 242.

A person who sells "all his right, title and good-will" to a certain paper route has no right thereafter to sell papers in the territory covered by the route. Wentzel *v.* Barbin, 189 Pa. St. 502, 42 Atl. 44.

25. Such a contract raises no implied agreement not to reëngage in the same business in the same place.

Connecticut.— Cottrell *v.* Babcock Printing Press Mfg. Co., 54 Conn. 122, 6 Atl. 791.

Georgia.— Porter *v.* Gorman, 65 Ga. 11.

Illinois.— Shonk Tin Printing Co. *v.* Shonk, 138 Ill. 34, 27 N. E. 529 [*affirming* 37 Ill. App. 20].

Iowa.— Findlay *v.* Carson, 97 Iowa 537, 66 N. W. 759; Grimm *v.* Warner, 45 Iowa 106.

Kansas.— Drake *v.* Dodsworth, 4 Kan. 159.

Louisiana.— Bergamini *v.* Bastian, 35 La. Ann. 60, 48 Am. Rep. 216.

Massachusetts.— Hoxie *v.* Chaney, 143 Mass. 592, 10 N. E. 713, 48 Am. Rep. 149; Bassett *v.* Percival, 5 Allen 345.

Michigan.— Williams *v.* Farrand, 88 Mich. 473, 50 N. W. 446, 14 L. R. A. 161.

New Hampshire.— Smith *v.* Gibbs, 44 N. H. 335.

New York.— White *v.* Jones, 1 Rob. 321; Costello *v.* Eddy, 12 N. Y. Suppl. 236.

Ohio.— Moody *v.* Thomas, 1 Disn. 294, 12 Ohio Dec. (Reprint) 630.

Pennsylvania.— Rupp *v.* Over, 3 Brewst. 133; Palmer *v.* Graham, 1 Pars. Eq. Cas. 476.

Rhode Island.— Zanturjian *v.* Boornazian, 25 R. I. 151, 55 Atl. 199; Bradford *v.* Peckham, 9 R. I. 250.

Tennessee.— Jackson *v.* Byrnes, 103 Tenn. 698, 54 S. W. 984; Moreau *v.* Edwards, 2 Tenn. Ch. 347.

Wisconsin.— Washburn *v.* Dosch, 68 Wis. 436, 32 N. W. 551, 60 Am. Rep. 873.

England.— Labouchere *v.* Dawson, L. R. 13 Eq. 322, 41 L. J. Ch. 427, 25 L. T. Rep. N. S. 894, 20 Wkly. Rep. 309; Churton *v.* Douglas, Johns. 174, 5 Jur. N. S. 887, 28 L. J. Ch. 841, 7 Wkly. Rep. 365.

See 24 Cent. Dig. tit. "Good Will," § 5.

26. Cottrell *v.* Babcock Printing Press Mfg. Co., 54 Conn. 122, 6 Atl. 791; Churton *v.* Douglas, Johns. 174, 5 Jur. N. S. 887, 28 L. J. Ch. 841, 7 Wkly. Rep. 365; Kennedy *v.* Lee, 3 Meriv. 441, 36 Eng. Reprint 170.

Parol evidence is not admissible to prove it. Bassett *v.* Percival, 5 Allen (Mass.) 345.

27. Cottrell *v.* Babcock Printing Press Mfg. Co., 54 Conn. 122, 6 Atl. 791; Findlay *v.*

unquestioned. It has been held that he must not apply to any of the old customers privately, by letter, personally, or by traveling agent, asking them to continue their custom with him and not to deal with his vendee.[28] But on the other hand there are cases which accord to the vendor all the usual modes of soliciting trade,[29] so long as he refrains from representing to the public that he is continuing his former business or is successor of an old firm from which he has retired.[30] It is conceded that he has no right to make such representations,[31] or to practice any deception upon the customers of the prior establishment or upon the public.[32]

B. Under Agreement to Refrain — 1. In General. It is not unusual for the seller of the good-will of an established business to enter into an agreement with the buyer to refrain from entering into competition with him within specified territorial limits or for a specified time.[33] So long as the purchaser continues in the business, and the stipulation remains in force, the vendee cannot lawfully

Carson, 97 Iowa 537, 66 N. W. 759; Williams *v.* Farrand, 88 Mich. 473, 50 N. W. 446, 14 L. R. A. 161; Labouchere *v.* Dawson, L. R. 13 Eq. 322, 41 L. J. Ch. 427, 25 L. T. Rep. N. S. 894, 20 Wkly. Rep. 309.

28. Althen *v.* Vreeland, (N. J. Ch. 1897) 36 Atl. 479; Zanturjian *v.* Boornazian, 25 R. I. 151, 55 Atl. 199; Labouchere *v.* Dawson, L. R. 13 Eq. 322, 41 L. J. Ch. 427, 25 L. T. Rep. N. S. 894, 20 Wkly. Rep. 309. This latter case was followed in Ginesi *v.* Cooper, 14 Ch. D. 596, 49 L. J. Ch. 601, 42 L. T. Rep. N. S. 751, and again in Leggott *v.* Barrett, 15 Ch. D. 306, 28 Wkly. Rep. 962, and Sir George Jessel extended the doctrine to a case where the good-will had been sold, not by the trader himself, but by his trustee in bankruptcy, but this ruling was reversed by the court of appeals. Walker *v.* Mottram, 19 Ch. D. 355, 51 L. J. Ch. 108, 45 L. T. Rep. N. S. 659, 30 Wkly. Rep. 165.

A contract for the sale of the good-will of a milk route is violated by the seller's soliciting trade along the route, and this, although the persons solicited were not former customers. Munsey *v.* Butterfield, 133 Mass. 492.

If a seller conveys and warrants the good-will of a business, he may be enjoined from soliciting old customers to deal with him upon reëngaging in the same business. Ranft *v.* Reimers, 200 Ill. 386, 65 N. E. 720, 60 L. R. A. 291. See also Gillingham *v.* Beddow, [1900] 2 Ch. 242, 64 J. P. 617, 69 L. J. Ch. 527, 82 L. T. Rep. N. S. 791.

Neither as principal or agent has the seller a right to interfere with or obstruct the purchaser in the prosecution of the business he has transferred to him. Ewing *v.* Johnson, 34 How. Pr. (N. Y.) 202.

After expiration of contract period.—Where there was a stipulation not to engage in the same business in the same place for three years, which was performed, it was held that after the expiration of that time the vendor was not debarred by the contract from soliciting the patronage of his old customers. Hanna *v.* Andrews, 50 Iowa 462.

29. Cottrell *v.* Babcock Printing Press Mfg. Co., 54 Conn. 122, 6 Atl. 791.

30. Pearson *v.* Pearson, 27 Ch. D. 145, 54 L. J. Ch. 32, 51 L. T. Rep. N. S. 311, 32 Wkly. Rep. 1006.

31. *Connecticut.*—Cottrell *v.* Babcock Printing Press Mfg. Co., 54 Conn. 122, 6 Atl. 791.

Michigan.— Williams *v.* Farrand, 88 Mich. 473, 50 N. W. 446, 14 L. R. A. 161.

New Hampshire.— The sale of the good-will of a business will take from the seller the right to continue or in any way hold himself out as continuing the identical business the good-will of which he has sold. Smith *v.* Gibbs, 44 N. H. 335.

New York.— White *v.* Jones, 1 Rob. 321.

Ohio.— Burckhardt *v.* Burckhardt, 42 Ohio St. 474, 51 Am. Rep. 842.

Pennsylvania.— Hall's Appeal, 60 Pa. St. 458, 100 Am. Dec. 584.

See 24 Cent. Dig. tit. "Good Will," § 5.

A sale under a chattel mortgage covering a newspaper plant and the circulation, franchises, and good-will thereof vests the purchaser with the right to equitable relief against the mortgagor or his assigns to the extent of restraining them from using the name of such newspaper, or from publishing and circulating a newspaper by the same or a different name as the newspaper or successor of the newspaper covered by the mortgage. Lawrence *v.* Times Printing Co., 90 Fed. 24.

Where a firm's laundry business was sold in a suit between the members to wind up the business, they may be enjoined by the purchaser from soliciting the custom of the old establishment, enticing away its employees, or using devices tending to mislead the public to believe they are continuing the old firm's business. Richardson *v.* Westjohn, 6 Ohio Dec. (Reprint) 1043, 9 Am. L. Rep. 723.

32. Dodge Stationery Co. *v.* Dodge, 145 Cal. 380, 78 Pac. 879; Vonderbank *v.* Schmidt, 44 La. Ann. 264, 10 So. 616, 32 Am. St. Rep. 336, 15 L. R. A. 462; Williams *v.* Farrand, 88 Mich. 473, 50 N. W. 446, 14 L. R. A. 161; Snowden *v.* Noah, Hopk. (N. Y.) 347, 14 Am. Dec. 547.

33. It is well settled that these partially restrictive contracts, when made upon a good consideration, are valid and may be enforced at law or in equity. See *post*, IV, C.

Such contracts as in restraint of trade see Contracts, 9 Cyc. 523 *et seq.*

Where the stipulation is not to reëngage in the same business in the same place, it has been held that the seller may go into the

enter into competition with him either on his own account or as the agent and business manager of another.[34] Neither is it lawful for him to take stock in and help to organize or manage a corporation formed to compete with the purchaser.[35]

2. Rights of Vendee's Assignee. An agreement to refrain from entering into competition with the purchaser is not personal, but inures to the benefit of one to whom it is assigned with the business.[36]

3. Vendor Reacquiring Interest. If the vendee afterward takes the vendor into partnership in the transaction of the business, this works a rescission of the stipulation to refrain from engaging in the same business.[37] So if the covenantor by assignment afterward becomes the owner of the business, he cannot be restrained from carrying it on under the trade-name of the original firm.[38]

C. Remedies. Where there has been a sale of an established business and the good-will of the same coupled with an agreement that the vendor will not engage in the same business within territorial limits reasonably necessary to protect the good-will of the business, the vendee may maintain an action at law for damages for a breach of the contract,[39] and it is well established that he may have relief in equity by injunction.[40] So also for the breach of an agreement by

same business in another place, and that a sale from the latter place to an old customer is not a violation of the agreement. Thomas *v.* Miles, 3 Ohio St. 274.

34. Meyer *v.* Labau, 51 La. Ann. 1726, 26 So. 463; Corwin *v.* Hawkins, 42 N. Y. App. Div. 571, 59 N. Y. Suppl. 603.

Such contract does not prohibit the seller from accepting employment as an assistant or clerk to others in the same business at the same place. Battershell *v.* Bauer, 91 Ill. App. 181; Crimm *v.* Warner, 45 Iowa 106; Eastern Express Co. *v.* Meserve, 60 N. H. 198. But he cannot, without violating his contract, carry on during the period covered by the agreement a similar business for another or in another name of which he is the exclusive manager and the success of which depends entirely on his skill, efficiency, personal reputation, and popularity. Jefferson *v.* Markert, 112 Ga. 498, 37 S. E. 758.

35. Kramer *v.* Old, 119 N. C. 1, 25 S. E. 815, 56 Am. St. Rep. 650, 34 L. R. A. 389, where it was held that neither the corporation nor those interested in it other than the vendors could be enjoined.

36. *California.*— California Steam Nav. Co. *v.* Wright, 6 Cal. 258, 65 Am. Dec. 511.

Georgia.— Swanson *v.* Kirby, 98 Ga. 586, 26 S. E. 71.

Iowa.— Hedge *v.* Lowe, 47 Iowa 137.

Maryland.— Guerand *v.* Dandelet, 32 Md. 561, 3 Am. Rep. 164.

Mississippi.— Klein *v.* Buck, 73 Miss. 133, 18 So. 891.

Pennsylvania.— Gompers *v.* Rochester, 56 Pa. St. 194.

Wisconsin.— Palmer *v.* Toms, 96 Wis. 367, 71 N. W. 654.

England.— Elves *v.* Crofts, 10 C. B. 241, 14 Jur. 855, 19 L. J. C. P. 385, 70 E. C. L. 241.

Where the purchaser of a business takes a bond from the seller conditioned in a certain sum as liquidated damages that the seller will not engage in business of the character sold for a stated period, such bond can be enforced for the protection and indemnity of the buyer alone, while carrying on the business in person, and will not be extended to his assignee. In such case there is no right of action to assign until after a breach of the conditions of the covenant. Hillman *v.* Shannahan, 4 Oreg. 163, 18 Am. Rep. 281.

37. Norris *v.* Howard, 41 Iowa 508.

38. Townsend *v.* Jarman, [1900] 2 Ch. 698, 69 L. J. Ch. 823, 83 L. T. Rep. N. S. 366, 49 Wkly. Rep. 158.

39. Van Valkenburgh *v.* Dean, 15 Ind. App. 693, 44 N. E. 652; Bassett *v.* Percival, 5 Allen (Mass.) 345.

It was at one time thought that the vendee's only remedy was by an action of covenant or an issue *quantum damnificatus.* Shackle *v.* Baker, 14 Ves. Jr. 468, 33 Eng. Reprint 600. Lord Thurlow refused to go farther in Sloman *v.* Walter, 1 Bro. Ch. 418, 28 Eng. Reprint 1213.

Defendant having sold his wood-yard to plaintiff and agreed not to engage in the wood business while plaintiff was engaged therein, gave an employee two cords of wood for his services and a tenant eight cords in lieu of repairs. It was held that such acts did not constitute a breach of the agreement for which plaintiff could recover damages. Parkhurst *v.* Brock, 72 Vt. 355, 47 Atl. 1068.

40. *California.*— Gregory *v.* Spieker, 110 Cal. 150, 42 Pac. 576, 52 Am. St. Rep. 70; Ragsdale *v.* Nagle, 106 Cal. 332, 39 Pac. 628.

Georgia.— Jefferson *v.* Markert, 112 Ga. 498, 37 S. E. 758.

Indiana.— Eisel *v.* Hayes, 141 Ind. 41, 40 N. E. 119.

Maine.— Emery *v.* Bradley, 88 Me. 357, 37 Atl. 167.

Massachusetts.— Angier *v.* Webber, 14 Allen 211, 92 Am. Dec. 748.

Michigan.— Hubbard *v.* Miller, 27 Mich. 15, 15 Am. Rep. 153.

New York.— U. S. Cordage Co. *v.* William Wall's Sons' Rope Co., 90 Hun 429, 35 N. Y. Suppl. 978.

Ohio.— Peterson *v.* Schmidt, 13 Ohio Cir. Ct. 205, 7 Ohio Cir. Dec. 202.

Pennsylvania.— Harkinson's Appeal, 78 Pa.

a professional man to sell his practice and refrain from entering into competition with the purchaser, the injured party may maintain an action at law for damages,[41] or may have a more complete remedy in equity by injunction, and so compel the vendor to the performance of his agreement.[42]

V. MEASURE OF DAMAGES.[43]

Upon the breach of a contract of a sale of the good-will of a business, the measure of damages is the loss suffered by the purchaser by reason of the wrongful acts of the seller, and not the profits realized by defendant as the result of his wrongful enterprise;[44] and if plaintiff fails to furnish the data from which the court or jury can estimate his actual damages, his recovery will be restricted to

St. 196, 21 Am. Rep. 9; Palmer *v.* Graham, 1 Pars. Eq. Cas. 476; Carroll *v.* Hickes, 10 Phila. 308.

England.— Bryson *v.* Whitehead, 1 L. J. Ch. O. S. 42, 1 Sim. & St. 74, 1 Eng. Ch. 74; Williams *v.* Williams, 2 Swanst. 253, 36 Eng. Reprint 612.

See 24 Cent. Dig. tit. "Good Will," § 6.

See also, generally, INJUNCTIONS.

A court of equity will enforce specific performance of a restrictive contract by injunction where it is apparent from a view of all the circumstances of the case that it will subserve the ends of justice, as where the damages caused by its violation are not susceptible of proof. American Fisheries Co. *v.* Lennen, 118 Fed. 869.

Under the system of pleading prevailing in Georgia an action may be brought against one who has sold out a given business and contracted not to again carry on the same in a particular locality, both to recover such damages as may have accrued to plaintiff from a breach of the contract up to the bringing of the action, and to restrain defendant from a further violation of his agreement. Swanson *v.* Kirby, 98 Ga. 586, 26 S. E. 712.

41. Tichenor *v.* Newman, 186 Ill. 264, 57 N. E. 826; Linn *v.* Sigsbee, 67 Ill. 75; Dwight *v.* Hamilton, 113 Mass. 175.

After the sale by a physician of his shop as a stand for a physician with the statement that he intended to move to another state and with a promise to recommend the purchaser to the seller's patrons, his return and resumption of practice is sufficient to authorize the purchaser to rescind the contract and to refuse to pay his note for the purchase-money. Townsend *v.* Hurst, 37 Miss. 679.

42. *Arkansas.*— Webster *v.* Williams, 62 Ark. 101, 34 S. W. 537.

Massachusetts.— Dwight *v.* Hamilton, 113 Mass. 175.

Pennsylvania.— McClurg's Appeal, 58 Pa. St. 51.

Rhode Island.— French *v.* Parker, 16 R. I. 219, 14 Atl. 870, 27 Am. St. Rep. 733.

Vermont.— Butler *v.* Burleson, 16 Vt. 176.

England.— Hayward *v.* Young, 2 Chit. 407, 18 E. C. L. 709; Bunn *v.* Guy, 4 East 190, 1 Smith K. B. 1, 7 Rev. Rep. 560; Mallan *v.* May, 7 Jur. 536, 12 L. J. Exch. 376, 11 M. & W. 653; Davis *v.* Mason, 5 T. R. 118, 2 Rev. Rep. 562. See also Fox *v.* Scard, 33 Beav. 327, 55 Eng. Reprint 394.

Canada.— Snider *v.* McKelvey, 27 Ont. App. 339.

See 24 Cent. Dig. tit. "Good Will," § 6.

43. **Measure of damages** generally see DAMAGES.

44. *Alabama.*— Taylor *v.* Howard, 110 Ala. 468, 18 So. 311.

California.— Gregory *v.* Spieker, 110 Cal. 150, 42 Pac. 576, 52 Am. St. Rep. 70.

Indiana.— Rawson *v.* Pratt, 91 Ind. 9.

Louisiana.— Verges *v.* Forshee, 9 La. Ann. 294.

Missouri.— Peltz *v.* Eichele, 62 Mo. 171.

Ohio.— Burckhardt *v.* Burckhardt, 36 Ohio St. 261.

See 24 Cent. Dig. tit. "Good Will," § 8.

Plaintiff's damages are not confined to the difference between the sum paid and the value of the stock in trade and fixtures received by him. Taylor *v.* Howard, 110 Ala. 468, 18 So. 311. He may recover the actual damage sustained, not merely the consideration paid by him. Stewart *v.* Challacombe, 11 Ill. App. 379. See also Bassett *v.* Percival, 5 Allen (Mass.) 345.

The proper measure of damages, it has been held, is the difference between the value of the business after the breach, and what it would have been if the contract had been performed in good faith. Moorehead *v.* Hyde, 38 Iowa 382.

Where plaintiffs sued for loss of profits because defendant from whom plaintiffs purchased a business engaged in the same business in competition with plaintiffs, in violation of his agreement not to engage therein for a period of five years after the sale, although plaintiffs were not entitled to recover for a loss of profits after the expiration of such period, evidence of such loss was admissible to show the reduced value of the good-will of the business at the end thereof, for which they were entitled to recover. Salinger *v.* Salinger, 69 N. H. 589, 45 Atl. 558. Where defendant sold out his business to plaintiff and agreed not to engage therein in the same place for five years, and before the expiration of such time defendant went into such business in violation of his agreement and in bitter competition with plaintiff, such act being a wilful and malicious breach

nominal damages.[45] But there are cases in which it is impossible to prove the injurious consequences of each particular act; and the substantial damages should be determined by the combined result of the wrongful acts upon the business, and to this end all the facts and circumstances tending to show the extent of the injury should be considered by the court or jury in estimating the damages.[46]

GOODYEAR RUBBER. A term descriptive of well-known classes of goods produced by the process known as Goodyear's invention.[1]

GOOSE-HORN. A term sometimes used as referring to a bawdy-house or house of ill-fame.[2] (See BAWD; BAWDY-HOUSE; and, generally, DISORDERLY HOUSES.)

GOOSE-NECK. Used in connection with "deadwood," a term which designates the fixtures or parts of the respective cars which come in contact when coupling is done.[3] (See DEADWOOD; and, generally, RAILROADS.)

GORE. In Maine and Vermont,[4] and formerly in Massachusetts,[5] an unorganized and thinly settled subdivision of a county.

GORGE. As applied to an outlet of surface water, a defile between hills or mountains; that is, a narrow throat or outlet from a region of country.[6] (See, generally, WATERS.)

GORING. A piece of textile material cut diagonally so as to increase the width of the part to which it is applied; or in a sail to give the required sweep.[7]

GOSPEL. According to the common and more general acceptation of the term, a word synonymous with "christianity" or "the christian religion."[8] (Gospel: Bequest to Disseminate, see CHARITIES.)

GO TO BED WITH. To be in bed with.[9]

GOTTEN. See GET.[10]

GOVERN.[11] To direct and control, etc.; to regulate; to influence; to direct; to restrain; to manage; as to govern the life or passions; to govern the motion the ship, etc.[12] (See GOVERNMENT.)

GOVERNING BOARD. The board of supervisors of a county, the town board of a town, the common council of a city, and the board of trustees of a village;[13]

of the contract, plaintiff was entitled to recover profits lost during the term shown by a balance of probability to have resulted from defendant's wrongful act and for any loss to the value of the good-will of the business at the end of the stipulated period. Salinger *v.* Salinger, *supra.*

45. Taylor *v.* Howard, 110 Ala. 468, 18 So. 311.

46. Burckhardt *v.* Burckhardt, 42 Ohio St. 474, 51 Am. Rep. 842.

1. Goodyear's India Rubber Glove Mfg. Co. *v.* Goodyear Rubber Co., 128 U. S. 598, 602, 9 S. Ct. 166, 32 L. ed. 535.

2. Dyer *v.* Morris, 4 Mo. 214, 216.

3. Grannis *v.* Chicago, etc., R. Co., 81 Iowa 444, 446, 46 N. W. 1067.

4. See Paine *v.* Hutchins, 49 Vt. 314, 317.

5. Century Dict.

6. Gibbs *v.* Williams, 25 Kan. 214, 217, 37 Am. Rep. 241 [*citing* Palmer *v.* Waddell, 22 Kan. 352].

7. Century Dict.

"Goring" as used in a tariff act see Drucker *v.* Robertson, 38 Fed. 97, 98, 99.

8. Atty.-Gen. *v.* Wallace, 7 B. Mon. (Ky.) 611, 617, where the expression in a devise "the dissemination of the gospel at home and abroad" is construed.

Bequest "for the spread of the gospel" see *In re* Lea, 34 Ch. D. 528, 534, 56 L. J. Ch. 671, 56 L. T. Rep. N. S. 482, 35 Wkly. Rep. 572.

9. Walton *v.* Singleton, 7 Serg. & R. (Pa.) 449, 450, 10 Am. Dec. 472, where the court said: "In all times, in every age, and by all writers sacred and profane, in the language of scripture, and in the language of the law, these words except as between man and wife, significantly impute illicit intercourse, and with them it imports the rite of hallowed love."

10. See *ante*, page 316, note 4.

11. "Shall be governed by the law now in force regulating the manner of making loans." See Fisher *v.* Brower, 159 Ind. 139, 148, 64 N. E. 614.

12. State *v.* Ream, 16 Nebr. 681, 683, 21 N. W. 398.

"The power to govern implies the power to ordain and establish suitable police regulations; and that, it has often been decided, authorizes municipal corporations to prohibit the use of locomotives in the public streets, when such action does not interfere with vested rights. Richmond, etc., Co. *v.* Richmond, 96 U. S. 521, 528, 24 L. ed. 734 [*citing* Whitson *v.* Franklin, 34 Ind. 392; Donnaher *v.* State, 8 Sm. & M. (Miss.) 649].

13. N. Y. Sess. Laws (1892), c. 685, § 1.

the selectmen of a town, the commissioners of a village district or precinct, and the school-board of a school-district.[14]

GOVERNING BODY. A term sometimes applied to a municipal council.[15]

GOVERNMENT.[16] In its ordinary signification, management; CONTROL,[17] *q. v.*; regulation and control.[18] In a political sense, the state itself,[19] the ligament that holds the political society together;[20] the machinery or expedient for expressing the will of the sovereign power;[21] that form of fundamental rules by which the members of a body politic regulate their social action, and the administration of public affairs according to established constitutions, usages, and laws;[22] the

14. N. H. Pub. St. (1901) c. 43, § 1.

15. Fitzgerald *v.* Jersey City, 69 N. J. L. 152, 155, 53 Atl. 819 [*citing* Dillon Mun. Corp. § 19].

As used in a statute relative to education, it is a body constituted on a permanent footing and charged, by act of parliament, royal charter, deed of endowment and trust, or otherwise, with the management and administration of any fund devoted to higher education. 52 & 53 Vict. c. 55, § 3; 51 & 52 Vict. c. 53, § 2; 48 & 49 Vict. c. 78, § 1; 45 & 46 Vict. c. 59, § 1; 34 & 35 Vict. c. 109, § 3. See also *In re* Endowed Schools Act, L. R. 15 A. C. 172, 185; 32 & 33 Vict. c. 56, § 7, c. 28, § 4; 27 & 28 Vict. c. 92, § 3.

16. "Government is a very comprehensive term, and one of the most important subjects included in it is that of finances, including assets in property as well as in money." *In re* Sugar Notch Borough, 192 Pa. St. 349, 354, 43 Atl. 985.

Bequest of stock to government "in exoneration of the national debt" see Newland *v.* Atty.-Gen., 3 Meriv. 684, 36 Eng. Reprint 262.

By-laws for the government and regulation of lightermen and watermen on the Thames river see Kennaird *v.* Cory, [1898] 2 Q. B. 578, 582, 62 J. P. 580, 67 L. J. Q. B. 809, 78 L. T. Rep. N. S. 816, 47 Wkly. Rep. 30.

"All debts and claims due to the Crown or to the Government" in insolvency see Fox *v.* Newfoundland, [1898] A. C. 667, 668, 67 L. J. P. C. 77, 78, L. T. Rep. N. S. 602, 5 Manson 238.

Used in connection with other words see the following phrases: "Good Government of New Zealand" (Ashbury *v.* Ellis, [1893] A. C. 339, 341, 62 L. J. P. C. 107, 69 L. T. Rep. N. S. 159, 1 Reports 388); "government accountant" (26 & 27 Vict. c. 116, § 3); "government annuities" (36 & 37 Vict. c. 44, § 3); "government or parliamentary stocks or funds" (see Brown *v.* Brown, 4 Kay & J. 704, 706, 6 Wkly. Rep. 613); "government printer" (45 & 46 Vict. c. 9, § 4; 44 & 45 Vict. c. 58, § 163); "government stock" (56 & 57 Vict. c. 69, § 5, (2); 57 & 58 Vict. c. 47, § 16 (2)); "improvements upon government lands" (Crocker *v.* Donovan, 1 Okla. 165, 178, 30 Pac. 374).

17. St. Louis *v.* Howard, 119 Mo. 41, 46, 24 S. W. 770, 41 Am. St. Rep. 630.

18. Tennessee *v.* Whitworth, 117 U. S. 139, 148, 6 S. Ct. 649, 29 L. ed. 833.

19. Wharton L. Lex. [*citing* Locke Gov.; Montesquieu Spirit of Laws].

"The distinction between the government of a State and the State itself is important, and should be observed. In common speech and common apprehension they are usually regarded as identical; and as ordinarily the acts of the government are the acts of the State, because within the limits of its delegation of power, the government of the State is generally confounded with the State itself. . . . The State itself is an ideal person, intangible, invisible, immutable. The government is an agent, and, within the sphere of its agency, a perfect representative." Poindexter *v.* Greenhow, 114 U. S. 270, 290, 5 S. Ct. 903, 941, 29 L. ed. 185 [*quoted* in Grunert *v.* Spalding, (Wis. 1899) 78 N. W. 606, 613].

"We have in our political system a government of the United States and a government of each of the several States. Each one of these governments is distinct from the others, and each has citizens of its own who owe it allegiance, and whose rights, within its jurisdiction, it must protect." U. S. *v.* Cruikshank, 92 U. S. 542, 549, 23 L. ed. 588 [*citing* Butchers' Benev. Assoc. *v.* Crescent City Livestock Landing, etc., Co., 16 Wall. (U. S.) 36, 74, 21 L. ed. 394].

20. Thomas *v.* Taylor, 42 Miss. 651, 706, 2 Am. Rep. 625 [*citing* Vattel 59].

21. Cherokee Nation *v.* Southern Kan. R. Co., 33 Fed. 900, 906.

"Good government" embraces within its scope the whole range of legislation necessary to secure the comfort, prosperity, and happiness of a people. Swan *v.* Williams, 2 Mich. 427, 431.

"Government is a necessity of man's nature, and not a mere caprice, however wisdom and experience may mould its structure or vary its application. Its perpetuity springs from its continued necessity, and is therefore an essential element of its nature. Hence, no people since the formation of the world have been known to exist without government in some form; and no government, not merely provisional, is known to have been formed for a limited period." Hood *v.* Maxwell, 1 W. Va. 219, 242.

"Government is not sovereignty."— Cherokee Nation *v.* Southern Kan. R. Co., 33 Fed. 900, 906.

"It is an axiom in our government, that all legitimate power emanates from the people." Charles River Bridge *v.* Warren Bridge, 7 Pick. (Mass.) 344, 445.

22. Winspear *v.* Holman Dist. Tp., 37 Iowa 542, 544 [*citing* Young Sci. Gov. 13]. See also Bouvier L. Dict.

exercise of authority in the administration of the affairs of a state, community, or society; the authoritative direction and restraint exercised over the actions of men in communities, societies, or states.[23] Again, in a general sense, the word may be taken to express the ruling powers of a country, including legislative and executive, or, in a more limited sense, only the chief executive officers to whose administration the executive duties of government are especially delegated.[24] In a colloquial sense, the word is often used to mean the United States, or its representatives, considered as the prosecutor in a criminal action.[25] (Government: In General, see States; Territories; United States. Action Brought by, see Actions. Distribution of Powers and Functions, see Constitutional Law. Exemptions Against Debts Due to, see Exemptions. Foreign Government — Judicial Notice of, see Evidence; Judicial Notice of Matters Relating to, see Evidence. Lands, see Public Lands. Local Government and Territorial Divisions, see Counties; District of Columbia; Municipal Corporations; Towns. Protection of From Liability For Damage to Individual, see Actions. See also Govern.)

GOVERNMENTAL WORK. A term sometimes applied to the abatement of a nuisance.[26] (See, generally, Municipal Corporations; Nuisances.)

GOVERNMENT DE FACTO. See States.

GOVERNMENT OFFICE. A public station or employment, conferred by appointment of government; and the term embraces the ideas of tenure, duration, emolument, and duties.[27]

GOVERNMENT PURPOSES. As used in the constitution which provides that public property taken for public purposes is exempt from taxation, the term means, in its most extensive sense, the punishment for crime, for prevention of a wrong, the enforcement of a private right, or in some manner preventing wrong from being inflicted upon the public or an individual, or redressing some grievance, or in some way enforcing a legal right, or redressing or preventing a public individual injury.[28]

GOVERNMENT SECURITIES. Any annuities, exchequer bonds, exchequer bills, and other parliamentary securities of the government of the United Kingdom;[29] any consolidated, reduced, or new three pounds per centum bank annuities.[30]

23. Century Dict. [*quoted* in People *v.* Pierce, 18 Misc. (N. Y.) 83, 85, 86, 41 N. Y. Suppl. 858].

"Government was not organized for the purposes of taxation, but taxation may be necessary for the purposes of government." Stone *v.* Mississippi, 101 U. S. 814, 820, 25 L. ed. 1079.

24. Leprohon *v.* Ottawa Corp., 1 Cartwr. Cas. (Can.) 592, 648.

"Government of India" see 42 & 43 Vict. c. 45, § 5.

"Government clerk" is a sufficient designation of a clerk in the admiralty. Grant *v.* Shaw, L. R. 7 Q. B. 700, 701, 41 N. J. Q. B. 305, 27 L. T. Rep. N. S. 602.

25. Black L. Dict.

26. Quill *v.* New York, 36 N. Y. App. Div. 476, 480, 55 N. Y. Suppl. 889.

27. Matter of Notaries Public, 9 Colo. 628, 629, 21 Pac. 473 [*citing* U. S. *v.* Hartwell, 6 Wall. (U. S.) 385, 393, 18 L. ed. 830].

"A government office is different from a government contract. The latter from its nature is necessarily limited in its duration and specific in its objects. The terms agreed upon define the rights and obligations of both parties, and neither may depart from them without the assent of the other." U. S. *v.* Hartwell, 6 Wall. (U. S.) 385, 393, 18 L. ed. 830 [*quoted* in Moll *v.* Sbisa, 51 La. Ann. 290, 292, 25 So. 141].

"Government officer" as defined by statute is a term which includes the state treasurer and all other heads of departments who by law may receive or keep in their care public money of the state; tax collectors, and all other officers who by law are authorized to collect, receive or keep money due to the government. Tex. Pen. Code (1901), § 100, art. 100.

A government officer does not include a clerk in the office of a district attorney. U. S. *v.* McDonald, 72 Fed. 898, 900, 21 C. C. A. 347.

28. Owensboro *v.* Com., 105 Ky. 344, 353, 355, 49 S. W. 320, 44 L. R. A. 202.

29. St. 35 & 36 Vict. c. 44, § 3.

"Government security" see Knott *v.* Cottee, 16 Beav. 77, 80, 16 Jur. 752, 51 Eng. Reprint 705; Matthew *v.* Brise, 6 Beav. 239, 244, 12 L. J. Ch. 263, 49 Eng. Reprint 817; *Ex p.* Southeastern R. Co., 9 Jur. 650.

"Government Stocks or Securities" do not include Indian or colonial securities. *In re* Hamilton, 6 T. L. R. 173.

"Government securities trust" see Sykes *v.* Beadon, 11 Ch. D. 170, 191, 48 L. J. Ch. 522, 40 L. T. Rep. N. S. 243, 27 Wkly. Rep. 464.

30. St. 36 & 37 Vict. c. 57, § 7.

GOVERNOR.[31] The chief executive officer of a state,[32] colony or district.[33] Also one who exercises executive control over an institution.[34] In mechanics, a device for regulating the speed of an engine, or motor, or flow of liquid;[35] an appliance contained within a gasometer, which regulates the pressure of the gas therein;[36] and as used in connection with the propulsion of street cable cars, a device attached to the engine used to propel the cable by the automatic action of which a certain rate of speed may be maintained without variation.[37] (Governor: In General, see States; Territories. Approval of Amendment to Constitution, see Constitutional Law. Authority with Respect to Bail, see Bail. Distribution of Powers Between Executive, Legislative, and Judiciary Departments, see Constitutional Law. Extradition of Fugitive From Justice, see Extradition.)

GOVERNOR'S COUNCIL. See States.

GRAB IRON. In railroad parlance, a round iron, three or four feet long, placed immediately over the door of the cupola of a caboose, and used by employees to protect them from injury through jars of the car.[38] (See, generally, Railroads.)

GRACE, DAYS OF. See Commercial Paper.

GRADE. As a noun, in common parlance, quality;[39] a degree, or rank, in order or dignity; a step or degree in any ascending series.[40] As a verb, applied

31. "Governors of the Bounty of Queen Anne" see 34 & 35 Vict. c. 43, § 3.

32. Whitsett *v.* Forehand, 79 N. C. 230, 233.

"The Governors of the States are frequently called chief executive officer, chief magistrate, commander-in-chief. And so we say king, sovereign, monarch, designating the same officer and office." Whitsett *v.* Forehand, 79 N. C. 230, 233.

33. English L. Dict.

As defined by statute the term means the executive or the person having the executive powers. Va. Code (1887), § 5, subs. 1; Va. Code Supp. (1898), § 5; W. Va. Code (1899), p. 133, c. 13, § 6. As respects Canada and India, the expression means the governor-general, and includes any person who for the time being has the powers of the governor-general, and as respects any other British possession, shall include the officer for the time being administering the government of that possession. St. 52 & 53 Vict. c. 63, § 18, subs. 6. See also 48 & 49 Vict. c. 60, § 1; 35 & 36 Vict. c. 23, § 3; 33 & 34 Vict. c. 52, § 26, c. 9, § 30; 32 & 33 Vict. c. 10, § 2; 1 & 2 Vict. c. 9, § 67, § 10. "Governor of any British possession" see 33 & 34 Vict. c. 14, § 17. "Governor of the Province of Canada" see 3 & 4 Vict. c. 35, § 61. "Governor general of India" see 42 & 43 Vict. c. 33, § 180. "Governor of New Zealand" see 14 & 15 Vict. c. 86, § 12. "Governor in council" see 35 & 36 Vict. c. 19, § 2.

In accordance with the context, the term has been construed to include the "chief" of an Indian nation. Whitsett *v.* Forehand, 79 N. C. 230, 233, where it is said: "There is no officer in the Cherokee Nation called Governor, so far as we know. And the 'Chief' discharges the duties which usually pertain to the office of Governor. The 'Chief' is therefore for our purposes Governor."

34. English L. Dict.

"Governor" of a prison see 62 & 63 Vict. c. 11, § 2 (2); 40 & 41 Vict. c. 53, § 71.

35. English L. Dict.

36. Consolidated Gas Co. *v.* Baltimore, 62 Md. 588, 591, 50 Am. Rep. 237.

37. Bishop *v.* St. Paul City R. Co., 48 Minn. 26, 31, 50 N. W. 927.

38. Lake Shore, etc., R. Co. *v.* Vogelson, 23 Ohio Cir. Ct. 361, 362.

39. Whitehall Mfg. Co. *v.* Wise, 119 Pa. St. 484, 494, 13 Atl. 298, where the word as used in a lumber contract is compared with "kind."

In logging, the term refers to the quality into which lumber is classified. Tompkins *v.* Gardner, 69 Mich. 58, 62, 37 N. W. 43. See Cull; and, generally, Logging.

"'Graders' rejection'" see Merehin *v.* Ball, 68 Cal. 205, 206, 8 Pac. 886.

40. People *v.* Rawson, 61 Barb. (N. Y.) 619, 631. See 3 Cyc. 821 note 27.

Applied to employees the word denotes the rank or relative positions occupied by them while engaged in the common service of their master. Gulf, etc., R. Co. *v.* Warner, 89 Tex. 475, 478, 35 S. W. 364.

In a railroad or highway grade is "the rate of ascent or descent — usually stated as so many feet per mile, or as one foot rise or fall in so many of horizontal distance as a heavy grade — a grade of twenty feet per mile or of 1 in 264 — a gradient deviation from a level surface to an inclined plane." Webster Dict. [*quoted* in McDonald *v.* Halifax, 28 Nova Scotia 84, 89].

Used in reference to streets, grade has two distinct meanings: By the first, it signifies the line of the street's inclination from the horizontal; by the second, a part of the street inclined from the horizontal (Century Dict. [*cited* in Little Rock *v.* Citizens' St. R. Co., 56 Ark. 28, 32, 19 S. W. 17]), that is, it sometimes signifies the line established to guide future construction, and at other times the street wrought to the line (Little Rock *v.* Citizens' St. R. Co., *supra*). It also may mean the amount of difference between the grade line and a level or horizontal line. Davies *v.* East Saginaw, 66 Mich. 37, 39, 32 N. W. 919; Bissell *v.* Larchmont, 57 N. Y. App. Div. 61,

to a street or highway, to lay out;[41] to change the level;[42] to bring the surface of the street to the grade line;[43] to reduce to a certain degree of ascent or descent;[44] to reduce by filling or excavation to a fit or established degree of ascent or descent.[45] (Grade: Of Employees, see MASTER AND SERVANT. Maintenance of by Railroad, see RAILROADS; STREET RAILROADS. Of Officers of Army and Navy, see ARMY AND NAVY. Of Street or Highways, see MUNICIPAL CORPORATIONS; STREETS AND HIGHWAYS. See also CONSTRUCT; CONSTRUCTION; GUTTER.)

GRADE CROSSING. See RAILROADS; STREET RAILROADS.

GRADIENT. Moving by steps, the deviation of railways from a level surface to an inclined plane.[46] (See GRADE; and, generally, RAILROADS.)

GRADING. As applied to streets or highways, a word which includes cutting as well as filling. Technically it is the reducing of the surface of the earth to a given line fixed by authority as the grade, and may involve filling or excavating, or both, as shall be necessary to accomplish that object.[47] (Grading Contracts: See CONTRACTS.)

GRADUATE.[48] As a noun, a scholar who has taken a degree in a university;[49] and as used in the apportionment of a license-tax, it embraces steps, degrees,

62, 67 N. Y. Suppl. 962. In stating to the jury what constituted a change of grade of a highway, the court said: "'The term grade is used in this statute not to signify a level precisely established by mathematical points and lines, but the surface of the highway as it in fact exists.'" Pickles *v.* Ansonia, 76 Conn. 278, 281, 56 Atl. 552. To the same effect is McGarr *v.* Bristol, 71 Conn. 652, 656, 42 Atl. 1000.

"Grades of crime, in legal parlance, are always spoken of and understood as higher or lower in grade, or degree, according to the measure of punishment attached and meted out on conviction, and the consequences resulting to the party convicted." People *v.* Rawson, 61 Barb. (N. Y.) 619, 631.

41. Hitchcock *v.* Springfield, 121 Mass. 382, 385.

"Curb, grade, and gutter" see McNair *v.* Ostrander, 1 Wash. 110, 115, 23 Pac. 415. See also 8 Cyc. 1140 note 6.

"Laid out, altered, graded" see Hitchcock *v.* Springfield, 121 Mass. 382, 384.

"Laying out and profile of the grade" see Como *v.* Worcester, 177 Mass. 543, 546, 59 N. E. 444.

42. State *v.* Warren R. Co., 29 N. J. L. 353, 356.

43. Davies *v.* East Saginaw, 66 Mich. 37, 39, 32 N. W. 919; Bissell *v.* Larchmont, 57 N. Y. App. Div. 61, 62, 67 N. Y. Suppl. 962.

44. Smith *v.* Washington City, 20 How. (U. S.) 135, 148, 15 L. ed. 858 [*quoted* in Ryan *v.* Dubuque, 112 Iowa 284, 287, 83 N. W. 1073].

45. Wilcoxon *v.* San Luis Obispo, 101 Cal. 508, 510, 35 Pac. 988.

The term should be construed to involve more than to simply prepare a street or highway for travel. Aldrich *v.* Providence, 12 R. I. 241, 244. It naturally includes all that is necessary to be done to put a roadway in proper condition (McChesney *v.* Chicago, 201 Ill. 344, 348, 66 N. E. 217), to excavate and to fill so as to make the surface conform to the grade line (Davies *v.* East Saginaw, 66 Mich. 37, 39, 32 N. W. 919), to remove dirt from one point and to place it at another on a street to bring the surface to a certain line (Leavenworth *v.* Rankin, 2 Kan. 357, 373); and it will embrace grubbing, guttering, and curbing (Spokane *v.* Browne, 8 Wash. 317, 322, 36 Pac. 26).

"Graded or regraded to the official grade" see Palmer *v.* Burnham, 120 Cal. 364, 365, 52 Pac. 664.

46. Wharton L. Lex.

47. Ryan *v.* Dubuque, 112 Iowa 284, 287, 83 N. W. 1073 [*quoting* Smith *v.* Washington City, 20 How. (U. S.) 135, 138, 15 L. ed. 858, where the court said: "Hills must be cut down, and hollows filled up, or, in other words, the road be graded or 'reduced to a certain degree of ascent or descent,' which is the proper definition of the verb 'to grade'"].

"Amount of grading" see Ryan *v.* Dubuque, 112 Iowa 284, 288, 83 N. W. 1073.

May be accomplished by macadamizing.—State *v.* Ramsey County Dist. Ct., 33 Minn. 164, 170, 172, 22 N. W. 295.

48. The word, philologically considered, is one of elastic import having various meanings (Worcester Dict. [*quoted* in State *v.* Liverpool, etc., Ins. Co., 40 La. Ann. 463, 465, 4 So. 504]); and as used generally has a broad and extensive meaning (Sheriff *v.* Selser, 106 La. 691–693, 694, 31 So. 290 [*citing* State *v.* Liverpool, etc., Ins. Co., 40 La. Ann. 463, 4 So. 504]).

49. Wharton L. Lex.

Technically, the word implies a degree and regular curriculum. People *v.* Eichelroth, 78 Cal. 141, 143, 20 Pac. 364, 2 L. R. A. 770.

"Certificate of graduation" see 22 U. S. St. at L. 285 [U. S. Comp. St. (1901) p. 1046].

"Date of graduation," "sea service since graduation" see Leopold *v.* U. S., 18 Ct. Cl. 546, 557.

"Graduates" and "not graduates" see U. S. *v.* Redgrave, 116 U. S. 474, 480, 6 S. Ct. 444, 29 L. ed. 697.

"Graduates in pharmacy" as used in a statute includes a "pharmaceutical gradu-

grades or intervals, that is, division into degrees, grades or intervals.[50] As a verb, to mark with degrees, regular intervals, or divisions;[51] to regulate by degrees; to proportion; to adjust;[52] also to pass to or receive a degree in a college or university.[53] (Graduate: As Condition Requisite to Practice, see PHYSICIANS AND SURGEONS. Of College or University, see COLLEGES AND UNIVERSITIES.)

GRAFT. See MORTGAGES.

GRAIN.[54] A single seed or hard seed of a plant, particularly of those kinds whose seeds are used for food of man or beast;[55] the fruit of certain plants which constitute the chief food of man and beast;[56] a small, hard seed; specifically, a seed of one of the cereal plants collectively; the gathered seed of cereal plants in mass, also the plants themselves, whether standing or gathered.[57] Also, a term sometimes used to designate a crop in a field,[58] or cereals in the straw.[59] In accordance with the context or otherwise the term may include barley;[60] broom corn;[61] CORN,[62] *q. v.*, in general; corn and millet hay;[63] FLAX,[64] *q. v.*; millet;[65]

ate." State Bd. of Pharmacy *v.* White, 84 Ky. 626, 633, 2 S. W. 225, 8 Ky. L. Rep. 678.

"Suitable graduate in medicine" see People *v.* Eichelroth, 78 Cal. 141, 144, 20 Pac. 364, 2 L. R. A. 770.

"Graduated physician" see Thompson *v.* State, 37 Ark. 408, 411.

50. Sheriff *v.* Selser, 106 La. 691, 693, 31 So. 290, where the court said: "The division here is by classification into wholesale and retail merchants."

51. Craig Etym. Techn. Pron. Dict. [*quoted* in Chandler *v.* Ladd, 5 Fed. Cas. No. 2,593].

52. Worcester Dict. [*quoted* in State *v.* Liverpool, etc., Ins. Co., 40 La. Ann. 463, 465, 4 So. 504]. So used in the expression "shall graduate the amount of such tax." State *v.* O'Hara, 36 La. Ann. 93, 95.

"Graduating the license" means "to regulate its amount according to the amount of the gross sales of the licensee, or on some other basis of proportion." State *v.* Rittenberg, 112 La. 224, 226, 36 So. 330.

53. Webster Dict. [*quoted* in People *v.* Eichelroth, 78 Cal. 141, 143, 20 Pac. 364, 2 L. R. A. 770].

54. **Legacy of "grain" or "wine"** see Trouard's Succession, 5 La. Ann. 390.

Used in connection with other words see the following phrases: "Any stack of corn or grain" (Rex *v.* Swatkins, 4 C. & P. 548, 552, 553, 19 E. C. L. 643); "grain brought in to be sold as grain" (Cotton *v.* Vogan, [1896] A. C. 457, 459, 61 J. P. 36, 65 L. J. Q. B. 486, 74 L. T. Rep. N. S. 591); "hay and grain" (Brockway *v.* Rowley, 66 Ill. 99, 101); "other grain" (Bethune *v.* State, 48 Ga. 505, 510; Holland *v.* State, 34 Ga. 455, 457; State *v.* Williams, 2 Strobh. (S. C.) 474, 476, 477; Warren *v.* Peabody, 8 C. B. 800, 808, 14 Jur. 150, 19 L. J. C. P. 43, 65 E. C. L. 800).

55. Webster Dict. [*quoted* in Holland *v.* State, 34 Ga. 455, 457].

56. Smith *v.* Clayton, 29 N. J. L. 357, 361 [*quoting* Webster Dict.; and *citing* Bouvier L. Dict.]; Webster Dict. [*quoted* in Hewitt *v.* Watertown F. Ins. Co., 55 Iowa 323, 324, 7 N. W. 596, 39 Am. Rep. 174].

57. Century Dict. [*quoted* in Norris *v.* Farmers' Mut. F. Ins. Co., 65 Mo. App. 632, 638]. See also Stultz *v.* Dickey, 5 Binn. (Pa.) 285, 289, 6 Am. Dec. 411; Biggs *v.* Brown, 2 Serg. & R. (Pa.) 14, 17.

58. As, for instance, "a field or stack of grain." Century Dict. [*quoted* in Norris *v.* Farmers' Mut. F. Ins. Co., 65 Mo. App. 632, 638].

59. Century Dict. [*quoted* in Norris *v.* Farmers' Mut. F. Ins. Co., 65 Mo. App. 632, 638]; Briggs *v.* Taylor, 35 Vt. 57, 66 (where it is said: "The phrase 'grain' as used in the officer's return might include grain in the straw. The words are 'all the hay and grain in the barns and in stacks.' If there were grain in the straw in the barn, we think the plain and ordinary meaning of the words 'all the grain in the barn' would include such grain, though it might include other grain."

60. *Georgia.*— Holland *v.* State, 34 Ga. 455, 457.

Iowa.— Hewitt *v.* Watertown F. Ins. Co., 55 Iowa 323, 324, 7 N. W. 596, 39 Am. Rep. 174 [*quoting* Webster Dict.].

Missouri.— Norris *v.* Farmers' Mut. F. Ins. Co., 65 Mo. App. 632, 638 [*quoting* Century Dict.].

New Jersey.— Smith *v.* Clayton, 29 N. J. L. 357, 361 [*quoting* Webster Dict., and *citing* Bouvier L. Dict.].

England.— Rex *v.* Swatkins, 4 C. & P. 548, 552, 553, 19 E. C. L. 643.

61. Reavis *v.* Farmers' Mut. F. Ins. Co., 78 Mo. App. 14, 17.

62. Holland *v.* State, 34 Ga. 455, 457; Smith *v.* Clayton, 29 N. J. L. 357, 361 [*quoting* Webster Dict., and *citing* Bouvier L. Dict.]; Century Dict. [*quoted* in Norris *v.* Farmers' Mut. F. Ins. Co., 65 Mo. App. 632, 638]; Webster Dict. [*quoted* in Hewitt *v.* Watertown F. Ins. Co., 55 Iowa 323, 324, 7 N. W. 596, 39 Am. Rep. 174]; 57 & 58 Vict. c. 60, § 456. See also Kerrick *v.* Van Dusen, 32 Minn. 317, 318, 20 N. W. 228.

"Tithes of corn and grain" see Daws *v.* Benn, 1 B. & C. 751, 762, 8 E. C. L. 316.

63. Norris *v.* Farmers' Mut. F. Ins. Co., 65 Mo. App. 632, 638.

64. Hewitt *v.* Watertown F. Ins. Co., 55 Iowa 323, 325, 7 N. W. 596, 39 Am. Rep. 174; State *v.* Cowdery, 78 Minn. 94, 99, 81 N. W. 750, 48 L. R. A. 92.

65. Holland *v.* State, 34 Ga. 455, 457 [*quoting* Webster Dict., and *cited* in Hewitt *v.* Watertown F. Ins. Co., 55 Iowa 323, 325, 7 N. W. 596, 39 Am. Rep. 174]; Century Dict. [*quoted* in Norris *v.* Farmers' Mut. F. Ins. Co., 65 Mo. App. 632, 638].

oats;[66] peas;[67] sugar-cane seed;[68] and wheat, rye, maize.[69] As applied to weights, the twenty-fourth part of a penny-weight;[70] as defined by statute, one seven thousandth part of the imperial standard pound.[71] (Grain: In General, see Crops. Collection of Duties on Importation of,[72] see Customs Duties. Elevator, Storage in, see Warehousemen. Inspection of, see Inspection. Sale of, see Factors and Brokers. Speculative Contracts Relative to, see Gaming. Used in a System of Weights, see Weights and Measures. See also Away-Going Crop; Corn Fruit.)

GRAIN BROKER. A broker who, for commission or other compensation, is engaged in selling or negotiating the sale of goods, wares, merchandise, produce or grain belonging to others.[73] (See Grain; and, generally, Factors and Brokers; Licenses.)

GRAIN RENT. A share of the crops due to a landlord from croppers.[74] (See Grain; and, generally, Crops; Landlord and Tenant.)

GRAMMAR SCHOOL. As defined by statute, the term means and includes every endowed school, whether of royal or other foundation, founded, endowed, or maintained for the purpose of teaching Latin and Greek, or either of such languages, whether in the instrument of foundation or endowment, or in the statutes or decree of any court of record, or in any act of parliament establishing such school.[75] (Grammar School: See Schools and School-Districts. See also Free Grammar Schools.)

GRANARY. A term denoting a building usually devoted to the storage of corn and grain;[76] a store-house or repository of grain, after it is threshed; a corn-house.[77] (Granary: Burglary in Respect to, see Burglary. Burning of, see Arson. See also Corn-Crib.)

GRANDCHILDREN. In common parlance, children of children,[78] or a son's or daughter's child;[79] a man's nearest blood relations after his own children;[80] persons of the second descent, and even of the third, viz., great grand-

66. Holland *v.* State, 34 Ga. 455, 457; Smith *v.* Clayton, 29 N. J. L. 357, 361 [*quoting* Webster Dict., and *citing* Bouvier L. Dict.]; Century Dict. [*quoted* in Norris *v.* Farmers' Mut. F. Ins. Co., 65 Mo. App. 632, 638]; Webster Dict. [*quoted* in Hewitt *v.* Watertown F. Ins. Co., 55 Iowa 323, 324, 7 N. W. 596, 39 Am. Rep. 174].

That "other grain" will exclude oats in a charter-party see Warren *v.* Peabody, 8 C. B. 800, 808, 14 Jur. 150, 19 L. J. C. P. 43, 65 E. C. L. 800.

67. State *v.* Williams, 2 Strobh. (S. C.) 474, 476, 478.

68. Holland *v.* State, 34 Ga. 455, 457 [*quoting* Webster Dict., and *cited* in Hewitt *v.* Watertown F. Ins. Co., 55 Iowa 323, 325, 7 N. W. 596, 39 Am. Rep. 174].

69. Holland *v.* State, 34 Ga. 455, 457; Smith *v.* Clayton, 29 N. J. L. 357, 361 [*quoting* Webster Dict., and *citing* Bouvier L. Dict.]; Century Dict. [*quoted* in Norris *v.* Farmers' Mut. F. Ins. Co., 65 Mo. App. 632, 638]; Webster Dict. [*quoted* in Hewitt *v.* Watertown F. Ins. Co., 55 Iowa 323, 324, 7 N. W. 596, 39 Am. Rep. 174].

"Grain of wheat" is an article which may be described generally as follows: "It consists of a pellicle or outside covering known as bran, an inner envelop consisting of cells and their contents of gluten and phosphates, the most nutritious portion of the berry, and an interior white mass composed mainly of starch and albuminoid matter, extending to the heart of the berry. At one end of the berry, under an irregularly-curved surface layer of bran, technically called the shield, is the embryo or germ. The germ is a yellow, waxy substance, and the bran is consistent and tough." Downton *v.* Yeager Milling Co., 108 U. S. 466, 469, 3 S. Ct. 10, 27 L. ed. 789.

As defined by statute, grain is any rice, paddy, pulse, seeds, nuts, or nut kernels. St. 57 & 58 Vict. c. 60, § 456.

70. Wharton L. Lex.

71. St. 41 & 42 Vict. c. 49, § 14.

72. See also U. S. Treasury Reg. (1899) arts. 600–603.

73. O'Neill *v.* Sinclair, 153 Ill. 525, 526, 39 N. E. 124, so defined in a municipal ordinance.

74. Fremont, etc., R. Co. *v.* Bates, 40 Nebr. 381, 391, 58 N. W. 959. See also 12 Cyc. 797.

75. St. 3 & 4 Vict. c. 77, § 25. See also Jenkins *v.* Andover, 103 Mass. 94, 99; Atty.-Gen. *v.* Mansfield, 2 Russ. 501, 520, 26 Rev. Rep. 155, 38 Eng. Reprint 423.

76. State *v.* Wilson, 47 N. H. 101, 104, where the word is distinguished from "store" and "warehouse."

77. Webster Dict. [*quoted* in State *v.* Laughlin, 53 N. C. 455, 458].

78. Pemberton *v.* Parke, 5 Binn. (Pa.) 601, 605, 6 Am. Dec. 432; *In re* Coates St., 2 Ashm. (Pa.) 12, 23.

79. Webster Dict. [*quoted* in Otterback *v.* Bohrer, 87 Va. 548, 552, 12 S. E. 1013].

80. Beatty *v.* Benton, 135 U. S. 244, 251, 34 L. ed. 124.

children.[81] The word is of equivocal import, and its meaning often depends upon the context.[82] (Grandchildren: Rights of Inheritance, see DESCENT AND DISTRIBUTION. Rights Under Will, see WILLS. See also CHILDREN; DESCENDANTS; HEIRS; ISSUE; OFFSPRING.)

GRANDFATHER. The father of either of one's parents.[83] (See GRANDMOTHER; GRANDPARENTS; and, generally, DESCENT AND DISTRIBUTION; WILLS.)

81. Cutter *v.* Doughty, 23 Wend. (N. Y.) 513, 521 [*citing* Hussey *v.* Berkeley, 2 Eden 194, 196, 28 Eng. Reprint 872].

82. Scott *v.* Nelson, 3 Port. (Ala.) 452, 457, 29 Am. Dec. 266; Cowles *v.* Cowles, 56 Conn. 240, 247, 13 Atl. 414; Bragg *v.* Carter, 171 Mass. 324, 328, 50 N. E. 640; Hamilton *v.* Lewis, 13 Mo. 184, 188; Wright *v.* Wright, 41 N. J. Eq. 382, 387, 4 Atl. 855; Hone *v.* Van Schaick, 3 N. Y. 538, 539, 540, 541; Cutter *v.* Doughty, 7 Hill (N. Y.) 305, 309, 310; *In re* Herrick, 12 N. Y. Suppl. 105, 107; Matter of Hallet, 8 Paige (N. Y.) 375, 378; McKeehan *v.* Wilson, 53 Pa. St. 74, 78; Swift *v.* Duffield, 5 Serg. & R. (Pa.) 38, 40; Dickinson *v.* Lee, 4 Watts (Pa.) 82, 83, 28 Am. Dec. 684; Stroman *v.* Rottenbury, 4 Desauss. Eq. (S. C.) 268, 272; Oppenheim *v.* Henry, 10 Hare 441, 442, 1 Wkly. Rep. 126, 44 Eng. Ch. 425; Arnold *v.* Congreve, 8 L. J. Ch. O. S. 88, 90, 1 Russ. & M. 209, Taml. 347, 31 Rev. Rep. 106, 5 Eng. Ch. 209, 29 Eng. Reprint 80; Strutt *v.* Finch, 7 L. J. Ch. O. S. 176, 177; Freeman *v.* Parsley, 3 Ves. Jr. 421, 423, 30 Eng. Reprint 1085.

Great grandchildren may be included in the meaning of the term. Hone *v.* Van Schaick, 3 Barb. Ch. (N. Y.) 488, 505; Pemberton *v.* Parke, 5 Binn. (Pa.) 601, 605, 6 Am. Dec. 432 [*quoted* in *In re* Coates St., 2 Ashm. (Pa.) 12, 23]. *Compare* Halstead *v.* Hall, 60 Md. 209, 214; Hussey *v.* Berkeley, 2 Eden 194, 196, 28 Eng. Reprint 872 [*cited* in Cutter *v.* Doughty, 23 Wend. (N. Y.) 513, 521; Heyward *v.* Hasell, 2 S. C. 509, 518]; Orford *v.* Churchill, 3 Ves. & B. 59, 69, 35 Eng. Reprint 401.

"Grandchildren" will not include illegitimate children unless "the testator's intention to include them otherwise clearly appears." Smith *v.* Lansing, 24 Misc. (N. Y.) 566, 572, 53 N. Y. Suppl. 633 [*citing* Gelston *v.* Shields, 16 Hun (N. Y.) 143; Collins *v.* Hoxie, 9 Paige (N. Y.) 81].

Gift to a "granddaughter" imports a person of legitimate birth unless a contrary intention appears from the will. Ferguson *v.* Mason, 2 Sneed (Tenn.) 618, 629. See also Jefferies *v.* Michell, 20 Beav. 15, 19, 52 Eng. Reprint 507.

83. Black L. Dict.

GRAND JURIES

By Horace E. Deemer
Chief Justice of the Supreme Court of Iowa

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CROSS-REFERENCES

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Constitutional Law, see CONSTITUTIONAL LAW.
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Criminal Law, see CRIMINAL LAW.
Indictments or Informations, see INDICTMENTS AND INFORMATIONS.
Petit Jury, see JURIES.

I. DEFINITION AND NATURE.

A. Definition. A grand jury is a body of men selected and summoned according to law to serve before a competent court and by such court impaneled, sworn, and charged to inquire in regard to crimes committed within its jurisdiction, and to present all offenders against the law in the mode and manner defined by it.[1]

B. An Informing and Accusing Body. A grand jury is an informing and accusing body rather than a judicial tribunal.[2]

C. Constituent Part of Court. It is, however, a constituent part or branch of the court[3] and is under its general supervision and control;[4] and it may be empowered to discharge the legal functions imposed on it only by virtue of the authority which it derives as a body of men sworn and impaneled in open court in the mode prescribed by law.[5] But while this is true, it has been said that a grand jury is not under the control of the court to the same extent as a petit jury,[6] and it is very generally conceded that after a grand jury is duly organized the larger part of its legitimate functions is to be performed by it as a separate and independent body acting apart from the court.[7]

II. ORIGIN AND HISTORY.

The institution of the grand jury is of very ancient origin in the history of England; it goes back many centuries. For a long period its powers were not clearly defined; and it would seem, from the accounts of commentators on the laws of that country, that it was at first a body which not only accused but also tried public offenders. However this may have been in its origin, it was, at the time of the settlement of this country, an informing and accusing tribunal only, without whose previous action no person charged with a felony could, except in certain special cases, be put upon his trial. And in the struggles which at times arose in England between the powers of the king and the rights of the subject, it often stood as a barrier against persecution in his name; until at length it came to be regarded as an institution by which the subject was rendered secure

1. People *v.* Duff, 65 How. Pr. (N. Y.) 365, 369.

Other definitions are: "A lawful body empowered to hear and investigate charges of a criminal nature against persons within their proper county." Perselly *v.* Baker, 20 Mo. 330, 336.

"A body of men, returned at stated periods from the citizens of the county, before a court of competent jurisdiction, and chosen by lot, and sworn to inquire of crimes committed or triable in the county." People *v.* Sheriff, 11 N. Y. Civ. Proc. 172, 183.

2. State *v.* Wolcott, 21 Conn. 272; Com. *v.* Woodruff, 157 Mass. 516, 32 N. E. 939, 34 Am. St. Rep. 302; U. S. *v.* Belvin, 46 Fed. 381; Charge to Grand Jury, 30 Fed. Cas. No. 18,255, 2 Sawy. 667. See also U. S. *v.* Kilpatrick, 16 Fed. 765.

3. *Alabama.*— Finley *v.* State, 61 Ala. 201.

Arkansas.— Denning *v.* State, 22 Ark. 131.

Illinois.— Boone *v.* People, 148 Ill. 440, 36 N. E. 99; O'Hair *v.* People, 32 Ill. App. 277.

Maryland.— Mills *v.* State, 76 Md. 274, 25 Atl. 229.

Massachusetts.— Com. *v.* Bannon, 97 Mass. 214.

New York.— People *v.* Freund, 33 N. Y. Suppl. 612, holding that the recorder of the court of general sessions of New York city has authority pending examination before him, as magistrate, of a person charged with a criminal offense, to advise the grand jury not to entertain a charge against such person until the termination of such examination. *Compare* People *v.* Sheriff, 11 N. Y. Civ. Proc. 172.

United States.— U. S. *v.* Kilpatrick, 16 Fed. 765.

See 24 Cent. Dig. tit. "Grand Jury," § 71.

4. Law's Case, 4 Me. 439, 16 Am. Dec. 271; State *v.* Cowan, 1 Head (Tenn.) 280; U. S. *v.* Kilpatrick, 16 Fed. 765.

5. Com. *v.* Bannon, 97 Mass. 214.

6. Allen *v.* State, 61 Miss. 627.

7. *Alabama.*— Finley *v.* State, 61 Ala. 201.

Iowa.— State *v.* Will, 97 Iowa 58, 65 N. W. 1010. See also Keitler *v.* State, 4 Greene 291.

Maine.— See State *v.* Bowman, 90 Me. 363, 38 Atl. 331, 60 Am. St. Rep. 266.

Massachusetts.— Com. *v.* Bannon, 97 Mass. 214.

New York.— People *v.* Sheriff, 11 N. Y. Civ. Proc. 172; People *v.* Naughton, 7 Abb. Pr. N. S. 421.

United States.— See U. S. *v.* Kilpatrick, 16 Fed. 765.

See 24 Cent. Dig. tit. "Grand Jury," § 71.

against oppression from unfounded prosecutions of the crown. In this country, from the popular character of our institutions, there has seldom been any contest between the government and the citizen, which required the existence of the grand jury as a protection against oppressive action of the government. Yet the institution was adopted in this country and is continued from considerations similar to those which give to it its chief value in England, and is designed as a means, not only of the bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it come from government or be prompted by partisan passion or private enmity.[8]

III. Authority of Courts to Convene Grand Juries.

At common law a grand jury was a part of the machinery of the courts of oyer and terminer and of jail delivery in England,[9] and the rule has been laid down in this country that courts clothed by statute with a like criminal jurisdiction which can only be exercised by the aid of a grand jury, possess the power of summoning and impaneling grand juries apart from any express statutory authorization.[10] At common law the process for summoning a grand jury was a precept either in the name of the king or of two or more justices of the peace directed to the sheriff. This was anterior to and independent of any action of the court, the object being to have a grand jury in attendance at the commencement of the term.[11] The court, however, had power to have a grand jury summoned during the term, as occasion might require.[12] In many jurisdictions, either under statutory or constitutional provisions, a discretion is vested in the court as to the necessity or advisability of calling a grand jury; an order of court being required in some jurisdictions to call a grand jury[13] while in other jurisdic-

8. Charge to Grand Jury, 30 Fed. Cas. No. 18,255, 2 Sawy. 667 [*quoted* in *Ex p.* Bain, 121 U. S. 1, 7 S. Ct. 781, 30 L. ed. 849]. See also *In re* Gardner, 31 Misc. (N. Y.) 364, 64 N. Y. Suppl. 760; People *v.* Naughton, 7 Abb. Pr. N. S. (N. Y.) 421.

9. Com. *v.* Burton, 4 Leigh (Va.) 645, 26 Am. Dec. 337; Oshoga *v.* State, 3 Pinn. (Wis.) 56, 3 Chandl. 57. See also Chartz *v.* Territory, (Ariz. 1893) 32 Pac. 166.

10. Miller *v.* People, 183 Ill. 423, 56 N. E. 60; Smith *v.* Territory, 14 Okla. 518, 79 Pac. 214; Com. *v.* Burton, 4 Leigh (Va.) 654; U. S. *v.* Hill, 26 Fed. Cas. No. 15,364, 1 Brock. 156. See also Pusey *v.* Com., 8 Ky. L. Rep. 538. *Compare Ex p.* Farley, 40 Fed. 66, where the court was limited in its jurisdiction to offenses below the grade of felony.

The repeal of a statute investing a court with criminal jurisdiction divests it of the authority to summon a grand jury. State *v.* Doherty, 60 Me. 504.

Effect of transfer of jurisdiction.— In Com. *v.* Rich, 14 Gray (Mass.) 335, it was held that where a grand jury was summoned to attend at any term of the court of common pleas throughout the year and until another grand jury was impaneled in its stead, and the superior court was by statute substituted for the court of common pleas, all of whose jurisdiction was transferred to the superior court, all the incidents of such jurisdiction were also transferred and it became the duty of the existing grand jury during the residue of the term for which it was originally summoned to attend the superior court which by the transfer had jurisdiction over the offenses of which the grand jury had been charged to inquire. But in Stevens *v.* State, 3 Ohio St. 453, it was held that where by statute the criminal business of one court is transferred to another and the act conferring criminal jurisdiction in the latter court provides the manner in which it is to be supplied with a grand jury, such court has no power, apart from express statutory authorization, to employ a grand jury impaneled by the court to whose jurisdiction it has succeeded.

11. Curtis *v.* Com., 87 Va. 589, 13 S. E. 73; Com. *v.* Burton, 4 Leigh (Va.) 645. See also *infra*, VI, B, 3, a, note 10 *et seq.*

12. Curtis *v.* Com., 87 Va. 589, 13 S. E. 73; Com. *v.* Burton, 4 Leigh (Va.) 645. See also *infra*, VI, K, note 79.

13. *Kansas.*— State *v.* Marsh, 13 Kan. 443; Rice *v.* State, 3 Kan. 141.

Michigan.— People *v.* Reigel, 120 Mich. 78, 78 N. W. 1017, holding that an entry in the journal of a written order for a grand jury, over the judge's signature, complies with Howell Annot. St. § 9554, dispensing with grand juries, unless the judge shall direct a jury to be summoned by writing under his hand, and filed with the clerk.

Missouri.— State *v.* Berry, 179 Mo. 377, 78 S. W. 611.

Montana.— State *v.* King, 9 Mont. 445, 24 Pac. 265.

Nebraska.— State *v.* Lauer, 41 Nebr. 226, 59 N. W. 508; Jones *v.* State, 18 Nebr. 401, 25 N. W. 527.

tions it is required to dispense with a grand jury.[14] On the other hand it has been held under statute that the clerk in issuing a venire[15] acts *ex officio* and under the mandate of the statute and not by direction or authority of the court.

IV. COMPETENCY AND QUALIFICATIONS OF GRAND JURORS.

A. In General. The rule at common law requires grand jurors to be *probi et legales homini*,[16] and in many jurisdictions the qualifications of grand jurors are fixed by statute,[17] the competency of grand jurors being tested under some statutes by the same rules as those laid down for petit jurors.[18] In some jurisdictions by express statutory enactment the grounds of disqualification prescribed by statute are exclusive.[19] Under the federal statutes it has been held proper for the federal courts to require for their grand jurors similar qualifications to those of grand jurors in the court of the state in which the federal courts are held, and to enforce like objections and challenges to them.[20] Yet notwithstanding this, it is held that they still have the power and it is their duty to exercise it either on their own motion or that of counsel to enforce any other objection to grand jurors which from its nature, if well founded, would necessarily unfit them to act.[21]

B. Citizenship and Residence. The general rule both under statute and at common law is that a grand juror is required to be a citizen of the state or country,[22] and indeed a resident of the county in which the crime was committed or

Oregon.— State *v.* Carlson, 39 Oreg. 19, 62 Pac. 1016, 1119, holding that under the act of Feb. 17, 1899, authorizing the court to convene a grand jury whenever, in its opinion, it should be advisable, the order to have a grand jury drawn is an expression of the court's opinion as to a necessity therefor, and it need not make a special finding in respect thereto.

See 24 Cent. Dig. tit. "Grand Jury," § 23.

14. Cyphers *v.* People, 31 N. Y. 373 [*affirming* 5 Park. Cr. 666] (holding that the omission of the county judge to designate, under Acts (1851), c. 444, at what terms a grand jury shall be summoned does not deprive the court of its authority to impanel the grand jury at any term, the requirement that the terms to be held with or without a jury should be indicated being considered as only directory and the statute being so framed that in the absence of a designation of any terms to be held without a jury the general provision of law respecting the drawing and summoning of grand juries will take effect and will require the jury to be drawn and summoned for every term); Bird *v.* State, 77 Wis. 276, 45 N. W. 1126.

15. State *v.* Symonds, 36 Me. 128.

16. See Williams *v.* State, 61 Ala. 33; State *v.* Symonds, 36 Me. 128; Patrick *v.* State, 16 Nebr. 330, 20 N. W. 121; State *v.* Hoffman, 71 N. J. L. 285, 58 Atl. 1012; People *v.* Petrea, 92 N. Y. 128.

Members of peerage.— In England the rule has been laid down that a British or Irish peer ought not to serve on a grand jury except an Irish peer who is a member of the house of commons and who is to all intents and purposes a commoner. Irish Peer's Case, R. & R. 87.

17. State *v.* Hamlin, 47 Conn. 95, 36 Am. Rep. 54; Betts *v.* State, 66 Ga. 508; State *v.* Hoffman, 71 N. J. L. 285, 58 Atl. 1012.

Party to pending suit.— In North Carolina under statute it has been held that a party to an action pending and at issue in the superior court is disqualified to serve as a grand juror. State *v.* Smith, 80 N. C. 410; State *v.* Liles, 77 N. C. 496. See also State *v.* Edens, 85 N. C. 522.

18. State *v.* Gillick, 7 Iowa 287; State *v.* Quimby, 51 Me. 395; State *v.* Williams, 35 S. C. 344, 14 S. E. 819.

19. State *v.* Millain, 3 Nev. 409; State *v.* Chairs, 9 Baxt. (Tenn.) 196; State *v.* Cameron, 2 Chandl. (Wis.) 172.

20. U. S. *v.* Jones, 69 Fed. 973; U. S. *v.* Clune, 62 Fed. 798; U. S. *v.* Benson, 31 Fed. 896, 12 Sawy. 477; U. S. *v.* Eagan, 30 Fed. 608; U. S. *v.* Reed, 27 Fed. Cas. No. 16,134, 2 Blatchf. 435. *Compare* U. S. *v.* Williams, 28 Fed. Cas. No. 16,716, 1 Dill. 485.

21. U. S. *v.* Jones, 69 Fed. 973; U. S. *v.* Benson, 31 Fed. 896, 12 Sawy. 477.

22. *Alabama.*—Yancy *v.* State, 63 Ala. 141; Boyington *v.* State, 2 Port. 100.

Arkansas.— State *v.* Brown, 10 Ark. 78.

Georgia.—Reich *v.* State, 53 Ga. 73, 21 Am. Rep. 265.

Illinois.— See Musick *v.* People, 40 Ill. 268.

Iowa.— State *v.* Haynes, 54 Iowa 109, 6 N. W. 156; State *v.* Gibbs, 39 Iowa 318; Harless *v.* U. S., Morr. 169.

Kentucky.— Raganthall *v.* Com., 14 Bush 457.

Louisiana.— State *v.* Guillory, 44 La. Ann. 317, 10 So. 761.

New Jersey.— State *v.* Hoffman, 71 N. J. L. 285, 58 Atl. 1012.

Utah.— Territory *v.* Woolsey, 3 Utah 470, 24 Pac. 765.

Virginia.— Com. *v.* Towles, 5 Leigh 745; Com. *v.* Cherry, 2 Va. Cas. 20.

Wisconsin.— State *v.* Cole, 17 Wis. 674; Lark *v.* U. S., 1 Pinn. 77.

See 24 Cent. Dig. tit. "Grand Jury," § 9.

In Montana the rule has been laid down

in which the juror may be called to serve.[23] But absence from the state on temporary business with no intention of changing his citizenship or abandoning his residence does not disqualify a grand juror.[24]

C. Qualification as Elector or Voter. By statute in many jurisdictions it is essential that a grand juror shall have the qualifications of a voter or elector,[25] it being required in some jurisdictions under this rule that he shall have resided in the state for a specified period.[26]

D. Payment of Taxes. In some jurisdictions it is required by statutory or constitutional provision that a grand juror be a taxpayer[27] or a taxable person[28] or that he be not in default in the payment of taxes.[29]

under statute that a male person of lawful age is legally competent to serve as a grand juror, although not a full citizen of the United States, provided he has declared his intention to become such. Territory *v.* Harding, 6 Mont. 323, 12 Pac. 750. *Compare* Territory *v.* Clayton, 8 Mont. 1, 19 Pac. 293. In Territory *v.* Clayton, 8 Mont. 1, 19 Pac. 293 [*following* Territory *v.* Hart, 7 Mont. 489, 17 Pac. 718], it was held under the same statute that a grand juror who is made a full citizen before a vote is taken by the grand jury is a competent juror to participate in the finding.

Declaration of juror as prima facie evidence of citizenship.— It has been held that a declaration of a grand juror that he is a naturalized citizen should be received by the court as *prima facie* true so as to supersede the necessity of proof by the actual production of his papers. People *v.* Roberts, 6 Cal. 214; People *v.* Freeland, 6 Cal. 96. See also State *v.* Guillory, 44 La. Ann. 317, 10 So. 761.

23. *Arkansas.*— State *v.* Brown, 10 Ark. 78.

Connecticut.— State *v.* Hamlin, 47 Conn. 95, 36 Am. Rep. 54.

Georgia.—Betts *v.* State, 66 Ga. 508.

Indiana.— Miller *v.* State, 69 Ind. 284.

Kentucky.— Com. *v.* Smith, 10 Bush 476.

Mississippi.— Beason *v.* State, 34 Miss 602.

Montana.— Territory *v.* Harding, 6 Mont. 323, 12 Pac. 750.

New Jersey.— State *v.* Hoffman, 71 N. J. L. 285, 58 Atl. 1012.

New York.— See People *v.* Scannell, 37 Misc. 345, 75 N. Y. Suppl. 500.

North Carolina.—State *v.* Wilcox, 104 N. C. 847, 10 S. E. 453.

Tennessee.— Clifford *v.* State, 3 Tenn. Cas. 501.

See 24 Cent. Dig. tit. "Grand Jury," § 9.

24. State *v.* Alexander, 35 La. Ann. 1100; State *v.* Carlson, (Oreg. 1900) 62 Pac. 1016.

25. *Connecticut.*— State *v.* Hamlin, 47 Conn. 95, 36 Am. Rep. 54.

Florida.— Adams *v.* State, 28 Fla. 511, 10 So. 106.

Iowa.— State *v.* Harris, 122 Iowa 78, 97 N. W. 1093, holding that, although the law requires that grand jurors be electors of the county, a person need not have voted, or have his name on the poll-books, to make him eligible.

Kansas.—State *v.* Donaldson, 43 Kan. 431, 23 Pac. 650.

Louisiana.— State *v.* Brodden, 47 La. Ann. 375, 16 So. 874.

Maryland.— Downs *v.* State, 78 Md. 128, 26 Atl. 1005; Avirett *v.* State, 76 Md. 510, 25 Atl. 676, 987.

Ohio.— Doyle *v.* State, 17 Ohio 222; Shoemaker *v.* State, 12 Ohio 43.

Rhode Island.— State *v.* Congdon, 14 R. I. 267 (holding that under statute in Rhode Island the fact that a board of canvassers has listed a man among those qualified to vote on any proposition to impose a tax or expend money in the town of his residence is not conclusive evidence that he is qualified to serve as a grand juror); State *v.* Davis, 12 R. I. 492, 34 Am. Rep. 704.

Washington.— Harland *v.* Territory, 3 Wash. Terr. 131, 13 Pac. 453 [*overruling* Rosencrantz *v.* Territory, 2 Wash. 267, 5 Pac. 305, and *followed* in Rumsey *v.* Territory, 3 Wash. Terr. 332, 21 Pac. 152], holding that married women not being qualified electors are not eligible as grand jurors.

See 24 Cent. Dig. tit. "Grand Jury," § 12.

26. Harless *v.* U. S., Morr. (Iowa) 169; Doyle *v.* State, 17 Ohio 222.

27. Territory *v.* Harding, 6 Mont. 323, 12 Pac. 750. See also U. S. *v.* Collins, 25 Fed. Cas. No. 14,837, 1 Woods 499, construing a Georgia statute. *Compare* State *v.* Williams, 35 S. C. 344, 14 S. E. 819; U. S. *v.* Benson, 31 Fed. 896, 12 Sawy. 477, holding that under the statutes of California no provision exists making the absence of the name of a citizen from the last preceding assessment-roll of the county from which he is summoned a ground of challenge or of quashing an indictment.

28. State *v.* Carlson, 39 Oreg. 19, 62 Pac. 1016, 1119, holding that where a person is entered on the assessment-roll as the owner of certain realty and is allowed an exemption to the full amount of the assessed value of the realty, he is still a taxable person within a statute requiring grand jurors to be taxable persons, since the statute of exemption exempts personalty only.

Effect of transfer of realty.— In State *v.* Carlson, 39 Oreg. 19, 62 Pac. 1016, 1119, it was held that the fact that the owner of realty entered on the assessment-roll transfers it to another before he is drawn as a grand juror does not disqualify him as such juror, under the Oregon statute requiring grand jurors to be selected from the taxable persons of the county.

29. Collins *v.* State, 31 Fla. 574, 12 So. 906; State *v.* Perry, 122 N. C. 1018, 29 S. E. 384 (holding that it is no objection to a grand juror twenty-one years old that he has

E. Property Qualifications. While the authorities leave it somewhat doubtful whether it was necessary at common law for grand jurors to be freeholders,[30] it is very frequently provided by statute that members of a grand jury must be householders or freeholders, and this in some jurisdictions of the county in which they may be called to serve.[31]

F. Educational Qualifications. By statute, ability to speak, read, and write the English language is sometimes made a necessary qualification of grand jurors,[32] and indeed in the absence of statute a grand juror's ignorance of the language in which the proceedings before the grand jury are conducted is a disqualification.[33]

G. Service as Officer. In the absence of statutory enactment making pro-

not paid his taxes for the preceding year, as he could not have been liable for the poll tax and may not have had any property liable to taxation); State *v.* Durham Fertilizer Co., 111 N. C. 658, 16 S. E. 213; Cubine *v.* State, 44 Tex. Cr. 596, 73 S. W. 396.

30. People *v.* Jewett, 6 Wend. (N. Y.) 386.

Common-law authorities considered.— In People *v.* Jewett, 6 Wend (N. Y.) 386, 387, it is said: "Lord Hale, in his Pleas of the Crown, 2 Hale 155, holds that they ought to be freeholders, but admits that the amount of the freehold required is altogether uncertain. Sir Wm. Blackstone, in his Commentaries, 4 Bl. Comm. 302, adopts the language of Hale, and says, 'Grand jurors ought to be freeholders, but to what amount is uncertain, which appears to be a *casus omissus*,' &c. He observes, however, that in practice they are usually gentlemen of the greatest respectability and wealth in the county. Mr. Chitty, in his Treatise on Criminal Law, vol. 1, pp. 252, 308, remarks that 'it has been frequently taken for granted that none but freeholders can be returned on the panel of grand jurors,' and cites Hale and Blackstone to support the position. He says, with those authors, that the amount of the estate required was not fixed at common law; but remarks that, in the times of the feudal system, as no villein was eligible to the office of grand juror, none but those who possessed land as freeholders could obtain it. Villeins were ineligible as jurors, either grand or petit, I apprehend, on other grounds than a want of freehold estate. A juror must be *liber homo*; that is, as Lord Coke defines it, he must be a freeman and not bound, as well as have such freedom of mind that he stand indifferent as he stands unsworn. 1 Coke Litt. 155, a. Accordingly, among the causes of principal challenge to a juror is enumerated *defectum libertatis*, as villeins or bondmen. Coke Litt. 156, b. Villeins were not, in the eye of the law, *probi et legales homines*. Harison *v.* Errington, Popham 202. Hawkins, 2 Hawk. 216, b. 2, ch. 25, sect. 15, 16, 19, 21, considers it doubtful whether there be any necessity, by the common law or by statute, that a grand juror should be a freeholder. Vide also 2 Woodeson, sect. 558." In Case, R. & R. 132, it was held that a person may serve on the grand jury, although he is not a freeholder. *Compare* State *v.* Hamlin, 47 Conn. 95, 106, 36 Am. Rep. 54, where it is said: "The common law requires grand jurors to be good and lawful freeholders."

31. *Alabama.*— Fowler *v.* State, 100 Ala. 96, 14 So. 860 (holding that a grand juror need not be both a householder and freeholder); Cross *v.* State, 63 Ala. 40; State *v.* Brooks, 9 Ala. 9; State *v.* Ligon, 7 Port. 167; State *v.* Middleton, 5 Port. 484.

Arkansas.— See State *v.* Brown, 10 Ark. 78. But see Palmore *v.* State, 29 Ark. 248.

Indiana.— Wills *v.* State, 69 Ind. 286 (holding that a grand juror must be both a householder and freeholder); State *v.* Herndon, 5 Blackf. 75. See also Miller *v.* State, 69 Ind. 284.

Mississippi.— See Barney *v.* State, 12 Sm. & M. 68. But see Head *v.* State, 44 Miss. 731.

Ohio.— Shoemaker *v.* State, 12 Ohio 43.

Tennessee.— State *v.* Bryant, 10 Yerg. 527 (holding that the statute making it necessary that grand jurors be freeholders does not confine the freehold interest to the lands of the county); State *v.* Duncan, 7 Yerg. 271.

Texas.— Stanley *v.* State, 16 Tex. 557; Jackson *v.* State, 11 Tex. 261.

Virginia.— Wysor *v.* Com., 6 Gratt. 711; Com. *v.* Cunningham, 6 Gratt. 695; Com. *v.* Helmondollor, 4 Gratt. 536; Com. *v.* Burcher, 2 Rob. 826; Moore *v.* Com., 9 Leigh 639; Kerby *v.* Com., 7 Leigh 747; Com. *v.* Carter, 2 Va. Cas. 319.

Washington.— Rumsey *v.* Territory, 3 Wash. Terr. 332, 21 Pac. 152; Harland *v.* Territory, 3 Wash. Terr. 131, 13 Pac. 453.

West Virginia.— State *v.* Henderson, 29 W. Va. 147, 1 S. E. 225.

See 24 Cent. Dig. tit. "Grand Jury," § 11.

Compare People *v.* Jewett, 6 Wend. (N. Y.) 386; State *v.* Perry, 122 N. C. 1018, 29 S. E. 384 [*following* State *v.* Wincroft, 76 N. C. 38]; State *v.* Williams, 35 S. C. 344, 14 S. E. 819.

In New Jersey a freehold qualification was at one time required by statute (State *v.* Rockafellow, 6 N. J. L. 332); but by subsequent legislation this qualification was eliminated (State *v.* Hoffman, 71 N. J. L. 285, 58 Atl. 1012).

32. State *v.* Greenland, 125 Iowa 141, 100 N. W. 341.

33. U. S. *v.* Benson, 31 Fed. 896, 12 Sawy. 477. See also State *v.* Furco, 51 La. Ann. 1082, 25 So. 951.

vision to the contrary[34] the fact that a juror is a public officer does not disqualify him from serving as a grand juror.[35]

H. Prior Service as Juror. In the absence of statute, prior service as a juror within a prescribed period is not a disqualification.[36] Statutes, however, exist in several jurisdictions either rendering persons ineligible as grand jurors on account of prior jury service[37] or forbidding their selection for that reason by the court or other proper officer.[38]

I. Commission of Criminal Offense. Provision is sometimes made by statute for the disqualification as grand jurors of persons convicted of or charged with a felony or other criminal offense[39] and it seems that conviction of crime may operate as a disqualification at common law.[40]

J. Religious or Political Beliefs and Alliances. A grand jury should be selected with a view to the qualifications prescribed by law, without inquiry whether the individuals selected do or do not belong to any particular society, sect, or denomination, social, benevolent, political, or religious.[41] Neither religious beliefs nor church adhesion[42] nor membership in or affiliation with a political party[43] affect the qualifications of a grand juror. A person, however, who has conscientious scruples against capital punishment, or who could not, upon his conscience, find an indictment under the law, is incompetent as a grand juror.[44]

34. See Com. *v.* Pritchett, 11 Bush (Ky.) 277 (holding, however, that the fact that a member of a grand jury was a school trustee when the indictment was found was no ground for setting it aside, although if objection had been made to him when the grand jury was impaneled he might have been discharged); Com. *v.* Rudd, 3 Ky. L. Rep. 328.

35. State *v.* Carter, 106 La. 407, 30 So. 895; Com. *v.* Hayden, 163 Mass. 453, 40 N. E. 846, 47 Am. St. Rep. 468, 28 L. R. A. 318; Koch *v.* State, 32 Ohio St. 353 (township trustees); Com. *v.* Strother, 1 Va. Cas. 186. See also U. S. *v.* Belvin, 46 Fed. 381.

36. Loeb *v.* State, 75 Ga. 258; State *v.* Brown, 28 Oreg. 147, 41 Pac. 1042; Richardson *v.* Com., 76 Va. 1007; U. S. *v.* Clark, 46 Fed. 633. See also State *v.* Wilcox, 104 N. C. 847, 10 S. E. 453.

37. McFarlin *v.* State, 121 Ga. 329, 49 S. E. 267, holding that the disqualification created by statute on account of jury service at the preceding term may be taken advantage of by challenge or in a proper case by plea in abatement.

38. State *v.* Elson, 45 Ohio St. 648, 16 N. E. 684; Roth *v.* State, 3 Ohio Cir. Ct. 59, 2 Ohio Cir. Dec. 33; Bloodworth *v.* State, 6 Baxt. (Tenn.) 614, 32 Am. Rep. 546; State *v.* Ward, 60 Vt. 142, 14 Atl. 187; State *v.* Cox, 52 Vt. 471. See also U. S. *v.* Reeves, 27 Fed. Cas. No. 16,139, 3 Woods 199.

Effect of violation of statute on validity of indictment.— In State *v.* Cox, 52 Vt. 471, it was held that the statute forbidding the name of a person once drawn as a juror to be again put into the jury box within two years does not so far disqualify a person whose name is drawn within that time that an indictment found by a grand jury of which the person so drawn is a member will be thereby rendered invalid. To the same effect see State *v.* Cooley, 72 Minn. 476, 75 N. W. 729, 71 Am. St. Rep. 502; State *v.* Elson, 45 Ohio St. 648, 16 N. E. 684; Bloodworth *v.* State, 6 Baxt. (Tenn.) 614, 32 Am. Rep. 546. See also Moses *v.* State, 58 Ala. 117. *Compare* Roth *v.* State, 3 Ohio Cir. Ct. 59, 2 Ohio Cir. Dec. 33. See also INDICTMENTS AND INFORMATIONS.

39. State *v.* Nicholas, 109 La. 84, 33 So. 92; State *v.* Thibodeaux, 48 La. Ann. 600, 19 So. 680; Woods *v.* State, 26 Tex. App. 490, 10 S. W. 108. See also State *v.* Chairs, 9 Baxt. (Tenn.) 196; State *v.* Deason, 6 Baxt. (Tenn.) 511; U. S. *v.* Hammond, 26 Fed. Cas. No. 15,294, 2 Woods 197.

A conviction of felony in another state does not disqualify a person from serving as a grand juror, under statute in Ohio, where the offense of which he was convicted is not a felony in Ohio. State *v.* Davis, 8 Ohio S. & C. Pl. Dec. 680, 7 Ohio N. P. 650.

40. See Musick *v.* People, 40 Ill. 268 [*citing* 2 Hawkins P. C. 295, c. 25, § 16].

41. People *v.* Jewett, 3 Wend. (N. Y.) 314.

42. Com. *v.* Smith, 9 Mass. 107 (holding under statute that Quakers are capable of serving as grand jurors); U. S. *v.* Eagan, 30 Fed. 608.

43. U. S. *v.* Eagan, 30 Fed. 608, holding that the fact that a grand juror belonged to a political party and was a strong partisan was not a ground of challenge even if presented before the grand jury was empaneled and sworn.

44. Gross *v.* State, 2 Ind. 329; Jones *v.* State, 2 Blackf. (Ind.) 475; U. S. *v.* Reynolds, 1 Utah 226.

Belief in polygamy.— Under the federal statute which provides, "that in any prosecution for bigamy, polygamy or unlawful cohabitation, under any statute of the United States, it shall be sufficient cause of challenge, to any person drawn or summoned as a juryman or talesman, . . . that he believes it right for a man to have more than one living and undivorced wife at the same time," it was held that the proceedings to empanel the grand jury which finds an indictment for one of the offenses named,

K. Insanity. Insane persons and idiots are incompetent to act as grand jurors,[45] and express provision has been made by statute in some jurisdictions for their exclusion from service.[46]

L. Infancy. In many states statutes require that grand jurors shall be above twenty-one years of age,[47] and it seems that apart from statute a minor is disqualified to serve as a grand juror.[48]

M. Women. Women are incompetent to serve as grand jurors at common law,[49] and statutes to this effect have been passed in several jurisdictions.[50]

N. Race or Color. Statutes have been enacted in some jurisdictions requiring grand jurors to be white citizens and thereby excluding from jury service citizens of African descent;[51] but such legislation is unconstitutional.[52]

O. Interest, Bias, or Prejudice — 1. In General. A distinction is sometimes made between general disqualifications of grand jurors or those disqualifications which render a grand juror incompetent in law to act in any case, such as alienage or want of freehold, where a freehold qualification is required, and disqualifications, such as bias or prejudice, which do not exclude the juror from the panel but only preclude him from acting in a particular case.[53]

2. Formation or Expression of Opinion. It is a general rule that the fact that a grand juror has formed or expressed an opinion as to the guilt or innocence of the accused is no ground for a motion to quash the indictment or for a plea in abatement,[54] it being very frequently stated that the objection to be availing must be made before the grand juror is sworn or at least before the indictment is

under a statute of the United States, against a person not before held to answer, are a part of the prosecution, and the indictment is good, although persons drawn and summoned as grand jurors were excluded by the court from serving on the grand jury, on being challenged by the United States, for the cause mentioned, the challenge being found true. Clawson *v.* U. S., 114 U. S. 477, 481, 5 S. Ct. 949, 29 L. ed. 179.

Religious scruples held inoperative as exemption.— The fact that a person has a fixed scrupulous or religious objection to the discharge of the duties of a grand juror has been held not to be a sufficient ground for exempting him from service. State *v.* Willson, 2 McCord (S. C.) 393.

45. U. S. *v.* Benson, 31 Fed. 896, 12 Sawy. 477.

46. Betts *v.* State, 66 Ga. 508; State *v.* Carlson, 39 Oreg. 19, 62 Pac. 1016, 1119.

47. *Arkansas.*— State *v.* Brown, 10 Ark. 78.

Florida.— Kitrol *v.* State, 9 Fla. 9.

Georgia.— Jackson *v.* State, 76 Ga. 551; Betts *v.* State, 66 Ga. 508.

Kentucky.— Com. *v.* Smith, 10 Bush 476.

Montana.— See Territory *v.* Clayton, 8 Mont. 1, 19 Pac. 293.

New Jersey.— State *v.* Hoffman, 71 N. J. L. 285, 58 Atl. 1012.

Tennessee.— Clifford *v.* State, 3 Tenn. Cas. 501.

48. State *v.* Perry, 122 N. C. 1018, 29 S. E. 384.

49. Rumsey *v.* Territory, 3 Wash. Terr. 332, 21 Pac. 152; Harland *v.* Territory, 3 Wash. Terr. 131, 13 Pac. 453 [*overruling* Rosencrantz *v.* Territory, 2 Wash. Terr. 267, 5 Pac. 305, on the question of the effect of the state statutes in modifying the common law].

50. State *v.* Brown, 10 Ark. 78; Territory *v.* Clayton, 8 Mont. 1, 19 Pac. 293; State *v.* Chairs, 9 Baxt. (Tenn.) 196.

51. State *v.* Brown, 10 Ark. 78; Com. *v.* Johnson, 78 Ky. 509.

52. Com. *v.* Johnson, 78 Ky. 509; Bush *v.* Kentucky, 107 U. S. 110, 1 S. Ct. 625, 27 L. ed. 354. See also Civil Rights, 7 Cyc. 172 note 59 *et seq.*; Constitutional Law, 8 Cyc. 1073 note 90 *et seq.*

53. State *v.* Hughes, 1 Ala. 665; State *v.* Hamlin, 47 Conn. 95, 36 Am. Rep. 54; State *v.* Ostrander, 18 Iowa 435; U. S. *v.* Williams, 28 Fed. Cas. No. 16,716, 1 Dill. 485; U. S. *v.* White, 28 Fed. Cas. No. 16,679, 5 Cranch C. C. 457.

54. *Connecticut.*— State *v.* Hamlin, 47 Conn. 95, 36 Am. Rep. 54.

Georgia.— Lee *v.* State, 69 Ga. 705; Williams *v.* State, 69 Ga. 11.

Iowa.— State *v.* Baughman, 111 Iowa 71, 82 N. W. 452.

Massachusetts.— Com. *v.* Woodward, 157 Mass. 516, 32 N. E. 939, 34 Am. St. Rep. 302.

New Jersey.— Gibbs *v.* State, 45 N. J. L. 379, 46 Am. Rep. 782; State *v.* Rickey, 10 N. J. L. 83. See also State *v.* Hoffman, 71 N. J. L. 285, 58 Atl. 1012.

New York.— People *v.* Jewett, 3 Wend. 314.

North Carolina.—State *v.* Wilcox, 104 N. C. 847, 10 S. E. 453.

Tennessee.— State *v.* Chairs, 9 Baxt. 196.

Wisconsin.— State *v.* Cole, 19 Wis. 129, 88 Am. Dec. 678.

United States.— U. S. *v.* Belvin, 46 Fed. 381; U. S. *v.* Williams, 28 Fed. Cas. No. 16,716, 1 Dill. 485; U. S. *v.* White, 28 Fed. Cas. No. 16,679, 5 Cranch. C. C. 457. *Compare* U. S. *v.* Jones, 31 Fed. 725.

See 24 Cent. Dig. tit. "Grand Jury," § 38.

Compare State *v.* Clarissa, 11 Ala. 57.

found.[55] Moreover in many jurisdictions it is held that objections of this character are not a ground of challenge at common law,[56] although in other jurisdictions a contrary rule obtains either under statute[57] or at common law.[58]

3. INTEREST IN PROSECUTION. The general rule has been laid down that interest in a particular prosecution other than a direct pecuniary interest will not disqualify a grand juror or be a ground of objection to an indictment in the finding

An examining magistrate or commissioner is not disqualified to act as a grand juror upon cases sent in by himself, and the fact of his presence on the grand jury does not invalidate a finding in which he participated. State *v.* Chairs, 9 Baxt. (Tenn.) 196; U. S. *v.* Belvin, 46 Fed. 381.

Prior service on coroner's jury.— In Lee *v.* State, 69 Ga. 705 [*following* Betts *v.* State, 66 Ga. 508], it was held that it is not a good ground for a plea in abatement to an indictment that one of the grand jurors who found it had previously been a member of the coroner's jury which found that defendant had committed the crime under consideration.

Prior service on petit jury.— In U. S. *v.* Jones, 31 Fed. 725, it was held that where it is made to appear by a plea in abatement that one of the grand jurors who returned the indictment had served on a petit jury which had rendered a verdict of guilty against the prisoner for the same offense on a former trial, and further that defendant had no opportunity to challenge such grand juror, the plea will be sustained. *Compare* State *v.* Wilcox, 104 N. C. 847, 10 S. E. 453 (holding that the fact that a member of the grand jury that found an indictment for perjury was also one of the petit jury that tried the action in which, as it is charged, the perjury was committed, is not good ground for a plea in abatement); State *v.* Cole, 19 Wis. 129, 88 Am. Dec. 678.

55. *Illinois.*— Musick *v.* People, 40 Ill. 268.
Iowa.— State *v.* Gillick, 7 Iowa 287.
New Jersey.— State *v.* Rickey, 10 N. J. L. 83.
New York.— People *v.* Jewett, 3 Wend. 314.
Pennsylvania.— Com. *v.* Clark, 2 Browne 323.
United States.— U. S. *v.* White, 28 Fed. Cas. No. 16,679, 5 Cranch C. C. 457.
See 24 Cent. Dig. tit. "Grand Jury," § 38.

56. *Alabama.*— State *v.* Clarissa, 11 Ala. 57 (holding that objections on the ground of bias cannot be raised against a grand jury after they have been sworn and before indictment found); State *v.* Hughes, 1 Ala. 655 (holding that a grand juror could not be asked before he was sworn whether he had formed and expressed an opinion as to the guilt or innocence of a person accused of crime).
Colorado.— People *v.* Second Judicial Dist. Ct., 29 Colo. 83, 66 Pac. 1068.
Connecticut.— State *v.* Hamlin, 47 Conn. 95, 36 Am. Rep. 54.
Georgia.— See Betts *v.* State, 66 Ga. 508. *Compare* Lascelles *v.* State, 90 Ga. 347, 16 S. E. 945, 35 Am. St. Rep. 216.
Illinois.— Musick *v.* People, 40 Ill. 268.
Massachusetts.— *In re* Tucker, 8 Mass. 286.
Montana.— Territory *v.* Hart, 7 Mont. 42, 14 Pac. 768.
See 24 Cent. Dig. tit. "Grand Jury," § 38.

Partiality of trial judge in impaneling grand jury.— The right of an accused to challenge the grand jury does not embrace a right to require the trial judge to pass on or consider any charge of partiality on his part in impaneling the jury. People *v.* Second Judicial Dist. Ct., 29 Colo. 83, 66 Pac. 1068.

57. People *v.* Landis, 139 Cal. 426, 73 Pac. 153; People *v.* Hanstead, 135 Cal. 149, 67 Pac. 763; Terrell *v.* Santa Clara Super. Ct., (Cal. 1899) 60 Pac. 38; State *v.* Osborne, 61 Iowa 330, 16 N. W. 201; State *v.* Gillick, 7 Iowa 287; State *v.* Hinkle, 6 Iowa 380; State *v.* Ames, 90 Minn. 183, 96 N. W. 330.

Opinion formed in grand jury room.— Under statute in California providing that a challenge to an individual grand juror may be interposed on the ground that a state of mind exists on his part which will prevent him from acting impartially, etc., grand jurors who have found an indictment against a defendant are disqualified from again passing on a second charge, and finding a second indictment against him for the same offense. People *v.* Hanstead, 135 Cal. 149, 67 Pac. 763. To same effect see State *v.* Osborne, 61 Iowa 330, 16 N. W. 201; State *v.* Gillett, 7 Iowa 387. *Compare* People *v.* Northey, 77 Cal. 618, 19 Pac. 865, 20 Pac. 129, holding that the formation of an opinion of guilt of a party indicted by the grand jury from his testimony under oath given before them upon a similar charge against another person is no disqualification.

Opinion based on rumor.— Under statute in Iowa it has been held that a grand juror who had formed and expressed an opinion, based upon rumor but not an unqualified opinion, is not disqualified. State *v.* Billings, 77 Iowa 417, 42 N. W. 456; State *v.* Shelton, 64 Iowa 333, 20 N. W. 459; State *v.* Hinkle, 6 Iowa 380. See also People *v.* Landis, 139 Cal. 426, 73 Pac. 153; U. S. *v.* Clune, 62 Fed. 798, construing California statute.

58. Patrick *v.* State, 16 Nebr. 330, 20 N. W. 121; People *v.* Jewett, 3 Wend. (N. Y.) 314; Com. *v.* Clark, 2 Browne (Pa.) 323; U. S. *v.* Burr, 25 Fed. Cas. No. 14,693. See also People *v.* Landris, 139 Cal. 426, 73 Pac. 153; Gibbs *v.* State, 45 N. J. L. 379, 46 Am. Rep. 782.

Rule applied to grand jury sitting in civil proceeding.— Justices Pike County Inferior Ct. *v.* Griffin, etc., Plank-Road Co., 15 Ga. 39; *In re* Plymouth Borough, 167 Pa. St. 612, 31 Atl. 933.

of which he participates.[59] Accordingly in the absence of statutory provision to the contrary[60] the fact that a person has originated a complaint against the person accused of crime[61] or is a witness for the prosecution[62] does not operate as a disqualification. And the same rule has been applied to a person who has evinced a desire and purpose to enforce the law against a particular kind of crime,[63] or has subscribed funds for the purpose of legitimately suppressing a particular violation of law.[64]

4. Family Relationship to Person Interested in Prosecution. As a general rule, in the absence of statute, family relationship to the victim of a crime or to a person interested in the prosecution of a crime is no ground for quashing an indictment or for a plea in abatement,[65] provided at least the accused had an opportunity to raise the question by challenge before the finding of the indictment,[66] and while there is some conflict of opinion regarding the proposition on

59. Com. *v.* Woodward, 157 Mass. 516, 32 N. E. 939, 34 Am. St. Rep. 302; Com. *v.* Brown, 147 Mass. 585, 18 N. E. 587, 9 Am. St. Rep. 727, 1 L. R. A. 620 (holding that mere inhabitancy does not unfit one for sitting as a grand juror and investigating an alleged offense against the town in which he lives); Com. *v.* Ryan, 5 Mass. 90 (holding that it is no defense to an indictment for an offense punishable by fine to be paid to the use of a town that the foreman of the grand jury who found the bill was a taxable inhabitant of that town); State *v.* Rickey, 10 N. J. L. 83 (holding that a plea in abatement to an indictment for embezzling the money of a bank "that one of the jurors sworn and charged on the said grand jury, was a stockholder of the capital stock of said company and also possessed a large amount of the promissory notes of said bank, and was greatly interested in procuring the said indictment," was bad on general demurrer); Rolland *v.* Com., 82 Pa. St. 306, 22 Am. Rep. 758 (holding that it was not a ground for quashing an indictment for burglary that two of the grand jurors returning the same were stock-holders of the bank wherein the burglary was alleged to have been committed; the court saying, however, that it might have been a ground of challenge to the particular jurors); State *v.* Brainerd, 56 Vt. 532, 48 Am. Rep. 818; State *v.* Newfane, 12 Vt. 422 (holding that a ratable inhabitant of a town is not incompetent to act as a grand juror in presenting a bill of indictment against such town for making and opening a road). See also Jackson *v.* U. S., 102 Fed. 473, 42 C. C. A. 452. And see *infra*, IV, R, notes 75, 76.

60. By statute in some jurisdictions a prosecutor or complainant (Hudspeth *v.* State, 50 Ark. 534, 9 S. W. 1; Peeples *v.* State, (Fla. 1903) 35 So. 223; Yates *v.* State, 43 Fla. 177, 29 So. 965; People *v.* Lauder, 82 Mich. 109, 46 N. W. 956; State *v.* Williamson, 106 Mo. 162, 17 S. W. 172; State *v.* Millain, 3 Nev. 409; State *v.* Cameron, 2 Pinn. (Wis.) 490, 2 Chandl. 172); or a witness for the prosecution (Hudspeth *v.* State, *supra*; Peeples *v.* State, *supra*; Yates *v.* State, *supra*; State *v.* Williamson, *supra*; State *v.* Cameron, *supra*) is disqualified to sit as a grand juror.

A person appearing in response to a subpœna issued at the instance of the grand jury or the prosecuting attorney cannot be treated as a prosecutor, within the meaning of a statute disqualifying a prosecutor as a grand juror. State *v.* Millain, 3 Nev. 409, 425, where a prosecutor is defined to be "one who prefers accusations against a party whom he suspects to be guilty."

Person acting as prosecutor against third person.— In People *v.* Lauder, 82 Mich. 109, 46 N. W. 956, it was held, under a statute providing for the challenge of a grand juror on the ground that he is a prosecutor or complainant, that the fact that a member of the grand jury was an attorney and was then acting as special assistant prosecuting attorney for the sole purpose of prosecuting a case for contempt against a third person, is no cause of complaint to one indicted by such grand jury.

State statute disqualifying prosecutor followed in federal courts.— U. S. *v.* Reed, 27 Fed. Cas. No. 16,134, 2 Blatchf. 435. *Compare* U. S. *v.* Williams, 28 Fed. Cas. No. 16,716, 1 Dill. 485.

61. *In re* Tucker, 8 Mass. 286.

62. State *v.* Millain, 3 Nev. 409.

63. Koch *v.* State, 32 Ohio St. 353. See also Com. *v.* Brown, 147 Mass. 585, 18 N. E. 587, 9 Am. St. Rep. 736, 1 L. R. A. 620.

64. Koch *v.* State, 32 Ohio St. 353. See also Peeples *v.* State, (Fla. 1903) 35 So. 223.

65. *Florida.*— Peeples *v.* State, (1903) 35 So. 223.

Iowa.— State *v.* Russell, 90 Iowa 569, 58 N. W. 915, 28 L. R. A. 195.

North Carolina.— State *v.* Sharp, 110 N. C. 604, 14 S. E. 504.

Ohio.— State *v.* Easter, 30 Ohio St. 542, 27 Am. Rep. 478.

South Carolina.— State *v.* Boyd, 56 S. C. 382, 34 S. E. 661.

Tennessee.— State *v.* Maddox, 1 Lea 671.

Vermont.— State *v.* Brainerd, 56 Vt. 532, 48 Am. Rep. 818.

See 24 Cent. Dig. tit. "Grand Jury," § 41.

See also *infra*, IV, R, notes 75, 76.

66. Simpson *v.* State, 110 Ga. 249, 34 S. E. 204; Shope *v.* State, 106 Ga. 226, 32 S. E. 140; Lascelles *v.* State, 90 Ga. 347, 16 S. E. 945, 35 Am. St. Rep. 216.

the part of the courts it has been intimated in several decisions that it would not be a sufficient cause for challenge.[67]

P. Time of Applying Test of Competency. The rule has been laid down that the competency of a grand juror depends upon his status at the time he is called upon to serve.[68]

Q. Presumption as to Qualification. It will be presumed that persons duly summoned and returned are good and lawful men and in other respects legally qualified, and in the absence of record or other competent evidence on the question, the burden is on the challenging party, ordinarily the defendant, to show the disqualification.[69]

R. Effect of Disqualification on Validity of Finding.[70] In some jurisdictions it is held that a grand jury composed of persons who do not possess the requisite qualifications has no power to find a valid indictment;[71] the proviso being made, however, in some jurisdictions that the person raising the objection should not have had the opportunity of making a challenge or should not have been held to answer at the time.[72] But in other jurisdictions objections to the competency or qualifications of grand jurors must be raised by challenge and cannot be raised by plea or otherwise after indictment found,[73] and the want of opportu-

67. Peeples *v.* State, (Fla. 1903) 35 So. 223; State *v.* Russell, 90 Iowa 569, 58 N. W. 915, 28 L. R. A. 195; State *v.* Easter, 30 Ohio St. 542, 27 Am. Rep. 478. *Compare* Lascelles *v.* State, 90 Ga. 347, 16 S. E. 945, 35 Am. St. Rep. 216.

68. Collins *v.* State, 31 Fla. 574, 12 So. 906; State *v.* Perry, 122 N. C. 1018, 29 S. E. 384 (holding that the fact that a grand juror was a minor when his name was put on the jury list is immaterial if he was of age at the time he was served); State *v.* Wilcox, 104 N. C. 847, 10 S. E. 453. *Compare* State *v.* Ligon, 7 Port. (Ala.) 167; State *v.* Middleton, 5 Port. (Ala.) 484; State *v.* Carlson, 39 Oreg. 19, 62 Pac. 1016, 1119.

69. *Florida.*— Yates *v.* State, 44 Fla. 177, 29 So. 965.

Illinois.— Bruen *v.* People, 206 Ill. 417, 69 N. E. 24.

Iowa.— State *v.* Haynes, 54 Iowa 109, 6 N. W. 156.

Louisiana.—State *v.* Guillory, 44 La. Ann. 317, 10 So. 761.

Michigan.— Thayer *v.* People, 2 Dougl. 417.

Mississippi.— See Dowling *v.* State, 5 Sm. & M. 664. *Compare* Beason *v.* State, 34 Miss. 602.

Missouri.— State *v.* Holcomb, 86 Mo. 371.

Montana.— Territory *v.* Harding, 6 Mont. 323, 12 Pac. 750.

New York.— People *v.* Scannell, 37 Misc. 345, 75 N. Y. Suppl. 500.

North Carolina.— State *v.* Perry, 122 N. C. 1018, 29 S. E. 384; State *v.* Seaborn, 15 N. C. 305.

Tennessee.— Webb *v.* State, 1 Tenn. Cas. 427.

Compare State *v.* Ligon, 7 Port. (Ala.) 167.

See, generally, INDICTMENTS AND INFORMATIONS.

70. See, generally, INDICTMENTS AND INFORMATIONS.

71. *Arkansas.*— State *v.* Brown, 10 Ark. 78.

Dakota.— People *v.* Wintermute, 1 Dak. 53, 46 N. W. 694.

Louisiana.— State *v.* Nolan, 8 Rob. 513.

Maine.— State *v.* Carver, 49 Me. 588, 77 Am. Dec. 275; State *v.* Lightbody, 38 Me. 200; State *v.* Symonds, 36 Me. 128.

Massachusetts.— Com. *v.* Brown, 147 Mass. 585, 18 N. E. 587, 9 Am. St. Rep. 736, 1 L. R. A. 620; Com. *v.* Parker, 2 Pick. 550 [*criticizing* Com. *v.* Smith, 9 Mass. 107].

North Carolina.— State *v.* Durham Fertilizer Co., 111 N. C. 658, 16 S. E. 231; State *v.* Smith, 80 N. C. 410; People *v.* Griffice, 74 N. C. 316; State *v.* Martin, 24 N. C. 101; State *v.* Seaborn, 15 N. C. 305.

Ohio.— Huling *v.* State, 17 Ohio St. 583; Doyle *v.* State, 17 Ohio 222.

Tennessee.— State *v.* Duncan, 7 Yerg. 271. *Compare* Epperson *v.* State, 5 Lea 291.

Virginia.— Com. *v.* Long, 2 Va. Cas. 318.

United States.— Crowley *v.* U. S., 194 U. S. 461, 24 S. Ct. 731, 48 L. ed. 1075. See also U. S. *v.* Hammond, 26 Fed. Cas. No. 15,294, 2 Woods 197.

See 24 Cent. Dig. tit. "Grand Jury," § 15.

72. People *v.* Henderson, 28 Cal. 465; Turner *v.* State, 78 Ga. 174; Williams *v.* State, 69 Ga. 11; Reich *v.* State, 53 Ga. 73, 21 Am. Rep. 265; Pointer *v.* State, 89 Ind. 255; Mershon *v.* State, 51 Ind. 14; Hardin *v.* State, 22 Ind. 347. See also State *v.* Herndon, 5 Blackf. (Ind.) 75; Territory *v.* Harding, 6 Mont. 323, 12 Pac. 750; Com. *v.* Craig, 19 Pa. Super. Ct. 81.

The failure of the court to interrogate a by-stander, called as a grand juror, before permitting him to become one of the panel, as required by statute in Indiana, is not sufficient cause for abatement of the prosecution, if such person is in fact a qualified juror. Sago *v.* State, 127 Ind. 15, 26 N. E. 667.

73. *Alabama.*— Lide *v.* State, 133 Ala. 43, 31 So. 953; Moses *v.* State, 58 Ala. 117. *Compare* State *v.* Middleton, 5 Port. 484 [*overruling* Boynington *v.* State, 2 Port. 100].

nity to make a challenge has been held immaterial.[74] It is generally agreed, however, that to invalidate an indictment the disqualification must be such as is pronounced by the common law or by statute, where a statute prescribes the qualifications, and such as absolutely disqualifies, as alienage or the want of a freehold, when such qualifications are required, and which would be a cause of principal challenge as distinguished from challenge to the favor arising from bias, prejudice, interest, or the like objections of the latter character not being sustainable,[75] at least if the accused has had an opportunity to raise the question by challenge before the finding of the indictment.[76]

V. EXEMPTIONS.

Statutes have been enacted in many jurisdictions exempting from jury service persons who have reached a specified age limit,[77] public officers,[78] and persons

Iowa.— State *v.* Baughman, 111 Iowa 71, 82 N. W. 452; State *v.* Gibbs, 39 Iowa 318.

Missouri.— State *v.* Turlington, 102 Mo. 642, 15 S. W. 141 [*citing* State *v.* Holcomb, 86 Mo. 376; State *v.* Drogmond, 55 Mo. 87]; State *v.* Brown, 64 Mo. 367.

New Jersey.— State *v.* Hoffman, 71 N. J. L. 285, 58 Atl. 1012. *Compare* State *v.* Rockafellow, 6 N. J. L. 332.

New York.— People *v.* Scannell, 37 Misc. 345, 75 N. Y. Suppl. 500, 16 N. Y. Cr. 321.

Texas.—Lienburger *v.* State, (Tex. Cr. App. 1893) 21 S. W. 603; Lacy *v.* State, 31 Tex. Cr. 78, 19 S. W. 896; Doss *v.* State, 28 Tex. App. 506, 13 S. W. 788 [*disapproving dictum* in Woods *v.* State, 26 Tex. App. 490, 10 S. W. 108]; Kemp *v.* State, 11 Tex. App. 174. *Compare* Vanhook *v.* State, 12 Tex. 252.

In Mississippi under present statutes the rule of the text is applied (Dixon *v.* State, 74 Miss. 271, 20 So. 839; Logan *v.* State, 50 Miss. 269; Lee *v.* State, 45 Miss. 114; Durrah *v.* State, 44 Miss. 789; Head *v.* State, 44 Miss. 731); but a contrary view obtained under earlier statutes (Miller *v.* State, 33 Miss. 356, 69 Am. Dec. 351; Stokes *v.* State, 24 Miss. 621; Portis *v.* State, 23 Miss. 578; Barney *v.* State, 12 Sm. & M. 68; McQuillen *v.* State, 8 Sm. & M. 587).

Review of decision denying motion to quash. — In State *v.* Carlson, 39 Oreg. 19, 62 Pac. 1016, 1119, it was held, under a statute imposing on the court the duty of ascertaining the competency of grand jurors and prohibiting challenges by any person, that no appeal exists by right from the decision of the court as to the qualifications of grand jurors, and none being conferred by the statute the decision is conclusive on that question, and the court's refusal to set aside an indictment because of alleged disqualification cannot be reviewed.

74. State *v.* Turlington, 102 Mo. 642, 15 S. W. 141.

75. *Arkansas.*— Hudspeth *v.* State, 50 Ark. 534, 9 S. W. 1.

California.— People *v.* Geiger, 49 Cal. 643; People *v.* Colmere, 23 Cal. 631.

Connecticut.— State *v.* Hamlin, 47 Conn. 95, 36 Am. Rep. 54.

Florida.— Peeples *v.* State, (1903) 35 So. 223.

Iowa.— State *v.* Baughman, 111 Iowa 71, 82 N. W. 452.

Massachusetts.— Com. *v.* Ryan, 5 Mass. 90.

Minnesota.— State *v.* Ames, 90 Minn. 183, 96 N. W. 330.

New Jersey.— State *v.* Rickey, 10 N. J. L. 83.

North Carolina.— State *v.* Sharp, 110 N. C. 604, 14 S. E. 504.

Ohio.— Koch *v.* State, 32 Ohio St. 353; State *v.* Easter, 30 Ohio St. 542, 27 Am. Rep. 478.

Pennsylvania.— Rolland *v.* Com., 82 Pa. St. 306, 22 Am. Rep. 758.

South Carolina.— State *v.* Boyd, 56 S. C. 382, 34 S. E. 661.

Vermont.— State *v.* Newfane, 12 Vt. 422.

United States.— Jackson *v.* State, 102 Fed. 473, 42 C. C. A. 267; U. S. *v.* Williams, 27 Fed. Cas. No. 16,716, 1 Dill. 485; U. S. *v.* White, 28 Fed. Cas. No. 16,679, 5 Cranch C. C. 457. See also *supra*, IV, O, 2, note 54; IV, O, 3, note 59 *et seq.*; IV, O, 4, note 65 *et seq.*

76. Simpson *v.* State, 110 Ga. 249, 34 S. E. 204; Shope *v.* State, 106 Ga. 226, 32 S. E. 140; Fisher *v.* State, 93 Ga. 309, 20 S. E. 329; Lascelles *v.* State, 90 Ga. 347, 16 S. E. 945, 35 Am. St. Rep. 216; Lee *v.* State, 69 Ga. 705; Williams *v.* State, 69 Ga. 11; Betts *v.* State, 66 Ga. 508; State *v.* Corcoran, 7 Ida. 220, 61 Pac. 1034.

77. *Alabama.*— Spigener *v.* State, 62 Ala. 235.

Georgia.— Jackson *v.* State, 76 Ga. 551; Carter *v.* State, 75 Ga. 747; Loeb *v.* State, 75 Ga. 258.

Illinois.— Davison *v.* People, 90 Ill. 221.

Indiana.— State *v.* Miller, 2 Blackf. 35.

Iowa.— State *v.* Edgerton, 100 Iowa 63, 69 N. W. 280.

Minnesota.— State *v.* Brown, 12 Minn. 538.

Texas.— Breeding *v.* State, 11 Tex. 257.

Virginia.— Booth *v.* Com., 16 Gratt. 519.

See 24 Cent. Dig. tit. "Grand Jury," §§ 10, 14.

78. *Iowa.*— State *v.* Adams, 20 Iowa 486.

Kansas.— State *v.* Stunkle, 41 Kan. 456, 21 Pac. 675.

Kentucky.— See Com. *v.* Pritchett, 11 Bush 277.

Louisiana.— State *v.* Carter, 106 La. 407, 30 So. 895.

engaged in specified occupations.[79] But these statutes have very generally been held not to have the effect of absolutely disqualifying persons so exempted, but merely to extend to them a privilege which they may waive,[80] and hence, as a general rule, the fact that a grand juror may be exempt is no ground for challenge[81] or for attacking an indictment.[82]

VI. SELECTION, SUMMONING, AND ORGANIZATION.

A. Selection and Drawing — 1. In General. At common law grand jurors were selected as well as summoned and returned by the sheriff.[83] Instead of permitting grand juries to be thus selected and constituted as well as summoned at the discretion of the sheriff or other executive officer of the law from the citizens of the county generally, provision is made by statute or by constitution in many jurisdictions for the procuring of names and the preparation of jury lists from a specified source in some cases; as for instance, from the poll books or tax rolls,[84] and for drawing from the box, or wheel, or otherwise selecting persons competent to be summoned and to serve as grand jurors, by the judge or other officer

Maine.— State *v.* Wright, 53 Me. 328.
Ohio.— Koch *v.* State, 32 Ohio St. 353.
Texas.— Owens *v.* State, 25 Tex. App. 552, 8 S. W. 658.
See 24 Cent. Dig. tit. "Grand Jury," § 36.
Compare Com. *v.* Hayden, 163 Mass. 453, 40 N. E. 846, 47 Am. St. Rep. 468, 28 L. R. A. 318, holding that police officers are not exempt from service under statute.

79. Slagel *v.* Com., 5 Ky. L. Rep. 545, the owner of a grist-mill.
Business or occupation as disqualification. — Under statute in Virginia it has been held that an ordinary keeper is disqualified to serve as a grand juror. Com. *v.* Long, 2 Va. Cas. 318. See also Com. *v.* Willson, 2 Leigh (Va.) 739, holding, however, that where A obtains a license to keep an ordinary, opens a tavern under this license and alone resides at the tavern and acts as keeper thereof that B, a partner in the business, is not the keeper of an ordinary and as such is not disqualified to serve on grand juries, within the meaning of the statute. So under statute in the same state it has been held that the owner of a mill is ineligible as a member of the grand jury. Com. *v.* Long, 2 Va. Cas. 318. See also Wysor *v.* Com., 6 Gratt. (Va.) 711, holding, however, that the part ownership of the tract of land upon which there is a mill and which has been allotted to and is with the mill in possession of a widow as her dower, is not a disqualification to act as a grand juror.

80. *Alabama.*— Spigener *v.* State, 62 Ala. 383.
Georgia.— Jackson *v.* State, 76 Ga. 551; Carter *v.* State, 75 Ga. 747; Loeb *v.* State, 75 Ga. 258.
Illinois.— Davison *v.* People, 90 Ill. 221.
Indiana.— State *v.* Miller, 2 Blackf. 35.
Iowa.— State *v.* Edgerton, 100 Iowa 63, 69 N. W. 280; State *v.* Adams, 20 Iowa 486.
Kansas.— State *v.* Stunkle, 41 Kan. 456, 21 Pac. 675.
Kentucky.— Slagel *v.* Com., 5 Ky. L. Rep. 545.
Louisiana.— State *v.* Carter, 106 La. 407, 30 So. 895.
Maine.— State *v.* Wright, 53 Me. 328.
Minnesota.— State *v.* Brown, 12 Minn. 538.
Ohio.— Koch *v.* State, 32 Ohio St. 353.
Texas.— Owens *v.* State, 25 Tex. App. 552, 8 S. W. 658.
Virginia.— Booth *v.* Com., 16 Gratt. 519.
See 24 Cent. Dig. tit. "Grand Jury," § 15.
Compare Kitrol *v.* State, 9 Fla. 9, holding that under the provisions of the statutes of Florida, a person over sixty years of age is not a competent grand juror.

81. State *v.* Miller, 2 Blackf. (Ind.) 35; State *v.* Edgerton, 100 Iowa 63, 69 N. W. 280. *Compare* Com. *v.* Hayden, 163 Mass. 453, 40 N. E. 846, 47 Am. St. Rep. 468, 28 L. R. A. 318.
In New Jersey it is expressly declared by statute that an objection to a grand juror because he is above the statutory age is a ground of challenge. State *v.* Hoffman, 71 N. J. L. 285, 58 Atl. 1012.

82. State *v.* Miller, 2 Blackf. (Ind.) 35; State *v.* Edgerton, 100 Iowa 63, 69 N. W. 280; Com. *v.* Hayden, 163 Mass. 453, 40 N. E. 846, 47 Am. St. Rep. 468, 28 L. R. A. 318; State *v.* Hoffman, 71 N. J. L. 285, 58 Atl. 1012. See also INDICTMENTS AND INFORMATIONS.

83. Thayer *v.* People, 2 Dougl. (Mich.) 417; People *v.* Petrea, 92 N. Y. 128 [*citing* 2 Hawkins P. C. c. 25, § 16].

84. *Alabama.*— Cross *v.* State, 63 Ala. 40; State *v.* Brooks, 9 Ala. 9.
Arkansas.— Hudspeth *v.* State, 50 Ark. 534, 9 S. W. 1.
Florida.— Willingham *v.* State, 21 Fla. 761. See also Clemmons *v.* State, 43 Fla. 200, 30 So. 699.
Indiana.— State *v.* Cain, 6 Blackf. 422.
Iowa.— State *v.* De Bord, 88 Iowa 103, 55 N. W. 79; State *v.* Brandt, 41 Iowa 593; State *v.* Carney, 20 Iowa 82; State *v.* Rorabacher, 19 Iowa 154; State *v.* Knight, 19 Iowa 94.
Maryland.— Downs *v.* State, 78 Md. 128, 26 Atl. 1005.
Michigan.—Thayer *v.* People, 2 Dougl. 417.
Mississippi.— Sumrall *v.* State, 29 Miss. 202.

or board of officers designated by law for this purpose.[85] But statutes regulating the manner of making jury lists and the selection and drawing of grand jurors are frequently held to be directory merely and not mandatory;[86] and it may be

New York.— Dolan *v.* People, 64 N. Y. 485 [*affirming* 6 Hun 493]; People *v.* Harriot, 3 Park. Cr. 112.

North Carolina.— State *v.* Holmes, 63 N. C. 18.

Oklahoma.— Moran *v.* Territory, 14 Okla. 544, 78 Pac. 111.

Oregon.— State *v.* Carlson, 39 Oreg. 19, 62 Pac. 1016, 1119.

Washington.— State *v.* Krug, 12 Wash. 288, 41 Pac. 126.

See 24 Cent. Dig. tit. "Grand Jury," § 18.

A certification of grand jury lists is required by statute in some jurisdictions. Brassfield *v.* State, 55 Ark. 556, 18 S. W. 1040; Edmonds *v.* State, 34 Ark. 720; Jackson *v.* State, 76 Ga. 551; Mikell *v.* State, 62 Ga. 368 (holding that the reviser's certificate required by Ga. Code, § 3909, as to the correctness of the grand jury list may be made after an indictment has been found); State *v.* Krug, 12 Wash. 288, 41 Pac. 126. See also U. S. *v.* Cropper, Morr. (Iowa) 190.

Effect of death of grand juror on legality of jury lists.— In U. S. *v.* Rondeau, 16 Fed. 109, 4 Woods 185, it was held that the death of a grand juror is presumed to operate impartially and a jury list legally selected cannot be rendered illegal because of such death.

Effect of revision of lists for future service.— It has been held that although, in a revision of the list of persons qualified to serve as jurors, certain names already drawn as grand jurors were dropped from the list, from which future juries were to be drawn, these persons are nevertheless qualified to serve at the term of the court for which they were drawn, and a bill of indictment found by them, with others, at that term, will not be quashed because their names are not on the new list. Williams *v.* State, 55 Ga. 391.

85. *Alabama.*— Hester *v.* State, 103 Ala. 83, 15 So. 857; Cross *v.* State, 63 Ala. 40; Sanders *v.* State, 55 Ala. 183; State *v.* Brooks, 9 Ala. 9; State *v.* Williams, 5 Port. 130.

Arkansas.— Hudspeth *v.* State, 50 Ark. 534, 9 S. W. 1; Runnels *v.* State, 28 Ark. 121; Wilburn *v.* State, 21 Ark. 198.

California.— Levy *v.* Wilson, 69 Cal. 105, 10 Pac. 272; People *v.* Gallagher, 55 Cal. 462.

Colorado.— Wilson *v.* People, 3 Colo. 325.

District of Columbia.— Clark *v.* U. S., 19 App. Cas. 295.

Florida.— Woodward *v.* State, 33 Fla. 508, 15 So. 252; Reeves *v.* State, 29 Fla. 527, 10 So. 901; Willingham *v.* State, 21 Fla. 761.

Illinois.— Gott *v.* People, 187 Ill. 249, 58 N. E. 293; Empson *v.* People, 78 Ill. 248.

Kansas.— *In re* Tillery, 43 Kan. 188, 23 Pac. 162.

Kentucky.— Com. *v.* Mann, 7 Ky. L. Rep. 829.

Louisiana.— State *v.* Furco, 51 La. Ann. 1082, 25 So. 951, holding that a deputy clerk of court and deputy coroner, acting in their individual capacities, and not as officials, are not incompetent to serve as witnesses to the drawing of the grand jury.

Mississippi.— Sumrall *v.* State, 29 Miss. 202.

Nebraska.— State *v.* Lauer, 41 Nebr. 226, 59 N. W. 508.

Nevada.— State *v.* McNamara, 3 Nev. 70.

New York.— Dolan *v.* People, 64 N. Y. 485 [*affirming* 6 Hun 493].

North Carolina.— State *v.* Wilcox, 104 N. C. 847, 10 S. E. 453; State *v.* Martin, 82 N. C. 672; State *v.* Haywood, 73 N. C. 437.

Pennsylvania.— Com. *v.* Valsalka, 181 Pa. St. 17, 37 Atl. 405; Com. *v.* Salter, 2 Pearson 461.

Tennessee.— State *v.* Harris, (1898) 45 S. W. 438; Turner *v.* State, 89 Tenn. 547, 15 S. W. 838.

Wisconsin.— Hogan *v.* State, 30 Wis. 428, 11 Am. Rep. 575.

United States.— U. S. *v.* Hanson, 28 Fed. 74; U. S. *v.* Richardson, 28 Fed. 61 (holding that the federal statutes provide two alternative methods of drawing grand jurors to serve in the courts of the United States: One, by drawing from a box containing names put in by the clerk and the commissioner of court; the other, if the judge so orders, by drawing "from the boxes used by the state authorities in selecting jurors in the highest courts of the state;" and further, that it is within the power of the federal courts, conforming more strictly to statutes and practice in states respectively in which they are held, to have the grand jurors drawn by the state authorities); U. S. *v.* Rondeau, 16 Fed. 109, 4 Woods 185; U. S. *v.* Wilson, 28 Fed. Cas. No. 16,737, 6 McLean 604.

See 24 Cent. Dig. tit. "Grand Jury," § 16.

Effect of change of law subsequent to drawing.— In State *v.* Wiltsey, 103 Iowa 54, 72 N. W. 415, it was held that a grand jury drawn and selected pursuant to the laws then in force were competent to return an indictment subsequent to the passage of a law changing the mode of drawing and selecting grand jurors. To same effect see Anderson *v.* State, 42 Ga. 9. *Compare* Clark *v.* U. S., 19 App. Cas. (D. C.) 295.

Record of drawing.— In State *v.* Howard, 10 Iowa 101, it was held that no record is required to be kept of the drawing of grand jurors by the clerk. See also State *v.* Carney, 20 Iowa 82. *Compare* State *v.* Conner, 5 Blackf. (Ind.) 325.

Challenges for irregularities in selection see *infra*, VII, A, 2, note 89 *et seq.*

86. *Alabama.*— Cross *v.* State, 63 Ala. 40.

Mississippi.— Head *v.* State, 44 Miss. 731.

Missouri.— State *v.* Bleekley, 18 Mo. 428.

North Carolina.— State *v.* Durham Fertilizer Co., 111 N. C. 658, 16 S. E. 231; State *v.* Wilcox, 104 N. C. 847, 10 S. E. 453; State *v.* Martin, 82 N. C. 672; State *v.* Haywood, 73 N. C. 437.

Ohio.— Huling *v.* State, 17 Ohio St. 583.

laid down as a general rule that courts do not look with indulgence upon objections to irregularities in selecting or drawing grand jurors committed without fraud or design and which have not resulted in placing upon the panel disqualified jurors, and that mere irregularities not affecting the competency of any of the jurors, at least such as do not amount to a substantial departure from the statutory requirements, but show an honest intention to conform thereto, will not affect the validity of their proceedings,[87] with the proviso, however, in some juris-

Pennsylvania.— See Com. *v.* Zillafrow, 207 Pa. St. 274, 56 Atl. 539.

Rhode Island.— See State *v.* Fidler, 23 R. I. 41, 49 Atl. 100.

Washington.— State *v.* Krug, 12 Wash. 288, 41 Pac. 126.

United States.— U. S. *v.* Eagan, 30 Fed. 608, following the Missouri practice. *Compare* U. S. *v.* Ambrose, 3 Fed. 283.

Compare Downs *v.* State, 78 Md. 128, 26 Atl. 1005.

See also, generally, INDICTMENTS AND INFORMATIONS.

87. *Alabama.*—Stoneking *v.* State, 118 Ala. 68, 24 So. 47; Fincher *v.* State, 106 Ala. 667, 18 So. 694; Long *v.* State, 103 Ala. 55, 15 So. 565 (holding that the fact that the jury commissioners broke open the jury box, the key having been lost, and then proceeded to draw the grand jury, did not render an indictment found by such jury invalid); Murphy *v.* State, 86 Ala. 45, 5 So. 432; Cross *v.* State, 63 Ala. 40 [*distinguishing* State *v.* Clarkson, 3 Ala. 378]; Sanders *v.* State, 55 Ala. 183; State *v.* Brooks, 9 Ala. 9.

California.— People *v.* Goldenson, 76 Cal. 328, 19 Pac. 161; People *v.* Hunter, 54 Cal. 65; People *v.* Colby, 54 Cal. 37; People *v.* Southwell, 46 Cal. 141. *Compare In re* Gannon, 69 Cal. 541, 11 Pac. 240.

Georgia.— Crawford *v.* State, 81 Ga. 708, 8 S. E. 445; Holman *v.* State, 79 Ga. 155, 4 S. E. 8; Williams *v.* State, 72 Ga. 180.

Illinois.— Gott *v.* People, 187 Ill. 249, 58 N. E. 293.

Indiana.— Williams *v.* State, 86 Ind. 400; Dorman *v.* State, 56 Ind. 454; Meiers *v.* State, 56 Ind. 336; Kelley *v.* State, 53 Ind. 311; State *v.* Hensley, 7 Blackf. 324; Bellair *v.* State, 6 Blackf. 104.

Kansas.— State *v.* Donaldson, 43 Kan. 431, 23 Pac. 650; State *v.* Marsh, 13 Kan. 596.

Louisiana.— State *v.* Clavery, 43 La. Ann. 1133, 10 So. 203; State *v.* Taylor, 43 La. Ann. 1131, 10 So. 203; State *v.* Hoffauer, 21 La. Ann. 609.

Maryland.— State *v.* Keating, 85 Md. 188, 36 Atl. 840 (holding that, although Code, art. 51, § 8, relating to juries, provides that the clerk who was present at the writing and folding of the ballots shall not be designated to draw the forty-eight names from the box, the fact that a deputy clerk who wrote the ballots drew the names from the box was an irregularity not sufficient to invalidate the indictment, where his action was not prejudicial to defendant); Downs *v.* State, 78 Md. 128, 26 Atl. 1005; Avirett *v.* State, 76 Md. 510, 25 Atl. 676, 987; State *v.* Glascow, 59 Md. 209.

Massachusetts.— Com. *v.* Krathofski, 171 Mass. 459, 50 N. E. 1040; Com. *v.* Brown, 147 Mass. 585, 18 N. E. 587, 9 Am. St. Rep. 736, 1 L. R. A. 620, holding that the objection that a person serving as a grand juror was by a vote of the inhabitants of the town ordered stricken from the list but was placed in the box and drawn notwithstanding, is properly overruled where it is not shown that he is disqualified.

Michigan.— People *v.* Reigel, 120 Mich. 78, 78 N. W. 1017.

Minnesota.— State *v.* Cooley, 72 Minn. 476, 75 N. W. 729, 71 Am. St. Rep. 502; State *v.* Russell, 69 Minn. 502, 72 N. W. 832; State *v.* Greenman, 23 Minn. 209; State *v.* Davis, 22 Minn. 423; State *v.* Thomas, 19 Minn. 484.

Missouri.— State *v.* Connell, 49 Mo. 282; State *v.* Welch, 33 Mo. 33; State *v.* Bleekley, 18 Mo. 428. See also State *v.* Berry, 179 Mo. 377, 78 S. W. 611.

Nevada.— State *v.* Collyer, 17 Nev. 275, 30 Pac. 891.

New Jersey.— See Gibbs *v.* State, 45 N. J. L. 379, 46 Am. Rep. 782.

New York.— Dolan *v.* People, 64 N. Y. 485 [*affirming* 6 Hun 493]; People *v.* Jewett, 3 Wend. 314; People *v.* Harriot, 3 Park. Cr. 112.

North Carolina.— State *v.* Perry, 122 N. C. 1018, 29 S. E. 384; State *v.* Durham Fertilizer Co., 111 N. C. 658, 16 S. E. 231; State *v.* Wilcox, 104 N. C. 847, 10 S. E. 453; State *v.* Martin, 82 N. C. 672; State *v.* Haywood, 73 N. C. 437.

Ohio.— Huling *v.* State, 17 Ohio St. 583; Lindsay *v.* State, 24 Ohio Cir. Ct. 1.

Pennsylvania.— Com. *v.* Zillafrow, 207 Pa. St. 274, 56 Atl. 539.

Rhode Island.— State *v.* Fidler, 23 R. I. 41, 49 Atl. 100, holding that the fact that grand jurors were not selected in the order in which their names appeared on the jury list did not vitiate the indictment.

Tennessee.— Epperson *v.* State, 5 Lea 291, holding that the mere fact that a grand juror otherwise qualified has been selected from the bystanders instead of from the venire is no ground for vitiating an indictment found by him and twelve grand jurors taken from the venire.

Texas.— State *v.* White, 17 Tex. 242; State *v.* Mahan, 12 Tex. 283; Van Hook *v.* State, 12 Tex. 252 [*distinguishing* State *v.* Jacobs, 6 Tex. 99]; Reed *v.* State, 1 Tex. App. 1.

Vermont.— See State *v.* Champeau, 52 Vt. 313, 36 Am. Rep. 754. *Compare* State *v.* Ward, 60 Vt. 142, 14 Atl. 187.

Washington.— State *v.* Krug, 12 Wash. 288, 41 Pac. 126.

United States.— Stockslager *v.* U. S., 116 Fed. 590, 54 C. C. A. 46; U. S. *v.* Greene,

dictions that the accused shall have been held to answer or have had an opportunity to raise the question by challenge before the finding of the indictment.[88] But there are several cases where the courts have given a different effect to material departures from the mode or method provided by law for selecting grand juries,[89] as for instance, where grand jurors have been drawn or selected by officers or persons having no authority to make the selection[90] or there has been a

113 Fed. 683; Wolfson *v.* U. S., 101 Fed. 430, 102 Fed. 134, 41 C. C. A. 422; U. S. *v.* Rondeau, 16 Fed. 109, 4 Woods 185; U. S. *v.* Ambrose, 3 Fed. 283, 286, where it is said: "All that is required is an honest intention to conform to the statute, and to carry out its provision in good faith." *Compare* U. S. *v.* Richardson, 28 Fed. 61.

See 24 Cent. Dig. tit. "Grand Jury," § 17.

And see INDICTMENTS AND INFORMATIONS.

In Mississippi by statute no objection can be raised by plea or otherwise to irregularities in the mode of selecting and drawing grand jurors after the body has been organized, sworn, and charged. Logan *v.* State, 50 Miss. 269; Durrah *v.* State, 44 Miss. 789; Head *v.* State, 44 Miss. 731. See also Dixon *v.* State, 74 Miss. 271, 20 So. 839. A different rule obtained under prior statutes. Stokes *v.* State, 24 Miss. 621; Rawls *v.* State, 8 Sm. & M. 599; McQuillen *v.* State, 8 Sm. & M. 587.

Statutory enumeration of vitiating irregularities.— In some jurisdictions the irregularities in the selection and drawing of grand jurors which will vitiate an indictment are expressly enumerated and restricted by statute. Linehan *v.* State, 113 Ala. 70, 21 So. 497; People *v.* Goldenson, 76 Cal. 328, 19 Pac. 161 [*followed* in People *v.* Hunter, 54 Cal. 65; People *v.* Colby, 54 Cal. 37]; People *v.* Southwell, 46 Cal. 141; People *v.* Coffman, 24 Cal. 230; People *v.* Arnold, 15 Cal. 476; People *v.* Beatty, 14 Cal. 566; State *v.* Russell, 69 Minn. 502, 72 N. W. 832. See also State *v.* Ames, 90 Minn. 183, 96 N. W. 330.

The failure to certify jury lists has been held not to be a ground for quashing an indictment. State *v.* Krug, 12 Wash. 288, 41 Pac. 126. See also Stoneking *v.* State, 118 Ala. 68, 24 So. 47. *Compare* U. S. *v.* Cropper, Morr. (Iowa) 190. In Jackson *v.* State, 76 Ga. 551, it was held that where defendant pleads in abatement of an indictment that the names of certain of the grand jurors who appeared to have acted in finding the bill are not contained in a list certified by the jury commissioners as required by the statute, it is proper to allow such list to be completed by attaching thereto the required certificate *nunc pro tunc* on the evidence of the clerk of the superior court and surviving commissioners.

A mistake of the jury commissioners in indorsing the list of grand jurors as for the next February term, instead of for the next January term, is not prejudicial, where there was no February term, and such jurors were impaneled and sworn for the January terms. Carpenter *v.* State, 62 Ark. 286, 36 S. W. 900.

Objection not available to person responsible for irregularity.— A member of a jury commission who by his own misconduct in office as a member of such commission has rendered the making of the jury list so irregular that as to others it might be invalid cannot take advantage of his own wrong-doing when called on to answer a criminal charge presented by a grand jury selected from such jury list. State *v.* Second Judicial Dist. Ct., (Mont. 1904) 78 Pac. 769.

Selection or drawing under unconstitutional statute.— The mere fact that a grand jury is selected or drawn under an unconstitutional statute will not invalidate the indictment. People *v.* Thompson, 122 Mich. 411, 81 N. W. 344; People *v.* Petrea, 92 N. Y. 128 [*affirming* 1 N. Y. Cr. 233]; People *v.* Fitzpatrick, 30 Hun (N. Y.) 493.

88. Miller *v.* State, 69 Ind. 284; Mershon *v.* State, 51 Ind. 14; Hardin *v.* State, 22 Ind. 347; State *v.* McPherson, 126 Iowa 77, 101 N. W. 738; State *v.* Kouhns, 103 Iowa 720, 73 N. W. 353; State *v.* Pierce, 90 Iowa 506, 58 N. W. 891; State *v.* Ruthven, 58 Iowa 121, 12 N. W. 235; State *v.* Gibbs, 39 Iowa 318; State *v.* Hart, 29 Iowa 268; State *v.* Reid, 20 Iowa 413; State *v.* Ostrander, 18 Iowa 435; State *v.* Howard, 10 Iowa 101; State *v.* Hinkle, 6 Iowa 380; Dixon *v.* State, 3 Iowa 416. But see State *v.* Connell, 49 Mo. 282.

When the record is silent as to whether defendant was or was not held to answer before indictment the presumption will be in favor of the ruling of the court on that point. State *v.* Gibbs, 39 Iowa 318.

Waiver by attorney.— If defendant is in court by attorney and fails to exercise his right of challenge on the ground of irregularities in drawing the grand jury, he waives his right to set up the matter subsequently as a defense. State *v.* Ruthven, 58 Iowa 121, 12 N. W. 235.

89. *Iowa.*— State *v.* Beckey, 79 Iowa 368, 44 N. W. 679.

Maine.— State *v.* Symonds, 36 Me. 128.

Maryland.— Avirett *v.* State, 76 Md. 510, 25 Atl. 676, 987; Clare *v.* State, 30 Md. 163.

Massachusetts.— Com. *v.* Brown, 147 Mass. 585, 18 N. E. 587, 9 Am. St. Rep. 736, 1 L. R. A. 620.

Nebraska.— Jones *v.* State, 18 Nebr. 401, 25 N. W. 527; Burley *v.* State, 1 Nebr. 385.

Nevada.— State *v.* Collyer, 17 Nev. 275, 30 Pac. 891.

See also, generally, INDICTMENTS AND INFORMATIONS.

90. *Alabama.*— Cross *v.* State, 63 Ala. 40; Russell *v.* State, 33 Ala. 366; State *v.* Williams, 5 Port. 130.

Arkansas.— State *v.* Cantrell, 21 Ark. 127.

Iowa.— Dutell *v.* State, 4 Greene 125.

Louisiana.— State *v.* Clavery, 43 La. Ann.

failure to give public notice of the drawing in accordance with the directions of the statute.[91]

2. Time of Selection and Drawing. The time of selecting and drawing grand jurors or of making out and delivering the list to the proper officer for summons is frequently prescribed by statute.[92] Statutory provisions of this character have, however, been held to be directory merely, so that failure to follow them strictly will not vitiate the action of the grand jury.[93]

1133, 10 So. 203; State *v.* Taylor, 43 La. Ann. 1131, 10 So. 203 (holding that if a person not a jury commissioner intrudes upon the deliberations of the commission and takes part in the selection of the grand jury, this will vitiate the proceedings); State *v.* Bradley, 32 La. Ann. 402 (holding that an indictment will be quashed when it appears that the clerk of the court who acted as a jury commissioner for drawing the grand jury that found the bill had never been sworn as such commissioner).

Maryland.— Avirett *v.* State, 76 Md. 510, 25 Atl. 676, 987; Clare *v.* State, 30 Md. 163.

Nebraska.— Preuit *v.* People, 5 Nebr. 377.

Nevada.— State *v.* McNamara, 3 Nev. 70.

Texas.— Peter *v.* State, 11 Tex. 762.

United States.— U. S. *v.* Gale, 109 U. S. 65, 3 S. Ct. 1, 27 L. ed. 857. *Compare* U. S. *v.* Ambrose, 3 Fed. 283.

See also, generally, Indictments and Informations.

The mere summoning of a person selected without due authority will not vitiate an indictment unless he appears and serves upon the jury. Sylvester *v.* State, 72 Ala. 201.

Drawing by de facto officers.— It is the general rule that the fact that a grand jury is drawn by *de facto* officers does not invalidate indictments found by such grand jury. People *v.* Roberts, 6 Cal. 214; People *v.* Thompson, 122 Mich. 411, 81 N. W. 344; Durrah *v.* State, 44 Miss. 789; Dolan *v.* People, 64 N. Y. 485 [*affirming* 6 Hun 493]; State *v.* Krause, 1 Ohio S. & C. Pl. Dec. 122, 1 Ohio N. P. 91; Com. *v.* Valsalka, 181 Pa. St. 17, 37 Atl. 405. But see State *v.* Flint, 52 La. Ann. 62, 26 So. 913.

Drawing by deputy.— The general rule that all purely ministerial functions of a clerk of court may be performed by his deputy has been applied to the drawing from the jury box the names of persons to serve as grand jurors. Willingham *v.* State, 21 Fla. 761. On the other hand, under a statute providing that "when any officer is required to act in conjunction with, or in place of another officer, his deputy cannot supply his place," it has been held that where the comparison of the ballots in the list of grand jurors is made by the clerk and the deputy sheriff in the absence of the sheriff, the grand jury thus selected is not a legal body and is incapable of finding a valid indictment. State *v.* Brandt, 41 Iowa 593 [*following* Dutell *v.* State, 4 Greene (Iowa) 125].

What constitutes a quorum of jury commissioners.— Under statute in Georgia, it has been held that in drawing the grand jury the ordinary acts as one of the board of jury commissioners, and his absence during the drawing of the jury will not render it invalid; a majority of commissioners being present. Roby *v.* State, 74 Ga. 812. So the presence of the clerk at the drawing may also be dispensed with where the jury commissioners constituting a majority of all the officers designated to conduct the drawing appear and act. Goodman *v.* State, 90 Ga. 137, 15 S. E. 683; Smith *v.* State, 90 Ga. 133, 15 S. E. 682. See also Stevenson *v.* State, 69 Ga. 68.

91. Woodward *v.* State, 33 Fla. 508, 15 So. 252; State *v.* Clough, 49 Me. 573.

Irregularity in time of posting notice.— In U. S. *v.* Richardson, 28 Fed. 61, it was held that the validity of an indictment is not affected when the town meeting at which grand jurors were drawn was held at the prescribed time before the session of the court, although the notice of that meeting was posted less than the number of days required by statute.

Notification of officials to be present at drawing.— Under statutes requiring the officials who are to select grand jurors to be notified in regard to the drawing of grand jurors, it has been held to be immaterial whether any notice is given if such officers are actually present and participate in the drawing. People *v.* Gallagher, 55 Cal. 462; State *v.* Powers, 59 S. C. 200, 37 S. E. 690.

92. Kelley *v.* State, 53 Ind. 311; State *v.* Beste, 91 Iowa 565, 60 N. W. 112; State *v.* Lauer, 41 Nebr. 226, 59 N. W. 508 (holding that a county board in the county in which the grand jury is ordered must, at least twenty days before the first day of the term of court at which the said grand jury is to act, select the persons from among whom the grand jury is to be impaneled); Mesmer *v.* Com., 26 Gratt. (Va.) 976. See also Indictments and Informations.

93. State *v.* Durham Fertilizer Co., 111 N. C. 658, 16 S. E. 231. See Kelley *v.* State, 53 Ind. 311. See also Indictments and Informations.

Drawing in vacation.— In Stockslager *v.* U. S. 116 Fed. 590, 54 C. C. A. 46, it was held that the drawing of grand jurors, upon the order of the judge in vacation, instead of in open court, constitutes no ground for quashing an indictment, especially where it is not shown that any prejudice to defendant resulted therefrom.

Drawing at illegal term.— In Finnegan *v.* State, 57 Ga. 427, it was held that where a grand jury which was drawn at a term to which the superior court was adjourned, by an order of a judge issued at chambers to serve at the regular term, found a true bill and defendant was arraigned thereon, a plea in

3. APPORTIONMENT OF GRAND JURORS. The common-law practice required the sheriff to select some of the persons returned by him as grand jurors from every hundred.[94] It was not required that they should be selected from that part of the county in which the offense was committed or in which defendant resided.[95] Provision is made by statute in some jurisdictions for the selection of grand jurors from designated districts or divisions of a county; it sometimes being directed that they be selected from the particular division or locality in which the court is held, and sometimes that they be selected from the different divisions proportionately,[96] and such legislation has generally been upheld as being constitutional.[97] These statutes are frequently held to be mandatory,[98] although slight irregularities may be disregarded.[99]

3. DISCRIMINATION IN SELECTION. The rule has been laid down that while a grand

abatement setting forth the above facts should have been sustained upon the ground that the grand jury was not drawn at a legal term of court.

94. 4 Blackstone Comm. 302; 1 Chitty Cr. L. 310; 2 Hale P. C. 154. See also Thayer *v.* People, 2 Dougl. (Mich.) 417; Patrick *v.* State, 16 Nebr. 330, 20 N. W. 121.

95. Williams *v.* State, 61 Ala. 33.

96. *Alabama.*— Williams *v.* State, 61 Ala. 33; Sanders *v.* State, 55 Ala. 183.

Illinois.— Miller *v.* People, 183 Ill. 423, 56 N. E. 60 (holding that Rev. St. c. 78, § 9, which requires county boards to select grand jurors from each town or precinct within their respective counties applies to city courts, although such courts are not specifically mentioned in the statute; and it is error in the judge of such a court to require the grand jury to be selected exclusively from the inhabitants of the city); Bell *v.* People, 2 Ill. 397.

Iowa.— State *v.* Higgins, 121 Iowa 19, 95 N. W. 244; State *v.* Kouhns, 103 Iowa 720, 73 N. W. 353; State *v.* Edgerton, 100 Iowa 63, 69 N. W. 280; State *v.* Russell, 90 Iowa 569, 58 N. W. 915, 28 L. R. A. 195; State *v.* Pierce, 90 Iowa 506, 58 N. W. 891; State *v.* Beckey, 79 Iowa 368, 44 N. W. 679.

Michigan.— People *v.* Reigel, 120 Mich. 78, 78 N. W. 1017; Thayer *v.* People, 2 Dougl. 417.

Minnesota.— State *v.* Hawk, 56 Minn. 129, 57 N. W. 455.

Nebraska.— Polin *v.* State, 14 Nebr. 540, 16 N. W. 898; Barton *v.* State, 12 Nebr. 260, 11 N. W. 323.

New York.— People *v.* Sebring, 14 Misc. 31, 35 N. Y. Suppl. 237.

See 24 Cent. Dig. tit. "Grand Jury," § 7.

In Mississippi it has been held that the record need not show that the grand jury organized under the Mississippi act of 1854 were taken equally from each police district in the county. Weeks *v.* State, 31 Miss. 490.

Provision for selection from parts of federal district.— By U. S. Rev. St. (1878) § 802 [U. S. Comp. St. (1901) p. 625] it is provided that jurors shall be returned from such parts of the district from time to time as the court shall direct, so as to be most favorable to an impartial trial, and so as not to incur unnecessary expense or unduly to burden the citizens of any part of the district with such services. Under this provision it has been held that the fact that for a particular emergency the court directs that grand jurors be drawn from particular counties does not disqualify other jurors from other counties whose names are in the jury box. U. S. *v.* Greene, 113 Fed. 683. In U. S. *v.* Wan Lee, 44 Fed. 707 [*distinguishing* U. S. *v.* Munford, 16 Fed. 164, and *criticizing* U. S. *v.* Dixon, 44 Fed. 401], it was held that the act, subdividing the district of Washington and fixing the times and places for holding terms of the circuit and district courts therein, in effect limits the jurisdiction so that crimes committed within the district are triable only in the courts of the respective divisions which include the places of their commission, and that grand jurors must be drawn from the counties which constitute the division for which the term is held at which they are required to serve. See also U. S. *v.* Chaires, 40 Fed. 820. In Peters *v.* U. S., 2 Okla. 138, 37 Pac. 1081, it was held that there being no federal statute providing for the summoning of a grand jury in Oklahoma territory, the laws of the territory providing that a grand jury shall be summoned from the county, were controlling in the trial of an offense against the laws of the United States in the courts of the territory.

Provision for selection from county at large. — In Spito *v.* State, (Tex. Cr. App. 1893) 24 S. W. 97, it was held that where the statute creating and defining the boundaries of district courts within the same county provides "that the grand and petit jurors shall be selected and drawn from the body of the county," it is no ground for reversal that the grand jurors who presented the indictment were selected from the county at large without reference to the territorial lines of the two courts.

97. Williams *v.* State, 61 Ala. 33 (a statute requiring grand juries to be drawn from the immediate vicinity in which the court is held); Miller *v.* People, 183 Ill. 423, 56 S. E. 60; People *v.* Reigel, 120 Mich. 78, 78 N. W. 1017.

98. State *v.* Russell, 90 Iowa 569, 58 N. W. 915, 28 L. R. A. 195; Barton *v.* State, 12 Nebr. 260, 11 N. W. 323. See also INDICTMENTS AND INFORMATIONS.

99. State *v.* Edgerton, 100 Iowa 63, 69

jury should be selected with a view to the qualifications pointed out by law without inquiry whether the individuals selected do or do not belong to any particular society, sect, or denomination, social, benevolent, political, or religious, yet where those who are selected are unexceptionable the fact that others equally unexceptionable are excluded is no ground of challenge to the array or of objection to the indictment.[1] But the exclusion of persons on account of race or color in the selection of grand jurors is unconstitutional[2] and will affect the legality of the grand jury and the validity of indictments found by them against colored persons, provided the objection is taken at the proper time and in the proper manner.[3] But since the presumption is that in the selection of grand jurors the officers performed their duty, the facts showing a discrimination must be established by competent evidence;[4] and the mere circumstance that a grand jury may be composed entirely of white men is not in itself a violation of the rights of colored men.[5]

5. Presumption of Regularity. In the absence of any showing to the contrary, the officers charged with the duty of selecting or drawing grand jurors will be presumed to have performed their duty in accordance with law.[6]

B. Summoning — 1. In General. The summoning of grand jurors is very generally regulated by statute in the different jurisdictions.[7] In some jurisdictions the rule is laid down that slight irregularities in summoning grand jurors will not affect the validity of indictments,[8] and indeed in several jurisdictions the statutes relating to this question are regarded as directory merely.[9]

2. Necessity For Prior Order of Court. At common law it seems that a precept for the summoning of grand jurors might be issued independently of any action on the part of the court.[10] Statutes, have, however, been enacted in many

N. W. 280; U. S. *v.* Greene, 113 Fed. 683. See U. S. *v.* Ambrose, 3 Fed. 283. See also Indictments and Informations.

1. People *v.* Jewett, 3 Wend. (N. Y.) 314.

Circumstances held not to show bias in selection.— The jury commissioner who assisted in drawing the grand jury that found an indictment and the petit jury that convicted the prisoner of murder was the husband of the fourth cousin of the deceased. He was held so remotely connected by affinity with the deceased as to afford no evidence of bias or prejudice such as would justify the quashing of the indictment. State *v.* McNinch, 12 S. C. 89 [*distinguishing* State *v.* McQuaige, 5 S. C. 429].

2. See Constitutional Law, 8 Cyc. 1073 note 90 *et seq.*

3. *Florida.*— Tarrance *v.* State, 43 Fla. 446, 30 So. 685.

Kentucky.— Haggard *v.* Com., 79 Ky. 366.

Mississippi.— Dixon *v.* State, 74 Miss. 271, 20 So. 839.

Texas.— Smith *v.* State, 45 Tex. Cr. 405, 77 S. W. 453.

United States.— Neal *v.* Delaware, 103 U. S. 370, 26 L. ed. 567.

See also, generally, Indictments and Informations.

4. Tarrance *v.* State, 43 Fla. 446, 30 So. 685; Dixon *v.* State, 74 Miss. 271, 20 So. 839.

5. Haggard *v.* State, 79 Ky. 366; Cooper *v.* State, 64 Md. 40, 20 Atl. 986.

6. Tarrance *v.* State, 43 Fla. 446, 30 So. 685; State *v.* Howard, 10 Iowa 101; Thayer *v.* People, 2 Dougl. (Mich.) 417. See Wilson *v.* People, 3 Colo. 325. See also Indictments and Informations.

7. *Alabama.*— State *v.* Williams, 5 Port. 130.

Arkansas.— Hudspeth *v.* State, 50 Ark. 534, 9 S. W. 1.

California.— People *v.* Moice, 15 Cal. 329; People *v.* Cuintano, 15 Cal. 327.

Indiana.— Hughes *v.* State, 54 Ind. 95.

Kansas.— *In re* Tillery, 43 Kan. 188, 23 Pac. 162.

Kentucky.— Com. *v.* Graddy, 4 Metc. 223.

Mississippi.— Johnson *v.* State, 33 Miss. 363.

Rhode Island.— State *v.* Mellor, 13 R. I. 666.

United States.— U. S. *v.* Richardson, 28 Fed. 61; U. S. *v.* Antz, 16 Fed. 19, 4 Woods 174.

See 24 Cent. Dig. tit. "Grand Jury," § 22.

Challenges for irregularities in summoning see *infra*, VII, A, 3 note 92 *et seq.*

8. Com. *v.* Moran, 130 Mass. 281; State *v.* Dewick, 44 S. C. 344, 22 S. E. 337. See U. S. *v.* Ambrose, 3 Fed. 283. And see Indictments and Informations.

9. Stoneking *v.* State, 118 Ala. 68, 24 So. 47; Logan *v.* State, 50 Miss. 269; Head *v.* State, 44 Miss. 731; State *v.* Connell, 49 Mo. 282; State *v.* Welch, 33 Mo. 33; State *v.* Bleekley, 18 Mo. 428. See also Territory *v.* Clayton, 8 Mont. 1, 19 Pac. 293. *Compare* Bruen *v.* People, 206 Ill. 417, 69 N. E. 24; Stone *v.* People, 2 Ill. 326. And see Indictments and Informations.

Effect of voluntary appearance.— It has been held that if grand jurors regularly selected appear voluntarily the fact that they are not summoned does not affect the legal organization of the jury. Sylvester *v.* State, 72 Ala. 201; Hughes *v.* State, 54 Ind. 95.

10. Curtis *v.* Com., 87 Va. 589, 13 S. E. 73; Com. *v.* Burton, 4 Leigh (Va.) 645, 26 Am. Dec. 337.

jurisdictions making provision for a prior order of court authorizing the summoning of grand jurors.[11] But the failure to comply with such statutes is held in some jurisdictions not to affect the validity of the action of the grand jury summoned.[12]

3. The Writ — a. Necessity of Writ. At common law the process for summoning a grand jury was a precept either in the name of the king or of two or more justices of the peace directed to the sheriff.[13] In many jurisdictions in this country the rule has been laid down either at common law or under statute that a writ of venire facias or a process in the nature of that writ is necessary for the bringing together of a grand jury authorized to find valid indictments, and that the courts are without power to dispense with it.[14] But a contrary rule has been laid down under statute in other jurisdictions.[15] Moreover the weight of authority

11. *Arkansas.*— See State *v.* Cantrell, 21 Ark. 127.

California.— People *v.* Earnest, 45 Cal. 29.

Florida.— See Woodward *v.* State, 33 Fla. 508, 15 So. 252.

Indiana.— Hess *v.* State, 73 Ind. 537; Clem *v.* State, 33 Ind. 418, holding that where the record showed the date of meeting of the court and the subsequent impaneling of a grand jury, it would be presumed in the absence of anything to the contrary that the grand jurors were summoned in pursuance of an order of court.

Kansas.— State *v.* Marsh, 13 Kan. 596.

Missouri.— State *v.* Berry, 179 Mo. 377, 78 S. W. 611.

Montana.— State *v.* King, 9 Mont. 445, 24 Pac. 265.

Nebraska.— Jones *v.* State, 18 Nebr. 401, 25 N. W. 527.

See 24 Cent. Dig. tit. "Grand Jury," § 23.

12. Hess *v.* State, 73 Ind. 537 (holding that the statutory inhibition against the clerk issuing without an order of the judge a venire for the attendance of grand jurors constitutes no restriction on the power of the court to organize the panel if found in attendance although they have come in response to a summons issued without the prescribed order therefor); State *v.* Marsh, 13 Kan. 596 (holding that while a grand jury should only be called by order of the district court yet when one has been called by order of a judge in vacation and has been impaneled, charged, and sworn by the court, it is a *de facto* grand jury, and under the statutes of Kansas no objection to an indictment can be raised on that ground where the irregularity in the opinion of the court does not amount to corruption); State *v.* Connell, 49 Mo. 282 (holding that, under a statute of Missouri, the fact that no order of court for the summoning of a grand jury was made was neither a ground for challenge nor for setting aside an indictment). See also Indictments and Informations.

Order directing persons to be summoned as trial jurors.— Where the order, a copy of which was delivered to the sheriff, directed him to summon a designated number of persons to serve as trial jurors who were subsequently impaneled as grand jurors, it was held that an indictment found by them was void. People *v.* Earnest, 45 Cal. 29.

13. *In re* Nicholls, 5 N. J. L. 539; Curtis *v.* Com., 87 Va. 589, 13 S. E. 73; Com. *v.* Burton, 4 Leigh (Va.) 645, 26 Am. Dec. 337. See also People *v.* McKay, 18 Johns. (N. Y.) 212.

14. State *v.* Lightbody, 38 Me. 200; State *v.* Dozier, 2 Speers (S. C.) 211; Brannigan *v.* People, 3 Utah 488, 24 Pac. 767; U. S. *v.* Antz, 16 Fed. 19, 4 Woods 174; U. S. *v.* Reed, 27 Fed. Cas. No. 16,134, 2 Blatchf. 435.

In Virginia by statute until a comparatively recent period, the sheriff was required *ex officio* to summon a grand jury to attend on the first day of every term prescribed by law. Robinson *v.* Com., 88 Va. 900, 14 S. E. 627; Curtis *v.* Com., 87 Va. 589, 13 S. E. 73; Com. *v.* Burton, 4 Leigh 645, 26 Am. Dec. 337. But by subsequent legislation it is provided that a venire facias to summon a regular grand jury shall be issued by the clerk prior to the commencement of each term in which such grand jury is required. Curtis *v.* Com., 87 Va. 589, 13 S. E. 73. See also Robinson *v.* Com., 88 Va. 900, 14 S. E. 627, holding, however, that there is no requirement that a venire facias shall issue to summon a special grand jury in place of the regular grand jury.

Necessity of record evidence of writ.— In Curtis *v.* Com., 87 Va. 589, 13 S. E. 73, it was held that the award of process to summon a grand jury need not affirmatively appear of record.

Issuance of writ by deputy clerk.— In U. S. *v.* Greene, 113 Fed. 683, it was held that an indictment will not be quashed on the ground that no venire facias was issued by the clerk, nor filed in the clerk's office for the eastern division of the southern district of Georgia, until after the persons whose names were drawn had been summoned, where it is not denied that a venire facias was issued by a deputy clerk of the court having his residence in the western division.

15. *California.*— People *v.* Moice, 15 Cal. 329; People *v.* Cuintano, 15 Cal. 327, holding that it was no objection that a copy of the order of court directing the summoning of grand jurors was not served on the sheriff in accordance with the statute, provided he has summoned the jury in the proper manner.

Georgia.— Bird *v.* State, 14 Ga. 43.

Indiana.— Hess *v.* State, 73 Ind. 537; Hughes *v.* State, 54 Ind. 95.

Mississippi.— Logan *v.* State, 50 Miss. 269,

is in favor of the rule that the objection cannot be raised after trial and conviction.[16]

b. Requisites and Validity. While certain defects in the writ or process have been deemed so serious in their nature as to render it a mere nullity,[17] the general rule is that slight irregularities or mere defects in the form of the writ,[18] such as the absence of a statement of the qualifications of the grand jurors[19] or the failure

holding that after a grand jury has been impaneled and sworn the fact that no writ of special venire facias was issued will not invalidate an indictment.

New Jersey.— State *v.* Chase, 20 N. J. L. 218 [*distinguishing In re* Nicholls, 5 N. J. L. 539]; Challenge to Grand Jury, 3 N. J. L. J. 153.

New York.— People *v.* Cummings, 3 Park. Cr. 343; McCann *v.* People, 3 Park. Cr. 272 [*distinguishing* People *v.* McKay, 18 Johns. 212, and *disapproving* McGuire *v.* People, 2 Park. Cr. 148].

Tennessee.— Boyd *v.* State, 6 Coldw. 1.

See 24 Cent. Dig. tit. "Grand Jury," § 23.

And see, generally, INDICTMENTS AND INFORMATIONS.

16. State *v.* Brown, 2 Marv. (Del.) 380, 36 Atl. 458; Bird *v.* State, 14 Ga. 43; Robinson *v.* Com., 88 Va. 900, 14 S. E. 627; Curtis *v.* Com., 87 Va. 589, 13 S. E. 73. See also People *v.* Robinson, 2 Park. Cr. (N. Y.) 235 [*distinguishing* People *v.* McKay, 18 Johns. (N. Y.) 212; People *v.* McGuire, 2 Park. Cr. (N. Y.) 148]. *Compare* State *v.* Williams, 1 Rich. (S. C.) 188; State *v.* Dozier, 2 Speers (S. C.) 211.

17. See cases cited *infra*, this note.

Want of seal of court.— In some jurisdictions the rule of the text has been applied to a venire facias without the seal of the court issuing it (State *v.* Flemming, 66 Me. 142, 22 Am. Rep. 552; State *v.* Lightbody, 38 Me. 200; State *v.* McKay, 18 Johns. (N. Y.) 212; State *v.* Dozier, 2 Speers (S. C.) 211. *Compare* Maher *v.* State, 1 Port. (Ala.) 265, 26 Am. Dec. 379; State *v.* Bradford, 57 N. H. 188; State *v.* Mellor, 13 R. I. 666; Bennett *v.* State, Mart. & Y. (Tenn.) 133).

Writ tested by improper officer.— In U. S. *v.* Antz, 16 Fed. 19, 4 Woods 174, it was held under a federal statute providing that all writs and processes issuing from a circuit court shall bear teste of the chief justice of the United States, that a venire facias tested in the name of the deputy clerk of the circuit court is insufficient. *Compare* State *v.* Bradford, 57 N. H. 188, holding that a writ of venire need not bear teste of the chief or any other justice of the court.

Writ addressed to officer not in existence.— In U. S. *v.* Antz, 16 Fed. 19, 4 Woods 174, it was intimated that a paper purporting to be a venire facias and addressed to the marshal of the district of Louisiana was fatally irregular where it appeared that there was no such officer the title of the executive officer of the court being "the marshal of the eastern district of Louisiana." *Compare* State *v.* Phillips, 2 Ala. 297, holding that a writ of venire facias to summon a grand jury directed "to any sheriff of the state of Alabama" if received, executed, and returned by the proper sheriff is good.

18. Com. *v.* Moran, 130 Mass. 281; Pierce *v.* State, 12 Tex. 210. See also West *v.* State, 6 Tex. App. 485; U. S. *v.* Ambrose, 3 Fed. 283. See also INDICTMENTS AND INFORMATIONS.

Amendment of venire tested out of term.— In Jackson *v.* White, 20 Johns. (N. Y.) 313, it was held that a venire tested out of term is not void, as the court has the power to amend it, and defendant cannot take advantage of the error in arrest of judgment.

Substitution of names in venire by sheriff. — In McElhanon *v.* People, 92 Ill. 369, it was held that while it is irregular and improper for the sheriff to whom a venire facias for a grand jury has been directed to change the writ by substituting the name of another person for one named therein to be summoned, yet if the person whose name is thus substituted shall serve upon the grand jury and an indictment for a misdemeanor be found, the irregularity will not be a ground for quashing the indictment.

Surplusage.— In Hawes *v.* State, 88 Ala. 37, 7 So. 302, it was held that the words "to serve as grand jurors for the week" were properly treated as surplusage and did not vitiate an indictment found by a grand jury after the expiration of the week where it also appeared from record that the grand jurors were drawn and summoned "for the term."

Failure to direct mode of notifying town meeting.— In State *v.* Clough, 49 Me. 573, it was held that a venire need not direct the officer in what manner he should notify the town meeting for drawing jurors.

The recital of an order for the issuance of a venire has been held to form no part of the writ. State *v.* Cole, 9 Humphr. (Tenn.) 626.

Indorsement of entry in sheriff's office.— In State *v.* Clayton, 11 Rich. (S. C.) 581, it was held that a venire facias is valid, although the sheriff has not indorsed on it the fact of entry in his office.

19. Stewart *v.* State, 98 Ala. 70, 13 So. 319 (holding that the words "qualified persons" in a writ imply residents of the county); Welsh *v.* State, 96 Ala. 92, 11 So. 450 (holding that since citizens of the county only are qualified as grand jurors, an order to summon persons "competent to serve" is not objectionable because it does not direct citizens of the county to be summoned); Com. *v.* Moran, 130 Mass. 281; State *v.* Alderson, 10 Yerg. (Tenn.) 523 (holding that a venire facias directed to the sheriff of a particular county, commanding him to summon good and lawful men as jurors, is sufficient without specifying the other necessary qualifications of the juror). *Compare* Whitehead

to state the full or exact name of a grand juror,[20] the omission of the name of the town in the address of the venire,[21] or the affixing of an erroneous date[22] will not affect the validity of an indictment. And the same rule has been applied where the writ is signed by the clerk of the court without giving his official signature,[23] or the mandatory direction of the writ is in the name of the clerk instead of the name of the court.[24]

c. The Return. The rule is laid down both under statute[25] and at common law[26] that the sheriff must make a return to the court or some duly authorized official showing the names of grand jurors summoned and reciting such other facts as are required by law.[27] It has been held, however, in several cases, that the court may authorize the officer to amend his return according to the facts.[28]

4. Who May Summon. The sheriff is as a general rule both at common law and under statute the proper officer to summon grand juries.[29] Where, however, the sheriff is not expressly required by law to summon the jury in person,

v. Com., 19 Gratt. (Va.) 640, holding that a statute directing that the writ of venire facias shall command the officers charged with its execution to summon "twenty-four persons, freeholders of this county or corporation, residing remote from the place where the offense is charged to have been committed," is mandatory, and a writ which omits the words "residing remote," etc., is defective and should be quashed on motion.

Incorporation of qualifications not required by law.— In Wash *v.* Com., 16 Gratt. (Va.) 530, it was held that a writ of venire facias which directed the officers to summon freeholders who owned "property to the value of one hundred dollars, at least" ought to have been quashed on motion as it contained a qualification which the law did not require.

20. Stoneking *v.* State, 118 Ala. 68, 24 So. 47 (holding that the fact that the clerk's order to the sheriff to summon the grand jury did not contain the full name of one of the jurors is no objection to an indictment); Rampey *v.* State, 83 Ala. 31, 3 So. 593 (holding that the omission of a middle name or insertion of a wrong initial in the venire for grand jurors is immaterial in the absence of evidence that there is another bearing the name, the onus of showing which is on defendant).

21. Com. *v.* Moran, 130 Mass. 281.

22. Davis *v.* Com., 89 Va. 132, 15 S. E. 388, holding that the fact that the venire facias was dated October instead of September, by mistake, was no ground for a plea of abatement to the constitution of a grand jury where it appeared that the mistake was corrected in accordance with the fact and that the grand jury was duly impaneled at the right time.

23. Drake *v.* State, 14 Nebr. 535, 17 N. W. 117; State *v.* Cole, 9 Humphr. (Tenn.) 626.

24. State *v.* Cole, 9 Humphr. (Tenn.) 626.

25. Com. *v.* Barry, Hard. (Ky.) 229; State *v.* Rickey, 9 N. J. L. 293, holding that notwithstanding a statute substituting itself in the place of the precept formerly issued, the sheriff must make his return in obedience to the statute, just as he made it formerly in obedience to the precept.

26. State *v.* Rickey, 9 N. J. L. 293.

27. See cases cited *infra*, this note.

In New Jersey it has been held that the return must state the purpose for which, the authority by which, and the court to which the persons named in the panel were summoned. State *v.* Chase, 20 N. J. L. 218; State *v.* Rickey, 9 N. J. L. 293; Challenge to Grand Jury, 3 N. J. L. J. 153.

Fact of due service.— In State *v.* Powers, 59 S. C. 200, 37 S. E. 690, it was held that in determining the validity of an indictment, it is immaterial whether the sheriff's return shows that the jurors drawn were duly summoned, if it does not appear that one of the persons drawn failed to attend.

Fact of service on jury commissioner.— In State *v.* Derrick, 44 S. C. 344, 22 S. E. 337, it was held that the writ of venire facias need not show that the sheriff served it on the jury commissioner where it appeared from the record that the writ was duly served and the jury commissioner acted in obedience thereto. To same effect see State *v.* Powers, 59 S. C. 200, 37 S. E. 690.

Return under oath.— In State *v.* Derrick, 44 S. C. 344, 22 S. E. 337, it was held that the validity of an indictment is not affected by the fact that the sheriff failed to make a return of service upon the grand jurors under oath if the record shows the jurors acted in obedience to the summons.

28. *Alabama.*— Rampey *v.* State, 83 Ala. 31, 3 So. 593.

Maine.— State *v.* Clough, 49 Me. 573.

Massachusetts.— Com. *v.* Parker, 2 Pick. 550 [*approved* in Com. *v.* Moran, 130 Mass. 281], holding that after a verdict of guilty in a capital case the constable who served the venire on one of the grand jurors and who was still in office might be allowed to amend his return by affixing his signature.

New Jersey.— State *v.* Rickey, 9 N. J. L. 293.

Pennsylvania.— Com. *v.* Chauncey, 2 Ashm. 90, holding that where the sheriff neglects to sign the return the court on motion may direct him to complete the return by indorsing on his writ the execution thereof and signing the same.

See 24 Cent. Dig. tit. "Grand Jury," § 25.

29. *California.*— Bruner *v.* San Francisco Super. Ct., 92 Cal. 239, 28 Pac. 341; People *v.* Southwell, 46 Cal. 141.

it has been held that he may do so by deputy;[30] and indeed it has been held that if a grand juror receives notice and attends, it is immaterial by whom he was served.[31]

5. Time of Summoning. Statutes frequently require that grand jurors shall be summoned or that the writ shall issue within a specified period prior to the commencement of the term;[32] but statutes of this character are generally regarded as directory to the sheriff or officer and as being for the convenience of grand jurors that they may have sufficient notice of the service required of them, and hence if they attend and serve without such notice the validity of the organization of the grand jury and of indictments found by it is not affected.[33]

C. Impaneling.[34] The manner of selecting the grand jury from the number summoned by the sheriff and in attendance as grand jurors is regulated by statute or constitution of many jurisdictions,[35] provision being made in some instances for selection by lot.[36] But a statutory requirement that the grand jury shall be drawn or selected in a particular manner from the grand jurors summoned may be dispensed with where the precise number required to fill the panel are in attendance,[37] and many authorities are to the effect that mere irregularities in impaneling a grand jury, not affecting the competency of any of the

Kentucky.— Com. *v.* Graddy, 4 Metc. 223; Com. *v.* Barry, Hard. 229; Kendall *v.* Com., 19 S. W. 173, 14 Ky. L. Rep. 15.

Michigan.— Thayer *v.* People, 2 Dougl. 417.

Missouri.— State *v.* Clifton, 73 Mo. 430; State *v.* Hart, 66 Mo. 208; State *v.* Welch, 33 Mo. 33.

New York.— People *v.* Petrea, 92 N. Y. 128.

Pennsylvania.— Com. *v.* Salter, 2 Pearson 461.

See 24 Cent. Dig. tit. "Grand Jury," § 21.

Failure of sheriff to take official oath.— In State *v.* Clifton, 73 Mo. 430 [*following* State *v.* Hart, 66 Mo. 208], it was held to be no ground of exception that the record does not show that the sheriff and his deputies took the oath prescribed for summoning the grand jury. See also State *v.* Welch, 33 Mo. 33. In Kendall *v.* Com., 19 S. W. 173, 14 Ky. L. Rep. 15, it was held that the omission to swear the sheriff before a grand jury summoned by him was impaneled, sworn, and charged was cured where it was at once discovered and the sheriff on being sworn resummoned the same persons as grand jurors and the court admonished them to remember the charge that had been given.

30. Com. *v.* Salter, 2 Pearson (Pa.) 461.

31. Com. *v.* Salter, 2 Pearson (Pa.) 461.

Service of writ by coroner.— In California under statute it has been held not to be a ground of challenge to the array or for setting aside an indictment that the grand jury was summoned in pursuance of a venire directed to and actually served by the coroner instead of the sheriff. People *v.* Southwell, 46 Cal. 141.

Service by person specially appointed by court.—Under a statute authorizing the sheriff to summon grand jurors it has been held that the summoning of bystanders by one specially appointed by the court is substantial error, although it was intimated that a different rule would apply in summoning jurors selected by commissioners. Com *v.* Graddy, 4 Metc. (Ky.) 223. Under a statute authorizing the court to direct the sheriff or an elisor chosen by the court to summon a grand jury, it has been held that an elisor cannot act in place of the sheriff in the absence of a showing that the sheriff is disqualified. Bruner *v.* San Francisco Super. Ct., 92 Cal. 239, 246, 28 Pac. 341, where it is said: "In Bouvier's Law Dictionary, elisors are defined as 'persons appointed by the court to return a jury when the sheriff and coroner have been challenged as incompetent.'"

32. Com. *v.* Krathofski, 170 Mass. 459, 50 N. E. 1040; Johnson *v.* State, 33 Miss. 363; Weeks *v.* State, 31 Miss. 490; State *v.* Smith, 67 Me. 328; State *v.* Smith, 38 S. C. 270, 16 S. E. 997.

33. Johnson *v.* State, 33 Miss. 363; Weeks *v.* State, 31 Miss. 490; State *v.* Smith, 67 Me. 328; State *v.* Smith, 38 S. C. 270, 16 S. E. 997. *Compare* State *v.* Lauer, 41 Nebr. 226, 59 N. W. 508; Thorp *v.* People, 3 Utah 441, 24 Pac. 908. See also Indictments and Informations.

Rule applied to statutes requiring notification to jurors.— Hughes *v.* State, 54 Ind. 95; State *v.* Mellor, 13 R. I. 666.

34. Impaneling is the final formation by the court of the jury; the act that precedes the swearing of the jury, and which ascertains who are to be sworn. State *v.* Ostrander, 18 Iowa 435.

35. Wilson *v.* People, 3 Colo. 325; State *v.* Braskamp, 87 Iowa 588, 54 N. W. 532; Box *v.* State, 34 Miss. 614; State *v.* Lawrence, 12 Oreg. 297, 7 Pac. 116, holding that under a constitutional provision declaring that the grand jury shall be chosen from the jurors in attendance at court, a statute providing that the clerk shall draw from the body of the jurors a grand jury several days prior to the term of court is invalid.

36. State *v.* Standley, 76 Iowa 215, 40 N. W. 815; State *v.* Texada, 19 La. Ann. 436; State *v.* Lawrence, 12 Oreg. 297, 7 Pac. 116.

37. State *v.* Standley, 76 Iowa 215, 40 N. W. 815; Workman *v.* State, 4 Sneed (Tenn.) 425.

members, will not vitiate their action,[38] with the proviso in some jurisdictions that the accused shall have been held to answer before indictment and failed to avail himself of the opportunity to object by way of challenge.[39]

D. Time of Appearance and Organization — 1. In General. The terms of court for which grand juries are to be summoned and the time when they are to appear and be impaneled are very generally prescribed by statute, a discretion in these respects being in many instances vested in the court.[40] In the absence of statutory provision requiring grand jurors to be summoned to appear or the grand jury to be organized on the first day of the term, the organization may take place at any time during the term.[41] Statutes providing for the organization of a grand jury on the first day of the term have been held directory, so that failure to conform thereto will not invalidate an indictment found by such jury.[42]

2. Special or Adjourned Terms. So in many jurisdictions under statutory authority given either in express terms or by necessary implication, it has been held that a grand jury may be summoned and impaneled for an adjourned[43]

38. *California.*— See People *v.* Prather, 134 Cal. 436, 66 Pac. 589, 863.
Colorado.— Wilson *v.* People, 3 Colo. 325.
Iowa.— State *v.* Howard, 10 Iowa 101.
Louisiana.— See State *v.* Watson, 31 La. Ann. 379; State *v.* Thompson, 28 La. Ann. 187; State *v.* Hoffpauer, 21 La. Ann. 609; State *v.* Canady, 16 La. Ann. 141. *Compare* State *v.* Texada, 19 La. Ann. 436.
Massachusetts.— Com. *v.* Smith, 9 Mass. 107.
Michigan.— See People *v.* Morgan, 133 Mich. 550, 95 N. W. 542; People *v.* Lauder, 82 Mich. 109, 46 N. W. 956.
Mississippi.—Logan *v.* State, 50 Miss. 269; Head *v.* State, 44 Miss. 731.
Missouri.— State *v.* Drogmond, 55 Mo. 87. See also State *v.* Reed, 162 Mo. 312, 62 S. W. 982.
Oregon.— See State *v.* Witt, 35 Oreg. 230, 55 Pac. 1054 [*distinguishing* State *v.* Lawrence, 12 Oreg. 297, 7 Pac. 116].
Pennsylvania.— See Com. *v.* Chauncey, 2 Ashm. 90.
Texas.— State *v.* White, 17 Tex. 242. See also Smith *v.* State, (Tex. Cr. App. 1900) 56 S. W. 54; Dailey *v.* State, (Cr. App. 1900) 55 S. W. 821.
Compare State *v.* Ward, 60 Vt. 142, 14 Atl. 187.
See also Indictments and Informations.
Presumption of regularity.— In the absence of evidence to the contrary, it will be presumed that the grand jury was selected from those in attendance and organized according to law. Wilson *v.* People, 3 Colo. 325; Stout *v.* State, 93 Ind. 150; Chase *v.* State, 46 Miss. 683.

39. Meiers *v.* State, 56 Ind. 336; State *v.* Ostrander, 18 Iowa 435. See also People *v.* Hidden, 32 Cal. 445.

40. *Alabama.*— Oakley *v.* State, 135 Ala. 15, 33 So. 23; Daughdrill *v.* State, 113 Ala. 7, 21 So. 378; Perkins *v.* State, 92 Ala. 66, 9 So. 536; O'Brien *v.* State, 91 Ala. 16, 8 So. 559; O'Byrnes *v.* State, 51 Ala. 25.
California.— *In re* Gannon, 69 Cal. 541, 11 Pac. 240; People *v.* Long, 43 Cal. 444.
Indiana.— Harper *v.* State, 42 Ind. 405.
Iowa.— State *v.* Standley, 76 Iowa 215, 40 N. W. 815; State *v.* Winebrenner, 67 Iowa 230, 25 N. W. 146.
Kentucky.—Taggart *v.* Com., 46 S. W. 674, 20 Ky. L. Rep. 493.
Louisiana.— State *v.* Pate, 40 La. Ann. 748, 5 So. 21; State *v.* Davis, 14 La. Ann. 678.
Michigan.— People *v.* Reigel, 120 Mich. 78, 78 N. W. 1017.
Nebraska.— State *v.* Lauer, 41 Nebr. 226, 59 N. W. 508.
New York.— People *v.* Rugg, 98 N. Y. 537; Cyphers *v.* People, 31 N. Y. 373.
North Carolina.— State *v.* Lew, 133 N. C. 664, 45 S. E. 511.
Pennsylvania.— Traviss *v.* Com., 106 Pa. St. 597; Com. *v.* Smith, 16 Pa. Co. Ct. 568 [*affirmed* in 4 Pa. Super. Ct. 1].
Texas.— Smith *v.* State, (Cr. App. 1900) 56 S. W. 54; Broyles *v.* State, 41 Tex. Cr. 553, 55 S. W. 966.
Virginia.— Jones *v.* Com., 19 Gratt. 478.
Wisconsin.— Oshoga *v.* State, 3 Pinn. 56, 3 Chandl. 57.
See 24 Cent Dig. tit. "Grand Jury," § 68.
Effect of irregularities on validity of indictments see Indictments and Informations.

41. Jackson *v.* State, 102 Ala. 167, 15 So. 344. See also Com. *v.* Colton, 11 Gray (Mass.) 1.

42. Hughes *v.* State, 54 Ind. 95; State *v.* Dillard, 35 La. Ann. 1049; State *v.* Davis, 14 La. Ann. 678. See also Indictments and Informations.

43. *Georgia.*— Holman *v.* State, 79 Ga. 155, 4 S. E. 8. See also Sims *v.* State, 51 Ga. 495.
Indiana.— Long *v.* State, 46 Ind. 582; Harper *v.* State, 42 Ind. 405; Ulmer *v.* State, 14 Ind. 52.
Iowa.— Sharp *v.* State, 2 Iowa 454.
Massachusetts.— See Com. *v.* Read, Thach. Cr. Cas. 180.
Minnesota.— State *v.* Peterson, 61 Minn. 73, 63 N. W. 171, 28 L. R. A. 324.
Missouri.— State *v.* Sweeney, 68 Mo. 96; State *v.* Barnes, 20 Mo. 413.
Pennsylvania.— See Com. *v.* Smith, 4 Pa. Super. Ct. 1.
See 24 Cent. Dig. tit "Grand Jury," § 68.

or special term,[44] and in some it has been held that the court, when it adjourns the regular term to a special adjourned one, may require the grand jury summoned for the regular term to appear at the adjourned term.[45]

E. Number of Grand Jurors — 1. Number to Be Summoned or Drawn. At common law the sheriff of the county was required to return to every session of the peace, and every commission of oyer and terminer, and of general jail delivery, twenty-four good and lawful men of the county;[46] but at present the number of grand jurors to be drawn or summoned is frequently regulated by statutory or constitutional provision.[47] Statutes of this character are generally regarded as directory; and if a sufficient number appear to constitute a grand jury a mistake in the number drawn or summoned is usually disregarded in considering the validity of indictments.[48]

2. Number Necessary to Organization and Transaction of Business — a. In General. At common law a grand jury must be composed of not less than twelve nor more than twenty-three "good and lawful men;"[49] but the number

Drawing grand jury by judge in vacation.— In Georgia it has been held that when an adjourned term of the superior court is about to convene, and no grand jury has been drawn for the same, and a grand jury is necessary, the judge may in vacation draw such grand jury, and cause the persons drawn to be summoned. The necessity for such drawing may arise from the final discharge of the grand jury serving at the regular term, and from the failure of the judge to draw another before adjourning over. Holman *v.* State, 79 Ga. 155, 4 S. E. 8. In order to legalize the drawing of a grand jury in vacation it is not essential that petit jurors should also be drawn at the same time. Holman *v.* State, 79 Ga. 155, 4 S. E. 8. The drawing, to be legal, is not obliged to take place ten days before the opening of the adjourned term. Holman *v.* State, 79 Ga. 155, 4 S. E. 8.

44. *Alabama.*— Bales *v.* State, 63 Ala. 30; Aaron *v.* State, 39 Ala. 684; Harrington *v.* State, 36 Ala. 236; Nugent *v.* State, 19 Ala. 540.

California.— People *v.* Carabin, 14 Cal. 438.

Illinois.— Gardner *v.* People, 4 Ill. 83.

Indiana.— Wilson *v.* State, 1 Blackf. 428.

Iowa.— State *v.* Reid, 20 Iowa 413; State *v.* Nash, 7 Iowa 347.

Missouri.— Mary *v.* State, 5 Mo. 71.

New York.— People *v.* McKane, 80 Hun 322, 30 N. Y. Suppl. 95.

South Carolina.— State *v.* Cardoza, 11 S. C. 195; State *v.* McEvoy, 9 S. C. 208.

Wisconsin.— Oshoga *v.* State, 3 Pinn. 56, 3 Chandl. 57.

Compare State *v.* Lew, 133 N. C. 664, 45 S. E. 511.

See 24 Cent. Dig. tit. "Grand Jury," § 68.

45. State *v.* Davis, 22 Minn. 423; State *v.* Pate, 67 Mo. 488, holding that the order of adjournment did not have the effect of discharging the grand jury.

46. People *v.* Hunter, 54 Cal. 65; Wilson *v.* People, 3 Colo. 325; Patrick *v.* State, 16 Nebr. 330, 20 N. W. 121 [*citing* 4 Blackstone Comm. 302].

47. *Arkansas.*— Anderson *v.* State, 5 Ark. 444.

Florida.— Keech *v.* State, 15 Fla. 591; Gladden *v.* State, 12 Fla. 562.

Georgia.— Turner *v.* State, 78 Ga. 174; Stevenson *v.* State, 69 Ga. 68.

Illinois.— Beasley *v.* People, 89 Ill. 571; Barron *v.* People, 73 Ill. 256.

Indiana.— Hudson *v.* State, 1 Blackf. 317.

Kansas.— State *v.* Copp, 34 Kan. 522, 9 Pac. 233.

Massachusetts.— Crimm *v.* Com., 119 Mass. 326; Com. *v.* Wood, 2 Cush. 145.

Mississippi.— Weeks *v.* State, 31 Miss. 490; Leathers *v.* State, 26 Miss. 73.

Nevada.— State *v.* Hartley, 22 Nev. 342, 40 Pac. 372, 28 L. R. A. 33.

North Carolina.— State *v.* Watson, 104 N. C. 735, 10 S. E. 705.

South Carolina.— State *v.* Powers, 59 S. C. 200, 37 S. E. 690.

Tennessee.— Barnes *v.* State, 5 Yerg. 186.

Utah.— Brannigan *v.* People, 3 Utah 488, 24 Pac. 767.

Vermont.— State *v.* Brainerd, 56 Vt. 532, 48 Am. Rep. 818.

See 24 Cent. Dig. tit. "Grand Jury," § 4.

48. Anderson *v.* State, 5 Ark. 444; Turner *v.* State, 78 Ga. 174; Stevenson *v.* State, 69 Ga. 68; State *v.* Watson, 104 N. C. 735, 10 S. E. 705. *Compare* Keech *v.* State, 15 Fla. 591; Gladden *v.* State, 12 Fla. 562; Leathers *v.* State, 26 Miss. 73. See also Indictments and Informations.

49. *Florida.*— English *v.* State, 31 Fla. 340, 12 So. 639.

Indiana.— Hudson *v.* State, 1 Blackf. 317.

Louisiana.— State *v.* Swift, 14 La. Ann. 827.

Maine.— State *v.* Symonds, 36 Me. 128.

Missouri.— State *v.* Green, 66 Mo. 631.

Nevada.— State *v.* Hartley, 22 Nev. 342, 4 Pac. 372, 28 L. R. A. 33.

New York.— People *v.* King, 2 Cai. 98.

North Carolina.— State *v.* Barker, 107 N. C. 913, 12 S. E. 115, 10 L. R. A. 50; State *v.* Davis, 24 N. C. 153.

South Carolina.— State *v.* Clayton, 11 Rich. 581.

Tennessee.— Pybos *v.* State, 3 Humphr. 49.

Utah.— People *v.* Green, 1 Utah 11.

England.— Rex *v.* Marsh, 6 A. & E. 236, 1 Jur. 38, 2 Harr. & W. 366, 6 L. J. M. C. 153, 1 N. & P. 187, 33 E. C. L. 143.

In Massachusetts the common-law rule is

of persons necessary to be impaneled and sworn and to be present for the legal transaction of business is now very generally regulated by statutory or constitutional provision,[50] either confirming or imposing various modifications on the common-law rule, the constitutional provisions being frequently held to be self-executing.[51]

b. Constitutionality of Statutes Fixing Number. The federal constitution imposes no limitation upon the right of a state to regulate the number of jurors to compose grand juries in her courts as the law-making power shall prescribe.[52] So under constitutional provisions in some states it has been held competent for the legislature, within the maximum and minimum limits prescribed by the common law, to increase or diminish the number of grand jurors without infringing the rights of the accused guaranteed by the constitution.[53]

declared to be that a grand jury may consist of not less than thirteen nor more than twenty-three persons. Crimm *v.* Com., 119 Mass. 326; Com. *v.* Wood, 2 Cush. 149.

50. *Alabama.*— Thompson *v.* State, 70 Ala. 26; Creamer *v.* State, 70 Ala. 18; Blevins *v.* State, 68 Ala. 92; Berry *v.* State, 63 Ala. 126; State *v.* Miller, 3 Ala. 343. See also Ramsey *v.* State, 113 Ala. 49, 21 So. 209.

Arkansas.— Harding *v.* State, 22 Ark. 210; State *v.* Hawkins, 10 Ark. 71; Anderson *v.* State, 5 Ark. 444.

California.— People *v.* Simmons, 119 Cal. 1, 50 Pac. 844; People *v.* Hunter, 54 Cal. 65; People *v.* Gatewood, 20 Cal. 146; People *v.* Butler, 8 Cal. 435; People *v.* Roberts, 6 Cal. 214; People *v.* Thurston, 5 Cal. 69.

Colorado.— Wilson *v.* People, 3 Colo. 325.

Florida.— English *v.* State, 31 Fla. 340, 12 So. 689; Donald *v.* State, 31 Fla. 255, 12 So. 695; Keech *v.* State, 15 Fla. 591; Gladden *v.* State, 12 Fla. 562.

Georgia.— Thurman *v.* State, 25 Ga. 220. See also Hamilton *v.* State, 97 Ga. 216, 23 S. E. 824.

Idaho.— People *v.* Waters, 1 Ida. 560.

Illinois.— Beasley *v.* People, 89 Ill. 571; Barron *v.* People, 73 Ill. 256.

Indiana.— Meiers *v.* State, 56 Ind. 336; State *v.* May, 50 Ind. 170; State *v.* Wingate, 4 Ind. 193.

Iowa.— State *v.* Belvel, 89 Iowa 405, 56 N. W. 845, 27 L. R. A. 846; State *v.* Billings, 77 Iowa 417, 42 N. W. 456; State *v.* Salts, 77 Iowa 193, 39 N. W. 167, 41 N. W. 620; State *v.* Standley, 76 Iowa 215, 40 N. W. 815; State *v.* Shelton, 64 Iowa 333, 20 N. W. 459; State *v.* Ostrander, 18 Iowa 435; Norris *v.* State, 3 Greene 513.

Kentucky.— Downs *v.* Com., 92 Ky. 605, 18 S. W. 526, 13 Ky. L. Rep. 820; Wells *v.* Com., 22 S. W. 552, 15 Ky. L. Rep. 179.

Louisiana.— State *v.* Swift, 14 La. Ann. 827.

Maryland.— State *v.* Vincent, 91 Md. 718, 47 Atl. 1036, 52 L. R. A. 83.

Massachusetts.— See Crimm *v.* Com., 119 Mass. 326; Com. *v.* Wood, 2 Cush. 149.

Michigan.— People *v.* Thompson, 122 Mich. 411, 81 N. W. 344; People *v.* Lauder, 82 Mich. 109, 46 N. W. 956.

Minnesota.— State *v.* Cooley, 72 Minn. 476, 75 N. W. 729, 71 Am. St. Rep. 502.

Mississippi.— Box *v.* State, 34 Miss. 614; Miller *v.* State, 33 Miss. 356, 69 Am. Dec. 351; Portis *v.* State, 23 Miss. 578; Johnston *v.* State, 7 Sm. & M. 58.

Montana.— State *v.* Ah Jim, 9 Mont. 167, 23 Pac. 76.

North Carolina.— State *v.* Perry, 122 N. C. 1018, 29 S. E. 384; State *v.* Barker, 107 N. C. 913, 12 S. E. 115, 10 L. R. A. 50; State *v.* Davis, 24 N. C. 153.

Ohio.— Doyle *v.* State, 17 Ohio 222; Turk *v.* State, 7 Ohio 240.

South Carolina.— State *v.* Powers, 59 S. C. 200, 37 S. E. 690.

Tennessee.— Pybos *v.* State, 3 Humphr. 49.

Texas.— Ogle *v.* State, 43 Tex. Cr. 219, 63 S. W. 1009, 96 Am. St. Rep. 860, 61 S. W. 122; *Ex p.* Reynolds, 35 Tex. Cr. 437, 34 S. W. 120, 60 Am. St. Rep. 54; Jackson *v.* State, 25 Tex. App. 314, 7 S. W. 872; Drake *v.* State, 25 Tex. App. 293, 7 S. W. 868; Harroll *v.* State, 22 Tex. App. 692, 3 S. W. 479; Watts *v.* State, 22 Tex. App. 572, 3 S. W. 769; Wells *v.* State, 21 Tex. App. 594, 2 S. W. 806; Lott *v.* State, 18 Tex. App. 627.

Utah.— Brannigan *v.* People, 3 Utah 488, 24 Pac. 767; People *v.* Green, 1 Utah 11.

Vermont.— State *v.* Brainard, 56 Vt. 532, 48 Am. Rep. 818.

Virginia.— Hausenfluck *v.* Com., 85 Va. 702, 8 S. E. 683.

Wisconsin.— State *v.* Fee, 19 Wis. 562; Fitzgerald *v.* State, 4 Wis. 395.

United States.— Reynolds *v.* U. S., 98 U. S. 145, 25 L. ed. 244 [*affirming* 1 Utah 226]; U. S. *v.* Belvin, 46 Fed. 381; U. S. *v.* Eagan, 30 Fed. 608; U. S. *v.* Wilson, 28 Fed. Cas. No. 16,737, 6 McLean 604.

See 24 Cent. Dig. tit. "Grand Jury," § 5.

Effect of irregularity on validity of indictments see INDICTMENTS AND INFORMATIONS.

51. Downs *v.* Com., 92 Ky. 605, 18 S. W. 526, 13 Ky. L. Rep. 820; Wells *v.* Com., 22 S. W. 552, 15 Ky. L. Rep. 179; Sanders *v.* Com., 18 S. W. 528, 13 Ky. L. Rep. 820; State *v.* Ah Jim, 9 Mont. 167, 23 Pac. 76. *Compare* State *v.* Standley, 76 Iowa 215, 40 N. W. 815.

52. Parker *v.* People, 13 Colo. 155, 21 Pac. 1120, 4 L. R. A. 803; Brannigan *v.* People, 3 Utah 488, 24 Pac. 767; Hausenfluck *v.* Com., 85 Va. 702, 8 S. E. 683. *Compare* People *v.* Green, 1 Utah 11. See also CONSTITUTIONAL LAW, 8 Cyc. 1090 note 2.

53. English *v.* State, 31 Fla. 340, 12 So.

F. Appointment of Foreman. Grand juries are usually provided with a foreman;[54] in some jurisdictions the court[55] and in other jurisdictions the grand jurors themselves being authorized to make the appointment.[56] It has been held, however, that where an indictment is indorsed a "true bill" and is returned by the authority of the entire grand jury, it is sufficient without the special appointment of a foreman.[57]

G. Oath. Grand juries are not complete and organized for business until sworn[58] in accordance with the form of oath required to be administered at the

689; Donald *v.* State, 31 Fla. 255, 12 So. 695; Brucker *v.* State, 16 Wis. 333, a statute providing that no more than seventeen nor less than fifteen persons shall be sworn upon any grand jury.

In Nevada it has been held that the grand jury as it exists at common law is contemplated by a state constitution providing that "no person shall be tried for a capital or other infamous crime, . . . except on presentment or indictment of a grand jury" and that a statute providing for a grand jury of ten men is void. State *v.* Hartley, 22 Nev. 342, 40 Pac. 372, 28 L. R. A. 33.

A valid clause relating to number of grand jurors is not invalidated by a void clause providing for an unconstitutional number for concurrence. English *v.* State, 31 Fla. 340, 12 So. 689; Donald *v.* State, 31 Fla. 255, 12 So. 695.

54. See People *v.* Roberts, 6 Cal. 214; Woodsides *v.* State, 2 How. (Miss.) 655; Byrd *v.* State, 1 How. (Miss.) 247; State *v.* Gouge, 12 Lea (Tenn.) 132.

When reappointment of foreman unnecessary.— In Ohio it is held that where, after a grand jury has been sworn, a member is discharged on account of sickness, and another person having the legal qualifications is sworn in his stead, under Rev. St. § 7202, providing that in the event of sickness, death, discharge, or non-attendance of a grand juror after the jury is sworn, the court in its discretion may cause a new juror to be sworn, and the person so sworn takes his place on the panel, the body so constituted is a legal grand jury, although a foreman be not again appointed, or the oath administered to him, or to the other members as a body. State *v.* Thomas, 61 Ohio St. 444, 56 N. E. 276, 48 L. R. A. 459.

Record evidence of appointment.— In Woodsides *v.* State, 2 How. (Miss.) 655, it was held that the administration of the oath required by statute to be taken by the foreman of the grand jury is in effect the appointment, and that a statement in the record that a person was sworn as foreman necessarily implies his appointment as such by the court. To the same effect see Bird *v.* State, 1 How. (Miss.) 247. In People *v.* Roberts, 6 Cal. 214, it was held that, although the better practice would require it, it is not usual in all cases to enter the appointment of the foreman upon the minutes of the court, and that if an indictment is indorsed by the foreman, returned to the proper court, properly filed and transmitted, the fact that the appointment of a foreman was not entered upon the minutes of the court is not material. See State *v.* Gouge, 12 Lea (Tenn.) 132. See also INDICTMENTS AND INFORMATIONS.

55. Blackmore *v.* State, (Ark. 1888) 8 S. W. 940; State *v.* Brandt, 41 Iowa 593; State *v.* Froiseth, 16 Minn. 313.

Ratification of appointment by grand jury. — In Blackmore *v.* State, (Ark. 1888) 8 S. W. 940, it was held that by permitting the grand jury to select its foreman and report its action to the court, and directing the member selected to be sworn as foreman, the court in effect appointed the foreman. See also Lung's Case, 1 Conn. 428.

Appointment from bystanders.— Under statute in Iowa it has been held that the court may appoint a talesman properly selected from the bystanders foreman of the grand jury. State *v.* Brandt, 41 Iowa 593.

56. Woodward *v.* State, 33 Fla. 508, 15 So. 252; Com. *v.* Sanborn, 116 Mass. 61.

57. Peter *v.* State, 3 How. (Miss.) 433; Frior *v.* State, 3 How. (Miss.) 422. See also INDICTMENTS AND INFORMATIONS.

58. *Alabama.*— Roe *v.* State, (1887) 2 So. 459.

Arkansas.— Brown *v.* State, 10 Ark. 607.

Georgia.— Ridling *v.* State, 56 Ga. 601.

Illinois.—Allen *v.* People, 77 Ill. 484.

Mississippi.— Foster *v.* State, 31 Miss. 421; Abram *v.* State, 25 Miss. 589.

New Jersey.— State *v.* Fox, 9 N. J. L. 244.

New York.— People *v.* Rose, 52 Hun 33, 4 N. Y. Suppl. 787.

Texas.— Pierce *v.* State, 12 Tex. 210; Russell *v.* State, 10 Tex. 288; West *v.* State, 6 Tex. App. 485.

See 24 Cent. Dig. tit. "Grand Jury," § 60.

Mode of administering oath.— In Brown *v.* State, 10 Ark. 607, 613, it is said: "The mode or order of administering it (the oath) is purely a matter of practice, and must of necessity be governed by circumstances. The practice in England was to administer the entire oath first to the foreman, in the presence of his fellows, and then to call three of the others at a time, until the panel was completed, and swear them to keep and observe the same oath that their foreman had taken. The usual practice in this country is believed to be, first to administer the entire oath to the foreman, in the presence of his fellows, and then to call four of them at a time and require them to keep and observe the same oath that he has taken." In People *v.* Rose, 52 Hun (N. Y.) 33, 4 N. Y. Suppl. 787, it was shown that the persons returned as grand jurors appeared and took their proper places, a foreman was chosen and sworn in the usual form, in the presence of the court

common law[59] or prescribed by statute,[60] and failure to swear a grand juror in accordance with law is held in some jurisdictions to affect the validity of the action of the grand jury.[61]

H. Charge — 1. In General. It is the duty of the court to charge and instruct the grand jury.[62] It is, however, generally held that where grand jurors have been duly sworn they are legally charged with the performance of their duties, and that formal instructions are not essential to the validity of their indictments.[63]

2. Character of Charge. While the statutes frequently define the character of the charge,[64] it may be stated as a general rule that the extent to which the grand jury shall be instructed by the court rests in the discretion of the presiding judge.[65] However, it is improper for the court in its charge to the grand

and his fellow jurors; immediately thereafter the deputy clerk intended to administer the usual oath to the other jurors and read over the same to them in their presence and hearing; no objection was made and the court did not interpose to require the oath to be more formally administered. It was held that the facts did not impeach the recital in the indictment that the oath was duly taken.

Who may administer oath.— In the absence of a statute designating the officer to administer the oath, any officer authorized to administer oaths generally may, with the direction of the court, lawfully administer the prescribed oath to the grand jury. Allen *v.* State, 77 Ill. 484. In Hord *v.* Com., 4 Leigh (Va.) 674, 26 Am. Dec. 340, it was held that a plea in abatement upon a presentment for gaming that the clerk *de facto* who administered the oath to the grand jury was not at the time clerk *de jure* was insufficient.

Affirmations.— Provision is made by statute in some jurisdictions for administering affirmations to persons conscientiously scrupulous of taking an oath. Com. *v.* Smith, 9 Mass. 107; State *v.* Fox, 9 N. J. L. 44; State *v.* Harris, 7 N. J. L. 361.

59. See Brown *v.* State, 10 Ark. 607; Com. *v.* Woodward, 157 Mass. 516, 32 N. E. 939, 34 Am. St. Rep. 302.

60. State *v.* Allen, 63 Kan. 598, 66 Pac. 628; State *v.* Furco, 51 La. Ann. 1082, 25 So. 951; Com. *v.* Woodward, 157 Mass. 516, 32 N. E. 939, 34 Am. St. Rep. 302.

Oath as to inquiry into offenses committed in unorganized county.— In Wau-kon-chauw-neek-kaw *v.* U. S., Morr. (Iowa) 332, it was held that where by statute the grand jurors of a county had cognizance of offenses committed in an unorganized county, it was not necessary that they should be especially sworn to inquire into those offenses.

61. State *v.* Furco, 51 La. Ann. 1082, 25 So. 951. See also People *v.* Rose, 52 Hun (N. Y.) 33, 4 N. Y. Suppl. 787; U. S. *v.* Gale, 109 U. S. 65, 3 S. Ct. 1, 27 L. ed. 857. *Compare* State *v.* Baker, 4 Humphr. (Tenn.) 12; West *v.* State, 6 Tex. App. 485, 493, where it is said that "the law has not conferred upon one accused of crime any right or authority to question the form of oath administered to the grand jury." See also Indictments and Informations.

Record evidence of swearing.— It has been held that it must appear affirmatively from the record that the grand jury which found and returned the bill of indictment were sworn, and that statements to this effect in the indictment will not be sufficient. Foster *v.* State, 31 Miss. 421; Abram *v.* State, 25 Miss. 589; Cody *v.* State, 3 How. (Miss.) 27. Where the record states that the grand jurors were duly sworn the presumption is that the legal oath was administered to them. Brown *v.* State, 10 Ark. 607; Pierce *v.* State, 12 Tex. 210; Russell *v.* State, 10 Tex. 288 [*distinguishing* Arthur *v.* State, 3 Tex. 403]. See also Indictments and Informations.

62. *Indiana.*— Stewart *v.* State, 24 Ind. 142.

Massachusetts.— Com. *v.* Sanborn, 116 Mass. 61.

Minnesota.— State *v.* Froiseth, 16 Minn. 313.

Virginia.— Porterfield *v.* Com., 91 Va. 801, 22 S. E. 352.

United States.— U. S. *v.* Kilpatrick, 16 Fed. 765.

See 24 Cent. Dig. tit. "Grand Jury," § 61.

63. Stewart *v.* State, 24 Ind. 142; Crimm *v.* Com., 119 Mass. 326; Com. *v.* Sanborn, 116 Mass. 61; Clifford *v.* State, 3 Tenn. Cas. 501; Porterfield *v.* Com., 91 Va. 801, 22 S. E. 352.

Charging new juror.— It has been held that where a grand juror is admitted after the grand jury has been fully organized, the omission to recharge the grand jury or to charge the new juror will not, in the absence of a statutory provision requiring it, amount to an irregularity which will vitiate the organization of the grand jury or invalidate an indictment returned by it. State *v.* Froiseth, 16 Minn. 313. *Compare In re* Wadlin, 11 Mass. 142. So in State *v.* Furco, 51 La. Ann. 1082, 25 So. 951, it was held that the judge need not deliver anew a full charge to the grand jury after each filling of a vacancy in the panel. See also State *v.* Thomas, 61 Ohio St. 444, 56 N. E. 276, 48 L. R. A. 458.

64. State *v.* Will, 97 Iowa 58, 65 N. W. 1010; State *v.* Froiseth, 16 Minn. 313.

65. Com. *v.* Sanborn, 116 Mass. 61; Clair *v.* State, 40 Nebr. 534, 59 N. W. 118, 28 L. R. A. 367; Patrick *v.* State, 16 Nebr. 330, 20 N. W. 121; People *v.* Glen, 173 N. Y. 395, 66 N. E. 112 [*affirming* 64 N. Y. App. Div. 167, 71 N. Y. Suppl. 893]; U. S. *v.* Watkins, 28 Fed. Cas. No. 16,649, 3 Cranch C. C. 441, holding that the court in its discretion may give or refuse to give an instruc-

jury to express an opinion as to the guilt or innocence of a person accused of crime to be investigated,[66] or to assume that indictable offenses have been committed concerning which it is the duty of the grand jury to inquire.[67]

I. Completion of Defective Panel. By statute in the different jurisdictions various provisions are made for summoning grand jurors selected either from the grand jury lists, from bystanders, from the body of the county or district, or in some other prescribed mode, for the purpose of completing defective panels where there has been a failure to summon or procure the attendance of a sufficient number,[68] or where jurors have been discharged or excused or the

tion to the grand jury when asked either by the accused or by the prosecutor.

Instruction as to admissibility of evidence. — In Anonymous, 9 Pick. (Mass.) 495, it was held that the court will not in advance instruct the grand jury at the instance of a party accused in regard to the nature of evidence proper to be received by it.

Record of charge directing investigation of misdemeanors.— In Oligschlager *v.* Territory, (Okla. 1905) 79 Pac. 913, it was held that in a prosecution for a misdemeanor where the indictment shows affirmatively on its face that the court had instructed the grand jury to investigate such act, but the clerk had failed to enter on the journals of the court the order directing such investigation, it is not error for the court at any time during the term at which the instruction was given to direct the clerk to enter such order on the record. On a trial by indictment charging a misdemeanor, where the record does not affirmatively show that the grand jury was directed to investigate such act, the failure of the record to show the order of the court for such investigation is a mere irregularity, not affecting the jurisdiction of the court, and is waived unless taken advantage of by motion or demurrer before plea. Oligschlager *v.* Territory, (Okla. 1905) 79 Pac. 913.

66. State *v.* Turlington, 102 Mo. 642, 15 S. W. 141. See also Fuller *v.* State, 85 Miss. 199, 37 So. 749; Blau *v.* State, 82 Miss. 514, 34 So. 153. *Compare* People *v.* Glen, 173 N. Y. 395, 66 N. E. 112 [*affirming* 64 N. Y. App. Div. 167, 71 N. Y. Suppl. 893].

67. State *v.* Will, 97 Iowa 58, 65 N. W. 1010; Cobb *v.* State, 40 Nebr. 545, 9 N. W. 122; Clair *v.* State, 40 Nebr. 534, 59 N. W. 118, 28 L. R. A. 367. *Compare* Parker *v.* Territory, 5 Ariz. 283, 52 Pac. 361 (holding that a charge to the grand jury, calling its attention to a recent jail breaking, and asking them to investigate the same and make an early report, contains nothing prejudicial to a defendant subsequently indicted for and convicted of killing a citizen in making the escape); People *v.* Glen, 173 N. Y. 395, 66 N. E. 112.

In Pennsylvania it is held that the criminal courts may call the attention of grand juries to, and direct their investigations of, matters of general public import, which, from their nature and operation in the entire community, justify such intervention (Com. *v.* Dietrich, 7 Pa. Super. Ct. 515; Matter of Citizens' Assoc., 8 Phila. 478; Matter of Grand Jury, 5 Pa. L. J. 55); and this, although the suggestion upon which the court acts comes to it from the grand jury (Com. *v.* Dietrich, *supra*).

68. *Alabama.*— Compton *v.* State, 117 Ala. 56, 23 So. 750; Boyd *v.* State, 98 Ala. 33, 13 So. 14; Kilgrow *v.* State, 76 Ala. 1; Benson *v.* State, 68 Ala. 513; Oliver *v.* State, 66 Ala. 8; Couch *v.* State, 63 Ala. 163; Yancy *v.* State, 63 Ala. 141; Cross *v.* State, 63 Ala. 40; Finley *v.* State, 61 Ala. 201; State *v.* Brooks, 9 Ala. 9.

Arkansas.— State *v.* Swim, 60 Ark. 587, 31 S. W. 456; Wallis *v.* State, 54 Ark. 611, 16 S. W. 821; Straughan *v.* State, 16 Ark. 37.

California.— Levy *v.* Wilson, 69 Cal. 105, 10 Pac. 272; People *v.* Manahan, 32 Cal. 68.

Florida.— Jenkins *v.* State, 35 Fla. 737, 18 So. 182, 48 Am. St. Rep. 267; Jones *v.* State, 18 Fla. 889; Dukes *v.* State, 14 Fla. 499.

Illinois.— Nealon *v.* People, 39 Ill. App. 481.

Indiana.— Burrell *v.* State, 129 Ind. 290, 28 N. E. 699; Dorman *v.* State, 56 Ind. 454.

Iowa.— State *v.* Miller, 53 Iowa 84, 154, 209, 4 N. W. 838, 900, 1083; State *v.* Pierce, 8 Iowa 231. See State *v.* Bowman, 73 Iowa 110, 34 N. W. 767.

Kansas.— State *v.* Copp, 34 Kan. 522, 9 Pac. 233; Montgomery *v.* State, 3 Kan. 263.

Maryland.— Mills *v.* State, 76 Md. 274, 25 Atl. 229.

Massachusetts.— Crimm *v.* Com., 119 Mass. 326.

Minnesota.— State *v.* McCartey, 17 Minn. 76.

Missouri.— State *v.* Jones, 61 Mo. 232.

Pennsylvania.— Brown *v.* Com., 76 Pa. St. 319; Com. *v.* Morton, 12 Phila. 595.

Tennessee.— Madden *v.* State, (1901) 67 S. W. 74.

Virginia.—Richardson *v.* Com., 76 Va. 1007.

Wisconsin.— Newman *v.* State, 14 Wis. 393.

United States.— U. S. *v.* Eagan, 30 Fed. 608.

See 24 Cent. Dig. tit. "Grand Jury," § 30 *et seq.*

Effect of irregularities in completing panel see INDICTMENTS AND INFORMATIONS.

Filling vacancies from list of persons summoned as petit jurors.— In Montgomery *v.* State, 3 Kan. 263, it was held that where a sufficient number of the grand jurors summoned failed to attend, it was improper to complete the panel by transferring persons served and returned as petit jurors. See also Burley *v.* State, 1 Nebr. 385.

Naming by court of persons to act as talesmen.— In State *v.* Copp, 34 Kan. 522, 9 Pac.

panel has otherwise been reduced below the number required by law.[69] When the power is given by statute to excuse a grand juror, authority to fill the vacancy thus occasioned with another juror possessing the requisite qualifications is also conferred by necessary implication.[70] Indeed the rule is that apart from any statutory provision whatever the court has the power to excuse or discharge a grand juror and substitute another qualified juror in his place, and this either before[71] or after the organization of the grand jury.[72] In the same way it has been held that in case of the non-attendance of a part of the regular venire, the court may at common law order the defective panel to be supplied from bystanders.[73]

233, it was held that the action of the court in giving to the sheriff the names of persons to act as talesmen and requesting him to summon such persons was irregular, as the court had no power thus to control the sheriff in the exercise of his discretion, yet, that in the absence of proof, it would not be assumed that the court acted from any wrong or improper motive, and therefore it could not be said that the irregularity amounted to corruption so as to affect the validity of indictments.

69. *Alabama.*— Hall *v.* State, 134 Ala. 90, 32 So. 750; Sanders *v.* State, 129 Ala. 69, 29 So. 841; Ramsey *v.* State, 113 Ala. 49, 21 So. 209; Boyd *v.* State, 98 Ala. 33, 13 So. 14; Abernathy *v.* State, 78 Ala. 411; Kilgoro *v.* State, 74 Ala. 1; Benson *v.* State, 68 Ala. 513; Couch *v.* State, 63 Ala. 163; Scott *v.* State, 63 Ala. 59; Finley *v.* State, 61 Ala. 201.

Arkansas.— Wallis *v.* State, 54 Ark. 611, 16 S. W. 821; Runnels *v.* State, 28 Ark. 121.

Florida.— Jenkins *v.* State, 35 Fla. 737, 18 So. 182, 48 Am. St. Rep. 267; Jones *v.* State, 18 Fla. 889; Dukes *v.* State, 14 Fla. 499.

Georgia.—Winter *v.* Muscogee R. Co., 11 Ga. 438.

Illinois.— Beasley *v.* People, 89 Ill. 571.

Indiana.— Dorman *v.* State, 56 Ind. 454.

Iowa.— State *v.* Smith, 88 Iowa 178, 55 N. W. 198; State *v.* Silvers, 82 Iowa 714, 47 N. W. 772; State *v.* Gurlagh, 76 Iowa 141, 40 N. W. 141; State *v.* Garhart, 35 Iowa 315; State *v.* Ostrander, 18 Iowa 435; State *v.* Mooney, 10 Iowa 506.

Kansas.— State *v.* Copp, 34 Kan. 522, 9 Pac. 233.

Kentucky.— McNamara *v.* Com., 51 S. W. 786, 21 Ky. L. Rep. 539, 52 S. W. 957, 21 Ky. L. Rep. 718.

Maryland.— Mills *v.* State, 76 Md. 274, 25 Atl. 229.

Massachusetts.— Crimm *v.* Com., 119 Mass. 326.

Minnesota.— State *v.* Russell, 69 Minn. 502, 72 N. W. 832.

Missouri.— State *v.* Wilson, 85 Mo. 134; State *v.* Jones, 61 Mo. 232.

Nebraska.— Preuit *v.* People, 5 Nebr. 377; Burley *v.* State, 1 Nebr. 385.

Ohio.— State *v.* Thomas, 61 Ohio St. 444, 56 N. E. 276, 48 L. R. A. 459; Julian *v.* State, 46 Ohio St. 511, 24 N. E. 595.

Pennsylvania.— Brown *v.* Com., 76 Pa. St. 319.

Rhode Island.— State *v.* Mellor, 13 R. I. 666.

Tennessee.— Jetton *v.* State, Meigs 192.

United States.— U. S. *v.* Belvin, 46 Fed. 381.

See 24 Cent. Dig. tit. "Grand Jury," § 30 *et seq.*

Effect of irregularities in completing panel see INDICTMENTS AND INFORMATIONS.

Necessity of prior order of discharge.— In Peters *v.* State, 98 Ala. 38, 13 So. 334, it was held that where a grand jury has been organized and entered upon the discharge of its duties, and by reason of sickness or other cause the body is reduced below the proper number, an order of court directing the drawing of additional grand jurors is illegal without a prior order discharging those absent from the original panel. To the same effect see Ramsey *v.* State, 113 Ala. 49, 21 So. 209. *Compare* Germolgez *v.* State, 99 Ala. 216, 13 So. 517, holding that it was not a valid objection to an indictment that the court supplied the places of jurors who failed to appear without first making an order discharging them.

Discharging or excusing grand jurors see *infra*, VIII.

70. Burrell *v.* State, 129 Ind. 290, 28 N. E. 699 (where a selection was made from the bystanders); Portis *v.* State, 23 Miss. 578. See also State *v.* Ward, 60 Vt. 142, 14 Atl. 187.

71. State *v.* Hunter, 43 La. Ann. 157, 8 So. 624; State *v.* Ward, 60 Vt. 142, 14 Atl. 187. See also U. S. *v.* Jones, 69 Fed. 973.

72. Denning *v.* State, 22 Ark. 131; State *v.* Reiz, 48 La. Ann. 1446, 21 So. 26; Com. *v.* Burton, 4 Leigh (Va.) 645, 26 Am. Dec. 337. See also State *v.* Jacobs, 6 Tex. 99. But see Portis *v.* State, 23 Miss. 578 (holding that a court, although invested with the common-law powers of courts of oyer and terminer, does not possess the discretionary right to discharge a grand juror after he has been impaneled and sworn and cause a substitute to be sworn in the place of the discharged grand juror); Rawls *v.* State, 8 Sm. & M. (Miss.) 599 (holding it to be incompetent for the court, in the absence of statute, to discharge members of the regular panel who are in attendance and to accept substitutes tendered by them).

73. Johnston *v.* State, 7 Sm. & M. (Miss.) 58; Dowling *v.* State, 5 Sm. & M. (Miss.) 664. *Compare* Brannigan *v.* People, 3 Utah 488, 24 Pac. 767.

J. Adding Jurors After Organization. In several jurisdictions it has been held proper for the court to increase the number of grand jurors within the prescribed limits or to allow a grand juror to join the grand jury, after it has been impaneled, sworn, and charged.[74]

K. Special or Emergency Grand Juries. Provision is made by statute in some jurisdictions for procuring a grand jury by order of court where there has been neglect on the part of the proper officer or board to perform their duty in selecting a grand jury or a failure or inability of the jurors to attend, or a failure otherwise to procure a jury in the manner prescribed by law.[75] And apart from any express statutory provision it has been held that this power may be exercised by a court invested by the constitution with original jurisdiction of criminal cases.[76] So provision is made by statute in various jurisdictions for procuring and impaneling special grand juries upon the discharge of the regular grand jury during the term,[77] the question in many jurisdictions being left to the discretion

In Maine it has been held that where by the constitution of the state the whole subject of selecting grand jurors is within the control of the legislature, the court cannot, in the absence of legislative authority, complete a defective panel occasioned by the failure of some of the jurors to appear by causing jurors to be returned *de talibus circumstantibus* through the issuance of a new venire or in any other manner. State *v.* Symonds, 36 Me. 128.

74. *In re* Wadlin, 11 Mass. 142; People *v.* Lauder, 82 Mich. 109, 46 N. W. 956 (holding that the court may in its discretion increase the number of grand jurors to any number not more than twenty-three if the exigencies of justice require it in the opinion of the court); Findley *v.* People, 1 Mich. 234; State *v.* Froiseth, 16 Minn. 313. See also State *v.* Fowler, 52 Iowa 103, 2 N. W. 983.

75. *Alabama.*— Pickens *v.* State, 115 Ala. 42, 22 So. 551; Daughdrill *v.* State, 113 Ala. 7, 21 So. 378; Hester *v.* State, 103 Ala. 83, 15 So. 857; Kemp *v.* State, 89 Ala. 52, 7 So. 413; O'Byrnes *v.* State, 51 Ala. 25.

Arizona.— Chartz *v.* Territory, (1893) 32 Pac. 166.

Arkansas.—Hudspeth *v.* State, 50 Ark. 534, 9 S. W. 1.

California.— Levy *v.* Wilson, 69 Cal. 105, 10 Pac. 272; People *v.* McDonell, 47 Cal. 134; People *v.* Kelly, 46 Cal. 355.

Colorado.— Mackey *v.* People, 2 Colo. 13.

Florida.— Ford *v.* State, 44 Fla. 421, 33 So. 301; Newton *v.* State, 21 Fla. 53.

Illinois.— Stone *v.* People, 3 Ill. 326.

Indiana.— Burrell *v.* State, 129 Ind. 290, 28 N. E. 699; Willey *v.* State, 52 Ind. 246; State *v.* Myers, 51 Ind. 145.

Iowa.— State *v.* Beste, 91 Iowa 565, 60 N. W. 112; State *v.* Miller, 53 Iowa 84, 154, 209, 4 N. W. 838, 900, 1083.

Michigan.— People *v.* Reigel, 120 Mich. 78, 78 N. W. 1017.

Mississippi.—Baker *v.* State, 23 Miss. 243; Dowling *v.* State, 5 Sm. & M. 664.

South Carolina.— State *v.* Toland, 36 S. C. 515, 15 S. E. 599.

Tennessee.— Madden *v.* State, (1901) 67 S. W. 74.

See 24 Cent. Dig. tit. "Grand Jury," § 27.

Effect of irregularities in securing special grand juries see INDICTMENTS AND INFORMATIONS.

76. Straughan *v.* State, 16 Ark. 37. See also Edmonds *v.* State, 34 Ark. 720.

77. *Alabama.*— Oakley *v.* State, 135 Ala. 15, 33 So. 23; Lide *v.* State, 133 Ala. 43, 31 So. 953; O'Byrnes *v.* State, 51 Ala. 25.

Arizona.— Chartz *v.* Territory, (1893) 32 Pac. 166.

Arkansas.— Freel *v.* State, 21 Ark. 212.

Florida.— Davis *v.* State, (1903) 35 So. 76; Ford *v.* State, 44 Fla. 421, 33 So. 301.

Illinois.— White *v.* People, 81 Ill. 333; Empson *v.* People, 78 Ill. 248; Stone *v.* People, 3 Ill. 326.

Minnesota.—State *v.* Grimes, 50 Minn. 123, 52 N. W. 275.

Missouri.— State *v.* Cunningham, 130 Mo. 507, 32 S. W. 970; State *v.* Overstreet, 128 Mo. 470, 31 S. W. 35; State *v.* Dusenberry, 112 Mo. 277, 20 S. W. 461; State *v.* Harris, 73 Mo. 287.

New York.— People *v.* Fitzpatrick, 30 Hun 493.

See 24 Cent. Dig. tit. "Grand Jury," § 26.

Effect of irregularities in procuring special grand jury see INDICTMENTS AND INFORMATIONS.

Presumption in favor of regularity of order for special grand jury.— In the absence of evidence to the contrary the presumption is in favor of the regularity of the order for a special grand jury. Freel *v.* State, 21 Ark. 212; White *v.* People, 81 Ill. 333 (holding that where the transcript shows merely that the regular grand jury has been discharged, the court will presume that it was properly discharged); State *v.* Overstreet, 128 Mo. 470, 31 S. W. 35 [*following* State *v.* Dusenberry, 112 Mo. 277, 20 S. W. 461] (holding that in the case of a court of general jurisdiction it will be presumed that the regular grand jury was discharged before the special grand jury was impaneled).

Substitute for grand jury illegally impaneled.— It has been held that if a grand jury has been illegally impaneled at the beginning of the term, it is competent for the court to discharge it at any time during the term, and impanel another, in accordance with law.

of the court to be determined from all the circumstances of the case.[78] So aside from statute the rule is generally laid down that it is competent for a court to summon and impanel a special grand jury whenever, after the discharge of the regular jury, it is deemed necessary for the administration of public justice.[79]

L. Recalling Dismissed Grand Jury. By statute in some jurisdictions when the grand jury is dismissed before the final adjournment of court, they may

Meiers *v.* State, 56 Ind. 336. See also Litton *v.* Com., 101 Va. 833, 44 S. E. 923; Yelm Jim *v.* Territory, 1 Wash. Terr. 63. *Compare* O'Byrnes *v.* State, 51 Ala. 25; Baker *v.* State, 23 Miss. 243.

Selection from bystanders.— Under statute in some jurisdictions after the discharge of an old jury a new jury may be selected from the bystanders. Empson *v.* People, 78 Ill. 248; McCarthy *v.* State, 5 Ohio Cir. Ct. 627; Yelm Jim *v.* Territory, 1 Wash. Terr. 163; Watts *v.* Territory, 1 Wash. Terr. 409. See also Drake *v.* State, 14 Nebr. 535, 17 N. W. 117. *Compare* Jones *v.* State, 18 Nebr. 401, 25 N. W. 527.

Disqualification of grand juror as ground for special grand jury.— The disqualification of certain members of a grand jury is no ground for the discharge of the entire jury and the summoning and impaneling of a new one, and this, although the withdrawal of the illegal jurors would reduce the panel below the number required by law. State *v.* Reiz, 48 La. Ann. 1446; State *v.* Jacobs, 6 Tex. 99. See also State *v.* Furco, 51 La. Ann. 1082, 25 So. 951. *Compare* Ford *v.* State, 44 Fla. 421, 33 So. 301. The judge, it is held, may dismiss the ineligible juror and supply his place from the names remaining on the grand jury list. State *v.* Furco, 51 La Ann. 1082, 25 So. 951. In People *v.* Manahan, 32 Cal. 68, it was held under statute that where certain members of the regular jury are incompetent to consider the case of a prisoner on account of bias or prejudice, it is proper to impanel a special grand jury to consider it, the other cases being passed upon by the regular grand jury. But under statute in New York it has been held that a grand jury cannot be discharged as to some of the persons held to answer and remain as to others, since otherwise there might be two grand juries in existence at the same time. People *v.* Fitzpatrick, 30 Hun (N. Y.) 493.

That a judge was disqualified from presiding at the trial of an indictment which was quashed has been held not to disqualify him from summoning a special grand jury which returned a new indictment charging the same offense. State *v.* Moore, 156 Mo. 135, 56 S. W. 900.

78. State *v.* Overstreet, 128 Mo. 470, 31 S. W. 35; Drake *v.* State, 14 Nebr. 535, 17 N. W. 117.

In Virginia under a statute a special grand jury may be ordered at any time by a county, corporation, or hustings court, or the judge thereof in vacation, the matter being within the discretion of the court. Litton *v.* Com., 101 Va. 833, 44 S. E. 923; Combs *v.* Com., 90 Va. 88, 17 S. E. 881; Snodgrass *v.* Com., 89 Va. 679, 17 S. E. 238; Robinson *v.* Com., 88 Va. 900, 14 S. E. 627; Robertson *v.* Com., (1894) 20 S. E. 362; Shinn *v.* Com., 32 Gratt. 899. And the issuance of a venire facias is unnecessary for this purpose. Combs *v.* Com., *supra*; Robinson *v.* Com., *supra*.

79. *Arizona.*— Chartz *v.* Territory, (1893) 32 Pac. 166.

Colorado.— Mackey *v.* People, 2 Colo. 12.

Illinois.— Stone *v.* People, 3 Ill. 326, 332, where it was said: "This (common law) practice was adopted so far as relates to the empanelling of a second grand jury, in the case of a commission of a new offence, after the discharge of the first grand jury, in the courts of our state, at the earliest period of its state organization; and has, it is believed, been practised on more or less since."

Michigan.— Findley *v.* People, 1 Mich. 234.

Virginia.— Com. *v.* Burton, 4 Leigh (Va.) 645, 26 Am. Dec. 337.

Compare Newman *v.* State, 43 Tex. 525, 528, where it is said: "We know of no authority, either on principle or practice, for issuing a venire to enable the sheriff to select a new grand jury after that for the term has been discharged."

Common-law rule stated.— "When the grand jury were duly returned, charged and sworn, they usually served the whole session or assizes. But the court might, in its discretion, command another grand jury to be returned and sworn, and usually do so on two occasions. The first of these occasions is when, before the end of the sessions, the grand jury having brought in all their bills, are discharged by the court, and after that discharge, either some new offence is committed and the party taken, and brought into jail; or when, after the discharge of the grand inquest, some offender is taken, and brought in before the conclusion of the session. (2 Hale 156; J. Williams on Juries 1.) And the other instance of a new grand jury being sworn, it is said, is, when it is to enquire, under the statute, of the concealment of a former inquest, which provision, though it expressly mentions justices of the peace, extends to the King's bench, and the session of Oyer and Terminer; and this was formerly the proper mode of punishing the grand jurors if they refused to present such things as were within their charge, and of which they had sufficient evidence; but this proceeding is no longer in use. (2 Hale 156; 1 Chitty 258.)" Stone *v.* People, 3 Ill. 326, 332.

Issuance of venire prior to discharge of grand jury.— In State *v.* Jacobs, 6 Tex. 99, it was held that the issuance of a venire facias for a second grand jury, while the first grand jury was recognized as the legal grand jury

be summoned to reassemble at the same term if necessary.[80] Indeed this power has been held to be inherent in courts of general original jurisdiction in criminal matters.[81]

M. Collateral Attack of Organization. The general rule is that the validity of the organization of a grand jury, whether *de facto* or *de jure*, or of its acts, cannot be called in question in collateral proceedings between third persons.[82]

N. Curing Defective Organization. It has been held to be within the constitutional authority of a legislature to enact that citizens of a class qualified by the general laws to serve as grand jurors and who are in attendance upon the court as such, although irregularly drawn, summoned, returned, and impaneled, shall constitute the grand jury of the county for the residue of the usual period of service; such legislation not being *ex post facto* in so far as it applies to indictments found after the passage of the statute.[83]

VII. CHALLENGES.

A. Challege to Panel or Array[84] — **1. In General.** In many jurisdictions a right of challenge to the array or panel for various causes is recognized either at common law or by statute.[85] But in other jurisdictions the practice of challenging the array has never prevailed,[86] and in many jurisdictions statutes have either abolished the right of challenge to the array altogether or restricted the grounds of challenge within very narrow limits.[87] In the absence of any federal

and before any proceedings had been taken to set it aside, was illegal.

80. Long *v.* State, 46 Ind. 582; Ulmer *v.* State, 14 Ind. 52; State *v.* Phillips, 119 Iowa 562, 94 N. W. 229, 67 L. R. A. 292, (Iowa 1902) 89 N. W. 1092; Findley *v.* People, 1 Mich. 234; Newman *v.* State, 43 Tex. 525; Wilson *v.* State, 32 Tex. 112; Gay *v.* State, 40 Tex. Cr. 242, 49 S. W. 612 (holding that under Code Cr. Proc. (1895) art. 411, authorizing the reassembling of a grand jury after its discharge for the term and the completion of the panel by impaneling other persons, in case any of the members fail to reassemble, does not require the reimpaneling and reswearing of a grand jury on its reassembling after adjournment without day, where the members are the same as when it first convened); Trevinio *v.* State, 27 Tex. App. 372, 11 S. W. 447.

Completion of defective reassembled panel. — Under Tex. Code Cr. Proc. art. 411, providing that when the grand jury has been discharged it may be reassembled at any time during the term, and, in case of failure of one or more members to reassemble the court may complete the panel by impaneling other qualified persons in their stead, in accordance with the rules prescribed for completing the grand jury in the first instance, it has been held that where all the grand jurors reassemble, and but one of them is disqualified, the court can discharge him and complete the panel. Matthews *v.* State, 42 Tex. Cr. 31, 58 S. W. 86.

Recalling grand jury of preceding term upon discharge of new jury see State *v.* McEvoy, 9 S. C. 208.

81. State *v.* Reid, 20 Iowa 413. See also Reg. *v.* Holloway, 9 C. & P. 43, 38 E. C. L. 38, where the grand jury, although it had left the court, had not separated.

82. Plymouth *v.* Painter, 17 Conn. 585, 44 Am. Dec. 574; State *v.* Noyes, 87 Wis. 340, 58 N. W. 386, 41 Am. St. Rep. 45, 27 L. R. A. 776, holding that where the legal grand jury for a certain term continues into another term, and during such term is recognized by the court, it is a grand jury *de facto*, and indictments found by it during such terms are good as against collateral proceedings, such as a writ of habas corpus sued out by defendant under indictment.

Habeas corpus by witness held for contempt. — Under this rule it has been held that the validity of a *de facto* grand jury cannot be drawn in question in habeas corpus proceedings by a person held in custody for refusing to testify before the grand jury. *Ex p.* Haymond, 91 Cal. 545, 27 Pac. 859; *In re* Gannon, 69 Cal. 541, 11 Pac. 240; Kelly *v.* Wilson, (Cal. 1886) 11 Pac. 244.

Effect of irregularity in grand jury in action against sureties for bail see BAIL, 5 Cyc. 105 note 61.

83. Com. *v.* Brown, 121 Mass. 69.

84. **A challenge to the array is defined as follows:** "An exception to the panel in which the jury are arrayed and set in order by the sheriff in his return." People *v.* McKay, 18 Johns. (N. Y.) 212, 218. "A formal objection to the entire panel for some illegality in the drawing, summoning, or impaneling of it." People *v.* Second Judicial Dist. Ct., 29 Colo. 83, 85, 63 Pac. 1068.

85. See *infra*, VII, A, 2, 3.

Failure to challenge grand jury as not justifying forfeiture of bail see BAIL, 5 Cyc. 125 note 14.

86. State *v.* Martin, 82 N. C. 672; State *v.* Griffice, 74 N. C. 316. See also State *v.* Ward, 60 Vt. 142, 14 Atl. 187.

87. *California.* — People *v.* Southwell, 46 Cal. 141.

statute regulating challenges to grand jurors, the rule has been laid down that it is proper for a federal court to follow the practice of the state court in which it is held with reference to the mode of making objections.[88]

2. Selection and Drawing. In some jurisdictions objections on the ground of irregularities in the selection or drawing of grand juries may be made by way of challenge to the array.[89] By statute in other jurisdictions, however, the right of challenge to the array is restricted to specified irregularities in selecting or drawing grand jurors,[90] and in still other jurisdictions under statutes either limiting the grounds of challenge to the array or abolishing the right altogether, no challenge to the array on the ground of irregularities in the selection and drawing of grand juries is allowed.[91]

Michigan.— People *v.* Morgan, 133 Mich. 550, 95 N. W. 542; People *v.* Thompson, 122 Mich. 411, 81 N. W. 344; People *v.* Reigel, (1899) 78 N. W. 1017; People *v.* Smith, 118 Mich. 73, 76 N. W. 124; People *v.* Lauder, 82 Mich. 109, 46 N. W. 956.

Minnesota.— State *v.* Gut, 13 Minn. 341.

Missouri.— State *v.* Reed, 162 Mo. 312, 62 S. W. 982; State *v.* Holcomb, 86 Mo. 371; State *v.* Connell, 49 Mo. 282; State *v.* Welch, 33 Mo. 33; State *v.* Bleekley, 18 Mo. 428.

Nevada.— State *v.* Collyer, 17 Nev. 275, 30 Pac. 891.

New York.— Carpenter *v.* People, 64 N. Y. 483; People *v.* Fitzpatrick, 30 Hun 493.

Texas.— Hart *v.* State, 15 Tex. App. 202, 49 Am. Rep. 188; Green *v.* State, 1 Tex. App. 82.

United States.— U. S. *v.* Reed, 27 Fed. Cas. No. 16,134, 2 Blatchf. 435, decided under statute in New York. See also U. S. *v.* Eagan, 30 Fed. 608.

See 24 Cent. Dig. tit. "Grand Jury," § 42 *et seq.*

Courts have no power to originate a new and distinct ground of challenge. People *v.* Southwell, 46 Cal. 141; State *v.* Bleekley, 18 Mo. 428; Green *v.* State, 1 Tex. App. 82.

The constitutional right of the legislature to restrict the grounds of challenge has been sustained by the courts. People *v.* Southwell, 46 Cal. 141.

Substitute for challenge to array.— In New York under statute, although no challenge to the panel or array is allowed, the court may, in its discretion, at any time discharge the panel and order another to be summoned, for specified causes. People *v.* Borgstrom, 178 N. Y. 254, 70 N. E. 780.

88. U. S. *v.* Clune, 62 Fed. 798; U. S. *v.* Eagan, 30 Fed. 608. See also U. S. *v.* Williams, 28 Fed. Cas. No. 16,716, 1 Dill. 435.

Remedy where right of challenge is abolished.— But although the challenge to the array is wholly abolished by a state statute and the federal courts sitting in that state adopt this rule of law, it by no means follows that the accused has no remedy in a case where there has been any improper conduct on the part of the public officers employed in designating, summoning, and returning the grand jury. If there has been any improper conduct on the part of these officers in performing that service, or if any fraud has been committed through their instrumentality in the drawing, summoning, or organization of the grand jury, the accused who may be prejudiced thereby has his remedy by motion to the court for relief in consequence of such irregularity or fraud. These objections, however, to the proceedings in the selection and summoning of grand jurors over and beyond the right of challenge, are presented to the court for the exercise of its sound discretion, and, although there may be technical objections to the proceedings in point of strict regularity, yet unless the court is satisfied that they have resulted or may result to the prejudice of the party accused it will not set them aside. U. S. *v.* Reed, 27 Fed. Cas. No. 16,134, 2 Blatchf. 435.

89. *Indiana.*— Miller *v.* State, 69 Ind. 284.

Iowa.— State *v.* Howard, 10 Iowa 101. See also State *v.* Hart, 29 Iowa 268.

Mississippi.— Purvis *v.* State, 71 Miss. 706, 14 So. 268. See also Dixon *v.* State, 74 Miss. 271, 20 So. 839.

New Jersey.— Gibbs *v.* State, 45 N. J. L. 379, 46 Am. Rep. 782.

Oklahoma.— Stanley *v.* U. S., 1 Okla. 336, 33 Pac. 1025.

Pennsylvania.— Brown *v.* Com., 73 Pa. St. 321, 13 Am. Rep. 740, where the challenge to the array of the grand jury drawn from a jury wheel not secured and sealed according to law was sustained.

United States.— U. S. *v.* Richardson, 28 Fed. 61; U. S. *v.* Rondeau, 16 Fed. 109, 4 Woods 185.

See 24 Cent. Dig. tit. "Grand Jury," § 42 *et seq.*

90. *Alabama.*— *Ex p.* McCoy, 64 Ala. 201.

California.— People *v.* Southwell, 46 Cal. 141.

Minnesota.— State *v.* Russell, 69 Minn. 502, 72 N. W. 832; State *v.* Greenman, 23 Minn. 209.

Nevada.— State *v.* Collyer, 17 Nev. 275, 30 Pac. 891.

Texas.— Vanhook *v.* State, 12 Tex. 252; Hart *v.* State, 15 Tex. App. 202, 49 Am. Rep. 188; Smith *v.* State, 1 Tex. App. 133; Green *v.* State, 1 Tex. App. 82; Reed *v.* State, 1 Tex. App. 1.

See 24 Cent. Dig. tit. "Grand Jury," § 42 *et seq.*

91. State *v.* Reed, 162 Mo. 312, 62 S. W. 982; State *v.* Welch, 33 Mo. 33; State *v.* Bleekley, 18 Mo. 428; People *v.* Hooghkerk, 96 N. Y. 149 (holding that the fact that a grand jury was drawn under an unconstitutional statute was not a ground of challenge

3. Summoning. The challenge to the array, at common law, or according to the English understanding and definition of that term, is founded on the allegation that the sheriff who summoned the grand jury was an improper and unfit person to discharge that duty, as by reason of his being related to one of the parties — his relationship to the prisoner being a ground of challenge on the part of the king — and it being a ground of challenge by the accused that the sheriff is his enemy, or that the relations between them are such that, in view of a proper administration of justice, the sheriff is not a proper person to summon the grand jurors who are to be the triers of the accused.[92] By statute in some jurisdictions irregularities in summoning a grand jury are made a ground of challenge to the array.[93] But under statute in other jurisdictions the grounds of challenge on account of irregularities in summoning grand juries are either specifically restricted[94] or are denied altogether.[95]

4. Objection to Part of Panel. An objection to one grand juror or to a portion only of a panel will not be a ground of challenge to the array.[96]

5. Challenge to Polls as Waiver of Challenge to Array. The rule has been announced at common law that a challenge to the polls is a waiver of a challenge to the array.[97]

B. Challenge to Polls[98] — 1. In General. A grand juror may at common law be challenged for cause.[99] Provision is also made by statute in some juris-

to the array); Carpenter *v.* People, 64 N. Y. 483; People *v.* Petrea, 30 Hun (N. Y.) 98; State *v.* Fitzhugh, 2 Oreg. 227. See also U. S. *v.* Eagan, 30 Fed. 608.

92. U. S. *v.* Read, 27 Fed. Cas. No. 16,134, 2 Blatchf. 435. See also Challenge to Grand Jury, 3 N. J. L. J. 153; People *v.* McKay, 18 Johns. (N. Y.) 212.

Jury summoned by son of prosecuting attorney.— In State *v.* Cameron, 2 Pinn. (Wis.) 490, 2 Chandl. 172, it was held that the fact that the sheriff who summoned the grand jury was the son of the prosecuting attorney did not constitute an irregularity which would justify a challenge.

Want of venire facias.— In U. S. *v.* Reed, 27 Fed. Cas. No. 16,134, 2 Blatchf. 435, it was intimated that at common law, if a grand jury has been summoned and returned by a person who is not authorized by the issuance of a venire to originate, summon, and return a panel, the panel is objectionable under a challenge to the array or panel. *Compare* People *v.* McKay, 18 Johns. (N. Y.) 212.

93. State *v.* Howard, 10 Iowa 101; Dixon *v.* State, 3 Iowa 416. See also Gibbs *v.* State, 45 N. J. L. 379, 46 Am. Rep. 782.

94. Green *v.* State, 1 Tex. App. 82.

95. *Minnesota.*— State *v.* Gut, 13 Minn. 341.

Missouri.— State *v.* Welch, 33 Mo. 33.

New York.— People *v.* Hooghkerk, 96 N. Y. 149, holding that the fact that a grand jury was summoned under an unconstitutional statute was not ground of challenge to the array.

Oregon.— State *v.* Fitzhugh, 2 Oreg. 227.

United States.— U. S. *v.* Reed, 27 Fed. Cas. No. 16,134, 2 Blatchf. 435, holding that under statute in New York abolishing the right of challenge to the array, the absence of a venire for summoning a grand jury is not a ground of challenge.

See 24 Cent. Dig. tit. "Grand Jury," § 42 *et seq.*

96. People *v.* Simmons, 119 Cal. 1, 50 Pac. 844; Vanhook *v.* State, 12 Tex. 252; U. S. *v.* Richardson, 28 Fed. 61; U. S. *v.* Rondeau, 16 Fed. 109, 4 Woods 185.

97. People *v.* McKay, 18 Johns. (N. Y.) 212.

Under statute in Texas objection by way of challenge to the array must be made before the jurors have been interrogated as to their qualifications. Grant *v.* State, 2 Tex. App. 163; Smith *v.* State, 1 Tex. App. 133; Green *v.* State, 1 Tex. App. 82; Reed *v.* State, 1 Tex. App. 1.

98. A challenge to the poll is defined as: "A formal objection to one or more of the individual members for some disqualification designated by statute." People *v.* Second Judicial Dist. Ct., 29 Colo. 83, 85, 66 Pac. 1068.

99. *Colorado.*— People *v.* Second Judicial Dist. Ct., 29 Colo. 83, 66 Pac. 1068.

Connecticut.— State *v.* Hamlin, 47 Conn. 95, 36 Am. Dec. 54.

Illinois.— Musick *v.* People, 40 Ill. 268.

Indiana.— Mershom *v.* State, 51 Ind. 14; Hardin *v.* State, 22 Ind. 347; State *v.* Herndon, 5 Blackf. 75; Jones *v.* State, 2 Blackf. 475; Hudson *v.* State, 1 Blackf. 317.

Nebraska.— Patrick *v.* State, 16 Nebr. 330, 20 N. W. 121.

New York.— People *v.* Jewett, 3 Wend. 314.

Pennsylvania.— Rolland *v.* Com., 82 Pa. St. 306, 22 Am. Rep. 758.

Texas.— See Vanhook *v.* State, 12 Tex. 252.

United States.— U. S. *v.* Richardson, 28 Fed. 61; U. S. *v.* Williams, 28 Fed. Cas. No. 16,716, 1 Dill. 485.

See 24 Cent. Dig. tit. "Grand Jury," § 48 *et seq.*

In North Carolina this practice has never obtained. State *v.* Griffice, 74 N. C. 316.

dictions for challenges to individual grand jurors;[1] and where the grounds of challenge are fixed by statute, it is held that no other grounds may be recognized by the court.[2]

2. PEREMPTORY CHALLENGE. In the absence of express statutory provision permitting it a grand juror cannot be challenged peremptorily and without cause.[3]

C. Time of Making Challenge. The general rule, both under and apart from statute, is that an objection by way of challenge to be availing must be made before the grand jurors are impaneled and sworn.[4]

In the federal courts the practice with regard to challenges to the polls prevailing in the states in which the federal courts are sitting is followed. U. S. *v.* Benson, 31 Fed. 896, 12 Sawy. 477; U. S. *v.* Reed, 27 Fed. Cas. No. 16,134, 2 Blatchf. 435.

Traverse of challenge.— Where a grand juror was challenged by an accused person, and the district attorney waived the right to traverse it, and the court ordered the juror not to be present at any consideration of the charges against accused; but, it afterward appearing that he had inadvertently been present for a few minutes, the district attorney was allowed to call the grand jury into court, and then traverse the challenge and show it to be groundless, it was held that it was within the discretion of the court to allow the district attorney to traverse the challenge after he had originally waived it. State *v.* Cohn, 9 Nev. 179.

Specific grounds of challenge see *supra*, IV, O, 2, note 56 *et seq.*; IV, O, 4, note 67.

1. *Florida.*— Peeples *v.* State, (1903) 35 So. 223.

Missouri.— State *v.* Holcomb, 86 Mo. 271.

Montana.— Territory *v.* Hart, 7 Mont. 42, 14 Pac. 768.

New Jersey.— State *v.* Hoffman, 71 N. J. L. 285, 58 Atl. 1012.

Wisconsin.— State *v.* Cameron, 2 Pinn. 490, 2 Chandl. 172.

See 24 Cent. Dig. tit. "Grand Jury," § 48 *et seq.*

In Oregon a statute imposes upon the court the duty of ascertaining the qualification of grand jurors before accepting them, and prohibits all persons from challenging any individual grand juror (State *v.* Carlson, 39 Oreg. 19, 62 Pac. 1016, 1119) and such statute has been held constitutional (State *v.* Carlson, *supra*).

2. *Florida.*— Peeples *v.* State, (1903) 35 So. 223.

Michigan.— People *v.* Smith, 118 Mich. 73, 76 N. W. 124.

Missouri.— State *v.* Holcomb, 86 Mo. 371.

Montana.— Territory *v.* Hart, 7 Mont. 42, 14 Pac. 768.

Wisconsin.— State *v.* Cameron, 2 Pinn. 490, 2 Chandl. 172.

United States.— Jackson *v.* U. S., 102 Fed. 473, 42 C. C. A. 452, holding that the impaneling of a grand jury in Alaska is governed by the statutes of Oregon, extended by act of congress to that territory; and that under such statutes, which provide that no challenge shall be allowed to an individual juror except for some of the grounds of disqualification enumerated, it was not error to refuse to discharge a grand juror from the panel on a challenge for actual bias made by an accused person, whose case would come before such jury, but the rights of the accused were sufficiently protected by a direction to such juror not to take part in or vote upon that particular case.

3. Jones *v.* State, 2 Blackf. (Ind.) 475; State *v.* Felter, 25 Iowa 67. See also State *v.* Fowler, 52 Iowa 103, 2 N. W. 983.

4. *California.*— People *v.* Phelan, 123 Cal. 551, 56 Pac. 424; People *v.* Geiger, 49 Cal. 643; People *v.* Romero, 18 Cal. 89; People *v.* Arnold, 15 Cal. 476; People *v.* Moice, 15 Cal. 329.

Connecticut.— State *v.* Hamlin, 47 Conn. 95, 36 Am. Rep. 54.

Florida.— Tarrance *v.* State, 43 Fla. 446, 30 So. 685; Gladden *v.* State, 13 Fla. 623.

Illinois.— Musick *v.* People, 40 Ill. 268.

Indiana.— Bellair *v.* State, 6 Blackf. 104.

Iowa.— State *v.* Pierce, 90 Iowa 506, 58 N. W. 891; State *v.* Gibbs, 39 Iowa 318; State *v.* Hart, 29 Iowa 268; State *v.* Ingalls, 17 Iowa 8; State *v.* Howard, 10 Iowa 101 (holding that an objection to an irregularity in suffering a juror excused by the court to substitute another person in his place on the panel to be available should have been made at the time the juror whose place the grand juror was called to fill was excused by the court and the juror objected to was allowed by the court to take his place upon the jury); State *v.* Hinkle, 6 Iowa 380. *Compare* State *v.* Osborne, 61 Iowa 330, 16 N. W. 201.

Mississippi.— Dixon *v.* State, 74 Miss. 271, 20 So. 839. See also Logan *v.* State, 50 Miss. 269.

Missouri.— State *v.* Welch, 33 Mo. 33.

Nebraska.— Patrick *v.* State, 16 Nebr. 330, 20 N. W. 121.

New Jersey.— State *v.* Hoffman, 71 N. J. L. 285, 58 Atl. 1012.

New York.— People *v.* Jewett, 3 Wend. 314.

Pennsylvania.— Com. *v.* Clark, 2 Browne 323.

Texas.— Carter *v.* State, 39 Tex. 345, 46 S. W. 236, 48 S. W. 508; Barber *v.* State, (Cr. App. 1898) 46 S. W. 233; Hart *v.* State, 15 Tex. App. 202, 49 Am. Rep. 188; Kemp *v.* State, 11 Tex. App. 174; Thomason *v.* State, 2 Tex. App. 550.

United States.— U. S. *v.* Butler, 25 Fed. Cas. No. 14,700, 1 Hughes 457. See also U. S. *v.* Palmer, 27 Fed. Cas. No. 15,987. *Compare* U. S. *v.* Blodgett, 30 Fed. Cas. No. 18,312, 35 Ga. 336, holding, apart from express statutory authority, that when there is

D. Persons Entitled to Challenge. At common law any person under prosecution for crime may, before he is indicted, for good cause challenge the array or any person returned or placed upon the grand jury,[5] and statutory provisions exist in many jurisdictions to the same or similar effect.[6] Moreover the rule has been laid down that apart from statute the right of challenge either to the array or to the polls is properly confined to those who are under prosecution for a crime of which the grand jury is about to take cognizance.[7] On the other hand it has been held that it is not essential to this right that the challenger should be in prison or out on bail; but that it may be exercised by one who, although still at large, has been warned by the prosecuting attorney that he will

a reasonable excuse for delay challenges to members of the grand jury may be made after the body has been duly organized.

Allowing challenges after retirement of grand jury.— Under statute in some jurisdictions the challenge to a panel or to an individual member may be made before the jury retire and after they have been sworn and charged by the court. People *v.* Wintermuts, 1 Dak. 63, 46 N. W. 694 (holding that a judgment will be arrested for a refusal to entertain a challenge after the grand jury was sworn, although no excuse for the delay in making the challenge was given); Maher *v.* State, 3 Minn. 444.

Objection after discharge of grand jury.— In Com. *v.* Salter, 2 Pearson (Pa.) 461, it was held that a venire commanding the sheriff and jury commissioners to draw a grand jury to try issues from the wheel containing the names of the grand jurors is irregular, but that a motion to quash the venire must be made while the grand jury is arrayed and cannot be made after the jury is dispersed. See also Com. *v.* Shew, 8 Pa. Dist. 484. So in People *v.* Travers, 88 Cal. 233, 26 Pac. 88 [*criticizing* People *v.* Beatty, 14 Cal. 566], it was held that after a grand jury has completed its work and been discharged the conditions which make a challenge to a juror possible no longer exist.

In Louisiana objections to the array are to be made by a motion to set aside the venire on the first day of the term. State *v.* Robertson, 50 La. Ann. 1101, 24 So. 138; State *v.* Brittin, 50 La. Ann. 261, 23 So. 301; State *v.* Collins, 48 La. Ann. 1454, 21 So. 86.

5. *Indiana.*— Mershon *v.* State, 51 Ind. 14; Jones *v.* State, 2 Blackf. 475.

Massachusetts.— Com. *v.* Smith, 9 Mass. 107.

Michigan.— Thayer *v.* People, 2 Dougl. 417 [*citing* 1 Chitty Cr. L. 307; Hawkins P. C. b. 2, c. 25, § 16], where it was said: "At common law, if a person who was returned as a grand juror was disqualified, or was not returned by a proper officer, he might be challenged by any person under prosecution, before the bill was presented."

New York.— People *v.* Jewett, 3 Wend. 314, 321, where it is said: "There are causes of challenge to grand jurors, and these may be urged by those accused, whether in prison or out on recognizance."

Pennsylvania.— Com. *v.* Clark, 2 Browne 323.

See 24 Cent. Dig. tit. "Grand Jury," § 50.

Rule applied to counsel of accused.— Ross *v.* State, 1 Blackf. (Ind.) 390; Thayer *v.* People, 2 Dougl. (Mich.) 417.

6. *California.*— People *v.* Romero, 18 Cal. 89.

Iowa.— Keitler *v.* State, 4 Greene 291, a statute giving the right of challenge to a "defendant held to answer for a public offense."

Minnesota.— State *v.* Davis, 22 Minn. 423 (holding that the right to challenge a grand jury or any member thereof is by statute reserved only to "persons held to answer a charge for a public offence," and is not available to one arrested upon a warrant after indictment found); Maher *v.* State, 3 Minn. 444.

Montana.— Territory *v.* Hart, 7 Mont. 42, 14 Pac. 768; Territory *v.* Ingersoll, 3 Mont. 454.

Wisconsin.—State *v.* Cameron, 2 Pinn. 490, 2 Chandl. 172.

United States.— U. S. *v.* Reed, 27 Fed. Cas. No. 16,134, 2 Blatchf. 435, decided under a New York statute providing for challenges by persons who have been arrested and held to bail to appear.

See 24 Cent. Dig. tit. "Grand Jury," § 50.

In Texas, by statute, "any person, before the grand jury has been impaneled, may challenge the array of jurors or any person presented as a grand juror." Kemp *v.* State, 11 Tex. App. 174, 198; Reed *v.* State, 1 Tex. App. 1.

7. Ross *v.* State, 1 Blackf. (Ind.) 390 (challenge made by an attorney, who did not appear to have been acting at the prisoner's instance, or with his knowledge or consent); Hudson *v.* State, 1 Blackf. (Ind.) 317 (holding that the fact that a person had been indicted and was in the custody of the sheriff upon that indictment, and that the jury were about to investigate his conduct relative to a murder lately committed, is no evidence that he was at the time under a prosecution for a crime of which the grand jury were about to take cognizance, and hence that his counsel had no right by law to make a challenge); State *v.* Felter, 25 Iowa 67; Thayer *v.* People, 2 Dougl. (Mich.) 417 (where, although the person claiming the right of challenge was subsequently indicted by the grand jury then impaneled, he made no showing to the court that he was then under prosecution and that his case was about to be brought before that grand jury). See also Challenge to Grand Jury, 2 N. J. L. J. 153.

be prosecuted before the particular grand jury to whom objection is made.[8] And the rule has been announced that any person present, although wholly disinterested, may make the suggestion as *amicus curiæ*.[9] The right of challenge is conferred by statute in some jurisdictions upon the prosecuting attorney.[10]

E. Evidence and Burden of Proof. The fact which is to constitute the ground for challenge must as a general rule be established in the manner in which other facts are proved,[11] either by the examination of the grand jurors themselves[12] or by other competent evidence.[13] The burden is upon the challenging party to establish his cause of challenge.[14]

F. Effect of Denial of Right of Challenge. The right to be present at the impaneling of the grand jury and to make a challenge either to the polls or to the array is held to be a substantial right, the denial of which by the court renders the grand jury incompetent to sit on the case, and is a ground for invalidating the indictment,[15] and it has been held immaterial that the challenge of the accused might have proved ineffectual.[16] But in the absence of express statutory provision to the contrary[17] it is generally held that there is no absolute right on the part of an accused person in confinement to be brought into court for the purpose of challenging a grand jury, and that failure on his part to ask permission to appear and make his challenge at the proper time is a waiver of the privilege,[18]

8. U. S. *v.* Blodgett, 30 Fed. Cas. No. 18,312, 35 Ga. 336.

9. Com *v.* Smith, 9 Mass. 107; Challenge to Grand Jury, 3 N. J. L. J. 153; People *v.* Jewett, 3 Wend. (N. Y.) 314. See also *In re* Tucker, 8 Mass. 286.

10. People *v.* Borgstrom, 178 N. Y. 254, 70 N. E. 780; U. S. *v.* Blodgett, 30 Fed. Cas. No. 18,312, 35 Ga. 336. *Compare* Keitler *v.* State, 4 Greene (Iowa) 291.

Challenge of prosecutor withdrawn.— A challenge to grand jurors by the state whether authorized or not if withdrawn is not error. State *v.* Gut, 13 Minn. 341.

11. People *v.* Travers, 88 Cal. 233, 26 Pac. 88.

Affidavit as to cause of challenge.— By statute it is sometimes required that the challenge be supported by affidavit setting forth the cause of challenge. McClary *v.* State, 75 Ind. 260, holding that an oral statement of the cause of challenge is not sufficient.

12. People *v.* Travers, 88 Cal. 233, 26 Pac. 88.

Examination of grand jurors on voire dire as to qualifications.— It has been held that on a challenge to the polls the prisoner will not be permitted to examine the grand jurors on their *voire dire* to support his objections to their competency but must establish them by evidence *aliunde*. Brown *v.* Com., 76 Pa. St. 219. *Compare* People *v.* Travers, 88 Cal. 233, 26 Pac. 88; Justices Clark County Inferior Ct. *v.* Griffin, etc., Plank-Road Co., 15 Ga. 39.

13. People *v.* Travers, 88 Cal. 233, 26 Pac. 88.

14. State *v.* Howard, 10 Iowa 101 (holding that where the cause alleged in a challenge to the panel of a grand jury is denied by the state, the burden is upon the challenging party to maintain the truth of the challenge); State *v.* Gillick, 10 Iowa 98 (holding that the court may require evidence to sustain the challenge, although the prosecutor declines to plead thereto); Thayer *v.* People, 2 Dougl. (Mich.) 417 (holding that where grand jurors have been duly drawn and appear upon the summons of the sheriff in virtue of his writ, it will be presumed that they were properly selected, and it is only when good cause is shown by a party having the right to question the legality of the proceedings that the court will interfere and set aside the panel); State *v.* Cameron, 2 Pinn. (Wis.) 490, 2 Chandl. 172 (holding that a noncompliance with the statute providing the mode of summoning grand jurors must be shown to justify a challenge to the array). See also Meiers *v.* State, 56 Ind. 336.

15. People *v.* Romero, 18 Cal. 89; State *v.* Warner, 165 Mo. 399, 65 S. W. 584, 88 Am. St. Rep. 422; Territory *v.* Ingersoll, 3 Mont. 454; Smith *v.* State, 45 Tex. Cr. 405, 77 S. W. 453, holding that where accused and his counsel made efforts to act in regard to the impanelment of a grand jury, but could get no information as to its action concerning him, in time, the failure to challenge the panel does not deprive accused of his right to raise the question of discrimination in its formation.

16. State *v.* Warner, 165 Mo. 399, 65 S. W. 584, 88 Am. St. Rep. 422.

17. Territory *v.* Clayton, 8 Mont. 1, 19 Pac. 293; Territory *v.* Harding, 6 Mont. 323, 12 Pac. 750.

18. *California.*— People *v.* Romero, 18 Cal. 89.

Idaho.— See State *v.* Corcoran, 7 Ida. 220, 61 Pac. 1034.

Iowa.— State *v.* Harris, 38 Iowa 242; State *v.* Felter, 25 Iowa 67; State *v.* Klingman, 14 Iowa 404.

Minnesota.— State *v.* Hoyt, 13 Minn. 132; State *v.* Hinckley, 4 Minn. 345; Maher *v.* State, 3 Minn. 444.

Missouri.— State *v.* Taylor, 171 Mo. 465, 71 S. W. 1005.

and this is especially true where it is not shown that a valid cause of challenge existed.[19]

VIII. DISCHARGING OR EXCUSING GRAND JURORS.

A. In General. Provision is made by statute in some jurisdictions for discharging or excusing grand jurors by the court.[20] Moreover the rule is generally laid down apart from statute that for any good cause shown and in furtherance of justice the court has the right, in the exercise of its sound discretion on its own motion, without challenge from either party,[21] to discharge or excuse a grand juror at any time before he is sworn.[22] This rule has been applied in some jurisdictions even after the jurors have been impaneled and sworn,[23] although a contrary

Nevada.— See State *v.* Larkin, 11 Nev. 314.
New Mexico.— Territory *v.* Young, 2 N. M. 93.
New York.— People *v.* Borgstrom, 178 N. Y. 254, 70 N. E. 781. See also People *v.* Jewett, 3 Wend. 314.
Texas.—Barkman *v.* State, (Cr. App. 1899) 52 S. W. 69; Webb *v.* State, (Cr. App. 1897) 40 S. W. 980; Brown *v.* State, 32 Tex. Cr. 119, 22 S. W. 592; Kemp *v.* State, 11 Tex. App. 174.
See also INDICTMENTS AND INFORMATIONS.
Contrary practice commended.— But the practice of having prisoners confined brought into court, apart from any request on their part that they may have an opportunity to make challenges, while not regarded as a matter of right, has been commended. Kemp *v.* State, 11 Tex. App. 174; Reed *v.* State, 1 Tex. App. 1.
Where request is made of jailer.— The prisoner, if in jail, should make a request to the judge and not to his jailer, for permission to be present when the grand jury is impaneled. Barkman *v.* State, (Tex. Cr. App. 1899) 52 S. W. 69.
Waiver by attorney.— It has been intimated that a waiver of the privilege of challenge may be made by the attorney of the accused in the absence of the latter. State *v.* Harris, 38 Iowa 242; State *v.* Felter, 25 Iowa 67.

19. Dobson *v.* State, (Ark. 1891) 17 S. W. 3; State *v.* Taylor, 171 Mo. 465, 71 S. W. 1005; Barkman *v.* State, (Tex. Cr. App. 1899) 52 S. W. 69.

20. *Alabama.*— Peters *v.* State, 98 Ala. 38, 13 So. 334.
California.— People *v.* Leonard, 106 Cal. 302, 39 Pac. 617.
Florida.— See Jones *v.* State, 18 Fla. 889.
Maryland.— See Mills *v.* State, 76 Md. 274, 25 Atl. 229.
Minnesota.— State *v.* Brown, 12 Minn. 538.
Mississippi.— Portis *v.* State, 23 Miss. 578.
Missouri.— State *v.* Wilson, 85 Mo. 134.
Ohio.— State *v.* Thomas, 61 Ohio St. 444, 56 N. E. 276, 48 L. R. A. 459.
Tennessee.— Jetton *v.* State, Meigs 192. See also Epperson *v.* State, 5 Lea 291.
See 24 Cent. Dig. tit. "Grand Jury," §§ 28, 29.
Appearance in open court for the purpose of making an excuse has been held not to be required in California. People *v.* Hidden, 32 Cal. 445.

21. **The exercise of this discretion is not ordinarily reviewable,** and neither the government nor the accused may complain so long as an impartial and unexceptionable grand jury is obtained. Denning *v.* State, 22 Ark. 131; Williams *v.* State, 69 Ga. 11; State *v.* Bradford, 57 N. H. 188; State *v.* Ward, 60 Vt. 142, 14 Atl. 187; U. S. *v.* Jones, 69 Fed. 973.

22. *Arizona.*— Territory *v.* Barth, 2 Ariz. 319, 15 Pac. 673.
Arkansas.— Denning *v.* State, 22 Ark. 131.
Georgia.— Ridling *v.* State, 56 Ga. 601, holding that the fact that the court directed twenty-four men, summoned as grand jurors, to retire to the jury room and excuse the last man on the list, if there were twenty-four, and then organize by electing a foreman, and that the twenty-three return with the foreman to be then sworn, which was done, does not vitiate an indictment afterward found by the sworn jury, since the grand jury is not complete and organized for business until sworn.
Idaho.— State *v.* Schieler, 4 Ida. 120, 37 Pac. 272.
Louisiana.— State *v.* Jenkins, 43 La. Ann. 917, 9 So. 905.
Maryland.— See Mills *v.* State, 76 Md. 274, 25 Atl. 229.
New Hampshire.— State *v.* Bradford, 57 N. H. 188.
United States.— U. S. *v.* Jones, 69 Fed. 973.
See 24 Cent. Dig. tit. "Grand Jury," §§ 28, 29.

23. *Arkansas.*— Denning *v.* State, 22 Ark. 131.
Louisiana.— State *v.* Furco, 51 La. Ann. 1082, 25 So. 951; State *v.* Brooks, 48 La. Ann. 1519, 20 So. 905; State *v.* Reiz, 48 La. Ann. 1446, 21 So. 26; State *v.* Jenkins, 43 La. Ann. 917, 9 So. 905; State *v.* Woodson, 43 La. Ann. 905, 9 So. 903; State *v.* Causey, 43 La. Ann. 897, 9 So. 900.
Massachusetts.— See Crimm *v.* Com., 119 Mass. 326.
North Carolina.— State *v.* Perry, 122 N. C. 1018, 29 S. E. 384.
Texas.— See Vanhook *v.* State, 12 Tex. 252; State *v.* Jacobs, 6 Tex. 99. *Compare* Trevinio *v.* State, 27 Tex. App. 372, 11 S. W. 447; Smith *v.* State, 19 Tex. App. 95.
Virginia.— Com. *v.* Burton, 4 Leigh 645, 26 Am. Dec. 337.
Wisconsin.— State *v.* Fee, 19 Wis. 562.
United States.— U. S. *v.* Belvin, 46 Fed.

rule obtains in other jurisdictions.[24] In the absence of evidence to the contrary, it will be presumed that the court did not discharge or excuse a grand juror without sufficient and legal cause.[25] So it has been held that, where it appears from the record that a grand jury was duly impaneled, it will be presumed, in the absence of a contrary showing, that persons summoned to serve as grand jurors but not named as being of the panel were excused from such service by the court.[26]

B. Who May Excuse Grand Juror. The rule has been announced that the court alone has the power to excuse a grand juror.[27]

IX. TERM OF SERVICE AND SESSIONS.

A. In General. The term of service of grand jurors is generally regulated by statute, the term of court or some other particular period being prescribed in some jurisdictions, while in other jurisdictions the matter is left to the discretion of the court,[28] and it is the general rule that a grand jury does not cease

381, holding that the court may in its discretion excuse the foreman or any other member of a grand jury after they are impaneled and sworn.

See 24 Cent. Dig. tit. "Grand Jury," §§ 28, 29.

Discharge of foreman for intemperance.— *In re* Ellis, 8 Fed. Cas. No. 4,399*a*, Hempst. 10.

Service of grand juror after being excused. — It has been held that, although a grand juror has been excused after being sworn, he may avail himself of the excusal or not as he may think proper. Thompson *v.* State, 9 Ga. 210. So where a grand juror is inadvertently excused by the court, the court has the right, before any order excusing him is entered, to correct the mistake by recalling the juror. State *v.* Cohn, 9 Nev. 179.

24. Keitler *v.* State, 4 Greene (Iowa) 291; Portis *v.* State, 23 Miss. 578; Baldwin's Case, 2 Tyler (Vt.) 473. See also Gladden *v.* State, 12 Fla. 562.

25. *Arizona.*— Territory *v.* Barth, 2 Ariz. 319, 15 Pac. 673.

Arkansas.— Wallis *v.* State, 54 Ark. 611, 16 S. W. 821.

California.— People *v.* Millsaps, 35 Cal. 47; People *v.* Hidden, 32 Cal. 445.

Indiana.— Burrell *v.* State, 129 Ind. 290, 28 N. E. 699; State *v.* Wingate, 4 Ind. 193.

Minnesota.— State *v.* Brown, 12 Minn. 538.

Mississippi.— Cotton *v.* State, 31 Miss. 504.

See 24 Cent. Dig. tit. "Grand Jury," §§ 28, 29.

And see INDICTMENTS AND INFORMATIONS.

26. Wallis *v.* State, 54 Ark. 611, 16 S. W. 821. See also Epperson *v.* State, 5 Lea (Tenn.) 291.

Where the foreman indorsing an indictment as "a true bill" is not the same person who was appointed foreman at the organization of the grand jury, it will be presumed in the absence of evidence to the contrary that the original foreman was either excused or discharged. Mohler *v.* People, 24 Ill. 26; State *v.* Collins, 6 Baxt. (Tenn.) 151. See also INDICTMENTS AND INFORMATIONS.

27. Denning *v.* State, 22 Ark. 131. *Compare* State *v.* Perry, 122 N. C. 1018, 29 S. E. 384, holding that the foreman has the right to excuse a grand juror.

In Texas while it has been said that the grand jury itself may excuse a member temporarily provided the body be not thereby reduced below a quorum (Smith *v.* State, 19 Tex. App. 95), it has no authority to excuse or discharge a grand juror after being impaneled for the term (Trevino *v.* State, 27 Tex. App. 372, 11 S. W. 447; Watts *v.* State, 22 Tex. App. 572, 3 S. W. 769; Smith *v.* State, 19 Tex. App. 95).

28. *Alabama.*— Daughdrill *v.* State, 113 Ala. 7, 21 So. 378.

Arkansas.— Carpenter *v.* State, 62 Ark. 286, 36 S. W. 900.

California.— People *v.* Leonard, 106 Cal. 302, 39 Pac. 617; *In re* Gannon, 69 Cal. 541, 11 Pac. 240.

Indiana.— Barger *v.* State, 6 Blackf. 188.

Iowa.— State *v.* Graff, 97 Iowa 568, 66 N. W. 779; State *v.* Weinbrenner, 67 Iowa 230, 25 N. W. 146; State *v.* Reid, 20 Iowa 413; State *v.* Delong, 12 Iowa 453.

Louisiana.— State *v.* Bennett, 45 La. Ann. 54, 12 So. 306.

Massachusetts.— Com. *v.* Rich, 14 Gray 335.

Montana.— State *v.* Second Judicial Dist. Ct., (1904) 78 Pac. 769.

New York.— People *v.* McKane, 80 Hun 322, 30 N. Y. Suppl. 95.

North Carolina.— State *v.* Davis, 126 N. C. 1007, 35 S. E. 464.

Virginia.— Litton *v.* Com., 101 Va. 833, 44 S. E. 923.

See 24 Cent. Dig. tit. "Grand Jury," § 67 *et seq.*

Provision for retention of grand jurors for second term held constitutional.— In North Carolina it has been held that a statute authorizing the retention of the grand jury for service at a term subsequent to that for which it was drawn is within the power of the legislature, there being no restrictions on the general assembly forbidding its enact-

to exist until it is dissolved by operation of law or by order of court.[29] In the absence of statute to the contrary the grand jury usually serves during the entire term of court at which it has been summoned to attend,[30] and does not cease to be a legally constituted body until the expiration of that period.[31] But it has been held that a court may in virtue of its common-law powers as a court of oyer and terminer adjourn or dismiss the grand jury whenever it deems it proper to do so.[32]

B. Suspension or Interruption of Sessions — 1. Effect of Adjournment of Court — a. Final Adjournment. The right of a grand jury to remain in session does not as a general rule extend beyond the final adjournment of court for the term.[33]

b. Temporary Adjournment. But it is generally held that the actual presence of the court is not essential to the exercise of the functions of the grand jury, and that a grand jury when properly organized may lawfully proceed in the performance of its duties notwithstanding the temporary absence of the judge or the temporary adjournment of the court.[34]

2. Attendance of Petit Jury. In the absence of any statutory requirement to that effect, the attendance of a petit jury is not essential to the validity of the action of a grand jury.[35]

3. Vacancy in Office of Prosecuting Attorney. The powers and duties of a grand jury do not cease because there may happen to be no district attorney either by reason of a vacancy in the office or of the attorney's temporary inability to act or for any other cause.[36]

C. Power of Grand Jury to Dissolve Itself. A grand jury cannot dissolve itself.[37]

ment. State *v.* Battle, 126 N. C. 1036, 35 S. E. 624. To the same effect see State *v.* Davis, 126 N. C. 1007, 35 S. E. 464.

Effect of continuance beyond prescribed term.— It has been held that, although it is contemplated by statute that the work of a grand jury will be completed at the end of the term for which it is summoned, yet when a jury has in fact been continued into the next term and is recognized by the court as a valid jury it is a *de facto* grand jury and its indictments are not invalid. People *v.* Morgan, 133 Mich. 550, 95 N. W. 542. See State *v.* Noyes, 87 Wis. 340, 58 N. W. 386, 41 Am. St. Rep. 45, 27 L. R. A. 776. And see Indictments and Informations.

29. *In re* Gannon, 69 Cal. 541, 11 Pac. 240, holding that under the California statutes neither an end of the session of the court nor a final adjournment of the court for the year would have the legal effect of dissolving the grand jury of suspending its jurisdiction to transact business.

30. Chitty Cr. L. 314. See also Nealon *v.* People, 39 Ill. App. 481; Com. *v.* Bannon, 97 Mass. 214; Com. *v.* Colton, 11 Gray (Mass.) 1; People *v.* Sheriff, 11 N. Y. Civ. Proc. 172; Jackson *v.* U. S., 102 Fed. 473, 42 C. C. A. 452.

31. State *v.* Weinbrenner, 67 Iowa 230, 25 N. W. 146 [*distinguishing* State *v.* Delong, 12 Iowa 453]. See also Com. *v.* Colton, 11 Gray (Mass.) 1.

32. Portis *v.* State, 23 Miss. 578; Com. *v.* Burton, 4 Leigh (Va.) 645, 26 Am. Dec. 337. See also Trevinio *v.* State, 27 Tex. App. 372, 11 S. W. 447.

33. Nealon *v.* People, 39 Ill. App. 481; Com. *v.* Bannon, 97 Mass. 214; People *v.* Sheriff, 11 N. Y. Civ. Proc. 172.

34. Nealon *v.* People, 39 Ill. App. 481; Com. *v.* Bannon, 97 Mass. 214; People *v.* Sheriff, 11 N. Y. Civ. Proc. 172, holding that the grand jury when properly authorized meets and adjourns upon its own motion, without reference to the temporary adjournments of the court. *Compare* Territory *v.* Terrell, 11 Okla. 449, 68 Pac. 503.

Substitution of judge of another district. — In Territory *v.* Terrell, 11 Okla. 449, 68 Pac. 503, it was held that where the regular presiding judge of a district had impaneled the grand jury, and was then assigned by the supreme court to hold court in another district, and one of the justices of the supreme court was assigned to hold his court during his absence, it did not discharge the grand jury by operation of law, on the ground that the judge of that district was holding court in some other county, within the meaning of Sess. Laws (1895), c. 41, § 14, providing that on the completion of the business before the grand jury it shall be discharged by the adjournment of the court, or by the judge's holding court in some other county.

35. State *v.* Davis, 22 Minn. 423.

36. State *v.* Gonzales, 26 Tex. 197; U. S. *v.* McAvoy, 26 Fed. Cas. No. 15,654, 4 Blatchf. 418, 18 How. Pr. (N. Y.) 380.

37. *In re* Gannon, 69 Cal. 541, 11 Pac. 240; Clem *v.* State, 33 Ind. 418, holding that the fact that a grand jury was discharged until a future day and did not appear on that day, but upon the day following and without being reimpaneled returned an indictment, does not vitiate the indictment.

D. Special Grand Juries. A special grand jury serves only during the term for which it is called.[38]

X. POWERS AND DUTIES.

A. In General. Although grand juries are sometimes empowered to act in civil matters, they being even invested by statute with functions of an administrative character,[39] as a general rule their proceedings pertain exclusively to the investigation of crimes.[40] They are under a solemn obligation ordinarily imposed by the oath administered to them diligently to inquire and true presentment make of all infractions of the criminal law which may be given to them in charge or may come to the knowledge of any of the members touching the service in which they are engaged,[41] the jurisdiction of the grand jury being as a general rule coextensive with that of the court in which it is impaneled and for which it is to make inquiry,[42] and this according to the rule announced by several authorities

38. People *v.* Carabin, 14 Cal. 438; Wilson *v.* State, 1 Blackf. (Ind.) 428; Young *v.* State, 2 How. (Miss.) 865.

39. Tanner *v.* Rosser, 89 Ga. 811, 15 S. E. 750; *In re* Flemington Borough, 168 Pa. St. 628, 32 Atl. 86; *In re* Plymouth Borough, 167 Pa. St. 612, 31 Atl. 933; Com. *v.* Crans, 3 Pa. L. J. 442. See also Justices Pike County Inferior Ct. *v.* Griffin, etc., Plank-Road Co., 15 Ga. 39.

40. Pankey *v.* People, 2 Ill. 80 (holding that the grand jury has no power to inquire whether an officer has been guilty of taking illegal fees for the service of process); Jones *v.* People, 101 N. Y. App. Div. 55, 92 N. Y. Suppl. 275; People *v.* Sexton, 42 Misc. (N. Y.) 312, 86 N. Y. Suppl. 517; Matter of Gardiner, 31 Misc. (N. Y.) 364, 64 N. Y. Suppl. 760.

Grand jury an informing and accusing body see *supra*, I, A.

41. *In re* Lester, 77 Ga. 143; Heard *v.* Pierce, 8 Cush. (Mass.) 338, 54 Am. Dec. 757; *In re* Grand Jury, 62 Fed. 840; Charge to Grand Jury, 30 Fed. Cas. No. 18,248, Chase 263.

Impartiality.—The oath generally indicates the impartial spirit with which the duties of grand jurors should be discharged; they are to present no one from envy, hatred, or malice, nor should they leave any one unpresented through fear, favor, affection, hope of reward or gain, but should present all things truly as they come to their knowledge, according to the best of their understanding. *In re* Grand Jury, 62 Fed. 840; Charge to Grand Jury, 30 Fed. Cas. No. 18,255, 2 Sawy. 667; Charge to Grand Jury, 30 Fed. Cas. No. 18,248, Chase 263.

42. *Indiana.*— State *v.* Bindley, 152 Ind. 182, 52 N. E. 804.

Iowa.— Keitler *v.* State, 4 Greene (Iowa) 291.

Montana.— Territory *v.* Corbett, 3 Mont. 50.

New York.— People *v.* Sexton, 42 Misc. 312, 86 N. Y. Suppl. 517.

Utah.— People *v.* Green, 1 Utah 11.

United States.— U. S. *v.* Hill, 26 Fed. Cas. No. 15,364, 1 Brock. 156.

See 24 Cent. Dig. tit. "Grand Jury," § 64.

Offenses committed within county.— In many jurisdictions a grand jury has within the scope of its inquiry all public offenses committed or triable within the county and not barred by the statutes of limitations. People *v.* Northey, 77 Cal. 618; People *v.* Beatty, 14 Cal. 566; Ward *v.* State, 2 Mo. 120, 22 Am. Dec. 449; People *v.* McCarthy, 59 N. Y. App. Div. 231, 69 N. Y. Suppl. 513 [*affirmed* in 168 N. Y. 549, 61 N. E. 899]; *In re* Morse, 42 Misc. (N. Y.) 664, 87 N. Y. Suppl. 721; State *v.* Wilcox, 104 N. C. 847, 10 S. E. 453, holding that the matters which, whether given in charge or of their own knowledge, are to be presented by the grand jury are all offenses committed within the county, the prosecution of which is not barred by statute.

Effect of impaneling prior to commission of offenses.— In People *v.* Beatty, 14 Cal. 566, it was held that the fact that a grand jury was impaneled before an offense was committed does not vitiate an indictment where there is no statutory provision as to the time of the commission of offenses except that imposed by statutes of limitation.

Necessity of prior action before magistrate.— In several cases the rule has been laid down that it is in the power of the grand jury to find bills of indictment, although there has been no previous action taken before a magistrate. Blaney *v.* State, 74 Md. 153, 21 Atl. 547; People *v.* McCarthy, 168 N. Y. 549, 61 N. E. 899 [*affirming* 59 N. Y. App. Div. 231, 69 N. Y. Suppl. 513]; State *v.* Brown, 62 S. C. 374, 40 S. E. 776; State *v.* Bullock, 54 S. C. 300, 32 S. E. 424; State *v.* Bowman, 43 S. C. 108, 20 S. E. 1010. See also INDICTMENTS AND INFORMATIONS.

Effect of pendency of examination before inferior tribunal.— In People *v.* Molineux, 26 Misc. (N. Y.) 589, 57 N. Y. Suppl. 643 [*distinguishing* People *v.* Freund, 9 N. Y. Cr. 516, 33 N. Y. Suppl. 612], the rule was laid down that the grand inquest may at any time inquire into a crime which has been committed in the county, and if definite action be taken by indictment every inferior tribunal (in this case a coroner) is immediately ousted of jurisdiction, and that it makes no difference whether the inferior tribunal had acquired jurisdiction of the case or not. To

both as to territorial limits[43] and as to the character and kinds of offenses to be investigated.[44]

B. Extent of Inquisitorial Powers — 1. In General. The rule has been announced that the powers of the grand jury are inquisitorial to a limited extent only and that its investigations are restricted to such offenses as are called to its attention by the court or submitted for its consideration by the prosecuting attorney, or such as fall within the knowledge or observation of it, or such as have already been presented before a magistrate.[45] In other jurisdictions, however, it has been broadly stated that grand juries have plenary inquisitorial powers and may lawfully, upon their own motion, originate charges against offenders, and that it is immaterial how the information upon which they acted was brought to their attention.[46]

2. Presentments — a. In General. A presentment in its limited sense is the notice taken by a grand jury of any offense from its own knowledge or observation without a bill of indictment laid before it at the suit of the commonwealth.[47] It is generally regarded in the light of instructions upon which an indictment must be found.[48] In some jurisdictions either under statute[49] or apart

the same effect see People *v.* Heffernan, 5 Park Cr. (N. Y.) 393 (where, however, it was said: "As a general rule of practice, it is, . . . better to have an investigation before a magistrate in the first instance, and not to indict while such examination is pending"); People *v.* Horton, 4 Park. Cr. (N. Y.) 222; People *v.* Hyler, 2 Park. Cr. (N. Y.) 566. See also State *v.* Bindley, 152 Ind. 182, 52 N. E. 804; People *v.* Andrews, 115 N. Y. 427, 22 N. E. 358, 6 L. R. A. 128; State *v.* Brown, 62 S. C. 374, 40 S. E. 776. *Compare* People *v.* McCarthy, 168 N. Y. 549, 61 N. E. 899 [*affirming* 59 N. Y. App. Div. 231, 69 N. Y. Suppl. 513]. See also Indictments and Informations.

43. Keitler *v.* State, 4 Greene (Iowa) 291; Logan *v.* U. S., 144 U. S. 263, 12 S. Ct. 617, 36 L. ed. 429 [*reversing* 45 Fed. 872]. See also Indictments and Informations.

A grand jury is a local tribunal and cannot inquire into offenses committed outside of its jurisdiction. Rogers *v.* State, 15 Ark. 71; Beal *v.* State, 15 Ind. 378.

44. Keitler *v.* State, 4 Greene (Iowa) 291; Territory *v.* Corbett, 3 Mont. 50; U. S. *v.* Hill, 26 Fed. Cas. No. 15,364, 1 Brock. 156. See also Indictments and Informations.

45. Com. *v.* Green, 126 Pa. St. 531, 17 Atl. 878, 12 Am. St. Rep. 894; McCullough *v.* Com., 67 Pa. St. 30; Grand Jury *v.* Public Press, 4 Brewst. (Pa.) 313; Com. *v.* Wilson, 2 Chest. Co. Rep. (Pa.) 164; Loyd's Case, 3 Pa. L. J. Rep. 188; Matter of Citizens' Assoc., 8 Phila. (Pa.) 478; Charge to Grand Jury, 3 Pittsb. (Pa.) 174; U. S. *v.* Kilpatrick, 16 Fed. 765; Charge to Grand Jury, 30 Fed. Cas. No. 18,255, 2 Sawy. 667. See also Indictments and Informations.

Power to summon witnesses to give evidence generally see *infra*, XI, G, 1, note 91 *et seq.*

46. Oglesby *v.* State, 121 Ga. 602, 49 S. E. 706 (holding that where in the investigation of a case by the grand jury it is shown that an offense has been committed disconnected from the case under consideration, the grand jury can cause a special presentment to be preferred and require the witness to appear and be sworn on consideration of such presentment); Blaney *v.* State, 74 Md. 153, 21 Atl. 547; Cahen *v.* Jarrett, 42 Md. 571. See Ward *v.* State, 2 Mo. 120, 22 Am. Dec. 449. And see Indictments and Informations.

47. Com. *v.* Green, 126 Pa. St. 531, 17 Atl. 878, 12 Am. St. Rep. 894 [*citing* 4 Blackstone Comm. 301; Bouvier L. Dict.].

Other definitions are: "A statement by the grand jury of an offence from their own knowledge, without any bill of indictment laid before them, setting forth the name of the party, place of abode, and the offence committed, informally, upon which the officer of the court afterwards frames an indictment." Collins *v.* State, 13 Fla. 651, 663.

"An informal accusation, which is generally regarded in the light of instructions upon which an indictment can be framed." Charge to Grand Jury, 30 Fed. Cas. No. 18,255, 2 Sawy. 667 [*quoted* in Matter of Gardiner, 31 Misc. (N. Y.) 364, 64 N. Y. Suppl. 760].

48. Charge to Grand Jury, 30 Fed. Cas. No. 18,255, 2 Sawy. 667. See also Matter of Gardiner, 31 Misc. (N. Y.) 364, 64 N. Y. Suppl. 760.

In the Virginia practice the presentment has been allowed an efficacy not known to the common law of England, it having been allowed for many purposes to stand in the place of an indictment or to stand as a foundation for further proceedings against the party presented. Com. *v.* Christian, 7 Gratt. (Va.) 631.

Under statute in New York investing the grand jury with certain inquisitorial powers, it has been held that any final finding upon the exercise of these inquisitorial powers may be called a presentment, and is not improper because an indictment cannot or does not follow it. *In re* Jones, 92 N. Y. Suppl. 275. See also *In re* Gardner, 64 N. Y. Suppl. 760.

49. Kerby *v.* Long, 116 Ga. 187, 42 S. E. 386; *In re* Lester, 77 Ga. 143; Groves *v.* State, 73 Ga. 205 [*overruling* Hawkins *v.*

from statute[50] grand juries have the power to make presentment of offenses which are within their own knowledge and observation or are of public notoriety and injurious to the entire community. But in other jurisdictions it is held that the grand jury has no power to present any person for a criminal offense except by indictment.[51]

b. Misconduct of Officials. Under statute in some jurisdictions a grand jury may inquire into and present cases of misconduct on the part of public officials.[52]

State, 54 Ga. 653] (holding it to be the duty of a grand juror to bring to the attention of his fellows any violation of law coming to his knowledge either before or after he has taken his oath); State *v.* Richard, 50 La. Ann. 210, 23 So. 331; State *v.* Terry, 30 Mo. 368; State *v.* Lewis, 87 Tenn. 119, 9 S. W. 427; State *v.* Lee, 87 Tenn. 114, 9 S. W. 425; Smith *v.* State, 1 Humphr. (Tenn.) 396. See also INDICTMENTS AND INFORMATIONS.

50. Com. *v.* Woodward, 157 Mass. 516, 32 N. E. 939, 34 Am. St. Rep. 302 [*followed* in Com. *v.* Hayden, 163 Mass. 453, 40 N. E. 846, 47 Am. St. Rep. 468, 28 L. R. A. 318] (holding that a grand jury may properly act upon the personal knowledge of any of its members, communicated to his fellows under no other sanction than the grand juror's oath); Com. *v.* Green, 126 Pa. St. 531, 17 Atl. 878, 12 Am. St. Rep. 894; McCullough *v.* Com., 67 Pa. St. 30; Grand Jury *v.* Public Press, 4 Brewst. (Pa.) 313; Lloyd's Case, 3 Pa. L. Rep. 188; Charge to Grand Jury, 3 Pittsb. (Pa.) 174; Com. *v.* Porter, 10 Phila. (Pa.) 217; Com. *v.* Jadwin, 2 L. T. N. S. (Pa.) 13; Com. *v.* Towles, 5 Leigh (Va.) 743; U. S. *v.* Kilpatrick, 16 Fed. 765. See also Blaney *v.* State, 74 Md. 153, 21 Atl. 547. *Compare* Charge to Grand Jury, 30 Fed. Cas. No. 18,255, 2 Sawy. 667, where it is said: "This form of accusation has fallen into disuse since the practice has prevailed — and the practice now obtains generally — for the prosecuting officer to attend the grand jury and advise them in their investigations." See also INDICTMENTS AND INFORMATIONS.

In North Carolina the rule has been laid down that while the grand jury is not allowed to send for witnesses generally for the purpose of inquisition, it is its duty to originate presentments as to all violations of law that come under the personal observation or knowledge of each juror and as to the commission of any offenses of which they have information which they deem credible and which is so specific as to the nature of the offense and witnesses as to enable the prosecuting officer to frame an indictment upon it. State *v.* Wilcox, 104 N. C. 847, 10 S. E. 453 [*following* State *v.* Ivey, 100 N. C. 539, 5 S. E. 407]. See also Lewis *v.* Wake County, 74 N. C. 194.

51. Rector *v.* Smith, 11 Iowa 302. See also INDICTMENTS AND INFORMATIONS.

In Florida it has been stated that a presentment in the technical sense, although not prohibited by the constitution, is unknown to the practice of that state. Collins *v.* State, 13 Fla. 651.

In New York it has been held that a presentment as a means or as a link in the chain to hold a person to answer for a crime is unknown to the law of that state, and that under Code Cr. Proc. § 259, providing that "if a member of the grand jury know, or have reason to believe, that a crime has been committed, which is triable in the county, he must declare the same to his fellow jurors, who must thereupon investigate the same," it is the duty of the grand juror if he has knowledge of the guilt of a person to bring that evidence before the grand jury under oath as the basis of an indictment. Matter of Gardiner, 31 Misc. (N. Y.) 364, 64 N. Y. Suppl. 760, 14 N. Y. Cr. 519. In a subsequent decision it has been held that the power of a grand jury to act *ex mero motu* is preserved in the Code Cr. Proc. § 259, and that under section 260, investing the grand jury with certain inquisitorial powers, it may make a final finding which may be called a presentment and that this presentment is not improper because an indictment cannot or does not follow it, and further that such presentment or report need not be stricken out because it incidentally designates some public official as responsible for omissions or commissions. Jones *v.* People, 101 N. Y. App. Div. 55, 92 N. Y. Suppl. 275.

52. State *v.* Seawell, 64 Ala. 225 (holding that under a statute making provision for an impeachment proceeding against officers upon the report of a grand jury of a county, the report need not set forth the misconduct complained of with that degree of accuracy usually required in pleading, but that a succinct statement of the facts — the nature and description of the acts of official malfeasance charged — must be shown alike as a guide to the solicitor and as a protection to the accused); Groves *v.* State, 73 Ga. 205 [*overruling* Hawkins *v.* State, 54 Ga. 653] (holding that the Code, § 4504, does not limit the power of the grand jury investigating the acts of public officers to cases where there may be a prosecutor, and does not prohibit them from prosecuting by presentment on their own motion); Jones *v.* People, 101 N. Y. App. Div. 55, 92 N. Y. Suppl. 275.

In Iowa it has been held that a grand jury has no power to present to the court, otherwise than by indictment, the misconduct of an officer. Rector *v.* Smith, 11 Iowa 302.

Inspection of official books and records.— In Charge to Grand Jury, 30 Fed. Cas. No. 18,255, 2 Sawy. 667, it is held that the grand jury has no general inquisitorial power to inspect the books of federal officials and to

3. Special Grand Juries. A special grand jury when legally organized is generally regarded as a valid grand jury for every purpose the same as a regular one,[53] and may as a general rule investigate any offense committed within the jurisdiction of the court.[54]

C. Report of Grand Jury. It is the duty of the grand jury to report its action on such cases as have been submitted to it and it is the duty of the court and prosecuting attorney to see that this is done.[55]

XI. Proceedings Before Grand Jury.

A. Presence of Accused. In the absence of statute to the contrary, the general rule is that an accused person is not entitled as a matter of right to notice that the grand jury is investigating a charge against him,[56] or to be brought before the grand jury,[57] or to be heard,[58] or to have witnesses sworn in his behalf.[59] Indeed in the absence of statute to the contrary[60] it is held that a grand jury has no authority to allow the accused to come before it,[61] or to swear and

subject the officers themselves to examination in respect to the entries in those books, for the purpose of ascertaining whether or not there has been any official misconduct in any public office. But under statute in some jurisdictions an inspection by the grand jury of official books and records is authorized. Chatham County *v.* Gaudry, 120 Ga. 121, 47 S. E. 634. See also Jones *v.* People, 101 N. Y. App. Div. 55, 92 N. Y. Suppl. 275.

Statute authorizing appointment of committee to examine records see Chatham County *v.* Gaudry, 120 Ga. 121, 47 S. E. 634.

53. People *v.* McDonell, 47 Cal. 134; State *v.* Cunningham, 130 Mo. 507, 32 S. W. 970; Lyles *v.* Com., 88 Va. 396, 13 S. E. 802.

54. State *v.* Overstreet, 128 Mo. 470, 31 S. W. 35 (holding that a special grand jury is not restricted to the investigation of offenses committed after the regular grand jury has adjourned); *In re* Franklin County, 5 Ohio S. & C. Pl. Dec. 691, 7 Ohio N. P. 450 (holding that a special grand jury assembled to consider one case is not prevented from investigating any matter which involves the violation of the criminal laws of the state). *Compare* Oakley *v.* State, 135 Ala. 15, 33 So. 23; Lido *v.* State, 133 Ala. 43, 31 So. 953. See also Indictments and Informations.

55. Rion *v.* Com., 1 Duv. (Ky.) 235, holding that an omission of duty in this respect without sufficient reasons appearing of record will be a ground for dismissing the accused and his surety.

Assistance of counsel in drawing up final report of grand jury.— In State *v.* Harris, 39 La. Ann. 228, 1 So. 446, it was held that the fact that the final report of the grand jury was not drawn by a member of that body nor by the district attorney, but by an attorney at law called to draft the report, will not invalidate an indictment found by the jurors where it does not appear that the attorney was present at any of their deliberations or otherwise assisted them in their proceedings and findings.

Return and filing of indictment see Indictments and Informations.

56. People *v.* Goldenson, 76 Cal. 328, 19 Pac. 161; State *v.* Hamlin, 47 Conn. 95, 36 Am. Rep. 54; State *v.* Walcott, 21 Conn. 272.

57. State *v.* Hamlin, 47 Conn. 95, 36 Am. Rep. 54 [*distinguishing* Lung's Case, 1 Conn. 482]; State *v.* Walcott, 21 Conn. 272, holding that one accused of a crime of which a grand jury takes cognizance has no constitutional right to be present with the grand jury during its investigation.

Counsel of accused.— In Lung's Case, 1 Conn. 428, it was held improper to admit counsel for the accused.

58. People *v.* Goldenson, 76 Cal. 328, 19 Pac. 161 (holding that the accused is not entitled to be heard, unless called by the grand jury); Matter of Morse, 42 Misc. (N. Y.) 664, 87 N. Y. Suppl. 721.

Denial of hearing in examining court.— In Osborne *v.* Com., 20 S. W. 223, 14 Ky. L. Rep. 246, it was held that the proceedings in an examining court not being binding on the grand jury, an indictment was not defective because defendant was not heard in the examining court.

59. People *v.* Goldenson, 76 Cal. 328, 19 Pac. 161 (holding that the accused is not entitled to have witnesses sworn by the grand jury, unless called for by that body); State *v.* Walcott, 21 Conn. 272.

60. People *v.* Goldenson, 76 Cal. 328, 19 Pac. 161; People *v.* Singer, 18 Abb. N. Cas. (N. Y.) 96.

61. State *v.* Hamlin, 47 Conn. 95, 36 Am. Rep. 54 [*distinguishing* Lung's Case, 1 Conn. 482], holding that the grand jury has no authority unless directed by the court to allow the accused to come before the grand jury and interrogate witnesses produced by the state against him, it resting in the discretion of the court to grant the privilege or deny it.

Presence of handcuffed prisoner as prejudicing jury.— The fact that the accused was brought into the court-room handcuffed and the grand jury may have there seen him thus secured does not authorize the inference that they were prejudiced against him in finding the indictment. Com. *v.* Weber, 167 Pa. St. 153, 31 Atl. 481.

examine witnesses on behalf of the accused.[62] But while as a general rule grand juries should hear no other evidence than that adduced by the prosecution, they are sworn "to inquire and true presentment make," and if in the course of their inquiries they have reason to believe that there is other evidence not presented and within reach which would qualify or explain away the charge under investigation, it is their duty to order such evidence to be produced.[63]

B. Presence of Attorney For Prosecution — 1. In General. Although in some jurisdictions the prosecuting attorney is not allowed in the grand jury room,[64] the general rule is that he may be present before the grand jury [65] to assist in the examination of witnesses,[66] to advise it as to the admissibility of evidence and the proper mode of procedure,[67] and to give general advice on questions of law.[68] But he cannot participate in the deliberations or express opinions on questions

62. Respublica *v.* Schaffer, 1 Dall. (Pa.) 236, 1 L. ed. 116; Ayrs *v.* State, 5 Coldw. (Tenn.) 26; U. S. *v.* Lawrence, 26 Fed. Cas. No. 15,576, 4 Cranch C. C. 514 (holding that if the evidence on the part of the prosecution shows a full *prima facie* case of guilt, the grand jury will not be permitted to examine witnesses, not required on the part of the prosecution, to prove mere matters of excuse or justification); U. S. *v.* Palmer, 27 Fed. Cas. No. 15,989, 2 Cranch C. C. 11.

Effect of promise of district attorney.— In U. S. *v.* Blodgett, 30 Fed. Cas. No. 18,312, 35 Ga. 336, it was held that a promise on the part of the district attorney that the accused should be permitted, on the investigation before the grand jury, to have the evidence in his defense given before them, is of no effect.

63. U. S. *v.* Kilpatrick, 16 Fed. 765.

Rule applied under statute.— Matter of Morse, 42 Misc. (N. Y.) 664, 87 N. Y. Suppl. 721; People *v.* Singer, 18 Abb. N. Cas. (N. Y.) 96.

64. Lewis *v.* Wake County, 74 N. C. 194. See also Lung's Case, 1 Conn. 428.

65. Shoop *v.* People, 45 Ill. App. 110; State *v.* Aleck, 41 La. Ann. 83, 5 So. 639; *In re* Bridge Appropriations, 9 Kulp (Pa.) 427; U. S. *v.* Kilpatrick, 16 Fed. 765; *In re* Crittenden, 6 Fed. Cas. No. 3,393, 2 Flipp. 212; *In re* District Attorney, 7 Fed. Cas. No. 3,925; Charge to Grand Jury, 30 Fed. Cas. No. 18,255, 2 Sawy. 667.

Person illegally acting as district attorney. — In State *v.* Gonzales, 26 Tex. 197, it was held that it is improper to quash or set aside an indictment on the ground that the person who acted as district attorney before the grand jury was not legally authorized to do so, where it did not appear that he was present with the grand jury at an improper time or exercised any improper influence. In Kinnebrew *v.* State, 132 Ala. 8, 31 So. 567, it was held that the fact that the solicitor who appeared before the grand jury which returned an indictment might have been acting under an invalid appointment did not affect the validity of the indictment, as no function of the solicitor is necessary to give an indictment validity, and hence a motion to quash would not raise the legality of the solicitor's appointment. See also Indictments and Informations.

66. *Alabama.*—Blevins *v.* State, 68 Ala. 92. *Arkansas.*— Bennett *v.* State, 62 Ark. 516, 36 S. W. 947.

Illinois.— Gitchell *v.* State, 146 Ill. 175, 33 N. E. 757, 37 Am. St. Rep. 147.

Iowa.— State *v.* Kovolosky, 92 Iowa 498, 61 N. W. 223. See State *v.* Fertig, 98 Iowa 139, 67 N. W. 87.

Kentucky.— Franklin *v.* Com., 105 Ky. 237, 48 S. W. 986, 20 Ky. L. Rep. 1137.

Louisiana.— State *v.* Adam, 40 La. Ann. 745, 5 So. 30.

Montana.— State *v.* First Judicial Dist. Ct., 22 Mont. 25, 55 Pac. 916.

New York.— See People *v.* Scannell, 36 Misc. 40, 72 N. Y. Suppl. 449. *Compare* Anonymous, 7 Cow. 470.

Pennsylvania.— Com. *v.* Bradney, 126 Pa. St. 199, 17 Atl. 600; Com. *v.* Frey, 11 Pa. Co. Ct. 523.

United States.— U. S. *v.* Cobban, 127 Fed. 713; U. S. *v.* Kilpatrick, 16 Fed. 765; *In re* District Attorney, 6 Fed. Cas. No. 3,925; Charge to the Grand Jury, 30 Fed. Cas. No. 18,255, 2 Sawy. 667.

See 24 Cent. Dig. tit. "Grand Jury," § 73.

Rule applied to attorney-general.— State *v.* Sullivan, 110 Mo. App. 75, 84 S. W. 105; State *v.* First Judicial Dist. Ct., 22 Mont. 25, 55 Pac. 916.

67. Shoop *v.* People, 45 Ill. App. 110; Shattuck *v.* State, 11 Ind. 473; State *v.* Aleck, 41 La. Ann. 83, 5 So. 639; State *v.* Adam, 40 La. Ann. 745, 5 So. 30; Com. *v.* Bradney, 126 Pa. St. 199, 17 Atl. 600. See also Anonymous, 7 Cow. (N. Y.) 470; State *v.* Baker, 33 W. Va. 319, 10 S. E. 639.

It is the duty of the prosecuting attorney to take care that no evidence is received by the grand jury which would not be admissible in a court upon the trial of a cause. U. S. *v.* Kilpatrick, 16 Fed. 765.

Instructing foreman as to mode of writing finding.— In State *v.* McNinch, 12 S. C. 89, it was held that the fact that the circuit solicitor went into the room of the grand jury after it had agreed and at the request of the foreman to instruct him how to write the finding is no ground for quashing the indictment. See also State *v.* Harris, 39 La. Ann. 228, 1 So. 446.

68. Gitchell *v.* State, 146 Ill. 175, 33 N. E. 757, 37 Am. St. Rep. 147; Shattuck *v.* State, 11 Ind. 473; State *v.* Adam, 40 La. Ann. 745, 5 So. 30; *In re* District Attorney, 6

of fact or as to the weight and sufficiency of evidence, or attempt in any way to influence the finding.[69] While it seems to be very generally regarded as the better practice, and the grand jury has a right to require that the prosecuting attorney shall retire from the room during its deliberations,[70] and in some jurisdictions his presence is expressly forbidden by statute,[71] the mere fact that, with the consent of the grand jury, he is present while the jurors are deliberating or voting on a charge, will not constitute such an irregularity as, in the absence of a showing of injury or prejudice to the accused, will invalidate an indictment.[72]

2. Assistant Attorney or Special Counsel. In some jurisdictions it is held that a duly authorized assistant prosecuting attorney[73] or counsel specially

Fed. Cas. No. 3,935. *Compare* Lewis *v.* Wake County, 74 N. C. 194.

In Iowa under statute one of the duties to be performed by the county attorney or his deputy is to attend the grand jury for the purpose of giving it advice upon any legal matter. State *v.* Fertig, 98 Iowa 139, 67 N. W. 87.

Question of law affecting right of accused. — In U. S. *v.* Kilpatrick, 16 Fed. 765, the rule was laid down that while public prosecutors may direct grand juries in matters of procedure according to the well-established practice of the courts, and may read statutes upon which bills of indictment may be founded, they cannot give opinions upon questions of law which affect the rights and liberties of citizens charged with crime. *Compare* U. S. *v.* Cobban, 127 Fed. 713, holding that it is within the province of a district attorney to explain both the case and the law to the jurors, reserving to them the right, when in doubt, to call upon the court.

69. *Alabama.*— See Blevins *v.* State, 68 Ala. 92. *Compare* Hall *v.* State, 134 Ala. 90, 32 So. 750.

Arkansas.— See Bennett *v.* State, 62 Ark. 516, 36 S. W. 947.

Illinois.— Gitchell *v.* State, 146 Ill. 175, 33 N. E. 757, 37 Am. St. Rep. 147.

Indiana.— Shattuck *v.* State, 11 Ind. 473.

Louisiana.— State *v.* Aleck, 41 La. Ann. 83, 5 So. 639.

Mississippi.— See Wilson *v.* State, 70 Miss. 595, 13 So. 225, 35 Am. St. Rep. 664.

Pennsylvania.— Com. *v.* Bradney, 126 Pa. St. 199, 17 Atl. 600.

South Carolina.— State *v.* Addison, 2 S. C. 356.

United States.— *In re* District Attorney, 7 Fed. Cas. No. 3,925; Charge to Grand Jury, 30 Fed. Cas. No. 18,255. See also U. S. *v.* Reed, 27 Fed. Cas. No. 16,134, 2 Blatchf. 435.

See 24 Cent. Dig. tit. "Grand Jury," § 73.

Discussing testimony not necessarily improper.— It has been held that a plea in abatement to an indictment which avers that the prosecuting attorney of his own motion and without authority of law went into the room where the grand jury was sitting, and in the presence of the grand jury examined certain named witnesses upon whose testimony the indictment was found, and talked in the presence of the grand jury about the said testimony of said witnesses, and thus unlawfully conspired against defendant to have and procure the grand jury to find the indictment, does not present cause for abating the indictment and is properly rejected. State *v.* Baker, 33 W. Va. 319, 323, 10 S. E. 639, where the court said: "Now, this plea in abatement does not aver at what stage of the grand jury proceedings the attorney was present, or that he was present during deliberation or vote; or that he made any comment on the credit or effect of the evidence, or even on the law; or that he urged the finding of the indictment. It does say that he 'talked in the presence of said grand-jury about the testimony of said witness.' This may be so, and yet not improper."

70. Gitchell *v.* State, 146 Ill. 175, 33 N. E. 757, 7 Am. St. Rep. 147; U. S. *v.* Terry, 39 Fed. 355; *In re* District Attorney, 7 Fed. Cas. No. 3,925; Charge to Grand Jury, 30 Fed. Cas. No. 18,255.

71. Blevins *v.* State, 68 Ala. 92; Bennett *v.* State, 62 Ark. 516, 36 S. W. 947; State *v.* Fertig, 98 Iowa 139, 67 N. W. 87; Rothschild *v.* State, 7 Tex. App. 519.

72. *Illinois.*— Regent *v.* People, 96 Ill. App. 189.

Indiana.— Shattuck *v.* State, 11 Ind. 473.

Pennsylvania.— Com. *v.* Bradney, 126 Pa. St. 199, 17 Atl. 600.

Utah.— State *v.* Mickel, 23 Utah 507, 65 Pac. 484.

United States.— U. S. *v.* Terry, 39 Fed. 355.

See 24 Cent. Dig. tit. "Grand Jury," § 73.

See also Indictments and Informations.

73. *Illinois.*—Regent *v.* People, 96 Ill. App. 189.

Indiana.— Shattuck *v.* State, 11 Ind. 473.

Iowa.—See State *v.* Fertig, 98 Iowa 139, 67 N. W. 87.

Kentucky.— Franklin *v.* Com., 105 Ky. 237, 48 S. W. 986, 20 Ky. L. Rep. 1137.

New York.— People *v.* Scannell, 36 Misc. 40, 72 N. Y. Suppl. 449.

United States.— U. S. *v.* Cobban, 127 Fed. 713; U. S. *v.* Kilpatrick, 16 Fed. 765; *In re* District Attorney, 7 Fed. Cas. No. 3,925; U. S. *v.* Reed, 27 Fed. Cas. No. 16,134, 2 Blatchf. 435.

See 24 Cent. Dig. tit. "Grand Jury," § 73.

Attorney present with permission of prosecuting attorney.— In Bennett *v.* State, 62 Ark. 676, 36 S. W. 947, it was held that the fact that an attorney was present in the grand jury room examining witnesses by the consent, although not at the request of, the prosecuting attorney, did not vitiate an indictment where he was not present when the grand jury was deliberating or voting on

appointed for the state is invested with the same rights before the grand jury as the regular prosecuting attorney,[74] and this, it has been held, although the appointment was not authorized by law.[75]

3. PRIVATE PROSECUTOR. It has been held that an attorney employed as a private prosecutor may on the invitation of the prosecuting attorney attend upon the grand jury for the purpose of examining witnesses.[76] But it is generally considered to be improper for a private prosecutor to use his influence before the grand jury to secure an indictment, and an indictment thus obtained is invalid.[77]

C. Presence of Presiding Judge. Under statute it has been held that the presiding judge has no right to be in the grand jury room during the deliberations of the grand jurors and that his presence and interference with their action in a particular case will vitiate the indictment.[78]

D. Presence of Officers. It is not necessary to the legal constitution of a grand jury or to the legal transaction of any business coming before it that any officer should be appointed to wait upon it;[79] but since officers are usually

the charge, and this notwithstanding a statute providing that no person except the prosecuting attorney and the witnesses on examination are permitted to be present while the grand jurors are examining a charge. See also Blevins *v.* State, 68 Ala. 92 (holding that while an attorney is not authorized to attend grand juries at the request of the public prosecutor without permission of court and without having been sworn, since the duties of the public prosecutor cannot be delegated, yet this fact would not be a ground for quashing an indictment where it affirmatively appeared that the attorney did nothing more than examine witnesses); State *v.* Whitney, 7 Oreg. 386.

Presence of counsel as witness.— In People *v.* Bradner, 44 Hun (N. Y.) 233, 7 N. Y. St. 846, it was held that the presence before the grand jury of counsel assisting the prosecution had no effect upon the legality of the proceedings where it appeared that he was present as a witness only and gave no advice except that given to the district attorney outside the jury room.

Age of deputy state's attorney.— In State *v.* Phelps, 5 S. D. 480, 59 N. W. 471, it was held that a motion to quash an indictment on the ground that the regularly appointed deputy state's attorney who appeared before the grand jury, examined witnesses, and performed the other duties of a state's attorney was not at least twenty-five years of age, was properly overruled in the absence of a statutory or constitutional provision requiring age qualifications for such deputy; and this notwithstanding a constitutional provision requiring that a state's attorney must be at least twenty-five years of age.

74. State *v.* Tyler, 122 Iowa 125, 97 N. W. 983; State *v.* Kovolosky, 92 Iowa 498, 61 N. W. 223; People *v.* O'Neill, 107 Mich. 556, 65 N. W. 540; U. S. *v.* Cobban, 127 Fed. 713. *Compare* People *v.* Scannell, 36 Misc. (N. Y.) 40, 72 N. Y. Suppl. 449.

In Florida it has been held that the presence of assistant counsel, procured with the consent of the court, before the grand jury, during the examination of witnesses, and his mere presence at the time a vote is taken on a bill, is not sufficient ground, in the absence of any abuse shown, for setting aside the indictment; but when such counsel, after remaining in the grand jury room during the examination of witnesses and the deliberations of the jury on the case, including the time when the vote is taken, urges and requests the finding of the bill, the policy of the statute is violated, and the unbiased judgment of the jury on the merits of the case is invaded, and that this rule applies with even more force in case the counsel has not been procured with the consent of the court. Miller *v.* State, 42 Fla. 266, 28 So. 208.

75. State *v.* Tyler, 122 Iowa 125, 97 N. W. 983. *Compare* State *v.* Heaton, 21 Wash. 59, 56 Pac. 843.

76. Wilson *v.* State, 41 Tex. Cr. 115, 51 S. W. 916, holding that in the absence of a statutory provision, the fact that a private prosecutor appears in the grand jury room, on the invitation of the district attorney, to examine the witnesses, is not a ground for quashing the indictment, where it is not shown that he was present when the grand jury was deliberating or voting on the accusation. *Compare* Com. *v.* Frey, 11 Pa. Co. Ct. 523, 525, where it is said: "It is doubtful if private counsel for the prosecution has the same privilege to appear and examine witnesses before the grand jury."

Paper instructing grand jury as to examination of witnesses.— In Com. *v.* Frey, 11 Pa. Co. Ct. 523, it is held that an indictment will be quashed where it appears that a paper containing instructions to the foreman of the grand jury as to whom and on what points the different witnesses should be examined was drawn by a private counsel for the prosecution and sent out to the grand jury by the district attorney at the request of the private counsel.

77. Wilson *v.* State, 70 Miss. 595, 13 So. 225, 35 Am. St. Rep. 664; Durr *v.* State, 53 Miss. 425; State *v.* Addison, 2 Rich. (S. C.) 356. See Blevins *v.* State, 68 Ala. 92. And see INDICTMENTS AND INFORMATIONS.

78. State *v.* Will, 97 Iowa 58, 65 N. W. 1010. But see Hall *v.* State, 134 Ala. 90, 32 So. 750. See also INDICTMENTS AND INFORMATIONS.

79. State *v.* Perry, 44 N. C. 330.

in attendance upon grand juries, and in the performance of their duties it is often necessary for them to enter the grand jury room, the mere fact that an officer is present during the examination of witnesses[80] or even during the deliberations of the grand jury[81] will not vitiate an indictment in the absence of proof that he influenced or attempted to influence the jury in making its finding.

E. Presence of Stenographers. The presence of a stenographer in the grand jury room at the request of the prosecuting attorney, for the purpose of taking down in shorthand for the use of the prosecution the evidence upon which an indictment is returned, does not invalidate an indictment in the absence of any showing that the accused was injuriously affected thereby.[82]

F. Presence or Interference of Stranger. In the absence of statutory provision to the contrary[83] it is generally held that the presence of a stranger in the grand jury room, while the testimony of witnesses is being received, does not render an indictment invalid unless it be made to appear that the grand jury was influenced thereby and that the accused was prejudiced in his substantial rights.[84] So in the absence of statute[85] the same rule has been applied to the presence of a

80. State *v.* Kimball, 29 Iowa 267; Richardson *v.* Com., 76 Va. 1007. See also INDICTMENTS AND INFORMATIONS.

81. State *v.* Bacon, 77 Miss. 366, 27 So. 563. See also INDICTMENTS AND INFORMATIONS.

82. *Indiana.*— State *v.* Bates, 148 Ind. 610, 48 N. E. 2; Courtney *v.* State, 5 Ind. App. 356, 32 N. E. 335.

Missouri.— State *v.* Sullivan, 110 Mo. App. 75, 84 S. W. 105.

Texas.— Sims *v.* State, (Cr. App. 1898) 45 S. W. 705.

Vermont.— State *v.* Brewster, 70 Vt. 341, 40 Atl. 1037, 42 L. R. A. 444.

United States.— U. S. *v.* Simmons, 46 Fed. 65.

Compare State *v.* Bowman, 90 Me. 363, 38 Atl. 331, 60 Am. St. Rep. 266, holding that the presence of a stenographer by the express order of the court before a grand jury while witnesses are being examined, who takes stenographic notes of the testimony, invalidates an indictment found upon the testimony given under such circumstances although the stenographer retired before the jury commenced its deliberations.

See 24 Cent. Dig. tit. "Grand Jury," § 81.

And see INDICTMENTS AND INFORMATIONS.

In Alabama under statute authorizing the solicitor to employ a stenographer, whose duty it is, among other things, to appear before the grand jury for the purpose of transcribing testimony, and who shall make oath not to divulge any secrets, it has been held that a motion to quash an indictment on the ground that a person not a grand juror, a witness, or a solicitor was present before the grand jury during the investigation of the cause, and took part in the discussion, was properly denied, it appearing that the person was a stenographer, who took down the testimony and had been sworn as a stenographer. Thayer *v.* State, 138 Ala. 39, 35 So. 406.

83. See Bennett *v.* State, 62 Ark. 516, 36 S. W. 947.

84. *Indiana.*— State *v.* Bates, 148 Ind. 610, 48 N. E. 2; Shattuck *v.* State, 11 Ind. 473; Courtney *v.* State, 5 Ind. App. 356, 32 N. E. 335.

Mississippi.— State *v.* Bacon, 77 Miss. 366, 27 So. 563.

Oregon.—See State *v.* Justus, 11 Oreg. 178, 8 Pac. 337, 50 Am. Rep. 470.

Texas.— Mason *v.* State, (Cr. App. 1904) 81 S. W. 718; Sims *v.* State, (Cr. App. 1898) 45 S. W. 705.

Vermont.— State *v.* Brewster, 70 Vt. 341, 40 Atl. 1037, 42 L. R. A. 444.

Compare State *v.* Bowman, 90 Me. 363, 38 Atl. 331, 60 Am. St. Rep. 266; Com. *v.* Dorwart, 7 Lanc. Bar (Pa.) 121.

See 24 Cent. Dig. tit. "Grand Jury," § 82.

And see INDICTMENTS AND INFORMATIONS.

An interpreter may be allowed to be present before the grand jury under statute in California. People *v.* Lem Deo, 132 Cal. 199, 64 Pac. 265; People *v.* Ramirez, 56 Cal. 533, 38 Am. Rep. 73, holding that the fact that the interpreter is a witness in a case and had arrested defendant does not disqualify him from acting as interpreter in the examination of other witnesses in that case.

Presence of another witness.— Under Iowa Code, § 5319, providing that the presence of any person other than the grand jurors during the investigation of a charge, except such persons as are required or permitted by law to be present, shall constitute a ground for setting aside the indictment, it was held that, where a father and daughter were both witnesses before the grand jury on the investigation of a charge against defendant, the fact that the daughter, who was very nervous, was accompanied during her examination by her father, constituted no ground for setting aside the indictment. State *v.* Wood, 112 Iowa 484, 84 N. W. 503. See also People *v.* Ramirez, 56 Cal. 533, 38 Am. Rep. 73.

85. Territory *v.* Staples, 3 Ida. 35, 26 Pac. 166.

In Texas under statute the fact that a person not authorized by law was present when the grand jury was deliberating upon the accusation against defendant or was voting upon the same is a ground for setting aside the indictment. Stuart *v.* State, 35

stranger while the jurors are deliberating or even voting.[86] But where a stranger participates in the proceedings and uses his influence against a person accused, an indictment thus obtained will be invalid.[87]

G. Witnesses — 1. Summoning Witnesses. The right to call witnesses before the grand jury is recognized both at common law[88] and under statute;[89] a very usual practice being for the prosecuting attorney to have such witnesses summoned as he believes necessary to support the bills to be laid before the grand jury.[90] But apart from statute a witness cannot be summoned before the

Tex. Cr. 440, 34 S. W. 118; Rothschild *v.* State, 7 Tex. App. 519. See also Sims *v.* State, (Cr. App. 1898) 45 S. W. 705.

In Iowa it has been held under a statute providing that it shall be a ground for setting aside an indictment "when any person other than the grand jurors was present before the grand jury, when the question was taken upon the finding of the indictment, or when any person other than the grand jurors shall present before the grand jury during the investigation of the charge, except as required or permitted by law," that the presence of a person not a member of the grand jury, his examination of a witness and advising with the grand jurors in regard to the charge against defendant, does not invalidate the indictment unless it be affirmatively shown by defendant that such third person was not required or permitted by law to be present. State *v.* Fertig, 98 Iowa 139, 140, 67 N. W. 87.

Application of statutes to disqualified or irregularly impaneled jurors.— Statutes of this kind have been held applicable to strangers only and not to grand jurors, although they are disqualified to serve (Territory *v.* Staples, 3 Ida. 35, 26 Pac. 166; Doss *v.* State, 28 Tex. App. 506, 13 S. W. 788) or have not been legally selected, summoned, or impaneled (People *v.* Colby, 54 Cal. 37).

86. State *v.* Bacon, 77 Miss. 366, 27 So. 563 [*distinguishing* Wilson *v.* State, 70 Miss. 595, 13 So. 225, 35 Am. St. Rep. 664], where it appeared that the stranger made statements charging the guilt of a person afterward indicted, although they had no influence on the jury. See State *v.* Clough, 49 Me. 573 [*disapproved* in State *v.* Bowman, 90 Me. 363, 38 Atl. 331, 60 Am. St. Rep. 266]; State *v.* Brewster, 70 Vt. 341, 40 Atl. 1037, 42 L. R. A. 444. See also Indictments and Informations.

Appointment of stranger as clerk.— In State *v.* Watson, 34 La. Ann. 669, it was held that the appointment by the court of a citizen who is not a member of the grand jury, as a clerk of that body, is unauthorized by law and can be made a ground of a motion in arrest of judgment.

87. State *v.* Clough, 49 Me. 573; Wilson *v.* State, 70 Miss. 595, 13 So. 225, 35 Am. St. Rep. 664 [*distinguished* in State *v.* Bacon, 77 Miss. 366, 27 So. 563]; Matter of Gardiner, 31 Misc. (N. Y.) 364, 64 N. Y. Suppl. 760; Com. *v.* Salter, 2 Pearson (Pa.) 461. See U. S. *v.* Kilpatrick, 16 Fed. 765. And see Indictments and Informations.

When a witness gives advice upon request under cover of testifying to facts within his personal knowledge, it is the duty of the court to set aside the indictment or presentment. Matter of Gardiner, 31 Misc. (N. Y.) 364, 64 N. Y. Suppl. 760.

False personation of grand juror.— In Nixon *v.* State, 68 Ala. 535, it was held under statute that if a juror regularly drawn is falsely personated by another person of the same surname, who is sworn as a member of the jury in the place of the regular juror, it will be a ground for quashing an indictment.

Effect of written communication by strangers.— A motion to dismiss an indictment on the ground that certain persons not officers of the law distributed to each of the persons composing the grand jury list a circular letter advising them as to their duties and on other matters prejudicial to defendant's rights, and that unauthorized persons had interviews with the grand jurors, is properly denied where the only evidence in support of the motion to dismiss is that a committee of citizens had distributed to the grand jurors a circular reminding them of the great importance of their duties, stating some of their powers as set out in the statute, and offering to further advise them if they would call at the headquarters of the committee of the methods whereby each grand juror could do effective work. People *v.* Shea, 147 N. Y. 78, 41 N. E. 505. *Compare* People *v.* Sellick, 4 N. Y. Cr. 329, holding that the act of an unauthorized person in writing a postal card to the members of the grand jury, requesting them to call upon him, and holding interviews with them, requesting their investigation of a certain case to be tried before them, and making various statements regarding the facts, invalidated an indictment found by the grand jury in such case.

88. O'Hair *v.* People, 32 Ill. App. 277.

89. Baldwin *v.* State, 126 Ind. 24, 25 N. E. 820.

90. State *v.* Wolcott, 21 Conn. 272; O'Hair *v.* People, 32 Ill. App. 277; Lewis *v.* Wake County, 74 N. C. 194; U. S. *v.* Kilpatrick, 16 Fed. 765.

Permission of court unnecessary.— In State *v.* Wolcott, 21 Conn. 272, it was held that it is not usual for the court, without special reasons suggested on application, to give directions regarding witnesses to be called before the grand jury, but that the prosecuting attorney sends such as he believes to be necessary. See also State *v.* Barnes, 5 Lea (Tenn.) 398.

Mode of summoning.— In Baldwin *v.* State, 126 Ind. 24, 25 N. E. 820, it was held that

grand jury merely to be interrogated whether there has been any violation of the penal laws within his knowledge, where the fact to be investigated has not been discovered by the grand jury or any member thereof, and when that body knows nothing of any person connected with or guilty of a criminal offense.[91] By statute, however, provision is sometimes made that the grand jury shall have the right to summon and examine witnesses when it suspects a violation of the law in certain enumerated cases;[92] but such statutes are in derogation of the common law and cannot therefore be extended beyond their express terms;[93] and hence if the offense is one with respect to which full inquisitorial powers have not been specially granted by statute, the investigation must be confined to the knowledge of the grand jurors themselves, and in such case they can make a lawful presentment only upon knowledge or information possessed within themselves.[94]

while there was no statute which in express terms directed the clerk of the court to issue subpœnas for witnesses to appear before the grand jury, yet such authority was conferred by implication under the statutes of that state. But in State *v.* Parrish, 8 Humphr. (Tenn.) 80, it was held that while witnesses are not bound to attend before grand juries for the purpose of giving evidence without subpœna yet if they do so defendant cannot object thereto.

Issuance of subpœna during vacation.— In O'Hair *v.* People, 32 Ill. App. 277, it was held that the clerk of the circuit court may in vacation, at the request of the state's attorney, issue subpœnas for witnesses to appear before the grand jury at the ensuing term of court.

Direction to appear before court necessary. — The subpœna for a witness before the grand jury must direct him to appear not before the grand jury but before the court, and give evidence before the grand jury. O'Hair *v.* People, 32 Ill. App. 277. But it has been held that a subpœna which, instead of commanding the witness to appear before the court to give evidence to the grand jury, commands him to appear before the grand jury and give evidence, is no ground for a judgment *nisi* upon which to found a scire facias, and a demurrer to a scire facias reciting such a subpœna must be sustained. State *v.* Butler, 8 Yerg. (Tenn.) 83.

Fees for summoning witnesses see COUNTIES, 11 Cyc. 594 note 30.

91. *In re* Lester, 77 Ga. 143; Matter of Morse, 42 Misc. (N. Y.) 664, 87 N. Y. Suppl. 721; Com. *v.* Green, 126 Pa. St. 531, 17 Atl. 878, 12 Am. St. Rep. 894; Com. *v.* Dietrich, 7 Pa. Super. Ct. 515; Matter of Grand Jury, 5 Pa. L. J. 55 (holding that where charges are preferred before the grand jury by a member thereof against certain persons, the court has no authority at the request of the grand jury to make an order for the summoning of witnesses and the production of books before the grand jury for the purpose of enabling it to make presentments); U. S. *v.* Kilpatrick, 16 Fed. 765. But see Ward *v.* State, 2 Mo. 120, 22 Am. Dec. 449.

In North Carolina it has been stated that at common law the grand jury had originally the right to send for witnesses and have them sworn to give evidence generally, and to found presentments on the evidence of such witnesses. State *v.* Wilcox, 104 N. C. 847, 10 S. E. 453 [*quoting* Wharton Cr. L. § 457]. But under statute in that state a different rule now prevails. State *v.* Wilcox, 104 N. C. 847, 10 S. E. 453; Lewis *v.* Wake County, 74 N. C. 194, holding that a prosecuting officer has no right to send witnesses to the grand jury room merely to be interrogated whether there have been any violations of the law within their knowledge.

Summoning government officials.—In Charge to Grand Jury, 30 Fed. Cas. No. 18,248, it was held that the grand jury must not be satisfied by acting upon such cases only as may be brought before them by the district attorney or by members of their body to whom knowledge of particular offenses may come, but that they should summon before them officers of the government and others whom they may have reason to believe possess information proper for their action.

Compensation of witnesses.— In Lewis *v.* Wake County, 74 N. C. 194, it was held that witnesses are entitled to compensation where a bill is prepared and sent to the grand jury with the names of the witnesses summoned indorsed thereon, but that there is no provision of law for their compensation where they are summoned merely to testify generally before the grand jury "in certain matters then and there to be inquired of."

92. State *v.* Barnes, 5 Lea (Tenn.) 398 (holding, however, that in the absence of a requirement to that effect in the statute, no order of court is necessary to summon witnesses); State *v.* Staley, 3 Lea (Tenn.) 565; State *v.* Hestes, 3 Lea (Tenn.) 168; Doebler *v.* State, 1 Swan (Tenn.) 473; State *v.* Parrish, 8 Humphr. (Tenn.) 80; Garret *v.* State, 9 Yerg. (Tenn.) 389.

93. Warner *v.* State, 13 Lea (Tenn.) 52; State *v.* Adams, 2 Lea (Tenn.) 647; Robeson *v.* State, 3 Heisk. (Tenn.) 266; Harrison *v.* State, 4 Coldw. (Tenn.) 195; Deshazo *v.* State, 4 Humphr. (Tenn.) 275; State *v.* Smith, Meigs (Tenn.) 99, 33 Am. Dec. 132.

94. State *v.* Lee, 87 Tenn. 114, 9 S. W. 425; Harrison *v.* State, 4 Coldw. (Tenn.) 195; State *v.* Love, 4 Humphr. (Tenn.) 255

2. Volunteer Witnesses. A person having knowledge of a crime has the right in some jurisdictions to go before a grand jury and to disclose his knowledge without being summoned.[95] But in other jurisdictions it is held that a private individual has no right on his own motion to go before a grand jury for the purpose of communicating information and preferring charges, since the effect of such privilege would be to deprive the accused of a responsible prosecutor who may be made liable in costs and also to respond in damages for false and malicious prosecution,[96] the proper course in such case being to give the information to the prosecuting attorney to the end that a bill of indictment may be prepared and sent to the grand jury.[97]

3. Swearing Witnesses — a. In General. Before a witness may be examined by the grand jury he must be sworn,[98] and in the absence of a statute authorizing the oath to be taken in the grand jury room by the foreman or some other authorized officer[99] the general rule is that it must be taken in open court.[1] Where the

[*distinguishing* State *v.* McManus, 4 Humphr. (Tenn.) 358]. See also State *v.* Lewis, 87 Tenn. 119, 9 S. W. 427.

95. *In re* Lester, 77 Ga. 143; State *v.* Stewart, 45 La. Ann. 1164, 14 So. 143. See also State *v.* Wilcox, 104 N. C. 847, 10 S. E. 453; State *v.* Ivey, 100 N. C. 539, 5 S. E. 407. *Compare* Lewis *v.* Wake County, 74 N. C. 194.

It need not appear of record that the witness was sent before the grand jury by the solicitor. State *v.* Frizell, 111 N. C. 722, 16 S. E. 409.

96. McCullough *v.* Com., 67 Pa. St. 30; Com. *v.* Dietrich, 7 Pa. Super. Ct. 515; U. S. *v.* Kilpatrick, 16 Fed. 765.

97. *In re* Lester, 77 Ga. 143; U. S. *v.* Kilpatrick, 16 Fed. 765. See also Indictments and Informations.

98. *Connecticut.*— State *v.* Fasset, 16 Conn. 457.

Ohio.— Duke *v.* State, 20 Ohio St. 225.

Pennsylvania.— Com. *v.* Price, 3 Pa. Co. Ct. 175, 4 Kulp 289.

Tennessee.— Gilman *v.* State, 1 Humphr. 59.

United States.— U. S. *v.* Coolidge, 25 Fed. Cas. No. 14,858, 2 Gall. 364.

See 24 Cent. Dig. tit. "Grand Jury," § 76.

Certificate of administration of oath.— In Duke *v.* State, 20 Ohio St. 225, it was held that if the provision of Ohio Code Cr. Proc. § 75, providing that "before any witness shall be examined by the grand jury, an oath or affirmation shall be administered to him by the clerk," is observed, an indictment based upon the testimony of the witness will not be held to have been illegally found because the court has not certified that such oath or affirmation had been administered by the clerk or because such certificate if made had not been delivered to the witness or by him presented to the foreman of the grand jury when he was admitted for examination.

Necessity of swearing grand jurors as witnesses.— The rule has been laid down that a grand jury may properly act upon personal knowledge of any of its members communicated to his fellows under no other sanction than the grand juror's oath. Com. *v.* Hayden, 163 Mass. 453, 40 N. E. 846, 47 Am. St. Rep. 468, 28 L. R. A. 318; Com. *v.* Woodward, 157 Mass. 516, 32 N. E. 939, 34 Am. St. Rep. 302. *Compare* Matter of Gardiner, 31 Misc. (N. Y.) 364, 64 N. Y. Suppl. 760; State *v.* Cain, 8 N. C. 352.

99. *Alabama.*— Joyner *v.* State, 78 Ala. 448, a statute declaring that "oaths may be administered to witnesses before the grand jury while in session, either by the foreman, or by the solicitor."

Georgia.— Bird *v.* State, 50 Ga. 585, a statute giving the power to the foreman of a grand jury to administer the oath.

Mississippi.— Smith *v.* State, 61 Miss. 754.

Pennsylvania.— Com. *v.* Wilson, 9 Pa. Co. Ct. 24; Com. *v.* Price, 3 Pa. Co. Ct. 175, 4 Kulp 289.

Vermont.— State *v.* Brewster, 70 Vt. 341, 40 Atl. 1037, 42 L. R. A. 444.

See 24 Cent. Dig. tit. "Grand Jury," § 76.

Oath administered by special solicitor not legally appointed.— Under statute in Alabama providing that oaths may be administered to witnesses before the grand jury while in session, either by the foreman or by the solicitor, it has been held that an indictment will be quashed on motion when it is shown that a witness before the grand jury upon whose testimony it was found was sworn by a person who was acting as a substitute for the regular solicitor and had not been legally appointed. Joyner *v.* State, 78 Ala. 448.

1. *Illinois.*— Boone *v.* People, 148 Ill. 440, 36 N. E. 99; O'Hair *v.* People, 32 Ill. App. 277.

South Carolina.— State *v.* Kilcrease, 6 S. C. 444.

Tennessee.— Ayrs *v.* State, 5 Coldw. 26 (holding that the foreman of a grand jury has no right to swear witnesses before the grand jury except in certain cases designated by statute); Gilman *v.* State, 1 Humphr. 59 (holding that the fact that witnesses were not sworn in open court constitutes error but that to be available it must be pleaded as matter in abatement).

United States.— U. S. *v.* Reed, 27 Fed. Cas. No. 16,134, 2 Blatchf. 435.

law requires witnesses before the grand jury to be sworn in open court, the rule has been announced that an indictment founded upon the oath of a witness not properly sworn in open court is void.[2] But in jurisdictions where witnesses are allowed to be sworn in the grand jury room it has been held that no inquiry as to the oath administered to them can be entered into by the courts for the purpose of invalidating indictments.[3]

b. Form of Oath. The form of the oath to be administered to witnesses before the grand jury is sometimes prescribed by statute, and it has been held that a substantial departure from the statutory form will vitiate an indictment.[4] In the absence of statute prescribing the form of oath, a general oath to give evidence touching criminal charges to be laid before the grand jury, without reference to any particular person accused, or an oath to give evidence in support of an accusation against a person named and others concerning whom they should be interrogated by the grand jury, has been held to be unobjectionable.[5] If an oath embraces one or more persons by name whose cases are about to be laid

England.— Middlesex Special Commission, 6 C. & P. 90, 25 E. C. L. 336.

See 24 Cent. Dig. tit. "Grand Jury," § 76.

In Connecticut it has been held to be the practice for witnesses before the grand jury to be sworn by a magistrate in the grand jury room and not in open court, and that this is the lawful mode of administering the oath. State *v.* Fasset, 16 Conn. 457.

In North Carolina under the act of 1797, it was held to be the practice for bills of indictment to be found on the testimony of witnesses sworn in open court and sent to the grand jury. State *v.* Cain, 8 N. C. 352. See also State *v.* Allen, 83 N. C. 680. A subsequent statute in that state, giving to the foreman of the grand jury the power to swear and indorse on the bill the names of witnesses examined before that body, has been held to create and authorize an additional mode of swearing the witnesses, and that was not intended to abrogate the mode formerly prevailing of swearing them into court. State *v.* White, 88 N. C. 698; State *v.* Allen, 83 N. C. 680.

Presence of judge unnecessary.— The witness need not be sworn in the presence of the judge, if sworn in open court. Boone *v.* People, 148 Ill. 440, 36 N. E. 99. In Jetton *v.* State, Meigs (Tenn.) 192, it was held that if the witness was sworn while the court was open the swearing was sufficient, even if the mayor and aldermen were not on the bench or immediately before the witness, although it was held to be error in the lower court to state that the clerk and constable constitute members of the court and that if the witness was sworn before either he was sworn before the court.

2. State *v.* Kilcrease, 6 S. C. 444; Ayrs *v.* State, 5 Coldw. (Tenn.) 26; U. S. *v.* Coolidge, 25 Fed. Cas. No. 1,458, 2 Gall. 364; U. S. *v.* Reed, 27 Fed. Cas. No. 16,134, 2 Blatchf. 435. See also Middlesex Special Sessions, 6 C. & P. 90, 25 E. C. L. 336. *Compare* Reg. *v.* Russell, C. & M. 247, 41 E. C. L. 139. See also INDICTMENTS AND INFORMATIONS.

Record evidence of oath.— It is not necessary that it should appear of record that a witness on whose testimony an indictment is found was sworn in open court. Gilman *v.* State, 1 Humphr. (Tenn.) 59.

Indorsement on indictment.— While the clerk usually indorses on the indictment the names of the witnesses and the fact that they were sworn, yet if the witnesses have been in fact sworn their evidence will authorize the finding of an indictment whether the fact that they were sworn be indorsed upon the indictment or not. Gilman *v.* State, 1 Humphr. (Tenn.) 59.

3. State *v.* Easton, 113 Iowa 516, 85 N. W. 795, 86 Am. St. Rep. 389 (holding that the failure of a grand jury to swear a witness as required by Code, §§ 5254, 5255, 5260, is not sufficient to authorize the setting aside of an indictment, since it is not included in the grounds therefor specified in section 5319, which are exclusive of other grounds); Smith *v.* State, 61 Miss. 754. See also Lennard *v.* State, 104 Ga. 546, 30 S. E. 780 (holding that a plea in abatement attacking an indictment, on the ground that the oath required by law was not administered to a named witness upon his examination by the grand jury, was not good without alleging that the indictment was found true solely upon the testimony of this witness); Simms *v.* State, 60 Ga. 145; Morrison *v.* State, 41 Tex. 516.

4. Ashburn *v.* State, 15 Ga. 246 [*followed* in *In re* Lester, 77 Ga. 143], where the statutory oath was as follows: "The evidence you shall give the Grand Jury on this bill of indictment (or presentment) as the case may be, (here state the case,) shall be the truth, the whole truth, and nothing but the truth — so help you God," and where the oath administered to the witnesses was to testify concerning such matters as should be required of them by the grand jury. *Compare* Lennard *v.* State, 104 Ga. 546, 30 S. E. 780; Simms *v.* State, 60 Ga. 145; Morrison *v.* State, 41 Tex. 516, holding that the courts have no authority to inquire as to the form of the oath administered to a witness. See also INDICTMENTS AND INFORMATIONS.

5. U. S. *v.* Reed, 27 Fed. Cas. No. 16,134, 2 Blatchf. 435.

before the grand jury, and in respect to which the oath is administered, and nothing more, evidence cannot be given under it in support of any accusation against others.[6]

4. Examination and Control of Witnesses — a. In General. Witnesses before the grand jury are subject to the lawful authority and control of the court in the same manner as are the witnesses before the trial jury,[7] and in a proper case may be punished for contempt of court.[8] So a grand jury has the right to report a contumacious witness to the court,[9] and where a witness is duly summoned to appear before a grand jury and appears and refuses to be sworn or answer the questions proposed to him, and accompanies his refusal with profanity and disrespectful conduct toward the jury, it may lawfully direct and require the officer in attendance to detain the witness in custody and take him before the court for the purpose of obtaining its aid and direction.[10]

b. Recognizance of Witness. A court having the power belonging to a court of oyer and terminer or of general jail delivery has power to require a witness subpœnaed to testify before a grand jury, to enter into a recognizance to appear before such grand jury either at a present or a future term of court.[11]

c. Mode of Examination. Witnesses before the grand jury do not, as do the witnesses before a trial jury, testify in the presence and under the eye of the court;[12] and where witnesses for the state are required by the judge to be examined publicly and in open court, it has been held that an indictment found upon such testimony is invalid.[13] But where witnesses are examined secretly before the grand jury the rule has been stated that the court has no power to inquire into the mode in which the examination was conducted for the purpose of invalidating an indictment.[14]

H. Evidence Before Grand Jury — 1. Admissibility of Evidence — a. In General. The general rule has been laid down that investigations before grand juries should be made in accordance with the well established rules of evidence,[15] and that the evidence received must be competent legal evidence such as is legitimate and proper before a petit jury;[16] and this rule is recognized by statute in

6. U. S. *v.* Reed, 27 Fed. Cas. No. 16,134, 2 Blatchf. 435.

7. *In re* Gannon, 69 Cal. 541, 11 Pac. 240; Heard *v.* Pierce, 8 Cush. (Mass.) 338, 54 Am. Dec. 757.

8. See Witnesses.

9. People *v.* Kelly, 12 Abb. Pr. (N. Y.) 150. See also *Ex p.* Harris, 4 Utah 5, 5 Pac. 129.

10. Heard *v.* Pierce, 8 Cush. (Mass.) 338, 54 Am. Dec. 757.

11. Gwynn *v.* State, 64 Miss. 324, 1 So. 237.

12. Heard *v.* Pierce, 8 Cush. (Mass.) 338, 54 Am. Dec. 757; State *v.* Branch, 68 N. C. 186, 12 Am. Rep. 633. *Compare* State *v.* Brewster, 70 Vt. 341, 347, 40 Atl. 1037, 42 L. R. A. 444, where it is said: "But, at common law, where the accused was under arrest, the examination of witnesses was sometimes in open court, before the grand jury."

The use of minutes of testimony taken before a magistrate is under statute in Iowa equivalent to the examination of the witnesses before that body, the written examination taking the place of the oral. State *v.* Marshall, 105 Iowa 38, 74 N. W. 763.

13. State *v.* Branch, 68 N. C. 186, 12 Am. Rep. 633. See also Indictments and Informations.

14. U. S. *v.* Reed, 27 Fed. Cas. No. 16,134, 2 Blatchf. 435.

15. U. S. *v.* Kilpatrick, 16 Fed. 765. See also U. S. *v.* Burr, 24 Fed. Cas. No. 14,693.

16. State *v.* Logan, 1 Nev. 509; U. S. *v.* Reed, 27 Fed. Cas. No. 16,134, 2 Blatchf. 435.

Depositions taken before magistrate.— In People *v.* Stuart, 4 Cal. 218, it was held under statute that depositions of witnesses taken before a magistrate upon a criminal charge may be used before a grand jury.

Hearsay evidence is not admissible before the grand jury. U. S. *v.* Kilpatrick, 16 Fed. 765. See also U. S. *v.* Farrington, 5 Fed. 343.

Evidence of confessions ought never to be admitted before a grand jury except under the direction of the court or unless the prosecuting officer of the government is present and carefully makes the preliminary inquiries necessary to render the evidence admissible. U. S. *v.* Kilpatrick, 16 Fed. 765.

Testimony of co-defendants.— It has been held that a defendant may be indicted upon the testimony of his co-defendants. U. S. *v.* Brown, 24 Fed. Cas. No. 14,671, 1 Sawy. 531. See also State *v.* Frizelle, 111 N. C. 722, 16 S. E. 409.

Accomplices are competent witnesses before a grand jury. State *v.* Wolcott, 21 Conn. 272. See also State *v.* Barnes, 5 Lea (Tenn.) 398.

some jurisdictions.[17] But while this rule is laid down for the guidance of grand juries they are not as a matter of fact held to the same technical rules of evidence as petit jurors where their action is being passed upon by the courts.[18] It is very generally conceded that the mere fact that some illegal or improper evidence has been received before the grand jury or that certain witnesses examined were disqualified to testify will not invalidate an indictment where other legal evidence was received in its support,[19] and this, it has been held, notwithstanding a statute providing that the grand jury shall receive none but legal evidence, statutes of this character being usually regarded as directory and not mandatory.[20] On the other hand, while there are cases to the contrary,[21] the weight of authority seems to be in favor of the rule that an indictment will be vitiated where the finding is supported by illegal evidence only, provided that fact is established by competent testimony,[22] and indeed this rule has been applied to a

17. Com. *v.* Minor, 89 Ky. 555, 13 S. W. 5, 11 Ky. L. Rep. 775; State *v.* Beebe, 17 Minn. 241; State *v.* Logan, 1 Nev. 509; People *v.* Sellick, 4 N. Y. Cr. 329.

Comparison of disputed writing.— Under statute in New York, permitting comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine, the grand jury has the power to receive writings for the purpose of comparison and to assist in finding an indictment. People *v.* Molineux, 27 Misc. (N. Y.) 79, 58 N. Y. Suppl. 155.

18. Watson *v.* Hall, 46 Conn. 204; State *v.* Wolcott, 21 Conn. 272 (where it is said: "Grand-juries do not try, but enquire; they do not condemn, but only accuse; and it would be found intolerable, in practice, to confine them to technical rules of evidence"); State *v.* Fasset, 16 Conn. 457; People *v.* Sexton, 42 Misc. (N. Y.) 312, 86 N. Y. Suppl. 517.

19. *Alabama.*— Jones *v.* State, 81 Ala. 79, 1 So. 32; Washington *v.* State, 63 Ala. 189.

Connecticut.— State *v.* Fasset, 16 Conn. 457.

Iowa.— State *v.* Tucker, 20 Iowa 508.

Massachusetts.— See Com. *v.* Woodward, 157 Mass. 516, 32 N. E. 939, 34 Am. St. Rep. 302.

Michigan.— People *v.* Lauder, 82 Mich. 109, 46 N. W. 956.

New Jersey.— State *v.* Dayton, 23 N. J. L. 49, 53 Am. Dec. 270.

Ohio.— Turk *v.* State, 7 Ohio, Pt. II, 240.

Tennessee.— Bloomer *v.* State, 3 Sneed 66.

Texas.— Buchanan *v.* State, 41 Tex. Cr. 127, 52 S. W. 769; Dockery *v.* State, 35 Tex. Cr. 487, 34 S. W. 281.

United States.— U. S. *v.* Farrington, 5 Fed. 343.

See 24 Cent. Dig. tit. "Grand Jury," § 79. And see INDICTMENTS AND INFORMATIONS.

20. Com. *v.* Minor, 89 Ky. 555, 13 S. W. 5, 11 Ky. L. Rep. 775; Territory *v.* Pendry, 9 Mont. 67, 22 Pac. 760; State *v.* Logan, 1 Nev. 509.

In New York under statute the rule is laid down that the mere fact of admission of improper or illegal evidence before the grand jury will not vitiate an indictment if there is sufficient legal evidence introduced to sustain it. People *v.* Sexton, 42 Misc. 312, 86 N. Y. Suppl. 517; People *v.* Molineux, 27 Misc. 79, 58 N. Y. Suppl. 155; People *v.* Winant, 24 Misc. 361, 53 N. Y. Suppl. 695; People *v.* Linderborn, 23 Misc. 426, 52 N. Y. Suppl. 101.

21. *Iowa.*— State *v.* Will, 97 Iowa 58, 65 N. W. 1010; State *v.* Smith, 74 Iowa 580, 38 N. W. 492; State *v.* Fowler, 52 Iowa 103, 2 N. W. 983.

New Jersey.— State *v.* Dayton, 23 N. J. L. 49, 53 Am. Dec. 270.

South Carolina.— State *v.* Boyd, 2 Hill 288, 27 Am. Dec. 376.

Utah.— U. S. *v.* Cutler, 5 Utah 608, 19 Pac. 145.

England.— See Reg. *v.* Russell, 1 C. & M. 247, 41 E. C. L. 139.

See 24 Cent. Dig. tit. "Grand Jury," § 79. And see INDICTMENTS AND INFORMATIONS.

22. *Illinois.*— Boone *v.* People, 148 Ill. 440, 36 N. E. 99.

Michigan.— See People *v.* Lauder, 82 Mich. 109, 46 N. W. 956.

Nevada.— State *v.* Logan, 1 Nev. 509.

New York.— People *v.* Sexton, 42 Misc. 312, 36 N. Y. Suppl. 517.

North Carolina.— State *v.* Lanier, 90 N. C. 714; State *v.* Roberts, 19 N. C. 540.

Pennsylvania.— Com. *v.* McComb, 157 Pa. St. 611, 27 Atl. 794; Com. *v.* Green, 126 Pa. St. 531, 17 Atl. 878, 12 Am. St. Rep. 894.

United States.— U. S. *v.* Coolidge, 25 Fed. Cas. No. 14,858, 2 Gall. 364.

See 24 Cent. Dig. tit. "Grand Jury," § 79. And see INDICTMENTS AND INFORMATIONS.

In New York under statute it is held that an indictment will be vitiated when it is apparent that the grand jury must have given weight to the improper evidence presented and acted upon it in the final determination reached. People *v.* Molineux, 27 Misc. 79, 58 N. Y. Suppl. 155; People *v.* Lindenborn, 23 Misc. 426, 52 N. Y. Suppl. 101; People *v.* Metropolitan Traction Co., 50 N. Y. Suppl. 1117, 12 N. Y. Cr. 405; People *v.* Selleck, 4 N. Y. Cr. 329, holding that the disclosure of privileged communications by a physician before a grand jury was incompetent and illegal, and must from its very nature have influenced the grand jury in the finding of the indictment and therefore rendered the indictment void. See also People *v.* Brickner, 15 N. Y. Suppl. 528. Indeed a similar rule seems to have prevailed prior to the code. People *v.* Restenblatt, 1 Abb. Pr. (N. Y.)

finding based in part upon such palpably incompetent evidence as to indicate that the indictment resulted from prejudice or was found in wilful disregard of the rights of the accused.[23]

b. Testimony of Accused. Constitutional provisions declaring that no person in a criminal case shall be compelled to be a witness against himself are very generally held applicable to witnesses summoned before a grand jury,[24] and an indictment based on evidence secured in violation of this constitutional guaranty will as a general rule be deemed invalid.[25] But this rule does not apply where the accused testifies voluntarily or waives his privilege.[26]

2. Sufficiency of Evidence. Grand jurors should not find a bill upon evidence merely sufficient to render the truth of the charge probable, but they should be convinced that the evidence before them, unexplained and uncontradicted, would

268; People *v.* Moore, 65 How. Pr. (N. Y.) 177; People *v.* Briggs, 60 How. Pr. (N. Y.) 17. See also Hope *v.* People, 83 N. Y. 418, 38 Am. Rep. 460 [*approving* People *v.* Hulbut, 4 Den. (N. Y.) 133, 47 Am. Dec. 244].

23. U. S. *v.* Farrington, 5 Fed. 343 [*disapproving* U. S. *v.* Brown, 24 Fed. Cas. No. 14,671, 1 Sawy. 531]. See also State *v.* Froiseth, 16 Minn. 296.

24. Boone *v.* People, 148 Ill. 440, 36 N. E. 99; State *v.* Froiseth, 16 Minn. 296; People *v.* Haines, 1 N. Y. Suppl. 55; People *v.* Singer, 18 Abb. N. Cas. (N. Y.) 96. See also U. S. *v.* Farrington, 5 Fed. 343.

Testimony of co-defendant.— In State *v.* Frizell, 111 N. C. 722, 16 S. E. 409 [*distinguishing* State *v.* Krider, 78 N. C. 481], it was held that one defendant is competent and compellable to testify against a co-defendant provided his testimony does not incriminate himself. See also State *v.* Smith, 86 N. C. 705. So in U. S. *v.* Brown, 24 Fed. Cas. No. 14,671, 1 Sawy. 531, it was held that under the federal statutes a witness may be compelled to testify against a co-defendant before a grand jury concerning matters tending to incriminate himself, although no indictment may be found against him on his own testimony. *Compare* U. S. *v.* Farrington, 5 Fed. 343.

In Georgia it has been held that a witness before a grand jury, investigating a charge of gaming preferred against another, may be compelled to answer whether he has seen the latter play and bet at cards for money, in the county wherein the jury is sitting, within two years prior to the inquiry, although the testimony of such witness may relate to an act of gaming in which the witness himself criminally participated. Wheatley *v.* State, 114 Ga. 175, 39 S. E. 877.

Right of accused to refuse to testify see Contempt, 9 Cyc. 18 note 71.

25. Boone *v.* People, 148 Ill. 440, 36 N. E. 99; State *v.* Gardner, 88 Minn. 130, 92 N. W. 529 [*distinguishing* State *v.* Hawks, 56 Minn. 129, 57 N. W. 455]; State *v.* Froiseth, 16 Minn. 296; People *v.* Haines, 1 N. Y. Suppl. 55 [*distinguished* in People *v.* Willis, 23 Misc. (N. Y.) 568, 52 N. Y. Suppl. 808]; People *v.* Singer, 18 Abb. N. Cas. (N. Y.) 96. *Compare* Speardman *v.* State, 34 Tex. Cr. 279, 30 S. W. 229; Mencheca *v.* State, (Tex. Cr. App. 1894) 28 S. W. 203. See also Indictments and Informations.

The fact that a person may, in the investigation of some other charge by the grand jury, have been required to give evidence which would have been material on the particular charge for which he is indicted, is no cause for setting aside the indictment on the ground that he was required to testify against himself, unless it appears from the indorsement or entry of his name on the indictment as a witness that the grand jury found the bill, in whole or in part, upon his testimony. State *v.* Hawks, 56 Minn. 129, 5 N. W. 455. See also People *v.* Hayes, 28 Misc. (N. Y.) 93, 59 N. Y. Suppl. 761.

26. *Arkansas.*— Eastling *v.* State, 69 Ark. 189, 62 S. W. 584.

California.— People *v.* King, 28 Cal. 265.

Indiana.— State *v.* Comer, 157 Ind. 611, 62 N. E. 452.

Iowa.— State *v.* Trauger, (1898) 77 N. W. 336.

Louisiana.—See State *v.* Donelon, 45 La. Ann. 744, 12 So. 922.

Michigan.— People *v.* Lauder, 82 Mich. 109, 46 N. W. 956.

New York.— People *v.* Willis, 23 Misc. 568, 52 N. Y. Suppl. 808.

Ohio.— Lindsay *v.* State, 24 Ohio Cir. Ct. 1.

United States.— U. S. *v.* Brown, 24 Fed. Cas. No. 14,671, 1 Sawy. 531.

See 24 Cent. Dig. tit. "Grand Jury," § 78. And see Indictments and Informations.

Compelling attendance of accused no violation of his rights.— In People *v.* Lauder, 82 Mich. 109, 46 N. W. 956, it was held that it is no violation of the constitutional rights of a person accused to compel him by subpœna to attend before the grand jury, to administer an oath to him and to allow him to testify to incriminating matters against himself, where he makes no objection to testifying on account of privilege. To same effect see State *v.* Comer, 157 Ind. 611, 62 N. E. 452. *Compare* People *v.* Singer, 18 Abb. N. Cas. (N. Y.) 96, holding that an indictment will be quashed if the grand jury have required defendant to appear before them, and have received his voluntary statements made after he was informed that he was under no obligation to answer.

Warning as to constitutional privilege.— In State *v.* Comer, 157 Ind. 611, 62 N. E. 452, it was held that a grand jury examining a witness under oath need not inform the witness of his constitutional privilege to refuse

warrant a conviction by a trial jury,[27] this rule being sometimes prescribed by statute.[28] But while this is to be regarded as a rule for the guidance of grand jurors, it may be laid down as a general proposition that an indictment will not be invalidated on the ground of insufficiency of evidence[29] unless it is made to appear by competent evidence[30] that the indictment is unsupported by any evidence whatever,[31] or is supported by such insufficient evidence as to indicate that the indictment resulted from prejudice or was found in wilful disregard of the rights of the accused.[32] Indeed in some jurisdictions the rule is announced that

to testify in matters tending to incriminate him.

27. People *v.* Price, 2 N. Y. Suppl. 414; People *v.* Briggs, 60 How. Pr. (N. Y.) 17; People *v.* Hyler, 2 Park. Cr. (N. Y.) 570; *In re* Franklin County, 5 Ohio S. & C. Pl. Dec. 691, 7 Ohio N. P. 450; State *v.* Boyd, 2 Hill (S. C.) 288, 27 Am. Dec. 376; *In re* Grand Jury, 62 Fed. 840; U. S. *v.* Kilpatrick, 16 Fed. 765; Charge to the Grand Jury, 30 Fed. Cas. No. 18,257. See also State *v.* Cowan, 1 Head (Tenn.) 280.

Proof beyond reasonable doubt.— In *In re* Franklin County, 5 Ohio S. & C. Pl. Dec. 691, 693, 7 Ohio N. P. 450, it is said: "The rule in criminal cases applicable to trials in courts, requiring the evidence to be strong enough to establish their guilt beyond a reasonable doubt, has no application to your conclusion as grand jurors." See also Com. *v.* Dittus, 17 Lanc. L. Rev. (Pa.) 127, holding that where three respectable witnesses testified positively that defendant struck the prosecutor, the grand jury had no right to ignore such showing and put the costs on the prosecutor; their duty being simply to ascertain whether a *prima facie* case is made, and not to try the innocence or guilt of the accused. *Compare* People *v.* Brickner, 15 N. Y. Suppl. 528.

Burden of proof as to sanity of accused.— In U. S. *v.* Lawrence, 26 Fed. Cas. No. 15,576, 4 Cranch C. C. 514, it was held that it is unnecessary to summon witnesses before the grand jury on the part of the prosecution to prove the sanity of the accused, as every person is presumed in law to be of sound mind until the contrary is shown.

28. People *v.* Craven-Fair, 137 Cal. 222, 69 Pac. 1041; People *v.* Edwards, 25 N. Y. Suppl. 480.

29. *Alabama.*— Hall *v.* State, 134 Ala. 90, 32 So. 750; Bryant *v.* State, 79 Ala. 282; Washington *v.* State, 63 Ala. 189; Sparrenberger's Case, 53 Ala. 481, 486, 25 Am. Rep. 643, where it is said: "When it appears witnesses were examined by the grand jury, or the jury had before them legal documentary evidence, no inquiry into the sufficiency of the evidence is indulged."

Louisiana.— State *v.* Chandler, 45 La. Ann. 49, 12 So. 315; State *v.* Lewis, 38 La. Ann. 680.

New York.— People *v.* Farrell, 20 Misc. 213, 45 N. Y. Suppl. 911; People *v.* Strong, 1 Abb. Pr. N. S. 244. See also Hope *v.* People, 83 N. Y. 418, 38 Am. Rep. 460; People *v.* Brickner, 15 N. Y. Suppl. 528; People *v.* Clark, 14 N. Y. Suppl. 642; People *v.* Hulbut, 4 Den. 133, 47 Am. Dec. 244.

Ohio.— Turk *v.* State, 7 Ohio, Pt. II, 240.

United States.— U. S. *v.* Cobban, 127 Fed. 713; U. S. *v.* Farrington, 5 Fed. 343; U. S. *v.* Reed, 27 Fed. Cas. No. 16,134, 2 Blatchf. 435.

See 24 Cent. Dig. tit. "Grand Jury," § 79. And see INDICTMENTS AND INFORMATIONS.

30. State *v.* Faulkner, 185 Mo. 673, 84 S. W. 967; State *v.* Grady, 84 Mo. 220; State *v.* Logan, 1 Nev. 509.

Testimony of prosecuting attorney.— In State *v.* Grady, 84 Mo. 220, it was held that proof of such fact may be made by the testimony of the prosecuting attorney, but not by a member of the grand jury.

Testimony of grand jurors.— To authorize the setting aside of an indictment even where there was no legal evidence to sustain it, that fact, it is held, must appear by proof independent of the testimony of the grand jurors. State *v.* Grady, 84 Mo. 220; State *v.* Logan, 1 Nev. 509. See also *infra*, XI, K, 2, notes 53, 54.

31. *Missouri.*—State *v.* Grady, 84 Mo. 220. See also State *v.* Faulkner, 185 Mo. 673, 84 S. W. 967.

Nevada.— State *v.* Logan, 1 Nev. 509.

New York.— People *v.* Brickner, 15 N. Y. Suppl. 528; People *v.* Price, 2 N. Y. Suppl. 414 (holding under statute that a grand jury cannot find an indictment when an essential link in the proof of the charge is missing); People *v.* Restenblatt, 1 Abb. Pr. 268.

North Carolina.— State *v.* Lanier, 90 N. C. 714; State *v.* Roberts, 19 N. C. 540.

United States.— U. S. *v.* Coolidge, 25 Fed. Cas. No. 14,858, 2 Gall. 364.

See 24 Cent. Dig. tit. "Grand Jury," § 79. And see INDICTMENTS AND INFORMATIONS.

Reëxamination of witnesses.— If for some defect or irregularity an indictment is set aside it is no objection to a second indictment found by the same grand jury for the same offense that it is found on the minutes of the evidence attached to the first indictment and not on a reëxamination of the witnesses. State *v.* Clapper, 59 Iowa 279, 13 N. W. 294. To the same effect see Com. *v.* Woods, 10 Gray (Mass.) 477, holding that a grand jury, without examining witnesses anew, may find an indictment as a substitute for another indictment found by it upon the investigation of the facts at a previous term. See also Creek *v.* State, 24 Ind. 151.

32. U. S. *v.* Farrington, 5 Fed. 343. *Compare* U. S. *v.* Reed, 27 Fed. Cas. No. 16,134, 2 Blatchf. 435.

the courts can make no inquiry whatever into the sufficiency of the evidence passed upon by the grand jury.[33]

3. Minutes of Evidence. In the absence of statute the grand jury is not bound to keep a record of the evidence before it.[34] But by statute in some jurisdictions authority is given for taking down minutes of the testimony given before the grand jury,[35] and these minutes when properly returned and filed become a part of the records of the court and are to remain in its custody.[36]

4. Inspection of Premises. The rule has been laid down that a grand jury in investigating a criminal charge involving property belonging to the state may inspect the premises where permission is granted by the court, in the exercise of its sound discretion.[37]

33. *California.*— See People *v.* Tinder, 19 Cal. 539, 81 Am. Dec. 77.

Indiana.— Stewart *v.* State, 24 Ind. 142.

Iowa.—State *v.* Smith, 74 Iowa 580, 38 N. W. 492.

Kentucky.— See Raney *v.* Com., 2 Ky. L. Rep. 62.

Louisiana.— State *v.* Chandler, 45 La. Ann. 49, 12 So. 315; State *v.* Lewis, 38 La. Ann. 680.

Mississippi.— Smith *v.* State, 61 Miss. 754.

New Jersey.— State *v.* Dayton, 23 N. J. L. 49, 53 Am. Dec. 270.

Texas.— Morrison *v.* State, 41 Tex. 516; Terry *v.* State, 15 Tex. App. 66.

See 24 Cent. Dig. tit. "Grand Jury," § 79. And see Indictments and Informations.

34. Matter of Gardiner, 31 Misc. (N. Y.) 364, 64 N. Y. Suppl. 760 [*citing* Mohun's Case, 1 Salk. 104]; U. S. *v.* Reed, 27 Fed. Cas. No. 16,134, 2 Blatchf. 435. *Compare In re* District Attorney, 7 Fed. Cas. No. 3,925, holding that the minutes of the evidence should be delivered to the district attorney to be kept by him among the records of his office.

35. Hinshaw *v.* State, 147 Ind. 334, 47 N. E. 157; State *v.* Little, 42 Iowa 51; State *v.* Guisenhause, 20 Iowa 227; Matter of Gardiner, 31 Misc. (N. Y.) 364, 64 N. Y. Suppl. 760.

36. State *v.* Little, 42 Iowa 51; State *v.* Guisenhause, 20 Iowa 227; Matter of Gardiner, 31 Misc. (N. Y.) 364, 64 N. Y. Suppl. 760. *Compare* Hinshaw *v.* State, 147 Ind. 334, 47 N. E. 157.

Minutes not returned.— Where minutes of the testimony of a person whose name is not indorsed on the indictment are not returned as not being of sufficient importance, they do not become a part of the record. State *v.* Lewis, 96 Iowa 286, 65 N. W. 295.

The delivery of the minutes to the clerk for the purpose of having them kept as a part of the record is a sufficient filing to comply with the statute in Iowa (State *v.* Cross, 95 Iowa 629, 64 N. W. 614; State *v.* Craig, 78 Iowa 637, 43 N. W. 462; State *v.* Briggs, 68 Iowa 416, 27 N. W. 358); and such filing need not be evidenced by an indorsement of the clerk's signature (State *v.* Craig, *supra*; State *v.* Briggs, *supra*; State *v.* Guisenhause, 20 Iowa 227).

Inspection of minutes.— In Hofler *v.* State, 16 Ark. 534, it was held that a motion to permit defendant's counsel to inspect the minutes of the testimony taken before the grand jury by one of that body and delivered to the attorney for the state under the provisions of statute was properly overruled. See also Franklin *v.* Com., 105 Ky. 237, 48 S. W. 986, 120 Ky. L. Rep. 1137. On the other hand it has been held to be within the power of the court to entertain a motion to inspect the minutes of the grand jury the motion being addressed to its discretion (Eighmy *v.* People, 79 N. Y. 546; People *v.* Foody, 38 Misc. (N. Y.) 357, 77 N. Y. Suppl. 943; People *v.* Molineux, 27 Misc. (N. Y.) 60, 57 N. Y. Suppl. 936; People *v.* Bellows, 1 How. Pr. N. S. (N. Y.) 149; People *v.* Naughton, 38 How. Pr. (N. Y.) 430. See also Matter of Gardiner, 31 Misc. (N. Y.) 164, 64 N. Y. Suppl. 760); and that the fact that defendant was indicted without having had a preliminary examination before a magistrate furnishes a strong inducement to the court to look upon the application with favor (People *v.* Molineux, *supra*; People *v.* Foody, *supra*). In People *v.* Prosky, 32 Misc. (N. Y.) 367, 66 N. Y. Suppl. 736, 15 N. Y. Cr. 144, it was held that where defendant is held on preliminary examination, and afterward indicted, he will not be given leave to inspect and take a copy of the minutes of the grand jury, as he is otherwise fully informed by the examination of the charges against him.

Conclusiveness of minutes.— In Iowa it has been held that on a motion to set aside an indictment because the names of all the witnesses examined before the grand jury are not indorsed thereon, the minutes returned therewith are made by statute conclusive as to what names are or should be indorsed on the back of an indictment. State *v.* Miller, 95 Iowa 368, 64 N. W. 288; State *v.* Little, 42 Iowa 51. *Compare* Hinshaw *v.* State, 147 Ind. 334, 47 N. E. 157. But the minutes do not preclude the use of evidence other than the minutes on the trial in order to determine whether the witness was in fact examined before the grand jury. State *v.* Marshall, 105 Iowa 38, 74 N. W. 763. See also Indictments and Informations.

37. Wyatt *v.* People, 17 Colo. 252, 28 Pac. 961.

I. Number of Grand Jurors Concurring in Finding. At common law the concurrence of twelve at least of the panel was necessary to the finding of an indictment.[38] This rule has been confirmed or variously modified by statutory or constitutional provision in many jurisdictions.[39] Statutes authorizing the finding of indictments by the concurrence of a number of jurors less than twelve have been held unconstitutional in some jurisdictions.[40]

J. Misconduct of Grand Jurors. It has been held that an indictment will not be vitiated because one or more members of the grand jury were intoxicated while it was under consideration by that body.[41]

K. Secrecy — 1. In General. By the policy of the law the investigations and deliberations of the grand jury are conducted in secret and in furtherance of this object the oath administered to grand jurors usually binds them to secrecy,[42]

38. *Connecticut.*— Lung's Case, 1 Conn. 428.
Florida.— Gladden *v.* State, 12 Fla. 562.
Louisiana.— State *v.* Swift, 14 La. Ann. 827.
Maine.— State *v.* Symonds, 36 Me. 128; Low's Case, 4 Me. 439, 16 Am. Dec. 271.
Mississippi.— Barney *v.* State, 12 Sm. & M. 68.
North Carolina.— State *v.* Barker, 107 N. C. 913, 12 S. E. 115, 10 L. R. A. 50; State *v.* McNeill, 93 N. C. 552; State *v.* Davis, 24 N. C. 153. See also State *v.* Perry, 122 N. C. 1018, 29 S. E. 384.
Ohio.— Turk *v.* State, 7 Ohio, Pt. II, 240.
Pennsylvania.— Matter of Citizens' Assoc., 8 Phila. 478.
South Carolina.— State *v.* Williams, 35 S. C. 344, 14 S. E. 819.
Tennessee.— Epperson *v.* State, 5 Lea 291; Pybos *v.* State, 3 Humphr. 49.
England.— Clyncard's Case, Cro. Eliz. 654.
See 24 Cent. Dig. tit. "Grand Jury," § 6.

39. *Arkansas.*— State *v.* Hawkins, 10 Ark. 71.
California.— People *v.* Hunter, 54 Cal. 65; People *v.* Butler, 8 Cal. 435; People *v.* Roberts, 6 Cal. 214.
Colorado.— Wilson *v.* People, 3 Colo. 325.
Georgia.— Thurman *v.* State, 25 Ga. 220.
Iowa.— State *v.* Belvel, 89 Iowa 405, 56 N. W. 545, 27 L. R. A. 846; State *v.* Billings, 77 Iowa 417, 42 N. W. 456; State *v.* Salts, 77 Iowa 193, 39 N. W. 167, 41 N. W. 620; State *v.* Shelton, 64 Iowa 333, 20 N. W. 459; State *v.* Ostrander, 18 Iowa 435.
Kansas.— State *v.* Copp, 34 Kan. 522, 9 Pac. 233; Laurent *v.* State, 1 Kan. 313.
Kentucky.— Sanders *v.* Com., 18 S. W. 528, 13 Ky. L. Rep. 820.
Mississippi.— Barney *v.* State, 12 Sm. & M. 68.
Montana.— Territory *v.* Hart, 7 Mont. 42, 14 Pac. 768.
Texas.— Jackson *v.* State, 25 Tex. App. 314, 7 S. W. 872; Drake *v.* State, 25 Tex. App. 293, 7 S. W. 868; Watts *v.* State, 22 Tex. App. 572, 3 S. W. 769; Smith *v.* State, 19 Tex. App. 95.
Vermont.— State *v.* Brainerd, 56 Vt. 532, 48 Am. Rep. 818.
Virginia.— Lyles *v.* Com., 88 Va. 396, 13 S. E. 802.
Wisconsin.—Fitzgerald *v.* State, 4 Wis. 395.
See 24 Cent. Dig. tit. "Grand Jury," § 6.

Effect of irregularities on validity of indictments see INDICTMENTS AND INFORMATIONS.
Presumption as to number of jurors finding indictment see INDICTMENTS AND INFORMATIONS.
Constitutional provisions held self executing.— Sanders *v.* Com., 18 S. W. 528, 13 Ky. L. Rep. 820; State *v.* Ah Jim, 9 Mont. 167, 23 Pac. 76.

40. English *v.* State, 31 Fla. 340, 12 So. 689; Donald *v.* State, 31 Fla. 255, 12 So. 695; State *v.* Hartley, 22 Nev. 342, 40 Pac. 372, 28 L. R. A. 33; State *v.* Barker, 107 N. C. 913, 12 S. E. 115, 10 L. R. A. 50. *Compare* State *v.* Salts, 77 Iowa 193, 39 N. W. 167, 41 N. W. 620.

41. Allen *v.* State, 61 Miss. 627. See also INDICTMENTS AND INFORMATIONS.
Misconduct as ground for discharge see *supra*, VIII, A.
Misconduct as ground for criminal liability see *infra*, XII, B, notes 71, 72.

42. *California.*— *Ex p.* Sontag, 64 Cal. 525, 2 Pac. 402.
Connecticut.— State *v.* Fasset, 16 Conn. 457.
Indiana.— Stewart *v.* State, 24 Ind. 142.
Maine.— State *v.* Bowman, 90 Me. 363, 38 Atl. 331, 60 Am. St. Rep. 266.
Maryland.— Izer *v.* State, 77 Md. 110, 26 Atl. 282.
Massachusetts.—Com. *v.* Hill, 11 Cush. 137.
New York.— People *v.* Naughton, 38 How. Pr. 430; People *v.* Hulbut, 4 Den. 133, 47 Am. Dec. 244.
North Carolina.— State *v.* Broughton, 29 N. C. 96, 45 Am. Dec. 507.
Tennessee.— Jones *v.* Turpin, 6 Heisk. 181.
Vermont.— State *v.* Brewster, 70 Vt. 341, 40 Atl. 1037, 42 L. R. A. 444.
United States.— U. S. *v.* Kilpatrick, 16 Fed. 765; Charge to Grand Jury, 30 Fed. Cas. No. 18,255, 2 Sawy. 667.
See 24 Cent. Dig. tit. "Grand Jury," §§ 86, 87.

"The reasons on which the sanction of secrecy which the common law gives to proceedings before grand juries is founded are said in the books to be threefold. One is that the utmost freedom of disclosure of alleged crimes and offences by prosecutors may be secured. A second is that perjury and subornation of perjury may be prevented by withholding the knowledge of facts testified to before the grand jury, which, if known,

although it seems that the obligation of secrecy does not arise alone from the form of the oath and may exist in jurisdictions where no oath of secrecy is required.[43]

2. Disclosure in Judicial Proceedings — a. In General. In some jurisdictions the rule is laid down that grand jurors cannot be sworn and examined as witnesses to impeach the validity or correctness of their finding after an indictment has been regularly found and returned,[44] and the proposition is sometimes broadly stated that the members of a grand jury cannot disclose the proceedings that take place in the grand jury room.[45] In some jurisdictions moreover the cases in which a grand juror may disclose occurrences in the jury room are restricted by statute.[46] But there are many authorities to the effect that since it is of the highest importance that no citizen be tried until he has been regularly accused by the proper tribunal, neither the policy of the law nor the oath of the grand jurors prohibits the disclosure by a grand juror or any other person of what was done before the grand jury where the evidence is required for the purposes of public justice and the establishment of private rights.[47] So it has been held that the

it would be for the interest of the accused or their confederates to attempt to disprove by procuring false testimony. The third is to conceal the fact that an indictment is found against a party, in order to avoid the danger that he may escape and elude arrest upon it, before the presentment is made." Com. *v.* Mead, 12 Gray (Mass.) 167, 170, 71 Am. Dec. 741. See also State *v.* Fasset, 16 Conn. 457; State *v.* Bowman, 90 Me. 363, 38 Atl. 331, 60 Am. St Rep. 266; McLellan *v.* Richardson, 13 Me. 82; Jones *v.* Turpin, 6 Heisk. (Tenn.) 181; Crocker *v.* State, Meigs (Tenn.) 127; Little *v.* Com., 25 Gratt. (Va.) 921.

43. Sands *v.* Robinson, 12 Sm. & M. (Miss.) 704, 51 Am. Dec. 132; Little *v.* Com., 25 Gratt. (Va.) 921.

44. *Connecticut.*— State *v.* Fasset, 16 Conn. 457.

Georgia.— Simms *v.* State, 60 Ga. 145.

Illinois.— Gilmore *v.* People, 87 Ill. App. 128.

Kentucky.— Com. *v.* Skeggs, 3 Bush 19.

Minnesota.— State *v.* Beebe, 17 Minn. 241.

Missouri.— State *v.* Wammack, 70 Mo. 410; State *v.* Baker, 20 Mo. 338.

Nevada.— State *v.* Hamilton, 13 Nev. 386.

Pennsylvania.—Com. *v.* Twitchell, 1 Brewst. 551; Zeigler *v.* Com., 10 Pa. Cas. 404, 14 Atl. 237.

See 24 Cent. Dig. tit. "Grand Jury," §§ 86, 87.

Evidence in support of finding.—It has been held that grand jurors may be sworn and examined in support of their finding. Simms *v.* State, 60 Ga. 145. See also Com. *v.* Hill, 11 Cush. (Mass.) 137. *Compare* State *v.* Wammack, 70 Mo. 410.

Review on application for bail.— In People *v.* Tinder, 19 Cal. 539, 81 Am. Dec. 77, it was held under a statute forbidding the disclosure of testimony before a grand jury except in enumerated cases that upon an application for bail the testimony before the grand jury was not admissible and the finding of the grand jury could not as a consequence be the subject of a review. See also People *v.* Hyler, 2 Park. Cr. (N. Y.) 570.

45. State *v.* Lewis, 38 La. Ann. 680; State *v.* Baltimore, etc., R. Co., 15 W. Va. 362, 36 Am. Rep. 803.

Interrogating grand jurors as to proceedings to show prejudice.— In State *v.* Baltimore, etc., R. Co., 15 W. Va. 362, 36 Am. Rep. 803, it was held that a grand juror who is a witness on the trial of an indictment cannot be interrogated as to the proceedings in the grand jury room to show prejudice.

46. *Alabama.*— Hall *v.* State, 134 Ala. 90, 32 So. 750.

Arkansas.— Nash *v.* State, (1904) 84 S. W. 497.

California.— People *v.* Linder, 19 Cal. 539, 81 Am. Dec. 77.

Iowa.— State *v.* McPherson, 114 Iowa 492, 87 N. W. 421.

Michigan.— People *v.* Thompson, 122 Mich. 411, 81 N. W. 344; People *v.* Lauder, 82 Mich. 109, 122, 46 N. W. 956, where it is said: "Grand jurors cannot, in general, be questioned as to what took place among or before them while acting as such."

47. *Indiana.*— Hinshaw *v.* State, 147 Ind. 334, 47 N. E. 157; Burdick *v.* Hunt, 43 Ind. 381; Shattuck *v.* Hunt, 11 Ind. 473; Perkins *v.* State, 4 Ind. 222. *Compare* Stewart *v.* State, 24 Ind. 142.

Maine.— Hunter *v.* Randall, 69 Me. 183; State *v.* Benner, 64 Me. 267 [*distinguishing* State *v.* Knight, 43 Me. 11; McLallan *v.* Richardson, 13 Me. 82]; Low's Case, 4 Me. 439, 16 Am. Dec. 271.

Maryland.— Izer *v.* State, 77 Md. 110, 26 Atl. 282.

Massachusetts.—Com. *v.* Hill, 11 Cush. 137; Com. *v.* Mead, 12 Gray 167, 71 Am. Dec. 741.

Mississippi.— See Rocco *v.* State, 37 Miss. 357.

New Hampshire.— State *v.* Wood, 53 N. H. 484.

North Carolina.— State *v.* Broughton, 29 N. C. 96, 45 Am. Dec. 507.

United States.— U. S. *v.* Coolidge, 25 Fed. Cas. No. 14,858, 2 Gall. 364 (disclosure by witness); U. S. *v.* Farrington, 5 Fed. 343 [*disapproving* U. S. *v.* Brown, 24 Fed. Cas. No. 14,671, 1 Sawy. 531].

Where grand jurors are not required to

fact that a person did or did not testify before the grand jury [48] and the testimony given by him when otherwise competent may be proved by a grand juror.[49] It is generally conceded, however, that grand jurors cannot be permitted to state how any member of the grand jury voted,[50] or to testify as to opinions expressed

take the oath of secrecy they are competent witnesses to prove facts which came to their knowledge while acting in such capacity. Granger *v.* Warrington, 8 Ill. 299.

Reporting contumacious witness to court. — In People *v.* Kelly, 12 Abb. Pr. (N. Y.) 150, it was held that the oath of secrecy of a grand juror is not violated by a report to the court of the refusal of a witness to testify. See also *Ex p.* Harris, 4 Utah 5, 5 Pac. 129.

The presence and interference of the judge in the jury room during the deliberations of the jury, it has been held, may be shown by a grand juror. State *v.* Will, 97 Iowa 58, 65 N. W. 1010. But see Hall *v.* State, 134 Ala. 90, 32 So. 750.

Presence of prosecuting attorney. — In Ziegler *v.* Com., 10 Pa. Cas. 404, 14 Atl. 237, it was held that an indictment cannot be impeached by testimony of a grand juror to the effect that the prosecuting attorney participated in the deliberations of the grand jury and influenced them in their finding. To same effect see Hall *v.* State, 134 Ala. 90, 32 So. 750.

Violation of duty on the part of the clerk of the grand jury in the examination of witnesses may be shown by the testimony of a grand juror. State *v.* Miller, 95 Iowa 368, 64 N. W. 288.

48. People *v.* Northey, 77 Cal. 618, 19 Pac. 865, 20 Pac. 129; *Ex p.* Schmidt, 71 Cal. 212, 12 Pac. 55; Hunter *v.* Randall, 69 Me. 183; Com. *v.* Hill, 11 Cush. (Mass.) 137; Rocco *v.* State, 37 Miss. 357. *Compare* State *v.* Little, 42 Iowa 51.

Compelling district attorney to furnish list of witnesses to accused. — It has been held that the court has the power to order the district attorney to furnish to the accused a list of the witnesses examined before the grand jury. People *v.* Naughton, 38 How. Pr. (N. Y.) 430.

49. *Indiana.* — Hinshaw *v.* State, 147 Ind. 334, 47 N. E. 157.

Iowa. — State *v.* Carroll, 85 Iowa 1, 51 N. W. 1159.

North Carolina. — State *v.* Broughton, 29 N. C. 96, 45 Am. Dec. 507.

Texas. — Giles *v.* State, 43 Tex. Cr. 561, 67 S. W. 411. See also Gutgesell *v.* State, (Cr. App. 1898) 43 S. W. 1016.

United States. — U. S. *v.* Kilpatrick, 16 Fed. 765.

Compare People *v.* Tinder, 19 Cal. 539, 81 Am. Dec. 77; Com. *v.* Hill, 11 Cush. (Mass.) 137.

Accusation against third person. — In State *v.* Broughton, 29 N. C. 96, 45 Am. Dec. 507, it was held that a grand juror, on the trial of an indictment, may be compelled to disclose statements made by defendant before the grand jury charging a third person with the offense.

Confessions. — In U. S. *v.* Porter, 27 Fed. Cas. No. 16,072, 2 Cranch C. C. 60, it was held that a grand juror may be examined to prove what defendant confessed before the grand jury on a charge before them. See People *v.* Northey, 77 Cal. 618, 19 Pac. 865, 20 Pac. 129; Grimsinger *v.* State, 44 Tex. Cr. 1, 69 S. W. 583; People *v.* Reggel, 8 Utah 21, 28 Pac. 955. And see CRIMINAL LAW, 12 Cyc. 474 note 56.

An indictment for perjury committed before the grand jury may be supported by testimony of members of that body. People *v.* Young, 31 Cal. 563; State *v.* Fasset, 16 Conn. 457; Izer *v.* State, 77 Md. 110, 26 Atl. 282; State *v.* Logan, 1 Nev. 509; Crocker *v.* State, Meigs (Tenn.) 127; Reg. *v.* Hughes, 1 C. & K. 519, 47 E. C. L. 519. See also PERJURY.

To impeach a witness for the commonwealth on the trial of an indictment a member of the grand jury which found the indictment is competent to prove statements made by the witness before the grand jury. State *v.* McPherson, 114 Iowa 492, 87 N. W. 421; State *v.* Benner, 64 Me. 267; Com. *v.* Mead, 12 Gray (Mass.) 167, 71 Am. Dec. 741; People *v.* O'Neill, 107 Mich. 556, 65 N. W. 540; State *v.* Wood, 53 N. H. 484; Jones *v.* Turpin, 6 Heisk. (Tenn.) 181; Hines *v.* State, 37 Tex. Cr. 339, 39 S. W. 935; Clanton *v.* State, 13 Tex. App. 139. See also State *v.* Fasset, 16 Conn. 457; People *v.* Hulbut, 4 Den. (N. Y.) 133, 47 Am. Dec. 244; Little *v.* Com., 25 Gratt. (Va.) 921. So it has been held that statements made by a witness before the grand jury may be shown for the purpose of sustaining his evidence where he has been impeached. Perkins *v.* State, 4 Ind. 222.

The allowance of an inspection of the minutes of the grand jury by defendant does not unduly invade the secrecy of their proceedings. People *v.* Foody, 38 Misc. (N. Y.) 357, 77 N. Y. Suppl. 943.

50. *Alabama.* — Spigener *v.* State, 62 Ala. 383.

California. — *Ex p.* Sontag, 64 Cal. 525, 2 Pac. 402.

Connecticut. — State *v.* Fasset, 16 Conn. 457. See also State *v.* Hamlin, 47 Conn. 95, 36 Am. Rep. 54.

Iowa. — State *v.* Davis, 41 Iowa 311; State *v.* Gibbs, 39 Iowa 318.

Maine. — Low's Case, 4 Me. 439, 16 Am. Dec. 271.

Massachusetts. — Com. *v.* Hill, 11 Cush. 137.

New York. — People *v.* Shattuck, 6 Abb. N. Cas. 33.

Pennsylvania. — See Com. *v.* Twitchell, 1 Brewst. 551.

Texas. — State *v.* Oxford, 30 Tex. 428; Jacobs *v.* State, 35 Tex. Cr. 410, 34 So. 110.

Virginia. — See Richardson *v.* Com., 76 Va. 1007.

by their fellows or themselves, upon any question before them,[51] or to disclose the fact that an indictment for a felony has been found against any person not in custody or under recognizance.[52] In some jurisdictions it is not competent for a grand juror to testify as to the character or sufficiency of the evidence upon which an indictment was found,[53] although a different rule is laid down in other cases.[54]

b. In Civil Proceedings. In actions for malicious prosecution, slander, and other civil proceedings, the evidence of a grand juror is competent wherever the administration of justice renders it necessary to ascertain who was the prosecutor or a witness in a particular case.[55] So the testimony of witnesses before the grand jury in a particular case is held to be admissible,[56] unless a different rule is prescribed by statute.[57]

Washington.— Watts *v.* Territory, 1 Wash. Terr. 409.

United States.—U. S. *v.* Kilpatrick, 16 Fed. 765; U. S. *v.* Farrington, 5 Fed. 343.

Failure to disclose way of voting not contempt.— In *Ex p.* Sontag, 64 Cal. 525, 2 Pac. 402, it was held that a grand juror cannot be compelled to answer how he voted with respect to the finding of a particular indictment and that his refusal to do so is not a contempt of court.

The number of persons concurring in the finding of the bill of indictment may be shown by the testimony of a grand juror in some states. Skanenberger *v.* State, 53 Ala. 481, 25 Am. Rep. 643; State *v.* Symonds, 36 Me. 128; Low's Case, 4 Me. 439, 16 Am. Dec. 271; Com. *v.* Smith, 9 Mass. 107; Territory *v.* Hart, 7 Mont. 489, 17 Pac. 718; People *v.* Shattuck, 6 Abb. N. Cas. (N. Y.) 33; State *v.* Horton, 63 N. C. 595. See also State *v.* Logan, 1 Nev. 509. But a different rule obtains in other jurisdictions. Nash *v.* State, (Ark. 1904) 84 S. W. 497 (holding that the fact that the required number did not vote for the finding cannot be proved by a grand juror, although it may be proved otherwise); State *v.* Hamlin, 47 Conn. 95, 36 Am. Rep. 54; Gitchell *v.* People, 146 Ill. 175, 33 N. E. 757, 37 Am. St. Rep. 147; State *v.* Gibbs, 39 Iowa 318; Hooker *v.* State, 98 Md. 145, 56 Atl. 390; State *v.* Baker, 20 Mo. 338; State *v.* Oxford, 30 Tex. 428; Reg. *v.* Marsh, 6 A. & E. 236, 2 Harr. & W. 366, 1 Jur. 38, 6 L. J. M. C. 153, 1 N. & P. 187, 33 E. C. L. 143. See also State *v.* Hamlin, 47 Conn. 95, 36 Am. Rep. 54; Creek *v.* State, 24 Ind. 151.

51. *Ex p.* Sontag, 64 Cal. 525, 2 Pac. 402; Com. *v.* Hill, 11 Cush. (Mass.) 137; U. S. *v.* Kilpatrick, 16 Fed. 765; U. S. *v.* Farrington, 5 Fed. 343. See also Com. *v.* Green, 126 Pa. St. 531, 17 Atl. 878, 12 Am. St. Rep. 894.

52. State *v.* Fasset, 16 Conn. 457; Com. *v.* Hill, 11 Cush. (Mass.) 137; State *v.* Broughton, 29 N. C. 96, 45 Am. Dec. 507.

53. *Connecticut.*—State *v.* Fasset, 16 Conn. 457.

Georgia.— Simms *v.* State, 60 Ga. 145.

Iowa.— See State *v.* Will, 97 Iowa 58, 65 N. W. 1010.

Louisiana.— See State *v.* Richard, 50 La. Ann. 210, 23 So. 331.

Michigan.— People *v.* Thompson, 122 Mich. 411, 81 N. W. 344; People *v.* Lauder, 82 Mich. 109, 46 N. W. 956.

Minnesota.— State *v.* Beebe, 17 Minn. 241.

Missouri.— State *v.* Faulkner, 185 Mo. 673, 84 S. W. 967; State *v.* Grady, 84 Mo. 220.

Nevada.— State *v.* Logan, 1 Nev. 509.

See 24 Cent. Dig. tit. "Grand Jury," §§ 86, 87.

54. People *v.* Briggs, 60 How. Pr. (N. Y.) 17; State *v.* Frizell, 111 N. C. 722, 16 S. E. 409; Com. *v.* McComb, 157 Pa. St. 611, 27 Atl. 794; Com. *v.* Green, 126 Pa. St. 531, 17 Atl. 878, 12 Am. St. Rep. 894 [*citing* Gordon *v.* Com., 92 Pa. St. 216, 37 Am. Rep. 672]; U. S. *v.* Harrington, 5 Fed. 343. *Compare* People *v.* Hulbut, 4 Den. (N. Y.) 133, 47 Am. Dec. 244.

55. Huidekoper *v.* Cotton, 3 Watts (Pa.) 56; Freeman *v.* Arkell, 2 B. & C. 494, 9 E. C. L. 218, 1 C. & P. 135, 326, 12 E. C. L. 89, 3 D. & R. 669, 2 L. J. K. B. O. S. 64; Sykes *v.* Dunbar, 1 Campb. 202 note, 2 Selw. 1059. See also U. S. *v.* Farrington, 5 Fed. 343.

Where no oath of secrecy is prescribed by law a grand juror may in an action for malicious prosecution be a witness to the fact that a certain person was the prosecutor. Granger *v.* Warrington, 8 Ill. 299.

56. Burnham *v.* Hatfield, 5 Blackf. (Ind.) 21; Sands *v.* Robison, 12 Sm. & M. (Miss.) 704, 51 Am. Dec. 132; Jones *v.* Turpin, 6 Heisk. (Tenn.) 181. See also Shattuck *v.* State, 11 Ind. 473; U. S. *v.* Farrington, 5 Fed. 343.

Impeachment of testimony of witness.— A grand juror may be called to prove in a civil proceeding that a witness gave testimony before the grand jury different from that given before the petit jury in the civil proceeding. Burdick *v.* Hunt, 43 Ind. 38; Kirk *v.* Garrett, 84 Md. 383, 35 Atl. 1089; Way *v.* Butterworth, 106 Mass. 75. See also Jones *v.* Turpin, 6 Heisk. (Tenn.) 181. After such evidence has been received testimony of the witness as to his actual statements before the grand jury is competent in rebuttal. Way *v.* Butterworth, 106 Mass. 75.

The prosecuting attorney may testify in a civil proceeding as to statements made by a witness before the grand jury when the evidence is required for the purposes of public justice or the establishment of private rights. Hunter *v.* Randall, 69 Me. 183.

57. Loveland *v.* Cooley, 59 Minn. 259, 61 N. W. 138 [*following* Pinney's Will, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144]; Kennedy

c. Disclosure by Prosecuting Attorney, Witness, Etc. The rule has been laid down in some jurisdictions that the principle which would prevent disclosure by a grand juror extends to all persons required or permitted by law to be present, such as the prosecuting attorney and witnesses.[58] But a distinction in this respect has been made in other jurisdictions between the testimony of a grand juror and that of other persons present before the grand jury.[59]

3. Disclosure as Criminal Offense. A grand juror is punishable at common law for the disclosure to a person indicted of the evidence that appeared against him;[60] and statutes have been passed in several jurisdictions making the disclosure of the secrets of the grand jury, under certain circumstances, an indictable offense.[61]

L. Advice of Court. When the grand jury desires any further information than that offered in the general charge of the court, it may return to the court and make application therefor.[62] Thus, if there should be any doubt as to the admissibility of evidence, the grand jury should submit the question to the court for its instructions and directions,[63] and it has been said that such inquiries should

v. Holladay, 105 Mo. 24, 16 S. W. 688; Beam *v.* Link, 27 Mo. 261; Tindle *v.* Nichols, 20 Mo. 326; Fotheringham *v.* Adams Express Co., 34 Fed. 646, decided under a Missouri statute.

58. *Connecticut.*—State *v.* Hamlin, 47 Conn. 95, 36 Am. Rep. 54; State *v.* Fasset, 16 Conn. 457, holding that a witness before the grand jury cannot testify as to the character of the evidence received by the grand jury.

Illinois.— Gitchell *v.* People, 146 Ill. 175, 33 N. E. 757, 37 Am. St. Rep. 147.

Louisiana.— State *v.* Richard, 50 La. Ann. 210, 23 So. 331.

Maine.— See McLellan *v.* Richardson, 13 Me. 82.

Michigan.— People *v.* Thompson, 122 Mich. 411, 81 N. W. 344 (holding that Howell Annot. St. § 9502, allowing grand jurors to testify as to whether the testimony of a witness on a trial is consistent with his testimony given before them, and to disclose the testimony of a witness upon a complaint against him for perjury, does not authorize a prosecuting attorney, for the purpose of expediting the hearing of a plea in abatement to an indictment on the ground that the testimony did not authorize the indictment, to stipulate what the testimony was, since it must have been based on knowledge obtained in his official capacity); People *v.* Lauder, 82 Mich. 109, 46 N. W. 956.

New York.— People *v.* Hulbut, 4 Den. 133, 47 Am. Dec. 244.

59. *Arkansas.*— Nash *v.* State, (1904) 84 S. W. 497.

California.— People *v.* Northey, 77 Cal. 618, 19 Pac. 865, 20 Pac. 129.

Minnesota.— Loveland *v.* Cooley, 59 Minn. 259, 61 N. W. 138.

Missouri.— State *v.* Grady, 84 Mo. 220.

Nevada.— State *v.* Logan, 1 Nev. 509.

Pennsylvania.— See Com. *v.* Twitchell, 1 Brewst. 551.

Virginia.— Little *v.* Com., 25 Gratt. 921.

England.— Reg. *v.* Hughes, 1 C. & K. 519, 47 E. C. L. 519.

See 24 Cent. Dig. tit. "Grand Jury," §§ 86, 87.

60. 4 Blackstone Comm. 126, where it is said: "And anciently it was held, that if one of the grand jury disclosed, to any person indicted, the evidence that appeared against him, he was thereby made accessory to the offence, if felony: and in treason a principal. And at this day it is agreed that he is guilty of a high misprision, and liable to be fined and imprisoned." See also State *v.* Fasset, 16 Conn. 457; Sands *v.* Robison, 12 Sm. & M. (Miss.) 704, 51 Am. Dec. 132; State *v.* Brewster, 70 Vt. 341, 40 Atl. 1037, 44 L. R. A. 444.

61. White *v.* State, 44 Ala. 409 (holding that a deputy sheriff is an officer of court within the meaning of a statute providing that any judge, solicitor, clerk, or other officer of the court, or any grand juror who discloses the fact that an indictment has been found before defendant has been arrested or has given bail for his appearance to answer thereto is guilty of a misdemeanor); Beam *v.* Link, 27 Mo. 261; State *v.* Brewer, 8 Mo. 873; Higdon *v.* State, 46 Tex. Cr. 198, 79 S. W. 546; Hines *v.* State, 33 Tex. Cr. 339, 39 S. W. 935; U. S. *v.* Kirkwood, 5 Utah 123, 13 Pac. 234.

62. State *v.* Addison, 2 Rich. (S. C.) 356; U. S. *v.* Watkins, 28 Fed. Cas. No. 16,649, 3 Cranch C. C. 441 [*approving* 1 Burns Trial 174], holding that the court may in its discretion give an additional charge to the grand jurors, although they do not ask it, and when they do ask it the court perhaps may be bound to give it if it be such an instruction as can be given without committing the court upon the points that might come to it upon the trial in chief.

Advising part of grand jury.— Under a statute providing that "the grand jury may at all reasonable times ask the advice of the . . . court," it has been held that while the grand jury as a whole should be present when the advice is given an indictment was not vitiated because the court gave instructions relating to the law governing the crime charged to part of the grand jurors, in the absence of the others. State *v.* Edgerton, 100 Iowa 63, 69 N. W. 280.

Charge of court see *supra*, VI, H.

63. U. S. *v.* Kilpatrick, 16 Fed. 765. See also State *v.* Fasset, 16 Conn. 457.

be made in writing and that the judge must determine whether the instructions should be by written communication or from the bench.[64]

M. Executive Control Over Grand Juries. The rule has been announced that, although the president or executive may interfere even in advance of an indictment by exercising the pardoning power, he has authority in no other way to control the action of the grand jury.[65]

N. Record of Finding and Proceedings. It has been held that recording of the finding of a grand jury is as essential as the recording of the verdict of a petit jury.[66]

O. Presumption of Regularity. In the absence of evidence to the contrary, the presumption is in favor of the legality and regularity of the proceedings of the grand jury.[67]

XII. LIABILITIES OF GRAND JURORS.

A. Civil Liability. The rule is recognized under statute[68] and apart from statute,[69] that during the whole of their proceedings grand jurors are protected in the discharge of their duties and that a person cannot be held to answer in an action for malicious prosecution for what he has said or done, as a member of the grand jury, however malicious or destitute of probable foundation his action may have been. But it has been held that where process is issued on the complaint of a grand juror which is without any authority whatever, he is liable in an action for trespass by the person injured.[70]

B. Criminal Liability. Grand jurors may be punished for contempt for any wilful misconduct or neglect of duty,[71] and are liable to indictment or presentment both at common law and under statute for various violations of the duties of their office.[72]

64. U. S. *v.* Kilpatrick, 16 Fed. 765.

65. *In re* Miller, 17 Fed. Cas. No. 9,552.

66. State *v.* Brown, 81 N. C. 568; State *v.* Heaton, 23 W. Va. 773. See, generally, INDICTMENTS AND INFORMATIONS.

67. English *v.* State, 31 Fla. 356, 12 So. 689; Creek *v.* State, 24 Ind. 151; Shattuck *v.* State, 11 Ind. 473; State *v.* Lanier, 90 N. C. 714; U. S. *v.* Wilson, 28 Fed. Cas. No. 16,737, 6 McLean 604. See also INDICTMENTS AND INFORMATIONS.

This rule has been applied to the swearing of witnesses before the grand jury (King *v.* State, 6 Miss. 730; Gilman *v.* State, 1 Humphr. (Tenn.) 59), the competency and sufficiency of evidence received (State *v.* Lanier, 90 N. C. 714; U. S. *v.* Wilson, 28 Fed. Cas. No. 16,737, 6 McLean 604), the fact of the examination of witnesses (State *v.* Marshall, 105 Iowa 38, 74 N. W. 763), and the concurrence of the requisite number of jurors in the finding (English *v.* State, 31 Fla. 356, 12 So. 689; Creek *v.* State, 24 Ind. 151; U. S. *v.* Wilson, *supra*).

68. Turpen *v.* Booth, 56 Cal. 65, 38 Am. Rep. 48; Thornton *v.* Marshall, 92 Ga. 548, 17 S. E. 926; Ullman *v.* Abrams, 9 Bush (Ky.) 738; Black *v.* Sugg, Hard. (Ky.) 556.

69. Sidener *v.* Russell, 34 Ill. App. 446 [*citing* 1 Hawkins P. C. 341]; Griffith *v.* Slinkard, 146 Ind. 117, 44 N. E. 1001; Hunter *v.* Mathis, 40 Ind. 356 [*citing* 1 Chitty Cr. L. 323]; Engelke *v.* Chouteau, 98 Mo. 629, 12 S. W. 358. See also MALICIOUS PROSECUTION.

Report of grand jury held not a libel.— In Iowa it has been held that where the grand jury has no power to present any person for a criminal offense except by indictment, a presentment or report to the court otherwise than by indictment charging an officer with malfeasance, while not a privileged communication, is not actionable as a libel where the publication was made without malice and, as defendant supposes, in the discharge of a public duty. Rector *v.* Smith, 11 Iowa 302. See also LIBEL AND SLANDER.

70. Allen *v.* Gray, 11 Conn. 95.

71. Territory *v.* Staples, 2 Ida. 778, 26 Pac. 166; U. S. *v.* Kilpatrick, 16 Fed. 765. See also CONTEMPT, 9 Cyc. 16 note 60.

72. See cases cited *infra*, this note.

Failure to make complaint of crime.— In Watson *v.* Hall, 46 Conn. 204, it was held that a penal statute providing a penalty against any grand juror who after he is sworn shall neglect to make seasonable complaint of any crime or misdemeanor committed within the town where he lives which shall come to his knowledge, etc., should receive a liberal construction in favor of the party accused, and that a defendant who acted in good faith and in the honest belief that an offense committed was not of sufficient magnitude to justify a prosecution is not liable for the penalty.

Voluntary intoxication during sitting of grand jury.— Com. *v.* Keffer, Add. (Pa.) 290. See also *In re* Ellis, 8 Fed. Cas. No. 4,399*a*, Hempst. 10.

XIII. INDICTMENT FOR INTERFERENCE WITH GRAND JURY.

Communications on the part of private individuals with grand jurors and solicitations for the purpose of influencing their action in matters before them or likely to come before them have sometimes been made indictable by statute,[73] and have been held to constitute contempt of court apart from statutory provision.[74]

XIV. COMPENSATION OF GRAND JURORS.

Provision is frequently made by statute for the allowance of compensation to grand jurors for their services.[75]

GRAND JURY BOX. The box in which are placed, on separate pieces of paper, the names of a number of persons taken from a list from which grand jurors are to be selected.[1] (See, generally, GRAND JURIES.)

GRAND LARCENY. See LARCENY.

GRAND LIST. A schedule of the polls and ratable estate of the inhabitants upon which taxes are to be assessed.[2] (See TAXATION.)

GRAND or SUPREME LODGE. In their ordinary and popular sense, words which apply only to secret organizations or supreme bodies constituted from and having jurisdiction over secret societies.[3] (See, generally ASSOCIATIONS.)

GRANDMOTHER. The mother of either of one's parents.[4] (See GRANDPARENT; and, generally, DESCENT AND DISTRIBUTION; WILLS.)

Disclosure of grand jury secrets see *supra*, XI, K, 3.

73. Charge to Grand Jury, 30 Fed. Cas. No. 18,255, 2 Sawy. 667. See also Com. *v.* Woodward, 157 Mass. 516, 518, 32 N. E. 939, 34 Am. St. Rep. 302, where the court says: "The evil, or apprehension of evil, from this source has been so great elsewhere as sometimes to lead to legislation for preventing or punishing it. . . . No such legislation has yet been deemed necessary in this Commonwealth, and the question of the criminality of such importuning, if it should arise, would have to be determined on general principles of law."

74. Matter of Tyler, 64 Cal. 434, 1 Pac. 884; Com. *v.* Crans, 3 Pa. L. J. 442.

In New York it has been held that while it is contempt of court at common law for witnesses or bystanders to communicate with the grand jury without its request, yet to render such communication a contempt under statute the manner of making it must involve some contemptuous behavior committed during the sitting of the court and at least tending to impair the respect due to it. Bergh's Case, 16 Abb. Pr. N. S. 266. So in People *v.* Sallick, 4 N. Y. Cr. 329, it was held that the acts of an unauthorized person in writing a postal card to the members of a grand jury to request them to call upon him, and holding interviews with them requesting their investigation of a certain case to be tried before them, and making various statements regarding the facts, while reprehensible, did not constitute contempt of court under the New York statute. So a communication in discharge of official duty has been held not to be a contempt of court. Bergh's Case, 16 Abb. Pr. N. S. (N. Y.) 266.

75. People *v.* Stookey, 98 Ill. 537 (holding that the fees of grand jurors for services in the city courts are not made a charge upon the county treasury but are required to be paid out of the treasuries of cities in which such courts are held); Gillette *v.* Sharp, 7 Nev. 245; *Ex p.* Lopez, 7 Rich. (S. C.) 123 (holding that under a statute allowing grand jurors' fees to be paid by the state, grand jurors of the city court of Charleston are not entitled to be paid by the state); *In re* Grand Jurors, 120 Fed. 307.

Extra pay as stenographer.— In People *v.* Lauder, 82 Mich. 109, 46 N. W. 956, it was held proper for a member of the grand jury to receive extra pay from the county for his services as stenographer, as he could not be compelled to do this extra duty without compensation.

Computation of mileage.— In *In re* Grand Jurors, 120 Fed. 307, it was held that the legal fiction that a term of court is but one day cannot affect the construction of U. S. Rev. St. § 852, as amended, relating to the allowance of mileage compensation to jurors, but that where grand jurors in obedience to due process attended the district court of the United States in Delaware on the first day of the term and were on the same day discharged by the court until thirteen days thereafter, on which latter day they duly attended and were finally discharged, they were entitled to mileage compensation for two round trips or four single trips between their places of residence and the place of holding court.

1. State *v.* Greenman, 23 Minn. 209, 211, construing Minn. Gen. St. c. 107, § 14.

2. Wilson *v.* Wheeler, 55 Vt. 446, 452.

3. State *v.* National Assoc., 35 Kan. 51, 56, 9 Pac. 956.

4. Black L. Dict.

GRANDNIECE. See Descent and Distribution.

GRANDNEPHEW. See Descent and Distribution.

GRANDPARENT. The parent of one's parent; an ancestor in the second degree, a Grandfather (*q. v.*), or Grandmother,[5] *q. v.* (See, generally, Descent and Distribution.)

GRANDSON. In its primary sense, a term which refers to a legitimate son of a son or daughter.[6] (See Grandchildren; and, generally, Descent and Distribution; Wills.)

GRANITE. A rock composed of orthoclase-feldspar, mica, and quartz, and having a thoroughly crystalline-granular texture.[7]

GRANT.[8] As a noun,[9] the act of granting — a bestowing or conferring;[10] the passing of real estate from one to another;[11] the thing granted or bestowed, a gift, a boon;[12] a term originally used to signify a conveyance of an incorporeal hereditament,[13] of such things whereof no livery could be had,[14] of things which lay in grant and not in livery, which could not pass without a deed;[15] a mode of

5. Standard Dict.

6. Doe *v.* Taylor, 6 N. Brunsw. 525, 550.

Evidence to explain meaning of see 17 Cyc. 685.

7. Century Dict. See Medina *v.* Builders' Mut. F. Ins. Co., 120 Mass. 225, 226, granite building. See also 11 Cyc. 617.

8. "It is a word which has acquired peculiar and appropriate meaning in the law, and must be construed and understood according to such meaning. R. S. c. 5, sec. 1." McVey *v.* Green Bay, etc., R. Co., 42 Wis. 532, 535. But its meaning, in particular cases, is to be determined from its connection and the manner of its use. Des Moines County Agricultural Soc. *v.* Tubbessing, 87 Iowa 138, 140, 54 N. W. 68.

9. Compared with "license" see Jamieson *v.* Millemann, 10 Duer (N. Y.) 255, 258. See also De Haro *v.* U. S., 5 Wall. (U. S.) 599, 627, 18 L. ed. 681 [*quoted* in Jensen *v.* Hunter, (Cal. 1895) 41 Pac. 14, 17].

Distinguished from "license" see Fitzgerald *v.* Firbank, [1897] 2 Ch. 96, 103, 66 L. J. Ch. 529, 76 L. T. Rep. N. S. 584; Heap *v.* Hartley, 42 Ch. D. 461, 468, 470, 58 L. J. Ch. 790, 61 L. T. Rep. N. S. 538, 38 Wkly. Rep. 136.

Distinguished from "gift."—"Gifts are always gratuitous; grants are upon some consideration or equivalent." Jacob L. Dict. [*quoted* in Parkinson *v.* State, 14 Md. 184, 197, 74 Am. Dec. 522]. Ordinarily the grant of a thing for a consideration is a sale of it. Des Moines County Agricultural Soc. *v.* Tubbessing, 87 Iowa 138, 140, 54 N. W. 68.

Presumption of a grant see 13 Cyc. 439 note 8.

10. Webster Dict. [*quoted* in State *v.* New Orleans, 50 La. Ann. 880, 889, 24 So. 666].

11. Whitney *v.* Richardson, 59 Hun (N. Y.) 601, 603, 13 N. Y. Suppl. 861.

12. Webster Dict. [*quoted* in State *v.* New Orleans, 50 La. Ann. 880, 889, 24 So. 666].

"A grant implies a disposition of a thing in esse, or potentially so." Everman *v.* Robb, 52 Miss. 653, 659, 24 Am. Rep. 682.

"Grant of administration" is a term sometimes used as the equivalent to the probate of a will. Dawley *v.* New Shoreham Prob. Ct., 16 R. I. 694, 696, 19 Atl. 248.

"Grant" of discharge of an enlisted man see North *v.* Appleton, 12 N. Y. Suppl. 72, 73, 25 Abb. N. Cas. 389.

Grant of a franchise see Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 658, 4 L. ed. 629; Crowther *v.* Wentworth, 6 B. & C. 366, 372, 13 E. C. L. 172.

"Grant of incorporation" is a compact between the crown and a certain number of the subjects, the latter of whom undertake, in consideration of the privileges which are bestowed, to exert themselves for the good government of the place. Rex *v.* Pasmore, 3 T. R. 199, 246, 1 Rev. Rep. 688 [*quoted* in Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 658, 4 L. ed. 629].

"Grant of a mineral estate . . . is a grant of the right to penetrate the earth in search of the mineral stratum, and when found to quarry and remove the mineral in a proper manner." Robertson *v.* Youghiogheny River Coal Co., 172 Pa. St. 566, 571, 33 Atl. 706.

Grant or bounty on sugar see Downs *v.* U. S., 113 Fed. 144, 150, 151, 51 C. C. A. 100.

"Grant to a pueblo," in Mexican law, is a grant in which the lands conveyed constitute a political subdivision of the state and are held in trust for the use and benefit of the inhabitants thereof. United Land Assoc. *v.* Knight, 85 Cal. 448, 470, 24 Pac. 818.

"More comprehensive in meaning than the term 'bounty.'" Downs *v.* U. S., 113 Fed. 144, 147, 51 C. C. A. 100.

13. Des Moines County Agricultural Soc. *v.* Tubbessing, 87 Iowa 138, 140, 54 N. W. 68; French *v.* French, 3 N. H. 234, 260; Archer *v.* Eckerson, 10 N. Y. App. Div. 598, 601, 42 N. Y. Suppl. 137 [*citing* 4 Kent Comm. 490, 492]. See also Elliott *v.* Shaw, 32 Ohio St. 431, 433 [*citing* Bouvier L. Dict.].

14. Jordan *v.* Indianapolis Water Co., 159 Ind. 337, 342, 64 N. E. 680 [*citing* 2 Blackstone Comm. 317]; Dudley *v.* Sumner, 5 Mass. 438, 471 [*citing* 2 Blackstone Comm. 317].

15. Estes Park Toll Road Co. *v.* Edwards, 3 Colo. App. 74, 32 Pac. 549 [*citing* Mucklestone *v.* Thomas, Willes 144, 149]. Jackson *v.* Alexander, 3 Johns. (N. Y.) 484, 491, 3

assurance applicable, not to estates in possession of which livery of seisin may be made, but to incorporeal estates, or to estates in reversion or remainder of which livery cannot be made;[16] but now a word of far more extended application and said to be applied where anything is granted or passed from one to another,[17] in its largest sense comprehending every thing that is granted or passed from one to another, and is applied to every species of property;[18] a generic term applicable to all transfers of real property;[19] a transfer of property by deed or writing, especially an appropriation or conveyance made by the government;[20] a transfer in writing;[21] a *nomen generalissimum*, applicable to all sorts of conveyances,[22] feoffments, bargains and sales, gifts,[23] leases, charges and the like,[24] leases in writing or by deed, and sometimes by word without writng;[25] feoffments, gifts, leases, releases, confirmations, or surrenders;[26] also sometimes used as meaning a CONCESSION,[27] *q. v.*, an ADMISSION (*q. v.*) of something as true.[28] As a verb,[29]

Am. Dec. 517; Coke Litt. 172*a* [*quoted* in McVey *v.* Green Bay, etc., R. Co., 42 Wis. 532, 536]; Williams Real Prop. 147, 195 [*quoted* in Loyal Mystic Legion *v.* Jones, (Nebr. 1905) 102 N. W. 621, 624].

16. Irvine *v.* Webster, 2 U. C. Q. B. 224, 233, where it is said: "Such estates are said to lie only in grant, and to pass by the deed or not at all."

17. Des Moines County Agricultural Soc. *v.* Tubbessing, 87 Iowa 138, 140, 54 N. W. 68.

Although anciently used as applicable more particularly to a conveyance of incorporeal hereditaments, or of such property or rights as could not be transferred by livery of seizin, it has now a more comprehensive signification, and includes a demise or lease. Darby *v.* Callaghan, 16 N. Y. 71, 75. It comprehends more than a transfer of incorporeal hereditaments — a conveyance of corporeal hereditaments. Dudley *v.* Sumner, 5 Mass. 438, 472 [*citing* 2 Blackstone Comm. 314]. The word even in its more restricted signification may properly be applied to a conveyance of land as well as of incorporeal hereditaments. McVey *v.* Green Bay, etc., R. Co., 42 Wis. 532, 536.

18. Elliott *v.* Shaw, 32 Ohio St. 431, 433 [*citing* Bouvier L. Dict.], where it is said: "The term, however, is so seldom, if ever, applied to the transfer of a chose in action, that nothing short of a manifest purpose to apply it, would carry that meaning with the use of the word."

19. *California.*— Faivre *v.* Daley, 93 Cal. 664, 668, 29 Pac. 256, construing Cal. Civ. Code, § 1243.

Colorado.— Estes Park Toll Road Co. *v.* Edwards, 3 Colo. App. 74, 32 Pac. 549, 550 [*citing* 3 Washburn Real Prop. 181, 353].

Illinois.— Cross *v.* Weare Commission Co., 153 Ill. 499, 510, 38 N. E. 1038, 46 Am. St. Rep. 902 [*citing* Patterson *v.* Carneal, 3 A. K. Marsh. (Ky.) 618, 13 Am. Dec. 208].

Nebraska.— Loyal Mystic Legion *v.* Jones, (1905) 102 N. W. 621, 624 [*quoting* 3 Washburn Real Prop. 181, 353].

Ohio.— Elliott *v.* Shaw, 32 Ohio St. 431, 433 [*citing* Bouvier L. Dict.].

Oregon.— Lambert *v.* Smith, 9 Oreg. 185, 193.

West Virginia.— Chapman *v.* Charter, 46 W. Va. 769, 779, 34 S. E. 768 [*citing* Washburn Real Prop. 163].

20. Webster Dict. [*quoted* in State *v.* New Orleans, 50 La. Ann. 880, 889, 24 So. 666].

21. Cal. Civ. Code, § 1053 [*quoted* in Faivre *v.* Daley, 93 Cal. 664, 668, 29 Pac. 256]; Mont. Civ. Code (1895), § 1450; S. D. Civ. Code (1903), § 921.

Both the incipient and the complete title in the general word may be comprehended. U. S. *v.* Clarke, 8 Pet. (U. S.) 436, 449, 8 L. ed. 1001.

It is also said to be a contract executed. — Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 517, 698, 4 L. ed. 629 [*quoted* in Blagge *v.* Miles, 3 Fed. Cas. No. 1,479, 1 Story 426].

22. McVey *v.* Green Bay, etc., R. Co., 42 Wis. 532, 536; Durant *v.* Ritchie, 8 Fed. Cas. No. 4,190, 4 Mason 45, 69 [*quoted* in Faivre *v.* Daley, 93 Cal. 664, 669, 29 Pac. 256].

23. Sheppard Touchst. [*quoted* in Faivre *v.* Daley, 93 Cal. 664, 669, 29 Pac. 256; McVey *v.* Green Bay, etc., R. Co., 42 Wis. 532, 536]; Wood Conv. [*quoted* in Faivre *v.* Daley, 93 Cal. 664, 668, 29 Pac. 256].

"Blackstone says a grant 'differs but little from a feoffment, except in the subject-matter: for the operative words therein commonly used are *dedi et concessi*, "have given and granted." '" Archie *v.* Eckerson, 10 N. Y. App. Div. 598, 601, 42 N. Y. Suppl. 137 [*quoting* 2 Blackstone Comm. 317].

24. Sheppard Touchst. [*quoted* in Faivre *v.* Daley, 93 Cal. 664, 669, 29 Pac. 256; McVey *v.* Green Bay, etc., R. Co., 42 Wis. 532, 536].

25. Wood Conv. [*quoted* in Faivre *v.* Daley, 93 Cal. 664, 668, 29 Pac. 256].

26. Coke Litt. 301*b*, 302*a* [*quoted* in Simmons *v.* Augustin, 3 Port. (Ala.) 69, 93; Chester *v.* Willan, 2 Saund. 96*a*, 96*b*].

27. Archer *v.* Eckerson, 10 N. Y. App. Div. 598, 601, 42 N. Y. Suppl. 137; Webster Dict. [*quoted* in State *v.* New Orleans, 50 La. Ann. 880, 889, 24 So. 666].

28. Webster Dict. [*quoted* in State *v.* New Orleans, 50 La. Ann. 880, 889, 24 So. 666].

29. **Synonyms of this word** are: "To admit; to allow; to bestow; to concede; to confer; to give; to transfer." Webster Dict. [*quoted* in State *v.* New Orleans, 50 La. Ann. 880, 888, 24 So. 666]. See North *v.* Appleton, 12 N. Y. Suppl. 72, 73, 25 Abb. N. Cas. 389. See also ADMIT, 1 Cyc. 912; ALLOW, 2 Cyc. 134; BESTOWED, 5 Cyc. 684; CONVEY, 9 Cyc. 858.

to CONVEY,[30] *q. v.*, an operative word of transfer,[31] technically applicable to real estate,[32] made use of in deeds of conveyance of lands to import a transfer;[33] to confer or bestow with or without compensation, particularly in answer to prayer or request;[34] also sometimes used as meaning to admit as true when disputed or not satisfactorily proved, to yield belief to, to allow to yield.[35] As used in a will, to devise or to bequeath.[36] As used in a treaty, it comprehends

"Used in connection with other words, as a verb, see the following phrases: "Covenant, grant and agree" (Monypenny *v.* Moneypenny, 9 H. L. Cas. 114, 137, 31 L. J. Ch. 269, 11 Eng. Reprint 671); "demise, grant or the like" (Mershon *v.* Williams, 63 N. J. L. 398, 403, 44 Atl. 211); "do grant" (Chapman *v.* Charter, 46 W. Va. 769, 779, 34 S. E. 768); "give, grant, and convey" (Young *v.* Ringo, 1 T. B. Mon. (Ky.) 30, 31; State *v.* Callvert, 33 Wash. 380, 387, 74 Pac. 573); "grant and allow" (Middletown *v.* Newport Hospital, 16 R. I. 319, 331, 15 Atl. 800, 1 L. R. A. 191); "grant and convey" (United Land Assoc. *v.* Knight, 85 Cal. 448, 463, 24 Pac. 818; 11 Cyc. 1047 note 31); "grant and release" (Thompson *v.* Leach, 3 Mod. 296, 301); "grant, let, or otherwise dispose of" (Croft *v.* Lumley, 6 H. L. Cas. 672, 694, 4 Jur. N. S. 903, 27 L. J. Q. B. 321, 6 Wkly. Rep. 523, 10 Eng. Reprint 1459); "lay off and grant" (Pinson *v.* Ivey, 1 Yerg. (Tenn.) 296, 358); "make over and grant" (Jackson *v.* Alexander, 3 Johns. (N. Y.) 484, 491, 3 Am. Dec. 517).

"Granted" as used in connection with other words see the following phrases: "Granted and demised" (Iggulden *v.* May, 2 B. & P. N. R. 449, 451, 7 East 237, 3 Smith K. B. 269, 9 Ves. Jr. 325, 8 Rev. Rep. 623, 32 Eng. Reprint 628); "granted in fee" (Brooke *v.* Campbell, 12 Grant Ch. (U. C.) 526, 532); "granted to the state" (Whiteside County *v.* Burchell, 31 Ill. 68, 78); "granted to the Territory or State of Minnesota" (Winona, etc., R. Co. *v.* Barney, 113 U. S. 618, 628, 5 S. Ct. 606, 28 L. ed. 1109); "hereby granted" (Estes Park Toll Road Co. *v.* Edwards, 3 Colo. App. 74, 32 Pac. 549, 550; Northern Pac. R. Co. *v.* Majors, 5 Mont. 111, 130, 2 Pac. 322; Wright *v.* Roseberry, 121 U. S. 488, 500, 7 S. Ct. 985, 30 L. ed. 1039); "lands granted" (Brooke *v.* Campbell, 12 Grant Ch. (U. C.) 526, 533); "quantity of lands hereby granted" (Winona, etc., R. Co. *v.* Barney, 113 U. S. 618, 628, 5 S. Ct. 606, 28 L. ed. 1109).

30. *Iowa.*— Des Moines County Agricultural Soc. *v.* Tubbessing, 87 Iowa 138, 140, 54 N. W. 68.

Kentucky.— Patterson *v.* Carneal, 3 A. K. Marsh. 618, 621, 13 Am. Dec. 208.

Louisiana.— State *v.* New Orleans, 50 La. Ann. 880, 888, 24 So. 666 [*quoting* Webster Dict.].

Oregon.— Lambert *v.* Smith, 9 Oreg. 185.

West Virginia.— Chapman *v.* Charter, 46 W. Va. 769, 774, 34 S. E. 768.

31. Harlowe *v.* Hudgins, 84 Tex. 107, 111, 19 S. W. 364, 31 Am. St. Rep. 21.

"The word grant is not a technical word like the word enfeoff, and although, if used broadly, without limitation or restriction, it would carry an estate or interest in the thing granted." Rice *v.* Minnesota, etc., R. Co., 1 Black (U. S.) 358, 378, 17 L. ed. 147.

"The word 'grant' comprehends something more than the mere execution of the instrument; it includes a delivery of it." People *v.* Potter, 1 Edm. Sel. Cas. (N. Y.) 235, 240.

"The word 'grant' . . . must have a thing to operate upon, a thing in the objective case, and its operation is limited to the thing specified as granted, the thing shown by the whole deed to have been intended to be granted, and if that is only a right of way, the word 'grant' passes that only." Uhl *v.* Ohio River R. Co., 51 W. Va. 106, 116, 41 S. E. 340.

"Granted by deed."— In conveyancing, words which of themselves necessarily imply a perfect instrument, one competent to pass the title. Brown *v.* Chambersburg Bank, 3 Pa. St. 187, 201.

32. New York L. Ins., etc., Co. *v.* Hoyt, 31 N. Y. App. Div. 84, 90, 52 N. Y. Suppl. 819.

"The words 'grant or demise' pertain to an estate in lands, and not to the mere privilege of occupation or possession upon the payment of rent." Mershon *v.* Williams, 63 N. J. L. 398, 406, 44 Atl. 211.

"The word 'grant,' . . . includes purchase, and applies alike, . . . to corporeal and incorporeal, personal and real property." Rich *v.* Rich, 12 Minn. 468.

33. Estes Park Toll Road Co. *v.* Edwards, 3 Colo. App. 74, 32 Pac. 549, 550 [*citing* 3 Washburn Real Prop. 378, 380].

"To constitute a grant, it is not indispensable that technical words shall be used." Barksdale *v.* Hairston, 81 Va. 764, 765.

Does not import the quantity of estate conveyed.— Krider *v.* Lafferty, 1 Whart. (Pa.) 303, 316.

"The words 'assigned' and 'surrendered' are certainly more appropriate to a lease already made than to one to be made, and the word 'granted' may be applied to either." Davis *v.* Pollock, 36 S. C. 544, 550, 15 S. E. 718.

34. Webster Dict. [*quoted* in State *v.* New Orleans, 50 La. Ann. 880, 888, 24 So. 666].

"Granting."— As used in bills of lading which authorize the collector of the port to grant a general order of discharge immediately after entry of the ships, the phrase means not the mere act of signing the permit alone, but all acts that lawfully belong to the proper execution of the general order itself, and necessarily or properly flow from it. The Egypt, 25 Fed. 320, 332.

35. Webster Dict. [*quoted* in State *v.* New Orleans, 50 La. Ann. 880, 888, 24 So. 666].

36. Rigden *v.* Vallier, 2 Atk. 731, 735, 26

not only those concessions which are made in form, but also any concession, warrant, order, or permission to survey, possess or settle, whether evidenced by writing or parol or presumed from possession.[37] As applied to public grants,[38] it implies the conferring by the sovereign power of some valuable privilege, franchise, or other right of like character upon a corporation, person, or class of persons;[39] an act evidenced by letters patent under the great seal, granting something from the king to a subject;[40] also the conveyance by the government of townships of land.[41] It is used oftentimes technically to refer to lands in place which are spoken of as granted lands, in contradistinction to lands which are to be selected, or indemnity lands; and then it is oftentimes used, both in land legislation and opinions, to refer to all lands, the title to which has passed either as lands in place or by selection.[42] (Grant: In General, see COVENANTS; DEEDS. Alteration of, see ALTERATIONS OF INSTRUMENTS. As Color of Title, see ADVERSE POSSESSION. As Evidence — In General, see EVIDENCE; In Boundary Proceeding, see BOUNDARIES. Dedication, see DEDICATION. For College, see COLLEGES AND UNIVERSITIES. Impairment of Obligation of Grant by Statute, see CONSTITUTIONAL LAW. Legislative Constitutionality of, see CONSTITUTIONAL LAW. Of a Corporation, see CORPORATIONS. Of Easement, see EASEMENTS. Of Ferry Privilege, see FERRIES. Of Franchise, see FRANCHISES. Of Injunction, see INJUNCTIONS. Of Lands — To Alien, see ALIENS; Under Navigable Waters, see NAVIGABLE WATERS. Of License,[43] see LICENSES. Of Mandamus, see MANDAMUS. Of Monopoly, see MONOPOLIES. Of New Trial,[44] see APPEAL AND ERROR; CRIMINAL LAW; NEW TRIAL. Of Pardon,[45] see PARDONS. Of Prohibition,[46] see PROHIBITION. Of Public Land, see PUBLIC LANDS. Of Right to Construct Wharf, see WHARVES. Of Trial,[47] see TRIAL. Of Water-Right, see

Eng. Reprint 1219, 2 Ves. 252, 28 Eng. Reprint 163.

37. Bryan *v.* Kennett, 113 U. S. 179, 193, 5 S. Ct. 407, 28 L. ed. 908; Strother *v.* Lucas, 12 Pet. (U. S.) 410, 436, 9 L. ed. 1137.

38. In California the term has often been used by the people to designate all concessions of the Mexican government. "The term grant, as almost universally used in California, both in legal proceedings and common parlance, does not, necessarily, have this signification [perfect title]. It is a matter of public notoriety, and a part of the general history of the country, . . . that there are, in the whole State of California, but very few of that class of Mexican titles, which have sometimes been called 'perfect titles.'" Seale *v.* Ford, 29 Cal. 104, 108 [*citing* Minturn *v.* Brower, 24 Cal. 644].

39. Downs *v.* U. S., 113 Fed. 144, 147, 51 C. C. A. 180.

Office grant applies to conveyances made by some officer of the law to effect certain purposes where the owner is either unwilling or unable to execute the requisite deed to pass the title. Bouvier L. Dict.

Private grant is a grant by the deed of a private person. Bouvier L. Dict.

"Public grant is the mode and act of creating a title in an individual to lands which had previously belonged to the government." Estes Park Toll Road Co. *v.* Edwards, 3 Colo. App. 74, 32 Pac. 549, 550 [*citing* Martin *v.* Waddell, 16 Pet. (U. S.) 367, 10 L. ed. 997; Johnson *v.* McIntosh, 8 Wheat. (U. S.) 543, 5 L. ed. 681; 2 Kent Comm. 450, 494; Washburn Real Prop. 181, 208].

40. Cruise Dig. tit. 33, 34 [*quoted* in Estes Park Toll Road Co. *v.* Edwards, 3 Colo. App. 74, 32 Pac. 549, 550].

41. Dudley *v.* Sumner, 5 Mass. 438, 472.

"'A grant' of lands 'may be made by law as well as by a patent issued pursuant to a law.'" Northern Pac. R. Co. *v.* Majors, 5 Mont. 111, 126, 2 Pac. 322 [*citing* Strother *v.* Lucas, 12 Pet. (U. S.) 410, 454, 9 L. ed. 1137; Wilkinson *v.* Leland, 2 Pet. (U. S.) 627, 7 L. ed. 542; Fletcher *v.* Peck, 6 Cranch (U. S.) 87, 3 L. ed. 162; 3 Washburn Real Prop. (4th ed.) 193, 194].

42. Barney *v.* Winona, etc., R. Co., 24 Fed. 889, 891.

"Granted lands." — As used in the construction of land grant acts, in aid of railroads, a term which refers to lands falling within the limits specially designated, and the title to which attaches when the lands are located by an approved and accepted survey of the line of the road filed in the land department, as of the date of the act of congress. Barney *v.* Winona, etc., R. Co., 117 U. S. 228, 232, 6 S. Ct. 654, 29 L. ed. 858 [*quoted* in Altschul *v.* Clark, 39 Oreg. 315, 324, 65 Pac. 991; Northern Pac. R. Co. *v.* Amacher, 53 Fed. 48, 54]; where the term is distinguished from "indemnity lands."

43. See also Sullivan *v.* Borden, 163 Mass. 470, 473, 40 N. E. 859.

44. See also Kinkead *v.* Keene, 22 R. I. 336, 337, 47 Atl. 887.

45. See also People *v.* Potter, 1 Edm. Sel. Cas. (N. Y.) 235, 241.

46. See also State *v.* Rombauer, 104 Mo. 619, 628, 15 S. W. 850, 16 S. W. 502, opinion of Barclay, J.

47. See also Kinkead *v.* Keene, 22 R. I. 336, 337, 47 Atl. 887.

Waters. Parol Evidence of, see Evidence. To Charities, see Charities. Void as Defense, see Ejectment. See also Convey; Conveyance; Give.)

GRANT, BARGAIN, AND SELL.[48] See Deeds.

GRANTED. A word sometimes used as the equivalent of admitted.[49] (See Grant.)

GRANTEE.[50] A person to whom a grant is made;[51] every person to whom a freehold estate or interest passes in or by any deed;[52] one who takes by any species of conveyance;[53] the purchaser of an estate;[54] a legal representative of the assignor or grantor, in regard to the thing assigned or granted.[55] (See Convey; Conveyance; Grant; Grantor; and, generally, Deeds.)

GRANTEE OF A POWER. A term used to designate the person in whom a power is vested, whether by grant, devise or reservation.[56] (See, generally, Powers.)

GRANTOR. A person who gives, bestows, or concedes a thing;[57] one who makes a grant;[58] the proper and customary word to designate the party who conveys by deed,[59] and in legal parlance is understood to be the party who makes and executes a deed or conveyance;[60] the most common and comprehensive word used to mean one who transfers, by any mode of conveyance, property in houses or lands.[61] (See Convey; Conveyance; Grant; Grantee; and, generally, Deeds.)

48. See also 11 Cyc. 1047 note 31, 1113 note 27.

49. Glenn *v.* Dimmock, 43 Fed. 550, 551.

50. A word of well-known signification see Van Rensselaer *v.* Albany County, 1 Cow. (N. Y.) 501, 502.

"Heir, grantee, or devisee" see Elliott *v.* Shaw, 32 Ohio St. 431, 433.

51. Elliott *v.* Shaw, 32 Ohio St. 431, 433; Black L. Dict. [*quoted* in Loyal Mystic Legion *v.* Jones, (Nebr. 1905) 102 N. W. 621, 624].

52. Mass. Pub. St. c. 3, § 3, cl. 7 [*quoted* in Hayden *v.* Peirce, 165 Mass. 359, 362, 43 N. E. 119]. See also 31 & 32 Vict. c. 101, § 3.

53. Dudley *v.* Sumner, 5 Mass. 438, 472.

54. Van Rensselaer *v.* Albany County, 1 Cow. (N. Y.) 501, 502.

55. Grand Gulf R., etc., Co. *v.* Bryan, 8 Sm. & M. (Miss.) 234, 276.

Mortgagee is held not to be a grantee, within the meaning of an act authorizing the owner of an estate, or his grantee, to redeem from a sale under execution. Van Rensselaer *v.* Sheriff Albany County, 1 Cow. (N. Y.) 501, 502.

Does not include heirs and assigns of the grantee as used in a mortgage. Allendorff *v.* Gaugengigi, 146 Mass. 542, 544, 16 N. E. 283.

As applied to patents, the grantee is one who has had transferred to him, in writing, the exclusive right under the patent, to make and use, and to grant to others to make and use, the thing patented, within and throughout some specified part or portion of the United States. Potter *v.* Holland, 19 Fed. Cas. No. 11,329, 4 Blatchf. 206, 211. See Patents.

As defined by statute, the term includes every person to whom any estate or interest in land passes in or by any deed (N. H. Pub. St. (1901) p. 64, c. 2, § 16); every person to whom any freehold estate or interest passes in or by any deed (Del. Rev. Code (1893), p. 42, c. 5, § 1, subd. 3; Ky. St. (1903) § 461; Me. Rev. St. (1883) p. 59, c. 1, § 6, subd. 5; Mass. Rev. Laws (1902), p. 88, c. 8, § 5, subd. 3; Mich. Comp. Laws (1897), § 50, subd. 5; Wis. Rev. St. (1898) § 4971). As defined in a statute relative to forfeitures, it means the person to whom land, right, or privileges were granted, and the representatives or assigns of such person, and the corporation thus created (Vt. St. (1894) c. 80, § 1567); the person or corporation to whom a grant is made, and all persons having the right of such person or corporation therein (N. H. Pub. St. (1901) p. 750, c. 240, § 1).

56. Minn. Gen. St. (1894) § 4361; Wis. Rev. St. (1898) § 2158.

57. Russell *v.* Watt, 41 Miss. 602, 609, 93 Am. Dec. 270 [*quoted* in Smith *v.* Mills, 145 Ind. 334, 343, 43 N. E. 564, 44 N. E. 362].

58. Dudley *v.* Sumner, 5 Mass. 438, 471.

59. Carey *v.* Foster, 7 Wyo. 216, 223, 51 Pac. 206.

60. Russell *v.* Watt, 41 Miss. 602, 609, 93 Am. Dec. 270 [*quoted* in Smith *v.* Mills, 145 Ind. 334, 343, 43 N. E. 564, 44 N. E. 362].

61. Dudley *v.* Sumner, 5 Mass. 438, 472. See 9 Cyc. 861 note 29.

As defined by statute, it includes every person from or by whom any freehold estate or interest passes in or by any deed. Del. Rev. Code (1893), p. 42, c. 5, § 1, subd. 3; Ky. St. (1903) § 461; Me. Rev. St. (1883) p. 59, c. 1, § 6, subd. 5; Mass. Pub. St. c. 3, § 3, cl. 7 [*quoted* in Hayden *v.* Peirce, 165 Mass. 359, 362, 43 N. E. 119]; Mich. Comp. Laws (1897), § 950, subd. 5; N. H. Pub. St. (1901) p. 64, c. 2, § 16; Wis. Rev. St. (1898) § 4971. See 54 & 55 Vict. c. 57, § 3; 44 & 45 Vict. c. 65, § 1; 18 & 19 Vict. c. 39, § 1; 13 & 14 Vict. c. 72, § 64. See also Saunders *v.* White, [1901] 1 K. B. 70, 74, 75, 70 L. J. K. B. 34, 83 L. T. Rep. N. S. 712, 8 Manson 31, 49 Wkly. Rep. 127.

GRANTOR OF A POWER. A term used to designate the person in whom a power is vested, whether by grant, devise, or reservation.[62] (See, generally, POWERS.)

GRANULATED. Consisting of, or resembling, grains.[63]

GRAPEVINES. A term which may mean indifferently either cuttings or rooted plants, according to common usage.[64]

GRAPPLE. To contend or dispute with something.[65]

GRASS. In common usage, the green plants on which cattle and other beasts feed; any herbage that serves for pasture.[66] (Grass, In General, see CROPS. Conversion of Into Hay, see ACCESSION. Measure of Damages For Injuries to, see DAMAGES.)

GRASSUM. A Scotch word importing a fine taken upon granting a lease.[67]

GRATES OF THE ENGINE. A term which is understood not to mean any part of that particular contrivance by which the steam itself is applied to the wheels, but as one of the component parts which go to make up and complete a machine in position to propel railroad cars by steam.[68]

GRATING. As defined by statute, a term which means and includes any device[69] approved by the Secretary of State for preventing the passage of fish through any channel.[70] (See, generally, FISH AND GAME.)

GRATIS DICTUM. A voluntary assertion, a statement which a party is not bound to make, and as to which he is not held to precise accuracy, nor liable in damages for an injury to one misled thereby.[71] (See DICTUM.)

GRATUITA. A term applied to a corrupt bargain for money or direct profit.[72]

GRATUITOUS. Without valuable or legal consideration; a term applied to deeds of conveyance. In old English law, voluntary, without force, fear, or favor.[73] (Gratuitous: Contract — Generally, see GIFTS; In Fraud of Creditors, see FRAUDULENT CONVEYANCES; Nudum Pactum, see CONTRACTS. See also GRATUITY.)

"**Grantor**" **construed to mean "grantee"** through a misprint. See Roebuck *v.* Duprey, 2 Ala. 535, 541.

"**Grantor**" **of an annuity** see Darwin *v.* Lincoln, 5 B. & Ald. 444, 449, 7 E. C. L. 245.

"**We the grantors**" see Tasker *v.* Bartlett, 5 Cush. (Mass.) 359, 361, 365.

62. Minn. Gen. St. (1894) § 4361; Wis. Rev. St. (1898) § 2158.

63. Webster Int. Dict.

"**Granulated linoleum composition**" is a phrase which is susceptible of a construction which may mean linoleum composition which has been separated into grains, or which may mean, not a material which has been granulated, but that particular composition in a thorough state of combination from which granulated linoleum is made, as distinguished from the somewhat differently constituted composition from which linoleum cement is made. Melvin *v.* Potter, 91 Fed. 151, 154.

"**Granulated tobacco**" is "a species of chewing or smoking tobacco, held to be synonymous with 'cut tobacco.'" Venable *v.* Richards, 28 Fed. Cas. No. 16,913, 1 Hughes 326, where the term is distinguished from "snuff."

64. Remy *v.* Olds, (Cal. 1893) 34 Pac. 216, 218.

65. Standard Dict.

"**Grapple with the subject**" see Shedd *v.* Troy, etc., R. Co., 40 Vt. 88, 94.

66. Standard Dict.

Distinguished from the term "hay" see Baumgartner *v.* Sturgeon River Boom Co., 120 Mich. 321, 323, 79 N. W. 566; Reed *v.* McRill, 41 Nebr. 206, 208, 59 N. W. 775.

"**Grass or herbage growing or standing in the field**" see State *v.* Harvey, 141 Mo. 343, 346, 42 S. W. 938.

"**Grass seeds**" see Nordlinger *v.* U. S., 127 Fed. 683, 684, 62 C. C. A. 409.

67. Queensberry Leases' Case, 1 Bligh 339, 346, 4 Eng. Reprint 127. See also Say *v.* Smith, Plowd. 269, 270.

68. Brown *v.* Benson, 101 Ga. 753, 757, 29 S. E. 215.

69. "Device" defined see 14 Cyc. 283.

70. St. 36 & 37 Vict. c. 71, § 4.

71. Abbott L. Dict. [*citing* Medbury *v.* Watson, 6 Metc. (Mass.) 246, 39 Am. Dec. 726]. See also Crocker *v.* Manley, 164 Ill. 282, 292, 45 N. E. 577, 56 Am. St. Rep. 196.

72. Fletcher *v.* Sondes, 3 Bing. 501, 583, 1 Bligh N. S. 144, 230, 4 Eng. Reprint 826, where it is said that the word is used as the opposite of "*oneraria.*"

73. Black L. Dict.

"**Gratuitous bailment**" is a bailment without compensation or benefit to the bailee, or from which he is to derive benefit or profit (Prince *v.* Alabama State Fair, 106 Ala. 340, 345, 17 So. 449, 28 L. R. A. 716 [*citing* Schouler Bailm. §§ 9, 29, 90]); a mere deposit, where there is no advantage but to the depositor (Foster *v.* Essex Bank, 17 Mass. 479, 499, 9 Am. Dec. 168 [*citing* Coggs *v.* Bernard, 2 Ld. Raym. 909]).

"**Gratuitous contract**" is a contract "the object of which is for the benefit of the person with whom it is made without any profit

GRATUITY. A present, a recompense, a free gift.[74] (See GRATUITOUS.)

GRAVA. In old deeds, a little wood or grove.[75]

GRAVAMEN. The grievance complained of; the substantial cause of the action; also, in general, the ground or essence of a complaint.[76]

GRAVEL. As a noun, small stones or fragments of stone.[77] As a verb, to cover with gravel.[78] (See GRADE; and, generally, MUNICIPAL CORPORATIONS.)

GRAVEL ROAD. See STREETS AND HIGHWAYS; TOLL ROADS.

GRAVES.[79] See CEMETERIES.

GRAVESTONE. A stone laid over a grave, or erected near it (commonly at its head), in memory of the dead.[80] (Gravestone: Bequests For Erection of, see CHARITIES. Erection and Maintenance — In General, see CEMETERIES; Powers of Executor or Administrator and Liability of Decedent's Estate For, see EXECUTORS AND ADMINISTRATORS.)

GRAVEYARD. A place of burial.[81] (See, generally, CEMETERIES.)

GRAVEYARD INSURANCE. A term employed to designate an insurance company engaged in the business of issuing wagering policies, etc.[82] (See, generally, LIFE INSURANCE.)

GRAVING DOCK. A water-tight chamber fitted with timber or iron gates, which are shut against the tide after the vessel has entered for the purpose of being inspected or repaired.[83]

GRAVIORIS INJURIÆ SPECIES EST QUÆ SCRIPTA FIT QUIA DIUIUS IN CONSPECTU HOMINUM PERSEVERAT. VOCIS ENIM FACILE OBLIVISCIMUR, AT LITERA SCRIPTA MANET; ET PER MANUS MULTORUM LONGE, LATEQUE VAGATUR. A maxim meaning "Writing is a species of more serious injury, because it remains longer in public sight, for we easily forget words; but what is written remains, and passes through the hands of many, far and near."[84]

GRAVITY SYSTEM. As applied to sewer drainage, a system in which gravitation alone is depended upon for the discharge of sewage.[85]

GRAVITY YARD. As made use of by railroad men in connection with the operation of cars, a term employed where a switch track is constructed on a downgrade for a certain distance, and from thenceforth on a level, so that

received or promised as a consideration for it." Bouvier L. Dict. [*quoted* in Georgia Penitentiary Co. *v.* Nelms, 65 Ga. 499, 505, 38 Am. St. Rep. 793].

Gratuitous donees see 10 Cyc. 444.

Gratuitous services see 9 Cyc. 913 note 91.

"Gratuitous trustees" see 30 & 31 Vict. c. 97, § 1.

"Gratuitous deposit" as defined by statute is a deposit for which the depositary receives no consideration beyond the mere possession of the thing deposited. Cal. Civ. Code (1903), § 1851; N. D. Rev. Codes (1899), § 4020; S. D. Civ. Code (1903), § 1372.

74. Bouvier L. Dict. [*quoted* in Georgia Penitentiary Co. *v.* Nelms, 65 Ga. 499, 505, 38 Am. Rep. 793]. See 5 Cyc. 977 note 3.

The word embraces "any recompense, or benefit of pecuniary value." Caruthers *v.* State, 74 Ala. 406, 407, where the expression "gift, gratuity, or thing of value" as used in an indictment is considered.

Acceptance of gratuity by United States officer see U. S. *v.* Kessel, 62 Fed. 57, 58.

"Mere gratuities" see 10 Cyc. 858.

Gratuity fund see 17 Cyc. 863.

75. Coke Litt. 4*b*.

76. Illinois Cent. R. Co. *v.* People, 81 Ill. App. 176, 178 [*quoting* Webster Int. Dict., and *citing* Bouvier Dict.]. See also Lohman *v.* State, 81 Ind. 15, 19; State *v.* Olympic Club, 46 La. Ann. 935, 942, 15 So. 190, 24 L. R. A. 452; Grannis *v.* Clark, 8 Cow. (N. Y.) 36, 39; Funk *v.* Voneida, 11 Serg. & R. (Pa.) 109, 113, 14 Am. Dec. 617; Arkwright *v.* Newbold, 17 Ch. D. 301, 50 L. J. Ch. 372, 375, 44 L. T. Rep. N. S. 393, 29 Wkly. Rep. 445; Elsee *v.* Gatward, 5 T. R. 143, 151. See also 1 Cyc. 185.

77. Webster Int. Dict.

"Earth and gravel" see Hatch *v.* Hawkes, 126 Mass. 177, 181.

"Sand and gravel" see Brown *v.* Brown, 8 Metc. (Mass.) 573, 576.

78. Webster Int. Dict.

To gravel a street is "to cover the surface of a street already existing with some durable substance." Wilcoxon *v.* San Luis Obispo, 101 Cal. 508, 510, 35 Pac. 988.

79. "Grave openings" see Bennet *v.* Washington Cemetery, 47 N. Y. App. Div. 365, 366, 62 N. Y. Suppl. 87.

80. Century Dict.

81. Metairie Cemetery Assoc. *v.* Board of Assessors, 37 La. Ann. 32, 38. See also Stockton *v.* Weber, 98 Cal. 433, 438, 33 Pac. 332, where the expression "used as a public cemetery or graveyard" occurs.

82. McCarty's Appeal, 110 Pa. St. 379, 381, 4 Atl. 925.

83. The Vidal Sala, 12 Fed. 207, 211.

84. Taylor L. Gloss.

85. McChesney *v.* Hyde Park, 151 Ill. 634, 642, 37 N. E. 858.

cars are switched by allowing them to run down by gravity, thereby saving the handling of cars by locomotive.[86]

GRAVIUS EST ALTERNAM QUAM TEMPORALEM LÆDERE MAJESTATEM. A maxim meaning "It is more grievous to injure an alternate than a temporary authority."[87]

GRAVIUS EST DIVINAM QUAM TEMPORALEM LÆDERE MAJESTATEM. A maxim meaning "It is more serious to hurt divine than temporal majesty."[88]

GRAZE. To cause to feed upon growing grass or herbage.[89]

GREASE. A term which may include oily or unctuous matter of any kind.[90]

GREAT.[91] More than ordinary in degree; very considerable in degree.[92] (Great: Bodily Harm or Personal Injury, see ASSAULT AND BATTERY; HOMICIDE. Care, see BAILMENTS; NEGLIGENCE. Lakes — In General, see NAVIGABLE WATERS; Admiralty Jurisdiction, see ADMIRALTY; Criminal Jurisdiction, see CRIMINAL LAW.)

GREAT BRITAIN. As defined by statute, a term applied to the united kingdom of England and Scotland.[93]

GREAT GRANDPARENT. See DESCENT AND DISTRIBUTION.

GREAT NEPHEW. A nephew once removed.[94] (See COUSINS.)

GREAT ROADS. A term commonly used to designate main or principal roads or highways.[95] (See, generally, STREETS AND HIGHWAYS.)

GREAT SEAL. The seal of a nation, no matter whether the government be a monarchy or a republic.[96]

GREEN. New; fresh; recent.[97]

GREENBACKS.[98] Currency issued by or under the authority of the United States, and so called from the back of the notes being of green color;[99] a particular and distinct kind of obligation of the United States;[1] a term sometimes employed to denote national bank bills as well as United States treasury notes;[2]

86. Haesley *v.* Winona, etc., R. Co., 46 Minn. 233, 234, 48 N. W. 1023, 24 Am. St. Rep. 220.

87. Peloubet Leg. Max.

88. Bouvier L. Dict.

89. Standard Dict. See 2 Cyc. 444 note 63.

"Grazing" does not mean occasional eating of grass by cattle as they go from range to range, or while stopped for needed rest. Phipps *v.* Grover, (Ida. 1904) 75 Pac. 64, 65.

90. U. S. *v.* Dodge, 94 Fed. 481, 482, where the term "enfleurage grease" is considered.

91. Distinguished from enormous" see 15 Cyc. 1051.

92. Webster Dict. [*quoted* in Gulf, etc., R. Co. *v.* Smith, 87 Tex. 348, 353, 28 S. W. 520.

"Great inconvenience" see Betts *v.* U. S., 132 Fed. 228, 237, 65 C. C. A. 452. See also 12 Cyc. 246 note 64.

"Great man" contradistinguished from "noblemen" see St. Paul's *v.* Lincoln, 4 Price 65, 74.

"Great oaks" see 3 Dyer 374*b*.

"Greater part of them in interest" see Henry *v.* Thomas, 119 Mass. 583, 584.

"Greater sum" see Erd *v.* Chicago, etc., R. Co., 41 Wis. 65, 69.

"Greatest number of votes" see Reg. *v.* Coaks, 2 C. L. R. 947, 3 E. & B. 249, 254, 18 Jur. 378, 23 L. J. Q. B. 133, 77 E. C. L. 249.

"Great waste of property" see Johnson *v.* People, 42 Ill. App. 594, 599.

"The greater includes the less." Pracht *v.* Pister, 30 Kan. 568, 572, 1 Pac. 638.

93. St. 5 Anne, c. 8, art. 1. See Nightingale *v.* Goulbourn, 16 L. J. Ch. 270, 271.

94. Saunderson *v.* Bailey, 2 Jur. 958, 8 L. J. Ch. 18, 4 Myl. & C. 56, 18 Eng. Ch. 56.

95. *Ex p.* Withers, 3 Brev. (S. C.) 83, 86; State *v.* Mobley, 1 McMull. (S. C.) 44.

96. Phillips *v.* Lyons, 1 Tex. 392, 393. See also 40 & 41 Vict. c. 4, § 7; 12 & 13 Vict. c. 109, § 50; 11 & 12 Vict. c. 94, § 46.

97. Century Dict.

"Green grain in the ground" see Hendrickson *v.* Ivins, 1 N. J. Eq. 562, 570.

"Green sugar" is a term which may include both concentrated molasses and concentrated melado or syrup. Belcher *v.* Linn, 24 How. (U. S.) 508, 518, 16 L. ed. 754. See COLOR OF SUGAR.

"Green tea" see Roberts *v.* Egerton, L. R. 9 Q. B. 494, 501, 43 L. J. M. C. 135, 30 L. T. Rep. N. S. 633, 22 Wkly. Rep. 797.

98. Used in connection with "coin" see Spencer *v.* Prindle, 28 Cal. 276, 277, 279. See COIN.

99. Duvall *v.* State, 63 Ala. 12, 17, where the court said: "They are of convertible value, in ordinary commercial transactions."

Originally, a nickname or slang word, derived from the color of the engraving on the backs of the currency thus denominated. See Wesley *v.* State, 61 Ala. 282, 287.

In common use it is applied to the issues of currency circulated by the federal government during the war between the American states. Burton *v.* Brooks, 25 Ark. 215, 218.

1. U. S. *v.* Howell, 64 Fed. 110, 114.

2. Duvall *v.* State, 63 Ala. 12, 17.

the popular and almost exclusive name applied to almost all United States treasury notes, and is not applied to any other species of currency.[3] (Greenbacks: Counterfeiting of, see Counterfeiting. Medium of Payment, see Payment. See also Currency.)

GREEN BAG. The bag or satchel in which a lawyer formerly carried papers to and from court.[4]

GREEN BONDS or GREEN CONSOLS. As used in reference to certain securities issued in connection with the funding of a state debt, a term applied to original consolidation bonds colored green which were exchanged for new consolidation bonds colored brown.[5]

GREEN GOODS. A slang term for counterfeit money.[6]

GREENWICH TIME.[7] See Time.

GRIEVANCE. An injury, a wrong done, that which gives ground of complaint, because it is unjust or oppressive.[8] (See Cause of Action; and, generally, Actions.)

GRIND. To crush into small fragments;[9] to triturate.[10] (See Flour; Flouring-Mill; Grist; Grist-Mill.)

GRINDSTONE. A flat circular stone so hung that it can be rotated upon an axis; used for sharpening tools, etc.[11]

GRIP. As applied to cable street railroads, a clutch as it is generally called, running in the trench, beneath the track, where it is made to grasp or clutch the moving cable, when it is desired to propel the train, or (going down hill) to restrain the speed of the train, so that it shall not exceed that of the cable.[12] (See, generally, Street Railroads.)

GRIP-CAR. The forward car of two cars of cable street railroads which is open on all sides, but provided with seats for passengers; so called because it

The term is more frequently applied to United States treasury notes issued by the government, but is also sometimes used to designate the national currency or bank notes issued under its authority. Levy *v.* State, 79 Ala. 259, 261.

3. Hickey *v.* State, 23 Ind. 21, 23.

"'One ten-dollar treasury-note of the United States, usually called a greenback, and one ten-dollar national-bank-bill, usually called a greenback,'" as used in an indictment for larceny see Sallie *v.* State, 39 Ala. 691, 692. See also Gady *v.* State, 83 Ala. 51, 3 So. 429.

4. English L. Dict.

"The green bag was so characteristic of the profession [of law] in the reign of Queen Anne that 'to say that a man intended to carry a green-bag was the same as saying that he meant to adopt the law as a profession.'" 5 Alb. L. J. 225.

5. Whaley *v.* Gaillard, 21 S. C. 560, 568.

6. Usually used in connection with a swindle whereby, under a pretense of selling counterfeit money, some worthless substance is palmed off on the buyer. Cyclopedic L. Dict. [*citing* People *v.* Marvin, 79 Hun (N. Y.) 310, 29 N. Y. Suppl. 381; People *v.* Reilly, 51 Hun (N. Y.) 624, 4 N. Y. Suppl. 81].

7. See also State *v.* Johnson, 74 Minn. 381, 383, 77 N. W. 293.

8. Webster Dict. [*quoted* in Chartiers' Appeal, 4 Pa. Cas. 464, 8 Atl. 181].

A "grievance," to give a person a right to an appeal from the decision or doings of any school committee, district meeting, or trustees, does not imply a wrong growing out of some infraction of law or a litigated question of right. A deprivation of school privileges is a grievance. Cottrell's Appeal, 10 R. I. 615, 616.

"Grievance day" as used in connection with municipal improvements means an opportunity to be heard in respect to the justice and correctness of a proposed assessment. People *v.* Henion, 64 Hun (N. Y.) 471, 475, 19 N. Y. Suppl. 488.

9. Webster Dict. [*quoted* in German *v.* U. S., 128 Fed. 467, 468].

10. Standard Dict. [*quoted* in German *v.* U. S., 128 Fed. 467, 468].

11. Standard Dict.

The term "grindstone," as used in a declaration in tort for the conversion of one grindstone, would include, not only the stone, but the frame and hangings, which are necessary for its use. Patterson *v.* Dudley, 12 Gray (Mass.) 375.

12. Bishop *v.* St. Paul City R. Co., 48 Minn. 26, 31, 50 N. W. 927, where the court said: "To stop the cars, on level ground, the grip is released from the cable, and brakes applied to the cars. The grip is connected with the grip car through a slot in the trench above the cable, and is operated in the grip car by a lever by means of which, at will, the grip may be made to grasp or to release its hold on the cable. The grip proper consists of two 'dies,' as they are called by the witnesses, one just above and the other just below the cable. By means of the grip lever, these dies are pressed against the cable, so as to hold it firmly in their grasp, or are separated so that the cable runs freely between them."

contains the apparatus called the "grip" by which attachment is made to the cable underneath the tracks.[13] (See Grip; and, generally, Street Railroads.)

GRIST. A term which refers to grain taken to a mill to be ground, and not to the process or production of grinding.[14] (See Flour; Flouring-Mill; Grind; Grist-Mill.)

GRIST-MILL. A mill which grinds grain taken to it to be ground for the owners for toll.[15] (See Flour; Flouring-Mill; Grain; Grind; Grist; Grist-Mill.)

GRIT. Firmness of mind; Courage, *q. v.*; spunk.[16]

GROAT. In England, a coin which has been referred to as a fourpenny piece.[17]

GROCER. A trader who deals in tea, sugar, spices, coffee, liquors, fruit, etc.[18]

GROCERIES. A term which may include all such goods and merchandise as are usually kept in such stores as are called dry goods and grocery stores.[19] (Groceries: Exemption From Seizure and Sale, see Exemptions.)

GROG-SHOP. A place where liquors are sold in such quantities as to be drunk upon the premises where sold.[20] (See, generally, Intoxicating Liquors.)

GROOM. A word applied to a person who is said to be the mere servant, menial as it were, and not the general agent of the owner of a horse.[21]

GROOVE. A furrow, channel, or long hollow;[22] a word which conveys to the mind the idea of a noticeable depression of some length in a surface.[23]

GROSS. Whole; Entire, *q. v.*; total;[24] without deduction;[25] taking in the

13. This car is followed by "a closed passenger car which may be distinguished as the 'coach.'" Bishop *v.* St. Paul City R. Co., 48 Minn. 26, 31, 50 N. W. 927.

14. Hutchinson *v.* Chicago, etc., R. Co., 37 Wis. 582, 606 [*citing* Johnson Dict.; Webster Dict.; Wedgewood Dict.].

15. Hutchinson *v.* Chicago, etc., R. Co., 37 Wis. 582, 606, where the court said: "We do not understand either term to be popularly restricted to any kind of grain."

According to the context, it must be taken to include a mill with all the necessary incidents connected with a plant of this character to render it available as such. Norris *v.* Hill, 1 Mich. 202, 206.

"Confusion [has arisen] as to the distinction between the terms flouring-mill and grist-mill. At this late day there should be no uncertainty as to the distinctive signification of these words of common use." Washington Mut. Ins. Co. *v.* Merchants,' etc., Mut. Ins. Co., 5 Ohio St. 450, 486.

It is said to be an essential part of all flouring-mills, although the bolting apparatus connected with the latter do not constitute an indispensable part of a mill of this character. Washington Mut. Ins. Co. *v.* Merchants', etc., Mut. Ins. Co., 5 Ohio St. 450, 486, where the court said: "But it will not be controverted that the bolting apparatus is an ordinary appendage or usual incident to grist-mills."

"Farm product" does not include a grist-mill. See 19 Cyc. 459 note 94.

16. Webster Dict. [*quoted* in Mitchell *v.* State, 38 Tex. Cr. 170, 186, 41 S. W. 816].

17. Reg. *v.* Conwell, 1 C. & P. 190, 191, 47 E. C. L. 190, where Maule, J., in speaking of the word, in connection with an indictment for counterfeiting, said: "A 'groat' is a common word belonging to our own mother tongue, such as 'uttering,' 'public-house,' 'half-pint,' and many other expressions."

18. Webster Dict. [*quoted* in McGurk *v.* Metropolitan L. Ins. Co., 56 Conn. 528, 537, 16 Atl. 263, 1 L. R. A. 563].

"Grocer delivering goods" see Hall *v.* American Masonic Acc. Assoc., 86 Wis. 518, 524, 57 N. W. 366.

19. Germania F. Ins. Co. *v.* Francis, 52 Miss. 457, 468, 24 Am. Rep. 674.

The term, however, is to be taken in its natural and accepted meaning, and when so construed it does not include all articles which are usually kept in a grocery store, as, for instance, buckets, pails, and shovels. Fletcher *v.* Powers, 131 Mass. 333, 335. Nor, as used in an insurance policy, will it include oils and sulphur kept in a store, where such articles are enumerated as hazardous, and the keeping of the same is prohibited by the terms of the contract. Whitmarsh *v.* Charter Oak F. Ins. Co., 2 Allen (Mass.) 581, 583.

It is a question for a jury whether the word "groceries," as used in a policy of fire insurance, covers alcohol and spirituous liquors kept in the store, in violation of the prohibitory law. Niagara F. Ins. Co. *v.* De Graff, 12 Mich. 124, 126.

20. Leesburg *v.* Putnam, 103 Ga. 110, 114, 29 S. E. 602, where the court said that the definitions of the terms "'barroom' and 'saloon' are inseparably connected with that class of the liquor traffic formerly represented by what was called the tippling-house or grog-shop."

21. Moore *v.* Tickle, 14 N. C. 244.

22. Gordon *v.* Carnegie Steel Co., 126 Fed. 538, 540.

23. Schreiber, etc., Mfg. Co. *v.* Adams, 117 Fed. 830, 833, 54 C. C. A. 128.

24. Braun's Appeal, 105 Pa. St. 414, 415; Webster Dict. [*quoted* in Wickes *v.* Wickes, 98 Ill. App. 156, 162]; Worcester Dict. [*quoted* in Scott *v.* Hartley, 126 Ind. 239, 246, 25 N. E. 826].

25. Webster Dict. [*quoted* in Wickes *v.* Wickes, 98 Ill. App. 156, 162].

whole; having no deduction or abatement.[26] (Gross: Adventure, see Shipping. Average, see General Average. Drunkenness, see Drunkards. Earnings, see Taxation. Fault, see Negligence. Inadequacy of Consideration, see Contracts. Lewdness, see Lewdness. Misbehavior, see Divorce. Misdemeanor, see Criminal Law. Negligence, see Bailments; Negligence. Proceeds, see Marine Insurance. Receipts,[27] see Corporations. Sales,[28] see Sales. Ton,[29] see Weights and Measures. Tonnage,[30] see Shipping. Weight, see Weights and Measures.)

GROSS INCOME. As applied to a partnership, the entire profit arising from the conduct of the business.[31] (See, generally, Partnership.)

GROSSLY INADEQUATE CONSIDERATION. A consideration so far short of the real value of the property as to arouse a presumption in the mind that the person who takes that property takes it under some kind of secret trust.[32] (See, generally, Contracts; Fraud.)

GROSSUM CAPUT. A Dunce,[33] *q. v.*

GROUND. A term used in the sense of foundation, basis, support;[34] but often used as synonymous with land.[35]

GROUND GAME. As defined by statute, a term which includes hares and rabbits.[36] (See, generally, Fish and Game.)

GROUND OF ACTION. See Actions; Cause; Cause of Action.

26. Webster Dict. [*quoted* in Scott *v.* Hartley, 126 Ind. 239, 246, 25 N. E. 826].

"Gross damages" see Ingram *v.* Maine Water Co., 98 Me. 566, 574, 57 Atl. 893.

"Gross estimated rental" see Horton *v.* Walsall Poor Law Union, [1898] 2 Q. B. 237, 240, 62 J. P. 43, 67 L. J. Q. B. 804, 75 L. T. Rep. N. S. 684, 46 Wkly. Rep. 607.

"Gross receipts" see New Jersey Steamboat Co. *v.* Pleasonton, 18 Fed. Cas. No. 10,166, 8 Blatchf. 259, 260.

"Gross sum" see Bristol Waterworks Co. *v.* Uren, 15 Q. B. D. 637, 643, 49 J. P. 564, 54 L. J. M. C. 97, 52 L. T. Rep. N. S. 655.

"Gross value" see Pullen *v.* St. Saviour's Union, [1900] 1 Q. B. 138, 141, 69 L. J. Q. B. 139, 81 L. T. Rep. N. S. 583, 48 Wkly. Rep. 186; Reg. *v.* London School Bd., 17 Q. B. D. 738, 741, 50 J. P. 419, 55 L. J. M. C. 169, 55 L. T. Rep. N. S. 384, 34 Wkly. Rep. 583. "Gross value is different from value. It is, though a convenient, an inaccurate expression, like 'gross profits.' The difference between what a thing costs and the larger sum it sells for is not profit if the buying and selling are attended with expense to the trader. Value is net value." Dobbs *v.* Grand Junction Waterworks Co., 9 App. Cas. 49, 55, 48 J. P. 5, 53 L. J. Q. B. 50, 49 L. T. Rep. N. S. 541, 32 Wkly. Rep. 432.

27. See also 7 Cyc. 477 note 93, 482 note 31.

28. Gross sales, as used in a contract providing for the payment of royalties of a certain per cent of the gross amount of goods sold, are actual sales, without deducting expenses. Seven Sutherland Sisters *v.* McInnerney, 24 Misc. (N. Y.) 720, 721, 53 N. Y. Suppl. 771.

29. "Gross ton of bituminous rock" as used in a contract for the delivery of certain mineral, is a sum equal to two thousand pounds advoirdupois. Higgins *v.* California Petroleum, etc., Co., 109 Cal. 304, 311, 41 Pac. 1087.

30. "Gross tonnage" is the entire cubic contents of the interior space of a vessel, numbered in tons. The Thomas Melville, 62 Fed. 749, 751, 10 C. C. A. 619.

31. Braun's Appeal, 105 Pa. St. 414, 415. See also Opinion of Judges, 5 Metc. (Mass.) 596, 598.

32. McGhee *v.* Wells, 57 S. C. 280, 285, 35 S. E. 529, 76 Am. St. Rep. 567.

Within the rule which renders a contract void on this ground, gross inadequacy of consideration is such inadequacy as will shock the conscience and furnish satisfactory and decisive evidence of fraud. 2 Pomeroy Eq. Jur. § 927 [*quoted* in Cleere *v.* Cleere, 82 Ala. 581, 589, 3 So. 107, 60 Am. Rep. 750]. See also Clark *v.* Freedman's Trust Co., 100 U. S. 149, 152, 25 L. ed. 573.

33. Swinburne Wills, p. 2, § 4 [*quoted* in Tarr's Estate, 18 Phila. (Pa.) 172, 173].

34. People *v.* New York, 83 Hun (N. Y.) 11, 17, 31 N. Y. Suppl. 17.

"Grounds of belief" is practically synonymous and interchangeable with "ground of belief." Lucas *v.* Johnson, (Tex. Civ. App. 1901) 64 S. W. 823, 825.

"Grounds on which the forfeiture is alleged to be incurred" see Atty.-Gen. *v.* Petersburg, etc., R. Co., 28 N. C. 456, 467.

35. Ferree *v.* Allegheny Sixth Ward School Dist., 76 Pa. St. 376, 378.

It most frequently means earth surface; but it also means the lower surface in the space to which the word relates. Wood *v.* Carter, 70 Ill. App. 217, 219. See also Oskaloosa College *v.* Western Union Fuel Co., 90 Iowa 380, 383, 54 N. W. 152, 57 N. W. 903.

"All those sea-grounds" see Scratton *v.* Brown, 4 B. & C. 485, 504, 6 D. & R. 536, 28 Rev. Rep. 344, 10 E. C. L. 670.

"Ground of the . . . railroad" see Pence *v.* Armstrong, 95 Ind. 191, 193.

"Rest of the ground" see Com. *v.* Roxbury, 9 Gray (Mass.) 451, 491.

"Grounded" electric current see Bergen County Traction Co. *v.* Bliss, 62 N. J. L. 410, 414, 41 Atl. 837.

36. St. 43 & 44 Vict. c. 47, § 8.

GROUND-RENTS

By Henry B. Patton* and R. M. Cadwalader†

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CROSS-REFERENCES

For Matters Relating to:
Rent Reserved in Lease, see LANDLORD AND TENANT; MINES AND MINERALS.

I. NATURE OF THE ESTATE.

A. In General — 1. DEFINITION. A ground-rent is a rent reserved to himself and his heirs, by the grantor of land in fee simple, out of the land conveyed;[1] and at the common law it is a rent-service and not a rent-charge.[2] The fact that

1. Bosler *v.* Kuhn, 8 Watts & S. (Pa.) 183; Ingersoll *v.* Sergeant, 1 Whart. (Pa.) 337; Kenege *v.* Elliot, 9 Watts (Pa.) 258; Bouvier L. Dict.

2. Littleton names three kinds of rents: Rent-service, rent-charge, and rent-seck. Littleton, c. 12, § 213.

A rent-service is a reservation of rent out of lands conveyed. Littleton, c. 12, § 214.

A rent-charge is a grant of rent out of lands retained. Franciscus *v.* Reigart, 4 Watts (Pa.) 98; Bantleon *v.* Smith, 2 Binn. (Pa.) 146, 4 Am. Dec. 430; Littleton, c. 12, § 218. "Rent-charge" distinguished from "annuity" see 2 Cyc. 459 note 1.

A rent-seck is a grant of rent without reservation in the deed of the right to distrain. Wollaston *v.* Hakewill, 10 L. J. C. P. 303, 3 M. & G. 297, 3 Scott N. R. 593, 42 E. C. L. 161; Gilbert Rents 38; Littleton, c. 12, § 218.

By the common law a rent-service could be reserved with or without deed. Coke Litt. 142*b*, 143*a*. And in either case distraint was incident to the rents "of common right," that is to say, "by the common law, without any particular reservation or provision of the party." Coke Litt. 87*b*, 142*a*. The reason of this was that a rent-service was a tenure "by fealtie and certaine rent," and wherever fealty was incident to a rent, distress was also an incident thereto (Gilbert Rents 5; Coke Litt. 142*a*; Littleton, c. 12, § 213), and fealty necessarily implies that the reservation of the lands is in the grantor. A rent-charge, being a rent charged by the grantor on lands retained, could not be created except by deed, for no tenure was thereby created (Coke Litt. 143*a*), and also for the reason that rent-charges were considered against the policy of the law inasmuch as they rendered the grantor less competent to perform his feudal services, being an encumbrance on his land, while they did not place upon the grantee the burden of performing those services, or any part thereof, in the grantor's stead. A rent service on the other hand did create a new tenure, and was so called because under the feudal system the land itself was considered as owing to its immediate lord certain feudal service, and the tenant by paying to the lord a fixed yearly rent made that fixed yearly rent a substitute therefor. A rent-service, then, was merely a compensatory or substituted charge upon the land, and in no sense, as in the case of a rent-charge, an added burden or encumbrance thereupon (Coke Litt. 142*a*; 3 Cruise Dig. tit. 28, c. 1, §§ 6, 9; Gilbert Distr. 5; Gilbert Rents 11, 133 *et seq.*), and as has been pointed out above the

in some of the cases, in jurisdictions where the common law prevails, a rent reserved by a conveyance in fee is called a rent-charge is probably due to the failure to recognize that one of the examples of a rent-charge given by the early writers is based upon the statute *quia emptores*,[3] by which what was formerly a rent-service or fee-farm rent was converted into a rent-charge if the reservation of the rent was accompanied by a clause of distress.[4]

2. Ground-Rents in England. In England, since the statute of *quia emptores*,[5] ground-rents as above defined have ceased to exist in theory,[6] although the example given by Littleton of a rent-charge under that statute is a transaction substantially identical with the ground-rent deed common in Pennsylvania.[7] Certain established rents of the freeholders and the ancient copyholders of a manor which could not be varied and which were called quit rents[8] because

right of distress is not incident to a rent-charge, while it is to a rent-service, for the reason that there is no right of reverter in the case of a rent-charge (Gilbert Rents 5, 6). Important results follow from these distinctions; for example, as was said by Kennedy, J., in Ingersoll *v.* Sergeant, 1 Whart. (Pa.) 337, 350, "a covenant to pay a rent-charge is merely personal and collateral to the land, and therefore will not render the assignee liable to an action of covenant for the non-performance of it. Cook *v.* Arundel, Hardres 87; Brewster *v.* Kitchin, 1 Ld. Raym. 317, 5 Mod. 369, 12 Mod. 166, 1 Salk. 198; Platt Covenants 65, 475." And in other points, such as merger, apportionment, extinguishment, partition, etc. (see *infra*, IV; V), the legal results of the distinctions between a rent-charge and a rent-service are equally marked. Ingersoll *v.* Sergeant, 1 Whart. (Pa.) 337; Cadwalader Ground Rents 101 note 1, 144 *et seq.*; Littleton 216. In Farley *v.* Craig, 11 N. J. L. 262, the court said, after quoting from Coke Litt. § 217, that the deed under consideration granted an estate in fee simple and reserved to the grantor a perpetual rent-charge. See Horner *v.* Dellinger, 18 Fed. 495, 499, for illustration of a deed held to create a rent-charge "according to the ancient meaning of that term, and as defined in the old books."

3. Where the statute of quia emptores (18 Edw. I, c. 1) prevails, no one can reserve to himself a rent-service who does not retain a right of reversion, and consequently when rent is reserved in a deed conveying land in fee simple, it is called a rent-charge on the theory that, instead of being reserved by the grantor it is made a charge upon the land in his favor by the grantee as the owner in fee. Van Rensselaer *v.* Dennison, 35 N. Y. 393; Van Rensselaer *v.* Chadwick, 22 N. Y. 32; Cruger *v.* McClaughry, 51 Barb. (N. Y.) 642; Van Rensselaer *v.* Smith, 27 Barb. (N. Y.) 104. It was held in Bosler *v.* Kuhn, 8 Watts & S. (Pa.) 183, in a case in which apparently no right of distress in case of non-payment of the rent was reserved, that if the statute *quia emptores* were in force in Pennsylvania, the ground-rent of that state would be a rent-seck charging neither the person nor the land. And *compare* Church *v.* Seeley, 39 Hun (N. Y.) 269 [*affirmed* in 110 N. Y. 457, 18 N. E. 117].

4. Van Rensselaer *v.* Smith, 27 Barb. (N. Y.) 104.

The right of reëntry is not an estate in the land but a right of action. De Peyster *v.* Michael, 6 N. Y. 467, 57 Am. Dec. 470. The right to reënter in case of non-payment of the rent reserved is in the nature of a condition subsequent, and while the condition is unbroken the estate of the grantee is as absolute as if no such qualification had been annexed. Garrett *v.* Scouten, 3 Den. (N. Y.) 334. A conveyance of land in fee subject to an annual rent-charge with a right of reentry in the case of non-payment of the rent leaves neither a reversion nor a possibility of reverter in the grantor. Cruger *v.* McClaughry, 51 Barb. (N. Y.) 642.

5. St. 18 Edw. I, c. 1.

6. The statute of *quia emptores*, which was passed to prevent subinfeudation, made it impossible to create a new tenure upon the grant of a fee, and thus changed fee-farms in England to rent-charges. A fee-farm rent was a rent issuing out of an estate in fee, and was a rent-service, founded on the perpetuity of the rent, not on the *quantum*. It was thus properly speaking a ground-rent. The effect of the statute of *quia emptores* upon fee-farm rents is well described by Gibson, C. J., in Cuthbert *v.* Kuhn, 3 Whart. (Pa.) 357, 365, 31 Am. Dec. 513, in the following language: "In England a rent reserved with a clause of distress in a conveyance in fee — in a word a feefarm rent — is turned into a rent-charge by force of that statute which, abolishing intermediate tenure while the reservation severs the rent from the indispensable incident fealty, throws the landlord's right exclusively on the clause of distress, as in the case of a rent granted and charged by such a clause on the grantor's land which is a rent-charge proper. But though an extinction of the common-law right of distress reduces rent-service to rent-charge a clause of distress added to it is inoperative and productive of no such consequence, because, being against common right, it is less favored and accounted less worthy."

7. See *supra*, I, A, 1.

8. Passingham *v.* Pitty, 17 C. B. 299, 2 Jur. N. S. 837, 25 L. J. C. P. 4, 4 Wkly. Rep. 122, 84 E. C. L. 299; 2 Blackstone Comm. 43; Coke Litt. 85, a, h, (1); Williams Real Prop. (19th ed.) 55 note 1.

thereby the tenant was relieved from performing other services must not be confused with them.[9]

3. Ground-Rents in the United States. Ground-rents as above defined, or fee-farm rents, are upheld in the United States;[10] and while the practice of giving deeds reserving such rents has been confined very largely to the state of Pennsylvania, there has existed in other states a form of conveyance or lease which, with respect to the purpose served and the estate created, does not differ substantially from the ground-rent deeds of Pennsylvania.[11]

B. In Land Conveyed and in Rent Reserved. A ground-rent is real estate,[12] such quality growing out of the theory that it is a rent service and not a

It is said that quit-rents in England were rents reserved to the king or a proprietor on an absolute grant of waste lands, for which a price in gross was at first paid, and a merely nominal rent reserved as a feudal acknowledgment of tenure; and that inasmuch as no rent of this description can exist in the United States, where a quit-rent is spoken of, some different interest must be intended. Hilliard Real Prop. 239.

Quit-rents are now redeemable in England under 44 & 45 Vict. c. 41, § 45.

9. See also Marshall *v.* Conrad, 5 Call (Va.) 364, for a discussion of the difference between a quit-rent and a rent-charge.

10. Alexander *v.* Warrance, 17 Mo. 228; De Peyster *v.* Michael, 6 N. Y. 467, 57 Am. Dec. 470; Van Rensselaer *v.* Jones, 5 Den. (N. Y.) 449.

11. See cases cited *infra*, this note.

In Maryland a system of giving leases for ninety-nine years renewable forever grew up and seems to have been based upon the same policy which prompted the giving of ground-rent deeds in Pennsylvania, namely, the encouragement of the lessee or grantee to make improvements, and such leases have been looked upon with favor by the courts, and sometimes where the lessee has failed to obtain a renewal within the term, equity has stepped in to compel the owner of the reversion to execute a new lease. Banks *v.* Haskie, 45 Md. 207. The statutes have in express terms designated the one holding under such a lease as the owner of the land. Holland *v.* Baltimore, 11 Md. 186, 69 Am. Dec. 195. The rent reserved under such a lease has been held a rent-service (Kraft *v.* Egan, 76 Md. 243, 25 Atl. 469; Ehrman *v.* Mayer, 57 Md. 612), and apportionable (Worthington *v.* Cooke, 56 Md. 51). And while it has been held that such leases are mainly controlled by the law that governs personalty (Myers *v.* Silljacks, 58 Md. 319; Spangler *v.* Stanler, 1 Md. Ch. 36. And *compare* Posner *v.* Bayless, 59 Md. 56), it has also been held that the estate created so far partakes of realty that the title can only pass by deed executed with all the formalities prescribed by law for the conveyance of real estate (Bratt *v.* Bratt, 21 Md. 578). See Cassell *v.* Carroll, 11 Wheat. (U. S.) 134, 6 L. ed. 438, for a case of a deed executed by the proprietary of the province of Maryland conveying land in fee simple and reserving a ground-rent.

In New York under the manorial leases formerly common in that state which granted the premises in perpetuity reserving a fixed rent, the estate created was one in fee simple subject to the payment of the rent reserved, the landlord having the right of forfeiture and reëntry for the non-payment of rent. Millard *v.* McMullin, 68 N. Y. 345. And while many of the decisions are apparently based upon the assumption that the statute of *quia emptores* is in force in that state, it has been held in some cases that rent reserved on a conveyance in fee is a rent service and subject to apportionment. Van Rensselaer *v.* Bradley, 3 Den. 135, 45 Am. Dec. 451. By a lease in perpetuity in which the lessee covenanted to pay a yearly rent, it was held that the rents were not granted to the lessor but that they were reserved by him when he granted the land to the lessees. Van Rensselaer *v.* Dennison, 8 Barb. 23. See Tyler *v.* Heidorn, 46 Barb. 439, reviewing the New York cases which have arisen in regard to the lands held under the Van Rensselaer title.

In Ohio conveyances in fee reserving rent have been given which seem to have been expressly based upon the practice prevailing in Pennsylvania. Stephenson *v.* Haines, 16 Ohio St. 478.

In Virginia in certain cases, deeds have been given reserving ground-rent, although without right of distress in case of non-payment of the rent and containing no covenant on the part of the grantee to pay the same. Mulliday *v.* Machir, 4 Gratt. 1.

In Georgia also it seems that ground-rents have been reserved. Swoll *v.* Oliver, 61 Ga. 248.

In Louisiana see Canonge's Succession, 1 La. Ann. 209.

12. *In re* White, 167 Pa. St. 206, 31 Atl. 569; Cobb *v.* Biddle, 14 Pa. St. 444; Farmers, etc., Bank *v.* Schreiner, 1 Miles (Pa.) 291; Matter of Patterson, 5 Phila. (Pa.) 460. See Weidner *v.* Foster, 2 Penr. & W. (Pa.) 23, where the court said that with respect to the effect of a mortgage of a rent-charge as amounting to an absolute transfer, there was no difference between a mortgage of land and of a rent-charge issuing out of land, the latter partaking of the realty.

In Louisiana under statutes derived principally from the French law it is of the essence of the contract imposing ground-rent that it conveys the property in perpetuity and that the rent reserved should be a charge imposed upon the property itself which is

rent charge, and may be sold under execution the same as real estate;[13] and this is the case, although the ground-rent is redeemable at any time at the option of the grantee by payment of the principal sum.[14] The owner of the ground-rent, that is, the grantor of the land, has an estate of inheritance in the rent,[15] and the grantee of the land who has covenanted to pay the rent has an estate of inheritance in the land;[16] nor does the reservation of the rent diminish the estate conveyed.[17] But the proceeds of a sale in extinguishment of the rent are regarded as personalty.[18] The grantee in a ground-rent deed[19] or the lessee in a lease

inherent in it, to which it is perpetually subject and which follows it into whatever hands it may pass. Canonge's Succession, 1 La. Ann. 209.

In New York the rent reserved upon a grant of land in fee has been held to be, although not an estate in the land, a hereditament divisible and assignable like other incorporeal hereditaments. Van Rensselaer *v.* Dennison, 35 N. Y. 393. Under a lease in fee the landlord cannot dispossess the tenant so long as he complies with the terms of the lease or the conditions of the tenancy, and the tenant has therefore an inheritable interest. Van Derzee *v.* Van Derzee, 30 Barb. 331.

In Ohio the interest of the owner of a ground-rent dying intestate descends under the provision of the statute controlling the descent of real estate. McCammon *v.* Cooper, 69 Ohio St. 366, 69 N. E. 658.

13. Hurst *v.* Lithgrow, 2 Yeates (Pa.) 24, 1 Am. Dec. 326; Farmers, etc., Bank *v.* Schreiner, 1 Miles (Pa.) 291.

14. *In re* White, 167 Pa. St. 206, 31 Atl. 569.

15. Irwin *v.* U. S. Bank, 1 Pa. St. 349.

A fee-farm rent is an estate of inheritance. Scott *v.* Lunt, 7 Pet. (U. S.) 596, 8 L. ed. 797.

16. Sahl *v.* Wright, 6 Pa. St. 433. Where lands were let to one on ground-rent, the lessee covenanting to make certain improvements within a certain time on the making of which a deed was to be executed to him, and it was further provided that if the improvements should not be made within the stipulated time he should pay the rent which should have accrued in the meantime and give up the premises, it was held that prior to the performance of the condition the lessee had a legal interest in the land which was subject to judgment against him. Vandevender's Case, 2 Browne (Pa.) 304. Where the absolute owner of land conveys it in fee, reserving rent with a condition of forfeiture and reëntry for non-payment thereof, the executor of the grantor cannot enforce the condition since the party reëntering will be reinvested with the original estate, namely, a fee simple. Van Rensselaer *v.* Hayes, 5 Den. (N. Y.) 477.

No conflict of estates.— The estates are, in the language of Kennedy, J., in St. Mary's Church *v.* Miles, 1 Whart. (Pa.) 229, 235, "susceptible of being fully enjoyed without conflict." The owner of the ground-rent cannot be in any way interfered with by the tenant of the land; and while the tenant pays up the rent, and prevents the existence of arrears, his enjoyment of the land is beyond the control of the owner of the rent. Punctual payment deprives the party who had reserved the rent of all lien or charge whatever, and obliges him to leave the tenant of the land in the unrestrained and unrestricted use and enjoyment of his freehold. In Robb *v.* Beaver, 8 Watts & S. (Pa.) 107, 127, a husband and wife seized, in right of the wife of an estate of inheritance "granted, demised, leased, set and to farm let the same unto A. B., to have and to hold to the said A. B., his heirs and assigns, from the day of the date hereof, for and during the existence of the world, he yielding and paying therefrom and thereout yearly and every year hereafter to the said grantors, their heirs and assigns, the yearly rent of $100;" and in the same deed the grantees covenanted to erect a house upon the premises of the value of four hundred dollars; and upon their failure so to do, a right to the grantors was reserved. The court was of the opinion that upon the death of the wife the husband was seized of the whole estate, created by the deed, in fee, and that it was subject to a levy and sale for the payment of his debts. "The case is then the same as if the fee-simple in this rent had been conveyed by a third person to the husband and wife and their heirs. It would be in them an estate by entireties, and on the death of either, would go to the survivor in fee." To the same effect is Muirhead *v.* Clabby, 7 Phila. (Pa.) 345.

Liability for taxes.— One in possession of land pursuant to the terms of a ground-rent deed is so much the owner that he and not the owner of the ground-rent is liable for taxes assessed on the land. Philadelphia Library Co. *v.* Ingham, 1 Whart. (Pa.) 72; Franciscus *v.* Reigart, 4 Watts (Pa.) 98. See *infra*, VI, B.

17. Auman *v.* Auman, 21 Pa. St. 343, where there was a conveyance of land to A and his wife for their lives, or the life of the survivor, and then to their lawful heirs. In the deed there was reserved a yearly rent of one peppercorn. It was argued that the estate conveyed was diminished thereby so that the rule in Shelley's case would not apply. But the court held that the reservation of the rent did not diminish the estate and the application of the rule was properly made.

18. Hirst's Estate, 147 Pa. St. 319, 23 Atl. 455.

19. See cases cited *infra*, this note.

Injunction against grantee.— Where one executes a deed of land reserving ground-rent

renewable forever[20] has the absolute control or management of the subject of the deed or lease.

II. CREATION AND VALIDITY.

A. In General. Where the statute *quia emptores* is not in force, and titles are allodial,[21] it is necessary that ground-rents shall be reserved by a valid deed in order to be enforceable;[22] and there must be a conveyance of the land.[23] And the transaction is still a conveyance or sale, and not a loan, although the deed contains a provision for the redemption of the ground-rent upon the payment of the principal sum within a given time.[24] A condition annexed to a conveyance in fee that the grantee, his heirs and assigns, shall pay to the grantor and his heirs an annual rent, and that in default of payment the grantor or his heirs may reënter is a lawful condition;[25] and it is competent for the grantor to reserve a ground-rent inextinguishable but subject at long intervals to be changed and increased by a revaluation of the land out of which it is to issue.[26]

and the deed contains a covenant by the vendee to build within a certain time for the purpose of securing the rent reserved, the vendor cannot, subsequent to the expiration of such time, on the mere allegation that there are no buildings on the land, and that it is valuable chiefly on account of a large quantity of brick clay thereon, restrain the vendee from excavating and removing the clay. Lafferty's Appeal, 20 Wkly. Notes Cas. (Pa.) 36. But where a deed conveying property on ground-rent contains a covenant by the grantee to erect suitable buildings or to secure the ground-rent, the one purchasing from the original grantee may be restrained on suit by the vendor from removing the foundation wall of a building erected by the original grantee. Pennsylvania L. Ins. Co. *v.* Lynch, 6 Wkly. Notes Cas. (Pa.) 446.

20. The lessee under a ninety-nine-year lease renewable forever has the absolute control and management of the property. Crowe *v.* Wilson, 65 Md. 479, 5 Atl. 427, 57 Am. Rep. 343, holding that the common-law doctrine of waste does not apply in all its strictness to the tenant in such a lease.

21. See *supra*, I, A, 1.

22. Wallace *v.* Harmstad, 44 Pa. St. 492.

Title allodial not feudal.—"Ground-rents are rents-service, of which distress is a necessary incident: but a grantor who has not reserved his rent by a valid deed cannot enforce it, because the statute of *quia emptores*, which would have converted the rent-service into a rent-charge, is not in force here, and it cannot exist independently of the deed, because Pennsylvania titles are allodial and not feudal." Wallace *v.* Harmstad, 44 Pa. St. 492.

23. A mere agreement to convey is not sufficient even though it provides for the reservation of the rent and contains the usual clause of distress. Moroney *v.* Copeland, 5 Whart. (Pa.) 407.

Presumption after lapse of time.—The seizin of the rent, however, for twenty-one years raises a presumption of the title to it. McElroy *v.* R. Co., 7 Pa. St. 536. So where a farm was occupied for over eighty years by one and his descendants who uniformly paid rent and made valuable improvements, it was held that it would be presumed that there was an agreement for a lease in fee at the acknowledged rent under which the occupants took possession. Ham *v.* Schuyler, 4 Johns. Ch. (N. Y.) 1. And where, for seventy years prior to the date at which an instalment of ground-rent for which an action was brought became due, such rent was regularly paid to plaintiff and his predecessors in title, the existence of a deed creating the ground-rent will be presumed. Real Estate Title Ins. Co. *v.* Hodges, 15 Pa. Super. Ct. 299. Where it is proven that a deed of premises reserving ground-rent was executed and that the rent as stipulated in the deed has been paid for more than half a century by the persons occupying the premises, it will be presumed that the person in possession occupies subject to the ground-rent. Heckerman *v.* Hummel, 19 Pa. St. 64. But see Somersetshire Coal Canal Co. *v.* Harcourt, 2 De G. & J. 596, 4 Jur. N. S. 671, 27 L. J. Ch. 625, 6 Wkly. Rep. 670, 59 Eng. Ch. 468, 44 Eng. Reprint 1120, in which it was held that the fact that a canal company having power to purchase lands for annual rent-charges took possession of the lands of an infant pursuant to an award of commissioners, determining the amount of annual rent-charge which ought to be paid, but which award was afterward held invalid, and the further fact that after the infant attained his majority the canal company continued paying to the landowner for forty years a rent of nearly the amount awarded by the commissioners, did not raise a presumption of an agreement by the landowner for a sale of the fee in consideration of a rent-charge. The fact that one has been in possession of land for a great many years, claiming to be owner subject to an annual rent, constitutes no defense to an action of ejectment where he admits that he has no lease, simply claiming that he is entitled to a lease. Van Rensselaer *v.* Van Wie, 23 Wend. (N. Y.) 531.

24. McKibbin *v.* Peters, 185 Pa. St. 518, 40 Atl. 288; Hurst *v.* Lithgrow, 2 Yeates (Pa.) 24, 1 Am. Dec. 326.

25. Van Rensselaer *v.* Ball, 19 N. Y. 100.

26. Philadelphia Library Co. *v.* Beaumont, 39 Pa. St. 43.

B. Where Grantor Has Limited Interest. A tenant for life who has power to make ground-rent deeds can only make covenants binding on the trustees or remainder-men within the strict limitations of his power.[27]

III. Conveyances of.

A. How Conveyed — 1. By Deed. The right to the rent reserved by a ground-rent deed is assignable;[28] and transfer may be made by deed of whatever estate in the nature of ground-rent the grantor actually owns,[29] whether it be the same estate which was conveyed to him by his immediate predecessor in title, or a different estate acquired by him by virtue of his ownership of the above-mentioned original estate.[30]

2. By Operation of Law. Ground-rents may also be conveyed by operation of law, and where adverse enjoyment of the rent has lasted for twenty-one years a grant will be presumed.[31]

B. Effect of Conveyance[32] **— 1. In General.** The power of reëntry passes with an assignment of the rent.[33] And the heirs and assigns of the original grantor are entitled on non-payment of the rent to recover the land.[34] The transfer of a fee-farm rent without any transfer of the right of entry gives the assignee a right to sue for the rent in his own name.[35] The right which a purchaser of real estate has to resort to an action on warranty on proof of eviction may be invoked by an assignee of the ground-rent.[36]

27. Naglee *v.* Ingersoll, 7 Pa. St. 185.

28. Van Rensselaer *v.* Dennison, 35 N. Y. 393.

29. Kurr *v.* Brobst, 2 Woodw. (Pa.) 187, where it was held that the assignment of a ground-rent by deed conveying to the assignee "all the appurtenances," etc., and "all the estate, right, title, interest, use, property, possession, claim and demand," of the grantor, without any express reservation, passed to the assignee the title to all the accrued arrears of ground-rent. See Andrew *v.* Meyerdirck, 87 Md. 511, 40 Atl. 173, as to the enforcement of an option given by the lessor to the lessee to purchase the ground-rents.

A mortgage of a ground-rent is but a security for the debt, and without possession or demand of payment, does not amount to an absolute transfer. Weidner *v.* Foster, 2 Penr. & W. (Pa.) 23.

The power of trustees, committees, guardians, and married women, in connection with the sale and conveyance of ground-rents, is regulated by Pa. Pamphl. Laws 506.

30. In Shollenberger *v.* Filbert, 44 Pa. St. 404, it appeared that A had certain ground-rents conveyed to him and reëntered upon the land securing one of them because of arrears. He thus obtained title to this plot and subsequently reconveyed it reserving a new ground-rent. He then assigned this and other rents to a third party. Subsequently on suit brought for arrears of the new ground-rent it was objected that A had no right to convey the new ground-rent he had reserved to the purchaser thereof as it differed from the estate originally conveyed to him. It was decided that the new rent passed to the purchaser and arrears thereon were collectable. As to the point above mentioned the court said: "It was different from the estate which he had purchased; yet it was one which had grown out of that."

31. Newman *v.* Rutter, 8 Watts (Pa.) 51. "Thus, although subjects which lie in grant only do not fall within the express legal operation of the statute of limitations, the courts have in furtherance of justice, and for security of title, applied the principles of the statute to them, as an artificial rule of law, and it is the duty of the court, in a proper case, to advise and instruct the jury, to infer a grant of an incorporeal hereditament after an adverse enjoyment of it for twenty-one years." Wallace *v.* Pittsburgh Fourth United Presbyterian Church, 111 Pa. St. 164, 170, 2 Atl. 347, per Clark, J.

32. **Subrogation.**— Right of the assignor of the ground-rent who has guaranteed its payment for a limited time to be subrogated to the rights of the assignee after having been called upon to respond to his guaranty see Subrogation.

33. Robert *v.* Ristine, 2 Phila. (Pa.) 62. This was so under the statutes of New York. Van Rensselaer *v.* Slingerland, 26 N. Y. 580.

The assignee of a rent-charge may take advantage of the clause of reëntry. Farley *v.* Craig, 11 N. J. L. 262.

34. Van Rensselaer *v.* Barringer, 39 N. Y. 9.

Legislation taking away the remedies of the assignee after the assignment of the rent see Constitutional Law, 8 Cyc. 1021 *et seq.*

35. Scott *v.* Lunt, 7 Pet. (U. S.) 596, 8 L. ed. 797.

A covenant to pay rent reserved in a lease in fee runs with the land, and an action will lie thereon in favor of the asignee of the lessor against the assignee of the lessee. Main *v.* Feathers, 21 Barb. (N. Y.) 646.

36. Lukens *v.* Nicholson, 4 Phila. (Pa.) 22.

2. Upon Bona Fide Purchaser. And since a ground-rent is a freehold and has all the attributes of real estate,[37] it follows that a *bona fide* purchaser of the rent cannot be defeated in an action for arrears of rent by the setting up of a secret collateral agreement between the original grantee and grantor in the ground-rent deed.[38]

3. Upon Purchaser at Sheriff's Sale. The purchaser at a sheriff's sale of a ground-rent may maintain an action of covenant for the rent against the ground owner.[39]

IV. Incidents of.

A. Apportionment — 1. In General. A ground-rent, regarded as a rent-service,[40] is apportionable,[41] and although the general rule is otherwise where the rent is regarded as a rent-charge,[42] there is nothing in the nature of a rent-charge which absolutely prevents its being apportioned, and where land charged is divided into several portions by operation of law an apportionment will take place.[43] The purchase of a ground-rent by one who is the owner of a part of the land subject to it does not extinguish it, but he is entitled to a proportionable part

37. See *supra*, I, B.

38. Juvenal *v.* Patterson, 10 Pa. St. 282, 283. In this case Rogers, J., said: "Whether the parol evidence would be admissible in an action in which Walker, the grantor, was a party, it is immaterial to inquire. But, admitting the proposed defence would be available there, can it be taken as against the plaintiff, who, it is conceded, is a *bonâ fide* purchaser without notice? . . . It (the rent) being in the nature of real estate, Walker having conveyed the ground-rent to the plaintiff, who had no notice, she holds it discharged of any secret agreement between the original parties. . . . In Pennsylvania, at least, the assignment of a ground-rent passes the legal title, not only to the rent, the right of distress, the power to re-enter, but to all the remedies, of whatever description, which the grantor had against the grantee."

39. Streaper *v.* Fisher, 1 Rawle (Pa.) 155, 161, 18 Am. Dec. 604. In this case Huston, J., said: "And the only difference in the liabilities of the original parties, and those coming after them, is, that covenant lies generally against the original party after his interest is parted with; assignees are generally answerable for breaches within their own time; and when the books say no stranger can take advantage of a covenant, if by covenant is meant a covenant real respecting land, or leases, it is to be understood that whoever is privy in contract or in tenure, is not a stranger. A stranger is one who claims under another title, adverse or paramount."

40. See *supra*, I, A, 1.

41. Voegtly *v.* Pittsburgh, etc., R. Co., 2 Grant (Pa.) 243; Littleton, § 222.

But if the service be entire, as to render yearly one day's service with a carriage and horse, it is not divisible. Van Rensselaer *v.* Bradley, 3 Den. (N. Y.) 135, 45 Am. Dec. 451. In Van Rensselaer *v.* Gifford, 24 Barb. (N. Y.) 349, however, the court said, with respect to a lease which reserved rent payable in fowls and service of carriage and horses, and the possibility of apportionment that it was unable to see why a division would not be as practicable as in any other case.

In Maryland the ground-rent may be apportioned on a conveyance of a part of the premises. Ehrman *v.* Mayer, 57 Md. 612; Worthington *v.* Cooke, 56 Md. 51.

42. Cruger *v.* McLaury, 41 N. Y. 219; Cruger *v.* McClaughry, 51 Barb. (N. Y.) 642; Van Rensselaer *v.* Bradley, 3 Den. (N. Y.) 135, 45 Am. Dec. 451.

A rent-charge unlike rent-service is entire and indivisible, and if the holder of the rent-charge purchases any part of the premises the rent is wholly extinct. Horner *v.* Dellinger, 18 Fed. 495. In Van Rensselaer *v.* Chadwick, 22 N. Y. 22, the court in speaking of the rule that if a man having a rent-charge releases a part of the land charged with the rent he extinguishes the entire rent, says that, although the distinction in this respect between a rent-service and a rent-charge arose out of the theory of feudal tenures and is founded upon reasons which are inapplicable to the existing state of society, it should be observed as a rule of property.

43. See cases cited *infra*, this note. There were some cases where either by agreement of the parties or of necessity a rent-charge was apportioned, as for instance, where a part came to the landlord, not by his own act, but by inheritance. Church *v.* Seeley, 39 Hun (N. Y.) 269 [*affirmed* in 110 N. Y. 457, 18 N. E. 117]. And see Van Rensselaer *v.* Chadwick, 22 N. Y. 32 [*affirming* 24 Barb. 333], holding that where there has been no actual satisfaction of a rent-charge and the act, which was claimed to be an extinguishment, was done in ignorance of the parties' rights, the rent will be considered in equity apportionable. If the grantor or lessor has enforced a right of reëntry as to a part of the premises for non-payment of rent, and the ground owner has a right of redemption as to the other part, the former cannot compel the ground owner to pay the entire rent-charge on the theory that it cannot be apportioned. Church *v.* Seeley, 39 Hun (N. Y.) 269 [*affirmed* in 110 N. Y. 457, 18 N. E. 117].

from the other tenants.[44] So a release from the rent of part of the land out of which ground-rent issues leaves the remaining part of the land subject to its proportion of the rent.[45] When a ground-rent is divided or sold in parts the right of apportionment attaches at that moment.[46]

2. LAND TAKEN FOR PUBLIC PURPOSES. The taking of a portion of land, out of which certain ground-rent is reserved, for public purposes, does not work an apportionment of the rent.[47]

3. PRESUMPTION OF APPORTIONMENT. Apportionment will not be presumed from the fact of continuous full payment by part owners;[48] nor will it be presumed from the fact of continuous part payment by the owner of a portion of the land.[49]

4. PROVINCE OF COURT AND JURY. While equity will decree an apportionment of rent, the proportions must be determined by a jury.[50]

B. Partition.[51] Redeemable ground-rents must be treated as realty for the purpose of distribution, and therefore they are subjects of partition.[52]

C. Curtesy.[53] The husband may become tenant by the curtesy of a ground-rent;[54] but there can be no tenancy by the curtesy of a remainder or reversion vested in the wife, if the particular estate continues till the death of the wife.[55]

V. RELEASE OR OTHER EXTINGUISHMENT.[56]

A. In General. A release of ground-rents operates to enlarge an estate, and is not sufficient to extinguish the rent, unless thereby creating a privity of estate between the releasor and releasee.[57] Where the entire lot, which was subject to

44. Paul *v.* Vannie, 1 Pa. L. J. Rep. 332.

45. Ingersoll *v.* Sergeant, 1 Whart. (Pa.) 337.

46. Linton *v.* Hart, 25 Pa. St. 193, 64 Am. Dec. 691.

47. If the owners of the land receive the damages, they cannot set up the taking in defense to an action for rent. Workman *v.* Mifflin, 30 Pa. St. 362, where it was decided that the remedy of the ground-rent landlord lay in equity, to have a portion of the damages impounded to meet the accruing rents. Previously to that decision it had indicated in Cuthbert *v.* Kuhn, 3 Whart. (Pa.) 357, 31 Am. Dec. 513, that the rule was the other way. In that case a lot was granted in fee, the grantor reserving to himself in fee a certain annual ground-rent. Afterward a public street was opened by authority through a part of the lot, and damages were awarded to the owner of the land, a part of which was ordered to be paid to the owner of the ground-rent, and a decree was entered authorizing extinguishment of a portion of the rent upon the payment of such part of the damages to the owner. Strong, J., in Workman *v.* Mifflin, *supra*, said, that Cuthbert *v.* Kuhn had not been overlooked, and was still authority for all that was decided under it, but that it was an unwarrantable deduction from it that a ground-rent is apportioned by the opening of a street through the land out of which it issues. It was a mode selected by the parties in which to effect an amicable arrangement. And while Cuthbert *v.* Kuhn, therefore, may be authority for the proposition that equity has jurisdiction to decree an apportionment in such case, after the proportions have been settled by a jury, it is no authority for the doctrine that appropriation of land for a public highway, without payment of the principal sum, extinguishes the rent. In such case there is no eviction by the landlord nor by one claiming under paramount title. This view was also taken in Voegthy *v.* Pittsburgh, etc., R. C., 2 Grant (Pa.) 243.

Extinguishment by taking all the land for public purposes see *infra*, V, A.

48. Brown's Petition, 4 Leg. Gaz. (Pa.) 389.

49. Quigley *v.* Molineaux, 10 Wkly. Notes Cas. (Pa.) 118.

50. Cuthbert *v.* Kuhn, 3 Whart. (Pa.) 357, 31 Am. Dec. 513.

51. Partition generally see PARTITION.

52. *In re* White, 167 Pa. St. 206, 31 Atl. 569.

53. Curtesy generally see CURTESY.

54. Coke Litt. 29*a*, 30*a*; Littleton, § 35. See also Chew *v.* Southwark, 5 Rawle (Pa.) 160.

55. This applies as well to equitable as to legal estates, so that where a woman held a ground-rent in trust for another during his life, with the beneficial interest in the reversion, and afterward married and died, and then the *cestui que trust* died, the husband was not entitled to such rent as tenant by the curtesy. Chew *v.* Southwark, 5 Rawle (Pa.) 160.

56. Discharge of the owner of land in bankruptcy as a discharge of ground-rent falling due thereafter see BANKRUPTCY.

57. Gibbs *v.* Smith, 2 Phila. (Pa.) 84, 86, where it was said: "It is to be observed also, that the release of a rent service does not operate as the extinguishment of a bare right. It operates in enlargement of the estate of the tenant, there being a possibility of reverter in the landlord, where the grant reserving the rent is in fee. Now he to whom

the ground-rent, is taken for public use, the ground-rent is extinguished and the ground landlord is entitled to receive such portion of the value of the property as represents the market value of his estate in the rent.[58]

B. Forfeiture by Breach of Covenant. To constitute a breach of the covenant for quiet enjoyment in a ground-rent deed there must be a successful attempt to interfere with the tenant's enjoyment of the premises,[59] and a breach of a covenant in a ground-rent deed against encumbrances is no cause for forfeiture of the rent if the grantee was aware of the encumbrances at the time of taking the deed.[60]

C. Lapse of Time Without Payment or Claim. Where a conveyance in fee or perpetual lease has been given reserving rent a presumption arises that one in possession of the land holds subject to the rent reserved.[61] And, in the absence of statute,[62] a ground-rent is not within any statute of limitations nor is there any presumption that it has ceased to exist from the mere lapse of time without pay-

the release is made, must have some estate in possession, in deed, or in law, or in reversion in deed, in his own or another's right, of the lands, whereof the release is made, to be as a foundation for the release to stand upon. 1 Sheppard, 324. If he have a possession only and no estate, the release will not avail to enlarge the estate of the releasee. Ibid. 325. And if a man have only an occupation of land as tenant at sufferance, as when a lessee for years doth hold over his term, or the like, no release to him can work any enlargement of estate; for albeit, he have a possession, yet hath he no estate; and besides, in this case there is no privity. For as in all releases that enure by way of increase or passing an estate, there must be some privity in estate between them at the time of the release made; for an estate without privity is not sufficient. 1 Sheppard, 325. Lord Coke shows a diversity between a rent service and a rent charge, in that the former may be released and extinguished to him that hath but a bare right in the land on account of the privity, while it is otherwise with a rent charge. Co. Lit. 268. The English books which speak of the release of a seignory or rent as operating by way of extinguishment merely, do not apply in this State, where the statute of *quia emptores* is not in force. The estate in our ground rents is a distinct and separate estate, and the release of it is not the bare extinguishment of a right in the land."

58. *In re* Twenty-Fifth St., 18 Wkly. Notes Cas. (Pa.) 318.

Apportionment when part of land is taken for public uses see *supra*, IV, A, 2.

59. The bringing of a suit in equity by the landlord to prevent the terre-tenant from using the premises as a brick-yard and clay lot, which has been dismissed on demurrer, and is still pending on an undecided appeal to the supreme court from such dismissal, is not sufficient to sustain the plea of breach of covenant as a defense to an action against the terre-tenant to recover rent. Jarden *v.* Lafferty, 4 Pa. Cas. 578, 7 Atl. 743.

60. Juvenal *v.* Jackson, 14 Pa. St. 519, 523, where Gibson, C. J., said: "A vendee who takes a covenant against a known defect in the title, shall not detain the purchase-money as a further security against it, for the reason that the covenant would be nugatory if he did."

61. One in possession of land subject to a Van Rensselaer perpetual lease, with a right of reëntry for non-payment of rent, although he claims under a quitclaim deed from a person formerly in possession, is presumed to hold under the lease, in the absence of proof of adverse possession; nor is the case affected by neglect of the lessor or his successors to demand rent in the past. Bradt *v.* Church, 110 N. Y. 537, 18 N. E. 357.

Burden of proof.— Where action is brought to recover the rent and a covenant to pay the rent is proven, a presumption of non-payment arises as to the rent accruing within twenty years, and the burden of establishing that the covenant has been extinguished in some way is upon defendant. Troy Cent. Bank *v.* Heydorn, 48 N. Y. 260.

62. **In Pennsylvania** under a statute enacted in 1855, if no payment or demand for payment of ground-rent has been made for a period of twenty-one years nor any acknowledgment within that period, a presumption arises that the ground-rent has been extinguished. Korn *v.* Browne, 64 Pa. St. 55. And no arrears can be recovered. Wallace *v.* Fourth United Presb. Church, 152 Pa. St. 258, 25 Atl. 520; *In re* Gassman, 3 Walk. 126 [both *overruling* McQuesney *v.* Hiester, 33 Pa. St. 435]. No exception is made in favor of persons under a disability. Wallace *v.* Fourth United Presb. Church, 152 Pa. St. 258, 25 Atl. 520. A claim for arrears of rent by a former owner on a former owner of the premises does not interrupt the running of the statute. Barber *v.* Lefavour, 176 Pa. St. 331, 35 Atl. 202. And the statute is retrospective. Clay *v.* Iseminger, 187 Pa. St. 108, 41 Atl. 38; Korn *v.* Browne, 64 Pa. St. 55. But a judgment for arrears obtained against a former owner will prevent the operation of the statute. Hiester *v.* Shaeffer, 45 Pa. St. 537. A recital in a deed, however, that it is under and subject to the payment of ground-rent is not such an acknowledgment of the existence of the right to enforce payment of the rent as will prevent the operation of the statute. Clay *v.* McCreanor, 9 Pa. Super. Ct. 433.

ment of the rent,[63] or from a mere delay of the owner of the ground-rent in demanding it.[64]

D. Merger. The general rule is that when the title to the rent and the possession of the premises out of which it issues are united in one person the former is extinguished;[65] and a purchase by the ground landlord of the land under a judgment for arrears of ground-rent relates back to the creation of the title and sweeps away all intervening estates.[66] There must, however, be a union of the title of the land and of the rent in the same person to work such an extinguishment.[67] A vested right to enter and hold the land until payment of the rent is not sufficient to effect a merger;[68] nor is it sufficient that there is a union of title to two ground-rents, successively reserved out of the same land, in one person,[69] nor that the legal owner of the rent has acquired an equitable title to the land.[70] So a ground-rent will not be extinguished when it has been purchased by

63. Kurr *v.* Brobst, 2 Woodw. (Pa.) 187. It cannot be presumed from the mere fact that no rent has ever been paid since the date of the instrument reserving the rent that the rent has been extinguished or released. Troy Cent. Bank *v.* Heydorn, 48 N. Y. 260. Payment of rent reserved in a perpetual lease or conveyance in fee may be presumed after the lapse of twenty years; but the non-payment for more than that period does not raise a presumption that the covenant to pay rent has been released or discharged. Lyon *v.* Odell, 65 N. Y. 28. Although the name of the real purchaser of a lot which is subject to ground-rent under indenture does not appear in an after conveyance of the premises, yet he cannot take advantage of the statute of limitations to avoid the payment of the rent, and in an action against him for rent his ownership may be shown by parol. Elkington *v.* Newman, 20 Pa. St. 281. Where it is conceded that the relation of landlord and tenant under a perpetual lease once existed, the fact that no part of the original rent has in the memory of any one living been paid by any owner of the leasehold interest in a lot which was a portion of the original tract leased, and that this tract has always been treated as discharged from the payment of rent, raises no presumption of some act of the parties in interest leaving this lot free from payment of any part of the original rent. Ehrman *v.* Mayer, 57 Md. 612.

64. St. Mary's Church *v.* Miles, 1 Whart. (Pa.) 229.

65. Philips *v.* Clarkson, 3 Yeates (Pa.) 124. *Compare* Huston *v.* Davidson, 8 Watts & S. (Pa.) 181, where by an agreement to let land on a ground-rent the grantor was to execute a deed when the land should be improved by buildings, and on the failure of the lessee to improve the land or to pay the rent the grantor obtained judgment and bought in the land at the execution sale, it was held that the grantee was discharged from his covenant. [This decision, however, does not seem to have been based upon the doctrine of a merger, but upon the idea that the grantor had disabled himself from executing his contract to deliver the deed and consequently could not enforce the covenant which was the consideration of his contract.] But in Millard *v.* McMullin, 68 N. Y. 345, the owner of the rent entered into an executory contract with the ground owner by which the landlord agreed to relinquish all his rights and give a deed in consideration of a sum which was made up of rent in arrear and the estimated value of the future rent reserved. In case of default in payment the landlord might reënter. The contract was not made with intent to disturb the title under the lease, which was not surrendered nor was there any agreement to surrender. The court held that there was no merger.

66. Bunting's Estate, 16 Wkly. Notes Cas. (Pa.) 335, holding that the effect of such a purchase is precisely the same as if there had been an entry for a breach of condition.

67. Where several persons, being the owners of land chargeable with rent, as tenants in common, make partition between themselves, each assuming the payment of his equitable share of the rent, the purchase of a portion of the land by the owner of the rent will not extinguish the liability of the person owning the other portion of the premises. Van Rensselaer *v.* Gifford, 24 Barb. (N. Y.) 349.

68. Phillips *v.* Bonsall, 2 Binn. (Pa.) 138.

69. In Phillips *v.* Clarkson, 3 Yeates (Pa.) 124, A granted land to B, subject to a yearly ground-rent, with right of entry into the premises to hold until the rent was paid, and B covenanted to pay the yearly rent to A, his heirs and assigns. B granted the lands to C, subject to the first rents, and to a new created rent payable to himself, which he conveyed to W, who afterward, by will, became entitled to a part of the first rent. The court decided that no part of the first rent was thereby extinguished, since the property in the ground continued subject to both species of rents.

70. An owner of a lot granted it in fee, reserving an annual rent to himself, his heirs and assigns. Subsequently he made his will, whereby he devised the ground-rent to his wife for life, with remainder to or in trust for his five children in different shares, giving one-eighth part to his son. The lot with an unfinished building thereon was sold at sheriff's sale, subject to the ground-rent, and was purchased in the former owner's name by the son. The owner died without

the covenantor after he has conveyed the land,[71] or after he has contracted to convey the land, although no deed has actually been delivered.[72] Also a purchase of both land and rent will not effect an extinguishment if the title to the land prove to be defective,[73] and even union of the two estates in the same person may not be sufficient to constitute a merger.[74] If the conveyances which the purchaser of a ground-rent is bound to take notice of do not show a merger of the rent estate with the estate in the ground, they are not as to him legally merged.[75]

E. Redemption — 1. In General. A covenant to release ground-rents to the grantee on payment of the principal is valid and obligatory between the parties,[76] and may be specifically enforced,[77] and such a covenant runs with the land.[78]

any deed having been made to him by the sheriff, and it was ruled that the ground-rent did not merge in the equitable estate acquired by the former owner at the sheriff's sale. Penington *v.* Coats, 6 Whart. (Pa.) 277.

71. The original covenantor in a ground-rent deed, after conveying his estate in the land to another, subject to the rent, became the assignee of the covenantee, but the rent did not thereby become extinguished, and on his afterward assigning the rent to B, covenant lay against him on the ground-rent deed, under which the land could be sold, so as to divest the title of the terre-tenant. Atwater *v.* Lloyd, 2 Pa. L. J. Rep. 19.

72. A took a lot of land on ground-rent and made a contract with B to give him a deed on the performance of certain conditions. B was put in possession of the premises, subject to the ground-rent, and fulfilled the conditions of his contract with A. A afterward purchased the ground-rent, but such purchase did not merge the ground-rent in the fee, nor inure to the benefit of B. Charnley *v.* Hansbury, 13 Pa. St. 16.

73. Wilson *v.* Gibbs, 28 Pa. St. 151.

74. Thus where the husband owns the fee of land on which the wife holds in her own right a ground-rent, a conveyance by both without reservation or qualification conveys the ground-rent, and the grantee may convey by separate deeds to different persons the ground-rent and the land. Wasserman *v.* Carroll, 2 Pa. Super. Ct. 551. So the ordinary effect attaching to the union of the two estates in one person may be defeated in equity by showing that such person had no intention that there should be a merger. Sheehan *v.* Hamilton, 4 Abb. Dec. (N. Y.) 211, 2 Keyes 304, 3 Abb. Pr. N. S. 197. And where land subject to a prior outstanding mortgage is conveyed to one who has previously taken a conveyance of an interest in the ground-rent to which the land is subject, and subsequently the grantee conveys both rent and land on the same day by two separate instruments to the same person, and it is manifestly against the interest both of the grantor and the grantee to allow a merger and the merger is only demanded by the holder of the intervening mortgage, equity will not enforce a merger. Cook *v.* Brightly, 46 Pa. St. 439.

75. McQuigg *v.* Morton, 39 Pa. St. 31.

76. *Ex p.* Penevoyre, 6 Watts & S. (Pa.) 446. Where there is a covenant in the ground-rent deed to allow redemption it cannot be annulled by any grant or devise of the grantor creating contingent estates. Calhoun's Petition, 3 Pa. Dist. 232.

Compelling redemption.—The privilege, however, reserved to the owner of the land to pay the principal of the rent to the grantor of the ground carries with it no corresponding right on the part of the owner of the ground-rent to enforce the payment of such principal sum. Matter of Patterson, 5 Phila. (Pa.) 460.

77. Church of Incarnation *v.* Williams, 5 Pa. Co. Ct. 641. See also Shollenberger *v.* Brinton, 52 Pa. St. 10. It is held that a bill in equity to redeem rents under a statute permitting such redemption is in the nature of specific performance. Plaenker *v.* Smith, 95 Md. 389, 52 Atl. 606.

Specific performance of a covenant to allow redemption may be denied if the owner of the land has been in default for a long period with respect to the performance of building covenants. Dohnert's Appeal, 64 Pa. St. 311.

78. Ritzman *v.* Spencer, 5 Pa. Dist. 224. A covenant to extinguish a ground-rent runs with the land, and must be performed by the heirs and appointees of the covenantor, and not by his administrator. Conard's Appeal, 33 Pa. St. 47. In Sergeant *v.* Ingersoll, 7 Pa. St. 340, A being the owner of land subject to a ground-rent, conveyed the same to B free of the rent, and with covenant to extinguish the rent within the time limited to do so. A soon after obtained a conveyance of the ground-rent to C, who, by deed indorsed on the deed to B, extended the time for extinguishing the rent. Afterward B conveyed a part of the land to D, reciting in the deed the covenant of A to extinguish the rent. On the deed to D, C indorsed a release of the land conveyed to D from the rent, with a reservation of his claim for the rent on the residue of the land retained by B. After this, but before the deed and release to D were recorded, C conveyed the rent to E, reciting in his deed the creation of the rent, the release of a part of the land from it, and the extension of the time for extinguishing the rent. E having bargained for the conveyance with A, it was decided that there was nothing in the deeds to affect E with constructive notice of the ownership of the rent by A, and his covenant with B; that the fact that E made the purchase of A, and took the conveyance from C, was sufficient to put her on inquiry, which, if pursued, would have exposed to her the facts; and

The lapse of a long period of time after the time limited for the exercise of the option to redeem may defeat the exercise of such right.[79] And where there is no covenant or stipulation in a ground-rent deed to allow redemption, and in the absence of any statute on the subject, redemption can only be effected by an agreement between the parties.[80] The intention, however, to make the ground-rent irredeemable must clearly appear.[81] In a number of states a right to redeem under certain conditions or upon the observance of prescribed formalities is conferred by statute;[82] and where such is the case, the conditions prescribed must be strictly complied with.[83] Such statutes do not apply to leases made before their passage.[84]

2. Covenant For Redemption as Affecting Nature of Transaction. A covenant to allow redemption does not render the transaction a loan instead of a sale, nor convert the ground-rent deed into a mortgage.[85]

3. Formalities and Matters of Practice. Where the ground-rent deed provides for the extinguishment of the rent upon the payment of the principal sum within a given time, it is the duty of the grantee to prepare the release and to tender it to the grantor for execution.[86] The deed of extinguishment is to be executed, after the death of the grantor, by his devisees,[87] even though the will gives a power of sale to the executors.[88] And when a redeemable ground-rent has become vested in trustees, they may execute a deed of extinguishment without an application to the court.[89] A bill by the lessee to procure a conveyance to him-

that she could not recover the rent after the time for its extinguishment by the covenant of A. In McKibbin *v.* Peters, 6 Pa. Dist. 67, defendant, in pursuance of an agreement, sold land at an agreed valuation to a builder, and advanced money to him to assist him in a building operation on the land, and, pursuant to the agreement, retained ground-rents on the premises, in which the redemption money was fixed at the agreed valuation of the land plus the amount of defendant's agreed advances. Subsequently plaintiff purchased the premises subject to the ground-rents, and acquired all the rights of the builder under the agreement. Plaintiff was held to be entitled to the satisfaction of the ground-rents on payment of the redemption money and arrears of rent and interest on arrears, less a portion of the advances which defendant was not called on to make, but without any allowance of interest thereon. Church of Incarnation *v.* Williams, 5 Pa. Co. Ct. 641.

79. *In re* Shoemaker, 1 Rawle (Pa.) 89.

80. Elcock *v.* Conover, 11 Wkly. Notes Cas. (Pa.) 216.

81. Springer *v.* Phillips, 71 Pa. St. 60.

82. Jones *v.* Linden Bldg. Assoc., 79 Md. 73, 29 Atl. 76; Packard *v.* Maryland Protestant Episcopal Church Relief Corp., 77 Md. 240, 26 Atl. 411; Laviolette *v.* Toupin, 21 Quebec Super. Ct. 538.

The act passed by the Pennsylvania legislature in 1850, providing that in case of a deed reserving ground-rent to become perpetual on the failure of the grantee to comply with the conditions contained therein, such conditions shall not prevent the grantee from paying at any time the full amount of ground-rent due, which payments shall constitute a complete discharge (Pa. Pamphl. Laws 549) does not apply to a deed reserving rent which is in its inception perpetual with the right in the grantee to extinguish the ground-rent by payment of the principal sum within a certain time. In such case the privilege extended to the grantee is unilateral, not being in any sense obligatory upon him. Palairet *v.* Snyder, 106 Pa. St. 227. Nor does it prohibit the creation of ground-rents redeemable only on the death of a person in whom a life-interest in the rents is vested. Skelly's Appeal, 11 Wkly. Notes Cas. (Pa.) 11.

And a statute creating a right after the expiration of a certain time to redeem ground-rents does not apply to a lease, executed before the enactment of the statute, creating an irredeemable annual ground-rent, nor does it apply to separate leases of different portions of the premises executed after the enactment of the statute pursuant to the provisions of the original lease. Flook *v.* Hunting, 76 Md. 178, 26 Atl. 670.

83. Plaenker *v.* Smith, 95 Md. 389, 52 Atl. 606.

84. Jones *v.* Linden Bldg. Assoc., 79 Md. 73, 29 Atl. 76.

85. McKibbin *v.* Peters, 185 Pa. St. 518, 40 Atl. 288.

86. Springer *v.* Phillips, 71 Pa. St. 60.

87. Conard's Appeal, 33 Pa. St. 47.

88. Church of Incarnation *v.* Williams, 5 Pa. Co. Ct. 641.

89. Matter of De Coursey, 15 Phila. (Pa.) 110.

Notice of course must be given to the parties in whom is the title to the ground-rent. Bouvier's Estate, 14 Wkly. Notes Cas. (Pa.) 535; Spangler's Estate, 13 Wkly. Notes Cas. (Pa.) 535; *In re* Hein, 1 Wkly. Notes Cas. (Pa.) 455.

The power of trustees to execute a deed of extinguishment without an order of court has frequently been sustained. Matter of

self of the reversion in extinguishment of the rents should join all the persons interested as defendants.[90]

VI. Rights and Liabilities of Parties as to Property and Rent.[91]

A. In General. The ordinary rule applicable to the relation of landlord and tenant which estops the tenant from denying the landlord's title applies to the owner of land subject to ground-rent.[92] The rights of the owner of a ground-rent are not affected by partition made of the estate of the tenant, or by reason of the widow's interest under the intestate law having been made chargeable on the land.[93] So, as a ground-rent is a separate estate from the ownership of the ground, the owner of the rent is not charged with notice of the subdivision of the land and the manner of apportionment of rents among the owners.[94] An agreement by the owner of the rent to reduce it is not enforceable unless based upon a consideration.[95]

B. Liability as to Taxes. In all cases of land conveyed subject to ground-rent, the two resultant estates in the land and in the rent are separately assessable; the owner of the rent is not liable for any of the taxes assessed on the land out of which the rent issues,[96] and the owner of the ground is not liable for taxes assessed upon the rent.[97]

C. Building Covenants — 1. Covenant to Build. Where there is a covenant to build it is part of the consideration and one of the inducements to the contract.[98] And in a proper case, if the covenant be not kept, specific performance will be decreed by the chancellor.[99] Or the estate may be forfeited by non-performance within a convenient time.[1] A covenant that the vendee will erect a

De Coursey, 15 Phila. (Pa.) 110; Bouvier's Estate, 14 Wkly. Notes Cas. (Pa.) 535; Spangler's Estate, 13 Wkly. Notes Cas. (Pa.) 535; Spangler's Estate, 4 Wkly. Notes Cas. (Pa.) 74; *In re* Kirkham, 1 Wkly. Notes Cas. (Pa.) 233. See Bache's Estate, 2 Wkly. Notes Cas. (Pa.) 493, in which one to whom a ground-rent was devised in trust petitioned for a decree authorizing the extinguishment of the rent.

Where a committee of a lunatic has, under order of the court, sold a ground-rent, with a provision in the deed for its extinguishment, the committee may execute a deed of extinguishment, so as to relieve the terre-tenant from liability to see to the application of the purchase-money, without further order from the court. *In re* Kennelly, 17 Phila. (Pa.) 99.

90. Plaenker *v.* Smith, 95 Md. 389, 52 Atl. 606.

All parties must have notice. Serrill's Petition, 9 Pa. Dist. 755.

91. Joint liability of tenants in common for ground-rent see Tenancy in Common.

92. Naglee *v.* Ingersoll, 7 Pa. St. 185; McCurdy *v.* Smith, 35 Pa. St. 108. *Contra*, Hulseman *v.* Griffiths, 10 Phila. (Pa.) 350.

93. Bunting's Estate, 16 Wkly. Notes Cas. (Pa.) 335..

94. McQuigg *v.* Morton, 39 Pa. St. 31.

95. Fidelity Trust Co. *v.* Carson, 28 Pa. Super. Ct. 418, holding, however, that one who subsequently purchased the land with knowledge that the owner of the rent was in the habit of accepting the reduced rate was entitled to notice of the intention of the owner of the rent to restore the old rate before the old rate could be collected.

96. Philadelphia Library Co. *v.* Ingham, 1 Whart. (Pa.) 72.

97. Franciscus *v.* Reigart, 4 Watts (Pa.) 98

Even where the grantee covenants to pay all taxes that may be assessed on the premises demised, without any deduction from the rent reserved, he is liable for the taxes assessed on the land only, and not for taxes on the ground-rent. Robinson *v.* Allegheny County, 7 Pa. St. 161. See also Woodruff *v.* Oswego Starch Factory, 177 N. Y. 23, 68 N. E. 994; Van Rensselaer *v.* Dennison, 8 Barb. (N. Y.) 23, 4 How. Pr. 390.

In an early case in Pennsylvania, however, where a covenant to pay ground-rents clear of assessments was under consideration the determination of the question of the extent of liability of the covenantor was made to turn upon whether a custom existed to pay taxes on the rents as well as upon the land, and it was held that the covenantor could not deduct the tax on the rents from the ground-rent owing to the owner. Peart *v.* Phipps, 4 Yeates (Pa.) 386.

98. Dohnert's Appeal, 64 Pa. St. 311, holding that this is not merely because the covenant is intended to secure the payment of the rent, but because if such a covenant is broken the ground-rent is less valuable, that is, less salable in the market.

99. Dohnert's Appeal, 64 Pa. St. 311; Pennsylvania Co. *v.* Lynch, 6 Wkly. Notes Cas. (Pa.) 446.

1. Hamilton *v.* Elliott, 5 Serg. & R. (Pa.) 375. But where the lessee covenanted that he would erect and keep in repair a building and there was no condition that on non-performance the lessor might reënter, it was

building within a certain time runs with the land and is enforceable by an assignee of the vendor against a purchaser from the vendee.[2] But an action on the breach of a covenant to build cannot be maintained by an assignee of the ground-rent whose title accrued subsequently to the date of the breach,[3] and a general release or a merger discharges the land from a covenant to build.[4] So no damages may be recovered for a breach of a building covenant occurring after the covenantor becomes the owner of the rent.[5]

2. COVENANT NOT TO BUILD. A covenant not to build may be for the benefit of the grantor's heirs or assignees owning the rent, and enforceable by them.[6]

D. Liability For Rent as Affected by Transfer of Land or Change of Interest Therein — 1. ORIGINAL GRANTEE OR PERSONAL REPRESENTATIVES. The grantee in a deed who covenants on behalf of himself, his heirs and assigns, to pay an annual fee-farm or ground-rent remains personally liable after he has assigned his estate in the premises.[7] But although the covenant in a ground-rent deed is personal on the part of the covenantor, yet, as to arrears of rent accruing after his decease, the landlord is restricted to the realty out of which it issues, and is not entitled to payment out of money in the hands of the executors.[8] And a ground-rent covenant does not survive against executors and administrators, except as to the rent which accrued in the lifetime of decedent.[9] It is to be noted, however, that an administrator of a grantee in a ground-rent deed is a proper party to an action of covenant for rent accruing after his death, especially if the judgment is restricted to the land.[10] And where executors accept as part

held that the lessor's remedy for non-performance was on the covenants and that he could not enforce a forfeiture. Jackson *v.* McClallen, 8 Cow. (N. Y.) 295.

2. Fisher *v.* Lewis, 1 Pa. L. J. Rep. 422, 3 Pa. L. J. 73.

3. Huston *v.* Davidson, 8 Watts & S. (Pa.) 181; Davis *v.* Oberteuffer, 5 Pa. L. J. Rep. 413.

4. Huston *v.* Davidson, 8 Watts & S. (Pa.) 181.

5. The grantee of real estate charged with rent covenanted that he and his heirs and assigns should within one year erect upon the ground substantial brick buildings, etc. He assigned the estate over, and afterward, and before the expiration of the year, took a conveyance of the rent to himself. It was decided that any claim to damages for a breach of the building covenant, occurring while the grantee was the owner of the rent, was extinguished. Fisher *v.* Lewis, 1 Pa. L. J. Rep. 431, 3 Pa. L. J. 81.

6. King *v.* Large, 7 Phila. (Pa.) 282.

7. Scott *v.* Lunt, 7 Pet. (U. S.) 596, 8 L. ed. 797.

That the lessor accepts rent from the assignee will not preclude him from maintaining an action of covenant against the lessee for the rents subsequently accruing. Kunckle *v.* Wynick, 1 Dall. (Pa.) 305, 1 L. ed. 149.

8. Williams' Appeal, 47 Pa. St. 283. In the old case of Quick *v.* Ludburrow, 3 Bulstr. 29, it was said that executors were bound to perform their testator's contract to build; but in Dickinson *v.* Calahan, 19 Pa. St. 227, the court came to the opposite conclusion [*citing* Cooke *v.* Colcraft, 2 W. Bl. 856, 3 Wils. C. P. 380, 1266; and Com. *v.* King, 4 Serg. & R. (Pa.) 109]; and the question is now settled in accordance with that ruling. Thus it was said in Quain's Appeal, 22 Pa. St. 510, that the covenant was perpetual and it was impracticable to require it to be performed by executors and administrators, for their office was not perpetual, and the grantor of the land cannot be presumed to have placed any value on such covenants, for the personal covenant of the original grantor is as nothing in a series of tenants lasting forever. The real security is the covenant running with the land and encumbering it, and this is the essential reliance of the owner of the rent.

9. Quain's Appeal, 22 Pa. St. 510; *In re* Torr, 2 Rawle (Pa.) 252.

To the contrary it was held in Scott *v.* Lunt, 21 Fed. Cas. No. 12,540, 3 Cranch C. C. 285, that the fact that the land on the death of the original lessee descended to the heirs burdened with the rent did not preclude enforcing the personal covenant of the lessor against his personal representatives. The court distinguished the case of Kunckle *v.* Wynick, 1 Dall. (Pa.) 305, 1 L. ed. 149, on the ground that in the pending case there was no acceptance of rent from the heirs by plaintiff, while in the case distinguished plaintiff had accepted rent from the assignee.

10. Gardiner *v.* Painter, 3 Phila. (Pa.) 365. This case was carefully distinguished by Stroud, J., from Quain's Appeal, *supra*. He pointed out that the covenant here is an express one, the executors and administrators being carefully named as within the intention of the parties to be bound by its performance. The question — unlike Quain's appeal — is merely whether the executor or administrator can be made a party defendant in such an action of covenant, what judgment should be entered on a verdict for the plaintiff being quite another question.

of their trust certain lands subject to ground-rent, pay taxes, and make part payment of the rent, an action of covenant may be maintained against them for arrears of rent accruing during their possession, and the judgment will not be confined to the land out of which the rent issues.[11]

2. One Succeeding to Title of Original Grantee — a. In General. In the absence of statute [12] a covenant for payment of rent reserved in a deed conveying the fee of lands runs with the land,[13] and is binding upon the party in possession, although he has not executed the deed conveying the same to him.[14] Whoever succeeds to the title to the land takes it subject to such rent,[15] and the legal means of recovering it.[16] The former owner of the land is liable after the sale for the rent accruing during his tenure.[17] And the owner of a merely equitable interest in the land may be liable for the rent.[18]

11. Newkumet *v.* Davidson, 13 Wkly. Notes Cas. (Pa.) 10.

12. In Pennsylvania, by statutory provision, the transferee of the land is not personally liable in the absence of an express assumption of such liability. Under a statute enacted in 1878, the ground and the original covenantor or the original grantee named in the ground-rent deed are alone liable for the rent, and no personal liability rests upon any subsequent transferee in the absence of an express assumption in writing of personal liability or of express words in the deed of conveyance stating that the grant is made on condition of the grantee assuming such personal liability. Easby *v.* Easby, 180 Pa. St. 429, 36 Atl. 923. The act of 1878, however, does not apply to rents reserved before it was passed. Sachse *v.* Myers, 15 Pa. Super. Ct. 425; Hopple *v.* Hutchinson, 44 Wkly. Notes Cas. (Pa.) 441; Conway *v.* Salter Bldg., etc., Assoc., No. 2, 44 Wkly. Notes Cas. (Pa.) 439; Smith *v.* Conrad, 11 Wkly. Notes Cas. (Pa.) 100; Miller *v.* Kern, 7 Wkly. Notes Cas. (Pa.) 504; Burton *v.* Association, 7 Wkly. Notes Cas. (Pa.) 439. In Miller *v.* Kern, *supra*, the leading case on this point, the original ground-rent deed was made in 1869, and eight years later the land became vested in B. In 1879 the ground landlord brought covenant against B for arrears accruing subsequently to B's tenancy. B pleaded the act of June 12, 1878. On demurrer to the plea counsel for plaintiff urged that the act did not apply simply to the remedy or mere form of action, but that it defeated the right of the owner of the rent to recover at all, and therefore if the act were retrospective it would be unconstitutional as affecting vested rights. The demurrer was sustained.

13. Van Rensselaer *v.* Hays, 19 N. Y. 68, 75 Am. Dec. 278 [*affirming* 27 Barb. 104]; Van Rensselaer *v.* Read, 26 N. Y. 558; Main *v.* Green, 32 Barb. (N. Y.) 448; Van Rensselaer *v.* Bonesteel, 24 Barb. (N. Y.) 365.

14. Hurst *v.* Rodney, 12 Fed. Cas. No. 6,937, 1 Wash. 375.

15. Cowton *v.* Wickersham, 54 Pa. St. 302. See also Van Rensselaer *v.* Barringer, 39 N. Y. 15; Tyler *v.* Heidorn, 46 Barb. (N. Y.) 439; Van Rensselaer *v.* Smith, 27 Barb. (N. Y.) 104; Main *v.* Feathers, 21 Barb. (N. Y.) 646. By accepting the assignment of and entering into possession of the land, the assignee subjects himself to all the covenants that run with the land, including that for the payment of ground-rent. Myers *v.* Silljacks, 58 Md. 319.

A covenant by the grantee in a ground-rent deed for himself, his heirs, executors, administrators, and assigns, to pay the rent reserved imposes no obligation upon the heirs unless they accept and enter upon the inheritance. Gardiner *v.* Painter, 3 Phila. (Pa.) 365.

A sale to satisfy a judgment recovered for arrears of ground-rent does not extinguish the rent, and a purchaser at the sale remains personally liable for the arrears unpaid by the proceeds of the sale. Heister *v.* Shaeffer, 45 Pa. St. 537.

A purchaser at a tax-sale of land subject to ground-rent becomes personally liable for the rent as fully as the original covenantor. Conrad *v.* Smith, 12 Phila. (Pa.) 306.

In Louisiana it is held that ground-rent is a real obligation which follows the property in whatever hands it may be found. New Orleans *v.* Camp, 105 La. 288, 29 So. 340; Canonge's Succession, 1 La. Ann. 209.

In Pennsylvania under a statute enacted in 1850 an action was maintainable against the assignee of the original grantee for arrears accruing before the assignment (McQuesney *v.* Hiester, 33 Pa. St. 435); and a purchaser at sheriff's sale was an assignee within the meaning of the rule (Sergeant *v.* Fleckenstein, 9 Pa. Super. Ct. 557).

That a lease was executed by two persons jointly does not affect the liability of an individual as assignee of a part of the premises charged with the rent. Van Rensselaer *v.* Gifford, 24 Barb. (N. Y.) 349.

16. Royer *v.* Ake, 3 Penr. & W. (Pa.) 461.

One satisfaction only.— The owner of a ground-rent may sue both the original covenantor and his assignee, although he can only receive one satisfaction. Bray *v.* Hartwell, 2 Pa. L. J. 303.

17. Brolasky *v.* Furey, 12 Phila. (Pa.) 428.

18. One who owns the equitable interest in land, and who is in the constructive possession, and may receive the income of it, is liable in covenant for ground-rent charged thereon, although the legal title is in another,

b. Necessity of Possession. The mere fact that an assignee of land so subject to ground-rent does not take actual possession will not relieve him from liability;[19] but the assignee of the land is not liable personally unless he has the possession or right to possession of the premises, and after he has conveyed the equitable interest in the land to another to whom actual possession is surrendered the fact that the assignee retains the legal title does not render him liable.[20]

c. Under Express Stipulations. The owner of the land may of course on conveying it make such stipulations as he chooses with reference to the payment of the rent,[21] and may, on conveying a part of it, stipulate with his grantee that the part conveyed shall be exempt from payment of the rent or that it shall bear the entire rent.[22] Where the owner of the land conveys it subject to the payment of the rent, a liability rests upon the grantee to indemnify his grantor against any loss which may arise from the non-payment of the rent,[23] but this liability does not continue after such grantee has himself transferred the premises.[24]

E. Liability For Rent as Affected by Eviction of Tenant. Where a tenant is evicted from a part of the premises granted, the right to rent is suspended until the tenant has been restored to the whole possession.[25] And the existence of an outstanding paramount title is a constructive eviction constituting a defense in an action for rent.[26]

F. Interest on Arrears of Rent. In covenant to recover a ground-rent, interest is recoverable, in the absence of special reasons for not allowing it;[27] and the fact that the landlord has failed to demand payment for eighteen years is

and no trust appeared by the deed. Berry *v.* McMullen, 17 Serg. & R. (Pa.) 84.

19. Hanner *v.* Ewalt, 18 Pa. St. 9. But the holder of a mortgage upon land subject to a ground-rent who has never been in actual possession nor claimed title is not liable to the ground landlord for arrears of rent. Wetherell *v.* Hamilton, 15 Pa. St. 195.

20. Wickersham *v.* Irwin, 14 Pa. St. 108.

21. The owner of the land and his grantee of a part may agree that each part shall be liable for its own share only of the rent. Van Rensselaer *v.* Chadwick, 22 N. Y. 32 [*affirming* 24 Barb. 333].

22. Jones *v.* Rose, 96 Md. 483, 54 Atl. 69. Where the owner of land subject to a ground-rent conveys a small part of it, reserving to himself a ground-rent, and covenants to save the grantee a loss on account of the paramount ground-rent, and gives the grantee a right of distress over the part retained, in case the grantee does suffer loss from the enforcement of the paramount ground-rent, such covenant runs with the title of both the smaller and the larger parcels from the day from which it is made, exempting the one and binding the other to the burden of paramount rent. Provident Life, etc., Co. *v.* Fiss, 147 Pa. St. 232, 23 Atl. 560. So where the owner of the land conveys a part of it by a deed which recites that the grantee shall assume the payment of the entire ground-rent, a subsequent purchaser at sheriff's sale of the parcel so conveyed, who has full knowledge of the facts, takes subject to the payment of the entire ground-rent. Wistar *v.* Mercer, 6 Phila. (Pa.) 44. And where a part of a lot of ground is sold subject to the ground-rent against the whole lot, a subsequent owner of such part cannot call on the other part for contribution to pay the ground-rent. *In re* Gassman, 3 Walk. (Pa.) 126. But where the grantee of a part agreed to pay the entire ground-rent and to save his grantor harmless and the grantee himself conveyed reciting the deed under which he claimed and under and subject to the payment of the entire ground-rent, it was held that the last grantee could enforce contribution from the first grantor for the proportion properly chargeable upon the part retained by him. Donagan *v.* McKee, 7 Wkly. Notes Cas. (Pa.) 112.

23. Walker *v.* Physick, 5 Pa. St. 193.

24. American Academy of Music *v.* Smith, 54 Pa. St. 130; Walker *v.* Physick, 5 Pa. St. 193.

25. Lewis *v.* Payn, 4 Wend. (N. Y.) 423.

26. Hulseman *v.* Griffiths, 10 Phila. (Pa.) 350.

A title which cannot be levied on and sold under execution is not such a paramount title. Spear *v.* Allison, 20 Pa. St. 200.

The appropriation of a mill privilege, which was the subject of the demise, by the canal commissioners, was held not to be an eviction by title paramount, so as to discharge the lessee, the lessee being entitled to compensation. Folts *v.* Huntley, 7 Wend. (N. Y.) 210.

Where grantor covenanted that grantee should have common of estovers and pasture out of other lands of the grantor, and the grantee was prevented by the act of the grantor from enjoying the common, it was held that this did not constitute a defense in an action for the rent. Watts *v.* Coffin, 11 Johns. (N. Y.) 495.

27. Naglee *v.* Ingersoll, 7 Pa. St. 185; Newman *v.* Keffer, 18 Fed. Cas. No. 10,177, 1 Brunn. Col. Cas. 502, 33 Pa. St. 442 note. See also Livingston *v.* Miller, 11 N. Y. 80.

not such a special reason.[28] The payment of interest will be decreed in all cases where the arrears of rent have been unjustly withheld;[29] but where the landlord has been oppressive or has given reason to infer that he has relinquished his claim to interest it will be refused.[30] And so where the landlord is seeking payment out of the estate, as in the case of a sheriff's sale, adversely to other claimants.[31] Nor is interest allowed where the property has been taken for public purposes.[32] Nor will an assignee of the lessee be charged with interest on arrears which accrued prior to the assignment to him, although on subsequent arrears he is liable for interest.[33]

G. Lien For Rent and Enforcement Thereof — 1. In General. Where ground-rent is reserved by a deed containing a clause of reëntry in case of non-payment, the lien for arrears relates back to the time when the ground-rent deed was executed,[34] cuts out all intervening encumbrances,[35] is entitled to preference in payment,[36] and takes preference over judgments subsequent to the creation of the rent, but prior to the arrears.[37] The lien is not lost by taking a bond for the arrears.[38]

2. Effect of Sheriff's Sale or Judicial Sale of Land. On a judicial sale of the land the arrears are payable out of the proceeds,[39] whether there was property on the premises which might have been distrained or not.[40] Since arrears of ground-rent may be collected by entry they are, where no mortgage intervenes, discharged by a sheriff's sale under subsequent encumbrances.[41] But where by force of a

28. Society *v.* Swindell, 2 Wkly. Notes Cas. (Pa.) 560.

29. Chew's Estate, 4 Phila. (Pa.) 186.

30. McQuesney *v.* Hiester, 33 Pa. St. 435; Smith *v.* Montgomery, 2 Yeates (Pa.) 72.

31. Ter-Hoven *v.* Kerns, 2 Pa. St. 96; *In re* Dougherty, 9 Watts & S. (Pa.) 189, 42 Am. Dec. 326; Pancoast's Appeal, 8 Watts & S. (Pa.) 381; Sands *v.* Smith, 3 Watts & S. (Pa.) 9; Bantleon *v.* Smith, 2 Binn. (Pa.) 146, 4 Am. Dec. 430.

32. *In re* Makinson, 8 Phila. (Pa.) 381. This case was decided partly on the ground that sufficient damages had been awarded, and partly on the ground of the landlord's laches in neglecting to demand the arrearages of the rent.

33. McQuesney *v.* Hiester, 33 Pa. St. 435.

34. Wills *v.* Gibson, 7 Pa. St. 154; Fassitt *v.* Middleton, 5 Phila. (Pa.) 196.

Lien for arrears of ground-rent for which judgment has been entered does not arise from the judgment but from the ground-rent deed. Wills *v.* Gibson, 7 Pa. St. 154.

35. Stephenson *v.* Haines, 16 Ohio St. 478; Powell *v.* Whitaker, 88 Pa. St. 445; Bantleon *v.* Smith, 2 Binn. (Pa.) 146, 4 Am. Dec. 430; Pepper's Estate, 1 Phila. (Pa.) 562; Watson *v.* Bradley, 1 Phila. (Pa.) 177.

In Ohio where the ground-rent deed reserves to the grantor the right to reënter and avoid the conveyance for default in payment of the rent, the grantor has a lien upon the premises for the rent superior to that of a mortgage executed by the grantee. Stephenson *v.* Haines, 16 Ohio St. 478.

Right of a mortgagee to redeem from the prior lien of a ground-rent see Mortgages.

36. For example the proprietor of a ground-rent in fee who obtains judgment in covenant for the arrears and sells the land is entitled to be paid the whole of the rent in arrears out of the proceeds in preference to older judgments. Bantleon *v.* Smith, 2 Binn. (Pa.) 146, 4 Am. Dec. 430. The rule is the same, although the sale be under a judgment by a stranger. Ter-Hoven *v.* Kerns, 2 Pa. St. 96. A ground-rent created by deed with a clause of reëntry is payable out of the proceeds of a sheriff's sale of the property under a judgment by a stranger, in preference to such judgment. Where there is a clause of reëntry the tenant's estate is immediately liable to make satisfaction, and it makes no difference whether it has been sold on a judgment recovered by a stranger, or on a judgment recovered by the landlord on the covenant in his ground-rent deed. The landlord has a lien on the estate of the tenant, and he may have recourse to its substitute brought into court, however the conversion into money may have been effected. Pancoast's Appeal, 8 Watts & S. (Pa.) 381.

37. Watson *v.* Bradley, 1 Phila. (Pa.) 177.

38. Gordon *v.* Correy, 5 Binn. (Pa.) 552.

39. Mather *v.* McMichael, 13 Pa. St. 301; Ter-Hoven *v.* Kerns, 2 Pa. St. 96; Western Bank *v.* Willitts, 1 Pa. L. J. Rep. 188, 2 Pa. L. J. 45; Ackley *v.* Aechternacht, 3 Phila. (Pa.) 224.

40. *In re* Dougherty, 9 Watts & S. (Pa.) 189, 42 Am. Dec. 326. And so well guarded is the right of the landlord to obtain his arrears from the fund realized by a sheriff's sale that where one half of a city lot, which was subject to the ground-rents reserved out of the whole lot, was sold by the sheriff, and the proceeds paid into court for distribution among the lien creditors, it was decided that the ground landlord was entitled to receive out of the money the arrears of rent due from the entire lot, and could not be restricted to the half sold. Mayer *v.* Powell, 10 Lanc. Bar (Pa.) 41.

41. Terry's Estate, 13 Phila. (Pa.) 298.

statute a judicial sale of land subject to a ground-rent does not discharge a mortgage or other fixed lien on the land, a lien on account of arrears of ground-rent accruing under a deed given before such mortgage or the creation of such fixed lien will also be preserved.[42] And when a ground-rent falls due on the same day as a sheriff's sale of the land out of which it issues, it is not discharged by the sale.[43]

3. Distress and Enforcement of Lien Against Personalty. A ground-rent deed which is invalid because of a fraudulent alteration is no more available for the purpose of affording the remedy of distress to enforce the rent than it is as a basis for the actions of debt and covenant.[44] A demand for the rent is not a condition precedent to invoking the remedy of distress to collect it, as the distraint is itself a sufficient demand.[45] The right of the ground landlord to have his claim for arrears of rent paid out of the proceeds of an execution sale of personalty upon the premises is regulated by statute in Pennsylvania.[46]

H. Actions to Collect Rent[47] — 1. In General. An action for the recovery of ground-rents is a proceeding *in personam* and not *in rem*.[48]

2. Form of Action. Where the ground-rent deed contains a covenant to pay with the usual clause of distress and reëntry, the land may be charged with arrears of rent by an action of covenant.[49] And where ground-rent has been

The lien is transferred to the proceeds and the owner of the ground-rent cannot elect to refuse the money and continue the lien. Foulke *v.* Millard, 108 Pa. St. 230.

In Pennsylvania under the act of 1878 a purchaser at sheriff's sale takes the land free from a lien of arrears of ground-rent. Sergeant *v.* Fleckenstein, 9 Pa. Super. Ct. 557.

42. Devine's Appeal, 30 Pa. St. 348; Terry's Estate, 13 Phila. (Pa.) 298; Lewis' Estate, 14 Wkly. Notes Cas. (Pa.) 499.

In Pennsylvania where land is encumbered by two ground-rents of different dates and a subsequent mortgage, a judicial sale of the land under the mortgage does not discharge the ground-rent first in order. Hacker *v.* Cozzens, 92 Pa. St. 461. Arrearages in ground-rent due at the time of sale are not payable out of the proceeds where a mortgage exists which was given after the execution of the ground-rent deed and which is not discharged by the sale. Field *v.* Oberteuffer, 2 Phila. 271.

43. "While the tenant may tender the rent on the day it is made payable, and the landlord may demand it, yet he cannot distrain for it until the next day; and when a landlord has no right to distrain for rent, he has no footing in Court on a question of distribution; . . . It follows, therefore, that, as the plaintiff in the present case could not have participated in the distribution, if there had been enough realized by the sheriff's sale to pay the ground rent, the rent was not discharged and the plaintiff is entitled to recover in this suit." Kingley *v.* Knot, 41 Wkly. Notes Cas. (Pa.) 31, 32, per Arnold, J.

The date of the sheriff's sale is the time to which all liens, entitled to payment out of the proceeds, are to be computed. In Walton *v.* West, 4 Whart. (Pa.) 221, it was decided that where a lot subject to the ground-rent is sold at sheriff's sale, the ground-rent accruing after the date of the sale is not to be paid out of proceeds, but must be paid by the purchaser, although he may not receive his deed for a considerable time, because of the pendency of a motion to set aside the sale.

44. Wallace *v.* Harmstad, 44 Pa. St. 492.

45. Royer *v.* Ake, 3 Penr. & W. (Pa.) 461, even though the ground-rent deed provides that if the rent be behind and is lawfully demanded, the lessor may distrain when the rent becomes due.

46. Pattison *v.* McGregor, 9 Watts & S. (Pa.) 180.

47. Distress to enforce lien see *supra*, VI, G, 3.

Proceedings to enforce right of reëntry see *infra*, VI, I.

48. Hiester *v.* Shaeffer, 45 Pa. St. 537.

49. Brown *v.* Johnson, 4 Rawle (Pa.) 146. See Covenant, Action of, 11 Cyc. 1022.

A ground-rent is not, like a mortgage, foreclosed, it must be sued out. The old deeds contained a right of reëntry, while the modern ones usually have provision for an attorney, both to be used of course only if distress be of no avail. 2 Troubat & H. 1895, 1901.

In Pennsylvania under a statute enacted in 1850, there is now a complete remedy by action against the lessees or their assigns, whether the premises out of which the rent issues be held by deed poll or otherwise, which was not formerly the law (Maule *v.* Weaver, 7 Pa. St. 329; Wilson *v.* Brechemin, Brightly 445); and it has been decided since the act that the covenant runs with the land and an action of covenant may be maintained for rent reserved by a deed which has not been sealed by defendant (Louer *v.* Hummel, 21 Pa. St. 450).

Since legislation enacted in 1887, the distinction heretofore existing, in Pennsylvania, between actions *ex contractu* has been abolished and all demands, heretofore recoverable in debt or covenant, are now recovered in one form of action called an "action of assumpsit." See Pa. Pamphl. Laws 271.

apportioned, action on the covenant may be brought for the whole rent and recovery had for the part to which plaintiff is entitled.[50]

3. DEMAND AND NOTICE. A demand of performance is not necessary before bringing an action of covenant to recover rent not paid on the named day,[51] even though the action be against the assignee of the covenantor.[52] Nor is it necessary to notify the terre-tenant when the action is against the covenantor.[53] Statutory provisions with reference to the necessity of making demand before instituting proceedings to collect rent have been held applicable to the collection of ground-rent.[54]

4. PARTIES. If the ground-rent belongs in undivided portions to two owners, each may maintain a separate action of covenant for his portion of the rents.[55] And all the assignees of a lot of ground, although claiming by assignments of different dates, may be joined in an action of covenant for arrears of ground-rent accruing after their several assignments.[56]

5. PLEADING. It is not necessary that the statement or complaint should contain an abstract of the title, although that is the better practice.[57] A ground-rent deed is held to be an instrument in writing for the payment of money within the meaning of a statute authorizing the court in an action on such instruments to enter judgment for want of an affidavit of defense.[58]

6. EVIDENCE. A statute providing that after the expiration of a stated period from the time of the accrual of the right of action upon any sealed instrument for the payment of money such right shall be presumed to have been extinguished applies to a covenant to pay ground-rent;[59] but the ground owner will not be given the benefit of such statute unless the facts bring his case strictly within it.[60] And if the lease and the occupancy under it are not disputed when the lessor comes into court claiming rent which has fallen due within the stated period, he has nothing more to prove to entitle him *prima facie* to recover.[61] Where the statute provides that failure to pay ground-rents or to demand its payment for a period of years will afford a conclusive presumption that the rent has been extinguished, proof of such failure, along with other circumstances, may require the court to open a judgment for arrears.[62]

7. JUDGMENT. Where defendants fail to appear after service of summons judgment may be taken by default;[63] and where service cannot be made, statutory provisions sometimes enable plaintiff to recover against a cove-

50. Worthington *v.* Cooke, 56 Md. 51.

51. Van Rensselaer *v.* Gallup, 5 Den. (N. Y.) 454.

52. Royer *v.* Ake, 3 Penr. & W. (Pa.) 461.

53. Charnley *v.* Hansbury, 13 Pa. St. 16; Brown *v.* Johnson, 4 Rawle (Pa.) 146.

54. Hosford *v.* Hallard, 39 N. Y. 147; Van Rensselaer *v.* Slingerland, 26 N. Y. 580.

On the other hand it has been held that an ordinary landlord and tenant act authorizing proceedings to recover possession of premises for non-payment of rent do not authorize proceedings against a ground tenant in fee. McDermott *v.* McIlwain, 75 Pa. St. 342; Leinbach *v.* Kaufman, 1 Pa. Cas. 12, 1 Atl. 348.

55. Cook *v.* Brightly, 46 Pa. St. 439.

56. Hannen *v.* Ewalt, 18 Pa. St. 9; Royer *v.* Ake, 3 Penr. & W. (Pa.) 461.

57. Coxe *v.* Williams, 15 Phila. (Pa.) 187.

If there is no defense on the merits judgment will not be stricken off for this cause. Mitcheson *v.* Southcott, 17 Wkly. Notes Cas. (Pa.) 27.

58. Watkins *v.* Phillips, 2 Whart. (Pa.) 209.

Sufficiency of affidavit of defense see Kimball *v.* Title Ins., etc., Co., 19 Pa. Super. Ct. 20.

59. Central Bank *v.* Heydorn, 48 N. Y. 260.

60. Central Bank *v.* Heydorn, 48 N. Y. 260.

61. Central Bank *v.* Heydorn, 48 N. Y. 260.

62. Heiss *v.* Banister, 176 Pa. St. 337, 35 Atl. 203; Gibbs *v.* Smith, 1 Phila. (Pa.) 400.

63. In Pennsylvania judgment may be had either by the failure of defendants to enter an appearance or to file an affidavit of defense. The former judgment is taken under the provisions of the act of June 13, 1836 (Pamphl. Laws 578), which is still in force. Saupp *v.* Flanigan, 7 Pa. Dist. 604, although Judge Arnold, in a letter to the Legal Intelligencer of Nov. 27, 1896, advanced a contrary view.

It is safer practice to take judgment against both the covenantor and the real owner for want of an affidavit of defense, and not for want of an appearance. Judgment in the latter case will be stricken off

nantor for want of appearance after the observance of certain prescribed formalities.[64]

8. Execution. Matters relating to the issuance and stay of executions in actions of this character are ordinarily governed by the general provisions of the statutes with reference to executions generally.[65]

I. Enforcement of Right of Reëntry — 1. In General. With respect to the enforcement of the right of reëntry for non-payment of rent, the general rule applies that all conditions on the non-performance of which vested estates of freehold are to be divested and the grantor reinstated are to be construed with the greatest strictness.[66]

where plaintiff has failed to file a declaration. Henderson *v.* Bancroft, 1 Wkly. Notes Cas. (Pa.) 26.

64. **Procedure in Pennsylvania.**— If the suit be against a covenantor who cannot be served, then judgment is taken against him under the provisions of the act of April 8, 1840 (Pamphl. Laws 249), upon "two returns of *nihil.*" Bunting's Estate, 16 Wkly. Notes Cas. (Pa.) 335. That is to say, after the first summons has been returned by the sheriff "*nihil habet*," or "could not be served," an alias summons is issued, and when that, too, has been returned *nihil*, these two returns, under the provisions of the act, are equivalent to an actual service, and judgment may be had against the covenantor for want of an appearance fourteen days after the return-day of the alias writ. To get such a judgment it is necessary to file a *narr.* or statement of the cause of action. Pennsylvania Hospital *v.* White, 2 Tr. & H. Pr. (Pa.) 32; Henderson *v.* Bancroft, 1 Wkly. Notes Cas. (Pa.) 26. Service of the writ may be made by the sheriff in any one of the following three ways: (1) By serving a copy on the tenant in possession. Judgment will be opened if the terre-tenant had had no notice. Gibbs *v.* Smith, 1 Phila. (Pa.) 400; Rudderon *v.* Hodges, 5 Wkly. Notes Cas. (Pa.) 567. (2) By posting a copy on a conspicuous part of the premises at least ten days prior to the return-day. If the sheriff adopts this method he need not state that there was no tenant on the premises as this will be presumed from the return. Hawkins *v.* Weightman, 71 Pa. St. 128. But when the return fails to show either service on the terre-tenant or posting on the premises, a judgment under the act of 1840 will be stricken off. Rudderon *v.* Hodges, 5 Wkly. Notes Cas. (Pa.) 567. So where the return shows that the posting was done on the wrong premises. Stokes *v.* Harrison, 2 Wkly. Notes Cas. (Pa.) 28. (3) By publication. But this is no longer the practice. See Act July 9, 1901, § 10 (Pamphl. Laws 614); Act May 25, 1887 (Pamphl. Laws 271).

65. Ellis *v.* Cadwallader, 14 Wkly. Notes Cas. (Pa.) 400. See, generally, Executions; Judgments.

Stay of execution.— Within a statute giving defendant in certain actions the right to enter security for stay of execution, it has been held that where judgment has been rendered against the original covenantor the terre-tenant and owner in fee simple of the ground out of which the rent issues, although not technically defendant, may enter security. Ellis *v.* Cadwallader, 14 Wkly. Notes Cas. (Pa.) 400. Stay of execution may sometimes be had on the furnishing of evidence by defendant that he is owner of a freehold within the county of a certain value. But on a rule to strike off a plea of freehold on a judgment for arrears of ground-rent, where the property pleaded as freehold is the lot out of which the rent issues and the rent is of recent origin, and no improvements have been made on the lot, and there is no evidence that the ground in that neighborhood has risen in value, the plea of freehold will be stricken off. Harrison *v.* Hyneman, 1 Phila. (Pa.) 204.

66. McCormick *v.* Connell, 6 Serg. & R. (Pa.) 151 (holding that before the owner of the rent can enter for non-payment he must make a demand for the precise amount due on the most notorious part of the land, although no one is in occupancy and there is nothing to distrain); Newman *v.* Rutter, 48 Pa. Super. Ct. 51.

Demand for rent.— A demand on the land is essential to the right of entry for non-payment of the rent. Robert *v.* Ristine, 2 Phila. (Pa.) 62. But in Maryland it is held that under the statute of 4 Geo. II, a demand for the rent and reëntry is not necessary and that the service of a copy of the declaration in ejectment is all that is required. And that the fact that the lease gives the right of reëntry if the rent should be in arrear for a prescribed term "the same being first lawfully demanded" makes no difference. Campbell *v.* Shipley, 41 Md. 81. And in New York the assignee of the rent can maintain ejectment without a demand where one-half year's or more rent is in arrears. Van Rensselaer *v.* Slingerland, 26 N. Y. 580. And a statutory notice has been held sufficient which did not state that the conditions of the lease had been broken. Van Rensselaer *v.* Smith, 27 Barb. (N. Y.) 104.

Requirement of seizin or possession by plaintiff.— And it has been held that the provision of a statute requiring as a condition precedent to the maintenance of an action for the recovery of real property or the possession thereof that plaintiff or his predecessor in title should have been seized or possessed of the premises in question within twenty years of the commencement of the action do not apply to an action to enforce a clause in a ground-rent deed reserving the right of

2. By Ejectment.[67] If there is no clause of reëntry in the deed reserving the ground-rent, payment cannot be enforced by ejectment.[68] But statutes giving to the lessor in an ordinary lease an action of ejectment on the non-payment of rent have been held applicable to leases reserving ground-rents.[69] And statutes abolishing the remedy by distress do not defeat the remedy of reëntry by ejectment.[70]

3. Evidence of Reëntry. Lapse of time alone is not sufficient to raise a presumption of reëntry. In order to raise such a presumption it must be connected with the fact that the tenant has abandoned the premises or left them vacant with rent in arrear.[71] The parties, however, may make a valid agreement as to what shall constitute evidence of reëntry.[72]

GROUP. A number of persons or things existing or brought together with or without interrelation, orderly form, or arrangement.[1]

GROUTING. As used in a contract for the construction of bridge piers, being laid flush with mortar.[2]

GROWING CROP.[3] A crop which exists in contemplation of law from the time the seed is deposited in the ground until after it is harvested;[4] an interest in land, and a part of the freehold.[5] As used in reference to levy of execution on any growing crop it imports that the crop is not come to maturity, but is green or not made.[6] (See Away-Going Crop; Emblements; Farm; Farm Product; Fruit; Grain; and, generally, Agriculture; Crops.)

GROWING UP IN CRIME. A term sometimes applied to a youth who is incorrigible.[7]

GRUB STAKE. A peculiar and novel character of contract, common in the early mining history, where two parties enter into a common venture, one furnishing the grub and the other the labor, in prospecting for valuable mining

reëntry in case of default in payment of the rent and failure to find sufficient distress upon the premises. Tyler *v.* Heidorn, 46 Barb. (N. Y.) 439.

67. Ejectment generally see Ejectment.

68. Kenege *v.* Elliot, 9 Watts (Pa.) 258.

69. Campbell *v.* Shipley, 41 Md. 81.

The remedy by ejectment is but a mode of enforcing the covenant for the payment of the rent or for taking advantage of the breach of the condition. Tyler *v.* Heidorn, 46 Barb. (N. Y.) 439; Main *v.* Green, 32 Barb. (N. Y.) 448.

70. Van Rensselaer *v.* Smith, 27 Barb. (N. Y.) 104.

71. Garrett *v.* Scouten, 3 Den. (N. Y.) 334.

72. Swoll *v.* Oliver, 61 Ga. 248. Where it was stipulated that in case the ground lessee should fail to pay two instalments of the rent he was to lose all rights and he consented to be ousted on a sworn demand of plaintiff and an order of court thereon, and that his improvements on the land should not stand in the way of the execution of the order expelling him, it was held that, on the default of the ground owner for a number of years to pay the rent, placing him *in mora* was not a condition precedent to his dispossession. New Orleans *v.* Camp, 105 La. 288, 29 So. 340.

1. Standard Dict. See also Hope *v.* Flentge, 140 Mo. 390, 399, 41 S. W. 1002, 47 L. R. A. 806.

Grouping instructions see 12 Cyc. 647.

2. Sullivan County *v.* Ruth, 106 Tenn. 85, 93, 59 S. W. 138. See also 19 Cyc. 108 note 56.

3. "Gathered or growing" crops see Carnagy *v.* Woodcock, 2 Munf. (Va.) 234, 239, 5 Am. Dec. 470.

Growing trees see 6 Cyc. 1050 note 49.

Growing wood and timber see 6 Cyc. 1081 note 61.

4. Wilkinson *v.* Ketler, 69 Ala. 435, 440. See 15 Cyc. 183; 14 Cyc. 972; 12 Cyc. 976 note 1.

"Growing annual crops" for many purposes are and always have been considered chattels. Kingsley *v.* Holbrook, 45 N. H. 313, 319, 86 Am. Dec. 173.

"All crops growing and to be grown" see Luce *v.* Moorhead, 73 Iowa 498, 499, 35 N. W. 598, 5 Am. St. Rep. 695.

Alfalfa is not exempt from taxation as "growing crops" under Pol. Code, § 3607, exempting growing crops from taxation. Miller *v.* Kern County, 137 Cal. 516, 525, 70 Pac. 549.

5. Steele *v.* Farber, 37 Mo. 71, 79 [*citing* Pratte *v.* Coffman, 27 Mo. 424; McIlvaine *v.* Harris, 20 Mo. 457, 64 Am. Dec. 196; 1 Cruise Dig.; Greenleaf Ev. § 59, note 1].

"Growing crops" are not land. Green *v.* Armstrong, 1 Den. (N. Y.) 550, 554.

6. Shannon *v.* Jones, 34 N. C. 206, 209.

7. Scott *v.* Flowers, 60 Nebr. 675, 682, 84 N. W. 81.

properties;[8] a contract by the terms of which one party is to furnish the necessary provisions, tools, powder, etc., and the other party agrees to prospect and locate mineral lands, and do the work necessary to the location of mining claims thereon, the interest thus acquired in the property to be held jointly by the parties.[9] (See, generally, MINES AND MINERALS.)

GUANO. A substance found in great abundance on some coasts or islands frequented by sea fowls, and composed chiefly of their excrement.[10] (Guano: Inspection and Branding of, see AGRICULTURE; INSPECTION. See also FERTILIZER.)

8. Berry *v.* Woodburn, 107 Cal. 504, 512, 40 Pac. 802, where it is said that such ventures are of joint and mutual benefit.

"Grub stake" is a term colloquially applied to a prospecting contract, and in its usual scope means simply a common venture, wherein one party, called the "outfitter," furnishes the supplies or "grub," and the other, called the "prospector," performs the labor, and all discoveries inure to the benefit of the parties in the proportion fixed by the agreement. Hartney *v.* Gosling, 10 Wyo. 346, 361, 68 Pac. 1118, 98 Am. St. Rep. 1005 [*citing* 2 Lindley Mines, § 858].

9. Meylette *v.* Brennan, 20 Colo. 242, 38 Pac. 75.

10. Webster Int. Dict.

"Prohibited from all guano islands" see Whiton *v.* Albany City Ins. Co., 109 Mass. 24, 29.

"Guano" as used in a policy of insurance does not include every kind of fertilizer used for agricultural purposes. Planters' Mut. Ins. Co. *v.* Engle, 52 Md. 468, 481.

GUARANTY

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* Author of "Notice of Acceptance in Contracts of Guaranty," 5 Columbia Law Review 215, and of "Demand on Principal Before Action Against Guarantor," 6 Columbia Law Review 229.

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CROSS-REFERENCES

For Matters Relating to:
Guaranty by:
Administrator, see EXECUTORS AND ADMINISTRATORS.
Agent, see PRINCIPAL AND AGENT.
Bank, see BANKS AND BANKING.
Carrier, see CARRIERS.
Corporation, see CORPORATIONS.
Executor, see EXECUTORS AND ADMINISTRATORS.
Infant, see INFANTS.
Insane Person, see INSANE PERSONS.
Married Woman, see HUSBAND AND WIFE.
Partner, see PARTNERSHIP.

For Matters Relating to — (*continued*)
Guaranty Insurance, see FIDELITY INSURANCE; GUARANTY INSURANCE.
Guaranty on Behalf of Corporation, see CORPORATIONS.
Guaranty Within Statute of Frauds, see FRAUDS, STATUTE OF.
Indemnity, see INDEMNITY.
Suretyship, see PRINCIPAL AND SURETY.
Usury, see USURY.
See also, generally, COMMERCIAL PAPER.

I. DEFINITION, GENERAL NATURE, AND KINDS.

A. In General. A guaranty[1] is a collateral undertaking by one person to be answerable for the payment of some debt or the performance of some duty or contract for another person who stands first bound to pay or perform.[2] There can only be a contract of guaranty where there is some principal or substantive liability to which it is collateral; if there is no debt, default, or miscarriage of a third person either present or prospective, there can be nothing upon which to base a contract of guaranty.[3] The chief characteristic of a guaranty being that

1. **English jurists and writers adopt the term "guarantee"** rather than "guaranty." Offord *v.* Davies, 12 C. B. N. S. 748, 9 Jur. N. S. 22, 31 L. J. C. P. 319, 6 L. T. Rep. N. S. 579, 10 Wkly. Rep. 758, 104 E. C. L. 748; Pope *v.* Andrews, 9 C. & P. 564, 38 E. C. L. 331; Kennaway *v.* Treleavan, 3 Jur. 1034, 9 L. J. Exch. 20, 5 M. & W. 498; Sorby *v.* Gordon, 30 L. T. Rep. N. S. 528; De Colyer Guar. 2.

The contract of guaranty (guarantee) is of very ancient date and appears indeed to be coeval with the first contracts recorded in history. 2 Story Contr. (5th ed.) 319; De Colyer Guar. 2.

2. La Rose *v.* Logansport Nat. Bank, 102 Ind. 332, 335, 1 N. E. 805.

Other definitions are: "An agreement by one person to answer to another for the debt, default or miscarriage of a third person." Buckingham *v.* Murray, 7 Houst. 176, 179, 30 Atl. 779; Lachman *v.* Block, (La. 1894) 15 So. 649, 651; Wallace *v.* Leber, 65 N. J. L. 195, 199, 47 Atl. 430; Hall *v.* Farmer, 5 Den. (N. Y.) 484, 487; Wood *v.* Bevan, 8 Montg. Co. Rep. (Pa.) 189, 191; Welsh *v.* Ebersole, 75 Va. 651, 656; Bowen *v.* Needles Nat. Bank, 87 Fed. 430, 440.

"A collateral undertaking to pay a debt owing by a third person in case the latter does not pay." Dole *v.* Young, 24 Pick. (Mass.) 250, 252; Gallagher *v.* Nichols, 60 N. Y. 438, 444; Johnston *v.* Chapman, 3 Penr. & W. (Pa.) 18, 19; Toppan *v.* Cleveland, etc., R. Co., 24 Fed. Cas. No. 14,099, 1 Flipp. 74, 77.

"A contract by which one person is bound to another for the fulfilment of the promise or engagement of a third party." 3 Kent Comm. 121; 2 Parsons Contr. 3; Story Pr. Notes 457.

"A contract in and of itself, but . . . also [having] relation to some other contract or obligation with reference to which it is collateral." Coleman *v.* Fuller, 105 N. C. 328, 329, 11 S. E. 175, 8 L. R. A. 380.

"A promise to answer for the payment of some debt or the performance of some duty in case of the failure of some person who in the first instance, is liable for such payment or performance." Redfield *v.* Haight, 27 Conn. 31, 37; Middletown Bank *v.* Magill, 5 Conn. 28, 70; Abbott *v.* Brown, 131 Ill. 108, 113, 22 N. E. 813; Gridley *v.* Capen, 72 Ill. 11, 13; Drake *v.* Markle, 21 Ind. 433, 436, 83 Am. Dec. 358; Gallagher *v.* Nichols, 60 N. Y. 438, 444, 16 Abb. Pr. N. S. 337; Barnett *v.* Wing, 62 Hun (N. Y.) 125, 128, 16 N. Y. Suppl. 567; Manrow *v.* Durham, 3 Hill (N. Y.) 584, 591; Andrews *v.* Pope, 126 N. C. 472, 475, 35 S. E. 817; Carter *v.* McGehee, 61 N. C. 431, 432; Spencer *v.* Carter, 49 N. C. 287, 289; Beeker *v.* Saunders, 28 N. C. 380, 381; Wood *v.* Bevan, 8 Montg. Co. Rep. (Pa.) 189, 191; Tidioute Sav. Bank *v.* Libbey, 101 Wis. 193, 196, 77 N. W. 182, 70 Am. St. Rep. 907; Parker *v.* Culvertson, 18 Fed. Cas. No. 10,732, 1 Wall. Jr. 149.

"[A] solemn assurance, covenant, or stipulation that something shall be or be done." Anderson L. Dict.

"A special contract and the guarantor is not in any sense a party to the note guaranteed." Ellis *v.* Brown, 6 Barb. (N. Y.) 282, 285.

"An undertaking by one person to be answerable for the payment of some debt, or the due performance of some contract or duty, by another person, who himself remains liable to pay or perform the same." Story Pr. Notes, § 457 [*quoted* in Abbott *v.* Brown, 131 Ill. 108, 113, 22 N. E. 813; Durham *v.* Manrow, 2 N. Y. 533, 548].

"An undertaking by one person that another shall perform his contract or fulfil his obligation, or that if he does not, the guarantor will do it for him." Gridley *v.* Capen, 72 Ill. 11, 13.

"An obligation for the ability or solvency of another." Leonard *v.* Wood, 2 Chest. Co. Rep. (Pa.) 329, 330.

3. There must be as a prerequisite to the contract of guaranty a primary liability of a third person which continues after the con-

it is collateral to some other contract or duty, if it can be seen that the person sought to be held is primarily liable, prior to the breach of the contract or duty by someone else, the conclusion at once follows that the contract in question is not one of guaranty;[4] and, although a contract is in form to answer for the debt or default of another, if its leading purpose is to secure some benefit to the promisor or to promote his interest, it will be regarded as an original undertaking.[5] On the other hand, although the word "guaranty" may be used when the engagement is an original and absolute one to pay the debt when it becomes due, that construction is put upon it only when it is plain that such was the intent of the parties.[6] The question as to whether a contract is one of original promise or of guaranty merely is one of fact to be determined from the circumstances surrounding the transaction.[7]

B. Absolute Guaranties. An absolute guaranty is one by which the guarantor is bound immediately upon the principal failing to perform his contract without further steps taken by any one or without further conditions to be performed.[8]

C. Conditional Guaranties. Where the guaranty is not enforceable immediately upon the default of the principal debtor but the guarantee is obliged to take some steps to fix the liability under the guaranty, such as diligently prosecuting the claim against the principal debtor, the guaranty is a conditional one.[9]

D. Continuing Guaranties. Continuing guaranties are those unrestricted guaranties which continue in force until revoked.[10]

E. Unlimited Guaranties. An unlimited guaranty is one which is unlimited either as to time or amount, or as to both time and amount.[11]

tract of guaranty is entered into. Kilbride *v.* Moss, 113 Cal. 432, 45 Pac. 812, 54 Am. St. Rep. 361; Gridley *v.* Capen, 72 Ill. 11.

Existence of a principal debtor is essential to a contract of guaranty. Carroll County Sav. Bank *v.* Strother, 22 S. C. 552.

4. Gridley *v.* Capen, 72 Ill. 11.

When promise deemed to create a primary liability.— Where one on selling stock guarantied to the purchaser that he would make up any deficit in dividends to a certain percentage he was held to have entered into a contract as principal, as the transaction was for his own benefit for a consideration moving to him as principal. Kernochan *v.* Murray, 111 N. Y. 306, 18 N. E. 868, 7 Am. St. Rep. 744, 2 L. R. A. 183. A contract by a corporation to retain one hundred dollars out of money due for each raft of logs run for it, and to pay the same to the creditor of the person running the logs, until the debt of such person is fully paid to such creditor, assumes that at least one hundred dollars will be due on each raft, and the burden is on the corporation to show that there was less than one hundred dollars due on any raft. Such a contract is not one of guaranty, continuing or otherwise; but creates an original indebtedness of the corporation to the creditor in the sum of one hundred dollars for each raft, unless a smaller sum is shown to be due thereon after deducting proper expenses. Malone *v.* Crescent City Mill, etc., Co., 77 Cal. 38, 18 Pac. 858. An agreement by which one promised to pay a debt of another on consideration of having the use of certain property was held to be a direct undertaking and not a guaranty and therefore was not required to be in writing. Humphreys *v.* St. Louis, etc., R. Co., 37 Fed. 307. But where one requests another to perform services on behalf of a third person and tells him that "I will see you paid for your trouble," such promise is not direct but in the nature of a guaranty implying that the person for whom the services are rendered is primarily liable. Sedgwick *v.* Bliss, 23 Nebr. 617, 37 N. W. 483. So where one agrees to become responsible for payment of goods furnished to a third person and credit is in fact given to the third person who becomes liable for the price, the one who has agreed to so become responsible cannot be held as an original contractor but at most as a mere guarantor. Harris *v.* Frank, 81 Cal. 280, 22 Pac. 856.

5. Crane *v.* Wheeler, 48 Minn. 207, 50 N. W. 1033. The mere recital in an instrument which contains all the essentials of a direct original promise that it is given to secure the payment of a debt of another does not stamp the instrument as a contract of guaranty. Clanin *v.* Esterly Harvesting Mach. Co., 118 Ind. 372, 21 N. E. 35, 3 L. R. A. 863.

Any technical term employed to designate the contract is of little importance if the nature of the contract is clearly indicated by other language used in it. Manning *v.* Alger, 78 Iowa 185, 42 N. W. 643.

6. Hernandez *v.* Stilwell, 7 Daly (N. Y.) 360; Kemmerer *v.* Wilson, 31 Pa. St. 110.

7. Harris *v.* Frank, 81 Cal. 280, 22 Pac. 856.

8. See *infra*, VII, A, 4; VII, B, 2; VII, C, 2.

9. See *infra*, VII, A. 2.

10. See *infra*, V, G.

11. It may be a standing or continuing guaranty intended to cover transactions with-

F. Limited Guaranties. Limited guaranties are those in which the guarantor specifies a time during which the guaranty shall operate or fixes a maximum amount of liability.[12]

G. Temporary Guaranties. Temporary guaranties are those in which the guarantor limits the time during which credit may be extended on the faith of the guaranty.[13]

H. General Guaranties. A general guaranty is one for acceptance by the public generally, and is so written that any one to whom it is presented may act upon it, and having done so, may hold the guarantor responsible thereon.[14] A general guaranty is also defined as one in which none of the terms are fixed in the writing and to which the law therefore adds the condition that there shall be due and unsuccessful diligence used by the creditor to collect the claim from the principal debtor unless it is apparent that all diligence would be without avail.[15]

I. Special Guaranties. A special guaranty is one on which the guarantor is responsible only to the person addressed in the writing itself.[16]

J. Letters of Credit. A letter of credit is a written proposal to a particular person [17] or to the general public [18] to stand as surety or guarantor for the person named in the letter for an amount mentioned therein or for an indefinite amount, which may be accepted by such particular person addressed, or if general, by some one of the general public.[19]

out limit. Such a guaranty is not binding till acted upon and may be withdrawn at any time before its terms are accepted. Martin *v.* Wright, 6 Q. B. 917, 9 Jur. 178, 14 L. J. Q. B. 142; Carpenter *v.* Treasury Solicitor, 7 P. D. 235, 46 J. P. 663, 51 L. J. P. & Adm. 91, 46 L. T. Rep. N. S. 821, 31 Wkly. Rep. 108.

12. See *infra*, V, E; V, F.

13. See *infra*, V, F; V, G.

14. It is a general promise to any one accepting it to be answerable for a debt or duty in case of the failure or default of another person, who is liable in the first instance. Tucker *v.* Blaudin, 48 Hun (N. Y.) 439, 1 N. Y. Suppl. 842; Lonsdale *v.* Lafayette Bank, 18 Ohio 126; Lowry *v.* Adams, 22 Vt. 160.

15. Ritchie *v.* Walter, 166 Pa. St. 604, 31 Atl. 334.

16. Although others may fulfil the terms of the guaranty, they thereby secure no rights against the guarantor.

Delaware.— Taylor *v.* McClung, 2 Houst. 24.

Georgia.— Johnson *v.* Brown, 51 Ga. 498.

Illinois.— Peoria Second Nat. Bank *v.* Diefendorf, 90 Ill. 396.

New York.— Evansville Nat. Bank *v.* Kaufmann, 93 N. Y. 273, 45 Am. Rep. 204; Penoyer *v.* Watson, 16 Johns. 100; Walsh *v.* Bailie, 10 Johns. 180.

Pennsylvania.— Bussier *v.* Chew, 5 Phila. 70.

Tennessee.— Allison *v.* Rutledge, 5 Yerg. 193.

Texas.— Smith *v.* Montgomery, 3 Tex. 199.

Vermont.— Michigan State Bank *v.* Peck, 28 Vt. 200, 65 Am. Dec. 234.

Virginia.— Wadsworth *v.* Allen, 8 Gratt. 174, 56 Am. Dec. 137.

Canada.— Royal Canadian Bank *v.* Payne, 19 Grant Ch. (U. C.) 180; Stevenson *v.* McLean, 11 U. C. C. P. 208; Van Wart *v.* Carpenter, 21 U. C. Q. B. 320.

17. A special letter of credit is one addressed to a particular person and he alone has any right to act upon it. Should any one else make advances thereon they will not be binding upon the writer of the letter. Penoyer *v.* Watson, 16 Johns. (N. Y.) 100; Walsh *v.* Bailie, 10 Johns. (N. Y.) 180; Dry *v.* Davy, 10 A. & E. 30, 3 Jur. 315, 8 L. J. Q. B. 209, 2 P. & D. 249, 37 E. C. L. 41; Arlington *v.* Merricke, 2 Saund. 403.

18. A general letter of credit is one addressed in general to any person to whom it may be presented by the holder, and any such person may advance upon it and thereby make a legal binding contract with the drawer of the letter. A privity of contract at once comes into existence which the courts recognize to be as binding as if the letter had been directed personally to the one thus making the advances. Pollock *v.* Helm, 54 Miss. 1, 28 Am. Rep. 342; Lonsdale *v.* Lafayette Bank, 18 Ohio 126; Adams *v.* Jones, 12 Pet. (U. S.) 207, 9 L. ed. 1058. Although a general letter of credit is not negotiable in the full sense and proper meaning of that term, it may be acted upon by any one to whom it is exhibited so as to make it a contract with himself which may be enforced in his own name at law or in equity. Roman *v.* Serna, 40 Tex. 306; Lowry *v.* Adams, 22 Vt. 160. A general letter of credit has been held equivalent to the case of one assuring another that he will accept and pay bills drawn by a third person in favor of such other person. Pollock *v.* Helm, 54 Miss. 1, 28 Am. Rep. 342. Agreement for acceptance of bill of exchange see COMMERCIAL PAPER, 7 Cyc. 766 *et seq.*

19. Union Bank *v.* Coster, 3 N. Y. 203, 53 Am. Dec. 280; Birckhead *v.* Brown, 5 Hill (N. Y.) 634; Adams *v.* Jones, 12 Pet. (U. S.) 207, 9 L. ed. 1058. See also BANKS AND BANKING, 5 Cyc. 522.

A letter of credit has been defined to be a

K. The Parties Defined. The one executing the guaranty is called the guarantor; the one to whom the guaranty is given is the guarantee or creditor; and the person whose debt, conduct, or contract is guarantied is known as the principal or principal debtor.[20]

II. DISTINGUISHED FROM OTHER CONTRACTS.[21]

A. Suretyship — 1. In General. While guaranty is a branch of suretyship[22] the two subjects have many distinguishing features. A surety is primarily liable on his contract from the beginning; his obligation springs out of no breach or condition; but the liability of the guarantor is fixed only by the happening of the prescribed condition at a time after the contract itself is made.[23] A surety is bound with the principal on the identical contract under which the liability of the principal accrues; a guarantor becomes bound for the performance of a prior or collateral contract upon which the principal is alone indebted.[24] The contract of the surety is made at the same time and jointly with that of his principal; while that of the guarantor is a contract separate and distinct from that of his principal; it may be made at the same time and upon the same consideration, but it is often made later and upon a separate consideration; the obligation of the surety is primary, that of the guarantor is secondary.[25] The contract of the surety is a

letter of request whereby one person requests some other person to advance money or give credit to a third person and promises that he will repay or guaranty the same to the person making the advancement. 2 Daniel Neg. Instr. 666.

While letters of credit resemble bills of exchange in some particulars they differ from such bills in many ways. "(1) [A letter] is not payable absolutely, but only in the event that the letter bearer may use it; . . . (2) It is not necessarily for a certain amount. (3) It is not necessary that it be addressed to a particular person. (4) The letter writer in many cases becomes the principal and only debtor for the advances, and is not in such cases at all like the drawer of a bill. And (5) he is never, like the drawer of a bill, entitled to immediate notice, if the letter is not complied with." Daniel Neg. Instr. par. 1794.

20. Black L. Dict.; Bouvier L. Dict.

21. **Distinguished** from an assignment see Welsh *v.* Ebensole, 75 Va. 651.

22. **Every guaranty is a contract of suretyship** simply because it is an engagement to answer in some way for another; but it is a contract of suretyship of a peculiar nature carrying with it certain incidents as the result of the characteristics which limit its scope. 10 Am. L. Reg. 435.

It would be difficult to define the commercial contract of guaranty so clearly as to reconcile all the adjudged cases lying upon the confines between guaranty and suretyship.

Alabama.— Saint *v.* Wheeler, etc., Mfg. Co., 95 Ala. 362, 10 So. 539, 36 Am. Rep. 210.

Indiana.— Gaff *v.* Sims, 45 Ind. 262; McMillan *v.* Bull's Head Bank, 32 Ind. 11, 2 Am. Rep. 323; Sullivan *v.* Cluggage, 21 Ind. App. 667, 52 N. E. 110.

Iowa.— Singer Mfg. Co. *v.* Littler, 56 Iowa 601, 9 N. W. 905.

Massachusetts.— Oxford Bank *v.* Haynes, 8 Pick. 423, 19 Am. Dec. 334.

Pennsylvania.— Kramph *v.* Hatz, 52 Pa. St. 525; Reigart *v.* White, 52 Pa. St. 438.

West Virginia.— Kearns *v.* Montgomery, 4 W. Va. 29.

See 25 Cent. Dig. tit. "Guaranty," § 4.

23. Parsons Notes and Bills, p. 117, § 2.

The one is the insurer of the debt, the other the insurer of the solvency of the debtor.— It is said in Kramph *v.* Hatz, 52 Pa. St. 525, "[A surety] by his contract . . . undertakes to pay if his debtor do not, the guarantor undertakes to pay if the debtor cannot." See also Dole *v.* Young, 24 Pick. (Mass.) 250. What is known in some jurisdictions as a conditional guaranty is distinguished from the contract of suretyship in this: the former is an engagement to pay in default of solvency in the debtor provided due diligence be used to obtain payment from him; the contract of suretyship assumes a direct liability to the creditor for the act to be performed; the guarantor undertakes that his principal is able to perform while the surety assumes to perform the contract of the principal debtor if he should not. Reigart *v.* White, 52 Pa. St. 438. A guaranty of payment, however, as will be shown in another part of this article, involves an absolute liability on failure of the principal debtor to perform. See *infra*, VII, A, 3; VII, B.

24. Singer Mfg. Co. *v.* Littler, 56 Iowa 601, 9 N. W. 905.

25. *Alabama.*— Walker *v.* Forbes, 25 Ala. 139, 6 Am. Dec. 489.

Illinois.— Abbott *v.* Brown, 30 Ill. App. 376.

Indiana.— Cole *v.* Merchants' Bank, 60 Ind. 350; Richwine *v.* Scovill, 54 Ind. 150; Virden *v.* Ellsworth, 15 Ind. 144; Smith *v.* Bainbridge, 6 Blackf. 12.

Massachusetts.— Courtis *v.* Dennis, 7 Metc. 510; Dole *v.* Young, 24 Pick. 250.

Nebraska.— Mowery *v.* Mast, 9 Nebr. 445, 4 N. W. 69, holding guarantor of a note not jointly liable with maker.

direct original agreement with the obligee that the very thing contracted for shall be done; a guarantor enters into a cumulative collateral engagement by which he agrees that his principal is able to and will perform a contract which he has made or is about to make, and then if he fails he will, upon being notified thereof, pay the resulting damages.[26] When everything has been said, however, the difference between the contract of guaranty and of suretyship is in many cases of a very shadowy kind;[27] and a transaction which is called in some jurisdictions an absolute guaranty is denominated by other courts a contract of suretyship.[28]

2. Use of Technical Words and Phrases. The nature of the contract is not in general conclusively determined by the use of any particular form of words.[29]

Oregon.— Tyler *v.* Tualatin Academy, etc., 14 Oreg. 485, 13 Pac. 329.

Pennsylvania.—Hartman *v.* Lancaster First Nat. Bank, 103 Pa. St. 581; Zahm *v.* Lancaster First Nat. Bank, 103 Pa. St. 576; Mizner *v.* Spier, 96 Pa. St. 533; Camden, etc., R. Co. *v.* Pennypacker, 21 Wkly. Notes Cas. 118.

United States.— Hall *v.* Weaver, 34 Fed. 104, 13 Sawy. 188.

West Virginia.— Kearnes *v.* Montgomery, 4 W. Va. 29.

See 25 Cent. Dig. tit. "Guaranty," § 4.

Suretyship.— If the sponsor for another assumes a primary and direct liability, although it may be conditional in the sense of not being immediate but postponed until some subsequent occurrence, he is a surety; if his responsibility is secondary and collateral to that of the principal he is a guarantor. Saint *v.* Wheeler, etc., Mfg. Co., 95 Ala. 362, 10 So. 539, 36 Am. St. Rep. 210. In most cases the joint execution of a contract by the principal and another operates to exclude the idea of a guaranty and is in all cases a circumstance pointing toward suretyship. Saint *v.* Wheeler, etc., Mfg. Co., 95 Ala. 362, 10 So. 539, 36 Am. St. Rep. 210. Where upon a written agreement for the purchase of property a third person indorses a writing as follows: "I hold myself with them responsible for their part of the above contract," it is held that the contract is one of suretyship and not of guaranty. Kirby *v.* Studebaker, 15 Ind. 45.

Parties in suit to enforce liability.— A guarantor cannot as a general rule be sued with his principal because his engagement is not jointly with the latter but is strictly an individual contract. Clark *v.* Morgan, 13 Ill. App. 597; Gaff *v.* Sims, 45 Ind. 262; McMillan *v.* Bull's Head Bank, 32 Ind. 11, 2 Am. Rep. 323. In other states, however, it is held that one who indorses upon the instrument evidencing the principal obligation a contract absolutely guarantying its payment may be sued jointly with the principal debtor. Lucy *v.* Wilkins, 33 Minn. 21, 21 N. W. 849; Hammel *v.* Beardsley, 31 Minn. 314, 17 N. W. 858.

26. Gage *v.* Lewis, 68 Ill. 604; Abbott *v.* Brown, 30 Ill. App. 376; Clark *v.* Morgan, 13 Ill. App. 597; Ward *v.* Wilson, 100 Ind. 52, 50 Am. Rep. 763; Milroy *v.* Quinn, 69 Ind. 406, 35 Am. Rep. 227; Singer Mfg. Co. *v.* Littler, 56 Iowa 601, 9 N. W. 905; Woods *v.* Sherman, 71 Pa. St. 100; Reigart *v.* White, 52 Pa. St. 438. In Kearnes *v.* Montgomery, 4 W. Va. 29, 40, Maxwell, J., sets forth the distinction between guaranty and suretyship as follows: "The contract of a guarantor is collateral and secondary. It differs in that respect generally, from the contract of a suretyship which is direct; and in general the guarantor contracts to pay if, by the use of due diligence, the debt cannot be made out of the principal debtor, while the surety undertakes directly for the payment, and so is responsible at once if the principal debtor makes default. Where one covenanted with another that the payments due under an agreement of a third person should be made in the manner and form mentioned in the agreement, the contract was held to be one of suretyship. Levering *v.* Willard, 2 Pennyp. (Pa.) 352.

27. In Jamieson *v.* Holm, 69 Ill. App. 119, the court said that the difference between sureties who directly and absolutely undertake to pay and guarantors who undertake that the principal shall pay is merely formal. A contract of guaranty may be either collateral or independent. Holm *v.* Jamieson, 173 Ill. 295, 50 N. E. 702, 45 L. R. A. 846.

In England the distinction between "guaranty" and "suretyship" is not emphasized. In De Colyer Guar. [*citing* Courtis *v.* Dennis, 7 Metc. (Mass.) 510; Kearnes *v.* Montgomery, 4 W. Va. 29] the author in note (A), page 1, says: "It seems in America, there is a distinction between a surety and a guarantor."

28. Frechie *v.* Drinkhouse, 4 Wkly. Notes Cas. (Pa.) 298.

In Louisiana a distinction is made between letters of credit contemplating a future engagement on the part of its bearer and a promise to guaranty the payment of an existing debt contracted by a third person. In the former case the person to whom the letter is addressed and who acts under it is regarded in a qualified sense as the agent of the writer, while in the latter case the contract is regarded as one of suretyship. Gasquet *v.* Thorn, 14 La. 506.

In Pennsylvania it has been held that the thing which distinguishes guaranty from suretyship is whether the contract fixes the time of default on the part of the principal debtor; if it does not it is held to be one of guaranty, and if it defines the time of default when the surety is to pay or see the debt paid it is one of suretyship. McBeth *v.* Newlin, 15 Wkly. Notes Cas. 129.

29. Carter *v.* McGehee, 61 N. C. 431, where

3. Liability Assumed by Obligors in Official Bonds, Etc. On the theory that the liability of a guarantor is to pay any damages which may accrue on account of the default of the principal debtor, it has been held that a surety upon a bond given to secure the faithful performance of his duties by a person occupying some official position or position of trust assumes the liability of a guarantor and not that of a surety.[30]

B. Indemnity. There are important differences between a contract of guaranty and one of indemnity.[31] The former being a collateral undertaking presupposes some contract or transaction as principal thereto;[32] while a contract of indemnity is original and independent, to which there is no collateral contract and with respect to which there is no remedy against the third party.[33] As contracts of indemnity are not required by the statute of frauds to be in writing while contracts of guaranty must be evidenced by a sufficient writing in order to be enforceable,[34] the courts have been frequently called upon to determine whether parol contracts belong to the one class or to the other.[35]

one who bound himself as "security" for another was held to be a guarantor and not a surety. Thus a writing to the effect that "I hereby guaranty," etc., has been held to impose the liability of a surety. Sherman *v.* Roberts, 1 Grant (Pa.) 261.

"Responsible."— A promise to be "responsible" for the contract of another has been held to impose merely the contingent liability of a guarantor. Bickel *v.* Auner, 9 Phila. (Pa.) 499 [*following* Gilbert *v.* Henck, 30 Pa. St. 205]. *Contra,* Frechie *v.* Drinkhouse, 4 Wkly. Notes Cas. (Pa.) 298 [*criticizing* and *overruling* Bickel *v.* Auner, *supra*]. *Compare* Duval *v.* Trask, 12 Mass. 154, as to effect of use of words "responsible for them."

"Security."— In Rudy *v.* Wolf, 16 Serg. & R. (Pa.) 79, one who on assigning a bond entered into a covenant with the assignee "to stand security for the payment of it" was held as a guarantor. On the other hand an agreement to become "security" for another has been held to be the undertaking of a surety. Marberger *v.* Pott, 16 Pa. St. 9, 55 Am. Dec. 479. See also Allen *v.* Hubert, 49 Pa. St. 259; Marberger *v* Pott, 16 Pa. St. 9, 55 Am. Dec. 479. Where one signed his name at the end of a document below that of another party adding the words "security for the fulfillment of the above," it was held that he signed not as guarantor but as surety. Craddock *v.* Armor, 10 Watts (Pa.) 258.

"Surety."— A writing by which the maker agreed "to stand as surety for," etc., was held to indicate the undertaking of a surety. Watson *v.* Beabout, 18 Ind. 281. To same effect see Scott *v.* Swain, 4 Pa. Cas. 471, 8 Atl. 24. See also Principal and Surety.

30. La Rose *v.* Logansport Nat. Bank, 102 Ind. 332, 1 N. E. 805. Where a debtor executes a bond with sureties conditioned for the performance of a previous contract by him, stipulating that the principal shall well and truly perform such contract, and that the bond shall be a continuous guaranty, the contract is in its nature and by its very terms a contract of guaranty. Weed Sewing Mach. Co. *v.* Winchel, 107 Ind. 260, 7 N. E. 881.

A bond for the faithful performance of the duties of one's office is a contract of guaranty that, in the event of failure, the guarantor will answer the consequences; and it is not a contract of suretyship, where the promisor engages to perform the original undertaking if the principal fails. La Rose *v.* Logansport Nat. Bank, 102 Ind. 332, 1 N. E. 805. See Closson *v.* Billman, 161 Ind. 610, 69 N. E. 449. *Contra,* Saint *v.* Wheeler, etc., Mfg. Co., 95 Ala. 362, 10 So. 539, 36 Am. St. Rep. 210 (holding that a bond conditioned on the faithful performance by the principal of his duties under a contract of employment is a contract of suretyship and not of guaranty); Nelson *v.* Howe Mach. Co., 10 Ky. L. Rep. 37 (holding that the surety in a bond executed by an agent to his principal for the failure in the performance of his duties is not entitled to notice of the acceptance of the bond, the bond not being a contract of guaranty but an original undertaking of suretyship). To same effect see Page *v.* White Sewing Mach. Co., 12 Tex. Civ. App. 327, 34 S. W. 988.

31. See cases cited *infra,* note 33 *et seq.*

32. See *supra,* I, A.

33. Dickenson *v.* Colter, 45 Ind. 445; Dole *v.* Young, 24 Pick. (Mass.) 250. The contract of indemnity is an original and independent one. Between the promisor and promisee there is a direct privity, while there is no debt owing by the third person to the promisee and there is no remedy against such third person. Anderson *v.* Spence, 72 Ind. 315, 37 Am. Rep. 162.

Indemnity defined.— To indemnify is to secure or save harmless against loss or damage of a specified character which may happen in the future; to compensate or reimburse one for a loss previously incurred. Bouvier L. Dict. An indemnity is something given to a person to prevent his suffering damage. Peck *v.* Wakely, 2 McCord (S. C.) 279.

Use of word "guaranty."— A writing indorsed on a contract "in consideration of one dollar . . . , I hereby guarantee the full and fair performance of the . . . [within] agreements" is a guaranty, and not a contract of indemnity. Redfield *v.* Haight, 27 Conn. 31.

34. See Frauds, Statute of, *ante,* p. 147.

35. Jones *v.* Bacon, 145 N. Y. 446, 40 N. E. 216; Sanders *v.* Gillespie, 59 N. Y.

C. Indorsement.[36] An indorser is a kind of surety. His responsibility is much like that of a guarantor. Strictly speaking, however, indorsement applies only to negotiable paper, although by statute many states authorize the transfer of non-negotiable paper by indorsement and impose upon the indorser of such paper much of the responsibility of one indorsing negotiable paper.[37] But one may guaranty the collection or payment of a promissory note or make any other special undertaking in relation to it without being regarded either as maker or indorser of the original instrument, and an express contract of guaranty cannot under any circumstances be converted into a contract of indorsement.[38]

D. Warranty. Guaranty is distinguished from warranty, although they have many corresponding features.[39] They are both collateral contracts. But, as heretofore shown, guaranty is an undertaking to answer for another's liability,[40] while warranty is an undertaking that a certain fact regarding the subject of a

250; Chapin *v.* Merrill, 4 Wend. (N. Y.) 657; Wildes *v.* Dudlow, L. R. 19 Eq. 198, 44 L. J. Ch. 341, 23 Wkly. Rep. 435; Thomas *v.* Cook, 8 B. & C. 728, 7 L. J. K. B. O. S. 49, 3 M. & R. 444, 15 E. C. L. 358.

The English courts have been much in conflict on this question. Guild *v.* Conrad, [1894] 2 Q. B. 885, 63 L. J. Q. B. 721, 71 L. T. Rep. N. S. 140, 9 Reports 746, 42 Wkly. Rep. 642; Wildes *v.* Dudlow, L. R. 19 Eq. 198, 44 L. J. Ch. 341, 23 Wkly. Rep. 435; Green *v.* Cresswell, 10 A. & E. 453, 4 Jur. 169, 9 L. J. Q. B. 63, 2 P. & D. 430, 37 E. C. L. 250; Thomas *v.* Cook, 8 B. & C. 728, 7 L. J. K. B. O. S. 49, 3 M. & R. 444, 15 E. C. L. 358; Hargreaves *v.* Parsons, 14 L. J. Exch. 250, 13 M. & W. 561. The weight and final conclusion of English authorities seems to be that the statute of frauds applies to parol guaranties but not to parol indemnities. And the conclusion seems to be put upon the theory that a guaranty is a promise *to* another person in his capacity as *creditor* to secure the payment of a debt payable *to* him, whereas an indemnity is a promise to another person in his capacity as *debtor* to secure the repayment of a debt payable *by* him. See cases cited *supra*.

36. See COMMERCIAL PAPER, 7 Cyc. 658.

37. See cases cited *infra*, this and note 38.

There seems to be no difference between the undertaking of a general guarantor and that of an indorser except that the liability of the latter, being a party to the note, is governed by the law merchant while the undertaking of the former is construed by the general law of contracts. Each undertakes that the maker will pay the note at maturity and in case of being compelled to pay it for the principal, each has recourse upon the principal to recover the amount paid. Jones *v.* Goodwin, 39 Cal. 493, 2 Am. Rep. 473.

38. Miller *v.* Gaston, 2 Hill (N. Y.) 188.

Illustrations.— One who indorses on a promissory note a writing to the effect that he warrants the collection of the note is liable, not as an indorser but as the party to a special contract, which might have been given on a separate piece of paper as well as on the back of the note. Lamourieux *v.* Hewit, 5 Wend. (N. Y.) 307. Where on the day of the maturity of the note a stranger to it indorses upon the back thereof a writing guarantying the payment "without protest," his contract is that of a technical guarantor. Zahn *v.* Lancaster First Nat. Bank, 103 Pa. St. 576. An indorsement on a note of the words "we guaranty payment" is a guaranty and not a contract of suretyship or mere indorsement. Sample *v.* Martin, 46 Ind. 226. One who wrote upon the back of a promissory note words to the effect that he assigned the note and indorsed "prompt payment of it" has been held as a guarantor and not as an indorser. Tatum *v.* Bonner, 27 Miss. 760. An indorsement in blank of a note by a stranger after its delivery has been held to constitute *prima facie* a contract of guaranty. Fuller *v.* Scott, 8 Kan. 25.

Whether a stranger indorsing a note in blank before or after delivery assumes the liability of an indorser or of a guarantor see COMMERCIAL PAPER, 7 Cyc. 660.

Writing contract of guaranty over blank indorsement see COMMERCIAL PAPER, 7 Cyc. 802, 803.

39. In legal contemplation there is a wide difference between warranty and guaranty. In law the term "warranty" is an engagement or understanding forming part of a transaction and is an absolute undertaking or liability on the part of the warrantor. Masons' Union L. Ins. Assoc. *v.* Brockman, 20 Ind. App. 206, 50 N. E. 493.

Originally guaranty and warranty signified the same thing and were identical in their meaning. They are derived from the same word in French "garantir." Ayres *v.* Findley, 1 Pa. St. 501; Parsons Contr. 493. And, as in the case of guaranty (see *infra*, III, C, 1), no particular form of words is required to express a contract of warranty (Sturges *v.* Circleville Bank, 11 Ohio St. 153, 78 Am. Dec. 296).

The word "guaranty" is sometimes used in the sense of "warranty" (Field *v.* Lamson, etc., Mfg. Co., 162 Mass. 388, 38 N. E. 1126, 27 L. R. A. 136), as where the word "guaranty" is used in a contract of sale of goods in connection with an affirmance by the seller of the quality and character of the goods sold (Martinez *v.* Earnshaw, 36 Wkly. Notes Cas. (Pa.) 498; Accumulator Co. *v.* Dubuque St. R. Co., 64 Fed. 70, 12 C. C. A. 37).

40. See *supra*, I, A.

contract is what it has been represented to be,[41] and relates to some agreement made ordinarily by the party who makes the warranty.[42] While a verbal warranty is just as valid and enforceable as if it were in writing,[43] on account of the statute of frauds the same is not true of a guaranty.[44]

III. Essentials to Valid Contract of Guaranty.

A. Mutuality of Assent and Acceptance — 1. Mutual Assent of Parties. Like other contracts a guaranty requires the concurrent or mutual assent of the minds of the parties.[45]

2. Unaccepted Offer and Its Revocation. A mere offer to guaranty the payment of the debt of another does not amount to a guaranty;[46] and before acceptance of the offer it may be revoked as can any other offer.[47]

3. Notice of Acceptance — a. When Required — (i) *Rule Stated.* An undertaking of guaranty is primarily an offer and does not become a binding obligation until it is accepted and notice of the acceptance given to the guarantor.[48] Such acceptance is not shown by the mere performance of acts in reliance upon the offer; the one to whom the offer is made must notify the one making the offer of his acceptance thereof or of his intention to act upon it,[49] the rule differing from

41. The term "warranty" is generally understood as an absolute undertaking *in præsenti* as well as *in futuro* against the defect or for the quality or quantity contemplated by the parties in the subject-matter of the contract. Sturges *v.* Circleville Bank, 11 Ohio St. 153, 78 Am. Dec. 296.

42. Wylie *v.* Athol, 150 Mass. 426, 23 N. E. 311, 6 L. R. A. 342.

43. Lindsay *v.* Davis, 30 Mo. 406.

44. See Frauds, Statute of.

45. Fellows *v.* Prentiss, 3 Den. (N. Y.) 512, 45 Am. Dec. 484; Hoffmann *v.* Mayaud, 93 Fed. 171, 35 C. C. A. 256. In Davis Sewing Mach. Co. *v.* Richards, 115 U. S. 524, 527, 6 S. Ct. 173, 29 L. ed. 480 [*following* Davis *v.* Wells, 104 U. S. 159, 26 L. ed. 686], it was said: "Those rules may be summed up as follows: A contract of guaranty, like every other contract, can only be made by the mutual assent of the parties. If the guaranty is signed by the guarantor at the request of the other party, or if the latter's agreement to accept is contemporaneous with the guaranty, or if the receipt from him of a valuable consideration, however small, is acknowledged in the guaranty, the mutual assent is proved, and the delivery of the guaranty to him or for his use completes the contract. But if the guaranty is signed by the guarantor without any previous request of the other party, and in his absence, for no consideration moving between them except future advances to be made by the principal debtor, the guaranty is in legal effect an offer or proposal on the part of the guarantor, needing an acceptance by the other party to complete the contract."

46. Bushnell *v.* Church, 15 Conn. 406; Sollee *v.* Meugy, 1 Bailey (S. C.) 620; Wilkins *v.* Carter, 84 Tex. 438, 19 S. W. 997 [*affirming* (Civ. App. 1895) 29 S. W. 1102].

Intention of parties governs.— In determining whether a transaction amounts to a present undertaking of guaranty or only to a mere offer to enter into a contract of guaranty by some subsequent proceeding, the question turns, not on the mere use of the present or future tense, but depends upon whether the words used indicate an intention to be thereby bound or whether they indicate that something further is to be done on the part of the one sought to be held as guarantor before the obligation shall attach. McNaughton *v.* Conklings, 9 Wis. 316.

47. Offord *v.* Davies, 12 C. B. N. S. 748, 9 Jur. N. S. 22, 31 L. J. C. P. 319, 6 L. T. Rep. N. S. 579, 10 Wkly. Rep. 758, 104 E. C. L. 748.

At any time before it is delivered or accepted a guarantor may revoke his guaranty. Potter *v.* Gronbeck, 117 Ill. 404, 7 N. E. 586.

48. Saint *v.* Wheeler, etc., Mfg. Co., 95 Ala. 362, 10 So. 539, 36 Am. St. Rep. 210; Walker *v.* Forbes, 25 Ala. 139, 60 Am. Dec. 498; Roberts *v.* Griswold, 35 Vt. 496, 84 Am. Dec. 641; Davis Sewing Mach. Co. *v.* Richards, 115 U. S. 524, 6 S. Ct. 173, 29 L. ed. 480. See Powers *v.* Bumcratz, 12 Ohio St. 273.

But in England even an offer of guaranty becomes binding on a guarantor without other acceptance by the guaranty than acting under it and it is esteemed the duty of the person to whom such offer is delivered to expressly dissent therefrom, if it be his intention not to accept and within a reasonable time, otherwise his acceptance of the offer will be implied. Lachman *v.* Block, (La. 1894) 15 So. 649. In Douglass *v.* Howland, 24 Wend. (N. Y.) 35, in which the question at issue was whether it was necessary to show notice of the default of the principal debtor, it was said that all the cases requiring notice of acceptance of a guaranty are American and depart from the rule of common law and from the doctrine as laid down by the English cases.

49. *Alabama.*— Cahuzac *v.* Samini, 29 Ala. 288; Walker *v.* Forbes, 25 Ala. 139, 60 Am. Dec. 498.

that applicable to contracts in general, which is, that where a party offers to do a thing in a certain event which may become known to him or with which he can make himself acquainted, he is not entitled to notice of acceptance unless he specifically stipulates for it.[50] Such notice of acceptance is as necessary in a case of a continuing guaranty as in that of a guaranty limited to a single transaction.[51]

Connecticut.— Rapelye *v.* Bailey, 3 Conn. 438, 8 Am. Dec. 199.

Delaware.— Farmers' Bank *v.* Tatnall, 7 Houst. 287, 31 Atl. 879; Taylor *v.* McClung, 2 Houst. 24.

Illinois.— Sears *v.* Swift, 66 Ill. App. 496; Neagle *v.* Sprague, 63 Ill. App. 25; Ruffner *v.* Love, 33 Ill. App. 601; Newman *v.* Streator Coal Co., 19 Ill. App. 594.

Indiana.— Wills *v.* Ross, 77 Ind. 1, 40 Am. Rep. 279; Milroy *v.* Quinn, 69 Ind. 406, 35 Am. Rep. 227.

Kentucky.— Estey *v.* Murphy, 7 Ky. L. Rep. 596.

Maine.— Howe *v.* Nickels, 22 Me. 175; Seaver *v.* Bradley, 6 Me. 60.

Massachusetts.— Mussey *v.* Rayner, 39 Mass. 223.

Minnesota.— Winnebago Paper Mills *v.* Travis, 56 Minn. 480, 58 N. W. 36.

Missouri.— Central Sav. Bank *v.* Shine, 48 Mo. 456, 8 Am. Rep. 112; Smith *v.* Anthony, 5 Mo. 504.

Texas.— Mayfield *v.* Wheeler, 37 Tex. 256; Wilson *v.* Childress, 2 Tex. App. Civ. Cas. § 425.

United States.— Lee *v.* Dick, 10 Pet. 482, 9 L. ed. 503.

See 25 Cent. Dig. tit. "Guaranty," § 9 *et seq.*

Other statements of rule.— Where no present consideration passes to one making an offer of guaranty and the one to whom the offer is made has not requested a guaranty and the offer is presented not immediately through the guarantor but through the third person, some notice to the guarantor of the fact that the creditor has acted on the guaranty is required. Winnebago Paper Mills *v.* Travis, 56 Minn. 480, 58 N. W. 36. If the guaranty is signed by the guarantor without any previous request of the one to whom the guaranty is to be given and in his absence for no consideration moving between them except future advances to be made to the principal debtor, the guaranty is in legal effect a mere offer or proposal needing an acceptance by the proposed creditor to complete the contract. Davis Sewing Mach. Co. *v.* Richards, 115 U. S. 524, 6 S. Ct. 173, 29 L. ed. 480.

The rule has been applied to an offer to guaranty: The payment of debts to be created in the future. Fay *v.* Hall, 25 Ala. 704; Farmers' Bank *v.* Tatnall, 7 Houst. (Del.) 287, 31 Atl. 879; Milroy *v.* Quinn, 69 Ind. 406, 35 Am. Rep. 227; Norton *v.* Eastman, 4 Me. 521; Lawton *v.* Maner, 9 Rich. (S. C.) 335; Davis Sewing Mach. Co. *v.* Richards, 115 U. S. 524, 6 S. Ct. 173, 29 L. ed. 480. The payment of the price of the goods purchased by other person. McCollum *v.* Cushing, 22 Ark. 540; Craft *v.* Isham, 13 Conn. 28; Neagle *v.* Sprague, 63 Ill. App. 25; Ruffner *v.* Love, 33 Ill. App. 601; Acme Mfg. Co. *v.* Reed, 197 Pa. St. 359, 47 Atl. 205, 80 Am. St. Rep. 832. Future contingent event. Whiting *v.* Stacy, 15 Gray (Mass.) 270. Carrying out of a compromise. U. S. *v.* Libby, 26 Fed. Cas. No. 15,596, 1 Hask. 271.

50. Hayden *v.* Bradley, 6 Gray (Mass.) 425, 66 Am. Dec. 421; Vyse *v.* Wakefield, 8 Dowl. P. C. 377, 4 Jur. 509, 6 M. & W. 442.

Compared with ordinary contracts.— "It is a general rule, that if a person offers to pay money upon the performance of an act by another, the performance of the act by the latter, without any notice of his acceptance of the offer, or of his intention to act upon it, gives him a right to demand the money. . . . But . . . where the offer is to guaranty a debt for which another is primarily liable, in consideration of some act to be performed by the creditor, mere performance of the act is not sufficient to fix the liability of the guarantor; but the creditor must notify the guarantor of his acceptance of the offer, or of his intention to act upon it." Steadman *v.* Guthrie, 4 Metc. (Ky.) 147, 156. "Ordinarily there is no occasion to notify the offerer of the acceptance of such an offer, for the doing of the act is a sufficient acceptance, and the promisor knows that he is bound when he sees that action has been taken on the faith of his offer. But if the act is of such a kind that knowledge of it will not quickly come to the promisor, the promisee is bound to give him notice of his acceptance within a reasonable time after doing that which constitutes the acceptance. In such a case it is implied in the offer that, to complete the contract, notice shall be given with due diligence, so that the promisor may know that a contract has been made. But where the promise is in consideration of an act to be done, it becomes binding upon the doing of the act so far that the promisee cannot be affected by a subsequent withdrawal of it, if within a reasonable time afterward he notifies the promisor." Bishop *v.* Eaton, 161 Mass. 496, 499, 37 N. E. 665, 42 Am. St. Rep. 437. "When a proposition is made by a man for a thing to be done for himself, he must know, when done, that it is done on his proposition. But when he proposes his responsibility for a thing to be done for another, he may not know that it is done, . . . on his proposition, or on the sole credit of the third person, or on some other security. The responsibilities and duties of a guarantor imply certain correlative rights and privileges, which, without notice of his condition, he can never exercise." Oaks *v.* Weller, 13 Vt. 106, 110, 37 Am. Dec. 583.

51. Tuckerman *v.* French, 7 Me. 115.

And notice is especially necessary in case of a general letter of credit addressed to no particular person.[52]

(II) *Reason For Rule and Its Reasonableness.* Proof of acceptance by the guarantee and of notice thereof to the guarantor is required on the ground that it is essential to an inception of the contract.[53] The above doctrine of the necessity of notice of acceptance has been the subject of considerable criticism and has not been adopted without opposition.[54] Leaving out of view the necessity of the meeting of the minds of the parties,[55] the rule grows to a certain extent out of the peculiar nature of the contract of guaranty,[56] the guarantor being only secondarily liable should be informed that his offer has been accepted, that he may know the amount of his liability,[57] and may have an opportunity of

Notice of acceptance is especially necessary in a case of a continuing guaranty, since such notice may guide the judgment of the one making the offer and influence him in the matter of recalling or suspending it. Douglass *v.* Reynolds, 7 Pet. (U. S.) 113, 8 L. ed. 626.

52. Hill *v.* Calvin, 4 How. (Miss.) 231, holding that a notice given eighteen months after an extension of credit on the faith of the letter was not reasonable notice. It might otherwise be difficult for the guarantor to ascertain to whom and under what circumstances the guaranty attached or to what period it might be protracted. Adams *v.* Jones, 12 Pet. (U. S.) 207, 9 L. ed. 1058. Where one issues a letter of credit not addressed to any particular person and for an indefinite sum, he is entitled to notice that credit has been given on the faith of it within a reasonable time after credit has been so extended, in order that he may know the extent of his liability and if necessary be enabled to take the proper steps to secure himself. Lawson *v.* Townes, 2 Ala. 373; Kay *v.* Allen, 9 Pa. St. 320.

53. *Georgia.*— Claflin *v.* Briant, 58 Ga. 414; Valloton *v.* Gardner, R. M. Charlt. 86.

Illinois.— Sears *v.* Swift, 66 Ill. App. 496; Taylor *v.* John A. Tolman Co., 47 Ill. App. 264; Ruffner *v.* Love, 33 Ill. App. 601.

Iowa.— Carmen *v.* Elledge, 40 Iowa 409.

Louisiana.—Lachman *v.* Block, 47 La. Ann. 505, 17 So. 153, 28 L. R. A. 255.

Massachusetts.— Thomas *v.* Davis, 14 Pick. 353.

Missouri.— Taylor *v.* Shouse, 73 Mo. 361; Smith *v.* Anthony, 5 Mo. 504.

New Hampshire.— March *v.* Putney, 56 N. H. 34.

New York.— Beekman *v.* Hale, 17 Johns. 134; Penoyer *v.* Watson, 16 Johns. 100.

Pennsylvania.—Kellogg *v.* Stockton, 29 Pa. St. 460.

Vermont.— Oaks *v.* Weller, 13 Vt. 106, 37 Am. Dec. 583.

United States.— Davis Sewing Mach. Co. *v.* Richards, 115 U. S. 524, 6 S. Ct. 173, 29 L. ed. 480; Davis *v.* Wells, 104 U. S. 159, 26 L. ed. 686; Edmondston *v.* Drake, 5 Pet. 624, 9 L. ed. 251; Hoffman *v.* Mayaud, 93 Fed. 171, 35 C. C. A. 256.

England.— McIver *v.* Richardson, 1 M. & S. 557; Symmons *v.* Want, 2 Stark. 371, 3 E. C. L. 450.

See 25 Cent. Dig. tit. "Guaranty," § 9.

As the original contract of the principal debtor is not the contract of the guarantor, the creditor is bound to give notice if he intends to hold him responsible. Central Sav. Bank *v.* Shine, 48 Mo. 456, 8 Am. Rep. 112.

54. 2 Am. Lead. Cas. (5th ed.) 59, 94, where, in reference to this doctrine, it is said: "It becomes plain that the numerous instances in which notice of acceptance has been held essential to the obligation of guaranty, imply and depend upon the single proposition that assent cannot give rise to a contract, unless each party knows or is informed that the other has agreed, which may be true, when the obligation of the contract is meant to be reciprocal and not mutual, but not when the sole object is to induce the performance of an act which is subsequently performed."

As early as 1840 where this rule in reference to letters of credit and offers to become responsible for another person had only begun to take root in American jurisprudence, Cowen, J., said of it, in Douglass *v.* Howland, 24 Wend. (N. Y.) 35, 50, that it had no foundation in English jurisprudence; and he there lays down the rule of notice in reference to contracts in general as properly applicable to letters of credit and contracts of guaranty. This rule he says is, that "on a promise to pay, on the performance of an act by the promisee to a third person, the promisee need not give any notice; for the promisor takes it on himself to get notice at his peril."

55. See *supra*, III, A, 1.

56. Farmers' Bank *v.* Tatnall, 7 Houst. (Del.) 287, 31 Atl. 879; Beekman *v.* Hill, 17 Johns. (N. Y.) 134.

57. The writer of a letter of credit should be notified at once by the person accepting or acting upon such letter. Otherwise the guarantor cannot know whether or not he is under obligations to any one on account of his letter. Lawson *v.* Townes, 2 Ala. 373; McCollum *v.* Cushing, 22 Ark. 540; Lowe *v.* Beckwith, 14 B. Mon. (Ky.) 184, 58 Am. Dec. 659; Kincheloe *v.* Holmes, 7 B. Mon. (Ky.) 5, 45 Am. Dec. 41; Illinois Bank *v.* Sloo, 16 La. 539, 35 Am. Dec. 223; Norton *v.* Eastman, 4 Me. 521; Roots *v.* Jenifer, 3 Ohio Dec. (Reprint) 214, 4 Wkly. L. Gaz. 401; Oaks *v.* Weller, 13 Vt. 106, 37 Am. Dec. 583; Peck *v.* Barney, 13 Vt. 93; Reynolds *v.* Douglass, 12 Pet. (U. S.) 497, 9 L. ed. 1171; Adams *v.* Jones, 12 Pet. (U. S.) 207, 9 L. ed. 1058.

taking indemnity from the principal debtor or of otherwise securing himself against loss.[58]

b. When Not Required — (I) *In General.* The meeting of the minds of the parties may be evidenced by other modes than the giving of formal notice of acceptance.[59]

(II) *Consideration Moving to Guarantor.* Where the consideration of the guaranty moves either directly or indirectly to the guarantor no notice of acceptance is necessary.[60] The receipt from the creditor of a consideration is sufficient to prove the mutual assent required to complete a contract of guaranty.[61]

(III) *Guaranty Absolute.* Both the English and American cases hold generally that the rule requiring notice by the guarantee of his acceptance of the guaranty applies only where the guaranty is in legal effect an offer or proposal.[62] Where the transaction is not merely an offer to guaranty the payment of debts and amounts to a direct promise of guaranty, all that is necessary to make the promise binding is that the promisee should act upon it; he need not notify the

58. Milroy *v.* Quinn, 69 Ind. 406, 35 Am. Rep. 227; German Sav. Bank *v.* Drake Roofing Co., 112 Iowa 184, 83 N. W. 960, 84 Am. St. Rep. 335, 51 L. R. A. 758; Wilkins *v.* Carter, 84 Tex. 438, 19 S. W. 997; Wheeler *v.* Mayfield, 31 Tex. 395, 98 Am. Dec. 545. "The question . . . is, whether upon a letter of guaranty addressed to a particular person, or to persons generally, for a future credit to be given to the party in whose favor the guaranty is drawn, notice is necessary to be given to the guarantor, that the person giving the credit has accepted or acted upon the guaranty, and given the credit on the faith of it. We are all of opinion that it is necessary, and this is not now an open question in this court, after the decisions which have been made in Russell *v.* Clark, 7 Cranch (U. S.) 69, 3 L. ed. 271; Edmondston *v.* Drake, 5 Pet. (U. S.) 624, 8 L. ed. 251; Douglass *v.* Reynolds, 7 Pet. (U. S.) 113, 8 L. ed. 626; Lee *v.* Dick, 10 Pet. (U. S.) 482, 9 L. ed. 503. . . . It is in itself a reasonable rule, enabling the guarantor to know the nature and extent of his liability; to exercise due vigilance in guarding himself against losses which might otherwise be unknown to him; and to avail himself of the appropriate means in law and equity to compel the other parties to discharge him from future responsibility." Adams *v.* Jones, 12 Pet. (U. S.) 207, 213, 9 L. ed. 1058, per Story, J.

59. Davis *v.* Wells, 104 U. S. 159, 26 L. ed. 686, holding that notice is not required where the instrument is in the form of a bilateral contract which in any way by its terms creates between the guarantee and guarantor a privity of contract. See also *infra*, III, A, 3, b, (v).

60. Nading *v.* McGregor, 121 Ind. 465, 23 N. E. 283, 6 L. R. A. 686; Doud *v.* National Park Bank, 54 Fed. 846, 4 C. C. A. 607. Where a guarantor received a consideration for his guaranty, and this is known to the guarantee, and the words of the guaranty are certain, notice of acceptance is unnecessary. Sears *v.* Swift, 66 Ill. App. 496.

61. Davis Sewing Mach. Co. *v.* Richards, 113 U. S. 524, 6 S. Ct. 173, 29 L. ed. 480.

Other statements of rule.— Where the guarantor receives a consideration for his guaranty, and this is known to the creditor and the words of the guaranty are certain and clearly show an intention to be bound as soon as the promise is delivered, notice of acceptance is unnecessary. Sears *v.* Swift, 66 Ill. App. 496. Where one guaranties the performance of a contract or act as a present undertaking and for a consideration the guarantor is liable without notice of acceptance on the part of the one in whose favor the contract of guaranty is made for in such case the liability of the guarantor is primary. Taylor *v.* Tolman Co., 47 Ill. App. 264. Where the guaranty is for the fulfilment of a contract already, or contemporaneously made, or for the payment of an existing debt, or upon a consideration distinct from the credit extended to the principal, and moving directly between the guarantor and guarantee, notice of acceptance is unnecessary. Furst, etc., Mfg. Co. *v.* Black, 111 Ind. 308, 12 N. E. 504.

62. *Connecticut.*—Craft *v.* Isham, 13 Conn. 28.

Kansas.—Platter *v.* Green, 26 Kan. 252.

Maine.— Bradley *v.* Cary, 8 Me. 234; Tuckerman *v.* French, 7 Me. 115.

Maryland.— Boyd *v.* Snyder, 49 Md. 325.

Massachusetts.— Paige *v.* Parker, 8 Gray 211; Mussey *v.* Rayner, 22 Pick. 223; Babcock *v.* Bryant, 12 Pick. 133.

Missouri.— Central Sav. Bank *v.* Shine, 48 Mo. 456, 8 Am. Rep. 112.

Nebraska.— Klosterman *v.* Olcott, 25 Nebr. 382, 41 N. W. 250; Wilcox *v.* Draper, 12 Nebr. 138, 10 N. W. 579, 41 Am. Rep. 763.

New York.— Whitney *v.* Groot, 24 Wend. 82.

Ohio.— Wise *v.* Miller, 45 Ohio St. 388, 14 N. E. 218; Powers *v.* Bumcratz, 12 Ohio St. 273.

Tennessee.— Yancey *v.* Brown, 3 Sneed 89; Bright *v.* McKnight, 1 Sneed 158.

Vermont.— Lowry *v.* Adams, 22 Vt. 160; Oaks *v.* Weller, 13 Vt. 106, 37 Am. Dec. 583.

See 25 Cent. Dig. tit. "Guaranty," § 9.

promisor of his acceptance.[63] And notice of acceptance is not necessary where the offer is to guaranty the payment of an existing debt of a definite and known character,[64] since, where the guarantor at the time of making his offer of guaranty knows precisely what he guaranties and the extent of his responsibility, any

63. *Alabama.*— Scott *v.* Myatt, 24 Ala. 489, 60 Am. Dec. 485.

Connecticut.— Bushnell *v.* Church, 15 Conn. 406; Breed *v.* Hillhouse, 7 Conn. 523; Beckwith *v.* Angell, 6 Conn. 315.

Indiana.— Kline *v.* Raymond, 70 Ind. 271; Studabaker *v.* Cody, 54 Ind. 586; Kirby *v.* Studebaker, 15 Ind. 45.

Maine.— Norton *v.* Eastman, 4 Me. 521.

Massachusetts.— Paige *v.* Parker, 8 Gray 211.

Michigan.— Crittenden *v.* Fiske, 46 Mich. 70, 8 N. W. 714, 41 Am. Rep. 146; Farmers', etc., Bank *v.* Kercheval, 2 Mich. 504.

New York.— Union Bank *v.* Coster, 3 N. Y. 203, 53 Am. Dec. 280; Grant *v.* Hotchkiss, 26 Barb. 63; Curtis *v.* Brown, 2 Barb. 51; Smith *v.* Dann, 6 Hill 543; McLaren *v.* Watson, 26 Wend. 425, 37 Am. Dec. 260; Watson *v.* McLaren, 19 Wend. 557; Butler *v.* Wright, 20 Johns. 367.

North Carolina.— Straus *v.* Beardsley, 79 N. C. 59.

Ohio.— Castle *v.* Rickly, 44 Ohio St. 490, 9 N. E. 136, 58 Am. Rep. 839; Clay *v.* Edgerton, 19 Ohio St. 549, 2 Am. Rep. 422; Powers *v.* Bumcratz, 12 Ohio St. 273.

Tennessee.— Yancey *v.* Brown, 3 Sneed 89; Bright *v.* McKnight, 1 Sneed 158.

Texas.—Hart *v.* Wynne, (Civ. App. 1897) 40 S. W. 848.

Vermont.— Maynard *v.* Morse, 36 Vt. 617; Noyes *v.* Nichols, 28 Vt. 159; Train *v.* Jones, 11 Vt. 444; Smith *v.* Ide, 3 Vt. 290.

Wisconsin.— McNaughton *v.* Conkling, 9 Wis. 316.

United States.— Silver *v.* Kent, 105 Fed. 840.

See 25 Cent. Dig. tit. "Guaranty," § 9.

Other statements of rule.— Express notice of the acceptance of an absolute guaranty is not always, if ever, necessary for the purpose of binding the guarantor. Wise *v.* Miller, 45 Ohio St. 388, 14 N. E. 218. If a proposition of guaranty or suretyship be made in terms that are absolute, evidencing a design to give the other party the right of concluding the engagement by his assent, the proposer will be irrevocably bound by such assent, either express or implied, and his signification of dissent thereafter will be of no avail. Lachman *v.* Block, (La. 1894) 15 So. 649.

What is an absolute guaranty.— A writing to the effect that the maker holds himself responsible for the payment of any sum not to exceed a specified limit which a third person may desire to obtain from the one to whom the writing is given for legitimate purpose is an absolute guaranty, notice of acceptance of which need not be given to the maker of the writing. Poughkeepsie City Nat. Bank *v.* Phelps, 86 N. Y. 484. Where defendant was informed that upon his security plaintiff would lend money to the third person, and he subsequently addressed a letter to plaintiff stating that "I will become his eventual security for the payment," it was held that the transaction was more than a mere offer of guaranty and amounted to an absolute undertaking. Caton *v.* Shaw, 2 Harr. & G. (Md.) 13. See also *supra*, I, B; and *infra*, VII, A, 3.

Absolute continuing guaranty.— An order reading, "Please let my daughter, Mrs. . . ., have what goods she wants and I will stand good for the money to settle the bills," given after a refusal to give the daughter credit, is an absolute, continuing guaranty, and requires no notice of its acceptance. Wright *v.* Griffith, 121 Ind. 478, 23 N. E. 281, 6 L. R. A. 639.

Statutory provisions to the effect that an absolute guaranty is binding without notice of acceptance exist in some states. See London, etc., Bank *v.* Parrott, 125 Cal. 472, 58 Pac. 164, 73 Am. St. Rep. 64. Such provisions are not affected by other provisions to the effect that the consent of the parties to a contract must be communicated to each other.

64. Wills *v.* Ross, 77 Ind. 1, 40 Am. Rep. 279. Where the undertaking of the guarantor is positive and the amount he agrees to guaranty is fixed, and the guaranty is to take effect on the doing or forbearing of some definite thing as its consideration, no notice of acceptance is necessary. Manry *v.* Waxelbaum Co., 108 Ga. 14, 33 S. E. 701.

Where a guaranty is absolute for the payment of the debt if the debtor does not pay no notice of acceptance is necessary. Nading *v.* McGregor, 121 Ind. 465, 23 N. E. 283, 6 L. R. A. 686; Snyder *v.* Click, 112 Ind. 293, 13 N. E. 581; Kline *v.* Raymond, 70 Ind. 271; Jackson *v.* Yandes, 7 Blackf. (Ind.) 526; Carman *v.* Elledge, 40 Iowa 409; Long *v.* Hemphill, 5 Ky. L. Rep. 770; Mitchell *v.* McCleary, 42 Md. 374; Paige *v.* Parker, 8 Gray (Mass.) 211; Crittenden *v.* Fiske, 46 Mich. 70, 8 N. W. 714, 41 Am. Rep. 146; Klosterman *v.* Olcott, 25 Nebr. 382, 41 N. W. 250; Niles Tool Works Co. *v.* Reynolds, 4 N. Y. App. Div. 24, 38 N. Y. Suppl. 1028; Union Bank *v.* Coster, 1 Sandf. (N. Y.) 563 [*affirmed* in 3 N. Y. 203, 53 Am. Dec. 280]; Whitney *v.* Groot, 24 Wend. (N. Y.) 82; Wise *v.* Miller, 45 Ohio St. 388, 14 N. E. 218; Powers *v.* Bumcratz, 12 Ohio St. 273; Rochford *v.* Rothschild, 16 Ohio Cir. Ct. 287, 9 Ohio Cir. Dec. 47; Yancey *v.* Brown, 3 Sneed (Tenn.) 89; Bright *v.* McKnight, 1 Sneed (Tenn.) 158; Johnson *v.* Bailey, 79 Tex. 516, 15 S. W. 499.

An absolute undertaking to be responsible for any unsettled balance due by another for goods furnished under a written contract not paid when required by its terms requires no notice of acceptance to bind the guarantor.

further notice to him of action taken upon his offer would be useless.[65] And a letter of credit addressed to a certain person stating that bills to a certain amount will be duly honored by the writer of the letter up to a certain date differs from a commercial guaranty requiring notice.[66] And in some of the cases the simultaneous execution of the contract of guaranty which is said to constitute a sufficient notice of acceptance is held to be the quality which characterizes an absolute guaranty, notice of acceptance of which is not required.[67]

(iv) *Knowledge Derived From Other Sources Than Creditor.* Notice need not be given by a party in interest; knowledge from any source is binding upon the guarantor.[68]

(v) *Precedent Request For Guaranty.* Where there has been a precedent request for the guaranty notice of its acceptance need not be given to the guarantor;[69] but if the offer of guaranty varies from the proposition requested, notice of acceptance is necessary.[70]

(vi) *Principal Contract and Guaranty Contemporaneous.* Notice is not necessary in cases where the agreement to accept, or the contract guarantied, is contemporaneous with the guaranty,[71] and the whole arrangement for the exten-

Globe Printing Co. *v.* Bickley, 73 Mo. App. 499.

65. Lee *v.* Dick, 10 Pet. (U. S.) 482, 9 L. ed. 503.

66. Lonsdale *v.* Lafayette Bank, 18 Ohio 126. In Lanusse *v.* Barker, 3 Wheat. (U. S.) 101, 4 L. ed. 343, the letter of credit involved contained a direct promise to honor the bills of the addressee, and the court distinguished between a mere guaranty of bills to be drawn and such a direct promise and stated that where defendant confers the right to draw upon himself, he makes himself the paymaster and must be regarded as having entered into an original substantive undertaking.

67. Farmers' Bank *v.* Tatnall, 7 Houst. (Del.) 287, 31 Atl. 879.

68. Powell *v.* Chicago Carpet Co., 22 Ill. App. 409; Webster *v.* Smith, 4 Ind. App. 44, 30 N. E. 139; Greer Mach. Co. *v.* Sears, 66 S. W. 521, 23 Ky. L. Rep. 2025; Peoria Rubber Mfg. Co. *v.* During, 85 Mo. App. 131; Tolman Co. *v.* Means, 52 Mo. App. 385; Mitchell *v.* Railton, 45 Mo. App. 273; Roots *v.* Jenifer, 3 Ohio Dec. (Reprint) 214, 4 Wkly. L. Gaz. 401. In Rochford *v.* Rothschild, 16 Ohio Cir. Ct. 287, 9 Ohio Cir. Dec. 47, it was held that the guarantor was not entitled to direct notice that his guaranty was accepted.

Formal notice in writing is not necessary, it being sufficient that the guarantors have knewledge within a reasonable time that goods have been sold on the faith of the guaranty. Ford *v.* Harris, 102 Ky. 169, 43 S. W. 199, 12 Ky. L. Rep. 1236.

69. Hasselman *v.* Japanese Development Co., 2 Ind. App. 80, 27 N. E. 318, 28 N. E. 207; Davis *v.* Wells, 104 U. S. 159, 26 L. ed. 686. Effect of circumstance that the proposal for the guaranty came from the creditor *compare* Lawton *v.* Manor, 9 Rich. (S. C.) 335.

Where a guaranty is signed by the guarantor at the request of the other party, and the receipt from him of a valuable consideration is acknowledged in the guaranty, the mutual assent is sufficient, and the delivery of the guaranty to him, or to another for his use, completes the contract without notice of acceptance. Field *v.* Haish, 85 Ill. App. 164. Where a guaranty is signed by a guarantor at the request of the guarantee, or the latter accepts the guaranty at the time of its signing, or gives a consideration for its execution, the mutual assent completes the contract on the delivery of the guaranty. Clinton Bank *v.* Goldstein, 86 Mo. App. 516. *Contra*, Evans *v.* McCormick, 167 Pa. St. 247, 31 Atl. 563, where it was held that the precedent request by the creditor looking toward the contract of guaranty cannot supply the place of a subsequent notice, since after the making of the request and the offer of the guaranty the creditor may change his mind about advancing credit.

70. Hasselman *v.* Japanese Development Co., 2 Ind. App. 80, 27 N. E. 318.

71. *Indiana.*— Wright *v.* Griffith, 121 Ind. 478, 23 N. E. 281, 6 L. R. A. 639; Nading *v.* McGregor, 121 Ind. 465, 23 N. E. 283, 6 L. R. A. 686; Wills *v.* Ross, 77 Ind. 1, 40 Am. Rep. 279.

Maryland.— Mitchell *v.* McCleary, 42 Md. 374.

Missouri.— Davis Sewing Mach. Co. *v.* Jones, 61 Mo. 409.

Nebraska.— Klosterman *v.* Olcott, 25 Nebr. 382, 41 N. W. 250; Wilcox *v.* Draper, 12 Nebr. 138, 10 N. W. 579, 41 Am. Rep. 763.

Ohio.— Wise *v.* Miller, 45 Ohio St. 388, 14 N. E. 218.

Texas.— Lemp *v.* Armengol, 86 Tex. 690, 26 S. W. 941.

See 25 Cent. Dig. tit. "Guaranty," § 9.

If the one to whom the offer of guaranty is made is present at the time of the making of the offer and agrees to accept, this will be all the notice which the law requires. Kellogg *v.* Stockton, 29 Pa. St. 460. In Davis Sewing Mach. Co. *v.* Richards, 115 U. S. 524, 527, 6 S. Ct. 173, 29 L. ed. 480, the court referring to this subject said: "If the guaranty is signed by the guarantor at the request of the other party, or if the latter's agree-

sion of credit to the principal debtor and for the guaranty is concluded at the same time.[72]

c. Sufficiency of Notice — (I) *In General.* What kind of a notice of acceptance of an offer of guaranty is required depends upon the nature of the transaction, the situation of the parties, and the inference fairly to be drawn from their previous dealings, if any, in regard to the subject-matter of the guaranty.[73] No express form of words is required to constitute a good notice.[74]

(II) *Time of Giving Notice.* Notice of acceptance must be given within a reasonable time after the making of the offer,[75] the question of what is a reason-

ment to accept is contemporaneous with the guaranty, or if the receipt from him of a valuable consideration, however small, is acknowledged in the guaranty, the mutual assent is proved, and the delivery of the guaranty to him or for his use completes the contract."

The contemporaneous execution of an agreement of guaranty by all the contracting parties with the intention that it shall be acted upon for a purpose beneficial to the promisor and its delivery by each to the other is a sufficient acceptance and notice thereof. Wise *v.* Miller, 45 Ohio St. 388, 14 N. E. 218.

Under a written guaranty to be responsible for indebtedness incurred before a certain day, entered into contemporaneously with an agreement to accept the guaranty, or where the acceptance constitutes the consideration or basis of the guaranty, no notice of acceptance is necessary. Cahuzac *v.* Samini, 29 Ala. 288; Walker *v.* Forbes, 25 Ala. 139, 60 Am. Dec. 498; New Haven County Bank *v.* Mitchell, 15 Conn. 206; Farmers, etc., Bank *v.* Kercheval, 2 Mich. 504; Newbury Bank *v.* Sinclair, 60 N. H. 100, 49 Am. Rep. 307; Bay *v.* Thompson, 1 Pearson (Pa.) 551.

Where a creditor of a corporation required as a condition of extending the time of payment of a debt that a guaranty of its payment should be signed by the members of the board of directors, and the members accordingly executed their guaranty at the same time, notes were given by the corporation which allow the corporation the desired extension, and all the papers were delivered, no further notice of acceptance was required. Marx *v.* Luling Co-operative Assoc., 17 Tex. Civ. App. 408, 43 S. W. 596.

Where the creditor wrote out the guaranty and defendant signed it in the creditor's place of business and left it with him as a completed contract and the creditor retained it, this was held to be an acceptance of which the guarantor was obliged to take notice. Paige *v.* Parker, 8 Gray (Mass.) 211.

A guaranty of notes in consideration of the release by the payee of a lien did not require notice of acceptance because the release was executed fifteen days before the contract of guaranty was made. Koenigsberg *v.* Lenning, 161 Pa. St. 171, 28 Atl. 1016.

72. Walker *v.* Forbes, 25 Ala. 139, 60 Am. Dec. 498; Bushnell *v.* Church, 15 Conn. 406.

Simultaneous performance.— Where the act with reference to which the contract of guaranty is entered into is to be simultaneously performed, the performance is itself notice of acceptance. Farmers' Bank *v.* Tatnall, 7 Houst. (Del.) 287, 31 Atl. 879.

Not an exception to general rule.— The rule that notice of acceptance is not necessary where the agreement to accept the guaranty is contemporaneous with it is not an exception to the general rule requiring notice; it merely affirms that when a guarantor is present and the agreement to accept is made the moment the offer of guaranty is made, this is notice and nothing more is required. Kellogg *v.* Stockton, 29 Pa. St. 460.

73. Bishop *v.* Eaton, 161 Mass. 496, 37 N. E. 665, 42 Am. St. Rep. 437.

Where one issues a letter of credit to a certain firm authorizing a named person to purchase of him in the name of the writer goods to a certain amount and goods are purchased in the name of the writer of the letter, who subsequently examines the invoices, no other notice of the acceptance of the letter is necessary. Bleeker *v.* Hyde, 3 Fed. Cas. No. 1,537, 3 McLean 279.

74. Thus where on receiving a letter from defendant offering to guaranty payment of purchases by N, plaintiff sold N goods, and on the same day wrote defendant acknowledging receipt of his letter, "guarantying whatever N may purchase of us," and saying that "his purchases up to this time amount to" a certain sum, "which we are getting ready for shipment," it was held that the letter constituted a valid notice of acceptance. Hart *v.* Minchen, 69 Fed. 520.

75. *Alabama.*— Walker *v.* Forbes, 25 Ala. 139, 68 Am. Dec. 498.

Illinois.— Meyer *v.* Ruhstadt, 66 Ill. App. 346.

Indiana.— Furst, etc., Mfg. Co. *v.* Black, 111 Ind. 308, 12 N. E. 504.

Maine.— Tuckerman *v.* French, 7 Me. 115.

North Carolina.— Grice *v.* Ricks, 14 N. C. 62.

Ohio.— Powers *v.* Bumcratz, 12 Ohio St. 273.

Pennsylvania.— Coe *v.* Buehler, 110 Pa. St. 366, 5 Atl. 20; Kellogg *v.* Stockton, 29 Pa. St. 460.

Vermont.— Oaks *v.* Weller, 13 Vt. 106, 37 Am. Dec. 583.

United States.— Davis *v.* Wells, 104 U. S. 159, 26 L. ed. 686.

See 25 Cent. Dig. tit. "Guaranty," § 9.

In an action on a letter of guaranty plaintiff must show that he gave notice in a reasonable time to defendant of his acceptance of the guaranty and of the value of the articles

able time depending upon the circumstances of the particular case,[76] and being generally a question of fact to be determined by the jury under proper instructions.[77]

(III) *In Case of Continuing Guaranties.* In the case of a continuing guaranty notice of acceptance having once been given need not be given on a subsequent extension of credits.[78] But when all the transactions are closed notice of the amount for which it is sought to hold the guarantor should be communicated to him within a reasonable time.[79]

(IV) *Acceptance by Mail.* When an offer of guaranty is made by mail or where the parties are so situated that it may reasonably be expected that acceptance will be by mail, a letter duly posted containing an acceptance will constitute a contract binding on the guarantor, although the letter is never received by him.[80]

d. Proof of Notice. That the notice was given need not be proven by direct testimony;[81] it may be inferred from the facts and circumstances of the case.[82]

e. Waiver of Notice. The parties to the contract may expressly or by implication waive the necessity of notice.[83] Thus the guarantor by acknowledging his liability upon the guaranty may waive the failure to give notice of acceptance,[84] and a subsequent promise to pay, without a new consideration for such promise, constitutes a waiver.[85]

4. Condition That Others Assume the Same Liability. As there can be no binding contract of guaranty unless the guarantor has assented to the guaranty in the form in which it was accepted by the other party to the contract,[86] where a joint

furnished. Burns *v.* Semmes, 4 Fed. Cas. No. 2,183, 4 Cranch C. C. 702.

76. Seaver *v.* Bradley, 6 Me. 60; Lowry *v.* Adams, 22 Vt. 160.

77. Louisville Mfg. Co. *v.* Welch, 10 How. (U. S.) 461, 13 L. ed. 497. See Seaver *v.* Bradley, 6 Me. 60. And see *infra*, XI, K, 1.

78. Cahuzac *v.* Samini, 29 Ala. 288. But see Clark *v.* Remington, 11 Metc. (Mass.) 361; Douglass *v.* Reynolds, 7 Pet. (U. S.) 113, 8 L. ed. 626.

It is enough if the guarantor has notice of their amount when the business is closed. Noyes *v.* Nichols, 28 Vt. 159.

Ordinarily after acceptance of a continuing guaranty of payment for goods to be sold in the future the seller need not give the guarantor notice of the sales made until a reasonable time after default by the buyer. Paige *v.* Parker, 8 Gray (Mass.) 211.

79. Clark *v.* Remington, 11 Metc. (Mass.) 361. Where a guaranty is a continuing one, and the parties must have understood their liability thereunder would be increased and diminished from time to time, and it is uncertain as to when it will cease to be binding on the guarantor, and the party indemnified has power to bring to an end the contract guarantied without the guarantor's knowledge, the latter is entitled to notice, within a reasonable time after the transactions guarantied are closed, of the amount of his liability thereunder. Singer Mfg. Co. *v.* Littler, 56 Iowa 601, 9 N. W. 905; Davis Sewing Mach. Co. *v.* Mills, 55 Iowa 543, 8 N. W. 356. And see Farmers', etc., Bank *v.* Kercheval, 2 Mich. 504.

80. Bishop *v.* Eaton, 161 Mass. 496, 37 N. E. 665, 42 Am. St. Rep. 437.

81. Winnebago Paper Mills *v.* Travis, 56 Minn. 480, 58 N. W. 36; Woodstock Bank *v.* Downer, 27 Vt. 539; Reynolds *v.* Douglass, 12 Pet. (U. S.) 497, 9 L. ed. 1171.

82. Hickox *v.* Fels, 86 Ill. App. 216; Ruffner *v.* Love, 33 Ill. App. 601; Reynolds *v.* Douglass, 12 Pet. (U. S.) 497, 9 L. ed. 1171.

83. Reynolds *v.* Douglass, 12 Pet. (U. S.) 497, 9 L. ed. 1171. Notice of acceptance of guaranty may be waived by the form of the guaranty, or it may be implied from the terms of the instrument. People's Bank *v.* Lemarie, 106 La. 429, 31 So. 138. And see Farwell *v.* Sully, 38 Iowa 387, holding that a letter written by the guarantor about three months after the creditor had extended credit on the faith of the guaranty acknowledging his liability constituted a waiver.

Waiver.— A stipulation by a guarantor that he shall be notified upon a given date of the amount due from the principal debtor may be waived and is waived where the creditor writes to him before such date that the debtor is bankrupt and inclosing the amount due and the guarantor replies telling the creditor to prove his claim in bankruptcy and that he will make his guaranty good. Farwell *v.* Sully, 38 Iowa 387. So a stipulation that only notice of default shall be given the guarantor has been held a waiver of notice of acceptance. Wadsworth *v.* Allen, 8 Gratt. (Va.) 174, 56 Am. Dec. 137.

No waiver.— A promise by the guarantor to pay the debt made after a reasonable time has elapsed for the giving of notice of acceptance is not a waiver of the right to notice if the promise was qualified by a condition which was rejected. Reynolds *v.* Douglass, 12 Pet. (U. S.) 496, 9 L. ed. 1171.

84. Trefethen *v.* Locke, 16 La. Ann. 19.

85. Gamage *v.* Hutchins, 23 Me. 565; Sigourney *v.* Wetherell, 6 Metc. (Mass.) 553.

86. See *supra*, III, A, 1.

guaranty is signed by several persons but before its delivery one of the signers withdraws his name without the knowledge of the others, and it is accepted by the guarantee with notice of these facts, it is not binding on any of the guarantors;[87] and where one signs a letter of guaranty upon the condition that it shall not be delivered until another guarantor is obtained, a delivery in violation of such condition will not bind the guarantor[88] unless he waives the condition.[89]

B. Notice to Principal Debtor. It is not necessary, in order that the guaranty should be binding upon the guarantor, that the debtor should have knowledge of the transaction or be in any way a party thereto.[90]

C. Formal Requisites of Contract — 1. In General. There is no exact form or expression necessary to create a guaranty; any language which may be construed as binding the guarantor to answer for another's default is sufficient.[91] But while this is the case the law will not subject a man having no interest in the transaction to pay the debt of another unless his undertaking manifests a clear intention to bind himself for that debt.[92] Neither a mere request by one person that credit shall be given to another,[93] a mere certificate to the correct moral habits of a third person,[94] nor a mere expression of confidence that such third person will pay for goods which he is about to purchase[95] amounts to a guaranty. There must at least be an assurance and representation of responsibility of the person to whom credit is to be given, which is relied upon to his damage by the person giving credit. Moreover the writing must in some way indicate the intention of the writer to stand responsible for the person recommended.[96] Contracts

87. Potter *v.* Gronbeck, 117 Ill. 404, 7 N. E. 586 [*affirming* 17 Ill. App. 251].

Whether sureties upon a bond are released by the act of one of their number in canceling his signature without their knowledge before the delivery or final approval of the bond see Principal and Surety.

88. State Bank *v.* Burton-Gardner Co., 14 Utah 420, 48 Pac. 402; New Home Sewing Mach. Co. *v.* Simon, 107 Wis. 368, 83 N. W. 649.

89. Sartwell *v.* Humphrey, 136 Mass. 396; Adams *v.* Bean, 12 Mass. 137, 7 Am. Dec. 44.

90. Solary *v.* Stultz, 22 Fla. 263.

The reason why the principal need not know of the guaranty is because privity of contract between the guarantor and the principal is not required. Hughes *v.* Littlefield, 18 Me. 400; Peake *v.* Dorwin, 25 Vt. 28. See also Solary *v.* Stultz, 22 Fla. 263.

91. *Iowa.*— Westphal *v.* Moulton, 45 Iowa 163.

Maine.— Bunker *v.* Ireland, 81 Me. 519, 17 Atl. 706.

Ohio.— Union Nat. Bank *v.* Delaware First Nat. Bank, 45 Ohio St. 236, 13 N. E. 884; Sturges *v.* Circleville Bank, 11 Ohio St. 153, 78 Am. Dec. 296.

Texas.— Roman *v.* Serna, 40 Tex. 306.

United States.— Silver *v.* Kent, 105 Fed. 840.

See 25 Cent. Dig. tit. "Guaranty," § 10.

For example it is not necessary that the contract of guaranty specifically name the creditor, if it sufficiently describes the principal contract in which the creditor is named. Otto *v.* Jackson, 35 Ill. 349.

Requirements of statute of frauds see Frauds, Statute of.

Form of guaranty of negotiable instrument see Commercial Paper, 7 Cyc. 659.

92. Beadle County Nat. Bank *v.* Hyman, 33 Ill. App. 618; Consolidated Electric Storage Co. *v.* Atlantic Trust Co., 161 N. Y. 605, 56 N. E. 145; Russell *v.* Clark, 7 Cranch (U. S.) 69, 3 L. ed. 271.

93. Bushnell *v.* Bishop Hill Colony, 28 Ill. 204; Kellogg *v.* Stockton, 29 Pa. St. 460.

94. Mitchell *v.* Stewart, 10 Heisk. (Tenn.) 18.

95. Eaton *v.* Mayo, 118 Mass. 141; Thomas *v.* Wright, 98 N. C. 272, 3 S. E. 487.

A mere recommendation as to reliability is not sufficient. Crooks *v.* Propp, 32 Misc. (N. Y.) 309, 66 N. Y. Suppl. 753. A writing recommending another as one on whose integrity and punctuality dependence may be placed and assuring the one to whom it is addressed that the third person will comply fully with any contract entered into with him does not import a guaranty of the performance of such contract. Clark *v.* Russell, 3 Dall. (U. S.) 415, 1 L. ed. 660, 7 Cranch 69, 3 L. ed. 271. The following is held not to be a guaranty: "Let [M] have what goods he may want on four months' time and he will pay as usual." Eaton *v.* Mayo, 118 Mass. 141.

On the other hand a statement that "we know them to be good" has been held sufficient to impose the liability of a guarantor upon the one using them. Union Nat. Bank *v.* Delaware First Nat. Bank, 45 Ohio St. 236, 13 N. E. 884.

96. Harris *v.* Frank, 81 Cal. 280, 22 Pac. 856; Bushnell *v.* Bishop Hill Colony, 28 Ill. 204; Moore *v.* Holt, 10 Gratt. (Va.) 284. Where one on being appointed to sell goods was requested by his principal to guaranty any notes which might be taken for goods sold and replied that he would only guaranty to the extent of his commissions on all the sales which he should make, the agent did

of guaranty may be made contemporaneously with the principal contract or after it is executed.[97]

2. Necessity of Writing. Contracts both of guaranty and suretyship fall within the statute of frauds as undertakings to answer "for the debt, default, or miscarriage of another," and must therefore be evidenced by a written memorandum in accordance with the provisions of the statute.[98]

3. Delivery. A guaranty must be delivered.[99]

D. Consideration — 1. In General. It is essential to a valid contract of guaranty that there be a sufficient legal consideration.[1] If there is not to be found in the contract either a benefit to the principal debtor or to the guarantor on the one hand, or some detriment to the guarantee on the other, the contract will fail for want of a consideration.[2] The mere naked promise in writing to pay

not guaranty the payment of the notes. Wilson *v.* Dean, 21 S. C. 327.

97. See *supra*, III, A, 3, b, (VI). See also Tenney *v.* Prince, 4 Pick. (Mass.) 385, 16 Am. Dec. 347; Osborne *v.* Gullikson, 64 Minn. 218, 66 N. W. 965.

98. The apparent exceptions where such contracts are held not to be within the meaning of the statute will be found upon examination to be neither strictly contracts of guaranty nor suretyship, and are generally classed as indemnity contracts. See Frauds, Statute of, *ante*, p. 160 *et seq.*

Necessity of written guaranty of negotiable instrument see Commercial Paper, 7 Cyc. 661.

99. March *v.* Putney, 56 N. H. 34.

The last step in the execution of a written contract is delivery. Such contract is not valid until delivered, even though it be in the form of negotiable paper in the hands of an innocent purchaser for value before due. This rule applies in full force to the contract of guaranty. March *v.* Putney, 56 N. H. 34. See also Contracts, 9 Cyc. 302.

Where the president of a corporation, as a guarantor of a draft by the corporation upon a bank, directed the treasurer of the corporation to inform the cashier of the bank that the draft was not to be taken unless A placed his name on the back of it, it was held not to constitute a delivery in escrow by such guarantor. Belleville Sav. Bank *v.* Bornman, (Ill. 1886) 7 N. E. 686.

1. Cowles *v.* Pick, 55 Conn. 251, 10 Atl. 569; Elliott *v.* Giese, 7 Harr. & J. (Md.) 457; Wood *v.* Atlantic, etc., R. Co., 131 N. C. 48, 42 S. E. 462.

A guaranty of payment of a note is an independent contract and must be supported by an independent consideration, unless on the faith of it, and contemporaneously with it, the person receiving it parts with value. Osborne *v.* Lawson, 26 Mo. App. 549.

To render the writer of a letter of credit liable either upon an implied acceptance or an agreement to accept drafts taken on the faith of such letter, the drafts must be taken for a valuable consideration. Sherwin *v.* Brigham, 39 Ohio St. 137 [*affirming* 4 Ohio Dec. (Reprint) 94, 1 Clev. L. Rep. 22].

New consideration.— In an action against the managing director of a bank, as guarantor of the payment of the bank's certificate of deposit, an instruction that the jury should regard the guarantor's signature to the guaranty as a fact, and that, if the signature was made after the delivery of the certificate to the holder, a new consideration would be necessary to bind the guarantor, was not erroneous. Rattelmiller *v.* Stone, 28 Wash. 104, 27 Pac. 168.

Performance of legal obligation.— The general rule that the performance of that which a party is under a previous legal obligation to do is not a sufficient consideration for a new contract applies to contracts of guaranty. Vanderbilt *v.* Schreyer, 91 N. Y. 392. Where plaintiff, working under a contract, was coerced by defendant, under threats of stopping the work, into giving a guaranty not included in the original contract, such guaranty is without consideration, and cannot be enforced. McCarthy *v.* Hampton Bldg. Assoc., 61 Iowa 287, 16 N. W. 114. See Contracts, 9 Cyc. 347 *et seq.*

Necessity of express consideration for guaranty of negotiable instrument see Commercial Paper, 7 Cyc. 661.

2. Blakely Printing Co. *v.* Barnard, 63 Ill. App. 238; Cleveland, etc., R. Co. *v.* Bruce, 63 Ill. App. 233; Briggs *v.* Latham, 36 Kan. 205, 13 Pac. 139; Barney *v.* Forbes, 118 N. Y. 580, 23 N. E. 890; Evansville Nat. Bank *v.* Kaufmann, 93 N. Y. 273, 45 Am. Rep. 204; Cobb *v.* Page, 17 Pa. St. 469. A person cannot be held liable as guarantor for a preëxisting debt, when neither he nor the principal receives any benefit, and the party to whom the promise is made sustains no detriment of change of position, by reason of the guaranty. Greer *v.* Clermont Distilling, etc., Co., 15 Ky. L. Rep. 237. *Compare* Carroll County Sav. Bank *v.* Strother, 28 S. C. 504, 6 S. E. 313, holding that in an action by the holder of a note against guarantors of "payment when due," who were strangers to the original contract, and received no benefit from their guaranty, evidence of failure of consideration between the payee and the maker is admissible to reduce the guarantor's liability.

Detriment to guarantee.— In determining the question as to whether a consideration exists for a contract of guaranty, the general rule applies that an injury sustained by the promisee is as effective upon which to predicate a consideration, as the passing of some benefit to the promisor. Ferst *v.* Blackwell,

the existing debt of another without any consideration therefor is void.[3] The amount of the consideration is unimportant.[4] And it is not necessary that any consideration pass to the guarantor. It may pass to someone else or it may be a mere detriment to the other party to the contract.[5] So a consideration which

39 Fla. 621, 22 So. 892; Union Bank *v.* Coster, 3 N. Y. 203, 53 Am. Dec. 280. Where a purchase of land is made upon the promise of the vendor to furnish a tenant and in reliance upon a guaranty executed by a third person that the tenant will pay a specified rent, there is a sufficient consideration for the guaranty although the third person receives no benefit. McDougald *v.* Argonaut Land, etc., Co., 117 Cal. 87, 48 Pac. 1021.

3. *Illinois.*— Blakely Printing Co. *v.* Barnard, 63 Ill. App. 238.

Kansas.— Fuller *v.* Scott, 8 Kan. 25.

Maryland.— Aldridge *v.* Turner, 1 Gill & J. 427.

Massachusetts.— Tenney *v.* Prince, 4 Pick. 385, 16 Am. Dec. 347, 7 Pick. 243.

Missouri.— Macfarland *v.* Heim, 127 Mo. 327, 29 S. W. 1030, 48 Am. St. Rep. 629; Cook *v.* Elliott, 34 Mo. 586; Pfeiffer *v.* Kingsland, 25 Mo. 66; Chauvin *v.* Labargo, 1 Mo. 556.

New Hampshire.— March *v.* Putney, 56 N. H. 34.

New York.— Strough *v.* Brown, 38 Hun 307; Leonard *v.* Vredenburgh, 8 Johns. 29, 5 Am. Dec. 317; Bailey *v.* Freeman, 4 Johns. 280.

Pennsylvania.— Reading R. Co. *v.* Johnson, 7 Watts & S. 317.

Tennessee.— Gilman *v.* Kibler, 5 Humphr. 19.

Virginia.— Beers *v.* Spooner, 9 Leigh 153.

See 25 Cent. Dig. tit. "Guaranty," § 13.

Illustration.— In an action on an alleged agreement by defendant to pay the debt of his employee to plaintiff, plaintiff's attorney testified that the debtor, on being pressed for payment, asked defendant to assist him, whereupon the latter paid ten dollars and executed an agreement in writing to pay the remainder of the claim at five dollars per week, provided the debtor remained in his employ. It was held that as no consideration for such guaranty was shown, plaintiff could not recover. Decker *v.* Hammond, 17 N. Y. Suppl. 645.

4. *California.*— Granger *v.* Bourn, (1885) 7 Pac. 760.

Connecticut.— Colburn *v.* Tolles, 14 Conn. 341.

Indiana.— Butler *v.* Edgerton, 15 Ind. 15.

Kansas.— McDermott *v.* Halleck, 65 Kan. 403, 69 Pac. 335.

Maine.—Castner *v.* Slater, 50 Me. 212.

Massachusetts.— Worcester Mechanics' Sav. Bank *v.* Hill, 113 Mass. 25.

Mississippi.— Dick *v.* Crowder, 10 Sm. & M. 71.

Nebraska.— Klosterman *v.* Olcott, 25 Nebr. 382, 41 N. W. 250; Newton Wagon Co. *v.* Diers, 10 Nebr. 284, 4 N. W. 995.

New York.— Union Bank *v.* Coster, 3 N. Y. 203, 53 Am. Dec. 280.

Ohio.— Cahill *v.* Smith, 9 Ohio Cir. Ct. 4, 6 Ohio Cir. Dec. 74.

Oregon.— Hildebrand *v.* Bloodsworth, 12 Oreg. 76, 6 Pac. 233.

Pennsylvania.— Campbell *v.* Knapp, 15 Pa. St. 27; Martin's Estate, 5 Pa. Co. Ct. 555.

Tennessee.— Stephens *v.* Stephens, 1 Baxt. 52.

Vermont.— Gregory *v.* Gleed, 33 Vt. 405.

Wisconsin.— Saxton *v.* McNair, 71 Wis. 459, 37 N. W. 439.

United States.— Zabriskie *v.* Cleveland, etc., R. Co., 23 How. 381, 16 L. ed. 488; Lawrence *v.* McCalmont, 2 How. 425, 11 L. ed. 326.

See 25 Cent. Dig. tit. "Guaranty," § 14.

The general rule that a valuable consideration, however small or nominal, is in the absence of fraud or bad faith sufficient to support an action on a contract applies to contracts of guaranty. Sears *v.* Swift, 66 Ill. App. 496.

Sufficient consideration.— Where in a writing guarantying the payment of a note, the guarantor directs a deduction of a certain sum from the note, this is a sufficient consideration for the guaranty. Logan *v.* Lee, 10 Ark. 585. A guaranty that the owner of stock shall receive dividends thereon of a specified amount, the guarantor to receive any surplus of dividends above that amount, is supported by a sufficient consideration. Elliot *v.* Hayes, 8 Gray (Mass.) 164. The indorsement of a promissory note is sufficient consideration for a promise to guaranty the debt of another. Sanders *v.* Gillespie, 64 Barb. (N. Y.) 628. A stipulation for a share in profits, if any, realized from an investment, is sufficient consideration to support a guaranty against loss by such investment. Shelton *v.* Reynolds, 111 N. C. 525, 16 S. E. 272. Where one railroad company holds stock in another, and the latter's road, when constructed, will become a feeder to the former's line, there is a sufficient consideration for the guaranty by the former of bonds issued by the latter to aid in the construction of its road. Harrison *v.* Union Pac. R. Co., 13 Fed. 522, 4 McCrary 264.

Amount of liability of guarantor is not limited by the amount of the consideration. A guarantor of a promissory note is liable, not only for the amount he receives in consideration for his guaranty, but for the whole amount of the note. Day *v.* Elmore, 4 Wis. 190.

5. *Arkansas.*— Killian *v.* Ashley, 24 Ark. 511, 91 Am. Dec. 519.

Illinois.— Munson *v.* Adams, 89 Ill. 450. But see Smith *v.* Finch, 3 Ill. 321.

Iowa.— Jones *v.* Berryhill, 25 Iowa 289.

Maryland.— Heyman *v.* Dooley, 77 Md. 162, 26 Atl. 117, 20 L. R. A. 257.

Massachusetts.— Adams *v.* Bean, 12 Mass.

moves from the principal debtor and not from the one to whom the offer of guaranty is made is sufficient.[6]

2. Separate and Independent From Consideration of Principal Contract — a. In General. Where as the result of the carrying out of the contract to which a promise of guaranty is collateral, benefits will accrue to the guarantor, no other consideration is required.[7] And where a guaranty executed by the payee of a note, on transferring it, of the collection of the note imposes no greater obligation on him than that specified by the law, no new consideration is required.[8]

b. As Affected by Time of Making Contract of Guaranty. Where the contract of guaranty is made at the same time as the principal contract one consideration is sufficient for both the principal and the collateral contract;[9] the fact that on the strength of his guaranty the guarantee has parted with money or property which passed to a third person is sufficient to bind the guarantor; his promise is founded upon the consideration existing between the principal parties.[10] The

137, 7 Am. Dec. 44; Deshon *v.* Dyer, 4 Allen 128.

New York.— Barney *v.* Forbes, 118 N. Y. 580, 23 N. E. 890 [*affirming* 44 Hun 446]; Erie County Sav. Bank *v.* Coit, 104 N. Y. 532, 11 N. E. 54; Church *v.* Brown, 21 N. Y. 315; Oppenheim *v.* Waterbury, 86 Hun 122, 33 N. Y. Suppl. 183; Wheelwright *v.* Moore, 1 N. Y. Super. Ct. 201; Hurd *v.* Newbrook, 2 Misc. 38, 21 N. Y. Suppl. 1029; Grant *v.* Hotchkiss, 15 How. Pr. 292; Smith *v.* Weed, 20 Wend. 184, 32 Am. Dec. 525.

See 25 Cent. Dig. tit. "Guaranty," § 13 *et seq.*

Any act in the nature of a benefit to a guarantor, or to any person at his request, is a sufficient consideration for his agreement of guaranty. Williams *v.* Marshall, 42 Barb. (N. Y.) 524. Any benefit or injury received by either party in consequence of the guaranty and its inducement is a sufficient consideration. Adams *v.* Huggins, 78 Mo. App. 219.

Benefit to the principal debtor or harm or inconvenience to the creditor is enough to constitute a consideration for the guaranty. Pennsylvania Coal Co. *v.* Blake, 85 N. Y. 226.

Credit given to the third person is a good consideration of a guaranty of his debt. Brewster *v.* Silence, 8 N. Y. 207.

Debt of a third person is a sufficient consideration for a promise to pay; but the promise must be unequivocally and freely made, and made to the creditor. La. Civ. Code, arts. 3004–3008; New Orleans Gas Light, etc., Co. *v.* Paulding, 12 Rob. (La.) 378; Flood *v.* Thomas, 5 Mart. N. S. (La.) 560.

6. Laing *v.* Lee, 20 N. J. L. 337, holding that a written promise to pay the debt of another out of the proceeds of the debtor's property, transferred for that purpose, will be binding, notwithstanding the consideration moves from the original debtor, and not from the promisee, and notwithstanding the original debtor remains liable.

7. Osborne *v.* Lawson, 26 Mo. App. 549. An agreement by the president of a brewing company to guaranty the payment of the rent accruing under a lease, in consideration of an agreement by the lessee to sell the product of the brewing company upon the leased premises is founded upon a sufficient consideration. Gunderson *v.* Hasterlik, 100 Ill. App. 429.

A promise by persons to work for a subcontractor for a specified time is a sufficient consideration to support a promise by the principal contractor to be responsible for their pay. McDonald *v.* Fernald, 68 N. H. 171, 38 Atl. 729.

Carrying out of a contract with a corporation is a sufficient consideration for a guaranty by its principal officer that payment will be made thereunder. Hirsch *v.* Chicago Carpet Co., 82 Ill. App. 234.

Where one pays his own debt with the note of a third person, the benefit resulting to him from being allowed to make payment in such manner is a sufficient consideration for his guaranty that the note will be paid. Worden *v.* Salter, 90 Ill. 160; Wilson *v.* St. John's Hospital, 92 Ill. App. 413.

8. Judson *v.* Gookwin, 37 Ill. 286.

9. See cases cited *infra*, note 10.

Statutory provisions which expressly dispense with the necessity of any other consideration than that of the principal obligation where the guaranty is entered into at the same time with the principal contract exist in some states. Cunningham *v.* Norton, (Cal. 1895) 40 Pac. 491.

10. *California.*— Cunningham *v.* Norton, (1895) 40 Pac. 491; Hazeltine *v.* Larco, 7 Cal. 32.

Connecticut.— Garland *v.* Gaines, 73 Conn. 662, 49 Atl. 19, 84 Am. St. Rep. 182.

Illinois.— Dillman *v.* Nedelhoffer, 160 Ill. 122, 43 N. E. 378; Capps *v.* Watts, 43 Ill. 60; Heintz *v.* Cahn, 29 Ill. 308; Joslyn *v.* Collinson, 26 Ill. 61; Rich *v.* Hathaway, 18 Ill. 548; McDonald *v.* Harris, 75 Ill. App. 111; Featherstone *v.* Hendrick, 59 Ill. App. 497.

Kansas.— Winans *v.* Gibbs, etc., Mfg. Co., 48 Kan. 777, 30 Pac. 163; Jones *v.* Kuhn, 34 Kan. 414, 8 Pac. 777.

Maine.— True *v.* Harding, 12 Me. 193. See Gilligan *v.* Boardman, 29 Me. 79, holding that where a guaranty is made at the same time

fact that the contract of guaranty was executed a short time subsequently to the carrying out of the principal contract does not take the transaction out of the above rule if the guaranty was executed pursuant to an understanding had before the performance of the principal contract and was a material inducement to the parting with value by the creditor.[11] And a guaranty, although made subsequent in time to the execution of the principal contract, if made pursuant to some provision in such principal contract, does not require a separate and independent consideration;[12] and the same rule applies to a contract of guaranty which expressly refers to a previous agreement between the principal debtor and the

as the principal contract, both constituting the ground of credit to the principal debtor, the consideration of the principal contract is a sufficient consideration for the guaranty.

Maryland.— Heyman *v.* Dooley, 77 Md. 162, 26 Atl. 117, 20 L. R. A. 257; Ordeman *v.* Lawson, 49 Md. 135.

Massachusetts.— Lennox *v.* Murphy, 171 Mass. 370, 50 N. E. 644; Bickford *v.* Gibbs, 8 Cush. 154.

Minnesota.—Osborne *v.* Gullikson, 64 Minn. 218, 66 N. W. 965.

New York.— Erie County Sav. Bank *v.* Coit, 104 N. Y. 532, 11 N. E. 54; Wood *v.* Tunnicliff, 74 N. Y. 38; Cahill Iron Works *v.* Pemberton, 48 N. Y. App. Div. 468, 62 N. Y. Suppl. 944; Marsh *v.* Chamberlain, 2 Lans. 287; Colston *v.* Pemberton, 21 Misc. 619, 47 N. Y. Suppl. 110; Brewster *v.* Short, 17 N. Y. Suppl. 799; Leonard *v.* Vredenburgh, 8 Johns. 29, 5 Am. Dec. 317.

North Carolina.— Greer *v.* Jones, 52 N. C. 581; Green *v.* Thornton, 49 N. C. 230.

Utah.— Gagan *v.* Stevens, 4 Utah 348, 9 Pac. 706.

United States.— Bebee *v.* Moore, 3 Fed. Cas. No. 1,202, 3 McLean 387; Toppan *v.* Cleveland, etc., R. Co., 24 Fed. Cas. No. 14,099, 1 Flipp. 74.

See 25 Cent. Dig. tit. "Guaranty," § 15.

A verbal promise of guaranty made at the time of the making of the principal contract is sufficient upon which to found a subsequent written agreement of guaranty. Wills *v.* Ross, 77 Ind. 1, 40 Am. Rep. 279.

Guaranty of payment of notes.— A guaranty of a note made before delivery is valid, although without separate consideration. Kennedy, etc., Lumber Co. *v.* Steamship Co., 123 Cal. 584, 56 Pac. 457; Davis *v.* Wolff Mfg. Co., 84 Ill. App. 579; Maher *v.* Dakota Bldg., etc., Assoc., 79 Ill. App. 231. Where a contract of guaranty is indorsed upon a note at the time it is executed, the consideration of the note is a sufficient consideration for the contract of guaranty. Duncanson *v.* Kirby, 90 Ill. App. 15. If a guaranty of a note for the price of goods was the inducement for extending credit this is a sufficient consideration for the guaranty. Sears *v.* Loy, 19 Wis. 96. And an indorsement on a note in the form of a guaranty at the time of its transfer will be supported by the same consideration which supports the transfer. Packer *v.* Wetherell, 44 Ill. App. 95; Gillighan *v.* Boardman, 29 Me. 79.

Guaranty of payment of price.— The delivery of merchandise to a third person on the faith of a guaranty of payment is a sufficient consideration for the guaranty. Lamb *v.* Briggs, 22 Nebr. 138, 34 N. W. 217; Beakes *v.* De Cunha, 126 N. Y. 293, 27 N. E. 251 [*affirming* 12 N. Y. Suppl. 351]; Williams *v.* Marshall, 42 Barb. (N. Y.) 524; Young *v.* Brown, 53 Wis. 333, 10 N. W. 394; Eastman *v.* Bennett, 6 Wis. 232.

Whenever the promise of guaranty is made before the one to whom the promise is made has incurred any loss or assumed any obligations with reference to the third person and such promise enters into the inducement for giving credit to the third person the promise of guaranty will be regarded as founded upon a valid consideration. Ferst *v.* Blackwell, 39 Fla. 621, 22 So. 892.

11. Standley *v.* Miles, 36 Miss. 434; Wheelwright *v.* Moore, 2 Hall (N. Y.) 162; Gottsberger *v.* Radway, 2 Hilt. (N. Y.) 342.

Where the payment of a note is guarantied subsequent to its delivery there must be a distinct consideration. But if such guaranty was in payment of an arrangement made before the delivery the consideration for the note itself would be sufficient to support the guaranty also. Commonwealth Nat. Bank *v.* Law, 127 Mass. 72; Phelps *v.* Church, 65 Mich. 231, 32 N. W. 30; Tinker *v.* McAuley, 3 Mich. 188; Moses *v.* Bank, 149 U. S. 298, 13 S. Ct. 900, 37 L. ed. 743.

Regarded as contemporaneous.—A guaranty, although executed subsequently to the principal contract, will be deemed to have been made contemporaneously with it within the meaning of the above rule, if it was delivered at the same time and before any action was taken by the creditor in reliance thereon. Garland *v.* Gaines, 73 Conn. 662, 49 Atl. 19, 84 Am. St. Rep. 182. So where after a contract for the sale of goods is made, the seller declines to deliver them unless security for their payment is furnished and a third person thereupon guaranties payment and the goods are furnished, the contract of guaranty must be regarded as having been made contemporaneously with the principal contract. Hirsch *v.* Chicago Carpet Co., 82 Ill. 234.

12. See cases cited *infra*, this note.

Where an agent for the sale of goods is required by his contract with his principal to guaranty the payment of notes taken in payment of the price of goods sold, such a guaranty is based upon a sufficient consideration. Long, etc., Co. *v.* Hill, 48 Ill. App. 517; Windels *v.* Milwaukee Harvester Co., 39 Ill. App. 521; Osborne *v.* Smith, 18 Fed. 126, 5 McCrary 487.

creditor which is executory in its character and embraces prospective dealings between the parties.[13]

c. Guaranties Relating to Past Transactions — (I) *In General.* A past consideration is one which has already served its purpose in a former transaction and is therefore not sufficient to support the promise of a guarantor.[14] And where the guarantor derives no benefit from the principal contract,[15] and the contract of guaranty is made so long subsequent to the execution of the principal contract that it cannot be said to have been a part of the original transaction and the creditor has taken no action to his prejudice in reliance upon the guaranty, there must be a new and independent consideration to support it.[16]

(II) *Payment of Preëxisting Debt.* The guaranty of a preëxisting debt relates to a past consideration and therefore to be valid must be based upon a new and additional consideration.[17] Such a consideration may be found in an agreement to extend the time of the payment of the debt or to forbear suit thereon.[18]

13. Roberts *v.* Woven-Wire Mattress Co., 46 Md. 374.

14. Gilman *v.* Kibler, 5 Humphr. (Tenn.) 19.

15. Holmes *v.* Williams, 69 Ill. App. 114. A person cannot be held liable as guarantor for a preëxisting debt when neither he nor the principal receives any benefit, and the party to whom the promise is made sustains no detriment or change of position by reason of the guaranty. Greer *v.* Clermont Distilling, etc., Co., 15 Ky. L. Rep. 237.

16. *California.*— Hazeltine *v.* Larco, 7 Cal. 32.

Connecticut.— Cowles *v.* Peck, 55 Conn. 251, 10 Atl. 569, 3 Am. St. Rep. 44.

Illinois.— Joslyn *v.* Collinson, 26 Ill. 61; Haven *v.* Chicago Sash, etc., Co., 96 Ill. App. 92; Holmes *v.* Williams, 69 Ill. App. 114; Featherstone *v.* Hendrick, 59 Ill. App. 497; Grier *v.* Cable, 45 Ill. App. 405; Cassell *v.* Morrison, 8 Ill. App. 175; Blanchard *v.* McCuller, 7 Ill. App. 431.

Kentucky.— Snowden *v.* Light, 6 Ky. L. Rep. 118, 5 Ky. L. Rep. 606.

Maine.— Ware *v.* Adams, 24 Me. 177.

Maryland.— Roberts *v.* Woven-Wire Mattress Co., 46 Md. 374.

Massachusetts.— Tenney *v.* Prince, 4 Pick. 385, 16 Am. Dec. 347.

Missouri.— Peck *v.* Harris, 57 Mo. App. 467.

New Hampshire.— Badger *v.* Barnabee, 17 N. H. 120.

New York.— Strong *v.* Sheffield, 66 Hun 349, 21 N. Y. Suppl. 505; Farnsworth *v.* Clark, 44 Barb. 601; Clune *v.* Ford, 8 N. Y. Suppl. 719.

North Carolina.— Greer *v.* Jones, 52 N. C. 581; Green *v.* Thornton, 49 N. C. 230.

Tennessee.— Gilman *v.* Kibler, 5 Humphr. 19; Clark *v.* Brown, 6 Yerg. 418.

Texas.— Baker *v.* Wahrmund, 5 Tex. Civ. App. 268, 23 S. W. 1023.

United States.— McNaught *v.* Fisher, 96 Fed. 168, 37 C. C. A. 438; Bebee *v.* Moore, 3 Fed. Cas. No. 1,202, 3 McLean 387; Toppan *v.* Cleveland, etc., R. Co., 24 Fed. Cas. No. 14,099, 1 Flipp. 74.

See 25 Cent. Dig. tit. "Guaranty," § 16.

Extent and limits of rule.— A guaranty made after the execution of the principal contract which is not based upon any new consideration is not obligatory and putting it in writing, if not under seal, will not help it. Green *v.* Thornton, 49 N. C. 230. Where three parties joined in a contract to purchase certain lands, a contract subsequently entered into between two of such parties, whereby one, "in consideration of" the other "entering into and signing" such first contract, agrees to guaranty the payment to him of all money advanced, is without consideration. Lane *v.* Richards, 119 Iowa 24, 91 N. W. 786. But an instrument which expressly guaranties past and future advances in consideration of the future advances is good as to the whole. Hargroves *v.* Cooke, 15 Ga. 321. To same effect see Sears *v.* Swift, 66 Ill. App. 496.

"The engagement of a guarantor is generally founded on some new or independent consideration, growing out of the original obligation, except in those cases where it is given at the time of the contracting of the principal debt, and is necessarily connected with it." Lane *v.* Levillian, 4 Ark. 76, 84, 37 Am. Dec. 769. Thus where after a lease of premises has been fully executed and delivered to the lessee, one executes a separate and distinct contract to guaranty the payment of the rent under the lease there must be a new and independent consideration from that of the lease to sustain the promise of guaranty. Bullen *v.* Morrison, 98 Ill. App. 669.

17. Union Bank *v.* Coster, 3 N. Y. 203, 53 Am. Dec. 280.

The legal quality of the consideration is determined without regard to the character of the contract that is sought to be based upon it and a guaranty of past indebtedness requires no other or different consideration from any other contract. Vinal *v.* Richardson, 13 Allen (Mass.) 521.

18. *Illinois.*— Ives *v.* McHard, 103 Ill. 97; Smith *v.* Finch, 3 Ill. 321; Featherstone *v.* Hendrick, 59 Ill. App. 497.

Kansas.— Fuller *v.* Scott, 8 Kan. 25.

Maine.— King *v.* Upton, 4 Me. 387, 16 Am. Dec. 266.

Massachusetts.— Johnson *v.* Wilmarth, 13 Metc. 416.

And a promise to forbear generally without specifying any time is a sufficient consideration.[19] But mere forbearance to sue the debtor, without any agreement to that effect on the part of the creditor, is not a sufficient consideration for a guaranty of the debt.[20] And the agreement to forbear must be concerning some valid existing and enforceable right.[21]

3. FAILURE OF CONSIDERATION. Failure of consideration of the principal contract is a good defense on behalf of the guarantor,[22] unless the guarantor has

Minnesota.— Peterson *v.* Russell, 62 Minn. 220, 64 N. W. 555, 54 Am. St. Rep. 634, 29 L. R. A. 612.

Pennsylvania.— Kean *v.* McKinsey, 2 Pa. St. 30.

Tennessee.— Allen *v.* Morgan, 5 Humphr. 624.

Wisconsin.— Dahlman *v.* Hammel, 45 Wis. 466.

See 25 Cent. Dig. tit. "Guaranty," § 17.

The extension of time to a principal debtor is a sufficient consideration to support a guaranty by a stranger of the payment of the debt and an agreement to forbear the enforcement of a preëxisting debt followed by actual forbearance on the part of the creditor is sufficient consideration for a guaranty of its payment by a third person. Faulkner *v.* Gilbert, 57 Nebr. 544, 77 N. W. 1072; Greene *v.* Odell, 43 N. Y. App. Div. 494, 60 N. Y. Suppl. 78.

19. For the law will require the creditor to forbear for a reasonable time.

California.— Smith *v.* Compton, 6 Cal. 24.

Connecticut.— Sage *v.* Wilcox, 6 Conn. 81.

Illinois.— Webbe *v.* Romona Oolitic Stone Co., 58 Ill. App. 222.

Indiana.— Wills *v.* Ross, 77 Ind. 1, 40 Am. Rep. 279.

Maine.— Moore *v.* McKenney, 83 Me. 80, 21 Atl. 749, 23 Am. St. Rep. 753.

Michigan.— Calkins *v.* Chandler, 36 Mich. 320, 24 Am. Rep. 593.

New Jersey.— Meyers *v.* Hockenbury, 34 N. J. L. 346.

New York.— Finch *v.* Skilton, 79 Hun 531, 29 N. Y. Suppl. 925; Hayes *v.* Hood, 10 N. Y. Suppl. 265; Traders' Nat. Bank *v.* Parker, 8 N. Y. Suppl. 683; Watson *v.* Randall, 20 Wend. 201; McFarland *v.* Smith, 6 Cow. 669.

Pennsylvania.— Giles *v.* Ackles, 9 Pa. St. 147, 49 Am. Dec. 551; Kean *v.* McKinsey, 2 Pa. St. 30; Caldwell *v.* Heitshu, 9 Watts & S. 51; Hesser *v.* Steiner, 5 Watts & S. 476; Silvis *v.* Ely, 3 Watts & S. 420; Downing *v.* Funk, 5 Rawle 69.

South Carolina.— McCelvy *v.* Noble, 13 Rich. 330; Thomas *v.* Croft, 2 Rich. 113, 44 Am. Dec. 279.

See 25 Cent. Dig. tit. "Guaranty," § 17.

20. Webbe *v.* Romona Oolitic Stone Co., 58 Ill. App. 222; Mecorney *v.* Stanley, 8 Cush. (Mass.) 85; Hoffmann *v.* Mayaud, 93 Fed. 171, 35 C. C. A. 256. To constitute a good consideration for a contract to guaranty the payment of a note made after its delivery, a promise of forbearance must be definitely binding upon the party making it so that the party to whom it is made may enforce it in case of breach. McMicken *v.* Safford, 197 Ill. 540, 64 N. E. 540.

21. See cases cited *infra*, this note. If the contract be to forbear doing a thing which plaintiff has not a right to do, there is no consideration to support a guaranty of the claim in question. Thus a promise to pay a debt of a third person, in consideration of the promisee's forbearance to proceed against such third person to have him adjudged a bankrupt, is without consideration, and an action is not maintainable thereon, if at the same time the promise was made the promisee had no right under the bankrupt act to institute such proceedings. Ecker *v.* McAllister, 45 Md. 290. So a creditor's agreement to forbear seizing property on attachment against his debtor will not support a promise by a third person to pay the debt, if at the time the debtor has no interest in the property. Rood *v.* Jones, 1 Dougl. (Mich.) 188.

A promise to guaranty a debt already due, made in consideration of the forbearance of the creditor to attach the debtor's goods, is void where there was no valid ground of attachment. Smith *v.* Easton, 54 Md. 138, 39 Am. Rep. 355.

22. Hitchcock *v.* Burchell, 74 N. Y. App. Div. 622, 76 N. Y. Suppl. 812 [*affirmed* in 177 N. Y. 570, 69 N. E. 1124]; McDonald Mfg. Co. *v.* Moran, 52 Wis. 203, 8 N. W. 864. Thus where on the sale of land one of the purchasers executes a bond payable to the other two purchasers, who assign it, with a guaranty, to the vendor, the purpose being that the bond shall be security for the obligor in the bond for the payment of purchase-money, the guarantors in an action on their guaranty can raise the defense that the consideration for the bond has failed by a failure of the title to the land purchased. Waring *v.* Cheeseborough, 1 Hill (S. C.) 187. So where the consideration for the guaranty of the payment of a previously existing debt is an agreement to extend the time of payment, failure to carry out the agreement is a good defense in an action on the guaranty. Wallace *v.* Hudson, 37 Tex. 456. A judgment of restitution in a suit of forcible retainer for the possession of leased premises puts an end to the lease, and a guarantor on the lease is not responsible for rent accruing after such termination. Snell *v.* Owen, 63 Ill. App. 377.

A mere counter-claim growing out of a breach of warranty is not available to a guarantor or surety, whether he be an indorser for value or merely an accommodation indorser; but, if there is any fact from which

received a consideration direct from the creditor.[23] But where the principal contract is not entire a partial failure of consideration for it is a defense on behalf of the guarantor only to the extent of such failure.[24] And where the consideration of a guaranty is sufficient when entered into, the guaranty does not fail by the subsequent loss of value of the consideration.[25]

E. Competency of Parties to Contract — 1. In General. The contract of guaranty, like all other contracts, to be binding, must be made by parties competent to contract.[26]

F. Duress. With respect to the right of a guarantor to avail himself of duress brought to bear upon the principal debtor, the general principle is that only he to whom duress is offered can take advantage of it.[27]

G. Fraud. A guarantee who has demanded and received a guaranty of his claim is not responsible for misrepresentation and deception practised without his knowledge by the principal upon the guarantor.[28] If, however, the creditor has participated in false representations or in a fraudulent concealment of facts which has operated to induce the making of the contract of guaranty, the guarantor may of course set up such fraud as a defense in an action upon the guaranty.[29]

a total failure of consideration for the original contract arises, the guarantor or surety has a right to avail himself of that fact. Osborne *v.* Bryce, 23 Fed. 171.

Forbearance or dismissal of proceedings.— If a promissory note is given, with a guaranty of payment, in consideration that the payee shall dismiss a proceeding in bankruptcy against the maker, and such proceeding is not dismissed, there will be a failure of the consideration, which may be set up by the guarantor in a suit upon the guaranty by the payee. Paton *v.* Stewart, 78 Ill. 481. The issuing of a writ of summons, although returned not served, is a suit brought, and would release the guarantor of a bond who had stipulated in consideration of total forbearance. Caldwell *v.* Heitshu, 9 Watts & S. (Pa.) 51. One who promises to pay the debt of another in consideration of a general forbearance is not liable to pay it if the original debtor has been sued, since a general forbearance is a total forbearance. Clark *v.* Russel, 3 Watts (Pa.) 213, 27 Am. Dec. 348.

23. Walter A. Wood Mowing, etc., Mach. Co. *v.* Land, 98 Ky. 516, 32 S. W. 607, 17 Ky. L. Rep. 791.

24. Mechanics' Nat. Bank *v.* Frazer, 86 Ill. 133, 29 Am. Rep. 20.

25. Mordecai *v.* Gadsden, 2 Speers (S. C.) 566.

26. See Contracts, 9 Cyc. 371 *et seq.* Ordinarily those who are capable of binding themselves in other contracts may enter into binding contracts of guaranty. Occasionally, however, there is a limitation placed upon certain persons which makes their contracts of guaranty or suretyship void. Guaranty by: Bank, see Banks and Banking, 5 Cyc. 523. Corporation, see Corporations, 10 Cyc. 1109. Married woman, see Husband and Wife.

27. Griffith *v.* Sitgreaves, 90 Pa. St. 161.

Duress at common law where no statute is violated is a personal defense which can only be set up by the person subjected to the duress. Hazard *v.* Griswold, 21 Fed. 178.

Right of a surety to avail himself of duress offered to the principal see Principal and Surety.

28. The law requires good faith on the creditor's part, but does not hold him responsible for the principal's wrongful acts of which he himself has no knowledge. Davis Sewing Mach. Co. *v.* Buckles, 89 Ill. 237; Lucas *v.* Owens, 113 Ind. 521, 16 N. E. 196; Page *v.* Krekey, 137 N. Y. 307, 33 N. E. 311, 33 Am. St. Rep. 731, 31 L. R. A. 409 [*affirming* 17 N. Y. Suppl. 764]; Powers *v.* Clarke, 127 N. Y. 417, 28 N. E. 402; McWilliams *v.* Mason, 31 N. Y. 294 [*affirming* 1 Rob. 576, 2 Abb. Pr. N. S. 211]; Burge Suretyship 218; Baylis Sur. & Guar. 214.

In such case the real question is which of two innocent parties shall suffer by a fraud perpetrated by a third person and it is more consonant with public policy as well as sound morals that he who by permitting himself to be deceived has put it in the power of another to defraud and influence such third person should himself suffer rather than the latter. McWilliams *v.* Mason, 31 N. Y. 294.

Whether a surety may defend an action on a bond by showing misrepresentations made by the principal see Principal and Surety.

29. *Alabama.*— Anderson *v.* Bellenger, 87 Ala. 334, 6 So. 82, 13 Am. St. Rep. 46, 4 L. R. A. 680.

California.— Guardian F., etc., Assur. Co. *v.* Thompson, 68 Cal. 208, 9 Pac. 1.

Connecticut.— Phœnix Mut. L. Ins. Co. *v.* Holloway, 51 Conn. 310, 50 Am. Rep. 21; Doughty *v.* Savage, 28 Conn. 146.

Georgia.— Holliday *v.* Poole, 77 Ga. 159.

Illinois.— Comstock *v.* Gage, 91 Ill. 328; Easter *v.* Minard, 26 Ill. 494.

Indiana.— Wilson *v.* Monticello, 85 Ind. 10; Fishburn *v.* Jones, 37 Ind. 119; Ham *v.* Greve, 34 Ind. 18.

Iowa.— Monroe Bank *v.* Gifford, 72 Iowa 750, 32 N. W. 669; Conger *v.* Bean, 58 Iowa 321, 12 N. W. 284.

Kentucky.— Connecticut Mut. L. Ins. Co. *v.* Scott, 81 Ky. 540.

Louisiana.— State *v.* Dunn, 11 La. Ann. 549; Reusch *v.* Keenan, 42 La. 419, 7 So. 589.

So if the guarantee knows that the guarantor is entering into the contract, induced to do so by a misrepresentation of facts by some third person which if known to him would cause him to refuse to become guarantor, or if he is thereby led to believe his contract less burdensome than it is in fact, his contract is not binding.[30] And active concealment[31] of facts by the creditor which if known would have prevented the guarantor from obligating himself, or which materially increases his responsibility, will amount to such fraud upon the guarantor as to relieve him from liability.[32]

IV. Invalidity of Principal Contract as Affecting Liability of Guarantor.

A. General Rule. It is a general rule that the extent of the liability of the principal debtor measures and limits the liability of the guarantor.[33] And that if the principal obligation with reference to which the collateral contract of guaranty is made is not binding the guaranty is also invalid.[34] Thus where the con-

Maine.— Franklin Bank *v.* Stevens, 39 Me. 532; Franklin Bank *v.* Cooper, 36 Me. 179.

Michigan.— Waterbury *v.* Andrews, 67 Mich. 281, 34 N. W. 575.

Missouri.— Harrison *v.* Lumbermen, etc., Ins. Co., 8 Mo. App. 37; Home Sav. Bank *v.* Troube, 6 Mo. App. 221.

New York.—Vose *v.* Florida R. Co., 50 N. Y. 369; McWilliams *v.* Mason, 31 N. Y. 294.

Pennsylvania.— Wayne *v.* Commercial Nat. Bank, 52 Pa. St. 343; Frisch *v.* Miller, 5 Pa. St. 310; Reed *v.* Garvin, 12 Serg. & R. 100.

Texas.— Trammell *v.* Swan, 25 Tex. 473.

Utah.— Jungk *v.* Holbrook, 15 Utah 198, 49 Pac. 305, 62 Am. St. Rep. 921.

Wisconsin.— Remington Sewing Mach. Co. *v.* Kezertee, 49 Wis. 409, 5 N. W. 809.

England.— Gillett *v.* Whitmarsh, 8 Q. B. 966, 10 Jur. 904, 15 L. J. Q. B. 291, 55 E. C. L. 966.

Canada.— Molsons Bank *v.* Turley, 8 Ont. 293.

See 25 Cent. Dig. tit. "Guaranty," § 22.

The guarantor for the payment of rent and the performance of other conditions of a lease, who was induced to sign the guaranty by false and fraudulent representations of the landlord made to him and the tenant at the time, will be relieved from liability as guarantor; and the fact that there was no rescission of the contract or lease by the tenant does not affect the rights of his surety or guarantor. The contract of the latter is so far independent of the former that the tenant could not do anything or omit to do anything that would destroy or impair the right of the guarantor to set up a fraud practised upon himself by the landlord, and to avail himself of the same as a defense. Mendelson *v.* Stout, 37 N. Y. Super. Ct. 408.

30. Doughty *v.* Savage, 28 Conn. 146; State *v.* Sooy, 39 N. J. L. 135; Pidcock *v.* Bishop, 3 B. & C. 605, 5 D. & R. 505, 3 L. J. K. B. O. S. 109, 27 Rev. Rep. 430, 10 E. C. L. 276; Stone *v.* Compton, 5 Bing. N. Cas. 142, 6 Scott 846, 35 E. C. L. 85.

31. The concealment which will avoid a guaranty need not necessarily have been with a view to the advantage of the person who is benefited by the guaranty. If the concealment is designed to prejudice the guarantor and prejudice results from the concealment, it is sufficient to constitute a fraud which will avoid the obligation. Howe Mach. Co. *v.* Farrington, 82 N. Y. 121. In order to enable the guarantor to avoid the contract by means of an equitable discharge, predicated upon fraudulent concealment of material facts, such material facts must constitute parts of the transaction and necessarily operate as an inducement to the guarantor to bind himself; and these facts must immediately affect his liability, and bear directly on the particular transaction to which the suretyship attaches. Lachman *v.* Block, (La. 1894) 15 So. 649.

32. Pidcock *v.* Bishop, 3 B. & C. 605, 5 D. & R. 505, 3 L. J. K. B. O. S. 109, 27 Rev. Rep. 430, 10 E. C. L. 276; Williams *v.* Rawlinson, 3 Bing. 71, 11 E. C. L. 43, 10 Moore C. P. 362, R. & M. 233, 21 E. C. L. 740, 28 Rev. Rep. 584; Lee *v.* Jones, 17 C. B. N. S. 482, 11 Jur. N. S. 81, 34 L. J. C. P. 131, 12 L. T. Rep. N. S. 122, 13 Wkly. Rep. 318, 112 E. C. L. 482; Hamilton *v.* Watson, 12 Cl. & F. 109, 8 Eng. Reprint 1339; Smith *v.* Scotland Bank, 1 Dow. 272, 3 Eng. Reprint 697; Leith Banking Co. *v.* Bell, 8 Shaw & Danl. 721. Guarantors of the performance by a partnership of a contract for the sale of live stock are released from liability by their ignorance of the fact that the contract was negotiated by a common member of both the buying and the selling partnerships, since the risk of the guarantors is increased by intrusting the performance of a contract to one whose interest is equally with both parties. Jungk *v.* Reed, 9 Utah 49, 33 Pac. 236. See also Principal and Surety.

The creditor is not required to make any disclosure or explanation, the withholding of which does not amount to a fraud. Powers *v.* Clarke, 127 N. Y. 417, 28 N. E. 402.

33. See cases cited *infra*, note 34 *et seq.*

34. *California.*— Fisher *v.* Salmon, 1 Cal. 413, 54 Am. Dec. 297.

Iowa.— Merchants' Nat. Bank *v.* Citizens' State Bank, 93 Iowa 650, 61 N. W. 1065, 57 Am. St. Rep. 284.

sideration for the guaranty is the carrying out of the principal contract and the contract made for the purpose of carrying out such principal contract is invalid, the guaranty will fail for lack of a consideration.[35]

B. Exceptions to Rule — 1. In General. Important exceptions to the above rule exist which must not be overlooked. They are found in those cases where the defect is not in the contract itself but pertains to those matters which are personal to the principal debtor; or they may arise from causes which originate in the law.[36] A guaranty of an existing contract may stand by itself, although the obligation guarantied is invalid;[37] and it will usually be found that where the

Missouri.— Sedalia, etc., R. Co. *v.* Smith, 27 Mo. App. 371.

New York.— Joslyn *v.* Dow, 19 Hun 494.

Tennessee.—Smith *v.* Dickinson, 6 Humphr. 261, 44 Am. Dec. 306.

United States.— Drummond *v.* Prestman, 12 Wheat. 515, 6 L. ed. 712.

See 25 Cent. Dig. tit. "Guaranty," § 7. See also Chitty Contr. 499.

If the principal contract is void for illegality or immorality the guaranty must fall with it because the court will not enforce a guaranty upon a contract which ought not to be enforced against any one. Zerkle *v.* Price, 7 Ohio S. & C. Pl. Dec. 465, 5 Ohio N. P. 480.

Rule applied.— Where a promissory note was given on the sale of real estate and the vendor had neither title nor color of title, the contract between the original parties was without consideration and unenforceable. Therefore he who guarantied this note was not bound on his contract of guaranty. Fisher *v.* Salmon, 1 Cal. 413, 54 Am. Dec. 297. A guaranty to pay all sums collected by an employee for his employer and all indebtedness now due or which may become due such employer, in excess of the amount due the employee "as per" an agreement between the employer and the employee, cannot be enforced if the agreement referred to in the guaranty created no liability on the part of the employee. Rice *v.* John A. Tolman Co., 60 Ill. App. 516 [*affirmed* in 164 Ill. 255, 45 N. E. 496]. Plaintiff bought a draft, drawn by A on B for the price of a carload of oranges sold by A to B, on receiving defendant's guaranty in the words "Will guaranty B's draft for car of oranges from A," and took the bill of lading, which was made out in A's name, and attached to the draft. It was held that defendant's liability on the guaranty depended on B's liability on the draft, and no liability having arisen against B, defendant was not liable. Merchants' Nat. Bank *v.* Citizens' State Bank, 93 Iowa 650, 61 N. W. 1065, 57 Am. St. Rep. 284. In an action against a guarantor, it is a sufficient defense that the principals were not bound because of the fraudulent or mistaken representations of plaintiff. Bennett *v.* Corey, 72 Iowa 476, 34 N. W. 291. One who guaranties to town railroad commissioners the due performance by a railroad company of its contract to invest the proceeds of railroad aid bonds in ties, to belong to the commissioners until the road is completed, is not bound thereby, where the contract guarantied is void, the commissioners having no authority to make it. Joslyn *v.* Dow, 19 Hun (N. Y.) 494. A induced H to execute a promissory note to him, of which defendant afterward guarantied the payment. It was held that the defense of fraud on the part of A in procuring the note was available to defendant in an action upon the guaranty by the executor of A. Putnam *v.* Schuyler, 4 Hun (N. Y.) 166, 6 Thomps. & C. 485.

35. Fisher *v.* Salmon, 1 Cal. 413, 54 Am. Dec. 297.

Where the principal obligation and the guaranty are coeval in their relation and identical in their consideration, the invalidity of the one will cause the other to fail; as where at the time of the giving of a promissory note there is indorsed upon it a guaranty of its payment and the note is void for usury. Rosa *v.* Butterfield, 33 N. Y. 665.

Where a third person secretly agrees to guaranty the payment in full of a claim owing by an insolvent debtor to a particular creditor in consideration of the latter entering into a composition, the secret agreement to secure to such creditor an advantage over the other creditors being invalid, the guaranty is invalid. Morrison *v.* Schlessinger, 10 Ind. App. 665, 38 N. E. 493.

36. See cases cited *infra*, note 37 *et seq.* While such exceptions have generally been pointed out and discussed in cases of suretyship there appears to be no reason why they are not applicable in cases of guaranty as well. See Principal and Surety.

37. Rosa *v.* Butterfield, 33 N. Y. 665. A guarantor may be held, although no suit could be maintained upon the original debt, for the guaranty may have been required for that very reason. Sterns *v.* Marks, 35 Barb. (N. Y.) 565. In Mann *v.* Eckford, 15 Wend. (N. Y.) 502, a corporation paid a sum of money for a bond executed by one G, the bond being secured by a mortgage also executed by G, and defendant guarantied the repayment by G of the amount so paid by the corporation. It was held in an action on the guaranty that defendant could not set up as a defense that the original bond and mortgage were invalid because of usury, it not appearing that the corporation had any knowledge of the usury. Where defendant guarantied the payment of a particular note and thereupon plaintiff upon the faith of such guaranty purchased it, both parties being equally innocent as to any fraud, misrepresentation, or concealment, it was held that defendant was liable upon his guaranty

fact that the supposed principal debtor is not bound is held to be a defense on behalf of the guarantor, such fact has also resulted in a failure of consideration for the contract of guaranty or that such contract has been brought about by fraud or has been entered into under a mutual mistake.[38] And as the guarantor may by the terms of his contract make himself liable for the principal debt, although it be invalid,[39] the question of whether the liability of a guarantor is to be measured by the liability of the principal debtor is largely a matter of interpretation of the contract of guaranty.[40]

2. CONTRACT OR DEBT OF MARRIED WOMAN. One who guaranties the debt of a married woman is not discharged from his liability thereon, although by pleading her coverture she is enabled to escape liability.[41]

3. CONTRACT OR DEBT OF CORPORATION. A corporation's contract may be *ultra vires* and thus not enforceable against the corporation itself; but unless there is something in connection with the execution more than the mere lack of power in the corporation to execute it, the surety or guarantor thereon will be bound.[42]

4. CONTRACT OR DEBT OF INFANT. Guaranties of the contracts or debts of infants constitute another exception to the general rule.[43]

C. Estoppel of Guarantor to Dispute Validity of Principal Contract. On the same theory that a surety upon an official bond or bond of one appointed to some position of trust is estopped from denying that the principal in the bond

for non-payment of the same by the parties whose names were attached to the note, although it was subsequently made to appear that the names of the maker of the note and one of the indorsers were forged. Veazie *v.* Willis, 6 Gray (Mass.) 90. To the same effect see Jones *v.* Thayer, 12 Gray (Mass.) 443, 74 Am. Dec. 602. And where one guarantied the performance of the covenants in a lease on behalf of the lessees the fact that the lease was not executed by one of the lessees was held not to prevent recovery against the guarantor, both lessees having received the full benefit of the lease and occupied the demised premises for the whole term. McLaughlin *v.* McGovern, 34 Barb. (N. Y.) 208. See also cases cited *infra*, note 38 *et seq.*

38. Bennett *v.* Carey, 72 Iowa 476, 34 N. W. 291. See also cases cited *supra*, note III, D, 3.

39. Sedalia, etc., R. Co. *v.* Smith, 27 Mo. App. 371; Jamison *v.* Griswold, 6 Mo. App. 405. A collateral contract may sometimes be recovered upon when the principal one to which it is auxiliary is entirely incapable of enforcement. McLaughlin *v.* McGovern, 34 Barb. (N. Y.) 208.

40. Merchants' Nat. Bank *v.* Citizens' State Bank, 93 Iowa 650, 61 N. W. 1065, 57 Am. St. Rep. 284. Thus where defendant undertook to guaranty the draft of the buyer of goods for the price thereof, it was held that the guarantor was not liable unless the goods were delivered to and accepted by the buyer. Merchants' Nat. Bank *v.* Citizens' State Bank, 93 Iowa 650, 61 N. W. 1065, 57 Am. St. Rep. 284. So a contract to make good, up to a certain amount, any deficit in the payment of subscriptions to the capital stock of a corporation was held not to guaranty the payment of subscriptions which were invalid. Sedalia, etc., R. Co. *v.* Smith, 27 Mo. App. 371.

41. *Arkansas.*— Stillwell *v.* Bertrand, 22 Ark. 375.

Indiana.— Davis *v.* Statts, 43 Ind. 103, 13 Am. Rep. 382.

Mississippi.— Whitworth *v.* Carter, 43 Miss. 61.

Missouri.— Lobargh *v.* Thompson, 74 Mo. 600.

New York.— Kimball *v.* Newell, 7 Hill 116.

Pennsylvania.— Wiggins' Appeal, 100 Pa. St. 155.

South Carolina.— Smyley *v.* Head, 2 Rich. 590, 45 Am. Dec. 750.

Vermont.— St. Albans Bank *v.* Dillon, 30 Vt. 122, 73 Am. Dec. 295.

42. Gist *v.* Drakely, 2 Gill (Md.) 330, 41 Am. Dec. 426; Weare *v.* Sawyer, 44 N. H. 198; Bowman Cycle Co. *v.* Dyer, 31 Misc. (N. Y.) 496, 64 N. Y. Suppl. 551; Mason *v.* Nichols, 22 Wis. 376; Yorkshire Railway Wagon Co. *v.* Maclure, 19 Ch. D. 478, 51 L. J. Ch. 259, 45 L. T. Rep. N. S. 751, 30 Wkly. Rep. 291.

Extent and limits of this exception.— Where the principal contract is one made with a corporation and is *ultra vires*, but affects private persons only and may therefore be validated by the assent of such persons, a guaranty of the performance of the contract is enforceable. Zerkle *v.* Price, 7 Ohio S. & C. Pl. Dec. 465, 5 Ohio N. P. 480. But where a corporation before making a contract obtained a guaranty from defendant that if it should be "called upon to pay" under the contract he would reimburse the corporation, it was held that the fact that the contract thereupon entered into by the corporation was *ultra vires* relieved defendant from liability upon his guaranty. Koehler *v.* Reinheimer, 20 Misc. (N. Y.) 62, 45 N. Y. Suppl. 337.

43. Thus the note of an infant will still be binding on the surety or guarantor, although by the plea of infancy the maker is

was not duly elected or appointed,[44] one who guaranties, under seal, the performance of the contract of another is estopped from denying that the contract was duly executed by the principal debtor.[45] And a guaranty of payment of a bond imports the agreement that the maker of the bond is competent to contract in the manner he has and that the instrument is a binding obligation upon the maker.[46] So where the principal debtor has assumed to enter into the principal contract in a corporate capacity, the guarantor is estopped from claiming that no legal incorporation was effected.[47] An innocent purchaser of a negotiable note before due may hold the guarantor, although the note is void if he purchased it on the faith of the guaranty.[48] And the guarantor of the payment of a note or other written obligation is estopped from denying the genuineness of the signature of the maker of such instrument.[49]

V. Construction of Contract and Extent of Liability of Guarantor.

A. In General — 1. General Rules Applicable to Contracts. In ascertaining the meaning of the language of the contract of guaranty the same rules of construction are applicable as to other contracts.[50] The apparent intention of the parties as it is gathered from the instrument itself is to control.[51] Where there is

relieved of responsibility thereon. Baker *v.* Kennett, 54 Mo. 82; Conn *v.* Coburn, 7 N. H. 368, 26 Am. Dec. 746; Kuns *v.* Young, 34 Pa. St. 60.

44. See Principal and Surety.

45. Otto *v.* Jackson, 35 Ill. 329.

46. Remsen *v.* Graves, 41 N. Y. 471.

47. Mason *v.* Nichols, 22 Wis. 376.

48. Holm *v.* Jamieson, 173 Ill. 295, 50 N. E. 702, 45 L. R. A. 846. Where the payee named in a bond negotiates it upon the strength of his guaranty of its payment, he cannot resist liability upon his guaranty upon the ground that the bond was invalid. Jamison *v.* Griswold, 6 Mo. App. 405.

49. Austin, etc., Mfg. Co. *v.* Heiser, 6 S. D. 429, 61 N. W. 445. Where a limited partnership executed its note for a bank as collateral for notes of such customers of the firm as the bank should discount on the indorsement of the firm and a guaranty by one of the members of the firm was indorsed on the collateral note, it was held that under the peculiar circumstances of the case the guarantor as well as the firm was bound by the representations of the latter that notes so discounted were valid. Pennsylvania Trust Co. *v.* McElroy, 112 Fed. 509, 50 C. C. A. 371.

Indorsement of a note as a guaranty of genuineness of previous signatures and of the capacity of the parties to the note to contract see Commercial Paper, 7 Cyc. 833.

50. *Connecticut.*— National Exch. Bank *v.* Gay, 57 Conn. 224, 17 Atl. 555, 4 L. R. A. 343.

Illinois.—Union Oil Co. *v.* Maxwell, 33 Ill. App. 421.

Iowa.—Shickle, etc., Iron Co. *v.* Council Bluffs City Water Works Co., 83 Iowa 396, 49 N. W. 987.

Kentucky.— Baker *v.* Farmers' Tobacco Warehouse Co., 90 Ky. 419, 14 S. W. 410, 11 Ky. L. Rep. 528.

Louisiana.— Herries *v.* Canfield, 9 Mart. 385.

New York.— Cheever *v.* Schall, 87 Hun 32, 33 N. Y. Suppl. 751; Bush *v.* Hibbard, 24 Barb. 292.

Pennsylvania.— Meade *v.* McDowell, 5 Binn. 195.

Rhode Island.— Morrow *v.* Brady, 12 R. I. 130; Deblois *v.* Earle, 7 R. I. 26.

See 25 Cent. Dig. tit. "Guaranty," § 28. See also Contracts, 9 Cyc. 577 *et seq.*

51. *Connecticut.*— Hotchkiss *v.* Barnes, 34 Conn. 27, 91 Am. Dec. 713; Lewis *v.* Dwight, 10 Conn. 95.

Illinois.—Ewen *v.* Wilbor, 99 Ill. App. 132.

Louisiana.— Talmadge *v.* Williams, 27 La. Ann. 653; Menard *v.* Scudder, 7 La. Ann. 386, 56 Am. Dec. 612.

Michigan.— Home Sav. Bank *v.* Hosie, 119 Mich. 116, 77 N. W. 625; Locke *v.* McVean, 33 Mich. 473.

Missouri.— Boehne *v.* Murphy, 46 Mo. 57, 2 Am. Rep. 485; Allen *v.* Central Sav. Bank, 4 Mo. App. 66.

Nebraska.— Van Buskirk *v.* Indermill, 25 Nebr. 240, 41 N. W. 136.

New York.— Melick *v.* Knox, 44 N. Y. 676; Hamilton *v.* Van Rensselaer, 43 N. Y. 244; Gates *v.* McKee, 13 N. Y. 232, 64 Am. Dec. 545; Union Bank *v.* Coster, 3 N. Y. 203, 53 Am. Dec. 280; Crist *v.* Burlingame, 62 Barb. 351; People *v.* Backus, 4 N. Y. Suppl. 728; Walrath *v.* Thompson, 4 Hill 200; Whitney *v.* Groot, 24 Wend. 82.

Vermont.— Keith *v.* Dwinnell, 38 Vt. 286.

West Virginia.— Pratte *v.* Enslow, 46 W. Va. 527, 33 S. E. 322.

United States.— Cremer *v.* Higginson, 6 Fed. Cas. No. 3,383, 1 Mason 323.

England.— Melville *v.* Hayden, 3 B. & Ald. 593, 22 Rev. Rep. 495, 5 E. C. L. 342.

See 25 Cent. Dig. tit. "Guaranty," § 28.

The rule, as in other cases, must be to look at the whole instrument, and the circumstances and relations in which the parties stand to each other at the time of entering into the contract, and therefrom to ascertain the intent of the parties; and the intent, when thus ascertained, must govern the con-

no ambiguity in the language of the contract the writing itself must be alone consulted in ascertaining the intention;[52] and if the language is ambiguous the surrounding circumstances may be looked at to ascertain the intent.[53] So also the rule applies that acts of the parties done in carrying out the contract are a practical construction of it which may be held binding upon the parties.[54] The creditor may invoke the rule that in construing instruments some effect, if possible, will be given to them, and that a construction which will destroy the guaranty is not to be adopted if avoidable.[55] Furthermore the interpretation must be with reference to the known usages of trade.[56]

2. CONSTRUING CONTRACT AGAINST GUARANTOR. If after the application of the general rules governing the interpretation of contracts[57] there still remains an ambiguity and the contract admits of two fair interpretations, one for and one against the guarantor, the authorities differ as to which of such interpretations shall be chosen.[58] It has been affirmed in the strongest terms that if there is

struction of the contract. Bent *v.* Hartshorn, 1 Metc. (Mass.) 24. Guaranties are to be construed like other written instruments according to the plain and obvious import of the language used. Deck *v.* Wroks, 18 Hun (N. Y.) 266.

What is the most reasonable interpretation of a guaranty is to be deduced, considering its subject, the relative condition of the parties, and their probable intent, from the language employed in it. Bailey *v.* Larchar, 5 R. I. 530.

Construction in court of equity.— The construction of a letter of guaranty must be the same in a court of equity as in a court of law, and any explanatory fact which can be received in one court will be admitted in the other. Russell *v.* Clark, 7 Cranch (U. S.) 69, 3 L. ed. 271.

52. Boston, etc., Glass Co. *v.* Moore, 119 Mass. 435.

Where the instrument is clear and unambiguous in its terms the rule that the contract of the surety or guarantor must be strictly construed has no application. Peoria Sav. L. & T. Co. *v.* Alder, 165 Ill. 55, 45 N. E. 1083; Locke *v.* McVean, 33 Mich. 473.

53. *Alabama.*— Scott *v.* Myatt, 24 Ala. 489, 60 Am. Dec. 485.

California.— Graham *v.* Farmers', etc., Bank, 116 Cal. 463, 48 Pac. 384.

Connecticut.— Atwater *v.* Hewitt, 72 Conn. 233, 44 Atl. 34.

Illinois.— Starr *v.* Milligan, 180 Ill. 458, 54 N. E. 328; Fairbanks *v.* Owensboro Wagon Co., 72 Ill. App. 530.

Massachusetts.— Foster-Black Co. *v.* Fennessey, 159 Mass. 538, 34 N. E. 1077.

Mississippi.— Standley *v.* Miles, 36 Miss. 434.

New York.—Evansville Nat. Bank *v.* Kaufmann, 93 N. Y. 273, 45 Am. Rep. 204; White's Bank *v.* Myles, 73 N. Y. 335, 29 Am. Rep. 157; Krakauer *v.* Chapman, 16 N. Y. App. Div. 115, 45 N. Y. Suppl. 127; People *v.* Backus, 4 N. Y. Suppl. 728.

Vermont.— Brown *v.* Haven, 37 Vt. 439.

See 25 Cent. Dig. tit. "Guaranty," § 28.

The true rule of construction is to give the instrument that effect which best accords with the intention of the parties, taken in connection with the subject-matter. Mussey *v.* Rayner, 22 Pick. (Mass.) 223. The interpretation of the writing should be in accordance with the parties' intention as disclosed by its terms, the surrounding circumstances, and the purpose for which the contract was made. Belloni *v.* Freeborn, 63 N. Y. 383. The question of guaranty is not what the guarantor believed or intended, except as such intent appears from the writing, when read in the light of the relations of the parties and the attendant circumstances. McCasland *v.* O'Brien, 57 Ill. App. 636. Contracts of guaranty are to be read by the light of the circumstances surrounding them. Wills *v.* Ross, 77 Ind. 1, 40 Am. Rep. 279. The contract is to be construed in the light of the situation of the parties and the subject-matter with reference to which the instrument was given. John A. Tolman Co. *v.* Griffin, 112 Mich. 301, 69 N. W. 649.

Where the guaranty possesses a latent ambiguity the extrinsic circumstances may always be shown for the purpose of ascertaining the construction which the parties intended the instrument to have. Hotchkiss *v.* Barnes, 34 Conn. 27, 91 Am. Dec. 713.

54. Parker *v.* McKelvain, 17 Tex. 157; Michigan State Bank *v.* Peck, 28 Vt. 200, 65 Am. Dec. 234.

Acts of parties done in the performance of a contract held to indicate that the guaranty in question was a continuing one see Hotchkiss *v.* Barnes, 34 Conn. 27, 91 Am. Dec. 713.

But where there is no ambiguity in the language of the instrument, the acts of the parties are not admissible to explain its meaning. Scott *v.* Myatt, 24 Ala. 489, 60 Am. Dec. 485.

55. Marx *v.* Luling Co-operative Assoc., 17 Tex. Civ. App. 408, 43 S. W. 596.

56. Smith *v.* Dann, 6 Hill (N. Y.) 543; Wells *v.* Davis, 2 Utah 411. But where the guaranty is clear and explicit and it is conceded that its terms have been departed from such departure cannot be justified by evidence of a custom. Stewart *v.* Ranney, 26 How. Pr. (N. Y.) 279.

57. See *supra*, V, A, 1.

58. See cases cited *infra*, notes 59–61.

room to doubt what the intention of the guarantor was or if uncertainty is to be found on the face of the instrument of guaranty the words used are to be accepted in the strongest sense against the guarantor;[59] and this position is supported by the weight of authority.[60] But some authorities take a contrary view.[61]

3. Rule of Strict Construction. It would seem, however, that the difference between those courts that support the doctrine of liberal construction of the contract in favor of the creditor,[62] and those courts which favor a strict interpretation

59. Shine *v.* Central Sav. Bank, 70 Mo. 524; Hurley *v.* Maryland Fidelity, etc., Co., 95 Mo. App. 88, 68 S. W. 958.

60. *Alabama.*— Scott *v.* Myatt, 24 Ala. 489, 60 Am. Dec. 485.

California.— London, etc., Bank *v.* Parrott, 125 Cal. 472, 58 Pac. 164, 73 Am. St. Rep. 64; Lafargue *v.* Harrison, 70 Cal. 380, 11 Pac. 636, 59 Am. Rep. 416.

Maine.— Eaton *v.* Granite State Provident Assoc., 89 Me. 58, 35 Atl. 1015.

Michigan.— Locke *v.* McVean, 33 Mich. 473.

Missouri.— Hurley *v.* Maryland Fidelity, etc., Co., 95 Mo. App. 88, 68 S. W. 958.

Nebraska.— Tootle *v.* Elgutter, 14 Nebr. 158, 15 N. W. 228, 45 Am. Rep. 111, guaranty held to be continuing.

New Jersey.— Hoey *v.* Jarman, 39 N. J. L. 523.

New York.— Rindge *v.* Judson, 24 N. Y. 64; Crist *v.* Burlingame, 62 Barb. 351; Hernandez *v.* Stilwell, 7 Daly 360; Walrath *v.* Thompson, 4 Hill 200.

Ohio.— Stone *v.* Rockefeller, 29 Ohio St. 625.

United States.— Lawrence *v.* McCalmont, 2 How. 426, 11 L. ed. 326; Lee *v.* Dick, 10 Pet. 482, 9 L. ed. 503; Drummond *v.* Prestman, 12 Wheat. 515, 6 L. ed. 712.

England.— Hargreave *v.* Smee, 6 Bing. 244, 8 L. J. C. P. O. S. 46, 3 M. & P. 573, 31 Rev. Rep. 407, 19 E. C. L. 117. And see Mayer *v.* Isaac, 4 Jur. 437, 9 L. J. Exch. 225, 6 M. & W. 605.

See 25 Cent. Dig. tit. "Guaranty," § 28.

Other statements of this rule.— In Drummond *v.* Prestman, 12 Wheat. (U. S.) 515, 6 L. ed. 712, it was said that the words of guaranty would be taken as strongly against the guarantor as the sense would admit. To the same effect see Mason *v.* Pritchard, 2 Campb. 436, 12 East 227, 11 Rev. Rep. 369. And in Mauran *v.* Bullus, 16 Pet. (U. S.) 528, 10 L. ed. 1056, the court said that while generally all instruments of suretyship are construed strictly as a mere matter of legal right, the rule is otherwise if they are founded on a valuable consideration. In Belloni *v.* Freeman, 63 N. Y. 383, the court said that if the terms of the instrument of guaranty should be ambiguous and after resort to the surrounding circumstances an ambiguity should still remain, there was no reason why the ambiguity should not be taken most strongly against the guarantor and that this certainly should be the rule to the extent that the guarantor has in good faith acted upon and given credit to the supposed intent of the guarantor.

Letters of credit should be construed as the parties to whom they are addressed may fairly be expected to understand them. Gelpcke *v.* Quentell, 59 Barb. (N. Y.) 250.

A special letter of credit is not governed by the rule *strictissimi juris*, but by the rule of construction which holds the party to the full extent of the fair import of his engagement, and to this end the words used and the intent of the instrument will be understood in a sense as strong as their meaning will permit. Krakauer *v.* Chapman, 16 N. Y. App. Div. 115, 45 N. Y. Suppl. 127.

61. In doubtful cases inasmuch as the promise is to pay the debt of another the presumption is that a guaranty of a single transaction or of limited transactions was intended rather than a continuing guaranty. Sherman *v.* Mulloy, 174 Mass. 41, 54 N. E. 345, 75 Am. St. Rep. 286. In Morgan *v.* Boyer, 39 Ohio St. 324, 48 Am. Rep. 454, which involved the question as to whether the guaranty was a continuing one the court said that the rule that the language of the promise is to be construed most strongly against the promisor does not apply to the construction of a guaranty and held that in a doubtful case the presumption should be against the construction that the guaranty is continuing. *Compare* Whitney *v.* Groot, 24 Wend. (N. Y.) 82, where the question was whether the guaranty involved was a continuing one, and the court said that upon general principles a strict interpretation should be applied in favor of a surety or a guarantor.

62. Scott *v.* Myatt, 24 Ala. 489, 60 Am. Dec. 485; Lawrence *v.* McCalmont, 2 How. (U. S.) 426, 11 L. ed. 326; Lee *v.* Dick, 10 Pet. (U. S.) 482, 9 L. ed. 503. See also cases cited *supra*, note 60.

As a guaranty is a mercantile contract it should be construed so as to give effect to whatever may fairly be presumed to be the intention of the parties, and not according to any strict technical nicety. Schultz *v.* Crane, 6 Hun (N. Y.) 236 [*affirmed* in 64 N. Y. 659]. In the federal courts it has been held that notwithstanding the contract of guaranty is the obligation of a surety, it is to be construed as a mercantile instrument in furtherance of a spirit of liberality to facilitate commercial intercourse. Davis *v.* Wells, 104 U. S. 159, 26 L. ed. 686. In some cases a distinction is made between sureties upon bonds and letters of guaranty on the ground that the former are usually entered into with caution and even after taking legal advice, while the latter are usually written by merchants, and rarely with caution, and the inference is therefore deduced that the guar-

in favor of the guarantor,[63] is generally with reference to the point at which the rule of *strictissimi juris* is to be applied. It is settled that when the intent of the guarantor has been ascertained or the terms of the guaranty are clearly defined the liability of the guarantor is absolutely controlled by such intent and is never to be extended beyond the precise terms.[64] He is not liable on an implied engage-

antor is not entitled to the benefit of the rule of strict construction which is applied in favor of such sureties. Bell *v.* Bruen, 1 How. (U. S.) 169, 11 L. ed. 89.

Guaranties for a valuable consideration are interpreted liberally. Mauran *v.* Bullus, 16 Pet. (U. S.) 528, 10 L. ed. 1056.

Letters of credit should not receive a strict and technical interpretation, but a fair and reasonable one according to the true import of their terms and what may be fairly presumed to have been the intention and understanding of the parties. Tischler *v.* Hofheimer, 83 Va. 35, 4 S. E. 370. In letters of guaranty which are commercial instruments executory in their character, the better opinion is that in their construction the language used is to be taken according to its ordinary acceptation and common meaning without any special leaning against the maker of the instrument. Courtis *v.* Dennis, 7 Metc. (Mass.) 510.

63. All courts will probably agree that at some time in the history of the contract of guaranty the rule of strict construction should be applied. Keeping in mind the rule given above for the construction of the contract it would seem that that point should be when the process of interpreting the language of the instrument for the purpose of ascertaining the intention of the parties has ceased and the actual working out of such intention has begun. See Brandt Sur. & Guar. § 79. When the meaning of the language in the contract of guaranty is ascertained the guarantor is entitled to the application of the strict rule of construction and cannot be held beyond the precise terms of the contract. Barnett *v.* Wing, 62 Hun (N. Y.) 125, 16 N. Y. Suppl. 567. A guarantor not being chargeable on the consideration which he does not share is chargeable only by virtue of the contract, and although this is no reason for construing the contract strictly, it is a reason for keeping strictly within it. Bussier *v.* Chew, 5 Phila. (Pa.) 70.

64. *California.*—London, etc., Bank *v.* Parrott, 125 Cal. 472, 58 Pac. 164, 73 Am. St. Rep. 64.

Colorado.— Patterson *v.* Gage, 11 Colo. 50, 16 Pac. 560; Johnson *v.* Fisher, 4 Colo. 242.

Georgia.— Tift *v.* Harden, 22 Ga. 623, 68 Am. Dec. 512.

Illinois.— Smith *v.* Riddell, 87 Ill. 165; Omaha Nat. Bank *v.* St. Paul First Nat. Bank, 59 Ill. 428; Rice *v.* John A. Tolman Co., 60 Ill. App. 516; Beadle County Nat. Bank *v.* Hyman, 33 Ill. App. 618; Harney *v.* Laurie, 13 Ill. App. 400.

Indiana.— Yater *v.* Judah, 15 Ind. 228.

Iowa.— Springer Lithographing Co. *v.* Graves, 97 Iowa 39, 66 N. W. 66; Tansey *v.* Peterson, 88 Iowa 544, 55 N. W. 577.

Kansas.— Kepley *v.* Carter, 49 Kan. 72, 30 Pac. 182; Alton First Nat. Bank *v.* Marbourg, 22 Kan. 535; Woolley *v.* Van Volkenburgh, 16 Kan. 20.

Maryland.— Boyd *v.* Snyder, 49 Md. 325.

Massachusetts.— Abercrombie *v.* Spalding, 158 Mass. 32, 32 N. E. 911; Woods *v.* Doherty, 153 Mass. 558, 27 N. E. 676; Warren *v.* Lyons, 152 Mass. 310, 25 N. E. 721, 9 L. R. A. 353; Schlessinger *v.* Dickinson, 5 Allen 47; Carkin *v.* Savory, 14 Gray 528; Chace *v.* Brooks, 5 Cush. 43; Courtis *v.* Dennis, 7 Metc. 510; Carew *v.* Denny, 8 Pick. 363.

Michigan.— McDonald *v.* Bewick, 43 Mich. 438, 5 N. W. 425; Wetherbee *v.* Kusterer, 41 Mich. 359, 2 N. W. 45.

Minnesota.— Cushing *v.* Cable, 48 Minn. 3, 50 N. W. 891.

Mississippi.— Robinson *v.* Lane, 14 Sm. & M. 161.

Missouri.— Shine *v.* Central Sav. Bank, 70 Mo. 524; Sedalia, etc., R. Co. *v.* Smith, 27 Mo. App. 371; Allen *v.* Central Sav. Bank, 4 Mo. App. 66.

Nebraska.— Simms *v.* Summers, 39 Nebr. 781, 58 N. W. 431; Labaree *v.* Klosterman, 33 Nebr. 150, 49 N. W. 1102.

New York.— People *v.* Backus, 117 N. Y. 196, 22 N. E. 759; Burch *v.* Newbury, 10 N. Y. 374 [*affirming* 1 Barb. 648]; Hutchinson *v.* Root, 2 N. Y. App. Div. 584, 38 N. Y. Suppl. 16; Hayden *v.* Crane, 1 Lans. 181; Gelpcke *v.* Quentell, 66 Barb. 617; Davis Sewing Mach. Co. *v.* Lawrence, 3 Thomps. & C. 386; Oil-Seed Pressing Co. *v.* Hutchinson, 9 Misc. 490, 30 N. Y. Suppl. 256; Robinson Consol. Min. Co. *v.* Craig, 4 N. Y. St. 69; Boyd *v.* Townsend, 4 Hill 183. *Compare* Schwartz *v.* Hyman, 107 N. Y. 562, 14 N. E. 447, holding that while the guarantor should be held to every obligation fairly and reasonably embraced within the terms of his contract, his language should not be strained beyond its obvious meaning for the purpose of enlarging the liability.

Ohio.— Rutherfoord *v.* Brachmann, 8 Ohio Dec. (Reprint) 109, 5 Cinc. L. Bul. 696.

Pennsylvania.— Warren First Nat. Bank *v.* Cadwallader, 10 Pa. Cas. 534, 14 Atl. 410; Allen *v.* Herman, 3 Phila. 378.

Rhode Island.— Bailey *v.* Larchar, 5 R. I. 530.

South Carolina.— Gadsden *v.* Quackenbush, 9 Rich. 222.

Texas.— Bornefield *v.* Wettermark, 3 Tex. Civ. App. 291, 22 S. W. 997.

United States.— Cabot *v.* McMasters, 55 Fed. 722; Dobbins *v.* Bradley, 7 Fed. Cas. No. 3,944, 4 Cranch C. C. 298.

A guarantor like a surety is a favorite of the law and his liability is never to be extended beyond the precise terms of his obligation. John S. Brittain Dry Goods Co. *v.*

ment where a party contracting for his own interest might be, and he has a right to insist upon the exact performance of any condition for which he has stipulated.[65] And in the application of this rule the courts go so far as to hold him discharged by any alteration of the contract to which his guaranty applies, whether material or not, and whether or not such change has prejudiced him.[66] But on the

Yearout, 59 Kan. 684, 54 Pac. 1062; Burton *v.* Dewey, 4 Kan. App. 589, 46 Pac. 325; Mayfield *v.* Wheeler, 37 Tex. 256.

Although contracts of guaranty like all commercial contracts are to receive a liberal interpretation in furtherance of the intention of the parties, they should never be extended beyond the obvious import of the terms used. Fisher *v.* Cutter, 20 Mo. 206.

65. Gates *v.* McKee, 13 N. Y. 232, 64 Am. Dec. 545; Bigelow *v.* Benton, 14 Barb. (N. Y.) 123; Smith *v.* Dann, 6 Hill (N. Y.) 543; Lawton *v.* Maner, 10 Rich. (S. C.) 323; Carnegie Steel Co. *v.* Chattanooga Constr. Co., (Tenn. Ch. App.) 38 S. W. 102; Weekes *v.* Sunset Brick, etc., Co., 22 Tex. Civ. App. 556, 56 S. W. 243; Bleeker *v.* Hyde, 3 Fed. Cas. No. 1,537, 3 McLean 279. A case which carries the doctrine of *strictissimi juris* to its extreme limit is that of Staver *v.* Locke, 22 Oreg. 519, 30 Pac. 497, 29 Am. St. Rep. 621, 17 L. R. A. 652, where by a contract between an agent and his principal the agent was to guaranty the payment at maturity of all notes taken by the agent for goods sold, and one who guarantied the faithful and full performance by the agent of his undertaking was held only bound to see that the agent entered into a formal contract guarantying the payment of the notes and that he was not bound to see that the agent actually paid the notes.

Illustrations.— If the proposal of guaranty be for a credit to the principal debtor of three months that particular credit must be given. A variance of three days will be as fatal as though it was for the month. Smith *v.* Dann, 6 Hill (N. Y.) 543. Where the creditor proposes in consideration of the guaranty to give credit for a specified time to the principal debtor, it is not enough that the creditor waits until such time has expired before he calls for payment; he must agree to wait so that he cannot sue in the meantime. Leeds *v.* Dunn, 10 N. Y. 469. Where defendant guarantied to plaintiff the repayment of a loan made by plaintiff to A, on which plaintiff was to return securities deposited by A with him as collateral, it is a sufficient defense in an action on such guaranty that plaintiff had not tendered the securities, and it is too late for him to make the tender at bar on the hearing of a rule for judgment. Scott *v.* Patterson, 13 Pa. Co. Ct. 614. Defendant wrote plaintiff, a mercantile firm, introducing a third person and stating that any favor shown to such third person in the way of introducing him to commercial establishments so that he might be able to fill his orders would be indorsed by defendant if necessary for the amount of his purchases. Goods were sold to such third person on his individual note and defendant was not asked for his indorsement until about six months afterward. It was held that as the indorsement of defendant was not necessary to enable the third person to purchase the goods, defendant was not required to furnish the indorsement. Mayfield *v.* Wheeler, 37 Tex. 256. Where defendant gave a guaranty of payment of all moneys collected by one employed as a salesman by plaintiff and all indebtedness of the salesman as per agreement between plaintiff and his employee and plaintiff then signed an agreement with the salesman for one year or less at plaintiff's option and the salesman worked for a period of three years and then left owing a balance, it was held that defendant was only liable for the part of the deficiency which had occurred during the first year. John A. Tolman Co. *v.* Clements, 98 Mich. 6, 56 N. W. 1038. A guaranty of payment for goods to be consigned to a certain person will not cover transactions which amount to absolute sales to such person. Carkin *v.* Savory, 14 Gray (Mass.) 528.

Application of payments by principal debtor.— Where defendant executed a writing in which it was recited that a third person had purchased goods to a specified amount from plaintiff and binding defendant to see that a certain percentage of the purchase-price should be paid within a certain time, it was held that defendant could insist that payments made by the third person upon the purchase-price should be applied upon that part of the price covered by the guaranty so as to reduce his liability. Eddy *v.* Sturgeon, 15 Mo. 199. But where defendant guarantied the payment of advances to be made by the bank to a third person and after considerable advances had been made deposits were made in the bank by the third person, it was held that the bank was not under obligation as against the guarantor to apply such deposits upon the advances. London, etc., Bank *v.* Parrott, 125 Cal. 472, 58 Pac. 164, 73 Am. St. Rep. 64.

A guaranty for the acts of one will not be extended to those of another. Dick *v.* Crowder, 10 Sm. & M. (Miss.) 71.

The rule that the liability of a surety is not to be extended by implication applies to guarantors. John A. Tolman Co. *v.* Rice, 164 Ill. 255, 45 N. E. 496; McAfee *v.* Wyckoff, 44 Misc. (N. Y.) 380, 89 N. Y. Suppl. 996.

Those who claim benefit of a guaranty must show that its terms have been strictly complied with. Fellows *v.* Prentiss, 3 Den. (N. Y.) 512, 45 Am. Dec. 484.

66. Page *v.* Krekey, 137 N. Y. 307, 33 N. E. 311, 33 Am. St. Rep. 731, 21 L. R. A. 409. The courts will not inquire whether the alteration of the contract has been prejudicial or beneficial to the guarantor. Fellows *v.*

other hand where a contract of guaranty is entered into which is rigid as against the guarantor and liberal with reference to the privileges of the creditor, there is no reason why it should not be enforced according to its terms.[67] And when, by the application of the legal rules of construction the intent of the parties to impose upon the guarantor certain liabilities has been ascertained,[68] the effect of the instrument should not be destroyed by requiring a strict compliance according to the letter and not according to the spirit if the instrument appears to have been drawn by an unskilful hand.[69]

B. Who May Avail Themselves of Terms of Guaranty — 1. General Guaranties. One may sue upon a guaranty if intended for his benefit, although he is not named in the offer of guaranty.[70] In fact what is known as a general

Prentiss, 3 Den. (N. Y.) 512, 45 Am. Dec. 484. It is not a question whether the guarantor has been harmed by a deviation from the terms of the contract, to which deviation he has not assented. He may plant himself upon the technical obligation. Schoonover *v.* Osborne, 108 Iowa 453, 79 N. W. 263. The guarantor may stand upon the strict letter of his contract and any change in parties or terms, even though beneficial to him, if made without his consent, discharges him. Daube *v.* Philadelphia, etc., Coal, etc., Co., 77 Fed. 713, 23 C. C. A. 420. A guarantor cannot be held beyond the actual terms of his engagement, and it does not matter that a proposed alteration would be for his benefit; he has a right to stand upon the exact terms of his agreement. Smith *v.* Montgomery, 3 Tex. 199. But see *infra*, VI.

Place of transaction.— A guarantor has a right to have the stipulation of his contract with respect to the place of transactions observed, and is not bound as to transactions had in other places, although no greater liability is thereby imposed upon him and the purpose of the guaranty is substantially fulfilled. Johnson *v.* Brown, 51 Ga. 498, holding that a letter of credit guarantying the payment of what the party in whose favor it was drawn might purchase from any dealer in a certain city did not bind the guarantor as to purchases of dealers in another and different city.

67. Davis Sewing-Mach. Co. *v.* Rosenbaum, (Miss. 1894) 16 So. 340. A contract of guaranty, by which a debtor was, within a specified time, to pay a certain execution, "or cancel it in some other satisfactory way," or deliver to the officer certain property, will be construed to mean that the cancellation shall be in a manner satisfactory to the creditor. Monroe *v.* Matthews, 48 Me. 555.

68. Low *v.* Taylor, 41 Mo. App. 517; Burton *v.* Baker, 31 Barb. (N. Y.) 241; Oakley *v.* Boorman, 21 Wend. (N. Y.) 588; John A. Tollman Co. *v.* Bowerman, 5 S. D. 197, 58 N. W. 568; Tobler *v.* Willis, 59 Tex. 80; Young *v.* Brown, 53 Wis. 333, 10 N. W. 394. Where, before a note secured by chattel mortgage was delivered, defendant, for the purpose of giving it credit, indorsed on it, "For value received I hereby guaranty the payment of the within note upon assignment to me of the mortgage accompanying the same," an assignment of the mortgage to defendant was not a condition precedent to the guaranty's becoming operative. Maxwell *v.* Capehart, 62 Minn. 377, 64 N. W. 927.

69. Gillighan *v.* Boardman, 29 Me. 79. Where defendant guarantied a contract by which the third person was to manufacture certain raw material to be furnished by plaintiff into cloth and return the cloth to plaintiff upon certain specified terms, it was held to be matter of indifference to plaintiff who should do the manual work of making the cloth and that the third person could have the work done through others without obtaining the consent of plaintiff. Corlies *v.* Estes, 31 Vt. 653.

On a guaranty to a bank for "legitimate business purposes," the bank is not bound to see to the application of the money; but only not to exceed what is needed for such purpose, and not knowingly to furnish money for other purposes. Poughkeepsie City Nat. Bank *v.* Phelps, 86 N. Y. 484.

Upon a letter of credit guarantying drafts by F "against shipments of cattle," it was held that swine were included in the term "cattle." Decatur First Nat. Bank *v.* St. Louis Home Sav. Bank, 21 Wall. (U. S.) 294, 22 L. ed. 560. In Lawton *v.* Maner, 10 Rich. (S. C.) 323, a letter written by defendant to the creditor reciting defendant's understanding that if he should give a letter of credit to the third person, the creditor would sell him on longer time, "say nine months or one year," and then stating that defendant will be responsible for the third person to a certain amount, was held not to require the giving of credit for a period of at least nine months.

Where one gives a special letter of credit for the purpose of inducing a delivery of goods upon credit and this purpose has been accomplished, the courts ought not to fritter away the substance of the contract and defeat the creditor's right by subtle refinement as to precise and particular procedure in the matter of payment. Krakauer *v.* Chapman, 16 N. Y. App. Div. 115, 45 N. Y. Suppl. 127.

70. Drummond *v.* Prestman, 12 Wheat. (U. S.) 515, 6 L. ed. 712; Van Wart *v.* Carpenter, 21 U. C. Q. B. 320. And *compare* Anderson *v.* May, 10 Heisk. (Tenn.) 84.

Where a surety of a lessee by a separate covenants guaranties the payment of the rent and the performance of the covenants of the lease, such separate covenant passes to the grantee of the reversion, and enables him to

guaranty is one that does not purport to be a contract with any person named but is an open invitation to any one to whom knowledge of it comes to enforce liability under it on complying with its terms.[71] The liability of a party whose name appears on the back of a negotiable promissory note as guarantor is to be determined by the relation which is thereby assumed toward the payee, indorsee, or holder at the time when the note first takes effect by delivery as a valid security for the money paid upon it.[72] But a letter giving general credit to a person does not charge the writer with liability for goods sold by persons who have never seen the latter, although they have heard of its contents.[73]

2. Special Guaranties — a. In General. As a general rule no one can accept the propositions of a special guaranty[74] or acquire any advantage therefrom unless he is expressly referred to or necessarily embraced in the description of persons to whom the offer of guaranty is addressed.[75] Only the particular indi-

maintain an action against the surety in his own name for a breach of his covenant. Allen *v.* Culver, 3 Den. (N. Y.) 284.

71. Griffin *v.* Rembert, 2 S. C. 410; Lowry *v.* Adams, 22 Vt. 160; Tidioute Sav. Bank *v.* Libbey, 101 Wis. 193, 77 N. W. 182, 70 Am. St. Rep. 907; McNaughton *v.* Conkling, 9 Wis. 316.

General guaranty defined see *supra*, I, H.

Where a letter of credit is general, that is, not addressed to any particular person, any one to whom it is presented may act upon and enforce it. Birckhead *v.* Brown, 5 Hill (N. Y.) 634. See also cases cited *supra*, this note. When any person acts thereon a contract arises between him and the maker of the instrument, in the same manner as if it had been addressed to him by name. Union Bank *v.* Coster, 1 Sandf. (N. Y.) 563 [*affirmed* in 3 N. Y. 203, 53 Am. Dec. 280]. A letter of credit authorizing the person to whom it is addressed to draw on a third person for a specified amount is a general letter of credit on which an action may be maintained by any holder of a bill or draft drawn according to its terms against the writer of the letter. Pollock *v.* Helm, 54 Miss. 1, 28 Am. Rep. 342. A letter addressed to one desirous of purchasing a certain article, stating that the writer will pay whatever sum the addressee agrees to pay and that the letter may be considered as a guaranty to the party from whom the purchase may be made, may be sued upon by any one furnishing the article and requires no other proof of acceptance than that afforded by the furnishing of the article. Manning *v.* Mills, 12 U. C. Q. B. 515.

72. Wood *v.* Gregg, 75 Minn. 527, 78 N. W. 93, holding that where the payee of the note indorses it for the accommodation of the maker and a writing is indorsed upon the note to the effect that the maker of the writing guaranties the payment of the "within note" the contract of the maker of such writing is not with the payee but with the party who first accepts it as a valid contract and advances money to the maker of the note upon its credit. One indorsed on a note, "For value received I hereby guaranty the payment of the balance due on the within note. J. S. Nevins." It was held that this promise was general in its form, and became fixed whenever any one took the note on the guarantor's credit, and that such holder could not in a suit be held to show that the contract was made with him. Nevius *v.* Lansingburg Bank, 10 Mich. 547.

A guaranty of a negotiable note is intended as security for the note and is available to any legal holder thereof. Hopson *v.* Ætna Axle, etc., Co., 50 Conn. 597.

Where a guaranty of a note does not name the guarantee, the guaranty necessarily applies to the holder of the note who advanced the money thereon. Douglass *v.* Titusville Second Nat. Bank, 4 Wkly. Notes Cas. (Pa.) 163.

73. McClung *v.* Means, 4 Ohio 196, where A gave B a letter of general credit in the words, "All the goods C. O. Page may purchase in Philadelphia, during the month of January, 1826, I hold myself accountable for the payment of same." But in Hart *v.* Wynne, (Tex. Civ. App. 1897) 40 S. W. 848, it was held that where one writes to a bank saying that he will assume all the liabilities of a named debtor, he will be liable to any creditor of such debtor who learns of the contents of the letter and acts upon it.

74. Special guaranty defined see *supra*, I, I. Special guaranties are those which operate in favor of the particular person only to whom they are addressed. Evansville Nat. Bank *v.* Kaufmann, 93 N. Y. 273, 45 Am. Rep. 204. Defendant addressed a letter to B as follows: "Any drafts that you may draw on Mr. A. Feigelstock, . . . we guarantee to be paid at maturity." Plaintiff discounted the drafts drawn on F, one of the drafts appearing to be accommodation paper. It was held that the guaranty was special, and that plaintiff acquired no right of action thereon. Evansville Nat. Bank *v.* Kaufmann, *supra*.

75. McCollum *v.* Cushing, 22 Ark. 540; Peoria Second Nat. Bank *v.* Diefendorf, 90 Ill. 396; Birckhead *v.* Brown, 5 Hill (N. Y.) 634; Taylor *v.* Wetmore, 10 Ohio 490.

The drawer of a letter of credit on a particular house is not liable to a third person who has made advancements to the drawee on the faith thereof. Edmonston *v.* Drake, 5 Pet. (U. S.) 624, 8 L. ed. 251. A letter of credit addressed to a certain person will not bind the writer in favor of a third person who acted on the strength of it and for whom

vidual to whom the offer of guaranty is addressed has the right to act upon and acquire rights under it.[76] If the offer is to guaranty one person, it cannot be accepted and acted upon by two.[77] If it is addressed to two or more, one alone cannot act upon it and secure to himself its benefits.[78]

b. Directed to or Acted on by Partnership. If addressed to an individual, it cannot be acted upon by a firm of which he subsequently becomes a member;[79] on the other hand it has been held that an offer of guaranty made to an individual member of the firm may cover transactions in which credit is extended by the firm in reliance upon the guaranty,[80] unless the guarantor has no knowledge at

the person addressed acted as agent. Wilson *v.* Childress, 2 Tex. App. Civ. Cas. § 425.

Where a party to a note guaranties, by a separate paper, the payment and costs of collection, and limits the guaranty to the benefit of a particular holder, the guaranty will not benefit any subsequent indorsee. Batavia Bank *v.* Sewell, 8 Ohio Dec. (Reprint) 210, 6 Cinc. L. Bul. 288.

A person guarantying a partner immunity against all creditors of the firm, if he conveys his interest to his copartners, is not liable at the instance of a creditor of the firm for a firm debt. Holloway *v.* Blum, 60 Tex. 625. Where one of two partners sells out his interest to the other, who agrees to pay all the firm debts and indemnify the selling partner, which agreement is guarantied by a surety, such surety is not liable in an action brought against him by a creditor of the firm to recover one of the debts so guarantied, as in such case there is no privity of contract between the parties to the suit. Campbell *v.* Lacock, 40 Pa. St. 448.

76. Birckhead *v.* Brown, 5 Hill (N. Y.) 634.

A special guaranty is limited to the person to whom it is addressed and usually contemplates a trust, for it reposes a confidence in such person. Tidioute Sav. Bank *v.* Libbey, 101 Wis. 192, 77 N. W. 182, 70 Am. St. Rep. 907.

Procuring another to furnish goods.— If the guaranty is for goods to be furnished by one person and he procures another to furnish them, the guarantor will not be liable. If under a letter of credit addressed by A to B, to deliver goods to C, B delivers a part of the goods himself, and procures others to deliver the residue, A is liable only for those delivered by B. Robbins *v.* Bingham, 4 Johns. (N. Y.) 476. If a person agrees to be responsible to A for goods delivered to B, and A, instead of delivering the goods himself, gives B a letter to C, requesting him to deliver them, who delivers them accordingly, the surety will not be liable for the goods delivered by C. Walsh *v.* Bailie, 10 Johns. (N. Y.) 180.

Change of name of corporation guarantee.— Where the one intended to be benefited by the guaranty was a corporation the fact that it afterward accepted a new charter and that its name was slightly altered did not preclude the corporation from enforcing the guaranty. Poughkeepsie City Nat. Bank *v.* Phelps, 16 Hun (N. Y.) 158, guarantee being a bank which changed from a state to a national bank. But see Crane Co. *v.* Specht, 39 Nebr. 123, 57 N. W. 1015, 42 Am. St. Rep. 562, in which it was held that where a guaranty for goods to be sold to a third person is given to a corporation which afterward changes its name and supplies the goods after such change there can be no recovery against the guarantor for the goods supplied.

77. Sollee *v.* Meugy, 1 Bailey (S. C.) 620. A guaranty upon its face addressed to one person cannot be made available on behalf of such person if he has acted in reliance thereon jointly with others not named in the letter. Allison *v.* Rutledge, 5 Yerg. (Tenn.) 193.

Such joint action constitutes a departure from the agreement into which the guarantor entered. Stevenson *v.* McLean, 11 U. C. C. P. 208. To same effect see Bussier *v.* Chew, 5 Phila. (Pa.) 70.

78. Thus a letter of guaranty addressed to two persons but delivered to one only of them, and acted upon by him alone, is not binding upon the writer of the letter. Smith *v.* Montgomery, 3 Tex. 199.

79. Gargan *v.* School Dist. No. 15, 4 Colo. 53; Holmes *v.* Small, 157 Mass. 221, 32 N. E. 3; Barns *v.* Barrow, 61 N. Y. 39, 19 Am. Rep. 247. And *compare* Wright *v.* Russel, 2 W. Bl. 934, 3 Wils. C. P. 530.

Limitations of rule.— Where defendant guarantied that an attorney should receive payment for services rendered to a certain client and the services contracted for were rendered by the attorney as contemplated by the guaranty, it was held that the fact that the attorney subsequently entered into a contract of partnership with another attorney who received part of the compensation stipulated for did not release the guarantor. Roberts *v.* Griswold, 35 Vt. 496, 34 Am. Dec. 641. And see Wright *v.* Russel, 2 W. Bl. 934, 3 Wils. C. P. 530, as to whether one becoming surety for the carrying out of a contract with a sole trader is liable on his subsequently forming a partnership with another person.

80. Drummond *v.* Prestman, 12 Wheat. (U. S.) 515, 6 L. ed. 712. Where defendant wrote to plaintiff and stated that he would guaranty the payment of rent if plaintiff would rent certain premises to a third person and plaintiff was engaged in the real estate business as a member of a firm, the fact that the premises were leased by the firm in reliance upon such guaranty did not disable plaintiff from recovering upon the guaranty, the court holding that a liberal

the time of entering into the contract of guaranty that credit is to be or has been extended by the firm.[81] If it is directed to a firm, a change in the partnership terminates the offer, and advances made thereon by the new firm are not secured by it.[82]

c. Identification of Guarantee. Where it appears upon the face of the letter of guaranty that it is addressed to someone in a representative capacity,[83] or there is some uncertainty as to who is intended to avail himself of the guaranty,[84] parol evidence is admissible to identify the real party in interest.

C. Negotiability and Transfer of Guaranty[85] — **1. In General.** On the subject of the negotiability of guaranties the authorities do not agree. The basis of much of the conflict will be found in two adverse theories. The one is that the position of the guarantor in the law is peculiar. His contract is usually not made for his own benefit, but his risk is undertaken in behalf of another; he is therefore a favorite in the law and his contract will not be extended by implication or construction beyond the strict letter of its terms; and unless he intended that someone not mentioned in his guaranty should have the advantage of his credit, only such person can secure any rights against him.[86] The other is a tendency to break away from the old common-law rule in reference to the nontransferability of choses in action. It is found in the decisions, and is especially

construction should be given to the language used in guaranties. Anderson *v.* May, 10 Heisk. (Tenn.) 84.

81. Where one of several partners agrees in his own name to furnish another goods to be sold on commission, and the goods are furnished by the firm, an action cannot be maintained by the latter upon a guaranty that the factor will account for the proceeds of his sales, in the absence of proof of knowledge on the part of the guarantor, at the time of executing the guaranty, that the goods were to be furnished by the firm. Barns *v.* Barrow, 61 N. Y. 39, 19 Am. Rep. 247.

82. Taylor *v.* Wetmore, 10 Ohio 490; Smith *v.* Montgomery, 3 Tex. 199. Where a letter of credit is addressed to a firm the writer cannot be held on account of credit extended by an individual member of the firm after its dissolution. Penoyer *v.* Watson, 16 Johns. (N. Y.) 100. Where one entered into a contract of guaranty with two persons by name who made part of a firm composed of three persons and subsequently the third person withdrew from the partnership, it was held that the guaranty was at an end. Dry *v.* Davy, 10 A. & E. 30, 3 Jur. 315, 8 L. J. Q. B. 209, 2 P. & D. 249, 37 E. C. L. 41.

Statutes have been enacted in some jurisdictions providing that where either the creditor or principal debtor is a firm, any change taking place in the firm will release the guarantor unless the contract of guaranty expressly stipulates for such change, or it appears by necessary implication from the nature of the firm or otherwise that such change must have been contemplated. Cosgrave Brewing, etc., Co. *v.* Starrs, 5 Ont. 189.

Where there are two mercantile firms doing business under different names, but composed of the same members, a guaranty designed for one of the firms cannot be accepted and used by the other. Taylor *v.* McClung, 2 Houst. (Del.) 24.

83. Michigan State Bank *v.* Peck, 28 Vt. 200, 65 Am. Dec. 234, where the offer of guaranty was made to a person who was designated as president at a certain place and parol evidence was held admissible to show that the person to whom the offer of guaranty was intended to be made was a bank of which the named person was president.

84. Van Wart *v.* Carpenter, 21 U. C. Q. B. 320, where a letter was addressed to I. B. & Co., stating that in consideration of the recipience of the letter filling orders for goods from their Birmingham house, the writer would guaranty payment for the goods so delivered, and it was held that it is proper to show that plaintiffs in the action upon the guaranty were the Birmingham house referred to in the letter, although there were other than the representatives of the latter. In Wadsworth *v.* Elm, 8 Gratt. (Va.) 174, 56 Am. Dec. 137, in which the offer of guaranty was addressed to two persons as a copartnership, it was held that it was competent in an action upon the guaranty to show that at the time of the making of the offer of guaranty the persons addressed were partners in a firm composed of themselves and others, that they were not engaged in the mercantile business on their own account or in connection with any other firm, and that their firm had acted upon the guaranty in good faith.

85. For matters relating to negotiability in general see COMMERCIAL PAPER, 7 Cyc. 542, 658.

Whether a guaranty indorsed upon a note: Affects its negotiability, see COMMERCIAL PAPER, 7 Cyc. 658. Amounts to a transfer of the note, see COMMERCIAL PAPER, 7 Cyc. 795.

Assignment generally see ASSIGNMENTS, 4 Cyc. 1 *et seq.*

86. *Iowa.*— Tansey *v.* Peterson, 88 Iowa 544, 55 N. W. 577.

Kansas.— Kepley *v.* Carter, 49 Kan. 72, 30 Pac. 182.

seen in those states which require that actions shall be begun in the name of the real party in interest. As early as 1843[87] it was said that a great effort was being made to have everything in the form of paper credit turned into a circulating medium; or at the least, placed upon the footing of bills of exchange and promissory notes. It is evident that this effort has not ceased as will be seen from the decisions favoring negotiability.[88] Other decisions, however, hold firmly against negotiability where the instrument itself does not indicate that the parties intended it to be negotiable.[89]

2. MEANING OF "NEGOTIABLE." There seems to be much confusion as to what is meant by the term "negotiable" in this connection. It is frequently alleged that a contract of guaranty is not negotiable, meaning thereby that mere indorsement of the guarantied note will not pass to the indorsee such a title to the guaranty as to authorize an action thereon in his own name.[90] But "negotiable" is defined to mean also that which is capable of being transferred by assignment, or by delivery;[91] and in nearly all of the states now a general guaranty may be assigned so that the assignee may sue thereon in his own name; and it is nowhere held that the equitable interest may not be transferred from one person to another.[92] In the sense then of being transferable it may be said that guaranties which are not special may be regarded as negotiable; or, as the courts usually say, assignable.[93] And where the guaranty relates to a negotiable instrument the courts will not presume that the parties intended that the guaranty should not be assignable.[94]

Massachusetts.— Woods *v.* Doherty, 153 Mass. 558, 27 N. E. 676.

Michigan.— John A. Tolman Co. *v.* Clements, 98 Mich. 6, 56 N. W. 1038.

Nebraska.— Crane Co. *v.* Specht, 39 Nebr. 123, 57 N. W. 1015, 42 Am. St. Rep. 562.

New York.— People *v.* Backus, 117 N. Y. 196, 22 N. E. 579.

See 25 Cent. Dig. tit. "Guaranty," § 35.

87. Birckenhead *v.* Brown, 5 Hill (N. Y.) 634.

88. *Illinois.*— McPherson Nat. Bank *v.* Velde, 49 Ill. App. 21; Packer *v.* Wetherell, 44 Ill. App. 95.

Indiana.— Studabaker *v.* Cody, 54 Ind. 586.

Massachusetts.— Baldwin *v.* Dow, 130 Mass. 416.

Minnesota.— Harbord *v.* Cooper, 43 Minn. 466, 45 N. W. 860.

New York.— Claflin *v.* Ostrom, 54 N. Y. 581.

Vermont.— Partridge *v.* Davis, 20 Vt. 499.

See 25 Cent. Dig. tit. "Guaranty," § 35.

89. Briggs *v.* Latham, 36 Kan. 205, 13 Pac. 129; Thomas *v.* Dodge, 8 Mich. 51; Everson *v.* Gere, 122 N. Y. 290, 25 N. E. 492; Northumberland County Bank *v.* Eger, 58 Pa. St. 97.

90. True *v.* Fuller, 21 Pick. (Mass.) 140; Taylor *v.* Binney, 7 Mass. 479.

91. Bouvier L. Dict.

92. Cole *v.* Merchants' Bank, 60 Ind. 350; Levi *v.* Mendell, 1 Duv. (Ky.) 77. In Wood *v.* Gregg, 75 Minn. 527, 78 N. W. 93, it was held that the assignment of a debt carried with it a contract by a third person guarantying the payment of a debt so that the assignee of the debt could enforce the guaranty. See also ASSIGNMENTS.

The cause of action arising on a guaranty to pay drafts drawn on a certain party may be assigned. Evansville Nat. Bank *v.* Kaufman, 24 Hun (N. Y.) 612 [*reversed* in 93 N. Y. 273, 45 Am. Rep. 204].

93. Harbord *v.* Cooper, 43 Minn. 466, 45 N. W. 860.

A contract of guaranty is assignable.— Anchor Inv. Co. *v.* Kirkpatrick, 59 Minn. 378, 61 N. W. 29, 50 Am. St. Rep. 417; Weir *v.* Anthony, 35 Nebr. 396, 53 N. W. 206; Stillman *v.* Northrup, 109 N. Y. 473, 17 N. E. 379; Everson *v.* Gere, 40 Hun (N. Y.) 248 [*affirmed* in 122 N. Y. 290, 25 N. E. 492]. Where a payee of a note indorsed it to a third party, adding a guaranty of payment, it was held that the contract and guaranty were assignable. Harbord *v.* Cooper, 43 Minn. 466, 54 N. W. 860. Where a note having a guaranty indorsed upon it is assigned by the payee, only the equitable title to the guaranty passes to the assignee. Levi *v.* Mendell, 1 Duv. (Ky.) 77; Smill *v.* Sloan, 1 Bosw. (N. Y.) 352. At common law a contract of guaranty was not assignable (Cole *v.* Merchants Bank, 60 Ind. 350), but it was assignable in equity (Cole *v.* Merchants Bank, 60 Ind. 350). If a contract of guaranty of a coupon bond transferable by delivery is not negotiable at law along with the bond and coupons it is assignable in equity, and an interest in it passes in equity to each successive holder of the bond or coupon. Arents *v.* Com., 18 Gratt. (Va.) 750.

94. By express words the parties may limit the right to assign a guaranty before a cause of action arises upon it; but courts will not presume that they have done, or intend to do so, when the guaranty relates to a negotiable paper, unless the intention to render the guaranty unassignable clearly appears on the face of the contract or from the surrounding circumstances. Everson *v.* Gere, 40 Hun (N. Y.) 248 [*affirmed* in 122 N. Y. 290, 25 N. E. 492].

3. What Necessary to Effect Transfer. Where one by assignment or indorsement becomes the owner of a debt the transfer carries with it as an incident all securities for its payment.[95] A general guaranty, written upon a negotiable promissory note, of the payment of it, passes by assignment and delivery of the note, to the holder thereof,[96] although nothing is said touching the guaranty.[97] Where the guaranty of the payment of a note is embodied in an instrument separate from the note, it will pass by delivery of the note without any written assignment.[98] The assent of the guarantor to the assignment is not necessary.[99]

4. Right of Transferee to Sue in Own Name. "Negotiability," however, is often used with a meaning deeper and more restricted than simply that of being transferable. There is a mercantile sense attached to it. When a note is said to be negotiable under the law merchant it is understood that the note may be so transferred as to cut off the equities which might have been enforced prior to its transfer.[1] Negotiability of a guaranty then involves two principal questions: (1) Whether the indorsement of the negotiable instrument has the effect to pass to the purchaser the title to the guaranty and the right to sue thereon in his own name, as it does under the law merchant, to the negotiable instrument itself on which the guaranty is written; and (2) whether such indorsement will operate upon the guaranty so as to give such indorsee a title free from equities of other persons to the extent given to the indorsee of the negotiable instrument itself.[2] If the guaranty is written on a negotiable instrument, and is not itself expressed

95. *California.*—Peters *v.* Jamestown Bridge Co., 5 Cal. 335, 63 Am. Dec. 134.

Illinois.—Pardee *v.* Lindley, 31 Ill. 174, 83 Am. Dec. 219; Herring *v.* Woodhull, 29 Ill. 92, 81 Am. Dec. 296.

Indiana.—Perry *v.* Roberts, 30 Ind. 244, 95 Am. Dec. 689.

Iowa.—State Bank *v.* Anderson, 14 Iowa 544, 83 Am. Dec. 390.

New York.—Barlow *v.* Myers, 64 N. Y. 41, 21 Am. Rep. 582.

Texas.—Perkins *v.* Stems, 23 Tex. 561, 76 Am. Dec. 72.

Vermont.—Miller *v.* Rutland, etc., R. Co., 40 Vt. 399, 94 Am. Dec. 414.

United States.—George *v.* Tate, 102 U. S. 564, 26 L. ed. 232.

See 25 Cent. Dig. tit. "Guaranty," § 35.

See also Assignments, 4 Cyc. 69.

A simple guaranty of the payment of debt goes with the assignment of the debt and can be enforced by the same parties who can enforce the debt. Brunn *v.* Gilbert, 50 N. Y. App. Div. 430, 64 N. Y. Suppl. 144.

Where, on a sale of its bonds by a corporation, directors in their individual capacities guaranty the bonds, the guaranty passes as an incident of the bonds, and is assignable to subsequent purchasers. Ashland Bank *v.* Jones, 16 Ohio St. 145; Reed *v.* Garvin, 12 Serg. & R. (Pa.) 100.

96. Phelps *v.* Sargent, 69 Minn. 187, 71 N. W. 927; Harbord *v.* Cooper, 43 Minn. 466, 45 N. W. 860.

Even under the common law a guaranty written upon a negotiable note or bill addressed to no particular person partook of the negotiable quality of said bill or note and any person having the legal instrument could enforce the guaranty. Cole *v.* Merchants Bank, 60 Ind. 350.

The assignment of a note carries with it a guaranty of the note made by a third party at the time of the execution of the note. Ellsworth *v.* Harmon, 101 Ill. 274.

Before delivery of a non-negotiable note for four hundred dollars to the payee defendant indorsed thereon: "I hereby warrant the within note good and collectible until paid." Pending an action on the note by the payee against the maker, the payee transferred the note to plaintiff for three hundred dollars by a written indorsement directly under the guaranty and signature of defendant, as follows: "For value received, I hereby sell and assign this note to D. S. Lemmon." The payee then withdrew from the action, and plaintiff was submitted. The maker of the note was insolvent. It was held that the assignment passed the guaranty to plaintiff. Lemmon *v.* Strong, 59 Conn. 448, 22 Atl. 293, 21 Am. St. Rep. 123, 2 L. R. A. 270.

97. Cooper *v.* Dedrick, 22 Barb. (N. Y.) 516.

The assignment of a bond and mortgage carries with it a guaranty of payment of collection, although not mentioned in the assignment. Stillman *v.* Northrup, 109 N. Y. 473, 17 N. E. 379.

98. Gould *v.* Ellery, 39 Barb. (N. Y.) 163.

In an assignment of a bond and mortgage, the omission to assign therewith the guaranty is remedied by the second assignment of the same bond and mortgage with the guaranty, which vests in the assignee, as was originally intended, all the securities incident to the bond. Stillman *v.* Northrup, 109 N. Y. 473, 17 N. E. 379.

99. Cunningham *v.* Norton, (Cal. 1895) 40 Pac. 491.

1. See, generally, Commercial Paper.

2. Claflin *v.* Ostrom, 54 N. Y. 581; Craig *v.* Parkis, 40 N. Y. 181, 100 Am. Dec. 469; Allen *v.* Culver, 3 Den. (N. Y.) 284; Ashland Bank *v.* Jones, 16 Ohio St. 145, guaranty of payment of bonds of railroad company.

in terms of negotiability, some courts hold that the guaranty is not negotiable and that an indorsement which transfers the title to the note giving the indorsee the right to sue in his own name has not a like effect upon the guaranty; that the guaranty is not negotiable, and that such a transfer of the note carries with it only an equitable assignment of the guaranty.[3] But perhaps now in the majority of the states an indorsement of negotiable paper so guarantied carries with it the title to the guaranty, with the right in the purchaser to sue thereon in his own name.[4] It may be concluded from the authorities that if a guaranty of a negotiable note is written upon a separate paper it is only assignable.[5]

5. Existing Equities Between Original Parties. The courts do not agree as to whether such transferee, being innocent, takes the guaranty free from the equities of the guarantor. But the better rule is that he takes subject to defenses which existed between the original parties.[6] And, where a guaranty is not in its terms

3. See cases cited *infra*, this note. The words, "I guaranty the payment of semi-annual interest on this note, as well as the principal," were held not to constitute a negotiable guaranty *per se*; and not to be rendered such by being written upon a negotiable instrument. True *v.* Fuller, 21 Pick. (Mass.) 140. An agreement indorsed upon a negotiable note at the time of its execution guarantying its payment is not negotiable regarded as a guaranty. Tinker *v.* McCauley, 3 Mich. 188. Where payment of a negotiable promissory note is guarantied by another than the maker, the guaranty itself is not negotiable. Ten Eyck *v.* Brown, 3 Pinn. (Wis.) 452, 4 Chandl. 151.

Under the early decisions in New York, letters of credit and commercial guaranties were not negotiable. Birckhead *v.* Brown, 5 Hill (N. Y.) 634.

4. Watson *v.* McLaren, 19 Wend. (N. Y.) 557; Ellsworth *v.* Harmon, 101 Ill. 274. If a guaranty be general it is negotiable, together with the instrument on which it is indorsed. Batavia Bank *v.* Sewell, 8 Ohio Dec. (Reprint) 210, 6 Cinc. L. Bul. 288; Toppan *v.* Cleveland, etc., R. Co., 24 Fed. Cas. No. 14,099, 1 Flipp. 74. A guaranty executed and attached to a promissory note at the time it is indorsed and delivered imposes no trust or confidence in the indorsee, and although it specially names him will be considered a general guaranty of the note, and not a special guaranty personal to the indorsee, and it may be transferred by assignment upon the further indorsement of the note. Everson *v.* Gere, 122 N. Y. 290, 25 N. E. 492 [*affirming* 40 Hun 248]; Stillman *v.* Northrup, 109 N. Y. 473, 17 N. E. 379. A written guaranty of the payment of a promissory note placed by the payee upon the back of the note for the purpose of negotiating it passes with the note so that any subsequent *bona fide* holder has a right as well against the guarantor as against the maker that pertained to the person to whom the note was first assigned. Partridge *v.* Davis, 20 Vt. 499. Where a guaranty not in itself drawn in terms of negotiability is indorsed on a negotiable note, guarantying payment thereof "according to its tenor," the note being negotiable may perhaps draw the quality into the guaranty. Codman *v.* Vermont, etc., R. Co., 5 Fed. Cas. No. 2,935, 16 Blatchf. 165. A writing indorsed upon a note guarantying its payment is equivalent to a general letter of credit on which an action may be maintained by and in the name of the person who gives credit on the strength of it. Northumberland County Bank *v.* Eyer, 58 Pa. St. 97.

5. A general guaranty, not naming any person as the party guarantied, is good, and may be declared on as a promise to himself by any one who advances money on it, in the name of the original party giving credit on it; but it is not negotiable unless made upon the note the payment of which it guaranties. McLaren *v.* Watson, 26 Wend. (N. Y.) 425, 37 Am. Dec. 260 [*affirming* 19 Wend. 557].

A separate guaranty of a negotiable note or bill does not, like an acceptance of indorsement, run with its principal but must end where it began. Watson *v.* McLaren, 19 Wend. (N. Y.) 557.

6. Hayden *v.* Weldon, 43 N. J. L. 128, 39 Am. Rep. 551; Barlow *v.* Myers, 64 N. Y. 41, 21 Am. Rep. 582; Gallagher *v.* White, 31 Barb. (N. Y.) 92. L without any consideration therefor wrote upon a mortgage which secured certain negotiable promissory notes the following: "I hereby guaranty the payment of the within mortgage. L." L was an entire stranger to the notes and mortgage. It was held that the guaranty was not a negotiable contract, and, even if the notes were subsequently transferred to a *bona fide* purchaser, L might nevertheless set up the want of consideration for the guaranty. Briggs *v.* Latham, 36 Kan. 205, 13 Pac. 129. Although the bonds and coupons executed by a railroad company are negotiable, a guaranty of the payment of the interest on the bonds is not, it being neither a bill nor a note, which instruments are alone negotiable, under Vt. Rev. Laws, §§ 2002, 2003; and the guarantor may make any defense to an action on his contract by the transferee of the bonds or coupons that he could have made if sued by the original payee in the bonds. Eastern Townships Bank *v.* St. Johnsbury, etc., R. Co., 40 Fed. 423. But see Jackson *v.* Foote, 12 Fed. 37, 11 Biss. 223, holding that a guaranty in the hands of a *bona fide* holder is valid and is not affected by any of the equities between

negotiable and is not placed upon an instrument which is in and of itself negotiable, a transfer of the instrument guarantied, whether by an indorsement of the instrument or otherwise, only transfers the rights of the original party to the guaranty.[7]

6. Special Guaranties. A guaranty may be so drawn as to be personal and so as to have force and effect only as to the person to whom it is given and so not transferable or assignable to any other person.[8] And in cases of special guaranties not connected with negotiable instruments no person except the one specified can secure any advantage from the guaranty, and it is non-transferable till after a breach, when a right of action has accrued thereon.[9] But while this is so, in order thus to limit a guaranty, the language used should be plain and the intention of the parties should be certain.[10]

D. Transactions Covered by Guaranty — 1. In General. In determining the extent of liability under a contract of guaranty the court may consider first, who the parties were, second, in what position they were, and third, what the subject-matter of the agreement was.[11] No strained construction should be resorted to to defeat the obvious intent of the parties.[12]

2. Change in Identity of Principal Debtor. If a guaranty is given for advances to be made to a firm it will not cover advances made to individual members of such firm.[13] And where the contract of guaranty expressly names a certain person as the one to whom credit is to be extended, the guaranty will not cover transactions in which credit is extended to such person and a partner.[14]

the original parties. A written guaranty of a note, placed by the payee on the back of it for the purpose of negotiating it, passes with the note, so that any subsequent *bona fide* holder has the right, as well against the guarantor as against the maker, that belonged to the person to whom the note was first assigned. Partridge *v.* Davis, 20 Vt. 499. See also Assignments, 4 Cyc. 34 note 77.

7. Briggs *v.* Latham, 36 Kan. 205, 13 Pac. 129, where the guaranty was written upon a mortgage to secure certain negotiable promissory notes and guarantied the payment of the mortgage.

8. Brumm *v.* Gilbert, 50 N. Y. App. Div. 430, 64 N. Y. Suppl. 144; Robbins *v.* Bingham, 4 Johns. (N. Y.) 476. See also Stillman *v.* Northrup, 109 N. Y. 473, 17 N. E. 379; Tidioute Sav. Bank *v.* Libbey, 101 Wis. 193, 77 N. W. 182, 70 Am. St. Rep. 907.

9. A special guaranty is not assignable. If it were, there would be no difference between a general guaranty and one addressed to a particular person. Schoonover *v.* Osborne, 108 Iowa 453, 79 N. W. 263. See also *supra*, I, J.

10. Stillman *v.* Northrup, 109 N. Y. 473, 17 N. E. 379.

11. Morrell *v.* Cowan, 7 Ch. D. 151, 47 L. J. Ch. 73, 37 L. T. Rep. N. S. 586, 26 Wkly. Rep. 90, holding that an instrument by which defendant guarantied to plaintiff a certain sum, the guaranty to continue in force for a named period and no longer, did not bind defendant for past debts. See also Scott *v.* Myatt, 24 Ala. 489, 60 Am. Dec. 485, holding that a contract by which defendant agreed to be responsible "for any little thing" the third person should stand in need of imposed a liability for any articles of no great value which should come under the denomination of necessaries to one in the circumstances of the third person.

12. In Krakauer *v.* Chapman, 16 N. Y. App. Div. 115, 45 N. Y. Suppl. 127, defendant gave a special letter of credit in which it was recited that the third person would send an order for goods which he required and that he was authorized to draw on defendant in behalf of plaintiff for the amount of the bill at thirty days' sight, and it was held that the drawing of a draft on defendant for a part of the bill and its payment did not exhaust the letter of credit but that defendant was liable on a subsequent draft in plaintiff's favor for the balance of the bill. A guaranty of the prompt fulfilment of all the provisions, conditions, and agreements mentioned in a lease, and that full payment shall be made "of the sum or sums of money specified in the within lease," is broad enough to embrace every obligation imposed on the lessee by the lease, and is a guaranty that payment shall be made as the sum or sums shall become due as provided by the terms of the lease. Binz *v.* Tyler, 79 Ill. 248. The following guaranty, viz., "I hereby guaranty the payment of any purchases of bagging and rope which Thomas Barrett may have occasion to make between this and the 1st of December next," extends the liability of the guarantor to purchases upon a reasonable credit, made anterior to the first of December, although the time of payment was not to arrive until after that day. Louisville Mfg. Co. *v.* Welch, 10 How. (U. S.) 461, 13 L. ed. 497.

13. Cremer *v.* Higginson, 6 Fed. Cas. No. 3,383, 1 Mason 323. See also *supra*, V, B, 2, b.

14. Shaw *v.* Vandusen, 5 U. C. Q. B. 353. See also *supra*, V, B, 2, a.

3. Limitations as to Place. Where either the principal contract [15] or the contract of guaranty [16] names the place where the transactions between the principal parties are to occur, the limitation must be observed.

E. Limitations as to Amount of Liability in General — 1. Rule Stated. In ascertaining the intent of the parties as to the debts covered by the guaranty and the amount of liability, where the language of the instrument is ambiguous, the circumstances surrounding the execution of the contract are to be considered.[17] And where the terms have been ascertained, the contract will be strictly construed for the purpose of confining the amount of the liability of the guarantor to the precise terms.[18]

2. Rule Applied — a. Amount Limited in Express Terms. Where a limit is named in the instrument, extrinsic facts cannot be resorted to for the purpose of enlarging the limit if the guarantor was ignorant of such facts.[19] And going beyond such limit does not discharge the guarantor as to that part of the debt which is within the limit.[20]

b. Amount Not Limited in Express Terms. Expressions in the instrument of guaranty which, taken by themselves, would indicate that no limit as to amount was intended to be named, will ordinarily not be so construed if there is any justification in the context for the opposite construction.[21] And it has been held that where there is no limit either as to the time or the amount of the guarantor's liability, the amount of credit which may be extended must be reasonable, tak-

15. Where the subject-matter of the principal contract is agency and it names the place where the agent is expected to transact his business, one who guaranties the performance of the agent's contract cannot be held as to transactions occurring in other places than that named in the principal contract. Wheeler *v.* Brown, 65 Wis. 99, 25 N. W. 427, 26 N. W. 564.

16. A letter of credit guarantying the payment of what the party in whose favor it is drawn may purchase from any dealer in a certain state cannot be altered so that it will bind the writer for goods purchased of dealers in a different state. Johnson *v.* Brown, 51 Ga. 498. So where a guaranty bond is given for the faithful conduct of an agent appointed for certain territory it does not cover his default in matters beyond this territory. Hopkins *v.* Briggs, 41 Mich. 175, 2 N. W. 199.

17. Abercrombie *v.* Spalding, 158 Mass. 32, 32 N. E. 911.

General usage.— An agreement to indorse any paper which a certain person may give for "purchases" made for his mill does not cover a claim for labor performed in rolling iron to prepare it for manufacturing in the mill, unless a general usage is proved to include such labor under that term. Schlessinger *v.* Dickinson, 5 Allen (Mass.) 47.

Interest.— Where the treasurer of a corporation, knowing that it was its uniform practice to charge up interest on all accounts every four months, and to treat accrued interest as principal, agreed "to pay on thirty days' notice . . . any sum that may now or may hereafter be due . . . said corporation, not exceeding in the aggregate to both thirty-five thousand dollars, for goods sold and money loaned to [H.]" the guaranty included, in addition to the sum named, such sums as might be charged up as interest thereon under the practice of the corporation. Hooper *v.* Hooper, 81 Md. 155, 31 Atl. 508, 48 Am. St. Rep. 496.

Scaling laws.— A guaranty of the payment of certain notes was held to render the guarantor liable for the full face value of the notes, without any benefit of the scaling laws, nothing appearing to indicate a contrary intent. James *v.* Long, 68 N. C. 218.

18. Where the owner of a mortgage upon assigning the same executed a guaranty as follows, "For a valuable consideration, I hereby agree to, and do hereby guaranty G. J. Griffith against loss from this mortgage," it was held that the guaranty was limited to the amount paid on the assignment. Griffith *v.* Robertson, 15 Hun (N. Y.) 344.

19. Skinner *v.* Valentine, 59 N. Y. 473.

20. Fisk *v.* Stone, 6 Dak. 35, 50 N. W. 125; Curtis *v.* Hubbard, 6 Metc. (Mass.) 186; Pratt *v.* Matthews, 24 Hun (N. Y.) 386. *Contra*, Brez *v.* Warner, 1 Ky. L. Rep. 226, holding that where, in a contract of guaranty, the guarantor stipulates that consignment of goods are not to exceed a sum of five thousand dollars at any one time, this is a condition of his liability, and if credits exceed that sum at any time he will be released.

Limitation construed.— It has been held that a condition that the amount of credit to be extended to the principal debtor shall not exceed at any one time a prescribed sum is merely a limit as to the guarantor's liability. Curtis *v.* Hubbard, 6 Metc. (Mass.) 186.

21. Wilde *v.* Haycraft, 2 Duv. (Ky.) 309. Thus where defendant addressed a letter to plaintiff in which he stated that if a third person should order goods at any time within a certain period defendant would see that the same were paid for and attached the proviso that the amount of the bill should not

ing into consideration the language of the guaranty and all the circumstances of the case.[22]

3. Liability For Interest — a. General Rule. As the general rule is that the liability of the guarantor is measured by that of the principal debtor,[23] it is usually held that the guarantor is liable for interest after maturity of the debt whose payment is guarantied.[24]

b. After Maturity. Where a guaranty expressly provides for the payment of interest upon a specified note or obligation, the rule is that the liability of the guarantor does not extend to interest accruing after the maturity of the principal obligation.[25] But where the notes, the payment of the interest on which is guarantied, themselves provide for payment of interest after maturity in the same manner as before, it has been held that the guaranty will cover the interest accruing after maturity.[26]

c. On Open Account. It has been held that the guarantor is not liable for interest where the obligation guarantied is an open account.[27]

d. Rate of Interest. Where the guaranty is entered into by a separate instrument and there is no stipulation for interest, he is only liable for the legal rate.[28]

4. Liability For Costs. One who guaranties the collection of the debt of another is liable for the costs of an action brought against the principal debtor to enforce collection.[29] But the guarantor is not liable for such costs if the suit was instituted unnecessarily.[30] And where the guarantor expressly agrees to become bound for costs of collection he is not liable for costs of a suit on the guaranty;[31] and unnecessary expenses cannot be recovered.[32]

exceed a certain sum, it was held that the guaranty would not cover a sum in excess of the named limit. Historical Pub. Co. *v.* La Vaque, 64 Minn. 282, 66 N. W. 1150.

22. Lehigh Coal, etc., Co. *v.* Scallen, 61 Minn. 63, 63 N. W. 245, where the guaranty provided, "I agree to become responsible for any amount of credit you may give him," and it was held that this language must be given due weight, but, that even under this language, an unreasonable amount of credit might be given, and, where there was evidence tending to show that a reasonable line of credit in the business of the principal debtor was from three hundred dollars to four hundred dollars, it was a question for the jury whether it was unreasonable on the faith of this guaranty to extend to him a line of credit amounting to over one thousand three hundred dollars.

23. See *supra*, IV, A.

24. *Georgia.*— Gammell *v.* Parramore, 58 Ga. 54; Hitt *v.* Lippitt, Ga. Dec. Pt. II, 89.

New York.—Gutta Percha, etc., Mfg. Co. *v.* Benedict, 37 N. Y. Super. Ct. 430.

Pennsylvania.— Love *v.* Philadelphia, etc., R. Co., 22 Wkly. Notes Cas. 171.

Texas.— Looney *v.* Le Geirse, 2 Tex. Civ. App. Cas. § 531.

United States.— Jefferson City Gas Light Co. *v.* Clark, 95 U. S. 644, 24 L. ed. 521.

Bond with coupons attached.— One who guaranties the punctual payment of principal and interest of a bond with coupons attached, "when and as the same shall respectively fall due," is liable for the interest on overdue coupons detached at maturity. Philadelphia, etc., R. Co. *v.* Knight, 124 Pa. St. 58, 16 Atl. 492.

25. Melick *v.* Knox, 44 N. Y. 676; Hamilton *v.* Van Rensselaer, 43 N. Y. 244 [*reversing* 43 Barb. 117].

One who has agreed to pay the interest only on the note of a third person is entitled to even greater consideration at the hands of the creditor than one who has guarantied the payment of the whole debt. Rector *v.* McCarthy, 61 Ark. 420, 33 S. W. 633, 54 Am. St. Rep. 271, 31 L. R. A. 121.

26. King *v.* Bates, 149 Mass. 73, 21 N. E. 237, 4 L. R. A. 268.

Interest on two notes one of which is past due.— Where one, in consideration of the forbearance for two years to collect a note already due, guaranties "the punctual payment of each and every instalment of interest on said note as they shall become due, and also of each and every instalment of interest that shall come due" on another note, this is a guaranty of the interest on both notes before and after maturity until the principal is paid. Tyler *v.* Waddingham, 58 Conn. 375, 20 Atl. 335, 8 L. R. A. 657.

27. Bishop *v.* Ross, 1 Rice (S. C.) 21.

28. Vogelsang *v.* Mensing, 1 Tex. App. Civ. Cas. § 1165.

29. Mosher *v.* Hotchkiss, 3 Abb. Dec. (N. Y.) 326, 2 Keyes 589, 3 Keyes 161; Tuton *v.* Thayer, 47 How. Pr. (N. Y.) 180. But see Eaton *v.* Harth, 45 Ill. App. 355, in which it is held that one who guaranties the fulfilment of a contract with another is not liable for the costs of an action against his principal. And *compare* Redfield *v.* Haight, 27 Conn. 31.

30. Peck *v.* Cohen, 40 N. Y. Super. Ct. 142.

31. Abbott *v.* Brown, 131 Ill. 108, 22 N. E. 813 [*affirming* 30 Ill. App. 376].

32. Gilman *v.* Lewis, 15 Me. 452.

F. Limitations as to Time in General. A clause in a contract of guaranty specifically naming the time during which the principal contract is to run controls a clause indicating that the liability is to go on indefinitely.[33] On the other hand where, on the face of the contract there is room for a construction that the time during which the guaranty is to run is so short as not to render the guaranty of any practical service, the contract will be construed as one for a reasonable time if the acts of the parties or other extrinsic facts justify such a construction.[34] A guaranty may relate to past debts as well as future advances,[35] but it will not cover debts of which the guarantor is ignorant at the time of entering into the guaranty.[36]

G. Continuing Guaranties — 1. Strict Rule of Construction Applied. Upon the question whether a guaranty is continuing or not some courts adopt a strict rule of construction,[37] and hold that as a guaranty is an engagement for the debt of another, liability upon it will be carefully restricted to the fair import of its terms;[38] that a guaranty given to enable a third person to obtain credit will

33. Liverpool Water-Works Co. *v.* Atkinson, 6 East 507, 2 Smith K. B. 654, holding that the condition of a bond reciting that defendant had agreed with plaintiffs to collect their revenues "from time to time for 12 months;" and afterward stipulating that, "at all times thereafter during the continuance of such his employment, and for so long as he should continue to be employed," he would justly account and obey orders, etc., confines the obligation to the period of twelve months mentioned in the recital.

34. Clark *v.* Merriam, 25 Conn. 576.

Transactions occurring after the death of the principal debtor will be covered, if such appears to have been the intention of the parties. Thus where B agreed to pay plaintiff as trustee certain monthly instalments for the use of B's wife during her life, and defendant guarantied, "in consideration of $1," "the payment of the said several instalments," it was held that defendant's guaranty did not terminate with B's death. Elmendorf *v.* Whitney, 153 Pa. St. 460, 25 Atl. 607.

35. Merchants' Nat. Bank *v.* Hall, 83 N. Y. 338, 38 Am. Rep. 434; Herrick *v.* Guarantors' Finance Co., 58 N. Y. App. Div. 30, 68 N. Y. Suppl. 560.

A guaranty may have a retrospective operation, so as to embrace debts already contracted, where it clearly appears that such was the intention of the parties; and an instrument may be antedated so as to embrace a particular transaction, where no fraud or mistake is shown. Abrams *v.* Pomeroy, 13 Ill. 133. And an agreement guarantying payment of any demands plaintiff "may from time to time have or hold against" the third person was held to apply to demands against him acquired by plaintiff after the making of the instrument of guaranty, although the debts arose before. Merchants' Nat. Bank *v.* Hall, 83 N. Y. 338, 38 Am. Rep. 434. But a guaranty, like every other written contract, only takes effect from the time of its execution, and cannot be held to have influenced a party in giving credit on a draft, which was drawn before the execution of the guaranty. Crowder *v.* Dick, 24 Miss. 39.

36. Drake *v.* Sherman, 179 Ill. 362, 53 N. E. 628, holding that a contract whereby S agrees to pay a bank any loss it may sustain through overdrafts on it, or money advanced or paid out by it on the checks of drafts of M for the purpose of buying grain, or any other purpose, that it may advance or pay out money on M's checks or drafts, does not make S liable for an overdraft then existing, but of which S knew nothing.

37. Brittain Dry Goods Co. *v.* Yearout, 59 Kan. 684, 54 Pac. 1062; Barnett *v.* Wing, 62 Hun (N. Y.) 125, 16 N. Y. Suppl. 567; Whitney *v.* Groot, 24 Wend. (N. Y.) 82; Frost *v.* Weathersbee, 23 S. C. 354. See *supra*, V, A, 2.

A natural meaning should be given to the words of the guaranty and no technical niceties should be observed. Allnutts *v.* Ashenden, 7 Jur. 113, 12 L. J. C. P. 124, 5 M. & G. 392, 6 Scott N. R. 127, 44 E. C. L. 210.

38. Perryman *v.* McCall, 66 Ala. 402, 41 Am. Rep. 752; Liverpool Water-Works Co. *v.* Atkinson, 6 East 507, 2 Smith K. B. 654. In Hall *v.* Rand, 8 Conn. 560, the court said that it is an unfounded position that in the construction of mercantile agreements a peculiar liberality should be exercised.

The language of a guaranty is not to be extended by any strained construction for the purpose of enlarging the guarantor's liability. Gay *v.* Ward, 67 Conn. 147, 34 Atl. 1025, 32 L. R. A. 818.

Guaranties not continuous. — A letter in which the writer requests the one to whom the letter is addressed to send a bill of goods to a third person and then makes the additional statement that he indorses such third person and hopes that he will become one of the best customers of the prospective seller of the goods does not constitute a continuing guaranty. Perryman *v.* McCall, 66 Ala. 402, 41 Am. Rep. 752. An instrument reciting that whereas a named person has agreed to indorse the notes of another named person at a certain bank "to the amount of $4,000" the maker of the instrument agrees to be responsible to the indorser for one-half the amount of any loss he may sustain by the indorsement does not amount to a continuing

not be construed as continuing beyond the first transaction unless the terms of the contract plainly import such a liability;[39] and that in a doubtful case the presumption should be against the construction that the guaranty is a continuing one.[40]

2. Liberal Rule of Construction Applied. Other courts, however, favor the doctrine that a liberal construction is to be given in favor of the person claiming under the guaranty.[41]

3. Proper Rule of Construction. The rule of construction having the support of the weight of authority is to give the instrument that effect which shall best accord with the intention of the parties as manifested by the terms of the guaranty taken in connection with the subject-matter to which it relates.[42]

4. Rule Where Contract Does Not Limit Time or Amount. While some early cases have held that contracts of guaranty should be given a liberal[43] and not a restricted interpretation and have construed instruments containing no limitation either as to amount or time as continuing guaranties,[44] the rule of strict interpre-

guaranty but limits the liability of the maker to the indorsement of notes, once only, to the amount of four thousand dollars. Hall *v.* Rand, 8 Conn. 560. Defendant signed an agreement to be bounden for stock delivered by plaintiffs, dealers in building materials, to a contractor and builder, to the amount of two hundred dollars, and to pay the same. It was held that it was not a continuing guaranty covering a balance not exceeding two hundred dollars, due on a subsequent account with the contractor, but bound defendant to pay for a sale not exceeding that amount. Sherman *v.* Mulloy, 174 Mass. 41, 54 N. E. 345, 75 Am. St. Rep. 286.

39. Bloom *v.* Kern, 30 La. Ann. 1263; Gerson *v.* Hamilton, 30 La. Ann. 737; Melville *v.* Hayden, 3 B. & Ald. 593, 22 Rev. Rep. 495, 5 E. C. L. 342; Nicholson *v.* Paget, 5 C. & P. 395, 1 Cromp. & M. 48, 2 L. J. Exch. 18, 3 Tyrw. 164, 24 E. C. L. 622; Sutherland *v.* Patterson, 4 Ont. 565.

40. Morgan *v.* Boyer, 39 Ohio St. 324, 48 Am. Rep. 454; Sawyer *v* Senn, 27 S. C. 251, 3 S. E. 298.

Where one on seeking credit presents the guaranty of a third person, the liability under such guaranty should be confined to the immediate present transaction unless the language of the contract of guaranty is sufficiently broad to show that it was meant to reach beyond the present and render the guarantor answerable for future credits. Birdsall *v.* Heacock, 32 Ohio St. 177, 30 Am. Rep. 572; Bussier *v.* Chew, 5 Phila. (Pa.) 70.

41. In Farmers', etc., Bank *v.* Kercheval, 2 Mich. 504, which was a case involving the question whether the guaranty was a continuing one or not, the court said that inasmuch as commercial guaranties are frequently written without very much care and by persons without much technical knowledge a narrow and restricted rule of interpretation should not be applied to relieve parties to such instruments from what appears to have been engagements not voluntarily assumed.

If the guarantor desires to limit his responsibility to a single transaction he should do it in plain and unmistakable terms, and if he fails to do so and by equivocal language induces the guarantee to extend credit in the belief that the contract is to cover more than one transaction, the guarantor should be held to abide the consequences of his omission. Rindge *v.* Judson, 24 N. Y. 64; Poughkeepsie City Nat. Bank *v.* Phelps, 16 Hun (N. Y.) 158. A letter from defendant requesting plaintiff to furnish goods to the third person "as he shall want them," not exceeding a certain sum, and guarantying payment for them, was held to create a continuing guaranty, the court saying that the words of the contract ought to be taken as strongly against defendant as the sense of them would admit. Rapelye *v.* Bailey, 5 Conn. 149, 13 Am. Dec. 49.

42. Lewis *v.* Dwight, 10 Conn. 95; Home Sav. Bank *v.* Hosie, 119 Mich. 116, 77 N. W. 625.

Surrounding circumstances, etc., considered. — Where, if the face of the instrument is alone considered, it is impossible to say with certainty whether it is intended as a guaranty for a single credit or as a continuing guaranty, resort may be had to the surrounding circumstances and the nature of the business in which the credit was to be used, and the relation of the parties in previous transactions may be shown to enable the court to ascertain the meaning of the instrument. White's Bank *v.* Myles, 73 N. Y. 335, 29 Am. Rep. 157. See Coles *v.* Pack, L. R. 5 C. P. 65, 39 L. J. C. P. 63, 18 Wkly. Rep. 292, holding that the guaranty in question was unlimited both as to time and amount.

Construction adopted by the parties. — While the language of the instrument of guaranty may be such that the court may incline to treat it as one limited to a single transaction, yet the parties by their acts may have put such a practical construction upon the contract that the court may consider that it must be deemed a continuing guaranty. Michigan State Bank *v.* Peck, 28 Vt. 200, 65 Am. Dec. 234.

43. See *supra*, V, A.

44. Lowe *v.* Beckwith, 14 B. Mon. (Ky.) 184, 58 Am. Dec. 659, guaranty to enable a retailer to purchase on credit.

tation is generally regarded as especially applicable in favor of a guarantor where it is sought to hold him liable on a continuing guaranty and there is no express limitation in the contract of guaranty of the amount of credit which may be extended to the principal debtor.[45] And where no time is fixed during which the guaranty shall continue and nothing in the instrument indicates the continuance of the undertaking, the presumption is in favor of a limited liability as to time whether the amount of credit which may be obtained by the third person is limited or not.[46]

5. Rule Where Amount Is Limited But Time Is Not — a. In General. When the amount of the liability is limited and the time is not expressly limited the courts lean toward construing the guaranty as a continuing one.[47]

45. Knowlton *v.* Hersey, 76 Me. 345; Schwartz *v.* Hyman, 107 N. Y. 562, 14 N. E. 447; Baker *v.* Rand, 13 Barb. (N. Y.) 152; Whitney *v.* Groot, 24 Wend. (N. Y.) 82; Rogers *v.* Warren, 8 Johns. (N. Y.) 119; Anderson *v.* Blakely, 2 Watts & S. (Pa.) 237.

It is reasonable to suppose that any man of ordinary prudence would not become surety for another without limitation as to time or amount unless he has done so in express terms or by clear implication. Gard *v.* Stevens, 12 Mich. 292, 86 Am. Dec. 52, holding that where the instrument purporting to guaranty payment for goods to be furnished to a third person contains no express limitation as to the amount of goods to be furnished or as to the time during which they are to be furnished, and there is nothing in the instrument from which it can be inferred that it was the intention of the guarantor to leave it open as to both time and amount, it must be understood as referring to a single transaction.

46. Knowlton *v.* Hersey, 76 Me. 345; Schwartz *v.* Hyman, 107 N. Y. 562, 14 N. E. 447; Crist *v.* Burlingame, 62 Barb. (N. Y.) 351; Fellows *v.* Prentiss, 3 Den. (N. Y.) 512, 45 Am. Dec. 484.

47. Mathews *v.* Phelps, 61 Mich. 327, 28 N. W. 108, 1 Am. St. Rep. 581. When the only limitation is upon the extent of the liability of the guarantor, there is no difficulty in holding the undertaking to be a continuing guaranty to the extent so limited. W. W. Kimball Co. *v.* Baker, 62 Wis. 526, 22 N. W. 730.

Reasonable time.— Where plaintiff agreed to become surety for the payment of the price of merchandise to be delivered to a third person up to a certain amount, it was held that plaintiff had a right to deliver the merchandise from time to time within a reasonable time from the date of the execution of the guaranty. Keith *v.* Dwinnell, 38 Vt. 286.

Guaranties continuing.—A guaranty, whereby the guarantor simply offers his guaranty as security for goods sold on credit, not exceeding a certain amount, is a continuing guaranty for goods sold on credit without limitation as to price, terms, and agreement between the original parties. Peoria Rubber Mfg. Co. *v.* During, 85 Mo. App. 131. A guaranty of the account of a debtor for a line of credit with a creditor to the amount of five hundred dollars, and obliging the guarantor to pay for any goods bought by the debtor to the amount of five hundred dollars in case he should not do so, is a continuing one for any balance that may be due at any time, not to exceed such amount. Schneider-Davis Co. *v.* Hart, 23 Tex. Civ. App. 529, 57 S. W. 903. "In consideration that D. B. Fisk & Co., . . . will and do sell to Mrs. J. W. Cook, . . . upon credit, sundry bills of goods from time to time as she may purchase or order, I, the undersigned, do hereby guaranty to said D. B. Fisk & Co. the prompt payment of all such bills at their maturity,— said maturity to be sixty days from date of bills; hereby waiving any and all notice of times or amounts of sales, or of defaults or delays in the payment therefor. Not exceeding four hundred dollars," is a continuing guaranty to the amount of four hundred dollars. Fisk *v.* Rickel, 108 Iowa 370, 371, 79 N. W. 120. "I guarantee the payment of your account with Robert Shook . . . to the amount of four hundred dollars. I would kindly ask you to state terms of sale on each invoice. . . . Please forward . . . (goods) now," is a continuing guaranty. Friedman *v.* Peters, 18 Tex. Civ. App. 11, 12, 44 S. W. 572. See also Campbell Banking Co. *v.* Worman, 99 Iowa 671, 68 N. W. 912.

Guaranties not continuing.— A letter of credit to a definite amount (Sollee *v.* Meugy, 1 Bailey (S. C.) 620), or an instrument reading "I agree to become security to . . . for any bills contracted by . . . from this date, said bills not to exceed $300" (Bussier *v.* Chew, 5 Phila. (Pa.) 70) does not constitute a continuing guaranty. And an instrument which defendant delivered to plaintiff requesting the latter to deliver goods to a third person "as he may want from time to time, not exceeding in amount $300" and guarantying payment has been held not to be a continuing guaranty, the words "not exceeding in amount $300" being construed as applicable to the goods to be delivered and not merely as a limitation of the amount for which the guarantor would be responsible at any time or from time to time. Cutler *v.* Ballou, 136 Mass. 337, 49 Am. Rep. 35. A writing by which the maker guaranties the account of a third person with the promisee to a certain amount was held to relate to an existing account and that it should not be construed to apply to an account which was to run on until a future time. Allnutts *v.* Ashenden, 7 Jur.

b. More Than One Transaction Contemplated. The liability under the guaranty will be regarded as continuing when by the terms of the contract it is evident that the object is to give a standing credit to the principal debtor to be used from time to time either indefinitely or until a certain period.[48] So a guaranty may be construed as continuing where attendant circumstances strongly indicate that more than a single transaction was contemplated,[49] especially if the right to recall the guaranty is expressly reserved.[50]

c. Particular Words Used. The use of the word "may" with reference to the proposed transactions between the principal parties is held usually to indicate a continuing guaranty.[51] So words guarantying payment for "any goods" which may be purchased by the third person,[52] or the payment of "any debt" which

113, 12 L. J. C. P. 124, 5 M. & G. 392, 6 Scott M. R. 127, 44 E. C. L. 210. So an instrument by which defendant guarantied a specified sum in merchandise purchased by a third person from the creditors was construed as limited to the purchase of a single quantity of goods of a specified value. Boston, etc., Glass Co. *v.* Moore, 119 Mass. 435.

Where one writes to a bank stating that if another overdraws his account to the amount of five hundred dollars to honor his checks he will be responsible to the bank to that amount, the guaranty is a continuing one, not limited as to time. John S. Brittain Dry Goods Co. *v.* Yearout, 59 Kan. 684, 54 Pac. 1062; Alexandria Bank *v.* Turney, (Tenn. Ch. App. 1898) 52 S. W. 762; Friedman *v.* Peters, 18 Tex. Civ. App. 11, 44 S. W. 572.

48. Crist *v.* Burlingame, 62 Barb. (N. Y.) 351.

49. Wright *v.* Griffith, 121 Ind. 478, 23 N. E. 281, 6 L. R. A. 639; Mussey *v.* Rayner, 22 Pick. (Mass.) 223; L. Bauman Jewelry Co. *v.* Bertig, 81 Mo. App. 393.

Applying this rule, expressions in the contract of guaranty indicating that the guarantor contemplated a series of transactions and that he desired to enable the principal debtor to engage in business (Lowe *v.* Beckwith, 14 B. Mon. (Ky.) 184, 58 Am. Dec. 659), and the fact that the relation between the principal debtor and plaintiff was that of shopkeeper and jobber (Hotchkiss *v.* Barnes, 34 Conn. 27, 91 Am. Dec. 713; Celluloid Co. *v.* Haines, 176 Mass. 415, 57 N. E. 691; Boehne *v.* Murphy, 46 Mo. 57, 2 Am. Rep. 485; Lawton *v.* Maner, 10 Rich. (S. C.) 323; Heffield *v.* Meadows, L. R. 4 C. P. 595, 20 L. T. Rep. N. S. 746; Fennell *v.* McGuire, 21 U. C. C. P. 134), have been held to be strong circumstances to show that more than a single transaction was contemplated.

Open account.— Where a party guaranties the payment of goods to be furnished on credit to a third party to the sum of five hundred dollars, on an open account upon the order of such third party, such guaranty is a continuing one, and not limited to the payment of the goods, to the amount of five hundred dollars, furnished next after the execution of such guaranty. Lennox *v.* Murphy, 171 Mass. 370, 50 N. E. 644; Rochford *v.* Rothschild, 16 Ohio Cir. Ct. 287, 9 Ohio Cir. Dec. 47.

50. Manry *v.* Waxelbaum Co., 108 Ga. 14, 33 S. E. 701.

51. Thus a guaranty containing a recital "may have occasion to make further purchase from you," was held to be a continuing guaranty. Allan *v.* Kenning, 9 Bing. 618, 2 Moore & S. 769, 23 E. C. L. 731. A guaranty of "the full, prompt and ultimate payment" of all commercial paper which the guarantee may "have discounted, or may hereafter discount," for a corporation of which the guarantors are stock-holders, is a continuing guaranty, which covers all renewals, substitutions, and extensions made while the contract is in force. National Exch. Bank *v.* Gay, 57 Conn. 224, 17 Atl. 555 [*followed* in Gay *v.* Ward, 67 Conn. 147, 34 Atl. 1025, 32 L. R. A. 818]. So with respect to a guaranty of payment for goods which the third person "may" buy, it has been held that the use of the word "may" indicates a continuing guaranty, as it may apply either to a present transaction not complete or to a future transaction, whether definite in the minds of the parties or definite in discretion and indefinite as to the detail. Heffield *v.* Meadows, L. R. 4 C. P. 595, 20 L. T. Rep. N. S. 746.

52. Melendy *v.* Capen, 120 Mass. 222; Louisville Mfg. Co. *v.* Welch, 10 How. (U. S.) 461, 13 L. ed. 497; Ross *v.* Burton, 4 U. C. Q. B. 357.

Expressions of similar import.— A guaranty not under seal of a specified sum in merchandise to be purchased by the third person "from time to time as he may want" was held a continuing one, and not to be exhausted by a single transaction up to the sum involving the maximum limit. Hatch *v.* Hobbs, 12 Gray (Mass.) 447. So words agreeing to be responsible for goods purchased "at any time hereafter" to a specified amount indicates a continuing guaranty which is not exhausted by a single transaction involving a specified sum. Bent *v.* Hartshorn, 1 Metc. (Mass.) 24. A defendant who had guarantied payment for goods to be supplied by plaintiff to A up to the first of July, gave on the 9th of April the following additional guaranty: "In consideration of your extending the credit already given to [A] . . . and agreeing to draw upon him at three months, from the first of the following month for all goods purchased up to the 20th of the preceding month, I . . . guarantee the payment, and agree to pay you any sum that

may be contracted,[53] up to a certain amount,[54] are almost invariably held to indicate that the liability is intended to be continuing.

H. What Law Governs. The general rule in reference to contracts is that their validity is to be determined in accordance with the law of the state where they are executed;[55] if valid there they are deemed valid everywhere, and will be enforced in another state whose laws do not authorize such a contract to be made.[56] And a contract is complete and takes effect when nothing further remains to be done to give either party a right to have it enforced,[57] and it takes effect at once at the place where delivered if the parties intended it to be delivered there.[58] A contract of guaranty is presumed to have been made where the last assent or act necessary to its execution as a contract takes place.[59] So if an offer of guaranty

shall be due and owing to you upon his account for goods supplied." It was held that this constituted a continuing guaranty and that the words "following month" and "preceding month" were to be given a general application. Hitchcock *v.* Humphrey, 7 Jur. 423, 12 L. J. C. P. 235, 5 M. & G. 559, 6 Scott N. R. 540, 44 E. C. L. 296.

53. Merle *v.* Wells, 2 Campb. 413. So words agreeing to pay debts "either contracted or which might thereafter be contracted" were held to indicate a continuing guaranty. Lewis *v.* Dwight, 10 Conn, 95.

"All sums of money and debts."— An instrument which recited that the maker of it would pay all sums of money and debts which the principal debtor might owe to plaintiff equal to a specified sum "either contracted already, or which may hereafter be contracted," was held a continuing guaranty. Lewis *v.* Dwight, 10 Conn. 95.

"Any demands."—An agreement to become security for the payment of "any demands" plaintiff "may from time to time have or hold against" the third person was held a continuing guaranty. Merchants' Nat. Bank *v.* Hall, 83 N. Y. 338, 38 Am. Rep. 434.

54. See cases cited *infra*, this note.

"Any bills."— Words guarantying the payment of "any bills" up to a certain amount were held to be a continuing guaranty and not exhausted by a single transaction involving the amount specified which was settled by defendant. Mayer *v.* Isaac, 4 Jur. 437, 9 L. J. Exch. 225, 6 M. & W. 605.

"Any deficiency."— Where as a part of the transaction in which the guaranty was given the creditor agreed to sell merchandise up to a certain sum to the principal debtor and the guarantor agreed to pay any deficiency in the account between the parties that might be due upon the settlement, not exceeding a certain sum, it was held that the guaranty was a continuing one. Emerson *v.* Dye, 4 Ky. L. Rep. 236.

"Any sum."— A guaranty for the payment of any sum, not exceeding a specified amount, which a party may require for business purposes, constitutes a continuing guaranty, and not one for a single dealing only. City Nat. Bank *v.* Phelps, 86 N. Y. 484.

"Any transaction."— So where the words used are "will guarantee . . . any transaction they may have with your house." Grant *v.* Risdale, 2 Harr. & J. (Md.) 186.

On the other hand an agreement to guaranty the payment of any bills contracted by the third person, the bills not to exceed a certain sum, has been held not to continue in force after the amount specified has been reached. Bussier *v.* Chew, 5 Phila. (Pa.) 70. So an instrument in which the maker recites that he does not hesitate to be responsible up to a specified sum should the third person "require that amount," is not a continuing guaranty. Shaw *v.* Vandusen, 5 U. C. Q. B. 353. An instrument as follows: "I hereby agree to guaranty to you the payment of such an amount of goods, at a credit of one year, interest after six months not exceeding . . . as you may credit to . . ." was held not a continuing guaranty and to be exhausted by a single purchase to the amount mentioned. Fellows *v.* Prentise, 3 Den. (N. Y.) 512, 45 Am. Dec. 484.

55. Freeman's Appeal, 68 Conn. 533, 37 Atl. 420, 57 Am. St. Rep. 112, 37 L. R. A. 452, holding that a guaranty executed by a married woman in the state of her residence where the law does not give her capacity to execute it does not become valid on its delivery in another state by her agent, whose agency is created in the state of her residence. See CONTRACTS, 9 Cyc. 666 *et seq.*

56. McIntyre *v.* Parks, 3 Metc. (Mass.) 207; Greenwood *v.* Curtis, 6 Mass. 358, 4 Am. Dec. 145; Scudder *v.* Union Nat. Bank, 91 U. S. 406, 26 L. ed. 245. Where a contract is executed in a state in which it is valid, and a person there agrees to guaranty its performance, the guaranty is valid, although it is actually affixed in a state in which the contract is void. Richter *v.* Frank, 41 Fed. 859.

57. MacTier *v.* Frith, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262; Hamilton *v.* Lycoming Mut. Ins. Co., 5 Pa. St. 339.

58. Lee *v.* Selleck, 33 N. Y. 615; Richardson *v.* Draper, 23 Hun (N. Y.) 188; Tilden *v.* Blair, 21 Wall. (U. S.) 241, 22 L. ed. 632.

59. A guaranty, executed in one state, of the payment of a note payable there, although made elsewhere, is governed by the laws of the state where executed. Cowles *v.* Townsend, 37 Ala. 77. A guaranty executed and to be performed in Louisiana is a Louisiana contract, and is governed by the laws of that state, although designed to obtain credit in another state. Lachman *v.* Block, 47 La. Ann. 505, 17 So. 153, 28 L. R. A. 255. A

is made in one state and accepted in another, it is held to be a contract of the latter state and governed by the laws thereof.[60] Contracts of guaranty of existing debts are to be construed with reference to the statutes of the state in which the contract is entered into.[61]

VI. Effect of Departure From Terms of Principal Contract or of Subsequent Agreements or Change in Circumstances Before Default of Debtor.

A. In General. As already shown in considering the rules for the construction of the contract of guaranty,[62] the creditor, after the terms of the guaranty have been ascertained, is held to a very strict compliance with them,[63] and it is generally held that the effect of any material departure from such terms,[64] either by a change in the contract or in the manner of its execution,[65] made without the assent of the guarantor,[66] will release him. And where an offer of guaranty is

letter of guaranty written in the United States and addressed to a house in England must be construed according to the laws of that country. Bell *v.* Buren, 1 How. (U. S.) 169, 11 L. ed. 89.

60. Milliken *v.* Pratt, 125 Mass. 374, 28 Am. Rep. 241; Jordan *v.* Dobbins, 122 Mass. 168, 23 Am. Rep. 305; Kline *v.* Baker, 99 Mass. 253; Orcutt *v.* Nelson, 1 Gray (Mass.) 536; Richardson *v.* Draper, 23 Hun (N. Y.) 188.

61. Gasquet *v.* Thorn, 14 La. 506, holding if such a contract is entered into in Louisiana, the municipal law of that state must cover the contract and not the law merchant.

62. See *supra*, V, A.

63. See *supra*, V, A.

64. See cases cited *infra*, note 65 *et seq.*

65. Hancock *v.* Wilson, 46 Iowa 352; Brez *v.* Warner, 1 Ky. L. Rep. 226; Mann *v.* Dublin Cotton-Oil Co., 20 Tex. Civ. App. 678, 50 S. W. 190.

Illustrations.— Where, after a breach of a contract, the performance of which is guaranteed, the creditor and principal debtor without the consent of the sureties enter into a new contract, the creditor accepting notes for the damages, payable at a future time, and upon terms differing from the original contract, the new contract supersedes the old, and the sureties will be released. Weed Sewing Mach. Co. *v.* Winchell, 107 Ind. 260, 7 N. E. 881. Where after a guaranty is given that the principal will receive any pay for a steam engine and two boilers of a given capacity, an agreement between the principals to the contract, without the assent of the guarantor, requiring delivery of any engine with three boilers and of a greater capacity, is such a change in the contract as to discharge the guarantor. Grant *v.* Smith, 46 N. Y. 93. A note given in a firm-name was indorsed, "I hereby guaranty the within until paid." Afterward, the guarantor having in the meantime died, a new note, signed by the individual members of the firm, was given in the place of the old one. It was held that the guarantor was discharged. Weed *v.* Grant, 30 Conn. 74. Where the creditor takes the debtor's notes, some for a longer and some for a shorter period than the guaranty allowed, the guarantor is discharged. A surety must be held according to the unchanged tenor of his contract, or not at all. Henderson *v.* Marvin, 31 Barb. (N. Y.) 297.

66. Robinson *v.* Reed, 46 Iowa 219; Farrar *v.* Kramer, 5 Mo. App. 167; *In re* North American Land Co., 60 Pa. St. 247; Yaeger Flour Mill Co. *v.* Rawls, 41 S. C. 331, 19 S. E. 649, where an agent guarantied the payment of a debt to his principal contracted through him and the contract giving rights to the debt was materially altered without the agent's consent and he was held to be discharged, although he had knowledge of the alteration, and although he received valuable information relating to the subject-matter of the guaranty which he withheld from the principal until too late for the latter to avoid loss.

A contract of guaranty of performance by an agent appointed to vend farm implements contained a provision that it should not be in force until approved and countersigned by the principal. Instead of approving it as written the principal made an alteration by which the agent was bound to take certain old machines instead of all new ones. The guarantor did not assent to the change. It was held that the alteration was material and discharged the guarantor. Osborne v. Van Houten, 45 Mich. 444, 8 N. W. 77. A contract of agency in writing provided that the agent was to conduct a lumber yard for the principals, they to supply him with stock, which he was to sell; sales, however, for "cash in all cases," and K guarantied the "due performance" by the agent "of his obligations in the above contract," and after the yard was opened, the agent began selling on credit and continued to do so for several years when he defaulted, and the principals not only knew of these sales, but warned the agent "to be cautious in giving credit," and told him "to watch his book accounts and keep them closely collected," and made him shipments under the contract which they authorized him in express terms to sell on credit, it was held that the contract of employment had been materially altered and

made with reference to credit proposed to be extended to a firm, the retirement from the firm of one of the partners will release the guarantor,[67] especially if the creditor evidences his intention to rely solely upon the remaining partner.[68] But a subsequent change in the condition of the subject-matter of the guaranty made without consent of the creditor will not release the guarantor.[69] And where one merely guaranties in general terms the performance of the contract of another and makes no effort to ascertain what its terms are and is not misled, he cannot complain that the contract was not carried out in accordance with his understanding of the intention of the parties.[70] Nor can the guarantor complain as to the manner of carrying out certain details of the principal contract where the manner of their performance has not been specified in the principal contract.[71]

B. Immaterial Changes. Some courts have gone so far as to hold that, although the departure from the principal contract or the change in its terms is

that the guarantor was discharged. Evans *v.* Lawton, 34 Fed. 233.

A party who has engaged to guaranty the payment of the paper of another made payable at a particular bank is not liable upon a note drawn by such party not made so payable, although it be deposited in the specified bank. Dobbin *v.* Bradley, 17 Wend. (N. Y.) 422.

It is a good defense to an action brought by a discounter against the guarantor of a check that the guaranty was given upon the faith that the check was to be deposited by the maker with the discounter as collateral security for, and to obtain the discount of the note of another exceeding the amount of the check, but was really discounted upon the deposit of the note as collateral security for the payment of the check; and that the discounter had, at the request of the maker of the check, but without the assent of, or any communication with the guarantor, collected and applied the collateral to other debts due by the maker of the check to the discounter; although there was no agreement or communication between the guarantor and discounter at the time of the discount of the check and the deposit of the note as collateral thereto. Hidden *v.* Bishop, 5 R. I. 29.

Where a lessor of the premises executes a new lease of the premises to the same or another lessee during the term of the prior lease the guarantor of the first lease is released. White *v.* Walker, 31 Ill. 422.

The mere fact that the guarantor has knowledge in advance of the proposed new arrangement between the creditor and the principal debtor will not prevent his discharge, if the arrangement is subsequently carried out without his consent. The guarantor is not bound to warn the creditor. Polak *v.* Everett, 1 Q. B. D. 669, 46 L. J. Q. B. 218, 35 L. T. Rep. N. S. 350, 24 Wkly. Rep. 689.

Release of a surety by alteration of a contract between the principal and a creditor see PRINCIPAL AND SURETY.

67. Byers *v.* Hickman Grain Co., 112 Iowa 451, 84 N. W. 500, holding that in the case of a guaranty given to a bank to secure the repayment of advances which may be made by the bank to a firm the guarantor is not bound if before any advances are made one of the partners withdraws from the firm.

In England a statute has been enacted based upon previous judicial decisions to the effect that no guaranty to answer for the debt of another made to a firm, and no promise to answer for the debt of a firm shall be binding upon the person making the promise in respect of anything done or omitted to be done after a change shall have taken place in any one or more of the persons constituting the firm, unless the intention of the parties that such promise shall continue to be binding notwithstanding such change shall appear either by express stipulation or by necessary implication from the nature of the firm or otherwise. Cosgrove Brewing, etc., Co. *v.* Starrs, 5 Ont. 189.

68. Bill *v.* Barker, 16 Gray (Mass.) 62.

69. Thus where plaintiff bought stock in a land and cattle company from S Bros., with the option of reselling to them within a certain time, and defendant guarantied performance of the contract of S Bros., and afterward this company sold out to another, and transferred to it all its property, plaintiff not consenting to the sale, saying that he relied on defendant's guaranty, and plaintiff's stock was never transferred to him on the books of the company, and remained in the name of S Bros., who voted on it in voting for the sale, although there was stock enough besides this to authorize the sale, and defendant also owned stock and voted on it, it was held that defendant was not released from his guaranty. Richter *v.* Frank, 41 Fed. 859. But where defendants transferred to plaintiff in payment of an indebtedness shares of stock in a certain corporation, guarantying that at a certain future date the shares would be worth a certain sum, and in the meantime a consolidation of such corporation with others was effected with the consent of plaintiff, it was held that defendants' guaranty did not extend to the stock of the new corporation. Ferguson *v.* Meredith, 1 Wall. (U. S.) 25, 17 L. ed. 604.

70. Bascom *v.* Smith, 164 Mass. 61, 41 N. E. 130.

71. Miller *v.* Eccles, 155 Pa. St. 36, 25 Atl. 776.

not of a material nature, the guarantor will be released.[72] It is believed, however, that the weight of authority requires that such changes shall be of a material and substantial character in order to release him.[73] And where the only alteration of the principal contract is beneficial to the principal debtor — as by securing to him a discount from the original price — the guaranty may be enforced.[74] And where the principal contract is carried out as contemplated the mere fact that the creditor makes an ineffectual attempt to impose a greater liability upon the debtor than the contract warrants will not discharge the guarantor.[75]

C. Subsequent Collateral Agreements. The making of a purely collateral agreement which does not affect the obligations imposed by the principal contract, although it relates to the subject-matter thereof, does not discharge the guarantor.[76]

D. Guarantor's Consent or Ratification. Changes made in accordance with some provision in the principal contract permitting them will not discharge the guarantor.[77] The guarantor may ratify any irregularity or change in the con-

72. Where a guaranty of payment for goods provides for the delivery by the principal of the goods at a particular place, and contracts between the latter and the guarantee subsequently executed provide for the delivery of such goods at a different place, the guarantor is thereby released, irrespective of whether such change is material or not, such obligation is *strictissimi juris*. Page *v.* Krekey, 137 N. Y. 307, 33 N. E. 311, 33 Am. St. Rep. 731, 21 L. R. A. 409 [*reversing* 17 N. Y. Suppl. 764]. And *compare* Whitcher *v.* Hall, 5 B. & C. 269, 8 D. & R. 22, 4 L. J. K. B. O. S. 167, 29 Rev. Rep. 244, 11 E. C. L. 458, holding that the fact that there may be very little difference between the original contract and the subsequent contract is not the test as to whether the guarantor is released by the change. See *supra*, V, A.

73. Traveler's Ins. Co. *v.* Stiles, 82 N. Y. App. Div. 441, 81 N. Y. Suppl. 664; Fond du Lac Harrow Co. *v.* Bowles, 54 Wis. 425, 11 N. W. 795. Whether a departure from the contract in a manner which is not detrimental to the guarantor discharges him see Sweet *v.* Newberry, 92 Mich. 515, 52 N. W. 1005.

Extension of bank's corporate existence.— Where the guaranty related to the repayment of deposits made with a banking corporation by the state, it was held that a subsequent extension of the bank's corporate existence by statute without changing its corporate identity and before default did not release the guarantor. People *v.* Backus, 117 N. Y. 196, 22 N. E. 759.

Filling blanks.— Filling up, in a printed form of a guaranty of a lease spaces which were blanks when the guaranty was signed, was not a material alteration. Kinney *v.* Schmitt, 12 Hun (N. Y.) 521.

"I" for "we."— An alteration made in a guaranty after its delivery, whereby "we guaranty" was changed to "I guaranty" is immaterial, so far as the person who has signed before delivery is concerned. Kline *v.* Raymond, 70 Ind. 271.

Substitution of goods.— Where defendant guarantied the payment of the price of cigars purchased by the third person and by an agreement made subsequent to the original agreement for the sale of the cigars a substitution was made for cigars of a particular brand, but the cigars substituted were of the same quality, kind, style, and price as the brand named in the original contract, and it did not appear that either of the brands had any special or commercial value or that the brand upon the boxes containing the cigars affected the sale thereof, it was held that the defendant was not released by the substitution. Quinn *v.* Moss, 45 Nebr. 614, 63 N. W. 931.

Taking one note instead of two.— Where defendant guarantied the payment of two notes, one due in one month and the other in two months, and provided that no extension of time should release the guarantor, the fact that the creditor took one note for a total equal to the sum which was to be included in the two notes, and that the note was made payable in two months, was held not to be such a departure from the terms of the guaranty as to release the guarantor. Koenigsberg *v.* Lennig, 161 Pa. St. 171, 28 Atl. 1016.

74. Rice *v.* Filene, 6 Allen (Mass.) 230.

75. Campbell *v.* Warden, 45 Wis. 338. See also Pratt *v.* Matthews, 24 Hun (N. Y.) 386.

Exceeding amount of liability expressly limited in contract of guaranty see *supra*, V, E, 2, a.

76. Morrill *v.* Baggott, 157 Ill. 240, 41 N. E. 639; McAfee *v.* Wyckoff, 44 Misc. (N. Y.) 380, 89 N. Y. Suppl. 996. The making of a subsequent collateral contract which does not add in any way to the obligations of the original contract but rather diminishes them does not discharge the guarantor. New York *v.* New York Refrigerating Constr. Co., 8 Misc. (N. Y.) 61, 28 N. Y. Suppl. 614, where the contract whose performance was guarantied was a lease in which the collateral contract related to the surrender of the unexpired term with an agreement that claim for rent already accrued should not be effected. To same effect see Robertson *v.* Sully, 2 N. Y. App. Div. 152, 37 N. Y. Suppl. 935.

77. Miller *v.* Eccles, 155 Pa. St. 36, 25 Atl. 776. *Compare* Mason *v.* Standard Distilling,

tract which he has guarantied, and his assent to the change or modification will bind him without any new consideration.[78]

VII. Default of Principal Debtor and Steps Necessary Upon Such Default to Fix Liability of Guarantor.[79]

A. Diligence in Enforcing Claim Against Principal Debtor — 1. Necessity of the Exercise of Diligence in General. Looking alone to the nature of the contract of guaranty and to the elements which distinguish it from a contract of suretyship the conclusion seems to follow that the liability of the guarantor is not determined by the single fact of the default of the principal debtor, but that the creditor should use every effort to collect the debt from the latter and on his failure should carefully inform the guarantor thereof;[80] and while in some early cases,[81] and in some jurisdictions,[82] it has been held without qualification that a guarantor is entitled to have the creditor exercise due diligence to collect a debt upon its maturity before resort can be had to the guarantor, yet as a general rule the courts are not inclined to annex such conditions to the contract of guaranty unless the terms of the contract or the nature of the subject-matter of the guaranty require the exercise of such diligence or the giving of such information.[83] If by the terms of the contract of guaranty due exercise of diligence to collect

etc., Co., 85 N. Y. App. Div. 520, 83 N. Y. Suppl. 343, 13 N. Y. Ann. Cas. 264.

78. Jackson *v.* Johnson, 67 Ga. 167; Pelton *v.* Prescott, 13 Iowa 567. If, after a loan is made by a bank on a letter of credit, the writer has information thereof, and with full knowledge approves of and assents to the loan, this amounts to a ratification, and he will be bound thereby. Central Sav. Bank *v.* Shine, 48 Mo. 456, 8 Am. Rep. 112.

79. Option of holder of note whose payment is guarantied to declare default see Commercial Paper, 7 Cyc. 860.

80. Read *v.* Cutts, 7 Me. 186, 22 Am. Dec. 184. Usually the contract of the guarantor is to answer for the default of his principal, if by the use of due diligence the loss results from such default, while the surety is responsible at once upon his direct engagement to pay. Furst, etc., Mfg. Co. *v.* Black, 111 Ind. 308, 12 N. E. 504; La Rose *v.* Bank, 102 Ind. 332, 1 N. E. 805; Ward *v.* Wilson, 100 Ind. 52, 50 Am. Rep. 763.

In Pennsylvania it has been held that where a guaranty is general, that is, without having any of its terms fixed in the writing, the law will add the conditions that there shall be due and unsuccessful diligence used by the creditor to collect from the principal debtor unless it appears that all diligence will be hopeless. Campbell *v.* Baker, 46 Pa. St. 243. See also Ritchie *v.* Walter, 166 Pa. St. 604, 31 Atl. 334. A guaranty as interpreted by the law of Pennsylvania is virtually a warranty of the solvency of the principal debtor and that the money can be made by the use of due diligence on the part of the creditor and consequently no recovery can be had on the guaranty without proof that an execution has been issued and returned *nulla bona* or that the principal was insolvent and that further efforts would have been useless. Teller *v.* Bernheim, 3 Phila. (Pa.) 299.

After a guarantee has used such means as are in his power, with due diligence, and fails to obtain satisfaction of the principal, he may resort to the guarantor. Towns *v.* Farrar, 9 N. C. 163.

81. Williams *v.* Collins, 6 N. C. 47; Wilson *v.* Dean, 21 S. C. 327.

82. Hoffman *v.* Bechtel, 52 Pa. St. 190.

In Pennsylvania it has been held that the contract of guaranty requires the use of due and ordinary diligence by the guarantor and that if the contract does not require such diligence it is to be regarded as a contract of suretyship. Rudy *v.* Wolf, 16 Serg. & R. 79.

A guaranty of payment requires the exercise of reasonable diligence on the part of the creditor. Hanks *v.* Harris, 29 Ark. 323. Thus a person who has indorsed upon a bond a writing to the effect that he guaranties "the payment of the within in full" has been held entitled to have the creditor exercise due diligence in collecting the debt from the principal debtor. Seiple's Appeal, 11 Wkly. Notes Cas. (Pa.) 392. To the same effect see Camden, etc., R. Co. *v.* Pennypacker, 21 Wkly. Notes Cas. (Pa.) 118.

83. Pierce *v.* Merrill, 128 Cal. 464, 61 Pac. 64, 79 Am. St. Rep. 56, where it is said that whether or not a guaranty is conditional is to be determined by the language of the contract.

If the very terms of the guaranty do not necessarily imply that the liability of the guarantor is dependent upon the failure to obtain payment after proceedings at law against the principal a suit at law is not necessary to bind him. Deck *v.* Works, 18 Hun (N. Y.) 266. In Huntress *v.* Patten, 20 Me. 28, in which defendant guarantied the "final payment" of the debt of another, the court said that as the contract of guaranty did not in terms require any legal proceedings against the principal, it would be fully satisfied by proof that the principal debtor had

the debt from the principal debtor is required, such diligence must be exercised.[84] The court will not dispense with that which the parties have agreed upon, or declare that to be immaterial which they have thought of sufficient importance to condition their contract upon;[85] and the fact that the circumstances of the case make the steps pointed out of no avail does not relieve the creditor from taking them.[86]

2. In Case of Conditional Guaranties[87] — a. Guaranties of Collection. A guaranty of collection or a guaranty against loss as a result of a failure to collect the debt imposes the duty upon the creditor to make a reasonable effort to collect the

become insolvent before the commencement of the suit.

84. Salt Springs Nat. Bank *v.* Sloan, 135 N. Y. 371, 32 N. E. 231; Strohecker *v.* Farmers' Bank, 6 Pa. St. 41. Where a guaranty is dependent on some condition or contingency expressed in or fairly implied from the terms of the contract of guaranty a compliance with those terms on the part of the creditor is necessary and must be alleged and proved in order to recover thereon. Clay *v.* Edgerton, 19 Ohio St. 549, 2 Am. Rep. 422.

"Collectable after due course of law."— Where defendant guarantied that the note in question "was good and collectable after due course of law" it was held that a necessity was imposed upon the holder of the note if he meant to resort to his guaranty to prosecute with due diligence all the parties to the note. Moakley *v.* Riggs, 19 Johns. (N. Y.) 69, 10 Am. Dec. 196. To the same effect see Shippens *v.* Clapp, 36 Pa. St. 89, where defendant guarantied the payment of a judgment if it should be "uncollectable."

"Due and legal diligence."— Where one guarantied the payment of debts which might be contracted in the purchase of goods, if the seller should not be able to collect payment from the buyer "by due and legal diligence," a delay of seven months in suing the buyer was held to be such laches that a jury were authorized to find in favor of the guarantor. Penniman *v.* Hudson, 14 Barb. (N. Y.) 579.

Duty to foreclose.— Where the undertaking of the guarantor was that in case there should be any deficiency after a foreclosure of a mortgage given to secure a note he would pay the deficiency, it was the duty of the holder of the note upon its maturity to proceed at once to realize upon the mortgage. Bouche *v.* Louttit, 104 Cal. 230, 37 Pac. 902. A executed a note to B, giving a lien upon a boat to secure payment. B transferred the boat and lien to C, guarantying to pay it if C failed to get pay on it from the maker, after the use of all proper and reasonable means. It was held that C should make all reasonable endeavors to get the money on the note by enforcing the lien before resorting to the guarantor. Brainard *v.* Reynolds, 36 Vt. 614. And see Griffith *v.* Robertson, 15 Hun (N. Y.) 344.

Obtaining judgment.— Where defendant on assigning a note agreed that "if anything should fail in the recovery of the said note" defendant would make the note good, it was held that these words meant not only that a judgment should be obtained but that the money should be paid. Hoover *v.* Clark, 7 N. C. 169.

85. Eddy *v.* Stanton, 21 Wend. (N. Y.) 255; Moakley *v.* Riggs, 19 Johns. (N. Y.) 69, 10 Am. Dec. 196; Dwight *v.* Williams, 8 Fed. Cas. No. 4,218, 4 McLean 581. Where defendant guarantied the collection of a claim within a reasonable time, provided legal and proper steps were taken to enforce such collection, it was held that proof of the recovery of a judgment against the debtor, and the issuing and return of two successive executions against him, was sufficient to entitle plaintiff to recover on such guaranty. Pollock *v.* Hoag, 4 E. D. Smith (N. Y.) 473.

Statutes defining the rights and liabilities of creditors do not apply to cases where the contract expressly names the degree of diligence to be exercised by the creditor. La. Civ. Code, §§ 3014–3016, defining the obligations of sureties toward creditors, apply to original contracts of suretyship or simple guaranties but do not apply to cases where the contract expressly provides as to the degree of diligence required of the creditor, and necessitate a greater diligence than that set forth in such section. Walker *v.* Forbes, 25 Ala. 139, 60 Am. Dec. 498.

86. Allen *v.* Rundle, 50 Conn. 9, 47 Am. Rep. 599. But see Thomas *v.* Woods, 4 Cow. (N. Y.) 173, in which case the guaranty was of payment in case the creditor should not be able to enforce payment "by due process of law," and in which the holding was that such stipulation did not require the creditor to take every possible step and exhaust every legal process where no valuable purpose would be subserved.

87. Conditional guaranty defined see *supra*, I, C. A conditional guaranty is an undertaking to pay if payment cannot by reasonable diligence be obtained from the principal debtor. Beardsley *v.* Hawes, 71 Conn. 39, 40 Atl. 1043.

A guaranty of collection is sometimes defined as an undertaking to pay a debt on condition that the person to whom the guaranty is given shall diligently prosecute the principal debtor without avail or that the debt will be paid if the principal be prosecuted with reasonable diligence or that the debt is collectible by due course of law. New York Security, etc., Co. *v.* Lombard Inv. Co., 73 Fed. 537. See also Bailie Sur. 17, 18.

Both the guaranty of payment and the guaranty of collection are conditional, but a guaranty of collection requires the positive affirmative action of the creditor in the direc-

debt from the principal debtor and until he does so a cause of action does not accrue upon the guaranty.[88] Thus an indorsement on a promissory note in these or in similar words: I guaranty the collection of the within note, is only a con-

tion of collecting the debt. Day *v.* Elmore, 4 Wis. 190.

Distinguished from guaranty of payment. — There is a broad distinction between guaranties of payment and guaranties of collection, the former being an absolute undertaking that the principal debtor will pay at the time stipulated while the latter undertake to make payment only if by reasonable diligence it cannot be obtained from the principal debtor. Cowles *v.* Peck, 55 Conn. 251, 10 Atl. 569, 3 Am. St. Rep. 444.

Distinguished from indemnity.—"There is a well-understood difference between a guaranty of payment, and a contract of indemnity against loss, as the result of the nonpayment of a debt. In the first case the liability of the guarantor is fixed by the failure of the principal debtor to pay at maturity, or at the time when payment was guarantied. In the second the contract partakes of the nature of a guaranty of collection, no liability being incurred until after, by the use of due and reasonable diligence, the guarantee has become unable to collect the debt from the principal debtor." Burton *v.* Dewey, 4 Kan. App. 589, 46 Pac. 325; Osborne *v.* Lawson, 26 Mo. App. 549. See also *supra*, II, B.

88. *Connecticut.*— Lemmon *v.* Strong, 55 Conn. 443, 13 Atl. 140; Cowles *v.* Pick, 55 Conn. 251, 10 Atl. 569, 3 Am. St. Rep. 44; Allen *v.* Rundle, 50 Conn. 9, 47 Am. Rep. 599.

Illinois.— Allison *v.* Waldhan, 24 Ill. 132.

Iowa.— Durand *v.* Bowen, 73 Iowa 573, 25 N. W. 644; Summers *v.* Barrett, 65 Iowa 292, 21 N. W. 646; Voorheis *v.* Atlee, 29 Iowa 49.

Kansas.— McNall *v.* Burrow, 33 Kan. 495, 6 Pac. 897; Burden *v.* Dewey, 4 Kan. App. 589, 46 Pac. 325.

Michigan.— Bosman *v.* Akeley, 39 Mich. 710, 33 Am. Rep. 447; Barwan *v.* Carhartt, 10 Mich. 338.

Minnesota.— Osborne *v.* Gullikson, 64 Minn. 218, 66 N. W. 965; Crane *v.* Wheeler, 48 Minn. 207, 50 N. W. 1033; Osborne *v.* Thompson, 36 Minn. 528, 33 N. W. 1.

Nebraska.— Central Inv. Co. *v.* Miller, 56 Nebr. 272, 76 N. W. 566, 71 Am. St. Rep. 681.

New York.— Northern Ins. Co. *v.* Wright, 76 N. Y. 445; McMurray *v.* Noyes, 72 N. Y. 523, 28 Am. Rep. 180; Craig *v.* Parkis, 40 N. Y. 181, 100 Am. Dec. 469; Van Derveer *v.* Wright, 6 Barb. 547; Ward *v.* Fryer, 19 Wend. 494; Moakley *v.* Riggs, 19 Johns. 69, 10 Am. Dec. 196.

North Carolina.— Jenkins *v.* Wilkinson, 107 N. C. 707, 12 S. E. 630, 22 Am. St. Rep. 911.

Ohio.— Stone *v.* Rockefeller, 29 Ohio St. 625.

Pennsylvania.—Woods *v.* Sherman, 71 Pa. St. 100.

Tennessee.—Turly *v.* Hodge, 3 Humphr. 73.

Texas.— Evans *v.* Bell, 45 Tex. 553; Shepard *v.* Phears, 35 Tex. 763; Shepard *v.* Phears, 1 Tex. App. Civ. Cas. § 168.

Vermont.— Benton *v.* Fletcher, 31 Vt. 418.

Wisconsin.— Day *v.* Elmore, 4 Wis. 190.

United States.— Parker *v.* Culvertson, 18 Fed. Cas. No. 10,732, 1 Wall. Jr. 149.

In North Dakota the code expressly provides that a guaranty to the effect that an obligation is good or is collectable imports that the debtor is solvent and that the demand is collectable by the usual legal proceedings if taken with reasonable diligence. Roberts *v.* Laughlin, 4 N. D. 167, 59 N. W. 967.

Rule applied and illustrated.— *In general.* — One who guaranties the collection of a note or debt undertakes to pay the debt only upon condition that the one to whom it is due shall make use of the ordinary legal means to collect it from the principal debtor with diligence and without avail. Dillman *v.* Nadelhoffer, 160 Ill. 121, 43 N. E. 378. A promise "that if the plaintiff would endeavor to collect the amount of the loss described from the Grand Trunk Railway Company, they, the defendants, would pay the said claim if the Grand Trunk Railway Company did not do so," is in legal effect a guaranty of the collection of the debt. Phoenix Ins. Co. *v.* Louisville, etc., R. Co., 8 Fed. 142.

Bonds.—Where a bond is assigned with a guaranty, it is an engagement of the assignor to pay the money on the insolvency of the obligor, provided the assignee uses due diligence to obtain satisfaction from the obligor. Johnston *v.* Chapman, 3 Penr. & W. (Pa.) 18. Where one on assigning a bond indorses on the back of it a writing agreeing that if it cannot be recovered from the maker to pay the amount thereof together with all charges "thereupon accruing," it is a covenant that the obligor is able to pay and that the assignee by using due diligence shall receive the money. Strohecker *v.* Farmers' Bank, 6 Pa. St. 41.

Notes.— In the case of the guaranty of the collection of notes the use of diligence by the holder of the notes is required to collect them on maturity unless a proper excuse is shown for failure to exercise such diligence. Leas *v.* White, 15 Iowa 187. Defendant on transferring to plaintiff a note executed the following guaranty: "I have this day conveyed a note to J. E. S. against D. G. . . . which note I hold myself accountable for the payment thereof, on condition the said J. E. S. uses proper exertion to collect the same." It was held that the instrument was a guaranty of collection and not a guaranty of payment. Spicer *v.* Norton, 13 Barb. (N. Y.) 542. A guaranty to pay if the holder "fail to recover the money on said note" is merely a guaranty for the collection of the note by diligent prosecution of the maker. Jones *v.* Ashford, 79 N. C. 172. One who guaranties the collection of a note merely stipulates that the note is collectable in due course of law by use of reasonable diligence. Evans *v.* Bell,

ditional guaranty, and the guarantor is only bound upon condition that the payee of the note uses due diligence to collect the debt from the maker.[89]

b. Not in Form Guaranties of Collection. No express form of words is necessary in order that a guaranty shall be regarded as conditional or as one guarantying collection.[90] Where one transfers claims and notes owing to him which are

45 Tex. 553. So words warranting "the within note due and collectable" require the creditor to make use of due diligence in proceeding against the maker. Foster *v.* Barney, 3 Vt. 60.

89. *Illinois.*— Dillman *v.* Nadelhoffer, 160 Ill. 121, 43 N. E. 378 [*affirming* 56 Ill. App. 396].

Iowa.— Voorhies *v.* Atlee, 29 Iowa 49; Peck *v.* Frink, 10 Iowa 193, 74 Am. Dec. 384.

New York.— Cady *v.* Sheldon, 38 Barb. 501; Burt *v.* Horner, 5 Barb. 501; Loveland *v.* Shepard, 2 Hill 139; Cumpston *v.* McNair, 1 Wend. 457.

North Dakota.— Roberts *v.* Laughlin, 4 N. D. 167, 59 N. W. 967.

Ohio.— Stone *v.* Rockefeller, 29 Ohio St. 625.

Texas.— Evans *v.* Bell, 45 Tex. 553; Shepard *v.* Phears, 35 Tex. 763; Shepard *v.* Phears, 1 Tex. App. Civ. Cas. § 168.

Vermont.— Bull *v.* Bliss, 30 Vt. 127; Wheeler *v.* Lewis, 11 Vt. 265.

Wisconsin.— Day *v.* Elmore, 4 Wis. 190.

See 25 Cent. Dig. tit. "Guaranty," §§ 37, 39.

An indorsement on a note, made before its maturity, in the following words, viz.: "I assign and guaranty the within note to J. C. for value received," is an absolute unconditional guaranty of the payment of the note at maturity. Donley *v.* Camp, 22 Ala. 659, 58 Am. Dec. 274.

Where both the words "payment" and "collection" are used in the contract of guaranty, the word "collection" immediately following the word "payment," the contract has been held to be one of guaranty of collection. Baxter *v.* Smack, 17 How. Pr. (N. Y.) 183. But where the indorsers of a note gave a guaranty a few days before its maturity guarantying its payment and then warranting that the note was "good and collectible till paid at 7% interest," it was held that the guaranty was absolute and not a conditional one. Loomis Inst. *v.* Hurd, 57 Conn. 435, 18 Atl. 669. A guaranty on a note in the following words: "For value received I guarantee the payment and collection of the within note," is a guaranty both of payment and collection. Tuton *v.* Thayer, 47 How. Pr. (N. Y.) 180.

90. See cases cited *infra*, this note.

A guaranty for the faithful performance of a lease is *prima facie* a restricted engagement to indemnify against such losses only as the creditor cannot avert by his own efforts, or an engagement that the debtor is solvent and that the debt may be secured by a resort to legal process. Smeidel *v.* Lewellyn, 3 Phila. (Pa.) 70.

That note is "good."— A guaranty that the note is "good" is in law a contract that the maker is solvent, and that the amount can be collected by due course of law. Cowles *v.* Pick, 55 Conn. 251, 10 Atl. 569, 3 Am. St. Rep. 44; Cooke *v.* Nathan, 16 Barb. (N. Y.) 342; Curtis *v.* Smallman, 14 Wend. (N. Y.) 231; Union Nat. Bank *v.* Delaware First Nat. Bank, 45 Ohio St. 236, 13 N. E. 884; Hammond *v.* Chamberlain, 26 Vt. 406. "I warrant this note good," indorsed by the payee on the note, was held to be a guaranty that the note is collectable and not that it will be paid on demand. Curtis *v.* Smallman, 14 Wend. (N. Y.) 231. Where one sold a note and placed upon the back of it a writing to the effect that he guarantied the note "good" until a certain date, the guaranty required the use of legal diligence to collect the debt from the principal debtor. Hammond *v.* Chamberlin, 26 Vt. 406. "The words, 'I guarantee the collection of the within note,' and 'I promise that this note is good and collectible after due course of law,' and 'I warrant this note good,' are phrases of similar import, binding the guarantor only upon condition that the guarantee acts with due diligence in prosecuting the collection of the note." 2 Daniel Neg. Instr. § 1769. "I warrant this note good" means that it is collectable, that the maker is responsible; it is not an engagement that the note will be promptly paid at maturity; and it is therefore incumbent on the holder of such note and guaranty, in order to charge the guarantor, to prove by legal evidence that the maker was not responsible. Edwards Bills & Pr. Notes 235.

"Ultimate payment."— A guaranty of "ultimate payment" of notes requires the prosecution of the makers to insolvency. Peck *v.* Frink, 10 Iowa 193, 74 Am. Dec. 384; Dewey *v.* W. B. Clark Inv. Co., 48 Minn. 130, 50 N. W. 1032, 31 Am. St. Rep. 623; Sandusky Bank *v.* Follett, 1 Ohio Dec. (Reprint) 87, 2 West. L. J. 78; Johnston *v.* Mills, 25 Tex. 704. A guaranty of the ultimate payment of any bill for goods which the guarantee may furnish to C is a conditional undertaking. Walker *v.* Forbes, 25 Ala. 139, 60 Am. Dec. 498. Where the contract guarantied the "ultimate payment" of the principal debt together with interest and all lawful charges, the court did not expressly affirm that the creditor was required to exhaust the ordinary legal remedies against the principal debtor as in the case of a guaranty of the collection of a debt, but held that it was clear that the instrument contemplated the probability of such a procedure on the part of the creditor. Hernandez *v.* Stilwell, 7 Daly (N. Y.) 360.

Under a general guaranty of payment of non-negotiable securities which are assigned by the guarantor, the assignor should, within

long past due and guaranties their payment, and there is nothing to indicate at what time the guarantor contemplates that the claims shall be paid, whether immediately or ultimately, in order to enforce the guaranty plaintiff must show that he could not by reasonable diligence have collected the claims from the principal debtor.[91]

3. In Case of Absolute Guaranties[92] — a. In General. It is competent for the guarantor to make himself liable on the default of the principal debtor without the use of the ordinary means to compel payment by him or proof of his insolvency;[93] and in the case of an absolute guaranty the guarantor is bound immediately upon the failure of the principal debtor to perform his contract without further steps taken by any one or without further conditions to be performed.[94] In some states the statute declares a guaranty to be unconditional unless its terms import some condition precedent to the liability of the guarantor.[95]

b. Guaranty of Payment — (i) *In General.* While in some jurisdictions one who guaranties the payment of an obligation of another has been held entitled to the exercise by the creditor of due diligence in enforcing his claim against the principal debtor,[96] such a guaranty is generally held to be an absolute undertaking imposing liability upon the guarantor immediately upon the default of the princi-

a reasonable time, seek payment from the obligor in the securities by the usual and ordinary means by which payment is enforced, before suing the guarantor. Benton *v.* Gibson, 1 Hill (S. C.) 56.

91. Donley *v.* Bush, 44 Tex. 1, where the extrinsic circumstances all tended to the conclusion that it was not the expectation of the parties that the claim should be paid immediately or at an early date.

Writing name in blank on back of note.— It has been held that where one assumed the liability of a guarantor of a note by writing his name in blank upon the back of it he did not guaranty the payment of the note at all events but that due diligence was required on the part of the holder to collect the money on the maturity of the note. Clayton *v.* Coburn, 42 Conn. 348; Holbrook *v.* Camp, 38 Conn. 23; Rhodes *v.* Seymour, 36 Conn. 1; Huntington *v.* Harvey, 4 Conn. 124; Bradly *v.* Phelps, 2 Root (Conn.) 325. To same effect see Withers *v.* Berry, 25 Kan. 373.

92. Absolute guaranty defined see *supra*, I, B.

93. Arents *v.* Comm., 18 Gratt. (Va.) 750. See also Blackburne *v.* Boker, 1 Pa. L. J. 30, where defendant guarantied the prompt payment of certain notes and used the words, "And I hereby obligate myself as firmly for the prompt payment thereof as if I had signed the same."

94. Garland *v.* Gaines, 73 Conn. 662, 49 Atl. 19, 84 Am. St. Rep. 182; Stowell *v.* Raymond, 83 Ill. 120; Bloom *v.* Warder, 13 Nebr. 476, 14 N. W. 395; Helios-Upton Co. *v.* Thomas, 96 N. Y. App. Div. 401, 89 N. Y. Suppl. 222; Robinson *v.* Vaughan, 49 N. Y. App. Div. 170, 63 N. Y. Suppl. 197; Parker *v.* McKelvain, 17 Tex. 157. Where the guaranty is absolute the creditor is not required to exhaust the remedies against the principal debtor nor to give notice to him of the default in payment. Klein *v.* Kern, 94 Tenn. 34, 28 S. W. 295. An absolute guaranty carries with it all the liability of an original undertaking. Tucker *v.* St. Louis, etc., R. Co., 59 Ark. 81, 26 S. W. 375; Hoyt *v.* Quint, 105 Iowa 443, 75 N. W. 342.

"Against all losses."—An instrument which after reciting a consideration binds the guarantor to protect the creditor against all losses to which he may be subjected by reason of the indorsement of the paper of the third person is an absolute contract of guaranty. Wise *v.* Miller, 45 Ohio St. 388, 14 N. E. 218.

95. Pierce *v.* Merrill, 128 Cal. 464, 61 Pac. 64, 79 Am. St. Rep. 56.

Under statutory provisions to the effect that the liability of one who guaranties a conditional obligation is commensurate with that of the principal, one who guaranties the performance of the principal contract in accordance with the conditions thereof, the guaranty being a part of the same transaction with the principal obligation, is absolutely liable on the principal's failure to meet his agreement. Bagley *v.* Cohen, 121 Cal. 604, 53 Pac. 1117.

96. Stearns in treating of commercial guaranties says that the earlier cases in some jurisdictions make no distinction between absolute and conditional guaranties, and seem to rest upon the assumption that, although the guaranty is absolute, yet the principal must first be exhausted before recourse can be had to the guarantor. Stearns Sur. § 61.

In Pennsylvania a technical guarantor of the payment of a promissory note cannot be proceeded against until the remedies against the maker or the indorsers, if any, have been exhausted. Hartman *v.* Lancaster First Nat. Bank, 103 Pa. St. 581; Zahm *v.* Lancaster First Nat. Bank, 103 Pa. St. 576. An indorsement of a judgment note, "I guarantee the payment of the within note, for value received," is a contract of guaranty, undertaking to pay only in case of the insolvency of the makers, or after due diligence has been used to collect the note from them. Mizner *v.* Spier, 96 Pa. St. 533. The cases, however, in this jurisdiction, are to be distinguished in which defendant has guarantied the payment of a sum of money

pal debtor and regardless of whether any steps were taken to enforce the liability of the principal debtor or whether notice of the default was given to the guarantor.[97] Thus where one guaranties payment of a note at maturity without impos-

on a day certain. In such case the court holds that the contract is absolute and that when the day named arrives the creditor may sue without pursuing the principal debtor. Street *v.* Silver, Brightly 96; Girard L. Ins. Co. *v.* Finley, 1 Phila. 70. This was the holding where defendant guarantied the payment of a note "when due." Campbell *v.* Baker, 46 Pa. St. 243. In Shollenberger's Estate, 1 Woodw. 316, the court said that when the time or manner of default of the principal debtor is made definite, the guaranty becomes special and the creditor is relieved from the necessity of pursuing legal proceedings against the debtor.

97. *Alabama.*— Cahuzac *v.* Samini, 29 Ala. 288; Donley *v.* Camp, 22 Ala. 659, 58 Am. Dec. 274.

Colorado.— Jain *v.* Giffin, 3 Colo. App. 90, 32 Pac. 80.

Connecticut.— Williams *v.* Granger, 4 Day 444.

Illinois.— Hooker *v.* Gooding, 86 Ill. 60; Penny *v.* Crane Bros. Mfg. Co., 80 Ill. 244; Heaton *v.* Hulbert, 4 Ill. 489.

Indiana.— Taylor *v.* Taylor, 64 Ind. 356; Sample *v.* Martin, 46 Ind. 226. See also Metzger *v.* Hubbard, 153 Ind. 189, 54 N. E. 761.

Iowa.— Star Wagon Co. *v.* Swezy, 63 Iowa 520, 19 N. W. 298; Peddicord *v.* Whittam, 9 Iowa 471.

Maine.— Read *v.* Cutts, 7 Me. 186, 22 Am. Dec. 184.

Maryland.— Gray *v.* Farmers' Nat. Bank, 81 Md. 631, 32 Atl. 518.

Massachusetts.— Sanford *v.* Allen, 1 Cush. 473.

Michigan.— Roberts *v.* Hawkins, 70 Mich. 566, 38 N. W. 575; Inkster *v.* Marshall First Nat. Bank, 30 Mich. 143.

Minnesota.— Osborne *v.* Gullikson, 64 Minn. 218, 66 N. W. 965.

Mississippi.— Wren *v.* Pearce, 4 Sm. & M. 91.

Missouri.— Osborne *v.* Lawson, 26 Mo. App. 549.

Nebraska.— Bloom *v.* Warder, 13 Nebr. 476, 14 N. W. 395.

New Hampshire.— Morrison *v.* Citizens' Nat. Bank, 65 N. H. 253, 20 Atl. 300, 23 Am. St. Rep. 39, 9 L. R. A. 282.

New York.— Miller *v.* Rinehart, 119 N. Y. 368, 23 N. E. 817; Allen *v.* Bantel, 2 Thomps. & C. 342; Cordier *v.* Thompson, 8 Daly 172; Noxon *v.* Bentley, 7 How. Pr. 316; Lamourieux *v.* Hewit, 5 Wend. 307.

North Carolina.— Jenkins *v.* Wilkinson, 107 N. C. 707, 12 S. E. 630, 22 Am. St. Rep. 911; Charlotte First Nat. Bank *v.* Homesley, 99 N. C. 531, 6 S. E. 797.

South Carolina.— Foster *v.* Tolleson, 13 Rich. 31.

Tennessee.— Klein *v.* Kern, 94 Tenn. 34, 28 S. W. 295; Irvine *v.* Brasfield, 10 Heisk. 425.

Texas.— McCormick Harvesting Mach. Co. *v.* Millett, (Civ. App. 1894) 29 S. W. 80.

Vermont.— Dana *v.* Conant, 30 Vt. 246; Bull *v.* Bliss, 30 Vt. 127.

United States.— Memphis *v.* Brown, 16 Fed. Cas. No. 9,415, 1 Flipp. 188 [*affirmed* in 20 Wall. 289, 22 L. ed. 264].

See 25 Cent. Dig. tit. "Guaranty," § 28.

In California the statute provides that a guarantor of payment or performance is liable to the guarantee immediately upon the default of the principal without demand or notice. Pierce *v.* Merrill, 128 Cal. 464, 61 Pac. 64, 79 Am. St. Rep. 56. So an instrument by which the persons executing it guaranty the payment of a loan at the time and according to the terms expressed in a specified note and mortgage is an absolute guaranty, and liability is imposed upon the guarantor upon default in the payment of the loan, although no attempt has been made by the creditor to foreclose the mortgage. Pierce *v.* Merrill, *supra*. *Compare* Whiting *v.* Clark, 17 Cal. 407, holding that where defendant guarantied the payment of the price of any goods which might be sold to a third person and he was notified of the default of the buyer, nothing further was required from the seller to show diligence, at least in the absence of any request by the guarantor to bring suit.

Where the guaranty is of payment and not merely of solvency it is held that the liability of the guarantor is fixed immediately upon the default of the principal debtor without the necessity of the institution of legal proceedings against the debtor. Wren *v.* Pearce, 4 Sm. & M. (Miss.) 91.

Guaranties of payment held not to be absolute.— A guaranty of the "ultimate payment" of the price of goods which may be sold to a third person has been held to impose only a conditional liability. Walker *v.* Forbes, 25 Ala. 139, 60 Am. Dec. 498. As to the effect of use of word "ultimate" see Yeates *v.* Walker, 1 Duv. (Ky.) 84. A guaranty of the payment of a mortgage by due foreclosure and sale is not an absolute guaranty of the payment of the mortgage, but a guaranty that it shall be paid in a particular manner. The words by "due foreclosure and sale" qualify the preceding words and make the guaranty a conditional one. Vanderbilt *v.* Schreyer, 91 N. Y. 392. So a guaranty in these words, "I guarantee the payment of the within note at the insolvency of the drawers," is a guaranty of the solvency of the drawers, the words "at the insolvency" denoting the condition that the holder of the note must use reasonable diligence in the collection of the money. Graham *v.* Bradley, 5 Humphr. (Tenn.) 476. And in the case of Gamage *v.* Hutchins, 23 Me. 565, in which a note payable on demand was indorsed by defendant with a writing guarantying the "payment of the within

ing other conditions,[98] or waives demand and protest or notice of non-payment,[99] legal proceedings need not be instituted against the maker in order to hold the guarantor. In order that the contract may be deemed one of absolute guaranty it need not be in form one of payment.[1]

(II) *Of Debt Past Due.* The rule has been laid down that when the debt which is the subject of the guaranty has become due and absolute before the guaranty is given the guarantee is not required to take any legal steps to perfect his claim against the principal debtor before proceeding against the guarantor.[2]

note" a delay of two years after the guaranty to make any effort to collect the note, during which time the maker continued solvent, was held to discharge the guarantor in the absence of any other circumstances appearing.

98. *Arkansas.*—Friend *v.* Smith Gin Co., 59 Ark. 86, 26 S. W. 374.

Connecticut.— Beardsley *v.* Hawes, 71 Conn. 39, 40 Atl. 1043; Tyler *v.* Waddingham, 58 Conn. 375, 20 Atl. 335, 8 L. R. A. 657.

Illinois.— Holm *v.* Jamieson, 175 Ill. 295, 50 N. E. 702, 45 L. R. A. 846; Dillman *v.* Nadelhoffer, 160 Ill. 121, 43 N. E. 378; Hance *v.* Miller, 21 Ill. 636.

Iowa.—Hoyt *v.* Quint, 105 Iowa 443, 75 N. W. 342.

Nebraska.— Leonhardt *v.* Citizens' Bank, 56 Nebr. 38, 76 N. W. 452; Flentham *v.* Steward, 45 Nebr. 640, 63 N. W. 924; Huff *v.* Slife, 25 Nebr. 448, 41 N. W. 289, 13 Am. St. Rep. 497.

New York.—Brown *v.* Curtiss, 2 N. Y. 225. See 25 Cent. Dig. tit. "Guaranty," § 37.

"When due" or "according to its terms." — A guaranty of the payment of a note "when due" is broken by non-payment at maturity, the creditor not being bound upon such non-payment either to pursue the maker or to show his insolvency. Campbell *v.* Baker, 46 Pa. St. 243. The same liability is imposed by a guaranty of the payment of a written obligation "according to its terms." Roberts *v.* Riddle, 79 Pa. St. 468. In Zahm *v.* Lancaster First Nat. Bank, 103 Pa. St. 576, however, the contracts involved in the above cases seem to have been regarded as contracts of suretyship and not of guaranty.

Where one by a separate written instrument undertook to pay certain notes in case the maker thereof should not pay, it was held that the exercise of due diligence to collect the notes on their maturity was not required. Tyler *v.* Marsh, 1 Day (Conn.) 1.

Non-negotiable instruments.— In an action by the holder of a non-negotiable note against guarantors of "payment when due" it is not necessary to prove that suit has been brought against the maker. Carroll County Sav. Bank *v.* Strother, 28 S. C. 504, 6 S. E. 313. A guaranty that a third person will pay a mortgage on or before a certain date together with the interest due and all expenses incurred is an absolute guaranty. Klein *v.* Kern, 94 Tenn. 34, 28 S. W. 295.

99. Adams *v.* Tomlinson, (Iowa) 12 N. W. 137; Osborne *v.* Gullikson, 64 Minn. 218, 66 N. W. 965. A writing indorsed upon a note as follows, "For value received we guarantee the payment of the within note, and hereby waive protest, demand, and notice of non-payment," is an absolute guaranty. Bloom *v.* Warder, 13 Nebr. 476, 14 N. W. 395.

1. Dickerson *v.* Derrickson, 39 Ill. 574. Thus a guaranty that all bills receivable taken by a bank "are to be fully guaranteed and such guaranty to remain on all bad and doubtful paper until the same are collected" has been held to be a guaranty of payment and not merely of collection. Leonhardt *v.* Citizens' Bank, 56 Nebr. 38, 76 N. W. 452. Defendant, on purchasing a horse from plaintiff, offered in part payment a note then four years overdue. Plaintiff refused to receive it until defendant wrote on the back of it: "I guaranty the within note." It was held that this was a guaranty of the payment, and not merely that the note was collectable. Winchell *v.* Doty, 15 Hun (N. Y.) 1. Where a debtor transferred to his creditor a note in payment of a debt with a guaranty that it was "as good as gold" it was held that there was no implied condition that the creditor must on the insolvency of the maker of the note first sue him before having recourse to the guarantor. Koch *v.* Melhorn, 25 Pa. St. 89, 64 Am. Dec. 685. Where defendant, an agent for a loan and building company, by written guaranty on the back of a certificate of stock of said company guaranties to plaintiff the principal and coupons of said certificate as part consideration for plaintiff's purchase thereof, plaintiff, on default of the company, is not bound to exhaust his legal remedy against it before bringing suit against defendant, but only needs to take such steps as are necessary to establish the company's default. Howland *v.* Currier, 69 N. H. 202, 44 Atl. 106.

2. Lane *v.* Levillian, 4 Ark. 76, 37 Am. Dec. 769; Reed *v.* Cutts, 7 Me. 186, 22 Am. Dec. 184. A writing indorsed upon the back of a note after its maturity guarantying its payment within a specified period is an absolute guaranty. Breed *v.* Hillhouse, 7 Conn. 523. In Foster *v.* Tolleson, 13 Rich. (S. C.) 31, in which case defendant, after the maturity of a sealed note, guarantied its payment, it was held that the failure to sue the maker did not discharge defendant. To same effect see State Bank *v.* Hammond, 1 Rich. (S. C.) 281. So where payee of a sealed note assigned it when past due and guarantied the payment of it without demand or notice of non-payment by the maker, mere indulgence on the part of the creditor did not discharge the guarantor. Munro *v.* Hill, 25 S. C. 476. It is held that the right of action on such a guaranty does not accrue immediately upon the making of the contract but that the guarantor

c. Failure to File Claim Against Debtor's Estate. So where the creditor has failed to file his claim against the estate of the principal until after the time given by statute has elapsed, thus barring himself from ever recovering anything from the principal, he may still collect from the guarantor provided the guaranty is absolute.[3]

d. Failure to Sue Debtor as a Defense. Although where the guaranty is absolute and unconditional the fact that the principal debtor is solvent at the maturity of the debt does not require the creditor to sue,[4] and in some jurisdictions it is held that a guarantor of payment may show in defense of an action upon the guaranty that he has been injured by the failure to sue and that he will be discharged to the extent of the injury.[5]

4. What Constitutes Exercise of Due Diligence — a. Instituting Suit Against Principal Debtor — (i) *Necessity For.* Where diligence on the part of the creditor to collect the debt on the default of the principal debtor is required, it is generally held that the prosecution of a suit against the debtor to judgment and execution,[6] and proof that execution has been issued without avail,[7] are necessary as evidence of the exercise of such diligence.[8] And if in addition to the institu-

is entitled to a reasonable time to see whether payment will not be made by the principal. Yeates *v.* Walker, 1 Duv. (Ky.) 84. And in Donley *v.* Bush, 44 Tex. 1, it was not only held that where one guaranties the payment of a past due obligation there are no technical rules which require immediate payment, but that it can be shown by the surrounding circumstances that the guarantor intended only ultimate payment or, in other words, that the debt constituting the subject of the guaranty is good and can be collected. And see Grannis *v.* Miller, 1 Ala. 471, holding that where one on assigning a note past due indorses upon it a guaranty of its payment and waives demand or notice, he is not absolutely liable but only liable on the ascertainment of the fact of the inability of the maker to pay.

3. *Alabama.*— Minter *v.* Mobile Branch Bank, 23 Ala. 762, 58 Am. Dec. 315; McBroom *v.* Governor, 6 Port. 32.

California.— Bull *v.* Coe, 77 Cal. 54, 18 Pac. 808, 11 Am. St. Rep. 235.

Illinois.— People *v.* White, 11 Ill. 341.

Mississippi.— Johnson *v.* Planters Bank, 4 Sm. & M. 165, 43 Am. Dec. 480.

Tennessee.— Marshall *v.* Hudson, 9 Yerg. 57.

Texas.— Willis *v.* Chrowing, 90 Tex. 617, 40 S. W. 395, 59 Am. St. Rep. 842; Scantlin *v.* Kemp, 34 Tex. 388.

4. Penny *v.* Crane Bros. Mfg. Co., 80 Ill. 244; Parkhurst *v.* Vail, 73 Ill. 343; Roberts *v.* Hawkins, 70 Mich. 566, 38 N. W. 575 (applying the rule, although the debtor was solvent at maturity but insolvent at time of suit brought against the guarantor); Flentham *v.* Steward, 45 Nebr. 640, 63 N. W. 924. The mere neglect of the holder of a note upon its maturity to sue the maker does not discharge the guarantor, although the maker subsequently became insolvent. Huff *v.* Slife, 25 Nebr. 448, 41 N. W. 289, 13 Am. St. Rep. 497; Partridge *v.* Davis, 20 Vt. 499.

In Georgia a general guarantor, for value, who guaranties payment of a promissory note at maturity, is not discharged by mere failure of the creditor to bring suit, or to proceed against the maker of the note, although the maker becomes insolvent, or some obstacle, such as sale and removal of personalty, arises to the effective enforcement of a collateral security held by the creditor; the creditor himself taking no part in producing the insolvency, or in creating the obstacle, and the guarantor having given no notice to sue, or to proceed otherwise. Nance *v.* Winship Mach. Co., 94 Ga. 649, 21 S. E. 901.

5. Sabin *v.* Harris, 12 Iowa 87.

Even an absolute guarantor may insist that his risk shall be fixed and determined within a reasonable time after the debt has become due. Heaton *v.* Hulbert, 4 Ill. 489.

6. Crane *v.* Wheeler, 48 Minn. 207, 50 N. W. 1033; Burt *v.* Horner, 5 Barb. (N. Y.) 501.

7. Stone *v.* Rockefeller, 29 Ohio St. 625.

8. *Connecticut.*— Cowles *v.* Peck, 55 Conn. 251, 10 Atl. 569, 3 Am. St. Rep. 44.

Illinois.— Allison *v.* Waldham, 24 Ill. 132, holding that where the principal debtor after the maturity of the debt has property openly in his possession more than sufficient to satisfy the debt the fact that constables testified that they did not know how to reach the property constitutes no excuse for the failure of the creditor to proceed against the debtor.

Kansas.— McNall *v.* Burrow, 33 Kan. 495, 6 Pac. 897.

Michigan.— Aldrich *v.* Chubb, 35 Mich. 350.

Nebraska.— Central Inv. Co. *v.* Miles, 56 Nebr. 272, 76 N. W. 566, 71 Am. St. Rep. 681.

New York.— Northern Ins. Co. *v.* Wright, 76 N. Y. 445; Craig *v.* Parkis, 40 N. Y. 181, 100 Am. Dec. 469; Moakley *v.* Riggs, 19 Johns. 69, 10 Am. Dec. 196.

Ohio.—Bashford *v.* Shaw, 4 Ohio St. 263.

Wisconsin.— McFarlane *v.* Milwaukee, 51 Wis. 691, 8 N. W. 728; Dyer *v.* Gibson, 16 Wis. 557.

United States.— Dwight *v.* Williams, 7 Fed. Cas. No. 4,218, 4 McLean 581.

See 25 Cent. Dig. tit. "Guaranty," §§ 78, 89.

tion of suit and obtaining judgment there are other steps which the creditor may reasonably take for the purpose of collecting his debt he should take such steps.[9] But in order that the failure to take such additional steps shall constitute a defense, there must have been a concurrent loss and the burden is upon the guarantor to show such loss.[10]

(II) *Time of Instituting Suit.* What constitutes due diligence in prosecuting legal proceedings against the principal debtor must depend upon the circumstances of the case.[11] In the absence of any special facts due diligence requires that suit should be brought against the principal at the first regular term of court after the maturity of the debt and that judgment be taken and execution issued thereon as soon as practicable by the ordinary rules and practice of the court.[12] And if expedition can be secured by beginning the action in an inferior court it should be done.[13] But there is no inflexible rule that the exercise of due diligence requires an action to be commenced in every case on the day that the principal debt matures,[14] or at a stated time after such maturity.[15] The mere delay to prosecute on the failure to pay at maturity is not of itself sufficient to negative the use of due diligence,[16] although it may be continued so long as to

The legal means necessary to be used to show diligence are the commencement and prosecution of a suit against the principal debtor to judgment and execution. Foster *v.* Barney, 3 Vt. 60; Day *v.* Elmore, 4 Wis. 190; Phœnix Ins. Co. *v.* Louisville, etc., R. Co., 8 Fed. 142.

It is a condition precedent to a recovery upon a guaranty of the collection of a debt that resort shall first have been had to a suit or some other legal proceedings for the enforcement of the debt. Phœnix Ins. Co. *v.* Louisville, etc., R. Co., 8 Fed. 142.

A guaranty of collection of a note requires the use of reasonable diligence to collect from both the maker and prior indorsers or guarantors. Summers *v.* Barrett, 65 Iowa 292, 21 N. W. 646. In the case of the guaranty of the goodness or collectability of a note the supreme and perfect test of the liability of a guarantor is the result of legal proceedings seasonably and properly instituted and diligently pursued. Lemmon *v.* Strong, 55 Conn. 443, 13 Atl. 140. In the case of a guaranty of a non-negotiable note by a stranger, the diligence required by law is the immediate institution of a suit by attachment on the maturity of the note if the maker is possessed of property. Clark *v.* Merriam, 25 Conn. 576. And due diligence is not shown by the attachment of property sufficient to satisfy the debt if collection fails because of the defective service of the writ. Beach *v.* Bates, 12 Vt. 68.

9. Backus *v.* Shipherd, 11 Wend. (N. Y.) 629. Thus if the creditor has exclusive knowledge that the debtor has tangible property sufficient to satisfy the debt it is his duty to inform the sheriff seeking to levy. Hoffman *v.* Bechtel, 52 Pa. St. 190.

10. And see Hurd *v.* Callahan, 9 Abb. N. Cas. (N. Y.) 374; Backus *v.* Shipherd, 11 Wend. (N. Y.) 635.

11. Davey *v.* Waughtal, 99 Iowa 654, 68 N. W. 904; Thomas *v.* Woods, 4 Cow. (N. Y.) 173 (where it is said that what would be laches in one case might be reasonable diligence in another); Williams *v.* Miller, 2 Lea (Tenn.) 405. The time when and the circumstances under which the legal means of enforcing collection from the principal debtor shall be employed depend upon a variety of circumstances. Day *v.* Elmore, 4 Wis. 190.

There is a material distinction between the omission to prosecute the principal debtor altogether and the omission to prosecute him within a reasonable time and with due diligence. The reasonable time is not a definite time and must always depend upon the particular circumstances of the case presented. Gallagher *v.* White, 31 Barb. (N. Y.) 92.

12. Roberts *v.* Masters, 40 Ind. 461; Kelsey *v.* Ross, 6 Blackf. (Ind.) 536; Merriman *v.* Maple, 2 Blackf. (Ind.) 350; Durand *v.* Bowen, 73 Iowa 573, 25 N. W. 644; Thompson *v.* Goven, 9 Gratt. (Va.) 695.

13. Allison *v.* Smith, 20 Ill. 104.

14. Thomas *v.* Woods, 4 Cow. (N. Y.) 173.

15. Where after the accepter of drafts discounted by plaintiff made a voluntary assignment defendant guarantied the payment of the drafts up to a specified amount if plaintiff "in the exercise of due diligence" should fail to collect them from the accepters or their assignees within a year from the date of the guaranty, it was held that due diligence on the part of plaintiff did not require him to at once institute legal proceedings against the assignee but that he was entitled to a reasonable time within which to investigate the good faith of the assignment. Salt Springs Nat. Bank *v.* Sloan, 135 N. Y. 371, 32 N. E. 231.

16. Day *v.* Elmore, 4 Wis. 190.

There is a legal presumption that he has been duly diligent if the creditor sues out legal process without unnecessary delay. Hoffman *v.* Bechtel, 52 Pa. St. 190.

Delay held not to discharge guarantor.— Where defendant warranted a demand note "good and collectible until paid" he was held liable upon his guaranty, although judgment was not obtained against the maker until seven years after the date of the note. Lemmon *v.* Strong, 55 Conn. 443, 13 Atl. 140. Defendant covenanted that, upon the foreclosure of a mortgage held by plaintiff, if any

afford, unexplained, a legal presumption against its exercise so as to release the guarantor.[17]

(III) *Going to Another Jurisdiction to Begin Suit.* The guarantee is not required to follow the debtor outside of the county where the contract was made and the debtor resides and bring an action against him in another county in the same state,[18] and though where the maker of a note at the time of its execution resides without the state and continues to so reside, and all his property is situated at the place of his residence, the exercise of due diligence requires that the guarantee shall sue the maker at the place of his residence before he can have recourse to the guarantor,[19] the general rule is that he is not required to proceed against the principal debtor outside the state where the contract was executed;[20] and if the debtor has removed from the state and cannot be sued therein when the debt falls due the guarantee may at once sue the guarantor.[21] And if the maker of the note lives in one place and his property is situated in another jurisdiction, due diligence does not require that he shall be sued in both places;[22] nor does it require that because he happens to have property in several states he shall be sued in all of them.[23]

(IV) *Steps to Be Taken After Suit Commenced.* While it is not necessary after an action has been commenced against the principal debtor that each step in the prosecution thereof shall be taken with the greatest possible diligence and that all known means shall be resorted to to hasten the prosecution,[24] there

deficiency should occur, and plaintiff should have a decree therefor, according to the New York practice, he would pay the deficiency. It was held that a delay of fourteen months between maturity of the mortgage and the institution of a suit to foreclose did not release defendant, in the absence of special damage from the delay. Goldsmith *v.* Brown, 35 Barb. (N. Y.) 484. One who has covenanted to pay a debt, if it cannot be collected of another by due process of law, is liable, if the covenantee has exerted a reasonable diligence to collect, although he may have suffered a term to elapse without suit, the covenantor having sustained no injury by the delay. Thomas *v.* Woods, 4 Cow. (N. Y.) 173. Guaranty by one transferring notes after maturity that they were good, delay for nearly a year on the part of the holder to attempt to enforce the notes and for more than two years to give notice of non-payment to the guarantor was held such laches as to discharge the guarantor. Beeker *v.* Saunders, 28 N. C. 380. Where on the transferring of a note payable on demand the transferrer guarantied that the note was due and collectable, it was held that a delay by the transferee of five or six days before suing was not unreasonable. Foster *v.* Barney, 3 Vt. 60.

17. *Iowa.*— Voorhies *v.* Atlee, 29 Iowa 49, failure to bring suit until after two terms of court had passed.

Minnesota.— Crane *v.* Wheeler, 48 Minn. 207, 50 N. W. 1033, unexplained delay of fifteen months.

New York.— Penniman *v.* Hudson, 14 Barb. 579 (holding that a delay of seven months required the submission of the question to the jury); Burt *v.* Horner, 5 Barb. 501 (delay of seventeen months); Thomas *v.* Woods, 4 Cow. 173 (allowing a term to elapse after his debt fell due without suit).

North Carolina.— Beeker *v.* Saunders, 28 N. C. 230, delay of a year to demand payment and of a year and a half more to give notice of default to the guarantor.

Pennsylvania.— Miller *v.* Berkey, 27 Pa. St. 317, delay of two years in entering judgment on judgment notes.

Tennessee.— Graham *v.* Bradley, 5 Humphr. 476, holding that failure to bring suit on a note at the term of court commencing two and one-half months after the note fell due constituted a failure to exercise reasonable diligence.

See 25 Cent. Dig. tit. "Guaranty," § 89.

18. Judson *v.* Goodwin, 37 Ill. 286; Tarlton *v.* Miller, 1 Ill. 68.

19. Burt *v.* Horner, 5 Barb. (N. Y.) 501.

Qualification of rule.— If the maker of the note at the time of its execution resided in one state and the collection of the note was guarantied later in another state, where the holder resided, and the maker later removed to a third state before the note fell due, the holder of the note may sue the guarantor without taking steps to hold the maker. All he will be required to prove is the fact that the maker moved to another state before the note came due. If the maker left property in the state from which he moved, out of which the note could be collected, the burden of proving this fact is on the guarantor. Fall *v.* Youmans, 67 Minn. 83, 69 N. W. 690, 64 Am. St. Rep. 390.

20. Barber *v.* Bell, 77 Ill. 490; Crouch *v.* Hall, 15 Ill. 263; Pierce *v.* Short, 14 Ill. 144; Bard *v.* McElroy, 6 B. Mon. (Ky.) 416.

21. A guarantee of a note, if the maker has absconded from the state, is not bound to follow him, nor commence any action against him, before suing on the guaranty. Cooke *v.* Nathan, 16 Barb. (N. Y.) 342.

22. Williams *v.* Miller, 2 Lea (Tenn.) 405.

23. Williams *v.* Miller, 2 Lea (Tenn.) 405.

24. Chatham Nat. Bank *v.* Pratt, 135 N. Y. 423, 32 N. E. 236.

must be no unnecessary delay in securing judgment and issuing an execution thereon.[25] The exercise of due diligence does not require the creditor after having obtained judgment and issued execution to prosecute a levying officer for failure to make the money upon the execution.[26]

(v) *Matters Excusing Bringing of Suit.* There is some conflict of authority whether in case of a conditional guaranty or guaranty of collection there are any circumstances which will excuse the bringing of suit against the principal debtor upon the maturity of the debt, or the making of an attempt to collect the debt.[27] Some courts hold that the only evidence that the debt is not collectable which will be received is the failure of legal proceedings diligently pursued to result in collection ;[28] and that a return of *nulla bona* by the sheriff is necessary in order that plaintiff may enforce the guaranty.[29] The weight of authority, however, seems to be that if the insolvency of the principal debtor,[30] or other cir-

25. Robinson *v.* Olcott, 27 Ill. 181; Peck *v.* Fink, 10 Iowa 193, 74 Am. Dec. 384.

The mere formal suing out of process without any attempt to present evidence in support of plaintiff's case is not sufficient to show diligence. Where the holder of the guaranty in his suit against the principal, although requested by the guarantor, subpœnaed no witness and in consequence thereof judgment went against him on the testimony of defendant alone, it was held that he could not recover from the guarantor. Sawyer *v.* Haskell, 18 How. Pr. (N. Y.) 282.

Where after commencing suit the creditor delayed for nearly three months to strike out a frivolous answer, it was held that there was such lack of diligence as discharged the guarantor. Chatham Nat. Bank *v.* Pratt, 135 N. Y. 423, 32 N. E. 236.

26. Leonard *v.* Giddings, 9 Johns. (N. Y.) 355.

27. Allen *v.* Rundle, 50 Conn. 9, 47 Am. Rep. 599. See cases cited *infra*, notes 28–32.

28. Northern Ins. Co. *v.* Wright, 76 N. Y. 445, holding that in case of guaranty of collection, proof of insolvency of the debtor or inability to pay at the time of the maturity of the debt will not excuse pursuing the ordinary legal remedies to enforce collection.

In Michigan the New York rule that in fixing liability on guaranty of collection the only evidence that the debt is not collectable is the failure of legal proceedings diligently pursued to result in collection has been followed. Bosman *v.* Akeley, 39 Mich. 710, 33 Am. Rep. 447.

Death of debtor.— In the case of such a guaranty the failure to make an attempt to collect a debt from the principal debtor is not excused by reason of the fact that the debtor died before the maturity of the debt and that no one thereafter took out letters of administration upon the estate. Taylor *v.* Bullen, 6 Cow. (N. Y.) 624.

Insolvency of the principal is not a sufficient excuse for failure to sue him, because the sheriff on execution may find property of which witnesses have no knowledge, or defendant may prefer giving up exempt property to contesting an execution. Bosman *v.* Akeley, 39 Mich. 710, 33 Am. Rep. 447. Where defendant covenanted to pay whatever should remain uncollected of a debt when the creditor should "by due course of law have been unable to collect," etc., the fact that the debtor was insolvent at the maturity of the debt was held no excuse for failure to institute legal proceedings. Dwight *v.* Williams, 8 Fed. Cas. No. 4,218, 4 McLean 581.

29. *Kentucky.*—Chambers *v.* Keene, 1 Metc. 289; Smith *v.* Bacon, 3 J. J. Marsh. 312.

Michigan.— Schermerhorn *v.* Conner, 41 Mich. 374, 1 N. W. 955; Bosman *v.* Akeley, 39 Mich. 710, 33 Am. Rep. 447; Aldrich *v.* Crubb, 35 Mich. 350.

New York.— Salt Springs Nat. Bank *v.* Sloan, 135 N. Y. 371, 32 N. E. 231; Craig *v.* Parkis, 40 N. Y. 181, 100 Am. Dec. 469; Cady *v.* Sheldon, 38 Barb. 103; Eddy *v.* Stanton, 21 Wend. 255; Thomas *v.* Woods, 4 Cow. 173; Moakley *v.* Riggs, 19 Johns. 69, 10 Am. Dec. 196.

North Carolina.— Jones *v.* Ashford, 79 N. C. 172.

Wisconsin.— French *v.* Marsh, 29 Wis. 649; Borden *v.* Gilbert, 13 Wis. 670.

United States.— Dwight *v.* Williams, 8 Fed. Cas. No. 4,218, 4 McLean 581.

See 25 Cent. Dig. tit. "Guaranty," § 89.

30. *Connecticut.*—Allen *v.* Rundle, 50 Conn. 9, 46 Am. Rep. 599.

Maine.— Gilligham *v.* Boardman, 29 Me. 79.

Massachusetts.— Miles *v.* Linnell, 97 Mass. 298.

Minnesota.— Crane *v.* Wheeler, 48 Minn. 207, 50 N. W. 1033; Brackett *v.* Rich, 23 Minn. 485, 23 Am. Rep. 703.

Ohio.— Stone *v.* Rockefeller, 29 Ohio St. 625.

Pennsylvania.— Janes *v.* Scott, 59 Pa. St. 178, 98 Am. Dec. 328; McClurg *v.* Fryer, 15 Pa. St. 293; McDoal *v.* Yeomans, 8 Watts 361.

Vermont.— Bull *v.* Bliss, 30 Vt. 127, holding that where one warrants that a note shall be good for two years from the date thereof, a showing that the maker became insolvent within the specified time is *prima facie* a sufficient excuse for an omission to attempt to collect the note of the maker.

United States.— Camden *v.* Doremus, 3 How. 515, 11 L. ed. 705; Osborne *v.* Smith, 18 Fed. 126, 5 McCrary 487.

See 25 Cent. Dig. tit. "Guaranty," §§ 78, 89.

cumstances,[31] would render a suit against the principal debtor unavailing, it need not be instituted. The cases thus holding are based upon the reasonable ground that the guarantee's contract is only to use proper, just, and reasonable diligence; not the performance of acts which are obviously useless, from which no advantage could be gained. To ascertain upon sufficient proof that the principal is notoriously insolvent completely answers the demand of due diligence.[32]

b. Resorting to Other Securities — (i) *In General.* While in all cases the intention of the parties to the contract of guaranty must govern the construction of the contract, yet where the guarantor has furnished to the guarantee or knows that the guarantee has in his hands the means out of which the debt can be collected, such as a mortgage on the principal debtor's property[33] or other collateral

31. Bull *v.* Bliss, 30 Vt. 127; Wheeler *v.* Lewis, 11 Vt. 265.

If there are any other circumstances which would render a suit against the principal debtor fruitless, the creditor need not institute such suit. Koch *v.* Melhorn, 25 Pa. St. 89, 64 Am. Dec. 685.

Insolvency of prior indorsers.— Where defendant stipulated for the use of reasonable and due diligence to collect the note from a drawer and prior indorsers before resorting to defendant, it was held that the ascertainment upon correct and sufficient proofs of the entire and notorious insolvency of the prior indorsers and the principal debtor excused the institution of a suit. Camden *v.* Doremus, 3 How. (U. S.) 515, 11 L. ed. 705.

No loss sustained.— A guarantor is not discharged simply by the negligence of the creditor, but the former must also show that he has suffered a loss by reason of the failure of the creditor to pursue his remedies against the principal debtor. Gillighan *v.* Boardman, 29 Me. 79; Ashford *v.* Robinson, 30 N. C. 114. Where, during the whole period covered by a guaranty, the principal was unable to pay the debt, the mere delay of the creditor in demanding payment of the principal will not discharge the guarantor. Hooper *v.* Hooper, 81 Md. 155, 31 Atl. 508, 48 Am. St. Rep. 496. A guarantor cannot defend an action on the guaranty on the ground of laches in presenting the paper for payment to the principal obligor, unless he shows that he has been injured by such laches. Lewis *v.* Harvey, 18 Mo. 74, 59 Am. Dec. 286. A guarantor of a note is not discharged by failure of demand on the maker and failure of the guarantee to use diligence in endeavoring to collect the money of the maker, unless it appears that he has suffered loss in consequence of the guarantee's lack of diligence. Farrow *v.* Respess, 33 N. C. 170. See also Lemmon *v.* Strong, 55 Conn. 443, 13 Atl. 140; Tyler *v.* Marsh, 1 Day (Conn.) 1; Andrus *v.* Carpenter, 52 Ill. 171; Smith *v.* Bainbridge, 6 Blackf. (Ind.) 12; Blanchard *v.* Wood, 26 Me. 358; Thomas *v.* Davis, 14 Pick. (Mass.) 353; Yale *v.* Watson, 54 Minn. 173, 55 N. W. 957; Force *v.* Craig, 7 N. J. L. 272; Kinyon *v.* Brock, 72 N. C. 554; Gardner *v.* King, 24 N. C. 297; Williams *v.* Collins, 4 N. C. 382; Roberts *v.* Laughlin, 4 N. D. 167, 59 N. W. 967; Ritchie *v.* Walter, 166 Pa. St. 604, 31 Atl. 334; Philadelphia, etc., R. Co. *v.* Snowdon, 166 Pa. St. 236, 30 Atl. 1129; Seiple's Appeal, 11 Wkly. Notes Cas. (Pa.) 392; State Bank *v.* Hammond, 1 Rich. (S. C.) 281; Burrow *v.* Zapp, 69 Tex. 474, 6 S. W. 783; Carr *v.* Rowland, 14 Tex. 275; Foster *v.* Barney, 3 Vt. 60.

Where the debtor removes from the jurisdiction before the maturity of the principal contract the creditor is relieved *prima facie* from any obligation to attempt to collect the debt from the principal debtor. Benton *v.* Gibson, 1 Hill (S. C.) 56.

In Illinois the statute provides that an assignor of a promissory note cannot be held liable to the assignee unless the assignee prosecutes the maker of the note to insolvency, unless the institution of such a suit would be unavailing, or unless the maker has absconded or left the state when the note falls due. Crough *v.* Hall, 15 Ill. 263; Pierce *v.* Short, 14 Ill. 144.

32. Roberts *v.* Laughlin, 4 N. D. 167, 59 N. W. 967; McClurg *v.* Fryer, 15 Pa. St. 293; McDoal *v.* Yeomans, 8 Watts (Pa.) 361; Bull *v.* Bliss, 30 Vt. 127; Wheeler *v.* Lewis, 11 Vt. 265. See also Camden *v.* Doremus, 3 How. (U. S.) 515, 11 L. ed. 705; and cases cited *supra*, notes.

The law does not require the performance of an idle act by a guarantor which is useful to no one, but hurtful to himself, by reason of useless expense and trouble incurred by carrying on an action against one who is hopelessly insolvent. Benton *v.* Gibson, 1 Hill (S. C.) 56.

33. A guaranty of collection of a debt secured by mortgage creates no obligation on the part of the guarantor to pay until after foreclosure decree, and a failure to obtain payment out of the mortgaged premises and out of other property of the principal; and such guarantor ought not to be made a party defendant to the foreclosure suit. Johnson *v.* Shepard, 35 Mich. 115.

Where one assigned a mortgage and guarantied the collection thereof, it was held that no claim accrued on the guaranty until the guarantee had exhausted his remedies against the mortgaged premises and the personal liability of the mortgagor. Vanderkemp *v.* Shelton, 11 Paige (N. Y.) 28.

Where one assigns a note, guarantying its collection, and at the same time and as part of the same transaction assigns a mortgage, securing it, he is not liable upon the guaranty until resort has been had to the mortgage

security,[34] it is reasonable to assume that they intended that resort should first be had to those means before the guaranty should become operative.[35]

(II) *Where Guaranty Absolute.* Where, however, the guaranty is an absolute one and the creditor has also other security he need not proceed against the security but may at once sue the guarantor on the default of the principal debtor.[36]

B. Making Demand Upon Principal Debtor For Performance* — **1. In General.** The necessity of a demand for payment upon the party primarily

security. Dewey *v.* W. B. Clark Inv. Co., 48 Minn. 130, 50 N. W. 1032, 31 Am. St. Rep. 623.

34. Barman *v.* Carhartt, 10 Mich. 338, holding that where in addition to the guaranty the creditor holds collateral security, it is the duty of the creditor in the case of a guaranty of collection to resort to the collateral before enforcing the guaranty.

A contract guarantying the payment of any deficiency which may arise upon the foreclosure of collateral security given for a debt of another is a species of guaranty of collection, the only difference between such a guaranty and an ordinary guaranty of collection being that in the latter case the undertaking is that after it has been ascertained by all such legal proceedings as the case admits of that the demand cannot be collected, the guarantor will pay, while in the former case the only proceeding which must be taken is that pointed out. McMurray *v.* Noyes, 72 N. Y. 523, 28 Am. Rep. 180.

Where one guaranties to another that a judgment is collectable, it is a condition precedent to a right of action that the person to whom the guaranty is given shall proceed in the collection in due course of law, and use reasonable diligence. Mains *v.* Haight, 14 Barb. (N. Y.) 76.

35. Johnson *v.* Shepard, 35 Mich. 115; Barman *v.* Carhartt, 10 Mich. 338. See also Crocker *v.* Gilbert, 9 Cush. (Mass.) 131; Briggs *v.* Norris, 67 Mich. 325, 34 N. W. 582; Vanderbilt *v.* Schreyer, 91 N. Y. 392; Mead *v.* Parker, 29 Hun (N. Y.) 62; Cady *v.* Sheldon, 38 Barb. (N. Y.) 103; Deering *v.* Russell, 5 N. D. 319, 65 N. W. 691; Ege *v.* Barnitz, 8 Pa. St. 304.

Premature action.— An action against the guarantor of any deficiency on a note after the security has been exhausted, brought before the security has been sold, is premature. Bouche *v.* Louttit, 104 Cal. 230, 37 Pac. 902.

36. Fuller *v.* Tomlinson, 58 Iowa 111, 12 N. W. 127. Deering *v.* Russell, 5 N. D. 319, 65 N. W. 691. A guaranty, "We further guarantee the payment of the interest as it matures on the principal sum of said loan until the principal is paid," is a guaranty of "payment," so that on default resort may be had to the guarantor, without first proceeding against the principal debtor. Jackson *v.* Decker, 14 N. Y. App. Div. 415, 43 N. Y. Suppl. 957.

Plaintiff need not resort to other possible sources of indemnity. Willard *v.* Welch, 94 N. Y. App. Div. 179, 88 N. Y. Suppl. 173.

A guaranty of payment of a debt at a particular time is enforceable upon the default of the principal obligor, although no effort is made by the creditor to collect from the principal. Crissey *v.* Interstate Loan and Trust Co., 53 Pa. St. 867.

Debts secured by mortgage.— Where one guaranties payment of a mortgage debt the mortgagee may sue on the guaranty without proceeding to realize on the mortgage. Adams *v.* Wallace, 119 Cal. 67, 51 Pac. 14; Duncanson *v.* Kirby, 90 Ill. App. 15; Marston *v.* Marston, 45 Me. 412; Crocker *v.* Gilbert, 9 Cush. (Mass.) 131. A creditor is not required to resort to a chattel mortgage given by the principal debtor before suing the guarantor of the debt. Day *v.* Elmore, 4 Wis. 190; Osborne *v.* Smith, 18 Fed. 126, 5 McCrary 487. If the guarantor desires an immediate resort to the mortgage security, his remedy is to pay the note and subrogate himself to the mortgagee's rights. Fegley *v.* Jennings, 44 Fla. 203, 32 So. 873, 103 Am. St. Rep. 142; Jenkins *v.* Wilkinson, 107 N. C. 707, 12 S. E. 630, 22 Am. St. Rep. 911; Osborne *v.* Smith, 18 Fed. 126, 5 McCrary 487.

Stock as collateral security.— W held certain shares of stock as collateral security for a debt owing him by S, and defendant executed a contract by which after reciting such fact he agreed to guarantee W against any loss that he might sustain by reason of the holding and carrying of said stock. At the date of the guaranty the stock was worth more than the amount of the debt, and the purpose of S was to avoid a sale of the stock and until a better market could be secured. It was held that the guaranty was against any depreciation of the stock which might render it insufficient to pay the debt, and was not a guaranty of the collection of the debt, so as to require the remedy against S to be exhausted before proceedings could be had against defendant. Wallace *v.* Straus, 113 N. Y. 238, 21 N. E. 66.

One who guaranties the performance by executors of an award upon an arbitration between the executors and a third person is bound to perform upon the failure of the executors to do so, although the funds of the estate are sufficient to pay the award. Wood *v.* Tunnicliff, 74 N. Y. 38.

Where the principal debtor is a corporation, the creditor is not bound, before proceeding

* For a full discussion of this subject see the article by W. P. Rogers in The Columbia Law Review for April, 1906 (6 Columbia Law Review, 229).

liable and of giving notice of default to the party secondarily liable is not incidental to the relation of guarantor and guarantee as it is to that of an indorser and indorsee. It must be derived, if it exists, from the terms of the contract and the nature and circumstances of the particular case and not from the general rule.[37] But wherever the guarantee's claim against the principal is of that character which requires a demand to complete his right of action thereon, or where the contract of guaranty, either by implication or in express terms, provides for a demand, the step is a condition precedent and must be shown in an action against the guarantor,[38] unless no benefit to the guarantor could result from the making of such a demand.[39] And in a general way it may be said that where it is uncertain as to when the obligation of the principal debtor matures, demand upon him is necessary before suing the guarantor.[40] Where the courts insist on the making of a demand[41] they go upon the theory that a guaranty is a collateral contract in which there is always the implied condition that the creditor will try first to collect his debt from the principal debtor,[42] and that the making of a demand shows diligence on the part of the guarantee;[43] but in fact it does not, unless upon failure to receive payment he proceeds to take the necessary legal steps to enforce collection.[44] Where the principal is insolvent when the debt falls due, no demand is necessary to charge the guarantor.[45]

2. In Case of Absolute Guaranties. The general rule is that no demand upon the principal debtor is necessary in case of an absolute guaranty.[46] And

against the guarantor, to attempt the enforcement of the individual liability of stockholders. National Loan, etc., Assoc. *v.* Lichtenwalner, 100 Pa. St. 100, 45 Am. Rep. 359.

37. Vinal *v.* Richardson, 13 Allen (Mass.) 521. And *compare* Pierce *v.* Kennedy, 5 Cal. 138; Riggs *v.* Waldo, 2 Cal. 485, 56 Am. Dec. 356.

38. National Surety Co. *v.* Long, 125 Fed. 887, 60 C. C. A. 623.

Where one assigns a non-negotiable instrument indorsing upon it, after its maturity, a general unrestricted guaranty, it is held that a demand by the assignee upon the principal debtor is necessary before suing the transferrer, since the principal cannot be required to pay except to one who is the lawful holder of his undertaking, and he can only know such holder by the fact that he has possession of the instrument. Rhodes *v.* Morgan, 1 Baxt. (Tenn.) 360.

39. Pennsylvania Coal Co. *v.* Blake, 85 N. Y. 226.

40. Ilsley *v.* Jones, 12 Gray (Mass.) 260, where defendant guarantied the payment of the price of goods sold by plaintiff to a third person upon a credit for an indefinite term.

41. Douglass *v.* Reynolds, 7 Pet. (U. S.) 113, 8 L. ed. 626.

Reasonable diligence in making demand on the principal is necessary to charge the guarantor. Ringgold *v.* Newkirk, 3 Ark. 96. Under a contract of guaranty made in Louisiana, a guarantor cannot be held liable unless the creditor uses reasonable diligence to make a demand on the original debtor. McGuire *v.* Newkirk, 6 Ark. 142.

A guaranty indorsed on certain certificates of stock of a certain "annual dividend or income" for two years is a collateral undertaking, and a demand upon the company is necessary to fix the liability of the guarantor except where the company is totally insolvent. Hank *v.* Crittenden, 11 Fed. Cas. No. 6,024, 2 McLean 557.

To charge a guarantor of the delivery of flour, a demand of the article must be made on the principal. Bebee *v.* Moore, 3 Fed. Cas. No. 1,202, 3 McLean 387.

42. Talbott *v.* Gay, 18 Pick. (Mass.) 534; Oxford Bank *v.* Haynes, 8 Pick. (Mass.) 423, 19 Am. Dec. 334; Newton Wagon Co. *v.* Diers, 10 Nebr. 284, 4 N. W. 995; Douglass *v.* Reynolds, 7 Pet. (U. S.) 113, 8 L. ed. 626.

43. Lane *v.* Levillian, 4 Ark. 76, 37 Am. Dec. 769; Cumpston *v.* McNair, 1 Wend. (N. Y.) 457; State Bank *v.* Livingston, 2 Johns. Cas. (N. Y.) 409.

44. If the principal was already in default before demand, as he ordinarily would be, when the debt being due was unpaid, demand is meaningless, unless it is required as in case of an indorser, which is nowhere maintained. While there may be good reason for giving notice to the guarantor of the principal's default, as will presently be shown, it is submitted that where the right of action is already complete against the principal there is no reason for making demand upon him as a step toward perfecting a claim against the guarantor. See *infra*, VII, B, 2.

45. Mayberry *v.* Bainton, 2 Harr. (Del.) 24; Skofield *v.* Haley, 22 Me. 164, 38 Am. Dec. 307; Morris *v.* Wadsworth, 11 Wend. (N. Y.) 100; Janes *v.* Scott, 59 Pa. St. 178, 98 Am. Dec. 328; Fegenbush *v.* Lang, 28 Pa. St. 193; Wildes *v.* Savage, 29 Fed. Cas. No. 17,653, 1 Story 22. *Prima facie* it is not necessary to make a demand upon the debtor if at the time of the maturity of the principal obligation he is insolvent. Warrington *v.* Furbor, 8 East 242.

46. *Connecticut.*— City Sav. Bank *v.* Hopson, 53 Conn. 453, 5 Atl. 601; Breed *v.* Hillhouse, 7 Conn. 523.

Illinois.— Penny *v.* Crane Bros. Mfg. Co.,

when from the absolute character of a debt whose payment is guarantied nothing of a preliminary nature on the part of the creditor is required by the law to perfect his rights, demand and notice are not essential to enable him to enforce the guaranty,[47] as where the guaranty is of the payment of a preëxisting debt.[48] And by the great majority of the courts it is held that where one guaranties the payment of a note proof of demand and notice of non-payment are unnecessary.[49] Instruments by which the maker guaranties payment of a specified sum of money at the end of a stated period are usually held to be absolute contracts of guaranty within the rule.[50] Of course this rule has no application where a demand upon the principal debtor is necessary to place him in default.[51]

80 Ill. 244; Gage *v.* Mechanics' Nat. Bank, 79 Ill. 62; Volts *v.* Harris, 40 Ill. 155; Dickerson *v.* Derrickson, 39 Ill. 574; Hance *v.* Miller, 21 Ill. 636.

Indiana.— Taylor *v.* Taylor, 64 Ind. 356.

Iowa.— Knight *v.* Dunsmore, 12 Iowa 35.

Kentucky.—Bowman *v.* Curd, 2 Bush 565; Lowe *v.* Beckwith, 14 B. Mon. 184, 58 Am. Dec. 659.

Maine.—Blanchard *v.* Wood, 26 Me. 358.

Massachusetts.— Parkman *v.* Brewster, 15 Gray 271.

Mississippi.— Baker *v.* Kelly, 41 Miss. 696, 93 Am. Dec. 274; Tatum *v.* Bonner, 27 Miss. 760; Mathews *v.* Christman, 12 Sm. & M. 595, 51 Am. Dec. 124; Thrasher *v.* Ely, 2 Sm. & M. 139.

Missouri.— Wright *v.* Dyer, 48 Mo. 525; Airey *v.* Pearson, 37 Mo. 424; Osborne *v.* Lawson, 26 Mo. App. 549.

Nebraska.— Bloom *v.* Warder, 13 Nebr. 476, 14 N. W. 395.

New Hampshire.— Newbury *v.* Sinclair, 60 N. H. 100, 49 Am. Rep. 307; Beebe *v.* Dudley, 26 N. H. 249, 59 Am. Dec. 341.

New York.— Brown *v.* Curtiss, 2 N. Y. 225; Winchell *v.* Doty, 15 Hun 1; Curtis *v.* Brown, 2 Barb. 51; Clark *v.* Burdett, 2 Hall 197; Cordier *v.* Thompson, 8 Daly 172; Mann *v.* Eckford, 15 Wend. 202; Mechanic F. Ins. Co. *v.* Ogden, 1 Wend. 137; Butler *v.* Wright, 20 Johns. 367; Allen *v.* Rightmere, 20 Johns. 365, 11 Am. Dec. 288; Deane *v.* Higgins, 4 N. Y. Leg. Obs. 423. See also East River Bank *v.* Rogers, 7 Bosw. 493.

Ohio.— Castle *v.* Rickly, 44 Ohio St. 490, 9 N. E. 136, 58 Am. Rep. 839; Clay *v.* Edgerton, 19 Ohio St. 549, 2 Am. Rep. 422; Reed *v.* Evans, 17 Ohio 128.

Oregon.— Weiler *v.* Henarie, 15 Oreg. 28, 13 Pac. 614.

Tennessee.— Klein *v.* Kern, 94 Tenn. 34, 28 S. W. 295; Hunter *v.* Dickinson, 10 Humphr. 37.

Vermont.— Partridge *v.* Davis, 20 Vt. 499; Smith *v.* Ide, 3 Vt. 290.

Virginia.— Pasteur *v.* Parker, 3 Rand. 458.

Wisconsin.— Ten Eyck *v.* Brown, 3 Binn. 452, 4 Chandl. 151.

United States.— Evans *v.* Cleveland, etc., R. Co., 8 Fed. Cas. No. 4,557.

See 25 Cent. Dig. tit. "Guaranty," § 88.

Failure to demand payment of a note does not discharge an unconditional guarantor, if it results in no injury to him. Heaton *v.* Hulbert, 4 Ill. 489.

The indorser of a note not negotiable has no right, in an action against him, to insist upon previous demand and notice; his indorsement is equivalent to a guaranty. Seymour *v.* Van Slyck, 8 Wend. (N. Y.) 403.

Where a commission merchant is to sell for his principal and guaranty payment of the price and is to collect the purchase-price himself the principal need not make a demand upon the customer for payment before suing on the guaranty. Milliken *v.* Byerly, 6 How. Pr. (N. Y.) 214. In this case, however, the court pointed out the distinction between the above facts and a case where one merely guaranties a debt which the creditor has collected and said that in this last case it might well be that demand upon the principal debtor would be necessary to make the guarantor liable.

47. Read *v.* Cutts, 7 Me. 186, 22 Am. Dec. 184.

Even in the case of a general letter of credit it is held that demand upon the principal debtor is not necessary. Sleight *v.* Watson, 53 N. C. 10.

Where one assigned a sealed bill and guarantied the payment thereof, it was held that demand upon the maker was not necessary. Stout *v.* Stevsenson, 4 N. J. 178.

48. Lane *v.* Levillian, 4 Ark. 76, 37 Am. Dec. 769. Where one guaranties the payment of a debt of a third person, or that in case of a default on the part of such third person a guarantor will undertake the performance himself, there is not, at common law, any obligation on the creditor to demand payment of the debtor primarily liable, but it is the duty of the guarantor by inquiry of his principal to ascertain whether payment has been made and if not to make it himself in pursuance of his contract to that effect. Lowe *v.* Beckwith, 14 B. Mon. (Ky.) 184, 58 Am. Dec. 659.

49. Voltz *v.* Harris, 40 Ill. 155; Roberts *v.* Hawkins, 70 Mich. 566, 38 N. W. 575; Wright *v.* Dyer, 48 Mo. 525; Clay *v.* Edgerton, 19 Ohio St. 549, 2 Am. Rep. 422.

50. Reed *v.* Cutts, 7 Me. 186, 22 Am. Dec. 184; Mann *v.* Eckford, 15 Wend. (N. Y.) 202. Where the payee of the note on assigning it before maturity guaranties its payment, demand upon the maker need not be shown as a condition precedent for holding the guarantor. Bowman *v.* Curd, 2 Bush (Ky.) 565.

51. Greely *v.* McCoy, 3 S. D. 218, 52 N. W. 1050, holding that where one guarantied the

C. Notice to Guarantor of Default of Principal Debtor — 1. In General. As to the necessity of giving notice to the guarantor of the default of the principal debtor, a different principle applies from that governing the question of making demand. The guaranty itself may rest upon a condition requiring notice, which condition may be express or implied,[52] or the guaranty may be continuing, or contingent upon the happening of some event peculiarly within the guarantee's knowledge; or the principal's default may be of such nature that it will not easily be discovered by the guarantor while known to the guarantee. In all such cases it is eminently fair to require the guarantee to promptly notify the guarantor of the principal's default.[53] And where the guaranty itself is conditional, where the contract in terms requires notice of default, or where the amount of the debt and time of its payment are uncertain, as in continuing guaranties, notice of default is required.[54] In some jurisdictions it is held that while

collection and payment of county warrants which were payable only upon presentation at the county treasurer's office such presentation was necessary to enforce liability against the guaranty.

52. *Alabama.*— Walker *v.* Forbes, 25 Ala. 139, 60 Am. Dec. 498.

Connecticut.— Sage *v.* Wilcox, 6 Conn. 81.

Indiana.— Ward *v.* Wilson, 100 Ind. 52, 50 Am. Rep. 763; Wills *v.* Ross, 77 Ind. 1, 40 Am. Rep. 279; Gaff *v.* Sims, 45 Ind. 262; Smith *v.* Bainbridge, 6 Blackf. 12.

Iowa.— Rockford Second Nat. Bank *v.* Gaylord, 34 Iowa 246.

Maine.— Globe Bank *v.* Small, 25 Me. 366; Howe *v.* Nickels, 22 Me. 175.

Massachusetts.—Vilal *v.* Richardson, 13 Allen 521; Whiton *v.* Mears, 11 Metc. 563, 45 Am. Dec. 233; Clark *v.* Remington, 11 Metc. 361; Talbot *v.* Gay, 18 Pick. 534.

Missouri.— Rankin *v.* Childs, 9 Mo. 673.

New Hampshire.— March *v.* Putney, 56 N. H. 34; McDougal *v.* Calef, 34 N. H. 534.

Ohio.— Bashford *v.* Shaw, 4 Ohio St. 263.

United States.— Davis *v.* Wells, 104 U. S. 159, 26 L. ed. 686.

See 25 Cent. Dig. tit. "Guaranty," § 77.

53. Taussig *v.* Reid, 145 Ill. 488, 32 N. E. 918, 36 Am. St. Rep. 504 [*reversing* 35 Ill. App. 439]. In Austin *v.* Richardson, 3 Call (Va.) 201, 2 Am. Dec. 543, the question as to the necessity of giving notice was made to turn upon the ability of the guarantor to perform the thing guarantied without receiving notice.

54. *Alabama.*— Lawson *v.* Townes, 2 Ala. 373.

Arkansas.— McCollum *v.* Cushing, 22 Ark. 540; Lane *v.* Levillian, 4 Ark. 76, 37 Am. Dec. 769; Ringgold *v.* Newkirk, 3 Ark. 96.

California.— Reeves *v.* Howe, 16 Cal. 152, where the guaranty was: "I guarantee the collection of the within note when due."

Delaware.— Mayberry *v.* Bainton, 2 Harr. 24.

Indiana.— Milroy *v.* Quinn, 69 Ind. 406, 35 Am. Rep. 227; Gaff *v.* Sims, 45 Ind. 262; Smith *v.* Bainbridge, 6 Blackf. 12. See also Furst, etc., Mfg. Co. *v.* Black, 111 Ind. 308, 12 N. E. 504.

Iowa.— Singer Mfg. Co. *v.* Littler, 56 Iowa 601, 9 N. W. 905; Davis Sewing Mach. Co. *v.* Mills, 55 Iowa 543, 8 N. W. 356.

Kentucky.— Kincheloe *v.* Holmes, 7 B. Mon. 5, 45 Am. Dec. 41.

Maine.— Howe *v.* Nichols, 22 Me. 175.

Massachusetts.— Clark *v.* Remington, 11 Metc. 361; Mussey *v.* Raynor, 22 Pick. 228.

New Hampshire.— March *v.* Putney, 56 N. H. 34; McDougal *v.* Calef, 34 N. H. 534; Beebe *v.* Dudley, 26 N. H. 249, 59 Am. Dec. 341.

New York.— Hernandez *v.* Stilwell, 7 Daly 360.

Ohio.— Bashford *v.* Shaw, 4 Ohio St. 263.

South Carolina.— State Bank *v.* Knotts, 10 Rich. 543, 70 Am. Dec. 1.

Tennessee.— Kannon *v.* Neely, 10 Humphr. 288.

Vermont.— Sandford *v.* Norton, 14 Vt. 228.

United States.— Davis *v.* Wells, 104 U. S. 159, 26 L. ed. 686; Douglass *v.* Reynolds, 7 Pet. 113, 8 L. ed. 626; Wildes *v.* Savage, 29 Fed. Cas. No. 17,653, 1 Story 22. To charge a guarantor on his principal's failure to deliver flour a reasonable notice of such failure must be given to the guarantor. Beebe *v.* Moore, 3 Fed. Cas. No. 1,202, 3 McLean 387.

A guaranty of annual dividends indorsed on certificates of stock is a collateral undertaking, and notice of non-payment is necessary to fix the liability of the guarantor. Hank *v.* Crittenden, 11 Fed. Cas. No. 6,024, 2 McLean 557.

By the law of Louisiana notice of non-payment to the guarantor is necessary in all contracts of guaranty. McGuire *v.* Newkirk, 6 Ark. 142.

Guarantor of letter of credit.— The guarantor of a letter of credit is entitled to notice of its dishonor in order to render him liable thereon, since his promise is only collateral. Lawson *v.* Townes, 2 Ala. 373; Smith *v.* Bainbridge, 6 Blackf. (Ind.) 12.

Guaranty of payment of non-negotiable note.— In Sutton *v.* Owen, 65 N. C. 123, it was held that the payee in a non-negotiable note who guarantied its payment on assigning it was entitled to notice of default of the maker.

Notice of acceptance of a guaranty, followed by notice, in due season, that the principal has made default, fixes the liability of the guarantor and gives an immediate right

a creditor is not bound to institute legal proceedings against a debtor, the exercise of due diligence requires the creditor to make demand and give notice of the default of the debtor.[55] With respect to the guaranty of the payment of debts to be created in the future, it is usually held that the guaranty is conditional and that the guarantor is entitled to notice of the default of the principal debtor.[56] So where the guaranty takes the form of a letter of credit by which the guarantor promises to be responsible for the payment of the price of goods which may be sold to the third person.[57] The purpose in giving notice is to inform the guarantor that he is relied upon for payment and to give him an opportunity to take the necessary steps to secure himself against the principal's default.[58] Where he already has this knowledge, or where the contract is such that the facts concerning the default lie equally within the knowledge of guarantee and guarantor, notice need not be given.[59]

2. In Case of Absolute Guaranties. The parties may expressly stipulate that the guaranty shall be unconditional.[60] And in the case of absolute guaranties[61] no condition being annexed to the contract, no condition is implied by law requiring notice to the guarantor of the default of the principal.[62] The rule is that demand and notice are not necessary to hold the guarantor of the payment of the debt liable if nothing remains to be done on the part of the guarantee to perfect

of action against him as an original debtor. Montgomery *v.* Kellogg, 43 Miss. 486, 5 Am. Rep. 508.

Where a contract binds one collaterally, and depends on the fault of another, notice of the default ought to be given in order to charge the person secondarily liable. Adcock *v.* Fleming, 19 N. C. 225.

Where a party gave a bond guarantying his own indorsement, it was held that the failure to give him due notice of the dishonor of the note constituted a good defense in an action on the bond. Ralston *v.* Bullitts, 3 Bibb (Ky.) 261.

Where one guaranties payment of a note "after final process," notice of non-payment after a failure to collect from the principal, by the use of the requisite remedy for collection, is necessary to charge the guarantor. Bashford *v.* Shaw, 4 Ohio St. 263.

55. McCollum *v.* Cushing, 22 Ark. 540; Ringgold *v.* Newkirk, 3 Ark. 96.

56. Hall *v.* Farmers' Bank, 65 S. W. 365, 23 Ky. L. Rep. 1450; Sullivan *v.* Field, 118 N. C. 358, 24 S. E. 735, which was a guaranty of payment of the price of any goods which might be sold to the principal.

The guaranty of the performance by a tenant of the covenants of the lease is held to be a conditional one entitling the guarantor to notice of the default of the principal. Ward *v.* Wilson, 100 Ind. 52, 50 Am. Rep. 763.

Upon a guaranty given of the price of goods to be paid by a bill due notice of the non-payment must be given both to the drawer and guarantor unless both drawer and accepter are bankrupts when the bill becomes due. Philips *v.* Astling, 2 Taunt. 206, 11 Rev. Rep. 547. *Compare* Van Wart *v.* Woolley, 3 B. & C. 439, 10 E. C. L. 204, 5 D. & R. 374, 3 L. J. K. B. O. S. 51, R. & M. 4, 21 E. C. L. 690.

Where defendant guarantied the prompt payment at maturity of any indebtedness which might be owing by a third person on account of goods to be purchased thereafter, it was held that the guaranty was conditional and that he was entitled to notice of the purchaser's failure to pay. Taussig *v.* Reid, (Ill. 1892) 30 N. E. 1032. In White *v.* Walker, 31 Ill. 422, which was the case of a guaranty by defendant of the payment of rent under a lease, the court said that as the fact of non-payment rested entirely with the landlord, it seemed reasonable that defendant should have notice of the default so that he might pay what was due without being harassed by a suit and so that he might procure indemnity. But in German Sav. Bank *v.* Drake Roofing Co., 112 Iowa 184, 83 N. W. 960, 84 Am. St. Rep. 335, 51 L. R. A. 758, which was an action on a guaranty of the payment of any indebtedness which might accrue to the bank from a certain principal, it was held that notice of non-payment was not essential to a recovery. And where defendant guarantied the payment of all sums of money that a certain person might obtain from plaintiff on or before a certain date, not exceeding a certain sum at any one time, it was held that no notice of the principal's default was necessary. Newbury Bank *v.* Sinclair, 60 N. H. 100, 49 Am. Rep. 307.

57. Smith *v.* Bainbridge, 6 Blackf. (Ind.) 12, holding that the promise in such case is only collateral.

58. Norton *v.* Eastman, 4 Me. 521; Babcock *v.* Bryan, 12 Pick. (Mass.) 133; Beebe *v.* Dudley, 26 N. H. 249, 59 Am. Dec. 341; Follmer *v.* Dale, 9 Pa. St. 83.

59. Lent *v.* Padelford, 10 Mass. 230, 6 Am. Dec. 119; Baker *v.* Kelly, 41 Miss. 696, 93 Am. Dec. 274; Train *v.* Jones, 11 Vt. 444.

60. Wells *v.* Davis, 2 Utah 411.

61. Breed *v.* Hillhouse, 7 Conn. 522; Cobb *v.* Little, 2 Me. 261, 11 Am. Dec. 72; Noyes *v.* Nichols, 28 Vt. 159; Train *v.* Jones, 11 Vt. 444. To the same effect see Wright *v.* Dyer, 48 Mo. 525.

62. *Connecticut.*— Sage *v.* Wilcox, 6 Conn. 81.

his rights as against the principal; in such a case his undertaking is not treated as a collateral liability but is a primary and positive agreement;[63] and the contract of the guarantor is commensurate with that of the principal, and the breach of the principal's contract *ipso facto* imposes upon him a complete liability.[64]

Georgia.— Rogers *v.* Burr, 97 Ga. 10, 25 S. E. 339.

Massachusetts.— South Reading Nat. Bank *v.* Sawyer, 177 Mass. 490, 59 N. E. 76, 83 Am. St. Rep. 292; Shepard, etc., Lumber Co. *v.* Eldridge, 171 Mass. 516, 51 N. E. 9, 68 Am. St. Rep. 446, 41 L. R. A. 617.

New Hampshire.— Beebe *v.* Dudley, 26 N. H. 249, 59 Am. Dec. 341.

New York.— Curtis *v.* Brown, 2 Barb. 51; Butler *v.* Wright, 20 Johns. 367.

Tennessee.— See Williams *v.* Miller, 2 Lea 405, where the court says that the guarantor may impose such terms as he chooses in order to fix his liability and that if any notice of non-performance by the principal debtor is desired, the guarantor should stipulate for it. These remarks, however, were not necessary to a decision of the point in hand.

England.— Patent Safety Gun Cotton Co. *v.* Wilson, 49 L. J. Q. B. 713.

63. Braddock *v.* Wertheimer, 68 Ark. 423, 59 S. W. 761.

Rule applied and illustrated.— It is not necessary to give notice to one who guaranties the performance by the lessee of the covenants of a lease that the lessee has made default in order to fix the liability of the guarantor. Obermann Brewing Co. *v.* Ohlerking, 33 Ill. App. 26. In an action on a guaranty it appeared that defendants in writing guarantied that M would deliver to plaintiff five hundred cases of tomatoes, according to his written contract with him. On the strength of the guaranty, plaintiff paid M the price of the tomatoes. It was held that there was no obligation on plaintiff to notify defendants of the default of M in order to make defendants liable. Heyman *v.* Dooley, 77 Md. 162, 26 Atl. 117, 20 L. R. A. 257. An indorsee guarantied the note before transferring it, for value, to plaintiff. Plaintiff did not give notice of non-payment either to a prior indorser or the guarantor. It was held, in action on the guaranty, that, although the prior indorser was discharged by the omission to give notice, the guarantor was still liable. Deck *v.* Works, 57 How. Pr. (N. Y.) 292. Where one warrants that A will pay according to his agreement, the guarantor is not entitled to notice of default. Smith *v.* Ide, 3 Vt. 290.

An absolute guarantor of a certain debt not due at the time the guaranty is executed becomes liable to an action on his guaranty with his rights clearly fixed as soon as the debt becomes due and default is made thereon. Gage *v.* Mechanics' Nat. Bank, 79 Ill. 62; Dickerson *v.* Derrickson, 39 Ill. 574; Lent *v.* Padelford, 10 Mass. 230, 6 Am. Dec. 119; Evans *v.* Bell, 45 Tex. 553; Day *v.* Elmore, 4 Wis. 190. And where the debt has become due and absolute when the guaranty is given, the guarantor's liability is not conditional, but absolute. Lane *v.* Levillian, 4 Ark. 76, 37 Am. Dec. 769; Allen *v.* Rightmere, 20 Johns. (N. Y.) 365, 11 Am. Dec. 288.

However, in some jurisdictions, it has been held that in cases of a guaranty of the payment of the obligation of another, notice of default should be given to the guarantor unless facts exist which dispense with such notice. Virden *v.* Ellsworth, 15 Ind. 144; Cox *v.* Brown, 51 N. C. 100.

64. *Alabama.*— Donley *v.* Camp, 22 Ala. 659, 58 Am. Dec. 274.

Arkansas.— Logan *v.* Lee, 10 Ark. 585.

Connecticut.— City Sav. Bank *v.* Hopson, 53 Conn. 453, 5 Atl. 601; Breed *v.* Hillhouse, 7 Conn. 523; Williams *v.* Granger, 4 Day 444.

Illinois.— Hooker *v.* Gooding, 86 Ill. 60; Voltz *v.* Harris, 40 Ill. 155; Dickerson *v.* Derrickson, 39 Ill. 574; Pool *v.* Roberts, 19 Ill. App. 438. In Gage *v.* Lewis, 68 Ill. 604, which involved a bond of indemnity on which defendants were security, the court said that it is a general rule that where one guaranties the act of another his liability is commensurate with that of his principal and he is no more entitled to notice of the default than the latter.

Indiana.— Nading *v.* McGregor, 121 Ind. 465, 23 N. E. 283, 6 L. R. A. 686; Kline *v.* Raymond, 70 Ind. 271; Taylor *v.* Taylor, 64 Ind. 356.

Iowa.— Claflin *v.* Reese, 54 Iowa 544, 6 N. W. 729; Peddicord *v.* Whittam, 9 Iowa 471.

Kansas.— Brenner *v.* Weaver, 1 Kan. 488, 83 Am. Dec. 444.

Maine.— Blanchard *v.* Wood, 26 Me. 358.

Massachusetts.— Parkman *v.* Brewster, 15 Gray 271.

Michigan.— Roberts *v.* Hawkins, 70 Mich. 566, 38 N. W. 575.

Mississippi.— Baker *v.* Kelly, 41 Miss. 696, 93 Am. Dec. 274; Tatum *v.* Bonner, 27 Miss. 760; Matthews *v.* Chrisman, 12 Sm. & M. 595, 51 Am. Dec. 124; Thrasher *v.* Ely, 2 Sm. & M. 139.

Missouri.— Barker *v.* Scudder, 56 Mo. 272; Wright *v.* Dyer, 48 Mo. 525.

New Hampshire.— Newbury Bank *v.* Sinclair, 60 N. H. 100, 49 Am. Rep. 307; Dearborn *v.* Sawyer, 59 N. H. 95; March *v.* Putney, 56 N. H. 34; Batchelder *v.* Wendell, 36 N. H. 204; Simons *v.* Steele, 36 N. H. 73; Beebe *v.* Dudley, 26 N. H. 249, 59 Am. Dec. 341.

New Jersey.— Sibley *v.* Stull, 15 N. J. L. 332.

New York.— Curtis *v.* Brown, 2 Barb. 51; Cordier *v.* Thompson, 8 Daly 172; Van Rensselaer *v.* Miller, Lalor 237; Hough *v.* Gray, 19 Wend. 202; Mann *v.* Eckford, 15 Wend. 502; Butler *v.* Wright, 20 Johns. 367; Allen *v.* Rightmere, 20 Johns. 365, 11 Am. Dec.

While in some jurisdictions it has been held that the guarantor of the payment of a note is entitled to notice of the default of the maker,[65] it is usually held that a guaranty of payment,[66] of a specific sum within a specified time,[67] is an absolute guaranty within the meaning of the rule. And with respect to their absolute nature guaranties of performance are placed upon the same ground as guaranties of payment.[68] In some states the statutes expressly provide that a guarantor of

288; Deane *v.* Higgins, 4 N. Y. Leg. Obs. 423.

Ohio.— Castle *v.* Rickly, 44 Ohio St. 490, 9 N. E. 136, 56 Am. Rep. 839; Clay *v.* Edgerton, 19 Ohio St. 549, 2 Am. Rep. 422; Reed *v.* Evans, 17 Ohio 128.

South Carolina.—Carroll County Sav. Bank *v.* Strother, 28 S. C. 504, 6 S. E. 313; Foster *v.* Tolleson, 13 Rich. 31; State Bank *v.* Hammond, 1 Rich. 281; Carson *v.* Hill, 1 McMull. 76.

Tennessee.— Hunter *v.* Dickinson, 10 Humphr. 37; Taylor *v.* Ross, 3 Yerg. 330.

Vermont.— Partridge *v.* Davis, 20 Vt. 499; Train *v.* Jones, 11 Vt. 444.

United States.— Evans *v.* Cleveland, etc., R. Co., 8 Fed. Cas. No. 4,557, 5 Phila. (Pa.) 512. *Contra,* Lewis *v.* Brewster, 15 Fed. Cas. No. 8,318, 2 McLean 21.

See 25 Cent. Dig. tit. "Guaranty," §§ 77, 78.

65. Erwin *v.* Lamborn, 1 Harr. (Del.) 125.

66. *Alabama.*— Donley *v.* Camp, 22 Ala. 659, 58 Am. Dec. 274.

Arkansas.— Lane *v.* Levillian, 4 Ark. 76, 37 Am. Dec. 769.

Connecticut.— Tyler *v.* Waddington, 58 Conn. 375, 20 Atl. 335, 8 L. R. A. 657; City Sav. Bank *v.* Hopson, 53 Conn. 453, 5 Atl. 601; Clark *v.* Merriam, 25 Conn. 576; Breed *v.* Hillhouse, 7 Conn. 523; Beckwith *v.* Angell, 6 Conn. 315.

Illinois.— Gage *v.* Lewis, 68 Ill. 604; Voltz *v.* Harris, 40 Ill. 155; Dickerson *v.* Derrickson, 39 Ill. 574; J. Obermand Brewing Co. *v.* Ohlerking, 33 Ill. App. 26.

Indiana.—Nading *v.* McGregor, 121 Ind. 465, 23 N. E. 283, 6 L. R. A. 686; Frash *v.* Polk, 67 Ind. 55; Leonard *v.* Shirts, 33 Ind. 214.

Iowa.— Griffin *v.* Seymour, 15 Iowa 30, 83 Am. Dec. 396, holding that where one by a separate written instrument guaranties the payment of a county warrant he is not entitled to notice of its presentation or of non-payment, his liability being absolute.

Maine.— Cobb *v.* Little, 2 Me. 261, 11 Am. Dec. 72.

Massachusetts.— Vinal *v.* Richardson, 13 Allen 521; Parkman *v.* Brewster, 15 Gray 271; Salisbury *v.* Hale, 12 Pick. 416.

Minnesota.— Hungerford *v.* O'Brien, 37 Minn. 306, 34 N. W. 161.

Mississippi.— Matthews *v.* Chrisman, 12 Sm. & M. 595, 51 Am. Dec. 124.

Missouri.— Singer Mfg. Co. *v.* Hester, 71 Mo. 91; Barker *v.* Scudder, 56 Mo. 272.

New Hampshire.— Simons *v.* Steele, 36 N. H. 73, where it was said that notice of non-payment or non-performance by the principal debtor is not necessary to charge the absolute guarantor, although it may generally be advisable to give him notice in order to rebut any presumption of laches on the part of the creditor. A guarantor in all ordinary contracts of liability warrants the solvency of his principal and the payment of the debt in case of his default, and where his undertaking to pay is absolute notice to him of the failure of his principal to pay is unnecessary. McDougal *v.* Calef, 34 N. H. 534.

New York.— Cordier *v.* Thompson, 8 Daly 172; Douglass *v.* Howland, 24 Wend. 35; Hough *v.* Gray, 19 Wend. 202; Mann *v.* Eckford, 15 Wend. 502; Allen *v.* Rightmere, 20 Johns. 365, 11 Am. Dec. 288.

Ohio.— Castle *v.* Rickley, 44 Ohio St. 490, 9 N. E. 136, 58 Am. Rep. 839; Clay *v.* Edgerton, 19 Ohio St. 549, 2 Am. Rep. 422; Reed *v.* Evans, 17 Ohio 128.

Oregon.— Weiler *v.* Henarie, 15 Oreg. 28, 13 Pac. 614.

Pennsylvania.—Roberts *v.* Riddle, 79 Pa. St. 468; Overton *v.* Tracey, 14 Serg. & R. 311.

South Carolina.—Carroll County Sav. Bank *v.* Strother, 28 S. C. 504, 6 S. E. 313; Monro *v.* Hill, 25 S. C. 476.

Vermont.— Woodstock Bank *v.* Downer, 27 Vt. 539; Train *v.* Jones, 11 Vt. 444; Smith *v.* Ide, 3 Vt. 290.

See 25 Cent. Dig. tit. "Guaranty," §§ 77, 78.

But in Louisiana notice of default is necessary to charge the guarantor. McGuire *v.* Newkirk, 6 Ark. 142.

67. Dickerson *v.* Derrickson, 39 Ill. 574; Welch *v.* Walsh, 177 Mass. 555, 59 N. E. 440, 83 Am. St. Rep. 302, 52 L. R. A. 782.

Where a guaranty is absolute in its terms and definite as to its amount and extent no notice to the guarantor is necessary. Carson *v.* Hill, 1 McMull. (S. C.) 76.

Where one on assigning an order for the payment of a specific sum of money guaranties its payment within a definite time he is not entitled to notice of its non-payment. Gammell *v.* Parramore, 58 Ga. 54.

68. Hubbard *v.* Haley, 96 Wis. 578, 71 N. W. 1036, holding that it is the business of the guarantor to inform himself as to the conduct of his principal. In the case of the guaranty of "the full, faithful, and complete performance" of a contract, the creditor need not make demand upon the guarantor before commencing suit against him. Kenney *v.* Masemann, 14 Daly (N. Y.) 379. Where one party agrees to account and a third person covenants that the party thus agreeing shall perform the agreement, an action lies against the covenantor or guarantor, without notice of the non-performance of the principal. Douglass *v.* Howland, 24 Wend. (N. Y.) 35. But see Gaff *v.* Sims, 45 Ind. 262, where the guarantor of the performance of a contract of another was held

payment or performance is liable to the guarantee immediately upon the default of the principal and without demand or notice,[69] and in most jurisdictions the fact that the guarantor has suffered damage from the failure to give notice is not material to the question of his liability in the case of an absolute guaranty.[70]

3. Application to Non-Commercial Contracts of Rule as to Negotiable Paper. The rule in the case of negotiable paper as to demand and notice has but a feeble and qualified application to the guaranty of the performance of non-commercial contracts.[71]

4. Failure to Give Notice of Default Where Guarantor Is Entitled Thereto — a. Effect in General. An unreasonable delay in giving notice of non-performance by the principal debtor, or a failure to give it altogether, is not of itself a bar to recovery upon the guaranty;[72] and the failure to give notice, although resulting in damage to the guarantor, does not deprive the guarantee of his right of action. In such case the guarantor may set up by way of cross complaint any damage he may have sustained,[73] the burden being upon the guarantor to

entitled to notice of default of the principal debtor; and no notice having been given and the principal debtor remaining solvent for eighteen months after the maturity of the contract and before suit, the guarantor was discharged.

69. Chafoin *v.* Rich, 77 Cal. 476, 19 Pac. 882.

70. Welch *v.* Walsh, 177 Mass. 555, 59 N. E. 440, 83 Am. St. Rep. 302, 52 L. R. A. 782, holding that where one guarantied the payment of rent the fact that the landlord did not make demand upon the guarantor for more than twenty-three months and that the guarantor suffered from not knowing that the rent was not paid was no defense in the action on the guaranty. *Compare* Claflin *v.* Reese, 54 Iowa 544, 5 N. W. 729, holding that where one assigned a mortgage and guarantied its payment, he was not entitled to notice of non-payment unless he was prejudiced by the failure to give notice. Notice of non-payment was not required in case of absolute guaranty of note, although maker was solvent at time of maturity of note and subsequently became insolvent. Roberts *v.* Hawkins, 70 Mich. 566, 38 N. W. 575.

In some jurisdictions, however, an absolute guarantor if injured by the failure to give him notice of the default of the principal debtor may show such fact as a defense at least *pro tanto*. Simons *v.* Steele, 36 N. H. 73. In the case of an absolute guaranty if any loss has resulted to the guarantor by reason of any laches on the part of the guarantor or failure to give notice such laches or failure, if it can be made available at all, must be asserted by way of defense on the part of the guarantor. Clay *v.* Edgerton, 19 Ohio St. 549, 2 Am. Rep. 422.

71. Bushnell *v.* Church, 15 Conn. 406; Peddicord *v.* Whittam, 9 Iowa 471, where it was held that one who guaranties, on the assignment of a non-negotiable note, that it shall be paid is not entitled to notice of default in payment. And in jurisdictions where one writing his name in blank upon the back of a negotiable instrument would be held as an indorser such an indorsement on the back of a non-negotiable instrument imposes an absolute liability upon the writer who is not entitled to notice of default. Ford *v.* Mitchell, 15 Wis. 334. To same effect see San Diego First Nat. Bank *v.* Babcock, 94 Cal. 96, 29 Pac. 415, 28 Am. St. Rep. 94. And in some jurisdictions it has been held that where a stranger guaranties a non-negotiable note, although due diligence requires the institution of a suit against the maker on the maturity of the note, the guarantor is not entitled to notice of non-payment. Clark *v.* Merriam, 25 Conn. 576.

In Iowa under the code a guarantor of non-negotiable written contract is not entitled to notice before a suit brought. Henderson *v.* Booth, 11 Iowa 212.

Where the indorsement upon the back of a non-negotiable instrument was as follows, "I guaranty the within," it was held that the guarantor was not entitled to notice of the default of the maker. Woolley *v.* Sergeant, 8 N. J. L. 262, 14 Am. Dec. 419. Where one by writing indorsed upon the bond of a third person guaranties its payment he is not entitled to notice of non-payment. State Bank *v.* Hammond, 1 Rich. (S. C.) 281.

Where the payee named in a sealed instrument after its maturity assigns it, guarantying its payment, he is not entitled to notice of non-payment. Foster *v.* Tolleson, 13 Rich. (S. C.) 31.

72. *Alabama.*— Walker *v.* Forbes, 25 Ala. 139, 60 Am. Dec. 498.

District of Columbia.— Hughes *v.* Heyman, 4 App. Cas. 444.

Indiana.— Ward *v.* Wilson, 100 Ind. 52, 50 Am. Rep. 763.

Iowa.— Burns *v.* Cole, 117 Iowa 262, 90 N. W. 731.

New York.— Clark *v.* Burdett, 2 Hall 197, guaranty of the payment of the price of goods to be furnished to the principal.

Utah.— Wells *v.* Davis, 2 Utah 411.

Vermont.— Keith *v.* Dwinnell, 38 Vt. 286.

See 25 Cent. Dig. tit. "Guaranty," § 77.

73. *Indiana.*— Cole *v.* Merchants' Bank, 60 Ind. 350.

Iowa.— Sibley *v.* Van Horn, 13 Iowa 209; Marvin *v.* Adamson, 11 Iowa 371.

show, as matters of defense, failure to give notice and that he has been injured by such failure.[74]

b. Excuse For Not Giving. Where the principal is insolvent at the time of default and continues so, or where other circumstances exist which would cause notice to be of no advantage to the guarantor, notice is excused unless specially provided for in the contract.[75]

5. Guaranty of Payment of Commercial Paper — a. In General. In some jurisdictions the rights and liabilities of guarantors of commercial paper have been tested by the rules applicable to commercial paper;[76] and it has been held that while the strictness required in giving notice to indorsers does not prevail with respect to persons guarantying the payment of notes or bills by a separate instrument,[77] they are entitled to notice of non-payment within a reasonable

Kansas.— Brenner *v.* Weaver, 1 Kan. 488, 83 Am. Dec. 444.

Michigan.— Farmers', etc., Bank *v.* Kercheval, 2 Mich. 504.

Minnesota.— Brackett *v.* Rich, 23 Minn. 485, 23 Am. Rep. 703.

New Hampshire.— McDougal *v.* Calef, 34 N. H. 534.

North Carolina.— Salem Mfg. Co. *v.* Brower, 49 N. C. 429.

Pennsylvania.—Overton *v.* Tracey, 14 Serg. & R. 311.

South Carolina.— State Bank *v.* Knotts, 10 Rich. 543, 70 Am. Dec. 234.

Vermont.— Stevens *v.* Gibson, 69 Vt. 142, 37 Atl. 244; Bull *v.* Bliss, 30 Vt. 127.

United States.— Reynolds *v.* Douglass, 12 Pet. 497, 9 L. ed. 1171.

Extent of release.— The omission to make presentment and give notice only releases the guarantor of a note to the extent of the injury thereby sustained. Pendexter *v.* Vernon, 9 Humphr. (Tenn.) 84.

Matter of defense.— The failure to give notice of default except in cases of the guaranty of commercial paper covered by the law merchant is a matter of defense, and resulting damages must concur with such failure in order to work a discharge of the guarantor. La Rose *v.* Logansport Nat. Bank, 102 Ind. 332, 1 N. E. 805.

74. Stanley *v.* Stanley, 112 Ind. 143, 13 N. E. 261; Ward *v.* Wilson, 100 Ind. 52, 50 Am. Rep. 763.

75. *Alabama.*— Walker *v.* Forbes, 31 Ala. 9, 25 Ala. 139, 60 Am. Dec. 498.

Connecticut.—Bushnell *v.* Church, 15 Conn. 406.

Delaware.— Mayberry *v.* Bainton, 2 Harr. 24; Erwin *v.* Lamborn, 1 Harr. 125.

District of Columbia.— Hughes *v.* Heyman, 4 App. Cas. 444.

Illinois.— Mamerow *v.* National Lead Co., 206 Ill. 626, 69 N. E. 504, 99 Am. St. Rep. 196.

Indiana.— Furst, etc., Mfg. Co. *v.* Black, 111 Ind. 308, 12 N. E. 504; Ward *v.* Wilson, 100 Ind. 52, 50 Am. Rep. 763; McMillan *v.* Bull's Head Bank, 32 Ind. 11, 2 Am. Rep. 323.

Iowa.— Weller *v.* Hawes, 19 Iowa 443; Knight *v.* Dunsmore, 12 Iowa 35; Fear *v.* Dunlap, 1 Greene 331.

Maine.— Howe *v.* Nickels, 22 Me. 175; Skofield *v.* Haley, 22 Me. 164, 38 Am. Dec. 307; Tuckerman *v.* French, 7 Me. 115.

Minnesota.— Winnebago Paper Mills *v.* Travis, 56 Minn. 480, 58 N. W. 36.

Mississippi.— Davis Sewing-Mach. Co. *v.* Rosenbaum, (1894) 16 So. 340.

New Hampshire.— Dearborn *v.* Sawyer, 59 N. H. 95; March *v.* Putney, 56 N. H. 34; Beebe *v.* Dudley, 26 N. H. 249, 59 Am. Dec. 341.

North Carolina.— Sullivan *v.* Field, 118 N. C. 358, 24 S. E. 735.

Ohio.— Bashford *v.* Shaw, 4 Ohio St. 263.

Pennsylvania.— Coe *v.* Buehler, 110 Pa. St. 366, 5 Atl. 20; Janes *v.* Scott, 59 Pa. St. 178, 98 Am. Dec. 328; Fegenbush *v.* Lang, 28 Pa. St. 193; Gibbs *v.* Cannon, 9 Serg. & R. 198, 11 Am. Dec. 699.

Tennessee.— Woodson *v.* Moody, 4 Humphr. 303.

Texas.— Wilkins *v.* Carter, 84 Tex. 438, 19 S. W. 997.

United States.— Rhett *v.* Poe, 2 How. 457, 11 L. ed. 338; Reynolds *v.* Douglass, 12 Pet. 497, 9 L. ed. 1171; Wildes *v.* Savage, 29 Fed. Cas. No. 17,653, 1 Story 22. If the principal debtor be insolvent at the time when the payment becomes due, notice is not necessary, unless some damage or loss can be shown to have accrued to the guarantor in consequence of his not receiving such a notice. And in no instance, in case of a guaranty, will the guarantor be exempt from liability for want of the notice, unless loss or damage is shown to have accrued as a consequence. Louisville Mfg. Co. *v.* Welch, 10 How. 461, 13 L. ed. 497.

England.— Holbrow *v.* Wilkins, 1 B. & C. 10, 2 D. & R. 59, 1 L. J. K. B. O. S. 11, 25 Rev. Rep. 285, 8 E. C. L. 5.

See 25 Cent. Dig. tit. "Guaranty," § 77.

Where the undertaking of a guarantor is collateral, and not absolute, notice must be given in a reasonable time, or it must appear that the guarantor has not been injured by want of notice. Beebe *v.* Dudley, 26 N. H. 249, 59 Am. Dec. 341.

76. See, generally, Commercial Paper.

77. It has been held in Nevada that reasonable notice of a note or bill is all that the guarantor is entitled to, and that he will not be discharged by a failure of the holder to give strict notice of non-payment. Van

time,[78] and that the guarantor is discharged by failure to give such notice unless the principal debtor is insolvent at the maturity of the note or bill.[79] In the case of commercial paper demand and notice in order to fix the liability of one who, writing his name as guarantor, is held to have assumed the liability of an indorser, are required by an arbitrary rule of the law merchant.[80] In some states the statute requires notice of non-payment to be given to the guarantor of a note who is not an original party thereto.[81] But where one writes upon the back of a promissory note an express contract of guaranty the courts in many jurisdictions treat the contract as one of ordinary guaranty, and the question of the necessity of notice

Doren *v.* Tjader, 1 Nev. 322, 90 Am. Dec. 498.

78. Peck *v.* Frick, 10 Iowa 193, 74 Am. Dec. 384; Grice *v.* Ricks, 14 N. C. 62; Carroll County Sav. Bank *v.* Strother, 28 S. C. 504, 6 S. E. 313; Foote *v.* Brown, 9 Fed. Cas. No. 4,909, 2 McLean 369. Where the payee indorses on a note a guaranty of payment for "value received," and subsequently indorses it for transfer, notice of non-payment is necessary. Barrett *v.* May, 2 Bailey (S. C.) 1.

Under the rules of the common law where one to whom a negotiable note has been indorsed himself transfers the note, guarantying its payment, he is entitled to notice within a reasonable time of the non-payment of the note by the maker, and will be discharged from liability if he can show actual loss sustained by him on account of or by reason of lack of notice. Greene *v.* Thompson, 33 Iowa 293. And in Globe Bank *v.* Small, 25 Me. 366, a guaranty of the punctual payment by accepters of a bill was held to require notice of non-payment to the guarantor within a reasonable time. In this case the court distinguished Cobb *v.* Little, 2 Me. 261, 11 Am. Dec. 72, on the ground that the guaranty in that case fixed a time for payment different from that named in the note whose payment was guarantied.

79. Talbot *v.* Gay, 18 Pick. (Mass.) 534; Oxford Bank *v.* Haynes, 8 Pick. (Mass.) 423, 19 Am. Dec. 334; Reynolds *v.* Douglass, 12 Pet. (U. S.) 497, 9 L. ed. 1171; Lewis *v.* Brewster, 15 Fed. Cas. No. 8,318, 2 McLean 21.

In the case of a guaranty of the payment of a promissory note the rule seems to be that unless a demand be made upon the principal debtor within a reasonable time and notice given in case of non-payment, the guarantor is discharged to the extent that he may be damaged by the delay. Newton Wagon Co. *v.* Diers, 10 Nebr. 284, 4 N. W. 995.

In Massachusetts it has been held ever since the case of Oxford Bank *v.* Haynes, 8 Pick. 433, 19 Am. Dec. 334, that the guarantor of a note is entitled to notice of the default of the maker and if he is damnified by not receiving it within a reasonable time he is discharged. In Whiton *v.* Mears, 11 Metc. 563, 45 Am. Dec. 233, it was held that where an intermediate transferee indorses a note in blank, thus assuming the liability of a guarantor, he is discharged by failure to give him notice of the non-payment of the note if the maker was solvent when the note matured and that the burden of proving insolvency rests upon the one seeking to enforce the guaranty. In Welch *v.* Walsh, 177 Mass. 555, 59 N. E. 440, 83 Am. St. Rep. 302, 52 L. R. A. 782, the court admits, however, that the weight of authority is against the Massachusetts rule.

80. Ward *v.* Wilson, 100 Ind. 52, 50 Am. Rep. 763. Where one indorsing a guaranty upon a note is held as an indorser, one suing upon the note must prove its presentment to the maker and notice of non-payment to the one so indorsing the guaranty. Pattillo *v.* Alexander, 96 Ga. 60, 22 S. E. 646, 29 L. R. A. 616. Where the payee of a note before its maturity on transferring it indorsed upon it a guaranty of payment for value received, the indorsement was held to be within the custom of merchants and not a merely commercial guaranty. Barrett *v.* May, 2 Bailey (S. C.) 1.

Where defendant indorsed his name in blank on a note and afterward the holder wrote over his signature a promise to pay the note according to its tenor, defendant was held entitled to notice of non-payment. Greene *v.* Dodge, 2 Ohio 430.

In California before the adoption of the code, it was held that one who signed his name to a negotiable instrument as a guarantor had the rights of an indorser and must have notice of presentment and non-payment. Riggs *v.* Waldo, 2 Cal. 485, 56 Am. Dec. 356. See also Chafoin *v.* Rich, 77 Cal. 476, 19 Pac. 882; Crooks *v.* Tully, 50 Cal. 254; Jones *v.* Goodwin, 39 Cal. 493, 2 Am. Rep. 473; Geiger *v.* Clark, 13 Cal. 579. And that failure to give him due notice of the dishonor of a bill or note would release him from liability regardless of the question as to whether he sustained any loss from lack of notice. Crooks *v.* Tully, 50 Cal. 254; Geiger *v.* Clark, 13 Cal. 579; Vance *v.* Collins, 6 Cal. 435; Pierce *v.* Kennedy, 5 Cal. 138; Lightstone *v.* Laurencel, 4 Cal. 277; Riggs *v.* Waldo, 2 Cal. 485, 56 Am. Dec. 356. Guarantors who are in effect indorsers are, by the present Civ. Code, § 2807, entitled to notice as other indorsers. Fessenden *v.* Summers, 62 Cal. 484. See COMMERCIAL PAPER.

81. Knight *v.* Dunsmore, 12 Iowa 35.

In Iowa under the code the blank indorsement of an instrument for the payment of money by a person not a payee, indorsee, or assignee thereof is deemed a guaranty of the

of default then depends upon whether the guaranty is to be regarded as absolute or conditional.[82]

performance of the contract, and to charge the guarantor notice of non-payment by the principal must be given within a reasonable time. Picket *v.* Hawes, 14 Iowa 460; Sabin *v.* Harris, 12 Iowa 87.

82. See cases cited *infra*, this note; and *supra*, VII, C, 1, 2.

The law merchant which defines the terms of the implied contract created by the indorsement and delivery of commercial paper and the consequent rights and obligations of the parties thereto can have little or no application to the case of a special assignment and guaranty in which the terms of the contract are fully expressed. Forest *v.* Stewart, 14 Ohio St. 246.

Where the guaranty of the payment of a note is absolute it is the duty of the guarantor upon the maturity of the note to go to the holder and pay it and this without demand or notice. City Sav. Bank *v.* Hopson, 53 Conn. 453, 5 Atl. 601. One who purchases an unindorsed negotiable note and afterward writes his name with the word "holden" upon the back of it before its maturity and sells it for value is absolutely liable as a guarantor. Irish *v.* Cutter, 31 Me. 536. And where the payee of a note makes such an indorsement before the maturity of the note, he can be held without demand or notice (Blanchard *v.* Wood, 26 Me. 358), whether the note at the time of the indorsement was past due being immaterial. Where an absolute guaranty is indorsed on a note payable to B or bearer at the time of the making thereof, an assignee of the payee may maintain an action in his own name against the guarantor without showing a demand of payment of the maker and notice of non-payment. Hough *v.* Gray, 19 Wend. (N. Y.) 202. In Parkman *v.* Brewster, 15 Gray (Mass.) 271, in which a third person indorsed upon the margin of a note, before maturity, a writing guarantying its payment, the court held that in the absence of any unreasonable delay in proceeding against the guarantor on the default of the maker, it was not necessary to notify the guarantor of such default.

Illustrations of absolute guaranty.— In the following cases the indorser was held to have given an absolute guaranty of the payment of the paper upon dishonor, and that therefore notice to him was unnecessary. Beardsley *v.* Hawes, 71 Conn. 39, 40 Atl. 1043 ("we sign the above note for security for payment thereof which we hereby guarantee"); Williams *v.* Granger, 4 Day (Conn.) 444 (payment on a day certain if the note was not then paid by the maker); Gage *v.* Mechanics' Nat. Bank, 79 Ill. 62 (payment at maturity); Gilligham *v.* Boardman, 29 Me. 79 (to be accountable for the note if it could not be collected of the maker "after they have obtained execution against him"); True *v.* Harding, 12 Me. 193 (payment out of collateral received); Baker *v.* Kelly, 41 Miss. 696, 704, 93 Am. Dec. 274 ("I assign the within to Samuel D. Kelly for value received, and bind myself to paying it promptly after maturity, if not paid by the drawers at maturity"); Furber *v.* Caverly, 42 N. H. 74 ("Alfred Caverly accountable"); Clay *v.* Edgerton, 19 Ohio St. 549, 2 Am. Rep. 422 (guaranty by stranger before maturity of note); Foster *v.* Barney, 3 Vt. 60 ("I warrant the within note due and collectable"). So notice is not required by a writing upon the back of a note, "For a valuable consideration I hereby guaranty the payment of the within note." Singer Mfg. Co. *v.* Hester, 71 Mo. 91; Davis Sewing Mach. Co. *v.* Jones, 61 Mo. 409; Barker *v.* Scudder, 56 Mo. 272. To the same effect see Townsend *v.* Cowles, 31 Ala. 428; Huff *v.* Slife, 25 Nebr. 448, 41 N. W. 289, 13 Am. St. Rep. 497. See also Farrer *v.* People's Trust Co., (Kan. 1901) 64 Pac. 1031 ("for value received, I hereby guaranty the payment of the within note, and waive demand and notice of protest"); Central Inv. Co. *v.* Miles, 56 Nebr. 272, 76 N. W. 566, 71 Am. St. Rep. 681 ("I assign and guaranty the within note for value received"). An indorsement, "For value received we hereby guarantee the prompt payment of the within note" has been held to impose the liability of sureties. Iron City Nat. Bank *v.* Rafferty, 207 Pa. St. 258, 56 Atl. 445. So where after the maturity of a note strangers to it indorsed upon it a writing as follows: "We bind ourselves to see the within note paid," the promise was held to be absolute and enforceable without demand upon the principal debtor or notice of his default. Taylor *v.* Ross, 3 Yerg. (Tenn.) 330. A guaranty to pay a note when due if the principal debtors do not is absolute, and does not require notice to charge the guarantor. Stevens *v.* Gibson, 69 Vt. 142, 37 Atl. 244. A promise written upon the back of a note by a stranger to it to secure the note was held to be a promise to pay according to its tenor and effect and to require no notice of default. True *v.* Harding, 12 Me. 193. And in Ewen *v.* Wilbor, 99 Ill. App. 132, it was held that one who became a guarantor by simply writing his name across the back of a note was not entitled to notice of the default of the maker.

But in Ohio it has been held that where one not a party to a note guaranties its payment, demand of payment must be made upon the maker when the note becomes due and notice given to the guarantor before he can be sued. Parker *v.* Riddle, 11 Ohio 102, one judge holding that not merely notice was necessary but that the maker of the note should have been prosecuted to insolvency. And in that state it has been held that one who indorses on a note a writing binding himself as security "for the payment of the within note according to the tenor and effect thereof," enters into a conditional liability and that payment must be demanded of the maker of

b. Express Guaranty of Payment. In the absence of any statute regulating the subject it is now held in most jurisdictions that an express guaranty of payment, whether by a separate instrument[83] or indorsed upon the note itself,[84] by the holder on transferring it,[85] or by a stranger to the note,[86] does not entitle the guarantor to notice of default of the maker. It has even been held that where one on transferring a note before maturity guaranties its payment, he is not discharged from liability upon his guaranty by the failure to give notice of non-payment to a prior indorser.[87] And where a stranger to a note or bill has indorsed his name in blank upon the back thereof and has been sued as a guarantor it has been held that notice of non-payment to him need not be proved.[88] The fact that the maker of the note is solvent at its maturity does not affect the application of the rule.[89]

c. Guaranty of Collection. Where, however, the guaranty is of the collection

the note when it is due and notice of non-payment must be given to the guarantor. Greene *v.* Dodge, 2 Ohio 430.

83. Peck *v.* Barney, 13 Vt. 93.

A guaranty of a note by a separate instrument as follows, "I guarantee the said note is good and the payment of the same," is an absolute undertaking and the holder of the note need not commence suit against the maker nor give notice of his default. Woodstock Bank *v.* Downer, 27 Vt. 539. In Forest *v.* Stewart, 14 Ohio St. 246, defendant by a separate written instrument agreed to become responsible for certain notes, provided that the holder used all diligence in collecting them of the maker, and promised in case the notes could not be collected by due process of law to pay them, and it was held that the stipulation for due process of law was satisfied by the institution of suit against the makers and that demand and notice were not necessary.

84. Sample *v.* Martin, 46 Ind. 226.

Where the payee of a negotiable note indorsed it as follows, "For value received, I sell, assign and guaranty the payment of the within note to . . . bearer," this was held to constitute an absolute guaranty that the maker would pay the note when due or that defendant would himself pay it. Allen *v.* Rightmere, 20 Johns. (N. Y.) 365, 11 Am. Dec. 288. To same effect see Brown *v.* Curtiss, 2 N. Y. 225.

85. Thrasher *v.* Ely, 2 Sm. & M. (Miss.) 139, where the holder of a note, before maturity, on transferring it guaranties its payment and also waives suit and the exercise of diligence against the maker the guaranty is an absolute one and he is not entitled to notice of non-payment at maturity. Burt *v.* Parish, 9 Ala. 211. In Studabaker *v.* Cody, 54 Ind. 586, in which case the payee of a note on assigning it executed an indorsement thereon, reading, "For value received I assign this note . . . and guarantee the payment of the same when due," the court held the indorsement amounted to something more than a collateral undertaking and was a direct obligation to pay the note when due, depending upon no demand of payment or other condition, and that therefore notice of non-payment was not required.

Indorsement by intermediate transferee before maturity guarantying "payment of within note" was held to constitute an unconditional guaranty making the guarantor absolutely liable upon default of the maker. Hungerford *v.* O'Brien, 37 Minn. 306, 34 N. W. 161.

86. Barker *v.* Scudder, 56 Mo. 272. Where before the maturity of a note a stranger to it indorsed upon it a writing by which he guarantied that the maker would continue to be of sufficient responsibility to pay it at maturity and promised that if the amount of the note was not paid by a certain time after the maturity of the note he would himself advance the same, it was held that the promise was an absolute one and that he was not entitled to notice of the failure of the maker to pay at maturity. Williams *v.* Granger, 4 Day (Conn.) 444. And in the case of a note payable on demand, payment of which within a definite time was guarantied by a stranger, it was held that no demand upon the maker of the note or notice to the guarantor was required to make the latter liable on his guaranty. Cooper *v.* Page, 24 Me. 73, 41 Am. Dec. 371. And see Cole *v.* Merchants' Bank, 60 Ind. 350, holding that in case of a guaranty of payment by a stranger indorsed upon the note delay in giving notice to him of the non-payment did not release him. In Beckwith *v.* Angell, 6 Conn. 315, it was held that a stranger to the note who, after its maturity, guarantied its payment was not entitled to notice of non-payment.

87. Deck *v.* Works, 18 Hun (N. Y.) 266.

88. Holmes *v.* Preston, 71 Miss. 541, 14 So. 455. In Castle *v.* Rickly, 44 Ohio 490, 9 N. E. 136, 58 Am. Rep. 839, it was held that an indorsement of a note in blank by a stranger before maturity was governed by the common law and not by the law merchant and that it was unnecessary to prove either demand or notice in order to make out a *prima facie* case for recovery on the guaranty, the indorsement importing an undertaking as absolute and unconditional as though the words, "I guaranty the payment of the within note," had been used.

89. Roberts *v.* Hawkins, 70 Mich. 566, 38 N. W. 575, guaranty by stranger before maturity.

of a note, the rule applying to the guaranty of other obligations governs, and if the maker is solvent when the note falls due, the guarantor is entitled to notice within a reasonable time after the failure to collect by due diligence and will be released to the extent of the injury sustained by the failure to give such notice.[90]

d. Rule That Injury Resulting From Failure to Give Notice May Be Shown by Way of Defense. In some jurisdictions it has been held that where one not an original party to a note guaranties its payment, although he is liable at the suit of the holder without any proof of notice of non-payment, yet if he can show affirmatively that he has sustained damage from the want of notice, such damage will constitute a defense *pro tanto*.[91]

6. Sufficiency of Notice. The notice of default must be positive and unconditional,[92] but no particular form is required for such notice,[93] and its sufficiency must depend upon the circumstances of the case.[94] While the same strictness is not required in giving notice of default as in the case of notice to hold the indorser of a bill or note,[95] notice should be given within a reasonable time. The creditor must not delay so long as to cause injury to the guarantor.[96] But where one cove-

90. Woodson *v.* Moody, 4 Humphr. (Tenn.) 303. An indorsement written on the back of a note, "We guaranty the collection of the within note," amounts to a guaranty of the collection of the note by due course of law. Burt *v.* Horner, 5 Barb. (N. Y.) 501. But see Sterns *v.* Marks, 35 Barb. (N. Y.) 565, in which case a third person indorsed upon a note a writing as follows: "For value received, I hereby guaranty the collection of the within note," and in which the court held that it was necessary for the holder of the note to make an attempt to collect it by legal proceedings but that it was not necessary to give notice of non-payment.

91. *Delaware.*—Erwin *v.* Lamborn, 1 Harr. 125.

Illinois.— Heaton *v.* Hulbert, 4 Ill. 489.

Indiana.— Harris *v.* Pierce, 6 Ind. 162.

Iowa.— Martyn *v.* Lamar, 75 Iowa 235, 39 N. W. 285 (guaranty was by a separate instrument); Rockford Second Nat. Bank *v.* Gaylord, 34 Iowa 246; Weller *v.* Hawes, 19 Iowa 443; Sabin *v.* Harris, 12 Iowa 87; Marvin *v.* Adamson, 11 Iowa 371.

Kansas.— Fuller *v.* Scott, 8 Kan. 25; Brenner *v.* Weaver, 1 Kan. 488, 83 Am. Dec. 444.

Maine.— Skofield *v.* Haley, 22 Me. 164, 38 Am. Dec. 307.

Massachusetts.— See Johnson *v.* Wilmarth, 13 Metc. 416.

United States.— Lewis *v.* Brewster, 15 Fed. Cas. No. 8,318, 2 McLean 21.

England.— See Hitchcock *v.* Humphrey, 7 Jur. 423, 12 L. J. C. P. 235, 5 M. & G. 559, 6 Scott N. R. 540, 44 E. C. L. 296, holding that a person who guaranties payment of a bill drawn by the vendor of goods on the vendee for their price does not put himself in the same situation as a drawer of a bill, but merely undertakes that the accepter shall pay the bill, and can only have a right to insist on notice of dishonor in cases where failure to give such notice will cause him damage.

See 25 Cent Dig. tit. "Guaranty," § 80.

Where one not a party to a note guaranties its payment he is not entitled to notice if not injured by the omission to give notice. Palmer *v.* Baker, 23 U. C. C. P. 302.

Where the maker was insolvent at maturity of the note, it was held that the guarantor, whose guaranty was in a separate instrument, was bound without notice of dishonor, unless he could show that he had been damaged by want of notice, in which case he might have his defense to the extent of the damages proved. Reynolds *v.* Douglass, 12 Pet. (U. S.) 497, 9 L. ed. 1171.

92. Spencer *v.* Carter, 49 N. C. 287; Benton *v.* Gibson, 1 Hill (S. C.) 56.

93. Williams *v.* Reynolds, 11 La. 230; Protection Ins. Co. *v.* Davis, 5 Allen (Mass.) 54; Paige *v.* Parker, 8 Gray (Mass.) 211; Curtis *v.* Hubbard 9 Metc. (Mass.) 322.

94. Keith *v.* Dwinnell, 38 Vt. 286.

Question of law for court.— Where the facts are not in dispute the question of whether the notice was given within a reasonable time is one of law to be decided by the court. Wells *v.* Davis, 2 Utah 411. See *infra*, XI, L. 3.

The bringing of suit on the notes against the makers is a sufficient demand, and if known to the indorser would be sufficient notice. Benton *v.* Gibson, 1 Hill (S. C.) 56.

95. Where a debt guarantied is not paid, notice to the guarantor must be given within a reasonable time, and nothing can excuse the want of notice except the insolvency of the debtor; but the same strictness is not required in such a case as is necessary to charge an indorser on a bill or note. Dunbar *v.* Brown, 7 Fed. Cas. No. 4,129, 4 McLean 166.

96. McDougal *v.* Calef, 34 N. H. 534. See also Cahuzac *v.* Samini, 29 Ala. 288; Ringgold *v.* Newkirk, 3 Ark. 96; Williams *v.* Reynolds, 11 La. 230; Protection Ins. Co. *v.* Davis, 5 Allen (Mass.) 54; Paige *v.* Parker, 8 Gray (Mass.) 211; Curtis *v.* Hubbard, 9 Metc. (Mass.) 322; Courtis *v.* Dennis, 7 Metc. (Mass.) 510; Dole *v.* Young, 24 Pick. (Mass.) 250; Talbot *v.* Gay, 18 Pick. (Mass.) 534. Notice and demand on the guarantor at any time before action brought will be sufficient, provided he has not been prejudiced by want of notice. Salisbury *v.* Hale, 12 Pick. (Mass.) 416; Babcock *v.* Bryant, 12 Pick. (Mass.) 133.

nants to pay the debt of another if it cannot be collected by due process of law, it is enough that he has notice of the failure to collect after resort has been had to due process of law.[97]

D. Waiver of Steps Necessary to Fix Liability — **1. In General.** A guarantor may waive the steps necessary to fix his liability or estop himself from taking advantage of the failure to take such step.[98]

2. New Promise. A new promise or unequivocal act of recognition by a guarantor of his continued liability made with full knowledge of the laches of the creditor will continue the liability of the guarantor.[99] The rule that the promise of an indorser of a note to pay it with knowledge of facts releasing him from liability because of the laches of the holder binds him [1] applies to cases of guaranty of the payment of a note by a separate instrument, and such a promise by a guarantor can be enforced against him.[2] But such promise to be binding must be made with a full knowledge of the facts; if not it will be based upon a mistake of facts and for this reason will not amount to a waiver.[3]

VIII. Discharge of Guarantor by Transactions of an Affirmative Nature Taking Place, Subsequent to Default, Between Principal Debtor and Creditor.

A. In General.[4] Since, as has been shown above,[5] the guaranty of the collection of a debt requires the exercise of due diligence by the creditor to collect the debt at its maturity from the principal debtor, it needs no argument to show that the refusal of the creditor upon the day of maturity to receive the debt,[6] or any other act evidencing an attitude of something more than mere indulgence toward the debtor,[7] will discharge one who has given such a guaranty. And while mere indulgence on the part of the creditor will not release a guarantor in cases where

97. Thomas *v.* Woods, 4 Cow. (N. Y.) 173, holding that there is no need of a demand or request upon the covenantor.

98. Thus he may waive the failure to institute legal proceedings against the principal debtor. Koenig *v.* Bramlett, 20 Mo. App. 636. Where the guarantor is bound only in the event that the creditor shall use diligence to collect from the principal debtor, he may waive the use of such diligence. Goodwin *v.* Buckman, 11 Iowa 308; Mead *v.* Parker, 111 N. Y. 259, 18 N. E. 727 [*affirming* 41 Hun 577]; Ege *v.* Barnitz, 8 Pa. St. 304. And he may waive demand upon the principal debtor and notice of his default. Bickford *v.* Gibbs, 8 Cush. (Mass.) 154; Davis Sewing-Mach. Co. *v.* Rosenbaum, (Miss. 1894) 16 So. 340. It is of course open to the guarantor by the express terms of his contract to waive notice of default. Swisher *v.* Deering, 104 Ill. App. 572.

99. Sigourney *v.* Wetherell, 6 Metc. (Mass.) 553; Ashford *v.* Robinson, 30 N. C. 114. A promise by a guarantor after the failure of his principal to pay the debt is an admission that there has been no such want of diligence as is prejudicial to his interests. Tinkum *v.* Duncan, 1 Grant (Pa.) 228. Where after a guarantor has been released by the failure of the creditor to diligently pursue the debtor he admits his liability by giving a note for the debt, he waives the failure to use due diligence if he was aware of such failure. Teller *v.* Bernheim, 3 Phila. (Pa.) 299.

Notwithstanding gross neglect in the holder of a note, the guarantor thereof will be bound by a new promise made with knowledge of the facts. Ashford *v.* Robinson, 30 N. C. 114.

1. See Commercial Paper, 7 Cyc. 1134.

2. Ashford *v.* Robinson, 30 N. C. 114.

Admission of liability by the guarantor is admissible to show the fact of notice to him of the default of the principal debtor or waiver of such notice. Dubuque First Nat. Bank *v.* Carpenter, 34 Iowa 433.

3. Louisville Mfg. Co. *v.* Welch, 10 How. (U. S.) 461, 13 L. ed. 497. Where it is sought to enforce the liability of the guarantor after he has been released by the unreasonable delay of the creditor to enforce payment from the principal debtor until after the latter has become insolvent, it must be shown that the guarantor acknowledged his liability or made a new promise of payment with full knowledge of the want of due diligence on the part of the creditor. Gamage *v.* Hutchins, 23 Me. 565.

4. **Departure from terms of principal contract.**— The question as to whether the guarantor has been released by a departure from the terms of the principal contract or by a change therein by subsequent agreement involves in many cases a construction of the contract and has therefore been treated *supra*, VI.

5. See *supra*, VII, A, 2.

6. Sears *v.* Van Dusen, 25 Mich. 351.

7. Sawyer *v.* Haskell, 18 How. Pr. (N. Y.) 282.

the guaranty is considered to be absolute and unconditional, positive acts by the creditor which tend to impair the remedies of the guarantor against the principal debtor will release such a guarantor if he has in no way been a party or privy to such acts.[8]

B. Extension of Time of Payment or Performance — 1. In General. The rule with reference to the discharge of a surety by the giving of time is equally applicable to the guarantor of the debt of another.[9] And an extension by the creditor of the time of payment or of performance by the principal debtor without the consent of the guarantor discharges him if it is something more than a mere indulgence and is based upon a binding agreement,[10] which is for a definite

8. Holmes *v.* Williams, 177 Ill. 386, 53 N. E. 93. Even where the guaranty is absolute the creditor must not do any affirmative act which will impair security which has been given to him and deprive the guarantor of any benefit which he may derive therefrom on payment of the debt. Humphrey *v.* Hayes, 94 N. Y. 594. Where a verdict in a suit against the principal debtor was for less than the face of the debt and the guarantor moved for a new trial on the ground of the smallness of the verdict and the motion was denied because of the opposition of the creditor, it was held that the guarantor was discharged. Stark *v.* Fuller, 42 Pa. St. 320.

The guarantor has a right to expect that the creditor will not wantonly lose his debt or destroy his claim against the principal debtor with a view of falling back upon the liability of the guarantor. Stark *v.* Fuller, 42 Pa. St. 320. Where commission merchants made advances to a customer to a large amount on a letter of credit written by his mother, and they afterward failed to make application as they should have made of funds in their hands belonging to the debtor in payment of the advances, and to notify his mother of non-payment of her son's indebtedness so as to preserve her rights of subrogation under a mortgage on her son's estate for any payment she was compelled to pay, and so also failed to become subrogated themselves, as to secure the amount advanced, but presented their claims only as general creditors of the son's insolvent estate, it discharges her as surety. Darby *v.* Fuselier, 21 La. Ann. 636.

Mistake of judgment.— The fact, however, that the creditor has made a mistake of judgment by reason of which he has failed to realize upon collateral will not release defendant. Kaufman *v.* Loomis, 110 Ill. 617.

9. Rutherford *v.* Brachman, 40 Ohio St. 604.

Under custom of trade.— The fact that the term of credit is extended in accordance with a custom of trade will not take the case out of the rule if the time of credit has been definitely fixed in the contract of guaranty. Stewart *v.* Ranney, 26 How. Pr. (N. Y.) 279. But see Smith *v.* Dann, 6 Hill (N. Y.) 543.

10. *California.*— Gross *v.* Parrott, 16 Cal. 143.

Connecticut.— Deming *v.* Norton, Kirby 397.

Georgia.— White *v.* Ault, 19 Ga. 551.

Illinois.— Hurd *v.* Marple, 10 Ill. App. 418.

Iowa.— Springer Lithographing Co. *v.* Graves, 97 Iowa 39, 66 N. W. 66.

Massachusetts.—Bishop *v.* Eaton, 161 Mass. 496, 37 N. E. 665, 42 Am. St. Rep. 437; Carkin *v.* Savory, 14 Gray 528; Chace *v.* Brooks, 5 Cush. 43.

Mississippi.— Frank *v.* Williams, (1895) 18 So. 351.

New Jersey.— Haskell *v.* Burdette, 35 N. J. Eq. 31.

New York.— Antisdel *v.* Williamson, 165 N. Y. 372, 59 N. E. 207 [*affirming* 37 N. Y. App. Div. 167, 55 N. Y. Suppl. 1028]; Challenge Corn Planter Co. *v.* Diel, 92 Hun 165, 36 N. Y. Suppl. 364; Cohran *v.* Kennedy, 10 Daly 346; Fellows *v.* Prentiss, 3 Den. 512, 45 Am. Dec. 484.

Ohio.— Rutherford *v.* Brachman, 40 Ohio St. 604; Fithian *v.* Corwin, 17 Ohio St. 118; Jones *v.* Turner, 6 Ohio Dec. (Reprint) 1059, 10 Am. L. Rec. 31.

Pennsylvania.— Campbell *v.* Baker, 46 Pa. St. 243.

Tennessee.— Horrigan *v.* First Nat. Bank, 9 Baxt. 137.

Wisconsin.— Robinson *v.* Dale, 38 Wis. 330.

See 25 Cent. Dig. tit. "Guaranty," § 67.

Contract under seal.— It is a defense to an action at law against a guarantor that the creditor granted an extension to the principal debtor, although the contract is under seal, if it shows on its face that defendant is merely a guarantor. Dixon *v.* Spencer, 59 Md. 246.

Extension of term of bailment.— The fact that after the expiration of the term for a bailment the bailors consent to the retention of the property by the bailees exonerates the guarantor of the bailees from liability for failure to return it. Cushing *v.* Cable, 54 Minn. 6, 55 N. W. 736.

Renewal of note.— The liability of a guarantor of a note is discharged by the renewal of the note at maturity. Hart *v.* Hudson, 6 Duer (N. Y.) 294; Russell *v.* Perkins, 21 Fed. Cas. No. 12,160, 1 Mason 368. Plaintiffs, in the renewal of the notes of a firm, which they held and which were secured by the guaranty bond of a surety, took the individual notes of a member of the firm, payable at a future time, signed by the late firm of "A., B. & Co., A." It was held that, although time might not be given thereby to all the members of the firm, it was given to the maker of the

time,[11] and is founded upon a consideration.[12] The amount of the consideration is unimportant,[13] and the length of time of the extension is not material.[14] An agreement not to sue for a definite time after the maturity of the debt amounts to an extension within the meaning of the above rule;[15] and so does the acceptance of a promissory note in the place of a preëxisting simple contract debt payable at a future time.[16]

renewal notes, and that the surety was consequently discharged from his obligation. Farmers', etc., Bank *v.* Kercheval, 2 Mich. 504.

Must be binding agreement.— An extension of time of payment of a bond which will discharge a guarantor must be an actual agreement on a sufficient consideration for a definite period, and must amount in law to an estoppel which will prevent a suit on the bond against the principal until the expiration of the period of extension. Hayes *v.* Wells, 34 Md. 512. And a previous or contemporaneous oral agreement between a creditor and the principal debtor, by the terms of which the former was to give the latter a longer time for making his payments than is stipulated in their written contract, being invalid, does not discharge the guarantor. Robinson *v.* Dale, 38 Wis. 330. Extending the time of payment of a note, without making any binding agreement to do so, does not release an unconditional guarantor. Tobin Canning Co. *v.* Fraser, 81 Tex. 407, 17 S. W. 25.

11. *Illinois.*— Gardner *v.* Watson, 13 Ill. 374.

Indiana.— Bucklen *v.* Huff, 53 Ind. 474; Manifee *v.* Clark, 35 Ind. 304.

Maryland.— Hayes *v.* Wells, 34 Md. 512.

Mississippi.— Frank *v.* Williams, (1895) 18 So. 351; Thornton *v.* Dubney, 23 Miss. 559.

Ohio.— Jenkins *v.* Clarkson, 7 Ohio 72.

See 25 Cent. Dig. tit. "Guaranty," § 10; and cases cited *supra*, note 10.

12. Berry *v.* Pullen, 69 Me. 103, 31 Am. Rep. 248; Frank *v.* Williams, (Miss. 1895) 18 So. 351; Ford *v.* Beard, 31 Mo. 459; Fair *v.* Pengelly, 34 U. C. Q. B. 611. See also cases cited *supra*, note 10.

Consideration when not necessary.—A promise to forbear the collection of a debt, although not supported by any consideration, if it has induced the guarantor to neglect any means which might have been used to secure indemnity, may estop the creditor from enforcing the guaranty. White *v.* Walker, 31 Ill. 422.

13. Starret *v.* Burkhalter, 86 Ind. 439; Uniontown Bank *v.* Mackey, 140 U. S. 220, 11 S. Ct. 844, 35 L. ed. 485. An agreement, made while the Indiana interest law of 1865 was in force, by a creditor with the principal debtor, without the consent of the surety or the guarantor, to give a limited time after the debt became due, in consideration of the payment in advance of four per cent in excess of six per cent interest, released the surety and the guarantor. Cross *v.* Wood, 30 Ind. 378. But the extension of the time of payment of a guarantied debt, without consent of the guarantor, in consideration of the payment by the debtor of an open account between him and the guarantee, is not such an extension of time for a good consideration as will discharge the guarantor. Solary *v.* Stultz, 22 Fla. 263.

14. An extension of time for a short period releases the guarantor as effectually as for a long period. Winne *v.* Colorado Springs Co., 3 Colo. 155; Kerns *v.* Ryan, 26 Ill. App. 177; Berry *v.* Pullen, 69 Me. 101, 31 Am. Rep. 248; Ducker *v.* Rupp, 67 N. Y. 464.

15. *California.*— Leslie *v.* Conway, 59 Cal. 442.

Maine.— Smith *v.* Bibber, 82 Me. 34, 19 Atl. 89, 17 Am. St. Rep. 464.

Maryland.— See Clopper *v.* Union Bank, 7 Harr. & J. 92, 16 Am. Dec. 294.

Massachusetts.— Gifford *v.* Allen, 3 Metc. 255; Fullam *v.* Valentine, 11 Pick. 156.

Michigan.— Morgan *v.* Butterfield, 3 Mich. 615; Robinson *v.* Godfrey, 2 Mich. 408.

New York.— Pearl *v.* Wells, 6 Wend. 291, 21 Am. Dec. 328.

Rhode Island.— Thurston *v.* James, 6 R. I. 103.

Texas.— Blair *v.* Reid, 20 Tex. 310.

Vermont.— Austin *v.* Dorwin, 21 Vt. 38.

Wisconsin.—Millett *v.* Hayford, 1 Wis. 401.

England.— Ford *v.* Beech, 11 Q. B. 852, 5 D. & L. 610, 12 Jur. 310, 17 L. J. Q. B. 114, 63 E. C. L. 852.

See 25 Cent. Dig. tit. "Guaranty," § 15.

16. Frank *v.* Williams, 36 Fla. 136, 18 So. 351. Receiving notes from a debtor, payable at a future date, operates as an extension of credit, which will discharge the guarantor of the debt. Shipman *v.* Kelley, 16 Misc. (N. Y.) 673, 38 N. Y. Suppl. 597 [*affirmed* in 9 N. Y. App. Div. 316, 41 N. Y. Suppl. 328]. M agreed to guaranty to plaintiffs the payment of the price of goods to be sold to a third person, prior to Jan. 1, 1857, to the amount of five hundred dollars, on a credit of six months, and after the sales of the goods and their delivery plaintiffs extended the credit as to a part, and shortened as to a part, by taking the third party's promissory notes therefor, having different periods of time to run. It was held that the guarantor was discharged. Henderson *v.* Marvin, 31 Barb. (N. Y.) 297.

Note maturing before maturity of original debt.— Where, however, the principal debtor, after his debt became due, gave plaintiff a note for the amount at ten days from date, but antedated it, so that it matured by its terms before the maturity of the original debt, it was held that there was no extension of credit or suspension of the remedy on the

2. Assent by Guarantor to Extension or Lack of Definite Agreement Therefor. If the guarantor assents to the extension of time he is not discharged by it,[17] although no new consideration passes to him.[18] Nor is he discharged if subsequent to the extension he ratifies it with full knowledge of all the facts.[19] The mere fact that a guarantee acquiesces in the taking by the principal debtor of a longer time for performance than was specified in the contract will not as a matter of law discharge the guarantor.[20] Nor will the taking of collateral security from the principal debtor without an agreement to give him additional time for the payment of the debt discharge the guarantor.[21] Where the guaranty is merely to the effect that certain collateral security given by the principal debtor is good and enforceable the extension of the debt for which the collateral was given will constitute no defense in an action upon the guaranty.[22] Of course where the contract of guaranty expressly provides that any extension of time shall not affect the liability of the guarantor, such extension will not discharge him.[23]

3. Time of Maturity of Principal Debt Uncertain. Where there is nothing to show when the principal debt matures there can be no such extension of time as to discharge the guarantor.[24]

C. Payment or Other Satisfaction of Principal Debt[25] — 1. In General. Payment of the debt by the principal or by any one for him discharges the guarantor, and being once discharged a revival of the debt in any way will not renew his liability.[26] And an extinguishment of part of the claim relieves the guarantor

original debt, and that the guarantor was not discharged. Robinson *v.* Dale, 38 Wis. 330.

Taking note as collateral.— Merely taking another note from the debtor as collateral does not involve such an extension of time as to release defendant. Penny *v.* Crane Bros. Mfg. Co., 80 Ill. 244.

17. Briggs *v.* Norris, 67 Mich. 325, 34 N. W. 582; National Radiator Co. *v.* Hull, 79 N. Y. App. Div. 109, 79 N. Y. Suppl. 519; Rutherford *v.* Brackman, 40 Ohio St. 604.

18. Gray *v.* Brown, 22 Ala. 262; Treat *v.* Smith, 54 Me. 112; Lime Rock Bank *v.* Mallett, 34 Me. 547, 56 Am. Dec. 673; Baldwin *v.* Western Reserve Bank, 5 Ohio 273.

19. Rutherford *v.* Brackman, 40 Ohio St. 604.

Subsequent promise to pay.— If after he knows of the extension, the guarantor promises to pay the debt, he will be bound without any new consideration. Monmouth First Nat. Bank *v.* Whitman, 66 Ill. 331; Porter *v.* Hodenpuyl, 9 Mich. 11.

20. Benjamin *v.* Hillard, 23 How. (U. S.) 149, 16 L. ed. 518.

Mere forbearance will not discharge the guarantor. There must be some binding agreement between the creditor and the principal debtor giving time. Kenney *v.* Masemann, 14 Daly (N. Y.) 379.

In the case of an absolute guaranty the indulgence of the principal debtor by the creditor in extending the time of payment of the debt not predicated upon an agreement will not operate to discharge the guarantor. Tobin Canning Co. *v.* Fraser, 81 Tex. 407, 17 S. W. 25.

21. Pendexter *v.* Vernon, 9 Humphr. (Tenn.) 84.

22. Farmers', etc., Nat. Bank *v.* Lang, 22 Hun (N. Y.) 372.

23. Deering *v.* Russell, 5 N. D. 319, 65 N. W. 691; Koenigsberg *v.* Lennig, 161 Pa. St. 171, 28 Atl. 1016.

24. Manning *v.* Alger, 78 Iowa 185, 42 N. W. 643. If a contract of guaranty is made with reference to a contract or contracts thereafter to be made fixing terms of payment, and the guaranty neither expressly nor by implication limits the period of credit, the fact that notes subsequently taken from the debtor are renewed will not enable the guarantor to resist liability on the guaranty in the absence of any evidence that the renewal was not authorized by the principal contract. Delaware, etc., R. Co. *v.* Burkhard, 114 N. Y. 197, 21 N. E. 156.

Under a contract of guaranty "to cover open account or other forms of indebtedness" to remain in force until notice, the guarantor's liability not to exceed a certain amount, his liability is not limited to the original term of credit given on a sale and therefore the taking of the debtor's notes for goods sold on account after the account has become due does not release the guarantor. Burt *v.* Butterworth, 19 R. I. 127, 32 Atl. 167.

Where no time has been fixed between the principal debtor and the creditor for the payment of the debt, the mere taking of notes by the creditor for the debt payable at a specified time in the future does not waive his right to enforce the guaranty, although the guarantor has no notice of the agreement under which the notes are given at the time it is made. Emerson *v.* Dye, 4 Ky. L. Rep. 236.

25. **Discharge by composition with creditors** see 8 Cyc. 854.

26. Petefish *v.* Watkins, 124 Ill. 384, 16 N. E. 248; Brown *v.* Mason, 55 N. Y. App. Div. 395, 66 N. Y. Suppl. 917 [*affirmed* in 170 N. Y. 584, 63 N. E. 1115]. Where a person guaranties payment of notes given for

pro tanto.[27] But the payment must be valid and binding in order to release the guarantor.[28] A mere technical satisfaction of the debt may not be sufficient to discharge the guarantor.[29] And a mere exchange of securities of the same grade does not amount to a satisfaction of the debt so as to discharge the guarantor.[30] But where the form of a debt is changed, as by the giving of a higher security, the debt may be deemed discharged so as to relieve the guarantor from liability.[31]

2. Tender of Payment. While a tender of payment in no way satisfies the debt, and the creditor after refusing payment still has the right of action against the debtor, a refusal to accept a proper legal tender by him works a complete release of the guarantor.[32]

machinery sold to the maker, "at maturity or any time thereafter," if, by reason of a breach of warranty the maker becomes entitled to recover from the payee a sum equal to the balance due on the notes, in contemplation of law the notes are paid, and the guaranty is satisfied. Aultman, etc., Co. *v.* Hefner, 67 Tex. 54, 2 S. W. 861.

The guarantor of interest on a mortgage given for the price of lands purchased from plaintiff is released by plaintiff's acceptance of a reconveyance of the lands in full satisfaction of his claims against the mortgagor. Lozier *v.* Graves, 91 Iowa 482, 59 N. W. 285.

27. Oberndorff *v.* Union Bank, 31 Md. 126, 1 Am. Rep. 31; Sweet *v.* Newberry, 92 Mich. 515, 52 N. W. 1005. In an action on a guarantied debt against the guarantor a plea of part payment by the assignee of the debtor is good, since such payment will operate as an extinguishment *pro tanto* of plaintiff's demands. Solary *v.* Stultz, 22 Fla. 263; Plano Mfg. Co. *v.* Parmenter, 41 Ill. App. 635; Lozier *v.* Graves, 91 Iowa 482, 59 N. W. 285; Miles *v.* Linnell, 97 Mass. 298; Hopkins *v.* Farwell, 32 N. H. 425. But where the creditor agreed to accept as payment in full a part of a debt then due, and the debtor paid the part in accordance with this agreement, such payment did not discharge the guarantor of the debt; being without consideration as to the portion not paid such portion was not discharged. Orbendorff *v.* Union Bank, 31 Md. 126, 1 Am. Rep. 31.

28. Hence if it is made by giving a forged instrument instead of the original (Allen *v.* Sharpe, 37 Ind. 67, 10 Am. Dec. 80; Kincaid *v.* Yates, 63 Mo. 45; Reading Second Nat. Bank *v.* Wentzel, 151 Pa. St. 142, 24 Atl. 1087; Bank *v.* Buchanan, 87 Tenn. 32, 9 S. W. 202, 10 Am. St. Rep. 617, 1 L. R. A. 199), with the obligation of one under such disability that it cannot be enforced (Godfrey *v.* Crisler, 121 Ind. 203, 22 N. E. 999), or with a note void for any other reason (Winsted Bank *v.* Webb, 39 N. Y. 325, 100 Am. Dec. 435; Lee *v.* Peckham, 17 Wis. 383), the guarantor's liability will continue.

29. Terrell *v.* Smith, 8 Conn. 426. Defendant assigned to plaintiff a mortgage for four thousand dollars, conditioned for the payment of interest and one hundred dollars annually, and providing that the premises should be kept insured for the benefit of the mortgagee. At the time of the assignment defendant guarantied "the payment of the within mortgage according to its terms until the same is reduced to three thousand dollars." Subsequently the buildings were burned, and plaintiff applied the insurance money to the mortgage debt, reducing it to two thousand seven hundred dollars. It was held that such reduction did not discharge defendant from liability under his guaranty. Smith *v.* Ferris, 143 N. Y. 495, 39 N. E. 3 [*reversing* 70 Hun 445, 24 N. Y. Suppl. 258]. Where prior to the dissolution of a partnership a creditor of the firm obtains a judgment against it, and execution is issued and levied on the firm's property sufficient to pay the debt, but under the dissolution of the firm one partner assumes the debts, pays a small sum on the judgment, and gives his individual note for the balance (this note not being received in payment of the debt), and judgment is obtained on the note, which remains unpaid, none of these acts amounts to a payment or extinguishment of the debt which will release the guarantor of a contract whereby the remaining partner assumed the debts of the firm. Claflin *v.* Ostrom, 54 N. Y. 581.

Satisfaction by recovery of judgment against principal debtor and taking possession of lands under an execution issued upon the judgment see Wilson *v.* Jackson, 5 Leigh (Va.) 102.

30. Norton *v.* Eastman, 4 Me. 521.

31. Jones *v.* Pierce, 35 N. H. 295. Where one agrees as guarantor that the principal shall pay a debt within a specified time and the creditor draws a bill for the amount on the bill payable to a third person at a given day within the time specified and the bill is accepted, there is a satisfaction of the debt only conditional upon the refusal of the drawee upon presentment of the bill to pay it, and if the payee and holder of a bill neglects to present it to the drawee for payment, the guarantor is discharged on his liability. Jones *v.* Pierce, 35 N. H. 295.

32. O'Conor *v.* Morse, 112 Cal. 31, 44 Pac. 305, 53 Am. St. Rep. 155; Hayes *v.* Josephi, 26 Cal. 535; Kortright *v.* Cady, 21 N. Y. 343, 78 Am. Dec. 145.

So a tender by the guarantor of a debt which he is then legally bound to pay must be accepted. If refused the guarantor is relieved from further liability. O'Conor *v.* Morse, 112 Cal. 31, 44 Pac. 305, 53 Am. St. Rep. 155; Sneed *v.* White, 3 J. J. Marsh.

3. Application of Payments. If a creditor has matured debts against another, one of which is guarantied and the other is not, the debtor in making payments has the right to apply them on either debt he chooses;[33] but if he pays generally, not designating where the payments are to be applied, the creditor has a right to make the application.[34] But where both the principal debtor and the creditor waive their respective privileges of making an application neither can afterward ask the court to make an application such as to advance the peculiar interest of the one to the injury of the other; but the application should be made by the court so that under all the circumstances the greatest equity shall be done or the mutual intention of the parties at the time of the payment, if it can be ascertained, shall be best carried out.[35]

D. Novation. A novation of the debt guarantied in which the guarantor does not join releases the guarantor.[36]

E. Taking Additional or Substituted Securities From Principal Debtor. The taking of additional security does not release the guarantor, for it in no way changes his contract and is not to his injury.[37]

(Ky.) 525, 20 Am. Dec. 175; Rucker *v.* Robinson, 38 Mo. 154, 90 Am. Dec. 412; King *v.* Baldwin, 17 Johns. (N. Y.) 384, 8 Am. Dec. 415.

33. King *v.* Andrews, 30 Ind. 429; Milliken *v.* Tufts, 31 Me. 497; Capen *v.* Alden, 5 Metc. (Mass.) 268; Trullinger *v.* Kofoed, 7 Oreg. 228, 33 Am. Rep. 708; Field *v.* Holland, 6 Cranch (U. S.) 8, 3 L. ed. 136.

34. Stamford Bank *v.* Benedict, 15 Conn. 437; Pickering *v.* Day, 2 Del. Ch. 333; Bond *v.* Armstrong, 88 Ind. 65; Cremer *v.* Higginson, 6 Fed. Cas. No. 3,383, 1 Mason 323. See also Sturges *v.* Robbins, 7 Mass. 301.

A bank is not bound, in favor of a guarantor, to apply on a note held by it deposits made by the maker after its maturity, nor a balance then due him, which, with the subsequent deposits, does not equal the sum due on the note. Lancaster First Nat. Bank *v.* Shreiner, 110 Pa. St. 188, 1 Pa. Cas. 79, 1 Atl. 190, 20 Atl. 718.

A merchant is not bound to apply payments for goods furnished under a new contract, while an indebtedness by the buyer guarantied by defendant for goods previously furnished is unpaid, to the payment of the guarantied debt, although defendant had no knowledge of the new contract when it was made. Keith *v.* Dwinnell, 38 Vt. 286.

35. Stamford Bank *v.* Benedict, 15 Conn. 437; Bridenbecker *v.* Lowell, 32 Barb. (N. Y.) 9; Blackmore *v.* Granbery, 98 Tenn. 277, 39 S. W. 229; Daniel Neg. Instr. § 1252; Randolph Com. Paper 377. See also Eddy *v.* Sturgeon, 15 Mo. 199; Webb *v.* Dickinson, 11 Wend. (N. Y.) 62.

Right of guarantor to insist that payment be applied upon debts whose payment is guarantied.— The reason for requiring payments made by the debtor to be applied to that part of an account covered by the guaranty is founded upon the nature of the contract. Phipps *v.* Willis, 11 Tex. Civ. App. 186, 32 S. W. 801. Where one guaranties a purchase of merchandise to be made he is entitled to have the firm's money afterward received from the principal applied in payment of the goods sold under the guaranty. Gard *v.* Stevens, 12 Mich. 292, 86 Am. Dec. 52. See also Drake *v.* Sherman, 179 Ill. 362, 53 N. E. 628; King *v.* Bates, 149 Mass. 73, 21 N. E. 237, 4 L. R. A. 268; Hurd *v.* Callahan, 9 Abb. N. Cas. (N. Y.) 374; Deering *v.* Russell, 5 N. D. 319, 65 N. W. 691; Frost *v.* Weathersbee, 23 S. C. 354; Pierce *v.* Knight, 31 Vt. 701; Noyes *v.* Nichols, 28 Vt. 159; Kortlander *v.* Elston, 52 Fed. 180, 2 C. C. A. 657 [*distinguishing* English *v.* Carney, 25 Mich. 178].

36. So in those jurisdictions where the acceptance of a negotiable instrument is a presumptive payment, the guarantor will be released upon the guarantee taking from the principal such a note for the debt. Appleton *v.* Parker, 15 Gray (Mass.) 173; Bangs *v.* Mosher, 23 Barb. (N. Y.) 478; Weed Sewing Mach. Co. *v.* Oberreich, 38 Wis. 325; Rees *v.* Berrington, 2 Ves. Jr. 540, 30 Eng. Reprint 765. But unless the new note in effect satisfies the existing debt, or its acceptance in some way changes the old contract, the guarantor will still be held. Commonwealth Bank *v.* Potius, 10 Watts (Pa.) 148; Weakly *v.* Bell, 9 Watts (Pa.) 273, 36 Am. Dec. 116; Ripley *v.* Greenleaf, 2 Vt. 129. See also U. S. *v.* Hodge, 6 How. (U. S.) 279, 12 L. ed. 437.

37. *Illinois.*— Brown *v.* Abbott, 110 Ill. 162. The fact that the debtor gave the creditor security for the debt, payment of which was guarantied, did not discharge the guarantor, where the security was also given expressly for his benefit. Peoria Sav., etc., Co. *v.* Elder, 165 Ill. 55, 45 N. E. 1083 [*affirming* 65 Ill. App. 567].

Indiana.— Board of Publication *v.* Gilliford, 139 Ind. 524, 38 N. E. 404.

Iowa.— Citizens' Bank *v.* Whinery, 110 Iowa 390, 81 N. W. 694; Case *v.* Howard, 41 Iowa 479.

Massachusetts.— Curtis *v.* Hubbard, 9 Metc. 322; Babcock *v.* Bryant, 12 Pick. 133. The holder of a guarantied note does not discharge the guarantor by taking collateral security of the maker without giving him time. Sigourney *v.* Wetherell, 6 Metc. 553.

Nebraska.— Korty *v.* McGill, 44 Nebr. 516, 62 N. W. 1075.

F. Release of Other Securities — 1. In General. A guarantor who pays the debt of the principal debtor is entitled to be subrogated to whatever rights and collateral security the guarantee held. For this reason the guarantee has no right to surrender to the debtor collateral securities held by him, and if he does so without the guarantor's consent[38] or if he releases other security,[39] he will be discharged to the extent of the value of the collaterals surrendered or the security released. But if the guarantor assents to such surrender or release,[40] or if the guarantor has misled the creditor into thinking that he has consented,[41] his liability will not be thereby affected. And defendant cannot complain of the release of other security if he is not prejudiced thereby.[42]

2. Release of Co-Guarantors. According to the rule that a guarantor is entitled to a strict compliance with his contract, and that any material change thereof discharges him from further liability, even though he is not injured by such change, it is held in some jurisdictions that a release of a cosurety or co-guarantor works a release of the remaining surety or guarantor.[43] But other courts, representing the weight of authority, and perhaps the better reasoning, hold that a

New York.— Colemard *v.* Lamb, 15 Wend. 329.

Oregon.— Hand Mfg. Co. *v.* Marks, 36 Oreg. 523, 52 Pac. 512, 53 Pac. 1072, 59 Pac. 549.

South Carolina.— Lawton *v.* Maner, 9 Rich. 335.

Vermont.— Woodstock Bank *v.* Downer, 27 Vt. 539.

United States.— Dumont *v.* Fry, 14 Fed. 293.

See 25 Cent. Dig. tit. "Guaranty," § 71.

Taking note or bond.— Where the guaranty is to continue for a specified time, and the guarantee and principal have a settlement, and the principal gives his note, which is payable within the period of the guaranty, this does not discharge the guarantor. Bush *v.* Critchfield, 5 Ohio 109. A guarantor for the payment of the price of goods is not discharged by the vendee giving a bond to the vendor for the price. Wadsworth *v.* Allen, 8 Gratt. (Va.) 174, 56 Am. Dec. 137.

Additional surety.— A guarantor of the payment of the debt of another is not discharged by the creditor's taking a new stipulation from the debtor with an additional surety, nor by the recovery of judgment against the surety. Norton *v.* Eastman, 4 Me. 521. *Compare* Friend *v.* Smith Gin Co., 59 Ark. 86, 26 S. W. 374; New York F. Ins. Co. *v.* Tooker, 4 N. J. L. J. 334.

38. Foerderer *v.* Moors, 91 Fed. 476, 33 C. C. A. 641. One accepting as collateral notes secured by chattel mortgage, of which one was indorsed by a guarantor, without the latter's knowledge, permitted the mortgagee depositing them to sell the personalty on credit, and surrendered the mortgage and the notes not guarantied, taking in their stead the securities given by the purchaser. This discharged the guarantor to the extent of the injury caused thereby. Holmes *v.* Williams, 177 Ill. 386, 53 N. E. 93.

39. Lancaster First Nat. Bank *v.* Shreiner, 110 Pa. St. 188, 1 Pa. Cas. 79, 1 Atl. 190, 20 Atl. 718. Where assets pledged to the creditor as collateral are lost through his negligence the guarantor is discharged. Kemmerer *v.* Wilson, 31 Pa. St. 110. A guarantor who binds himself for the payment of a promissory note given for the price of personal property, sold by the payee to the maker of the note, with a reservation of title, is discharged by failure of the payee to have the contract of conditional sale, which was in writing, duly recorded; the maker of the note having subsequently, and while the instrument was unrecorded, sold the property to a *bona fide* purchaser for value, whereby it became lost to the payee, and incidentally to the guarantor, as security for the debt. Nance *v.* Winship Mach. Co., 94 Ga. 649, 21 S. E. 901.

40. Brown *v.* Abbott, 110 Ill. 162.

Release by bankruptcy proceedings.— A guarantor of bonds secured by a mortgage on property which is disposed of under proceedings in bankruptcy is not thereby released from his guaranty, when such guaranty was made while the bankruptcy law was in force. Owen *v.* Potter, 115 Mich. 556, 73 N. W. 977.

41. Knoebel *v.* Kircher, 33 Ill. 308.

42. Kane *v.* Williams, 99 Wis. 65, 74 N. W. 570. As where the security is afterward restored. Kane *v.* Williams, *supra*. But *compare* Bell's Appeal, 1 Penny. (Pa.) 416, in which case the postponing of the lien of the debt whose payment was guarantied in favor of other claims against the principal debtor, although done with the intention of benefiting the guarantor, was held to release him.

43. Spencer *v.* Houghton, 68 Cal. 82, 8 Pac. 679; Clark *v.* Mallory, 185 Ill. 227, 56 N. E. 1099; Stockton *v.* Stockton, 40 Ind. 225; Seligman *v.* Gray, 66 Mich. 341, 33 N. W. 510. A executed a promissory note, payable to S or bearer. C, by indorsement, guarantied payment of the note and waived notice, and subsequently B, by indorsement, guarantied the "collection" of the note. A became insolvent and removed from the state, and eight years after the maturity of the note S sued B, having made no effort to collect the note from C. It was held that he was not entitled to recover. Summers *v.* Barrett, 65 Iowa 292, 21 N. W. 646.

discharge of a co-guarantor only effects a release of the remaining guarantor to the extent that he is thereby damaged, being the amount for which the discharged guarantor could have been held by the remaining guarantor in contribution had he not been discharged.[44] And in any event the release of a co-guarantor will not effect a discharge of the others unless the release of the one is granted without the consent or acquiescence of such others.[45]

G. Voluntary Release of Principal Debtor. A voluntary release of the principal debtor by the guarantee will also release the guarantor.[46] This is true after judgment rendered against principal and guarantor as well as before.[47] It is held, however, that a contract to release the principal in which the rights against the guarantor are expressly reserved will not release the guarantor.[48]

44. *Alabama.*— Jemison *v.* Governor, 47 Ala. 390.

Arkansas.— Gordon *v.* Moore, 44 Ark. 349, 51 Am. Rep. 606.

Georgia.— Lewis *v.* Armstrong, 80 Ga. 402, 7 S. E. 114.

Maryland.— Smith *v.* State, 46 Md. 617.

Missouri.— Rice *v.* Morton, 19 Mo. 263.

New York.— Morgan *v.* Smith, 70 N. Y. 537. But see North American F. Ins. Co. *v.* Handy, 2 Sandf. Ch. 492, holding that where a mortgagee in a bill to foreclose his mortgage sought a decree over against two joint guarantors, and, on a defense being offered by one, compromised with and released him, he could not afterward hold the other for the deficiency, although he had suffered the bill to be taken for confessed against him.

Pennsylvania.— Klingensmith *v.* Klingensmith, 31 Pa. St. 460.

Texas.— See Tobin Canning Co. *v.* Fraser, 81 Tex. 407, 17 S. W. 25.

Virginia.— Waggener *v.* Dyer, 11 Leigh 384.

England.— Mercantile Bank *v.* Taylor, [1893] A. C. 317, 57 J. P. 741, 1 Reports 371.

See 25 Cent. Dig. tit. "Guaranty," § 73.

Each of two or more joint guarantors of a note is a principal, nor do such guarantors occupy the relation of principal and surety, and the negligence of the holder of the note in not compelling payment of his equitable share by one of such guarantors will not discharge the others. Gage *v.* Mechanics' Nat. Bank, 79 Ill. 62.

Where several are guarantors of a note by bank indorsements made at different times. the release of one of them in consideration of the payment of a less sum than the amount claimed will not operate to discharge the other guarantors. Knight *v.* Dunsmore, 12 Iowa 35.

45. Blewett *v.* Bash, 22 Wash. 536, 61 Pac. 770.

46. In such case the debt is extinguished, and where there is no debt there is nothing on which to hold the guarantor. Glassell *v.* Coleman, 94 Cal. 260, 29 Pac. 508; Brown *v.* Ayer, 24 Ga. 288; Trotter *v.* Strong, 63 Ill. 272; Jamieson *v.* Holm, 69 Ill. App. 119; Tillotson *v.* Herrick, 66 Ill. App. 660; Plano Mfg. Co. *v.* Parmenter, 41 Ill. App. 635; Stull *v.* Davidson, 12 Bush (Ky.) 167; Farmers', etc., Bank *v.* Kingsley, 2 Dougl. (Mich.) 379; Kingsbury *v.* Williams, 53 Barb. (N. Y.) 142; Swift *v.* Beers, 3 Den. (N. Y.) 70; Irons *v.* Manufacturers' Nat. Bank, 36 Fed. 843 [*affirmed* in 133 U. S. 67, 10 S. Ct. 238, 33 L. ed. 564]; Commercial Bank *v.* Jones, [1893] A. C. 313, 57 J. P. 644, 62 L. J. C. P. 104, 68 L. T. Rep. N. S. 776, 1 Reports 367, 42 Wkly. Rep. 256; Cragoe *v.* Jones, L. R. 8 Exch. 81, 42 L. J. Exch. 68, 28 L. T. Rep. N. S. 36, 21 Wkly. Rep. 408; Lewis *v.* Jones, 4 B. & C. 506, 6 D. & R. 567, 3 L. J. K. B. O. S. 270, 28 Rev. Rep. 360, 10 E. C. L. 679.

Where a tenant moved out of a house held under a lease, and the landlord accepted another tenant, a guarantor of payment of rent under the lease is not liable for rent accruing after the removal of the tenant. Tillotson *v.* Herrick, 66 Ill. App. 660. But a surrender of the term by a lessee and a release of the tenant from liability for rent during the unexpired term do not discharge a guarantor of the rent from any previous liability for rents already due and payable. Kingsbury *v.* Williams, 53 Barb. (N. Y.) 142.

47. Trotter *v.* Strong, 63 Ill. 272; Carpenter *v.* King, 9 Metc. (Mass.) 511, 43 Am. Dec. 405; Bangs *v.* Strong, 10 Paige (N. Y.) 11.

48. The reason for this is that when he is called upon to pay, and has done so, he still has a right to collect from the principal, notwithstanding his release by the guarantee. Mueller *v.* Dobschuetz, 89 Ill. 176; Rucker *v.* Robinson, 38 Mo. 154, 90 Am. Dec. 412; Hubbell *v.* Carpenter, 1 Seld. (N. Y.) 171; Morse *v.* Huntington, 40 Vt. 488; North *v.* Wakefield, 13 Q. B. 536, 13 Jur. 731, 18 L. J. Q. B. 214, 66 E. C. L. 536; Maltby *v.* Carstairs, 7 B. & C. 735, 6 L. J. K. B. O. S. 196, 1 M. & R. 549, 14 E. C. L. 330; Kearsley *v.* Cole, 16 L. J. Exch. 115, 16 M. & W. 128; Cowper *v.* Smith, 4 M. & W. 519.

It is said in support of this view that a release of the principal, reserving rights against sureties, must be construed to accomplish the purpose intended, although in fact the language of such a release presents an inconsistency. To carry out the party's intentions therefore the instruction is construed to be not a release but a covenant not to sue the principal. Hence the guarantor will not in such case be discharged. Smethurst *v.* Woolston, 5 Watts & S. (Pa.) 106; Green *v.* Wynn, L. R. 4 Ch. 204, 38 L. J. Ch.

And where the release of the principal debtor has been occasioned by the act of the guarantor himself he will not be released.[49]

IX. REVOCATION BY GUARANTOR.

A. In General. Revocation may be effected by the voluntary act of the guarantor.[50] And if the guaranty is in form continuing, or if provision has been made therein for withdrawal, the guarantor may withdraw therefrom and will not be held for any advances made or responsibilities incurred after giving notice of his intention to no longer stand as guarantor.[51]

B. Where Consideration Has Been Executed. However, there can be a revocation of a guaranty by the guarantor only when the instrument amounts to an offer of guaranty. Revocation is an act by one of the parties alone, and may be effected, if at all, without the consent or over the objection of the other party. It should not be confounded, as is sometimes done,[52] with rescission. And if the consideration for the guaranty is executed there can be no revocation.[53] And in no case will the revocation affect obligations already incurred on the strength of the guaranty.[54]

220, 20 L. T. Rep. N. S. 131, 17 Wkly. Rep. 385; Bateson *v.* Gosling, L. R. 7 C. P. 9, 41 L. J. C. P. 53, 25 L. T. Rep. N. S. 570, 20 Wkly. Rep. 98.

49. Where the guarantor of another's contract to convey to the guarantee certain lands, to which he could obtain title only through the guarantor, and which the guarantee agreed to accept at a fixed price in payment of the principal's indebtedness to him, afterward promises to pay the guarantee a certain sum in case of the principal's non-performance, a release of the principal from his contract by the guarantee will not relieve the guarantor from liability, if it was induced by his own act, as where, subsequently to his entering into such undertakings, he assured the guarantee that he would not convey the land to the principal; it being immaterial in such case that the refusal to convey was because of the principal's failure to pay him for the lands. Lyman *v.* Babcock, 40 Wis. 503.

50. Lloyd's *v.* Harper, 16 Ch. D. 290, 50 L. J. Ch. 140, 43 L. T. Rep. N. S. 481, 29 Wkly. Rep. 452; Bastow *v.* Bennett, 3 Campb. 220.

51. *Connecticut.*— Gay *v.* Ward, 67 Conn. 147, 34 Atl. 1025, 32 L. R. A. 818.

Illinois.— Potter *v.* Gronbeck, 117 Ill. 404, 7 N. E. 586; Rapp *v.* Phœnix Ins. Co., 113 Ill. 390, 55 Am. Rep. 427.

Indiana.— La Rose *v.* Logansport Nat. Bank, 102 Ind. 332, 1 N. E. 805.

Louisiana.— Menard *v.* Scudder, 7 La. Ann. 385, 56 Am. Dec. 610.

Massachusetts.— Hyland *v.* Habich, 150 Mass. 112, 22 N. E. 765, 15 Am. St. Rep. 174, 6 L. R. A. 383.

Michigan.— Jeudevine *v.* Rose, 36 Mich. 54.

New York.— Kernochan *v.* Murray, 111 N. Y. 309, 18 N. E. 868, 7 Am. St. Rep. 744, 2 L. R. A. 183; Howe Mach. Co. *v.* Farrington, 82 N. Y. 121.

North Carolina.— Singer Mfg. Co. *v.* Draughan, 121 N. C. 88, 28 S. E. 136, 61 Am. St. Rep. 657.

Rhode Island.— National Eagle Bank *v.* Hunt, 16 R. I. 148, 13 Atl. 115.

Vermont.—Michigan State Bank *v.* Leavenworth, 28 Vt. 209.

Virginia.— Tischler *v.* Hofheimer, 83 Va. 35, 4 S. E. 370.

England.— Coulthart *v.* Clementson, 5 Q. B. D. 42, 49 L. J. Q. B. 204, 41 L. T. Rep. N. S. 798, 28 Wkly. Rep. 355; Harriss *v.* Fawcett, L. R. 15 Eq. 311; Mason *v.* Pritchard, 2 Campb. 436, 12 East 227, 11 Rev. Rep. 369; Offord *v.* Davies, 12 C. B. N. S. 748, 9 Jur. N. S. 22, 31 L. J. C. P. 319, 6 L. T. Rep. N. S. 579, 10 Wkly. Rep. 758, 104 E. C. L. 748.

See 25 Cent. Dig. tit. "Guaranty," § 26.

Where the consideration for a continuing guaranty is divisible and part only has been advanced and further advances are optional with the guarantee, there may be a revocation as to future advances. Snow *v.* Horgan, 18 R. I. 289, 27 Atl. 388; National Eagle Bank *v.* Hunt, 16 R. I. 148, 13 Atl. 115.

Guaranty of fidelity of persons see Ætna Ins. Co. *v.* Fowler, 108 Mich. 557, 66 N. W. 470; Emery *v.* Baltz, 94 N. Y. 408; Singer Mfg. Co. *v.* Draughan, 121 N. C. 88, 28 S. E. 136, 61 Am. St. Rep. 657; Burgess *v.* Eve, L. R. 13 Eq. 450, 41 L. J. Ch. 515, 26 L. T. Rep. N. S. 540, 20 Wkly. Rep. 311.

52. De Colyer Guar. 388.

53. Green *v.* Young, 8 Me. 14, 22 Am. Dec. 218; Kernochan *v.* Murray, 111 N. Y. 306, 18 N. E. 868, 7 Am. St. Rep. 744, 2 L. R. A. 183.

54. The guarantor cannot revoke a continuing guaranty at his pleasure, so as to render the creditor's condition more onerous without indemnifying him for liabilities already incurred. He may renew obligations to which he was a party under the guaranty at the revocation. Williams *v.* Reynolds, 11 La. 230. Defendant at Bremen wrote to plaintiff at New York, opening a credit in favor of a mercantile house in New Orleans, authorizing plaintiff to accept drafts of the New Orleans house at six days' sight, the

X. EFFECT OF DEATH OF GUARANTOR.

A. In General. A guaranty which could be ended at the will of the guarantor while living will be terminated by his death and notice thereof.[55] And a general guaranty of payment by another of a liability to be created in the future,[56] or a contract of a personal nature will be terminated by the death of the guarantor.[57] In some jurisdictions there are statutory provisions by virtue of which the death of a member of a firm to which a guaranty has been given releases the guarantor.[58]

B. In Case of Absolute Guaranties. The rule applicable to contracts generally that if they can be performed by the personal representatives the obligation survives the death of the contracting party and must be performed by those who represent his estate[59] governs the contract of guaranty, and where the guaranty is absolute and the full consideration therefor has been received,[60] and there is nothing further to be done on behalf of the guarantee,[61] the death of the guar-

credit to be in force for one year. Plaintiff notified the New Orleans house but soon after defendant wrote withdrawing the credit. In the meantime the New Orleans house had drawn drafts, which were received by plaintiff after the receipt of the letter of revocation and were accepted by him. It was held that the revocation could not operate to relieve defendant from liability on these drafts. Gelpcke *v.* Quentell, 74 N. Y. 599.

55. Aitkin *v.* Lang, 106 Ky. 652, 51 S. W. 154, 21 Ky. L. Rep. 247, 90 Am. St. Rep. 263; Hyland *v.* Habich, 150 Mass. 112, 22 N. E. 765, 15 Am. St. Rep. 174, 6 L. R. A. 383; Jordan *v.* Dobbins, 122 Mass. 168, 23 Am. Rep. 305; Harriss *v.* Fawcett, L. R. 8 Ch. 866, 42 L. J. Ch. 502, 29 L. T. Rep. N. S. 84, 21 Wkly. Rep. 742.

56. Gay *v.* Ward, 67 Conn. 147, 34 Atl. 1025, 32 L. R. A. 818; Hyland *v.* Habich, 150 Mass. 112, 22 N. E. 765, 15 Am. St. Rep. 174, 6 L. R. A. 383; Harriss *v.* Fawcett, L. R. 8 Ch. 866, 42 L. J. Ch. 502, 29 L. T. Rep. N. S. 84, 21 Wkly. Rep. 742.

57. A guaranty that in consideration of the purchase of stock upon his representation the guarantor does "hereby guarantee that you shall receive, as long as you hold said stock, dividends equal to seven per cent per annum, or I will make good to you all deficit from such account," is a personal contract, on which the personal representatives of the guarantor are not liable for dividends accruing since his death. Kernochan *v.* Murray, 4 N. Y. St. 489.

58. Cosgrave Brewing, etc., Co. *v.* Starrs, 5 Ont. 189.

In England where a guaranty is given to a firm, the death of one of the partners before the expiration of the time during which the guaranty is to run terminates it. Backhouse *v.* Hall, 6 B. & S. 507, 11 Jur. N. S. 562, 34 L. J. Q. B. 141, 12 L. T. Rep. N. S. 375, 13 Wkly. Rep. 654, 118 E. C. L. 507; Holland *v.* Teed, 7 Hare 50, 27 Eng. Ch. 50.

59. Richardson *v.* Draper, 87 N. Y. 337; Jacobson *v.* La Grange, 3 Johns. (N. Y.) 199. See ABATEMENT AND REVIVAL.

60. Green *v.* Young, 8 Me. 14, 22 Am. Dec. 218; Kernochan *v.* Murray, 111 N. Y. 306, 18 N. E. 868, 7 Am. St. Rep. 744, 2 L. R. A. 183; Shackamaxon Bank *v.* Yard, 143 Pa. St. 129, 22 Atl. 908, 24 Am. St. Rep. 521; Hecht *v.* Weaver, 34 Fed. 111, 13 Sawy. 199.

This is especially true where the consideration is entire and given once for all. Rapp *v.* Phœnix Ins. Co., 113 Ill. 390, 55 Am. Rep. 427; Lloyd's *v.* Harper, 16 Ch. D. 290, 50 L. J. Ch. 140, 43 L. T. Rep. N. S. 481, 29 Wkly. Rep. 452.

But a guaranty of the payment of the price of goods to be sold thereafter to a third person, no consideration therefor having passed to the guarantor, is revoked by his death and the price of goods sold after the guarantor's death cannot be collected from his estate. Hyland *v.* Habich, 150 Mass. 112, 22 N. E. 765, 15 Am. St. Rep. 174, 6 L. R. A. 383; Jordan *v.* Dobbins, 122 Mass. 168, 23 Am. Rep. 305; Coulthart *v.* Clementson, 5 Q. B. D. 42, 49 L. J. Q. B. 204, 41 L. T. Rep. N. S. 798, 28 Wkly. Rep. 355; Lloyd's *v.* Harper, 16 Ch. D. 290, 50 L. J. Ch. 140, 43 L. T. Rep. N. S. 481, 29 Wkly. Rep. 452; Harriss *v.* Fawcett, L. R. 15 Eq. 311, 42 L. J. Ch. 502, 29 L. T. Rep. N. S. 84, 21 Wkly. Rep. 742 [*affirmed* in L. R. 8 Ch. 866].

61. Hyland *v.* Habich, 150 Mass. 112, 22 N. E. 765, 15 Am. St. Rep. 174, 6 L. R. A. 383; Jordan *v.* Dobbins, 122 Mass. 168, 23 Am. Rep. 305. See Fewlass *v.* Keeshan, 88 Fed. 573, 32 C. C. A. 8; McClaskey *v.* Barr, 79 Fed. 408; Harriss *v.* Fawcett, L. R. 8 Ch. 866, 42 L. J. Ch. 502, 29 L. T. Rep. N. S. 84, 21 Wkly. Rep. 742 [*affirming* L. R. 15 Eq. 311]; Lloyd's *v.* Harper, 16 Ch. D. 290, 50 L. J. Ch. 140, 43 L. T. Rep. N. S. 481, 29 Wkly. Rep. 452.

Joint guaranty.— As by the laws of Ohio where one of several persons indebted on a joint contract dies, his estate is liable as though the contract had been joint and several, the estate of a joint guarantor in that state is liable for the amount of the guaranty. Richardson *v.* Draper, 23 Hun (N. Y.) 188 [*affirmed* in 87 N. Y. 337]. Where a corporation erected its works in a city, in

antor does not terminate it, unless it is so provided in the contract.[62] Thus the death of the guarantor does not extinguish an absolute guaranty, where advances are made in good faith.[63] And where by the terms of the contract of guaranty it is to remain in force until revoked by notice, the death of the guarantor alone does not terminate it.[64]

C. Notice of Death. The authorities are divided on the question whether death of the guarantor *ipso facto* works a revocation of a guaranty, or whether notice of death must not first be given to relieve the guarantor's estate from liability for advances made in good faith after death occurs.[65] It has been held that the death of the guarantor does not *ipso facto* terminate his liability under the contract and that the personal representative of the guarantor must give notice in order to put an end to it.[66] But whenever the guaranty is held to be simply a continuing offer, such as would generally require a notice of acceptance, in order to complete a contract, there is good ground for holding, as some courts do, that the death of the guarantor terminates such guaranty without notice to the guarantee.[67]

D. Extending Time of Payment or Performance After Death. Extending the time of payment of the principal obligation after the guarantor's death,[68]

consideration of the city's donating lands and loaning money on bonds issued by the corporation, and the promoters of the corporation guarantied the bonds, the liability of one of them as guarantor was not discharged by his death. Richardson *v.* Draper, 87 N. Y. 337.

62. Chamberlain *v.* Dunlop, 126 N. Y. 45, 26 N. E. 966, 22 Am. St. Rep. 807. A contract of guaranty is not terminated by the death of the guarantor unless such provision is clearly made in the guaranty itself. Kernochan *v.* Murray, 111 N. Y. 306, 18 N. E. 868, 7 Am. St. Rep. 744, 2 L. R. A. 183.

A guaranty by one selling stock that the purchaser shall receive dividends equal to a certain percentage, and that he will make good any deficiency, is not terminated by the guarantor's death, unless so expressed. Kernochan *v.* Murray, 111 N. Y. 306, 18 N. E. 868, 7 Am. St. Rep. 744, 2 L. R. A. 183.

So where a bond is given for one's integrity in consideration of his being appointed to a position by the obligee, the death of the guarantor will not terminate the guarantor's liability unless expressly so stipulated. *In re* Crace, [1902] 1 Ch. 733, 71 L. J. Ch. 358, 86 L. T. Rep. N. S. 144; Lloyd's *v.* Harper, 16 Ch. D. 290, 50 L. J. Ch. 140, 43 L. T. Rep. N. S. 481, 29 Wkly. Rep. 452.

63. Hightower *v.* Moore, 46 Ala. 387; Janin *v.* Browne, 59 Cal. 37; Knotts *v.* Butler, 10 Rich. Eq. (S. C.) 143. The death of the guarantor does not defeat the creditor's right to indemnity for advances made in good faith after the event and without notice or knowledge thereof. Menard *v.* Scudder, 7 La. Ann. 385, 56 Am. Dec. 610.

64. Menard *v.* Scudder, 7 La. Ann. 385, 56 Am. Dec. 610; Knotts *v.* Butler, 10 Rich. Eq. (S. C.) 143. See also Slagle *v.* Forney, 22 Wkly. Notes Cas. (Pa.) 457; Knotts *v.* Butler, 10 Rich. Eq. (S. C.) 143.

65. *Alabama.*—Hightower *v.* Moore, 46 Ala. 387.

California.— Grand Lodge I. O. G. T. *v.* Farnham, 70 Cal. 158, 11 Pac. 592.

Connecticut.— Gay *v.* Ward, 67 Conn. 147, 34 Atl. 1025, 32 L. R. A. 818.

Illinois.— Pratt *v.* Elgin Baptist Soc., 93 Ill. 475, 34 Am. Rep. 187.

Iowa.— Royal Ins. Co. *v.* Davies, 40 Iowa 469, 20 Am. Rep. 581.

Kentucky.— Aitken *v.* Lang, 106 Ky. 652, 51 S. W. 154, 21 Ky. L. Rep. 247, 90 Am. St. Rep. 263.

Massachusetts.— Clark *v.* Thayer, 105 Mass. 216, 7 Am. Rep. 511.

Ohio.— Wallace *v.* Townsend, 43 Ohio St. 537, 3 N. E. 601, 54 Am. Rep. 829.

Pennsylvania.— *In re* Halfenstein, 77 Pa. St. 328, 18 Am. Rep. 449; White *v.* Com., 39 Pa. St. 167; Phipps *v.* Jones, 20 Pa. St. 260, 59 Am. Dec. 708.

Vermont.— Michigan State Bank *v.* Leavenworth, 28 Vt. 209.

See 25 Cent. Dig. tit. "Guaranty," § 63.

66. Bradbury *v.* Morgan, 1 H. & C. 249, 8 Jur. N. S. 918, 31 L. J. Exch. 462, 7 L. T. Rep. N. S. 104, 10 Wkly. Rep. 776; Fennell *v.* McGuire, 21 U. C. C. P. 134.

67. It continues only during the will of the guarantor, and it seems reasonable to hold that the parties intend in such case that when the power to terminate ceases by death the offer should no longer continue. The death of the guarantor of the repayment of advances to be made in the future revokes the guaranty and advances thereafter made are not binding on his estate, although made without notice of his death. Michigan State Bank *v.* Leavenworth, 28 Vt. 209. See also 2 Parsons Contr. (8th ed.) 31 note; Pollock Contr. 21.

The death of the person making the offer amounts to a revocation of the offer and it may not thereafter be accepted even though the accepter is unaware of the death at the time of acceptance. Dickinson *v.* Dodds, 2 Ch. D. 463, 45 L. J. Ch. 777, 34 L. T. Rep. N. S. 607, 24 Wkly. Rep. 594.

68. Home Nat. Bank *v.* Waterman, 30 Ill. App. 535 [*affirmed* in 134 Ill. 461, 29 N. E. 503].

or renewing a note after the death of the guarantor,[69] will release his estate from liability.

XI. Actions By Creditor Against Guarantor.

A. Nature and Form of Action.[70] An action against a guarantor must be brought specially on the contract of guaranty itself.[71] Where one guaranties and agrees to pay in such form as to make the debt thus guarantied his own and not the collateral contract of another it is held that *indebitatus assumpsit* will lie against him.[72] In some jurisdictions, however, the form of action has been modified by the code of procedure permitting a recovery against the guarantor without pleading specifically his contract of guaranty.[73]

B. Election of Remedies.[74] The contract of guaranty may be so framed that the creditor will have an election of remedies thereon, as where an indorsement of a note is in form a guaranty.[75]

C. Who May Sue — 1. In General. The question of the right of action on

69. In National Eagle Bank *v.* Hunt, 16 R. I. 148, 13 Atl. 115, it was held that the guaranty was released by the bank renewing a note, which fell due after the guarantor's death.

70. Right of action, although no damage has been sustained by the creditor, see Actions, 7 Cyc. 661.

Conditions precedent.— In some jurisdictions of cases of conditional guaranties or guaranties of collection, it is held that the institution of a suit against the principal debtor and the giving of notice of his default to the guarantor are conditions precedent to instituting a suit against the guarantor; while in other jurisdictions it is held that the failure to institute such suit or to give such notice is merely a matter of defense which may be asserted by the guarantor so far as he has sustained injury from such failure. These questions have been considered *supra*, VII, A. Necessity of the creditor resorting to security, which may have been placed in his hands by the principal debtor, before suing the guarantor see *supra*, VII, A, 6.

71. The guarantor's contract is distinct from the principal contract upon which money or goods were received, and a count for money had and received will not lie against him. Action for money had and received will not lie on a guaranty written on the back of a note reading, "For value received we jointly and severally guaranty the within note good and collectible until paid." Allen *v.* Rundle, 45 Conn. 528. The seller of goods cannot recover upon a letter of guaranty under a count for money had and received, although defendant has been credited by the purchaser with the value of the goods purchased. Burns *v.* Semmes, 4 Fed. Cas. No. 2,183, 4 Cranch. C. C. 702. If a letter of credit states that the writer will guaranty the payment of goods to be afterward sold to another, that he will see the goods paid for, or that he will be security for their payment, the promise is only collateral. In such cases the person to whom the goods are sold is liable on a general count for goods sold and delivered, but the writer of the letter can only be sued on the special contract. Smith *v.* Bainbridge, 6 Blackf. (Ind.) 12.

But a complaint containing only the common counts will be good as against the guarantor, where as such he has received back in payment of the debt guarantied the property for which the note was given. Harris *v.* Wicks, 28 Wis. 198. See Johnson *v.* Glover, 19 Ill. App. 585, holding that a contract of guaranty is admissible under the common money counts.

72. Packer *v.* Benton, 35 Conn. 343, 95 Am. Dec. 246.

73. This has been done in England, although formerly there as here the guarantor could not be sued on the common counts; but it was necessary to sue specially on his contract of guaranty. Jones *v.* Fleming, 7 B. & C. 217, 6 L. J. K. B. O. S. 113, 14 E. C. L. 103; Mines *v.* Sculthorpe, 2 Campb. 215.

In Arkansas, under a statute providing that suits of law may be commenced by filing in the office of the clerk of the court a note, writing obligatory, due-bill, or other evidence of debt, which writing shall be a sufficient declaration on which a writ of summons or capias against the person, or of attachment against the property of defendant, may be issued, an instrument stating that the person executing it promises to pay the full amount of a note of P for a specified sum due on a certain date, although a collateral undertaking to pay the debt of another, is an absolute promise to pay, which is within the provisions of the statute. Logan *v.* Lee, 10 Ark. 585.

74. See, generally, Election of Remedies.

75. If one indorses a note to another and at the same time guaranties that it is good and collectable, the holder may elect whether to treat him as an indorser or guarantor, or both; and if he elects to treat him as guarantor, and omits charging him as indorser, it is no defense to the guarantor's liability that he was not charged and proceeded against as indorser. Dana *v.* Conant, 30 Vt. 246. The following agreement, "'For value received, I hereby guaranty to A., that the bond of,'" etc., "'shall be of the value of,'"

a guaranty involves the negotiability of a contract of guaranty heretofore discussed.[76] Where the common-law rule yet prevails in reference to the assignability of contracts, the action on a guaranty even if the contract is held to be assignable must be brought in the name of the assignor;[77] but now in most of the states such action may be maintained in the name of the assignee.[78] It is sometimes difficult to determine who has a right to sue upon a guaranty which is not made specific in terms,[79] but where the guaranty is special it cannot be assigned and will not pass by indorsement; no one may sue thereon except the person mentioned in the contract; after a breach of such guaranty, however, a right of action accrues thereon, and it then stands as any other chose in action.[80]

2. On Indorsed Instruments. The question whether the indorsement of a negotiable instrument for the purpose of transferring the title to another carries with it the title to the guaranty on such instrument, so as to allow the indorsee to sue on the guaranty in his own name is one on which the courts are greatly divided.[81] That the real party in interest must sue in his own name is now the rule in most of the states,[82] although formerly the weight of authority was otherwise.[83]

etc. "'on,'" etc., "'at which price, and at which date I will purchase the same if offered to me,'" contains both a contract of guaranty and a contract of purchase; and it gives A his option to recover on the guaranty retaining the bond, or to recover as on a sale of the bond upon delivering it up. Delafield *v.* Holbrook, 9 Bosw. (N. Y.) 446.

76. See *supra*, V, C.

77. *Maine.*— Irish *v.* Cutter, 31 Me. 536.

Massachusetts.— Taylor *v.* Binney, 7 Mass. 479.

New York.— Lamourieux *v.* Hewit, 5 Wend. 307.

Pennsylvania.— McDoal *v.* Yoemans, 8 Watts 361.

Rhode Island.— King *v.* Batterson, 13 R. I. 117, 43 Am. Rep. 13.

Tennessee.— Turloy *v.* Hodge, 3 Humphr. 73.

Wisconsin.— Ten Eyck *v.* Brown, 3 Pinn. 452, 4 Chandl. 151.

See 25 Cent. Dig. tit. "Guaranty," §§ 35, 86. See also Assignments, 4 Cyc. 92.

78. Killian *v.* Ashley, 24 Ark. 511, 91 Am. Dec. 519; Dubuque First Nat. Bank *v.* Carpenter, 41 Iowa 518; Weir *v.* Anthony, 35 Nebr. 396, 53 N. W. 206; Claflin *v.* Ostrom, 54 N. Y. 581. See also Assignments, 4 Cyc. 93.

In New Jersey the assignee of a bond may sue in his own name on a guaranty of payment of the bond, when the assignment was made prior to the amendment of section 19 of the practice act by the act of March 4, 1890. Wooley *v.* Moore, 61 N. J. L. 16, 38 Atl. 758. See *supra*, V, C.

79. As where one partner sells to another his interest in the business, the purchaser agreeing to pay the debts of the firm, and a third person guaranties the purchaser's promise. It has been held in such a case that the creditors could not sue upon the guaranty. In construing such guaranty the court seeks to determine for whose benefit it was intended. If it was intended only for the benefit of the guarantee, he alone can sue upon it. Campbell *v.* Lacock, 40 Pa. St. 448. So where the stock-holders of a corporation sign an agreement to hold themselves responsible to its creditors, the writing is not negotiable, so that an assignee of a creditor can bring suit thereon in his own name. Gamwell *v.* Pomeroy, 121 Mass. 207. A construction company, when it placed on the market bonds secured by a mortgage on the road, gave a guaranty that the local subscriptions and grants would be sufficient to prepare the road for rails. It was held that any holders of bonds sustaining any loss by reason of the guaranty had an action over against the company. Meyer *v.* Egbert, 101 U. S. 728, 25 L. ed. 1078.

80. See *supra*, V, C, 6.

81. In the present state of the authorities it is difficult to adopt any general rule on the subject, but it may be said that wherever it is held that the guaranty itself is negotiable and passes by the indorsement, the indorsee may sue thereon in his own name. If the court holds that the guaranty is not negotiable, then the question as to whether the action can be maintained in the name of the indorsee will depend upon the rule of the jurisdiction where the action is begun, in reference to maintaining actions in the name of the real party in interest. See cases cited *infra*, note 82. See also Assignments; Commercial Paper; Parties.

82. *Alabama.*— Neal *v.* Smith, 5 Ala. 568.

Illinois.— Judson *v.* Gookwin, 37 Ill. 286.

Iowa.— Green *v.* Marble, 37 Iowa 95.

Michigan.— Green *v.* Burrows, 47 Mich. 70, 10 N. W. 111; Waldron *v.* Harring, 28 Mich. 493.

New York.— Sawyer *v.* Hopgood, 13 N. Y. St. 711; Ketchell *v.* Burns, 24 Wend. 456; Hough *v.* Gray, 19 Wend. 202.

Tennessee.— Taylor *v.* Memphis, etc., R. Co., 11 Lea 186.

See 25 Cent. Dig. tit. "Guaranty," § 82.

83. Springer *v.* Hutchinson, 19 Me. 359; True *v.* Fuller, 21 Pick. (Mass.) 140; Tinker

D. Parties.[84] The rule formerly was that a contract of guaranty, being separate and distinct from the principal contract, a joint action could not be maintained against the principal and guarantor of an obligation.[85] But this rule has been greatly modified by the codes of various states which now often permit one action to be maintained against both principal and guarantor.[86] Some cases also distinguish between a guaranty executed simultaneously with the principal contract and one made thereafter, based upon a separate consideration.[87] The prin-

v. McCauley, 3 Mich. 188; Ten Eyck *v.* Brown, 3 Pinn. (Wis.) 452, 4 Chandl. 151.

One taking an assignment of a bond from one who holds a guaranty of the bond, to avail himself of the guaranty, must bring suit in the name of the assignor. Beckley *v.* Eckert, 3 Pa. St. 292.

A guaranty of a note must be sued on in the name of the original guarantee. Moore *v.* Shinn, 1 Phila. (Pa.) 20.

A letter of credit under seal is not assignable so as to enable the assignees of a person who has given credit upon it to sustain a suit thereon in their own names. Aldricks *v.* Higgins, 16 Serg. & R. (Pa.) 212.

Before the code, a guaranty, the equitable title to which passed with the assignment of the note, could be enforced for the benefit of the assignee only in the name of the person to whom the offer of guaranty was made. Small *v.* Sloan, 1 Bosw. (N. Y.) 352.

84. See, generally, PARTIES.

85. *Arkansas.*— Killian *v.* Ashley, 24 Ark. 511, 91 Am. Dec. 519; Preston *v.* Davis, 8 Ark. 167.

Illinois.— Columbian Hardwood Lumber Co. *v.* Langley, 51 Ill. App. 100; Clark *v.* Morgan, 13 Ill. App. 597.

Maine.— Smith *v.* Loomis, 72 Me. 51.

Missouri.— Parmerlee *v.* Williams, 71 Mo. 410; Graham *v.* Ringo, 67 Mo. 324.

New York.— Tibbits *v.* Percy, 24 Barb. 39; De Ridder *v.* Schermerhorn, 10 Barb. 638; Miller *v.* Gaston, 2 Hill 188.

Ohio.— Camp *v.* Hulet, 6 Ohio 417.

Wisconsin.— Stewart *v.* Glenn, 5 Wis. 14.

See 25 Cent. Dig. tit. "Guaranty," § 97.

Where the guaranty is an entirely separate instrument from the original contract, the principal and guarantor cannot be joined as parties in one suit. Griffin *v.* Grundy County, 10 Iowa 226.

Right to join maker and guarantor of note see COMMERCIAL PAPER, 8 Cyc. 95.

86. *Iowa.*— Mix *v.* Fairchild, 12 Iowa 351; Marvin *v.* Adamson, 11 Iowa 371; Peddicord *v.* Whittam, 9 Iowa 471.

Kansas.— Hendrix *v.* Fuller, 7 Kan. 331.

Maine.— Castner *v.* Slater, 50 Me. 212.

Missouri.—Maddox *v.* Duncan, 62 Mo. App. 474.

New York.— Decker *v.* Gaylord, 8 Hun 110.

Ohio.— Kautzman *v.* Weirick, 26 Ohio St. 330.

Texas.— Tooke *v.* Taylor, 31 Tex. 1.

See 25 Cent. Dig. tit. "Guaranty," § 97.

In Iowa under Rev. St. par. 2764, authorizing an action against any one or all persons, jointly and severally, or severally bound by contract or any liability growing out of the same, including parties to negotiable paper and securities on the same or separate instruments, a joint action may be maintained against the maker of a negotiable note and the payee as guarantor. Tucker *v.* Shiner, 24 Iowa 334. Where a guarantor joins with the lessee in the execution of a lease, and guaranties on his part that the payments of rent shall be faithfully made as they become due, his liability is fixed by the failure of the lessee to pay the rent when due, and he may be joined in an action by the lessee to recover the rent. McLott *v.* Savery, 11 Iowa 323.

In Minnesota a statute providing that "persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and sureties on the same instrument, may all or any of them be included in the same action," an absolute guarantor on the same instrument, of the payment of a promissory note, may be joined as defendant in the same action with the maker. Hammel *v.* Beardsley, 31 Minn. 314, 17 N. W. 856.

In Ohio the payee of a negotiable promissory note who on transferring it writes his name on the back and guaranties its payment at maturity is a party to such note within the meaning of the statute; he may be sued jointly with the maker. Kautzman *v.* Weirick, 26 Ohio St. 330.

In Utah, in an action on a promissory note, the guarantors may be joined with the maker as defendants, under Comp. Laws (1876), par. 1240, providing that "persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and sureties on the same or separate instruments, may all, or any of them, be included in the same action." Gagan *v.* Stevens, 4 Utah 348, 9 Pac. 706.

87. In the former a joint action will be permitted against the principal and guarantor, while in the latter they must be sued separately. Where an instrument recites that the maker for value agrees to deliver certain tobacco on a certain day, and a guaranty is thereto attached of the fulfilment of the contract, if both instruments are executed on the same time, and take effect from a single delivery, the makers will be regarded as original contractors, and a joint action may be prosecuted against them. Lamping *v.* Cole, 2 Ohio Dec. (Reprint) 737, 5 West. L. Month. 187. Where A gave B a note, payable in clocks, and C, at the time of the execution of the note, wrote upon the back and signed these words, "I guarantee the fulfilment of the within contract," it was held that the instrument with its indorsement was a joint

cipal debtor is not a necessary party.[88] Persons who have jointly guarantied the payment of a note which is payable to themselves may be sued either jointly or severally.[89]

E. Set-Off.[90] Whether the right to a set-off which the principal if sued could plead is available to a guarantor when sued on his contract of guaranty is unsettled. While it has been held that he might set up in defense of an action against the principal and himself a claim existing in favor of the principal against plaintiff,[91] it is generally held that when the guarantor is sued in a court of law by the creditor he will not be permitted to plead a claim in set-off which belongs solely to the principal debtor.[92] But aside from the fact that the principal's rights may in some way be interfered with, as where the counter-claim amounts to more than the claim upon which the guarantor is sued, it seems but fair and equitable that the guarantor should be permitted to plead a set-off or counter-claim in favor of his principal. That this may be done in a court of equity or under a statute where all the parties are before the court is now settled by the authorities.[93] And

contract, and that A and C might be sued jointly upon it. Gale *v.* Van Arman, 18 Ohio 336. Where the principal gave a subscription to a medical college, and his subscription was at the same time and as a part of the same instrument, guarantied by another, the principal and guarantor may be jointly sued on the instruments. Neil *v.* Ohio Agricultural, etc., College, 31 Ohio St. 15.

When the contract was made in the name of the principal alone, and for further assurance another was made concerning the same subject-matter in the name of the principal, to which the agent added his personal guaranty, it was held that the principal and agent were properly joined as defendants to a bill brought on such contracts. Penn Tobacco Co. *v.* Leman, 109 Ga. 428, 34 S. E. 679; Mamerow *v.* National Lead Co., 98 Ill. App. 460; Douglass *v.* Titusville Second Nat. Bank, 4 Wkly. Notes Cas. (Pa.) 163; Eureka Marble Co. *v.* Windsor Mfg. Co., 47 Vt. 430; Eakin *v.* Burger, 1 Sneed (Tenn.) 417.

88. Zerkle *v.* Price, 7 Ohio S. & C. Pl. Dec. 465, 5 Ohio N. P. 480.

89. Gage *v.* Mechanics' Nat. Bank, 79 Ill. 62.

90. Set-off generally see RECOUPMENT, SET-OFF, AND COUNTER-CLAIM.

91. Concord *v.* Pillsbury, 33 N. H. 310; A guarantor may plead and prove in his defense any offset or counter-claim which would be available to the principal debtor. Aultman, etc., Co. *v.* Hefner, 67 Tex. 54, 2 S. W. 861.

92. The reason given for this view is that the claim sought to be set off does not belong to defendant, and that unless he is able to show that by refusing to allow him to plead the claim of the principal debtor in defense he will be injured, there is no occasion for allowing this defense. If the principal was at the time insolvent, so that after fulfilling his contract of guaranty he would have no remedy against him, the guarantor would in equity be permitted to plead any set-off which would be available to the principal debtor. Scholze *v.* Steiner, 100 Ala. 148, 14 So. 552; Lasher *v.* Williamson, 55 N. Y. 619; Gillespie *v.* Torrence, 25 N. Y. 306, 82 Am. Dec. 355; Henry *v.* Daley, 17 Hun (N. Y.) 210; Jarratt *v.* Martin, 70 N. C. 459; Hines *v.* Newton, 30 Wis. 640. See also East River Bank *v.* Rogers, 7 Bosw. (N. Y.) 493; Harrison *v.* Union Pac. R. Co., 13 Fed. 522, 4 McCrary 264.

A counter-claim growing out of a breach of warranty of an article sold is not available to a guarantor of the purchase-price of the article. Osborne *v.* Bryce, 23 Fed. 171. Where one is sued as guarantor of a promissory note given for a machine, he cannot deny his liability on the ground of a breach of warranty, where the warranty provided for the return of the machine, if it was not fulfilled, and he has not offered to return it. Plano Mfg. Co. *v.* Parmenter, 30 Ill. App. 569.

Credit for commissions, claimed by an insurance agent from the company, cannot be allowed a guarantor of the agent's note in a suit at law by the company against such guarantor. Such claim, if available at all, must be maintained in equity. New York Mut. L. Ins. Co. *v.* Wilcox, 17 Fed. Cas. No. 9,980, 8 Biss. 203.

In an action on a guaranty of the payment of rent the guarantor cannot under a plea of payment claim as a set-off any damages sustained by the tenant from trespass or other acts of the landlord. Coe *v.* Cassidy, 6 Daly (N. Y.) 242.

Under a defense of payment the guarantor cannot avail himself of any legal set-off or counter-claim existing in favor of the principal debtor as payment or otherwise except under circumstances appealing to the equitable consideration of the court. Coe *v.* Cassidy, 6 Daly (N. Y.) 242.

93. *Georgia.*— Livingston *v.* Marshall, 82 Ga. 281, 11 S. E. 542.

Illinois.— Himrod *v.* Baugh, 85 Ill. 435; Waterman *v.* Clark, 76 Ill. 428.

Indiana.— Harris *v.* Rivers, 53 Ind. 216.

Iowa.— Reeves *v.* Chambers, 67 Iowa 81, 24 N. W. 602.

Maine.— Peirce *v.* Bent, 69 Me. 381.

New Hampshire.— Concord *v.* Pillsbury, 33 N. H. 310; Mahurin *v.* Pearson, 8 N. H. 539.

the rule now is that when the principal can claim a right of set-off in equity, the surety or guarantor is entitled to the same benefit.[94]

F. Statute of Limitations[95] Against Principal Debtor. The general rule of law that the guarantor may for himself set up any defense which is available to the principal has, as has been shown, some exceptions, as where the principal is discharged by operation of law. Such an exception is found in the statute of limitations.[96]

G. Pleading[97] — 1. Declaration or Complaint[98] — a. In General.[99] A complaint which sets out the principal contract[1] and shows that it is binding,[2] the making of the guaranty and its terms or according to its legal effect,[3] the facts from which due diligence in seeking to collect the debt from the principal debtor may be inferred or the insolvency of the debtor,[4] and a breach,[5] is sufficient.

b. Averments as to Validity and Binding Force of Contract. A complaint in an action upon a guaranty of the payment of debts to be created in the future must allege that notice of acceptance was given to the guarantor.[6] But where

New York.— Bathgate *v.* Haskin, 59 N. Y. 533; Springer *v.* Dwyer, 50 N. Y. 19.

Ohio.— Wagner *v.* Stocking, 22 Ohio St. 297.

Pennsylvania.— Hollister *v.* Davis, 54 Pa. St. 508.

England.— Bechervaise *v.* Lewis, L. R. 7 C. P. 372, 41 L. J. C. P. 161, 26 L. T. Rep. N. S. 848, 20 Wkly. Rep. 726.

See 25 Cent. Dig. tit. "Guaranty," § 92.

The Judicature Act in England (1873) authorizes the surety or guarantor to plead a set-off in his own behalf which might be pleaded by his principal. This may be done in a court of law or equity. Bechervaise *v.* Lewis, L. R. 7 C. P. 372, 41 L. J. C. P. 161, 26 L. T. Rep. N. S. 848, 20 Wkly. Rep. 726.

94. *Connecticut.*— Merwin *v.* Austin, 58 Conn. 22, 18 Atl. 1029, 7 L. R. A. 84.

District of Columbia.— Darby *v.* Freedman, 3 MacArthur 349.

Missouri.— Field *v.* Oliver, 43 Mo. 200.

New Jersey.— Brewer *v.* Norcross, 17 N. J. Eq. 219.

New York.— Coffin *v.* McLean, 80 N. Y. 560; Smith *v.* Felton, 43 N. Y. 419.

Ohio.— Wagner *v.* Stocking, 22 Ohio St. 297.

Vermont.— Downer *v.* Dana, 17 Vt. 518.

See 25 Cent. Dig. tit. "Guaranty," § 92.

Where the principal debtor is insolvent this is especially true. Becker *v.* Northway, 44 Minn. 61, 46 N. W. 210, 20 Am. St. Rep. 543; Armstrong *v.* Warner, 49 Ohio St. 376, 31 N. E. 877, 17 L. R. A. 466.

95. Statute of limitations generally see Limitations of Actions.

96. The courts generally hold that the creditor may proceed against an absolute guarantor of payment even when his action is barred against the principal debtor. Smith *v.* Gillam, 80 Ala. 296; Hooks *v.* Mobile Branch Bank, 8 Ala. 580; McBroom *v.* Governor, 6 Port. (Ala.) 32; Bull *v.* Coe, 77 Cal. 54, 18 Pac. 808, 11 Am. St. Rep. 235; Sichel *v.* Carrillo, 42 Cal. 493; Villars *v.* Palmer, 67 Ill. 204; Taylor *v.* Beck, 13 Ill. 376; People *v.* White, 11 Ill. 341; Johnson *v.* Planters' Bank, 4 Sm. & M. (Miss.) 165, 43 Am. Dec. 480; Sibley *v.* McAllaster, 8 N. H. 389; Moore *v.* Gray, 26 Ohio St. 525; Camp *v.* Bostwick, 20 Ohio St. 337, 5 Am. Rep. 669. But some of the courts do not admit this exception to the general rule stated and hold that where the statute of limitations releases the principal the surety or guarantor may also depend upon that ground. Bridges *v.* Blake, 106 Ind. 332, 6 N. E. 833; Auchampaugh *v.* Schmidt, 70 Iowa 642, 27 N. W. 805, 59 Am. Rep. 459.

97. Pleading generally see Pleading.

98. Declaration against maker and guarantor which treats them as joint makers see Commercial Paper, 8 Cyc. 117 note 58.

99. General requisites of complaint see Sames *v.* Spawn, 6 Dak. 16, 50 N. W. 195; Cole *v.* Merchants' Bank, 60 Ind. 350; Mitchell *v.* McCleary, 42 Md. 374.

1. Fay *v.* Hall, 25 Ala. 704; Walker *v.* Forbes, 25 Ala. 139, 60 Am. Dec. 498.

A variance between the pleading and proof as to the date when credit was given on the strength of the guaranty has been held immaterial. Lawson *v.* Townes, 2 Ala. 373.

2. Wood *v.* Husted, 83 N. Y. App. Div. 174, 82 N. Y. Suppl. 631.

3. Where the complaint in an action on a note alleged that defendant by writing his name on the back of the note became a guarantor for its payment and that upon the strength of such guaranty another person received the note for value, it was held that the complaint sufficiently averred a guaranty of payment. Wallace *v.* Lark, 12 S. C. 576, 32 Am. Rep. 516. But under a declaration in assumpsit, alleging a guaranty of payment of a certain sum within four months, the admission in evidence of a guaranty of payment of one-half the sum within sixty days and of the other half within four months is a fatal variance. Reading *v.* Linington, 12 Ill. App. 491. Although a guaranty is written upon the same instrument as that containing the principal contract and is actually executed on the same date, if it bears no date it is erroneous to allege that it bears the same date as that of the principal contract. Phillips *v.* Smoot, 1 Mackey (D. C.) 478.

4. Nesbit *v.* Bradford, 6 Ala. 746.

5. Nesbit *v.* Bradford, 6 Ala. 746.

6. Roots *v.* Jenifer, 3 Ohio Dec. (Reprint) 214, 4 Wkly. L. Gaz. 401.

notice of the acceptance of a proffered guaranty is necessary, in order to charge the guarantor, it is sufficient if such notice be alleged in general terms in the declaration.[7] And where the guaranty set out is of such a nature as to imply notice of acceptance, it need not be averred.[8] The declaration should state the consideration for the guaranty.[9] And where the guaranty was executed in another state by whose laws it is valid and the contract of guaranty is invalid in the jurisdiction where suit is brought the laws of the foreign state must be pleaded.[10] The complaint need not, however, allege that the guaranty was in writing.[11]

c. Averments as to Performance or Non-Performance. The creditor must allege performance by him of the principal contract,[12] and that he kept strictly within its terms;[13] and must allege non-performance of such contract by the principal debtor.[14] The complaint must also aver non-performance by the guarantor.[15] A declaration which merely avers non-payment of the debt by the principal debtor is not sufficient.[16]

d. Averments as to Performance of Conditions Precedent — (i) *In General.* Where the contract of guaranty contains any condition precedent to the guarantor's liability the performance of this condition must be alleged in the complaint against the guarantor.[17]

7. Cahuzac *v.* Samini, 29 Ala. 288; Fay *v.* Hall, 25 Ala. 704; Williams *v.* Staton, 5 Sm. & M. (Miss.) 347; Central Sav. Bank *v.* Shine, 48 Mo. 456, 8 Am. Rep. 112. If the complaint alleges that notice of acceptance of the guaranty was given, it is not necessary to aver that notice was necessary. Oaks *v.* Weller, 16 Vt. 63.

8. White *v.* Reed, 15 Conn. 457.

9. Leach *v.* Rhodes, 49 Ind. 291; Bailey *v.* Freeman, 4 Johns. (N. Y.) 280; Greene *v.* Dodge, 2 Ohio 430; Winkler *v.* Chesapeake, etc., R. Co., 12 W. Va. 699. See also Mathews *v.* Chrisman, 20 Miss. 595, 51 Am. Dec. 124; Clay *v.* Edgerton, 19 Ohio St. 549, 2 Am. Rep. 422. A declaration that a corporation by its treasurer made a note payable to the treasurer, to be indorsed by him for the benefit of the corporation, that he so indorsed it, that defendants, directors in the corporation, indorsed on the note their guaranty of its payment, and that it was then sold to plaintiff for a valuable consideration paid to the treasurer, sufficiently states the consideration for the guaranty and that plaintiff is the first indorsee and holder. Jones *v.* Dow, 137 Mass. 119. And where A, being indebted to B, and having mortgaged land to secure the debt, made another mortgage of the same land to secure a debt to C and C had undertaken to pay A's debt to B, and C then made a written promise to B to pay A's debt to him, it was held in an action by B against C on this written promise, that A's mortgage to C was proper evidence to prove a consideration moving from A to C for C's promise to pay A's debt to B, although no such consideration was laid in the declaration. Colgin *v.* Henley, 6 Leigh (Va.) 85. But where plaintiff declared on defendant's special agreement to guaranty the payment of certain promissory notes made by S to plaintiff, in consideration of a sale and delivery of goods by plaintiff to S, and the agreement introduced in evidence recited the notes of S which purported to be for value received, but contained no consideration for defendant's promise, except such as might be inferred from the words, "Value received," used in the notes, and no other evidence of a consideration was offered, it was held that the proof did not meet the declaration. Wheelwright *v.* Moore, 1 Hall (N. Y.) 201.

The consideration of the assignment of a lease need not be set out in a suit on a guaranty given by the assignor of lease at the time of the assignment. Harper *v.* Pound, 10 Ind. 32.

Necessity of averring consideration for guaranty by indorsement see COMMERCIAL PAPER, 8 Cyc. 111.

10. Cahill Iron Works *v.* Pemberton, 27 N. Y. Suppl. 927, 931, 30 Abb. N. Cas. 450.

11. Miles *v.* Jones, 28 Mo. 87.

12. Snowden *v.* Light, 5 Ky. L. Rep. 606, 6 Ky. L. Rep. 118.

13. Horton *v.* Ruhling, 3 Nev. 498.

14. Camp *v.* Scott, 47 Conn. 366; Mitchell *v.* Dall, 2 Harr. & G. (Md.) 159; Winkler *v.* Chesapeake, etc., R. Co., 12 W. Va. 699; Hank *v.* Crittenden, 11 Fed. Cas. No. 6,024, 2 McLean 557. See also Curtis *v.* Hubbard, 6 Metc. (Mass.) 186. A declaration in assumpsit alleging a contract by defendant to become security for another is defective, in failing to allege non-payment by the principal debtor. Fay *v.* Hall, 25 Ala. 704.

15. Roberts *v.* Treadwell, 50 Cal. 520; Williams *v.* Staton, 5 Sm. & M. (Miss.) 347.

A complaint against the guarantor of payment of money due upon a contract must allege that defendant has not paid the money due. An averment that the sum is now due is not enough. Roberts *v.* Treadwell, 50 Cal. 520.

In the case of a general guaranty the complaint must show non-performance by the guarantor as to some particular debt or obligation. Wassenick *v.* Ireland, (Tex. 1888) 9 S. W. 203.

16. Williams *v.* Staton, 5 Sm. & M. (Miss.) 347.

17. Mickle *v.* Sanchez, 1 Cal. 200.

(II) *Due Diligence of Creditor.* Where due diligence is required on the part of the creditor in enforcing his claim against the principal debtor, such diligence must be averred,[18] or plaintiff must allege that the principal debtor was insolvent.[19]

(III) *Notice of Default.* If notice of default is held to be a condition precedent to the guarantor's liability,[20] as in the case of a guaranty of collection, it is necessary to aver both notice to the guarantor of default of the principal debtor and also the exercise of due diligence to collect the debt from the debtor.[21] And where an averment of such notice is necessary, the complaint should allege when the principal debt fell due and when demand of payment was made.[22] But as notice of default is not required in the case of absolute guaranty,[23] an averment of notice in such a case is not required.[24] And even in the case of conditional guaranties it has been held that a failure to give notice where notice is necessary, unless expressly made a condition precedent, is ground for a defense only to the extent that defendant has been damaged by such failure and hence notice need not be alleged in the complaint or petition.[25]

2. Answer. The sufficiency of the answer of the guarantor must ordinarily depend on the application of the general rules of pleading.[26] A plea of *non est*

The keeping of the tenant in quiet possession of the premises during the term is a condition precedent to the liability of the guarantor of rent, and in action against the guarantor the petition must allege its performance. Snowdon *v.* Light, 6 Ky. L. Rep. 118, 5 Ky. L. Rep. 606.

18. Berry *v.* Kenney, 5 B. Mon. (Ky.) 120.

Sufficiency of allegation.— It is not sufficient to allege generally that due diligence has been used; the facts constituting such diligence must be set out. Leas *v.* White, 15 Iowa 187. Where due diligence is required the mere allegation that the creditor secured judgment against the debtor and that it remained unpaid and uncollected is not sufficient in the absence of averments that the debtor was insolvent or of other circumstances showing a reason for the judgment remaining uncollected. Nichols *v.* Allen, 22 Minn. 283. But an allegation that the debtor refused to pay a judgment recovered against him has been held sufficient, although there was no averment of a return of execution *nulla bona.* McCown *v.* Muldoon, 147 Pa. St. 311, 23 Atl. 369.

Waiver of use of diligence.— Plaintiff cannot show that the use of due diligence was waived without alleging the fact of such waiver. Clark *v.* Kellogg, 96 Mich. 171, 55 N. W. 667.

19. Gaster *v.* Ashley, 1 Ark. 325.

20. An averment in a declaration on a guaranty that a note would be collectable, that "when said note became due and payable, said note was not good and collectable, and the plaintiff was unable to collect said note," and that plaintiff "hath been wholly unable to collect said note," does not sufficiently import that all endeavors to collect the note would have been manifestly useless, so as to furnish a sufficient excuse for omitting to give the guarantor notice of the failure to collect. Sylvester *v.* Downer, 18 Vt. 32.

21. Sylvester *v.* Downer, 18 Vt. 32.

22. Lawson *v.* Townes, 2 Ala. 373. In an action on a contract of guaranty, whereby the guarantor was to have "ninety days, after demand in writing . . . to pay the amount . . . in default," it is not sufficient to aver merely that more than ninety days before action brought the creditor gave notice to the guarantor of the debtor's indebtedness in a certain sum, and then made a written demand on the guarantor for payment of said sum, as such averment is not equivalent to an allegation that, at the time of such notice to the guarantor, such sum was due and payable, or that the debtor was in default. Curtis *v.* Hubbard, 6 Metc. (Mass.) 186.

23. See *supra*, VII, C, 2.

24. Thrasher *v.* Ely, 2 Sm. & M. (Miss.) 139. Where a written agreement sets forth that one party has assigned to the other a judgment bearing a specified rate of interest, and that a third party guaranties payment at a given time, and if not then paid guaranties three per cent additional interest from that date, a complaint thereon by the assignee against the guarantor need not allege notice to the latter of the non-payment of the judgment or contain an offer to assign the judgment to the guarantor. Frash *v.* Polk, 67 Ind. 55.

25. Although a guarantor is entitled to notice of the principal's default, yet in an action upon his contract a guarantor cannot demur to the complaint, on account of its failure to aver such notice. La Rose *v.* Logansport Nat. Bank, 102 Ind. 332, 1 N. E. 805. In an action on a note against the maker and the payee who has guarantied the note, it is not necessary in order to charge the guarantor to allege presentment to the maker and notice of non-payment to the guarantor. Marvin *v.* Adamson, 11 Iowa 371.

26. See, generally, Pleading.

Creditor's acts or conduct.— If the guarantor desires to set up the defense that the creditor disabled himself from performing his part of the contract he must plead the facts

factum does not put in issue an averment of demand and notice.[27] But where the guaranty is of the payment of a debt, a plea of "never indebted" is sufficient to put in issue the consideration of the guaranty.[28]

3. Issues, Proof, and Variance.[29] An immaterial variance may be disregarded.[30] But the proof must substantially correspond with the averments of the complaint,[31] with respect to the terms of the guaranty,[32] and with respect to the consideration.[33] If defendant desires to avail himself of facts which discharge him from liability under an admitted contract of guaranty he must plead them.[34]

H. Presumptions and Burden of Proof.[35] The creditor must clearly prove the liability of the guarantor[36] and show all the elements of his cause of action,[37] including the consideration for the contract,[38] and that the guarantor acted in reliance upon the guaranty.[39] The burden rests upon the creditor to show that the terms of the guaranty have been complied with,[40] and that the guarantor has not paid the debt.[41] And in the case of a conditional guaranty, the burden rests

showing such defense. Thus where defendant guarantied payment of the purchase-price on a contract for the sale of land by plaintiff to his principal, to entitle defendant to raise the defense that plaintiff has parted with his title to the land he must plead such defense, or give notice of it under a plea of *non est factum*. Van Rensselaer *v.* Miller, Lalor (N. Y.) 237.

Extension of time to debtor.— Where the guarantor asserts as a defense that he was discharged by an extension of time to the principal debtor, he must allege that there was a consideration for such extension, and that it was for a definite time. Sample *v.* Martin, 46 Ind. 226.

Failure to give notice of default.— If he desires to avail himself of the fact that no notice of default was given to him he must aver the failure to give such notice. Furst, etc., Mfg. Co. *v.* Black, 111 Ind. 308, 12 N. E. 504; Ward *v.* Wilson, 100 Ind. 52, 50 Am. Rep. 763.

27. Mann *v.* Eckford, 15 Wend. (N. Y.) 502.

28. Little *v.* Edwards, 69 Md. 499, 16 Atl. 134.

29. See Commercial Paper, 8 Cyc. 199 note 49.

30. Lawson *v.* Townes, 2 Ala. 373; Phipps *v.* Willis, 11 Tex. Civ. App. 186, 32 S. W. 801.

31. Scott *v.* Horn, 9 Pa. St. 407.

Under an averment of the exercise of due diligence, plaintiff cannot show a waiver by defendant of such diligence. Clark *v.* Kellogg, 96 Mich. 171, 55 N. W. 667.

32. Phillips *v.* Smoot, 1 Mackey (D. C.) 478; Reading *v.* Linington, 12 Ill. App. 491.

33. Wheelright *v.* Moore, 1 Hall (N. Y.) 201. *Compare* Colgin *v.* Henley, 6 Leigh (Va.) 85.

34. Furst, etc., Mfg. Co. *v.* Black, 111 Ind. 308, 12 N. E. 504; Ward *v.* Wilson, 100 Ind. 52, 50 Am. Rep. 763.

So a release by an extension of time to the principal debtor must be pleaded. National Radiator Co. *v.* Hull, 79 N. Y. App. Div. 109, 79 N. Y. Suppl. 519.

35. **Burden of proof** to show whether one indorsing a note in blank has assumed the liability of a guarantor see Commercial Paper.

36. Kellogg *v.* Stockton, 29 Pa. St. 460.

Every ambiguity in the proof will weigh in favor of the guarantor. Kellogg *v.* Stockton, 29 Pa. St. 460.

37. See cases cited *infra*, note 38 *et seq.*

38. Where the consideration alleged is forbearance to sue the creditor must show actual forbearance. Thomas *v.* Croft, 1 Strobh. (S. C.) 40. And where the guaranty was given subsequent to the execution of the principal contract, in pursuance of some subsequent arrangement, the burden rests upon the creditor to show a consideration for the guaranty. Klein *v.* Currier, 14 Ill. 237; Featherstone *v.* Hendrick, 59 Ill. App. 497.

But if the guaranty recites that it is "for value received," the burden is thrown upon the guarantor to show that he did not receive a consideration. Quimby *v.* Morrill, 47 Me. 470. Effect of words "Value received" as raising presumption of consideration see Commercial Paper, 7 Cyc. 612.

Where a guaranty is written upon the same instrument as that containing the principal contract and the guaranty has no date, it will be presumed to have been made at the same time as the principal contract. See *supra*, III D, 2, b.

39. In an action for the price of goods alleged to have been sold on defendant's credit, and delivered at his request to a third person, the burden of overcoming the inference against a sale on defendant's credit, arising from the fact that plaintiff's books show that credit was given to the third person, is upon plaintiff. Drummond *v.* Huyssen, 46 Wis. 188, 50 N. W. 590. But the production by plaintiff of a letter of credit addressed to him by defendant raises the presumption that he acted in reliance thereon at the time of the transaction in question. Union Bank *v.* Lockett, 18 La. Ann. 678.

40. Hayden *v.* Crane, 1 Lans. (N. Y.) 181.

41. Craig *v.* Phipps, 23 Miss. 240.

upon plaintiff to prove performance of the condition.[42] But the creditor need not show that notice of default was given to the guarantor if the guaranty did not make any provision for such notice.[43] In general the burden rests upon the guarantor to show that he has been discharged from liability under an admitted contract of guaranty,[44] or to show that the creditor did not realize as much as he might have realized from collateral securities which he has foreclosed.[45]

I. Admissibility of Evidence[46] — **1. In General.** Where defendant denies the making of the writing sued on parol evidence is admissible to prove the execution of it.[47] And parol evidence may be admissible to show that a contract of guaranty was intended to form part of a transaction evidenced by a written instrument and that it was omitted from the writing through the fraudulent representations of one of the parties.[48] The declarations of the guarantor are admissible for the purpose of showing his promise[49] or of proving notice to him of acceptance of the guaranty.[50] With respect to the consideration of the contract,[51] evidence is admissible to show failure thereof.[52] A written guaranty is evidence of the facts therein recited;[53] and where the execution of a guaranty is admitted the note evidencing the debt whose payment is guarantied is admissible in evidence without proof of execution.[54] Where it is alleged that the contract of guaranty was induced by fraud, the ordinary rules governing the admission of evidence to show fraud or disprove its existence apply.[55]

2. As to Extent of Guarantor's Liability. The principal contract is admissible in evidence for the purpose of showing the measure of the guarantor's liability[56]

42. Cereghino *v.* Hammer, 60 Cal. 235; Waldheim *v.* Sonnenstrahl, 8 Misc. (N. Y.) 219, 28 N. Y. Suppl. 582 [*reversing* 7 Misc. 738, 27 N. Y. Suppl. 1133]. Where defendant guarantied the payment of a certain amount of P's indebtedness to plaintiffs, providing he owed that amount to P at a certain time, in an action against defendant it was incumbent on plaintiff to show that defendant was so indebted to P at that time. Gillett *v.* McAllister, 1 Colo. App. 168, 27 Pac. 1013. Defendant indorsed on a note, "the within amount I promise to pay, when in funds, belonging to" the maker of the note, "the period not to exceed six months." This being a promise to pay the debt of another, and without any apparent consideration, the fact of defendant's having such funds within that period must be averred and proved, to bind defendant. Duncan *v.* Gadsden, Harp. (S. C.) 364.

43. Crompton's Estate, 9 Pa. Co. Ct. 401. **Although a notice is required,** in some jurisdictions, defendant has the burden of showing that he has sustained damage from failure to give him notice of default. Snyder *v.* Click, 112 Ind. 293, 13 N. E. 581.

44. Meyer *v.* Blakmore, 54 Miss. 570; Travelers' Ins. Co. *v.* Stiles, 82 N. Y. App. Div. 441, 81 N. Y. Suppl. 664. The burden rests on defendant to show that he was released by an extension of time. Alger *v.* Alger, 83 N. Y. App. Div. 168, 82 N. Y. Suppl. 523. But where defendant asserts that he is discharged by reason of the making of a subsequent agreement, the burden of proof rests upon the creditor to show that the guarantor consented to the agreement. Gardner *v.* Watson, 76 Tex. 25, 13 S. W. 39.

The burden is on the unconditional guarantor of a note to prove the holder guilty of such laches in seeking to collect against the maker as to work his discharge. Heaton *v.* Hulbert, 4 Ill. 489.

45. Kortlander *v.* Elston, 52 Fed. 180, 2 C. C. A. 657.

46. **Evidence** generally see Evidence.

Admissibility of guaranty written on note to prove genuineness of indorsement see Commercial Paper, 8 Cyc. 261 note 87.

47. Lennon *v.* Goodspeed, 89 Ill. 438.

48. Overton *v.* Tracey, 14 Serg. & R. (Pa.) 311.

49. Crenshaw *v.* Jackson, 6 Ga. 509, 50 Am. Dec. 361.

50. White *v.* Reed, 15 Conn. 457. Where one has made an offer of guaranty and subsequently has postponed payment upon being called upon for payment, or where he denies liability, but not upon the ground that he has received no notice of acceptance of the guaranty by the creditor, such facts are admissible in evidence for the purpose of showing that he received notice of acceptance. Oaks *v.* Weller, 16 Vt. 63.

51. Sterns *v.* Marks, 35 Barb. (N. Y.) 565. The guarantor may show that the consideration recited in his contract was no part of the transaction in which the guaranty was given. Snowden *v.* Light, 5 Ky. L. Rep. 606, 6 Ky. L. Rep. 118.

52. Southard *v.* Bryant, 26 Nebr. 253, 41 N. W. 1009.

53. Peck *v.* Barney, 12 Vt. 72.

54. Martin *v.* Butler, 111 Ala. 422, 20 So. 352.

55. Martin *v.* Butler, 111 Ala. 422, 20 So. 352; Walker *v.* Thompson, 61 Me. 347; Blanchard *v.* Mann, 1 Allen (Mass.) 433; Egan *v.* Gordon, 65 Minn. 505, 68 N. W. 103. See also Riley *v.* Melquist, 23 Nebr. 474, 36 N. W. 657.

56. Mallory *v.* Lyman, 3 Pinn. (Wis.) 443, 4 Chandl. 143.

With respect to the admission of parol evidence for the purpose of determining the scope and extent of the guarantor's liability,[57] or for the purpose of showing that the contract was executed upon some condition, the ordinary rules governing the admission of parol evidence apply.[58]

3. As to Performance of Conditions Precedent or Discharge of Guarantor. Evidence is admissible to show that the creditor has exhausted his remedies against the principal debtor.[59] In jurisdictions where proof of insolvency at the time of the maturity of the debt excuses the failure to give notice of default,[60] evidence as to the time when the principal debtor became insolvent is of course admissible.[61] On the other hand on behalf of the guarantor any evidence tending to show laches on the part of the creditor in pursuing the principal debtor is admissible in those jurisdictions where such diligence is required as a condition precedent to suing the guarantor.[62] And where the guarantor alleges that he has been released by the making of a new agreement between the creditor and the principal debtor, he may show facts which might have operated to induce the making of the alleged new agreement.[63]

J. Sufficiency of Evidence[64] — **1. In General.** The evidence as to the making of a contract of guaranty should be clear and satisfactory.[65] The mere fact that a considerable time after the making of the guaranty the principal debtor took advantage of the insolvent law does not conclusively prove insolvency at the time of the making of the guaranty.[66]

2. To Show Release and Discharge of Guarantor. Merely showing that property has been delivered to the creditor by the principal debtor without showing some understanding as to its application does not conclusively show payment.[67] And a mere admission of liability by the guarantor is not conclusive, as there may have been facts unknown to him which discharged him from liability.[68]

K. Questions For Jury[69] — **1. In General.** Whether upon undisputed facts there is a contract of guaranty is a question of law.[70] But where the terms of the contract in question are such as to admit of two interpretations and which is to be chosen depends upon extrinsic facts,[71] and these facts are in dispute, the question as to whether the contract sued on is one of guaranty or of original

57. Commercial Bank *v.* Eddy, 7 Metc. (Mass.) 181.

In an action on a letter of credit which announces that the one to whom it is given is the agent of the writer, and requests that any goods or assistance the agent may need shall be furnished and charged to the account of the writer, but gives no authority to draw drafts, evidence is admissible to show other acts and admissions of the writer to charge him with responsibility for drafts drawn by the agent in favor of the person to whom the letter was addressed on the writer of the letter of credit. Friedlander *v.* Cornell, 45 Tex. 585.

58. Medary *v.* Cathers, 161 Pa. St. 87, 28 Atl. 1012. Admission of parol evidence generally see Evidence.

59. Sterns *v.* Marks, 35 Barb. (N. Y.) 565. A decree directing the name of one of the makers of a note to be canceled, because it was used without authority, is competent evidence in a subsequent suit upon the guaranty, although the guarantor was not a party, to show that plaintiff had exhausted his remedy against the makers of the note. Sterns *v.* Marks, 35 Barb. (N. Y.) 565.

To show insolvency of the principal debtor a return of *nulla bona* execution issued against him is competent. Bertram *v.* Jackson, 32 Ga. 409; Lawson *v.* Wright, 21 Ga. 242; Eichelberger *v.* Pike, 22 La. Ann. 142.

60. See *supra*, VII, C.

61. Bushnell *v.* Church, 15 Conn. 406.

62. Kramph *v.* Hatz, 52 Pa. St. 525.

63. White *v.* Walker, 31 Ill. 422.

64. Evidence generally see Evidence.

65. Diggs *v.* Staples, 7 La. Ann. 653; Weinhandler *v.* Colonial Brewing Co., 32 Misc. (N. Y.) 731, 66 N. Y. Suppl. 306.

66. Whiton *v.* Mears, 11 Metc. (Mass.) 563, 48 Am. Dec. 233. But to render the guarantor of the collection of a bond liable, proof that the principal debtors from the maturity of the debt have been uniformly insolvent and unable to pay any part of it is satisfactory and sufficient evidence that legal proceedings would be unavailable to collect the debt. Cady *v.* Sheldon, 38 Barb. (N. Y.) 103.

67. Tyler *v.* Stevens, 11 Barb. (N. Y.) 485.

68. Louisville Mfg. Co. *v.* Welch, 10 How. (U. S.) 461, 13 L. ed. 497.

69. Questions of law and fact generally see Trial.

70. Ferris *v.* Walsh, 5 Harr. & J. (Md.) 306; Gallagher *v.* White, 31 Barb. (N. Y.) 92.

71. Hueske *v.* Broussard, 55 Tex. 201.

promise[72] is for the jury. The question as to whether notice of acceptance was given in a reasonable time is usually for the jury,[73] as is the question of the sufficiency of such notice.[74] Where there is no direct evidence as to when a contract of guaranty was executed the question as to whether it was simultaneous with the principal contract is properly left to the jury.[75] And it is usually for the jury to say whether there was a failure of consideration for the guaranty,[76] and whether the creditor relied upon the guaranty in extending credit.[77]

2. Construction and Operation of Contract. Where the facts surrounding the transaction have been ascertained the construction of the contract of guaranty is a matter of law for the court;[78] but if the consideration of extrinsic facts is necessary to get at the intention of the parties, and they are in dispute, then the question of construction is for the jury,[79] under proper instructions of the court.[80] The question as to whether there has been a departure from the contract so as to release the guaranty is usually one for the jury;[81] but where the facts are undisputed the question as to whether there has been a change in the contract releasing the guarantor is for the court.[82]

3. Diligence in Pursuing Principal Debtor. The question of whether the creditor has used due diligence in attempting to collect his debt from the principal debtor is usually for the jury;[83] and this is true, although the evidence as to

72. Hauck *v.* Craighead, 8 Hun (N. Y.) 237. Where the evidence tends to show a guaranty, it is error to submit the case to the jury as one of an original promise to pay. Hall *v.* Woodin, 35 Mich. 67. The evidence of a promise to pay the debt of another must be clear, explicit, and certain; but whether it be so or not is a question of fact for the jury. Kuns *v.* Young, 34 Pa. St. 60.

Whether a guaranty is absolute or special has been held to be a question of fact. Donovan *v.* Griswold, 37 Ill. App. 616.

73. Central Sav. Bank *v.* Shine, 48 Mo. 456, 8 Am. Rep. 112. But where no notice of the amount of advances made in reliance upon a guaranty was given until nearly three years had elapsed after the credit on the last parcel of goods had expired, it was held that it was not for the jury to say whether or not this notice was seasonable. Craft *v.* Isham, 13 Conn. 28.

74. Lowry *v.* Adams, 22 Vt. 160.

Notice of acceptance is a question of fact to be found by the jury or court, the same as any other issuable act in a given case. Hasselman *v.* Japanese Development Co., 2 Ind. App. 180, 27 N. E. 318, 28 N. E. 207.

75. Bickford *v.* Gibbs, 8 Cush. (Mass.) 154.

76. Kansas Mfg. Co. *v.* Lumry, 36 Nebr. 123, 54 N. W. 123. But in an action against a married woman on an instrument reciting that "for value received" defendant guarantied the payment to a certain bank of all the debts of her husband, defendant is not entitled to go to the jury upon the question of consideration merely upon evidence that on the day the guaranty was executed the husband did not receive any money or notes from the said bank. Hayes *v.* Hood, 10 N. Y. Suppl. 265.

77. Billingsley *v.* Dempewolf, 11 Ind. 414; Currie Fertilizer Co. *v.* Byfield, 9 Ind. App. 180, 34 N. E. 451, 36 N. E. 438; Lazear *v.* National Union Bank, 52 Md. 78, 36 Am. Rep. 355.

Where in an action to hold liable the maker of a letter of credit, the teller of the bank giving the credit testified that, although he did not remember seeing such a letter and could not state the contents, the one applying for the credit stated that he had a letter from defendant, and that it was because of the applicant having it that the bank discounted his bills, and the letter was produced on the trial, it was held that a finding that the credit was given on the faith of the letter was warranted. Union Bank *v.* Lockett, 18 La. Ann. 678.

78. Bell *v.* Bruen, 1 How. (U. S.) 169, 11 L. ed. 89.

79. McClanathan *v.* Friedel, 85 Hun (N. Y.) 175, 32 N. Y. Suppl. 588.

80. Coquillard *v.* Hovey, 23 Nebr. 622, 37 N. W. 479, 8 Am. St. Rep. 134.

81. Brennen *v.* Busch, 67 Mich. 670, 35 N. W. 795.

Where the guaranty was a continuing one in which neither the time for which it should continue nor the amount of the guarantor's liability was limited, and upon the question as to whether the creditor had attempted for an unreasonable length of time to give credit on the faith of the guaranty, the only fact which appeared was that credit was extended about a year after the guaranty was given, it was held proper for the trial court to determine as a matter of law that the creditor did not continue for an unreasonable time to act on the faith of the guaranty. Lehigh Coal, etc., Co. *v.* Scallen, 61 Minn. 63, 63 N. W. 245.

82. Johnson *v.* Bailey, 79 Tex. 516, 15 S. W. 499.

83. Backus *v.* Shipherd, 11 Wend. (N. Y.) 629; Tissue *v.* Hanna, 158 Pa. St. 384, 27 Atl. 1104; Kramph *v.* Hatz, 52 Pa. St. 525; Rudy *v.* Wolf, 16 Serg. & R. (Pa.) 79; Brainard *v.* Reynolds, 36 Vt. 614.

the delay in suing is undisputed,[84] if the creditor introduces evidence in explanation of the delay.[85] On the other hand it has been held that what constitutes due diligence in trying to collect the debt from the principal debtor is a question of law for the court;[86] and that if it depends upon the existence of certain facts the jury may be instructed that due diligence exists or not, as they may find such facts.[87]

4. Giving Notice of Default. The question whether notice of default was given to the guarantor within a reasonable time is usually one for the jury.[88]

5. Release and Discharge of Guarantor. Where there is no question as to the facts it is for the court to say whether a change in the contract is material so as to release the guarantor;[89] but in case of a dispute as to the facts, it is usually for the jury to say whether the guarantor has been released by such a change,[90] or by an extension of the time of performance;[91] as is the question whether the guarantor has consented to the change.[92] So also as to the question whether a guarantor revoked the guaranty before the creditor acted in reliance thereon.[93]

L. Conclusiveness of Adjudication in Action Against Principal.[94] In an action upon a contract of guaranty, a judgment against the principal debtor, if fairly obtained, especially if obtained on notice to the guarantor, is admissible in evidence against defendant;[95] but it is not conclusive.[96]

What is due diligence is a mixed question of law and fact. Day *v.* Elmore, 4 Wis. 190.

84. Undisputed evidence.—Generally, where the question of what constitutes due diligence arises upon undisputed evidence, it is one of law only. Salt Springs Nat. Bank *v.* Sloan, 135 N. Y. 371, 32 N. E. 231; Burt *v.* Horner, 5 Barb. (N. Y.) 501. Yet if the uncontradicted evidence shows a case where different inferences might be drawn from undisputed facts as to the existence or nonexistence of diligence, it is held that such inferences should be drawn by the jury under proper instructions from the court. Salt Springs Nat. Bank *v.* Sloan, *supra*. Where defendant guarantied the collection of a bond and mortgage, and the facts, although undisputed, were such that different inferences might be drawn, the court might under proper instruction submit to the jury the question whether the guarantee had prosecuted the claim with due diligence. Mead *v.* Parker, 111 N. Y. 259, 18 N. E. 727.

85. Salt Springs Nat. Bank *v.* Sloan, 135 N. Y. 371, 32 N. E. 231 [*reversing* 15 N. Y. Suppl. 306].

86. Jones *v.* Ashford, 79 N. C. 172; Graham *v.* Bradley, 5 Humphr. (Tenn.) 476. Whether the guarantor is discharged by a lack of diligence when, after judgment against the principal and two nihils returned, the guarantee neglects to take judgment against bail, is a question of law. Battle *v.* Little, 12 N. C. 381.

87. Brown *v.* Brooks, 25 Pa. St. 210.

88. Jackson *v.* Yandes, 7 Blackf. (Ind.) 526; Wadsworth *v.* Allen, 8 Gratt. (Va.) 174, 56 Am. Dec. 137.

89. Farrar *v.* Kramer, 5 Mo. App. 167.

90. Duquesne Nat. Bank *v.* Williams, 155 Pa. St. 48, 25 Atl. 742.

91. Helios-Upton Co. *v.* Thomas, 96 N. Y. App. Div. 401, 89 N. Y. Suppl. 222.

92. Wickham *v.* Terhune, 5 Silv. Sup. (N. Y.) 114, 8 N. Y. Suppl. 170.

93. Nichols *v.* Bauman, 6 Misc. (N. Y.) 219, 26 N. Y. Suppl. 539.

94. Res judicata generally see Judgments.

95. Clark *v.* Carrington, 7 Cranch (U. S.) 308, 3 L. ed. 354.

A judgment and execution against the principal are *prima facie* evidence, in an action against the guarantor, in an attempt to collect the money by due course of law. Backus *v.* Shipherd, 11 Wend. (N. Y.) 629.

In an action against the guarantor of a note, the record of a judgment for defendants in a suit upon the note against the makers is evidence of the fact of its rendition, especially where notice of the suit was given to the guarantor. Robinson *v.* Lane, 14 Sm. & M. (Miss.) 161. A judgment for defendant in an action by the guarantee on a note assigned to him, of which action the guarantor had notice, concludes him in an action on the guaranty; and, without such notice, it is *prima facie* evidence that nothing was due. Ayres *v.* Findley, 1 Pa. St. 501.

In an action by a lessor against a guarantor of the rent, the judgment-roll in a forcible entry suit brought by the lessor against the lessee for non-payment of rent is not evidence, as against the guarantor, of the truth of the allegations in the complaint in such suit, or of the findings of the court therein, where it does not appear that the guarantor was notified of such suit or had an opportunity to defend it. Grommes *v.* St. Paul Trust Co., 147 Ill. 634, 35 N. E. 820, 37 Am St. Rep. 248 [*affirming* 47 Ill. App. 568].

Where one guaranties the payment of a judgment, provided the judgment debtor is prosecuted to insolvency, the record of proceedings in another state against the judgment debtor on the judgment, where judgment was rendered for the debtor, is admissible in an action against the guarantor to show that the effort to prosecute the debtor failed. Woodward *v.* Moore, 13 Ohio St. 136.

96. *Illinois.*—Eaton *v.* Harth, 45 Ill. App. 355.

M. Review on Appeal.[97] The ordinary rule applying to appeals in general that objections which are not raised in the trial court cannot be raised for the first time on appeal applies to actions upon guaranties.[98]

XII. Recourse by Creditor to Indemnity Given to Guarantor.

Where the guarantor is himself indemnified by a lien on the property of the principal, or where he has any of the principal's property, which he holds as collateral security, the creditor may resort to such property and by proper proceedings subject it to the payment of his debt.[99] It is not necessary in such case that there be any express contract between the parties that the property so held as collateral shall be used for the purpose of paying the debt. If it is property furnished by the principal the law at once implies a trust and imposes it upon the property. But this rule does not apply where such collaterals are furnished not by the principal but by some third person. In the absence of an express trust in such case, none will be implied by law, and the creditor cannot therefore reach the property.[1] But it does not follow that the creditor may take the benefit of all indemnities held by the guarantor.[2]

XIII. Rights and Remedies of Guarantor.[3]

A. In General. The guarantor, on paying the principal debt, may transfer

New York.— Backus *v.* Shipherd, 11 Wend. 629.

North Carolina.— Casey *v.* Williams, 51 N. C. 578.

Pennsylvania.— Woods *v.* Sherman, 71 Pa. St. 100; White *v.* Smith, 33 Pa. St. 186, 75 Am. Dec. 589; Brown *v.* Brooks, 25 Pa. St. 210; Ayres *v.* Findley, 1 Pa. St. 501.

South Carolina.— Eddings *v.* Glascock, 1 Nott & M. 295.

United States.— Osborne *v.* Smith, 18 Fed. 126, 5 McCrary 487.

See 25 Cent. Dig. tit. "Guaranty," § 93.

The record of a judgment confessed by the principal is admissible but not conclusive evidence against the guarantor. Drummond *v.* Prestman, 12 Wheat. (U. S.) 515, 6 L. ed. 712.

97. Review generally see Appeal and Error.

98. See Dillman *v.* Nadelhoffer, 160 Ill. 121, 43 N. E. 378; Deshon *v.* Dyer, 4 Allen (Mass.) 128; Pennsylvania Coal Co. *v.* Blake, 85 N. Y. 226; Wood *v.* Tunnicliff, 74 N. Y. 38; Fowler *v.* Clearwater, 35 Barb. (N. Y.) 143; Colemard *v.* Lamb, 15 Wend. (N. Y.) 329. See also Appeal and Error, 2 Cyc. 677 *et seq.*

In an action on a guaranty of a note the appellate court will not consider a question which is raised for the first time on appeal as to whether there had been due diligence in prosecuting a suit against the maker (Dillman *v.* Nadelhoffer, 160 Ill. 121, 43 N. E. 378), or whether the note should have been returned to the guarantor after default of the maker (Fowler *v.* Clearwater, 35 Barb. (N. Y.) 143).

99. Vail *v.* Foster, 4 N. Y. 312; Oldham *v.* Broom, 28 Ohio St. 41; Gaster *v.* Waggoner, 26 Ohio St. 450. Such lien or property is in equity regarded as a trust for the better security of the debt, and chancery will enforce the trust for the benefit of the creditor. Kelly *v.* Herrick, 131 Mass. 373; Curtis *v.* Tyler, 9 Paige (N. Y.) 432; Pendery *v.* Allen, 50 Ohio St. 121, 33 N. E. 716, 19 L. R. A. 367; Green *v.* Dodge, 6 Ohio 80, 25 Am. Dec. 736; Paris *v.* Hulett, 26 Vt. 308; Chamberlain *v.* St. Paul, etc., R. Co., 92 U. S. 299, 23 L. ed. 715.

It is not material that the creditor did not know that such collaterals were taken and in no way relied on them, nor that they were taken after the debt was created. Curtis *v.* Tyler, 9 Paige (N. Y.) 432; Kramer's Appeal, 37 Pa. St. 71; Hopewell *v.* Cumberland Bank, 10 Leigh (Va.) 206; McCollum *v.* Hinckley, 9 Vt. 143.

The courts go upon the theory that such property is charged with the payment of the debt of the principal and should be used for that purpose. Stearns *v.* Bates, 46 Conn. 306; Loehr *v.* Colborn, 92 Ind. 24; Steward *v.* Welch, 84 Me. 308, 24 Atl. 860; Union Nat. Bank *v.* Rich, 106 Mich. 319, 64 N. W. 339; Barton *v.* Croydon, 63 N. H. 417; Grant *v.* Ludlow, 8 Ohio St. 1.

1. Taylor *v.* Farmers' Bank, 87 Ky. 398, 9 S. W. 240, 10 Ky. L. Rep. 368; Macklin *v.* Northern Bank, 83 Ky. 314; Osborn *v.* Noble, 46 Miss. 449; Leggett *v.* McClelland, 39 Ohio St. 624; Hampton *v.* Phipps, 108 U. S. 260, 2 S. Ct. 622, 27 L. ed. 719, Mr. Justice Matthews delivering opinion of the court.

A creditor who bona fide purchases the property of the principal debtor at a sheriff's sale under his execution is not bound to account therefor to the guarantor at its actual value. Forney *v.* Bard, 4 Brewst. (Pa.) 84.

2. Thus when the collaterals are held by the guarantor for his personal indemnity, to which he may resort only done after payment by himself, then until he has something as such guarantor neither he nor the creditor may resort to such collaterals. Osborn *v.* Noble, 46 Miss. 449.

3. Recovery from principal see Commercial Paper, 7 Cyc. 1020.

the evidence of it and his right to be reimbursed by the principal to a third person.[4]

B. Indemnity Against Principal. When a guarantor pays his principal's matured debt he at once has a right of action against him to be reimbursed for the amount so paid, whether there is any express agreement by the principal to indemnify him or not;[5] but the rule is that the guarantor cannot recover from the principal more than the amount he paid in extinguishing the debt.[6]

XIV. RIGHTS AND REMEDIES AS BETWEEN CO-GUARANTORS.

A. In General. The general rule is that where one guarantor receives property by way of indemnity it inures to the benefit of all the co-guarantors,[7] although

4. Chicago Fourth Nat. Bank *v.* Walker, 9 Fed. Cas. No. 4,992, holding that a guarantor of commercial paper has the right as guarantor to take up such paper and transfer his claim as guarantor to the parties from whom he obtained the means with which to take up the paper.

5. In such case the law imposes on the principal the obligation to repay at once to the guarantor the amount he has paid. Dye *v.* Mann, 10 Mich. 291; Lowry *v.* Lumbermen's Bank, 2 Watts & S. (Pa.) 210; Warrington *v.* Furbor, 8 East 242, 6 Esp. 89; Davies *v.* Humfreys, 4 Jur. 250, 9 L. J. Exch. 263, 6 M. & W. 153.

Rule applied.— Where persons who are bound by a written guaranty to pay a debt of a third person pay it without his knowledge and take a written assignment of the debt, they may recover from such debtor the amount paid. Teberg *v.* Swenson, 32 Kan. 224, 4 Pac. 83. A guarantor who has paid his principal's obligation may recover from the principal, although he might have defended against an action on the guaranty on the ground that the guaranty was not in writing, and although the principal had given him notice not to pay it, where the notice was given after he had given his check for the amount upon which he was absolutely liable. Beal *v.* Brown, 13 Allen (Mass.) 114. When one guaranties the debt of a firm and the firm, supposing there are profits from their business, divides some of their funds and allot to one partner a bond with which he purchases a plantation, this plantation will be subject to the claim of the guarantor for reimbursement. Green *v.* Ferrie, 1 Desauss. (S. C.) 164. The maker of a note, when sued by a guarantor who has paid the note to foreclose a mortgage given as security therefor, cannot set up as a defense that the guarantor at the time he paid the note was released by a lack of diligence on the part of the holder in proceeding against the maker. Hopson *v.* Ætna Axle, etc., Co., 50 Conn. 597. The mere fact that a guarantor of a note, at the request of a principal maker, received the amount loaned thereon and discharged a judgment against the principal maker, which was a paramount lien to a mortgage held by the guarantor on their land, does not affect his right to recover the amount which he has been compelled to pay, even though the parties whom he sues as makers of a note were sureties on the judgment. Lichty *v.* Moore, 38 Nebr. 269, 56 N. W. 965. If one of several joint guarantors pays the debt for which all were bound, he has thereby a separate right of action against the principal for whom he paid the money, which cannot be defeated by evidence of payment to another of the guarantors. Lowry *v.* Lumbermen's Bank, 2 Watts & S. (Pa.) 210. But the guarantor of a note against whom the holder obtains a judgment cannot recover from the maker the costs of an action by the holder, as such costs were incurred by the nonperformance of the guarantor's own contract. Sturdevant *v.* Riley, 8 N. Y. Suppl. 281. If the owner of a note payable to the order of another and not indorsed by him sells and delivers it and guaranties its payment without the request or knowledge of the maker, and is compelled to fulfil his guaranty, he cannot sue the maker for money paid to his use, the note in the meantime having become outlawed. Marsh *v.* Hayford, 80 Me. 97, 13 Atl. 271.

6. Coggeshall *v.* Ruggles, 62 Ill. 401; Bonney *v.* Seely, 2 Wend. (N. Y.) 481, opinion of the court delivered by Savage, C. J.

His action is for indemnity and he should not be permitted to recover an amount beyond his damages. Kendrick *v.* Forrey, 22 Gratt. (Va.) 748.

7. *Alabama.*— Steele *v.* Mealing, 24 Ala. 285; Morrison *v.* Taylor, 21 Ala. 779.

Iowa.— Reinhart *v.* Johnson, 62 Iowa 155, 17 N. W. 452.

Kentucky.— Goodloe *v.* Clay, 6 B. Mon. 236.

Maine.— Titcomb *v.* McAllister, 81 Me. 399, 17 Atl. 315.

New Jersey.— Wolcott *v.* Hagerman, 50 N. J. L. 289, 13 Atl. 605.

Pennsylvania.— Shaeffer *v.* Clendenin, 100 Pa. St. 565.

See 25 Cent. Dig. tit. "Guaranty," § 112.

But see McDowell County Com'rs *v.* Nichols, 131 N. C. 501, 42 S. E. 938, 92 Am. St. Rep. 785, holding that where one surety or guarantor is indemnified by the principal before entering into the contract of guaranty or suretyship, and for this purpose property is placed in his hands with the understanding that it is for his personal benefit alone, such indemnity will not inure to the benefit of co-guarantors or cosureties upon the principal's default.

such indemnity was taken by one guarantor at the time of entering into the contract without the knowledge of a co-guarantor or cosurety.[8]

B. Contribution[9] — **1. In General.** Contribution is an equitable right[10] which one guarantor has against his co-guarantors where he has paid more than his proportionate part on the debt of the principal; he is permitted to collect from the others an amount sufficient to make the payment of all equal; it is based upon the maxim that equality is equity.[11] Guarantors may be bound by separate instruments, and if the debt is the same for which they are liable they are subject to contribution.[12] The right to contribution accrues when the guarantor has actually paid more than his equal share of the debt.[13]

2. Necessity of Actual Payment of Debt. Mere liability to pay more than his share even after judgment rendered is not sufficient ground for contribution. There must be some form of payment, amounting to more than the proportionate share of the guarantor who has paid;[14] but the payment need not be made in

Wherever a surety or guarantor attempts by fraud or unfair means to secure advantage of his cosureties by taking indemnity for his personal benefit secretly from the debtor, the indemnity will inure to the benefit of all the cosureties whether taken at the time of signing or afterward. Hoover *v.* Mowrer, 84 Iowa 43, 50 N. W. 62, 35 Am. St. Rep. 293; Steel *v.* Dixon, 17 Ch. D. 825, 50 L. J. Ch. 591, 45 L. T. Rep. N. S. 142, 29 Wkly. Rep. 735.

A guarantor who himself obtains indemnity from a stranger to the contract and is thus saved from paying out anything upon the principal's default cannot be required to contribute to his cosureties who were not indemnified. In thus protecting himself he has in no way injured them. They cannot complain of his act unless it has been to their prejudice. American Surety Co. *v.* Boyle, 65 Ohio St. 486, 63 N. E. 73; Central Trust Co. *v.* Louisville Trust Co., 100 Fed. 545, 40 C. C. A. 530.

8. Hoover *v.* Mowrer, 84 Iowa 43, 50 N. W. 62, 35 Am. St. Rep. 293; Bolin *v.* Metcalf, 6 Wyo. 1, 42 Pac. 12, 44 Pac. 694, 71 Am. St. Rep. 898. See American Surety Co. *v.* Boyle, 65 Ohio St. 486, 63 N. E. 73; Henderson-Achert Lithographic Co. *v.* John Shillito Co., 64 Ohio St. 236, 60 N. E. 295.

9. **Contribution** generally see Contribution.

Discharge in bankruptcy as affecting right to contribution see Bankruptcy, 5 Cyc. 400.

10. **Recognized in court of law.**— While contribution is based upon equitable doctrines and was first enforced in courts of equity, it is now generally recognized in courts of law, and when practical, enforced there on the theory of quasi-contract; or an implied contract between the sureties to contribute each his proportionate share of what one alone is required to pay. Bagott *v.* Mullen, 32 Ind. 332, 2 Am. Rep. 351; Johnson *v.* Harvey, 84 N. Y. 363, 38 Am. Rep. 515; Wolmershausen *v.* Gullick, [1893] 2 Ch. 514, 62 L. J. Ch. 773, 68 L. T. Rep. N. S. 753, 3 Reports 610; Layer *v.* Nelson, 1 Vern. Ch. 456, 23 Eng. Reprint 582.

11. Paulin *v.* Kaighn, 29 N. J. L. 480; Camp *v.* Bostwick, 20 Ohio St. 347, 5 Am. Rep. 669. Where one of two co-guarantors of a note pays the note before it is due at the request of the other, the latter is liable to contribution. Golsen *v.* Brand, 75 Ill. 148. Where the guarantee credits two of three guarantors in an amount exceeding the sum due under the guaranty, and by direction of guarantors they are charged and their principal is credited with amounts sufficient to pay the sum due under the guaranty, an action against the other guarantor for contribution will lie. Hooper *v.* Hooper, 81 Md. 155, 31 Atl. 508, 48 Am. St. Rep. 496.

A guarantor's right to contribution from the estate of a deceased co-guarantor is not defeated by failure to give the administrator notice of the existence of the guaranty, where there was no laches in asserting his claim after he had paid the debt. Knotts *v.* Butler, 10 Rich. Eq. (S. C.) 143.

12. Powell *v.* Powell, 48 Cal. 234; Monson *v.* Drakeley, 40 Conn. 552, 16 Am. Rep. 74; Golsen *v.* Brand, 75 Ill. 148. A guarantor who is compelled to pay is entitled to contribution from another guarantor of the same contract, although their guaranties were evidenced by separate instruments. Young *v.* Shunk, 30 Minn. 503, 16 N. W. 402.

13. Backus *v.* Coyne, 45 Mich. 584, 8 N. W. 694; Camp *v.* Bostwick, 20 Ohio St. 337, 5 Am. Rep. 669; Glasscock *v.* Hamilton, 62 Tex. 143; Bushnell *v.* Bushnell, 77 Wis. 435, 46 N. W. 442, 9 L. R. A. 411. See also Deering *v.* Winchelsea, 2 B. & P. 270, 1 Cox Ch. 318, 1 Rev. Rep. 41, 1 White & T. Lead. Cas. Eq. 114, 29 Eng. Reprint 1184; Davies *v.* Humfreys, 4 Jur. 250, 9 L. J. Exch. 263, 6 M. & W. 153. Where one of two co-guarantors paid the debt, taking an assignment of the note to a third party, to whom he charged the amount paid by him, and caused suit to be brought thereon against his co-guarantor, which he afterward dismissed, and brought suit for contribution, producing the note on the trial with the payee's indorsement erased, it was held that causing the note to be indorsed and suit brought thereon was no bar to his right to sue for contribution. Golsen *v.* Brand, 75 Ill. 148.

14. Camp *v.* Bostwick, 20 Ohio St. 337, 5 Am. Rep. 669. Two guarantors on a number

money.[15] If the payment was at the time only his proportionate share of the whole debt, and thereafter the principal pays the remainder of the debt, a right of contribution which he had not before arises in his favor on such payment by the principal; and the same is true where payment of less than his proportion extinguishes the debt.[16]

3. Effect of Voluntary Payment. It is generally held that contribution may be enforced, although the debt was paid voluntarily, the principal remaining solvent;[17] although there are authorities to the effect that the principal's insolvency is a condition precedent to contribution.[18] If a guarantor pays his principal's debt to which a good defense exists, but he at the time of such payment was ignorant of such defense, he may enforce contribution against a co-guarantor.[19]

4. Where Some of Co-Guarantors Are Insolvent. Where there is an insolvent cosurety or guarantor he will be excluded in determining the amount of contribution; and the debt will be divided equally among the solvent guarantors.[20]

5. Where Debt Paid Was Barred by Statute of Limitations. Where a guarantor is compelled to pay a debt which is barred by a statute of limitations, as against the principal, the guarantor may recover from the principal the amount he is so compelled to pay;[21] but if he pays a debt, barred by the statute of limitations, both as to him and his co-guarantor, he cannot have contribution.[22]

6. As Against One Becoming Guarantor at Co-Guarantor's Request. It has been held that where one surety or guarantor signs at the request of a cosurety or

of bonds agreed in writing that as between themselves they should be liable for certain proportions of the bonds, and bound themselves to pay to each other any sum that might be paid by either in excess of his portion, and interchanged mortgages to secure the fulfilment of such agreement. It was held that one of such guarantors had no right of action against the other until his payments exceeded the portion assumed by him, and then only for such excess. Gourdin *v.* Trenholm, 25 S. C. 362.

15. If the creditor has accepted the co-guarantor's note in payment of the debt, and the note is not yet due and is unpaid, this is sufficient on which to base an action for contribution. Ralston *v.* Wood, 15 Ill. 159, 58 Am. Dec. 604; White *v.* Carlton, 52 Ind. 371; Stubbins *v.* Mitchell, 82 Ky. 535.

16. Nixon *v.* Beard, 111 Ind. 137, 12 N. E. 131.

17. *Alabama.*— Roberts *v.* Adams, 6 Port. 361, 31 Am. Dec. 694.

Illinois.— Sloo *v.* Pool, 15 Ill. 47.

Indiana.— Judah *v.* Meiure, 5 Blackf. 171.

Iowa.— Wood *v.* Perry, 9 Iowa 479.

Maine.— Hickborn *v.* Fletcher, 66 Me. 209, 22 Am. Rep. 562.

Wisconsin.— Mason *v.* Pierron, 69 Wis. 585, 34 N. W. 921; Mason *v.* Pierron, 63 Wis. 239, 23 N. W. 119.

See 25 Cent. Dig. tit. "Guaranty," § 116.

18. Allen *v.* Wood, 38 N. C. 386; Rainey *v.* Yarborough, 37 N. C. 249, 38 Am. Dec. 681.

19. Houck *v.* Graham, 106 Ind. 195, 6 N. E. 594, 55 Am. Rep. 727; Hichborn *v.* Fletcher, 66 Me. 209, 22 Am. Rep. 562; Warner *v.* Morrison, 3 Allen (Mass.) 566.

But if he knew the facts constituting a good defense and under a mistaken belief that a liability exists pays the debt, he cannot enforce contribution. Skillin *v.* Merrill, 16 Mass. 40; Russell *v.* Failor, 1 Ohio St. 327, 59 Am. Dec. 631; Aldrich *v.* Aldrich, 56 Vt. 324, 48 Am. Rep. 791.

20. Burroughs *v.* Lott, 19 Cal. 125; Newton *v.* Pence, 10 Ind. App. 672, 38 N. E. 484.

Under Wis. Rev. St. par. 2600, abolishing the distinction between actions at law and suits in equity, in an action in the nature of implied assumpsit by a guarantor for contribution there obtains the equitable doctrine allowing a surety who has paid the whole debt to recover against his cosureties, who are solvent and reside in the state, the same contribution as though they were the only sureties bound. Faurot *v.* Gates, 86 Wis. 569, 57 N. W. 294.

21. Peaslee *v.* Breed, 10 N. H. 489, 34 Am. Dec. 178; Reeves *v.* Pulliam, 7 Baxt. (Tenn.) 119; Marshall *v.* Hudson, 9 Yerg. (Tenn.) 57; Faires *v.* Cockerell, 88 Tex. 428, 31 S. W. 190, 639, 38 L. R. A. 528. *Contra*, Auchampaugh *v.* Schmidt, 70 Iowa 642, 27 N. W. 805, 59 Am. Rep. 459; Dorsey *v.* Wayman, 6 Gill (Md.) 59; State *v.* Blake, 2 Ohio St. 147.

The reason for this is that the claim of the surety or guarantor is not based upon the principal debt, but upon the implied contract which the law raises in the sureties' favor in such cases. Crosby *v.* Wyatt, 23 Me. 156; Wood *v.* Leland, 1 Metc. (Mass.) 387.

22. *Alabama.*— Evans *v.* Evans, 16 Ala. 465.

Kentucky.— Cochran *v.* Walker, 82 Ky. 220, 56 Am. Rep. 891.

North Carolina.— Long *v.* Miller, 93 N. C. 227; Green *v.* Greenborough Female College, 83 N. C. 449, 35 Am. Rep. 579.

Ohio.— Camp *v.* Bostwick, 20 Ohio St. 337, 5 Am. Rep. 669.

Tennessee.— Cocke *v.* Hoffman, 5 Lea 105, 40 Am. Rep. 23.

Vermont.— Aldrich *v.* Aldrich, 56 Vt. 324, 48 Am. Rep. 791.

See 25 Cent. Dig. tit. "Guaranty," § 116.

co-guarantor he cannot be held for contribution by him who made the request;[23] but unless there is more than the mere request, such as a promise to hold such guarantor harmless, or to indemnify him, it would seem that he should be held for contribution. When it is determined that the two are clearly co-guarantors, they should share the burdens equally.[24]

7. Amount of Contribution. A guarantor is not entitled to contribution if the payment he has made is not greater than his proportionate amount.[25] Guarantors may, by their contract with the creditor, bind themselves in different amounts for the same debt, in which case they should contribute proportionately to the amount for which each guarantor is liable.[26] So too as between themselves the relative liability of the guarantors may be fixed by special agreement at a different proportion from that existing between one guarantor and the total number of guarantors; in which case the guarantor has no right of action against another until he has paid something in excess of the amount for which he has bound himself by such special agreement.[27]

GUARANTY INSURANCE.[1] A contract whereby one, for a consideration, agrees to indemnify another against loss arising from the want of integrity, fidelity, or insolvency of employees and persons holding positions of trust, against insolvency of debtors, losses in trade, losses from non-payment of notes and other evidences of indebtedness, or against other breaches of contract.[2] (See Credit Insurance; Fidelity Insurance; Guaranty; Indemnity; Indemnity Insurance; Insurance.)

23. Taylor *v.* Savage, 12 Mass. 98; Blake *v.* Cole, 22 Pick. (Mass.) 97; Cutter *v.* Emery, 37 N. H. 567.

24. Bagott *v.* Mullen, 32 Ind. 332, 2 Am. Rep. 351; Hendrick *v.* Whittemore, 105 Mass. 23; McKee *v.* Campbell, 27 Mich. 497.

25. If the payment is less than the whole debt, he can recover from his co-guarantors only the amount paid in excess of his share. Morgan *v.* Smith, 70 N. Y. 537; Byram *v.* McDowell, 15 Lea (Tenn.) 581.

26. Ellsemere Brewery Co. *v.* Cooper, [1896] 1 Q. B. 75, 65 L. J. Q. B. 173, 73 L. T. Rep. N. S. 567, 44 Wkly. Rep. 254; Deering *v.* Winchelsea, 2 B. & P. 270, 1 Cox Ch. 318, 1 Rev. Rep. 41, 1 White & T. Lead. Cas. Eq. 114, 29 Eng. Reprint 1184; *In re* MacDonaghs, Ir. R. 10 Eq. 269; Craythorne *v.* Swinburne, 14 Ves. 160, 9 Rev. Rep. 264, 33 Eng. Reprint 482.

27. Gourdin *v.* Trenholm, 25 S. C. 362.

1. Distinguished from life insurance and from marine insurance in Towle *v.* National Guardian Ins. Soc., 7 Jur. N. S. 618, 623.

2. 1 Joyce Ins. § 12 [*quoted* in People *v.* Rose, 174 Ill. 310, 312, 51 N. E. 246, 44 L. R. A. 124], where it is also said that such a contract of insurance "includes other forms of insurance which are specifically classified as 'fidelity guaranty,' 'credit guaranty,' etc." See also Robertson *v.* U. S. Credit System Co., 57 N. J. L. 12, 29 Atl. 421.

"For purposes of classification and treatment herein, guaranty insurance contracts may be divided into three classes,— those of fidelity, commercial, and judicial insurance." Frost Guar. Ins. § 2 [*quoted* in Cowles *v.* U. S. Fidelity, etc., Co., 32 Wash. 120, 124, 72 Pac. 1032, 98 Am. St. Rep. 838].

Guaranty insurance "has reference to insurance bonds or policies issued upon persons occupying fiduciary relationships with the insured, whose faithful performance of duty therein is guarantied by such policies, The fiduciary relationships here referred to, embrace those both of a public and private nature; such, for example, as those existing between officials and the public, between corporate officers or agents and the corporation; and generally between employers and employees to whom is intrusted the disbursing of funds or the handling of property." Frost Guar. Ins. § 2 [*cited* in Cowles *v.* U. S. Fidelity, etc., Co., 32 Wash. 120, 125, 72 Pac. 1032, 98 Am. St. Rep. 838].

"The contract of guaranty insurance is invariably entered into for a compensation, and usually after the fullest investigation, and frequently under stipulations largely technical in character, based upon written representations relative to the nature and extent of the risk. The policy is written by a company incorporated for the express purpose of furnishing guaranty bonds as a means of revenue to the corporation and its stockholders." Frost Guar. Ins. § 4 [*quoted* in Cowles *v.* U. S. Fidelity, etc., Co., 32 Wash. 120, 125, 72 Pac. 1032, 98 Am. St. Rep. 838]. See also Remington *v.* Fidelity, etc., Co., 27 Wash. 429, 435, 67 Pac. 989.